The Second PART of the

REPORTS

OF

EDWARD COKE,

Her Majesty's ATTORNEY-GENERAL,

OF

Divers Matters in LAW, with great and mature Consideration resolv'd and adjudg'd, which were never resolv'd or adjudg'd before; and the Reasons and Causes thereof; during the Reign of the most Illustrious and Renowned Queen ELIZABETH, the Fountain of all 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.

Videte quod non mihi soli laboravi, sed omnibus exquirentibus scientiam.
ECCLESIASTICUS, CAP. 24.

Lex est commune præceptum, virorum prudentium consultum, delictorum quæ sponte vel ignorantia contrahuntur, communis reipublicæ sponsio.
PAPIAN, LIB. 1. *Definit'.*

Lex dicitur a ligando, quia obligat; vel dicitur a legendo, quia publice legatur.
IIIODORIUS.

Cum dico legem, a me dici nihil aliud intelligi volo quam imperium; sine quo domus ulla; nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest.
CIC. LIB. 1. de Legibus.

In the SAVOY:

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

Seneca ad Lucil. Epiſt. 108.

ILLUD tamen prius ſcribam, quemadmodum tibi iſta cupiditas diſcendi, qua flagrare te video, regenda ſit, ne ipſa impediat; nec paſſim carpenda ſunt, nec avide invadenda univerſa: Per partes pervenitur ad totum: Aptari onus viribus debet, nec plus occupari, quam cui ſufficere poſſumus: Non quantum vis, ſed quantum capis hauriendum eſt: Quo plus recipit animus, hoc ſe magis laxat.

THIS firſt will I ſet down, (which elſe might hinder thee) how thou art to order that fervent Deſire of Learning which I find to be in thee; Things are not every where to be alike gathered, nor univerſally all greedily ſnatched: The Whole is to be attained unto by Parts: Burdens muſt be fitted to the Strength of the Bearers; neither ſhould we undertake *more than we are able to* effect: *Draw out ſo much as may ſatisfy not thy Will but thy Want: The very Mind of Man, the more it receiveth, the more it looſens and freeth itſelf.*

Idem. Epiſt. 45.

Lectio certa prodeſt, varia delectat; qui quo deſtinavit pervenire vult unam ſequatur viam, non per multas vagetur, non ire iſtud ſed errare eſt.

Certainty in Reading is profitable, Variety delightful; he that deſireth to come to his Journey's End, muſt purſue one Way, not wander in many, for that is rather to err than to go forward.

Idem ad Lucil. in Epiſt.

Non refert quam multos, ſed quam bonos habeas Libros; multitudo librorum onerat non inſtruit, & ſatius eſt paucis

It matters not how many Books thou haſt, but how good; Multitude of Books do rather burden than inſtruct, and it is far better

thoroughly to acquaint thyſelf with a few Authors, than to wander through many.

authoribus te tradere, quam errare per multos.

Jero. Epiſt. 88.

Tax thyſelf at ſo many Hours for reading, that thou mayſt do it rather with Delight than with Toil.

Statue tibi quot horis legas, non ad laborem ſed ad delectationem.

TO THE

Learned READER.

QUÆ tria *Euripides* civis pariter atque viri boni officia facit, Deos colere, & qui te genuerunt parentes, ἠ νόμες τε κοινὲς Ἑλλάδ☉ legeſque inquit communes Greciæ; ea quo commendo tibi, (humaniſſime Lector) ut ſecundum pietatem ac religionem in Deum, & unctam ejus ſereniſſimam tuam Principem, addo etiam & honorem parentibus debitum, proxime leges Angliæ communes juſto obſequio ſtudioque proſequaris: Nam ex omnibus legibus (humanis dico) &

THERE are (ſaith Euripides) *three Virtues worthy our Meditation: To honour God, our Parents who begat us,* ἠ τόμες τε κοινὲς Ἑλλάδ☉ *and the Common Laws of* Greece; *the like do I ſay to thee (Gentle Reader) next to thy Duty and Piety to God, and his Anointed, thy Gracious Sovereign, and thy Honour to thy Parents, yield due Reverence and Obedience to the Common Laws of* England: *For of all Laws (I ſpeak of human) theſe are moſt equal and moſt certain, of greateſt Antiquity,*

Honour God and thy Parents, obſerve the Common Law.

and leaſt Delay, and moſt beneficial and eaſy to be obſerved; as, if the Model of a Preface would permit, I could defend againſt any Man that is not malicious without Underſtanding; and make manifeſt to any of Judgment and Indifferency, by Proofs pregnant and demonſtrative, and by Records and Teſtimonies luculent and irrefragable: Sed ſunt quidam faſtidioſi, qui neſcio quo malo affectu oderunt Artes antequam pernoverunt. *There is no Jewel in the World comparable to Learning; no Learning ſo excellent both for Prince and Subject, as Knowledge of Laws; and no Knowledge of any Laws (I ſpeak of human) ſo neceſſary for all Eſtates, and for all Cauſes, concerning Goods, Lands, or Life, as the common Laws of* England. *If the Beauty of other Countries be faded and waſted with bloody Wars, thank God for the admirable Peace, wherein this Realm hath long flouriſhed under the due Adminiſtration of theſe Laws: If thou readeſt of the Tyranny of other Nations, wherein powerful Will and Pleaſure ſtands for Law and Reaſon, and* æquiſſimæ illè ſunt certiſſimæque, & integritatis maximæ, minimæque moræ, utiliſſimæ deniquæ facillimæque obſervatu. Atque hoc, (ſiquidem præfatiunculæ iſtius pateretur modulus) puto me, niſi ſi quis malitioſe nolit intelligere, adverſus quempiam tueri poſſe, idque oſtendere graviſſimis ac demonſtrativis argumentis, monimentis etiam & teſtimoniis clariſſimis firmiſſimiſque, cuicunque æquo eſtimatori incorrupti candidique judicii. Sed ſunt quidam faſtidioſi, qui neſcio quo malo affectu oderunt artes, antequam pernoverunt. Nulla eſt uſquam gentium margarita doctrinæ æquiparabilis; nulla doctrina, principi ſimul ac populo legum ſcientia præſtantior; nullæ Leges (humanas intelligo) ita cognitu neceſſariæ omni hominum conditioni, ad omnes cauſas & judicia, de fortunis, poſſeſſionibus, vita denique ipſa atque communes Angliæ. Quod ſi cæterarum fere nationum ſplendorem ac pulchritudinem, aut fœdavit aut extinxit cruentum bellum, immortales Deo gratias age, pro admirabili pace, in qua regnum hoc ſub iſtarum legum

legum juſta adminiſtratione diutiſſime floruit: Sin quid unquam de exterarum gentium tyrannide legeris, in qua ſtat pro ratione voluntas præpotens, libido pro lege, ubi offenſæ leves (forte etiam proprie eſtimationis errore ſuſceptæ) venificio aut cœde, indicta cauſa, ſubito vindicant' lauda Deum pro juſtit' almæ tuæ Principis, quæ hiis ipſis legib' (ad totius mundi admirationem) populum ſuum dei benignitate in pace & proſperitat' regit; neq; vel graviſſime delinquentem punit quempiam, etiamſi læſæ Majeſtatis capitale crimen admiſerit, niſi ſecundum juſtam & æquam in hac lege actionem.

where, upon Conceit of Miſlike, Men are ſuddenly poiſoned, or otherwiſe murder'd, and never called to anſwer; praiſe God for the Juſtice of thy gracious Sovereign, who (to the World's Admiration) governeth her People by God's Goodneſs, in Peace and Proſperity by theſe Laws, and puniſheth not the greateſt Offender, no, though his Offence be Crimen læſæ Majeſtatis, *Treaſon againſt her Sacred Perſon, but by the juſt and equal Proceedings of Law.*

Quod ſi in aliis regnis obtinere quidem videntur leges, eas tamen malint Judices ad injuſtitiam detorquere, quam ut offenſum habeant dominum Regem, unde Poetæ illud, *Ad libitum Regis ſonuit ſententia legis*; benedicas (Lector) Deo pro *Elizabetha* noſtra, quæ ſecundum antiquum regni ipſius canonem, illud imprimis legum interpretibus & juſtitiæ miniſtris ſuis omnibus in mandatis dare ſolet, ne intervenientibus quibuſcunq; reſcriptis, epiſtolis, mandatis

If in other Kingdoms the Laws (only) ſeem to govern, but the Judges had rather miſconſtrue Law, and do Injuſtice, than diſpleaſe the King's Humour, whereof the Poet ſpeaketh, Ad libitum Regis ſonuit ſententia legis; *bleſs God for Queen* Elizabeth, *whoſe continual Charge to her Juſtices, agreeable with her ancient Laws, is, that for no Commandment under the Great or Privy Seal, Writs or Letters, common Right be diſturbed or delayed. And if any ſuch Commandment (upon untrue Surmiſes)*

Juſt. Inſt. Quod Principi placuit, &c. See Forteſ. 26.

2 E. 3. cap. 8.
20 E. 3. c. 1.
20 E. 3. c. 2.

Surmiſes) *ſhould come, that the Juſtices of her Laws ſhould not therefore ceaſe to do Right in any Point: And this agreeth with the ancient Law of* England, *declared by the great Charter, and ſpoken in the Perſon of the King,* Nulli vendemus, nulli negabimus, aut differemus Juſtitiam vel Rectum.

Magna Charta cap. 29.

etiam ſub ſigillo ſive communi, ſive privato ſuo, aut impediatur publicum jus, aut vel tantillum differatur. Quod ſi forte aliquod mandatum fictis nixum cauſis aliquando intercedat, ne propterea judices a debita juſtitiæ adminiſtratione ceſſent aut retardentur: Atque hoc facit ex antiquo inſtituto Angliæ, in *Magna* (ut loquuntur) *Charta* poſito, quæ ſic loquentem inducit perſonam Regis, *Nulli vendemus, nulli negabimus, aut differemus Juſtitiam vel Rectum.*

See the Epiſtle to the 5th Rep. Forteſ. 20, 39.

If the ancient Laws of this noble Iſland had not excelled all others, it could not be but ſome of the ſeveral Conquerors and Governors thereof, that is to ſay, the Romans, Saxons, Danes, *or* Normans, *and ſpecially the* Romans, *who* (*as they juſtly may*) *do boaſt of their Civil Laws, would* (*as every of them might*) *have altered or changed the ſame.*

For thy Comfort and Encouragement, caſt thine Eye upon the Sages of the Law, that have been before thee, and never ſhalt thou find any that hath excelled in the Knowledge of theſe Laws, but hath ſuck'd from the Breaſts of that Divine

Qui ſi antiquæ leges celeberrimæ iſtius Inſulæ, cæteris omnibus non excelluiſſent, fieri profecto non poſſit, quin ex tot victoribus dominiſq; cum penes ſingulos eſſet, ſive Romani, ſive Saxones, ſive Dani, ſive Normani, precipue vero Romani, qui de jure ſuo civili merito gloriantur, eas immutaſſent.

Pone tibi, Lector, ante oculos ad ſolatium & alacritatem tuam in hoc ſtudio, ſapientes noſtri juris qui aliquot retro actis ſæculis vixerunt, neq; quenquam invenies qui aliquando jura hæc calluerit, quin ab uberibus quaſi divinæ

vinæ illius ſcientiæ, honeſtate, gravitatem, integritatem una ſuxerit, & ſingulari Dei beneficio, majori ornamento familiæ poſteriſque ſuis extiterit, quam quicunque cujuſcunque profeſſionis alii; id quod ſequens pagina in aliquibus ſaltem ex magno numero indicabit; manent enim indubitata & conſtans illa veritas, *Juſtus ut Palma florebit, & ſicut Cedrus Libani multiplicabitur.*

Knowledge, Honeſty, Gravity, and Integrity, and by the Goodneſs of God hath obtained a greater Bleſſing and Ornament than any other Profeſſion to their Family and Poſterity, as by the Page following, taking ſome for many, you may perceive; for it is an undoubted Truth, That the Juſt ſhall flouriſh like the Palm-Tree, and ſpread abroad as the Cedars of *Libanus.* Pſalm 91. ver. 13.

Horum igitur exempla, una cum hoc tuo inſtituto vitæ, ſtudium ac virtutem requirunt: Neque enim hactenus vidi hominem impura & improba vita, ſolidam perfectamque noſtri Juris ſcientiam attigiſſe: Neq; quenquam ex adverſo, præſtantis judicii in hoc jure obſervavi, qui non idem (hujuſmodi Magiſtrum nactus) honeſtus fidelis, probus evaſerit.

Their Example and thy Profeſſion do require thy Imitation: For hitherto I never ſaw any Man of a looſe and lawleſs Life, attain to any ſound and perfect Knowledge of the ſaid Laws: And on the other Side, I never ſaw any Man of excellent Judgment in theſe Laws, but was withall (being taught by ſuch a Maſter) honeſt, faithful, and virtuous.

Quod ſi quando Juriſperitorum diſcrepantes paulo ſententiæ occurrant, contendite ipſi (ſicut æquum eſt) ad ſcientiæ iſtius culmen, & intelligetis profecto, *Hominum hæc, non Artis vitia eſſe.* Neque enim (ut quod res eſt dicam) difficiles propemodum ac ſpinoſæ queſtio-

If you obſerve any Diverſities of Opinions amongſt the Profeſſors of the Laws, content you (as it behoveth) to be learned in your Profeſſion, and you ſhall find, that it is Hominis vitium non profeſſionis. *And to ſay the Truth, the greateſt Queſtions ariſe not upon any of the Rules of* The Cauſe of Diverſity of Opinions.

the Common Law, but ſometimes upon Conveyances and Inſtruments made by Men unlearned; many Times upon Wills intricately, abſurdly, and repugnant ſet down, by Parſons, Scriveners and ſuch other Imperites: And oftentimes upon Acts of Parliament, overladen with Proviſoes and Additions, and many Times on a ſudden penn'd or corrected by Men of none or very little Judgment in Law.

nes ex principiis juris oriuntur, ſed aliquando ex imperitia hominum pactiones aut inſtrumenta conſcribentium; ſæpius ex teſtamentis perplexis abſurdis, pugnantibuſque, ſive ab eccleſiæ alicujus rectore factis, ſive a tabellione & ſcriba, ſive ab imperito quocunq; alio nonnunquam denique ex ipſis comitiorum inſtitutis, cautionum atque additionum mole onuſtis, & vel in pulvere ac feſtinatione conſcriptis, vel a Sciolo quopiam in hoc genere correctis & emendatis.

The Remedy. *If Men would take ſound Advice and Counſel in making of their Conveyances, Aſſurances, Inſtruments, and Wills; and Counſellors would take Pains to be rightly and truly informed of the true State of their Client's Caſe, ſo as their Advice and Counſel might be apt and agreeable to their Client's Eſtate; and if Acts of Parliament were after the old Faſhion penn'd, and by ſuch only as perfectly knew what the Common Law was before the making of any Act of Parliament concerning that Matter, as alſo how far forth former Statutes had provided Remedy for former Miſchiefs and De-*

Quod ſi homines in teſtamentis, contractib' & inſtrumentis aliis conficiendis ſolidum ac maturum judicium adhiberent, operamq; & laborem diligentem inſumerent Conſiliarii in clientum ſuorum cauſis recte ac limate pernoſcendis, quo apte & ad rem ipſam accommodate imprimis reſpondeant: Et ſi leges publicis comitiis ſancitæ, non niſi antiqua ratione ſcriberentur, ab iis ſcilicet qui explorate norunt, quid de quaque re poſtulata jus regni antiquum præſtituerit, quouſque etiam inſtituta vetera, malis & incommodis illorum temporum experientia retectis providerint

& oc-

& occurrerint, certe quidem tum queſtiones in jure perpaucæ orirentur, neque ſe torquerent adeo viri docti, in conciliandis aptandiſque ſecundum juris regulas, verbis, ſententiis, & cautelis pugnantibus alioqui inter ſe planeq; incommodis ac ineptis.

fects diſcovered by Experience; then ſhould very few Queſtions in Law ariſe, and the learned ſhould not ſo often and ſo much perplex their Heads, to make Attonement and Peace by Conſtruction of Law between inſenſible and diſagreeing Words, Sentences, and Proviſoes, as they now do.

Quinetiam adeo certum eſt Jus noſtrum ſibiq; conſtans, ut ex toto illo tempore quo ſtudium & inſtitutum hoc vitæ ſum ingreſſus, ne duas quidem adverti queſtiones de jure hæreditatum, de terrarum legitima confiſcatione ſive (ut loquuntur) eſcæta aliiſq; conſimilibus. Fælices merito perhiberentur artes, ſi quidem primo qui eas profitentur, ſumma cura ac religione in id incumberent, ut poſſent plenam perfectamque earum cognitionem adipiſci: Deinde ſi in eas nullus cenſoriam authoritatem, abſque judicio & doctrina cenſoria in ſe aſſumeret.

In all my Time, I have not known two Queſtions made of the Right of Diſcents, of Eſcheats by the Common Law, &c. ſo certain and ſure the Rules thereof be: Happy were Arts, if their Profeſſors would contend, and have a Conſcience to be learned in them, and if none but the Learned would take upon them to give Judgment of them.

Note.

Humaniſſimi Lectores, fecit gratus ac benevolus veſter animus quo ſuperiorem elucubrationum mearum editionem proſecuti & amplexi eſtis, ut quod de ſecunda hac, numero cauſarum aucta, prius promiſeram nunc ex-

Your kind and favourable Acceptation (gentle Reader) of my former Edition, hath cauſed me to publiſh theſe few Caſes in Performance of my former Promiſe, and I wiſh to you all no leſs Profit in reading of them than I perſwade

perſwade myſelf to have reaped in obſerving of them: This only of the Learned I deſire:

oluam; in quibus legendis non minorem vobis exopto fructum, quam (ficut mihi perſuadeo) in colligendis ipſe perceperim. Hoc tantum a doctis peto:

Perlege; ſed ſi quid noviſti rectius iſtis,
Candidus imperti; ſi non hiis utere mecum.

The Names of the Judges and Serjeants at Law cited in theſe Reports.

A.

Audeley.
Aldeburgh.
Aſcoughe.
Aſhton.
Arderne.
Alyngton.

B.

Bereford.
Burghe.
Brooke.
Butler.
Browne.
Bridges.
Bere.
Belknap.
Babthorpe.
Brampton.
Bingham.
Billing.
Babington.
Barton.
Brudnell.
Brian.
Bacon.
Bell.
Beaumont.
Baſſet.
Botteler.
Bouſſer.
Brencheſle.
Bois.

C.

Cheny.
Cavendiſh.
Clopton.
Connisby.
Conſtable.
Cockeine.
Choke.
Cateſby.
Cherlton.
Callowe.
Colepeper.
Corbet.
Carril.
Cotteſmore.
Cooke William.

D.

Danby.
Danvers.
Delves.

E.

Elderton.
Ermitage.
Englefield.
Elyot.

F.

Forteſcue.
Falſtoff.
Fencotes.
Finchden.
Fineux.
Fitz-John.
Fitz-James.
Fitz-Herbert.
Fiſher.
Frowick.
Fulthorpe.
Fairfax.

G.

Glanvile.
Grevile.
Grene.
Gaſcoine.
Godard.
Gargrave.
Gawdy.

H.

Howard.
Huſſey.
Holt.
Hankford.
Heydon.
Herle.
Hare.
Hubart.
Hill.
Hales.
Huls.
Hody.
Haugh.
Hynde.
Harper.

I.

Ingleby.
Juyin.
Jenney.

K.

Knyvet.
Knightley.
Kirton.
Kingſmill.
Kelleſhull.

L.

Laicon.
Lowther

Lowther.
Littleton.
Lodington.
Luke.

M.

Mowbrey.
Markham.
Molyneux.
Mordant.
Morgan.
Mervin.
Mutford.
Martin.
Marow.
Mountague.
Moyle.
More.
Meade.
Manwood.

N.

Nevile.
North.
Nele.
Newport.
Newdigate.
Newton.
Norton.
Nedham.
Norwich.

O.

Oxenbridge.
Owen.
Onley.

P.

Perſey.
Pole.
Pawlet.
Paſton.
Portington.
Poer.
Pigot.
Portman.
Preſton.
Palmer.
Pollard.

R.

Ratclife.
Ruſſell.
Roe.
Riche.
Rokeby.
Rolfe.
Rokewood.
Rhodes.

S.

Segrave.
Strange.
Scrope.
Seton.
Sadlier.
Stoner.
Skipwith.
Sulyard.
Sydenham.
Stonerton.
Stonford.
Strangeways.
Scot.
Shelley.
Say.
Starkey.
Sydney.
Spilman.
Stamford.
Southill.

T.

Thorpe.
Townefende.
Travers.
Tremayle.
Tirwhitt.
Trevaignon.
Treſham.
Tilleſley.

W.

Willoughby.
Weſt.
Wangford.
Wickingham.
Whorewood.
Weſton.
Wood.
Wadham.
Wray.

Y.

Yelverton.
Yaxley.
Yonge.

MANSER's *Case.*

Pasch. 26 Eliz. Rot. 1608.

In the Common Pleas.

London ss. *Richard Manser* late of *London*, *Yeoman*, (otherwise called *Richard Manser* of *Gillingham* in the County of *Kent*, *Yeoman*) was summoned to answer to *William Painter*, Esq; of a Plea, That he render to him 40 Pounds which he owes to him and unjustly detains, *&c.* And whereof the same *William*, by *Thomas Antrobus* his Attorney saith, That whereas the aforesaid *Richard*, the 6th Day of *April*, in the 12th Year of the Reign of the Lady the now Queen, at *London*, in the Parish of the *Blessed Mary of the Arches*, in the Ward of *Cheap*, by his certain Writing obligatory, had granted, That himself was bound to the same *William* in the foresaid 40 Pounds, to be paid to the same *William* on the Feast of the *Lord's Ascension* then next following: Yet the aforesaid *Richard*, tho' oftentimes thereunto required, the said 40 Pounds unto the same *William* had not yet rendred, but the same to him hath hitherto refused, and still doth refuse to render; whereof he saith, That he is the worse, and hath Damage to the Value of Ten Pounds, and thereof he bringeth Suit, *&c.* And he produces here in Court the aforesaid Writing, which doth testify the said Debt, in the Form aforesaid, the Date of which is the Day and Year abovesaid, *&c.* Declaration in Debt on Bond.

And the foresaid *Richard*, by *John Cooke* his Attorney, comes and defends the Force and Injury, when, *&c.* and prayeth Oyer (hearing) of the Writing aforesaid; and it is read to him, *&c.* And he also prayeth the hearing of the Endorsement of the same Writing, and 'tis read unto him in these Words. *The Condition of this Obligation is such, That whereas the within bounden* Richard Manser, *and* John Manser *his Son, by their Deed of Feoffment, bearing the Date of this Obligation, have given, granted and confirmed, unto the within named* William Painter, *and his Heirs, all that Parcel of Woodland called* Southwood, *containing by Estimation Ten Acres, be it more or less, lying together in the Parish of* Gillingham *within said, and* Bedherst *in the County within said, to the Lands of one* Thomas Kemsley, *towards the* East, West, *and* North, *and to the King's Highway towards the* South, *adjoyning as by the same Deed more at large it appeareth, if the said* William Painter, *and his Heirs, shall and may at all Times hereafter* Plea. Oyer of the Bond. And Condition.

after, have, hold and enjoy all the foreſaid Parcel of Woodland, with the Appurtenances, diſcharged or ſaved harmleſs, of and from all and every former Bargain, Sale, Gift, Grant, Leaſe, Right, Jointure, Dower, Rent-Charge, and all other Things and Incumbrances whatſoever, had, made, or ſuffered to be done by the ſaid R. Manſer, *or his Heirs or Aſſigns: And alſo if the ſaid* R. Manſer, *and* J. Manſer *his Son, and their Heirs, and the Heirs of either of them, do at all Times hereafter, upon Requeſt to them or any of them made, at the only Coſts and Charges of the ſaid* W. Painter, *his Heirs and Aſſigns, make, ſeal, deliver, acknowledge, and do all and every ſuch further reaſonable Act and Acts, Thing and Things, Deviſe and Deviſes in the Law, as ſhall be reaſonably deviſed or required to be done by the ſaid* W. Painter, *his Heirs or Aſſigns, or his or their Council learned in the Law, for the further Aſſurance, Surety, and ſure making of the aforeſaid Parcel of Woodland, with the Appurtenances, unto the ſaid* W. Painter, *his Heirs and Aſſigns: That then this preſent Obligation to be void, or otherwiſe to remain in his Force and Virtue.* Which being read and heard, The ſaid *Richard* ſaith, That the ſaid *William* ought not to have his Action againſt him, becauſe he ſaith, That the aforeſaid *William*, from the Time of the making of the Writing aforeſaid, until the Day of the bringing of the Original Writ of the ſaid *William*, that is to ſay, the 16th Day of *October*, in the 24th Year of the Reign of the now Queen, had, held, and enjoyed, all the ſaid Parcel of Wood, with the Appurtenances, called *Southwood*, in the Condition aforeſaid above ſpecified, kept free of and from all and ſingular former Bargains, Sales, Gifts, Grants, Demiſes, Rights, Jointures, Dowers, Rent-Charges, and from all other Charges, and Incumbrances whatſoever had, made, or ſuffered to be made, by the ſaid *Richard Manſer*, his Heirs or Aſſigns, according to the Form and Effect of the Endorſement thereof. And the ſaid *Richard Manſer* further ſaith, That after the making of the Writing aforeſaid, and before the Day of the bringing of the Original Writ aforeſaid, that is to ſay, the tenth Day of *April*, in the 24th Year of the Reign of the ſaid Lady the now Queen, The aforeſaid *William Painter*, at *Gillingham* in the County of *Kent*, deviſed in Writing, by a certain Writing of Releaſe, between the ſaid *William Painter*, and him the ſaid *Rich. Manſer*, and the aforeſaid *John Manſer*, and then and there required the ſaid *Richard*, and the ſaid *John*, that they would ſeal and deliver the ſaid Writing as their Deed, where upon the ſaid *Richard*, the ſaid Writing at *Gillingham* aforeſaid, ſealed and delivered as the Deed of the ſaid *Richard*, to the aforeſaid *William*. And further the ſaid *Richard* ſaith, that the ſaid *John*, Son of the ſaid *Richard*, in the Condition aforeſaid named, upon the Requeſt of the ſaid *William*, made to the ſaid *John*, to ſeal and deliver that Writing as his Deed, upon the ſhewing of the ſaid Writing of Releaſe

ſo deviſed, becauſe the ſaid *John* was not lettered, and could not read, nor diſcern the Contents, or Matter of the ſaid Writing at *Gillingham* aforeſaid, then required of the ſaid *William Painter*, the Writing aforeſaid, to be delivered unto him, to ſhew the ſame to a Man learned, who could read the ſaid Writing to him: So that he upon the reading of the Contents of the Writing aforeſaid, might inform himſelf, whether that Writing were made according to the Tenor of the Condition aforeſaid, or not; and the ſaid *John*, ſaid then and there, that he would ſeal and deliver that Writing, if that Writing were according to the Tenor of the Condition aforeſaid; but the ſaid *William*, then and there refuſed to deliver to the ſaid *John*, the Writing aforeſaid, to ſhew to a Man learned in the Law, who could read the ſame to the ſaid *John*: By Reaſon of which, the ſaid *John* did not ſeal, nor deliver the Writing aforeſaid to the ſaid *William*, upon the Requeſt of the ſaid *William*, in Manner and Form aforeſaid made: And the aforeſaid *Richard Manſer* further ſaith, That from the Time of the making of the Writing aforeſaid, until the Day of the bringing of the Writ aforeſaid, there were not any other or farther Act or Acts, Deviſe or Deviſes by the ſaid *William*, or his Counſel learned, deviſed, and required to be done to the aforeſaid *William Painter*, for the further Aſſurance, Security, and ſure making of the aforeſaid Parcel of Wood with the Appurtenances, by the ſaid *Richard Manſer*, and *John Manſer*, or either of them, to the aforeſaid *William Painter*, his Heirs and Aſſigns, according to the Form and Effect of the Condition aforeſaid to be done, and this he is ready to averr, whereupon he prayeth Judgment, if the ſaid *William* his Action aforeſaid againſt him, ought to have. And the ſaid *William* ſaith, that the Plea of the ſaid *Richard*, in Manner and Form above pleaded, is not ſufficient in Law to bar the ſaid *William*, to have his Action aforeſaid againſt the ſaid *Richard*, and that he to that Plea in Manner and Form aforeſaid pleaded, needeth not by the Law of the Land to anſwer, and this he is ready to aver, whereupon for Default of a ſufficient Plea in this Particular, the ſaid *William* demandeth Judgment, and his Debt aforeſaid, together with his Damages, by Occaſion of detaining his Debt to be adjudged unto him, *&c.* And the ſaid *Richard*, foraſmuch as he ſufficient Matter in Law, to barr the aforeſaid *William* of having the Action aforeſaid, againſt the ſaid *Richard* hath above alledged, which he is ready to aver, and which Matter the ſaid *William* doth not deny, nor to the ſame in any Manner anſwer, but the ſame Averment to admit, doth altogether refuſe, he as before demandeth Judgment, and that the ſaid *William* from having his Action aforeſaid, againſt him the ſaid *Richard* be barred, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment, Day is given to the Parties aforeſaid thereof until the Day after the *Holy Trinity*, to hear

their Judgment, *&c.* Becauſe, the ſaid Juſtices here, thereof not yet, *&c.* At which Day here come, as well the ſaid *William Painter*, as the ſaid *Richard Manſer*, by their Attorneys aforeſaid; and becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment, further Day is given thereof to the Parties aforeſaid, until in eight Days of St. *Michael*, to hear their Judgment, becauſe the ſaid Juſtices here thereof not yet, *&c.* At which Day come as well the ſaid *William Painter*, as the ſaid *Richard Manſer*, by their Attorneys aforeſaid; and upon this the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeemed to the Juſtices here, that the aforeſaid Plea of the ſaid *Richard Manſer* above in Bar pleaded, is not ſufficient in Law to bar the ſaid *William* to have his Action aforeſaid againſt the ſaid *Richard Manſer*, as the ſaid *William Painter* above hath alledged: Therefore it is granted, that the ſaid *William Painter*, recover againſt the ſaid *Richard Manſer* his Debt aforeſaid, and his Damages, by Occaſion of detaining of his Debt, to 20 Marks to the ſaid *William*, with his Aſſent by the Court here adjudged, and the aforeſaid *Richard* in Mercy, *&c.* Afterwards, that is to ſay, the 10th Day of *June*, in the 28th Year of the Reign of the now Queen, came into Court here the ſaid *William Painter* by the aforeſaid *Thomas Antrobus* his Attorney; and by a ſpecial Warrant made to him in this Behalf, acknowledged that he is ſatisfied of the Debt and Damages aforeſaid; therefore let the ſaid *Richard* be acquitted of the Debt and thoſe Damages, *&c.*

MANSER's *Caſe.*

Paſch. 26 Eliz. Rot. 1608.

In the Common Pleas.

BETWEEN *Painter* and (*a*) *Manſer*, the Caſe was thus: *Painter* brought an Action of Debt upon an Obligation againſt *Manſer*, and the Defendant pleads the Obligation was with Condition, *ſc.* That whereas the Defendant had enfeoffed the Plaintiff of certain Lands, if the Plaintiff ſhall at all Times following enjoy thoſe Lands diſcharged, or otherwiſe kept indempnified from all Incumbrances, *&c.* and alſo if the Defendant and *John Manſer* his (*b*) Son, ſhall do all Acts and Deviſes for the better Aſſurance of thoſe Lands to him, as by the Plaintiff or his Council learned in the Law ſhall be deviſed, that then the Obligation ſhall be void; and pleads that the Plaintiff had enjoy'd the ſaid Lands diſcharged and kept indempnified from all Incumbrances, *&c.* and that the Plaintiff deviſed a Writing of Releaſe to be made by the Defendant and *John* his Son, to the Plaintiff, which the Defendant did ſeal and deliver as his Deed; and becauſe his Son was not lettered, and could not read, the ſaid *John* prayed the Plaintiff to deliver it to him, to be ſhewed to ſome Man learned in the Law, who might inform him if it was made according to the Condition; and ſaid further, that if it was according to the Condition, he would deliver it, which the Plaintiff refuſed; wherefore he did not deliver it, as it was lawful he ſhould not: Whereupon the Plaintiff demurred; and it was adjudged for the Plaintiff. In this Caſe three Points were reſolved, (1.) That if a Man not lettered be bound to make a Deed, he is not bound to ſeal and deliver any Writing tender'd to him, unleſs ſome Body be preſent who can (*c*) read the Deed to him, if he requires the Writing to be read to him; and if the Deed be in *Latin*, *French*, or other Language (which the Party who is to execute the Writing doth not underſtand) in ſuch Caſe, if the

(*a*) Moor 182. 12 Co. 89. 1 Roll. 440. 4 Leon. 62.

(*b*) 3 Bulſt. 30.

Poſt. 9. b.

(*c*) Inf. 9. b. 1 Jones 314.

Party demands that one ſhould read and interpret the Writing to him, and none be preſent that can read and expound the Tenor of the ſame in that (*a*) Language that the Party who is to deliver the Deed underſtands, there the Party may well refuſe to deliver it. So it is although the Man can read (*b*), yet if the Deed be indicted in *Latin*, *French*, or other ſuch Language as the Party who is to execute cannot underſtand; if he demands that the Writing be (*c*) read or expounded to him in ſuch Language as he may underſtand it, and no Body be there to do it, the Party may refuſe to deliver it. And it is to be obſerved, *quod* (*d*) *ignorantia eſt duplex*, viz. *facti & juris*; *& rurſum ignorantia facti* (*quoad rem noſtram attinet*) *eſt duplex*, *videlicet*, *lectionis & linguæ*. Note, Reader, that Ignorance in Reading, or Ignorance of the Language, *quæ ſunt ignorantiæ facti*, may excuſe; but as is commonly ſaid (*e*), *Ignorantia juris non excuſat*: for notwithſtanding it was ſaid there, that altho' the Party might read, and underſtand the Language alſo in which the Writing was made, yet he might not know the Senſe and Operation of the Words in Law, and whether they agree with the Condition of his Obligation or not; and therefore *prima facie* ſome of the Juſtices did ſeem to hold, that in ſuch Caſe the Party ſhall have (*f*) reaſonable Time to ſhew the Writing to his Council learned in the Law, to be inſtructed by them whether it be according to what he is bound to do, and namely when there is no Time limited, in which it is to be done, ſo as in regard that the other Party might requeſt the doing of it when he pleaſed, it is not poſſible for the Party to have his Council at all Times with him: and therefore it ſeems reaſonable, *prima facie*, that the Party ſhall have reaſonable Time, as is aforeſaid: But at laſt, upon the View of the Record of a Judgment in this Court, *An.* 16. *Eliz.* in the Time of the Lord *Dyer*, between Sir *Anthony Cook* and *Wotton*, that upon ſuch Requeſt made to Sir *Anthony Cook* (*g*) by *Wotton*, to ſeal an Indenture, Sir *Anthony*, who was not learned in the Law, was obliged to ſeal it peremptorily at his Peril, and could not obtain convenient Time to conſult upon it with his Council; hereupon it was reſolved in the Caſe at the Bar according to the ſaid Judgment. See the Caſe now reported by the Lord *Dyer*. And it was ſaid, that the Caſe at the Bar was ſtronger than that of Sir *Anthony Cook*; for in this Caſe the Def. obliged himſelf, that his Son, who was a Stranger to the Obligation, ſhould do, *&c.* In which Caſe he has undertaken that his Son ſhall do it at his Peril; for he that is obliged, undertakes more for a (*h*) Stranger than for himſelf, in many Caſes. *Vide* (*i*) 33 *H.* 6. 16. b. 36 *H.* 6. 8. 2 *E.* 4. 2. 15 *E.* 4. 5. b. 22 *E.* 4. 43. and 10 *H.* 7. 14. b. It was reſolved that the Pleading was inſufficient; for he hath pleaded, That the Plaintiff had enjoyed the Land diſcharged

(*a*) Inf. 9. b.

(*b*) 12 Co. 89.

(*c*) 11 Co. 27.

(*d*) Plowd. 19. a.

(*e*) 1 Jones 314. 1 Co. 177. b. 14 H. 8. 26. b.

(*f*) Cr. El. 9. Cro. Car. 299.

Vide Dyer, Tr. 16 El. placito 39. fo. 337, & 338.

(*g*) 4 Leon. 63. 190. 1 Jones 314. Dyer 337, 338. pl. 39. 1 Ander. 53. New Benl. 228. pl. 260. 5 Co. 8. a. 19. a. 1 Rol. 424, 440. Godb. 445.

(*h*) Moor 183. 3 Bulſt. 30. 5 Co. 23. b. Cr. El. 716. 864. C. Lit. 209. a. 1 Rol. 452. 6 Co. 31. a. 2 Rol. Rep. 196. 2 Rol. 402. H. 2. Perk. Sect. 756. 15 E. 4, 5. b. 6. a. Br. Condition. 62. 242.

(*i*) 2 Rol. Rep. 196. 3 Bulſtr. 29, 30. 5 Co. 23. b. Br. Covenant 3. Br. Condition 13. Fitz. Bar. 62.

diſcharged and kept harmleſs from Incumbrances, where he ought to have ſhewed how: So if he had *(a)* pleaded, That he had ſaved him harmleſs, he ought to have ſhewed how; but in ſuch Caſe, if he had pleaded in the negative, *Non fuit damnificatus*, there it is otherwiſe. Secondly, He hath pleaded, *Quod quoddam (b) ſcriptum relaxationis* was ſealed and delivered, and doth not ſhew whether the Releaſe concerns the Land mentioned in the Condition, and for all theſe Cauſes the Plaintiff had Judgment to recover.

Note Reader, There is great Reaſon, that the Writing ſhould be expounded in ſuch Language, that the Party may underſtand it, although he could read, becauſe by the Law he is at his Peril to *(c)* deliver it preſently upon Requeſt, and hath not Time to conſult upon it with Council learned in the Law.

(a) Cr. Jac. 165, 340, 359, 363, 503, 634. Moor 857. Hob. 13. 296. Cr. El. 253, 393, 477, 914, 916. Cr. Car. 384. 2 Leonard 214. Kelw. 80. b. 95. b. 5 H. 7, 8. a. 6 H. 7. 6. a. Plowd. 7. b. 33. b. Co. Lit. 303. a. Dyer 43. pl. 18, 19. Br. Condition 133. in fine. 9 Co. 25. a. 1 Leon. 71. Winch. 9. Hardres 133. 2 Rol. Rep. 159, 488. Doctrin. Placi. 58, 270. 40 E. 3. 20. a. Moor 3. pl. 9. Bro. Cond. 185. 3 Mod. 252. 5 Mod. 243.

(b) Moor 183.

(c) Cr. El. 9.

GODDARD's *Case.*

Hill. 26 Eliz. *Rot.* 1038.

In the Common Pleas.

(a) 3 Leon. 100.

(a) GOddard, Adminiſtrator of *James Newton*, brought an Action of Debt againſt *John Denton* upon a Bond made to the Inteſtate, bearing Date 4 *April*, 24 *Eliz.* The Defendant pleaded, That the Inteſtate died before the Date of the Bond, and ſo concluded, that the ſaid Writing was not his Deed, upon which they were at Iſſue; the (b) Jury found that the Defendant did deliver it as his Deed, 30 *July*, *Anno* 23 *Eliz.* and found the Tenor of the Deed *in hæc verba*, *Noverint Univerſi*, *&c. dat.* 4 *Aprilis*, *Anno* 24 *Eliz.* and that the Inteſtate was living 30 *July*, 23 *Eliz.* and that he died before the ſaid Date of the Bond: And prayed the Advice of the Court, Whether this was (c) the Defendant's Deed. And it was adjudged by *Anderſon* Chief Juſtice, *Windham*, *Periam* and *Walmeſly*, That it was his Deed, and the Reaſon of their Judgment was, That although the Obligee in Pleading cannot alledge the Delivery before (d) the Date, as it was adjudged in 12 *H.* 6. 1. (e) which Caſe was affirmed to be good Law, becauſe he is eſtopped to take an Averment againſt any Thing expreſſed in the Deed, yet the Jurors, who are ſworn to ſay the Truth, ſhall not be eſtopped, for an Eſtoppel is to conclude one to ſay the Truth; and therefore Jurors cannot be eſtopped, becauſe they are ſworn to ſay the Truth. *Vide* (f) 1 *H.* 4. 6. *b.* 35 *Aſſ.* 8. 17 *E.* 3. 6. *Plowd. Comm.* 515. *a.* but if the Eſtoppel or Admittance be within the ſame Record in which the Iſſue is joined, upon which the Jurors ſhall give their Verdict, there they cannot find any Thing againſt that which the Parties have affirmed and admitted of Record, although the Truth be contrary; for the Court may give Judgment upon a Thing confeſſed by the Parties, and (g) Jurors are not to be charged with any ſuch Thing, but only with Things in which the Parties differ. *Vide* 28 *Aſſ.*

(b) Cro. Car. 130, 131. 1 Jones 192.

(c) Cr. Jac. 640.

(d) 3 Keb. 332. Br. faits 94. Perk. Sect. 149.

(e) 2 Rol. 690. 4 Co. 53. a. Cr. El. 36, 37, 140, 309. Cr. Car. 110. Co. Lit. 227. a. 352. a. Owen 96. 1 Leon. 206. Savil. 98, 99. Dyer 147. pl. 73. Cart. 155. Palm. 20. Hard. 483.

(f) 1 H. 4. 5. b.

(g) Raymond 47. 2 Rol. 691. Dyer 33. pl. 8. 9 Co. 69. b. 28 Aſſ. 17. per Pinchden. Br. Confeſſion 27.

Aſſ. 34. 9 *H.* 6. 37. *a. b.* 3 & 4 *Phil. & Mar. Dyer* (*a*) 147. And the (*b*) Date of a Deed is not of the Subſtance of a Deed; for if it hath no Date, or hath a falſe or impoſſible Date, as the thirtieth Day of *February*, yet the Deed is good; for there are but three Things of the Eſſence and Subſtance of a Deed, that is to ſay, Writing in Paper or Parchment, Sealing and Delivery, and if it hath theſe three, although it wanted, *In* (*c*) *cujus rei teſtimonium ſigillum ſuum appoſuit*, yet the Deed is ſufficient, for the Delivery is as neceſſary to the Eſſence of a Deed, as the putting of the Seal to it, and yet it need not be contained in the Deed, that it was delivered. And note, the Order of making a Deed is, firſt to write it, then to ſeal it, and after to deliver it, and therefore it is not neceſſary that the Sealing or Delivery be mentioned in the Writing, foraſmuch as they are to be done after. And ſo it was ſaid it was reſolved in *Henry* the Eighth's Time. See Reader 40 *E.* 3. 2. *a.* and an Opinion 7 *H.* 7. 14. *a.* to the contrary; but ſee the Caſe cited in the Time of *H.* 8. now reported by the Lord *Dyer* (*d*) 28 *H.* 8. 19. and believe, Reader, the late Judgments are grounded upon full and pregnant Reaſon. And when a Deed is delivered, it takes Effect by the Delivery, and not from the Day of the Date. And therefore be the Deed without Date, or of a falſe or impoſſible Date, yet the Deed is good. Secondly, By this Judgment it is to be obſerved, That if a Man bring an Action of Debt, and declares, That the Defendant 4 *April*, 24 *Eliz.* made a Bond, bearing Date the ſame Day and Year, and the Defendant pleads *Non eſt factum*, and it is found that the Deed was (*e*) delivered at another Day before or after the Day which the Plaintiff hath declared, that yet Judgment ſhall be given for the Plaintiff, foraſmuch as the Date is not material, and the Defendant cannot be twice charged. And many Times Bonds are delivered at other Days than they bear Date. So it appeareth by this Judgment, that the miſtaking of the Date of the Bond ſhall not hurt, upon *Non eſt factum* pleaded.

(*a*) Dyer 247. pl. 73.
(*b*) Co. Lit. 6. a. 46. b. 1 Rol. 849. 2 Rol. 21. Mod. Rep. 180. Noy 21, 85. Keilw. 34. b. Plowd. 231. b. 491. Cr. Car. 78. 1 Jones 140. Latch 158. Cr. Jac. 261. Yelv. 194. Cart. 153. 1 Brownl. 110. Perk. 25. b. Moor 28.
(*c*) Moor 3. Co. Lit. 6. a. 7. a. 229. b. 2 Inſt. 78. Keilw. 34. b. 70. b. 2 Rol. 21, 22. Perk. 27. b. 28. a. Br. factis 103. Br. Obligat. 8. 7 H. 7. 14. b. 8 H. 6. 35. a. Dyer 19. pl. 113. 22. pl. 140. 1 Leon. 25. 3 Bulſt. 300, 301, 302. Old. Benl. 127. Owen 33. 40 E. 3. 2. a. Statham Obligation 1.
(*d*) Dyer 19. pl. 113.
(*e*) Plow. Com. 393. a. Cr. Jac. 136. Hob. 73. 349. Salk. 463.

THOROUGH-

THOROUGHGOOD's *Caſe.*

Trin. 24 Eliz. *Rot.* 928.

In the Common Pleas.

4 Co. 5. b.

Filmer.

Declaration in Treſpaſs.

Eſſex ſſ. WILLIAM COLE, late of *Great Parington*, in the County aforeſaid, Gent. was attached to anſwer to *William Thoroughgood*, of a Plea, wherefore with Force and Arms, the Cloſe and Houſe of him the ſaid *Will. Thoroughgood*, at *Great Parington*, he brake, and his Graſs there to the Value of 20 *l.* growing, with certain Cattle trod down and conſumed, and other Harms to him did, to the grievous Damage of him the ſaid *Will. Thoroughgood*, and againſt the Peace of the Lady the now Queen, *&c.* And whereupon the ſaid *Will. Thoroughgood*, by *Will. Ayleſbury* his Attorney, complaineth, That the aforeſaid *Will. Cole*, the 12th Day of *October*, in the 23d Year of the Reign of the Lady the now Queen, with Force and Arms, the Cloſe and Houſe of him the ſaid *Will. Thoroughgood*, at *Great Parington* aforeſaid, brake, and his Graſs to the Value, *&c.* there late growing, with certain Cattle, that is to ſay, Horſes, Cows, Hogs and Sheep, did eat, tread down and conſume, the Treſpaſs aforeſaid as to the feeding, treading down and conſuming of the Graſs aforeſaid, from the aforeſaid 12th Day of *October*, in the 23d Year aboveſaid, until the Day of the bringing of this Writ Original of him the ſaid *Will. Thoroughgood*, that is to ſay, the 6th Day of *November* then next following, at divers Days and Terms continuing, and other Harms, *&c.* to the grievous Damage, *&c.* and againſt the Peace, *&c.* and whereupon he ſaith, he is the worſe, and hath Damage to the Value of 40 *l.* and thereof he bringeth Suit, *&c.* And the aforeſaid *Will. Cole* by *Tho. Reynolds* his Attorney, cometh and defendeth the Force and Injury, when, *&c.* And as to the coming with Force and Arms, he ſaith, That he is not guilty thereof, and of this puts himſelf upon the Country, and the aforeſaid *Will. Thoroughgood* likewiſe. And as to the reſt of the Treſpaſs aforeſaid, above ſuppoſed to be done, the ſaid *Will. Cole* ſaith, that the aforeſaid *Will. Thoroughgood* ought not to have his Action againſt him, becauſe he ſaith, that the Cloſe and Houſe aforeſaid, as alſo the Places in which it is ſuppoſed the Treſpaſs aforeſaid to be done, are, and at the Time of the Treſpaſs

With a *Continuando.*

Plea to Part Not Guilty.

To other Part a Special Bar.

Treſpaſs aforeſaid, above ſuppoſed to be done, were one Meſſuage and two Acres of Meadow with the Appurtenances called *Nichols* Tenement in *Great Parington* aforeſaid; which Tenements, with the Appurtenances are, and at the aforeſaid Time of the Treſpaſs aforeſaid, above ſuppoſed to be done, were the Soil and Freehold of him the ſaid *Will. Cole*; for which, the aforeſaid *William*, at the aforeſaid Time in which, *&c.* the Cloſe and Houſe aforeſaid, as his Cloſe and Soil, and Freehold of him the ſaid *William*, into the ſame Meſſuage, and two Acres of Meadow, with the Appurtenances, brake, and the Graſs of him the ſaid *Will. Cole*, being his own, there growing, with his Cattle did, tread down and conſume as it was lawful for him to do; and this he is ready to aver, whereupon he demandeth Judgment, whether that the aforeſaid *Will. Thoroughgood* his Action aforeſaid againſt him ought to have, *&c.*

Replication with a new Aſſignment.

And the aforeſaid *Will. Thoroughgood* ſaith, That he for any Thing before alledged from having his Action aforeſaid ought not to be barred, becauſe he ſaith, that the Cloſe and Houſe, and alſo the Places in which the Treſpaſs aforeſaid, whereof he above maketh Complaint, was, are, and the Time of the Treſpaſs aforeſaid done. were one Meſſuage called *Burrowes*, eight Acres of Land, called the *Great Weſt-field*, four Acres of Land called *Diggins Holme*, and ſix Acres of Land called *Groveſield*, with the Appurtenances, in *Great Paringdon* aforeſaid, (others then the aforeſaid Meſſuage, and two Acres of Meadow with the Appurtenancess called *Nichols* Tenements, in the Bar of the aforeſaid *Will. Cole* above ſpecified) and this he is ready to aver, wherefore inaſmuch as the ſaid *Will. Cole*, to the Treſpaſs aforeſaid, in the Tenements aforeſaid, with the Appurtenances of new Aſſignment made, doth not anſwer; the aforeſaid *Will. Thoroughgood* demandeth Judgment and his Damages by Occaſion of that Treſpaſs, to be to him adjudged, *&c.* And the aforeſaid *Will. Cole*, as to any Treſpaſs in the aforeſaid Tenements of new now aſſigned, above ſuppoſed to be done, he ſaith, That the aforeſaid *Will. Thoroughgood* his Action againſt him ought not to have, becauſe he ſaith, That long before the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done, That the aforeſaid *Will. Thoroughgood*, was ſeized of the ſaid Tenements with the Appurtenances of *new aſſigned* in his Demeſn as of Fee; and ſo thereof being ſeized, before the aforeſaid Time in which, *&c.* A Fine was levied in the Court of the Lady the now Queen here, that is to ſay, at *Weſtminſter*, in eight Days of St. *Hillary*, in the 10th Year of her Reign, before *James Dyer*, *Rich. Weſton*, *John Walſh* and *Rich. Harper*, then Juſtices, and afterwards from the Day of *Eaſter*, in 15 Days then next following, granted and recorded before the ſame Juſtices, and other the Queen's faithful People then and there preſent, between *Will. Chicken* and *Eliz.* his Wife, Plaintiffs, and the aforeſaid *Will. Thoroughgood* and *Agnes* his Wife, Deforcients,

8 Co. 146. a. Poſt. 181. b.

Rejoinder claiming Title, *&c.*

of

of the Tenements aforeſaid with the Appurtenances amongſt other Things, by the Names of one Meſſuage, one Garden, 45 Acres of Land, five Acres of Meadow, ten Acres of Paſture, and four Acres of Wood, with the Appurtenances, in *Great Parington* and *Roydon*, whereof a Plea of Covenant was ſued between them in the ſaid Court here, That is to ſay, that the aforeſaid *Will. Thoroughgood* and *Agnes* his Wife, acknowledged the Tenements aforeſaid to be the Right of the ſaid *Will. Chicken*; as thoſe which the ſaid *Will.* and *Eliz.* had of the Gift of the aforeſaid *Will. Thoroughgood* and *Agnes*, and them remiſed and quit claimed from them the ſaid *William* and *Agnes*, and their Heirs, to the aforeſaid *Will. Chicken* and *Elizabeth*, and the Heirs of the ſaid *William* for ever, which Fine in Form aforeſaid levied and had, was levied, to the Uſe of the aforeſaid *Will. Chicken* and *Elizabeth*, and the Heirs of the ſaid *William* for ever. By Virtue of which ſaid Fine the aforeſaid *Will. Chicken* and *Eliz.* were ſeiſed of the Tenements aforeſaid, that is to ſay, the ſaid *Will. Chicken* in his Demeſn as of Fee, and the aforeſaid *Eliz.* in her Demeſn as of Freehold for the Term of her Life. And the ſaid *Will.* and *Eliz.* ſo thereof being ſeized, before the aforeſaid Time in which, *&c.* of the ſaid Tenements with the Appurtenances, enfeoffed one *Edw. Turner*, Eſq; to have to him and his Heirs for ever. By Virtue of which Feoffment the aforeſaid *Edw.* was of the Tenements aforeſaid, with the Appurtenances, ſeized in his Demeſn as of Fee, by which the ſaid *Will. Cole*, as Servant to the ſaid *Edward*, and by his Commandment, at the aforeſaid Time in which, *&c.* the Cloſe and Houſe aforeſaid, as the Cloſe and Houſe, Soil and Freehold of the ſaid *Edward* his own, brake, and the Graſs aforeſaid, as the proper Graſs of him the ſaid *Edward*, in the Tenements aforeſaid, with the Appurtenances, of new aſſigned, then growing, with his Cattle aforeſaid, eat, trod down and conſumed, as it was lawful for him to do: And this he is ready to aver; whereupon, he demandeth Judgment, if the aforeſaid *Will. Thoroughgood* his Action aforeſaid againſt him ought to have, *&c.* And the aforeſaid *Will. Thoroughgood*, as to the aforeſaid Plea of the aforeſaid *Will. Cole* to the Treſpaſs aforeſaid, in the Tenements aforeſaid, with the Appurtenances of *new Aſſignment* made above in Bar thereof pleaded, ſaith, That he for any Thing in the ſaid Plea before alledgeth from the having his Action aforeſaid, ought not to be barred: Becauſe he ſaith, That the aforeſaid Fine was had and levied to the Uſe and Behoof of the aforeſaid *Will. Chicken* and *Elizabeth*, and the Heirs of the ſaid *William*, upon the Condition that the aforeſaid *Will. Chicken* and *Eliz.* and the Heirs and Aſſigns of the ſaid *Will. Coicken*, well and truly ſhould deliver and pay to the ſaid *Will. Thoroughgood* and *Agnes*, and their Executors and Aſſigns, 8*l.* of good and lawful Money of *England*, 12 Buſhels of Wheat, and 12 Buſhels of Malt at the Manſion-houſe called *Barrowes*,

Surrejoinder, ſetting forth the Eſtate to be on a Condition not performed.

rowes, in *Parington* aforeſaid, yearly, during the natural Lives of them the ſaid *Will. Thoroughgood* and *Agnes*, and the longer liver of them, at the Feaſt of St. *Michael the Archangel*, and the Feaſt of the Annunciation of the *Bleſſed Mary the Virgin* by equal Portions; and alſo upon Condition, That the aforeſaid *Will. Chicken* and *Eliz.* and their Heirs, Executors or Aſſigns, ſhould pay to the ſaid *Will. Thoroughgood* and *Agnes*, their Executors, Adminiſtrators or Aſſigns, 76 *l.* 13 *s.* and 4 *d.* of like lawful Money of *England*, at the aforeſaid Manſion-houſe called *Barrowes*, in Form following, that is to ſay, at the Feaſt of *St. Michael the Archangel*, in the Year of our Lord God 1568, 3 *l.* 6 *s.* and 8 *d.* and ſo at the Feaſt of *St. Michael the Archangel*, at the Manſion-houſe aforeſaid, 3 *l.* 6 *s.* and 8 *d.* yearly, until the aforeſaid Sum of 76 *l.* 13 *s.* and 4 *d.* ſhould be fully ſatisfied and paid; and for the not Payment, doing and performing of the aforeſaid Conditions, according to the true Intents and Meanings of the ſame Conditions, the aforeſaid Fine, and other the Conveyances of the Premiſſes aforeſaid then to be made, were to be to the Uſe and Behoof of them the ſaid *Will. Thoroughgood* and *Agnes*, as in their former Eſtate, by Colour of which Fine, the aforeſaid *Will. Chicken* and *Elizabeth*, were ſeized of the Tenements aforeſaid with the Appurtenances of new aſſigned amongſt other Things, that is to ſay, the aforeſaid *William* in his Demeſn as of Fee, and the aforeſaid *Elizabeth* in her Demeſn as of Freehold for Term of her Life, upon the Conditions aforeſaid. And further the ſaid *William Thoroughgood*, by Proteſtation, that the ſaid *Will. Chicken* and *Elizabeth* did not pay, do or perform any Thing according to the Form and Effect of the Conditions aforeſaid, for Plea ſaith, That the aforeſaid *Will. Chicken* and *Elizabeth*, or either of them, did not pay to the ſaid *Will. Thoroughgood* and *Agnes*, or either of them, 3 *l.* 6 *s.* 8 *d.* of good and lawful Money of *England*, at the Feaſt of *St. Michael the Archangel*, in the 18th Year of the Reign of the ſaid Lady the now Queen, which to them at the ſaid Feaſt of *St. Michael*, they ought to have paid according to the Form and Effect of the aforeſaid firſt Condition, by which, the aforeſaid *Will. Thoroughgood*, by Virtue of the Fine aforeſaid, and by Force of a certain Act made and provided in Parliament, of the Lord *Henry* the 8th, late King of *England*, holden at *Weſtminſter*, the fourth Day of *February*, in the 27th Year of his Reign, of transferring Uſes into Poſſeſſion, was ſeiſed of the Tenements aforeſaid, with the Appurtenances of new aſſigned amongſt other Things in his Demeſn as of Fee; and in the Tenements aforeſaid of new aſſigned, entred, and the aforeſaid *Will. Cole*, the Day and Year in the Declaration aforeſaid above ſpecified, with Force and Arms, *&c.* the Cloſe and Houſe of him the ſaid *William Thoroughgood* in the aforeſaid Tenements of new aſſigned, broke, and the Graſs aforeſaid there

Proteſtation.

Plea not Performance.

there then growing, with his Cattle aforeſaid, was eaten, trod down, and conſumed, as he the ſaid *William* againſt him complaineth; and this he is ready to aver: Wherefore, inaſmuch as the ſaid *Will. Cole*, doth acknowledge the Treſpaſs aforeſaid in the ſame Tenements of new aſſigned, done as aboveſaid, the ſaid *Will. Thoroughgood* demandeth Judgment and his Damages, by the Occaſion of that Treſpaſs to be to him adjudged, *&c.* And the aforeſaid *Will. Cole*, by Proteſtation, that the Fine aforeſaid was not levied to the Uſe of the ſaid *Will. Chicken* and *Elizabeth* upon the Conditions aforeſaid, as the aforeſaid *Will. Thoroughgood* hath above alledged, for Plea ſaith, That after the Fine aforeſaid levied, that is to ſay, the ſecond Day of *September*, in the 18th Year of the Reign of the Lady the now Queen, at *Great Parington* aforeſaid, the aforeſaid *Will. Thoroughgood*, by his Writing of Releaſe, which the ſaid *Will. Cole*, with the Seal of the ſaid *Will. Thoroughgood* ſealed, brings here into Court, whoſe Date is the ſame Day and Year, by the Name of *Will. Thoroughgood* of *Hunſdon* in the County of *Hertford*, Yeoman, remiſed, releaſed, and for him and his Heirs for ever, quit-claimed, to the aforeſaid *Will. Chicken*, by the Name of *Will. Chicken* of *Hunſdon* aforeſaid, Yeoman, all and all manner of Conditions, Entries for Conditions broken, and Demands whatſoever, from the Beginning of the World unto the Day of the Date of the ſaid Writing of Releaſe: And this he is ready to aver, whereupon as at firſt he demandeth Judgment; and that the aforeſaid *Will. Thoroughgood* be barred from having his Action aforeſaid againſt him, *&c.* And the aforeſaid *Will. Thoroughgood* ſaith, That he is a Layman, and unlearned, and that at the Time of the making of the Writing of Releaſe above ſuppoſed to be made, divers Arrearages of the aforeſaid yearly Payments above recited in Form aforeſaid to be paid, were in arrear, and that the aforeſaid Writing of Releaſe was then read and declared to him, as a Writing of Acquittance of all Arrearages of Monies (to him in Form aforeſaid to be paid) at that Time to the ſaid *Will. Thoroughgood*, being behind and unpaid, only: By which the ſaid *Will. Thoroughgood* believing that Writing to be a Writing of Acquittance of the Arrearages of the Monies aforeſaid only, ſealed and delivered the ſame Writing to the aforeſaid *Will. Chicken*, and ſo the ſaid *Will. Thoroughgood* ſaith, That the ſaid Writing into Court here brought, containing in itſelf, him the ſaid *Will. Thoroughgood*, to have remiſed, releaſed, and for him and his Heirs for ever quit Claimed, to the aforeſaid *Will. Chicken*, all and all manner of Conditions, Entries for Conditions broken, and Demands whatſoever, from the Begining of the World, until the Day of the Date of the ſaid Writing of releaſe, *is not his Deed*; And he prayeth that this may be enquired of by the Country; and the aforeſaid *Will. Cole* likewiſe, Therefore it is commanded to the Sheriff, that he cauſe

By a Releaſe of the Condition.

Surrebutter nient Lettr.

to

to come from the Day of the *Holy Trinity*, in 3 Weeks, 12 *&c.* By whom, *&c.* And who neither, *&c.* To Recognize, *&c.* Becauſe as well, *&c.* Afterwards the Proceſs was continued between the Parties aforeſaid, of the Plea aforeſaid, by Jurors put between them in reſpite here, until this Day, that is to ſay, the Morrow of St. *Martin*, in the 25th Year of the Reign of the Lady the now Queen. And now at this Day, come as well the aforeſaid *Will. Thoroughgood*, as the aforeſaid *Will. Cole*, by their Attornies aforeſaid, and the Jurors thereof impannelled likewiſe come, who to ſay the Truth of the Premiſſes, (being choſen, tryed, and ſworn) ſay upon their Oath, That the aforeſaid *Will. Thoroughgood*, is a Lay-man, and unlearned, and that divers Arrearages of the yearly Payments aforeſaid, to the aforeſaid *Will. Thoroughgood*, at the aforeſaid Time of making of the aforeſaid Writing of Releaſe were unpaid, and alſo that the ſaid Writing of Releaſe, at the Time of the Sealing thereof, was not read to the aforeſaid *Will. Thoroughgood*, But after one *Tho. Ward*, had begun to read that Writing to the aforeſaid *Will. Thororghgood*, one *John Ward* ſnatch'd that Writing out of the Hands of the aforeſaid *Thomas* before he had read the firſt Line thereof, ſaying to the aforeſaid *William Thoroughgood*, theſe *Engliſh* Words following; Goodman *Thoroughgood, you are a Man unlearned, and I will declareit unto you, and make you underſtand it better, than you can by hearing it read*; And afterwards the aforeſaid *John Ward*, declared the aforeſaid Writing or Releaſe, to the aforeſaid *Will. Thoroughgood*, in theſe *Engliſh* Words following; *Goodman Thoroughgood*, the Effect of it is this, That you do releaſe to *Will. Chicken*, all the Arrerages of Rent that he doth owe you, and no otherwiſe, and then you ſhall have your Land again, meaning the Tenements aforeſaid of new aſſigned, To which the aforeſaid *Will. Thoroughgood* then anſwered in theſe *Engliſh* Words following, that is to ſay, If it be no otherwiſe I am content, And upon that, The ſaid *Will. Thoroughgood*, giving credit to the Words of the aforeſaid *John Ward*, then and there ſealed the ſaid Writing of Releaſe, and delivered it to the aforeſaid *Will. Chicken*. But whether upon the whole Matter, in Form aforeſaid found, the ſaid Writing of Releaſe be, and in Law ought to be adjudged the Deed of the aforeſaid *Will. Thoroughgood* or not, the Jurors aforeſaid are utterly ignorant; And therefore pray the Advice of the Juſtices and the Court here, And if upon the whole Matter aforeſaid, in Form aforeſaid found, It ſhall ſeem to the Juſtices here, that that Writing is not, nor ought in Law to be adjudged the Deed of the aforeſaid *Will. Thoroughgood*, Then the ſaid Jurors ſay upon their Oath, That the aforeſaid Writing of Releaſe, is not the Deed of the aforeſaid *Will. Thoroughgood*, as the ſaid *Will.* above alledgeth, and they aſſeſſe Damages of the ſaid *William Thoroughgood*, by Occaſion of the Treſpaſſes aforeſaid, above his Coſts and

Charges

Charges by him in this Part about his Suit expended to 20 Shillings, and for his Coſts and Charges to 12 Pence: And if upon the whole Matter aforeſaid, in Form aforeſaid found, It ſhall ſeem to the Juſtices here, That the Writing aforeſaid of Releaſe, is the Deed of the aforeſaid *Will. Thoroughgood*, as the aforeſaid *Will. Cole* above hath alledged, Then the ſaid Jurors ſay upon their Oath, That the ſaid Writing of Releaſe, is the Deed of the aforeſaid *Will. Thoroughgood*, as the ſaid *Will. Cole* above hath alledged. And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day is given to the Parties aforeſaid, here until in 8 Days of St. *Hillary*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day, here cometh as well the aforeſaid *Will. Thoroughgood*, as the aforeſaid *Will. Cole*, by their Attornies aforeſaid, And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties aforeſaid, here from the Day of *Eaſter* in 15 Days, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day here cometh as well the aforeſaid *Will. Thoroughgood*, as the aforeſaid *Will. Cole*, by their Attornies aforeſaid, And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day further is given to the Parties aforeſaid, here until the Morrow of the *Holy Trinity*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day here cometh as well the aforeſaid *Will. Thoroughgood*, as the aforeſaid *Will. Cole*, by their Attornies aforeſaid, And upon this, The Premiſſes being ſeen, and by the Juſtices here fully underſtood, It is granted, That the aforeſaid *Will. Thoroughgood*, ſhall recover againſt the ſaid *Will. Cole*, his Damages to 21 Shillings, by the Jurors aforeſaid, in Form aforeſaid aſſeſſed, as alſo 23 Pound, 19 Shillings, to the ſaid *Will. Thoroughgood*, at his Requeſt for his Coſts and Charges aforeſaid, by the Court *of Encreaſe* adjudged, which Damages in the Whole do amount to 25 Pound, and that the aforeſaid *Will. Cole* be taken, *&c.*

THROUGHGOOD's *Case.*

Trin. 26 Eliz. Rot. 928.

In the Common Pleas.

Filmer,

THroughgood (*a*) brought an Action of Treſpaſs for breaking of his Cloſe againſt *Cole* Defendant, who pleaded, That long Time before the Treſpaſs, the Plaintiff releaſed to one *William Chicken*, all Demands whatſoever, *&c.* whoſe Eſtate in the Land the Defendant hath, and juſtified the Treſpaſs, *&c.* The Plaintiff ſaid, That he was a Lay-man, not lettered, and that at the Time of the ſaid Releaſe made, divers Arrearages of an Annuity were due to him by the ſaid *William Chicken*, and that the ſaid Writing of Releaſe was read and declared to him as a Writing of Acquittance for thoſe Arrearages only; and that he (giving Credit thereunto) did ſeal and deliver the ſame to the ſaid *William Chicken*, and ſo, not his Deed; upon which Iſſue was joined; and the Jury found a Special Verdict to this Effect: That is to ſay, That the Plaintiff was a Lay-man, not lettered, and that divers Arrearages of the ſaid Annuity were behind, and that the Writing was never read to him; but after that one *Thomas Ward* had begun to read it to the Plaintiff, and before he had read a Line of the Writing, one *William Ward* took the Writing out of his Hands, ſaying to the Plaintiff, Goodman *Throughgood*, you are a Man (*b*) unlearned, and I will declare it unto you, and make you underſtand it better than you can by hearing of it read: And then ſaid further to him, Goodman *Throughgood*, the Effect of it is this, That you do releaſe to *William Chicken* all the Arrearages of Rent that he doth owe you, and no otherwiſe, and then you ſhall have your Land again: To which the Plaintiff ſaid, If it be no (*c*) otherwiſe, I am content; and thereupon the Plaintiff giving Credit to the ſaid *William Ward*, delivered the ſaid Releaſe to the ſaid *William Chicken*; and whether this, upon the whole

(*a*) Moor 148. 1 And. 129. Ante 3. Finch. 109.

(*b*) 1 And. 129. Moor 148.

(*c*) 1 And. 129. Moor 148.

Matter, be the Plaintiff's Deed, the Jury refer to the Court, *&c.* And it was adjudged, That it was not the *(a)* Plaintiff's Deed; and in this Caſe three Points were reſolved: Firſt, That although the Party to whom the Writing is made, or other by his Procurement, doth not read the Writing, but a Stranger of his own Head read it in other Words than in Truth it is, yet it ſhall not bind the Party who delivereth it; for it is not material who readeth the Writing, ſo as he who maketh it be a *(b)* Layman, and being not lettered, be (without any Covin in himſelf) deceived; and that is proved by the uſual Form of Pleading in ſuch Caſe, that is to ſay, That he was a Layman, and not learned, and that the Deed was read to him in other Words, *&c.* generally, without ſhewing by whom it was read. And if a Stranger, *(c)* menace *A.* to make a Deed to *B.* *A.* ſhall avoid the Deed which he made by ſuch Threats, as well as if *B.* himſelf had threatned him, as it is adjudged. 45 *E.* 3. 6. *a.* *Vide* 39 *H.* 6. 36. *a.*

(a) Moor 148. 1 And. 129. Skinner 656.

(b) 11 Co. 27. 9 H. 5. 15. a. Br. non eſt factum 8. Hob. 96.

(c) Fitz. dures 10. Statham durei & Manaſſe 9.

Secondly, That *(d)* ſuch Layman, not learned, is not bound to deliver the Deed, if there be not one preſent which can read the Deed unto him in ſuch Language that he who ſhould make the Deed may underſtand it; and that is the Reaſon, that if it be read to him in other Words than are contained in the Writing, it ſhall not bind the Party who delivereth it, for it is at the Peril of the Party to whom the Writing is made, that the true Effect and Purport of the Writing be declared, if it be required; *(e)* but if the Party who ſhould deliver the Deed, doth not require it, he ſhall be bound by the Deed, although it be penned againſt his Meaning.

(d) 1 Jones 314. Antea 3. a.

(e) Moor 184.

