The Fourth PART of the

REPORTS

OF

Sir *Edward Coke*, Kt.

The KING's ATTORNEY GENERAL,

OF

Divers Reſolutions and Judgments given upon ſolemn Arguments, and with great Deliberation and Conference of the moſt Reverend Judges and Sages of the LAW, of Caſes difficult, in which are great Diverſities of Opinions, and which were never reſolved or adjudged, or reported before: And the Reaſons and Cauſes of the ſaid Reſolutions and Judgments.

Publiſh'd in the Firſt Year (the Spring-Time of all Happineſs) of the moſt happy Reign of the moſt High and moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the XXXVII. the Fountain of all Piety and Juſtice, and the Life of the LAW.

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

Abominables Regi qui agunt impie, quoniam Juſtitia firmat ſolium.
PROVERB. xvi. 12.

Voluntas Regis labia juſta, qui recta loquitur diligetur.
PROVERB. xvi. 13.

Cuſtodi innocentiam, & vide æquitatem, quoniam ſunt reliquæ homini pacifico. PSAL. xxxvii. 37.

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 B. Manby, T. Woodward, F. Clay, A. Ward, J. and P. Knapton, T. Cotton, T. Longman, D. Browne, T. Osborne, H. Lintot, and T. Waller. M.DCC.XXXVIII.

TO THE

READER.

NIhil plane eſt qd' de Legibus dici aut ſcribi poteſt (licet ſpacioſus ſit ille campus, & argumentum pene infinitum) quod mea quidem ſententia ad ſex Capita, de iiſdem, vidl't, Condendis, Corrigendis, Dirigendis, Exponendis, Addiſcendis, & Obſervandis nequeat reduci. In Condendis vero Legibus, ſex ſunt quæ inter alia veniunt precipue conſideranda. Ac primum quidem ipſius in qua feruntur πολιτείας forma, quando alia ratio ſit ubi regimen eſt Monarchicum, alia ubi ariſtocraticum, ubi democra-

THere *is nothing that can be ſaid or writen of Laws, although the Field be large, and the common Place thereof may ſeem to be infinite, but in mine Opinion may be reduc'd to one of theſe Six Heads,* Making, Correcting, Digeſting, Expounding, Learning, and Obſerving. *Of Laws, concerning* Making *of new, Six Things amongſt many other do principally fall into Conſideration. Firſt, under what Form of Commonwealth the Lawmakers be governed; for one Conſideration is requiſite where the Government is* Monarchical, *another when* (1)

when it is Ariſtocratical, *and a Third when it is* Democratical. *Secondly, to know the ſeveral Kinds of the* Muncipal *Laws of his own proper Nation: For the Innovation or Change of ſome Laws is moſt dangerous, and leſs Peril in the Alteration of others. Thirdly, to underſtand what the true Senſe and Sentence of the Laws then ſtanding is, and how far forth former Laws have made Proviſion in the Caſe that falleth into Queſtion. Fourthly, by Experience to apprehend what have been the Cauſes of the Danger or Hindrance that hath fallen out in that particular to the Commonwealth, either in reſpect of Time, Place, Perſons or otherwiſe. Fifthly, to foreſee that a proportional Remedy be applied ſo, as that for curing of ſome Defects paſt, there be not a ſtiring of more dangerous Effects in future. Sixthly, the mean, and that only is by Authority of the high (that in Troth is the higheſt) Court of Parliament. Concerning the* Correction of old, *the ſame Reſpects are to be obſerved, that have been ſaid touching the* Making of new. *For* Digeſting *of former Laws into Method and Order, Three Things are requiſite: Judgment to know them, Art to diſpoſe them, and Diligence*

(2)

(3)

ticum rurſus alia. Alterum vero eſt legum municipalium, quæ nationi illi propriæ ſunt, in ſingulis ſuis generibus certa cognitio, quandoquidem periculoſa magis ſit harum quam illarum Legum ſive antiquatio, ſive innovatio, ſive denique immutatio. Tertium eſt, ut verum ſenſum atque ſententiam illarum legum quæ tum obtinent, necnon quouſque Leges ſuperiores cauſſæ controverſæ proſpexerint teneamus. Quartum, ut rationes periculi aut damni, ſi quid in illo caſu reipublicæ acciderit, reſpectu tempor', loci perſonarum, aut undecunque alias, experientia aſſequamur. Quintum, diligens cautio eſt, ut remedium aptum atque commodum ſic adhibeatur, ne dum aliquibus malis præteritis mederi cupimus, futura alia longe periculoſiora excitemus. Ultimum eſt legum ferendarum medium, quod totum in magnæ illius & ſupremæ ſane curiæ Parliamenti authoritate poſitum eſt Legum antiquarum emendation' quod attinet, eædem plane cautiones obſervandæ ſunt, quas in condentis novis ſupra attigimus. Ad

Leges

Leges vero ſuperiores in methodum atque ordinem dirigendas, tria requiruntur; Judicium ad eas cognoſcendas, ars ad diſponendas, denique diligentia ad complectandas ſingulas ne quæ omittatur. Legum expoſitio ordinarie quidem reverendos Judices regnique ſapientes ſpectat, in maximis vero difficilimiſque cauſis ſupremum parliamenti judicium. De addiſcendis Legibus earumque ſcientia aſſequenda in præfatione ad primum meum Librum paucula attigi. Legum obſervatio omnes quidem in genere reſpicit, præcipue vero ac ſpeciatim nonnullos, ut poſtea annotabitur, nam ſumma ſequar faſtigia rerum. Status hujus Regni monarchicus eſt, & originis jure hæreditario inhærenter ſucceſſivus: Abſolutiſſima ſane perfectiſſimaque πολιτείας forma, utpote quæ interregnum atque infinita ſimul incommoda penitus excludat. Habetur enim in communi jure axioma, *Regem Angliæ nunquam mori:* Quod ſane verum eſt reſpectu perpetuo durantis, & nunquam morientis politicæ capacitatis. Leges hic in Anglia tripartitæ; jus

to omit none of them. The Expounding *of Laws doth ordinarily belong to the Reverend Judges and Sages of the Realm: And in Caſes of greateſt Difficulty and Importance to the High Court of Parliament: Concerning* Learning, *and attaining to the Knowledge of theſe Laws, I have in the Preface of my firſt Book, ſomewhat touched. The* obſerving *of Laws doth concern all whatſoever; but principally ſome in particular, as hereafter ſhall be touched, for* Summa ſequar faſtigia rerum. *Our Kingdom is a* Monarchy Succeſſive *by inherent Birthright, of all others the moſt abſolute and perfect Form of Government, excluding* Interregnum, *and with it infinite Inconveniencies; the Maxim of the Common Law being, that the King of* England *never dieth, which is true in reſpect of the ever during, and never dying Politick Capacity. The Laws of* England, *conſiſt of Three Parts, the Common Law, Cuſtoms, and Acts of Parliament: For any fundamental Point of the antient Common Laws and Cuſtoms of the Realm, it is a Maxim in Policy, and a Trial by Experience, that the Alteration of any of them is moſt dangerous; for that which*

(4) (5) (6)

hath been refined and perfected by all the wiſeſt Men in former Succeſſion of Ages, and proved and approved by continual Experience to be good and profitable for the Commonwealth, cannot without great Hazard and Danger be altered or changed. Infinite were the Scruples, Suits, and Inconveniencies that the Statute of 13 E. 1. de Donis conditionalib' *did introduce, which intended to give every Man Power to create a new found Eſtate in Tail, and to eſtabliſh a perpetuity of his Lands, ſo as the ſame ſhould not be alienated nor letten, but only during the Life of Tenant in Tail, againſt a fundamental Rule of the Common Law, that all Eſtates of Inheritance were Fee-ſimple; whereupon theſe Inconveniencies enſued, Purchaſers defeated, Leaſes evicted, other Eſtates and Grants made upon juſt and good Conſideration were avoided, Creditors defrauded of their juſt and due Debts, Offenders imboldned to commit capital Offences, and many other Inconveniencies followed: Alſo, what Suits and Troubles aroſe by the Statute of* 34 Ed. 3. *of* Nonclaime, *enacted againſt a main Point of the Common Law, whereby enſu'd the univerſal Trouble of the K's Subjects, as it was reſolv'd in Par-*

commune, Conſuetudines, ac decreta Comitiorum: Jam principia atque fundamenta Juris communis & conſuetudinem regni quod attinet, axioma politicum eſt, uſu atque experientia ratum, periculoſiſſimam eſſe uniuſcujuſque eorum alterationem: Qd' enim a ſapientiſſimis olim viris longa ætatum ſerie politum ac perfectum eſt, inde vero aſſidua experientia bonum atque utile reipublicæ probatum & approbatum, illud ſine magno periculo ac diſcrimine mutari aut alterari nequit. Infiniti fuerunt ſcrupuli, lites, & incommoda ex ſtatuto, 13 *E.* 1. *De Donis conditionalibus*, introducta: ubi cautum fuit ut penes unumquemque eſſet recens excogitatum jus taliatum, hoc eſt limitatum, inciſum, aut reſtrictum creare; terrarum inſuper ſuarum perpetuitat' quandam ſtabilire, adeo ut neque alienari, neque locari, niſi durante naturali vita tenentis illius (ut loquimur) taliati poſſent: Atque hoc contra fundamentale principium Juris communis, videlicet, *quod hæreditatum jus omne per feudum ſimplex tranſiret:* Unde incommoda hæc aliaque plurima ſequuta ſunt, emptores

res defraudati, locationum formulæ evictæ, ſtatus alii atque donationes æquis boniſque rationibus conceſſe penitus fruſtatæ, emuncti argento creditores, fontes ad capitalia flagitia perpetrande animitati. Adhæc cuivis etiam vel mediocriter inſtituto apparet, quæ lites, quantæ turbæ, ex ſtatuto illo ortæ ſunt: 34. *Ed.* 3. cui titulus *de non repoſcendo*, nob' *Non claime*, lato contra Juris communis præcipium fundamentum; unde tot moleſtiæ ſubditis exhibitæ velut in Comitiis illis, 4 *H.* 7. *cap.* 24. concluſum ac definitum eſt. Quam vero ſubtiles ac ſpinoſæ quæſtiones indies pullurarunt de validitate atque interpretatione teſtamentorum quibus datæ ſunt terrarum hæridates, quæ tamen jure commuui, ante ſtatuta teſtamentaria, 32 & 34 *Hen.* 8. legari non poterant, quotidiana experientia clare docet, ad multorum quidem ruinam, plurimorum vero damnum ac detrimentum. Atque præ cæteris, recentes qued' inventiones ac commenta, in ſatiſdatione firmandiſque terrarum poſſeſſion', per limitation' quorundam uſum, ſub novis & fanaticis cautioni-

liament in 4 H. 7. cap. 24. *is apparent to all of leaſt Underſtanding: What intricate and ſubtile Queſtions in Law daily aroſe upon the Validity and Conſtruction of Wills of Lands, which by the Rule of Law were not deviſable before the Statutes of* 32 & 34 H. 8. *of Wills, daily Experience to the Ruin of many, and Hinderance of Multitudes manifeſtly teacheth. But above all, certain late Inventions and Deviſes in Aſſurances of Lands by Limitation of Uſes, under upſtart and wild Proviſoes and Limitations, ſuch as the Common Law never knew, do breed and multiply infinite Troubles, Queſtions, Suits, and Difficulties: In the Parliament holden in the* 20 *Year of King* Henry III. *it was moved that Children born before Marriage (being Baſtards by the Common Laws of this Realm, the Wiſdom of the Law abhorring clandeſtine Contracts) might be legimate according to the Civil or Eccleſiaſtical Laws, whereunto ſaith the Statute*, Omnes Comites & Barones una voce reſponderunt, Nolumus leges Angliæ mutare que hucuſque uſitatæ ſunt & approbatæ: *In which few Words is obſervable; firſt, the abſolute Concord and Unity*, una voce, *of all the Peers*

and Lords of Parliament: Secondly the Denial, Nolumus leges Angliæ, *not of* Normandy, *or of any other Nation, as is fondly dreamed, as elſewhere I have ſhewed, but the Common Law of* England: *And thirdly, the Reaſon of their Denial:* Quæ hactenus uſitatæ ſunt & approbatæ, *as if they would have ſaid, we will not change the Laws of* England, *for that they have been antiently uſed and approved from Time to Time by Men of moſt ſingular Wiſdom, Underſtanding and Experience. I will not recite the ſharp Law of the* Locrenſes *in* Magna Græcia, *concerning thoſe that ſought Innovation in preferring any new Law to be made, you may read it in the Gloſs of the firſt Book of* Juſtinian's *Inſtitutes, becauſe it is too ſharp and tart for this Age: But take we the Reaſon of that Law,* Quia leges figendi & refigendi conſuetudo eſt pernicioſa. *But* Plato's *Law I will recite touching this Matter, which you may read in his 6th Book* de Legibus; *if any Citizen do Invent any new Thing, which never before was read or heard of, the Inventor thereof, ſhall firſt Practice the ſame for the Space of* 10 *Years in his own Houſe, before it be brought into the Commonwealth, or publiſhed to the People, to the*

bus, quas ne novit quidem jus noſtrum, infinitas plene turbus, quæſtiones, lites, ac difficultates & pariunt, & multiplicant. In comitiis habitis *Anno* 20 *Hen.* 3. propoſitum & rogatum eſt, ut liberi ante matrimonium nati (quos omnes Jus noſtrum commune (prudenter quidem abhorrens a clandeſtinis nuptiis) habet pro ſpuriis) ex inſtituto juris Civilis aut Eccleſiaſtici, fierent legitimi; Cui (inquit Lex) omnes Comites & Barones una voce reſponderunt, *Nolumus Leges Angliæ mutare, quæ hucuſque uſitatæ ſunt & approbatæ.* In quibus verbis (numero ſane paucis) obſervari poteſt. 1. Abſoluta concordia atque unitas, una voce, omnium, ſcil', Comit' & Baronum in Comitiis. 2. Negationis forma, *Nolumus Leges Angliæ,* non Normanniæ, aut alterius cujuſvis Nationis, ut nonnulli imprudenter ſomniant (ſicut alibi oſtendemus) ſed Jus Commune Angliæ. 3. Negationis ratio, videlicet, *quæ hactenus uſitatæ ſunt & approbatæ:* Ac ſi dixiſſent, Nolumus mutare Leges Angliæ, utpote de tempore in tempus a viris ſingulari prudentia, ingenio,

nio, experientia preditis antiquitus uſurpatas atque approbatas. Nolo hic commemorare Locrenſium illud in magna Græcia decretum ſane aſperum, in eos latum qui novis rebus ſtudentes, legem aliquam novam atque inauditam rogarent: Apud *Juſtinianum* in gloſſa ad primum librum inſtitutionum lectu eſt, & vereor ut huic ætati aceſcat plus ſatis: Rationem tantum illius decreti ſic habere, *Quia Leges figendi & refigendi conſuetudo eſt periculoſiſſima. Platonis* vero legem de hac re recitabo, que habetur apud cum 6 de Legibus: *Si quis Civis nondum quid & inauditum invenerit, illud ad decennium in ſuis ædibus inventor exerceat, hoc fine, ut ſi utile probetur inventum profit authori, ſin vero malum, ipſi ſoli, non reipublicæ noceat.* Probo etiam & edictum illud a *Suetonio* relatum, videlicet: *Quæ præter conſuetudinem & morem majorem fiunt, neque placent, neque recta videntur.* Atque ſane diſcuperem *Honorii* & *Arcadii* inſtitutum illud a noſtratibus obſervari, nimirum; *Mos fideliſſimæ vetuſtatis retinendus eſt:* Sentio denique & concludo rem hanc *Periandri End that if the Invention be good, it ſhall be profitable to the Inventor, and if it were nought, he himſelf, and not the Commomwealth might taſte of the Prejudice. And I like well the Edict reported by* Suetonius; quæ præter conſuetudinem & morem majorum fiunt, neque placent, nepue recta videtur. *And I would the Commandment of* Honorius *and* Arcadius *were of us* Engliſhmen *obſerved*, Mos fideliſſimæ vetuſtatis retinendus eſt: *And I agree and conclude this Point with the Apothegy of* Periander *of* Corinth, that old Laws and new Meats are fitteſt for us. *As concerning the Correcting of the Common Laws, or antient Cuſtoms of* England, *may be applied all that hath been ſaid concerning making of Laws: Only this add; That it hath been an old Rule in Policy and Law, that* Correctio Legum eſt evitanda. *And yet concerning certain of our Penal Statutes, to repeal many that Time hath antiquated as unprofitable, and remain but as Snares to intangle the Subjects with all; and to omit all thoſe that be repealed, that none by them be deceived, as for Example concerning* Drapery, *or ſuch like. To make one plain and*

per-

perſpicuous Law divided into Articles, ſo as every Subject may know what Acts be in Force, and what repeal'd, either by particular or general Words, in Part, or in the Whole, or what Branches and Parts abridged, what enlarged, what expounded: So as each Man may clearly know what and how much is of them in Force, and how to obey them, it were a neceſſary Work, and worthy of ſingular Commendation: Which his Majeſty out of his great Wiſdom and Care to the Commonwealth, hath commanded to be done: For as they now ſtand, it will require great Pains in reading over all, great Attention in obſerving, and greater Judgment in diſcerning upon Conſideration of the Whole, what the Law is in any one particular Point: But with this Caution that there be certain Statutes concerning the Adminiſtration of Juſtice, that are in Effect ſo woven into the Common Law, and ſo well approv'd by Experience, as it will be no ſmall Danger to alter or change them: And herein, according to his Royal Commandment (God willing) ſomewhat in due Time ſhall be perform'd. For bringing of the Com. Laws into a better Method, I doubt much of the Fruit of that Labour.

Corinthii illo Apothegmate; *Antiquis Legibus, & cibis recentibus utendum eſſe.* Juris vero Communis & conſuetudinum Angliæ antiquar' emendation' qd' attinet eo referatur quicquid de condendis Legibus dictum eſt; unum id addas, receptam olim fuiſſe cum in reipublicæ adminiſtratione, tum in juriſprudentia, regulam, quod correctio Legum eſt evitanda Operæ precium tamen interea eſſet, & ſingulari laude dignum, ex Statutis noſtris pœnalibus multa reſcindere atque abrogare, quæ diuturnitas temporis tamquam inutilia antiquavit, & ſubditis tantum illa quærendis inſerviunt: Ea item omnia omittere que jamdudum abdicata ſunt, ne quis illis fallatur, velùti de Pannaria, aut conſimilibus; unum denique idque perſpicuum juris quaſi corpus condere, ita in articulos diſtributum, ut quivis ſubditus intelligat, quæ Statuta obtineant, quæ abrogenter, ſive ſpecialibus ſive generalibus verbis, vel in parte, vel in toto; tum etiam quæ membra aut partes reſtringuntur, quæ dilatantur, quæ exponuntur, ita ut cuivis pateat quid quan-

quantumque in iis valeat, atq; tum illa quid jubeant, tum hic quomodo pareat; id quod Ma. Regia pro ſingularii ejus prudentia atque cura erga rempublicam juſſit fieri: Nam ut ſe nunc habent ſtatuta, requirent profecto & in perlegendo ingentem operam, & in obſervando magnam intentionem, maximum vero in diſcernendo judicium, ut dum quis omnia penſitet, quid Lex ſit vel in uno aliquo articulo clare pronunciet. Hic tamen monerite volo, eſſe quædam Statuta quæ juſtitiæ adminiſtration' reſpiciunt, ita Juri communi intertexta & involuta, adeoque experientia ipſa comprobata, ut periculoſum plane eſſet & convellere aut immutare: Verum hac quidem in re ex mandata Regio ſiquidem Deus dederit, opportuno tempore aliquid fiet. Quod vero ad reductionem Juris Communis in commodiorem Methodum attinet, de illius laboris fructu plurimum dubito; illud ſcio, quod compendiæ in multis quidem ſcientiis authoribus ipſis profuerunt, verum aliis (præſertim ut nunc uſurpantur) non mediocri-

This I know, that Abridgments in many Profeſſions have greatly profited the Authors themſelves; but as they are uſed, have brought no ſmall Prejudice to others: For the adviſed and orderly Reading *over of the Books at large in ſuch Manner as elſewhere I have pointed at, I abſolutely determine to be the right Way to enduring and perfect Knowledge, and to uſe Abridgments as Tables, and to truſt only to the Books at large: For I hold him not diſcreet that will* Sectari rivulos, *when he may* petere fontes. *And certain it is, that the tumultuary reading of Abridgments, doth cauſe a confuſed Judgment, and a broken and troubled Kind of Delivery or Utterance: But to reduce the ſaid Penal Laws into ſuch Method and Order, and with ſuch Caution as is aboveſaid (which cannot be done but in the High Court of Parliament, nor without the Advice of ſuch as before is touched) were an honourable, profitable and commendable Work for the whole Commonwealth. This 4th Part of my Reports doth concern the true Senſe and Expoſition of the Laws in divers and many Caſes, never adjudged or reſolved before: Which for that they may, in mine Opinion, tend to*

the

the general Quiet and Benefit of many, the only End (God knoweth) of the Edition of them; I thought it a Part of my great Duty that I owe to the Commonwealth not to keep them private, but being withal both encourag'd, and in manner thereunto inforc'd, to publiſh and communicate them to all, wherein my Comfort and Contentation is great, both in reſpect of your ſingular and favourable Approbation of my former Labours, as for that I (knowing mine own Weakneſs) have one great Advantage of many famous and excellent Men that have taken upon them the great and painful Labour of Writing: For they, to give their Works the more Authority and Credit, have much uſed the Figure Proſopopeia *in faining divers Princes, and others of high Authority, excellent Wiſdom, profound Learning, and long Experience, to ſpeak ſuch Sentences, Rules and Concluſions, as they intended and deſired for the common Good, to have obey'd and obſerv'd, as* Xenophon *the great in his Book which he wrote of the Inſtitution of Princes, faineth that King* Cambyſes *taught and ſpeak many excellent Things to* Cyrus *his Son; and in another Book*

ter obfuerunt. Illud enim abſolute ſtatuto (qd & alias etiam attigi) majorum librorum ſtudioſam & methodicam perlectionem, certam viam ac rationem eſſe ad conſtantem perfectamque juriſprudentiam aſſequendam: Interim compendiis tanquam indicibus utendum cenſeo, libris vero ipſis innitendum ac fidendum; neque enim prudentis arbitror ſectari rivulos, ubi fontes ipſos potere liceat. Et ſane conſtat tumultuar' compendiorum lection', confuſum judic' & interruptam ac perturbatam elocution' cauſare. Leges vero pœnales in eam methodum atq; formam (adhibitis inſup' cautionibus quas ſuprapoſuimus) reducere, (qd' non niſi in honorario Commitiorum conventu, neq; ſine eor' quos prius attigimus conſilio fieri poteſt) opus eſſet univerſæ reipub. utile, laudabile, glorioſum. Quarta hæc pars Relationum meorum, verum ſenſum atq; expoſition' Legum in multis capitibus nunquam prius judicatis aut definitis continet: Quæ quia ad commune multor' bonum ac tranquillitatem (mea opinione) ſpectare vident', (quem novit Deus) unum mihi finem in illis edendis fuiſſe

fuiſſe propoſit', officii mei erga rempub. putavi eas non ſupprimere, verum efferre in lucem omnibuſq; publicare, ad id præſertim non invitatus modo, ſed tractus quaſiq; compulſus: Qua quidem in re magna mihi ſolatio eſt, tum ſingularis veſtra ſuperiorum mearum elucubration' approbatio, tum qd' imbecillitatis meæ conſcius, illud unum mihi præ multis illuſtribus ſane ac præſtantiſſimis viris, qui difficilem hunc ſcribendi labor' ſuſceperunt commode accidit, qd' illi quo fidem atq; authoritat' operib'ſuis conciliarent, figura illa quam *Proſopopœiam* vocant ſæpius uſi ſunt, dum multis principib' aliiſq; in ſumma poteſtate conſtitutis, denique excellenti prudentia recondita doctrina, longa experientia viris, eas ſententias, regulus ac concluſiones affinxerunt, quas ipſi ad bonum publicum recipi atque obſervari volebant & cupiebant: Ita magnus ille *Xenophon* in libro quem de inſtitutione principis ſcripſit, fingit imprimis quod *Cambyſes* ipſe *Cyrum* filium multas res præſtantiſſimas docuit; & rurſus de diciplina Militari ſermonem inſtituens, regem *Philippum* inducit, *Alexandrum*

which he wrote of the Art of Chivalry, he faineth how K. Philip *taught and inſtructed his Son* Alexander *to fight. But I, without Figure, or faining, do report and publiſh the very true Reſolutions, Sentences and Judgments of the Reverend Judges and Sages of the Laws themſelves, who for their Authority, Wiſdom, Learning and Experience, are to be honoured, reverenced and believed. The due* Obſervation *of the ſaid Laws doth generally without any Limitation or Exception concern all: But principally Princes, Nobles, Judges and Magiſtrates, to whoſe Cuſtody and Charge the due Execution (the Life and the Soul of the Laws) is committed; for that they in reſpect of their Places are more eminent and conſpicuous than other Men, wherein three Things are neceſſarily required,* Underſtanding, Authority, *and* Will: Underſtanding *concerneth Things and Perſons; that is, firſt what is Right, and juſt to be done, and what ill, and to be avoided; ſecondly, what Perſons for Merit are to be rewarded, and what for Offences to be puniſh'd: And both in Reward and Puniſhment to obſerve Quantity and Quality.* Authority *to protect the good, and to chaſtiſe the ill.* Will

prompt

prompt, and ready duly, ſincerely, and truly to execute the Law. But foraſmuch as many Adverſaries, and two open Enemies do continually lie in wait to Aſſault this good and ready Will, it muſt of Neceſſity have two defenſive compleat Armours of Proof: Firſt Integrity *againſt theſs 6 ſecret Adverſaries*, Gifts, Affections, Intreaty, Anger, Precipitation, *and* Moroſa cunctatio, *peviſh delay. Secondly*, Fortitude *and* Conſtancy *againſt the Terror of Malice and Fear of Danger, two open and violent Enemies:* Videte Judices quid faciatis, non enim hominis exercetis judicium ſed Domini, & quodcunq; judicaveritis in vos redundabit. *And* Deus eſt Judex juſtus, fortis, & patiens, *and ſo muſt every Judge be.* Juſtus, *without reſpect, to give every Man his own: And therefore* Judicia *are ſo call'd, becauſe they are* tanquam Juris dicta, *and the Law whereby you judge* eſt mens quædam nullo perturbata affectu, Ariſt. lib. 3. polit. Fortis *againſt Malice and Danger*, Neq; timida probitas, neq; improba fortitudo reipublicæ eſt utilis. *And* Patiens, *when he doth Juſtice ſincerely and with a good Conſcience, and yet is deſpiſed, deſpited, or diſgraced:* Non

2 Paralip. xix. verſ. 6.

filium ſuum ad pugnam inſtituentem: Ego vero ſine figura aut fixione omnino aliqua, fero in publicum ipſiſſimas quidem ſolutiones, ſententias ac judicia, reverendiſſimorum Judicium legumque Antiſtitum, qui propter authoritatem, prudentiam, doctrinam, atque experientiam, facile honorem, reverentium ac fidem merentur. Jam vero legum juſta obſervatio, ut in genere omnes abſque ulla limitatione aut exceptione reſpicit, ita præcipue Principes, Nobiles, Judices, ac Magiſtratus, quorum fidei & tutelæ earum debita adminiſtratio (quam vitam atque animam legum vero dixeris) committitur ac demandatur; quando illi reſpectu ordinis & loci quem obtinent, longe eminentiores atque conſpicui præ aliis exiſtunt. Hic ergo tria neceſſario requiruntur, Judicium, Authoritas, Voluntas: Judicium res aut perſonas reſpicit, id eſt, primo quid factu rectum juſtumque, quid item malum ac declinandum. 2. Quibus præmia merito debentur, quibus etiam pœnæ; ac ut in utriſque quantitas & qualitas juſte obſervetur: Authoritas ad bo-

bonos tuendos, malos puniendos: Denique voluntas prompta atque expedita ad ſynceram ac debitam legum executionem: Quoniam vero multi adverſarii & preſertim duo hoſtes aperti, juſte huic ac promptæ voluntati ſemper inſidiantur, duplici armatura gravi & defenſiva opus eſt. 1. Integritate adverſus ſex latentes hoſtes, viz. Dona, Affectiones, Regationes, Iras, Præcipitationem, & moroſum cunctationem. 2. Fortitudine & Conſtantia contra terrorem malitiæ, & timorem periculi, qui duo hoſtes ſunt aperti acerrimique. *Videte Judices quid faciatis, non enim hominis exercetis judicium ſed Domini, & quodcunque judicaveritis, in vos redundabit. Deus eſt Judex juſtus, fortis, & patiens*, talem decet eſſe omnem Judicem. *Juſtum*, ſine reſpectu quod ſuum eſt cuique dando, ideoque Judicia ſic dicuntur quaſi Juris dicta; & Lex ſecundum quam judicium fit, eſt mens quædam nullo perturbata affectu, *Ariſt. polit. 3. Fortem*, contra malitiam & periculum; nam neque timida probitas, neque improba fortitudo reipub. eſt utilis. Denique *Patientem*, ut ſincere & ex ſolum pœna, ſed patientia acquiret nomen perſecutionis, & gloriam victoriæ. *Ariſtotle, lib. 2. Top.* Melius eſt judicare ſecund' leges & literas, quam ex propria ſcientia & ſententia. Ignorantia Judicis eſt plerumq; calamitas innocentis, *and thereof it proceedeth that the Kings of this Realm have had ſuch ſpecial Care of calling ſuch Men to judicial Places, as have Knowledge, and other the Incidents inſeparable abovemention'd. And becauſe theſe Judges are (if Order be obſerved) taken of ſuch as be Serjeants, eſpecially Care is always taken in calling Men of Learning, Integrity, and Living to that State and Degree; never can a Judge puniſh Extortion, that is corrupted himſelf, nor any Magiſtrate puniſh any Sin as he ought, that is known to be an Offender therein himſelf; therefore it is an Incident inſeparable to good Government, that the Magiſtrates to whom the Execution of Laws is committed, be principal Obſervers of the ſame themſelves. But herein hear what ſhall be ſaid, to the which nothing can be added*; Et nunc reges intelligite, erudimini qui judicatis terram, Servite Domino in timore, & exultate ei cum

cum tremore, apprehendite disciplinam, ne quando iraſcatur Dominus, & pereatis de via juſta. *Whoſoever will be compleat Judges*, Intelligite, apprehendite, erudimini, ſervite, exultate, *you muſt be apparelled with the rich Robes of Underſtanding and Learning, you muſt your ſelves embrace Diſcipline, you muſt obſerve the Laws your ſelves, with great Fear and Humility, which if you will do*, Servite Domino in timore; *you muſt be Chearful, and comfort yourſelves in doing of Juſtice, for you ſhall find many Croſſes and Dangers.* Et exultate, *but yet* cum tremore, *do all theſe Things leaſt ye enter into Wrath, and ſo ye periſh from the Way of Righteouſneſs; whereby it appeareth, that the greateſt Loſs a Judge or Magiſtrate can have, is to give himſelf over to Paſſion, and his own corrupt Will, and to loſe the Way of Righteouſneſs*, Et pereatis de via juſta. *To the whole Body of the Realm concerning this Point, I ſay, your Fault will be the greater, if having a Sovereign ſo religious, wiſe and learned, ſo great an Obſerver of Laws, ſo virtuous of his own Perſon, you apply not your ſelves to his Example and Precedent; for the Heathen* pura conſcientia juſtitiam adminiſtret, licet inde deſpicatui, opproprio, forte etiam ludibrio habitus ſit; nam non ſolum pœna, ſed patientia acquirit nomen perſecutionis, & gloriam victoriæ. *Ariſt. 2. Top: Melius inquit eſt judicare ſecundum Leges & literas, quam ex propria ſcientia & ſententia. Ignorantia Judicis eſt plerumque calamitas innocentis.* Atque hinc eſt quod Regibus noſtris illud imprimis curæ ſemper fuit, ut ad jus publice dicendum eos promoverent qui ſcientia aliiſque ſupradictis virtutibus præpollerent. Et quoniam Judices hii ordinarie quidem ex ſervientibus ad Legem eliguntur, cautum præcipue eſt, ut ad ſtatum & gradum ill' non niſi viri doctrina, integritate, opibus pares vocentur. Neq; enim poteſt Judex de pecuniis repetundis alium damnare qui eſt ipſe compilator: neque cuivis Magiſtratus crimen aliquod uti par eſt punire cujus ipſe reus eſſe dignoſcitur. Illud ergo in omni bene inſtituta repub. neceſſario requiritur, ut Magiſtratus quibus legum adminiſtratio committitur, eaſdem ipſi præ aliis obſervent, ad quam

rem

rem ſententiam illam (cui nihil addi poteſt) apponam: *Et nunc Reges intelligite, erudimini qui judicatis terram: Servite Domino in timore, & exultare ei cum tremore, apprehendite diſciplinam, ne quando iraſcatur dominus, & pereatis de via juſta.* Qui judices completi eſſe vultis intelligite, apprehendite, erudimini, ſervite, exultate, precioſis imprimis veſtibus intelligentiæ & doctrinæ indui ipſos vos oportet, diſciplinam apprehendere, leges obſerve, idque magno cum tremore ac humilitate; quod ut facere poſſitis, ſervite Domino in timore: Alacres ſitis oportet, & conſcientia juſtitiæ adminiſtratæ ſolari vos, ſiquidem multas invenietis tribulationes, multa pericula; ſed exultate, verum cum tremore: Hæc omnia facite, ne quando iraſcatur Dominus, & pereatis de via juſta. Unde patet quod graviſſima jactura quam Judex aut Magiſtratus poteſt facere, in eo eſt ut paſſioni ſeſe ac corruptæ ſuæ voluntati tradat, atque ita pereat de via juſta. Illud denique toti reipub. noſtræ corpori dico atque edico, quod graviore omnes culpa rei

Poet could ſay; Regis ad exemplum totus componitur Orbis. *But whilſt I was intending and going about this Edition, I by Commandment, attended upon his moſt excellent Majeſty for Direction about his Highneſs Affairs that concerned the Duty of my Place to proſecute; at what Time I well perceived what princely Care his Majeſty had taken for Execution and Expedition of Juſtice, and that upon Conſideration thereof he found two Impediments therein: One, that in the two eminent Courts of ordinary Juſtice, the King's Bench, and the Common Pleas, there were four Judges; and many Times in Caſes of great Difficulty, the Judges being equally divided in Opinion in either Court, the Matter depended long undecided: For preventing whereof his Majeſty in this Term of Saint* Hillary, *in the firſt Year of his moſt happy and proſperous Reign, added a Judge more to either Bench, Sir* David Williams, *Kt. Serjeant at Law, to the King's Bench; and Sir* Wm. Daniel, *Kt. Serjeant at Law to the Court of Common Pleas, his Majeſty ſaying, that* Numero Deus impare gaudet. *The ſecond Impediment was, that divers Doubts and*

Queſtions of Law remained undetermined, the ſame riſing partly upon long and ill penn'd Statutes lately made, partly by Reaſon of late, and new Deviſes and Inventions in Aſſurances, which the Eye of the Law in former Ages never beheld, and cannot yet incline to allow them, and partly by Conveyances and Wills drawn and deviſed by ſuch as have Scientiam ſciolorum quæ eſt mixta Ignorantia: *Which Queſtions and Doubts already grown, his Majeſty deſired might be reſolved and determined according to the true Senſe of the Laws of the Realm. And where there have been ſome Diverſity of Opinions between certain of the Courts of Juſtice, that the ſame might upon Conference and mature Conſideration be agreed and reſolved. And his Majeſty Underſtanding (as it ſeemeth) by Reaſon of my former Editions, that I have obſerved many Determinations and Judgments of queſtionable and doubtful Caſes, which upon great Study, Conſideration, Conference and Deliberation, have been reſolved and given by the Reverend Judges and Fathers of the Law, required me to proceed, and for the general Good and Quiet of the Subject to publiſh them, whoſe* tenebimur, ſiquidem Regem habentes adeo pium, prudentem, doctum, diligentem legum virtutumq; omnium cultorem; illius nos exemplo non accommodemus, quando poeta ethnicus dicere potuit? *Regis ad exemplum totus componitur Orbis.* Interea vero dum huic Editioni operem dabam, Regiam Majeſtatem ex mandato adii de celſitudinis ipſius negotiis quibuſdam ordinandis, quorum adminiſtratio munus meum ſpectabat; quo quidem tempore illud imprimis perſpexi, quam impenſe Magiſt. ipſius execution' atq; expeditionem juſtitiæ curaverat, quodq; re mature penſitata, duo ejus impedimenta inveniſſet: Unum quod in duabus eminentiſſimis juſtitiæ ordinariæ Curiis (Banco, viz. tam regio, quam Communi ut loquimur) quatuor tantum judices eſſent, unde ſæpius uſu venit, ut in cauſis perplexis & difficilioribus, æqualiter diviſis ac diſcrepantib' Judic' utraq; Curia ſentent', lis non deciſa diutius penderet: Cui mala ut occurreret, placuit Majeſt. ejus in hoc Term' S. *Hill'*, an' 1°. fœliciſſimi ipſi' ac florentiſſimi Regni, utrique Banco (ut loquimur) Judicem

cem quintum addere: Regio quidem *Dav. Williams* equidem, ſervientem, ad Legem, Communi vero *Gulielmum Daniel* equitem, ſervientem item ad Legem: Dicente inſuper Majeſt. ſua, quod *Numero Deus impare gaudet.* 2. Impedimentum fuit, quod multæ queſtiones dubiæ adhuc maneant non definitæ; quæ quidem ortæ ſunt, partim ex ſtatutis quibuſd' recentiorib' perplexis ac male ſcriptis; partim ex commentis atq; inventionibus novis in pactis firmandis & ſatiſdationibus: Quales neque vidit oculus juris apud ſæculum prius, neque etiam dum adduci poteſt ut approbet aut amplexetur: Partim deniq; ex Pactionibus & Teſtamentis ſcriptis factiſq; ab iis qui ſcientiam babent Sciolorum, quæ eſt mixta ignorantia. Quæ ſane queſtiones atq; controverſiæ jamdiu ortæ, ut ſecundum verum ſenſum Legum hujus Regni ſolvantur, Majeſt. ipſi' magnopere deſideravit; nec non ut diſcrepantes ſententiæ atque opiniones judiciariæ in diverſis foris ortæ, communi conſilio & matura deliberatione componantur atq; determinentur. Quin & certior factus Rex, ut videtur, quod in *Commandment being to me* ſuprema Lex, *hath both encouraged and impoſed a Neceſſity upon me to publiſh this 4th Edition: Which containeth nothing but his Majeſty's own, being ſweet and fruitful Flowers of his Crown; for the Laws of* England *are indeed ſo called,* Jura Coronæ, *or* Jura Regia: *Becauſe as* Bracton, lib. 1. cap. 8. *ſaith*: Ipſe autem Rex, non debet eſſe ſub homine, ſed ſub Deo & Lege, quia Lex facit Regem: Attribuat igitur Rex legi, qd' Lex attribuit ei, videl' domination' & imperium: Non eſt enim Rex ubi dominatur voluntas, & non Lex: *That is, the King is under no Man, but only God and the Law, for the Law makes the King: Therefore let the King attribute that to the Law, which from the Law he hath received, to Wit, Power and Dominion: For where Will, and not Law doth ſway, there is no King. And in the* Regiſter *the Words of the Writ of* Ad Jura Regia, *be,* Rex, &c. ſalutem: Ad jura noſt' Regia ne depereant, ſeu per aliquor' uſurpationes indebit' aliqualiter ſubtrahantur, quatenus juſte poterimus manutenenda, ſubtractaq; & occupata, ſi quæ fuerint ad ſtatum debitum

revocanda, necnon ad impugnatores eorundem jurium noſtror' refrænandos, & prout convenit juxta eor' demerita puniendos, eo ſtudioſius nos decet operam adhibere, & ſolicitius extendere manum noſtram, quo ad hoc vinculo Juramenti teneri dignoſcimur & aſtringi, pluresque conſpicimus indies jura illa pro viribus impugnare, &c. 1. *That our kingly Laws and Rights periſh not, neither be at all withdrawn by undue Uſurpation of any, which ſo far forth as juſtly we may, are to be maintained, and if any ſhall be withdrawn or diverted, to be again reſtored to their due State; as alſo for the bridling of the Impugnors of thoſe our ſaid Laws, and the puniſhing of them as is mete according to their Deſerts, we ought the more diligently to provide, and the more carefully to extend our Hand and Authority; for that we are known to be thereto tied and bound by the Bond of an Oath, and for that we daily ſee very many to their Powers to impugne thoſe ſaid Laws. And again,* Rex, &c. ſalutem. Ad conſervatione Jurium Coronæ noſtræ, eo nos decet ſtudioſius operam adhibere, quoad hoc aſtringimur vinculo Sacra-

ſuperioribus meis elucubrationibus multas cauſarum dubiarum atq; perplexarum deciſiones ac concluſion' retulerim, quæ magno ſane ſtudio, conſilio, deliberatione per reverendos Judices at patres Juris datæ fuerint, progredi me juſſit, eaſq; ad publicum bonum atque tranquillitatem Subditor' divulgare: Cujus ſane mandatum (quod ſupremæ Legis loco habeo) ut Quartum hunc librum ederem & me movit, & neceſſitatem quandam attulit. In quo quicquid continetur ipſius totum ac proprium eſt, viz. ſuaviſſimi lectiſſimique coronæ flores: Nam & revera ſunt & appellantur Leges Angliæ, Jura Coronæ aut Jura Regia, quia ut inquit, *Bracton lib. 1. cap. 8. Ipſe autem Rex noſtrum debet eſſe ſub homine, ſed ſub Deo & Lege, quia Lex facit Regem: Attribuat igitur Rex legi, quod Lex attribuit ei, viz.* dominationem & imperium. *Non eſt enim rex ubi dominatur voluntas & non Lex.* Et in *Regiſtro* verba reſcripti (cui titulus ad jura regia) ſunt: *Rex, &c. ſalutem: Ad jura noſtra Regia, ne depereant, ſeu per aliquorum uſurpationes indebitas aliqualiter ſubtrahantur, quatenus*

tenus juſte poterimus manutenenda, ſubtractaque & occupata ſi que fuerint ad ſtatum debitum revocanda, nec non ad impugnatores eorundem jurium noſtrorum refrænandos, & prout convenit juxta eorum demerita puniendos, eo ſtudioſius nos decet operam adhibere, & ſolicitius extendere manum noſtram, quo ad hoc vinculo juramenti teneri dignoſcimur & aſtringi, pluresque conſpicim' indies jura illa pro viribus impugnare, &c. Et rurſus, *Rex, &c. ſalutem: Ad conſervationem jurium Coronæ noſtræ, eo nos decet ſtudioſius operam adhibere, quo ad hoc aſtringimur vinculo ſacramenti, & alios conſpicimus ad ipſorum jurium enervationem amplius anhelare, &c.* denique concludit, *Et ſciatis quod ſi ſecus facere præſumpſeritis, ad vos tanquam violatores regii juris noſtri non immerito gravitur capiemus.* Ex quibus antiquis reſcriptis conſtat. 1. Quam capitale flagitium ſemper habitum eſt, leges haſce quæ Imperiales ſunt & Coronæ jus reſpiciunt, impugnare aut calumniari. 2. Quod in omnibus fere ſæculis Leges iſtæ multos habuerunt qui eis obſiſterent intercederentq; violatores. Denique quam graviter puniendi ſunt, menti, & alios conſpicimus ad ipſorum jurium enervatione amplius anhelare, &c. *concluding thus,* Et ſciatis quod ſi ſecus fafere preſumpſeritis, ad vos tanquam violatores Regii Juris noſtri non immerito graviter capiemus, *which is, we ought the more earneſtly to provide for the Conſervation of the Laws and Rights of our Crown, as being thereunto tied by the Bond of an Oath; and for that we ſee others the more greedily to gape after the weakning and ſubverting of thoſe ſaid Laws, &c. concluding thus; and know ye, that if ye ſhall preſume otherwiſe to do, we ſhall with Grief not undeſervedly hold you as Violators of our kingly Rights and Laws. By which antient Writs appeareth.* 1. *What an exorbitant Offence it hath been ever deemed to impugn or caluminate theſe Laws, being the Imperial Laws of the Crown.* 2. *That in all Ages, theſe Laws have had many that ſought to impugn and violate them: And laſtly how grievouſly ſuch as ſo preſumed to offend, ſhould be puniſhed;* Nam & fruſtra feruntur Leges niſi ſevere puniant'contemptores; *and it is truly ſaid, that* Non debet Princeps ferre

Legum

Legum ſuarum ludibrium: *And woful Experience hath often taught, (which I my ſelf have ſometimes obſerv'd) that many of thoſe Men that have ſtrain'd their Wits, and ſtretch'd their Tongues to ſcandalize or calumniate theſe Laws, had either practiſed or plotted ſome heinous Crime, and therefore hated, becauſe they feared the juſt Sentence and heavy Stroke. The reading of the ſeveral Reports and Records of theſe Laws, doth not only yield immenſe Profit, as elſewhere I have noted, but doth contain the faithful and true Hiſtories of all ſucceſſive Times, as well concerning the Puniſhment of the Evil for their heinous, horrible, and exorbitant Offences, as concerning the Reward and Advancement of Men of great Merit and Virtue for their high and honourable Service in the Commonwealth: And (which is above all) they are Memorials to all Poſterity of the valorous Piety, Virtues and Victories of the Kings and Princes of this Realm. The firſt appeareth moſt evidently amongſt other Things by the Creations and Erections of Men of great Deſert to eminent Places, and Degrees of Nobility and Honour, of ſuch Eſtates, and in ſuch Manner* qui peccare in hoc genere præſumpſerint: Nam & fruſtra fuerunt Leges niſi ſevere puniant' contempt', & veriſſime dicitur; *Quod non debet Princeps ferre Leg' ſuar' ludibr'*. Quin & ſepius docuit miſera ac luctuoſa experientia (qd' aliquando ipſe etiam obſervavi) multos qui in id ingenii nervos omnes intenderunt, linguaſq; exacuer', ut Legib' hiiſte ſcandal' aut calumniam imponerent, nefarium aliqd' crimen aut commiſiſſe, aut fuiſſe machinatos; ideoqne leges odiſſe, quia juſtam cenſuram & grav' plag' metuer'. Lectio iſtar' Legum ut referuntur ac mandantur literis, non ſolum utilitatem ſummam affert (ſicut alias attigi) verum fidelem etiam certamq; hiſtoriam omnium ſuperior' tempor' complectitur, tam reſpectu præmii atq; provection' bonor' optimeq; meritor' viror' propt' egregiam atq; honorabilem operam reipub. datam; quam pœnæ malorum propt' nefaria atrocia ac immania flagitia: Deniq; (quod caput eſt) libri iſti memorales ſunt ac monumenta ad omnem poſteritatem pietatis, virtutum, fortitudinis, atq; victoriarum Reg' ac Principum hujus Imperii: Atq;

pri-

primum quidem clariſſime patet cum alias, tam præcipue ex eo, qd' viri optime meriti ad excelſa atque illuſtria loca, nec non ad nobilitatis & honoris gradus evecti ſunt, tantum ordine modo ac forma a Legib' hujus regni præſcript' & conſtitutis. 2. Etiam conſtat ex formulis convincendi atque proſequendi capitalium aliorumque criminum reos: Tercium, ex multis præclariſſimis ſcriptis ac monumentis fideliſſimis illis ſane & perpetuis teſtibus digniſque adeo que divulgentur omnibuſque innoteſcant: Ad quam rem, (ne extra terminos ac fines, ſuos egrediatur præfatio) unum in hoc tempore exemplum ejus generis charitæ ſive donationis accipite, factum quidem ab *Edgaro* Rege Angliæ, inde vero ſcripto traditum, ac vel in hunc uſq; diem fideliſſime aſſervatum.

" *Altitonantis Dei largi-*
" *flua clementia, qui eſt*
" *Rex regnum, & Domi-*
" *nus Dominantium, ego*
" Edgarus *Anglor' Baſileus,*
" *omniumq; regum Inſular'*
" *Oceani quæ Britanniam*
" *circumjacent, cunctarum-*
" *que Nationum quæ infra*
" *eam includuntur Impera-*

and Form, as are warranted by the Laws of the Realm. The ſecond by the Records of the Attainders in judicial Proceedings againſt Capital and other Offenders. And the third by many excellent Records, the moſt faithful and perpetual Witneſſes, and worthy to be publiſhed, and made known to all; and therefore at this Time, leſt my Preface ſhould exceed his proper Model of that Sort; take one Example of a Charter made by Edgar *King of* England, *and recorded, and thereby faithfully continued to this Day.*

" Altitonantis Dei lar-
" giflua clementia, qui
" eſt Rex Reg', & Domi-
" nus Dominantium: E-
" go Edgarus Anglor' Ba-
" ſileus, omniumq; regum,
" Inſularum Oceani quæ
" Britan' circumjacent,
" cunctarumq; Nationum
" quæ infra eam includun-
" tur

" tur Imperator & Dominus: Gratias ago ipſi " Deo omnipotenti Regi " meo, qui meum imperium " ſic ampliavit & " exaltavit ſuper Regnum " patrum meor'. Qui licet " Monarchiam totius Angliæ adepti " ſunt a tempore Athelſtani, qui primus Reg' Angl' omnes " Nationes quæ Britanniam " incolunt ſibi armis ſubegit, nullus tamen eor' " ultra fines Imperium " ſuam dilatare aggreſſus " eſt, mihi tamen conceſſit propitia divinitas " cum Anglor' imperio, " omnia regna Inſularum " Oceani cum ſuis ferociſſimis Regibus uſq; Norvegiam, maximamque " partem Hiberniæ, cum " ſua nobiliſſima Civitate " de Dublina, Anglorum " regno ſubjugare; quos " etiam omnes meis imperiis, colla ſubdare Dei " favente gratia coegit. " Quapropter & ego Chriſti gloriam & laudem in " regno meo exaltare, & " ejus ſervitium amplificare devotus diſpoſui: " Et per meos fideles fautores Dunſtanum, viz. " Archiepiſc', Ayelyolan', " ac Oſwaldum Archiepiſcopus, quos mihi patres ſpirituales & conſiliatores elegi, magna ex

" *tor & Dom': Gratias ago* " *ipſi Deo omnipotenti Regi* " *meo, qui meum imperium* " *ſic ampliavit & exaltavit* " *ſuper Regn' patrum meo-* " *rum. Qui licet Monarchi-* " *am totius Angliæ adepti* " *ſunt, a tempore* Athelſta- " *ni qui primus Regum An-* " *gloram omnes Nationes* " *quæ Britanniam incolunt* " *ſibi armis ſubegit, nullus* " *tamen eorum ultra fines* " *Imperium ſuum dilitare* " *agreſſus eſt; mihi tamen* " *conceſſit propitia divinitas* " *cum Anglorum imperio,* " *omnia regna Inſularum* " *Oceani cum ſuis ferociſſi-* " *mis Regibus uſque Norve-* " *giam, maximamque Par-* " *tem Hiberniæ, cum ſua* " *nobiliſſima civit' de Dub-* " *lina, Anglorum regni ſub-* " *jugare: Quos etiam om-* " *nes meis imperiis colla* " *ſubdare Dei favente gra-* " *tia coegi. Quapropter &* " *ego Chriſti gloriam & lau-* " *dem in Regno meo exal-* " *tare, & ejus ſervitium* " *amplificare devotus diſpo-* " *ſui: Et per meos fideles* " *fautores* Dunſtanum: " *viz. Archiepiſcopum,* Aye- " lyolanum *ac* Oſwaldum " *Epiſcopus, quos mihi pa-* " *tres Spirituales & Con-* " *ſiliatores elegi, magna ex* " *parte diſpoſui, &c. Facta* " *ſunt hæc Anno Domini* " 964. *Indictione* 8 *Regni*

" *vero*

Vide Præf. ad Lib. 8.

" *vero* Edgari *Anglorum*
" *Regis* 6. *in regia urbe*
" *quæ ab incolis* Ocleyeca-
" *ſtriæ nominatur, in Na-*
" *tale Domini feſtivitate,*
" *Sanctorum Innocentum fe-*
" *ria* 4, *&c.* ✠ *Ego* Ed-
" gar *Baſilius Anglorum*
" *& Imperator Reg' gen-*
" *tium cum conſenſu &*
" *Principium & Archiep' meo-*
" *rum hanc meam munifi-*
" *centiam ſigno crucis corro-*
" *boro* ✠ *Ego* Alfriie *Re-*
" *gina conſenſi & ſigno*
" *crucis confirmavi.* ✠ *Ego*
" Dunſtan' *Archiepiſcopus*
" *Dorobor. Eccleſiæ Chriſti*
" *conſenſi & ſubſcripſi.* ✠ *E-*
" *go* Oſticel *Archiep' Ebora-*
" *cenſis Eccl' conſenſi & ſub-*
" *ſcripſi.* ✠ *Ego* Alferic
" *Dux. Ego* Bruthnod
" *Dux. Ego* Aridgari *Dux.*
✠ Ubi hæc obſervanda: 1. Ejus in Deum pietas ac devotio, quæ beatitudinis omnis fons eſt & ſummum bonum. 2. Imperii ejus amplitudo & Hibern' prima ſubjugatio, diu ante tempora Regis Hen. 2.

" parte diſpoſui, &c. Fa-
" cta ſunt hæc anno Dom'
" 964. Indictione 8. Reg-
" ni vero Edgari Anglor'
" Reg' 6. in regia urbe quæ
" ab incolis Ocleayecca-
" ſtriæ nominatur, in na-
" tale Dom' feſtiviate,
" ſanctorum Innocentium
" feria 4, &c. ✠ Ego Ed-
" gar Baſilius Anglor' &
" Imperator Regum gen-
" tium, cum conſenſu &
" Principium & Archiepo-
" rum meor' hanc meam
" munificentiam ſig' cru-
" cis corroboro. ✠ Ego
" Alfriie Regina conſenſi
" & ſigni crucis confir-
" mavi. ✠ Ego Dunſtan'
" Archiepiſcop' Dorobor'
" Eccleſiæ Chriſti conſenſi
" & ſubſcripſi. ✠ Ego O-
" ſticel Archiepiſ. Ebo-
" racenſis Eccl' conſenſi
" & ſubſcripſi. ✠. Ego
" Alferic Dux. Ego Bruth-
" nod Dux. Ego Aridgari
" Dux. ✠ *Whereby is to be obſerved, firſt his Piety and Devotion towards God the Fountain of all Happineſs, the true* Summum bonum. *Secondly, the Largeneſs of his Empire, and the firſt Conqueſt of* Ireland, *long before the Reign of K.* Hen. *the Second.*

Ut ergo concludam, illud a docto lectore peto, vel ut corrigat ſicubi erratum invenirit, vel ſal-

To conclude, of the learned Reader my deſire is, that he would either amend that which herein he ſhall find amiſs,

amiſs, or at leaſt that he will not find Fault with any Part, until he hath ſeriouſly read over the Whole, and then, it may be, he will reprehend the Leſs: And altho' herein I have taken all the Labour; yet I unfainedly wiſh to all the Readers, all, or at the leaſt, equal Profit.

tem ne partem aliquam reprehenda, donec totum ſtudioſe perlegerit, unde forte fiet ut pauciora criminetur: Et utcunq; labor iſte totus ſit meus; Lectoribus tamen ſingulis, idque ex animo omne, aut ſaltem parem mecum fructum exopto.

Plura quidem feci, quam quæ comprendere dictis
In promptu mihi ſit; Rerum tamen ordine ducar.

Plura quidem feci, quam quæ comprendere dictis
In promptu mihi ſit; Rerum tamen ordine ducar.

Interea Lector valeas, & memineris quod quicunque genuinum ſenſum ac vim alicujus legis commento aut techna illuſerit, legis violator habendus eſt.

Interea Lector valeas, & memineris quod quicunque genuinum ſenſum ac vim alicujus legis commento aut techna illuſerit, legis violator habendus eſt.

Bene Vale.

VERNON's *Caſe.*

Mich. 14 & 15 Eliz.

IN a Writ of *Dower* brought by *Mary Vernon* againſt *John Vernon*, Eſq; of the Manor of *Sudbury* in the County of *Derby:* The Tenant pleaded, that her Huſband was alſo ſeiſed of certain Lands in the ſame County in his Demeſn as of Fee, and by Deed indented thereof enfeoff'd Sir *Thomas Gifford*, Knight, and others, and their Heirs to the Uſe of himſelf for the Term of his Life, without Impeachment of Waſte, and after his Deceaſe, to the Uſe of the Demandant then his Wife, for the Term of her Life; and after her Deceaſe to the Uſe of the right Heirs of the Huſband; and averr'd, that the ſaid Eſtate for Life ſo limited to the ſaid Demandant, was for her Jointure, and in full Satisfaction of her Dower, and that after the Death of her Huſband, the Demandant enter'd into the ſaid Land ſo limited to her for her Jointure, and agreed to it: To which the Demandant replied, and confeſſed the ſaid Feoffment, and the Limitation of the Uſes, *ſc.* to the Uſe of the Huſband for his Life, without Impeachment of Waſte, and afterwards to the Uſe of the Demandant, for her Life; but further ſaid, that the Limitation to the Wife for Life, was upon Condition that ſhe ſhould perform the laſt Will of her Huſband; and ſhewed all the Will in certain, in which divers Things were to be perform'd by the Demandant, and demanded Judgment if the Tenant ſhould be admitted, and receiv'd to aver that this Eſtate ſo limited to the Wife upon the ſaid Condition, was for the Jointure of the Wife, and in Satisfaction of her Dower; upon which Matter the Tenant demurr'd in Law: And in this Caſe five Points were reſolved.

Dyer 317. pl. 7. N. Bendl. 210. pl. 247.

1. That by the Rule of the Common Law, a Right or Title which any one has to any Lands or Tenem. of any Eſtate of Inherit. or Freeho. can't be barred by Acceptan. of any Mann. of

(a) Co. Lit. 36. b. 9 Co. 97. b. 1 Rol. Rep. 297.

1ſt Point.

Doct. pla. 17. 2 Brownl. 132. Dyer 91. pl. 12.

(a) Doct. pla. 17. *(a)* collateral Satisfaction or Recompence: As if *A.* diſſeiſes *B.* Tenant for Life, or in Fee, of the Manor of *Dale*, and afterwards gives the Manor of *Sale* to *B.* and his Heirs, in full Satisfaction of all his Rights and Actions which he has in or for the Manor of *Dale*, which *B.* accepts, yet *B.* may enter into the Manor of *Dale*, or recover it in any real Action: For a Right or Title of *(b)* Freehold or Inheritance can't be barr'd by any collateral Satisfaction, but by Releaſe or Confirmation, or an Act which *tantamounts*, and therefore it is commonly ſaid in our Books, that *(c)* Accord with Satisfaction is a good Plea in Perſonal Actions, where Damages are only to be recovered, and not in real Actions: *Vide* 13 *H.* 7. 13, 20, *&c.* And that was the Reaſon that no collateral Satisfaction or Recompence made to the Wife in Satisfaction of her Dower, was any Bar of her Dower by the Common Law: But Dower *ad oſtium Eccleſiæ*, or *ex aſſenſu patris* concluded her of her Dower, *(d)* if ſhe enter'd into the Land ſo aſſigned, after the Death of her Huſband; for the Law allows them, being made in ſuch Form as the Law requires, to be Dowers in Law. But if a Man in Conſideration of a Marriage after to be had with *A.* makes an Eſtate of certain Lands to her for her Life, in full Satisfaction of all the Dower which after Marriage may accrue to her in any of his Lands, and after they intermarry, that was no *(e)* Bar of her Dower at the Common Law for two Reaſons; one, becauſe ſhe had no Title of Dower at the Time of the Acceptance of the Satisfaction, but it accru'd after: Secondly, becauſe no *(f)* collateral Satisfaction can bar any Right or Title of any Inheritance or Freehold, as has been ſaid, and thereby the Doubt in 29 *E.* 3. 3. is well reſolv'd. So if the Huſband purchaſes or cauſes an Eſtate to be made to him and his Wife for Life, or in Tail, in full Satisfaction of her Dower, and dies, that was no Bar of her Dower at the Common Law, *cauſa qua ſupra:* So if after the Death of the Huſband the Heir makes an Eſtate to the Wife for Life of any Land *(g)* (whereof ſhe is not dowable) in full Satisfaction of her Dower, that is no Bar of her Dower: *Vide* the Caſe now in the Reports of the Lord *Dyer*, *(h)* 1 *Mar.* 91. *acc. & vide (i)* 31 *E.* 3. *Scire facias* 99. Before the making of the Statute of 27 *H.* 8. *cap.* 10. the greateſt Part of the Land in *England* was convey'd to ſundry Perſons to Uſes, and foraſmuch as a Wife was not dowable of *(k)* Uſes, her Father or Friends upon her Marriage procur'd the Huſband to take an Eſtate from his Feoffees, or others ſeiſed to his Uſe, to him and to his Wife before or after Marriage, for their Lives, or in Tail, for a competent Proviſion for the Wife after the Huſband's Death: Then comes the Statute of 27 *Hen.* 8. which transfers the Poſſeſſion and Eſtate of the Lands to

(b) Co. Lit. 36. b. 9 Co. 79. b. 1 Rol. Rep. 297. 2 Brown. 232. Dy. 91. pl 12.

(c) 6 Co. 43. b. 44. a. 13 H. 7. 13, 20. Cro. El. 357. Cro. Jac. 100.

(d) Co. Lit. 36. a. b. Lit. Sect. 43.

(e) Co. Lit. 36. b.

(f) Co. Lit. 36. b. ſupra.

(g) Co. Lit. 34. b.

(h) 1 Mar. Dyer 91. pl. 12, 13. 31 E. 3. Sci. fac.

(i) Co. Lit. 36. b. Perk. Sect. 410. Dyer 91. pl. 13.

(k) Dyer 266. pl. 7.

to the Uſe, by which the Huſbands were ſeiſed accordingly; and by Conſequence if further Proviſion had not been made, the Wives would have as well their Dowers as their Jointures for the Reaſons aforeſaid; and for this Reaſon the Branches concerning Jointures were added to the ſaid Statute of 27 *H.* 8. And therefore it was reſolv'd, that if this Eſtate in the Caſe at Bar limited to the Wife, was not within the ſaid Act of 27 *H.* 8. that by the Common Law it was no Bar of the Demandant's Dower, but that ſhe ſhould have both.

Reaſon why the Clauſe of Jointures was added to the Stat. 27 H. 8. c. 10.

Secondly, it was reſolv'd, That if a Man makes a Feoffment to the Uſe of himſelf for Life, (*a*) and afterwards to the Uſe of his Wife for her Life, for the Jointure of his Wife, that ſuch Eſtate in Remainder is within the Intent of the ſaid Act of 27 *H.* 8. For altho' the Statute expreſſes particularly theſe five Forms, 1. To the Huſband and Wife, and to the Heirs of the Huſband; 2. To the Huſband and Wife, and to the Heirs of their two Bodies; 3. To the Huſband and Wife, and to the Heirs of the Body of one of them; 4. To the Huſband and his Wife for their Lives; 5. To the Huſband and Wife for the Life of the Wife; and yet many other Eſtates not there expreſſed are within this Act, for the ſaid particular Forms are put but for (*b*) Examples, and not to exclude any other Eſtate, which is to ſuch Effect, and agrees with the Intent of the Makers of the Act; and altho' it was objected, that all the Examples expreſs'd in the Act are of a joint Eſtate made to the Huſband and Wife, and none of them to the Wife only, nor by Way of Remainder; and altho' by a Proviſo in the ſame Act, it is provided, *That if any Wife ſhall have any Manors, Lands, &c. unto her aſſur'd after Marriage, for Term of her Life, or otherwiſe, in Jointure, &c.* ſo as the Letter of the Act imports a joint Eſtate, and that this Word *Junctura* implies a joint Eſtate, and that the Dowers of Women are much favour'd in Law; yet it was reſolv'd, that all is of one Effect as to the Wife, to limit an Eſtate to the Huſband and Wife for their Lives, (*c*) and to the Huſband for his Life, the Remainder to the Wife for her Life; for the one Eſtate is as beneficial to the Wife as the other; *vide* after the Caſe of (*d*) *Aſhton* as to this Point. But it was reſolv'd, that the Eſtate which by Force of this Act ſhall be in lieu and Bar of her Dower, ought by the Limitation thereof to take Effect (*e*) immediately after the Huſband's Death, for that plainly appears by all the Examples expreſſed in the ſaid Act, *ſc.* that the Eſtates of the Wives ſhall take Effect immediately after the Death of their Huſbands; and therefore (*f*) no other Eſta. not expreſ. in the Act, ſhall be taken by the Equity of the Act, unleſs it has the ſame Beginn. for the Benef. of the Wives,

2d Point.

(*a*) Dyer 340. pl. 50.

(*b*) Lit. Sect. 21. Co. Lit. 24. a. Cro. Car. 533. 2 Inſt 311, 334. Godb. 78, 79. Yelv. 176.

(*c*) Dyer 340. pl. 50.

(*d*) Poſtea 2. b.

(*e*) Co. Lit. 36. b.

(*f*) Hob. 40.

as the Examples purport: And therefore if the Huſband makes a Feoffment in Fee to the Uſe of himſelf for Life, (*a*) and afterwards to the Uſe of *B.* for his Life, and afterwards to the Uſe of his Wife for Life, for her Jointure, it is not within the Act, altho' *B.* dies, living the Huſband; ſo if the Huſband makes a Feoffment in Fee to the Uſe of *A.* for his Life (*b*) and afterw. to the Uſe of his Wife for her Life, for her Jointure, it is not within the Act, altho' *A.* dies, living the Huſb. For in theſe, and other like Caſes, foraſmuch as at the Time of the Limitation of the Eſtates they were out of the Act, becauſe it was not certain that the Eſtate of the Wife would take Effect immediately by the Death of the Huſb. as it ought by the Act, no ſubſequent Event can make them within the Act. For (*c*) *quod ab initio non valet, in tractu temporis non convaleſcet; & (d) quæ malo ſunt inchoata principio, vix eſt ut bono peragantur exitu:* And therefore in all the ſaid and the like Caſes, altho' the Wife attains to them, and enters and takes the Profits, yet ſhe ſhall have Dower of the Reſidue. For if the ſaid Act doth not bar her, (*e*) the Common Law, as has been ſaid before, will not conclude her in ſuch Caſe of her Dower. And the Lord *Dyer* ſaid, that it was adjudged in Q. *Mary*'s Time, that where the Duke of *Somerſet* purchaſed Lands to him and to the Dutcheſs his Wife, and to the Heirs Males of their two Bodies, that altho' it was not any of the Eſtates put for Example in the ſaid Act, yet it was adjudg'd, that it was within the Intent of it, which Caſe you may ſee in the Ld. *Dyer*'s *Rep.* 1 *Ma.* 96. (*f*) Alſo the Ld. *Dyer* ſaid that it was reſolved in the Time of Q. *Eliz.* that where one *Aſhton*, in Performance of Covenants of a Marriage to be had between his Son and one *A.* made a Feoffm. to the Uſe of *A.* for her Life, for her Jointure, and afterwards they intermarried, and the Huſband died, it was a Jointure within the Intent of the Act, and yet all the five Examples are of Eſtates made to the Huſband and Wife: But in the ſaid Caſe of *Aſhton*, the ſaid Eſtate was made before (*g*) Marriage, ſo that there was not any Huſb. or Wife at the Time of the making of the Eſtate; alſo the Eſtate was only to the Woman, where all the Examples are of a joint Eſtate, but all is of one Effect, which Caſe you may ſee *M.* 6 *&* 7 *Eliz. Dyer* 228.

(1) Winch. 33. Hutt. 51. Hutt. Argument 49. Cro. Jac. 489. Cawly 213, 214. Co. Lit. 36. b. Moor 903. 1 Sid. 3, 4.
(*b*) Hob. 151. Winch 33. Hutt. 51.
(*c*) Hutt. 51. Cawly 214. 2 Co. 55 b. 4 Co. 90. a. 8 Co. 135. b. 10 Co. 62. a. Cro. El. 585. Co. Lit. 35. a. Dav. 32. a. 2 Bulſt. 304, 305. 3 Bulſt. 192.
(*d*) 3 Bulſt. 43, 192. 10 Co. 62. a. 11 Co. 78. a.
(*e*) Co. Lit. 36. b.
(*f*) Dyer 96. pl. 42. 97. pl. 48, 49. The Dutcheſs of Somerſet's Caſe. 1 Mariæ, Dyer 96.
(*g*) Antea 1. a. Moor 28, 29. Aſhton's Caſe, Mich. 6 & 7 Eliz. Dy. 228. pl. 46, 47.

3d Point.

Thirdly, it was reſolv'd, that altho' the Eſtate limited to the Wife was upon Condition, and altho' Dower (in lieu of which the Jointure comes) at the Common Law was an abſolute Eſtate for Life, yet foraſmuch as an Eſtate for Life upon Condition, is an Eſtate for Life, it was within the Words and the Intent of the Act, if the Wife after the Death of her Huſband accepts it; for it was agreed that a Jointure is a (*i*) competent Livelihood of Freehold for the Wife, to take Effect immediately after the Death of the Huſband, for the Life of the Wife, if ſhe herſelf is not the Cauſe of the Determination or Forfeiture of it; and therefore if the Huſband makes

(*b*) 1 Leon. 311. Dyer 317. pl. 7. Cr. El. 451, 452. Poſtea 3. a. Moor 31.
(*i*) Co. Lit. 36. b. Poſtea 3. a.

makes a Feoffment in Fee to the Uſe of his Wife, (*a*) for another's Life, for her Jointure, it is not within the Act, for the Eſtate is not for the Wife's Life, and it may determine without her Act or Default, during her Life, and thereby ſhe will be deſtitute of a Livelihood: But if a Man makes a Feoffment in Fee to the Uſe of himſelf for his Life, and after to the Uſe of his Wife (*b*) *durante viduitate ſua* for her Jointure, that is an Eſtate for her Life, and it can't determine without her own Act, and therefore it is a Jointure within the ſaid Act. The ſame Law of an Eſtate made to the Wife for her Life, upon (*c*) Condition, for if ſhe does not break the Condition, it is an Eſtate to her for her Life. And in the Caſe at the Bar, if the Condition binds her to any unreaſonable Thing, ſhe might have wav'd it, but when ſhe after the Death of her Huſband, enters and accepts the conditional Eſtate for her Jointure, ſhe is barr'd of her Dower.

(*a*) Hob. 40. 153.

(*b*) Dy. 317. pl. 7. Moor 31. Poſtea 30. a.

(*c*) Antea 2. b. 1 Leon. 311. Dyer 317. pl. 7. Cro. El. 451, 452. Moor 31.

Fourthly, it was reſolved, that if a Jointure is made to a Woman (*d*) before Marriage, after the Huſband's Death, the Wife can't wave it, and take her Dower, as ſhe may of a Jointure made to her during the Marriage, and that by Force of the ſaid Proviſo, the Effect of which is, that if any Woman hath any Manors, Lands, Tenements or Hereditaments aſſured to her (*e*) after Marriage for Term of her Life, or otherwiſe in Jointure, *&c.* that ſhe after the Death of her Huſband, ſhall have Liberty to refuſe it; by which they reſolved, that if the Jointure was made before Marriage, that the Intent of the Makers of the Act was, that ſhe ſhould not refuſe, but ſhould take ſuch Jointure as was made to her. *Vide the Caſe of* Aſhton *put before as to this Purpoſe.* And it was ſaid, if Lands are conveyed to a Woman before (*f*) Marriage, for Part of her Jointure, and after Marriage more Land is conveyed to her for her full Jointure, and in Satisfaction of her whole Dower, and afterward the Huſband dies, in that Caſe if the Wife waves the Land convey'd to her Uſe after her Marriage, ſhe ſhall have the Land convey'd to her before the Marriage, and her Dower alſo in the Reſidue; for Land convey'd to a Woman (*g*) in Part of her Jointure, or in Satisfaction of Part of her Dower, is no Bar (for the Uncertainty) of any Part of her Dower. As if the Debtor gives the Creditor an Horſe, or any other Thing in Satisfaction (*h*) of Part of his Debt, it ſhall be a Bar for no Part for the Uncertainty. Alſo the Words of the Act are, For the Jointure of Wives, and not for Part of their Jointures.

4th Point.

(*d*) Co. Lit. 36. b. Plowd. 399. b.

(*e*) Co. Lit. 36. b. 3 Co. 27. a. 28. a. b. Plowd. 396. b. Dyer 61. pl. 31. B. N. C. 421. Goldſb. 84, 85.

(*f*) Co. Lit. 36. b. Cawly 214.

(*g*) Co. Lit. 36. b.

(*h*) Doct. pl. 25.

Fifthly, it was reſolved, that altho' in the Caſe at Bar, the Eſtate of the Wife was upon expreſs Condition to perform his Will, which imports a Conſideration of the making of the Eſtate, yet it may be (*i*) averr'd to be for the Jointure of his Wife, for the one Conſideration ſtands well with the other; and altho' it is not expreſs'd in the Deed, yet it may be averr'd, as the L. *Dyer* ſaid it was adjudg'd in the like

5th Point.

(*i*) Owen 33. 9 Co. 26. a. b. 2 And. 46, 47.

Case between *Villers* (*a*) and *Beaumont*, in the Time of Q. *Mary*, which you may now see in his *Rep.* 4 & 5 *P. & M.* 146. And in the Case at Bar the Case is stronger, because the Averment is given by the said Act of 27 *H.* 8. by the Words in the Act, For the Jointure of the Wife; and in this Case the Lord *Dyer* said, that the Case of 6 *E.* 6. (*b*) *Br. Dower* 69. was misreported; for true it is, that it was resolv'd, that an Estate in Fee-simple conveyed to the Wife, was no Jointure within the Statute, but that is to be intended within the Statute of (*c*) 11 *H.* 7. 20. which restrains the Alienation of Women, which Act neither in the Letter nor in the Meaning can be intended when a Woman has an Estate in Fee-simple; for to restrain (*d*) such Estate that it shall not be aliened, is repugnant and against the Rule of the Common Law, and utterly out of the Letter and Intention of the Act: But he said, that an Estate in Fee-simple conveyed to a Woman for her Jointure, and in Satisfaction of her Dower, is a Jointure within the Equity of the said Act of 27 *H.* 8. for that is a (*e*) competent Livelihood to the Wife of an Estate of Freehold, to take Effect immediately after the Death of the Husband for all the Wife's Life and more: And the L. *Dyer* said, it was so resolved in Sir *Morris Dennis*'s Case, which Case is now reported 8 *Eliz. Dyer* (*f*) 248. And he said, that the Reason reported by *Brook*, that a Fee-simple is no Jointure within the said Act of 27 *H.* 8. is because such Jointure is not mentioned in the Statute; but that is no Reason in Law for 3 Reasons. 1. Because the principal Case at Bar, and divers others Cases put before, were out of the Words of the Act, and yet were within the Equity and Intent of the Act. 2. It agrees with the Description of a Jointure agreed and resolved before. 3. He said, this Estate in Fee-simple was within the express Letter of the Act, for the Words of the said Proviso are; *for Term of Life, or otherwise in Jointure*, which Word (*otherwise*) extends to all other Estates conveyed to the Wife not mentioned before in the Act, which are as, or more, beneficial to the Wife than the Estates beforementioned, for all other Estates which are as beneficial to the Wife, or more, as the Estates mentioned in the Act, are within this Word (*otherwise.*) For *nota*, this Word (*otherwise*) is not indefinite, but *otherwise* in Jointure; *id est* for a Jointure which is as much as to say, *otherwise*, having all the Effect of the Incidents to a Jointure implied in the said five Examples, or more: And if an Estate for Life, in Tail, or Fee-simple is convey'd to the Wife for her Jointure, and after the Death of the Husband she is evicted, she shall recover Dower to the Value in the Residue, and shall have but an Estate for Life, of what Estate soever her Jointure is by an express Proviso in the said Act of 27 *H.* 8. So that upon Eviction no greater Prejudice shall accrue to the Terre-tenant, if the Jointure is of any Estate of Inheritance, than if it was but only for

(*a*) Moor 495, 505. 1 Co. 176. a. B. N. C. 182. N. Bend. 39. 2 Roll. 781. 2 Inst. 672. Owen 33. Raym. 47, 50. Bendl. in Kelw. 208. 3 Co. 51. a. 7 Co. 39. a. 11 Co. 25. a. Cart. 140. Palm. 214, 215. 506, 507. 2 Rol. Rep. 68.

(*b*) Dy. 317. pl. 7. B. N. C. 421. Dyer 248. pl. 78.

(*c*) Bridgm. 136. Co. Lit. 326. b. 10 Co. 37. a.

(*d*) Co. Lit. Sect. 360. Co. Lit. 223. a. 206. b. 8 H. 7. 10. b. 21 E. 4. 47. a. Doct. and Stud. 39, 123. 6 Co. 41. b. Br. Con. 82, 135. 13 H. 7. 23. a. 21 H. 7. 8. a. Br. Prerog. 102. 21 H. 7. 11. a. Plowd. 77. a. 21 H. 6. 33. b. 5 Co. 56. a. Hob. 170.

(*e*) Co. Lit. 36. b. Antea 2. b.

(*f*) Dyer 248. pl. 78.

for Term of her Life. And afterwards Judgment in the principal Case was given against the Demandant. *Note* Reader, in the said Case reported by the Lord *Brook*, it is further said, That a Devise (*a*) of Land by the Husband to the Wife by Will, is no Bar of her Dower, for it is a (*b*) Benevolence, and not a Jointure, *per Justiciar'* as it is there reported; and that is good Law, if it is well understood. And as to that some have said, That no Estate devised by Will can be a Jointure within 27 *H.* 8. for two Reasons. 1. That by the said Act of 27 *H.* 8. the whole Estate of the Feoffees was transferr'd to *Cestui que use*, and *per consequens* no Land after the making of that Act was deviseable till the Statute of 32 *H.* 8. and therefore a Devise of Land, which then by the Law could not be made, can't be within the said Act of 27 *H.* 8. The other Reason was, because every Jointure intended within the Act of 27 *H.* 8. is made and assur'd either before, or during the Coverture, as appears by the said Act, but a Devise takes its Effect after the Husband's Death: But that neither of these is any Reason in Law, appears by the Resolution following, *Mich.* 38 *&* 39 *Eliz.* between *Leak* and *Randall in the Court of Wards*, it was resolved by the two Chief Justices, *& tot' Cur'* That if a Man devises Land to his Wife for Term of her Life (*c*) generally, it can't be averred to be for the Jointure of the Wife, and in Satisfaction of her Dower, for two Reasons. 1. Because a Devise implies a Consideration in itself, and therefore as a Devise can't be averr'd to be to the Use of another, than of the Devisee, unless it is express'd in the Will, no more can a Devise be averred to be for a Jointure, unless it is so express'd in the Will. But as it is said in the said Case of 6 *E.* 6. it shall be taken for a Benevolence, and so is the said Case of 6 *E.* 6. to be intended. 2. The whole Will concerning Lands by the Statutes of 32 *&* 34 *H.* 8. ought to be in Writing, and no Averment ought to be taken out of (*d*) the Will, which can't be collected by the Words contained in the Will. But if a Man devises Land to a Woman for Term of her Life, or in Tail, *&c.* for her Jointure, and in Satisfaction of her Dower, it was resolved that it is a Jointure within the Act of 27 *H.* 8. for as an Estate for Life made to a Woman for her Jointure before Marriage, when she is not his Wife, is within the Equity of the said Act, so an Estate for Life devised to a Woman for her Life, which takes Effect after his Death, when the Marriage is dissolv'd, is also within the Equity of the said Act, for such Estate well agrees with the Intent of the Makers of the said Act of 27 *H.* 8. and with the said Description of a Jointure made by the Justices in the said Case of *Vernon*. And altho' Land was not deviseable 'till 32 *H.* 8. yet it is frequent in our Books, that an Act made of (*e*) late Time shall be taken within the Equity of an Act made long Time bef. As the

(*a*) Moor 31.

(*b*) B. N. C. 421. Dyer 248. pl. 78. Postea 4. a.

Mich. 38 & 39 Eliz. inter Leak and Randall, in Curia Wardorum.

(*c*) Co. Lit. 36. b. Winch. 100. Cawly 214.

(*d*) 5 Co. 68. a. Latch. 42. Jenk. Cent. 115. Cro. Eliz. 498. Mood 222. 2 Bulst. 177, 178. Bridg. 135. Godb. 432. Litt. Rep. 188. Hutt. Arg. 49, 50. Raym. 410, 411. 2 Leon. 70.

(*e*) Plowd. 127. a. 82. b. 2 Inst. 35, 322. Godb. 79. 2 Brownl. 115. Cro. Eliz. 177. 1 Jones 188, 381.

Statute of *Marlbridge*, which was made *Anno* 52 *H.* 3: gave the Wardſhip of the Heir of the Tenant who held by Knights Service, notwithſtanding a Feoffment made by Colluſion, at which Time, and for 200 Years and more after, that is to ſay, 'till the Stat. of *(a)* 4 *H.* 7. *c.* 17. which gave the Wardſhip of the Heir of *Ceſtui que uſe*, the Heir of *Ceſtui que uſe* was not in Ward; and yet it is held in 27 *H.* 8. 9. *a. b.* that if *Ceſtui que uſe* after the Statute of *(a)* 4 *H.* 7. makes a Feoffment in Fee by Colluſion to defraud the Lord of his Ward, it is taken within the Equity of the Statute of *Marlebridge*. Alſo the Statute *de Donis Conditionalibus* made 13 *E.* 1. as to the Warranty of Tenant in Tail with Aſſets, is taken within the *(b)* Equity of the Statute of *Glouceſter*, *cap.* 3. made *anno* 6 *E.* 1. as it is held in 11 *E.* 2. *garr. Stath.* & (38) 43 *E.* 3. 23. *b.* For *Formedon in Diſcender* was given in lieu of a *Mortdanceſter*. So that the Statute of *Weſt.* 2. *cap.* 25. made 13 *E.* 1. gave a Certificate, but gave no Adjournment, but *(c)* Adjournment is taken by Equity of the Statute of *Magna Charta*, *cap.* 13. made 9 *H.* 3. as it is held 12 *H.* 4. 9. *b.* So the Statute of 7 *R.* 2. gave Aſſiſe in *conſinio Comitatus*; and *(d) Reddidit-ſeiſin* taken by Equity of the Statute of *Merton*, *c.* 3. made 20 *H.* 3. *Vide* 1 *E.* 3. 25. *b.* & 12 *Eliz. Dyer* 289. The Biſhop *(e)* of *London* being one of the High Commiſſioners, by Force of the Act of 1 *Reg. Eliz.* was tranſlated to the Archbiſhoprick of *York*, yet his Authority remain'd by Force of the Act made *anno* 1 *E.* 6. *cap.* 7. and with this Reſolution *(f)* in *Leak*'s Caſe aforeſaid, agrees the Caſe reported by the L. *Dyer*, 5 *Reg' Eliz.* (22.) 220. *(g)* A Man ſeiſed of certain Land in Fee, held in Soccage, and of other Land in Tail held *in Capite*, deviſed by his Will in Writing the third Part of all his Lands to his Wife in Recompence of her Dower, and dy'd; the Wife entred into the third Part of the Land in Fee-ſimple; and it was reſolv'd, that it ſhould be a Bar of her Dower by the ſaid Act of 27 *H.* 8. *in Curia Wardorum* *Note* Reader, a good Difference, and all the Opinions, which ſeem to diſagree, well reconcil'd,

(a) 12 H. 7. 19, 20.

(b) Plowd. 127. a. 178. b. 8 Co. 52. b. Co. Lit. 365. a. Plowd. 100. a.

(c) Fitz. Adjor. 3. Br. Adjor. 3.

(d) Co. Lit. 144. a. 2 Inſt. 82, 83. F. N. B. 188. b.

(e) Dyer 289, 290. pl. 60.

(f) Antea 4. a.

(g) Dyer 220. pl. 12. Hob. 33, 34.

Know Reader, that by ſubtil and ſiniſter Counſel, an Evaſion out of the ſaid Act of 27 *H.* 8. (as was intended) was deviſed, How Women might have Jointures and Dowers alſo notwithſtanding the ſaid Act, and the Invention was ſuch: One *Chriſtian*, who was the Wife of one *Richard Melles* of the County of *Suffolk*, had a Jointure made of an Houſe and certain Land in *Stoke Naylond* in the County of *Suffolk*, to her Huſband and her, and to the Heirs of the Body of the Huſband, by one *John Melles*, Uncle of the ſaid *Richard*; which *Richard* was ſeiſed in Fee of divers other Lands in the ſame Town, and afterwards *Richard* dy'd; the Wife with certain of her Friends of her Confederacy, in a ſecret Manner entred into the ſaid Tenements conveyed to her, and claim'd them for her Joint, and yet wav'd the Poſſeſſion, and brought a Writ of

Dower

Dower to be endow'd of the whole, as well of that which was aſſign'd to her for her Jointure as of the Reſidue of her Huſband's Lands and Tenements, and had a full third Part of the whole (accounting the Land convey'd to her for her Jointure to be Parcel) aſſign'd to her by the Sheriff for her Dower (not knowing the Practice) only out of the Reſidue: And when ſhe had her Dower, then ſhe openly entred into the Houſe and Land convey'd to her for her Jointure, who was held out by *Tho. Purſlow*, the Terre-tenant, and afterwards ſhe marry'd one *John Sharp*, who brought an Action of Treſpaſs againſt the ſaid *Tho. Purſlow*, for a Treſpaſs done 10 *June*, *anno* 18 *Eliz.* in the Houſe and Land conveyed in Jointure. And *Purſlow*, by the Advice of one of the *Inner-Temple* pleaded the Feoffment of the ſaid *Richard* to him and juſtify'd. To which the Plaintiffs reply'd, that before *Richard* had any thing, the ſaid *John* was ſeiſed, and gave to her and her Huſband *ut ſupra*. To which the Defendant rejoin'd, that the Eſtate made to *Richard* and *Chriſtian*, was for the Jointure of *Chriſtian*, and that after the Death of her Huſband, and before the Treſpaſs, ſhe brought a Writ of Dower againſt the Defendant then Tenant of all the Land whereof her Huſband was ſeiſed, and demanded the third Part of all recover'd, and had Execution out of the Reſidue, and averred, that the Houſe and Land which was Parcel of the Land convey'd to her for her Jointure, was no Part of the Land aſſign'd to her for her Dower. To which the Plaintiffs ſurrejoined, that the ſaid *Chriſtian* after the Death of her Huſband, and before the Writ of Dower brought, enter'd into the ſaid Houſe, claiming it for her Jointure. To which the Defendant by Way of Rebutter ſaid, That to ſay that the ſaid *Chriſtian* after the Death of her Huſband, and before the Writ brought, had entred, they ſhould not be admitted againſt the ſaid Record of Recovery in the ſaid Writ of Dower: Upon which the Plaintiffs demurr'd in Law, and it was argued by the Plaintiff's Counſel, that firſt, this bringing of the Writ of Dower, can't be any Waver of the Eſtate of the Wife, becauſe by the Entry of the Wife, ſhe has agreed to the ſaid Eſtate, and was actually ſeiſed; and therefore ſhe can't afterwards wave and diveſt it out of her by the bringing of the ſaid Writ of Dower. To which it was anſwered by the Defendant's Counſel, That admitting the Wife could not wave it, yet ſhe might well bar and conclude herſelf from claiming the ſaid Eſtate, and in this Caſe ſhe has (*a*) eſtopped herſelf to claim any Eſtate in the Houſe and Land, in which, *&c.* For when ſhe brings her Writ of Dower, and has (*b*) Judgment to have the third Part of the whole, by that ſhe affirms, that ſhe has only Title of Dower, and *per conſequens* no Eſtate, *ergo* ſhe is eſtopped to claim any Eſtate, in any Part of that whereof ſhe has demanded by her Writ to be endowed; as if the Huſband diſcontinues the Wife's Land, and dies, and the Wife brings a Writ of Dower againſt

(*a*) 1 Roll. 862.

(*b*) Cr. Eliz. 128. 1 Leon. 136, 137, 138. Owen 154.

againſt the Diſcontinuee, and recovers the third Part, ſhe is thereby eſtopped to bring a *(a) Cui in vita*, for by her Writ of Dower ſhe claim'd Title of Dower only, and thereby ſhe ſhall be eſtopped to claim any other Right by a *Cui in vita: Vide* 10 *E.* 3. *Double Plea.* 8. 20 *E.* 3. *Scire fac'* 13. *F.N.B.* 194. 17 *Aſſ.* 3. Acceptance of Dower by Deed indented, concludes the Wife of her Right, *vide* 11 *H.* 7. 20. *b.* So if ſhe had brought her Writ of Dower to be (*b*) endow'd of the Reſidue only, and had recover'd her Dower thereof, ſhe ſhould be eſtopped to claim any Eſtate in the ſaid Houſe and Land ſo convey'd to her, altho' ſhe had enter'd before; for by the bringing of her Writ of Dower to be endowed of the Reſidue, ſhe has *tacite* affirm'd, that ſhe has not agreed to any Jointure made to her; for then ſhe can't bring any Writ of Dower by the ſaid Act of 27 *H.* 8. And if the Law ſhould be otherwiſe, great Inconvenience would enſue, which by no Induſtry or Policy can be prevented, as appears before: And for theſe Reaſons it was concluded, That the Plaintiffs were in any Caſe concluded from claiming the ſaid Houſe and Land in which, *&c.* *Quod fuit conceſſum per* Sir *Chriſtopher Wray*, Chief Juſtice, Sir *Thomas Gawdy*, *& totam Curiam. Nota* Reader, *Simplicitas eſt legibus amica, & (c) nimia ſubtilitas in jure reprobatur.*

(a) Owen 154. 26 H. 8. 2. a. F. N. B. 194. b.

(b) 1 Roll. 862.

(c) 4 Co. 41. b. 3 Bulſt. 65.

BEVIL's *Caſe.*

Mich. 27 & 28 Eliz. *Rot.* 1739.

4 Co. fo. 6. a.

In the Common Pleas.

Cornwall ſſ. NIcholas *Francis*, was attached by the Writ of the Lady the Queen, of ſecond Deliverance, to anſwer to *Walter Parker* of a Plea, wherefore he took the Cattle of him the ſaid *Walter*, and them unjuſtly detained againſt Gages and Pledges, *&c.* And whereupon, the ſaid *Walter*, by *Francis Eyrman*, his Attorney, complaineth, That the aforeſaid *Nicholas*, the 30th Day of *October*, in the 15th Year of the Reign of the Lady the now Queen, at *Tallan*, in a certain Place called *Newton*, took the Cattle, that is to ſay, two Oxen of him the ſaid *Walter*, and them unjuſtly detained againſt Gages and Pledges, until, *&c.* whereupon he ſaith that he is the worſe, and hath Damage to the Value of 20 Pound, and thereof he bringeth Suit, *&c.* And the aforeſaid *Nicholas*, by *William Leigh* his Attorney, cometh and defendeth the Force and Injury when, *&c.* And as Bailiff of *Joon Bevil*, Eſq; doth well acknowledge the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* and juſtly, *&c.* Becauſe he ſaith, That the ſame Place callen *Newton*, in which it is ſuppoſed the taking of the Cattle aforeſaid to be done, doth contain, and at the Time of the taking of the Cattle aforeſaid ſuppoſed to be done, did contain in itſelf 20 Acres of Land, with the Appurtenances, in *Tallon* aforeſaid, and that long before the aforeſaid Time in which, *&c.* one *Robert Smith* the elder, Eſq; was ſeiſed of the ſaid 20 Acres of Land with the Appurtenances, in his Demeſn as of Fee, and held the ſaid 20 Acres of Land with the Appurtenances, of the aforeſaid *John Bevill*, as of his Manor of *Keligath*, in the County aforeſaid, by Knights Service, that is to ſay, by Homage, Fealty, and Eſcuage to the Lady the Queen, when it ſhould happen, 42 Shillings; and when more, more, and when leſs, leſs; and alſo by the Service of doing Suit at the Court of him the ſaid *John*, of his Manor aforeſaid, twice by the Year, that is to ſay, once within a Month next after the Feaſt of *Saint Michael the Archangel*, and again, within a Month next after the Feaſt of *Eaſter* every

Replevin.

every Year, at that Manor holden, of which Services, the aforeſaid *John Bevil*, was ſeiſed by the Hands of the aforeſaid *Robert Smith* the elder, as by the Hands of his very Tenant, that is to ſay, of the Homage, Fealty, Eſcuage, and Suit of Court, as of his Fee and Right; and that afterwards the aforeſaid *Robert Smith* the elder, died of the aforeſaid 20 Acres of Land with the Appurtenances ſeiſed. After whoſe Death, the aforeſaid 20 Acres of Land with their Appurtenances, deſcended to one *Robert Smith*, as Son and Heir of the aforeſaid *Robert Smith:* By which the ſaid *Robert Smith* the Son, before the Time in which, *&c.* in the aforeſaid 20 Acres of Land with the Appurtenances entred, and was thereof ſeiſed in his Demeſn as of Fee; and becauſe the Homage of the aforeſaid *Robert* the aforeſaid Time in which, *&c.* to the aforeſaid *John Bevil* was behind not done, the ſaid *Nicholas* as Bailiff of the ſaid *John Bevil*, doth well avow the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* And juſtly, *&c.* for that Homage ſo undone, as in the Lands of the ſaid *John*, in Form aforeſaid holden, *&c.* And upon the aforeſaid *Robert* the Son, as upon the very Tenant of the aforeſaid *John Bevil*, and within his Fee and Lordſhip. And the aforeſaid *Walter* ſaith, That long before the ſaid Time of the taking of the Cattle aforeſaid done, the ſaid *Robert Smith* the Son was ſeiſed of the aforeſaid 20 Acres of Land with the Appurtenances, in *Tallon* aforeſaid, called *Newton*, in his Demeſn as of Fee; and ſo thereof being ſeiſed, before the Time of the taking aforeſaid done, that is to ſay, the 24th Day of *January*, in the 13th Year of the Reign of the ſaid Lady the now Queen, at *Tallon* aforeſaid, among others, leaſed the aforeſaid 20 Acres of Land with the Appurtenances, to him the ſaid *Walter*, to have to the ſaid *Walter* and his Aſſigns, from the aforeſaid 24th Day of *January*, in the Year aforeſaid, unto the End of the Term of five Years then next following, to be compleat and ended: By Virtue of which Leaſe, the ſaid *Walter* into the aforeſaid 20 Acres of Land with the Appurtenances entred, and was, and yet is thereof poſſeſſed, the Reverſion thereof after the Term aforeſaid ended, to the aforeſaid *Rob. Smith* the Son, and his Heirs expectant; without which *Robert* the Son, the ſaid *Walter* cannot anſwer to the Avowry aforeſaid, of the ſaid *Nicholas*, nor the Plea thereof bring into Judgment. And prays Aid of the aforeſaid *Robert Smith* the Son, who is preſent here in Court in his proper Perſon, and willingly joins himſelf to the ſaid *Walter* in Aid againſt the aforeſaid *Nicholas*, in the Plea aforeſaid, *&c.* And upon this, as well the ſaid *Walter*, as the aforeſaid *Rob. Smith* the Son, who, *&c.* ſay that the aforeſaid *Nicholas*, for the Reaſon before alledged, ought not to avow the taking of the Cattle aforeſaid, to have been juſt; for that by Proteſtation, that the aforeſaid *Robert Smith* the Son, did not hold the aforeſaid 20 Acres of Land with the Appurtenances, called *Newton*,

ton, in *Tallon* aforeſaid, of the aforeſaid *J. Bevil*, as of his Manor of *Keligath*, by Knights Service, that is to ſay, by Homage, Fealty, and Eſcuage, to the Lady the Queen, when it ſhould happen, 42 Shillings, and to more, more, and leſs, leſs, *&c.* As alſo by the Service of doing Suit at the Court of the ſaid *John Bevil*, of his Manor aforeſaid, twice by the Year, that is to ſay, once within one Month after the Feaſt of *St. Michael the Archangel*, and again within one Month after the Feaſt of *Eaſter*, every Year, at that Manor to be holden, as the aforeſaid *Nicholas* above hath alledged; For Plea he ſaith, That the aforeſaid *John Bevil* never was ſeiſed of the aforeſaid Services, as the ſaid *Nicholas* above hath alledged, and this they are ready to aver; wherefore inaſmuch as the ſaid *Nicholas* above acknowledgeth the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* the aforeſaid *Walter*, and the aforeſaid *Robert*, who, *&c.* demand Judgment and their Damages, by the Occaſion of the taking, and unjuſt detaining of the Cattle aforeſaid, to the ſaid *Walter* to be adjudged; and the aforeſaid *Nicholas*, as at firſt ſaith, That the aforeſaid *John Bevil*, was ſeiſed of the aforeſaid Services, by the Hands of the aforeſaid *Rob. Smith* the Father, as by the Hand of his very Tenant, as he hath above alledged; and of this puts himſelf upon the Country; and the aforeſaid *Walter*, and the aforeſaid *Robert Smith* the Son, who, *&c.* likewiſe; therefore it is commanded to the Sheriff, that he cauſe to be here from the Day *St. Martin*, in 15 Days, 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* Becauſe as well, *&c.* Proceſs againſt the Jurors, to try the Iſſue aforeſaid, is continued until 15 Days of *Eaſter*, in the 19th Year of Queen *Eliz.* unleſs the Juſtices to Aſſiſes, in the County aforeſaid to be taken aſſigned, by the Form of the Statute, *&c.* upon *Monday*, in the 5th Week of *Lent*, the ſaid 19th Year ſhall firſt come; at which Aſſizes, the Verdict was given as followeth. The Jurors ſay upon their Oath, That the within named *John Smith* the Father, held the Tenements aforeſaid with the Appurtenances, called *Newton*, of the within named *John Bevil*, as of the within written Manor of *Keligath*, by Knights Service within written; and that the ſaid *John Bevil* was ſeiſed of the Fealty and Suit of Court, only Parcel of the Services within written, by the Hands of the aforeſaid *Robert Smith* the Father, as by the Hands of his very Tenant. But whether the aforeſaid Seiſin of Fealty, and Suit of Court aforeſaid, be a good and ſufficient Seiſin of the whole Services within written, or not, the Jurors are altogether ignorant, and pray therefore the Advice and Diſcretion of the Juſtices aforeſaid. And if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the ſame Juſtices, That the aforeſaid Seiſin of Fealty, and Suit of Court, be not a good and ſufficient Seiſin of the whole Services aforeſaid, then the Jurors ſay upon their Oath, That the aforeſaid *John Bevil* was not ſeiſed of the within written

Services,

Services, by the Hands of the aforeſaid *Rob. Smith* the Father, as by the Hand of his very Tenant, as the ſaid *Walter* hath within alledged; and then they aſſeſs the Damages of him the ſaid *Walter*, by Occaſion of the taking, and unjuſt detaining of the Cattle aforeſaid, beſides his Coſts and Charge by him about his Suit in this Behalf expended, to 12 Pence, and for his Coſts and Charges to 40 Shillings. And if upon the whole Matter aforeſaid, it ſhall ſeem to the Juſtices, That the ſaid Seiſin of Fealty, and Suit of Court aforeſaid, be a good and ſufficient Seiſin of the whole Services within written, then the ſaid Jurors ſay upon their Oath aforeſaid, That the ſaid *John Bevil* was ſeiſed of the Services within written, by the Hands of the aforeſaid *Robert Smith* the Father, as by the Hands of his very Tenant, as the aforeſaid *Nicholas* hath within alledged. And then they aſſeſs the Damages of the ſaid *Nicholas*, by Occaſion of the Premiſſes, beſides his Coſts and Charges by him about his Suit in this Behalf expended to 12 Pence, and for his Coſts and Charges to 40 Shillings. And becauſe the Juſtices here will adviſe themſelves of upon the Premiſſes before they give their Judgment thereof, Day is given to the Parties here, until in the Morrow of the *Holy Trinity*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* And ſo the Plea aforeſaid, was continued until the Morrow of the *Holy Trinity*, in the 25th Year of Queen *Elizabeth*, on which Day Judgment was given as followeth. At which Day, here cometh as well the aforeſaid *Walter Parker*, by his Attorney aforeſaid, as the aforeſaid *Nicholas Francis*, by *William Ayleſbury* his Attorney. And upon this, the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeemeth to the Juſtices here, That the aforeſaid Seiſin of Fealty, and Suit of Court aforeſaid, is a good and ſufficient Seiſin of the whole Services aforeſaid; therefore it is granted, That the aforeſaid *William Parker*, take nothing by his Writ aforeſaid, but be in Mercy for his falſe Clamour. And the aforeſaid *Nicholas Francis*, thereof go without Day, and that he have Retorn of his Cattle aforeſaid, to be kept by him irreplegible for ever, *&c.* It is alſo granted, That the aforeſaid *Nicholas Francis* recover againſt the aforeſaid *Walter Parker*, his Damages aforeſaid to 41 Shillings, by the Jurors in Form aforeſaid aſſeſſed, as alſo 13 *l.* to the ſaid *Nicholas*, at his Requeſt for his Coſts and Charges aforeſaid, by the Court here of Increaſe adjudged, which Damages in the whole no amount to 15 *l.* 1 *s.* *&c.*

BEVIL's *Caſe.*

Mich. 17 & 18 Eliz. *Rot.* 1739.

In the Common Pleas.

In REPLEVIN.

Expoſition of the Stat. 32 H. 8. c. 2. of Limitations.

BEtween *Walter Parker*, Plaintiff, and *Nicholas Frauncis*, Defendant, for taking of his Cattle in *Tallan* in the County of *Cornwall*, in a Place call'd *Newton*; the Defendant made Conuſans as Bailiff to *John Bevil*, Eſq; by Reaſon that the Place where, *&c.* contained 20 Acres, whereof one *Robert Smith* was ſeiſed in Fee, and held them of the ſaid *John Bevil*, as of his Manor of *Keligath* in the ſaid County, by Knights Service, *viz.* by Homage, Fealty, and Eſcuage, *ſcil.* when Eſcuage runs to 40 *s.* 40 *s.* and when to more, more; and when to leſs, leſs; and by Suit of Court *bis per annum*, of which Services he was ſeiſed by the Hands of the ſaid *Robert Smith*, as by the Hands of his very Tenant, and made Conuſans for Homage: And Iſſue was taken that the ſaid *John Bevil nunquam fuit ſeiſitus de præd' ſervitiis, prout* the ſaid *Nicholas* had alledged. And the Jury gave a ſpecial Verdict, that the ſaid *John Bevil* was ſeiſed of the Fealty only, *&c.* And if the Seiſin of Fealty was a ſufficient Seiſin of all the Services was the Doubt, which the Jurors referr'd to the Conſideration of the Court. And this Point was made one of the principal Points in the Serjeant's Caſe, which was argued by *Popham*, *Rhodes*, *Fenner*, *Shute* and *Gawdy*, Serjeants, and *Windham* and *Anderſon* the Queen's Serjeants, *Paſch.* 21 *Eliz.* the Record and Pleading of which Serjeants Caſe is entred, *Hill.* 20 *Eliz. Rot.* 1745. And this Caſe at Bar was many Times argued in the Time of Sir *James Dyer*, and after his Death, after many Arguments at the Bar and Bench, was adjudg'd, by *Anderſon*, Chief Juſtice, *Mead*, *Windham*, and *Periam*, That the Seiſin of the Fealty was (*a*) Seiſin of all the ſaid Services, and therewith agree 44 *E.* 3. 11. *b.* 8 *H.* 6. 16. and the Reaſon was, That when the Tenant

Anderſ. 57, 58.

Seiſin of Fealty is of all other Services.

To what Rent and Services the Statute doth not extend, *&c.*

(*a*) Co. Lit. 68. *a.* 45 E. 3. 28. *a.* Br. Avow. 24, 52. Fitz. Avow. 71. 8 H. 6. 16. *b.* Poſtea 8. *b.*

Tenant does Fealty, he takes a corporal Oath, that he will be faithful and true to the Lord, and bear Faith (*a*) to him for the Tenements which he claims to hold of him; and that he will lawfully do the Customs and Services which he ought to do, so that the doing of this Service (by which he swears to do all Services) is sufficient (*b*) Seisin of all. And true it is that *Littleton* says, That Homage is the (*c*) most honourable Service, and the most humble Service of Reverence that a Freehelder can do to his Lord: But also it is true, that Fealty is a more (*d*) sacred Service than Homage; for that is done upon Oath, and the other not; And it is to be observed, That these Words *scil.* (will be faithful and true to him, and bear Faith to him for the Tenements which he claims to hold of him) are also Parcel of the Words in doing of the Service of Homage, and Seisin of Part of any Service is Seisin of the whole, as after appears. And that is the Reason that the Law makes so great Account of the Seisin of these Services of Homage and Fealty; for the Seisin of them (because it is the Seisin of all other Services) is so inestimable in Law, that no Distress for them of any Goods or Chattels (of what Value soever) is in Judgment of Law, (*e*) excessive; and altho' the Lord often distreins for them, so that the Tenant can't till his Land, yet the Tenant shall not have Assise *de multiplici districtione*, as he shall have for Rent or other Profits. *Vide* 28 *Ass.* 50. 11 *H.* 4. 2. *a.* 42 *E.* 3. 26. *a. Br. Distress* 80. And in this Case these Points were also resolv'd. 1. That Seisin of superior Service is (*f*) Seisin of all inferior Services which are incident to it; as Seisin of Escuage is Seisin of Homage and Fealty, and Seisin of Homage is Seisin of Fealty, and Seisin of the Rent is Seisin of the Fealty where the Seigniory is by Fealty and Rent, *Vide* 3 *E.* 2. *Avowry* 188. 5 *E.* 2. *Avowry* 209. 9 *E.* 2. *Monstrans des faits* 41. 19 *E.* 2. *Avowry* 224. 7 *E.* 4. 28. *&* 29. 13 *E.* 3. *Avowry* 103. 21 *E.* 3. *Avowry* 115. 27 *H.* 8. 21. *a. Pasch.* 1 *&* 2 *Ph. Mar. in Communi Banco, Rot.* 329. It was adjudg'd, That where the Seigniory is by Fealty and Rent, that Seisin of the Rent is Seisin of the Fealty, and so is the Book adjudg'd in 29 *E.* 3. 31. *a.* and with that agrees 3 *E.* 2. *Avowry* 188. 2. It was resolv'd, that the doing of Homage is (*g*) Seisin for all Services, as well inferior as superior, because in doing of Homage, he takes upon him to do all Services, and therefore his Service is sufficient Seisin of all the Services. And therewith agrees 13 *H.* 4. 5. *b.* Seisin of Homage is Seisin of Escuage, which is superior, and of Relief, which is inferior, 22 *Ass.* 66. Payment of 1 *d.* in the Name of Attornment of the whole, may be sufficient Seisin of (*h*) 4 Rents. 3. That Seisin of Rent, or (*i*) Suit, or other Service which is Annual, is sufficient Seisin of Escuage, Homage, Fealty, Ward, Relief, Heriot-Service, Service to cover the Hall of

(*a*) Lit. Sect. 91. Co. Lit. 67. b.

(*b*) 44 E. 11. b. Co. Lit. 68. a. 45 E. 3. 28. a. Br. Avow. 24, 52. Fitz. Avow. 71. 8 H. 6. 17. b. Antea 8. a.

(*c*) 2 Brownl. 99. Lit. Sect. 85. Co. Lit. 68. a. 64. a.

(*d*) 2 Brownl. 99. Co. Lit. 68. a.

Note.

(*e*) 42 E. 3. 26. a. Fitz. Avow. 67. 27 Ass. 51. Br. Distr. 34, 36. 29 E. 3. 24. a. 2 Inst. 106, 107. 1 Rol. 674. Fitz. Avow. 250. 2 Brownl. 90. 11 Co. 44. a. 13 Co. 2.

(*f*) 9 Co. 35. a. Hutt. 20. Winch. 31. 10 H. 7. 15. a. Co. Lit. 153. a. 315. a.

(*g*) Co. Lit. 68. a.

(*h*) 2 Roll. 462.

(*i*) Keilw. 3. b.

of the chief House of the Manor, or for impaling the Lord's Park, or such casual Services, which perhaps will not happen in 40, 60, or 70 Years; and therefore there is great Reason that Seisin of annual Services shou'd be Seisin of all such casual Services, and therewith agrees, 20 *E.* 3. *Avowry* 131. that Seisin of Rent, and other Annual Services, is Seisin of Relief, and other Services casual or accidental, and 7 *E.* 6. *Br. Gard.* 69. *&* *Avowry* 69. that it was agreed by the Justices of both Benches, that where the Seigniory is by Knights-Service and Rent, that Seisin of the Rent which is annual and inferior to all the other, is a good Seisin, to have the Wardship of the Heir of the Tenant; and therefore the Opinion of *Brook* there, that it shall not be a Seisin to make an Avowry is not Law; for the Case of the Ward is the stronger Case. But it was said, That Seisin of one annual Service is not Seisin of another annual Service: As if there be Lord and Tenant by Fealty, 10 *s.* Rent, and three Work Days by the Year, Seisin of the Rent is not Seisin of the Work Days; nor Seisin of Rent is not Seisin of Suit of Court which is annual, *vide* 16 *Eliz. Dyer* 330. and the Reason is, because it shall be accounted the Folly of the Lord, that he does not get Seisin of that which is due yearly; and it would be mischievous to the Tenant, for perhaps the Work Days were discharged in ancient Times, which now can't be shewed, upon which Suits and Troubles wou'd ensue. But *nota* Reader, that all this which has been said, is to be intended of Seisin in Law, and not of actual Seisin; For Seisin of Fealty in the Case at Bar, is no actual Seisin of Homage, nor of Suit of Court; nor Seisin of Fealty is no actual Seisin of Rent. *Vide* 8 *H.* 7. 17. 20 *H.* 3. *Assise* 433. 40 *E.* 3. 22. 49 *Ass.* 6. 44 *E.* 3. 11. *Br. Seisin* 40. But Seisin of any Part of any Service, is actual Seisin of the whole to have Assise. *Vide* 5 *E.* 4. 2. *b.* 12 *E.* 4. 7. 8 *E.* 3. 13. *a.* 8. *Ass.* 4. 44 *E.* 3. 32. 3 *E.* 3. *Assise* 175; and as to an Avowry, Seisin in Law is sufficient, but as to have Assise, actual Seisin is requisite; so the Seisin which is requisite in a Writ of Right of Land, ought to be actual and not Seisin in Law, as appears 35 *E.* 3. *Droit* 30, *and Litt. lib.* 3. *cap. Releases* 112. agrees thereto. If a Man makes a Lease for Life, or a Gift in Tail, yielding the first Year a Quarter of Wheat, and afterwards the yearly Rent of 100 Shillings, Seisin of the Wheat is Seisin of the Rent, whereof he may have Assise, for all is but one Reservation. *Vide* 5 *E.* 4. 2. 44 *E.* 3. 11. *b.* 15 *E.* 3 *Exec.* 63. it is said, that in the same Case all is one Freehold, and Seisin of the one is the Seisin of the other to have Assise, which was affirmed to be good Law. It was also said, if a Mesnalty becomes Rent-seck by Surplusage, the ancient Seisin is sufficient: For the Mesnalty is extinct by the Act of the Lord and of the Tenant paravail, and the Nature

Dyer 330. pl. 19.

