The Fifth PART of the

REPORTS

OF

Sir *Edward Coke* Kt.

Her Majeſty's ATTORNEY GENERAL.

OF

Divers Reſolutions and Judgments given with great Deliberation, by the Reverend Judges and Sages of the Law, of Caſes and Matters in Law which were never reſolved or adjudged before: And the Reaſons and Cauſes of the ſaid Reſolutions and Judgments, during the moſt happy Reign of the moſt Illuſtrious and Renowned Queen *ELIZABETH*, the Fountain of all JUSTICE and the LIFE of the LAW.

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

Quid enim laboro, niſi ut veritas in omni quæſtione explicetur; verum dicentibus facile cedam. TUL. Tuſc. quæſt. lib. 3.

In the SAVOY:

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TO THE READER.

VERE dicitur (candide Lector) quod *Error* (cui *ignorantia* gemella eſt individua) in progreſſu adeo infinite ſe multiplicat, tam prodigioſas & novas Chimæras procreat, tanta & tam multiplici incertitudine fluctuat, & ejuſmodi venenum ex virulento *ignorantiæ* halitu imbibit, ut ſingulos quibus aliquid ſui venenati halitus infundit, peſtifera contagione inficiat ſeu contaminet; Quodque mirandum eſt, priuſquam ad terminum perveniat, ad miſerum & immaturum exitum (niſi prævertatur) confuſione

IT is truly ſaid (good Reader) that Error (Ignorance *being her inſeparable Twin*) *doth in her Proceeding ſo infinitely multiply her ſelf, produceth ſuch monſtrous and ſtrange Chimæra's, floateth in ſuch and ſo many Incertainties, and ſucketh down the Poiſon from the contagious Breath of Ignorance, as all ſuch into whom ſhe infuſeth any of her poiſoned Breath, ſhe dangerouſly infects or intoxicates; And that which is wonderful, before ſhe can come to any End, ſhe bringeth all Things (if ſhe be not prevented) by Confuſion to a miſerable and untimely*

Pref. to Parſons's Anſwer.

End; Naturalia & vera artificialia ſunt finita, nullus terminus falſo, error immenſus. *On the other Side, Truth cannot be ſupported or defended by any Thing but by Truth her ſelf, and is of that Conſtitution and Conſtancy, as ſhe cannot at any Time, or in any Part or Point be diſagrecable to her ſelf; ſhe hateth all Bombaſting and Sophiſtication, and bringeth with her Certainty, Unity, Simplicity, and Peace at the laſt*; Putida ſalſamenta amant origanum, *Veritas* per ſe placet, honeſta per ſe decent, falſa fucis, turpia phaleris indigent. *Ignorance is ſo far from excuſing or extenuating the Error of him that had Power to find out the Truth (which neceſſarily he ought to know) and wanted only Will to ſeek it, as ſhe will be a juſt Cauſe of his great Puniſhment*: Quod ſcire debes & non vis, non pro ignorantia ſed pro contemptu haberi debet. *Error and Falſhood are of that Condition, as without any Reſiſtance they will in Time of themſelves fade and fall away: But ſuch is the State of Truth, that though many do impugn her, yet will ſhe of her ſelf* quadam abripit; *Naturalia & vera artificialia ſunt finita, nullus terminus falſo*, Error *immenſus*. Contra vero *Veritas* ſuſtentari & oppugnari niſi ipſa veritate minime poteſt, & ea eſt ejus natura & conſtantia, ut nullo tempore nulla parte ſibi a ſe diſſentiat, mangonio & phaleris exornari odit, comiteſque ſecum ducit *Unitatem, Simplicitatem*, & *Pacem* tandem: *Putida ſalſamenta amant origanum*, Veritas *per ſe placet, honeſta per ſe decent, falſa fucis, turpia phaleris indigent*. Tantum abeſt, ut *ignorantia* excuſet aut extenuet ejus errorem qui *Veritatem* invenire poterat (quam neceſſario agnoſcere debeat,) & tantum inveſtigare noluit, ut in cauſa ſit cur gravius plectatur; *Quod ſcire debes & non vis, non pro ignorantia ſed pro contemptu haberi debet*. Erroris & falſitatis ea eſt natura, ut nemine repugnante ſenſim per ſe dilabantur & evaneſcant: Ea autem veritatis natura, ut quamvis plurimi oppugnent, ipſa tamen demum vincat & ut Palma efflo-

reſcat;

reſcat; Ad tempus forſitan vi quadam prematur, ſed nullo tempore ulla ratione opprimatur. Nullus eſt hujus Reipublicæ Civis, qui illuſtribus documentis & perſpicuis indiciis de ſuo patrimonio & jure avito & certiſſimo vere edoctus (quamvis aliquantiſper ignorantia, falſa perſuaſione, aut inani timore deceptus fuerit, & poſſeſſione deturbatus) ſed Juris prudentes ad eam recuperandam conſulet: Antiquæ & præcellentes Angliæ Leges ſunt avita jura & antiquiſſima optimaque hæreditas quæ cives hujus Regni habent: Per illas etenim non ſolum hæreditate & bonis in pace & tranquilitate, ſed etiam vita & patria chariſſima ſecure gaudent. Cum autem male metuo ne ex chariſſimis concivibus permulti, (& ex illis quamplurimi præſtanti ingenio, ſingulari ſolertia, & eximiis animi dotibus) quia illuſtria quæ habent indicia minus intelligunt, jus etiam avitum in nonnullis maximi momenti rebus minus vere cognoſcant; In primo limine hujus Quinti operis mei illos direxi, & quaſi ma-

ever prevail in the End, and flouriſh like the Palm-Tree; ſhe may peradventure by Force for a Time be trodden down, but never by any Means whatſoever can ſhe be trodden out. There is no Subject of this Realm, but being truly inſtructed by good and plain Evidence of his ancient and undoubted Patrimony and Birth-right, (tho' he hath for ſome Time by Ignorance, falſe Perſuaſion, or vain Fear, been deceived or diſpoſſeſſed) but will conſult with learned and faithful Counſellors for the Recovery of the ſame: The antient and excellent Laws of England *are the Birth-right, and the moſt ancient and beſt Inheritance that the Subjects of this Realm have, for by them he injoyeth not only his Inheritance and Goods in Peace and Quietneſs, but his Life and his moſt dear Country in Safety. And for that I fear that many of my dear Countrymen, (and moſt of them of great Capacity, and excellent Parts) for want of underſtanding of their own Evidence, do want the true Knowledge of their ancient Birth-right in ſome Points of greateſt Importance; I have in the Beginning of this my Fifth Work, directed them to thoſe that will*

will not only faithfully counſel, and fully reſolve therein, (ſuch as cannot be daunted with any Fear, moved by any Affection, nor corrupted with any Reward,) but alſo eſtabliſh and ſettle them in quiet and lawful Poſſeſſion. Upon juſt Grounds to rectify an Error in a Man's own Mind, is a Work of a clear Underſtanding, and of a reformed Will, and frequent with ſuch as be good Men, and have ſober and ſettled Wits. The End of ſuch as write concerning any Matter, which by ſome, for want of Inſtruction, is called into Controverſy, ſhould be, with all the Candor and Charity that can be uſed, to perſuade and reſolve by demonſtrative Proofs the diligent Reader in the Truth. But now a Days thoſe that write of ſuch Matters, do for the moſt part by their bitter and uncharitable Invectives, tranſported with Paſſion and Fury, either beget new Controverſies, or do as much as in them lie to make the former immortal. Certain it is, that ſome Books of that Argument, that have had Truth for their Center, yet becauſe they have wanted Temperance, Modeſty and Ur-

nu duxi, ad eos qui non tantum ſano conſilio aderunt, & cumulate ſatisfacient (nec enim vel timore frangi, vel affectione moveri, vel præmio corrumpi poſſunt) verum etiam in tranquilla & juſta poſſeſſione ſtabilient & confirmabunt: Errorem ex animo ſolidis argumentis extorquere intellectus eſt acerrimi, animi integri, viriſque probis, ſobriis, & ſanis non eſt inſolens. Hoc iis propoſitum eſſet qui de re aliqua ſcribunt, quæ inter alios controvertitur quia non ſunt informati, ut omni quo poſſunt candore & charitate ſtudioſum Lectorem certiſſimis argumentis perſuadeant & edoceant. Sed ut nunc ſunt tempora, qui de ejuſmodi rebus ſcribunt, animi impetu abrepti, acerbis & contumelioſis convitiis aut novas controverſias ſuſcitant, aut quantum in illis eſt priores reddunt immortales: Certo certius eſt nonnullos ejus generis libros, quibus veritas ipſa centrum fuerat, nihilominus quia in peripheria temperantia, modeſtia & urbanitas non aderant,

in

in veritatis præjudicium adverſarios in erroribus obfirmaſſe ſuis; & conviciis amarulentis non ſolum exacuerunt eos ut ſe ipſos defenderent, & defendendo ſimiliter impingerent, verumetiam ſæpenumero (inde ad ſcribendum adacti) errorem ipſum in multorum fraudem propugnarent, qui alias nemine contradicente in auras abiiſſet. Qui contra conſcientiam veritatem cognitam oppugnat, id facit aut ſui ipſius aut aliarum gratia; ſui ipſius, eo quod animo ſit male contento: Aliorum, quibus ob aliam rationem placere ſtudet: Male ille contentus, quia quo ambitioſa & injuſta cupiditas traxit non pervenerit, aut quia in luce Reipublicæ, ob pravitatem vel flagitia, pœnam merito ſubierit, aut gratia exciderit, ac igitur tempori adverſo æſtu oblu&tatur ut aliis placeret, eo quod ex eorum favore & benevolentia, ejus æſtimatio & victus dependet. Non me latet, quod hoc tempore omnia Regna & Reſpublicæ Legibus adminiſtrantur, quodque ſua cujuſque nationis peculi-

banity for their Circumference, have to the great Prejudice of the Truth hardened the Adverſaries in their Errors; and by their bitter Invectives, whetted them not only to defend themſelves, and to offend in the like, but many Times (being thereby urged to write) to defend the Error it ſelf to the Hurt of many, which otherwiſe might have vaniſhed away without any Contradiction. He that againſt his Conſcience doth impugn a known Truth, doth it either in reſpect of himſelf, or of others; of himſelf, in that he hath within him a diſcontented Heart; of others, whom for certain wordly Reſpects he ſeeketh to pleaſe: Diſcontented he is, either becauſe he hath not attained to his ambitious and unjuſt Deſires, or for that in the Eye of the State, he for his Vices or Wickedneſs, hath juſtly deſerved Puniſhment and Diſgrace, and therefore doth oppoſe himſelf againſt the Current of the preſent Times to pleaſe others, in Reſpect that his Credit or Maintenance dependeth upon their Favour or Benevolence. I know that at this Day all Kingdoms and States are governed by Laws, and that the particular and ap-

approved Cuſtom of every Nation is the moſt uſual binding and aſſured Law; I deal only with the Municipal Laws of England, *which I profeſs, and whereof I have been a Student above theſe thirty-five Years: My only End and deſire is, that ſuch as are deſirous to ſee and know (as who will not deſire to ſee and know his own?) may be inſtructed: Such as have been taught amiſs (every Man believing as he hath been taught) may ſee and ſatisfy himſelf with the Truth, and ſuch as know and hold the Truth (by having ſo ready and eaſy a Way to the Fountains themſelves) may be comforted and confirmed.*

aris & approbata conſuetudo, uſitatiſſimum eſt vinculum, & Lex firmiſſima; Mihi res eſt cum Municipalibus Angliæ Legibus quas profiteor, & quibus jam triginta quinque annos invigilavi: Hoc mihi ſolummodo propoſitum, & in votis eſt, ut qui expectant perſpicere & cognoſcere (Quis enim quæ ſua ſunt videre & recognoſcere non expetit?) edoceantur, qui male fuerint edocti (Quiſque enim credit ut eſt edoctus,) veritatem perſpiciant & in ea acquieſcant, qui autem veritatem perſpiciunt & tuentur, (cum tam facilis via ad ipſos fontes pateat) cum ſolatio confirmentur.

Vale.

Parſon's Anſwer, fol. 19.

Multa Ignoramus quæ non laterent, ſi Veterum lectio nobis eſſet familiaris. Macrob. lib. 6. Satur.

De

CASES of LEASES.

CLAYTON's *Case.*

Mich. 27 & 28 Eliz.

In the King's Bench.

IN *Ejectione firmæ* between *Clayton* and *Preſenham*, of Lands in *Littleton* in the County of *North.* the Caſe was ſuch; Indentures of Demiſe were ingroſſed bearing Date 26 *Maii, anno* 25 *Eliz.* of Land in *L.* to have and to hold (for three Years from henceforth) and the ſaid Indentures were delivered at four of the Clock in the Afternoon, the 20th Day of *June, anno* 25 *ſupradicto*: And when this Leaſe by Computation ſhould have its Beginning, whether from the Day of the Date, or from the Delivery, was the Queſtion. And in this Caſe three Points were reſolved by *Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. Latch 61. 6 Mod. 244.

1. That (*a*) (*from henceforth*) ſhould be accounted from the Day of the Delivery of the Indentures, and not by any Computation of Date; for, *from henceforth* is as much as to ſay, *from the making*, or *from the Time of the Delivery of the Indentures*, or (*b*) *a confectione præſentium*; for the Confection or making of the Leaſe does begin by the Delivery, and theſe Words (*from henceforth*) or any other Words of the Indenture, are not of any Effect or Force until Delivery, *quia traditio loqui facit chartam.*

(*a*) Co. Lit. 46. b. Cr. Jac. 258. Wing. Max. 13. 2 Co. 5.

(*b*) Co. Lit. 46. b. 2 Rol. 520. Poſt. 94. a. Cr. Jac. 647. Plow. 108. b. Wing. Max. 1. Perk. Sect. 1.

2. That where the ſaid Indent. was delivered at 4 of the Clock in the Aftern. of the ſaid 20 of *June*, it was reſolved, that this Leaſe ſhould end the 19th Day of *June* in the 3d

Year for the Law in this Computation doth reject all (*a*) Fractions and Diviſions of a Day for the Incertainty, which is always the Mother of Confuſion and Contention.

(*a*) 1 Brownl. 125. Moor 879. Cowly 198. 2 Rol. 521. 3 Inſt. 53.

3. That in this Caſe the Day of the Delivery of the Leaſe ſhould be taken *incluſive*, and the Day itſelf is Parcel of the Demiſe; ſo where the Demiſe is limited to begin from the Making; but if the Leaſe be to begin from the Day of the Making, (*b*) or from the Day of the Date, there the Day itſelf of the Date is excluded, and ſo the Doubt in 12 *Eliz. Dyer* 286. well explain'd, and with this Reſolution agrees 14 *Eliz. Dyer* 307. And it was adjudg'd in the *Common Pleas*, *Trin.* 21 *Eliz.* where the Words of the Stat. of 27 *H.*8. *cap.*16. of Inrolments are (*within ſix Months after the Date of the ſame Writings indented*) that if ſuch Writings have a Date, the ſix Months ſhould be accounted from the Date, and not from the Delivery; but if they have no Date, then the ſix Months ſhould be accounted from the Delivery. *Vide Dyer*, 5 *Eliz.* 218. An Indenture of Bargain and Sale bore Date the fourth Day of *October*, 4 & 5 *Phil.* & *Mar.* was (*c*) inrolled the 21ſt Day of *March* next following, which was the laſt Day of the ſix Months, accounting the Day of the Date *excluſive*. And it was adjudged on Demurrer in the *Common Pleas* (which Plea began *Paſ.* 4 *Eliz. Rot.* 812.) that the Deed was well inrolled within the ſaid Act; for the whole Day of the 4th of *Octob.* ſhould be accounted in Law the Date of the Indenture, *unde ſequitur*, *That from the Date* (*d*) *and from the Day of the Date*, are all of one Senſe, foraſmuch as in Judgment of Law, the Date doth include the whole Day of the Date.

(*b*) Hob. 140. Alleyn 77. Cr. Jac. 135, 136, 258, 647. Co. Lit. 46. b. Poſt 94. a. 2 Rol. 520. 1 Rol. Rep. 387, 388. Owen 50. 1 Bulſtr. 177. 2 Bulſtr. 83. 3 Bulſt. 203. 2 Cr. 264.

(*c*) Hob. 139, 140. Moor 40, 41, 42, 879. Dall. in Kelw. 205. pl. 6 Dall. in Aſh. pl. 6. 2 Inſt. 674. Yelv. 100. Latch 14, 60. Dall. 41, 42. 1 Rol. Rep. 387. 3 Bulſt. 203. Dyer 218. pl. 6. 286. pl. 43. Co. Lit. 46. b.

(*d*) Cr. Jac. 136. 1 Rol. Rep. 387. 3 Bulſt. 204. Salk 413, 625.

[*See 6 Mod.* 244.]

ELMER's *Caſe.*

Trin. 30 Eliz.

In the King's Bench.

BEtween *Elmer* (*a*) Biſhop of *London*, and *Gale* Defendant for the Scite of the Manor of *Drayton* in *Middleſ.* two Points were reſolved.

1. That the Statute of (*b*) 1 *Eliz.* is a private Act, whereof the Court without pleading of it would not take Notice.

2. It was reſolved, That where the ſaid Scite Parcel of the Biſhoprick was in Leaſe for Years, and *Grendal* the Biſhop ouſted the Leſſee, and made a Leaſe (which was confirmed by the Dean and Chapter) for three Lives, rendering the ancient and accuſtomed Rent; that this Leaſe was voidable by the (*c*) Succeſſor. 1. Becauſe the Statute of 1 *Eliz.* was in the Diſjunctive for 21 Years or three Lives, and therefore the Biſhop could not make both: But if in the Caſe at Bar the ſaid Leaſe ſhould be good, then a Biſhop might make a Leaſe for 21 Years, and preſently after make a Leaſe for three Lives, which would be againſt the Words and Meaning of the Act. 2. The Rent reſerved on the Leaſe is not payable within the Meaning of the ſaid Act; for although *ex vi termini* it is payable, becauſe after the Leaſe for Years determined, the Leſſor might diſtrain for all the Arrearages of the Rent reſerved on the Leaſe for Lives; yet it is not payable within the Meaning of the Act, for the Act was made to maintain Hoſpitality, and to avoid Dilapidations, and that cannot be but by a continual Revenue yearly payable by Compulſion of Law, and not in Expectancy, or *in futuro.* For (*d*) Poſſibilities neither maintain Hoſpitality nor repair Churches; and in this Caſe the Biſhop would have but a Poſſibility; for the Leſſees for Lives would have the Rent reſerved on the Leaſe for Years; and if they

(*a*) 10 Co. 60. b. Moor 253. Hard. 89. 2 Brownl. 164. Winch 47.

(*b*) Raſt. Leaſes 4. Cr. Jac. 112. 4 Co. 76. a. Doct. plac. 337. Moor 108, 253. 1 And. 65, 66, 193. 3 Leon. 59. Cr. El. 141. 2 Brown 164. Co. Lit. 45. a. Palm. 467, 468. Latch 241. Cr. Car. 50. 10 Co. 60. a. b.

(*c*) 3 Co. 60. a. Co. Lit. 45. Cr. El. 473, 474, 564. 10 Co. 59. a. 3 Keb. 109. 1 Mod. Rep 205. Cart. 13, 16. 1 Vent. 247. 1 Rol Rep. 152, 154, 156, 169.

(*d*) Bridg. 122.

ſurvive the Leaſe for Years, then the Biſhop and his Succeſſors would have remedy for the Rent and Arrearages reſerved on the Leaſe for Lives, as it hath been ſaid. And it was ſaid, That where the Statute of (*a*) 32 *H.* 8. *cap.* 28. provides, *That the old Leaſe be ſurrendered within one Year*, &c. that a Surrender (*b*) conditional is not within the ſaid Act: For the Intent of the Makers of the Act was to have a continuing and abſolute Surrender, and not ſuch illuſory Surrender, which might be avoided the next Day; for *factum non dicitur quod non perſeverat*; and *Senſus verborum eſt anima legis.* But in the principal Caſe Judgment was given againſt the Biſhop, for not pleading the ſaid Stat. of 1 *Eliz.*

(*a*) 10 Co. 60. a. 3 Co. 50. b. 5 Co. 6. a. 6 Co. 37. a. 7 Co. 7. b. 8 Co. 34. a. 72. a. 9 Co. 140. b. Co. Lit. 44. a. 33. a. Plow. 112. b. Raſt. Leaſes 2. Dyer 72. pl. 3. 162. pl. 48, 191. pl. 22, 246. pl 69. 271. pl. 28, 357. pl. 43, 363. pl. 26. Savil 85. pl. 165. Cr. Jac. 173. Cr. Car. 22, 44, 435. 1 Rol. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch 45. Bridg. 28. Moor 58, 759, 783. 1 Leon. 59, 148. 3 Leon. 132, 156. 1 Jones 60. 2 Inſt. 342, 681. Godb. 102. pl. 119. 3 Keb. 381. Cr. El. 350, 602.

(*b*) Moor 783. Hutt. 8. Lit. Rep. 131. Hob. 204. Co. Lit. 44. b.

JEWELL's

JEWEL's *Caſe.*

Trin. 30 Eliz.

In the King's Bench.

BEtween *Paul* and *Maior* the Caſe was; (*a*) *Jewel* Biſhop of *Salisbury* 6 *Eliz.* by Deed indented made a Leaſe of a Fair, Parcel of the Poſſeſſions of his Biſhoprick, with all Profits thereof in *Sherburn* in the County of *Dorſet* for three Lives, rendering *the old and accuſtomed Rent*, which was confirmed by the Dean and Chapter; and afterwards the Biſhop died; and if this Leaſe was good againſt the Succeſſor, and not reſtrained and made void by the Statute of (*b*) 1 *Eliz.* not printed, was the Queſtion. And it was adjudged that the Succeſſor ſhould avoid the Leaſe; for a Fair is but a Franchiſe or Liberty, not manurable, out of which a (*c*) Rent cannot be reſerved; and therefore for ſuch Rent reſerved the Leſſor or his Succeſſors have not any Remedy, either by Diſtreſs or Aſſiſe; and all Leaſes of ſuch Inheritances, out of which the antient and accuſtomed Rent cannot be well and lawfully reſerved, are voidable by the ſaid Act. It was alſo reſolved, that if the Leaſe had been made for 21 (*d*) Years, rendering *the antient and accuſtomed Rent*, the Succeſſor ſhould avoid it; for altho' the Rent reſerved ſhould be good by Way of (*e*) Contract between the Leſſor and the Leſſee, yet it is not incident to the Reverſion, nor ſhall go with it; and therefore ſuch Leaſe ſhould be alſo voidable by the Succeſſor, by the ſaid Stat. *Vide* 17 *E.* 3. 75. *b.* 9 *Aſſ. p.* 24. (*f*) 30 *Aſſ. p.* 5. 14 *E.* 3. *Scire* (*g*) *facias* 122. 10 *H.* 6. 2. 3 *H.* 6. 21, &c.

(*a*) 10 Co. 60 b.

(*b*) Ley's Rep. 77. 5 Co. 2. a. Raſt. Leaſes 4. Cr. Jac. 112. 4 Co. 76. a. Doct. plac. 337. Moor 108, 253. 1 And. 65, 66, 193. 3 Leon. 59. Cr. El. 141. Co. Lit. 405. a. 2 Brownl. 164. Palm. 105, 467, 468. Latch 241. Cr. Car. 50. 10 Co. 60. a. b.

(*c*) 7 Co. 23. b. Co. Lit. 44. b. 142. a. Poſt. 4. a. Cr. Jac. 111, 112. Moor 163, 168. 2 Rol. 446. Cr. El. 690.

2 Sand. 303. Vaugh. 203. Raym. 194.

(*d*) Cr. Jac. 112. 2 Sand. 303, 304. Moor 778.

(*e*) 2 Sand. 303.

(*f*) Poſtea 4. a.

(*g*) Poſt. 4 a.

The Lord MOUNTJOY's *Caſe.*

Mich. 31 & 32 Eliz.

In the King's Bench.

Moor 197, 494, Hardr. 89, 92, 397. 3 Keb. 192, 373, 378, 380, 583, 596, 597. Li. Rep. 305.

Richard Shephard was Plaintiff againſt *Blackaller* Defendant in an *Ejectione firmæ* of two Houſes and 18 Acres of Land in *Hemſton Arundel*, on a Demiſe made 10 *April* 28 *El.* for three Years; the Defendant pleaded Not guilty, and the Jurors, as to the Moiety of one Houſe and 18 Acres of Land, found the Defendant guilty, and as to the Reſidue they gave a ſpecial Verdict to this Effect: They found that the Tenements in which, &c. were Parcel of the Manor of *Hemſton Arundel*, and demiſed and demiſable Time out of Mind, by Copy, &c. And that *Robert* Lord *Brook* was ſeiſed of the ſaid Manor in Fee, and further found that by a ſpecial Act of Parliam. made 4 *Feb.* 27 *H.* 8. the ſaid Manor was intailed to *Anne* Wife of *Charles* Lord *Mountjoy*, and to *John Pawlet* and *Elizabeth* his Wife, and to the Heirs of their Bodies begotten, with divers Remainders over; by which Act it was provided as follows, *ſcil.* That the Donees, nor any of them, *non facerent aliquid in nocumentum, vel exhæredationem hæredum ſuorum vel eorum alicujus, vel alicujus eorum in remanere, ſed tantum pro junctura uxoris pro termino vitæ, vel alicujus viri, &c. pro termino vitæ, vel pro termino vitæ alicujus aliæ perſonæ vel pro annis, vel ad voluntatem, ſecundum conſuetudinem manerii; reddend' verum & antiquum reddit' prædictarum terrarum, & tenementorum ſic demiſſorum, & quod* all other Acts ſhould be void, as by the ſaid Act appears: And further found, that the ſaid Manor did conſiſt of divers free Rents amounting to 7 *l.* and of 15 Copyhold Tenem. which were held for Lives, the Cuſtomary Rent of which was 3 *l.*

3 *l.* and of the Demeſnes which had uſually been demiſed by Indenture for the ſeveral Rents and Farms of 7 *l.* &c. And that there was one Acre of Waſte, Parcel of the ſaid Manor, in which were divers Highways, and Common for the Tenants of the yearly Value of 12 *d.* And that on the Death of every Copyholder, the Lord by Cuſtom ought to have an Heriot; and that there was a Court Baron incident to the ſaid Manor, and Perquiſits of Court, and a Leet appertaining to the ſaid Manor; and that the Free Rents, or Copyhold Rents, or Heriots, or Perquiſits of Court, or Leet, never were demiſed before for Life, or Years, or otherwiſe; and that afterw. *Cha.* L. *Mountjoy* died, after whoſe Death the ſaid *Anne* his Wife in 5 *El.* did accept a Fine of a Stranger, *ſur conuſans de droit come ceo*, &c. of the Moiety of the ſaid Manor with the Appurtenanc. and of a great Number of Acres which did comprehend the Demeſnes; by which Fine the ſaid *Anne* did grant and render the Moiety of the ſaid Manor, &c. with the Appurt. for 300 Years, rendering Rent, amounting to the free Rents, the Copyhold-Rents, the Farm-Rents, and 18 *d.* more, and 12 *d.* for the Acre of Waſte, to be paid at two Feaſts of the Year, where the old Rent was payable at four Feaſts. And afterwards the ſaid *Anne* died, and the now Plaintiff claimed under the ſaid Leaſe for 300 Years: And the Defend. claimed by the Lord *Mountjoy* that now is, being Heir to the ſaid Entail. And the Doubt of this Caſe was, if the ſaid Leaſe for 300 Years, made in Manner and Form aforeſaid, was to be avoided by the ſaid Clauſe of Reſtraint of the ſaid Act of 27 *H.* 8. or not; and it was argued on the Plaintiff's Side (in which as much was ſaid as the Wit of Man could think or invent) that the Leaſe ſhould be good, and not reſtrained by the ſaid Act. And all that which was ſaid may be briefly divided into five Parts.

1. Foraſmuch as this Act reſtrains the Power which the Tenant in Tail had by the Laws of the Land, it ſhould be taken ſtrictly, as to the Reſtraint, and beneficially for the Tenant in Tail: And to that Purpoſe the Rule put by *Read* in 21 *H.* 7. 17. *b.* and 18 *E.* 4. 16. *a.* and divers other Books on that Ground were cited.

2. It was ſaid, That although the Rents of Aſſize, Heriots, Leets, &c. were never demiſed before, it was not material; for the Rent reſerved doth not (*a*) iſſue out of them, but only out of Things manurable, to which the Leſſor may reſort to diſtrain; as in 9 *Aſſ.* 24. A Leaſe of Land and of the Toll (*b*) of a Mill, rendering Rent, or in 30 *Aſſ.* 5. A Leaſe of Land and an (*c*) Hund. or Advowſ. rendering Rent, &c. all the Rent ſhall iſſue out of the Land, and not out of the Toll, Advowſ. or Hund. But the K. may reſerve a Rent out of a Fair, or other Thing not manurable, as is adjudged in 14 *E.* 3. (*d*) *Scire facias* 122. becauſe he may (*e*) diſtrain for it in all

(*a*) Antea 3. a. 7 Co. 23. b. Palm. 105. Co. Lit. 44. b. 148. a. 2 Rol. 446 Cr. Jac. 111, 112. Moor 163, 168. 2 Saund. 303, 304. Raym. 194. Cr. El. 690. Vaugh. 203.

(*b*) Br. Rents 11. Br. Tenure 26.

(*c*) Antea 3. a.

(*d*) Antea 3. a.

(*e*) Plowd. 239. a. 243. b. 343. a. Br. Prerogative 68, 77. Fitz. Grant 47. 44 E. 3. 45. a. Fitz. Prerogative 7. Br. Diſtrets 6, 49. 13 E. 4. 6. a. 2 Inſt. 131. 4 Inſt. 119. 5 H. 7. 38. b. 5 Co. 56. a.

all the other Lands of the Grantee. *Vide* 10 *H.* 6. 2. And this Point was concluded with 12 *Aſſ. p.* 40. That if a Rent be granted out of a Manor, that the Demeſnes only (*a*) and not the Services are charged.

(*a*) Br. Char. 19. 50 14 H. 6. 24. Fitz. Charge 12.

3. Altho' the Acre of Waſte was never demiſed before, and altho' the Moiety was now demiſed, where no Moiety was demiſed of the Demeſnes before; and altho' the Rent was reſerved at two Days of the Year, where before it was reſerved at four Days of the Year, yet *verus & antiquus redditus* is reſerved within the ſaid Act: For every Rent hath Quantity and Quality, and *verus & antiquus redditus* is not to be intended of every Quality incident to it, but of the Quantity of the Rent, for that is the Effect and Subſtance of the Thing reſerved; as if the ancient Reſervat. was of the Rent to be paid in Gold, (*b*) and the new Reſervation was to be paid in Silver; or if a Quarter of Wheat was anciently reſerved, and now (*c*) the Leaſe is made rendering eight Buſhels of Wheat, all is one; for the Law doth not reſpect the Form of Words, or the Quality, but the Subſtance and Effect of the Matter: So if the old Rent was 10 *l.* and the Leſſor reſerves (*d*) 200 *s.* this is not *ex vi termini verus & antiquus redditus*, (*e*) but *parum differunt quæ re concordant*, & (*f*) *qui hæret in Litera, hæret in cortice.* And it is not neceſſary to have all the Qualities incident to an annual Rent; for if it were cuſtomary or copyhold Rent before, other Rent may now be reſerved by Indenture: For by that he ſhall have *veram & antiquam ſummam reddit'*, which he had before, and that is the Effect and Subſt. of the Matter, altho' it differs in Quality; ſo when the Rent is payable at 4 Days of the Year, (*g*) and now it is reſerved at two Days only, it is not material. For the Words are, *reddendo verum & antiquum redditum*, and doth not ſay, *ad uſualia feſta*, &c. ſo if he reſerves the true and ancient Rent, it is ſufficient. And it was ſaid, if Tenant in Tail be of 2 Farms, (*h*) one, which hath been always let for 20 *l.* Rent, and the other for 10 *l.* Rent, and he makes a Leaſe of both for 21 Years, rend. 30 *l.* Rent intirely out of both, it is good, and yet it is not the accuſtomable Rent which hath been paid, &c. for now it is one intire Rent, where it was ſeveral before, and now this intire Rent iſſues out of both, and each of them charged with the whole Rent, where each of them was ſeverally charged before; but intire and ſeveral are but Qualities of the Rent; but in Subſtance the accuſtomable Rent is reſerved, for they both amounted to 30 *l.* and that is reſerved. So if Tenant in Tail be ſeiſed of three Acres of Land, each of equal yearly Value, and all have been demiſed for 3 *s. per annum*, in ſuch Caſe he may leaſe one of them for 12 *d. per annum*, or two of them for two Shillings *per annum*, and ſo (*i*) *pro rata*: And yet in theſe two Caſes it is not the accuſtomable

Noy 110.

(*b*) Poſtea 5. b.

(*c*) Bridg. 20. Poſtea 5. b.

(*d*) Co. Lit. 44. b.

(*e*) 10. Co. 124. b. 2 Bulſt. 53, 86. 1 Leon. 160.

(*f*) 11 Co. 34 b. Co. Lit. 54. b. 283. b. Wing. Max. 19. Hawk Max. 425. 3 Bulſtr. 65.

(*g*) 6 Co. 38. a. Poſt. 4. Co. Lit. 44. b. Ley 72. Cr. Jac. 76, 77. 2 Rol. Rep. 407. Cr. Car. 17. Degge 111.

(*h*) Poſtea 5. b. Contr.

(*i*) Poſtea 5. b. Co. Lit. 44. b.

cuſtomable Rent which hath been paid. So if two *(a)* Coparceners be ſeiſed of certain Land in Tail, which hath been let for 10 *l.* Rent, one of them may let his Part or Moiety for 5 *l.* In all which Caſes the Rent reſerved, altho' it differs in Form or Quality, yet in Subſtance it is *verus & antiquus redditus* within the ſaid Act of 27 *H.* 8. It was further ſaid, That if a Manor has been always let for 10 *l.* Rent, and afterwards a Tenancy * eſcheats, yet it may be let for 10 *l.* and yet it may be argued that this is not *verus & antiquus redditus*; for no Rent was ever reſerved before out of Land eſcheated, and by Conſequence the Rent reſerved cannot be called *verus & antiquus redditus*: But that would be too nice and ſubtile an Interpretation; for by the ſame Reaſon, if a Copyhold of Inheritance is forfeited, it may be ſaid, that becauſe the Rent of the Copyhold was demiſed and not the Land, it ſhould impeach the Leaſe, which would be too hard a Conſtruction, tending to avoid many Leaſes of poor Men, which would be inconvenient: So in the Caſe at Bar, altho' the Acre of *(b)* Waſte was never demiſed before, yet inaſmuch as the Value thereof, and more is reſerved, the Purview and Intent of the Act is well obſerved.

(a) Co. Lit. 44. b. Poſt. 5. b.

* Poſt. 6. a.

(b) Poſtea 5. b. Moor 199.

4. It was argued, and ſtrongly urged, that if the ſaid Render as to the ſaid Acre of Waſte, the Services, Heriots, Leets, *&c.* (which were never demiſed before the ſaid Grant and Render) ſhould be void by the ſaid Act, that then it was conſequently good for the Demeſnes which had been demiſed; for then all the Rent reſerved ſhould iſſue out of the Demeſnes.

5. If it ſhould not be void as to ſuch Things which were not demiſed before, yet after the Death of him who made the Grant and Render, there ſhould be an Apportionment of the Rent for them; and then foraſmuch as the whole Rent and more is reſerved for the Demeſnes, (altho' the Rents of the Freeholders and Copyholders and the Acre of Waſte be deducted) *& verus & antiquus Redditus*, and more beſides them ſhould remain for the Demeſnes, for this Cauſe it was urged, that the ſaid Render ſhould be good for the Demeſnes; *& id (c) certum eſt, quod cert' reddi poteſt*: And in this Caſe, after many Arguments, and great Deliberation and Conſideration ſix Points were reſolved.

(c) Co.Lit 45. a. 96. a. 142. a. 9 Co. 30. a. 47. a. 4 Co. 66. b. Lane 51. Hetley 98. Poſt. 6. a. 2 Brown 336.

1. That altho' it be provided by the ſaid Act, that all Eſtates, *&c.* reſtrained by the ſaid Act, *&c.* ſhould be void, yet it is not by Conſtruction of Law void as to the Tenant in Tail himſelf, *(d)* but ſhould be avoided by the Iſſues in Tail; for the Intent of the Act was to provide, that the Donees, or any of them, *non facerent aliquid ad nocumentum, vel exhæreditation' hæred' eorum*, and not to make void the Eſtate which the Donee himſelf made againſt himſelf; and all Acts of Parliament, as well private as general, ſhall be taken by

(d) 3 Co. 59. b. 60. a. Mo. 199. 10 Co. 59. a. b. 60. b. 61. b. Co. Lit. 45. a. Cr. El. 207. 1 And. 244. Carter 13, 16. 1 Rol. Rep. 152, 159, 169. 1 Mod. Rep. 205. 1 Vent. 247.

a reaſonable Conſtruction to be collected out of the Words of the Acts themſelves, according to the true Intent and Meaning of the Makers of the Act. *Vide (a)* 14 *E.* 4. 1. *a.* & *(b)* 43 *Aſſ. p.* 29.

(a) 4 Co. 76. b. Br. Parliam. 61.
(b) 4 Co. 76. b. Br. Parliam. 35.

2. It was reſolved, That in reſpect of the ſaid Acre of Waſte, which was never (c) demiſed before, the Rent which is entirely reſerved out of the Whole, cannot be called *verus & antiquus redditus:* For how can it be called *verus & antiquus redditus*, when it iſſues out of a Thing, which was never charged with any Rent, by any Reſervation before?

(c) 3 Bulſtr. 291. Moor 198, 199, 494. Cro. Car. 50. Co. Lit. 44. b.

3. By the Grant and Render of the Manor, he to whom the Render is made hath an Intereſt and a Term in the Lands held by Copy, and when any of the Copyholders die, or it be forfeited, he may enter and enjoy the Land himſelf if he will; and the Rent reſerved doth iſſue out of the ſame Lands held by Copy, which Lands were never charged with any former Rent before, but always have been demiſed by Copy according to the Cuſtom of the Manor: And when the Demeſnes of the ſaid Manor have been only demiſed for Rent, in the Caſe at Bar, the whole Manor cannot be demiſed within the ſaid Act; alſo the Eſtates which the Ten't in Tail ſhall make by the ſaid Act of 27. are diſtinguiſhed by the Act, *ſcil.* Eſtates for Life, for Years, and at Will, according to the Cuſtom of the Manor; but by this Grant and Render all are put in Hotchpot and jumbled together, as Sir *Tho. Gawdy* ſaid, whereas the Copyholds ought to have been granted by Copy, accord. to the Cuſtom of the Manor, and not by Fine or Deed.

(d) Co. Lit. 44. b. 6 Co. 37. b. 38. a. Antea 4. b. Ley 72. 2 Rol. Rep. 407. Cr. Jac. 76, 77. Cr. Car. 17. Degge 111.

4. The Reſervation of the Rent at (d) two Days, where the Rent was reſerved and payable at four Days before, makes the Grant and Render void, becauſe it is *ad nocumentum* of the Heirs in Tail, which is reſtrained by the Act; for it is more beneficial for them to have it paid at four Feaſts than at two. And all beneficial Qualities of the Rent ought to be reſerved and obſerved.

(e) Antea 4. b. (f) Cr. Car. 21, 22. Antea 4. b. (g) Bridg. 20. Antea 4. b.

5. As to the Caſes which have been put, of the Reſervation of Silver *(e)* in lieu of Gold, or of joining *(f)* two ſeveral Farms in one Demiſe, with Reſervation of one and the ſame Rent, or to let Parcel of a Farm rendring Rent *pro rata*, all theſe were denied by the whole Court; but the Caſe of Reſervation of eight Buſhels of Wheat in *(g)* lieu of a Quarter is all one in Quantity, Value, and Nature, and varies only in Words. But *Wray* Ch. Juſt. ſaid, that he did agree to the Caſe of *(h)* two Coparceners, that one might let her Moiety, yielding the Moiety of the accuſtomable Rent; for in as much as they are in by Act of Law, and of God, it would be hard that the Frowardneſs of her Coparcener ſhould prejudice her of the Benefit of a Fine which ſhe might have by making of a Leaſe of her Moiety: And ſo a Difference between that Caſe and the Caſe of the Leaſe of Part with Reſervation of Rent *(i) pro rata*, which is her own Act, and which Rent for Parcel is not the accuſtomable

(h) Antea 5. a. Co. Lit. 44. b.

(i) Co. Lit. 44. b. Antea 4. b.

ſtomable Rent which hath been paid. So and for the ſame Cauſe, when two diſtinct Farms are joined *(a)* together, the whole Rent, which is reſerved out of both, is a new Rent, and not the accuſtomed Rent. And as to the Caſe of *(b)* Eſcheat of a Tenancy, it was agreed for good Law. For the Act of Law, or of God, will not prejudice any one. But if the Leſſor had purchaſed the Tenancy, it would be otherwiſe, for that which is purchaſed is not Parcel of the Manor, becauſe he acquires it by his own Act.

(a) 1 Co. 139. a. Cr. Car. 21, 22.

(b) Antea 5. a.

(c) 3 Co. 32. b. 33. a.

6. It was reſolved, That no Apportionment (if any ſhould be) in this Caſe would make the Render good; for firſt, no Apportionment could be made in this Caſe, for as much as there be Copyholders for Mens Lives, which depend on the Providence of God, Heriots, Profits of Court, which are Accidentals, and other Caſualties, which could not be reduced to a *(c)* yearly Value, as it is ſaid in *Butler's* and *Baker's* Caſe; for this Cauſe no Apportionment could be made, for Apportionment ought to be of a Certainty. And where it was ſaid, *Quod id (d) cert' eſt, quod cert' reddi poteſt*; It was anſwered, *Quod * id incert' eſt, quod cert' reddi nullo modo poteſt.* 2. *Wray* Ch. Juſt. ſaid, That altho' there ſhould or might be an Apportionment after the Death of Tenant in Tail, that would not ſerve to make the Grant and Render good, for if *verus & antiquus reddit'* be not reſerved Yearly, during the Term (as by Conſtruction of Law is implied) the Power which the Tenant in Tail hath is not purſued. For it is not ſufficient, *Quod verus & antiquus reddit'* be reſerved to the Heirs in Tail, but it ought alſo to be reſerved to the Tenant in Tail himſelf; and therefore if he reſerves a leſs Rent to himſelf during his Life, and after his Death, the true and ancient Rent, the Leaſe is not good: And altho' the Stat. was made principally, as hath been ſaid, for the Benefit of the Heirs in Tail, *&c.* yet the Reſervation ought in Conſtruction in Law to be of the true and antient Rent during the whole Term. And therefore if the true and antient Rent be not reſerved during the Life of the Tenant in Tail who made the Grant and Render, (as in Truth it was not in the Caſe at Bar) no Apportionment after his Death will make the Demiſe good. And for as much as the Land it ſelf held by Copy was demiſed, it would appear on Apportionment (if any ſhould be) that the antient Rent would not remain for the Demeſnes.

(d) Co. Lit. 45. b. 96. a. 142. a. 9 Co. 30. a. 47. a. 4 Co. 66. b. Antea 5. a. Lane 51. Hetl. 98. 2 Brownl. 336. * 1 Co. 155. a. (e) 3 Co. 50. b. 5 Co. 2. b. 6 Co. 37. a. 7 Co. 7. b. 8 Co. 34. a. 72. a. 9 Co. 140. b. 10 Co. 60. a. Co. Lit. 44. a. 333. a. Flow. 112. b. Raſt. Leaſes 2. Dyer 72. pl. 3. 162. pl. 48, 191. pl. 22, 246. pl. 69, 271. pl. 28, 357. pl. 43, 363. pl. 26. Sav. 85. pl. 165. Cr. Jac. 173. Cr. El. 350, 602. Cr. Car. 29, 44, 435. 1 Roll. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch 45. Bridg. 28. Moor 58, 759, 783. 1 Leon. 59, 148. 3 Leon. 132, 156. 1 Jones 60. 2 Inſt 342, 681. Godb. 102. pl. 119. 3 Keb. 381.

And in the Argument of this Caſe, the Difference of Penning of divers Stat. concerning Leaſes was obſerved. The Stat. of 32 *(e) H.* 8. *c.* 28. that appoints the Demiſe to begin *from the Day of the Making*, &c. *not above the Number of* 21 *Years, or three Lives, and that there ſhall be reſerved Yearly during the ſame Leaſe*, &c. *ſo much Yearly Rent, or Farm, or more, as hath been moſt accuſtomably paid*, &c. *within* 20 *Years before ſuch Leaſe made*; ſo that a Leaſe

for

for a leſſer Term for a greater Rent is within the Letter of the ſaid Statute; the Words of the Statute of 1 *Eliz.* of Leaſes made by Biſhops are, *Other than for the Term of* 21 *Years, or three Lives,* (without ſaying, *or under) from ſuch Time as any ſuch Grant or Aſſurance ſhall begin, whereupon the old accuſtomed yearly Rent, or more* (without Limitation of any Time) *ſhall be reſerved,* &c. And yet a Leaſe for a leſſer Time is good, and the Rent ought to be reſerved during the whole Term. The Stat. of *(a)* 13 *Eliz. c.* 10. ſays, *other than for the Term of* 21 *Years, or three Lives,* (without ſaying, *or under) from the Time as any ſuch Leaſe or Grant ſhall be made, whereupon the accuſtomed yearly Rent, or more, ſhall be reſerved,* &c. And many other Matters were moved by the Counſel on both Sides at the Bar in this Caſe, which I purpoſely omit becauſe the Court gave no Reſolution of them.

(a) Co. Lit. 44. b. 6 Co. 37. b. 38. a.

And take great Care (good Reader) if you contract for any Leaſe, on any of the ſaid, or any other Statutes, or with any Perſon who hath Power to make Leaſes, by any of the Proviſoes newly invented and put into Indentures, you take good Advice of Counſel on the Sight and good Conſideration of them in making of your Leaſe; and my hope is, that the Report of theſe Caſes concerning Leaſes will bring to their Memory ſome Things tending to the repoſe and quiet of poor Farmers.

Juſtice

Juſtice WINDHAM's *Caſe.*

Mich. 31 & 32 Eliz.

In the King's Bench, in a Writ of Error.

Fitzgib. 12.

IN Treſpaſs between *Francis Windham* one of the Juſtices of the *Common Pleas* Plaintiff, and *John Debney* and others Defendants, in the *Common Pleas* for Treſpaſs done in a Meadow called *Sextens* Meadow in *Trowſe* in the County of *Norfolk*, the Caſe was ſuch; The Dean and Chapter of the holy and individed Trinity of *Norwich* were ſeiſed of the ſaid Meadow called *Sextens* Meadow, and of another Meadow in the ſaid Town called *Cheeſe* Meadow; and by Indenture under their common Seal, 37 *H.* 8. demiſed Cheeſe Meadow to *Howlins* for 40 Years: And afterwards 4 & 5 *Phil. & Mary*, by Indenture under their common Seal, demiſed *Sextens* Meadow to the ſaid *Howlins* and *Debney* for 21 Years. And afterwards 12 *Eliz.* the ſaid Dean and Chapter demiſed to *Nicholas Manne* both the Meadows, with a ſeveral *Habendum*, *ſcil.* to have and to hold *Cheeſe* Meadow for 40 Years after the End of the firſt Leaſe thereof made; and to have and to hold *Sextens* Meadow for 40 Years after the firſt Leaſe thereof made, with ſeveral Reſervations of Rents. The ſaid *Manne* aſſigned his Intereſt to *John Hoe*, who 15 *Eliz.* ſurrendred and took a new Leaſe by Indenture of the ſaid Dean and Chapter under their common Seal (in which the firſt Leaſes were recited) of both the Meadows, *Habendum ſibi ab & poſt determinationem præd. ſeparalium dimiſſion', videlicet, præd. dimiſſionem præd'* Rob. Howlyns *in forma præd. fact', & præd. dimiſſionem præf.* Rob. Howlyns & J. Debney, &c. *in forma præd. fact', ſive eſſet per ſurſ. reddit', determinat', &c. uſq; ad fin' & termin'*

Moor 191. Cr. El. 199. 2 Leon. 106. Lit. Rep. 364.

min' 40 annor' ex tunc proxim. ſequen', exiſten' verum numerum annor' mentionat. in dict. ſurſum reddit. Indentur. dict. Nicholao Manne made: *Reddendo, &c.* the antient Rent ſeverally for the ſaid Meadows; ſo that in Effect the Caſe is; A Man makes a Leaſe of *Sextens* Meadows to *A.* for ten Years, and of *Cheeſe* Meadow to *B.* for twenty Years; and afterwards by Indenture reciting the ſaid two Leaſes, makes a Leaſe to another of both for forty Years, to begin after the End or Determination of the ſaid ſeveral Leaſes made to *A.* and *B.* And afterwards the former Leaſe of *Sextens* Meadow ends, and the Leaſe of *Cheeſe* Meadow continues; and when the laſt Leaſe as to *Sextens* Meadow now in Queſtion ſhould begin, was the Queſtion; for if it ſhould not begin till the Leaſe of *Cheeſe* Meadow be ended, then the Plaintiff had entred before his Time, for the former Leaſe of *Cheeſe* Meadow hath yet Continuance. But if the ſaid *Habendum* in the later Leaſe ſhould be taken * *reſpective* or *diſtributive*, (*a*) *Reddendo ſingula ſingulis*, ſo that when the Leaſe in *Sextens* Meadow determines, the new Term for forty Years therein ſhould begin, then Judgment ought to be given for the Plaintiff. And after many Arguments at Bar and Bench in the *Common Pleas*, it was reſolved and adjudged, That the *Habendum* in the later Leaſe ſhould be taken *reſpective*, that is to ſay, the Leaſe of *Sextens* Meadow to *John Hoe* for forty Years ſhould begin (*b*) preſently after the End of the firſt Leaſe thereof made. For every Deed ſhall be taken more (*c*) ſtrong againſt the Grantor, and more beneficially for the Grantee, and it is more ſtrong againſt the Leſſor, and more beneficial for the Leſſee to have the Leaſe of *Sextens* Meadow to begin preſently after the Expiration of the firſt Leaſe made thereof, than to tarry till the Leaſe of *Cheeſe* Meadow be ended. As in (*d*) *9 E. 4. 42. b. & 19 H. 6. 4. a.* If I releaſe unto you all Actions which I have againſt you and another, in this Caſe notwithſtanding the joint Words, all Actions which I have againſt you alone are releaſed, for it ſhall be moſt beneficially for him to whom the Releaſe is made, and moſt ſtrongly againſt him who makes it; and the joint Words of the Parties ſhall be taken *reſpective* and ſeverally.

1. Sometimes in reſpect of the ſeveral Intereſts of the Grantors; as if two (*e*) Tenants in common, or ſeveral Tenants join in a Grant of a Rent-Charge, yet in Law this Grant ſhall be ſeveral, although the Words are joint, as Sir *Robert Catlyn* Chief Juſtice held in *Browing's* Caſe in *Plow. Commentaries.*

2. Sometimes in reſpect of the (*f*) ſeveral Intereſts of the Grantees, *&c.* as (16) *19 H. 6. 63, 64.* a Warranty made to two of certain Lands ſhall enure as ſeveral Warranties in reſpect that they are ſeverally ſeiſed, the one of

*1 Mod. Rep 33.
(*a*) Mooi 291. Cr. Jac. 259. 9 Co. 27. b. 10 Co. 85. b. 2 Rol. Rep. 411, 412. Cr. El. 471. Palm. 390. 1 Sand. 184.
(*b*) Jenk. Cent. 272. Cr. Jac. 35, 259, 656. 10 Co. 85. b. Yelv. 183. 1 Bulſt. 42. 1 Brownl. 147. 3 Keb. 85. 1 Sand. 184. Moor 191. 2 Leon. 106. Cr. El. 199. 3 Keb. 85.
(*c*) Jenk. Cent. 272. Lit. Rep. 371. Co. Lit. 42. a. 99. a. 183. a. 197. a. 6 Co. 36. a. Plowd. 103. b. 287. b. Winch 96. 7 Co. 23. a. 8 Co. 145. a.
(*d*) Fitz. Releaſe 14. 4 Co. 50. a. Br. Releaſe 29.
(*e*) Plowd. 140 b. 161. b. 171. a. 289. a. b. Perk. ſect. 106, 107. Hetly 9. Yelv. 189. Co. Lit. 197. a. 267. b.
(*f*) Poſtea 19. a.

Part of the Lands, and the other of the Reſidue in Severalty, 6 *E.* 2. * *Covenant Br.* 49. A joint *(a)* Covenant taken ſeveral in reſpect of the ſeveral Intereſts of the Covenantees. *Vide* 16 *Eliz. Dyer* 337, 338. between Sir *Anthony (b) Cook* and *Wotton*, a good Caſe.

3. Sometimes in reſpect that the Grant cannot take Effect, but at ſeveral Times, as 24 *E.* 3. 29. *a.* a Rem'r limited to the right Heirs of *J. S. (c)* and *J. N. (J. S.* and *J. N.* being alive) in which Caſe the Words are joint, and yet the Heirs ſhall take ſeverally; for they ſhall not join in Action.

4. Sometimes in reſpect of the Incapacity and Impoſſibility of the Grantees to take jointly, as a Leaſe made to an Abbot and *(d)* ſecular Man, or a Gift to two Men, or to two Women, and to the Heirs of their two Bodies begotten, the Inheritance is *(e)* ſeveral, 7 *H.* 4. 17. *vide Chapman's* Caſe, *Pl. Com.*

5. Sometimes in reſpect of the Cauſe of the Grant, or *ratione ſubjectæ materiæ*, as 15 *H.* 7. 14. *a.* One *(f)* Coparcener grants a Rent to two other Coparceners for Owelty of Partition, altho' the Words are joint, yet the Cauſe of the Grant ſhall be reſpected, and the Rent ſhall be of the Quality of the Land, and therefore they ſhall have the Rent in Degree and Quality of Coparcenary, and not jointly. And *Knivet* Ch. Juſt. and Chancellor ſaid in 38 *E.* 3. 26. that if two Coparceners make a Feoffment in Fee, rendring Rent to them and their Heirs, the Heirs of both ſhall inherit, becauſe their Right in the Land was ſeveral, *(g)* 22 *E.* 4. 25. *b.* & *(h)* 2 *R.* 3. 18. *b.* A joint Submiſſion to Arbitrament taken ſeverally in reſpect of the ſeverally Cauſes, &c.

6. Sometimes *Ne res deſtruatur, & ut evitetur abſurd'*, as in 6 *H.* 7. 7. *b. in (i) Ceſſavit*, where the Tenure is alledged by Homage, Fealty, and Rent, and the Demandant counts, that *in faciendo ſervitia præd' ceſſavit*, ſhall be by Conſtruction taken to ſuch Services only, of which a Man may ceaſe *(k)* 17 *E.* 3. 1. *b.* & 2. *a.* The Prior of *Tikeford's* Caſe in a *Scire facias* againſt the Succeſſor of the Prior on a Judgment given in a Writ of Annuity for the Arrearages in the Time of the Predeceſſor, and of the Succeſſor, and the Writ was, that the Predeceſſor and Succeſſor *nondum reddiderunt*: To which Exception was taken that the Predeceſſor was ſuppoſed not to Render that which the Succeſſor ought, & *non allocatur*; for *reddendo ſingula ſingulis*, by reaſonable Conſtruction, the Words may well ſtand together. *Vide* 21 *E.* 3. 48. *a.* in a *Per quæ ſervitia*, *F. N. B.* 14. in *Monſtraverunt*: And the Reaſon of all theſe Caſes is, either *quod (l) res non deſtruatur*, or that the Grant ſhall be taken more ſtrong againſt the Grantor, and ſhall take Effect as near as may be according to the Intent of the Parties. And ſuch Conſtruction concurs with two of the ſaid Reaſons in the principal Caſe. 1. It ſhall be taken more ſtrongly againſt the Leſſor. 2. This Conſtruction

* Poſtea 19. a.
(a) Poſtea 19. a.
(b) 1 Anderſ. 53, 54. N. Benl. 228, 229.
Dyer 337, 338. pl. 39.
Poſtea 19. a.
(c) Co. Lit. 188. a. 2 Roll. 89.
13 Co. 57. Fitz. Joinder in Action 10.
30 Aſſ. pl. 47.
(d) Perk. ſect. 106. Lit. ſect. 296, 297.
Co. Lit. 190. a.
(e) Co. Lit. 183. a. b. 184. a. 8 Co. 87. a. 7 H. 4. 16. b. 17. a. Lit. ſect. 283, 284. 1 Co. 84. b. 2 Anderſon 12, 138. Br. Jointenants 40.
(f) Hob. 172. Br. Rent 8. Br. Jointenants 20. 3 Keb. 215. Co. Lit. 169. b. Dy. 153. pl. 14.
29 Aſſ. pl. 23. Fitz. Partition 12. Plow. 134. b.
(g) Br. Condition 182. Br. Arbitrement 41. 8 Co. 98. a. b.
(h) Bridg. 91. Plowd. 289. b. Br. Arbitrement 44.
(i) Fitz. Ceſſavit 5. Br. Ceſſavit 23. Br. faux latin 76. Doctrin. placit. 97, 289, 290.
(k) Fitz. Brief 663.
(l) 1 Co. 76. a. 2 Co. 72. b. 8 Co. 95. b. 3 Keb. 288. 2 Jones 69. 5 Co. 55. b. 1 Mod. Rep. 109.

ction will concur with the Intent and Meaning of the Parties, for after the *Habendum* and the Number of the Years theſe Words are added, *exiſten' verum numerum annor' in dict' ſurſum reddit' Indent' mentionat'*, in which Indenture the *Habendum* was ſeveral, ſo that the Intent of the Parties was to have ſeveral Beginnings in this new Leaſe, *&c.* and the Leſſor and Leſſee never imagined but that the Leaſes ſhould begin ſeverally, and not that the Leſſee ſhould wait for *Sextens* Meadow, until the Leaſe of *Cheeſe* Meadow, which is another diſtinct Leaſe, and a diſtinct Thing, ſhould end. And ſo it was adjudged, and the Plaintiff had Execution. Upon which Judgment a Writ of Error was brought; and after many Arguments it was reſolv'd by Sir *Chriſtoph. Wray*, Sir *Thomas Gawdy*, and the whole Court of *King's Bench*, That the Leaſe to *Hoe* ſhould have ſeveral Beginnings. And ſo this Caſe was reſolved by both Courts. And afterwards the ſame Term in a Caſe between *Pollard* and *Alcocke* in the Court of *Wards*, *Wray* Chief Juſtice clearly held, That if a Man be ſeiſed of three Acres of Land in Fee, and makes a Leaſe of one Acre to *A.* for Life, of another Acre to *B.* for Life, and of the other to *C.* in Tail, and afterwards by Deed (reciting the ſaid Eſtates) covenants with his Brother, That after all the ſaid Eſtates ended and determined, he and his Heirs would ſtand ſeiſed of the ſaid three Acres to the Uſe of his Brother in Tail, *&c.* That in this Caſe preſently by the Death of *B.* the Brother ſhould have the Acre leaſed to *B.* and ſhould not tarry till all the Eſtates, *ſcil.* the other Eſtate for Life, and the Eſtate-tail be ended: But *reddendo ſingula ſingulis*, by the Covenant the Eſtate in the ſeveral Acres ſhould veſt preſently in the Brother, and ſhould take Effect in Poſſeſſion, as the ſeveral Eſtates in Poſſeſſion end or determine; which was granted by the whole Court. And in the Caſe of *Pollard*, *Wray* cited and relied on the ſaid Caſe of Juſtice *Windham*. And afterwards the Plaintiffs in the Writ of Error, perceiving the Opinion of the Court, did not proceed in their Writ of Error.