Thirdly, Although the Writing be not read to the Party, yet if the Effect be declared to him in other *(f)* Form than is contained in the Writing, and upon that he deliver it, he ſhall avoid the Deed; for it is all one in Law to read it in other Words, and to declare the Effect thereof in other Manner than is contained in the Writing, if the Party who maketh the Writing (being not learned) deſire one to read the Writing to him, and he read it, or declare the Effect thereof to him in other Manner than the Writing doth Purport, it (unleſs there be Covin betwixt them) ſhall not bind him.

(f) Moor 184. 2 Rol. 28. 4 Leon. 63. Plowd. 66. b. 15 E. 4. 18. b. Hob. 96. 11 Co. 27. b. 12 Co. 89.

[See the Effect of Covin, *Co. Lit.* 357. *a.*]

WISE-

WISEMAN's *Caſe.*

Trin. 27 Eliz. *Rot.* 1354.

In the Common Pleas.

Radford,

AT another Time, as it appeareth, in *Eaſter* Term, in the 27th Year of the Reign of the Lady the now Queen, *Rott.* 1056. it is contained thus: *Eſſex.* ſſ. *Richard Bernard* of *Great Brackſted*, in the County aforeſaid, Yeoman, was ſummoned to anſwer to *John Wiſeman* of a Plea, that he render to him 18 *l.* which he oweth him, and unjuſtly detaineth, *&c.* And whereupon the ſaid *John* by *Apollo Playne*, his Attorney, ſaith, That whereas one *Thomas Wiſeman* was ſeiſed of and in the Iſland of *Oſee*, with the Appurtenances in great *Totham*, in the County aforeſaid in his demeſn as of Fee, and ſo thereof being ſeiſed, the ſaid Iſland with the Appurtenances, held of the Lady the now Queen, as of her Manor of *Eaſt Greenwich*, in the County of *Kent* in free Socage, that is to ſay, by Fealty only; and the ſaid *Thomas* ſo thereof being ſeiſed, the 15th Day of *October*, in the 19th Year of the Reign of the now Queen, at *Great Totham* aforeſaid, demiſed the one Moiety of the ſaid Iſland to the aforeſaid *Richard*, to have and occupy the ſaid Moiety, with the Appurtenances to the ſaid *Richard*, from the Feaſt of St. *Michael* the *Archangel* then laſt paſt, until the End and Term of 21 Years from thence next following, and fully to be compleated; yielding and paying therefore yearly to the aforeſaid *Thomas*, his Heirs and Aſſigns, 36 *l.* of lawful Money of *England* at two Terms of the Year, that is to ſay, at the Feaſt of the Nativity of St. *John* the Baptiſt, and the Birth of our Lord, by equal Portions to be paid; by Virtue of which Demiſe the aforeſaid *Richard*, into the Moiety aforeſaid, with the Appurtenances did enter, and was, and yet is thereof poſſeſſed, and ſo being thereof poſſeſſed, and the ſaid *Thomas* of the Reverſion of the ſaid Moiety as of Fee and Right, and of the other Moiety of the Iſland aforeſaid, being ſeiſed thereof in his Demeſn as of Fee, the ſaid *Thomas* had Iſſue *William* his Son and Heir apparent; and the ſaid *William* had Iſſue *John*, his Son and Heir apparent; and afterwards the ſaid Eſſex, ſſ.

William, at *Great Totham* aforesaid died; and the aforesaid *Thomas* of the Reversion of the one Moiety of the Island aforesaid, and of the other Moiety of the said Island, with the Appurtenances, in form aforesaid being seised, the said *Thomas* so thereof seised, the 20th Day of *November*, in the 23d Year of the Reign of the now Queen, at *Great Totham* aforesaid, made his Testament and last Will in Writing, and by the same, willed and bequeathed to one *Thomas Wiseman*, his Son, the said Reversion of the aforesaid Moiety of the Island aforesaid; and the other Moiety of the said Island, to have to him and the Heirs Males of his Body lawfully begotten, and for default of such Issue, the Remainder to the right Heirs of the said *Thomas Wiseman* the Father, for ever. And afterwards the said *Thomas Wiseman* the Father, at *Great Totham* aforesaid died, of such Estates of the aforesaid Reversion of the one Moiety of the Island aforesaid, and of and in the aforesaid other Moiety of the said Island with the Appurtenances seised. After whose Death the aforesaid *Thomas Wiseman* the Son, into one Moiety of the Island aforesaid entered, and was thereof seised in his Demesn as of Fee-tail, and seised of the aforesaid Reversion of the other Moiety of the said Island as of Fee-tail, that is to say, to him and the Heirs Males of his Body lawfully begotten, the Reversion thereof to the said *John*, as Cousin and Heir of the said *Thomas Wiseman* the Father belonging, that is to say, as Son and Heir of *William Wiseman*, deceas'd, Son and Heir of *Thomas Wiseman* the Father: And the aforesaid *Thomas Wiseman*, the Son, so thereof being seised; and the said *John*, Cousin and Heir of the aforesaid *Thomas*, the Father, of the Reversion thereof, as of Fee and Right being also seised; the said *John*, the 6th Day of *May*, in the 24th Year of the Reign of the Lady the now Queen, at *Great Totham* aforesaid, by his Indenture baring Date the same Day and Year, made between him the said *John Wiseman*, by the Name of *John Wiseman*, of the *Inner-Temple*, *London*, Gent. Cousin and next Heir of *Thomas Wiseman*, late of *Norhend*, within the Parish of *Muchwaltham* in the County of *Essex*, Esq; deceas'd, of the one Party, and *Anthony Everard*, *John Mead*, and *John Sorrel*, by the Name of *Anthony Everard*, of the *Inner-Temple*, *London*, Gent. *John Mead* of *Great Easton* in the County of *Essex*, Gent. and *John Sorrel* of *Stysted* in the aforesaid County of *Essex*, Gent. of the other Party, and in the Court of the said Lady the now Queen, of Pleas holden before the Queen herself, within six Months then next following, according to the Form of the Statute in such Case late had and provided in due Manner of Record enrolled, and of which one Part, with the Seals of the said *Anthony*, *John Mead*, and *John Sorrel* sealed, the said *John Wiseman* brings here in to Court, whose Date is the said 6th Day of *May*,

in

in the 24th Year aforeſaid, teſtifying, That the aforeſaid *Thomas Wiſeman*, as well in Conſideration and to the Intent, that all, and all Manner, the Manors, Meſſuages, Lands, Tenements and Hereditaments, with all and ſingular their Appurtenances, ſhould and might for ever after continue, remain, and be at the Will and good Pleaſure of God in the Stock, Name, or Blood of the ſaid *John Wiſeman*, as for divers other good Cauſes and Conſiderations, him the ſaid *John Wiſeman*, then eſpecially moving, had covenanted and granted for himſelf, his Heirs, Executors, Adminiſtrators, and Aſſigns, to and with the ſaid *Anthony Everard*, *John Mead*, and *John Sorrel*, their Heirs, Executors, and Adminiſtrators, and the Heirs, Executors, and Adminiſtrators of every of them by the ſaid Indenture, That he the ſaid *John Wiſeman*, his Heirs and Aſſigns, ſhould and would immediately from thenceforth ſtand and be ſeiſed of and in the Reverſion and Reverſions, Remainder and Remainders, of all and ſingular the Manors, Lands, Tenements, and Hereditaments before-mentioned, To the Uſe of the ſaid *John Wiſeman*, and the Heirs Males of his Body lawfully to be begotten; and for Default of ſuch Iſſue, to the Uſe of *William Wiſeman*, Brother of the ſaid *John Wiſeman*, and the Heirs Males of the Body of the ſaid *William*, lawfully begotten; and for Default of ſuch Iſſue, to the Uſe of *Thomas Wiſeman*, another Brother of the ſaid *John Wiſeman*, and the Heirs Males of the Body of the ſaid *Thomas* lawfully to be begotten; and for Default of ſuch Iſſue, to the Uſe of the Heirs of the Body of *William Wiſeman*, Father of the ſaid *John Wiſeman*, and the Heirs of his Body lawfully to be begotten; and for Default of ſuch Iſſue, to the Uſe of the Heirs of the Body of the aforeſaid *Thomas Wiſeman*, deceas'd, and the Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue, to the Uſe of the Lady the now Queen, and the Heirs and Succeſſors of the ſaid Lady the Queen, Kings and Queens of this Realm of *England* for ever, as by the ſaid Indenture among other Things, it is more fully manifeſt and doth appear: And by Virtue of which Indenture, and by Force of a certain Act made and publiſhed in a Parliament of the late King *Henry* 8. at *Weſtminſter*, in the County of *Middleſex*, the 4th Day of *February*, in the 27th Year of his Reign, of transferring of Uſes in Poſſeſſion, the ſaid *John Wiſeman* was ſeiſed of the Reverſion of the whole Iſland aforeſaid, as of Fee-tail and Right; and for Default of ſuch Iſſue, the Remainder thereof to the aforeſaid *William Wiſeman*, Brother of the ſaid *John Wiſeman*, and the Heirs Males of the Body of the ſaid *William*, lawfully to be begotten; and for Default of ſuch Iſſue, to the Uſe of the ſaid *Thomas Wiſeman*, another Brother of the ſaid *John Wiſeman*, and the Heirs Males of the Body of the ſaid *Thomas*, lawfully begotten; and for Default of ſuc Iſſue, the Remainder thereof to the Heirs of the

Body of the aforeſaid *William Wiſeman* the Father, and the Heirs of their Bodies lawfully to be begotten; and for Default of ſuch Iſſue, the Remainder thereof to the Heirs Males of the Body of the ſaid *Thomas Wiſeman*, deceas'd, and the Heirs Males of their Bodies lawfully to be begotten; and for Default of ſuch Iſſue, the Remainder thereof to the ſaid Lady the now Queen, her Heirs and Succeſſors, Kings and Queens of this Kingdom of *England* belonging; and the beforeſaid *John* of the aforeſaid Reverſion of the whole Iſland aforeſaid, as of Fee-tail and Right in Form aforeſaid being ſeiſed, the Remainder thereof further in the Form aforeſaid belonging; the ſaid *Thomas Wiſeman* the Son, afterwards, that is to ſay, the 15th Day of *July*, in the 26th Year of the ſaid Lady the now Queen, at *Great Totham* aforeſaid, died without Heir Male of his Body lawfully begotten; after whoſe Death the ſaid *John*, into one Moiety of the Iſland aforeſaid, with the Appurtenances entred, and was, and yet is thereof ſeiſed in his Demeſn as of Fee-tail; and likewiſe the ſaid *John* was and yet is ſeiſed of the aforeſaid Reverſion of the other Moiety of the ſaid Iſland, as of Fee-tail and of Right, and thereof being ſeiſed, and the ſaid *Richard*, of the ſaid other Moiety of the aforeſaid Iſland, with the Appurtenances in Form aforeſaid, being poſſeſſed, the aforeſaid 18 *l.* of the Rent aforeſaid, for Half a Year, ended at the Feaſt of the Birth of our Lord, in the 27th Year of the Reign of the Lady the now Queen, to the ſaid *John*, was behind, and do yet remain unpaid, for which Action accrued to the ſaid *John* to require and have of the ſaid *Richard* the aforeſaid 18 *l.* Yet he the ſaid *Richard*, altho' he was often required, the ſaid 18 *l.* to the ſaid *John*, hath not yet rendered; but hitherto to render the ſame to him hath denied, and yet doth deny; whereupon he ſaith he is the worſe, and hath Damage to the Value of 20 *l.* and thereof he bringeth Suit, *&c.* And the ſaid *Richard Barnard*, by *John Cook* his Attorney, comes and doth defend the Force and Injury when, *&c.* And ſaith, That the aforeſaid *John Wiſeman*, his Action aforeſaid againſt him, ought not to have, becauſe he ſaith, That well and true it is, that the aforeſaid *Thomas Wiſeman*, the Father, was ſeiſed of the Iſland aforeſaid, in his Demeſn as of Fee; and that the ſaid *Thomas* demiſed unto the ſaid *Richard Barnard* the Moiety of the Iſland aforeſaid, with the Appurtenances; and that the ſaid *Thomas Wiſeman* the Father, by his aforeſaid Teſtament and laſt Will, willed and bequeathed to the aboveſaid *Thomas Wiſeman*, the Son, the aboveſaid Reverſion, of the ſaid one Moiety of the ſaid Iſland aforeſaid, and the other Moiety of the ſaid Iſland in Form aforeſaid; and that the ſaid *Thomas Wiſeman* the Son, by Virtue of the Bequeſt aforeſaid, was ſeiſed of the one Moiety of the Iſland aforeſaid, in his Demeſn as of Fee-tail, *viz.* to him and the Heirs Males of his Body lawfully begotten, and of the Reverſion of the other Moiety

Plea.

Moiety thereof in his Demeſn as of Fee-tail and Right, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, as the aforeſaid *John Wiſeman*, by his Declaration aforeſaid, above ſuppoſeth: But the ſaid *Richard Barnard* further ſaith, That the ſaid *Thomas Wiſeman* the Son, of the one Moiety of the Iſland aforeſaid, and of the Reverſion of the other Moiety in Form aforeſaid being ſeiſed, one *John Godfrey* the 9th Day of *June*, in the 26th Year of the Reign of the ſaid Lady the now Queen, ſueth forth out of the Court of the *Chancery* of the ſaid Lady the now Queen, the ſaid Court of *Chancery* then being at *Weſtminſter* aforeſaid, a certain Writ of the ſaid Lady the Queen, of Entry upon Diſſeiſin in the *Poſt* againſt the ſaid *Thomas Wiſeman* the Son, by the Name of *Thomas Wiſeman*, Gent. of the Iſland aforeſaid, with the Appurtenances, amongſt other Things, to the Sheriff of the County of *Eſſex* directed, by which ſaid Writ the ſaid Lady the now Queen commanded the ſaid then Sheriff, that the ſaid then Sheriff ſhould command the ſaid *Thomas Wiſeman* the Son, that truly and without Delay, he ſhould render to the ſaid *John Godfrey* the Iſland aforeſaid, with the Appurtenances, amongſt other Things, by the Name of the Manor of *Mockinghall*, with the Appurtenances, and 22 Meſſuages, three Dove-Houſes, 22 Gardens, 430 Acres of Land, 162 Acres of Meadow, 460 Acres of Paſtures, 22 Acres of Wood, 110 Acres of Furrs and Heath, 10 Acres of Moor, 400 Acres of Marſh, as of 50 *s.* of Rent, with the Appurtenances in *Barlinge* the *Great*, *Staubrigge*, *Great Wakeringe*, *Little Wakeringe*, *Leigh*, *Shopland*, *Rochford*, *Prittlewell*, *Benfleet*, *Foulneſs*, *Althorpe*, *Thunderſley*, *Hadley*, *Great Baddowe*, *Great Totham*, and *Gouldhanger*, which he claimed to be his Right and his Inheritance, and into which the ſaid *Thomas Wiſeman* then had not Entry; but after a Diſſeiſin, which *Hugh Hunt* thereof unjuſtly, and without Judgment, did, to the ſaid *John Godfrey*, within 30 Years then laſt paſt, as he then ſaid; and whereof he then complained, That the ſaid *Thomas Wiſeman* the Son, him then did deforce, and unleſs he ſhould do it, and the aforeſaid *John Godfrey* ſhould then make the ſaid Sheriff ſecure his Clamour to proſecute; then he ſummon by good Summons the aforeſaid *Thomas Wiſeman* the Son, that he be before the Juſtices of the ſaid Lady the Queen here, *to wit*, at *Weſtminſter* aforeſaid, from the Day of *Holy Trinity*, in 15 Days then next following, to ſhew wholly he did not: And that the ſaid Sheriff ſhould then have here the Summons, and the ſaid Writ; at which 15 Days of *Holy Trinity*, before *Edmund Anderſon*, Knt. and his Companions, then Juſtices of the ſaid Lady the now Queen of the Bench, come here as well the ſaid *John Godfrey*, as the ſaid *Thomas Wiſeman* the Son, in their proper Perſons, and *Thomas Lucas*, Knt. then

Writ of Diſſeiſin.

And Recovery thereon.

then Sheriff of the County of *Eſſex* aforeſaid, returned then here the Writ aforeſaid, to him in Form aforeſaid directed, in all Things ſerved and executed, that is to ſay, That the ſaid *John Godfrey* found to the then ſaid Sheriff Pledges to proſecute his Writ aforeſaid, that is to ſay, *John Doe* and *Richard Roe*; and that the ſaid *Thomas Wiſeman* the Son, was ſummoned by *John Den* and *Richard Fen*: Whereupon the ſaid *John Godfrey*, in his proper Perſon in the ſaid Court, here declaring upon his Writ aforeſaid, then demanded againſt the ſaid *Thomas Wiſeman* the Son, the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, as his Right and his Inheritance, and into which the ſaid *Thomas* had not Entry, but after a Diſſeiſin, which *Hugh Hunt* thereof unjuſtly, and without Judgment, did to the ſaid *John*, within 30 Years then laſt paſt; and whereupon then he ſaid, that he himſelf was ſeiſed of the Manor, Tenements, and Rents aforeſaid, with the Appurtenances in his Demeſn, as of Fee and Right, in the Time of Peace, in the Time of the Lady the now Queen, taking the Profits to the Value, *&c.* And into which, *&c.* and thereupon he then brought Suit, *&c.* And the ſaid *Thomas Wiſeman* the Son, in his proper Perſon, then did defend the Right when, *&c.* And thereof vouched to Warranty *David Howel*, who was then preſent in the ſame Court in his own Perſon, and freely the Manor, Tenements, and Rents aforeſaid, with the Appurtenances to him did then warrant; upon which the ſaid *John Godfrey* then demanded againſt the ſaid *David*, then Tenant by his Warranty, the Manor, Tenements, and Rents aforeſaid, with the Appurtenances in Form aforeſaid, *&c.* And whereupon he then ſaid, That he himſelf was ſeiſed of the Manor, Tenements and Rents aforeſaid, with the Appurtenances in his Demeſn as of Fee and Right in Time of Peace, in the Time of the Lady the now Queen, taking the Profits thereof to the Value, *&c.* and in which, *&c.* and thereupon he then brought his Suit, *&c.* And the ſaid *David Howel*, Tenant by his Warranty, then defended his Right when, *&c.* and then ſaid, that the aforeſaid *Hugh* did not diſſeiſe the ſaid *John Godfrey* of the Manor, Tenements, and Rents aforeſaid, with the Appurtenances, as the ſaid *John* by his Writ and Declaration aforeſaid above ſuppoſed; and upon that then put themſelves upon the Country; and the ſaid *John Godfrey* then demanded Licenſe thereof to imparl: And he then had it, *&c.* And the ſaid *John* retorned back unto the ſame Court, in the ſaid Term, in his proper Perſon. And the ſaid *David*, altho' then ſolemnly demanded, then came not again, but in Contempt of the ſaid Court departed and made Default; wherefore it was granted in the ſame Court, that the ſaid *John Godfrey* ſhould recover his Seiſin againſt the ſaid *Thomas Wiſeman* the Son, of the Manor, Tenements, and Rent aforeſaid, with the Appurtenances; and that the ſaid *Thomas* ſhould have of the Land of the ſaid *David*, to

Voucher to Warranty.

the

the Value, *&c.* And that the ſaid *David* ſhould then be in Mercy, *&c.* and thereupon the aforeſaid *John Godfrey*, then demanded the Writ of the ſaid Lady the Queen, to the ſaid Sheriff of the County aforeſaid to be directed, to give him full Seiſin of the Manor, Tenements, and Rent aforeſaid, with the Appurtenances, and which was to him then granted retornabled here without delay, *&c.* And afterwards, that is to ſay, the 8th Day of *July*, the ſelf ſame Term, came into the ſaid Court, the aforeſaid *John Godfrey* in his proper Perſon; and the ſaid *Thomas Lucas*, then Sheriff of the County of *Eſſex*, then here ſent, That he by Virtue of the ſaid Writ to him directed, the 4th Day of *July* then laſt paſt, cauſed to be delivered to the ſaid *John Godfrey* full Seiſin of the Manor, Tenements, and Rents aforeſaid, with the Appurtenances, as by the ſaid Writ he was commanded; which Recovery and Execution thereupon in Form aforeſaid, proſecuted and had, was to the Uſe of the ſaid *Thomas Wiſeman* the Son, and his Heirs for ever. By Virtue of which, and of the ſaid Statute in Parliament, of the ſaid *Henry* VIII. late King of *England*, held at *Weſtminſter* aforeſaid, the 4th Day of *February*, in the 27th Year of his Reign, of transferring of Uſes into Poſſeſſions, held, publiſhed and provided; the ſaid *Thomas Wiſeman* the Son, was ſeiſed of the ſaid Reverſion of one Moiety of the Iſland aforeſaid, with the Appurtenances amongſt other Things, in his Demeſn as of Fee and Right, and ſo being thereof ſeiſed, at *Great Totham* aforeſaid, died of ſuch his Eſtate ſo thereof ſeiſed, after whoſe Death the aforeſaid Reverſion of the one Moiety of the Iſland aforeſaid, with the Appurtenances, amongſt other Things, to *Elizabeth*, now the Wife of *Richard Jennins*, and *Dorothy Wiſeman*, as Siſters and Heirs of the ſaid *Thomas Wiſeman* the Son, which *Elizabeth* and *Dorothy* are yet exiſting, and in full Life, that is to ſay, at *Great Totham* aforeſaid, and this he is ready to aver; whereupon he demandeth Judgment, if the ſaid *John Wiſeman* his Action aforeſaid, againſt him ought to have, *&c.* And upon this, the ſaid *John Wiſeman* prayeth Licenſe to imparle here until the next Day after the *Holy Trinity*, and hath it, *&c.* And the ſame Day is given to the ſaid *Richard* here, *&c.* And the ſaid *John Wiſeman* ſaith, That he by any thing before alledged, to have his Action aforeſaid, ought not to be barred, becauſe he ſaith, That long before the Recovery aforeſaid, of the Tenements aforeſaid, with the Appurtenances in Form aforeſaid, had, by a certain Act of Parliament of the Lord *Henry* VIII. late King of *England*, the moſt dear Father of the Lady the now Queen, at *Weſtminſter* in the County of *Middleſex*, the 22d Day of *January*, in the 34th Year of his Reign, begun and there then holden, and afterwards by divers Prorogations continued until the 12th Day of *May*, in the 35th Year of the Reign of the ſaid late King *Henry* VIII. held, amongſt other Things, It was enacted by Authority of Stat. 34 H. 8.

the

the ſaid Parliament, That whereas divers of the noble Progenitors of the ſaid late King *Henry* VIII. and eſpecially the ſaid late King, chiefly, liberally, above all others, had given, granted, or otherwiſe had provided to his and their loving and good Servants and Subjects, as well Nobles as others, Manors, Meaſes, Lands, Tenements, Rents, Services, and Hereditaments, to them and to the Heirs Males of their Bodies, or to the Heirs of their Bodies lawfully begotten, minding at the Time of ſuch Gifts, nor only to prefer and advance preſently the Donees, but alſo their Heirs in Blood of their Bodies, according to the Limitation of the ſaid Gifts, to the Intent that the Recompence for the Service of ſuch Donees, ſhould not only be a Benefit for their own Perſons, but a continual Profit and Commodity to, and for their Heirs coming of their Bodies, whereby ſuch Heirs ſhould have in ſpecial Memory, and daily Remembrance, the Profit that they have and take by the Service of their Anceſtors, done to the Kings of this Realm of *England*, and thereby be the better encouraged to do the like Service to their Sovereign Lords, as to their Duty and Allegiance appertaineth: And becauſe divers ſuch Donees in Tail, and their Heirs, daily before the making of the Act aforeſaid, have ſuffered by their Aſſent, *falſe and feigned* Recoveries * to be had againſt them, with common Voucher, or otherwiſe, of Manors, Meſſuages, Lands, Tenements, or Hereditaments, ſo given or provided in Tail, by the aforeſaid Lord the King, or his noble Progenitors, as is aforeſaid, to the Intent by Fraud, Covin, and undue Means, not only to bind and defraud their Heirs inheritable, by the Limitation of ſuch Gifts, but alſo the ſaid Lord the King, of his Prerogative, Wardſhip, Primer Seiſin, and other his Rights, whereby Queſtions, and Diverſity of Opinions have riſen, and yet be, whether ſuch falſe and feigned Recoveries againſt ſuch Tenants in Tail, by their own Conſents, of Lands, Tenements, or Hereditaments, of which the Reverſion or the Remainder were in the King at the Time of ſuch Recovery or Recoveries had, ſhould, after the Death of Tenant in Tail, bind the Heirs Tail or not; for full Declaration thereof, and to avoid and extinct from henceforth Diverſities of Opinions in the like Caſes, It was enacted by the ſaid Act, that no ſuch feigned Recovery from henceforth after to be had, by Aſſent of Parties againſt ſuch Tenant or Tenants in Tail, of any Lands, Tenements, or Hereditaments, whereof the Reverſion or Remainder at the Time of ſuch Recovery, ſhould be in the Lord the King, ſhould bind or conclude the Heirs in Tail, whether any Condition or Voucher ſhould be, in any

[* See 10 *Co.* 40. *Mary Portington's* Caſe.]

any ſuch feigned Recovery or not, but after the Death of every ſuch Tenant in Tail, againſt whom any ſuch Recovery ſhould be had, the Heirs in Tail might enter, have, and enjoy, the Lands, Tenements, and Hereditaments, ſo recovered, according to the Form of the Gift in Tail, the ſaid Recovery, or any other Thing or Things hereafter to be had and ſuffered, by or againſt any ſuch Tenant in Tail, to the contrary notwithſtanding. And further by the ſaid Act, by Authority of the ſaid Parliament, it was enacted, That the Heirs of every ſuch Tenant in Tail, againſt whom any ſuch feigned Recovery ſhould be had, ſhould take no Advantage for any Recompence in Value againſt the Vouchee nor his Heirs, as by the ſaid Act amongſt other Things more fully it appeareth: And the ſaid *John* further ſaith, That the ſaid *Thomas* ſo of the aforeſaid one Moiety of the Iſland aforeſaid, and of the Reverſion of the other Moiety thereof in Form aforeſaid being ſeiſed, the Recovery aforeſaid, in Form aforeſaid, by the ſaid *John Godfrey*, againſt the aboveſaid *Thomas Wiſeman* the Son, was had and executed, contrary to the Form of the Statute aforeſaid, and this he is ready to aver: Wherefore he demands Judgment and his Debt aforeſaid, together with his Damages, by Occaſion of the detaining of the ſaid Debt to be adjudged unto him, *&c.* And the ſaid *Richard Barnard* ſaith, That the aforeſaid Plea of the aforeſaid *John Wiſeman*, above, by Replication pleaded, and the Matter in the ſame contained, are not ſufficient in Law to maintain the ſaid *John* to have his aforeſaid Action againſt the ſaid *Richard*, and that he unto the Plea aforeſaid, in Manner and Form aforeſaid pleaded, needeth not, nor is by the Law of the Land bound to anſwer unto: And this he is ready to aver, wherefore for Default of ſufficient Replication of the ſaid *John* in this Part, the ſaid *Richard* demandeth Judgment; and that the ſaid *John* from having his Action aforeſaid againſt him be barred, *&c.* And the ſaid *John Wiſeman*, for as much as he ſufficient Matter to have his Action againſt the ſaid *Richard* by the Replication aforeſaid hath alledged, which he is ready to aver, which Matter the aforeſaid *Richard* doth not deny, nor to the ſame doth any Ways anſwer, but doth altogether refuſe to admit the Averment aforeſaid, as before he demandeth Judgment and his Debt aforeſaid, together with his Damages for the detaining of his Debt, to be adjudged unto him, *&c.* And becauſe the Juſtices here will adviſe themſelves of, and upon the Premiſſes before they give Judgment thereof, Day is given to the Parties aforeſaid, within eight Days of St. *Michael*, to hear their Judgment, becauſe the Juſtices here not yet, *&c.* at which Day here come as well the ſaid

John

John Wiſeman, as the ſaid *Richard Barnard* by their Attornies aforeſaid, upon which the Plea of the ſaid *John Wiſeman*, upon the Replication pleaded, being ſeen, and by the Juſtices here fully underſtood. It ſeemeth to the Juſtices here, that the ſaid Plea, and the Matter in the ſame contained, are not ſufficient in Law for the ſaid *John*, to have and maintain his Action aforeſaid, againſt the ſaid *Richard*; therefore it is granted, that the ſaid *John* take nothing by his Writ aforeſaid; but that he be in Mercy for his falſe Clamour: And that the ſaid *Richard* go thereof without Day, *&c.*

WISE-

WISEMAN's *Caſe.*

Trin. 27 Eliz. *Rot.* 1354.

In the Common Pleas.

BEtween (*a*) *Wiſeman*, Plaintiff, and *Bernard*, Defendant, in Debt, upon a Leaſe for Years; the Caſe was ſuch, Tenant in Tail of certain Land, the Remainder in Fee; he in Remainder, by Deed indented and enrolled, in Conſideration, and to the Intent, as well that all his Lands and Tenements for ever after ſhould continue and remain in his Family, Name, and Blood, as for other good Conſiderations, doth covenant, that he himſelf will ſtand ſeiſed of all his Lands, *&c.* to the Uſe of himſelf, and of his Heirs Male of his Body begotten, and after, to the Uſe of divers of his Brothers in Tail; and for Default of ſuch Iſſue, to the Uſe of the Queen, her Heirs and Succeſſors, Kings and Queens of this our Realm; and afterwards the Tenant in Tail in Poſſeſſion, doth ſuffer a Common Recovery with Voucher; and whether this ſhall be a Bar to the Iſſue in Tail, was the Queſtion: And it was adjudged, That the Iſſue in Tail by this Recovery was barred. And in this Caſe ſix Points were reſolved.

(*a*) Moor 195. 1 Anderſ. 140. Poſt. 53. 1 Co. 62. Capel's Caſe.

1. That no Uſe by the ſaid Indenture was raiſed to (*b*) the Queen; for the Words, that is to ſay, for other good Conſiderations, are too (*c*) general to raiſe any Uſe, as it hath been adjudged, without ſpecial Averment, that valuable or other good Conſideration was given.

(*b*) Carter 146. 1 Anderſ. 141. 143. Moor 195. (*c*) 1 Co. 176. a. b. 2 Rol. 786. Cr. El. 394. Cr. Jac. 175. Cart. 138. 140.

2. The Conſideration that the Land ſhall (*d*) remain in the Name and Blood, notwithſtanding the Uſe limited to the Queen, and for the Benefit and Preſervation of the Eſtates in Tail, as well againſt Diſcontinuances, as againſt Bars, as it was ſaid, it was reſolved to be no Conſideration to raiſe the Uſe to the Queen, for there wanteth *Quid pro quo, &c. & contractus dicitur quaſi actus contra actum.*

(*d*) Cro. Jac. 168. Carter 146.

See 3 Co. 81. a. 83. a.

3. Admitting the Covenantor had ſaid in his Indenture, In Conſideration that the Queen is the Head of the Common-

See 1 Co. 136. Co. Lit. 47.

Commonwealth, and hath the Care and Charge as well to preſerve the Peace of the Realm, as to repel foreign Hoſtility (which is implied in the Word Queen) yet this is not a good Conſideration to raiſe an Uſe for the Cauſe aforeſaid, for there wanteth *Quid pro quo*, and Kings *ex Officio* ought to govern and preſerve their Subjects in Peace and Tranquillity.

4. It was reſolved, that admitting the Conſiderations had been ſufficient to raiſe the Uſe to the Queen, yet it doth not (*a*) preſerve the Eſtate-tail in Poſſeſſion, by Force of the Act of (*b*) 34 *H.* 8. for no Eſtate-tail is preſerved by the ſaid Act, unleſs the Eſtate-tail be created by the King's Letters Patents, or the Eſtate-tail be by the King's Proviſion, and not where the Eſtate-tail is of the Gift or Creation of a common Perſon without the King's Proviſion; and the ſame appeareth fully by the Preamble of the Act. And note Reader, this Word (*c*) (ſuch) through the whole Body of the Act which couples it with the Preamble, which extends only to Gifts made by the King, or by the King's Proviſion. And it was no Miſchief at the Common Law (as it appeareth by the Preamble) that the Donees of common Perſons ſhould bar their Iſſues. See the Statute of 32 *H.* 8. *cap.* 26. that a Fine levied by Tenant in Tail ſhall bar his Iſſue, unleſs the Eſtate-tail be created by the King's Letters Patents: And ſo the Statute of 34 *H.* 8. doth preſerve no Eſtate, unleſs it be of the King's Gift, or by the King's Proviſion. Alſo the Queen doth not loſe any primer Seiſin, or Livery, when the Eſtate-tail is of the Gift of a common Perſon, as ſhe loſeth when her Donees are barred by Recovery, ſo the Diſadvantage to the Queen is not equal, and therefore without Queſtion it ſhall not be taken by Equity. And in this Caſe it was ſaid, that if one makes a Gift in Tail, and afterwards the Crown (*d*) deſcends to him, this Gift is out of the Statute, for it was made by a Subject. So if the Anceſtor of the King, who was not King, makes a Gift in Tail, and afterwards the (*e*) Reverſion deſcends to the King, ſuch Gift is out of the ſaid Statute; for the Words of the Preamble are, *Whereby ſuch Heirs ſhould have in ſpecial Memory*, &c. *the Profit that they have and take by the Service of their Anceſtors done to the Kings of this Realm:* By which it appeareth, that the Intent of the Act was not to extend to the Gift of any Anceſtor of the King who was not King. Alſo there is more Miſchief to the Subject in one Caſe than in the other. For by the Limitation of the Remainder to the King, the Meſnalties of the Subjects are in ſuſpence, or extinct, by which they loſe their Eſcheats, Wards, Heriots, Reliefs, *&c.* but no ſuch Miſchief is in the King's Gifts. Alſo by ſuch ſecret and unknown Limitations of the Remainder to the Queen, Purchaſers are deceived, and the Tenant in Tail in Poſſeſſion deprived of

(*a*) Moor 115, 195. 1 Anderſ. 46, 47, 142, 143. Cr. Car. 430. Plow. 555. a. Yelv. 149. Noy 132. Co. Lit. 372. b. 3 Leon. 57. Poſtea 52. a. 4Leon. 40. Benl. in Kelw. 213. a. b. O. Benl. 32. Benl. in Aſh. 26. N. Benl. 223. pl. 254. 8 Co. 77. b.

(*b*) 34 & 35 H. 8. cap. 20. 10 Co. 37. a. 1 Anderſ. 46, 141. 2 Co. 52. a. 6Co. 55. a. Hob. 299. 2 Rol. Rep. 417.

(*c*) 2 Rol. Rep. 108.

(*d*) Co. Lit. 172. b.

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

of the Power which the Law giveth unto him to cut off the Remainder, but when the King maketh the Gift in Tail, there is no ſuch Miſchief.

5. It was reſolved, that the true Interpretation of theſe Words *(whereof the (a) Reverſion or Remainder at the Time of ſuch Recovery had, ſhall be in the King*, &c.) is, where the King createth the Eſtate-tail by his Letters Patents, reſerving the Reverſion; or when the King, in Conſideration of Money, or of Aſſurance of other Lands, or for other Conſideration, procureth a Subject to make a Gift in Tail to one of his Servants or Subjects, for Recompence of Service or other Conſideration, the *(b)* Remainder to the King; And therefore, where the Preamble of the ſaid Act ſaith, *Where the King*, &c. *hath given*, &c. *or otherwiſe provided to his Servants or Subjects*; theſe Words, *(Reverſion to the King)* in the Body of the Act, have Reference to the Gift of the King mentioned in the Preamble: And theſe Words, *(Remainder to the King)* in the Body of the Act, refer to the Proviſion mentioned in the Preamble made by the King, when he procureth a Subject to make the Gift with the Remainder to him, and ſo the Body of the Act well *(c)* expounded by the Preamble.

(a) Co. Lit. 372. b. 8 Co. 77. b.

(b) Co. Lit. 372. b.

(c) 2 Rol. Rp. 410.

6. It was reſolved, that before the Statute of 34 & 35 *H.* 8. *cap.* 20. a Common Recovery did bar *(d)* the Eſtate-tail which was created by the King's Letters Patents, whereof the Reverſion did continue in the King. And with this Reſolution agreeth 33 *H.* 8. *Tit. Recovery in Value.* 31 *Br.* and 29 *H.* 8. 32 *Dyer pl.* 1.

(d) Co. Lit. 335. a. 372. b. 1 Anderſ. 171. Raym. 349. 1 Leon. 85. Cro. Car. 430.

LANE's *Case*,

Mich. 28 & 29 Eliz.

In the Common Pleas.

(a) Godb. 101, 191. pl. 117. 1 Anderſ. 191. 1 Leon. 170. Goldſb. 34. Fitz. 91. Skin. 607.

BEtween (a) *Smith*, Plaintiff, and *Lane*, Defendant, in the Common Pleas, the Caſe in Effect was ſuch: The King ſeiſed of a Manor in Fee in the Right of his Crown, by his Steward granted Copyhold Lands Parcel of the Manor to one by Copy of Court Roll, according to the Cuſtom of the Manor in Fee. And afterwards the King by his Letters Patents under the Exchequer Seal, made a Leaſe of thoſe Lands for 21 Years, to another, who granted his Term to the Copyholder: And afterwards the Queen that

(b) Cr. Car. 22. now is, (reciting the ſaid Leaſe for Years) (b) granted the Reverſion in Fee: The Term of 21 Years expired, the Patentee of the Reverſion entred upon the Copyholder, and if his Entry was lawful or not was the Queſtion. And it

(c) 1 Leon. 170. was adjudged that his Entry was (c) lawful. And in this Caſe three Points were reſolved unanimouſly by the whole Court.

1. That although by the Common Law no Grant of any Land by the King is available or pleadable but under the

(d) 2 Rol. 182. (d) Great Seal of *England*; and although in this Caſe it was not alledged, That in the Exchequer the common Courſe of the Court was to make ſuch Leaſes under the Seal of the Court; yet it was adjudged, that the ſaid Leaſe

(e) 1 Leon. 170. Cr. Car. 513. 528. Cr. Jac. 109. 1 Rol. 524. 2 Rol. 182. under the Exchequer (e) Seal was good, and that by the

(f) Plowd. 230. b. common Uſage of the (f) Court of Exchequer; for the (g)

(g) Bridgman 21. 4 Co. 93. b. 9 Co. 30. b. Hardr. 340. Cuſtoms and Courſes of every of the King's Courts are as a Law, and the Common Law for the Univerſality thereof doth take Notice of them; and it is not neceſſary to alledge in Pleading any Uſage or Preſcription to warrant the ſame. And ſo it is holden in *L.* 5 *E.* 4. 1. *a.* &

(h) 1 Rol. 524. Cr. Car. 179, 445. 513, 528. Cr. Jac. 68. Cro. Eliz. 502. 544. 1 Ro. Rep. 106. 1 Sand. 73, &c. 11 *E.* 4. 2. *b.* that the Courſe of a Court is a Law; and in 2 *R.* 3. 9. *b.* it is holden that (h) every Court of *Weſtminſter* ought to take Notice of the Cuſtoms of the other

Courts, (*a*) otherwiſe of Courts *in patria*. And *vide* 8 *H.* 6. 34. & *Br. Leaſes* 71. where it is ſaid, The Order of the Exchequer is to make their Leaſes by this Word (*b*) *Committimus* ſuch Lands, *Habendum*, *&c. Reddendum* ſuch Rent or Farm, *&c.* this is a good Leaſe there by ancient Uſage, by which it appeareth, that the ancient Uſage maketh a Leaſe to be good and available in Law; and if ſuch Leaſes ſhould not be good, great Miſchief would enſue, for an infinite Number of Leaſes and Grants under the Exchequer-Seal, would be otherwiſe declared void, and a great Number of Grants of Reverſions expectant upon Leaſes under the Exchequer-Seal, would be alſo void: For if the King granteth a Reverſion where he hath a Poſſeſſion, his Grant is void. And the Judges in general Caſes have great Reſpect and Conſideration, that their Judgments ſhall not impeach the Eſtates and Inheritances of many Men againſt ancient and common Approbation. In a Patent of King *Hen.* 7. four Letters, *viz.* (*c*) *H. R. F. H.* of the firſt Words were left out, intending afterwards *propter honorem* to be drawn and limmed with Gold, but the Great Seal was put to the Grant, leaving out the ſaid Letters. And yet the Patent was adjudged good for the Multitude of Precedents.

(*a*) 1 Rol. 524. Noy. 90. Latch. 180. b.

(*b*) 4 Inſt. 112. Hardres 340.

1 Co. 94. a.

(*c*) Dyer 342. pl. 53. 9 Co. 48. a. Stiles 302. Godb. 415.

Note Reader, In every Commiſſion to makes Leaſes under the Great Seal there is a Special Grant, that Leaſes made by the Commiſſioners under the Seal of the Exchequer, *&c.* ſhall be good, but that was not touch'd in this Caſe, nor do I think it material; for if the Leaſes were not good for the Cauſes aforeſaid, certainly the ſaid Clauſe in the Commiſſion would not remedy it.

2. It was reſolved, that by the Acceptance of the Term by the Copyholder, the Copyhold Eſtate was (*d*) determined, as well as if the Copyholder had accepted immediately a Leaſe for Years of his Copyhold, as hath been adjudged in (*e*) *Hide*'s Caſe; for it is the ſame Reaſon in both Caſes, *viz.* that a Copyhold Intereſt and Eſtate for Years of one and the ſame Land, cannot ſtand together in one and the ſame Perſon at the ſame Time, without confounding the Leſſer. Alſo they are of divers Natures, and therefore they cannot ſtand together in one and the ſame Perſon.

(*d*) 1 Rol. 510. Cr. Jac. 84. Noy. 12. Godb. 101. 153. 4 Co. 31. a. b. Cr. Car. 521. Cr. El. 7. Moor 185. Savil 70. 3 Bulſtr. 81. 1 Brownlow 32. 2 Sid. 140. 1 Anderſ. 191. 1 Leon. 170.

(*e*) 4 Co. 31. b. Moor 185.

3. That the (*f*) Severance of the Freehold and Inheritance of the Land holden by Copy of the Manor, hath not extinguiſhed or determined the Copyhold Eſtate; for notwithſtanding his Eſtate is taken but for an Eſtate (*g*) at Will, yet the Cuſtom hath ſo eſtabliſhed the Copyholder's Eſtate, that he is not removeable at the Lord's Will, ſo long as he performs the Cuſtoms and Services; and by the ſame Reaſon the Lord can-

(*f*) 4 Co. 24. b. 26. b. Hob. 181. Cr. Jac. 126. 573. 2 Rol. 510. 8 Co. 64. a.

(*g*) 4 Co. 21. a. 24. b. 8 Co. 64. a. Lit. Sect. 77. Co. Lit. 60. b. 3 Co. 8. a. 6 Co. 37. b. Cr. Car. 45. Hetl. 6. 9 Co. 105. a. Moor 60, 61.

cannot determine his Intereſt by any Act that he can do, and ſo it hath been adjudged divers Times in the King's Bench: But becauſe the Eſtate of the Copyholder was determined by the Acceptance of the Leaſe for Years, it was adjudged againſt the Copyholder.

Note Reader, The Law to ſeveral Purpoſes and Intents taketh Notice of divers of the King's Seals. 1. Of the Great Seal. 2. Of the Seal of the Exchequer, as appeareth before. 3. Of the Privy Seal: *F. N. B.* 26. *b.* The King may grant to one to make (*a*) Attorney by his Letters Patents under his Privy Seal; and therewith agreeth 37 *H.* 6. 27. *b.* and the King may command under his Privy Seal, that one do not go beyond the Sea (*b*) out of the Realm, as appeareth by *F. N. B.* 85. *a.* But it is holden in 35 *H.* 6. *a.* that a (*c*) Protection or Warrant of an Eſſoin is worth nothing under the Privy Seal. And it appeareth by the Statute *de* (*d*) *Articulis ſuper chartas, cap.* 6. that no Writ ſhall be ſealed with the Petit Seal.

(*a*) 2 Rol. 183.

(*b*) 2 Rol. 183. 11 Co. 92. a. Dyer 128. pl. 61. 165. pl. 6. 176. pl. 30. Moor 675. 2 Inſt. 54. Jenk. Cent. 220.

(*c*) 2 Rol. 183. Co. Lit. 131. a. Br. Protect. 13. 35 H. 6. 2. a.

(*d*) 2 Inſt 555, 556. Moor 476.

4. The Law taketh Notice alſo of the (*e*) Privy Signet, *vide F. N. B.* 85. *a.* That the Privy Signet is ſufficient to prohibit one to go beyond the Sea. And ſee a Record in the Exchequer, *Hill.* 1 *E.* 4. *ex parte Rememoratoris dom' Reginæ Rot.* (*f*) 14. that the Diſcharge under the Privy Signet of a Debt due by the Sheriff of *London*, was not ſufficient; but it ought to have been under the Privy-Seal, and then it had been a good Diſcharge in Law.

(*e*) 2 Rol. 183. 11 Co. 92. a.

(*f*) 2 Rol. 183. 11 Co. 92. Moor 476.

Know, Reader, that of ſmall Things (as the Caſe at Bar was) and to poor Men, Leaſes have been made under the Exchequer Seal, as appeareth by many old Precedents before and in the Time of King *Ed.* 3. and by infinite Precedents after to this Day: And ſuch Leaſes made according to the ſaid Precedents, have been allowed good. And there were three Cauſes of the Beginning of the Uſages. 1. For the Multiplicity, that every poor Man ſhall not be driven for ſuch infinite Number of Leaſes to ſue for Cottages to the King, and other ſmall Things, to paſs by the King's ſigning, the Privy Signet, Privy Seal, and Great Seal. 2. For Neceſſity, leſt if a poor Subject ſhould be driven to ſuch a tedious Suit, the Land would lie many Times without a Tenant to the King's Damage. 3. For the Impoſſibility, becauſe many Times the Subject was not able, nor the Thing leaſed of Value to paſs the Great Seal. But to you who are rich, my Advice is to paſs your Leaſes under the Great Seal, for that is the ſure Way.

Cro. Car. 513. Cro. Jac. 109.

BALDWIN's *Caſe.*

a Co. 18. a.

Paſch. 31 Eliz. *Rot.* 1151.

In the Common Pleas.

Broker,
York, ſſ. *Chriſtopher Marton*, late of *Marton* in the County aforeſaid, Eſq; was attached to anſwer to *Anthony Baldwin* of a Plea, wherefore with Force and Arms, the Cloſe of him the ſaid *Anthony*, at *Marton*, he break, and his Corn to the Value of 10 *l.* there late growing, by walking with his Feet trod down and conſumed, and other Harms to him did, to the grievous Damage of him the ſaid *Anthony*, and againſt the Peace of the Lady the now Queen, *&c.* And whereupon the ſaid *Anthony*, by *Robert Somerſcale*, his Attorney, complaineth, That the aforeſaid *Chriſtopher*, the 10th Day of *September*, in the 30th Year of the Reign of the Lady the now Queen, with Force and Arms, the Cloſe of him the ſaid *Anthony*, at *Marton*, broke, and his Corn, that is to ſay Oats, to the Value, *&c.* then there late growing, by walking, with his Feet trod down and conſumed, and other Harms, *&c.* to his grievous Damage, *&c.* and againſt the Peace, *&c.* whereupon he ſaith that he is the worſe, and hath Damage to the Value of 20 *l.* and thereof he bringeth Suit, *&c.* And the aforeſaid *Chriſtopher*, by *William Burton* his Attorney, comes and defends the Force and Injury when, *&c.* And as to the Force and Arms, he ſaith, that he is thereof not guilty: And as to the reſt of the Treſpaſs aforeſaid ſuppoſed to be done, the ſaid *Chriſtopher* ſaith, That the aforeſaid *Anthony*, his Action againſt him ought not to have, becauſe he ſaith, that the Cloſe aforeſaid, as alſo the Places in which it is ſuppoſed the Treſpaſs aforeſaid to be done, are, and at the aforeſaid Time in which it is ſuppoſed the Treſpaſs aforeſaid to be done, were ten Acres of Land called *Bromfield*, with the Appurtenances in *Marton* aforeſaid, which ten Acres of Land with the Appurtenances, are the Soil and Freehold of the ſaid *Chriſtopher*, and that the ſaid *Chriſtopher*, at the aforeſaid Time in which, *&c.*

the Cloſe aforeſaid, as his own Cloſe, Soil, and Freehold of him the ſaid *Chriſtopher*, in the ſaid ten Acres of Lands, with the Appurtenances did break, and the Corn there, as own Corn there growing in the aforeſaid ten Acres, with the Appurtenances, as in his own Soil and Freehold, there trod down and conſumed, as it was lawful for him to do; and this he is ready to aver: Whereupon he demandeth Judgment, if the aforeſaid *Anthony*, his Action aforeſaid againſt him ought to have, *&c.* And the aforeſaid *Anthony* ſaith, that he by any thing before alledged, ought not to be barred from having his Action aforeſaid, becauſe he ſaith, that the Cloſe aforeſaid, as alſo the Places in which the Treſpaſs aforeſaid above complained of was done, are, and at the Time aforeſaid, of the Treſpaſs aforeſaid done, were, four Acres of Land with the Appurtenances, called *Scarhill-Set*, and *Waterſey-Mire*, in *Marton* aforeſaid, others than the aforeſaid ten Acres of Lands, called *Bromfield*, with the Appurtenances, in the Bar of the ſaid *Chriſtopher* above ſpecified; and this he is ready to aver: Wherefore in as much as the aforeſaid *Chriſtopher*, to the Treſpaſs aforeſaid, in the aforeſaid four Acres of Lands, with the Appurtenances, *above of new aſſigned*, done, doth not anſwer, the ſaid *Anthony* demandeth Judgment, and his Damages, by Occaſion of that Treſpaſs to be to him adjudged, *&c.* And the aforeſaid *Chriſtopher*, as to any Treſpaſs in the aforeſaid four Acres of Land, with the Appurtenances of *new aſſigned*, above ſuppoſed to be done, ſaith, that he thereof is not guilty, as the aforeſaid *Anthony* againſt him complaineth, and of this puts himſelf upon the Country, and the aforeſaid *Anthony* likewiſe; therefore it is commanded to the Sheriff, that he cauſe to come here in the Morrow of the *Holy Trinity*, twelve, *&c.* by whom, *&c.* And who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* at which Day here come the Parties, *&c.* and the Sheriff ſent not the Writ, Therefore, as at firſt it is commanded to the Sheriff, that he cauſe to come here from the *Holy Trinity*, in three Weeks, twelve, *&c.* To recognize in Form aforeſaid, *&c.* At which Day, the Jurors between the Parties aforeſaid, of the aforeſaid Plea between them, were put in Reſpite here until this Day, that is to ſay, in eight Days of St. *Michael* then next following, unleſs the Juſtices of the Lady the now Queen to take Aſſizes in the County aforeſaid aſſigned, by the Form of the Statute, *&c.* Upon *Monday* the 14th Day of *July* laſt paſt, at the Caſtle of *York*, in the ſaid County, ſhould firſt come; and now here at this Day, come as well the aforeſaid *Anthony*, as the aforeſaid *Chriſtopher*, by their Attornies aforeſaid, and the aforeſaid Juſtices to Aſſizes, before whom, *&c.* ſent here their Record in theſe Words: Afterwards the Day and Place within contained, before *John Clench*, one of the Juſtices of the Lady the now Queen to Pleas, before the Queen herſelf to be holden and aſſigned; and *Thomas Walmſley*,

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one of the Juſtices of the ſaid Lady the Queen, of the Bench Juſtices of the ſaid Lady the Queen to Aſſizes in the County of *York*, to be taken, aſſigned by the Form of the Statute, *&c.* came as well the within named *Anthony Baldwin*, as the aforeſaid within written *Chriſtopher Marton*, by their Attornies within mentioned, and the Jurors of the Jury, whereof within is made mention, ſome of them, that is to ſay, *William Wharton of Dunkeſwick*, Gentleman, *Adam Wyre* of *Ayrton*, Yeoman, *John Brown* of *Pathorn*, Yeoman, *Ralph Walker* of *Bolton*, Gentleman, *Thomas Preſton* of *Whengille*, Yeoman, and *Henry Laycock* of *Felliface*, Yeoman, come, and the Jurors aforeſaid are ſworn; and becauſe that the reſt of the Jurors of that Jury did not appear, therefore others of the Standers-by, to this choſen by the Sheriff of the County aforeſaid, are, at the Requeſt of the ſaid *Anthony*, and by the Commandment of the Juſtices, of new added, whoſe Name to the Pannel within written are filed, according to the Form of the Statute in ſuch Caſe made and provided, and the Jurors ſo anew added, now appearing, that is to ſay, *Gabriel Green*, *William Newby*, *John Hawton*, *John Brorey*, *John Craven*, and *William Richardſon*, come, who to ſay the Truth of the within contained, together with the other Jurors aforeſaid firſt impannelled, and ſworn to ſay, choſen, tried and ſworn, ſay upon their Oath, that before the within written Time, in which it is ſuppoſed the Treſpaſs within written to be done, the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* were Parcel of the Poſſeſſions of the late Monaſtery, or Priory of *Bolton* in *Craven*; and that one *Richard*, late Prior of the Priory, or Monaſtery aforeſaid, was ſeiſed of one Tenement, Meſſuage or Farm, called *Ungthorpe* in the Pariſh of *Marton* in *Craven*, whereof the aforeſaid four Acres of Land with the Appurtenances within new aſſigned are, and at the within written Time, in which, *&c.* were Parcel in his Demeſn as of Fee, in the Right of his Monaſtery aforeſaid; and ſo thereof being ſeiſed, the ſaid late Prior, with the Aſſent of the Covent of the ſame Place, the 26th Day of *December*, in the 25th Year of the Reign of the Lord *Henry* VIII. late King of *England*; by an Indenture ſealed with the common Seal of the aforeſaid Prior and Covent, to the Jurors in Evidence ſhewed, demiſed the aforeſaid Tenement, Meſſuage and Farm, whereof the within written four Acres of Land, with the Appurtenances then were, and yet are Parcel, to one *Hugh Baldwin*, and *Agnes* his Wife, to have and to hold, to the ſaid *Hugh Baldwin* and his Aſſigns, from the Date of the Indenture aforeſaid, unto the End and Term of 31 Years, fully to be ended; by Virtue of which Demiſe, the ſaid *Hugh* and *Agnes* in the aforeſaid four Acres of Land, with the Appurtenances in which, *&c.* entred and were thereof poſſeſſed, the Reverſion thereof to the aforeſaid Prior and his Succeſſors; And the aforeſaid *Hugh* and *Agnes* into

the aforeſaid four Acres of Land, with the Appurtenances in which, *&c.* entred and were thereof poſſeſſed, the Reverſion thereof to the aforeſaid Prior and his Succeſſors: And the aforeſaid *Hugh* and *Agnes* of the aforeſaid four Acres of Land, with the Appurtenances in which, *&c.* for the Term aforeſaid being poſſeſſed, the Reverſion thereof to the aforeſaid late Prior in Form aforeſaid expectant; by a certain Act made in Parliament of the ſaid late K. *Henry* VIII. at *Weſtminſter* in the County of *Middleſex*, begun the 28th Day of *April*, in the 31ſt Year of his Reign, and continued until the 28th Day of *June* then next following, and there then holden, amongſt other Things it is ordained and eſtabliſhed by the ſaid late King, and the Lords Spiritual and Temporal, and the Commons in the ſaid Parliament aſſembled: That the ſaid late King ſhould have, hold, poſſeſs, and enjoy to him, his Heirs and Succeſſors, all and ſingular ſuch late Monaſteries, Abbies, Priories, Nunneries, Colleges, Houſes of Fryars, and other Eccleſiaſtical and Religious Houſes and Places, of what Kinds, Natures, Qualities, or Diverſities of Habits, Rules, Profeſſions, or Orders, they or any of them were named, known, or called, which after the fourth Day of *February*, in the 27th Year of the Reign of the aforeſaid late King, were diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited, given up, or by any other Means came to his Highneſs, and who by the ſame Authority, and in like Manner ſhould have, hold, poſſeſs and enjoy all Scites, Circuits, Precincts, Manors, Lordſhips, Grainges, Meſſuages, Lands, Tenements, Meadows, Paſtures, Rents, Reverſions, Services, Woods, Tithes, Penſions, Portions, Rectories, Appropriated Vicarages, Churches, Chapels, Advowſons, Nominations, Patronages, Annuities, Rights, Intereſts, Entries, Conditions, Commons, Leets, Courts, Liberties, Privileges, Franchiſes, and other whatſoever Hereditaments which appertained, or belonged to the ſaid late Monaſteries, Abbies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, at the Time of the aforeſaid Diſſolution, ſuppreſſing, renouncing, forfeiting, giving up, or by any other Manner of Means came to the ſaid King's Highneſs, after the fourth Day of *February* abovementioned. And further it is Enacted by the Authority aforeſaid, That not only all and ſingular the aforeſaid late Monaſteries, Abbies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, Scites, Circuits, Precincts, Manors, Lordſhips, Grainges, Meſſuages, Lands, Tenements, Meadows, Paſtures, Rents, Reverſions, Services, and all and ſingular other the Premiſſes, from thence immediately and preſently, but alſo all other Monaſteries, Abbies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and all and ſingular other Eccleſiaſtical and Religious Houſes, which hereafter ſhould happen to be diſſolved, ſuppreſſed, renounced, relinquiſhed,

quiſhed, forfeited, given up, or by any other Means came to the King's Highneſs: And alſo all Scites, Circuits, Precincts, Manors, Grainges, Meſſuages, Lands, Tenements, Meadows, Paſtures, Rents, Reverſions, Services, Woods, Tithes, Penſions, Portions, Rectories appropriate, Vicarages, Churches, Chapels, Advowſons, Nominations, Patronages, Annuities, Rights, Intereſts, Entries, Conditions, Commons, Leets, Courts, Liberties, Privileges, Franchiſes, and other Hereditaments whatſoever, were belonging or appertaining to them or any of them, whereſoever, and as ſoon as they ſhould be diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited, given up, or by any other Means come to the King's Highneſs, ſhould be veſted and adjudged by Authority of the ſame Parliament, in the very actual and real Seiſin and Poſſeſſion of the ſaid late King, his Heirs and Succeſſors for ever, in the State and Condition as then they were: And as if all the ſaid Monaſteries, Abbies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes ſo diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited, given up, or came to the King's Highneſs as aforeſaid, as alſo the aforeſaid Monaſteries, Abbies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, which then after ſhould happen to be diſſolved, ſuppreſſed, renounced, relinquiſhed, or given up to his ſaid Highneſs, Scites, Circuits, Precincts, Manors, Lordſhips, Grainges, and other the Premiſſes whatſoever, in the ſaid Act of Parliament ſpecially or particularly recited or expreſſed by expreſs Names, Words, Faculties and in their Natures, Kinds and Qualities, as in the ſaid Act amongſt other Things more fully it appeareth. And the ſaid Jurors further ſay upon their Oath aforeſaid, That the aforeſaid Monaſtery or Priory of *Bolton* aforeſaid, after the aforeſaid 4th Day of *February*, in the 27th Year aforeſaid, that is to ſay, the 11th Day of *June*, in the 31ſt Year of the Reign of the ſaid late King, was diſſolved: By Colour of which Diſſolution, and by Force of the Statute aforeſaid, the aforeſaid late King was ſeized of the aforeſaid Monaſtery, or Priory of *Bolton* aforeſaid, and of the Reverſion of the aforeſaid four Acres of Land with the Appurtenances, amongſt other Things in his Demeſne as of Fee, in the Right of his Crown of *England*; and that the aforeſaid Meſſuage and Tenement called *Ungthorp*, and the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* At the Time of the Diſſolution aforeſaid, were Parcel of the Poſſeſſions of the aforeſaid Monaſtery, or Priory; and the ſaid late King, ſo thereof being ſeized, the third Day of *April*, in the 33d Year of his Reign, by his Letters Patents, ſealed with the Great Seal of *England*, to the Jurors aforeſaid, ſhewed in Evidence, gave and granted unto *Henry* late Earl of *Cumberland*, all the aforeſaid Tenement, Meſſuage and Farm, with the Appurtenances

called *Ungthorp*, whereof the within written four Acres with the Appurtenances adjoining, were, and yet are, Parcel, to have and to hold to the ſaid late Earl, his Heirs and Aſſigns for ever: By Colour of which Letters Patents the ſaid late Earl was, amongſt other Things, ſeized of the Reverſion of the aforeſaid Tenement, Meſſuage and Farm, with the Appurtenances, whereof the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* then were, and yet are Parcel in his Demeſn as of Fee; and the aforeſaid *Hugh* and *Agnes* for the aforeſaid Term of Years, in Form aforeſaid, being poſſeſſed, the Reverſion thereof to the aforeſaid Earl, and his Heirs expectant, the aforeſaid *Hugh*, died of the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* in Form aforeſaid poſſeſſed; and the aforeſaid *Agnes* overlived him the ſaid *Hugh*, and was of the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* poſſeſſed by Way of Survivor, *&c.* And the aforeſaid *Agnes* ſo being thereof poſſeſſed, the Reverſion thereof to the late Earl, in Form aforeſaid expectant, the ſaid late Earl made, ſealed, and delivered a certain Indenture as his Deed, of the aforeſaid four Acres of Land, with the Appurtenances, in which, *&c.* among other Things, the Tenor of which followeth in theſe Words.

This Indenture made the 1 Day of September, in the Year of our Lord God 1545, and in the 37th Year of the Reign of our Sovereign Lord Henry VIII. by the Grace of God, King of England, France, and Ireland, Defender of the Faith, and in the Earth the ſupreme Head of the Church of England and Ireland, betwixt the Right Noble Lord Henry Earl of Cumberland, Lord of the Honor of Shipton, Lord Weſtmorland and Veſtion of the one Part, and Agnes Baldwin of Ungthorp, Widow, and Anthony Baldwin on the other Part, Witneſſeth, That the ſame Earl for the Sum of 58 l. 13 s. 4 d. Sterling, at the Day of the Date hereof by the ſaid Agnes and Anthony paid to the ſaid Earl, whereof the ſaid Earl acknowledgeth himſelf to be truly contented and paid, and the ſaid Agnes and Anthony, their Heirs and Executors, thereof, and of every Part thereof, to be diſcharged and acquitted for ever, hath covenanted, granted, and to Farm letten, and by theſe Preſents covenanteth, granteth, demiſeth, and letteth to Farm to the ſaid Agnes and Anthony, and to the Heirs of the ſame Anthony, the ſaid Tenement, Meſſuage or Farm, called Ungthorp in the Pariſh of Marton in Craven in the County of York, together with the Cloſures, Feedings, Paſtures, Arrable Land, Meadow, Woods, Waters, Common of Paſture in the Moors of Eaſt and Weſt Marton, Common of Turbury, with free Paſſage to and fro the ſame Common of Eſton, to a Ground or Meadow called Tadholm, lying in the demeſn Cloſes of Marton-Hall, and all Houſes, Barns,

Barns, Boons, and Buildings to the ſame Tenement or Farm called Ungthorp belonging, or in any wiſe heretofore appertaining, now and of old Time being of the only yearly Rent of 53 s. 4 d. to have and to hold the ſame Tenement or Farm called Ungthorp, with all and ſingular the Premiſſes with the Appurtenances, to the ſame Agnes and Anthony, and to the Heirs of the ſame Anthony, from the Date hereof to the End and Term of 99 Years, next and immediately following, and fully to be compleat and ended, and ſo from 99 Years to 99 Years, untill ſuch Time as 300 Years be ſpent, fully finiſhed, and expired, without Impeachment of any Manner of Waſte, in as ample, free, and large Manner as ever Nicholas Simſon, Hugh Baldwin, and the ſaid Agnes Baldwin, or any other Tenant or Farmer of the ſaid Tenement or Meſſuage of Ungthorp, with all and ſingular the Premiſſes with the Appurtenances ever occupied or might have occupied the ſame, without Interruption, Let, Diſturbance, Denial, Contradiction, or Reſiſtance of the ſame Earl, or of his Heirs and Aſſigns, or of any other Officer, Farmer, or Farmers of the ſame Earl's, of the Manor or Capital Meſe called Marton-Hall for the Time being, or of any other, at or by the Will, Aſſent, Conſent, or Furtherance of the ſame Earl, his Heirs or Aſſigns: And further, The ſaid Agnes and Anthony covenanteth and granteth by theſe Preſents, for them and the Heirs of the ſaid Anthony, to and with the ſame Earl, that they the ſame Agnes and Anthony, and the Heirs of the ſame Anthony, ſhall yearly, during the ſaid Term, at the Feaſt of St. Michael the Archangel, and within forty Days after, for certain urgent Conſiderations, content and pay, or cauſe to be contented and paid to the ſaid Earl, his Heirs and Aſſigns, as well a Penny ſeparately by itſelf as 5 s. 4 d. Sterling, in a groſs and intire Sum if it be asked; for the which Payment of the ſaid ſingle Penny, and of the ſaid 5 s. 4 d. Sterling, the ſaid Earl covenanteth and granteth for him, his Heirs and Aſſigns, to and with the ſaid Agnes and Anthony, to diſcharge and ſave harmleſs from Time to Time, all the ſaid Land and Tenements, and the ſaid Agnes and Anthony, and the Heirs of the ſame Anthony, as well of and from the Payment of the ſaid Penny, as for the Payment of the Sum of 5 s. 4 d. as of all other Suits, Gractions, Boons, Groſſoins, Fines, Cuſtoms, and all other Impoſitions or Demands whatſoever they be, concerning the ſame Meſſuage or Tenement called Ungthorpe, and all other the Premiſſes with the Appurtenances, during the ſaid Term now granted, or any Term hereafter by Force of this Indenture to be granted by the Earl and his Heirs, as well againſt our

Sovereign Lord the King and his Heirs, as against all other Person or Persons whatsoever they be. And furthermore the said Earl covenanteth to and with the said Agnes and Anthony by these Presents, that he the said Earl, his Heirs and Assigns, shall at the End and Term of 300 Years, make or cause to be made to the Heirs or Assigns of the said Anthony, a like Demise and Lease of the said Messuage or Tenement, and all other the Premisses with the Appurtenances, if it be asked, for so many more Years as is contained in this Lease, and the same Lease to be of like Force, Effect, and Strength in the Law as this present is, without any Covin, Fraud, Collusion, Denyer, or Male-Engine, but truly and faithfully according to the true Purport and Meaning of these Presents. In witness whereof the Parties aboveſaid to these Indentures interchangeably have set their Seals, the Day and Year aboveſaid.

And the said Jurors further say upon their Oath, that no Livery or Seisin of the Tenements aforesaid, or any Part thereof, was delivered to the aforesaid *Agnes* and *Anthony*, or to any of them upon the Indenture aforesaid; and that the aforesaid *Agnes* and *Anthony* had and held the Tenement, Mese, and Farm aforesaid, with the Appurtenances, whereof the aforesaid four Acres with the Appurtenances, in which, *&c.* are and then were Parcel, as the Law in this Case requireth: And the said *Agnes* and *Anthony* so having and holding the Tenement, Messuage, and Farm aforesaid with the Appurtenances, whereof the four Acres in which, *&c.* are and then were Parcel, the said *Agnes* the last Day of *October*, in the 5th Year of the Reign of the said Lady the now Queen, at *Marton* aforesaid, in the County aforesaid died, and the aforesaid *Anthony* her Son overlived, and continued the Possession of the Tenement, Messuage, and Farm aforesaid, with the Appurtenances, whereof the aforesaid four Acres of Land with the Appurtenances, in which, *&c.* are Parcel, and took the Profits thereof, and had occupied and held the Tenement, Messuage and Farm aforesaid, whereof the aforesaid four Acres of Land, with the Appurtenances, in which, *&c.* with the Appurtenances, are Parcel of such Estate and Interest, as the Law in this Case requireth; and he having, occupying, and holding the Tenement, Messuage and Farm aforesaid, whereof the within written four Acres of Land are Parcel; the aforesaid Henry, late Earl of *Cumberland* died, having Issue *George*, now Earl of *Cumberland*, his Son and Heir, and the said *George* Earl of *Cumberland*, entred into the Tenements aforesaid, and afterwards, that is to say, the 17th Day of *April*, in the 24th Year of the Reign of the said Lady the now Queen, enfeoffed the aforesaid *Christopher Marton* of the

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aforeſaid four Acres of Land with the Appurtenances, to have to the ſaid *Chriſtopher* and his Heirs for ever. And that the aforeſaid *Anthony*, at the Time of the making of the Feoffment aforeſaid, and after that Feoffment made hitherto continued in Poſſeſſion, as well of the aforeſaid four Acres of Land with the Appurtenances, as of the Meſſuage and reſt of the Tenements, and Farm aforeſaid; but yet the Jurors further ſay, That before the Feoffment aforeſaid, the aforeſaid Rent to the aforeſaid *Henry* late Earl of *Cumberland*, and his Heirs, by the Indenture aforeſaid, granted as well to the aforeſaid *Henry* Earl of *Cumberland* in his Life, and after the Death of him the ſaid late Earl, to the aforeſaid *George* now *Earl* of *Cumberland*, as to the aforeſaid *Chriſtopher Marton*, after the Feoffment aforeſaid, by the aforeſaid *Anthony* was paid. And the ſaid Jurors further ſay upon their Oath, That the ſaid *Chriſtopher*, the Day and Year in the Declaration above ſpecified, entred into the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* upon the Poſſeſſion of the aforeſaid *Anthony*, and the Oats within written, then there by walking with his Feet trod down and conſumed, as the aforeſaid *Anthony* within againſt him complaineth: But whether upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, the aforeſaid Entry of the aforeſaid *Chriſtopher*, in the aforeſaid four Acres of Land with the Appurtenances, in which, *&c.* be a good and lawful Entry or not, the ſaid Jurors are utterly ignorant, and thereof pray the Advice and Judgment of the Juſtices of the Court here; and if upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Juſtices and Court here, that the aforeſaid Entry of the aforeſaid *Chriſtopher* be not a good and lawful Entry in Law, in the aforeſaid four Acres of Land, upon the Poſſeſſion of the ſaid *Anthony*: Then the ſaid Jurors ſay, upon their Oath, That the aforeſaid *Chriſtopher* is guilty of the Treſpaſs in the aforeſaid four Acres of Land within of new aſſigned, as the aforeſaid *Anthony* within againſt him complaineth. And then they aſſeſs the Damages of the ſaid *Anthony*, by Occaſion of that Treſpaſs, above his Coſts and Charges by him about his Suit in this Behalf expended, to twenty Shillings, and for his Coſts and Charges to forty Shillings; and if upon the whole Matter aforeſaid, it ſhall ſeem to the Juſtices and Court here, That the aforeſaid Entry of the aforeſaid *Chriſtopher*, in the aforeſaid four Acres of Land of new aſſigned, upon the Poſſeſſion of the ſaid *Anthony*, is a good and lawful Entry in Law, then the ſaid Jurors ſay upon their Oath, that the aforeſaid *Chriſtopher* is not guilty of the Treſpaſs within written, in the within written four Acres of Land within of new aſſigned. And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes, before that they give their Judgment thereof, Day is given to the Parties aforeſaid, here until in eight

Days

Days of St. *Hillary*, to hear their Judgment thereof becauſe the ſaid Juſtices here thereof not yet, *&c.* At which Day come as well the ſaid *Anthony*, as the aforeſaid *Chriſtopher* by their Attornies aforeſaid; and upon this, all and ſingular the Premiſſes being ſeen, and by the Juſtices here fully underſtood: It is granted that the aforeſaid *Anthony* recover againſt the aforeſaid *Chriſtopher* his Damages to 3 *l.* by the Jurors aforeſaid, in Form aforeſaid aſſeſſed; as alſo 11 *l.* 6 *s.* 8 *d.* to the ſaid *Anthony* at his Requeſt, for his Coſts and Charges by the Court here of Increaſe adjudged; which Damages in the whole amount to 14 *l.* 6 *s.* 8 *d.* and that the aforeſaid *Chriſtopher* be taken, *&c.*

BALD-

BALDWIN'S *Caſe.*

Paſch. 31 Eliz. *Rot.* 1151.