49 E. 3. 15. b. Co. Lit. 153. a. 315. a. 2 Rol. 463. 6 Co. 57. a.

Kelw. 164. a. Plowd. 154. b.

Cr. Car. 82. 1 Jones 2. 4.

of the Rent of the Meſne is not altered by his own Act, but by the Act of others. And therefore, altho' the Rent is become ſeck, yet he ſhall (*a*) diſtrein for it, as is ſaid in 2 *E.* 2. *Extinguiſhment* 6. *vide* 31 *Aſſ.* 23. 26 *H.* 6. *Extinguiſhment* 7. 7 *Aſſ.* 2. 2 (4) *E.* 3. 42. 20 *E.* 3. *Avowry* 126. *vide* 50 *E.* 3. 26. a Preſentation to a Prebend which is after changed into a Treaſury, ſhall ſerve to maintain a *Quare impedit* upon Diſturbance to the Treaſury. But if there be Lord and Tenant by Fealty and Rent, and the Lord grants over the Fealty ſaving the Rent; Or if a Man makes a Gift in Tail, or a Leaſe for Life, rendring Rent, and grants over the Reverſion, excepting the Rent, in theſe Caſes the Nature of the Rent is altered by his own Act; and therefore the ancient Seiſin when it was a Rent-Service will not ſerve, when by his own Act the (*b*) Nature of the Rent is altered; and Aſſiſe of any Rent-ſeck he can't have, for he was never ſeiſed of any ſuch Rent; yet ſuch Rent-ſeck which was once Rent-Service, ſeems to be apportionable by the Book in 32 *Aſſ.* 10. Return irrepleviſable is a good Seiſin of Rent, as it is held 2 *H.* 4. 23. for otherwiſe the Tenant might defeat the Lord of his Seigniory, and the Lord would never attain to his Services. So in Avowry for Suit, if the Lord recovers (*c*) Damages for the Suit, it is a ſufficient Seiſin, *cauſa qua ſupra*. If the Lord grants his Seigniory upon (*d*) Condition, and the Tenant pays the Rent to the Grantee, afterwards the Condition is broke, and the Lord diſtrains for his Services, upon Reſcous made he ſhall have Aſſiſe, for the Seiſin before is ſufficient. Otherwiſe if a Man gives Land upon Condition, the Condition is broke, the ancient Seiſin is not ſufficient, but he ought to enter and gain a new Seiſin: But note in the Caſe of Rent the Diſtreſs is in lieu of an Entry. *Vide* (*e*) 15 *E.* 3. *Aſſiſe* 95. & 15 *Aſſ.* 12. *quod vide Brook Seiſin* 38. If the Diſſeiſee releaſes to the Diſſeiſor upon Condition, and afterwards the Condition is broke, the Diſſeiſee ſhall have Aſſiſe for the firſt Diſſeiſin, as appears by 17 *Aſſ.* 2. & 17 *E.* 3. 2. where in Aſſiſe of Land the Tenant pleaded the Releaſe of the Pl. the Pl. pleaded a Defeaſance of the Releaſe upon a certain Condition, and pleaded Performance of the Condition, and ſo maintained the Aſſiſe, which proves that by the Performance of the Condition, and the bringing of the Aſſiſe, the Right which was releaſed upon Condition was reveſted in the Pl. for without a Right he could not have Aſſiſe, and ſo the ancient Seiſin ſufficient. If a Man grants over divers and ſeveral Rents, and the Tenant attorns, and gives 1 *d.* in the Name of Seiſin of all the Rents, it is a good Seiſin for all to have (*f*) Aſſiſe, and yet no Rent was due or payable at that Time, and wherewith agrees 22 *Aſſ.* 66. And yet if there be L. and Tenant by Fealty, and 20 *d.* Rent, and the Ld grants

(*a*) Co. Lit. 153. a. Kelw. 104. a. 7 Co. 24. b. Cr. Car. 82. Perk, Sect. 323. Lit. Sect. 226.

(*b*) 1 Leon 266.

(*c*) 1 Rolls 314.

(*d*) Co. Lit. 202. b. 2 Rolls 465.

(*e*) 2 Rolls 465.

(*f*) Co. Lit. 315. a. 10 Co. 127. b.

grants over his Seigniory, and the Tenant pays 2 *d.* to the Grantee in Name of Seiſin of his Rent, yet at the Rent Day the Lord ſhall have his whole Rent of 20 *d.* for the 2 *d.* can't be *(a)* Parcel of the Rent, for no Rent is due or payable till the Day, and yet it ſhall enure to this Purpoſe, *ſc.* to give Seiſin of the Rent. *Vide* 34 *H.* 6. 42. *a.* 37 *H.* 6. 38. *b.* *Br. Seiſin* 15. 5 *E.* 4. 2. *a.* 25 *E.* 3. 44. *b.* by *Hill.* 29 *E.* 3. 31. 22 *Aſſ.* 66. *Lit. lib.* 3. *cap. Attorn.* 127. *a. b.* Then it was moved, if Seiſin of Fealty in the Caſe at Bar is Seiſin of all the other Services within the Statute of * 32 *H.* 8. *cap.* 2. by which Statute it is provided, That none ſhall have a Writ of Right of the Seiſin of his Anceſtor or Predeceſſor, unleſs the Seiſin was within *(b)* 60 Years before the *Teſte*; nor any Writ of *Mortdanceſtor*, *Aiel*, *Coſinage*, or Writ of *Entry ſur diſſeiſin*, unleſs the Seiſin was within 50 Years before the *Teſte*; nor any Action of his own Seiſin or Poſſeſſion, unleſs within *(c)* 30 Years; nor any Avowry, or Conuſans for any Rent, Suit, or Service, unleſs Seiſin was had within 50 Years before the Avowry made: In all which four Branches this Word *(Seiſin)* is ſpoken indefinitely, and therefore if the Act had not gone further, this Word *(Seiſin)* ſhou'd be conſtrued according to the Subject Matter, ſometimes for actual Seiſin, and ſometimes for Seiſin in Law; and therefore as to the Writ of *Right*, Writ of *Mortdanceſter*, *Aiel*, *&c.* *Aſſiſe*, *&c.* it ſhou'd be intended of an actual Seiſin, and not of a Seiſin in Law; ſo that the three firſt Branches are to be intended only of an actual Seiſin, and the fourth Branch concerning *Avowries* extends to Seiſins in Law, as well as to Seiſins in Fact, or actual Seiſins: But the Words of the Act (upon which the Doubt ariſes) go farther, *ſc.* And be it further Enacted, That if any Perſon or Perſons ſhall ſue any of the ſaid Actions, Writs, *&c.* or make any Avowry, Conuſans, Preſcription, or Claim for any Rent, Suit, Service, or other Hereditament, and cannot prove that any of his Anceſtors or Predeceſſors were in actual Poſſeſſion, or Seiſin of or in the ſame Lands, Tenements, Rents, Services, *&c.* within the Years before limited by this Act, and in Manor and Form aforeſaid, if it be traverſed or denied by the Plaintiff, Demandant, Avowant, or by the Party Tenant, or Defendant, that after ſuch Trial had, the Party and his Heirs ſhall be barred of all ſuch Writs, Actions, Avowries, Conuſans, Preſcription, Title and Claim for the ſame Lands, Tenements, and Hereditaments, *&c.* And it was objected, that theſe Words (actual Poſſeſſion or Seiſin) exclude Seiſin in Law, and therefore this Act has altered the Common Law: For altho' at the Common Law, Seiſin in Law was ſufficient to make Avowry, yet this Act allows only of actual Poſſeſſion

Co. Lit. 315. a. 2 Inſt. 95. 96.

* Lit. Rep. 342. 1 Bulſtr. 162. Moor 31. Co. Lit. 115. a.

(b) 6 Co. 59. a. 1 Bulſtr. 162.

(c) 1 Bulſtr. 162. 2 Inſt. 95.

or Seiſin; and the Reaſon of it, as was ſaid, was becauſe actual Seiſin is the ſure Cogniſance and Enſign of Right: But if the Seiſin of the Fealty ſhou'd be Seiſin for all the other Services, then wou'd Contention ariſe what were the other Services (which peradventure were never done) and which can't be known by any Seiſin had of them. And therefore it was ſaid, that this Act by expreſs Words extends only to actual Poſſeſſion and Seiſin, and not to relieve thoſe who for ſo long Time have neglected to have actual Seiſin of their Services, and eſpecially of Suit, which ought to be done twice every Year: And it was ſaid, that it was *Craſſa & ſupina negligentia*, which this Law did never intend to relieve; For as it is commonly ſaid, *Vigilantibus (a) & non dormientibus jura ſubveniunt.* To which it was anſwer'd and reſolv'd *per totam Curiam*, that Seiſin in Law was ſufficient to make Avowry within the Intention and the Letter alſo of the Act; For the Intention of the Act was to limit the Time within which Seiſin ought to be had, and not to exclude any Seiſin which was lawful Seiſin by the Common Law, and that appears by the Preamble, for there it is ſaid, *Foraſmuch as the Time of Limitation, &c. extend, and be ſo far, and ſo long Time paſt, that it is above the Remembrance of any living Man*, &c. Alſo the former Acts of Limitation, *ſcil. W.* 1. *cap.* 38. *W.* 2. *cap.* 2. *&* 46. do not exclude any Manner of Seiſin which was ſufficient at the Common Law. Alſo it is not againſt the Letter of the Act; for the three firſt Branches extend to actual Seiſin, and the fourth extends as well to Seiſin in Law as to actual Seiſin: Then the ſaid Words of the Act, *ſc. actual Poſſeſſion, or Seiſin* in the disjunctive, makes a Diſtinction between actual Poſſeſſion which refers to the three firſt Branches, and a Seiſin, be it actual or in Law, which refers to the fourth, ſo that actual is coupled with Poſſeſſion, and Seiſin is disjoyned by this Word (*or*) and ſtands of itſelf indefinitely, *& eo potius*, becauſe the Words ſubſequent are, *and in Manner and Form as is aforeſaid*, which Words refer actual Poſſeſſion or Seiſin to the ſaid four Branches precedent, ſo that *reddendo ſingula ſingulis*, all ſtands well together. 2. It was reſolved, That the ſaid Act doth not extend to ſuch Rent or Service which by the common Poſſibility may not happen or become due within 60 Years: As if a Seign. conſiſts of Homage (*b*) and Fealty only, for the Tenant may live above 60 Years after they are done; ſo if the Service be to cover the Lord's Hall, (*c*) or to go with him when there ſhall be War between the King and any of his Enemies, ſuch caſual Services which by common Poſſibility may not happen within 60 Years are not within this Act. The ſame Law of (*d*) *Formedon in Diſcender*, for the Tenant in Tail may live

(*a*) 1 Sid. 55. Poſtea 82. b. 2 Inſt. 690. 2 Co. 26. b. Palm. 157.

(*b*) 2 Inſt. 95, 96. Co. Lit. 115. a.

(*c*) Co. Lit. 115. a. 2 Inſt. 95.

(*d*) Lit. Rep. 342. Co. Lit. 115. a. 1 And. 16. N. Bendl. 394.

live 60 Years after Diſcontinuance, and altho' *in facto* he dies within the Time, ſo that the Iſſue may bring his *Formedon*, and altho' the Iſſue does not proſecute any Writ within the Time, yet the Iſſue may bring it at any Time, for by common Poſſibility the Writ of (*a*) *Formedon in Diſcender* was not within the Statute, as it is adjudged in * *Fitz-William*'s Caſe, *M.* 10 & 11 *Eliz.* which is now reported by the Lord *Dyer*, *fol.* 278. Alſo there it is ſaid, That the Seiſin of the Donee was never traverſable: The ſame Law of Homage and Fealty, and other ſuch accidental Services, altho' they become due within the Time limited by this Act, and by lacheſs of the Lord no Seiſin is had of them, yet he may deſtrain for them when he will, for they are not within the Purview of the Act: The ſame Law, if the Lord releaſes to the Tenant, as long as *J. S.* has Heir of his Body, and 60 Years paſs, and afterwards *J. S.* dies without Heir of his Body; in this Caſe altho' the 60 Years are paſt, yet he may diſtrain, for it was impoſſible that he ſhould attain to any Seiſin within that Time, & (*b*) *impotentia excuſat legem.* And a Man may hold by Homage and Fealty, and they ſhall never be done by him. As if Land held by Homage and Fealty is conveyed to a Mayor and Commonalty, or other (*c*) Corporation aggregate of many, in this Caſe they hold by Homage and Fealty, but they can't do them. And therefore altho' they have enjoyed the Land above 60 Years, yet if they alien the Land, the Lord may diſtrain for the Homage and Fealty, *vide* 33 *H.* 8. *Br. Fealty* 15. And *it was agreed*, that the Writ of *Eſcheat*, (*d*) *Ceſſavit*, or Writ of (*e*) *Reſcous* are not within this Act, for in theſe Writs the Seiſin is not traverſable, but the Tenure. Alſo in Writs of *Eſcheat* and *Ceſſavit* they demand the Land, and cannot alledge any Seiſin in the ſame Land, &c. as the Statute ſpeaks, and therefore theſe Writs are not within the Statute, for the Act extends only to ſuch Writ where the Demandant or his Anceſters may have Seiſin of the Land in Demand within the Time of the Limitation preſcribed by the Act, and the Statute doth not compel them to any Impoſſibility. And it is agreed in 21 *H.* 6 22. *a.* that in a Writ of *Eſcheat* (*f*) or *Ceſſavit*, the Demandant ſhall not alledge Eſplees, and the Reaſon is, becauſe he claims the Land by Reaſon of his Seigniory, and not by any Seiſin of the Land in him, or any of his Anceſtors. So *nota*, altho' the Lord was not ſeiſed of his Services within the Time of the Limitation, yet if the Tenant dies without Heir, the Land ſhall Eſcheat, for at the Time of the Eſcheat the Seigniory remains, altho' there wanted Seiſin; and in the ſame Caſe, if the Tenant ceaſes for two Years, and the Land is not open and ſufficient to his Diſtreſs, the Lord ſhall have *Ceſſavit* although he wants Seiſin of his Services, for

(*a*) Kelw. 212. b. 213. a. Bendl. in Aſh. 24. 1 And. 16. N. Bendl. 194. Dyer 278. pl. 2. Co. Lit. 115. a. 21 Jac. cap. 16. * Dyer 290, 291.

(*b*) 1 Co. 98. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. 8 Co. 172. b. 9 Co. 73. a. 10 Co. 139. b. Co. Lit. 29. a. Hard. 387.

(*c*) Co. Lit. 66. b. 7 Co. 10. b. Calvin's Caſe. 10 Co. 32. b.

(*d*) Lit. Rep. 342. Moor 44.

(*e*) 6 E. 4. 11. b.

(*f*) Fitz. Ceſſavit 6. Br. Ceſſavit 31. Br. Eſplees 5.

in *Ceſſavit* Seiſin is not traverſable, 8 *E.* 3. 46. *F. N. B.* 209. *E. vide in* 10 *&* 11 *El. Dyer* 278. And altho' the L. was never ſeiſed, yet becauſe the Seign. remains, if he diſtrains, the Tenant ought not to make Reſcous, as ſome Opinions are in 40 *E.* 3. 33. *a.* 6 *R.* 2. *Reſcous* 10. 22 *H.* 6. 2. *b.* 6 *E.* 4. 11. *b.* 7 *E.* 4. 20. *a.* But it was reſolved, That if nothing is behind, and the Lord deſtrains, the Tenant may make (*a*) Reſcous; or if he often diſtrains ſo that he can't manure his Land, he may have his Aſſiſe *de* (*b*) *multiplici diſtrictione* and that in ſuch Caſe the Tenant may make Reſcous as divers Judgments have been given. *Vide* 2 *H.* 4. 21. *b.* 8 *H.* 4. 1. 4 *E.* 6. *Diſtreſs* 75. *Br.* by the Juſtices. *Vide* 31 *E.* 3. *Reſcous* 17. 39 *E.* 3. 45. 39 *H.* 6. 7. *F. N. B.* 102. *E.* 27 *Aſſ.* 51. 28 *Aſſ.* 50. *Nota* Reader, a great Doubt in our Books well reſolved; But for wrongful Diſtreſs where nothing is arrear, the Tenant ſhall not have an Action of (*c*) Trepaſs *vi & armis* againſt the Lord, for that is prohibited by the Statute of *Marlebr. cap.* 3. *non ideo puniatur Dominus per redemptionem.* And if Lord and Tenant are by Fealty and 2 *s.* Rent, and the Lord by Encroachment, *ſc.* by voluntary Payment of the Tenant gets Seiſin of more than he ought to have, the Law ſo greatly favours Seiſins and Poſſeſſions, that he ſhall not avoid this Seiſin had by Encroachment in (*d*) Avowry, unleſs it is in the Caſe of the (*e*) Succeſſor, as 4 *E.* 2. *Avowry* 204. is agreed; and in Caſe of the Iſſue (*f*) in Tail, as is held in 20 *E.* 3. *Avowry* 131. But Seiſin by Encroachment ſhall be avoided in *Aſſiſe*, (*g*) and *Ceſſavit. Vide* 22 *Aſſ.* 68. 22 *E.* 3. 18. 28 *Aſſ.* 33. 12 *E.* 4. 7. 10 *H.* 7. 11. 10 *H.* 6. 3. *b.* the ſame Law in Treſpaſs. Alſo if he diſtrains, *ſc.* for the due Rent and the Encroachment alſo, for the whole Rent Arrear; the Tenant may tender that which is due of Right, and may make Reſcous if the Lord will not accept it, *vide* 12 *E.* 4. 7. 5 *E.* 4. 62. 87. and ſhall not be driven to *Ne injuſte vexes*, or *Contra formam feoffamenti*, as his Caſe is; but it ſhall be avoided in an Action brought by the Lord for the Reſcous, or in Treſpaſs brought by himſelf for the Diſtreſs for the Sum which was encroached, and which of Right was not due. But if the Lord encroaches more by (*h*) Coercion of Diſtreſs than he ought to have, (altho' the Coercion be to his Goods) yet he ſhall avoid ſuch Seiſin in Avowry, *vide* 10 *E.* 3. 26. 12. 22 *E.* 4. 7. *Long* 5 *E.* 4. 87. 20 *E.* 4. 17. 8 *H.* 6. 18. 30 *H.* 6. 5. 10 *H.* 7. 11. *Plow. Com.* 94. *b.* in *Woodland*'s Caſe. 3. It was reſolved, That altho' a Man has been out of Poſſeſ. of Land for 60 Years, yet if his Entry is not toll'd he may well enter, and bring any Action of his own Poſſeſſion, for the firſt Clauſe doth not bar any Right, but prohib. that no Perſ. ſhall ſue, have, or maintain any Writ of Right, or make any Preſcription, Tit. or Claim, for

(*a*) 6 Co. 23. a. Co. Lit. 160. b.

(*b*) 27 Aſſ. 71. Br. Aſſiſe 273. 28 Aſſ. 50. Br. Aſſiſe 290. Br. Diſtreſs 34. 8 Co. 50. a. b. 11 Co. 44. a. F. N. B. 108. i.

Note.

(*c*) 2 Inſt. 105. 44 E. 3. 20. a. 9 Co. 76. a. 10 E. 4. 7. a. 9 H. 7. 4. a. 14. a. 11 H. 4. 78. b. Co. Lit. 127. a. Fitz. Office del Court. 7. Br. Office del Court 29. Plow. 66. b. 84, 85. a.

(*d*) 9 Co. 34. a. Doct. pla. 318. 5 Co. 100. b. 2 Inſt. 21.

(*e*) 2 Inſt. 21. 9 Co. 34. a. Doct. pla. 318.

(*f*) 2 Inſt. 21. 9 Co. 34. a. 10 Co. 108. a. Doct. pla. 318.

(*g*) 5 Co. 100. b. 9 Co. 34. a. 2 Inſt. 21. Doct. pla. 318.

(*h*) 2 Inſt. 21.

for any Lands, Tenements, Rents, Commons, *&c.* of the Poſſeſſion of his Anceſtor and Predeſſor, but only of the Seiſin of ſome of his Anceſtors within 60 Years: But if his Entry is congeable, and he enters, he may have an Action of his own Poſſeſſion; and the firſt and ſecond Clauſes extend only to Seiſin *anceſtrel*, and not to a Writ of *Right* brought of his own Seiſin. And the third Branch extends only to Actions of his own Poſſeſſion, and not to Entries; the fourth to Avowries, and the fifth to Formedons and certain Actions there mentioned. *Nota* Reader, foraſmuch as by theſe Reſolutions it appears, that the Services of Homage and Fealty are not within the Act of 32 *H.* 8. and that Seiſin of Rent, or other annual Service is Seiſin of Homage and Fealty, and that Seiſin of Homage or Fealty is Seiſin of all Services annual or not annual; thence it follows, that when the Tenant has done Homage or Fealty, (which the Lord may compel him to do) it ſhall be Seiſin of all other Services, as to make Avowry, which of Right ought to be done, altho' the Lord, nor any by whom he claims have had Seiſin within 60 Years. Co. Lit. 68. a.

[See the late Statute touching Entries and Claims, *&c.*]

Actions for Slander, viz.

The Ld. CROMWEL's *Caſe.*

Trin. 20 Eliz. *Rot.* 28.

In the King's Bench.

H. Lord Cromwell v. Denny, Poph. 69. 1 Danv. 165.

HEnry Lord *Cromwell* brought an Action *de Scandalis Magnatum* againſt *Ed. Denny* Vicar of *Northlinham* in the County of *Norfolk*, *tam pro Dom' Regina*, quam *pro* * *ſeipſo*; and declared upon the Statute of 2 *R.* 2. *cap.* 5. That if any contrive *aliqua falſa nova, horribilia & falſa nuncia de Prælatis, Ducibus, Comitibus, & aliis Proceribus* † *& Magnatibus Regni, &c.* by which Debate may ariſe betwixt the Lords and Commons (which God forbid) by which Danger, Miſchief, and Deſtruction may happen to the whole Realm, *&c.* and *quicunque contra fecerit*, ſhall incur the Penalty of the Statute of *W.* 1. *c.* 33. And the Defendant was charged that he ſaid to the Plaintiff, (*a*) then a Baron of the Realm, *It is no Marvel that you like not of me, for you like of thoſe that maintain* (*b*) *Sedition againſt the Queen's Proceedings*. The Defendant juſtified the Words, upon which the Plaintiff demurr'd, and the Bar was held inſufficient. And *Term' Trin' anno* 23 *Eliz.* in Arreſt of Judgment it was moved by the Defendant's Counſel, that the Declaration was inſufficient, becauſe the ſaid Act of 2 *R.* 2. was (*c*) miſrecited; for the Words of the Act are, *Si aſcun controver aſcun faux nouvelles & horribles & faux meſſoinges*, which Word (*d*) (*Meſſoinges*) he who tranſlated the Statutes at large into *Engliſh*, has tranſlated (Meſſages) which was the Reaſon that he who drew the Declaration in the Caſe at Bar inſerted the ſaid Word (*e*) (*nuncia*) where it ſhould be *mendacia*. 2. The ſaid Act ſaith, *and whoſoever ſhall do it, ſhall incur, &c.* And the Plaintiff in his Declaration ſaith, *& Quicunq; contra fecerit*, which is as much as to ſay, *who ſhall not do it*; But againſt that it was objected, That the ſaid Act was a private Act, it concerning only the

* Note, This Stat. is not of Record in the Parliament Rolls, 4 Inſt. 51. Sed vide Pryn. contra.

† See Cro. Car. 136. Palm. 565.

(*a*) Cro. Car. 136.

(*b*) Doct. pla. 20, 21. 3 Bulſt. 266. 1 Rol. Rep. 427.

(*c*) Doct. pla. 93. 340.

(*d*) Hutt. 56.

(*e*) Cr. Car. 135, 136. 3 Bulſtr. 91.

'Twas made on Occaſion of a Quarrel between *John* of *Gaunt* and *W. Wickham*, who had Slandered *Gaunt* with Illegitimacy, *&c.*

Prelates, Nobles, and certain great Officers, whereof the Court wou'd not take Notice *ex officio*; and therefore the Court ought to take the Act, as the Party has alledged it: But it was reſolved by *Wray* Chief Juſtice, Sir *Thomas Gaudy*, *& totam Curiam*, that it was ſuch an Act, whereof the (*a*) Court ought to take Notice; and *eo magis* becauſe it by a Means concerns the King himſelf. 1. Foraſmuch as it touches the Prelates, Nobles, and great Officers, which are of the King's Council, and of eminent Qualities, and ſerve him in ſo high and honourable Offices which they have under the K. and by his Royal Authority have the Adminiſtration of Juſtice to his Subjects, by which it appears that the ſlandring of them principally concerns the King himſelf in his Royal Government. 2. Foraſmuch as the Statute ſaith, that Danger, Miſchief, and Deſtruction may happen to the whole Realm, *&c.* that alſo concerns the King, for he is the Head of the Realm; and theſe are the Reaſons that always ſuch Actions *de Scandalis magnatum* have been brought upon the ſaid Stat. *tam* (*b*) *pro Domino Rege quam pro ſeipſo*, and of all Statutes which concern the (*c*) King, the Judges ought to take Notice. It was likewiſe reſolv'd that if the Act was private, and that the Court ought to take it to be ſuch as is alledged; Then the ſaid Act was againſt Law, and Reaſon, and therefore void: For as it is alledged, thoſe who don't offend ſhall be puniſhed, and that was *condemnare inſontem & dimittere reum*; wherefore Judgment was given againſt the Pl. *quod nihil capiat per billam.* And afterwards the Pl. brought a new Action, and amended the Faults of the Declaration: And then the Court was moved that the ſaid Words were not Actionable, becauſe it might well be that the Pl. meant liking of ſome Perſons which maintain Sedition againſt the Queen's Proceedings, and yet he did not (*d*) know that they maintain Sedition, nor do the Words import that the Pl. knew that they maintain'd Sedition. And it was ſaid, *quod ſenſus verborum eſt duplex*, ſcil. *mitis & aſper*; *& verba ſemper accipienda ſunt in* (*e*) *mitiore ſenſu.* To which it was ſaid, that Sedition is a publick Thing. *Et dicitur Seditio* (*f*) *quaſi ſcorſum itio magni populi, quando itur ad manus*, which is notably deſcribed by the Poet:

Ac veluti magno in populo cum ſæpe coorta eſt
Seditio, ſævitque animis ignobile vulgus,
Jamq; faces & ſaxa volant, furor arma miniſtrat. Virg. Æn.

By which Sedition (being ſo publick and violent) it was ſaid that by common Intendment the Plaintiff had Notice of it; and it is not like Felony or Murder which may be clandeſtine, and done in Secret. But as to that the Judges did not deliver any Opinion, for they ſaid, that upon Argument and Conſideration they might alter their Opinion which

(*a*) Hob. 226, 310. Doct. pla. 336, 337, 338, 339. 8 Co. 28. a. b. Poſtea 76. a. b. 77. a. Plowd. 231. a.

(*b*) Doct. pla. 340.

(*c*) Poſtea. 77. a. 8 Co. 28. a.

(*d*) Palm. 278. Cro. El. 52. 251. 487, 746. Cro. Jac. 59. 268, 629. Yelv. 64.

(*e*) 4 Co. 20. a. Godb. 278. Poſtea 15. b. 17. b. Hutt. 38, 65, 113.

Virgil 1 Æneid. 1 Roll. 71, 72, 73. 1 Mod. Rep. 19, 23. Poph. 211. Palm. 29.

(*f*) Ruſhw. Collect. Append. 19, 20, &c.

which they now conceived, which wou'd be dangerous to the Party; and therefore they ſaid to the Defendant's Counſel, be well adviſed, and plead, or demur at your Peril; wherefore they pleaded a ſpecial Juſtification, (well knowing that the other Matter wou'd be ſaved to them) and the Effect of the Juſtification was, That the Defendant was Vicar of *Northlinham*, which was a Benefice with Cure, and that the Plaintiff procured *J. T.* and *J. G.* to preach ſeverally in the Church of *Northlinham*, who in their Sermons inveigh'd againſt the Book of Common Prayer, which was eſtabliſhed by the Queen and the whole Parliament in the (a) Doct. pla. 20, 21. firſt Year of her Reign, and affirm'd it to be ſuperſtitious and impious, *&c.* upon which the Plaintiff and Defendant ſpeaking in the ſaid Church of theſe Sermons, becauſe the Vicar knew they had no Licence nor were authoriſed to preach; when they were ready to preach, before their Sermons forbad them, but they by the Encouragement of the Plaintiff proceeded: The Plaintiff ſaid to the Defendant, *Thou art a falſe Varlet, and I like not of thee*; To which (b) Doct. pla. 20, 21. the Vicar ſaid, *It is (b) no Marvel though you like not of me, for you like of theſe innuendo prædʼ J. T.* and *J. G. that maintain Sedition, (innuendo ſeditioſam illam doctrinam) againſt the Queen's Proceedings*; and ſo juſtified: And it was moved by the Plaintiff's Counſel, that this Bar was inſufficient for two Reaſons. 1. That the Matter of Juſtification was inſufficient, becauſe (as has been ſaid) Sedition can't be committed by Words, but by publick and violent Action. 2. If the Matter of Juſtification was ſufficient, then upon the ſaid Dialogue between the Pl. and Def. the Def. is not guilty: But it was ſaid, that ſuch Juſtification Dialogue-wiſe had not been ſeen before; but if the Truth of the Cauſe is ſuch, he ought to plead Not Guilty, and give the ſpecial Matter in Evidence. But if he will juſtify, he ought to juſtify the Words in the ſame Senſe they import upon the Matter alledged in the Declaration. As if a Man (c) Doct. pla. 21. brings an Action on the Caſe for calling the Pl. (c) Murderer; the Def. will ſay, that he was talking with the Pl. concerning unlawful Hunting, and the Pl. confeſſed that he killed ſeveral Hares with certain Engines; to which the Def. anſwered and ſaid, *Thou art a Murderer (innuendo* (d) Doct. pla. 21. Poſtea 14. a. the killing of the ſaid Hares) this is no (d) Juſtification, for he does not juſtify the Senſe of the Words which the Declaration imports, and therefore he ought to plead not guilty: But as to that it was anſwered by the Deft's Counſel, and (e) Doct. pla. 20, 21. reſolved by the whole Court, That the (e) Juſtification was good. For in Caſe of Slander by Words, the Senſe of the Words ought to be taken, and the Senſe of them appears by the Cauſe and Occaſion of ſpeaking of them: For *ſenſus verborʼ ex cauſa dicendi accipiendʼ eſt, & Sermones ſemper accipiendi*

piendi ſunt ſecundum ſubjectam materiam. Then in this Caſe the Defendant's Counſel have well done to ſhew the ſpecial Matter by which the Senſe of this Word (*Sedition*) appears upon the Coherence of all the Words, that it was in the Defendant's Meaning, the ſaid ſeditious Doctrine againſt the Queen's Proceedings, *ſcil.* the ſaid Act of Parliament *de anno primo*, by which the Book of Common Prayer was eſtabliſhed, and that he did not mean any ſuch publick or violent Sedition as has been deſcribed, and as *ex vi termini per ſe* the Word itſelf imports; And it was ſaid, God forbid that a Man's Words ſhou'd be by ſuch ſtrict and grammatical Conſtruction taken by Parcels againſt the manifeſt Intent of the Party upon Conſideration of all the Words, which import the true Cauſe and Occaſion which manifeſt the true Senſe of them; *Quia quæ ad unum finem loquuta ſunt, non debent ad alium detorqueri*: And therefore in the ſaid Caſe of Murder, the Court held the *(a)* Juſtification good; and that the Defendant ſhou'd never be put to the general Iſſue, when he confeſſes the Words and juſtifies them, or confeſſes the Words, and by ſpecial Matter ſhews that they are not actionable. And altho' he varies from the Plaintiff in the Senſe and Quality of the Words, yet it is no Cauſe to drive him to the general Iſſue: As in Maintenance the Plaintiff charges the Defendant with unlawful Maintenance, the Defendant may juſtify by Reaſon of a lawful Maintenance, and may not plead the general Iſſue: wherefore the Plaintiff replied and ſaid, *Quod præd' Edwardus Denny dixit & propalavit prædicta verba, &c. de injuria ſua propria abſque tali cauſa*, and thereupon Iſſue was joined; *& poſtea partes concordaverunt*; And this was the firſt Cauſe that the Author of this Book (who was of Counſel with the Defendant) moved in the King's Bench. In this Caſe, Reader, you may obſerve an excellent Point of Learning in Actions for Slander, to obſerve the Occaſion and Cauſe of ſpeaking of them, and how it may be pleaded in the Defendant's Excuſe. 2. When the Matter in Fact will clearly ſerve for your Client, altho' your Opinion is that the Plaintiff has no Cauſe of Action, yet take Heed you do not hazard the Matter upon a Demurrer; in which upon the Pleading, and otherwiſe, more perhaps will ariſe than you thought of; but firſt take Advantage of the Matters of Fact, and leave Matters in Law, which always ariſe upon the Matters in Fact *ad ultimum*, and never at firſt demur in Law, when after Trial of the Matters in Fact, the Matters in Law (as in this Caſe it was) will be ſaved to you.

(a) Doct. pla. 21. Antea 13. b.

Doct. pla. 116.

Cutler

Cutler and Dixon.

2. M. 27 & 28 El. in B. R. Cutler & Dixon. (a) 3 Leon. 123. 4 Leon. 35. Noy 102. 1 Bulſt. 151, 185. Cro. El. 230, 231, 248. Cro. Jac. 134, 191, 356. 432. Godb. 240, 340. 2 Bulſtr. 269. 1 Rol. Rep. 61. Palm. 145, 188, 189. 1 Sand. 132. 2 Sid. 163. 1 Vent. 25. Mo. 143, 820, 821. 2 Inſt. 228. Yelv. 117. March. 76, 77.

It was adjudg'd, that if one exhibits Articles to Juſtices of Peace againſt a certain Perſon, containing divers great Abuſes and Miſdemeanors, not only concerning the Petitioners themſelves, but many others, and all this to the Intent that he ſhou'd be bound to his good Behaviour; In this Caſe the Party accuſed ſhall not have for any Matter contained in ſuch Articles any Action upon the Caſe, for they have purſued the (a) ordinary Courſe of Juſtice in ſuch Caſe: And if Actions ſhou'd be permitted in ſuch Caſes, thoſe who have juſt Cauſe of Complaint, wou'd not dare to complain for Fear of infinite Vexation. *R. Q. A.* 50.

Buckley and Wood.

3. M. 33 & 34 El. Buckley & Wood. in B. R. (b) Cro. El. 230, 247, 248. 2 And. 28. Moor 705, 706. 2 Brownl. 100. Hard. 223. Lane 50.

The Caſe was, that *Owen Wood* exhibited a Bill in the *Star-Chamber* againſt Sir *R.* (b) *Buckley*, and charged him with divers Matters examinable in the ſame Court; and further, that he was a Maintainer of Pyrates and Murderers, and a Procurer of Murders and Piracies, which Offences were not determinable in the *Star-Chamber*: Sir *R. Buckley* brought an Action on the Caſe againſt *Owen Wood*, and declared that the ſaid *Owen* had exhibited the ſaid Bill, containing (*inter alia*) that the ſaid *Rich.* was a Maintainer of Pirates and Murderers, and a Procurer of Murders and Piracies, and that the ſaid *Owen* at *B.* in the County of *Salop*, ſpeaking of the Matters contained in the ſaid Bill, ſaid *in auditu quamplurimor'* That the ſaid Bill and Matters therein contained were true: The Defendant confeſſed the exhibiting of the Bill in the *Star-Chamber*, and that he in the ſaid Court at *Weſtminſter* ſaid the ſaid Words; *abſque hoc* that he ſpoke the Words in the County of *Salop*, before or after the Day mentioned in the Declaration, by which he excluded the (c) Day itſelf and anſwered not to it, for which Cauſe the Bar was held inſufficent *per totam Curiam.* And it was reſolved *per totam Curiam*, That for any Matter contain'd in the Bill that was examinable in the ſaid Court, no Action lies, altho' the Matter is meerly falſe, becauſe it was in (d) Courſe of Juſtice: And this agrees with the Opinion in 11 *Eliz. Dyer* 285. and with the Judgment in *Cutler* and *Dixon's* Caſe before. 2. It was reſolv'd and adjudg'd, that for the ſaid Words not (f) examinable in the ſaid Court, an Action on the Caſe lies, for that can't be in a Courſe of Juſtice; for the Court has no Power or Juriſdiction to do that which appertains to Juſtice, nor to puniſh the ſaid Offences, and if ſuch Matters may be inſerted in Bills exhibited in ſo high and honourable a Court, in great Slander of the Parties, and they cannot anſwer it to

(c) Cr. El. 230. Doct. pla. 21, 55.

(d) March 76, 77. Yelv. 117. 2 Inſt. 228. Noy. 102. Cr. El. 230, 231, 248. Cr. Jac. 134, 191, 356, 432. 3 Leon. 123. 4 Leon. 35. 1 Bulſtr. 151, 185. 3 Bulſtr. 269. Godb. 240, 340. 1 Rol. Rep. 61. Palm 145, 188, 189. 1 Sand. 132. 2 Sid. 163. 1 Vent. 25 Moor 143, 820, 821.

(e) Dyer 285. pl. 37. Kelw. 36, 37, 28. Cro. El. 230.

(f) Hob. 267. Hob. 206. 2 Inſt. Cr. El. 248, 836. Cro. Jac. 134, 432. 2 And. 28, 29. 2 Brownl. 100. 1 Rol. 34. 228. Moor 143, 706. 1 Vent. 25.

to clear themſ. nor have their Actions as well to clear themſ. of the Crimes, as to recover Damages for the great Injury and Wrong done them, great Inconvenience will enſue; but the ſaid Libel without any Remedy given the Party will remain always on Record, to his Shame and Infamy which will be full of great Inconvenience. Alſo by the Law no Murder, or Piracy can be tried on any Bill exhibited in Engliſh, but the Offender ought to be indicted for it, and thereupon to have his Trial; and therefore he who preferr'd this Bill has not only miſtaken the proper Court, but the Manner and Nature of exhibiting the ſaid Bill (as to the ſaid Clauſes) has not any Appearance of an ordinary Suit in Courſe of Juſtice: But if a Man brings an Appeal of Murder, returnable in *C. B.* for that no Action lies; for altho' the Writ is not returnable before competent Judges who can do Juſtice, yet it is in the Nature of a lawful Suit, namely by Writ of Appeal. And afterwards Judgment, was given for the Plaintiff. And ſo in the like Caſe, *Trin.* 21 *Eliz. Rot.* 561. *inter Bowes (a) & Standen*, it was reſolved *per totam Curiam* in *B. R.* in the like Caſe on a Bill preferr'd in the Star-Chamber; but the Parties agreed and no Judgment was entred. And upon the ſame Judgment *O. Wood* brought a Writ of Error in the Exchequer-Chamber; and there it was reſolv'd that upon the ſaid Matter Sir *R. Buckley* might have had a good Action: But in this Caſe, he has not alledged the Matter in a ſufficient Manner, for the Action was not grounded upon the Bill exhibited at *Weſtminſter*, but becauſe he ſaid in the County of *Salop*, *in auditu quamplurimorum*, that his Bill was true, without expreſſing the ſaid Matters in particular contain'd in the Bill on which the Action was intended to be grounded, ſo that they who heard only the ſaid Words, That his Bill was true, cou'd not without ſaying more, know the ſaid Clauſes that were ſlanderous to the Plaintiff; and for this Cauſe the Judgment was revers'd.

6 Mod. 169. 5 Co. 57.

(a) Cro. El. 231. 248. 2 And. 29.

Co. Ent. 24. nu. 21.

Stanhope and Blith.

4.

The Plaintiff reciting in his Declaration, that whereas he was a Juſtice of Peace, Surveyor of the Dutchy of *Lancaſter*, and had divers other Offices: The Defendant ſaid of him, *M.* Stanhope *hath but one Manor, and that he hath gotten by ſwearing and forſwearing*: And it was adjudged that the ſaid Words were not actionable. 1. Becauſe they were too general; and Words which ſhall charge any one with an Action, in which Damages ſhall be recover'd, ought to have convenient Certainty. 2. The Defendant doth not charge the Plaintiff with ſwearing or forſwearing, for he may

P. 27 El. Stanhope Blith. in B. R. Co. Ent. 21. nu. 18. Cro. El. 192, 603. 888. Winch. 124. 3 Leon. 163.

may recover or get a Manor by ſwearing and forſwearing, and yet he was not procuring or aſſenting to it; and Words which maintain an Action ought to be directly applied to the Plaintiff, and not by Collection or Inference; for the Damages ought to be given to the Plaintiff, in Regard to the Damage which he has by the Scandal. 3. If one charges another that he has (*a*) forſworn himſelf, it is not actionable for two Reaſons. 1. Becauſe he may be forſworn in common Converſation, *Quia benignior ſententia in verbis generalibus ſeu dubiis eſt præferenda.* 2. It is an uſual Word of Paſſion and Anger for one to ſay, that another has forſworn himſelf; As if one ſays of another, that he is a Villain, or a Rogue, or a Varlet, *vel ſimilia*, theſe or ſuch like will not maintain an Action, for (*b*) *boni Judicis eſt lites dirimere*: But if one ſays of another, that he is (*c*) perjur'd, or that he has forſworn himſelf in ſuch a Court, for ſuch Words an Action ſhall be maintained; for by theſe Words it appears that he has forſworn himſelf in a Judicial Proceeding; *Sed hæc ita in promptua ſunt, ut res probatione non egeant.* For all theſe Caſes have been often adjudg'd. And *Wray* Chief Juſtice ſaid, That altho' Slanders and falſe Imputations are to be ſuppreſſed, becauſe many Times *a* (*d*) *verbis ad verbera perventum eſt*: yet he ſaid, That the Judges had reſolv'd, that Actions for Scandals ſhou'd not be maintain'd by any ſtrained Conſtruction or Argument, nor any Favour given to ſupport them, foraſmuch as in theſe Days they more abound than in Times paſt, and the Intemperance and Malice of Men increaſe; *Et malitiis hominum eſt obviandum:* And in our Books *Actiones pro Scandalis ſunt rariſſime*; and ſuch which are brought, are for Words of eminent Slanders, and of great Import.

Skinner 124.

(*a*) 1 Rol. 39, 40, 41, 42. Godb. 340. Yelv. 27. Cro. El. 135, 293, 394, 492, 905. Poph. 211. Noy 34. 1 Bulſt. 40. 3 Inſt. 166. Hutt. 34, 44. Hob. 283. 1 Brownl. 13. Moor 365, 404. Cro. Jac. 190, 204, 436. Cro. Car. 288, 337, 378. Winch. 2 & 3. 1 Leon. 127. 1 Jones 307. 30 H. 8. Br. Action ſur le Caſe 104.

(*b*) 5 Co. 31. a. 73. a.

(*c*) Hutton 34, 44. Cro. El. 135. Cro. Jac. 120. 158, 80, 436. Moor 365. Yelv. 27, 72. 3 Inſt. 166. 1 Rol. 39, 40, 42.

(*d*) Palm. 129.

Hext againſt *Yeomans.*

5. *Yeomans* charged *Hext* then being a J. of Peace; *For my Ground in* Allerton, Hext *ſeeks my Life, and if I could find* John Silver, *I do not doubt but within two Days to arreſt* Hext *for Suſpicion of Felony*, and it was adjudged, that for the firſt Part of the Words, *That for my Ground in* Allerton, Hext *ſeeks my Life*, no Action lay for two Reaſons, 1. Becauſe he may *ſeek his Life* lawfully upon juſt Cauſe, and his Land may be held of him, and ſo in (*a*) *mitiore ſenſu.* 2. Seeking of his Life is too general, and for ſeeking *tantum* no Puniſhment is inflicted by the Law: But for the (*b*) latter Words it was adjudged, that the Action lay, becauſe for Suſpicion of Felony he ſhall be impriſoned, and his Life drawn in Queſtion.

Eodem Term' Hext v. Yeomans in B. R. Poph. 210. Latch. 176. 3 Bulſt. 262. Godb. 340.

(*a*) 4 Co. 13. a. 20. a. Godb. 278. Poſtea 17. b. Poph. 211. 1 Roll. 71, 72, 73. 1 Mod. Rep. 19, 23. Hutt. 38, 65, 113.

(*b*) Poph. 210. Latch. 176. 3 Bulſt. 262. Godb. 340.

Byrchley

Byrchley's Case.

Byrchley being one of the Attornies or Clerks of *B. R.* and sworn to deal duly without Corruption in this Office; the Defendant speaking of the Manner of *Byrchley's* dealing in his Profession, said to *Byrchley*, *You are well known to be a corrupt Man, and to deal corruptly.* 1. It was resolv'd that the said Words *ex causa dicendi* imply that *Byrchley* had dealt corruptly in his Profession: Also it was said, *Quod sermo relatus ad Personam, intelligi debet de* (b) *conditione personæ.* And the Plaintiff had Judgment for two Reasons. 1. Because the said Scandal touches the Plaintiff in his said Oath. 2. The said Words scandalize him in the Duty of his Profession, by which he gets his Living. *Skinner* a Merchant of *London* said of *Manwood* Chief Baron, *That he was a* (c) *corrupt Judge*; and it was adjudg'd that the Words were Actionable, *Vide* 4 *E.* 6. *Action sur le Case* 112 But it was resolv'd in the principal Case, That if the precedent Speech had been, that *Byrchley* was an Usurer, or that he was another's Executor, and would not perform the Will, *&c.* and thereupon the Defendant had spoke the said Words, then no Action would be maintainable for them, which agree with the Resolution in the Lord *Cromwel's* Case.

6.
M. 27 & 28. El. In B. R. Birchley's Case.
(a) 1 Leon. 336. Hob. 9. Winch. 40. 1 Bulstr. 134. Poph. 177. 3 Bulstr. 266. Cr. Car. 15, 490. 2 Rolls Rep. 72, 149. Herl. 123, 160, 161. Cr. Eliz. 358. Hutt. 104.
(b) Cr. El. 192. Cr. Car. 192. Godb. 278. Hutt. 104. 1 Ventr. 50. Antea 13, 14.
(c) Postea 19. a. 1 Ventr. 50. Poph. 177. 1 Mod. Rep. 23. 2 Rolls Rep. 136. Skinner 98.

Stuckley and Bulhead.

Stuckley (d) Justice of Peace in the County of *Devon*, brought an Action on the Case against *Bulhead* for these Words; *M. Stuckley covereth and hideth Felonies, and is not worthy to be a Justice of Peace:* And adjudg'd, that the Action lies, for it is against his Oath and the Office of a Justice of Peace, and a good Cause to put him out of the Commission, and he may be indicted and fined for it.

7.
M. 44. & 45. El. In C. B. Stuckley & Bulhead.
(d) Cr. Car. 15. 1 Ventr. 50. 1 Mod. Rep. 23. Cr. Jac. 56. Herl. 161.

Weaver and Cariden.

The Defendant said, That the Plaintiff was (e) detected for Perjury in the *Star-Chamber*; and adjudged, that no Action lay: For an honest Man may be detected, but not convicted; and every one who has a Bill of Perjury exhibited against him there, is detected.

8.
H. 37. El. Weaver & Cariden.
(e) Cr. El. 371. Cr. Car. 268. Hutt. 2. 2 Rol. Rep. 142.

Snag against *Gee.*

The Plaintiff shewed in his Declaration, That the Defendant had a Wife yet living, and that the Defendant said of the Plaintiff, *Thou hast killed my* (f) *Wife, thou art a Traytor.* And as to these Words, *Thou hast killed my Wife*, The Defendant demur'd in Law; and it was adjudged, that no Action lay; and the Difference taken when the Wife was living (as in this Case it appeared she was) and when she was dead; For when she is alive no Action lies, altho' the Defendant says, That the Plaintiff has murdered her; for then it appears that no Murder of her can be committed, nor the Defendant in any Jeopardy, and so the Words vain, and no Scandal or Damage to the Plaintiff.

9.
H. 39 El. In C. B. Snag v. Gee.
(f) Cr. Car. 489. Poph. 187. 1 Jones 141. Latch. 159, 160. Winch. 39, 40. 3 Bulstr. 167. Palm. 358. March 109.

Eaton

Eaton againſt Allen.

10. The Defendant ſaid of the Plaintiff, *He is* (*a*) *a Brabler and a Quarreller, for he gave his Companion Counſel to make a Deed of Gift of his Goods, to kill me, and then to fly out of the Country, but God preſerved me.* And it was ſtrongly urged that the Action ſhould be maintainable, and divers Caſes cited; one of the Lady (*b*) *Cockeyn*, *M.* 32 & 33 *El. in B. R.* for theſe Words, *My Lady* Cockeyn *offered to give Poyſon to one to kill the Child in her Body.* Another *inter Tibots & Heyn* in *Glouceſter* for theſe Words, (*c*) *Tibots and another did agree to hire one to kill* S. B. Alſo *Cardinal's Caſe*, for theſe Words, *If I had conſented to M.* Cardinal, T. H. *had not been alive:* And the Lord *Lumley's Caſe*; *My Lord* Lumley (*d*) *hath gone about to take away my Life againſt all Chriſtian Dealing.* But upon great Conſideration and Adviſement it was adjudg'd that in the principal Caſe the Words were not actionable: For the Purpoſe or (*e*) Intent of a Man without Act is not puniſhable by Law. *Et ubi non eſt Lex, ibi non eſt tranſgreſſio quoad mundum.* And altho' for ſuch Conſpiracy he might be puniſhed in the *Star-Chamber*, that is by the abſolute Power of the Court, and not by the ordinary Courſe of the Law. *Nota bene*, this Caſe, and the Cauſe and Raeſon of this Judgment.

Tr. 40 El. In C. B. Eaton v. Allen.
(*a*) Cr. Car. 140. Cr. Eliz. 684.
(*b*) Cr. El. 49. Moor 419. 2 Bulſt. 206. 3 Bulſtr. 167. Lane 98.
(*c*) Cr. Eliz. 191. 3 Bulſt. 167.
(*d*) Moor 142. 1 Leon. 187. 2 Siderf. 22, 31. 1 Anderſ. 121.
(*e*) Poſtea 19. b. Cr. Car. 140. 1 Jones 195. 3 Siderf. 231.

Davis againſt Gardiner.

11. The Plaintiff declared, That ſhe was a Virgin of good Fame, *&c.* and free from all Suſpicion of Incontinency, *&c.* And whereas *Anthony Elcock* Citizen and Mercer of *London*, of the Subſtance and Value of 3000 *l.* deſired her for his Wife, and had thereupon conferr'd with *John Davis* her Father, and was ready to conclude it, the Defendant (*præmiſſarum non ignarus*) to defame the ſaid *Ann*, and to obſtruct the ſaid *Anthony's* Proceeding, uttered and publiſhed of the ſaid *Ann* theſe Words; *I know* Davis's *Daughter well* (innuendo præd' Annam) *ſhe dwelt in* Cheapſide, *and there was a Grocer that did get her with Child* (and the Defendant being there then admoniſhed that he ſhould be adviſed *quid dixerat de præfata Anna:*) *ulterius de eadem dixit: I know very well what I ſay, I know her Father, and Mother, and Siſter, and ſhe is the youngeſt Siſter, and had the Child by the* Grocer: By Reaſon of which Words the Pl. was greatly defamed, *& ratione inde dict' Anthonius ipſam* Annam *in uxor' ducere penitus recuſabat*; and the Defendant pleaded not guilty, and by *Niſi prius* in the County of *Bucks*, the Jurors found for the Plaintiff, and aſſeſſed Damages to 200 Marks. And it was now moved in Arreſt of Judgment by the Defendant's Counſel, that the ſaid Defamation of Incontinency concern'd the Spiritual, and not the Temporal Juriſdiction: And therefore as the Offence ſhou'd be puniſhed in the Spiritual Court, ſo her Remedy for ſuch Defamation ſhou'd be there alſo; for *Cognitio cauſæ non ſpectat ad Forum Regium:* So if a

Tr. 35 El. Davis v. Gardiner Poph. 36. 1 Rolls Rep. 34, 35, 119. Moor 409. Cr. Car. 141. 155. Cr. Jac. 323. 2 Bulſt. 89, 90. 1 Siderf. 397. 1 Jones 141. 2 Sidref. 172. Larch. 218. 2 Rolls Rep. 249. Poph. 140. Hetl. 161. Sal. 694. 6 Mod. 104, 105.
Cro. Jac. 323. Cr. Eliz. 639. 1 Ventr. 4.
Skinner 112. Poſt. 20.

Man

Man is called *Baſtard*, or *Heretick*, or *Miſcreant*, or *Adulterer*, (foraſmuch as theſe belong to the (*a*) Eccleſiaſtical Juriſdiction) no Action lies at the Common Law; and in Proof thereof 12 *H.* 7. 22. *a. b. &* 27 *H.* 8. 14. *a. b.* were cited. But it was anſwered by the Plaintiff's Council, and reſolv'd *per totam Curiam*, that the Action was (*b*) maintainable for two Reaſons. 1. Becauſe if the Woman had a Baſtard, ſhe was * puniſhable by the Statute of 18 *Eliz. cap.* 3. And altho' Fornication or Adultery is not examinable by our Law, becauſe they are done in Secret, and peradventure are indecent to be openly examin'd, yet the having of a Baſtard is a Thing apparent, and examinable and puniſhable by the ſaid Act. 2. It was reſolved, if the Defendant had charged the Plaintiff with bare Incontinency, yet the Action ſhould be maintainable: For in this Caſe the Ground of the Action is (*c*) Temporal, *ſc.* that ſhe was to be advanced in Marriage, and that ſhe was defeated of it, and the Means by which ſhe was defeated was the ſaid Slander, which Means tending to ſuch End, ſhall be tried by the Common Law. So if a Divine is to be preſented to a Benefice, and one to defeat him of it, ſays to the Patron, *That he is an Heretick, or a Baſtard, or that he is excommunicated*, by which the Patron refuſes to preſent him (as he well might if the Imputations were true) and he loſes his Preferment, he ſhall have his Action on the Caſe for thoſe Slanders tending to ſuch End. And if a Woman is bound that ſhe ſhall live continent and chaſte; or if a Leaſe is made to her *quamdiu* (*d*) *caſta vixerit*, in theſe Caſes Incontinency ſhall be tried by the Common Law. And *Popham*, Chief Juſtice, ſaid, That if one ſays of a Woman that keeps an (*e*) Inn, that ſhe has a great infectious Diſeaſe, by which ſhe loſes her Gueſts, ſhe ſhall have an Action on the Caſe. *Trin.* 25 *Eliz. in B. R. inter Baniſter & Baniſter*, it was reſolved, That where the Defendant ſaid of the Plaintiff (being Son and Heir to his Father) that he was a (*f*) Baſtard, that an Action on the Caſe lies; for it tends to his Diſinheriſon of the Land which deſcends to him from his Father: But there it was reſolved, That if the Defendant pretends that the Plaintiff was a Baſtard, and that he (*g*) himſelf was the next Heir, there no Action lies, and that the Defendant may ſhew by Way of Bar, if the Plaintiff omits it in his Declaration; which agrees with the Reſolution in *Ann Davis*'s Caſe, and with the Lord *Cromwel*'s Caſe.

Skinner 112.
(*a*) 1 Brownl. 16. Moor 10, 29. Cr. Eliz. 787. Godb. 327, 328.
(*b*) Cr. Eliz. 639. 787.
* Cart. 55. Palm. 298.
(*c*) Cr. Car. 141, 155. Cr. Jac. 323, 642. Palm. 298. 1 Rolls. 35. Cart. 234, 235. 3 Keb. 148. 5 Co. 58. a. Hetl. 161.
(*d*) 1 Sid. 214.
(*e*) 2 Rolls Rep. 136. Cr. El. 289, 582, 583.
(*f*) 1 Rolls Rep. 244. 2 Rolls Rep. 250. Cr. Jac. 422. Cr. Car. 469. 1 Jones 388. Hob. 179. Godb. 451. Owen 32. Dall. 63. 3 Bulſtr. 75. 1 Rolls 38. Cr. El. 346, 347.
(*g*) Poſtea 18. a. 1 Sider. 79. Cr. Jac. 164. Moor [illegible] Cr. Eliz. 197. I [illegible]

James verſus *Rutlech*.

The Plaintiff declared, That the Defendant and one *John Bonner* having Conference of the Plaintiff, the Defendant ſaid of the Plaintiff to the ſaid *John Bonner* theſe Words, *Hang him* (prædictum *Johannem James* innuendo) *he is full of the Pox* (innuendo *the French* (*a*) *Pox*) *I marvel that you* (præd' *Johannem Bonner* innuendo) *will eat*

M. 41 & 42 El. in B. R. James ver. Rutlech. Mod. 73. 1 Rolls 69. Styles 206.
(*a*) Cr. El. 289. Cr. Jac. 430. Palm. 64, 65.

or drink with him, (prædictum *Johannem James* innuendo) *I will prove that he is full of the Pox* (innuendo *the French Pox.*) The Defendant pleaded, Not-guilty; and it was found for the Plaintiff, and Damages aſſeſſed. And it was moved in Arreſt of Judgment, that the Words were not actionable: And it was reſolved, that in every Action on the Caſe for ſlanderous Words, two Things are requiſite;

(a) Moor 63. 1. That the Perſon who is ſcandalized, is (*a*) certain. 2. That the Scandal is apparent by the Words themſelves; and therefore, if one ſays without any precedent Communication, that one of the Servants of *J. S.* (he having many) is a notorious Felon, or Traitor, *&c.* here, for the Incertainty of the Perſon no Action lies; and an (*b*) *innuendo* cannot make it certain. So if one ſays generally, *I know one near about* J. S. *that is a notorious Thief,* or ſuch like; but when the Perſon is once named in certain, as if two ſpeaking together of *J. S.* one ſays, *He is a notorious Thief,* there *J. S.* in his Declaration may ſhew that there was Speech of him between them two, and that one ſaid of him, *He* (*innuendo prædict'* J. S.) *is a notorious Thief.* For the Office of an *innuendo* is to contain and deſign the ſame Perſon who was named in certain before, and in Effect ſtands in lieu of a *prædict',* but an *innuendo* cannot make a Perſon certain who was incertain before. For it would be inconvenient, that Actions ſhould be maintained by Imagination of an Intent which doth not appear by the Words upon which the Action is grounded, but is altogether incertain and ſubject to deceivable Conjecture: But if one ſays to *J. S. Thou art a* (*c*) *Traytor, &c.* there *conſtat de perſona,* and the Action lies: So here in the Caſe at Bar, when the Defendant and *Bonner* had Speech of the Plaintiff, Then, when the Defendant ſaid, *Hang him, &c.* there *innuendo* will denote the ſame Perſon named before: But if the Defendant without any Diſcourſe of the Plaintiff, had ſaid, *Hang him, &c.* there no *innuendo* would have made the Perſon certain. As to the 2d, as an *innuendo* cannot make the Perſon certain which was incertain before, ſo an *innuendo* cannot alter the Matter or Senſe of the Words themſelves: And therefore when the Defendant in the Caſe at Bar ſaid of the Plaintiff, *That he was full of the Pox,* (innuendo *the French Pox,*) this *innuendo* doth not do its proper Office, for it endeavours to extend the general Words, *the Pox,* to the *French Pox,* by Imagination of an Intent which is not apparent by any precedent Words, to which the *innuendo* ſhould refer. And the Words themſelves ſhall be taken *in* (*d*) *mitiori ſenſu. Carthew* 422.

(b) 1 Sid. 52. March. 109, 110. 2 Rolls Rep. 145. Cr. Car. 236, 243, 443. 3 Bulſtr. 72, 73. 1 Rolls Rep. 227. Hutt. 65. Cr. Jac. 241, 126, 107, 514. Cr. El. 497. Hob. 2. 3, 45, 268. Aleyn 32. Styles 46. Yelv. 21. Hutt. 65. 1 Rolls 82, 83, 84. Hetl. 174. 2 Caſes in Law, *&c.* 197. Poſt 20. a.

(c) 10 Co. 130. b.

(d) Antea 13. a. 15. b. 4 Co. 20. a. Godb. 278. Poph. 211. Hutt. 38, 65, 113. 1 Rolls 71, 72, 73. Latch. 2. Palm. 29. 3 Bulſtr. 74.

Ox-

Oxford & Ux. verſus *Croſs.* 13.

The Plaintiffs brought an Action in *London*, becauſe the Defendant called the Plaintiff's Wife (*a*) *Whore*; and the Defendant removed it into *B. R.* by *Habeas Corpus*, and it was moved to have a *Procedendo* to remand it, becauſe the Action was maintainable in *London* for the ſaid Words, but not at the Common Law. And the *Procedendo* was denied *per tot' Cur'*. For ſuch Cuſtom to maintain Actions for ſuch brabling Words is againſt Law; *Licet* (*b*) *conſuetudo ſit magnæ Authoritatis, nunquam tamen præjudicat manifeſtæ veritati.*

Tr. 41 El. Oxford. & Ux. v. Croſs.
(*a*) 1 Rolls 550. 2 Rolls 69. March. 107. Cr. Car. 141, 350, 394, 486, 487. Cr. El. 282, 283. Lit. Rep. 10.
(*b*) Stiles 68, 70, 229, 245. 6 Co. 6. b.

Sir *G. Gerard* verſus *Dickenſon.* 14.

The Plaintiff declared, That he was ſeiſed of the Manor and Caſtle of *H.* in the County of *Stafford* in Fee by Purchaſe from *George* Lord *Audley*; and that he was in (*a*) Communication to demiſe the ſaid Caſtle and Manor to *Ralph Egerton* for 22 Years for 200 *l.* Fine, and 100 *l.* Rent *per Annum*; and that the Defendant (*præmiſſorum non ignara*) ſaid, *I have a Leaſe of the Manor and Caſtle of* H. *for* 90 *Years*; and then and there ſhewed and publiſhed a Demiſe ſuppoſed to be made by *George* Lord *Audley*, Grandfather to the ſaid *George* Lord *Audley*, for ninety Years, to *Edward Dickenſon* her Huſband, and publiſhed the ſaid Demiſe as a true and good Leaſe; and ſo affirmed it, and offered to ſell it; *ubi revera* the ſaid Leaſe was counterfeited by her Huſband, and that the Defendant knew it to be counterfeited; by Reaſon of which Words and Publication, the ſaid *Ralph Egerton* did not proceed to accept the ſaid Leaſe, to Damage, *&c.* The Defendant pleaded in Bar, *quod* (*b*) *talis Indentura* (*qualis* in the Declaration is alledged) came to the Defendant's Hands by Trover, and traverſed that ſhe knew of the Forgery, upon which the Plaintiff demurr'd in Law. And in this Caſe three Points were reſolved. 1. If the Defendant had affirmed and publiſhed, that the Plaintiff had no Right to the Caſtle and Manor of *H.* but that ſhe herſelf had Right to them, in that Caſe, becauſe the Defendant herſelf (*c*) pretends Right to them, altho' in Truth ſhe had none, yet no Action lies. For if an Action ſhould lie when the Defendant herſelf claims an Intereſt, how can any make claim or Title to any Land, or begin any Suit, or ſeek Advice and Counſel, but he ſhould be ſubject to an Action, which would be inconvenient. Which Reſolution agrees with the Opinion in (*d*) *Baniſter's* Caſe before, (*e*) 2 *E.* 4. 5. *a. b. &* (*f*) 15 *E.* 4. 32. *a. b.* no Action upon the Caſe lies againſt one who publiſhes another to be his (*g*) Villain, without ſaying that he lies in wait to impriſon him, *Et tales & tantas minas in ipſum fecit, quod circa negotia ſua palam intendere non audebat. Vide* 22 *E.* 3. 1. *in* (*h*) *Conſpiracy*, 38 *E.* 3.

M 32 & 33 El. Sir G. Gerard, Kt. Maſter of the Rolls, v. Dickenſon.
(*a*) Yelv. 89. Cr. Car. 140, 141. Cr. Jac. 397, 398, 485. 1 Rolls Rep. 244. 3 Bulſtr. 75. Palm. 529. Cr. El. 196.
(*b*) Poſtea 18. b. Cr. El. 196, 197. Lane 62.
(*c*) 1 Rolls Rep. 409. 1 Sid. 79. Cr. Jac. 164. Moor 188. Cr. El. 197. Antea 17. a. Hob. 205. Heil. 161, 162.
(*d*) Supra 17. a.
(*e*) Fitz. Action ſur le Caſe 16. Br. Action ſur le Caſe 90.
(*f*) Br. Action ſur le Caſe 63. Br. Villenage 75.
(*g*) Cr. El. 197. Keilw. 26. b. 40. a.
(*h*) Cr. El. 197

33. 43 *E.* 3. 20 *F. N. B.* 116. *b.* And therefore it was reſolved, that for the ſaid Words, *I have a Leaſe of the Manor of* H. for 90 *Years*, altho' it is falſe, yet no Action lies for ſlandering of his Title or Intereſt in the ſaid Caſtle and Manor. And altho' it appears by the Defendant's Bar, that ſhe has no Title or Intereſt in the ſaid Leaſe, but is a Stranger to it; yet foraſmuch as the Matter alledged in the Declaration doth not maintain the Action, the (*a*) Bar will not make it good. 2. It was reſolved, that there was other Matter in the Declaration ſufficient to maintain the Action, and that was becauſe it was alledged in the Declaration that the Defendant knew of the Communication of the making of the ſaid Leaſe to *Ralph Egerton*, and alſo that ſhe knew that the Leaſe was forged and counterfeited, and yet (againſt her own Knowledge) ſhe has affirmed and publiſhed, that it was a good and true Leaſe, by which the Plaintiff was defeated of his Bargain. *Vide* 5 *E.* 4. 126. If a Man (*b*) forges a Bond in my Name, and puts it in Suit againſt me, by which I am vexed and damnified, I ſhall have an Action on the Caſe, 42 *Aſſ.* 8. *B.* offered eight Oxen to ſell to *A.* as his (*c*) proper Goods, knowing them to be the proper Goods of *P. A.* truſting in the Fidelity of *B.* bought then for 8 *l.* and afterwards *P.* retook the Oxen; in that Caſe *A.* ſhall have an Action upon the Caſe againſt *B.* 3. It was reſolved, that the Bar was inſufficient, for the Defendant's knowing of the Forgery is not traverſable. As in an Action upon the Caſe, becauſe the * Defendant's Dog has bit the Plaintiff's Cattle, *ipſe ſciens canem ſuum ad mordandas oves conſuetum*; the (*d*) (*ſciens*) is not traverſable, but ought to be proved in Evidence upon the General Iſſue, for *ſciens, &c.* is no direct Allegation, nor ever alledged in any Place, ſo that it is not traverſable nor triable. Alſo the Manner of Pleading, (*e*) *alis Indentura qualis* in the Declaration is alledged, is no direct Anſwer to the Indenture alledged in the Declaration, for *talis Indentura non eſt eadem Indentura*; for *Nullum ſimile eſt idem. Vide* 30 *Aſſ.* 19. 2 *E.* 4. 5. 15 *E.* 4. 32. 27 *H.* 8. 14. 22. 30 *H.* 8. *Br. Action ſur le Caſe* 104, 4 *E.* 6. *ibid.* 112. 28 *H.* 8. *Dyer* 19. 6 *E.* 6. *ibid.* 72. & 75. 3 *Mar. ibid.* 118. 7 *Eliz. ibid.* 236. 11 *Eliz.* 285. 15 *Eliz.* 317. And theſe are in Effect all the Caſes in our Books.

(*a*) Doct. pl. 69.

(*b*) Hob. 267. Cr. Eliz. 197. Fitzgib. 98, 174.

(*c*) Cr. Jac. 197, 468, 469, 474. Cr. Eliz. 44.

* Fitzgib. 263. (*a*) Cr. Jac. 398, 469. 1 Rolls 4. Cr. Car. 254, 487. 3 Bulſt. 76. 28 H. 6. 7. a. Br. travers perſans ceo 20. Doct. pl. 189. Hard. 2. 1 Siderf. 21. 2 Bulſt. 291. 1 Roll. Rep. 43, 70, 119. (*e*) Cr. Eliz. 169, 197. Doct. pl. 56. Lane 62.

Brittridge's Caſe.

15. M. 44 & 45 El. in B. R. Brittridges Caſe. Yelv. 10. 34. 2 Rolls Rep. 343. Mod. 666.

Brittridge brought an Action upon the Caſe for theſe Words, *Mr.* Brittridge *is a perjured old Knave, and that is to be proved by a Stake parting the Land of* H. Martin *and Mr.* Wright. The Def. pleaded Not-guilty, and was found guilty;

guilty: And now in Arreſt of Judgment it was moved, that theſe Words are not (*a*) actionable. 1. Becauſe this Word, *A perjured old Knave*, the Noun is *Knave*, and *perjured* is ſpoke adjectively; as if a Man ſays, one is a ſeditious or thieviſh Knave, theſe Words are not actionable, becauſe the Words do not import that he hath made Sedition or Felony, but are adjective, which imply an Inclination to it. 2. That the Court ought to judge upon all the Words together, and collect the Defendant's Intention upon all his Words, and not to take his Words by Parcels. And it was ſaid that (*b*) the laſt Words extenuate the genuine and proper Senſe of the firſt Words, for Perjury ſhall be intended in ſome Court upon judicial Proceeding; but when he adds, *And that is to be proved by a Stake parting, &c.* that explains for any Thing that appears to the Court, that this Perjury was not in any Court, but an unadviſed Oath extrajudicial about the placing of a Stake for a Partition. As to the firſt it was reſolved by *Popham*, Chief Juſtice, *Gawdy*, *Fenner*, and *Yelverton* Juſtices, that for theſe Words, *Thou art a perjured Knave*, without any more, an Action upon the Caſe lies, for ſometimes adjective Words will maintain an Action, and ſometimes not. They are actionable, 1. When the Adjective preſumes an Act committed. 2. When they ſcandalize one in his Office, or Function, or Trade, by which he gets his Living: As if a Man ſays, That one is *a perjured Knave*, there muſt be an Act done, or otherwiſe he can't be perjured, as was reſolved before: So if one ſays of an Officer, or a Judge, That he is a (*c*) corrupt Officer or Judge, an Action lies for both Cauſes; 1. Becauſe it implies an Act done: 2. It is ſlanderous to him in Reſpect of his Office. *Paſch.* 24 *Eliz.* in *B. R. Philips*, Batchelor of Divinity, and Parſon of *D.* brought an Action upon the Caſe againſt *Robert Badby*, Eſq; becauſe the ſame Defendant ſpoke theſe Words in *London*, *Thou haſt made a ſeditious Sermon, and moved the People to Sedition this Day.* The Defendant juſtified at St. *Edmund's-Bury* in *Suffolk*, that he ſpake the ſaid Words at *Bury*, upon which the Plaintiff demurred; and in that Caſe two Points were reſolved. 1. Notwithſtanding that the firſt Part of the Words were uttered adjectively, and the latter Words were but moving to Sedition, and it did not appear that any follow'd, yet becauſe they ſcandaliz'd the Pl. in his Fuction, it was reſolved that the Words were actionable. 2. That the Defendant ought to have juſtified the Words in *London*, and not at *Bury*, for the Words in the Declaration were not anſwered; wherefore Judgm. was given for the Pl. So if one ſays of a Merchant, That he is a *bankruptly Knave*, or *bankrupt Knave*, altho' there (*d*) *Bankrupt* be ſpoken adjectively,

(*a*) Cr. Jac. 81. Palm. 11.

(*b*) Stiles 379.

(*c*) Supra 16. a. 1 Ventr. 50. Poph. 177. Mod. Rep. 23. 2 Rolls Rep. 136. Paſch. 24 Eliz. inter Philips & Badby in B. R.

(*d*) Cro. Jac. 345, 585. 1 Rolls 17. Cr. Car. 31, 472. 1 Rol. Rep. 22. 2 Bulſtr. 210. Palm. 10, 11. Godb. 151. Cr. El. 268, 918.

adjectively, yet an Action lies, as it was adjudged in *Mitton's* Case, in *C. B. Mich.* 43 & 44 *Eliz.* Or if one says of a Merchant, *That he (a) will be Bankrupt in two Days*, which implies but Inclination, yet an Action lies, *6 E. 6. Dyer* 72. for that defames him in his Trade by which he gets his Living: But when the Words do not imply an Act done, but an Inclination to an Act which doth not scandalize the Party in the Duty of any Office, or Function nor in his Trade of living, there an Action upon the Case doth not lie; as to say that he is a *seditious* or (*b*) *thievish Knave*, these do not import an Act to be done, but an (*c*) Intent or Inclination to it, which is not punishable by the Common Law. As to the second, it was resolved *in the Case of Brittridge*, That upon all the Words taken together no Action lay; for the latter Words extenuate the first, and explain his Intent, that he did not intend any judicial Perjury. Also it's impossible that a *Stake* can prove him perjured: And therefore upon Consideration of all the Words for the Impossibility and Insensibility of them, they are not actionable, as it has been adjudged, that where one says to another, *Thou art a Thief, for thou hast stollen my Apples out of my Orchard*; or, *For thou hast robbed my Hop-ground*, which latter Words prove it no Felony: and so qualify the proper Sense of this Word *Thief*, which of it self, although it is generally spoken, will bear an Action. And so it was adjudged *inter Dobbins & Franklin, Mich.* 43 & 44 *Eliz. in C. B.* And it was agreed that it is all one to say, *Thou art a Thief, for thou hast stollen my Apples out of my Orchard*; and to say, *Thou art a Thief, and that will be proved by stealing my Apples in my Orchard.* So in the Case at Bar, *Thou art a perjured old Knave, and that will be proved by a Stake parting, &c.* For the Office of Judges is upon Consideration of all the Words to collect the true Scope and Intention of him who speaks them: And if in this Case the Plaintiff had declared only upon the first Words, *sc. Thou art a perjured Knave*, the Defendant might have shewed all the Words, and the Coherence of them, as appears before in the Lord *Cromwel's* Case. But it was said, that if the Plaintiff's Council had disclosed the Truth of the Case in the Declaration, the said Words would have well maintained the Action; for the Truth of the Case was, That in an Action between *Martin* and *Wright*, the State of the Controversy was, Whether the said *Stake* stood upon the Land of the one, or of the other, or indifferently, as a Boundary betwixt them. And in that Action the Plaintiff was sworn as a Witness, and by the Pretence of the Defendant, had in his Deposition perjured himself: But this Special Matter was not shewed, and therefore it was adjudged, *quod Querens nihil capiat per Billam.*

(a) 2 Roll. Rep. 145, 433.

(b) Latch. 47. 1 Sid. 373. Palm. 11. Cr. Jac. 65, 66.

(c) Antea 16. b. Cr. Car. 140. 1 Jones 195. 1 Sid. 231. Yelver. 90.

Godb. 241. Cro. Jac. 39. Hutt. 113. Cr. Jac. 674. 3 Inst. 109.

Barham's Case. 16.

Barham brought (*a*) *an Action on the Case* against *Netherſal*, and the Words were, *Maſter* Barham *did burn my Barn* (innuendo *a Barn with Corn*) *with his own Hands, and none but he*; and after Verdict, it was mov'd in Arreſt of Judgment, That the Words were not actionable, for it is not Felony (*b*) to burn a Barn if it is not Parcel of a Manſion-Houſe, nor full of Corn: And in ſuch Caſe *agitur civiliter* and not *criminalitur*, *& verba accipienda ſunt in* (*c*) *mitiore ſenſu*: And the (*d*) *Innuendo* will not ſerve when the Words themſelves are not ſlanderous; which well agrees with divers of the Reſolutions before.

Salk. 513. M. 44 & 45 Eliz. in B. R. Barham's Caſe. (*a*) Co. Entr. 24. Numb. 22. Cr. El. 834. 1 Rol. 73. 82. Yelv. 21. Noy. 155. Hutt. 65. Cr. Jac. 438. 1 Sid. 52. 3 Bulſtr. 83. (*b*) Stamf. Cor. 36. a. 11 H. 7. 1. b. Br. Corone 226. Hales pl. Cor. 85, 86. 3 H. 7. 10. a. 11 Co. 29. a. 2 Inſt. 188. Cr. Car. 376, 377. 1 Jones 351. 3 Inſt. 66, 67. Cr. El. 834. 10 E. 4. 14. b. 49 H. 6. 14. b. in lib. E. 4. (*c*) Antea 17. b. 13. a. 15. b. Godb. 278. Poph. 211. Hutt. 38, 65, 113. 1 Rol. 71. 72, 73. 1 Mod. Rep. 19, 23. Latch. 2. Palm 29. 3 Bulſtr. 74. (*d*) Antea 17. b. 1 Siderf. 52. March 109, 110. 2 Rol. Rep. 145. Cr. Car. 236, 243, 443. 3 Bulſt. 72, 83. 1 Rol. Rep. 227. Hutt. 65. Cr. Jac 107, 126, 241, 514. Cr. El. 497. Hob. 2, 3, 45, 268. Allen 32. Stiles 46. Yelv. 21. 1 Rol. 82, 83, 84. Hetl. 174.

Palmer and *Thorpe*. 17.

Touching Defamations determinable in the *Eccleſiaſtical Court*, it was reſolved, That ſuch Defamation ought to have three Incidents: 1. That it concerns Matter meely Spiritual and determinable in the *Eccleſiaſtical Court*, as for calling him *Heretick*, *Schiſmatick*, *Adulterer*, *Fornicator*, *&c.* 2. It ought to concern Matter meerly Spiritual only, for if ſuch Defamation touches or concerns any thing determinable at the Common Law, the *Eccleſiaſtical* Judge ſhall not have Conuſans of it. 3. Altho' ſuch Defamation is meerly Spiritual, and only Spiritual; yet he who is defam'd can't ſue there for Amends or Damages, but the Suit ought to be only for the Puniſhment of the Sin, *pro ſalute animæ*. And as to the firſt and ſecond, the Caſe in 22 *E.* 4. 20. *a. b.* was cited to this Effect: The Abbot of St. *Albans* ſent his Servant to a Feme-Covert to come to his Maſter and ſpeak with him, the Servant perform'd his Command, and thereupon the Woman came with him to the Abbot; and when the Abbot and the Woman were together, the Servant (who knew his Maſter's Will) withdrew from them, and left them two in the Chamber alone; and then the Abbot ſaid to the Woman, That her Apparel was groſs Apparel; to whom the Woman ſaid, That her Apparel was according to her Ability, and according to the Ability of her Huſband: The Abbot (knowing in what Women repoſe Delight) ſaid to her, That if ſhe would be ruled by him, that ſhe ſhould have as good Apparel as any Woman in the Pariſh, and ſolicited her Chaſtity: When the Woman would not conſent to him, the Abbot aſſaulted her, and would have made her an ill Woman againſt her Will, which ſhe would not ſuffer; whereupon the Abbot kept her in his Chamber againſt her Will, and to the Intent, *&c.* The Huſband having Notice of this Abuſe to his Wife, ſpoke of all this Matter, and ſaid, That he would have his Action of falſe Impriſonment againſt the Abbot, for that he had impriſon'd his Wife; whereupon the Abbot (adding one Sin to another) ſued the innocent and poor Huſband for Defamation in the Spiritual Court, becauſe the Huſband had publiſhed, that the Lord Abbot had ſolicited his Wifes Chaſtity, and would have made her an ill Woman:

T. 25 El. in B. R. Palmer and Thorpe. 2 Inſt. 492. 27 H. 8. 14. b. Cr. Car. 229. Cr. Jac. 462. 5 Co. 51. a. Davis 73. a. Br. Prohib. 14.

See Rep. Q. A. 209. No Difference between Scandal of a Clergy-man and a Layman. And Lucas 385. That no Action lies at Common Law for calling Whore, Bawd, *&c.*

man: But upon all this Matter diſcloſed to the Court, the Huſband had a Prohibition, becauſe the Huſband might have an Action at the Common Law for this Aſſault and Impriſonment of his Wife, altho' he then had no Action, nor perhaps never would; yet becauſe the Scandal determinable in the Eccleſiaſtical Court, was upon the Matter diſclos'd, mix'd with Matter determinable at the Common Law, for this Cauſe, upon a Motion made by the Abbot's Counſel to have a *Conſultation* in that Caſe, it was deny'd by the Court. *Vide* 18 *E.* 4. 6. 12 *H.* 7. 22. *Regiſt.* 46, 47, *&* 54. As to the third, *vide* the Statute of *Articuli Cleri*, *cap.* 1, 2, *&* 3, and the Stat. of *Circumſpecte agatis*, *anno* 13 *E.* 1. and *F. N. B.* 51.

2 Inſt. 487, 488, *&c.* *J. K.* 52. *D. M.* 53. *A. F.* So it appears there, if a Parſon ſues in the Spiritual Court for laying violent Hands upon him, and to have him excommunicated, or have corporal Puniſhment, and not for Damages or Amends; but the Plaintiff ſhall recover Coſts there: And if the Defendant in Caſe of Defamation is put to corporal Puniſhment, or for laying violent Hands upon Clerks, *&c.* if the Party will redeem his Penance, and agree to pay the Party damnify'd a certain Sum of Money, it appears there, that the Party damnified ſhall have Suit for this in the Spiritual Court, and no *Prohibition* lies; and upon theſe Differences you will better underſtand the better Opinion in 12 *H.* 7. 22. and the Senſe of the *Regiſt.* 54. where all the Juſtices refuſed to grant a Conſultation in Caſe of Defamation, *id eſt*, either becauſe the Matter of the Defamation was not meerly and ſolely ſpiritual, or that the Plaintiff ſued for Damages or Amends for ſuch Defamation; and therewith agrees *F. N. B.* 53. *f.*

Theſe Reſolutions concerning Scandals (which I amongſt many others for my private Inſtruction have obſerv'd) at the importunate Requeſt and Deſire of my good Friends, ſome in the Realm of *Ireland*, and others dwelling in the remote Parts of *England*, out of the Meridian of *Weſtminſter*, I have reported, but in a ſummary and ſuccinct Manner, as you ſee, omitting many others which I do not think neceſſary to be publiſh'd, my Opinion always being, *Quod multo utilius eſt pauca idonea effundere, quam multis inutilibus homines gravari.* And nevertheleſs theſe brief Reſolutions, and the Reaſon of them being well underſtood, and obſerved, will, peradventure, give great Direction and Inſtruction *pro multis aliis*, and will deter Men, for Words which are but Wind, from ſubjecting themſelves to Actions, in which Damages and Coſts are to be recover'd, which ſometimes trench to the great Hindrance and Impoveriſhment of the Speakers.

Copyhold

Copyhold Caſes.

See Rep. Q. A. 99.

BROWN'S *Caſe.*

COpyholder in Fee by Licence made a Leaſe for Years, the Leſſee entred; the Copyholder having Iſſue a Son and a Daughter by one *Venter*, and a Son by another, dy'd; the eldeſt Son dy'd before Admittance; it was adjudg'd, that the Land ſhould deſcend to the Daughter of the whole Blood. And in this Caſe three Points were reſolved *per totam Curiam.*

Brown's Caſe, M. 23 & 24 Eliz. in C. B. Moor 125, 126. 1 Leon. 2.

1. Altho' a Copyholder has in Judgment of Law but an Eſtate at Will, (*a*) yet Cuſtom has ſo eſtabliſh'd and fix'd his Eſtate, that by the Cuſtom of the Manor it is deſcendible, and his Heirs ſhall inherit it, and therefore his Eſtate is not meerly *ad voluntatem Domini*, but *ad voluntatem Domini ſecundum conſuetudinem manerii*: So that the Cuſtom of the Manor is the (*b*) Soul and Life of Copyhold Eſtates, for without Cuſtom, or if they break their Cuſtom, they are ſubject to the Lord's Will; and by Cuſtom a Copyholder is as well inheritable to have his Land according to the Cuſtom, as he who has Freehold at the Common Law, for (*c*) *Conſuetudo eſt altera lex*: Cuſtom and Uſage from Time whereof, *&c.* may create and conſolidate Inheritances; for (*d*) *Conſuetudo vincit commun' legum.* And Copyhold Eſtates are of great Antiquity, for * *Bracton* who wrote in the Time of the Reign of K. *H.* 3. writes of them, *lib.* 2. *cap.* 8. where he ſays, *Si ipſe ad alium transferre voluerit, prius illud reſtituat Domino, vel ſervienti* (*id eſt Seneſchallo manerii*) *ſi Dominus præſens non fuerit, & de manibus illorum fiat tranſlatio ad alium, &c. quia ille non habet poteſtatem transferendi, cum liberum tenementum non habeat. Et eodem libro, folio* 76. *Et ſemper in hujuſmodi ſocagiis conſuetudo loci eſt obſervando. Anno* 4 *E.* 1. (who was the Son of *H.* 3.) by the Stat. call'd (*e*) *Extenta Manerii*, there it is ſaid, *Inquirend' eſt de liberis tenentibus quibuſcunq; &c. Inquirend' eſt etiam de cuſtumariis, viz. Quot ſunt cuſtumarii, & quantum terræ quilibet*

1ſt Point.

(*a*) 3 Co. 8. a. Lit. Sect. 77. 9 Co. 105. b. 6 Co. 37. b. Cr. Car. 45. Hetl. 6. Poſt. 24. b. Co. Lit. 60. b. 8 Co. 64. a. 2 Co. 17. a. Moor 60, 61. Yelver. 223.

(*b*) Hetly 6. Poſt. 23. b.

(*c*) Co. Lit. 58. b. Carth. 42.

(*d*) Co. Lit. 33. b.

* Poſtea 24. b. Co. Lit. 59. a. Bract. lib. 2. c. 8.

(*e*) Co. Lit. 58. a.

quilibet cuſtumar' teneat, quæ opera, quas conſuetud' faciat, & quant' opera & conſuetud' cujuſlib' cuſtum' valeant per ann' & quant' reddit' de reddit' Aſſiſæ per ann', præter opera & conſuetud' quæ poſſunt talliari, & quæ non ad voluntat' Domini. By which it appears, that the whole Parliament eſteemed of them as of cuſtomary Tenants; 2. That their Rent is accounted Parcel of the Rent of Aſſiſe. 3. That ſome of their Cuſtoms within ſome Manors are arbitrary at the Lord's Will, (*a*) as Fines incertain, *&c.* and within ſome Manors their Cuſtoms are certain, and all that as Cuſtom has allow'd.

(*a*) Co. Lit. 59. b. 60. a. Poſtea 27. b.

42 *E.* 3. 25. * 1 Roll. 506. Co. Lit. 59. a.

42 *E.* 3. 25. *a. b.* The Lord brought an Action of Treſpaſs againſt his Copyholder, who pleaded Not-guilty; * The Jury gave a Special Verdict, that the Copyholder had not done his Services, by which he broke the Cuſtom of the Manor, for which Reaſon the Entry of the Lord was adjudg'd lawful, and that he ſhould have the Corn then growing; which proves that he enter'd for the Forfeiture, and could not put him out without Cauſe: So 33 *E.* 3. *Treſp.* 254. If a Copyholder makes an Alienation, it is a Diſſeiſin to the Lord, and a Forfeiture of his Eſtate.

13 *R.* 2. (*b*) Co. Lit. 60. a.

13 *R.* 2. *Faux Judgment* 7. It is there adjudg'd, that where an Heir of a Copyholder recover'd in a Plaint in the Nature of an Aſſiſe of *Mortdanceſter*, in the Court of the Biſhop of *London*, of his Manor of *Stepney* in *Middleſex*, the Tenant brought a Writ of falſe Judgment returnable in *C. B.* which Writ of (*b*) falſe Judgment did not lie in that Caſe; but there it is ſaid, that he has no other Remedy but to ſue to the Lord, who has the Freehold, by (*c*) Petition, and he may if there be Cauſe, reverſe the Judgment; by which it appears, that the Heir of a Copyholder is inheritable according to the Cuſtom, and ſhall recover by Plaint in Nature of an Aſſiſe of *Mortdanceſter*; but it is true that *Charleton* there ſays, that he ſhall not have an Aſſiſe againſt his Lord as Tenant in ancient Demeſn ſhall have, becauſe he has not the Freehold, as *Bracton* ſays. Yet *Quære* if Tenant in ancient Demeſn (who is only the King's Villein) can be ſaid a *Freeholder*.

(*c*) Co. Lit. 60. b. Lit. Sect. 77. Poſtea 30. b.

2 *H.* 4. 12. a. (*d*) Fitz. Treſp. 168. Br. Treſp. 73. Br. Ten. per Copy 2.

2 (*d*) *H.* 4. 12. *a.* A Copyholder brought an Action of Treſpaſs for breaking his Cloſe, and cutting his Trees, and the Defendant pleaded Not-guilty, the Jury found the Defendant guilty, and aſſeſſed Damages, and the Plaintiff recovered.

1 *H.* 5. 11, 12. A Copyholder may ſurrender to the Uſe of another, reſerving Rent with Condit. of Re-entry for Non-payment, and for Default of Payment, may re-enter, 4 *H.* 6. 11 *&* 21 *H.* 6. 37. If a Biſhop grants cuſtomary Lands by Copy and dies, the Copyhold is not determin'd by his Death, for he was *Dominus pro tempore*, and this Grant ſhall bind the King and the Grantee, (the Temporalties being in the King's Hands) ſhall have Aid of the King.

1 *H.* 5. 11, 12.

7 *E.* 4. (*a*) *Danby*, Chief Juſtice ſaid, That a Copyholder is as well inheritable to have his Land according to the Cuſtom, as he who has a Freehold at the Common Law.

21 *E.* 4. 80. *b.* (*b*) *Brian* ſaid, that his Opinion always had been, and ever ſhould be, That if ſuch Tenant by the Cuſtom paying his Services be ejected by his Lord, that he ſhould have an Action of *Treſpaſs*.

(*c*) 15 *H.* 7. 10. *a.* & (*d*) 27 *H.* 8. 28. *a. b.* A Biſhop grants Lands by Copy and dies, the Temporalities come into the King's Hands, the Copyhold Eſtate ſtands, and he ſhall have Aid of the King.

15 *H.* 8. *Tenant per Copy*, *Brook* 24. The Heir of a Copyholder Tenant in Tail ſhall recover in a (*e*) *Formedon* in the Diſcender *per omnes Juſticiarios*. By which Caſes it appears, that the Judges in all Succeſſions of Ages have allow'd Copyhold Eſtates to be eſtabliſh'd and ſure by the Cuſtom of the Manor, and deſcendible to their Heirs as other Inheritances are.

2. It was reſolved, when Cuſtom has created ſuch Inheritances, and that the Land ſhall be deſcendible, then the Law will direct the Deſcent according to the Maxims and Rules of the Common Law, as (*f*) Incidents to every Eſtate deſcendable; *Quia quod tacite intelligitur deeſſe non videtur.* As 5 *E.* 4. 7. *b.* when Uſes had gain'd the Reputation of Inheritances deſcendable, the Common Law directed the Deſcent of them, and that there ſhould be *poſſeſſio fratris* (*g*) of an Uſe, as well as of other Inheritances at the Common Law: But it was reſolved, that ſuch cuſtomary Inheritances ſhould not have by the Law any other collateral Qualities which do not concern the Deſcent of the Inheritance, which other Inheritances at the Common Law had: And therefore ſuch cuſtomary Inheritance ſhould not be * Aſſets to charge the Heir in an Action of Debt, on a Bond made by his Anceſtor, altho' he binds himſelf and his Heirs, neither ſhall the Wife, of ſuch cuſtomary Tenant be (*h*) endow'd, nor ſhall the Huſband of a Woman Inheritrix, of ſuch Eſtate be || Tenant by the Courteſy, nor ſhall a (*i*) Deſcent of ſuch Eſtate toll the Entry of him who has a cuſtomary Right to it, & *ſic de cæteris*; for as without Cuſtom ſuch Eſtate at Will can't be deſcendable, ſo without Cuſtom it can't have any (*k*) collateral Quality or Incident to other Inheritances at Common Law: For Copyholders have Eſtates of Inheritances *ſecundum quid*, that is to ſay, to be deſcendible by Cuſtom to their Heirs, and not to be determined by their Deaths, nor ſubject to the Lord's Will, as other Eſtates at Will are, but they are not Eſtates of Inheritance *ſimpliciter*, *ſc.* to all other collateral Qualities, but ſuch as Cuſtom has allow'd, or are incident to them.

3. It

7 *E.* 4. 19. *a.*
(*a*) Co. Lit. 60. *b.* 61. *a.* Lit. Sect. 77. 9 Co. 76. *b.* 2 Leon. 209.
21 *E.* 4. 80. *b.*
(*b*) 2 Leon. 209. Lit. Sect. 77. Co. Lit. 60. *b.* 61. *a.*
15 *H.* 7. 10. *b.*
27 *H.* 8. 28.
(*c*) Fitz. Aid de Roy 98. Br. Aid de Roy 49.
(*d*) Br. Aid de Roy 1.
15 *H.* 8.
(*e*) 1 Rol. 838. Co. Lit. 60. *a. b.* 9 Co. 8, 9. Cr. Car. 42, 43, 44, 45. Popham 34, 35.
2d Point.
(*f*) Poſtea 23. *a*
(*g*) 1 Co. 88. *a.* 121. *b.* Raym. 317. Dyer 10. *b.* 11. *a.* pl 40. Br. Deſcent 36. Plowd. 58. *a.* Bac. Read. on 27 H. 8. c. 10. p. 9. Fitz. Sub. 3. 1 And. 192. 2 And. 146. Co. Lit. 14. *b.*
* Poph. 188.
(*h*) 2 Bulſtr. 337. Poſtea 30. *b.* Co. Lit. 33. *a.* 2 Sid. 139. Hob. 215.
|| Cro. El. 361. Hutt. 17. Mo. 272, 597. 2 Bulſtr. 337. Poſtea 22. *b.* 1 And. 192. 1 Rol. Rep. 126.
(*i*) Poſtea 23. *a.* Cro. Jac. 36.
(*k*) Hob. 215, 216.

3d Point.

3. It was reſolved, That where the cuſtomary Eſtate of Inheritance deſcends to the Heir, (*a*) before Admittance he may enter and take the Profits, and that there ſhall be a (*b*) *poſſeſſio fratris* before Admittance on an actual Poſſeſſion as in the Caſe at Bar: And ſuch Heir may ſurrender to the Lord to the Uſe of another before Admittance, as any other Copyholder may, but it can't prejudice the Lord of his Fine due to him by the Cuſtom of the Manor upon the Deſcent; and he is a Tenant by Copy of Court-Roll, for the Copy made to his Anceſtor belongs to him; as the (*c*) Admittance of a Tenant for Life, is the (*c*) Admittance of him in Remainder to veſt the Eſtate in him, but ſhall not bar the Lord of his Fine, which he ought to have by the Cuſtom: And altho' it was objected, that every * Admittance of an Heir upon a Deſcent, amounted in Law to a (*d*) Grant, and ſo may be pleaded, and therefore nothing ſhall veſt in the Heir before Admittance. To that it was anſwered and reſolved, That true it is, that after Admittance the Heir may in pleading alledge (*e*) it as a Grant, and that has been allow'd to avoid the Inconvenience which would otherwiſe enſue; for if the Copyholder ſhould in pleading (*f*) be compelled to ſhew the firſt Grant, either it was before Time of Memory, and then it's not pleadable, or within Time of Memory, and then the Cuſtom fails, and therefore the Law has allow'd the Copyholder in pleading to alledge any Admittance, as well upon a Deſcent (*g*) as upon Surrender, as a Grant; and yet he may, if he will, alledge the (*h*) Admittance of his Anceſtor as a Grant, (*i*) and ſhew the Deſcent to him, and that he entred, and well without any Admittance of him; but the Heir can't (*k*) plead, that his Father was ſeiſed in Fee at the Will of the Lord by Copy of Court-Roll of ſuch a Manor according to the Cuſtom of the Manor, and that he died ſeiſſed, and that it deſcended to him, for in Truth ſuch Intereſt is but a (*l*) particular Intereſt at Will in Judgment of Law, altho' it is deſcendible, as has been ſaid, by Cuſtom: For he is a Tenant at the Will of the Lord, according to the Cuſtom of the Manor. *Nota* Reader, all theſe Reſolutions and Opinions have been confirm'd and adjudg'd, as appears by the Caſes following:

(*a*) 1 Rol. 502. Dy. 291. pl. 69. Lane 20. Poph. 39. Cr. El. 90, 148, 662. Cr. Jac. 36. Plow. 529. b. Yelv. 144, 145. 1 Brownl. 145.
(*b*) Mo. 125, 126. 597. Poph. 35. 1 Roll. 502. 1 Buſtr. 42.
(*c*) Cr. El. 504, 662. Cr. Jac. 31. 1 Vent. 260. 3 Keb. 329. 1 Mod. Rep. 102. 2 Brownl. 301. Moor 358, 465. 1 Roll. 505. 4 Co. 23. a. Noy 29.
* 2 Ventr. 182.
(*d*) Winch. 67. Cr. Jac. 103.
(*e*) Doct. pl. 80.
(*f*) Doct. pl. 80.
(*g*) Doct. pl. 80.
(*h*) Doct. pl. 80.
(*i*) Doct. pl. 80. Cr. Jac. 103.
(*k*) Doct. pl. 80.
(*l*) Doct. pl. 80.

2.

It was agreed by the two Chief Juſtices, *Wray* and *Anderſon*, Juſtices of Aſſiſe there, upon Evidence to a Jury, that where a Woman Copyholder in Fee takes an Huſband who has Iſſue, and the Wife dies, that the Huſband ſhall not be Tenant by the Courteſy without Special Cuſtom, according to the Reſolution aforeſaid; and according to their Opinions the Jury paſſed againſt the Huſband.

In Lent Aſſizes 24 El. in Suff. in *Rivet*'s Caſe.
(*m*) Antea 22. a. Cr. El. 361. Hutt. 17. 2 Bulſtr. 337. Mo. 272, 397. 1 Roll. Rep. 126. 1 Ander. 192.

It

It was adjudg'd, that where by the Custom of the Manor, Plaints have been made in the Court of the Manor in Nature of real Actions, that if a Recovery be in a Plaint in Nature of a real Action against Tenant in Tail (admitting that Copyhold Land may be (*b*) entailed) that it should be a Discontinuance, and should toll the Entry of the Heir in Tail; for inasmuch as Plaints in Nature of real Actions are warranted by the Custom, it is an Incident which the Law annexes to the said Custom, that such Recovery shall make a (*c*) Discontinuance, which agrees with the Reason of the principal Point in *Brown*'s Case.

3. Trin. 36 Eliz. Rot. 547. in B. R. (*a*) *Deal & Rigden.* Moor 358. Cro. Eliz. 372. 1 Rol. 634. Like Judgm. in B. R. M. 36 & 37 Eliz. inter Clun & Pease, Rot. 1417. (*b*) Moor 358. 1 Rol. 506, 634. 3 Co. 8, 9. Cro. El. 391. Cr. Car. 43. (*c*) Cro. El. 391, 392. 1 Rol. 634.

It was adjudged, That if a Man seised of Copyhold Land in the Right of his Wife, surrenders it to the Use of another in Fee, who is admitted accordingly; the Husband dies, it is no (*d*) Discontinuance to the Wife or her Heir, but that the Wife may enter, and shall not be put to *Cui in vita*, nor her Heir to *Sur cui in vita*. And if a Copyholder for Life surrenders to the Use of another in Fee, it is no (*e*) Forfeiture, for it passes by Surrender to the Lord, and not by Livery; and Copyhold Estates shall not have such Qualities as Estates at Common Law have without Special Custom, as has been often said.

4. Pasch. 35 El. in B. R. Rot. 734. inter *Bullock* & *Dibley* in Transgres. in Berk. (*d*) Moor 596. Poph. 38, 39. Cro. Jac. 105. 1 Roll. 632. Cro. Car. 7. 3 Co. 9. a. Like Judgm. in B. R. Eliz. inter *Wright* & *Portman*. (*e*) Cart. 238. Et 35 Eliz. in C. B. inter *Foxton* & *Colston*. Like Judgment given.

In this Case two Points were adjudg'd. 1. That (*h*) a Descent of a Copyhold in Fee shall not toll the Entry of him who has Right to the Copyhold, which agrees with the Resolution in *Brown*'s and the other Cases before. 2. That where the Custom of the Manor of *Allesley* in the County of *Warwick*, was, that Copyhold Lands may be granted to any Person *in feodo simplici*, that a Grant to one and his Heirs of his (*i*) Body is within the Custom: For be it a Fee-simple conditional, or an Estate-Tail, it is within the Custom. So he may grant for Life or for Years by the same Custom, for an Estate in Fee-simple includes all; and it is a Maxim in Law, * *Cui licet quod majus non debet quod minus est non licere. 6 Mod.* 67.

5. M. 35 & 36 El. in B. R. inter. *Gravenor* & *Ted.* (*g*) Antea 22. a. Cro. Jac. 36. (*h*) Cr. El. 148, 149, 307, 717. Cro. Car. 42, 43. 44, 45. Poph. 33, 34, 35, 128, 129. Godb. 367, 368. 369. 3 Co. 8, 9. Co. Lit. 60. a. b. 1 Rol. Rep. 48, 49. 2 Rol. Rep. 383. O. Bend. 163, 164, 165, 166, 167. 1 Roll. 838. Moor 188. 1 Leon 174, 175. (*i*) Postea 30. a. Godb. 20. Co. Lit. 52. b. Cr. El. 323, 373. 1 Rol. Rep. 4c. 1 Roll. 511, 512. 1 Leon. 64. * 5 Co. 7. a. Cawdry's Case.

Richard (*k*) *Fitch*, the Father, Copyholder in Fee, makes a Surrender to the Use of himself for Life, and after to the Use of *Rich.* his Son for Life, and after to the Use of his Last Will; the Father is admitted and dies, and afterwards the Lord pretending Cause of Forfeiture grants it to a Stranger: In this Case two Points were adjudged. 1. That the Admittance (*l*) of Tenant for Life, was Admittance of him in the Remainder, but not to prejudice the Lord of his Fine, which was due by the Custom of the Manor, according to the Opinion in *Brown*'s Case. 2. It was adjudg'd, that the Fee-simple of the Copyhold being limited to the Use of his Will (*m*) remain'd in the Copyholder, and not in the Lord.

Three

9 Co. 48. b. Pasch. 36 Eliz. in B. R. Rot. 331. (*g*) inter *Fitch* & *Huckley*. (*k*) Cr. El. 441, 442. (*l*) Cr. El. 148, 442. (*m*) Cr. El. 504, 662. Cro. Jac. 31. Noy 29. Moor 396, 465. 1 Mod. Rep. 102. 2 Brownl. 301. 1 Roll. 505. 1 Vent. 260. 3 Kelw. 329.

7. Three Points were adjudg'd: 1. That the Heir of a Copyholder may enter and have an Action of Treſpaſs (*a*) before Admiſſion, and ſo if ſuch Heir dies before Admiſſion (as the principal Caſe was) his Heir may enter and take the Profits and have an Action of Treſpaſs, which agrees with the Judgment in the principal Point in *Brown*'s Caſe; and in this Caſe *Wray*, Chief Juſtice ſaid, That 'twas now lately adjudg'd, that there ſhould be (*b*) *poſſeſſ' fratris* on a Deſcent of Copyhold before Admittance. 2. It was adjudg'd, that where King *H.* 8. granted a Manor to the Queen his Wife for Life, that there the (*c*) Queen was a ſole Perſon exempt by the Common Law, and may make a Leaſe or Grant without the King, and ſo may plead and be impleaded alone. *Vide* 10 *E.* 3. 18 *&* 50. 18 *E.* 3. 1, 2, *&* 32. 20 *E.* 3. *Nonability* 9. 32 *E.* 3. *Brief* 346. 49 *E.* 3. 4. 11 *H.* (4.) 6. 67. 26 *H.* 6. *Aide del Roy* 24. 3 *H.* 7. 14. 7 *H.* 7. 7. and that the Statute of 32 *H.* 8. is but a Declaration of the Common Law. 3. It was adjudg'd, that where the Queen was Tenant for Life, and a Copyhold of Inheritance eſcheated to her, there the Queen may grant it to whom ſhe pleaſes, and it ſhall bind the King, his Heirs and Succeſſors for ever; for ſhe was *Domina pro temp'* and the Cuſtom of the Manor ſhall bind the King. And it was reſolved that every one who has a (*d*) lawful Eſtate or Intereſt in a Manor, be it in Fee, in Tail, in Dower, or Tenant by the Courteſy, or for Life, or Years, or as Guardian, or Tenant by Statute, or *Elegit*, or at Will, if a Copyhold eſcheats, or comes to their Hands during their Time, every one of them at their Wills may re-grant it *reddend'* the ancient Rent, Cuſtoms, and Services, and it ſhall bind the Lord who has the Inheritance or Freehold of the Manor, for every one of 'em is *Dominus pro tempore*, and within the Cuſtom; as in 20 *H.* 6. 8. *b.* the Chief Juſtice (*e*) of the *Common Pleas*, who has his Office but at Will, may by Cuſtom grant Offices for Life: And it is to be obſerv'd, that a Copyholder doth not derive his Eſtate out of the Eſtate or Intereſt of the Lord only, for then the Copyhold Eſtate would ceaſe when the Eſtate of the Lord determines. But as it was ſaid in *Brown*'s Caſe, * the Soul and Life of a Copyhold is the Cuſtom of the Manor; and when the Grant is made by any who has a lawful Eſtate, or Intereſt, the Copyholder is in by the Cuſtom without any Regard to the Eſtate, or Perſon of the Grantor, and therefore ſuch Grant made by Huſband and Wife, ſhall bind the Wife notwithſtanding the Coverture: So of a Grant made by *Non compos Mentis*, or an Infant, or by a Biſhop, Prebendary, Parſon, *&c.* it ſhall bind for ever; for the Cuſtom is, That the Tenements are Parcel of the Manor. *Et dimiſſ' & dimiſſib' per Dom' Man' &c. pro temp' exiſt', seu per ejus Seneſch', &c.* And ſo a Feme Covert, *Non compos mentis*, an

Tr. 26 El. *Clarke* v. *Pennifather* in B. R.
(*a*) 1 Rol. 502. Dy. 291. pl. 69. Lane 20. Cr. El. 90, 148, 662. Cr. Jac. 36. Plowd. 529. Yelv. 144, 145. 2 Brownl. 145. Poph. 39. Antea 22. b.
(*b*) Moor 125, 126, 597. 1 Bulſtr. 42. Poph. 35.
(*c*) Præf. 6. Rep. p. 3. Co.Lit.3.a.133.a. Plowd. 231. a. Seld. Tr. of Honour 86. 9 Co. 47. a. Fitz. Nonabil. 9. Selden's Epinomis 11.
(*d*) Co.Lit.58.b. 59. a. Cr. Jac. 98. 1 Roll. 499. 2 Roll. 41.
(*e*) 6 Co. 60. b. 61. a. Dy. 71. pl. 44.
* Antea 21. a. Hetl. 6. Vide 17 Eliz. E. of Arundel's Caſe. Dyer. 342. Cr. El. 622.

an Infant, the Succeſſors of Biſhops, Prebendaries, Parſons, *&c.* are bound by the ſaid Cuſtom: But by Force of theſe Words in the ſaid Cuſtom *(per Dom' Maner', &c. pro temp' exiſt')* in ſome Caſe the Lord ought to have a lawful Eſtate, and in ſome Caſe not. And therefore this Difference was unanimouſly agreed; if a Diſſeiſor, * or Feoffee of a Diſſeiſor, or any other who has a torcious or defeaſible Eſtate or Intereſt ſubject to the Action, or Entry of another, holds Court, and makes any voluntary (*a*) Grant upon Eſcheat, or Forfeiture of a Copyhold, ſuch voluntary Grant ſhall not bind him who has Right, when he has recontinued the Manor by Action, or Entry; for to this Intent the ſaid Cuſtom ſhall be intended of a Lord who has a lawful Eſtate or Intereſt: But if ſuch Lord who has a wrongful or defeaſible Eſtate, (*b*) admits any upon Surrender made to the Uſe of another, or admits the Heir upon a Deſcent, ſuch Admittances are good, and within the ſaid Cuſtom; for ſuch Acts are lawful, and *quodam modo* judicial, to do which he may be compell'd and enforced in a Court of Equity, and therefore ſuch Admittances ſhall bind him who has Right.

* Skinner 28.

(*a*) Co. Lit. 58. b. 1 Co. 140. b. Cr. El. 699. 1 Roll. 499. Mo. 112, 236, 237. Poph. 71. Ow. 28. Dal. 83.

(*b*) 1 Roll. 503. 1 Co. 140. b. Moor 112, 237. Cr. El. 699. Co. Lit. 58. b. 3 Bulſt. 215. Poph. 71.

8.