2 Leon. 106. Cr. El. 199. Jenk. Cent. 272. Lit. Rep. 220. 2 Bulſtr. 132.

BRUDNEL's *Caſe.*

Trin. 34 Eliz.

In the King's Bench.

THomas *Brudnel* Adminiſtrator of *Anthony Rone*, brought an Action of Debt on Bond of 200 *l.* againſt *Thomas Skidmore*, and had Judgm. to recover in the *Common Pleas*, and died; *Robert Brudnel* and *John Brudnel* Executors of the ſaid *Thomas Brudnel* ſued a *Scire facias* on the ſaid Judgment, and Proceſs continued until the ſaid *Thomas Skidmore* was outlawed; and now the ſaid *Thomas Skidmore* brought a Writ of Error. And note, it appeared by the Record certified, that the ſaid *Thomas Brudnel* was Adminiſtrator to the ſaid *Anthony*, during the Minority of *Edward*, *Jeremy*, *Humphrey* and *Anne*, the Children of the ſaid *Anthony*, and he averred in his Declaration, that the ſaid *Edward*, *Humphrey* and *Anne* were alive, and within Age, and did not (*a*) aver that the ſaid *Jeremy* was alive, or within Age; and the Plaintiff's Counſel aſſigned for Error, that when Adminiſtration is committed to one during the (*b*) Minority of four, if one of them dies, or comes of full Age, the whole Authority ceaſes, for a Difference was taken between a Limitation annexed to an Eſtate or Intereſt, and a collateral and bare Limitation not coupled or conjoined with an Eſtate or Intereſt, of which there can be no Survivor; as if a Man makes a Leaſe to two (*c*) during their Lives, there if one dies his Eſtate ſhall ſurvive: But if a Leaſe be made to *A.* during the Life of *B.* and *C.* without ſaying, and during the Life of the (*d*) Survivor of them, there if one of them dies, the Eſtate (as it was ſaid) was determined. But it was anſwered and reſolved by Sir *John Popham* Ch. Juſtice, and the whole Court, that in the ſame Caſe put by the Plaintiff's Counſel, if one of the *Ceſtuy que vies* dies, the Eſtate is not determined, but *A.* ſhould have the Land during the Life of the Surviv. of them: And ſo was it reſolved by all the Juſtices in *Mich.* Term

(*a*) Cr. Car. 56.

(*b*) 1 Brown 46. 47. 2 Brown 83. 1 Leon. 74.

(*c*) 1 Mod. Rep. 187.

(*d*) 2 Brown. 292. 11 Co. 3. b. 13 Co. 66.

held at *St. Albans* 5 & 6 *Eliz.* for *A.* had an Eſtate of Freehold by Way of Limitation of an Eſtate during the Lives of two Men, and by Conſtruction of Law during the Life of the Survivor of them: As if a Man makes a Leaſe of Land to two Men during their Lives, and they aſſign their Eſtate over, now the Aſſignee hath an Eſtate for the Life of the two Men, and if one dies, he ſhall have the Land during the Life of the Survivor of them. And two Differences were taken and agreed in this Caſe.

1. Between a Limitation, as the Caſe before, and a Condition: For if a Man leaſes Land for 100 Years if *A.* and *B.* ſhall ſo long live, in that Caſe if one of them dies, the Leaſe is (*a*) ended, for the Leaſe was conditional, and not determinable by Limitation of Eſtate; and the Life of a Man is collateral, as to the Leaſe which is but a Chattel.

(*a*) Raym. 126. 1 Rol. Rep. 197, 309, 310. 3 Bulſtr. 31, 131. Moor 400, 876. Cr. Car. 378. Cr El. 414. Co. Lit. 296. b. 1 Rol. 832. 11 Co. 3. b. 1 And. 161, 162. Owen 52. Goldsb. 71, 72. 1 And. 151. pl. 199. 1 Mod. Rep. 187. Cr. Jac. 377, 378. 1 Leon. 74, 103. 1 Brownl. 30, 39, 180, 181. 1 Vent. 163. Palm. 23. 2 Vent. 74, 108

The ſecond Difference was between a Limitation of an Eſtate of Freehold during Lives, (which is the uſual and ordinary Limitation of a Freehold) and a collateral Determination, as during the Time that *C.* and *D.* ſhall be of the *Inner Temple*, or during the Time that *C.* and *D.* ſhall be dwelling in *Norfolk*, or ſhall be Juſtices of Peace, or the like; for in theſe Caſes the Failure of the one ſhall determine the Eſtate: But the ſaid Point moved for an Error in the Caſe at Bar was not expreſly reſolved, becauſe another Error was moved for which without Queſtion the Judgment was reverſed, and that was, that when the Adminiſtrator had Judgment and died, his Executors could not ſue Execution of the ſaid Judgment; for none ſhall have Execution of that Judgment, but he who ſhall be ſubject to the Payment of the Debts of the firſt Inteſtate, and that the ſaid Executors are not, *vide* 26 *H.* 8. 7. And it is adjudged in 28 *H.* 8. reported by Serj. *Bendloes*, That the Adminiſtrator of an Executor ſhall not have Execution of a Judgment given for the Executor. (*b*) And the Opinion of the Court was, that the ſaid Outlawry on this Judgment was erroneous; and for this Cauſe it was reverſed.

(*b*) 1 Co. 96. a. 1 Rol. 890, 907. Went. 148, 149. Yelv. 33, 83. Moor 4, 139, 680. 1 Jones 214, 248, 385, 386 O. Benl. 2. pl. 5. N. Benl. 18. pl. 24. Cr. Jac. 4, 394, 459. Cr. Car. 167, 227, 451, 459. 2 Sand. 149. 1 Sid. 29, 317. March 9. 1 And 23, 24. Finch 4. b. 5. a. 17 Car. 2. c. 8. 30 Car 2. c. 6. Swinb 323. Cr. El. 435. Dyer 47. pl. 12. 112. pl. 51. 2 Brown. 144. Noy 81, 82. Latch 140. Palm. 443. 2 Sid. 122.

HENSTEAD's *Caſe.*

Mich. 36 & 37 Eliz. Rot. 1634.

In the Common Pleas.

THE Caſe was ſuch; A Woman Tenant for Life of a Houſe and certain Land in *Shoram* in *Kent* made a Leaſe at Will, rendering Rent, and afterwards took Huſband; and ſhe and her Husband brought an Action of Debt for the Arrearages after the Marriage; and if the Leaſe at Will were determined by the Intermarriage or not, was the Queſtion. And it was agreed by the whole Court, That the Will was not determined (*a*) by the Intermarriage; for altho' the Woman had by marrying ſubmitted her ſelf to the Will of her Husband as her Head; yet foraſmuch as it might be prejudicial to the Husband to have the Leaſe determined (for then he would loſe the Rent to be paid at the next Day after the Marriage, and it could not be in any Manner prejudicial to the Wife, if the Leaſe continue, but rather to her Benefit. And generally it might be great Prejudice to all Husbands who intermarry with Women who have Tenants at Will, for the Loſing of their Rents.) For theſe Cauſes it was reſolved, that without expreſs Matter done by the Husband after the Marriage to determine the Will, it is not determined. The ſame Law, if a Leaſe be made to a Woman (*b*) at Will, and ſhe marries, the Will continues notwithſtanding the Marriage.

(*a*) Kelw. 162. b. 163. a. Hetl. 72. 1 Rol. 861. Cr. Car. 304. Co. Lit. 55. b.

(*b*) Co. Lit. 55. b. 1 Rol. 861. Ca. Car. 304.

So if a Leaſe at Will be made to (*c*) three, rendering Rent, and one dies, it is no Determination of the Will, and although nothing can ſurvive, yet becauſe every Joint-tenant is poſſeſſed *per my & per tout*, they ſhall be charged with the whole Rent. And ſo the *Quære* in 10 *El. Dyer* (*d*) 269. *b.* well reſolved: But in the Caſe at Bar after the Marriage, the Woman her ſelf could not countermand or determine the Leaſe at Will, no more than when (*e*) ſhe and her Husb. make a Leaſe at Will, rendering Rent during the Co-

(*c*) Dyer 269. pl. 20.

(*d*) Dyer 269. pl. 20.

(*e*) 1 Rol. 861. Co. Lit. 55. b.

verture; or if a Leaſe be made to them at Will: For ſhe hath ſubmitted her ſelf, and all her Will to her Husband; and ſo a Feme Covert may have a Tenant at Will; and be Tenant at Will, and yet ſhe her ſelf cannot countermand it, becauſe ſhe by her Intermarriage hath put her countermanding Power in this Caſe (which doth not concern Freehold or Inheritance) into her Husband's Mouth.

(*a*) 1 Rol. 861. Co. Lit. 55. b. Alſo if the Husband (*a*) and Wife leaſe Land at Will, rendering Rent, and the Husband dies, it is no Countermand of the Will, but the Leaſe continues. So it was ſaid, if

(*b*) 1 Rol. 861. Co. Lit. 55. b. two (*b*) Jointenants make a Leaſe at Will rendering Rent, and one dies, all ſurvives to the other; and if the Leſſee continues his Poſſeſſion, the Survivor ſhall have an Action for the whole Rent for the Privity, and it ſhall not be a Countermand for one Moiety for the Miſchief which might enſue to Leſſors, and the rather becauſe no Miſchief or Prejudice can come to the Leſſees in ſuch Caſe.

IVE's *Caſe.*

Mich. 39 & 40 Eliz. *which began Paſch.* 38 Eliz. *in the Common Pleas.*

IVE brought an Action of Waſt againſt *Sammes*, and counted of a Leaſe made to the Defendant of the Manor of *Tottenham* in the County of *Eſſex* for 30 Years: The Defendant pleaded, *non dimiſit*; and by ſpecial Verdict it was found, That the Leſſor made a Leaſe for 30 Years of the ſaid Manor, except all Woods and Underwoods growing or being on the Manor; and afterwards made a ſecond Leaſe to the ſame Leſſee of all the Woods and Underwoods growing or being on the ſaid Manor for the Term of 62 Years without Impeachment of Waſt, and afterwards made a third Leaſe of the ſaid Manor to the ſaid Leſſee for 30 Years, without Exception, to begin at a Day to come, *ſcil.* from the Expiration of the ſaid firſt Leaſe for 30 Years; and after the Term of 30 Years expired; the Leſſee cut Trees; *Ive* in Reverſion brought an Action of Waſt; and it was adjudged for the Plaintiff. And in this Caſe three Points were reſolved.

1. That by the (*a*) Exception of the Woods and Underwoods growing or being on the Manor, the Soil itſelf is excepted (*b*), 14 *H.* 8. 1. *a. b. acc'*, and by Name of Wood may be demanded and recovered, and that theſe Words (growing or being) are Words of Abundance, for without them the Law will imply as much, & (*c*) *expreſſio eorum quæ tacite inſunt nihil operatur*, for by the Leaſe of the Wood and Underwood on the Manor, is implied that they are growing; and therefore to demiſe all Woods on the Manor, and all Woods growing on the Manor is all one. And ſo it was alſo adjudged, *Trin.* 7 *Eliz.* in the *King's Bench*, as it was there ſaid. *Vide* 46 *E.* 3. 22. *b.* 28 *H.* 8. *Dyer* (*d*) 19. 33 *H.* 8. *Br.* (*e*) *Reſervation* 39. 7 *E.* 6. *Dyer* (*f*) 79, *&c.* and ſo a Queſtion in our Books well reſolved.

2 And. 51. Lib 11. f. 52. a. Cr. El. 521, 522. (*a*) 3 Bulſt. 290. Dall. 11. pl. 11. Br. Except. 2. Br. Treſp. 167. Palm. 497. (*b*) Dall. 11. pl. 11. 3 Bulſt. 290. 2 Rol. 453. 11 Co. 49. b. 47. b. Cr. El. 522. 1 Rol. Rep. 95, 96, 98. Co. Lit. 4. b. 44 E. 3. 34. b. Cr. Jac. 487, 488, 524. Perk. Sect. 642, 643. Poph. 146. 2 Brown 231. (*c*) 8 Co. 56. b. 145. a. 4 Co. 73. b. 11 Co. 60. a. 10 Co. 39. a. 2 Rol Rep. 393. Latch 25. Palm. 433, 437. Co. Lit. 191. a. 205. a. Wing. Max. 235. 2 Inſt. 365. Lit. Rep. 111. 2 Sand. 351. 2 Bulſt. 131. 1 Mod. Rep. 190. Hard. 92. 1 Rol. Rep. 310. Hob. 170. (*d*) Dyer 19. pl. 110, 111. pl. 48. 11 Co.

3 Bulſt. 290. Co. Lit. 4. b. 47. b. Co. Lit. 4. b. 3 Bulſt. 290. (*e*) 11 Co. 47. b. 3 Bulſt. 290. 1 Leon. 49 (*f*) Dyer 79.

2. Notwithſtanding the ſaid Exception, the Wood remains Parcel of the (*a*) Manor, and by Leaſe of the Manor ſhall paſs, becauſe the Freehold remains intire, and the Leſſor remains Tenant to every *Præcipe*, and there needs no Exception. *Vide Plow. Comm.* 103. *b.* (*b*) *Fulmerſton*'s Caſe; otherwiſe of a Leaſe for Life with ſuch Exception, *cauſa patet.* And therefore it was reſolved, That by the Leaſe of the Manor, the Woods ſhall paſs. *Vide* (*c*) 38 *H.* 6. 33. *b.* The King, ſeiſed of a Manor to which an Advowſon was appendant, leaſed the Manor, (without ſpeaking of the Advowſon appendant, whereby it did not paſs) for Life; and afterwards granted the Reverſion, *Habendum una cum Advocatione*, the Advowſon ſhall not paſs, for during the Life of the Leſſee it was not appendant: Whereupon it is to be obſerved, That if a Man grants an Advowſon appendant for Life, the Reverſion is appendant to the Manor: But when a Man leaſes the Manor for (*d*) Life, except the Advowſon, the Advowſon in Poſſeſſion cannot be appendant to the Reverſion of the Manor expectant on the Eſtate for Life; otherwiſe on an Eſtate for Years.

3. That by the Acceptance of a future Leaſe to begin divers Years after, the ſaid Leaſe of the Wood for 62 Years was preſently (*e*) ſurrendered, becauſe the Leſſee by Acceptance thereof had affirmed the Leſſor to have Ability to make the new Leaſe, which he had not, if the firſt Leaſe ſhall ſtand; As if Leſſee for 20 Years takes a Leaſe for 3 Years, to begin 10 Years after; it is a preſent Surrender of the whole Term, for it cannot be a Surrender of the laſt 10 Years, and remain for the firſt 10 Years, and ſo to make a Fraction of the Term: Nor can he who hath a Leaſe for 20 Years ſurrender the laſt 10 Years by any expreſs Surrender ſaving to him the firſt 10 Years. *Vide* 14 *H.* 8. 15. 2 *Mar.* 112. 4 *Mar.* 141. 3 *Eliz.* 200. 10 *Eliz.* 272. 11 *Eliz.* 280. 35 *H.* 8. 57. 21 *H.* 7. 6. 31 *Aſſ. p.* 26. 32 *H.* 8. 46. 37 *H.* 6. 17. 14 *H.* 7. 37. 21 *H.* 7. 12, 40. 13 *R.* 2. *Dower.* 40 *E.* 3. 24, 43. 41 *E.* 3. 13. 44 *E.* 5. 25, 26. 45 *E.* 3. 13.

(*a*) Co. Lit. 324. *b.*
(*b*) Plow. 103. *b.* 104.
(*c*) Co. Lit. 324. *b.* 325. *a.* Fitz Grant 15. Hutt 89. Br. Grant 60. Br. Patent 29. Plowd. Comm. 152. *b.* 399. *a. b.* 2 Rol. 121. Plow. 103. *b.* 104. *b.* 11 Co. 47. *b.*
(*d*) Co. Lit. 324. *b.* 325. *a.* 1 Rol. 233. 11 Co. 50 *a.* Hutt. 88, 89. Dyer 57. *b.*
(*e*) Cr. El. 264, 522, 605, 873, 874. Co. Lit. 218 *b.* 338. *a.* 2 Rol. 496. 10 Co. 52, 53. *a.* 67 *b.* Poph. 8, 9. 2 Leon. 188. 3 Leon. 247. 4 Leon. 30. Dal. 74 Mo. 196, 358, 636, 637. 2 And. 52, 192. Dyer 46. pl. 9. 57, 58. pl. 2, 3, 112. pl. 49, 140. pl. 43, 177 pl. 35. 200. pl. 62, 280 pl. 13, 349. pl. 15. Perk. Sect. 617. 14 H. 8. 15. *a.* Br. Leaſe 14. 2 Rol Rep. 171. 406. Lit. Rep. 269, 273, 282. Lane 7. 61. 69. *b.* 37 H. 8. 18. *a.* Plow. 107. *b.* 194. *b.* Br. Surrender 14, 35. 2 Co. 17. *b.* 7 Co 38. *a.* Raym. 148. O Benl. 57, Kelw. 70. *b.* 21 H 7. 5. *a. b.* Br. Eſtoppel 210. 2 Sid. 138.

SAUNDER's *Caſe.*

Trin. 41 Eliz. *which began Hill.* 40 Eliz. Rot. 747.

In the Common Pleas.

Saunders brought an Action of Waſt againſt *Marwood* Aſſignee of the Term in the Tenement for Waſt done in digging of Sea-coals; the Defendant pleaded in Bar, that the firſt Leſſee, who opened the Mine, granted to him all his Intereſt in the Land *cum omnibus profic'* (*Except' & ſemper reſervatis ſibi & hæred' ſuis tot' benefic' & profic' Miner'*, *Anglice* the Coal-Mine, *in præd' parcell' terr' ac omnibus arboribus macremii*;) and averred, that the ſaid Mine was at the Time of the Aſſignment, and yet is open. Whereupon the Plaintiff demurred in Law. And on great Deliberation it was adjudged for the Plaintiff; and in this Caſe three Points were reſolved.

1 Brown 241. Cr. El. 683.

(*a*) Co. Lit 54 b. (*b*) Fitz Waſt 101. (*c*) 1 Sider. 152. 2 Rol. 816. Latch 190. Co. Lit. 54. b. Hob. 234. (*d*) F. N. B. 149. c. Co. Lit. 54. b. Latch 190. Hob. 234. 2 Rol. 816. 2 Jones 72. Hutt. 39. 2 Bulſt. 252. 1 Vent. 45. (*e*) Poſt. 47. a. Hob. 234 2 Bulſtr. 252. 12 Co. 13, 130. Co. Lit. 56 a. 153. a. 2 Inſt. 306. Moor 218 Cawly 246. Hawk. Max. 258 2 Sid. 39.

1. If a Man hath Land in Part of which there is a Coal-Mine open, and he leaſes the Land to one for Life, or for Years, the Leſſee may (*a*) dig in it: For inaſmuch as the Mine is open at the Time, *&c.* and he leaſes all the Land, it ſhall be intended that his Intent is as general as his Leaſe is; *ſcil.* that he ſhall take the Profit of all the Land, and by Conſequence of the Mine in it. *Vide* (*b*) 17 *E.* 3. 7. *a. b. John Hull's* Caſe *acc'*; and ſo the Doubt in *F. N. B.* 149. *C.* well explained.

2. If the Mine were not (*c*) open, but included within the Bowels of the Earth at the Time of the Leaſe made, in ſuch Caſe by Leaſing of the Land, the Leſſee cannot make new Mines, for that ſhall be Waſt. *F. N. B.* 59. & 22 *H.* 6. 18. *b. acc'*.

3. If a Man hath Mines hid within his Land, and leaſes his Land, and (*d*) all Mines therein, there the Leſſee may dig for them, for (*e*) *quando aliquis aliquid concedit, conceditur & id ſine quo res ipſa eſſe non poteſt*, and therewith agrees

agrees 9 *E.* 4. 8. where it is ſaid, That if a Man leaſes his Land to another, and in the ſame there is a (*a*) Mine (which is to be intended of a hidden Mine) he cannot Dig for it; but if he leaſe his Land and all Mines in it, then although the Mine be hidden, the Leſſee may dig for them; and by Conſequence the Digging of the Mine in the principal Caſe was Waſt in the firſt Leſſee.

(*a*) 2 Bulſt. 252. 12 E. 4. 8. a. Br. Waſt 126. 9 E. 4. 35. b.

4. It was reſolved, That although the Mine was firſt opened by the firſt Leſſee, yet if his Grantee dig in it, it is Waſt in him.

5. It was reſolved, that the Exception was (*b*) void, for firſt by the Exception of the Profits of the Mine, or of the Mine itſelf, the Land is not excepted; and then it follows, that he hath excepted that which he could not have or take: As if a Man aſſigns his Term, and excepts the Timber-trees on the Land, or the Gravel, or Clay within the Land, it is void, for he cannot except to himſelf a Thing which doth not belong to him by the Law. And although it was ſaid, That foraſmuch as the Leſſee firſt opened the Mine, and thereby committed Waſt, and ſo had *quodam modo* appropriated it to himſelf, and by his Wrong has ſubjected himſelf to loſe the Place waſted, and treble Damages, it ſhould be a Reaſon that he might keep it to himſelf, and ſo continue puniſhable for the Waſt of which he was the firſt Author; but notwithſtanding that, it was reſolved as above; for his Wrong which he committeth cannot deveſt the Intereſt in the Mine, being in the Land demiſed to him out of the Leſſor; and therefore he cannot except that to himſelf which belongs to another: And it was adjudged *Paſch.* 28 *Eliz.* in the *Common Pleas*, *Rot.* 820. between *Foſter* and *Miles* Plaintiffs, (*c*) and *Spencer* and *Bode* Defendants, that where the Leſſee for Years aſſigns over his Term except the Timber-trees, and afterwards the Trees were felled, that the Action of Waſt was maintainable againſt the Aſſignee, for the (*d*) Exception was utterly void for the Cauſes aforeſaid, *quod nota bene*. And in this Caſe it was ſaid, if Leſſee for Years deviſes his Term to another, and makes his Executors, and dies, the Executors do Waſte, and afterwards aſſent to the Deviſe, in that Caſe although between the Executors and the Deviſee it hath Relation, and the Deviſee is in by the Deviſor, yet an Action of (*e*) Waſt ſhall be maintainable againſt the Executors in the *tenuit*. So if Grantee of a Term on Condition doth waſte, and afterwards the Grantor enters for the Condition broken, the Action of Waſt ſhall be maintainable againſt the Grantee in the *tenuit*, (*f*) 30 *E.* 3. 16. *a. b. acc*.

(*b*) 1 Brownl. 241. Cr. El. 683. Allein 81, 82. 13 Co. 60. Cr. Jac. 296. Poph. 195. 2 Bulſt. 6, 8.

(*c*) Goldſb. 63. 1 Leon. 48, 49. Cr. El. 17, 18, 683. 13 Co. 60, 61. Co. Ent. 695. pl. 3. 2 Bulſtr. 6.

(*d*) 1 Leon. 49. Cr. El. 17, 18, 683. 2 Bulſt. 6, 8. Poph. 194.

(*e*) 1 Rol. Rep. 248. 2 Inſt. 302. Swinb. 324. Bridgm. 54.

(*f*) Fitz. Waſt 36.

ROSSE's *Caſe.*

Mich. 41 & 42 Eliz.

BEtween *Peter Roſſe* and *Aldwick* in an *Ejectione firmæ*, which began *Paſch.* 37 *Eliz. Rot.* 499. the Caſe was ſuch; A Leaſe is made to *A.* and his Aſſigns, *Habendum* to him during his Life, and the Lives of *B.* and *C.* and if this Limitation during the Life of *B.* and *C.* were void or not, was the Queſtion. And it was adjudged, That the Limitation was good; for where it was objected, That when a Man hath two Eſtates in him, the greater ſhall drown the leſs, and that an Eſtate for his own Life is higher than for the Life of another; and therefore an Eſtate for his own Life, and for the Lives of others cannot ſtand together. To that it was anſwered and reſolved, That in the Caſe at Bar, the Leſſee had but one Eſtate, which hath this Limitation, *ſcil.* during his Life, and the Lives of two others, and he hath but one Freehold, and therefore there cannot be any Drowning of Eſtates in the Caſe, but he hath an Eſtate of Freehold to continue during theſe three Lives, and the Survivor of them.

Moor 398, 399. Gold. 157, 158. Cr. El. 491, 492.

1 Bulſtr. 136. Cr. Jac. 282. Cr. El. 58, 182. 2 Bulſtr. 135. Moor 8. Co. Lit. 41. b. 2 Leon. 1. 2 Rol. 445, 446, 472. Rol. Rep. 178.

The

The Counteſs of SHREWSBURY's *Caſe.*

Mich. 42 & 43 Eliz.

In the King's Bench.

Cr. El. 777, 784.

THE Counteſs of *Shrewsbury* brought an Action on the Caſe againſt *Richard Crompton* a Lawyer of the *Temple*, and declared, That ſhe leaſed to him a Houſe at Will, & *quod ille tam negligenter & improvide cuſtodivit ignem ſuum, quod domus illa combuſta fuit:* To which the Defendant pleaded Not guilty, and was found guilty, &c. And it was adjudged that for this (*a*) permiſſive Waſte no Action lay, againſt the Opinion of *Brook* in the Abridgment of the Caſe of 48 *E.* 3. 25. (*b*) *Waſt* 52. And the Reaſon of the Judgment was, becauſe at the Common Law no Remedy lay for Waſte, either voluntary or permiſſive againſt Leſſee for Life (*c*) or Years, becauſe the Leſſee had Intereſt in the Land by the Act of the Leſſor, and it was his Folly to make ſuch Leaſe, and not reſtrain him by Covenant, Condition, or otherwiſe, that he ſhould not do Waſte. So and for the ſame Reaſon, a Tenant at Will ſhall not be puniſhed for permiſſive Waſte. But the Opinion of *Littleton* is good Law, *fol.* (15) 152. If Leſſee at Will commits (*d*) voluntary Waſte, *ſcil.* in Abatement of the Houſes, or in Cutting of the Woods, there a general Action of Treſpaſs lies againſt him. For as it is ſaid in 2 & 3 *Phil. & Mar. Dyer* 122. *b.* when Tenant at Will takes upon him to do ſuch Things which none can do but the Owner of the Land, theſe amount to the Determination of the Will, and of his Poſſeſſion, and the Leſſor ſhall have a general Action of Treſpaſs without any Entry: And there 15 *E.* 4. 20. *b.* is cited, That if a (*e*) Bailee of Goods, as of a Horſe, &c. kill them, the Bailor ſhall have a general Action of Treſpaſs, for by the Killing the Privity was determined. But it was agreed that in ſome Caſes, when there is a Confidence repoſed in the Party, the Action upon the Caſe will lie for Negligence, although

(*a*) Co. Lit. 57. a.

(*b*) Br. Waſt 51.

(*c*) Cr. El. 777. 2 Inſt. 299. Stat. Glouc. c. 5. Dr. & Stud. 60. a. 4 Co. 62. b. 6 Co. 43. a. Salk. 19. 6 A. c. 31. 10 A. c. 14.

(*d*) Cr. El. 777, 784. Cr. Car. 187. Noy 51. Lit. ſect. 71. Co. Lit. 57. a. 1 Rol. 860. 2 Rol. 555, 556. Raym. 148.

(*e*) Co. Lit. 57. a. Cr. El. 784. 18 E. 4. 27. b. 11 Co. 82. a. Moor 248. 1 Leon. 87, 88. Goldsb. 66, 67, 72. Owen 52. Dyer 121. pl. 17. Moor 248.

although the Defendant comes to the Poſſeſſion by the Act of the Plaintiff. As (*a*) 12 *E.* 4. 13. *a. b.* where a Man delivers a Horſe to another to keep ſafe, the Defendant *equum illum tam negligenter cuſtodivit, quod ob defectum bonæ cuſtodiæ interiit*; the Action on the Caſe lies for this Breach of the Truſt. So 2 *H.* 7. 11. if my (*b*) Shepherd, whom I truſt with my Sheep, and by his Negligence they be drowned, or otherwiſe periſh, an Action upon the Caſe lies: But in the Caſe at Bar it was a Leaſe at Will made to the Defendant, and no Confidence repoſed in him; wherefore it was awarded, that the Plaintiff take nothing by her Bill.

(*a*) Fitz. Action ſur le Caſe 19. Br. Action ſur le Caſe 97.
(*b*) Cr. El. 777, 784. Lit. ſect. 71. Owen 52. Moor 248. Dy. 121. pl. 17. Goldsb. 72.
(*c*) Cro. El. 777.

The Caſe of ECCLESIASTICAL PERSONS.

Mich. 43 & 44 *Eliz.*

IN THE

High Court of PARLIAMENT.

AT a Parliament held in the ſame Term upon Conſideration of a Bill for Confirmation of Conveyances made by the Subjects to the Queen, and of Letters Patents made by the Queen to Subjects, it was reſolved by the Chief Juſtices, *Popham* and *Anderſon*, and by divers other Juſtices aſſiſtant to the Lords of Parliament in the Upper Houſe, That Leaſes made to the Queen by Colleges, Deans and Chapters, Wardens of Hoſpitals, or any other having Spiritual or Eccleſiaſtical Livings, againſt the Proviſion of the Act of 13 *Eliz.* (*a*) *cap.* 10. are reſtrained by the ſame Act, as well as Leaſes made to common Perſons.

Full. Ch. Hiſt. l. 10. p. 27.
(*a*) 10 Co. 60. b. 11 Co. 67. a. 70. a. 73. a. 75. b. 76. a. 1 Rol. Rep. 152, 155, 158, 160, 164, 166, 236. Carter 13. Hardres 302, 445. 1 Jones 21. Jenk. Cent. 255, 256. Antea 6. b. Cr. Argument 60. Co. Lit. 43. a. 44. b. 301. a. 342. a.

1. Becauſe the Eccleſiaſtical Perſons are diſabled by the Act to make any Leaſe, Gift, Grant, Feoffment, Conveyance, or Eſtate, but only in the ſame Form as the Statute preſcribes;

preſcribes; and if they are diſabled to make Eſtates, then the Queen cannot take any Eſtate of them, which is not warranted by the ſaid Act. For altho' the Queen by the Common Law hath Ability to take, yet for as much as the Parliament hath diſabled them to make Eſtates, the Eſtates made to the Queen againſt the Act are void.

2. The Stat. of 1 *Eliz.* which reſtrains Biſhops to make Eſtates, hath a ſpecial (*a*) Proviſion, that they may make Eſtates to the Queen; which proves, that if ſuch Proviſion had not been made for the Queen, for as much as the Act doth diſable Biſhops to make Eſtates, the Queen could not take an Eſtate from them againſt the Proviſion of the Act, but no ſuch Proviſion is in the ſaid Act of 13 *Eliz.*

(*a*) 11 Co. 71 b. (*b*) 2 Inſt. 358, 681. Co. Lit. 43. b. 99. a. 120. a. 11 Co. 70. a. b. 72. a. 2 Sid. 69. 1 Rol. Rep. 152, 153, 166, 167. Cr. Car. 526. (*c*) 35 H. 6. 61. a. (*d*) Co. Lit. 344. b. 2 Inſt. 353, 354, &c. (*e*) Plowd. 243. b. 244. a. b. 248. b. 251. b. 252. a. 1 Co. 44. b. 48. a. 7 Co. 21. a. 23. a. 11 Co. 72. a. 1 Rol. Rep. 153. (*f*) Raſt. Leaſes 4. (*g*) 1 Rol. Rep. 167. Hardr. 302. 10 Co. 55. a. Co. Lit. 341. a. 2 Bulſtr. 53. Hob. 295. Hawk. Max. 2. Wing. Max. 3. (*h*) 11 Co. 76. a. Palm. 216. 1 Rol. Rep. 164. Co. Lit. 342. a. (*i*) Eytrue's Caſe, Paſch. 14 Eliz. in Communi Banco. 10 Co. 60. b. 1 Roll. Rep. 160, 164. Hob. 97. 11 Co. 69. b. (*k*) Bridg. 30. Hob. 97. 10 Co 61. a. 11 Co. 69. b. Cr. Car. 49. 1 Rol. Rep. 160.

3. In divers Caſes the King is (*b*) bound by Act of Parliament, altho' he be not named in it, nor bound by expreſs Words. And therefore all Stat. which are made to ſuppreſs Wrong, or to take away Fraud, or to prevent the Decay of Religion, ſhall bind the King altho' he be not named: For Religion, Juſtice, and Truth are the ſure Supporters of the Crowns and Diadems of Kings. And therefore it is agreed in 35 *H.* 6. 60. that the (*c*) King ſhall be bound by the Stat. of *Weſt.* 2. (*d*) *cap.* 5. which makes Proviſion againſt tortious Uſurpations, altho' the King be not named in the Act. So in the Lord *Barkley*'s Caſe reported by Mr. *Plowden*, it is adjudged, That if a Gift in Tail be made to the King, he can't alien to defraud him in Reverſion, or his Iſſue, but is (*e*) bound by the Stat. of *Weſt.* 2. *De donis conditionalibus.* And the ſaid Act of (*f*) 1 *Eliz.* proves, That Acts which reſtrain Eccleſiaſtical Perſons from waſting their Poſſeſſions, which were given to maintain the Service of God, ſhall bind the King, if ſpecial Proviſion had not been made to the contrary by the ſame Act; *Et* (*g*) *ſumma ratio eſt quæ pro religione facit.* Sir *Tho. Egerton* Lord Keeper of the Great Seal agreed in Opinion with the Juſtices aforeſaid in the principal Caſe: Note, Reader, the ſaid Act of 13 *Eliz.* hath been conſtrued (*h*) beneficially, to prevent all Inventions and Evaſions againſt the true Intent of the Makers of the Act. And therefore it was held *Pſch.* 14 *Eliz.* in the *Common Pleas* in (*i*) *Eitrue*'s Caſe, That if a Writ of Annuity be brought againſt a Parſon or a Vicar on a feigned Preſcription, or by a Grant by him, the Patron and Ordinary, ſuppoſed to be made before the Statute; and he prays in Aid of the Patron and Ordinary, and loſes by Action tried; and all this is feigned to make an Evaſion out of this Act, that this Invention is taken to be within the Equity of it; for altho' the (*k*) Annuity charge the Parſon or Vicar and not the Poſſeſſions, yet it is within the Miſchief, *ſcil.* impoveriſhing of the Succeſſor, Cauſe of Dilapidations, and Decay of Spiritual Livings, and Hoſpitals, which are the Miſchiefs mentioned in the Preamble

Preamble. And note his Word (*ſuffered*) in the Act was well obſerved.

It was adjudged in the *Com. Pleas, Mich.* 37 & 38 *Eliz.* between the Dean and Chapter of *Hereford*, and the Biſhop of *Hereford* (*a*) and *Ballard*, That the Grant of the next (*b*) Avoidance of a Benefice by the Dean and Chapter was within the Purview of this Act; ſo it was reſolved there, If a Dean and Chapter grant a (*c*) Rent-Charge out of their Poſſeſſions, it is reſtrained by the Equity of the Act; and yet the Rent is not any Part of their Poſſeſſion within the Words of the Act. It hath been held, That where an Archdeacon made a Leaſe for three Lives according to this Act, and the Leſſees made a Leaſe for 100 Years, and the Archdeacon, Biſhop, and the Dean and Chapter confirmed it; yet it ſhould not bind the Succeſſor; for if ſuch Confirmation ſhould not be ſaid a Conveyance within this Act, the Statute would be to little or no Purpoſe, and the good Intent and Purview of the Act would be defeated and defrauded.

(*a*) Cr. El. 440. Biſhop of Hereford. Caſe. Mich. 37 & 38 Eliz. in Communi Banco.

(*b*) Cr. El. 207, 690.

3 Co. 59. b.

(*c*) Dyer 370. pl. 62.

And it was held *Trin.* 30. *Eliz.* in a Caſe depending by *Engliſh* Bill in the Exchequer-Chamber, between *Hodges* Pl. and (*d*) *Newcomen* Def. by Sir *Roger Manwood* Ch. Baron, and all the Barons of the Exchequer, That where the Parſon of *Weſton* in the County of *Glouceſter* 9 *Eliz.* demiſed his Rectory to *Will. Hodges* then Patron of the ſame Rectory for 50 Years, who 14 *Eliz.* by his Deed aſſigned it over to Sir *John Throgmorton*, the Biſhop confirmed this Leaſe 17 *Eliz.* in the Life of the Leſſor, that the ſaid Confirmations were good. And in that Caſe two Points were reſolved.

(*d*) Newcomen's Caſe. Trin. 30 Eliz. in the Exchequ. 1 Rol. Rep. 171, 361. 2 Rol. Rep. 9. Co. Lit. 301. b. 1 Rol. 481. Cr. Car. 38. 3 Bulſt. 238. Bridg. 83.

1. That for as much as the ſaid Leaſe was made before the Stat. of 13 *Eliz.* and ſo not reſtrained by the ſaid Act, the (*e*) Confirmations made after the ſaid Act to perfect the ſaid Leaſe, were not within the Purview or Intention of the Act.

(*e*) Cr. El. 18, 430. Cr. Jac. 53. Co. Lit. 301. b.

2. It was reſolved, that the Grant made by the Patron of the ſaid Leaſe, did (*f*) import in it ſelf as well a Grant of the Term, as a Confirmation of the ſame Term: And ſo one Deed of one and the ſame Thing by one and the ſame Perſon, to one and the ſame Perſon, at one and the ſame Time ſhall enure to two ſeveral Purpoſes, *ſcil.* to a Grant of the Intereſt as Leſſee, and to a Confirmation of the ſame Intereſt as Patron. As if (*g*) Tenant for Life grants a Rent-Charge to him in the Rev'n in Fee, and he by Deed grants it over to another and his Heirs, that is a good Grant and Confirmation alſo to make the Rent good for ever. So if a (*h*) Diſſeiſor makes a Leaſe for Life, the Remainder to the Diſſeiſee, and the Diſſeiſee grants the Remainder over, it is a good Grant and Confirmation alſo.

302. a. (*f*) Co. Lit. 301. b.

(*g*) Co. Lit. 302.

(*h*) Co. Lit. 302. a.

And in the principal Caſe the Lords of the Parliament, after the ſaid Reſolution, being informed, that divers Deans and Chapters, Colleges, &c. had made Leaſes to the Queen, intending that the Queen was not bound by the ſaid Act of 13 *Eliz.* cauſed a Clauſe

to be added in the firſt Branch of the Act of Confirmation that it ſhould not extend to make any Leaſe, Grant, &c. good to the Queen by any Eccleſiaſtical Perſon, &c. who had not Power by the Laws and Statutes of the Realm to make it, which is more than was in the Act of Confirmations *in anno* 18 *Eliz.* which was done to manifeſt the Matter to the Lay-people; for it was held by the ſaid Juſtices, That the general Words of the ſaid Act of 18 *Eliz.* hath not enabled ſuch Eccleſiaſtical Perſons to make Leaſes or Eſtates to the Queen, who by the ſaid Act of 13 *Eliz.* were upon good and important Conſiderations diſabled. *Vide* 17 *E.* 3. 40. & 21 *E.* 3. 46. The King being Head of the Commonwealth, cannot be an Inſtrument to defeat the Purview of an Act of Parliament made *pro bono publico.*

9 Co. 73. a.

11 Co. 76. a.

Caſes

Caſes of Covenants, Agreements, &c. concerning Leaſes, Aſſurances, &c.

SPENCER's *Caſe*.

Paſch. 25 Eliz. *in the King's Bench.*

SPencer and his Wife brought an Action of Covenant againſt *Clark*, Aſſignee to *J.* Aſſignee to *S.* and the Caſe was ſuch: *Spencer* and his Wife by Deed indented demiſed a Houſe and certain Land (in the Right of the Wife) to *S.* for Term of 21 Years, by which Indenture *S.* covenanted for him his Executors and Adminiſtrators with the Plaintiffs, that he, his Executors, Adminiſtrators, or Aſſigns, would build a Brick Wall upon Part of the Land demiſed, &c. *S.* aſſigned over his Term to *J.* and *J.* to the Defendant; and for not making of the Brick Wall the Plaintiffs brought the Action of Covenant againſt the Defendant as Aſſignee: And after many Arguments at the Bar, the Caſe was excellently argued and debated by the Juſtices at the Bench: And in this Caſe theſe Points were unanimouſly reſolved by Sir *Chriſtopher Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. And many Differences taken and agreed concerning expreſs Covenants, and Covenants in Law, and which of them run with the Land, and which of them are collateral, and do not go with the Land, and where the Aſſignee ſhall be bound without naming of him, and where not; and where he ſhall not be bound although he be expreſly named, and where not. 2 Bulſtr. 281, 282. Cumberb. 64. Carth. 178. Skinner 211, 297. Moor 159.

1. When the Covenant extends to a Thing in *eſſe*, Parcel of the Demiſe, the Thing to be done by Force of the Covenant is *quodam-*

quodammodo annexed and appurtenant to the Thing demiſed, and ſhall go with the Land, and ſhall bind the Aſſignee (*a*) altho' he be not bound by expreſs Words: But when the Covenant extends to a Thing which is not in Being at the Time of the Demiſe made, it cannot be appurtenant or annexed to the Thing which hath no Being: As if the Leſſee covenants to repair the Houſes demiſed to him during the Term, that is Parcel of the Contract, and extends to the Support of the Thing demiſed, and therefore is *quodammodo* annexed and appurtenant to Houſes, and ſhall bind the Aſſignee altho' he be not bound expreſly by the Covenant: But in the Caſe at Bar, the Covenant concerns a Thing which was not in *eſſe* at the Time of the Demiſe made, (*b*) but to be newly built after, and therefore ſhall bind the Covenantor, his Executors, or Adminiſtrators, and not the Aſſignee, for the Law will not annex the Covenant to a Thing which hath no Being.

(*a*) Moor 27, 399. Cro. El. 457, 552, 553. 1 Rol. 521, 522. Poſtea 24. 1 Sand. 239. Cr. Jac. 125. Cr. Car. 222, 523. 1 Jones 245. 1 Siderf. 157. 1 Anderſ. 82. 1 Show. 284. 4 Mod. 80. 3 Lev. 326. Salk. 185, 317.

(*b*) Cr. El. 457. Cr. Car. 439. Dy. 14. pl. 69. 1 Anderſ. 82. Moor 159.

2. It was reſolved that in this Caſe, If the Leſſee had covenanted for him and his (*c*) Aſſigns, that they would make a new Wall upon ſome Part of the Thing demiſed, that for as much as it is to be done upon the Land demiſed, that it ſhould bind the Aſſignee; for altho' the Covenant doth extend to a Thing to be newly made, yet it is to be made upon the Thing demiſed, and the Aſſignee is to take the Benefit of it, and therefore ſhall bind the Aſſignee by expreſs Words. So on the other Side, If a Warranty be made to one, his Heirs and Aſſigns, by expreſs Words, the Aſſignee ſhall take Benefit of it, and ſhall have a (*d*) *Warrantia Chartæ*, *F. N. B.* 135. & 9 *E.* 2. *Garr' de Charters* 30. 36 *E.* 3. *Garr.* 1. 4 *H.* 8. *Dyer* 1. But altho' the Covenant be for him and his Aſſigns, yet if the Thing to be done be meerly collateral to the Land, and doth not touch or concern the Thing demiſed in any Sort, there the Aſſignee ſhall not be charged. As if the Leſſee covenants for him and his Aſſigns to build a Houſe upon the Land of the Leſſor which is no Parcel of the Demiſe, or to pay any collateral Sum to the Leſſor, or to a Stranger, it ſhall not bind the Aſſignee, becauſe it is meerly collateral, and in no Manner touches or concerns the Thing that was demiſed, or that is aſſigned over; and therefore in ſuch Caſe the Aſſignee of the Thing demiſed cannot be charged with it, no more than any other Stranger.

(*c*) Cr. Car. 25, 188. 1 Jones 223. 1 Rol. Rep. 360. Moor 159, 399

(*d*) F. N. B. 135. d. Co. Lit. 384. b.

(*e*) 2 Jones 152. 1 Leon. 43. Swinb. 324.

3. It was reſolved, If a Man leaſes (*e*) Sheep or other Stock of Cattle, or any other perſonal Goods for any Time, and the Leſſee covenants for him and his Aſſigns at the End of the Time to deliver the like Cattle or Goods as good as the Things letten were, or ſuch Price for them; and the Leſſee aſſigns the Sheep over, this Covenant ſhall not bind the Aſſignee, for it is but a perſonal Contract, and wants ſuch (*f*) Privity as is between the Leſſor and Leſſee and his Aſſigns

(*f*) Cr. Car. 188.

of the Land in Reſpect of the Reverſion. But in the Caſe of a Leaſe of perſonal Goods there is not any Privity, nor any Reverſion, (*a*) but merely a Thing in Action in the Perſonalty, which cannot bind any but the Covenantor, (*b*) his Executors, or Adminiſtrators, who repreſent him. The ſame Law, if a Man demiſes a Houſe and Land for Years, with a Stock or Sum of Money rendering Rent, and the Leſſee covenants for him, his Executors, Adminiſtrators, and Aſſigns, to deliver the Stock or Sum of Money at the End of the Term, yet the Aſſignee ſhall not be charged with this Covenant; for altho' the Rent reſerved was increaſed in Reſpect of the Stock or Sum, yet the Rent did not iſſue out of the Stock or Sum (*c*), but out of the Land only; and therefore as to the Stock or Sum the Covenant is perſonal; and ſhall bind the Covenantor, his Executors and Adminiſtrators, and not his Aſſignee: And it is not certain that the Stock or Sum will come to the Aſſignees Hands, for it may be waſted, or otherwiſe conſumed or deſtroyed by the Leſſee, and therefore the Law can't determine at the Time of the Leaſe made, that ſuch Covenant ſhall bind the Aſſignee.

(*a*) 1 Leon. 43.
(*b*) Swinb. 324.
(*c*) Kelw. 153. b. 1 And. 4. Dyer 56. pl. 15, 16, 212. pl. 37, 38. 21 E. 4. 29. a. 3 Bulſt. 291. 9 E. 4. 1. b.

4. It was reſolved, that if a Man makes a Feoffment by this Word (*d*) *Dedi*, which implies a Warranty, the Aſſignee of the Feoffee ſhall not vouch: But if a Man makes a Leaſe for Years by this Word *Conceſſi*, (*e*) or *Demiſi*, which implies a Covenant, if the Aſſignee of the Leſſee be evicted, he ſhall have a Writ of Covenant; for the Leſſee and his Aſſignee hath the yearly Profits of the Land which ſhall grow by his Labour and Induſtry for an annual Rent, and therefore it is reaſonable when he hath applied his Labour, and employed his Coſt upon the Land, and be evicted (whereby he loſes all) that he ſhall take ſuch Benefit of the Demiſe and Grant, as the firſt Leſſee might, and the Leſſor hath no other Prejudice than what his eſpecial Contract with the firſt Leſſee hath bound him to.

(*d*) 2 Inſt. 275. 4 Co. 81. a. 1 Co. 2. b. Co. Lit. 384. a. Yelv. 139. Perk. Sect. 124.
(*e*) 4 Co. 81. a. Yelv. 139. Co. Lit. 384. a. Perk. Sect. 124. Dall. 101. Cr. Jac. 73. 2 Inſt. 276. F. N. B. 134. h. Hob. 12. 1 Vent. 44. 1 Rol. 521.

5. Tenant by the Curteſy, or any other who comes in the *Poſt* ſhall not vouch (which is in lieu of an Action.) But if (*f*) a Ward be granted by Deed to a Woman who takes Huſband, and the Woman dies, the Husb. ſhall vouch by Force of this Word *Grant*, altho' he comes to it by Act in Law. So if a Man demiſes or grants Land to a Woman for Years, and the Leſſor covenants with the Leſſee to repair the Houſes during the Term, the Woman marries and dies, the Husband ſhall have an Action of Covenant as well on the Covenant in Law on theſe Words (demiſe or grant) as on the expreſs Covenant. The ſame Law is of Tenant by Statute-Merchant or Statute-Staple, or *Elegit* of a Term, and he, to whom a Leaſe for Years is ſold by Force of any Execution, ſhall have an Action of Covenant in ſuch Caſe as a Thing annexed to the Land, altho' they come to the Term by Act in Law; as if a Man grants to Leſſee

(*f*) 2 Rol. 743.

*Poſt. 24. b. F. N. B. 181. n. for Years, that he ſhall have ſo many * Eſtovers as will ſerve to repair his Houſe, or as he ſhall burn in his Houſe, or the like, during the Term, it is as appurtenant to the Land, and ſhall go with it as a Thing appurtenant, into whoſe Hands ſoever it ſhall come.

6. If Leſſee for Years covenants to repair the Houſes during the Term, (*a*) it ſhall bind all others as a Thing which is appurtenant, and goeth with the Land in whoſe Hands ſoever the Term ſhall come, as well thoſe who come to it by Act in Law, as by the Act of the Party, for all is one having Regard to the Leſſor. And if the Law ſhould not be ſuch, great Prejudice might accrue to him; and Reaſon requires, that they, who ſhall take Benefit of ſuch Covenant when the Leſſor makes it with the Leſſee, ſhould on the other Side be bound by the like Covenants when the Leſſee makes it with the Leſſor.

(*a*) Ant. 16. a. b. Poſt. 24 b Cr. Jac. 240. 309. 439. 1 Jones 223 Cr. El. 373. 1 Sid. 157.

(*b*) 1 Rol. 521. 1 Rol. Rep. 81, 82. 2 Bulſt. 281. Owen 151, 152. 7. It was reſolved, That the Aſſignee (*b*) of the Aſſignee ſhould have an Action of Covenant. So of the Executors of the Aſſignee of the Aſſignee; ſo of the Aſſignees of the Executors or Adminiſtrators of every Aſſignee, for all are compriſed within this Word (*Aſſignees*) for the ſame Right which was in the Teſtator, or Inteſtate, ſhall go to his Executors or Adminiſtrators: As if a Man makes a Warranty to one, his Heirs and Aſſigns, the Aſſignee (*c*) of the Aſſignee ſhall vouch, and ſo ſhall the Heirs of the Aſſignee: The ſame Law of the Aſſignee of the Heirs of the Feoffee, and of every Aſſignee. So every one of them ſhall have a Writ of *Warrantia Chartæ*. *Vide* 14 *E.* 3. *Garr.* 33. 38 *E.* 3. 21. 36 *E.* 3. *Garr.* 1. 13 *E.* 1. *Garr.* 93. 19 *E.* 2. *Garr.* 85, *&c.* For the ſame Right, which was in the Anceſtor, ſhall deſcend to the Heir in ſuch Caſe without expreſs Words of the Heirs of the Aſſignees.

(*c*) Cr. El. 534. Co. Lit. 384. b.

Obſerve Reader your old Books, for they are the Fountains out of which theſe Reſolut. iſſue, but perhaps by theſe Differences the Fountains themſelves will be made more clear and profitable to thoſe who will make Uſe of them. For Example (*d*) in 42 *E.* 3. 3. the Caſe is; Grandfather, Father, and two Sons, the Grandfather was ſeiſed of the Manor of *D.* whereof a Chapel was Parcel, a Prior with the Aſſent of his Covent by Deed covenanted for him and his Succeſſors, with the Grandfather and his Heirs, that he and his Covent would ſing all the Week in his Chapel, Parcel of the ſaid Manor, for the Lords of the ſaid Manor and his Servants, *&c.* The Grandfather did enfeoff one of the Manor in Fee, who gave it the younger Son and his Wife in Tail; and it was adjudg'd, that the Tenants in Tail, as (*e*) Tertenants (for the elder Brother was Heir) ſhould have an Action of Covenant againſt the Prior, for the Covenant is to do a Thing which is annexed to the Chapel, which is within the Manor, and ſo annexed to the Manor, as it is there ſaid. And *Finchden* related, That he had ſeen it adjudged

(*d*) Co. Lit. 384. a 1 Rol. 520. 521. Br. Covenant 5. Statham Covenant 3.

(*e*) Co. Lit. 385. a.

adjudged, that two (*a*) Coparceners made Partition of Land, and one did covenant with the other to acquit him of Suit, which was due, and that Coparcener to whom the Covenant was made did alien, and the Suit was arrear; and the Feoffee brought a Writ of Covenant againſt the Coparcener to acquit him of the Suit; and the Writ was maintainable, notwithſtanding he was a Stranger to the Covenant, becauſe the Acquittal fell upon the Land: But if ſuch Covenant were made to ſay divine Service in the (*c*) Chapel of another, there the Aſſignee ſhall not have an Action of Covenant, for the Covenant in ſuch Caſe cannot be annexed to the Chapel, becauſe the Chapel doth not belong to the Covenantee, as it is adjudged in (*c*) 2 *H.* 4. 6. *b.* But there it is agreed, that if the Covenant had been with the Lord of the Manor of *D.* and his Heirs, Lords of the Manor of *D.* and Inhabitants therein, the Covenant ſhall be annexed to the Manor, and there the Tertenant ſhall have the Action of Covenant without Privity of Blood. *Vide* 29 *E.* 3. 48. & 30 *E.* 3. 14. *Simpkin (d) Simeon's* Caſe, where the Caſe was, That the Lady *Bardolf* by Deed granted a Ward to a Woman who married *Simpk. S.* againſt whom the Queen brought a Writ of Right of Ward, and they vouched the Lady *Bardolf*, and afterwards the Wife died, by which the Chattel (*e*) real ſurvived to the Husband (and reſolved that the Writ ſhould not abate) the Vouchee appeared, and ſaid, What have you to bind me to Warranty? The Husband ſhewed, how that the Lady granted to his Wife before Marriage the ſaid Ward; the Vouchee demanded Judgment for two Cauſes.

(*a*) 1 Rol. 521. Co. Lit. 384. b. 385. a. 42 E. 3. 3. b. Br. Covenant 5. 1 Rol. Rep. 81.

(*b*) 1 Rol. 521.

(*c*) Co. Lit 385. a. Fitz. Covenant 13. Br. Covenant 17.

(*d*) Co. Lit. 384. a 2 Rol. 743, 744. 3 Bulſt. 165. Hob. 47. 1 Rol. Rep. 81. Cr. El. 436.

(*e*) 1 Rol. 345. Co. Lit. 351. a.

1. Becauſe no Word of Warranty was in the Deed; as to that it was adjudged, that this Word (*f*) (*Grant*) in this Caſe of Grant of a Ward (being a Chattel real) did import in it ſelf a Warranty.

(*f*) Co. Lit. 384. a.

2. Becauſe the Husband was not Aſſignee to the Wife, nor privy. As to that it was adjudged, That he ſhould vouch, for this Warranty implied in this Word (*Grant*) is in Caſe of a Chattel real ſo annexed to the Land, that the Husband who comes to it by Act in Law, and not as Aſſignee, ſhould take Benefit of it. But it was reſolved by *Wray* Ch. Juſtice, and the whole Court, that this Word (*Conceſſi* or *demiſi*) in Caſe of (*g*) Freehold or Inheritance doth not import any Warranty. 11 *H.* 6. 41. *acc'*, *vide* 6 *H.* 4. 12 *H.* 4. 5. 1 *H.* 5. 2. 25 *H.* 8. *Covenant Br.* 32. 28 *H.* 8. *Dyer* 28. 48 *E.* 3. 22. *F. N. B.* 145. *C.* 146, & 181. 9 *Eliz. Dyer* 257. 26 *H.* 8. 3. 5 *H.* 7. 18. 32 *H.* 6. 32. 22 *H.* 6. 51. 18 *H.* 3. *Covenant* 30. *Old N. B. Covenant*, 46 *H.* 3. 4. 38 *E.* 3. 24. See the Statute of (*h*) 32 *H.* 8. *c.* 24, 34. which Act was reſolved to extend to Covenants which touch or concern the Thing demiſed, and not to collateral Covenants.

(*g*) Co. Lit. 384. a.

(*h*) 32 H. 8. c. 34. Moor 159. Cr. Jac. 523. 2 Bulſt. 281, 282, 283. 1 Sand. 238, 239. Cr. Car. 25, 222. 1 Anderſ. 82. 2 Jones 152. Owen 152. Stile 316, 317. Co. Lit. 215. a.

SLINGSBY's *Caſe*.

Mich. 29 & 30 Eliz. *in a Writ of Error in the Exchequer Chamber.*

3 Leon. 160, 161. 2 Leon. 47. Jenk. Cent. 262.

Slingsby and *Francis* his Wife brought an Action of Covenant in the *King's Bench* againſt *Roger Beckwith*, and declared on an Indenture tripartite between the Defendant *Roger Beckwith* of the firſt Part, *William Vavaſor*, *Francis Slingsby*, and *Elizabeth* Siſter of the ſaid *Roger*, of the ſecond Part, and *George Harvey*, and the ſaid *Frances* (then his Wife) another of the Siſters of the ſaid *Roger*, of the third Part; and declared, That the ſaid *Roger Beckwith* the Defendant by the ſaid Indenture (*a*) *conveniſſet, promiſiſſet, & conceſſiſſet ad & cum dictis* Will. & Franciſco, & *ad & cum præd'* Georgio & Franciſca *uxore ejus, & aſſignat' ſuis, & ad & cum quolibet & qualibet eorum, quod præd'* Rogerus *ad ſigillationem & deliberationem ejuſdem indentur' fuit legitime & ſolus ſeiſitus de Rectoria de* Aldingfleet *in Com' Eborum*: And on this Covenant Iſſue was joined, and the *Venire facias* was *de vicinet' Caſtri Eborum*, and the Iſſue by *Niſi prius* was tried for the Plaintiff, and Damages aſſeſſed; upon which Judgment was given in the *King's Bench*. And now in a Writ of Error in * the *Exchequer-Chamber* before *Anderſon* Ch. Juſtice of the *Common Pleas*, *Manwood* Chief Baron of the *Exchequer*, *Windham*, *Periam*, and *Rhodes*, Juſtices of the *Common Pleas*, and *Gent* and *Clark* Barons of the *Exchequer*, and of the Coif, it was reſolved that the ſaid Judgm. was † erroneous; for it appears by the Plaintiff's own Shewing in his Declaration, that the Plaintiffs only cannot maintain an Action of Covenant, but the other Covenantees ought to have (*b*) joined in the Action with them, notwithſtanding theſe Words (*& ad & cum (c) quolibet & qualibet eorum*;) for as to theſe Words this Difference was agreed: When it appears by the Declaration, that every of the Covenantees hath, or is to have, a ſeveral Intereſt or Eſtate, there, when the Covenant is made with the Cove-

(*a*) 1 Bulſt. 26.