In the Common Pleas.

BEtween *Baldwin* and *Morton* in Treſpaſs in the County of *York*, and adjudged in the Common Pleas; the Caſe was ſuch; the Prior of *Boulton*, *Anno* 25 *H.* 8. with the Aſſent of his Covent by Indenture demiſed the Land in Queſtion to *Hugh Baldwin* and *Anne* his Wife for twenty-one Years. And afterwards the Priory by Surrender, *&c.* came to King *Hen.* 8. and after *Hugh Baldwin* died, King *Hen.* 8. *Anno* 33. granted the Land in Queſtion to *Henry* Earl of *Cumberland*, and his Heirs, who, 37 *H.* 8. by his Indenture, covenanted, granted, demiſed, and to farm let the ſaid Land to the ſaid *Anne*, and to one *Anthony Baldwin* her Son, and to the Heirs of the ſaid *Anthony*: *Habendum* to them from the Date of the ſame Indenture, until the End of 99 Years, and ſo from 99 Years to 99 Years, until 300 Years be expired, without Impeachment of Waſte, in as ample and large Manner and Form as the ſaid *Hugh* and *Anne*, or any Tenant or Farmer ever had or enjoyed the ſame. And the Leſſee covenanted to pay during the ſaid Term, 5 *s.* 8 *d.* if it were demanded: And the Leſſor covenanted that he, his Heirs and Aſſigns, at the End of the ſaid Term of 300 Years, would make unto the Heirs and Aſſigns of the ſaid *Anthony Baldwin*, ſuch Leaſe for other 300 Years, *&c.* And the Jury found, that no Livery and Seiſin was made to the ſaid *Anthony* or *Anne*, according to the ſaid Indenture; *Anne* died, and *Anthony* ſurvived,

(a) 1 And. 223. Owen 40. Palm. 33. Hardres 149.

ſurvived, *Henry* Earl of *Cumberland* died, *George* his Son and Heir, *Anno* 14 *Eliz.* did enfeoff the Defendant thereof; the ſaid *Anthony* at the Time of the Feoffment being in Poſſeſſion of the ſaid Land, upon whom the Defendant entred, upon which Entry the ſaid *Anthony Baldwin* brought his Action of Treſpaſs. And the Doubt in this Caſe was, If foraſmuch as the Fee-Simple was limited and expreſſed by the Premiſſes, to *Anthony* and his Heirs, if the Limitation of the Term for Years in the *(a) Habendum* were contrary and repugnant to the Premiſſes. And firſt it appeareth, That the Intent of the Parties was, that but a Term ſhould paſs; for in the Premiſſes the Parties uſe the uſual Words of a Leaſe, *ſcil.* grant, demiſe, and to Farm let, and a certain Term for Years is limited by the *Habendum*; alſo it is limited without *(b)* Impeachment of Waſte; alſo the Leſſee binds himſelf by Covenant to pay the Rent during the Term; and the Leſſor covenants that a new Leaſe ſhall be made at the End of the Term, and that the Leſſees ſhall enjoy the Land, *&c.* as other Farmers, *&c.* had enjoyed the ſame. Then ſuch Conſtruction ſhall be always made, that the *(c)* Intent of the Parties ſhall take Effect, if the ſame by any Conſtruction may ſtand with the Rule of Law: And it was objected, that the Rule of Law was, That an *(d) Habendum* being contrary or repugnant to the Premiſſes is void, and the Premiſſes ſhall ſtand: As if a Man by Deed give Lands by the Premiſſes to one and his Heirs, *Habendum* to him for his Life, this *Habendum* is void, becauſe a Fee-Simple is expreſſed in the Premiſſes, and but an Eſtate for Life in the *Habendum*, which is repugnant and void, which Caſe was agreed on all Sides. But it was adjudged by *Anderſon*, Chief Juſtice, *Windham*, *Periam*, and *Walmſley* Juſtices, that the *Habendum* in the Caſe at Bar, was not repugnant; and that by the ſaid Demiſe both the Leſſees had a Leaſe for Years therein expreſſed; and in this Caſe theſe Differences were taken and agreed for good Law.

(a) 2 Sid. 78. 2 Co. 50. a. 52. a. 55. a. b. 5 Co. 94. a. b. 8 Co. 56. b. 93. b. 154. b. 9 Co. 47. a. 48. a. 10 Co. 107. b. Co. Lit. 21. a. 2 Rol. 65, 66, 67.

(b) 2 Inſt. 146. 4 Co. 63. a. 9 Co. 9. a. 11 Co. 82. b. 83. a. Co. Lit. 220. a. 3 E. 3. 44. Dyer 10. pl. 37. 1 Bulſt. 136. Moor 317.

(c) 1 Co. 85. a. Co. Lit. 314. b. Lit. Rep. 187.

(d) Hob. 171. Cr. El. 255. Winch. 92.

See Co. Lit. 21. a. Moor 26. 87. Cro. Jac. 282. 2 Roll. 66.

1. When to Things which take their Eſſence and Effect by the Delivery of the Deed without other Ceremony, and which lie in Grant, there in ſuch Limitation as in the Caſe at Bar, the *Habendum* was repugnant and void. As if a Man grant Rent, or Common, *&c.* out of his Land by the Premiſſes of the Deed to one and his Heirs, *Habendum* to the Grantee for Years or for Life, the *Habendum* is repugnant, for a Fee paſſeth by the Premiſſes by the Delivery of the Deed, and therefore the *Habendum* for Years or Life is void.

2. If

2. If one by Deed grant a Rent in *esse*, or a Seignory in the Premisses to one and his Heirs, *Habendum* to the Grantee for Years, or Life; although another Thing or Ceremony is requisite, that is to say, (Attornment) besides the Delivery of the Deed, yet forasmuch as the Thing lieth in Grant, and both Estates, that is to say, as well the Estate in Fee, as the Estate for Years or for Life ought to have one and the same Ceremony, that is to say, (Attornment) to pass it, as a Seignory, *&c.* and for this Cause the *Habendum* in such Case is repugnant and void.

3. When a Man gives Land by Deed in Fee by the *(a)* Premisses, *Habendum* to the Lessee for Life, there the *Habendum* is void, as hath been said; for one and the same Ceremony, *scil.* Livery is requisite to both the Estates; and therefore when Livery is made according to the Form and Effect of the Deed, it shall be taken strongest against the Feoffor, and more for the Advantage of the Feoffee; and the *Habendum* in such Case is void, and till Livery be made the Feoffee hath but at Will.

(a) 13 H. 7. 23. b. 24. a. Plow. 153. a. Perk. §. 162. Davis 46. a. antea 23. b.

Co. Lit. 57.

4. When to the Estate limited by the Premisses a Ceremony is requisite to the Perfection of the Estate, and to the Estate limited by the *Habendum*, nothing is required to the Perfection and Essence thereof but only the Delivery of the Deed, there, although the *Habendum* be of lesser Estate than is mentioned in the Premisses, the *Habendum* shall stand, as in the Case at the Bar: To the Fee-Simple limited by the Premisses, it is requisite to have Livery and Seisin; and till Livery be made, nothing shall pass but an Estate at Will (if the Deed had not gone further) and therefore the *Habendum* for Years is good presently by the Delivery of the Deed, and so it appeareth it was the Intent of the Parties that it should take Effect by the Livery of the Deed for Years.

3 Co. 154.

Note, Reader, a Difference between an Estate in the Premisses implied, *(b)* and an Estate expressed; for if *A.* grant a Rent to *B.* generally, the same by Implication and Construction of Law is an Estate for Life; but if the *Habendum* be for Years, it is good, and shall qualify the Generality and Implication of the Premisses. And note in the Case at Bar, the *Habendum* cannot be good to *Anne* only, and void to *Anthony*, for *(c) Maledicta expositio quæ corrumpit textum.* Also it is to be observed, that although *Anne Baldwin* had an Estate for Years in Possession, and had sole and lawful Possession, and *Anthony* nothing, and

(b) Hob. 171. 8 Co. 154. b. Winch 92. Perk. §. 167, 174. Co. Lit. 183. a. b. 299. 190. b. Postea 55. a.

(c) 4 Co. 35. a. 8 Co. 56. b. 154. b. 3 Bulst. 105, 107, 108. 1 Rol. Rep. 319.

and therefore it might be objected, that this Deed ſhould enure to *Anne* only by Way of Confirmation or Releaſe, 1 Anderſ. 224. yet it was adjudged that the Leaſe was good to both, *ſcil.* to *Anthony* and *Anne*, for ſo are the Words and the Intention of the Parties; and theſe Words, And to the Heirs of *Anthony*, upon Conſideration of the whole Deed are void, and both Leſſees had a good Eſtate for Years. And if Livery of Seiſin had been made to the Leſſees, it had Co. Lit. 18. a. b. not altered the Caſe, for it was a Leaſe for Years at the Beginning; and Judgment was given for the Plaintiff.

The

The Caſe of BANKRUPTS.

Trin. 31 *Eliz.*

GRegory *Smith*, *Cullamor*, and other good Merchants of *London*, brought an Action upon the Caſe upon Trover and Converſion of divers Goods in *London* againſt *Thomas Mills*, and upon Not guilty pleaded, the Jury gave a Special Verdict to this Effect: *John Cook* of *Spalding* was poſſeſſed of the ſame Goods, and exerciſing the Trade of Buying and Selling, 30 *Januarii*, 29 *Eliz.* became a Bankrupt, and abſented himſelf *ſecundum formam Statuti* (which was found at large) and the ſaid 30 *Januarii* was indebted to the Plaintiffs, being Subjects born, in 273 *l.* 12 *d. pro Merchandizis per quemlibet eorum prius venditis*; and then alſo was indebted to *Rob. Tibnam*, being alſo a Subject born, in 64 *l.* Afterwards, 12 *Feb.* 29 *Eliz.* the Plaintiffs exhibited a Petition to the Lord Chancellor to have a Commiſſion upon the Statute of Bankrupts, and 17 *Feb.* 29 *Eliz.* a Commiſſion was granted, according to the ſaid Statute, under the great Seal, to *William Watſon* and others. And afterwards, 21 *Februarii*, 29 *Eliz.* *John Cook* gave and delivered the ſaid Goods to *Tibnam*, in Satisfaction of Part of his ſaid due Debt, the Goods being of the Value of 24 *l.* And afterwards, *ultimo Martii*, 29 *Eliz.* the Commiſſioners, by Deed indented, ſold to the Plaintiffs jointly the ſaid Goods, and at the ſame Time the ſaid *Mills* then Factor to *Tibnam in ea parte* refuſed to come in as Creditor, but claimed the ſaid Goods as the proper Goods of his Maſter by the Gift aforeſaid; and afterwards the Goods came to the Defendant's Hands and he converted them; but whether the Sale of the ſaid Commiſſioners, notwithſtanding the ſaid Gift and Delivery to *Tibnam*, be good or not, that was the Doubt referred to the Conſideration of the Court. And Judgment was given by *Wray*

Moor 594.

13 El. c. 7.

Chief Justice, and the whole Court, for the Plaintiffs. And in this Case divers Points were resolved:

* 1 Sider. 272. Moor 594. pl. 805.

1. That the said * Sale made by the said Commissioners was good; and because the Doubt arose only upon the Words and Intent of the Statute of 13 *Eliz. cap.* 7. the Court considered the several Parts and Branches thereof. First, The Act describes a Bankrupt, and whom he defrauds, *scil.* the Creditors. 2. To whom the Creditors should complain for Relief, *scil.* To the Lord Chancellor. 3. How and by what Way Relief and Remedy is provided, *scil.* by Force of a Commission under the Great Seal; *&c.* 4. The Authority of the Commissioners, *scil.* to sell, *&c.* that is to say, *(a) to every one of the Creditors a Portion, Rate and Rate alike, according to the Quantity of his or their Debt.* So that the Intent of the Makers of the said Act expressed in plain Words was to relieve the Creditors of the Bankrupt equally, and that there should be an equal and rateable Proportion observed in the Distribution of the Bankrupt's Goods amongst the Creditors, having Regard to the Quantity of their several Debts, so that one should not prevent the other, but all should be in *æquali jure.* And so we see in divers Cases, as well at the Common Law as upon the like Statutes, such Constructions have been made; for, as *Cato* saith, *(b) Ipsa etenim leges cupiunt ut jure regantur:* And therefore it is held in 35 *H.* 8. *tit. Testaments, Br.* 19. *(c)* a Man holdeth three Manors of three several Lords by Knights Service, each Manor of equal Value, he cannot devise two Manors and leave the Third to descend according to the generality of the Words of the Acts of *(d)* 32 & 34 *H.* 8. of Wills, for then he should prejudice the other two Lords, but by a favourable and equal Construction he can devise but two Parts of each Manor, so that Equality between them shall be observed. And in 4 *E.* 3. *Assize* * 178, the Lord of a Town cannot improve it all, leaving sufficient Common in the Lands of other Lords within the Statue of *Merton, (e) cap.* 4. And so in Cases at the Common Law, an Equality is required, as in 11 *H.* 7. 12. *b. (f)* a Man binds himself in an Obligation and his Heirs, and hath Heirs and Lands on the Part of his Father, and on the Part of his Mother, both Heirs shall be equally charged, 48 *E.* 3. 5. *a. b.* in Dower, if the *(g)* Heir be vouched in three several Wards within the same County, he shall not have Execution against one only, but all shall be equally charged. *(h)* 29 *E.* 3. 39. the like Case. So here in our Case there ought to be an equal Distribution *secundum quantitatem debitorum suorum*; but if after the Debtor becomes a Bankrupt, he may prefer one (who paradventure hath least need) and defeat and Defraud many other poor Men of their true Debts, it

(a) 8 Co. 98. *b.*

Hawk. M. 306 307.

(b) 5 Co. 100. a. 8 Co. 152. a. 9 Co. 123. b. Co. Lit. 10. a. 43. a. 106. b. 174. b. 271. b.

(c) 5 Co. 100. a. 2 Bulstr. 15. Br. C. 275.

(d) Co. Lit. 111. b. 32 H. 8. c. 1. 34 H. 8. c. 5.

* Co. 100. a.

(e) 4 Co. 37. a.

(f) 3 Co. 13. a. 14. a. 5 Co. 100. a. Co. Lit. 376. b. 388. b. Hob. 25. 3 Bulstr. 318. Cr. ac. 218. 12 E. 3. Det. 7.

(g) 3 Co. 13. a. 14. a. Br. Dower. 98. Statham. Dower 18. Fitz. Voucher 76. Br. Voucher. 38.

(h) 5 Co. 100. a.

it would be unequal and unconſcionable, and a great Defect in the Law, if after that he hath utterly diſcredited himſelf by becoming a Bankrupt, the Law ſhould credit him to make Diſtribution of his Goods to whom he pleaſed, being a Bankrupt Man, and of no Credit; but the Law as hath been ſaid before, hath appointed certain Commiſſioners of Indifferency and Credit to make the Diſtribution of his Goods, *To every one of his Creditors, Rate and Rate alike, a Portion, according to the Quantity of their Debts* as the Statute ſpeaketh. Alſo the Caſe is ſtronger, becauſe this Gift is an Aſſignment of the Bankrupt after the Commiſſion awarded under the Great Seal, which Commiſſion is Matter of Record, whereof every one may take Conuſance. Judg. Reſol. on the Stat. p. 99. 130.

Laſtly and principally, the Court relied upon other Words in the Act, *ſcil. And that every Direction, Bargain and Sale,* &c. *done by the Perſons ſo authorized as is aforeſaid, in Form aforeſaid, ſhall be good and effectual in Law,* &c. *againſt the ſaid Offender,* &c. *and againſt all other Perſons claiming by, from, or under ſuch Offender by any Act had, made, or done, after any ſuch Perſon ſhall become Bankrupt,* &c. So that in as much as this Aſſignment and Delivery of the ſaid Goods was after the ſaid *Cook* became Bankrupt, notwithſtanding that, the Commiſſioners may well ſell them. And the Court reſolved, that the Proviſo concerning Gifts and Grants *bona fide* makes no Gift or Grant good which the Bankrupt makes after he becomes Bankrupt, but excludes them out of the Penalty inflicted by the ſame Proviſo. And divers Exceptions were taken to the Verdict by the Defendant's Council. Judg. Reſ. 121.

1. That it was not found, that the ſaid Sale by the Commiſſioners of the ſaid Goods was by Deed inrolled, as they objected the Words of the ſaid Act require: But to that it was anſwered and reſolved by the Court, That the Words of the Act concerning Inrollment of the Deed coming next after theſe Words, *Goods and Chattels*, are, *or otherwiſe to order the ſame for true Satisfaction and Payment,* &c. *and that every Direction, Order,* &c. *ſhall be good and effectual*, ſo this Sale without Deed inrolled is good enough. 1 Vent. 360. Goodwin Bank. 118. Judg. Reſ. 145.

2. It was objected, that it was not found that the Commiſſioners had firſt ſeen the Goods before their Sale, for the Words of the Act are, *ſcil. to be ſearched, viewed,* &c. To that it was anſwered and reſolved, that the ſaid Words, *Or otherwiſe to order,* &c. *and that every Direction,* &c. refer it to the Diſcretion of the Commiſſioners, and paradventure they cannot come to the Sight of them.

3. That the Commiſſioners ought to make ſeveral Diſtributions to the ſeveral Creditors, and not to make a joint Sale or Aſſignment to ſeveral Creditors; for if Judg. Reſ. 149, 150, 156, 157.

he owed *A.* 20 *l.* *B* 20 *l.* and *C.* 5 *l.* a Joint-Sale or Assignment to *A. B.* and *C.* is not according to the Power given to the Commissioners by the said Act; for the Act limits them to make Disposition amongst the Creditors, *&c. to every one a Portion, Rate and Rate like, according to the Quantity of their Debts*; but in this Case, he who hath the least Debt shall have as great Interest in the Goods as he who hath the greatest, and so such Assignment in the said Case put of several Debts is void, *quod fuit concessum per Curiam.* But to that it was answered and resolved by the Court, that in the Case at the Bar, it appears by the Verdict, that the Debt due to the Plaintiffs was joint, for they found *ut supra*, that the said *John Cook* was indebted to the Plaintiffs in 273 *l.* 12 *d.* which shall be intended a Joint-Debt, and so the Sale good in the Case at the Bar.

Judg. Ref. 156. 157.

(a) 8 Co. 98. b.

4. That forasmuch as the Words of the Act are, *To (a) every of the said Creditors a Portion, Rate and Rate like*, Distribution ought to be made to all the Creditors: But here it appears that the said *Tibnam* was a Creditor, and 64 *l.* due to him, and yet nothing is allotted or assigned to him, so the Sale is void. To that it was answered and resolved by the Court, that in this Case the Factor of the said *Tibnam*, *in ea parte*, refused to come in as a Creditor, but claimed all the Goods; And this Act gives Benefit to those who will enquire and come in as *(b)* Creditors, and not to those who either out of Obstinacy refuse, or through Carelesness neglect to come before the Commissioners and pray the Benefit of the said Statute; for *(c) vigilantibus & non dormientibus jura subveniunt*, for otherwise a Debt might be concealed, or a Creditor might absent himself, and so avoid all the Proceedings of the Commissioners by Force of the said Act. And every Creditor may take Notice of the Commission, being Matter *(d)* of Record as is aforesaid; and so no Inconvenience can happen to any Creditor who will be vigilant; but great Inconvenience will follow, and the whole Effect of the Act be overthrown, if other Construction should be made.

(b) 8 Co. 98. a Hob. 287. Hutt. 37, 38. Cr. Jac. 200.

(c) 4 Co. 10. b. 82. b. 2 Inst. 690. 1 Sid. 55. Palm. 157.

(d) Goodw. Bankr. 48.

BET-

BETTISWORTH's *Caſe.*

Paſch. 22 Eliz. *Rot.* 738.

In the Common Pleas.

THomas Bettiſworth was ſummons'd to anſwer to *John Hayward*, of a Plea wherefore he took the Cattle of the ſaid *John*, and them unjuſtly detained againſt Gages and Pledges, *&c.* and thereupon he the ſaid *John*, by *John Comber* his Attorney, complains, That the aforeſaid *Thomas*, the 28th Day of *October*, in the 19th Year of the Reign of the Lady now Queen at *Ipping*, in a certain Place called *Raynolds*, took the Cattle, that is to ſay, Two Cows of the ſaid *John*, and them unjuſtly detained againſt Gages and Pledges, until, *&c.* And whereupon he ſaith, that he is the Worſe, and hath Damage to the Valve of 10 *l.* And thereof he bringeth Sute, *&c.* And the aforeſaid *Thomas*, by *John Trot* his Attorney, comes and defends the Force and Injury when, *&c.* And doth well avow the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* And juſtly, *&c.* Becauſe he ſaith, That the ſaid Place in which it is ſuppoſed, the taking of the Cattle aforeſaid to be done, contains in itſelf one Acre and Half of Land with the Appurtenances, in *Ipping* aforeſaid, And that long before the aforeſaid Time in which, *&c.* One *John Bettiſworth*, was ſeized of and in one Meſſuage, and a Garden, twelve Acres of Land, and one Acre of Wood, with the Appurtenances, in *Ipping* aforeſaid, whereof the aforeſaid Place in which, *&c.* is, and the aforeſaid Time in which, *&c.* from the Time whereof the Memory of Men is not to be contrary, was Parcel in his Demeſn as of Fee; and ſo thereof being ſeized, the ſaid *John* long before the aforeſaid Time in which, *&c.* that is to ſay, the 20th Day of *March*, in the 11*th* Year of the Reign of the Lady the now Queen, at *Ipping* aforeſaid, by his Indenture made between the aforeſaid *John Bettiſworth* of the one Part, and the aforeſaid *John Hayward*, by the Name of *John Hayward*, of the ſame Pariſh and County, Husbandman, of the other Part, demiſed, granted, and to Farm Let, to the aforeſaid *John Hayward*, Eſſex, ſs.

the Tenements aforeſaid with the Appurtenances, whereof, *&c.* To have and to hold, the ſaid Tenements with the Appurtenances, to the ſaid *John Hayward* and his Aſſigns, from the Feaſt of the Annunciation of the Bleſſed *Mary* the Virgin, then next following, until the End and Term of 21 Years, and then next following, and fully to be compleat and ended; Yielding and paying, therefore yearly during the ſaid Term, to the aforeſaid *John Bettiſworth* and his Aſſigns, twelve Pence, at the Feaſt of St. *Michael* the Archangel, or within ten Days next after the ſaid Feaſt of St. *Michael* the Archangel. By virtue of which Demiſe, the ſaid *John Hayward*, in the Tenements aforeſaid with the Appurtenances entered and was thereof poſſeſſed, the Reverſion thereof to the ſaid *John Bettiſworth*, and his Heirs expectant; and the ſaid *John Hayward* ſo of the Tenements aforeſaid with the Appurtenances whereof, *&c.* being poſſeſſed, and the aforeſaid *John Bettiſworth* of the Reverſion thereof and of the Rent aforeſaid being ſeized in his Demeſn as of Fee, The ſaid *John Bettiſworth*, before the Time in which, *&c.* that is to ſay, the 3*d* Day of *January*, in the 19*th* Year of the Reign of the ſaid Lady the now Queen, at *Ipping* aforeſaid, died, of ſuch his Eſtate of the Reverſion and Rent aforeſaid, with the Appurtenances whereof, *&c.* ſeized, without Iſſue of his Body begotten; after whoſe Death, the ſaid Reverſion of the Tenements aforeſaid with the Appurtenances whereof, *&c.* deſcended to the ſaid *Tho. Bettiſworth*, as Brother and Heir of the ſaid *John Bettiſworth*; by which the ſaid *Thomas* was ſeized of the aforeſaid Reverſion, of the Tenements aforeſaid with the Appurtenances, whereof, *&c.* and of the Rent aforeſaid, in his Demeſn as of Fee. And becauſe twelve Pence of the Rent aforeſaid, for one whole Year after the Death of the aforeſaid *John Bettiſworth*, ended at the Feaſt of St. *Michael* the Archangel, in the 19*th* Year of the Reign of the ſaid Lady the now Queen, to the ſaid *Thomas* the aforeſaid Time in which, *&c.* was behind and not paid, the ſaid *Thomas* doth well avow the Taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* as in Parcel of the Tenements aforeſaid with their Appurtenances, to the aforeſaid *John Hayward* in form aforeſaid demiſed, and juſtly, *&c.* for the ſaid twelve Pence of the Rent aforeſaid to him the ſaid *Thomas* ſo being behind, *&c.* And the aforeſaid *John Hayward* ſaith, That the aforeſaid *Thomas*, for the Reaſon before alledged, ought not to avow the Taking the Cattle aforeſaid in the Place aforeſaid in which, *&c.* to be juſt; becauſe he ſaith, That well and true it is, That the aforeſaid *John Bettiſworth*, was ſeized of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in his Demeſn as of Fee, and ſo thereof being ſeized, Demiſed to the ſaid *John Hayward*, the Tenements aforeſaid,

with the Appurtenances whereof, *&c.* To have and to hold to the ſaid *John Hayward*, for the aforeſaid Term of the aforeſaid 21 Years, as the aforeſaid *Thomas* hath above alleged; but the ſaid *John Hayward* ſaith, That the aforeſaid *John Bettiſworth*, of the Reverſion of the Tenements aforeſaid with the Appurtenances, whereof, *&c.* in his Demeſn as of Fee, in Form aforeſaid being ſeized, before the aforeſaid Time in which, *&c.* into the Tenements aforeſaid with the Appurtenances whereof, *&c.* upon the Poſſeſſion of him the ſaid *John Hayward*, thereof entred, and him the ſaid *John* from his Poſſeſſion did expel, and amove, and immediately after, of the ſaid Tenements with the Appurtenances, whereof, *&c.* enfeoffed one *William Bettiſworth*, to have and to hold the ſaid Tenements with the Appurtenances, whereof, *&c.* to the ſaid *William*, and his Heirs and Aſſigns for ever; By Virtue of which Feoffment, the aforeſaid *William* was ſeized of the ſame Tenements with the Appurtenances, whereof, *&c.* in his Demeſn as of Fee, upon the which Poſſeſſion of the ſaid *William Bettiſworth* thereof the ſaid *John Hayward*, afterwards, and before the aforeſaid Time in which, *&c.* claiming his Term aforeſaid, of and in the Tenements aforeſaid with the Appurtenances, whereof, *&c.* into the ſaid Tenements with the Appurtenances, whereof, *&c.* re-entered, and was thereof Poſſeſſed; and ſo thereof being poſſeſſed, The ſaid *John Hayward*, before the aforeſaid Time in which, *&c.* put the Cattle aforeſaid, into the aforeſaid Place in which, *&c.* to eat the Graſs in the ſame then growing; which Cattle were in the ſaid Place in which, *&c.* eating the Graſs in the ſame then growing, until the aforeſaid *Thomas*, the Day and Year in the Declaration aforeſaid above ſpecified, at *Ipping* aforeſaid, in the aforeſaid Place called *Raynolds*, took the Cattle of him the ſaid *John Hayward*, and them unjuſtly detained againſt Gages and Pledges, until, *&c.* as he above againſt him complaineth: Without that, that the aforeſaid *John Bettiſworth*, died of the Reverſion of the Tenements aforeſaid with the Appurtenances, whereof, *&c.* and of the Rent aforeſaid ſeized, as the aforeſaid *Thomas* above hath alleged; and this he is ready to aver, wherefore inaſmuch as the aforeſaid *Thomas*, the Taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* above acknowledgeth. The ſaid *John Hayward* demandeth Judgment, and his Damages by the Occaſion of the Taking, and unjuſt Detaining of the ſaid Cattle, to be adjudged unto him, *&c.* And the aforeſaid *Thomas* as at firſt ſaith, That the aforeſaid *John Bettiſworth* died of the Reverſion of the Tenements aforeſaid with the Appurtenances whereof, *&c.* and of the Rent aforeſaid ſeized, as he hath above alledged; and of this he puts himſelf upon the Country, and the ſaid *John Hayward* likewiſe; Therefore

it is commanded to the Sheriff, that he cauſe to come here, from the Day of *Eaſter*, in five Weeks, 12 *&c.* by whom *&c.* And who, neither, *&c.* To recognize, *&c.* Becauſe as well, *&c.* At which Day here came the Parties, *&c.* And the Sheriff ſent not the Writ: Therefore as before, It is commanded to the Sheriff, that he cauſe to come here 12, *&c.* in the Morrow of the *Holy Trinity*, to recognize, *&c.* At which Day here cometh the Parties, *&c.* and the Sheriff ſent not the Writ, Therefore it is commanded the Sheriff as at firſt, That he cauſe to be here the Morrow of Saint *Martin*, 12 *&c.* to recognize in the Form aforeſaid, *&c.* at which Day come the Parties, and the Sheriff ſent not the Writ: Therefore as at firſt, it is commanded the Sheriff, that he cauſe to come here 12 *&c.* in 8 Days of St. *Hillary*, &c. To recognize, *&c.* in the Form aforeſaid, *&c.* At which Day the Parties come, *&c.* and the Sheriff ſent not the Writ, *&c.* Therefore as at firſt, it is commanded to the Sheriff, that he cauſe to come here from *Eaſter* Day in 15 Days, 12 *&c.* to recognize in Form aforeſaid, *&c.* at which Day here come the Parties, *&c.* and the Sheriff ſent not the Writ, *&c.* Therefore as at firſt, it is commanded the Sheriff that he cauſe to come here in the Morrow of the Holy *Trinity*, 12 *&c.* to Recognize in Form aforeſaid, *&c.* At which Day the Parties come here, *&c.* and the Sheriff ſent not the Writ, *&c.* Therefore as at firſt, it is commanded to the Sheriff, that he cauſe to come here in the Morrow of St. *Martin*, 12 *&c.* to recognize in Form aforeſaid, *&c.* At which Day the Parties come here, *&c.* and the Sheriff ſent not the Writ: Therefore as at firſt, it is commanded the Sheriff, that he cauſe to come in 8 Days of St. *Hillary*, 12 *&c.* to recognize in Form aforeſaid, *&c.* before which Day the Plea aforeſaid was adjourned, by the Writ of the Lady the Queen, of common adjournment from *Weſtminſter* in the County of *Middleſex*, to the Caſtle of *Hertford* in the County of *Hertford*, at which ſaid Day of the Morrow of St. *Martin*, here, to wit, at the Caſtle aforeſaid, came the Parties aforeſaid, and the Sheriff ſent not his Writ. Therefore as at firſt, it is commanded to the Sheriff, *&c.* as before, and the Sheriff ſent not the Writ, (And ſo ſeveral *Venire Facias* were awarded to the Sheriff, from Term to Term, to return Jurors at a Day, every of the ſaid Terms, as at firſt, and the Parties come at the ſaid Days, and the Sheriff ſent not the Writ; *as in the Rolls upon Record appeareth*) And Proceſs was continued between the Parties aforeſaid, of the Plea aforeſaid, by Jurors put in reſpit, until this Day, that is to ſay, in 8 Days of St. *Michael*, in the 31ſt Year of the Reign of the Lady the now Queen. Unleſs the Juſtices of the Lady the Queen to Aſſizes in the County aforeſaid to be taken aſſigned by the Form of the Statute, *&c.* upon *Wedneſday* the 27th of *June* at *Eaſt Ringſtead*

Vic. non miſit Iteve. *&c.*

Ringſtead in the County aforeſaid firſt ſhould come. And now here at this Day, as well the aforeſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth* come by their Attornies aforeſaid: And the aforeſaid Juſtices of Aſſize, before whom, *&c.* ſent here their Record in theſe Words: Afterwards the Day and Place within contained, before *Robert Clarke* one of the Barons of the Lady the Queen, of her Exchequer, and *John Puckering* one of the Serjeants at Law of the Queen, Juſtices of the ſaid Lady the Queen, to take Aſſizes in the County of *Eſſex*, aſſigned by the Form of the Statute, *&c.* come as well the within named *John Hayward*, by *William Siday* his Attorney, as the within written *Thomas Bettiſworth* by *John Lyons* his Attorney, and the Jurors of the Jury whereof within Mention is made, being called, ſome of them, that is to ſay, *Edward Pickham*, *William Ayles*, *Thomas Pertley*, *William Grevet*, *Edmond Gray*, *John Lock*, *John Capron*, and *John Andrew* appeared, and were ſworn Jurors in the ſaid Jury: And becauſe the reſt of that Jury did not appear, therefore others of the Standers-by choſen by the Sheriff, at the Requeſt of the aforeſaid *Thomas Bettiſworth*, and by the Command of the Juſtices aforeſaid, were of new put to them, whoſe Names to the Pannel within Written, are filled according to the Form of the Statute in ſuch Caſe of late made and provided: The Names of which Jurors ſo put to, that is to ſay, *John Pitte*, *Thomas Bayley*, *William Leefe*, and *Thomas Aylewyn* come; and to ſay the the Truth of the Matter within contained, together with the Jurors firſt impannelled and ſworn to ſay, choſen, tryed, and ſworn, ſay upon their Oath, That one *John Bettiſworth* was ſeized in his Demeſn as of Fee, of and in the within written Meſſuage, with the Garden, twelve Acres of Land, and one Acre of Woodland, with the Appurtenances, in *Ipping* within written, whereof the within written Place in which, *&c.* is and at the within written Time in which, as alſo Time whereof the Memory of Man is not to the contrary, was Parcel: And further the Jurors ſay upon their Oaths aforeſaid, that the aforeſaid Place in which, *&c.* doth contain, and the aforeſaid Time in which, *&c.* did contain in itſelf, one Acre and half an Acre of Land, and called by the Name of *Raynolds*, and is, and the aforeſaid Time in which, *&c.* as alſo Time whereof the Memory of Men is not to the contrary, was a ſeveral Cloſe by itſelf ſeparately incloſed; and further the Jurors ſay upon their Oath, That the aforeſaid *John Bettiſworth* ſo thereof (as before is ſaid) being ſeized: Afterwards, that is to ſay, the 20th Day of *March*, in the 11th Year of the Reign of the Lady the now Queen, at *Ipping* afore aid, By his Indenture within written, made between the aforeſaid *John Bettiſworth* of the one Part, and the aforeſaid *John Hayward* of the other,

Part,

Part, demiſed, granted, and to Farm Let to the aforeſaid *John Hayward*, the Tenements aforeſaid with the Appurtenances whereof, *&c.* To have and to hold the ſaid Tenements with the Appurtenances whereof, *&c.* to the aforeſaid *John Hayward*, and his Aſſigns, from the Feaſt of the bleſſed *Mary* the Virgin then next following, unto the End and Term of 21 Years then next following, *&c.* fully to be compleat and ended; Yielding and paying therefore yearly, to the aforeſaid *John Bettiſworth* and his Aſſigns 12 *d.* At the Feaſt of St. *Michael* the Archangel, or within 10 Days next after the ſaid Feaſt. By Virtue of which Demiſe, the ſaid *John Hayward* into the Tenements aforeſaid with the Appurtenances whereof, *&c.* entred, and was thereof poſſeſſed, the Reverſion thereof to the aforeſaid *John Bettiſworth* and his Heirs expectant: And he the ſaid *John Hayward* ſo of the Tenements aforeſaid with the Appurtenances whereof, *&c.* being poſſeſſed: And the aforeſaid *John Bettiſworth* of the Reverſion thereof, and of the Rent aforeſaid being ſeized in Demeſn as of Fee: The ſaid *John Bettiſworth* into the aforeſaid Cloſe, in which, *&c.* called *Raynolds*, in the Poſſeſſion of the ſaid *John Hayward*, entred, and there immediately after, ſealed and delivered as his Deed, a certain Deed, containing a Feoffment of the Tenements aforeſaid, with the Appurtenances whereof, to one *William Bettiſworth* his Heirs and Aſſigns for ever; And further, the Jurors ſay, upon their Oath aforeſaid, that immediately after the ſealing and delivery of the Deed of Feoffment aforeſaid, Poſſeſſion and Seiſin upon that Deed of Feoffment was given and delivered, by the aforeſaid *John Bettiſworth*, to the aforeſaid *William Bettiſworth*, in and upon the aforeſaid Cloſe called *Raynolds*, in which, *&c.* Neither the aforeſaid *John Hayward*, nor any other for him, at the ſaid Time of the Giving and Delivery of the ſaid Poſſeſſion or Seiſin, in the ſaid Cloſe being; By Virtue whereof, the ſaid *William Bettiſworth*, into the Tenements aforeſaid with the Appurtenances, whereof, *&c.* entred, and thereof was ſeized, as the Law requireth. And the Jurors further ſay upon their Oath aforeſaid, That the aforeſaid *John Hayward*, at the Time of the Giving and Delivery of the Poſſeſſion and Seiſin in the Cloſe aforeſaid, was in the Meſſuage and the Reſidue of the Tenements aforeſaid, with the Appurtenances, by Virtue of the Leaſe aforeſaid to him made; and that afterwards and before the Time in which, *&c.* the aforeſaid *John Hayward* into the aforeſaid Cloſe called *Raynolds*, with the Appurtenances in which, *&c.* re-entred, claiming the ſame Cloſe by Virtue of the Leaſe aforeſaid, to him in Form aforeſaid made; And further, the Jurors ſay, upon their Oath aforeſaid, That afterwards, and before the ſaid Time

Time in which, *&c.* that is to ſay, the 3d Day of *January*, in the 19th Year of the Reign of the ſaid Lady the now Queen, the ſaid *John Bettiſworth*, at *Ippin* aforeſaid died, without Iſſue of his Body begotten; And that the aforeſaid *Thomas Bettiſworth*, is his Brother and next Heir. But whether upon the whole Matter aforeſaid, in Form aforeſaid found the Poſſeſſion and Seiſin in Manner and Form aforeſaid, given and delivered, of and in the aforeſaid Cloſe called *Raynolds*, in which, *&c.* be, or in Law ought to be adjudged a good and lawful Poſſeſſion and Seiſin of the aforeſaid Cloſe called *Raynolds*, in which, *&c.* the Jurors are utterly ignorant, and thereof they pray the Advice of the Juſtices here of the ſaid Lady the Queen, and if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the ſaid Juſtices of the ſaid Lady the Queen, That the aforeſaid Poſſeſſion and Seiſin, in Manner and Form aforeſaid given and delivered, of and in the aforeſaid Cloſe called *Raynolds*, be, or in Law ought to be adjudged, a good and lawful Poſſeſſion and Seiſin, of the aforeſaid Cloſe called *Raynolds*, in which, *&c.* with the Appurtenances, *&c.* Then the Jurors aforeſaid, ſay upon their Oath aforeſaid, That the ſaid *John Bettiſworth*, did not die ſeized of the Reverſion of all the Tenements within written, with their Appurtenances whereof, *&c.* nor of the Rents within written ſeized, as the ſaid *John Hayward* within for *him* alledgeth. And then they aſſeſs Damages of the ſaid *John Hayward*, for the Occaſion within written, above his Coſts and Charges by him the ſaid *John Haward*, about his Sute in this Part, expended to four Pence, and for his Coſts and Charges to two Pence. But if upon the whole Matter aforeſaid, in Form aforeſaid found, It ſhall ſeem to the ſaid Juſtices of the ſaid Lady the Queen, That the aforeſaid Poſſeſſion and Seiſin, in Manner and Form aforeſaid given and delivered, of and in the aforeſaid Cloſe called *Raynolds*, in which, *&c.* be not, nor in Law ought to be adjudged a good and lawful Poſſeſſion and Seiſin of the aforeſaid Cloſe called *Raynolds*, in which, *&c.* Then the Jurors ſay, upon their Oath aforeſaid, That the aforeſaid *John Bettiſworth* died of the Reverſion of the Tenements aforeſaid with the Appurtenances, whereof, *&c.* and of the Rents aforeſaid ſeized, as the ſaid *Thomas Bettiſworth*, within for him hath alledged. And then they aſſeſſe Damages of the ſaid *Thomas Bettiſworth*, for the Occaſion within written, above his Coſts and Charges mentioned about his Sute in this Part expended to four Pence, and for his Coſts and Charges to two Pence. And becauſe the Juſtices here will aviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, Day is given to the Parties aforeſaid,

aforeſaid, here until in 8 Days of St *Hillary*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day here cometh as well the aforeſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, further Day is given to the Parties aforeſaid, here until from the Day of *Eaſter* in 15 Days, to hear their Judgment thereof, becauſe the Juſtices here thereof not yet, *&c.* At which Day, here comes as well the aforeſaid *John Hayward*, as the ſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; And becauſe the Juſtices here, will further adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, Day further is given to the Parties aforeſaid here, until the Morrow of *Holy Trinity*, to hear their Judgment thereof, becauſe the Juſtices here thereof not yet, *&c.* At which Day here cometh as well the aforeſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties aforeſaid, here until in 8 Days of St. *Michael*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day, here cometh as well the ſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; and becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, Day further is given to the Parties aforeſaid, here until in 8 Days of St. *Hillary*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day, here cometh as well the aforeſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; And becauſe the Juſtices here, will further adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, further Day is given to the Parties aforeſaid, here until from the Day of *Eaſter* in 15 Days, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day here cometh as well the aforeſaid *John Hayward*, as the aforeſaid *Thomas Bettiſworth*, by their Attornies aforeſaid; And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day further is given to the Parties aforeſaid here until the Morrow of *Holy Trinity*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day, here cometh as well the aforeſaid *John*, as the aforeſaid *Thomas*, by their Attornies aforeſaid, and upon this, The Premiſſes being ſeen, and by the Juſtices here fully

fully underſtood, It is *granted*, that the aforeſaid *John*, take nothing by his Writ aforeſaid, but be in Mercy for his falſe Clamour, *&c.* And the aforeſaid *Thomas* go thereof without Day, *&c.* And that he have return of the Cattle aforeſaid to be kept by him irreplegible for ever. And how, *&c.* The Sheriff make it here appear in 8 Days of St. *Michael*, *&c.* It is alſo *granted*, That the aforeſaid *Thomas* recover againſt the ſaid *John*, his Damages aforeſaid by the Jurors in Form aforeſaid aſſeſſed, as alſo 11 *l.* and 9 *s.* and 6 *d.* to the ſaid *Thomas* at his Requeſt, for his Coſts and Charges aforeſaid, by the Court here of encreaſe adjudged which Damages, in the Whole do amount to 12 *l.* *&c.*

BET-

BETTISWORTH's *Caſe.*

Paſch. 22 Eliz. Rot. 738.

And adjudged in the Common Pleas, Trin. 33 Eliz.

Moor 250. 2 Rol. 4. Co. Lit. 18. b.

IN a Replevin between *Haywood* and *Bettiſworth* in the Common Pleas, which began *Paſch.* 22 *Eliz. Rot.* 738. the Caſe was ſuch: A Leaſe for Years was made of a Houſe, of a Cloſe called *Reynolds*, and of divers other Lands in *Dale*, which Cloſe called *Reynolds* was incloſed and ſevered by itſelf; and afterwards the Leſſee being in the Houſe, the Leſſor entred into the Cloſe and made a Feoffment of the Houſe ~~and~~ of all the Land ſo demiſed, and made Livery in the ſaid Cloſe, the Leſſee continuing in the ſaid Houſe, and not put out thereof, and afterwards the Leſſee re-enter'd into the ſaid Cloſe, and if this was a good Feoffment and Livery of Seiſin of the ſaid Cloſe, the Leſſee nor any other for him being upon the Cloſe, was the Doubt.

(*a*) Dyer 18. pl. 106. 2 Brownl. 230. Cr. El. 322. 2 Rol. 4. Co. Lit. 48. b.

And it was adjudged that the (*a*) Livery and Seiſin was void, as well for the Cloſe as for the Houſe and the other Lands ſo demiſed. For when a Meſſuage with Land is entirely demiſed, the Meſſuage is the Principal, for that ſerves for the Habitation of Man, and in (*b*) a *Præcipe* ſhall be firſt demanded as the more worthy before Land; and the Demand for (*c*) Rent Arear ſhall be at the Houſe as the moſt principal and notorious Thing. So that the Meſſuage being more worthy, and the Principal, and the Land but as Acceſſary, without Queſtion the Poſſeſſion of the Houſe is a good Poſſeſſion of the Land demiſed with it.

(*b*) F. N. B. f. 2. c. Co. Lit. 4. a.

(*c*) Co. Lit. 201. b. 202. a.

Secondly, the Leſſee cannot be upon every Parcel of the Land for the Preſervation and Continuance of his Poſſeſſion, for it may be that (*d*) divers Parcels of the Lands demiſed lie in ſeveral Places, and diſtinct one from the other by ſeveral Diſtances; and therefore it is but reaſonable, that his Continuance, not only in the Houſe, but alſo upon any other Part of the Land demiſed, ſhall be a good

(*d*) Cr. El. 322. Co. Lit. 48. b.

Poſſeſſion

Poſſeſſion of the Reſidue. And ſo it was reſolved by the whole Court.

Thirdly, Peradventure the Leſſee durſt not for Fear of Force, *&c.* be upon the Land to preſerve his Poſſeſſion, but his Houſe is his *(a)* Caſtle, which he may by Law ſafely keep, and therefore the Caſe of the Houſe is ſtronger. And this Difference was taken; when a Man lawfully departs with his Poſſeſſion, and when a Man keeps his Poſſeſſion againſt an unlawful and torcious Entry. For when a Man makes a Feoffment of a *(b)* Meſſuage *cum pertinentiis*, he departs with nothing thereby but what is Parcel of the Houſe, *ſcil.* the Buildings, *(c)* Curtilage, and Garden; but in the Caſe at Bar, the Keeping of the Poſſeſſion of the Houſe or any Part of the Thing demiſed, againſt a torcious Entry and Expulſion by the Leſſor, is not only a Poſſeſſion of all that which might paſs by the Name of the Houſe or of ſuch Parcel, *(d)* but of all Lands, *&c.* which are demiſed by one entire Demiſe in one and the ſame County for the Reaſons and Cauſes aforeſaid. And it is not material whether the Thing whereof the Livery was made be within the View or not; but if the Leſſee for Years in the ſame Caſe make a Leaſe for a *(e)* certain Term of any Parcel, and ſo divides the Poſſeſſion thereof from the Reſidue, if of ſuch Parcel ſo ſevered Livery be made, the Poſſeſſion in the Reſidue by the firſt Leſſee is not any Impediment to the Livery of this Parcel; otherwiſe, if the Leſſee makes a Leaſe *(f)* at Will of any Parcel, for there his Poſſeſſion of the Reſidue ſhall hinder the Livery made in ſuch Parcel. And with this Judgment agreed all the other Judges and Serjeants of *Serjeants Inn* in *Fleet-ſtreet*.

(a) 5 Co. 91. b. 7 Co. 6. a. Cro. El. 753. 8 Co. 126. a. 11 Co. 82. a. 1 Bulſtr. 146.

(b) Plowd. 186. 21 H. 8. Br. Feoffment 23. 31. H. 8. Br. Leaſes 55.

(c) Co. Lit. 5. Dall. 5. 6.

(d) Co. Lit. 48. b.

(e) 2 Rol. 4.

(f) 2 Rol. 4. Dyer 18. b. pl. 106.

DOD-

DODDINGTON's *Caſe.*

Mich. 36. & 37 Elizab.

In the Common Pleas.

Poph. 60. 2 Rol. 51. Cr. El. 368.

William Hall brought an Ejectment againſt *John Peart* and *James Peart*, on a Demiſe made by *William Doddington* of Lands in the Pariſh of *Dynder* in the County of *Somerſet*, 16 *Martii*, 24 *Eliz.* for ſeven Years, from the Feaſt of St. *Michael* then paſt; and upon Not guilty pleaded, the Jury gave a ſpecial Verdict to this Effect: King *Hen.* 8. was ſeiſed of the Scite of the late Hoſpital of St. *John* of *Wells* in the ſaid County of *Somerſet*, and of all the Lands and Tenements appertaining to the ſaid late Hoſpital (whereof the Tenements aforeſaid, in which, *&c.* were Parcel) and that the Tenements aforeſaid, in which, *&c.* lay in the Pariſh of *Dynder*, and are diſtant from the City of *Wells*, and from the Suburbs and Liberty thereof by the Space of a League; And afterwards the ſaid King, by his Letters Patents bearing Date 26 *Martii*, 36 of his Reign, under the Great Seal *(ex certa ſcientia & mero motu ſuis) & in conſideratione de* 300 l. *dedit & conceſſit Johanni Aylworth & Radulpho Duckinfield, omnia & ſingula illa meſſuagia, toſta, cottagia, terras, tenementa, ædificia, & gardina ſua quæcunque cum pertinentiis tunc vel nuper in ſeparalibus tenuris ſive occupationibus Thomæ Gibbes, Johannis Brown* (and divers others by ſpecial Names) *ſcituat', jacent' ſeu exiſten' in Civitate Wells in dicto Com' Somerſet, ac in ſuburbiis ejuſdem Civitatis & extra eand' Civitatem infra juriſdictionem & libertat' ejuſdem Civitatis dicto nuper Prioratui ſive Hoſpitali dudum ſpectant' & pertinent', quæ quidem meſſuagia, toſta, &c. in dicta Civitate Wells ac ſuburbiis dicto nuper Hoſpitali ſpectant', tunc extendebantur ad clarum annuum valorem* 40 l. 3. s. 8 d. *Habendum & tenendum omnia & ſingula premiſſa præfato*

præfato Jo. A. & Ra. D. & hæredibus ſuis, ad opus & uſum prædict' J. A. & hæredum ſuorum. And the Jury further found, that at the Time of the Particular made by the Auditor of the ſaid late King, upon which the ſaid Grant was made, and at the Time of the Grant aforeſaid, the ſaid *John Brown* was Tenant of the Tenements aforeſaid, in which, *&c.* for the yearly Rent of 6 *s.* 8 *d.* which *John Brown* was named in the ſaid Particular, and that he paid the ſaid Rent. And the Jury found that the ſaid *John Brown*, at the Time of the ſaid Particular and Grant, was Farmer of the Tenements in which, *&c.* and had not any other Lands Parcel of the ſaid late Hoſpital in *Wells*, but only the Tenements in which *&c.* And that the ſaid Rent of 6 *s.* 8 *d.* was Parcel of the Value of the ſaid 40 *l.* 3 *s.* 8 *d.* mentioned in the ſaid Particular, and in the ſaid Letters Patents. And that the ſaid *John Ayleworth* died, and that *Aſhton Ayleworth* his Son and Heir demiſed the Tenements aforeſaid to the Defendants for their Lives. And that the Queen that now is, 5 *Jul.* 30 of her Reign, granted to *Edw. Borough* the Reſidue of the Tenements appertaining to the ſaid late Hoſpital not granted to *Jo. A.* and *Ra. D.* who by Deed enrolled ſold them to the ſaid *William Doddington*, who leaſed them to the Plaintiff, *prout*, *&c.* upon whom the Defendants entred. And if their Entry was lawful or not was the Queſtion. And in this Caſe two Points were moved:

1. Whether this Grant of the King was good by the Common Law or not?

2. If it was void by the Common Law, Whether the Statute of (*a*) 34 *H.* 8. *cap.* 21. hath made it good?

And as to the firſt Point, it was reſolved by *Popham* Chief Juſtice, *Glench*, *Gawdy*, and *Fenner*, Juſtices, that the Grant was void by the Common Law, as this Caſe is, as well in the Caſe of a common Perſon as in the Caſe of the King. For as to that, the Point is but thus, the King or a common Perſon grants *omnia illa meſuagia in tenura Johannis Brown, ſituat' in Well', nuper Prioratui de W. ſpectant'*, and in (*b*) Truth the Lands lie in *D.* in this Caſe, becauſe the Grant is general, and is reſtrained to a certain Town, the Patentee or Grantee ſhall not have any Lands out of the Town to which the Generality of the Grant doth refer. And this Caſe is the ſtronger by Reaſon of this Pronoun (*c*) (*illa*) for *omnia illa meſuagia*, *&c.* makes ſuch a neceſſary Reference as well to the Town as to the Tenure of *John Brown*, that if one or the other fail, the general Grant is void; for (*illa*) is not ſatisfied till the Sentence is ended, and (*illa*) governs all the Sentence till the full Stop. Wherefore it was unanimouſly agreed by the whole Court, (*d*) that this

(*a*) Raſtal Patents 12. Cr. Jac. 50, 51. Godb. 416. 422. Moor 45. 421. Poph. 60. 34. & 35 H. 8. c. 21. 2 Rol. Rep. 273. 274. 355, 356, 359. Dyer 87. pl. 101. 129. pl. 65. 331. pl. 22.

(*b*) Cr. Car. 473. 548. 2 Rol. 54, 55. Moor 45. 881. Cr. El. 299. 368. Cr. Jac. 22, 34. 483, 680. 1 Anderſon 148. 3 Leon. 162, 235. 1 Leon. 21. 3 Co. 10. a. Carter 154. Plowd. 191. b. 10 Co. 113. a. Dyer 50. pl. 6, 7, 8, 87, pl. 101. 129. pl. 65. 2 Bulſtr. 178. Godbolt 416. Hob. 171. Goldsb. 23, 24. 10 Co. 113. a.

(*c*) 4 Co. 35. a. Poph. 60. Cr. Jac. 48. Moor 755. 3 Keb. 413, 414. Hard. 225. 2 Rol. Rep. 118. Godb. 423. (*d*) 2 Rol. Rep. 275. Poph. 60.

this Grant was void by the Common Law. But the greater Doubt was conceived upon the ſecond Point; for the ſaid Act of 34 *H.* 8. makes all Letters Patents, which ſhall be made within ſeven Years after, good, *notwithſtanding the miſ-naming of any Town wherein the Honours, Manors,* &c. *granted do lie.* And it was ſaid, that here the Town was miſ-named, for the Tenements lay in *D.* and are ſuppoſed by the Patent to lie in *W.* and ſo the Town is miſtaken. And to this Purpoſe the Book in 3 *Mar. Dier* 129. *b.* was cited, (*a*) *Heydon*'s Caſe, where it is conceived that the Miſpriſion of the Town and of the Name of the Tenant alſo are remedied by the ſaid Act. And in this Caſe at the Bar it appears that the Tenements in the Tenure of *J. B.* were contained within the Particular, and were Parcel of the Value mentioned in the Letters Patents, which *John Aylesworth* and *Ra. D.* purchaſed of the King. And by the Letters Patents all Lands in the Tenure of *J. B. &c.* are granted, as appears before. And ſo it appears as it was objected, That it was the King's Intent to paſs them, and the King was not deceived in his Grant, for they were Parcel of the Value which the Patentees purchaſed, and the King hath accepted a Conſideration of Money from the Patentees for the ſame.

(*a*) Dyer 129. pl. 65. Godb. 422. pl. 491. 2 Rol. Rep. 360. 3 Leon. 162. 1 Anderſon 148. Goldsb. 23, 24.

But it was reſolved by the whole Court, that notwithſtanding theſe Lands were in the Tenure of *J. B.* for the Rent of 6*s.* 8*d.* and were Parcel of the Value mentioned in the Letters Patents; and if this Miſpriſion of the Town be not remedied by the ſaid Act, the Patentees ſhould loſe ſo much of their Value as was in the Tenure of *J. B.* and the ſaid Grant of all the Lands in the Tenure of *J. B.* ſhould by the Miſpriſion of the Town only be utterly void; yet the ſaid Grant was not remedied by the ſaid Act. And a Difference was taken between a general Grant as our Caſe is, and a Grant which comprehends (*b*) convenient Certainty: For ſuch general Grants are not remedied by the ſaid Statute, nor by any other Act of Confirmation of Letters Patents, but ſuch Grants only which comprehend convenient Certainty, and that for two Reaſons:

(*b*) 3 Co. 10. a. Moor 45. Dyer 50. pl. 6, 7, 8.

1. Becauſe (*c*) *generale nihil certum implicat*; For if a common Perſon be (*d*) bound to deviſe or grant all his Lands in the Tenure of *J. B.* in *W.* the Obligor may ſay, that he hath not any Lands there, for *generale nihil ponit*: And with that agreeth the Book in 21 *E.* 4. If a Man be bound to be Nonſuit in all Actions which he hath againſt one in the Common Pleas, he may ſay, he had no Action there: otherwiſe if the Condition be particular, *ſcil.* that he ſhall be Nonſuit in a *Formedon, &c.* So that it appears, that

(*c*) 2 Rol. Rep. 300. 3 Keb. 414. 2 Sid. 36. 8 Co. 98. a.
(*d*) 1 Rol. 872. Cr. El. 362. 2 Rol. Rep. 83. Poph. 114, 115. Owen 112, 111. Moor 406. Dall. 28. 2 Rol. Rep. 408.

that general Words do not imply any Certainty, nor ſhall conclude any Perſon to ſay that he had nothing there. And the Difference between general Grants and particular, appears in *Plow. Comm.* in (*a*) *Worteſley's* Caſe 191. (*b*) 20 *Aſſ.* 8. 9 *H.* 6. *fol.* 11, 12. (*c*) 2 *Edw.* 4. 27. Then for as much as the Eſſence of this general Grant in the Caſe at Bar depends upon the Town, if the Town be miſtaken nothing is granted. And in this Caſe it cannot be ſaid that the Town in which the Tenements lie, as the Statute ſpeaketh, is miſnamed; for no Tenements are granted or mentioned to be granted by theſe Letters Patents, becauſe the general Grant being entire was referred to a Falſity, it cannot be conſtrued to extend to any Lands or Tenements, and therefore it cannot be ſaid, that the Town in which the Lands lay, *&c.* is miſnamed.

(*a*) Cr. Car. 473.
(*b*) Fitz Aſſize 217. Br. Grant 69.
(*c*) Plow. 395. a. Fitz Releaſe 11. Br. Releaſe 46. Br. Grant. 92.

Secondly, Great Inconvenience will follow, if ſuch general Grants ſhall be remedied by the ſaid Act; for ſuppoſe, That the King being ſeiſed of 1000 Acres of Land of the yearly Value of 100 *per Ann.* in *D.* in the County of *N.* Parcel of the Poſſeſſions of the late Priory of *N.* and one will deſire the King to grant to him all his Lands in *F.* in the County of *S.* appertaining to the ſaid Priory, and in Truth the King hath nothing in *F.* and becauſe none of his Officers can find any Lands there appearing to the King, he was the more eaſily induced to make the Grant. But in ſuch Caſe, if by ſuch Conſtruction all the Land which the King hath in *D.* in the County of *N.* ſhall paſs, it would be inconvenient. For as it is ſaid, (*d*) *Dolus verſatur in generalibus*; and the King and all his Officers would be by ſuch Conſtruction utterly deceived. And therefore when the general Words of the Patent do not comprehend Content, Number, Nature, Quality, certain Name, nor any convenient Certainty of the Land, but the Town is the principal Thing which reſtrains the Generality of the Grant, and reduces it to a Certainty, it would be dangerous to extend the ſame out of the Town compriſed in the Grant by any Conſtruction upon the ſaid Statute. But it is otherwiſe when the Grant doth comprehend any convenient (*e*) Certainty, as of a Manor, Farm, Land known by a certain Name, or containing ſo many Acres, *&c.* ſo as there may appear in the Letters Patents ſome convenient Certainty of the Thing which the King intended to paſs, for there the ſaid Act doth remedy it, and the King cannot in ſuch Caſe be deceived. And as to the (*f*) Particular, the Judges in this Caſe did not give any Regard to it, for in

(*d*) 3 Co. 81. a. 1 Roll. Rep. 357. 2 Bulſtr. 226. Moor 321.

(*e*) Cr. Jac. 34.

(*f*) Hob. 111.

this Caſe they ought to ground their Judgment upon the Letters Patents, and not upon the Particular, for the Particular is *prima intentio Regis*, and the Letters Patents are *ultima intentio Regis.* And to this Purpoſe the Book in 16 *Eliz. Dyer* 331 *b.* was cited, where the Judges took no Regard to the (*d*) Particular. But note, The principal Caſe there is not to be likned to the Caſe at Bar; for there the Words of the Letters Patent are ſatisfied, but not in this Caſe, and therefore the greater Doubt was conceived upon it; but the ſaid Caſe of 16 *Eliz.* was agreed to be good Law by the whole Court. And afterwards Judgment was given for the Plaintiff.

(*a*) Dyer 331. pl. 22. Hob. 111

Note Reader, It is the moſt ſure Way for the Patentee to expreſs in the King's Grant before the general Words as much as he can in certain. *Vide* 38 *H.* 6. 38. *b.* a *Difference between a ſpecial Confirmation by Parliament and a general one.* And the Attorney General and others were of Council with the Plaintiff, and *Godfrey* and others with the Defendants.

Note.

Sir

Sir ROWL. HEYWARD's *Caſe.*

Paſch. 37 Eliz.

In the Court of Wards.

SIR *Rowland* (a) *Heyward* Knight, ſeiſed in Fee of the Manors of *Doddington*, alias *Ditton*, *Round Acton*, and *Wenlock* in the County of *Salop*, and of divers other Lands and Tenements, whereof Part was in Demeſn, Part in Leaſe for Years with Rent reſerved, and Part in Copyhold; by Indenture dated 2 *die Septembris*, *Anno* 34 *Reginæ Eliz.* in Conſideration of a certain Sum of Money paid to him by *Richard Warren*, *Edward Pilſworth*, and *William Cotton*, demiſed, (b) granted, bargained and ſold to the ſaid *Warren*, *Pilſworth* and *Cotton*, the ſaid Manors, Lands, Tenements, and the Reverſions and Remainders of them, with all Rents reſerved upon any Demiſe, to have and to hold to them and their Aſſigns preſently after the Deceaſe of the ſaid Sir *Rowland Heyward*, for the Term of 17 Years, yielding to the Heirs of Sir *Rowland* a Red Roſe at the Feaſt of St. *John Baptiſt*; which Indenture was acknowledged to be enrolled, and afterwards the ſaid Sir *Rowland* by another Indenture covenanted with *Thomas Fanſhaw* and others to ſtand ſeiſed of the Premiſſes to the Uſe of himſelf and the Heirs of his Body; And no Attornment was ever made to the ſaid *Warren*, *Pilſworth* or *Cotton*. And afterwards Sir *Rowland* died ſeiſed of the Premiſſes, his Heir within Age, and left a third Part to deſcend to his Heir: In the Court of Wards the Queſtion was, Whether *Warren* and the other Leſſees ſhould have the Demeſns, and the Rents of the Copyholders by the Demiſe, as an Intereſt at the Common Law, and the Rents of the Leſſees for Years by Bar-

(a) 2 Anderſ. 202. pl. 19. Poph. 95. 5 Co. 40. a. Hob. 159.

(b) 1 Siderfin 267.

gain and Sale by the Statute of 27 *H.* 8. without Attornment; or whether any Attornment by the Common Law was requiſite at all to this future Intereſt, or whether the Bargainees ſhould have (*a*) Election to take it by the Bargain and Sale *in toto*, or by the Demiſe *in toto*, notwithſtanding their general Entry; or whether the Intereſt which paſſed as an Intereſt at Common Law ſhould be preferred before the raiſing of an Uſe. And after many Arguments and great Deliberation, it was reſolved by *Popham* and *Anderſon* Chief Juſtices, and the whole Court of Wards:

(*a*) 4 Co. 74. a.

Firſt, If it ſhould paſs as a future Intereſt at the Common Law, there ought to be Attornment of the Leſſees for Years, and the Attornment in this Caſe ought to be in the (*b*) Life of Sir *Rowland* which is before the Intereſt commences. But if a Man makes a Leaſe of a Manor to begin at a Day to come, the Tenants may attorn either before or after the Day, ſo as the Attornment be in the Life of the Parties. And in the Caſe at Bar, becauſe there was not any Attornment of the Leſſees for Years in the Life of Sir *Rowland Heyward*, it was reſolved, that if they take this Intereſt as a Demiſe at Common Law, they ſhould not have the ſaid Rents reſerved upon the ſaid Leaſes for Years.

(*b*) Vaughan 46. 1 Co. 104. b. 155. b. Lit. Sect. 551. 568. Co. Lit. 151. b. 309. a. b. 315. a. 316. a. 9. E. 4. 39. a. 40. Aſſ. 19. Br. Attornment. 55.

Secondly, That it ought to take Effect (*c*) intirely as a Demiſe at Common Law, or intirely by Bargain and Sale by raiſing of an Uſe, and not for Part by the Common Law, and for other Part by raiſing of an Uſe, for by that the Manor would be diſmembered, which would be againſt the expreſs Demiſe and Bargain; for both Parties agree that a Manor ſhould be wholly demiſed and bargained, and a Manor accepted by the Leſſee without any Fraction or Diviſion thereof.

(*c*) Moor 496. Cr. Car. 290. 2 Brownl. 52. Hob. 159. Lit. Rep. 279.

Thirdly, It was reſolved, that in this Caſe *Warren*, *Pilſworth*, and *Cotton*, had (*d*) Election to take it, either by Demiſe at the Common Law, or by Bargain and Sale; for although at the Common Law, if (*e*) *Ceſtuy que uſe* and his Feoffees join in a Feoffment, Grant, or Demiſe generally, it ſhall by Conſtruction of Law be the Feoffment, Grant or Demiſe of the Feoffees who were Owners of the Lands, and who paſs the Eſtate by Common Law, and not by *Ceſtuy que uſe* who hath nothing but a Truſt and Confidence, and who derives only his Authority by the Statute of (*f*) 1 *R.* 3. as it is agreed in 21 *H.* 7. and the Common Law ſhall be in ſuch Caſe by its own Conſtruction preferred; yet when a Man ſeiſed of Land in Fee, for Money demiſes, grants, bargains and ſells his Land for Years, he who is owner of the Land by his expreſs Grant, gives Election to the Leſſee to take it by the one Way or the other, for he hath ſole Power to paſs it by Demiſe or by Bargain; And therefore the Law will not make Conſtruction againſt ſuch expreſs Grant, and namely

(*d*) 2 Rol. 787. Hob. 159. 1 Jones 206. Poph. 95. 2 Anderſ. 203. 2 Inſt. 671, 672. Poſtea 37. b. 1 Brownl. 142. Yelvert. 123, 124. 1 Mod. Rep. 176. 8 Co. 93. b. 94. a.

(*e*) Co. Lit. 49. a. 2 Rol. Abr. 64. pl. 6.

(*f*) 1 R. 3. cap. 1.

Skinner. 72. Poph. 95.

in this Case, when it will trench to the Prejudice of the Lessees; for if the Law should enforce them to take it by Demise, then they would lose the Rents reserved upon the said Leases for Years; for it was agreed, if this Interest should take Effect by Bargain and Sale, then an (a) Attornment is not necessary; for the Statute of 27 *H.* 8. *cap.* 10. of Uses, doth execute the Possession to it. And the Statute of 27 *H.* 8. *cap.* 16. of Enrolments doth not extend to it, because no Estate of Freehold passes, but (b) only an Estate for Years. Also at this Day an Use and Interest pass in a Manner *uno flatu* together in an Instant.

(a) Co. Lit. 309 b. Cr. El. 285. 5 Co. 113. a. 6 Co. 68. b. 69. a. 8 Co. 94. a.

(b) 2 Rol. Rep. 204. 2 Inst. 671. 8 Co. 94. a.

Fourthly, It was resolved, that this (c) Election doth remain to them, notwithstanding the Alteration of the Estate by the second Indenture, and notwithstanding the Death of the Lessor, and notwithstanding also the Queen was entitled to the Wardship of the Heir, as appears before; for they had an (d) Interest in them presently, which they before Election might assign over, and which the Executors of the Survivor should have, although they all died before Election; for here is not Election to claim one of two several Things by one and the same Title, but to claim one and the same Thing by one of the two several Titles; for where the Things are several, nothing passes before Election, and the Election ought to be precedent; but when one and the the same Thing shall pass, there it passeth presently, and the Election of the Title may be subsequent; and therefore if I have three Horses, and I give you one of my Horses, in this Case the Election ought to be made in the Life of the Parties, for inasmuch as (e) none of the Horses is given in certain, the Certainty, and thereby the Property begins by Election. And with that agreeth 10 *Eliz.* 281. (f) *Bullock's* Case; The Bp. of *Sarum* having a great Wood of 1000 Acres (called *Berewood*) enfeoffed another of an House and 17 Acres Parcel of the Wood, and made Livery in the House, none of the Wood passed before Election, and therefore his Heir shall not make Election: But when one only Thing is granted, and the Party hath Election to take it in one Manner or another, there the Interest vests presently, and it shall be always in the Election of the Grantee or his Executors at any Time to elect in what Manner and Degree he will claim it: As if I grant you a Rent of 40 *s.* out of my Manor of *D.* for Years, you shall have in this Case but one Sum of 40 *s.* but you shall have Election to take it in what Manner and Degree you will, that is to say, (g) either as a Rent-charge to charge the Manor by Distress, or to charge the Person of the Grantor in a Writ of Annuity, and therefore the Interest passeth presently, and you or your Executors at any Time shall make Election at your Pleasure, and in the mean time the Law will not determine it one Way or

(c) 1 Jones 206.

(d) Co. Lit. 145.

(e) C. Lit. 145. a.