It was adjudg'd, that where the Lord of a Manor wherein were many Copyholders for Lives took a Wife, and afterwards a Copyholder died, the Lord after Marriage granted the Land again, according to the Cuſtom of the Manor for Lives and died, that the Wife ſhould not (*c*) avoid theſe Grants in a Writ of Dower; for altho' the Grant was after the Title of Dower, yet the Cuſtom which is the Life and Force of the Grant, was long before: And an Opinion in 8 *Eliz.* was cited to the contrary, (which now *vide Dyer* 251.) and yet Judgment *ut ſupra.* If Feoffee of a Manor upon Condition makes voluntary Grants of Copyhold Eſtates according to the Cuſtom, and afterwards the Condition is broke, and the Feoffor re-enters, yet the Grants by Copy ſhall ſtand; and therewith agrees the Judgment, *anno* 17 *Eliz.* the Earl of *Arundel*'s Caſe, *Dyer* 342.

P. 26 El. in B. R. (*c*) 8 Co. 63. b. Mo. 758, 812. 1 Roll. 684. 2 Brownl. 208. Bridgm. 51. 1 Leon. 16. Godb. 130. 2 Siderf. 82. Dy. 251. pl. 89.

9.

It was adjudg'd, if Tenant *pur* (*d*) *auter vie* be of a Manor, and *Ceſtuy que vie* dies, and he who was Tenant for Life continues in the Manor, and holds Courts, and makes voluntary (*e*) Grants by Copy, they ſhall not bind the Leſſor; (it is otherwiſe of (*f*) Admittances on Surrender to the Uſe of others, or upon Deſcent) for in ſuch Caſe it was reſolved, that he was only Tenant at Sufferance, who has no lawful Intereſt;

P. 29 El. inter *Rous & Arters*, in B. R. (*d*) Moor 236. Owen 27, 28. 2 Leon. 45, 46. (*e*) Co. Lit. 58. b. 1 Co. 140. b. Cr. El. 699. 1 Rol. 499. Mo. 112, 236, 237. Poph. 71. Ow. 28. Dal. 83.

(*f*) Co. Lit. 58. b. 1 Roll. 503. 1 Co. 140. b. Moor 112, 237. Cr. El. 699. Poph. 71. 3 Bulſt. 215.

Intereſt; and a Writ of *Entry ad Terminum qui præteriit* lies againſt him, and ſo he is a Diſſeiſor of the Manor.

10. M. 33 & 34 Eliz. in B. R. inter *Murrel* and *Smith* in Treſpaſs. (a) Cr. El. 252. 2 Leon. 209.

Upon a Special Verdict the Caſe was ſuch; Queen *Eliz.* ſeiſed in Fee of the Manor of *Bawdeſey Butley* in *Suffolk* granted Part of it being ancient Copyhold Land to *Smith* the Father in Fee; and afterwards the Queen granted the Inheritance of the ſaid Copyhold to a Stranger in Fee; and afterwards *Smith* made his Will in Writing, and thereby deviſed the Copyhold to *Murrell* the Plaintiff, in Fee; and at a Court held at the ſaid Manor ſurrendred into the Hands of the Queen, Lady of the ſaid Manor, to the Uſe of his Will; and in pleading, *Smith* the Defendant alledged the ſaid Grant made to his Father, by Force whereof he was ſeiſed, *&c.* and ſo ſeiſed, died ſeiſed, and that it deſcended to the Defendant as his Son and Heir, and the Plaintiff claiming by the ſaid Deviſe and Surrender, traverſed the Deſcent to the Defendant: And the Jurors upon this Special Iſſue, gave the ſaid Special Verdict; and upon great Advice and Deliberation, Judgment was given againſt the Plaintiff; and in this Caſe three Points were reſolved:

1ſt Point. (b) 8 Co. 94. a. Antea 21. a. 2 Co. 17. a. Poſtea 26. b. Cr. El. 103. Cr. Jac. 573. Hob. 181. (c) 5 Co. 113. a. 6 Co. 57. b. 68. b. 8 Co. 63. b. Co. Lit. 309. b.

1. That Cuſtom has ſo eſtabliſh'd and fix'd the Eſtate of a Copyholder, that by the (b) Severance of the Inheritance of the Copyhold from the Manor, the Copyhold is not deſtroy'd, for inaſmuch as the Lord himſelf cannot ouſt the Copyholder, no more can any claiming under him do it; for (c) *Nemo poteſt plus juris ad alium transferre, quam ipſe habet; & quod per me non poſſum, nec per alium.* But it was objected, that every Copyhold Eſtate in any Land or Tenement, ought to ſtand upon two Pillars, and without either of them can't be ſupported; the one, that the Land or Tenement be (d) Parcel of the Manor; the other, that ſuch Land or Tenement has been demiſed (e) and demiſable Time out of Mind, ſo that Parcel of the Manor, and Preſcription, are two Incidents to every Copyhold; but in the Caſe at Bar one of them fails, for by the ſaid Severance the Land was not Parcel of the Manor. To which it was anſwered and reſolved, foraſmuch as the Land was Parcel of the Manor, and Cuſtom has one eſtabliſh'd and fix'd the Eſtate, ſo that once it had both the Incidents, for this Cauſe the Severance made by the Lord after the Eſtate has had its Perfection, ſhall not deſtroy the Eſtate of the Copyholder.

(d) Co. Lit. 58. b.

(e) Co. Lit. 58. b. Poſtea 31. b.

2d Point. 2. That in this Caſe the ſaid cuſtomary Lands deſcended to the Defendant, notwithſtanding the Deviſe and Surrender, for the Surrender after the Severance of the Inheritance of the Copyhold from the Manor, was utterly void, becauſe the Lands were not Parcel of the Manor at the Time of the Surrender, and the Deviſe alone cannot transfer ſuch cuſtomary Eſtate; for as it appears by * *Bracton* before, and by *Litt. fol.* 15. *b.* it cannot be tranferred but by (f) Surrender into the Hands of the Lord, according to the Cuſtom

* Antea 21. a. Co. Lit. 59. a. (f) Lit. Sect. 74. Co Lit. 58. b.

of

of the Manor. 3. That after the Severance, the Copyholder shall pay his Rent to the Feoffee, and also shall pay and do other (*a*) Services which are due without Admittance or holding of any Court; as to plough the Lords Demesns, Heriot, and such like; but Suit of (*b*) Court, and Fine upon Alienation, or Admittance, are gone: For now the Land or Tenement can't be aliened; for as the Copyholder has some Benefit by this Severance, as appears before, so has he great Prejudice, for now he can't (*c*) surrender or alien his Estate, because he can't alien it by Surrender *in manus Domini servitiorum*, as the Custom has warranted, and that he can't now do, nor can the Feoffee make Admittance or Grant of the Copyhold, for he is not *Dominus pro tempore*: But it was resolv'd, that such (*d*) Forfeitures as were Forfeitures before the Severance, as the making of a Feoffment, Lease, Waste, denying of Rent, or such like, are Forfeitures also after the Severance. So if Land was of the Nature of *Borough English* or Gavelkind before; the same Customs, and all other Customs which run with the Land, shall remain after the Severance: And it was said, if such Copyholder will alien, there is no Means but to have a Decree against him and his Heirs in *Chancery*, but thereby the Interest of the Land is not bound, but the Person only.

3d Point.

(*a*) Cr. El. 252.

(*b*) Cr. El. 252. Moor 393.

(*c*) Cr. El. 252.

(*d*) Cr. El. 252, 499. 2 Leon. 203. Moor 393. 1 Bulst. 51.

Co. Copyh. 101. Rep. in Canc. 193.

Kite and *Queinton*'s Case.

THE Case was, a Copyholder in Fee of the Manor of the Dean and Chapter of *Westminster*, call'd *Launton* in the County of *Oxford*, surrender'd his Copyhold Lands out of Court, by the Hands of certain Copyhold Tenants according to the Custom of the Manor, to the Use of another and his Heirs upon certain Conditions, and after, at the next Court, the Surrender was presented, but in the Presentment the (*b*) Conditions were omitted, and he to whose Use the Surrender was made being (*c*) dead, the Lord by the Steward, according to the Custom, admitted his Daughters and Heirs, who entred; he who made the Surrender by his Deed, releas'd to the Daughters being in Possession, and afterwards entred upon them, and if his Entry was lawful or not was the Question: And it was adjudg'd, that his Entry was not lawful; and in this Case, two Points were resolv'd, 1. That the Presentment of the said Surrender was (*d*) void, for the Surrender out of Court ought by the Custom of the Manor, to be presented in Court; but forasmuch as the Surrender was upon Condition, and the Presentment was of an absolute Surrender, the Surrender which the Copyholder made was not presented: But if the Truth of the Case was, that the Surrender conditional was presented, and the (*e*) Steward in entring thereof omitted the Condition, yet upon good Proof thereof, the Surrender should not be avoided, but the

11.

P. 31 El. inter *Kite* & *Queinton* in *B. R.*

(*a*) Co. Lit. 62. a.

(*b*) 1 Roll. 504.

(*c*) Postea 29. b. Bridgm. 51.

(*d*) 1 Roll. 501.

(*e*) 1 Roll 501.

Roll ſhould be (*a*) mended, for the Roll ſhould not (*b*) conclude in ſuch Caſe the Party either to plead, or give in Evidence the Truth of the Matter. The 2d Queſtion and the greater Doubt was, If by the ſaid Releaſe by Deed, the Cuſtomary Right of the Copyholder was extinct, and he who made the Surrender barr'd of his Right. And it was objected that *Littleton*, *fol.* 15. *b.* ſaith, That a Copyholder can't alien his Land by (*c*) Deed; but if he will alien, he ought according to the Cuſtom, *&c.* ſurrender, *&c.* And he ſaith, that ſuch Tenants are call'd Tenants by Copy, becauſe they have no other Evidence concerning their Tenements, but the Copies of the Court-Rolls. And it was ſaid, that that excludes all Releaſes by Deed, for then they would have other Evidences than the Court-Rolls. Alſo it was ſaid, that he who purchaſes the Land, may, upon ſearching the Rolls, be adviſed if the Title of the Land be good. But if a Releaſe by Deed ſhould extinguiſh Rights, then it would be very dangerous to Purchaſers, for that doth not appear in the Rolls. To which it was anſwer'd and reſolv'd, That the (*d*) Releaſe in the Caſe at Bar extinguiſh'd the Right of the Copyholder; and their Reaſon was, becauſe he to whom the Releaſe was made was admitted to the Tenements, and Copyholder in Poſſeſſion; ſo that a Releaſe of the cuſtomary Right may enure to him, and therefore the Lord is not at any Prejudice, for he has had his Fine upon Admittance, and he to whom the Releaſe was made was in by Title, *ſcil.* by the Lord's Admittance, and ſo the Releaſe enures by Way of Extinguiſhment: But if a Copyholder be (*e*) ouſted by one by Tort, there his Releaſe by Deed to the Diſſeiſor, or other wrong Doer, doth not transfer his Right, nor bar him for two Reaſons: 1. Becauſe he has no cuſtomary Eſtate upon which the Releaſe of the cuſtomary Right can enure. 2. It would be to the Lord's Prejudice, for thereby he would loſe his Fine and Services; and for theſe Reaſons, the Releaſe by Deed in ſuch Caſe is utterly void, and this is not againſt any Thing *Littleton* ſaith, for *Littleton* ſpeaks of an Alienation by (*f*) Surrender, and that of Neceſſity ought to be into the Lord's Hands, according to the Cuſtom: But the Releaſe in the Caſe at Bar could not be made to the Lord, but to the Copyhold Tenant in Poſſeſſion: Alſo he who claims a Copyhold Eſtate by Surrender, hath not other Evidences but Copies, and ſo are *Littleton*'s Words to be intended. But he who claims Extinguiſhment of a Right, may have it by Releaſe by Deed: So the Reſolution in *Murrel*'s Caſe before well agrees with the Judgment in this Caſe upon the Difference aforeſaid, in transferring of an Eſtate, and extinguiſhing of a Right: And as to the Danger of Purchaſers, it was ſaid, that there was not any Danger; for if the Copyholder who is in Poſſeſſion ſells it, he will ſhew the Purchaſor the Releaſe made to him, and he who is out of

(*a*) 1 Roll. 501.
(*b*) 1 Roll. 501.
(*c*) Lit. Sect. 74. Co. Lit. 58. b. 59. a.
(*d*) Cr. Jac. 36, 161. Co. Lit. 59. a. 60 a. 1 Leon. 102. 1 Roll. 504.
(*e*) 1 Leon. 102.
(*f*) Lit. Sect. 74. Co. Lit. 58. b. 59. a. Antea 24. b.
Skin. 296.

Poſſeſſion, ought not to ſell it 'till he has regain'd the Poſſeſſion; and if any one will purchaſe any Title, he is not to be favour'd, but in ſuch Caſe * *caveat emptor:* And yet he who has made ſuch Releaſe, may and ought to acquaint the Purchaſor with that which he himſelf has done, and ſo no Miſchief. And *Wray* Chief Juſtice in this Caſe ſaid, That if one who has a pretended Right or Title (*a*) to Copyhold Land, bargains and ſells it to another, it is within the Statute of 32 *H.* 8. *cap.* 9. for the Statute ſaith, *If any bargain, buy, or ſell, &c. any Right, or Title, in or to any Lands or Tenements:* So that theſe Words, *Any Right or Title,* extend to all Manner of Rights or Titles, *& per Conſequens* to Copyhold Lands. And great Part of the Land of the Kingdom is in Grant by Copy; and therefore the Intent of the Makers of the Act was to include it, for avoiding of Suits, Maintenance, and Champerty, and not to leave all Copyhold Eſtates to the Miſchiefs mention'd in the Preamble of the ſaid Act, and eſpecially when a (*b*) Leaſe for Years has been adjudg'd in *Partrige's* and *Croker's* Caſe. *Plow.* (*c*) *Com.* 77, *&c.* to be within the ſaid Act.

* 5 Co. 84. 2. 1 Roll. Rep. 195. 2 Bulſt. 337.

(*a*) Co. Lit. 369 b. Cr. Car. 43.

(*b*) Dy. 74. pl. 19, 20. Plowd. 77 b. 78. &c. Moor 266. 1 Leon. 166. Sav. 95, 96. 1 And. 75, 76, &c. 201, 202. Goldſb. 101, 102. Dy. 374. pl. 16, 17.

(*c*) Plowd. 77, 78, &c.

Melwich and *Luter.*

12.

30 El. in *Melwich* & *Luter* in *B. R.*

(*a*) Cr. El. 102, 103.

William (*a*) *Melwich* brought an *Ejectt' firmæ* againſt *John Luter* and *Mary* his Wife, on a Demiſe made by *John Melwych* of Land, in *Eaſtworth* in the County of *Salop*, for one Year, *&c.* The Defendant pleaded, Not Guilty; and the Jury gave a Special Verdict to this Effect: The Abbot of *Tewkſbury* was ſeiſed of the Manor of *Boveridge*, whereof the ſaid Tenements in which, *&c.* were Parcel, and Copyhold Land of the ſame Manor; and that there were many other ancient Copyholds of the ſame Manor in *Eaſtworth* aforeſaid, which Manor came to the King by Diſſolution. And the King *anno* 37 *H.* 8. granted the Inheritance of all the Copyholds in *Eaſtworth*, to *John Ogden* and his Heirs, who call'd it his Manor of *Eaſtworth:* And afterwards a Copyholder of the Tenements aforeſaid, in which, *&c.* ſurrender'd them to the ſaid *John Ogden*, who alſo being ſeiſed of the Manor of *Harbridge* within the ſame County, at *Harbridge*, granted the Tenements in which, to *John Melwych* the Leſſor of the Plaintiff by Copy, according to the Cuſtom of the Manor of *Eaſtworth*, for Term of his Life, and that the Plaintiff was poſſeſſed 'till he was ejected by the Defendants, claiming it under the Title of *John Ogden*, pretending that the ſaid Grant by Copy did not bind him. And afterwards upon good Advice, Judgment was given for the Plaintiff; and in this Caſe four Points were reſolv'd.

1. That Leſſee of a Copyhold (*b*) for one Year ſhall maintain (*c*) *Ejectt' fir'*; for inaſm. as his Term is warranted by the Law by the gen. Cuſt. of the Realm, it is Reaſon that if he be ejected, that

1ſt Point. Moor 679. 3 Bulſtr. 214. Bridgm. 49, 50.

(*b*) 1 Roll. 846. Hutt. 101. Owen 18. Lit.

(*c*) Cr. El. 102, 103, 224, 225, 394, 395. Cro. Jac. 403. 1 Leon. 328. Poph. 188. Rep. 223. Hetl. 126.

that he should have *Ejectione firmæ*, and it is a speedy Course for a Copyholder to have the Possession of the Land against a Stranger.

2d Point.
(a) Cr. El. 103. Cr. Jac. 573. Antea 24. b. 2 Co. 17. a. 8 Co. 64. a. Hob. 181.

2. That by the (a) Severance of the Inheritance of Copyholds from the Manor, the Copyholds were not destroy'd, but remain'd of Force and Effect, which agrees with the said Judgment in *Murrel's* Case.

3d Point.
(b) Cr. El. 103, 394, 395, 443, 662. Postea in *Neale's* Case.

3. When the Lord of a Manor having many ancient Copyholds in one Town, grants the Inheritance of all the Copyholds to another; the (b) Grantee may hold Court for the Copyhold Tenements, and take Surrenders to the Use of others, and make Admittances and Grants: For altho' it is not a Manor in Law, because it wants free Tenants, yet as to the Copyhold Tenants, the Feoffee or Grantee has such a Manor, that he may hold a Court to make Admittances and Grants of the Copyhold Tenements: For every Manor which consists of Freehold and Copyhold Tenements, comprehends in itself in Effect two (c) several Courts; one which is commonly called the Court Baron, *s.* the Court of Freeholders, and in this Court the (d) Suitors, *s.* the free Tenants are Judges, and therewith agree 7 *H.* 6. 39 *H.* 6. 5. 6 *E.* 4. 3. 12 *H.* 7. 16. Another Court is for the Copyholders, and as to that, the Lord or the (e) Steward of the Manor is Judge; and as the other is called the Freeholder's Court, so this may be called the Copyholder's Court: And therefore when the Lord grants over the Inheritance of his Copyholds to another, the Grantee may hold such Court for the Copyhold Tenements only, as his Grantor might. And as to this Court it need not have any free Tenants; so if the Freeholds escheat, or if the Lord releases the Tenure and Services of all his free Tenants, yet the Lord may hold a customary Court for his Copyhold Tenements, and make Admittances and Grants of them; (f) *Benedicta est expositio, quando res redimitur a destructione. Nota Reader*, altho' the Lord by his own Act can't (g) make of one and the same Manor at the Common Law sundry Manors consisting upon Demesns and Freeholders, yet he may by his own Act, as by this Judgment appears, make a customary Manor consisting upon Copyholders only, as to the Purposes aforesaid.

(c) Co. Lit. 58. a.

(d) Co. Lit. 58. a. 4 Co. 33. b. 6 Co. 11. b. 8 Co. 60. b. 9 Co. 48. b. 49. a. Godb. 49. 1 Roll. 543. Cr. El. 792. Cr. Jac. 582. 4 Inst. 266, 268. 7 E. 4. 23. a. 21 E. 4. 66. b. 1 Mod. Rep. 171. 12 H. 7. 16, 17. Br. Judges 18. Br. Court Baron 9. B. N. C. 116.

(e) Co. Lit. 58. a.

(f) Palm. 444. Poph. 166.

(g) Cr. El. 39, 103, 443.

4th Point.
(h) 1 Roll. 499, 500, 505. Co. Lit. 59. a. 61. b. (i) Postea 27. a. Owen 35. Co. Lit. 58. a. Cr. El. 103. 1 Roll. 505. B. N. C. 387 Br. Court Baron 22. Br. Tenant per Copy 26.

4. It was resolv'd, that the Lord (h) himself may make a Grant or Admittance of a Copyhold out of the Manor at what Place he pleases; but the (i) Steward of the Court of a Manor, can't at any Court held out of the Manor make Grants or Admittances.

13. Cr. El. 394, 395. Pasch. 37 El. inter *Neale* &

Neale and *Jackson's* Case.

IT was adjudged by *Anderson* Chief Justice of the *Common Pleas*, *Walmesley*, & *totam Curiam*, That where the Lord of a Manor demises all his Lands granted by Copy to another for two thousand Years, that such Lessee

(*a*) may hold a Court for the Copyholds, according to the Reſolution of the third Point in *Melwiche*'s Caſe. And in this Caſe it was ſaid, that ſo it was reſolv'd *by all the Juſtices*, in the Caſe of Sir *Chr.* (*b*) *Hatton*, late Lord Chancellor of *England* touching Copyholds in *Wellingborough* in *Northamptonſhire*: *Nota* Reader, a good Difference between theſe Caſes which conſiſt upon Numbers of Copyholds which may ſupport a Cuſtom, and one ſingle Caſe of a Copyhold, as in *Murrel*'s Caſe before, in which the Lord doth not grant *tacite* any cuſtomary Court, nor the Grantee having but one ſingle Copyhold, can't hold Court.

Jackſon in *C. B.*
(*a*) Antea 26. b. Cr. El. 103, 394, 395, 443, 662.
(*b*) Cr. El. 103, 395, 443, 662.

Clifton and *Molineux.*

14.

TWO Points were reſolv'd by *Wray* Chief Juſtice, Sir *Tho. Gawdy*, *& tot' Cur'*, upon Evidence given to a Jury; that if a Court be held by a Steward of a Manor (*c*) out of it, and divers Grants and Admittances there made; the Court and all the Grants and Admittances are void, for the Court of the Manor ought to be held within the Manor, and not out of the Juriſdiction of it; which agrees with the Reſolution of the fourth Point before, in *Melwiche*'s Caſe. But it was reſolv'd, that by (*d*) Cuſtom the Court may be held out of the Manor, and Grants and Admittances made there good enough, as divers Abbots, Priors, *&c.* uſed to hold Courts at one Manor, for divers ſeveral Manors, and good by Cuſtom. 2. It was reſolv'd, that where a Woman Tenant for Life takes Huſband, and the Huſband commits Waſte againſt the Cuſtom of the Manor, and dies, the Eſtate of the Wife is utterly forfeited (*e*) by the Act of the Huſband. But if (*f*) a Stranger commits the Waſte without the Aſſent of the Huſband, it is no Forfeiture; and according to this Reſolution it was certify'd into the Chancery by *Mead* and *Periam*, two of the Juſtices of the *Common Pleas* between the ſame Parties as to both Points, upon Conference had with divers other Juſtices.

Mich. 27 & 28 El. inter *Clifton* & *Molineux*, in *B. R.*
(*c*) Antea 26. b. Ow. 35. 9 Co. 51. b. Cr. El. 103. 1 Roll. 505. B. N. C. 387. Br. Court Baron 22. Bl. Tenant per Copy 26. Co. Lit. 58. a.
(*d*) Co. Lit. 58. a. Cr. Car. 367.
(*e*) 1 Roll. 509. 2 Roll. Rep. 344, 361, 372. Cr. El. 149. Cr. Car. 7. O. Bendl. 83, 119. God. 34. Palm. 383, 384.
(*f*) 1 Roll. 508.

Taverner and *Cromwell.*

15.

IT was reſolv'd by *Wray* Chief Juſtice, Sir *Thomas Gawdy*, *& tot' Curiam*, upon Evidence to a Jury, That if a Copyholder be ſeiſed by Force of ſeveral Copies, *ſc.* of *Black Acre* by the Rent of 3 *d.* and of *White Acre* by the Rent of 4 *d.* and of *Green Acre*, by the Rent of 6 *d.* and afterwards the Copyholder commits (*h*) Waſte in Part of *Black Acre*, or makes a Feoffment of Part of *Black Acre*, or denies the Rent of that Acre, by that all *Black Acre* is forfeited, (*i*) but it is no Forfeiture of *White Acre*, nor of *Green Acre*. For altho' they all are in one and the ſame Hand, yet every Acre is held ſeverally, and to every Acre there is a ſeveral Condit. in Law (*k*) *tacite* annex'd, ſo as the Forfeiture of the one can't be the Forfeit. of any of the others, for the ſev. Condit. in Law follow the ſev. Tenures; and theref. the Forfeit. of the one can't be the Forfeit. of any of the others: So it was at the ſame Time reſolv.

Tr' 26 El. in *B. R.* inter *Taverner* & *Cromwell.*
(*g*) Cr. El. 353. Co. Ent. 272, ad 288.
(*h*) 1 Bulſt. 51.
(*i*) Cr. El. 353.
(*k*) Poſtea 28

That if the ſaid Copyholder of the ſaid three Acres ſeverally held as aforeſaid, ſurrenders them to the Uſe of *A.* and his Heirs, and the Lord admits *A.* accordingly, (*a*) *Tenendum per antiqua ſervitia inde prius debita & jure conſueta*, or to ſuch Effect; and after *A.* commits a Forfeiture in *Black Acre*, he ſhall forfeit that only, and none of the others, for the ſaid *Tenendum* (*reddendo ſingula ſingulis*) continues the ſeveral Tenures; and ſo it is not material whether the Copyholds be in one or ſeveral Copies, but whether the Tenure be one or ſeveral, is only material as to this Purpoſe; and ſo was it adjudg'd upon Demurrer, *Hill.* 35 *Eliz. in C. B. inter James Taverner Pl. & Thomas Cromwel Def.* So if divers ſeveral Copyholds eſcheat to the Lord, and he regrants them to another, *Tenend' per antiqua ſervitia, &c.* they ſhall be ſeverally held as they were before the Eſcheat: And in this Caſe it was reſolv'd, That when a Copyholder ſurrenders to the Uſe of another, and the Lord admits him, now he who is ſo admitted is (*b*) in by him who made the Surrender: and in Plaint in Nature of a Writ of *Entry in the Per*, ſhall be ſuppoſed *in the Per* by him who made the Surrender; for the Lord is but an (*c*) Inſtrument to make Admittance, and he who is admitted ſhall not be ſubject to the Charges or Incumbrances of the Lord: And ſo *Reader*, where it is ſaid in the *Caſe of Clifton and Molineux* before, that by the Forfeiture of the Huſband all the Eſtate of the Wife ſhall be forfeited, it is to be intended all the Copyhold Eſtate under the ſame Tenure.

(*a*) 3 Leon. 109. Poſtea 28. a.

(*b*) Poſtea 28. b. 29. b. Mo. 358. Cr. El. 361. Co. Lit. 59. b. Bridgm. 51. 1 Roll. 503. Cr. Car. 205.

(*c*) Cr. El. 361. Poſtea 29. b. Bridgm. 51. 1 Roll. 503. 8 Co. 63. b. 13 Co. 3. Moor 112. See Skin. 192, 306.

Hobart and *Hammond.*

16. Mich. 42 & 43 El. in *B. R.* inter *Hobart* & *Hammond.*

UPON Evidence to a Jury, theſe Points were reſolv'd by *Popham* Chief Juſtice, *Gawdy*, *Clench*, and *Fenner*, Juſtices of the *King's Bench.*

1. That if the Fines of Copyholders of a Manor upon Admittance, be incertain, yet the Lord can't demand or exact exceſſive and (*d*) unreaſonable Fines, and if he does, the Copyholder by the Law may deny to pay them without any Forfeiture: and it ſhall be determin'd by the Opinion of the Juſtices, before whom the Matter is depending, either upon Demurrer, or upon Evidence to a Jury upon the Confeſſion or Proof of the yearly Value of the Land, whether the Fine demanded was reaſonable or not: For if the Lords might aſſeſs exceſſive Fines at their Pleaſures, all the Eſtates of Copyholders, which are a great Part of the Realm, and which have continued from Time whereof, *&c.* would be at the Wills of the Lords defeated and deſtroy'd, which would be inconvenient. And it was ſaid, that according to this Reſolution in this Point, it had been adjudg'd in *C. B.* in (*e*) *Hoddeſdon's* Caſe.

(*d*) Mo. 622, 623. Cr. El. 351, 779. Cr. Car. 196. 1 Roll. 507, 523. 2 Roll. 178. 1 Roll. R. p. 33. 11 Co. 44. a. 13 Co. 3. 1 Brownl. 186. *Treby's* Argument *in quo Warranto* 34. Hob. 135. Co. Lit. 56. b. 59 b. 60. a. Antea 21. b. Vide ſupra 21. b. Brown's Caſe. Cumb. 44.

(*e*) Cr. El. 351, 779.

2. It was reſolv'd, if the Lord in Caſe of Incertainty of Fines, aſſeſs a reaſonab. Fine, and requires the Copyh. to pay it, the

the Copyholder is not bound (*a*) to pay it preſently, becauſe he can't tell what Fine the Lord will aſſeſs, *Et * Nemo tenetur divinare*; and therefore he can't provide any certain Sum, and therefore he ſhall have convenient Time to pay it, if the Lord himſelf appoints no certain Day for Payment of it; But otherwiſe it is of Fines certain.

(*a*) Cr. El. 779. Moor 623. 13 Co. 2. Palm. 550. Lit. Rep. 98. 4 Co. 66. b.

3. It was reſolved, that where a Copyholder has ſeveral Lands ſeverally held by ſeveral Services by Copy, there the Lord ought to aſſeſs and demand the Fines (*b*) ſeverally for every Parcel which is ſo ſeverally held. For the Tenant may refuſe (*c*) to pay the Fine for one Parcel, and forfeit that, and pay the Fines for the others; And as it was agreed in *Taverner's* Caſe, every ſeveral Tenure has a ſeveral Condition in Law (*d*) *tacite* annexed to it; and therefore the Lord ought for every ſeveral Tenure to aſſeſs and demand a ſeveral Fine: So if all the ſaid ſeveral Copyholds are ſurrender'd to the Uſe of another and his Heirs, and the Lord admits him (*e*) *Tenendum per antiqua ſervitia inde prius debita & de jure conſueta*, there, as it was alſo reſolved in *Taverner's* Caſe, the Tenures are ſeveral, and therefore the Fines ought to be ſeverally aſſeſſed and demanded.

(*b*) Cr. El. 779. Moor 623.

(*c*) Cr. El. 779. Moor 623.

(*d*) Antea 27. a

(*e*) Antea 27. b. 3 Leon. 109.

4. *Popham* Chief Juſtice ſaid, it was adjudged in *Sandes* Caſe, that no Fine is due to the Lord either upon Surrender or Deſcent till Admittance; for the Admittance is the Cauſe of the Fine, and if after, the Tenant denies to pay the Fine, it is a Forfeiture. And ſo it was reſolved by *Wray* and *Periam* Juſtices of Aſſiſe in Evidence to a Jury in the County of *Suffolk inter Nicholas Bacon*, Knt. Plaintiff, & *Flatman*, Defendant, for a Copyhold of the Manor of *Walſham in the Willowes*, in the County of *Suffolk*.

Inter *Bacon* & *Flatman*.

Weſtwick verſus *Wyer*.

17.

THE Caſe was ſuch; *Alice Weſtwick* was Copyholder of the Tenements in which, *&c.* in Fee, held of the Manor of *Peter Leyſton* in the County of *Bucks*; and 12 *H.* 8. ſurrender'd the Tenements into the Hands of the Lord of the ſaid Manor to the Uſe of *W. Weſtwick* her Son in Fee; and at the next Court held 13 *H.* 8. for the ſame Manor, the Entry in the Roll was to this Effect; *Ad hanc Curiam venerunt* Will. Weſtwick *&* Johan' *uxor' ejus, & ceperunt de Domino Tenementa præd' cum pertinentiis in quibus, &c. præf.* W. Weſtwick *&* Joh' *uxori ejus: Tenend' eiſdem* W. *&* J. *& hæred' ſuis, &c.* And afterwards *William* died, and *Jo.* ſurvived and ſurrendered the Tenements to the Uſe of the Defendants, who entred, upon whom the Plaintiff as Couſin and Heir of *William Weſtwick* entred, and the Defendants re-entred; and the Plaintiff brought an Action of Treſpaſs, and all this was found in a ſpecial Verdict: And it was argued by the Pl'ts Council, that the Plaintiff ought to have Judg-

Tr. 33 Eliz. in B. R. *Weſtwick* v. *Wyer* & Ux'.

ment for divers Reaſons. 1. When *Alice Weſtwick* ſurrender'd her Land to the Lord of the Manor to the Uſe of *W. W.* by the Surrender the Eſtate of the Copyholder is in the Lord, which he might grant to any Stranger, as the Feoffees to an Uſe might at the Common Law; and *W. W.* had no Remedy but in a Court of (*a*) Equity, to compel the Lord to admit him, & *per conſequens* when the Lord grants the Land to *W. Weſtwick* and his Wife in Fee, it is a good Grant to both. 2. *Will. Weſtwick* in the Caſe at Bar, having but Remedy in Equity to be admitted to the Land, it ſhall be intended that *Will. Weſtwick* requeſted the Lord to make a Grant to him and his Wife, for ſo much is implied in it, when it is ſaid, *Quod ad hanc Curiam venerunt* W. Weſtwick & Johan' *uxor ejus, & ceperunt, &c.* and every Admittance of a Copyhold amounts in Law to a Grant, wherefore they conceived that Judgment ought to be given for the Plaintiff. To which it was anſwered and reſolved by the Court, That as to the firſt Reaſon the Plaintiff's Council had miſtaken the Law. For when *A. W.* ſurrender'd the Land to the Lord to the Uſe of *W. W.* the Lord by the Cuſtom (which makes the Law in ſuch Caſe) had but a cuſtomary Power to make Admittance (*b*) *ſecundum formam & effectum ſurſum redditionis*, and therefore it is not to be likened to the Caſe of Feoffees at the Common Law. And altho' the Lord grants the Land over by Copy to another, all that is without Warrant, for notwithſtanding that, the Lord may make Admittance according to the Surrender, and that ſhall be good, and he who is admitted ſhall be (*c*) in by him who made the Surrender, as it was reſolved in *Taverner's* Caſe next before: And therefore it was agreed *per totam Curiam*, if the Lord after ſuch Surrender grants the Land to *Ceſtuy que uſe*, and a Stranger, the whole ſhall enure to the *Ceſtuy que uſe*; or if he admits *Ceſtuy que uſe* upon Condition, the (*d*) Condition is void, for after Admittance he is in by him who made the Surrender. As if a Man deviſes a Term to *J. S.* and the Executors agree and aſſent that *J. S.* and *J. N.* ſhall have the Term, or that *J. S.* ſhall have it upon Condition, in theſe Caſes *J. S.* ſhall have the Term ſolely and abſolutely, for after the Aſſent of the Executors he is in by the Deviſe. And it was ſaid, that it has been lately adjudged in *Bunting's* Caſe, That where a Copyholder ſurrenders to the Lord to the Uſe of another for Life, (*e*) and the Lord admits him to hold to him and his Heirs, that yet he who is ſo admitted, has but an Eſtate for Life, for he is in after the Admittance by Force of the Surrender. As to the ſecond Objection it was anſwered and reſolved, That without ſpecial Cuſtom, for (*f*) *Conſuetudo loci eſt ſemper obſervanda*, or other ſpecial Matter which is in this Caſe, the Admittance ſhall enure (*g*) only to the Huſband for the Reaſons aforeſaid; wherefore Judgment was given againſt the Plaintiff.

(*a*) Cr. Jac. 368.

(*b*) 8 Co. 135. b. 9 Co. 107. a. Co. Lit. 59. b.

(*c*) Antea 27. b. Moor 358. Cr. Eliz. 361. Co. Lit. 59. b. Bridgm. 51. 1 Rolls 503. Poſtea 29. b. Cr. Car. 203.

(*d*) 1 Roll. Rep. 165.

(*e*) Poſtea 29. a. b.

(*f*) 10 Co. 140. a. 6 Co. 67. a. 7 Co. 5. a.

(*g*) Lane 99.

THE

Bunting verſus *Lepingwel.*

18.

M. 27 & 28 El. inter *Bunting* v. *Lepingwel.* Moor 169, 170, 171. 2 Inſt. 684. Skin. 468, 470, 493.

THE Caſe as it was found by ſpecial Verdict was to this Effect; *J. Bunting* the Plaintiff's Father, and *Agnes Adingſhal* contracted Matrimony between them *per verba de præſenti tempore*; and afterwards, 1 *Decemb. anno Dom.* 1555, the ſaid *Agnes* took to Huſband *Thomas Twede*, and afterwards 9 *Julii*, 1556, *John Bunting* libelled againſt the ſaid *Agnes* upon the ſaid Contract in the Court of Audience, upon the Proceeding in which Libel, *Decretum fuit quod præd' Agnes ſubiret matrimonium cum præfato* Johanne Bunting, *& inſuper pronunciatum, decretum & declaratum fuit dictum matrimonium fore nullum, &c.* And further it was adjudged, that the ſaid *John* and *Agnes* ſhould intermarry, which they did, and had Iſſue the Plaintiff, the ſaid *T. Twede* then living, and afterwards *John Bunting* died; and it was further found, that one *Richard Bunting*, Father of the ſaid *John* was a Copyholder in Fee of the Land in which, *&c.* held of the Manor of *Goldingtons* in *Caniſcoln* in *Eſſex*, and out of Court, according to the Cuſtom of the Manor, ſurrender'd by the Hands of the cuſtomary Tenants to the Lord of the Manor to the Uſe of *Margaret* his Wife, and *Robert* his younger Son, and died, after whoſe Death the ſaid Surrender was preſented according to the Cuſtom, and thereupon the Lord of the Manor gave Admittance, and granted Seiſin of the Land to *Margaret* and *Robert*, and to the Heirs of *Robert*; and *Margaret* died, and *Robert* ſurviving, and ſurrender'd the Land to the Uſe of *Emme* his Wife, and died, *Emme* was admitted, *Charles Bunting* as Couſin and Heir of the ſaid *Richard Bunting*, *ſc.* Son and Heir of *John*, Son and Heir of the ſaid *Richard* entred upon *Emme*, and the Def. as her Servant, and by her Command re-enter'd, upon which Re-entry the Pl. brought the Action: And in this Caſe five Points were adjudg'd. 1. That altho' *Twede* then being *de facto* the Huſband of the ſaid *Agnes* was not Party to the ſaid Suit, nor to the Sentence in the *Spiritual Court* which diſſolved the Marriage betwixt him and the ſaid *Agnes*, but the ſaid *Agnes* (*a*) only; yet the Sentence againſt the Wife only being but declaratory, was good, and ſhould bind the Huſband *de facto*, and forasmuch as the Conuſance of the Right of (*b*) Marriage belongs to the Eccleſiaſtical Court, and the ſame Court has given Sentence in this Caſe, the Judges of our Law ought (altho' it be againſt the Reaſon of our Law) to give Faith and (*c*) Credit to their Proceedings and Sentences, and to think that their Proceedings are conſonant to the Law of holy Church, for (*d*) *cuilibet in ſua arte perito eſt credendum*, and ſo have the Judges of our Law always done, as appears in (*e*) 34 *H.* 6. 14. *b.* 11 *H.* 7. 9. *a. b.* 8 *Aſſ. pl.* So that it was reſolv'd, that the Plaintiff was (*f*) legitimate, and no Baſtard.

(*a*) Moor 169.

(*b*) Carth. 233.

(*c*) 2 Ventr. 43. 5 Co. 7. a. *Cawdrie's* Caſe. Cawly 31.

(*d*) 7 Co. 42. b. 5 Co. 7. a. *Cawdrie's* Caſe. Cawly 31. 7 Co. 19 a. *Calvin's* Caſe. Co. Litt. 125. a.

(*e*) 7 Co. 43. b.

(*f*) Moor 169, 171.

2. When *R. Bunting* Copyholder ſurrender'd into the Hands of the Lord to the Uſe of the ſaid *Marg.* and *Rob.* without Limi-

(a) Co. Lit. 59. b. Limitation of any (a) Eſtate, it was reſolved, that they had but an Eſtate for Lives, for as well Eſtates as Deſcents ſhall be directed by the Rules of the Law, as neceſſary Conſequents upon the Cuſtom, unleſs there is a ſpecial Cuſtom (which is always to be obſerv'd) within the Manor; as theſe Words, *ſibi & ſuis*, or *ſibi & ſignatis*, or ſuch like may by Cuſtom create an Eſtate of Inheritance. And it was obſerved that the Eſtates in the Caſes limited upon Surrenders, are always annexed to Eſtates of him to whoſe Uſe the Surrender is made, and always the Surrender to the Lord is general (b) without Limitation of any Eſtate.

(b) Co. Lit. 59. b.

3. It was reſolved, That when the Lord made Admittance and deliver'd Seiſin to *Margaret* and *Robert*, and to the Heirs of *Robert*, it was only an (c) Admittance to them for the Term of their Lives, the Reverſion over to *Richard Bunting* who made the Surrender, becauſe the Lord is but an Inſtrument (d) in this Caſe, and when he has admitted according to the Effect of the Surrender, nothing remains in him but the Reverſion of the Eſtate in him who made the Surrender to diſpoſe of as he pleaſes according to the Cuſtom of the Manor; and thoſe who were admitted for their Lives, were in (e) by him who made the Surrender, which can't be if the Reverſion ſhall be in the Lord.

(c) Antea 28. b. Co. Lit. 59. b. 8 Co. 135. b. 9 Co. 107. a. Cr. El. 392. Cr. Car. 205. 1 Rolls 504.

(d) Cr. El. 361. Cr. Car. 205. Antea 27. b. Bridgman 51. 1 Roll 503. 8 Co. 63. b. Moor 112. 13 Co. 3. 2 Siderf. 61.

4. Altho' he who is admitted is in by him who made the Surrender, yet it was reſolved that a Man may ſurrender (as *Robert Bunting* did in this Caſe) to the Uſe of his Wife, becauſe the Huſband doth not make it immediately to the Wife but by two Means, *ſc.* by Surrender of the Huſband to the Lord to the Uſe of the Wife, and by Admittance of the Lord to the Wife according to the Surrender.

(e) Antea 27. b. 28. b. Moor 358. Cr. Eliz. 361. Co. Lit. 59. b. Bridgm. 51. 1 Rolls 503. Cr. Car. 205.

5. When *Rich. Bunting* made the Surrender out of Court (f) and died before it was preſented in Court, yet the Surrender being preſented after his Death, according to the Cuſtom, is good, but if it had not been preſented according to the Cuſtom, then the Surrender became of no Force or Effect. So if the (g) Tenants by whoſe Hands the Surrender was made die, yet if it is upon good Proof preſented, it is good enough. So in the Caſe of (h) *Kite* and *Queinton* before, where he to whoſe Uſe the Surrender was made died before Admittance, yet his Heirs ſhall be admitted. And this laſt Point was reſolved without any Difficulty or Scruple, and that was the true Caſe of *Bunting* mentioned in (i) *Weſtwick*'s Caſe next before, and well agrees with the Reaſon of the ſame Caſe.

(f) Cr. Jac. 403. 1 Rolls 100, 501. Co. Lit. 59. b. 3 Bulſtr. 215. 1 Roll. Rep. 415. Bridgman 51. Lane 99. 2 Syd. 37, 38, 61, 62. 1 Rolls 504. 2 Sand. 422. 1 Mod. Rep. 102.

(g) 3 Bulſt. 215. Bridgman 54.

(h) 1 Rolls 504. Antea 25. a.

(i) Antea 28. b.

19.

P. 36. El. *Down* v. *Hopkins* in B. R.

Down verſus *Hopkins.*

(k) Cr. Eliz. 323.

THE (k) Caſe was, within the Manor of *Chaldwarton* in the County of *South.* there were divers cuſtomary Lands and Tenements, and which by Cuſtom of the Manor, from Time whereof, *&c.* had been granted by Copy of Court Roll of the ſame Manor, for one, two, or three Lives;

of

of which Manor Sir *George Pawlet* and *Elizabeth* his Wife, as in the Right of his Wife were ſeiſed, *&c.* and at a Court of the ſaid Manor, 4 *&* 5 *Phil. & Mar.* granted the Place where, *&c.* being Parcel of the cuſtomary Tenements, *&c.* to the ſaid *Down*, *durante viduitate ſua*; and if this Grant was according to the Cuſtom of the Manor or not, was the Queſtion: And it was adjudg'd that this Grant was within the Cuſtom, for every Grant (*a*) *durante viduitate* is an Eſtate for Life, as appears by *Lit.* 90. *&* 37 *H.* 6. 27. 14 *H.* 8. 13. *a. &c.* but every Grant for Life is not *durante viduitate*, for a general Eſtate for Life is larger and more beneficial than *durante viduitate*. *In Mich.* 2 *&* 3 *Eliz. Dyer* 192. Iſſue was taken, whether the Cuſtom of a Manor was, that the Wife of every Copyholder ſhou'd have the Land after the Death of her Huſband for the Term of her Life; and it was given in Evidence that the Cuſtom was, that ſhe ſhould have (*b*) *durante viduitate ſua*, and it was adjudg'd, that this Evidence did not maintain the Cuſtom alledged before, becauſe it is a leſs Eſtate than Cuſtom *pro termino vitæ* was, and the Effect and Subſtance of Iſſues joined betwixt the Parties are to be proved preciſely: But in the principal Caſe it was reſolv'd, that the Cuſtom is well purſued, becauſe the Eſtate granted was leſs (*c*) than the Cuſtom warranted; And that agrees with the Reſolution before of the ſecond Point in *Gravenor's Caſe*. And in this Caſe it was ſaid, that the Lord of a Manor may by (*d*) Word retain one to be Steward of his Manor, and to hold the Courts thereof, as well as a (*e*) *Bailiff* may be, and that by Word, and this Retainer ſhall ſerve till he is diſcharged, and therewith agrees 8 *Eliz. Dyer* 248.

(*a*) Lit. Sect. 380. Co. Lit. 42. a. 234. b. 37 H. 6. 26. Fitz. brief. 136. Br. Waſte 102. Br. general brief 11. 4 Co. 3. a. Dyer 305. pl. 59. Moor 31.

(*b*) Dyer 192. pl. 23. Cr. El. 415. Doct. pl. 200, 205.

(*c*) 4 Co. 23. a. 1 Rols 511. Co. Lit. 52. b. Cr. Eliz. 323. 373. Godb. 20. 4 Leon. 64. 1 Rolls Rep. 48. 1 Leon. 56. Salk. 189.

(*d*) Co. Lit. 61. b. Kelw. 158. b. Cr. Jac. 526, 527. 1 Leon. 227, 228. Godb. 142. Dyer 248. pl. 79. Infra 30. a.

(*e*) Kelw. 174. pl. 2. 7 H. 7. 10. a.

Harrys and *Jay*.

20.

IN this Caſe three Points were reſolved. 1. That the Lord of a Manor may retain one to be Steward of his Manor, and to keep his Courts by (*g*) Word, and this Retainer ſhall endure till he is diſcharged thereof, and this agrees with the Opinion in Caſe next before.

Tr. 41 Eliz. *Harrys* and *Jay* (*f*) in B. R. on a ſpecial Verdict. Cr. El. 699. a.

(*g*) Dyer 248. pl. 79. Kelw. 158. b. Co. Lit. 61. b. Cr. Jac. 526, 527. Godb. 142. 1 Leon. 227, 228.

2. That where a Copyholder of the Queen's Manor was attainted of Felony, by which his Copyhold eſcheated, the Queen's Steward of the ſame Manor might (*h*) grant it over *ex officio* without any ſpecial Warrant; for the Cuſtom of the Manor warrants the Steward of the Manor for the Time being to grant it, and the Cuſtom binds the Q. her Heirs and Succeſſors: But altho' he may by the Law do it, yet his Duty is before he makes any Grant to inform the Lord Treaſurer of *England*, Chancellor and Barons of the Exchequer or ſome of them, for his better Direction, and for the Queen's greater Profit in thoſe Caſes.

(*h*) Cr. El. 699.

3. It was reſolv'd, That the K's Auditor (*i*) or Receiver has

(*i*) Cr. El. 699.

not

not Power to retain a Steward to hold the Queen's Courts: But he ought (if ſuch voluntary Grants by him made upon Eſcheats or Forfeitures ſhall be good) to have Letters Patents of the Office of the Stewardſhip of the ſame Manor.

Lady *Holcroft's* Caſe.

21. Lady *Holcroft's* Caſe. (*a*) Antea 30. Co. Lit. 61. b. Kelw. 158. b. Cr. Jac. 526, 527. 1 Leon. 227. 228. Godb. 142. Dyer 248. pl. 79. (*b*) 1 Leon. 227. Godb. 142. Cro. Jac. 526, 527. 1 Ro. 500. Co. Lit. 59. a. (*c*) Co. Lit. 61. b.

AND it was ſaid in this Caſe, That it was adjudged in *C. B.* in the Lady *Julian Holcroft's* Caſe, that where one was generally retained by the Lord of a Manor by (*a*) Word to be Steward of his Manor, and to keep his Courts, that ſuch Steward might take (*b*) Surrenders of cuſtomary Tenements out of the Court; for till ſuch Steward is (*c*) diſcharged, he is Steward of the Manor, as well by the Retainer by Word, as if he had a Grant thereof by Deed.

Shaw and *Thompſon.*

22. Trin. 37 Eliz. *Shaw* & *Thompſon.* (*d*) Moor 410, 411. Cr. Eliz. 426. 1 Rolls 600, 601. (*e*) 2 Siderf. 139. 2 Bulſt. 337. Hob. 215. Antea 22. a. Co. Lit. 33. a. (*f*) 1 Rolls 600. Co. Lit. 32. b. Cr. Car. 43. 2 Inſt. 80. Moor 411. (*g*) Cr. El. 426. Noy 129. (*h*) Antea 22. a. (*i*) Antea 22. b.

THE Caſe was, That the Plaintiff late the Wife of a Copyholder in Fee of a Manor in which by ſpecial Cuſtom Women were to be endowed, recovered Dower by Plaint in the Court of the Manor, and becauſe her Huſband died ſeiſed, ſhe recovered 50 *l.* Damages for the Profits from the Death of her Huſband: The Woman brought an Action of Debt for this 50 *l.* in *B. R.* And in this Caſe, 1. It was reſolved, That the Wife ſhou'd not have Dower (*e*) of a Copyhold, unleſs it be by ſpecial Cuſtom. 2. When a Wife is to be endowed by Cuſtom of a Copyhold, then ſhe ſhall have all Incidents to Dower, and therefore in ſuch Caſe ſhe ſhall recover Damages by the Statute of (*f*) *Merton, cap.* 1. *de viduis, &c.* and therefore in the Caſe at Bar the Recovery of Damages was lawful; and altho' they exceed (*g*) 40 *s.* yet they were well warranted by Law; which two Points well agree with the Reſolution before in (*i*) *Brown* and *Rivet's Caſe.* 3. It was reſolved, That no Action of Debt lies for the ſaid Damages at Common Law, for upon ſuch Judgment no Writ of Error (*k*) or falſe Judgment lies, but the (*l*) Remedy is in the *Court* of the Manor, or in the *Chancery*, which is alſo conſonant to the Reſolution in *Brown's Caſe.* And *Fenner* Juſtice ſaid, That he had ſeen a Record of 36 *H.* 8. where the Lord upon a Petition to him, had, for certain Errors in the Proceedings, reverſed ſuch Judgment given in his own Court; And upon that, the Defendant ſhall have *Audita querela* to be reſtored to the Damages recovered againſt him.

(*k*) Moor 410, 411. 1 Rolls 600, 601. (*l*) 1 Rolls 600, 601. 13 Rich. 2 Faux judgment 7. Antea 21. b. Lit. Sect. 77. Co. Lit. 60. b. Vide 13 R. 2. cited before in *Brown's* Caſe, & 14 H. 4. 4. Vide 7 E. 4. 35.

Hoe and *Taylor.*

23. P. 37 El. *Hoe* & *Taylor* in Error in B. R. (*m*) Cr. El. 413. Moor 355. Gob. 134. 13 Co. 69.

THE ſaid Writ of Error was brought upon a Judgment given in *C. B.* where the Caſe was ſuch; *Henry Jerningham*, Eſq; was Lord of the Manor of *Mutford*, in the County of *Suffolk*, and *Taylor* claimed the Underwood of a great Wood called *Mutford-Wood*, Parcel of the ſame Manor, to be demiſed, and demiſeable from Time whereof, *&c.* by Copy of Court Roll of the ſame Manor, *&c.* to be cut yearly by

by four (*a*) or five Acres at the moſt, and conveyed to himſelf a Grant of the ſaid Underwood by Copy, *&c.* according to the Cuſtom; and for Treſpaſs done in the Underwood, he brought the Action of Treſpaſs againſt *Hoe.* And it was adjudged in *C. B.* that Underwood growing upon Parcel of the Manor might by Cuſtom be granted by Copy of Court Roll of the ſame Manor; And that Judgment was affirmed in *B. R.* for it was there ſaid, That the ſaid (*b*) Underwood might be granted by Copy, becauſe it grew upon Parcel of the Manor; alſo it is a Thing of Perpetuity to which Cuſtom may extend, for after every Felling, the Underwood grows again, *ex ſtipitibus.* So it was reſolved, that (*c*) Herbage, or any (*d*) Profit of any Parcel of the Manor, might by Cuſtom be granted by Copy: And it was ſaid that a (*e*) Fair appendant to the Manor of *Crokenhorn* in the County of *Somerſet*, is granted by Copy of the ſame Manor. And that well explaineth the Reſolution in *Murrel's* Caſe before, concerning the firſt of the Pillars upon which every Copyhold ſtands, *ſc.* Cuſtom. *The 10th Caſe of theſe.*

(*a*) Cr. El. 413. Moor 355.

(*b*) Jenk. Cent. 274. Cr. El. 413. Moor 355. Co. Lit. 58. b.

(*c*) Co. Lit. 58. b. 1 Rolls 498.

(*d*) Jenk. Cent. 274.

(*e*) Antea 24. b. Jenk. Cent. 274. Cr. El. 413. Moor 355. Co. Lit. 58. b.

French's Caſe.

24.

IT was adjudg'd that if a Copyhold Eſtate is forfeited to the Lord, or eſcheats, or otherwiſe comes to the Lord's Hands, if the Lord makes a Leaſe for Years, or for Life, or other Eſtate by Deed, or without Deed, that this Land can never after be (*f*) regranted by Copy, for the Cuſtom is deſtroyed, becauſe during ſuch Eſtates, the Land was not demiſed nor demiſable by Copy of Court Roll: So if the Lord makes a Feoffment in Fee thereof upon Condition, and afterwards enters for the Condition broke, yet it can never be regranted by Copy; But if the Lord keeps the Land in his Hands for a long Time, or lets it at Will, he, his Heirs or Aſſigns may well regrant it at his Pleaſure. So if the Interruption is wrongful, as if the Lord is diſſeiſed, and the Diſſeiſor dies ſeiſed, or if the Land is recovered againſt the Lord by falſe Verdict, or erroneous Judgment, in theſe Caſes, till the Land is recovered, or the Judgment reverſed by the Lord of the Manor, the Land was not demiſed, or demiſable, and yet after the Land is re-continued, it is grantable again by Copy; for *Non valet* (*g*) *impedimentum quod de jure non ſortitur effectum, & quod contra legem ſit pro infecto habetur*: But if the Land ſo forfeited, or eſcheated before any new Grant made is extended upon a Statute, or Recognizance acknowledged by the Lord, or if the Wife of the Lord in a Writ of Dower has this Land aſſigned to her, altho' theſe Impediments are by Acts in Law, yet inaſmuch as the Interruptions are lawful, the Lands can never after be granted by Copy. If a Copyholder accepts (*h*) a Leaſe for Years of the Lord of his Copyhold, the

M. 18 & 19 El. in B. R. *Frenche's* Caſe.

(*f*) 1 Rolls 498. 2 Syderf. 35, 140, 142. 1 Jones 449. Dyer 414. pl. 61. Cr. Car. 521. 2 Rep. Q. Ann. 53. 5 Co. 84.

(*g*) Co. Lit. 381. b.

(*h*) 2 Co. 17 a. 1 Rol. 510. God. 101. Sav. 70, 71. 1 Brown. 32. 1 Anderſ. 191. 1 Leon. 170.

Copyhold

Copyhold is deſtroyed for ever, and can never be granted again: If the Copyholder (*a*) takes a Leaſe for Years of the Manor, by that his Copyhold has not Continuance, as it was adjudg'd, *Paſch.* 17 *Eliz.* in (*b*) *Hide's Caſe*; but in the ſame Caſe it was reſolved, That ſuch Leſſee might regrant the Copyhold again to whom he wou'd, for the Land was always demiſed or demiſeable; And if a Copyhold is ſurrender'd to the Leſſor of the Manor, or is forfeited to him, he or his Executors or Aſſigns may well regrant it: And if a Copyholder eſcheats to the Lord, and he aliens the Manor by Fine, Feoffment, or otherwiſe, his Alienee may regrant the Land by Copy, for it was always demiſed or demiſable: And by theſe Reſolutions you will better underſtand the general Learning in *Murrel's* Caſe before, concerning the ſecond of the Pillars of a Copyhold, *ſc.* (*c*) demiſed and demiſable from Time whereof, *&c.*

(*a*) Sav. 70, 71. 3 Bulſt. 81. Godb. 34. Cr. El. 7. Cr. Jac. 84. God. 153. Noy 12. Moor 185. 2 Syderf. 339. Cr. Car. 521.
(*b*) Moor 185. 2 Co. 17. a.
(*c*) 2 Syderf. 142. Co. Lit. 58. b.

Foiſton and *Crachroode.*

25. M. 29 & 30 El. *Foiſton & Crachroode* in B. R.

THE Caſe was, that a Copyholder of certain Tenements called *Collins*, Parcel of the Manor, *&c.* in Pleading alledged, *Quod infra Maner' præd' talis habetur, necnon a toto tempore cujus contrarii memoria hominum non exiſtit, habebatur conſuetudo*, (viz.) *quod quilibet tenentes præd' tenementorum vocat' Collins*, had uſed to have Common in ſuch a Place Parcel of the ſaid Manor; And if the Cuſtom might be alledged within the Manor and applied to but one ſingle Copyhold was demurr'd in Law. And it was adjudged, that ſuch (*a*) Cuſtom, as well for the Form as for the Matter of it, was good: For firſt, the Copyholder in his own Name can't (*b*) preſcribe, for the Weakneſs and Baſeneſs of his Eſtate; but if he will preſcribe, he ought to preſcribe in the Name of the Lord of the Manor, *ſc.* to ſay, That the Lord of the Manor and all his Anceſtors, and all thoſe whoſe Eſtate he has, have had Common in ſuch a Place for him and his Tenants at Will, *&c.* as appears in 22 *H.* 6. 51. *a. &c.* and that ſhall ſerve when the Copyholder claims Common or other Profit in the Soil of a Stranger: But when the Copyholder claims Common or other Profit in the Lord's Soil, then he can't (*c*) preſcribe in the Name of the Lord; For the Lord can't preſcribe to have Common or other Profit in his own Soil; but then the Copyholder, foraſmuch as he can't preſcribe, neither in his own Name, nor in the Lord's Name, he muſt of Neceſſity alledge, that within the Manor is ſuch a Cuſtom as in the Caſe at Bar: And as when the Copyholder claims Common or other Profit in the Soil of the Lord, he ought to claim it by Cuſtom of the Manor; ſo when he claims it in the Land of ano. which is not Parcel of the Manor, he can't claim it by the Cuſtom of the Manor, for the Cuſtom is, *Quod infra manor' talis habetur, &c. conſuetudo*, and theref. he can't apply

(*a*) 6 Co. 60. b. Hob. 86. Cr. Jac. 665. Cr. El. 353.
(*b*) Doct. pla. 81. Moor 461. Hob. 86. Cr. Jac. 665. Cr. El. 353, 390. 6 Co. 60. b. Kelw. 77. a. 6 Mod. 19, 20.
(*c*) Doct. pla. 81. Cr. El. 390. Moor 461. 6 Co. 60. b. Cr. Jac. 665.
1 Salk. 365, 366.
Hob. 286.

apply it, or by Force thereof claim any Thing out of the Manor, as was done 21 *Eliz.* (*a*) *Dyer*, and therefore there it was clearly miſpleaded; but in ſuch Caſe he ought to preſcribe in the Name of the Lord.

(*a*) Dyer 363. pl. 27. 6 Co. 61. a. 1 Leon. 313.

Nota, a good (*b*) Difference between Preſcription which is Perſonal, and is always made in the Name of a Perſon certain and his Anceſtors, or thoſe whoſe Eſtate he has, and Cuſtom which is local and alledged in no Perſon, but that within a Manor, *&c.* is ſuch Cuſtom, and that ſerves for them who can't preſcribe in their own Name, nor in the Name of any Perſon certain, as Inhabitants of a Town, *&c.* as appears in 15 *E.* 4. 29. 40 *Aſſ.* 41. 2 *Mar. Br. Preſcription* 100. 6 *E.* 6. *Dyer* 71. Alſo Allegation of a Cuſtom ſhall ſerve when it is referred to a Thing inſenſible, *ſc.* that all ſuch Lands, *&c.* are deviſable, or the like. *Vide* 40 *Aſſ.* 41. *&c.* And becauſe in the Caſe at Bar the Cuſtom might have a lawful Beginning, *ſc.* That one Copyholder only ſhould have Common, or Eſtovers, or other Profit in the Land of the Lord, and that in many Manors, ſome Copyholders had Common in one Waſte of the Manor, and others in another ſeverally, ſo that the Cuſtom cannot be applied to all; and becauſe all the other Copyholders may be determined or extinct; for theſe Reaſons 'twas adjudg'd that the Cuſtom was well alledged in the Caſe at Bar, as well for the Manner as for the Matter; and ſuch Cuſtom for one Copyholder to have Common of Eſtovers in the Lord's Wood, Parcel of the Manor whereof the Copyhold was held, was adjudged to be good. *Paſch.* 10 *Eliz.* as it was ſaid in this Caſe. *Vide* 21 *E.* 3. 34. 1 *Mar. Dyer* 114. 5 *E.* 6. *Dyer* 70, 71. And becauſe it has been often ſaid before, That the Cuſtom of the Manor is the Soul and Life of the Copyholders, it was neceſſary in my Opinion to add this Caſe, to ſhew how he ſhall alledge the Cuſtom, and when and how he ſhall preſcribe.

(*b*) Hob. 286. 6 Co. 60. b. 8 Co. 64. b. Co. Lit. 113. b. Co. Coph. 68, *&c.*

Note, *Cuſtom* is always local, *ut ſupra*, but *Preſcription* is perſonal.

How a Preſcription may be laid *in Tenentes & occupatores*. See *Salk.* 316.

MITTON's *Caſe.*

Paſch. 26 Eliz.

QUEEN *Elizabeth* by her Letters Patents under the Great Seal conſtituted and granted the Office of Clerk of the County-Court, or Shire-Clerk of the County of *Somerſet* to *Mitton*, with all Fees, *&c.* for Term of his Life: And afterwards the Queen conſtituted *Arthur Hopton*, Eſq; Sheriff of the ſame County, who interrupted *Mitton*, claiming that which was mention'd to be granted to *Mitton* to be incident to his Office of Sheriff, and thereupon he appointed a Clerk himſelf of the County-Court: *Mitton* thereupon complained to the Lords of the Council, who referred the Conſideration of the Validity of the Grant of the ſaid Office to the two Chief Juſtices, *Wray* and *Anderſon*, before whom the Matter was often debated: And *Mitton*'s Council argued, that the Grant of the ſaid Office was good in Law for divers Reaſons. 1. Becauſe the County-Court is the Queen's Court, and in it as to all Actions and Proceeding by *Juſticies*, or other Writ, or by Plaint, the Suitors are Judges, and the Sheriff but Miniſter, and as to Utlagaries, the (*a*) Coroners are Judges; and in Proof thereof *6 E.* 4. 3. *b.* *7 E.* 4. 23. *a.* *39 H.* 6. 5. *a.* *26 Aſſ.* 45. were cited, and therefore it was concluded, that the Queen might in her own Court appoint a County Clerk to enter the Judgments and Proceedings in the ſame Court. 2. That *Arthur Hopton* (who was made Sheriff after the Patent) could not avoid it, and principally foraſmuch as the Sheriff has his Office but at the Will of the Queen, which Office ſhe might at her Pleaſure determine in Part or in all, and the Queen has granted the ſaid Office of Shire Clerk to *Mitton* for Term of his Life, and therefore the ſaid Sheriff ſhould not avoid it. 3. *Mitton*'s Council ſhewed two or three (*b*) Precedents, by which it appear'd, that ſuch

(*a*) 9 Co. 119. a. Co. Lit. 288. b. Cr. El. 50.

(*b*) Hardr. 98.

ſuch Offices had been granted in the Time of King *H.* 8. and after; and that was the Subſtance of all which was ſaid for the Maintenance of all the ſaid Letters Patents: And after many Arguments (becauſe the Caſe concern'd the Validity of the Queen's Grant) the two Chief Juſtices had Conference with the other Juſtices, and upon Conſideration had of the Letters Patents, and of all that was ſaid in Maintenance of them, it was reſolv'd by all the Juſtices *nullo contradicente, aut reluctante*, That the ſaid Letters Patents were void in Law; and the Reaſons and Cauſes of their Reſolution were. 1. That the Office of (*a*) a Sheriff is an ancient Office which has had Continuance long before the Conqueſt, and is an Office of great Truſt and Authority; for the King commits to him * *cuſtodiam Comitatus*, the Cuſtody and Guard of the County; And when the King appoints a Sheriff *durante bene placito*, altho' he may determine his Office (*b*) at his Pleaſure, yet he can't determine it in (*c*) Part, as in one Town, or Hundred, or any other Part, nor abridge the Sheriff of any Thing incident, or appurtenant to his Office, for the Office is intire, and ſo ought to continue in its Intierty without any Fraction or Diminution, unleſs it be by Act of Parliament; or that the King makes ſome Town *&c.* a County of itſelf, and appoints a Sheriff and all Things incident to a Sheriff within the ſame Town; but can't determine the Office of Sheriff, or any Part without making a new Sheriff, *ſc.* for the Execution and Adminiſtration of Juſtice. And it was reſolv'd, that the County Court, and the entring of all the Proceedings in it are incident to the Office of (*d*) Sheriffs, and therefore can't by Letters Patents be divided from it: And altho' the ſaid Grant had been made to *Mitton* when the Office of Sheriff was void, yet it had been void, and when the Queen has appointed a Sheriff, he ſhall avoid it. And ſo it was ſaid it was adjudged in *Scrogge's* Caſe, in the Begining of the the Reign of Queen *Elizabeth*, where the Caſe was; That *tempore vacationis* of the Office of Chief Juſtice of the *Common Pleas*, Queen *Mary* granted (*e*) the Office of the Exigenter of *London* to *Scrogges*, and it was held void, becauſe it was incident to the Office of Chief Juſtice of the *Common Pleas*, which the Queen could not have, and the next *C. J.* ſhall avoid it. And as to the firſt Objection it was anſwer'd, That in all Writs directed to Sheriffs concerning the County Court, the King ſaith, *In Comitatu tuo*; And in all Returns of Exigents made by him he ſaith, *ad Comitatum meum tentum, &c.* And the Stile of the Court proves it alſo: And by the Statute of 33 *H.* 8. *cap.* 13. it is provided by the K. the Lords Spiritual and Temporal, *and the Commons in Parl. aſſembled, That the Sheriff of the County of* Denbigh, *ſhall keep*

(*a*) Davis 60; Co. Lit. 168. a. Pref. 3 Rep. p. 4. 5.

* 9 Co. 49. Co. Lit. 168. a. Dalt. Sher. 5. 6.

(*b*) Kelw. 47. pl. 3. Dalt. Sher. 6.

(*d*) 2 Rolls 74, 75. 2 Inſt. 425. 2 Ventr. 269. 2 Syd. 140.

Vide this Caſe Dyer 2 Eliz. 175.

(*e*) 2 Ventr. 269. 1 Add. 152, 153. &c. pl. 25, 26. Noy 51. 201. Hob. 12. 17. 2 Inſt. 425. 3 Bulſtr. 49. 20 H. 6. 8. 20 E. 4. 13.

his Shire Court at the Shire-Hall in the ſaid County, &c. by which (as by many other Parliaments) it appears, that the County or Shire Court is the Court of the Sheriff, and altho' the Suitors be there the Judges in ſome Caſes, yet *non ſequitur* that the Court doth not belong to the Sheriff, for in a Court Baron (*a*) the Suitors are Judges, and yet the Court belongs to the Lord of the Manor. As to the ſecond Objection that is anſwered before, becauſe the County Court is incident to the Office of Sheriff, as the (*b*) Sheriffs turn is. As to the 3d Objection it was anſwered, *Quod (c) judicandum eſt legibus, non exemplis.* But for a general Anſwer to all the ſaid Objections, and all others which may be made, it was ſaid, that great Inconvenience would enſue to Sheriffs, who are great and ancient Officers and Miniſters of Juſtice, if ſuch Grants ſhou'd be of Validity, for by ſuch, as well the entring of all Proceedings in the ſame Court, as the Cuſtody of the Entries and Rolls thereof do belong to the Office of Sheriff, and that is well proved by the Writ of (*d*) *Falſe Judgment*, of an erroneous Judgment given in the County Court, the Form of which Writs is ſuch; *Jacobus, &c. Vic' S. ſalutem, ſi A. fecerit &c. tunc in pleno Com' tuo recordari facias loquelam*, which is, *in eodem Comitatu per breve noſtrum de recto, inter A. petentem, &c. unde idem A. queritur falſum ſibi factum fuiſſe judicium in eodem Com' & record' illud habeas coram Juſticiariis noſtris apud* Weſtm' *&c. ſub ſigillo tuo, & per quatuor legales milites ejuſdem Com' ex illis qui Recordo illo interfuer' &c.* And this alſo appears by the Precept of a Tolt which the Sheriff makes to remove a Plea in any Court Baron before him in his County, the Words of the Precept are, *Et loquelam, &c. tollas, & ſummoneas, &c. prædict. J. quod ſit ad Comitatum meum S.* ſcil. *die Lunæ, &c. tenend.* And in all Writs to remove any Plea out of the County into the *Common Pleas*, the King calls the County Court the (*e*) Sheriff's Court; And if the Sheriffs do not certify by Force of ſuch Writs the Record, then at laſt ſhall iſſue Proceſs of Contempt: And if the Record be imbezilled, the Sheriff ſhall anſwer for it, and therefore it wou'd be full of Danger and Damage to Sheriffs, if others ſhou'd be appointed to keep the Entries and Rolls of the County Court, and yet the Sheriff (*f*) ſhould anſwer for them as immediate Officer to the Court, and therefore the Sheriff ſhall appoint Clerks under him in his County Court, for whom he ſhall anſwer at his Peril; the ſame Law of the (*g*) Sheriff's Turn: And Law and Reaſon require, that the Sheriff who is a publick Officer and Miniſter of Juſtice, and who has an Office of ſuch Eminency, Confidence, Peril and Charge, ought to have all Rights appertaining to his Office, and ought to be favoured in Law bef. any private Perſ. for his ſingular

(*a*) Antea 26. b. Co. Lit. 58. a. 6 Co. 11. b. 8 Co. 60. b. 9 Co. 48. b. 49. a. Godb. 49. 1 Rolls 543. Cr. El. 792. Cr. Jac. 582. 4 Inſt. 266, 268. 7 E. 4. 23. a. 21 E. 4. 66. b. 1 Mod. Rep. 171. 12 H. 7. 16, 17. Br. Judges 18. Br. Court Baron 9. B. N. C. 116.

(*b*) 1 Rolls 542.

(*c*) Cro. Arg. 75. 12 Co. 122. 130. Hard. 122.

(*d*) F. N. B. 18. b. Dyer 164. pl. 58.

(*e*) 6 Co. 11. b.

(*f*) Cawly 184.

(*g*) 6 H. 7. 2. b. 3. a.

gular Benefit and Avail. *Mich.* 39 & 40 *Eliz.* at *Serjeant's-Inn* in *Fleetſtreet* it was reſolv'd by *Popham* and *Anderſon* Chief Juſtices, and all the Juſtices of *England*, That the Cuſtody of the (*a*) Gaols of the Counties, of Right belongs and is annexed and incident by the Law to the Office of Sheriffs, and that well appears by the Judgment in Parl. *anno* 14 *E* 3. *cap.* 10. by which it is ordained and enacted, That all Gaols of Counties ſhall be rejoined to Sheriffs, and the Sheriffs ſhall have the Cuſtody of the ſame Gaols, as before Time they were wont to have; and that they ſhall put in ſuch Keepers for whom they will anſwer. Upon which it was reſolved by all the Juſtices, that the Grants of the Cuſtodies of the Gaols of Counties (now lately, either by King *H.* 8. or after, granted to ſundry Perſons) were utterly void: And foraſmuch as the Cuſtody of them belongs to the Office of Sheriff, who being immediate Officer to the King's Courts, ſhall anſwer for Eſcapes, and ſhall be ſubject to Amercements if he has not the Body in Court upon Proceſs directed to him, *&c.* it is Reaſon that he ſhall put in ſuch Keepers of the ſaid Gaols for whom he will anſwer, according to the Purview of the ſaid Act of 14 *E.* 3. and therefore it wou'd be againſt all Reaſon, that he ſhou'd anſwer for Eſcapes out of the ſaid Gaols, and that he ſhou'd be ſubject to Amercements for not having the Bodies of Priſoners, *&c.* and yet another ſhou'd have the Keeping and Cuſtody of the Gaol: Which Reſolution agrees in Reaſon with the ſaid Reſolution in *Mitton's Caſe*, and therefore I have added it in this Place.

(*a*) Mich. 39 & 40 Eliz. Caſe of Gaolers. 2 Roll. 75. 3 Co. 44. a. 3 Inſt. 92. 1 And. 345, 345. Raym. 423, 468.

BOZOUN's *Caſe.*

Mich. 26 & 27 *Eliz.*

In the King's Bench.

Godb. 35, 36, 37. 2 Roll. 192, 193.

THE Caſe between *Futter* Plaintiff, and *Bozoun* and others Defendants, as it was found by ſpecial Verdict, was ſuch; A Portion of Tithes in *Longham* in the County of *Norfolk*, appertaining to the Rectory of *Greſenhall*, which was a Rectory preſentable, and all the other Tithes in *Longham* were Parcel of the Rectory of *Longham*, which was appropriated to the late Monaſtery of *Wendling* within the ſame County; of which Rectory of *Longham* Queen *Elizabeth* was ſeiſed in her Demeſn as in Fee, in Right of her Crown; And by her Letters Patents, bearing Date 26 *Januarii, anno* 12 *Eliz. Ex gratia ſpeciali, certa ſcientia, & mero motu*, granted to *Nicaſius Yerteſworth* and *Bartholomew Brockesby* and to their Heirs, *Totam illam portionem decimarum & garbarum ſuarum in Longham in Com' Norf. cum omnibus aliis decimis ſuis quibuſcunque in Longham, in dicto Com' Norf. tunc vel nuper in occupatione Johannis Corbet*; and further granted by the ſaid Letters Patents, that they ſhou'd be of Force and Effect againſt the Queen, her Heirs and Succeſſors, *Non obſtante male nominando, vel male recitando præd' portionem decimar & aliorum præmiſſor'*; *Et non obſtante aliquibus aliis defectis in non nominando, vel male recitando, vel non nominando alicujus tenentis ſive occupatoris.* And it was further found by the Jurors, That the ſaid *John Corbet* never had any Tithes in *Longham* in his Occupation; And if all the Tithes in *Longham* Parcel of the ſaid Rectory of *Longham* ſhould paſs by the ſaid Letters Patents or not was the Queſtion: In this Caſe 4 Queſt. were moved; 1. Whether the laſt Words, *ſc.* in the Occupation of *J. C.* ſhou'd refer to the firſt Words, *ſc. tot' ill' portion' decimar' & garbar' ſuarum*

ſuarum in Longham in dicto Com' Norf. or only to the latter Words, *ſc. cum omnibus aliis decimis &c.* 2. When the Queen granted *totam illam portionem decimarum & garbarum in Longham*, if the Tithes which were Parcel of the Rectory of *Longham* ſhou'd paſs? 3. If the ſaid firſt Words, *totam illam portionem decimarum*, were ſo certain, that the laſt Words being falſe, ſhou'd not make the Grant, but the ſuperfluous Words void? 4. If the *Non obſtante* ſhall ſupply the Defect of the miſtaking of the Farmer? As to the firſt, it was reſolv'd by Sir *Chriſtopher Wray*, Chief Juſtice, Sir *Thomas Gawdy*, *& totam Curiam*, that the laſt Words refer to the whole Sentence: 1. Becauſe the Words are, *totam illam portionem decimarum & garbarum ſuarum &c.* ſo that this Pronoun (*illam*) ſhews plainly that there ought to be Words ſubſequent to explain and reduce into (*a*) Certainty, what Portion by the Queen's Intent ſhall be granted, *ſc.* that which was in the Occupation of *John Corbet*, and therefore this Pronoun (*illam*) is not ſatisfied till it's come to the full End of the Sentence. 2. This Conjunction, *cum omnibus aliis decimis ſuis, &c.* couples the latter Words to the former, and makes the Words ſubſequent refer to the whole Sentence. 3. If the firſt Words wou'd convey all the Tithes of the ſaid Rectory, then the Addition of the Occupation of *John Corbet* to the ſubſequent Words wou'd be vain and nugatory; *Et* (*b*) *maledicta expoſitio eſt quæ corrumpit textum.* As to the ſecond Queſtion, it was reſolv'd, that this Word (*c*) (*portio*) properly ſignifies a Part or Portion in groſs divided, and not Parcel of the Rectory of *Longham*; and in the Caſe at Bar, the Queen had not any Portion of Tithes in groſs, but all were Parcel of the Rectory: And altho' the Queen's Grant is, *Ex gratia ſpeciali, certa ſcientia, & mero motu*, yet that will not extend the Queen's Grant againſt her Intent and Meaning expreſſed in her Grant, nor by any ſtrained Conſtruction make any Thing paſs againſt the apt and proper Signification, or at leaſt the common and uſual Intendment of the Words of her Grant, and as well the proper and apt Signification, as the uſual Intendment of a Portion of Tithes, is of Tithes in groſs, and not Parcel of the Rectory, and therefore no Tithes Parcel of the Rectory in the Caſe at Bar ſhall paſs. And as to the 3d Point, when the Queen granted *totam illam portionem, &c. adtunc vel nuper in occupatione Johannis Corbet*, and *Corbet* had no Tithes there, it was reſolv'd, that nothing (*d*) paſt thereby: For admitting that this Word (*portio*) ſhall be taken for a Part, then the Effect of the Grant is, *totam ill' partem decimar' noſtr' in occupatione J. Corbet*, and in Truth he had never any Part, without Queſtion nothing ſhall paſs for the Incertainty, if it was in the Caſe of a common Perſon,

(*a*) Cro. Car. 548. Moor 45. Palm. 83.

(*b*) 2 Co. 24. a. 8 Co. 56. b. 154. b. 3. Bulſtr. 105, 107, 108. 1 Roll. Rep. 310.

(*c*) Godb. 35. 3 Keb. 413.

(*d*) Lit. Rep. 63. 66. 2 Roll. 192, 193. Cro. Jac. 48, 680. Lane 11. 111. Poph. 60. Mo. 755. 3 Keb. 413. Hard. 225. 2 Roll. Rep. 118. Godb. 423. 2 Co. 33. a. 3 Co. 10. a. 10 Co. 113. a.

a fortiori in the Queen's Case. As to the last Point, these two Differences were taken and resolv'd by the Court, *sc.* when a Clause of *Non obstante* shall make the Queen's Grant good, when not. 1. When the Queen by the Common Law can't in any Manner make a Grant, there a (*a*) *Non obstante* of the Common Law will not against the Reason of the Common Law make the Grant good; but when the Queen may lawfully by the Common Law make the Grant, but the Common Law requires that she shou'd be so instructed, that she be not deceived, there a (*b*) *Non obstante* supplying it, stands with the Reason of the Common Law, and shall make the Grant good. And therefore if the King grants (*c*) a Protection in a *Quare Impedit*, or *Assise*, with *Non obstante* of any Law, to the contrary, this Grant is void; for by the Common Law, Protection doth not lie in either of those Cases, for the Loss which may happen to the Plaintiff, by such great Delay, and therefore the *Non obstante* can't avail, when by the Common Law the King can't grant it for the Reason aforesaid, as it is ruled in 39 *H.* 6. 39. *a.* But when the King makes a Lease for Life, or for Years, he has the Reversion in him which he may lawfully grant; But the Law requires that the King in this Case be not deceived in his Estate, *sc.* to grant the Possession of the Land, where he has but the Reversion: And therefore when he (*d*) grants the Land, notwithstanding (*e*) that it be in Lease for Life, or Years, of Record or otherwise, or if he Grants the Land, (*f*) and further grants the Reversion of it dependant or expectant upon any Estate for Life or for Years, in both these Cases the Grant is good; First, because it stands with the Reason of the Common Law, *sc.* that the King be not deceived in his Grant. 2. In some Case it may be doubtful whether the Lease in Possession be good or not; and if the King recites it, and grants the Reversion, and afterwards it shou'd be determined by Judgment in Law that the Lease was void, the Grant will be void also, which often trenches to the Disinherison of the Patentee, which Hazard is avoided by this Resolution. 3. Admitting that all the Leases be good, if they all ought to be recited, or otherwise the Letters Patents shou'd be void: 1. It wou'd be great Danger to the Patentee, if he omits or misrecites any of them. 2. Greater Danger if any Lease be not enrolled: 3. Great Charge in Search for them, and greater Charge in Recital of them, which in some Cases draws the Letters Patents to such infinite Length, that they deserve to be called *Elephantini Libri*; and all this Danger, Charge, and Prolixity is helped by this Resolution. 2. When the Words of the Grant are not sufficient *ex vi termini* to pass the Thing granted, but the Grant is utterly void, there no *Non obstante* can make the Grant good: As in the Case at Bar, the K. grants *totam illam*

(*a*) Dav. 75, 76. Vaugh. 334. 2 Roll. Rep. 17. 215. Hard. 110, 132.

(*b*) Hob. 229. 2 Roll. Rep. 359.

(*c*) Co. Lit. 131. a. 10 H. 4. 6. a. 27 H. 6. 1. b. 39 H. 6. 39. a. 1 Roll. 325. Br. Protection 8. Fitz. Essoign 185. 43 Ass. 21. per Thorp.

(*d*) 2 Roll. 190. (*e*) Cro. Car. 198. Hob. 229. (*f*) 2 Roll. 181. 1 And. 46.

portionem decimarum in Longham, nuper in tenura J. C. here the Addition of *J. C.* as has been ſaid, is of the Subſtance of the Grant, and becauſe *J. C.* never had any Portion there, the Grant is void *ex vi termini*, and therefore a *Non obſtante* can't make it good: But in Caſe of Grant of Land which is in Leaſe for Life, or for Years, there, by the Grant of the Land, the Words are ſufficient *ex vi termini* to make the Reverſion paſs; but the Law requires that the Queen be not deceived in the Thing which ſhe grants, and that is ſupplied by the *Non obſtante*: And ſo the Caſe of the Reverſion which was ſtrongly urged of the Plaintiff's Part, is upon evident Reaſon anſwer'd and reſolv'd. *Will. Daniel* and *Robert Snagge* were of Council with the Plaintiff, and *Godfrey* and *Coke* with the Defendant. And the ſaid Letters Patents were not made good by the Statute of 18 *Eliz. cap.* 2. for they were Patents of (*a*) Concealments, and therefore by expreſs Proviſo excepted out of the ſaid Act.

(*a*) 3 Co. 76. b. 10 Co. 109.

TYRRINGHAM's *Caſe.*

Mich. 26 & 27 Eliz.

In the King's Bench.

13 Co. 66. 2 Brownl. 47.

IN Treſpaſs between *Pheſant* Plaintiff, and *Salmon* Defendant, the Caſe was ſuch; *Tho. Tyrringham* was ſeiſed of an Houſe, 44 Acres of Land, 7 Acres of Meadow, and two Acres of Paſture, in *Titchmerſh* in the County of *Northampton*; to which Houſe, Land, Meadow and Paſture, he and all thoſe whoſe Eſtate he had, had uſed to have Common of Paſture for Oxen, Cows, and Heifers levant and couchant upon the Houſe, Land, Meadow, and Paſture, as well in 30 Acres of Land in the ſame Town, (whereof one *John Pickering* was then ſeiſed in Fee) as in 40 Acres of Land and Paſture in *Titchmerſh* aforeſaid (whereof one *Boniface Pickering* was then ſeiſed in Fee) as to the ſaid Houſe, Land, Meadow, and Paſture appertaining. And afterwards the ſaid *Boniface Pickering* being ſeiſed as aforeſaid, of the ſaid 40 Acres, purchaſed to him and his Heirs the ſaid Houſe, 44 Acres of Land, 7 Acres of Meadow, and two Acres of Paſture, to which, *&c.* and ſo ſeiſed as well of the ſaid 40 Acres in which, as of the ſaid Tenements, to which, *&c.* demiſed the Houſe, Land, Meadow, and Paſture to which, *&c.* to *Pheſant*, who put in two Cows into the ſaid 30 Acres to uſe the ſaid Common, and the ſaid *Salmon* who was Farmer of the ſaid *John Pickering*, with a little Dog, *levitur & moliter* drove out the ſaid Cows, and the ſaid *Pheſant* brought his Action of *Treſpaſs* for chaſing of his Cattle. In this Caſe divers Points were reſolv'd by *Wray*, C. J. Sir *Thomas Gawdy*, *& totam Curiam.* Firſt, that Deſcription don't make a Thing appendant, unleſs the Thing which ſhall be appendant agrees in Quality and Nature to the Thing to which it ſhall be appendant; as a Thing corporate can't be appendant to a Thing (*a*) corporate, nor a Thing incorporate to a Thing incorporate, as it is held

(*a*) Co. Lit. 121. b. 122. a. 1 Roll. 230. Plowd. 85. b. 170. a. Godb. 353.

held in *Hill & Granges's Caſe*, *Plow. Com.* (160) 168. *a. b.* But a Thing incorporate, as an Advowſon, may be to a Thing corporate as to a Manor; or a Thing corporate as Land, to a Thing incorporate as an (*a*) Office, as it is there alſo held: But every Thing incorporate can't be appendant to a Thing corporate; as Common of (*b*) Turbary can't be appendant to Land, but to an Houſe, as it is held in 5 *Aſſ.* 9. for the Thing which is appendant ought to agree with the Nature and Quality of the Thing to which it is appendant, and Turfs are to be ſpent in an Houſe: So 10 *E.* 3. 5. (*c*) a Leet can't be appendant to a Church or Chappel, for they are of ſeveral Natures. The Beginning of Common appendant by the ancient Law was in ſuch Manner; When a Lord (*d*) enfeoff'd another of Arable Land, to hold of him in Socage, *i. e.* (*e*) per *ſervicium Socæ*, as every ſuch Tenure at the Beginning (as *Littleton* ſaith) was, That the Feoffee *ad manutenendum ſervicium Socæ*, ſhould have Common in the Lord's Waſtes for his neceſſary Cattle which plowed and manured his Land, and that for two Reaſons, 1. Becauſe it was as it was then held, *tacite* implied in the Feoffment, for the Feoffee could not plough and manure his Land without Cattle, and they could not be kept without Paſture, *& per conſequens* the Feoffee ſhou'd have (as a Thing neceſſary and incident) Common in the Lord's Waſtes and Land, and that appears by the ancient Books in *temp. E.* 1 * *Common* 24. *&* 17 *E.* 2. *Common* 23. *&* 20 *E.* 3. *Admeaſurement* 8. *&* 18 *E.* 3. and by the Rehearſal of the Statute of *Merton*, (*f*) *cap.* 4. The 2d Reaſon was for the Maintenance and Advancement of (*g*) Tillage, which is much reſpected and favoured in Law; ſo that ſuch common appendant is of common Right, and commences by Operation of Law, and in Favour of Tillage, and therefore it's not neceſſary to (*h*) preſcribe therein, as it is held in (*i*) 4 *H.* 6. *&* 22 (*k*) *H.* 6. as it wou'd be if it was againſt common Right; But it is only appendant to ancient Land Arable *Hide* and *Gain*, and only for Cattle, *ſc.* Horſes and Oxen to plow his Land, and Cows and Sheep to manure his Land, and all for the bettering and Advancement of Tillage, and with this Reſolution agree (*l*) 37 *H.* 6. 34. *a. b. per tot' Cur' & 26* (*m*) *H.* 8. 4. *a.* as to this latter Point, and therefore it is againſt the Nature of Common Appendant, to be Appendant to Meadow or Paſture; and becauſe in the Caſe at Bar the Preſcription was to have Common Appendant from Time whereof, *&c.* to an Houſe, Meadow, and Paſture, as well as to Arable Land, by which it appears to the Court that there had been an Houſe, Meadow and Paſture, from Time whereof, *&c.* it was therefore reſolved, that this Common was Appurtenant and not Appendant. But if a Man has had Common for Cattle which ſerve for his Plough Appendant to his Land, and perhaps of late Time an Houſe is built upon

Part

(*a*) Plowd. 162. a. 169. a. Dav. 34. a. Co. Lit. 121. b. Dyer 71. pl. 43. 1 H. 7. 29. a. 1 Rol. 230.
(*b*) Co. Lit. 121. b. Br. Common 36.
(*c*) Co. Lit. 121. b. 1 Rol. 230.
(*d*) 2 Inſt. 85. 86.
(*e*) Lit. Sect. 119. Co. Lit. 89. b.
* 2 Inſt. 86. Poſtea 38. a.
(*f*) 2 Brownl. 298. 2 Inſt. 85. 2 Co. 25. b.
(*g*) 2 Inſt. 86. 2 Brownlow 297, 298.
(*h*) Co. Lit. 122. a. Cro. Car. 542. 4 H. 6. 13. a. Br. Common 11, 34. Br. Preſcription 23, 30. Dyer 299. pl. 32. 22 H. 6. 10. a.
(*i*) 4 H. 6. 13. a.
(*k*) 22 H. 6. 10. a.
(*l*) Br. Common 13.
(*m*) Br. Common 1.

Part, and ſome Part is imployed to Paſture, and ſome for Meadow, and that for Maintenance of Tillage which was the Original Cauſe of the Common, in this Caſe the Common remains appendant, and ſhall be intended, in Reſpect of the continual Uſage of the Common for Cattle levant and couchant upon ſuch Land, at the Beginning all was Arable, but in Pleading he ought to preſcribe to have it appendant to Land, and altho' (*a*) *terra dicitur a terendo, quia vomere teritur*, yet *terra* includes all, and altho' now it is Paſture or Meadow, yet it is Arable, *id eſt*, may be ploughed, altho' it is not now in Tillage and ploughed: But if he preſcribes to have it appendant to an Houſe, or Meadow, or Paſture, and then he can't have Common as appendant to it, but ſuch is Common appurtenant. A Man may preſcribe to have Common appendant to his Manor, for all the Demeſns ſhall be intended Arable, or at leaſt ſhall be in Conſtruction of Law *reddendo ſingula ſingulis* appendant to ſuch Demeſns as are ancient Arable Land, and not to any Land newly plowed and improved to be Arable out of his Waſtes and Moors Parcel of the Manor, and therewith agrees 5 *Aſſ.* 2. Alſo when a Man claims Common appendant to his Manor, no Incongruity, as in the Caſe at Bar appears of his own ſhewing. So Common may be claimed to be appendant to a Carve of Land, and yet (*b*) a Carve of Land may contain Paſture, Meadow, and Wood, as it is held in 6 *E.* 3. 42. but no Incongruity appears there, and it ſhall be applied to that which agrees with the Nature and Quality of a Common appendant. 2. It was reſolv'd that Common appendant may be apportioned for two Reaſons: 1. Becauſe it is of common Right, and therefore if the Commoner purchaſes Parcel of the Land in which, *&c.* yet the Common ſhall be apportioned; as if the Lord purchaſes Parcel of the Tenancy, the Rent ſhall be apportioned: So if *A.* has common appendant to 20 Acres of Land, and enfeoffs *B.* of Part of the ſaid 20 Acres to which, *&c.* this Common ſhall be (*c*) apportioned, and *B.* ſhall have Common *pro rata*. And where it was objected, 1. That the Preſcription fails in both the Caſes; for in the firſt Caſe he never had Common in Part of the Land only, but intirely in all; and it would be now a Prejudice to the Terre-Tenant if he ſhou'd have Common in the 30 Acres only for all the Cattel levant and couchant upon all the Tenements to which, *&c.* And in the latter Caſe, no Common was ever appendant to Part of the Land, but intirely to the whole: Alſo, 2. In Aſſiſe of Common all the Terre-Tenants ought to be named, and that can't be when the Com. himſelf has purchaſed Part of the Land. As to theſe Objections, it was anſwer'd and reſolv'd, That as to the 1ſt, the Preſcrip. ought to be ſpecial, *ſc.*

to

(*a*) Co. Lit. 4. a.

(*b*) 9 Co. 124. a. Plowd. 168. b. Co. Lit. 69. a. 2 Brownl. 297.

(*c*) 8 Co. 79. a. Hob. 25. 1 Rol. 234. Co. Lit. 122. a. 2 Brownl. 297, 298.

to preſcribe to have Common in the whole 'till ſuch a Day, and then to ſhew the Purchaſe of Part, and from that Time that he has put in his Cattle into the Reſidue *pro rata portione*; as in the Caſes, when a Corporation has Liberties by Preſcription, and within Time of Memory the Corporation is altered, there ought to be ſpecial Preſcription; As to the ſecond Caſe, *&c.* when Part of the Land to which, *&c.* is aliened, there every of them may preſcribe to have Common for Cattle levant and couchant upon his Land, and in none of theſe Caſes any Prejudice accrues to the Tenant of the Land in which the Common is to be had, for he ſhall not be charged with more upon the Matter than he was before the Severance; and God forbid the Law ſhould not be ſo, when Part of the Land to which, *&c.* is aliened; for otherwiſe many Commons in *England*, (which God forbid) wou'd be annihilated and loſt: And it was agreed, that ſuch Common which is admeaſurable, ſhall remain after the Severance of Part of the Land to which, *&c.* But in the Caſe at Bar, foraſmuch as the Court reſolved, That the Common was appurtenant and not appendant, and ſo againſt common Right, it was adjudged, That by the ſaid Purchaſe *(a)* all the Common was extinct; For in ſuch Caſe, Common appurtenant can't be extinct in Part, and be *in eſſe* for Part by the Act of the Parties. And as to the laſt Objection, it was anſwer'd and reſolv'd, that if upon the Matter the Common appendant ſhou'd be apportioned, then the Terre-Tenant ſhou'd be only named out of the Land charged with the Reſidue of the Common, as in Caſe were a Rent-charge is apportioned in Caſe of Deſcent, the Tenant of the Land ſhall be only named out of which the Reſidue of the Rent which remains iſſues. And it was ſaid, in this Caſe this Word *(b)* (*pertinens*) is *Latin*, as well for appurtenant as for appendant, and therefore *ſubjecta materia*, and the Circumſtance of the Caſe ought to direct the Court to judge the Common to be appendant, or appurtenant. 3. It was reſolved, that *(c)* Unity of Poſſeſſion of the whole Land to which, *&c.* and of the whole Land, in which, *&c.* makes Extinguiſhment of Common appendant againſt the Opinions 11 *E.* 3. *Common* (*d*) 11. 14 *Aſſ.* 21. 15 *Aſſ.* 2. 20 *E.* 3 (*e*) *Admeaſurement* 8. The Reaſon of which Opinions was, becauſe the Land to which the Common was claimed was ancient Land *Hide* and *Gain*, and for Maintenance and Advancement of Tillage, but inaſmuch as it was againſt a Rule in Law, *&c.* when a Man has as high and perdurable Eſtate as well in the Land as in the Rent, Common, and other Profit iſſuing out of the ſame Land, there the Rent, Common, and Profit is extinct, and therewith agrees 24 *E.* 3. 25. 4. In this Caſe *Wray* C. J. ſaid, That Common for Cauſe of Vicinage is not Common appendant, but inaſmuch as it ought to be by Preſcription, from Time whereof, *&c.* as Com. appendant ought, it is in this Reſpect reſembled to Com. appendant, but Com. appurtenant and in

(*a*) Co. Lit. 122. a. Hob. 25, 235. 8 Co. 72. a. Winch. 45. Hut. 58. Cro. El. 594. Cro. Car. 482. 1 Jones 397. 2 Brownl. 998.

(*b*) Co. Lit. 221. b. 2 Inſt. 86. a.

(*c*) Cro. El. 570. Moor 462. Poph. 106. Owen 122. 2 Brownl. 47, 297. 2 Sid. 111.

(*d*) Antea 27. a. 2 Inſt. 86.

(*e*) 2 Inſt. 86.

groſs, may commence either at this (*a*) Day by Grant, or by Preſcription. And *Wray* Chief Juſtice further ſaid, That in Caſe of Common for Cauſe of Vicinage, the one may encloſe (*b*) againſt t'other, for he who has ſuch Com. can't put his Cattle in the Land of the other, but he ought to put them in the Land where he has Common, and if they eſtray into the other Land, they are excuſed of Treſpaſs, by Reaſon of the ancient Uſage which the Law allows to avoid Suits which would ariſe, if Actions ſhou'd be brought for every ſuch Treſpaſs, when no Separation or Encloſure is between the Commons, and therefore he ſaid, that one may encloſe againſt the other, for (*c*) *ceſſante cauſa ceſſat effectus*. 5. It was reſolv'd without any Difficulty, that when the Plaintiff's Cattle came into the Defendant's Land, and did him Treſpaſs, the Defendant (*d*) with a little Dog might chaſe them out, and ſhou'd not be compelled to diſtrain them Damage feaſant. *Nota Reader*, according to the ſaid Opinion of *Wray* C. J. it was now lately adjudged in the *King's Bench*, between *Smith* Pl. and *How* and *Redman* Defts. where the Caſe was; That two Lords of two ſeveral Manors had two Waſtes adjoyning (Parcels of their Manors joyning) without Incloſure or Separation, and yet the Bounds of each Manor was well known by certain Bounds and Marks, in which Waſtes the Tenants of the one Manor, and of the other, had reciprocally Com. for Cauſe of Vicinage; in that Caſe one may encloſe (*e*) againſt the other, and thereby utterly toll the Common for Cauſe of Vicinage: Againſt which two Objections were made. 1 Becauſe it had been uſed by Preſcription from Time whereof, *&c.* the Beginning of which cannot be known, it wou'd be hard now to break that which has had ſuch Continuance; For as it is ſaid, *Obtemperandum eſt conſuetudini rationabili tanquam legi*. 2. Perhaps the Waſte of one was greater or of greater Value than the other, and probably thoſe who had the leſs at the Beginning gave (*f*) Recompence to have his Common in the greater, and therefore it wou'd be now unreaſonable to do it. As to theſe it was anſwered and reſolved, That the Preſcription imports the reciprocal Cauſe in itſelf, *ſc.* for Cauſe of Vicinage, and no other Cauſe can be imagin'd; and foraſmuch as it is *potius* an Excuſe of Treſpaſs, when the Cattle of the Tenants of the one Manor ſtray into the Waſte of the other Manor, than any certain Inheritance; for it was reſolv'd clearly, That the Tenants of the one Manor could not put their Beaſts into the Waſtes of the other Manor, but they ſhould come there only by Eſcape, and that the Incloſure is only to prevent the Eſcape of the Cattle (which is a lawful Act;) for theſe Reaſons it was adjudg'd, that th one might incloſe againſt the other.

Nota Reader, it is true that (*g*) Agriculture and Tillage is greatly

(*a*) Co. Lit. 121. b.

(*b*) Dy. 316. pl. 4. 7 Co. 5. a. b. Co. Lit. 122. a. 1 Rol. 399. 13 H. 7. 13. b. 14. a. 7 E. 4. 5. a.

(*c*) 13 Co. 38. Co. Lit. 78. b. 2 Inſt. 203. Dav. 3. a. Mo. 181. 15 E. 4. 3. b.

(*d*) Poph. 162. 2 Roll. 566. Smith's Caſe.

(*e*) Co. Lit. 122. a.

(*f*) 13 H. 7. 13. b.

(*g*) Co. Lit. 85. b.

greatly reſpected and favour'd as well by the Common Law, as by the com. Aſſent of the King, Lords Spiritual and Temporal and all the Commons in many Parliaments: 1. The Common Law prefers Arable (*a*) Land before all other, and therefore for its Dignity it ought to be named in *Præcipe* before Meadow, Paſture, Wood, or any other Soil; and it appears by the Statute of 4 *H.* 7. *cap.* 19. that ſix (*b*) Inconveniences are introduc'd by Subverſion or Converſion of Arable Land to Paſture, tending to two deplorable Conſequences, The firſt Inconvenience is the Increaſe of (*c*) Idleneſs, the Root and Cauſe of all Miſchiefs. 2. Depopoulation and Decreaſe of populous Towns, and Maintenance only of two or three Herdſmen, who keep Beaſts, in lieu of great Numbers of ſtrong and able Men. 3. Churches for want of Inhabitants run to Ruin and are deſtroy'd. 4. The Service of God neglected. 5. Injury and Wrong done to Patrons and Curates. 6. The Defence of the Land for want of Men ſtrong and enur'd to Labour againſt foreign Enemies, weaken'd and impar'd. The (*d*) two Conſequences are: 1. Theſe Inconveniencies tend to the great Diſpleaſure of God. 2. To the Subverſion of the Policy and good Government of the Land, and all this by Decay of Agriculture, which is there ſaid to be one of the greateſt Commodities of this Realm, which one Act of Parliament as to this Purpoſe may, as a Figure in Arithmetick, in the 3d Place ſtand for an Hundred: But I have obſerv'd that the moſt excellent Policy, and aſſured Means to increaſe and advance Agriculture, is to provide that Corn ſhall be of a reaſonable and competent Value; for make what Statutes you pleaſe, if the *Plowman* has not a competent Profit for his exceſſive Labour and great Charge, he will not employ his Labour and Charge without a reaſonable Gain to ſupport himſelf and his poor Family.

(*a*) F. N. B. 2. c. Plowd. 169. a.

(*b*) Co. Lit. 85. b.

(*c*) Co. Lit. 85. b.

(*d*) Co. Lit. 85. b.

Nota Bene

CASES

CASES OF APPEALS *and* INDICTMENTS, *&c.*

I.

Hill. 28 El. in B. R. *Brook's Case.* 2 Leon. 83. * 9 E. 4. 26. b. Br. Indictm. 7. Cr. Jac. 20. (*a*) Cr. El. 920. 5 Co. 121. a. 11 Co. 32. a. Doct. pla. 84. Hales pl. Cor. 84, 207. 1 Salk. 686. 3 Salk. 30.

Richard Vaux brought * Appeal of Burglary againſt *Thomas Brooke*, and declar'd, that the Defendant *Domum manſionalem præd' Richardi Vaux felonice & burgaliter fregit, &c.* The Defendant pleaded not guilty, and by a Jury of the County of *Bucks*, which appear'd this Term at the Bar, he was convicted of the Felony and Burglary aforeſaid; and the Defendant's Council mov'd in Arreſt of Judgment, that the Declaration was inſufficient, becauſe the ſaid Word *burgaliter* was of no Signification, but the Declaration ought to be *burglariter*, or *burgulariter*, and the Offence is called Burglary, or Burgulary, and not Burgalry, for there wants an *l* between *g* and *a* and in the latter Syllable *l* is inſerted in lieu of *r*, and *burglariter* (*a*) *eſt vox artis*, as *felonice* † *murdravit*, (*b*) *rapuit*, (*c*) *excambium*, (*d*) *warrantizare*, (*e*) *frankalmoign*, (*f*) *Frankmarriage*, and ſeveral others which can't be expreſs'd by any Periphraſis or Circumlocution; and this Word (*Burglary*) is deriv'd from theſe two Words *Burgh* and *Laron*, and therefore Burglary or Burgulary is ſufficient, but not Burgalry, for that wants Senſe; and many Preſidents warrant *burgulariter* to be good, but none was found to warrant *burgaliter*: And upon this Exception *Curia adviſare vult* 'till next Term; and in the mean Time the Plaintiff dy'd, and that was ſhewn to the Court by the Defendant's Council as *Amicus Curiæ*, 6 *Mod.* 143. and made manifeſt by ſufficient Teſtimony; and thereupon the Court was mov'd, that foraſmuch as for this Felony and Burglary he was once convicted at the Suit of the Party, he could never be charg'd with the ſame Offence at the Suit of the K. that he might be thereof diſcharg'd, and upon that the Court took advice: And it was reſolv'd, that if the Declaration had been

† Co. Lit. 123. b. 287. b. (*b*) 9 E. 4. 26. a. b. Co. Lit. 124. a. Stanf. Cor. 24. a. 82. a. Hales pl. Cor. 187, 207. Fitz Indictm. 18. Br. Indictment 7. 1 H. 6. 1. a. 20 H. 7. 7. a. Br. Rape 4. Br. Appeal 48. Fitz Cor. 1. Cr. Jac. 20. Poph. 42. (*c*) Co. Lit. 50. b. 51. b. 1 Rol. 814. b. 9 E. 4. 21. b. Perk. Sect. 253. 19 H. 6. 27. a. Br. Eſchange 12. 10 Co. 24. a. (*a*) Lit. Sect. 733. Co. Lit. 9. a. 383. b. 384. a. 10 Co. 24. a. (*e*) Co. Lit. 94. a. b. 10 Co. 24. a. (*f*) 10 Co. 24. a. Co. Lit. 21. b. (*g*) Præf. Cr. Car. 3. a. (*b*) 3 Inſt. 63.

been ſufficient, then being convicted at the Suit of the Party, he ſhould not be again impeach' dat the Suit of the King; but it was reſolv'd, that the Declaration (here) was inſufficient, and thereupon he was diſcharg'd: And in this Caſe upon the Evidence, *Wray* Chief Juſtice ſaid, That if a Man has a Manſion-Houſe, and he and his whole Family upon ſome Accident are Part of the Night (*a*) out of the Houſe, and in the mean Time one comes and breaks the Houſe to commit Felony, that this is Burglary, for tho' neither the Owner nor any of his Family is in the Houſe, yet it is *domus manſionalis*; and the Words of the Appeal or Indictment of Burglary are, *domum manſionalem præd' R. V. fregit, &c.* And according to this Opinion it was reſolv'd, *Hill.* 38 *Reginæ Eliz.* by *Popham* Chief Juſtice, *and all the Juſtices*; That where a Man has (*b*) two Houſes, and dwells ſometimes in the one and ſometimes in the other, and has a Family or Servants in both, and in the Night when his Servants are out of the Houſe, the Houſe is broke by Thieves, that this is Burglary for the ſaid Reaſon which *Wray* Chief Juſtice gave.

Pleas of another Action pending. See 6 Mod. 157. &c. ib. 5 Co. 32. Q.

(*a*) Mo. 660, 661. Hales pl. Cor. 82. 3 Inſt. 64. Poph. 42.

(*b*) Hales pl. Cor. 82. Mo. 661. Poph. 52.

2.

Wetherel (*c*) brought Appeal againſt *Darly* of Murther, the Def. pleaded not guilty, and was found guilty of (*d*) Homicide, and had his Clergy: And afterwards was indicted of Murther, and thereupon arraign'd at the Suit of the Queen, and he pleaded the former (*e*) Conviction in the Appeal at the Suit of the Party; and it was adjudg'd a good Bar, and thereupon he was diſcharg'd, for it was a good Bar by the Common Law, and reſtrain'd by no Statute, and the Reaſon is, becauſe a Man's Life ſhall not be (*f*) twice put in Jeopardy for one and the ſame Offence.

Paſch. 25 Eliz. *Darly's Caſe.* (*c*) Cr. El. 296. (*d*) Hal. pl. Cor. 267. Co. Lit. 282. a Cr. El. 276, 296, 465. Moor 407. (*e*) 3 Inſt. 214.

(*f*) Poſtea 43. a. 45. a. 47. a.

3.