* 27 Eliz. c. 8.

† 3 Leon. 161. Jenk. Cent. 262. 1 Bulſt. 26.

(*b*) 1 Bulſt. 26. 1 Sand. 155.

(*c*) 3 Leon. 161. 2 Leon. 47.

Covenantees, & *cum quolibet eorum*, theſe Words *cum quolibet eorum* make the Covenant ſeveral in Reſpect of their ſeveral (*a*) Intereſts. As if a Man by Indenture demiſes to (*b*) *A.* black Acre, to *B.* white Acre, to *C.* green Acre, and covenants with them and *quolibet eorum*, that he is lawful Owner of all the ſaid Acres, *&c.* in that Caſe in Reſpect of the ſaid ſeveral Intereſts by the ſaid Words, & *cum quolibet eorum*, the Covenant is made ſeveral: But if he demiſes to them the Acres jointly, then theſe Words *cum quolibet eorum* are void, for a Man by his Covenant (unleſs in Reſpect of ſeveral Intereſts) cannot make it firſt joint, and then to make it ſeveral by the ſame or the like Words, *cum quolibet eorum*: For altho' ſundry Perſons may bind themſelves & *quemlibet eorum*, and ſo the Obligation ſhall be (*c*) joint or ſeveral at the Election of the Obligee; yet a Man cannot (*d*) bind himſelf to three, and to each of them to make it joint or ſeveral at the Election of ſeveral Perſons, for one and the ſame Cauſe; for the Court would be in Doubt for which of them to give Judgment, which the Law would not ſuffer, as it is held in 3 *H.* 6. 44. *b.* There it appears that one brought a Replevin againſt two Perſons for an Ox, who made ſeveral (*e*) Avowries, each by himſelf in his own Right; and there by Advice of all the Juſtices, both the Avowries abated for the Inconveniency, that if both the Iſſues ſhould be found for the Avowants, the Court could not give Judgment on them ſeverally for one and the ſame Thing. Alſo the Covenantor in the Caſe at Bar would be divers Times charged for one and the ſame Thing; and therefore the ſaid Words & *cum quolibet eorum* are in ſuch Caſe but Words of Amplification and Abundance, and cannot ſever the joint Cauſe of Action. And it was alſo reſolved, That an * Intereſt could not be granted jointly and ſeverally: As if a Man grants *proximam advocationem*, (*f*) or makes a Leaſe for Years of Land to two jointly, and ſeverally, theſe Words ſeverally are void, and they are Jointenants; ſo if a Man makes a Feoffment in Fee by Deed to three, and warrants the Land to them, & *cuilibet eorum*, this Warranty is joint and not ſeveral: But in ſuch Caſe, if their Eſtates were ſeveral, their Warranty ſhould be ſeveral accordingly: But a Power or Authority, as to make Livery, (*g*) or to ſell, *&c.* may be joint and ſeveral, for there they have not any Intereſt or Action, but are as Servants to others. *Vide* 16 *Eliz. Dyer* 337, 338. *acc.* Sir (*h*) *Anthony Coke's* Caſe, 6 *E.* 2. *Covenant* (*i*) *Br.* 49. 12 *H.* 4. 18. *in Detinue.* And for this Error the Judgment was reverſed. Another Error was aſſigned concerning the *Viſne*; but as to that the Court did not deliver any Opinion.

(*a*) Antea 7. b.

(*b*) Jenk. Cent 262. Bridg. 63. Skinner 401.

(*c*) Poſtea 21. b.

(*d*) 2 Brownl. 208. Yelv. 177.

(*e*) Plowd. 10. b. Manxel's Caſe. Poſtea 38. b. 21 R. 2. Fitz. Avowry 262.

* Raym. 6.

(*f*) Jenk. Cent. 262, 263.

(*g*) Jenk. Cent. 263.

(*h*) Antea 8. a. 1 And. 53, 54 1. Beni. 228, 269.

Dyer 337, 338. pl. 39

(*i*) 2 Leon. 47. Antea 8. a.

ROSEWEL's *Case.*

Paſch. 35 Eliz.

Cr.El. 297,298. (a) Cr. El. 9. 465,466. 1 Rol. 466. Moor 143, 595, 596. (b) 6 H. 7. 4. a. Br. Condition 133. Fitz. Bar. 149. Cart. 205. (c) Poſtea 20. a. Br. Condition 247. Cr.El.298. (d) 26 H. 8. 1. b. Br. Condir. 1.

BEtween *Moor* and *Roſewel* it was adjudged, That if a Man bargains and ſells Land in Fee, and covenants to make further Aſſurance to the Bargainee as his Counſel ſhall deviſe; in this Caſe the Bargainee (*a*) himſelf, although he be learned in the Law, cannot deviſe the Aſſurance, but ſome of his Counſel ought to deviſe it; and therewith agree the Books in (*b*) 6 *H.* 7. & (*c*) 11 *H.* 7. 21. *a.* for if the Party himſelf might deviſe it, then it would be no Plea to ſay, *quod conſilium non dedit adviſamentum. Vide* (*d*) 26 *H.* 8. 1.

HIGGINBOTTOM's *Case.*

Paſch. 35 Eliz.

In the King's Bench.

Cr.El 298, 299. Moor 595, 596. 1 Rol. 424. Carter 205.

JOhn *Stafford* Eſq; brought an Action on the Caſe, (which began in the *King's Bench, Hill.* 34 *Eliz. Rot.* 647. *Gloceſtr*') againſt *Ralph Higginbottom* Parſon of *Littleton* upon *Severn*, becauſe the Defendant, upon good Conſideration mentioned in the Declaration, did promiſe that he would make a good and lawful Eſtate and Aſſurance in Law of the Rectory of *Littleton* aforeſaid to the Plaintiff, diſcharged of all former Bargains, Sales, *&c.* made by the Defendant during the joint Lives of the Plaintiff and Defendant, as by Counſel learned of the Plaintiff, on Requeſt made, ſhould be adviſed: And alledged that one *Maurice Tovey* was of the Plaintiff's learned Counſel, and gave his Advice to the Plaintiff, That the Defendant ſhould make a Leaſe

a Leaſe by Indenture to the Plaintiff of the ſaid Rectory with the Appurtneances, to have to him during their Joint-Lives, *&c.* and the Plaintiff gave Notice to the Defendant of the ſaid Advice, and requeſted him to perform it, which the Defendant did deny to do, *&c.* The Defendant pleaded *Non Aſſumpſit*; and it was found for the Plaintiff. And it was moved in Arreſt of Judgment, that this Advice of the Plaintiff's Counſel ought to be given immediately by the Counſellor himſelf to the Defendant, and not to the Plaintiff, and he to give Notice as above. And the Defendant's Counſel did rely ſtrongly on the Book of 11 *H.* 7. 21. for there it is held by all the Juſtices, that the Counſel ought to be given to him who ought to make the Eſtate, and not to him with whom he is of Counſel: And they inſiſted much on the Words of the Book; but on Conſideration of the Book, and on the Reſidue of the ſaid Caſe, afterwards in the ſame Year *fol.* 23. *b.* it appears plainly; and ſo it was reſolved, That the Intent of the Judges was not, that the Counſel could not be given or ſignified to the Party who ſhould make the Eſtate, but only to the Covenantor, becauſe it is Matter whereof by Intendment he who ſhould make the Eſtate (without Notice given) could not have Knowledge. And it was reſolved, That it would be more proper that the Counſellor ſhould give his Counſel to him with whom he is of Counſel, and he to give Notice thereof to him who ſhould make the Eſtate. And altho' he hath two or three of his Counſel, yet none of them may give Advice to him who is to make the Eſtate, without Requeſt, for peradventure he would not uſe their Advice in ſuch Caſe; and it is Reaſon that the Counſel be given to the Party with whom he is of Counſel, for peradventure he may miſlike it, and will not have it notified. 2. It is leſs miſchievous; for if the Party himſelf notify other Advice to him who ſhould make the Eſtate than the Counſellor gave, if the Covenantor knows it, he may refuſe; if he do not know it, and the Counſel notified it according to his Covenant or Agreement, if he perform it, he is excuſed; and if it be not according to his Covenant or Agreement, he may refuſe it, and ſo no Miſchief to the Party; but if the Counſellor ſhould give Advice to him who ſhould make the Eſtate, he may be ignorant, whether he be his Counſel or not. And afterwards Judgment was given for the Plaintiff for the Cauſes before alledged. *Vide* 8 *E.* 4. 1, & 2. 6 *H.* 7. 4 *a.* & 14 *H.* 8. 21. *b.*

Antea 10. b. Br. Condit. 247. Cr. El. 298.

Cr. El. 298.

1 Rol. 424.

Perk. Sect. 777.

1 Rol. 424.

Cr. El. 298.

STILE's *Caſe.*

Hill. 38 Eliz.

In the King's Bench.

2 Roll. 22. Cr. El. 472. (*a*) 2 Brownl. 291. Co. Lit. 143. b. 229. a. 2 Inſt. 672. Cr. Jac. 429. (*b*) Co. Lit. 35. b. 229. a. 2 Inſt. 672. 2 Rol. 21.

BEtween *Frampton* and *Stile* in Debt upon an Obligation; the Defendant ſaid, that it was on Condition to perform Covenants in an Indenture, *hic in Curiâ prolat'*, and in Truth the Deed was not indented, but wrote *hæc indentura:* And it was adjudged, that it was (*a*) not an Indenture, although it was in two Parts; for the Words of a Deed cannot make it indented; But to the Making of an Indenture there ought to be a manual Act of Indenting of the (*b*) Parchment, or Paper; and becauſe the Defendant did not ſhew any Indenture, the Plaintiff had Judgment.

Sir ANTHONY MAIN's *Caſe.*

Paſch. 38 Eliz. Rot. 42.

In Error, in the King's Bench.

Co. Ent. 244. pl. 6. Jenk. Cent. 256. Moor 452, 453. Cr. El. 450, 479. 2 And. 18. Poph. 109, 110.

THE Caſe in Effect was, That Sir *Anthony Main* did leaſe certain Land to *Scot* for 21 Years by Indenture, and covenanted that at any Time during the Life of *Scot* upon Surrender of his Leaſe, Sir *Anthony*, &c. would make a new Leaſe during the Reſidue of the Years, and bound himſelf to perform the Covenants, &c. And now in Debt on the ſaid Obligat. by *Scot* againſt Sir *Anth.* he pleaded that *Scot* did not ſurrender, &c. To which *Scot.* replied, and ſaid, that after

after the ſaid Leaſe Sir *Anthony* had accepted a Fine *ſur conuſans de droit come ceo*, &c. and by the ſame Fine granted and rendred the Land to the Conuſee for 80 Years: Upon which the Def. did demur in Law. And it was adjudged for the Pl. And in this Caſe three Points were reſolved:

1. That S. *Ant. Main* had broke his Covenant without any (*a*) Surrender made, for by the ſaid Fine levied by him for 80 Years, he had (*b*) diſabled himſelf either to take a Surrender, or to make a new Leaſe; and the Law will not enforce any one to do a Thing which will be vain and fruitleſs (*c*) *Lex nemini cogit ad vana ſeu inutilia peragenda*: But it would be vain to compel him to make a Surrender to him who cannot take it; and altho' the Leſſee in this Caſe by the Words of the Indenture ought to do the firſt Act, *ſcil.* to make the Surrender, yet when the Leſſor hath diſabled himſelf not only to take the Surrender, but alſo to make a new Leaſe according to the Covenant, for this Cauſe the Leſſor's Covenant is broke without any Surrender made. *Vide* 32 *E.* 3. (*d*) *Barre* 264. & 21 *E.* 4. (*e*) 55. *a.* If you are bound to enfeoff me of the Manor of *D.* before ſuch a Feaſt, if you make a Feoffment of the ſaid Manor to another before the ſaid Feaſt, you have forfeited your Obligation, altho' you repurchaſe the Land again before the Feaſt, becauſe you were once diſabled to make the Feoffment. And therewith agreeth *Temp. E.* 1. *Covenant* 29. If a Man leaſes a Manor for Years, and the Leſſee covenants to keep the Houſes of the Manor, and as much as was in the Manor in as good Plight as he found them, during the Term, the Leſſee committed Waſte in the Houſes, and in cutting of Oaks, the Leſſor brought an Action of Covenant (*f*) before the End of the Term for the Oaks, becauſe for them it was impoſſible that the Covenant ſhould be performed: Otherwiſe is it of the Houſes; and therewith agree *F. N. B.* 145. *k.* & 12 (13) *E.* 3. *Covenant* 2.

2. It was reſolved, If a Man ſeiſed of Lands in Fee, covenants to enfeoff *J. S.* of them upon requeſt, and (*g*) afterwards he makes a Feoffment in Fee of the ſaid Lands; now in this Caſe *J. S.* ſhall have an Action of Covenant without Requeſt. And that in Effect is all one with the principal Caſe.

3. It was reſolved that in the Caſe at Bar, If the ſaid Term of 80 Years were but an Intereſt of a future Term, ſo that *Scot* notwithſtanding that might make the Surrender, yet in ſuch Caſe *Scot* ſhould have an Action of Covenant without making any Surrender; for true it is that he may Surrender; but alſo true it is, that Sir *Anthony* after ſuch Surrender cannot make the new Leaſe, which was the Effect that the Surrender ſhould produce; and therefore in as much as the Leſſor hath diſabled himſelf to make a new Leaſe, which is the Effect and End of the Surrender, and that which he ought to do on his Part, the Leſſee ſhall not be enforced to make the Surrender, which is the firſt Thing to be done on his Part, for

(*a*) Hardres 387. 2 Rol. Rep. 347, 348, 408. Hutt. 48. Winch 29. Er. El. 450, 479. Jenk. Cent. 256. Moor 453. Poph 109. Raym. 26.
(*b*) 1 Bulſtr. 117. Perk. ſect. 767, 801. Lit. ſect. 355, 356, 357, 358.
1 Co. 25. b. Co. Lit. 221. a. b. 222. a. 2 Co. 59. b. 79. a. 13 H. 7. 23. b. Br. Condition 26, 217. 44 Aſſ. 26. 20 H. 6. 34. b. Cr. El. 450, 479. Moor 323, 452, 453, 626. 2 Anderſ. 18. Poph. 110, 198. Hutt. 48. 1 Rol. 477, 448. 3 Co. 29. a. b. 10 Co. 49. b. 1 Rol. Rep. 168. Hardr. 387. 7 H. 4. 16. a. 8 Co. 83. a. O. Benl. 77.
(*c*) 2 Rol. Rep. 408. Hard. 387. b. Co. Lit. 127. b. 197. b. Poſtea 89. a.
(*d*) Cr. El. 479.
(*e*) 8 Co. 83. a.
(*f*) 7 Co. 15. a. F. N. B. 145. K. Moor 313, 323. 2 Rol. Rep. 232, 347. Godb. 335.
(*g*) 1 Bulſtr. 117.

for by the Surrender he would loſe his old Term without a Poſſibility of having the New according to the Leſſor's Covenant. And therewith agreeth 14 *H.* 4. 19. *a. J. (a)* Parſon of the Church of *G.* was bound in an Obligation of 100 *l.* to the Prior of *E.* the Condition was, That if the Parſon reſign his Church within certain Time to the Prior for a certain Penſion as they could agree, that then the Obligation ſhould be void; and afterwards and within the Time the Prior and Parſon agreed of a Penſion of 5 *l.* yet the Parſon did refuſe to reſign. And the Opinion of the whole Court was, That although they had agreed of the Penſion, yet the Parſon is not bound to reſign until he be ſure of the Penſion, and that he cannot be without Deed. And therefore in ſuch Caſe the Parſon is not obliged to reſign until the Prior hath tendred him a Deed of the ſaid Penſion, by which he might be ſure of it.

(a) 2 Rol. Rep. 408. Perk. ſect. 774. 14 H. 4. 18. b. Fitz. Bar. 190. Br. Condition 42.

LAUGHTER's *Caſe.*

In the King's Bench.

Trin. 37 Eliz.

Cr. El. 398, 399. Poph. 98. Moor 357. 2 Jones 96. 2 Rol. Rep. 216. 1 Salk. 253.

THomas Eaton Eſquire, and *Roger Monox* Gent. brought an Action of Debt on a Bond of 400 *l.* bearing Date 26 *Sept.* 26 *Eliz.* againſt *Thomas Laughter*. The Defendant demanded *Oyer* of the Bond and Condition; and it appeared by the Bond, that *Richard Ramsford* was alſo bound in the ſaid Bond with the Defendant jointly and ſeverally: And the Condition was in Effect, "That if the within "bounden *Rich. Ramsford* after lawful Marriage had be- "tween him and *Jane Gilman* Wife of *Henry Gilman* de- "ceaſed, and together with the ſaid *Jane*, do and ſhall law- "fully ſell and alien in Fee-ſimple, or Fee-tail, all the great "Meſſuage with the little Tenement thereunto adjoining, "of the ſaid *Jane*, ſituate in *London*, now in the Occu- "pation of *William Fitzw.* Eſquire, If then the ſaid "*Richard Ramsford* do or ſhall either in his Life-time "purchaſe to the ſaid *Jane*, and her Heirs and Aſſigns, Lands,

" Lands, Tenements, and Hereditaments, of as good Right, " and of as good Value, as the Money by him received or " had by or upon his Sale or Alienation of the Premiſſes " ſhall amount unto: Or elſe do or ſhall leave unto her " the ſaid *Jane* as Executrix, or by Legacy, or other good " Aſſurance or Conveyance, as much Money as ſhall be by " him received upon ſuch, *&c.* that then, *&c.*' And pleaded that the ſaid *Richard Ramsford* married the ſaid *Jane* 1 *Decemb.* 27. and that the ſaid *Jane* died 8 *Auguſt* 31. and the ſaid *Richard Ramsford* ſurvived her; the Plaintiff ſhewed by way of Replication, that the ſaid *Ramsford* and *Jane*, *Paſch.* 30 *Eliz.* for 320 *l.* levied a Fine of the Premiſſes to *John Thompſon* and *William Kerwen*, and to the Heirs of *John Thompſon*; and that the ſaid *Ramsford* did not purchaſe Lands, Tenements, or Hereditaments, of the Value of 320 *l.* to the ſaid *Jane* and her Heirs, *neque reliquit præd'* Jane *poſt deceſſum ipſius* Rich. *ut executrici*, *&c.* And on this Plea the Defendant's Counſel did demur in Law. And on great Deliberation Judgment was given by *Popham* Chief Juſtice and the whole Court againſt the Plaintiff: And the Reaſon and Cauſe of the Judgment was, That where a Condition of a Bond conſiſts on two Parts in the (*a*) Disjunctive, and both are poſſible at the Time of the Bond made, and afterwards one of them becomes impoſſible by the Act of God, the Obligor is not bound to perform the other Part: For the Condition is made for the Benefit of the Obligor, and ſhall be taken beneficially for him, and he hath Election to perform the one or the other for the Saving of the Penalty of his Bond: And when one Part is become impoſſible by the Act of God, it is as beneficial for him as if that Part of the Disjunctive, which is become impoſſible, had been only the Condition of the Bond: And ſo when one became (*b*) impoſſible by the Act of God, which by no Induſtry he could perform, his Bond is ſaved, altho' he doth not perform the other, *quia* (*c*) *impotentia excuſat legem.* And in this Caſe at Bar, for as much as *Jane* died before the ſaid *Ramsford*, ſo that he could not leave to the ſaid *Jane*, either as Executrix, or by Legacy, or other Aſſurance, ſo much Money as ſhould be received by him, *&c.* and ſo this Part of the Disjunctive became impoſſible by the Act of God. *Vide* (*d*) 30 *H.* 6. *Barre* 60. (*e*) 15 *H.* 7. 4. 9 *Eliz. Dyer* (*f*) 162. between *Arundel* and *Combe*. And the Caſe in (*g*) 21 *E.* 3. 29. *b.* is not like this Caſe. For there at the Time of the Bond made, and at the Time when the Condition was to be performed, one Part of the Disjunctive was not poſſible to be performed, for there the Heir of his Body was not *in rerum natura.*

(*a*) 1 Rol. 447, 450. 4 Co. 52. b. 1 Mod. Rep. 264, 265. Cr. El. 396, 397, 539. 10 Co. 127. Poph. 98. O. Benl. 8. pl. 31. Goldsb. 142. Moor 395, 396. Co. Lit. 225. a. Lutw. 693. 2 Mod. 200. (*b*) 1 Jones 171, 172, 179, 139, 180, 181. Palm. 514, 515, 549, 552, 553, 554, 555, 556, 557, 558. Dyer 231. pl. 4. Co. Lit. 206 a, b. Cr. El. 864. Yelv. 138. 139. 1 Brownl. 104, 105. 1 Rol. 419, 420. (*c*) Co. Lit. 29. a. 1 Co. 98. a. Hardres 387. Co. Lit. 206. a. Plowd. 289. a.

4 Co. 11. a. 6 Co. 21. b. 68. a. 8 Co. 172. b. 9 Co. 73. a. 10 Co. 139. b. (*d*) 31 H. 6. Fitz. Bar. 60. (*e*) 15 H. 7. 13. a. (*f*) Dyer 262. pl. 30. Cr. El. 398. Moor 432. Palm. 549. (*g*) Poſtea 112. a. 1 Rol. 450. Br. Condition 47. Bridg. 10.

HALLING's *Caſe.*

Trin. 38 Eliz. Rot. 1734.

In the Common Pleas.

Owen 157. Cr. El. 517. Poph. 199. Allein 25. Godb. 445. 1 Anderſ. 300. 2 Rol. Rep 466. Cart. 205. Kelw. 53. a. Moor 22, 454, 457, 458. Co. Ent. 132. pl. 15.

BEtween *Halling* and *Convard* in Debt on Bond for Performance of Covenants, it was adjudged, That where the Covenant was, that he ſhould make an Eſtate in Fee before ſuch Feaſt at the Coſts of the Covenantee, that the Covenantor ought to do the firſt Act, *ſcil.* notify to the Covenantee what Manner of Eſtate he would have, ſo that the Covenantee might know what Sum of Money to tender: And it was ſaid, 'twas all one when the Covenant was general, and when it was particular: As to make a Feoffment, the Covenantor ought to do the firſt Act, *ſcil.* ſhew what Manner of Feoffment he would make, either by Deed Poll, or by Indenture, *&c.* So in the principal Caſe, if nothing be done before the Day, the Covenant is broke, becauſe the Covenantor ought to have done the firſt Act, and ſo the Default is in him.

MATHEWSON's *Caſe.*

Hill. 39 Eliz.

In the Common Pleas.

Cr. El. 408, 470, 471. 2 Rol. 30, 149.

BEtween *Matthewſon* and others Plaintiffs, and *Lydiate* Defendant, the Caſe was ſuch: A Charter-party indented between the Maſter and the Owner of a Ship of the one Part, and *George Lydiate* and ſix other Merchants of the other Part. By which the Maſter and Owner covenant with the Merchants to ſhip certain Merchandizes

Merchandizes at ſuch a Port beyond Sea, and to tranſport them to the City of *London*, for which each of the Merchants covenants *ſeparatim* with the Maſter and Owner, that one Merchant ſhall pay 3 *l.* another 3 *l.* &c. & *ſic de cæteris*. And the Words of the Covenant are, *conveniunt ſeparatim*, &c. and in the End is this Clauſe, *Et ad (a) performationem omnium & ſingulorum conventionum ex parte præd' Mercatorum perimplend', quilibet Mercatorum præd' ſeparatim obligat ſeipſum præfat' Magiſtro & proprietariis*, in double the Fraight. And now on one of the ſeveral Covenants an Action of Debt was brought againſt *Lydiate* one of the Merchants on the ſaid Indenture. To which the Defendant (*b*) pleaded, That the Seal of another of the Merchants fixed to the ſaid Indenture was broke from the Deed; upon which the Plaintiff did demur in Law. And in this Caſe it was reſolved:

(*a*) 2 Rol. 149.

(*b*) Cr. El. 408.

1. That although the Merchants join in Covenant, *ſcil. conveniunt (c) ſeparatim*, yet this Word, *ſeparatim*, makes it ſeveral Covenants, and not a joint Covenant. Alſo the ſaid later Clauſe, *ad performationem omnium & ſingulorum*, &c. is in Law ſeveral, by Reaſon of this Word *ſeparatim*; and this Word ſhall be referred to the ſeveral Covenants before.

(*c*) 2 Rol. 149. Cr. El. 546. (*d*) 11 Co. 28. b. 1 Rol. Rep. 40. Cr. El. 576. 2 Rol. 30. Doct. placit.

2. It was reſolved, That although the Covenants on the Part of the Maſter and Owner were joint, yet the Covenants on the Part of the Merchants ſtood ſeveral; and for this Cauſe if (*d*) the Seal of one of the Merchants be broke from the Deed, it ſhould not avoid the Deed, but only againſt him: But if any of the (*e*) Seals of the Maſter or Owners had been broke from the Deed all their Covenants had been defeated. And if the Deed had been raſed in the Date after the Delivery, it had gone to the whole. But when the Covenants are ſeveral, they are as ſeveral Deeds wrote in one and the ſame Piece (*f*) of Parchment. And Judgment was given accordingly. *Vide* (*g*) 3 *H.* 7. 14 *H.* 8. 25. 30 *E.* 3. 31. 32 *in Aſſ.* 47 *E.* 3. 3. *in Debt per* Finchden, 39 *H.* 8. 36.

(*e*) 2 Rol. 30. Doct. placit. 260, 262, 263. Cr. El. 546. Poph. 161. March 125. 2 Show. 28. 2 Lev. 220.

(*f*) Cr. El. 546.

(*g*) 11 Co. 28. b. Cr. El. 408. 3 H. 7. 5. a. 2 Rol. 30. Br. Obligation 43. Fitz. Bar. 46.

LAMB's *Case.*

Trin. 41 Eliz. Rot. 3252.

In the Common Pleas.

Co. Ent. 129. pl. 13. Cr. El. 716, 864. Moor 645. (*a*) 1 Mod. Rep. 104, 265. 3 Bulſtr. 30. 1 Rol. 452. 6 Co. 31. a. 1 Rol. Rep. 196. Co. Lit. 209. a. 2 Mod. 200. Lutw. 694. (*b*) 2 Jones 96. Cart. 205. 1 Vent. 255. 1 Rol. 458. (*c*) Br. Covenant 3. Co. Lit. 209. a. 33 H. 6. 16. b. 17. a. Fitz. Bar. 62. Br. condition 13. 2 Co. 3. b. 1 Rol Rep. 196. 3 Bulſt. 29, 30. (*d*) 2 Co. 3. b. (*e*) Perk. ſect. 775. Fitz. Det. 81.

IN Debt on a Bond by *Lamb* Executor of *D.* againſt *Brownwent*, with Condition, " That if the Defendant " ſhall in the Term of St. *Michael* next, in the Prerogative " Court of the Archbiſhop of *Canterbury* give unto the ſaid " *D.* his Executors or Aſſigns, ſuch ſufficient Releaſe and " Diſcharge, &c. as by the Judge of the ſaid Court ſhall be " thought meet, that then, &c.' The Defendant ſhewed, that Doctor *Lewyn* was Judge of the Court, & *quod idem Judex nec deviſavit, nec appunctavit aliquam relaxationem, ſeu exonerationem, &c. ſecundum formam, &c.* upon which the Plaintiff did demur in Law. And it was adjudged for the Plaintiff; for in as much as the Judge was (*a*) a Stranger to the Condition, and the Condition is for the Benefit of the Obligor, and the Performance thereof ſhall ſave his Bond, he hath taken upon him to perform it at his Peril; and therefore he ought not only to have done the (*b*) firſt Act, but ought alſo to have procured the Judge to have deviſed and directed it. Otherwiſe it is, if the Obligee himſelf or his Counſel ſhould deviſe. *Vide (c)* 33 *H.* 6. 16. *b.* adjudged accordingly, *(d)* 36 *H.* 6. 8. *b.* 32 *E.* 3. *Barre* 264. (294) *b.* 2 *E.* 4. 2. 8 *E.* 4. 2. 15 *E.* 4. 5. *b.* 22 *E.* 4. 43. *b.* 9 *H.* 7. 17. *&c. vide* 7 *(e) E.* 4. 13. *b.* it was ſaid, If a Man be bound to make to a Man a ſure, ſufficient, and lawful Eſtate in certain Lands, by the Advice of *J. D.* if he make an Eſtate to him according to the Deviſe of *J. D.* be it ſufficient or not, lawful or not lawful, yet his Bond is ſaved.

2.

BROUGHTON's *Caſe.*

Mich. 42 & 43 Eliz. *In the K.'s Bench.*

IN Debt in the *Common Pleas* by *Broughton* againſt *Pretty* on a Bond, the Condition was; that where the Plaintiff was bound in a Bond of 200 *l.* for the Defendant, for the Payment of 100 *l.* to *A. B.* "If therefore the Defendant "ſhould ſave and keep harmleſs the Plaintiff for all Suits, "Quarrels, and Demands touching and concerning the ſaid "Bond of 200 *l.* That then this Obligation to be void. At the Day of Payment of the 100 *l.* the Plaintiff came to the Place where the 100 *l.* ought to be paid, and perceiving no Perſon there preſent to pay the 100 *l.* for the Defendant, he to ſave the Penalty of the Bond paid the 100 *l.* to *A. B.* and now brought this Action on his Counter-Bond; and on *Non fuit damnificatus* pleaded, the Plaintiff replied, and ſhewed all the ſaid ſpecial Matter: and thereupon the Defendant demurr'd; And it was adjudged that the Plaintiff ſhould recover, for the Payment of the 100 *l.* is (*a*) a Damage and Harm, and if he had not paid it, a greater Harm would have followed: And it is not neceſſary that the Plaintiff be arreſted, or ſued, *&c.* Alſo it was ſaid, That this Plea, *Non fuit* (*b*) *damnificatus* implied that the Defendant had ſaved him harmleſs, as by Releaſe, Payment, or otherwiſe. *Vide* 18 *E.* 4. 27. *b.* by *Bryan* and *Littleton*, Terror of Suit, ſo that he dare not go about his Buſineſs, is a Damnification, (*c*) although he be not arreſted or Forced by Proceſs, *&c.*

(*a*) 1 Vent. 36, 261. 1 Jones 329, 330. 2 Bulſtr. 94. Cr. El. 53, 264, 369. 1 Rol. 432. Owen 19. Cr. Car. 349, 350. Cr. Jac. 288, 340. Dyer 187. pl. 4. Yelv. 207. 3 Bulſt. 234. (*b*) Doctrin. placit. 270. (*c*) Cr. Jac. 340. 1 Rol 432. 2 Bulſtr. 94, 105. 3 Bulſtr. 234. 18 E. 4. 27. b. 28. a. Br. condition 165.

The Dean and Chapter of WINDSOR's *Caſe.*

Mich. 43 & 44 Eliz. *In the K.'s Bench.*

IN the *King's Bench*, between the Dean and Chapter of *Windſor* and *Hyde*, the Caſe was ſuch: A Man demiſed a Houſe by Indenture for Years; the Leſſee for him and his Executors covenanted and granted with the Leſſor to repair the Houſe at all Times neceſſary, the Leſſee aſſigned it over to *Hyde*, who ſuffered it to decay; the Leſſor brought an Ac-

Cr. El. 457, 552, 553. 1 Rol. 521. Moor 399, 400.

ſion of Covenant againſt the Aſſignee. And it was adjudg'd by *Popham* Chief Juſtice, and the whole Court, that the Action of Covenant did lie, although the Leſſee had not covenanted for him and his Aſſigns; For (*a*) ſuch Covenant which extends to the Support of the Thing demiſed is *quodammodo* appurtenant to it, and goes with it. And in Reſpect the Leſſee hath taken upon him to bear the Charges of the Reparations, the Yearly Rent was the leſs, which goes to the Benefit of the Aſſignee, & (*b*) *qui ſentit commodum ſentire debet & onus.* If a Man grants to one (*c*) Eſtovers to repair his Houſe, it is appurtenant to his Houſe. *F. N. B.* 181. 28 *H.* 8. (*d*) 28. If the Leſſee covenants to diſcharge the Leſſor *de omnibus oneribus ordinariis & extraordinariis*, and to repair the Houſes, an Action lies againſt the Aſſignee.

2 Saik. 4.
(*a*) Moor 27, 399. Cr. El. 457, 552, 553. 1 Rol. 521, 522. 1 Sand. 239. Cr. Jac. 125. 1 Sid. 147. Cr. Car. 222, 523. 1 Jones 245. 1 Anderſ. 82. Antea 16. a. b 17. b.
(*b*) Poſtea 100. a. a. 1 Co. 99. a. 7 Co. 38. b. Co. Lit. 231. a. 2 Inſt. 499. Carter 142. 3 Keb. 592. F. N. B. 181. N.
(*c*) Ant. 17. b.
(*d*) Dyer 27 pl. 172, 173, &c.

Sir THOMAS PALMER's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

Co. Ent. 36. pl. 29. Cr. El. 819, 820. 2 Rol. 699. Noy 32. Moor 691, 692

IN an Action on the Caſe between *Baſſet* and *Maynard*, on the general Iſſue the Jurors gave a ſpecial Verdict to this Effect; Sir *Thomas Palmer* was ſeiſed in Fee of a great Wood, and bargained and ſold to one *Cornford* and his Aſſigns 600 Cords of Wood to be taken by the Aſſignment of Sir *Thomas*; *Cornford* aſſigned his Intereſt to the Plaintiff, and afterwards the ſaid Sir *Thomas* ſold to the Defendant ſuch Quantity of Wood as would make 4000 Cords, to be taken within the ſaid great Wood, at the Election of the Vendee. And afterwards Sir *Thomas* aſſigned to the Plaintiff 600 Cords of Wood to be taken by him, who felled them; and the Defendant took and converted them, *&c.* And Judgment was given for the Plaintiff. And in this Caſe two Points were reſolved:

(*a*) Goldsb. 184. 1 Rol. Rep. 99. 2 Rol. 47. (*b*) Winch 29. Cr. El. 820. 1 Rol. 725. 1 Jones 276. Cr. Jac. 481.

1. That *Cornford* had an Intereſt which he might (*a*) aſſign over, and not a Thing in Action, or a Poſſibility only; For it was reſolved, That if Sir *Tho.* did not aſſign them to *Cornford* on Requeſt, *Cornford* might take them without (*b*) Aſſignm. for the Grantor cannot by his own Act, or Default, either ſub-

vert, or derogate from his Grant; then it follows that he had an Intereſt which he might aſſign over. *Vide* 44 *E.* 3. 43. *b.* where the (*a*) Prior of *Letton* ſeiſed of a Wood called *Hoſley*, by Deed by Aſſent of his Covent ſold the ſaid Wood to one *Barth. Wilby* to be felled and carried away within two Years next following (except 40 of the beſt Oaks to be taken at the Election of the Prior) the Vendee for Shortneſs of Time upon the End of the Covenant requeſted the Prior to come and chuſe his Oaks, and he would not come; wherefore the Vendee ſuffered 40 of the beſt Oaks to ſtand, and the others he felled. And there Iſſue was taken on the Requeſt: Which Caſe is not well abridg'd by *Brook*, Tit. *Reſervation* 3. for there he has omitted the Requeſt; But *Fitz.* Tit. *Barre* 204. hath truly abridged it. Take heed, Reader, of all (*b*) Abridgments, for the chief Uſe of them is as of Tables to find the Book at large. But I exhort every good Student to read and rely only on the Books at large, as in another Place I have adviſed. And with this Reſolution agreeth the Book in 8 *E.* 3. 5. & 54. *b.* where the Caſe was; *J.* had a Houſe and a Carve of Land, and he had reaſonable (*c*) Eſtovers in the Wood of another by View and Delivery of the Baily, &c. If he takes Eſtovers without View or Livery, he is a Treſpaſſer, although he takes leſſer than he ought to have by his Delivery: But if *J.* demands his Eſtovers, and the Owner of the Wood or his Baily will not deliver them to him, *J.* may have an Aſſiſe. *Vide* 5 *E.* 3. 64. *b.* & 65. *a.*

(*a*) Cr. El 820. Hob. 174. 44 E. 3. 43 b. Fitz. Bar. 204. Br. Reſervat. 3. Br. Relat. 4.

(*b*) 10 Co. 41. a. 117. b. Præf. 4 Rep.

(*c*) 2 Inſt. 411.

2. It was reſolved, That admitting the Aſſignment to the Plaintiff to be void, yet after that the Trees are felled, the Defendant (*d*) could not take them: As if I grant 1000 Cords of Wood to one to be taken at the Election of the Grantee; the Grantor or Stranger fells ſome Trees, the Grantee cannot take them, but ought to ſupply his Grant out of the (*e*) Reſidue.

(*d*) 3 Keb. 493. Cr. El. 820. Palm. 212. 1 Brownl. 220. Yelv. 188.

(*e*) 1 Vent. 271. 1 Bulſt. 94.

The Counteſs of Rutland's *Caſe.*

Trin. 2 Jac. 1.

In the King's Bench.

Moor 723, 724, 725. Cr Jac. 29.

Iſabel Counteſs of *Rutland* brought an Action of Treſpaſs againſt *Roger* Earl of *Rutland* for breaking her Houſe and Cloſe, called *Eykering* Houſe, and *Lady* Park at *Eykering* in the County of *Nottingham*: The Defendant pleaded Not Guilty; and now this Term on Evidence to a ſubſtantial Jury at the *King's Bench* Bar, the Caſe on the Evidence was ſuch; *Edward* Earl of *Rutland* was ſeiſed in Fee of the Manor of *Eykering*, whereof the Houſe and Cloſe in which, *&c.* were Parcel, and by Indenture bearing Date 10 *Martii*, 21 *Eliz.* for the Augmentation of the Jointure of the ſaid Counteſs, then his Wife, covenanted with Sir *Gilbert Gerrard*, Knt. and *Thomas Holcroft*, Eſq; his Brother, that he before the End of *Trinity* Term then next following, would aſſure by Fine, or other Conveyance the ſaid Manor to the ſaid Sir *Gilbert* and *Thomas* in Fee, which Fine or other Conveyance of the ſaid Manor of *Eykering* ſhould be to the Uſe of the ſaid Earl and the ſaid *Iſabel* his Wife (for their Lives) and the Heirs of the ſaid Earl, which Indenture the ſaid Earl acknowledged before a Maſter of the Chancery, the 28th Day of the ſame Month; and the ſame Day it was inrolled; and the next Day, *ſcil.* the 29th Day of *March* by another Indenture between the ſaid Earl of the one Part, and the Lord *Burghley*, Sir *Gilbert Gerrard* and others, of the other Part, for the Advancement of thoſe who ſhould ſucceed him in the Earldom; and for the Advancement of the Heirs Males of the Body of *Thomas* Earl of *Rutland* his Grandfather, covenanted with the Lord *Burghley*, Sir *Gilbert Gerrard* and others, to convey the ſaid Manor of *Eyker.* amongſt others to the ſaid Ld. *Burghley*, Sir *G. Gerrard* and others, or to ſome or one of them, before the Feaſt of the Annunciat. of our Lady next follow. which Aſſurance ſhould be to the Uſe of the ſaid Earl *Edw.* and to the Heirs Males

Note, Sir Gilb. was Party to both the Indentures.

Males of his Body; and for Default of ſuch Iſſue, to the Uſe of the Heirs Males of the Body of the ſaid *Thomas* Earl of *Rutland*, with divers Remainders over. And afterwards the ſaid *Edward* Earl of *Rutland*, by the ſaid later Indenture, covenanted and granted with the Parties thereto, That if the ſaid Earl *Edw.* ſhould not convey ſufficiently the ſaid Manor amongſt others as is aforeſaid, before the ſaid Feaſt of the Annunciation of our Lady, that then the ſaid Earl *Edward* and his Heirs would ſtand ſeiſed of the ſaid Manor of *Eykering*, to the ſaid Uſes contained in the ſecond Indenture. No Fine or other Aſſurance was levied or made by the ſaid Earl *Edward* before the End of *Trinity* Term: And afterwards, *ſcil.* 17 *Sept.* next following, the ſaid Earl acknowledged a Note of a Fine of the Manor of *Eykering* only to Sir *Gilbert Gerrard* and *Thomas Holcroft*, and to the Heirs of Sir *Gilbert*; and the 18th Day of the ſame Month acknowledged another Note of a Fine of the ſaid Manor of *Eykering*, amongſt many other Manors mentioned in the laſt Indenture to the Lord *Burghley*, Sir *Gilbert Gerrard* and others; Parties to the laſt Indenture, and to the Heirs of the Lord *Burghley*; and both were entered *in Octab. Michaelis* then next following. And it was proved by divers Witneſſes, That the ſaid Earl *Edward* as well before the Indentures as after the Fine levied, told them, That the ſaid Counteſs ſhould have the Manor of *E.* for her Jointure.

And in this Caſe four Points were reſolved by Sir *John Popham* Chief Juſtice, and the whole Court.

1. Altho' the Indentures being made for declaring of the Uſes of a ſubſequent Fine, Recovery, or other Aſſurance, to certain Perſons, and within a certain Time, and to certain Uſes, are but directory, and do not bind the Eſtate or Intereſt of the Land; yet if the Fine, Recovery, or other Aſſurance be purſued according to the Indentures, there could not be any bare *(a)* Averment againſt the Indentures taken in ſuch Caſe, that after the making of the Indentures, and before the Aſſurance by mutual Agreement of the Parties, it was concluded and agreed that the Aſſurance ſhould be to other Uſes: But if other Agreement or Limitation of Uſes be made by Writing, or by other Matter as high or higher, then the laſt Agreement ſhall ſtand; for every Contract or Agreement ought to be diſſolved by Matter of as high a Nature as the firſt Deed, *(b) Nihil tam conveniens eſt naturali æquitati, unumquodque diſſolvi eo ligamine, quo ligatum eſt.* Alſo it would be inconvenient, that Matters in Writing made by Advice and on Conſideration, and which finally import the certain Truth of the Agreement of the Parties ſhould be controlled by Averment of the Parties to be proved by the incertain

(*a*) 2 Co. 76. a. 9 Co. 10. b. 3 Bulſt. 251, 257. Palm. 507. Cr. Jac. 29. 2 Anderſ. 46, 47. 2 Rol. Rep. 39. Winch 119.

(*b*) Bract. lib. 2. f. 28. 1 Brown. 191. 2 Co. 53. a. 4 Co. 57. b. 6 Co. 43. b. 2 Inſt. 339, 573. Davis 33. b.

Teſtimony of ſlippery Memory. And it would be dangerous to Purchaſers and Farmers, and all others in ſuch Caſes, if ſuch nude Averments againſt Matter in Writing ſhould be admitted.

Cr. Jac. 29. Poſt. 68. b. 1 Co. 176. a. 2 Co. 76. a. 7 Co. 39. a. b. 2 And. 46, 47.

2. It was reſolved, That if the Form of the Indentures be not purſued, as for the Quantity of the Land, or the Time within which, *&c.* in theſe Caſes, and other like, where the Indentures be not purſued, Averment without Writing might be taken, That the Fine, Recovery, or other Aſſurance was to another Uſe or Intent than is contained in the Indenture: For inaſmuch as the Indentures are not purſued, it is reaſonable that the Parties ſhould be admitted to ſhew the Cauſe and Reaſon why they were not purſued by Reaſon of the new Agreement ſubſequent, which in ſuch Caſe might be as well by Word as by Writing.

Cr. Jac. 512.

3. it was reſolved, That although the Indentures are not purſuant in Circumſtance of Time, Quantity, Perſon, and the like; yet if no other new mean Agreement can be proved, the Aſſurance ſhould be in Judgment of Law to the Uſe contained in the Indentures.

4. That in the principal Caſe the Fines could not be directed by both the Indentures, that is to ſay, by the firſt Indenture to the Uſe of the Earl *Edward* and *Iſabel* his Wife *for their Lives*; and by the ſecond Indenture to the Earl and the Heirs Males of his Body with the Remainders over, limited by the ſecond Indenture, and ſo the Fines to work on both the Indentures (although peradventure ſuch was the Intent of the Parties) and that for three Reaſons:

Bridgm. 113.

1. The Directions and Declarations of the firſt Indentures were controlled and fruſtrated by the ſecond Indentures, and therefore the Fines could not be directed by both.

2. The Indentures import ſeveral diſtinct and divers Contracts and Eſtates, that is to ſay, one to the Earl and *Iſabel* his Wife, and to the Heirs of the Earl; the other to the Earl only, and to his Heirs Males of his Body, with divers Remainders over; ſo that the Fines ought for the Manor of *Eykering* to be directed, either wholly by the firſt, or wholly by the ſecond, without any Fraction or Diviſion of Eſtates.

3. It would be againſt the Words and Intent of both the Indentures, to make a Hotchpot and Commixture of both, which by their Creation were ſeveral and diſtinct in Time, in Perſons and in Eſtates.

CASES

CASES of EXECUTORS.

RUSSEL's *Case.*

Hill. 26 Eliz.

In the King's Bench.

EDward *Ruſſel* as Executor of *William Ruſſel* brought an Action on the Caſe againſt *Thomas Prat* and *Margery* his Wife; and declared, that *William Ruſſel* was poſſeſſed of a Cheſt with divers Jewels, Goods, and Sums of Money (and declared what in certain) in it, and that the ſaid *William* loſt them, and that they came to the Hands of *Margery dum ſola fuit*, that is to ſay, 6 *Jan.* 1. *Eliz.* And afterwards the Teſtator died, & *quod præd' Margeria dum ſola fuit*, did convert the Goods to her own Uſe, &c. The Defendants pleaded in Bar a Releaſe of the Plaintiff made to them, &c. To which the Plaintiff ſaid, That at the Time of the Releaſe made, he was within the Age of 21 Years, &c. on which the Defendants did demur in Law. And the great Queſtion (which was often argued at the Bar and Bench) was, Whether the Releaſe of an Infant Executor having proved the Will ſhould bar him or not. And it was argued that the ſaid Releaſe ſhould bar him for divers Reaſons.

1 And. 177, 178. 1 Leon. 193. Moor 146. Poph. 190, 191. 1 Jones 174.

1. Becauſe the Executor repreſents the Perſon of the Teſtator, and all that which he doth is in the Right (and as in the Perſon) of the Teſtator, and not in his own Right; and therefore his Infancy is not be reſpected.

2. The Law which enables him to take on him the Charge of the Will, and to prove it, and to bring Actions, and to do Things which belong to the Office of an Executor, the ſame Law enables him to make Releaſes and Acquittances without any Regard to his Nonage. As the (*a*) K. ſhall not avoid Leaſes or Grants in Reſpect of the Infancy of his natural Capacity; nor the Mayor, Bailiff, or the Head of any

(*a*) 1 Rol. 728 a. 25 Aſſ. 54. Co. Lit. 43 a. Fitz. Infant. 15. Br. Age 34. 7 Co. 12. a. Calvin's Caſe. Plowd. 213. a. 221. a. 364. b.

other Corporation ſhall not avoid any of their Deeds or Grants, for the Infancy of their natural Capacity, becauſe they do them in another Right and Capacity.

3. It would be inconvenient that an Infant Executor ſhall compel the Debtors of his Teſtator to pay the Debts to him, and that he ſhall not have Power to acquit or diſcharge them.

(a) Cr. Car. 490. 4. They cited divers Books in the Point, 16 *H.* (*a*) 6. *Releaſes* 45. the Opinion of the whole Court, that a Releaſe made

(b) Moor 146. by an (*b*) Infant within Age, as an Executor, is good, and he cannot avoid it. And the ſame Law is of a Releaſe made by a Feme covert Executrix; and ſo the Releaſe of the Husband is nought worth, as there it is ſaid, 18 *H.* 6. 4. of a Feme covert, and 18 *E.* 4. 10. of a Feme covert, 21 *E.* 4. 13. & 24. of an Infant and Feme covert, and 16 *H.* 7. 6. But on great Deliberation, and on Conference had with *Anderſon* Chief Juſtice of the *Common Pleas*, *Manwood* and others, Juſtices, it was reſolved by Sir *Chriſtopher Wray* Ch. Juſtice, Sir *Thomas Gawdy*, and the whole Court of *King's Bench*,

(b) Moor 146. Cr. El. 43, 671. 1 And. 177 pl. 138, 164. Swinb. 288. Co. Lit. 172. a. 4 Leon. 102. 1 Jones 420. 3 Rol. 730. Cr. Car. 490, 491. 1 Rol. Rep. 366. 1 Brownl. 120 Cr. El. 43, 671. Godb. 29. (c) Cr. El 254. Cr. Jac. 441. Co. Lit. 172. a. 1 And. 117, 177, 178. 1 Rol. Rep. 366. 1 Brownl. 120. (d) 8 Co. 133. a. 20 H. 7. 5. a. (e) 16 H. 6. Releaſe 45. Cr. Car. 490.

that the (*b*) Releaſe was no Bar, and principally for 3 Reaſons.

1. Becauſe, if it ſhould be a Bar, it would be a *Devaſtavit*, and charge the Infant of his own proper Goods.

2. It would do a Wrong, which an Infant by his Releaſe can never do.

3. In making of this Releaſe he doth not purſue his Office, nor perform the Duty of an Ex'or: And therefore it was well agreed, That all things which he doth (*c*) according to the Office and Duty of an Ex'or ſhould bind him: But Things which he doth againſt the Office of an Ex'or ſhould not bind him, foraſmuch as he is within Age. The Office of an Ex'or (as appears in 20 *H.* 7. 5. a.) is to do his Office (*d*) truly, diligently and lawfully; and all theſe he breaks when he waſtes the Goods of the Dead: But it was reſolved, that on Payment or Satisfaction to an Infant Executor, he might acquit and diſcharge the Debtor for as much as he receives: But it was reſolved, That a Monk Ex'or might releaſe without Satisfaction, for his Profeſſion would be no Impedim. to the Releaſe, 21 *E.* 4. 13. *b.* And as to the ſaid Book of (*e*) 16 *H.* 6. in the ſaid Caſe of the Infant, it was to be intended when the Infant receives full Satisfaction; for the Book ſaith, *The Act of an Infant done as Ex'or*; and he doth it not as Ex'or when he releaſes, and receives nothing. But the Opin. there as to the

(f) 1 And. 117. Kelw. 122. a. b. Cr. Car. 519. 1 Sid. 188.

Feme (*f*) Covert Ex'trix, was utterly denied, for altho' ſhe be Ex'ix, yet ſhe can do nothing to the Prejudice of her Husband: But without Queſt. in ſuch Caſe the Releaſe of the Husb. is good. And ſo the Doubts in the Books of 13 *E.* 1. *Ex'ors* 119. 5 *E.* 3. 45. *Barbor's* Caſe, 18 *H.* 6. 4. & 18 *E.* 4. 10. 21 *E.* 4. 13. & 24. 2 *H.* 7. 15. 6 *H.* 7. 6. 7 *H.* 7. 13, & 14. are well explain'd. And afterwards on a Writ of Enquiry of Damages returned after the

(g) 1 Leon. 193. 194. Moor 146.

Stat. of (*g*) 27 *El. cap.* 8. Judgment was given for the Plaint.

And

And on the ſaid Act a Writ of Error was brought in the Exchequer-Chamber, where it was unanimouſly agreed, That the ſaid Releaſe was no Bar. And ſo this Point was reſolved by all the Judges of *England:* But divers other Errors were aſſigned and moved as well in the Declaration, as that the Plea was diſcontinued; and afterwards the Parties agreed, and for Error in the Proceeding the Judgment was reverſed. And note, good Reader, by theſe Reſolutions you will better underſtand the ſaid Books before cited, & *alios ejuſdem farinæ*. And Sir *Thomas Gawdy* ſaid in this Caſe, that an Executor might well (*a*) releaſe any Action before Probate, for altho' he could not have an (*b*) Action, yet the Intereſt (*c*) of the Action is in him (*d*) 21 *E.* 4. 24. *a. c.*

(*a*) Plow. 278. b. 281. a. infra in Middleton's Caſe. 9 Co. 39. a. Raym. 481. 1 Rol. 917. A. 1. Co. Lit. 292. b. Hutt. 31. 10 Co. 52. a. (*b*) Plow. 278. b. 280. b. 281. a. 7 H. 4. 18. infra in Middleton's Caſe. Fitz. Executors 107. Br Execut. 49. 9 Co. 39. a. Wentworth 51. Caſe. 3 Lev. 59.

Raym. 481. 1 Rol 917. A. 2. Co. Lit. 292. b Hutt. 31. 10 Co. 52. a. Perk. Sect. 482. (*c*) Dy. 135. pl. 13. (*d*) Br. Execut. 117. infr. in Middleton's 2 Show. 256. Salk. 302.

MIDDLETON's *Caſe.*

Paſch. 1 Jacob. 1.

In the Common Pleas.

IT was adjudged in the *Common Pleas* between *Middleton* and *Rimot*, That an Ex'or before Probate might (*a*) releaſe an Action, although before Probate he could not (*b*) have an Action, for the (*c*) Right of the Action is in him; but if *A.* releaſes and afterwards takes (*d*) Adminiſtration, it ſhould not bar him, for the Right of the Action was not in him at the Time of the Releaſe. *Vide* (*e*) 18 *H.* 6. 43. *b. Greisbrook's* Caſe, *Plow. Com.* 227, 278. (*f*) 21 *E.* 4. 24. *a.* Two Ex'tors prove the Will, the third refuſes, yet he may releaſe. (*g*) *Lit.* 177. If a Man be bound to pay a Sum at a Day to come, a Releaſe of all Actions before the Day bars it, yet before the Day he cannot have an Action of Debt; and ſo the Opinion of Sir *Thomas Gawdy* in the Caſe before was now adjudg'd.

(*a*) Plowd. 278: b. 281. a. ſupra in Ruſſel's Caſe. 9 Co. 39. a. Raym. 481. 1 Rol. 917. a. Co Lit. 292. b. Hutt. 31. 10 Co. 52. a. (*b*) Plow. 278 b. 280. b. 281. a. 7 H. 4. 18. a. ſupra in Ruſſel's Caſe. Fitz. Executors 107. Br. Executors 49. 9 Co. 39. a. 10 Co. 52. a. Raym.

[*See* 1 Sal. 301, 306. 1 Mod. 213.]

481. 1 Rol. 917. a. 2. Co. Lit. 292 b. Went. 51. Perk. Sect. 482. (*c*) Dyer 135. pl. 13. (*d*) Moor 119, 126. Swinb. 281. (*e*) 18 H. 6. 23. b. (*f*) Br. Executors 117. ſupra in Ruſſel's Caſe. (*g*) Lit. Sect. 512. f. 118. b. Co. Lit 292. a. b.

HARRISON's *Caſe.*

Hill. 40 Eliz. Rot. 119.

In the Common Pleas.

Co. Ent. 146. pl. 25. Jenk. Cent. 274. Bridgm. 80.

ROBERT *Green* brought an Action of Debt on a Bond of 40 *l.* againſt *William Harriſon* Adminiſtrator of the Goods and Chattels of *Thomas Sidney*: The Defendant pleaded, that the Inteſtate was bound in a Bond in the Nature of a Statute-Staple, beyond which he had no Goods, *&c.* The Plaintiff replied, that there were Indentures of Defeaſance made to perform Covenants in certain Indentures, which were all performed hitherto; upon which the Defendant demurred. And it was adjudg'd that the Plaintiff ſhould recover; for a Debt due by Bond ſhall be paid before a Statute made to perform Covenants, when none of them then were, nor perhaps ever would be broken, but are Things in Contingency, and *in futuro*; and therefore ſuch Poſſibility which peradventure may never happen, ſhall not bar preſent and due Debts by Bond or other Specialties. And if ſuch Statutes to perform Covenants ſhould bar others of their due Debts, little or no Debts would be paid. *Et nota bene*, that it was adjudged in the *King's Bench* by *Popham* Chief Juſtice, and the whole Court, *Hill.* 42 *Eliz.* that if a Man recover Debt by Judgment in the King's Court, this Judgment ſhall be paid before Bonds in the Nature of a (*b*) Statute Staple or Merchant; for Judgment given in the King's Court is higher than ſuch Statutes which are *private Records, and portable by the Conuſee in his* * *Pocket.* But Judgments given in the King's Court on ordinary and judicial Proceedings, which remain in the Cuſtody of a ſworn Officer, are Records which are preferred in Law before ſuch Statutes. And the Law preſumes, *quod judicium redditur in invitum*; and ſuch Judgments ſhall be paid before Recognizances acknowledged by the Aſſent of the Parties in any of the K.'s Courts, which may be acknowledg'd in a private Manner; and it is not material whether the Judgm. or Recognizance, or Stat. be firſt; but be the Judgm. firſt or

(*a*) 1 Rol. 925. Bridgm 80, 122. 2 Leon. 212. 1 Rol. Rep. 405. Moor 752. Jenk. Cent. 274. Cr. Jac. 9, 35, 102, 182. 1 Bulſt. 101. Cr. Car. 363. Cr. El. 467. Stile 55. 9 Co. 108 b. Swinb. 370. Owen 72.

(*b*) 4 Co. 59. b. 60. a. Cr. El. 575, 734, 735, 822. 2 And. 160. 1 Brownl. 101. 1 Rol. 926. Yelv. 29, 133. 6 Co. 45. b. Swinb. 369, 370. * Rep. Q. A. 224. 36 H. 6. 6. a.

or laſt, it ought to be firſt ſatisfied. And ſo it was held by the whole Court of *Common Pleas*, between (*a*) *Pemberton* and *Bartram*, *Paſch.* 32 *Eliz. Rot.* 235. which ſee before in the End of the *Sadlers* Caſe, in the fourth Part of my Reports.

(*a*) Swinb. 369, 370. 4 Co. 59. b.

PIGGOT's *Caſe.*

See 6 Mod. 304. &c. ibid.

Hill. 40 Eliz.

In the Common Pleas.

PIggot Adminiſtrator of *Longfield durante minore ætate* of *A. Longfield* brought an Action of Debt in the *Common Pleas* on a Bond againſt *Gaſcoigne* and *Furthee*; and (*a*) averred that *A. Longfield* was within the Age of 21 Years; to which the Defendants pleaded an inſufficient Bar; on which the Plaintiff demurr'd. And for as much as the Bar was inſufficient, now the Queſtion was, whether the Declaration were good or not. And the Doubt was, When Adminiſtration is granted *durante minore ætate*, how long it ſhould endure, *ſcil.* to the Age of 21 Years, or to what Age it ſhould continue. And thereupon the Court confer'd with ſundry Doctors of the Civil Law openly in Court. And it was held by them, That Adminiſtration *durante minore ætate* ſhould ceaſe at the Age of (*b*) 17 Years; and if ſuch Adminiſtration be committed, the Executor being of the Age of 17 Years, it is void: And for this Cauſe it was adjudged by the Court, that the Declaration was inſufficient; for perhaps the Executor was of the Age of 17, or 18, *&c.* and within the Age of 21 Years, as the Plaintiff hath averred; and yet the Plaintiff's Adminiſtration was determined; for which Cauſe it was awarded, that the Plaintiff ſhould take nothing by his Bill.