(f) 1 Rol. Abr. 725. 1 Jones 136. Hob. 174, 222. 1 Anderf. 11. 12. Dyer 280, 281. pl. 17, 18, 19, 20. Moor 81, 82, &c. N. Ben. 148. pl. 206. 1 Rol. Rep. 187. 2 Rol. Abr. 11.

(g) Co. Lit. 144. b. 145. a. F. N. B. 152. a. Plow. 13. a.

other. And therefore it was reſolved by all the Juſtices of *England*, and afterwards adjudged in the Common Pleas in a Writ of Annuity between *George* (*a*) *Fulwood*, Gent. Plaintiff, and *William Ward*, Gent. Defendant, where the Caſe was: That *William Ward* being Tenant for Years, determinable upon the Life of *Thomas* Lord *Paget*, of a Barn and certain Tithes in *Stretton* in the County of *Stafford*, granted a Rent of 10 *l. per Ann.* by his Deed bearing Date 30 *Junii*, 29 *Eliz.* out of the ſaid Barn and Tithes to *George Fulwood* for 15 Years, with Clauſe of Diſtreſs; and afterwards 32 *Eliz.* the Lord *Paget* died, and the Writ of (*b*) Annuity was maintained for the Arrearages after the Death of the Lord *Paget*, for there was not Election to have one of two ſeveral Things, but to have one Sum in one Degree as a Rent-charge, or in another as an Annuity: And therefore preſently by the Grant the Thing veſted in the Grantee, and his Election doth always remain, either to make it a Thing real to charge the Land, or a perſonal Thing to charge the Perſon. And there in the principal Caſe the Act of God, *ſcil.* the Death of the L. *Paget*, by which the Rent-charge was determined, was no Determination of the (*c*) Annuity. So in the principal Caſe, Election being given to the ſaid Leſſees to have one and the ſame Things by one Means or another, there the Leſſees have the Intereſt veſted in them preſently, and Election doth always remain in them in what Manner they will take it. But when Election is given to (*d*) ſeveral Perſons, there nothing veſts before Election, and the firſt Election ſhall ſtand. As if a Man makes a Leaſe for Life of two Acres, the Remainder of one Acre to *I. S.* and of the other Acre to *I. N.* he he who firſt makes Election ſhall enjoy the one Acre, and thereby the other Acre hath veſted in the other. And it was ſaid, If a Man gives (*e*) two Acres to another, *Habendum* one Acre to him in Fee, and the other Acre to him in Tail, and he aliens both and hath Iſſue and dies, in this Caſe the Iſſue may bring a *Formedon in diſcender*, for which Acre he will, for the Election is not determined by his Death: For an Eſtate paſſes preſently by the Livery, and the Iſſue ſhall take by Deſcent. But in the Caſe of 10 *Eliz.* 281. (*f*) *Bullock's* Caſe, if the Heir of the Feoffee ſhould make the Election, he would be in as a Purchaſer, for there nothing paſſes of the 17 Acres to the Feoffee before Election, and by the Law he cannot be a (*g*) Purchaſer; for there theſe Words (*h*) (his Heirs) were Words of Limitation. So note, Reader, theſe Differences concerning Election.

1. When (*i*) nothing paſſeth to the Feoffee or Grantee before the Election, to have one Thing or the other, there the Election ought to be made in the Life of the Parties, and the Heir or Executor cannot make the Election

(*a*) Moor 301. Co. Lit. 148. a. 349. a. 2 Anderſ. 1. Poph. 86.

(*b*) Co. Lit. 349. a.

(*c*) Co. Lit. 148. a. 349. a.

(*d*) Co. Lit. 145. a.

(*e*) Moor 85.

(*f*) Moor 81. Hob. 174. 1 Anderſ. 11. Dyer 280, 281. pl. 17, 18, &c. Antea 36. a.

(*g*) Moor 86, 84.

(*h*) 1 Co. 95. b. 104. a. 105. b.

(*i*) Co. Lit. 145. a.

tion. But (*a*) when an Eſtate or Intereſt paſſeth preſently to the Feoffee, Donee or Grantee, there Election may be made by them, or by their Heirs or Executors. (*a*) Co. Lit. 146. a.

2. When a (*b*) Thing paſſeth to the Donee, or Grantee, and the Donee or Grantee hath Election in what Manner or Degree he will take it, there the Intereſt paſſeth preſently, and the Party, his Heirs or Executors may make Election when they will. (*b*) Co. Lit. 145. a.

3. When Election is given to (*c*) ſeveral Perſons, there the firſt Election made by any of the Parties ſhall ſtand. (*c*) Co. Lit. 145. b.

4. In Caſe Election be given of two ſeveral Things, always he who is the firſt Agent, and who ought to do the firſt Act ſhall have the Election. As if a Man (*e*) grant a Rent of 20 *s.* or a Robe to one and his Heirs, the Grantor ſhall have the Election, for he is the firſt Agent by Payment of the one, or Delivery of the other. (*f*) So if a Man makes a Leaſe yielding Rent, or a Robe, the Leſſee ſhall have the Election, *cauſa qua ſupra*. And with that agree the Books, 9 *E.* 4. 36. *b.* 13 *E.* 4. 4. *b.* *L.* 5 *E.* 4. 6. *b.* 11 *E.* 3. (*g*) *Annuity* 27. 11 *Aſſ.* 8. 29 *Aſſ.* 55. 3 *E.* 3. *Aſſize* 175. 43 *E.* 3. *Barre* 194. But if I give you one of my (*h*) Horſes in my Stable, there you ſhall have Election, for you ſhall be the firſt Agent by Taking or Seizure of one of them, 2 *H.* 7. 23. *a.* And if one grant to another 20 Loads of Haſel, or 20 Loads of Maple to be taken in his Wood of *D.* there the Grantee ſhall have Election, for he ought to do the firſt Act, *ſcil.* to cut and take it. (*d*) Co. Lit. 145. b. Dyer 108. pl. 32. 1 Rol. Rep. 447. (*e*) Co. Lit. 145. b. (*f*) Co. Lit. 145. b. Plowd. 13. a. (*g*) 5 Co. 40. a. (*h*) Dyer 91. pl. 11. 2 H. 7. 13. a. Co. Lit. 145. a. Plowd. 13. a. Moor 83. Perk. Sect. 74. Br. Done 19. 21. H. 7. 18. b. Co. Lit. 145. b.

5. When the Things granted are (*i*) annual Things, and are to have Continuance, there the Election remains to the Grantor (in Caſe where the Law gives him Election) as well after the Day as before; otherwiſe when the Things are to be performed *unica vice*. And therefore, if I grant to another for Life an Annuity (*k*) or a Robe, at the Feaſt of *Eaſter*, and both are behind, the Grantee ought to bring his Writ of Annuity in the Disjunctive, for if he ſhould bring his Writ of Annuity for one only and recover, this Judgment would determine the Election for ever; for he ſhould never have a Writ (*l*) of Annuity after, but a (*m*) *Scire facias* upon the ſaid Judgment; which Reaſon *Fitzherbert* in his *N. B.* not obſerving, held an Opinion contrary. But if I (*n*) contract with you to pay you 20 *s.* or a Robe, at the Feaſt of *Eaſter*, after the Feaſt you ſhall bring Debt for the one or the other, *Vide* 9 *E.* 4. 36. *b.* 13 *E.* 4. 4. *b.* and the Books before. (*i*) Co. Lit. 145. a. (*k*) Co. Lit. 145. a. Note. (*l*) 1 Rol. 229. Co. Lit. 145. a. 6 Co. 45. a. (*m*) F. N. B. 122. E. 1. Rol. 229. Co. Lit. 145. a. (*n*) Co. Lit 145. F. N. B. 152. h. Dyer 18. pl. 104. Kelw. 78. a.

Co. Lit. 145. a. 6. The Feoffee by his Act and Wrong may loſe his Election, and give it to the Feoffor; as if one enfeoff another of two Acres, to have and to hold, one for Life, the Co. Lit. 145. a. other in Tail, and he before Election makes a Feoffment of both, in this Caſe the Feoffor ſhall enter into which Acre he will for the Act and Tort of the Feoffee.

7. Although the Leſſees in the Caſe in Queſtion have enter'd generally, yet they may afterwards elect either to take by the Demiſe, or by the Bargain and Sale, for their general Entry cannot be any Determination of the Election; no more than if one be Executor and Deviſee of a Term and he entereth generally, it is no Determination of his Election; Antea 35. b. And after the Leſſees made their Election to take it by Bargain and Sale, and thereupon they had the Rents reſerved upon the Leaſes for Years, which otherwiſe they could not have.

The

The Biſhop of Wincheſter's *Caſe.*

2 Co. Fo. 38. a.

Paſc. 38 Eliz. *Rot.* 628.

In the King's Bench.

South. ſſ. MEmorandum, that at another Time, that is to ſay, in *Michael.* Term laſt paſt, before the Lady the Queen at *Weſtminſter*, come *Robert Wright*, who ſues as well for the Lady the Queen as for himſelf, by *Thomas Webb* the Younger, and brought here in the Court of the ſaid Lady the Queen, then and there his Bill againſt *John Wright* Executor of the Teſtament and laſt Will of *Nicholas Wright* deceaſed, late whilſt he lived Farmer, as he affirmed, of the Rectory of the Pariſh Church of *Eaſtmeon*, otherwiſe called *Eaſtmean*, in the Dioceſe of *Wincheſter*, in the Province of *Canterbury*, in the Cuſtody of the *Marſhal*, *&c.* in a Plea of Treſpaſs and Contempt againſt thoſe who proſecuted in the Spiritual Court, againſt the Queen's Prohibition to the Contrary thereof, directed and deliver'd: And there are Pledges of ſute, to wit, *John Doe*, and *Richard Roe*: Which Bill followeth in theſe Words, *South. ſſ.* That is to ſay, *Robert Wright*, who as well for the Lady the Queen as for himſelf proſecuteth, complaineth of *John Wright* Executor of the Teſtament and laſt Will of *Nicholas Wright* deceaſed, late whilſt he lived Farmer, as he affirmed, of the Rectory of the Pariſh Church of *Eaſtmeon*, otherwiſe called *Eaſtmean*, in the Dioceſe of *Wincheſter*, in the Province of *Canterbury*, in the Cuſtody of the Marſhal of the *Marſhalſey* of the Lady the Queen, before the Queen herſelf being, why he hath ſued in the Spiritual Court, after the Queen's Prohibition to the contrary thereof directed and delivered, for that, that is to ſay, whereas all and ſingular Pleas, and Conuſans of Pleas, of whatſoever Grants, Demiſes, or Contracts ariſing within this Kingdom of *England*, made and had, and the Validity of ſuch Grants, and Demiſes in Law, and other ſuch Pleas, and Conuſans of Pleas, ſo as they be not Teſtamentary, or Matrimonial, to the ſaid Lady the now Queen, and her Royal Crown

Prohibicon & Attaohm. thereon.

do

do eſpecially of Right appertain; and by the Laws of the Land of this Kingdom of *England*, and not by the Laws or Sentences Eccleſiaſtical, ought to be tried, determined, and diſcuſſed, and ever heretofore have been accuſtomed and ought ſo to be; And whereas *Stephen* by Divine Providence, late Biſhop of *Wincheſter*, the 4th Day of *July*, in the Year of the Reign of the Lord *Henry* the 8th, late King of *England*, was ſeized in his Demeſn as of Fee, in the Right of his ſaid Biſhoprick, of and in the Manor of *Eaſtmeon*, in the County of *Southton*, aforeſaid, whereof one Capital Meſſuage called the *Scite* of the Manor of *Eaſtmeon*, 800 Acres of Lands, 50 Acres of Meadow, 1000 Acres of Paſture, and 400 Acres of Wood with the Appurtenances, in *Eaſtmeon* in the County aforeſaid, (being demeſn Lands of the Manor aforeſaid) then and time whereof the Memory of Men is not to the contrary, was and yet are Parcel, and alſo of and in one Meſſuage with the Appurtenances, in *Eaſtmeon* aforeſaid, being the Manſion Houſe of the ſame Manor. And whereas the ſaid *Stephen*, and all his Predeceſſors, Biſhops of the Biſhoprick aforeſaid, for the Time being, ſeized of the Mannor aforeſaid, and other the Premiſſes with their Appurtenances, the *Scite* of the Manner aforeſaid, and the Capital Meſſuage, aforeſaid, and the Demeſn Lands aforeſaid with the Appurtenances, by himſelf, his Farmers and Tenants thereof, and every Parcel thereof for Term of Years, or at Will, held and enjoyed, were exonerated, acquitted, freed, diſcharged, and privileged, of and from the Payment of Tithes whatſoever, of, in, or upon the Capital Meſſuage aforeſaid, and the Demeſns aforeſaid with the Appurtenances, and of every and any Parcel thereof Yearly what Way ſoever, for the whole Time aforeſaid, growing, happening, renewing, or ariſing. And the aforeſaid *Stephen*, late Biſhop aforeſaid, of the Capital Meſſuage aforeſaid, and the Demeſn Lands aforeſaid with the Appurtenances in Form aforeſaid being ſeized, and the ſame having, and holding, exonerated, acquitted, freed, and diſcharged, and privileged, of and from the Payment of Tithes whatſoever, of, in, and upon the Capital Meſſuage aforeſaid, and other the Premiſſes with the Appurtenances, or any Parcel thereof, growing, renewing, or any wiſe happening. The ſaid *Stephen*, the 4th Day of *July*, in the 38th Year of the Reign of the ſaid late King *Henry* the 8th, at *Eaſtmeon*, in the County aforeſaid, By his Indenture with his Seal Epiſcopal ſealed, and to the Court of the ſaid Lady the Queen that now is, here produced, bearing date the ſame Day and Year, demiſed to one *Robert Wright*, Grandfather of the ſaid *Robert* that now is Plantiff, The Moiety of the Demeſn Lands aforeſaid, with the Appurtenances,

by

by the Name of all the Demeſn Lands of the Mannor of *Eaſtmeon* aforeſaid anciently belonging, with all Houſes, Stables, Barns, and Buildings upon the Moiety aforeſaid, then and of old Time ſituate, lying and being, with the Appurtenances; which Moiety, then lay in the Fields on the South Side of the Town of *Eaſtmeon* aforeſaid, together with the Meadows, Feedings, and Paſtures, Encloſures, Ways, Paths, and other their Appurtenances, together with the Farm of 40 Muttons, called Weathers, the higheſt Price 16 Pence, 40 Ew Sheep, the higheſt Price 16 Pence, to have and to occupy the ſaid Moiety of the Tenements aforeſaid with the Appurtenances, in Form aforeſaid demiſed, to the aforeſaid *Robert Wright* the Grandfather, and his Aſſigns, from the Feaſt of St. *Michael* the Archangel, in the Year of our Lord God 1575, until the End and Term of 40 Years, then next following, and fully to be compleated and ended: Yielding therefore yearly during the Term aforeſaid, to the aforeſaid *Stephen* late Biſhop aforeſaid, and his Succeſſors, at his Exchequer of *Wolveſley* in *Wincheſter*, in the County of *Southampton*, then being, 10 Pound, and 10 Shillings, of lawful Money of *England*, at the Feaſts of *Eaſter* and St. *Michael*, by even and equal Portions to be paid, and for the Farm of the aforeſaid 40 Weathers, and 40 Ew Sheep, 11 Pounds, and 13 Shillings, and 4 Pence, to be paid at the Feaſt of St. *Peter* the Biſhop *ad vincula*, for the chief Weathers 3 Pence, and for the chief Ews 4 Pence, as by the ſame Indenture amongſt other Things it more fully appeareth. Which Indenture of demiſe, to the aforeſaid *Robert Wright* the Grandfather, in Form aforeſaid made, and all and ſingular therein contained, afterwards, that is to ſay, the 20th Day of *July*, in the 38th Year aboveſaid, *William Kingſmill*, then Dean of the Cathedral Church of the *Holy Trinity* of *Wincheſter* aforeſaid, and the Chapter of the ſame Place, at *Wincheſter* aforeſaid, that is to ſay, in their Chapter-houſe there, by their Writing of Confirmation with the Seal of the Chapter Sealed, in the Lifetime of the aforeſaid *Stephen*, then being Biſhop of *Wincheſter* aforeſaid, and in the Life-time of the ſaid *Robert Wright* the Grandfather, now deceaſed, were ratified, and confirmed, as by the Writing of Confirmation thereof, bearing date the Day and Year laſt aforeſaid, amongſt other Things it appeareth. By Virtue of which Demiſe and Confirmation, the ſame *Robert Wright* the Grandfather, was of the Intereſt of the Term aforeſaid, in the aforeſaid Moiety of the demiſed Lands aforeſaid with the Appurtenances, in Form aforeſaid, demiſed, poſſeſſed, and the aforeſaid

ſaid *Robert Wright* the Grandfather, of the Intereſt of the Term aforeſaid, in the Moiety of the Demeſn Lands aforeſaid with the Appurtenances, in Form aforeſaid demiſed, being poſſeſſed, the ſaid *Robert Wright* the Grandfather, the 14th Day of *Auguſt*, in the Year 1558, at *Eaſtmeon* aforeſaid, made his Teſtament and laſt Will in Writing, and by the ſaid his Teſtament made and ordained *Margaret* then his Wife, and *Nicholas Wright* his younger Son, to be Executors of his laſt Will, and by the ſaid Teſtament, gave and bequeathed all his Intereſt aforeſaid, of and in the aforeſaid Moiety of the Demeſn Lands aforeſaid, ſo as is ſaid demiſed, with the Appurtenances then to come, to *Edward Wright* the Eldeſt Son of the aforeſaid *Robert* the Grandfather, and afterwards the aforeſaid *Robert Wright* the Grandfather, at *Eaſtmeon* aforeſaid died, of his Intereſt aforeſaid, of and in the Tenements aforeſaid with the Appurtenances, to the ſaid *Robert* the Grandfather, in Form aforeſaid demiſed, poſſeſſed; After whoſe Death, the aforeſaid *Margaret* and *Nicholas*, took upon them the Burthen of the Execution of the Teſtament aforeſaid, at *Eaſtmeon* aforeſaid, And the ſaid Executors at *Eaſtmeon* aforeſaid, gave their Conſent that the ſaid *Edward Wright* ſhould have and enjoy to him and his Aſſigns, the Intereſt aforeſaid, of the aforeſaid Term of Years, of and in the Moiety of the Demeſn Lands aforeſaid with the Appurtenances, to the ſaid *Robert Wright* the Grandfather, in Form aforeſaid demiſed; By virtue whereof the ſaid *Edward* was of the Intereſt of the Term aforeſaid poſſeſſed, and being ſo thereof poſſeſſed, the ſaid *Edward*, the 11th Day of *July*, in the Year of our Lord 1563, at *Eaſtmeon* aforeſaid, made his Teſtament and laſt Will in Writing, and by his ſaid Teſtament conſtituted and appointed *Agnes* then his Wife, to be ſole Executrix of his ſaid Teſtament, and by the ſaid Teſtament, gave and bequeathed all his Intereſt aforeſaid, in the Moiety aforeſaid, of the Demeſn Lands aforeſaid, ſo as before is ſaid, with the Appurtenances, to the aforeſaid *Robert Wright* now the Plantiff, one of the Sons of the ſaid *Edward*; And afterwards, the ſaid *Edward Wright*, at *Eaſtmeon* aforeſaid, died of his Intereſt aforeſaid, of and in the Moiety aforeſaid, of the Demeſn Lands aforeſaid with the Appurtenances, in Form aforeſaid demiſed, poſſeſſed; After whoſe Death, the aforeſaid *Agnes* took upon her the Burden of Execution of the ſaid Teſtament of the ſaid *Edward* aforeſaid, at *Eaſtmeon* aforeſaid, and the ſaid Executrix, at *Eaſtmeon* aforeſaid, gave her Conſent, that he the ſaid *Robert Wright*, ſhould have and enjoy to him and his Aſſigns, the

the Intereſt of the Term aforeſaid, of and in the aforeſaid Moiety of the Demeſn Lands aforeſaid with the Appurtenances, in Form aforeſaid. By virtue of which, the ſaid *Robert Wright* now Plantiff, was of the Intereſt of the Term aforeſaid, of and in the Moiety of the Demeſn Lands aforeſaid with the Appurtenances poſſeſſed, until the Morrow of the Feaſt of St. *Michael* the Archangel, in the Year of our Lord, 1575, in which Morrow of the aforeſaid Feaſt of St. *Michael* the Archangel, in the Year 1575 aforeſaid, the ſaid *Robert Wright* now Plantiff, into the aforeſaid Moiety of the Demeſn Lands aforeſaid with the Appurtenances, entred, and was thereof poſſeſſed, and ſo thereof being poſſeſſed, the ſaid Moiety with the Appurtenances, had, held, and enjoyed, and now hath and occupieth, and ought to have and occupy, of and from the Payment of Tithes whatſoever, of, in, or upon the Moiety aforeſaid, of the Demeſn Lands aforeſaid with the Appurtenances, or any Parcel thereof yearly, any Manner of Ways growing and appertaining, renewing, or ariſing, for the Occaſion aforeſaid in this Behalf alledged, utterly exonerated, acquitted, freed and privileged, by Reaſon of the Preſcription and Privilege aforeſaid. And whereas by the Statute in the Parliament of the Lord *Edward* the 6th, late King of *England*, holden at *Weſtminſter* in the County of *Middleſex*, the 4th Day of *November*, in the Second Year of his Reign, amongſt other Things, it is Enacted by Authority of that Parliament, that no Perſon or Perſons be ſued, or otherwiſe compelled to yield, give, or pay, any Manner of Tithes, for any Manors, Tenements, or Hereditaments, which by the Law and Statutes of this Kingdom of *England*, or by any Privilege or Preſcription, were not chargeable with the Payment of any ſuch Tithes, by any Compoſition real, as by the ſaid Act amongſt other Things it more fully appeareth; yet the aforeſaid *Nicholas Wright*, in his Life-time pretending himſelf to be Farmer of the Rectory of the Pariſh Church aforeſaid, and by Colour of a Demiſe to him thereof made, by *Thomas* by Divine Providence then Biſhop of *Wincheſter*, for the Term of 21 Years ſuppoſed to be made, upon that Occaſion falſely ſuppoſing Tithes, whatſoever in and upon the aforeſaid Moiety of the Demeſn Lands aforeſaid with the Appurtenances, to the aforeſaid *Robert Wright*, the Grandfather, in Form aforeſaid demiſed, ariſing and happening to the ſaid *Nicholas Wright*, by Virtue of the Demiſe aforeſaid, to him in Form aforeſaid ſuppoſed to be made, to belong and appertain; whereas in Truth, the ſaid *Robert* now Plaintiff, the Moiety aforeſaid of the Demeſn Lands aforeſaid, by Virtue of the Demiſe aforeſaid, to the aforeſaid *Robert Wright* the Grandfather, in Form aforeſaid made, and by Reaſon of the Immunity

nity of the Privilege and Act aforeſaid above ſpecified, was exonerated, acquitted, freed, and privileged, of and from Payment of Tithes, whatſoever thereupon growing, to have and enjoy, ought during the Term aforeſaid, to the aforeſaid *Robert Wright* the Grandfather, in Form aforeſaid granted of the Premiſſes, not ignorant, endeavouring, the Queen's Majeſty that now is, and her Regal Crown to diſinherit, and to draw the Conuſance of her Pleas, which of Right do belong to her Royal Crown, and not to the Spiritual Court, to another Juriſdiction and Examination in the Spiritual Court, ſuppoſing the Indenture of Demiſe aforeſaid, to the aforeſaid *Robert Wright* the Grandfather made, and the Writing of Confirmation aforeſaid, as alſo the Eſtate of him the ſaid *Robert* now Plantiff, of and in the Moiety aforeſaid, of the Demeſn Lands aforeſaid with the Appurtenances, to the aforeſaid *Robert* the Grandfather, from the Tithes aforeſaid, in Form aforeſaid diſcharged had and made, to be void and of no validity in Law; whereas in Truth, the Indenture of Demiſe aforeſaid, and the Writing of Confirmation thereof, and alſo the Eſtate of the ſaid *Robert* aforeſaid, the now Plantiff, of and in the Moiety of the aforeſaid Demeſn Lands aforeſaid, with the Appurtenances to the aforeſaid *Robert* the Grandfather, in Manner and Form aforeſaid Demiſed, ſo as before is ſaid, diſcharged of Tithes, is good and effectual in the Law; And whereas in Truth, the ſame Demiſe to the aforeſaid *Nicholas* in Form aforeſaid alleged to be made, (if any ſuch was) was utterly void and inſufficient in Law, and as to any Tithes of, in, and upon the aforeſaid Moiety of the Demeſn Lands aforeſaid growing is; the ſaid *Robert Wright* now the Plantiff, in the Spiritual Court before the Reverend and Worthy Man, Mr. *William Awbray*, Doctor of Law, in the Court of Audience of Cauſes and Buſineſſes, in the Court of *Canterbury* lawfully deputed to hear, of and for the withdrawing, and not Payment of Tithes of Wheat, Barly, Peaſe, and Beans, of, in, and upon, the aforeſaid Moiety of the Demeſn Lands aforeſaid, in the Year of our Lord 1590, growing, renewing, ariſing, and happening, as alſo of and for the withdrawing, and Non-payment, of the Tithes of the Wooll of Lambs and Sheep, of the ſaid *Robert* now Plantiff, of, in, and upon the aforeſaid Moiety of the Demeſn Lands aforeſaid, in the Year of our Lord aforeſaid, kept, ſhorn, and ariſing, as alſo of the Tithes of the Apples of the ſaid *Robert Wright* the Plantiff, of, in, and upon, the ſaid aforeſaid Moiety of the Demeſn Lands aforeſaid, in the Year aforeſaid, growing, gotten, and ariſing, the 8th Day of *October*, in the 32d Year of the Reign of the ſaid Lady the now Queen, at *Euſtmcon* aforeſaid, in the County aforeſaid, drew into ſute: And the aforeſaid *Nicholas*, the

the ſame *Robert* now Plaintiff, before the aforeſaid Spiritual Judge, for that Occaſion aforeſaid to appear, and to the ſaid *Nicholas*, of and upon the Premiſſes, to anſwer in that Manner the Validity of the Law of the Indenture of the Demiſe aforeſaid, by the ſaid *Stephen*, late Biſhop aforeſaid, in Form aforeſaid made, and the Confirmation aforeſaid; as alſo the Eſtate of the ſaid *Robert* the now Plaintiff aforeſaid, of and in the aforeſaid Moiety of the aforeſaid demeſn Lands, with the Appurtenances, to the aforeſaid *Robert Wright* the Grandfather, in Form aforeſaid made, and the Tithes thereof ariſing to the Spiritual Court aforeſaid, to draw and determine, cauſed and moſt unjuſtly compelled: Which Plea, by Appeal in that Behalf had and made, from the aforeſaid Court of Audience, before the worſhipful and worthy Men, *Robert Forth*, *Thomas Binge*, *John Lloyd*, *Thomas Legg*, and *Richard Swale*, Doctors of Law, Judges, Delegates, in that Behalf was duly removed, and in the Spiritual Court before the ſame Judges, Delegates, or ſome of them at *Eaſtmeon* aforeſaid, as yet dependeth undecided: And although the ſaid *Robert* the now Plaintiff, the Indenture of Demiſe aforeſaid, and the Writing of Confirmation aforeſaid, and the Eſtate of the ſaid *Robert* now Plaintiff aforeſaid, of and in the aforeſaid Moiety of the demeſn Lands aforeſaid, of the Tithes aforeſaid, diſcharged with the Appurtenances, to the aforeſaid *Robert Wright* the Grandfather in Form aforeſaid demiſed, and the other Matter aforeſaid in this Part contained, as well to the aforeſaid Spiritual Court, before the aforeſaid *William Awbrey*, Spiritual Judge aforeſaid, as in the aforeſaid Spiritual Court, before the Judges Delegates aforeſaid, in Diſcharge of the Premiſſes is ſhewed, pleaded, and alledged, and the Sealing and Delivery of the Indenture aforeſaid, and of the Writing of Confirmation aforeſaid, and the Reſidue of the Matter in that Behalf contained on the Part of him the ſaid *Robert Wright*, the now Plaintiff, in the Premiſſes in that Behalf alledged, according to the Law of this Kingdom of *England*, with unavoidable Truth and Witneſs he offered to prove, yet the ſaid Judge of the Court of Audience aforeſaid, and the aforeſaid Judges Delegates in the Spiritual Court aforeſaid, the Plea, Allegation, and that Proof utterly refuſed, and every of them refuſed to admit. And afterwards the Appeal aforeſaid, ſo depending in the aforeſaid Spiritual Court before the Judges aforeſaid, the ſaid *Nicholas Wright* at *Eaſtmeon* aforeſaid, made his Teſtament and laſt Will in Writing, and thereof conſtituted and ordained *John Wright* his Executor of his ſaid Teſtament, and afterwards there died; after whoſe Death the aforeſaid *John Wright* took upon him the Charge of the Execution of the Teſtament aforeſaid, and the Proſecution of the Appeal aforeſaid, in the Cauſe aforeſaid; and afterwards the aforeſaid *John Wright*, the Executor aforeſaid, the aforeſaid *Robert Wright*, now Plaintiff, in the aforeſaid

Spiritual Court, before the aforeſaid Judges Delegates at *Eaſtmeon* aforeſaid, for the Occaſion aforeſaid unjuſtly bound to appear, and the ſaid *Robert* now Plaintiff, of and in the Premiſſes to condemn, and to the Tithes aforeſaid, in the aforeſaid ſeveral Spiritual Courts in Form aforeſaid, demanded to him to be paid, to compel by the definitive Sentence of the ſaid Court of Delegates, with all his Power yet endeavoureth, and daily threatneth: And altho' the Writ of the aforeſaid Lady the Queen of Prohibition to the aforeſaid Judges Delegates, and other Judges in that Behalf, the 12th Day of *July*, in the 37th Year of the Reign of the now Queen, at *Eaſtmeon* aforeſaid, to the contrary thereof was directed and delivered; yet the ſaid *John Wright* the Plea aforeſaid, after the Queen's Majeſty's Royal Prohibition firſt to the contrary thereof in Form aforeſaid directed and delivered, that is to ſay, the firſt Day of *October*, in the 37th Year of the Reign of the ſaid Lady the now Queen, at *Eaſtmeon* aforeſaid, in the County aforeſaid proſecuted, and in the Plea aforeſaid proceeded, the ſaid Writ of the ſaid Lady the Queen, of Prohibition to the aforeſaid Spiritual Judges firſt to the contrary thereof in Form aforeſaid directed and delivered, in any thing notwithſtanding, in Contempt of the ſaid Lady the now Queen, and to the Damage, Prejudice, Impoveriſhing, and grievous moleſting of him the ſaid *Robert*, now Plaintiff, and contrary to the Form and Effect of the Preſcription, Privilege, and Act of Parliament aforeſaid; whereupon the ſame *Robert*, now Plaintiff, ſaith, that he is the worſe, and hath Damage to the Value of 40 Marks, and thereof as well for the ſaid Lady the Queen as for himſelf, he bringeth Suit, *&c.* And now at this Day, that is to ſay, *Wedneſday* after 15 Days of *Eaſter*, in this Term, until which Day the ſaid *John Wright* had Licence to the Bill aforeſaid to imparl, cometh as well the ſaid *Robert Wright*, by his Attorney aforeſaid, as the aforeſaid *John Wright*, by *Stephen Worley* his Attorney, and the ſaid *John*, defendeth the Force and Injury when, *&c.* and all the Contempt, and whatſoever, *&c.* and ſaith, he did not proſecute the Plea aforeſaid, in the Spiritual Court aforeſaid, after the Queen's Prohibition to him firſt to the contrary directed and delivered in Manner and Form as the aforeſaid *Robert Wright*, who as well, *&c.* above againſt him complaineth: And of this he puts himſelf upon the Country, and the aforeſaid *Robert*, who as well for, *&c.* likewiſe, *&c.* But to have a Conſultation in this Behalf, the ſaid *John* by Proteſtation, not acknowledging any thing by the aforeſaid *Robert* above alledged to be true; for Plea the ſaid *John* ſaith, That well and true it is, that the aforeſaid *Robert*, in the aforeſaid Spiritual Court, before the aforeſaid Judges Delegates ſhewed, pleaded, and alledged, that the aforeſaid *Stephen*, late Biſhop of *Wincheſter* aforeſaid, the aforeſaid 4th Day of *July*, in the 38th Year aforeſaid, was ſeiſed of the

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aforeſaid Manor of *Eaſtmeon* with the Appurtenances, in the County of *Southampton* aforeſaid, whereof the aforeſaid capital Meſſuage with the Appurtenances, called the Scite of the Manor of *Eaſtmeon*, 800 Acres of Land, 500 Acres of Meadow, 1000 Acres of Paſture, 400 Acres of Wood, with the Appurtenances, in *Eaſtmeon* aforeſaid, being demeſn Lands of the Manor aforeſaid, then and from the Time aforeſaid were Parcel, and of and in the aforeſaid Meſſuage, with the Appurtenances, being the Manſion-houſe of the Manor aforeſaid, in his Demeſn as of Fee in the Right of his Biſhoprick aforeſaid; and that the ſaid *Stephen* and all his Predeceſſors, Biſhops of the Biſhoprick aforeſaid, being ſeiſed of the Manor aforeſaid, and other the Premiſſes with their Appurtenances, from the whole Time aforeſaid, for him and his Farmers, his Tenants thereof, and of every Parcel thereof, for the Term of Years, or at Will, had, holden, and enjoyed, to them diſcharged, acquitted, freed and privileged, of and from the Payment of any Tithes, of, in, or upon the aforeſaid capital Meſſuage and demeſn Lands aforeſaid, with the Appurtenances, and every Part and Parcel thereof yearly, any Manner of Ways, by the whole Time aforeſaid, growing, happening, and renewing or ariſing; and that the aforeſaid late Biſhop, of the capital Meſſuage aforeſaid, and of the demeſn Lands aforeſaid, with the Appurtenances, in Form aforeſaid being ſeiſed, and the ſame having and holding, exonerated, acquitted, freed, and privileged, of and from the Payment of Tithes whatſoever, in and upon the capital Meſſuage aforeſaid, and other the Premiſſes with their Appurtenances, or any Part thereof growing, renewing, or in any wiſe happening, the aforeſaid 4th Day of *July*, in the 38th Year of the Reign of the aforeſaid late King *Henry* VIII. aforeſaid, at *Eaſtmeon* aforeſaid, by his aforeſaid Indenture, with the Seal of his Biſhoprick ſealed, bearing Date the ſaid Day and Year, demiſed to the aforeſaid *Robert Wright* the Grandfather of the aforeſaid *Robert*, the Moiety of the demeſn Lands aforeſaid, with the Appurtenances, by the Name of all the demeſn Lands of the Manor of *Eaſtmeon* aforeſaid, of old appertaining, with all Houſes, Stables, Barns, and Buildings, upon the Moiety aforeſaid, then and of old, ſituate, lying, and being, with the Appurtenances, which Moiety then lay in the Fields, on the South Part of the Town of *Eaſtmeon* aforeſaid, to have and to occupy the ſaid Moiety with the Appurtenances, to the aforeſaid *Robert Wright* the Grandfather, and to his Aſſigns, from the Feaſt of St. *Michael* the Archangel, which then ſhould be in the Year of our Lord God 1575, until the End and Term of 40 Years, from thence next following, and fully to be ended: And that afterwards, that is to ſay, the aforeſaid 20th Day of *July*, in the 38th Year aforeſaid, the aforeſaid *William Kingſmill*, then Dean of the aforeſaid Cathedral Church of the *Holy Trinity*

of *Wincheſter*, and the Chapter of the ſame Place, at *Wincheſter* aforeſaid, in their Chapter-houſe aforeſaid, by their Writing aforeſaid, ſealed with the Chapter Seal aforeſaid, in the Life of the aforeſaid late Biſhop, and in the Life-time of the aforeſaid *Robert Wright* the Grandfather confirmed and ratified; and that the ſaid *Robert Wright*, by Virtue of the Demiſe and Confirmation aforeſaid, was of the Intereſt of the Term aforeſaid, of and in the Moiety aforeſaid, with the Appurtenances poſſeſſed, and ſo thereof being poſſeſſed the aforeſaid 14th Day of *Auguſt*, in the Year of our Lord 1658, aforeſaid, at *Eaſtmeon* aforeſaid, made his Will in Writing, and by his ſaid Will conſtituted the aforeſaid *Margaret* and *Nicholas Wright* his Executors, and by the ſaid his Will gave and bequeathed all his Intereſt aforeſaid, of and in the Moiety aforeſaid with the Appurtenances, to the aforeſaid *Edward Wright*, Son of the ſaid *Robert* the Grandfather, and afterwards at *Eaſtmeon* aforeſaid died, of his Intereſt aforeſaid, in Form aforeſaid poſſeſſed; after whoſe Death the aforeſaid *Edward*, by the Aſſent of the Executors aforeſaid, was of the Intereſt of the aforeſaid Term of Years, of and in the Moiety aforeſaid, with the Appurtenances poſſeſſed. And that the ſaid *Edward* ſo being thereof poſſeſſed, the aforeſaid 11th Day of *July*, in the Year of our Lord 1563, aboveſaid, at *Eaſtmeon* aforeſaid, made his Will in Writing, and by his ſaid Will conſtituted one *Agnes*, then his Wife, his Executrix of his Will aforeſaid; and by the ſaid his Will, gave and bequeathed all his Intereſt aforeſaid, of and in the Moiety aforeſaid with the Appurtenances, to the aforeſaid *Robert Wright* the now Plaintiff, and afterwards there died of ſuch his Intereſt aforeſaid, of and in the Moiety aforeſaid with the Appurtenances, in Form aforeſaid poſſeſſed; and that the ſaid *Robert* now Plaintiff, by the Conſent of the ſaid *Agnes*, the Burthen of the Execution of the Will aforeſaid, upon her taking, was of the Intereſt of the Term aforeſaid, of and in the Moiety aforeſaid, with the Appurtenances poſſeſſed, until the Feaſt of St. *Michael* the Archangel, in the Year of our Lord 1575, immediately after which Feaſt the ſaid *Robert*, into the Moiety aforeſaid, with the Appurtenances entered, and was thereof poſſeſſed, and that the aforeſaid *Robert* thereof ſo poſſeſſed, the ſaid Tenements, with the Appurtenances likewiſe had and occupied, and ought to have and occupy, of and from the Payment of Tithes whatſoever, of, in, and upon the Moiety aforeſaid, with the Appurtenances, or any Part thereof yearly, any Ways growing, happening, renewing, or ariſing by the Occaſion aforeſaid alledged, utterly diſcharged, acquitted, freed, and privileged, by Reaſon of the Preſcription and Privilege aforeſaid, and by Force of the ſaid Statute aforeſaid, in the aforeſaid Parliament of the aforeſaid late King *Edward* VI. at *Weſtminſter* aforeſaid, the aforeſaid 4th Day of *November*, in the ſecond Year of his Reign, of the Payment of Tithes,

then

then made, as the aforeſaid *Robert Wright*, now Plaintiff, above alledged: But the ſaid *John Wright* further ſaith, That the aforeſaid Judges Delegates, in the aforeſaid Court, before them, the Plea and Allegations of the aforeſaid *Robert Wright*, now Plaintiff, allowed, and the Proofs thereof by him the ſaid *Robert* brought, accepted and admitted: Without that the aforeſaid Judges Delegates, in the aforeſaid Spiritual Court before them, the Plea, Allegations, and Proofs of the aforeſaid *Robert Wright*, now Plaintiff aforeſaid, refuſed to admit in Manner and Form as the aforeſaid *Robert* now Plaintiff above hath alledged, and this he is ready to aver; whereupon he demands Judgment, and the Writ of the Lady the Queen of Conſultation, to him in this Behalf to be granted. And the aforeſaid *Robert Wright* now Plaintiff, ſaith, that he for any thing by the aforeſaid *John Wright* above in pleading, alledged, the ſaid Writ of the ſaid Lady the Queen, of Conſultation ought not to have; becauſe he ſaith, That the Plea aforeſaid, by him the ſaid *John Wright*, in Form aforeſaid above pleaded, and the Matter therein contained, is inſufficient in Law to the aforeſaid Writ of the Lady the Queen, of Conſultation to be brought, to which the ſaid *Robert* needeth not, nor by the Law of the Land is bound in any wiſe to anſwer, wherefore for Default of ſufficient Anſwer in this Behalf, the ſaid *Robert* demandeth Judgment, and his Damages aforeſaid, for the Occaſion aforeſaid, to be adjudged unto him, *&c.* And the aforeſaid *John Wright* ſaith, That the Plea aforeſaid, by him the ſaid *John*, in Manner and Form aforeſaid above pleaded, and the Matter in the ſame contained, is good and ſufficient in Law to the aforeſaid Writ of the ſaid Lady the Queen, of Conſultation, to have and demand; which Plea, and the Matter in the ſame contained, the ſaid *John* is ready to aver, and prove as to the Court, *&c.* and becauſe the ſaid *Robert* to that Plea doth not anſwer, nor the ſame hath hitherto any wiſe denied, the ſaid *John* as at firſt demandeth Judgment, and the Writ of the ſaid Lady the Queen, of Conſultation, in this Behalf to be granted unto him, *&c.* And becauſe the Court of the Lady the Queen here of giving their Judgment of and upon the Premiſſes is not yet adviſed, Day is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until the ſame—— next after—— to hear their Judgment of and upon the Premiſſes, *&c.* Becauſe the Court of the Lady the Queen here, not yet, *&c.*

The Biſhop of Wincheſter's *Caſe.*

Paſch. 38 Eliz. *Rot.* 628.

In the King's Bench.

(a) Cr. El. 475. 511. 2 Rol. 653. 11 Co. 14. b. Godb. 183. Moor 425, 531. Doctor and Student, lib. 2. cap. 55.

(b) Doctrin. Placit. 104.

IN a Prohibition between *Robert* (a) *Wright*, Plaintiff, and *John Wright*, Defendant, which began *Paſch.* 38. *Eliz. Rot.* 628. the Caſe was ſuch; the Plaintiff ſhewed, That *Stephen Gardiner*, Biſhop of *Wincheſter*, the 4th Day of *July*, 38 *H.* 8. was ſeized of the Manor of *Eaſtmean* in *Eaſtmean* in the County of *Southampton*, in the Right of his Biſhoprick; and that the ſaid (b) Biſhop, and all his Predeceſſors of the ſaid Biſhoprick ſeized of the ſaid Manor had holden and enjoyed the Scite of the ſaid Manor, and all the Demeans of the ſaid Manor, *a Tempore cujus, &c.* for him, his Tenants and Farmers, for Years, or at Will, *exonerat' acquietat' & privilegiat' de & a ſolutione decimarum quarumcunque de, in vel ſuper præd' ſcit' & terr' dominic' & qualibet ſeu aliqua inde parcel' annualim quoviſmodo per totum tempus præd' creſcent', contingent', ſive renovant'.* And the Plaintiff conveyed to himſelf an Intereſt for Years in Parcel of the Demeſns of the ſaid Manor, by the Demiſe of the ſaid Biſhop; and that the Defendant being Farmer of the Rectory of *Eaſtmean*, had libelled againſt him for Tithes growing within Parcel of the Demeſns of the ſaid Manor, before the Judges Delegates; and although the Plaintiff had ſhewed all the Matter, and pleaded the ſame before them, and offered with inevitable Proof to prove it, yet *prædicti Judices delegati in prædict' Cur' Chriſtianitatis coram eis placitum allegationes & probationes prædict' Roberti Wright admittere recuſaverunt.* The Defendant to have a Conſultation, confeſſeth that the ſaid Plaintiff had alledged all the Matter aforeſaid before the Judges Delegates, and that the Judges Delegates allowed the Plea and Allegation of the Plaintiff, and admitted him to his Proof thereof, *abſq; hoc quod præd' Judices delegati in Curia*

Curia Chriſtianitatis coram eis placitum allegationes & probationes prædict' Robert Wright admittere recuſaverunt. And upon this Plea the Plaintiff's Council did demur in Law; and in this Caſe three Points were moved: 1. Whether the ſaid Preſcription for diſcharge of Tithes, was good or not. 2. Whether the Plaintiff, being a Layman, ſhould take Benefit thereof. 3. Whether the ſaid Traverſe was good or no. And as to the firſt Point, three Things were conſider'd: 1. Who were by the Common Law capable of Tithes in Pernancy, and who not. 2. Who was capable of a Diſcharge of Tithes at the Common Law, and who not. How he who was capable of a Diſcharge, might be diſcharged of Tithes, *ſcil.* either by Preſcription, or by Compoſition, *&c.*

As to the firſt it was reſolved, That none by the Common Law had Capacity to take Tithes, but only Spiritual Perſons, or a mixt Perſon, and regularly no meer Lay-man was at the *(a)* Common Law capable of them, unleſs in ſpecial Caſes; for no Layman but in ſpecial Caſes, could *(b)* ſue for them at the Common Law in the Spiritual Court, *ſcil.* for the Subtraction of them. See the Books in 7 *Edw.* 3. 5. 11 *Aſſ.* 9. 44 *E.* 3. 5. *b.* 10 *H.* 7. 18. *a.* and 7 *E.* 6. *(c) Dyer* 84. and the Books in 43 *E.* 3. 34. *a.* and 44 *E.* 3. 39. *a. b.* that a Farmer of a Parſon may ſue for Tithes; but it appears that ſuch Farmer was a *(d)* Spiritual Man, as Vicar, *&c.* And ſo it was ſaid by ſome are all the other Books in 31 *H.* 6. 11. *a.* 35 *H.* 6. 39. *a. b.* 2 *E.* 4. 15. *a. b.* 6 *E.* 3. 4. *a. b.* 12 *H.* 7. 24. *b.* (in which in Truth there are but Opinions) to be intended: And if the Common Law had generally enabled a Layman to be capable of Tithes, the Common Law would have given him Remedy for the Recovery of them; but regularly a *(e)* Layman had no Remedy for the Subſtraction of Tithes, till the Statute of *(f)* 32 *H.* 8. *cap.* 7. But ſee 22 *Aſſ.* 75. that the King was capable of Tithes at the Common Law, for he was *(g) perſona mixta*, and his *(h)* Patentee alſo by his Prerogative, as it there appears.

As to the ſecond Point it was reſolved, That a meer Layman who was not *(i)* capable of Tithes in Pernancy, was notwithſtanding capable of a *(k)* Diſcharge of Tithes at the Common Law in his own Land, as well as a Spiritual Man; for by the Common Law the Parſon, Patron, and Ordinary might *(l)* have diſcharged a Pariſhioner of Tithes in his own Land, *&c.* or the Pariſhioner might have *(m)* given Part of his Land to the Parſon for a Diſcharge of Tithes in the Reſidue: And for Proof thereof ſee the Book in 8 *E.* 4. 14. *a. b.* and *Regiſter* 38. where it appears that a Layman might be diſcharged of Tithes at the Common Law; but a Layman might alſo be diſcharged of Tithes at the Common Law by rant, or Compoſition, as it appears in the ſaid Books, but not by Preſcription to be diſcharged of Tithes; for it is commonly ſaid in our Books, that he may preſcribe

(a) Cr. El. 512.
(b) Co. Lit. 159. a. 5 Co. 16. a. Cawdry's Caſe. Br. diſmes 9.
(c) Cr. Jac. 438. Moor 531. Dyer 84. pl. 84. Poſtea 44. b.
(d) Poſtea 45. a.
(e) Cr. El. 512.
(f) Co. Lit. 159. a. 13 Co. 15. 1 Mod. Rep. 260.
(g) Cr. Car. 423. 1 Rol. 655. 657. Davis 4. a. 10 H. 7. 18. a. Cawly 6. Cr. El. 599. 785. 5 Co. 28. a. Cawdry's Caſe. 11 Co. 70. a. 13 Co. 17. Hob. 297. 1 Jones 387.
(h) Cr. Car. 94. 423. Cr. El. 511. 785. 1 Rol. Abr. 655. Herl. 60. 1 Jones 387. Noy 132.
(i) 1 Jones 184.
(k) Cr. El. 512.
(l) Cr. Jac. 455. Hob. 297.
(m) F. N. B. 41. G. Hob. 297. Cr. El. 512. Cr. Car. 423. 1 Jones 368, 369. Moor 913.

(a) Hob. 297. Davis 6. b. 13 Co. 16. 1 Jones 369. 1 Rol. 653.

(a) in modo decimandi, but not *in non decimando*, and the Reason thereof is, because he is not, but in Special Cases, capable of Tithes at the Common Law, and therefore without Special Matter shewed, it shall not be intended that he hath any lawful Discharge. And for this Reason, in Favour of Holy Church, although it might have a lawful Beginning, the Law will not suffer such Prescription in this Case, to put it to the Trial of Laymen, who will rather strain their Consciences for their private Benefit, than yield to the Church the Duties which belong to it. And the Law hath great *Policy* therein, for the Decay of the Revenues of Men of Holy Church, in the End, will be the Overthrow of the Service of God, and of his Religion. And therefore it is recorded in History, That there were (amongst others) *(b)* two grevious Persecutions, one under *Diocleſian*, the other under *Julian*, sirnamed *Apoſtata*; for it is recorded, That one of them intending to have rooted out all the Professors and Preachers of the Word of God, *occidit omnes Preſbyteros*, but notwithstanding that, Religion flourished, for *ſanguis Martyrum eſt ſemen Eccleſiæ*; and yet the same was a fearful and grievous Persecution: But the Persecution under the other was more grievous and dangerous, because (as the History saith) *ipſe occidit (c) Preſbyterium*, for he robbed the Church, and spoiled Spiritual Persons of their Revenues, and took all from them whereon they might live; and thereupon in short Time did follow great Ignorance of the true Religion and Service of God, and thereby great Decay of the Christian Profession; for none will apply themselves, or their Sons, or any other who he hath in Charge, to the Study of Divinity, when they shall have, after long and painful Study, nothing to live upon. And it was said, That if a Prescription in *non decimando* should be suffered, the *(d)* Church would rather lose than gain in these Days. And for this Reason such Prescription was not allowable. But a Spiritual Person who was capable of Tithes at the Common Law in Pernancy, may prescribe to be *(e)* discharged of Tithes generally; for as he may prescribe to have a Portion of Tithes in the Land of another, so he may prescribe to discharge his own Lands of Tithes; for it is commonly said in our Books, That before the Council of *Lateran*, *(f)* every Man might have given his Tithes to any Ecclesiastical Person he would, and that appears by the Books aforesaid. And note, It is recited by the Statute of *(g)* 2 *E.* 6. *cap.* 13. that Land may be discharged of Tithes by Prescription, but that cannot be in Case of a Layman, *Ergo* it ought to be in Case of a Spiritual Man, *Vide* 10 *El. Dyer* 277. The *(h)* Orders of the *Ciſtercians*, *Templars*, and *Hoſpitularii*, were discharged of Tithes *ſub modo*, *ſcil. quamdiu propriis manibus excoluntur*, *&c.* and 18 *Eliz. Dyer* (*i*) 349. And as to the second Point, the same dependeth upon the first, for if the Lands of the Bishop

Spiritual Policy.

Fitz. 79.

(b) 11 Co. 70. a.

(c) 1 Rol. Rep. 164. 11 Co. 70. a. Hob. 308.
(d) Hob. 297.
(e) 1 Rol. 653. 11 Co. 14. b. Cr. Car. 423. Hob. 297. Poſtea 48. b.
(f) Hob. 296. Cr. Eliz. 511. Moor 436. 530. 1 Jones 368, 369. 44 E. 3. 5. b. Br. diſmes 1. 21. 10 H. 7. 18. a. Dyer 84. pl. 84. Godolph. Abridg. 354. 7 E. 3. 5. per Parn. 44. Aſſ. pl. 25. Cr. Jac. 454, 559. Sylden de decimis 292. 2 Inſt. 641. 646. Degg's Parſ. 219.
(g) 2 & 3 E. 6. cap. 13.
(h) Dyer 277. pl. 60. 2 Brown. 24. Moor 532. 2 Inſt. 652. 2 Co. 47. b. Cr. El. 579. Palm. 115. 1 Leon. 332. Cr. Jac. 454. 559.
(i) Dyer 349. pl. 16. Poſtea 48. a. Cr. El. 511. 13 Co. 18. Hob. 44. Palm. 119.

were

were diſcharged in his Hands abſolutely by Preſcription, then the demiſing thereof to a Layman, cannot make the ſame (*a*) chargeable which was diſcharged before; and in that it may be more beneficial to the Biſhop, for in reſpect of that he might reſerve the greater Rent, *&c.* And as to the third Point, it was reſolved, That the Traverſe was inſufficient, for as it is ſaid in (*b*) 8 *E.* 4. 14. *a.* the Spiritual Court will not allow any Plea in diſcharge of Tithes, and therefore the Refuſal in ſuch Caſe is not material, for the Party may have a Prohibition before any ſuch Plea pleaded by him in diſcharge of Tithes, and therefore in ſuch Caſes the Allegation of the Refuſal of the Eccleſiaſtical Judge, are rather Words of Courſe than of Effect and Subſtance; but in ſome Caſe the Refuſal is (*c*) traverſable, as it was adjudged *M.* 30 *&* 31 *Eliz.* in this Court, between (*d*) *Morris* and *Eaton*, where the Caſe was, That *Morris* was ſued by *Eaton* in the Spiritual Court for Tithes; *Morris* alledged there, That *Eaton* had not read the Articles according to the Statute; and that the Eccleſiaſtical Judge did refuſe to allow the ſame; and this Refuſal was traverſable by the Judgment of the Court, for otherwiſe, upon ſuch Surmiſe, all Matters might be prohibited in the Spiritual Court, although the Spiritual Judge do all that belongeth to Law and Juſtice. And in the ſame Caſe, the Party grieved may have Remedy by his Appeal; but in the other Caſe of Diſcharge of Tithes, or *de modo Decimandi*, the (*e*) Judges of our Law well know, that the Eccleſiaſtical Judges will not allow ſuch Allegation, and ſo is the Difference. Note Reader, a Man may preſcribe, That he and all thoſe whoſe Eſtate he hath in the Manor of *Dale*, *in Dale a tempore cujus*, *&c.* have paid to the Parſon of *Dale* for the Time being, a certain Penſion yearly, for Maintenance of Divine Service there, in Contentation of all Tithes renewing or ariſing within the ſame Manor: And further preſcribe, That he, and all thoſe whoſe Eſtate he hath in the ſame Manor, Time out of Mind, have uſed in reſpect of the ſaid Penſion ſo paid the Parſon, to have all the Tithes accruing and ariſing within the ſaid Manor, or any Part thereof, *ſcil.* of all Lands holden of the ſaid Manor, or Parcel thereof: And ſuch Preſcription was adjudged good in the King's Bench, *M.* 39 *&* 40 *Eliz. Rot.* 199. in an Action upon the Caſe between *Pigot* (*f*) and *Hern*, in which Caſe two Points were reſolved for good Law: 1. That in ſuch Special Caſe, a Lay Perſon, Owner of the ſaid Manor, ſhall ſue for the Tithes upon all the Special Matter aforeſaid in the Spiritual Court, for it ſhall be intended at the Beginning, the Lord was ſeized of the whole Manor before the Tenancies were derived thereout, and then by

(*a*) Cr. El. 785. Cro. Car. 94, 422, 423. 1 Rol. 633. Antea 44. a. Hob. 42. 309. Yelv. 2, 3. Noy 132. Moor 618, 619. 1 Jones 376. Godb. 183.

(*b*) Hard. 406. Cro. El. 511. 512. Dyer 79. pl. 42. 13 Co. 18, 38, 46.

(*c*) Cro. El. 511.

(*d*) 6 Co. 29. b. Cro. El. 511. 680. Hetl. 87. Hob. 168.

(*e*) Cro. El. 511.

(*f*) Cro. El. 599, 785. Cro. Jac. 501. 1 Sand. 142. Lane 17. Moor 483. 589. Hob. 42. 297. Degg. Parſ. 224.

by Compoſition, or other lawful Means, the Lord ſhould have all the Tithes within the Manor for the ſaid Penſion paid to the Parſon; and the Law intendeth, that at the Beginning it was for the Maintenance of Divine Service, and *pro bono Eccleſiæ*, the Reaſon of which Intendment is the continual Uſage, *a tempore cujus, &c.* 2dly. It was reſolved, That upon this Special Matter alledged, a Man may have Tithes as (*a*) appurtenant to a Manor; for he preſcribeth by a *Que* Eſtate in the Manor, and therefore cannot have them in groſs. But it was adjudged in (*b*) *Winchcomb*'s Caſe, in this Court, in a Prohibition, *Hill.* 35 *Eliz.* That a Man cannot preſcribe generally in him and all thoſe whoſe Eſtate he hath in ſuch Manor, to have any Tithes appertaining to the ſame; for without ſuch Special Matter ſhewed, Tithes which are Spiritual Things, and due *jure Divino*, for the Subſtraction of which, Remedy lieth only in the Spiritual Court, and no Remedy at the Common Law, cannot be Parcel or appurtenant to a Manor, or any other temporal Inheritance. And the Attorney-General was of Council with the Plaintiff, and *Walter* of the *Inner-Temple* with the Defendant.

(*a*) Cro. El. 599.

(*b*) Cr. El. 293. 763.

[But note, Tithes in *England* are now generally confeſs'd to be due only *Jure humano*. See *Bohun*'s Law of Tithes, pag. 2, 3, 12, 13, *&c.*] And Quære how Tithes could be ſued for in the *Spiritual Courts*, when there was no ſuch Court in being?

The

The Archbiſhop of Canterbury's *Caſe.*

Trin. 38 Eliz.

In the King's Bench.

IN a Prohibition in the *King's-Bench*, between *Green* and *Balſer*; the Caſe was, There was a Religious College in *Maidſtone*, to which the Rectory of *Maidſtone* was impropriate. And the ſaid College had divers Lands and Tenements within the ſaid Pariſh of *Maidſtone*, and all was given to the King by the Statute of 1 *E.* 6. And afterwards the Rectory was conveyed to the Biſhop of *Canterbury*, and the Lands, Parcel of the Poſſeſſion of the ſaid College, were conveyed to the Lord *Cobham*; and now the Farmer of the Lord *Cobham* brought a Prohibition againſt *Balſer*, Farmer of the ſaid Rectory, to *Whitgift* Archbiſhop of *Canterbury*, and in his Prohibition he alledged the Branch of the Statute of 31 *H.* 8. concerning diſcharge of Tithes, and ſhewed, That the Maſter of the ſaid College was ſeized of the ſaid Lands, and of the ſaid Rectory, *ſimul & ſemel*, as well at the Time of the making of the Act of 31 *H.* 8. as at the making of the ſaid Act of 1 *E.* 6. and held them diſcharged of Tithes; and ſhewed the ſaid Act of 1 *E.* 6. by which the ſaid College was given to King *E.* 6. and thereupon the Defendant did demur in Law. And in this Caſe divers Queſtions were moved.

Moor 420. 534. 1 Jones 43. Co. Lit. 301.

31 H. 8. c. 13.

1 E. 6. cap. 14.

1. Whether the ſaid College came to the King as well by the Statute of 31 *H.* 8. as by the Statute of 1 *E.* 6. for if this College came to the King by the Statute of 31 *H.* 8. then without Queſtion the ſaid Branch of the ſaid Act concerning diſcharge of Tithes, extends to it: And it was objected by the Plaintiff's Council, That the Words of the ſaid Act are general, *ſc. That all Monaſteries*, &c. *Colleges*, &c. *which hereafter ſhall happen to be diſſolved*, &c. *or by any other Means*

Means come to the King's Highneſs, &c. ſhall be veſted, deemed, and judged by Authority of this Parliament in the very actual and real Poſſeſſion of the King, &c. And when this College came to the King by the Stat. of 1 *E.* 6. it came to the King within theſe Words of the Act (*by any means.*) But it was anſwered by the Defendant's Council, and reſolved by the Court, That that could not be, for (*a*) ſeveral Reaſons.

(*a*) Hob. 310.

1. When the Statute ſpeaks of Diſſolution, Renouncing, Relinquiſhing, Forfeiture, giving up, *&c.* which are (*b*) inferior Means, by which ſuch Religious Houſes came to the King, then the ſaid latter Words (*or by any other Means*) cannot be intended of an Act of Parliament; which is the higheſt Manner of Conveyance that can be; and therefore the Makers of the Act would have put that in the Beginning, and not in the End, after other inferior Conveyances, if they had intended to extend the Act thereunto. But theſe Words (*by any other Means*) are to be ſo expounded, *ſcil.* by any other ſuch inferior Means. As it hath been adjudged, That Biſhops are not included within the Statute of 13 *Eliz. cap.* 10. for the Statute beginneth with (*c*) Colleges, Deans and Chapters, Parſons, Vicars, and concludes with theſe Words, *And others having ſpiritual Promotions*; theſe latter Words do not include Biſhops, *cauſa qua ſupra.* So the Statute of *Weſt.* 2. *cap.* 41. the Words of which are, *Statuit Rex, quod ſi Abbates, Priores, cuſtodes Hoſpital', & aliarum domorum religioſarum, &c.* Theſe latter Words do not include Biſhops, as it is holden 1 & 2 *Phil. & Mary*, *Dyer* 100. 109. for the (*d*) Cauſe aforeſaid.

(*b*) Cro. Jac. 58. Raym. 62. Hard. 442. 2 Inſt. 137. 457. 478. 629. 1 Leon. 277. Dyer 109. pl. 38. Godb. 395. Latch. 89.

(*c*) Goldſb. 171. pl. 102. Godb. 395. 1 Jones 186.

(*d*) Dyer 109. pl. 38. 1 Jones 185.

2. The ſaid Clauſe of 31 *H.* 8. That the ſaid Religious Houſes ſhall be in the King by Authority of the ſame Act; and the Statute of 1 *E.* 6. enacts, That all Colleges, *&c.* ſhall be by Authority of this Parliament, adjudged and deemed in the actual and real Poſſeſſion of the King, ſo that the (*e*) latter Parliament being of as high a Nature as the firſt was, and providing by expreſs Words, That the Colleges ſhall be, by Authority of the ſaid Act, in the actual Poſſeſſion of the King, the ſaid College cannot come to the King by the Act of 31 *H.* 8. It is ſaid in 29 *H.* 8. *Parliament. & Stat. Br.* (*f*) If Lands be given to Tenant in Tail in Fee, his Iſſue cannot be remitted, for the latter Act doth take away the Stat. *de Donis, &c.* 3. The uſual Form of pleading of them, which came to the King by the Statute of 1 *E.* 6. and by the Act of 31 *H.* 8. doth manifeſt the Law clearly, *ſcil.* to plead Surrender or Relinquiſhment, &c. *virtute cujus ac vigore* of the Statute of 31 *H.* 8. the King was ſeized, but to (*g*) plead the Act of 1 *E.* 6. of Chauntries, *virtute cujus ac vigore* of the Statute of 31 *H.* 8. was never heard or ſeen, and for all theſe Cauſes it was reſolved, That this College came to the King by the Act of 1 *E.* 6. and not by the Act of 31 *H.* 8.

(*e*) 4 Inſt. 42.

(*f*) Br. Parliam. & Stat. 73.

(*g*) Hob. 310.

The 2d Queſtion was, Foraſmuch as the ſaid College came to the King by the Act of 1 *E.* 6. and not by the Act of 31 *H.* 8.

Whether

Whether the ſaid Branch of diſcharge of Tithes, extends to ſuch Colleges which after came to the King by any other Act, and not by the Act of 31 *H.* 8. and it was objected, That the ſaid Branch ſhould extend to Colleges which came to the King by any other Act, for it was ſaid, That although the Preamble of the ſaid Branch ſaith, *The late Monaſteries*, &c. yet this is not literally to be underſtood of Monaſteries only which were diſſolved before the Act, for *(late)* is to be conſtrued according to the Body of the Act, *ſc.* of thoſe which were diſſolved before, or which ſhould come to the King afterwards by the ſaid Act, ſo that when they are diſſolved, and in the King by Force of this Act, this Act may call them *(late) quod fuit conceſſum per Curiam.* Alſo they ſaid, That the Words of the Branch it ſelf are general, *ſcil. any Monaſteries*, &c. *Colleges*, &c. without any Limitation, ſo that they conceived, That the Words of the ſaid Branch made for them, and that this Clauſe of Diſcharge ſhould extend to all Monaſteries, *&c.* Colleges, *&c. quæcunque*, by what Means ſoever they came to the King; and they ſaid, That the Intent of the Act was ſo, for the Intent of the Act was to benefit the King, and to make the Subject more deſirous of purchaſing them, *&c.* Againſt which it was ſaid by the Defendant's Council, and reſolved by the Court, That neither the Words, nor the Meaning of the ſaid Branch, did extend to any Monaſteries, *&c.* but to thoſe *(a)* only, which came to the King by the Act of 31 *H.* 8. for it would be abſurd, That the Branch of the Act of 31 *H.* 8. ſhould extend to a future Act of Parliament, which the Makers of the Act of 31 *H.* 8. without the Spirit of Prophecy, could have no Foreknowledge of; but this Clauſe of Diſcharge of Tithes, ſhall extend only to thoſe Poſſeſſions which came to the King by the ſame Act. And where it was ſaid, That the firſt Words of the Branch were general, the ſame is true, but the Concluſion of that Branch is, *In as large and ample Manner as the late Abbots*, &c. So that *(late)* being ſo intended, as it hath been agreed on the other Side, *ſcil.* only of Religious Houſes which came to the King by 31 *H.* 8. It is clear, that that Branch cannot extend to this College which came to the King by the Act of 1 *E.* 6.

(a) 1 Jones 45. 371, 185. Cro. Jac. 608. Hob. 309. Moor 420.

The 3d Queſtion was, admitting that the ſaid College had come to the King by the Stat. of 31 *H.* 8. Whether ſuch general Allegation of Unity of Poſſeſſion of the Rectory and of the Lands in it, was ſufficient; and it was reſolved by the Court, that it was not ſufficient; for no Unity of Poſſeſſion ſhall be ſufficient within the ſame Act, but a lawful and perpetual Unity of Poſſeſſion Time out of Mind, as it was adjudged *M.* 34 *&* 35 *Eliz.* in a Prohibition between *(b) Valentine Knightly*, Eſq; Plaintiff, and *William Spencer*, Eſq; Defendant, where the Caſe was ſuch, The Plaintiff in the Prohibition ſhewed, That *Philip Abbot*, of *Eveſham*, and all his Predeceſſors, Time out of Mind, were ſeized as well of the Rectory impropriate of

(b) 1 Leon 331. Lit. Rep. 54. Lane 17. Moor 534. 2 Bulſtr. 20. 240. 2 Bro. 25. Poſtea 48. 2.

Bad'y

Badby cum Newnam in the County of *Northampton*, as of the Manor of *Badby cum Newnam*, in *Badby* aforesaid, in his Demesn, as of Fee, in the Right of his Monastery, *simul & semel*, until the Suppression of the same Monastery, *quodque ratione inde*, the said Abbot, and all his Predecessors, until the Dissolution of the same Monastery had held the said Manor discharged from the Payment of Tithes, until the Dissolution of the same House, and shewed the Branch of the Statute of 31 *H.* 8. concerning Discharge from the Payment of Tithes, and conveyed the said Manor to *Knightly*, and the said Rectory to *Spencer*, who libelled in the Spiritual Court for Tithes of the Demesns of the said Manor, against *Knightly*, who upon the Matter aforesaid brought the Prohibition, and it was adjudged, That the Prohibition was maintainable; for the said Branch of the Act of 31 *H.* 8. was made to prevent two Mischiefs, one, That otherwise all the (*a*) Impropriations of Rectories to Houses of Religion, had been disappropriate; for if the Body to which the Rectory is appropriated, had been dissolved, the Impropriation to such Body had been dissolved also, as appears by 3 *E.* 3. 21 *E.* 4. 1. *a.* 21 *H.* 7. 4. *b.* *F. N. B.* 33. *k. l.* Another Mischief was, That whereas many religious Persons were discharged from the Payment of Tithes, some by their (*b*) Order, as the *Cistercians*, *Templars*, *Hospitallers* of St. *John's* of *Jerusalem*, as appears by 10 *Eliz. Dyer* 277. Some by Prescription, some by Composition, some by the Pope's Bulls, *&c.* And the greater Part of Religious Houses, as the said Abby of *Evesham* was, were founded before the Council of *Lateran*; and before Time of Memory, it would be infinite, and in a Manner impossible by any Search, to find all the Discharges and Immunities which such religious Houses had, and for this Reason also the said Branch was made. And the great Doubt in the said Case, was conceived upon this Word (*Discharge*) for it was said, That (*c*) Unity of Possession was not any Discharge of Tithes, and by Consequence was not such Discharge as was within the Intent of the said Act. And for the Force of this Word (*Discharge*) 18 *E.* 3. *Bar.* 247. 35 *H.* 6. 10. *b.* 22 *E.* 4. 40. *b.* *&* 6 *H.* 7. 10. *b.* were cited. But as to that, it was resolved by the Court:

1. That the (*d*) Statute doth not say Discharge of Tithes, but Discharge of Payment of Tithes.

2. The Statute doth not say, Discharge of Payment of Tithes absolutely, but as freely as the Abbot, *&c.* held it at the Day of Dissolution, and then this Word (*Discharge*) being referred to a certain Time, may be intended of a Suspension by Unity. As if a Man seized of a Rent disseises the Tenant of the Land, and makes a Feoffment with Warranty, the Feoffee shall (*e*) vouch as of Land discharged of the Rent, and yet the Rent was but suspended, but

(*a*) Hob. 308.

(*b*) Hob. 296, 297. 309. Cro. Jac. 454, 559. 608. Dyer 277. pl. 60. Antea 44. b. Moor 532. 913. 2 Inst. 652. Cro. El. 579. 2 Brownl. 25. Palm. 119. 1 Leon. 332. Latch. 90, 91.

(*c*) 11 Co. 10. 2. 14. b. Moor 50. 218. pl. 356. 532, 533, 534. 1 Jones 3. Hob. 44, 298, 302, 311. 32 H. 8. Br. dismes 17. Dav. 6. a. Br. N. C. 178. Dall. 50. pl. 14. 2 Bulstr. 184. Noy 35. 132. 1 Leon. 248. 332. 334, 335. 4 Leon. 47. Cro. Jac. 452, 453. 608. Dyer 43. pl. 21. Sav. 62.

(*d*) 11 Co. 14. b. Hob. 298.