AT the Aſſizes held at *Suſſex* 25 *Febr' anno* 28 *Eliz.* before the Juſtices of *Aſſiſe H. Yong, W. Garland*, and others, were indicted, *De eo quod ipſi ſexto Auguſti, anno* 27 Eliz. *vi et armis, videlicet, gladiis, &c. apud Lewes prædict' ex malitiis ſuis præcogitatis in quendam Thomam Butcher, nuper de Lewes, &c. Yeoman, adtunc & ibidem in pace Dei & dictæ Dom' Reginæ exiſt' inſultum & affraiam fecerunt, & præd' W. Garland cum uno gladio de ferro & chalibi ad valentiam quinque ſolidorum, quem idem Willihelmus in manu ſua dextra adtunc & ibidem habuit & tenuit, violenter & felonice, & ex malitia ſua præcogitata præfatum Thomam Butcher adtunc & ibidem percuſſit, dans eidem Thomæ Butcher adtunc & ibidem unam* plagam mortalem

Suſſex. Trin' 28 El. *Yong's Caſe.* Carth. 332. Skinner 443.

talem *ſuper faciem ipſius T. Butcher, & cum præd' gladio amputavit naſum ſuum a facie ſua, partem labiorum ſuorum, ac partem menti ſui voc'* the Chin. *Et præd' Henricus Yong cum quodam alio gladio, &c.* (ut ſupra) *præf' T. Butcher adtunc & ibid'* (a) 1 Bulſtr. 80. *percuſſit* (a) *& perforavit, dans eidem T. Butcher adtunc & ibid' unam aliam* plagam mortalem *circiter pectus uſq; ad oſſa humer' ipſius T. Butcher, latitudinis unius pollicis & dimid' & profunditatis ſeptem pollicium, de quibus quidem plagis & vulneribus ſic per præfat' W. G. & H. Y. in forma prædict' prius dat', dictus T. Butcher eodem ſexto die Auguſti, anno 27 ſuprad' apud Lewes præd' in com' præd' inſtanter obiit, & præd' Thomas Brewer præd' ſexto die Auguſti, anno 27 ſupradicto, apud Lewes præd' in com' præd' ex malitia ſua præcogitata fuit felonice præſens, abettans, procurans, confortans, & auxilians præfatos H. Y. & W. G. ad feloniam & murdrum præd' in forma præd' faciend' exequend' & perpetrand' contra pacem dictæ Dom' Reginæ coronam & dignitatem ſuam; & ſic juratores præd' dicunt ſuper ſacramentum ſuum qd' præd' H. Y. W. G. & Thomas Brewer præfat' Thomam Butcher præd' ſexto die Auguſti, anno 27 ſupradicto, apud Lewes præd' in com' præd' felonice & ex malitiis ſuis præcogitat' modo & forma præd' interfecer' & murderaverunt contra pacem, &c.* And it was mov'd that this Indictment was inſufficient, becauſe *unam* (b) Poſtea 41. a. 1 Bulſtr. 80. 2 Bulſtr. 328. 1 Rol. Rep. 237. 2 Inſt. 318. *plagam mortal'* (b) *circiter Pectus*, was altogether incertain, for it might be in the Neck, or in the Arm, or in the Belly, and Indictments ought to expreſs in certain as well in what Part the mortal Wound is, as the Depth and Breadth of it, that it may appear to the Court to be mortal, and becauſe 'tis ſaid, that he dy'd *de vulneribus & plagis præd'* and one of them is incertainly alledged, it makes the Indictment inſufficient as to all; *Quod fuit conceſſum per totam Curiam*: And it was ſaid that the Indictment ought to have been, that if the Party did not die of the firſt Wound, that he died of the other Wound, and that is the common Courſe; *Ad quod non fuit reſponſum*: And in this Caſe it was held *per totam Curiam* (c) 9 Co. 66. a. Jenk. Cent. 291. Cr. Jac. 280. 3 Inſt. 52. Hales pl. Cor. 45. 9 Co. 67. b. Rep. Q. A. 242, 243. *&c.* that if upon an Affray the Conſtable and (c) others, in his Aſſiſtance, come to ſuppreſs the Affray, and preſerve the Peace, and in executing their Office the Conſtable or any of his Aſſiſtants is kill'd, it is Murther in Law, altho' the Murtherer knew not the Party that was kill'd, and altho' the Affray was ſudden, becauſe the Conſtable and his Aſſiſtants came by Authority of Law to keep the Peace and prevent the Danger which might enſue by the Breach of it; and therefore the Law will adjudge it Murther, and that the Murtherer had Malice prepenſe, becauſe he ſet himſelf againſt the Juſtice of the Realm: So if the Sheriff or any of his Bailiffs or other Officers

Officers is kill'd in executing the Process of the Law, or in doing their Duty, it is Murther; the same Law of a Watchman, who is kill'd in the Execution of his Office. (a)

(a) 9 Co. 66. a. 68. b. 3 Inst. 52. Cr. Jac. 280. Hales pl. Cor. 45.

4.

Walker was indicted and outlaw'd of Murther, and the Indictment was, that he struck the Deceas'd *in (b) sinistr' parte ventris circa umbelicam*, and it was resolv'd *per totam Curiam*, that the Indictment was certain enough, for *in sinistra parte ventris*, was of itself certain and sufficient, and these Words *circa umbelicam*, which were uncertain, were abundant and superfluous: But *Yong*'s Case before, was affirm'd to be good Law, for there was no Certainty before the (c) *circiter*: But the Outlawry was revers'd for other Errors, and *Walker* was put to plead to the Indictment.

Tr. 41 El. in B.R. *Walker*'s Case. (b) Cro. Jac. 95. 5 Co. 121. b. (c) Antea 40. b. 1 Bulst. 80. 2 Bulstr. 328. 1 Rol. Rep. 237. 2 Inst. 318.

5.

Southampton: Tr. 28 El. in B.R. *Heydon*'s Case. Coroner's Inquest.

INquisitio indentata capt' apud Basingstoke in com' præd' 21 die Decembr', &c. coram Johan' Scullard, gen' uno Coronator' dict' Dom' Reginæ, in com' præd' super visum corporis Edwardi Savage, gen' tunc & ibidem mortui jacen', per sacramentum Jacobi Serle, &c. Ad inquirend' qualiter & quomodo præd' Edw' Savage ad mortem suam devenit, qui dic' super sacram' suum quod Jacobus Heyden, de S. in com' præd' Yeoman, T. M. W. M. and several others, *quarto die Augusti, Anno* 27, *apud B. præd' in com' præd' circa (d) horam decimam ante meridiem ejusdem diei, ex malitiis suis præcogitatis felonice ut felones dictæ Dominæ Reginæ in dict' Edw' Savage adtunc & ibidem insultum & Affraiam fecerunt, & quod præd' Jacobus Heydon cum quodam gladio, Anglice*, a Sword, *valor' quinque Solidor' quem idem Jacobus in manu sua dextra tenebat, adtunc & ibidem præfat' Edwardum Savage felonice percussit, & dedit eidem Edwardo adtunc & ibidem unam plagam mortalem super sinistrum genu ipsius Edwardi totaliter abscindens quoddam os præd' genu ipsius Edwardi, Anglice vocat'*, the Pan of the Knee, *de qua quidem plaga mortali idem Edw' Savage languebat a præd' quarto die Augusti, Anno* 27, *usq; ad decimum nonum diem mensis Decembris, Anno* 28, *quo quidem decimo nono die Decembr' idem Edw' Savage ex mortali plaga præd' apud B. præd' in com' præd' obiit, et sic Juratores præd' dic' super sacram' suum quod prædictus Jacobus Heyden modo & forma prædicta prædictum Edwardum Savage felonice & ex malitia sua præcogitata interfecit & murdravit, contra pacem dictæ Dominæ*

(d) 1 Bulstr. 81.

Reginæ coronam & dignitatem ſuam: Et ulterius præd' Juratores ſuper ſacramentum ſuum præd' dicunt quod præd' T. M. W. M. &c. tempore feloniæ & Murdred' præd' in forma præd' fact' ſcilicet dicto quarto die Auguſti apud B. præd' in com' præd' anno 27 ſupradicta, circa horam decimam ante meridiem ejuſdem diei felonice fuer' præſentes cum gladiis, &c. tunc & ibidem auxiliantes, aſſiſtentes, abettantes, comfortantes & manutenentes præd' Jacobum Heydon ad felonium & murdrum præd' faciend' & perpetrand' contra pacem dictæ Dominæ Reginæ coronam & dignitatem ſuam. And many Exceptions were taken againſt this Indictment: 1. Becauſe the Indictment was taken before *J. S. coronatore in* (*a*) *com' præd'*, and did not ſay, *coronatore comitatus præd'*, nor (*b*) *de com' præd*, and every Coroner of a County is a Coroner in every County of *England*, but not of every County; *ſed non allocatur*; for the Court ſaid, that Coroner in the County, *&c.* ſhall be in all reaſonable Intendment taken to be Coroner of the County, and that is prov'd by the Writ *de* (*c*) *coronatore eligendo*, the Beginning of which is, *Rex Vicecom', &c. quia L. nuper unus coronatorum noſtrorum in com' tuo diem clauſit extremum, &c.* And ſo it is taken in the Lord *Willoughby*'s Caſe in *Plowden*'s *Commentaries*, *fol.* 75 & 76. And Precedents almoſt innumerable were ſhewn in the ſame Manner as this is; and it was ſaid, *quod nimia* (*d*) *ſubtilitas in jure reprobatur.* 2. Exception was taken, becauſe it was not ſaid that the ſaid *Edward Savage* who was kill'd, was *in* (*e*) *pace Dei & Dominæ Reginæ*, (as the uſual Form, and the Precedents are) *ſed non allocatur*, for thoſe are Words but of Amplification of the Heinouſneſs of the Act, and not of Subſtance, and perhaps he was not in Peace, but fighting and breaking the Peace; and many Precedents were likewiſe ſhewn in which thoſe Words were omitted. 3. Becauſe 'twas ſaid, *& dedit eidem Edw' adtunc & ibidem, &c.* and did not ſay, *felonice*, nor *ex* (*f*) *malicia ſua præcogitata dedit, &c.* and this Exception was diſallow'd by the Court, for this Conjunction (*&*) couples the Sentences together, ſo that theſe Words (*g*) *(felonice & ex malicia ſua præcogitata)* firſt mention'd, refer to all the Verbs ſubſequent, or otherwiſe too much Repetition and Tautology would be made of the ſaid Words, and many Precedents were likewiſe ſhewn to ſuch Effect, and in the ſame Form as this is, as to this Point; and theſe Words *adtunc & ibid'* make this Point clear, for *adtunc & ibid'* make all to be done at one and the ſame Inſtant. The 4th Except. was,

(*a*) 2 Rolls 803.
(*b*) Godb. 64. 66. Plowd. 75. a.
(*c*) F.N.B. 163. k.
(*d*) 5 Co. 121. a. Antea 5. b. 3 Bulſt. 65.
(*e*) Godb. 65.
(*f*) Godb. 65, 66. Dy. 68, 69. pl. 28. Stanf. Cor. 130. a. 1 Bulſtr. 93.
(*g*) Lit. Rep. 62.

because the Depth (*a*) and Breadth of the Wound was not shewn, as is always usual in Indictments, so that it may appear to the Court that the Wound was mortal: But it was answer'd and resolv'd by the Court, that it could not be in this Case, because all the Pan of the Knee was (*b*) entirely cut off; as if an Arm or (*c*) Leg is cut off, or if a Man is beheaded, the Depth or Breadth of the Wound shall not be shewn. The 5th Exception was, because 'twas said *tempore feloniæ & (d) murdred' præd'* whereas it should be *murdri*, and this Exception was also disallow'd, for *tempore feloniæ præd'* had been sufficient without saying *murdred'*, and therefore the Addition of that shall not make the Indictment insufficient, forasmuch as *Murdredum* is a Word insensible and vain, so that no Contrariety or Repugnancy appears, for (*e*) Surplusage will not hurt but when it is repugnant or contrary to the Matter precedent or subsequent. The 6th Exception was, because the Wound was given the 4th Day of *August*, and the Death was the 19th Day of *December* next ensuing, and the Indictment says that *præd' T. M W. M, &c. tempore feloniæ & murdred' præd' fact', scilicet* 4 *Augusti, &c. felonice fuerunt præsentes, &c. ad feloniam & murdrum præd' in forma præd' faciend':* To which it was said by *Gawdy* the Queen's Serjeant, and *Popham* the Queen's Attorney, that the Death has Relation to the Stroke, for if a Man *non compos* (*g*) *mentis*, strikes himself, and afterwards becomes *compos mentis*, and dies, the Death shall have Relation to the Stroke, and he shall forfeit nothing, as it is agreed in 22 *E.* 3. *Corone* 244. So (*h*) *Stamford* says, that the Appeal shall be brought within the Year after the Stroke, and not the Death, for when the Death ensues, now in Judgment of the Law the Felony was committed the Day when the Wound was given, for the Death is but *quodammodo* the Execution of the Felony; but *tota Curia in Banco Regis* against that; and they said they had often adjudg'd Indictments insufficient, when the Stroke is one Day, and the Death another, and the Jury concluded the Murther or Homicide to be committed the first Day; but they said that in the Case at Bar the Indictment should be, that the said *præsentes & abettantes fuerunt præsentes, auxiliantes, &c. ad feloniam & murdrum præd' in forma præd' faciend'*. Another Reason to maintain the Indictment was urg'd, because the Indictment, notwithstanding that, was sufficient enough, for the Office of the Jury is to find *veritatem facti:* (*i*) and the Office of the Judges is to declare *veritatem juris*; and because they have found the whole Circumstance and Truth of the Fact, that without Question the Law makes them Principals,

(*a*) Godb. 65, 66. 2 Inst. 318. Stamf. Cor. 79. a. 5 Co. 121. b. 122. a.

(*b*) 2 Inst. 318. 5 Co. 122. a.

(*c*) 5 Co. 122. a.

(*d*) God. 65, 66. 5 Co. 121. b.

(*e*) 5 Co. 121. b.

(*f*) Plowd. Com. 401.

(*g*) 3 Inst. 54. 1 Co. 99. b. Plowd. 260. a. Mo. 140. Stamf. Cor. 19. b. 20. a.

(*h*) 2 Inst. 320. Stamf. Cor. 63. a. Dyer 50. pl. 9, 10. 2 Inst. 318, 320. 3 Inst. 53. Cr. El. 196, 739. 3 Salk. 37.

(*i*) 11 Co. 10. b. 2 Bulst. 204, 251, 305, 314. 1 Sid. 127. 8 Co. 155. a. 9 Co. 13. a. 25. a. Co. Lit. 125. a. 155. b. 226. a. Plowd. 114. b.

cipals, therefore altho' they take upon themſelves alſo the Office of Judges, *ſc.* to decide when and at what Time the Felony was committed, it ſhall not make that vicious which they have found ſufficiently and certainly; for in all Caſes, when a (*a*) Jury find the Matter committed to their Charge at large, and further conclude againſt Law, the Verdict is good, and the Concluſion ill: Moreover 'twas mov'd in Maintenance of the Indictment, that the Indictment againſt them was good, in Regard it appears by the Indictment, that they all of their Malice prepenſe, feloniouſly, and as Felons made the Aſſault, and then, altho' *Heydon* (*b*) only gave the Wound, yet it appears by the Connection of all the Parts of the Indictment, by the Conjunction, and by the Adverbs *adtunc & ibidem*, that they were preſent, *&c.* And thereupon *Wray*, Chief Juſtice, Sir *Thomas Gawdy*, *Shute* and *Clench*, would be adviſed; and afterwards, upon Conference had with the other Juſtices, the ſaid Indictment, as to the ſaid 6th Exception, was held repugnant and inſufficient as to the ſaid *T. M. W. M. &c.* for no Felony was committed 'till the Death, and none ſhall be adjudg'd a Felon by Relation, which is but (*c*) a Fiction of the Law: And *Wray*, Chief Juſtice, ſaid, the common Experience of the *King's Bench* was, and ſo was the Law without Queſtion, that the Year to bring the Appeal ſhould be accounted from (*d*) the Death and not from the Stroke, againſt the Opinion of (*e*) *Stamford:* But it was reſolved, that to conclude that he committed the Murther the laſt Day was ſufficient, but the better Form is to conclude, that he committed the Murther (*f*) *modo & forma ſuprad'*. 2. That the ſaid Clauſe of preſent, aiding, *&c.* was neceſſary, and without it the Indictment was inſufficient, for it ſhall not be maintain'd by Argument or Implication, nor ſupply'd by Intendment; and ſo as to this 2d and laſt Point it was reſolv'd in *Milbourn's* Caſe, *Paſch.* 1 *Jac. Regis*, in the *King's Bench*; and becauſe the Indictment wanted the ſaid Clauſe, he and divers others were diſcharg'd.

(*a*) 11 Co. 10. b. Mo. 105, 269. Cr. El. 41, 481, 482. Hob. 53. Plowd. 112. b. 114. b. Cr. Car. 75, 76, 212. 12 Co. 15. Hutt. 121. Dy. 361. pl. 15. Hard. 347. 2 Rol. 701, 702.

(*b*) 11 Co. 5. b. Plowd. 98. a. 34 H. 8. Br. Cor. 171. 1 Rol. Rep. 31. 3 Inſt. 138.

Vide Cole's Caſe. Pl. Com. fol. 401. & 11 H. 4. 12.

(*c*) 2 Inſt. 318.

(*d*) 2 Inſt. 320. 3 Inſt. 53. Stamf. 63. a.

(*e*) 2 Inſt. 318. Cr. El. 196. 739. Dy. 50. pl. 9, 10. 2 Inſt. 320. 3 Inſt. 53. Poſtea 47. a.

(*f*) 2 Inſt. 318.

6. *Ogle's* Caſe. (*g*) Cr. El. 196. Mich. 32 & 33 El.

Catharine (*g*) *Hume* brought Appeal of Murther againſt *Luke Ogle* of the Death of *A. H.* her Huſband, and declar'd, that the Defendant, 27 *Septembris*, gave the Mortal Wound at *Weetwood in com' Northumb'*, and that the Huſband the ſame Day of the Wound aforeſaid, *apud Weſtlibborn in eodem com' obiit, & ſic prad' Lucas Ogle apud Weetwood prad' modo & forma prad'*, the ſaid *A. H. felonice, &c. murdravit*; and it was reſolved that the Declaration was repugnant and inſufficient, for as it (*h*) can't be ſaid, that he murder'd him the firſt Day, as it was adjudg'd before in *Heydon's* Caſe, ſo it can't be ſaid that he murder'd him at the (*i*) Place where he was ſtruck, but where he dy'd.

(*h*) 2 Inſt. 318, 320. 3 Inſt. 53. Dy. 50. pl. 9, 10. Cr. El. 196, 739.

(*i*) 7 Co. 2. a.

7.

Hudson brought Appeal of Maihem againſt *Lee*, and declar'd that the Defendant the 8th Day of *Jan.* 28 *Eliz.* felonioufly maihem'd him in the Left Hand, *&c.* The Defendant pleaded, that heretofore, and before the Appeal commenced, the Plaintiff brought an Action of Treſpaſs in the *Common Pleas* of Aſſault, Battery, and Wounding, againſt the Defendant, the ſame 8th Day of *January*, *Anno* 28 aforeſaid, to which the Defendant pleaded Not-guilty, and was found Guilty, and Damages aſſeſs'd to 200 Marks for the Aſſault, Battery and Wounding, and 10 *s.* Coſts, and Judgment thereupon given, and Satisfaction acknowledged before the Appeal brought, and averr'd, that the Battery and Wounding in the ſaid Action of Treſpaſs, and the ſaid Maihem, whereof the Appeal is now brought, was all one and not ſeveral: And it was mov'd, that it was no Bar for two Reaſons. 1. Becauſe the Appeal of Maihem is of an higher Nature than the Action of Treſpaſs, for in the Appeal the Plaintiff declares that the Defendant, *felonice* maihem'd him, *Vide* 40 *Aſſ.* 9. where the Plaintiff declares, that the Defendant *felonice* (*a*) *ut Felo Dom' Regis* maihem'd him, and the Rule of the Law is, that a Recovery or Bar in any Action, is a good Bar in another Action of an equal or inferior Nature, but not in an Action of a (*b*) ſuperior Nature, as a Recovery or Bar (*c*) in Aſſiſe is a good Bar in another Aſſiſe, 44 *E.* 3. 45. 9 *H.* 7. 23, *&c.* but not in (*d*) *Mortdaunceſter*, 5 *Aſſ.* 1. nor is a Recovery or Bar in *Mortdaunceſter*, a Bar in a Writ of Right, (*e*) *F. N. B.* 5. 30 *Aſſ.* 5. 11 *E.* 3. *Entre* 56, *&c.* And a Bar in an Action of Treſpaſs of (*f*) Goods taken away, is no Bar in Appeal of Robbery, for the Appeal of Robbery is higher, as it is held in 2 *R.* 3. 14. And this was mov'd, admitting the Appeal was brought for the ſame Thing for which the Action of Treſpaſs was brought: But 'twas further mov'd, that the Appeal is brought for the Maihem only, and therefore it is ſaid *felonice*, which cannot be apply'd to Treſpaſs, and the Action of Treſpaſs for the Battery and Wounding, which does not touch the Maihem; and therefore it's agreed in 22 *Aſſ.* 82. That after the Plaintiff in the Appeal has recover'd for the Maihem, (*g*) he may have an Action of Treſpaſs for the Battery, whereby it appears, that the Appeal concerns the Maihem only: But it was reſolv'd *per totam Curiam*, that the (*h*) Bar was good, for in all Caſes when the Plaintiff for a Wrong or Injury is only to recover Damages, he ſhall not be twice ſatisfy'd for one and the ſame Thing, *juxta illud*; (*i*) *nemo debet bis puniri pro uno delicto*, & (*k*) *Deus non agit bis in ipſum*; but in both theſe Actions, *ſc.* of Appeal and Treſpaſs, the Plaintiff ſhall only recover Damages; (*l*) and it appears to the

Hill. 31 El. in B. R. *Hudſon* v. *Lee*. 1 Leon. 51. 318, 319. Moor 268. Gouldſ. 33. Styl. 347. Skinner 49. 3 Salk. 5.

(*a*) Br. Ap. 72.

(*b*) 6 Co. 7. b. 5 Co. 33. a.

(*c*) Doct. pl. 67.

(*d*) Doct. pl. 67.

(*e*) F. N. B. 5. n.

(*f*) Doct. pl. 67

(*g*) 1 Leon. 319. Br. Appeal 60. Br. Treſpaſs 241.

(*h*) Doct. pl. 67. 1 Leon. 19, 319. Moor 268. 2 Rolls 112.

(*i*) 8 Co. 118. b. 2 Ventr. 170. 5 Co. 61. a. 11 Co. 59. b. Cr. Jac. 481. Cawly 78. Noy 82. 1 Rol. Rep. 95. Bridgm. 122. Wing. Max. 695.

(*k*) 8 Co. 118. b

(*l*) Co. Lit. Sect 194, 502. Co. Lit. 126. b. 288. a.

the Court by the Defendant's Bar, which the Plaintiff by his (*a*) Demurrer has confeſs'd, that he himſelf in the Action of Treſpaſs, which he brought for the Battery and Wounding, has recover'd Damages for the Maihem, for Wounding includes the Maihem and more, and the Defendant has averr'd, that the Wounding in the Action of Treſpaſs, and the Maihem in the Appeal were all one: So altho' the Appeal of Maihem is an higher Action, yet foraſmuch as he ſhall therein only recover Damages, and Damages he has recover'd in the Action of Treſpaſs, it was therefore reſolv'd, that the Bar in the Caſe at Bar was good: And *Wray*, Chief Juſtice, ſaid, that ſo it was (*b*) now lately adjudg'd in this very Court, which Record he had ſeen, and it agreed with the Book in 41 *Aſſ.* 16. and the Book 2 *R.* 3. 14. is good Law, for in the Appeal of Robbery, the Plaintiff ſhall have Judgment againſt the Defendant for his Life, and not for any Damages.

(*a*) Hutt. Arg. 57. 3 Salk. 5.

[(Q.)

(*b*) Moor 268. 1 Leon. 319.

8.

IT was reſolv'd *per tot' Curiam*, That if Principal and Acceſſory are, and the Principal (*c*) is pardon'd, or has his Clergy, the Acceſſory can't be arraign'd; for the Maxim of the Law is, *ubi factum nullum, ibi fortia nulla*; *& ubi non eſt Principalis, non poteſt eſſe Acceſſorius*: Then before it appears that there is a Principal, one can't be charg'd as Acceſſory, but none can be call'd Principal, before he is ſo prov'd and adjudg'd by the Law, and that ought to be by Judgment upon Verdict or Confeſſion, or by Outlawry, for it is not ſufficient that *in rei veritate* there was a Principal, unleſs it ſo appears by Judgment of the Law, and that is the Reaſon that when the Principal is pardon'd, or takes his Clergy before Judgment, that the Acceſſory ſhall never be arraign'd, for it don't appear by Judgment of the Law that he was Principal, and the Acceptance of the Pardon, or praying of the Clergy is an Argument, but no Judgment in Law that he is guilty: But if the Principal after Attainder, is pardon'd, or has his Clergy allow'd, there the Acceſſory ſhall be arraign'd, becauſe it appears judicially that he was Principal.

Tr. 32 El. in B.R. *Syer's* Caſe. (*c*) Hales pl. Cor. 221, 222. Jenk. Cent. 29. Dalt. Juſt. 401. 18 Ed. 4. 9. b. Fitz. Inſt. 32. b. 33. a. 1 Rolls 777. Vent. Na. Br. 117. b. 7 H. 7. 12. b. Fitz. Corone 53. Br. Clergy 16. 3 Inſt. 114, 139. Cr. Car. 566, 567. Plowd. 99. a. b. 9 Co. 117. a. 2 Inſt. 183, 184. Stamf. Cor. 47. b. 48. a. 11 Co. 35. a. Cr. El. 541. 3 H. 7. 1. b. Br. Corone 131. Br. Clergy 15. Fitz. Cor. 58. 9 H. 7. 19. b. 2 Rolls 3. 21. b. Moor 461. 13 E. 4. 3. b. Br. Cor. 137, 157, 164.

9.

JOHN GOFF, (*d*) Brother and Heir of *R. Goff*, brought Appeal of Murther of the ſaid *R. G.* againſt *Bibithe* as Principal, and againſt *Hoell David* as Acceſſory before, and againſt *David ap Thomas* as Acceſſory after; the Principal pleaded Not Guilty, and by *Niſi Prius* in the County of *Monmouth*, he was found Guilty of Manſlaughter, and not Guilty of Murther, and had his Clergy: And upon this Matter, firſt it was reſolved, by *Popham*, Chief Juſtice, *& per totam Curiam*, in *B. R.* that *Hoell David* was

Paſch' 39 Eliz. *Bibithe's* Caſe. (*d*) Cr. El. 540. 541. 3 Inſt. 114.

was diſcharg'd, becauſe he could not be Acceſſory before the Fact in Caſe of *(a)* Manſlaughter, for Manſlaughter ought to enſue upon a ſudden Debate or Affray, for if it is premeditated it is *(b)* Murther. 2. It was reſolved, that altho' the Principal (*c*) was convicted by Verdict, yet foraſmuch as he had his Clergy before Judgment, ſo that it don't appear judicially, *ſc.* by Judgment of the Law that he was a Principal, therefore, and for the Cauſes alledged in *Syer*'s Caſe, it was awarded, that both the Acceſſories, as well before as after, ſhould be diſcharged. The ſame Law, if the Principal upon his Arraignment confeſſes the Felony, and before Judgment obtains a Pardon, or has his Clergy allow'd, the Acceſſory thereby is diſcharg'd, *Vide* 2 *E.* 3. 27. 22 *E.* 3. *Corone* 260. 7 *H.* 4. 16. 10 *H.* 4. 5. 3 *H.* 7. 1. *b.* & 3 *H.* 7. *Corone* 53. And upon divers diſagreeing Opinions, you will underſtand the Law, as here it was adjudg'd upon Conſideration of all the Books.

(*a*) Moor 461. Hales pl. Cor. 217.
(*b*) Co. Lit. 287. b. 3 Inſt. 55. b.
(*c*) 3 Inſt. 114, 139. 11 Co. 35. a. Cr. El. 541. Antea 43. b.

10. Paſch' 33 El. *Vaux*'s Caſe in B. R. Fitzgib. 263.

William Vaux at the Seſſions of Peace for the County of *Northumberland*, held 27 *Julii*, *anno* 32 *Eliz.* before the Juſtices of Peace of the ſame County, was indicted of voluntary poiſoning of *Nicholas Ridley*, which Indictment was remov'd into the *King*'s *Bench*: And in Diſcharge thereof the ſaid *Vaux* pleaded, That at another Time, *ſcil.* 12 *Auguſti*, *Anno* 30 *Eliz.* at *Newcaſtle* upon *Tine* in the County of *Northumberland*, before the Juſtices of Aſſiſe of the ſame County the ſaid *Vaux* was indicted: *Quod cum Nich' Ridley nuper de W. in com' præd' Armig' jam defunctus, per multos annos, ante obitum ſuum nuptus fuiſſet cuidam Margaretæ uxori ejus & nullum exitum habuit, præd' Will' Vaux nuper de K. in com' C. generoſ. ſubdole, caute, & diabolice intendens mortem, Venenationem, & deſtructionem ipſius Nicholai, & Deum præ oculis non habens, 20 Decembris, anno 28 Eliz. apud W. prædict' felonice, (a) voluntarie, & ex malitia ſua præcogitata, perſuadebat eundem Nichol' recipere & bibere quendam potum mixtum cum quodam (b) veneno vocat' (c) Cantharides, affirmans & verificans eidem Nich' quod' præd' potus ſic mixtus cum præd' veneno vocat' Canth' non fuit intoxicatus (Anglica* poiſon'd) *ſed quod per reception' inde præd' Nich' exit' de corpore dictæ Margaretæ tunc uxoris ſuæ procuraret, & haberet ratione cujus quidem perſuaſionis & inſtigationis præd' Nich' poſtea, ſcil.* 16 *Januarii anno ſupradicto' apud T. in com' N. præd' neſciens prædictum potum cum veneno in forma prædict' fore mixt', (d) ſed fidem adhibens predictum perſuaſioni dicti Willielmi recepit & bibit, per quod prædictus Nicholaus immediate poſt receptionem veneni prædicti per tres horas immediate*

(a) Cr. Jac. 438.
(b) 3 Inſt. 48.
(c) Palm. 547, 548.
(d) 1 Ventr. 2[illegible]

mediate ſequent' languebat, & poſtea præd' 16 Jan. anno ſupra-
(a) Cr. Jac. 438. *dict' ex venenatione & intoxicat' præd' apud T. præd' (a) obiit: Et ſic præd' Will' Vaux felonice & ex malitia ſua præcogitata præfat' Nich' voluntarie & felonice modo & forma præd' intoxi-*
(b) 5 Co. 123. a. *cavit, interfecit, (b) & murdravit, contra pacem, &c.* Upon which Indictment the ſaid *Vaux* was arraigned before the ſame Juſtices, and pleaded Not Guilty: And the Jurors gave a Special Verdict, and found, *Quod præd' Nich' Ridley venenatus fuit, Anglice* poiſoned, *per receptionem præd' Cantharides, & quod præd' Will Vaux non fuit præſens tempore quo præd' Nich' Ridley recepit præd' Canth' ſed utrum, &c.* And thereupon Judgment was given by the ſaid Juſtices of Aſſiſe in this Manner; *Super quo viſis, & per Cur' hic intellectis omnibus & ſingulis præmiſſis, pro eo quod videtur cur' hic ſuper tota materia per veredictum præd' in forma præd' comperi', quod præd' venenatio per reception' præd' Canth' & præd' procuratio præd' Will' ad procurand' præd' Nich' ad accipiend' præd' Canth' modo & forma prout per veredict' præd' compert' fuit, non fuit felonia & murdrum voluntar': Ideo conſiderat' eſt quod præd' Will' Vaux, de felonia & murdro præd' in indictamento præd' ſuperius ſpecificat', necnon de dicta felonica venenatione præd' Nich' Ridley in eodem Indictamento nominati eidem Will' impoſit' eat ſine die:* And as to the Felony and Murther he pleaded Not Guilty.

And firſt, it was reſolved *per totam Curiam*, That the ſaid Indictment upon which *Vaux* was ſo arraign'd was inſufficient, and principally becauſe it is not expreſly alledg'd in the Indictment, that the ſaid *Ridley* receiv'd and drank the ſaid Poiſon, for the Indictment is, *præd' Nich' neſciens præd' potum cum veneno fore intoxicatum, ſed fidem adhibens dict' perſuaſioni dicti W. recepit & bibit, per quod, &c.* So that it doth not appear what Thing he drank, for theſe Words (*venenum præd'*) are wanting, and the Words ſubſequent, *ſcil. per quod præd' N. immediate poſt receptionem veneni prædict', &c.* which Words imply Receipt of Poiſon, are not ſufficient to maintain the Indictment, for the Matter of the Indictment ought to be full, expreſs, and certain, and ſhall not be main-
(c) Stamf. Cor. 96. a. b. tain'd by Argument, or (*c*) Implication, becauſe the Indictment is found by the Oath of Laymen. 2. It was agreed *per*
(d) 2 Inſt. 183. 3 Inſt. 48, 138. 9 Co. 81. b. Jenk. Cent. 290. *Curiam*, That *Vaux* was a principal (*d*) Murderer, altho' he was not preſent at the Time of the Receipt of the Poiſon, for otherwiſe he would be guilty of ſuch horrible Offence, and yet ſhould be unpuniſh'd, which would be incovenient and miſchievous; for every Felon is either Principal or Ac-
(e) Co. Lit. 152. a. Palm. 434. Latch. 27. ceſſory, and if there is no Principal there can be no Acceſſory, *quia (e) acceſſorium ſequitur principalem*, and if any had procured *Vaux* to do it, he had been Acceſſory before; *quod*

nota

nota a Special Case, where the Principal an Accessory also shall both be absent at the Time of the Felony committed. 3. It was resolv'd by the Lord *Wray*, Sir *Thomas Gawdy*, *Clench* and *Fenner*, Justices, that the Reason of *Auterfoits acquit* was, because where the Maxim of the Common Law is, That the Life of a Man shall not be twice (*a*) put in Jeopardy for one and the same Offence, and that is the Reason and Cause that *Auterfoits* acquitted or convicted of the same Offence is a good Plea, yet it is intendable of a (*b*) lawful Acquittal or Conviction, for if the Conviction or Acquittal is not lawful, his Life was never in Jeopardy; and because the Indictment in this Case was insufficient, for this Reason he was not *legitimo modo acquietatus*, and that is well prov'd, because upon such Acquittal he shall not have an Action of (*c*) Conspiracy, as it is agreed in 9 *E.* 4. 12. *a. b. vide* 20 *E.* 4. 6. And in such Case in Appeal, notwithstanding such insufficient Indictment, the Abettors shall be enquir'd of, as it is there also held; and altho' the Judgment is given that he shall be acquitted of the Felony, yet this Acquittal shall not help him, because he was not *legitimo modo acquietatus*; and when the Law saith, that *Auterfoits acquitted* is a good Plea, it shall be intended when he is lawfully acquitted; and that agrees with the old Book in 19 *E.* 3. *Corone* 444. (*d*) where it is agreed, if the Process upon Indictment or Appeal is not sufficient, yet if the Party appears (by which all Imperfections of the Process are sav'd) and is acquitted, he shall be discharg'd; but if the Appeal or Indictment is (*e*) insufficient (as our Case is) there it is otherwise: But if one, upon an insufficient Indictment of Felony has Judgment, *Quod suspend' per coll'*, and so attainted, which is the Judgment and End which the Law has appointed for the Felony, there he can't be again indicted and arraign'd 'till this Judgment is revers'd by (*f*) Error: But when the Offender is discharged upon an insufficient Indictment, there the Law has not had its End, nor is the Life of the Party, in the Judgment of the Law, ever in Jeopardy; and the Wisdom of the Law abhors that great Offences should go unpunished, which was grounded without Question upon these ancient Maxims of Law and State: *Maleficia non debent remanere impunita, & impunitas continuum affectum tribuit delinquendi, & minatur innocentes qui parcit nocentibus:* So if a Man is convicted either by Verdict, or by Confession upon an insufficient Indictment, and no Judgment thereupon given, he may be again indicted and arraign'd, because his Life was never in Jeopardy, and the Law wants its End: And afterwards, upon a new Indictment, the said *Vaux* was try'd and found Guilty, and had his Judgment, and was hanged.

(*a*) Postea. 47. a. Antea fol. 40. a. 1 Bulstr. 142.

(*b*) 3 Inst. 214. Cr. Car. 147. 20 H. 7. 12. a.

(Q.)

(*c*) 3 Inst. 143. Palm. 45. Bridgm. 132. Br. Consp. 23.

(*d*) 1 Bulstr. 142. Stamf. Cor. 106. a. F. N. B. 115. g. Palm. 39.

(*e*) Hal. pl. Co. 244. Postea fol. 47. a. Stamf. Cor. 106. a. Doct. pl. 36, 67. 3 Inst. 214. Hales pl. Cor. 247. 2 Leon. 160.

(*f*) Hales pl. Cor. 247.

Catharine

II. Mich. 33 & 34 Eliz. *Wrote* v. *Wigges.* Cro. Eliz. 296.

CAtharine, late the Wife of *Robert Wrote*, brought an Appeal of the Murder of her Huſb. againſt *Thomas Wigges*, and declared, that the ſaid *T. Wigges* at *Shepperton* in the County of *Middleſex*, 23 *September*, *anno* 31 *Eliz.* of his Malice forethought, felonioufly ſtruck, *&c.* whereof the ſaid *Robert Wrote* died 24 *September* then next following, *&c.* and ſo the Defendant murder'd him the 24th of *September* aforeſaid. The Defendant pleaded, that he himſelf heretofore, 8 *Octob'*, *Anno* 31 *Reg. Eliz.* at *Shepperton* aforeſaid, by an Inquiſition there then taken before *William Danby*, then Coroner of the Queen's Houſhold, and *Iron Chaukhill*, then one of the Coroners of the ſaid County of *Middleſex*, upon the View of the Body of the ſaid *Robert Wrote*, by the Oath of 12 Men (and ſhewed their Names) of the ſaid County of *Middleſex*, was preſented, that the ſaid *Thomas*, 23 *Sept.* 31 *Eliz.* at *Shepperton* aforeſaid, the ſaid *Robert Wrote* feloniouſly did ſtrike, *&c.* whereof he died the 24th of *Sept.* following, and ſo indicted him of Manſlaughter, which Inquiſition afterwards the 23d *Sept.* 32 *Eliz.* at *London*, in the Pariſh of St. *Sepulchres*, the ſaid *Iron Chaulkill*, then one of the Coroners of the ſaid County of *Middleſex*, at the Gaol-delivery at *Newgate*, made for the ſaid County of *Middleſex* there, *viz.* at Juſtice-Hall in the *Old-Baily*, before *John Hart*, then Mayor of the City of *London*, and other Juſtices of Gaol-delivery of Priſoners in the ſaid Gaol of *Newgate*, being delivered and certified; upon which the ſaid *Thomas Wigges*, then under the Cuſtody of the Sheriffs of *London*, was brought to the Bar; and there then the ſaid *Thomas Wigges* being arraigned upon the ſaid Indictment, confeſſed the Felony, and prayed his Clergy; and the Book being deliver'd to him he read as a Clerk, as by the ſaid Record appears, and ſaid that no Judgment was given thereupon; and averred, that *Shepperton* at the Time of the ſaid Inquiſition, and Stroke and Death was within the Verge of the Queen's Houſhold, and pleaded over to the Felony, *&c.* And it appear'd that the ſaid Arraignment and Confeſſion, and Allowance of the Clergy, was after the Purchaſe of the Writ of Appeal * and before the Return of it; upon which Plea in Bar the Plaintiff demurr'd in Law. And after many Arguments, and great Deliberation, it was adjudg'd againſt the Defendant. And in this Caſe ſix Points were reſolved.

* Antea 47. b.

(a) Yelv. 205. Antea 40. a. 16 E. 4. 11. a.

1. That *Auterfoits* (a) Convict of Manſlaughter, and Clergy thereupon allow'd was a good Bar in an Appeal of Murder, and ſo was it adjudg'd in an Appeal in *B. R.* between *T. Burghe*, Eſq; Brother and Heir of *H. Burghe*, and *T. Holcroft*, (b) Eſq: *Paſch.* 20 *Eliz.* of the Murther of the ſaid *H.* where the Defendant pleaded, that at *Hampton-Court*, in the Pariſh of *Hampton* in the County of *Middleſex*, within the Verge, by an Inquiſition taken before *R. Vale*, then Coroner of the Queen's Houſhold and one of the Coroners *Com' Midd'* *ſuper*

(b) 3 Inſt. 131. 2 Leon. 83, 100, 101. 1 Anders. 68. Co. Entr. 53. b. pl. 4.

ſuper viſum corporis, the Def. was indicted of the Manſlaughter of the ſaid *Henry* within the Verge; upon which Indictment the Def. was arraigned before Commiſſioners of *Oyer* and *Terminer* in the County of *Midd'*, and confeſſed the Indictment, and prayed his Clergy, and thereupon *Curia adviſare vult*, and demanded Judgment of the Appeal; and in that Caſe two Points were reſolved. 1. That that Indictment was well taken, and within the Stat. of *Articuli ſuper chartas*, *cap.* (*a*) 3. by which it is enacted, That in Caſe of the Death of a Man within the Verge, it ſhall be commanded to the Coroner of the County, that he with the Coroner of the King's Houſhold, ſhall do as belongeth to his Office. And altho' it was objected, That the Statute requires two Perſons, *ſc.* two Coroners to do the Office which appertains in this Caſe; and in the Caſe at Bar there was but one Perſon, altho' he had two ſeveral Offices, *ſc.* Coroner of the Houſhold, and one of the Coroners of the County, and when the Law gives Authority to two Perſons, one only can't execute it; for (*b*) *Securius expediuntur negotia commiſſa pluribus, & plus vident* (*c*) *oculi quam oculus, & una* (*d*) *perſona non poteſt ſupplere vicem duarum:* Yet in this Caſe of ſeveral Authorities, it was reſolved that the Indictment was well (*e*) taken, for the Intent and Meaning of the Act was performed, and the Miſchief recited in the Act avoided as well when one Perſon is Coroner of the Houſhold, and of the County alſo, as if there ſhould be two ſeveral Perſons, for altho' the Court removes, yet he, as Coroner of the County, may proceed, *&c.* 2. Where it is provided by the Stat. of 3 *H.* 7. (*f*) *cap.* 1. *That if it fortune that the Felons, Murderers, and Acceſſories, or any of them be acquitted upon Indictment, or the Principal attainted*, &c. *the Wife or next Heir to him ſo ſlain, may have their Appeal againſt the Perſons ſo acquitted, or againſt the Principals ſo attainted, if they be alive, and that his Benefit of his Clergy thereof before be not had*; (for at that Time Clergy was allowed for Murder.) It was reſolved that the Bar was good at the Common Law not reſtrained by the ſaid Act, becauſe if the Def. had had his Clergy, then without Queſtion the Appeal would not lie; for if the Offender is attainted, and has his Clergy, it is excepted out of the Act and left to the Common Law; *a fortiori* when he is but convicted thereof, and prays his Clergy, and the Act of the Court (to be adviſed as to the Allowance of Clergy) ſhall not (*g*) prejudice the Party in Caſe of Life; but it was reſolved, that theſe Words (*Attainted of Murder*) in this Act, ſhall not be intended only of a Perſon who has Judgment of Life, but alſo extend to a Perſon convicted by Confeſſion, or Verdict; for a Perſon attainted is a Perſon convicted and more, & (*h*) *omne majus continet in ſe minus*; and if the Statute ſhould not extend to Perſons convicted, all the Purview of the Act would be overthrown. And in the Statute of 25 *E.* 3. *cap.* 2. it is ſaid, attainted by Verdict, which is as much as to ſay, convicted by Verdict, and

(*a*) 6 Co. 12. a. 20. b. 10 Co. 69. b. 74. a. 3 Keb. 335. 2 Inſt. 547, 548. 3 Inſt. 134. Cro. El. 502. 1 Bulſt. 208, 209, 210, 211, 212. 2 Leon. 160. 5 E. 4. 129. a. Br. Action ſur le Statute 38, 49. 10 H. 6. 13. a. Regiſtr. 185. a. 191. b. F. N. B. 241. Raſt. En. 433. a.

(*b*) 11 Co. 3. b. 4. a.

(*c*) Lit. Rep. 96.

(*d*) Cawly 209.

(*e*) 3 Inſt. 134.

(*f*) 3 Inſt. 213. 131. Stamf. Cor. 106. b. 107. a. 1 Jones 145. F. N. B. 115. h.

(*g*) 3 Inſt. 131.

(*h*) 2 Co. 68. a. 5 Co. 115. a. 6 Co. 43. b. 3 Inſt. 109. Co. Lit. 72. b. 293. a. 1 Bulſtr. 125. 2 Bulſtr. 48.

many Times in common Speech a Perſon convicted is called a Perſon attainted; & (a) *loquendum eſt ut vulgus:* Alſo it would be hard that the Law ſhould enable the Party to appeal againſt a Perſon acquitted, who by Judgment of the Law is innocent, and ſhould not enable him againſt one who is convicted who is found guilty: And in that Caſe it was ſaid that it was adjudg'd in the Caſe of one *Agnes Gainsford*, that where the ſaid Act of 3 *H.* 7. *cap.* 1. is, *That the Wife, or Heir of him ſo ſlain, ſhall have the Appeal*; That the Heir of a Woman who was murder'd ſhall have Appeal againſt one who was acquit. of the ſame Mur. for (b) *apices juris non ſunt jura:* And it was reſolv'd without Difficulty in *Holcroft's* Caſe, that if a Man commits Murder, and is indict. and convict. or acquited of Manſlaugh. he ſhall never anſwer to any Indict. of the ſame Death, for all is one and the ſame Felony for one and the ſame Death, altho' Murder is in Reſpect of the Circumſtance of the Forethought Malice more odious; and theref. in an Indictment, or Appeal of Murder, he may be found guilty (c) of Manſlaughter. 2. It was reſolved in the Caſe at Bar, That at Com. Law the Coroner of the K's Houſe has an exempt Juriſdiction within the Verge; and that the Coroner of the County can't intermeddle therein; and that well appears by the Preamble of the ſaid Stat. of *Articuli ſuper chartas*; *And foraſmuch as heretofore many Felonies committed within the Verge have been unpuniſhed* (and the Reaſon and Cauſe thereof was) *becauſe the Coroners of the Country have not been authoriſed to enquire of ſuch Manner of Felonies done within the Verge, but the Coroner of the King's Houſe which never continueth in one Place, by Reaſon whereof there can be no Trial made in due Manner, nor the Felons put in Exigent, nor Outlawed, nor any Thing preſented in the Circuit, the which hath been to the great Damage of the King, and nothing to the good Preſervation of his Peace:* By which it appears, that at Common Law the Coroner of the County could not intermeddle with the Death of a Man within the Verge, but the Coroner of the Houſhold only, and ſo was it adjudged, *Paſchæ* 24 *Eliz.* in *B. R.* where *Swift* was indicted before the Coroner of the County of *Middleſex*, of a Murder committed at *Tuthil* in the *Com' Midd'*, which Indictment was removed into *B. R.* and there *Swift* pleaded, That *Tuthil* was at the Time of the Murder, and yet is within the Verge, *&c.* upon which the Queen's Attorney demurr'd in Law, and it depended in Adviſement 3 Terms, and at length the Plea was adjudged good, and thereupon he was diſcharged of the Indictment, for as the Coroner of the Houſh. can't intermeddle within the County out of the Verge, becauſe his Office extends not to it. ſo the Coroner of the County can't intermeddle within the Verge; for that was exempted out of his Office by the Common Law, and it would be againſt Reaſon that their Offices and Juriſdictions being ſeveral that the one ſhou'd intermeddle within the Juriſdiction of the other. But it was reſolv'd, that the Juſtices (d) *B. R.* Juſtices of Oyer and

(a) 3 Keb. 20. Cart. 120. Hetl. 101. 2 Roll. Rep. 239.

(b) 6 Co. 65. a. 10 Co. 126. a. Co. Lit. 283. b. 304. b. Noy 30.

(c) Cro. El. 276, 296, 464, 465. Antea 40. a. Latch. 126. O. Bendl. 144. 2 Roll. Rep. 461. Moor 407. Britton fib.

(d) 2 Inſt. 549.

Terminer, Gaol-delivery, (*a*) and Justices of Peace, may enquire of, hear and determine all Murders and Felonies within the Verge, because their Authority and Jurisdiction are general thro' the whole County, and so always it has been used, and so it was adjudged without Scruple in *Holcroft's* Case. 3. It was resolved, That the Indictment was insufficient, for by the said Indictment taken before the Coroner of the Houshold, and the Coroner of the County, it appears that the Stroke and the Death were at *Shepperton* in *Com' Midd'* and it doth not appear in the Indictment that *Shepperton* was within the Verge, *scil.* (*b*) within 12 Miles of the Lodging of the King in his Court; and altho' in Truth it was within the Verge, yet the Indictment being (*c*) *veredictum, i. e. dictum veritatis*, and Matter of Record, ought to import all the Truth which is requisite by Law, for *de* (*d*) *non apparentibus & non existentibus eadem ratio*, and every Part of the Indictment material ought to be found by the Oath of the Indictors, and can't be (*e*) supplied by bare Saying or Averment of the Party; and because it doth not appear within the Indictment that *Shepperton* was within the Verge, for this Cause, the Indictment taken before the Coroner of the Houshold, and the Coroner of the County is insufficient; for it doth not appear that the Coroner of the Houshold had any Authority to take it, and it shall not be as void and *coram non Judice* as to the Coroner of the Houshold, and good before the Coroner of the County, for the Record is entire, and the Indictment taken before both intirely, and perhaps the Jury was directed principally by the Coroner of the Houshold, and the Witnesses examined and sworn by him, altho' all is recorded and enrolled in both their Names: Also the Defendant has averred in his Plea, that *Shepperton* was within the Verge, so that the Coroner of the County, as appears by the Confession of the Defendant himself, could not take it solely. 4. It was resolved, That forasmuch as the Indictment upon which he was convicted was (*f*) insufficient, notwithstanding such Conviction, he may be indicted and arraigned again, or appealed of the same Offence, because his Life in Judgment of the Law was never in Jeopardy, as it was resolved in *Vaux's* Case before, *Pasch.* 33 *E.* 5. It was resolved *per totam Cur'*, that where the Stroke was given the 23d Day of *September*, and the Death followed the 24th Day; and concludes that the said *T. Wigges* murdered the said *Robert Wrote* the (*g*) 24th Day, that it was good enough, for it was not Murder before; but to conclude that he murdered him the 23d Day, was repugnant, as it was resolved before in *Heydon's* Case, *Trin.* 28 *Eliz.* But it was resolved, That the finding of the Stroke and the Death was not sufficient by itself without making Conclusion, that is to say, and so the said *Tho. Wigges* murder'd the said *Rob. Wrote*, *&c.* 6. It was resolved, That though the Conviction was (*h*) pending the Appeal, yet,

(*a*) 2 Inst. 549.

(*b*) 10 Co. 72. b. 74. a. F. N. B. 241. b. 13 R. 2. c. 3. 27 H. 8. c. 5 & 33 H. 8. c. 12.

(*c*) Co. Lit. 226. a.

(*d*) 5 Co. 5 b. *Cawdry's* Case. Vaugh. 72. 12 Co. 52. 2 Inst. 20. Palm. 15. 3 Bulstr. 110. Hob. 295.

(*e*) 5 Co. 120. b. 22 E. 4. 12.

(*f*) Hales pl. Cor. 244, 247. Stamf. Cor. 106. a. Doct. plac. 36, 37. 3 Inst. 214. Antea 45. a.

(*g*) Antea 42. b. 2 Inst. 318, 320. 3 Inst. 53. Cro El. 196, 739. Dyer 50. pl. 9, 10. Stamf. 63. a.

(*h*) 1 Jones 145.

(a) Antea 45. b. 2 Jones 145.

yet, if it had been *(a)* lawful, and before the Def. was compell'd to plead, it had been a good Bar. And afterwards *Wigges* was tried in *B. R.* and upon his Trial, the Queen's Attorney was of Council with him (becauſe it was a Subject's Suit) and *Wigges* was found Not-guilty of the Murder.

12. Hill. 45 Eliz. in B. R. *Wait's* Caſe. (b) Jenk. Cent. 29. 2 Inſt. 183.

THE Wife of *William (b) Waits*, Gent. brought an Appeal of Murder of her Huſband againſt divers; and afterwards ſhe brought another Appeal againſt others; and in all ſhe had brought ſeven ſeveral Appeals of the ſaid Murder againſt ſeveral Perſons as Principals: And it was reſolved by *Popham*, C. J. *& totam Curiam*, That all the ſaid Appeals but the firſt ought to abate; for without any Difficulty, all the Principals and Acceſſories before the Murder, and alſo all Acceſſories after, and before the Writ purchaſed, againſt whom the Plaintiff would bring Appeal, ought to be named in one Writ, and not in divers. *(c) 9 H.* 4. 1. The Wife of *Thomas Goter* brought an Appeal of Death againſt *Tho. Walton*, and two others, *Walton* only appeared, and the others made Default. The Plaintiff declared againſt all three, that is to ſay, two as Principals, and againſt the other as Acceſſory: *Walton* pleaded, That at another Time the ſaid Woman made an Appeal of the ſame Death before certain Juſtices of Gaol-delivery in the County of *N.* againſt one Man as Principal of the ſame Death, who at her Suit before the ſaid Juſtices was attainted and hang'd, and demanded Judgment of the Writ, and pleaded over to the Felony: And it was ſaid by the Plaintiff's Council, that her Writ ought not to abate, becauſe in her Appeal before the ſaid Juſtices of Gaol-delivery, ſhe could not charge any, nor could the Juſtices of Gaol-delivery make Deliverance of any who then was not in Priſon in the Gaol before them, and that *Walton* and the others, now Defendants, then were at Liberty, and therefore it was impoſſible to join them in the ſaid Appeal before the ſaid Juſtices of Gaol-delivery, and ſo no Default in the Plaintiff. But it was adjudg'd, that the Writ ſhould abate; and in the ſame Caſe three Points were reſolved. 1. That the Plaintiff ought to have made her Appeal againſt all, and afterwards to have removed it by Writ before us in this Place. 2. That the Wife ſhould not have *(d)* two Appeals of Death in this Place, but ought to join all (whom ſhe will charge) in one and the ſame Writ. For if one brings an Appeal of death againſt divers, and all but one make Default, yet the Plaintiff ought to declare againſt all; and by the ſame Reaſon that he ſhall be driven to *(e)* declare againſt all, he ought to bring his Appeal againſt all. 3. That in that Caſe the Defendant ſhould not have *(f)* Damages by the Statute of *W.* 2. *cap.* 12. *quia extra caſum Statuti*, becauſe the Writ abated. *Vide* 28 *E.* 3. 90. *a. (g)* A Woman brought an Appeal of the Death of her Huſband againſt the principal Doer, and the principal Aſſiſtants

(c) Jenk. Cent. 29. pl. 56. 9 H. 4. 1. b. 2. a. Fitz. Coron. 77. Br. Appeal. 28. Kelw. 83. pl. 4. Stamf. Cor. 65. b.

(d) 47 E. 3. 16. b. Br. Appeal 14. Fitz. Cor. 104. Dyer 39. pl. 58. Jenk. Cent. 29. 2 Inſt. 183. 7 Co. 2. b. Bulwer's Caſe. Kelw. 83. pl. 4. Hales pl. Cor. 188. Stamf. Cor. 65. b.

(e) Hales pl. Cor. 188.

(f) Stamf. Cor. 65. b. Fitz. Cor. 138.

(g) Stamf. Cor. 29. a.

Aſſiſtants and Doers, and ſued another Appeal againſt the Receivers, and the Book ſaith, That the two Appeals were maintainable, notwithſtanding the Statute gives that all ſhall be in one Writ, which are the Words of the Book, in which the Statute intended is the Statute of *Magna Charta, cap.* 34. by which it is enacted, That (*a*) *Nullus capiatur propter appellum feminæ de morte alterius quam viri ſui:* And becauſe the Statute ſaith *Appellum* in the Singular Number, it was collected that all ought to be named in one Writ; which Book, if it can be maintained for Law, ought to be intended of Acceſſories after the firſt Appeal brought, which could not be named in the firſt Appeal. *Vide* 26 (*b*) *Aſſ.* 52. to the ſame Effect.

(*a*) 2 Inſt. 68. Stamf. Cor. 58. b.

(*b*) Jenk. Cent. 29. Stamf. Cor. 65. b. Fitz. Cor. 196. Br. Appeal 65.

13. *INquiſitio capt' ad Seſſion' pacis, &c. in Com' Surr', tent' die Martis & die Mercurii, &c.* and recites the Statute of (*c*) 8 *H.* 6. of *Forcible Entry*, and miſrecites it in ſome Points; and this Indictment was quaſh'd for two Reaſons: 1. Altho' the Seſſions might laſt two or three Days, yet the Record ought to mention, that the Seſſions were held at one certain (*d*) Day: 2. Alſo becauſe the Statute of 8 *H.* 6. was miſrecited in a material Point: *Know Reader*, it is not Policy in ſuch Indictments to (*e*) recite the ſaid Act of 8 *H.* 6. for the Recital thereof is not neceſſary, and Miſrecital thereof is fatal to the Indictment, and therefore the ſure Way is to draw the Indictment with Concluſion, (*f*) *contra formam Statuti, &c.* and with no Recital of the Act.

Hill. 30 Eliz. Star. 8 H. 6.

(*c*) 8 H. 6. c. 9.

(*d*) Palm. 44.

(*e*) Cr. El. 96, 307, 697. Note.

(*f*) Aleyn 50.

ANDREW

Mountjoy v. Mr. Hob. 349. 582.

ANDREW OGNEL's *Case.*

Hill. 29 Eliz.

In the Common Pleas.

Vaughan 48. 1 And. 178. 4 Leon. 115, 116. Carthew. 91.

IN a *Replevin* between *Andrew Ognel*, Plaintiff, and *Thomas Underhill*, and *Henry Appleby*, Defendants: The Case was, *William Rainsford*, *Anno* 4 *E.* 6. poſſeſs'd for 30 Years of a Farm called *Crewelfield Grange*, which conſiſted of divers Parcels know by ſeveral Names, *ſcil. Hobbes-field*, *Park-field*, and divers others, made his Will, and thereof appointed *Hercules* his Son his Executor, who 3 & 4 *Phil. & Mar.* demiſed all the Grange, (except *Hobbes-field*) to one *Henry Bere* for 23 Years; and demiſed *Hobbes* to *Walter Frecleton* for 23 Years; and afterwards granted all the Reſidue of his Term in the whole Grange, to the ſaid *Henry Bere* and *Frecleton*; he in the Reverſion in Fee, *Anno* 13 *El. Regina*, by his Deed granted a Rent-Charge in Fee iſſuing out of all his Lands and Tenements, *communiter vocat' Crewelfield Grange, quondam in tenura Will. Rainsford, & adtunc in tenura & (a) occupat. Henrici Bere vel aſſignator' ſuorum.* The Rent is behind, the ſaid Term for 30 Years expires, he in Reverſion makes a Feoffment in Fee of the ſaid Farm to another, the Grantee makes his Executors and dies, the Feoffee makes a Leaſe at Will, the Executors of the Grantee diſtrein for the Rent arrear in the Life of the Grantee before the Expiration of the Term; and Judgment was given for the Executors againſt the Plaintiff. And in this Caſe three Points were reſolv'd, *ſcil.* two at the Common Law, and one upon the Statute of 32 *H.* 8. *cap.* 37.

(a) Cro. Car. 130. Hob. 171. 2 Rol. Rep. 261. 296. Palm. 320. 1 Leon. 251. 4 Leon. 115. Lit. Rep. 25. 1 And. 178.

The firſt Point was, That at the Common Law there was a Difference between Annuity in Fee and Rent-Service, Charge, or Seck; for in Caſe of Annuity, altho' it continues, yet in ſome Caſe an Action of Debt may be maintainable for the Arrearages; as if (*b*) a Parſon or Prebendary, *&c.* has an Annuity, and the Annuity is arrear, and Parſon or Prebendary, *&c.* reſigns, he ſhall have an Action of Debt for the Arrearages; ſo

(b) Poſtea 49. b. F. N. B. 121. D. Poph. 87.

So if the Parſon or Prebendary dies, his (*a*) Executors ſhall have an Action of Debt for the Arrears incurr'd in the Life of his Teſtator, becauſe the Perſon of him who ought to pay the Annuity, is chargeable in a Writ of Annuity: But otherwiſe it is in Caſe of Rent, be it Rent Service, Rent Charge or Seck, for when the Rent continues of any Eſtate of Freehold, no Action of Debt lies for the (*b*) Arrearages. Alſo at the Common Law great Difference appears when Rent in Fee is extinct either by Act in Law, or by Act of the Party, and when particular Eſtates in Rents expire or determine: And therefore at the Common Law, if the Son be Lord, and the Father Tenant by certain Rent, the Rent is Arrear, the Tenant dies, and the Tenancy deſcends to the Son, in that Caſe the Rent is determin'd and extinct by Act in Law, and yet the Executors of the Lord ſhall not have an Action of Debt for the Arrears incurr'd in the Life of the Teſtator, becauſe the Lord himſelf could by no Poſſibility have an Action of Debt for the Arrears, for the Tenure was all in the Realty, and the Tenant could not be charged in any Perſonal Action for them. But if a Woman is endow'd of a Rent, or if a Rent is granted for Life, and the Tenant attorns, the Rent is Arrear, and afterwards the particular Eſtate in the Rent determines by Death, the Executors of the Tenant in Dower, or of the Grantee for Life, ſhall have an Action of Debt by the Common Law for two Reaſons. 1. Becauſe by Poſſibility the Teſtator himſelf might have an Action of Debt, for if he had ſurrender'd his Eſtate to him in Reverſion, he ſhould have an Action of Debt for the Arrearages incurr'd before. 2. Theſe particular Eſtates with the Attornment of the Tenant, or when the Law ſupplies Attornment, amount to a real Contract in Law, which Realty, when the Eſtate of Freehold is determin'd, diſſolves itſelf into Perſonalty: And theſe are the true Differences as to this Point prov'd and approv'd in our Books; and therefore in 45 *E.* 3. *Executors* 71. where the Caſe was, that the Father granted a Rent Charge out of certain Lands to his Son in Fee, the Rent is Arrear, the Father dies, the Land deſcends to the Son, by which the Rent is extinct by Act in Law, the Son brings an Action of Debt againſt the Executors of the Father for the Arrears incurr'd in the Father's Life, and adjudg'd that for them (as Arrears of a Rent) no Action lies, but for the Arrears of an Annuity it was maintainable; and altho' by the Deſcent of the Land to the Grantee being Heir to the Grantor, as well the Annuity as the Rent was determin'd and that the orig. Election was annex'd to an Inheritance, yet inaſmuch as the Inherit. of both was determin'd by Act in Law, (which will do Wrong to none) it was therefore adjudg'd, That his Election ſhould remain as to the ſaid Arrears, which Election he has made by bringing the Action of Debt againſt the

(*a*) F.N.B. 120. L. Poſtea 49. b.

(*b*) 9 Co. 38. b. Cr. El. 895. 1 Roll. 594.

Executors of his Father; for the Book ſays, that the Son may chooſe whether he will have a Writ of Annuity or Diſtreſs, *&c.* 4 *E.* 3. *Executors* 98. A Man makes a Leaſe for Life (*a*) rendring Rent, the Rent is Arrear, the Leſſor dies, the Executors during the Life of the Tenant for Life ſhall not have an Action of Debt, but after the Eſtate for Life determin'd the Action ſhall be maintainable, 9 *H.* 6. 43. 14 *H.* 6. 26. 19 *H.* 6. 43. 32 *E.* 3. *Dette* 9. *F. N. B.* 121. *C.* accord: So if Rent is granted for Life, or a Woman is endow'd of a Rent, the Executors of the Grantee, or of the Tenant in Dower ſhall have an Action of Debt by the Common Law, as appears by 32 *E.* 3. *Dette* 9. 34 *H.* 6. 20. * 9 *H.* 7. 17. But in the Caſe of 11 (*b*) *H.* 4. *fol. ultimo*, when Rent is granted for Life, and afterwards becomes Arrear, and afterwards the Tenant aliens, and afterwards the Grantee of the Rent dies, the Action ſhall be maintainable againſt him who was Tenant, and took the Profits when it was arrear. (*c*) 26 *E.* 3. 64. *a. b.* Sir *Will. Loringe*'s Caſe. Sir *William Loringe* was Grantee for Life of a Rent out of the Moiety of a Manor, of which Moiety a Man was ſeiſed in the Right of his Wife, the Rent was Arrear; Sir *William Loringe* dy'd, his Executors brought an Action of Debt againſt the Husband only for the Arrearages of the Rent, and there two Points are adjudg'd: One, that by the Death of Sir *William Loringe*, the Grant for Life was turn'd into Nature of Debt. 2. That foraſmuch as the Huſband took the Profits of the Land charg'd with the Rent when it was Arrear, that he only (without his Wife) ſhall be charg'd in an Action of Debt: And there it is held, that after the Death of the Huſband the Action of Debt in ſuch Caſe ſhall lie againſt his Executors. If there is Leſſee for Life of a Manor, and the Rents are arrear, the Tenant for Life ſurrenders his Eſtate, he ſhall have an Action of Debt for the Arrearages: So if a Parſon or a Prebendary, *&c.* who has an Annuity (*d*) reſigns, he ſhall have an Action of Debt for the Arrearages incurr'd before the Reſignation, 19 *H.* 6. 41. *b.* 43. *F. N. B.* 121. *D. E.* So if a Prebendary or Parſon, *&c.* (*e*) dies, his Executor ſhall have an Action of Debt for the Arrearages incurr'd during his Life. *Vide* 4 *H.* 6. 31. 7 *H.* 6. 19. 8 *H.* 6. 7. 19 *E.* 3. * *Juriſdiction* 22. *F. N. B.* 120. *L.* The Executors of the Lord ſhall have an Action of Debt for (*f*) Relief, for it is but an Improvement of the Service, and ſo it was adjudg'd in 32 *H.* 8. *Rot.* 429. in *Leak*'s Caſe. *Vide* (10.) 11 *H.* 6. 11. 11 *H.* 6. 18. 34 *E.* 1. *Avowry* 233. But the Lord himſelf ſhall (*g*) diſtrein, and ſhall not have an Action of Debt, as it is ſaid in 7 *H.* 6. 13. 22 *Aſſ.* 52. A Woman made a Leaſe for Life rendering the firſt 3 Years 100 *s.* and afterwards 40 *l.* during the firſt 3 Years ſhe was diſſeiſed of the Rent, and brought an Aſſiſe, and adjudg'd maintainable, for in Judgment of Law all is but one Rent, altho' it is divided in Payment, *Vide* 15 *E.* 3. *Execution* 63. But it was reſolved, in the Caſe at Bar, that the Arrears due in the Life of the Grantee

(*a*) Dy. 375. pl. 20.

* 7 Co. 38. b.
(*b*) Co. Lit. 162. b.

(*c*) Co. Lit. 162. b. Fitz Det. 180. Poſtea 51. a.

(*d*) Antea 48. b. Poph. 87. Br. Det. 94.

(*e*) Antea 45. a.

* Co. Lit. 162. b.
(*f*) Co. Lit. 47. b. 83. b. 162. b. 3 Co. 66. a. Dall. 17. pl. 6. 1 Roll. 196, 665, 915. Dy. 24. pl. 149. Dy. 140. pl. 37. B. N. C. 176. Br. Det. 194. Br. Relief 11. Noy 43, 44. O. Benl. 10.
(*g*) Co. Lit. 47. b. 83. a. 162. b. Dall. 17. pl. 6. 1 Roll. 596, 665. Br. Det. 194. Br. Relief 11. Kelw. 133. pl. 111.

were loſt at Common Law.[x] The ſecond Point reſolv'd was, That *Hobbesfield* was not charged with the ſaid Rent by Reaſon of theſe joint Words; for altho' it is Parcel of *Crewelfield-Grange*, and that *Henry Bere* and *Frecleton* had the Reverſion of the Term, and ſo the Land might be ſaid in their Tenure; yet foraſmuch as *Henry Bere* had not then *Hobbesfield* in his Occupation, *Hobbesfield* is out of the ſaid Words, by Reaſon of the ſaid laſt Clauſe, *ſcil. & adtunc in tenura & occupatione Henrici Bere.* So that by Reaſon of the Conjunctive, which joins the Tenure and *(a)* Occupation together, nothing is charg'd, but ſo much of the ſaid *Grange* only as was in the Tenure and Occupation of *Henry Bere*, and that was not *Hobbesfield*; *vide* for the Expoſition of this Conjunctive *(Et)* *(b)* 19 *H.* 6. 4. *a. b. & 9 E.* 4. *(c)* 42. *b.* in the Caſe of a Releaſe. The third Point reſolv'd was upon the ſaid Statute of 32 *H.* 8. *(d) cap.* 37. And the Doubt aroſe upon theſe Words: *And it ſhall be lawful to every ſuch Executor*, &c. *of any ſuch Perſon or Perſons to whome ſuch Rent or Fee Farm is or ſhall be due and not paid at the Time of his Deceaſe, to (e) diſtrein for the Arrearages of all ſuch Rents upon the Lands*, &c. *So long as the ſaid Lands, Tenements, or Hereditaments, continue, remain, or be in the Seiſin or Poſſeſſion of the ſaid Tenant in Demeſne, who ought immediately to have paid the ſaid Rent*, &c. *be in the Seiſin or Poſſeſſion of any other Perſon or Perſons claiming the ſaid Lands, Tenements, and Hereditaments only, by and from the ſaid Tenant, by Purchaſe, Gift, or Deſcent, in like Manner and Form as their ſaid Teſtator might or ought to have done in his Life.* And it was objected, that this Caſe was out of the ſaid Act, for the ſaid Act extends only to Tenants in Demeſne who immediately ought to have paid it, and that was in the Caſe at Bar, the Grantor and thoſe who claim only *by and from him*; and in this Caſe Leſſee at Will of the Feoffee doth not claim only *by and from the Grantor*, but he claims *by and from the Feoffee*, and ſo out of the Statute. And therefore it was ſaid, That the Feoffee of the Feoffee, and ſo in *infinitum*, is out of the ſaid Act; and ſo, it was ſaid, have like Statutes been conſtrued, which are *ſtricti Juris*, becauſe they reſtrain the Common Law, as *W.* 2. *cap.* 40. *(f)* in *Cui in vita*, if the Vouchee vouches over one within Age, the Parol ſhall demur, as it is adjudg'd in 18 *E.* 4. 16. *a.* So there it is ſaid, upon theſe Words *(expectet emptor)* that the Feoffee of the Feoffee is out of the ſaid Act. 16 *E.* 3. *Age* 47. agrees to the Caſe of 2 Feoffee. 19 *E.* 3. *Age* 2. But it was adjudg'd, that altho' the Leſſee at Will doth not claim immediately from the Grantor, yet he is within the ſaid Act; for where Things are due in Right and Truth, and become remedileſs by the Act of God, *ſc.* by the Death of him to whom they were due, in ſuch Caſes Acts of Parl. which give Remedy

(a) Hob. 171. 2 Roll. Rep. 261, 226. Palm. 320. 4 Leon. 115. Lit. Rep. 25, 63. Cr. Car. 130, 448, 473. Godb. 237. Hard. 225. Co. Lit. 249. b. 1 And. 178. 1 Leon. 251.
(b) 5 Co. 7. b.
(c) 5 Co. 7. b. Fitz Releaſe 14. Br. Releaſe 29.
(d) Co. Lit. 162. a. 1 Leon. 302, 303. 3 Leon. 59, 263.
(e) 5 Co. 118.

(f) 1 Co. 15. a. Plowd. 17. b. 47. a. 2 Inſt. 455. 2 Leon. 148. 6 Co. 5. a. 2 Roll. Rep. 246. Br. Age 43. 46 E. 3. Age 76. 7 E. 2. Age 139. 14 H. 7. 18. b 19. a. 6 E. 3. 216. b.

in ſuch Caſes, God forbid that they ſhould not have a benign and favourable Interpretation, and extend to advance the Remedy proportionably to the Miſchief and Defect of the Law, according to the Intent and Meaning of the Makers of the Act. And therefore the ſecond *(a)* Feoffee, and ſo over *in infinitum*, ſhall be charged by Force of this Act, for what Reaſon will there be to bind the firſt Feoffee, and not the ſecond Feoffee, and ſo all others? And what Reaſon will there be to bind only the immediate Heir who ſhall have it by Deſcent, and not any other mediate Heir? For otherwiſe as to this Point the Statute will ſerve to little Purpoſe, and eſpecially when the firſt Feoffee may alien the Land at his Pleaſure; and all the Sons of *Adam* are ſubject to Death: Some alſo conceiv'd, that the ſecond Feoffee is within the expreſs Words of the Act, for altho' he is not in *by the Grantor*, yet he is in *from him*, for *from (b) him*, amounts to as much as *under him*; and the Word *(c) (and)* in this Caſe ſhall be taken for (or) and this Word *(only)* was added only to this Purpoſe, that he ought to claim *only* under the Tenant in Demeſne, and not paramount. As if Tenant in Tail makes a Feoffment in Fee and dies, and the Diſcontinuee charges the Land with a Rent in Fee, and afterwards enfeoffs the Iſſue in Tail within Age, ſo that he is remitted, in that Caſe *(only)* has its Operation, for now the Iſſue in Tail claims by Title paramount; But if the Tenant makes a Feoffment in Fee to the Uſe of another, in that Caſe *Ceſtuy que uſe* doth not claim only by the Feoffor, but alſo by the Statute, and he is not in the *Per*, and yet he claims under the Feoffor, and that was the Intent of the Act: So if the Tenant makes a Gift in Tail, and the Donee dies, the Iſſue in Tail is within this Statute, for he claims *(only)* under the Title and Eſtate of the Tenant in Demeſne, altho' he does not claim only by Deſcent, but alſo *per formam doni*: So if Tenant in Tail be the Remainder over in Fee, the Iſſue in Tail is within this Statute, againſt the Opinion in *Plow. Com.* in *Manxel's Caſe* 4. *b.* But it was agreed *per totam Curiam*, if *A.* has a *(d)* Rent-Service, or Rent-Charge in Fee, or for Life, and the Rent is arrear, and afterwards *A.* grants over the Rent to another, and the Tenant attorns, and afterwards *A.* dies, his Executors are not within this Branch, for by the ſaid Grant over, the Arrearages were loſt, and were not due to the Teſtator at the Time of his Death, as the Statute ſpeaks. Alſo the Concluſion of the ſaid Branch is, *In as large and ample Manner as the ſaid Teſtator might and ought to have*; and after the ſaid Grant the Teſtator himſelf nor any other could diſtrain, or have any Remedy for the ſaid Arrears: Alſo in the Clauſe next preceding touching the Action of Debt, the Words are, *Unto whom any ſuch Rent or Fee Farm is or ſhall be due, and not paid at the Time of his Death*: So that the Act gives no Remedy, when the Teſtator himſ. by his own Act has diſpenſed with the Arrears, but when they were

(a) 3 Leon. 263. 1 Leon. 302, 303.

(b) Co. Lit. 162. b. (c) 2 Sid. 54. Godb. 363.

(d) Vaugh. 40, 41. 1 Roll. 672. Co. Lit. 162. b.

due to him at the Time of his Death, and by the Act of God become remediless: And in this Case a Judgment upon another Branch of this Statute, reported by Serjeant *Bendloes*, between *Sharp* (*a*) Plaintiff, and *Pool*, Defendant, *in Communi Banco. Hill.* 17 *Eliz. in Debt, London*, 457, was cited, and the Case was, A Rent-Charge was granted by Deed to a Feme-Sole for Life, the Rent was arrear, the Woman took *Sharp* to Husband, the Rent was again arrear, the Wife died, *Sharp* brought an Action of Debt against the Def. Heir of the Grantor (Tenant of the Land charged) for all the said Arrearages, as well before as after Marriage: And in that Case it was resolv'd, that for the Arrearages incurr'd (*b*) before the Marriage, the Husband had no Remedy by the Common Law, but for the Arrears which incurr'd (*c*) during the Marriage, the Husband in that Case might have an Action of Debt at the Common Law, 26 *E.* 3. 64. 10 *H.* 6. 11. *a. b. F. N. B.* 121. *c.* 22 *H.* 6. 25. *a.* But it was adjudged by Force of these Words in the said Act, *That if any Man hath, or hereafter shall have in the Right of his Wife any Estate in Fee-simple, Fee-tail, or for Term of Life, of or in any Rents or Fee Farms, which be or shall be due behind or unpaid in the said Wife's Life, that then the Husband, after the Decease of his said Wife, his Executors and Administrators, shall have an Action of Debt for the said Arrearages against the Tenant of the Demesne that ought to have paid the same, his Executors or Administrators: And also may distrain for the said Arrearages in like Manner and Form as he might have done if his said Wife had then been living, &c.* That the Husband should have (*d*) all the Arrearages, as well due before the Marriage as after: But two Objections were made, that the Husband should not have the Arrearages before the Coverture: 1. Because by the Common Law, the Executors or Administrators of the Wife, might have an Action of Debt for the said Arrearages before the Coverture; and the Statute, as appears by the Preamble, provides Remedy when the Executors or Administrators of him to whom the Rent was due, *cannot have or come by the said Arrearages, &c.* And therefore it was said, That the Makers of the Act did not intend to give Remedy where there was Remedy at the Common Law, nor to take away the Remedy which one had at the Common Law, and give it to another. The second Objection was, That the said Branch touching the Husband, gives Remedy to him for the Arrearages *due in the said Wife's Life*; so that the Arrearages ought to incur when she was a Wife, and not before. But notwithstanding these Objections, it was unanimously resolv'd, That the Husband by Force of the said Branch, should have the said (*e*) Arrearages; for the said Branch enacts, That the Husband shall have the Arrears incurr'd in the Life of his Wife, and that can't extend

(*a*) N. Bendl. 263. pl. 273. Benl. in Ash 31. Benl. in Kelw. 214. b. Co. Lit. 162. b. 165. b. Owy. 3. O. 133. Co. Ent. 119. pl. 2. 1 And. 47.

(*b*) 1 Rolls 345. Co. Lit. 162. b. 351. b.

(*c*) Co. Lit. 162. b. 351. a. 1 Roll. 345, 352.

(*d*) Co. Lit. 162. b. 351. b. 1 Roll. 345.

(*e*) Co. Lit. 162. b. 351. b. 1 Roll. 345.

to Arrearages during the Coverture, for the Common Law, in Caſe when the Wife has the Rent but for Life, gave him ſuch Arrearages as appears before. And therefore when the Statute gives an Action of Debt to the Huſband for Arrearages, it ought not to be conſtru'd to extend to thoſe which he might have by the Common Law before, but to the Intent that the Words of the Act ſhould have Effect, for *(a)* (*verba accipienda ſunt cum effectu*) the ſaid Words of the Act ſhould be conſtrued of Arrearages which were due before: And as to the ſaid Exceptions it was reſolv'd, That a Feme *(b)* Covert could not make an Executor without the Aſſent of her Huſb. and the *(c)* Adminiſtration of her Goods of Right belongs to the Huſband, and the Statute in naming the Woman (*Wife*) intended only to deſign and deſcribe the Condition of the Woman, and not to imply that the Arrearages ſhould incur after the Coverture.

(a) 10 Co. 28. a.

(b) Mo. 339, 340. Fitz Deviſe 24. 1 Rolls 912. Cr. Car. 106. 12 H. 7. 22. Perk. 97. a. 18 E. 4. 11. b. FitzTeſtament 13 1 Roll. 914. 12 H. 7. 23. a. b. 39 H. 6. 27. b. Br. Teſtament 10. 176. Cr. Car. 106. 521, 522. See 3 Salk. 21. 1 Salk. Tit. *Adminiſtrator*, &c.

Br. Executors 98. Fitz. Executor 28. (c) 1 Roll. 910, 912. Dyer 251. pl. 90. 1 Jones Mo. 871. 1 Leon. 216. 29 Car. 2. cap. 3. 1 Mod. Rep. 231. 1 Sid. 409. Hob. 3. Palm.

RAW-

RAWLYNS's *Caſe.*

Mich. 29 & 30 Eliz.

In the King's Bench.

BEtween *Rawlyns* and *Somerford* the Caſe in Effect as it was found upon ſpecial Verdict upon Not guilty pleaded in *Ejectione firmæ*, for an Houſe called the *Ship* without *Temple-Bar*, was ſuch; *Peter Cartwright* being poſſeſſed of the ſaid Houſe for 30 Years, of all in Poſſeſſion, except a Stable whereof one *Warlow* was poſſeſſed for two Years, aſſign'd all his Intereſt to *Rawlyns*; and afterwards *Cartwright* by Deed indented demiſed the ſaid Stable to *Warlow*, for ſix Years after the ſaid two Years ended: And afterwards *Rawlyns* by Deed indented in Conſideration of 25 *l.* Fine to be paid, redemiſed all the Houſe to *Cartwright* for 21 Years, rendring to him 24 *l. per annum* quarterly, and 5 *l.* quarterly at the ſame Feaſts until the ſaid 25 *l.* were paid; upon Condition, that if the ſaid Sum of 25 *l.* or the ſaid Rent was arrear at any Feaſt, *&c.* that then it ſhould be lawful for *Rawlyns* to re-enter; and upon the Back of the ſaid Indenture of Redemiſe was indorſed in this Manner, *Memorand' It was agreed between the Parties before the Sealing and Delivery hereof, That* Warlow *ſhall have the ſaid Stable according to the ſaid Demiſe to him made.* And afterwards and before any Day of Payment, *Cartwright* redemiſed the ſaid Stable, which then was in Poſſeſſion of *Warlow* by Force or Colour of the Leaſe for ſix Years made to *Warlow*, to the ſaid *Rawlyns* for ten Years; and afterwards the Rent was arrear and lawfully demanded, and alſo the 5 *l.* Parcel of the Sum in groſs was alſo not paid; and *Rawlyns* never entred into the Stable, but *Warlow* always continu'd in Poſſeſſion of it, and *Warlow* never attorn'd to any of the Leſſees; and if the Entry of *Rawlyns* for the Condition broke was lawful or not was the Queſt.? And after many Arguments at the Bar and Bench, now in this Term it was adjudged, That the Entry of *Raw.* for the Condi.

4 Leon. 116. Gould. 89, 93, 94. Jenk. Cent. 25. 3 Keb. 500, 505, 541. 542. 10 Co. 51. a. 1 Sal. 47, 48.

broke was lawful. And in this Case seven Points were unanimously resolved by Sir *Christ. Wray*, C. Justice, Sir *T. Gawdy*, *and the whole Court*. 1. Whereas the Verdict was entred three Terms past, and in the Entry thereof in the Roll, the said Demise made by *Cartwright* to *Warlow* was not entred to be made by Deed indented, and now in this Term it was prayed to be amended; and because the Note of the Special Verdict which the Jury exhibited to the Court, and which remained with Master *George Kemp*, Secondary to Master *Roper*, purported that the Jury found the said Demise, *prout*, *&c.* by which it appeared to the Court, that the Demise was given in Evidence, and Reference made by the Note to it; it was therefore held *by the whole Court*, that the Record in this Point should be (*a*) amended; and so was it done in like Manner in Accompt between *Gomersal* and *Gomersal* in this very Court within two Years before. 2. Altho' the Condition consisted of two Parts in the (*b*) Disjunctive, *sc.* either for Non-payment of the Rent, or of the Sum in Gross, which as to that was collateral; yet if it had been found that *Cartwright* had redemised any Part of the House to *Rawlyns*, and that *Rawlyns* had entred, by which the Rent was suspended, that thereby the whole Condition, as well as to the said collateral Sum, as to the said Rent was suspended. For it was resolved, altho' the Condition comprehended two several Things in this Disjunctive of two several Natures; the one, the Rent (*c*) issuing out of the Land which is incident to the Reversion, and may be suspended by the Intermedling with the Land; the other, Matter (*d*) collateral to the Land, which cannot be suspended by the said Redemise, yet here are not several Conditions, but one intire Condition which refers to two several Branches, and therefore suspended in Part is suspended in the Whole; and that the Condition was intire, appears by the Conclusion of it, *sc.* for the Non-payment of the one or the other, it should be lawful for the Lessor to re-enter into the whole Land, so that there is but one intire Condition, and one intire Entry, which is not by the Act of the Parties to be apportioned or divided, and because this Point was of late, *sc. Pasch.* 27 *Eliz. Rot.* 185. between (*e*) *Brightman* and *Somerford* in this very Case (altho' between other Parties) upon grave Advice adjudged by Sir *Ed. Anderson*, and his Companions, Justices of the Court of *C. B.* Sir *Christopher Wray*, and the Court of *King's Bench* would not suffer this Point to be argued again, but agreed with the said Court of *Common Pleas* in the Point adjudged. 3. That if *Cartwright* had redemised any Part of the House to *Rawlyns*, and *Rawlyns* never entred into it, yet the Rent by the Acceptance of the Redemise before any Entry, is (*f*) suspended; so that the Non-entry of *Rawlyns* makes no Difference between this Case, and the Case which was in the *Common Pleas*; for when the Lessor accepts a Re-

(*a*) Noy 118, 119. Palm. 260. Jenk. Cent. 254. 8 Co. 162. b. Co. Lit. 260. a. 2. Leon. 194. Salk. 53.

(*b*) 5 Co. 22. a. 1 Rolls 450.

(*c*) Jenk. Cent. 254.

(*d*) Jenk. Cent. 254.

(*e*) Owen 41. 3 Leon. 221.

(*f*) Co. Lit. 158. a. b. Cr. Car. 101. 1 Ventr. 277.

Edwards v Wickwar 3 a n 404 81

Redemiſe, and ſuffers a Stranger to occupy the Part redemiſed, it ſuſpends the Rent, as well as if he himſelf had entred. 4. That the ſaid Leaſe made by *Cartwright* to *Warlow* by Indenture when he (*a*) had nothing in the Houſe, was notwithſtanding good againſt him by Concluſion; and when *Rawlyns* redemiſed the whole to him, then was his Intereſt bound with this Concluſion, and then when *Cartwright* redemiſed the ſaid Stable to *Rawlyns*, now was *Rawlyns* concluded alſo. For all Parties and Privies in Eſtate or Intereſt are bound by Eſtoppels, and then the Caſe is no other; but *Cartwright* demiſes to *Warlow* for ſix Years the ſaid Stable, and afterwards demiſes to *Rawlins* for 20 Years, ſo that this is a good Leaſe in Reverſion for 14 Years, this doth not make any Suſpenſion of the Rent, or Condition, for it is not any Grant of the Reverſion, but a future Intereſt in Reverſion, no Term but an Intereſt of a Term as the Pleading is; And notwithſtanding ſuch Grant, the Reverſion (without Attornment) remains in the Grantor, and he ſhall have the Rent reſerved upon the firſt Leaſe: But if there be Attornment, then the Reverſion paſſes, and then will follow Suſpenſion: And therefore it was agreed, if a Man (*b*) makes a Leaſe for 21 Years rendring Rent, with Clauſe of Re-entry, and afterwards the Leſſee makes a Leaſe to the Leſſor for ſix Years to begin two Years after, and afterwards the Rent being lawfully demanded, is Arrear, the Leſſor may lawfully re-enter and take Advantage of the Condition, notwithſtanding the Acceptance of the ſaid future Intereſt, and by the *Entry defeat the future Intereſt which was veſted in him: If a Man makes a Feoffment in Fee upon a (*c*) collateral Condition, and afterwards the Feoffee redemiſes the Land to the Feoffor, and afterwards the Condition is performed, now the Redemiſe of the Land being no Suſpenſion of the Condition, is no Impediment but that the Feoffor ſhall take Advantage of it, and thereby deſtroy the Term which he himſelf has accepted, as it is held in 20 *E.* 4. 19. *a.* 8 *H.* 7. 8. 20 *H.* 7. 4. So in the Caſe at Bar, the Redemiſe *in futuro* makes no Suſpenſion of the Rent, and *per conſequens* no Suſpenſion of the Condition. 5. Altho' it was objected, 1. That (*d*) Eſtoppels conclude the Parties to ſay the Truth, but can't conclude the Jurors becauſe they are ſworn *ad veritatem de & ſuper præmiſſis dicendam:* And 2. That Eſtoppels ought to be pleaded, and in Pleading the Party ought in the Concluſion of his Plea to (*e*) rely upon the Eſtoppel, and not demand Judgment if Action, or make other Concluſion, as it is held in 22 *H.* 6. 53. and for theſe Reaſons the Court ſhall not give Regard to this Eſtoppel by Deed indented found by the Jurors: Yet it was reſolved in this Caſe, That this Eſtoppel being found by Verdict, the Court ought to judge upon the whole ſpecial Mat. according to Law: And true it is, that the Jurors are ſworn *ad veri' dic'*; and therf. they've well done in the Caſe at Bar to find

(*a*) Cr. Car. 110. Hetl. 83. Jenk. Cent. 254.

(*b*) 1 Rolls 939.

* Carthew 260.

(*c*) 1 Rolls 939. 1 Co. 97. a. Jenk. Cent. 254. 3 Keb. 505. 1 Co. 174. a. 2 Brownl. 228.

(*d*) 2 Rolls 690. Cr. Car. 110. Co. Lit. 227. a. 352. a. Cr. El. 36, 37. 140, 309. Jenk. Cent. 254. 2 Co. 4. b. Owen 96. 1 Leon. 206. Sav. 98, 99. Dyer 147. pl 73. Carr. 155. Palm. 20. Hard. 483. 2 Brownl. 150. Hetl. 83. Moor 96. Lit. Rep. 271, 273. Latch. 241.

(*e*) 2 Jones 8. Co. Lit. 227. a. Hob. 207. 11 Co. 2. a. Vaugh. pl. 8.

find the whole Truth of the Caſe, and leave the Judgment of it to the Court, which upon the whole Matter ought to judge according to Law. And *Wray* C. J. ſaid, That it was adjudged in (*a*) *Pleadal*'s Caſe, in 8 *Eliz.* that becauſe a Jury did not find ſuch a Leaſe by Deed indented which took its Operation only by Concluſion, intending that they being ſworn *ad veritatem dicendam*, and that Eſtoppels conclude the Parties, but not the Jurors to ſay the Truth, were therefore *attainted* and had Judgment accordingly; for the Juſtices in the ſame Caſe held, That the Intereſt of the Land as to Parties and Privies was in a Manner by ſuch Concluſion bound, and no Concluſion ſhall be by ſuch Deed indented after the Term ended, as *Wray* Chief Juſtice held, and in ſuch Caſe the Jury ought, if they will not find the ſpecial Matter, and leave it to the Judgment of the Law, to find *at their Peril* according to Law. *Vide* for this Point, 17 *E.* 3. 6. 18 *Aſſ.* 2. 22 *Aſſ.* 2. 22 *Aſſ.* 37. 34 *E.* 3. *Droit* 29. 15 *E.* 3. *Aſſiſe* 322. 13 *E.* 3. *Gar.* 26. 35 *Aſſ.* 8. 1 *H.* 4. 6. *b.* 27 *H.* 8. 22. *Plow. Com.* 515. and many other Books. And upon good Conſideration of this Judgment and the ſaid Books, you ſhall underſtand and obſerve good Differences, and which Opinions in the Books are according to Law, and which not. 6. It was reſolved, that if a Man has Land for 20 Years, and he leaſes for two Years rendring Rent, and afterwards grants his whole Term and Intereſt to another, if the Leſſee attorns, the Reverſion ſhall paſs; and if no Attornment is had, yet the Intereſt in Reverſion ſhall paſs, ſo that the Grantee ſhall have the Land after the two Years determined; For the Grant of one ſhall not be adjudged void, if to (*b*) any Intent it may take Effect. 7. It was reſolv'd if Leſſee of an Houſe for 20 Years, leaſes Part for two Years, and afterwards leaſes the whole to another for ten Years rendring Rent, ſo that this enures as a Leaſe in Reverſion for the Part in Leaſe, and a Leaſe in Poſſeſſion for the Reſidue, that the Rent ſhall iſſue out of the whole, and the Intereſt of the Term, altho' it is not any Eſtate which can be ſurrender'd, and altho' it is joined with Land in Poſſeſſion, yet the Rent ſhall iſſue out of the whole: Upon which Judgment *Somerford* brought a Writ of Error upon the new Statute upon the Judgment, and two Errors were aſſigned. 1. Becauſe *Rawlyns* the Plaintiff was an (*c*) Infant, and was admitted by Guardian, and no Record thereof was made as is uſed in *C. B.* but only recited in the Count; *J. Rawlins per A. B. gard' ſuum ad hoc per Cur' ſpecialiter admiſ. queritur, &c.* 2. The 2 Error was aſſigned in the Judgment itſelf given in *B. R.* As to the 1 Error the Judges *Anderſon* C. J. of *C. B. Manwood* Chief Baron of the Exchequer, *Periam*, *Windham*, and *Rhodes* Juſtices, *Clark* and *Gent* Barons of the Exchequer, and of the Coif, order'd the Precedents in *B. R.* be ſearch'd, for without Precedents, *prima facie* it ſeemed to them, That there ought to be a Record made of the ſaid Admittance by Guardian; and on Search of the Records in *B. R.* many

(*a*) Moor 69. 2 Leon. 159. Co. Lit. 227. a. Cr. El. 36, 37. 140, 309. Lit. Rep. 271, 283.

Co. Lit. 228. a.

Co. Lit. 228. b.

(*b*) Lit. Rep. 371.

* St. 27 El. c. 8. See 2 Sand. 213.

(*c*) 1 Siderf. 173. Lit. Rep. 60. Hetl. 52. 1 Jones 177. Hutt. 92. Cr. El. 424. 541. Palm. 295.

were found and ſhewed to the Juſtices, where (*a*) Infants had ſued by Guardians in the ſame Court, and no Record made of their Admittance by Guardian, but ſuch Recital in the Count as aforeſaid: The Juſtices and Barons *una voce* in Regard of the Precedents which in this Caſe make a Law in the ſame Court diſallowed the Error, altho' Precedents *in minuto numero* were ſhewed, where Record was made of the like Admittance of an Infant in the *King's Bench*, as is done in the *Common Pleas*. As to the Error in the Judgment, all the ſaid Points often argued in the *King's Bench*, and upon great Deliberation adjudged, were again argued before the ſaid Juſtices and Barons of the Exchequer; and after many Arguments at the Bar and Bench, all the Matters before reſolv'd were from Point to Point, and for the Reaſons before alledged, affirmed by all the ſaid Juſtices, and Judgment given accordingly. *Ed. Coke* and others were of Council with the Plaintiff, and *Glanvill* Serjeant and others with the Defendant. And this was the laſt Caſe that Sir *Thomas Gawdy* argued, who was a moſt reverend Judge and Sage of the Law, of ready and profound Judgment, and of venerable Gravity, Prudence, and Integrity.

(*a*) 1 Siderf. 17. Lit. Rep. 60. Hetl. 52. 1 Jones 177. Hutt. 92. Palm. 295.

Nota Reader, according to the Opinion of *Wray* Chief Juſtice, it was afterwards adjudged in the *Common Pleas*, *Paſch.* 33 *Reginæ Eliz.* in the Caſe of one *London*, That if a Man takes a Leaſe for Years by Deed indented of his own Land, it is no concluſion but during the Term, and after the End of the Term the Leſſor may enter or occupy the Land, for by the Determination of the Term, the Eſtoppel is alſo determined, and then both the Parts of the Indenture belong to the Leſſor, as it is held 38 *H.* 6. 24. And ſo the Law is now reſolved in a Caſe which was much controverted in our Books, 14 *H.* 6. 23. 8 *H.* 4. 58. 3 *E.* 4. 14. 8 *H.* 6. 17. 44 *E.* 3. *Eſtoppel* 10. 43 *E.* 3. 17. 21 *H.* 6. 2. 43 *E.* 3. *Eſtoppel* 7. 3 *H.* 4. 6. 12 *H.* 4. 19. *Litt.* 156. (17) 47 *Aſſ.* 3. 35 *Aſſ.* 8. 10 *E.* 3. *Double Plea* 8. The Opinion of *Hales* and *Montague* in *Pl. Com.*

London's Caſe. 1 Anderſon 12. 8. Moor 181. 1 Rolls 871, 877. 1 Jones 459. Lit. Rep. 372. Co. Lit. 47. b. Cr. Eliz. 36. Jenk. Cent. 254.

The

The *Warden* and *Commonalty* of *Sadlers* Caſe.

Trin. 30 Eliz. *in Chancery.*

Monſtrans de Droit.

1 Anderſ. 180, 181. Co. Ent. 402. pl. 1. 9 Co. 95. b. 96. a. See Skinner 608, 609.

BY Virtue of a Writ of *Mandamus* after the Death of *Thomas Cox*, it was found by Enqueſt before *Wolſtan Dixy* Mayor of *London*, Eſcheator of the ſaid City 17 *Junii*, *anno* 28 *Eliz.* and returned in the Chancery, That the ſaid *Tho. Cox*, *die obitus ſui* was ſeiſed in his Demeſn, as of Fee of 11 Meſſuages and 8 Gardens in the Pariſh of *All-Saints* in *London*, and died without Heir, and that they were held of the Q. in Socage: And the Wardens and Comminalty of *Sadlers* in the *Chancery* ſhewed their (*a*) Right, That long Time before the ſaid *Tho. Cox* had any Thing in the ſaid Meſſuages and Gardens, one *Richard Mylard* was ſeiſed of them in his Demeſn as of Fee. And ſo ſeiſed 6 *die Aug. anno* 15. *H.* 8. by his Will in Writing deviſed the ſaid Meſſuages and Gardens to the Wardens and Comminalty of *Sadlers* in Fee, and died; and that they were ſeiſed 'till by the ſaid *Tho.* diſſeiſed, who ſo ſeiſed died without Heir: And ſhewed the Cuſt. of *Lond.* That a Citizen (*b*) and Freeman may deviſe in Mortmain; and aver'd that the ſaid *R. Mylard* was a Cit. and Freem. of *Lond.* at the time of his Death: Upon this Plea the Attorney-General demur'd in Law; and if a *Monſtrans de droit* in this Caſe lay, or they ſhou'd be put to their Petition was the great Queſtion of the Caſe: And this Caſe on the Q's Part, and on the Parts of the Wardens and Comminalty was often argued as well *in Can'* as before all the Juſtices of *Eng.* and Barons of the *Exchequer* at *Serj. Inn* in *Fleetſt.* And in this Caſe div. Points were reſolv'd.

(*a*) 1 Anderſ. 180, 181. 1 Co. 173. 2 Rolls Rep. 421. 2 Inſt. 688.

(*b*) 2 Bulſt. 193. 8 Co. 129. a. 1 Rolls 556.

In every Caſe where the King is intitul'd to any Freehold or Inheritance, his Title

- Is by Matter of Record, which is either
  1. By Record judicial, as Attainder, *&c.*
  2. Miniſterial on Oath, as Office.
  3. Or by Conveyance of Record by Aſſent as Fine, Deed inroll'd, *&c.*
- Or by Matter in Fact, and found by Office of Record on Oath, — As Alienation in Mortmain, Purchaſe by Alien born, the K's Villain, Eſcheat by Death without Heir, *&c.* and this found by Record Miniſterial, as before the Eſcheator or other Officer.
- Or by Matter in Fact only, — When Land comes to the King by Eſcheat or other Matter of Fact, and the King's Officers put it in Charge in the Exchequer without Office.

And it was reſolved that in all theſe Caſes, at the Common Law, when the King was ſeiſed of any Eſtate of Inheritance or Freehold by any Matter of Record, be his Title by Matter of Record Judicial or Miniſterial, or by Conveyance of Record, or by Matter in Fact, and found by Office of Record, he who has Right could not by the Common Law have any Traverſe upon which he was to have *Amoveas manum*, but was put to his *Petition of Right* (in Nature of his real Action which he could not have againſt the King, becauſe the King by his Writ can't command himſelf) to be reſtored to his Freehold, and Inheritance, 4 *H.* 6. 12. 24 *E.* 3. 23. 1 *H.* 7. 3. 4 *E.* 4 21. *b.* 9 *E.* 4. 52. But at the Common Law the Party grieved might in ſome Caſe have his *Monſtrans de droit* where the King was ſo entitled, and in ſome Caſe not, when the King's Title was by Matter in Fact, as by Reaſon of Purchaſe by an Alien born, or the King's Villain, or for Alienation in Mortmain, or by Death of the King's Tenant without Heir, *&c.* in all theſe and the like Caſes, if Office be found for the King, and in the ſame Office the Title or Intereſt of the Party be found, there the Party grieved might at the Common Law have his *Monſtrans de droit*, becauſe his Title appears by the ſame Record, whereby the King is intitled; as if a Diſſeſor aliens in Mortmain, or to an Alien born, or to the King's Villain, or dies without Heir, the Land being held of the King and all the ſpecial Matter is found by Office, *ſc.* the Diſſeiſin and the Alienation, or the Death without Heir, in all theſe Caſes the Party griev'd ſhould have *Monſtrans de Droit* at Common Law; And ſo are the Books to be intended in 9 *E.* 4. 51. *&* 13 *E.* 4. 8. *a.* 4 *E.* 4. 21. 33 *E.* 3. *Traverſe* 36. It was found by Office that *T.* by Licence of the King did marry the King's Neif, and that certain Lands deſcended to the ſame Neif, which her Huſb aliened without the King's Licence (his Wife being the King's Neif) to another, and for this Cauſe the Land was ſeiſed; whereupon the Alienee came into the *Chancery* and ſhewed all his Caſe which was found by the Office, and becauſe the whole Truth of the Caſe, *ſc.* The K's Neif, married by his Licence; 2. The Deſcent to the Neif after the Coverture appeared in the Office; it was awarded, that for this Cauſe the Huſband might hold by the *(a)* Courteſie, and by his Alienation put the Wife to her Action, and thereupon by Award the Alienee had Reſtitution: By which Caſe it appears; firſt that the Woman being married by the K's Licence, is enfranched *(b)* at leaſt during the Coverture, for if ſhe ſhould remain Neif, then the Huſb. ſhould not be Tenant by the Courteſie; for when the K's Title, and the Title of a Subject concur in the Beginning, the K's Title ſhall be *(c)* preferred, as *Weſton* holds, *Plow. Com.* 263. *b.* 2. That when the whole Truth of the Caſe appears in the Office, that there was *Monſtrance de droit* at the Common Law: So if Land was conveyed to the King upon Condition,

2 Cro. 186. 1 Roll. Rep. 95.

(a) 1 Leon. 47. Co. Lit. 30. b. Goldsb. 29.

(b) Co. Lit. 30. b. 136. b. 137. b. Doct. & Stud. 140. a.

(c) Co. Lit. 30. b. 9 Co. 129. b. Hard. 24.

dition, if the Performance of the Condition be of Record, as if the Condition be to levy a Fine of other Land to the King, or to make a Recogniſance to the King in any Court of Record, or other like Conditions which are to be performed of Record; he who has performed the Condition may have his *Monſtrans de droit* at the Common Law, for his Title appears of Record, and there is no Record which abſolutely entitles the King: But if the Performance of the Condition be not on Record, then if the Performance of the Condition be found by Office, he ſhall have *Monſtrans de droit* by the Common Law, *vide Plow. Com.* 229. But in the ſame Caſe, if the Office finds only Title for the King, and omits the Right or Title of the Party, altho' all the Words of the Office are true, yet by the Common Law he can't have *Monſtrans de droit*, but for the Reaſon aforeſaid he was put to his Petition, and therewith agrees *Piers Partifield*'s Caſe in 29 *Aſſ. p.* 31. it was found by Force of a Writ of *Diem clauſit extremum*, that one held certain Lands of the King in *London* and died ſeiſed without Heir, wherefore the King gave the Lands by his Letters Patents to *Piers Partifield* for his Life, who ſued a Writ to the Mayor of *London* to put him in Seiſin, and thereupon nothing was done, for which Cauſe he ſued *Sicut alias, vel Cauſam nobis ſignifices*, upon which Writ the Mayor returned, That the K's ſame Tenant, by his Will in Writing and enrolled before the Mayor, deviſed the Land to his Wife for Life, and that ſhe or her Executors ſhould ſell the Reverſion for his Soul, and that the Wife and *John Digle* her now Husband were in by the ſaid Deviſe, wherefore he could not make Livery; and afterwards *P. Partifield* by Force of the K's Patent entred; whereupon *John Digle* and his Wife ſued a *Scire facias* againſt *Piers P.* if he could ſay any Thing wherefore they ſhould not be reſtored. *Piers P.* demanded Judgment of the Writ for 2 Reaſons: Firſt, Becauſe he held but for Life, the Reverſion to the King, in which Caſe Suit ſhould be made againſt the K. 2. Since an Office was found for the King he ſhou'd not have this Suit before that upon his Petition an Office is found as it ought to be intended for him, and ſo before he is admitted to ſhew his Right, he ought to have his Right as well found by Office, as the K's Title was found by Office, for that is *æquale jus*: To which it was anſwered: 1. That ſince they were ſeiſed of the Freehold, that they were not to be ouſted without Suit. 2. That againſt the King Petition could not be ſued, becauſe *Piers* was Tenant of the Freehold. 3. That this Matter returned by the Mayor, *&c.* ſhou'd ſerve for an Office, but for the Office the Reverſe of her Matter was not found; which is as much as to ſay, That the whole Matter found by the Office was true, *ſcil.* that the Tenant held the Land of the K. and died without Heir, and by the ſaid Deviſe it was confeſs'd and avoided. And to decide theſe Queſt.

all

2 Rolls 215. Hard. 13.

Br. Livery, &c. 42. Br. Office Antea, &c. 19.

all the Juſtices of *England* were aſſembled in the *Chancery*; And by the Award *of all the Juſtices* the Writ was abated, becauſe no Office was found for *John Digle* and his Wife, and they were directed to ſue to the K. (*ſc.* by Petition) for an Office which might ſerve them. Out of which Award of all the Juſtices I obſerve theſe Things: Firſt, that at Common Law when by Office the King was ſeiſed of an Eſtate of Freehold, altho' all the Points of the Office were true, yet the Party grieved was put to his Petition in Nature of his real Action, unleſs his Title was found by the Office. 2. That a Petition lies to the K. altho' he has departed with the Freehold. 3. That foraſmuch as the K's Title is found by Enqueſt of Office upon Oath, the Title of the Subject ought to appear by Record of as high Nature, *ſc.* by like Enqueſt of Office upon Oath, and not by the Return of the Mayor, which altho' it is of Record, yet it is not of ſo high and great Regard in Law as the Office found by Oath: So *Nota*, Judicial Records, as Attainders and Judgments, are preferred before Miniſterial Records, as Inquiſitions, and Offices before Eſcheators, and they alſo being found in Courſe of lawful Proceeding by Oath before Returns, or Conveyances of Record, as hereafter more fully appears to you in this Caſe. And in 30 *Aſſ. pl.* 28. by *Diem clauſit extremum* it was found, that *J.* held of the K. and that *M.* was his Daughter and Heir, who was of full Age and had Livery; And by another Office it was found, that the ſame *J.* had another Daughter *K.* who was yet within Age, by which a *Scire facias* iſſued againſt the ſaid *M.* and her Huſband, *&c.* who ſaid, That the Land was given to *J.* and to his firſt Wife, Mother of *M.* in Tail, and that *K.* was the Iſſue of another Wife, and ſo *M.* ſole Heir. But by Award of the whole Council (*ſc.* the Juſtices, who are as to Adminiſtration of Juſt. called in Law the Council) all the Land was ſeiſed into the K's Hands, becauſe the Tail was not found by any Office, but only that *M.* was general Heir, ſo at the Common Law, if the King by falſe Office was poſſeſſed of the Cuſtody or Intereſt in any Land by Reaſon of Ward, or Ideocy, or Alienation without Licence, or the like; in ſuch Caſes, altho' the King was not entitled to a Freehold, but to a Chattel real, and by falſe Office only, yet the Party grieved could not have a Traverſe, and thereupon to have *Amov' manum*, but was put to his Petition by the Com. Law; and therewith agrees the Book in 17 *E.* 3. 11. *a. b.* But yet as well a Traverſe as a *Monſtr' de droit* was at the Com. Law, as well concerning Freeh. and Inheritance, as Chattels real, for in all Caſes when by the Office Land is not in the K's Hands, nor the K. thereby

Stamf. prer. 83. b. Br. Office Antea 21. Br. reſeiſer pro Rege 25. Br. Scire fac' 220. Co. Lit. 77. b. Poſtea 56. b.

Co. Lit. 77. b.

thereby in Poſſeſſion, but the K. by the Office is only entitled to an Action, and can't make a Seiſure without Suit, there in a *Scire facias* brought by the King in the Nature of ſuch Action to which he is entitled, the Party may upon the ſaid *Scire facias* appear, and traverſe the Office at the Common Law, for the Party is in Poſſeſſion, and upon the Matter found for him ſhall not have any *Amoveas manum*, becauſe by the Office nothing was in the K's Hands, but the K. ſhall be barred of his Action. And therefore if it is found by Office that the King's Tenant has (*a*) ceaſed for two Years; or that the K's Tenant for Life, or Years has committed Waſte, or that his Tenant by Knight's Service has made a Feoffment by Colluſion, in theſe Caſes the King is put to his *Scire facias* againſt the Tenant, and in all theſe Caſes the Tenant in the *Scire facias* might traverſe the Ceſſer, Waſte and Colluſion at the Common Law, and therewith agree the Books in 14 (*b*) *H.* 7. 23. *a.* & 25. *a.* (*c*) 15 *H.* 7. 6. *b.* & 12 *H.* 7. 21. *b.* it appears alſo by a Book before any Statute made which gives Traverſe, or *Monſtrans de droit*, (*d*) 30 *Aſſ.* 28. 32 *E.* 3. *Scire facias* 106. 32 *E.* 3. *Fitz. Traverſe* 38 (*e*) 50 *Aſſ.* 2. It was found by Office that *W.* the K's Tenant *in Capite* died, and that the Tenancy deſcended to *R.* his Son and Heir who is a Fool and Ideot from his Birth, and that *N.* was Terre-Tenant, againſt whom a *Scire facias* iſſued, if he could ſay any Thing that the Land ſhould not be ſeiſed into the King's Hands, who came and pleaded that this *R.* after the Death of *W.* releaſed to one *F.* then Tenant, all the Right, *&c.* who enfeoffed him, at which Time *R.* was of good Memory; and traverſed the Point of the Office *ſcil.* without that, that *Richard* was a Fool from his Birth, for it would be in vain to award a *Scire facias* to know if he can ſay any Thing, *&c.* and when he comes that he ſhou'd plead nothing: But if the Office finds no other in Poſſeſſion but the Ideot, thereby the K. is in Poſſeſſion, then he who in Truth was Terre-Tenant and is ouſted by the Office, can't traverſe the Office to have *Amoveas manum*, becauſe it doth not appear by the Office, that he was Tenant at the Time of the Office, but is put to his Petition: But foraſmuch as in Caſe when the K. was in Poſſeſſion by the Office, or might ſeiſe without Suit, there the Party was put to his Petition, which Suit was tedious, and of great Delay and Charges to the Party grieved, for his Relief was the Stat. of (*f*) 34 *E.* 3. *cap.* 14. made, by which it is enacted, That where Lands or Tenements are ſeiſed into the K's Hands by Office of the Eſcheator, containing that the K's Tenant made thereof Alienation without the K's Licence, *&c.* Out of which Words divers things are to be obſerv. 1. where it is ſaid, where Lands or Tenem. are ſeiſed into the K's Hands, *&c.* it thereby appears that the Miſchief was, where the Lands or Tenem. were ſeiſed into the K's Hands by the Office, for it was not any Miſchief as has been ſaid, where the K. was entit. but to the Action, for there was traverſe at the Com. Law. 2. That this Act ex-

Vaugh. 62.