Cr. El. 602.

(*a*) 1 Rol. Rep. 399, 401. Vaugh. 93. Cr. Jac. 590. Cr. Car. 240. Hob. 251. Yelv. 128. Doctrin. placit. 86. 2 Sid. 60.

(*b*) Poſtea 29 b. Cr. El. 602. 1 Brownl. 46, 101. 2 Brownl. 247, 248. 6 Co. 67. b. Cr. Car. 516. 1 Rol. 526, 910. Moor 462. Vaugh. 93. Cr. Jac. 590. Hob. 251.

Yelv. 130. 2 Sand. 213. 2 Jones 43. 1 Mod. Rep. 299. Swinb. 43, 286, 287. 2 Rol. Rep. 209. Doctrin. placit. 86.

PRINCE's

1 Salk. 42:
6 Mod. 304.

PRINCE's *Caſe.*

Mich. 41 & 42 Eliz.

In the Common Pleas.

2 Anderſ. 132.
Cr. El. 718, 719.
3 Leon. 278.
(a) 1 Anderſ. 132. Cr. Jac. 718, 719.
6 Co. 67. b.
Swinb. 288.
(b) Raym. 484.
Swinb. 288.
(c) 1 Anderſ. 132. Cr. Jac. 718, 719.
Swinb. 288.
(d) March 138.
Cr. El. 719.
Swinb. 288.
(e) 8 Co. 135. b.
(f) 6 Co. 67. b
(g) Antea 29. a
1 Brownl. 46, 101. 2 Brownl. 247, 248.
Cr. El. 602.
6 Co. 67. b.
1 Rol. 526, 910.
Moor 462.
Vaugh. 93.
Cr. Jac. 590.
Yelv. 128, 130.
2 Jones 48.
1 Mod. Rep. 299.
Swinb. 43, 286, 287.
Hob. 251.
1 Rol. Rep. 400, 401.
2 Rol. Rep. 209. Cr. Car. 240, 516.
2 Sand. 213.
Doct. placit. 86.

IN Treſpaſs *quare clauſum fregit*, between *John Prince* Plaintiff, and *William Simpſon* Defendant, the Caſe was ſuch; One *Jackſon* being poſſeſſed of a Term for Years, had Iſſue *James* and *Jane*, and made his Will, and made *Jane* his Daughter (then of the Age of 12 Years) his Executrix; and then deviſed the ſaid Term to *James*, then alſo within Age, and died. Adminiſtration *durante minore ætate* of *Jane* was committed to her Mother who took Husband; *James* died, the Husband took Adminiſtration of his Goods, and ſold the ſaid Term, *Jane* took Husband; and the Queſtion was, whether the ſaid Sale was good or not. And in this Caſe three Points were reſolved by the Juſtices of the *Common Pleas.*

1. That ſuch an Adminiſtrator *durante minore ætate*, could not *(a)* ſell any of the Goods of the deceaſed, unleſs it be of Neceſſity, *(b)* for Payment of Debts, or *(c)* *bona peritura*, for he hath his Office of Adminiſtration *pro bono & commodo* of the Infant, and not for his Prejudice. Alſo he can't *(d)* aſſent to any Legacy, unleſs there be Aſſets to pay Debts, *&c.* and generally he can't do any Thing to the Prejudice of *(e)* the Infant; for the Words of the Letters of Adminiſtration are, *Adminiſtrationem omnium & ſingulorum bonorum ad opus, (f) commodum, & utilitatem executric' durante ſua minore ætate, & non aliter, nec alio modo committimus, &c.*

2. Such Adminiſtration doth ceaſe at the Infant's Age of *(g)* 17, as it was adjudged between *Piggot* and *Gaſcoign*, *Hill.* 40 *Eliz.* in the *Common Pleas:* And there it was alſo held, That an Infant Executor before 17 cannot aſſent to a Legacy, *&c.* And when *Jane* within 17 took Husband, if it had appeared that the Husband had been of full Age, then the Adminiſtration ſhould ceaſe, for ſhe hath taken a Husband, who might adminiſter as Executor; but it did not appear in the Caſe whether the Husband was of full Age or within Age. And in this Caſe it was ſaid, That Judgment was given in the King's Bench, *Paſchæ* 22 *Eliz.*

Eliz. between *Vere* and (*a*) *Jefferies*, that where one hath Goods only in an inferior Dioceſe, yet the Metropolitan of the ſame Province pretending that he had *bona notabilia* in divers Dioceſes, committed Adminiſtration, this Adminiſtration is not void, but voidable by Sentence, becauſe the Metropolitan hath Juriſdiction over all the Dioceſes in his Province; and therefore it cannot be void, but voidable by Sentence; but if an (*b*) Ordinary of a Dioceſe commits Adminiſtration of Goods, when the Party hath *bona notabilia* in ſundry Dioceſes, ſuch Adminiſtration is meerly void, as well as to Goods within his own Dioceſe as elſewhere, becauſe he can by no Means have Juriſdiction of the Cauſe: And true it is that ſuch Judgment was given.

Vere's Caſe, Paſchæ 22 Eliz. in Bank le Roy.
(*a*) 8 Co. 135. a. 2 Jones 78. Davis 44. a. 47. a. 3 Bulſtr. 176. 4 Leon. 212. 1 Rol. Rep. 423. Cr. El. 457. Moor 145, 693. Swinb. 357. 2 Leon. 155. Hob. 185. Plowd. 281. a.
(*b*) Plowd. 281. a. 2 Leon. 155. Cr. El. 457. See Carth. 143.

COULTER's *Caſe.*

Mich. 40 & 41 Eliz.

In the King's Bench.

Robert Coulter brought an Action of Debt on a Bond of 40 *l.* againſt *William Ireland*, *Executorem Teſtamenti & ultim' voluntatis Rich. Hunt*; the Defendant pleaded, that he had fully adminiſtred, and ſo nothing was in his Hands; on which they were at Iſſue; and the Jury gave a ſpecial Verdict; That the ſaid *Richard Hunt* was bound to the Defendant and his Son in a Bond in the Nature of a Statute Staple of 500 *l.* and that the Defendant was Executor of his own Wrong, and had 140 *l.* of the Goods of the deceaſed in his Hands, and retain'd the ſaid Goods in his Hands to ſatisfy himſelf Part of the ſaid Debt of 500 *l.* And whether the ſaid Retainer by an Executor of his own Wrong was lawful or not, was the Queſtion. And it was objected, that the Defendant in ſuch Caſe might retain for divers Reaſons.

Moor 527. Cr. El. 630, 631. 1 Rol. 922. Cumberb. 8.

1. The Plaintiff hath by his Declarat. affirmed him *for eſe Executorem*

cutorem Teſtamenti & ultim' voluntatis Rich. Hunt, and the Jury cannot find againſt that which both the Parties have (*a*) agreed in Pleading, as it is agreed in 28 *Aſſ. p.* (*b*) 38. *in Aſſiſe*, (*c*) 9 *H.* 6. 37. *a. b. in Debt*, 1 *Eliz. Dy.* 167. 9 *H.* 7. 3. *a. b. in Reſcous*, &c. and therefore the finding that he is Executor of his own Wrong is abundant and Surpluſage.

(*a*) Raymond 47. 2 Co. 4. b. 2 Rol. 691. Dyer 32. pl. 8. 9 Co. 69. b.

2. Altho' an Executor of his own Wrong cannot retain againſt a rightful Executor, or againſt an Adminiſtrator, yet he may retain againſt the Pl. who is a Creditor as the Def. is, & *eo potius* becauſe he hath affirmed him Executor in his Declaration, as is aforeſaid; & *ideo* againſt him he ſhall have all the Privileges of an Executor, and ſo *reſpective* he ſhall have againſt the one, and not againſt the other.

(*b*) 28 Aſſ. pl 34. Br. Confeſſion 27. Fitz. Aſſiſe 272. (*c*) Br. Confeſſion 38. Br. Verdict 3. Br. Non eſt factum 4.

3. In divers Caſes one who is in of his own Wrong ſhall recoupe and retain, &c. 3 *H.* 6. *Damages* 18. he who hath a Rent of 10 *l.* iſſuing out of certain Land, diſſeiſes the Tenant of the Land, in an Aſſiſe brought by the Diſſeiſee, the Diſſeiſor (*d*) ſhall recoupe the Rent in the Damages, ſo that where the mean Profits of the Land in ſuch Caſe were of the Value of 13 *l.* the Diſſeiſee ſhall recover but 3 *l.* 43 *E.* 3. *Damages* 37. The Diſſeiſor ſhall recoupe all in Damages which he hath expended in amending of the Houſes, 14 *E.* 3. *Damages* 92. 24 *E.* 3. 50. & 14 *Aſſ. pl.* 124. *acc.* 8 *Aſſ. p.* 37. Rent-Service incurred during the Diſſeiſin ſhall be recoup'd, 9 *E.* 3. 8. 4 *H.* 7. 11. 14. *b. acc.* and in 40 *Aſſ. p.* 56. the Wife ſhall retain the 3d Part of the Profits againſt the King in Reſpect of her Right of Dower which ſhe hath to the ſame Lands. So he who is (*e*) Guard. in Socage of his own Wrong ſhall have reaſonable Allowances. But it was reſolved by the whole Court, That an Executor of his own Wrong ſhould not (*f*) retain, for from thence would enſue great Inconvenience and Confuſion; for every Creditor (and chiefly when the Goods of the deceaſed are not ſufficient to ſatisfy all the Creditors) would contend to make himſelf Executor of his own Wrong, to the Intent to ſatisfy himſelf by Retainer, by which others would be barred. And it is not reaſonable that one ſhould take Advantage of his own Wrong; and if the Law ſhould give him ſuch Power, the Law would be the Cauſe and Occaſion of Wrong, and of the wrongful Taking of the Goods of the deceaſed. And the Law of God ſaith, *Non facias malum ut inde fiat bonum, & melius eſt omnia mala pati, quam malo conſentire.* And it is clear, that all lawful Acts, (*g*) which an Executor of his own Wrong, or a (*h*) Diſſeiſor, or Abator, &c. doth, is good. And therefore if a Diſſeiſor or Abator endows a Woman who hath Title of (*i*) Dower, it is good, and ſhall bind the Diſſeiſee: But if a Woman who hath Title of Dower diſſeiſes the Tenant of the Land, ſhe cannot endow herſelf by Retainer. Alſo if a Woman, who hath Title of Dower, occupies the Land as Guardian in Socage by her own Right, and not as rightful Guardian,

(*d*) Cr. El. 631. Dyer 2. pl. 7.

(*e*) Cr. El. 631.

(*f*) 1 Rol. 922. Cr. El. 631. Moor 527. 1 Brown. 103, 104. 1 Mod. Rep. 208. 1 Sid. 76. Yelv. 137, 138. Clayton's Rep. 116. pl. 203. Swinb. 237, 381. 2 Vent. 180. Godb. 217. Stil. 337, 381. Chan. Rep. 33.

(*g*) Plow. 282. b.

(*h*) Dy. 2. pl. 7.

(*i*) Co. Lit. 35. a. 357. b. 2 Co. 67. a. 12 Aſſ. 20. Br. Dower 59. Br. Aſſiſe 181. Br. Damage 96. 6 Co. 58. a.

ſhe

ſhe ſhall not endow her ſelf *de la pluis beale*, for that is in a Judgment given in the King's Court. Alſo if a Woman who hath rightful Title of Dower be party or privy or conſenting to a Wrong, the (*a*) Aſſignment of Dower to her is void; as if ſhe procures one to diſſeiſe the Tenant of the Land, to the Intent to be endowed by him. And the naming the Defendant *Executor' Teſtamenti & ultimæ voluntatis, &c.* doth not prove him lawful Executor, for ſo every Executor of his own Wrong is named, and there is no other (*b*) Form of Writ or Count. And as to the Caſe of Recouper in Damages in the Caſe of Rent-Service, Charge, or Seck, it was reſolved, that the Reaſon of the Recouper in ſuch Caſe is, becauſe otherwiſe when the Diſſeiſee re-enters, the Arrearages of the Rent-Service, Charge, or Seck, wou'd be revived; and therefore to avoid Circuity of Action, and (*c*) *circuitus eſt evitandus, & (d) boni Judicis eſt lites dirimere, ne lis ex lite oriatur*, the Arrearages during the Diſſeiſin ſhall be recoup'd in Damages: But if the Diſſeiſor ought to have Common in the Land, the Value of the Common ſhall not be recoup'd, for by the Regreſs of the Diſſeiſee, he ſhould not have any Arrearages or Recompence for them, as appears in (*e*) 27 *H.* 6. 10. And with this Reſolution concerning Recouper in Caſe of Common agreeth the Book in 33 *H.* 6. (*f*) 32. *a.* in *Riche*'s Caſe. And ſo the Doubt in 16 *H.* 7. 11. *a.* is well explained. And it appears that the Caſe of Recouper doth ſtand on another Reaſon than the Caſe at Bar.

(*a*) 2 Co. 67. a. 3 Co. 78. a. 6 Co. 58. a. 8 Co. 132. b. 15 E. 4. 4. b. Br. Dower 15, 59. Br. Aſſiſe 181. Co. Lit. 35. a. 357. b. (*b*) 1 Rol. 549. 2 Rol. Rep. 17. Plow. 51. a. 54. b. Poph. 64, 100. Br. Damages 96. (*b*) 1 Brownl. 102. Yelv. 137. 1 Mod. Rep. 208. (*c*) Co. Lit. 348. a. (*d*) Poſtea 37. a. 4 Co. 15. b. (*e*) Fitz. common. 6. Carr. 76, 77. Br. Grant 2. Br. Common 4. Br. Pernor de Profits 2. (*f*) Br. Treſpaſs 30. Fitz. Bar. 63. Br. Titles 2.

HARGRAVE's *Caſe.*

Mich. 41 & 42 Eliz.

Carth. 519.

In the King's Bench.

BODY made a Leaſe for Years rendring Rent, the Leſſee died inteſtate; *Hargrave* took Letters of Adminiſtration, and for Rent arrear in his Time, after the Death of the Inteſtate, *Body* brought an Action of Debt in the *debet & detinet, &c.* And after Verdict the Def. Counſel moved in (*a*) Arreſt of Judgm. that the Writ ought to be brought in the *detinet tant'*, becauſe the Def. took the Profits in another Right, and

Moor 566. Cr. El. 711, 712. 1 Rol. 603. (*a*) 5 Geo. c. 13.

(a) Br. det. 238. Cr. El. 326, 712. 1 Bulſt. 23. 2 Rol. Rep. 132. 2 Brownl. 206. Palm. 117. * Cr. El. 711, 712. Moor 566. 1 Rol. 603, 927. Cr. Car. 225, 226. Cr. Jac. 238, 411, 545, 546, 549, 685. 1 Bulſt. 22, 23. Palm. 116, 117. 2 Rol. Rep. 131, 132, 133. Noy 137. 1 Brownl. 56. 2 Brownl. 202, 203, 204, 205, 206, 207. Allein 34, 42, 43. Stile 61, 80, 81. Hutt. 79. Poph. 121. 1 Mod. Rep. 185. 1 Keble 189, 493. Lit. Rep. 342. 8 Co. 159. a. Poſtea 35. b. 2 Jones 169, 170. 1 Sid. 266, 342, 379. Hob. 282. 1 Vent. 271, 272.

and they ſhall be Aſſets in Law. And the Book in (*a*) 10 *H.* 7. 5. *b.* was ſtrongly urged; for there it is expreſly held, that in the Caſe at Bar the Writ ſhall be in the *Detinet* for the Arrearages incurred in the Time of the Executor of the Leſſee: Yet on good Conſideration and Conference had with other Juſtices, it was adjudged, that the Writ ſhould be in the *debet* * & *detinet* in the Caſe at Bar; for when an Executor or Adminiſtrator takes the Profits, nothing ſhall be (*b*) Aſſets but the Profits above the Rent; as if the Land be worth 10 *l. per Annum*, and 5 *l.* is reſerved, in that Caſe nothing ſhall be Aſſets but the 5 *l.* above the Rent; and therefore the Writ ſhall be for the Rent in the *debet* & *detinet*. *Vide Dyer* 7 *E.* (*c*) 6. 81. *acc.* But note, that in all Actions brought by Executors, (as Executors) the Writ ſhall be always in the (*d*) *Detinet* only, although the Duty accrues in their own Time. As (*e*) 18 *H.* 8. 3. if the Executors of the Leſſor bring an Action of Debt againſt the Leſſee for Arrearages incurred in their Time, the Writ ſhall be in the *Detinet* only, 20 *H.* 6. 4. *b.* In Debt upon Arrearages of Account, of Aſſignment of the Auditors, by themſelves, the Writ ſhall be in the (*f*) *Detinet* only; for in all Caſes when Executors are bound to name themſelves Executors in any Action brought by them, the Writ ſhall be in the *Detinet* only, becauſe the Thing or Damages recovered ſhall be Aſſets. And it was adjudged, *Paſch.* 36 *Eliz.* in the Exchequer, in the Caſe of one (*g*) *Hitchcock*, that for an † Eſcape out of Execution in the Time of the (*h*) Executor, on a Recovery had by the Executor himſelf, he ſhall not have an Action in the *debet* & *detinet*, but in the (*i*) *detinet* only againſt the Sheriff, *cauſa qua ſupra*. *Vide* 11 *H.* 6. 7, 8, 16, 35. *Harlewin's* Caſe.

(*b*) Moor 566. Cr. El. 712. Poph. 121. Salk. 297, 317. (*c*) 1 Bulſt. 22. Cr. El. 712. Dyer 81. pl. 68. Stile 81. (*d*) 2 Brownl. 203, 206.

[*Note this Caſe of* Hargrave *has been often denied to be Law*; Ergo Quære & vide Cro. Jac. 545. Cro. Car. 163. &c. 1 Mod. 185. 1 Vent. 271, 272. 1 Sid. 266, 342, 379. 2 Jon. 169, 170.]

Moor 566. Cr. El. 840. F. N. B. 119. m. 1 Rol. 603. Noy 32. Cr. Jac. 225, 238, 545, 546. Br. Executors 15. (*e*) 2 Jones 170. (*f*) 2 Rol. Rep. 132. Cr. Jac. 545. 2 Jones 169, 170. 2 Brownl. 203. Cr. Car. 326. Br. det. 9. Fitz. Brief 84. 1 Rol. 602. (*g*) Poph. 190. 2 Rol. Rep. 132. Lane 80. Cr. Eliz. 326, 327. Hob. 264. Hutt. 79. Cr. Jac. 546. † Hob. 38. (*h*) F. N. B. 121. a. (*i*) Hob. 272. Jenk. Cent. 300.

PETTIFER's *Caſe.*

Hill. 45 Eliz.

In the King's Bench.

IN a Writ of Error between *Robinſon*, &c. and *Pettifer*, the Caſe was ſuch: In Debt Judgment was given in the *Common Pleas* againſt two Executors to recover the Debt *de bonis teſtatoris*; upon which a *Fieri facias* was awarded to the Sheriff to levy the Debt *de bonis teſtatoris*, &c. whereupon the Sheriff returned, *Nulla bona*, &c. And upon this Return an Entry was made in the Roll, becauſe *teſtatum eſt* that the Executors had ſold divers Goods of the Teſtator, and converted the Money to their own Uſe, a Writ was awarded to the Sheriff, to enquire by the Oath of good Men of his Bailiwick what Goods (which were the Teſtator's the Day of his Death) were waſted by the Executors; by Force of which Writ the Sheriff took an Inquiſition, by which it was found that divers Goods of the Teſtator to the Value of the ſaid Debt recovered were waſted by the Executors: And this was returned into Court. Upon which the Plaintiff ſued a *Scire facias* againſt the Defendants to ſhew Cauſe wherefore Execution ſhould not be awarded of their own proper Goods. And upon two *Nihils* the Court awarded Execution: And thereupon the Executors brought a Writ of Error *in redditione executionis.* And altho' it was ſaid that the ſaid Courſe was uſual in the *Common Pleas*, and more favourable than the ancient Courſe was, for by this the *Devaſtavit* ſhall not be returned by the Sheriff only, but now ſhall be inquired by Inqueſt returned, and upon that a *Scire facias* ought to be awarded.

Co. Ent. 268. pl. 15. 1 Jones 417, 418. Lit. Rep. 47. 2 Sid. 102. Cr. Car. 564. 2 Inſt. 472. 1 Jones 417, 418.

But it was adjudged that the ſaid Proceeding was erroneous: For when Judgment is given againſt Executors, and on the *Fi. fa.* the Sheriff returns *Nulla bona*, &c. the Plaintiff may have a ſpecial Writ of *Fi. fa. ſcil.* that the Sheriff levy the Debt of the Goods of the Dead, *& ſi ſibi conſtare poterit*, that the Executors have waſted the Goods, then *de bonis propriis*: And that is agreeable to Law and Reaſon;

Cr. Car. 520, 526, 527, 564, 603.

Lib. Intr. 11. 11 H. 6. 16, 36. Kelw. 22. b. Noy 124. Owen 132, 133. Cr. El. 860.

ſon; to Law, as appears in 12 *E.* 3. *Executors* 73. & 85. 9 *H.* 6. 9. *b.* & 57. *b.* To Reaſon, becauſe in ſuch Caſe, if the Sheriff makes a falſe Return, the Party may have his Remedy by Action on the Caſe, which is a good Means to force the Sheriff to make true and juſt Returns in ſuch Caſes. But by the ſaid new Courſe, if the Sheriff takes an Inqueſt and returns it, although it be falſe, yet the Party hath no Remedy againſt the Sheriff, nor againſt any other: And al-

Cr. Car. 528. Dyer 168. pl. 17.

though a *Scire facias* in the Caſe at Bar was awarded againſt the Executors, yet on two *Nihils* returned they ſhall be condemned, and charged of their own Goods, and yet perhaps had no Notice thereof, the Action ſometimes being brought in a foreign County, and ſometimes in the County where they dwell, and yet the Executors have not

Cr. Car. 527. Cr. Car. 520. 1 Rol. 776.

Knowledge thereof, which will be miſchievous; and for theſe Cauſes the Execution was reverſed, but the Judgment ſtood.

ROBINSON's *Caſe.*

Paſch. 1 Jacobi 1.

In the Common Pleas.

Cr. Jac. 15. Dyer 202. pl. 69.

Robinſon and others, Executors of *J. Robinſon*, brought an Action of Debt on a Bond againſt *Robinſon*; the Def. pleaded that before the Purchaſe of this Writ, one of the Plaintiffs as Adminiſtrator of *J. R.* brought an Action of Debt on the ſame Bond in this ſame Court againſt the Defendant, who then pleaded, That *J. R.* made Executors who adminiſtred; and traverſed that he died Inteſtate.

Then the Plaintiff replied, That Adminiſtration was committed to him *pendente lite* between the Executors of the ſaid Will; on which the Defendant demrru'd; and it was adjudged for the Plaintiff. And this Plea was pleaded by Way of Eſtoppel, and Judgment demanded, if he as Executor ſhould have an Action of Debt againſt the Defendant on the ſame Bond: The Plaintiffs replied, and ſhewed the Repeal of the Letters of Adminiſtration, and that the Plaintiffs are Executors; on which the Defendant did demur, he pretending, that foraſmuch as one of the Plaintiffs was barred in the former Action, that they ſhould be barred for ever. And the Cauſe was well debated at the Bar and Bench; and at laſt Judgment was given for the Plaintiff. For it was unanimouſly agreed, That by the former Judgment the Plaintiff was barred as to the Action of the Writ, *ſcil.* to have any Action as Adminiſtrator: But although he then in Truth was Executor, yet the Miſtaking of his Action is no Bar nor Eſtoppel to bring his true Action; as if an Heir bring a *Formedon* in the Diſcender, and be barred therein, yet he may have a *Formedon* in the Remainder, or Reverter. See 3 *E.* 3. 21. 4 *E.* 3. *Eſtoppel* 133. 19 *E.* 3. *Eſtoppel* 227. 18 *E.* 3. 31. 40 *E.* 3. 21. 2 *R.* 2. *Eſtoppel* 210. 6 *H.* 4. 4. 11 *H.* 4. 30. 2 *R.* 3. 14. 21 *H.* 7. 24. 7 *E.* 6. *Eſtoppel* 162.

Cr. Jac. 15, 194. 6 Co. 7. b. 8. a.

6 Co. 7. b. Doct. pl. 65, 66. Dy. 371. pl. 6. 1 Mod. 207.

[*See* Ferrer's *Caſe*, 6 Co. 7. *b.* 8. *a.* *and for* Pleas of other Actions pending, *&c.* *See* 6 *Mod.* 157, *&c.* *ib.* 4 *Co.* 39, 40.]

READ's *Caſe.*

Trin. 2 Jac. 1.

In the Common Pleas.

Co. Ent. 144. pl. 23.

READ brought an Action of Debt againſt *Carter* Executor of *Yong*, which Plea began in the *Common Pleas*, *Hill.* 44 *Eliz. Rot.* 401. the Jurors found, that the ſaid *Yong* made his Teſtament and laſt Will, and made one *A.* his Executor; and the Day of his Death was poſſeſſed of Goods above the Value of the Debt in Demand, and died; and before the Will was proved the Defendant took the Teſtator's Goods into his Poſſeſſion, and intermeddled with them; and afterwards, and before the Writ purchaſed, the Will was proved; and if on this Matter the Defendant ſhould be charged as Executor of his own Wrong was the Queſtion. And on great Deliberation Judgment was given for the Plaintiff. And in this Caſe theſe Points were reſolved.

1. When a Man dies inteſtate, and a Stranger takes the Inteſtate's Goods and uſes them, or ſells them, in that Caſe it makes him (*a*) Executor of his own Wrong. For although the Pleading in ſuch Caſe be, That he was never Executor, nor ever adminiſtred as Executor; and therefore it was objected, that he ought to pay Debt or Legacy, or do ſomething as Executor: Yet it was reſolved, and well agreed, that when no one takes upon him to be Execut. nor any hath taken Letters of Adminiſtration, there the Uſing of the Goods of the Deceaſed by any one, or the Taking of them into his Poſſeſſion, which is the Office of an Executor or Adminiſtrator, is a good Adminiſtration to charge them as Executors of their Wrong; for thoſe to whom the Deceaſed was indebted in ſuch Caſe have not any other againſt whom they can have an Action for Recovery of their Debts.

(*a*) 2 Leon. 223, 224. 1 Rol. 918. Noy 65. Swinb. 289 380. Mo. 14. N. Bendl. 72. 1 And. 11. Dyer 166. b. Antea 30. b.

1 Sal. 313.

2. When an (*b*) Ex'or is made, and he proves the Will, or takes upon him the Charge of the Will, and adminiſters, in that Caſe, if

(*b*) Swinb. 289, 380.

if a Stranger takes any of the Goods, and claiming them for his proper Goods, uſes and diſpoſes of them as his own Goods, that doth not make him in Conſtruction of Law an Executor of his Wrong (*a*), becauſe there is another Executor of Right whom he may charge, and theſe Goods which are in ſuch Caſe taken out of his Poſſeſſion after that he hath adminiſtred, are Aſſets in his Hands: But (*b*) altho' there be an Executor who adminiſters, yet if the Stranger takes the Goods, and claiming to be Executor, pays Debts; (*c*) and receives Debts, or pays Legacies, and intermeddles as Executor, there for ſuch expreſs Adminiſtration as Executor, he may be (*d*) charged as Executor of his own Wrong, although there be another Executor of Right; and therewith agreeth 9 *E.* 4. 13.

3. In the Caſe at Bar, when the Defendant takes the Goods before the rightful Executor hath taken upon him, or proved the Will, in this Caſe he may be charged as Executor of his own Wrong, for the rightful Executor ſhall not be charged but with the Goods which come to his Hands after he takes upon him the Charge of the Will. Note, Reader, theſe Reſolutions, and the Reaſon of them, and by them you will better underſtand your Books, which otherwiſe ſeem *prima facie* to diſagree. 41 *E.* 3. 13. *b.* 50 *Ed.* 3. 9. 6 *H.* 4. 3. *a.* 11 *H.* 4. 83. *b.* 84. *a.* 13 *H.* 4. 4. *b.* 8 *H.* 6. 35. *b.* 19 *H.* 6. 14. *b.* 21 *H.* 6. (*f*) 26, & 27. 32 *H.* 6. 7. *a.* 33 *H.* 6. 21. 21 *E.* 4. 5. *a.* 20 *H.* 7. 5. *a.* 26 *H.* 8. 7. *b.* 8. *a.* 1 *Eliz. Dyer* (*g*) 166. 9 *Eliz.* (*h*) *Dyer* 255. And ſo the *Quære* in 1 *Mariæ* (*i*) *Dyer* 105, 203. well reſolved.

[*See the Caſes in* 1 Salk. 312, & 313.]

(*a*) Swinb. 289, 380.
(*b*) Swinb. 289.
(*c*) N. Benl. 72. Moor 14. 1 And. 11. Dyer 166. b.
(*d*) Latch 160, 267, 268 Noy 65, 86. 6 Co 19. a. 1 Sid. 57. 1 Keb. 114. pl 16. Cro. Car. 88, 89. Hob. 49, 266. Cr El. 460, 565. 1 Rol. 919.
(*e*) Swinb. 289, 380, 381. 1 Rol. 919.
(*f*) 21 H. 6. 27. b. 28. a.
(*g*) Dyer 166. pl. 10, 11, 12. 1 Anderſ. 11. N. Benl. 72. 2 Brownl. 183, 184. Moor 14.
(*h*) 8 Co. 135. b. 9 Co. 39. a. 1 Rol. 918. Swinb. 351, 352. Dyer 355, 356. pl. 8. 1 Keb. 854. Wentw. 250. 2 Inſt. 398.
(*i*) 1 Rol. 918. 1 & 2 Ph. & M. Dyer 105. pl. 7. 17.

Conſtruction of the Statutes of Jeofails, &c. Amendment of Records, Fines, Common Recoveries, &c.

*PLAYTER's *Caſe*.

Mich. 25 & 26 Eliz.

In the King's Bench.

*1 Salk. 643. Carth. 49. Rep. Q. A. 66. Lucas 140.

(a) Palm. 101. Cr. Jac. 665. (b) 1 Ventr. 122, 123.

PLayter brought an Action of Treſpaſs againſt *Warne*, *Quare clauſum ſuum fregit, & (a) piſces (b) ſuos cepit, &c.* (without ſhewing the Number or Nature of the Fiſh;) the Defendant pleaded Not guilty, and was found Guilty to the Damage, &c. And now this Term in Arreſt of Judgment it was ſhewed, That the Declaration (which by the Law ought to be certain, becauſe it is in a Manner the Foundation of the Suit) was in the Caſe at Bar altogether uncertain for two Cauſes.

(c) 1 Vent. 105, 106, 272. 1 Rol. Rep. 25 Hard. 132. Palm. 101. Cr. Car. 18. Cr. El 837. 2 Rol. Rep. 442.

1. It doth not appear by the Declaration of what (c) Nature the Fiſh were, Pikes, Tenches, Breams, Carps, Roches, &c.

(d) Cr. Car. 18. Plow. 128. b. Cr. El. 866. 2 Rol. Rep. 269, 270. 1 Rol. Rep. 25. Cr. Jac. 435. Hardr. 132. Godb. 370. 1 Vent. 272.

2. The certain (d) Number of them doth not appear, but generally *piſces ſuos cepit*; To which it was anſwer'd by the Plaintiff's Counſel:

1. That it was good by the common Law, for the Verdict hath found the Defendant guilty to Damages, and therefore it is not now material of what Nature, or of what Number the Fiſh were, but taking of Fiſh to Damages, in which Caſe the Verdict hath made the Declaration (if it wants Form) good.

2. They conceived that the Declaration in an Action of Treſpaſs without expreſſing the Number or Nature of the Fiſh was good enough, foraſmuch as the Fiſh themſelves are not to be recovered, but Damages for them: As in 20 *H.* 6. 19. in a Writ of (e) Deceit for purchaſing and caſting a Protection, and doth not ſhew in certain of what Nature the firſt Writ was (as in *Formedon*, Aſſiſe, or other Writ) which was delay'd by the Protection, and yet the Writ was adjudged good: And in Treſpaſs on the Caſe the Writ was, that

(e) Doct. pl. 87. 20 H. 6. 18 a. Fitz Diſceit 13.

that the Pl. did retain the Def. *pro quadam pecuniæ ſumma ſolvend'*, *&c.* without ſhewing the Quantity of the Sum, and yet held good in 11 *H.* 6. 55. *b.*

3. If the Law doth require more (*a*) Certainty as to the Fiſh, then it ſhall be intented that the Judges before whom this Iſſue was tried, did direct the Jury to find the Defendant guilty only for the Cloſe for which the Declaration was good, and not for the Fiſh for which the Declaration was inſufficient.

(*a*) Poſt 121. a. 8 Co. 57. a. Salk 129. 364. 5 Geo. cap. 13.

4. Admitting the Declaration was inſufficient in the Form thereof by the Com. Law, and that it was not made good by the Verdict, yet they conceiv'd that it was remedied by the Stat. of 18 *El. cap.* 14. (for the Statute of 32 *H.* 8. *c.* 30. doth not extend to Counts) By which Act of 18 *El.* after Verdicts it is provided, "That all Defaults in Form in any "Writ Original or Judicial, Count, Declaration, Plaint, Bill, or Demand, are remedied, and Judgment for them ſhall not be ſtayed. And it was ſaid, that the Omiſſion of the Number and Nature is but of the Form and not of the Subſtance of the Action, but the Subſtance is for the Taking of the Fiſh; But it was reſolved by Sir *Chr. Wray* Chief Juſtice, Sir *T. Gawdy* and the whole Court againſt the Plaintiff.

And to the 1ſt and 2d Object. it was anſwered and reſolved, That the Declaration was inſufficient, and was not made good by the Verdict, for the Declarat. ought to reduce the Generalty of the Writ to Particularity, and to declare that which is briefly touched in the Writ in Certainty, to which the Defend. may have certain Anſwer, and on which a certain Judgm. may be given, *Quia* (*b*) *oportet quod certa res deducatur in judic'*. And true it is, if this Action had been brought by Original, the Writ ſhould be general; but the Declarat. ought to have comprehended the Fiſh in (*c*) certain; and therewith agree all the Precedents, and 4 *H.* 6. 11. *b.* where the Writ was *Quare piſcem* (*d*) *cepit*, and declared of ſo many Pikes in certain; and altho' the Writ was *piſcem* in the ſing. Numb. yet it was well, for *piſc' eſt nomen collectivum*, in which the plural Numb. is comprehended. *Vide* 21 *H.* 6. 39. *a. b. acc.* that (*e*) the Certainty of the Fiſh ſhall be alledged in the Declaration; and great Inconvenience would thereof follow, for unleſs the Iſſue hath Certainty with which the Jury may be charg'd, on ſuch a general Incertainty they cannot be charg'd in Attaint, if they give a falſe Verdict.

(*b*) Co. Lit. 96. a. 303. a. Poſtea 38. a. 61. a. March 98. Hard. 132.
(*c*) Poſt. 120, 121. Hard. 132. Co. Lit. 303. a. Plow. Com. 121, 122. Cr. Car. 18. 573. 2 Rol. Rep. 96. Godb. 370. Cr. El. 887. Latch 195. Cr. Jac. 435, 665. Palm. 101. 447. 1 Vent. 53, 95, 106, 272, 329. 2 Jones 109. Doct. pl. 87. Kelw. 153. pl. 2. Noy 91. C. Bendl. 174.
(*d*) Br. General brief 9. Doct. placit. 84, 384. Fitz. Brief 27. Br. Brief 209. Br. fauxlatin 51.
(*e*) Fitz. brief 92. Br. fauxlatin 93.

As to the 3d Object. it was anſwer'd and reſolved, That when the Jurors have found the Defendant guilty (*f*) generally of the Treſpaſs in the Declaration, *&c.* That without Queſtion doth extend to both the Treſpaſſes, and no ſuch Intendment ſhould be taken as was objected: But if the Pl. Counſel had done wiſely, they would have cauſed the Damages to have been (*g*) ſevered, that is to ſay, ſo much for the Fiſh, and ſo much for breaking the Cloſe, and then the Pl.

(*f*) 2 Sand. 170, 171. Lane 98.
(*g*) Moor 708.

(a) 18 El. c. 14.
(b) Palm. 123, 124. Cr. Car. 147, 148. Poſtea 36. a. 1 Leon. 300.
(c) 1 Jones 199.
(d) Hutt. 57, 79. Antea 31. a. b. Cr. Jac. 238, 411, 545, 546, 549. 685. 8 Co. 159. a. Cr. El. 850, 711, 712. 1 Rol. 603, 927. Moor 566. 1 Bulſt. 22, 23 Cr. Car. 225, 226. Palm. 116, 117. Noy 137. 2 Rol. Rep 131, 132, 133. Stil. 61, 80, 81. Poph. 121. 1 Brownl. 156 2 Brownl. 202, 203, 204, 205, 206, 207. 1 Mod. Rep. 185. Allein 34, 42, 43. Lit. Rep. 342. 1 Keb. 189, 493 1 Sid. 266, 342, 379 2 Jones 169, 170. Hob. 282. 1 Vent. 271, 272.

should recover Damages for breaking the Cloſe, with his Coſts.

As to the laſt Objection, it was agreed by the whole Court, that the Omitting of the Nature and Number of the Fiſh, was a Matter of Subſtance, and not of Form to be remedied by the ſaid Statute of (*a*) 18 *Eliz.* for Want of Form within the ſaid Act is ſuch Matter of Courſe, that the (*b*) Clerk might have ſupplied and amended without any Information of the Party, for the Party ought to inform the Truth of the Matter, and the Clerk ought to draw it in Form: But in the Caſe at Bar the Clerk without Information of the Party could not know the Nature or the Number of Fiſh; and therefore it is not Want of Form within the Purview of the ſaid Act. But *Wray* Chief Juſtice ſaid, That every (*c*) Miſpriſion of a Clerk in a Thing, which he might have ſupplied and amended without Information of the Party, is not remedied by the ſaid Act: As if a Writ be brought againſt Executors in the (*d*) *Debet* and *Detinet*, this is the Fault of the Clerk; but becauſe it is in Matter of Subſtance, that is to ſay, in the Point of the Action, and not Want of Form, as the Statute ſpeaks, it is not remedied by the ſaid Act. So there is a Difference between Matter of Courſe and Matter of Subſtance, which the Clerk might have amended.

WALCOT's *Caſe.*

Carth. 49.

Trin. 30 Eliz.

In the King's Bench.

LLoyd brought an Action of Debt in the Common Pleas against *Walcot* and the Lady *Arnold* his Wife on an Obligation made by the Wife before Marriage; the Defendant pleaded to Iſſue, and found againſt him; on which Judgment was given: The Defendant brought a Writ of Error, and divers Errors were aſſigned, which were all over-ruled by the Court; then one of the Defendant's Counſel moved, that the Writ was brought againſt them in the *Detinet tantum*, where it ought to have been in the *debet & detinet*, for the Wife who is Party to the Action made the Bond her ſelf, and the (*a*) Intermarriage is a Gift in Law to the Huſband of all the perſonal Goods, and Diſpoſition of all Chattels real, and all thoſe he hath to his own Uſe, and not to another's Uſe as Executors have. But as againſt the Heir of the Obligor an Action lies in the (*b*) *debet & detinet*, becauſe he hath Aſſets from the ſame Anceſtor in Fee-ſimple in his own Right; ſo hath the Husband the Goods and Chattels of his Wife to his own Uſe; and therefore the Writ ſhall be brought againſt them in the *debet* (*c*) *& detinet, quod fuit conceſſum per totam Curiam*: Then it was moved, That it was want of Form, and therefore ſhould be amended by the Statute of 18 *Eliz. cap.* 14. becauſe it was but (as it was ſaid) the Miſpriſion of the (*d*) Clerk, which he himſelf ought to have amended and ſupplied: But it was reſolved by the whole Court, That it was Matter of (*e*) Subſtance, and the very Point of the Action, and the ſaid Act remedied only Want of Form; which Reſolution agrees with the Opinion of *Wray* Chief Juſtice in the Caſe before.

3 Leon. 206.

(*a*) Co. Lit. 351. a.

(*b*) Cr. El. 350, 712. 1 Jones 199. Plow. Com. 441 a. 10 H. 7, 8. b. 1 Sid 342.

(*c*) 3 Leon. 206.

(*d*) Antea 35. b. Palm. 123, 124.

(*e*) 1 Bulſt. 152. Cr. Jac. 546. Antea 35. a.

BAYNHAM's *Caſe*.

Trin. 30 Eliz.

In the Exchequer.

1 Salk. 373. (*a*) Style 8. Cr. Car. 17, 162. Cr. Jac. 631. Stat 21 Jac. c. 13. 2 Rol. Rep. 258. 1 Sid. 19. Cr. El. 664. (*b*) 8 Co. 162. b. 11 Co. 6 b. 1 Anderſ. 26, 27. pl. 60. O. Benl. 12. N. Benlow 37. Benl. in Kelw. 207. b. Benl. in Aſh pl. 5. Hob 281. 21 Jac. c. 13. (*c*) Godb. 429. 2 Rol. Rep. 363. Cr El. 574, 586, 894. 8 Co. 162. b. 163. a. Hut. 26. Co Lit. 125. b. Cr. Jac. 21. Yelv. 15. 1 Rol. Rep. 28. 3 Bulſt. 175. Moor 356. Dyer 367. pl. 40. 2 Rol. 668, 669. Brownl. 134. (*d*) Co. Lit. 125 a. 126. a. Cr. El. 664. 2 Rol. Rep. 363. Hob. 5. Jenk. Cent. 310. Poſt. 40. b. O. Bendl. 83. Godb. 429. (*e*) Co. Lit. 37. a. 126. a. 180. a. Poſtea 40. b. 2 Rol. Rep. 363. 1 Bulſt. 216. (*f*) Cr. El. 194, 586, 587. Poſtea 37. a.

BEtween *Baynham* and *Brook* in an *Ejectione firmæ* on a Demiſe of the Rectory of *A.* in *A. B.* & *C.* the Defendant pleaded Not guilty, and the Venue came only out of *A.* and the Jurors found the Defendant Guilty, and Judgment was given thereon: And in a Writ of Error this Judgment was reverſed, for the Venue ought to be out of the three Towns; and this Trial was reſolved to be inſufficient, and inſufficient Trials are not remedied by any Statute, for the Statute of 32 *H.* 8. *cap.* 30. doth not extend to a Verdict given between the Demandant * and the (*b*) Vouchee, not to any Fault in the original Writ, or in the Return thereof, or to the Want of an Original, or in the Count, or to any Inſufficiency in Trial, Verdict, or Judgment, &c. And the Stat. of 18 *Eliz. cap.* 14. helps many of the ſaid Defects, but doth not remedy any inſufficient Trial, but that remains as it was in the Common Law. And *Wray* Chief Juſtice ſaid, that it was of late adjudged in the King's Bench between *Goodwyn* and *Franklyn*, that where a *Venire facias* was awarded (*c*) to the Coroners where it ought to have been awarded to the Sheriff; and ſo the Jurors returned by one who had not Authority, that it was in the Nature of an inſufficient Trial; and therefore on Conſideration of the ſaid Statutes, and of the Opinion in 21 & 22 *El. Dyer* 367. it was reſolved that it was not remedied by any of the Statutes; but for this Cauſe a new *Venire facias* was awarded: *Et verum dixit*; for I was of Counſel with *Franklyn* in the ſame Caſe: But the principal Caſe in the Lord *Dyer* was held good Law, becauſe there the *Venire facias* was awarded *ex* (*d*) *aſſenſu partium*, & *omnis* (*e*) *aſſenſus tollit errorem*. And in this Caſe *Wray* Chief Juſtice ſaid, that it had been adjudged in this Court in *Gardiner*'s Caſe, that if on the *Venire facias* but (*f*) 23 be returned, and 12 appear and give a Verdict, that is remedied by the ſaid Acts of 32 *H.* 8. & 18 *Eliz.*

GAR-

GARDINER's *Caſe.*

Paſch. * 31 Eliz. Rot. 301.

In the King's Bench.

* The Original is 21 Eliz. but Q. if it ſhould not be 21.

BEtween *Tirrel* and *Gardiner* on Iſſue joined, 23 (*a*) Jurors were only returned, whereof 12 did appear and give Verdict; and that was moved in Arreſt of Judgment: And on great Deliberation it was reſolved, That it was remedied by the Statute of 18 *Eliz. cap.* 14. and thereupon Judgment was given accordingly; which was the Caſe which *Wray* Chief Juſtice cited in the Caſe next before.

(*a*) O. Benl. 95. 1. El. 194, 585. 587. 2 Brownl. 274. Cr. Car. 223, 224, 278, 279. Antea 36. a. 1 Jones 245, 302, 357. 1 Rol. 800.

Cr. Jac. 627. Latch 54. Savil 124. 1 Sid. 66. 2 Show. 309.

BISHOP's *Caſe.*

Paſch. 34 Eliz.

In the King's Bench.

Matthew Biſhop brought an Action on the Caſe againſt *Michael Harecourt* in the Common Pleas by original Writ, ſetting forth that the Defendant in Conſideration that the Plaintiff had given and delivered to the Defendant a Horſe; and that the Plaintiff promiſed the Defendant that he, on 90*l.* to him by the Defendant to be paid, would deliver to the ſaid *Michael* an Indenture, *inter William Ward ex una parte, & Agnetem Faukener ex altera parte fact'*, &c. and a Bond by which *Tho. Ward* and *Chriſtopher Biſhop* were bound to the ſaid *Agnes*, &c. in 500*l.* aſſumed, and to the ſaid Plaintiff did promiſe to pay him 90*l.* *Termino Trinit.* next following: And the Plaintiff declared, and the Writ and Declaration agreed in all but only in this, That where by the Writ the ſaid Bond of 500*l.* was alledged to be made by *Tho. Ward* and *Chriſt. Biſhop*, &c. in the Declaration he was named *George Biſhop*, &c. And the Def. pleaded *Non aſſumpſit*, and found againſt him, and Judgment given accordingly. And the Defendant brought a Writ of Error,

1 Leon. 210, 211. 1 Anderſ. 240. Cr. El. 210. Lucas 318. 6 Mod. 114, 206, 208, &c.

3 Bulſtr. 224, 228. 1 Rol. Rep. 432. 2 Rol. Rep. 262. Cr. Jac. 629, 630. O Benl. 51. Palm. 193.

(a) 1 Jones 9, 140. Latch 152. Noy 83, 84. 1 Rol. 764, 765. Styl. 175, 176. 1 Rol. Rep. 432. 2 Bulſtr. 71. Cr. Jac. 6, 141. Cr. El. 84, 155, 281, 282, 836, 837. 1 Leon. 22, 23, 176. 2 Leon. 3. 1 Sid. 139. Hard. 112. Palm. 285. (b) 2 Bulſt. 71. 1 Leon. 22. 2 Leon. 3. Palmer 285. 1 Jones 140. (c) Fitz. Error 44. Br. Error 166. (d) 22 E. 4. 45. b. 46. a. b. (e) Fitz. Error 29. Br. Error 12. (f) 8 Co. 163. a. 4 Bulſt. 224. 2 Rol. Rep. 252. Cr. Jac. 629, 630. O. Benl. 51. 1 Rol. Rep. 432. Palm. 193. Winch 69. (g) 1 Jones 304. Cr. El. 722. Cr. Jac. 185, 654. Doctrin. placit. 385. Yelv. 109. 3 Bulſtr. 224. 1 Sid. 84. (h) 3 Bulſt. 224 Doct. placit. 385. Cr. Car. 272, 282. Cr. Jac. 185, 654, 655. Cr. El. 722. 1 Sid. 84. 1 Jones 139, 304. 5 Co. 4. Caudrie's Caſe. Vide 5 Geo. 1. cap. 13.

Error, and aſſigned divers frivolous Errors, to which the Court gave no Regard. And then another Error not aſſigned was moved, *ſcil.* the ſaid Variance between the original Writ and the Declaration. For the Declaration in the Common Pleas always recites the Writ, by which it appeared that the Writ was *Chriſtopher Biſhop*, (who was one of the Obligors in the ſaid Bond) and the Declaration was *George Biſhop*. And on that after *in nullo erratum* pleaded, the Plaintiff by *Certiorari* out of the King's Bench removed the original Writ, by which the Variance appeared to the Court. And it was moved, That it ſhould be helped by the Statute of 18 *Eliz. cap.* 14. by which it is enacted, That after Verdict no Judgment ſhall be reverſed for Want of Form, *&c.* or for any Want of any Writ original or judicial, or Default in Proceſs: And here wants an original Writ in our Caſe, for the Action on the Caſe conſiſts on two Parts, *ſcil.* on Conſideration and Promiſe. And as to the Conſideration, the Writ and Declaration vary, and ſo no original Writ to warrant this Declaration; and if that ſhould not be within the Letter of the Act, yet it would be within the Meaning and Intent of it, becauſe it was in equal Miſchief. Alſo it was moved, That after in *(a) Nullo eſt erratum* pleaded, no Writ of Diminution, or *Certiorari* ſhould be awarded, as it is agreed in *(b)* 7 *E.* 4. *(c)* 25. *b. (d)* 22 *E.* 4. *(e)* 28 *H.* 6. 10. *b.* but if any ſhould be awarded by the Diſcretion of the Court, it ſhould be only to aſſure them of the Truth for the amending the Record in Things amendable, and to ſalve the former Judgment, according to the Truth of the Caſe, but never to reverſe the Judgment, as it would be in our Caſe.

But as to the firſt it was anſwered and reſolved by the whole Court, That this *(f)* Variance between the original Writ and the Declaration was not remedied by the Statute of 18 *Eliz.* nor any other Statute; and a Difference was taken by the Court when there was an *(g)* original Writ, which in Matter of Subſtance varieth from the Declaration, that was not remedied by the ſaid Act, *Quia Caſus omiſſus & oblivioni datus, diſpoſitioni juris communis relinquitur*; but when there is *(h)* no original Writ, that was expreſly remedied by the Act.

As to the ſecond Point they all agreed, That when the original Writ is removed (be it before *in nullo eſt erratum* pleaded, or after,) and a material Variance appears to the Court between the Writ and the Declaration, the Judgment ſhall be reverſed: And ſo it hath been done before this Time, as *Wray* Chief Juſtice ſaid.

[*See* 6 Mod. 206. *That this Caſe was not on a* nullo eſt erratum, *but after a* Nil dicit & remanet indefenſ. *See* Latch 152. 1 Salk. 269.]

TEY's *Caſe.*

Trin. 34 Eliz.

In the King's Bench.

Thomas Tey and *Eleanor* his Wife levied a Fine to *Robert Drury* and *Tho. Cannock*, and to the Heirs of *Robert Drury*, of the Manors of *Layerdelahay*, *Layer Bretton*, and of divers other Manors, and of a great Number of Acres of Land, Meadow, Paſture, *&c.* in *Layerdelahay*, *Layer Bretton*, *Magna Bretten*, *Magna Birch*, and many other Towns in the County of *Eſſex*. And in the ſaid Fine divers Grants and Renders were made: And in the third Render the Manors of *Layerdelahay*, *Layer Bretton*, and divers other Manors, *& tenementa prædict' in Layerdelahay*, *Layer Bretton*, *Neverds* and *Magna Birch*, were granted and rendred to the ſaid *Thomas* and *Eleanor*, and to the Heirs of the ſaid *Thomas*. And by the fourth Render 115 Acres of Land in *Layer Bretton* and *Magna Birch*, were granted and rendred to *Eleanor* in Tail, the Remainder to the right Heirs of Sir *Thomas Tey*: And after the Death of *Thomas Tey*, *William Tey* his Brother and Heir brought a Writ of Error, and aſſigned Error in the Grant and Render made by *Drury* and *Cannock*; and that was for the Repugnancy between the third and (*a*) fourth Render, for by the third Render all the Tenements in *Layer Bretton* and *Magna Birch* were rendred to *Thomas* and *Eleanor*, and to the Heirs of *Thomas*; and by the fourth Render, certain of the ſaid Tenements are granted and rendred to the ſaid *Eleanor* in Tail, the Remainder to the right Heirs of Sir *Thomas Tey*; ſo one and the ſame Thing is granted and render'd to ſeveral Perſons and of ſeveral Eſtates, and ſo repugnant, and erroneous: For it was ſaid, That a Fine is like a Judgment, for a *Scire facias* lies to execute it, as of a Judgment; and *oportet* (as *Bracton* ſaith) *Quod (b) certa res deducatur in judicium*: As in Caſe where there are two Demandants, and the Court ſhould

(*a*) Jenk. Cent. 256.

(*b*) Antea 35. a. Co. Lit. 96. a. 303. a. Hardr. 132. Poſtea 61. a. March 98.

ſhould adjudge one and the ſame Thing to each Demandant ſeverally, it would be Error as well for the Repugnancy, as for the (*a*) Doubtfulneſs to which of them the Court ſhould make Execution. As in the Caſe of 3 *H.* 6. 44. *b.* where two Avowants are, and one avows for Rent-Service, and the other for Rent-Charge, both the Avowries (*b*) ſhall abate; for the Court will be in doubt to which of them Return ſhall be awarded; ſo here in the Caſe at Bar, becauſe the ſame Thing is granted and rendred in the third Render to one, and in the fourth to another, becauſe both cannot have one and the ſame Thing, for the Contrariety and Incertainty to whom the Court ſhall make Execution, it is erroneous. And it was further objected, that a Fine ought to be more certain than a Judgment, or any other Record, for a Fine can't be receiv'd being levied to two (*c*) and to their Heirs, as it is held in 2 *H.* 5. 7. *a. b.* & 24 *E.* (*d*) 3. 36. and a Man cannot acknowledge the Right to two, as it is held in 27 *E.* 3. 79. Neither can a Fine be levied on (*e*) Condition, as it is held in 22 *H.* 6. But after many Arguments at Bar and Bench, Firſt, it was reſolved by them, That the (*f*) fourth Render, as to that which was contained in the third Render, ſhould be of the ſame Condition and Quality in Conſtruction as a Charter, or other Conveyance between Party and Party, and need not have ſuch preciſe Form as a Writ or a Judgment; but a Conuſance of a Fine and a Grant and Render ſhould have the like Conſtruction as another (*g*) Conveyance between Party and Party, for it hath the Words of Grant and Render, becauſe it is a Conveyance of Record. And although a Fine may be refuſed in the Caſes which have been put; yet if ſuch Fines be received they would be good enough in all the ſaid Caſes; for *fieri non debuit, ſed factum valuit*; and therefore if a Fine be accepted to two and their Heirs, or if the Conuſance of Right be to two, or if a Fine be on Condition, in all theſe Caſes, and other like, the Fine (*h*) ſhall ſtand, and ſhall not be reverſed by Writ of Error. 2. In the Argument of this Caſe, all the Parts of a Fine *ſur conuſans de droit come ceo*, &c. were recited and peruſed. And it was reſolved by the whole Court that there are five (*i*) Parts of every Fine, that is to ſay; 1. An original Writ, for without (*k*) an original Writ a Fine cannot be levied, as appears by the Stat. *De* (*l*) *modo levandi Fines*, that the Order of Law will not ſuffer that a final Accord be levied in the

(*a*) Antea 19. a. Hob. 128. 1 Rol. 353. Moor 864, 865.

(*b*) Antea 19. a. Plowd. 10 b. Manxel's Caſe. 21 R. 2. Fitz. Avowry 262. Br. Avowry 6. in Fine. Moor 865.

(*c*) Fitz. Fines 15, 77. 7 H. 4. 7. b. 24 E. 3. 36. b. 37. a. Br. Fines 10, 31. 33 H. 6. 52. b.

(*d*) 24 E. 3. 36. b. 37. a. Fitz. Fines 77.

(*e*) 2 Rol. 18. 44 E. 3. 22. a. Fitz. Fines 15, 36.

(*f*) Jenk. Cent. 256.

(*g*) Jenk. Cent. 256. Poſtea 45. b. 6 Co. 66. b.

(*h*) 27 H. 8. 24. a. Br. Fines 5.

(*i*) Raym. 71. Co. Lit. 121. a. 2 Inſt. 511.

(*k*) 2 Inſt. 513, 514. 1 H. 7. 9. a. Br. Fines Levies, &c. 85, 97. in Fine. Fitz. Fines 27. 21 E. 4. b. Plowd. 394. B. N. C. 461. Fitz. Aſſiſe 13. Br. Aſſiſe 396. Fitz. Error 28. Br. Judgment 114, 130.

(*l*) 2 Inſt. 510, 511, &c.

2 Co. 72. b. 1 Leon. 62. 3 Co. 84. a.

33 H. 6. 52. b. Perk. ſect. 629. Plowd. 34. b.

2 Co. 72. b. 1 Leon. 62. 3 Co. 84. a. 27 H. 8. 24. a. Br. Fines 5, 10. Br. Done 3. 33 H. 6. 52. b. Perk. ſect. 629. Plowd. 34. b.

King's

King's Court without an original Writ; and ſo it is held 37 (*a*) *Aſſ.* 17. And on every Writ, by which Land is demanded, or by which Land is to be charged or bound, or which in any Sort doth concern Land, &c. (*b*) a Fine may be levied. See for that 5 *E.* 2. *Statham Fines*, & 18 *E.* 4. 22. *a. b.* 19 *E.* 4. 2. 21 *E.* 4. 4. *b.* 32 *E.* 3. *Scire facias* 100. *in Præcipe, in Warrantia Chartæ*, in a Writ of Meſn, in *Quid juris clamat, Per quæ ſervitia*, in *Ration' dimiſſ.* & *ſimilia.*

1 Salk. 240.
(*a*) Br. Judgment 114. Br. N. C. 461. Br. Error 129. Br. Fines, Levies, &c. 82.
(*b*) 2 Inſt. 513.

2. There ought to be a Licence or (*c*) Leave to agree, for which Licence there is a (*d*) Fine due to the King, which is an ancient Revenue of the Crown, and that is (*e*) called the King's Silver; and that fully appears by the ſaid Stat. *De modo levandi fines.* And the Entry of the King's Silver in ſuch Caſe at the Bar was ſuch, *Robertus Drury armig' dat dominæ Reginæ ſeptem libr' pro Licentia concordandi cum Thoma Tey armiger' & Eleanora uxore ejus, de placito conventionis, de maneriis de, &c. & habet Chirographum per pacem admiſſum, coram Jacobo Dier. Et nota bene*, The Uſe is that he in whom the Fee (*f*) repoſes, pays the King's Silver, and not the other Conuſee who hath but for Life, and all the Precedents agree therewith. And note the King's Silver is entred on the Writ of (g) Covenant, and ought to expreſs, 1. The Sum given for the Licence to agree. 2. The Party who pays it, that is to ſay, he in whom the Fee repoſes. 3. The Plea, and between whom, &c. And 4. The Land for which the Fine is paid; and all this was well obſerved in the Caſe at Bar.

(*c*) 2 Inſt. 511, 512.
(*d*) 1 Leon. 249, 250. 2 Leon. 56, 179, 233, 234.
(*e*) Poſtea 43. b. Cumberb. 66.
(*f*) 2 Inſt. 512.
(*g*) Poſtea 43. b. 44. a. Dyer 320. pl. 19.