(*e*) 2 Rol. 745.

but every Suſpenſion is a Diſcharge for a Time, and the Diſcharge being referred to the Time of the Warranty, extends to the Suſpenſion. *Quod vide* 30 *E.* 3. 30. 3 *H.* 7. 4. 41. *a.* 21 *H.* 7. 9. *a. b.* F. N. B. 135. *e.*

3. The Statute ſaith, *As freely as the Abbot*, &c. *retained the ſame.* And it was ſaid, That it was the Intent (*a*) of the King, and of the Makers of the Act, to diſcharge the Land of Payment of Tithes in ſuch Caſe of Unity of Poſſeſſion, being a general Caſe to (*b*) induce Purchaſers the rather to purchaſe the Land for greater Prices.

(*a*) Cro. Jac. 559. 11 Co. 14. b.

(*b*) Bridgm. 34.

4. For (*c*) the infinite Impoſſibility, and the impoſſible Infiniteneſs as hath been ſaid, all the Diſcharges which ſuch Religious Houſes had, could not be known; and the ſame Conſtruction was made in this Court, *Hill.* 24 *Eliz.* in a Prohibition between (*d*) *John Roſe* and *William Gurling*, for Tithes in *Flixton* in the County of *Suffolk.* See 18 *Eliz. Dyer* (*e*) 349. the Parſon of *Peykirk's* Caſe. And it was likewiſe reſolved in the ſaid Caſe of (*f*) *Knightly*, That nothing could be traverſed but the Unity, for (*g*) *ratione inde*, *&c.* is but the Concluſion and the Judgment of the Law upon the precedent Matter; but it was alſo reſolved, That if before the Diſſolution the Farmers of the Demeſns had (*h*) paid Tithes, *&c.* to the Abbot, *&c.* then the Intendment of the Law by the Reaſon of the ſaid Unity of Poſſeſſion (which ought to be Time out of Mind) that the Land was diſcharged of the Payment of Tithes, will not hold Place. For as *Bracton* ſaith, (*i*) *Stabitur preſumptioni donec probetur in contrarium.* But if the Lands were always occupied by the Abbots, or demiſed over, and no Tithes at any Time paid for the ſame before the Act, although the Land be conveyed to one, and the Rectory to another, yet the Land is diſcharged of the Payment of Tithes: And if the Farmers of the Demeſns had paid Tithes before the Act, the ſame ſhould be pleaded by the Defendant in the Prohibition, and Iſſue thereupon might be taken, as it was in the like Caſe, *Trin.* 38 *Eliz.* in this Court, between *Edward Grevil*, Eſq; Poſſeſſor of the Demeſns of the Manor of (*k*) *Naſing* in the County of *Eſſex*, Plaintiff, and *Martin Trot*, Proprietor of the Rectory of *Naſing*, Defendant, where againſt ſuch Unity of Poſſeſſion in Manner and Form aforeſaid, alledged by the Plaintiff in the Abbot of *Waltham* and his Predeceſſors, *&c.* in the Rectory and Demeſns, and with like Concluſion as aforeſaid: The Defendant alledged Payment of Tithes by the Farmers of the ſaid Demeſns (without any (*l*) Traverſe by the Rule of the Court) and Iſſue was joined thereupon, and it was tried againſt *Trot*, and therefore the Prohibition ſtood. And it was likewiſe reſolved, That although the Plaintiff in the Caſe at Bar alledged, That the Maſter of the ſaid College, at the Time of the making of the ſaid Act of 1 *Edw.* 6. held them diſcharged

(*c*) 9 Co. 25. a. 11 Co. 14. b. Hob. 298. Bridgm. 34.

(*d*) Co. Ent. nu. 4.

(*e*) Antea 44. b. Dyer 349. pl. 16. Hob. 44. Palm. 119. Cro. El. 511. 13 Co. 18.

(*f*) Antea 47. a.

(*g*) 11 Co. 10. a. Hard. 70. Hob. 298. 1 Leon. 333. Cro. El. 29. 584, 585. Moor 530, 534. Doct. pla. 351.

(*h*) Cro. Jac. 453. 559. 11 Co. 14. b.

(*i*) 4 Co. 71. b. 5 Co. 7. b. Cawdry's Caſe. 6 Co. 73. b. Co. Lit. 373. b. 2 Bulſt. 314. Hob. 298. See Poll. 3. 9.

(*k*) Moor 528, 529.

(*l*) Hob. 298.

charged of Tithes; and although the Lands of ſuch religious Perſons may be (*a*) diſcharged of Tithes by Preſcription, as it hath been late adjudged in the Caſe of one *Wright* in this Court, or by Compoſition, *&c.* yet ſuch general Allegation that he was diſcharged of Tithes, was not ſufficient, without ſhewing how he was diſcharged, either by Preſcription, Compoſition, or other lawful Means. But if the Land had come to the King by the Statute of 31 *H.* 8. then (*b*) by Force of the ſaid Branch of Diſcharge of the Payment of Tithes, ſuch general Allegation, that ſuch Prior, *&c.* held the Land at the Time of the Diſſolution of the ſaid Priory diſcharged of the Payment of Tithes, without ſhewing how, had been ſufficient, and ſo is the common Uſe in Prohibitions.

(*a*) 1 Rol. 653. 11 Co. 14. b. Cro. Car. 423. Hob. 297. Antea 44. b.

(*b*) Hob. 300. 9 Co. 26. a. Cro. Car. 543. Bridg. 142. Godb. 398.

The fourth Queſtion in the Caſe at Bar was, Whether any Houſe which was Eccleſiaſtical, and not Religious, as Biſhops, Deans and Chapters, Archdeacons, and the like, ſhall be within the Act of 31 *H.* 8. for no Houſe within the Act of 31 *H.* 8. is ſaid Religious, but ſuch which was regular, and which conſiſted of ſuch Perſons as had profeſſed themſelves, and vowed three Things, that is to ſay Obedience, voluntary Poverty, and perpetual Chaſtity; and thoſe are called in our Law, dead Perſons in Law. For after ſuch Profeſſion their Heirs ſhall have their Lands, and their Executors or Adminiſtrators their Goods, and that was called *Mors civilis*, which was the Reaſon that when a Leaſe for Life was made, always the *Habendum* was, To have and to hold to him *durante vita ſua naturali*, for it was then taken, that if the *Habendum* had been *durante vita ſua* (without ſaying *naturali*) the civil Death, that is to ſay, the Entry into Religion had determined it. But it was reſolved by the Court, That no Eccleſiaſtical Houſe, if it be not (*c*) Religious, is within the Act of 31 *H.* 8. for divers Reaſons.

(*c*) Co. Lit. 342. a. 1 Jones 185.

1. The Words of the Act are always through the whole Act in the copulative, *Religious and Eccleſiaſtical*, ſo that if it be Eccleſiaſtical only, it is out of the Act.

2. The Makers of the Act gave the King as well thoſe Religious and Eccleſiaſtical Houſes as were diſſolved, *&c.* as thoſe which ſhould be afterwards diſſolved, but none were diſſolved before the Act, but only Religious Houſes, and no Houſe Eccleſiaſtical only; for no Biſhoprick, Deanary, Archdeaconry, *&c.* or ſuch-like Eccleſiaſtical and Secular Corporation was diſſolved before; therefore no Eccleſiaſtical Houſe which was not Religious, (which after the Act ſhall be diſſolved) was within the Intent and Meaning of the ſaid Act.

Thirdly, It is enacted by the Statute of 31 *H.* 8. that (*d*) all Religious and Eccleſiaſtical Houſes, which after ſhall be diſſolved, *&c.* ſhall be in the actual Poſſeſſion of the King, in the ſame State and Condition as they were at the

(*d*) Dyer 231. pl. 1. 1 Co. 47. a. 10 Co. 55. b. Ben. in Kelw. 211. pl. 19. Ben. in Aſh. pl. 19. N. Benl. 132. pl. 195.

the Time of the making of the ſaid Act, upon which Clauſe of the Statute it was adjudged, *Paſch.* 5 *Eliz. Rot.* 129. reported by Serjeant *Bendloes*. And *Mich.* 6 *&* 7 *Eliz. Dyer* 231. and *Plow. Com.* 207. *(a)* That if an Abbot after the ſaid Act grants the next Avoidance of an Advowſon, or makes a Leaſe for Years, and afterwards ſurrenders, ſo that by the Act, the Poſſeſſions of the Abby ought to be in the King, in the ſame State and Condition as they were at the Time of the making the Act; and at the Time of making of the Act, the Land and the Advowſon were diſcharged of all Intereſts, for this Reaſon it was adjudged in both Caſes, That the Leaſe and the Grant were void by the ſaid Act. But if a Dean and Chapter, and other ſuch Eccleſiaſtical and Secular Corporations ſhould be within the ſaid Act, then if they ſhould ſurrender their Poſſeſſions, they would avoid all their own Grants and Leaſes, which would be dangerous. And that was one principal Reaſon that the Colleges, Chanteries, *&c.* which came to the King by the Acts of 37 *H.* 8. or 1 *E.* 6. ſhould not veſt in the King by the Act of 31 *H.* 8. for the Miſchief before, for avoiding of their Leaſes, Grants, *&c.* And to conclude this Point, it was held in the Common Pleas in *Parret*'s Caſe, concerning the Priory of *Frideſwide*, that if the Houſe be not religious and regular, it is not within the Act of 31 *H.* 8.

Co. Lit. 342.

(a) Dyer 231. pl. 1. 1 Co. 47. a. 10 Co. 55. b. Ben. in Kelw. 211. pl. 19. Benl. in Aſh. pl. 19. N. Ben. 132. pl. 195.

And as to the Opinion of 10 *Eliz. Dyer* 280 *(b) Corbet*'s Caſe, concerning the Priory of *Norwich*, it ſeems that that differs much from other Deans and Chapters, for the Dean and Chapter of *Norwich* was once religious, for they were Prior and Convent before; and yet that Caſe was denied by *Popham* Chief Juſtice, and ſome other of the Judges, for the Reaſons and Cauſes aforeſaid.

(b) Dyer 280. pl. 11, 12, 13.

Fifthly, It was held by the Court, That although it is provided by the Statute of 1 *E.* 6. that the King ſhall have the Lands of the Colleges, *&c. in as ample and large Manner as the ſaid Prieſts, Wardens*, &c. *had or enjoyed the ſame*, that theſe general Words ſhould not diſcharge the Land of any Tithes, for they are not iſſuing out of Land, but are Things diſtinct from the Land. For as the Book is in (24) 42 *Edw.* 3. 13. *a.* the Prior ſhall have *(c)* Tithes of Land againſt his own Feoffment of the ſame Land; and it is no good Cauſe of Prohibition to alledge Unity of Poſſeſſion in a College which came to the King by the Statute of 1 *Edw.* 6. as a Man may by the Statute of 31 *Hen.* 8. in an Abbot, Prior, *&c.* as aforeſaid; for the Statute of 1 *Edw.* 6. hath no ſuch Clauſe of

See Raym. 225, &c. ibid. cont.

(c) Cro. Jac. 362. 452. 1 Co. 111. a. 11 Co. 13. b. 1 Rol. 655. 2 Rol. 57. 2 Bulſt. 183, 184. Styles 279. Owen 39, 40. Moor 47. 50. 219, 532, 910. Dall. 50. Dav. 6. a. Noy 35. 132. Br. N. C. 178. Dyer 43. pl. 21. Cro. El. 161. 479. Degge 226. Hetl. 31.

Diſcharge of Payment of Tithes, as the Statute of 31 *H.* 8. hath. And therefore ſuch perpetual Unity, as hath been ſaid before, will not ſerve upon this Act of 1 *E.* 6. And afterwards a Conſultation was granted: And another Conſultation was granted the ſame Term in another Prohibition ſued upon the ſame Matter between *Green* and *Buſſken.* And *Laurence Tanfield* and others, were of the Council with the Plaintiff, and the Attorney-General and others with the Defendant.

[See *Hob.* 295. *contra.* And note *Raym.* 225, *&c.* That no Precedent, Judgment, or good Opinion, will warrant *Coke*'s Opinions in this Caſe. *Q.*]

Sir

Sir HUGH CHOLMLEY'S *Caſe.*

Paſch. 39 *Eliz.*

In the Exchequer.

SIR *Hugh Cholmley*, Debtor to the Queen, brought an Action of Treſpaſs in the Exchequer, againſt *Randal Hanmer* and others, *Quare clauſum fregit* in *Bettifield* in the County of *Flint*, *quo minus*, *&c.* And upon Not-guilty pleaded, The Jury gave a Special Verdict to this Effect; *Thomas Holford* had Iſſue two Sons, *Chriſtopher* the Elder, and *George* his younger Son; *Chriſtopher* had Iſſue *Mary*, Wife of the ſaid Sir *Hugh Cholmley*, now Plaintiff; and that the ſaid *Thomas Holford* was ſeiſed in Fee of the Land in Queſtion amongſt others; and he and *Jane* his Wife, and *Chriſtopher* their elder Son, did levy a Fine of the ſaid Land 7 *Eliz.* to *John Warren* and *Thomas Stanley*, *&c.* to the Uſe of the ſaid *Thomas Holford* for Life, and afterwards to the Uſe of the ſaid *Chriſtopher*, and the Heirs Males of his Body, and afterwards to the Uſe of the ſaid *George*, and to the Heirs Males of his Body, *&c.* and afterwards to the Uſe of the right Heirs of the ſaid *Thomas*. And afterwards, that is to ſay, in *September*, 11 *Eliz.* the ſaid *Thomas Holford* died; 23 *January*, 12 *Eliz.* the ſaid *George* by Indenture between him and *John Warren*, inrolled within ſix Months in the Chancery, for 20 *l.* bargained and ſold the Tenements aforeſaid; and all his Eſtate, Right, Title and Intereſt in them, to the ſaid *John Warren*, to have and to hold the Tenements aforeſaid, and all his Eſtate, Right, Title, and Intereſt in them, to the ſaid *John Warren*, for the Life of the ſaid *Chriſtopher*, and after his Death, the Remainder to the Queen, her Heirs and Succeſſors for ever, upon Con-

Moor 342. 2 Rol. Rep. 60.

Condition that the Eſtate ſhould be void upon Tender of 20 *l.* at the Chapel of the Rolls to the ſaid *Warren*, or to the Queen, her Heirs or Succeſſors; 14 *Martii*, 12 *Eliz.* the ſaid *Chriſtopher* did enfeoff Sir *Hugh Cholmley*, the Plaintiff's Father, and others, to the Uſe of them and their Heirs, and 17 *Aprilis*, 12 *Eliz.* at the great Seſſions held within the ſaid County of *Flint*, a Common Recovery was had againſt the ſaid Feoffees, who vouched to Warranty the ſaid *Chriſtopher*, who vouched over the common *(a)* Vouchee, and Execution was had accordingly, which was to the Uſe of *Chriſtopher* and his Heirs. And afterwards, that is to ſay, 21 *Novemb.* 14 *Eliz.* *George Holford* tenderd 20 *l.* to *Warren* at the Chapel of the Rolls, which he received. After which Tender, the Queen, by her Letters Patents, bearing Date 14 *Decemb.* 14 *Eliz.* reciting the Grant made by the ſaid *George Holford* to *Warren*, the Remainder to her upon the Condition aforeſaid; and that the ſaid Grant and Remainder to her was by Fraud and Covin, *&c. prout nobis ſatis liquet*, the Queen *ex certa ſcientia & mero motu* granted the Remainder which ſhe had in the Tenements aforeſaid to the ſaid *Chriſtopher* in Fee. And afterwards 15 *Decemb.* 14 *Eliz.* *George Holford*, by Indenture delivered at *Weſtminſter*, and inrolled within ſix Months in the Chancery, bargained and ſold to *John Bruin* the Tenements aforeſaid, to have and to hold for the Term of *Chriſtopher*'s Life, the Remainder to the Queen in Fee, upon Condition to ceaſe upon Tender of 30 *s.* at St. *Dunſtan*'s Church, *&c.* to which Grant 18 *Decemb.* 14 *Eliz.* *Bruin* agreed; and afterwards 4 *Feb.* 14 *Eliz.* another Recovery with *(b)* double Voucher, in which the ſaid *Chriſtopher* was vouched again, was ſuffered; which Recovery was to the Uſe of the ſaid *Chriſtopher* and his Heirs, *Anno* 19 *Eliz.* *Chriſtopher* died without Iſſue Male, 27 *Jan.* 23 *Eliz.* *George* paid the 30 *s.* to *Bruin*, according to the ſaid Condition which was found by Inquiſition, found by Virtue of a Commiſſion under the Great Seal of *England*, upon which the ſaid *George* ſhewed his Title to the Court; and, upon ſhewing his Right, it was awarded *quod Manus Dominæ Reginæ amoveantur*. And thereupon the Defendants, by the Commandment of the ſaid *George*, entred upon the Plaintiff, who claimed in the Right of his Wife, whereupon the Plaintiff brought his Action of Treſpaſs: and whether the Entry of the ſaid *George* was lawful or not, was the Queſtion.

(a) 1 Co. 62. a. Co. Lit. 372. b.

(b) Co. Lit. 372.

And after many Arguments at the Bar, the Caſe was argued at the Bench by *Ewens*, *Clark*, and *Periam* Chief Baron: And it was unanimouſly agreed by them, that the Entry of *George Holford* was not lawful, wherefore Judgment was

was given for the Plaintiff. And in this Case divers Points were unanimously resolved by the Court

1. That the Remainder limited to the Queen after the Death of *Christopher*, was void for three Reasons:

1. Because *Warren*, who was Party to the first Indenture, took nothing; and by Consequence the Queen, who is not Party to the Indenture, but named by way of Remainder (*a*) after the *Habendum*, the particular Estate being void, shall take nothing; for the Estate which is limited to *Warren* is for the Life of *Christopher*. And as to this Point, the Case is such, *Christopher* being Tenant in Tail, the Remainder to *George* in Tail; *George*, by Deed indented and inrolled, doth bargain and sell his Remainder to *Warren* for the Life of *Christopher*; this Grant is void, because it can never take Effect in Possession, nor can the Grantee ever have any Benefit thereof: And therefore a Difference (*b*) was taken between such Grant of a Reversion and the said Grant of a Remainder; for the Grant of a (*c*) Reversion during the Life of a Tenant in Tail is good, because he shall have the (*d*) Services which the Tenant in Tail ought to do during the Life of the Tenant in Tail; but such Grant of a Remainder can never, to any Purpose, take Effect, and therefore it is void. Moreover, a manifest Difference appears between this Case at Bar, and a (*e*) Lease to *Christopher* for his Life, the Remainder to another for the Life of *Christopher*, for by Possibility the Remainder may take Effect; *scil.* If the Tenant for Life makes a Feoffment in Fee, or commits any Forfeiture, he in the Remainder may enter for the Forfeiture; and that is proved by the Book in 41 *E.* 3. *Fitz. West.* 83. and (*f*) (*remanere dicitur quasi terra remanens*) that cannot be when a Remainder cannot by any Possibility fall into Possession. For a Remainder ought to vest in Estate, during the (*g*) particular Estate, and ought to take Effect in Possession when the particular Estate ends, for *vana est illa potentia quæ nunquam venit in actum.* It was objected, that *Christopher* might enter into Religion, and then might *Warren* enter during his natural Life, for as much as *Christopher* had no Issue Male. But as to that, it was answered and resolved, that such Possibility (*h*) of Profession shall not make the Remainder good for two Reasons:

(*a*) Co. Lit. 21. a. 26. b. 378. b. Cr. Jac. 434. Poph. 125, 126.

(*b*) Yelv. 149. See 1 Salk. 233.

(*c*) 11 Co. 70. b.

(*d*) Yelv. 149.

(*e*) Plowd. 422. a. Moor 344. Winch. 55. 1 Sand. 151.

(*f*) Yelv. 149. Co. Lit. 143. a.

(*g*) 1 Co. 66. b. 129. b. 130. a. 134. b. 135. b. 3 Co. 2 1. a. Raym. 54, 13. 2 Anderf. 37. Moor 104.

(*h*) 11 Co. 70. b.

1. Because it is such a remote Possibility as shall not be intended by a common Intendment to happen; but (*i*) a Possibility which shall make a Remainder good, ought to be a common Possibility, and *potentia propinqua*, as Death, or Death without Issue, or Coverture, or the like. And therefore as the Logician saith, *Potentia est duplex, remota & propinqua, 9 H.* 6. 24. *b.* the Remainder to a (*k*) Corporation which is not at the Time of the Limitation of the Remainder is void, although

(*i*) Co. Lit. 20. b. 25. b. 10 Co. 50. b. 2 Rol. Rep. 129.

(*k*) Winch. 55. Moor 104. Hob. 33. 4 Leon. 223. Co. Lit. 264. a. Dall. 31. 1 Rol. Rep. 254.

although such be erected afterwards during the particular Estate, for it was *potentia remota:* And this Difference plainly appears in a common Case in our Books. If a Lease be made for Life, the (*a*) Remainder to the right Heirs of *J. S.* This is good; for, by common Possibility, *J. S.* may die during the Life of the Tenant for Life: But if at the Time of the Limitation of the Remainder there is no such (*b*) *J. S.* but during the Life of the Tenant for Life, *J. S.* is born and dies, his Heir shall never take as it is agreed in 2 *H.* 7. 13. *b.* And in (*c*) 10 *E.* 3. 46. the Case was, That upon a Fine levied to *R.* he granted and rendred the Tenements to one *I.* and *Florence* his Wife for their Lives, the Remainder to (*d*) *G.* Son of *I.* in Tail, the Remainder to the right Heirs of *I.* and in Truth at the Time of the Fine levied, *I.* had not any Son named *G.* but afterwards he had a Son named *G.* and died: And in a *Præcipe* against *Florence*, it was adjudged that *G.* should not take the Remainder in Tail, because he was not born at the Time of the Fine levied, but long after, wherefore another, who was right Heir to *I.* by Judgment of the Court, was received; for when *I.* had not any Son named *G.* at the Time of the Fine levied, the Law will not suppose that he will afterwards have a Son named *G.* for that is *potentia remota.* Note Reader, a (*e*) Difference between a Remainder limited by a particular Name, and by a general Name; for a Remainder limited by a general Name may be good, although the Person be not *in esse* at the Time of the Remainder limited: As if a Lease for Life be made, the (*f*) Remainder to the right Heirs of *J. S.* who is alive, this Remainder may be good, and yet he hath no Heir at the Time of the Remainder limited. The same Law of a Remainder *primogenito filio:* But a Remainder limited in (*g*) particular by Name of Baptism and Sirname is not good, if the Person be not *in esse.* It is held in 7 *E.* 3. that if the Advowson of the Church of *D.* be granted to the Parson of *D.* and his Successors, it is void as to the Successor, because the Successor who ought to take it, can never have any Benefit by Way of Presentation.

(*a*) Br. Done 22. Br. Grant 151. Raym. 144. Co. Lit. 343. a. Winch. 55. 2 Anderf. 37. Moor 104. Perk. Sect. 52. Poph. 82. 9 H. 6. 24. a. Hob. 33. 3 Co. 20. a. 10 Co. 50. b. 51. a.

(*b*) Hob. 33. 1 Rol. Rep. 254. Br. Done 22. Br. Grant 151.

(*c*) 10 E. 3. 45. a. b. 46. a.

(*d*) 1 Rol. Rep. 254. Moor 104.

(*e*) Moor 104.

(*f*) 3 Co. 20. a. Raym. 144. 2 Anderf. 37. Winch. 55. Moor 104. Co. Lit. 343. a. Poph. 82. Perk. Sect. 52. Hob. 33. 9 H. 6. 24. a. 10 Co. 50. b. 51. a.

(*g*) 1 Rol. Rep. 254. Moor 104.

The second Reason why the Remainder to the Queen is void, was because the Law will never adjudge a Grant good by Reason of a Possibility or Expectation of a Thing which is against Law, for that is *potentia remotissima & vana*, which by Intendment of Law *nunquam venit in actum.*

Thirdly, The Remainder to the Queen is void, because *George* having a Remainder in Tail, hath granted all his Estate to *Warren*, *Habendum* all his Estate during the Life of *Christopher*, the Remainder to the Queen, in which Case, when he hath granted all his Estate to *Warren*, he (*h*) cannot limit any Remainder

(*h*) Moor 344.

Remainder thereof to the Queen; for a Remainder is but a Remnant of the Eſtate of the Grantor, and the Queen cannot have any Remnant of the Eſtate of *George*, when he having a Remainder in Tail, has granted all his Eſtate to *Warren*. And *Littleton*, *fol.* 145, ſaith, That in ſuch Caſe the Eſtate Tail is in (*a*) Abeyance. And 19 *H.* 6. 60. *a.* it is ſaid, That if (*b*) Tenant in Tail be attainted of Felony, and the King, after Office found ſeiſed, the Eſtate Tail is in Suſpence. And *vide* 13 *H.* 7. 10. *a.* if (*c*) there be Tenant for Life, the Remainder in Tail, if he in Remainder in Tail releaſe to Tenant for Life all his Right, it puts the Eſtate Tail ſo in Abeyance, that no Right remains in him who releaſes to have an Action of Waſte; for in the ſame Caſe, by his Releaſe, he hath put all his Eſtate out of him. It was agreed, *Hill.* 35 *Eliz.* in (*d*) *Blitheman*'s Caſe, That if Tenant in Tail, in Conſideration of paternal Love, covenants by Deed to ſtand ſeiſed to the Uſe of himſelf, for his own Life, and after his Death to the Uſe of his eldeſt Son in Tail; and after this Covenant the Covenantor marries and dies, the Wife ſhall be endowed; for when Tenant in Tail hath limited the Uſe to himſelf for the Term of his own Life, he cannot limit any Remainder over, for an Eſtate for his own (*e*) Life is as long as he can limit by the Law, and therefore the Limitation of the Remainder is void. Wherefore it was concluded, that upon Conſideration of the firſt Point, *Warren* had nothing: And upon Conſideration of this latter Point, if he ſhould take *omnino*, he would take (*f*) *nimium*, and by Conſequence the Remainder to the Queen is void, *quacunque via data*. And it was agreed that the Limitation to *Warren* by the *Habendum* for the Life of *Chriſtopher*, was void and repugnant.

(*a*) Lit. Sect. 649. Lit. 146. a. 3 Co. 84. b.
(*b*) Godb. 442.
(*c*) Godb. 442.
(*d*) 1 And. 291. Moor 345, 683. Lit. Rep. 122. Yelv. 51. Cr. El. 279, 280. Noy 46. 2 Rol. Rep. 70. Godb. 442. Dyer 55. pl. 3. in Marg.
(*e*) 1 Co. 44. a. Co. Lit. 331. a. 332. a. Godb. 442, 443. Moor 414, 413. Lit. Sect. 613.
(*f*) Moor 344.

2. Admitting the Remainder to the Queen was good, yet it was reſolved, that the Common Recovery did bar the Eſtate of *Warren*, and by Conſequence the Condition alſo during his Life; and therefore as to this Point the Caſe is but thus: A Man makes a Gift in Tail, the Remainder in Fee; he, in Remainder, grants his Remainder to another for Life; the Remainder to the Queen in Fee upon Condition *ut ſupra*, Tenant in Tail ſuffers a Common Recovery, if this Recovery ſhall bar the Eſtate of Tenant for Life in Remainder, and the Condition alſo, is the Queſtion. And it was reſolved, That the Recovery doth bar not only the Eſtate Tail, but alſo the Eſtate for Life of *Warren*, although the (*g*) Remainder of the Fee was in the Queen, for it is out of the Statute of (*h*) 34 *H.* 8. *cap.* 20. becauſe the Eſtate Tail was not of the Queen's Gift, nor of any of her Anceſtors, Kings of *England*, as it hath

(*g*) Antea 15. b. Moor 115, 195, 345. 1 And. 46, 47, 142, 143. Cr. Car. 430. Plowd. 555. a. Yelv. 149. Noy 132. Co. Lit. 371. b. 3 Leon. 57. 4 Leon. 40. Benl. in Kel. 213. a. b. O. Ben. 32. Benl. in Aſh. 26. N. Benl. 223. pl. 234.
(*h*) 34 & 35 H. 8. c. 20. 10 Co. 37. a.

hath been adjudged, *Mich.* 15 & 16 *Eliz. in Partitione facienda, inter Jackſon & (a) Drury*; & 27 *Eliz. in Communi Banco, inter (b) Wiſeman & Jennings*. And if the Eſtate of *Warren* be bound and barred, the Condition annexed to his Eſtate is barred alſo during his Life. And therefore, if one gives Lands in Tail, and afterwards grants the Reverſion upon Condition; if the Tenant in Tail ſuffers a Common Recovery, it bars the Reverſion and Condition alſo. And therefore it was adjudged *Mich.* 34 & 35 *Eliz.* between *(c) Gately* and *Hunt*, being an Exchequer Chamber Caſe, by all the Judges of *England*, That if he in the Reverſion with a Remainder expectant upon an Eſtate Tail grants a Rent Charge, or Common, or makes a Leaſe for Years, or acknowledges a Statute, and afterwards Tenant in Tail ſuffers a Common Recovery and dies without Iſſue, the Poſſeſſion of the Recoveror ſhall not be ſubject to the Charges, Leaſes, or Statutes of him in the Remainder. 1. Becauſe the Recoveror, ſo long as the Recovery remains in Force, is under the Eſtate of Tenant in Tail, which Eſtate was not ſubject to any of the ſaid Incumbrances of him in Remainder: For ſuppoſe, that before the Recovery Tenant in Tail had made a Leaſe for Years, or acknowledged a Statute, and afterwards had ſuffered a Recovery, and died without Iſſue, without Queſtion the Poſſeſſion of the Recoveror ſhall be ſubject to the Leaſe and Statute of the Tenant in Tail, and ſhall not be ſubject to the Leaſes and Statutes of him in Remainder alſo, for then there would be Confuſion. Alſo the Charges of him in Remainder or Reverſion cannot take Effect in Poſſeſſion till the Remainder or Reverſion comes in Poſſeſſion, and that cannot happen after the Recovery. The ſame Law of a Condition annex'd to a Reverſion or Remainder for the Reaſons aforeſaid; then this Payment to *Warren* cannot diveſt the Remainder out of the Queen for three Reaſons:

(a) Moor 115. pl. 258. 3 Leon. 37. Ca. 84. 1 Anderſ. 48. ca. 118. Benl. in Keiw. 213. pl. 26. Benl. in Aſh. 26. O. Benl. 32. pl. 132. N. Benl. 223. pl. 254.

(b) 2 Co. 15. a. b. Moor 195. 345. 1 Anderſ. 140, 141.

(c) Moor 154, 345. 1 Co. 61. b. 62. a. b. Poph. 5. Jenk. Cent. 250. 4 Leon 150. 1 Anderſ. 282. Goldſb. 5. 10 Co. 42. b. 2 Rol. Rep. 221. 1 Co. 127. b. 128. a. 3 Keb. 288, 289. Winch. 41. Noy 10. Palm. 139.

1. Becauſe the Condition, during the Life of *Warren*, was diſcharged.

2. Becauſe he who takes Benefit of a Condition ought to have the whole Eſtate given, reveſted in him as in his *(d)* firſt Eſtate, and that cannot be here; for the Eſtate for Life of *Warren* was barred by the Recovery: Alſo the Tender to *Warren* was to the Intent to reveſt his Eſtate, and that cannot be when his Eſtate was barred, and cannot be reveſted, for which Cauſe this Payment cannot diveſt the Remainder out of the Queen.

(d) Co. Lit. 202. a. 1 Co. 86. b. 4 Co. 120. b. 1 Rol. 474. Cr. El. 641.

A third Point was argued by the Defendant's Counſel, That there needed not in this Caſe any *(e)* Office or *Monſtrance de droit* to diveſt the Remainder out of the Queen by Force of the Condition, for the Condition is performed by one Subject to another Subject by Matter *in pais*, and inſamuch as the Eſtate for Life cannot be reveſted by Force of the Condi-

(e) 2 Rol. 215. Cr. Eliz. 641. Moor 546.

tion, unleſs the whole Eſtate to which the Condition trencheth be defeated, therefore for Neceſſity, and by Operation of Law, the Eſtate for Life being defeated, the Remainder to the Queen, which depends upon it, ſhall be defeated alſo: as in 49 *E.* 3. in *Iſabel* (*a*) *Goodcheap*'s Caſe. One deviſed Houſes in *London*, deviſable by Cuſtom, and held of the King in Tail, and if the Donee died without Iſſue, that the Land ſhould be ſold by his Executors, and died; the Deviſee died without Iſſue, now the Land is eſcheated to the King, yet the Bargain and Sale of the Executors ſhall diveſt the King's Eſtate for Neceſſity, and that without Petition, or *Monſtrance de droit*; and alſo their Vendee is in by the Deviſor, paramount the Eſcheat: So the Bargainor in this Caſe ſhall be in of his ancient Eſtate paramount the Remainder to the Queen. 25 *E.* 3. 48. *a.* (*b*) If a Diſſeiſor, or one who hath no Title, makes a Leaſe for Life, the Remainder to the Queen; if the Diſſeiſee, or he who hath good Right, recovers againſt Tenant for Life, and entreth, the Queen's Remainder ſhall be thereby defeated; otherwiſe, if the Recovery be by (*c*) feigned or no Title, there the Queen's Remainder is not touched; and *Plow. Comm.* 553, *a. b.* agrees therewith. So if Tenant in Tail grants the Land to the King in Fee with Warranty, and the King grants it for Life, Tenant in Tail dies, and the Iſſue in Tail recovers in a *Formedon* againſt Tenant for Life, the King's Eſtate ſhall be defeated, as it appears by (*d*) 7 *R.* 2. *Aide del Roy* 61. 22 *E.* 3. 7. *acc.* And ſo it was ſaid, if the Diſſeiſee in ſuch Caſe enters, it ſhall defeat the King's Remainder. See *Plow. Comm.* (*e*) 489. *a.* And note there the principal Caſe of the Lord *Lovel*: An Eſtate veſted in the King ſhall be defeated by Force of a Condition, by an Act in Law, without Office or *Monſtrans de droit*: And mark there the Caſes of Remitter put in the End of the Caſe. Againſt which it was argued by the Plaintiff's Counſel, That admitting the Remainder to the Queen to be good, that this Tender *in pais* to a Subject ſhall not diveſt the Remainder out of the Queen: For as *Bracton* ſaith, (*f*) *Nihil tam conveniens eſt naturali æquitati unumquodque diſſolvi eo ligamine quo ligatum eſt*: And as no Eſtate can be veſted in the Queen without Matter of Record, ſo no Eſtate can be diveſted out of her (*g*) without Matter of Record. See *Plow. Comm.* 553. *a. b.* in *Walſingham*'s Caſe, and *Plow. Comm.* 380. *Nevil*'s Caſe, (*h*) 12 *H.* 7. and many other Books. And it was ſaid, that when an Eſtate ſhall be diveſted out of a common Perſon, and veſted in another, without Action, Entry, or Claim, it ſhall be diveſted out of the King without Petition or *Monſtrans de droit*; as it is agreed, *Plow. Comm.* 489. *a.* in the Lord *Lovel*'s Caſe, cited by the other Side; but when in the Caſe of a common Perſon the Eſtate ſhall not be diveſted out of him without Action, Entry, or Claim; there it ſhall not be diveſted out of the King without Petition or *Monſtrans de droit*, &c.

(*a*) Lit. Rep. 123. Godb. 443. Cr. El. 640. 8 Co. 76. b. 49 E. 3. 16. a. b. Br. Eſcheat 32. Br. Deviſe 10. Fitz. Deviſe 8. Plowd. 259. a. 4 Co. 58. Raym. 83. 29 Aſſ. 31. Hard. 13, 14. Swinb. 335. 2 Rol. Rep. 351. Poſtea 53. b. Salk. 277.

(*b*) Co. Lit. 241. a. 354. b. Cr. El. 640. 1 Co. 16. a.

(*c*) Co. Lit. 354. b. 1 Co. 16. a.

(*d*) Co. Lit. 354. b. 4 Co. 59. b.

(*e*) Hob. 348.

(*f*) 4 Co. 57. b. 5 Co. 26. a. 6 Co. 43. b. 2 Inſt. 359, 573. Davis 33. b.

(*g*) Cro. Eliz. 641. Moor 346. Kelw. 7. b.

(*h*) 12 H. 7. 21.

And

And the principal Caſe in *Plowden*'s Commentaries in the Caſe of the Lord *Lovel* was well agreed; for there, by Force of the Condition, it had been in the Caſe of a common Perſon, the Eſtate gained by Eſcheat ſhould be diveſted by Act in Law without Entry or Claim: And ſo and for the ſame Reaſon the Caſes of Remitter, and the Caſes in (*a*) 49 *E.* 3. 16. were well agreed. And alſo foraſmuch as the Executors in 49 *E.* 3. had but a Power, they had no other Mean but only to ſell, for they could not have a Petition, *Monſtrans de droit*, or other Remedy. But in this Caſe, *G. Holford*, the Grantor, had clear and apparent Remedy, either by Petition or *Monſtrans de droit*. And it was ſaid, that the Queen's Remainder did ſo privilege the Eſtate of the Tenant for Life, that the Grantor could not enter upon the Tenant for Life. And it was ſaid, if Land upon Condition comes to the Queen, the Condition is broken; the Queen makes a Leaſe for Life, he who hath the Condition cannot enter, but ought to have a Petition, or *Monſtrans de droit*, *&c.* and that appears in the Book in (*b*) 9 *H.* 4. 4. *a. b.* A Man bound in a Statute conveys Land to the King, who leaſes for Life, the Conuſee ſhall not extend upon the Poſſeſſion of the Tenant for Life. And it was ſaid, if the Caſes put before, when he who hath Right doth recover againſt Tenant for Life, the Reverſion or Remainder being to the King by (*c*) defeaſible Title ſhall diveſt the King's Eſtate, ſhould be granted, yet they are not to be compared to our Caſe; for in our Caſe, the Party himſelf, who hath conveyed the Land lawfully to the King, would now defeat the Eſtate which himſelf hath made by Entry, which, as was ſaid, he cannot do; but when a Diſſeiſor conveys Land to the King, and the King grants it over for Life, there, if the Diſſeiſee, who is a meer Stranger, by his Entry or Action, ſhall diveſt the King's defeaſible Title, yet it is not to be reſembled to our Caſe. But this Point was not (*d*) reſolved, for the Barons gave Judgment upon the other Points.

(*a*) 49 E. 3. 16. a. b. Antea 53. a.

(*b*) Br. Petit. 9. Br. Statute Merchant 11. Br. Entry congeable 21. Fitz. Petit. 15.

(*c*) Co. Lit. 354. b. Cr. El. 640.

(*d*) 2 Rol. Rep. 60.

But it was agreed in this Caſe, although the Remainder paſſed by Bargain and Sale, ſo as in Judgment of Law an Uſe paſſed firſt, and although it was of a Thing which lieth in Grant and not in Livery; and that the Words of the Condition are, that upon Payment of the Money, that the Eſtate ſhall ceaſe and ſhall be void, yet the Eſtate ſhall not be reveſted in the Grantor without Claim; for the Eſtate of Inheritance cannot be determined by Condition (*e*) without Entry or Claim. In *Newis* and *Scholaſtica*'s Caſe in *Plow. Comm.* 413, Difference is taken between a Condition and a Limitation; for a Limitation ſhall determine an Eſtate without Entry or Claim, otherwiſe of a Condition. See *Browning* and *Beſton*'s Caſe, 133 and 136. Another Difference is taken between a Rent *in eſſe* granted upon Condition, and a Rent newly created granted upon Con-

(*e*) Moor 292, 345, 346. Co. Lit. 214. b. 218. a. 1 Co. 94. b.

Condition. And although an (*f*) Uſe at Common Law might have ceaſed without Claim, yet now the Uſe is transferred to the Poſſeſſion; for the Pleading is, (*g*) *vigore Statuti, &c. de uſibus in poſſeſſionem transferendis*; ſo that now ſince the Statute, to ſuch Qualities to which Eſtates by the Common Law are ſubject, to ſuch (*a*) Qualities Uſes are ſubject, for the Uſe is transferred and incorporated to the Poſſeſſion. And Baron *Ewens* ſaid, That upon this Reaſon it was adjudged in the King's Bench, that where one by Deed indented and inrolled, bargained and ſold Land to another, and his Heirs rendring Rent, that the (*b*) Reſervation was good; for now the Uſe and the Poſſeſſion paſs *tanquam uno flatu*, and therefore it is all one with a Grant of the Land itſelf; for if the Uſe ſhould paſs firſt, then Rent cannot be reſerved out of the Uſe, and then the Reſervation of the Rent would be void. Alſo it was reſolved, that this Claim of the Remainder, by Force of the Condition, ought to have been made upon the Land, and that a Claim made out of the Land was not ſufficient: And therefore the ſaid Bargain and Sale to *Bruyn* by Deed indented, being made at *Weſtminſter* out of the Land, could not in this Caſe enure to two Effects: *ſcil.* Firſt, to make a Claim, and then to paſs the Remainder, as it was objected by the Defendant's Counſel. See *Litt.* 40. If a Villain purchaſe a Reverſion, the (*c*) Claim by the Lord ought to be made upon the Land. And the Book 15 *Aſſ.* 12. is good Law; that a Diſtreſs upon the Land after a Condition broken, amounts to a Claim upon the Seigniory, to which it was annexed. So it was concluded, firſt, becauſe the Remainder to the Queen was void, by Conſequence the ſaid Common Recovery hath barred the Remainder to *George*, and by Conſequence the Plaintiff claiming under the Recovery, ought to have Judgment to recover. Secondly, Admitting the Remainder good to the Queen, and that the Condition was not diſcharged during *Warren*'s Life; and that the Remainder to the Queen ſhall be defeated without Petition or *Monſtrans de droit*, yet the ſame is not determined 'till Claim made upon the Land, and then the Grant of the Queen is good, and the ſecond Grant of *G. Holford* to the Queen is void, and by Conſequence the ſecond Recovery is a good Bar. But againſt the Grant, by the Letters Patents, divers Objections were made by the Defendant's Counſel.

(*f*) 6 Co. 34. a. 3 Co. 34. a. 3 Co. 27. a.
(*g*) 27 H. 8. c. 10.
(*a*) Co. Lit. 23. a. 1 Co. 137. b. 138. a. 6 Co. 34. a.
(*b*) Co. Lit. 144. a. Cr. El. 595. 2 Rol. 448. 2 Inſt. 672.
Co. Lit. 218.
(*c*) Co. Lit. 119. a. Co. Lit. §. 179. Perkins, §. 29. Moor 346.

1. Foraſmuch as the Queen recites that the ſaid Bargain and Sale to *Warren*, the Remainder to the Queen was upon Fraud and Covin, and it was not found that it was upon Fraud and Covin, It was ſaid, that the Patent was void, becauſe the Queen was deceived in her Grant, and then admitting the Remainder to the Queen to be good, the Land doth yet remain in the Queen, and then the Defendant not guilty as to the Plaintiff.

Secondly,

(*d*) Lane 12. Secondly, The Queen recites her Eſtate to be upon (*d*) Condition, and in Truth at the Time of the Making of the Letters Patents, the Condition was diſcharged during the Life of *Warren*. And for this Cauſe alſo the Patent was void, becauſe the Queen alſo in that was deceived. For, peradventure, if the Queen had known that her Eſtate was diſcharged of the Condition during the Life of *Warren*, and had not been ſubject to the Pleaſure of *G. Holford*, to be revoked when he would, the Queen would not have granted it. As to the firſt Objection, it was reſolved, that the Grant is good notwithſtanding that, for three Reaſons:

1. Whether it was upon Fraud or no, was not any thing material; for if the Recital be of a Thing which ſounds to the Queen's Profit, and is falſe, that may make the Patent void. But (*a*) Recital of a Matter *in pais*, and not of Record, which is paſt, and not material nor valuable, ſhall not impeach the Grant.

(*a*) Lane 109. Cr. Eliz. 641.

See Alton Woods 1 Co. 41. Secondly, It appears to be Covenous, and need not be averred; for it appears to be made upon a Condition to be defeated at his Will, and the Intent and Purpoſe of it was to prevent *Chriſtopher* of his Birthright, *ſcil.* of his Power which he had to cut off the Remainder to *George* by a Common Recovery.

Thirdly, The Queen recites it to be upon Fraud *prout nobis ſatis liquet*, and the Letters Patents are *ex certa ſcientia & mero motu*, ſo that the Queen takes ſpecial Knowledge thereof, and it cometh not upon the Suggeſtion of the Party.

(*b*) 6 Co. 55. b. Lane 12, 13. Moor 164. And as to the ſecond Objection againſt the Grant, it was reſolved, That notwithſtanding that, the Patent is good: For the Queen's Recital is true; for at firſt the ſaid Bargain and Sale was conditional as it was recited, and it is not affirmed by the Recital that it doth ſo remain. Alſo the Condition might be determined by Matter *in pais*, *ſcil.* by Releaſe to *Warren*, or by many other Ways; ſo that it would be hard for the Patentee to take Knowledge thereof: and a Thing which may be done or performed by Matter *in pais* need not be recited. *Warberton*, Serjeant at Law, the Attorney-General, and *Harris* of *Lincoln's-Inn*, were of Counſel with the Plaintiff; and *Williams*, Serjeant at Law, *Dampport* and others, with the Defendant.

BUCK-

BUCKLER'S *Case.*

Mich. 39 & 40 Eliz.

In the Common Pleas.

THE Case between (*a*) *Buckler* and *Harvis* in the Common Pleas, which began *Trin.* 37 *Eliz.* was such: *In Ejectione firmæ*, it was found by Special Verdict, That *Buckler* was Tenant for Life, the Remainder over in Fee; Tenant for Life made a Lease for four Years, in *March*, 20 *Eliz.* the Lessee entred, Tenant for Life granted *tenementa prædicta* to *C. Habendum tenementa prædicta* from the Feast of the Nativity of St. *John* the Baptist next following for Life, after the said Feast the Lessee for Years attorned; the Years expired. *C.* entred and made a Lease at Will to *D.* to whom the Tenant for Life levied a Fine *come ceo, &c.* he in Remainder in Fee entred, and made a Lease to the Plaintiff, the Tenant at Will entred upon him, and he brought the *Ejectione firmæ*. And Judgment was given for the Plaintiff. And in this Case five Points were resolved.

(*a*) 2 And. 29. Moor 423. Cr. El. 450, 585. Skin. 331, 544.

1. That the Grant to *C.* was void; for the Law will make Construction upon the (*b*) whole Grant; and an Estate of Freehold cannot commence in (*c*) *futuro*. And the *Habendum* in this Case is not contrary to the Premisses; for no certain Estate is contained in the Premisses, but generally the Land given and granted, which might be qualified by the *Habendum* to an Estate for Years, or at Will. For the Office of the (*d*) Premisses of a Deed of Feoffment is to express the Grantor, Grantee, and Thing to be granted, and the Office of the (*c*) *Habendum* is to limit the Estate: So that the general Implication of the Estate which shall pass by Construction of Law by the Premisses, is always controlled and

(*b*) 3 Co. 59. b. Godb 324. (*c*) 2 And. 29. Moor 393, 394, 423, 424, 881. Cr. El. 29, 254, 255, 440, 585. Cr. Car. 547, 548. Cr. Jac. 376, 563. 1 Jones 437. Godb. 265, 451. 1 Rol. Rep. 109, 110, 138, 253, 254, 256, 261. 4 Leon. 8. Co. Lit. 48. b. 2 Rol. 10, 66. 11 Co. 77. a. 78. a. Br. Grant. 60. Br. Patent 29. 109. Hetley 23. (*d*) Co. Lit. 6. a.

Palm. 29, 30. 5 Co. 94. b. 2 Bulst. 272, 273, 274, 275. 303. Hob. 171. Bridg. 108, 2 Brownl. 299, 300.

(a) 2 Co. 24. a. Plowd. 153. a. Dall. 30. pl. 10. 1 Leon. 10, 11. 8 Co. 154. b. (b) Cr. El. 25. 89. Co. Lit. 182. a. b. Hob. 172. Palm. 34. 2 Rol. 65. Moor 26.

and (a) qualified by the *Habendum*. As a Leaſe to (b) two, *Habendum* to one for Life, the Remainder to the other for Life, will alter the general Implication of Joint-tenancy of the Freehold, which without any *Habendum* would be made. And although the *Habendum* be void, and ſo in Effect as no *Habendum*, yet no Eſtate ſhall paſs by Implication of Law againſt the expreſs Limitation of the Party, although his Limitation be void; and ſo it was adjudged in the King's Bench between (c) *Hegge* and *Croſs* for Houſes in *London*, *M.* 33 & 34 *Eli. in Ejectione firmæ*.

(c) Cr. El. 254, 255. Cr. Jac. 376. Co. Lit. 48. b. 2 Bulſt. 274. Hob. 171. 1 Rol. Rep. 254. Moor 881. 2 Rol. 10, 66. (d) Cr. Jac. 563. (e) Cro. El. 585. Co. Lit. 35. a. 4 Co. 2. b. 90. a. 10 Co. 62. a. Cawley 214. 8 Co. 135. b. Davis 32. a. 2 Bulſt. 304, 305. 3 Bulſt. 192. (f) Cr. El. 451. Cr. Car. 306, 388. Lit. Rep. 298, 373. Cr. Jac. 660. 1 Jones 316.

Secondly, That the Grant being void at the Beginning, the (d) Attornment after Midſummer would not make the Reverſion paſs; For *quod* (e) *ab initio non valet, tractu temporis non convaleſcet.*

Thirdly, When *C.* entreth by Colour of this void Grant, he is a (f) Diſſeiſor. And a Difference was taken betwixt a Grant made by Agreement of the Parties which ſtands not with the Rules of Law, and which never can by any ſubſequent Act, as by Livery, or Attornment, be made good, and a Grant good at the Beginning, but to have its Perfection by a ſubſequent Ceremony. As in Caſe of a Charter of Feoffment, if the Feoffee entreth before Livery, he is no Diſſeiſor, for the Charter is good; and the Agreement of the Party accords with the Law, and it may be made good by Livery of Seiſin (g) ſubſequent. Note, There is Difference between a good Beginning or a Foundation capable of a Building, and a bad one, which wanteth Foundation, upon which no Building can ſtand.

(g) Co. Lit. 49. a.

(h) Co. Lit. 252. a. (i) Co. Lit. 252.

Fourthly, It was agreed, that if the Fine had been levied (h) to the Diſſeiſor himſelf *come ceo, &c.* he who had the Right of Remainder might enter for the Forfeiture; for it was agreed, that the (i) Right of a particular Eſtate might be forfeited, and Entry given thereby to him who had but a Right to the Remainder: As if Leſſee for Years be ouſted, or Leſſee for Life be diſſeiſed, and the Leſſee for Years brings an Aſſize, or other real Action, and the Leſſee for Life brings a Writ of Right, it is a Forfeiture of their Right; and he who hath but a Right of Reverſion may enter for the Forfeiture.

(k) 2 And. 29, 30. Cr. El. 450, 4, 1. 586. Moor 42. (l) Cr. El. 586. (m) Co. Lit. 252. a. (n) Co. Lit. 252. a. 10 H. 7. 29. b.

Fifthly, it was agreed, that in the Caſe at Bar, the Fine levied to the Tenant at Will was a (k) Forfeiture, and he who had the Right of Remainder might enter upon the Tenant at Will, and by that purge the Diſſeiſin; and the Tenant for Life, and the Tenant at Will alſo, ſhall be (l) eſtopped to ſay (m) *quod partes finis nihil habuerunt*, and of ſuch Eſtoppels which are by Matter of Record, and trench to the Diſ-inheriſon of them in the Reverſion or Remainder, they ſhall take Advantage, although they be not Parties to it, as of an (n) Aid Prayer of a Stranger, or

or by (*a*) Acceptance of a Fine, *sur Conusans de droit come ceo, &c.* Although he in the Reversion or Remainder be not Party to the Record, yet he is privy in Estate to take Advantage of any Forfeiture by any Matter of Record done to his Dis-inherison.

Sixthly, It was said, that if the (*b*) Disseisee levy a Fine to a Stranger, that in this Case the Disseisor shall retain the Land for ever; for the Disseisee, against his own Fine, cannot claim the Land, and the Conusee cannot enter; for the Right which the Conusor had cannot be transferred to him; but, by the Fine, the Right is extinct; whereof the Disseisor shall take Advantage. See *Co. Lit.* 214. 266. 277. 3 *Co.* 59.

(*a*) 1 Rol. 852. Co. Lit. 252. a. Dyer 148. pl. 79. 9 Co. 106. b. 1 Mod. Rep. 117. 3 Keb. 687, 688. 1 H. 7. 12. a. b.

(*b*) Cr. Car. 306, 484. Co. Lit. 49. a. 1 Jones 316, 398. Goldsb. 162. 1 Rol. 865. E. pl. 3.

BECK-

BECKWITH'S *Caſe.*

Trin. 31 Eliz. *Rot.* 750.

In the Common Pleas.

Radford,

Co. Ent. 603. pl. 18. 4 Leon. 88. 1 And. 164. 2 Anderſ. 78. Moor 196. Gold. 12, 67. Godbolt 180. Palm. 214.

IN a Replevin between *Colgate* and *Blithe*, of the Taking, *&c.* in a Place called *Ryecroft* in *Floodſtray* in the County of *Lancaſter*; the Defendant made Conuſans as Bailiff to *Robert Beckwith*, becauſe *Elizabeth Beckwith*, his Mother, was ſeiſed in Fee, and died ſeiſed, whereby it deſcended to him as to her Son and Heir, who entred and was ſeiſed; and for Damage-feaſant, the Defendant, as Bailiff to the ſaid *Robert*, did diſtrain, *&c.* In bar of which Avowry, the Plaintiff ſaid, That to ſay that the ſaid *Elizabeth* died ſeiſed in Fee, the Defendant ſhall not be received for long Time before the Diſtreſs, *&c.* the ſaid *Elizabeth* was ſeiſed in Fee, and took to Huſband *Chriſtopher Kenne*, who levied a Fine to the Uſe of the ſaid *Chriſtopher Kenne*, and the ſaid *Elizabeth* his Wife for their Lives, and afterwards to the Uſe of the Conuſees for their Lives, to the Intent that they ſhould ſuffer the ſaid *Robert Beckwith* to take the Profits of the Tenements, in which, *&c.* for his Life, with divers Remainders over, *&c.* Againſt which the Defendant ſaid, that the ſaid Fine was levied, to the Uſe of the ſaid *Elizabeth* in Fee, without that, that it was levied to the Uſe of the ſaid *Chriſtopher* and *Elizabeth* for their Lives, *ut ſupra*; and the Jurors found a Special Verdict to this Effect: *Chriſtopher Kenne*, and *Elizabeth* his Wife, were ſeiſed of the Tenements aforeſaid, in Fee in the Right of the ſaid *Elizabeth*; and that an Indenture was made by the ſaid *Elizabeth* without the Aſſent of her Huſband, between her, by the Name of *Elizabeth Beckwith*, one of the Daughters and Heirs of *Roger Cholmley*, Knt. on the one Part, and *William Vaviſour* and other Conuſees in the ſaid Fine on the other Part, bearing Date the

the 14th Day of *March*, in the 14th Year of the Reign of our Sovereign Lady the Queen that now is, (which ſhe ſealed and delivered as her Deed in *Auguſt* after, without the Aſſent of her Huſband) by which Indenture the ſaid *Elizabeth* alone limited and declared the Uſes of a Fine which afterwards ſhould be levied, to be in Form following: That is to ſay, To the Uſe of the ſaid *Elizabeth* for Life, without (*a*) Impeachment of Waſte, and afterwards to the Uſe of the Conuſees for their Lives, and afterwards to ſuch Uſes as in the Replication is alledged: And it was further found, that the ſaid *Chriſtopher Kenne*, after the Marriage, and before the Fine levied, made another Indenture without the Conſent of *Elizabeth* his Wife, bearing Date the 13th of *February*, in the 22d Year of the ſaid Queen's Reign, by which it was mentioned, That the ſaid Indenture was made between the ſaid *Chriſtopher* and *Elizabeth* his Wife on the one Part, and one *Robert Wrote*, *Nicholas Brook*, and others, of the other Part; which Indenture was ſealed and delivered by the ſaid *Chriſtopher* only, as his Deed. By which Indenture it was declared, That the Uſes of the ſaid Fine ſhould be to the Uſe of the ſaid *Chriſtopher* and *Elizabeth* for their Lives, without Impeachment of Waſte, and afterwards to the Uſe of the Conuſees, as in the Replication was alledged. And further it was found, That afterwards the ſaid Fine mentioned in the ſaid Bar, was levied by the ſaid Huſband and Wife of the Tenements aforeſaid, to the ſaid Conuſees mentioned in the Indenture of the Wife, and that there were no other Uſes of this Fine. And whether upon the whole Matter aforeſaid, the ſaid Fine was levied to the Uſe of the ſaid *Chriſtopher* and *Elizabeth* for their Lives was the Queſtion. And it was adjudged, that (*b*) both the ſaid Limitations and Declarations of the Uſes in both the Indentures were void, and that the ſaid Fine was by Conſtruction of Law to the Uſe of the ſaid *Elizabeth* and her Heirs, as if no Uſe had been declared. And in this Caſe theſe Points were reſolved:

(*a*) 2 Co. 23. b. 4 Co. 63. a. 9 Co. 9. a. 11 Co. 82. b. 83. a. 1 Rol. Rep. 182. Co. Lit. 220. a. Dyer 10. pl. 37. 1 Bulſtr. 136.

(*b*) 1 Anderſ. 164; Skin. 73. Poſt. 71.

1. If Huſband and Wife levy a Fine of the Land whereof they are ſeiſed in the Right of the Wife, and the Huſband only declare the Uſe of the Fine, this Declaration of the Uſe ſhall bind the Wife, (*c*) if her Diſ-aſſent doth not appear, although her Aſſent to the Declaration of the Uſes cannot appear. For when ſhe joins with her Huſband in the Fine, it ſhall be intended, if the contrary cannot appear, that ſhe joined alſo with him in Agreement in the Declaration of the Uſes of the Fine:

(*c*) Goldſb. 68, 69, 70. 2 Rol. 798. Godb. 180. Moor 197. 2 Ander. 78. Owen 6.

Secondly, It was reſolved, That if Huſband and Wife ſell the Wife's Land to another for Money by Word, and afterwards levy a Fine to the Vendee and his Heirs, in this Caſe it is good, and ſhall bind the Wife without any Writing proving her Aſſent, *a multo fortiori* when the Uſe is declared

(*d*) 4 Leon. 89, 90. 2 Rol. 798. 1 Ander. 164. Goldſb. 14. Moor 22.

by the Huſband's Deed, and no other declared by the Wife, it ſhall bind; *Vide* 12 *Eliz. Dyer* 290. *(a)* Huſband and Wife were ſeiſed of a Tenement in *London* to them and to the Heirs of the Huſband, and the Huſband covenanted by Indenture, in Conſideration of 20 *l.* That he and his Wife ſhould ſuffer a Recovery by Writ of Right, according to the Cuſtom of *London*, which binds as a Fine at Common Law, and that the Recovery ſhould be to the Uſe of the Recoverors, until they had made a good and ſufficient Leaſe by Indenture, for forty Years, and after the making of the ſaid Leaſe, then to the Uſe of the Huſband and Wife, and the Heirs of the Huſband, and the Recovery was had accordingly; and the Opinion of all the Judges was, that the Leaſe was good, and not defeaſible by the Wife who ſurvived her Huſband, and ſo was the Opinion of all the Juſtices in the King's Bench, and yet in ſuch Caſe the Huſband was only Party to the Deed, which declared the Uſes, and notwithſtanding it bound the Wife for the Reaſon aforeſaid.

(a) Goldſb. 14. 69. 1 Rol. 388. 2 Rol. 798. 4 Leon. 90. Noy 122. Jenkin's Cent. 238. Dyer 290. pl. 61.

Thirdly, it was reſolved, That every one may declare and diſpoſe the Uſe of the Land, according to the Eſtate which he hath in the Land, for the Declaration and Diſpoſition of the Uſe doth follow the Ownerſhip of the Land, as *(b)* the Shadow followeth the Body; and now by the Stat. of 27 *H.* 8. the Shadow or the *(c)* Acceſſary draweth to it the Body and the Principal, that is to ſay, The Uſe draweth to it the Eſtate of the Land, and therefore in all Reaſon the Owner of the Land ought to limit the Uſe, for by it the Eſtate of the Land itſelf ſhall be transferred to the Uſe; and therefore in the principal Caſe, the Wife, alone, although ſhe is Owner of the Land, yet foraſmuch as ſhe is *ſub poteſtate viri*, *(d)* ſhe cannot in reſpect of her Coverture, without her Huſband, limit the Uſe; and on the other Side, the Huſband, who hath not any Eſtate in his own Right, cannot againſt the Agreement of the Wife, limit the Uſe, for he is not Owner of the Land: So one is not *ſui juris*, and hath the Eſtate, and the other is *ſui juris*, and hath not the Eſtate, and therefore when they differ in the Limitation, it is void. And it is to be noted, That when Huſband and Wife levy a Fine of the Wife's Land, the whole Eſtate paſſeth from the Wife, and the Conuſee is in by the Wife only; and if the Fine be reverſed for the Nonage of the Wife, the whole Eſtate which paſſed by the Fine, ſhall be reſtored to the Wife preſently, for the whole Eſtate paſſed from the Wife, as it was adjudged in the King's-Bench, in *(e) Worſley*'s Caſe: And therefore it would be againſt all Reaſon, that the Huſband, againſt the Agreement of the Wife, ſhould limit the Uſes of the Wife's Land. And if the Huſband may declare the Uſe of his Wife's Land, great Inconvenience would follow, and Wives might be diſinherited and deceived by their Huſbands, which would be inconvenient: As if they perſwade

(b) Goldſb. 68.

(c) 10 Co. 42. b.

(d) 1 And. 164. Goldſb. 13, 15. 67, 68, 69. Moor 197. 4 Leon. 89, 90. Winch. 104.

(e) 1 Rol. 748. Cr. Eliz. 129. Poſtea 77. b. Owen 21. 1 Leon. 114, 115. Bridgm. 75.

their Wives, that the Uſes ſhall be in one Form, and thereby draw them to conſent to levy a Fine, and afterwards the Huſband alone declares other Uſes, varying altogether from the Uſes to which the Wife agreed, and ſo deceive and diſinherit their Wives: And truly, if the Law requires ſuch Ceremony of ſecret (*a*) Examination of married Women before a Judge, touching their voluntary and free Aſſent as if ſhe was Sole, it would be againſt Reaſon, that the Huſband ſhould, againſt the Aſſent of the Wife, diſpoſe of the Uſe of the Wife's Land, which is the whole Fruit of the Land now. And it was ſaid, If an (*b*) Infant levies a Fine, and declares the Uſe of it, this Declaration ſhall bind him as long as the Fine remains in Force; for inaſmuch as he hath been admitted by the Judges as a Man of full Age to levy a Fine, the Law, as long as the Fine remains in Force, will permit him to limit the Uſe thereof, ſo of a Man *non compos mentis*.

(*a*) Hob. 225.

(*b*) 10 Co. 42. b. Goldſb. 13. Hob. 224. 4 Leon. 89. Moor 22. Winch. 104, 106. 1 Jones 390. Bridgm. 75.

Fourthly, It was reſolved, That although the Variance was in the firſt particular Uſe (the Wife limiting it to herſelf only for her Life, and the Husband limiting it to him and his Wife for their Lives) and all the other Uſes in Remainder limited in both the Indentures, are according to both their Conſents, yet all the Uſes are void: But if there be two (*c*) Jointenants, or two having ſeveral Eſtates, join in a Fine, and one declares the Uſe in one Manner, and the other in another Manner, the ſame is good for each of their Parts, for the Declaration of the Uſe ſhall be directed and governed according to their Eſtates and Intereſts; but between Huſband and Wife, the Eſtate is only in the Wife, and ſo is the Difference. But if the Huſband and Wife agree in the Limitation of the Uſe of Part of the Land, and vary in the Limitation of the Reſidue of the Land, it is good for Part, and void for the Reſidue.

(*c*) Goldſb. 15. 4 Leon. 90. Latch. 82. Noy 77. Palm. 405.

So note Reader, a Difference between Variance, touching the Limitation of the Uſe of Part of the Eſtate of the Land, and touching the Limitation of the Uſe of Part of the Land itſelf. And it was ſaid, If a Man at this Day ſeized of the Land on the Part of the (*d*) Mother makes a Feoffment in Fee, without Conſideration, he ſhall be ſeized as he was before on the Part of the Mother. And if there be two Jointenants, one for Life, and the other in Fee, and they levy a Fine without Declaration of any Uſe, the Uſe ſhall be to them of the ſame Eſtate as they had before in the Land. So if *A.* (*e*) Tenant for Life, and *B.* in Reverſion or Remainder, levy a Fine generally, the Uſe ſhall be to *A.* for Life, the Reverſion or Remainder to *B.* in Fee, for each grants that which he may lawfully grant, and each ſhall have the Uſe which the Law veſts in them, according to the Eſtate which they convey over.

(*d*) Dall. 61. pl. 14. Goldſb. 69. 1 Co. 127. a. b. 100. b. 2 Rol. 780. Dyer 134. pl. 9. Co. Lit. 23. a. 1 Co. 88. a. Hob. 31. 13 Co. 56. 8 Co. 54. b. 5 E. 4. 7. b. Fitz. Subp. 2. Br. Diſcent. 11. 7 H. 6. 4 b. Br. Feoffment al Uſe 32.

(*e*) Gold. 15. 70.

If *A.* ſeized in Fee of an Acre of Land, and he and *B.* levy a Fine of it to another without Conſideration, the Uſe implied ſhall be to *A.* only and his Heirs; for an (*a*) Uſe which is but a Truſt and Confidence, and a Thing in Equity and Conſcience ſhall be by Operation of Law to him who in Truth was (*b*) Owner of the Land, without having Regard to Eſtoppels or Concluſions, which are averſe to Truth and Equity. So it was adjudged in the principal Caſe. When Huſband and Wife levy a Fine without (*c*) Declaration of any Uſe (which was ſufficient in Law) the Law ſhall reveſt the Uſe in the Wife only, becauſe the Eſtate in the Land paſſes only from her, and the Huſband joins with her but for Conformity.

Note Reader, Although the Huſband may diſpoſe of the Wife's Lands during the Coverture, yet in this Caſe, for the Reaſons and Cauſes aforeſaid, his Declaration was meerly void, *quod nota.*

(*a*) Bac. Lect. fur 27 H. 8. 5, 6, 7, 8, &c. 1 Co. 101. b. 112. a. 121. b. 127. a. 140. a. 6 Co. 64. b. 7 Co. 13. b. 34. b. Poſtea 78. b. Co. Lit. 272. b.

(*b*) Palm. 214.

(*c*) 1 And. 164. 1 Anderſ. 78. Moor 197. Goldſb. 68, 69. 9 Co. 126. b. Godb. 180. Poſtea 77. b. 1 Co. 76.

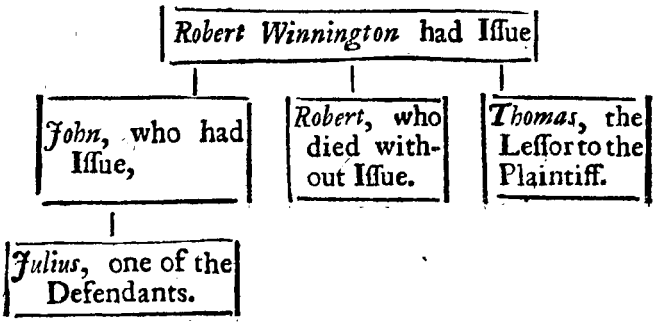
JULIUS

JULIUS WINNINGTON's *Caſe.*

Mich. 40 & 41 Eliz.

In the King's Bench.

James Pilkington brought an *Ejectione firmæ* againſt *Julius Winnington*, upon a Demiſe made by *Thomas Winnington*, of a Houſe and Land in *Binches* in the County of *Cheſter*, before the Juſtice there, and upon Not-guilty pleaded, the Jurors gave a Special Verdict to this Effect; and for the better Manifeſtation of the Caſe, this Pedigree is to be obſerved. Co. Ent. 225. pl. 1. Jenk. Cent. 253.



Robert the Father was ſeized of the Tenements in which, *&c.* in Fee, and thereof did enfeoff by Deed indented, 1 *Eliz. Richard Birket*, to have and to hold to him and his Heirs, upon Condition, That the Feoffee or his Heirs, ſhould re-enfeoff the Feoffor for Life, the Remainder to *John* his Son and Heir apparent, and his Heirs, by Force whereof the ſaid Feoffee was thereof ſeized in Fee, *poſt quod quidem Feoffamentum*, the Jury found that the Feoffor entred, and took the Profits *abſque contradictione, ſive agreamente* of the Feoffee; and afterwards, 11 Eliz. the Feoffor

by Deed indented made a Leaſe to *D.* and *P.* for twenty-one Years, and yet the Feoffor continued in Poſſeſſion. *Birket* the Feoffee, 19 *Eliz.* acknowledged a Statute-Staple to one *J.* The Feoffor, 24 *Eliz.* did enfeoff divers Perſons to the Uſe of himſelf for Life, the Remainder to *Robert*, the ſecond Son in Tail, the Remainder to *Thomas* his third Son in Tail. The Feoffor, 27 *Eliz.* died, *Birket* the Feoffee, after his Death entred and enfeoffed *John* the eldeſt Son, and his Heirs. *Robert* the ſecond Son died without Iſſue, *John* had Iſſue *Julius* and died. *Thomas* entred, and made the Leaſe to the Plaintiff, upon whom *Julius* entred, and ejected him, *Et ſi, &c.* And upon this Special Verdict Sir *Richard Shuttleworth*, Juſtice of *Cheſter*, gave Judgment for the Defendant, upon which the Plaintiff brought a Writ of Error in the King's Bench. And in this Caſe theſe Points were moved and reſolved by the whole Court.

Firſt, When the Feoffor entred after the Feoffment, and took the Profits, and made a Leaſe for Years; upon all this Matter the Law doth adjudge it (*a*) a Diſſeiſin, although the Intent of the Parties was, That the Feoffee ſhould make a Demiſe to him for the Term of his Life: For this Entry by Wrong, and taking of the Profits without the Agreement of the Feoffee, is a Diſſeiſin. And the Caſe is the ſtronger, becauſe he took upon him as the Owner of the Land to make a Leaſe.

(*a*) Cr. Car. 303, 304.

Secondly, It was agreed, That when he made the Leaſe for Years by Deed indented, he thereby diſpenſed with the Condition during the Term, ſo that during the Term he could not for any Cauſe take Advantage of the Condition.