(*a*) Kelw. 33. a. b. 200. b. 9 Co. 96. b. Stamf. prær. 55. a. b. 3 Co. 11. a.

(*b*) Br. Scire fac' 122. Stamf. prær. 55. a.
(*c*) Stamf. prær. 55. b. 9 Co. 95. b. 96. b.
(*d*) Stamf. prær. 83. b. Antea 56. a. Br. Office Antea 21. Br. reſeiſer pro Rege 25. Br. Scire fac' 220. Co. Lit. 77. b.
(*e*) Br. Alienat. 14. Br. Ideot 2. Br. traverſe de Office 22. Br. Office devant 24. Poſtea 126. b. Br. Feoffment de &c. 63.

(*f*) Kelw. 178. pl. 11. 4 E. 4. 21. b. Br. Petition 28. Br. Traverſe 33. Fitz. Traverſe 5. 3 Cro. 523. Stamf. Prær. 61. Moor 659.

only where the King was entitled by Office only, for the Words are, *ſeiſed into the King's Hands by Office of the Eſcheator.* 3. That this Act extends only to to the Caſe of Alienation without Licence, and to the Caſe of Ward. But three Things were grievous to the People which were not remedied by this Act. 1. That no Office was within the Purview of this Act, but only Office found *virtute brevis*, or *commiſſionis*; for the Words are (taken by the King's Commandment) ſo that an Office found *virtute officii*, was out of this Act. 2. That the ſaid Act, as appears before, extends only to the ſaid two Caſes of Alienation, without Licence and Ward. 3. That the ſaid Act extends to a Traverſe only, and not to *Monſtrans de droit*, by which altho' on the Traverſe the Iſſue was found for the Plaintiff, yet the Judges could not proceed to Judgment without a Writ *de Procedendo ad judic'*, which were great and grievous Miſchiefs; for Remedy of which another Stat. was made, *anno 36 E. 3. cap. 13.* for the grievous Complaints which the King had heard from his People of his Eſcheators, *&c.* He willed and ordained, with the Aſſent aforeſaid, That Lands ſeiſed into the King's Hands for Cauſe of Ward, be ſafely kept without Waſte, *&c.* So of other Lands ſeiſed into the King's Hands by Enqueſt of Office taken before Eſcheators, which Words are general. 1. As to the Matter, for they are not reſtrain'd to the two Things, *ſc.* Alienation without Licence, and Ward mention'd in the former Act. 2. As to the Office, for they extend as well to Offices found *virtute brevis, ſive commiſſionis*, to which only the former Act extended, as to Offices found *virtute officii.* And as to the great Objection which was made, that foraſmuch as the Words of the Act are, that the Eſcheator ſhall ſend the Enqueſt into the *Chancery* within the Month, *&c.* that it ought to be intended of an Office found *virtute brevis, ſive commiſſionis*, becauſe no Office found before the Eſcheator *virtute officii*, could by the Law be return'd into the Chancery, but only into the Exchequer, as it is ſaid in 4 *E.* 4. 24. *a. & Stamf. Prærog.* 70. *b.* To that it was anſwer'd and reſolv'd, upon ſhewing of infinite Precedents in all Ages, that ſuch Offices had been return'd by the Eſcheator as well into the *Chancery*, (*a*) as into the Exchequer, and the Eſcheator had Election to return it into which of the Courts he would, for he is Attendant to both Courts, and both are the King's Courts: Then the Statute goes further, *and be heard without Delay to traverſe the Office*, (which Words, as to the Matter and Manner of the Office, are general, ſo that by theſe Branches, the two firſt of the ſaid Defects were remedied) *or otherwiſe to ſhew his Right, &c.* by which the *Monſt' de droit* was given to make a final Diſcuſion without attending other Commandment, by which Words they ſhall proceed to Judgment without any *Procedendo*; and ſo all the ſaid Miſchiefs were remedied. But it was reſolved, that this Act doth not extend to any judicial Record, as Attainder, or Recovery, but only when nothing

Kelw. 178. 3 Cr. 523. 2 Rolls Rep. 351.

(*a*) 1 Co. 42. b. 52. b. Moor 416. 4 Inſt. 225. Kelw. 173. a. Ley de Gards 8. Liveries 25.

(*b*) Hard. 141.

nothing appears of Record for the King but only the Office; and therein the Makers of the Act had great Reason, for in Case of Attainder and Office, the King is entitled by (*a*) double Matter of Record, wherefore the Party griev'd ought to avoid it by double Matter of Record, and not by single Traverse, or *Monstrans de droit*; for it was said, *Nihil tam* (*b*) *conveniens est naturali æquitati, unumquodq; dissolvi eo ligamine quo ligatum est*, and therefore he shall be put to his Petition, upon which he shall have an Office found containing his Title of Record, which is requir'd by the Justice of the Law, because the King's Title commences by Record, and thereupon the Party griev'd shall traverse the King's Title found by the Office, or shew his Right, and confess and avoid it; and if upon the Traverse, or *Monst' de droit'*, it is found for him, or the King's Attorney confesses it, * then he shall have *Amov' man'*, for he has answer'd and satisfied double Matter of Record with double Matter of Record; *Vide* 11 *H.* 4. 52. *b.* Another Reason was, when the King is in by Force of a Title by judicial Matter of Record, as by Attainder or Recovery there, for the Estimation and Credit which the Law gives to judicial Records, the Party is put to his Petition: These Resolutions of the Justices in this Case agree with our Books. 1. That the Statute of (*d*) 36 *E.* 3. extends to other Cases, than to the Case of Alienation without Licence and Ward, which are mention'd in the Act of (*e*) 34 *E.* 3. there are divers Cases agreed in our Books; and therefore 43 *Ass.* 28. it was found by Office return'd into Chancery, that one *W.* of (*f*) *Herlington*, who was seised of certain Lands in the County of *York*, was aiding to *Guilbert de M.* who was the King's Enemy, whereby the Lands were seised into the King's Hands, and thereupon came *W.* into Chancery, and traversed the Office, and it was found for him, and he had Restitution by Judgment of the Court, which Special Case is not mention'd in the Act of 34 *E.* 3. but is included within the general Words of 36 *E.* 3. *Cave Lector*, for at this Day, altho' a Man is aiding to the King's Enemies, or is kill'd in open Rebellion against the King, he shall not (*g*) forfeit his Lands nor his Goods; but if the Chief Justice of the King's Bench (who is supream (*h*) Coroner of all *England*) in Person upon the View of the Body of him kill'd in open Rebellion makes a Record of it and returns it into the King's Bench, he shall forfeit his Lands and Goods, as it was done and resolv'd in the Time of *H.* 7. by *Fineux*, C. J. *Vide* 8 *E.* 3. 38. 7 *H.* 4. 47. and in 2 *H.* 4. (*i*) 10. *b.* Sir *Tho. Talbot's* Case: The Possessions of a Prior alien were seised into the King's Hands for certain Cause, and afterwards the King made Livery thereof, *&c.* and after Livery, the King by Writ out of the Chancery had taken them again into his Hands by this Word *resumpsimus*, and committed them to one *Tutbury*; and now came the Executors of the said Sir *Thomas*,

(*a*) Hard. 81.

(*b*) 5 Co. 26. a. 1 Brownl. 191. 2 Co. 53. a. 6 Co. 43. b. 2 Inst. 359, 573. Dav. 33. b. 5 Co. 111. a.

* Lane 58.

(*c*) Fitz Petit. 17. Br. Petit. 10. Br. Nonsuit 12.

(*d*) 36 E. 3. c. 13. Antea 57. a.

(*e*) 34 E. 3. c. 14. Antea 56. b. Kelw. 178. pl. 11.

(*f*) Br. Office. Antea 23.

(*g*) 3 Inst. 12. Hales 17. 1 Inst. 390. 22 R. 2. nu. 9. Cott. Rec. 378. Stamf. Cor. 189. a. Plowd. 262. a. 263. a. 3 Inst. 12. 22 R. 2. nu. 27. Cott. Rec. 381.

(*h*) 4 Inst. 73. 17 E. 3. 13. a. 2 Sid. 101.

(*i*) Fitz Petit. 13. Br. Petit. 4. Br. Sci. fac. 55. Br. Traverse de Office 5.

mas, who had a Term for Years in the ſaid Poſſeſſions, and in the Chancery exhibited their Traverſe, and had a *Scire facias* againſt the ſaid *Tutbury*, and there *Skrene* for the Def. demanded Judgment of the Writ, for where the King ſeiſes for Cauſe, a Man may have a Traverſe to the Cauſe, and anſwer to it by the Statute, meaning the ſaid Act of 36 *E.* 3. for this Caſe of Prior Alien was not within the ſaid Act of 34 *E.* 3. But where the King ſeiſes into his Hands, and determines no Cauſe wherefore in certain, he ought to ſue to the King by Petition, *quod fuit conceſſum* by the Juſtices aſſembled together for this Purpoſe in the Chancery. *Nota* Reader, it thereby appears, That a Termor may have a Traverſe in that Caſe by the Statute of 36 *E.* 3. But it was objected, that neither the Stat. of 34 (*a*) *E.* 3. nor the Stat. of 36 (*b*) *E.* 3. extended to the Caſe at Bar, becauſe in this Caſe the King was intitled to the Freehold and Inheritance, and the ſaid Acts give Remedy only when the King is entitled to a Chattel, as Ward or Alienation without Licence, *&c.* To which it was anſwer'd and reſolv'd, that the Act of 36 *E.* 3. extends generally to Lands ſeiſed, *&c.* by Office, which is a beneficial Law made in Advancement and for Execution of Juſtice and Right, without grievous and tedious Delay, and therefore ſhall be taken as generally according to the Letter and Intent of the Act, and with this Reſolution in this Point agree the Books 13 *E.* (*c*) 4. 8. *a.* 4 *E.* 4. 22. *b.* Lord *Hungford*'s Caſe, 3 *H.* 7. 20. Lord *Greiſtock*'s Caſe. 49 *E.* 3. 16. *a. b. Iſabel* (*d*) *Goodcheap*'s Caſe, & 10 19 *R.* 2. *Travers* 37. and ſo the *Quære in Stamf. Prærog'* 61. well reſolved; and the Book in 8 *H.* 5. *Traverſe* 47. is to be intended at the Common Law before the ſaid Act: It was alſo reſolved, that when the King's Tenant ſeiſed of Lands in Fee dies without Heir, that the Fee (*e*) and Freehold is immediately after his Death, and before Office found thereof, caſt upon the King; for in ſuch Caſe it ought to be in ſome Perſon, and if any Perſon enters into the Land and takes any of the Profits, an Information of Intruſion for the King may be preferred againſt him before Office or Seiſure; for the K. immediately by the Death is in actual Poſſeſſion, and has not only a Freehold in Law, as a common Perſon in ſuch Caſe has; and as to that, this Difference was taken and agreed; when the King's Tenant dies in Poſſeſſion without Heir, ſo that in ſuch Caſe *poſſeſſio eſt vacua*, and in Nobody, there the Law will adjudge the K. (in whom no Lacheſs ſhall be reckon'd) in actual Poſſeſ. immediately; but when another is in Seiſin and Poſſeſ. at the Time of the Eſcheat, ſo that *poſſeſſ plena eſt* (*f*) *& non vac'*, there the K. ſhall not be adjudg'd in Poſſeſſ. till this Seiſin and Poſſeſ. is remov. as if the K's Ten. is (*g*) diſſeiſed and dies without Heir; or if an Alien born or the K's Villain, or the Alienee in Mortm. is diſſeiſ. and all this is found by Office in theſe Caſes the K. ſhall not be in Poſſeſ. till the Poſſeſ. and Seiſin of the Terre-tenant is removed; but if Land deſcends to the K.

(*a*) 34 E. 3. c. 14
(*b*) 36 E. 3. c. 13.
(*c*) Br. Traverſe d' Office 38. Fitz Trav. 9.
(*d*) 2 Co. 53. a. b. 8 Co. 76. b. Lit. Rep. 123. Godb. 443. Cr. Eliz. 640.
Br. Eſcheat 32. Br. Deviſe 10. Fitz Deviſe 8. Plowd. 259. a. Raym. 83. Hard. 13, 14. Swinb. 335. 2 Roll. Rep. 351. 2 And. 113, 114.
(*e*) 3 Co. 10. b. 9 Co. 95. b. 96. a. Plowd. 229. b. 2 Rol. Rep. 321. Cr. Car. 173. Godb. 312. 1 Jones 71. 3 Leon. 187. 9 H. 7. 2. b. Br. Office Antea 17, 34. Br. Prerog. 91. Br. Eſch. 25, 33. Moor 293. Hard. 14.
(*f*) Hard. 14.
(*g*) Hard. 14.

after the Death of his Father, or any other collateral Ancestor, the King shall be immediately in Possession before Entry or Seisure: So if the King makes a Lease for Life, or a Gift in Tail, and the Lessee dies, or the Donee dies without Issue, in this Case the Possession shall be actually in the King, without any Entry or Seisure, and therewith agrees (*a*) 9 *H.* 7. 2. *b.* and there it is expresly said, That when no Man is in Possession, it shall be adjudg'd in the King, according to his Title; and so the Doubt which *Stamford* makes, *Prærog.* 53. *b.* well resolv'd: But it was hereupon strongly urg'd by one of the Justices, that in the principal Case the Company of Sadlers should be put to their Petition, for inasmuch as immediately after *Cox* was dead without Heir, the Possession was actually in the Queen; then before Office found they were put to their Petition, for the Act of 36 *E.* 3. extends only in Case where an Office is found, for that is the Record traversable by the Statute; and therefore he said, If a Disseisor conveys the Land to the King, in that Case the Disseisee was put to his Petition by the Common Law, and therewith agree 22 *E.* 3. 5. 24 *E.* 3. 23. 4 *E.* 4. 22. and that is not remedied by the said Act; for altho' the King is entitled by a Record, yet it is not a Record traversable by the said Act: So he said when *Richard* Duke of *York*, Father of King *Edw.* 4. disseised one and died seised, and it descended to King *Edw.* 4. now the Disseisee was put to his Petition; and therefore, altho' the Descent was afterwards found by Office, and altho' the King was entitled by Office, and single Matter of Record only, yet he was put to his Petition, and was not remedied by the said Act, as appears in 9 *E.* * 4. 51. *b.* 2. It was objected, That the Statute of 36 *E.* 3. *cap.* 13. extends only in Case where one is put out of Possession by the Office, as *Stamf.* conceives, *Prærog.* 61. *a.* But in this Case the Company of Sadlers was not put out of Possession by the Office, but by the Disseisin made by *Cox* to them, and therefore this Case was not remedied by the said Act. But as to that it was answer'd and resolved, That it is a Maxim in Law, that when one common Person against another common Person is put to his real Action, in such Case he shall be put to his Petition. (*b*) which is in lieu of his real Action, against the King. *Vide* 7 *H.* 4. 33. 9 *H.* 4. 5. and therefore there is a great Difference between the Cases which have been put, and the Case at Bar; For 1. as to the said Case were Land descends to the King from his Ancestor, by this Descent the Entry of the Disseisee is toll'd, if it was in the Case of a common Person, and therefore in the Case of the King he shall be put to his Petition: But in Case of Escheat, when a Disseisor dies without Heir, if it was in the Case of a common Person, the Entry of the Disseisee was not toll'd, but he might enter upon the Lord by Escheat; and altho' it should be admitted, that in the Case at Bar, the Company of Sadlers could not have their

Monstrans

(*a*) 3 Co. 10. b. 9 Co. 95. b. 96. a. Br. Offices Antea 34. Br. Prærog. 91. Br. Esch. 25, 33. Plowd. 229. b. Moor 393. 3 Leon. 187.

* 7 Co. 11. a. Calvin's Case.

(*b*) 2 Co. 53. a. Plowd. 489. 2 And. 112.

Monſtrans de droit before Office found, and that it ſhould remain at the Common Law not remedied by the ſaid Act of 36 *E.* 3. yet when Office is found, it has Relation to the Time of the Death of the Tenant without Heir, and now the Statute of 36 *E.* 3. extends to it; and if it ſhould be alſo admitted, That the Caſe when a Diſſeiſor conveys Land to the King, that that remains not remedied by the ſaid Act of 36 *E.* 3. becauſe there is no Writ traverſable by the Act in ſuch Caſe; yet foraſmuch as in the Caſe at Bar, Office is found, and that the Record is traverſable, the Party griev'd by the Purview of the ſaid Act ſhall have *Monſtrans de droit.* And as to the ſecond Objection it was reſolv'd, that the Stat. of 36 *E.* 3. extends to this Caſe, altho' the Party griev'd was not ouſted by the Office, for the Words are, *And if there be any Man that will make Claim or Challenge to the Lands, &c.* and that without Queſtion the Party griev'd does, for he makes Challenge and Claim to the Lands found by the Office; and the Statute does not ſay if the Party grieved be ouſted by the Office: And ſo the Doubt which *Stamford* conceived in this Point alſo well explain'd. And it was well urg'd, That the Stat. of 36 *E.* 3. has provided Remedy when the King by Office is entitled to Land, either by Purchaſe of his Villain, or of an Alien born, or by Alienation in Mortmain, or by any ſuch Title, which is Matter of Fact, or in *pais*, and the Office is the ſole Record which entitles the King, becauſe the Makers of the Act of 2 *E.* 6. have provided Remedy only when the King is entitled by double Matter of Record, as Attainder of Treaſon, Felony, and *Præmunire*, and Office: And it was ſaid, That if Traverſe and *Monſtrans de droit* had not been provided in the ſaid Caſes of the King's Villain, Alien born, Mortmain, *&c.* by the former Act, without doubt they for theſe Caſes alſo would have provided Remedy, becauſe theſe would be in as great Miſchief if the Party griev'd ſhould be put to his Petition, as where the King was entitled by double Matter of Record: But it was ſaid, if the King, Lord, Tenant in Tail, the Remainder over in Fee, Meſn and Tenant be, and the Meſn aliens the Meſnalty in Mortmain, or to the King's Villain, or to an Alien born, and upon Office thereof found, the King ſeiſes, Tenant in Tail dies, the Tenancy eſcheats, the Iſſue ſhall not have Traverſe nor *Monſtrans de droit*, for the Eſcheat is a Thing newly accru'd and dependant upon the Seigniory; and foraſmuch as the King had the Seigniory at the Time of the Eſcheat, of Neceſſity the Land ſhall eſcheat to him *quouſque, &c.* and he ſhall be put to his Petition in ſuch Caſe, *vide* 8 *H.* 4. 9. *vide Plowd. Com. Wimbiſhe's* Caſe. If a Tenancy eſcheat to a Woman who hath a Jointure, it is out of the Statute of 11 *H.* 7. And laſtly, a Judgment in the Point now lately given in the Exchequer was vouched, where the Caſe was, That by Office return'd into the Exchequer it was found, That *Jane*, Wife of *Theophilact Aden*, was

36 E. 3. cap. 13. 9 Co. 129. b.

Co. Lit. 77. b.

Plowd. 44. b. v. Bſt. 61. Inſt. 365.

was ſeiſed of certain Lands in Fee, and held them of the Queen, and dy'd without Heir, and one *Collins* and *Howſtead* came into the Exchequer, and by Way of *Monſtrans de droit* alledg'd, that one *Nicholas Reynolds* was ſeiſed of the ſaid Lands in Fee, and by his Will in Writing deviſed them to *Emme* his Wife in Fee, and dy'd; the Wife did thereof enfeoff *Collins* and *Howſtead*, by which they were ſeiſed 'till diſſeiſſed by the ſaid *Jane*, who dy'd without Heir, and ſo confeſſed and avoided the Office. And by the Rule of the Court, the Attorney-General anſwer'd thereunto, and maintain'd the Office, and traverſed the Deviſe, which was found againſt the Queen. Out of which Judgment I obſerve, That the Barons adjudg'd the ſaid Act of 36 *E.* 3. to be taken by Equity; for the ſaid Act ſpeaks only of Offices return'd into the Chancery, and the ſaid Office was return'd into the (*a*) Exchequer, which, without Queſtion, was within the Intent and Meaning of the Act, *Vide Stamf. Prærog.* 70. And in this Caſe, this Difference as to Petition, Traverſe, and *Monſtrans de droit* was reſolved; In all Caſes at the Common Law, when the King's Title accrues to him by a Judicial Record, or as *Gaſcoigne*, 9 *H.* 4. ſays, by Judgment of Record, there altho' the King grants all his Eſtate over, yet the Party griev'd was put to his Petition, and ſhould have *Scire facias* againſt the Patentee, as in Caſe of Attainder, Recovery, *&c.* 44 *E.* 3. 22. 10 *H.* 6. 15. 21 *H.* 7. 2. 3 *Mar.* 139. 7 *H.* 4. 21. But where the King was entitled by Conveyance of Record, as if a Diſſeiſor convey'd the Land to the King by Fine, Deed enroll'd, or other Matter of Record, there altho' the Party was put to his Petition againſt the King; yet if he granted the Land over, the Diſſeiſee, or he who had Right, might (*b*) enter, or have his Action againſt the Patentee; for a Judicial Record is preferr'd always before a Conveyance of Record by Aſſent, as has been ſaid; *vide* 9 *H.* 4. 4. by *Gaſcoigne* the ſame Difference, 25 *E.* 3. 48. *a.* *Plowd. Com.* 553. 22 *E.* 3. 7. 11 *H.* 4. 67. 7 *R.* 2. (*c*) *Aide del Roy* 61. by which Books, if they are well conſider'd, this Difference appears. Alſo in all Caſes, when the Party grieved might have *Monſtrans de droit*, or traverſe againſt the King, there if the King granted over the Land, the Party griev'd might enter or have his Action againſt the Patentee, *Stamf. Prærog.* 75. *a. vide* 4 *E.* 4. 22. 3 *Mar. Dyer* 139.

Nota Reader, in Communi Banco inter Pemberton & Barham, Paſchæ 32 *Eliz. Rot.* 235. and in the King's Bench, *Hill.* 42 *Eliz.* in a Writ of Error, between *Bereblocke* and *Read*, it was reſolv'd, That if *A.* is bound in a Recogniſance, or Statute-Merchant, or Staple; and afterwards a Recovery is had againſt *A.* in an Action of Debt, and *A.* makes his Executors and dies, his Executors are bonnd by the Law to pay the Debt due upon the Recovery, altho' it be Puiſne, before the Debt due by

(*a*) Antea 57. a. Stamf. Prærog. 70. b. 1 Co. 42. b. 52. b. Moor 416. 4 Inſt. 225. Kelw. 173. a. Ley de Gards & Liveries 25.

(*b*) Kelw. 91. pl. 17. 2 And. 113, 114.

(*c*) 2 Co. 53. a. Co. Lit. 354. b.

5 Co. 29. a. 1 Roll. 926. Swinb. 369, 370. 2 And. 160. Yelv. 29. Cr. El. 734, 735, 822. 2 Brownl. 39, 81, 82. Co. Ent. 152. 3 Leon. 270.

Recognizance, or Statute, becauſe altho' both are Records, yet the Judgment in the King's Court upon judicial and ordinary Proceeding is more notorious and conſpicuous, and of more high and eminent Degree than a Statute or Recognizance taken in private, and by Conſent of the Parties, and therefore préferr'd in Judgment of Law before a Recognizance or Statute, which agrees with the Reaſon of the Reſolution in this Caſe: And I thought this Caſe neceſſary to be reported, for by this the Reader ſhall underſtand what was the Common Law before any Statute made concerning this Matter, and what Caſes are remedied by the ſaid Statutes of 34 & 36 *E.* 3. and hereby you will better apprehend the true Intention and Purview of the Statute of 2 *E.* 6. *cap.* 8. concerning theſe Matters.

6 Co. 45. b.

34 E. 3. cap. 14. 36 E. 3. cap. 13.

FORSE *and* HEMBLING's *Caſe.*

Mich. 30 & 31 Eliz.

In the Common Pleas.

1 And. 181, 182. Gould. 109, 110. Swinb. 439. Hard. 375. Palm. 384. Lane 74. 2 Rolls Rep. 372. 5 Co. 10. a. b. Fitzgib. 227.

FOrſe brought *Ejectione firmæ* againſt *Hembling* on a Demiſe made by *Thomas Calie* to the Plaintiff for three Years, of certain Houſes in *Norwich*, from the Feaſt of St. *Michael*, *anno* 29 *Eliz.* &c. To which the Defendant pleaded Not Guilty; and the Jury gave a Special Verdict, *ſc.* That one *Alice Allen* was ſeiſed of the ſaid Houſes in Fee, and made her Will in Writing, and thereby deviſed, that if *James Amynde* ſurviv'd her, that then ſhe deviſed and bequeath'd to him and his Heirs the Tenements in Queſtion, and afterwards ſhe intermarry'd with the ſaid *James Amynde*; and further found, that ſhe oftentimes after the Marriage, revoked the ſaid Will, ſaying, that the ſaid *James Amynde* ſhould not have the ſaid Tenements by the ſaid Will, and afterward the Wife dy'd ſeiſed without Iſſue, and the Huſband ſurvived, and thereof enfeoffed the Defendant, upon whom the ſaid *Thomas Calie* as Heir to the ſaid *Alice*, enter'd and made the Leaſe as in the Declaration, and pray'd the Advice of the Court. Upon which Verdict two Queſtions were moved. 1. If the Will of a Woman by the Intermarriage with the Deviſee was countermanded, or not. 2. If it was not countermanded by the Intermarriage, if by her Words of Revocation after the Marriage it was countermanded. And it was objected by the Huſband's Counſel. 1. That if a Feme ſole make her Will, and deviſes her Land to *A.* and afterwards marries *B.* and afterwards *B.* dies, and the Wife ſurvives him, in that Caſe it was ſaid that the Will remains good, and was not countermanded by the Marriage, as *Manwood* ſaid in *Plow. Com.* 343. and was not deny'd; but if it was admitted that the Will in ſuch Caſe was countermanded by the Marriage with a Stranger; yet in the Caſe at Bar for the Benefit of the Huſb being the Deviſee, the Will ſhall not be countermand. and therefore it is adjudg'd in 2 (*a*) *R.* 2. *Attorn-*

(*a*) Goldſb. 109, 110. Bridgm. 83.

ment 8. That where a Feme ſole makes a Leaſe for Life rendring Rent, and afterwards by her Deed grants the Reverſion to anoth. and afterwards and before Attornment marries with the Grantee, that this Marriage was not a Countermand (*a*) of the Attornment, as if ſhe had marry'd with a Stranger, for it is for the Benefit of the Huſband that it ſhall not be a Countermand, and therefore there by the Payment of the Rent by the Tenant to the Huſband in the Name of Attornment, the Reverſion paſs'd out of the Wife to the Huſband; for the ſame Reaſon which proves that the Intermarriage with a Stranger ſhall be a Countermand of the Attornment for the Benefit of the Huſb. proves that when the Grantor marries with the Grantee, that it ſhall not be a Countermand, for that ſhall be for the Benefit of the Huſb. And ſo in the princip. Caſe it is for the Benefit of the Huſb. that the Will by the Marriage ſhall not be countermanded, but ſhall take Effect according to the Purport thereof: And it was ſaid, That the Caſe of a Will when the Woman marries with a Stranger is not like the Caſe of Attornment when the Grantor marries with a Stranger; for the Will of a Woman can't take any Effect during her (Huſband's) Life, but only after (her) his Death, and can by no Poſſibility be any Prejudice to the Huſband: For if he has Iſſue he ſhall be Tenant by the Courteſie, and he may take the Profit thereof during the Coverture, or diſpoſe of them at his Pleaſure to all Intents and Purpoſes, as if no Will had been made. 2. To ſay as it is ſaid in 3 *E.* 3. *Deviſe* 12. that the Will (*b*) of a Feme Covert is void, becauſe the Law preſumes that it was made by Coherſion of the Huſband that can't be ſo intended in this Caſe, foraſmuch as in the Caſe of 3 *E.* 3. the Will was made by a Woman when ſhe was Covert, which can't be made good by any Cuſtom: But here in our Caſe the Woman was ſole, and free from all Conſtraint at the Time of the making of her Will. 3. It was objected, that if the Will was not countermanded by the Intermarriage, without Queſtion it was not nor could be countermanded by the Woman's Words after the Marriage, for after Marriage the whole Will of the Wife is in Judgment of Law ſubject to the Will of the Huſband, and as is commonly ſaid, a Feme Covert has not any Will; and therefore if the Will ſtands notwithſtanding the Intermarriage, her Countermand afterwards is of no Force nor Effect, *quod fuit conceſſum per tot' Curiam* as to this Point: Further it was objected, That notwithſtanding that after the Marriage the Wife could not revoke her Will, ſo that now after the Marriage it is irrevocable, yet that is no Reaſon that the Intermarriage ſhould be a Countermand; for if a Man of ſound (*c*) Memory makes his Will, and afterwards becomes *non compos mentis*; in that Caſe until the Time of his Death, after that he became of nonſane Memory, he cannot countermand his Will, and yet the Diſability or Imperfection of nonſane Memory, was not any Countermand of it. 4. It was ſaid

(*a*) 1 And. 181. Co. Lit. 310. a. b. Goldſb. 110. 1 Ven. 186. 1 Roll. 299. Kelw. 163. a. Cr. El. 270. 1 Mod. Rep. 91. 11 H. 7. 19. b.

(*b*) Godb. 15. Mo. 123. Goldſb. 109, 110. Co. Lit. 112. b. Br. Dev. 34. vet. N. B. 86. b. 1 Sid. 17. Antea 51. b. 24 & 25 H. 8. cap. 5. Plowd. 344. a. Perk. Sect. 501, 502. Bl. Teſt. 9, 13, 21. Dy. 143. pl. 56, 354. pl. 34. 18 E. 4. 11. b. 12. a. Br. Conſc. 28. Swinb. 56, 57. 3 Leon. 81, 82, 83. 4 Leon. 143. Godb. 143, 144. 2 Brown. 218.

(*c*) 1 And. 181. Goldſb. 109.

that

that Countermands of Wills are not favour'd in Law; and therefore foraſmuch as there is no Book in Law in this Point, but the ſaid Caſe of Attornment adjudg'd is all one in Reaſon with this Caſe; for theſe Cauſes it was concluded, that Judgment ſhould be given againſt the Plaintiff: But it was upon great Deliberation adjudg'd for the Plaintiff. And in this Caſe it was unanimouſly agreed upon the whole Matter, *ſc.* By the taking of Huſband, and Coverture at the Time of her Death, the Will was (*a*) countermanded, and that for two Reaſons. 1. The making of a Will is but the Inception of it, and it doth not take any Effect 'till the Death of the Deviſor, for *omne* (*b*) *Teſtament' morte conſummat' eſt*; & (*c*) *voluntas eſt ambulatoria uſque extremum vitæ exitum:* Then it would be againſt the Nature of a Will to be ſo abſolute, (*d*) that he who makes it, being of good and perfect Memory, can't countermand it: and therefore this taking of Huſband being in the Caſe at Bar her proper Act, ſhall amount to a Countermand in Law. But when a Man of ſound Memory makes his Will, and afterwards, by the Viſitation of God, becomes of unſound Memory (as every Man for the moſt Part before his Death is) God forbid that this Act of God ſhould be in Law a Revocation of his Will, which he made when he was of good and perfect Memory. 2. It would be miſchievous to Women, that after their Intermarriages, they could not for no Cauſe countermand their Wills. 3. As the Law will not allow any Cuſtom, that a Feme Covert may make any Deviſe for the Preſumption that the Law has, that it will be made by Conſtraint of the Huſband, as it is adjudg'd in (*e*) 3 *E.* 3. So if it was in the Power of the Wife after her Marriage to revoke her Will, the Law would not ſuffer the Continuance thereof after Marriage, foraſmuch as the Huſband by Conſtraint may cauſe her againſt her Will to revoke or continue it. And as to the ſaid Caſe of (*f*) Attornment, it was ſaid in 2 *R.* 2. that when the Woman in the ſame Caſe by her Deed ſealed and deliver'd by her, granted the Reverſion to another, it took ſuch Effect againſt herſelf, that ſhe herſelf could not by any Words countermand it before or after the taking Huſband, and therefore it is not like the Caſe of a Will, and therefore it might well be, that inaſmuch as her Grant by Deed ſtood in Force after the taking of the Grantee to Huſband, that it ſhall not be any Countermand.

(*a*) 5 Co. 10. a. 1 Jones 388. 2 And. 181, 182.

(*b*) 3 Co. 29. b. 32. a. 34. a. 6 Co. 76. a.

(*c*) Co. Lit. 112. b.

(*d*) 1 And. 182. Goldſb. 110. 8 Co. 82. a. March Arbit. 165. Bacon's Max. reg. 19.

(*e*) 1 Sid. 17. Antea 61. a. 3 E. 3. Demiſe 12.

(*f*) 1 And. 181. Co. Lit. 310. a. b. Goldſb. 110. 1 Vent. 186. 1 Roll. 399. Kelw. 163. a. Cr. El. 270. 1 Mod. Rep. 91. Bridgm. 83. 11 H. 7. 19. b.

[See 2 *Cro.* 640. That the Wife's Receipt or Acquittal after Marriage, for the Rent of her own Land, ſhall be no Diſcharge againſt the Huſband, though the Tenant had no Notice of the Marriage.]

HER-

HERLAKENDEN's *Caſe.*

Paſch. 31 Eliz.

In the King's Bench.

RObert Ivy brought an Action of Treſpaſs againſt *Roger Herlakenden*, Eſq; for breaking of his Cloſe, *ſc.* 380 Acres Parcel of *Colme-Park* in *Colme* in the County of *Eſſex*, and 300 Oaks, 300 Aſhes, 300 Maples, and 100 Beeches there growing cutting, and 1000 Load of Wood and Underwood carrying away, *&c.* and the Defendant, as to the whole Treſpaſs, *præter fraction' clauſorum, necnon præter ſucciſion'* 200 *quercuum*, 10 *fraxinorum*, *&* 10 *acer' parcel*, *&c.* pleaded Not Guilty; *Et quoad fractionem clauſorum præd' ac herbæ prædict' pedibus ambulant' conculcat'*, *&* *conſumption'*; The Defendant pleaded the Matter in Law which follows, by which he entitled himſelf to the ſame Land, and juſtified the Cutting of the Trees, but in the *quoad*, *&c.* (as appears before) the Treſpaſs, as to the Trees, was utterly omitted, and ſo in Law nothing pleaded thereto; and then the Demurrer being join'd, the whole is diſcontinu'd, as it is agreed in 7 *H.* 6. 27. *a.* *Vide* 27 *H.* 8. 1. *&* *Dyer* 9 *Eliz.* 264. 7 *E.* 4. 24. *b.* *&* 10. 7 *H.* 6. 5. *a.* And therefore to the Intent the Matter in Law might appear, by Aſſent the Defendant's Plea was amended. For it was agreed, *per totam Curiam*, that all was (*a*) diſcontinued, and thereupon the Roll was amended: *Et quoad ſucciſionem arborum*, *&c.* was inſerted. And the Matter in Law in Effect, was ſuch, *Edward* Earl of *Oxford* was ſeiſed of *Colme-Park* in *Eſſex*, in Fee, and 17 *Eliz.* leaſed to *Tho. Barefoot*, *Tho. Luter* and *John Collins*, the ſaid Park (except the Trees in the Declaration mention'd) for 21 Years; *John Collins* aſſign'd his Intereſt to *Anthony Luter*, and afterwards the Earl ſold to the ſaid *Barefoot*, *Luter* and *Luter* the Trees aforeſaid, who 15 *Julii*, *anno* 26 *Eliz.* leaſed the ſaid 380 Acres

11 Co. 52. a. Carthew. 139.

(*a*) 1 Roll. 487, 488. 1 Roll. Rep. 176, 177. 11 Co. 7. a. 2 Bulſt. 335. 1 Brownl. 192. 228. Cr. Jac. 353. Yelv. 6.

Acres of Land and Paſture, Parcel of the Park aforeſaid (upon which the Trees aforeſaid grew) to one *John Bragge* for 11 Years; and afterwards in *Auguſt* 26 *Eliz. Barefoot*, *Luter* and *Luter* ſold the ſaid Trees to the Defendant; and afterwards, 27 *Eliz. Bragge* aſſigned his Intereſt to the Plaintiff, and afterwards the Defendant cut down the Trees, and if this cutting down was lawful or not, was the Queſtion. And the Point was, When a Man leaſes his Land for Years, excepting the Wood, and afterwards the Leſſor grants the Wood to the Leſſee, if now the Wood is ſo united again to the Land, that by the Leaſe of the Land the Wood ſhall paſs as a Thing annexed to it, or if the Wood remains as an Intereſt diſtinct and ſevered from the Land, ſo that by the Leaſe of the Land it ſhall not paſs to the Leſſee; and in this Caſe divers Points were reſolved: 1. When a Man makes a Leaſe for Life or Years, the Leſſee has but a ſpecial Intereſt or Property in the (*a*) Trees, being Timber, as Things annexed to the Land, ſo long as they are annexed to it: But if the Leſſee, or any other ſevers them from the Land, the Property and Intereſt of the Leſſee is thereby determined, and the Leſſor may take them as Things which were Parcel of his Inheritance, and in which the Intereſt of the Leſſee is determined. In an Action of Waſte for cutting down of Trees againſt Leſſee for Life or Years, the Writ ſaith *ad exhæredationem*, and it would be abſurd that the Leſſee, who has but a particular Intereſt in the Land, ſhould have an abſolute Property in any Thing which was Parcel of the Inheritance: At the Common Law, if Tenant in Dower, or Tenant by the Courteſy cut down Trees, he in Reverſion might take them, yet their Eſtate is as high as Leſſee for Life: But the Leſſor ſhould not have an Action of Waſte at the Common Law againſt the (*b*) Leſſee, becauſe it was his own Act, and it was his Folly to make a Leaſe to him who ought to do him Fealty, and yet will commit Waſte: It was alſo his (*c*) Folly, that in his Leaſe he would not provide by Condition or Covenant, that he ſhould not commit Waſte, or to prevent it by Exception. If I leaſe my Land for Life, (*d*) and afterwards give the Trees, and afterwards the Leſſee dies, yet the Donee can't take them, as it is held *per totam Curiam* in 21 *H.* 6. 46. *d.* becauſe at the Time of the Gift the Leſſee had the Property in them as annexed to the Land. And Sir *Chriſtopher Wray*, C. J. ſaid, a Caſe between *Moyle Finch*, Eſq; and Madam *Finch* his Mother, was now lately referred to him and Sir *Roger Manwood*, Chief Baron, which in Effect was, That Madam *Finch* had an Eſtate for Life in certain Land without Impeachment of Waſte, and the ſaid *M.* had the Inheritance expectant, Madam *Finch* cut down divers Trees growing upon the

See 11 Co. 57. *Liford's* Caſe.

(*a*) 5 Co. 76. b. 11 Co. 48. b. 81. b. Cro. Car. 242, 274. 2 Rol. 119. 1 Rol. Rep. 181. O. Benl. 113. Palm. 327. Mo. 19. 10 H. 7. 2. b.

(*b*) 5 Co. 13. b. 6 Co. 43. a. 11 Co. 81. b. Cro. El. 777. 2 Inſt. 299. Sta. Glouc. cap. 5. Dr. & Stud. 60. a.

(*c*) Dr. & Stud. 60. a.

(*d*) 11 Co. 47. a. 48. b. Cro. Car. 274. Mo. 9. Palm. 328. Br. Done & remainder 13. 1 Rol. Rep. 97.

the said Land: The Question was, if the said *Moyle* might lawfully take the said Trees, or if they of Right belong'd to his Mother; and upon Conference had with divers other Justices, they resolv'd: 1. That if the said Estate had been made for Life, without any such Clause of without Impeachment of Waste, that without Question the said *M.* should have the Trees, because they were Parcel of his Inheritance, and that the Interest which the Tenant for Life had in the Trees, was by the Severance from the Land determined, because she had them as Things annexed to the Land. 2. In the same Case it was resolved, That the said Clause of without (*a*) Impeachment of Waste gave the Tenant for Life no greater Interest in the Trees than she had by the Demise of the Land; but it should serve only that she should not be impeached in any Action of Waste, either to recover Damages, or the Place wasted; As if I grant to one that he shall not be impeached for cutting of all my Trees in such Woods, it shall excuse him in any Action brought against him for the Cutting, but notwithstanding that the Property and Interest remains in me, for no Property or Interest is thereby given him. So if a Man disseises me of my Land, or dispossesses me of my Goods, and I (*b*) release to him all Actions, yet I may enter into my Land, or take my Goods, for the Discharge of my Action is no Bar of my Right; and therewith agrees *Lit. cap. Releases* 115. and all this was said and reported by the said Sir *Chr. Wray. Vid.* 27 (*c*) *H.* 6. *Waste.* 8. where it is said, If a Man leases Land *absque impetitione vasti*, and a Stranger cuts down Trees, and the Lessee brings an Action of Trespass, he shall not recover Damages for the Value of the Trees, because the Property is to him in the Reversion, wherefore the Lessee shall recover but for the cropping and breaking of the Close: And it was said, That if Tenant in Tail, after Possibility of Issue extinct, fells the Trees, the Lessor shall have them; for inasmuch as he has but a particular Estate for Life in the Land, he can't have an absolute Interest in the Trees, but he shall not be punished in (*d*) Waste, because his original Estate is not within the Stat. of *Gloucester*, *cap.* 5. 2. It was resolv'd, that if the House falls by Tempest, (*e*) or other Act of God, the Lessee for Life, or Lessee for Years, has a Special Interest to take the Timber to build the House again if he will for his Habitation: But if the Lessee (*f*) pulls downs the House, the Lessor may take the Timber as a Thing which was Parcel of his Inheritance, and in which the Interest of the Lessee is determined, as in Case of Trees, and for the same Reason; and notwithstanding he may have an Action of Waste, and recover treble Damages: *Vide* 44 *E.* 3. 5, *&* 6, *&* 44. 29 *E.* 3. 42. 2 *H.* 7. 14. *per Brian.* 10 *H.* 7. 2. 13 *H.* 7. 9. 21 *E.* 4. 52. 1 *Mar. Dyer* 90. 2 *Eliz. Dy.* (184.) 194. 3. It was resolv'd, That if (*g*) Trees being

(*a*) 11 Co. 63. a. 82. b. 9 Co. 9. a. cont. Dyer 184. pl. 63. 1 Roll. Rep. 182, 183. 2 Rol. Rep. 325. 2 Roll. 835. Co. Lit. 220. Hob. 132. Latch. 269, 270. 2 Inst. 146. Moor 18, 317, 327. 2 Co. 23. a. 72. a. Poph. 193, 194. 195. Dyer 47. pl. 11. Bridgm. 102. Plowd. 135. b. Cro. Jac. 216. Hetl. 77.

(*b*) 8 Co. 152. a. Co. Lit. 286. a. b. Lit. Sect. 496.

(*c*) Dyer 184. pl. 63. 1 Rol. Rep. 183. 11 Co. 83. a. 4 Leon. 143. Poph. 194. Moor 321.

(*d*) 6 Co. 41. a. 9 Co. 139. a. 11 Co. 80. a. Co. Lit. 27. b. 1 Rol. Rep. 100, 179, 184. F. N. B. 59. P. 39 E. 3. 16. a. b. Dr. & Stud. lib. 2. cap. 7. Lit. Sect. 34. 12 H. 4. 3. b. 4. a. 10 H. 6. 1. b. 45 E. 3. 25. a. 18 E. 3. 32. b. 11 H. 4. 14. b. 15. a. 11 H. 6. 1. b. 2 Roll. 826, 828. West. Symb. 180. b. 2 Inst. 302, 306.

(*e*) 11 Co. 81. b. 82. a. 1 Rol. Rep. 181. Co. Lit. 53. b.

(*f*) Porter 81. a. (*g*) 11 Co. 81. b.

being Timber are blown down by the Wind, the (*a*) Leſſor ſhall have them (for they were Parcel of his Inheritance) and not the Tenant for Life or Tenant for Years: But if they be Dotards without any Timber in them, the Tenant for Life or Tenant for Years ſhall have them, *Vide* 40 *Aſſ.* 22. that Guardian (*b*) in Chivalry ſhall not have Windfals; and ſo the *Quære* in 7 *H.* 6. 38. well ſatisfied. 4. Point was, when the Earl leaſed the Land for Years, excepting the Trees, by which they were ſevered from the Poſſeſſion of the Land during the Term, then after the Leſſor granted the Trees to the Leſſee, if now they be re-united to the Poſſeſſion of the Land, ſo that when the Term ended the Leſſor ſhou'd have them again as Things annexed to the Land. And it was reſolved, That the Leſſee had in Judgment of Law an abſolute and divided Property in the Trees, (*c*) ſo that by the Leaſe of the Land they ſhou'd not paſs, and therefore this Difference was taken: If I enfeoff you of my Land (except the Trees) to have and to hold to you and your Heirs, now the Trees in Property are divided from the Land, altho' *in facto* they remain annexed to the Land, for if one cuts them down and carries them away it is not (*d*) Felony: And therefore in ſuch Caſe, if the Feoffor grants the Trees to the Feoffee, they are reunited as well in Property as they are *de facto*, and the Heir of the Feoffee ſhall have them, and not the Executors, for the Feoffee had abſolute Ownerſhip in both, ſo that it is not any Prejudice but rather a Benefit to him that they are reunited to the Land. But in the Caſe at Bar he had but a Term for Years in the Land, ſo that he had not Equality in Ownerſhip in both, and it wou'd be a Prejudice to him, that during the Term he could not fell them, but ſhou'd be puniſhed in Waſte, and after the Term ſhou'd loſe them, and it wou'd be (*e*) againſt Reaſon that the Leſſor ſhou'd againſt his own Grant have them again. It was alſo ſaid, That *Barefoot*, *Luter* and *Luter* were Tenants in Common of the Land, and they were Joint-tenants of the Trees, and ſo their Intereſt divers and of ſeveral Qualities, therefore there could not be an Union between them. *Nich. Fuller* and *Tanfield* were of Council with the Pl. and *Egerton* the Q's Sollicitor and *Coke* with the Def.

Nota Reader, *Mich.* 18 & 19 *Devon*'; It was adjudged in *C. B.* that Waſte might be committed in (*f*) Glaſs annexed to Windows, for it is Parcel of the Houſe, and ſhall deſcend as Parcel of the Inheritance to the Heir, and that the Executors ſhould not have them; And altho' the Leſſee himſelf at his own Coſts put the Glaſs in the Windows, yet it being once Parcel of the Houſe he could not take it away, or waſte it, but he ſhould be puniſhed in Waſte; And upon the ſaid Judgment a Writ of Error was brought in *B. R.* and there the Judgm. was affirmed. *Nota* alſo, *inter Warner & Fleetwood*, *Mich.* 41 & 42 *Eliz. in C. B.* it was reſolved *per totam Curiam*; that Glaſs

(*a*) 11 Co. 81. b. Moor 317.

(*b*) Ley 74.

(*c*) Goldſb. 188. 11 Co. 50. a. Owen. 49. Cro. Jac. 458, 459. Cro. El. 522. 1 Rol. Rep. 101.

(*d*) 2 Brownl. 196.

(*e*) Hob. 173.

(*f*) Moor 178. Swinb. 132, 345. Co. Lit. 53. a.

Glaſs annexed to Windows by Nails, or in other Manner, by the Leſſor or by the Leſſee, could not be removed by the Leſſee, for without Glaſs it is no perfect Houſe; and by Leaſe or Grant of the Houſe it ſhould paſs as Parcel thereof, and that the Heir ſhould have it, and not the Executors; and peradventure great Part of the Coſts of the Houſe conſiſts of Glaſs which if they be open to Tempeſts and Rain, Waſte and Putrefaction of the Timber of the Houſe would follow, which agrees with the Judgments given before. It was likewiſe then reſolved, That Wainſcot, be it annexed to the Houſe by the Leſſor or by the Leſſee, is Parcel of the Houſe; and there is no Difference in Law if it be faſten'd by great Nails or little Nails, or by Screws, or Irons put through the Poſts or Walls (as have been invented of late Time;) but if the Wainſcot is by any of the ſaid Ways, or by any other, faſtned to the Poſts or Walls of the Houſe, the Leſſee cannot remove it, but he is puniſhable in an Action of Waſte, for it is Parcel of the Houſe; and ſo by the Leaſe or Grant of the Houſe, (in the ſame Manner as the Ceiling and Plaiſtering of the Houſe) it ſhall paſs as Parcel of it.

Co. Lit. 53. a. 1 Rol. Rep. 216. Swinb. 346, 132. Owen 70, 71. 20 H. 7. 13. b. Moor 177, 178.

FUL-

FULWOOD's *Caſe.*

Hill. 33 Eliz.

In the King's Bench.

See Cumb. 78. 3 Caſes in Law and Equity 289. Lucas 289.

BEtween *Cartwright*, Plaintiff, and *Roberts*, Defendant, in *Ejectione firmæ* of Houſes in *London*, upon a Demiſe made by *Sarah Sharington*, *&c.* Upon Not Guilty pleaded, the Jury gave a Special Verdict to this Effect: *T. Caſtle* was ſeiſed of the Houſes aforeſaid, and *primo Eliz.* took a Wife, and afterwards 1 *Eliz.* before the Mayor and Aldermen of *London*, acknowledged a Recognizance of 250 *l.* to the Chamberlain of the City of *London*, and his Succeſſors, according to the Cuſtom for Orphanage Money; and afterwards, *ſc.* 8 *El.* the ſaid *Caſtle* came before the Recorder of *London* and Mayor of the Staple, and acknowledged *ſe debere* 200 *l.* to Sir *Thomas Rivet*; and afterwards *anno* 10 *El.* Sir *Thomas Rivet* ſued Execution upon the ſaid Stat. and had a *Liberate*; upon which the Sheriff delivered the ſaid Houſes, amongſt others, to the ſaid Sir *Thomas* (but it did not appear that the *Liberate* was returned:) And afterwards the Succeſſors of the ſaid Chamberlain ſued Execution in *London* by a Precept, in Nature of an *Elegit*, directed to one *Flick*, Serjeant of the Mace, and Officer of the ſaid Court, who by Force thereof delivered the ſaid Houſes, among others, for one Moiety, to the Chamberlain aforeſaid; and afterwards *Tho. Caſtle* died, and after his Death his Wife recovered Dower, and had the ſaid Houſes aſſigned her for her third Part to hold in Dower, and ſhe died in *anno* 18 *El.* and afterwards the ſaid Chamberlain aſſigned over his Intereſt to one *Fulwood*, and afterwards 21 *Eliz.* Sir *T.* aſſigned over his Intereſt to the ſaid *Fulwood* alſo: *Anno* 29 *Eliz.* the Heir of the ſaid *Caſtle*, demiſed to *Guilbert Sharington* the ſaid Houſes for Years, who demiſed to the Leſſor of the Plaintiff, upon whom the Defendant by Title derived from the ſaid *Fulwood* enter'd, *&c.* And if the Entry of the Defendant was lawful or not, was the Queſtion. And in this Caſe eight Points were unanimouſly reſolv'd by Sir *Chriſtopher Wray*

Wray Chief Juſtice, and the whole Court. 1. That whereas it was objected that in Caſe of a ſole Corporation or Body Politick, be it created by Charter or Preſcription, as Biſhop, Parſon, Vicar, Maſter of an Hoſpital, *&c.* no *(a)* Chattel either in Action or in Poſſeſſion, ſhall go in Succeſſion, but the Executors or Adminiſtrators of the Biſhop, Parſon, *&c.* ſhall have them, no more than the Heir of a private Man can have them; for Succeſſion in a Body Politick is Inheritance in Caſe of a Body private. But otherwiſe it is in Caſe of a Corporation (*b*) aggregate of many, as Dean and Chapter, Mayor and Commonalty, and the like, for there they in Judgment of Law never die. And all this was affirmed *per tot' Curiam*, 8 *E.* 4. 18. *&* 20 *E.* 4. 2. *a.* Wherefore it was concluded, that the Chamberlain of *London* being a ſole Corporation, that the Executor could not have the ſaid Recogniſance acknowledged to his Predeceſſor; yet it was reſolved, that the *(c)* Succeſſor ſhould have it, for in this Caſe the Corporation of the Chamberlain was by Cuſtom, and the ſame Cuſtom which has created and made him a Corporation in Succeſſion as to this ſpecial Purpoſe concerning Orphanage, has enabled his Succeſſor to take ſuch Recogniſances, Obligations, *&c.* which are made to his Predeceſſor, and ſuch Cuſtom is grounded upon great Reaſon; for the Executors or Adminiſtrators of the Chamberlain ought not to intermeddle with ſuch Recogniſances, Obligations, *&c.* which by the ſaid Cuſtom, are taken in the corporate Capacity of the Chamberlain, and not in his private Capacity: But a Biſhop, Parſon, *&c.* or any ſole Corporation which are Bodies Politick by Preſcription, can't take a Recogniſance or Obligation but only to their private, and not in their politick Capacity, for there wants ſuch Cuſtom (as in the Caſe at Bar) to take a Chattel in their politick or corporate Capacity. 2. It was objected, That where the Statute of *W.* 2. *cap.* 18. which gives the (*d*) *Elegit*, provides, *Quod de cætero ſit in electione illius, &c. quod vicecomes liberet ei omnia catalla, &c. & medietatem terræ ſuæ, quouſque debitum fuerit levatum per rationabile pretium & extentum, &c.* That becauſe the Statute gives Power expreſly to the Sheriff to execute the *Elegit* by reſonable Extent, which is to be intended by (*e*) Inquiſition of honeſt Men, and foraſmuch as the Sheriff is a great Officer and ſworn, *&c.* that the ſaid Act by any ſtrained Conſtruction ſhall not be extended to a Serjeant at Mace (who is not ſworn) to take a Jury, *&c.* and thereupon the Books in 7 *H.* 6. 35. 14 *E.* 2. *Rediſſeiſin* 9. *&* 32 *H.* 6. 25. were cited, That an Action of Waſte nor Rediſſeiſin doth not lie in *(f)* ancient Demeſn, becauſe the Enquiry of Waſte, and the Proceeding in Rediſſeiſin is appointed by the Statutes to be made by the Sheriff, and in

(*a*) 1 Rolls 515. Hob. 64. 12 Co. 105. Co. Lit. 9. a. 46. b. 90. a. Br. Corporation 60. 20 E. 2. 4. a. Dyer 48. pl. 15.

(*b*) Dyer 48. pl. 15. 27 H. 8. 15. a.

(*c*) Cr. Eliz. 464, 682. 1 Rolls 515. Cr. Jac. 159.

Co. Lit. 46. b.

(*d*) 2 Inſt. 394, 395.

(*e*) Poſtea 67, a. 74. b. 2 Inſt. 396. Cr. Jac. 569. Dyer 100. pl. 71. 2 Bulſtr. 97. Cr. El. 584. Dall. 28. pl. 1.

(*f*) 2 Sand. 254. Owen 24. 1 Rol. 323. Doct. pl. 52.

ancient Demeſn there is not any Sheriff, and the Bailiff who is Officer in ancient Demeſn ſhall not ſupply the Place of the Sheriff. But it was reſolved by the whole Court, that the Execution was well enough, for the Statute which provides, That Proceſs ſhall be made to the Sheriff, by Equity is to be extended to every (a) other immediate Officer to every Court of Record of the King, and *eo potius*, becauſe the Statute of *W.* 2. *cap.* 18. couples the *Elegit*, with the *Fieri facias*, and limits both to be executed by the Sheriff; and yet without Queſtion the Serjeant at Mace in the Caſe at Bar may execute a *Fieri facias*: And it is not like the Caſe of Waſte, for the Statute of *W.* 2. *cap.* 14. provides that *in (b) propria perſona accedat ad locum vaſtatum*; So that the perſonal Appearance of the Sheriff is requiſite, and in the Caſe of Rediſſeiſin the Sheriff is (c) Judge, and therefore not like. 3. Where it was further objected, that the Execution upon the *Elegit* was not lawful, foraſmuch as Sir *Tho. Rivet* was in by Matter of Record whereof he ought to take Notice, and to have ſued *Scire facias* againſt him, in Proof of which the Books in 9 *E.* 3. or 4. 24. & 2 *R.* 3. 8. *Simpſon*'s Caſe, were recited. But it was reſolved *per totam Curiam*, That the Execution upon the *Elegit* was good enough: But it was ſaid, if the Sheriff had returned the former by Extent, and the Matter had appeared to the Court, the Plaintiff (d) ought to have had a *Scire facias*; But the whole Court ſaid, if the Sheriff levies Execution it is good enough, *vide* for that 22 *E.* 3. 7. 4. It was objected, that here was no Statute or Recogniſance in Nature of a Statute ſufficiently found, for the Jurors have found, That the ſaid *Tho. Caſtle Veniebat coram R. O. Recordatore civitatis London, & Tho. O. majore ſtapulæ, & recognovit ſe debere Tho. Rivet, militi*, 200 *l.* and doth not ſay, *ſecundum formam* (e) *Statuti, &c. nec per ſcriptum obligatorium, &c.* where the Statute of 23. *H.* 8. provides that it ſhall be by Bill Obligatory, ſealed with 3 Seals. But it don't appear by the Verdict, that there was any Bond or any Seal, neither doth it appear by any Word of the Verdict, that it was made according to the Stat. *&c.* And it was ſaid, that altho' Verdicts being the Words of Lay Men ſhall be taken according to their Meaning, and there need not ſo preciſe Form in them as in Pleading, yet the Subſtance of the Matter ought to appear either by expreſs Words, or by Words equipollent, or tantamount, ſo that there ought to be convenient Certainty, which if it be falſe, the Party for ſuch Falſity may have his Attaint: But it was reſolved, that the (f) Verdict is good enough, for inaſmuch as they have found a Recogniſance before the Mayor and Recorder, *&c.* it ſhou'd in a Verdict of Laymen be intended according to the Statute, for otherwiſe they could not take any Recog. and alſo the whole Sequel of the Verdict implies that this was a Recogniſance in the Nature of a Statute,

(a) Cr. Car. 319. Hob. 83.

(b) 2 Inſt. 390. Dyer 204. pl. 1.

(c) 10 H. 7. 28. a.

(d) Cr. Jac. 478. 2 Rolls 473.

(e) Hob. 55. 2 Rolls 700. Cr. Car. 363. 2 Ventr. 3. Raym. 150. Vaugh. 102.

(f) Hard. 413. Hob. 55, 56, 262. 2 Rolls 700. Raym. 150. Lane 40. 1 Siderf. 27. 3 Co. 9. a. Cr. Car. 363. Vaugh. 102.

or otherwiſe no Execution could be ſued thereupon in the Chancery. 5. It was objected, when the Wife of the Conuſor recover'd Dower, and thereby the Poſſeſſion of the Conuſee was evicted, and alſo when a greater Term in the Moiety was evicted by Force of the *Elegit* than the Conuſee had; for (for Example) the Extent upon the Statute if no Eviction had been incurred in 13 Years; and the Moiety which was evicted by the *Elegit* wou'd be ſubject to Execution by Force of the *Elegit* for 15 Years; ſo that a greater Term was evicted by *Elegit*, and a greater Eſtate was recovered by the Writ of Dower than the Conuſee had, and therefore he ſhou'd be put to his *Scire facias* upon the Statute of 32 *H.* 8. *cap.* 5 (*a*) for otherwiſe great Miſchief would enſue; for if the Conuſee ſhould hold over after the Death of the Tenant in Dower, and after the Extent upon the *Elegit* incurred, then during the Life of the Tenant in Dower, and during the Execution upon the *Elegit*, the Conuſee might ſue a new Execution upon the ſaid Statute, and ſo have double Remedy, which never was the Intention of the Statute. But it was reſolved *per totam Curiam*, that in this Caſe the Conuſee could not have any Help of the ſaid Statute, for inaſmuch as but Part was evicted, *ſc.* the Moiety upon the *Elegit*, the Conuſee ſhould not only hold over the other Moiety, but alſo after the Death of the Tenant in Dower, and the Extent upon the *Elegit*, ended, he ſhould re-enter into the ſaid Land ſo evicted, and therefore he is not helped by the ſaid Act, for the ſaid Act will not help but when the Conuſee is put clearly without Remedy to obtain any Part of his Debt: As where the whole Execution is avoided by Title paramount for ever. And that appears by the expreſs Words of the Preamble, for the Words of the Preamble are; *By Reaſon whereof the Obligees, Recogniſees and Recoverers have been thereby ſet clearly without Remedy by any Manner of Suit of Law.* And the Body of the Act refers to the Preamble, *ſcil. ſuch Lands, &c.* In the Body of the Act it is ſaid, *any ſuch Lands, Tenements or Hereditaments, as be or ſhall be had or delivered in Extent*, and doth not ſay, *or any Part thereof:* And it is provided that new Execution ſhall be done: *for the levying of the Reſidue of all ſuch Debt and Damage as then ſhall appear to be unlevied, &c.* And that can't be when but Parcel of the Land extended is evicted, for by the Common Law the Conuſee in ſuch Caſe is not without Remedy, but the Conuſee ſhall hold the Reſidue of the Land over, till the Reſidue of the Debt ſhall be ſatisfy'd; and therefore, if he ſhou'd have his Remedy alſo upon the ſaid Statute, he wou'd have double Satisfaction, which wou'd be inconvenient: And if the Conuſee has Remedy either *in præ* for Part, or *in futuro* for all, or Part, the ſaid Act of 32 *H.* 8. doth not extend to it. 6. It was objected that when Sir *T.* had Execut. (*exem' græ*) of 4 Houſes, and the Extent of that by Courſe of Time would endure for 13 Years and afterwards 2 of the ſaid Houſes are evicted by *Elegit* for 15

(*a*) 2 Inſt. 677, 678, 679, 680. Co. Lit. 289. b. 290.

Co. Lit. 289. b. Cr. Jac. 694.

Co. Lit. 289. b. 5 Co. 87. a. See Skinner 203.

Co. Lit. 289. b.

Co. Lit. 289. b.

Years, and afterwards Sir *T. Rivet* aſſigned over all his Intereſt in the Execution upon the Statute to *Fulwood*, that this Aſſignment as to the two Houſes ſo evicted was void, for in that a greater Term was evicted than the Conuſee had for the Moiety, and then at moſt the Conuſee had but a Poſſibility which could not be aſſigned over. And a Caſe adjudged now lately in *C. B.* was cited, which was ſuch in Effect; a Man poſſeſſed of a Term for divers Years, deviſed the Profits thereof to one for Life, and after his Deceaſe to another for the Reſidue of the Years, and died; the firſt Deviſee enter'd by the Aſſent of the Executor, and afterwards he in the Remainder during the Life of the firſt Deviſee aſſigned it to another, and afterwards the firſt Deviſee died; it was adjudged that the Aſſignment was void, for he in Remainder had but a (*a*) Poſſibility during the Life of the firſt Deviſee; for it is as much in Law, as if the Land had been deviſed to him for ſo many of the Years as he ſhou'd live, or for the whole Term if he ſhould live ſo long, ſo that the Intereſt of the Term *ſub modo* is in him, and the other in Remainder has but a Poſſibility which he can't grant over: But it was reſolved, That in the Caſe at Bar, the Conuſee had an Intereſt in the two Houſes which were evicted, for it was agreed by them, if a Man is bound in two Statutes, and the latter Statute is (*b*) firſt extended and delivered in Execution, and afterwards the firſt Statute is put in Execution for greater Time, and for a greater Sum than the firſt was, yet when the firſt Stat. is ſatisfied, and his Intereſt lawfully determined, the 2d Conuſee ſhall have the Land again by Force of the firſt Extent; and ſo in the Caſe at Bar, when a Moiety was evicted for 15 Years by Force of the *Elegit*, now by Computation the Conuſee of the Stat. ſhall hold the other Moiety for 15 Years, and after the 15 Years expired, the whole Land, until the whole Debt upon the Stat. is ſatisfy'd: So that it is not a Poſſibility, nor ſo uncertain, but that by Computation it may be by reaſonable Intendment made certain: *Et id* (*c*) *certum eſt, quod certum reddi poteſt:* And altho' Caſualties and ſudden Accidents may happen, yet *Caſus fortuitus non eſt ſperandus*, & (*e*) *nemo tenetur divinare.* It was alſo reſolved, that if the Conuſee is ouſted by Wrong by the Conuſor, or any other who has the immediate Eſtate, that the Conuſee ſhall hold (*f*) over. So when the Wife (*g*) of the Conuſor recover'd Dower, the Conuſee ſhall hold over, for ſhe claimed by her Huſband: The ſame Law if a Man makes a Leaſe for Life or for Years, and (*h*) afterwards diſſeiſes his Leſſee for Life, or ouſts his Leſſee for Years, and acknowledges a Stat. or Recogniſance, upon which Execution is ſued, and afterw. the Leſſee for Life enters and dies, or the Years expire, the Conuſee ſhall re-enter and hold over; and ſuch Eviction for a Time is not within the ſaid Act of 32 *H.* 8. becauſe the Conuſee has remedy *in futuro.* 7. It was objected that foraſmuch as the *Liberate* was not returned,

(*a*) 10 Co. 47. b. *Carter's* Caſe. 2 Brownl. 175. 1 Bulſtr. 192, 193. Raym. 146. Palm. 48. 2 Rolls Rep. 129. Cr. Jac. 510. Palm. 274. 1 Co. 153. 6.

(*b*) Palm. 272.

(*c*) 5 Co. 5. a. Co. Lit. 45. a. 96. a. 142. a. 9 Co. 30. a. 47. a. Lane 51. Hetly. 98. 2 Brownl. 336. 5 Co. 6. a.

(*d*) Hard. 82. Lit. Rep. 98.

(*e*) Antea 28. a. Lit. Rep. 98.

(*f*) Co. Lit. 289. b.

(*g*) Co. Lit. 289. b.

(*h*) Co. Lit. 289. b.

Execution was not lawfully done, for inaſmuch as Tenant by Statute Merchant is Tenant by Matter of Record, the *Liberate* ought to be returned, or otherwiſe he will be Tenant by Matter in fact in *pais*, and not by Matter of Record. Alſo the *Liberate* ought to be returned, or otherwiſe the Time of the *Liberate* made will not appear, and the Term of the Conuſee ſhall begin from the Time of the *Liberate* executed, *quod vide* 33 *H.* 8. *tit. Statute* 41. 2. It appears by the *Liberate* that the Conuſee ſhall be ſatisfied for all his Coſts and Damages, *quæ tunc, ſc. tempore* of the Delivery of the Land to the Conuſee *ſuſtinuit*, ſo that the Time of the Delivery is material and ought to appear of Record. 3. If the Terre-Tenant ſhou'd be driven to ſue a *Scire fac'* after the Extent incurred by Courſe of Time, the *Liberate* ought to appear of Record, ſo that it might appear to the Court that the Time is paſt. 4. It was ſaid, that it wou'd be dangerous to Purchaſors, for they could not know of the Execution by any Search, if the Execution don't appear of Record: But it was reſolved *per totam Curiam*, that the Execution of the *Liberate* was well enough, altho' the Writ was not (*b*) returned, for the Writ is not conditional, but has theſe Words, *Et qualiter hoc præceptum, &c.* and is ſtronger than the Caſe of the *capias ad ſatisfaciendum*, for there are Words conditional, and yet the Execution is good altho' the Writ is not returned; So of *Habere facias ſeiſinam*, and generally of all other Writs of Execution which are the moſt final Proceſs, and after which no Judgment is to be given, nor no farther Proceſs had: *Vide Paſchæ* 13 *Eliz. inter Borley & Borley*, 17 *Aſſ.* 24. 32 *E.* 3. 101. *tit. Scire fac'*, 19 *E.* 3. *Scire facias*, 120. 20 *H.* 6. 24. 21 *H.* 6. 5. *b.* 11 *H.* 4. 57 *b.* But it was ſaid, that this Caſe was not like the Caſe of *Elegit*, where an (*c*) Inquiſition was to be taken, for there the Writ ought to be returned, to the Intent that the Court ſhall judge upon the Sufficiency or Inſufficiency of that Inquiſition; But it was agreed clearly, That where no Inqueſt was to be taken, but only Land to be delivered, or Seiſin had, or Goods ſold, *&c.* which were but Matters in Fact, theſe are good altho' the Writ is not returned: (*d*) But every Inqueſt taken by the King's Writ ought to be of Record, and not averable by the Country. 8. It was objected that after the Extent upon the Statute Staple incurred by Courſe of Time, the Conuſor might enter, and ſhould not be put to his *Scire facias*; for altho' the Damages and Coſts are incertain, yet the Judges might adjudge and take Knowledge of them, for firſt the Time of the Conuſans of the Statute appears, and for what Time the ſaid Debt was with-held till the *Liberate*, ſo that they might well judge of the Damages and Coſts; and therefore when by Courſe of Time as well the Debt

(*a*) Cr. El. 463.

(*b*) 1 Leon. Rep. 280. Cr. Eliz. 17. Moor 209. 2 Leon 13. Godb. 82, 83. Kelw. 3. a. Latch. 223. 4 Co. 90. a.

(*c*) Poſtea 74. b. 2 Inſt. 396. Cr. Jac. 569. Dyer 100. pl. 71. 2 Bulſt. 97. Cr. El. 584. Dall. 28. pl. 1.

(*d*) 5 Co. 90. a. Moor 57. Cr. Jac. 569.

as the Coſts and Damages, and greater Sum is levy'd, the Conuſor might enter: And Difference was taken when the Extent incurs by Effluxion of Time, and when by caſual Profit; for when it is ſatisfy'd by caſual Profit, he ought to have (*a*) *Sci' fac'*, but in the other Caſe he may enter. And to this Intent the Books in 32 *E.* 3. *Sci' fac'* 101. 11 *H.* 6. 7. 9 *E.* 4. 50. 2 *R.* 2. *Execution.* 17. *Fitz* 15 *H.* 7. 15. were cited. *Et vide* 30 *H.* 6. 1. *b.* 38 *E.* 3. 10. 14 *H.* 4. 9. That in Debt the Court may aſſeſs Coſts and Damages without any Enquiry, for the Reaſon aforeſaid. But it was reſolv'd *by the whole Court*, That in the Caſe at Bar the Conuſor could not enter, for the Conuſee ſhall hold the Land not only 'till he is ſatisfyed for (*b*) Damages, *&c.* for the Detainer of the Debt, and for Coſts of Suit, but alſo for his reaſonable Labours and Expences, *&c.* for the Entry thereof is, *Tenendum ut liberum tenementum, &c. quouſque debitum præd' una cum damnis & coſtagiis ſuis neceſſariis & rationabilibus, ut in laboribus, ſectis, dilationibus, & expenſis, &c.* which are incertain. And foraſmuch as they are incertain, and the Conuſee in by Matter of Record, Reaſon requires that the Conuſor ſhould bring a *Scire facias* againſt the Counſee before that his Eſtate ſhall be defeated: Alſo the Court of (*c*) Chancery, which awards the Extent and *Liberate*, ſhall adjudge of the Reaſonableneſs of the Coſts, Damages, Labours, Expences, *&c.* as any other Court, And it was agreed *by all*, That in Caſe of *Elegit*, (*d*) the Counſor after Satisfaction had, might enter, for he ſhould not have Damages, (*e*) Coſts, nor other Thing, but only the Land until the Debt is ſatisfy'd; and becauſe all is certain, the Conuſor, after the Extent expir'd, might enter: *Vide* the Statute *de Mercatoribus* 13 *E.* 1. the Statute of *Acton Burnel*, and the Statute of 27 *E.* 3. for Coſts, and Damages upon the Statute Staple. And Judgment was given againſt the Plaintiff. *William Daniel*, *James Dalton*, and others were of Council with the Plaintiff, and *Edward Coke* and others with the Defendant.

(*a*) 2 Rolls 483. 2 Inſt. 396. Hard. 82.

1 Sand. 107.

(*b*) Cr. Car. 598, 599. 2 Rolls 479. 2 Inſt. 678, 680.

(*c*) 2 Roll. 486.

(*d*) Cr. Car. 598. 2 Rol. 480. Hard. 80. 2 Inſt. 680.

(*e*) 2 Inſt. 678.

HYNDE's

HYNDE's *Caſe.*

4 Co. 68.

Hill. 34 Eliz. *Rot.* 2380.

In the King's Bench.

Brownlow:

Oxon: ſſ. ELizabeth *Hynde*, was ſummoned to anſwer to *Richard Libb*, Eſq; of a Plea, Wherefore, whereas by the Common Counſel of the Realm of the Lady the now Queen *England*, it is provided, that it ſhall not be lawful for any one Waſte, Spoil, or Deſtruction to do in Lands, Houſes, Woods or Gardens, to him demiſed for Term of Life or Years, the ſaid *E.* of Lands and Woods in *Goring* and *Whitchurch*, which ſhe holded for Term of Years, of the Demiſe of *Rob. Garrard*, of the aforeſaid *Rich.* of the Aſſignment of *W. Haw*, who thoſe to the ſaid *Rob.* demiſed, for the ſaid Term thereof made, to the ſaid *Rich.* did Waſte, Spoil, and Deſtruction, to the Diſſenheriſin of him the ſaid *Rich.* and againſt the Form of the Proviſion aforeſaid, *&c.* And whereupon the ſaid *Rich.* by *Tho. Lane* his Attorney ſaith, That whereas the aforeſaid, *Will. Haw*, was ſeiſed of a Meſſuage called *Haw Place*, 200 Acres of Land, 10 Acres of Meadow, 100 Acres of Paſture, and 50 Acres of Wood, with the Appurtenances in *Goring* and *Witchurch* aforeſaid, in his Demeſn as of Fee, and ſo thereof being ſeiſed the 4th Day of *January*, in the 28th Year of the Reign of the ſaid Lady the now Queen at *Goring* aforeſaid, by a certain Indenture between the aforeſaid, *Will.* by the Name of *Will. Haw* of *Haw Place*, in the Pariſh of *Goring*, in the County of *Oxon*, *Yeoman*, of the one Part, and the aforeſaid *Rob. Garrard*, by the Name of *Rob. Garrard* of *Hedſor* in the County of *Buckingham*, Gent. of the other Part, made, which ſaid other Part of which, ſealed with the Seal of the aforeſaid *Rob.* the ſaid *Rich.* here in Court brings, whoſe Date is the ſame Day and Year, demiſed to the ſaid *Rob.* the Tenements aforeſaid with the Appurtenances, except (during the Life of *Agnes Haw*, Mother of the ſaid *Will.*) ſuch Part of the Meſſuage aforeſaid, Parcel of the Premiſſes, Orchard and Garden, one Cloſe call'd *Reaves Dean*, and one Cloſe called *Bell Cloſe*, and one Orchard, called the *Orchard Pedell*, Parcel of the Premiſſes, which the ſaid *Agnes* then occupy'd, and then had, taken, and agreed, to receive for her Dower, of, in, and for the Tenements aforeſaid with the Appurtenances, to have, and to occupy the ſaid Tenements with the Appurtenances, (except before excepted) to the ſaid *Rob.* and his Aſſigns, from the Feaſt of the Birth of our Lord God then laſt paſt, until the

End and Term of 16 Years, from thence next enſuing, and fully to be compleat and ended, by Virtue of which Demiſe, the ſaid *Rob.* in the Tenements aforeſaid with the Appurtenances, above in Form aforeſaid demiſed, entred, and was thereof poſſeſſed, and ſo thereof being poſſeſſed, the 20th Day of *Auguſt*, in the 29th Year of the Reign of the ſaid Lady the now Queen, at *Goring* aforeſaid, granted all his Eſtate, Intereſt, and Term of Years, which he had then to come, of and in the aforeſaid Tenements with the Appurtenances, above in Form aforeſaid demiſed, to the aforeſaid *Eliz. Hynde*, by Virtue of which Grant, the aforeſaid *Eliz.* into the ſaid Tenements with the Appurtenances, above in Form aforeſaid demiſed, entred and was thereof poſſeſſed, and the aforeſaid *Eliz.* being thereof ſo poſſeſſed, and the aforeſaid *Will. Haw*, of the Reverſion thereof in his Demeſne as of Fee, in Form aforeſaid being ſeiſed, the ſaid *Will.* the 7th Day of *March*, in the 30th Year of the Reign of the ſaid Lady the now Queen, at *Goring* aforeſaid, by his Indenture of Bargain and Sale, made between him the ſaid *Will.* of the one Part, and the aforeſaid *Rich.* of the other Part, which other Part, ſealed with the Seal of the ſaid *Will. Haw*, the ſaid *Rich.* here brings into Court, whoſe Date is the ſame Day and Year, and in the Court of the ſaid Lady the Queen of the Bench here at *Weſtminſter*, in *Eaſter Term*, in the ſaid 30th Year of the Reign of the ſaid Lady the Queen aboveſaid, before the then Juſtices of the ſaid Lady the Queen of the Bench aforeſaid here, as the Deed of the ſaid *Will. Haw*, by him the ſaid *Will.* acknowledged, and within ſix Months then next following, that is to ſay, the ſame *Eaſter Term*, in due Manner in the ſaid Court of Record enrolled, according to the Form of the Statute in ſuch Caſe made and provided, for and in Conſideration of 120 *l.* to the ſaid *Will.* by the ſaid *Rich.* before that Time paid, bargained and ſold to the ſaid *Rich.* amongſt other Things the Reverſion aforeſaid, to have and to hold to him and his Heirs for ever, by Colour of which Bargain and Sale, and Inrollment aforeſaid, and by Force of a certain Statute made in the Parliament of the Lord *Henry* late King of *England* the 8th, holden at *Weſtminſter* in the County of *Middleſex*, the 4th Day of *February*, in the 27th Year of his Reign, of transferring of Uſes into Poſſeſſion, the aforeſaid *Rich.* was and yet is ſeiſed of the Reverſion aforeſaid, in his Demeſn as of Fee, and the ſaid *Rich.* ſo thereof being ſeiſed, and the aforeſaid *Eliz.* of the Tenements aforeſaid, with the Appurtenances, to her in Form aforeſaid granted, being poſſeſſed, the ſaid *Eliz.* did Waſte, Spoil, and Deſtruction of the Lands, that is to ſay, in digging in 10 Acres of Land, in *Goring* aforeſaid, Parcel of the Tenements aforeſaid to the aforeſaid *Rob.* demiſed, 100 Loads of Clay, taking for the Price of every Load of Clay thereof 8 Pence, and cutting down and ſelling of the Woods, alſo in a certain Wood called *Highgrove*, containing 10 Acres of Wood, with the Appurtenances in *Goring* aforeſaid, and Parcel of the Tenements aforeſaid

with

with the Appurtenances, to the ſaid *Rob.* above in Form aforeſaid demiſed, 200 Oaks, the Price of every Oak five Shillings, through the ſaid whole Wood here and there growing, and in a certain other Wood called the *Hedge Row*, lying in *Goring* aforeſaid near the aforeſaid Wood called *High-grove*, in *Goring* aforeſaid, Parcel of the Tenement aforeſaid with the Appurtenances, in Form aforeſaid, to the aforeſaid *Rob.* demiſed, 40 Oaks, the Price of each of them ſix Shillings, thro' the ſaid whole Wood here and there growing, and in a certain Coppice, called *Home Coppice*, in *Goring* aforeſaid, Parcel of the aforeſaid Tenements with the Appurtenances, to the ſaid *Rob.* in Form aforeſaid above demiſed, 100 Oaks, the Price of each of them 10 Shillings, in the ſaid Coppice called *Home Coppice*, late growing here and there, and in 20 Acres of Paſture called the *Hanging*, in *Goring* aforeſaid, lying there, betwixt a certain Cloſe called *High-grove Hill*, and another Cloſe called *Dicker-grove Hill*, that is to ſay, Parcel of the Tenements aforeſaid with the Appurtenances, to the aforeſaid *Rob.* in Form aforeſaid demiſed, 10 Oaks, Price of each of them 10 Shillings, ſix Aſhes, Price of each of them 5 Shillings, and 10 Beeches, Price of each of them 6 Shillings, in the aforeſaid 20 Acres of Paſture likewiſe, late here and there growing, and in a certain Hedge of a certain Cloſe called *Home Field*, in *Whitchurch* aforeſaid, that is to ſay, Parcel of the Tenements aforeſaid with the Appurtenances, to the aforeſaid *Rob.* in Form aforeſaid demiſed, lying near unto a Wood called *Hawes Coppice*, 3 Oaks, Price of each of them 10 Shillings, and one Beech, Price 10 Shillings, and in a certain other Hedge, of the Cloſe aforeſaid called *Home Field*, in *Whitchurch* aforeſaid, that is to ſay, Parcel of the Tenements aforeſaid, to the aforeſaid *Rob.* in Form aforeſaid demiſed, lying near to the aforeſaid Wood called *Home Coppice*, 10 Oaks, Price of each of them 20 Shillings, and alſo in ſuffering the Sprouts of the Roots of 20000 other little Oaks, called *Oak Saplings*, of 10000 Beeches, and 100 Aſhes, to the Value of 20 Pound, in the aforeſaid Wood called the *Hedge Row*, and 10000 of Oaks, 10000 of Beeches, and 200 of Aſhes, in the aforeſaid Coppice called *Haw Coppice*, by the ſaid *Eliz.* through the whole Woods here and there growing to be cut, and to be eaten and utterly deſtroyed and waſted with Cattle, to the Diſſenheriſin of the ſaid *Rich.* and againſt the Form of the Proviſion aforeſaid: Whereupon he ſaith he is the worſe, and hath Damage to the Value of 200 Pound, and thereof he bringeth Suit, *&c.* And the aforeſaid *Eliz.* by *Ralph Burges* her Attorney, cometh and defendeth the Force and Injury, when, *&c.* And whatſoever, *&c.* And ſaid that the aforeſaid *Rich.* his Action againſt her ought not to have, becauſe ſhe ſaith, That well and true it is, That the aforeſaid *Will. Haw*, was ſeiſed of the Tenements aforeſaid with the Appurtenances, in his Demeſn as of Fee, and being thereof ſo ſeiſed, the aforeſaid 4th Day of *January*, in the 29th Year of the Reign of the ſaid Lady the now Queen

aboveſaid, by his Indenture, demiſed to the aforeſaid *Rob.* the Tenements aforeſaid with the Appurtenances, (except before excepted) To have, and to hold, to him and his Aſſigns, from the aforeſaid Feaſt of the Birth of our Lord then laſt paſt, until the End and Term of the aforeſaid 16 Years, then next following and fully to be compleat and ended. By Virtue of which Demiſe, the aforeſaid *Rob.* into the Tenements aforeſaid with the Appurtenances, above in Form aforeſaid demiſed, entred, and was thereof poſſeſſed, and ſo thereof being poſſeſſed, the aforeſaid 20th Day of *Auguſt* aboveſaid, granted all his Eſtate, Intereſt, and Term of Years, which he had then to come, of and in the aforeſaid Premiſſes, with the Appurtenances, above demiſed, to the aforeſaid *Eliz. Hynde*, By Virtue of which grant, the aforeſaid *Eliz.* into the aforeſaid Tenements with the Appurtenances above demiſed, entred and was thereof poſſeſſed, as the aforeſaid *Rich.* by his Declaration above ſuppoſeth: But the ſaid *Eliz.* further ſaith, that the ſaid *Eliz.* of the Tenements aforeſaid with the Appurtenances, above demiſed, in Form aforeſaid being poſſeſſed, and the ſaid *Will. Haw*, of the Reverſion thereof, being ſeiſed in his Demeſn as of Fee, after the aforeſaid 7th Day of *May*, in the 30th Year aforeſaid, and before the aforeſaid Indenture of Bargain and Sale, between the aforeſaid *Will.* of the one Part, and the aforeſaid *Rich.* of the other Part made, in the Court of the Lady the Queen of the Bench here in Form aforeſaid was enrolled; A Fine was levied in the aforeſaid Court of the Lady the Queen of the Bench here, that is to ſay, at *Weſtminſter* aforeſaid from the aforeſaid Day of *Eaſter* in 15 Days, in the 30th Year of her Reign aboveſaid, before *Edmond Anderſon*, *Francis Windham*, *William Periam*, and *Francis Rodes*, then Juſtices of the ſaid Lady the Queen of the Bench, and other of the ſaid Lady the Queen's liege People then there preſent, between the aforeſaid *Rich.* by the Name of *Richard Libb*, Gent. Plaintiff, and the aforeſaid *Will. Haw*, and *Ellen* his Wife Deforceants, of the Tenements aforeſaid, above in Form aforeſaid demiſed, amongſt other Things by the Name of one Meſſuage, one Cottage, two Gardens, 70 Acres of Land, one Acre of Meadow, 10 Acres of Paſture, 60 Acres of Wood, and 10 Acres of Furz and Heath, with the Appurtenances in *Goring* and *Whitchurch* aforeſaid, in *Maple Deram* in the County aforeſaid, whereupon a Plea of Covenant was ſummoned betwixt them in the ſaid Court, that is to ſay, that the aforeſaid *Will.* and *Ellen*, acknowledged the Tenements aforeſaid to be the Right of him the ſaid *Rich.* as thoſe which the ſaid *Rich.* had, of the Gift of the aforeſaid *Will.* and *Ellen*, and them remiſed and quit claimed, from them the ſaid *Will.* and *Ellen* and their Heirs, to the aforeſaid *Rich.* and his Heirs for ever: And further the ſaid *Will.* and *Ellen*, granted for them, and the Heirs of the ſaid *William*, that they warrant to the aforeſaid

aforeſaid *Rich.* and his Heirs, the aforeſaid Tenements with the Appurtenances, againſt all Men for ever, as by the ſaid Fine here in Court of Record remaining more fully appeareth: Which Fine, in Form aforeſaid had and levied, was to the Uſe of the aforeſaid *Rich.* and his Heirs; After which Fine, ſo as afore is ſaid levied, that is to ſay, The 20th Day of *April*, in the 30th Year of the Reign of the ſaid Lady the now Queen aforeſaid, the aforeſaid Indenture to the aforeſaid *Rich.* as before is ſaid made, before the aforeſaid Juſtices of the ſaid Lady the Queen of the Bench here was inrolled. And the ſaid *Eliz.* further ſaith, That ſhe to that Grant of the Reverſion of the Tenements aforeſaid, with the Appurtenances above as before is ſaid demiſed, by Virtue of which Fine aforeſaid, the aforeſaid *Rich.* did not attorn or agree, and this ſhe is ready to aver, whereupon ſhe demandeth Judgment, if the aforeſaid *Rich.* his Action aforeſaid againſt her ought to have, *&c.* And the aforeſaid *Rich.* ſaith, that the aforeſaid Plea of the aforeſaid *Eliz.* above in Bar pleaded, and the Matter in the ſame contained, is inſufficient in Law to bar him the ſaid *Rich.* to have his Action aforeſaid againſt the aforeſaid *Eliz.* And that he to that Plea in Form aforeſaid pleaded needeth not, nor by the Law of the Land is bounden to Anſwer, and this he is ready to aver, wherefore for want of a ſufficient Plea in Bar in this Behalf made, the aforeſaid *Rich.* demandeth Judgment, and his Damages by the Occaſion of the Waſte aforeſaid to be to him adjudged: And the aforeſaid *Eliz.* inaſmuch as ſhe hath alleged ſufficient Matter in bar of the Action aforeſaid which ſhe is ready to aver, which Matter the aforeſaid *Rich.* doth not deny, nor to the ſame any ways anſwereth, but that Averment altogether refuſeth to admit, demandeth Judgment, and that the aforeſaid *Rich.* be barred from having his Action aforeſaid againſt her, *&c.* 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 from the Day of *Eaſter* in 15 Days, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.*

HYNDE's

HYNDE's *Caſe.*

Trin. 33 Eliz.

In the King's Bench.

1 And. 215, 286. Cumberb. 67. Skinner 184, 186.

Richard Libbe, Eſq; brought an Action of Waſte againſt *Elizabeth Hynde*, and declar'd, That *William Hawe* was ſeiſed of an Houſe called *Place*, and certain Lands in *Goring* and *Whitchurch* in the County of *Oxford*: And 4 *die Julii*, *anno* 29 *Eliz.* by his Deed indented demiſed the Tenement aforeſaid to *Robert Gerrard* from the Feaſt of *Chriſtmas* then paſt for 16 Years, who 20 *Auguſti*, the ſaid 29th Year, aſſign'd his Intereſt to the Defendant: And that the ſaid *William Hawe* (*a*) 7 *Maii*, *anno* 30 *Reg' Eliz'* by Deed indented and inroll'd in the Court of *C. B. Termino Paſchæ*, in the ſaid 30th Year (within ſix Months, according to the Form of the Statute) for the Conſideration of 120 *l.* bargain'd and ſold the ſaid Reverſion to the ſaid *Libbe*, now Plaintiff, in Fee, and aſſign'd the Waſte in digging of Clay, *&c.* The Defendant confeſs'd that *William Hawe* was ſeiſed of the ſaid Land, and that he by the ſaid Indenture demiſed to *Robert Gerrard*, and that he aſſign'd to the ſaid *Elizabeth*, *prout*, *&c.* But ſhe further ſaid, that after the ſaid 7th Day of *May*, in the ſaid 30th Year, and before the ſaid Indenture of Bargain and Sale was enrolled, the ſaid *William Hawe*, 15 *Paſchæ*, in the ſaid 30th Year, levy'd a Fine of the Tenements aforeſaid to the ſaid *Richard Libbe*, now Plaintiff, *come ceo*, *&c.* which Fine was to the Uſe of the ſaid Plaintiff and his Heirs, after which Fine levied, *ſcil.* 29 *Aprilis*, in the ſaid 30th Year, the ſaid Deed indented was enrolled in the ſaid Court of *C. B.* And further the Def. ſaid, that ſhe never attorn'd; and upon this Plea the Plaintiff demurr'd in Law, and in this Caſe two Points were moved. 1. If the Conuſee of the Fine after the ſaid Indenture enroll'd ſhould be ſaid in by the (*b*) Fine, or by the Bargain and Sale, for if he ſhould be ajudg'd in by the Fine, no Action of Waſte would lie for Want of Attornment; And if he ſhould be in by the Indenture enrolled, then there needed no (*c*) Attornment. And it was unanimouſly reſolv'd by Sir *Edm. Anderſon* and his Companions, Juſtices of the Common

(*a*) Godb. 433.

(*b*) Cr. El. 285, 917. 6 Co. 68. a. Co. Lit. 320. a. 1 And. 286. F. N. B. 60. 9.

(*c*) 1 And. 286. Co. Lit. 309. b. 321. b. 2 Co. 36. a. 5 Co. 113. b. 8 Co. 94. a. 2 Inſt. 673.

Common Pleas, That when *Hawe* by Deed indented bargain'd and ſold the Reverſion to *Libbe* and his Heirs, and before the Inrollment levied a Fine to *Libbe* and his Heirs, and afterwards the Deed is inrolled within the ſix Months, that the Conuſee ſhould be (*a*) in by the Fine, and not by the Indenture inrolled; for when the Fee ſimple paſſed by the Fine to the Conuſee and his Heirs, the Inrollment of the Deed indented afterwards could not diveſt and turn the Eſtate out of himſelf, which was abſolutely ſettled in him by the Fine; for then where he was in before in the *Per*, he would be now in the *Poſt*. Alſo when the Common Law and Statute Law concurr, the Common Law ſhall be (*b*) preferred: And it is true, that the Inrollment ſhall have Relation to the Delivery of the Deed, but that is to (*c*) avoid mean Eſtates or Charges made to a Stranger by the Bargainor after the Delivery of the Deed, and before the Inrolment, but not to diveſt any Eſtate lawfully ſettl'd in the *interim* in the Bargainee himſelf. And the Statute of 27 *H.* 8. *c.* 16. *of Inrolments*, ſpeaks by Bargain and Sale only, and here it is not by Bargain and Sale only, but the Eſtate is paſſed originally by the Fine. The other Point was, Whether the Def. ſhould be in this Caſe admitted to aver when the Deed was inroll'd, *ſc.* ſuch a Day after the Fine levied, and before the Inrolment; and it was objected, 1. That in the Caſe at Bar it ſhould be intended in Law, That the Deed was inroll'd the firſt Day of the ſaid *Eaſter* Term, for the Term as to divers Purpoſes is but one (*d*) Day in Law, and *eo potius*, becauſe it doth not appear by the Record what Day of the Term the Deed was enrolled, but generally *Term' Paſch'*, and therefore it ſhould be intended to be inroll'd the firſt Day of the Term. 2. It was objected, That Records (for the avoiding of Infiniteneſs, which the Law abhors) are ſo high and ſacred that they import in themſelves inviolable Truth, which if any dare to deny, the Law attributes ſo great Honour and Credit to them that they ſhall be (*e*) try'd only by themſelves, and not by the Country: But if this Averment ſhould be ſuffer'd, then the Effect and Validity of the Record would be try'd by the Country, which would be againſt the Rule of Law. 3. It was objected, That it would be miſchievous to allow of ſuch nice Averments, and trench to the Diſenheriſon of many to draw in Queſtion the Time of all Inrolments of Bargains and Sales; for if the Beginning of the Term was within the ſix Months, and the End thereof after the ſix Months, by ſuch Averment after long Poſſeſſion, when Witneſſes are dead, the Eſtate of the Land might be drawn in Queſt. which would be a perilous and dangerous Precedent, and eſpecially in theſe Days, in which Subornation of Perjury abounds: But it was reſolved *per tot' Curiam*, that the (*f*) Averment was good and lawful. And as to the 1ſt Objection, it was anſwer'd and reſolved by the *Court*, That it is true, that it ſhould be intended by Preſumption in Law, that

Skinner 184.
(*a*) Mo. 337. 338. Hob. 222. 1 Bulſtr. 163. 2 Bulſtr 671, 672. Cr. El. 917. Cr. Car. 218. Poph. 49. 1 Brownl. 142. 1 And. 27, 113. 2 And. 161. Yelv. 124. Owen 70. 10 Co. 96. a. Mo. 680, 681.
(*b*) 2 Inſt. 672. 4 Inſt. 140. 1 Leon. 6. 2 Co. 35. b. 1 And. 191. Co. Lit. 49. a.
(*c*) Hob. 222. 2 Bulſt. 34. Cr. Car. 218. Owen 70.
(*d*) Godb. 433. 5 Co. 74. b.
(*e*) 9 Co. 25. a. 31. a. 2 Rol. 574. Co. Lit. 260. a. 117. b.
(*f*) 1 And. 286. Cr. Jac. 451.

(a) 2 Co. 48. a. 5 Co. 7. b. Cawdry's Caſe. 6 Co. 73. b. Co. Lit. 373. Hob. 298. 2 Bulſtr. 314.

the Deed was enrolled the 1ſt Day of the Term: But (*a*) *Stabit præſumptio donec probetur in contrarium.* And becauſe the Plaintiff has by his (*b*) Demurrer confeſs'd the Inrolment to be after the Fine, for this Cauſe the Preſumption vaniſhes and becomes of no Force, and the mutual Conſent and Confeſſion of both Parties ſhall ſtand. As to the ſecond Objection, it was anſwer'd and reſolv'd by the Court, That it is true that (*c*) Records import in themſelves Truth, and conclude all Men from denying any Thing appearing within the Record, as antedate, *&c. Vide* 37 *H.* 6. 21. *b. Plow. Com.* 7 *&* 8 *Eliz. Dyer* 242. But to take (*d*) Averment which ſtands with the Record, and which doth not impugn any Thing apparent within the Record, the Law doth well admit and allow: As againſt a Fine (*e*) upon Releaſe, to ſay that the Conuſee had nothing at the Time of the Fine levied, as it is held in 16 *H.* 7. 5. *b.* So againſt the King's Letters Patents under the Great Seal ſhewed in Court, none can deny them, but *Non* (*f*) *conceſſit per præd' literas patentes*, is a good Plea, for altho' there be ſuch Letters Patent, yet perhaps nothing paſs by them, and ſo *per conſequens non conceſſit.* And altho' (*g*) Inrolment, or other Matter of Record ſhall not be try'd *per Pais*, yet the Time when the Inrolment was made ſhall be try'd *per Pais*, for the Inrollment itſelf ſhall never be drawn in Queſtion (for that is agreed by both Parties) but only the Time of it, as in the other Caſe, where one pleads a Grant of the King by his Letters Patents under the Great Seal, and the other pleads *non conceſſit* by the ſame Letters Patents, in that Caſe the Letters Patents are confeſſed, but the Effect and Operation of them is denied, and therefore the Trial ſhall not be where the Letters Patents bear Date, but where the Lands (*h*) lie, as it was adjudg'd. So if (*i*) Profeſſion is deny'd, it ſhall be try'd by the Spiritual Court, but if the Time of the Profeſſion is in Iſſue, it ſhall be try'd by Jury, as it is held in 9 *H.* 7. 2. As to the third Objection, it was anſwer'd and reſolv'd *per totam Curiam*, That if ſuch Averment ſhould not be admitted, great Injuſtice would be protected, and great Inconvenience enſue on the other Side; for ſuppoſe (as has been ſaid) that the Beginning of the Term is only within the ſix Months, and in Truth the Inrolment was towards the End, out of the ſix Months, if ſuch Averment ſhall not be receiv'd, the Bargainor would be diſinher. againſt Truth and Juſtice, and no Inconven' can riſe on the other Side, for the Preſump. of the Law (as has been ſaid) he who ſtrives to avoid the Bargain, (*k*) ought to make manifeſt Truth thereof, for *actori incumbit onus probandi:* And as

(b) Hutt. Argument 57.

(c) 8 Co. 67. a. 9 Co. 25. a. 31. a. Co. Lit 117. b. 260. a. 2 Rol. 574.

(d) Cr. Jac. 451.

(e) 1 Rol. 862.

(f) 6 Co. 15. b. Doct. pla. 307, 308, 352. Hard. 158. 2 Sid. 145. Hob. 147, 156. Co. Lit. 260. a.

(g) 2 Roll. 575. 2 Rol. Rep. 119.

(h) Cr. Jac. 375. Co. Lit. 125. b. 6 Co. 15. b.

(i) 2 Roll. 588.

(k) Latch. 157.

to

to Fear of Perjury, (*a*) *Nullum iniquum eſt in jure præſumendum*; and theſe Days are not to be tainted with ſuch Infamy of Abundance of Perjury, as has been ſurmiſed; and commonly thoſe who have moſt corrupt Conſciences, are oftentimes moſt ſuſpicious, and complain moſt of the Iniquity of the Times. 3. It was ſaid by ſome of the Juſtices, That if it be admitted that the Inrolment ſhould be preſum'd to be made in *Quindena Paſchæ*, and that at the ſame Time the Fine was alſo levy'd, that then the Bargainee ſhould have (*b*) Election to have the Reverſion by the one, or by the other: But in Reſpect of the former Reſolutions, this Point was not reſolv'd by the Court.

(*a*) Hard. 64.

(*b*) Mod. Rep. 176. 1 Brownl. 142. Yelv. 123, 124. 2 Co. 35. b. 37. b. 2 Rol. 787. Hob. 159. 1 Jones 206. Poph. 95. 2 And. 203.

BOROUGHES's

BOROUGHES's *Caſe.*

Paſchæ 38 Eliz.

In the King's Bench.

Gold. 124. Cr. El. 462. Moor 404.

BEtween *Boroughes* and *Taylor* the Caſe was; Queen *Elizabeth* made a Leaſe for Years, rendring Rent payable at the Receipt of her Exchequer at *Weſtminſter*, *ſeu ad manus Ballivorum ſeu Receptorum*, *&c.* with the uſual Condition, to be void by Nonpayment of the Rent; And afterwards the Queen granted over the Reverſion to another and his Heirs, and whether the Patentee ſhould demand the Rent to take Advantage of the Condition, was the Queſtion, upon a ſpecial Verdict. And it was mov'd, that the Demand ought to be made at the Receipt of the Exchеq. for that is the certain Place appointed in the Leaſe, and principally becauſe *Weſtm.* is added, and therefore of Neceſſity it ought to be demanded there and not upon the Land; and altho' the Reverſion is granted over, yet that does not alter the Place where the Rent ſhall be paid; As if a com. Perſon makes a Leaſe of his Manor of *D.* rendring Rent to be paid at his Manor of *Sale*, with Condition of Re-entry, *&c.* for Nonpay. and afterwards he grants over the Reverſion of the Manor of *D.* yet the Grantee ought to demand his Rent at the Manor of *S.* And altho' it is further ſaid, *ſeu ad manus Ballivorum ſive Receptorum*, *&c.* yet foraſmuch as it is for the Benefit of the Leſſee, and he has Election either to pay it at a certain Place, or to the Bailiff or Receiver of the Leſſor, and foraſmuch as the ſaid Words are Words of Abundance, for the (*a*) Law implies them, altho' they were omitted, and becauſe the Condition is here penal to the Leſſee that he ſhall loſe his Intereſt, for theſe Reaſons the Law requires that the Patentee ought to make Demand upon the Land, and not elſewhere. And therefore if a common Perſon makes a Leaſe for Years of the Manor of *D.* rendring Rent at his Manor of *Sale*, with Condition of Re-entry, if the Rent be not paid at the Place aforeſaid,

(*a*) Co. Lit. 201. b. Hard. 306.

aforeſaid, or to the Hands of the Leſſor himſelf, in that Caſe for the Reaſons aforeſaid, the Demand ought to be made at the Manor of *Sale*, and chiefly becauſe the ſaid Words are abundant, and no more than the Law without them would have implied, wherefore it was ſtrongly urged and concluded, that in the Caſe at Bar, the Demand ought to be made at *Weſtminſter*, at the Place where the Receipt of the Queen's Exchequer is kept: But it was adjudg'd by *Popham*, C. J. *Clench*, *Gawdy*, and *Fenner*, Juſtices, That in the ſaid Caſe the Demand ought to be made upon the (*a*) Land; And in this Caſe divers Points were unanimouſly reſolved by the Court. 1. That if in Caſe of a common Perſon, the Rent reſerved upon the Demiſe be payable at a (*b*) Place out of the Land, that he who will take Advantage of a Condition for Non-payment of ſuch Rent, ought to demand the Rent at the Place where it is appointed to be paid; for the Limitation of the Payment of the Rent off from the Land, doth not alter the Nature or Quality of the Rent, nor of any Thing incident to it, but it is to all Intents a Rent iſſuing out of the Land, and not a Sum in groſs, for it ſhall paſs with the Reverſion as incident to it, and ſhall be ſuſpended by Entry of the Leſſor into any Part of the Land leaſed, and ſhall be apportioned by Recovery of Part in Waſte, or Entry into Part for Forfeiture, *&c.* and ſhall have all other Qualities of a Rent in the ſame Manner as if it had been payable upon the Land; and therefore the Opinion in *Kidwelly*'s Caſe, in *Plow. Com.* 70. that he in the Reverſion may enter for Non-payment of ſuch Rent without any (*c*) Demand made, was utterly denied by the whole Court in this Caſe; and the Juſtices ſaid, that it had oftentimes been adjudged to the cont. 2. When the Q. makes a Leaſe for Years, rendring Rent with Condition *ut ſupra*, the Q. ſhall take Advantage of the Condition (*d*) without any Demand; but when ſhe grants the Reverſion over, her Grantee ſhall not take Advantage of the Condition (*e*) without Demand; for the Reaſon that the Q. ſhall take Advantage of the Condition without Demand, was not in Reſpect of the Nature or Quality of the Rent, or that the Law adjudges, that ſuch Rent reſerved to the Q. was not *omnino* demandable, but that the Leſſee in ſuch Caſe ought to do the firſt Act, *ſc.* either to pay or tender the Rent; for it was reſolved by the Court, that as long as the Reverſion and Rent continue in the Q. the Law diſpences with the Demand as a Thing undecent, and againſt the Dignity of the Q. to attend upon her Subject to make a Demand of him; but the Law (which always requires that *Decorum* and Conveniency be obſerv'd) appoints the Subject to attend upon his Sovereign, and in ſuch Caſe to do the firſt Act, altho' it be in Caſe of a Condition, which trenches to the Deſtruction of his Eſtate, but this is but a perſonal Prerogative annexed to the Perſon of the K. and not in Reſpect of the Nature or Quality of the Rent; and therefore

(*a*) Goldſb. 124. Hard. 306. Cro. El. 167, 415, 462. Co. Lit. 201. b.

(*b*) Co. Lit. 153. a. 202. a. 1 Roll. 459. 2 Roll. 428. Cro. Car. 508. 2 Jones 33.

(*c*) Dy. 68. pl. 23, 24, 329. pl. 12. Moor 598.

(*d*) Latch. 28, Moor 210, 296. 5 Co. 56. a. b.

(*e*) Co. Lit. 201. b.

if he grants the Reverſion over, the Grantee ſhall not take Advantage of the Condition without Demand made of the Rent. The 3d Point (the great Doubt of the Caſe) which was reſolved, was, that in this Caſe the Patentee ought to (a) demand the Rent upon the Land; and their principal Reaſon was grounded upon a Rule in Law, *ſc.* That the Expreſſion of a Clauſe which the Law implies, works nothing, (b) *Expreſſio eorum quæ tacite inſunt nihil operatur & expreſſa non proſunt, quæ non expreſſa proderunt:* And yet as (c) *Littleton* ſaith, it is well done to put in ſuch Clauſes to declare and expreſs to Laymen which have no Knowledge of the Law, what the Law requires in ſuch Caſes: As in 30 *Aſſ.* 8. a Leaſe is made to two for Term of their Lives, (this Clauſe being added and expreſſed, *& diutius (d) eorum viventi*) and afterwards they made Partition, and one died, and he in the Reverſion entred, and his Entry adjudged lawful notwithſtanding the ſaid Words, *& diutius eorum viventi*, for without them ſo much was *tacite* implied by the Law. *Vide* 17 *E.* 3. 7. *John Hull's* Caſe. 27 *H.* 8. *tit. Office Br.* 17. in Caſe of an Act of Parliament, 2 *H.* 7. 9. in Caſe of a *Liberate*, *Plow. Com.* 486 *&* 545. And it was reſolved, that if the King makes a Leaſe for Years rendring Rent, without appointing any Place, or to whoſe Hands it ſhall be paid, the Leſſee may by Law pay it either at the Receipt of the Exchequer, or to the Hands of the King's Bailiffs or Receivers which the King has authorized to ſuch Purpoſe. And therefore the ſpecial and uſual Limitation of Payment of Rent in ſuch Caſes at the Receipt of the (e) Exchequer, or to the Hands of the King's Bailiffs or Receivers, *&c.* imports no more than the Law without it would have (f) implied, and therefore *nihil operatur* thereby; and although the ſaid Clauſe is *ad receptum Scaccarii, &c. apud Weſtm.* yet it being affirmative and declaratory, it is not neceſſary that the Receipt be held at *Weſtm* for if the Receipt of the Exchequer be held at another (g) Place, the Rent is to be paid there; for as to this Point, the Law would have implied that which is expreſſed, *ſc.* at *Weſtm.* and more, *ſc.* at whatſoever other Place the Receipt be kept: Then, in the principal Caſe, if the Rent had been reſerved generally, the Patentee ought to have demanded it upon the Land, *& per conſequens* ſo ought it to be done in the Caſe at Bar. And it was ſaid, as the Law has appointed the Receipt of the Exchequer to be the Place where the King's Revenues ſhall be received, ſo in the Caſe of a common Perſon, the Law has appointed a Place where his Rent (if no other Place by mutual Agreement of the Parties be appointed) ſhall be paid, and that is, upon the Land demiſed, and there he ought to make a Demand of it.

(a) Co.Lit.201.b.

(b) 5 Co. 11. a. 8 Co. 56.b. 145. a. 10 Co. 39. a. 11 Co. 60. a. 1 Roll. Rep. 310. 2 Roll. Rep. 393. Latch. 25. Palm. 433. 437. Wing. Max. 235. Co. Lit. 191. a. 205. a. Lit. Rep. 111. 2 Inſt. 365. 2 Sand. 351. 2 Bulſtr. 131. 1 Mod. Rep. 190. Hard. 92. Hob. 170.

(c) Lit. Sect. 331. Co. Lit. 204. b. 1 Jones 135.

(d) 2 Roll. Rep. 393. Co. Lit. 191. a. 2 Roll. 150.

(e) Goldſb. 124. Cro. El. 462. Co. Lit. 201. b.

(f) Co.Lit201.b. Hard. 306.

(g) Cro. El. 462.

PALMER's *Caſe.*

Hill. 39 Eliz.

In the King's Bench.

BEtween *Palmer*, Plaintiff, and *Umphrey*, Defendant, in the King's Bench, it was reſolved *per totam Curiam*, that if a *Fieri facias* comes to the Sheriff to levy the Money of the Goods and Chattels of the Defendant, and the Sheriff, by Writing, reciting that the Defendant has a Term for Years (and ſhews what) and ſuppoſing that it began 2 & 3 *Phil. & Mar.* (as it was in the Caſe at Bar) where in Truth the Term began 3 & 4 *Phil. & Mar.* ſells the ſame Term, the Sale is void, for there is no ſuch (*a*) Term: But notwithſtanding this falſe Recital, if the Sheriff ſells alſo all the Intereſt which the Defendant has in the ſaid Land (as alſo in the Caſe at Bar he did) this Sale is good. And *Popham*, Chief Juſtice, ſaid, in this very Court, *Anno* 26 *El.* between Sir *George* (*b*) *Sydnam* and *Rolles*, the Caſe was ſuch; The Sheriff in the like Caſe reciting that *Rolles* had a Term of a Parſonage *pro termino diverſorum annorum adtunc ventur'*, ſold it by Force of a *Fieri facias* to another, and it was adjudged good enough. For by common Intendment the Sheriff can't have preciſe Knowledge of the Certainty of the Beginning, and the Certainty of the End of the Term; but if he takes upon him to recite the Term, and (*c*) miſrecites it, and ſells the ſame Term, it is void; but if he ſells all the (*d*) Intereſt that the Defendant has in the Land, it is good enough, notwithſtanding the Miſrecital as is aforeſaid. And ſo obſerve the Difference between the Sale of a Term, and an Extent of a Term, for accordingly it was adjudged, *M.* 32 & 33 *Eliz. in Scaccario*, that where it was found by Inquiſition that the Queen's (*e*) Debtor was poſſeſſed of certain Lands *pro Termino quorundam annorum adtunc ventur'* that this Inquiſition was inſufficient, for a Term cannot be extended without

Goldſb. 172, 173. Cro. El. 584. Styl. 62. Owen 18. Moor. 702. pl. 976.