3. The Concord, and that begins thus, *Et eſt concordia talis*, ſcil. *quod præd' Tho. & Eleanora recognoverunt maner', &c. eſſe jus, &c. Et notand' eſt*, that this is the Foundation and Subſtance of the Fine. For if thereon the (*h*) King's Silver be entred, altho' the Conuſor dies afterwards, the Fine is good, as it was adjudged in *Carrel*'s Caſe, 5 *Eliz. Dy.* 220. *b.* And the Note and the Foot of the Fine are but Abſtracts out of it, but the Concord is the Ground and Subſtance of the Fine.

(*h*) Co. Ent. 231. a. Hob. 330. 2 Inſt. 511, 512. 4 Leon. 96. 2 Sid. 46.

4. The Note of the Fine, and that is but an Abſtract out of the Original and the Concord, and begins in this Manner, *ſcil. inter Robert' Drury & Tho. Cannock querent', & Tho. T. & E. uxor' ejus deforcean' de maner', &c. unde placit' conventionis ſummonit' fuit inter eos*, ſcil. *quod præd' Tho. Tey & Eleanora recognover' maner', &c. eſſe jus, &c.* But it was obſerved, that in old Books the Note of the Fine is taken for the Concord, as in 12 *H.* 4. 16. *a.* that the (*i*) Note of a Fine is pleadable before the Fine engroſſed, and (*k*) 22 *H.* 6. 51. *acc.* But that is intended of the Concord it ſelf; and all the Pleadings in *Quid juris clamat, &c.* that the Leſſee had Fee the Day of the Note levied, are to be intended of the Concord it ſelf.

Dyer 89. b. 220. pl. 15. 254. a. Hutt. 135. Cumberb. 66.
(*i*) Doctrin. placit. 307. Br. Fines Levies, &c. 41.
(*k*) 22 H. 6. 13. a. Doct. pl. 307.

5. The Foot of the Fine, and that begins ſo, that is to ſay, *Hæc eſt finalis concordia facta in Curia Domini*

Domini Regis, apud Weſt. a die Paſchæ in quindecim dies, anno, &c. coram Jacobo Dyer, &c. So that the Foot of the Fine includes the whole, and hath the Day, Year, Place, and before what Juſtices the Concord was made. And a Fine is ſaid to be * engroſſed when the Chirographer makes the Indentures of the Fine, and delivers them to the Party to whom the Conuſancè was made. And it is to be known, that if a Fine is levied of a Reverſion, the Conuſee preſently (*a*) after the Conuſance, which is the Concord, ought to ſue a (*b*) *Quid juris clamat* againſt the Leſſee; for if the Conuſee ſtay till the Fine be engroſſed, he ſhall never have a *Quid juris clamat*, for preſently by the Record and Conuſance the Reverſion paſſes. *Vide F. N. B.* 147. & 22 *H.* 6. 57. *acc'*. And at the Common Law immediately after the Fine ingroſſed, it was ſent in the (*c*) Treaſury, as appears in 17 *E.* 3. 29. *a.* But now by the Statute of 5 *H.* 4. *cap.* 14. it is enacted, That all the Parts of the Fine ſhall be (*d*) enrolled with the chief Clerk of the Bench (who is the *Cuſtos Brevium*) before the Chirographer hath them out of Court. And note before this Statute the *Cuſtos Brevium* had not any Record of the Fine but the Chirographer; and nothing remains with the Chief Juſtice of the Common Pleas but the Licence to accord. And note, it is provided by the ſame Statute, that the original Writ ſhall be of Record. And the Uſe is to direct a Writ of Error to the Chief Juſtice of the Bench, another to the *Cuſtos Brevium*, to certify *tranſcript' pedis finis*, and another to the Chirographer to certify *tranſcriptum notæ finis*. And note that Words † are added in the Writ to the *Cuſtos Brevium*, *cum* † *omnibus eundem finem tangen'*, by Force of which Writ he certifies the original Writ. 3. It was reſolved that the Conuſor ſhould not aſſign Error in the Grant and Render, by which he himſelf took an Eſtate, no more than the Conuſee ſhall do in the Conuſance; for that is to defeat the Eſtate which by the Fine is given to him; nor ſhall the Recoveror bring a Writ of Error to defeat the Record in which he himſelf doth recover; for the Judgment in the Writ of Error is to be reſtored to all that which he loſt by the Fine or Judgment, and not to avoid and loſe that which he hath gained by the Fine or Judgment. 7 *E.* 3. 25. *b.* A Man ſhall not reverſe a Judgment for Error, if he cannot ſhew that the Error is to his (*e*) Diſadvantage, 8 *H.* 5. 2. *b.* *F. N. B.* 21. *acc'*. and afterwards the Fine was affirmed.

* F. N. B. 147. a.

(*a*) F. N. B. 147. a. 3 Co. 86 a. 6 Co. 68. a. Br. Quid juris clamat 14. Br. Attornment 25. 22 H. 6. 13. b. Plowd. 431. b.

(*b*) F. N. B. 147. a

(*c*) Fitz. Scire facias 8.

(*d*) Lane 62.

† D. 89. pl. 2.

(*e*) 8 Co. 59. a. 7 Co. 4. b. 1 Rol. 757, 759, 760, 784.

Palm. 39. 11 Co. 56. a. Jenk. Cent. 256, 257, 286. Fitz. Error 92. Br. Error 37. 8 H. 5. 2. b. F. N. B. 21. f. 7 H. 4. 16. a. 11 H. 4. 88. b. 89. a. 2 Sand. 46. Cr. Eliz. 84, 107. Dyer 315. pl. 99.

DORMER's *Caſe.*

Paſch. 35 Eliz.

In the King's Bench.

William Dormer Eſquire, Son and Heir of *Jeffrey Dormer* brought a Writ of Error on a Judgment given in a Writ of Entry in the Poſt, on which a common Recovery was had in the Common Pleas, between *John Crooker* and *George York* Demandants, and the ſaid *Jeffrey* Tenant of the Manor of *Farninghoe cum pertinentiis, & ſex meſuagiis, ſex cotagiis, duodecim gardinis,* 400 Acres of Land, 60 Acres of Meadow, 400 Acres of Paſture, 2 Acres of Wood, 60 Acres of Moor and Heath, and 40 *s.* Rent in *Farninghoe*, and of one Yearly Rent or Penſion of 4 Marks, *exeunt' de Eccleſia ſive rectoria de Farninghoe in Com' Northampton*; and that the Tenant vouched *H.* the common Vouchee, and Judgment was given, *Ideo conſideratum eſt quod prædict' Georgius & Johannes recuperent ſeiſinam ſuam verſus præfat' Galfridum de manerio, tenement' & reddit' præd' cum pertinen', ac de * advocatione Eccleſiæ præd': Et quod idem Galfridus habeat de terra præd' Henrici* the Vouchee, *ad valentiam, &c.* In this Record divers Errors were aſſigned.

Common Recovery. Poph. 22, 23, 24. 2 Inſt. 519.

* 2 Vent. 32. Poph. 22, 23. 1 Mod. Rep. 250. 2 Rol. Rep. 67. 2 Co. 74. a. Jenk. Cent. 257. Cr. Car. 270. Poſtea 40. b. Raym. 71. 1 Rol. Rep. 303.

1. Becauſe the Writ of Entry was *de uno annuali redditu ſive penſione quatuor marcarum exeun' de Eccleſia ſive rectoria*; it was ſaid that this was erroneous for two Cauſes: 1. Becauſe a Penſion is properly a Sum demandable in the (*a*) Eccleſiaſtical Court, and a Rent is a Thing demandable by our Law. 2. The Demand of Rent, or Penſion in the (*b*) Disjunctive is utterly incertain, and every *Præcipe* ought to be of a Thing certain; for although the Grant be in the Disjunctive, the *Præcipe* in a Writ of Annuity ſhall be of a Thing * certain. *Vide* 11 *E.* 3. (*c*) *Annuity* 27. 5 *E.* 4. 6. And ſee in my Reports Sir *Rowland* (*d*) *Heyward's* Caſe: But otherwiſe it is in Affiſe. *Vide* 3 *E.* 3. *Aſſiſe* 175. 11 *Aſſ.* 8. & 29 *Aſſ.* 7. 11 *E.* 3. *Variance* 69. *Alternativa petitio non eſt audienda.*

(*a*) Poph. 23.

(*b*) Poph. 23.

* F.N.B. 152. h. Co. Lit. 145. a.

(*c*) 2 Co. 37. a. Poſtea 41. a.

(*d*) 2 Co. 37. a.

Anoth. Err. was aſſign'd, That a Writ of Entry in the Poſt lies not

not of an Advowſon, as appears by the Statute of *Weſt.* 2. (*a*) *cap.* 5. 4 *E.* 3. 162. 14 *H.* 4. 33. *a.* no more than of Common of Paſture, 4 *E.* 3. 146. 27 *H.* 8. 12. *a.* But the Judgment was affirmed by the whole Court. And in this Caſe four Points were reſolved.

1. That a common Recovery is not to be compared to a Judgment or Proceeding in any other real Action for three Cauſes. 1. Becauſe it is now by Uſage and Cuſtom become a common Aſſurance and Conveyance of Lands, *&c.* for it may be averred to an Uſe; and if Tenant for Life ſuffers a common Recovery, it is a (*c*) Forfeiture. 2. That it is had by mutual Conſent of the Parties, *&* (*d*) *conſenſus tollit error*', 39 *E.* 3. 1. the Demandant and Tenant conſent that two (*e*) of the four in the Writ of Right ſhall be Eſquires, where by the Law they ought to be Knights, and well, becauſe by conſent, 44 *E.* 3. 6. *b.* Trial of (*f*) Villenage alter'd from the natural Trial by Conſent, 7 *H.* 6. 7. *b.* Pleading of a Feoffment in * Fee on Condition without Deed and Re-entry is good, if the other Party confeſs the Condition, 34 *E.* 3. *Office de Court* 12. If 12 be ſworn and one depart, (*g*) another of the Panel by conſent may be ſworn, and with the 11 give Verdict, 11 *H.* 6. 13. The Court in a *Quare Impedit* by Conſent may give longer Day than is limited by the Stat. of *Marlebridge*,† 11 *H.* 4. The Stat. of 2 *E.* 3. and 20 *E.* 3. ‖ provide, That neither for the Great Seal (*h*) nor Petit Seal, Juſtice ſhall not be delayed; yet when the Matter doth concern the K. only, if he command it, it may be ſtayd, *F. N. B.* 21. *b.* 27 *H.* 7. A Tenure may be created at this Day by Conſent of all, notwithſtanding the Stat. of *Quia emptores terrar*', 6 *E.* 6. *Dy.* 78. By ſpecial Conſent of the Parties, a (*i*) Re-entry may be for Default of Payment of Rent without Demand of it. And divers other Caſes were put where Conſent of the Parties ſhall alter the Form and Courſe of the Law. 3. Otherwiſe no Aſſurance could be of an (*k*) Advowſon, (*l*) Commons in Groſs, *&c.* to bar Rem'rs or Rev'ns expectant on Eſtates-tail: The ſame Law of Common of Paſture, Franchiſes, Liberties and Privileges, as to have Felons Goods, *&c.* Waifs, Strays, *&c. Et ſæpenumero neceſſitas vincit commun' leg', & quod neceſſari eſt licit' eſt.* As if two Jointenants (*m*) be of Land to them and to the Heirs of one of them, they ſhall not join in a Writ of Right. But 2 Jointenants to them and to the Heirs of one of them of an Advowſon ſhall join in a Writ of Right of Advowſon. And the Reaſon of the Difference is, becauſe in the firſt Caſe they have ſeveral Ways and Remedies, as it is agreed in 46 *E.* 3. 21. b. But in the other Caſe, if the Tenant for Life ſhould not join with him who hath the Fee, neither the one nor the other would have any Remedy; and therefore in ſuch Caſe, *neceſſitas vincit legem. Vide* 21 *E.* 3. 27. *& nota Dictum de Stone there. Vide* Sir *William Pelham*'s (*n*) Caſe in the firſt Reports.

(*a*) 2 Inſt. 353, 354, 355, &c.
(*b*) Jenk. Cent. 237. Poph. 23. Poltea 46. a. 1 Co. 15. b. Cr. Car. 270.
(*c*) Poph. 23. 1 Co. 15. b. 10 Co. 44 a. 2 Leon. 60, 61, 62, 67. 4 Leon. 123, 124, 125, &c. 133. 1 Anderſ. 227. Co. Lit. 356. a. 362. a. Moor 271. Vaugh. 51. 2 Brownl. 170. 1 Rol. Rep. 304. 2 Co. 74. a. 3 Co. 4. b.
(*d*) Co. Lit. 37. a. 180. a. 126. a. 5 Co. 36 b. 2 Rol. Rep. 363 1 Bullſt. 216.
(*e*) Godb. 429, 430. 39 E. 3. 2 b.
(*f*) Godb. 429 1 Rol. Rep. 28 Raym. 372,
* Doct. pl. 176
(*g*) Godb. 429.
† 52 H. 3. Stat. de Marl c. 12. 2 Inſt. 123. 124.
‖ 2 E 3. c. 8. & 20 E. 3 c. 1.
(*h*) F. N. B. 240. d.
(*i*) Palm. 411. Godb. 429. 1 Rol. 459.
(*k*) 1 Mod. Rep 250. 2 Vent. 32. Poph. 22, 23. 2 Rol. Rep. 67 Jenk Cent. 257. 2 Co. 74. a. Cro Car. 270. Raym. 71. 1 Rol. Rep. 303.
(*l*) Jenk. Cent. 257. Poph. 25.
(*m*) Br. Jointenants 6.
(*n*) 1 Co. 14. b. 15. *a.* b. 2 Leon. 60. 4 Leon. 123. Moor 271.

2. As to the Demand of the (*a*) Rent, or Penſion of four Marks iſſuing out of the Rectory, it was reſolved, That the Writ was good enough, for here is not any (*b*) Incertainty, for one of two ſeveral Things is not demanded, but one Thing only is demanded; for the Demand is of a Rent or Penſion of four Marks, ſo that there is not but one four Marks. And in this Caſe *redditus* and *penſio*, as this Caſe is, are *ſynonyma*. For theſe later Words (*exeunt de rectoria*) prove it to be a Rent, for if it was but an Annuity, then it would not be iſſuing out of the Rectory, but the Parſon in ſuch Caſe ſhould be charged in Reſpect of the Rectory. And in 11 *E.* 3. (*c*) *Annuity* 27. there one granted by Deed *quandam annuam penſionem unius robæ pretii unius marcæ, vel unam marcam.* 22 *E.* 3. 4. *Lacy's* Caſe, there an Abbot granted *quandam annuam penſionem &c.* and *F.N.B.* 231. *H.* the Writ is *de annuali penſione:* By which it appears, that *penſio & annuitas*, or *annualis redditus* are all one, and principally in the Caſe at Bar, when it is alledged to be iſſuing out of the Rectory. And if a Writ be brought *de redditu, ſive annuitate, exeunt'* out of the Manor of *D.* it is good enough for the Cauſes aforeſ.

(*a*) Poph. 23.

(*b*) Palm. 267.

(*c*) Antea 20. 2 Co. 37. a. Co. Lit. 143. a.

3. It was alſo reſolved, that common Recoveries are ſo uſual, and their Form and Order of proceeding ſo notorious by Appearances the firſt Day, and *gratis*, &c. that the Law takes Knowledge of them; and therefore the Judges *ex Officio*, without Allegation of the Party, ſhall take Notice that they are Recoveries had by Conſent of the Parties for Aſſurance of Lands as in *Wimbiſhe* and *Talboy's* Caſe, *Plow. Com.* 56. A Recovery in *Formedon* appeared to the Judges to be by Conſent of Parties, becauſe the Tenant was not eſſoined, nor demanded the View, &c. but appeared the firſt Day and confeſſed the Action. *Vide Plow. Comm.* 515. in *Stowel's* Caſe, that the (*d*) common Uſage in the Caſes of Recoveries is to be allowed, and that in them the Intent of the Parties is to be obſerved.

(*d*) 2 Co. 72. a.

ROWLAND's *Caſe.*

Mich. 35 & 36 Eliz.

In the King's Bench.

IN an *Ejectione firmæ* between *John Rowland*, alias *Steyner*, Plaintiff, and *William James*, and *William Sherive*, Defendants, of Lands in *W.* in the County of *Worceſter*, on Not guilty pleaded the Jury found for the Plaintiff: And now it was moved in Arreſt of Judgment, that on the *Venire facias* no Return was indorſed, nor any (*a*) Name of any Sher. appeared on the Back of the Writ, *nec quod executio brevis præd' patet in quodam panello, &c.* but a Panel of the Jury with their Manucaptors was annexed and ſewed to the ſaid Writ; and alſo a *Tales* was awarded, and a Panel of the *Tales* annexed, but no Return of them, nor Name of Sheriff to it, but the *Poſtea* made Mention that they were returned by the Sheriff *per mandatum Juſtic'*. But it was moved that that would not ſerve, for the Sher. ought to return the Jurors, and the *Tales* alſo; and where there is no Return, it is not remedied by the Statute of 18 *El. cap.* 14. nor by any other Statute, but inſufficient Returns, or which wants Form, *&c.* And therefore a notable Precedent was cited, and Judgment given in the Common Pleas, *Trin.* laſt paſt, between *Harbert Barney* and others Plaintiffs, and (*b*) *Walkley* Defendant, *Trin.* 35 *Eliz. Rot.* 1251, which follows in theſe Words, *Poſtea continuato proceſſu inter partes præd' de placito prædict' per Jur' poſit' inde inter eos in reſpect' hic uſque hunc diem, &c. Et modo ad hunc diem venerunt tam prædict' H. B. &c. quam præd' J.W. per attorn' ſuos præd': Et ſuper hoc idem Johannes W. cur' hic dat' intelligi, quod quoddam breve de Venire facias hic duodecim, &c. inter partes præd' de placito præd', a die Sanctæ Trin. in tres ſeptiman' ultimo præterit', retornat' fuit album, & abſque aliquo indorſamento ſive ſcriptura ſuper dorſum ejuſdem brevis in ligulis Civitatis Glouc' annex', arraiat' inter brevia de tres ſeptiman' Sanctæ Trin' remanen' affilat', nullamque faciend' mentionem ſuper breve illud de aliquo Vicecomite, qui retorn' brevis illius warran-*

(*a*) Cr. El. 310. 2 Rol. Rep 210. 3 Bulſt. 220. Cr. Jac 188, 443, 528. 8 Co 162. b. 163. a. Cr. Car. 189. Cr. El. 466, 509. 704 Noy 115 Moor 65, 868. Yelv. 110. Palm. 152. 21 Jac. c. 13. 1 Rol. 204 Hob.

Harbert Barny's Caſe, Trin. 35 El. in Com. Banco.

(*b*) Cr. El. 310. 1 Rol. 204.

warrantizaret, nec quod executio patet in dict' panell' eidem brevi annex', petendo quod breve illud una cum panell' de nominibus Jur' & proceſſ. inde retornat' adnihilent, & pro nullo habeantur. Super quo brevi præd' ac dorſo ejuſdem brevis, una cum panell' annex', per Juſtic' hic viſ. & inſpect' dict' allegatio dicti Johan' Walkeley comperta eſt vera. Ideo conſideratur' eſt, quod præd' breve de Venire fac', ac panell' eidem brevi annexat' necnon totus proceſſus ſuperinde retornat', adnihilentur, & pro nullo habeantur. Et ſuper hoc præd' H. B. &c. petunt breve Dominæ Reg' Venire facias de novo hic duodecim, &c. ad triandum exitum præd' ſuperius junctum; & eis conceditur: Ideo præceptum eſt Vicecomiti, quod venire faciat de novo hic in craſtino Sanct' Trinit' duodecim, &c. per quos, &c. And note, that the ſaid Exception was taken after Verdict, as in our Caſe at Bar. And ſee the like Precedent, *Mich.* 32 *H.* 8. *Rot.* 112. In the Com. Pleas: But there *Curia adviſare vult.* And it was moved in the Common Pleas, 35 *Eliz.* in the ſaid Caſe of *H. B.* that the ſaid Writ on Examination might be endorſed and amended; *ſed non allocatur; & judicium ut ſupra.* And ſo it was prayed in 32 *H.* 8. but there *Curia adviſare vult.*

The Counteſs of Rutland's *Caſe.*

Mich. 34 & 35 Eliz.

In the King's Bench.

IN Debt on a Bond of 500 *l.* brought by the Counteſs of *Rutland*: The Defendant pleaded to Iſſue, and it was found for the Plaintiff. And now in Arreſt of Judgment it was ſhewed, that one *Robert Moore* was returned on the *Venire facias*; and ſo named in the Diſtreſs, but in the Panel before the Juſtices of *Niſi prius*, by Miſpriſion he was named (*a*) *Robert Mawre*, and ſo on the *Poſtea*; upon which it was ſaid, that a Stranger, who was not return'd, was ſworn and gave Verdict; for which Cauſe Judgment ſhould not be given. But it was reſolved by the whole Court, that if it could appear by Examination that his

(*a*) 1 Rol. 197. 8 Co. 162. b. Moor 762. 1 Rol. Rep. 200. 2 Rol. Rep. 168, 483.

right Name is *Robert Moore*, ſo that he is well named in the Panel on the (*a*) *Venire facias*, and alſo that he is the ſame Man who was returned, and was ſworn, there the *Poſtea* ſhould be amended. And to this Purpoſe, *vide* 9 *E.* 4. 14. by *Danby*, & 19 *H.* 6. 39. Tit. *Amendment Br.* 37. 27 *H.* 6. 5. by which Books it appears, That if one be well returned in the Panel of *Venire facias*, and miſnamed in the *Diſtringas*, or *Habeas Corpor'*, That it was not amendable; but the Proceſs againſt the Jurors was diſcontinued: But at this Day after Verdict Judgment ſhall not be therefore ſtayed, for all Diſcontinuances are remedied by the Stat. of 32 *H.* 8. and 18 *Eliz.* But at this Day, if a Juror be miſnamed in the Panel of *Venire facias*, altho' he be well named in all the ſubſequent Proceſs, it cannot be amended. And ſo it was adjudg'd *M.* 35 & 36 *Eliz.* in the King's Bench in *Codwel's* Caſe; and afterwards the Sheriff was examin'd, and on Examination it appeared that the true Name of the Juror was *Robert Moore*, and that the ſaid *Robert Moore* who was returned appeared and gave his Verdict; and thereupon for the Reaſon aforeſaid, the Record of the *Poſtea* was amended by the Opinion of the whole Court, *viz. Popham* Chief Juſtice, *Clench*, *Gawdy*, and *Fenner*.

(*a*) 8 Co. 162. b. Mo. 762. 1 Rol. Rep. 200. 2 Rol. Rep. 168, 483. Poſtea 43. a. 2 Rol. 397.

Cr El. 57, 222 32 H 8. cap. 30. 18 El. c. 14. 21 Jac cap. 13. Cr. Jac. 457, 458. Cr. Car. 278. 1 Rol. 404.

CODWEL's *Caſe*.

Mich. 35 & 36 Eliz.

In the King's Bench.

1 Rol. 197, 198. Cr. El. 3 9. Goldsb. 184, 185. Moor 762. Cr. Jac. 457, 458 Cr. Car. 203. Palm. 103, 104.

IN an Appeal of Mayhem between *John Codwell* Plaintiff, and *Thomas Parker* Defendant, the Parties came to Iſſue, and the Jury found for the Plaintiff; and now it was moved in Arreſt of Judgment, that there was Variance between the Panel of the *Venire facias* and the *Diſtringas* and *Poſtea* in the Name of one of the Jury, who appear'd and gave Verdict; for in the Panel of the *Venire facias* he was named *Palus Cheal*, and in the *Diſtring'* and *Poſtea*

Poſtea he was named *Paulus Cheale*; and becauſe the Name of the Juror (*a*) was miſnamed in the *Venire facias*, and eſpecially in his (*b*) Chriſtian Name; therefore the Judgment was arreſted; but if he had been well named in the Panel of *Venire facias*, and miſnamed on the *Diſtringas* or in the *Poſtea*, there on Examination it ſhould be amended.

(*a*) 1 Rol. 197. 198. 1 Jones 448, 449. Cr. Car. 32 203, 563. Cr. El. 57, 222, 258, 866. Cr. Jac 28, 116, 353, 354, 396, 457, 458, 653, 654. 1 Rol. Rep. 474, 375. Hutt. 81. 3 Bulſt. 179, 180. Hob. 328. 1 Leon. 278. Owen 61, 62. 1 Sid. 66. 1 Keb. 182. (*b*) Cr. El. 256.

NICHOLS's *Caſe*.

3 Salk. 305.

Mich. 37 & 38 Eliz.

In the King's Bench.

CHamberlain brought Debt againſt *Nichols* on a ſingle Bill; the Defendant pleaded Payment without Acquittance, on which they were at Iſſue, and found for the Plaintiff; and although Payment without Acquittance is no Plea, and Iſſue is joined on a Thing not material; for if the Defendant hath paid the Sum without Acquittance, yet the ſingle Bill remains in Force: But foraſmuch as there was an Iſſue joined on an Affirmative and a Negative, which Iſſue is found for the Plaintiff, it was expreſly helped by the Stat. of 32 *H.* 8. & 18 *Eliz.* and on that the Plaintiff had Judgment; on which Judgment a Writ of Error was brought on the new Statute, (*a*) and there on good Conſideration the Judgment was affirmed. *Quod nota.*

Jenk. Cent. 257. Cr. El. 157, 455, 679, 716, 884. 1 Brownl. 225, 229, 232. Moor 12, 692. Dy. 6. pl. 3. 1 Rol. 243. pl. 4. Cr. Car. 27, 78. Cr. Jac. 86, 377, 435. 447. Noy 85, 86. Latch 158. 1 Jones 140, 141. Hob. 68, 69, 113. 1 Keb. 5. pl. 13. Winch 76. Hutt. 54.

3 Bulſtr. 301, 302. O. Benl. 127. Hard. 2, 3, 40. Lane 81. Style 198. (*a*) 27 El. c. 8.

BOHUN's *Caſe.*

Mich. 38 & 39 Eliz.

In the Common Pleas.

Amendment of Fines.

IN 32 *H.* 8. *Grey* and *Elizabeth* his Wife being ſeiſed in the Right of the ſaid *Elizabeth*, of the Manor of *Empoles* in *Weſthall* in *Suffolk*, in the ſame Year levied a Fine thereof to *Nicholas Bohun* Eſq; and his Heirs, by the Name of the Manor of *Empoles*, and of a great Number of Acres of Land, Meadow, &c. according to the common Form of Fines; and the Manor and Tenements were valued at 20 Marks *per Annum*; ſo that the Fine in the Hamper was 26 *s.* 8 *d.* which was endorſed on the Writ of Covenant; and always the Fine *pro licentia concordandi* (which is (*a*) call'd the King's Silver, or the Poſt-Fine) is the Fine in the Hamper, and half the ſaid Fine more. As in this Caſe the Fine in the Hamper was 26 *s.* 8 *d.* and the half is 13 *s.* 4 *d.* in all amounting to 40 *s.* and yet the Clerk made the Entry of the King's Silver in this Form, *Nicolaus Bohun armiger dat' Dom' Reginæ* 40 *s. pro licentia concordandi, &c. in placito conventionis* of ſo many Acres of Land, Meadow, &c. leaving out the Manor, and following the other Words. And for this Miſpriſion *Aldam* who was Couſin and Heir of the ſaid Woman, brought a Writ of Error in the King's Bench, and the Tranſcript of the Fine was certified. And Error aſſigned (amongſt others) in the ſaid Point, becauſe the King's Silver was not paid as well for the Manor as for the Tenements. And after that, the Judges of the Common Pleas were moved to amend this Fine in open Court; and becauſe it appeared to them on Examination and Sight of all the Parts of the Fine, that it was only the Miſpriſion of the Clark who entered the King's Silver, and that the ſaid Sum of 40 *s.* was in Truth the Fine as well for the Manor as for the Reſidue. And always the Value entered on the Back of the Writ of Covenant is the Warrant for the Entry of the King's Silver; and altho' the Tranſcript of the Fine was removed by Writ of Error; yet foraſmuch as the

(*a*) Antea 39. a.

Body

Body of the Record did remain with them, they unanimouſly agreed, That the ſaid Entry ſhould be amended, and made in a Writ of Covenant of the Manor aforeſ. and of all the Acres, &c. as it ought to be. And afterw. on Diminution alledged in the Omiſſion of the ſaid Manor, in the Entry of the K.'s Silver, a Writ was directed to this Purpoſe to the Ld. *Anderſon*, who one Day this Term moved all the Juſtices of Serjeants Inn in *Fleetſtreet* to know their Opinions concerning the ſaid Amendment in this Caſe, pending the ſaid Writ of Error. And it was reſolved by *Popham* Ch. Juſt. of *Engl.* *Periam* Ch. Baron, *Clark*, *Walmſley*, *Fenner*, *Owen* and *Ewyns*, that the ſaid Entry of the King's Silver ſhould be amended, and that pending the Writ of Error. Alſo where the Writ of Covenant ſhould be *Teſte meipſo*, the Writ was, *Dede meipſo*, which was inſenſible and viticus; and that was alſo amended by all their Opinions. oſtea 39. a. 2 Sid. 93. Poph. 102.

Note Reader, theſe Precedents and Reſolutions of the Juſtices following in the like Caſes were ſhewed to the ſaid Juſtices before they reſolved of the principal Caſe.

In *Eſſex*, *Dowling's* Caſe, &c. Fine levied *Hill. 6 E. 6.* certified in a Writ of Error, *Mich.* 24 & 25 *Eliz.* and certificate by Writ of *Certiorari Paſch. 26 El. & Trin. 26 El. ex aſſenſu omnium Juſticiar' de Reg' Banco, & Com' Banco, & Baron' de Scaccario*, pending the Writ of Error, Proclamat. endorſed *ſup' pedem finis* were amended according to the Proclamations on the Note of the Fine remaining with the *Chirographer, ut patet per record'*. The Juſt. of the. King's Bench were then *Wray*, *T. Gawdy*, *Ayloffe* and *Clench*; and the Juſtices of the Common Pleas then were *Anderſon*, *Mead*, *Windham* and *Periam*, and the Barons of the Exchequer were *Manwood* and *Shute*. Dowl. Caſe. Tr. 26. El. by all the Juſtices and Barons. Godb. 103.

2. In *Kent*, *Kettle's* Caſe. The Return of the Writ of Covenant was, *Oct' Purif.* 31 *H.* 8. and in Truth was ingroſſed *Trin. ſequen'* but was entred thus, *ſc. & poſt conceſſ. & recordat. in craſt' Sanct' Trin', ann.* 30 *H.* 8. where it ſhould be 32 *H.* 8. and thereupon a Writ of Error was brought; and pending the Writ of Error, the Juſtices of the King's Bench, by the Reſolution of *Wray*, *Gawdy*, *Clench*, and *Shute* (*ſedente Curia*) the Record was amended in theſe Words, *Et poſtea conceſſ. craſtin' Trin'* 32. And on that *Regula intratur in Reg' Banco Term. Mich.* 27 & 28 *Eliz.* And it appears by the ſaid Rule, that the Juſtices of the Com. Pleas, that is to ſay, *Anderſon*, *Periam*, *Windham* and *Rhodes* aſſented to it; and *Rhodes* ſaid, that there was a good Precedent in 30 *H.* 8. *ubi pes finis* was amended by the Note and the Proclamations, &c. Kettle's Caſe. Mich. 27 & 28 El. by all the Juſtices.

3. *Morgan's* Caſe in the County of *Oxford*, *Certificat' notæ Judicis*, ſc. *Concordia partium fuit in his verbis*, *In Præcipe de* Morgan's Caſe. Hill. 38 El. per Cur. de Com. Banco.

de duabus partibus Rector', & de duabus part' tenem', & per vitium Clerici ſcriptor' in concordia, deforcian' recognovit partem ultim' quam, &c. & pes finis, & nota cum Chirographar' recte ingroſſant', viz. recognovit partes quas, ut illas quas, &c. Et pender' ſuper hoc breve de errore, Hill. 38. Eliz. emendatur certificatio Judicis per notam & pedem finis, per Curiam, before Judgm. given in the King's Bench; and thereupon the Plaintiff in the Writ of Error moved the Court of Common Pleas, that foraſmuch as the Writ of Error was depending, that the Fine might be *in ſtatu quo prius* before the Amendment, as it was certified before the Writ of Error certified. And the Juſtices of the Common Pleas, *ſcil. Anderſon, Walmeſley, Beaumont* and *Owen* denied the Motion, and awarded that the Amendment ſhould ſtand, although it was after the Writ of Error brought.

Down's Caſe. Mich. 38 & 39 Eliz. per Cur' de Com'Banco.

4. In *Suffolk*, *Down*'s Caſe, *Mich.* 38 & 39. by the Motion of *Williams* Serjeant at Law *proclam' pedis finis* were amended *per proclam' notæ, in his verbis, ſuper pedem finis proclam'* was indorſed to be made 30 *Julii*, which was after *Trin'* Term ended; & *ſuper notam finis fuit* 30 *Jun.* and well and duly done, & *emendatur per Curiam* after Writ of Error brought; and that aſſigned for Error. And ſo in the principal Caſe the Roll of the Entry of the King's Silver was amended (a Writ of Error depending and that aſſigned for Error) according to the Writ of Covenant, the Note, the Foot, and the Certificate of the Judge in theſe Words (*de manerio de Empoles cum pertinentiis ac*) which by the Negligence of the Clerk in the Entry of the King's Silver were omitted in the Roll and are plainly extant in the Writ of Covenant, Note, Foot and Certificate of the Judge: And becauſe it appeared that the whole Sum was paid to the Queen as well for the Manor as for the Reſidue, and ſo no Prejudice to the Queen, it was amended, *ut ſupra.*

Payn's Caſe, Mich. 33 & 34 Eliz. per Cur' de Com Banco

5. *Mich.* 33 & 34 *Eliz.* between *Pain* and *Covert*; the Records (before Amendment) were *in Com' Suſſex*, and amended, and made *Banc'* as the Truth was; & *duo alii fines, M.* 33 & 34 *Eliz.* were amended, and *pro civitate Eborum*, made *Eborum.*

Wealch's Caſe.

6. *Suſſex, Wealch*'s Caſe, *Cognitio Judicis*, the Town in which, *&c.* was to be *Saleburſt*, as the Truth was, and the Writ of Covenant, Note and Foot were *Caleburſt*, & *emendatur*, and made *Saleburſt per Curiam. Et notandum eſt, Quod tales emendationes per mandatum Curiæ intrantur in dorſo Recordi per Regulam Curiæ.*

FREE-

FREEMAN's *Caſe*.

Paſch. 41 Eliz.

In the King's Bench.

ERror by *Smith* againſt *Freeman* in a Recovery in Waſte: The Writ was in Recital of the Statute of (*a*) *Glouceſter*, *Quod nullus faciat vaſtum, venditionem* & (*b*) *deſtrictionem*, &c. where it ſhould be *deſtructionem*. And in that Error was aſſign'd, and it was prayed that this original Writ might be amended, being but the Miſpriſion of the Clerk, who hath miſtaken a Word in the Statute of *Glouceſter*, on which the Writ was grounded. And the Miſpriſion was only in a Letter, that is to ſay, *deſtrictionem* for (*c*) *deſtructionem*. And the whole Court on good Debate and Conſideration at two ſeveral Times reſolved: 1. That it was a Matter of Subſtance; for *diſtrictio* is a *Latin* Word, and alters the Senſe of the Statute. 2. That it could not be (*d*) amended by any Statute, for Matter of Subſtance in an original Writ is not remedied by any Statute, but Matter of Form only.

Cr. El. 462, 8 Co. 163. a. Conſtruction de Statutes.

(*a*) 6 E. 1. Stat. de Glouceſt. cap. 5. 2 Inſt. 299, 300, &c.

(*b*) F. N. B. 55. c.

(*c*) 2 Bulſt. 51. Cr. El. 462. Hutt. 56, 57.

(*d*) 2 Bulſt. 51. Cr. El. 462, 644.

Note well Reader, on Conſideration of the Statutes of (*e*) 14 *E.* 3. *cap.* 6. *Stat.* 1. 9 *H.* 5. *cap.* 4. 4 *H.* 6. *cap.* 3. 8 *H.* 6. *cap.* 12. 32 *H.* 8. *cap.* 30. & 18 *Eliz.* *cap.* 14. If a Writ original at this Day wants Form, or contains falſe *Latin*, or varies from the Regiſter in Matter of Form after Verdict, no Judgment ſhall be ſtayed or reverſed. But if it wants Subſtance, as in the Caſe at Bar, although it be by Miſpriſion of the Clerk, it is not remedied by

(*e*) 8 Co. 157. a. 158. a. 1 Salk. 626.

See the Stat. 5 Geo. 1. c. 13.

by any Statute. *Vide* 3 *E.* 6. 86. 10 *E.* 3. 482, 553. 41 *E.* 3. 14. 45 *E.* 3. 6. 4 *H.* 6. 16. 7 *H.* 6. 40. 21 *H.* 6. 8. 40 *Aſſ.* 26. 11 *H.* 6. 34. 27 *H.* 6. 6. 27 *H.* 6. *Amendment* 34. 28 *H.* 6. 8. 2 *H.* 7. 11. 9 *H.* 7. 16. 9 *H.* 7. 19. 34 *H.* 6. 26. 35 *H.* 6. 10. 30 *H.* 6. 4. 8 *E.* 4. 4. 10 *E.* 4. 12. 11 *E.* 4. 14. 22 *E.* 4. 21, 47. 13 *H.* 7. 21. 14 *H.* 7. 13. *Vide Mich.* 3 *E.* 6. *Bendloes*, the Juſtices of the Common Pleas, in a Writ of Partition, added the Word *oſtenſurus*, (*a*) which was omitted: And in a Writ of Aiel they amended this Word (*b*) *Ave*, and made it *Avie*.

(*a*) 8 Co. 160. a. 1 Ander. 24. Moor 5. Dall. 5. pl. 9. N. Benl. 33. pl. 53. O. Benl. 3. pl. 9.

(*b*) 8 Co. 159. b. Moor 5. 1 Anderſ. 24. N. Benl. 33. pl. 53. O. Benl. 3. pl. 9.

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* 1 Salk. 53.

* GAGE's *Caſe*.

Trin. 41 Eliz.

In the King's Bench.

Jenk. Cent. 258. Co. Ent. 250. pl. 9. Noy 71. Moor 571. Cro. El. 740. Salk. 52, 53.

IN a Writ of Error by *Gage* againſt *Tawyer* to reverſe a Fine levied 4 *Eliz.* and aſſigned for Error that the Writ of Covenant bore *Teſte* 24 *Aprilis*, returnable 15 *Paſch.* (which in Truth was the 15th Day of *April*) and ſo the Return before the *Teſte*. And it was reſolved * by the whole Court that it ſhould be amended; for a Fine and common Recovery are but common (*a*) Aſſurances, had by the mutual Conſent of the Parties, and therefore ſuch Miſpriſions might be amended. But in other Actions no Amendment ſhould be in ſuch Caſe: And it was ſaid, That in 18 *Eliz.* between (*b*) *Norris* and *Braybrook* a Writ of Error was brought to reverſe a Recovery in 19 *H.* 8. and the *Teſte* was a Day after the Return; and becauſe it appeared, that it was the Miſpriſion of the Clerk, in Caſe of a common Recovery, it was amended. *Vide* 11 *H.* 6. 2. *b.*

(*a*) Antea 40. b. Jenk. Cent. 257. Cr. Car. 270. Poph. 23. Poſtea 46. a. 1 Co. 15. b.

(*b*) Raym. 71.

* *See and Note* 6 Mod. 196. *where it is ſaid, the Record of this Caſe in* Co. Entries 250. *and other Books, is contrary to the above Reſolution.*

COOK's *Caſe.*

Trin. 41 Eliz.

In the Common Pleas.

CHallenor brought a *Formedon* againſt *Cook* of the Manor of (*a*) *Iſfield* in the County of *Suſſex*. The Tenant pleaded in Bar a common Recovery againſt the Donee in Tail of the ſaid Manor; The Plaintiff pleaded, *Nul tiel Record*, upon which they were at Iſſue; and the Record was *Iffield*, either by the Negligence of the Clerk, or by Corruption by drawing a Stroke, and making an *ſ* an *f*, *ſc. Iſfield* for *Iffield*. And the Court was moved to amend it; and it was reſolved, That if it could (*b*) appear to them, that it was the Miſpriſion of the Clerk, or corrupted after, that it ſhould be amended. And to induce the Court to it, the Tenant ſhewed, that the Recoveror enfeoffed him who was Tenant in Tail by Deed, which recited the Recovery by the Name of *Iſfield*, and he enfeoffed him by the ſame Name, and divers Conveyances immediately after the Recovery, and all by the true Name of *Iſfield*. And the Court agreed that it ſhould be amended, and the rather that it was in a common Recovery which is ſuffered by Aſſent of the Parties for (*c*) Aſſurance of Land. And thereupon it was amended, and Judgment given againſt the Demandant.

(*a*) 2 Brownl. 236. 1 Bulſt. 7. Noy 1.

(*b*) 2 Brownl. 236. 1 Bulſt. 7.

(*c*) Antea 40. b. 45. b. Jenk. Cent. 257. Poph. 23. Cr. Car. 270. 1 Co. 15. b. Noy 1.

CASES

CASES of PARDONS.

FRANKLIN's *Caſe.*

Mich. 35 & 36 Eliz.

In the Star-Chamber.

1 Ander. 131, 132. 3 Inſt. 234.

A Queſtion was referred to the Conſideration of *Coke* the Queen's Solicitor General, out of the Court of Star-Chamber, between *Downing* Pl. and *Franklin*, *Eden* and others, Defendants, on the general Pardon, 19 *Feb.* 35 *Eliz.* and the Caſe was, That *Downing*'s Bill was exhibited into the ſaid Court five Years before the laſt Parliament, for Riots, Routs, &c. and what Thing was pardoned by the ſaid general Pardon, was the Queſtion: And it depended on two Branches of the ſaid Act, *ſcil.* " And alſo " except all Penalties, Forfeitures now due, accrued or " grown, or which ſhall or may be due, accrue or grow to " the Queen's Majeſty by Reaſon of any Offence, Miſdemea- " nor, or Contempt; and whereof and for the which any " Action, Bill, Plaint or Information at any Time within " eight Years next before the laſt Day of this preſent Seſ- " ſion of Parliament, hath been or ſhall be exhibited, com- " menced, or ſued, and ſhall be there the laſt Day of this " Seſſion of Parliament depending or remaining to be proſe- " cuted.' And next following there is another Exception, *ſcil.* " And alſo excepted out of this general and free Par- " don, all Offences, Contempts, Diſorders, Covins, Frauds, " Deceits, and Miſdemeanors, &c. whereof or for the " which any Suit by Bill, Plaint, &c. within four Years " next before the laſt Day of this Seſſion of Parliament, is " or ſhall be commenced, or exhibited:' And on Conſidera-

tion of theſe two Branches, the Solicitor General certified, That the Fine due to the Queen was excepted, and the Plaintiff or the Queen's Attorney might proceed for the Fine which is excepted, and that the Queen ſhould have it, for without Proſecution the Queen could not have the Fine, nor the Party his Coſts. *Et (a) quando Lex aliquid alicui concedit, concedere videt' & id, ſine quo res ipſa eſſe non poteſt.* But he certified, that the Impriſonment, and all the corporal Puniſhment in the ſaid Caſe were pardoned. For in the firſt of the ſaid two Exceptions the Offence it ſelf is not excepted, but the Forfeiture, Penalty and Profit due to the Queen. And therefore the Impriſonment or any other corporal Puniſhment is not excepted; for that is not included within theſe Words, *Forfeiture, Penalty, or Profit.* But if the Bill had been exhibited within the four Years, then the Offence it ſelf being excepted, by Conſequence all Incidents *(b)* or Appendants thereon, as well corporal, as pecuniary, are excepted. And therefore in ſuch Caſe nothing is pardoned: Which Certificate oftentimes ſince hath been confirmed by the Opinion of *the Court of Star-Chamber.*

(a) 5 Co. 12. a. 115. b. 12 Co. 13, 130. Co. Lit. 56. a. 153. a. 2 Inſt. 306. Cawly 246. Moor 218.

(b) 6 Co. 13. b. Latch 81. Palm. 412. Hob. 81, 82. 2 Inſt. 236. Cr. Jac. 207. 1 Brownl. 211.

Hardres 370. Poſtea 51. a. b. Jenk. Cent. 258. Moor 394, 599. Yelv. 126. Plowd. 401. a. Cr. El. 72.

GILBERT LITTLETON's *Caſe.*

Hill. 39 Eliz.

In the Star-Chamber.

BEtween *Gilbert Littleton* Eſq; Pl. and the Lord *Dudley* and others Def. in the Star-Chamber, the Caſe was ſuch: At the laſt Parliament which began 19 *Feb.* 35 *Eliz.* in the general Pardon is ſuch Exception:' And alſo except-" ed out of this general Pardon all Offences, *&c.* whereof, or " for the which any Suit by Bill, *&c.* at any Time within four Years

3 Inſt. 234. Hard. 370.

" Years next before the laſt Day of this preſent Parliament " is, or ſhall be commenced or exhibited in the Court of " Star-Chamber, and now is, or the laſt Day of this Seſſion " of Parliament ſhall be there depending.' And the Bill was exhibited by *Gilbert Littleton, Term' Hillar'* before the Parliament, and Proceſs awarded returnable *Term' Paſch'* next following, which was after the Parliament; and whether this Suit ſhould be ſaid depending before the Return of the Proceſs, was the Queſtion. And firſt, it was objected, that the Words of the Exception are, *Suit by Bill depending*, and it cannot be ſaid Suit till the Proceſs be returned. 2. It was obſerved, That in the next preceding Exception concerning Suits commenced within eight Years, there the Concluſion is, *Depending, or remaining to be proſecuted*, which Words, *or remaining to be proſecuted*, as it was ſaid, extend to Bills not depending, *ſcil.* when the Proceſs is not returned, but no ſuch Words are in this Exception. And to prove that the Bill was not depending before the Proceſs returned, the Defendants Counſel reſembled it to Writs at the Common Law, where divers Books were cited, to prove that original Writs are not in Law depending (*a*) before their Returns, 21 *E.* 4. 55. *a.* a Writ is brought as ſoon as it is ſealed, but it is not depending until it be returned, (*b*) 18 *H.* 8. 5. *a. acc.* But it was anſwered and reſolved, That there was a great Difference between an original Writ purchaſed out of the Chancery, and returnable in the Common Pleas, or King's Bench for there inaſmuch as the Original comes out of another Court, the Common Pleas or King's Bench hath not any Record before the Return thereof: But in the Caſe at Bar, the Bill is exhibited in the Star-Chamber, and Proceſs iſſues out of the ſame Court, and is returnable in the ſame Court; and therefore the Suit by Bill ſhall be ſaid depending before the Return, or ſerving of the *Subpœna*. And it was ſaid, that Suit by Bill depending, and Bill depending are all one; for the Bill is, *Origo rei & caput ſectæ, & res denominatur a principaliori parte:* And the Attorney General ſaid, That where an original Writ is purchaſed out of the Chancery returnable in the Common Pleas, or King's Bench, in ſuch Caſe after the Writ ſhall be returned, the Writ ſhall be ſaid pending from the Day of the (*c*) *Teſte* of it. And if the Tenant alien before the Return, and after the *Teſte* it ſhall be ſaid an Alienation pending the Writ; or if the Defendant purchaſes another Writ before the Return of the firſt Writ, it ſhall be ſaid purchaſed pending the firſt Writ. And it is ſaid in 9 *H.* 6. 54. that where a Writ of Covenant (*d*) is purchaſed to levy a Fine, and before the Return, *Dedimus poteſtat'* recites, *cum breve noſtr' de conventione pendeat*; and yet the Writ of Covenant then is not returned;

(*a*) 2 Inſt. 329. Cr. El. 261. Hob. 224. Hutt. 4. 10 E. 4. 19. a. 2 Sid. 94. Poſtea 48. b. 7 Co. 30. a. 3 Keb. 172. 9 H. 6. 51. b. 54. b.

(*b*) Cr El 677. Br. Eſtrepment 1.

Nota.

(*c*) 2 Sid. 94. 9 H. 6. 54. b.

(*d*) Cr. El. 677. Cr. Jac. 11.

returned; and ſo is the common Experience at this Day. *Vide* 2 *E.* 4. 11. *b.* If *(a)* a *Quare Impedit* be delivered to the Sheriff in the Court of Common Pleas to be executed, it is pending to this Purpoſe, that the Plaintiff may have a Prohibition for Suit for the ſame Cauſe in the Spiritual Court: And a Man may purchaſe his original Writ, and at the ſame Time a Writ *(b)* of Eſtrepement. Alſo the Words of the Exception were obſerved, "*ſc.* Whereof any Suit by "Bill is, or ſhall be commenced, *&c.* and ſhall be depend- "ing the laſt Day of this Parliament. In which this Word (*is*) is to be intended, depending 19 *Feb.* which was the firſt Day of the Parliament; but *(ſhall be commenced)* ought to be of Neceſſity after the ſaid 19th Day of *Feb.* which is always out of Term. And becauſe it appears that the Makers of the Act intended that the putting in of the Bill only into the Star-Chamber after the 19th Day of *Feb.* and before the ſaid laſt Day, ſhould be ſaid depending; and ſo it appears that the ſaid Words in the preceding Branch, *ſcil. Depending or remaining to be proſecuted*, are all one in Effect; wherefore it was concluded, That in the Caſe at Bar, the Bill ſhould within the true Intendment of the ſaid Exception be ſaid *(c)* depending. And ſo it was reſolved by the Juſtices on a Conference had between them. And thereupon Sentence in the Star-Chamber did *(d)* proceed againſt the Defendant in the ſaid Bill.

(a) Br. Prohibition 10. Hutt. 4. F. N. B. 43. g. Fitz. Prohibition 7.

(b) 19 H. 8. 5. a. 18 H. 8. 5. a. Br. Eſtrepment 1. F. N. B. 61. d. e. 2 Inſt. 328, 329.

(c) Poſtea 48. b.

(d) 2 Rol. Rep. 485.

DRYWOOD's *Caſe.*

Paſch. 42 Eliz.

In the Star-Chamber.

Drywood was Plaintiff againſt *Appleton* and others Defendants in the Star-Chamber for Riots, and Routs, and other Miſdemeanors; which Bill was brought before the laſt general Pardon in 39 *Eliz.* and before the ſaid Pardon the Plaintiff died. And afterwards the Queen's Attorney informed for the ſame Offences againſt the Defendants, and proſecuted

3 Inſt. 234. Hard. 368.

proſecuted on the firſt Suit: And now a great Queſtion was moved, whether the ſaid Offences were pardoned or not by the ſaid general Pardon. And it is to be known, that the ſaid Bill was brought four Years and more before the laſt Day of the ſaid Parliament, and within the eight Years. And the Doubt was conceived on theſe Words of the Exception of the ſaid Paadon, *ſcil.* " And now is, or the laſt " Day of this Seſſion of Parliament ſhall be there depend- " ing, or remaining to be proſecuted: And it was ſaid, That altho' this Suit was not depending, becauſe the Plaintiff, who proſecuted for the Queen (for every Suit in the Star-Chamber is for the (*a*) Queen, and ſhe may pardon it) was * dead; yet it was ſaid that theſe Words *(or remaining to be proſecuted)* ought to have Conſtruction in Caſes where no Suit is depending, and yet may be proſecuted; and that is when the Plaintiff dies, or will not proſecute, then the Queen's Attorney may proſecute for the Queen. But it was reſolved by the two Chief Juſtices and the Chief Baron, that the ſaid Offences were pardon'd, for theſe Words, *Or remaining to be proſecuted*, ought to be conſtrued, *to be proſecuted by the Party*; and the ſaid Words, *remaining to be proſecuted*, are added, to remove a Scruple which ſome conceived, That a Bill ſhould not be ſaid depending till the Proceſs be returned, altho' in Judgment of Law, the Bill in ſuch Caſe is ſaid (*b*) to be depending.

(*a*) Poſtea 50. b. 51. a. 2 Bulſt. 182. 2 Inſt. 238. * Hard. 398.

(*b*) Antea 47, 48. a.

VAUGHAN'S *Caſe.*

Mich. 39 & 40 Eliz.

In the King's Bench.

IN a Writ of Error between *Hall* and *Vaughan* on a Writ of Entry in the *Quibus* brought in *Wales:* The Defendant pleaded *Non diſſeiſivit*, and pending this Plea the general Pardon in 35 *El.* was made, by which all Fines, Amercements, Contempts, *&c.* were pardoned, *&c.* and after divers Continuances the Iſſue was found for the Demandant, and Judgment given, *ſed non in miſericordia, quia* (*a*) *pardonatur.* And the principal Error which was aſſigned was, becauſe the Defendant ought to have been amerced, becauſe the general Pardon did not diſcharge the Amercement; for it was ſaid, that the Wrong, or the Diſſeiſin was not the Cauſe of the Amercement, but the Delay of the Plaintiff; for if the Defendants come (*b*) the firſt Day and render to the Demandants, they ſhall not be amerced, as 14 *E.* 3. *Amerciament* 16. 22 *E.* 3. 1 & 2. 8 *R.* 2. Tit. *Amerciament* 26. and divers other Books are agreed. And a Caſe was cited in the Com. Pleas, *M.* 15 & 16 *El.* where a *Præcipe* was brought againſt an (*c*) Infant, and pending the Plea he came of full Age; it was adjudged he ſhould be amerced for the Delay, as it was urged, after his full Age. So in the Caſe at Bar, foraſmuch as there was a Delay as well after as before the Pardon, and the Amercement was wholly for the Delay, for this Cauſe the Pardon did not diſcharge it. But the Court reſolved, the Judgment ſhould be affirmed. And in this Caſe theſe Points were reſolved.

Jenk Cent. 258. Moor 394.

(*a*) Lane 71.

(*b*) 8 Co. 61. b. Cr. El. 65. 2 Sand. 227. Co. Lit. 126. b. Cr. Car. 564. Plowd. 42. b. 1 Rol. 212.

(*c*) 1 Rol. 215. Co. Lit. 126. b. 127. a. Mo. 394.

1. That the original Cauſe of the Amercement in the Caſe at Bar was the Wrong and Contempt of the Tenant that he did not render the Land to the Demandant, as he was commanded by the K.'s Writ; and altho' the Amercem. cannot be impoſed, nor the Queen intitled to it before the Judgm. (becauſe by the Judgment the Wrong is diſcerned) and although

The Reſolution of the Court.

though the Pardon comes before the Judgment, yet the (*a*) original Cauſe of the Amercement being pardoned, the Amercement it ſelf by Conſequence is pardoned, as in *Cole*'s Caſe in *Plow. Com.* 401. *a.* And in *Quatermoigne*'s Caſe in 37 (*b*) *H.* 8. 21. where it is agreed, that a general Pardon ought to be taken (*c*) moſt beneficial for the Subject, and moſt ſtrong againſt the King.

2. It was reſolved, That all Statutes of Jeofails extend to (*d*) *Wales*, for the Statute of 27 (*e*) *H.* 8. hath made it Parcel of *England*; and afterwards the Judgment was affirmed. Note; he who commits a Wrong, and at the (*f*) firſt confeſſes it, and obeys the King's Command by his Writ ſhall not be amerced; for *prudenter facit, qui præcepto legis obtemperat*: But every one who commits a Wrong, and being commanded by the King's Writ, *quod juſte & ſine dilatione reddat, &c.* and he unjuſtly maintains the Wrong on Record in the King's Court, and with great Delay, compels the Demandant to recover it by Courſe of Law, *peccatum peccato addit, qui culpæ quam fecit patrocinia defenſionis adjungit*; and therefore he ſhall be amerced.

(*a*) 1 Brownl. 211. Yelv 126. Antea 47. a. 6 Co. 13. b. Latch 81. Palmer 412. 3 Inſt. 236. Hob. 81, 82. Hardr. 370. Co. Lit. 126. b. Moor 394, 599. Cr. Jac. 207. Cr. El. 72. Jenk. Cent. 258.

(*b*) Cr. El. 72. 37 H. 6 21.

(*c*) Latch 22, 82, 141. Godb. 288. 6 Co. 79. b. Poſtea 50. a. Kelw. 198. a.

(*d*) 2 Bulſt. 54 3 Keb. 405.

(*e*) 27 H. 8. c. 26. 2 Bulſtr. 54. 2 Sand. 40. Plowd. 126. b. Vaugh. 396.

(*f*) Co. Lit. Plowd. 42. b.

126. b. 8 Co. 61. b. 2 Sand. 227. Cr. El. 65. 1 Rol. 212. Cro. Car. 564.

WYRRAL's *Caſe*.

Hill. 41 Eliz.

In the Exchequer.

3 Inſt. 234.

Hill. 40 *Eliz. Rot.* 188. the Caſe was ſuch; *Thomas Wyrrel* and *Jaſper Boſvile* were bound to *Henry Thwaits* in a Recogniſance in the Nature of a Statute-Staple 15 *Feb.* 35 *El.* of 500 *l.* And afterwards the ſaid *Thwaits* was outlawed in the County of *York*, 8 *Octob.* 38 *El.* and afterwards the general Pardon at the laſt Parliament 39 *El.* was made. And whether this Debt was pardoned or not was the Queſtion now in this Term in the Exchequer. And it conſiſted on two Exceptions in the ſaid Pardon, *ſcil.* "And "alſo except out of this Pardon all Debts which were or "be due to our Sovereign Lady the Queen, *&c.* or to "any

" any to her Uſe, by any Condemnation, Recogniſance,
" Obligation, or otherwiſe, *&c.* And alſo except out of
" this Pardon, all Goods, Chattels, Debts, Actions, and
" Suits already forfeited, *&c.* by Reaſon of any Outlawry,
" and whereof her Majeſty by her Highneſs's Letters Pa-
" tents hath before the laſt Day of this preſent Seſſion made
" any Grant, Covenant, or Promiſe to any Perſon or Per-
" ſons.". And it was reſolved, that by the laſt Exception it is proved, that the Intention of the Queen was not to include *(a)* Debts which accrued to her by Outlawry within the firſt Exception; for there is a ſpecial Saving, and in a ſpecial Manner for them by the laſt Exception. Alſo the general Pardon is to be taken moſt *(b)* beneficially for the Subject, and moſt ſtrong againſt the Queen.

(a) Lit Rep. 87. Swinb. 303.
(b) Antea 49. b. Kelw. 198. a b. 6 Co. 79. b. Latch 22, 82. 141. Godb. 288.

BIGGIN's *Caſe:*

Trin. 41 Eliz.

In the King's Bench.