Thirdly, When the Feoffor (*b*) diſſeiſeth the Feoffee upon Condition, and during the Diſſeiſin, the Feoffee acknowledged a Statute or Recognizance, the ſame is no (*c*) Diſability in him, or any Cauſe for the Feoffor to re-enter; for the Feoffee having but a Right, the Poſſeſſion in the Hands of the Diſſeiſor is not ſubject to his Statute or Recognizance, and therefore no Cauſe of Entry for any Diſability is given to the Feoffor in this Caſe: But when the Feoffee being in Poſſeſſion takes a Wife, or grants a Rent Charge, or acknowledges a Statute, there the Land is preſently ſubject to the Title of Dower, and charged with the Rent or Statute: But when the Feoffee is (*d*) diſſeiſed, and takes a Wife, or acknowledges a Statute, there the Land is not bound with it. And although it was ſtrongly objected, That it was not poſſible that the Feoffee could perform the Condition, unleſs he enters, and if he enters the Land is charged, ſo he hath diſabled himſelf to perform the Condition; yet it was reſolved, That it was not any Diſability until he enter *in facto*, ſo that the Poſſeſſion of the Land be charged. But (*e*) if the Wife dies, or the Conuſee releaſes the Statute, then the Feoffee might well enter and perform the Condition without any

(*b*) Co. Lit. 222. a.
(*c*) 1 Co. 25. b. Perkins §. 801. Co. Lit. 221. a. b. 222. a. 13 H. 7. 23. b. Br. Condit. 217. 44. Aſſ. 26. 20 H. 6. 34. b. 5 Co. 21. a. Cr. El. 450, 479. Hard. 396. Lit. Sect. 357, 358. 2 Anderſ. 18. Moor 452, 453. Laur. 48. 1 Rol. 447, 448. 2 Co. 29. a. b. 10 Co. 49. b. 1 Rol. Rep. 168. 2 Brownl. 26.
(*d*) Co. Lit. 222. a.
(*e*) Co. Lit. 222. a.

any Diſability; then when the Feoffor made a Feoffment over, he extinguiſhed the Condition, ſo that when the Feoffee entred and enfeoffed *John* the eldeſt Son, he had a good and rightful Eſtate in the Land which deſcended to the Defendant; and ſo the Judgment given by Sir *Richard Shuttleworth* was affirmed. The Attorney-General and *Tanfield*, were of Council with the Plaintiff, and *Heſket*, Attorney of the Court of Wards, and *Dampart* with the Defendant.

Co. Lit. 30. b. 264 a.

WISCOT'S *Caſe.*

Hill. 41 Eliz.

In the Common Pleas.

Cr. El. 470. 481. 3 Keb. 327. Skin. 262.

IN an *Ejectione firmæ*, between *Giles*, Plaintiff, upon a Demiſe made to him by the Huſband and Wife, and *Wiſcot* Defendant, upon the General Iſſue a Special Verdict was found, upon which the Caſe was ſuch: *A.* Tenant for Life, the Remainder to *B.* and three others (*a*) for Life, the Reverſion to *C.* and his Heirs expectant: *C.* levied a Fine *Sur conuſans de droit come ceo, &c.* to *A.* and *B.* to the Uſe of *A.* for Life, and after his Death, to the Uſe of *B.* in Fee, *A.* died, and afterwards *B.* died; and whether the Jointure was ſevered or not, ſo that after the Death of *A.* *B.* was Tenant in common, was the Queſtion. And it was reſolved, That the Jointure was ſevered, and this Difference taken, when the Fee is limited by one (*b*) and the ſame Conveyance, there the one may have Fee-ſimple, and the other an Eſtate for Life jointly; but when they are (*c*) firſt Tenant for Life, and afterwards one of them doth get the Fee-ſimple, or the Fee-ſimple doth deſcend to one, there the Jointure is ſevered. As if a Man makes an Eſtate to three, and to the Heirs of one of them, there one of them hath Fee-ſimple, and yet the Jointure doth continue, for all is but one entire Eſtate, created at one and the ſame Time, and therefore the Fee-ſimple cannot merge the Jointure, which took Effect with the Creation of the Remainder in Fee; but when three are Jointenants for Life, and afterwards one purchaſeth the Fee, or the Fee deſcends to him, there the Fee-ſimple merges the Eſtate for Life, for the

(*a*) 2 Sand. 386.

(*b*) 2 Sand. 387. C. Lit. 182. a. b. Raym. 36. Dyer 12. pl. 57. Lit. Sect. 283. 2 Jones 137.

(*c*) Cr. Eliz. 470. 1 Rol. 933, 934. 2 Sand. 386, 387. Raym. 413.

the Eſtate for Life was in *eſſe* before, and might be merged or ſurrendred, and ſo cannot the Eſtate for Life in the firſt Caſe. But in the ſame Caſe, that is to ſay, when an Eſtate is made to three, and to the Heirs of one of them, and he who hath the Fee dies, and one of the Survivors purchaſes the Remainder, the Jointure is ſevered, *cauſa qua ſupra*; And when one Tenant for Life purchaſes the Reverſion in Fee, if the Jointure ſhould remain, he would have a Reverſion in Fee, and an Eſtate for Life alſo in Part, which Reverſion in Fee he might grant over, and his Eſtate for Life would remain in Part, which would be abſurd and againſt Reaſon; for in the firſt Caſe, when an Eſtate is made to three, and to the Heirs of one, he who hath the Fee cannot (*a*) grant over his Remainder, and continue in himſelf an Eſtate for Life, as it is held in 12 *E.* 4. 2. *b.* But if there be Tenant in Tail, the Remainder to his right Heirs, he may grant his Remainder over, or deviſe it, as it is held in (*b*) 27 *Aſſ.* 60. for an Eſtate Tail cannot be merged nor ſurrendred, nor extinguiſhed by Acceſſion of a greater Eſtate. *Vide* 42 *E.* 3. 9. *b.* 29 *H.* 8. *Mortdaunceſter* 59. 11 *H.* 4. 55. *b.* & 31 *E.* 3. *Scire facias* 19. by the better Opinion of all the Books, he who had the Fee died, and afterwards Tenant for Life died, it is at the (*c*) Election of the Heir to have a *Mortdaunceſter*, (which proves that his Anceſtor died ſeized of the Fee) or a *Scire facias*, or a *Formedon* in Remainder at his Pleaſure. It is agreed, 39 *H.* 6. 2. *b.* if the Reverſion be (*d*) granted to Tenant for Life, and another in Fee, the Reverſion is extinct for a Moiety, for Tenant for Life cannot purchaſe or get the Reverſion or Remainder of the ſame Land, but the Eſtate for Life will be merged, having regard to the Eſtate which he hath gotten in the Reverſion.

(*a*) Co. Lit. 182. b. Raym. 40.

(*b*) Br. N. C. 115. Br. Aſſ. 275. Br. Deviſe 42. Br. Titles 28.

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

(*d*) 1 Rol. 933. Co. Lit. 182. b. Raym. 36.

Note Reader, It ſeems by the Reſolution of this Caſe, That if (*e*) Tenant for Life, grants his Eſtate to him in Reverſion, and a Stranger, that it is a Surrender for one Moiety, for it appears here, That by getting of the Reverſion, and the particular Eſtate at ſeveral Times, the Reverſion expectant upon his particular Eſtate for Life, cannot remain diſtinct in him, and grantable over, but the one ſhall merge the other, and the Benefit of Survivorſhip not regarded, as it appears by the Caſe at Bar, and ſo the Doubt in (*f*) 7 *H.* 6. is well reſolved as I think. And then it was moved in Arreſt of Judgment, That the Leaſe was made by the Huſband and Wife generally, without alledging it to be by (*g*) Deed, as it ought to be, as appears *Dyer* 1 *Mar.* 91. *b.* *Vide* 26 *H.* 8. 2. *a.* 15 *E.*

(*e*) 1 Rol. 934, 935. Co. Lit. 182. b. 2 Rol. Rep. 473.

(*f*) 7 H. 6. 2. b.

(*g*) Cr. El. 438, 481. 656. 708. Cr. Car. 527. Doct. pl. 176. Palm. 268. Hutton 55. 102. Winch. 34. 1 Leon. 192. 204. 4 Leon. 50. Sav. 110. 1 Rol. Rep. 402. Plowd. 431. a. Cr. Jac. 563. 3 Co. 21. b. Dyer 91. pl. 13.

(a) 15 *E.* 4. 18. *a.* & 21 *H.* 6. 24. *b.* But upon a Sight of a Judgment given, *Trin.* 36 *Eliz.* in the King's Bench, between *Bateman* and *Allen*, *Rot.* 339. and of another Precedent ſhewed by *Brownlow* chief Prothonotary, between (c) *Moſely* and *Guilbert*, *Paſch.* 33 *Eliz.* in the Common Pleas, and of another Judgment between (d) *Diggs* and *Withers*, in the King's Bench, in all which Precedents Judgment was given for the Plaintiff upon a Demiſe made by the Huſband and Wife, without alledging it to be by (e) Deed: Upon the View of which Precedents, Judgment was given in the Caſe at Bar for the Plaintiff.

(a) Cro. Eliz. 482.
(b) Cr. El. 418.
(c) Cr. El. 482.
(d) Cr. El. 482.
(e) Antea 61. a.

HOOKER's

TOOKER's *Caſe.*

2 Co. 62. a.

Mich. 36 & 37 Eliz. *Rot.* 136.

In the King's Bench.

Devon, ſſ. *Memorandum*, that at another Time, that is to ſay, in the Term of *Eaſter* laſt paſt, before Treſpaſs. the Lady the now Queen, at *Weſtminſter*, came *William Rud* by *Michael Bland* his Attorney, and brought here in the Court of the ſaid Lady the Queen, then there, his Bill againſt *Edward Tooker* in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs; and there are Pledges of Suit, that is to ſay, *John Doe*, and *Richard Roe*, which Bill followeth in theſe Words. ſſ. *Devon.* ſſ. *William Rud* complaineth of *Edward Tooker*, in the Cuſtody of the Marſhal of the *Marſhalſea* of the Lady the Queen, before the Queen herſelf being; for that he the firſt Day of *April*, in the 36th Year of the Reign of the Lady *Elizabeth*, now Queen of *England*, with Force and Arms, *&c.* the Cloſe and Houſe of him the ſaid *William*, called *Bertonland*, otherwiſe, the *Barton* of *Sprecombe*, at *Morthoe* in the County aforeſaid, broke and entred, and his Graſs, of the Value of an hundred Marks, in the Cloſe aforeſaid, then late growing, with certain Cattle, that is to ſay, with Horſes, Oxen, Cows, Hogs and Sheep, fed, trod down, and conſumed, and other Harms to him did, againſt the Peace of the ſaid Lady the now Queen, to the Damage of the ſaid *William* an hundred Pounds, and thereof he bringeth Suit, *&c.* And now at this Day, that is to ſay, *Wedneſday* next after eight Days of St. *Michael* in this Term, until which Day the aforeſaid *Edward* had leave to imparl to the ſaid Bill, and then to Anſwer, *&c.* before the Lady the Queen at *Weſtminſter*, cometh as well the aforeſaid *William* by his Attorney aforeſaid, as the aforeſaid *Edward* by *John Halſtaff*, his Attorney: And the ſaid *Edward* defendeth the Force and Injury when, *&c.* and ſaith, that he is not thereof guilty, and of this puts himſelf upon the County, and the aforeſaid *William* likewiſe, *&c.* Therefore it is commanded the Sheriff, that a Jury come before the Lady the Queen at *Weſtminſter*,

minſter, on *Friday* next after fifteen Days of St. *Hillary*, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* the ſame Day is given to the Parties aforeſaid there, *&c.* Afterwards the Proceſs is continued between the Parties aforeſaid, of the Plea aforeſaid, by Jurors thereof betwixt them put in reſpite of the Plea aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Wedneſday* next after fifteen Days of *Eaſter* then next following, unleſs the Juſtices of the Lady the Queen to Aſſizes, in the County aforeſaid, to be taken aſſigned, firſt upon *Monday* the 10th Day of *March*, at the Caſtle of *Exeter*, in the County aforeſaid, by Form of the Statute, *&c.* ſhall come for want of Jurors, *&c.* At which Day before the Lady the Queen at *Weſtminſter*, come the Parties aforeſaid, by their Attornies aforeſaid, and the aforeſaid Juſtices to Aſſizes, before whom, *&c.* ſent their Record before them had in theſe Words; *ff.* Afterwards the Day and Place within contained, before *Edmond Anderſon*, Kt. Chief Juſtice of the Lady the Queen of the Bench, and *Thomas Walmſley*, one of the Juſtices of the ſaid Lady the Queen of the Bench, Juſtices of the ſaid Lady the Queen to Aſſizes, in the County of *Devon* to be taken, aſſigned, by Form of the Statute, *&c.* came as well the within named *William Rud*, by *Eraſmus Ford* his Attorney, as the within written *Edward Tooker*, by *Thomas Clayton* his Attorney. And the Jurors of the Jury, whereof within mention is made, being called, ſome of them, that is to ſay, *David Matacot* of St. *Giles*, *John Hayman* of *Shelbere*, *John Hooper* of *Weſtdown*, *Richard Clyeff* of *Chaford*, *John Bow* of the ſame, and *John Hole* of *Drew Steinton* came, and are ſworn in the ſaid Jury; and becauſe the reſt of the Jurors of the ſaid Jury did not appear, therefore others of the Standers-by, by the Sheriff of the County aforeſaid, choſen at the Requeſt of the ſaid *William Rud*, and by Command of the Juſtices aforeſaid of new are added, whoſe Names in the Pannel within written are filed, according to the Form of the Statute in ſuch Caſe lately made and provided; and the Jurors ſo new added, that is to ſay, *George Snell*, *John Barnacott*, *John Shute*, *George Slade*, *William Killand*, and *Chriſtopher Cheek*, being called likewiſe, came, who, to ſay the Truth of the within contained, together with the other Jurors aforeſaid, firſt impanelled and ſworn, being choſen, tried, ſworn, ſay upon their Oath, That before the within written Time, in which it is ſuppoſed the Treſpaſs within written to be done, one *John Arundell*, Eſq; was ſeiſed of the Tenements within written, with their Appurtenances, in which it is ſuppoſed the Treſpaſs within written to be done, in his Demeſn as of Fee, and ſo thereof being ſeiſed, afterwards and before the within written Time, in which, *&c.* that is to ſay, the third Day of *July*, in the 30th Year of the Reign of the Lord *Henry* VIII. late K. of *England*, did demiſe to one *John Tooker*, and to the within named *William Rud*,

Rud, the Tenement within written, with the Appurtenances in which, *&c.* amongſt other Things, to have and to hold to the ſaid *John Tooker* and *William Rud*, for the Term of their Lives, and the Life of the longeſt Liver of them, the ſaid *John* and *William*; by Virtue of which Demiſe the ſaid *John Tooker* and *William Rud* were ſeized of the Tenements within written, with the Appurtenances in which, *&c.* in their Demeſn as of Freehold for the Term of the Lives of them the ſaid *John* and *William*, and the longeſt Liver of them; and ſo being thereof ſeized, and the ſaid *John Arundel* of the Reverſion of the Tenements within written, with the Appurtenances in which, *&c.* being ſeized, the ſaid *John Arundel* afterwards, and within the Time in which, *&c.* At *Morthoe* within written of ſuch Eſtate died ſeized; after whoſe Death, the Reverſion of the Tenements aforeſaid with the Appurtenances in which, *&c.* amongſt other Things, deſcended to one *John Arundel*, Knt. as Son and Heir of the aforeſaid *John Arundel*; by which the ſaid *John Arundel*, Knt. was ſeized of the aforeſaid Reverſion of the Tenements within written, with the Appurtenances, in which, *&c.* in his Demeſn (among other Things) as of Fee, and ſo thereof being ſeized, afterwards, and before the within written Time, in which, *&c.* that is to ſay, the 20th Day of *September*, in the 10th Year of the Reign of the ſaid Lady the now Queen; at *Morthoe* within written, by his Writing indented, one Part of which ſealed with the Seal of the ſaid *John Arundel*, Knt. was ſhewed to the ſaid Jurors in Evidence, whoſe Date is the ſame Day and Year, granted the Reverſion of the Tenements within written, with the Appurtenances, in which, *&c.* amongſt other Things, to the ſame *Edward Tooker*, to have and to hold the ſame Reverſion with the Appurtenances, in which, *&c.* (amongſt other Things) to the ſaid *Edward Tooker*, for the Term of his Life, when after Death, Surrender or Forfeiture of the aforeſaid *John Tooker* and *William Rud*, it ſhould happen, as by the ſaid Writing indented amongſt other Things, more fully appeareth, To which Grant of the Reverſion of the Tenements within written, with the Appurtenances, in which, *&c.* amongſt other Things, to the ſame *Edward* by the aforeſaid *John Arundel*, Knt. in Form aforeſaid made, the aforeſaid *John Tooker*, being Tenant of the Tenements aforeſaid within written, with the Appurtenances, in which, *&c.* for the Term of his Life, jointly, with the aforeſaid *William Rud*, afterwards and before the within written Time, in which, *&c.* at *Morthoe* within written, to the aforeſaid *Edward* thereof attorned and agreed; by Colour of which Grant of the Reverſion aforeſaid, and of the Attornment and Agreement aforeſaid, the aforeſaid *Edward* was ſeized of the Reverſion of the Tenements within written, with the Appurtenances, in which, *&c.* as the Law requireth, as of a Freehold for the Term of his Life, and ſo thereof being

ſeized;

ſeized; and the aforeſaid *John Tooker* and *William Rud* of the Tenements within written with the Appurtenances, in which, *&c.* amongſt other Things being ſeized, the ſaid *John Tooker* afterwards, and before the within written Time, in which, *&c.* that is to ſay, the 14th Day of *December*, in the 31ſt Year of the Reign of the ſaid Lady the now Queen, at *Morthoe* aforeſaid, made to the ſaid *Edward Tooker*, a certain Writing of Surrender of the Tenements within written, with the Appurtenances, in which, *&c.* amongſt other Things, which to the Jurors aforeſaid was ſhewed in Evidence, the Tenor of which followeth in theſe Words:

To all Chriſtian People to whom this preſent Writing ſhall come, (I) John Tooker of Morthoe in the County of Devon, Yeoman, ſendeth greeting in our Lord God everlaſting. Whereas (I) the ſaid John Tooker and William Rud, have and do hold jointly for Term of their Lives, and the Lives of the longeſt Liver of them, all that Capital Meſſuage and Lands, Tenements and Hereditaments, called Barton Lands, in the Manor of Sprecombe, or Parcel of the ſaid Manor, and all thoſe Lands, Tenements, and Hereditaments, with the Appurtenances in Hokeſmill, with the Paſture of Hokeſwood, and common of Paſture upon Hokeſdowne, Parcel of the ſaid Manor of the Demiſe and Grant of J. Arundel, Eſq; as by the Deed of the Demiſe and Grant thereof made by the ſaid J. Arundel at large, and plainly it doth and may appear: Now know ye, that the ſaid J. Tooker, for divers and ſundry Cauſes and Conſiderations him moving, doth by theſe Preſents ſurrender and yield up unto E. Tooker, the Son of the ſaid J. Tooker, to whom the Reverſion of all and ſingular the Premiſſes is granted and doth belong for Term of the Life of the ſaid Edward, all his Eſtate, Title and Intereſt in and to the Premiſſes, and in and to every Part and Parcel thereof, in as large and ample Manner as he the ſaid John Tooker can or may ſurrender the ſame. In Witneſs whereof the ſaid J. Tooker to theſe Preſents hath ſet his Seal. Given the 14th Day of December, in the 31ſt Year of the Reign of our Sovereign Lady Elizabeth, by the Grace of God, of England, France, and Ireland, Defender of the Faith, &c.

And further the ſaid Jurors ſay upon their Oath aforeſaid, That the aforeſaid *John Tooker* afterwards, and before the within written Time in which, *&c.* at *Morthoe* aforeſaid died; and that the ſaid *Edward* afterwards, that is to ſay, the within written firſt Day of *April*, in the 36th Year of the Reign of the ſaid Lady the now Queen aforeſaid, claiming to have and occupy the Tenements within written, with the Appurtenances, in which, *&c.* in common, with the ſaid *William Rud*, by Virtue of the aforeſaid Writing of Surrender, by the aforeſaid *John Tooker*, in Form aforeſaid made,

made, into the Tenements aforeſaid, with the Appurtenances, in which, *&c.* entred, and the Graſs within written, to the Value, *&c.* in the Cloſe aforeſaid then growing, with the Cattle within written fed, trod down and conſumed, as the aforeſaid *William Rud* againſt him complaineth. But whether upon the whole Matter aforeſaid, in Form aforeſaid found, the aforeſaid Entry of the ſaid *Edward*, into the Tenements aforeſaid, with the Appurtenances, in which, *&c.* be a good and lawful Entry in Law or not, the Jurors aforeſaid are utterly ignorant; and thereof pray the Advice and Conſideration of the Court, *&c.* And if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Juſtices and Court here, that the aforeſaid Entry of the aforeſaid *Edward*, into the Tenements aforeſaid, with the Appurtenances, in which, *&c.* in and upon the Poſſeſſion of the ſaid *William Rud*, be not a good and lawful Entry in Law, then the ſaid Jurors ſay upon their Oath, that the aforeſaid *Edward Tooker* is guilty of the Treſpaſs within written, as the ſaid *William Rud* above againſt him complaineth; and aſſeſs the Damages of the ſaid *William Rud*, by that Occaſion above his Coſts and Charges by him about his Suit it that Behalf expended, to Six-pence, and for his Coſts and Charges to 20 *s.* And if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Juſtices and Court here, that the aforeſaid Entry of the aforeſaid *Edward*, into the Tenements within written, with the Appurtenances, in which, *&c.* in and upon the Poſſeſſion of the aforeſaid *William*, be a good and lawful Entry in Law, then the ſaid Jurors ſay upon their Oath aforeſaid, that the aforeſaid *Edward* is not guilty of the Treſpaſs within written, as the ſaid *William* above againſt him alledgeth; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter*, until *Friday* next after the Morrow of *Holy Trinity*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Weſtminſter*, come the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Thurſday* next after the Morrow of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day is given to the Parties aforeſaid, before the Lady the

Queen,

Queen at *Weſtminſter*, until *Friday* next after eight Days of St. *Hillary*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Weſtminſter* aforeſaid, come the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day further is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Friday* next after 18 Days of *Eaſter*, to hear their Judgment of and upon the Premiſſes, becauſe the ſaid Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, further Day is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter*, until *Friday* next after the Morrow of *Holy Trinity*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed; Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter*, until *Saturday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Monday* next after eight Days of St. *Hillary*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid, and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof is further given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Wedneſday* next after 18 Days of *Eaſter*, to hear their Judgment of and upon the Premiſſes; becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes is not yet adviſed: Day further

further thereof is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Friday* next after the Morrow of the *Holy Trinity*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Monday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Monday* next after eight Days of St. *Hillary*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Wedneſday* next after 18 Days of *Eaſter*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the ſaid Queen here, of giving their Judgment, of and upon the Premiſſes, is not yet adviſed, Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Friday* next after the Morrow of the *Holy Trinity*, to hear their Judgment thereof, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtm.* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day thereof further is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter* aforeſaid, until *Monday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before

the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter* aforeſaid, until *Tueſday* next after eight Days of St. *Hillary*, to hear their Judgments thereof, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day thereof is further given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter* aforeſaid, until *Wedneſday* next after eighteen Days of *Eaſter*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until the Morrow of *Holy Trinity*, to hear their Judgment thereof, becauſe the Court of the Lady the Queen thereof not yet, *&c.* At which Day, before the Lady Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed; Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Tueſday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day thereof further is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter* aforeſaid, until *Wedneſday* next after eight Days of St. *Hillary*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; And becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter*

minſter aforeſaid, until *Wedneſday* next after 18 Days of *Eaſter*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof further is given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Friday* next after the Morrow of the *Holy Trinity*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed: Day thereof is further given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Thurſday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the Lady the Queen here, of giving their Judgment of and upon the Premiſſes, is not yet adviſed, Day thereof is further given to the Parties aforeſaid, before the Lady the Queen, at *Weſtminſter* aforeſaid, until *Wedneſday* next after eight Days of St. *Hillary*, to hear their Judgment of and upon the Premiſſes; becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day, before the Lady the Queen, at *Weſtminſter* aforeſaid, came the Parties aforeſaid, by their Attornies aforeſaid; upon which, all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here fully underſtood, and mature Deliberation being had thereof; becauſe it ſeemeth to the ſaid Court of the ſaid Lady the Queen, and the Juſtices here, That the aforeſaid Entry of the aforeſaid *Edward*, into the Tenements aforeſaid, with the Appurtenances, in which, *&c.* in and upon the Poſſeſſion of the ſaid *William* thereof, is a good and lawful Entry in Law; therefore it is granted, that the ſaid *William* take nothing by his Bill aforeſaid, but for his falſe Clamour he be in Mercy, *&c.* And the aforeſaid *Edward* go thereof without Day.

TOOKER's *Caſe.*

Hill. 43 *Eliz.*

In the King's Bench.

Attornment by one Jointenant good for both. Cro. El. 737, 802. Co. Lit. 309, 310.

IN an Action of Treſpaſs for breaking of his Cloſe, in the *King*'s-*Bench*, between *William Rud*, Plaintiff, and *Edward Tooker*, Defendant, which began *Mich.* 36 & 37 *Eliz. Rot.* 136. upon Not-guilty pleaded, a Special Verdict was found, and upon the whole Matter the Caſe was ſhortly ſuch: *John Arundel*, Eſq; was ſeiſed of the Barton of *Sprecombe* in *Morthoe* in the County of *Devon*, in Fee, and demiſed it to *John Tooker* and to the ſaid *William Rud*, for the Term of their Lives, and died; after whoſe Death the Reverſion deſcended to Sir *John Arundel*, as his Son and Heir, who by Deed indented, granted to the ſaid *Edward Tooker* the Reverſion of the ſaid Barton for Term of his Life, to which Grant the ſaid *John Tooker* then being jointly ſeiſed of the ſaid Barton, with the ſaid *William Rud*, did attorn; and afterwards the ſaid *John Tooker*, by his Deed, ſurrendred to the ſaid *Edward Tooker* all his Eſtate, Title, and Intereſt in the ſaid Barton, and died: The ſaid *Edward Tooker* entred into the ſaid Barton, claiming to hold in common with the ſaid *William Rud*; and whether his Entry was lawful or not, was the Queſtion. And the Point was, whether by the Attornment of one Tenant for Life, the Reverſion was veſted in *Edward Tooker* or not. For if the Attornment of one doth not veſt the Reverſion in him, then the Surrender aforeſaid made to him was void. And after many Arguments at the Bar by the Parties Counſel, and at the Bench by the Juſtices, Judgment was given againſt the Plaintiff. And in this Caſe two Points were reſolved by the Court.

(*a*) Cro. El. 802. Co. Lit. 310. a. 315. a. Lit. Sect. 566. (*b*) Cr. El. 802. Co. Lit. 186.

Firſt, That the Attornment of one (*a*) Tenant for Life ſhall veſt the whole Reverſion in the Grantee for divers Reaſons, becauſe the Eſtate of Joint-Leſſees is intire; for every Joint-Tenant is ſeiſed *per* (*b*) *my & per tout*, and by Conſequence the Reverſion which is dependant and expectant upon ſuch Eſtate, is entire alſo.

Secondly,

Secondly, The Attornment is a lawful Act: 3. The Attornment doth not paſs any (*a*) Intereſt from him who attorns, but only perfects a Grant made by another. See 7 *H.* 6. 34. 8 *E.* 3. 38. *Fitz. Dower* 110. 10 *E.* 2. *Dower* 139. If one (*b*) Joint-Tenant aſſign Dower, it is good. So Dower aſſigned by an Abator or (*c*) Diſſeiſor ſhall not be avoided by the Diſſeiſee, as it is agreed in 12 *Aſſ.* 20. for theſe are lawful Acts. So it was ſaid by the ſame Reaſon: If a (*d*) Diſſeiſor attorns or gives Seiſin to the Grantee of the Seigniory, it ſhall bind the Diſſeiſee, yet the Grantee of the Seigniory cannot compel the Diſſeiſor to attorn to him, or to give him Seiſin, if he had not Seiſin before within Time of Limitation. See for that 8 *H.* 6. 17. 8 *Aſſ.* 16. 8 *E.* 3. 52. 11 *H.* 4. 29. 39 *H.* 6. 2. *b.* And it was ſaid, if the Leſſor diſſeiſes his two Leſſees for Life, and enfeoffs another, and one (*e*) Leſſee re-enters, this Act of the one is an Attornment in Law by both. *Ergo*, an expreſs Attornment of one ſhall bind both. So if one Joint-Tenant gives Seiſin of the Rent to the Lord, it ſhall bind his Companion, as it is agreed in 39 *H.* 6. 2. *b.* If a Leaſe be made to two, and afterwards the Reverſion is granted to one of them, and he (*f*) accepts the Deed, *Baldwin* 28 *H.* 8. *Dyer* 12 *b.* held it a good Attornment in Law for both; which Opinion was affirmed for good Law by *Popham* Chief Juſtice and the whole Court. And in 4 *E.* 3. 22 *b.* in *Holland*'s Caſe it is ſaid, That the Attornment of one Joint-Tenant is the Attornment of the other. *Littleton* Ch. *Attornment* 129, holdeth, That if there be Lord and two (*g*) Joint-Tenants by certain Services, and the Seigniory is granted over, and one Joint-Tenant attorns, it is as good as if both had attorned, becauſe the Seigniory is intire; which Opinion of *Littleton* in his (*h*) Book (which is the Ornament of the Common Law, and the moſt perfect and abſolute Work that was ever written in any human Science) the Court did prefer before the ſudden Opinions in 39 *H.* 6. 2. *b.* & 32 *E.* 3. (*i*) *Quid juris clamat* 5. But if the Reverſion of two Tenants for Life, or the Rent, or Seigniory of two Joint-Tenants be granted by Fine, there in a *Quid juris clamat*, *Quem redditum reddit*, or *Per quæ ſervitia* againſt ſuch Joint-Tenants, the one ſhall not be ſuffered to attorn without his Companion for two Reaſons:

(*a*) 9 Co. 85.

(*b*) Co. Lit. 34. b. 35. a. Bridg. 130.

(*c*) Co. Lit. 357. b. 5 Co. 30. b. 6 Co. 58. a. Br. Dower 59. Br. Aſſiſe 181.

(*d*) Br. Damages 96. Co. Lit. 311. b.

(*e*) Co. Lit. 319. a.

(*f*) 3 Leon 279. Dyer 12. pl. 57. Cr. El. 802. Lit. Sect. 559. Lit. fol. 127. b.

(*g*) Co. Lit. 315. a. Lit. Sect. 566. Lit. f. 128. b.

(*h*) Præf. Co. Lit. Co. Lit. 311. a.

(*i*) Cro. El. 737.

1. Becauſe the Plaintiff ought to have Attornment in the ſame Manner as he himſelf hath demanded it, as it is held in 9 *H.* 6. 21. *b.*

2. If one attorns only, he may prejudice his Companion; as if he will not (*k*) claim to be unpuniſhed for Waſte, or a Condition to have Fee, or future Term, *&c.* for upon a general Attornment in a Court of Record, the Leſſee ſhall loſe all Advantages which are not claimed

(*k*) 9 Co. 85 b. Co. Lit. 320. b.

of Record; for the Queſtion is demanded of him, *Qui juris clamat?* And therefore he ſhall not have more than he claims of Record; and for this Cauſe one Joint-Tenant only ſhall not be ſuffered to attorn of Record for the manifeſt Prejudice which might accrue to his Companion if it ſhould be the Attornment of both. But in the Caſe of a Grant by Deed, no ſuch Prejudice can happen, and therefore the Attornment of one ſhall bind both, becauſe it cannot prejudice his Companion. So, and for the ſame Cauſe, if one (*a*) Joint-Tenant attorns *in pais* to the Conuſee where the Grant is by Fine, it ſhall bind both. And in Proof that the Reverſion in the Caſe at Bar was intire, to follow the Reaſon of *Littleton*, it was ſaid, If (*b*) Huſband and Wife be Joint-Tenants for Life, and the Leſſor grants the Reverſion of the Land which the Huſband holdeth for Life, the grant is void; as it is agreed in 13 *E.* 3. *Grants* 63. The ſame Law, as it was agreed by *Popham* Chief Juſtice, and the whole Court, of two Joint-Tenants Leſſees. See 32 *E.* 3. *Quid juris clamat* 5. So if a (*c*) Man holds three Acres by 12 *d.* and the Lord grants the Services of the third Acre, the Grant is void; as it is agreed in 27 *E.* 3. 79. and 7 *E.* 4. 25. *a.*

(*a*) 1 Rol. 302. fol. 3. Co. Lit. 315. a. Cro. Eliz. 737.

(*b*) Plowd. 162. b. Br. Grants 137. Br. Joint-Tenants 63.

(*c*) Fitz. Grants 19. Plowd. 162. b.

Secondly, It was reſolved by the Court, that if the Tenant having perfect (*d*) Notice of the Grant (as he by Law ought to have as it was agreed in *Vivian*'s Caſe, 13 *Eliz. Dyer* 332.) there, if the Tenant gives his Aſſent, or attorns for any Part, it is good for (*e*) the Whole, for inaſmuch as an Attornment is but an Aſſent to perfect the Grant of another, he who attorns cannot apportion, divide, or alter the Grant, but the Attornment ought to be according to the Grant; and therefore if he attorns in Part, it ſhall not be taken void, but ſhall be taken ſtrongeſt againſt him, and ſhall be in Law an Attornment for the Whole, and herewith agrees *Littleton*, *Attorn.* 127. And therefore if a (*f*) Reverſion or Seigniory be granted to two, and the Tenant attorns to one of them, it is good to both againſt the Opinion of *Huſſey* and *Danvers*, 11 *H* 7. 12. *b.* So if the (*g*) Reverſion of 3 Acres be granted, and the Leſſee attorns for one of them, it is good for all, *vi.* 18 *E.* 3. *Variance* 63. and 22 *E.* 3. 18. So if a Reverſion be granted for 40 Years, and the Leſſee attorns for Part of the Years, it is good for all. So if it be granted for Life, (*h*) with divers Remainders over, if the Leſſee attorns to the Grantee for Life only, yet it ſhall enure to all in the Remainder. But if a Reverſion be granted for Life, the Remainder in Fee by Deed, and the Grantee for Life (*i*) dies, the Attornment to him in the Remainder is void, for it is not according to the Grant: Otherwiſe, if the Grant was by (*k*) Fine, for there, by the Fine, the Eſtate was veſted in them, and the Attornment was only to make Privity; but if the Reverſion be granted to two, and one dies, there the Attornment

(*d*) Co. Lit. 309. b. 6 Co. 69. a. Dyer 302. pl. 43. Poſtea 68. b. 5 Co. 113. b.

(*e*) Co. Lit. 309. b. 314. a.

(*f*) Co. Lit. 310. a.

(*g*) Co. Lit. 309. b.

(*h*) Co. Lit. 310. a.

(*i*) Co. Lit. 309. a. b. 310. a. Lane 36. 2 Co. 104. b. 155. b. 9 E. 4. 39. a. Lit. Sect. 551, 568. Br. Attorn. 55. Br. Diſſeiſin and Diſſeiſor 61.

tornment to the Survivor is good. So if (*a*) a Reverſion be granted to *J. S.* and *Ja. G.* and afterwards they intermarry, and the Tenant attorns, now they ſhall not have Moieties according to the Purport of the Grant, but that is by the Act of the Grantees themſelves. And if the Leſſee attorns upon any Condit. ſubſequent, the (*b*) Condition is void; for if the Reverſion be once veſted, it cannot be diveſted by any Condition annexed to the Attornment, becauſe the Grantee is not in by him, but by the Grantor; but if one attorns upon a Condition precedent, there it is no Attornment till the Condition be performed. But in all the Caſes aforeſaid, if the Tenant hath Notice that the Seigniory was granted but to one, or that the Reverſion was granted but of one Acre, or that the Reverſion was granted for fewer Years, or that the Reverſion was granted for Life only with no Remainder over, there general Attornment without true Notice of the Grant, is void; for the uſual Pleading (the ſure Oracle of Law) is, (*c*) to which Grant he attorned; and therefore if he hath no Notice of the Grant, or if he hath not true Notice of the Grant, which is all one, his Aſſent which he gives to that, which in Truth was but Part of the Grant, the Law (which abhors Falſity) will not conſtrue it to be an Attornmenr to the true Grant. And *Popham*, C. J. ſaid, that every Act done by one Joint-Tenant in (*d*) Benefit of himſelf and his Companion, is good; as (*e*) Payment of Rent, *&c.* to the Lord by one, doth diſcharge the other: But one Joint-Tenant cannot prejudice his Companion as to (*f*) any Matter of Inheritance or Freehold, but as to the Profits of the Freehold, the one may prejudice the other; for there is a Privity and Truſt between Joint-Tenants, and therefore if one takes all the (*g*) Profits of the Land, or the whole Rent, *&c.* the other hath no Remedy; for it was his Folly to join himſelf in Eſtate with ſuch a Perſon as would break the Truſt. And he ſaid, if (*h*) two Joint-Lords, and Tenants be by Knights Service, and the Tenant dies, his Heir within Age, now the Lords have Election either to ſeiſe the Ward, or to diſtrain for the Services, and ſo wave the Wardſhip, as it is agreed in 1 *E.* 3. But he ſaid, if one Lord ſeiſes the Ward, and the other Lord diſtrains for the Services, he who firſt ſeiſed or diſtrained, ſhall bind the other. Alſo in perſonal Actions, one Joint-Tenant may releaſe all; but if the Perſonalty be mixed with the Reality, it is otherwiſe, as in Aſſize by two, the (*i*) Releaſe of all Actions perſonal by one, is no Bar againſt the other; for although the Aſſiſe is an Action mix'd in the Reality and Perſonalty, yet (*k*) *omne majus trahit ad ſe minus*, as it is adjudged in 30 *H.* 6. *Bar.* 59. So in a Writ of (*l*) Right of Ward for the Body brought by two, the Releaſe of the one ſhall not prejudice the other, but ſhall give his Companion the whole Ward, as it is held in

(*a*) Plow. 483. Co. Lit. 187. b. 310. a.

(*b*) 5 Co. 81. a. b. 9 Co. 85. b. Co. Lit. 274. b. 297. a. 300. b. 1 Rol. 412. M. 1.

(*c*) Co. Lit. 309.

(*d*) Cr. El. 803. Bridgm. 129.

(*e*) Bridgm. 129.

(*f*) Cr. El. 737. 803.

(*g*) Cr. El. 803. Bridgm. 129.

(*h*) Cro. El. 803. Bridgm. 129.

(*i*) 5 Co. 97. b. 2 Rol. 411. Co. Lit. 285. a. 18 E. 4. 14. a.

(*k*) Co. Lit. 52. b. 285. a. 5 Co. 115. a. 6 Co. 43. b. 1 Bulſt. 105. 2 Bulſt. 48. 3 Inſt. 109.

(*l*) Fitz Gard. 100. Br. Gard. 1. Co. Lit. 285. Br. Severance 5.

* e. If in the *Tenuit*, otherwiſe not. Co. Lit. 198. 355.

45 *E.* 3. 10. *a.* & 30 *H.* 6. *Bar.* 59. But in an Action of Waſte brought by two, the Releaſe of one ſhall bar the other, as it is held in (*a*) 9 *H.* 5. 15. *a. per Curiam.* for in Waſte the Perſonalty is the Principal. But note, Reader, If in a (*b*) *Quid juris clamat*, the Defendant, as to Parcel, is ready to attorn; and, as to the Reſidue, claims Fee; there he ſhall be admitted to attorn for Parcel, becauſe he ſhall never attorn for the Reſidue; for if it be found with the Plaintiff, he ſhall enter for the (*c*) Forfeiture; and if it be found with the Defendant, he ſhall never attorn; but when to Parcel he is ready to attorn, and as to the Reſidue, (*d*) pleads ſuch a Plea, that if it be found againſt him, he ſhall attorn; there the Attornment ſhall not be taken by Parcels, 11 *H.* 4. 57. *a. b.* 11 *R.* 2. *b. Attornment* 9. 22 *E.* 3. 18. *b.*

(a) Br. Waſte 73. Fitz. Waſte 171.

(b) F.N.B. 147. a. Fitz. quid juris clamat. 13, 33. Br. quid juris clamat. 10. Br. Attorn. 50.

(c) 1 Rol. 853.

(d) 1 Rol. 299.

(e) Antea 67. b. Co. Lit. 309. b. 5 Co. 113. b. 6 Co. 69. a. Dyer 302. pl. 43.

And it is true, that to every Attornment, true Notice of the Grant is requiſite; but it is to be underſtood, that there is a Notice in Fact and a Notice in Law; for in ſome Caſes the Law will imply Notice without any expreſs Notice given by any Perſon, as in the Caſe of *Littleton*, *Attornment* 130. If he (*f*) in the Reverſion ouſts his Leſſee for Life, and makes a Feoffment in Fee, and the Leſſee re-enters, it is a good Attornment; and yet perhaps he had not Notice neither of the Feoffment nor of the Eſtate given by the Feoffment. And *Littleton* gives two Reaſons for it.

(f) Co. Lit. 318. b. 319. a. Lit. Sect. 576.

Co. Lit. 67. a.

1. Becauſe the Leſſee by Law ſhould not be ignorant (Note, the Law implies Notice) of Feoffments which are made of and upon the ſame Land.

2. By his Re-entry, he cauſe the Reverſion to be to him to whom the Feoffment was made, who was ſeiſed in Demeſn, and had not any Reverſion before. And with *Littleton* agrees the whole Court, in 9 *H.* 6. 16. *a. b.* And that the Agreement of the Leſſee there pleaded upon his Re-entry was not material, for without it the Juſtices were agreed, that the Reverſion and the Rent were in the Feoffee, and 18 *E.* 3. *Feoffments & Faits* 62. *acc. per Wilby & omnes*, And although *prima facie*, in 2 *H.* 5. 4. *a. b.* the Court thought it was not an Attornment; yet afterwards in 5 *H.* 5. 12. *a. b.* it is adjudged, that the (*g*) Re-entry is a good Attornment, and that the Action of Waſte brought by the Feoffee was maintainable, 46 *E.* 3. 30. *b.* & 34 *H.* 6. 6. *b. acc.* And there it is ſaid, that if the Leſſee for Life recovers in Aſſize againſt the Feoffee, it ſhall not be an Attornment.

(g) Co. Lit. 318. b.

Co. Lit. 319. 6 Co. 69.

And

And if the Tenant hath Notice of the Grant by a Stranger, he may attorn, and aſſent to the Grant in the Abſence of the Grantee; and *Popham*, Chief Juſtice, ſaid, It had been ſo adjudged againſt the Opinion in 28 *H.* 8. *Br. Attornment* 40.

Cr. Car. 441. 1 Rol. 295. 300. Co. Lit. 310. a. 3 Leon. 17. pl. 40. 4 Leon. 23. pl. 73. 1 Jones 366, 377.

And note Reader, a Difference between an Attornment, which is an Agreement, for that may be made in the Abſence of the Grantee, but in Caſe of a Diſagreement, that ought to be made to the Party himſelf, as appears in *Wheeler*'s Caſe, 14 *H.* 8. 23. *a. b.* And the Reaſon and Cauſe of the Difference is, becauſe in Caſe of Diſagreement, the Party might perſwade and move the other by Reaſon, by Entreaty, or other Means to give his Conſent or Good-will; and therefore the Law requires that the Diſagreement be made to the Party, for the Prejudice which otherwiſe might happen to him; but in the Caſe of Conſent, (and namely in Caſe of Attornment, which is to veſt and perfect the Eſtate of the Grantee, and ſo for his Benefit) there it being made in his Abſence, is as well as if it were made in his Preſence.

The

The Lord CROMWEL's *Caſe.*

Hill. 43 Eliz.

In the Common Pleas.

Jenk. Cent. 252. Moor 105, 471. 1 Ander. 17, 230. 2 Anderſ. 69. Cr. El. 891. Yelv. 3. Noy 44. N. Benl. 201. pl. 239. Dyer 311. pl. 83. 2 Bulſt. 251, 255. Skin. 74. 186.

IN an Aſſize brought by *Edward* Lord *Cromwel* againſt *Edward Andrewes* of *Gray's-Inn*, Eſq; and others, of Lands and Tenements in *Alaxton* in the County of *Leiceſter*, upon *nul tort nul diſſeiſin* pleaded, the Recognitors of the Aſſize gave a Special Verdict to this Effect: *John Blunt*, Eſq; ſeiſed of the Manor of *Alaxton* in the County of *Leiceſter*, whereof the Lands and Tenements put in View are Parcel, to which Manor the Advowſon of the Church of *Alaxton* was appendant, by Deed indented 10 *Aprilis*, 1 & 2 *Phil. & Mar.* between him and *Anthony Andrewes*, (Father of the ſaid *Edward*) did grant, bargain, and ſell the ſaid Manor, with the Appurtenances, by the Name of the Manor of *Alaxton*, and of the Advowſon of *Alaxton*, appendant to the ſaid Manor, to *Anthony Andrewes*, to have and to hold to him and his Heirs, to the Uſe of him and his Heirs in the ſame Manner and Form as afterwards in the ſaid Indenture is mentioned. And *Blunt*, by the ſaid Indenture covenanted, that the Manor was of the Value of 42 *l. per Ann.* and that he was thereof Owner of an Eſtate of Inheritance, and that it ſhould be diſcharged of Incumbrances, except Leaſes, upon which the ancient Rent was reſerved. And further, *Blunt* covenanted that he would permit *William Rud* and *Richard Elſon* to recover by Common Recovery the ſaid Manor, with the Appurtenances, againſt him; which Recovery ſhould be to the Uſes and Intents following, *ſcil.* To the Uſe of *Anthony Andrewes* and his Heirs, rendring for the ſaid Manor, with the Appurtenances, 42 *l. per Annum*, to have and receive to *Blunt* and

and his Heirs, at two Feaſts, *&c.* according to the Covenants in the Indenture, and 10 *l. Nomine pœnæ*, and Diſtreſs for both. And further, it was covenanted and agreed by the ſame Indenture between the ſaid Parties, and each covenanted and granted, with the other, in Manner and Form following, that is to ſay, as well for the Aſſurance of the ſaid Manor, with the Appurtenances, to *Anthony Andrewes* and his Heirs, as of the ſaid Rent to *Blunt* and his Heirs: That *Blunt*, before *Eaſter* then next following, ſhould levy a Fine of the ſaid Manor, with the Appurtenances, to *Anthony Andrewes* and his Heirs; and that by the ſame Fine *Anthony Andrewes* ſhould render a Rent of 42 *l.* in Fee, payable at two Feaſts, with *Nomine pœnæ* and Diſtreſs. Provided always that the ſaid *Anthony Andrewes* ſhall by his Deed ſufficient in the Law, give the Advowſon and Parſonage of the ſaid Church to the ſaid *John Blunt*, during his Life; and if it happen not void in his Life, then one Turn to his Executors. And further it was covenanted and agreed by the ſame Indenture, between the ſaid Parties, and the ſaid *Anthony Andrewes* covenanted with the ſaid *Blunt* to give *Blunt* 840 *l.* for the ſaid Rent and Patronage, to be paid within a Year after Notice that he would ſell it; the Notice to be ſeven Years after the ſaid Sale. And further it was covenanted, granted and agreed, between the ſaid Parties, by the ſame Indenture, That all Manner of Eſtates, Aſſurances and Conveyances after to be made and conveyed of the ſaid Manor and other the Premiſſes, ſhould be to the Uſes and Intents comprized in that Indenture, and to no other Uſe or Intent; and that is the Order, Courſe, and Effect of all the Covenants and Clauſes of the ſaid Indenture.

And afterward, *Ter. Paſch.* next following, a Recovery was had by *Rud* and *Elſon* againſt *Blunt* of the ſaid Manor, with the Appurtenances, according to the ſaid Indenture. By Force of which *Anthony Andrewes* was ſeiſed of the ſaid Manor, with the Appurtenances, *(prout lex poſtulat.)* And afterwards, *Octab. Mich.* 2 *&* 3 *Phil. & Mar. Blunt* and *Anthony Andrewes* levied a Fine to *Richard Perkins* and his Heirs, of the ſaid Manor, with the Appurtenances, and he granted and rendred a Rent of 42 *l. per Ann.* out of the ſaid Manor to *Blunt* in Tail, with the Remainder to the Lord *Montjoy*, in Fee, with Clauſe of Diſtreſs and *nomine pœnæ* to be paid as the firſt Rent was limited to be paid, and granted and rendred the Manor, with the Advowſon, to *Anthony Andrewes*, in Fee, and Proclamations were made according to the Statute. And further it was found by the Recognitors of the Aſſiſe, that this Fine was not levied for a new Sum of Money, or upon any new Conſideration, but was levied to the Uſes in the Indenture mentioned. *Anthony Andrewes*, in his Life, did not grant the Advowſon according to the Indenture, and afterwards *Anthony Andrewes* died;

died; and after his Death, and in the Life of *Blunt*, the Church became void; *Edw. Andrewes*, Son and Heir of *Anth. Andrewes*, entred into the ſaid Manor; *Blunt* did not requeſt *Anth. Andrewes*, in his Life, to grant him the ſaid Advowſon according to the ſaid Proviſo, *Blunt* entred into the ſaid Manor for the Condition broken. And 6 *Dec.* 16 *Eliz.* in Conſideration of 848 *l.* by Deed indented and inrolled in the Common Pleas, granted, bargained, and ſold the ſaid Manor, with the Advowſon, to *Henry* Lord *Cromwel*, in Fee, by Force whereof he entred, upon whom the ſaid *Edw. Andrewes* entred; and afterwards *Henry* Lord *Cromwel* died, and the ſaid *Edw.* Lord *Cromwel*, his Son and Heir, entred upon the ſaid *Edw. Andrewes*, who, with the other Defendants by his Commandment, entred upon him, and put him out of Poſſeſſion; and whether this Entry was a Diſſeiſin to the Plaintiff, or not, was the Queſtion.

And this Caſe was oftentimes argued in the Common Pleas by *Yelverton*, *Glanvill*, and *Williams*, Serjeants on the Plaintiff's Part, and by *Drew* the Queen's Serjeant, and others, on the Defendant's Part. And afterwards it was argued *Mich.* 39. & 40 *Eliz.* by the Lord *Anderſon*, *Walmſley*, *Beamond*, and *Owen*, Juſtices, at two ſeveral Days, in the Common Pleas, and the Court was divided in Opinion. And thereupon the Caſe was argued before all the Judges of *England* in the Exchequer Chamber, by *Williams*, Serj. and *Coke*, Attorn. Gen. for the Plaintiff; and by *Fleming*, Sollicit. Gen. and *Francis Bacon*, for the Defendant. And afterwards the Caſe was openly argued in the Exchequer Chamber by all the Juſtices of the one Bench and of the other, and by the Barons of the Exchequer. And it was there reſolved, that Judgment ſhould be given for the Plaintiff. And *Mich.* 42 & 43 *Eliz.* Judgment was given by the Juſtices of the Common Pleas according to the ſaid Reſolution. And for avoiding Prolixity, I will omit all the Arguments at the Bar, and report only thoſe Matters in Law that were reſolved by the Juſtices in this Caſe, and the Reaſons and Cauſes of their Judgment: Four Matters were reſolved in this Caſe:

First, that the ſaid Proviſo makes a Condition; for the Law hath not appointed any *(a)* Place in a Deed proper or peculiar to a Condition, but its Place is where the Parties pleaſe. And it appears by *Littleton*, that *(b) Proviſo* is as apt a Word to make an Eſtate conditional, as *ſub Conditione*, or any other Word of Condition: But notwithſtanding that, when this Word (Proviſo) ſhall make an Eſtate or Intereſt conditional, three Things are to be obſerved: 1. That the Proviſo do not depend upon another Sentence, nor participate thereof, but ſtand originally of itſelf. 2. That the Proviſo be the Words of the Bargainor, Feoffor, Donor, *&c.* 3. That it be Compulſory to enforce the Bargainee, *(c)* Feoffee, Donee, *&c.* to do an Act; and becauſe they all concur

(a) 2 Rol. Rep. 356. Godb. 418. 1 Jones 169.
(b) Litt. Sect. 329. Co. Lit. 203. b. Cr. Car. 129. Lit. fol. 75. a. 1 Rol. 518. See Dyer 222. a. in Margin. Five Significations of the Word Proviſo.
(c) Palm. 496. 1 Lev. 48. 155.

cur in this Caſe, it was reſolved that it was a Condition in what Place ſoever it be placed: But that this Proviſo ſhould not make a Condition in the Caſe at Bar, divers Objections were made.

1. That the Indenture in which the Condition is contained was not inrolled, ſo that no Eſtate paſſed by it; and then (as it was objected) the Condition cannot be annexed to an Eſtate which was afterwards conveyed by the Recovery, for the Indenture was ſealed and delivered in *Feb.* and the Recovery paſſed in *Eaſter* Term, and the Condition could not precede the Eſtate, but a Condition ought to be in the ſame Conveyance, or comprized in another Deed delivered (*a*) at the ſame Time, as the Books are agreed, in 17 *Aſſ.* 2. & 43 *Aſſ.* for (*b*) *Quæ incontinenti fiunt, in eſſe videntur*. 2. It was objected, that *Andrewes* had nothing by the Indentures but Covenants of *Blunt*'s Part, and therefore it would be equal to conſtrue it, that *Blunt* ſhould have like Remedy; *ſcil.* covenants on *Andrewes* Part. 3. It was objected, that the precedent Sentence, as it appears before, is to this Effect: And further it is covenanted and agreed between the ſaid Parties, and each of them covenanteth with the other in Manner and Form following: And then the Fine upon Grant and Render is appointed; and immediately after that, the Proviſo is added; and next after the Proviſo, this Clauſe followeth. And further it is covenanted and agreed between the ſaid Parties, containing a Covenant for Purchaſe of the Rent. And it was ſaid, that (*c*) *ex antecedent' & conſequent' fit optima interpret'*; but it appears by the precedent Clauſe, that all that ſhall follow after it ſhall be but Covenants; for it is ſaid, that each covenants with the other, in Manner and Form following; ſo that by the expreſs Words and Intent of the Parties, all that follows ſhall be but Covenants; but the Proviſo follows, and therefore ſhall be but a Covenant. Then the ſubſequent Sentence explains it alſo; for there it is ſaid, And further it is covenanted and agreed between the Parties, *&c.* *Ergo*, the next Clauſe before, was but a Covenant, for ſo much this Word (further) implies. 4. It was objected, that if the Proviſo ſhall be a Condition, it ſhall refer to the Clauſe next precedent, *ſcil.* to the Fine to be levied according to the Purport of the Covenant next before, and not to the Recovery, which is more remote and diſtinct from it by the Interpoſition of the ſaid Covenant concerning the Fine, *Et* (*d*) *ad proximum antecedens fiat relatio niſi impediatur ſententia.*

As to the firſt Objection, it was anſwered and reſolved, That the Intent of the Parties was not that the Eſtate ſhould paſs by the Bargain and Sale, but that the Eſtate ſhould be conveyed by the Recovery; and that the Indentures ſhould direct the Uſes and Intents as well of the Recovery, as of all other Conveyances after to be made: Then it is apt and natural that the

Ante 57.

Co. Lit. 236.
(*a*) Plowd. 133. a. b. 137. a. b.
(*b*) Co. Lit. 272. a.

(*c*) Winch. 72. 3 Bulſtr. 65, 122. 1 Rol. Rep. 375. Lit. Rep. 63 Poph. 211.

(*d*) Raym. 505. Lit. Rep. 167. Hardres 77.

the Indentures which direct the Uſes which cannot be raiſed till the Recovery be had and executed, ſhould comprehend the Conditions and Limitations annexed to the Uſes; and as well as the Indentures may direct the Uſes of the Recovery ſubſequent, ſo may they declare the Conditions and Limitations annexed to the ſame Uſes: And the Statute of 27 *H.* 8. (*a*) doth execute the Eſtate according to the Manner, Condition, and Quality of the Uſe, ſo that by Force of the ſaid Act, the Eſtate itſelf is conditional, and that is approved by the general Allowance and Experience in all the Conveyances of the whole Realm.

(*a*) Co. Lit. 187. b. Poſtea 72. b. 1 Co. 102. b.

As to the ſecond Objection, it was anſwered and reſolved, That it was not unjuſt or unequal that the Bargainor ſhould annex ſuch Condition as pleaſed him to the Eſtate of the Land, for the Land moved from him, *Et cujus eſt dare, ejus eſt diſponere*, and the Bargainee hath accepted it.

As to the third Objection, it was anſwered and reſolved, that neither the Precedent nor the ſubſequent Covenant takes away the Force of the Proviſo; for altho' Words of Covenant had been contained in the ſame Clauſe of the Proviſo itſelf, yet the Proviſo being in Judgment of Law, a Word of Condition, ſhall not loſe its Force. And therefore it hath been adjudged, between (*b*) *Simpſon* and *Titterel*, in the Common Pleas, where the Caſe was, That Serj. *Bendloes*, 13 *Nov.* 26 *Eliz.* demiſed to *Titterel* certain Lands in *Eſſex* for 40 Years: Provided always, and it is covenanted and agreed between the ſaid Parties, that the Leſſee, *&c.* ſhould not alien, and it was adjudged, that it was a Condition by Force of the Proviſo, and a Covenant alſo by Force of the other Words. Alſo it was adjudged in the King's Bench, *Paſch.* (36.) 39 *Eliz. Rot.* 351. between *Henry* Earl of (*c*) *Pembroke*, Plaintiff, and Sir *Henry Barkley*, Knt. and *Symons*, Defendants; and the Caſe was, that the Earl of *Pembroke* granted the Office of Lieutenantſhip of the Weſt Part of the Forreſt of *Froomſelwood* in the County of *Somerſet*, to Sir *Morice Barkley*, (Father of the ſaid Sir *Henry*) in Tail, Provided always, and the ſaid Sir *Morice Barkley* for him, *&c.* doth covenant and grant to and with the ſaid Earl, that neither he the ſaid Sir *Morice*, nor any of the Heirs Males of his Body, ſhall cut down any Wood growing upon any Part of the Premiſſes: And it was reſolved by all the Judges of *England*, upon Argument before them at *Serjeants-Inn*, that although the Proviſo was coupled with the expreſs Covenant of the Grantee, and every Condition ought to be created by the Words of the Grantor, Donor, Feoffor, *&c.* yet, in the Judgment of Law, this Word (Proviſo) was a Condition created by the Grantor, although all the reſt of the Sentence was the Words of the Grantee,

(*b*) Cr. Eliz. 242. 1 Rol. 410. Gold. 116. 2 Anderſ. 72. Moor 707. Co. Lit. 203. b. Cr. El. 385. 1 Anderſ. 267. Winch. 36. Lane 109.

(*c*) 2 Anderſ. 20. Moor. 706. Poph. 116. Goldſb. 130. Cr. El. 384, 486, 560. Hardres 49. Lane 57. 109.

for Proviſo being an apt Word of Condition, the ſame Sentence contains the Words of the Grantor purporting a Condition, and the Words of the Grantee comprehending a Covenant; which Judgment was afterwards reverſed in the Exchequer Chamber for a Defect in the Declaration, but not for the Matter in Law, for that was reſolved by all the Juſtices. And in the Caſe at Bar, the Special *Habendum* was obſerved, *ſcil.* To have and to hold to *Andrewes* and his Heirs, in the ſame Manner and Form as afterwards in the Indenture is mentioned; by which it appears, that the Intent of the Parties was, that the Eſtate of *Andrewes* ſhould be *ſub modo*, which it would not be, if the ſaid Proviſo makes not a Condition, or a conditional Limitation, as *Popham* Chief-Juſtice called it. Note, in this Caſe 27 *H.* 8. 18. *a.* *(a)* *Dockwray*'s Caſe, *Littleton, Chap. Conditions.* *(b)* 14 *Eliz. Dyer* *(c)* 311. 4 & 5 *Phil. & Mar. Dyer* (*d*) 152, that this Word (*e*) (Proviſo) makes a Condition; but when a Proviſo depends upon another Sentence, or hath Reference to another Part of the Deed, it never makes a Condition, but a Qualification or Limitation of the Sentence, or Part of the Deed to which it is referred. As in 5 *Eliz. Dyer* (22.) 221. *b. inter Ayer & Orme*, a notable Caſe. 7 *H.* 6. a *(f)* Leaſe without Impeachment of Waſte, Proviſo that he ſhall not do voluntary Waſte, *Litt. Chap. Rents. f.* 48. *a. b.* A Grant of a Rent-Charge *(g)* Proviſo that the Grantee ſhall not charge his Perſon. *Tramington*'s Caſe in the King's Bench, *Paſch.* 16 *Eliz. Rot.* 273, there a Proviſo tending to qualify and explain a Sentence Precedent, doth not make a Condition, 3 & 4 *Phil. & Mar. Dyer* 150, *(h)* *Parker*'s Caſe. Proviſo amounts to a Covenant, 28 *H.* 8. *Dyer (i)* 13. *b.*

Note, Reader, The Caſe in 35 *H.* 8. *Br. Condit.* 195, commonly cited to prove that a Proviſo doth not make a Condition when it comes *inter alias conventiones*, doth not warrant it; but if it be well obſerved, the Opinion there is good Law, and ſtands well with this Judgment. For there it is ſaid, *Nota pro lege*, that a Proviſo put *(hoc eſt*, to be performed or not done) upon the Part of the Leſſee, upon the Words of the *Habendum*, makes a Condition, yet contrary of a Proviſo (to be performed or not done) on the Part of the Leſſor: As if it be covenanted in the Indenture, that the Leſſee ſhall make the Reparations, *Proviſo ſemper*, that the Leſſor ſhall find great Timber, it is not a Condition; *nec per aliquos* is it a Condition when it comes *inter alias conventiones*, upon the Part of the Leſſee, altho' it is covenanted after the *Habendum*, and after the *Reddendum*, that the Leſſee ſhall ſcour the Ditches, or the like, *Proviſo ſemper* that the Leſſee ſhall carry the Dung to ſuch a Field, it is not a Condition to forfeit the Leaſe, (and it is true, for it depends upon the precedent Covenant, and without the precedent Covenant could not ſtand) contrary if ſuch Proviſo

(*a*) Cr. Eliz. 242. 4 Leon 71.
(*b*) Lit. Sect. 329. Co. Lit. 203. b.
(*c*) Dyer 311. pl. 83.
(*d*) Dyer 152. pl. 7. 4 Co. 120. b. Cr. El. 757, 816.
(*e*) Cr. El. 73, 242. Co. Lit. 203. b. Moor 51, 52. 106. 2 Leon. 128, 225. 4 Leon. 70, 71, 72, 73. 10 Co. 42. a.
(*f*) 2 Ander. 71. 4 Leon. 71, 72, 73. 2 Leon. 128, 129. 3 Leon. 225. 9 H. 6. 35. a. Plowd. 135. b. Dyer 47. pl. 11. Bridgm. 102.
(*g*) 2 Leon. 128. 3 Leon. 225. Lit. Sect. 220. 4 Leon. 71. Co. Lit. 146. a.
(*h*) Dyer 150. pl. 83. 1 Co. 155. a. Moor 247. 480. 1 Rol. 518, 848. 1 Anderſ. 19. Hob. 35. Yelv. 9. 3 Leon. 22. 154. 4 Leon. 193. Noy 14. Cr. El. 841. 1 Rol. Rep. 359. 3 Bulſt. 163.
(*i*) Dyer 13. pl. 65. Co. Lit. 203. b. 10 Co. 42. a.

Proviſo be put immediately after the *Habendum* which makes the Eſtate, or after the *Reddendum*, (and true it is alſo, for then in Regard it ſtands upon itſelf, and doth not depend upon a precedent Clauſe, it makes a Condition) and all this is good Law, and ſtands well with the Reſolution of the ſaid Juſtices, and ſo the *Quære* which *Brook* made there is now reſolved, and made without Queſtion.

As to the fourth Object. it was anſwered and reſolved, That the Proviſo being a Condition ought to do the proper Office of a Condition, and that is to make the Eſtate conditional, and therefore in what Place ſoever it be put, it having the Force of a Condition ſhall have Reference to the Eſtate, and ſhall be annexed to it: And it was ſaid, *Quod Proviſo eſt providere præſentia & futura, & non præterita.*

(a) Co.Lit.187.b. Vaughan 52. Antea 71. b.

The ſecond Point which was reſolved by the Juſtices, was, that after the Recovery ſuffered, the Statute of *(a)* 27 *Hen.* 8. did execute the Eſtate of the ſaid Manor to *Andrewes*, according to the Limitation of the Uſe directed by the ſaid Indentures ſubject to the ſaid Condition or Proviſo: And alſo by Force of another Clauſe of the ſaid Act, created a Rent of 42 *l. per Ann.* in *Blunt* and his Heirs, for it is provided by a Special Branch of the ſaid Act of 27 *H.* 8. as followeth: That where divers Perſons ſtand and be ſeized of and in Lands, *&c.* in Fee-Simple or otherwiſe, to the Uſe and Intent that ſome other Perſon and Perſons ſhall have and perceive yearly to his or their Heirs, one annual Rent out of the ſame Lands, *&c.* in every ſuch Caſe ſuch Perſon, *&c.* be adjudged in Poſſeſſion and Seiſin of the ſame Rent, *&c.* as if a ſufficient Grant, *&c.* had been made, *&c.* by ſuch as were or ſhall be ſeized to ſuch Uſe or Intent, *&c.* 20 *Eliz. Dyer* 362. *b. acc.* And altho' in the Caſe at Bar the Uſe of the Recovery was firſt limited by the Indentures to *Andrewes* and his Heirs, and then came the Clauſe, yielding for the ſaid Manor 42 *l. per Ann.* to *Blunt* and his Heirs; and altho' it was objected that the Rent ought to be limited out of the Eſtate of the Recoverers, and not out of the Poſſeſſion which *Andrewes* had executed to him by the Stat. according to the Uſe limited to him by the Indenture; yet it was agreed that *Blunt* ſhould have the ſaid *(b)* Rent by Force of the ſaid Clauſe of the Act of 27 *H.* 8. for the Intent of the Parties appears, that *Blunt* ſhould have the Rent, and then the Law will make ſuch *(c)* Conſtruction, notwithſtanding the *Reddendum* comes after the Limitation of the Uſe, that he ſhall pay it who by Law ought to pay it, *ut (d) res magis valeat quam pereat.*

(b) 1 Jones 179. Dyer 362. pl. 21. 1 Co. 47. b. 137. a. N. Benl. 215. pl. 299. 1 Anderſ. 51, 52, 338.
(c) 5 Co. 8. a.
(d) 1 Co. 76. a. 8 Co. 95. b. 3 Keb. 288. 2 Jones 69. 5 Co. 55. b. 2 Mod. Rep. 109.

Thirdly, It was reſolved, that the Fine levied to *Perkins* by *Blunt* and *Andrewes*, hath not extinguiſhed the ſaid Condition, and that was the great Queſtion and Doubt of the Caſe; and altho' it is true as the Philoſopher ſaith, *Quod ſucatus error nuda veritate in multis eſt probabilior, & ſæpenumero rationibus*

rationibus vincit veritatem error, and altho' as much was objected againſt the Condition as the Art and Wit of any Man could invent or imagine, yet it was reſolved that the Condition remained for many notable Reaſons; and all the Objections were well and fully anſwered and ſatisfied. Firſt, Becauſe by the general Covenant it is declared, that all Manner of Eſtates, Aſſurances, and Conveyances after to be made of the ſaid Manor ſhould be to the Uſes and Intents compriſed in the ſame Indent. and to no other Uſe or Intent; within which Covenant the Fine levied to *Perkins* is included, for that is one Manner of Eſtate, Conveyance and Aſſurance, and therefore ought to be to the Uſe and Intent of the Indenture; and the Uſe and Intent of the Indenture was, that the Condition ſhould remain, and that the Eſtate of *Anth. Andrewes* ſhould be ſubject to the ſame Proviſo; and therefore the firſt general Reaſon of their Reſolution was, that by the Com. Law the Fine was ſo directed by the general Covenant to have ſuch ſpecial Operation according to the Intent of the Parties in this Caſe, of a common Aſſurance, that the Condition ſhould not be touched thereby, but that the Fine ſhould extinguiſh all other Rights and Titles to the Manor, ſaving the ſaid Condition only, which ſhould not be extinguiſhed thereby; and that is proved by the (*a*) like Caſes at the Com. Law. And therefore in 9 *E.* 3. 1. *b.* & (*b*) 12 *E.* 4. 3. the Lord, by Deed, may releaſe all his Right in the Land, ſaving to him his Rent. So 2 *E.* 2. (*c*) *Voucher* 208, one may enter into the Warranty, ſaving to him his Rent; And 50 *E.* 3. 12. *b.* a Man may enter into Warranty, ſaving to him his Condition. And *Putnam*'s Caſe, 4 & 5 *Phil. & Mar. Dyer* 157, was cited; where (*d*) *Putnam*, by Deed indented, did enfeoff *Duncombe* and his Heirs of the Manor of *Duncombe*, rendring to *Putnam* and his Heirs a Rent with a Clauſe of Diſtreſs, and for Non-payment a Re-entry, and by another Indenture of the ſame Date, *Putnam* covenanted with *Duncombe* to levy a Fine of the ſaid Manor before ſuch a Feaſt, &c. which Fine ſhould be to the Uſes, Intents, Purpoſes and Conditions expreſſed in the former Indenture, and to no other, and afterwards the Fine was levied accordingly by *Putnam* to *Duncombe come ceo*, &c. with uſual Words of Releaſe of all his Right. And it was reſolved, that neither the Condition nor the Rent were touched by the Fine levied of the Land, by Reaſon of the former Indenture which ruled the Fine: And there it is ſaid, that it is like a Releaſe made by the Lord to the Tenant of the Land *Salvo ſibi dominio*; and all this appears in the Reports of the Lord *Dyer*: The like Judgment was given *Trin.* 23 *Eliz.* as the Lord *Dyer* there reports *per opinionem omnium Juſticiar' de banco*, upon Evidence to a Jury in *Eſſex*, between *Tuſſer* Plaint. and others Defendants, notwithſtanding a general Entry into the War-

(*a*) Moor 298.
(*b*) 12 E. 4. 11. 2 Fitz. Releaſe 16. Perk. Sect. 647. Br. Releaſe 55.
(*c*) 2 E. 2. Vouch. 208.
(*d*) Moor 106, 107 384, 472, 2 Anderſ. 85, 87. Dyer 157. pl. 28, 29. 2 Rol. Rep. 246. 3 Keb. 38, 537. Palm. 250. 506. Winch. 111. Poſtea 73. b. 74. a. 78. a. b. 1. Anderſ. 18.