(*a*) Cro. Car. 399.

(*b*) Goldſb. 172, 173. Cro. El. 584.

(*c*) Godb. 433. Cart. 155.

(*d*) Goldſb. 173. Cro. El. 584.

(*e*) 2 Leon. 121. 3 Leon. 204. Lane 50, 51.

ſhewing the Beginning and Certainty of the Term, and the Reaſon is this, becauſe after the Debt ſatisfied, the Party is to have his Term again, if any Part of it remains, which ought to appear, and thereupon the Party may have Remedy to remove the Hands of the Queen, or other Perſon: But in the Caſe of a Sale upon the *Fieri facias*, the Sheriff may ſell all the Intereſt or Term which the Defendant has in ſuch Land, and never mention it in his Return, but generally, *quod fieri fecit de bonis & catallis, &c.* But if the Execution in the principal Caſe ſhould be levied, it would tend to the Ruin of a poor Man who made great Complaint to the Court; the Attorney-General coming into the Court at the Requeſt of the poor Man, peruſed the Record, and thereby found that the Execution was by Force of an *Elegit*, which ought to be made by Inquiſition, for the Statute of *Weſtm.* 2. *cap.* 18. which gives the *Elegit*, provides, *Quod Vicecom' liberet ei omnia catalla, &c. & medietatem terræ ſuæ, quouſque debitum fuerit levatum per rationabile pretium* (which refers to Chattels) *& extentum*, which refers to Land, and *rationabile pretium*, and Extent ought to be found by (*a*) Inquiſition and Verdict for that is implied in Law, and the Court (will adjudge) as the Law appoints, altho' it be not ſo expreſſed, *vide* 10 *E.* 4. 11. 7 *R.* 2. *Barr* 241. (*b*) Proof is intended Trial by Verdict, and the Words of the Writ of *Elegit* are according to the ſaid Statute, and therewith agrees 2 *Mar.* (*c*) *Dyer* 100. that the Extent and Appriſement ought to be *per ſacramentum duodecim*, and not by the Sheriff, and many Precedents: And becauſe the Term was miſtaken in the Inquiſition, and the Term ſo miſtaken was appriſed by it, and the Sheriff could not ſell any Term but that only which was appriſed by the Jurors of the Inquiſition, he therefore moved the Court, that the ſaid Sale was utterly void, and ſo was the Opinion of the whole Court: And Judgment given accordingly.

(*a*) Cro. El. 584. Cro. Jac. 569. Antea 67. a. 2 Inſt. 396. Dyer 100. pl. 71. 2 Bulſtr. 97. Dall. 28. pl. 1. Goldſb. 173.

(*b*) Hob. 93, 217. 2 Co. 108. a. 11 Co. 39. a. Cro. Jac. 188, 232, 381. 3 Bulſtr. 55. 2 Brownl. 57. 1 Rol. Rep. 222, 261. 2 Rol. 595. 1 Sid. 313. Moor 312. pl. 253. 181. pl. 322, 845. pl. 1140. 888. pl. 1250. Perk. Sect. 791.

3 Inſt. 98. Br. Condition 151. (*c*) Goldſb. 173. Cro. El. 584, 735. Dyer 100. pl. 71. 2 Inſt. 396. 2 Bulſtr. 97.

HOL-

HOLLAND's *Caſe.*

Trin. 39 *Eliz.*

In the King's Bench.

William Armiger was Plaintiff in a Prohibition againſt *William Holland*, Parſon of *Northcreak* in the County of *Norfolk*, and declared, That *Matthew* Biſhop of *Canterbury* collated by Lapſe *John Meye* to the ſaid Church of *Northcreak*, who was therein inducted, and further had the Moiety of the Church of *Darsfield* in the County of *York*, and afterwards, 17 *Auguſti*, *Anno* 19 *Eliz.* he was nominated and elected to be Biſhop of *Carliſle*; after which Election, and before Conſecration and Inſtallation into the ſaid Biſhoprick, *ſcil.* 18 *Auguſti*, *Anno* 19 *Eliz.* the Queen by her Letters Patents, *De gratia ſua ſpeciali, ac ex certa ſcientia, & mero motu ſuis conceſſit, & licentiam & poteſtatem dedit præfat' J. Meye, quod ipſe in ipſam Eccleſiæ Cathedralis Carl' conſecrat' procuret & obtineret; necnon realem, actualem & corporalem poſſeſſionem, &c. recipere & obtinere, nihilominus præd' medietat' dictæ Rector' de Darsfield, ac Rectoriam de Northcreak, una cum dicto Epiſc' quamdiu eidem Epiſcopat' præeſſet, retinere & poſſid', ac fructus & emolumenta inde quamdiu eidem Epiſcopat' præeſſet in ſuos proprios uſus convertere, &c.* And afterwards 29 *Sept. Anno* 19 *Eliz.* the ſaid *John Meye* was conſecrated and inſtalled into the ſaid Biſhoprick, and was, and yet is Biſhop of the ſame See: And the Plaintiff claimed a Leaſe for Years in the ſaid Rectory of *Northcreak* by Force of a Demiſe made by Indenture by the ſaid Biſhop, 1 *Maii*, *Anno* 20 *Eliz.* for a Term of Years yet enduring; and that the Defendant being now lately preſented by Lapſe by the Queen, pretending the ſaid Letters Patents of the Queen made to the ſaid *J. Meye* were void, ſued for Tithes in the Spiritual Court, *&c.* And the Def. *pro Conſultatione habenda* ſaid, That the ſaid Church of *Northcreak* at the Time of the Induction of the ſaid *J. Meye* was, and yet is *Benefic' cum cura animarum, & ultra annuum valorem* 8 *l. viz.* 8 *l.* 10 *s.* And afterwards the ſaid *J. Meye* (*a*) accepted the Moiety of the ſaid Church of *Darsfield*, and was inſtituted and inducted thereto, and the Pleading was,

Moor 542, 543. Cro. El. 601. Dav. 77, 78. Hob. 156. 2 Brownl. 46. 2 Rol. Rep. 453. 3 Salk. 37.

(*a*) 1 Sid. 163.

(a) Co. Lit. 17. b. 10 Co. 136. *ad* (a) *medietat' Rectoriæ*, where it ſhould be *ad Rector' medietatis, &c.* (but the Court took it to be all one in Effect) and that the ſaid Church of *D. fuit Beneficium cum cura animarum*, and confeſſed the ſaid Letters Patents *prout*; and concluded that *præterea præmiſſorum*, the Church of *Northcreak* became void, and Title to preſent by Lapſe devolv'd to the Queen, who preſented the Def. to it 15 *Feb.* 1592, and made

(b) Dav. 69. a. Poſtea 78. b. 89. b. 2 Brownl. 45. no Mention of the Act of (b) 21 *H.* 8. *cap.* 13. in his Plea; and upon this Plea the Pl. demurr'd in Law. And in this Caſe two Points were reſolved. 1. That before the Statute of 21 *H.* 8. *cap.* 13. if one had a Benefice with Cure, and accepted another Benefice with Cure, that the firſt Benefice was (c) void, but it was not an Avoidance by the Common Law, but by the Conſtitution of the Pope, of which Avoidance the Patron might take Notice if he would, and might preſent if he would without any Deprivation; but becauſe the Avoidance accrued by the Eccleſiaſtical Law, no Lapſe incurr'd without (d) Notice, as upon Deprivation or Reſignation, and yet the Patron might preſent, and take upon him Notice if he would; ſo that for the Benefit of the Patron the Church is void in the principal Caſe, but not for his Diſadvantage: And according to this Difference it is adjudged in *Hill.* 24 *E.* 3. 33. that in a *Quare Impedit* brought by the King againſt the Biſhop of *Worceſter*, it was a good Title for the King that the Predeceſſor of the Biſhop preſented to the ſame Church one *A.* who afterwards accepted another Benefice, by which Acceptance the Church in Queſtion was void, and remained void till the Temporalties of the Biſhop came to the King's Hands; and ſo it belong'd to him, *&c.* And the King upon this Title by Award of the Court had a Writ to the Biſhop, which proves that Church was void in Fact without any Deprivation, to which the K. might by Law preſent his Clerk; and there-

Dav. 79. (c) Moor 542. Cro. El. 601. Cro. Car. 357, 476. Heil. 125. Lit. Rep. 239. Co. Lit. 120. a. 2 Rol. 352. Dr. & Stud. lib. 2. cap. 31. F. N. B. 34. L. 1 Jones 404. 2 Brownl. 45, 46. Vaughan 21. Hob. 166.

(d) F. N. B. 35. H. Poſtea 79. b. 6 Co. 39. b. Goldſb. 141.

(e) Poſtea 79. a. with agree the Books in 9 (e) *E.* 3. 22. *a.* 10 *E.* 3. 1. 14 *H.* 7. 28. *b.* 14 *H.* 8. 17. *a. F. N. B.* 34. *l. Et dictum eſt in* 10 *E.* 3. 1. that in ſuch Caſes both Churches ſhall be void, and by *Parning*, the Conſtitution of Plurality is a general Judgment, that all ſhall be deprived who hold many Benefices with Cure above one Month after the Conſtitution, which binds ſtronger againſt them upon their Privation than particular Judgment of a certain Perſon, for a particular Deprivation may be avoided by Appeal, and the other not. But ſome Opinions are in 5 *E.* 3. 9. & 11 *H.* 4. 37. that the Church is not void without Deprivation; but that may be underſtood for the Diſadvantage of the Patron, but for his Advantage it is void as is aforeſaid; and ſo all the Books are well reconciled, ſo that the Statute of 21 *H.* 8. is in this Point but a Confirmation and Affirmance of the Law before: But now foraſmuch as it is affirmed by Act of Parliament, if the firſt Benefice be of the Value of 8 *l. per Ann.* the Patron at his (f) Peril ought to preſent to it,

(f) Cawly 23. 6 Co. 29. b. Cro. Car. 357. Dyer

for inasmuch as to an Avoidance by Parliament every one is Party, every one ought to take Notice of it at his Peril; but otherwise, if the first Church be not of the yearly Value of 8 *l.* for then it is void meerly by the Ecclesiastical Law, whereof the Patron need not take Notice at his Peril as is aforesaid. 2. It was resolved *per tot. Curiam*, that the said Act of (*a*) 21 *H.* 8. was such a general Act, that the Judges (although it be not set forth in Pleading by the Party) ought to take Notice of it *ex officio*. *Nota Reader*, the Rule of the Law is, That of general Statutes the Judges ought to take Notice, altho' they be not pleaded, otherwise of special or particular Statutes: And for the better understanding of your Books in this Point, and which shall be said in Judgment of Law *Statutum generale*, and which is *Statutum speciale*, it is to be known, that *generale* (*b*) *dicitur a genere, & speciale a specie*; And there are *Genus*, *Species*, *& Individua*: Know that Spiritualty is *Genus*, Bishoprick, Deanery, *&c.* are *Species*, and Bishoprick or Deanery of *Norwich*, *Individuum*, *sic dict' quia in* (*c*) *partes dividi nequit*. And therefore it was resolved in the Case at Bar, that forasmuch as the Act of 21 *H.* 8. concerns the whole Spiritualty in general, it was a general Act whereof the Judges ought to take Notice. And *Pasch.* 31 *Eliz. Rot.* 514. it was adjudged between *Claypool* (*d*) and *Carter* in *C. B.* and affirmed by Writ of Error in *B. R. Hill.* 32 *Eliz. Rot.* 791. that the Act of 18 *E. cap.* 6. concerning Colleges in the two Universities, and the Colleges of *Eaton* and *Wincheſter* was a particular Act whereof the Judges shall not take Notice. But the Statute of (*e*) 13 *Eliz. cap.* 10. and 18 *Eliz. cap.* 11. concerning Colleges, Deans and Chapters, Hospitals, Parson, Vicar, *or any other having any Spiritual or Ecclesiastical Living*, are general Acts, whereof the Judges shall take Notice, which Case is like the Case at the Bar. But it was adjudged *Trin.* 30 *Eliz.* in *B. R.* between *Elmer* Bishop of *London*, and *Gate*, for the Scite and Demesns of the Manor of *Draiton* in the County of *Middlesex*, that the Statute of (*f*) 1 *Eliz.* concerning Leases, *&c.* made by Bishops, was a special Act, because it concerned the Bishops only, who are but *Species* of the Spiritualty, and therefore of such special Law the Judges shall not take Conusance if it be not pleaded; and therewith agrees 13 *Edw.* 4. 8. *b. & sic de similibus*: So this Word (Officer) is a general Word or *Genus*, (Sheriff) is a special Word or *Species*; and Sheriff of *Norfolk* is *Individuum*: And therefore the Statute of *W.* 1. *cap.* 26. (*g*) by which it is enacted, *That no Sheriff, nor other the King's Officer, take any Reward to do his*

8 Co. 28, 137, &c. 6 Co. 29. b. Ante 13. Fitzgib. 45. 2 Lev. 151.

(*a*) Moor 542. Ci. El. 601. Doct. pla. 337. Yelv. 106. 2 Brownl. 208. 2 Rolls 466.

(*b*) Doct. pl. 336.

(*c*) Doct. pl. 336.

(*d*) Postea 120. b. Moor 593. 1 Leon. 306. Doct. pl. 337. Sav. 128, 129. 1 And. 248, 249, &c.

(*e*) Postea 120. b. Yelv. 106. 2 Roll. 465. Doct. pl. 337. Noy 124. 2 Brownl. 208. 1 Mod. Rep. 204, 205.

(*f*) 2 Rolls 466. Mod. Rep. 205. Lit. Rep. 306. Doct. pl. 337. 5 Co. 2. a. Cr. Jac. 112.

(*g*) Doct. pl. 3.

Office, but ſhall be paid of that which they take of the King, is a general Act, becauſe it extends to Officers *in general*: (a) But the Statute of (a) 23 *H.* 6. *cap.* 10. which extends only to Sheriffs, is but a particular and ſpecial Act, as it is held 3 *Ma. Dy.* 119. *a.* So Myſtery or Trade is a general Word, Trade of Grocery is ſpecial, and this Grocer by Name is *Individuum*: And therefore Acts of Parliament concerning Myſteries or Trades, are general Acts: But an Act of Parliament concerning the Trade of (b) Grocery is a ſpecial Act, as it is ſaid 28 *H.* 8. *Dyer* 27. becauſe the Trade of Grocers contains under it but *Individua*, or ſingular Perſons, as this or that Grocer by Name, *vide* 10 *E.* 4. 7. *a.* The Statute of *Marlebridge*, *cap.* 3. *Non* (c) *ideo puniatur Dominus per redemptionem*, is a general Law for the Reaſons aforeſaid, for this Word *Seignior* is a general Word. But an Act concerning all the Nobility, (d) or Lords of the Parliament, or all the Biſhops of *England*, or all Corporations made by King *H.* 6. are ſpecial and particular Acts for the Cauſes aforeſaid, as it is held in the Caſe of the Lord *Say*, in 13 *E.* 4. 8. *b. Know Reader*, if an Act is ſpecial which extends *ad ſpecies*; *a multo fortiori*, it is ſpecial or particular which extends *ad individua*: *Vide* (e) 14 *E.* 4. 1. *a.* & 43 (f) *Aſſ.* 29. So obſerve what Act as to Perſons is general, and what not. Now know, that altho' the Matter is ſpecial, ſo that under it there are but *individua*, yet if it is general as to Perſons, thereof the Judges ſhall take Conuſance; but if the Act concerns *aliquod ſingulare ſeu individuum*, altho' it is general as to Perſons, yet the Judges ſhall not take Conuſance thereof: As Appeal is a ſpecial Action, and contained under this general Word Writ; and yet the Statute of *Magna Charta*, *cap.* 34. which concerns (g) Appeals, is general, and the Judges ought to take Notice thereof, as it is held in 10 *E.* 4. 7. *a.* But if an Act was made that no (h) Appeal ſhall be brought of the Death of *J. S.* this Act is particular, *Cauſa qua ſupra*: So the Act of *Magna Charta*, *cap.* 25. of *Waſte*, (i) *W.* 2. *cap.* 25. concerning Aſſiſes, and *cap.* 18. concerning Aſſiſe by Tenant by *Elegit*, *cap.* 41. concerning *contra formam collationis*; 23 *H.* 8. of Attaint & *ſimilia*, are general Laws, although they concern ſpecial Actions; the ſame Law, 4 *H.* 7. *cap.* 17. and *Merton*, *cap.* 6. of (k) Wards, & *ſic de cæteris*: But although the Act as to Perſons is general, but the Matter thereof concerns *Individuums*, or ſingular Things, as any (l) particular Manor, or Houſe, &c. or all the Manors, Houſes, &c. which are in one or ſundry particular Towns, or in one or divers particular Counties; theſe are ſuch particular Acts, whereof the Judges ſhall not take Conuſance,

(a) Plowd. 65. a. 1 Sid. 23, 24, 356. Doct. pl. 337. Hob. 13. Moor 468. 2 Sand. 154, 155. 3 Co. 59. b. Cro. El. 460. 1 Vent. 85.
(b) Doct. pl. 337. Dyer 27. pl. 179.
(c) Doct. pl. 337.
(d) Doct. pl. 338.
(e) 5 Co. 5. b. Br. Parliam. 61.
(f) 5 Co. 5. b. Br. Parl. 35.
(g) Doct. pl. 338.
(h) Doct. pl. 338.
(i) Doct. pl. 338.
(k) Doct. pl. 338.
(l) Doct. pl. 338.

if they be not pleaded or alledged by the Party; but of every Act (altho' the Matter thereof concerns *Individua*, or ſingular Things, yet) if they touch the King, the Judges *ex officio* ought to take Conuſance, for every Subject has Intereſt in the King, as in the Head of the Commonwealth; and as the inferior Members can't eſtrange themſelves from the Actions and Paſſions of the Head, no leſs can any Subject eſtrange himſelf from any Thing which touches or concerns the King, their ſupreme Head. *Vide Plow. Com.* in the Lord *Barkley*'s Caſe. *Vide* for theſe Matters, 21 *E.* 4. 59. *a.* 37 *H.* 6. 15. *& Plow. Com.* in *Wimbiſh*'s Caſe 53. And *Tanfield*, *Godfrey*, and others, were of Counſel with the Plaintiff, and *Coke* and *Houghton* with the Defendant.

Hob. 226. Doct. pla. 338, 339. 8 Co. 28. a. 138. b. Antea 13. a. Plowd. 231. a. Godb. 168. Jenk. Cent. 215.

The

The CASE of CORPORATIONS.

Mich. 40 & 41 *Eliz.*

IN this Term at Serjeant's Inn in *Fleet-ſtreet*, it was demanded of the Chief Juſtices, *Popham* and *Anderſon*, *Periam*, Chief Baron, and the other Juſtices, That where divers Cities, Boroughs and Towns, are incorporated by Charters, ſome by the Name of Mayor and Commonalty, or Mayor and Burgeſſes, *&c.* or Bailiffs and Burgeſſes, *&c.* or Aldermen and Burgeſſes, *&c.* or Provoſt, or Reve and Burgeſſes, or the like. And in the ſaid Charters it is preſcribed, That the Mayors, Bailiffs, Aldermen, Provoſts, *&c.* ſhall be choſen by the Commonalty or Burgeſſes, *&c.* If the ancient and uſual Elections of Mayors, Bailiffs, Provoſts, *&c.* by certain ſelected Number of the Principal of the Commonalty, or Burgeſſes, commonly call'd the Common Council, or by ſuch like Name, and not in general by the whole Commonalty or Burgeſſes, nor by ſo many of them as would come to the Election, were good in Law, foraſmuch as by the Words of Charters, the Election ſhould be indefinitely by the Commonalty, or by the Burgeſſes, which is as much as to ſay by all the Commonalty, or all the Burgeſſes, *&c.* Which Queſtion being of great Importance and Conſequence, was referred by the Lords of the Council to the Juſtices, to know the Law in this Caſe, becauſe divers Attempts were of late in divers Corporations, contrary to the ancient Uſage to make popular Elections: And it was reſolv'd *by the Juſtices*, upon great Deliberation and Conference had amongſt themſelves, That ſuch ancient and uſual Elections were good and well warranted by their Charters, and by the Law alſo; for in every of their Chart. they have

Dav. 44. b.
Lane 21.
Jenk. Cent. 273.
3 Bulſtr. 71.
Hob. 15.

have Power given them to make Laws, Ordinances, and Conſtitutions, for the better Government and Order of their Cities or Boroughs, *&c.* by Force of which, and for avoiding of popular Confuſion, they by their common Aſſent conſtitute and ordain, That the Mayor or Bailiffs, or other principal Officers, ſhall be elected by a ſelected Number of the Principal of the Commonalty, or of the Burgeſſes, as is aforeſaid, and preſcribe alſo how ſuch ſelected Number ſhall be choſen, and ſuch Ordinance and Conſtitution was reſolv'd to be good and allowable, and agreeable with the Law and their Charters, for avoiding of popular Diſorder and Confuſion: And altho' now ſuch Conſtitution or Ordinance can't be ſhew'd, yet it ſhall be preſum'd and intended in Reſpect of ſuch ſpecial Manner of ancient and continual Election (which ſpecial Election could not begin without common Conſent) that at firſt ſuch Ordinance or Conſtitution was made, ſuch reverend Reſpect the Law attributes to ancient and continual Allowance and Uſage, altho' it began within Time of Memory: *Mos retinendus eſt fideliſſimæ vetuſtatis; quæ præter conſuetudinem & morem majorum fiunt, neque placent, neque recta videntur; & frequentia actus multum operatur.* And according to this Reſolution the ancient and continual Uſages have been in *London*, *Norwich*, and other ancient Cities and Corporations, and God forbid that they ſhould be now innovated or altered, for many and great Inconveniences, will thereupon ariſe, all which the Law has well prevented, as appears by this Reſolution. Jenk. Cent. 273.

DYGBY's

DYGBY's *Case.*

Hill. 41 Eliz.

In the King's Bench.

Co. Ent. 203. pl. 9. Jenk. Cent. 273. Mo. 434, 435, &c. Goldſb. 162, 163, &c. Vaugh. 21. 2 Roll. Rep. 453. Lit. Rep. 304.

BEtween *Richard Robins*, Plaintiff, in *Ejectione firmæ*, for Parcel of the Glebe of the Rectory of *Horton in comitat' Lincoln*, on a Demiſe made to him by *Edward Wickman*, Parſon there, and *William Gerrard* and *John Prince*, Defendants: Upon Not-guilty pleaded, the Jurors gave a Special Verdict to this Effect; (which Action began in the King's Bench, *Hill.* 38 *Eliz. Rot.* 781.) the ſaid Rectory of *Horton* is a Benefice with Cure, and of the annual Value of 8 *l. & amplius*, to which (the Church being void) *George Digby*, Eſq; Patron thereof, did preſent *Robert Merick* his Clerk, who at his Preſentment was admitted, inſtituted and inducted: And afterwards Queen *Elizabeth*, *anno regni ſui* 29, preſented the ſaid *Merick* to the Church of *Stanes* in the County of *Middleſex*, which is a Benefice with Cure; to which Church of *Stanes* the ſaid *Merick* was admitted and inſtituted, and before Induction, *Catherine*, the late Wife of the Lord *Borough* admitted and ~~receiv'd by Writing under her Seal~~ the ſaid *Merick* to be her Domeſtick Chaplain, according to the Form of the Statute, 21 *H.* 8. *(a)* And afterwards the Archbiſhop of *Canterbury*, by his Letters of Diſpenſation; *Cum eodem Rob. Merick, ut una cum Rectoria de Horton dioceſ. Lincoln' quam adtunc obtinuit, Eccleſiam de Stanes dioceſ. Lond' recipere, & quoad vixerit retinere libere & licite valeat, & poſſit, authoritate Parliamenti gratioſe diſpenſavit:* And afterwards the Q. by her Letters Patents under the Great Seal, ratify'd and confirm'd the ſaid Letters of Diſpenſation: And afterwards the ſaid *R. M.* was inducted in the ſaid Church of *Stanes*, *viz.* 30 *Aug. anno* 29 *El.* And afterwards the Q. by Lapſe *anno* 33, preſented

(a) Antea 75. b. Poſtea. 89. b. 117. a. 21 H. 8. cap. 13.

preſented the ſaid *Edward Wickman* to the Church of *Horton*, who was admitted, inſtituted, and inducted, and demiſed to the Plaintiff, upon whom the Defendants, as Servants of the ſaid *Robert Merick*, enter'd and ejected him; and if they were guilty or not, was the Queſtion: And it was adjudg'd for the Plaintiff, that the ſaid *(a)* Diſpenſation came too late, becauſe it came after the Inſtitution, for by the Inſtitution, *Eccleſia plena & conſulta exiſtit* againſt all Perſons but againſt the King. And it is to be known, that every Rectory conſiſts upon Spiritualty and Temporalty; and as to the Spiritualty, *ſc. Cura animar'*, he is compleat Parſon by the Inſtitution; for when the Biſhop, upon Examination found, admits him able, then he inſtitutes him, and ſays, *Inſtituo te ad tale beneficium, & habere cur' animar'* of ſuch a Pariſh, *& (c) accipe cur' tuam & meam, &c. Vide* 33 *H.* 6. 13. But as to the Temporalties, *(d)* as the Glebe Land, *&c.* he has no Freehold in that 'till Induction, *vide Hare & Buckley's* Caſe. *Plow. Com.* 528. And for the better underſtanding of our Books, know Reader, *Qd' per generale Concilium Lateranenſe tentum ſub Innocentio Papa tertio; Statut' eſt quod quicunq; reciper' aliquod benefic' habens cur' animar' annex', ſi prius tale benefic' obtinebat, eo ſit jure ipſo (e) privatus, & ſi forte illud retinere contenderit, alio etiam ſpolietur; Is quoque ad quem prioris ſpectat donatio, illud poſt receptation' alterius conferat cui merito viderit conferend'*, and this Council was held *Anno Dom'* 1215. *vide Tom.* 4. 221. *c.* 29. *de Multa:* By which it appears that by the Acceptance of the *(f)* ſecond Benefice, the firſt is void *ipſo jure*, and the Patron may preſent if he will: And upon this General Council are the Books in *(g)* 9 *E.* 3. 22. *a.* 10 *E.* 3. 1. (where the ſaid general Council is mention'd) 24 *E.* 3. 30. *a.* 11 *H.* 4. 37. 14 *H.* 7. 28. 14 *H.* 8. 17. *F. N. B.* 34 *l.* grounded. But now what ſhall be call'd an Acceptance of a ſecond Benefice with Cure, within the ſaid Act of *(h)* 21 *H.* 8. is the Queſtion; and the Doubt ariſes upon this, That altho' *Merick* by his Inſtitution was Parſon as to the Spiritualty, *ſc.* to celebrate Divine Service and Sacraments, to preach and inſtruct his Pariſhioners in the true Faith, yet he is not compleat Parſon, for he wants his Temporalties whereof he may live 'till Induction, and therefore he is not compleat Parſon 'till Induction, and the Statute is to be intended of a compleat Parſon. 2. It was objected, that altho' he ſhall be ſaid compleat Parſon before Induction, yet he has not a Benefice with Cure till he is inducted; for this Word (Benefice) as it was ſaid, implies Profit and Benefit, which he cannot have 'till Induction; and he who has *Beneficium* ought to execute and *facere officium*, but none can do his Office without ſome Benefit. 3. It was objected, that the ſaid Act of 21 *H.* 8. doth not make the firſt Benefice void 'till Induction, for the Words are, *And be inſtituted and inducted in the Poſſeſſion*

of

(a) Jenk. Cent. 273. Dav. 78. a. Goldſb. 166. Moor 12. Latch. 32. 2 Roll. 259, 360. Hob. 158.

(b) Co. Lit. 344. a. 2 Inſt. 356.

(c) 1 Sider. 427.

(d) 1 Inſt. 356.

* 1 Palm. 349.

(e) 2 Rolls 360, 361.

4 Co. 75.

(f) Cr. Car. 357. Antea fol. 75. b. 2 Rolls 360, 561.

(g) Antea 75. b.

(h) 21 H. 8. c. 15.

of the ſame, &c. But it was reſolv'd, that great Inconvenience would enſue, if the firſt Benefice ſhould not be void by the Inſtitution to the ſecond Benefice, by Force of the ſaid Conſtitution, for then one might be inſtituted to divers Benefices with Cure, the great Cure and Charge of which one could not diſcharge, and yet no other could be preſented to any of them which would be inconvenient; and therefore *vide Tomo* 5. *General' Concilior' pag.* 368. *cap.* 64. *Res ipſa loquitur plura. Beneficia potiſſimum quibus animarum cur' ſubmiſſa eſt, non ſine gravi Eccleſiarum damno ab uno obtineri, cum unus in pluribus Eccleſiis rite officia perſolvere, aut rebus earum neceſſarium curam impendere nequeat*; whereby it appears, that the great Miſchief before the ſaid Council was, That thoſe who had Plurality of Benefices, could not diſcharg etheir Paſtoral Duties which belong'd to their Functions, which Functions they had to all Intents by the Inſtitution before Induction: And in Judgment of our Law, he who is inſtituted to a Benefice has acepted it, for the Church is full by the Inſtitution before any Induction. 2. It has been now lately adjudg'd in the Common Pleas, that where a Clerk was preſented, (*a*) admitted and inſtituted to a Benefice with Cure above the Value of 8 *l.* and afterwards and before Induction to the firſt, he accepted another Benefice with Cure and is inducted to it; that the firſt is void by the Statute of 21 *H.* 8. for the Words of the Act are, *If any Perſon* (*b*) *having one Benefice with Cure, &c. accept and take another, &c.* and he who is inſtituted to a Benefice, is ſaid in Law to have accepted a Benefice, and to have a Benefice. And *Popham*, Chief Juſtice, ſaid, That altho' by the Inſtitution to the ſecond Benefice, the firſt is void by the Eccleſiaſtical Law, without any Deprivation, or Sentence declaratory, yet no Lapſe ſhall incur againſt the Patron, unleſs (*c*) Notice be given him, no more than if the Church became void by Reſignation or Privation, and yet the (*d*) Patron may take Notice if he will, and may preſent according to the ſaid Conſtitution; but he is not forced to take Notice at his Peril, unleſs he is inducted: *Quod fuit conceſſ' per totam Curiam.* And then foraſmuch as the Avoidance after Induction is declar'd by the Act of 21 *H.* 8. (to (*e*) which every one is Party) there he ought in ſuch Caſe to take Notice at his Peril: But admitting that the firſt Church was not void *de facto* by the Inſtitution 'till the Induction, yet for another Cauſe the Diſpenſation made comes too late, for the Words of the Act of 21 *H.* 8. are, *May purchaſe Licence to receive and keep two Benefices with Cure of Souls*, and the Words of the Diſpenſation in the Caſe at Bar are *reciper' & retin'*; and foraſmuch as by his Inſtitution, the Church was full of him, he could not purchaſe Licence to receive that which he had before, and the Words are in the Conjunctive, *recip' & retin'*, ſo that he could

(*a*) Co. Lit. 344. a. Lane 20.

(*b*) 3 Co. 30. b.

(*c*) Antea 75. b. Dyer 327. pl. 7. 6 Co. 29. b. Cawly 23. b.

(*d*) 1 Jones 404. Hob. 166. Cr. Car. 357.

(*e*) Antea 76. a. Doct. pl. 337. 2 Roll. 466.

could not retain that which he could not receive. And it appears by the ſaid Judgment *in Communi Banco*, that within the ſaid Act of 21 *H.* 8. he who is only inſtituted, is ſaid to have a Benefice with Cure; and the Queſtion, as to this Point, was asked of the other Juſtices and Barons of the Exchequer, and they all agreed, That the Diſpenſation in the Caſe at Bar came too late for the Reaſons aforeſaid. And the Attorney-General, *Tanfield*, and *Francis Moor*, were of Counſel with the Plaintiff, and *George Crook*, *Lawton*, and others, with the Defendant.

NOKES's

NOKES's *Case.*

Trin. 41 Eliz.

Cr. El. 674, 675. 2 Brownl. 213. Cr. Car. 176. Co. Lit. 139. b. Carth. 88. Skinner 160.

BEtween *Nokes*, Plaintiff, and *James* Defendant, in Debt on a Bond, the Caſe was ſuch: The Defendant demiſed to the Plaintiff an Houſe in *London*, by theſe Words, *Demiſe, Grant, &c.* and the Leſſor covenanted that the Leſſee ſhould enjoy the Houſe during the Term, without Eviction by the Leſſor, or any claiming under him; and the Leſſor was bound to perform all Covenants, Grants, Articles, and Agreements, *&c.* in the Indenture: The Plaintiff granted his Term over to a Stranger; in Debt upon this Bond, the Defendant pleaded Performance of the Covenants, *&c.* The Plaintiff aſſign'd the Breach, that one *Savery* enter'd upon the Aſſignee, and made a Leaſe of ſeven Years to one *Ducke*, if he ſhould ſo long live, who brought *Ejectione firmæ* againſt the Aſſignee, and recover'd by Verdict, and had Execution; upon which the Defendant demurr'd in Law. And the Opinion of the *Court* was againſt the Plaintiff: And in this Caſe theſe Points were reſolved: 1. That for this Covenant in (*a*) Law upon theſe Words, *Demiſe*, (*b*) *Grant*, &c. the (*c*) Aſſignee ſhall have a Writ of Covenant, 9 *Eliz. Dyer* 257. agrees. 2. That for this Breach of the Covenant in * Law, the Bond was forfeited, for he was bound to perform all Covenants, Grants, *&c.* which extends as well to Covenants in Law, as to Covenants in Deed. 3. Altho' the Recovery was by Verdict, yet the Plaintiff ought to have ſhew'd that *Savery* had (*d*) an older Title, for otherwiſe the Covenant in Law was not broken, and becauſe he did not ſhew that, for this Reaſon they reſolv'd againſt the Plaintiff. 4. It was held by *Popham*, Chief Juſtice, *& totam Curiam*, That the ſaid expreſs Covenant (*e*) qualify'd the Generality of the Covenant in Law, and reſtrain'd it by the mutual Conſent of both Parties, that it ſhould not extend further than the expreſs Covenant, *Quia clauſa (f) generalis non refert' ad expreſſa*, in this Caſe. And ſo was

(*a*) Vaugh. 126. 1 Sid. 447. 2 Brownl. 214, 215. Dyer 57. a.

(*b*) 5 Co. 17. a. 25 H. 8. Br. Covenant 32. 3 Co. 63. a. F. N. B. 146. c.

(*c*) Cro. El. 809. Yelv. 175. Cr. Jac. 73, 234. *Cr. El. 674, 675.

(*d*) 2 Rol. Rep. 6, 28, 287. 2 Browdl. 214. Cr. El. 675. Hob. 35. Doct. pl. 86. Vaugh. 122. Cr. Jac. 315. Palm. 339. Moor 861.

(*e*) Cr. El. 674, 864. Winch. 92, 93. Yelv. 175. 1 Rolſt. 3, 4. 2 Brownl. 212, 213, 214. Cr. Jac. 234. Cr. El. 864. 1 Sid. 328. 1 Saund. 60. Lit. Rep. 64, 200. Vaugh. 126. Raym. 46. Co. Lit. 384. a. (*f*) Antea 73. b. Lit. Rep. 345.

was it now lately adjudg'd in (*a*) *Hammond*'s Case in this Court.

(*a*) Cr. El. 675. Vaugh. 126.

Vide Reader 20 *E.* 3. *Counterplea de Garranty* 7. it is adjudg'd, that if a Man leases for Life rendring Rent, (*b*) and further binds himself and his Heirs to Warranty, here the express Warranty doth not toll the Warranty in Law, for if he in the Reversion grants over his Reversion, and the Lessee attorns, and afterwards is impleaded, he may (*c*) vouch the Grantee by the Warranty in Law, or he may vouch the Lessor by the express Warranty; and therewith agrees 31 *E.* 3. *Voucher* 289. (*d*) where the Case was, *L.* seised of 3 Oxegangs of Land leased by Deed to *C.* for Life, rendring Rent and Services, and bound himself and his Heirs to Warranty, *&c.* and afterwards granted the Reversion to one *R. &c. L.* dy'd, his Wife brought a Writ of Dower against *C.* who vouch'd the Heir of *L.* by Force of the express Warranty. And there *Howard* C. J. said, if she had two Warranties, she may choose which she will; but *Nota*, in both the said Cases the Warranty in Law and the express Warranty were general. And I heard the Lord *Dyer*, and the whole Court of Common Pleas, *Hill.* 14 *Reg. El.* resolve, That if a Man makes a Feoffment by Deed by this Word (*e*) *Dedi*, and with express Warranty in the Deed, he may use the one or the other at his Election. And that the Statute *de Bigamis*, *cap.* 6. is to be intended, That (*f*) *Dedi* imports a Warranty, altho' the Clause of Warranty be not contain'd in the Deed. The Letter of which Statute is, (*g*) *In chartis ubi continetur dedi & concessi, &c. sine clausula warrantia, ipse feoffator in vita sua, &c. sine warrantia, &c. id est quamvis nullam continet clausulam warrantiæ, tenetur warrantizare*: But *Nota*, by Force of the said Act, now *Dedi* is made an express Warranty during the Life of the Feoffor: And there is great Reason in the principal Case, that the particular Covenant subsequent, should qualify the general Force of this Word *demisi*, for otherwise the particular Covenant would be in vain, if the Force of this Word *demisi* should stand; and also these Words (*h*) *demisi & concessi* are frequent in every ordinary Lease that is made; and the best (*i*) Construction of Deeds is to make one Part of the Deed expound the other, and so to make all the Parts agree, *& quoad fieri possit* according to the true Intent and Meaning of the Parties, *vide* 48 *E.* 3. 2. If a Man makes a Lease for *Life* by this Word *Dedi*, and afterwards grants over the Reversion, the Lessor shall be vouch'd by Force of the *Dedi*. *Lib.* 1. 2. *b.*

(*b*) Co. Lit. 384. a.

(*c*) Co. Lit. 384. a.

(*d*) Cr. El. 675.

(*e*) Lit. Rep. 64. Co. Lit. 384. a. 1 Bulstr. 3.

(*f*) 2 Inst. 275, 276. 6 H. 7. 2. a. Dal. 101. pl. 35. Cr. El. 861. Co. Lit. 384. a. 1 Co. 2. b. Yelv. 139. 5 Co 17. a. Perk. Sect. 124.

(*g*) Co. Lit. 384. a. Pref. Rolls Abr. pag 7.

(*h*) 1 Sid. 430. 1 Vent. 44. Hob. 12. Cr. Jac. 73. 5 Co. 17. a. 18. a. Cr. El. 214.

(*i*) Lit. Rep. 187. 2 Co. 23. b. Co. Lit. 314. b.

Sir ANDREW CORBET's *Case.*

Mich. 41 & 42 Eliz.

In the Court of Wards.

2 Bulſt. 252.
1 Jones 25.
1 Vent. 202.
2 Rol. Rep. 13.
Skin. 126, &c.
180. 263.
Fitzgib. 139.

SIR *Andrew Corbet* Knight, 16 *Eliz.* ſeiſed of divers Manors, Lands, and Tenements in Fee, Part of which was held of the Queen by Knights Service *in Capite*, by his Will in Writing deviſed ſome of them to *Richard Corbet* and others to have and hold to them and the Survivor of them until ſuch Time and Term as the Sum of 800 *l.* by them or the Survivor of them, or the Executors of the Survivor of them, of the Iſſues, Rents, Revenues, and Profits of the ſaid Lands ſhould be fully levied and received above all Charges and Expences; and the ſaid Sum ſo levied to be employ'd for the Preferment of his two Daughters *Margaret* and *Mary*, as in this Will is limited, and left a third Part to deſcend. The ſaid Sir *Andrew*, *anno* 20 *Eliz.* dy'd, *Robert Corbet* his Son and Heir took the ſaid Will into his Hands, and entred into the ſaid Lands now in Charge, and receiv'd the Profits thereof during his Life, and afterwards dy'd in *anno* 25 *Eliz.* after whoſe Death, upon the Search of Evidences the ſaid Will was found at *Morton Corbet*, which Will was found in the Office after the Death of the ſaid *Robert*, and then tranſcrib'd into this Court; by Virtue of which Will the ſaid *Rich. Corbet* the Deviſee enter'd and hath receiv'd the Profits of the ſaid Land from the Feaſt of St. *Michael*, *anno* 26 *Eliz.* until the Feaſt of the Annunciation, *anno* 36 *Eliz.* and by ſuch Time had levied 640 *l.* and had employ'd it according to the Will; and if the Profits taken by *Rob. Corbet*, and which the Deviſees might have taken, ſhould be accounted Parcel of the ſaid Sum of 800 *l.* was the Queſtion: And in this Caſe 2 Points were reſolv'd. 1. That altho' the Words are until the Sum

of

of 800 *l.* ſhall be levied by them of the Profits of the Land; yet it is as much in Law, as if the Words had been, ſhall or (*a*) may be levied; and ſo it was held in Caſe of a Leaſe, (*b*) where the Limitation of an Uſe until ſuch Sum ſhall be levy'd, is as much as to ſay until ſuch Sum can be levy'd, for otherwiſe great Miſchief would enſue; for inaſmuch as he in Reverſion or Remainder can't enter 'till the Sum is levy'd, it would be in the Power of them who are appointed to levy the Sum, if they would defer the levying thereof, to exclude him in the Reverſion or Remainder, from taking the Profits of the Land for ever, which would be inconvenient: So it was agreed upon the Words of *W.* 2. *cap.* 18. *Quod* (by Force of the *Elegit* which is given by the ſame Statute) *vicecomes liberet, &c. medietatem terræ ſuæ quouſq; (c) debitum fuerit levat' per rationab' extent'*; And upon the Words of the Writ of *Execution* of a Statute Merchant and (*d*) Staple, *omnia terras & tenementa, &c. habend', &c. juxta form' ordinationis inde fact', ſcil't de Mercatorib'* 13 E. 1. or 27 E. 3. *quouſq; ſibi debitum præd' fuit ſatisfactum*, that if the Conuſee neglects to take the Profits, yet when the Conuſee might have been ſatisfy'd his Debt according to the Extent, the Conuſor ſhall have his Land again: But it was ſaid that Words make a Plea, and therefore it was agreed, that upon the Statute of *Merton, cap.* 6 & 7. that the Profits of the Land which the Guardian takes for the (*e*) double Value ſhall be in Satisfaction of the double Value, but otherwiſe in Caſe of (*f*) ſingle Value, for the Words of the ſaid Act (*g*) *cap.* 6. in Caſe of the double Value are, *Tunc teneat terram ejus ultra terminum ætatis ſuæ per tantum tempus quod inde poſſit percipere duplicem valorem maritagii:* So that by expreſs Words the Profits ſhall be accounted Parcel of the double Value; but the Words of the 7 Chapter concerning the ſingle Value are, *ſc. Si quis hæres, &c. pro domino ſuo noluit ſe maritare non compellatur hoc facere, ſed cum ad ætatem pervenerit det domino ſuo & ſatisfaciat ei, &c. pro maritagio ſuo antequam terram ſuam recipiat*, by which it appears, that the Guardian ſhall enjoy the Profits to his own (*h*) Uſe, until the Heir ſatisfies him, *vide* for this Difference, 27 *H.* 8. 5. *b.* 31 *Aſſ.* 26. 43 *E.* 3. 21. And further it was held, that in the ſaid Caſe of the double Value, it is in the Election of the Guardian, either to bring his Writ of Forfeiture of Marriage, or to hold the Land until he is ſatisfy'd, 18 *E.* 3. 18. *acc.* But if the Guardian chuſes to have the Land, and enters into it, he ſhall not have the Land but only ſo long that he might levy the double Value, and his Negligence ſhall be his own Damage: *Vide* 15 *H.* 4. 5. *b.* 7 *H.* 6. 12. 15 *H.* 7. 14. 11 *H.* 6. 8. *a.* 2. It was reſolv'd, that when the Heir himſelf in the Caſe at Bar, (*i*) or he in Reverſion or Remainder in the Caſe of a Leaſe, or Limitation of an Uſe enters upon him to whom the Land is deviſed, demiſed, or limited, as is aforeſaid,

(*a*) Cart. 77, 78. 1 Vent. 202. Moor 556. Bridgm. 82. Noy 33. Cr. El. 800.
(*b*) Bridgm. 82. Cart. 77.
(*c*) Bridgm. 42. Cart. 77.
(*d*) F.N.B. 131. D.
(*e*) Bridgm. 82. 2 Inſt. 91.
(*f*) 2 Inſt. 93.
(*g*) Co. Lit. 203. a.
(*h*) 2 Inſt. 93.
(*i*) Cart. 77, 78.

and puts him out, in that Case it is in the (*a*) Election of such Person so put out, either to bring his Action and recover the mesn Profits, which shall be accounted Parcel of the Sum, or he may re-enter and shall hold the Land over until he levies the whole Sum, and the Time in which he was so put out, shall not be accounted Parcel; for when he who is to have the Land again doth the Wrong, against him and all others who claim under him, he who was put out, if he will, may re-enter and hold the Land, and the other shall not take Advantage of his own Wrong, nor compel him who was put out to bring an Action against him, against his Will, for the mesn Profits: The same Law is in the other Cases, *&c.* of Tenant by (*b*) *Elegit*, Statute Merchant, (*c*) Statute Staple, or Guardian who holds over for the double Value, if he in Reversion who is to have the Land again ousts him, they have such Election as is aforesaid, either to hold over, or to bring their Action, *vide* 15 *H.* 7. 14. So if the Profits of the Land are wasted, by drowning of Water, or (*d*) Wildfire, or any other Act of God, without Default or Negligence in the Party, there the Conusee shall hold the Land over, *vide* 11 *H.* 6. 7. 7 *H.* 7. 12. *b.* 15 *H.* 7. 14. 33 *H.* 8. *Statute Merchant Br.* 41. But if he who has such Interest be ousted by a (*e*) Stranger, there the Time shall incur for the Mischief aforesaid, and there he is put to his Remedy against the Trespassor. If the Devisee in the Case at Bar, or Tenant by Statute Staple, *&c.* (*f*) surrenders to him in Reversion upon Condition, and afterwards enters for the Condition broken, he shall not hold over, for the Surrender is his own Act, and he can't enlarge his Interest, and therewith agrees 33 *H.* 8. *Statute Merchant Br.* 4. If Tenant by *Elegit* is interrupted in taking the Profits of the Land, by Reason of War, he shall not hold over, but it shall be in Disadvantage of the Tenant by *Elegit*, as it is adjudg'd in 19 *E.* 1. *Execution* 246. 3. It was resolv'd, that altho' the Devisee had not (*g*) Notice of the Devise, yet if a Stranger had occupy'd the Land, the Devisee ought to take Notice at his Peril, for (*h*) *vigilantib' & non dormientibus jura subveniunt*; and none by the Law in such Case is bound to give him Notice, *ideo* he ought to take Notice at his Peril, as in Case of Arbitrament, (*i*) 1 *H.* 7. 5. *&* 8 (*k*) *E.* 4. 1. but the Case at Bar is stronger, because the Heir himself conceal'd the Will, and the Devisee had no Remedy for the mesn Profits after the Death of the Heir, who ousted him; and where it is held in ancient Books, *&c.* 34 *E.* 1. *Gard.* 129. 34 *E.* 1. *Covenant* 26. 33 *H.* 6. 42. 5 *H.* 7. 36. 7 *H.* 7. 12. 14 *H.* 7. 27. 15 *H.* 7. 8. *F. N. B.* 142. *b.* that the (*l*) Guardian shall oust Tenant for Years, but not Tenant for Life, because Ten. for Life can't hold over as Lessee for Years (as it was held) may: It was resolv'd, that the Guardian shall oust neither, and therewith agrees

(*a*) Cart. 77, 78.

(*b*) 2 Saund. 72. Hardr. 82.
(*c*) 2 Roll. 478.

(*d*) 2 Roll. 478. Aleyn 27.

(*e*) 2 Roll. 478. 2 Sand. 72.

(*f*) 2 Roll. 479, 494. 2 Vent. 328. 1 Roll. 412.

(*g*) 1 Vent. 202. 1 Rol. Rep. 286. 2 Rol. Rep. 152. Winch 105, 117, 118. Palm. 73. Cr. Car. 577.
(*h*) Antea 10. b. 1 Sid. 55. 2 Inst. 690. 2 Co. 26. b. Palm. 157. 3 Keb. 19. Raym. 20.
(*i*) 8 Co. 92 b. Br. Condit. 124. March Arb. 191.
(*k*) 8 Co. 92. b. Cr. Jac. 146. Br. Notice 12, 18. Fitz. Arbit. 15. Br. Arbitrem. 37. March Arbit. 190. Hutt. 81.
(*l*) Lane 35.

agrees the Reſolution of all the Juſtices in 36 *H.* 8. *Leaſes Br.* 58. It was likewiſe reſolv'd, That if the Guardian may ouſt the Leſſee for Years, yet foraſmuch as his Term is certain, *ſc.* certain in Beginning, in Continuance, and in End, he can't by any Poſſibility hold over in ſuch Caſe: But in the Caſe at Bar, and in the other Caſes of Tenant by *Elegit*, Statute Merchant, *&c.* there is no Term certain, but until ſuch a Sum be by them levied, and therefore it ſtands with ſuch Intereſt, that in ſome Caſe he may hold over, and ſo a Difference. And it was ſaid, That the Words of the Statute of * *Marlebridge*; *Salva ſit nihilominus hujuſmodi feoffatis actio ſua, quoad terminum, ſeu ad feodum recuperandum, quam inde habuerint*, that is to be intended of an Eſtate or Leaſe made by Colluſion, for to that the Purview of the ſaid Act extends *ſc.* That the Guardian ſhall ouſt him, and in ſuch Caſe without Queſtion the Leſſee ſhall not hold over.

1 Jones 25.

* Marleb. cap. 6. 2 Inſt. 109.

SOUTHCOTE's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

Cr. El. 815. 3 Salk. 269.

SOuthcote brought *Detinue* againſt *Bennet* for certain Goods, and declared, that he delivered them to the Defendant to keep ſafe; the Defendant confeſſed the Delivery, and pleaded in Bar, that after the Delivery one *J. S.* ſtole them felonioufly out of his Poſſeſſion; The Plaintiff replied, that the ſaid *J. S.* was the Defendant's Servant retained in his Service, and demanded Judgment, *&c.* And thereupon the Defendant demurr'd in Law, and Judgment was given for the Plaintiff; And the Reaſon and Cauſe of their Judgment was, becauſe the Plaintiff delivered the Goods to be ſafe kept, and the Defendant had took it upon him by the Acceptance upon ſuch Delivery, and therefore he ought to keep them at his Peril, altho' in ſuch Caſe he ſhou'd have nothing for his ſafe keeping. So if *A.* delivers Goods to *B.* generally to be (*a*) kept by him, and *B.* accepts them without having any thing for it, if the Goods are ſtole from him, yet he ſhall be charged in Detinue, for to be kept, and to be kept ſafe is all one. But if *A.* accepts Goods of *B.* to keep them as he would keep (*b*) his own proper Goods, there if the Goods are ſtolen he ſhall not anſwer for them: Or if Goods are pawned or pledged to him for Money, and the Goods are ſtolen, he ſhall not anſwer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a Property in them and not a Cuſtody only, and therefore he ſhall not be charged as it is adjudged in 29 *Aſſ.* 28. But if (*d*) before the ſtealing he who pawned them tender'd the Money, and the other refuſed, then is there Fault in him, and then the ſtealing after ſuch Tender, as it is there held, ſhall not diſcharge him: So if *A.* delivers to *B.* a (*e*) Cheſt lock'd to keep, and he himſelf carries away the Key, in that Caſe if the Goods are ſtolen, *B.* ſhall not be charged, for

(*a*) 1 Leon. 224. Owen 141. 1 Rol. 338. Cro. El. 219. 10 H. 6. 21. a. Co. Lit. 89. a. Doct. & Stud. 129. a. b. Moor 543. Palm. 549, 550.

(*b*) Co. Lit. 89. a.

(*c*) 1 Roll. 338. Co. Lit. 89. a. Palm. 550.

(*d*) 1 Roll. 338. Co. Lit. 89. a.

(*e*) Co. Lit. 89. a. b.

for *A.* did not truſt *B.* with them, nor did *B.* undertake to keep them, as it is adjudged in 8 *E.* 2. *Detinue* (*a*) 59. So the Doubt which was conceived upon ſundry differing Opinions in our Books, in 29 *Aſſ.* 28. 3 *H.* 7. 4. 6 *H.* 7. 12. 10 *H.* 7. 26. of *Keble* and *Fineux*, are well reconciled, *vide Bract. lib.* 2. *fol.* 62. *b.* But in Accompt it is a good Plea before the Auditors for the (*b*) Factor, that he was robbed, as appears by the Books in 12 (22) *E.* 3. *Accompt* 111. 41 *E.* 3. 3. & 9 *E.* 4. 40. For if a Factor (altho' he has Wages and Salary) does all that which he by his Induſtry can do, he ſhall be diſcharged, and he takes nothing upon him, but his Duty is as a Servant to merchandize the beſt that he can, and a Servant is bound to perform the Command of his Maſter: But a Ferryman, (*c*) common Innkeeper, or Carrier, who takes Hire, ought to keep the Goods in their Cuſtody ſafely, and ſhall not be diſcharged if they are ſtolen by Thieves, *vide* 22 *Aſſ.* 41. *Br. Action ſur le Caſe* 78. And the Court held the (*d*) Replication idle and vain, for *non refert* by whom the Defendant was robbed, *vide* 33 *H.* 6. (1.) 31. *a. b.* If (*e*) Traitors break a Priſon, it ſhall not diſcharge the Gaoler, otherwiſe of the King's Enemies of another Kingdom, for in the one Caſe he may have his Remedy and Recompence, and in the other not. *Nota* Reader, it is good Policy for him who takes any Goods to keep, to take them in ſpecial Manner, *ſcil.* to keep them as he keeps his own Goods, or to keep them the beſt he can at the Peril of the Party; or if they happen to be ſtolen or purloined, that he ſhall not anſwer for them; for he who accepteth them, ought to take them in ſuch or the like Manner, or otherwiſe he may be charged by his general Acceptance. So if Goods are delivered to one to be deliver'd over, it is good Policy to provide for himſelf in ſuch ſpecial Manner, for Doubt of being charged by his general Acceptance, which implies that he takes upon him to do it.

(*a*) Co. Lit. 89. a. b.

(*b*) Co. Lit. 89. a. 1 Roll. 124. Moor 462. Doct. pla. 13. 1 Brownl. 25.

Doct. & Stud. 129. b.

(*c*) 1 Sid. 36. Aleyn 93. Palm. 523. 2 Sand. 380. 1 Rol. 2, 124. 2 Roll. 567. 1 Rol. Rep. 79. 2 Bulſtr. 280. Cro. Jac. 262, 330, 331. Hob. 17, 18. Co. Lit. 89. a. Moor 462. 1 Vent. 190, 191, 238, 239. 3 Keb. 72, 73, 74, 112, 113. 114, 135. 1 Mod. Rep. 85. 2 Mod. Rep. 270.

(*d*) 2 Bulſtr. 249.

(*e*) 1 Roll. 808. Dyer 66. pl. 15. 241. pl. 47. Cro. El. 815. Palm. 550. Jenk. Cent. 231. Br. Det. 22. Fitz. Barr. 57.

LUTTREL's *Caſe.*

Paſch. 43 Eliz. *Rot.* 569.

In the King's Bench.

Action on the Caſe.

Somerſ. ſſ. MEMORANDUM, That at another Time, That is to ſay, in the Term of St. *Michael* laſt paſt, before our Lady the Queen at *Weſtminſter*, came *Edw. Cottel*, Gent. by *J. Nightingale* his Attorney, and brought here in the Court of the ſaid Lady the Queen, then there, his Bill againſt *George Luttrel*, Eſq; *Robert Norcome*, and *John Quick*, in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs upon the Caſe: And there are Pledges of Suit, to wit, *John Doe* and *Richard Roe*, which Bill follows in theſe Words: ſſ. *Somerſet.* ſſ. *Edw. Cottel*, Gent. complaineth of *George Luttrel*, Eſq; *Robert Norcome*, and *John Quick*, in the Cuſtody of the Marſhal of the *Marſhalſey* of the ſaid Lady the Queen, before the Queen being, for that, *viz.* That whereas the ſaid *Edward*, the 4th Day of *May* in the 41ſt Year of the Reign of the ſaid Lady *Elizabeth*, now Queen of *England*, and before; was ſeiſed of and in two ancient and ruinous Fulling Mills, with the Appurtenances in *Dunſter*, in the County aforeſaid, in his Demeſn as of Fee, To which Fulling Mills, a great Part of the Water of the River in *Dunſter* aforeſaid, from a certain Place call'd the *head Wear* of the ſaid River in *Dunſter* aforeſaid, the ſaid 4th Day of *May*, the 41ſt Year aforeſaid did run; and alſo before, Time out of Memory of Men continually accuſtomed and uſed to run; and whereas alſo, the ſaid 4th Day of *May*, in the 41ſt Year aforeſaid, and before, Time out of the Memory of Men, for the Preſervation, Direction, and continuing of the right Courſe of the ſaid great Part of the Water of the River aforeſaid, to run to the Fulling Mills aforeſaid, a certain thick Bank was made of Timber and Earth, near and above the ſaid Mills aforeſaid, on the Weſt Part of the Courſe of the ſaid great Part of the ſaid Water of the River aforeſaid, and was near adjoining to a certain Street, commonly

monly call'd *Weſt-ſtreet*, in *Dunſter* aforeſaid: And alſo whereas, the ſaid *Edward* of the aforeſaid Fulling Mills, with the Appurtenances in the Form aforeſaid being ſeiſed, afterwards, that is to ſay, the 28th Day of *October*, in the 41ſt Year of the ſaid Lady the Queen that now is, the ſaid two Fulling Mills, (as before is ſaid) being ruinous, did totally pull down, and afterwards, that is to ſay, the 20th Day of *June*, in the 42d Year of the Reign of the ſaid Lady the now Queen, at *Dunſter* aforeſaid, in the County aforeſaid, in the Places of them, and where the aforeſaid two Fulling Mills before were made and built, upon the aforeſaid great Part of the ſaid Water of the River aforeſaid, Two Corn Mills for the grinding of Corn newly had built, erected and perfected, by Reaſon whereof the ſaid *Edward* then was ſeiſed, and as yet is ſeiſed of the ſaid two Corn Mills (ſo as before is ſaid) new built, erected and perfected, in his Demeſn as of Fee, and the aforeſaid great Part of the Water of the River aforeſaid, in *Dunſter* aforeſaid, from the Place called the *head Wear* of the ſaid River in *Dunſter* aforeſaid, from the Time of the new building, erecting and perfecting of the aforeſaid his two Corn Mills, until the 10th Day of *September* then next following did run: By Pretence of which, the ſaid *Edward*, after the building of the ſaid Two Corn Mills, until the 10th Day of *September*, divers Gains and Profits of the ſaid People of the Lady the now Queen, for the grinding of their Corn at the ſaid Corn Mills had gotten; yet the ſaid *George*, *Robert* and *John*, not ignorant of the Premiſſes, maliciouſly deviſing and intending the ſaid *Edward* unjuſtly to moleſt, and him altogether to hinder and deprive of the Profits of the grinding of their Corn Mills aforeſaid, the ſaid 10th Day of *September*, in the 43d Year aforeſaid, the ſaid thick Bank aforeſaid, did dig and break, and the whole aforeſaid great Part of the aforeſaid Water of the River aforeſaid, which to the aforeſaid Corn Mills of the ſaid *Edward*, from the ſaid Place called the *head Wear*, did run, and ought and uſed to run, from its ancient and uſed Courſe, That is to ſay, in the ſaid Street, commonly called the *Weſt-ſtreet*, in *Dunſter* aforeſaid, did divert and withdraw, whereby the ſaid *Edward*, of the grinding of the whole Profit of his Corn Mills aforeſaid, for a great Time, That is to ſay, from the aforeſaid 10th Day of *September*, in the 42d Year aforeſaid, until the bringing of this Bill, *viz.* that is to ſay, the 20th Day of *November*, in the 43d Year of the Reign of the ſaid Lady the now Queen, wholly loſt, to the Damage of the ſaid *Edward* 200*l.* and thereof he brings his Suit. And now at this Day, that is to ſay, *Wedneſday* next after 15 Days of *Eaſter* in this Term, until which Day the ſaid *George*, *Robert*, and *John*, had Licence to imparl, and then to anſwer, *&c.* before the ſaid Lady the Queen at *Weſtminſter*, come as well

the

the ſaid *Edward* by his Attorney aforeſaid, as the ſaid *George*, *Robert* and *John Quick*, by *Stephen Brodrippe* their Attorney; and the ſaid *George*, *Robert* and *John*, defend the Force and Injury, when, *&c.* and ſay, that they are thereof no Ways guilty, and of this put themſelves upon the Country; and the ſaid *Edward* likewiſe, *&c.* Wherefore let a Jury come before the ſaid Lady the Queen at *Weſtminſter*, upon *Thurſday*, in 15 Days of the *Holy Trinity*, and who neither, *&c.* becauſe as well, *&c.* the ſame Day is given to the Parties aforeſaid, here, *&c.* Afterwards Proceſs was continued between the Parties aforeſaid, of the Plea aforeſaid, by Juries thereof reſpited between them before the Lady the Queen, at *Weſtminſter*, until *Friday* next after eight Days of St. *Michael* then next following, unleſs the Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County aforeſaid, firſt, upon *Thurſday* the 6th Day of *Auguſt*, at the Caſtle of *Taunton* in the County aforeſaid, by the Form of the Statute, *&c.* ſhall come for Default 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 of the Aſſize, before whom, *&c.* ſent hither their Record had before them in theſe Words, ff. Afterwards the Day and Place within contained, before *Will. Periam*, Knt. Chief Baron of the Queen's *Exchequer*, and *Edw. Fenner*, one of the Juſtices of the ſaid Lady the Queen, of Pleas holden before the ſaid Queen, aſſigned, Juſtices of the ſaid Lady the Queen, aſſigned to take Aſſizes in the ſaid County of *Somerſet*, by the Form of the Statute, come as well the ſaid *Edw. Cottel*, Gent. by *Adrian Street* his Attorney, as the within written *Geo. Luttrell*, *Rob. Norcome*, and *John Quick*, by *Hen. Collier* their Attorney: And the Jury whereof Mention is within made, being likewiſe called, came, who being choſen, tried, and ſworn to ſay the Truth of the Matter within contained, ſay upon their Oath, That the ſaid *George*, *Robert*, and *John* are guilty of the Premiſſes within put unto (charged upon) them, as the ſaid *Edw. Cottel* within againſt them complaineth; and they do aſſeſs the Damages of the ſaid *Edward*, for the Occaſion within written, beſides Coſts and Charges by him about his Suit in this Part expended ſet to 40 *s.* and for Charges and Coſts of Suit to 5 *s.* Therefore it is granted, that the ſaid *Edward*, ſhall recover againſt the ſaid *George*, *Robert* and *John*, his Damages aforeſaid by the Jury, in Form aforeſaid aſſeſſed; as alſo 6 *l.* for his Coſts to the ſaid *Edward*, by the Court of the Lady the Queen here, with his Aſſent of Increaſe adjudged; which Damages in the whole, do amount to 8 *l.* and 5 *s.* And the ſaid *George*, *Robert* and *John*, in Mercy, *&c.*

LUTTREL'S *Caſe.*

Paſch. 43 Eliz. *Rot.* 596.

Between Cottel *Plaint. and* Luttrel *Def. in an Action on the Caſe in* B. R.

COttel brought an Action *on the Caſe* againſt *Luttrel*, and declared, that 4 *Martii*, *anno* 40 *Eliz.* he was ſeiſed in Fee of two old and ruinous Fulling Mills, and that from Time whereof Memory, *&c. magna pars aquæ cujuſdam rivoli* ran from a Place called *head Wear* to the ſaid Mills, and that for all the ſaid Time there had been a Bank to keep the Water within the Current, and that afterwards the Plaintiff, 8 *Octob.* 41 *Eliz.* pull'd down the ſaid Fulling Mills, and in *June* 42 in Place of the ſaid Fulling Mills, erected two Mills to grind Corn; and that the ſaid Water ran to the ſaid Mills 'till the 10th of *Sept.* next following, and that the ſame Day the Defendants *foderunt & fregerunt* the Bank, and diverted the Water from his Mills, *&c.* The Defendants pleaded Not Guilty, and it was found againſt them, upon which the Plaintiff had Judgment. Upon which *Luttrell* the Defendant brought a Writ of Error upon the new Statute in the Exchequer Chamber, and there two Errors were aſſigned. 1. That by the breaking and abating of the old Fulling Mills, and by the building of new Mills of another Nature, the Plaintiff had deſtroyed the Preſcription, and could not preſcribe to have any Water-Courſe to Griſt Mills: As if a Man grants me a Water-Courſe to my Fulling Mills, I can't (as it was ſaid) convert them to Corn Mills, *nec e contra.* So if I grant to one Eſtovers to burn in his Hall, he can't convert his Hall into a Kitchen or Malt-houſe: The ſame Law of a Preſcription; for Preſcription in ſuch Caſe ſhall be intended to commence by Grant, and in Proof thereof they cited *F.N.B.* 180. *H.* And 7 *E.* 4. 27. *a.* if a Man has Eſtovers by Grant, or appendant to an antient Houſe, he ſhall not have them to an Houſe which he new builds: And 10 *H.* 7. 13. *a. b.* & 16 *H.* 7. 9. *a. b.* where the Abbot of

Hutton 58. Carthew 215.

1 Rolls 104. 22 H. 6. 14.

27 El. cap. 8. Cro. Car. 45.

9 E. 4. 11. a. Co. Lit. 41. b. 3 Bulſtr. 334. 2 Cro. 25. Hob. 39.

of *Newark* granted by Fine to find three Chaplains in ſuch a Chapel of the Conuſee, and afterwards the ſaid Chapel fell, and there *tenetur* (during the Time that there is no Chapel) the Divine Service ſhall ceaſe, for it ought to be done in a decent and reverend Manner, and not at large *ſub dio*; But there *tenetur* if the Chapel is rebuilt in the ſame Place where the old ſtood, then he ought to do the Divine Service there: But (it was collected) if it is built in another Place, there the Grantee is not bound to do Divine Service there: If there be Lord and Tenant, and the Tenant holds to cover and repair the (*a*) Lord's Hall, as in 10 *E.* 3. 23. in this Caſe if the Hall falls, yet if the Lord builds the Hall in the ſame Place where it was before, and of ſuch Bigneſs as it was before, the Tenant is bound to cover it; But if it is of greater Length (*b*) or Breadth, ſo as Prejudice may come to the Tenant, or if it is built in another Place, or if that which was the Hall is converted to a Cow-houſe, Stable, Kitchen, or the like, he is not bound to cover it, for the Lord by his Act can't alter the Nature of the Tenure, nor of the Service which the Tenant ought to do: And in this Caſe here, it might be more beneficial to him who made the original Grant, and to others who had his Eſtate to have them Fulling Mills, than Corn Mills: For perhaps they have Corn Mills ſo near, that the building of Corn Mills would be prejudicial to them, and it would be againſt Reaſon to extend a Grant or Preſcription to have a Water-Courſe to Fulling Mills, to Corn Mills, which is not within the Purport or Intention of the Grant or Preſcription, and the Grant or Preſcription ought to be purſued: If a Man holds of another as of his Manor by Homage, Fealty and Caſtle Guard, the Lord aliens the Manor except the Caſtle, there the Alienee ſhall not have (*c*) Caſtle-guard, as appears by 31 *E.* 1. *Aſſ.* 441. And it was ſaid, that there the Alienee can't build a new Caſtle, for the Tenure was to keep the old Caſtle. Another Objection was made, forasmuch as the Plaintiff himſelf has broke and abated the Fulling Mills, altho' he builds new Mills in the ſame Place, and of the ſame Nature as the old were, yet he has deſtroyed his Preſcription; for altho' in Caſe when Mills or Houſes which have Water-Courſe, or Eſtovers, or other Things appendant or appurtenant to them be overthrown by the Wind, or burned by Wild-fire, or fall by any other Act of God, that if the Owner rebuilds them in the ſame Place, and in the ſame Manner as they ſtood before, that they ſhall have the ſame ancient Things Appendants and Appurtenants to this new Mill or Houſe, becauſe the Act of God ſhall not prejudice any; yet if they be eraſed by the Party himſelf, or fall thro' his Default, the ancient Appendants thereby are loſt; for by his own Act he cannot extend the Preſcription or Grant which was in a Manner appropriated to the old

1 Roll. Rep. 121.

(*a*) Winch. 45. Noy 127. Perk. Sect. 671. Kelw. 37. b.

(*b*) Noy 127. Perk. Sect. 671.

(*c*) Co. Lit. 83. a. 2 Roll. 513.

2 Cro. 182. Moor 877.

old Houſe, to a new Houſe: So it was objected, That if one of his own wrong, burns, or pulls down the Houſe or Mill which has ſuch Appurtenances, he ſhall recover all in Damages; and although in ſuch Caſe he rebuilds the Houſe or Mill, yet he ſhall not have the Appendances, *Vide Perkins* (*a*) 128. *b*. But it was reſolved, That the (*b*) Preſcription did extend to theſe new Griſt Mills, for it appears by the *Regiſter*, and alſo by (*c*) *F. N. B.* that if a Man is to demand a Griſt Mill, Fulling Mill, or any other Mill, the Writ ſhall be general, *de uno Molendino*, without any Addition of Griſt or Fulling, 21 *Aſſ.* 23. agrees of a Plaint in Aſſiſe. So that the Mill is the Subſtance, and Thing to be demanded, and the Addition of Griſt, or Fulling, are but to ſhew the Quality or Nature of the Mill, and therefore if the Plaintiff had preſcribed to have the ſaid Watercourſe to his Mill generally (as he well might) then the Caſe would be without Queſtion, that he might alter the Mill into what Nature of a Mill he pleaſed, provided always that no Prejudice ſhou'd thereby ariſe, either by diverting or ſtopping of the Water, as it was before, and it ſhou'd be intended that the Grant to have the Water-courſe was before the building of the Mills, for no Body will build a Mill before he is ſure to have Water, and then the Grant of a Water-courſe being generally to his Mill, he may alter the Quality of the Mill at his Pleaſure, as is aforeſaid: So if a Man has (*d*) Eſtovers either by Grant or Preſcription to his Houſe, altho' he alters the Rooms and Chambers of this Houſe, as to make a Parlour where it was the Hall, or the Hall where the Parlour was, and the like Alteration of the Qualities, and not of the Houſe itſelf, and without making new Chimneys by which no Prejudice accrues to the Owner of the Wood, it is not any Deſtruction of the Preſcription, for then many Preſcriptions will be deſtroyed, and although he builds new (*e*) Chimneys, or makes a new Addition to his old Houſe, by that he ſhall not loſe his Preſcription, but he can't imploy or ſpend any of his Eſtovers in the new Chimneys, or in the Part newly added; The ſame Law of Conduits and (*f*) Water-pipes, and the like: So if a Man has an old Window to his Hall, and afterwards he converts the Hall to a Parlour or any other Uſe, yet it is not lawful for his Neighbour to ſtop it, for he ſhall preſcribe to have the Light in ſuch Part of his Houſe: And altho' in this Caſe the Plaintiff has made a Queſtion, foraſmuch as he has not preſcribed generally to have the ſaid Water-courſe to his Mills generally, but particularly to his Fulling Mills, yet foraſmuch as in general the Mill was the Subſtance, and the Addition demonſtrates only the Quality, and the (*g*) Alteration was not of the Subſtance, but only of the Quality, or the Name of the Mill, and that without any Prejudice in the

(*a*) Perk. Sect. 671, 672.
(*b*) Hutt. 58. Godb. 237. Winch. 45. Poph. 172. Hob. 39. Cro. Jac. 182. Moor 877.
(*c*) F. N. B. 2. c. 212. b. Reg. Orig. 2. a. Cro. Jac. 557.
(*d*) Co. Lit. 41. b. 2 Leon. 45. 4 Leon. 241.
(*e*) Hob. 39. 1 And. 151. 2 Leon. 45. 4 Leon. 241. Godb. 97. 1 Bulſtr. 94.
(*f*) 1 Sid. 167, 291. 1 Ventr. 237.
(*g*) Cro. Jac. 182.

Water-

Water-courſe to the Owner thereof; for theſe Reaſons it was reſolved, that the (*a*) Preſcription remain'd. If a Corporation have Franchiſes or Privileges by Grant or Preſcription, and afterwards they are incorporated by another Name, as where they were Bailiffs and Burgeſſes before, now they are Mayor and Commonalty; or Prior and Convent before, and afterwards they are tranſlated into a Dean and Chapter, altho' in theſe Caſes the Quality and Name of their Corporation are (*b*) altered and changed, and chiefly in the Caſe of Prior and Convent, for from regular who are dead Perſons in Law they are made ſecular, yet the new Body will enjoy all the Franchiſes, Privileges and Hereditaments which the old Corporation or Body Politick had either by Grant or Preſcription, for no Perſon will be prejudiced thereby; *vide* 14 *H.* 6. 12. 37 *Aſſ.* 6. 38 *Aſſ.* 22. 39 *H.* 6. 15. Another Reaſon was added that when a Man has any Thing appendant or appurtenant to an Houſe or Mill, the moſt perdurable Part of it is the Land in which the Foundation is, and upon which the whole Fabrick of it conſiſts, and in Reſpect thereof, by Grant of all his (*c*) Lands, all his Houſes, Mills and Woods will paſs. And ſo it was reſolved, as *Popham* C. J. ſaid, by *Wray* and *Dyer* Chief Juſtices, upon Conference had with divers other Juſtices upon a Caſe referred to the ſaid Chief Juſtices: For in *Præcipe*, where an Houſe, Mill or Wood is demanded, the Warrant of Attorney is *in placito terræ*: And in Caſe of Voucher, when Judgment is given for the Tenant to have in Value againſt the Vouchee, the Judgment is *Quod habeat de terris* of the Vouchee *ad valentiam*, yet thereby he ſhall have Houſes, Mills, Woods, *&c.* and in Special Caſes by Recovery of Lands, a Man ſhall recover Houſes, as it is held by ſome 4 *E.* 3. 161. 6 *E.* 3. 283. 2 *E.* 3. 37. *Plow. Com.* 168. 8 *E.* 3. 377. *Dyer* 28 *H.* 8. 47. and therewith agrees the Civil Law; for (*d*) *appellatione fundi, omne ædificium & omnis ager continetur.* Then the Preſcription or Grant ſhall reſpect the moſt durable Part, and which in Judgment of Law includes the whole. And therefore it was reſolved that altho' the Houſe or Mill falls by the Act or Default of the Owner, or by the Wrong of another, yet foraſmuch as the perdurable Part, and which includes the whole, remains, he may rebuild it without any Loſs of any Appendant or Appurtenant to it, but it ought to be upon the ſame Place which was the old Foundation of the old Houſe: For as that ſupported and in Judgment of Law included the old Houſe when it ſtood, ſo it ſhall ſupport and include the new Houſe, and ſo in a Manner is a Continuance of the old Houſe; and ſo the *Quære* which *Perkins* makes *fol.* 128. (*e*) well reſol. And ſo it was ſaid in all the Caſes of Eſtovers and Tenures aforeſaid, when the Alteration of the Quality

(*a*) Godb. 237. Winch. 45. Hurton 58. Poph. 172. Hob. 39. Cro. Jac. 182. Moor 877.

(*b*) 21 E. 4. 59. a. 3 Co. 74. a. 1 Sand. 344. Moor 581. 3 Lev. 233.

(*c*) Co. Lit. 4. a. 2 Rol. Rep. 265. Palm. 320. 2 Roll. 57. Owen 75. Moor 360. 2 And. 123, 124. Cr. El. 658. 476, 477. Godb. 352.

(*d*) 2 Rol. Rep. 265.

(*e*) Perk. S. 671.

or Name of Part of the Houſe doth not cauſe any Prejudice to the Terre-tenant, the Eſtovers and Services remain: *Et nota* Reader, a Caſe reported, by Serjeant *Bendloes*, *Mich.* 3. *H.* 8. *Rot.* 649. *in Communi Banco*, in *Repl'* brought by Sir *William Capel* (*a*) againſt *Robert Apprice* and others, of four Horſes taken in a Place called old *Hadham Park*, in little *Hadham* in the County of *Hertford*; the Defendants made Conuſans as Bailiffs to *Richard* Biſhop of *London* becauſe Sir *Thomas Brand*, Kt. was ſeiſed of the Manor of little *Hadham* in Fee, whereof the Place where, *&c.* was Parcel, and held it of the Biſhop of *London*, *ut de Caſtro ſuo de Stortford in Com' præd', per homagium, fidelitatem, & ad* (*b*) *ſcutagium domini Regis xl s. cum acciderit, & ad plus plus, & ad minus minus, & per redditum, v. s. pro Ward' Caſtri præd' ad feſtum ſancti Michaelis Archangeli annuatim ſolvend', ac per redditum xiii s. iv d. pro auxilio vicecom' at Four Feaſts of the Year, &c.* And for 15 *s.* for Caſtle guard behind for three Years, *&c.* they avowed the taking of one of the ſaid four Horſes, and for 40 *s.* for Aid of the Sheriff behind alſo for three Years, they avow'd the taking of the other three Horſes. The Pl. in Bar of the Avowry as to the taking of one Horſe for Caſtle guard ſaid, that before the Beginning of the ſaid three Years, *Caſtrum præd' funditus corruit & penitus in decaſum extitit, & adhuc exiſtit, and hoc paratus eſt verificare, unde petit judicium ſi præd' Rich. Apprice, &c. pro aliquo redditu pro Wardo Caſtri præd' ſic obruti & penitus in decaſum exiſten', capt' præd' unius equi juſtam cognoſcere debet, &c.* Upon which it was demurred in Law, and as to the Aid of the Sheriff it was alſo demurred in Law: And in that Caſe it was reſolved, that altho' the Caſtle is * ruin'd and decayed, (*c*) yet the Rent remain'd; For when the Tenant holds of the Lord to ward or repair the Lord's Caſtle, and afterwards ſuch Service (as *Lit.* ſays in the Caſe of Soccage) was in ancient Time changed by mutual Conſent of the Lord and Tenant into an annual Rent, yet it is ſaid, That ſuch Rent is paid *pro Wardo Caſtri, id eſt*, in Satisfaction *Wardi Caſtri*; for in this Caſe, and ſuch like, *(pro)* ſignifies full and perpetual Recompence and Satisfaction, and not conditional, or Satisfaction temporary, *ſc.* for a Time, ſo that the Lord may have the Caſtle ward when he will, for the Seiſin of the Rent is not Seiſin of the Caſtle Guard in ſuch Caſe: But if the Tenant holds to guard the Lord's Caſtle, if the Caſtle falls, the Service (*d*) in ſuſpended until it is rebuilt, but then the Tenure ſhall not be in ſuch Caſe alledged to be by the Rent, but by the Caſtle Guard, neither ſhall the Avowry be made as in the Caſe at Bar it is for the Rent, but for the Caſtle Guard: *vide Lit.* 26. *b.* that if a Man holds his Land by certain Rent for Caſtle Guard, *Lit.* ſays, that ſuch Tenure is Tenure in (*e*) Soccage, which can't be if the Caſtle Guard remains, for then the

(*a*) Moor 1, 2. Co. Lit. 83. a. Dav. 3. a. b. N. Benl. 9, 10. Lit. Rep. 48.

(*b*) Co. Lit. 72. b.

* 1 Mod. Rep. 200.

(*c*) Dav. 3. a. b. Moor 2. Co. Lit. 83. a. N. Benl. 10.

(*d*) Co. Lit. 83. a.

(*e*) Co. Lit. 97. a. b. 6 Co. 20. a. F. N. B. 83, 256.

the Tenure ſhall be by Knight's Service, for *Littleton* ſaith, that where the Tenant ought by himſelf or by another to do Caſtle Guard, that ſuch Tenure is Tenure by (*a*) Knight's Service, ſo the Difference between Rent for Caſtle Guard, and Service to guard the Caſtle. The ſame Law if the Tenant holds of his Lord by certain Rent for Work-days, or any other Service. And Sir *William Capel* the Plaintiff perceiving the Opinion of the Court againſt him for both Points, was nonſuited, and both the Rents as the ſaid Serjeant reports, are paid (*b*) to this Day: And when a Man holds of another in Soccage, or otherwiſe as of his Caſtle, and afterwards the Caſtle falls, and is utterly ruinated, yet the Tenure remains; For it muſt be known That when any Tenure is of any Perſon as of a Caſtle, in ſuch Caſe the Caſtle includes in itſelf a Manor, for (*c*) *Caſtrum* as a Manor *eſt nomen generale & collectivum*, and may include in itſelf divers Things, *ſc.* Demeſns and Services, *&c.* 5 *H.* 7. 9. *a.* Land may be Parcel of a (*d*) Caſtle, *vide* 29 *H.* 6. *Traverſe* 4. That an Hundred may be as well Parcel of a Caſtle as it may be of a Manor, as it is held in 8 *H.* 7. 1. And therefore when a Tenure is of any as of his Caſtle (which always in ſuch Caſe includes in itſelf a Manor) altho' the Caſtle is ruinated, yet the Tenure remains without Queſtion: *Vide* 19 *E.* 2. *Aſſ.* 399. Divers Tenants held of another as of his Manor by Fealty and Suit to the Lord's Mill, the Lord alien'd the Mill, with the Suit to the Tenants, and afterwards the Vendor died, and his Son entred, and conceiving that the Tenants who held of his Manor could not do Suit to him who had not the Manor, of himſelf made a new Mill elſewhere upon other Parcel of his Demeſns, and had the Suit to his own Mill which the Vendee ought to have had; for no Man can have Suit to his Mill by Reaſon of Tenure, if it were not of Corn growing in certain Land, and that within his Seigniory: *Vide* 17 *E.* 3. (67) 97. 29 *E.* 3. 12. 16 *E.* 3. *Avowry* 92. And by the ſaid Caſe it appears, that altho' the ancient Mill is aliened, or if it falls, the Lord may erect a new Mill in another Place within his Manor, for the Tenure in ſuch Caſe is to do Suit to the Lord's Mill generally, and not to any particular Mill; *Nota bene* all theſe Differences. Another Error was aſſigned becauſe the Preſcription was, that *magna pars (f) aquæ cujuſdam rivuli, &c.* that it was incertain how much Water ſhou'd be comprehended within theſe Words, *magna pars aquæ*; and Declarations, and eſpecially in Actions on the Caſe, ought to be certain, and the whole Caſe ought to be ſhewed in certain, and if the Truth is that one and the ſame River before it comes to the Mills divides itſelf into two Branches, whereof one only

(*a*) Co. Lit. 82. b. 87. b. F. N. B. 83. c. Lit. Sect. 121.

(*b*) N. Benl. 19. Moor 2. Davis 3.

(*c*) Co. Lit. 5. a.

(*d*) Plowd. 168. b. 169. b. Br. Compriſe 18. Fitz. Bar. 143. Br. præcipe quod reddat 23.

(*e*) Co. Lit. 13. a. Dav. 3. a. b. Moor 2. N. Benl. 10.

(*f*) Palm. 504. Cr. Jac. 324. 2 Rolls 80. 2 Bulſtr. 119.

only runs to the Mills, the better Form was to preſcribe to have *aquæ curſum* to the ſaid Mills, for each of the Branches *eſt aquæ curſus*; *Quod fuit conceſſum* as to this Point; but it was reſolved, That altho' the Declaration might have had a better Form, yet in Subſtance it was good, for it was not poſſible to ſhew how much Water runs to Mills, and the Quantity (*a*) of the Water is not material, foraſmuch as the Defendant, by the breaking of the Bank, diverted the Water which ran to the ſaid Mills; *Vide* 8 *El. Dyer* 248. *b.* (*b*) where in an Action on the Caſe the Plaintiff declared that the Defendant *divertit multum curſus aquæ*; and another Precedent is there cited between *Wikes* and *Searle*, that an Aſſiſe of Nuſance was brought *pro diverſione majoris partis curſus aquæ*, by which the Judgment given by Sir *John Popham*, Chief Juſtice, and his Companions, Juſtices of the King's Bench, was affirmed. *Nota* well, this Caſe was adjudged by both the Courts, *(i. e. B. R. & Cam. Scac.)*

(*a*) Doct. pl. 86.

(*b*) Cr. Jac. 324. 2 Bulſtr. 119, 196. Dyer 248. pl. 80. 1 Leon. 273. 2 Roll. 143. 1 Bulſtr. 47.

DRURY's *Caſe.*

Trin. 43 Eliz.

In the King's Bench.

Moor 561, 562. 1 And. 201. Cr. El. 723, 724. 839. Jenk. Cent. 272, 273.

DRury brought a Writ of Error on a Judgment given in the Common Pleas in a *Quare Impedit* brought by the Queen, where the Caſe was; A Counteſs being a Widow, retain'd two Chaplains, and afterwards retain'd a third, which third firſt purchas'd a Diſpenſation to have two Benefices with Cure, and accordingly was advanced to two with Cure, and whereof the firſt was above the yearly Value of 8 *l.* And if he was lawfully qualify'd within the Statute of 21 *H.* 8. *cap.* 13. was the Queſtion in the Common Pleas: For if he was lawfully qualified, then the firſt Benefice by the Acceptance of the ſecond was not void, *& per conſequens*, no Title to preſent by Lapſe devolv'd to the Queen; and by the Pleading, it doth not appear that the two firſt Chaplains were living at the Time when the third was advanced, for it was averr'd only, that the two were alive at the Time when the third was retained; upon which, great Queſtion aroſe in the King's Bench: And it was adjudg'd in the Common Pleas, That Title to preſent by Lapſe was devolv'd to the Queen, and therefore Judgment was given there accordingly. And after many Arguments at Bar and Bench upon the Writ of Error in the King's Bench, the Judgment given in *C. B.* for the Queen was affirm'd. And in this Caſe two Points were reſolv'd: 1. When the Counteſs retain'd two Chaplains, theſe two are capable of a Diſpenſation, according to the Act of (*a*) 21 *H.* 8. by which it is provided, *That every Counteſs being a Widow, may have two Chaplains, whereof every one may purchaſe Licence or Diſpenſation.* Then when ſhe retains two, the Statute is executed, for ſhe cannot have more than two capable to have Diſpenſation, and the Retainer of the third can-

(*a*) Moor 561. Antea 78. b.

not diveſt the Capacity of Diſpenſation which was veſted by their Retainer in the firſt two; for although the Counteſs might have as many Chaplains as ſhe would at the Common Law, yet ſhe can't have more than two capable of a Diſpenſation by Force of the Statute; and Reaſon requires that he who has ſerv'd longeſt ſhould be firſt preferr'd, & (a) *qui prior eſt tempore, potior eſt jure.* And ſo now this Point has been four Times adjudg'd: 1. In the Common Pleas, *Paſch.* 31 *Eliz. Rot.* 728. in a *Quare Impedit* between the Queen and the Biſhop of *Lincoln*, the Preſident of *Maudlin* College, and *John Skuffling*, (b) Clerk. 2. In the Lady *St. John*'s Caſe. 3. In this very Caſe in the Common Pleas: And 4thly, now in the King's Bench; *vide Dyer* 312. (c) by the Opinion of *Catlyn*, *Saunders*, and *Dyer*, if a Lord who is allow'd but three Chaplains, retains ſix by his Letters Teſtimonial, at one and the ſame Time, and all ſix are preferr'd to ſix ſeveral Pluralities, the three who are firſt promoted, are warranted by the Statute, and yet the Retainer was not according to the Statute, but *in æquali jure* (d) *melior eſt conditio poſſidentis.* 2. It was reſolv'd, that when the two firſt were retain'd according to the Statute, and thereby the Statute executed as aforeſaid, the Retainer of the third, altho' it was good at the Common Law, yet it was void to give him Capacity to purchaſe Diſpenſation within the Statute; and therefore altho' the other two were dead before the Advancement of the third, yet foraſmuch as they were alive at the Time of his Retainer, which Retainer was at the Common Law, and not according to the Statute, therefore he ought to have a new Retainer after their Death and before his Advancement, for *quod* (e) *ab initio non valet, in tractu temporis non convaleſcet*; As if the Son and Heir apparent of a Baron retains a Chaplain, and gives him his Letters under his Hand and Seal, and afterwards his Father dies, and this Chaplain purchaſes Diſpenſation, this Retainer and theſe Letters will not ſerve him, becauſe they were not available at the Beginning: And if a Baron retains three Chaplains according to the Statute, and they purchaſe Diſpenſation, and are advanced according to the Statute, now if the Lord diſcharges one of them from his Service, he can't retain another during his Life, for then by ſuch Means he might advance infinite Chaplains without Number, by which the Statute would be defrauded, for the Statute

(a) Co. Lit. 14. a. 347. b. 2 Inſt. 95.

(b) Poſtea 118. a. Moor 277. 1 And. 201. Cr. El. 724. Sav. 101, 102.

(c) Cr. El. 724. Dy. 312. pl. 88. Moor 440.

(d) Vaugh. 60.

(e) 4 Co. 2. b. Hutt. 51. Cawly 214. 2 Co. 55. b. Cr. El. 585. Co. Lit. 35. a. 10 Co. 62. a. 8 Co. 135. b. Dav. 32. a. 2 Bulſt. 304, 305. 3 Bulſt. 192. Jenk. Cent. 272.

limits him to three only to have Benefit of the Act: And ſo was it adjudg'd in the Common Pleas, *Paſch.* 28 *Eliz. Rot.* 1130. in a *Quare Impedit* between the Queen and the Biſhop of *Glouceſter*, and *Edward* (*a*) *Savacre*, and affirm'd by a Writ of Error in the King's Bench; and it was ſaid, that the ſaid Act of 21 *H.* 8. ſhall be taken ſtrictly againſt Pluralities, and therefore it has been held, that if a Baron, who by the Statute may retain three Chaplains, is made Warden of the Cinque Ports, who may have a Chaplain in Reſpect of his Office, yet he ſhall have but three. And ſo if a Baron has three, and is made an Earl, yet he ſhall have but five in all, *& ſic de cæteris.*

(*a*) 1 And. 200, 201. Godb. 41, 42. Owen 51. Sav. 79.

Tanfield and others were of Counſel with the Plaintiff in the Writ of Error, and the Attorney and others with the Defendant.

SLADE's *Caſe.*

Hill. 38 Eliz. *Rot.* 305.

In the King's Bench.

Devon, ſſ. *Memorandum*, At another Time, that is to ſay, the Term of St. *Michael* laſt paſt, before the Lady the Queen at *Weſtm.* came *John Slade*, by *Nich. Weare* his Attorney, and brought here into the Court of the ſaid Lady the Qeen, then there, a certain Bill againſt *Humphry Morley*, in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs upon the Caſe: And there are Pledges of Suit, to wit, *John Doe* and *Richard Roe*, which Bill followeth in theſe Words: ſſ. *Devon*, ſſ. *John Slade* complaineth of *Humphrey Morley*, in the Cuſtody of the Marſhal of the *Marſhalſea* of the Lady the Q. before the Q. herſelf being, for that, that is to ſay, That whereas the ſaid *John*, the 10th Day of *Nov.* in the 36th Year of the Reign of the ſaid Lady *Elizabeth*, now Q. of *England*, *&c.* was poſſeſſed for the Term of divers Years then and yet to come, of and in one Cloſe of Land, with the Appurtenances in *Halberton*, in the County aforeſaid, called *Rack Park*, containing by Eſtimation eight Acres, and ſo thereof being poſſeſſed, the ſaid *John* afterwards, that is to ſay, the ſaid 10th Day of *Nov.* in the 36th Year aforeſaid, had ſowed the ſaid Cloſe with Wheat and Rye, which Wheat and Rye in the Cloſe aforeſaid, by the ſaid *John* (ſo as before is ſaid) ſowed afterwards, That is to ſay, the 8th Day of *May*, in the 37th Year of the Reign of the ſaid Lady the now Q. were grown into Ears. The ſaid *Humphrey*, the aforeſaid 8th Day of *May*, in the ſaid 37th Year aforeſ. the ſaid Wheat and Rye in Ears upon the Cloſe aforeſ. (as before is ſaid) then growing, at *Halberton* aforeſ. in Conſideration that the ſaid *John* then and there, at the ſpecial Inſtance and Requeſt of the ſaid *Humph.* had bargained and ſold unto the ſaid *Humph.* to the Uſe and Behoof of the ſaid *Humph.* all the Ears of Wheat and Corn which then did grow upon the ſaid Cloſe, called *Rack Park* (the Tithes thereof to the Rector of the Church of *Halberton* aforeſ. due only excepted) did aſſume, and then and there faithfully promiſed, that he the ſaid *Humph.* 16 *l.* of lawful Money of *Engl.* to the aforeſ. *John*, in the Feaſt of St. *John* the *Baptiſt*, then next following, would well and truly content and pay: Yet the ſaid *Humphrey*, his Aſſumption and Promiſe

aforeſ. little regarding, but endeavouring and intending the ſaid *John* of the aforeſ. 16 *l.* in that Part ſubtilly and craftily to deceive and defraud, the ſaid 16 *l.* to the ſaid *John*, accord. to his aſſuming and Promiſe, hath not yet paid, nor any Way for the ſame contented him, altho' the ſaid *Humph.* thereunto afterwards, that is to ſay, the laſt Day of *Sept.* in the 37th Year of the Reign of the ſaid Lady the now Q. aforeſ. at *Halberton* aforeſ. by the ſaid *John* was oftentimes thereunto required, but the ſame to pay him, or any Way to content him, hath altogether refuſed, and doth yet refuſe; whereupon the ſaid *John* ſaith he is the worſe, and hath Damage to the Value of 40 *l.* and thereof he bringeth Suit, *&c.* And now at this Day, that is to ſay, *Friday* next after the 8th Day of St. *Hillary*, the ſelf ſame Term, until which Day aforeſ. the ſaid *Humph.* had Licence to imparl to the Bill aforeſ. and then to anſwer, *&c.* before the Lady the Q. at *Weſtm.* cometh as well the ſaid *John* by his Attorney aforeſ. as the ſaid *Humph.* by *John Halſtaff*, his Attorney; and he the ſaid *Humph.* doth defend the Force and Injury when, *&c.* And ſaith, that he did not take upon him in Manner and Form, as the ſaid *John Slade* hath complained againſt him; and upon that putteth himſelf upon the Country; and the ſaid *J. Slade* likewiſe, *&c.* Therefore a Jury was to come before the ſaid Lady the Q. at *Weſtm.* upon *Thurſday* next after eight Days of the Purifica. of the Bleſſed *Mary*, *&c.* and who neither, *&c.* and becauſe as well, *&c.* The ſame Day is given to the Parties aforeſaid there, *&c.* Afterwards Proceſs was continued betw. the Parties aforeſ. of the Plea aforeſ. by Juries thereof reſpited betw. them before the Lady the Q. at *Weſt.* until *Wedneſday* next after the 15th Day of *Eaſter* then next, *&c.* following, unleſs the Juſtices of the Lady the Q. to take Aſſizes, firſt upon *Monday* the 2d Week of *Lent*, at the Caſtle at *Exeter*, in the County aforeſ. by the Form of the Stat. *&c.* ſhall come, for default of Jurors, *&c.* At which *Wedneſ.* before the Lady the Q. at *Weſtm.* aforeſaid came the Parties aforeſ. by their Attornies aforeſ. And the beforeſaid Juſtices of Aſſizes, before whom, *&c.* ſent hither their Record before them had in theſe Words. *ſſ.* Afterwards the Day and Place within mentioned, before *Thomas Walmeſley*, one of the Juſtices of the Q. of the Bench, and *Edw. Fenner*, one of the Juſtices of the ſaid Lady the Q. aſſigned to hold Pleas before the Q. herſelf, Juſtices of the ſaid Lady the Q. aſſigned to take Aſſizes in the County aforeſ. by Form of the Stat. *&c.* come as well the within named *J. Slade*, by *T. Clayton* his Attorney, as the within written *Humph. Morley*, by *Henry Collier* his Attorney and the Jurors ſworn, whereof mention is within made likewiſe, being called, came, who to ſay the Truth of the Matters within contained, being choſen, tried and ſworn; ſay upon their Oath, that the ſaid *Humph. Morley* did buy of the ſaid *J. Slade* the within written Wheat and Rye, in Ears, upon the within written Cloſe (as is ſaid before) growing being, for 16 *l.* of good and lawful Money of *England*,

to

to be paid to the ſaid *J. Slade* in the Feaſt of St. *John* the *Baptiſt*, then next following, as in the Declaration within written is within ſpecified: And further the ſaid Jurors ſay, upon their Oath aforeſaid, that betwixt the ſaid *J. Slade*, and the ſaid *Humph. Morley*, there was no Promiſe or taking upon him, beſides the Bargain aforeſ. But whether upon the whole Matter aforeſ. by the ſaid Jurors in Form aforeſ. found, the ſaid *Humph. Morley* did take upon him in Manner and Form, as in the Declaration within written, within ſpecified, or no, the ſaid Jurors are altogether ignorant, and thereof they ask the Advice and Conſideration of the Court here, *&c.* And if upon the whole Matter aforeſ. by the ſaid Jurors in Form aforeſ. found, it ſhall ſeem to the Juſtices of the Court here, that the ſaid *Humph. Morley* did take upon him in Manner and Form, in the Declarat. within ſpecified, then the ſaid Jurors ſay upon their Oath aforeſ. that the aforeſ. *Humph. Morley* did take upon him in Manner and Form as the aforeſ. *J. Slade* within againſt him complaineth; and then they do aſſeſs the Damages of the ſaid *J. Slade*, by occaſion of not Performance of his Promiſe, and taking upon him within written, beſides his Charges and his Coſts in the Suit aforeſ. by him expended to 16 *l.* And for thoſe Charges and Coſts to 20 *s.* And if upon the whole Matter by the ſaid Jurors, in Form aforeſ. found, it ſhall ſeem to the ſaid Juſtices and Court here, that the ſaid *Humph. Morley* did not take upon him in Manner and Form in the Declarat. within ſpecified, then the ſaid Jurors ſay upon their Oath, that the ſaid *Humph.* did not take upon him in Manner and Form as the ſaid *Humph.* hath within alledged: And becauſe the Court of the Lady the Q. here of giving their Judgment of and upon the Premiſſes, are not yet adviſed, Day is given to the Parties aforeſ. in State as now it is, before the Lady the Q. at *Weſtm.* until *Monday* next after 15 Days of the *Holy Trinity* to hear their Judgment of and upon the Premiſſ. becauſe the Court of the Lady the Q. here thereof not yet, *&c.* And ſo from Term to Term, until *Saturday* next after eight Days of St. *Michael*, to hear their Judgment of and upon the Prem. becauſe the Court of the Lady the Q. here not yet, *&c.* At which Day, before the Lady the Q. at *Weſtm.* aforeſ. came the Parties aforeſ. in their proper Perſons: Upon which ſeen, and by the Court of the Lady the Q. here, all and ſingular the Premiſſes being fully underſtood, and mature Deliberat. being thereupon had, for that it ſeemeth to the Court of the ſaid Lady the now Queen here, that the ſaid *Humph.* did take upon him in Manner and Form in the Declaration aforeſ. above ſpecified: It is granted, that the aforeſ. *J. Slade* ſhall recover againſt the ſaid *Humph. Morley*, his Damages and Coſts aforeſaid, by the Jurors aforeſ. in Form aforeſ. aſſeſſed; as alſo 9 *l.* for his Charges and Coſts aforeſ. to the ſaid *J. Slade*, by the Court of the ſaid Lady the Q. here by his Aſſent of Enceaſe adjudged, which Damages in the whole do amount to 26 *l.* And the ſaid *Humph. Morley* in Mercy, *&c.*

SLADE's *Caſe.*

Trin. 44 Eliz.

In the King's Bench.

Yelv. 20. Moor 433, 667.

John Slade brought an Action on the Caſe in the King's Bench againſt *Humfrey Morley*, (which Plea began *Hill.* 38 *Eliz. Rot.* 305.) and declared, that whereas the Plaintiff, 10 *Nov.* 36 *Eliz.* was poſſeſſed of a Cloſe of Land in *Halberton* in the County of *Devon* called *Rack Park*, containing by Eſtimation eight Acres for the Term of divers Years then and yet to come, and ſo poſſeſſed, the Plaintiff the ſaid 10th Day of *Nov.* the ſaid Cloſe had ſowed with Wheat and Rye, which Wheat and Rye, 8 *Maii*, 37 *Eliz.* were grown into Blades, the Defendant, in Conſideration that the Plaintiff, at the ſpecial Inſtance and Requeſt of the ſaid *Humfrey*, had bargain'd and ſold to him the ſaid Blades of Wheat and Rye growing upon the ſaid Cloſe (the Tithes due to the Rector, *&c.* excepted) aſſumed and promiſed the Plaintiff to pay him 16 *l.* at the Feaſt of St. *John Baptiſt* then to come; and for Non-payment thereof at the ſaid Feaſt of St. *John Baptiſt*, the Plaintiff brought the ſaid Action: The Defendant pleaded *Non aſſumpſit modo & forma*; and on the Trial of this Iſſue the Jurors gave a ſpecial Verdict, *ſc.* That the Defendant bought of the Plaintiff the Wheat and Rye in Blades growing upon the ſaid Cloſe as is aforeſaid, *prout* in the ſaid Declaration is alledged, and further found, that between the Plaintiff and the Defendant there was no other Promiſe or Aſſumption but only the ſaid Bargain: And againſt the Maintenance of this Action divers Objections were made by *John Doddridge* of Counſel with the Defendant. 1. That the Plaintiff upon this Bargain might have ordinary Remedy by Action of Debt, which is an Action formed in the *Regiſter*, and therefore he ſhould not have an Action on the Caſe, which is an extraordinary Action, and not limited within any certain Form in the *Regiſter*; for *ubi ceſſat remedium ordinarium, ibi decurritur ad extraordinarium, & nunquam decurritur ad extraordinarium ubi valet ordinarium*, as appears by all our Books; *Et nullus debet agere actionem de dolo, ubi alia actio ſubeſt.* The ſecond Objection was, That the Maintenance

Hard. 65.

nance of this Action takes away the Deft's Benefit of (*a*) Wager of Law, and ſo bereaves him of the Benefit which the Law gives him, which is his Birthright. For peradventure the Def. has paid or ſatisfy'd the Pl. in private betwixt them, of which Payment or Satisfaction he has no Witneſs, and therefore it would be miſchievous if he ſhould not wage his Law in ſuch Caſe. And that was the Reaſon (as 'twas ſaid) that Debts by ſimple Contract ſhall not be (*b*) forfeited to the King by Outlawry or Attainder, becauſe then by the King's Prerogative the Subject would be ouſted of his Wager of Law, which is his Birthright, as it is held in 40 *E.* 3. 5. *a.* 50 *Aſſ.* 1. 16 *E.* 4. 4. *b.* & 9 *Eliz. Dyer* 262. and if the King ſhall loſe the Forfeiture and the Debt in ſuch Caſe, and the Debtor by Judgment of the Law ſhall be rather diſcharg'd of his Debt, before he ſhall be depriv'd of the Benefit which the Law gives him for his Diſcharge, altho' in Truth the Debt was due and payable; *a fortiori* in the Caſe at Bar, the Def. ſhall not be charg'd in an Action in which he ſhall be ouſted of his Law, when he may charge him in an Action, in which he may have the Benefit of it: And as to theſe Objections, the Courts of King's Bench and Common Pleas were divided; for the Juſtices of the King's Bench held, that the Action (notwithſtanding ſuch Objections) was maintainable, and the Court of Common Pleas held the contrary. And for the Honour of the Law, and for the Quiet of the Subject in the appeaſing of ſuch Diverſity of Opinions (*Quia nil in lege intolerabilius eſt eandem rem diverſo jure cenſeri*) the Caſe was openly argued before all the Juſtices of *England*, and Barons of the Exchequer, *ſc.* Sir *John Popham*, Knt. C. J. of *England*, Sir *Edm. Anderſon*, Knt. C. J. of the Common Pleas, Sir *W. Periam*, Chief Baron of the Excheq. *Clark*, *Gawdy*, *Walmeſley*, *Fenner*, *Kingsmill*, *Savil*, *Warburton*, and *Yelverton*, in the Exchequer Chamber, by the Queen's Attorney-General for the Plaintiff, and by *John Dodderidge* for the Def. and at another Time the Caſe was argued at Serjeant's Inn, before all the ſaid Juſtices and Barons, by the Attorney General for the Pl. and by *Fran. Bacon* for the Def. and after many Conferences between the Juſtices and Barons, it was reſolved, that the Action was maintainable, and that the Pl. ſhould have Judment. And in this Caſe theſe Points were reſolv'd. 1. That altho' an Action of Debt lies upon the Contract, yet the Bargainor may have an Action on the Caſe, * or an Action of Debt at his Election †, and that for three Reaſons or Cauſes. 1. In Reſpect of infinite Precedents (which *George Kemp*, Eſq; Secondary of the Prothonotaries of the King's Bench ſhew'd me) as well in the Court of Common Pleas as in the Court of King's Bench, in the Reigns of King *H.* 6. *E.* 4. *H.* 7. & *H.* 8. by which it appears, That the Plaintiffs declared that the Defendants, in Conſideration of a Sale to them of certain Goods, promiſed to pay ſo much Money, &c. in which

(*a*) Co. Lit. 295. a.

(*b*) Poſtea 95. a. Moor 204, 106. 3 Rolls 806. Cr. El. 203, 575, 851. 1 Rolls 912. Stamf. Cor. 188. a. Dyer 262. pl. 31. Cr. Car. 187. 2 Vent. 282. Hard. 226. Went. 23. Noy 155, 176. 1 Leon. 64.