IN Appeal between *Shugborough* and *Biggins* the Defendant was found guilty of Manſlaughter; and the Queſtion was, if the Queen might pardon the Burning of the Hand. And it was objected, That the Appeal is at the Suit of the Party; and now by the Statute of 4 *H.* 7. *cap.* 13. the Burning of the Hand is Parcel of the Puniſhment. As if it was enacted, That he who is attainted in an Appeal of Mayhem, ſhall have Judgm. of Death; in that Caſe if one was attainted in an Appeal of Mayhem, the Queen could not pardon the Execut. of Death, becauſe it is the Puniſhment of the Offence at the Suit of the Party. But on Conference had with divers other Juſtices, it was reſolved, That the Queen might *(a)* pardon the Burning of the Hand in an Appeal, and that for two Reaſons.

Moor 571. Cr. El. 632, 682. 3 Inſt. 114. Rep. Q. A. 254.

(a) Dyer 261 pl. 26. Raym. 370. Hob. 294. Moor 571. 3 Inſt. 237. Cr. El. 465, 632, 682.

1. It appears by the ſaid Statute of *(b)* 4 *H.* 7. that at the Common Law a Man who had once had the Benefit of his *(c)* Clergy ſhould have it again, and ſo *in infinitum*;

(b) 4 H. 7. c. 13. Raym. 370. Stanf. Cor. 124. c. Hob. 294.
(c) Stanf. Coron. 124. c.

which was remedied by the ſaid Act; ſo that the Burning of the Hand was to no other Purpoſe but to (*a*) ſignify to the Judge whether he had had his Clergy before or not.

(*a*) Raym. 370. Hob. 294.

(*b*) Raym. 370. Hob. 294.

2. The Burning of the Hand is not any (*b*) Parcel of the Judgment, for then the Queen could not pardon it, becauſe the Plaintiff hath Intereſt in the Judgment; and for this Cauſe the Caſe of Mayhem, which was put on the other Side, was well agreed. And ſo the Doubt in *Ellen Lamb*'s Caſe, 5 *El. Dyer* 201, (*c*) & 202. and in *Muſgrave*'s Caſe in 9 *El. Dyer* (*d*) 261. well explained. But there it is ſaid, that the Queen cannot pardon the Impriſonm. for that is Parcel of the Execution of the Plaintiff in the Appeal. And *Taverner*'s Caſe, 15 *El. Dyer* (*e*) 323. was agreed by all, That the Queen may pardon the corporal Puniſhment in Caſe of (*f*) Forgery, becauſe all Suits in the Star-Chamber are but Informations for (*g*) the Queen, although the Suit be exhibited by the Party; and the Queen may pardon any Offence for which any Subject complains there. But if *Taverner* had been attainted at the Common Law in an Action of (*h*) Forgery of falſe Deeds, there the Queen could not have pardoned it. 2. It was objected, That altho' the Queen may pardon the Burning of the Hand, yet the Defendant might be impriſoned at the Suit of the Party; for before the Statute of (*i*) 18 *El. cap.* 7. the King might in Caſe of Indictment of Manſlaughter pardon the Impriſonment, as appears in (*k*) 15 *H.* 7. 9. *a.* but not in Appeal. And by the Statute of 18 *El.* they cannot deliver the Priſoner before he be burnt in the Hand. But it was reſolved, that foraſmuch as it was enacted by the ſaid Stat. of 18 *El.* that after Clergy allowed, and Burning in the Hand, the Priſoner ſhould be preſently at large, and delivered out of Priſon, which Act was reſolved to extend as well to the Caſe of Appeal as to the Caſe of Indictment; and the Q. now hath pardoned the Burning of the Hand; for this Cauſe the Burning of the Hand being diſcharged, the Party alſo ſhall be diſcharged of his Impriſonment by good Conſtruction of the ſame Act; otherwiſe the Party would be lawfully diſcharg'd of his Puniſhment, and yet remain perpetually in Priſon, which never was the Intent of the Makers of the Act. And thereupon *Biggins* was diſcharged.

(*c*) Dyer 201. 202. pl. 67, 68. C. El. 682. 3 Inſt. 237.

(*d*) Cr. El 465. Dy. 261. pl. 26.

(*e*) 2 Inſt. 200.

(*f*) Moor 571. Cr. El. 682.

(*g*) Antea 48. b Poſtea 51 a. 2 Inſt. 238.

(*h*) Moor 571.

(*i*) Raym. 370. Cr. Jac 430, 431 6 Co. 68. b. 2 Rol. 222. Hob 294. 5 Co. 110. a. b.

(*k*) Fitz. Impriſonment 28. Br. Coron. 53. Bi. Charter de Pardon 21.

[*See Lord Ch. Juſt.* Holt's *Argument in the Caſe of the Queen and* Plomer. Keeling's *Reports*.....

And yet at Com. Law it ſeems clear, that the K. could not pardon any Part of the Puniſhm. in an Appeal (*tho' the Appellant himſelf might*) *becauſe a civil Proſecution, and the K. could not pardon an Offence againſt a particular Perſon. See* Raym. 370, &c. *Ibid. Rep. Q. A.* 235.]

HALL's *Caſe.*

Trin. 2. Jac. 1.

In the Common Pleas.

ALice Cooke libelled in the Spiritual Court againſt *Rowland Hall* for Defamation, for calling her Whore, and had Sentence, and Coſts were taxed. *Et decretum fuit quod prædictus Rowlandus Hall foret movendus, & citandus, ad ſolvend' expenſ. citra tale feſtum.* From which Sentence the Defendant appealed, and before the ſaid Feaſt *Hall* obtained the King's Pardon, and thereupon got a Prohibition out of the Common Pleas. And in this Caſe four Points were reſolved.

1. In all Caſes depending between Party and Party in the Spiritual Court, where the Suit is only (a) *pro ſalute animæ, vel reformatione morum*, as for Defamation, or laying violent Hands on a Clerk, or the like, there the (b) K.'s Pardon is a Bar of the Suit, for the Suit is not to recover any Damages, or any other Thing, but only to inflict Puniſhment on the Offender *pro ſalute animæ*; which Puniſhment the King may pardon as well before as after the Suit begun, for in Truth ſuch Suits are only for the (c) King, although they be proſecuted by the Party, and like Suits in the (d) Star-chamber preferred by one Subject againſt another, the King may pardon them; for although a Subject proſecutes them, yet the Suits are for the King, and to puniſh the Defendants for their Offences and Miſdemeanors by Impriſonment and Fine, &c. to the King. But if one libels for Tithes or a Contract of Matrimony, or for a Legacy, or the like, where the Plaintiff hath an Intereſt and Property in the Thing in Demand, and Sentence ſhall be given for him for the Thing which he libels for, there the King cannot pardon it, neither before or after the Suit begun.

6 Mod. 155.
(a) 4 Co. 20. a. Patch. 8 I. Dav. 73. 8. Hob. 82.
(b) Dav. 73. a. Hob. 82.
(c) 2 Bulſt. 182. Cr. Jac. 335.
(d) Ante a 48. b. 50. b. 2 Inſt. 238. 2 Bulſtr. 182. Cr. Jac. 335. 3 Mod. 56. 2 Show. 420. Rep. Q. A. 235.

2. It was reſolved that all Proceedings in the Eccleſiaſtical Court *ex officio* are for the (*a*) King. For which Cauſe, whatſoever the Suit is, there the King may pardon it, for they are only to correct and puniſh the Party for the Offence or Crime, which the King may pardon, and not for the particular Intereſt of the Party.

(*a*) Cr. El. 684. Hob. 82. Dav. 73. a.

3. It was reſolved, that in the principal Caſe, although the Suit be for the King, and which the King may pardon, yet when Sentence is (*b*) given, and Coſts taxed for the Plaintiff, now the Plaintiff hath a particular Intereſt in them by the Sentence, which the King cannot pardon, although a Day be given for the Payment of them, *ut ſupra.* The ſame Law of Suits aforeſaid in the Star-chamber after Sentence given, and Coſts taxed for the Party, the Pardon ſhall not diſcharge them. But if the (*c*) Pardon had been obtain'd before the Sentence, there the Pardon had diſcharged the Whole, for then the Court could not have proceeded to any Sentence of the Principal, and by Conſequence not of the Coſts, which are but acceſſary.

(*b*) 3 Inſt. 238 Cr. Car. 9, 47, 199. Cr. Jac. 159. 335. Noy 91.

(*c*) 2 Bulſt. 182. Cr. Car. 68. Cr. Jac. 335.

4. Although the Defendant hath (*d*) appealed, by which the Sentence to divers Purpoſes (by the Opinion of the Doctors of the Spiritual Law) is ſuſpended, as appears in (*e*) 27 *H.* 6. *Gard.* 118. 2 *R.* 2. *Quare Impedit* 143. 1 *H.* 7. 12. 2 *Mar.* (*f*) 105. yet by the firſt Sentence the Party (notwithſtanding the Appeal) had an Intereſt in the Coſts, which could not be diſcharg'd by the King's Pardon. And therefore as to this Purpoſe the firſt Sentence is not ſuſpended by the Appeal. And afterwards a Conſultation was granted for the Coſts.

(*d*) 6 Co. 18. b. Palm. 412. 3 Bulſtr. 73. 1 Rol. Rep. 226. 2 Jones 67. 3 Keb. 282. Cr. El. 460.

(*e*) Cr. El. 460.

(*f*) Dyer 105. pl. 17.

[*See* 1 Salk. 383, 384. *whether a* Conviction *of Deer-ſtealing was pardon'd by an Act of* General Pardon.]

PAGE's *Caſe.*

Mich. 29 & 30 Eliz.

Carth. 138.

In the Exchequer.

IN an Information againſt *Page* and his Wife for Intruſion in certain Houſes in *Lyn-Regis* in the County of *Norfolk*, on Demurrer, the Caſe was ſuch; *Indy* ſeiſed of the ſaid Houſes in Fee, held in Socage, by his Will in Writing deviſed them to his Wife, (now the Wife of *Page*, who was an Alien born) and before the Death of *Indy*, the Queen by her Letters Patents under the Great Seal made the ſaid Woman a Denizen, and afterwards *Indy* died; and the ſaid Letters Patents under the great Seal were corrupted and raſed in the *Teſte*, ſo that now as they were raſed and corrupted they bore *Teſte* after the Death of *Indy*, and upon that *Page* and his Wife got an Exemplification of the Inrolment of the Letters Patents in the Chancery under the Great Seal, which was with the true *Teſte* according to the Truth. And afterwards an Office was found before certain Commiſſioners, by Force of a Commiſſion directed to them under the Exchequer-Seal, by which it was found that the ſaid Woman was an Alien born, *&c.* And in this Caſe theſe 4. Points were reſolved by Sir *Roger Manwood* Ch. Baron, and the whole Court of Exchequer.

1. That the Office was inſufficient and void for divers Cauſes. 1. Becauſe an Office found by Force of a Commiſſion under the Exchequer-Seal is not ſufficient to intitle the Queen to the Lands of an Alien born: For there are two Manner of (*a*) Offices; one that veſts the Eſtate and Poſſeſſion of the Land, *&c.* in the Queen, where ſhe had but a Right or Title before, and that is called an Office of Intitling: As in Caſe of a Purchaſe by an Alien, or the King's Villain, or by any Body Corporate or Politick in Mortmain, or by a Perſon attainted of Felony, *& ſic de ſimilibus*: And ſuch Office, which concerns Fee or (*b*) Freehold, ought to be by Force of a Commiſſion

(*a*) Hob. 231. Cr. Car. 173. 1 Jones 217. Godb. 312, 325. 2 Rol Rep. 322, 342. Lane 43. 1 Bulſtr. 34. 10 Co. 115. a.

(*b*) Hob. 231. Cr. Car. 173. Poſtea 56. b.

ſion under the great Seal of *England*. There is another Of-
(*a*) Godb. 312. Moor 293. fice, and that is called an Office of (*a*) Inſtruction, and that is when the Eſtate of the Land, &c. is lawfully in the K. before, but the Particularity of the Land, &c. doth not appear of
(*b*) 1 Co. 42. a. Record, ſo that it may be put in Charge. As if one be (*b*) attainted of High Treaſon, all his Lands, &c. are preſently by the Stat. of 33 *H.* 8. *c.* 20. in the King: Or if the King's Tenant commits Felony and is attainted, and dies, in theſe and the like Caſes the Eſtate of the Land without any Office is in the King: But it doth not appear to the Court of Exchеq. of what Lands the Perſon attainted was ſeiſed, at the Time of his Attainder or after; and if that be found by Office by Force of a Commiſſion under the Exchеq. Seal, it is a ſufficient Record to inſtruct the King of the Certainty of the Land, &c. by which it may be put in Charge.

(*c*) 1 Rol. Rep. 395. Cr. Car. 461. Doct. placit. 79. 2. It was reſolved, That the (*c*) Office was inſufficient, becauſe it doth not appear what Authority the Commiſſioners had, but generally, *Inquiſitio capta, &c. coram, &c. virtute cujuſdam Commiſſionis eis direct'*, and for divers other groſs Imperfections the Office was adjudged inſufficient.

(*d*) Moor 325. Co. Lit 2. b. Hob. 231. 2 Anderſ. 33. 3. It was reſolved, That in the Caſe of an Alien, (*d*) Perſon attainted, ſo long as he lives, the King's Villain, Alienation in Mortmain, Condition broke, Alienation *contra form' collationis*, and the like, the Inheritance or Freehold of the
(*e*) 1 Jones 78. 79. Moor 325. Land is not veſted in the King, till (*e*) Office found under the great Seal, for that is an Office of Intitling. *Vide* 35 *E.* 3. *Villenage* 22. 8 *E.* 4. 4. 9 *H.* 7. 2. *Mortmain*, 2 *H.* 7. 8. *Condition* 29 *H.* 8. *Charter de Pardon B.* 59. The King's Tenant attainted of Felony, 7 *E.* 4. 29. & 11 *H.* 4. 26. If an A-
(*f*) Dyer 283. pl. 31. 1 Leon. 47. Goldsb. 29, 102. 2 Sid. 148. Moor 390. lien and a Subject born, purchaſe Lands to them and to their Heirs, they are Jointenants, and ſhall join in an Aſſiſe, and till Office found the Survivor ſhall hold Place. *Plow. Com. Nichol's Caſe, fol.* 477. & 11 *Eliz. Dyer* 283. *Alien born. Vide Stanf. Prærogat. Regis, cap.* 18. *fol.* 53.

4. The great Queſtion of the Caſe was, Whether the Def.
(*g*) Hardr. 118. Co. Lit. 225. b. ſhould plead the ſaid (*g*) Exemplificat. of the Inrolm. of the ſaid Letters Pat. of Denizat. by Force of the Stat. of 3 *E.* 6. *c.* 4. or 13 *El. c.* 6. And it was object. that neither an Exemplication, nor a *Conſtat* of any Letters Patents were pleadable at the Com. Law, for as it appears by the Preambles of both Statutes, that this Caſe of Denizat. was out of the Words of both Stat. for the Words of the Purview of the Stat. of 3 *E.*
(*h*) 2 Inſt. 282. 6. are, "All and every Perſon or Perſons, Bodies Politick "or Corporate, which lawfully ſhall or may claim by Force "of any Patent made ſince 4 *Feb.* 27 *H.* 8. &c. and all other "that now have, or hereafter ſhall have any good or law-"ful Eſtate, Right, Title, Rent, Profit, &c. of, in, to, or out "of any Lands, Tenements, Hereditaments, or Offices un-"der any ſuch Patentee or Patentees, &c. ſhall and may, "&c. make and convey to themſelves Title, &c. unto the "ſaid

" ſaid Honours, Lands, Tenements, Offices, and other the " Premiſſes, &c. by, from or under the ſaid Patentees, or " any of them, &c. by ſhewing forth of any Exemplification " or *Conſtat* of the Roll, &c.' And in the Caſe at Bar, the Woman doth not claim any *Eſtate*, *Right*, *Title*, &c. of or in any Lands, Tenements, &c. by Force of any Letters Patents, but only to be made Denizen, which extendeth only to Ability and Capacity of her Perſon, and not to any Lands, Tenements, nor unto any Thing iſſuing out of them. And it was objected, That this Caſe was out of the Statute of 13 *Eliz. cap.* 6. for the Letter of that is, " That all and " every Patentee and Patentees, their Heirs, Succeſſors, " Executors and Aſſigns, and all and every other Perſon " and Perſons, having by or from them, or any of them, or " under their Title, any Eſtate, or Intereſt of, in, or to any " Lands, Tenements, Hereditaments, or other Thing what- " ſoever to ſuch Patentee or Patentees heretofore granted, " &c.' By which it appears for the Reaſon aforeſaid, that he who claims to be made a Denizen is out of theſe Words; alſo the Stat. doth intend ſuch Hereditament, or Thing only, as may be aſſigned or transferred over, which appears by the ſaid Words. " And all and every Perſon and Perſons " having by or from them, &c. any Eſtate, &c. of, in, or " to any Lands, &c. to ſuch Patentee, &c. granted.' But when the Queen by her Letters Patents makes one a Denizen, it is individual and incident inſeparable to the Perſon of him who is made Denizen, which cannot be transferr'd over; and therefore this Caſe is out of the ſaid Act: But it was thereunto anſwered and reſolved by the Court. 2 Inſt. 282.

1. That it was true, that neither an Exemplification nor a *Conſtat* was pleadable; and to be ſhewed to the Court at the Common Law, becauſe they were but the * *Tenor* of the Inrolment, and the *Tenor* of a Record is not pleadable by the Law. And with this the Preamble of both the ſaid Statutes agrees, and the Statute of 6 *R.* 2. *cap.* 4. Carth. 138. Co. Lit. 225. b. Hardr. 118. Palm. 62. * See 1 Salk. 660. 3 Salk. 225.

2. It was reſolved, That the ſaid Act of 13 *Eliz.* did extend to the ſaid Letters Patents of Denization; for it was a great Queſtion conceived on the ſaid Act of 3 *E.* 6. Whether the Patentee himſelf might plead the Exemplification or *Conſtat* of the Inrolment of his own Letters Patents by Reaſon of the ſaid Words in the Body of the Act, " Shall " and may, &c. make and convey to themſelves Title, &c. " unto the ſaid Honours, Lands, Tenements, &c. by, from " or under the ſaid Patentees, &c.' So that by the Words of the Act, the Patentees themſelves were left to the Common Law. *Vide* 1 *Eliz. Dyer* 167. Sir *Tho. Wrothe*'s Caſe; for the Remedy whereof, the ſaid Act of 13 *Eliz.* was made, which is more liberal and beneficial than the ſaid Act of 3 *E.* 6. for that by expreſs Words extends to all Patents whatſoever, without any Reſtraint: For it was reſolved that theſe Doct. pl. 213. 2 Bulſtr. 34. Dy. 167. pl. 13. Co. Lit. 225. b.

Q. Rep. Q. A. 97. theſe Words, " All and every Patentee and Patentees, their " Heirs, Succeſſors, Executors and Aſſigns, is a diſtinct Clauſe of it ſelf, and extends to all Letters Patents whatſoever, either concerning Lands, &c. or Perſons, &c. or any Thing, or Matter whatſoever. For in the next Clauſe the Words are, " any Lands, Tenements, or Hereditaments, or any Thing " whatſoever. And afterwards towards the End, " as ſhall " and may ſerve to and for ſuch Title, Claim or Matter; and therefore this Act doth extend to Letters Patents of Creation of *(a)* Dukes, Marqueſſes, Earls, Viſcounts, Barons. Alſo to Pardons of Treaſons, Felonies, &c. Outlawries, Infranchiſements of Villains, and all other Letters Patents which at the Time of the Exemplification or *Conſtat* are in Force, not lawfully ſurrendred, or cancelled, concerning any Inheritance, Freehold or Chattels, or any other Thing, or Matter real, perſonal, or mixt whatſoever. *Vide* the Opinion of *Mervin* in *(b)* 32 *H.* 8. Tit. *Patents Br.* that a *Conſtat* was pleadable at the Com. Law, but not an *Inſpeximus*. And the Opinion of *(c) Fiſher*, 12 *H.* 7. 12. *b.* & *vide Lib. Intrationum*, Aid granted on pleading of a *Conſtat*. But by this Reſolution you will better underſtand the Law in theſe Caſes.

(a) Doct. pla. 213.

(b) Palm. 87. Br. Patents 97. Br. N. C. 192. (c) Palm. 62. Br. Patents 58.

Note, Reader, foraſmuch as the ſaid Acts of 3 *E.* 6. & 13 *Eliz.* extend to make an Exemplification or *Conſtat* of the Inrolment of Letters Patents pleadable, it is requiſite to ſhew you the Difference between an Exemplification and a *Conſtat*, and the Signification alſo of thoſe Words by which Letters Patents are commonly called *(d) Inſpeximus*, *Innoteſcimus* & *Vidimus*: And it is to be known, that an Exemplification, and an *Inſpeximus*, as an *Innoteſcimus* and *Vidimus* are all one: An *Inſpeximus* or Exemplification begins in this Form; *Eliz. Dei gratia*, &c. *omnibus*, &c. *inſpeximus (e) irrotulament' quarund' literar' paten'*, &c. and recites them *de Verbo in Verb'*, and concludes in ſuch Form, *Nos autem tenorem literarum paten' præd'*, &c. *ad requiſitionem A. B. duximus exemplificand' per præſentes. In cujus rei teſtimonium*, &c. And it is called *Inſpeximus*, becauſe it begins after the King's Stile, with this Word, *Inſpeximus*: And it is called Exemplification *a re ipſa*, becauſe the Record is thereby exemplified, as appears by the End of it, *duximus exemplificand' per præſentes*. And a *Conſtat* after the King's Stile begins; *Conſtat nobis per Inſpection' Rot' Cancel' noſtræ quod Dom' Henric' nuper Rex Angliæ octav' pater noſter præchariſſimus literas ſuas Patentes fieri fecit in hæc verba: Henric' Dei gratia*, &c. and recites all the Letters Patents *de verbo in verbum*, and concludes, *Nos autem pro eo quod literæ Patentes prædict' ſunt caſualiter amiſſæ, ſicut A. B. nobis in Cancellar' noſtra perſonaliter conſtit' ſacramentum præſtitit corporale, & quod ipſe literas præd', ſi eas impoſter' reperir' contigerit, nobis in Cancell' noſtr' præd' reſtituerit*

(d) Co. Lit. 225. b.

(e) 8 Co. 8. a.

cancellandæ

cancellandʼ tenorem irrotulamentʼ prædʼ ad requiſitionem J. S. duximus exemplificʼ per præſentes. In cujus, &c. And it is called a *Conſtat*, becauſe after the King's Stile it begins with this Word, *Conſtat*. And it is to be obſerved, That by none of them any Thing is exemplified, but the Tenor of the Record. Alſo by that it appears, that a Man cannot have a *Conſtat* without an *Affidavit*, as by the Form of the *Conſtat* appears. But an *Inſpeximus* may be obtained without *Affidavit*. An *Innoteſcimus* or *Vidimus* are all one, and are always of a Charter of Feoffment, or ſome other Inſtrument which is not of Record; and the *Innoteſcimus* begins in this Form; *Regina, &c. omnibus, &c. Inſpeximus quoddam ſcriptʼ factʼ per A. B. Radulpho D. ſigillʼ ipſius A. ſigillʼ (utdicʼ) in hæc verba: Sciant præſentes, &c.* and recites the Inſtrument *de verbo in verbum. Et hoc omnibus quorum intereſt aut intereſſe poterit in præmiſſis Innoteſcimus per præſentes. In cujus rei, &c.* And it is called *Innoteſcimus*, becauſe of this Word *Innoteſcimus* in the End of it. And ſometimes it begins, *Vidimus quoddam ſcriptum, &c.* and then it is called a *Vidimus*: for the Antiquity of an *Inſpeximus* or Exemplification in the Form that now is uſed, I have read in the Chronicles of the Monaſtery of St. *Martin* of *Battaile*, that King *Henry* the firſt invented the ſaid Form; for theſe are the Words of the Chronicle: *Contigit unam ex chartis Willʼ fundatoris de Bello vetuſtate diſſolvi, unde Odo Abbas a Rege Hen. petiit, ut ſigillo ſuo remunita renoveʼ. Rex aſſentit. Ac ubi in chartis antiquis poſterior ſolet mentionʼ facerʼ prioris in hujuſmodi verbis: Sicut charta talis Regis vel hominis teſtatur. Rex Henrʼ, ne clauſula illa reſcriberetʼ, ſed aliam antea inſitatʼ, ipſe dictavit hoc modo, Quoniam inſpeximus chartam Willʼ &c. (recitans totam priorem cartam.) Et inclytus Rex reddidit hanc rationem facti ſui. Si enim (inquit) clauſula, quæ ſuppreſſa eſt, minime inſerta fuiſſet charta poſterior ſine prioʼ modicum conferret, nunc vero, nulla de præcedente facta mentione, hæc charta ſola ſufficit, etiamſi omnes alii deperiiſſent, quoniam ego ipſe, quæ in perſona vidi, teſtifico.*

3 Inſt. 373. Co. Lit. 225. b.

[*Note; the Reaſon here given ſeems rather* Monaſtic *than* Legal; Ergo Quære.]

* KNIGHT's

* Carth. 342. 1 Salk. 390.

* KNIGHT's *Caſe.*

Mich. 30 & 31 Eliz.

In the Common Pleas.

1 Anderſ. 173, 174, 175, &c. 3 Leon. 124, 125, 126, &c. Moor 199, 200, 201, &c. Cr. El. 855. Goldsb. 15, 16, 17, 18, 19, 20, 21, &c.

IN an Action of Treſpaſs between *Knight* and *Breech*, the Caſe was: The Prior of St. *John's* of *Jeruſalem*, *anno* 29 *H.* 8. made a Leaſe by Deed indented with the Aſſent of his Covent under their common Seal, of divers Houſes in *Clerkenwell* in the County of *Midd.* for Years yet enduring, yielding the yearly Rent of 5 *l.* 10 *s.* 11 *d.* at four Feaſts in the Years, uſual in the City of *London*, *ſcil.* for one Houſe 3 *l.* 11 *d.* for another 20 *s.* and for the other Houſes ſeveral Rents Reſidue of the ſaid Rent of 5 *l.* 10 *s.* 11 *d.* with Condition, that if the ſaid Rent of 5 *l.* 10 *s.* 11 *d.* be behind in Part or in all, at any of the ſaid Feaſts, that then the ſaid Prior and his Succeſſors ſhould re-enter. And afterwards the ſaid Priory and all the Poſſeſſions thereof came to King *H.* 8. by Surrender of the ſaid Prior and Covent, and by the Statute of 31 *H.* 8. which King in the 36th Year of his Reign by his Letters Patents under his Great Seal granted one of the Houſes (for which 20 *s.* of the Rent was by the ſaid Leaſe reſerved) to the Leſſee and another in Fee, and afterwards the Leſſee died; and afterwards it was found by Inquiſition, in the County of *Middleſex*, *anno* 26 *Eliz.* by Force of a Commiſſion under the Exchequer Seal, that 37 *s.* 5 *d.* Parcel of the ſaid Rent of 5 *l.* 10 *s.* 11 *d.* reſerved by the ſaid Demiſe for the Reſidue was behind at the Feaſt of St. *Michael* for a Quarter of a Year then laſt paſt: And that the ſaid Feaſt of St. *Michael* was one of the uſual Feaſts of Payment in *London*; and that afterwards the Queen, before the Commiſſion returned, and before any Entry or Seiſure by her, by her Letters Patents under the Great Seal, granted the Reſidue

of

of the Houſes to one in Fee, who made the Leaſe to the Plaintiff *Knight*, on whom *Breech* the Defendant the Aſſignee of the Executor of the firſt Leſſee entred, againſt whom *Knight* the Plaintiff brought an Action of Treſpaſs. And this notable Caſe was often argued at the Bar in the Common Pleas, and afterwards openly by the Juſtices at two ſeveral Days; and becauſe the Court was divided in Opinion, this Caſe was argued in the Exchequer Chamber before all the Juſtices of *England*. And after Argument at Bar, and divers Conferences had amongſt the Juſtices at *Serjeants Inn*, it was adjudged for the Plaintiff: And in this Caſe theſe Points were reſolved.

1. That it was one intire Leaſe, and conſiſted on ſix Unities: 1. The Demiſe is made by one Word of Demiſe. 2. To one Leſſee. 3. To have one Beginning. 4. One Term of Years. 5. One Determination of it. 6. One Reſervation of Rent in Groſs at the firſt; and the *(videlicet)* afterwards doth not make a Severance of it, as this Caſe is, but is rather a ſeveral Declaration of the ſeveral Values of each Parcel, by which it appears how and for what Rates the (*a*) whole Rent of 5 *l.* 10 *s.* 11 *d.* is reſerved. But it was reſolved, that on one Leaſe ſeveral yearly Rents by apt Words might be reſerved, for the Reſervation of the Rent is not of the Subſtance of the Leaſe, for a Leaſe may conſiſt without any Reſervation, either for Part, or for the whole. And therefore if a Man makes a Leaſe to *B.* of the Manors of *Dale*, *Sale* and *Down*, to have and to hold to him the ſaid Manors for 21 Years, rendring Yearly out of the Manor of *Dale* 10 *l.* in that Caſe the Manor of *Dale* is only charged with the ſaid Rent, and the Manors of *Sale* and *Down* are not charged with it; and in that Caſe the Rent is incident to the Reverſion of the Manor of *Dale* only; and if in that Caſe the Leſſor grants over the Reverſion of the Manors of *Sale* and *Down*, yet the whole Rent of 10 *l.* doth remain with the Leſſor, and the Leſſor or his Leſſee cannot diſtrain for this Rent in the Manors of *Sale* and *Down*: And in the ſame Caſe the Leſſor might have reſerved a Rent of 10 *l.* out of the Manor of *Dale* during 5 Years, and 10 *l.* out of the Manor of *Sale* during 10 Years, and 16 *l.* out of the Manor of *Down* to commence 10 Years after, and one on a Condition precedent, another on a Condition ſubſequent, and the third abſolutely, and to be paid at ſeveral Days and Places; in which Caſes without Queſtion the Rents are ſeveral; and for the Rent of the one, the Leſſor cannot diſtrain in any of the other: And a Surrender of one Manor will not extinguiſh the Rents for the others. And therewith agree 14 *Eliz. Dy.* in *Winter's* (*b*) Caſe 308 & 309. by three Juſtices, 17 *E.* 3. 75. *b.* 17 *Aſſ. p.* 10, & 9 *E.* 3. 12. And ſuch Conſtruction agrees alſo with the true Intent of the Parties, which is always to be obſerved, when it may by reaſonable

(*a*) 3 Bulſtr. 256. Hob. 172. Ley 77. 2 Rol. 448. Poſt. 55. b.

Q.

(*b*) Moor 98, 205. 1 Anderſ. 174. Cr. El. 341. 3 Leon. 124. Goldsb. 16, 19. Hob. 172. 2 Rol. 448. Cr. Car. 154. 2 Bulſtr. 281, 282. Dy. 308, 309. pl. 75.

reasonable Construction consist with the Rule and Reason of the Law. *Vide* 29 *E.* 3. 39. 29 *Ass. p.* 52. 18 *Eliz. Dy.* 350. 5 *Ass. p.* 6. 7 *Ass. p.* 1. 15 *Ass. p.* 11. But in the Case at Bar it was resolved, that the Rent was (*a*) entire, because first the Lessor reserves the yearly Rent (in the singular Number) of 5 *l.* 10 *s.* 11 *d.* And afterwards when the Lessor comes to his Condition for Payment of the said Rent, the Condition is also in the singular Number, *scil.* if the said Rent of 5 *l.* 10 *s.* 11 *d.* be behind in Part or in all, so that it agrees with the Words of the Indenture (which import the Intent of the Parties) that in this Case it should be one entire Rent; and if it should be several Rents, then a Question might be made of the Validity of the Condition, which extends to the said Rent, &c. in the singular Number, *Sed (b) benignæ faciendæ sunt interpretationes chartarum propter simplicitatem laicorum, ut res (c) magis valeat quam pereat.* And by this Construction all the Parts of the said Indenture well agree with themselves, and with the Law also. And the Difference between this Case and the said Case of (*d*) *Winter* is, because there the Reservations are several, and here (on Consiferations of the whole Indenture) intire, *quod nota bene.*

(*a*) 3 Bulstr. 256. Hob. 172. Ley 77. 2 Rol. 448. Moor 52, 98.

1 Salk. 390. (*b*) Co. Lit. 36. a. 183. b. 301. b. 2 Bulstr. 282. (*c*) 1 Co. 76. a. 2 Co. 72. b. 5 Co. 8. a. 8 Co. 95. b. 3 Keb. 288. 1 Mod. Rep. 109. 2 Jones 69. (*d*) Antea 55. a. Dyer 308, 309 Moor 98.

2. It was resolved, That admitting they had been several Rents, yet forasmuch as the Condition was intire, giving one intire Entry into the whole for Default of Payment of any Part, by the Severance of any Part of the Reversion (if it was in the Case of a common Person) (*e*) the whole Condition would be destroyed. And therewith agrees the Judgment in the said Case of *Winter*, 14 *Eliz. Dyer* 308, 309.

(*e*) 1 Rol. 472. Co. Lit. 215. a. 4 Co. 120. a. Styl. 316, 317.

3. The great Doubt was, Whether this being in the King's Case, if the Condition by the Severance of Part of the Reversion be destroyed or should be apportioned. And, 1. It was objected, That the Lease in the Case at Bar was made by common Persons, and the Reversion thereof was vested in the King by their Surrender, and by the Act of 31 *H.* 8. in which Case the King cannot take it in other Manner than the Subject had it before. For the Parliament which gave it the King, shall bind the King as well as the Subject, and his Prerogative shall not be extended to do (*f*) Wrong or Injury to any Subject, as it is held in 13 *E.* 4. 8. *a.* 19 *H.* 6. *Br. Quinzim.* 5 *E.* 3. 6. 17 *E.* 3. 40. *Stamford* 543. *Plow. Com. Nichols's* Case 246. 2. It was objected, That if the Condition in this Case should be divided, the Law and Nature of the Thing would be altered by the King's Grant, and that the King cannot do, for he cannot alter nor change the Law or Custom of the Land by his Patent. *Vide* 11 *H.* 4. (*g*) 73. 37 *H.* 8. *Patents Br.* 100. &c. 3. If the Condition should be divided, he would make two Condit. of one, and the Lessee would be subject to two, and for the Non-payment of the Rent to one, the other might enter, and many Absurdities would follow thereupon; all which will be avoided, if according to the

Fitzgib. 91, 92.

(*f*) 1 Co. 44. b. 52. b. 11 Co. 72. a. 2 Inst. 681. Co. Lit. 19. b. 13 E. 4. 8. a. Plowd. 246. b. 487. b. Cr. Argument 60. 1 Rol. Rep. 167. Noy 182. Moor 416. Godb. 317. 7 Co. 12. b. Dav. 75. a. b. (*g*) 11 H. 4. 37. b.

the Rule of Law the Condition ſhall not be divided. But on great Deliberation, and the Juſtices of the Common Pleas having divers Conferences with *Wray* Chief Juſtice of *England*, *Manwood* Chief Baron of the Exchequer, and all the other Juſtices, at laſt, on mature Conſideration it was reſolved, that the (*a*) Patentee of Parcel ſhould not take Advantage of the Condition; but as to that Part of the Land demiſed, it was altogether diſcharged of the Condition. But it was alſo reſolved, That as to the Reſidue the Condition (*b*) remain'd with the Reverſion which the King hath, and ſo no Prejudice to any Party, nor Wrong done to any by the King's Prerogative, nor the King by his Grant doth not alter the Law. For the Law makes a Difference between the King's Grants, who always is preſumed to intend *ardua regni pro bono publico omnium*, &c. and the Grants of Subjects who may follow their private Buſineſs; for the Grants of Subjects are always taken moſt ſtrong againſt them, but the Grants of the King are taken and interpreted by a favourable and beneficial Interpretation, ſo that no Prejudice ſhall accrue to him by Conſtruction or Implication on his Grant more than he truly intended by it. And therefore if the King grants Land to *J. S.* and his Heirs, and in truth *J. S.* is the King's Villain, it ſhall not (*c*) enfranchiſe the Villain by Implication. The ſame Law of an (*d*) Alien born, 17 *E.* 3. 39. (*e*) the Advowſon of a Prebend held of the King was aliened to an Abbot and his Succeſſors; and the King granted to the Abbot and his Succeſſors, That the Abbot and his Succeſſors ſhould hold the Prebend to his own Uſe, yet he ſhall ſeiſe the Advowſon for the Alienation in Mortmain, and ſhall deſtroy the Appropriation, for he ſhall not be ouſted of his Right to the Advowſon by Implication. And in 2 *R.* 3. 4. 21 *E.* 4. 46. & 34 *H.* 6. If two (*f*) are indebted to the King, and the King releaſes to one, it ſhall not diſcharge the other. And in 6 *H.* 7. 15. 11 *H.* 7. 10. if the King releaſes all (*g*) Demands, a Right of Inheritance ſhall not be releaſed. 21 *H.* 7. 7. The King grants Lands in Fee on Condition that he ſhall not (*h*) alien, it is good; but in all theſe Caſes it is otherwiſe in the Caſe of a common Perſon. And in many Caſes the K. who claims by a Subject ſhall be in a better Caſe in Reſpect of the Dignity and Prerogative incident by the Law to the Royal Perſon of the King, than the Subject himſelf by whom he claims. As if the King has a Rent-Seck by Attainder of Treaſon, or by Grant, (*i*) he ſhall diſtrain for it not only in the Land charged, but in all his other Lands, and yet the Subject by whom he claims ſhould not diſtrain for it. If a Subject has a (*k*) Recogniſance or Bond, and afterwards is outlawed, or attainted, the King ſhall ſeiſe all the Land of the Conuſor, or Obligor, whereas he himſelf could have but a Moiety: So in the Caſe at Bar, the King ſhall take Advantage of the Condit. without (*m*) Demand, and

(*a*) 2 Bulſtr. 281, Style 316. Co. Lit. 215. a. 1 Rol. 472.
(*b*) 1 Rol. 472. Co. Lit. 215. a.
(*c*) Plowd. 502. Goldsb. 20. 2 Sid. 81.
(*d*) 3 Leon. 243. Plowd. 502. b.
(*e*) 7 Co. 14. b.
(*f*) 3 Leon. 243. 2 Sid. 82.
1 H. 7. 13. a. Br. Charter de Pardon 36. 2 Inſt. 239.
(*g*) Co. Lit. 291. b.
(*h*) Lit. ſect. 360, 361. Co. Lit. 223. a. 3 Leon. 126, 127. Moor 204. Goldsb. 19, 22. 4 Co. 3. b. 6 Co. 41. b. Hob. 170. Br. Condition 82, 135. Dr. & Student 39. a. 123. a. 21 H. 6. 33. b. 8 H. 7. 10. b. 13 H. 7. 23. a. 21 H. 7. 8. a. Br. Prerog. 102. 21 E. 4. 47. a. Plowd. 77. a.
(*i*) 5 H. 7. 38. b. 3 Leon. 125. 13 E. 4. 6. a. 2 Inſt. 131. 4 Inſt. 119. Antea 4. a. Plowd. 239. a. 243. b. 343. a. Br. Prerogative 68, 77. Fitz. Grant 47. 44 E. 3. 45. a. Fitz. Prerog. 7. Br. Diſtreſs 6, 49. Goldsb. 17.
(*k*) 3 Leon. 125. Goldsb. 17. Plowd. 243. a.
(*l*) 4 Co. 73. a. Moor 210, 296. 2 H. 7. 8. b. Plowd. 243. a. Fitz. Prerog. 10. Br. Prerog. 101. Br. Condit. 125. Br. Entry conſeable 88.
(*m*) Cr. Jac. 513.

and yet the Prior himſelf, under whom the King claims, could not re-enter for Default of Payment of the Rent without a Demand made. And if the King purchaſe a Seigniory of which Land was held by Poſteriority, the King ſhall be in a better Condition than the Subject from whom he
F.N.B. 142. f. claims, and ſhall have the Priority. And ſo likewiſe ſhall his Grantee have in ſuch Caſe, as it is held in 24 *E.* 3. 65. *Garde* 27, 47.

Hard. 15. Lane, 41, 42. 4. It was reſolved, That although there was 37 *s.* 5 *d.* which was found to be behind at *Michaelmas*, which was more than was due at any one Quarter of the Year, yet it is ſufficient for the King when the Office hath Matter and Subſtance; for the ſole and ſubſtantial Point, which proves the Breach of the Condition, is the Non-payment of the Rent, or any Part of it; and it is not material how much Rent was behind, for if any Part was behind it is ſufficient; and the Party, who traverſes, ought not to traverſe that the ſaid Sum of 37 *s.* 5 *d.* was behind, but that the ſaid Sum of 37 *s.* 5 *d.* or any Part of it was behind; and every Office being the Finding of Lay People, which hath Matter and Subſtance, ſhall ſerve the King, although the Manner of it be not ſo formal as it might be. And therefore if it be found, that the Rent for one whole Quarter was behind, and in Truth but Part of it was behind, it ſhall ſuffice for the King. Alſo that the Jurors in *Middleſex* might find which were the uſual Feaſts in *London*, being another County.

1 Anderſ. 177. 5. It was reſolved, That although without Office the Leaſe was not void, becauſe a Clauſe of Re-entry is only reſerved, as appears before, and no Limitation, that for Non-payment the Leaſe ſhould be void, and although the
Cr. Car. 100, 173. Mo. 296. Office was not returned before the Date of the Patent; yet foraſmuch as the Office was found before the Grant, and afterwards it was returned of Record, the Grant was good; and that in this Caſe of Re-entry, by the Office without Seiſure, the Leaſe was void.

6. It was reſolved, Although the Commiſſion was under the Exchequer-Seal, yet foraſmuch as thereby a Chattel,
Cr. El. 855. Cr. Car. 173. 10 Co. 115. a. Antea 52. a. *ſcil.* a Leaſe for Years, ſhall be void, the Inquiſition found by Force thereof was good enough, although the Commiſſion was not under the Great Seal.

And ſo note a Difference between this Caſe and *Page*'s Caſe before. And afterwards the Plaintiff, according to theſe Reſolutions, had Judgment to recover.

SPECOT's *Case.*

Carth. 312. Skin. 593, &c. 1 Salk. 378.

Hill. 32 Eliz.

In the King's Bench on a Writ of Error.

HUmphrey Specot Eſq; and *Elizabeth* his Wife, *Paſch.* 28 *El.* brought a *Quare Impedit* againſt the Biſhop of *Exeter*, and declared, that *John Arſcot* was ſeiſed of the Manor of *Tedcote* in the County of *Devon*, to which the Advowſon of the Church of *Tedcote* was appendant in Fee, and held it in Socage; and ſo ſeiſed, 1 *Jan.* 4 & 5 *Ph.* & *M.* by his Will in Writing deviſed the ſaid Manor with the Appurtenances, to which, &c. to the ſaid *Elizabeth* for Term of her Life, and died, by which the ſaid *Elizabeth* entered into the ſaid Manor, and was thereof ſeiſed for Term of her Life, and took to Husband the ſaid *Humphrey*, and they preſented to the ſaid Church, then being void, *David Walter* who was admitted, inſtituted and inducted in Time of (*a*) Peace, &c. And afterwards the Church became void by the Death of the ſaid *David Walter*, and yet is void; and ſo it doth appertain to the Plaintiff to preſent, and that the Biſhop did diſturb them, &c. The Biſhop pleaded, that the ſaid Church *fuit infra dioceſ. ſuam, quodque ipſe nihil habet, nec habere clamat in Eccleſia illa, &c. niſi admiſſion', inſtitution' & induction' perſonarum, &c.* And that the ſaid Church *eſt beneficium cum cura animarum, &c.* And that the ſaid *David Walter* 24 *Nov'* 27 died, & *quod Eccleſia prædicta vacavit, ipſo Epiſcopo adtunc ejuſdem Eccleſiæ Ordinario exiſten'. Et ulterius idem Epiſcopus dicit, quod prædict' Humfrid' infra ſex menſes, proxim' poſt mortem prædict' David, apud civit' Exoniæ, in Com' ejuſdem Civit' præſentavit eidem Epiſcopo tunc Ordinar' Eccleſ. præd' quendam Johannem Holmes ut clericum ſuum, ad Eccleſiam prædictam ſic vacantem, eundem Epiſcopum requirens, quod ipſe eundem Johannem Holmes admittere, ipſumque in ead' Eccleſia inſtituere, & induci facere dignaret: Super quo idem Epiſc', ut Eccleſ. præd' Ordinarius, apud, &c. præd' Johan' Holmes ſic præſentat' de habilitat' & idoneitate ſua in hac parte, ſecund' Leges Eccleſiaſt' examinav', ut de Jure debuit: Et ſup' hujuſm' examinatio-*

3 Leon. 198, 199, &c. Goldsb. 35, 36, &c. 52. 1 And. 180, 190. Jenk. Cent. 258, 259.

(*a*) Doct. pl. 291.

nem ſuam, idem Epiſc' adtunc & ibid' invenit præfat' Johann' Holmes fore ſchiſmaticum inveteratum, ac eundem Johann' Holmes ea occaſione per legem ſacroſanct' Eccleſ. fore perſonam inhabil', & minime idoneam, ad acceptand' aliquod beneficium cum cura animarum, per quod idem Epiſcopus ut Eccleſ. illius Ordinarius adtunc & ibidem recuſavit admittere præd' Johann' Holmes ad Eccleſiam prædictam; and pleaded that he of the Cauſe of Refuſal aforeſaid gave Notice to the ſaid *Humph. &c.* upon which the Pl. did demur in Law: And it was adjudg'd in the Com. Pleas, That the Biſhop's Plea was inſufficient, becauſe he ſhewed generally that he was (*a*) *ſchiſmaticus inveterat'*. And on this Judgm. a Writ of Error was brought in the King's Bench by the ſaid Biſhop, and two Errors were aſſigned in the Record.

(*a*) Doct.pl.60. 1 Rol. Rep.136, 237, 238. 2 Bulſtr. 139, 329. 3 Leon. 200. 1 And.190. Cr. El. 242. Hob 296.

1. Becauſe no Preſentment was alledged in the Deviſor, but only in the Deviſees for Life; but *non allocatur*, for the (*b*) Preſentment of the Leſſee is a ſufficient Title for himſelf without Queſtion, (*c*) 8 *H.* 5. 10.

(*b*) Doct.pl.301. Poſtea 97. b. 6 Co. 57. b. 2 Rol. 378, 379. Cr. El. 518. Moor 456. 2 And. 49, 50. F. N. B. 33. h. 1 Leon. 230.

(*c*) 8 H. 5. 4. b. Fitz. Quare impedit 201.

2. Error was aſſigned, That the Court erred in Law in giving Judgm. againſt the Biſhop for the Inſufficiency of his Plea, where his Plea was ſufficient. And it was objected by the Biſhop's Counſel, that the Biſh. need not ſhew any particular Schiſm, for if he ſhews it, the Court cannot either decide or examine it, becauſe it is a ſpiritual Thing which lies not in their Conuſance, as it is held 27 *H.* 8. 14. *a. b.* That for calling a Man (*d*) Heretick, no Action on the Caſe lies in our Law, for thoſe of the Com. Law cannot determine what is Hereſy; and in 15 *H.* 7. 7, 8. *a.* it is agreed by all the Juſtices, that the Biſh. in Examination is Judge, and not a Miniſter, and therefore the Law gives Faith and Credit to his Judgm. And it was ſaid, that it is a good Cauſe * to remove a (*e*) Coroner from his Office generally, becauſe he is *minus idoneus ad officium illud exequend'*, as appears by the *Regiſter* and *F.N.B.* 163. But it was anſwered and reſolved, That the Plea of the Biſh. was inſufficient. Firſt, it is declared by the Stat. *De* (*f*) *Articul' Cleri*, c. 13. That *De idoneitate perſon' præſentat' ad beneficium Eccleſiaſt' pertinet examinatio ad Judicem Eccleſiaſticum, &c. ut propter defect' ſcient' & aliarum cauſarum rationabilium*: So that it appears there ought to be a reaſonable Cauſe, & *cauſa vaga & incerta non eſt rationabilis*, for it is commonly ſaid, *Quod doloſus verſatur in univerſalibus*: And by the Reaſon which hath been made, that the general Allegat. of the Pl. ſhould be good in the Caſe at Bar, it is good, becauſe the Biſhop in Examinat. is Judge; by the ſame Reaſon it may be maintained that he may refuſe any Clerk, becauſe *non eſt idoneus* generally, or becauſe he is (*g*) *criminoſus* generally: But although he is Judge in Examination, yet foraſmuch as the Proceedings of the Biſhop are not of (*h*) Record, the Cauſe of the Refuſal

(*d*) 2 Inſt. 631. 4 Co. 17. a. 20. a. Hob. 296. Br. Action ſur le Caſe 2.

*6 Mod. 169.

(*e*) 8 Co. 41. b. F. N. B. 163. n. Poſtea 58. b.

(*f*) Goldsb. 36. Dyer 293. pl. 3. 2 Inſt. 631. de Articulis cleri cap. 13. 2 Co. 34. a. 3 Co. 81. a. 2 Bulſtr. 226. 1 Rol. Rep. 157. Moor 321.

(*g*) 2 Sid. 97. 1 Rol. Rep. 192, 237.

(*h*) Doct.pl.351.

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is (*a*) traverſable, and if it be traverſed, and the Party refuſed be alive, it ſhall be tried by the Metropolitan, and if he be dead, it ſhall be tried by the (*c*) *Country*. And if ſuch a general Allegation of Biſhops ſhould be admitted (to which the Patron ſhall not have Anſwer, becauſe the Biſhop in his Examination is Judge, the Cauſe being Spiritual; as it hath been objected) Patrons would ſuffer great Prejudice in theſe Times in their Preſentations: In 38 *E.* 3. 2. (*c*) the Biſhop Plaintiff ſhewed for Cauſe of Refuſal that the Preſentee had acknowledged himſelf to be perjured, *&c.* and ſo *criminoſus*, by which it appears, that the Alledging that he is *criminoſus* generally is not good, for no certain Iſſue can be taken thereupon. *Et dubitatur* there, Whether there the Bp. ought not to ſay *in facto* that he is perjured, and not that he had confeſſed himſelf perjured. In 5 *R.* 2. *Trial* 54. it was agreed for good Law, That if a Miſcreant or Schiſmatick be preſented, admitted and inducted, it is a good Cauſe of Deprivation. So if he be irreligious he may be refuſed, as it is ſaid in 5 *H.* 7. 6. But when he is charged with the one, or refuſed for the other, it ought to be alledged in particular, ſo that the Party may anſwer to it. And it was obſerved, that it appears in our Books, that the Cauſe of Refuſal ought to be certain, as in 5 *H.* 7. 19. & 11 *H.* 7. 7. & 37. That the Preſentee is a Baſtard (*d*), Villain, within Age, or illiterate, *&c.* And 15 *H.* 7. that the Patron had been (*e*) excommunicated by 40 Days, and therefore his Preſentee is not to be admitted; or that the Preſentee had committed Manſlaughter, as it is held in 38 *E.* 3. 2. or that the Preſentee is outlawed, for then he is not *idonea perſona*, or one who is *mere laicus*, *Mich.* 12 & 13 *Eliz.* (*f*) *Dyer* 293. *Vide* 8 & 9 *Eliz.* (*g*) *Dyer* 254. The Biſhop of *Norwich* refuſed one becauſe he was a Haunter of Taverns, and a Player at unlawful Games, *ob quod & diverſa alia crimina* he was *criminoſus*, & *non idoneus*: And it was adjudged, that the particular Cauſes were not ſufficient, for they were not *mala in ſe*, but (*h*) *mala prohibita*. And *quod, ob diverſa alia crimina*, he was *criminoſus*, & *non idoneus*, was too general and incertain. As 40 *E.* 3. 6. in Tender of a Marriage and Refuſal, the Heir ought to alledge a certain Cauſe of the Refuſal, whereof Iſſue may be taken.

(*a*) Doct. pl. 351.
(*b*) 2 Inſt. 632.
(*c*) 3 Leon. 199. Goldsb. 35, 36. Fitz. Quare Imped. 124. Dyer 293. pl. 3. 2 Rol. 356.
(*d*) 2 Rol. 356.
(*e*) 2 Rol. 355.
(*f*) Dyer 293. pl. 3.
(*g*) Hob. 269. Goldsb. 35. Godb. 36.
(*h*) 2 Bulſtr. 139. Hob. 296. 1 Rol. 355. 2 Rol. 355. 1 Leon. 106. 2 Leon. 35.

And it was reſolved, That all ſuch as are (*i*) ſufficient Cauſes to deprive an Incumbent, are ſufficient to refuſe a Preſentee. And altho' it doth not appertain to the King's Court to determine Schiſms or (*k*) Hereſies, yet the original Cauſe of the Suit being Matter whereof the K.'s Court hath Conuſance, the Cauſe of the Schiſm or Hereſy, for which the Preſentee is refuſed, ought to be alledged in certain, to the Intent that the K.'s Court may conſult with Divines to know

(*i*) 2 Rol. 355.
(*k*) Wing. Max. 8. 27 H. 8. 14. a. b.

whether it be Schism or not; and if the Party be dead, thereupon to direct the Jury that try it. And as to the Case (*a*) of the Coroner, which hath been put, it was answered, That it was not to be compared to the Case of a Presentee; for such Allegation is not sufficient, as it is confessed by both Sides, either to refuse a Presentee, or to deprive an Incumbent, because he is *persona minus idon'* generally. And the Coroner at the Common Law hath but the Keeping of the Rolls of the Pleas of the Crown, but the Incumbent hath the Care and Keeping of Souls, and therefore the Law requires more Circumspection and Certainty in the one Case than in the other. 2. The King may remove a Coroner by Writ directed to him for a Cause which shall not be traversed, as appears in *F.N.B.* 163. and so not like (this Case).

(*a*) Antea 57. b. 84. Co. 41. b. F.N.B. 163. N.

(*b*) Stanf. Cor. 88. 1.

Then another Error not assign'd was moved, *sc.* That for the Insufficiency of the Bishop's Plea, the Court gave Judgment for the Plaintiff; *Ideo considerat' est quod præd'* H. & E. *recuperent vers. prædict' Episcopum præsentation' suum ad Ecclesiam prædictam, & habeant breve Joh. Archiepiscopo Cantuar' totius Angliæ primat', & loci illius Metropolitano, eo quod præd' Episc' est pars, &c. Et idem Episc' in misericordia.* And afterwards a Writ to inquire of the Value of the Church was awarded, and the Value and other Points of the Writ found and returned; and upon that Judgm. was entered again, *sc.* That the Plaintiff shall have a Writ to the Archbish. *ut supra. Et quod recuperent versus præd' Episc. damna, &c. Et præd' Epis' in Mi'a*: So that a Bishop was (*c*) twice amerced, and every Amercement of a Bishop is 5 *l.* and in this Case he ought not by the Law to be twice amerced; and therefore this Difference was taken, if a Man brings Trespass against two, and one is found guilty to Damages by himself, and the other is found guilty to Damages by himself, in that Case each Defendant shall be severally amerced; and the Plaintiff shall be also severally amerc'd against each of them, as appears in 47 *E.* 3. 20. But in an Action against (*e*) one and the same Defendant or Tenant, and the Defendant or Tenant pleads one Plea to Part, and another Plea to the Residue, or confesses Part, and pleads to Issue for the other Part, and the several Issues be found against him; yet the Def. or Ten't shall not be twice amerced. And therewith agrees 9 *E.* 3. 6. by *Herle*, & 22 *H.* 6. wherefore it was concluded, That forasmuch as the Bishop being one and the same Person was twice amerced, in this Case it was Error.

(*c*) 1 Rol. 218.
(*d*) 1 Rol. 216. 218.
(*e*) 1 Rol. 218. 8 Co. 61. a.

Against which it was answered by one of Counsel with the Def. That the latter was only a Recital of the former, and so to give a full Judgm. of all with the Damages, and not a new Judgment; for he cannot have two Writs to the Metropolitan, no more than he can be (*f*) twice amerced. But if it was *gratia argumenti* admitted, that the latter Judgment was erroneous, yet the (*g*) first Judgment is good and perfect in it self, and shall not be impeached for any Error in the

(*f*) Jenk. Cent. 259. 1 Rol. 218.
(*g*) 1 Rol. 776.

ſecond Judgment; for the firſt Judgment was the Judgment which was in the *Quare Impedit* at the common Law, for before the Stat. of *Weſt.* 2. *cap.* 5. the Plaintiff in a *Quare Impedit* did not recover Damages (*a*). And the Plaintiff after the ſaid Statute may take the Judgment (*b*) at the Common Law, and relinquiſh the Benefit of the Statute if he will, *Quod conceſſum fuit per totam curiam*, for which Cauſe the Defendant's (in Errors) Counſel prayed that the Judgment might be affirmed; and ſo it was.

1 Salk. 134, 135.

(*a*) 6 Co. 51 a. Co. Lit 17. b. 344 b. 2 Inſt. 362. 3 Inſt. 156. Cr. El. 162.

(*b*) Jenk. Cent. 259.

Note Reader, the Matter in Law was reſolved and adjudged by both Courts.

FOSTER's *Caſe*.

Hill. 32 Eliz.

In the King's Bench.

JOHN Foſter and *Urſula* his Wife brought a Writ of falſe Impriſonment againſt *Robert Smith*, and on the Pleading and ſpecial Verdict, the Caſe was ſuch; *ſcil.* That the Town of *Brancaſter* is in the Hundred of *Smithden* in the County of *Norfolk*; and that the Defendant was *præd' tempore quo, &c.* one of the Conſtables of *Brancaſter*. And that *Nathaniel Bacon* Eſquire, then one of the Juſtices of Peace within the ſaid County, made a Warrant ſealed with his Seal directed amongſt others to the Conſtables of *Brancaſter*, reciting that *John Lane* of *Brancaſter* was in Fear of his Life, Mutilation of his Members, and Burning of his Houſes by *Urſula* the Plaintiff, *&c. Vobis, &c. præcipimus quod præd' Urſulam coram aliquo Juſticiarior' noſtrorum ad pacem in Com' prædict' aſſign venire faciat', ſeu aliquis veſtrum venire faciat ſufficient' manucapt', quod ipſa prædict' Urſula præfat' Johann' Lane damnum & malum aliquod, &c. non faciat, nec fieri procurabit. Et ſi hoc facere recuſaverit, tunc ipſam ſic recuſantem proxim' priſon' noſtræ in Com' præd' duci facias, &c. ibidem moratur' quouſque gratis hoc facer' voluer', &c.* By Force of which Warrant the Def. did arreſt the ſaid *Urſula*, and that afterwards the Pl. and one *John Hammond*

offered them to go to *Thomas Farmor* Eſq; one of the Juſtices of Peace of the ſame County to be bound to the Q. according to the Purport of the ſaid Warrant; and that the ſaid *Robert Smith* did refuſe to go to the ſaid *Thomas Farmor*, on which the Plantiffs went with the ſaid *John Hammond* to the ſaid *Thomas Farmor*, and there acknowledged a Recogniſance to the Queen to appear at the next Seſſions to be held within the Hundred of *Smithden* (which was not according to the Warrant) and that the Defendant *prædict' tempore quo, &c.* by Force of the ſaid Warrant carried the ſaid *Urſula* before the ſaid *Nathaniel*, before whom ſhe refuſed to find Sureties; wherefore the Defendant carried the ſaid *Urſula* to Gaol by Force of the ſaid Warrant. And in this Caſe two Points were reſolved by *Wray* Chief Juſtice and the whole Court.