(*e*) Dyer 157. pl. 30.

ranty by *Bradborne* and his Wife upon a Voucher in a Writ of Entry in the Poſt, and the Iſſue was *utrum recuperatio prædt' fuit ad opus & uſum dict'* the Rec'ror *tantum*, *&c.* but *ad uſum etiam*, that a Rent reſerved by the Husband and Wife by Fine before the Rec'ry by them to *Tuſſer* levied, ſhould be aſſured to *Bradborne* and his Wife in Fee, and not to be extinguiſhed; upon which *propter opinionem Curiæ Tuſſer* was nonſuit. So there it appears by the Opinion of the Court, that the Aſſent and Agreement of the Parties did preſerve the Rent, notwithſtanding the general Entry into the War'ty; and by the ſpecial Agreement of the Parties, the Rec'ry is ſo directed, that the Rent is not touched by the general Entry into the Warranty. And it was adjudged in the K's Bench, *Trin.* 34 *Eliz.* between (*a*) *Clever* and *Childe*, *Rot.* 805, according to the Reſol. in *Putnam*'s Caſe; and ſo and for the ſame Reaſon was it adjudged in this very Caſe now in Queſt. *Paſch.* 14 *Eliz.* (*b*) *Dyer* 311, in a *Quare impedit* for the Advowſon of *Alaxton*, that the Condition was not extinguiſhed by the ſaid Fine; ſo that it is commonly ſaid, (*c*) *Modus & conventio vincunt legem*, and the Covenant and Agreem't of the Parties hath Power to raiſe an Uſe, as in *Bainton*'s Caſe *Plow. Comm.* 2. To declare Uſes upon a Fine or Recovery, as common Experience hath allowed: 3. To preſerve Rents and Conditions, and to direct Fines or Rec'ries, *&c.* to enure to certain Purpoſes, as in *Putnam*'s Caſe and other Caſes before cited.

(*a*) Cr. Eliz. 300. Poſtea 78. a.

(*b*) Dyer 311. pl. 83, 84. 2 Brownl. 52. 1 Anderſ. 17. Co. Ent. 499. Nu. 15. Moor 105. Yelv. 124. Poſtea 75. b.

(*c*) 12 Co. 71. Co. Lit. 19. a. 166. a. 180. a. 2 Roll. Rep. 332. 2 Sand. 167. Godb. 254. 1 Rol. Rep. 262. Winch. 48. 96. Hob. 40. Lit. Rep. 208.

Againſt which it was objected, 1. That the Condition or Rent cannot be ſaved by the Indenture, for no Saving can be in a collateral Deed or Record, but it ought to be ſaved in the ſame Deed or Record, as in the Caſes put before, where the Lord releaſes to the Tenant, it ought to be ſaved by a Saving in the ſame Deed, and not by any Covenant or Saving in any collateral Deed: And ſo the Books are in 50 *E.* 3. 12. 2 *&* 4 *E.* 2. *Voucher*, that a Man may enter into the War'ty, ſaving to himſelf his Rent or Action, but it ought to be in the ſame Record, for it cannot be ſaved in any collateral Record or Deed. And therefore if a Man by Deed covenants that he will make a Feoffment, and that the Feoffment ſhall be upon Condition, that if the Feoffee do not pay a certain Sum before ſuch a Feaſt, that he ſhall re-enter; and afterwards he makes a Feoffment without comprehending any Condition in it, the Feoffment ſhall be abſolute, and ſhall not be ſubject to the Condition compriſed in the firſt Deed.

As to that, it was anſwered and reſolved, 1. That the general Covenant ſhall rule and direct the Fine to have its Operation to extinguiſh his Right and Title whatſoever, ſaving the ſaid Condition, although the Saving be not within the ſame Record, and that for divers Reaſons:

1. The Objection which hath been made, might have been made againſt the Reſolution of the Juſtices in the Time

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of Queen *Mary*, in *Putnam*'s Caſe, and of the Court of Common Pleas in this Queen's Time, in *Bradbury*'s Caſe, and *Clever*'s Caſe, and in this very Caſe; for in all theſe Caſes it was agreed, That neither the Condition nor the Rent were extinguiſhed or touched, but continued, notwithſtanding the Fine *ſur conuſans de droit come ceo, &c.* and the general Entry into the Warranty; but it appears alſo in our Books, That it is not of Neceſſity that the Saving ſhould be always in the ſame Record or Deed, but in ſome Caſes it may be contained in (*a*) another Deed, although by Law it might have been ſaved in the ſame Deed or Record. As in (*b*) 17 *Aſſ.* 2. & (*c*) 43 *Aſſ.* 12. if the Diſſeiſee releaſe his Right to the Diſſeiſor, it may be defeated by a Condition contained in another Deed delivered at the ſame Time. So the ſame Law of a Saving. And *F. N. B.* 205. (*d*) if a Woman makes a Feoffment in Fee by Deed, rendring Rent, and hath another Deed to ſhew, that the Intent of the Feoffment was, That the Feoffee ſhould marry her, the ſame is good, and that by Reaſon of the collateral Deed, and ſhe may have a Writ of Entry *cauſa matrimonii prælocuti*, or ſhe may enter if ſhe will, and that is in the Caſe of a particular Aſſurance; but in the general Caſe of common Aſſurances, that is to ſay, in the Caſe of a common Recovery, he who enters into the Warranty may ſave his Rent, and yet if he enters into the Warranty generally, it may be ſaved by Covenant and Agreement, in an Indenture made before the Recovery, as it was agreed, as appears before in *Bradbury*'s Caſe, and that in Favour of common Recoveries, which are the (*d*) common Aſſurances, of the Land, the uſual Form of which ſhall not be altered by a ſpecial Manner of Entry, ſaving his Rent or Condition, but may be ſaved by an Indenture *debors:* And Conveyances, which are uſed for common Aſſurances of Land, ſhall be expounded and conſtrued according to common Allowance, without prying into them with Eagles Eyes. And therefore, *Paſch.* 35 *Eliz.* in *Dormer*'s Caſe, it was adjudged in the King's Bench, That a common Recovery might be had of an (*e*) Advowſon. So it was adjudged in the Exchequer in Sir *William Pelham's* Caſe, That if a common Recovery be ſuffered by Tenant for Life, it is a (*f*) Forfeiture of his Eſtate. And the Reaſon of both the ſaid Judgments was, Becauſe a common Recovery is by Uſage a commom Conveyance, as a Fine or Feoffment, *&c.* And it is ſaid in *Plow. Comm.* in *Trevilian*'s Caſe, 515. That in common Recoveries, the common Uſage and Intent of the Parties is to reſpected; for a common Recovery had againſt (*g*) Husband and Wife, ſhall bar the Wife of her Dower, and yet the Wife ſhall not have any Recompence in Value, and therefore in ſtrictneſs of Reaſon it is hard to be maintained, but common Uſage, and the (*h*) Intent of the Parties, makes it a Bar. And therefore it is wiſely ſaid of a Lawyer, *Non eſt recedendum a communi obſervantia, & minime*

Poſtea 78. a.

(*a*) Co. Lit. 146. b.
(*b*) Br. Condition 103. Antea 71. a. Br. Defeaſans 6. Br. Releaſe 34.
(*c*) Br. Releaſe 39. 1 Rol. 414. Br. Defeaſans 11. Br. Condition 115, 120.
(*d*) F. N. B. 205. k. Poſtea 75. a. b. Dyer 312. pl. 84. 8 E. 2. Entry 78. 2 Anderſ. 82. Palm. 507. Dyer 146, 147. pl. 71.

(*d*) 2 Rol. Rep. 216. 5 Co. 40. b.

(*e*) 5 Co. 40. Jenk. Cen. 257. Poph. 22, 23. 2 Rol. Rep. 67. Cr. Car. 270. 1 Mod. Rep. 250.
(*f*) Popn. 23. Co. Lit. 356. a. 362. a. 1 Co. 15. b. 3 Co. . . b. 10 Co. 43. a. 2 Leon. 60, 67. 4 Leon. 123. 133. 1 Anderſ. 227. Poſtea 77. b. Moor 271. Vaughan 51. 2 Brownlow 170. 1 Rol. Rep 324. 5 Co. 40. b.
(*g*) Poſtea 77. b. 78. a. 10 Co. 43. a. 1 Rol. 347. 2 Rol. 395. Palm. 226.
(*h*) Co. Lit. 314. b. Poſtea 76. a.

minime mutanda ſunt quæ certam interpretationem habuerunt But the Caſe of the Fine in our Caſe, is ſtronger than the Caſe of the Recovery; for in the Caſe of a Recovery, the Vouchee may enter ſpecially, ſaving his Action, Rent, Condition, *&c.* and yet becauſe the Uſuage before this Time hath allowed it, it may be ſaved by Covenant and Agreement precedent, as it hath been ſaid; but in the Caſe of a Fine, no Saving can be contained in it, and therefore for Neceſſity (and according to common Uſage always allowed) it may be ſaved by the Direction and Rule of a precedent Covenant and Grant. And therefore it is adjudged in *(a)* 6 *R.* 2. *Eſtoppel* 2. (211.) That if a Man and his Wife enfeoff two by Deed, to have and to hold to them and their Heirs, and afterwards the Feoffor and his Wife levy a Fine *ſur conuſans de droit* to them, and the Heirs of one of them, that this is no Concluſion, but that both ſhall have the Fee-ſimple as they had before: And there *Skipwith*, Chief Juſtice of the Common Pleas, *ex aſſenſu Belknap, & ſociorum ſuorum*, gave four Reaſons of their Judgment. 1. Becauſe they had Fee before by the Feoffment, and therefore the Fine ſhould enure but as a Releaſe. 2. The Conuſans to them, and the Heirs of one of them, *come ceo, &c.* might well ſtand with the Eſtate which they had before; for whereas the Fine acknowledgeth the Right of one (*Hoc eſt*, the Fee to one) it is true, for the Tenements were the Right of the one and other, *Ergo*, the Right of one. 3. We cannot take other Fines, for the Fee-ſimple ought to be determined in *(b)* one Perſon certain by the Fine. 4. The Fine is not executory but to extinguiſh the Right of the Wife only, wherefore it is no Eſtoppel. *Nota ex hoc*, That the precedent Feoffment doth rule and direct this ſubſequent Fine, and preſerves the joint Eſtate in them of the Fee-ſimple, againſt the expreſs Limitat. of the Fine: Alſo foraſmuch as the Fine by Law cannot be levied in other Form, it ſhall be ruled and directed according to the precedent Agreement, and Eſtate made by the Parties; *pari ratione*, foraſmuch as a Saving can't by Law be in the Fine, it may be directed and ruled by the precedent Agreement and Covenant of the Parties. So if two Parſons of two ſeveral Churches, by one Inſtrument in Writing, change their Benefices, by Way of Exchange, and to that Purpoſe reſign them into the Hands of the Ord. and the Patrons preſent accordingly, and one of the Parſons is admitted, inſtitued and inducted, and the other is admitted and inſtituted, and dies before Induction, altho' the Induction of the other was abſolute, yet it was directed by the precedent Agreement which was by Way of Exchange, which ought to be executed on both Parts in the Life of the Parties; and the Inſtitution and Induction cannot be upon expreſs Condition, nor in other Form than was done, *vide* 45 *E.* 3. *Exchange* 10.

Secondly, It was anſwered, That in this Caſe the Bargain

(a) 6 R. 2. Eſtopple. 211. Dyer 157. pl. 29. 10 Co. 96. a. 1 Bulſtr. 164. Cr. Eliz. 917. 2 Rol. Rep. 473. Poſtea 77. b. 78. a.

(b) 5 Co. 38. b. 1 Leon. 62.

2 H. 4, 5. Fitz. Exchange 10.

and Sale, the Recovery and the Fine, although they be made, ſuffered, and levied at ſeveral Times, yet all of them by the mutual Agreement of the Parties, make but one and the ſame Aſſurance of one and the ſame Manor, according to one and the ſame original Bargain and Contract, and therefore each of them doth tend to perfect the ſaid Bargain, none of them to deſtroy any Part of it, or to overthrow the true Intent and Meaning of the Parties in any Thing, but ſhall be taken as one and the ſame Aſſurance, made at one and the ſame Time. As if a Man makes a Leaſe by Indenture for Life, of Lands in ſeveral Counties, and makes Livery of the Land in one County, and then ſeveral Days after makes Livery in the other County, yet one entire Rent ſhall Iſſue out of the Lands in both Counties, and yet the Livery by which the Eſtate paſſed, was made at ſeveral Times, and therefore it might be argued, that preſently by the firſt Livery, the Rent ſhould iſſue out of that; but the Law will not adjudge by Parcels in Subverſion of the Intent and Agreement of the Parties, but when all Acts are done in Performance of the original Contract and Agreement of the Parties, the Law will judge upon the whole as executed at one and the ſame Time: So if a Man makes a Deed of Feoffment with Warranty, and delivers the Deed to the Feffoee, and afterwards at another Time makes Livery *ſecundum formam chartæ*, now the Warranty is good; and yet it may be objected, That when the Deed was delivered, no Eſtate paſſed to which the Warranty could be annex'd; nor no Eſtate was in the Feoffee upon which the Deed might enure as a Releaſe with Warranty, but the Deed which comprehended the Warranty took Effect preſently by the Delivery of the Deed before the Livery of Seiſin; and ſo by a nice Conſtruction upon Diſtinction of Time, the War'ty would be o'erthrown; but the War'ty is good for the Cauſe aforeſaid. And in theſe com. Aſſurances *praxis juriſperitorum* is to be obſerv'd, and the Sentence of *Theophraſtus* in *Met.* is true, (*b*) *Qui rationem in omnibus quærunt, rationem ſubvertunt*; and foraſmuch as the End of the Law is to Settle Repoſe, and make Peace betw. Man and Man, concerning their Poſſeſſ. *&c.* it wou'd be too dangerous a Thing to make any Conſtruction againſt the general Allowance in common Aſſurances, for thereupon would riſe infinite Contentions, Quarrels and Suits, which would be inconvenient. The 2d Object. which was made againſt it was, That this Fine was upon a Grant and a Render, and therefore without Writing could not be averred to be to an Uſe, for it imports a Conſider. in itſelf, and therefore by naked Averment by Word, cannot be averr'd to be to any other Uſe or Intent than is comprized in the Fine itſelf, but by Deed it may be; Alſo the finding of the Jury is not material, for their finding ought to be ſubmitted to the Judg. of the Law as in *Amy Townſhend*'s Caſe, *Plow. Com.* it is agreed. So holds *F. N. B.* 205. *k.* (*c*) If a Wom. makes a Feoffment in Fee, by Deed, rendering Rent, ſhe cannot by Word averr, That it was *cauſa matrimonii prælocuti*, for it appears by the Deed, That the Reſervation was the Cauſe of the Feoffment.

See Rep. Q. A. 184. a Deed, a Fine and a Recovery, but one Conveyance.

1 Co. 99. a. 5 Co. 79. b.

(*b*) Raym. 356.

(*c*) F. N. B. 205. k. Antea 74. a. Dyer 146, 147. pl. 71. 312. pl. 84. 8 E. 2. Entry 78. 2 Anderſon 82.

but if ſhe hath a Deed to ſhew, and prove that the Deed was to the Intent that he ſhould marry her, then ſhe may well maintain a Writ *cauſa matrimonii prælocuti*; but without a Deed ſhe cannot, as it is adjudg'd in 8 *E.* 2. *Entrie*, 78. ſee (*a*) 8 *Aſſ.* 34. and thereupon the Caſe of (*b*) *Wilks*, 1 *Eliz. Dyer*, and many other Caſes were cited to this Purpoſe; but they did rely upon the Opin. of the whole Court of Com. Pleas, 14 *E. Dyer* (*c*) 311. in this very Caſe, That without writing, a Fine upon a Grant and Render cannot be averr'd to be to any other Uſe or Intent than the Fine itſelf doth import: And then they objected in this Caſe, That foraſmuch as the Indentures which ſhould direct this Fine, were levied by *Blunt* and *Andrews* to *Perkins*, who rendered a Rent to *Blunt*, and the Manor to *Andrews*, the ſaid Indentures could not declare any Uſe or Intent of the Land from *Perkins*, who is a Stranger to the Indentures, and of a Fine levied to him, by which he rendreth a Rent to one, and the Land to the other, as is aforeſaid, which cannot be directed by any naked Averment, for the expreſs Conſideration and Intent expreſſed in the Fine, and no Deed to which *Perkins* was not Party, can direct it, becauſe now, by the mutual Agreement of *Blunt*, who had the Condition and the Rent, and of *Andrews* who had the Land, this Fine is levied to *Perkins*, by which they make him abſolute Owner of the Land, and that he ſhould render a Rent to *Blunt*, and the Manor to *Andrews*, ſo that now *Blunt* hath the Rent of the Grant of *Perkins*, and *Andrews* hath the Manor by the Grant and Render of *Perkins* alſo, *Ergo*, the Eſtate of *Perkins* cannot be ſubject to any Uſe or Intent comprized in the Indentures made before between *Blunt* and *Andrews*, but ought to have a Deed to which *Perkins* ſhall be Party, and this Objection was enforced by many Reaſons, 1. It is ſaid, That notwithſtanding the ſaid general Covenant, if *Blunt* and *Andrews* had made a Feoffment, or levied a Fine upon any new Agreement or Conſideration, altho' ſuch new Agreement was only by Word, that the general Covenant ſhould not rule any Conveyance or Aſſurance made upon a new Conſideration and Agreement, and therefore if *Blunt* and *Andrews* had enfeoffed *Perkins*, or levied a Fine to him for any Sum of Money, or other Conſideration, this Feoffment or Fine ſhould not be ruled or directed by the general Covenant, neither ſhould the general Covenant direct or rule any Conveyance, but thoſe which are made upon the firſt Conſideration, and in Performance of the firſt Bargain, and not for any new Conſideration, *quod fuit conceſſum*; then *a conceſſis*, they objected, That this Fine levied, imports in itſelf a new Agreement and Conſiderat. and that for divers Cauſes. 1. This Fine, as it hath been ſaid, imports an expreſs Conſider. in itſelf, *ſcil.* in Conſider. of the Fine levied by *B.* and *A.* to *Perkins*, he grants and renders a Rent to *B.* and the Manor to *A.* and no Averment by Word ſhall be receiv'd to ſhew that this Fine was

(*a*) Bro. Aſſiſe 140. Introd. Condition 100.
(*b*) Dyer 169. pl. 21, 22. 1 Anderſ. 313. 2 Anderſ. 81. 136. 196. 200, 201. 1 Rol. Rep. 42.
(*c*) Antea 73. b. Dyer 3 M. pl. 83, 84. 2 Brownl. 52. Moor 105. 1 Anderſ. 17. 313. Co. Entr. 499. nu. 15. Yelv. 124.

Vide Skinner 53.

levied to another Uſe or Intent than is contained in the Fine, ſo that the Manner of the Fine imports a new Agreement. 2. It is levied by both to a Stranger to the Indenture, whoſe Eſtate cannot be ſubject to the Declarations or Covenants made between *Blunt* and *And*, and this new Perſon makes a new Agreement. 3. The firſt Bargain and original Contract between the Parties, is altered in Subſtance and Effect; for by the firſt Bargain *Blunt* was to have a Rent of 42 *l.* to him and his Heirs, and by this Fine the Rent is rendered by *Perkins* to him in Tail, the Remainder over to a Stranger, ſo that this Eſtate Tail, which is new, and limited in Remainder to a new Perſon in Fee, doth manifeſt that there was a new Agreement between the Parties, and then *ex conſequenti* the ſaid Indentures cannot rule or guide the Intent or Uſe of this Fine, the Averment by Word cannot be by Law, and the finding of the Jury is not material, for here is a new Agreement of Record, and none will affirm, that there ſhall be two Rents to *Blunt*, one in Fee, and the other in Tail, for that would be againſt the Intent of the Parties, and againſt all Law and Reaſon. As to this, it was anſwered and reſolved, That it is true that a Fine upon a Grant and Render, unleſs it be in ſpecial Caſes, cannot be (*a*) averr'd by Word to be to another Uſe or Intent than it expreſſed in the Fine, Feoffment, or other Conveyance: But there is a Difference between an Uſe and a Conſideration, for when a Fine, Feoffment, or other Conveyance imports an expreſs Conſideration, a Man may averr by Word another Conſideration, which ſtands with the Conſideration expreſſed; but the Parties cannot by Parol aver any other Uſe than is contain'd in the ſame Conveyance; alſo no Averment ſhall be againſt the Conſideration expreſſed. But yet in ſome Caſes a Fine upon a Grant and Render may be ruled and directed in Part by an Averment by Word. And that is when the Original Bargain and Contract between the Parties is by Indenture or other Deed, as where it is agreed by Indenture, That a Fine ſhall levied of certain Land, by the Name of a certain Number of Acres, to divers Perſons, and that they ſhall grant and render the Land again in Fee-ſimple, which ſhall be to certain Uſes; the Fine is levied of the Land, but ſome Variance is in the Number of the Acres comprized in the Fine, or the Fine is levied to one of the Parties only, who grants and renders the Land, ſo as there is Variance betwixt the Covenant and the Fine in Number and Perſon; and yet God forbid but that this Fine ſhall be averr'd to be to the Uſe of the Indentures, for the original Bargain and Agreement of the Parties was declared by Writing, and altho' ſome ſmall Variance be in Quantity, Perſon, Time, or the like, betwixt the Fine and the Indenture, yet the Law (which in common Conveyances hath great Reſpect and Regard to the (*b*) Intent of the Parties, and to the Subſtance and Effect of their original Bargain and

(*a*) Cr. Jac. 29. 1 Co. 176. a. 5 Co. 26. a. b. 68. b. 7 Co. 39. a. 9 Co. 10. a. b. 11 Co. 25. a. 1 Rol. Rep. 42. 2 Rol. Rep. 362, 363. Lane 119. 1 Ander. 313. 1 Brownlow 191. Moor 192. 1 Vent. 368. Dyer 147. a. pl. 72, 73.

(*b*) Co. Lit. 314. b.

Agreement) will ſuffer an Averment to agree the Fine and the Indenture, notwithſtanding the Petit Circumſtances of Number, Perſon, Time, and the like, when the Party avers that there was not any new Conſideration, nor any new Agreement between the Parties, but that the Fine was levied according to the Indenture, and to the Uſes and Intents contained therein: And it is agreeable to Juſtice and Equity, and eſpecially in common Aſſurances of Lands between Party and Party, that ſome petit Variance in Circumſtance ſhall not overthrow all the Subſtance and agreement of the Parties in their Indentures, to the Diſinheriſon of one of them. And it was agreed in (*a*) *Taverner*'s Caſe, now lately referred to the Juſtices out of the Chancery, That if *A.* hath 10 Acres in *D.* and *B.* hath 10 Acres in the ſame Town, and *A* levies a Fine to *B.* of 20 Acres, and *B.* grants and renders 20 Acres to *A.* in Fee, yet *A.* ſhall not have the 10 Acres of *B.* unleſs there was a ſpecial Agreement between them to ſuch Purpoſe, for otherwiſe the Conuſee ſhall be ſaid to render more than he received.

(*a*) 3 Bulſtr. 318. 1 Rol. Rep. 117.

And as to that which is ſaid, That *Perkins* is a Stranger to the Indenture, and that *Blunt* and *Andrewes* cannot limit the Uſe or Intent of the Land, which by the Fine was abſolutely the Inheritance of *Perkins*, and that *Perkins* only hath the Power to limit the Uſe, and to make a Diſpoſition of the Land and no other: To that it was anſwered and reſolved, That the Scope and Purpoſe of the Indenture, and of the original Agreement of the Parties was, That *Andrewes* ſhould have the Manor, and *Blunt* a Rent out of it; now for Performance of it, it was adviſed, That both ſhould join in a Fine to *Perkins*, and that he ſhould render the Rent to *Blunt*, and the Manor to *Andrewes*, ſo that it appears *Perkins* was but an Inſtrument to perform the original Agreement of the Parties, and had not any Power to limit any Uſe, or to make any other Diſpoſition of the Land than *Blunt* and *Andrewes* had directed him; for if he had not agreed to make the Render in the ſame Fine as it was deviſed by *Blunt* and *Andrewes*, they would never have levied the Fine to him; ſo that he is but an Inſtrument to perform the Agreement of the Parties, and all ſhall be ſaid to be done by the Order and Diſpoſition of *Andrewes* and *Blunt*, according to their original Bargain and Agreement; as the Caſe in 2 *Eliz. Dyer* 172. *Lane* held of the Manor of *Walgrave* by Knight's Service, which Manor was held over of the King *in Capite*, *Lane* levied a Fine of the Tenancy to one, who granted and rendered it to *Lane* for Life, the Remainder to his Wife for Life, the Remainder to the right Heirs of the Husband. And it was reſolved in the Court of Wards, That altho' the Wife was immediately in by the Render of the Conuſee, yet becauſe it appears that he was but an Inſtrument to render the Land as *Lane* ſhould direct him, it

(*b*) Dyer 172. pl. 12. 9 Co. 17. a.

was

was by the Judgment of the Law the Diſpoſition of the Husband for the Advancement of the Wife. And it appears, That *Perkins*, in the Caſe at the Bar, was but an Inſtrument to perform the original Contract and Agreement of the Parties, becauſe he had not any Power to overthrow the ſaid Contract and Agreement of the Parties, which will be more apparent, if firſt the Parts of the Fine, and then the Seiſin of *Perkins*, be examined and conſidered.

As to the firſt, If any Part of the Fine would deſtroy the Condition, it would be the conuſans of the Fine, for that is made by *Blunt* who hath the Condition, and by *Andrewes* who hath the Manor: Suppoſe then, that *Perkins* had refuſed to make any Render, then it would be clear, that this Conuſans to *Perkins* might be directed by the firſt Covenants in the ſaid Indenture, although *Perkins* was a Stranger to it, and that is proved by the common Aſſurances. For if *A.* by Deed indented between him and *B.* bargains and ſells Land to *B.* and his Heirs, and it is covenanted between them, That *A.* ſhall levy a Fine to *B.* and that *C.* who is a Stranger to the Deed, ſhall recover the ſaid Land againſt *B.* in a common Recovery, which Recovery ſhall be to the Uſe of *B.* and his Heirs, this is good without Queſtion, for it hath been agreed by them who have argued on the contrary Part, That the ſaid Recoverors in the Caſe at Bar, although they were Strangers to the Indenture, yet their Eſtate was ſubject to the Uſes of the Indenture: And it is uſual, if Tenant in Tail, with Remainder, will bargain and ſell the Land by Deed indented and enrolled to his Friend and his Heirs, who ſuffers a common Recovery with *(a)* double Voucher, in which the Bargainor is vouched, and yet all that is to the Uſe of the Tenant in Tail and his Heirs, and ſo it is uſual to be averred; for now upon the Matter, the Bargainee is but an *(b)* Inſtrument to be Tenant to the *Præcipe* in the Recovery, which ſhall be ſuffered to bar the Eſtate Tail and all the Remainders, and the Bargain and Sale was only to this Purpoſe; then if no Render had been made, this Conuſans might have been ruled and directed by the Indenture: Then it is to be conſidered what *(c)* Seiſin *Perkins* had, and truly he had Seiſin but for an Inſtant, and only to this Purpoſe, to make the Render, for his Wife ſhall not be *(d)* endowed, nor the Land ſubject to his *(e)* Recognizances or Statutes; and the Render is to *Andrewes*, who was Party to the Indenture, ſo as the Render of *Perkins* cannot extinguiſh the Condition which *Blunt* had, but the Conuſans of *Blunt* ſhall extinguiſh it, if any Thing ſhall extinguiſh it, and his Conuſance is directed and ruled by the ſaid Indenture, becauſe *Blunt* at the Time of the making thereof, was abſolute Owner of the ſaid Manor, and had abſolute Power to declare

(a) Co. Lit. 372. b.

(b) Vaugh. 42.

(c) Vaugh. 41.

(d) Cr. Jac. 615. Vaugh. 41. Co. Lit. 31. b.

(e) Vaugh. 41.

to

to what Uſes and Intents the ſaid Recovery, and all other Aſſurances (without a new Agreement as hath been ſaid) ſhall be. Alſo, although *Perkins* was a Stranger, yet the Render was to *Andrewes*, who was Party.

Farther, it was ſaid, That in this Caſe *Blunt* joined with *Andrewes* in the Fine for Neceſſity; for if he had not been Party to the Fine, the Render of the Rent could not be made to him, ſo that for this ſpecial Purpoſe to have Aſſurance of the Rent by the Render of the Fine, he joined with *Andrewes*, ſo that he might ſhew the whole ſpecial Matter, by which it appears to what Intent and Purpoſe he joined in the Fine. And the fourth Reaſon of the ſaid Book of (*a*) 6 R. 2. is to be obſerved. For there the Juſtices (to avoid an Eſtoppel) regard the Scope and Purpoſe of the Parties which levied the Fine; And although the Fine be of ſo high Nature that it will not ſuffer a bare Averment againſt the Purport and Conuſans of the Fine, yet when the Law requires one of Neceſſity, and for Conformity, to join with another in a Fine, the Law will ſuffer him to ſhew the Truth of the Matter, to avoid Prejudice and Concluſion: *Mich.* 30 & 31 *Eliz.* in a Writ of Error, between (*b*) *Worſely* and his Wife Plaintiff, and *Charnocke* Defendant, to reverſe a Fine levied by the Husband and Wife, it was adjudged, That the Fine being reverſed for the Nonage of the Wife, the Husband and Wife ſhould have preſent Reſtitution, and the Conuſee ſhould not keep the Land during the Coverture, and the Reaſon and Cauſe of the Judgment was, Becauſe when the Husband and Wife join in a Fine, yet all the Eſtate paſſes from the Wife, and the Husband joins of Neceſſity and for Conformity, and therefore the Law doth permit that the Truth of it be ſhewed, and that the whole Eſtate ſhall be reſtored to the Wife, during the Life of the Husband, againſt the Opinion of *Cavendiſh*, 50 *E.* 3. 6. & *Hill.* 33 *Eliz.* in the ſame Court, and for the ſame Reaſon between *John* (*c*) *Harvey* Plaintiff, in an *Ejectione firmæ* againſt *Ralph Thomas* Defendant, for Lands in St. *Madryn* in the County of *Cornwall*, it was adjudged, That where the Husband is ſeized of Land in the Right of his Wife, and the Husband made a Leaſe to the Defendant for Twenty-one Years, and afterwards he and his Wife levied a Fine *ſur conuſans de droit come ceo*, &c. to *Thomas Saint Awbyn*, and his Heirs, the Husband died, That the Leaſe was ended by his Death, and the Conuſee ſhould avoid it, for the Husband joined but for Conformity and Neceſſity: And there it was ſaid, That it was adjudged in the Common Pleas, That the Conuſee in ſuch Caſe ſhould avoid (*d*) the Charge or Statute, &c. of the Husband after his Death, and the Caſe of *Eare & Snow*, *Plowd. Com.* where a (*e*) Recovery is had

(*a*) 6 R. 2. Eſtoppel 211. Antea 74. b. Dyer 157. pl. 29. 10 Co. 96. a. Cr. El. 917. 1 Bulſtr. 164. 2 Rol. Rep. 473.

(*b*) Palm. 238. Cr. Jac. 482. 1 Leon. 114. Owen 21. Cr. El. 729. 1 Rol. 348. Bridgman 57. Antea 75. b.

(*c*) 1 Leon. 247. 4 Leon. 15. Cr. El. 216. 1 Rol. 388, 389. 1 Rol. Rep. 402. Cr. Jac. 399. 1 Bulſtr. 273.

(*d*) 1 Rol. 389. 1 Co. 76. a.

(*e*) 10 Co. 43. a. Antea 74. a. 1 Rol. 347. 2 Rol. 395. Palm. 226. Plow. 514.

had againſt the Husband and Wife, of the Lands of the Husband, whereof he is ſeized in Tail, with a Voucher over, the Intent and Purpoſe of joyning of the Wife might be ſhewed; *ſcil.* to bar her of her Dower, and yet the whole Recompence in Value, ſhall go to the Iſſue in Tail; and the Caſe before, of (*a*) 6 *R.* 2. will ſerve alſo to this Purpoſe.

(*a*) 6 R. 2. Eſtoppel 211. Antea 74. b. 77. a.

And as to the Objection which hath been made, that foraſmuch as now the Rent is rendered in Tail, with Remainder over, that for this Cauſe the Fine doth import a new Agreement of Record; it was anſwered and reſolved, That as to the ancient Rent, it was extinct, becauſe another Rent of another Eſtate, and in another Manner, by the mutual Agreement of the Parties, was granted and rendred, for both *Blunt* ſhall not have; and the Eſtate Tail cannot be by expreſs Limitation to the (*b*) Uſe of another, as it appears 24 *H.* 8. *Br. Feoffm. al Uſes* 40. & 27 *H.* 8. 10. *a.* where it is ſaid, That ſo it was of late adjudged by the Advice of all the Juſtices, meaning the ſaid Reſolution in 24 *H.* 8. And according to that it is adjudged in Parliament, as appears by the Statute of (*c*) 1 *R.* 3. And ſo it was reſolved by the greater Part of the Juſtices in this Caſe; but although the Rent was altered, yet that is no Cauſe for an Alteration of the Eſtate of the Land, for the Jurors have found that there was not any new Conſideration or new Agreement for the Land, but that the Fine was to the Uſe and Intent of the firſt Indentures; and *Perkins*, *Andrewes*, or any other, hath not any Prejudice by it, for *Blunt* contents himſelf with an Eſtate Tail, in a Rent which was of ſuch Sum as he had in Fee before, and therefore appointed *Perkins* to limit the Remainder in Fee over to him that he nominated to him; but that is not any Reaſon to alter the Quality and Condition of the Eſtate of *Andrewes*; for *Blunt* hath not any Benefit, nor *Andrewes* any Prejudice by the Alteration of the Render of the Rent; and *Andrewes* hath not given any Conſideration to have an Eſtate abſolute, or to extinguiſh the Condition.

(*b*) Cr. Jac. 401. 3 Bulſtr. 184, 185. 2 Rol. 780. Co. Lit. 29. b. Godb. 269. 1 Rol. Rep. 332, 333, 385.

(*c*) 1 R. 3. cap. 1.

Another Reaſon to maintain the Reſolution in (*d*) *Putnam*'s Caſe, (*e*) *Bradbury*'s Caſe, and (*f*) *Clever*'s Caſe, was made upon the Statute of 27 *H.* 8. (*g*) of Uſes; for before that Statute, if *Blunt* had by Deed enfeoffed another of the Manor, to the Intent that he himſelf ſhould have a Rent of 42 *l.* to him and his Heirs, and that the Feoffee ſhould ſtand ſeized to the Uſe of *Andrewes* and his Heirs, upon certain Conditions to be performed by *Andrewes*; and further, it was covenanted and agreed between the ſame Parties, That all Aſſurances after to be made, ſhould be to the Uſes and Intents of the ſame Indentures, and afterwards *Blunt* had levied a Fine accordingly; this Fine ſhould not extinguiſh the Rent or the Condition, for that would be againſt

(*d*) Antea 73. a.
(*e*) Antea 73. a.
(*f*) Antea 73. b.
(*g*) 27 H. 8. cap. 10.

againſt the original Agreement of the Parties, and the Fine which they intended to perfect the former Aſſurance, if the Rent or Condition ſhould be extinct, would deſtroy the Intent and Meaning of the Parties, which would be againſt Equity and Conſcience; and therefore the Rent or (*a*) Uſe, being but a Thing of Truſt and Confidence, for which there was not any Remedy but in a Court of Equity, ſhall not be extinguiſhed by ſuch Fine levied to former Uſes and Intents: Then if it ſhall not be extinct by the Common Law, now the Statute of 27 *H.* 8. doth execute the Poſſeſſion to the Uſe, in the ſame Manner, Quality and Condition as he had the Uſe.

(1) Bac. Lect. Sur 27 H. 8. 5, 6, 7, 8, &c. 1 Co. 191. b. 112. a. 121. b. 127. a. 140. a. 7 Co. 13. b. 3. b. 6 Co. 64. b. Co. Lit. 272. b. Antea 58. b.

And further, it was ſaid, That at the Common Law before the ſaid Act, if a Man had made a Feoffment by Deed indented to another rendring Rent, and with Condition to re-enter; and further, it was covenanted and agreed between the Parties, That notwithſtanding any Fine or other Conveyance made by the Feoffor to the Feoffee, by which the Rent and Condition ſhould be extinct, that the Feoffee and his Heirs ſhall be ſeized, to the Intent that they ſhall pay the like Rent, and to be ſeized of the Land upon the like Condition as before, in this Caſe, if the Feoffor had levied a Fine, or releaſed his Right, or made any other Conveyance to the Feoffee, by which the Rent and Condition was extinct, yet by the original Agreement of the Parties, a new Rent and a new Condition annexed to the Uſe of the Land ſhould riſe, and the Feoffor ſhould have Remedy in Equity preſently for the Rent: And when the Condition was broken, the Uſe of the Land ſhould be newly raiſed to the Feoffor by the Breach of the Condition, and by the original Agreement of the Parties, notwithſtanding his Releaſe, or other Conveyance; and that is touched and moved in (*b*) *Putnam*'s Caſe in part cited before; and if that might have been done before the Statute, now the Poſſeſſion is executed to the Uſe by the ſaid Act, in the ſame Manner, Quality, and Condition as he had the Uſe; And therefore, altho' a Fine which enures by Way of Releaſe, or which goes by *Mitter le droit*, or by Way of Extinguiſhment, cannot be (without more) to any Uſe, no more than the ſurrender of a particular Eſtate may be, yet after ſuch Releaſe, which extinguiſhes the firſt Rent or Condition, another may be by original Agreement of the Parties then Owners of the Land, and who had the abſolute Diſpoſition to raiſe and direct it as is aforeſaid. And in this Caſe, *Popham* C. J. ſaid, That the Declarat. of the Uſe made by the Owner of the Land, ſhould be always preferred before the Declarat. of all others; and therefore if the Diſſeiſor and the Diſſeiſee levy a Fine, and the Diſſeiſee limit the Uſe to *A.* and the Conuſee of the Fine to the Uſe of *B.* and the Diſſeiſor to the Uſe of *C.* and *A.* limit the Uſe to one, the Recoveror to another, and the Voucher to a third, the Limitation of *A.* ſhall ſtand.

(*b*) Antea 73. a.

1 Rol. 439. Moor 106.

Fourthly, It was reſolved, That by the Death of *Andrews* the Condition was broken, for when the Feoffee

or

er Grantee upon Condition is to make an Eſtate to the Feoffor or Grantor, and no Time is limited, regularly it is true, that the Feoffee hath Time to do it during his (*a*) Life, if the Feoffor or Grantor do not haſten it by Requeſt, and upon Requeſt and Day or Time limited when he will have it, the Feoffee or Grantee ought to make it accordingly; and if no Requeſt be made, and the Feoffee or Grantee, who ought to perform the Condition, dies, the Condition is broken, for he hath not performed the Condition within the Time preſcribed to him by the Law, which was during his (*b*) Life: But yet this general Rule doth admit of divers Exceptions and Limitations. For in this Caſe of an (*c*) Advowſon, *Andrewes* had not Time, during his Life, although no Requeſt was made, but upon Contingent, that is to ſay, If no Avoidance fell in the mean Time, for if the Grantee ſhould ſtay till the Avoidance falls, then *ipſo facto* the Condition is broken, becauſe *Blunt* cannot have all the Effect which by the Grant he ought to have, and that is, to have all the Preſentations during his Life, and the Advowſon is become in another Plight than it was: So if *A.* enfeoff *B.* 1 *Maii*, upon Condition that he grants to *B.* an Annuity or Rent during his Life, payable (*d*) yearly at the Feaſt of S. *Michael*, and the Annunciat. in this Caſe the Feoffee hath not Time during his Life, to make this Grant, but he ought to make it before the Feaſt of S. *Michael*, or (*e*) otherwiſe he will not have the Annuity or Rent during his Life. And that may be gathered upon the Book in 14 *E.* 3. *Det.* (*f*) 138. that in Caſe of a Grant of a Rent, he ſhall not have Time during his Life: And if two not married be (*g*) enfeoffed upon Condition to re-enfeoff the Donor or Feoffor, *&c.* and one of them dies, yet the other may perform the Condition; but if he who ſurvives hath a Wife, then the Condition is broken, for if he ſhould make the Re-enfeoffment, his Wife ſhall be endowed: And in all the ſaid Caſes, when the Condition is that the Feoffee ſhall make the Eſtate, and the Feoffee dies, there the Condition is broken, and none can perform it, for the Condition extends only to the Feoffee; but if the Condition be, That the (*h*) Feoffee or his Heirs ſhall make an Eſtate to the Feoffor, and no Day is limited, there, although the Feoffee dies, the Condition is not broken, for the Feoffee only is not bound by the Condition during his Life, to make the Feoffment, ſo as by his Death the Time appointed to perform the Condition ſhall be paſt, but the Condition doth extend alſo to his Heirs indefinite, without Limitation of Time, and the Condition in ſuch Caſe being without Limitation of Time or Perſon, cannot be broken by not making the Eſtate; but upon Requeſt made by the Feoffor and his Heirs, and with that agrees the Book in 3 & 4 *Phil. & Mar. Dyer* 138, 139. the Earl of *Surry*'s Caſe; for the Condition there (admitting it to be a Condition)

(*a*) 1 Rol. 438. Co. Lit 208. b. 218. b. 219. a. Moor 106. 472. 2 Anderſ. 73.

(*b*) Co. Lit. 219. a.

(*c*) 1 Rol. 438, 439. Moor 472. Co. Lit. 222. b. 2 Anderſ. 73.

(*d*) 1 Rol. Rep. 374. 1 Rol. 439.

(*e*) Co. Lit. 208. b. 1 Rol. Rep. 374.

(*f*) 1 Rol. Rep. 374. 1 Rol. 439.

(*g*) 1 Rol. 451.

(*h*) 1 Rol. 451. Co. Lit. 219. a.

dition) being without Limitation of Perſon and Time, was not to be performed before Requeſt: But in the Caſe at Bar, if a Day had been limited before which *Andrewes* by the Proviſo ſhould grant the Advowſon, there, it before the Day *Andrewes* had died, the Condition ſhould not be broken, for when the Parties by their (*a*) mutual Agreement, give a certain Time, within which the Condition ſhall be performed, and within that Time he who ought to perform it dies, ſo that the Condition becomes impoſſible by the Act of God, there the Eſtate doth remain (*b*) abſolutely diſcharged of the Condition. See 15 *H.* 7. 13. *a.* 33 *H.* 6. 26, 27. 9 *Eliz.* (*c*) *Dyer* 262. and Sir *Tho. Wrothe's* Caſe, *Pl. Com.* 456. And therefore it is requiſite in ſuch Caſes, when a Day is limited, that the Condition do extend not only to the Feoffee or Feoffees, but alſo to their Heirs, for Fear of Death before the Day: As if one intends to enfeoff another, upon Condition that the Feoffee, before ſuch a Feaſt, or within a Year, *&c.* ſhall give back the Land to the Feoffor, *&c.* it is requiſite that the Condition be, That the Feoffee, or his Heirs, before ſuch Feaſt, *&c.* give back, *&c.* or otherwiſe, if the Feoffee dies before the Feaſt, the Condition is become impoſſible, and the Feoffor hath no Remedy by Law to compel the Heirs of the Feoffee to give back the Land.

(*a*) Co. Lit. 219. a.

(*b*) Co. Lit. 219. a.

(*c*) Dyer 262. pl. 30. Palm. 515. 549. 5 Co. 22. a. Cr. El. 398. Moor 342.

And another Difference was alſo agreed, When the Eſtate is to be made by the Condition to the Feoffee, and when to a (*d*) Stranger; for when the Eſtate is to be made to a Stranger, the Feoffee ought to make it within convenient Time, for he to whom the Feoffment is to be made, being a Stranger, need not make any Requeſt, as the Feoffor who is a Party, ought to do. And in ſuch Caſe, when a Stranger is to be enfeoffed, the Feoffee ought within convenient Time, to require the Stranger to appoint a Time when he will have the Feoffment made to him, and at that Time he ought to make it; and ſo the Feoffee ought to give Notice to the Stranger, and requeſt him to appoint a Time as is aforeſaid. And therewith agree 44 *E.* 3. 9. *a. b.* 9 *E.* 4. 22. *b.* 2 *E.* 4. 3. *b.* & 4. *a.* 19 *H.* 6. 67. *b.* 73. *a.* 76. *a.* And in the Caſe of *Littleton, fol.* 82. (*e*) where a Feoffment is made upon Condition that the Feoffee ſhall enfeoff many, *&c.* there it doth not appear that thoſe who ſhould be enfeoffed were Strangers, or if they were Strangers, whether they died before the Feoffee could enfeoff them.

(*d*) 6 Co. 35. a. Co. Lit. 208. b. 219. a. b. Hob. 51. 8. E. 4. 24. a. b.

(*e*) 1 Jones 181. Co. Lit. 218. b. 219. a. b. 8 Co. 90. b. Br. Condition 33. Fitz. Condition 5. Lit. Sect. 352, 353.

And another (*f*) Difference was taken by ſome when the Feoffee dies, and when the Feoffor dies before any Eſtate made according to the Condition, in the one Caſe the Condition is broke, and in the other not. As if *A.* enfeoff B. upon Condition that *B.* ſhall give back the Land to *A.* and his Wife, and to the Heirs of their two Bodies begotten, the Remainder to *C.* in Fee, in this Caſe, if *B.* dies, the Condition is broke as is aforeſaid; but if *A.* dies, the Condition is not broke,

(*f*) Co. Lit. 319. b.

broke, for the Feoffee hath Time during his Life if he be not haſtned by Requeſt, by the Feoffor or his Heirs, *&c.* and that appears by *Litt. Chap. Condit. fol.* (*a*) 82. for in the ſame Caſe *Littl.* ſaith, that if ſuch Feoffee will not make ſuch Eſtate when he is reaſonably required by them who ought to have the Eſtate by Force of the Condition, then may the Feoffor or his Heirs enter; by which it appears, that as long as the Feoffee lives, the Condition cannot be broke by the Death of the Feoffor; for *Littleton* puts in his Caſe that the Feoffor, *&c.* was dead. But againſt that, 18 *Aſſ. pl. ult.* was cited, where the Caſe was, That the L. (*b*) *Clifford* held his Barony and the Sheriffwick of *Weſtmorland* of the King by Grand Serjeanty *in Capite*, and the K. gave a Licence to the L. *Clifford* that he might thereof enfeoff ſeveral Chaplains in Fee, ſo that they gave back the ſame to the ſaid L. *Clifford* and the Heirs Males of his Body, the Remainder over. The L. *Clifford*, according to the ſaid Licence, did enfeoff the Chaplains; and before they had made the Re-gift accordingly, the Lord *Clifford* died, his Son and Heir within Age, and in Ward to the K. by Reaſon of other Lands; and all the ſaid Matter was found by Writ of *Diem clauſit extremum*, and returned into the Chancery; out of which and of the Charter of Licence, a *Scire facias* iſſued againſt the ſaid Chaplains if they could ſay any Thing why the ſaid Lands ſo occupied by them in Diſheriſon of the Heir, and to toll the King's Wardſhip, ſhould not be ſeiſed into the K's Hands; who appeared and pleaded the K's Licence, and the Feoffment of the L. *Clifford*, and ſo they were the K's Tenants by his Licence; and as to the Re-infeoffment, it was at their Will to do it; with that, that they were always ready to have made the Eſtate to the L. *Clifford* in his Life, and that he would have it by Fine, and thereupon brought a Writ of Covenant, and died pending the Writ; and after his Death they endowed the Wife of the L. *Clifford*, and were always ready, if they had the K's Licence, to make the Re-gift to the Son and Heir, to make the Eſtate according to the Condition: And Judgment was given that the Tenements ſhould be ſeiſed into the K's Hands, and that he ſhould have the Profits thereof from the Death of the L. *Clifford*. But note, Reader, (as I conceive) the ſaid Judgment doth not (*c*) contradict the Opinion of *Littleton*, for *Sadlier*, who pronounced the Judgment, gave two Reaſons and Cauſes of the ſaid Judgment.

(*a*) Co. Lit. 218. b. Antea 79. b.

(*a*) 18 Aſſ. 18. Br. Condition 135. Co. Lit. 221. a. b. 6 Co. 74. a. 8 Co. 90 b. 91. a. 1 Rol. 438. Poſtea 81. a.

(*c*) 8 Co. 91. a.

1. Becauſe by the Licence of the King, which is here of Record, and by the Office alſo returned, it appears upon Record that the Chaplains had no other Eſtate than upon Condition.

2. That it appears by their Plea, that they had Time in the Life of the Lord *Clifford* to have performed the Condition: The Effect of the firſt Reaſon is, foraſmuch as the

the Land was held *in Capite*, and the Licence was ſpecial to enfeoff the Chaplains, ſo as they gave back to the Feoffor in Tail, *&c.* if they had made the Gift in Tail to the Lord himſelf, they had purſued the Licence; but when the Lord himſelf died, they could not, by Force of the ſaid Licence, (which is always taken ſtrictly and ought to be purſued) make the Gift to his Son: Then foraſmuch (as it appears by the 2d Reaſon) that they had Time in the Life of the L. *Clifford* to have performed it, and the not doing of it drew a Charge to the Heir to purchaſe a Licence, and perhaps the K. would never give Licence, and then the Eſtate would never (without Charge, and Cauſe of Seiſure for Want of Licence) be made, and all that in Default of the Feoffees who had Time to make it; and if they had purſued the Licence, they ought to have made the Re-gift to the Lord himſelf; and therefore it is as much as if the Feoffees had bound themſelves in a Stat. or Recogniſ. which after their Feoffment would charge the Land; ſo if they without Licence ſhould give it back to the Heir, his Lands ſhould be ſeiſed into the K's Hands for Alienation (*a*) without Licence; for this Cauſe the Entry of the Heir was lawful. And note, in the ſaid Caſe, that the Feoffees in their Plea ſaid, That they were always ready to have enfeoffed the Heir if they had had Licence ſo to do, by which it appears that the ſaid Licence did not warrant them to make the Gift to the Heir.

Note.

(*a*) Co. Lit. 222. b.

Alſo it is ſaid in the ſaid Caſe by *Hampton*, That if the King ſeiſe the Land, it ought to be in his own Right, and the Heirs of the Lord *Clifford* diſinherited; for at that Time he thought, as it ſeems, that Land held by Grand Serjeanty, aliened without Licence, ſhould be forfeited to the King: For that ſee the Stat. *de Prærogativa Regis, c.* 7. (*b*) *de Serjeantiis alienatis ſine licentia Regis conſuevit Rex arrentare hujuſmodi Serjeantias per rationabilem extentam inde faciendam.* And accordingly, I have ſeen a Precedent, 26 *E.* 1. *Ex. Rememorat' Dominæ Reginæ in Scaccario*, That Land in *Cheſterton*, in the County of *Warwick*, and *temp. E.* 1. of Lands in *Hadnet* in the County of *Salop*, were ſeiſed and granted in Fee, rendring Rent, by Juſtices in *Eyre*, for Alienation without Licence, for then Juſtices in *Eyre* might have granted ſuch Land in Fee, rendring Rent, as a Juſtice of a Foreſt (which in Effect, as to this Purpoſe, are Juſtices in *Eyre*) at this Day may of Lands encloſed within a Foreſt without the King's Leave. And (*c*) *Wilby*, in 14 *E.* 3. *Quare Impedit* 54. ſaith, That if Lands held by Grand Serjeanty be aliened without Licence, they are forfeited by the Common Law, becauſe Service of Body cannot be transferred to another.

(*b*) Stamf. Prærog. 27. b.

(*c*) Stamf. Prærog. 29. a.

But note, Reader, at this Day it is without Queſtion, that Land held by Grand Serjeanty ſhall not be forfeited for Alienation without Licence; for if it were admitted that

that they were forfeited, as *Wilby* ſaid at the Com. Law, yet it is declared contrary, and (*a*) remedied by the Act of 1 *E.* 3. *cap.* 12. by which it is provided, That whereas divers People of the Realm complain that they are grieved by Reaſon that Lands and Tenements held of the King in chief, (as all which are held by Grand Serjeanty are) and aliened without Licence, have been held as Forfeit; hereafter, in ſuch Caſe, a reaſonable Fine ſhall be taken. And ſo at all Times after that Stat. when Land held by Grand Serjeanty hath been aliened without Licence, a Fine hath been taken, and no Seiſure ever made for the Forfeiture; *Et (b) optimus legum interpres conſuetudo.* And ſo it was held *M.* 38 & 39 *Eliz.* by the two Chief Juſtices *Popham* and *Anderſon*, *Periam* Chief Baron, and ſeveral other Juſtices. And the Reaſon for which I collect the Land was held by Grand Serjeanty is, firſt, becauſe the Book ſaith, that he aliened great Part of his Heritage, and the Sheriffwick of *Weſtmoreland*, which is Parcel of his Barony; and every (*c*) Barony, in antient Time, was held by Grand (*d*) Serjeanty. 2dly, *Hampton* there (either forgetting the Stat. of 1 *E.* 3. or not conceiving it to extend to Land held by Grand Serj.) ſaith, That the K. ſeiſed in his own Right, and diſ-inherited the Heirs, (*ſcil.* If an Eſtate ſhall be made without Licence) which, without Queſt. by the expreſs Letter of the Act of 1 *E.* 3. could not be, if it were held *in capite* and not by Grand Serj. So it appears that the Book in 18 (*e*) *Aſſ.* is reſolved upon other Reaſons, and doth not oppoſe the Opinion of *Litt.* who, without Queſt. had ſeen the ſaid Book. And I perceiving the Book in 2 *H.* 4. 5. *b.* (*f*) to agree with *Litt.* cauſed Search to be made for the Record of the ſaid Caſe: *Et inter recorda de Theſaur' recept' Scaccarii ſub cuſtodia Theſaur' & Camer' remanen' inter placit' de juratis & Aſſ. de ann.* 1 *H.* 4. *in Com. Devon.* the Record of the ſaid Caſe was found; and the Caſe was, That *Robert French* brought an Aſſiſe againſt *William Dean* and *Thomaſine* his Wife, and others, of his Freehold in *Chudleigh*, and the Aſſiſe was taken by Default, and a ſpecial Verdict found, that is to ſay, *Quod quidam Thomas Glaſier fuit ſeiſitus de præd' tenementis cum pertinentiis in eorum viſu poſitis in dominico ſuo ut de feodo, & ſic inde ſeiſit' exiſtens eadem tenementa cum pertinen' dedit & conceſſit quibuſdam Jo. Prous & Rogero Cockſhead, habend' ſibi & hæredibus ſuis, ſub conditione quod iidem Johannes & Rogerus ipſum Thomam & prædict' Thomaſinam adtunc uxorem ipſius Thom' de eiſdem tenementis refeoffaret, habend' eiſdem Thomæ & Thomaſinæ & hæredibus de corporibus ſuis exeuntibus, remanere rectis hæredibus ipſius Thomæ; virtute cujus iidem Johannes & Rogerus de tali ſtatu*

(*a*) F.N.B. 175. a. 235. c. Stamf. Præ. 29. a. 2 Inſt. 66. 1 Jones 111. Co. Lit. 43. b. 34 E. 3. 15.

(*b*) 10 Co. 70. b. 2 Inſt. 18.

(*c*) Davis 62, 63

(*d*) Jones 109, 111

(*e*) 18 Aſſ. 18. Antea 80. a. Br. Condition 105. 6 Co. 74. a. 8 Co. 90. b. 91. a. Co. Lit. 222. a. b. 1 Roll. 438.

(*f*) Fitz. Condition 5. Br. Condition 33. 1 Co. 137. b. 11 Co. 83. b. Poſtea 81. b. 1 Jones 181.

fuerunt inde ſeiſiti, & poſtea prædictus Thomas obiit ſine hærede de corpore ſuo & de corpore ipſius Thomaſinæ exeunt' abſque aliquo refeoffament' eiſdem Thom' & Thomaſ. juxta conditionem præd' fact, ſive per ipſum Thomam in vita ſua exact', poſt cujus mortem præd' Thomaſina cepit in virum præd' Will. Deane: Poſtmodumque iidem Will. Deane & Thomaſina petierunt a præfato Johanne & Rogero feoffamentum eidem Thomaſinæ de præd' tenementis juxta conditionem præd' fieri: Super quo iidem Johannes & Rogerus per quoddam ſcript' ſuum indentatum anno 14 *R.* 2. *conceſſerunt & confirmaverunt præfatis Willielmo Deane & Thomaſina præd' tenementa cum pertinentiis habend' & tenend' eiſdem Willielmo & Thomaſina, ad totam vitam ipſius Thomaſinæ, remanere inde rectis hæredibus præd' Thom' ſecundum formam conditionis præd': ſuper quo Johannes Vyen & Mariotta uxor ejus, in jure ipſius Mariottæ, ut ſororis & hæredis præd' Thomæ ſupponend' prædict' feoffamentum prædict' Will. Deane & Thomaſinæ de tenement' præd' in forma præd' factis fuiſſe contra formam conditionis præd' in tenementa illa intraverunt, & inde præd' Robertum French per cartam ſuam, &c. feoffaverunt, &c. virtute cujus idem Robertus in tenementa præd' intravit, & iidem Willielmus Deane & Thomaſina ipſum inde recenter amoverunt; Et ſi amotio illa diſſeiſina adjudicari debeat necne, dicunt quod ipſi omnino ignorant, & petunt diſcretionem Juſticiar', &c.* And Judgment was given againſt the Plaintiff.

Out of this Record, I obſerve four Things: Firſt, That in the ſpecial Verdict there is no Mention made at what Time the Feoffment was made upon Condition, ſo that (if the Time were material) it might appear how long Time was paſt between the Feoffment upon Condition and the Death of the Feoffor; and that anſwereth the Objection which ſome make, That in the ſaid Caſe of *Littleton*, it ſhall be intended, that thoſe to whom the Eſtate by the Condition ſhould be made, died preſently, ſo that the Feoffees had not convenient Time to make the Eſtate according to the Condition; for if the Law ſhould be ſuch, then the Time would be material, and by Conſequence, the Verdict, which found no Time, was imperfect, upon which no Judgment could be given. But the contrary appears by the ſaid Book of *(a)* 2 *H.* 4. 5. *b.* for there it appears, that by the Advice of all the Judges, Judgment was given againſt the Plaintiff, by which it appears, that the Death of the Feoffor, at what Time ſoever it be, is no Breach of the Condition, if no Requeſt were made by him, for ſo it appears by the ſaid Record.

(a) Antea 81. a. Fitz. Condi. 1. Br. Condition 33. 1 Co. 137. b. 11 Co. 83. b. 1 Jones 181.

Co. Lit. 218. b.

Secondly, That the Feoffees need not make the Eſtate either to the Feoffor in his Life, or to any other after his Death, until Requeſt made, and theref. the 2d Husb. and his Wife made

a Requeſt, as it is expreſly found by the Aſſiſe.

Thirdly, That although by the Law the Eſtate made to the Wife for her Life ought to have been without (*a*) Impeachment of Waſte, as appears by *Littleton*, *fol.* 82. and that the Wife is Covert, and it trencheth to her Prejudice; yet foraſmuch as it was the Folly of the Wife, being ſole, to take ſuch a Husband who would accept of ſuch Eſtate; and alſo becauſe the Eſtate for Life is the Subſtance of the Eſtate which ſhould be made by the Feoffee, and the Priviledge to be without (*b*) Impeachment of Waſte, is a Thing collateral, and only for the Benefit (of the Heir) of the Husband and Wife, and the omitting of it being for the Benefit of the Heir of the Feoffor, is not any Breach of the Condition to give him Cauſe of Re-entry, for then the Wife would loſe her Eſtate alſo, which would not be reaſonable.

Fourthly, That although the moſt ſure Way had been that the Eſtate ſhould be made to the Wife alone, yet the Eſtate being made (*c*) to the ſecond Husband and the Wife, for the Life of the Wife, it is no Breach of the Condition, for none is prejudiced thereby; And if the Eſtate had been made only to the Wife, the Husband would have had as much Power and Benefit as he now hath, and therefore it is all one in Subſtance and Effect.

(*a*) Co. Lit. 219. b. Lit. Sect. 352. Jones 181.

(*b*) 2 Co. 23. a. 72. a. 4 Co. 63. a. 9 Co. 9. a. 11 Co. 82. b. 83. b. 1 Rol. Rep. 182. 2 Rol. Rep. 325. Moor 18, 317, 327. 2 Inſt. 146. Hob. 132 Poph. 193, 194, 195. Latch. 269. 270. Bridgm. 102. Dyer 47. pl. 11. Plowd. 132. b. Cro. Jac. 216. 2 Rol. 835. Heel. 77. Co. Lit. 220. a.

(*c*) Co. Lit. 219. b. 220. a.

2 Co. Fo. 82. b.

BINGHAM's *Case.*

Mich. Term. 41 & 43 Eliz. *Rot.* 144.

In the King's Bench.

Ejectment.