* 1 Salk. 9.
† 5 Co. 88. 9 Co. 51, 72.
(*c*) Yelv. 20. Moor 433, 667. Vaugh. 101. 2 Roll. Rep. 292, 464. 3 Bulſtr. 237. Cr. Car. 327, 540. Cr. El. 434, 736. 1 Mod. Rep. 163. Dyer 21. pl. 125. 2 Sid. 169. Noy 59. Moor 694.

aſes

Caſes the Plaintiffs had Judgment. To which Precedents and Judgments being of ſo great Number, in ſo many Succeſſions of Ages, and in the ſeveral Times of ſo many reverend Judges, the Juſtices in this Caſe gave great Regard; and ſo the Juſtices in ancient Times, and from Time to Time did, as well in Matters of Form as in deciding of Doubts and Queſtions as well at the Com. Law, as in Conſtruction of Acts of Parliament, and theref. in 11 *E.* 3, *Formed.* 32. it is held, that the ancient Forms and Manner of Precedents are to be maintain'd and obſerv'd; and in 34 *Aſſ.* 7. that which has not been according to Uſage ſhall not be permitted, and in 2 *E.* 3. 29. the ancient Form and Order is to be obſerv'd. in 39 *H.* 6. 30. the Opin. of *Priſot & tot' Cur'* was, that in a Writ of Meſn the Pl. ought to ſurmiſe the Tenure between the Lord paramount and the Meſn, as well as between the Meſn and the Tenant, and ſhew there divers Reaſons and Cauſes of their Opinions, but when the Juſtices were inform'd by the Prothonotaries, that the Book call'd *Les Tales*, contain'd the Form that had always in ſuch Caſes been uſed, the Book ſaith, that the Juſtices reſolv'd that they would not change the Uſage, notwithſtanding their Opinion was to the contrary, and according to the Precedents they awarded the Count good: 4*E.* 4. 44. In a Writ of Error brought by *John Paſton*, to reverſe an Outlawry againſt him, he did not ſurmiſe in the Writ at whoſe Suit he was outlaw'd, and all the Juſtices ſaid it was a ſtrange Writ, and no Certainty ſuppoſed thereby; for by the Writ it did not appear whether he was outlaw'd at the Suit of the Party or at the King's Suit, or in what Suit, or for what Thing, and it might be that he was outlaw'd for Felony, Debt, Treſpaſs, Account or Fine to the K. but when the Court was inform'd that the ancient Form was ſuch, then they chang'd their Opinion and awarded the Writ good, and reſolv'd, that common Courſe makes a Law, altho' now as 'twas there ſaid, perhaps Reaſon willeth the contrary; but there the Juſtices ſaid, we can't change the Law now, for that would be inconvenient, and therewith agrees *Long* 5 *E.* 4. 1. where it is ſaid, that the Courſe of a Court makes a Law: *Vide Mich.* 2 *&* 3 *P. & M.* 120. The Stat. of *W.* 2. *cap.* 12. *Quod Juſtic' coram quib' format' erit' appellum & terminat'* ſhall enquire of Damages where the Def. is acquitted, yet Precedents expound the Law againſt the expreſs Letter, *ſc.* that Juſtices of *Niſi Prius* (before whom the Appeal was not began) ſhall do it, and many others to this Effect are in our Books; but foraſmuch as Precedents are not always allowable, for in our Books the Judges reject ſome Precedents, ſee a notable Caſe in *Long* 5 *E.* 4. 110. for certain Rules and Differences in this Matter, there it is agreed, that where a Queſtion was of a Retorn of an Aſſiſe, and 2 or 3 Preced. were ſhewed, which agreed with the ſaid Retorn, and the Juſtices ſaid, that 2 or 3 Retorns or Preced. do not make a Law, nor a Cuſtom, eſpecially when there are here in Court forty and more Precedents to the contrary; but if there was no Precedent to the contrary, it was another Matter,

ter, unleſs the Court adjudge it againſt Reaſon, and then it ſhall be amended, for perhaps the (*a*) Precedents paſſed without (*b*) Challenge of the Party, or Debate of the Juſtices, as then (as it is there recited) of late it was in a Writ of Error to reverſe an Outlawry in the County of *Lancaſter*, and the Error was becauſe the Sheriff retorned, that *ad Com' Lancaſtriæ tent' ibid', &c.* where it ſhould be, *ad Com' Lancaſtriæ tent' apud Lancaſtr'*, or other certain Place to which this Word *ibid'* ſhould have Relation, and altho' there were ſhewed 100 Precedents according to the ſaid Retorn, yet the Outlawry was reverſed; ſo that in divers Caſes Precedents do not make a Law; and therefore it was ſaid by the Juſtices to the Parties, that he who would have Advantage of Precedents, ought to ſearch for them at his Peril, and for his Speed, for the Court would not ſearch for them; for if none, or no uſual Precedents are ſhewn, the Court ought to adjudge according to Law and Reaſon: Out of which Book, 1. It is to be obſerved, that two or three, or ſuch ſmall Number of Precedents do not make a Law againſt the Generality of Precedents in ſuch Caſe. 2. That the Retorn of Sheriffs or Entries of Clerks without Challenge of the Party, or Conſideration of the Court, being againſt Common Law and Reaſon, are not allowable: But when the Precedents are (*c*) judicial, *ſc.* where the Juſtices, by divers Succeſſions of Ages, have given Judgment in Actions there brought, it ſhall be intended that ſome of the Counſel with the Defendant, or ſome of the Juſtices before whom the Action was tried, and the Record read, would have excepted againſt it, if in their Judgment the Action was not maintainable, but in Caſe of Return of an Outlawry, or Entries of Clerks, the Records paſs in Silence, and without Exception of the Parties, and therefore are not ſo authentic as Judgments upon Demurrers or Verdicts, and therefore in ſuch Caſes (*d*) *Multitudo errantium non parit errori patrocinium*, if ſuch Retorns or Entries of Clerks and Officers are clearly in the Opinion of the Juſtices againſt Law and Reaſon: So that in the Caſe at Bar it was reſolved, that the Multitude of the ſaid judicial Precedents in ſo many Succeſſions of Ages, well prove that in the Caſe at Bar the Action was maintainable. The ſecond Cauſe of their Reſolution was divers Judgments and Caſes reſolved in our Books where ſuch Action on the Caſe on *Aſſ.* has been maintainable, when the Party might have had an Action of Debt, 21 *H.* 6. 55. *b.* 12 *E.* 4. 13. 13 *H.* 7. 26. 20 *H.* 7. 4. *b.* & 20 *H.* 7. 8. *b.* which Caſe was adjudged as *Fitz James* cites it, 22 *H.* 8. *Dyer* 22 *b.* 27 *H.* 8. 24 & 25. in *Tatam*'s Caſe, *Norwood* and *Read*'s Caſe adjudged *Plowd. Com.* 180. 3. It was reſolved, That every Contract (*e*) executory imports in itſelf an *Aſſumpſit*, for when one agrees to pay Money, or to deliver any Thing, thereby he aſſumes or promiſes to pay, or deliver it, and therefore when one ſells any Goods to another, and agrees to deliver them at a Day to come, and the other in Conſideration thereof

(*a*) 2 Co. 61. b. 6 Co. 52. b. 1 Sid. 114. 1 And. 49. 1 Jones 424. Vaugh. 419. Hard. 340.
(*b*) Winch. 85. 1 Rol. Rep. 75. Lit. Rep. 125. Hard. 98.
(*c*) Cr. Arg. 75. 2 Rol. Rep. 75. Hard. 98, 355, 141.
(*d*) Cr. Arg. 75. Hard. 98.
(*e*) Yelv. 20. Moor 667.

thereof agrees to pay ſo much Money at ſuch a Day, in that Caſe both Parties may have an Action of Debt, or an Action on the Caſe on *Aſſumpſit*, for the mutual executory Agreement of both Parties imports in itſelf reciprocal Actions upon the Caſe, as well as Actions of Debt, and therewith agrees the Judgment in *Read* and *Norwood*'s Caſe, *Pl. Com.* 128. 4. It was reſolved, that the Plaintiff in this Action on the Caſe on *Aſſumpſit* ſhould not recover only Damages for the ſpecial Loſs (if any be) which he had, but alſo for the whole Debt, ſo that a Recovery or Bar in this Action would be a good * Bar in an Action of Debt brought upon the ſame Contract; ſo *via verſa*, a Recovery or Bar in an Action of Debt, is a good Bar in an Action on the Caſe on *Aſſumpſit*, *Vide* 12 *E.* 4. 13. *a.* 2 *R.* 3. 14. (32) 33 *H.* 8. *Action ſur le Caſe. Br.* 105. 5. In ſome Caſes it would be miſchievous if an Action of Debt ſhould be only brought, and not an Action on the Caſe, as in the Caſe *inter Redman & Peck*, 2 & 3 *Ph. & Mar. Dyer* 113. they bargained together, that for a certain Conſideration *Redman* ſhould deliver to *Peck* 20 Quarters of Barley yearly during his Life, and for Non-delivery in one Year, it is adjudged that an Action well lies, for otherwiſe it would be miſchievous to *Peck*, for if he ſhould be driven to his Action of Debt, then he himſelf could never have it, but his Executors or Adminiſtrators, for Debt doth not lie in ſuch Caſe, 'till all the Days are incurred, and that would be contrary to the Bargain and Intent of the Parties, for *Peck* provides it yearly for his neceſſary Uſe: So 5 *Mar. Br. Action ſur le Caſe* 108. that if a Sum is given in Marriage to be paid at ſeveral Days, an Action upon the Caſe lies for Non-payment at the firſt Day, but no Action of Debt lies in ſuch Caſe (*a*) 'till all the Days are paſt. Alſo it is good in theſe Days in as many Caſes as may be done by the Law, to ouſt the Defendant of his (*a*) Law, and to try it by the Country, for otherwiſe it would be occaſion of much Perjury. 6. It was ſaid, that an Action on the Caſe on *Aſſumpſit* is as well a formed Action, and contained in the Regiſter, as an Action of Debt, for there is its Form: Alſo it appears in divers other Caſes in the Regiſter, that an Action on the Caſe will lie, altho' the Plaintiff may have another formed Action in the Regiſter, *F. N. B.* 94, *g. & Regiſter* 103. *b.* If a Man has a Manor within any Honour, and has a Leet within his Manor of his Tenants, if he or his Tenants are diſtrained by the Lord of the Honour, to come to the Leet of the Honour, he who is ſo diſtrained may have a gereral Writ of Treſpaſs, or a ſpecial Writ upon his Caſe: So if any Officer takes Toll of him who ought to be quit of Toll, he ſhall have a general Writ of Treſpaſs, or an Action upon his Caſe, as appears by *Fitz. ib.* 94. And if a Prior or other Prelate, is riding in his Journey, and one diſtrains his Horſe upon which he

* Doct. pl. 67.

(*a*) Co. 22. a. 5 Co. 81. b. 8 Co. 153. a. 10 Co. 128. b. 2 Brownl. 62, 63. Co. Lit. 47. b. 292. b. F. N. B. 139, 131. a. 131. b. Yelv. 67. 1 Leon. 300, 319. 2 Leo. 107, 198, 131. Mo. 13. 3 Leon 4. 4 Leon. 13. Owen 40. Benl. in Aſh. pl. 10. O. Benl. 3. pl. 8. N. Benl. 57. pl. 95. Benl. in Kelw. 208, 209. Cro. El. 118, 119, 776, 807. Cro. Jac. 505. Cro. Car. 421. 1 Rol. 22, 601. 1 Rol. Rep. 221. 2 Rol. Rep. 47. Br. Action ſur le Caſe 108. in fine. 2 Sand. 327. Latch. 210.

he is riding when he may diſtrain other Goods, he may have a general Action of Treſpaſs, or an Action upon his Caſe, as appears in the *Regiſter*, 100 *b.* & *F. N. B.* 93. *H.* If the Sheriff ſuffers one in Execution upon a Statute Merchant to eſcape, the Conuſee may have an Action of Debt, (*a*) or an Action on the Caſe, as appears by the *Regiſter* 98 *b.* & *F. N. B.* 93. *B. C.* So if a Man ouſts the Executors of his Leſſee for Years of their Term, they may have a ſpecial Writ upon their Caſe, as appears *F. N. B.* 92 *G.* & *Regiſter* 97. and yet they may have *Ejectione firmæ*, or Treſpaſs. And therefore it was concluded, that in all Caſes when the Regiſter has two Writs for one and the ſame Caſe, it is in the Party's Election to take either. But the *Regiſter* has (*b*) two ſeveral Actions, *ſc.* Action upon the Caſe upon *Aſſumpſit*, and alſo an Action of Debt, and therefore the Party may elect either. And as to the Objection which has been made, that it would be miſchievous to the Def. that he ſhould not (*c*) wage his Law, foraſmuch as he might pay it in ſecret: To that it was anſwered, that it ſhould be accounted his Folly that he did not take ſufficient Witneſſes with him to prove the Payment he made; but the Miſchief would be rather on the other Party, for now Experience proves that Mens Conſciences grow ſo large that the Reſpect of their private Advantage rather induces Men (and chiefly thoſe who have declining Eſtates) to Perjury; for *Jurare in propria cauſa* (as one ſaith) *eſt ſæpenumero hoc ſeculo præcipitium diaboli ad detrudendas miſerorum animas ad infernum:* And therefore in Debt, or other Action where Wager of Law is admitted by the Law, the Judges without good Admonition and due Examination of the Party do not admit him to it. And as to the Caſe which was cited, that Debts or Duties due by ſingle Contract where the Party may wage his Law, ſhall not be (*d*) forfeited by Outlawry, becauſe the Debtor will be thereby ouſted of his Law: To that it was anſwered by the Attorney-General that in ſuch Caſe by the Law, Debts or Duties ſhall be forfeited to the King, and ſo are the better Opinions of the Books, *ſc.* 3 *E.* 3. *Corone* 343. 19 *E.* 2. *Avowry* 223. If the Tenant of a Prior Alien is amerced for Default of Suit to the Court Baron, the K. ſeiſes the Poſſeſſions of the Prior alien, he ſhall have this Debt due for the Amercement; yet in an Action of Debt brought for it by the Prior Alien, he ſhall have his (*e*) Law, as it was adjudged 6 *E.* 6. *in Serjeant Bendloe's* Reports, 28 *E.* 3. 92. *in Accompt*, & *Stamf.* Pleas of the Crown 188. and infinite Precedents in all Ages in the Exchequer, which I have ſeen, approve it, and ſo it was now lately reſolved in the Exchequer, and ſo it was held in this Caſe by *Popham*, *Anderſon*, and divers other Juſtices with whom I have conferred againſt the ſudden Opinions in 49 *E.* 3. 5. 50 *Aſſ.* 1. 16 *E.* 4. 4. & 9 *Eliz.* 262. (*f*) and ſo you have a Doubt

(*a*) Cro. Car. 540.

(*b*) Dyer 21. pl. 125.

(*c*) Co. Lit. 295. a. 9 Co. 88. b.

(*d*) 2 Vent. 282. Moor 204, 206. Antea 93. a. 2 Rol. 806. Cro. El. 575, 851, 203. Cro. Car. 187. Stamf. Cor. 188. a. Dy. 262. pl. 31. Hard. 226. Wentworth 23. Noy 155, 176. 1 Leon 64.

(*e*) O. Benl. 41. Moor 276, 277. 1 Leon. 203, 204.

(*f*) Dyer 262. pl. 31.

a Doubt in our Books well reſolved. *Et nota* Reader, in every (*a*) *Quo minus* in the Exchequer brought by the King's Debtor, againſt one who is indebted to him on a ſimple Contract, the Defendant ſhall not have his Law, for the Benefit of the King, as appears in 8 *H.* 5. *Ley* 66. 20 *E.* 3. *Ley* 42. 10 *H.* 7. 6. and yet there the King is not Party, *a fortiori* when ſuch Debt or Duty is forfeited to the King, and the King is the ſole and immediate Party: *Et nota* Reader, this Reſolution as to this Point, agrees with the Judicial Law of God, upon which our Law is in this Point grounded, for it appears by the 22d Chapter of *Exodus, ver.* 7. *Si quis commendaverit Amico pecuniam, &c. & ver* 10. *Si quis commendaverit Proximo ſuo Aſinum, Bovem, Ovem, & omne Jumentum ad Cuſtodiam, & mortuum fuer', aut debilitatum aut Captum ab Hoſtibus, nulluſque hoc viderit, Jusjurandum erit in medio quod non extenderit manum ad Rem Proximi ſui, ſuſcipietque Dominus Juramentum & ille reddere non cogetur*; by which it appears that it is in the Election of the Plaintiff, either to charge the Defendant by Witneſſes if he will, and to ouſt him of his Law, or to refer it to the Defendant's Oath; for the Text ſaith, *Nulluſque hoc viderit, ſc.* if there be no Witneſſes, ſo by our Law in the ſame Caſe put in the Text, the Owner has Election either to bring an Action on the Caſe in which the Defendant can't wage his Law, or an Action of Detinue in which he may, *Et jusjurandum in hoc caſu eſt finis*; for the Plaintiff is bound thereby, and it is the End of the Controverſy. And I am ſurpriz'd that in theſe Days ſo little Conſideration is made of an Oath, as I daly obſerve; *Cum jurare per Deum actus religionis ſit, quo Deus teſtis adhibetur tanquam is qui ſit omnium rerum maximus, &c. Nota* Reader, for Witneſſes or Acquittance (on Oath.)

(*a*) 9 Co. 88. a. Co. Lit. 295. a. Br. Ley 102. Godb. 291. 32 H. 6. 24. a.

ADAMS *and* LAMBERT's *Caſe.*

Hill. 40 Eliz. *Rot.* 788.

In the King's Bench.

Bucks, ſſ. *MEmorandum*, That at another Time, that is to ſay, in *Michaelmas* Term laſt paſt, before the Lady the Queen at *Weſtminſter*, came *Theophilus Adams*, Gent. by *John Povey* his Attorney, and brought here in the Court of the ſaid Lady the Queen then there, his Bill againſt *John Lambert* in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs and Ejectment of him out of his Farm, and are Pledges of Suit, *John Doe*, and *Rich. Roe*, which Bill followeth in theſe Words, *ſſ. Bucks, ſſ. Theo. Adams*, Gent. complaineth of *John Lambert*, in the Cuſtody of the Marſhal of the *Marſhalſea* of the Lady the Queen, before the Q. herſelf being, for that, that is to ſay, That whereas one *Rob. Snelling*, Gent. and *Tho. Butler*, Gent. the 23d Day of *May*, in the 36th Year of the Reign of the Lady *Eliz.* the now Queen of *England*, at the Town of *Buckingham* in the County aforeſaid, had demiſed, and to Farm Letten to the ſaid *Theo.* 1 Meſſuage and 10 Acres of Paſture, with the Appurtenances, to the ſaid Meſſuage near lying, called the *Conigree*, ſituate, lying and being in the Town of *Buckingham* aforeſaid, in the County aforeſaid, to have to the ſaid *Theo.* and his Aſſigns, from the aforeſaid 23d Day of *May*, in the 36th Year aforeſaid, until the End and Term of ten Years from thence next following, and fully to be compleat and ended, by Virtue of which Demiſe the ſame *Theo.* afterwards, that is to ſay, the 16th Day of *April*, in the 39th Year of the Reign of the ſaid Lady the now Queen, into the aforeſ. Tenements with the Appurtenances entred, and was thereof poſſeſſed until the aforeſ. *J. Lambert* afterward, that is to ſay, the ſame 16th Day of *April*, in the 39th Year aforeſaid, with Force and Arms, *&c.* into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the ſaid *Theo.* thereof entred, and him the ſaid *Theo.* from his Farm thereof, his Term aforeſaid not yet ended, ejected, expelled and amoved, and from his Poſſeſſion thereof held out, and yet holdeth out, and other Harms to him did againſt the Peace of the ſaid Lady the now Queen, to the Damage of the ſaid *Theo.* of 20 *l.* and thereof he bringeth Suit, *&c.* and now at this Day, that is to ſay, *Monday* next after eight Days of St. *Mich.* in this Term, until which Day the aforeſaid *J. Lambert* had Licence to imparl to the Bill aforeſ. and then to anſwer, *&c.* before the Lady the Q. at *Weſtm.* came as well the aforeſaid *Theo. Adams*, by his Ejectment.

his Attorney aforeſaid, as the ſaid *J. Lambert*, by *J. Harborn* his Attorney, and the ſaid *J. Lambert* defendeth the Force and Injury when, *&c.* and ſaith, that he is not thereof guilty, and of this putteth himſelf upon the Country, and the ſaid *Theo.* likewiſe, *&c.* and therefore a Jury thereof was to be before the Q. at *Weſtm.* on *Monday* next after the Morrow of the *Purification* of the Bleſſed Lady *Mary*, by whom, *&c.* and who neither, *&c.* becauſe as well, *&c.* Day is given to the Parties aforeſ. there, *&c.* of which Day the Jurors aforeſ. between the Parties aforeſ. of the Plea aforeſ. were put in Reſpit before the Lady the Q. at *Weſtm.* until *Mond.* next after a Month of *Eaſter*, in the 41ſt Year of the ſaid Lady the now Q. for Default of Jurors, *&c.* At which Day before the ſaid Lady the Q. at *Weſtm.* aforeſ. come the Parties aforeſ. by their Attornies aforeſ. And the Jurors of the ſame Jury being called come likewiſe, who to ſay the Truth of the Premiſſes being choſen, tried, and ſworn, ſay upon their Oath, that long before the Time of the Treſp. and Ejectm. aforeſ. that is to ſay, the 5th Day of the Month of *June* in the Year of our Lord 1431, and in the Year of the Reign of K. *Hen.* 6. after the Conqueſt the 9, one *J. Barton* the Elder was ſeiſed of the aforeſ. Meſſuage, and of ſix Acres of Paſture, Parcel of the aforeſ. ten Acres of Paſt. in the Declar. aforeſ. ſpecified, in which it is ſuppoſed the Treſp. and Ejectm. aforeſ. to be done, amongſt other, in his Demeſn as of Fee, and ſo thereof, of the Meſſuage aforeſ. and of the ſaid ſix Acres of Paſt. with the Appurt. Parcel, *&c.* ſeiſed, *&c.* enfeoffed *W. Brampton*, to have and to hold to him and his Heirs to the Behoof and Uſe of the aforeſ. *J. Barton* the Elder, and his Heirs: By Virtue whereof, the aforeſ. *W. Brampton* was ſeiſed of the Meſſuage and ſix Acres of Land, Parcel, *&c.* with the Appurt. in his Demeſn as of Fee, to the Uſe of the aforeſ. *J. Barton* and his Heirs, and the aforeſ. *W. Brampton*, ſo thereof being ſeiſed, the aforeſ. *J. Barton* afterwards, that is to ſay, the aforeſ. 5th Day of the Month of *June*, in the Year of our Lord 1431, in the ſaid 9th Year of the Reign of the ſaid late K. *Hen.* 6. aforeſ. at *Buck.* aforeſ. made his Teſta. and laſt Will within written of the aforeſ. Meſſuage and ſix Acres of Paſture, Parcel, *&c.* amongſt other Things in theſe Words, *&c.* In the Name of God, Amen. ff. *The* 5th *Day of the Month of* June 1431, *of the late Reign of K.* Hen. 6. *after the Conqueſt of* England *the* 9th, *I* John Barton *the Elder, being of perfect Mind and good Memory, do make and ordain my preſent Teſtament Indented containing my laſt Will, in this Manner:* Imprimis, *I give and recommend my Soul to God and my omnipotent Creator and Saviour, and to the Bleſſed* Mary *the Virgin his Mother, and to all the Saints, and my Body to be buried in the Church of the bleſſed* Peter *the Apoſtle of* Buckingham, *that is to ſay, in the Church of St.* Romwold, *in the ſame Place, wherein a Marble Stone for my Burying I have ordained and appointed, and for this my Burial there to be had I give to the Building of the Body of the ſaid Church,* 40 s. *alſo I will*

will, and ordain, that ſpeedily after my Death there be celebrated for my Soul, 4000 *Maſſes, for the celebrating of which I give* 16 l. 13 s. *and* 4 d. *and for his Pains who about this ſhall employ himſelf, that fully, faithfully and ſpeedily it be performed,* 6 s. 8 d. Item, *I give to the Religious Men under written, that they as ſoon as by my Executors or their Deputies they be acquainted of my Death, ſo ſpeedily as conveniently it may be done, every Order of them ſay a* Placebo *and* Dirige *by Note, and the Day following the Maſs of* Requiem *with Note for my Soul, the Souls of my Father and Mother, my Friends and Benefactors, and for the Souls of all the faithful departed, that is to ſay, to the Maſter and Brethren of the Houſe and Church of Saint* Thomas the Martyr *of* Canterbury, *called of* Acon, London, 40 s. *to the Maſter and Brethren of the Hoſpital of St.* Bartholomew *in* Weſt-Smithfield, London, 40 s. *to the Abbot and Convent of* Betleſden *in the County of* Buckingham, 100 s. *to the Prior and Covent of* Luffeild, 40 s. *to the Prior and Covent of* Cheitwood 40 s. *to the Prior and Covent of* Snelſale, 20 s. *to every Order of the four Orders of Fryars* Mendicants *in the Town of* Northampton, 20 s. *to every Order of the four Orders of Fryars* Mendicants *of the Town of* Oxford, 20 s. *to the Covents and Fryars* Minors *of* Aylſbury, 20 s. *to every Order of the five Orders of Fryars in the City of* London, 20 s. *Alſo I bequeath to the Brother of* John Upton, 100 s. *that he for my Soul celebrate for one whole Year next after my Death; and I will that all the Religious Men aforeſaid by my Executors or their Deputies be charged that they eſpecially pray for my Soul.* Item, *I give and bequeath to* John Barton *the Younger, my Brother, all my Tenements, together with all the Tenements which late were* Roger Skiret's, *which I purchaſed, with the Rents and Srvices, together with the Reverſion and all their Appurtenances in the Town of* Buckingham, *in the County of* Buckingham, *to have and to hold all the Tenements aforeſaid, with their Appurtenances, to the aforeſaid* John *my Brother, for the Term of his Life, upon the Conditions following, that is to ſay, That the ſaid* John *my Brother, during his Life, find one fit Chaplain, and honeſt, to celebrate for my Soul and the Souls of my Father, Mother, Brothers, Siſters, Benefactors, and my Friends, and of all the faithful deceaſed, at the Altar of Saint* James *in the aforeſaid Church of the Bleſſed* Peter, *daily; and I will and ordain, that the aforeſaid Chaplain all Feſtival Days be preſent at Mattines and Veſpers, in the Quire of the Church aforeſaid: And I will that the ſaid Chaplain, every Day within the Church aforeſaid, the Mattines of Saint* Mary, *and after the Mattines of the Day with certain Hours* canonical, *and theſe to be ended every Day, the ſaid Chaplain before he goeth to Maſs, read a Part of the Pſalter of* David, *ſo always that by the ſaid Chaplain every Week be ſaid one Pſalter of* David, *and afterwards daily when he is not troubled with Sickneſs, that he go to Maſs, which Maſs ended, before he go from the Altar, he read the Pſalm* de profundis, *with the Prayer* Inclina, *and daily after Dinner, as it ſhall ſeem beſt to him that the ſaid Chaplain ſay in the ſaid Church of the Bleſſed* Peter, *a* Placebo *and* Dirige *with nine Readings, Time of* Eaſter *excepted, which Time of* Eaſter *he ſay* Officium mortuorum *with three Readings, according to the Uſe of* Saliſbury, *and following every Day of the ſame Time of* Eaſter, *the* Pſalter *of the Bleſſed* Mary *the Virgin, and that afterwards follow the Commendations of Souls, with the Prayer,* Tibi Domine commendamus, *after that he ſay* veſperas de die, *and afterwards the Veſpers of*

Saint Mary, *and that the ſaid Chaplain, if not hindred with Sickneſs, every Day that he ſhall in the Default of ſaying Maſs in the ſaid Church of Saint* Peter, *that he give to one of the Poor of the Town of* Buckingham *aforeſaid, One Penny. I will alſo, that the ſaid Chaplain make his Aboad always there, yet that the ſaid Chaplain every Year have Recreation by the Space of* 15 *Days, ſo always as the ſaid Chaplain ſupply his Turns by another Chaplain, or every Day of the ſaid* 15 *Days, to give to one of the Poor of the Town of* Buckingham, *a Penny: And I will that the aforeſaid* John *my Brother yearly during his Life, pay to the ſaid Chaplain in the aforeſaid Church of Saint* Peter, *for his Maintenance and his Pains, as before is ſaid done and to be done,* 10 *Marks of lawful Money of* England *out of the Iſſues and Profits of the Tenements aforeſaid; ſo always, that the ſaid Chaplain of the ſaid Sum of* 10 *Marks for his Salary or Stipend, reputed himſelf contented, from no other any Stipend to be received or taken: And I the ſaid* John Barton *the elder, will and ordain in the Teſtament aforeſaid, that the ſaid Chaplain and his Succeſſors to the Office and Service aforeſaid, be choſen, ordained, preferred, admitted and received, by the Maſter and Brethren of the Houſe or Church of Saint* Thomas the Martyr *of* Canterbury, *called of* Acon, London, *aforeſaid, and his Succeſſors for ever, and if they do not behave themſelves well and honeſtly, or if they ſhall neglect or refuſe to do or perform the Charges aforeſaid, by the ſaid Maſters and Brethren and their Succeſſors, or by their ſufficient Deputies, from the ſaid Office or Service they be removed and expelled, and another fit Chaplain in the Place of the ſaid Chaplain for his Faults removed, expelled, or by Death failing, or otherwiſe howſoever from the ſaid Office or Service ceaſing or departing, by the aforeſaid Maſters and Brethren of the Houſe or Church of Saint* Thomas *aforeſaid, and his Succeſſors be choſen, ordained, preferred, admitted and received, ſo as the Lord Biſhop of* Lincoln, *who for Time ſhall be, or the Arch-Deacon of the Place, or the Prebendary of the Prebend of* Buckingham, *or other in their Name, upon the Election, Ordination, Preferring, Admiſſion, and Remotion or Amoving of the ſaid Chaplain, no Juriſdiction or Power have or claim hereafter in any Manner; therefore let the ſaid Maſter and Brethren and* (98.) *their Succeſſors take Care upon the Peril of their Souls, and as they will anſwer the ſame before the moſt high Judge, that neither for Favour, Love, Prayer or Price, they ordain any Chaplain into the aforeſaid Office or Service, or admit or receive, but an honeſt and an approved Perſon as much as his Converſation can appear to them, and that the aforeſaid Chaplain to the ſaid Office and Service to be admitted, on his firſt Admiſſion, the aforeſaid Maſter and Brethren of the Houſe and Church of Saint* Thomas *aforeſaid and their Succeſſors, take his Corporal Oath upon the Holy Goſpel, all and ſingular the Charges aforeſaid without Fraud or Deceit, or any Diſpenſation upon them to the contrary notwithſtanding, in the Manner and Form aforeſaid above declared, will and faithfully to be done and performed, as much as human Frailty will admit: And that every Chaplain to the ſaid Office or Service to be admitted, on his firſt Admiſſion find and make to the Maſters and Brethren of the Houſe and Church of Saint* Thomas the Martyr, *of* Canterbury, *called of* Acon, London *aforeſaid, for the Time being, ſufficient Security for the Ornaments of the ſaid Altar of Saint* James *belonging, ſafely and ſecurely to keep, and in their reſigning and ceaſing, to render back and deliver: And moreover that the ſaid* John *my Brother, during his Life, find*

find in the Town aforesaid, six poor Men or Women, to pray for my Soul and the Souls aforesaid, every Day for ever, and that he give every Week during his Life to every one of the same Poor, four Pence, and also to every one of them their Dwelling, as (by the Will of God) for them I have appointed and ordained, and also that the said John *my Brother, all his Life, find one Lamp burning every Day and Night, before Saint* Romwald *in the Church of the blessed* Peter *aforesaid, as now is found and maintained; and that my said Brother during his Life, hold or cause to be held my Anniversary, and of my Father and Mother, yearly, on the Day of the Translation of Saint* Benedict, *in the Church of the blessed* Peter *aforesaid, in which Anniversary the said* John *my Brother yearly find two Wax Lights at the Dirige, and the Day following at the Mass, one at the Head, and the other at the Feet of my Sepulchre burning, every Wax Light to contain three Pounds; which Funerals of me being compleated, I will that all that which shall be remaining of the said Wax Lights, be sent and remain to the Altar of Saint* James *aforesaid, upon the Candlestick there being, to the Chaplain of my Chantery aforesaid, to serve every Festival Day at Mass, as long as it may last: And that the aforesaid* John *my Brother during his Life find yearly one competent Torch to serve at the Altar aforesaid: And I will that all the aforesaid Tenements, Rents and Services, with the Reversions, and all their Appurtenances, after the Decease of the said* John *my Brother, wholly remain to* Margaret *and* Isabel *my Sisters, for the Term of their Lives, and the Life of the longer liver of them, To be holden of the Chief Lords of the Fee, by the Services thereof due and of Right accustomed; upon Condition that the said* Margaret *and* Isabel, *during their Lives, do perform and observe all and singular the Charges before limited in Form aforesaid, and after the Death of the said* Margaret *and* Isabel, *I will all the aforesaid Tenements, Rents and Services, with the Reversions, and all their Appurtenances wholly to remain to* William Fowler, *to be holden to him and the Heirs of his Body lawfully to be begotten, of the Chief Lords of the Fee, by the Services thereof due and of Right accustomed, upon Condition, that he the said* William *and his Heirs do perform and keep all and singular the Charges above written in the Form aforesaid for ever. And if it shall happen the said* William Fowler *to die without Heir of his Body lawfully begotten, that from thence all the aforesaid Tenements, Rents and Services with the Reversions, and all their Appurtenances, whole remain to* John Somerton *my Cousin, and the Heirs of his Body lawfully begotten, to be holden of the Chief Lords of the Fee, by the Services thereof due and of Right accustomed, upon Condition that he the said* John Somerton, *and his Heirs, all and singular the Charges above written in Form aforesaid fulfil and keep for ever; and if it shall happen him the said* John Somerton *to die without Heir of his Body issuing, That from thence all the aforesaid Tenements, Rents and Services with the Reversions and all their Appurtenances, wholly remain to* William Purfrey *my Cousin, and the Heirs of his Body lawfully begotten, to be holden of the Chief Lords of the Fee, by the Services thereof due and of Right accustomed, upon Condition, that the same* William Purfrey *and his Heirs aforesaid, do perform and observe all and singular the Charges above written in Form aforesaid for ever: And if it shall happen the said* William Purfrey *to die without Heir of his Body issuing, from hence I do give and bequeath that all the aforesaid Rents and Services with the Reversions, and all their Appurtenances, whole remain to the Master of the House of Saint* Thomas the Martyr *of*

Acon, London *aforeſaid, to have and to hold to him and his Succeſſors, Maſters of the ſame Houſe of Saint* Thomas, *to the End and Term of* 40 *Years from thence next following, and fully to be ended: And after the ſaid Term to be ended, that all the Tenements aforeſaid, Rents and Services, with the Reverſions, and all their Appurtenances, remain to the Maſter of the Hoſpital of Saint* Bartholomew *in* Weſt-Smithfield London, *aforeſaid, to have and to hold to the ſame Maſter and his Succeſſors, Maſters of the ſaid Hoſpital of Saint* Bartholomew, *to the Term and End of* 40 *Years from thence next enſuing and fully to be compleated,* (99.) *to every of them upon the Condition following, that is to ſay, that every of the ſaid Maſters and their Succeſſors, during their Term, do and perform all and ſingular the Charges above limited in Form aforeſaid: And if it ſhall happen the ſaid* John *my Brother during his Life in fulfilling the Charges aforeſaid to make Default, or not to perform the ſame, or all the aforeſaid Tenements during his Life not ſufficiently to repair and ſuſtain, or the ſame or any Parcel thereof to alien or to let the ſame at a lower Rate in Prejudice to the other Perſons in Remainder aforeſaid named, that then it ſhall be lawful to the ſaid* Margaret *and* Iſabel *into the aforeſaid Tenements, Rents and Services, with the Reverſions, and all their Appurtenances to enter, and the ſame to hold as in their Remainder aforeſaid without the Contradiction of any one, and that from thence the Eſtate of the ſaid* John *my Brother ſhall altogether ceaſe, and be of no Value; and if it ſhall happen the ſaid* Margaret *and* Iſabel *during their Lives in doing and performing of all the Charges aforeſaid to make Default, or the ſame not to fulfil, or all the Tenements aforeſaid during their Lives not ſufficiently to ſuſtain and repair, or them to alien or demiſe as before is ſaid, or be negligent to enter, if Cauſe as aforeſaid ſhall happen, that then it ſhall be lawful to the aforeſaid* William Fowler, *and his Heirs aforeſaid, into all the aboveſaid Tenements, Rents and Services, with the Reverſions, and all their Appurtenances, to enter as in his Remainder aforeſaid, and the ſame to hold without any Contradiction, and that then the Eſtate of the ſaid* Margaret *and* Iſabel *as aforeſaid, altogether to ceaſe and be of no Value: And if the aforeſaid* William Fowler, *or his Heirs aforeſaid, in doing and performing make Default, or not to fulfil, or all the aforeſaid Tenements not ſufficiently to be ſuſtained or repaired, or to be alien'd or demiſed as before is ſaid, or be negligent to enter, if Cauſe as before is ſaid ſhall happen, that from thence it be well lawful to the aboveſaid* John Somerton, *and his Heirs aboveſaid into all and ſingular the aforeſaid Tenements, Rents and Services, with the Reverſions and all their Appurtenances, to enter as in his Remainder aforeſaid, and the ſame to hold without any Contradiction, and that from thence the Eſtate of the ſaid* William Fowler *and his Heirs aforeſaid, as is aforeſaid, ſhall ceaſe and be of no Value: And if it happen the aforeſaid* John Somerton, *or his Heirs aforeſaid in doing and performing all and ſingular the Charges aforeſaid to make Default, or the ſame not to fulfil, or all the aforeſaid Tenements not ſufficiently to uphold and repair, or to alien or demiſe the ſame as above is ſaid, or that they be negligent to enter if Cauſe as before is ſaid ſhall happen, that from thence it ſhall be well lawful to the aforeſaid* William Purfrey *and his Heirs aforeſaid into all the Tenements aforeſaid, Rents and Services, with the Reverſions, and all their Appurtenances to enter as in his Remainder aforeſaid, and the ſame to hold without any Contradiction, and that from thence the Eſtate of the ſaid* John Somerton *and his Heirs aforeſaid, in all the Tenements*

Tenements aforeſaid altogether to ceaſe, and be of no Value. And if it happen the ſaid William Purfrey, *and his Heirs aforeſaid, in fulfilling all and ſingular the Charges aforeſaid to make Default, or the ſame not to repair, or all the aforeſaid Tenements not ſufficiently to uphold and repair, or the ſame to alien or demiſe, as above is ſaid, or they be negligent to enter, if Cauſe as before is ſaid ſhall happen, That then the Eſtate of the ſaid* William Purfrey, *and his Heirs, altogether to ceaſe, and be of no Value; and that from thence, it be lawful to the ſaid Maſter of the Houſe of the* Holy Martyr *of* Acon, London, *and his Brethren, of the ſame Houſe, and their Succeſſors, into all the aforeſaid Tenements, Rents and Services, with the Reverſions, and all their Appurtenances to enter, and in the Remainder of their Term aforeſaid, to be holden in Form aforeſaid; and if it ſhall happen the ſaid Maſter and Brethren of the Houſe of Saint* Thomas *aforeſaid, or their Succeſſors aforeſaid, in doing and fulfilling all and ſingular the Charges above ſpecified to make Default, or the ſame not to fulfil, or all the Tenements aforeſaid, as above is ſaid, not ſufficiently to uphold and repair, or they be negligent to enter, if Cauſe ſhall happen as before is ſaid, that from thence, it ſhall be lawful to the Maſter of the Hoſpital of Saint* Bartholomew *aforeſaid, and the Brethren of the ſaid Hoſpital, and their Succeſſors, into all the aforeſaid Tenements, Rents and Services, with the Reverſions and all their Appurtenances, to enter as in the Remainder of their Term aforeſaid, and that then the Eſtate of the ſaid Maſter of the Houſe of Saint* Thomas *aforeſaid to ceaſe: And if it happen the ſaid Maſter and Brethren of the Hoſpital of Saint* Bartholomew *aforeſaid, in doing and fulfilling all and ſingular the Charges above declared to make Default, or the ſame not to perform, or all the Tenements aforeſaid, not ſufficiently to uphold or repair, That then it ſhall be lawful to my right Heirs, into all the aforeſaid Tenements, Rents and Services, with the Reverſions, and all and ſingular their Appurtenances to enter, and the ſame to hold, without any Contradiction whatſoever for ever, ſupporting all the Charges aforeſaid, as above is ſaid, as they will for me and them before the moſt high Judge anſwer. And becauſe this my laſt Will was made and ordained for the Good of the Souls of my Father and Mother, and of my own Soul, and the Souls of my Brothers and Siſters, Friends and Benefactors, I pray and charge the ſaid* John *my Brother, as for me and himſelf he will anſwer it, that all his Life-time he overſee the Government of the* Chauntry *aforeſaid, and that the Charges aforeſaid in this my laſt Will and Teſtament declared, be inviolably fulfilled and kept; and that he give Notice to all thoſe who in Manner aforeſaid, ſhall have any Eſtate in the ſaid Tenements, Rents and Services, with the Reverſions and all their Appurtenances, that they know the Tenor of this my laſt Will and Teſtament. And I will that my Feoffees of the Tenements with the Appurtenances, which my poor Men now dwell in, becauſe the ſame is not dividable, that they make ſuch Eſtate after my Death, to all thoſe abovenamed, as they have of my Bequeſt of and in the Tenements in* Buckingham *aforeſaid, to the Uſe of the ſaid Poor their Dwelling, upholding the Reparations of the ſaid Tenements of the aforeſaid Poor, as often as Need ſhall require: And becauſe I doubt leſt the Tenements aforeſaid be ſufficient to uphold all the aboveſaid Charges, by Reaſon of the great Charge of repairing thereof, I will that my Feoffees preſently after my Death* (100.) *make ſuch Eſtate to all thoſe abovenamed, of all thoſe my Lands and Tenements in the Towns of* Barton, Moreton, Gavecote, *with the Prebend of* Lemburg,

Thornborough, Hilleſden, Waterſtratford, Shaldeſton, *and* Foycote, *in the County of* Buckingham, *and of all thoſe Lands with the Appurtenances in the Fields of* Buckingham, *as alſo of my Lands and Tenements in* Worton, *in the County of* Oxford, *and of my one Tenement in the Town of* Oxford, *in which the Feoffees ſhall have as they have of my Gift of and in the Tenements of* Buckingham *aforeſaid, ſo as they may ſufficiently uphold all the Charges aforeſaid, and receive and take, what is reaſonable for their Labour and Pains.* Item, *I will that my Executors, or one of them, according to their Aſſignment, upon the* Good-friday *next after my Death, cauſe him who ſhall preach at the Croſs in the Church-yard of the Cathedral Church of St.* Paul, London, *to the Prayers there of the People, recommend my Soul to the Congregation there aſſembled; for which Recommendation (and that he pray for my Soul) I will that the Preacher have* 40 *Pence.* Item, *I will that the three Preachers, who in the Church-yard of the new Hoſpital of the Bleſſed Lady without* Biſhopſgate, London, *in the three Days in the Week of* Eaſter, *next after my Death ſhall preach, recommend my Soul to the Prayers of the faithful People there aſſembled, and that every one of the ſaid three Preachers, for the ſame Recommendation of my Soul, and that they pray for my Soul, have* 40 *Pence. And I will, that my Executors during one whole Year next after my Deceaſe, every Lord's Day, cauſe the Preacher at the Croſs in the Church-yard of the Cathedral Church of St.* Paul *aforeſaid Preaching, ſpecially recommend my Soul to the Prayers of the People there aſſembled, for which Recommendation, every of the ſaid Preachers have four Pence.* Item, *I give to Mr.* Robert Forſet, *my Chaplain, of* London, *ten Pounds, that the ſaid* Robert *ſpecially celebrate for my Soul, and pray for it for eight Years next following my Deceaſe, taking yearly for his Salary* 100 *Shillings, if he ſo long live. And if he ſhall die within the ſaid Term of eight Years, that then the ſaid* Robert *make the Reſidue which thereof ſhall remain, to be diſtributed unto pious Uſes for my Soul, and the Soul of the ſaid* Robert. Item, *I give to* Margaret *my Siſter,* 100 *Shillings, and a Silver Cup, with a Cover belonging to it.* Item, *I give to* Iſabel *my Siſter,* 100 *Shillings and a Silver Cup with a Cover belonging to it, that the ſaid* Margaret *and* Iſabel *pray for my Soul: And to this Teſtament, containing my laſt Will, well and truly, and faithfully to be performed, and inviolably to be fulfilled, I ordain and appoint my Executors,* John Barton *my Brother, and* Alexander Sprot, *Citizen and* Clothworker *of* London; *and the ſaid* Robert Forſet *my Chaplain, Overſeer of this my preſent Teſtament; I ordain and appoint* John Wakering, *Maſter of the Hoſpital of Saint* Bartholomew *aforeſaid: To which my Executors, and Overſeer, abovenamed, I give the reſt of all and ſingular my Goods and Chattels, which ſhall remain by me not diſtributed, diſpoſed nor bequeathed, in this laſt Will, faithfully and ſpeedily to be*

diſtributed

diſtributed for my Soul, willing, That the ſaid Executors, and Overſeer, according to their Diſcretions and Conſciences, take of my Goods what is reaſonable for their Pains: And that my preſent Teſtament and laſt Will before written, be as ſpeedily as conveniently it may be, by my Executors performed and executed, as in the fearful Day of the laſt Judgment for me and them before the moſt high Judge, who is ignorant of nothing, they will anſwer. In Witneſs whereof, to this my preſent Teſtament indented, containing my laſt Will, I have ſet my Seal: Dated the Day and Year aforeſaid. And the Jurors aforeſaid, further ſay, upon their Oath aforeſaid, That the aforeſaid *William Brampton*, of the ſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* amongſt other, *&c.* as is beforeſaid, ſo being ſeiſed, the ſaid *John Barton* the Elder, afterwards at *Buckingham* aforeſaid died: After the Death of the ſaid *John Barton* the Elder, the aforeſaid *William Brampton* was ſeiſed of the Meſſuage aforeſaid, and ſix Acres of Lands aforeſaid, Parcel, *&c.* in his Demeſn as of Fee, to the ſeveral Uſes and Intents in the aforeſaid laſt Will of the aforeſaid *John Barton* the Teſtator above expreſſed: And that the ſaid *John Barton* the younger, after the Death of the ſaid *John Barton* the Teſtator, into the aforeſaid Meſſuage, and ſix Acres of Paſture with the Appurtenances, Parcel, *&c.* entred, and the Rents and Profits thereof yearly, after the Death of the ſaid *John Barton* the Teſtator, ariſing, for and during the Life of him the ſaid *John* the younger, took and had, and the ſame to the Uſes, Intents, and Appointments, in the ſaid Teſtament and laſt Will thereof limited and appointed, during the Life of the ſaid *John* the younger, did convert, apply, and pay: And afterwards, and before the Time in which, *&c.* the ſaid *John Barton* the younger, at *Buck.* aforeſaid died: After whoſe Death of the ſaid *John Barton* the younger, the aforeſaid *Will. Brampton* was ſeiſed of the aforeſaid Meſſuage, and ſix Acres of Paſture aforeſaid, Parcel, *&c.* with the Appurtenances, in his Demeſn as of Fee, unto the Uſes and Intents in the aforeſaid laſt Will of the ſaid *John Barton* the Teſtator, before expreſſed to be performed: And that the ſaid *Margaret* and *Iſabel*, after the Death of the ſaid *John Barton* the younger, into the aforeſaid Meſſuage and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, entred, and the Rents and Profits thereof yearly, after the Death of the ſaid *John Barton* the younger, ariſing for and during the Lives of the ſaid *Margaret* and *Iſabel*, and the longer liver of them, took and had, and the ſame to the Uſes, Intents, and Appointments, in the ſaid Teſtament and laſt Will of the aforeſaid *John Barton* the Teſtator, declared, limited and appointed, during the Lives of the ſaid *Margaret* and *Iſabel*, applied, converted and payed, and the longeſt liver of them did apply, convert and pay; and afterwards and before the Time in which, *&c.* the aforeſaid

W. H.

ſaid *Margaret* and *Iſabel*, at *Buckingham* aforeſaid died. After the Deaths of which *Margaret* and *Iſabel*, the ſaid *Will. Brampton* was ſeiſed in his Demeſn as of Fee, of and in the aforeſaid Meſſuage, and ſix Acres of Paſture aforeſaid, Parcel, *&c.* with the Appurtenances, to the Uſes and Intents in the aforeſ. laſt Will, of the aforeſaid *John Barton* (101.) the elder the Teſtator, expreſſed to be fulfilled: And that the ſaid *Will. Fowler* in the Teſtament aforeſaid named, had Iſſue of his Body lawfully begotten, one *Rich. Fowler*, and the ſaid *Will. Fowler* after the Deaths of the ſaid *Margaret* and *Iſabel*, into the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, entred, and the Rents and Profits thereof yearly, after the Deaths of the ſaid *Margaret* and *Iſabel*, ariſing, for and during the Life of the ſaid *W. Fowler*, took and had, and the ſame to the Uſes, Intents and Appointments in the ſaid Teſtament and laſt Will of the aforeſaid *John Barton* the elder the Teſtator expreſſed, during the Life of the ſaid *W. Fowler*, applied, converted and payed; and afterwards, the 6th Day of *July*, in the 30th Year of the Reign of King *Hen.* VI. the ſaid *W. Fowler*, at *Buckingham* aforeſaid died, after whoſe Death of the ſaid *W. Fowler*, the aforeſaid *Will. Brampton* was ſeiſed of and in the ſaid Meſſuage and ſix Acres of Paſture aforeſaid, Parcel, *&c.* with the Appurtenances, in his Demeſn as of Fee, to the Uſes and Intents in the aforeſaid laſt Will of the aforeſaid *John Barton* the elder before expreſſed to be fulfilled: And that the ſaid *Rich. Fowler* had Iſſue of his Body lawfully begotten, one *Edw. Fowler*, and the ſaid *Rich. Fowler*, after the Death of the ſaid *W. Fowler*, into the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances entred, and the Rents and Profits thereof yearly after the Death of the ſaid *W. Fowler*, ariſing, for and during the Life of the ſaid *Rich. Fowler* took and had, and the ſame to the Uſes, Intents and Appointments, in the ſaid Teſtament and laſt Will of the ſaid *John Barton* the elder the Teſtator, during the Life of the ſaid *Rich. Fowler*, applied, converted, and payed, that is to ſay, until the 3d Day of *November*, in the 7th Year of King *Edw.* IV. after the Conqueſt of *England*, which ſaid 3d Day of *November*, the aforeſaid *Rich. Fowler*, at *Buckingham* aforeſaid died: After the Death of which *Richard* aforeſaid, the aforeſaid *W. Brampton* was of the Meſſuage, and ſix Acres of Paſture aforeſaid, Parcel, *&c.* with the Appurtenances ſeiſed in his Demeſn as of Fee, to the Uſes and Intents in the Teſtament aforeſaid of the ſaid *John Barton* the Teſtator, limited and declared, to be fulfilled; and that the ſaid *Edw. Fowler*, had Iſſue of his Body lawfully begotten, one *Gabriel Fowler*, and the ſaid *Ed.* after the Death of the ſaid *Rich. Fowler*, into the aforeſaid Meſſuage and ſix Acres of Lands, Parcel, *&c.* with the Appurtenances entred, and the Rents and Profits thereof yearly, after the Death of the ſaid *Rich. Fowler*, ariſing, for and du-

ring the Life of the ſaid *Edward* took and had, and the ſame to the Uſes, Intents and Appointments, in the ſaid Teſtament and laſt Will declared and limited, until the 4th Day of *February*, in the 27th Year of the Reign of K. *Hen.* 8. applied, converted, and payed, which ſaid 4th Day of *February*, by Virtue of a certain Act of Parliament held at *Weſtminſter* in the County of *Middleſex*, made for transferring of Uſes into Poſſeſſion, the aforeſaid *Edw. Fowler*, was ſeiſed of and in the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, in his Demeſn, as of Fee-tail; and ſo thereof being ſeiſed, the Iſſues and Profits thereof all his Life took and had, and the ſame to the Uſes and Intents in the Teſtament of the ſaid *John Barton* the elder above expreſſed, applied and converted; and that the aforeſaid *Edward*, ſo thereof being ſeiſed, afterwards, that is to ſay, the 28th Day of *May*, in the 32d Year of the Reign of the late King *Hen.* VIII. at *Buckingham* aforeſaid, of ſuch his Eſtate died thereof ſeiſed, after the Death of which ſaid *Edw. Fowler*, the ſaid Meſſuage and ſix Acres of Paſture, Parcel, *&c.* deſcended to the ſaid *Gabriel Fowler*, as Son and Heir of the Body of the ſaid *Edw. Fowler* lawfully begotten, by Virtue of which the aforeſaid *Gabriel*, into the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, entred, and was thereof ſeiſed in his Demeſn as of Fee-tail, that is to ſay, to him, and the Heirs of his Body lawfully begotten, the Reverſion in Fee-ſimple thereof to the right Heirs of the ſaid *John Barton* the Teſtator expectant, unto the Uſes in the ſaid laſt Will of the ſaid *John Barton* the Teſtator expreſſed to be performed; and the aforeſaid *Gabriel Fowler*, the Iſſues and Profits thereof to the Uſes and Intents in the ſaid Teſtament of the aforeſaid *J. Barton* the Teſtator to be performed, limited, received, diſpoſed and converted, from the Time of the Death of the ſaid *Edward Fowler*, within five Years next before the firſt Year of the Reign of King *Edw.* VI. that is to ſay, until the 4th Day of *May*, in the 37th Year of the Reign of the late K. *Hen.* VIII. by Colour of which aforeſaid Premiſſes, and by Force of a certain Act of Parliament, of the ſaid King *Edward* late King of *England* the 6th at *Weſtminſter*, in the County of *Middleſex*, the 4th Day of *November*, in the Year of his Reign the firſt, begun, and from thence continued until the 24th Day of the ſame *November* then next following, and then and there holden, concerning Colleges, Free Chapels, Chauntries, Fraternities, Guilds, and other ſpiritual Promotions, made and provided, the aforeſaid late King *Edw.* VI. immediately after the Feaſt of *Eaſter* next following, after the making of the ſaid Act of Parliament, was ſeiſed of, and in the aforeſaid Meſſuage, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other Things) in the ſaid Teſtament as is aforeſaid given and appointed, in his

Demeſn

Demeſn, as of Fee, in the Right of the Crown of *England*, if the Law ſo in this Caſe requireth: And that afterwards the ſaid late King died of the ſaid Meſſuage, and ſix Acres of Paſture ſo ſeiſed, *if the Law of England* ſo requireth, without Heir of his Body begotten: After whoſe Death the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other) deſcended to the Lady *Mary* late Queen of *England*, as Siſter and Heir of the ſaid late King *Edw.* VI. if the Law of *England* in this Caſe ſo requireth: By which the ſaid late Q. *Mary* was ſeiſed of the Meſſuage aforeſaid, and of the aforeſaid ſix Acres of Paſture, Parcel, *&c.* (amongſt other) in her Demeſn as of Fee, in the Right of her Crown of *England*, if the Law this requireth; and the ſaid late Queen *Mary* afterwards, and before the aforeſaid Time, in which, *&c.* died ſo thereof ſeiſed, if the Law of *England* in this Caſe ſo requireth, without Heir of her Body iſſuing, after whoſe Death the Meſſuage (102.) aforeſ. and the aforeſ. ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other) deſcended to the ſaid Lady the Queen that now is, as Siſter and Heir of the aforeſaid late Queen *Mary*, if the Law of *England* in this Caſe ſo requireth, by which the ſaid Lady the Queen that now is, was of the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other) ſeiſed in her Demeſn as of Fee, in the Right of her Crown of *Eng.* if the Law of *Eng.* ſo thereof requireth: And the Jurors aforeſaid further ſay upon their Oaths aforeſaid, That after the aforeſaid Act of Parliament aforeſaid, in the firſt Year of the Reign of the late King *Edward* VI. made, the aforeſaid *Gabriel Fowler* occupied the aforeſaid Meſſuage, and ſix Acres of Paſture, with the Appurtenances, Parcel, *&c.* and continued, and was thereof ſeiſed in his Demeſn as of Fee-tail, if the Law of *England* in this Caſe requireth it, having Iſſue of his Body lawfully begotten, one *Richard Fowler*, and ſo thereof ſeiſed, continued the Occupation aforeſaid, if the Law of *England* requireth it, and afterwards, and before the Time in which, *&c.* that is to ſay, the firſt Day of *May*, in the 18th Year of the Reign of the ſaid Lady the now Queen, at *Bucks* aforeſaid, of ſuch his Eſtate, died thereof ſeiſed, if the Law of *Engl.* ſo requireth, by Colour of which the Meſſuage aforeſaid, and ſix Acres of Paſture aforeſaid, with the Appurtenances, Parcel, *&c.* deſcended, if the Law ſo requireth, to the aforeſaid *Richard Fowler*, as Son and Heir of the ſaid *Gabriel*, by Colour of which the ſaid *Richard Fowler* afterwards, and before the Time in which, *&c.* into the Meſſuage, and ſix Acres of Lands aforeſaid, with the Appurtenances, Parcel, *&c.* entred, and was thereof ſeiſed in his Demeſn as of Fee-tail, that is to ſay, to him, and the Heirs of his Body lawfully begotten, if the Law of *England* this requireth; and the ſaid *Richard*

Fowler

Fowler of the Meſſuage, and ſix Acres of Paſture aforeſaid, with the Appurtenances, Parcel, *&c.* ſo being ſeiſed, if the Law of *England* this requireth, the ſaid *Richard* after, and before the Time in which, *&c.* that is to ſay, the 10th Day of *March*, in the 33d Year of the Reign of the ſaid Lady the now Queen, at *Buckingham* aforeſaid, by his Writing, bearing Date the ſame Day and Year, with the Seal of the ſaid *Richard* ſealed, and to the Jurors aforeſaid, in Evidence ſhewed, for a certain Sum of Money, in the ſaid Writing ſpecified, if the Law of *England* this requireth, enfeoffed *Francis Dayrell* and *Edward Dayrell*, Gent. of the Meſſuage, and ſix Acres aforeſaid, with the Appurtenances, Parcel, *&c.* amongſt other, to have to the ſaid *Francis* and *Edward*, their Heirs and Aſſigns for ever, by Virtue of which the ſaid *Francis* and *Edward*, in the Meſſuage, and ſix Acres of Paſture aforeſaid, Parcel, *&c.* entred, and were thereof ſeiſed in their Demeſn as of Fee, if the Law of *England* this requireth; and ſo being thereof ſeiſed, if the Law of *England* this requireth, the ſaid *Francis* and *Edward* afterwards, and before the aforeſaid Time in which, *&c.* that is to ſay, the 18th Day of *June*, in the 33d Year of the Reign of the ſaid Lady the now Queen aforeſaid, at *Buckingham* aforeſaid, if by the Law of *England* this they could do, enfeoffed the aforeſaid *John Lambert*, of the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, to have and to hold unto the ſaid *John Lambert*, his Heirs and Aſſigns for ever, by Colour of which the ſaid *John Lambert*, after and before the aforeſaid Time in which, *&c.* that is to ſay, the ſaid 18th Day of *June*, in the 33d Year aforeſaid, into the Meſſuage and ſix Acres of Paſture aforeſaid, Parcel, *&c.* with the Appurtenances entred, and was, and yet is thereof ſeiſed in his Demeſn as of Fee, if the Law thereof ſo requireth: And the Jurors aforeſaid further ſay upon their Oath aforeſaid, that the aforeſaid Lady the Q. that now is, (as before is ſaid) ſeiſed in her Demeſn as of Fee in the Right of her Crown of *England*, of and in the aforeſaid Meſſuage, and ſix Acres of Paſture, Parcel, *&c.* if the Law of *England* this requireth, after, and before the Time in which, *&c.* that is to ſay, the 27th Day of *May*, in the 34th Year of her Reign, the ſaid Lady the now Queen, by her Letters Patents under the Great Seal of *England*, ſealed to the Jurors aforeſaid in Evidence ſhewed, whoſe Date is at *Weſtminſter*, the ſame Day and Year, in Conſideration of the good, true, faithful, and acceptable Service to the ſaid Lady the now Queen before that Time, by her well-beloved Couſin *Thomas* Earl of *Ormond* and *Oſory*, done, as for divers other Cauſes and Conſiderations, the aforeſaid Lady the now Queen, then ſpecially moving, as alſo at the humble Petition, *&c.* of the ſaid Earl, of her ſpecial Grace, certain Knowledge, and meer Motion, gave and granted for her,

her, her Heirs and Succeſſors, to her beloved Subjects *Edmond Downing* and *Roger Rant*, Gent. the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, with the Appurtenances, in which, *&c.* (amongſt other) by the Name of all that her late *Chauntry*, called *Barton's Chauntry*, ſituate, and being in the Pariſh of St. *Peter*, in the Town of *Buckingham*, and all Lands, Tenements, Rents and Hereditaments whatſoever, with their Appurtenances whatſoever, ſituate, lying and being, in the ſaid Town of *Buckingham* in the aforeſaid County of *Bucks*, to the ſaid late *Chauntry*, called *Barton's Chauntry*, belonging, or appertaining, or to the Maintenance of a Chaplain, or Prieſt, and other Uſes ſuperſtitious in the Church of St. *Peter* aforeſaid, according to the Ordination of *John Barton* the elder, before then given, bequeathed, limited, or appointed, to have, hold and enjoy, to the ſaid *Edmond Downing*, and *Roger Rant*, their Heirs, and Aſſigns, to the only and proper Behoof and Uſe of the ſaid *Edmond* and *Roger*, their Heirs and Aſſigns for ever, yielding and paying to the ſaid Lady the Queen that now is, her Heirs and Succeſſors yearly for ever, 13 Pounds and 12 Pence, of lawful Money of *England*, to the Hands of the Receiver-General of the County aforeſaid, for the Time being, or at the Receipt of the *Exchequer* of the ſaid Lady the Queen, her Heirs and Succeſſors, at the Feaſts of St. *Michael the Archangel*, and the *Annunciation* of the *Bleſſed Virgin Mary*, by equal Portions every Year to be paid, for all Rents, Exactions, Services and Demands whatſoever for the ſame, to the ſaid Lady the Queen, and her Succeſſors, any Ways to be rendred, payed or done: And the ſaid Lady the now Queen, by her ſaid Letters Patents, for her, her Heirs and Succeſſors, granted unto the ſaid *Edmond Downing* and *Roger Rant*, that the ſaid her Letters Patents, or the Enrolment of them, ſhould be of Force, (103.) firm, ſufficient and effectual in the Law, againſt the Lady the now Queen, her Heirs and Succeſſors, as well in all Courts as elſewhere within her Realm of *England*, without any Confirmations, Licences or Tolerations, by the aforeſaid Lady the Queen that now is, her Heirs or Succeſſors, thereafter by the ſaid *Edmond* and *Roger*, their Heirs or Aſſigns, or by any of them, to be procured or obtained, notwithſtanding the ill-naming or ill reciting, or non-reciting the aforeſaid ſeveral Manors, Rectories, Meſſuages, Lands, Tenements, and other all and ſingular the Premiſſes, or any Parcel thereof; and notwithſtanding the not finding of Office and Inquiſition of the Premiſſes, or of any Parcel thereof, by which the Title of the ſaid Lady the now Queen, ought to be found before the making of her Letters Patents aforeſaid; and notwithſtanding the not reciting, or ill reciting of any Demiſe or Grant of the Premiſſes, or of any Parcel thereof before then made, being of Record, or not of Record: And notwithſtanding any Defects

feets of the certain Compoſition or Declaration of the yearly Value of the Premiſſes, or not Declaration of the yearly Value of the Premiſſes, or any Part thereof in the ſaid Letters Patents expreſſed and contained; and notwithſtanding other Defects in not naming, or ill-naming any Tenant, Farmer or Occupier of the Lands, Tenements or Hereditaments aforeſaid, or any Part thereof, or not rightly naming any Town, Hamlet, Pariſh or County in which the Premiſſes or any Parcel thereof be, and alſo in not naming the Premiſſes or any Parcel thereof in Nature, Kind or Quality; By Colour of which ſaid Letters Patents, the aforeſaid *Edmond Downing* and *Roger Rant*, were of the aforeſaid Meſſuages and ſix Acres of Land, Parcel, *&c.* with their Appurtenances (amongſt other) ſeiſed in their Demeſn as of Fee, if the Law of *Engl.* this requireth, and ſo thereof being ſeiſed, if the Law of *Engl.* this requireth, the ſaid *Edmond Downing* and *Roger Rant*, by their certain Indenture made the 28th Day of *July*, in the 34th Year of the Lady the now Queen aforeſaid, between the aforeſaid *Edmond Downing* and *Roger Rant* of the one Part, and one *Robert Snelling* of *Eaſt-Horſly* in the County of *Surry*, Gentleman, and *Thomas Butler* of *Gray's-Inn* in the County of *Middleſex*, Gentleman, of the other Part, for a certain Sum of good and lawful Money of *England*, to them before Hand by the aforeſaid *Rob. Snelling* and *Tho. Butler* well and truly paid, gave, granted, ſold, bargained and confirmed, to the aforeſaid *Rob. Snelling* and *Tho. Butler*, their Heirs and Aſſigns for ever, the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other) to have and to hold to the aforeſaid *Robere Snelling* and *Thomas Butler*, their Heirs and Aſſigns for ever, as by the Indenture aforeſaid, inrolled in the cloſe Roll of the *Chancery* of the ſaid Lady the now Queen, the 10th Day of *December*, in the 35th Year of the Reign of the ſaid Lady the now Queen, to the Jurors aforeſaid in Evidence ſhewed, amongſt other Things it more fully appeareth: By Colour of which ſaid Indenture and the Inrolment thereof, the aforeſaid *Rob. Snelling* and *Tho. Butler*, were of the aforeſaid Meſſuage and of the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, in which, *&c.* amongſt other, ſeiſed in their Demeſn as of Fee (if the Law of *England* in this Caſe requireth it) and the aforeſaid *Rob. Snelling* and *Tho. Butler*, ſo thereof being ſeiſed (if the Law of *England* this requireth) after and before the Time in which, *&c.* that is to ſay, the 23d Day of *May*, in the 36th Year of the Reign of the ſaid Lady the now Queen aforeſaid, into the aforeſaid Meſſuage, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, entred and was thereof ſeiſed in their Demeſn as of Fee, if the Law of *England* ſo requireth, and ſo thereof ſeiſed, the aforeſaid *John Lambert* continuing his Poſſeſſion aforeſaid, if

the

the Law of *England* this requireth, the ſaid *Rob. Snelling* and *Tho. Butler* the aforeſaid 23d Day of *May* at the ſaid Town of *Buckingham* demiſed and to Farm let the Meſſuage aforeſaid and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances (amongſt other) to the aforeſaid *Theop. Adams*, to have to the ſaid *Theop. Adams*, his Executors and Aſſigns, from the aforeſaid 23d Day of *May*, in the 36th Year of the Reign of the ſaid Lady the now Queen aforeſaid, until the End and Term aforeſaid of ten Years fully to be compleat and ended: By Virtue of which the ſaid *Theop. Adams* into the Meſſuage aforeſaid, and into the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with their Appurtenances (amongſt other Things) afterwards, that is to ſay, the 16th Day of *April*, in the 39th Year of the Reign of the ſaid Lady the now Queen, entred and was thereof poſſeſſed, if the Law in this Caſe requireth it, upon whoſe Poſſeſſion of the ſaid *Theophilus* thereof, the aforeſaid *John Lambert* afterwards, that is to ſay, the ſame 16th Day of *April*, in the 39th Year aforeſaid, into the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, entred, and the ſame *Theop. Adams* from his Farm aforeſaid thereof, his Term aforeſaid thereof not yet ended, ejected, expelled and amoved, and him the ſaid *Theophilus* from his Poſſeſſion thereof held out, and yet holdeth out as the ſaid *Theophilus* before hath againſt him declared. But whether upon the whole Matter aforeſaid, found in Form aforeſaid, it ſhall ſeem to the Court here, that the aforeſaid *John Lambert* is guilty of the Treſpaſs and Ejectment of the ſaid *Theop. Adams*, of and in the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, *&c.* with the Appurtenances, or not, the Jurors aforeſaid are utterly ignorant of, and thereof they pray the Advice of the Court here, *&c.* and if upon the ſaid whole Matter in Form aforeſaid found, it ſhall ſeem to the Court here, that the aforeſaid *John Lambert* is guilty of the Ejectment and Treſpaſs to the ſaid *Theophilus* of the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, then the ſaid Jurors ſay, upon their Oath aforeſaid, that the aforeſaid *John Lambert* is guilty of the Treſpaſs and Ejectment thereof as the aforeſaid *Theophilus* above againſt him thereof complaineth, and then they aſſeſs the Damages of the ſaid *Theop.* by the Occaſion of the ſaid Treſpaſs and Ejectment beſides his Charges and coſts by him about his (104.) Suit in this Behalf put unto, to 12 *d.* and for his Charges and Coſts to 12 *d.* and if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Court here, That the aforeſaid *John Lambert* is not guilty of the Ejectment and Treſpaſs aforeſaid, of and in the Meſſuage aforeſaid, and the aforeſaid ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances, then the aforeſaid Jurors ſay upon their Oath aforeſaid, That the aforeſaid

John

John Lambert is not thereof guilty as the ſaid *John* for himſelf above in pleading hath alledged; and farther the ſaid Jurors ſay upon their Oath aforeſaid, that the aforeſaid *John Lambert* in nothing is guilty of the Treſpaſs and Ejectment aforeſaid, in 4 Acres of Paſture of the ſaid 10 Acres of Paſture Reſidue above ſuppoſed to be done, as the ſaid *John Lambert* above in pleading hath alledged, *&c.* and becauſe the Court of the Lady the Queen here of giving their Judgment of and upon the Premiſſes, 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 the *Holy Trinity*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the ſaid Lady the Queen here not yet, *&c.* And ſo from Term to Term, until *Tueſday* next after the Morrow of *All-Souls*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the ſaid Lady the Queen here not yet, *&c.* At which Day, before the ſaid Lady the Q. at *Weſtminſter* come the Parties aforeſaid, in their proper Perſons, upon which ſeen, and by the Court of the ſaid Lady the Queen here all and ſingular the Premiſſes being fully underſtood, and mature Deliberation thereupon had, for that it ſeemeth to the Court of the ſaid Lady the Q. here, that the aforeſ. *John Lambert* is guilty of the Treſpaſs and Ejectment of the ſaid *Theop. Adams*, of and in the Meſſuage aforeſ. and the aforeſ. ſix Acres of Paſture, Parcel, *&c.* with the Appurtenances; *Therefore it is conſidered*, That the aforeſ. *Theoph. Adams* ſhall recover againſt the aforeſ. *John Lambert* his Term aforeſ. yet to come, of and in the aforeſaid Meſſuage, and the aforeſaid ſix Acres of Paſture (Parcel of the ten Acres of Paſture) with the Appurtenances, and his Damages aforeſaid, by the Jurors, in Form aforeſaid aſſeſſed, as alſo 25 Pounds for his Charges and Coſts aforeſaid, to the ſaid *Theoph. Adams* by the Court of the ſaid Lady the Queen here with his Aſſent of Increaſe adjudged; which ſaid Damages in the whole do amount to 25 *l.* 2 *s.* 8 *d.* and that the ſaid *John Lambert* be taken, *&c.* And likewiſe the aforeſaid *Theop. Adams* be in Mercy for his falſe Clamour againſt the aforeſaid *John Lambert* for the reſt of the Treſpaſs and Ejectment aforeſaid, whereof the ſaid *John Lambert* is acquitted, Therefore the ſaid *John Lambert* as to the reſt of the ſaid Treſpaſs and Ejectment go thereof without Day, *&c.*

ADAMS *and* LAMBERT's *Caſe.*

Mich. 44 & 45 Eliz.

In the King's Bench.

Hern. 198. Moor 648, 649, 650, &c. 1 Rolls Rep. 49, 50.

IN *Ejectione firmæ* in the King's Bench, between *Adams* and *Lambert*, which began *Hill.* 40 *Eliz. Rot.* 748, of Lands in *Buckingham* within the County of *Bucks*, upon Not Guilty pleaded, the Jury gave a Special Verdict to this Effect; *John Barton* was ſeiſed of the ſaid Lands in Fee, and made a Feoffment in Fee to perform his Will, and afterwards by his Will in Writing deviſed the ſaid Lands to *John Barton* his younger Brother for his Life, *ſub conditionibus ſequentibus, viz. Quod idem Johannes durante vita ſua, inveniat unum Capellanum pro anima dicti Joh. Barton ſenioris, & aliorum in Eccleſia Sancti Petri in vill' de Buck' quotidie celebratur': Et voluit q'd præd' Joh. frater ſuus annuatim durante vita ſua perſolvat dicto Capellano in præd' Eccleſia pro ſuſtentat' ſua* 6 l. 13 s. 4 d. *de exitibus & proven' tenementor' præd'. Et inſuper voluit qd' dict' Joh' frater ſuus durante vita ſua inveniat in vill' præd'* 6 *pauperis homines ſive fœmin' ad orand' pro anima ſua & alior' in teſtamento præd' nominat' ſingulis diebus imperpetuum: Et quod daret qualibet ſeptimana durante vita ſua cuilibet ipſorum pauper'* 4 d. *& etiam cuilibet ipſorum manſion' prout (Deo diſponente) pro eis conſtituit & ordinavit: Ac etiam qd' idem Joh' frater ſuus tota vita ſua inveniat unum lampad' ardent' ſingulis diebus & noctibus coram Sancto Romwaldo in Eccleſia præd', prout modo inventus eſt & ſuſtentatus; & qd' idem Joh' frater ſuus durante vita ſua teneat ſeu teneri faciat Anniverſarium ſuum in Eccleſia præd', in quo quidem Anniverſario inveniet idem Joh' frater ſuus annuatim duos cereos nocte ad Dirige, & die ſequente ad Miſſ. unum ſcilicet ad caput, & alterum ad pedes ſepulturæ dict' teſtat' ardentes, quolibet cereo ponderant' tres lib' quibus exequiis complet',* voluit

Lit. Rep. 111.

voluit qd' totum id qd' de dictis cereis reſid' fuerit, dimitat' & reman' altari S. Jacobi in Eccleſia præd' ſuper candelabrum ibid' exiſten' Capellano cantar' ſuæ præd' ſingulis diebus feſtivis ad Miſſ. quamdiu durare poterit deſervitur: Et quod idem Joh' frater ſuus tota vita ſua durante, inveniat annuat' unum torcher' competen' ad altare præd' deſervitur': Et voluit qd' omnia præd' tenement' poſt mortem præd' Joh' fratris ſui integre remanerent Marg' & Iſab' ſororibus ſuis, ad vitam earum & earum alterius diutius viven'; ſub conditione quod eadem M. & I. earum vita durant', faciant perimpleri & obſervari omnia onera ſuperius limitat' in forma præd'. Et poſt mortem præd' Marg' & Iſab' voluit qd' omnia præd' tenement' remaneant Will. Fowler tenend' ſibi & hæred' de corpore ſuo legitime procreat'; ſub conditione qd' ipſi obſervent omnia & ſingula onera ſupraſcript' in forma antedict' imperpet', Et ſi contingat præd' Will. Fowler ſine hæred' de corpore ſuo legitime procreat' obire, tunc om' & ſing' præd' tenem' integre reman' Joh' Somerton conſanguineo ſuo & hæred' de corp' ſuo legitime exeun', ſub conditione qd' ipſi omnia & ſingula onera ſupraſcript' in forma præd' perimpleant & obſervent imperpet': Et ſi ipſum Cr. Jac. 578. *Joh' Somerton, abſq; hæred' ſuis de corpore ſuo legit' exeun' obire contigerit, qd' extunc omnia præd' tenementa integre reman' Will' Purfrey & hæred' ſuis de corpore ſuo legit' exeun', ſub condic' qd' idem Will' & hæred' ſui, faciant perimpleant & obſervent omnia & ſingula onera in forma præd' imperpet': Remanere pro defect' hujuſmodi exit' Magiſtro domus S. Tho. Martyris de Acon' Lond' pro* 40 *ann' extunc prox' ſequen' & plenar' complend': Et poſt term' ill' finit' reman' Magiſtro hoſpital' S. Barth. Lond' & ſucceſſ. ſuis pro* 40 *ann' extunc prox' ſequen' & plenar' complend: Cuilibet corum ſub condic', quod quilibet eorum Magiſtr' & ſucceſſ. ſuorum durante eor' term', faciant & perimpleant omnia & ſingula onera ſupra limitat' in forma ſupradict': Et ſi contingat præd' Joh' fratrem ſuum durante vita ſua in perficiend' onera ſupradict' deficere, ſeu ill' non perimplere, aut omnia prædicta tenementa durante vita ſua non competent' ſuſtentare & reparare, ſeu ea aut aliquam parcel' earund' alienare ſive ad parvum valor' ea dimittere in præjudic' cæter' perſonarum in remaner' ſupradict' nominat'; quod extunc bene licebit præf. Marg. & Iſab' in præd' tenementa cum pertin' intrare, & ea retinere ut in reman' ſuo præd' abſq; contradict' alicujus, & qd' extunc ſtatus præd' Joh' fratris ſui omnino ceſſat, & nullius ſit valoris:* And the like Condition or Limitation of Forfeiture is annexed to all the Remainders in the ſame Will, and if all in Remainder forfeit, the ſaid Lands to remain to the ſaid *John Barton* the Teſtator, and to his Heirs for ever. *Supportandum, &c. Et quia hæc mea voluntas pro bono animarum patris & matris meorum, anima etiam mea animabuſq; fratrum, ſoror', parentum & benefactorum meorum edita fuit, & ordinata: Precor & onero præd' fratrem meum, prout pro me & ſe voluerit reſpondere*

quod ipſe tota vita ſua diligenter ſupervideat gubernation' cantar' ſupradict'; & quod omnia ſupraſcripta & in hac mea ultima voluntate declarat' inviolabiliter perimpleant' & conſervent': Et quod notitiam fac' omnib' hiis qui in reman' præd' ſtatum habebunt in dictis tenementis, ut ipſi cognoſcant tenor' & effect' teſtamenti & ultimæ meæ voluntat'. Et volo qd' feoffati mei de tenement' cum ſuis pertinen' qd' mei pauperes homines modo inhabitant pro eo quod eſt diviſibile, facient talem ſtatum poſt mortem meam omnibus illis ſupranominat', prout habeant ex meo legato de & in tenementis in Buck' præts, ad uſum præd', pauperum ibid' habitan' ſupportand' reparationes illius tenementi præd' pauper' quoties indegerit: Et quia dubito ne tenement' ſuprad' ſufficiant ad ſupportand' omnia præd' onera, cauſa grandi cuſtus reparation' eorundem, volo qu' feoffati mei ſtatim poſt mortem meam faciant talem ſtatum omnibus illis ſupranominatis, de omnibus illis terris & tenementis meis in villis de Bourton, Moreton, Gavecot cum præbend' Lembergh, Thornborough, Hilleſden, Waterſtratford, Shaldeſton & Foycote in Com' Buck' ac de omnibus illis terris & tenementis meis in Worton in Com' Oxoniæ, ac de uno tenemento meo in villa Oxoniæ in quibus feoffati extiterunt, prout habent ex meo legato de & in tenementis de Buck. præd': Ita quod ſufficienter omnia onera præd' poſſint ſuſtentare, et etiam pro labore inde rationabiliter percipere & obtinere. And this Caſe was often argued at the Bar, and afterwards it was openly argued in Court by *Yelverton* and *Fenner* Juſtices in one Day, and by *Gawdy* and *Popham* Chief Juſtice in another. And in this Caſe (which extends to all the Parts in Effect of the Body of the Statute of 1 *E.* 6. *cap.* 14.) theſe Points were reſolv'd.

Duke 90.

1. Altho' in this Caſe the Land was deviſed to his Brother for Life, the Remainder to his Siſter, *&c.* between whom as was objected, was apparent Conſideration of Nature, and Blood and Poſterity in reaſonable Manner; and altho' the Deviſor has limited what Sum ſhall be employ'd upon the Chaplain, *Obit*, *&c.* by which his Intent (as it was objected) appears to advance them of his Blood (to whom he had deviſed the Land) with the Reſidue of the Profits which remain'd, and whereof no certain Diſpoſition was made by him, that by the Law the Land being deviſed to them they ſhould take the Surpluſage of the Profits (of which no Diſpoſition was made) to their own Uſe, and the apparent Conſideration of Advancement of his Blood expreſſes his Intent, that after the Divine Services (as it was then thought) were perform'd, thoſe of his Blood ſhould be maintain'd and reliev'd with the Reſidue, wherefore his Blood ſhould have the Land, and the Chaplains, *&c.* ſhould have Penſions, and ſo in Reſpect of the Perſons the Land was not given to the King; yet it was reſolv'd, That Wives, Sons, Daugh. Siſters, Couſins, and other

dear Friends, were Perſons within this Act; for if Men as well in their Lives, as by their Teſtaments after their Deaths, uſed to put and repoſe Confidence in their Kindred and dear Friends, for their temporal Goods, *a multo fortiori*, when they intend to diſpoſe of their temporal Poſſeſſions for the Health of their Souls (as it was then thought) they would convey them to thoſe in whom they had the greateſt Confidence: And in theſe Caſes of Divine Service concerning the Health of the Soul, it ſhall not be intended any Advancement or Preferment of his Blood, or any other earthly Conſideration, unleſs it is ſo declar'd by expreſs Words; but all ſhall be intended for the Advancement and Continuance of the Intents and Purpoſes expreſs'd, *ſc.* Divine Services as Things without all Compariſon moſt worthy and excellent; and he who betrays ſuch Truſt (the Divine Service being according to the Law of God) is by many Degrees a greater Offender than he who doth not perform Truſt or Confidence concerning temporal Things, for he who robs his Friend commits Felony, and he who robs poor Men of their Living is a greater Thief by the Law of God, for *Panis pauperum vita pauperum, & qui defraudit eos vir ſanguinis eſt*: But tho' he who takes away any Thing that is given for the Divine and true Service of God, *eſt ſacrilegus, & omnium prædonum cupiditatem & ſcelera ſuperat:* And altho' it appears by the Preamble of the Act, that the deviſing and phantaſing of vain Opinions of Purgatory and Maſſes ſatisfactory to be celebrated for thoſe who were dead, was great Cauſe of Superſtition and Error in Chriſtian Religion, *&c.* yet foraſmuch as the Deviſor and Deviſees in the Caſe at Bar were (as they were taught) perſwaded that it was for Divine Service and the Health of Souls, it ſhall be intended that their Intentions were to advance ſuch Uſes, and not the private Advantages of the Deviſees: And therefore it was reſolv'd, that the Perſon, be he of Blood or not, ſingle, or corporate, or politick, to whom the Land is deviſed or convey'd, is not to be reſpected, but all is one within the Purview of this Act. And this was reſolv'd as to the Perſons of the Deviſees, Feoffees, *&c.* within this Act. 2. Altho' it was objected, that foraſmuch as the Land was deviſed for Life, the Remainder in Tail, and a Reverſion of the Fee expectant to the Heirs of the Deviſor was not deviſed, and the Letter of the Act is, *To the finding of any Prieſt to have Continuance for ever*, upon which it was ſaid, that an Eſtate for Life and an Eſtate Tail, which were Eſtates limited and determinable, were not within the Letter or Intention of this Act, *& eo potius* becauſe the Makers of the Act by the firſt Branch have provided, when a Prieſt was appointed to be found for ever, and by another Branch ſubſequent, when he was to be found for Years,

Poſtea 116. a.

Co. Lit. 342. 8 Co. 131. a. b.

Duke 91.

by which ſpecial and preciſe Enumeration of theſe two Caſes, the Makers of the Act intended to exclude Eſtates in Tail, and Eſtates for Life, ſo that Eſtates in Tail and for Life *ſunt caſus omiſſi* as it was ſaid: Yet it was reſolv'd, that Eſtates in Tail and Eſtates for Life alſo were included by Equity and Meaning within the former Branch, for the Intent and Meaning of the Act, as appears by the Preamble, was to extirpate out of Mens Minds theſe ſuperſtitious Errors, and to take them utterly away, in what Manner, or for what Time they were given, and not to take them away only which were appointed to have Continuance for ever, and leave thoſe to have Eſſence which were determinable or limited for a Time: And foraſmuch as the Statute by expreſs Words abrogates and takes away all ſuch ſuperſtitious Uſes which were to have Continuance for ever, by Equity and good Conſtruction it extends to every leſs Time whatſoever. Alſo it was ſaid, that the Statutes ſay, *by any Manner of Aſſurance, Conveyance, &c. for ever*, and by common Poſſibility an Eſtate Tail may continue for ever. Alſo in this Caſe at Bar the Intent of the Deviſor was (as appears by his Will) that the Prieſt ſhould be found for ever, for he appoints alſo his right Heirs to find him: And if ſuch Conſtruction ſhould not be made, the Miſchief intended to be remedied by the Act would remain, againſt the Intent and Meaning of the Act: And in the Clauſes of Obits, the Words are, *To have Continuance for ever*. And yet it was agreed in the Caſe of *Wincheſter* that an Obit being appointed to be found for 8 Years was included within the Equity of the Act: So it was reſolv'd 22 *Eliz.* in the *Dean of Paul's Caſe*, That a College or Chauntry in Reputation, altho' it wants ſufficient Foundation and Incorporation in Law, was given to the King by the ſaid Act, and the Reaſon was, becauſe the Intent of the Makers of the Act was to take away all Superſtition out of Mens Minds, and not to ſuffer any to have Continuance; and Superſtition was maintain'd as well in reputative Chauntries, as in others; and yet it was not within the Letter of the Act, for in Judgment of Law it was no College nor Chauntry; for *Reputatio eſt vulgaris opinio ubi non eſt veritas*. And this was reſolv'd as to Eſtates deviſed to ſuperſtitious Uſes within the Purview of this Statute. 3. Where it was objected, That this Deviſe of the Land was not to the Intent to find a Chauntry or Stipendary Prieſt, or to the finding of a Prieſt as the Statute ſpeaks, but was upon Condition to find him, ſo that if the Prieſt ſhall not be found, the Eſtate ſhall ceaſe, and the ſaid third Branch of the Act doth

Duke 91, 107. Lane 101.

Duke 92. 10 Co. 83. b. 11 Co. 13. a. Dy. 368. pl. 47. 4 Leon. 156, 157. Goldſb. 93. Jenk. Cent. 245. 1 Roll. Rep. 127. Poſtea 108. a.

2 Inſt. 668. Poſtea 107. b.

doth not ſpeak of any Eſtate conditional, but only where the Prieſt was to be found for ever; and therefore an Eſtate conditional ſhall be out of the Purview of the Act: But it was anſwer'd and reſolv'd, that it was within the ſaid Act, for when the Land is deviſed upon Condition to find a Prieſt, without Queſtion this Land is deviſed, *To the finding of a Prieſt, &c.* as the Statute ſpeaks: And it is a ſtronger Caſe, where it is deviſed upon Condition, than where it is deviſed to the Intent, or for the finding of a Prieſt, for the Condition is more compulſory and penal for the Maintenance of Things prohibited by the Law. *Nota Reader*, there is one Proviſo *verſus finem actus*, by which it is provided, That it ſhall not be lawful for any Perſon by Reaſon of any Reverſion, Uſe or Condition, to enter, or claim any Land for not finding of any Prieſt, or poor Men, Obit, Anniverſary, Light, or Lamp, after the ſaid Act to be found or done. By which it appears, by the Judgment of the whole Parliament, that Land given upon Condition or other Determination, and all Eſtates whereof there were Reverſions expectant, be they Eſtates Tail, for Life, or any other particular Eſtate, were within the Act. And this was reſolv'd for the Manner of Conveyance or Aſſurance of Lands to ſuperſtitious Uſes within this Act. 4. It was reſolv'd, that all the Land in this Caſe was given to the King by the ſaid Act, which was the principal Point of the Caſe, and of great Conſequence, and that for divers Reaſons; for the better Underſtanding of which, 5 of the firſt Branches of the Act are to be conſider'd. 1. Are given to the King, *All Manner of Colleges, free Chappels, and Chauntries, &c.* 2. *All Manors, Lands, Tenements, &c. belonging to them or any of them.* 3. *All Manors, Lands, Tenem' &c. by any mean Aſſurance, Conveyance, &c. given, aſſigned, limited or appointed to the finding of any Prieſt to have Continuance for ever, and wherewith or whereby any Prieſt was ſuſtained, maintained or found, within 5 Years, &c.* 4. *And alſo all annual Rents, Profits and Emoluments at any Time within five Years, &c. imployed, paid or beſtowed toward or for the Maintenance or finding of any Stipendiary Prieſt for ever.* 5. *Shall be in the actual and real Poſſeſſion of the King, &c. in as large and ample Manner and Form, as the Prieſt, Wardens, Maſters, Miniſters, Governors, or other Incumbents of them within five Years, &c. had occupy'd or enjoy'd the ſame, and as tho' the Colleges, free Chappels, Chauntries, Stipends, Salaries of Prieſts, and the ſaid Manors, Lands, &c. were in this Act ſpecially, particularly, and certainly rehearſed, named and expreſs'd by expreſs Words, &c.* And the Conſideration of every of theſe Clauſes was requiſite for

Duke 91. 107.

Duke 91, 107.

1 Co. 24. b.

the deciding of this Point, for the true Expoſition of one of them ſerves very well for the good Underſtanding of the others: As to the firſt Clauſe it was reſolv'd, that ſome of the Colleges, Chauntries, *&c.* which were not lawfully founded, but were only in Reputation, were given to the King by the ſaid Act, and ſome not, and therefore this Difference was agreed; that where the College, Chauntry, *&c.* had ſuch Beginning which might have made a lawful Foundation, but for Error or Imperfection in the penning or proceeding of it, was not in Judgment of Law lawfully founded, ſuch College or Chauntry is given to the King by the ſaid Act: But when there is a College or Chauntry only in vulgar (*a*) Reputation, without any Commencement or Countenance of a lawful Foundation, or erected by ſuch Means which can't make a lawful Foundation, there ſuch College or Chauntry is not given to the King by this Act. *Nota Reader*, the Rule is, *Quod (b) reputatio eſt vulgaris opinio ubi non eſt veritas, & vulgaris opinio eſt duplex; ſc. Opinio vulgaris orta inter graves & diſcretos, & quæ vultum veritatis habet; & opinio tantum orta inter leves & vulgares homines abſque ſpecie veritatis*: And according to this Diſtinction it has been adjudg'd and reſolved by all the Juſtices upon this firſt Branch of this Act: and therefore *Hill. 6 & 7 E. 6. Dyer* 81. which was immediately after the making of the ſaid Act, the Caſe was, That Pope *Urban* at the Requeſt of *Ralph*, Baron *of Greyſtock*, founded a College of a Maſter and ſix Prieſts reſident at *Greyſtock*, and aſſign'd to each of the Prieſts 5 Marks *per Annum*, beſides their Bed and Chamber, and the Maſter 40*l. per ann'* and it was certified into the Book of Firſt Fruits and Tenths *Rector' & Colleg' de Greyſt*: That this College was *in eſſe* within 5 Years before the ſaid Act; and it was reſolv'd *by the Juſtices*, that this reputative College was not given to the King by the ſaid Act of 1 *E.* 6. becauſe it wanted a lawful Beginning, and the Countenance alſo of a lawful Commencement; for the (*d*) Pope can't found or incorporate a College within this Realm, nor aſſign nor licence others to aſſign temporal Livings to it; but it ought to be done by the King himſelf, and by no other, *Nomen non ſufficit, ſi res non ſit de jure aut de facto*, and it is as much as if one of his own Head had erected and founded a Chauntry without Licence or Authority derived from the King: But *Mich. 9 & 10 Eliz. Dyer* (*e*) 267. where the Caſe was, that King *E.* 1. *anno* 12 of his Reign, by his Letters Patents under the Great Seal, granted to *Tho. Beale* then Biſhop of S. *David's* and his Succeſſors, the Advowſon of 34 Churches in *Wales* within his Dioceſe, to hold of the King and his Succeſſors, ſo that the Biſhop and his Succeſſors might appropriate them, or any of them to their Churches of S. *David's*

(*a*) Cro. Jac. 51. 1 Roll. Rep. 127. Lit. Rep. 131.

(*b*) Antea 106. b. 2 Inſt. 668.

The Caſe of *Greyſtock* College.

(*c*) Dy. 81. pl. 64. Dyer 267. pl. 13. Stiles 52. Lit. Rep. 108. 10 Co. 34. b.

(*d*) 5 Co. 26. a. *Cawdry's* Caſe.

The Caſe of the College of *Lanwybrevie*.

(*e*) Moor 650. 10 Co. 34. b. Dyer 267. pl. 12, 13. Hob. 123. Palm. 125. 2 Roll. 403.

vid's and *Aberguelley*, or make and annex Prebends of them in the ſaid Churches of S. *David's* and *Aberguelley*, as to them ſhould ſeem moſt convenient; and three Years after, the Biſhop by the King's Aſſent (as the Biſhop in his Inſtrument affirm'd) of the Chapter of S. *David's*, erected and eſtabliſh'd a College, or Church Collegiate, *& quidquid celebratus Collegii depoſcit authoritate ſua ſupplevit in Landwybrevy*, being one of the 34 Churches, and ordain'd 13 Canons ſecular there, *ſc.* 5 Prieſts, 4 Deacons, and 4 Subdeacons, and made them Prebends and Prebendaries, and annexed and appropriated 13 of the ſaid Churches to them, *&c.* and reſerv'd to the Biſhop himſelf and his Succeſſors as Dean, *Locum in choro, & vocem in Capitulo*, and alſo Viſitation and Corrections, *&c.* In which the Biſhop did not purſue the Authority and Power given him by the ſaid Letters Patents, for by them no Power was given him to found ſuch College; and afterward King *E.* 3. by his Letters Patents reciting the ſaid Foundation and Erection of the ſaid College, and all other the Premiſſes, with ſome Doubt of the Validity of it, by his ſaid Letters Patents granted and confirm'd to the then Biſhop of S. *David's* and his Succeſſors, all that which his ſaid Predeceſſor had done in the Premiſſes, the Statute of *Mortmain*, or any Statute notwithſtanding; and notwithſtanding the ſaid College was erected or founded, and the Appropriations made without the King's Licence; which Grant and Confirmation being made to the Biſhop and his Succeſſors, coud not make the ſaid College (which wanted lawful Erection and Foundation) good in Law; and yet by thoſe Pretences the ſaid College of *(a) Landwybrevy* continu'd a College in Reputation 'till 1 *E.* 6. And it was reſolv'd by the Juſtices of both Benches, that this College was given to the King by the ſaid Act of 1 *E.* 6. becauſe this College had the Countenance of the King's Letters Patents, altho' they for the Cauſes aforeſaid were not of Effect, and the Statute ſaith, *All and all Manner of Colleges, &c.* And ſuch reputative College is within the ſaid Act, and Power is given to Commiſſioners by the ſaid Act to eſtabliſh a Vicar in every College which was a Church Parochial, and ſo upon this Difference concerning Reputations, it was reſolv'd in the Caſe of the *Dean of Paul's*, *Paſch.* 22 *Eliz.* between *Burton* and *Wilford*, by *Wray* Chief Juſtice, Sir *Thomas Gawdy & totam Curiam* of King's Bench, which Caſe is for other Points ſhortly touch'd in 22 *Eliz. Dyer* 368. And ſo in this Caſe at Bar it was reſolv'd, altho' the Deviſor calls it his Chauntry twice in his Will, as appears before; for he wills that the Deviſee ſhall find two Tapers burning at his Anniverſary, and that which remains the Chaplain of his ſaid Chauntry ſhall have: And afterwards he charges the Deviſee to overſee the Government of his ſaid Chaun-

(a) Hob. 123. Antea 106. b. Dyer 386. pl. 47. 4 Leon. 156, 157. &c. Goldſb. 93. 10 Co. 83. b. 11 Co. 13. a. Jenk. Cent. 245.

try, and that it was commonly call'd *Barton Chauntry*; yet becauſe it had not any Commencement or Countenance of a Commencement of an Erection or Foundation of a Chauntry, theſe Lands were not given to the King by the firſt Branch of this Statute. Alſo altho' in the proper Words of the Law, a Chauntry may conſiſt of a Prieſt ſinging for Souls (whence he is call'd a Chauntry Prieſt) without any Incorporation, as appears by *F. N. B.* (*a*) 209. *L. and the Regiſter*, That if a Man gives Lands to a Religious Houſe or other, to find a Chaplain ſinging Divine Service, if he ceaſes for two Years, the Lord ſhall have *Ceſſavit pro Cantaria*, and the Writ ſhall ſay, *Ad inveniendum quendam Canonicum pro animabus anteceſſorum, &c. divina celebrant'*. So in the Statute of *W.* (*b*) 2. *c.* 41. ſuch finding of a Chauntry Prieſt is called a Chauntry, for there it is ſaid, *Et ſi forte tenementum ſic datum pro Cantaria, Luminare, &c.* and yet it is not any Corporation of a Chauntry: Altho' in 40 *Aſſ.* 26. where a Man deviſed Lands to *H. C.* and his Heirs, to find Yearly 12 Marks to two Chaplains to pray for Souls, theſe are called Chauntry Lands by *Knevet* Chief Juſtice, 43 (*c*) *Aſſ.* 27. yet within this firſt Branch ſuch Chauntry is only intended when the Chauntry is lawfully incorporated, or at leaſt has the Countenance, or Beginning of a Corporation, and that for divers Reaſons as after appears: And ſo it was reſolv'd what Manner of Chauntries, Colleges, *&c.* were given to the King by this Act, and what not.

(a) Moor 650.

(b) F.N.B.209. L.

(c) Moor 649.

As to the ſecond Clauſe, it was reſolv'd; 1. That thoſe Words were neceſſary to be added, for otherwiſe by the Gift of the College, Chauntry, or free Chapel, nothing would be given to the King, but the Scite of the College, or Chauntry, or free Chapel, as is agreed 7 *Eliz. Dyer* (*d*) 233. *b.* & 29 *Aſſ.* 53. Secondly, this 2d Branch explains, that they ought to be Incorporations in Law, or in Reputation as is aforeſaid, or otherwiſe Land, *&c.* could not belong to them: And when Lands are deviſed to certain Perſons (as in the Caſe at Bar) to find a Chaplain, the Land doth not belong to the Chaplain, but to the Deviſees, and here the Chaplain has but a Penſion, and the Deviſees have the Lands.

(d) Dy. 233. pl. 13.

As to the third Branch, it was reſolv'd, that as the firſt Branch extends only to Colleges and Chauntries, which are of ſome Manner of Incorporation or Foundation as is aforeſaid; So this third Branch extends to Caſes, where Lands are given to find a Prieſt without any Foundation or Incorporation: But it was objected, that in the Caſe at Bar in Reſpect of the Certainty of the Sum appointed to the Prieſt that it was out of this third Branch, and within the

the 4th and 5th Branches; for the third Branch (as was objected) extends only when the Land is given, limited or appointed to the finding of a Prieſt to have Continuance for ever: But in the Caſe at Bar nothing is limited or appointed to the Prieſt, but a certain Stipend of 6*l.* 13*s.* 4*d.* *pro ſuſtentatione ſua:* And therefore it was ſaid, If Lands of the Value of 20*l.* *per ann.* are given to find a Prieſt, and that the Prieſt out of the Iſſues and Profits of the Land ſhall have 10*l.* for his Suſtentation, it was ſaid this Caſe was out of this third Branch, and within the expreſs letter of the fourth Branch, for here is the yearly Sum of 10*l.* which is yearly Profit within five Years imployed for the Maintenance and finding of a ſtipendiary Prieſt for ever; and in the Caſe at Bar he is but a ſtipendiary Prieſt, becauſe his Stipend was certain. But if Lands of the Value of 20*l.* *per ann.* are given to find a Prieſt without any Limitation in certain, and the Feoffees imploy 10*l.* in certain upon him, yet it was there agreed, that all the Land was given to the King, becauſe the Gift was directly within the third Branch, and not within the fourth for the Incertainty. It was likewiſe objected, that the fifth Clauſe doth greatly enforce this Caſe, for thereby it appears, that all that which the Prieſt had, the King ſhall have; *In as large and ample Manner and Form as the Prieſt at any Time within five Years, &c. had occupied and enjoyed the ſame:* And in this Caſe the Prieſt within the five Years, nor any Time before, had not by the Limitation aforeſaid, nor could have above the Sum of 6*l.* 13*s.* 4*d.* and to prove their Pretence the Caſe of the *Dean of Paul's*, 22 *Eliz. fo.* 368. was cited, where the Caſe was, That the Executors of *A. B.* according to the Will of their Teſtator, *anno* 6. *E.* 2. aſſigned and conveyed Lands and Tenements to the Value of 14*l.* *per ann.* to the Dean and Chapter of S. *Paul's*, to find a competent Suſtentation yearly of 10 Marks Sterling, for a Prieſt and his Clerk to ſing Maſs every Day for the Teſtator's Soul and all Chriſtian Souls in the Church of S. *Paul*; and the ſaid Dean and Chapter ought to find Bread, Wine, Candles, and all other Ornaments for Divine Service; and all the other Profits of the Premiſſes by the Executors were aſſigned to be employed for the yearly Obit for the ſaid Teſtator in the ſaid Church; The Prieſt was maintained within the five Years, and had 6*l.* 13*s.* 4*d.* *per ann'* but the Obit was not kept within the five Years. And it was reſolv'd by the Juſtices of both Benches, and the Barons of the Exchequer, that the Queen ſhould not have more than the 6*l.* 13*s.* 4*d.* and that for two Reaſons. 1. Becauſe the Land was not belonging to any Chauntry, but appertained to the Dean and Chapter of *Paul's*: Alſo the Words of the Statute are, That the King ſhall have the Land or Rent *in tam amplis modo & forma*, as the Prieſt himſelf had, and

Antea 106. b. 108. a. 10 Co. 83. b. 11 Co. 13. a. Dyer 368. pl. 47. 4 Leon. 156, 157, &c. Goldſb. 93. Jenk. Cent. 245. Moor 131, 264.

and the Prieſt had not the Land; and theſe in Effect are the Words of the Book. The ſecond Objection was, that in this Caſe there was a good Uſe, *ſc.* (*a*) 4 *d.* by the Week to ſix poor Men apiece, which is good and charitable; and altho' it be added, *Ad orandum pro anima ſua, & aliorum in teſtamento prad' nominat' in ſingulis diebus*, yet foraſmuch as that is not prohibited by any Branch of the ſaid Act, it is but Surpluſage, and is no Impediment to the good Uſe: For if it ſhall be prohibited by any Clauſe of the ſaid Act, it ſhall be by the Branch concerning Obits, *ſc. To the finding of any Anniverſary, Obit, or other like Thing, Intent, or Purpoſe.* And it may be ſaid, That this praying for Souls by theſe poor Men, is another *like Intent and Purpoſe*; But the Concluſion of the Sentence is, *In any Church or Chappel to have Continuance for ever:* So that the Intent of the Act was to prohibit all ſuperſtitious Uſes, which were publick in Churches for the general Prejudice which might accure by them; for *Malum quo communius eo pejus*, and not to prohibit private Prayers in their Chambers, or other private Places, which could not tend to ſo dangerous an Example. Then the Caſe is no other but that Land of the Value of 20 *l. per ann'* is given to the Intents following, *ſc.* to find a Prieſt to pray for Souls, and that he ſhall have 10 *l.* of the Profits of the Land, and ſix poor Men 4 *d.* apiece a Week for ever, in this Caſe, this good Uſe (as it was ſtrongly urged) ſhall ſave the Land, and the King ſhall have but that which was limited to the Prieſt, *ſc.* 10 *l.* for it was not the Intent of the Act to take away the good Uſe, but the Land ſhould remain with the Feoffees to perform it, and ſo much as was limited to the ſuperſtitious Uſe ſhould be given to the King; and to prove this, divers Caſes were cited. Firſt, a Caſe in the King's Bench, *anno* 21 *Eliz. inter* (*b*) *Hewet & Wotton* for Lands in *Exeter*, where the Caſe was, That *Gervaſe Luiſſant* enfeoffed divers of the ſaid Lands, and willed that they ſhould find a Prieſt to ſing Maſs in the Church of S. *Mary* every Sunday, and a *Dirge & Maſs de requiem* once a Year for his Soul, and that they out of the Iſſues and Profits of the ſaid Lands ſhould pay to the ſaid Prieſt, 2 *d.* every Week, and the Reſidue of the Profits to be imploy'd upon Books, Veſtments, and other Ornaments of the Church aforeſaid, and it was adjudged, that altho' the Land was given to find a Prieſt, yet foraſmuch as his Stipend was certain, and alſo was joined with a good Uſe, that the Land was not given to the King by the ſaid Act, but only the Stipend which the Prieſt had. Another Caſe was adjudged in the ſame Court, *Trin.* 30 *Eliz.* but it began *Paſchæ* 28 *Eliz. Rot.* 431. in Treſpaſs between *John* (*c*) *Chibnal* Pl. and *W. Witton* and *Chr. Witton* Defts. for an Houſe in *Fleetſt.* called, *The Angel*

Jur.

(*a*) 1 Co. 24. a. 26. a. 10. Co. 24. a. 34. a. 2 Rol. 787, 788.

(*b*) Duke 92. *Hewet & Wotton's* Caſe. Poſtea 114. b. Moor 131. 2 And. 100.

(*c*) Duke 92. *Chibnal & Whitton's* Caſe. Co. Ent. 197. pl. 7. Poſtea 114. b. 2 Sid. 15.

ſur le Hoop; upon Not guilty pleaded, and upon a ſpecial Verdict found, the Caſe was ſuch; *Bennet Harlewyn*, 36 *H.* 6. by his Will in Writing deviſed to the Maſter and Brethren of the Guild of Drapers of *London* 3 *s.* 4 *d.* yearly, to be imployed for the Relief of the poor Brethren and Siſters of the ſame Guild, and deviſed the ſaid Houſe to the Parſon and Churchwardens of S. *Chriſtopher*'s Pariſh and their Succeſſors, *Ad inde ſolvend' annuatim pærd' reddit'* 3 *s.* 4 *d. per me ſuperius conceſſ', & quod ipſi de exitibus inde ſolvant annuat' qualibet ſeptimana uni Capell' in Eccleſ. S. Chriſtopheri Miſſam celebrand' imperpet' pro anima mea*, 3 *d. Et quod ſolvant qualibet ſeptimana tribus pauperibus ejuſdem parochiæ* 6 *d. ad orandum pro anima mea; Et quod celebrari faciant annuat' unum Anniverſar' diſtribuend'* 13 *s.* 4 *d. in forma ſequenti*, viz. *cuilibet Capell' intereſſenti illo anniverſario* 4 *d. & quod* 12 *d. inde annuat' ſolvant cuſtodibus operis Eccleſiæ ad uſum fabricæ corporis Eccleſiæ, &* 12 *d. ad ſuſtentationem fraternitatis S. Chriſtopheri, reſiduum* 13 *s.* 4 *d. expendatur in panc & potu inter Capell' & alios pauperes eo die anniverſarii ad exorandum pro anima mea; Ac quod Gardiani habeant de exitibus inde* 6 *s. &* 8 *d. pro laboribus ſuis: Reſiduum de exitibus reſervetur in pixide ad ſuſtentation' & reparationem dictorum tenementorum & (cum opus fuerit) ad novam ædificationem eorund'*; And all theſe were imployed within the five Years. And it was adjudged in that Caſe the King ſhould not have the Land, and the Reaſon (as was ſaid) was becauſe the 3 *s.* 4 *d.* to the Poor of the Guild of Drapers, and alſo the 6 *d.* to the other 3 Poor of the Pariſh (altho' the 3 Poor were appointed to pray for Souls out of the Church, *&c.*) were good Uſes, and therefore the finding of a Prieſt gave not the Land to the King. But yet it was reſolv'd and adjudg'd, that this Caſe at Bar was within the ſaid third Branch of the Act, and that the Land was given to the King by the ſaid Act. And for the better and more perſpicuous Knowledge and Underſtanding of the Reſolution of the Juſtices in this Caſe, I am obliged, to avoid great Prolixity and Intricacy, to reduce all their Reaſons and Cauſes of their Reſolutions to theſe ſix Differences, all which neceſſarily concern the Caſe at Bar, as well for the Confirmation of their Reſolutions, as for the Confutation of all Objections, and alſo for the true Underſtanding of all the former Reſolutions and Judgments, amongſt all which by theſe Differences excellent and perfect Unity and Agreem. appear. The 1. Diff. was, If a Man gives Lands of the yearly Value of 20 *l.* to others, to the Intent to find a Prieſt to pray for Souls, and that the Prieſt ſhall have of the Iſſues and Profits of the Lands 10 *l.* for his Salary, without any other Limitation, that in that

Poſtea 114. b. Cro. El. 709. Moor 30, 31.

The 1 Diverſity. Duke 107. Cro. Car. 455, 456.

that Case all the Land is given to the King; But if the Land is given upon Condition, or to the Intent that the Feoffees shall pay of the Issues and Profits of the Lands 10 *l.* to a Priest to pray for Souls without any other Limitation, that the King shall not have the Land, but only the Rent of 10 *l.* out of the Land; And the Reason of this Difference is, because the first Case is within the third Branch of this Act, for the Land itself was given to find a Priest, according to the Letter of the Act; and inasmuch as he was maintained with 10 *l.* of the Issues and Profits of the Land, it was within the Words subsequent of the said 3d Branch *&c. wherewith, or whereby any Priest was maintained.* For by the Land and the Profits of it he was maintained, and no Use shall be intended but that which the Donor expresses, and the Maintenance or Augmentation of it, and forasmuch as the Land was given to find a Priest, altho' he limits in certain how much the Priest shall have for his Salary and Living, yet to the finding of a Priest to pray for Souls, other Things are necessary which are imployed in such Gift, *&c.* Garments, Books, Wine, Bread, *&c.* And the penning of these Branches concerning finding of Priests, differs much from the penning of the other Clauses concerning Obits, for there the Words of the first Clause are, *Given, assigned, or appointed, to go or be imployed wholly to the finding or Maintenance of any Anniversary, &c.* And the 2d Clause is, *And where but Part of the Issues or Revenues of any Manors, Lands, &c.* But no such Distinction is expressed within the Branches concerning Priests. And the Reason of the second Part of the Difference, *&c.* When the Feoffees are appointed to pay out of the Land a certain Sum to a Priest, *&c.* and because the Land itself is not given upon Condition, or to the Intent to find a Priest; But the Feoffees are limited or appointed to pay to the Priest 10 *l.* and therefore the King can't have more than was given to the finding of the Priest; and that was 10 *l.* as the Priest's Stipend, and not the Land which was not given for the Maintenance, or finding of the Priest; and therefore the King shall have the 10 *l.* only by Force of the said forth Branch of this Act; for that is in Nature of a yearly Rent, Profit, or Emolument; and therewith agrees the Judgment in the said Case of the Dean * of *Paul's*. The second Difference was, If Land of the yearly Value of 20 *l. per ann'* be given upon Condition, or to the Purposes following, *&c.* to find a Priest to pray for Souls, and that the Priest shall have for his Salary 10 *l.* and to distribute between twenty of the poor Men and Women other 10 *l.* yearly for ever for their Sustentation, in that Case

Duke 107. 2 Rol. Rep. 205, 206.

* Antea 106. b. The 2 Diversity. 108. a. 109. a. 11 Co. 13. a. Dyer 368. pl. 47. 4 Leon. 156, 157. Goldsb. 93. 10 Co. 83. b. Jenk. Cent. 245. Mo. 131. 204.

Caſe the King ſhall have but the 10 *l.* limited to the Prieſt, and not the Land: But if the ſame Land had not been given to find a Prieſt, and for the Maintenance of 20 poor Men, in that Caſe the King ſhall have all the Land, altho' in the Employment the Prieſt had 10 *l.* and the Poor the other 10 *l.* And the Reaſon and Cauſe of this Difference is becauſe in the firſt Caſe there was a good Uſe ſeparate and diſtinct from the ſuperſtitious Uſe; and therefore, God forbid that the ill Uſe ſhall ſwallow up the good Uſe, and a certain Sum was appointed to the Prieſt, which Sum the King ſhall have as a Rent by Force of the ſaid fourth Branch; And in ſuch Caſe, if the Land ſhou'd be given to the King, the good Uſe wou'd be taken away, which was never the Intent of the Act; for the Intent of the Makers was, as appears by the Preamble, to advance and continue good and charitable Uſes, as Grammar Schools, Augmentation of the Univerſities, and Proviſion for poor Men, as is expreſſed in the Preamble. And there is another Clauſe concerning the Continuance of ſuch charitable Uſes in the Body of the Act, by which Power is given to certain Commiſſioners, *To aſſign in every Place wherein any Guild, Fraternity, Prieſt, or Incumbent of any Chauntry, by the Foundation, Ordinance, or firſt Inſtitution thereof, ſhould or ought to have kept a Grammar School, or a Preacher, &c.* And alſo to enquire, *What Money, Profits, or Benefit any poor Perſon, by Virtue of any Conveyance, &c. had or enjoyed within five Years, &c. out of any College, free Chappel, or Chauntry, and other the Premiſſes given, limited or appointed to the King by this Act*; and thereupon to make Aſſignments to the Poor, which Clauſe is to be intended only when the Proviſion for the Poor is derived out of a ſuperſtitious Thing, or to be performed by the Perſon who was to do the Superſtition, as out of a College, or Chauntry, or free Chappel, or when all the Land was given to find a Prieſt, and that the Prieſt ſhould find a Grammar School, or Preacher, or ſhould pay ſo much to poor Men: And in ſuch Caſe it was neceſſary to make ſuch Proviſion; for the Colleges, Chauntries, free Chappels, and Prieſts praying for Souls, who ſhould make Diſtribution to the Poor, *&c.* were diſſolved, and their Poſſeſſions given to the King by this Act, and therefore it was very well and neceſſary to add the ſaid Clauſe for Continuance of the ſaid charitable Uſes, But that it doth not extend to, when Lands are given to divers Feoffees upon Condition, or to the Purpoſes following, *ſc.* to find a Prieſt, and of the Iſſues of the Land to pay him a certain Stipend, and out of the Reſidue of the Profits, that the Feoffees ſhall find a gram. School, or ſuſtain poor

Hob. 124. Duke 107. Moor 165. 2 Roll. Rep. 206, 207. Cro. Car. 249. Cro. El. 449.