1. That on the ſaid general Warrant, *ſcil. coram aliquo Juſticiar', &c.* it is at the Election of the Conſtable, who is an Officer and Miniſter of Juſtice, to carry the Party arreſted to what Juſtice he will, for it is more reaſonable to give Election to the Officer, who in Preſumption of Law is a Perſon indifferent, and ſworn to do and execute his Office duly, than to give the Election to the Delinquent himſelf, who by Preſumption of Law will ſeek Excuſes, and perhaps will carry the Conſtable being for the moſt part a poor Man, to the fartheſt Part of the County, by Reaſon whereof ſuch Conſtable would be more negligent and remiſs of ſuch Warrants for Fear of Travel, and Loſs of their Time; which Judgment is againſt the Opinion of *Fineux* 21 *H.* 7. 20. *obiter*, whereof the Reporter makes a *Quære*. But it agrees with the Opinion of the Lord *Brook* in Abridging the Caſe of 21 *H.* 7. Tit. *Faux Impriſonment* 11. Note Reader, the Law adjudged in the Point, which never (as I know) was adjudged before.

Lamb. Eir. 94.

Br. Peaces, &c. 9. 21 H. 7. 20. b. 21. a. Br. faux Impriſonment 21.

2. It was reſolved, That after the Officer in the Caſe above, had brought the Party before the Juſtice, and before him ſhe refuſed to find Sureties, That if the Officer without a new Warrant or Commandment might carry the Party to Priſon, and that by the Words of the ſaid Warrant, *Et ſi hoc facere recuſaverint, &c.* And *Wray* Chief Juſtice ſaid, That a Juſtice of Peace might in ſuch Caſe make a Warrant to bring the Party before himſelf, and it would be good and ſufficient in Law: For, for the moſt part, he who makes the Warrant, has beſt Knowledge of the Matter, and therefore moſt fit to do Juſtice in the Caſe.

GOOCH's *Caſe.*

Mich. 32 & 33 Eliz.

In the King's Bench.

BEtween *Rous* Plaintiff and *Gooch* Defendant, as Heir to his Father in Debt, on a Bond made by the Father, in which he bound himſelf and his Heirs; the Defendant pleaded *Riens per Diſcent*; and the Plaintiff maintained Aſſets at *I.* in the County of *Suff.* and at *Niſi prius* before *Wray* Chief Juſtice of *England*, one of the Counſel with the Plaintiff gave in Evidence that his Father was ſeiſed of Lands in *I.* aforeſaid in Fee, and died thereof ſeiſed; and that they deſcended to the Defendant, by which, *&c.* All which was agreed by the other Side: But the Defendant's Counſel gave in Evidence, That long Time before this Action brought, the Defendant had enfeoffed one *W. G.* in Fee of the ſame Lands, which was alſo confeſſed; but the Plaintiff's Counſel alledged and proved, that this Feoffment was made by Fraud and Covin to defraud the Plaintiff of his Action; and therefore void by the Stat. of (*a*) 13 *Eliz. cap.* 5. as to the Plaintiff. But it was ſtrongly urged and inſiſted on, That it ought to have been pleaded, and could not on this Iſſue (of *Riens per Diſcent* the Day of the Writ purchaſed) be given in Evidence: But on the Importunity of the Plaintiff's Counſel, *Wray* Chief Juſtice directed the Jurors to find the ſpecial Matter; and ſo they did. And now this Term on Argument at Bar and Bench, two Points were reſolved by *Wray* Chief Juſtice, and the whole Court.

(*a*) 1 Brownl. 111. 3 Co. 80. b. 6 Co. 18. b. 10 Co. 56. b. Co. Ent. 162. a. Hob. 166. 3 Inſt. 152. 2 Leon. 8, 9, 47, 233, 308, 309. 3 Leon. 57. Latch 222. 2 Rol. Rep. 493. Palm. 415. Cro. El. 645, 233, 234, 810. Dyer 295. pl. 17. 351. pl. 23. 2 Bulſtr. 226. Lane 47, 103. Co. Lit. 3. b. 76 a. 290. a. Raſtal Fraudulent Deeds 1. Raſt. Ent. 207. b. Cr. Jac 270, 271. Moor 638. Yelv. 196, 197.

1. That the Matter aforeſaid might well be given (*b*) in Evidence for two Reaſons; 1. Becauſe the ſaid Statute provides generally, That the Eſtate as to the Creditor ſhall be void, and Acts of Parliam. made in Prevention or Suppreſſion of Fraud ought to have a favourable Interpretation. 2. If this Matter ought to be pleaded, it would be miſchievous to Creditors, and make much to the Maintenance and Increaſe

(*b*) Hob. 72. Doct. pla. 200. 2 Rol. 684. 6 Co. 72. b. 2 Inſt. 445.

of a Fraud and Covin; for Fraud and Covin (becauſe they are odious) are ſo privately and ſecretly hatch'd in a hollow Tree, *in arbore cava & opaca*, and ſo artificially covered and concealed, that the Party grieved has no Means to find or know it; then to drive the Plaintiff, who is altogether a Stranger to it, to plead the Feoffment (whereof he hath no Knowledge) and that it was made by Fraud, *&c.* would be miſchievous and againſt Law and Reaſon. And Judgment was given for the Plaintiff. And in this Caſe *Wray* Ch. Juſtice ſaid, if *A.* ſeiſed of Land in Fee make a fraudulent Conveyance, to the Intent to deceive and defraud Purchaſers againſt the Stat. of (*a*) 27 *El.* and continues in Poſſeſſion, and is reputed as Owner, *B.* enters into Diſcourſe with *A.* for the Purchaſe of it, and by Accident *B.* has Notice and Knowledge of this fraudulent Conveyance, and notwithſtanding concludes with *A.* and takes his Aſſurance of him; in this Caſe *B.* ſhall avoid the ſaid fraudulent Conveyance by the ſaid Act, notwithſtanding his Notice; for the Act has by expreſs Words made the fraudulent Conveyance void as to a Purchaſer; and foraſmuch as it is within the expreſs (*b*) Purview of the Act, it ought to be ſo taken and expounded in Suppreſſion of Fraud. And according to the Opinion of the Lord *Wray*, it was unanimouſly agreed and reſolved by the whole Court of Common Pleas, *Paſch.* 3. *Jacobi* in Evidence to a Jury in an *Ejectione firmæ*, on a Leaſe made by *Standen* to *Houſe* Plaintiff, againſt *Bullock* Defendant, That where one *Bullock* had made a fraudulent Eſtate of his Land within the ſaid Act of 27 *El.* to *A. B.* and *C.* and afterwards notwithſtanding offered to ſell the ſaid Land to *Standen*, and before Aſſurance thereof made by *Bullock*, *Standen* had Notice of the ſaid fraudulent Conveyance, and notwithſtanding proceeded, and took his Aſſurance of *Bullock*, that *Standen* ſhould avoid (by the ſaid Act) the ſaid fraudulent Conveyance; for the Notice of the Purchaſer cannot make that good which an Act of Parliament made void as to him. And true it is, *Quod non decipitur qui ſcit ſe decipi.* But in that Caſe the Purchaſer is not deceived; for the fraudulent Conveyance whereof he has Notice, is void as to him by the ſaid Act, and therefore ſhall not hurt him, nor is he, as to that, in any Manner deceived. (*Q.*)

(*a*) 27 El. c. 4.

(*b*) Co. Lit. 3. b. 76. a. 290. a. b.

Standen's Caſe, Paſch. 3. Jac. in Comm. Banco.

(*c*) 3 Co. 82. b. Moor 605, 615. Bridgm. 23. Palm. 217. Lane 22. 2 Jones 95.

SPARRY's *Caſe.*

Mich. 32 & 33 Eliz.

In the Exchequer.

ISrael Owen brought an Action on the Caſe againſt *James Sparry*, of Trover of a certain Quantity of Cotton Yarn, and ſelling it to Perſons unknown, and Converſion to his own Uſe: The Defendant pleaded, That the Plaintiff had another Action on the Caſe depending in the King's Bench for the ſame Trover and Converſion of the ſame Goods; and this Suit is proſecuted pending the other: And demanded Judgment of the Bill: And thereupon the Plaintiff did demur in Law. And it was reſolved by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer, that the Bill ſhould (*a*) abate for two Reaſons.

(*a*) Doct. pla. 67, 68. Moor 539.

1. Becauſe by the Rule of Law a Man ſhall not be (*b*) twice vexed for one and the ſame Cauſe, *Nemo* (*c*) *debet bis vexari, ſi conſtet Curiæ quod ſit pro una & eadem cauſa.* But the old Difference in our Books is between Writs which comprehend Certainty as in Debt, Detinue, &c. And Writs which comprehend no Certainty, as Aſſiſe, Treſpaſs, &c. For it is true that in Writs (be they real, perſonal, or mixt) which are certain, it is a good Plea to ſay, That the Writ is brought pending another, but in Writs real or perſonal, where no Certainty is contained, there it is no Plea. As in Aſſiſe the Writ is general *de libero tenemento*, and a Writ of Treſpaſs is, *Quare bona & catalla cepit*, &c. generally without any Certainty, either of the Thing, or of the Time, &c. or of any convenient Certainty which may be put in Iſſue; for the Law requires, *Quod* (*d*) *certa res deducatur in exitum, & non poteſt conſtare Curiæ, quod ſit pro una & eadem cauſa.* But in Aſſiſe, Treſpaſs, &c. after Plaint or Declaration made, which Plaint or Declaration reduces the Generalty of the Writ to a Certainty, then the Writ purchaſed after ſuch Plaint or Declaration ſhall abate, as appears in 14 *E.* 3.

(*b*) Moor 418.
(*c*) 4 Co. 43. a. 8 Co. 118. b. 11 Co. 59. b. 2 Vent. 170. Cr. Jac. 481. Cawly 78. Noy 82. 1 Rol. Rep. 95. Bridg. 122. Wing. Max. 695.
(*d*) Antea 35. a. 38. a. Co. Lit. 96. a. 303. a. Hard. 132. March 98.

Moor 883. *E.* 3. *Brief* 270. adjudged in the Point, where in Aſſiſe of *Novel diſſeiſin* the Ten't pleaded, That the Pl. had another Writ of Aſſiſe depending of the ſame Tenements between the ſame Parties; and ſo this Writ purchaſed pending the other, Judgment of the Writ: And becauſe Plaint was not made in the firſt Writ, ſo that *non poteſt conſtare Curiæ*, of what Tenements he made his Plaint, the Writ was awarded good, and he pleaded to iſſue. And therewith agree 14 *Aſſ. p.* 7. 29 (*a*) *Aſſ. p.* 40. *Vide* (14) 18 *E.* 3. *Brief* 318. A Writ of Reſcous brought pending another ſhall abate, if it be of Record that the Pl. hath declared in the firſt Writ, or otherwiſe not; and (*b*) 39 *H.* 6. 12. *acc'* by *Priſot* in Aſſiſe after Plaint; and in Treſpaſs after Declaration the Plea is good. But in the Caſe at Bar, the firſt Action on the Caſe on Trover and Converſion, be it by Writ or Bill, is here as certain as an Action of Treſpaſs is after Declaration. But the Reaſon in (*c*) 5 *H.* 7. 15. *a. b.* which as it ſeems the Reporter miſtook) was utterly denied by the Court, where it is ſaid, That becauſe divers Treſpaſſes may be done in one and the ſame Day, therefore it is no Plea (as it is there ſaid) in Treſpaſs, that another Action is depending, *&c.* for the ſame Treſpaſs: For by the ſame Reaſon after the Pl. has recovered in Treſpaſs, and brings his Action for the ſame Treſpaſs again, the Def. cannot aver that it is all for one and the ſame Treſpaſs. But the Book in (*d*) 20 *H.* 6. 44. *b.* 45. *a.* was affirmed to be good Law; where in Forgery of falſe Deeds, the Def. demanded Judgm. of the Writ, becauſe the Pl. had the like Writ of Forgery of the ſame Deeds, to which he had appeared, and this Writ purchaſed pending the other. For the Writ of Forgery of falſe Deeds is general. *Quare diverſa falſa facta fabricavit, vel quodd' falſum fact' fabricavit*: And the Def. had not pleaded that the Pl. had declar'd in the firſt Action whereby the Certainty might appear; therefore *Newton* compared it to a Writ of Treſpaſs and awarded the Def. to anſwer. *Vide* (*e*) 14 *H.* 7. 12. *b.* & 22 (*f*) *H.* 6. 15. *b.* that in an Action of Treſpaſs for a Horſe, which by the Declarat. is reduced to a Certainty, it is a good Plea to the Writ, that there is a Replevin depending of the ſame Taking, where an Averment is allowed, that all is for one and the ſame Taking, and yet there may be ſeveral Takings in the ſame Day, which is againſt the Reaſon of 5 *H.* 7. and agrees with this Reſolut. And therewith agrees alſo the Book in 22 *H.* 6. 52. *a.* where the Caſe of Treſpaſs is adjudg'd; for there in Treſpaſs the Def. ſaid that the Pl. had another Writ depending againſt the Def. for the ſame Treſpaſs, on which he had declar'd, Judgm. of that Writ brought pending the other, and *Newton* and the whole Court awarded that the Writ ſhould abate. Note, there it is Part of the Plea to the Writ, that the Pl. had declar'd, by which he had made the Thing certain; and that is the Differ. between this Caſe and the Caſes in (*g*) 20 *H.* 6. 44. & 5 (*h*) *H.* 7. 15. *a. b.* for the principal

(*a*) Br. Brief 300. Br. Aſſiſe 299.

(*b*) Br. Brief 259. Fitz. Brief 142.

(*c*) Doct. pl. 68. Br. Brief 321.

(*d*) Fitz. Brief 87.

(*e*) Br. Treſpaſs 171. 14 H. 7. 12. b. 13. a.

(*f*) Fitz. Treſpaſs 59. Br. Treſpaſs 152. Br. Brief 188.

(*g*) 20 H. 6. 44. b. 45. a. Fitz. Brief 87.

(*h*) Doct. pl. 68. Br. Brief 321.

principal Caſe in 5 (*a*) *H.* 7. was affirmed to be good Law, for there it was not Part of the Plea that the Plaintiff had declared. And the Caſe at Bar was ſtronger, for it ſhall not be intended that there were divers Sales and Converſions in one and the ſame Day. Alſo it was reſolved, that although the firſt Action was in another Court, *ſcil.* in the King's Bench, or *vice verſa*, that the Plea is good. *Vide* 43 (*b*) *E.* 3. 27. *a. acc.* and that the Book in 34 *E.* 3. *Brief* 789. is good Law; for it doth not appear by the Plea, that the Plaintiff or Defendant was privileged in the Exchequer, and then by the Statute of *Articuli ſuper Chartas*, *cap.* 4. it is enacted, that no common Plea ſhall be held in the Exchequer: But in 43 *E.* (*c*) 3. 27. *a.* it appears that the Defendant was privileged in the Exchequer, and therefore the Plea to the Writ there was good. But if a Man brings an Action of Debt by Bill in *London* or *Norwich*, or in any other inferior Court, and afterwards brings an Action of Debt in the Common Pleas, this Suit in the higher Court, which is brought pending the Suit by Bill in an inferior Court, ſhall not abate, as appears in 7 (*d*) *H.* 4. 8. *a.* & 3 (*e*) *H.* 6. 15. *a. b.* *Vide* 43 *E.* 3. 22, 27. & (*f*) 7 *H.* 4. 44. *a. b.* *Briningam*'s Caſe. But it is ſaid 9 *E.* 4. 53. *a.* that all the King's Courts at *Weſtminſter*, have been Time out of Mind, &c. and ſo a Man cannot tell which of them is the moſt antient Court.

And afterwards it was adjudged that the Plea was good, and the Plaintiff took nothing by his Bill. And ſo note Reader, all the Books which *prima facie* ſeem to diſagree, are on full and ſolid Reaſon unanimouſly agreed and reconciled.

(*a*) 5 H. 7. 15. a. b. Doct. pla. 68. Br. Brief 321. Antea 61. b.

(*b*) Fitz. Bar. 197. Br. Debt. 35. Br. Brief 66.

(*c*) Supra.

Fitzgib. 314.

(*d*) Fitz. Brief 225. Br. Brief 108.

(*e*) Br. Eſtoppel 54. Br. Eſtoppel 1. Br. Brief 8. Fitz. Eſtoppel 15.

(*f*) Fitz. Action ſur le Caſe 26. Br. Action ſur le Caſe 37.

CASES

CASES of BY-LAWS and ORDINANCES.

The Chamberlain of London's *Caſe.*

Mich. 32 & 33 Eliz.

In the King's Bench.

3 Leon. 264, 265. 1 Rol. 365. See Carter 68, 114, 115, &c. Moor 576, &c. Lucas's Rep. 131.

THE Chamberlain of *London* brought an Action of Debt in *London* in the *Guild-Hall* there againſt divers Perſons, *&c.* And it was grounded on an Act of Common Council, or Ordinance made by the Mayor, Aldermen and Commonalty of the City at their common Aſſembly (which they make by Cuſtom, and which amongſt others is confirmed by divers Acts of Parliament) by which it was ordained, That if any Citizen, Freeman or Stranger within the ſaid City put any Broad-cloth to ſale within the City of *London* before it be brought to *Blackwell-Hall* to be viewed and ſearched, ſo that it may appear to be ſaleable, and that Hallage be paid for it, *ſcil.* 1 *d.* for every Cloth, that he ſhall forfeit for every Cloth 6 *s.* 8 *d.* And further it was ordained, for ſuch Forfeiture the Chamberlain of the City of *London* for the Time being ſhould have an Action of Debt, *&c.* And becauſe the Defendants had broke the ſaid Ordinance, for the Penalty inflicted by the ſaid Ordinance, the Chamberlain of *London* brought an Action of Debt in *London*; and it was removed by *Corpus cum Cauſa* into the King's Bench. And it was moved that thoſe of *London* could not make Laws and Ordinances to bind the King's Subjects, and principally Strangers, for then they wou'd have as high Authority as an Act of Parliament: And 2. The ſaid Ordinance (as it was urged) was againſt the Law, and the Freedom and Liberty of the Subject, to compel him to bring his Cloths to any one Place. 3. The Impoſit. of 1 *d.* for Hallage was a Charge to the Subject, and by the ſame Reaſon that they may impoſe 1 *d.* they may impoſe 2 *d.* and ſo *in infinit'*: And

And one of the Inner Temple of Counſel with the City moved to have a *Procedendo*. It appears by many Precedents, That it hath been uſed within the City of *London* Time out of Mind, for thoſe of *London* to make Ordinances and Conſtitutions for the good Order and Government of the Citizens, &c. conſonant to Law and Reaſon, which they call Acts of Common Council. Alſo all their Cuſtoms are confirmed by divers Acts of Parliaments, and all ſuch Ordinances, Conſtitutions or By-Laws are allowed by the Law, which are made for the true and due Execution of the Laws or Statutes of the Realm, or for the well Government and Order of the Body incorporate. And all others which are contrary or repugnant to the Laws or Statutes of the Realm are void and of no Effect: And as to ſuch Ordinances and By-Laws, theſe Differences were obſerved; Inhabitants of a Town without any Cuſtom may make Ordinances or By-Laws for the Reparation of the (*a*) Church, or a Highway, or of any ſuch Thing which is for the general Good of the Publick; and in ſuch Caſe the greater Part ſhall bind the whole without any Cuſtom. *Vide* 44 *E.* 3. 19. But if it be for their own private Profit, as for the well ordering of their (*b*) Common of Paſture, or the like, there without a Cuſtom they cannot make By-Laws: And if there be a Cuſtom, then the greater Part ſhall not bind the leſs, if it be not warranted by the Cuſtom. For as Cuſtom creates them, ſo they ought to be warranted (directed) by the Cuſtom. *Vide* 8 *E.* 2. *Aſſiſe* (*c*) 413. Alſo Corporations (*d*) cannot make Ordinances or Conſtitutions without a Cuſtom, or the King's Charter, unleſs for Things which concern the publick Good, as Reparations of the Church or common Highways, or the like. *Vide* 44 *E.* 3. 19. 8 *E.* 2. *Aſſiſe* 413. 21 *E.* 4. 54. 11 *H.* 7. 13. 21 *H.* 7. 20. & 40. 15 *Eliz. Dyer* 322.

(*a*) Poſtea 67. b. Hob. 212. 1 Mod. Rep. 194.

(*b*) Cr. Car. 498. 1 Anderſ. 234. 1 Leon. 190. Hob. 212. Goldsb. 79. Carter 178.

(*c*) 2 Brownl. 179. 3 Leon. 265. Hob. 212.

(*d*) 1 Rol. 513. Hob. 211.

And as to the Caſe at Bar many Statutes were made for the true Making of Woollen Cloth, which is the principal Commodity of this Realm; and to the Intent that the ſaid Statutes might be the better executed without any Deceit, the ſaid Act of Common Council was made, that they ſhall be brought to *Blackwell-Hall*, as to a Place publick, and known, to the Intent they might be ſearched and viewed, if they were made according to the ſaid Statutes. So the ſaid Ordinance being made for the better Obſervation and Execution of the ſaid Laws, to prevent all Frauds and Falſities, was good (*e*) and allowable by the Law. Alſo the Aſſeſſing of the ſaid (*f*) 1 *d.* for Hallage was good, becauſe it was *pro bono publico*, and it was competent and reaſonable, having regard to the Benefit

(*e*) 1 Rol. 365. 3 Leon. 264, 265. Hob. 212. Moor 580. 2 Jones 145.

8 Co. 127 a. Pollexfen's Argument in Quo Warranto 81. Hardr. 56, 210. Lane 24. Bridg. 140, 141. 1 Rol. Rep. 115. (*f*) 8 Co. 127. b. 2 Brownl. 287, 288. Hard. 56, 210. Pollexfen's Argument in Quo Warranto 81. Trebie's Argument in Quo Warranto 33. Cro. Arg. 22. 1 Rol. 365.

which

(*a*) 11 Co. 54. a. which the Subject enjoyed by Reaſon of the ſaid (*a*) Ordinances, and ſuch Aſſeſſments being for the Maintenance of the publick Good, and not *pro privato lucro*; were maintainable by the Law; and it was not to be called a Burthen or Charge to the Subject when he reaps a Benefit by it. But it is like Pontage, Murage, Toll, and the like; as appears in 13 *H.* 4. 14. *b.* in which Caſes the Sum for Reparations of Bridges, Walls, *&c.* ought to be ſo reaſonable, that the Subject ſhall have more Benefit thereby than Charge.

Alſo the Penalty inflicted on the Offender, be he Citizen or Stranger, was lawful, the Offence being committed within the City, and the Sum being competent and proportionable to the Offence, and without a Penalty the Ordinance

(*b*) 3 Leon. 265. would be in vain; for (*b*) *Oderunt peccare mali formidine*

(*c*) 1 Rol. 366. *pœnæ*. And the Appointment of their (*c*) Chamberlain, being their publick Officer for Debts, to bring the Action of Debt was good, and allowable by Law; and the Ordinance being according to Law, may be put in Execution without

(*d*) 1 Rol. 363. any other Allowance, (*d*) notwithſtanding the Statute of 29 *H.* 7. *cap.* 7.

1 Sid. 284. Moor 580, 585. (*e*) Hardr. 55. 2 Brownl. 179, 278. 1 Rol. Rep. 5. Palm. 3.

And after great Deliberation *Wray* Chief Juſtice, by the Advice of the other Juſtices, granted a *Procedendo*. *Vide* 2 *(e) E.* 3. 7. *John de Brittain's* Caſe. The King may grant by his Charter, that all Manner of Ships coming to ſuch a Haven laden with Merchandizes, ſhall be unladen at a certain Place, and not elſewhere, to the Intent he may be better anſwered his Cuſtoms and other Duties.

CLARK's

CLARK's *Caſe.*

See Carth. 482, 483.

Trin. 38 Eliz.

In the Common Pleas.

IN an Action of falſe Impriſonment brought by *Clark* againſt *Gape*; the Defendant juſtified the Impriſonment, becauſe King *E.* 6. incorporated the Town of *St. Albans* by the Name of Mayor, *&c.* and granted to them to make Ordinances: And ſhewed, that the Queen appointed the Term to be kept there, and that they with the Aſſent of the Plaintiff and other Burgeſſes, did aſſeſs a Sum on every Inhabitant for the Charges in erecting the Courts there; and ordained, That if any ſhould refuſe to pay, *&c.* that he ſhould be impriſoned, *&c.* and becauſe the Plaintiff being a Burgeſs, *&c.* refuſed to pay, *&c.* he as Mayor juſtified; and it was adjudged no Plea, for this Ordinance is againſt the Statute of *Magna Charta, cap.* 29. *Nullus liber homo impriſonetur*; which Act hath been confirmed and eſtabliſhed above thirty Times, and the Plaintiff's Aſſent cannot alter the Law in ſuch Caſe: But it was reſolved, that they might have inflicted a reaſonable Penalty, but not Impriſonment, which Penalty they might limit to be levied by Diſtreſs, or for which an Action of Debt lay; * and the Plaintiff had Judgment.

1 Rol. 363, 366, 367, 599. 1 Jones 162. 8 Co. 127. b. 2 Bulſtr. 328. Stile 85. Moor 411, 412, 580. 2 Inſt. 54, 702. Cr. Argument 22. Bridg. 141, 142. 2 Brownl. 288. Hob. 61.

* Ante 62.

JEFFREY's

JEFFREY's *Caſe.*

Mich. 31 & 32 Eliz. Rot. 447.

In the Common Pleas.

MEmorandum, That upon *Monday* next after a Month of St. *Michael* in this Term, before the Lady the Queen at *Weſtminſter*, came *William Jeffrey*, Gent. in his proper Perſon, and informed the Court of the Lady the now Queen here, That whereas, according to the Law of the Land, and the Cuſtom of this Kingdom of *England*, Time whereof the Memory of Men is not to the contrary, within the ſaid Kingdom had and uſed, the Inhabitants and Reſidents within any Pariſh within the Kingdom aforeſaid, within which any Pariſh Church is, the ſaid Church, at their own proper Coſts, as often as need required, was repaired, and from the whole Time aforeſaid uſed to be, and ought to be repaired; and that every other Perſon or Perſons, inhabiting without the ſame Pariſh in any other Pariſh, from the Reparations thereof from the Time aforeſaid were diſcharged and acquitted: And whereas by the Law of the Land, and the Cuſtom aforeſaid, it is not lawful to any Perſon or Perſons to impoſe any Rate or Tax upon any Perſon not Dwelling in any Pariſh where ſuch Church to be repaired is, in reſpect, or by reaſon of any Lands or Tenements which the ſaid Perſon holdeth or occupieth in the ſaid Pariſh where the ſaid Church is to be repaired, as above is ſaid, for the Reparation of any Church ſo unrepaired, without his Conſent. And whereas alſo the Trial and Determination of the Cauſe aforeſaid is a Matter determinable at the Common Law, and not by the Laws or Cenſures Eccleſiaſtical any ways to be tried, ended, or diſcuſſed, nor uſed to be, Time whereof the Memory of Men is not to the contrary; yet *Abraham Kenſhley* and *Thomas Foſter*, Church-wardens of the Pariſh of *Hayleſham* in the County of *Suſſex*,

not being ignorant of the Premiſſes, falſely and ſubtilely pretending the aforeſaid *William Jeffrey* to be an Inhabitant within the Pariſh of *Hayleſham* aforeſaid, (whereas in Truth the aforeſaid *William Jeffrey* is, and was dwelling within the Pariſh of *Chiddingly* in the County aforeſaid, and never was dwelling within the Pariſh of *Hayleſham* aforeſaid) and the ſame Church of *Hayleſham* aforeſaid, by Tenants and Proprietors of Lands and Tenements within the ſame Pariſh behoved and ought to be repaired, endeavouring the Queen's Majeſty that now is, and her Regal Crown to diſinherit, and the Conuſance of Pleas, which to the ſaid Queen's Majeſty, and to her Regal Crown, and not to the ſpiritual Court doth belong, to draw to be determined in the ſpiritual Court; the ſaid *William Jeffrey*, in the ſpiritual Court aforeſaid, before Doctor *Drewry*, Doctor of Law in and throughout the whole Archdeaconry of *Lewis*, of the Reverend Father in Chriſt by Divine Providence, *Thomas* Lord Biſhop of *Chicheſter*, lawfully deputed, at the procuring of the ſame *Abraham* and *Thomas* in this behalf, of and for a certain Tax upon him the ſaid *William Jeffrey*, to and about the Reparations of the Pariſh Church of *Hayleſham* aforeſaid, impoſed, cauſed to be cited, and him the ſaid *William* in the ſpiritual Court aforeſaid, before the aforeſ ſpiritual Judge to appear, and him the ſaid *Will:* ſo appearing to anſwer to certain Articles of and for the Tax aforeſaid, that is to ſay, for that the ſaid *William Jeffrey*, knew, believed, and heard, that within the Archdeaconry of *Lewis* in the County aforeſaid, there was a Church commonly called the Pariſh Church of *Hayleſham*, and that the ſaid Pariſh Church as well in the Tiling as in the Covering thereof, as in other things needed and wanted, ſo that unleſs it were repaired, it was feared it would fall to Decay and Ruine: And that as well of common Right, and of an ancient and laudable Cuſtom, as alſo Time whereof the Memory of Men is not to the contrary, inviolably, and unqueſtioned, it was uſed and obſerved within the Pariſh of *Hayleſham* aforeſaid, That all and ſingular the Pariſhioners intending the Reparation of any Church unrepaired, according to the Rate and Quality of their Poſſeſſions, having and occupying in the ſame Pariſh, might or ought to impoſe a Rate or Tax; and alſo that the ſaid Church (mature Deliberation being had thereof) could not be ſufficiently repaired for a leſs Sum than Three Score and Ten Pounds of lawful Money of *England*. As alſo that the Church-wardens of the Pariſh Church of *Hayleſham* aforeſaid for the Time being, in the Year of our Lord 1589, and Two Years then laſt paſt, of and with the Conſent of all the Pariſhioners of *Hayleſham* aforeſaid, or the greater or better Number of the ſame, a Rate according to the Quantity and Qualities of the Poſſeſſions aforeſaid, and of the Rents within the ſaid Pariſh, being for the Reparation of the ſaid Church, of the Poſſeſſions aforeſaid, or Rents in the ſaid Pariſh of all and ſingular to be impoſed, and the ſame be taxed, had and

decreed, and had appointed a Day and Place for the Rate and Tax aforeſaid to be made; and that of the ſame Day in which the ſaid Rate ſhould be impoſed, Notice was given in the Pariſh Church of *Hayleſham* aforeſaid, to all the Pariſhioners aforeſaid, as alſo to Foreigners having Lands, Poſſeſſions, or Rents, in the Pariſh of *Hayleſham* aforeſaid, and alſo in the publick Market there. And that at the Time and Place appointed for the Impoſing of the aforeſaid Tax or Rate, thoſe Church-wardens, as alſo the Pariſhioners of the ſaid Pariſh, to the Rate and Tax aforeſaid to be made proceeded, and the Sum of Four Pence of every Acre of Land called *Marſhland*, as alſo the Sum of Two Pence of lawful Money of *England*, of every Acre of Land called *Upland*, within the Pariſh of *Hayleſham* aforeſaid being, for the Reparations of the aforeſaid Pariſh Church, by the Havers and Occupiers of the aforeſaid Acres were impoſed, to be paid to the Church-wardens of the aforeſaid Pariſh Church. As alſo that the ſaid *William* Thirty Acres of Marſh, called *Marſh Ground*, and one Hundred Acres of Land, called *Upland*, within the Pariſh aforeſ. held and occupied, or Rents for the ſame then received; and that the Sum from the Havers and Occupyers of the Poſſeſſions aforeſ. or Rents within the ſaid Pariſh of *Hayleſham* aforeſaid, did not extend unto above the Sum of Fifty Pounds of good and lawful Money of *England*, according to the Rate and Tax aforeſaid, to be levied and collected under the Name and Colour of their Office (as before is ſaid) of and upon the Premiſſes to anſwer him unjuſtly bound. And although the ſaid *William Jeffrey* the Matter aforeſaid above contained, in the ſpiritual Court aforeſaid, before the aforeſaid ſpiritual Judge, in his Diſcharge of the Premiſſes often had pleaded, alledged, and the ſame with inevitable Truth and good Witneſſes offered to prove, that he by the Law of the Land in Form aforeſaid ought not to be cited for the Payment of the aforeſaid Sum upon him the ſaid *William Jeffrey*, for the Reparations of the Church of *Hayleſham* aforeſaid, as before is ſaid, taxed, and for that the Tax aforeſaid for the Reparations of the Church aforeſaid, in the Caſe aforeſ. is a Matter determinable at the Common Law, and not in the ſpiritual Court; yet the ſame ſpiritual Judge to admit the ſame Plea and Allegation utterly refuſed; And the aforeſaid *Abraham* and *Thomas Foſter* him the ſaid *William Jeffrey*, in the ſpiritual Court aforeſaid in the Premiſſes to be condemned, and to the Payment of the aforeſaid ſeveral Sums of Money upon him the ſaid *William Jeffrey* for the Reparations of the Church aforeſaid, above in this behalf ſpecially impoſed and taxed; (which he by the Law of the Land (as before is ſaid) to pay for the Reaſon aforeſaid ought not, or is bounden to do) by the definitive Sentence of the ſaid ſpiritual Court with all his Strength endeavoureth and daily threatneth, in contempt of the now Queen, and to the Loſs, Prejudice, Impoveriſhing and manifeſt Grievance of him the ſaid *William*, as alſo contrary to the Law of the Land aforeſaid: And this the ſaid *Will. Jeffrey* is ready to aver; and humbly imploring the Aid and Aſſiſtance

of

of the ſaid Court of the ſaid Lady the now Queen here, demands Remedy; and the Writ of the ſaid Lady the Queen of *Prohibition* to the aforeſaid ſpiritual Judge, in Form aforeſaid to Prohibit him, that he the Plea aforeſaid, nor any thing touching the ſame before him he further hold not; and it is granted unto him, &c. And thereupon cometh *John Porter* of *Cheddingley* in the County aforeſaid of *Suſſex* Eſq; and *Thomas Aynſcomb* of *Buxſted* in the County aforeſaid, Gent. in their proper Perſons, and undertake for the aforeſaid *William Jeffrey*, That if it happeneth the aforeſaid *Abraham Kenſhley* and *Thomas Foſter* to the Court of the Lady the Queen hereafter to come, to demand the ſaid Queen's Writ of Conſultation, or otherwiſe, to ſue for Juſtice thereof and upon the Premiſſes, that then the ſaid *William* the ſaid Matter of Suggeſtion ſhould follow with Effect, until the Plea thereof by ſome lawful Means be ended, that is to ſay, each of the Bail aforeſaid upon the Penalty of Ten Pounds, which ſaid Sum of Ten Pounds the Bail aforeſaid acknowledged, and each of them acknowledged of their Lands and Goods, and of every of them to be levied to the Uſe of the ſaid Lady the Queen, if it ſhall ſo happen the ſaid *William* not to proſecute in form aforeſaid with Effect, &c.

JEFFREY's *Caſe.*

Mich. 31 & 32 Eliz.

In the King's Bench.

Cr. El. 659. Hob. 212. 1 Mod. Rep. 261 Hardr. 379. See 2 Jon. 122. 2 Showr. Wayte & German. Cumberb. 53, &c.

William Jeffrey Gent. brought a Prohibition againſt *Abraham Kenſhley* and *Thomas Foſter*, and declared that by the Law of this Realm, the Pariſhioners of every Pariſh where they are dwelling ought to repair their own Church, and not the Pariſhioners of any other Pariſh, *&c.* The ſaid *Thomas* and *Abraham* being Church-wardens of the Pariſh of *Hayleſham* in the County of *Suſſex*, had ſued the Plaintiff in the Spiritual Court before Doctor *Drewry* in the Dioceſe of *Chicheſter* for certain Monies impoſed on the ſaid *William Jeffrey* without his Aſſent for 30 Acres of Marſh, and 100 Acres of Land which the ſaid *William Jeffrey* had, and occupied in the ſaid Pariſh of *Hayleſham*, for the Reparation of the Church of *Hayleſham*, and had conſtrain'd him to anſwer to certain Articles, *ſcil.* that the ſaid Church was in Decay, and that it could not be repaired for leſs than 70 *l.* And that the ſaid Churchwardens of the ſaid Church for the Time being, *anno Dom.* 1589, and two Years before, with the Aſſent of the greater Part of the Pariſhioners of the ſaid Pariſh, *juxta quantitatem & qualitatem poſſeſſion' & reddit' infra dict' parochiam exiſten'*, determined and agreed to make a Taxation for the Repair of the ſaid Church; and that Notice of ſuch Meeting was given in the ſaid Church, and alſo proclaimed in the Market; and that at the Day ſo appointed, the Churchwardens and the greater Part of the Pariſhioners of *Hayleſham* who were there met together, made a Tax, *ſcil.* of every Acre of Marſh-Land 4 *d.* and of every Acre of Arable Land 2 *d.* to be paid by the Occupiers of them in *Hayleſham* aforeſaid; and that the ſaid *William Jeffrey* the ſaid 30 Acres of Marſh, and 100 Acres of Land occupied, or received Rent for them; and that all the ſaid Tax of the ſaid Town did not exceed the Sum of 50 *l.* And further declared, that the ſaid *Will. Jeffrey* was at the Time of the ſaid Tax, and long Time before, and yet is an Inhabitant of the Pariſh of *Chiddingly* within the ſaid County of *Suſſex*, and never did inhabit within the Par.

of *Hayleſham*; and that he had pleaded the ſaid Matter in the Spiritual Court, and the Judge refuſed to allow it. And on this Declaration, *Coke* of Counſel with the Defendant did demur in Law. And after many Arguments at Bar and Bench it was adjudg'd, That a Conſultation ſhould be granted. And in this Caſe theſe Points were reſolved.

1. That the Spiritual Court *(a)* has Conuſance *de reparatione corporis ſive navis Eccleſiæ*; and that appears by *Britton* who wrote in 5 *E.* 1. *lib.* 1. *c.* 4. *fol.* 11. and in the Stat. *de Circumſpecte agatis, &c.* but *in rebus manifeſtis errat qui authoritates legum allegat, quia perſpicue vera non ſunt probanda*, becauſe he who endeavours to prove them, obſcures them. And it was objected, 1. That the Reaſon why every Pariſhioner is charged to the Reparations of the Church, and to provide convenient Ornaments in it for the greater Convenience and Honour of Divine Service, is firſt for the Spiritual Comfort which he has in Hearing the Word of God there for his Inſtruction in the true Way to Heaven in Celebration of the Sacraments, and in preſenting to God their Prayers, not only privately, but with the great Congregation to be thankful to God for all his Benefits, and to deſire of him all Things neceſſary, *&c.* in Reſpect of which ineſtimable Benefits, he is chargeable to repair his own proper Church in which he receives them. But ſhall not be bound to the Reparat. of any other Church in another Pariſh in which he doth not inhabit. And the Deſcript. of this Word *(Parochia)* was obſerved, *Parochia eſt locus in quo degit popul' alicujus Eccleſ.*

(a) 2 Rol. 289.

(b) 2 Inſt. 487, 488, &c.

2. It was objected, That it would be hard to charge the ſaid *Jeffrey* to ſuch Tax, becauſe he was dwelling in another Town, and never conſorted with them of *Hayleſham* at any of their Aſſemblies or Aſſeſments for ſuch Purpoſes.

3. It was objected, That the Libel in the Spiritual Court againſt the ſaid *William Jeffrey* was in the Disjunctive, that the ſaid *William Jeffrey* occupied the ſaid Lands, or received Rent for them, on which Libel if *Kenſhley* and *Foſter* ſhould have a Conſultation, although *Jeffrey* doth not occupy the Lands himſelf, but a Farmer in *Hayleſham* who pays to him Rent, that yet *Jeffrey* might be charged, which would be againſt Law and Reaſon, and againſt the common Experience of all *England*. But it was anſwered and reſolved, firſt, That although the Houſe wherein *Jeffrey* dwelt be in another Pariſh, yet foraſmuch as he had Lands in the Pariſh of *Hayleſham* in his proper Poſſeſſion and Manurance, he is in Law *Parochianus de Hayleſham*. For the Place where he lies, ſleeps, or eats, doth not make him Pariſhioner only; but alſo foraſmuch as he manures Lands in *Hayleſham*, and by that is reſident upon it; that makes him

The Reſolution of the Court.

2 Rol. 289. Cr. El. 659, 843. 2 Rol. Rep. 262. 2 Inſt. 653, 702. Winch 53. 2 Brownl. 10. 1 Bulſtr. 20. 2 Saund. 423. Salk. 164. Comb. 313.

him a Pariſhioner of *Hayleſham* alſo as to this Purpoſe.

2. If in this Caſe *Jeffrey* ſhould not be charged to the Reparation of the Church of *Hayleſham*, for thoſe Lands which he himſelf occupies there, no Perſon would be charged for them, upon which great Inconvenience would enſue; for one who inhabits in the next Town, may occupy the greateſt Part of the Lands in another Town; and ſo Churches in theſe Days will come to Ruin: But it was reſolved, when there is a (*a*) Farmer of the ſame Lands, the Leſſor who receives Rent for them ſhall not be charged for them in Reſpect of his Rent, becauſe there is an Inhabitant and Pariſhioner who may be charged; and the Receipt of the Rent doth not make the Leſſor a Pariſhioner.

(*a*) 2 Rol. 289. Cro. El. 659. 2 Rol. Rep. 270.

3. In this Caſe the Charge is on the Perſon, and not on the Land, but is on the Perſon in Reſpect of the Land, for the more Equality and Indifferency. *Vide Regiſt.* 44. *b. inter conſultation'. Conſultatio ad procedend' contra parochianos ſuper emendationem corporis ſive navis Eccleſ. &c. ubi prohibitio de laico feodo prius porrecta fuit*, which is to be intended when the Tax was of the Perſon in Reſpect of his Lay-Fee.

4. Altho' he dwells in another Town, yet foraſmuch as in Judgm. of Law he is an Inhabitant and Pariſhioner of *Hayleſham*, he may come, if he will, to the Aſſemblies of the Pariſhioners of *Hayleſham*, when they meet together for ſuch Purpoſes: And Sir *Chriſt. Wray* Ch. Juſtice ſaid, That foraſmuch as the Conuſance of the Reparations of Churches doth belong to the Spiritual Court, it was neceſſary to hear the Opinion of thoſe who profeſs the Eccleſiaſtic' Law as to this Point; and ſo it was done. And thereupon divers of them under their Hands in Writing did certify their Opinions, That *Jeffrey* by their Law was a Pariſhioner of *Hayleſham* as to this Purpoſe, and chargeable to the Reparations of the (*b*) Church of *Hayleſham*: And that the Churchwardens and greater Part of the Pariſhioners (on ſuch general Warning) met together, might make ſuch a Tax by their Law, and that it don't charge the Land but the Perſon in Reſpect of the Land, for Equality and Indifferency.

(*b*) 1 Mod. Rep. 194. Hob. 212 Antea 63. a.

5. As to the Objection, that the Libel was in this Diſjunctive, *&c.* It was anſwered and reſolved, That altho' the (*c*) Libel be ſo, yet the Defendants ſhould have a ſpecial Conſultat. only in Reſpect of ſuch Lands which the ſaid *W. Jeffrey* at the Time of the ſaid Tax had in his own Hands, and ſo much the rather becauſe the ſaid *Jeff.* has confeſſed in his Declarat. on the ſaid Prohibit. that he himſelf, at the Time

(*c*) Hob. 115. 193.

of

of the ſaid Tax, &c. had the ſaid Lands in his own Occupation. And a ſpecial Conſultation was awarded: And this was the firſt leading Caſe that ever was adjudged and reported in our Books as to this Matter.

And afterwards *Paſch.* 41 *Eliz.* between *Paget* and *Baump* in the King's Bench in the Time of *Popham* Ch. Juſtice, the Point came again in Queſtion on a like Tax, a Prohibition being obtained; after many Arguments and great Deliberation, at length on View of the Record of this Caſe at Bar, which was adjudged in the Point, it was reſolved again by *Popham* Chief Juſtice and the whole Court, that a Conſultation ſhould be granted according to this Judgment; and now it is generally allowed and received for Law. Cr. El. 659.

Note Reader, This is a good Caſe to many Purpoſes, and therefore obſerve well the Conſequences of it.

The Lord CHEYNEY's *Caſe.*

See Skin. 207. Lucas's R. 99.

Mich. 33 & 34 Eliz.

In the Court of Wards.

SIR *Thomas Cheyney* Knt. Lord Warden of the Cinque Ports, 1 *Eliz.* made his Will in Writing, and thereby deviſed to *Henry* his Son divers Manors, and to the Heirs of his Body, the Remainder to *Thomas Cheyney* of *Woodley*, and to the Heirs Male of his Body, on Condition *that he or they, or any of them ſhall not alien, diſcontinue, &c.* And it was a Queſtion in the Court of Wards, between Sir *Thomas Perot* Heir general to the Lord Warden, and divers of the Purchaſers of Sir *Tho. Cheyney*, if the ſaid Sir *Tho.* ſhould be received to prove by Witneſſes, that it was the Intent and Meaning of the Deviſor to include his Son and Heir within Moor 727, 728. Wing. Max. 15.

theſe Words of the Condition (*he or they*) and not only to reſtrain *Thomas Cheyney* of *Woodley* and his Heirs Males of his Body: But *Wray* and *Anderſon* Ch. Juſtices, on Conference had with other Juſtices reſolved, That he ſhould not be received (*a*) to ſuch Averment out of the Will, for the Will concerning Lands, *&c.* ought to be in Writing, and the Conſtructions of Wills ought to be collected from the (*b*) Words of the Will in Writing, and not by any Averment out of it; for it would be full of great Inconvenience, that none ſhould know by the written Words of a Will, what Conſtruction to make, or Advice to give, but it ſhould be controlled by collateral Averments out of the Will: But if a Man has (*c*) two Sons both baptized by the Name of *John*, and conceiving that the Elder (who had been long abſent) is dead, deviſes his Land by his Will in Writing to his Son *John* generally, and in Truth the Elder is living; in this Caſe the Younger Son may in Pleading or in Evidence alledge the Deviſe to him; and if it be denied, he may produce Witneſſes to prove his Father's Intent, that he thought the other to be dead; or that he at the Time of the Will made, named his Son *John* the Younger, and the Writer left out the Addition of the Younger: For in 47 *E.* 3. 16. *b.* the Caſe was; *Robert Peynel* had Iſſue two Sons baptized by the Name of *William*, and (*d*) levied a Fine to Sir *John Fanningbridges* and others *come ceo, &c.* who granted and rendered to *Robert* and *William* his Son generally; and after the Death of *Robert*, *William* the younger Son brought a *Scire facias* againſt the Heir of *William* the Elder; and the Younger by the Rule of the Court averred that the Fine was levied to make him Heir *priſt, &c.* and upon that Iſſue was taken. And no Inconvenience can riſe if an Avernm. in ſuch Caſe be taken in Caſe of a Deviſe, by Will, for he who ſees ſuch Will, whereby Land is deviſed to his Son *John*, cannot be deceived by any ſecret inviſible Averment; for when he ſees the Deviſe to his Son *John*, he ought at his Peril to inquire which *John* the Teſtator intended, which may eaſily be known by him who wrote the Will, and others who were privy to his Intent; and if no direct Proof can be made of his Intent, then the Deviſe is void (*e*) for the Incertainty, as the Render alſo would be in the ſaid Caſe of the Fine, as to *William*, for the Law will not make the one or the other by Conſtruct. inheritable, for neither the Elder Son ſhall have it by Courſe of Law, becauſe the Elder need not have an Addit. nor ſhall the Younger have it by Conſtruct. by reaſon the Father need not have limited the Land to the Elder, becauſe the Land after the Death of the Father would deſcend to the Elder. But he ſhall have it whom the Father intended to advance with it, and for want of Proof of ſuch Intent, the Will or the Render for the Incertainty (as hath been ſaid) is void; and ſo the Doubt in 11 *H.* 6. 13. well explained.

(*a*) 1 Rol. 422. Wing. Max. 15.

(*b*) 4 Co. 4. a. Latch 42. Jenk. Cent. 115. Cr. El. 498. Moor 222. 2 Bulſtr 177, 178. Bridg. 135. Godb. 432. Lit. Rep. 188. Hutt. Arg. 49, 50. Stile 293, 294. Wing. Max. 22. Raym. 410, 411. 2 Leon. 70. 1 Brownl. 132, 191. Salk. 235.

(*c*) 1 Brown 132. Stile 293. Moor 105. 2 Leon. 217. Swinb. 108. Hob 32. 1 Sal. 7.

(*d*) 8 Co. 155. a. Br. Noſm 63. Cr. Eliz. 531. B. F ne 28. F. N. Coffm. 56. Keilw. 49. a.

(*e*) 1 Bulſtr. 62. Swinb. 108.

CASES

CASES of USURY.

BURTON's *Caſe.*

Mich. 33 & 34 Eliz.

In the King's Bench.

IN a Replevin brought by *Humphrey Burton* againſt *H. H.* he avowed, becauſe *Thomas Woodhouſe* Eſq; was ſeiſed of the Place where, *&c.* containing 10 Acres in *Hicklyn* in the County of *Norfolk*, *inter alia*; and ſo ſeiſed 17 *Julii anno* 21 *Eliz.* by his Deed granted to *A. G.* Eſq; a Yearly Rent of 20 *l.* iſſuing out of the Place where, *&c. inter alia*, to perceive to him and his Heirs at the Feaſts of the Nativity of Chriſt and St. *John Baptiſt*, Yearly to be paid; The firſt Payment to begin at the Feaſt of the Nativity of Chriſt, which ſhall be *in Anno Domini* 1580. And afterwards *A.* by Deed acknowledged before Juſtices of Peace, and Clerk of the Peace of the ſaid County, and enrolled according to the Statute, did bargain and ſell the ſaid Rent to the Defendant and his Heirs, who for the Rent behind did avow: The Plaintiff in Bar of the ſaid Avowry, pleaded the Statute of Uſury, and alledged, that the ſaid 17 *Julii, anno* 21. *inter eoſdem Thomam Woodhouſe, & A. G. taliter concordatum fuit per viam corruptæ barganiæ,* ſcil. *quod prædictus A. mutuo daret præfat' Thomæ Woodhouſe centum libras, & quod idem Thomas concederet* to the ſaid *Anthony* and his Heirs the Rent of 20 *l.* under Condition, That if the ſaid *Thomas* ſhould pay to the ſaid *A.* 100 *l.* 17 *Julii* 1580. that then the ſaid Rent ſhould ceaſe; on which corrupt Agreement *Thomas* there then received the ſaid 100 *l.* and there then granted the ſaid Rent accordingly

37 H. 1. c. 9.
13 El. c. 8.
Co. Lit. 3. b.

ingly under ſuch Condition as is aforeſaid, according to the ſaid Agreement; *Qui quidem annuus redditus pro præd' 100 l. in forma præd' ſolubil' excedit ſecundum rat' 10 l. pro 100 l. pro uno anno, contra formam Statuti, &c.* and conveyed a Leaſe of the Land to the Plaintiff for 21 Years. And note the Diſtreſs was taken 27 *Decemb. anno* 33. for 20 *l.* behind at *Midſummer* then paſt; upon which the Avowant did demur in Law; and Judgment was given for the Avowant. For altho' it was objected, That the Plaintiff in his Bar to the Avowry hath alledged, that the ſaid Grant was on a corrupt Contract againſt the Statute, and the Avowant hath demurred thereupon, by which he hath confeſſed all Matters in Fact; yet becauſe on the Matter diſcloſed in the Bar, it appears to the Court, that it was not a corrupt Contract againſt the ſaid Statute, and ſo his Allegation of it repugnant to the Matter ſhewed by himſelf in his Bar to the Avowry; and a Demurrer is not a Confeſſion of all Matters in Fact, but of all ſuch Matters in Fact which are well and ſufficiently pleaded; for this Cauſe Judgment was given for the Avowant.

1 Brownl. 124. Co. Lit. 72. a. Hob. 56, 164, 199. Cr. Arg. 10. Hutt. Arg. 57. 3 Co. 52. b. Doct. pl. 116.

And the Cauſe that it was not againſt the Statute of Uſury was, That nothing was to be paid by *Thomas Woodhouſe* the Grantor within a Year and a Quarter after the Grant made; for within the 17th of *July* 1579, and *Chriſtmas* 1580, no Rent is appointed to be paid. And if the Grantor had paid the 100 *l.* the 17th of *July* 1580, the Rent ſhould ceaſe without any Thing paying for the ſaid 100 *l.* So that the Court ſaid, it was a plain Bargain, and Purchaſe conditional of ſuch Rent, and no Uſury. It was in the Election of the Grantor to have paid the ſaid 100 *l.* and to have fruſtrated the Rent, ſo that the Grantee (as the Nature of Uſury is) was not aſſured of any Recompence for the Forbearance of his 100 *l.* for a Year, and the ſaid Rent of 20 *l. per Annum* is but a Penalty to the Grantor, and Aſſurance to the Grantee for the Payment of the ſaid 100 *l.* But it was reſolved by the whole Court, That if it had been agreed between the Grantor and the Grantee, that notwithſtanding ſuch Power of Redemption, that the 100 *l.* ſhould not be paid at the Day, and that the Clauſe of Redemption was inſerted to make an Evaſion out of the Statute, then it had been an uſurious Bargain and Contract within the ſaid Statute. For if in Truth the Contract be uſurious againſt the Statute, no Colours or Shews of Words will ſerve, but the Party may ſhew it, and ſhall not be concluded or eſtopped by any Deed, or any other Matter whatſoever; for the Statute gives Averment in ſuch Caſe.

1 Bulſt. 36, 37. Cr. Jac. 253, 509. Cr. El. 27, 28. 1 Jones 410. Hard. 418. 1 Sid. 28, 132. Co. Lit. 3. b. Poſtea 70. b.

2 And. 15, 16. Poſtea 70. a.

And *Popham* Ch. Juſt. ſaid, If *A.* comes to *B.* to borrow 100 *l.* *B.* lends it him, if he will give him for the Loan of it for

for a Year 20 *l.* if the Son of *A.* be then alive, this is Uſury within the Statute; for if it ſhould be out of the Statute for the Incertainty of the Life of *A.* the Statute would be of little Effect: And by the ſame Reaſon that he may add one Life, he may add many; and ſo like a Mathematical Line, which is *diviſibilis in ſemper diviſibilia.* Noy 151. Hard. 418. Cr. Jac. 209, 253, 508, 509. Cr. El. 643.

CLAYTON's *Caſe*.

See Skin. 107.

Paſch. 37 Eliz. Rot. 1915.

In the Common Pleas.

BEtween *Reighnolds* Plaintiff, and *Clayton* Defendant, in an Action of Debt on a Bond of 60 *l.* the Caſe was, *Clayton* requeſted *Reighnolds* to lend him 30 *l.* and on Communication betwixt them, *Reighnolds* doth lend *Clayton* 30 *l.* 6 *Decemb.* 34 *Eliz.* until the ſecond Day of *June* next following, to pay him for the Principal and Loan of it 33 *l.* at the ſaid ſecond Day of *June*, if the Son of the Obligee be then alive; and if he die before the ſaid Day, that then he ſhall pay him but 27 *l.* which was 3 *l.* leſs than the Principal. And it was reſolved by the whole Court, That it was an uſurious Contract within the Statute, according to the Opinion of *Popham* Chief Juſtice before, and for the Reaſons there given by him, *Uſura dicitur ab uſu, & ære, quaſi uſuæra, i. e. uſus æris: Et Uſura eſt commodum certum, quod propter uſum* Co. Ent. 168. pl. 42. 2 And. 15, 16. Moor 397. 1 Bulſtr. 36, 37. Palm. 547. Moor 397. 2 And. 15, 16. Cr. Jac. 209, 252, 253, 508, 509. Co. Lit. 3. b. Antea 69. b. 1 Sid. 28, 182. 3 Inſt. 151.

uſum rei (*vel* æri) *mutuatæ recipitur.* And this Deſcription agrees with this Judgment: For if on the firſt Contract he who lends reſerves no certain Sum for the Loan; but *ſecundario ſperet de aliqua retributione ad voluntatem ejus qui mutuatus eſt, hoc non eſt vitioſum. Vide Glanvile lib.* 7. *cap.* 16. & *lib.* 10. *cap.* 1. what was the old Law of this Land concerning Uſury. *Vide etiam Leges Sancti Edwardi, &c.*

HOE's *Caſe.*

Paſch. 34 Eliz.

In the King's Bench, Rot. 275. *in Debt.*

(*a*) Cr. El. 579, 580. Goldsb. 166, 167, &c. Moor 469.

(*b*) 2 Bulſt. 231, 286. Poph. 136. Goldsb. 168. Moor 469. Winch 56. Cr. El. 580. Cr. Jac. 171, 401, 451, 623. 10 Co. 48. a. 51. a. Hutt. 12, 17. 1 Sid. 141. Co. Lit. 265. b.

(*c*) 1 Rol. Rep 256, 311, 386. 1 Co. 111. b. Co. Lit. 274. b. 1 Salk. 327.

IN an Action of Debt brought by (*a*) *Hoe* in the King's Bench, *Phelix Marſhal* was bail for the Defendant; and afterwards before any Judgment, the Plaintiff releaſed to *Phelix* all Actions, Duties, and Demands; and afterwards Judgment was given againſt the Defendant, and on Default of the Defendant a *Scire fac.* iſſued againſt *Phelix Marſhal*, who pleaded the ſaid general Releaſe; upon which the Plaintiff demurr'd. And it was adjudged that this (*b*) Releaſe ſhould not bar the Plaintiff; for the Words of the Bail are conditionally, that is to ſay, *Si contingeret prædict' defendentem debitum & damnum ill' præfat' quer' minime ſolvere, aut ſe priſonæ Mareſchall' ea occaſione non reddere, &c.* ſo that there can be by the ſaid Bail no certain Duty till Judgment be given, for before that none can know to what Sum the Debt and Damages will amount: So he who is Bail for the Def. is not bound in any certain Sum at firſt: But his Recognizance being general, ſhall be reduced to a Certainty by the Judgment, and not before; and therefore there is a (*c*) Difference between a certain Duty on Condition ſubſequent, for that may be releaſed before the Day of

of Performance of the Condition, and a Duty uncertain at firſt, and on Condition precedent to be made certain after; that in the mean Time is but a meer Poſſibility, and therefore cannot be releaſed; for this Recogniſance doth not create a Duty preſently, but ſhall produce a Duty after on a *Contingat.*

Note, That it was adjudged, *Trin.* 4 *Eliz. Rot.* 1207. in the Common Pleas, That by a Releaſe of all Actions, Suits, and Quarrels, a (*a*) Covenant before the Breach of it is not releaſed, becauſe there is not any Cauſe of Action, nor any certain Duty before the Breach of it, but the Breach of it ought to precede the Action, and the Cauſe of the Duty; and for this Cauſe ſuch Releaſe was no Bar. *Vide Dyer* 5 *Eliz.* (*b*) 217. *acc.* And *vide Littleton* in his Chapter of (*c*) Warranty 170. That by a Releaſe of all Demands a Warranty (which is a Covenant real) as is there ſaid, is extinct, yet it is executory and incertain; but there the Feoffee to whom the Warranty is made may preſently have a *Warrantia Chartæ*, and bind the Land *pro loco & tempore.* But ſee 35 *H.* 8. *Dyer* 57. that by a Releaſe of (*d*) Covenants, the Covenant is diſcharged before the Breach of it, which is proved by *Littleton* alſo, *fol.* 170. *&c.* 16 *E.* 3. *Barr.* 245. A Woman had Title of Dower, and releaſes to him in the Reverſion, and afterwards Tenant for Life ſurrendred to him, and it ſeemed a good Bar; and yet the Woman had no Cauſe of Action againſt him in the Reverſion at the Time of the Releaſe made. But the Reaſon is becauſe the Woman had Right to the Land, and he in the Reverſion had an Eſtate on which a Releaſe might enure, and by Recovery of her Dower his Eſtate would be charged, 21 *H.* 7. the laſt Caſe. A Releaſe in Time of (*f*) Vacation to the Patron, diſcharges an Annuity with which the Parſon is charged in Reſpect of the Parſonage. *Vide* 40 *E.* 3. 22. 18 *E.* 3. *Avowry* 77. 13 *R.* 2. *Avowry* 89. 14 *H.* 4. 4. *Recordare longe.*

[*See the Caſe of* Thorpe *verſ.* Thorpe, 1 Salk. 171, &c. *and* Rogers, *v.* Wood, Lucas 87.]