Dorſet. ſſ. MEmorandum, That at another time, that is to ſay, *Eaſter Term* laſt paſt, before the Lady the Queen at *Weſtminſter*, came *George Stroud, Eſq*; by *Simon Spatchurſt* his Attorney, and brought here in the Court of the ſaid Lady the Queen, his Bill againſt *Ralph Horſey*, Knt. *Richard Veal*, and *Edward Goor*, Gent. in the Cuſtody of the *Marſhall*, *&c.* of a Plea of Treſpaſs and Ejectment of him out his Farm: And there are Pledges of Suit, that is to ſay, *John Doo*, and *Richard Roo*, which Bill followeth in theſe Words. *ſſ. Dorſet. ſſ. George Stroud*, Eſq; complaineth of *Ralph Horſey*, Kt. *Richard Veal*, and *Edward Goor*, in Cuſtody of the *Marſhal* of the *Marſhalſea* of the Lady the Queen, before the Queen herſelf being; for that, That is to ſay, That whereas one *William Albert* the 7*th* Day of *April*, in the 41*ſt* Year of the Reign of the Lady the now Queen, at *Melcum* in the County aforeſaid, had demiſed, granted, and to Farm letten to the aforeſaid *George*, one Meſſuage, 120 Acres of Lands, 40 Acres of Meadow, 200 Acres of Paſture, and 100 Acres of Furze and Heath, with the Appurtenances, in *Melcum* aforeſaid, in the County aforeſaid; To have and to hold the Tenements aforeſaid with the Appurtenances, unto the ſaid *George*, and his Aſſigns, from the Feaſt of the *Annunciation* of the Bleſſed Lady the Virgin *Mary*, then laſt paſt, until the End and Term of 6 Years and a Half of a Year, from thence next enſuing fully to be compleated and ended: By Virtue of which Demiſe the ſaid *George* into the Tenements aforeſaid with the Appurtenances entred, and was thereof poſſeſſed, until the aforeſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, afterward, that is to ſay, the 11*th* Day of *April* in the 41*ſt* Year aforeſaid, with Force and Arms, *&c.* into the Tenements aforeſaid, with the Appurtenances, upon the Poſſeſſion of the ſaid *George*, thereof did

did enter, and the ſaid *George* from his Farm aforeſaid, thereout (his Term aforeſaid not being ended) did eject, expel, and amove, and the ſaid *George* from his Poſſeſſion thereof, did hold out, and do yet hold out, and other harms did unto him againſt the Peace of the ſaid Lady the Queen, to his Damage of 100 Pound, and thereof he bringeth Suit, *&c.* And now at this day, that is to ſay, *Tueſday* next after 8 Days of St. *Michael*, in this Term, until which Day the aforeſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, had Licence to imparl to the ſaid Bill, and then to anſwer, *&c.* before the Lady the Queen at *Weſtminſter*, come as well the ſaid *George Stroud*, by his Attorney aforeſaid, as the aforeſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, by *James Hyde* their Attorney, and the ſaid *Ralph*, *Richard*, and *Edward*, defend the Force and Injury, when, *&c.* and ſay, That they are not thereof guilty: And upon that put themſelves upon the Country, and the aforeſaid *George Stroud* likewiſe, *&c.* Therefore let a Jury thereof come before the ſaid Lady the Queen at *Weſtminſter*, upon *Wedneſday* next after 8 Days of St. *Hillary*, and who neither, *&c.* to recognize, *&c.* Becauſe as well, *&c.* The ſame Day is given to the Parties here, *&c.* ſſ. Afterwards Proceſs was continued between the parties aforeſaid, of the Plea aforeſaid, by Juries put between the Parties aforeſaid, in reſpit, before the ſaid Lady the Queen, at *Weſtminſter*, until *Wedneſday* next after 18 Days of *Eaſter*, unleſs firſt the Juſtices of the Lady the Queen to take Aſſiſes in the ſaid County, ſhall firſt upon *Monday* the three Weeks of *Lent* at *Dorcheſter* in the County aforeſaid, by the Form of the Statute, *&c.* come for default of Jurors, *&c.* At which *Wedneſday*, before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid, by their Attorneys aforeſaid, And the aforeſaid Juſtices of Aſſiſe, before whom, *&c.* ſent thither their Record before them, had, in theſe Words, to wit. Afterwards, the Day and Place within contained before *Thomas Walmſley* one of the Juſtices of the Lady the Queen of the Bench, and *Edward Fennes* one of the Juſtices of the ſaid Lady the Queen, of Pleas before the Queen herſelf, holden Aſſigned, Juſtices of the ſaid Lady the Queen to take Aſſiſes in the County of *Dorſet* aſſigned, by the Form of the Statute, *&c.* came as well the within named *George Stroud*, Eſq; by *Thomas Clayton* his Attorney, as the within named *Ralph Horſey*, Kt. *Richard Veal*, and *Edward Goor* by *Henry Collier* their Attorney, and the Jurors of the Jury, whereof within mention is made, ſome of them appeared, and ſome of them did not appear as it appeareth in the Pannel, *&c.* and ſome of the Jurors now appearing, that is to ſay, *Richard Ham*, *Thomas Toomer*, *John Burt*, *Henry Harbyn* Gentleman, *John Young* Gentleman, *John Butler* Gentleman, *William Withington*, *John Payn*, and *Chriſtopher Dolling* in the Jury aforeſaid are Sworn: And ſome of the ſaid Jurors now appearing, that is to ſay, *Thomas Keate*, *Edward Carter*, *Robert*

Robert Chippe, *Henry Squib*, and *George Frome*, becauſe they between the Parties aforeſaid are found to be ſuſpicious, from the Pannel aforeſaid they were utterly drawn out; and becauſe the reſt of the Jurors of the ſaid Jury did not appear, therefore others of the Standers by, by the Sheriff aforeſaid, to that being choſen at the Requeſt of the ſaid *George Stroud*, and by the Command of the Juſtices aforeſaid, were of new put, whoſe Names to the Pannel within written are filed according to the Form of the Statute in ſuch Caſe thereof late made and provided, and the Jurors ſo new put, that is to ſay, *Clement Jay*, *Nicholas Brown*, and *Thomas Eyres*, being called, likewiſe appeared, who to ſay the Truth of the Matters within contained, together with the other Jurors aforeſaid, firſt impanelled being choſen, tried and ſworn, ſay upon their Oath aforeſaid, that the Tenement within written in which it is ſuppoſed the Treſpaſs and Ejectment within written to be done, are, and Time whereof the Memory of Men is not to the contrary, were Parcel of the Manor of *Nether Melcum*, otherwiſe called *Melcum Bingham*, with the Appurtenances. and that the ſaid Manor of *Nether Melcum* otherwiſe *Melcum-Bingham*, with the Appurtenances whereof, *&c.* lieth within the Pariſh of *Melcum* in the County aforeſaid and that before the Time within written in which the Treſpaſs and Ejectment within written was ſuppoſed to be done, one *Robert Bingham* the Elder, was ſeiſed of the aforeſaid Manor of *Nether Melcum*, otherwiſe *Melcum Bingham* with the Appurtenances whereof, *&c.* in his Demeſne as of Fee, and ſo thereof ſeiſed, held the ſaid Manor with the Appurtenances, of one *John Horſey*, Kt. as of his Manor of *Melcum* otherwiſe *Horſeys Melcum*, otherwiſe *Sturges Melcum*, in the County aforeſaid by Knight's, Service, that is to ſay, by Homage and Fealty, and Eſcuage to the Lady the Queen of 40 Shillings, when it ſhould happen 2 Shillings, and for more more, and leſs leſs, *&c.* and the ſaid *Robert Bingham* being ſo ſeiſed, before the Time within written, in which, *&c.* that is to ſay, the Morrow of the Holy *Trinity*, in the 12th Year of the Reign of the ſaid Lady the now Queen, a Fine was levied in the Court of the ſaid Lady the Queen, at *Weſtminſter* in the County of *Middleſex*, before *James Dyer*, *Richard Weſton*, *Richard Harper*, then Juſtices of the ſaid Lady the Queen of the Bench, and other the Queen's Faithful People then preſent, between *Thomas Buckley* and *Henry Gawen* Gentlemen, Plaintiffs, and the ſaid *Robert Bingham* the Elder, Deforceant of the Manor of *Nether Melcum*, otherwiſe *Melcum Bingham* aforeſaid, with the Appurtenances, whereof, *&c.* by the Names of the Manor of *Nether Melcum*, otherwiſe *Melcum Bingham* aforeſaid, with the Appurtenances, and five Meſſuages, four Tofts, four Barns, five Gardens, two Orchards, 120 Acres of Land, 30 Acres of Meadow, 300 Acres of Paſture, 8 Acres of Wood, and 20 Acres of Furze and Heath, with the Appurtenances in *Nether Melcum* otherwiſe *Bingham's Melcum*,

Melcum, whereupon a Plea of Covenant was between them in the ſaid Court, that is to ſay, That the ſaid *Robert Bingham* did acknowledge the ſaid Manor and Tenements with the Appurtenances to be the Right of the ſaid *Thomas Buckley*, as that with the ſaid *Thomas Buckley* and *Henry Gawen*, had of the Gift of the ſaid *Robert Bingham*, and then That releaſed and quit claimed for him and his Heirs, to the ſaid *Thomas Buckley* and *Henry Gawen*, and the Heirs of the ſaid *Thomas* for ever: And afterwards the ſaid *Robert Bingham* granted for him and his Heirs, that they would warrant to the ſaid *Thomas Buckley* and *Henry Gawen*, and to the Heirs of the ſaid *Thomas*, the aforeſaid Manor and Tenements with the Appurtenances againſt all Men for ever, the Tenor of which Fine followeth in theſe Words: ſſ. *Dorſet*: ſſ. This is a final concord made in the Court of the Lady the Queen at *Weſtminſter* in the Morrow of the Holy *Trinity*, in the Year of the Reign of *Elizabeth* by the Grace of God of *England*, *France* and *Ireland*, Queen, Defender of the Faith, *&c.* from the Conqueſt, the 12th, before *James Dyer*, *Richard Weſton*, and *Richard Harper*, Juſtices, and other the Queen's faithful People there preſent, between *Thomas Buckley*, and *Henry Gawen*, Gentlemen, Plaintiffs, and *Robert Bingham*, Eſq; Deforceant of the Manor of *Nether Melcum* otherwiſe *Bingham Melcum*, with the Appurtenances, and of 5 Meſſuages, 4 Tofts, 4 Barns, 5 Gardens, 2 Orchards, 120 Acres of Land, 30 Acres of Meadow, 100 Acres of Paſture, 8 Acres of Wood, and 20 Acres of Furz and Heath in *Nether Melcum*, otherwiſe *Bingham's Melcum*, whereupon a Plea of Covenant was between them in the ſaid Court, that is to ſay, that the ſaid *Robert* acknowleged the aforeſaid Manor and Tenements with the Appurtenances to be the Right of the ſaid *Thomas*, and thoſe which the ſaid *Thomas* and *Henry* had of the Gift of the aforeſaid *Robert*, and the ſame releaſed and quit-claimed for him and his Heirs, to the ſaid *Thomas* and *Henry*, and the Heirs of the ſaid *Thomas* for ever, And farther the ſaid *Robert* granteth for him and his Heirs that they warrant to the aforeſaid *Thomas* and *Henry*, and to the Heirs of the ſaid *Thomas*, the aforeſaid Manor and Tenements with the Appurtenances againſt all Men for ever; and for this Recognition, Remiſſion, and quit-claim, Warranty, Fine and Concord the ſaid *Thomas* and *Henry* give to the ſaid *Robert* 150 Pound Sterling, which ſaid Fine of the Manor and Tenements aforeſaid, whereof, *&c.* in Form aforeſaid levied, was had and levied, to the Uſe of the ſaid *Robert Bingham* the Elder, and *Jane* his Wife, and the Heirs of the ſaid *Robert* for ever, by Virtue whereof, and by Force of a certain Act of *Parliament* of transferring of Uſes into Poſſeſſion, made at *Weſtminſter* in the 27th Year of the Reign of the late King *Henry*, the 8th of *England*, *&c.* made and provided, the ſaid *Robert Bingham* the Elder and *Jane* were ſeiſed of the Manor of *Nether Melcum* otherwiſe *Bingham's*

Melcum aforeſaid with the Appurtenances whereof, *&c.* that is to ſay, to the ſaid *Robert* and *Jane*, and the Heirs of the aforeſaid *Robert* for ever, And the ſaid Jurors farther ſay, upon their Oath aforeſaid, that the ſaid *Robert Bingham* the Elder then was ſeiſed in his Demeſn as of Fee, of and in the Manor, Lands and Tenements called *Woolcomb-Binghams*, ſituate and being in *Toller Porcorum* in the ſaid County of *Dorſet*, and the ſaid *Robert* ſo of the Manor and the ſaid Tenements, and of the aforeſaid Manor of *Nether Melcum* otherwiſe *Melcum Binghams* with the Appurtenances whereof, *&c.* being ſeiſed, a Fine was levied in the Court of the ſaid Lady the Queen that now is, at *Weſtminſter* aforeſaid, before the within written Time in which, *&c.* That is to ſay, in the Morrow of the Holy *Trinity* in the 20th Year of the Reign of the ſaid Lady the now Queen before *James Dyer*, *Roger Manhood*, *Robert Mounſon*, and *Thomas Mead*, then Juſtices of the ſaid Lady the Queen of the Bench, and other of the ſaid Lady the Queen's faithful People then preſent, between *Richard Rogers*, Knight, *Nicholas Turbervile*, and *John Williams*, Eſquires, then Plaintiffs, and the aforeſaid *Robert Bingham* the Elder, Eſq; then Deforceant of the ſaid Manor of *Nether Melcum*, otherwiſe *Melcum Binghams*, whereof, *&c.* and of the ſaid Manor of *Woolcomb Binghams* with the Appurtenances, by the Names of the Manors of *Melcum Bingham* and *Woolcomb Bingham*, with the Appurtenances, as alſo of 6 Meſſuages, 2 Tofts, 1300 Acres of Lands, 300 Acres of Meadow, 50 Acres of Paſture, 20 Acres of Wood, and 1000 Acres of Furz and Heath, with the Appurtenances, in *Nether Melcum*, *Toller Porcorum*, *Maypouder*, and *Haſelberry Brion* in the County of *Dorſet*, and of 8 Meſſuages, 3 Tofts, 6 Gardens, 1000 Acres of Land, 100 Acres of Meadow, 300 Acres of Paſture, 300 Acres of Furz and Heath with the Appurtenances in *Codford*, *Mary Codford*, *Peter Aſhton*, *Geffery Burdchalk*, *Alderbury*, *Eaſt Grimſtead* and *Weſt Grimſtead* in the County of *Wilts*, whereupon a Plea of Covenant was ſummoned between them in the ſaid Court, That is to ſay, that the ſaid *Robert Bingham* the Elder, acknowledged the ſaid Manors and Tenements, with the Appurtenances, to be the Right of the ſaid *Richard Rogers* as thoſe which the ſaid *Richard Rogers*, *Nicholas Turbervile* and *John Williams*, had of the Gift of the ſaid *Robert Bingham*, and Releaſed and Quit-claimed from him and his Heirs, to the ſaid *Richard Rogers*, *Nicholas Turbervile* and *John Williams*, and the Heirs of the ſaid *Richard Rogers* for ever. And further the ſaid *Robert Bingham* granted for him and his Heirs, that they ſhould Warrant to the aforeſaid *Richard Rogers*, *Nicholas Turbervile* and *John Williams*, and to the Heirs of the ſaid *Richard Rogers*, the aforeſaid Manors and Tenements with the Apurtenances againſt the ſaid *Robert Bingham* and his Heirs forever; the Tenor of which Fine followeth in theſe Words. ff. This is the final Concord made in the Court of the Lady the

the Queen at *Weſtminſter* in the Morrow of the Holy *Trinity*, in the Year of the Reign of *Eliz.* by the Grace of God of *England*, *France*, and *Ireland*, Queen, Defender of the Faith, *&c.* from the Conqueſt the 20th, before *James Dyer*, *Roger Manwood*, *Robert Mounſon*, and *Thomas Meade* Juſtices, and other of the Lady the Queen's faithful People then and there preſent, between *Richard Rogers*, Knt. *Nicholas Turburvile*, Eſq; and *John Williams*, Eſq; Complainants, and *Robert Bingham* the Elder, Eſq, Deforceant of the Manors of *Melcum Bingham*, and *Woolcomb Bingham*, with the Appurtenances, as alſo of 6 Meſſuages, 2 Tofts, 1300 Acres of Land, 300 Acres of Meadow, 50 Acres of Paſture, 20 Acres of Wood, and 1000 Acres of Furz and Heath, with the Appurtenances, in *Nether-Melcum*, *Toller Porcorum*, *Maypowder*, and *Haſelberry Bayan*, in the County of *Dorſet*, and of 8 Meſſuages, 3 Tofts, 6 Gardens, 1000 Acres of Land, 100 Acres of Meadow, 300 Acres of Paſture, and 300 Acres of Furz and Heath, with the Appurtenances, in *Codford*, *Mary Codford*, *Peter Aſhton*, *Gyfford Burdchalke*, *Alderbury*, *Eaſt Grimſtead*, and *Weſt Grimſtead*, in the County of *Wilts*, whereof a Plea of Covenant was ſummoned between them in the ſaid Court, that is to ſay, That the ſaid *Robert* acknowleged the Manors and Tenements aforeſaid with the Appurtenances, to be the Right of the ſaid *Richard*, as thoſe which the ſame *Richard*, *Nicholas*, and *John*, had of the Gift of the ſaid *Robert*, and thoſe releaſed, and quit-claimed from him and his Heirs to the ſaid *Richard*, *Nicholas*, and *John*, and to the Heirs of the ſaid *Richard* the aforeſaid Manors and Tenements, with the Appurtenances, againſt the ſaid *Robert* and his Heirs; And further the ſaid *Robert* granted for him and his Heirs that they warrant to the ſaid *Richard*, *Nicholas*, and *John*, and to the Heirs of the ſaid *Richard* the aforeſaid Manors and Tenements with the Appurtenances, againſt the ſaid *Robert* and his Heirs for ever. And for this Recognition, Releaſe, Quit-claim, Warranty, Fine and Concord, the ſame *Richard*, *Nicholas*, and *John*, gave to the ſaid *Robert* 826 Pound Sterling: Which fine aforeſaid levied and had, was levied of the aforeſaid Manor of Nether *Melcum* otherwiſe *Melcum Bingham*, with the Appurtenances whereof, *&c.* to the Uſe of the ſaid *Robert Bingham* the Elder, for the Term of his Life, and after his Deceaſe, then to the Uſe of the aforeſaid *Robert Bingham* then Son and Heir apparent of the ſaid *Robert Bingham* the Elder, and the Heirs of his Body, upon the Body of *Ann* then Wife of the ſaid *Robert Bingham* the Son to be begotten: And for Default of ſuch Iſſue, to the Uſe of the right Heirs of the aforeſaid *Robert Bingham* the Elder for ever: And of the aforeſaid Manor and Tenements called *Woolcum Binghams*, with the Appurtenances, to the Uſe of the ſaid *Robert Bingham* the Son, and the aforeſaid *Ann* and the Heirs of the Body of the ſaid *Robert Bingham* the Son upon the Body of the aforeſaid *Ann* lawfully to be begotten,

and

and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the aforeſaid *Robert Bingham* the Elder for ever; By Virtue of which Fine, and by Force of the aforeſaid Act of Parliament, of transferring Uſes into Poſſeſſion, made and provided, the aforeſaid *Robert Bingham* the Elder, was ſeiſed of the aforeſaid Manor of *Nether Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances, whereof, *&c.* in his Demeſn as of Freehold, for the Term of his Life, the Remainder thereof to the ſaid *Robert Bingham* the Younger in Fee Tail, that is to ſay, to him and to the Heirs of his Body to be begotten upon the Body of the ſaid *Ann*, the Remainder to the Right Heirs of the ſaid *Robert Bingham* the Elder for ever: And beſides, the ſaid *Robert Bingham* the Younger, and *Ann* his Wife, were ſeiſed of the ſaid Manor, Lands and Tenements, called *Woolcomb Binghams*, with the Appurtenances, that is to ſay, to the aforeſaid *Robert Bingham* the Younger, in his Demeſn, as of Fee Tail, that is to ſay, to him and the Heirs of his Body upon the Body of the ſaid *Ann* his Wife lawfully to be begotten; and to the aforeſaid *Ann* in her Demeſn as of Freehold for the Term of her Life, the Remainder thereof to the Right Heirs of the ſaid *Robert Bingham* the Elder for ever: And the Jurors aforeſaid, ſay upon their Oath aforeſaid, that at the Time of the Levying of the ſaid laſt recited Fine, by the ſaid *Robert Bingham* the Elder, in Form aforeſaid had, the ſaid *John Horſey* was ſeiſed of the aforeſaid Manor of *Over-Melcum*, otherwiſe *Horſeys Melcum*, otherwiſe *Sturges Melcum*, with the Appurtenances, in his Demeſn as of Fee, and the ſaid *John Horſey* ſo thereof being ſeiſed, a Fine was levied in the Court of the ſaid Lady the Queen that now is, at the Caſtle at *Hertford*, in the County of *Hertford* after, and before the within written Time in which, *&c.* that is to ſay, in the Morrow of *All-Souls*, in the 24th Year of the Reign of the ſaid Lady the now Queen, before *Edmund Anderſon*, *Thomas Meade*, *Francis Windham*, and *William Periam*, then Juſtices of the ſaid Lady the Queen, of the Bench, and other of the ſaid Lady the Queen's faithful People then there preſent, between *Henry* Viſcount *Bindon*, *Richard Rogers*, Kt. *Henry Aſhley*, Kt. *Thomas Hayward*, *George Trenchard*, *John Strange-ways*, *John Williams*, *Richard Watkins*, *Thomas Mullins*, *Henry Coker*, *Edward St. Kerke*, *John Fitz-James*, and *George Gilbert*, Eſquires, then Plaintiffs, and the ſaid *John Horſey*, Kt. then Deforceant of the ſaid Manor of *Over-Melcum*, otherwiſe *Horſeys Melcum*, otherwiſe *Sturges Melcum*, with the Appurtenances, by the Names of the Manors of *Clyſton*, *Malanke*, *Thorneford*, *Nether Crompton*, *Bradford*, *Sherborne*, *Wyke*, *Horſeys Melcum*, otherwiſe *Sturges Melcum*, with the Appurtenances, and 250 Meſſuages, 100 Tofts, 10 Mills, 10 Dovehouſes, 3000 Acres of Lands, 2000 Acres of Meadow, 5000 Acres of Paſture, 1000 Acres of Wood, 3000 Acres of Furz and Heath, and 10 Pound Rent, with the

the Appurtenances in *Yettmiſter*, *Ryme-intrinſeca*, *Thorneford*, *Bradford*, *Beere-Hacket*, *Shirborn*, *Dillington*, *Nether-Crompton*, *Over-Crompton*, *Long-Burton*, *Oburne*, *Heyden*, *Up-Melcum*, *Nether-Melcum*, *Cheſelborn*, *Buckland*, *Pluſhe*, *Maypowder*, *Mylton*, otherwiſe *Midleton*, and *Helton*, and the Rectory of *Bradford*, with the Appurtenances, as alſo of the Advowſon of the Churches of *Melcombe*, *Nether-Melcombe*, *Clyſton*, *Malank*, *Thorneford*, *Nether-Crompton*, and *Bradford*, in the County of *Dorſet*. And of the Manors of *Horſey*, and *Peignes* with the Appurtunances, and 20 Meſſuages, 6 Tofts, 2 Mills, 2 Dovehouſes, 1000 Acres of Land, 600 Acres of Meadow, 1200 Acres of Paſture, 40 Acres of Wood, 1000 Acres of Furz and Heath, and 40 Shillings Rent, with the Appurtenances in *Bridgwater*, *Chilton*, *Bough*, *Stafford*, *Berwick*, *Weſton*, *Baudrip*, *Peryton*, *Chedſey*, *Wembdon* and *Cannington*, in the County of *Somerſet*. Whereupon a Plea of Covenant was ſummoned between them in the ſame Court, That is to ſay, That the ſaid *John Horſey* acknowledged the aforeſaid Manors, Rectories, Tenements, and Hereditaments, with the Appurtenances, and the Advowſons aforeſaid, to be the Right of the ſaid Viſcount, as thoſe, which the ſaid Viſcount, *Richard Rogers*, *Henry Aſhley*, *Thomas Howard*, *George Trenchard*, *John Strange-ways*, *John Williams*, *Richard Watkins*, *Thomas Mullens*, *Henry Coker*, *Edward St. Kerke*, *John Fitz-James*, and *George Gilbert*, had of the Gift of the ſaid *John Horſey*, and thoſe releaſed and quit-claimed for him and his Heirs, to the ſaid Viſcount, *Richard Rogers*, *Henry Aſhley*, *Thomas Howard*, *George Trenchard*, *John Strangeways*, *John Williams*, *Richard Watkins*, *Thomas Mullens*, *Henry Coker*, *Edward St. Kerke*, *John Fitz-James*, and *George Gilbert*, and to the Heirs of the ſaid Viſcount for ever. And further, the ſaid *John Horſey* granted for him and his Heirs, that they warrant to the aforeſaid Viſcount, *Richard Rogers*, *Henry Aſhley*, *Thomas Howard*, *George Trenchard*, *John Strangeways*, *John Williams*, *Richard Watkins*, *Thomas Mullens*, *Henry Coker*, *Edward St. Kerke*, *John Fitz-James*, and *George Gilbert*, and to the Heirs of the ſaid Viſcount, the aforeſaid Manors, Rectories, Tenements, and Hereditaments, with the Appurtenances, and the Advowſon aforeſaid, againſt all Men for ever; the Tenor of which Fine followeth in theſe Words. ſſ. This is a final Concord, made in the Court of the Lady the Queen, at the Caſtle of *Hertford*, in the Morrow of *All-Souls*, in the 24th Year of the Reign of *Elizabeth* by the Grace of God, of *England*, *France*, and *Ireland* Queen, Defender of the Faith, *&c.* from the Conqueſt, *&c.* before *Edmond Anderſon*, Kt. *Thomas Mead*, *Francis Windham*, and *William Periam* Juſtices, and other of the Queen's faithful People then there preſent: Between *Henry* Viſcount *Byndon*, *Richard Rogers*, Kt. *Henry Aſhley*, Kt. *Thomas Howard*, Eſq; *George Trenchard*, Eſq; *John Strangeways*, Eſq; *John Williams*, Eſq; *Richard Watkins*,

Watkins, Eſq; *Thomas Mullens*, Eſq; *Henry Coker*, Eſq; *Edward St. Kerke*, *Eſq*; *John Fiz-James*, Eſq; and *George Gilbert*, Eſq; Plaintiffs, and *John Horſey*, Kt. Deforcient, of the Manors of *Clyfton*, *Malanke*, *Thorneford*, *Nether-Compton*, *Bradford*, *Sherborn*, *Wyke*, *Horſeys-Melcomb*, otherwiſe *Sturges Melcomb*, with the Appurtenances, and of 250 Meſſuages, 100 Tofts, 10 Mills, 10 Dove-houſes, 3000 Acres of Land, 2000 Acres of Meadow, 5000 Acres of Furz and Heath, and 10 Pound Rent with the Appurtenances in *Pettrainſter*, *Ryme-intrinſeca*, *Thorneford*, *Bradford*, *Beer-Hacket*, *Sherborn*, *Lillington*, *Nether-Compton*, *Over-Compton*, *Long-Burton*, *Oburne*, *Hayden*, *Up-Melcombe*, *Nether-Melcombe*, *Chaſelborne*, *Buckland*, *Pluſhe*, *Maypowder*, *Mylton*, otherwiſe *Midleton*, and *Helton*. And of the Rectory of *Bradford*, with the Appurtenances, as alſo of the Advowſons of the Churches of *Melcombe*, *Nether-Melcombe*, *Clyfton*, *Malanke*, *Thorneford*, *Nether-Compton*, and *Bradford* in the County of *Dorſet*: And of the Manor of *Horſey* and *Piegnes* with the Appurtenances: And of 20 Meſſuages, 6 Tofts, 2 Mills, 2 Dove-houſes, 1000 Acres of Lands, 600 Acres of Meadow, 1200 Acres of Paſture, 40 Acres of Wood, 1000 Acres of Furz and Heath, and 40 Shillings Rent, with the Appurtenances, in *Bridgwater*, *Chilton*, *Bough*, *Styford*, *Berwick*, *Weſton*, *Baudrip*, *Peryton*, *Chedſey*, *Wembdon*, and *Cannington*, in the County of *Somerſet*: Whereupon a Plea of Covenant was ſummoned between them in the ſaid Court, That is to ſay, That the ſaid *John Horſey*, acknowledged the aforeſaid Manors, Rectories, Tenements, and Rents, with the Appurtenances, and the Advowſons aforeſaid, to be the Right of the ſaid Viſcount, as thoſe which he the ſaid Viſcount, *Rich. Hen. Tho. George*, *Joh. Strangeways*, *John Williams*, *Rich. Tho. Henry*, *Edward*, *John*, *Fitz-James*, and *George*, have of the Guift of the aforeſaid *John Horſey*, and then releaſed and quit-claimed from him and his Heirs, to the aforeſaid Viſcount, *Richard*, *Henry*, *Thomas*, *George*, *John Strange-wayes*, *John Williams*, *Richard*, *Thomas*, *Henry*, *Edward*, *John Fitz-James*, and *George*, and to the Heirs of the ſaid Viſcount, for ever. And beſides the ſaid *John Horſey* granted for him and his Heirs, That they warrant to the ſaid Viſcount, *Richard*, *Henry*, *Thomas*, *George*, *John Strange-ways*, *John Williams*, *Richard*, *Thomas*, *Henry*, *Edward*, *John Fitz-James*, and *George*, and to the Heirs of the ſaid Viſcount, the aforeſaid Manors, Rectories, Tenements, and Rents, with the Appurtenances, and the Advowſon aforeſaid, againſt all Men for ever. And for this Recognition, Releaſe, Quit-claim, Warranty, Fine, and Concord, the ſaid Viſcount, *Richard*, *Henry*, *Thomas*, *George*, *John Strangewayes*, *John Williams*, *Richard*, *Thomas*, *Henry*, *John Fitz-James*, and *George*, gave to the aforeſaid *John Horſey* 2680 Pounds Sterling: Which Fine aforeſaid, in Form aforeſaid levied and had, was levied of the Manor and Tenements called *Over-Melcombe*, otherwiſe *Horſey's-Melcombe*, otherwiſe

otherwiſe *Sturges-Melcombe*, with the Appurtenances, to the Uſe of the ſaid *John Horſey*, and the Heirs Males of the Body of the ſaid *John Horſey* lawfully begotten, and for default of ſuch Iſſue, to the Uſe of *Edith*, now Wife of the ſaid *Ralph Horſey*, for the Term of her Life, and after the Deceaſe of the ſaid *Edith*, to the Uſe of the aforeſaid *Ralph Horſey* and the Heirs Males of his Body lawfully begotten; and for Default of ſuch Iſſue, to the Uſe of *Jaſper Horſey*, Brother of the ſaid *Ralph Horſey*, and the Heirs Males of his Body lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the aforeſaid *John Horſey* for ever; by Virtue of which, and of the aforeſaid Act of Parliament of Transferring of Uſes into Poſſeſſion made and provided, the aforeſaid *John Horſey* was ſeiſed of the aforeſaid Manor and Tenements, called *Over-Melcombe*, otherwiſe *Horſey's-Melcombe*, otherwiſe *Sturges-Melcombe*, with the Appurtenances, in his Demeſn as of Fee Tail, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, the Remainder thereof to the aforeſaid *Edith*, for the Term of her Life, the Remainder thereof to the aforeſaid *Ralph Horſey* in Fee Tail, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, the Remainder thereof to the aforeſaid *Jaſper Horſey* in Fee Tail, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, the Remainder over to the right Heirs of the ſaid *John Horſey* for ever. And the Jurors aforeſaid, ſay upon their Oath aforeſaid, that afterwards, and before the within written Time, in which, *&c.* that is to ſay, the 20th Day of *January*, in the 29th Year of the Reign of the ſaid Lady the now Queen, The aforeſaid *Robert Bingham* the Younger, and *Ann*, at *Melcombe* aforeſaid, had Iſſue between them lawfully begotten, *Richard Bingham* Son and Heir apparent of the ſaid *Rob. Bingham* the Younger: And that the aforeſaid *Robert Bingham* and *Ann*, of the ſaid Manors, Lands and Tenements, called *Woolcombe Binghams*, ſo as before is ſaid, being ſo ſeiſed, the Remainder thereof in Form aforeſaid expectant; and the ſaid *Robert Bingham* the Elder, and *Jane* his Wife, ſo as before is ſaid, of the aforeſaid Manor of *Nether-Melcom*, otherwiſe *Melcum-Bingham*, with the Appurtenances, whereof, *&c.* being ſeiſed, of the Manor thereof, to the aforeſaid *Robert Bingham* the Younger, and the Heirs of his Body, upon the Body of the ſaid *Ann* lawfully begotten, the Remainder thereof to the right Heirs of the ſaid *Robert Bingham* the Elder expectant, the ſaid *Robert Bingham* the Younger, afterwards, and before the Time within written, in which, *&c.* that is to ſay, the 11th Day of *November*, in the 30th Year of the Reign of the ſaid Lady the now Queen, at *Melcombe* aforeſaid, died of ſuch Eſtate of and in the Premiſſes as aforeſaid, ſeiſed. And the ſaid *Ann* did ſurvive him, and held herſelf in the Manor aforeſaid, and Tenements called *Wolcombe Binghams*, and was therefore ſole ſeiſed in her Demeſn

as

as of Freehold, for the Term of her Life, by right, of Survivor, and that after the Death of the ſaid *Robert Bingham* the Younger, the Remainder of the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum-Bingham*, with the Appurtenances, whereof, *&c.* in Fee Tail deſcended to the ſaid *Richard Bingham*, as Son and Heir of the Body of the ſaid *Robert Bingham* the Younger, upon the Body of the ſaid *Ann* begotten; the ſaid *Richard Bingham* at the Time of the Death of the aforeſaid *Robert Bingham* the Younger, his Father, being within Age, that is to ſay, of the Age of one Year and nine Months, and no more; And that the ſaid *Ann* of the aforeſaid Manor and Tenements, called *Wolcombe Binghams* in Form aforeſaid being ſeiſed, And the ſaid *Robert Bingham* the Elder, and *Jane* his Wife, of the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcombe Binghams*, with the Appurtenances, whereof, *&c.* in Form aforeſaid being ſeiſed, the Remainder thereof in Form aforeſaid expectant, the ſaid *Ann* afterwards, and before the within written Time in which *&c.* at *Melcombe* aforeſaid, took to Huſband one *John Stroud*, Eſq; And the Jurors aforeſaid ſay upon their Oath aforeſaid, That at the Time of the Death of the ſaid *Robert Bingham* the Younger, and before the within written Time in which, *&c.* The aforeſaid *John Horſey* was ſeiſed of the ſaid Manor, of *Over-Melcum*, otherwiſe *Horſey's-Melcum*, otherwiſe *Sturges-Melcum* with the Appurtenances in his Demeſn as of Fee Tail, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, the Remainder thereof over, in Form aforeſaid expecting. And the ſaid *John Horſey* ſo thereof being ſeiſed, one *John Popham*, Knt. Chief Juſtice of the ſaid Lady the Queen of Pleas, before the Queen herſelf to be held aſſigned, by the Name of *John Popham*, Eſq; *George Trenchard*, Eſq; and *Edward Gorge*, Eſq; before the within written Time in which, *&c.* that is to ſay, the 26th Day of *March*, in the 31ſt Year of the ſaid Lady the now Queen, out of the Court of *Chancery* of the ſaid Lady the Queen, at *Weſtminſter* in the County of *Middleſex* then being, ſued forth a certain Writ of the ſaid Lady the Queen of Entry, upon a Diſſeiſin in the Poſt againſt the ſaid *John Horſey*, then Tenant of the Freehold of the ſaid Manor, of *Over-Melcum*, otherwiſe *Sturges-Melcum*, with the Appurtenances of the ſaid Manor, by the Name of the Manor of *Horſeys-Melcum* otherwiſe *Sturges-Melcum* with the Appurtenances; and 10 Meſſuages, 300 Acres of Land, 200 Acres of Meadow, 5000 Acres of Paſture, 300 Acres of Wood, and 300 Acres of Furz and Heath, with the Appurtenances in *Horſeys-Melcum*, otherwiſe *Sturgis-Melcum*, to the then Sheriffs, of the aforeſaid County of *Dorſet* directed, by which Writ, the ſaid Lady the now Queen, to the then Sheriff of *Dorſet* commanded, that the ſaid then Sheriff ſhould command the ſaid *John Horſey*, that juſtly and without Delay, he ſhould render

render to the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, the ſaid Manor of *Horſeys-Melcum*, with the Appurtenances, and 10 Meſſuages, 300 Acres of Land, 200 Acres of Meadow, 5000 Acres of Paſture, 300 Acres of Wood, and 300 Acres of Furz and Heath, with the Appurtenances in *Horſeys-Melcum*, otherwiſe *Sturges-Melcum*, which the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, claimed to be their Right and Inheritance, and in which the ſaid *John Horſey* had not entry, but after a Diſſeiſin which *Hugh Hunt* thereof unjuſtly, and without Judgment made to the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, within 30 Years then laſt paſt, as they ſaid, and whereupon they complained that the aforeſaid *John Horſey* did them deforce, and if he ſhould not do, and the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, did ſecure the ſaid Sheriff for the Proſecution of his clamour, That then the ſaid Sheriff ſummon the aforeſaid *John Horſey*, that he be before the then Juſtices of the ſaid Lady the Queen, of the Bench at *Weſtminſter* aforeſaid, from *Eaſter-day* in 15 Days then next following, to ſhew why he had not done it: At which 15 Day of *Eaſter*, before *Edward Anderſon*, Kt. and his Companions then Juſtices of the ſaid Lady the Queen, of the Bench at *Weſtminſter* aforeſaid, came as well the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, by *John Willis* their Attorney, and *Robert Frampton*, Eſq; then Sheriff of the County of *Dorſet* aforeſaid, then and there returned the Writ aforeſaid to him, in Form aforeſaid directed, in all Things ſerved and executed, that is to ſay, that the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, had found to the ſaid Sheriff Pledges to proſecute the ſaid Writ; that is to ſay, *John Doo*, and *Richard Roo*: And that the ſaid *John Horſey*, was ſummoned by *John Den*, and *Richard Fen*: And thereupon the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, declared againſt the ſaid *John Horſey*, upon the Writ aforeſaid, in their proper Perſons, and demanded againſt the ſaid *John Horſey*, the ſaid Manor and Tenements, aforeſaid, with the Appurtenances, as their Right and Inheritance, and into which the ſaid *John Horſey* had not entry, but after the Diſſeiſin, which *Hugh Hunt* thereof unjuſtly, and without Judgment did to the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, within 30 Years then laſt paſt, *&c.* And whereupon they then ſaid, That they themſelves were ſeized of the Manor, and thoſe Tenements with the Appurtenances in their Demeſn as of Fee, *&c.* in Right, in Time of Peace, in the Time of the ſaid Lady the Queen that now is, taking thereof the Profits to the Value, *&c.* And in which, *&c.* And thereof they bring Suit, *&c.* And the ſaid *John Horſey* then and there defendeth the Force and Injury when, *&c.* And voucheth thereof to warranty, *David Howel*, who was then preſent in the ſame Court in his proper Perſon, and freely the Manor and Tenements aforeſaid,

aforeſaid, with the Appurtenances, then to him did warrant. And upon this, the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, then demanded againſt him the ſaid *David*, Tenant by his Warranty, the Manor and Tenements aforeſaid with the Appurtenances, in Form aforeſaid, *&c.* And whereupon they ſaid, that they themſelves were ſeiſed of the Manor and Tenements aforeſaid, with the Appurtenances, in their Demeſn as of Fee and Right in Time of Peace, in the Time of the Lady the Queen that now is, taking the Profits thereof to the Value, *&c.* And in which *&c.* and thereof then brought Suit, *&c.* And the aforeſaid *David*, then Tenant by his Warranty, defended the Force and Injury when, *&c.* and ſaid, That the aforeſaid *Hugh Hunt* did not Diſſeiſe the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, of the Manor and Tenements aforeſaid with the Appurtenances as the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, by their Writ and Declaration aforeſaid above ſuppoſed. And of this put himſelf upon the Country: And the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, then prayed Licence thereof to Imparl, and had it. And afterwards the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, came back into the ſame Court the ſame Term in their proper Perſons: And the ſaid *David*, although he was ſolemnly called, did not come back, but departed in Contempt of the ſaid Court, and made Default. Therefore then by the ſame Court, it was *granted*, That the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, ſhould recover their Seiſin againſt the ſaid *John Horſey*, of the Manor and Tenements aforeſaid, with the Appurtenances, and that the ſaid *John Horſey* ſhould have of the Tenements of the ſaid *David*, to the Value, *&c.* And the ſaid *David* ſhould be in Mercy, *&c.* And upon this, the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, then prayed a Writ of the Lady the Queen, to the Sher. of *Dorſet* aforeſaid to be directed, to give them full Seiſin and Poſſeſſion of the Manor and Tenements aforeſaid, with the Appurtenances, and it was granted unto them retornable there, from the Day of *Eaſter*, in five Weeks then next following, *&c.* At which Day, before *Edmund Anderſon*, Kt. and his Companions, then Juſtices of the ſaid Lady the Queen, of the Bench, that is to ſay, at *Weſtminſter* aforeſaid, came the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, in their proper Perſons. And the aforeſaid *Robert Frampton*, Eſq; then Sheriff of the aforeſaid County of *Dorſet*, then ſent, that he by Virtue of the ſaid Writ to him directed, made to the ſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, full Seiſin of the Manor and Tenements aforeſaid with the Appurtenances, as by the ſaid Writ he was commanded, the Tenor of which Recovery followeth in theſe Words, *ſſ. Dorſet. ſſ. John Popham*, Eſq; *George Trenchard*, Eſq; and *Edward Gorge*, Eſq; in their proper Perſons demand againſt *John Horſey*, Kt. the Manor of *Horſey's-Melcumb*, otherwiſe *Sturges-Melcumb*, with the Appurtenances,

and

and 10 Meſſuages, 300 Acres of Land, 200 Acres of Meadow, 5000 Acres of Paſture, 300 Acres of Wood, and 300 Acres of Furz and Heath, with the Appurtenances, in *Horſey's-Melcumb*, otherwiſe *Sturge's-Melcumb*, as their Right and Inheritance: And in which the ſaid *John Horſey* had not entry, but after a Diſſeiſin, which *Hugh Hunt*, thereof unjuſtly and without Judgment, did to the ſaid *John Popham*, *George* and *Edward*, within 30 Years now laſt paſt, *&c.* And whereupon they ſay, That they themſelves were ſeiſed of the Manor and Tenements aforeſaid, with the Appurtenances, in their Demeſn as of Fee, and in Right in the Time of Peace, in the Time of the Lady the now Queen, taking the Profits thereof, to the Value, *&c.* And in which, *&c.* And thereof bring Suit, *&c.* And the aforeſaid *John Horſey*, by *John Willis* his Attorney, cometh and defendeth his Right when, *&c.* And voucheth thereof to warranty *David Howel*, who is preſent here in Court in his proper Perſon, and freely the Manor and Tenements aforeſaid, with the Appurtenances to him doth warrant; and upon this, the aforeſaid *John Popham*, *George Trenchard*, and *Edward Gorge*, demand againſt the ſaid *David* Tenant by his Warranty, the Manor and Tenements aforeſaid, with the Appurtenances in Form aforeſaid, *&c.* And whereupon they ſay, That they themſelves were ſeiſed of the Manor and Tenements aforeſaid, with the Appurtenances in their Demeſn, as of Fee and Right, in the Time of Peace, in the Time of the Lady the Queen that now is, taking the Profits thereof to the Value, *&c.* and in which, *&c.* and thereof they bring Suit, *&c.* And the ſaid *David*, Tenant, by his Warranty defendeth his Right when, *&c.* and ſaith, That the ſaid *Hugh* did not diſſeiſe the aforeſaid *John Popham*, *George*, and *Edward*, of the Manor and Tenements aforeſaid, with the Appurtenances, as the ſaid *John*, *George*, and *Edward*, by their Writ and Declaration aforeſaid, above ſuppoſe, and of this puts himſelf upon the Country, *&c.* And the aforeſaid *John Popham*, *George* and *Edward*, pray Licence thereof to imparl, and have it, *&c.* and afterwards the ſaid *John*, *George*, and *Edward* return here into Court the ſame Term in their proper Perſons; and the ſaid *David*, altho' ſolemnly called, doth not come, but departed in deſpight of the Court, and made Default: Therefore it is granted, that the aforeſaid *John Popham*, *George* and *Edward*, recover their Seiſin againſt the aforeſaid *John Horſey* of the Manor and Tenements aforeſaid, with the Appurtenances, and that the ſaid *John* have of the Lands of the ſaid *David* to the Value, *&c.* and the ſaid *David* in Mercy, *&c.* and upon this the aforeſaid *John Popham*, *George* and *Edward*, pray a Writ of the Lady the Queen, to the Sheriff of the County aforeſaid, to be directed, to give them full Seiſin of the Manor and Tenements afore-

ſaid, with the Appurtenances, and it is granted unto them retornable here from *Eaſter* Day, in five Weeks, *&c.* At which Day here came the aforeſaid *John Popham*, *George* and *Edward*, in their proper Perſons, and the Sheriff, that is to ſay, *Robert Frampton*, Eſq; now ſent, that he by Virtue of the ſaid Writ to him directed, the 29th Day of *April* laſt paſt, gave to the ſaid *John Popham*, *George* and *Edward*, full Seiſin of the Manor and Tenements aforeſaid, with the Appurtenances, as by the ſaid Writ to him it was commanded, *&c.* Which Recovery, in Form aforeſaid had, was had to the Uſe of the ſaid *John Horſey*, and *Dorothy*, then his Wife, and to the Heirs Males of the Body of the ſaid *John* lawfully begotten; and for Default of ſuch Iſſue, to the Uſe of the aforeſaid *Jaſper Horſey*, and the Heirs Males of the ſaid *Jaſper* lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the ſaid *John Horſey* for ever; by Virtute whereof, and Force of the ſaid Act of Parliament of tranferring Uſes into Poſſeſſion made, the aforeſaid *John Horſey* and *Dorothy* were ſeized of that Manor, with the Appurtenances, that is to ſay, the ſaid *John Horſey* in his Demeſn as of Fee-tail, that is to ſay, to him and the Heirs Males of his Body lawfully begotten, and the aforeſaid *Dorothy*, in her Demeſn as of Freehold, for and during her Life, the Remainder thereof in Form aforeſaid expectant, and the ſaid *John* and *Dorothy*, ſo thereof being ſeiſed, the Remainder thereof in Form aforeſaid expectant, the ſaid *John Horſey* afterwards and before the within written Time in which, *&c.* that is to ſay, the 7th Day of *September*, in the 31ſt Year of the Reign of the ſaid Lady the now Queen, at *Melcum* aforeſaid, of ſuch his Eſtate, died thereof ſeiſed, without Iſſue Male of his Body lawfully begotten; and the aforeſaid *Dorothy* him over-lived and held herſelf in, in the the Manor aforeſaid, with the Appurtenances, and was thereof ſole ſeiſed in her Demeſn as of Freehold for the Term of her Life, by Way of Survivor, the Remainder thereof in Form aforeſaid expectant: And that *Mary Arnold*, Wife of *Richard Arnold*, Eſq; was only Siſter and Co-heir of the ſaid *John Horſey*, and *Reginald Moon*, Knt. was another Co-heir of the aforeſaid *John Horſey*, that is to ſay, Son and Heir of *William Moon*, Knt. and *Elizabeth* his Wife, other Siſter of the ſaid *John Horſey*. And the Jurors aforeſaid further ſay upon their Oath aforeſaid, that the aforeſaid *Dorothy* of the aforeſaid Manor of *Over-Melcum*, otherwiſe *Horſey's Melcum*, otherwiſe *Sturges Melcum*, with the Appurtenances, in Form aforeſaid being ſeiſed, after, and before the within written Time in which, *&c.* that is to ſay, the firſt Day of *September*, in the 32d Year of the ſaid Lady the now Queen, at *Melcum* aforeſaid, died of ſuch her Eſtate ſo ſeiſed; after whoſe Death the aforeſaid *Ralph Horſey*, and

Edith into the aforeſaid Manor of *Over-Melcum*, otherwiſe *Horſey's Melcum*, otherwiſe *Sturges Melcum*, with the Appurtenances did enter, and were thereof ſeiſed as the Law requireth: And the ſaid Jurors further ſay upon their Oath aforeſaid, that the ſaid *Robert Bingham* the Elder, and *Jane*, of the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances whereof, *&c.* ſo as is beforeſaid, for the Term of their Lives being ſeiſed, the Remainder thereof in Form aforeſaid expectant, the ſaid *Robert Bingham* the Elder, after, and before the Time in which, *&c.* that is to ſay, the 11th Day of *January*, in the 36th Year of the Reign of the ſaid Lady the now Queen, at *Melcum* aforeſaid, died, of ſuch his Eſtate thereof ſeiſed, the ſaid *Richard Bingham* being Couſin and Heir of the ſaid *Robert Bingham* the Elder, that is to ſay, Son and Heir of the aforeſaid *Robert Bingham* the Younger, Son and Heir of the ſaid *Robert Bingham* the Elder, and within the Age of Twenty-one Years, that is to ſay, of the Age of eight Years, and no more, and that the aforeſaid *Richard Bingham* is yet living and in full Life, that is to ſay at *Melcum* aforeſaid; and that the aforeſaid *Jane* the aforeſaid *Robert Bingham* the Elder over-lived, and held herſelf in in, the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances, whereof, *&c.* And was thereof ſole ſeized in her Demeſn as of Freehold, for the Term of her Life by Right of Survivor, the Remainder thereof in Form aforeſaid, as the Law requireth; and that the aforeſaid *Jane* of the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances whereof, *&c.* in her Demeſn as of Freehold, for the Term of her Life, in Form aforeſaid being ſeiſed, the aforeſaid *Jane* afterwards, and before the within written Time in which, *&c.* that is to ſay, the ſecond Day of *April*, in the 41ſt Year of the Reign of the ſaid Lady the now Queen, at *Melcum* aforeſaid, died, of ſuch her Eſtate thereof ſeiſed; after whoſe Death, and before the within written Time in which, *&c.* the aforeſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, into the Tenements within written, with the Appurtenances entred, and that after, and before the within written Time in which, *&c.* the aforeſaid *John Stroud* and *Ann* his Wife, and *Richard Bingham*, into the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances whereof, *&c.* entred in the Right of the ſaid *Richard Bingham*, by Virtue of which the aforeſaid *Richard Bingham* was of and in the Manor aforeſaid, with the Appurtenances whereof, *&c.* ſeiſed, and ſo thereof being ſeiſed, after, and before the within written Time in which, *&c.* that is to ſay, the 7th Day of *April*, in the 41ſt Year of the Reign of the ſaid Lady the now Queen aforeſaid, the

aforeſaid *John Stroud* and *Ann* his Wife, and the ſaid *Richard Bingham*, upon the Tenements within written, by their Writing ſealed with their Seals, bearing Date the ſecond Day of *April*, in the ſaid 41ſt Year of the Reign of the ſaid Lady the now Queen aforeſaid (to the Jurors aforeſaid in Evidence ſhewed) at *Melcum* aforeſaid, demiſed the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances whereof, *&c.* to the within named *William Albert*, To have and to hold to him and his Aſſigns, from the Feaſt of the *Annunciation* of the Bleſſed *Mary* the Virgin, then laſt paſt, before the Date of the ſaid Writing for the Term of ſeven Years from thence next and immediately enſuing, fully to be compleat and ended; yielding therefore yearly, during the Term aforeſaid, 140 *l. per Ann.* at the Feaſt of St. *Michael* the *Archangel*, and the *Annunciation* of the Bleſſed *Mary* the Virgin, by equal Portions to be paid: By Virtue of which Demiſe the aforeſaid *William Albert* the aforeſaid 7th Day of *April* in the 41ſt Year aforeſaid, into the aforeſaid Manor of *Nether-Melcum*, otherwiſe *Melcum Binghams*, with the Appurtenances whereof, *&c.* entred, and was thereof poſſeſſed, as the Law requireth, and ſo being thereof poſſeſſed, after, and before the within written Time in which, *&c.* that is to ſay, the aforeſaid 7th Day of *April*, in the 41ſt Year aforeſaid, the ſaid *William Albert*, upon the Tenements within written entred, and demiſed the Tenements within written, with the Appurtenances in which, *&c.* to the aforeſaid *George Stroud*, as in the Declaration within written above is ſpecified: By Virtue of which the aforeſaid *George Stroud*, the aforeſaid 7th Day of *April*, in the 41ſt Year aforeſaid, into the Tenements within written, in the Declaration within written mentioned, in which, *&c.* entred, and was thereof poſſeſſed as the Law requireth, until the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, the within written 11th Day of *April*, in the 41ſt Year aforeſaid, upon the Poſſeſſion of the ſaid *George Stroud* (his Term aforeſaid, not then yet ended) did eject, expel and amove; but whether upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, the Entry of the ſaid *George* into the Tenements within written, with the Appurtenances, be lawful or not, the ſaid Jurors are altogether ignorant, and pray thereof the Advice of the Court here, *&c.* And if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Court here, *&c.* That the Entry of the ſaid *George Stroud* into the Tenements within written, with the Appurtenances, be lawful, then the aforeſaid Jurors ſay, upon their Oath aforeſaid, that the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, are guilty of the Treſpaſs and Ejectment within written, as the aforeſaid *George Stroud* within againſt them com-

plaineth;

plaineth; and then they aſſeſs the Damages of the ſaid *George*, by Occaſion of the Treſpaſs and Ejectment within written, above his Charges and Coſts by him about his Suit in this Behalf expended, to two Shillings, and for his Coſts and Charges to 20 Shillings. And if upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Court here, *&c.* That the Entry of the ſaid *George Stroud* into the Tenements within written, with the Appurtenances, be not lawful, then the aforeſaid Jurors ſay, upon their Oath aforeſaid, that the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, are not guilty of the Treſpaſs and Ejectment within written, as the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, thereof within have alledged: And becauſe the Court of the ſaid Lady the Queen of giving their Judgment of and upon the Premiſſes, are not yet adviſed, Day thereof is given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Friday* next after the Morrow of *Holy Trinity*, to hear their Judgment thereof, becauſe the Court of the ſaid Lady the Queen here, thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, come the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the Lady the Queen of giving their Judgment of and upon the Premiſſes are not adviſed, Day thereof is further given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Thurſday* next after eight Days of St. *Michael*, to hear their Judgment thereof, becauſe the Court of the ſaid Lady the Queen here, thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, come the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the Lady the Queen of giving their Judgment of and upon the Premiſſes, are not yet adviſed, Day is further given to the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, until *Friday* next after eight Days of St. *Hillary*, to hear their Judgment thereof; becauſe the Court of the ſaid Lady the Queen thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment of and upon the Premiſſes, are not yet adviſed, Day thereof further is given to the Parties aforeſaid, until *Wedneſday* next after the 18th Day of *Eaſter*, to hear their Judgment thereof, becauſe the Court of the ſaid Lady the Queen here, thereof not yet, *&c.* At which Day, before the Lady the Queen at *Weſtminſter*, come the Parties aforeſaid, by their Attornies aforeſaid; and becauſe the Court of the ſaid Lady the Queen here, of giving their Judgment thereof are not yet adviſed, Day is given to the Parties aforeſaid, before the

Lady the Queen at *Weſtminſter*, until *Friday* next after the Morrow of *Holy Trinity*, to hear their Judgment thereof, becauſe the Court of the ſaid Lady the Queen here, thereof not yet, *&c.* At which Day came the Parties aforeſaid, before the Lady the Queen at *Weſtminſter*, by their Attornies aforeſaid; upon which, being ſeen, and by the Court of the ſaid Lady the Queen here, all and ſingular the Premiſſes fully underſtood, and mature Deliberation being thereof had, It is granted, that the ſaid *George Stroud* ſhall recover againſt the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor*, his Term aforeſaid, of and in the Tenements aforeſaid, in the Declaration aforeſaid ſpecified yet to come, and his Damages aforeſaid, by the Jurors aforeſaid, in Form aforeſaid aſſeſſed; as alſo 12 *l.* for his Charges and Coſts aforeſaid, to the ſaid *George Stroud*, by the Court of the ſaid Lady the Queen here, with his Aſſent of Increaſe adjudged; which Damages in the whole do amount to 13 *l.* 2 *s.* and the ſaid *Ralph Horſey*, *Richard Veal*, and *Edward Goor* be taken, *&c.*

BING-

BINGHAM's *Caſe.*

Trin. 43 Eliz. *(Which began* Mich. 41 & 42 Eliz. *Rot.* 144.)

Adjudged in the King's Bench.

IN an *Ejectione firmæ*, between *George Stroude*, Eſq; Plaintiff, upon a Demiſe made by *William Albert* againſt Sir *Raphe Horſey*, Knt. and others Defendants, upon the general Iſſue, a Special Verdict was found to this Effect; *Robert Bingham* the Grandfather, *Robert Bingham* the Father, *Richard Bingham* the Son, within Age. *Robert Bingham* the Grandfather, held the Manor of *Binghams Melcum*, of Sir *John Horſey*, Knt. as of his Manor of *Horſeys Melcum*, by Knight-Service. And *Anno* 12 *Eliz.* levied a Fine of the ſaid Manor of *Binghams Melcum*, to the Uſe of himſelf, and *Jane* his Wife, and of the Heirs of the ſaid *Robert* the Grandfather: 20 *Eliz.* the ſaid *Robert* the Grandfather levied another Fine of the ſaid Manor of *Binghams Melcum*, to the Uſe of himſelf for Life, and after to the Uſe of *Robert* the Father, (being his Son and Heir apparent) in Tail, and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the Grandfather: *Robert* the Father, 30 *Eliz.* died, *Richard* his Son and Heir then, and yet within Age, by which the Remainder in Tail deſcended to him. 31 *Eliz.* Sir *John Horſey* ſuffered a Common Recovery of his Manor of *Horſeys Melcum*, to the Uſe of himſelf and *Dorothy* his Wife, in Tail, and after to the Uſe of the Defendant Sir *Raphe Horſey*, and *Edyth* his Wife, in Tail, and after to the Uſe of the right Heirs of Sir *John*. 32 *El.* Sir *John*, and *Dorothy* his Wife dying without Iſſue, Sir *Raphe* the Defend. entred into the Manor of

Jenk. Cent. 267. Moor 607. Rep. Q. A. 182, 183, *&c.*

Horseys Melcum; 36 *Eliz.* *Robert Bingham* the Grandfather died, by which the Reversion in Fee descended to *Richard* the Son; 41 *Eliz.* *Jane*, Wife of *Robert Bingham* the Father, died, *Richard Bingham*, within Age, entred into the said Manor of *Ringhams Melcum*, and made a Lease of Part of the Demeans thereof to *Albert*, by Deed indented for seven Years, yielding 40 *l.* Rent *per Annum*, who demised to the said *George Stroude*, who entred, upon whom Sir *Raphe*, and the other Defendants, entred, against whom the Plaintiff brought the *Ejectione firmæ* for Part of the Demesns of the said Manor of *Binghams Melcum*: And upon great Deliberation and Conference had with divers other Justices, Judgment was given for the Plaintiff. And in this Case four Points were resolved.

First, When *Robert Bingham* the Grandfather, 20 *Eliz.* levied a Fine to the Use of himself and *Jane* his Wife, for Life, and after to the Use of *Robert* the Father, in Tail, and after to the Use of the right Heirs of the Grandfather, the Grandfather had a Fee expectant upon the Estate-Tail, as a *(a)* Reversion, and not as a Remainder. And therewith agree 32 *H.* 8. *Br. Garde* 93. *(b)* 4 *H.* 6. *Br. tit. Done & Remainder* 15. 28 *H.* 8. *Dyer* 7. *(c)* *Bucknam's* Case. And so it was adjudged, *Trin.* 31 *Eliz.* in the King's-Bench, between *Fenwick* and *Mytford*, where the Case was, That *Anthony Mytford*, seised of Land in Fee, levied a Fine thereof to the Use of *Margaret Mytford* for Life, and after to the Use of *Jasper Mytford*, in Tail, and after to the Use of the right Heirs of the said *Anthony*; and afterwards Tenant in Tail died without Issue. *Anthony*, in the Life of *Margaret*, made a Lease to one *Robert Halman* for a thousand Years, and died, and if this Lease were good or not against his Heir, was the Question. And it was adjudged, That the Lease was good, for *Anthony* had it as a Reversion. And so it was resolved in the like Case by all the Judges of *England*, in the Case of the Earl of *(d)* *Bedford* in the Court of Wards.

Secondly, It was resolved, That Sir *Raphe Horsey* should not have the Wardship of the Land, because a Reversion in Fee is expectant upon it, and the Reversion is immediately held of the Lord, and not the Estate-Tail: But it was objected, That in this Case, by the Death of *Robert* the Grandfather, the Reversion in Fee descended to *Richard*, who is also the Heir of the Donee in Tail, and the Land is held by Knight's Service, and ought to be in Ward to some, or otherwise many Lords may be defeated of the Wardship of Lands held of them: And *Richard* cannot hold the Estate-Tail

1 Inst. 22. b. 319. 1 Co. 100. 1 Leon. 185. Rep. Q. A. 182, 183.
(a) 3 Leon. 25. 54. B. N. C. 186. Moor 608.
(b) 4 H. 6. 21, 22, &c. Br. Tenure 21.
(c) Bockenham's Case. Co. Lit. 13. a. 22. b. 1 Leon. 182. 3 Leon. 25, 54. 1 And. 2, 288, 289. Hob. 27, 280. N. Benl. 16, 17. Cr. El. 321. Moor 284, 285. 310. 2 Rol. Rep. 105. Raym. 229. 1 Mod Rep. 98, 237, 238. 3 Keb. 122, 177, 178, 179, 240, 241, 317, 339. 1 Vent. 373, 375, 377. Jenk. Cent. 267.
(d) 1 Co. 130. a. Poph. 3. 82. Moor 371, 718, 719. Jenk. Cent. 248. 2 Anders. 197. 2 Rol. 418, 791. Raym. 83.

Tail of himſelf, and therefore Sir *Raphe Horſey* in this Caſe, ſhall have the Wardſhip of the Land. As if Tenant by Knight's Service make a Gift in Tail, and afterwards releaſes to the Donee and his Heirs, now the Donee hath the Eſtate Tail, and alſo the Rever. expectant; in that Caſe, if the Donee dies, his Iſſue within Age, the Lord ſhall have the Wardſhip of the Body and of the Land: And in Proof thereof, the Book in 38 *E.* 3. 7. *b.* was cited, where in a Writ of Ward of the Land and of the Heir of *R. C.* the Defendant pleaded, That *R. C.* levied a Fine to the Defendant, *come ceo, &c.* who granted and rendred the Land to him in Tail, ſaving the Reverſion to the Defendant, and ſo *R. C.* the Donee, held of him: To which the Plaintiff replied, That the Defendant releaſed to *R. C.* all his Right, and ſo *R. C.* became his Tenant: To which the Defendant, by Way of Rejoinder, ſaid, That he did not releaſe, and tendered Iſſue: And it was held no good Iſſue, wherefore he ſaid he did not releaſe, but continued his Eſtate at all Times in Tail, by Force of the Fine, and thereupon Iſſue was taken; and upon that it was inferred, That foraſmuch as the Writ of Ward was brought as well for the Land as for the Heir, that the Replication would not be good, unleſs the Lord ſhould have the Wardſhip of the Land in the ſame Caſe: But the Court, upon Conſideration of the ſaid Book, gave no great Regard to it, as well becauſe the ſaid Point, as to the Wardſhip of the Land, was not moved in the Caſe, as becauſe it appeared by the joining of the Iſſue, that it was pretended that by the Releaſe the Eſtate-Tail was extinct, for the Iſſue is, Whether he continued his Eſtate-Tail by Force of the Fine, and that without Queſtion he did, although the Releaſe were made. Note Reader, If the ſaid Book were agreed to be Law, yet it is not to be likened to the Caſe at Bar, for when the Donor doth releaſe to the Donee in Tail, the ſame doth enure by increaſing of his Eſtate. And therefore if the Law ſhould be, That the Lord in the ſame Caſe ſhould have the Wardſhip of the Heir and Land of the Donee, foraſmuch as the Heir claims both the Eſtates by Deſcent from one and the ſame Anceſtor: Yet in the Caſe at the Bar, when the Donee hath an Eſtate-Tail by Deſcent from his Father, and the Reverſion as Heir to his Grandfather; and ſo two diſtinct Eſtates deſcend to him from two ſeveral Anceſtors, the Land ſhall not be in Ward to the Lord, for the Father held the Eſtate in Tail of the Grandfather, and the Grandfather his Reverſion of the Lord. But it was held by the whole Court, That if Tenant in Tail be with the Reverſ. expectant to him and his Heirs, of Lands held by Kts Service, of a common Perſon, and afterwards he dies, his Heir within Age, he ſhall be in Ward for his Body, but the Lord ſhall not have the Ward. of the Land, for the Reverſion is held immed. of him, and not the Eſt. Tail. And if he grants over the Rever. he ſhall hold the Eſtate Tail of his Grantee, and altho' the Seigniory

2 Inſt. 505.

Co. Lit. 78. a.

9 Co. 126. b. Plow. Com. 296. b.

Seigniory of the Eſtate-Tail is ſuſpended, yet the Donee hath two diſtinct Eſtates in him, that is to ſay, the Eſtate-Tail, and the Reverſion in Fee; and the Reverſion is as a Meſnalty betwixt the Lord and the Donee, and it cannot be ſaid, that in this and other the like Caſes, the Lord may be defeated of the Wardſhip of the Land, foraſmuch as the Law doth not give in ſuch Caſes any Wardſhip of the Land to the Lord, and the Law doth Wrong to no Man. But if it were admitted, that the Tenure between the Donee and him in the Reverſion, by the Unity were determined, yet nothing ſhall be held of the Lord but the Reverſion, and in ſome Caſe, the Donee in Tail ſhall hold of no Body; for where the Tenant of the Archbiſhop of *Canterbury* made a Gift in Tail, the Remainder to the King in Fee, the Donee *(a)* held of no Body, as it was held 4 & 5 *Phil. & Mar. Dyer* 154.

(a) Dyer 154. pl. 18. Co. Lit. 152. b. Goldſb. 149. 2 Rol. 514.

Thirdly, it was reſolved, That if the Caſe were admitted, that *Robert* the Grandfather was Tenant for Life, the Remainder to *Robert* the Father in Tail, the Remainder to *Robert* the Father in Fee, and *Robert* the Father had Iſſue *Richard* within Age, and died, and afterward Sir *John Horſey* the Lord, conveyed the Seigniory to Sir *Raphe* the Defendant, and afterwards *Robert* the Grandfather died, that Sir *Raphe* the Defendant ſhall not have the *(b)* Wardſhip of *Richard*, becauſe *Robert* the Father held not of him (nor of any of his Anceſtors, whoſe Heir he is) the Day of his *(c)* Death, nor was the Land within the Fee or Seigniory of Sir *Raphe*, or any of his Anceſtors, whoſe Heir he is, at the Time of the Death of the ſaid *Robert* his Son; and a Man ſhall never have the Wardſhip of the Heir, when the Land was not in the Fee or Seigniory of himſelf, or of ſome of his Anceſtors, at the Time of the Death of the Tenant, and that is well proved by the Words of the Writ of Ward, that is to ſay, *Præcipe quod reddat cuſtodiam terræ & hæredis C. quæ ad ipſum pertinet, eo quod C. terram illam de eo tenuit die quo obiit.* And of ſuch Effect are the Words of the Writs of *(d) Diem clauſit extremum*, and *Mandamus*. And altho' *(e)* during the Life of the Tenant for Life, the Heir of him in Remainder ſhall not be in Ward, becauſe the Tenant for Life is Tenant to the Lord Paramount, and the Lord ſhall not have the Wardſhip ſo long as he hath a Tenant for Life: yet the Death of the Tenant for Life is not the Cauſe of the Wardſhip, but is a Removal of the Impediment for which for the Time he was not in Ward: As it was held *Paſch. 39 Eliz.* in Com. Pleas, in a Writ of Waſte betwixt *(f) Paget* and *Cary*, That if there be Tenant for Life, the Remaind. for Life, the Remaind. in Fee, and the Tenant for Life commits Waſte, and he in Remaind. for Life dies, now he in the Remaind. in Fee, ſhall have a Writ of Waſte, for the meſn Eſtate for Life which was the Impediment, is now removed. Alſo it was ſaid, when to the

(b) 9 Co. 129. b.

(c) 10 Co. 84. b.

(d) F. N. B. 251. k.

(e) F. N. B. 142. b.

(f) 5 Co. 76. b. 10 Co. 44. b. 11 Co. 81. b. Moor 18. 1 Jones 51. F. N. B. 58. c. 59. h. Cr. Jac. 688. 50 E. 3. 4. a. 2 Rol. 829. 2 Inſt. 301. Lit. Rep. 256. Co. Lit. 54. a.

the Perfection or Conſummation of a Thing (*a*) two Accidents are requiſite, and one happens in the Time of one, and the other in the Time of another, in ſuch Caſe, neither the one nor the other ſhall take Benefit of it, becauſe both do not happen in the Time of either of them, and both are requiſite to the Conſummation of the Thing. As if Lord and Tenant be by certain Rent, and the Tenant (*b*) ceaſes for a Year, and then the Lord grants over his Seigniory, and then the Tenant ceaſes for another Year, in this Caſe none of them ſhall take Benefit of this Ceſſer, *quod fuit conceſſum*.

(*a*) 3 Bulſtr. 253.

(*b*) 3 Bulſtr. 253. Palm. 417.

And a Caſe was adjudged in this Court, *Trin.* 25 *Eliz.* in (*c*) *Lacy*'s Caſe, That whereas *Lacy* ſtruck *Peacock*, and gave him a mortal Wound upon the Sea, of which *Peacock* died at *Scarborough* in the County of *York*, and *Lacy* was diſcharged of it, for thoſe of the County of *York* could not enquire of his Death, without Enquiry of the Stroke, and of the Blow they could not enquire, becauſe it was not given within any County; and thoſe of the Admiral Juriſdiction, could not as of a Felony, enquire of the Stroke, without Enquiry of the Death, and they could not enquire of the Death, becauſe it was *infra corpus comitatus*: And it was ſaid, when divers Accidents are requiſite to the Conſummation of a Thing, the Law in many Caſes will rather reſpect the (*d*) original Cauſe than any other. As 6 *E.* 3. 41. if a Man (*e*) preſent to the Church of another in the Time of War, and thereupon the Preſentee is inſtituted and inducted in the Time of Peace, the Law gives ſuch Regard to the original Act, that is to ſay, the Preſentment, that all that follows thereupon, although it were in Time of Peace, ſhall be avoided: And now, upon the whole Matter, this Uſurpation ſhall be conſtrued to be in Time of War, and ſhall not put the right Patron out of Poſſeſſion. And ſo, and upon the ſame Reaſon was (*f*) *Shelly*'s Caſe adjudged in this Court. And it appears alſo by the Caſe of Dower, in 4 *H.* 8. and cited in 5 *Eliz. Dyer* 224. if the Huſband levies a Fine with Proclamations, and dies, and five Years paſs after his Death, the (*g*) Wife is barred of her Dower, againſt the Opinion in *Plow. Com.* 373. for although to the Conſummation of Dower three Things are requiſite, that is to ſay, Marriage, Seiſin, and the Death of the Huſband; and although at the Time of the Fine levied, her Title was not conſummate, yet the Law reſpects the firſt and original Cauſes, *ſcil.* Marrige and Seiſin. So in the Caſe at Bar, it may be ſaid, That the Law ſhall rather reſpect the Death of him in the Remainder, and the Deſcent from him to one within Age, which is the original Cauſe of the Wardſhip, than the Death of the Tenant for Life, which is but *cauſa ſine qua non*, and rather a Removal of the Impediment, as hath been ſaid, than a Cauſe. But it was reſolved, as it hath been

(*c*) 1 Leon. 270. 13 Co. 53. 3 Inſt. 48, 113. Moor 121, 122. 5 Co. 107. 1 Rol. Rep. 139. 1 Bulſtr. 203. Dalt. Juſt. 340. 2 Brownl. 34.

Origo Rei reſpici debet.

(*d*) 1 Co. 106. b. 99 b. 3 Bulſtr. 257. 1 Jones 428. Cro. Jac. 512.

(*e*) 1 Jones 428. 1 Co. 99. b. 2 Rol. 351. 1 Mod. Rep. 230. 6 E. 3. 41. b. F. N. B. 31. J. Darreign Preſentment 4. 7 E. 3. Darreign Preſentment 2. 18 E. 2. Quare Impedit. 175. Co. Lit. 249. b. 344. b. 6 Co. 30. a.

(*f*) 1 Co. 99. b. 106. b.

(*g*) Dyer 72. pl. 3. 224. pl. 28. Moor 53. 10 Co. 49. b. 2 Rol. Rep. 409. Goldſb. 148. Co. Lit. 326. a. 3 Leon. 221. 3 Inſt. 216. 8 Co. 72. b. 1 Rol. Rep. 160. (*h*) Co. Lit. 31. a. 32. a. Plowd. 373. a.

been ſaid, That neither the one nor the other, for the Cauſe aforeſaid, in this Caſe ſhall have the Wardſhip.

2 Rol. Rep. 13. And it was ſaid, If there be Tenant for Life, the Remainder in Fee of a Seigniory, and Tenant for Life, the Remainder in Fee of the Tenancy held by Knight's Service, if he in Remainder of the Tenancy dies, his Heirs within Age, and afterwards Tenant for Life of the Seigniory dies, he in Remainder in Fee of the Seigniory, ſhall have the Wardſhip, becauſe the Land at the Time of the Death of the Tenant in Remainder, was in his Fee and Seigniory: So, and for the ſame Reaſon, if there be Tenant for Life, the Remainder in Fee of Lands held *ut ſupra*, and the Lord grants his Seigniory for Life and afterwards he in Remainder in Fee dies, his Heir within Age, and afterwards the Grantee for Life of the Seigniory dies, and then the Tenant for Life dies, he in Reverſion of the Seigniory ſhall have the Wardſhip: So if he in Remainder dies, his Heir within Age, *ut ſupra*, and afterwards the Lord dies, and then the Tenant for Life dies, the Heir of the Lord in this Caſe ſhall have the Wardſhip, for an Act in Law ſhall not prejudice any one; and his Executor cannot have it, for it was not a Chattel veſted in the Teſtator. And of ſuch Opinion, as to this third Point in the principal Caſe, were Sir *Edm. Anderſon*, and *Walmeſley*, Juſtices of the Common Pleas, upon Conference with them, as the Lord Ch. Juſtice *Popham* reported.

Fourthly, it was reſolved, That Sir *Ralph*, the Defendant, ſhould not have two Parts of the Lands by the Statutes of 32 & 34 *H.* 8. For altho' *Robert* the Grandfather had limited the Uſe to *Robert* the Father, which is within the ſaid Statutes, yet when *Robert* the Father died, in the Life of the Grandfather, now the ſaid Statutes do not extend further,

Co. Lit. 78. a. 9 Co. 132. a. for the Heir of the Father who is in by Deſcent, ſhall be in Ward by the Common Law, and not by the ſaid Statutes. And if the Statute ſhall extend to the Son and Heir of him in Remainder, *pari ratione*, it ſhall extend to all the Heirs of him in Remainder, *in infinitum*. As if a common Perſon be Lord, and there be Tenant by Knight's Service, and the Tenant makes a Gift in Tail to his younger Son, and dies, and the Reverſion deſcends to the Elder, in this Caſe, *hac vice*, the Lord ſhall have the Wardſhip of two Parts of the Land

Co. Lit. 78. a. 8 Co. 165. a. 9 Co. 132. a. of the Donee: But if the Donee dies, now the elder Son having the Reverſion, ſhall have the Wardſhip of the Heir of the Donee, and the Statutes do not extend but only to the Child firſt advanced, if he ſurvives the Father, and be then Owner of the Land. For if the Father conveys the Land to the Uſe of any of his Sons, and the Son ſo advanced, aliens or makes any Eſtate of the Land *bona fide*, in the Life of the Father, now the King, or the Lord of whom the Land is held, ſhall not have the Wardſhip by Force of the ſaid Statutes; for the Statutes are expounded to give two Parts to the King or the Lord, when the

Advance-

Advancement continues in the Perſon advanced, without Alteration, either by Act in Law, as by Deſcent, or by Act of the Party, as by Conveyance.

The ſame Law when Land is conveyed for the (a) Advancement of the Tenant's Wife, or for Payment of his Debts, if after the Land be aliened *bona fide* before the Death of the Tenant, the King nor other Lord ſhall have any Wardſhip. And ſo was the Statute of (b) *Marlebridge, cap. 6. de hiis autem qui primogenit', &c. feoffare ſolent, &c.* expounded: For if (c) the Father had enfeoffed his Son, yet if the Son in his Father's Life had aliened *bona fide*, it was out of the Remedy of that Statute; and in ſuch Caſe the Lord ſhall not have the Wardſhip, as appears by 33 *H. 6. 16.* in *Andrew Woodcock*'s Caſe. So in the ſame Caſe, if the Son had died in the Life of the Father: But otherwiſe it is, if the Conveyance made by the Son be made after the Death of the Tenant, for then the Lord had once Cauſe of Wardſhip, and therefore the Alienation after that, ſhall not toll his Benefit.

(a) Co. Lit. 78. a. 111. b. 2 Inſt. 112. 10 Co. 82. b. 83. a. 8 Co. 164. a. b.
(b) 8 Co. 164. b. 2 Inſt. 109, 110.
(c) Dyer 9. b. pl. 27. 33 H. 6. 14. b. 15, 16. 1 Co. 122. a.

Alſo for another Reaſon, Sir *Ralph* cannot take Benefit of the Conveyance to the Uſe of the Son, becauſe *Robert* the Father hath conveyed the Land to the Uſe of his Wife for Life, who ſurvived him, and ſo the Statute once ſatisfied. *Vide* 14 *Eliz. Dyer* (d) 308. *Accord.* And ſo it was reſolved in the Caſe of (e) *Northcote, Paſch.* 32 *Eliz.* in the Court of Wards, That if the King by Force of the ſaid Statutes, be entitled to have two Parts of the Land conveyed to one Son in Tail after his Death without Iſſue, he ſhall not have the Benefit of the Statute again againſt any other Son in Remainder: And ſo the Doubt in (f) *Shaw*'s Caſe, 2 & 3 *Phil. & Mar. Dyer* (g) 130. is adjudged and reſolved. The Attorney-General, *John Doderidge, John Strode*, and others, were of Council with the Plaintiff: And *Laurence Tanfield, Laurence Hyde*, and others, with the Defendant.

(d) Dyer 308. pl. 74. 10 Co. 80. b. 82. a. Co. Lit. 78. a.
(e) Co. Lit. 78. a. 9 Co. 129. b.
(f) Moor 608.
(g) 3 Bulſtr. 254, 257. Moor 608.

The

The Order of the CASES *contained in this Second Book of the Lord* COKE's *Reports.*

FINIS.