Co. Lit. 342. 1 Co. 24. b.

poor Men, for theſe are not derived out of the ſuperſtitious Uſe, nor to be diſtributed by the ſuperſtitious Perſons, but by the Feoffees, *&c.* who remain Perſons able to diſtribute, and continue the good Uſes, which are diſtinct from the ſuperſtitious Uſes; And the Reaſon of the ſecond Part of (a) Cro. El. 449. the laſt Difference, is, becauſe nothing is limited to the ſuperſtitious Uſe in certain by the Donor, or Deviſor himſelf, ſo that if the King ſhou'd not have the Land, the King wou'd have nothing, but the ſuperſtitious Uſe wou'd remain, and the intention of the Act (as hath been ſaid, and ſo it ought to be expounded,) was to take away all ſuch Superſtition; for the King can't have any Rent in ſuch Caſe, for every Rent ought to be a certain Sum; And altho' in ſuch Caſe the Feoffees have always imployed a certain Sum, yet they have not Power to make Alteration of the Subſtance of the Gift, but the Intent of the Donor The 3 Diverſity. ſhall ſtand. A 3d Difference was taken, when the Prieſt has Cro. Car. 249. a certain Salary, (and yet to the finding of him other Things, as Books, Bread, Wine, Veſtments, *&c.* as has been ſaid, are *tacite* implied and requiſite, which are incertain) and beſide that a good Uſe is limited, there the King Hob. 224. ſhall not have all by Reaſon of the implied Incertainty; Moor 266. But if Land is given to any expreſs ſuperſtitious Uſe prohibited by the Act, without Limitation of any Certainty for the finding of it, there all is given to the King by the ſaid Act; the Reaſon of the firſt Branch of this Difference is, that a good Uſe expreſſed ſhall be preferred before any Thing implied, and incident to a ſuperſtitious Uſe. 2. The finding of Books, Veſtments, Wine and Bread, are not of themſelves ſuperſtitious, therefore the Makers of the Act did not intend to regard them, as appears by divers Reſolutions and Judgments hereafter cited, but when the expreſſed Intent was not only to find a Prieſt, but alſo a good Uſe, there the King ſhall have only that which the Prieſt himſelf had, or which he was intended to have; The other Part of this laſt Difference, is agreed and reſolved before. The 4 Diverſity. The 4th Difference, or *potius* an Explanation of the former Differences, was taken between a ſole Prieſt to pray for Souls within the third Branch, and a ſtipendiary Prieſt within the fourth Branch; for when Lands are given to one or divers Feoffees to find one ſingle Prieſt with the Iſſues and Profits thereof, with a certain Limitation of ſome Sum for his Suſtenance, there, if no good Uſe is limited (as hath been ſaid) all the Land is given to the King for the Reaſons aforeſaid: But when a certain Sum is limited to the Prieſt for his Stipend, and beſide that a good Uſe is expreſſed, it amounts to as much as if the Land had been given that the Feoffees ſhould pay a certain Sum of Money to a Prieſt, in which Caſe he is a ſtipendary Prieſt within the fourth Branch of the Act, and in ſuch Caſe the

the King ſhall have but a Rent. The 5th Difference was taken, When a certain Sum is limited to a Prieſt, and divers other Uſes are alſo limited, which of themſelves are not prohibited, yet if they depend upon the ſuperſtitious Uſe, all is given to the King. As if a Man gives Land of the Value of 20 *l.* and that the Feoffees of the Profits of the Land ſhall pay to a Prieſt 10 *l.* and the Reſidue for Veſtiments, Books, Bread, Wine, *&c.* for the Celebration of Maſs, *&c.* or to one or divers to viſit, and ſee that the Service be done, or for the Reparation of the Chappel in which the Service is to be done, or for the repairing of the Tenements, or to poor People to be preſent at it, or ſome ſuch like Intents or Purpoſes which depend upon the ſuperſtitious Uſe, or for an Ornament or Continuance of it, there all is given to the King; but when the other Uſes are not depending upon it, but extend to diſtinct and ſeparate good Uſes, there the good Uſes ſhall ſave the Land. As if Land to the Value of 20 *l.* is given to pay a Prieſt 10 Marks to ſing for Souls in ſuch a Church, and the Reſidue of the Profits to repair the Church, altho' that by a Means concerns the Continuance of the ſaid ſuperſtitious Uſe, foraſmuch as it is to be celebrated in the ſame Church; or in ſuch Caſe if the Reſidue of the Profits were limited for the finding of the Ornaments of the Church, altho' they are by a Means Ornaments alſo for the Celebration of the ſaid ſuperſtitious Uſe, yet in both theſe Caſes, inaſmuch as the Reparation of the Church, or the finding of the Ornaments does not depend upon the ſuperſtitious Uſe, nor immediately concerns the ſuperſtitious Uſe, in ſuch Caſe the Land is not given to the King: So in the ſame Caſe, if Part of the Profits are limited for the Repairs of the Church, or to find the Ornaments of the Church, and the Reſidue of the Profits are limited for the Reparation of the Houſes ſo given, the King ſhall not have the Land; for Reparation of Houſes of themſelves is not an Uſe prohibited, and therefore being joined with a good Uſe ſhall ſave the Land, and yet by a Means both concern the Continuance of the ſuperſtitious Uſe: But the Statute is to be intended of immediate Uſes, and not only to ſuppreſs ſuperſtitious Uſes, but alſo to continue good Uſes, according to the Intent of the Makers of the Act. The 6th Difference was obſerved, When all the Uſes are ſuperſtitious, and when not; for when all the Uſes are ſuperſtitious, there in what Certainty or Manner ſoever they are limited, and of what Value ſoever the Land is, yet all the Land is given to the King. As if Land of the Value of twenty Pounds *per annum* is given, to the Intent, that ten Pounds out of the Iſſues and Profits thereof ſhall

The 5 Diverſity Latch. 38.

Cr. El. 449. Cr. Car. 249.

Cr. Car. 248, 456.

The 6 Diverſity

ſhallbe paid to a Prieſt, 5 *l.* for the Maintenance of the Obit, and 5 *l.* to find Lamps and Lights before ſuch Images in ſuch a Church: In this Caſe it was objected, That the King ſhall have but ſeveral Rents, for the Prieſt was but a ſtipendiary Prieſt, and the Land was not given to find him: Alſo the Clauſe concerning Obits, *&c.* gives to the King but a Rent, when but Part of the Profits are limited and appointed to it; and therefore by none of the ſaid ſeveral Branches by itſelf the King ſhall have the Land, but only the ſeveral Rents: But it was reſolv'd that in ſuch Caſe, all the Land by the Equity and true Conſtruction upon all the ſaid Act ſhall be given the King; for inaſmuch as all the Profits are limited to ſuperſtitious Uſes, it was the Intent of the Act to give all the Land to the King by a reaſonable Conſtruction upon the Coherence and Intention of all the Parts of the Act: And as to the Objection which was made, That the King in the principal Caſe ſhall not have more than the Prieſt had, becauſe the fifth Branch, which is the Concluſion of all the four Branches precedent has ſuch Words, *In as large and ample Manner and Form, as the Prieſts, Wardens, Miniſters, Governors, Rulers, or other Incumbents of them within five Years, &c. had occupied or enjoyed:* It was reſolv'd, that theſe Words do not abridge that which before was by any of the precedent Clauſes given to the King. 2. That theſe Words can't be referred to the third Clauſe, *ſc.* When Land was given to one or divers Perſons to find with the Iſſues and Profits a ſole Prieſt, for there the Prieſt had not the Land; and therefore if the ſaid Clauſe was reſtrictive, and if the King ſhould not have more than than the Prieſt had, the King would have nothing, for the Prieſt has nothing, and yet every one agrees, that the King in ſuch Caſe ſhall have the Land. But theſe Words are referred, *reddendo ſingula ſingulis*, to the 1ſt, 2d, & 4th Branches; for by the firſt two, the Land, and by the fourth a Rent is given to the King; and therefore the ſaid Words may well be referred to them, and can't be referr'd to the ſaid fourth Branch, for the King can't have the Land, *in as ample and large Manner as the Prieſt had it*, when in Truth the Prieſt had nothing in the Land, but the Feoffees were ſeiſed thereof; or the ſaid Words refer only to the fourth Branch concerning Stipendiary Prieſts, as *Popham* Chief Juſtice held: And the Caſe at Bar was within all theſe Differences; for 1. The Land was deviſed upon Condition to find a Prieſt. 2. In this Caſe one of the ſuperſtitious Uſes was incertain, for, for the finding of Lamps and Lights no certain Sum was limited; and if all the Land had been given to this incertain Uſe, the King ſhould have had all the Land. 3. Here was not any good Uſe, for altho' the Maintenance and Suſtentation of poor Men was good, yet Maintenance of them to pray for Souls was ſuperſtitious, and prohibited by the

ſaid

ſaid Act: And altho' theſe Prayers are not appointed to be made in any Church, Capel, *&c.* or other publick Oratory, yet it was reſolv'd, that it was prohibited by the ſaid Act, or (as ſome held) directly within the Words of the Clauſe concerning Obits, *ſc. Anniverſary or Obit, or other like Thing, Intent, or Purpoſe, or of any Light or Lamp in any Church or Chapel*: So that theſe Words, *In any Church or Chapel*, are referr'd only *to Lights or Lamps*, and not to theſe preceding Words, *or other like Thing, Intent, or Purpoſe.* And praying for Souls, is a *like Intent* or Purpoſe to an Anniverſary or Obit, for all was to pray for Souls, or (as others held) by the Equity of the ſaid Act which intended to extirpate all praying for Souls: And it ſeem'd to ſome that the Caſe is ſtronger, becauſe the principal ſuperſtitious Uſe is to be done in the Church. 4. Theſe Prayers for Souls by the poor Men, are in a Manner dependant upon the other ſuperſtitious Uſes, and of one and the ſame Kind and Nature with them. 5. In this Caſe all the Uſes were ſuperſtitious, and therefore all the Land was given to the King: And by theſe Differences you may (as hath been ſaid) better underſtand the Judgments and Reſolutions which have been before theſe Times, had upon the ſeveral Branches of this Act, and every one of them well ſtands with the other, and no Contrariety amongſt them. And all theſe Differences are well proved and approved by former Reſolutions, Decrees, and Judgments; and therefore I will make a ſummary Report of the former Reſolutions, Decrees and Judgments, which were cited and vouch'd in this Caſe, and firſt of the Reſolutions:

1 Co. 24. b.

Hob. 123. 1 Rol. Rep. 417.

Sir *Bartholomew Read*, by his Will in Writing, deviſed his Lands in *London* to the Company of *Goldſmiths*, to the Intent that they, with the Iſſues and Profits, ſhould repair the Tenements, and ſhould pay all Rents iſſuing thereout, and ſhould keep an Obit, and ſhould ſpend at it yearly 33*s.* 4*d.* and find perpetually a Prieſt to ſing Maſs for his Soul, who ſhould alſo keep a Grammar-School, and chiefly for the Poor, and to receive 10*l.* yearly for his Salary, and the ſaid Tenements were then of greater Value, *ſc.* of 50*l. per Ann.* than the ſaid ſuperſtitious Uſes. And it was reſolv'd by *Wray* and *Anderſon*, Chief Juſtices, upon Conference with Sir *Roger Manwood*, Chief Baron, and *Periam*, Juſtice, that all the Tenements were given to the King by the ſaid Act, for altho' there was a good and charitable Uſe, *ſc.* to find a Grammar School chiefly for the Relief of the Poor, yet becauſe it was mix'd with a ſuperſtitious Uſe, and nothing in certain was limited to the good Uſe, in ſuch Caſe the incertain Mixture of the bad Uſe with the good Uſe, infects the good Uſe, as a little Poiſon mixt with a great Quantity

Sir Bartholomew Read's Caſe. Moor 654.

of Wine, or as Truth mixt with Covin (Covin is ſo ill an Herb) that it makes the Whole unſavory, and turns the Goodneſs of the one into the Badneſs of the other, as it is ſaid in *Plowd. Com.* 51. *a.* Secondly, the good Uſe is deriv'd out of the ſuperſtitious Uſe, and to be perform'd by the Prieſt; And for theſe Reaſons the good Uſe in this Caſe ſhall not ſave the Land. Alſo altho' now upon the Matter, it is as if the good Uſe had been omitted, and that a certain Sum was limited for every of the Uſes, yet when all the certain Uſes were ſuperſtitious, all the Land ſhall be given to the King. Another Caſe was reſolv'd by them, that Sir *John Tate*, ſeiſed of certain Houſes in *London*, by his Will in Writing, deviſed them to the Company of *Dyers* to repair the Houſes, and to find a ſecular Prieſt for ever to pray for Souls in the Church of St. *Michael* in *Cornhill*, paying to him a competent Living, not leſs than eight Marks *per Ann.* and the Houſes then were of greater Value; and yet becauſe it was incertain what Sum the Prieſt ſhould have; and if the Sum had been certain, yet becauſe the Land was given to find a Prieſt, and no good Uſe was limited, the King ſhall have all the Land by the ſaid third Branch of the ſaid Act.

5 Co. 80. b.

Sir John Tate's Caſe. Duke 94. Hern 208.

Another Caſe reſolv'd by them was, That *John Allen*, by his Will in Writing, deviſed Houſes in *Eaſtcheap* to the Company of *Goldſmiths*, in *London*, to find an Obit for ever, which Houſes then were, and ſo continu'd, of the Value of 33 *l.* 13 *s.* 4 *d.* *per Ann.* and 23 *s.* 4 *d.* were only employ'd to the ſaid ſuperſtitious Uſe. And it was reſolv'd, that the King ſhould have all the Land, for the Deviſees, by their certain Employment, can't ſave the Land when the Gift it ſelf is incertain; nor any Diſpoſition in certain by the Deviſees, can alter the Nature and Subſtance of the Gift, nor the Operation of the Statute upon it.

Joh. Allen's Caſe. 1 Anderſ. 97. Moor 264.

Another Caſe was alſo reſolv'd by them: One *Pele* deviſed by his Will in Writing, certain Houſes in *London*, to the Company of *Clothworkers* of *London*, to the Intent that they for ever ſhould pay to ſuch Prieſt who ſhould pray for his Soul in the Pariſh Church of *Chilham*, 9 *l.* 6 *s.* 8 *d.* for his Salary; the King ſhall not have the Houſes, for they were not given to find a Prieſt, but to pay to a Prieſt a certain Sum.

Pele's Caſe. Duke 95. Hern 209.

One *Walpool*, in 23 *E.* 3. by his Will in Writing, deviſed to the Company of *Goldſmiths* in *London*, certain Houſes in *London* of the Value of 30 *l.* *per Ann.* to the Intent that they, with the Iſſues and Profits thereof, ſhould find two Prieſts, paying to each of them 6 *l.* 13 *s.* 4 *d.* for his Salary; and it was reſolv'd by the ſaid Juſtices, that the Queen ſhould have the Houſes, for it was within the third Branch of the Act, inaſmuch

Walpool's Caſe. Duke 95. 2 Sid. 14. Hern. 209.

inaſmuch as the Land was given to find two Prieſts, *and wherewith or whereby* they were maintain'd, *&c.* and foraſmuch as no good Uſe was limited, and all the Uſe expreſs'd was ſuperſtitious, for theſe Reaſons it was reſolv'd, that the Houſes were given to the King, and yet the Salaries of the Prieſts were certain.

Caley's Caſe. Moor 653, 654. 1 Anderſ. 96.

Anno 4 *H.* 8. *Will. Caley*, by his Will in Writing, deviſed certain Houſes in *London*, of the Value of 40 Marks *per Ann.* to the Company of *Drapers*, to the Intent to repair them ſufficiently for ever, and of the Iſſues and Profits of them to maintain a Chaplain in the Church of St. *M. Woolnauth*, to ſing Maſs every Day for the Souls of *Rich. Shore* and his Wife, and to have for his Salary 6 *l.* 13 *s.* 4 *d.* and to find an Obit in the ſame Church for the Soul of the ſaid *Richard Shore*, ſpending upon it 20 *s.* in Form following, *ſc.* the Wardens of the ſaid Company ſhall have Part, and the Beadle Part, and Part to be ſpent upon Bread, Beer, and other Neceſſaries, at *Drapers-Hall*, amongſt the Brethren there, and the Reſidue to be diſtributed amongſt the Poor dwelling within the Precinct of their Hall, to pray for Souls; and altho' the Salary of the Prieſt was certain, and the Expences of the Obit were certain, and the Prayers for the Souls were to be made in *Drapers-Hall*, and not in any Church or Chapel; and the Diſtribution of Bread and Beer amongſt the Poor, is of itſelf a good and charitable Uſe, yet foraſmuch as all the Uſes were ſuperſtitious, or depending thereupon, it was reſolv'd, that the Houſes were given to the King by the ſaid Act.

Gregory's Caſe.

Anno 5 *E.* 4. One *Gregory*, by his Will in Writing, deviſed his Houſes in *London*, of the Value of four Marks *per Ann.* to the Company of *Skinners*, to the Intent, with the Profits thereof, to find an Obit for ever in the Church of St. *Anthony*, ſpending at it 6 *s.* 8 *d.* and to diſtribute amongſt the Poor of the ſaid Pariſh, to pray for one Soul, 6 *s.* 8 *d.* and with the Reſidue of the Profits to maintain the Reparations, and with the Overplus to new build them, when Need ſhould be: And altho' the Sum for the ſaid ſuperſtitious Uſes (whereof one was to be done out of the Church or Chapel) were certain, and the Reparation and New-Building of the Houſes themſelves, were good, becauſe they concern'd the Habitation of Men; yet foraſmuch as theſe Uſes were for the Continuances of the ſuperſtitious Uſes, *& quodammodo* depending thereupon; for this Reaſon it was reſolv'd, that the Houſes were given to the King by the ſaid Act: Several other Reſolutions of the ſaid Juſtices were cited, but foraſmuch as they all tend to the Effect of thoſe which have been cited before, to avoid Prolixity I have omitted them. *Note Reader*, the Branch of the ſaid Act next following the laſt Clauſe of Obits, concerning the Employment of the Sums

of Money, or Profit of any Lands, by any Corporation, Guild, Fraternity, Company, or Fellowſhip of any Myſtery, or Craft, for the Maintenance of a Prieſt, Obit, *&c.* was but an Explanation of the ſaid fourth Branch, to ouſt a Scruple which ſome might conceive, Whether a Body incorporate might ſtand ſeiſed to ſuch Intents, and upon ſuch Truſts as is aforeſaid: But it appears by all the ſaid Reſolutions, as well Bodies Politick and Corporate as private Perſons, are within the former Branches of the ſaid Act, for the Letter of the Act is general and includes all, as in this very Caſe it is before reſolved.

Now to proceed to *Decrees:* In 5 *E.* 6. it appears *in libro Decret' in officio Rememor' Dom' Regis*, In the Exchequer, That divers Decrees were made ſo upon the Will of *(a) Comberton in* 5 *H.* 4. of *Cromer (b)* in 10 *H.* 6. of *William Rus (c)* in 11 *H.* 6. of one *Penne* in 5 *H.* 6. and of divers others in the Court of Augmentation; but becauſe they are agreeable to the ſaid Reſolutions and Differences before taken, as I conceive, altho' they are not fully there written, I will omit them, and proceed to *Judgments* given in the Queen's Courts upon Argument and great Conſideration judicially. And as to the Caſes of *Hewet* and *(d) Wotton*, and *Chibnal (e)* and *Witton*, they were affirm'd to be good Law, and that there were two principal Reaſons of the Judgment in the ſame Caſes. 1. Becauſe nothing was limited to the Prieſt but 2 *d.* or 3 *d.* every Week, which was not within the ſaid third Branch of the Act, for with ſuch a ſmall Sum a Prieſt can't be found or maintain'd. And the Letter of the ſaid Statute is, *To the finding of any Prieſt, &c. and wherewith or whereby any Prieſt was ſuſtain'd, maintain'd, or found*; and with ſuch ſmall Allowance he can't be ſuſtain'd, maintain'd, or found. Alſo in one Caſe he ſhould ſing Maſs but every *Sunday*, and *Dirige* once a Year, which was (as was ſaid) within the Clauſe of Obits, *ſc. To ſuch like Intent or Purpoſe.* 2. Admitting a certain Salary had been to the Prieſt ſufficient for his Maintenance, yet becauſe there were good Uſes *(f)* ſeparate from the ſuperſtitious Uſe, *ſc.* in the one Caſe 3 *s.* 4 *d.* to the Poor, *&c.* and in the other, to find Ornaments of the Church; for theſe Reaſons Judgment was given in both the Caſes, that the Land was not given to the King. It was alſo adjudg'd for theſe two Reaſons, that were given in *Hewet* and *Wotton*'s Caſe (for the ſaid two Caſes agreed with the ſaid Caſe of the Dean of *(g) Paul*'s, which the Lord *Dyer* has briefly touch'd in Part) that the Queen ſhall not have the Land for two Reaſons. 1. Becauſe the Land *(h)* itſelf was not given to find a Prieſt, ſo that it was not within the third Branch of the Act, but to find an annual Suſtentation of ten Marks for a Prieſt, ſo

(a) Moor 649, 652.
(b) Moor 652.
(c) Moor 649.
(d) Duke 92. Antea 109. b. Moor 131. 1 Anderſ. 100. Antea 109. b. Duke 92. Co. Ent. 197. pl. 7. 2 Siderf. 15.
(f) Duke 92.
(g) Antea 106. b. 108. a. 109. a. 110. b. Dyer 368. pl. 47. 4 Leon. 156, 157. Goldſb. 93. 10 Co. 83. b. Jenk. Cent. 245. Moor 131, 264.
(h) Duke 92.

ſo that it was within the fourth Branch, and not within the third. 2. It was reſolv'd in the ſaid Caſe of the Dean of (*a*) *Paul*'s, that if Land is given to pay ten Marks to a Prieſt, and 40 *s.* to the Maintenance of an Obit, in that Caſe, if both are found within the five Years, the King ſhall have all the Land, becauſe both the Uſes were ſuperſtitious by the Judgment of the Law, upon the Coherence, (as has been ſaid) of all the Act; But in the ſame Caſe becauſe the Obit was not found within the five Years, it was therefore adjudg'd that the King ſhould not have the Land: And therefore in the ſame Caſe of the Dean of *Paul*'s, this Difference was taken and reſolv'd, when certain Sums are limited to the ſuperſtitious Uſes, and one Uſe is ſeparate and divided from the other, there the finding of the one ſhall not give the whole Land to the King, but only the Sum appointed to the ſuperſtitious Uſe which was imploy'd within the five Years: But if the one Uſe depends upon the other, there the finding of the Principal or any Part of it, gives all the Land to the King. As if Land is given, to the Intent that an Obit ſhall be found in ſuch Chapel, and that upon the Obit 10 *s.* ſhall be diſtributed and employ'd to the Prieſt, and to divers poor Perſons who ſhall be preſent at it, 6 *s.* 8 *d.* and the reſt of the Profits to the Reparation of the ſaid Chapel; in this Caſe, if the Obit is maintain'd in any Part within the five Years, altho' the 6 *s.* and 8 *d.* is not employ'd to the poor Men, nor any thing upon the Reparation of the Chapel within the five Years, yet all the Land ſhall be given to the King, becauſe all the Uſes depend upon the firſt: So in the ſame Caſe, *Wray*, Chief Juſtice, ſaid, that it was adjudg'd, that where certain Houſes call'd the *Bull* were given to find a Prieſt to pray for Souls, *&c.* and other Tenements called the *Swan*, were given to the ſame Feoffees to find an Obit, *&c.* and the Feoffees employ'd the Profits of the ſaid ſeveral Houſes to contrary Uſes, *ſc.* the Profits of the *Bull* to find the Obit, and the Profits of the *Swan* to find the Prieſt, yet foraſmuch as the original Gift was ſuperſtitious, and the Employment ſuperſtitious, altho' the Employment did not purſue the Gift, yet in both Caſes ſuch Employment within the five Years was ſufficient to give the Land to the King. So if a Man gives the Manor of *Dale* and (*c*) the Manor of *Sale* to find ſuperſtitious Uſes, and the Feoffees with the Profits of the one Manor find the ſuperſtitious Uſes, and employ the Profits of the other to the Uſe of the poor Inhabitants of the ſame Town, or to bear the common Charges of the Town, yet both the Manors are given to the King; for if the Feoffees employ any Part of the Profits of the Lands which they have, and which were given for the Maintenance of the ſuperſtitious Uſes, all is given to the King; But if the Feoffees, before the five Years, have conveyed Part of the Land to another in Fee, and employ the Profits

(*a*) Antea 106. b. 108. a. 109. a. 110. b. 114. b. Dyer 368. pl. 47. 4 Leon. 156, 157. Goldſb. 93. 10 Co. 83. b. Jenk. Cent. 245. Moor 131, 264.

The Caſe of the Swan and Bull. (*b*) Duke 93.

(*c*) Duke 93.

of that which remains in their Hands, for the Maintenance of the ſuperſtitious Uſes, and no Part of the Profits of the Land of the ſecond Feoffee is employ'd within the five Years, there the King ſhall not have the Land of the ſecond Feoffee, but only the Lands which the firſt Feoffees have, for the Employment by the firſt Feoffees of the Land which they had, cannot bind the ſecond Feoffee, for the Land in which they had not any Eſtate or Intereſt; and that well ſtands with the Words of the ſaid third Branch, *ſc. To the finding of any Prieſt, and wherewith or whereby any Prieſt was ſuſtain'd, maintain'd, or found within five Years*: for as to the Land convey'd to the ſecond Feoffee (whereof no Part of the Profits was employ'd to ſuperſtitious Uſes within the five Years) that is not within the ſaid Words of *wherewith or whereby*, for neither with nor by the Land of the ſecond Feoffee the ſuperſtitious Uſes were found within five Years, but only with, and by the Land which remains with the firſt Feoffees; and in the ſaid Caſe of the *Dean* of *Paul's*, ſome held that a Proviſo that the ſaid Act ſhall not extend to the Manors, Lands, Tenements, or other Hereditaments of any Cathedral Church, *other than to ſuch Chauntries, Obits, or Lamps, or any of them within five Years, &c.* And in the ſaid Caſe, the Land was Parcel of the Poſſeſſions of a Cathedral Church; and the ſaid Land did not appertain to a Chauntry, *ſc.* within the firſt or ſecond Branch, but that Caſe was within the fourth Branch, to which this Word of the Proviſo (*Chauntry*) doth not extend; and as to the Words Obits, *&c.* foraſmuch as but Part of the Profits was aſſign'd thereto, although the Obit had been found, that the Land was not thereby given to the King.

Turner's Caſe. (*a*) Co. Ent. 275. pl. 11. Mo. 131, 653, 659, 264. 1 Anderſ. 100. 2 Siderf. 46.

Trin. 18 *Eliz. Rot.* 142. In an Information of Intruſion againſt *Lucas* and *Collier*, upon the General Iſſue, a ſpecial Verdict was found to this Effect; *Turner* ſeiſed of certain Houſes in *London* in Fee, of the yearly Value of 4 *l.* 6 *s.* 8 *d.* *Annq* 3 *H.* 6. deviſed them upon Condition to find an Obit within the Pariſh of St. *Mary Pattens* in *London*, *ſpending thereat ſo much as the Deviſees would in their Diſcretions*, the Deviſees expended only upon the Obit 6 *s.* 8 *d. per Ann.* and it was adjudg'd that the Queen ſhould have the Houſes; 1. Becauſe the Appointment was incertain, altho' the Employment was certain. 2. That all (*b*) the Uſe expreſs'd by the Deviſor, was ſuperſtitious: And therefore it was ſaid, If Land to the (*c*) Value of 50 *l.* is deviſed to find an Obit, ſpending upon it 3 *l. per Ann.* altho' a certain Sum is limited, yet foraſmuch as the Land is given to find an Obit, and no other Uſe is expreſs'd, the Land in ſuch Caſe ſhall be given to the King, for the Land is given in the ſame Caſe *wholly* (as the Statute ſpeaks) to find an Obit, and therefore within the firſt Branch of Obits.

(*b*) Duke 93.

(*c*) Duke 93.

Colborn and Dales's Caſe. (*d*) Co. Ent. 207. pl. 11. Moor 653, 649. 1 And. 99, 100. 2 Siderf. 46. Hern 193.

Trin. 20 *Eliz. Rot.* 589. *inter Colborn & (d) Dale, in B. R.* upon Demurrer the Caſe was ſuch; *Tho. Wells* 12 *E.* 4. deviſed divers

divers Houſes in *London*, of the yearly Value of 24 *l.* to his Wife for her Life, the Remainder to the Parſon and Churchwardens of St. *Edmond*'s and their Succeſſors; and deviſed that his Wife during her Life, and after her Deceaſe, they in Remainer ſhould find a Prieſt who ſhould perform Divine Service at the Altar in the Chapel of our Lady in the Church of St. *Edm.* for the Souls, *&c.* and that the ſame Prieſt ſhould be aiding and helping at Divine Service in the ſame Church, and deviſed, that his Wife during her Life, and thoſe in Remainder after her Death ſhould pay him for his Salary 6 *l.* 13 *s.* 4 *d.* Further he deviſed that they ſhould find an Obit with 6 Prieſts and appointed 22 *s.* in certain to be imploy'd upon it, whereof Part ſhould be diſtributed amongſt the (8) poor of the Trade of *Drapers*, which *ſhould* come to the ſaid Obit, and could not come. Alſo he appointed 16 *d.* yearly to the Parſon of St. *Edm.* for beading of Beads; every *Sunday* 3 *s.* 4 *d.* to the Friars of St. *Auguſtin* to pray for his Soul; alſo 4 *s.* yearly to be paid to the Preacher at *Paul*'s upon *Good Friday*; to 3 Preachers of the *Spittle* to commend his Soul to the Prayers of the People, 13 *s.* 4 *d.* Alſo 3 *s.* 4 *d.* to the Warden of the Company of *Sheermen* to diſtribute amongſt the poor Almſmen of the ſame Trade, to the Intent that thoſe of the Wardens, with 8 or more of the ſaid Company, upon Warning, *ſhould* come to his Obit: Alſo he appointed Accounts yearly to be taken, and that the Churchwardens of St. *Edm.* ſhould have the Letting and Setting of the Lands; and the C. Ws. of St. *M. Woolnauth* ſhould come yearly and have for their Pains 6 *d.* apiece. And the C. Ws. of St. *Edm.* to have 6 *s.* 8 *d.* And 11 *s.* 4 *d.* yearly he appointed for the finding of Books, Veſtments and Ornaments of the Chapel, where he appointed his Obit to be celebrated, and that all the Revenue coming of the Premiſſes ſhould be in ſeveral keeping, ſeparated from other Moneys in a Cheſt, for the Reparation and new building of the Tenements. And it was adjudg'd, that the ſaid Houſes were given to the K. by the ſaid Act. In which Judgment theſe Things were obſerv'd; 1. That the Deviſe was to his Wife. 2. That it was a Deviſe to his Wife for her Life. 3. That every ſuperſtitious Uſe had a certain Sum limited and appointed for the Maintenance of it. 4. That all the Uſes were either ſuperſtitious, or were depending upon the ſuperſtitious Uſes, or tending to the Maintenance or Continuance of them; and that was the principal Cauſe and Reaſon of the Judgm. *Trin.* 30 *El. Rot.* 709. *inter Adams & Stokes, in B. R.* upon Demurrer the Caſe was ſuch; *Walter Dunſton* deviſed Lands to the Parſon and C. Ws. of St. *Botolph*'s, upon Condition to find a Prieſt, and that he ſhould have for his Salary 6 *l.* of the Iſſues and Profits of the Lands. Alſo he deviſed yearly for ever 13 *s.* 4 *d.* to the Priſoners of *Newgate* and *Ludgate*, at the Day of his Death, to pray for his Soul, beſides the ſaid ſole Prieſt; and the Reſidue for the Reparation of the Tenements, and to augment the Prieſts Portion. And it was reſolv'd, that the Land was given to the King by the

Antea 105. b. 106. a.

Adams & Stoke's Caſe. Hern 194.

ſaid Act; for the praying for Souls by the ſaid Priſoners, altho' it was out of Church and Chapel, was ſuperſtitious; and the Augmentation of the Prieſt's Maintenance incertain. And this Reſolution was affirmed for good Law by *Popham*, Chief Juſtice, and divers others; but Judgment was not entred in the Roll.

Wherſton's Caſe. 4 Leon. 159, 160. Hern 193. 1 Anderſ. 100. Moor 130.

Paſchæ 2 & 3 *Ph. & Mar. Rot.* 186. in the King's Bench, *Wherſton*'s Caſe was adjudg'd, That where Lands were given to find an Obit in ſuch a Chapel, appointing a certain Sum for it, and that the Reſidue ſhould be employed on the Reparation of the Chapel, in which the Obit ſhould be celebrated; and it was adjudg'd that all the Land was given to the King, for the one depended upon the other. And *Popham*, C. J. ſaid, that *Paſchæ* 10 *Eliz. Rot.* 398. in an Information in the Exchequer the Caſe was ſuch; one *Draiton* ſeiſed of Lands in *London* in Fee, deviſed them to the Dean and Chapter of *Paul's*, upon Condition that they ſhould find two Chaplains to pray for his Soul in a Chapel newly there built by him; and to pay to them for their Salary 13 *l.* 6 *s.* 8 *d.* and to find an Obit, appointing for it a certain Sum, and to repair the Chapel, and all this was found within the five Years, and it was adjudged againſt the King; and that agrees with the Opinion in the Caſe before cited of *the Dean and Chapter of Paul's* before upon the Proviſo of this very Act.

Co. Ent. 384. pl. 14.

Partridge's and Walker's Caſe. Moor 693, 694. Hern 193.

Hill. 37 *Eliz. Rot.* 715. *inter Patridge & Walker* in the King's Bench, the Caſe was; That one *Hill* deviſed certain Houſes in *London*, to the Parſon and Churchwardens of the Church of St. *Brides* to find for ever his Anniverſary, appointing for it 20 *s.* and to pay to the Poor 5 *s.* 6 *d. in honorem & duplicationem annorum in quibus Chriſtus vixit in terra:* And it was adjudged, that the Land was not given to the King, for the Payment of the 5 *s.* 6 *d.* to the Poor, *in honorem, &c.* was a good and laudable Uſe in Commemoration of the Years of our Saviour, the continual Memory of which is moſt comfortable and neceſſary for every Chriſtian: But it was agreed in the principal Caſe at Bar, that if the Deviſor had limited by expreſs Words, or by any Words which might imply his Intent to be, that the Deviſees, for the Advancement of his Blood, ſhould have the Reſidue of the Profits, that would be a good Uſe, and would ſave the Land; and in ſuch Caſe the King ſhould have but the Rent. And this Caſe was very well and at large argued by the Juſtices: And it was the firſt Caſe that Sir *Chriſtopher Yelverton* argued after he was conſtituted Juſtice of the King's Bench.

2 Rol. Rep. 206.

ACTON's *Caſe.*

Hill. 45 Eliz.

In the Common Pleas.

THE Queen brought a *Quare Impedit* againſt the Biſhop of *Peterborough*, *Acton* Patron, and *Cartmel* Incumbent, for the Church of *Claycotton*, being above the yearly Value of 8 *l.* The Queen declar'd and made Title to preſent by Lapſe, *ratione acceptationis duorum beneficiorum :* The Patron and Incumbent ſevered in Pleas, but both their Pleas were to this Effect; *Anne*, Baroneſs of *Mounteagle*, in her Widowhood retained the ſaid *Cartmel* to be her Chaplain, according to the Stat. of 21 *H.* 8. and he having the ſaid Benefice of *Claycotton* obtained a Diſpenſation with Confirmation of the Queen, according to the Statute, and pleaded all at large, and that afterwards he accepted the Vicarage of *G. &c.* and traverſed, *abſque hoc quod prædᵗ Eccleſia de C. prætextu acceptationis Vicariæ de G. virtute Statuti vacavit, &c.* The Queen replied, and confeſſed the Retainer of him by the ſaid Baroneſs of *Mounteagle*, and that he obtained the Letters of Diſpenſation *prout, &c.* But further ſaid, that before the ſaid *Cartmel* was preſented to the ſaid Vicarage of *G.* the ſaid Baroneſs of *Mounteagle* took to Huſband *Henry* Lord *Compton*, one of the Barons of the Realm, and ſo was Covert Baron, and had loſt her Dignity of Baroneſs of *Mounteagle*, and afterwards *Cartmel* the Defendant accepted the ſaid Vicarage, and was thereunto admitted, inſtituted and inducted, and thereupon the Defendant demurr'd in Law. And it was objected by the Queen's Council, that the Body of the Act of 21 *H.* 8. contains a general Prohibition, that if any one has a Benefice of the Value of 8 *l.* that he ſhall not take any other Benefice with Cure, there if this Caſe is not within the Proviſoes, then the firſt Benefice became void by the Acceptance of the ſecond; and the firſt Proviſo, which is material to this Purpoſe, is, *That every Dutcheſs, &c. and Baroneſs, being Widows, may have two Chaplains, whereof every one of them may purchaſe Licence or Diſpenſation, to receive, have, and keep two Benefices*, &c. And the ſecond Proviſo material to this Purpoſe, is, *Provided always that every Dutc eſs*

Co. Ent. 511. pl. 21. Moor 678.

Cap. 13.

Co. Lit. 16. b.

Antea. 78. b. Sect. 18.

S.C. 33.

Dutcheſs, &c. and Baroneſs Widows, which have taken, or hereafter ſhall take any Huſbands under the Degree of a Baron, may take ſuch Number of Chaplains as is above limited to them, being Widows, and that every ſuch Chaplain may purchaſe Licence, &c. *ut ſupra*. And it was ſtrongly urged, that this Caſe was *Caſus omiſſus*, and out of theſe Proviſoes for divers Reaſons: 1. The firſt ought to be expounded, that the Baroneſs ought to be a Widow as well at the Time of the Acceptance, as at the Time of the Retainer, for if it ſhould be ſufficient that ſhe ſhould be a Widow at the Time of the Retainer, then the ſaid ſecond Proviſo would be in vain, for then it would not be material whom ſhe afterwards married, *ſc.* Noble, or Ignoble; but foraſmuch as the Makers of the Act intended, that if ſhe marry'd after, that then ſhe ſhould be out of the firſt Proviſo, they therefore added the ſecond. And without Queſtion ſhe is out of the ſecond, for that provides only when ſuch noble Woman marries with one under the Degree of a Baron, and their Reaſon that they extended the laſt Proviſo when they marry'd under the Degree of a Baron, was, becauſe if they marry'd a Baron, or other ſuperior Degree, then the Wife need not have Chaplains, becauſe her Huſband might have Chaplains by this Act, which would be ſufficient for both, being one Perſon in Law, and all of one Family. And that the Retainer and the Acceptance ought to concur: It was ſaid, if a Noble Man, or Noble Woman retains a Chaplain, and dies, the Chaplain can't take two Benefices within this Act, yet the Retainer was lawful, but the Perſon who made the Retainer ought to continue when the Chaplain accepts his ſecond Benefice:

Poſtea 118. b. Alſo it was ſaid, that it was adjudged in the Caſe of *Ralph* Earl of *Weſtmoreland*, that where the ſaid Earl retained a Chaplain, and afterwards was attainted of High Treaſon, and afterwards, and during his Life, the Chaplain, having a Benefice of the Value of 8 *l.* accepted a ſecond Benefice with Cure, and it was adjudged that the firſt Benefice was void; for altho' the Earl was alive, yet the Quality of his Perſon was altered, for by the Judgment he became ignoble; *vide*

Stanf. Cor. 195. b. Poſtea 118. b. *Stamford*, as if the Treaſurer or Comptroller of the King's Houſe, *&c.* retains a Chaplain, and afterwards is removed out of his Office, now the Chaplain can't accept a ſecond Benefice, for now his Quality is altered, and the Cauſe, in Reſpect whereof he was to have a Chaplain, is removed; and ſo when the Baroneſs Widow takes Huſband, her Quality is altered, for now ſhe is not *ſui juris*, but only *ſub poteſtate viri*: And therefore, if the latter Proviſo had not been, if ſuch Baroneſs, after the Retainer, had married with a Gent. under the Degree of a Baron, her Chaplain could not accept a 2d Benefice, for the Quality of the Baroneſs by her Marriage was altered; and ſhe ought to remain at the time of the Acceptance

Co. Lit. 16. b. 6 Co. 53. b. of the 2d Benefice, in the ſame Quality as ſhe was at the Time of Retainer. 2. It was objected that this Caſe was out of the

Pro-

Proviſoes, becauſe, if a Baron marries a Widow Baroneſs, in that Caſe the Baroneſs can't retain any Chaplain within the ſaid Act, for the Words of the Act are, *Every Baroneſs being Widow*, which exclude a Feme Covert Baroneſs, then if ſhe is excluded to retain, by the ſame Reaſon her Retainer to have Power by Force of the Act, to take a ſecond Benefice, is loſt by the Marriage, foraſmuch as ſhe now having married with a Nobleman, his Chaplains may perform Divine Service to them both, and the Wife of a Nobleman need not have Chaplains by the Judgment of the whole Parliament, for the Act has not made Proviſion for any ſuch Wives, but only for a Baron's Widow, or the Wife of one under the Degree of a Baron, who could not have any Chaplain within this Act; but in our Caſe, at the Time of the Acceptance, ſhe who retained was the Wife of a Baron, who may have Chaplains by Force of this Act. 3. It was ſaid, that this Act was always conſtrued ſtrictly againſt Non-Reſidency and Pluralities, as a Thing very prejudicial to the Service of God, and the Inſtruction of his People: And therefore, if a Biſhop is tranſlated to an Archbiſhop, or a Baron is created an Earl, now he has both theſe Dignities, and as it is commonly ſaid, *Quando duo* (*a*) *jura concurrunt in una perſona, æquum eſt ac ſi eſſent in diverſis*: But yet within this Act he can have but as many as an Archbiſhop or an Earl may have, for altho' he has ſundry Dignities, yet he is but one and the ſame Perſon to whom the Attendance and Service ſhall be done: So if a Baron is made Knight of the Garter, or Warden of the (*b*) Cinque Ports, he ſhall have but three Chaplains in all, *& ſic de ſimilibus: Quod fuit conceſſum; Quia difficile eſt ut unus homo vicem duorum ſuſtineat.* But on the other Part it was argued and reſolved by the Court, that in the Caſe at Bar, *Cartmel*, after the Marriage, might accept the ſaid Vicarage, within the Letter and Meaning of the ſaid Act, for without Queſtion the Retainer of *Cartmel* was not determined or countermanded by the ſaid Marriage. And as to that, it was ſaid that there are two Manners of Retainers: One at the Common Law, and according to that a Man may have as many Chaplains as he will: Another, according to the ſaid Act, and by that he is reſtrained to a Number; and the firſt which he retains are his Chaplains according to the ſaid Act, and ſhall be firſt (*c*) preferred, as it was adjudged, *Paſchæ* 31 *Eliz. in Com' Banco in* (*d*) *Skefling's Caſe, & Mich.* 41 *&* 42 *Eliz.* in the King's Bench in (*e*) *Drury's* Caſe. And therefore if any Officer allowed by the Statute to have one, two, or more Chaplains, retain a Chaplain, and afterwards is removed from his Office, in that Caſe the Retainer by the Com. Law remains, but the Retainer upon the Statute is determined, for after the Removal he can't be Non-reſident, nor accept

(*a*) 7 Co. 14. b. Calvin's Caſe. Cawly 209.

(*b*) Antea 90. b.

(*c*) Cro. El. 724. Antea 90. a. 1 And. 201.

(*d*) Antea 90. a. 89. b. 1 Ander. 201. Moor 561, 562. Cro. El. 723, 724, 839. Jenk. Cent. 272, 273.

(*e*) Antea 90. a.

accept another Benefice: So if an Earl or Baron retains a Chaplain, and, before his Advancement, is attainted of Treaſon, as in the Caſe of the Earl of (*a*) *Weſtmorland*, there the Retainer, according to the Statute, is determined; and after the Attainder ſuch Chaplain can't accept a ſecond Benefice, becauſe he who is attainted, by his Attainder is a dead Perſon in Law; and now as (*b*) *Stamf. pla. Coron.* ſays, from a Nobleman (by the Judgment by which his Blood is corrupted) he is become ignoble, and therefore his Dignity is determined: And altho' the Wife of a Baron, during the Coverture, can't retain a Chaplain, yet when a Baroneſs Widow retains one or two according to the ſaid Proviſo, this Retainer according to the Act, is the principal Matter; and as long as the Retainer is in Force, and the Baroneſs continues a Baroneſs, the Chaplains may well accept two Benefices by the expreſs Letter of the Act; for it is ſufficient if at the Time of the Retainer the Baroneſs was a Widow, for thereby the expreſs Words (*being a Widow*) are ſatisfied: But the Statute doth not provide that ſhe ſhall be a Widow at the Time of the Acceptance, but the Words imply the Contrary, *ſc.* that ſhe need not continue Widow; for the Words are, *Every Baroneſs being Widow, may have two Chaplains, whereof every of them may Purchaſe, &c.* ſo by theſe Words it is ſufficient, if ſhe be a Widow at the Time of the Retainer, and the Power to purchaſe Licence is annex'd to the Retainer; and there is no Miſchief in this Caſe, for the Number appointed by the Statute ſhall not be exceeded, and the Act appoints the Baroneſs Widow to have two, and her Huſband to have three, ſo that the Intention of the Act is not defrauded: And altho' (as it has been ſaid) the Huſband and Wife are but one Perſon in Law, yet as the Text ſaith, *Sunt animæ duæ in carne una*, and therefore there is no Reaſon that the Retainer of Chaplains which ſerve for the Inſtruction of Souls ſhould be determined by the Marriage. Alſo the laſt Proviſo, When a Baroneſs marries one under the Degree of a Baron, was added, becauſe by ſuch Marriage her Dignity was determined, for the Rule is, *Quando* (*c*) *mulier nobilis nupſerit ignobili, deſinit eſſe nobilis.* But this Rule is to be underſtood of a Woman who attains Nobility by Marriage, as by the Marriage of a Duke, Earl, or Baron, *&c.* for in ſuch Caſes, if ſhe afterwards marries under the Degree of Nobility, by ſuch Marriage with one who is ignoble, ſhe loſes her Dignity which ſhe had attained by Marriage with one of Nobility; for (*d*) *eodem modo quo quid conſtituitur, diſſolvitur*: but if a Woman is Noble, as Dutcheſs, Counteſs, Baroneſs, *&c.* by Deſcent, altho' ſhe marries with one under the Degree of Nobility, yet her Birthright remains, for that is annex'd to her Blood, and *eſt Character indelebilis*; but in the Caſe at Bar the Baroneſs by her Marriage with one of Nobility, doth not loſe her Dignity of Baron' but *potius* augments it. And theref. it's not like any

(*a*) Antea 117. b.

(*b*) Stamf. Cor. 195. b. Antea 117. b.

(*c*) 2 Inſt. 50. 6 Co. 53. b. Owen 81. Br. Noſme de Dignity 69. Cawly 247.

(*d*) Cawly 247. 2 Bulſtr. 284. 2 Rol. Rep 39. 6 Co. 53. b.

Caſes

Cases which have been put, and the second Proviso explains it, for the Makers of the Act well knew, that afterwards by such Marriage as this is in the Case at Bar, she is a Baroness as she was before, and not in Case as where she marries with one under the Degree of Nobility: To this was added, that the second Proviso doth not provide Remedy when a Baroness Widow retains two Chaplains, and afterwards marries with one under her Degree, but that is left to the general Construction of Law, and provides only that such Baroness, after such Marriage, may retain two Chaplains, *&c.* Also when a Baroness Widow retains two Chaplains, and afterwards marries with a Baron, by common Intendment she brings Living and Maintenance with her to support her State, and prefer her Chaplains; and the retaining of her Chaplains can't be a Prejudice to her Husband, but *potius* an Honour to him. If a Woman Baroness Widow retains two Chaplains according to the Statute, and afterwards takes one of the Nobility to Husband, and afterwards the Husband dies, the Retainer of these two Chaplains remains; and they without a new Retainer may take two Benefices; for their Retainer was not determin'd by such Marriage: Also for the same Cause, so long as they attend upon such Baroness in her House, they shall not be in Danger of Non-residence. Cro. Car. 146. And it is to be known, That if a Baron has three Chaplains, and each of them has two Benefices, and afterwards the Baron dies, yet they shall enjoy the Benefices with Cure, which were lawfully settled in them before; but altho' he dwells, and is resident upon one Benefice, yet he shall be punished for Non-residence upon the other, as 'twas adjudg'd in Parson *Boyton's* Case, and therefore he ought to obtain of the King a *Non obstante*. So if the Baron is attainted of Treason or Felony, or if any Officer is removed from his Office, *& sic de similibus*. *Pasch.* 44 *Eliz.* in a *Quare Impedit* brought by the Queen against the Bishop of *Salisbury* and others, it was ruled *per totam Curiam*, that the Earl of *Southampton* being of the Age of ten Years, and dwelling in the House with the Lord Admiral, to whom the Queen had granted his Wardship, might retain and qualify Chaplains within this Act; for the Words of the Act are general, and yet his Guardian was a Nobleman, and had Chaplains by the said Act allowed him, and the Earl of *Southampton* was under his Custody, and one of his Family, as the Wife was in the Case at Bar. Note.

DUMPOR's *Caſe.*

Hill. 45 Eliz.

In the King's Bench.

Co. Ent. 684. pl. 22. Cro. El. 815, 816.

IN Treſpaſs between *Dumpor* and *Symms*, upon the general Iſſue, the Jurors gave a Special Verdict to this Effect: The Preſident and Scholars of the College of *Corpus Chriſti* in *Oxford*, made a Leaſe for Years in *Anno* 10 *Eliz.* of the Land now in Queſtion, to one *Bolde*, *Proviſo* that the Leſſee or his Aſſigns ſhould not alien the Premiſſes to any Perſon or Perſons, without the Special Licence of the Leſſors. And afterwards the Leſſors by their Deed, *Anno* 13 *Eliz.* licenſed the Leſſee to alien, or demiſe the Land, or any Part of it, to any Perſon or Perſons *quibuſcunque*. And afterwards, *Anno* 15 *Eliz.* the Leſſee aſſigned the Term to one *Tubbe*, who by his laſt Will deviſed it to his Son, and by the ſame Will made his Son Executor, and died. The Son entred generally, and the Teſtator was not indebted to any Perſon, and afterwards the Son died inteſtate, and the Ordinary committed Adminiſtration to one who aſſigned the Term to the Defendant. The Preſident and Scholars, by Warrant of Attorney entred for the Condition broken, and made a Leaſe to the Plaintiff for 21 Years, who entred upon the Defendant, who re-entred, upon which Re-entry this Action of Treſpaſs was brought: And that upon the Leaſe made to *Bolde*, the yearly Rent of 33 *s.* 4 *d.* was reſerved, and upon the Leaſe to the Plaintiff, the yearly Rent of 22 *s.* was only reſerved. And the Jurors prayed upon all this Matter the Advice and Diſcretion of the Court, and upon this Verdict Judgment was given againſt the Plaintiff. And in this Caſe divers Points were debated and reſolved: 1ſt, That the Alienat. by Licence to *Tubbe*, had (*a*) determin'd the Condition, ſo that no Alienation which he might afterwards make, could break the Proviſo, or give Cauſe of Entry to the Leſſors, for the Leſſors could not diſpenſe with an Alienation for one Time, and that the ſame Eſtate

(*a*) 1 Rol. Rep. 70, 390. 1 Rol. 422, 471. 2 Bulſt. 291. Cro. Jac. 398.

Eſtate ſhould remain ſubject to the Proviſo after. And altho' the Proviſo be, that the Leſſee or his Aſſigns ſhall not alien, yet when the Leſſors licenſe the Leſſee to alien, they ſhall never defeat, by Force of the ſaid Proviſo, the Term which is abſolutely aliened by their Licence, inaſmuch as the Aſſignee has the ſame Term which was aſſigned by their Aſſent: So if the Leſſors diſpenſe with one Alienation, they thereby diſpenſe with all Alienations after; for inaſmuch as by Force of the Leſſor's Licence, and of the Leſſee's Aſſignment, the Eſtate and Intereſt of *Tubbe* was abſolute, it is not poſſible that his Aſſignee who has his Eſtate and Intereſt, ſhall be ſubject to the firſt Condition: And as the Diſpenſation of one Alienation is the Diſpenſation of all other, ſo it is as to the Perſons, for if the Leſſors diſpenſe with one, all the others are at Liberty. And therefore it was adjudg'd, *Trin.* 28 *Eliz. Rot.* 256. *in Com' Banco, inter Leeds* (*a*) & *Crompton*, that where the Lord *Stafford* made a Leaſe to three, upon Condition that they or any of them ſhould not alien without the Aſſent of the Leſſor, and afterwards one aliened by his Aſſent, and afterwards the other two aliened without Licence, and it was adjudg'd, that in this Caſe the Condition being determined as to one Perſon (by the Licence of the Leſſor) was determined in all. And (*b*) *Popham*, Chief Juſtice, denied the Caſe in 16 *Eliz. Dyer* (*c*) 334. That if a Man leaſes Land upon Condition that he ſhall not alien the Land, or any Part of it, without the Aſſent of the Leſſor, and afterwards he aliens Part with the Aſſent of the Leſſor, that he can't alien the Reſidue without the Aſſent of the Leſſor: And conceived, that is not Law, for he ſaid the Condition could not be divided or (*d*) apportioned by the Act of the Parties; and in the ſame Caſe, as to Parcel which was aliened by the Aſſent of the Leſſor, the Condition is determined; for altho' the Leſſee aliens any Part of the Reſidue, the Leſſor ſhall not enter into the Part aliened by Licence, and therefore the Condition being determined in Part, is determined in all. And therefore the Chief Juſtice ſaid, he thought the ſaid Caſe was falſe printed, for he held clear that it was not Law. *Nota Reader, Paſche* 14 *Eliz. Rot.* 1015. *in Com' Banco*, That where the Leaſe was made by Deed indented for 21 Years of three (*e*) Manors, *A. B. C.* rendring Rent, for *A.* 6 *l.* for *B.* 5 *l.* for *C.* 10 *l.* to be paid in a Place out of the Land, with a Condition of Re-entry into all the three Manors, for Default of Payment of the ſaid Rents, or any of them; and afterwards the Leſſor by Deed indented and inrolled, bargained and ſold the Reverſion of one Houſe and 40 Acres of Land, Parcel of the Manor of *A.* to one and his Heirs, and afterwards, by another Deed indented and inrolled, bargained and ſold all the Reſidue to another and his Heirs; and if the ſecond Bargainee ſhould enter for the Condition broken or not, was the Queſtion: And it was adjudged

(*a*) 1 Rol. 472. Cro. El. 816. Godb. 93. Noy. 32. 4 Leon. 58. 2 Bulſtr. 291.

(*b*) Styles 317.

(*c*) Dy. 334. pl. 32. Cro. El. 816. Styles 334. Moor 205.

(*d*) Co. Lit. 215. a.

(*e*) Dyer 308, 309. pl. 75. 5 Co. 55. b. Moor 97, 98.

(a) Co. Lit. 215. a. Cro. Jac. 390. 5 Co. 55. b.

adjudged, that he ſhould not enter for the (*a*) Condition broken, becauſe the Condition being entire, could not be apportioned by the Act of the Parties, but by the Severance of Part of the Reverſion it is deſtroyed in all. But it was agreed, that a Condition may be (*b*) apportioned in two Caſes. 1. By Act in Law. 2. By Act and Wrong of the Leſſee. By Act in Law, as if a Man ſeiſed of two Acres, the one in Fee, and the other in (*c*) Borough *Engliſh*, has Iſſue two Sons, and leaſes both Acres for Life or Years rendring Rent with Condition, the Leſſor dies, in this Caſe by this Deſcent, which is an Act in Law, the Reverſion, Rent and Condition are divided. 2. By Act and Wrong of the Leſſee, as if the Leſſee makes a Feoffment of Part, or commits Waſte (*d*) in Part, and the Leſſor enters for the Forfeiture, or recovers the Place waſted, there the Rent and Condition ſhall be apportioned, for none ſhall take Advantage of his own Wrong, and the Leſſor ſhall not be prejudiced by the Wrong of the Leſſee: And the Lord *Dyer*, then Chief Juſtice of the Common Pleas, in the ſame Caſe, ſaid, that he who enters for a Condition broken, ought to be in of the ſame Eſtate which he had at the Time of the Condition created, and that he can't have, when he has departed with the Reverſion of Part: And with that Reaſon agrees *Litt.* 80. *b.* And *vide* 4 & 5 *Ph. & Mar. Dyer* (*e*) 152. where a Proviſo in an Indenture of Leaſe was, that the Leſſee, his Executors or Aſſigns, ſhould not alien to any Perſon without Licence of the Leſſor, but only to one of the Sons of the Leſſee; the Leſſee died, his Executor aſſigned it over to one of his Sons, It is held by *Stamford* and *Catlyn*, that the Son might alien to whom he pleaſed, without Licence, for the Condition, as to the Son, was determined, which agrees with the Reſolution of the principal Point in the Caſe at Bar. 2. It was reſolv'd, that the Statutes of 13 *Eliz. cap.* 10. & 18 *Eliz. cap.* 11. concerning Leaſes made by Deans and Chapters, Colleges, and other Eccleſiaſtical Perſons, are (*f*) general Laws whereof the Court ought to take Knowledge, altho' they are not found by the Jurors, and ſo it was reſolved between *Claypole* and *Carter* in a Writ of Error in the King's Bench.

(b) 3 Bulſtr. 154. Co. Lit. 215. a.

(c) 1 Rol. Rep. 331. Co. Lit. 215. a.

(d) 1 Rol. Rep. 331. Moor 203.

(e) Dyer 152. pl. 7. Co. Lit. 215. a. Cro. Eliz. 757, 816.

(f) Antea 76. a. 2 Rol. 465. Yelv. 106. Doct. pl. 337, 338. Noy 124. 2 Brownl. 208. Cro. El. 816. Moor 593. 1 Leon. 306, 307.

BUSTARD's *Caſe.*

Paſch. 1 Jacobi 1.

Mich. 44 *Eliz.* in the King's Bench, in Treſpaſs between *Buſtard*, Plaintiff, and *Boulter*, Defendant, the Caſe was (a) Cr. El. 902, 917, Yelv. 8. Moor 665. 3 Salk. 158. ſuch; *Jaſper Dormer* and *Juſtine* his Wife, were ſeiſed of the Moiety of the Manor of *Ilbury* to them and to the Heirs of the Body of *Jaſper*; *Jaſper* levied a Fine thereof to one *Gregory*, who ſuffer'd a Common Recovery, in which *Jaſper* was only vouched, and he vouched over the common Vouchee, and it was to the Uſe of *Gregory* and his Heirs, who thereof enfeoffed *Buſtard*, who thereof enfeoffed *Savage* and *Darſton* in Fee; and afterwards an Exchange was made by Deed indented between *Savage* and *Darſton* of the one Part, and *Buſtard* (who was ſeiſed in Fee of the fourth Part of the Manor of *Barton* in the County of *Oxford*,) by which Exchange *Buſtard* gave the ſaid *Savage* and *Darſton*, and their * Heirs, the ſaid 4th Part of the Manor of *Barton* in Exchange * Co. Lit. 10. a. for the Moiety of the Manor of *Ilbury*, which Moiety *Savage* and *Darſton* gave to *Buſtard* and his * Heirs in Exchange for the ſaid 4th Part of the Manor of *Barton*; which Exchange was executed on both Parties: *Savage* and *Darſton* demiſed the 4th Part of the Manor of *Barton* to the Defendant for Years, *Jaſper* died, *Juſtine* his Wife entred into the Manor of *Ilbury*, upon which *Buſtard* entred into the 4th Part of the Manor of *Barton*; the Defendant re-entred, and *Buſtard* brought an Action of *Treſpaſs*. And after many Arguments at the Bar and Bench in divers ſeveral Terms, it was adjudg'd for the Plaintiff, and in this Caſe four Points were reſolved *per totam Curiam*. 1. That in every Exchange lawfully made, this Word (b) *Excambium* implies in itſelf *tacite* a Condition, and alſo a Warranty, the one to give Re-entry, and the other Voucher and Recompence, and all in Reſpect of the reciprocal Conſideration, the one Land being given in Exchange for the other; but (c) it is a ſpecial Warranty, for upon the Voucher, by Force of it, he ſhall not recover other Land in Value, but that only which

(b) Co. Lit. 50. b. 51. b. Perk. Sect. 253. 9 E. 4. 21. b. 1 Rol. 814. Co. Lit. 384. a. F. N. B. 155. b. Perk. Sect. 261. 12 H. 7. a. b. 45 E. 3. 20. b.

(c) Co. Lit. 384. a. b.

was by him given in Exchange; for inaſmuch as the mutual Conſideration is the Cauſe of the Warranty, it ſhall therefore extend only to Land reciprocally given, and not to other Land; And this Warranty runs only in Privity, for none ſhall (*a*) vouch by Force of it but the Parties to the Exchange, or their Heirs, and no Aſſignee; but the Aſſignee ſhall (*b*) rebut by Force of it, altho' the Exchange was without Deed, as appears 3 *E.* 3. *Formedon* 44. 2 *E.* 2. *Cui in vita* 17. * The ſame Law in Caſe of Partition: And as it is in Caſe of Warranty, ſo it is in Caſe of a Condition, which the Law implies upon the Exchange: And therefore if *A.* exchanges with *B.* and *B.* aliens to *C.* who is evicted by Title Paramount, *C.* ſhall not enter upon the other, for as the Warranty runs in Privity to the Parties to the Exchange and their Heirs, ſo alſo the Condition in Law runs alſo in Privity, and doth not extend to the Aſſignee, and ſo none (*c*) ſhall have *Contra formam feoffamenti* but the Feoffee or his Heirs, but the Aſſignee may rebut; *vide F.N.B.* 163. *c.* 22 *H.* 6. 50. *b.* 30 *H.* 6. 7. *a.* 10 *H.* 7. 11. (*d*) But in the ſame Caſe, if *A.* who did not alien is evicted, he ſhall re-enter into the Land which he gave in Exchange, altho' *B.* has aliened it over. 2. It was reſolv'd, if *A.* gives in Exchange three Acres to *B.* for other three Acres, and afterwards one Acre is evicted from *B.* in that Caſe the whole Exchange is defeated, and *B.* may enter into all his Land; for altho' the Exchange had been good if *A.* had given but two Acres, or but one Acre or leſs, yet foraſmuch as all the three Acres were given in Exchange for the others, and the Condition, which was implied in the Exchange, was entire, upon the Eviction of one Acre the Condition in Law was broken, and therefore Entry given into the Whole; for it is the Office of the Condition to defeat the Whole, and not any Parcel, unleſs the Condition is eſpecially reſtrained to one Part only, as it is not in this Caſe: And therefore there is not any Difference between a Thing entire as a Manor, and Things ſeveral given in Exchange: The ſame Law of a Partition, as it is alſo agreed in 15 *E.* 4. 3. & 42 *Aſſ.* 22. the Earl of *Pembroke*'s Caſe, where the principal Caſe of the Partition is good Law, but the Opinion of *Cavendiſh* there, that is to ſay, that altho' an Eſtate for Life or in Tail is evicted againſt one Coparcener, that yet the Partition ſhall remain in Force, * is not Law; as it was reſolved by the Court in this very Caſe, *Vide Littleton cap. parceners* 58. *b.* But in the ſaid Caſe of the Exchange, if one is impleaded for one Acre, and he vouches the other, and the Demandant recovers, in that Caſe the Tenant ſhall recover in Value but according to the Loſs: For altho' the Condition is entire, and extends to all, yet the Warranty upon the Exchange may ſeverally extend

(*a*) Co. Lit. 384. b. 174. a.
(*b*) Co. Lit. 383. b.
* Co. Lit. 173. b. 174. a. 384. a. b.
(*c*) 9 Co. 34. a. b. 2 Inſt. 118.
(*d*) Perk. Sect. 286, 287. 15 E. 4. 4; Ed. 4. 20, 21. Br. Exchange 12.
Co. Lit. 173. b. 174. a. 4 H. 7. 6. a. b.
1 Co. 86. b.
Yelv. 8. Co. Lit. 174. a.
* Co. Lit. 174. a. 173. b.
Lit. Sect. 262.

to

to Part; and there is great Difference between Warranty in Law upon Exchange, and Warranty in Law upon Partition, as to Recovery in Value; for in Caſe of Exchange, he who vouches ſhall recover in Value according to the Value which he loſt, but ſo it is not in the Caſe of Partition: For if a Man is ſeiſed of ſix Acres in Fee, every one of equal annual Value, and dies, having Iſſue two Daughters, and upon Partition each has three Acres, and afterwards one Siſter is impleaded for one Acre by one who has Title paramount, and prays in Aid of her Coparcener, ſhe ſhall not recover an Acre, but half an Acre, ſo that each of them ſhall have an equal Part; for inaſmuch as both claim by Deſcent, which is an Act in Law, and by the Law each of them ought to have an equal Part of the Inheritance of her Anceſtor, for this Cauſe ſhe ſhall recover in Value but the Moiety which ſhe loſt, ſo that the Loſs ſhall be equal. So if a Man is ſeiſed in Fee or in Tail of three Acres, each of equal yearly Value, and dies, the Heir endows the Wife of the third Acre, and afterwards the Wife is impleaded by one who has Title paramount, and ſhe vouches the Heir; now ſhe ſhall not recover in Value according to that which ſhe loſt, but the 3d Part of the two Acres which remain, for by the Law ſhe ought to have in Dower the 3d Part, and now upon the Matter ſhe is to have in Dower but the 3d Part of the two Acres, as appears by the Book in 5 *E.* 3. *Vouch.* 249. where the principal Caſe was, *Robert de Paris*, Great Grandfather, *Stephen de Paris*, Grandfather, *Robert de Paris*, Father, and *Robert de Paris*, the Son; *Robert*, the Great Grandfather, having to Wife *Maud*, ſeiſed of certain Land in Fee, gave it to *Stephen*, and the Heirs of his Body, who died; *Robert*, the Son of *Stephen*, endow'd *Margery* the Wife of *Stephen*, of the third Part of the Whole; and afterwards *Robert*, the Great Grandf. died, and *Robert* the Father died; *Maud*, late the Wife of the Gr. Grandf. brought a Writ of Dower againſt *Margery*, Wife of *Stephen*, and ſhe vouch'd *Robert* the Son of *Robert*, who had the Reverſion, and there the Queſtion was, of how much *Margery* ſhould have in Value; and by ſome ſhe ſhall only have Dower, having Regard to the two Parts which remain, becauſe the Dower which *Maud*, the Wife of the Gr. Grandfather demanded, is higher and elder than the Dower of *Margery*, the Wife of the Grandf. And notwithſtanding the Gr. Grandfather ſurviv'd *Stephen*, and the Wife of *Stephen* in the Life of *Robert* the Gr. Grandfather, was lawfully endow'd, at which Time *Maud* could demand nothing, yet when her Huſband dy'd her Title of Dower is more worthy. And ſome held the contrary, *ſc.* That the Wife ſhould recover in Value according to her Loſs; and a Difference was taken between Dower of the Wife of an Heir and of the Wife of a Purchaſor; for if there be Grandfather, Father, and Son, and the Grandfather dies, and afterwards the Father dies, and the Son endows the Wife of the Father, againſt whom the Wife of the Grandfather brings Dower,

Co. Lit. 174. a. 384. a. 2 Roll. 773.

Co. Lit. 31. a. b.

ſhe ſhall not recover over in Value, becauſe the Dower of the Wife of the Grandf. toll'd in Law the Deſcent as to the Freehold, and ſhe ſhall be in of the Eſtate of her Huſband, and *per conſequens* after the Death of the Wife of the Grandf. the Wife of the Father ſhall not be endow'd of the Part aſſign'd to the Grandmother for her Dower, for now in Judgment of Law the Father had but a Reverſion of that Part expectant upon an Eſtate for Life, *& ideo, Dos de dote peti non debet.* But in that Caſe the Gr. Grandf. made a Gift in Tail to *Stephen*, ſo that *Maud* demanded Dower againſt *Margery*, who was the Wife of a Purchaſor, and altho' *Maud* recover'd Dower againſt *Margery*, yet if *Margery* ſurviv'd her, ſhe ſhould reenter; for Dower toll'd the Eſtate which by Law deſcended, but not the Eſtate acquir'd and gain'd by Purchaſe, and ſo was it adjudg'd, and there *Margery* recover'd generally to the Value which ſhe loſt: So in Caſe of Exchange, each Party is a ſeveral Purchaſor, and each warrants the Whole to the other, and therefore he ſhall recover to the Value which he loſes.

Co. Lit. 31. b.

3. It was reſolv'd, that as when the whole Eſtate in Part is evicted, the whole Exchange is defeated: So in the principal Caſe, when the Eſtate of Freehold for the Life of *Juſtine*, which is but Parcel of the Eſtate, is evicted in all the Lands, or in Part, by that the whole Exchange may be defeated by Force of the Condition in Law; for altho' a Reverſion expectant upon an Eſtate for Life may be given in Exchange for Land in Poſſeſſion, yet when *Savage* and *Darſton* in the principal Caſe were ſeiſed of the Moiety of the ſaid Manor of *Ilbury* in their Demeſn as of Fee, and gave it in Poſſeſſion to *Buſtard* in Exchange, *ut ſupra*, when *Juſtine* entred and evicted an Eſtate for Life, *Buſtard* might enter into the whole Land which he gave in Exchange, for the whole Eſtate which was given to him, was the Conſideration that he departed with his Land, and therefore when any Eſtate of Freehold is evicted from him by Entry, or otherwiſe, he may by Force of the Condition in Law enter into the Land given by him: So if he in Reverſion in Fee diſſeiſes his Leſſee for Life, and gives this Land in Exchange to another for other Land, and afterwards the Leſſee for Life enters, now may the other enter into his Land, becauſe the whole Exchange is defeated; but if *A.* who has the Reverſion in Fee of an Acre of Land expectant upon an Eſtate for Life, makes an Exchange with *B.* by Deed indented, and gives this Acre by the Name of an Acre of Land, and not by the Name of the Reverſion in Exchange for another Acre; in this Caſe, altho' *B.* expects to have the Acre ſo given him in Poſſeſſion, yet in this Caſe (foraſmuch as nothing paſt by the Gift of the Acre of Land but the Reverſion) the Warranty or the Condition can't by the Law extend to more than paſs'd by Force of the Exchange, for they are incident and annexed to the Eſtate which is given, and cannot extend to the Freehold which was in the Leſſee; and if the Law ſhould be otherwiſe, great Miſchief

Co. Lit. 174. a. Yel. 3. 1 Roll. 815.

1 Roll. 813.

Co. Lit. 174. a. Cr. El. 902.

Co. Lit. 50.

Miſchief would enſue; for if Exchange is made of divers Manors, and peradventure divers Parcels of them are in Leaſe for Life, in this Caſe, if the Exchange ſhould be void becauſe it was made as of a Manor in Poſſeſſion, it would avoid all ſuch Exchanges, which would be miſchievous; and there can be no Miſchief on the other Part; for when the Tenants for Life are in Poſſeſſion of the Land, it ſhall be accounted the Laches and Folly of the Purchaſor, if he did not know it either by Survey or other Intelligence. But in the principal Caſe, by the Fine and Recovery, and other Eſtates made, the Eſtate which *Juſtine* had was diveſted, and ſhe had but a Right, ſo that *Savage* and *Darſton* who gave it in Exchange, had an Eſtate in Fee-ſimple in Poſſeſſion, to which the Warranty and Condition in Law upon the Exchange, was annex'd. 4. It was reſolv'd, that altho' *Buſtard* had Notice of the Right of *Juſtine* at the Time of the Exchange, yet it was not material, but that afterwards by her Entry the Exchange ſhall be defeated, for peradventure it was one of the Cauſes that he would not purchaſe *Ilbury* abſolutely but by way of Exchange, ſo that upon Eviction he ſhall have his own Land again. And *Coke*, the Attorney-General, and *Tanfield* and *Daſton* were of Council with the Defendant, and *Godfrey*, *Yelverton*, and others, with the Plaintiff.

BEVERLEY's *Caſe of* Non Compos Mentis.

Paſch. 1 Jacobi 1.

In the King's Bench.

Carth. 436. Skin. 177, 576. Lucas 161.

IN a Bill depending in the Court of Requeſts, between *Snow*, Plaintiff, and *Beverley*, Defendant; the Matter was, That *Snow* had made a Bond to the Defendant in 1000 *l.* and in the ſaid Court would be relieved, becauſe at the Time of the making of the ſaid Bond, he was *Non compos mentis*; and this Term I mov'd the Court of King's Bench to have a Prohibition to ſtay the ſaid Suit in the Court of Requeſts, becauſe the Matter was not determinable there. And upon this Caſe two Points upon Argument and on good Conſideration, were unanimouſly reſolv'd *per tot. Cur'*. 1. That every Deed, Feoffment, or Grant, which any Man *Non compos mentis* makes, is avoidable, and yet ſhall not be avoided by himſelf, becauſe it is a Maxim in Law, that no Man of full Age ſhall be in any Plea to be pleaded by him, receiv'd by the Law to (*a*) ſtultify himſelf, and diſable his one Perſon, as appears by *Littleton*, *lib.* 2. *cap. Diſcents*, *fol.* 95. and therewith agree 39 *H.* 6. 42. *b.* 5 *E.* 3. 70. *&* 35 *Aſſ.* 10. And there another Cauſe is given. *ſc.* becauſe when he recovers his Memory, he can't know what he did when he was *Non compos mentis*. 2*dly*, If the Common Law had given a Writ of *Non compos mentis*, to him who has recover'd his Memory after Alienation, certainly the Law would have given him Remedy for the Maintenance of himſelf, his Wife, Children and Family, altho' he recover'd not his Memory, but continu'd *Non compos mentis*. And it muſt be known, That this Diſability to diſable himſelf as to ſome Perſons, is perſonal, and extends only to the Party himſelf; and as to other Perſons, is not perſonal, but ſhall bind them alſo: And as to that, know that there are four manner of Privities, (*b*) *ſc.* Privity in Blood, as Heir: 2. Privity in Repreſentation, as Executors or

(*a*) Jenk. Cent. 40. F. N. B. 202. D. 1 Roll. 2. Br. Faits 62. Fitz. Iſſue 53. Cr. El. 398, 622. Godb. 302. Co. Lit. 247. a. b. Br. Dum fuit inf. ætatem 3. Br. Entre congeable 47. Lit. 95. a. b. Lit. Sect. 405.

(*b*) 3 Co. 23. a. 8 Co. 42. b. Co. Lit. 271. a. 1 Jones 32. 2 Inſt. 516, 517.

or Adminiſtrators, who as *Littleton* ſaith, *fol. 77. b.* repreſent the (*a*) Perſon of the Teſtator or Inteſtate, 2 *Mar. Dyer* 112. agrees. 3. Privity in Eſtate, or Donee in Tail, the Reverſion or Remainder in Fee, *&c.* 4. Privity in Tenure, as Lord by Eſcheat: And two of them, which are Privies only, may diſable him who was *Non comp' mentis*, and ſhall avoid his Deeds, Grants or Feoffments, and two not. For Privies in Blood may ſhew the Diſability of the Anceſtor; and Privies in Repreſentation the Infirmity of the Teſtator or Inteſtate; but neither Privy in (*b*) Eſtate, nor Privy in Tenure, ſhall do it: And therefore if Donee in Tail be *Non compos mentis*, makes a Feoffment in Fee, and dies without Iſſue, he in Reverſion or Remainder ſhall not enter or take Advantage of the Inſanity of the Donee: The ſame Law of Lord by Eſcheat, if his Tenant being *Non compos mentis*, makes a Feoffment in Fee, and dies without Heir, he ſhall not avoid it: But there are ſome Acts done by a Man *Non comp' mentis*, which none of them ſhall avoid; and therefore, if he levies a Fine, or ſuffers a Recovery, (*c*) or acknowledges a Statute or Recognizance, neither his Heir nor his Executors ſhall avoid it, for theſe are Matters of Record which ſhall not be avoided by a bare Averment of *Non compos mentis*, for the Inconvenience which may thence enſue: Alſo ſuch Averment is againſt the Office and Dignity of the Judge, for he ought not to take any Conuſance of a Fine or Recognizance of him who is *Non compos mentis*, 18 *E.* 2. *Fines* 120. 17 *Aſſ.* 17. 17 *E.* 3. —— 1 *Mar. Tit. Dum fuit infra ætat'* 7. 31 *E.* 3. *Saver Default*, (37) 57. 2. It was reſolv'd, that it being againſt an expreſs Maxim of the Common Law, that the Party ſhall not (*d*) diſable himſelf, that he ſhall not have for it Relief in any Court of (*e*) Equity, for that would be in Subverſion of a Principal and Ground in Law, *qd' nota*. And *Coke*, the King's Attorney, was of Counſel with *Beverley*, and *Herle*, the King's Serjeant, with *Snow*. *Nota Reader*, that every Act which a Man *Non compos* doth, either concerns his Life, his Lands, or his Goods; alſo every Act which he doth, is either in *pais*, or in a Court of Record: All Acts which he doth in a Court of Record, either concerning his Lands or Goods, ſhall bind himſelf and all others for ever; all Acts which he doth concerning his Lands or his Goods in *pais*, in ſome Caſe ſhall bind himſelf only during his Life, and in ſome Caſe ſhall bind for ever (as has been ſaid.) But as to his (*f*) Life, the Law of *England* is, that he ſhall not loſe his Life for Felony or Murder, becauſe the Puniſhment of a Felon is ſo grievous, *ſc.* 1. To loſe his Life. 2. To loſe his Life in ſuch odious Manner, *ſc.* by hanging, for he ſhall be hanged between Heaven and Earth as unworthy of both. 3. He ſhall loſe his Blood as to his Anceſtry (for he is as a Son of the Earth without any Anceſtor) and as to his

(*a*) Lit. Sect. 337. Co. Lit. 208. b. 209. a.

(*b*) 8 Co. 43. a. 1 Rol. Rep. 401, 442. 3 Bulſtr. 272. 2 Inſt. 483.

(*c*) Br. Fines ley, &c. 75. 2 Inſt. 4. 12 Co. 123, 124. Cr. El. 187. Co. Lit. 247. a. Perk. Sect. 24.

Caſes in Law, *&c.* 161.

(*d*) Jenk. Cent. 40. Cr. El. 398, F. N. B. 202. d. 1 Roll. 2. Br. Faits 62. Fitz. Iſſue 53. Godb. 302. Co. Lit. 247. a. b. Br. Dum fuit infra ætat. 3. Br. Entry conageable 47. Lit. Sect. 405. Lit. 95. a. b.

(*e*) 1 Rol. Rep. 210.

(*f*) 2 Rol. Rep. 547. Hob. 134. Plow. 19. a. 2 Rol. Rep. 321. Co. Lit. 247. b. 21 H. 7. 31. b. Br. Corone 61. Stamf. Cor. 16. b. Fitz. Cor. 351, 412, 414. Went. 302. Godb. 316.

(*g*) Co. Lit. 41. a. 1 Rol. Rep. 180, 187. 3 Inſt. 210, 211. Plow. [illegible]. b. Stamf. Cor. 182, a. b.

his Posterity also, for his Blood is corrupt, and he has neither Heir no Posterity. 4. His Lands. 5. His Goods; and in such Case the King shall have *Annum, diem, & vastum*, to the Intent that his Wife and Children shall be ejected, his Houses pulled down, his Trees eradicated, and subverted, his Meadows (*a*) plough'd and all that he has for his Comfort, Delight, or Sustenance, wasted and destroy'd, because he has in such felonious Manner offended against the Law; and all this was, *Ut (b) pœna ad paucos metus ad omnes perveniat:* But the Punishment of a Man who is depriv'd of Reason and Understanding, can't be an Example to others. 2. No Felony or Murder can be committed without (*c*) a felonious Intent and Purpose; *Et ideo dict' est felonia, quia fieri deb' felleo animo:* But *Furiosus non intelligit quid agit, & animo & ratione caret, & non multum distat a brutis*, as *Bracton* saith, and therefore he can't have a felonious Intent, *Vide* 21 *H.* 7. 31. 26 *Ass.* 27. *F. N. B.* 202. *D. Stamf. Pl. Coron.* 16. *b.* Also for the same Reason, *Non compos mentis* can't commit Petit Treason, as if a Woman, *Non compos mentis*, kills her Husband, as appears 12 *H.* 3. *Forfeiture* 33. But in some Cases *Non compos mentis* may commit High (*d*) Treason, as if he kills, or offers to kill the King, it is High Treason, for the King *est caput & salus Reipublicæ, & a capite bona valetudo transit in omnes*; and for this Reason their Persons are so sacred, that none can offer them any Violence, but he is *Reus criminis læsæ Majestatis, & pereat unus ne pereant omnes.* And it must be known, that there are four * Manner of *Non compos mentis:* 1. Ideot or Fool natural: 2. He who was of good and sound Memory, and by the Visitation of God has lost it: 3. *Lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound Memory, and sometimes *Non compos mentis:* 4. By his own Act, as a Drunkard; and it has been said, that there is great Difference between an Ideot *a nativitate*, and he who was of sound Memory, and becomes, by the Visitation of God, of unsound Memory; for an Ideot is known by his perpetual Infirmity of Nature, *a nativitate*, for he never had any Sense or Understanding to contract with any Man; but he who was of good Memory and Understanding, and able to make a Contract, and afterwards becomes by Infirmity or Casualty, of unsound Memory, is not so well known to the World as an Ideot natural. Also an Ideot in an Action brought against him shall appear in proper (*e*) Person, and he who pleads best for him, shall be admitted, as appears in 33 *H.* 6. 18. *b.* Otherwise it is of him who becomes *Non compos mentis*, for he shall appear by Guardian if he is within Age, and by Attorney if he is of full Age; but yet as to Estates or Gifts made by them, they themselves, by any Plea that they can plead, shall not avoid them, no less the Ideot than he who

(*a*) Co. Lit. 294. b.

(*b*) 3 Inst. 4, 6.

(*c*) Plow. 19. a. Hob. 134. 2 Roll. 547.

(*d*) 2 Roll. R. 324. Dalt. Just. 330. Hales pl. Cor. 10. 3 Inst. 6. 4 Godb. 316.

* Co. Lit. 247. a.

(*e*) Co. Lit. 135. b. F. N. B. 9, 27. Br. Ideot. 1. Stamf. Prærog. 36. a.

who becomes of unſound Memory; and be the Feoffment or Gift made by them in Perſon or by Attorney, they themſelves ſhall never avoid it either by Entry or by Action; for it appears by the ſaid Maxim, that they can't ſtultify (*a*) or diſable themſelves: But if they ſhall avoid Things which they do by Attorney, they themſelves ought to ſhew that they were then Ideots, or of unſound Memory: But yet as to others, there is a great Difference between an Eſtate made in Perſon and by Attorney; for if an Ideot or *Non compos mentis* makes a Feoffment in Fee in Perſon, and dies, his Heir within Age, he ſhall not be in Ward, or if he dies without Heir, the Land ſhall not eſcheat as is aforeſaid: But if the Feoffment is made (*b*) by Letter of Attorney, altho' the Feoffor ſhall never avoid it, yet after his Death as to all others in Judgment of Law, the Eſtate was void, and therefore in ſuch Caſe, if his Heir is within Age, he ſhall be in Ward, or if he dies without Heir the Land ſhall eſcheat, and that is the true Reaſon of the Books in 7 *H.* 4. 5. *b.* & 7 *H.* 4. 12. And like the Caſe of an (*c*) Infant, if he makes a Feoffment in Perſon, if he dies without Heir, the Land ſhall not eſcheat, but otherwiſe if it was made by Letter of Attorney, but the Infant himſelf ſhall avoid it, but ſo ſhall not the others; but Acts done by Matter of Record, as Fines, * Recoveries, Judgments, Statutes, Recognizances, *&c.* ſhall bind as well the Ideot, as he who becomes *Non compos mentis*, (*d*) 31 *E.* 3. *Saver default* 37. (371) 1 *Mar. Dum fuit infra ætatem* 7. Alſo of a Lunatick, all Acts which he doth during his Lunacy, are equivalent to Acts done by an Ideot, or he who is utterly *Non compos mentis*; but Acts done by him, *inter lucida intervalla*, when he is of ſound Memory ſhall bind him. Laſtly, altho' he who is (*e*) drunk, is for the Time *Non compos mentis*, yet his Drunkenneſs does not extenuate his Act, or Offence, nor turn to his Avail; but it is a great Offence in itſelf, and therefore aggravates his Offence, and doth not derogate from the Act which he did during that Time, and that as well in Caſes touching his Life, his Lands, his Goods, as any other Thing that concerns him: When and in what Caſes Laches ſhall prejudice an Ideot, or *Non compos mentis*, ſome have taken a Difference between a Bar of his Right, and a Bar of his Entry, for in Caſe of Bar of his Right, his Laches ſhall not prejudice him; but in ſuch ſpecial Caſe, if he becomes of unſound Memory, he ſhall ſhew that he was *Non compos mentis*; as if a Man, *Non compos mentis*, is diſſeiſed, and the Diſſeiſor levies a Fine, in this Caſe at the Common Law, although the Year and Day are paſt, yet he who was *Non compos mentis* ſhall not be thereby bound, but he may well enter, and that they ſay is proved by the Statute *de modo levandi fines*, made *Anno* 18 *E.* 1. which is but a Declaration of the Common Law, *ſc.* that a Fine is ſo high a Bar, and of ſo great Force, and of ſo ſtrong a Nature in it ſelf,

(*a*) Jenk. Cent. 40. Cr. El. 398, 622. F. N. B. 202. d. 1 Rol. 2. Antea 123. b. Br. Faits 62. Fitz. Iſſue 53. Godb. 302. Co. Lit. 347. a. b. Br. Dum fuit infra ætatem 3. Br. Entry congeable 47. Lit. Sect. 405. Lit. 95. a. b.

(*b*) F. N. B. 202. e. Br. Feoffm. 8.

(*c*) 8 Co. 42. b. 7 Co. 7. b. 2 Inſt. 483. Dy. 10. pl. 38. 49 E. 3. 13. a. 39 H. 6. 42. b. 7 H. 5, 9. b. 3 Bulſtr. 272.

* Antea 124. a. Cr. El. 187. Co. Lit. 247. a. Perk. Sect. 24. 2 Inſt. 483. Br. Fines levis, *&c.* 75. 12 Co. 123, 124.

(*d*) Antea 124. a.

(*e*) Co. Lit. 247. a. Plow. 19. a.

(*f*) Co. Lit. 2. b. Plow. 359. b. 2 Inſt. 510, 511.

ſelf, that it bars not only thoſe who are Parties and Privies to the Fine and their Heirs, but all other People of the World who are of full Age, out of Priſon, and of good Memory, and within the four Seas the Day of the Fine levy'd, if they put not in their Claim by their Action or Entry in the Country within the Year and the Day; by which it appears, that no Laches of a Man *Non compos mentis* ſhall bar him of his Right. Alſo it appears by the Statute of 4 *H.* 7. *cap.* 24. that in ſuch Caſe, if a Man levies a Fine with Proclamations, and at the Time of the Fine levy'd, he who has Right is *Non compos mentis*, and afterwards he recovers his Memory, in this Caſe he ought to purſue his Action, or make his Entry within five Years, after he becomes of ſound Memory, and in ſuch Caſe in pleading, he ſhall ſhew, that at the Time of the Fine levied he was *Non compos mentis*, and all the ſpecial Matter; but if he who has ſuch Right is an Ideot, or *Non compos mentis*, and never recovers his Memory, the Heir may have his Action, or make his Entry when he will, for he is excepted out of the Body of the Act, and is not bound to make any Entry, or bring his Action within any Time, but the Party himſelf, if he recovers his Memory. The ſame Law, if he who is beyond Sea at the Time of the Fine levied, and dies, there his Heir may enter, or bring his Action when he will; and in ſuch Caſe the Lord by Eſcheat ſhall take Advantage of *Non compos mentis*, Infancy, Impriſonment, or being beyond Sea, of his Tenant: For if there are Lord and Tenant, and the Tenant is diſſeiſed, and the Diſſeiſor levies a Fine, the Diſſeiſee being then within Age, or *Non compos mentis*, or in Priſon, or beyond Sea, and afterwards the Diſſeiſor takes back an Eſtate to himſelf in Fee, and afterwards the Diſſeiſee within Age, or *Non compos mentis*, or beyond Sea, or in Priſon, dies without Heir, the Lord by Eſcheat ſhall take Advantage of every of them againſt the Diſſeiſor. So if a collateral Warranty deſcends upon one *Non compos mentis*, which he might have avoided by Entry: But an Ideot, or *Non compos mentis*, by their Laches ſhall be barr'd of their Entry; and therefore if they are diſſeiſed, and the Diſſeiſor dies ſeiſed, it ſhall toll their Entry; but after their Death their Heir may enter and take Advantage of the Infirmity of their Anceſtor; and his Laches, which ſhall prejudice himſelf, ſhall not prejudice his Heir of his Entry; and all this appears by *Littleton*, *lib.* 3. *cap. Deſcents*, * *fol.* 95. For *Littleton* ſaith, No Laches can be adjudged by the Law in him who has no Diſcretion in ſuch Caſe, *ſc.* having regard to his Heir, and ſo is the Difference. As to that which is commonly objected, that the Civil Law, in this Point, is grounded upon greater Reaſon than the Common Law; for by the Civil Law, all Acts which Ideots, or *Non compos mentis*, do without their Tutor, are utterly void; and this ſeems to ſome more reaſonable than the Common Law, becauſe he who is an Ideot,

2 Inſt. 520. Plowd. 366. a.

Lit. Sect. 405. * Con. Claims, fol. 39.

or

or *Non compos mentis* wants Diſcretion and Underſtanding, and that comes by the Act and Viſitation of God; therefore they ſay (God forbid) that his Acts or Laches, during that Time, ſhould bind him: Others conceive, that the ancient Common Law agrees with the Civil Law in this Caſe; for *Bracton, lib. 3. fol.* 100. ſaith, *Furioſus autem ſtipulari non poteſt, nec aliq' negotium agere, quia non intellig' quod agit:* And therefore it ſeems unreaſonable that Acts done by them who have no Diſcretion, nor the Uſe of Reaſon, *Qui* (as *Bracton* ſaith) *non multum diſtant a brutis qui ratione carent*, ſhould bind them; and therefore it is (as is commonly ſaid) a great Defect in Law, that no Tutor is aſſign'd to them by Law, who may protect them, and principally their Inheritance: As to that it muſt be known, that the Law of *England* has provided for them a Tutor, and has made Proviſion for the Preſervation of their Inheritance, and their Goods alſo, and therefore in the Caſe of an Ideot, or Fool natural, for whom there is no Expectation, but that he, during his Life, will remain without Diſcretion and Uſe of Reaſon, the Law has given the Cuſtody of him, and all that he has, to the K. who (as *F. N. B.* 232. ſays) is bound of Right by his Laws to defend his Subjects, and their Goods and Chattels, Lands and Tenements; and becauſe every Subject is in the K's Protection; an Ideot who can't defend or govern himſelf, nor order his Lands and Tenements, Goods and Chattels, the K. of Right ought to have him, and to order him, his Lands, Goods and Chattels; and this, it appears, was the Common Law; for *Britton, fol.* 16. who wrote *Anno* 5 *E.* 1. ſaith, That if any Heir is a Fool natural, by which he is not able to demand and keep his Inherit. *&c.* that ſuch Heirs of whomſoever they hold, Male or Female, remain in the Cuſtody of the King, with all their Inheritance; and thence it follows, that the Stat. of *Prærog. Regis, cap.* 9. made in 17 *E.* 2. long time after *Britton* wrote, was but a Declaration of the Common Law, and therewith agrees 18 *E.* 3. *Scire facias* 10. where it appears by the ſaid Stat. *Prærog. Regis*; *quod Rex habebit cuſtodiam terrarum fatuorum naturalium, capiendo exitus earundem ſine vaſte & deſtructione, & inveniet eis neceſſaria ſua, de cujuſcunque feod' terræ illæ fuerint, & poſt mortem eorundem reddat eam rectis hæredib', ita quod nullatenus per eoſdem fatuos alienentur, nec quod eor' hæredes exhæredentur:* Upon theſe Words I obſerve divers Things: 1. That the Law gives the K. but the Cuſtody of the Lands of the Ideot, that altho' it continues during the Life of the Ideot, yet having but the Cuſtody, the K. has not the Freehold in him, but the Freehold is in the Ideot, for the Statute ſays, *Quod poſt mortem eorundem reddat eam rectis hæredibus*, and that appears alſo in 17 *E.* 3. 11 *&* 13 (31) *E.* 3. *Saver default* 37.. 2. Although the Statute ſays, *Cuſtodiam terrarum*, yet the K. ſhall have as well the Cuſtody of the Body, and of their Goods and Chattels, as of the Lands and other Hereditaments, and as well thoſe which he has by Purchaſe, as thoſe which he has

Co. Lit. 135. b. Stamf. Prærog. 33. b.

Co. Lit. 247. a.

Stamf. Prærog. 33. b. 34. 8 Co. 170. a. 2 Inſt. 14. 1 And. 23. Dyer 25. 26. pl. 16. Moor 4.

Stamf. Pr. 35. b.

Co. Lit. 2. b.

has as Heirs by the Common Law. 3. That he ought to be an Ideot *a nativitate, ſc. fatuus naturalis*, and not by Accident or Infirmity. 4. That no Feoffment, Gift, Leaſe or Releaſe, that an Ideot can make of his Inheritance, but may be avoided during his Life, which appears by theſe Words, *Ita quod nullatenus per eoſdem fatuos alienentur, nec quod eorum hæredes exhæredentur*: Suppoſe then that an Ideot, above the Age of 21 Years, makes a Feoffment in Fee of his Inheritance, if you aſk how and in what manner it may be avoided during his Life? I anſwer, that if it is found by Office at the (*a*) King's Suit, that he was Ideot *a natavitate*, and that he has alien'd his Lands, then upon a *Scire facias* againſt the Alienees, the Land ſhall be ſeiſed into the K's Hands, and thereby the Inheritance ſhall be reveſted in the Ideot, 18 *E.* 3. *Sci. fac'* 10. 32 *E.* 3. *Sci' fac'* 106. 50 * *Aſſ.* 2. For the Statute ſays, *quod poſt mortem eorum reddat eam rectis hæredib'*, which the K. can't do, neither can the K. have the Poſſeſſion of the Land to his own Uſe, unleſs by the Office and the Seiſure, ſuch Conveyance made by the Ideot be deſtroy'd, and that doth not impugn the ſaid Maxim of the Common Law. For in this Caſe the Ideot, in no plea that he can plead, ſhall diſable (*b*) or ſtultify himſelf: But all this is found by Office, by the Inquiſition and Verdict of 12 Men at the K's Suit, who are not concluded to ſpeak the Truth, and ſuch Office, when it is found, ſhall have † Relation *a tempore nativitatis*, to avoid all mean Acts done by the Ideot, as Feoffments, Releaſes, *&c.* and therewith agree 23 (32) *E.* 3. *&c. Sci' fac'* 106. *& Stamf. Prærog.* 34. *b. F. N. B.* 202. *E.* But notwithſtanding the Words of the ſaid Act are general and emphatical, *nullaten' alienen'*, yet if he aliens by Fine, (*c*) or Recovery, it ſhall bind him, as has been ſaid, for the Cauſe aforeſaid; and ſo after ſuch Office found, all Gifts made by him of his Goods or Chattels, and all Bonds made by ſuch Ideot, are utterly void, and after ſuch Office found, if the Ideot be ſued in any Action, upon any Bond or Writing that he has made, the K. by his Writ (ſo long as the Office ſtands in Force) reciting the Office, ſhall ſend a *Superſedeas* to the Juſtices where the Suit is commenc'd: But the K. ſhall not have the Cuſtody of the Land which an Ideot holds by (*d*) Copy, for that is but an Eſtate at Will by the Com. Law, and if the King ſhould have the Cuſtody of it, it would be a great Prejudice to the L. of the Manor; but yet an Alienation made by an Ideot of his Copyhold after Office found, ſhall be avoided, *vide* 13 *Eliz. Dyer* 302. And that the K. ſhall have the Protection of the Goods (*e*) and Chattels of an Ideot, as well as of his Lands, appears by *F. N. B.* 232. *b.* where he ſays, that if an Ideot who can't defend, or govern himſ. nor order his Lands, Tenements, Goods, and Chattels, the K. of Right ought to have him in his Cuſt. and to protect him and his Lands, Goods and Chattels; and this appears alſo by the Writ in the *Reg' de Ideota inquirendo*, where it is ſaid, *Quia (f) accep' quod J. de B. fatuus & Ideot' exiſt', ita qd' regim'*

ſui

(*a*) Jenk. Cent. 40. Co. Lit. 247. a. 8 Co. 170. a. 2 Rol. Rep 337. Godb. 302. F. N. B. 202. e. Stamf. Prærog. 34. b. * Antea 56. b. Br. Alienat. 14. Br. Ideot 2. Br. Travers de Office 22. Antea 24. Br. Feoffment de, &c. 63.

† 8 Co. 170. a. (*b*) Jenk. Cent. 40. Cr. El. 398, 622. F. N. B. 202. d. 1 Rol. 2. Br. faits 62. Fitz. Iſſue 53. Godb. 302. Co. Lit. 247. a. b. Br. Dum fuit infra ætatem 3. Br. Entry congeable 42. Lit. Sect. 405. Lit. 95. a. b.

(*c*) Cr. El. 187. Co. Lit. 247. a. Perk. Sect. 24. Br. Fines levies, &c. 75. 12 Co. 123, 124. 2 Inſt. 483. (*d*) Hard. 434. Stiles 21.

(*e*) Stamf. Pr. 36. a.

(*f*) F. N. B. 232. b.

ſui ipſius terrarum, tenementorum, bonorum & catallorum ſuor' non ſufficit, & quod ipſe in fatuitate ſua magnam partem terrarum & tenementor' ſuor' alienavit, & etiam magnam partem bonor' & catallor' ſuor' diſſipavit in exhæredationem ſuam, & noſtri prejudic' manifeſt', nos indemnitate ipſius in hac parte proſpicere volentes, &c. By which it appears, that by the Common Law, the K. ſhall have as great Protection of the Goods and Chattels of an Ideot, as of his Lands, and that as well the Conſumption of his Goods and Chattels, as the Alienation of his Lands is to be remedied and redreſs'd by the King, to whom the Law gives his Cuſtody and Protection. And as after Office found, he can't alien, give, *&c.* ſo Alienations, Gifts, *&c.* made before Office found, ſhall be avoided after Office thereof found, as is aforeſaid, for no Laches ſhall be accounted in the King, nor no Prejudice thereby accrue to the Ideot for not ſuing of the Office before the Feoffment or Gift. But if the Ideot dies before Office found, after his Death, no Office can be found, for the Words of the Writ are, *Et ipſum viis & modis quibus ſuper ſtatu ſuo melius poteritis informari circumſpecte examinaretis, &c.* which can't be done when he is dead, and without Office the King can't be entitled, 16 *E.* 3. *Livery* 30. and then the former Differences as to his Lands and Goods hold. The ſame Law, if a Man who was of ſound Memory becomes *Non compos mentis*, and afterwards aliens his Land, or Goods or Chattels, and afterwards, by Office at the King's Suit, it is found that he was *Non compos mentis*, and that he has alienᵉd, *&c.* the King ſhall protect him who can't protect himſelf, as is aforeſaid, and ſhall take the Profits of his Lands, and of all that he had (which the King could not do if his Alienation or Gift ſhould ſtand) and therewith maintain him and his Family, but the King ſhall not take any Part of the ſaid Profits to his own Uſe; and all this appears by the Statute of *Prærog. Reg. cap.* 10. which was but a Declaration of the Common Law; *Item Rex providebit, &c. Et nota* that the ſaid Words of *F. N. B.* 232. that the King is bound of Right by his Laws, to defend his Subjects, and their Goods and Chattels, Lands and Tenements, extend as well to *Non compos mentis*, as to an Ideot; but in Caſe of *Non compos mentis*, the K. has not any Intereſt in the Lunatick (as he has in the Ideot) becauſe the Lunatick may recover his Memory which he has loſt, and therefore in the Caſe of the Ideot, the Law ſays, *Rex habebit Cuſtodiam*, but in the Caſe of *Non compos mentis*, *Rex providebit.* And as to Alienation made by *Non compos mentis*, the Words are all one as they are in the Caſe of the Ideot, *ſc. Ita quod præd' terr' & tenementa infra præd' tempus nullatenus alienent'*, and therefore after the Office found thereof, the Alienation, Gift, *&c.* of him who is *Non compos mentis*, are in equal Caſe with the Alienation or Gift of an Ideot, and the ſaid Words of the ſaid Writ in the Regiſter, *Quia accipimus quod* I. *de* B. *fatuus & Ideota exiſtit, &c.* extend as well to *Non compos mentis*, as to a Fool natural,

8 Co. 170. a.

Stamf. Prærog. 34. a. Godb. 321.

Dyer 26. a.

Stamf. Prærog. 36. b. 2 Sid. 124.

17 E. 2. cap. 9. 10.

F. N. B. 232. b.

for afterwards, in the ſame Writ, it is ſaid, *Diligenter inquiras ſi idem* I. *fatuus & Ideota ſit necne, & ſi ſit, tunc utrum a nativitate ſua, an ab alio tempore, & ſi ab alio tempore, tunc a quo tempore & qualiter & quomodo, & ſi lucidis gaudet intervallis & ſi Idem* I. *in eodem ſtatu exiſtens terras aut tenementa aliqua alienavit necne, &c.* So that it appears that in Judgment of Law, *Fatuus & Ideota* include as well *Non compos mentis*, as *Ideota a nativitate*, and therefore they are in the ſame Caſe, as to the Alienation of their Lands and Tenements, Goods and Chattels. *Hill.* 28 *H.* 8. *Rot.* 401. in *C. B.* the Caſe was; In Treſpaſs *Quare clauſum fregit*, and cut his Trees in *Paddington*, in the County of *Middleſex*, *per Johan' Frauncis verſus Will' Holmes*, the Defendant pleaded, that it was found by Office before the Eſcheator in the ſaid County of *Middleſex*, that the ſaid *John Frauncis* was a Lunatick, *&c.* and that he was ſeiſed in Fee of the Land in which, *&c.* wherefore the King ſeiſed his Perſon, and his Land, and by his Letters Patents granted the Rule, Cuſtody and Government of the ſame Perſon and of his Lands, to the ſaid *Holmes*, *quamdiu* that the Perſon was lunatick, to take the Profits to his own Uſe, and ſo juſtify'd, and pray'd in Aid of the King, and thereupon it was demurr'd in Law, if he ſhould have Aid or not. And it was adjudg'd, that he ſhould not have Aid of the King, for this Grant was utterly void, for the King is bound to keep the ſaid Lunatick, his Wife, Children and Houſhold, with the Profits of the Land, and without taking any Thing to his own Uſe, but all to the Uſe of the *Non compos mentis* and his Family, and all this to the Intent that the King may provide, that he who wants Reaſon ſhall not alien his Lands, nor waſte his Goods; and the King, after Office found, has only Proviſion, and has not any Cuſtody or Poſſeſſion of the Body or Lands of one *Non compos mentis*, as he has of an Ideor, and he has nothing to grant over: But if the King provides one to have Care and Charge, that he who is *Non compos mentis*, and his Family ſhall be maintain'd, and that nothing ſhall be waſted; or if one, of his own Head, takes ſo much upon himſelf, in this Caſe he is but as Bailiff of him who is *Non compos mentis*, and ſhall be accountable as Bailiff to him who is *Non compos mentis*, or to his Executors or Adminiſtrators; and he can't cut down Trees but for neceſſary Houſebote, Ploughbote, and Cartbote, and to repair ancient Pales, and all that which a Bailiff may do, he may do, and not otherwiſe. And therewith agrees a Writ in the *Regiſter* directed to the Sheriff, *Diligenter inquiras utrum* I. *de* B. *a nativitatis ſuæ tempore ſemper hactenus purus Ideota exiſtit, per quod cuſtodiam terrarum & tenementorum ſuorum in* C. *ad nos debeat pertin', an per infortun' vel alio modo in hujuſm' infirmitat' poſtea incider', propter quod hujuſm' cuſtodiam ad nos pertinere non debeat.* And ſo by theſe Differences annex'd you will underſtand your

1 Anderſ. 23. Moor 4. N. Bendl. 17, 18. Dy. 25. 26. pl. 164.

Hutt. 16.

your Books, 18 *E.* 2. *Fines* 120. 3 *E.* 3. *Tit. Entry congeable Statham.* 3 *E.* 3. *Formedon.* —— 5 *E.* 3. 70. 10 *E.* 3. *Scire facias* 10. and as well 32 *E.* 3. *Scire facias* 106. 17 *Aſſ.* 17. 17 *E.* 3. 11. 25 *Aſſ.* 4. 35 *Aſſ.* 10. 50 *Aſſ.* 2. 9 *H.* 6. 6. 39 *H.* 6. 24. (42) 12 *E.* 4. 8. *F. N. B.* 202. *&* *Stamf. Prærog.* 34. *Bract. lib.* 2. *fol.* 11, 12. *&* *lib.* 3. *fol.* 100. *Britton, fol.* 66. Co. Lit. 246. b. *Brooke Tit. Dum fuit infra ætatem* 9. and divers Writs in the 247. a. b. *Regiſter, fol.* —— and which are agreeable with the true Reaſon of the Common Law. *Nota Reader, Ideota ſive Ideotes,* is a *Greek* Word, and properly ſignifies a private Man, who has not any publick Office: *Apud Latinos accipitur* for illiterate and ſimple; *apud Juriſperitos noſtros, Non compos mentis*; *Apud Anglos,* in common Speech, a natural Fool: *Fatuus prop' dic' a fando, quia fatur qd' puer primo fatur, id* Co. Lit. 246. b. *eſt, quia inepte loquitur*; *ſed apud Juriſperitos noſtros accip' pro Non compos mentis, & fatuus dic' qui omnino deſipit: Stultus dicitur a ſtupore, quia ſtultus eſt qui propter ſtuporem movetur*; *levius eſt eſſe ſtultum quam fatuum, ſc. imprudens, improvidus, ignorans mali & boni. Inſanus qui objecta ratione omnia cum impetu & furore facit. Amens, ab (a) quæ eſt particula privativa, & mente, id eſt conſilio & animo. Demens, eſt quæ non cogitat quid agit aut loquitur, (de) eſt particula privativa: Amens qui prorſus inſanit*; Ariſt. 7. Ethicorum, *Amentes dicuntur qui a natura experti rationis ſolum ſenſuum munus exequuntur.*

FINIS.

The Order of the CASES *in this Fourth Book.*

			Fol.
1	VErnon's Caſe.	*Mich.* 14 & 15 *Eliz.*	1
2	Bevil's Caſe.	*Mich.* 17 & 18 *El.*	8
3	*Actiones de Scandalis*, or Actions for Slander.	*Trin.* 20 *Eliz.*	12
4	Copyhold Caſes.	*Mich.* 23 & 24 *El.*	21
5	Mitton's Caſe.	*Paſch.* 26 *El.*	32
6	Bozoun's Caſe.	*Mich.* 26 & 27 *El.*	34
7	Tyrringham's Caſe.	*Mich.* 26 & 27 *El.*	36
8	Caſes of Appeals and Indictments.	*Hill.* 28 *El.*	39
9	Andrew Ognel's Caſe.	*Hill.* 29 *El.*	48
10	Rawlins's Caſe.	*Mich.* 29 & 30 *El.*	52
11	The Caſe of the Wardens and Commonalty of Sadlers.	*Trin.* 30 *El.*	54
12	Force and Hembling's Caſe.	*Mich.* 30 & 31 *El.*	60
13	Herlakenden's Caſe.	*Paſch.* 31 *El.*	62
14	Fulwood's Caſe.	*Hill.* 33 *El.*	64
15	Hind's Caſe.	*Trin.* 33 *El.*	70
16	Boroughes's Caſe.	*Paſch.* 38 *El.*	72
17	Palmer's Caſe.	*Hill.* 39 *El.*	74
18	Holland's Caſe.	*Trin.* 39 *El.*	75
19	Caſes of Corporations.	*Mich.* 40 & 41 *El.*	77
20	Digby's Caſe.	*Hill.* 41 *El.*	78
21	Nokes's Caſe.	*Trin.* 41. *El.*	80
22	Sir Andrew Corbet's Caſe.	*Mich.* 41 & 42 *El.*	81
23	Southcot's Caſe.	*Paſch.* 43 *El.*	83
24	Luttrel's Caſe.	*Paſch.* 43 *El.*	86
25	Drury's Caſe.	*Trin.* 43. *El.*	89
26	Slade's Caſe.	*Trin.* 44 *El.*	92
27	Adams and Lambert's Caſe.	*Mich.* 44 & 45 *El.*	104
28	Acton's Caſe.	*Hill.* 45 *El.*	117
29	Dumport's Caſe.	*Hill.* 45 *El.*	119
30	Buſtard's Caſe.	*Paſch.* 1 *Jac. Regis*	121
31	Beverley's Caſe of *Non compos mentis.*	*Paſch.* 1 *Jac. Reg.*	123