(*a*) 1 Co. 112 b. 8 Co. 153. b. 10 Co. 51. b. Co. Lit. 291. b. 292. b. Cr. Jac. 170. Moor 34. 2 Bulſt. 231. Yelv. 156. Hutt. 17. And. 8. Goldsb. 166, 167. (*b*) 8 Co. 151. b. 153. b. 4 & 5 Eliz. Dy. 217. pl. 2. N. Bendl. 126. pl. 190. 1 And. 8. Co. Ent. 115. pl. 5. Goldsb. 160, 167. Hutt. 12. Cr. Jac. 487. Yelv. 156. (*c*) 1 Co. 112. b. 8 Co. 154. a. Lit. ſect. 748. Lit. 171. a. Co. Lit. 392. b. Cr. Jac. 170. (*d*) Poph. 136. Hutt. 17. 1 Co. 112. b. 10 Co. 51. b. Palm. 218. Yelv. 156. 2 Rol. 404.

(*e*) 1 Co. 112. b. 8 Co. 151. a. b. 154. a. Co. Lit. 265. a. Doctrin. placit. 149. (*f*) 21 H. 7. 41. a. Br. Releaſe 33. Br. Dean and Chapter 11. 1 Co. 112. b. Poſtea 81. b. 2 Rol. 340. Co. Lit. 266. a. Fitz. Releaſe 57.

SEINT

3 Salk. 217.

SEINT JOHN's *Caſe.*

Trin. 34 Eliz.

In the King's Bench.

Cr. El. 821, 822.

Gardener had a Judgment in the King's Bench againſt one *Seint John* of the County of *Bedford*, and had a *Capias ad ſatisfaciend'* againſt him, and got a Warrant from the Sheriff to a ſpecial Bailiff to arreſt him, who came near the ſaid *Seint John*'s Houſe to arreſt him, and becauſe he feared Reſiſtance, he brought with him a Dagge. And *Seint John* being then a Juſtice of Peace of the ſaid County of *Bedford*, having Notice of it, ſent one of his Servants for him, who finding him armed with a Dagge arreſted him, and brought him before the ſaid *Seint John* being the next Juſtice of Peace; who on Examination of the Matter committed him to the next Gaol, there to remain till he had paid 10 *l.* one Moiety to the Queen, and the other Moiety to the Informer, according to the Statute of 33 *H.* 8. *cap.* 6. which prohibits *the Shooting in, or carrying,* &c. *of any Hand-gun.* And it was objected, that a Dagge was not within this Word *Hand-gun*; for it was ſaid, That Dagges were not in Uſe at the Time of the Making of the ſaid Act, but invented after; and although they are uſed with the Hand, yet it is not known by the Name of *Hand-gun*, no more than *Hagbut*, or *Demyhake*, which were alſo uſed with the Hand, but notwithſtanding are known by particular Names, and are not comprehended within this Word *Hand-gun*: For they are both particularly named with the Hand-gun in the Stat. So a Dagge is diſtinguiſhed by ſpecial Name from a Hand-gun. Wherefore for both theſe Reaſons, 1. That it was not in Uſe at the Time of the Making of the Act; 2. That it was known by a ſpecial Name, it was objected, that this Carrying of the ſaid Dagge was not within the ſaid Act. But it was reſolved by the whole Court, that it was within the ſaid Stat.

and comprehended within this Word *Hand-gun*; for altho' no Gun was known by the Name of a Dagge at the Time of the Making of the ſaid Act, and altho' in common Speech a Dagge is known by a ſpecial Name, yet foraſmuch as he who made the Dagge, had his Invention from the Hand-gun, and it is not of any new Kind in Subſtance, but has only a little Alteration in Form and Quality, for this Cauſe it is comprehended within this Word *Hand-gun*; for if a little Alteration or Addition ſhould defeat the Penalty of the Act, the Statute would be of ſmall Effect. And it has been explained by ſundry Proclamations, That Piſtols, Dagges, &c. were within the ſaid Act: And it was ſaid, That where the ſaid Act doth prohibit Croſs-bows, thereby Stone-bows are alſo prohibited, *cauſa qua ſupra*. And the Preamble of the ſaid Act ſpeaks of a little Hand-gun. But it was reſolved for another Cauſe, That the Carrying of this Dagge was not prohibited by the ſaid Act; for the Sheriff, or any of his Miniſters, for the better Execution of Juſtice, may carry with them Hand-guns, or other Weapons invaſive or defenſive, and the ſame is not reſtrained by the general Prohibition of the ſaid Act. *Vide* 3 *H.* 7. 1. *a.*

Cr. El. 822. Hard. 484. 3 Inſt. 160. Cr. El. 822. Cr. El. 822.

[*Note*; *the Authority of this Caſe ſeems to have been queſtioned in that of the* Q. *v.* Burnaby, Trin. 3 Annæ, 3 Salk. 217. *But affirmed by* Holt *Chief Juſtice*. *Q.*

Williams's *Caſe.*

Mich. 34 & 35 Eliz.

In the King's Bench.

Salop.

Cr. El. 664.
1 Rol. 110.
Skinner 399.
6 Mod. 46.

Thomas Williams Eſquire brought an Action on the Caſe in the King's Bench againſt *Henry Jones* Clerk, and declared, whereas the ſaid *Henry* being Vicar of *Alderbury in Comitat' prædict'*, ought and is bound by himſelf or by another Chaplain to celebrate Divine Service at *Wollaſton* in his Chapel of St. *John* within the Scite and Precinct of his Manor of *Wollaſton* aforeſaid, and within the Pariſh of *Alderbury* aforeſaid, there of antient Time built, every *Sunday per annum*, and every Feaſt-Day *per annum*, before Noon of the ſame Days, and to adminiſter the Sacraments to the ſaid *Thomas, hominibus, tenentibus & ſervientibus ſuis infra præcinctum ejuſdem manerii inhabitan' & commoran': Idemq; Hen' Vicarius & omnes prædeceſſ. ſui Vicarii Eccleſiæ paroch' de Alderbury præd', a tempore cujus contrarii memoria homin' non exiſtit, per ſeipſum vel hujuſmodi Capellanum ad celebrand' divina ſervitia in forma prædicta in Capella præd', ac ſacrament & ſacramentalia præſat' Thom' Williams & anteceſſor' ſuis, ac omnibus illis quorum ſtatum idem Thomas modo habet, ac hominibus ſervientibus, & tenentibus ſuis infra dictum ſcitum manerii præd' commorantibus, per totum annum miniſtrand' vel adminiſtratur' annuatim exhibere & ſuſtentare conſueverunt: Prædictus tamen Henricus Jones nunc Vicarius Eccleſiæ parochialis de Alderbury præd, per ſeipſum vel hujuſmodi Capellan' divinum ſervitium in Capella præd' in forma præd', ac ad Sacramenta & ſacramentalia eidem Thom' ac hominibus, ſervient', & tenent' ſuis ibidem in forma præd' miniſtrand', licet ſæpius requiſit', per magnum tempus, videlicet, a feſto Penteceſt' ultim' præterit' ante exhibition' hujuſmodi billæ, uſque exhibition' hujuſmodi bill', exhibere & ſuſtentare recuſavit, unde dicit quod deterioratus eſt, &c.* And the Defendant

Def. pleaded, Not guilty, and was found Guilty: And after divers Motions in Arreſt of Judgment, and the Matter well debated at the Bench, at laſt it was reſolved by *Popham* Chief Juſtice, and the whole Court, that in this Caſe an Action on the Caſe (*a*) did not lie, but the Remedy which the Plaintiff has is to ſue in the Spiritual Court: But if the Chapel had been (*b*) private only for himſelf and his Servants and Family within the ſaid Manor, there a private Action on the Caſe on the Preſcription would be maintainable by the Lord of the Manor, *&c.* for in ſuch Caſe he himſelf only (and none of his Family) ſhould have the Action; and altho' the divine Service be ſpiritual, yet forasmuch as it doth by Preſcription belong to a private Perſon, and to be celebrated for his Eaſe within his Manor, which ſhall be intended to begin at firſt by Grant; therefore for the not doing of this ſpiritual Service an Action on the Caſe lies, and Damages ſhall be recover'd for them; and therewith agrees 22 *H.* 6. 46. in the Prior of (*c*) *Wooburn's* Caſe. But when the Chapel is not (*d*) private to him and his Family, but publick and common to all * his Tenants of the ſame Manor, which may be many and of great Number; there no Action on the Caſe lies for the Lord; for then every of his Tenants might alſo have his Action on the Caſe as well as the Lord himſelf, and ſo infinite Actions for one Default, *Et* (*e*) *boni Judicis eſt, lites dirimere, &* (*f*) *expedit reipublicæ ut ſit finis litium propter communem omnium utilitatem*; and yet they ſhall not be without Remedy in ſuch Caſe, for (as it hath been ſaid) they may and ought to ſue for ſuch Default in the (*g*) ſpiritual Court, and there it ſhall be redreſſed, and herewith agrees *Lit. lib.* 2. *cap. Frankalmoigne* 30 *b. Vide* † 27 *H.* 8. 27. *a.* A Man ſhall not have an Action on the Caſe for a Nuſance done (*h*) in the Highway, for it is a common Nuſance, and then it is not reaſonable that a particular Perſon ſhould have the Action; for by the ſame Reaſon that one Perſon might have an Action for it, by the ſame Reaſon every one might have an Action, and then he would be puniſhed 100 Times for one and the ſame Cauſe. But if any (*i*) particular Perſon afterwards by the Nuſance done has more particular Damage than any other, there for that particular Injury, he ſhall have a particular Action on the Caſe: And for common Nuſances, which are equal to all the King's Liege-people, the common Law has appointed other Courts for the Correction and Reforming of them, *ſcil.* Tourns, Leets, *&c.* (*k*) 5 *E.* 4. 2. *b. acc. Vide* 2 *E.* 4. 9. *a.* See alſo *Salk.* 12, 16. 6 *Mod.* 46, *&c. ib.*

(*a*) 3 Keb. 428. 9 Co. 112. b. Cr. El. 664. 1 Rol. 110. 1 Sid. 34.
(*b*) 1 Rol. 110. Lit. Rep. 95.
(*c*) 22 H. 6. 46. b. 47. a. Fitz. Action ſur le Caſe 12. Br. Action ſur le Caſe 61. Br. Juriſdiction 43.
(*d*) 1 Rol. 110. Lit. Rep. 95. * 2 Sid. 174.
(*e*) 4 Co. 15. b. 5 Co. 31. a.
(*f*) 8 Co. 37. b. 98. b. 6 Co. 7. a. 9 Co. 79. b. Co. Lit. 103. a. 2 Inſt. 411. 11 Co. 69. a. 3 Bulſtr. 98. Hard. 128. Godb. 242.
(*g*) Lit. Sect. 136. Co. Lit. 96. a. Br. Action ſur le Caſe 6. † 2 Rol Rep. 26. Br. Action ſur le Caſe 6. Br. Chimin 1. Br. Nuſance 1.
9 Co. 112. b.
(*h*) Co. Lit. 56. b. 1 Rol. 88. Cr. El. 664. 2 Jones 157. Moor 180. 9 Co. 113. a. 1 Show. 243, 255. 3 Mod. 289. Salk. 12. Comb. 180.
(*i*) Co. Lit. 56. a. Cr. El. 664. Cr. Jac. 446, 478, 491. Noy 120. Moor 180. 9 Co. 113. a. Poſtea 104. b. 2 Rol. Rep. 26. Br. Action 6.
(*k*) Cr. Car. 185. Br. Action ſur le Caſe 93. Br. Nuſance 29. 9 Co. 112. b.

The Caſe of the Orphans of London.

Paſch. 35 Eliz.

In the King's Bench.

2 Rol. 313. 2 Inſt. 660. March 107. 4 Inſt. 249.

NOTE it was reſolved by the whole Court, That if any Orphan of *London*, who is by the Cuſtom of *London* under the Government of the Mayor and Aldermen of the ſaid City, ſues in the Eccleſiaſtical Court, or in the Court of Requeſts, *&c.* for any Goods, Monies, or Chattels due to them either by the Cuſtom of *London*, or by any Deviſe or Legacy in the Will of their Anceſtor, or to have an Account; that a Prohibition will lie, becauſe the Government of the Orphans of the City of *London* doth appertain to the Mayor and Aldermen of *London*, and they have Juriſdiction of them. And *Popham* Chief Juſtice ſaid, That if the Lord of a Manor has Probate of Wills within his Manor, if any ſuch Will be to be proved in the Eccleſiaſtical Court, a Prohibition lies, becauſe the Juriſdiction belongs to another; otherwiſe the Party may have double Trouble. And I have ſeen two Precedents of Prohibitions granted on the ſaid Cuſtom of the Orphans of *London*.

2 Rol. 313. 5 Co. 16. a. Caudry's Caſe.

[Note; *In many Manors they have by Cuſtom the Probate of Wills at this Day, which proves that ſuch Probates did not originally belong to the Spiritual Courts, but is an Uſurpation on the Common Law.*]

WYMARK's *Case*. 6 Mod. 233.

Mich. 35 & 36 Eliz.

In the King's Bench.

ABEL Dun brought an *Ejectione firmæ* againſt *William Law*, and declared of a Leaſe made by *Richard Sleford*, 9 *Nov.* 34 *El.* of a Houſe, &c. in *Northluffenham* in the County of *Rutland*, for three Years: The Defendant pleaded, That *ante præd' tempus quo*, &c. the ſaid *Richard Sleford* was ſeiſed in Fee of the Tenements aforeſaid; and 9 *Maii* 32 *El.* by his Deed indented and inrolled within 6 Months according to the Statute, *Quod quidem ſcriptum indentat' hic in (a) cur' profert*, &c. bargain'd and ſold the ſaid Tenements to *Edward Wymark* Gent. in Fee, by which and by Force of the Statute he was ſeiſed, till by the ſaid *Sleford* diſſeiſed, who made the Leaſe in the Declaration mentioned, on whom the Defendant by the Commandment of *Edward Wymark* enter'd, &c. To which the Plaintiff replied and confeſſed the Bargain and Sale by the ſaid Deed inrolled to the ſaid *Wymark*, *Modo & forma prout*, &c. *Et idem Abel ulterius dicit, quod in eodem ſcripto indentato, proviſ. exiſtit modo & forma ſequentibus videlicet, quod ſi præd' Edwardus Wymark*, &c. do not pay 300 *l.* 2 *Nov.* 1592. to *Sleford*, &c. that then the ſaid Bargain and Sale ſhall be void; and ſhewed the Breach of the Condition and Re-entry, and the Leaſe made to the Plaintiff, and the Ejectment *prout* in the Declaration, without that, that the ſaid *Sleford* diſſeiſed the ſaid *Edw. Wymark*, &c. on which the Defendant did demur in Law. And ſhewed this Cauſe according to the Statute (*b*) becauſe the Plaintiff in his Replication did not ſhew forth the Deed indented, which comprehend the Condition. And after good Debate and Conſideration of the Matter in Law, it was adjudged for the Plaintiff. And in this Caſe two Points were reſolved by *Popham* Chief Juſtice, and the whole Court.

Co. Ent. 190. pl. 4. 1 Rol. 751.

(*a*) Lane 320.

(*b*) 10 Co 94 a b. Co. Lit. 72. a. 27 El. cap. 5.

1. When any Deed is ſhewed in Court, the Deed by Judgment of Law doth remain in Court (*a*) all the Term in which it is ſhewed; but at the End of the Term, if the Deed be not denied, then the Law doth adjudge it to be in the Cuſtody of the Party to whom it belongs; for the whole Term in Law is but one (*b*) Day, and therefore it ſhall be intended to remain in Court all the Term in which it is ſhewed, but when the Term (*c*) is cloſed and ended, then there is no Officer in ſuch Caſe to whom the Cuſtody of it by the Law belongs; and therefore the Party who ſhewed it ſhall have the Keeping of it: For a Man's Evidences are as the Sinews of his Land. And where it appears by 38 *H.* 6. 2. *a. b.* that becauſe the Deed in another Term is in the Cuſtody of the Party, and not in Court, the Defendant ſhall not have (*d*) *Oyer* of it; and therewith agree 4 *H.* 7. 18. & 21 *H.* 7. 30. *b.* Alſo *vide Lit. fol.* 88. *b.* if the Tenant in Aſſiſe pleads a Feoffment by Deed-Poll of the Plaintiff, and ſhews it in Court, in this Caſe (*Lit.* (*e*) ſaith) that foraſmuch as the Deed is in Court, the Feoffee may ſhew to the Court, how that in the Deed there are ſeveral Conditions, *&c.* but that is to be intended, that he ſhall take Advantage of the Condition in the Deed, in the ſame Term that it was pleaded and ſhewed forth. And therewith agrees 24 *E.* 3. 73. *b.* that when a Deed is in Court one may take Advantage of it without having it in Hand, 38 *E.* 3. 8. *a.* & 40 *Aſſ. pl.* 34. *acc'.* and in 45 *E.* 3. Tit. *Feoffm.* & (*f*) *Faits.* In Aſſiſe againſt ſundry Tenants, ſome pleaded as to one Parcel the Deed of the Anceſtor of the Pl. to them with Warranty ſhewed forth in Court; and ſome other of the Tenants as to other Parcels pleaded in Bar by the ſame Deed without having it in Hand; and it was challeng'd, for that the Deed ought to be ſhewed the Court againſt one, the other could not have Advantage of the ſame Deed without ſhewing it; & *non allocatur*. Note when the Deed is by one ſhewed to the Court, it is not reſpective as to him, but all others ſhall take Advantage thereof, 21 *E.* 4. 49. *a.* in the Abbot of *Waltham*'s Caſe. If (*g*) Letters Patent be inrolled in any Court of Record, one may plead them in the ſame Court without ſhewing them, notwithſtanding that they were not pleaded before: And Difference was taken between Letters Patents or other Matters of Record, which of their own Nature are of Record, and Matter in Fact; for although a Deed be inrolled in Court, (*h*) one cannot plead it in the ſame Court without ſhewing it. *Vide* 19 *H.* 6. 6. *b.* 19 *E.* 4. 9. *b.* 22 *H.* 8. *Record Br.* 65. But if a Deed be pleaded and ſhewed in Court, (*i*) and denied, then it ſhall remain in Court for ever; for if it ſhall be found not his Deed, it ſhall be (*k*) damned. 41 *Aſſ.* 29. 12 (*l*) *H.* 4. 8. *a. b.* 7 *H.* 4 (*m*) 39. *b.* 11 *H.* 4. (*n*) 73. *b.* 45 *E.* 3. 11. *a.* And if a Deed be denied in one Court, by which

(*a*) Co. Lit 231 b. 8 Co. 156. b. 157. a. Poſtea 76. b.

(*b*) 4 Co. 71. a. Godb. 433.

(*c*) Co. Lit. 231. b. 1 Co. 1. b. 9 Co. 17. b. 11 Co. 50. b.

(*d*) Doct. pl. 271. Goldsb. 150. Bt. Laches 17. Br. Oyer de Records, &c. 16. Br. Contin. 74. Fitz. Monſt. de faits, &c. 98

(*f*) Fitz. Feoffments & faits 55.

(*g*) Br. Monſtr. de faits, &c. 124 Br. Plead. 110. in fine. Palm. 87.

(*h*) Br. Monſt. de faits 123.

(*i*) Co. Lit. 231. b. Salk. 215.

(*k*) 6 Co. 45. b

(*l*) Fitz. Monſt. de faits 129. Br. Monſtr. de faits 38. Br. faits 20

(*m*) 6 Co. 45. b. Br. Faits 16.

(*n*) 6 Co. 45. b. Br. Faits 19. Br. Obligat. 22. 6 Co. 45. b.

Oyer of the Writ 6 Mod. 27. poſt. 76. b.

which it remains there, this Deed may be *(a)* pleaded in another Court without ſhewing it, 12 *(b) H.* 4. 8. *a. b.* & 43 *E.* 3. 27. *a. acc'.* for *(c) lex non cogit ad impoſſibilia.* Note a good Caſe in 42 *E.* 3. 18. *a.* where the Caſe was, That a *(d)* Feme ſole made a Leaſe for Life, the Leſſee committed Waſt, the Husband releaſed and delivered the Deed to a 3d Perſon to be delivered to the Def. on certain Conditions performed; the Defendant performed the Conditions, the Husband got the Releaſe, and detain'd it from the Leſſee, and he and his Wife brought an Action of Waſt; the Leſſee on this ſpecial Matter ſhall plead it without ſhewing of it forth. *Vide* 10 *E.* 3. 40. *a.* If Husband and Wife be impleaded in a real Action, where the Default of the Wife is the Default of both, if the Demandant takes the Wife of the Tenant from him, it ſhall not turn the Tenant to a Default. So in Dower, Detinue of Charters, &c. by the Demandant is a good Plea. 20 *H.* 7. 5. Tenant by Statute-Merchant, or Staple, &c. ſhall not ſhew the Deed, for he comes to the Poſſeſſion of the Land by Proceſs of *(e)* Law, againſt the Will of him who has the Deed, and has no Means to come to it; otherwiſe of a Leaſe for Life or Years, &c. Becauſe he comes in by the Leſſor, and might have taken a Covenant, or other Security for his peaceable Enjoying of the Land let to him. And in Caſe when the Deed is denied, *(f)* the Law, which has appointed the Deed to remain in Court, has alſo appointed an Officer to have the Cuſtody of it, and that is the *Cuſtos (g) Brevium*, as appears in *F. N. B.* 243. *L.*

(a) Co. Lit. 231. b.
(b) Fitz. Monſt. de faits 129. Br. Monſt. de faits 38. Br. Faits 29.
(c) Co. Lit. 92. a. 231. b. Hard. 387.
(d) Statham Waſt 5. Fitz. Briet 554. Fitz. Monſtr. de faits 139.
(e) 10 Co. 40. b. Cr. Car. 209. 442. Cr. Jac. 209. 317. Co. Lit. 225. b.
(f) Co. Lit. 231. b.
(g) F. N. B. 243. L. Co. Lit. 231. b.

2. It was reſolved, That the Courſe of the King's Bench is, that although the Plaintiff after the Bar pleaded has Day to reply two or three Terms after, no Mention ſhall be made in the Roll of any Imparlance or Continuance, but when he replies, the Entry ſhall be *ut ſupra*; *Et præd' Abel dicit quod ipſe per aliqua per ipſum Williel' ſuperius placit' ab actione ſua præcludi non debet*, &c. But otherwiſe it is of a Bar there, for that contains the Imparlance or Continuance, and is in ſuch Form, *Et modo ad hunc diem*, ſcil. *diem Veneris*, &c. *iſto eodem termino, uſque quem diem præd' Willielmus habuit licentiam interloquend'*; but no ſuch Entry is made on any Replication, Rejoinder, &c. by which it ſhall be intended, when they are generally entered on Record, that they were made in the ſame Term, in which the Bar, &c. was pleaded; and by Conſequence the Plaintiff in the Caſe at Bar may take Advantage of the Condition compriſed in the Deed ſhewed forth by the Defendant.

CLIFTON's *Caſe.*

Mich. 35 & 36 Eliz.

In the Common Pleas.

Dy. 25, 214. 6 Co. 37. Fitz. Waſt. 62, 117, 146. Fitz Judgment 85, 134, 255. Fitz. Damage 7, 22, 42, 52, 92, 113, 114. 1 Inſt. 53, 54, 200, 247. 355. F. N. B. 59. 2 Inſt. 299. Reg. 23. Raſt. Entr. 689.

IN a Writ of Waſt between *Tho. Southcote* Eſq; Pl. and *John Clifton* Defendant, the Form of the Writ was ſuch; *Si Thom' Southcote Arm' fecerit, &c. ſummon' Johannem Clifton quod ſit, &c. quare cum, &c. idem Johannes de terris, domibus, boſcis & gardinis in Otterie, quæ tenuit ad vitam Margaretæ nuper uxor' ſuæ, in jure ipſius Margaret' de præfat' Tho' ex dimiſſione quam idem Thomas inde fecit præfat' Margaret', & cuidam Petro Carew Militi quond' viro ſuo, ad vitam eorundem Petri & Margaret', fecit vaſtum, venditionem & deſtructionem, ad exhæreditationem ipſius Thom', & contra formam proviſion' prædict', ut dicitur, &c. & habeas, &c. Teſte* 8 *Februar' anno* 35.

And it was reſolved by the whole Court in the Common Pleas, that the ſaid Writ doth not lie; for the Recital of the Writ is, *Quare cum de communi conſilio Regni noſtri Angl' proviſum ſit, quod non liceat alicui vaſtum, venditionem, ſeu deſtructionem facere de terris, &c. ſibi demiſſis ad terminum vitæ vel annorum, &c.* And in this Caſe the Husband had not any Eſtate for Life in this Land, but the Wife had the Eſtate for Life, and the Husband had it only in her Right, and ſo he is not within the ſaid Act; and therefore (*a*) if a Woman Tenant for Life takes Husband who commits Waſt, and the Wife dies, the Husband ſhall not be puniſhed for this Waſt.

(*a*) 1 Rol. 351. 2 Rol. 827, 833. 834. Cr. El. 357. 2 Inſt. 301. Co. Lit. 54. a. Co. Ent. 703. pl. 9. 707. b.

Note, Reader, this Judgment given on Conſideration of the Stat. of *Glouceſter cap.* 5. and of the Opinions *obiter* in 10 *H.* 6. 11 & 12. by *Strange* and *Coteſmore*, 46 *E.* 3. 25. 46 *E.* 3. Waſte in *Statham.*

PILKINGTON's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

BEtween *Pilkington* (*a*) Plaintiff, and *Haſtings* and others Defendants in Replevin, it was reſolved by the whole Court, That when a Diſtreſs is taken for Damage-feaſant, that the Party may tender Amends till the Cattle are (*b*) impounded, but after they are in the Cuſtody of the Law, then the Tender comes too late. *Vide* 13 (*c*) *H.* 4. 17. & 27 *E.* 3. 88. And ſo it was adjudged *Trin.* 33 *Eliz.* between *Nevil* (*d*) and *Segrave.*

2. It was reſolved, That Tender of Amends to the Bailiff (*e*) is not good, for he cannot deliver the Diſtreſs once taken, no more than he can change the Avowry of his Maſter, or demand Rent on a Condition of Re-entry.

(*a*) Co Ent 602. pl. 17. Cr. El. 813.
(*b*) Cr. El. 332, 813. 8 Co 147. b. Herl. 16. 1 Brownl. 173. 2 Inſt. 107. Lit. Rep. 34.
(*c*) Cr. El. 813.
(*d*) Cr. El. 332, 813. 1 Rol. Rep 258
(*e*) Cr. El. 813. Cr. Jac. 377. 1 Rol. Rep. 258. 2 Rol. Rep. 172. Hob. 154. 1 Brownl. 173

The Earl of Pembrook's *Caſe.*

Mich. 35 & 36 Eliz.

In the King's Bench.

IN an Action on the Caſe brought by the Earl of *Pembrook* againſt Sir *Henry Barkley*, for interrupting him of certain Walks in the Foreſt of *Selwood*; the Def. pleaded a Grant of them by the ſaid Earl to the Lord *Maur. Berkley* in Tail by Deed ſhewn forth. It was held by *Popham* Ch. Juſtice,

Cr. El. 384, 486 560. 2 And. 20. Goldsb. 130. Poph. 116. Hardr. 49. Moor 706.

Oyer of the Writ, &c. Antea 74. b. Doct. pl. 118. 6 Mod. 27. 3 Ley. 50. Farſſley 9.

Juſtice, and the whole Court, that in the ſame Term the Plaintiff may pray that the Deed be entered *in hæc verba*, and afterwards he may demur, or take Iſſue at his Pleaſure; but in another Term the Deed ſhall not at his Prayer be entered *in hæc verba*, although he would demur on it, for then the Deed is out of Court: And afterwards the Deed on the Prayer in the ſame Term was entered *in hæc verba*; the Earl pleaded, that *ulterius per ſcript' prædictum proviſum fuit*, (without ſhewing forth any Part) becauſe the Deed was entered *in hæc verba, quod nota*, good Policy. And the Earl ſhewed the Condition and the Breach of it: *Nota bene.*

[*See in this Caſe in* Popham 116, *&c. many Things touching Covenants, Conditions, &c.*]

PAGET's *Caſe.*

Mich. 35 & 36 Eliz.

In the Common Pleas.

(a) 2 Co. 92. b. Cr. Jac. 688. 10 Co. 44. b. 11 Co. 81. b. Allein 82. 1 Jones 51. F.N.B. 58. c. 59. h. 50 E. 3. 4. a. 1 Rol. 377. 2 Rol. 199, 829 2 Inſt. 301. Lit. Rep. 256. Winch 79 Moor 18. Go. Lit. 54. a. 299. b. Vide Herlakynden's Caſe in the 4th Part of my Reports acc' Lewis Bowl's Caſe 11 Co. 81. b. (b) 4 Co. 62, 63. (c) 4 Co. 62. b. 11 Co. 48 b. 81. b. Cr. Car. 242, 243, 274. 2 Rol. 119 Q. Ben 113, Palm. 327. Moor 19. 3 Rol. Rep. 181. 10 H. 7. 2. b.

BEtween *William Paget* Eſq; Plaintiff, and *Edward Cary* and *Elizabeth* his Wife Defendants in Waſt, in the Common Pleas, it was reſolved, that if there be (a) Tenant for Life, the Remainder for Life, the Remainder in Fee, if Tenant for Life doth Waſt in Trees, and afterwards he in the Remainder for Life dies, the Action of Waſt is maintainable for Waſt done in the Life of him in the Remainder for Life, for it was to the Diſinheritance of him in the Remainder in Fee; and now the Impediment, which was the mean Eſtate for Life is taken away. *Et remoto impedimento emergit actio.* And as it was there ſaid, ſo it was adjudged in 9 *Eliz.* The ſame Law, if he in the Remainder for Life after the Waſt ſurrender his Eſtate to him in the Remainder or Reverſion in Fee. And where it was objected, That at the Time of the Waſt, it could not be to the Damage of him in the Remainder in Fee, in Reſpect of the mean Eſtate for Life: To that it was anſwered and reſolved, when the Tree is ſevered, the (c) Property thereof belongs to him in the Remainder in Fee; and ſo where it is ſaid in ſome Books that he in the Remainder

or

or Reverſion in Fee ſhall not have an (*a*) Action of Waſte, it is to be intended during the Continuance of the mean Remainder; and where in other Books it is ſaid, That in ſuch Caſe the Action of Waſte well lies, it is to be intended after the Death of him in the Remainder for Life. *Quia cum aliquid impeditur propter unum, eo remoto, tollitur impedimentum:* And ſo all your Books are well reconciled. *Vide* 11 *E.* 3. *Receit* 118. 4 *E.* 3. 18. *b. Cotte*'s Caſe, 33 *E.* 3. *Waſt (b)* 114. 5 *E.* 3. 3. 10 *E.* 4. 9. *a. F. N. B. (c)* 58, 59. and the Writ in the *Regiſter*, 74. *b.* and the *Nota* there, *fol.* 75.

(*a*) 1 Rol. 377.

(*b*) 33 E. 3: Fitz. Waſt 144.
(*c*) F. N. B. 58. c. 59. b.

BOOTH's *Caſe.*

Trin. 36 Eliz. Rot. 1546.

In the Common Pleas.

GEorge *Booth* brought an Action of Waſte againſt *Skevington*, and declared that Sir *William Booth* demiſed for Years to *Enſor*, who aſſigned it to *Skevington*. The Defendant pleaded an Aſſignment to *Elizabeth Cave*, before which Aſſignment no Waſte done; The Plaintiff in his Replication ſhewed the Stat. of 11 *H.* 6. *cap.* 5. and that the Grant to *Elizabeth Cave* was to the Intent, that he might not know againſt whom to bring his Action of Waſte; and averred that he took the Profits; The Defendant rejoined, that *Elizabeth Cave* granted her Eſtate to *A.* who demiſed to the Defendant at Will, without that, that he granted to the Intent, &c. on which the Plaintiff demurr'd in Law. And in this Caſe three Points were reſolved.

Co. Ent. 697. pl. 5. 2 Anderſ. 23, 24, &c. Co. Lit. 54. a. 2 Inſt. 302. F. N. B. 59. a. Dyer 8.

1. That altho' the Words of the ſaid Act are, That where Ten't for Life or Years have leaſed or granted their Eſtate, to the Intent that thoſe in Rev'n, *ſcil.* their Leſſors, their Heirs or Aſſignees may not know their Names; and afterwards the firſt Ten'ts continually occupy thoſe Lands, &c. and commit Waſte, &c. it is ordained and eſtabliſhed, that he in the Reverſion

verſion in ſuch (*a*) Caſe ſhall maintain a Writ of Waſte againſt the ſaid Tenants for Life or Years. And there is Proviſo for the firſt Tenants. Yet it was reſolved, that every Aſſignee of the firſt Leſſee mediate or immediate is within the ſaid Act: For the Statute was made to ſuppreſs Fraud and Deceit, and therefore ſhall be taken beneficially.

(*a*) 2 Rol. Rep. 246. F. N. B. 59. c. Co. Lit. 54. a. 2 Inſt. 302. Lit. Rep. 106. (*b*) Co. Lit. 54. a. 2 Rol. Rep. 246. (*c*) Doctrin. placit. 354. Cawly 35. (*d*) Doctrin. placit. 346, 350. Br. Parner de Profits 18. Br. Traverſe per, &c. 180. Br. Peremptory 40. Fitz. Maintenance de Brief 38. (*e*) Fitz. Maintenance de Brief 31, 32, &c.

2. It was reſolved, that he in (*b*) Remainder is within the ſaid Act, as well as he in Reverſion, becauſe in equal Miſchief yet the Preamble and the Body of the Act ſpeak only of him in Reverſion.

3. It was reſolved, that (*c*) the Intent aforeſaid was not traverſable in this Caſe but the Pernancy of the Profits, for that was a Thing notorious, whereof the Country might have Knowledge, and in the Pernancy of the Profits, the Intent is implied. *Vide* 4 *H.* 7. 9. *a.* in *Formedon*, the Tenant pleaded Nontenure, the Demandant ſaid, that he made a Feoffment to Perſons unknown to defraud him of his Tenancy, and took the Profits: The Pernancy of the Profits, (*d*) and not the Feoffment is traverſable. See 1 *E.* 4. 2. 4 *E.* 4. 17, 29, 30. & 38. (*e*).

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1 Salk. 74, 76, 574. Fitzgib. 54.

SALMON's *Caſe*.

Trin. 36 Eliz. Rot. 877.

In the King's Bench.

1 Rol. 243. Co. Ent. 3. pl. 4. Cr. El. 432. Moor 359. Lit. Rep. 30.

SALMON brought an Action on the Caſe on *Aſſumpſit*, and declared, that whereas Controverſies were between the Plaintiff and Defendant concerning divers Lands in *D.* The Defendant in Conſideration of 6 *d.* aſſumed and promiſed to pay 200 *l.* to the Plaintiff, if the Defendant did not perform the Award of *J. S.* &c. which *J. S.* made an Award, That the Defendant ſhould enter into a Bond to the Plaintiff, that the Plaintiff and *Elizabeth* his Wife ſhould enjoy the ſaid Land, &c. which he had not done; on which the Defendant demurr'd. And it was adjudg'd againſt the Plaintiff; and the Reaſon and Cauſe of the Judgment was, becauſe the Award was void for the Incertainty;

certainty; (*a*) for it doth not appear of what Sum the Bond ſhould be, for the Arbitrators are Judges of the Caſe; and their Judgment and Award ought to be certain, ſo that thereby the Controverſy be decided; and that it ſhould not for the Incertainty be a Cauſe of new Controverſy. And the Arbitrators cannot (*b*) aſſign their Power over, but they themſelves ought to determine it, and therefore neither the Plaintiff nor the Defendant can aſſeſs the Sum. But it was agreed that if *I.* covenants with *B.* to enter into a Bond to him for the enjoying of ſuch Land, and does not expreſs what Sum, he ſhall be bound in ſuch Sum, as amounts to the (*c*) Value of the Land, as it is agreed in 10 *E.* 3. 18. If a Man grants an Annuity to one of 10 Marks till he be promoted to a convenient Benefice, the Law will expound it to be of the Value of the (*d*) Annuity or more; but the Reaſon of that is, becauſe it is the Act of the Covenantor himſelf, which cannot be void; but it is otherwiſe in the Caſe at Bar. Alſo the Award was void as to the Wife, for ſhe was (*e*) a Stranger to the Submiſſion. * *Nota bene.*

(*a*) Cr. Eliz. 432. Moor 359. Hardr. 45, 46. Style 56. 1 Rol. 263. Jenk. Cent. 340. March Arbitrament 163, 164, 192. 2 Rol. Rep. 214. Palm. 84, 146. Yelv. 98. Cr. Jac. 314, 315.

(*b*) Cr. El. 432.

(*c*) Cr. El. 432.

(*d*) Cr. El. 432.

(*e*) 1 Rol. 243, 247, 259. Cr. El. 4, 432. Moor 3, 359. Cr. Car. 226. 1 Rol. Rep. 270. Kelw. 43. a. 3 Leon. 62. 2 Sand. 293, 337. Hutt. 9. Hardr. 46. Yelv. 98. Hetley 5. Styl. 39. Godb. 12, 13. 10 Co. 131. b. 6 Mod. 244.

[* Quære, *if a Husband's Aſſent to a private Act of Parliament for alienating his Eſtate ſhall bar the Wife of her Dower, ſhe being no Party to the* Act, *which being private, is but in Nature of an* Award, ut ſupra. *And no private Act ſhall bind other than Parties. See* 8 Co. 138. *Sir* Francis Barington's, &c. ib. Nota poſt 80. b.]

GRAY's

See Lucas's Rep. 223.

GRAY's *Caſe.*

Hill. 37 Eliz. Rot. 601.

In the King's Bench.

Co. Ent. 573. pl. 4. Cr. El. 405, 546. Cr. Car. 533. Cart. 88. 1 Rol. Rep. 121, 123. Lit. Rep. 295. 1 Sand. 320.

IN *Replevin* between *Gray* and *Fletcher*, in Bar of the Avowry for Damage-feaſance, the Plaintiff by Cuſtom intitled himſelf to have Common of Paſture in the Place where, *&c.* to his Copyhold, which Cuſtom was traverſed. And it was found that he ought to have the ſame Common, but that every Copyholder had uſed to pay Time out of Mind, *&c. Pro eadem communia unam gallinam, & quinque ova annuatim.* And it was adjudged, that on this Verdict the Plaintiff ſhould have Judgment; for the Plaintiff need not ſhew more then makes for him, and that is of his Part. And the Doubt was, what Remedy the Terre-tenant ſhould have for the Hens and Eggs; for if the Terre-tenant has no Remedy for them, then the Commoner ſhould have his Common *ſub modo, ſcil.* paying ſo much, *&c.* and then it would be againſt the Pl. But if the Terre-tenant has a good Remedy for the Hens and Eggs, then as the Verdict is found, it is not *modus communiæ, ſcil.* a Manner of Commoning, nor Parcel of the Iſſue as to the Common, but a collateral Recompence to be paid for the Common, whereof every one has equal Remedy. And *Popham* Chief Juſtice ſaid, that it was adjudged in a *Devonſhire* Caſe, That where a Man preſcribed to have Pot-water out of the River, *&c.* and the Jury found that he ought to have it paying 6 *d.* Yearly. And it was adjudged that he had failed of his Preſcription, for he had preſcribed abſolutely, and the Jury had found it conditionally, or *ſub modo.* And there if he did not pay the Money he ought not to take the Water, and the Terre-tenant in ſuch Caſe might diſturb him, which is all the Remedy that the Terre-tenant had. But in the Caſe at Bar, the Terre-tenant may diſtrain

Cr. El. 405, 563. Doct. pla. 103. Hob. 42.

Cr. El. 405. Hob. 42. Doct. pla. 103. Godb. 238. Winch 22.

the Cattle of the Commoner on his own Land for the Hens and Eggs; and therewith agrees 26 *H.* 8. 5. But in the Caſe at Bar, if the Jury had found, that the Plaintiff ſhould have Common paying ſo many Hens and Eggs, the Iſſue had been found againſt him, becauſe it is Parcel of the Cuſtom: But in the Caſe at Bar, the Cuſtom as to the Commoning is perfect without the ſaid Payment, and the Payment doth not limit or qualify the Cuſtom, but it is a Recompence for the Common, for which Recompence the Terre-tenant has Remedy. But if the Terre-tenant had no Remedy for the Recompence, as in the Caſe put by the Chief Juſtice, but only to *make the ſaid Diſturbance*, as is aforeſaid, then the ſaid Manner of Payment (although it be found as it is in the Caſe at Bar) is Parcel of the Cuſtom. Note a good Difference. And the like Judgment was given in the Common Pleas, *Paſch* 37 *Eliz. Rot.* 723. between *Lovelace* and *Reighnolds*, *quod vide* there. *Vide* 10 *E.* 4. 17. *F. N. B.* 107. *a.* 15 *E.* 3. *Aſſiſe* 111.

Cr. El. 546.

Q.

Cr. El. 546, 563.

2 And. 67, 68.

FITZ-

Note.

FITZHERBERT's *Caſe.*

Paſch. 37 Eliz.

In the King's Bench.

Co. Lit. 366. b. 567. a. Cr. Car. 483, 484. 1 Jones 397, 398, &c. 3 Co. 78. a. Moor 469.

THE Caſe in Effect was; Tenant for Life, the Remainder to his Son and Heir apparent in Tail by Covin and Agreement between him and *A.* and *B.* to the Intent *to bar his Son of his Remainder* by a collateral Warranty made a Leaſe for Years to *A.* who made a Feoffment to *B.* in Fee, to whom the Father releaſed with Warranty, and all this by Covin and Conſent between the Parties, to the Intent aforeſaid; and afterwards the Father died, and the Warranty deſcended on the Son being then of full Age. And it was reſolved by *Popham* Chief Juſtice and the whole Court, that this Warranty ſhould not bar the Son; for the Feoffment of the Leſſee for Years is a Diſſeiſin, and the Father himſelf is *particeps criminis*, and agreeth to it; and then although the Releaſe with Warranty is made after the Diſſeiſin, yet for as much as the Diſſeiſin was to that Intent and Purpoſe, the Law will adjudge on the whole Act; as it is agreed in 19 *H.* 8. 12. *b.* If a Man diſſeiſes another to the Intent to make a Feoffment with Warranty, altho' he makes the Feoffment 20 Years after the Diſſeiſin, yet the Law will adjudge on the whole Act, and the Diſſeiſin and the Warranty ſhall be coupled together, according to the Intent of the Parties; and therefore in ſuch Caſe the Law will adjudge the Warranty to commence by Diſſeiſin, although they be made at ſeveral Times. As if a Man makes a Leaſe of Lands in two ſeveral Counties, reſerving one intire Rent, although the Livery be made at ſeveral Times, firſt in one County, and then in the other, yet the Rent is iſſuing out of the Lands in both Counties; ſo if a Man makes a Charter of Feoffment with Warranty, and delivers the Deed, and afterwards makes Livery of the Land *ſecundum formam chartæ*, now the Law will judge on the whole Act, and although the Deed was delivered at one Time, and the Livery of the Land at another Time; and although a Warranty ought

Cr. Car. 483, 484. 5 Co. 78. a. Co. Lit. 367. a. 1 Jones 397, 398.

Q. Skinner 72.

to enure on an Eſtate, yet on the whole Matter the Warranty is good.

2. It was reſolved, that although the Diſſeiſin was to the Father himſelf who made the Releaſe; yet foraſmuch as the Father agreed and conſented to the Diſſeiſin, and he who made the Warranty procured the Diſſeiſin, it ſhould not (*a*) hinder, but that the Warranty doth commence by Diſſeiſin, for *conſentientes & agentes pari pœna plectentur. Vide Litt.* 151. in his Chapter of *Remitter*. If the Husband diſcontinues (*b*) the Wife's Right, all is one as to a Remitter, as if they procure or aſſent to a Diſſeiſin, and afterwards take a Feoffment of the Diſſeiſor, or as if they themſelves had diſeiſed the Diſcontinuee; and ſo are the Books in (*c*) 44 *E.* 3. 46. *a.* 18 *H.* 8. 13. 11 *E.* 4. 2, &c.

(*a*) Co. Lit. 466. b.

(*b*) Co. Lit. 357. a. Lit. ſect. 678. 3 Co. 78. a.

(*c*) Lit. 152. b. (*c*) Perk. ſect. 394, 395. Plowd. 51. a. 3 Co. 78.

3. Altho' the Diſſeiſin was not made immediately to the Son who is to be bound by the Warranty; yet foraſmuch as this Diſſeiſin was a Wrong to him, and did deveſt his Remainder out of him, it ſhould not hinder, but that the Warranty commences by Diſſeiſin. And ſo is the Book in 31 *E.* 3. *Warranty* (*d*) 28. where one Brother made a Gift in Tail to another, the Uncle diſſeiſed the Donee, and made a Feoffment with Warranty; the Uncle died, and the Warranty deſcended on the Donor, and afterwards the Donee died without Iſſue; the Donor brought *Formedon* in the Reverter, and the Feoffee pleaded the Feoffment with Warranty, the Demandant avoided it, becauſe it began by Diſſeiſin, and yet the Diſſeiſin was to the Donee and not to the Donor; but by the Diſſeiſin a Wrong was done to him, and his Reverſion by it was deveſted. In this Caſe *Popham* Ch. Juſt. ſaid, That this very Point was in Queſtion between *Pawlet* and *Putenham*, and *Pawlet* who was in the Remainder enjoyed the Land. And by great Advice it was reſolved, that he was not barr'd by the Warranty: But it was not adjudged. *Vide* Reader the Books 14 *E.* 3. *Warranty* 5. *Temp. E.* 1. *Warranty* 86. 27 *E.* 3. 89. 12 *Aſſ. p.* 9. 4 *Ma. Dyer* 148, &c. and the Stat. of *Gloceſt. c.* 3. and the Stat. of 11 *H.* 7. *c.* 20. (*f*) That the Releaſe with Warranty of Tenant by the Curteſy, Tenant in Dower, or Tenant for Life to the Diſſeiſor was a collateral Warranty by the Common Law, and ſhould bind the Heir: But that is to be intended when there was not any *Covin or Colluſion* to make Diſſeiſins. But after Diſſeiſins made without Covin there ſuch Releaſe in Caſe of Tenant by the Curteſy, or Husband ſeiſed in Right of his Wife before the Statute of *Gloceſter*; or of Tenant in Dower, or in Jointure, before the Statute of 11 *H.* 7. (*g*) was a Bar, as a Releaſe by another Tenant for Life is at this Day. But a Releaſe at this Day by Tenant for Life made to a Diſſeiſor, or any other without Covin; and yet to the Intent to bar him in the Reverſion, ſhall bar him; for Intent without Covin and

(*d*) Co. Lit. 366. b. 3 Co. 78. a. Br. Fauxifier de Recovery 6. Br. Colluſion 10. Br. Dower 15. Fitz. Dower 42.

(*e*) Co. Lit. 366. b. 367. a.

Br. Judgm. 153, 248. 1 Inſt. 326. b. 381.

(*f*) Co. Lit. 365. b.

(*g*) Co. Lit. 326. b. 365. b.

Diſſeiſin

Diſſeiſin ſhall not avoid the Warranty. As if the Father in the Caſe at Bar had made a Feoffment in Fee with Warranty, and died, this Warranty ſhould bind the Son, altho' it was made of Purpoſe to bar him; for there was not any Diſſeiſin; and therefore ſuch Warranty cannot be avoided by Averment of Covin, becauſe there was not any Diſſeiſin in the Caſe; for a Warranty commencing by Wrong ſhall not be avoided, but a Warranty which commences by Diſſeiſin. And altho' it is ſaid in our Books (and it is true) That Warrantles are much favoured in Law, becauſe they extend to eſtabliſh him who is Terre-tenant in Poſſeſſion; yet when they are mixt with Covin, which is ſo odious, and ſo much abhorred in Law, the Warranty loſes not only its Favour, but its Force alſo: For Covin is like Poiſon, which will infect all the good Things wherewith it is mixt.

Co. Lit. 366. a. 1 Co. 66. b.

Note.

Note, Reader, a good Reſolution, for if ſuch covenous Invention ſhould be allowed in Law, every Father, or other Anceſtor, who on Conſideration of Marriage, or other good Conſideration has aſſured and eſtabliſhed his Lands after his Death to his Heir apparent, might *by ſuch covenous and ſiniſter Device diſinherit his Heir apparent*, which would be full of great Inconvenience.

FOORD's *Caſe.*

Paſch. 37 Eliz.

In the Common Pleas.

BEtween *Bettisford* and (*a*) *Foord* in Replevin, the Caſe was ſuch; The Prebendary of *Kingſton* in the County of *Dorſet* in the Cathedral Church of *Salisbury* in the Time of King *H.* 8. made a Leaſe of the ſaid Prebend for 70 Years. The Biſhop, Patron of the ſaid Prebendary, and the Dean and Chapter, by their ſeveral Inſtruments under their common Seal (reciting the ſaid Leaſe) confirm'd *dimiſſionem prædictam in forma prædict' fact' pro termino* 51 Years *tantum, & non ultra.* And afterwards the ſaid Prebendary made another Leaſe to begin after the Determination of the firſt Leaſe, *&c.* And whether the firſt Leaſe ſhould continue after the 51 Years, *viz.* Whether the Confirmation ſhould extend to the whole Term, or for the 51 Years only was the Queſtion. And it was adjudged, that the ſaid Confirmation (as this Caſe is) ſhould extend to the (*b*) whole Term; for when the Biſhop and the Dean and the Chapter (reciting the ſaid Demiſe for 70 Years) had confirmed *dimiſſionem prædict' in forma præd'*, theſe Words (*pro termino* 51 Years) *& non ultra*, come too late, and the Leaſe being for 70 Years, it is repugnant to confirm *dimiſſionem prædict'* for 51 Years, for it is as much as if they had confirmed the Leaſe and Term of 70 Years for 51 Years. But if the Biſhop and the Dean and Chapter had recited the Leaſe, and had confirmed the (*c*) Land to the Leſſee for 51 Years, that had been good enough, for then there would not be any ſuch Repugnancy in the Confirmation.

Et nota, A Difference (*d*) between a bare Aſſent, without any Right or Intereſt, and an Aſſent coupled with a Right or Intereſt; for the Ten't who is to perfect a Grant by his Attornment, cannot aſſent for a Time, nor (*e*) on Condition,

(*a*) 1 And. 47. Cr. El. 447, 472. Dy. 338, 339. pl. 43. N. Bendl. 238. Latch 251. Lane 64. Lit. Rep. 364.

(*b*) Co. Lit. 297. a. 1 And. 47. Cr. El. 447, 472. Lit. Rep. 82. Dy. 52. pl. 4. Winch 95, 96.

(*c*) 1 And. 47. Cr. El. 447, 472. Lit. Rep. 82.

(*d*) Cr. El. 447. Co. Lit. 297. a. 1 Anderſ. 47.

(*e*) Co. Lit. 297, 274. b. 300 b. 2 Co. 68. a. 9 Co. 85. b. 1 Rol. 412. M. 1.

Condition, nor for Part of the Thing granted, but it ſhall abſolutely enure to all, becauſe he has but a bare Aſſent, which cannot be qualified, or apportioned: But the Biſhop who is Patron, and the Dean and Chapter have an Intereſt in the Prebend, and every Part of it, for the Patron has *Jus conferendi*, and a Releaſe to the Patron of an Annuity in the Time of (*a*) Vac. is good, as it is held in 21*H.* 7. 41. *a.* 8 *E.* 3. 28. *Perſey*'s Caſe. 33 *E.* 3. *Aid le Roy* 103. 8*H.*6. 24. *acc'.* Alſo it is held in 31 *E.* 3. *Graunts* 90. 16 *E.* 3. *Annuity* 23. 8 *R.* 2. *Annuity* 53. That the Patron and Ordinary may (*b*) charge the Glebe in Time of Vacat. therefore they have an Intereſt; and *Fitz. N. B.* 49. ſaith, that the Right is in the Patron and Ordin. *Vide Lit. lib.* 3. *cap. Diſcontinuance* 144, 145. So if the Leaſe be made of 20 Acres, they may make a Confirmation as to Part of the Land, as for one or more Acres: So they may confirm Part or all on (*c*) Condition; by which it appears that they have not a bare Aſſent, as in Caſe of Attornment, but an Aſſent clothed with an Intereſt.

(*a*) Ant. 71. a. Br. Releaſe 33. Br. Dean and Chapter 11. 1 Co. 112. b. 2 Rol. 340. Co. Lit. 266. a. Fitz. Releaſe 57. (*b*) 1 Co. 147. b. Co. Lit. 297. a. 343. b. F. N. B. 152. J. (*c*) 1 Rol. 412. (*d*) Co. Lit. 297. a. (*e*) 3 Co. 22. a. 4 Co. 94. b. 8 Co. 153. a. 10 Co. 128 b. 1 Brownl. 62, 63. F. N. B. 130, 131. h. 131. a. 2 Leon. 107, 108, 131. 3 Leon. 4. 4 Leon. 13. Ow. 42. Benl. in Aſh. pl. 10. O. Benl. 3. pl 8. N. Benl. 57. pl. 93. Benl. in Kelw. 208, 209. Yelv. 67. Cr. El. 118, 119, 776, 807. Moor 13. 1 Rol. 29, 601. 1 Ro. Rep. 221. 2 Ro. Rep. 47. Br. Action ſur le Caſe 108. in fine. Cr. Car. 241. Cr. Jac. 505. Co. Lit. 47. b. 297. a. 292. b. 2 Sand. 337. (*f*) Cr. El. 118, 119, 472. Lit. Sect. 521. Co. Lit. 47. b. 297. a. 3 Co. 22. a. 8 Co. 153. a. 10 Co. 128. b. 2 Brown. 62, 63. 2 Leon. 108. Owen 42. 1 Rol. Rep. 221. (*g*) Co. Lit. 297. a.

Another Difference was taken between a Leaſe for Years, and a Leaſe for Life, a Gift in Tail, or of Feoffment in Fee; For if a Prebendary makes a Leaſe for Years, a Confirmation may be made of the Land, as has been ſaid before, for (*d*) leſs Years, for the Years are ſeveral, altho' the Leaſe or Term be one.

If I ſell you any Thing for 100 *l.* to be paid 20 *l. per ann.* in 5 Years, I ſhall not have an Action for Debt (*e*) till all the Years be incurred, becauſe all is but one Contract: But if a Man makes a Leaſe of Lands for 5 Years, rendering every Year 20 *l.* there in the Caſe of a Leaſe of Land for Years, the Years are ſeveral, and he ſhall have an Action of Debt for every Year, as it is adjudged in 45 *E.* 3. 8. But if a Prebendary makes a Leaſe for Life, or a Gift in Tail, or a Feoffment in Fee, and a Confirmation is made of the Land to the Leſſee, Donee or Feoffee for one Hour, it is good for ever, for an Eſtate of Freehold or Inheritance is intire: And therefore if he who has a Freehold or Inheritance be diſſeiſed, and confirms the Land to the Diſſeiſor for an Hour, it is good for ever.

So if a Diſſeiſor makes a Leaſe for Life, or a Gift in Tail, and the Diſſeiſee confirms the Land to the Leſſee or Donee for an Hour, it ſhall confirm his whole Eſtate, but it ſhall not (*f*) enure to the Remainder or Reverſion, becauſe he confirms the Land to the Leſſee or Donee only, and the Eſtate for Life or in Tail, and the Remainder or Reverſion are ſeveral diſtinct Eſtates: But if the (*g*) Diſſeiſor makes a Leaſe for Years of 20 Acres, the Diſſeiſee may confirm the Whole, or any Part of the Land to the Leſſee, to have and to hold to him for all, or any of the Years, upon or without a Con-

a Condition; for although the Term or Demiſe be one, and therefore if the Term or Demiſe be confirmed for an *(a)* Hour, it is good for ever, as it is reſolved in the Caſe at Bar; yet the Years and Acres are ſeveral, and therefore the Confirmation may extend to Part of them: *Pari ratione*, if my Tenant *(b)* for Life make a Leaſe for Years, I may confirm the Land to him for leſs Years: So if Tenant in Tail makes a Leaſe for 40 Years, and dies, the Iſſue in Tail may confirm the Term or Part, *&c.* for leſs Years. The ſame Law of a Woman after Coverture. *Vide Lit. lib.* 3. *cap. Confirmations* 119, 120, *&c.*

(a) Co. Lit. 297. a.

(b) Co. Lit. 297. a.

CASES of CUSTOMS.

SNELLING's *Caſe.*

Trin. 37 Eliz.

In the Common Pleas.

BEtween (*a*) *Snelling* and *Norton* the Caſe was ſuch; Debt was brought by *Snelling* againſt *Norton* Adminiſtrator of *N.* on a Bond; the Defend. ſhewed the Cuſtom (*b*) of *London*, That if a Contract be made by a Citizen in *London* to pay Money to another Citizen, and he who ought to pay dies inteſtate, that the Adminiſtrator ſhall be bound to pay it as well as if it was by Bond. And ſhewed further, that the Inteſtate was a Citizen of *London*, and was indebted on Contract to ſuch a Citizen, who after the Death of the Inteſtate had recovered againſt him, on which the Pl. demurr'd in Law; and Judgment was given againſt the Pl. And in this Caſe three Points were reſolv'd.

(*a*) Noy 53. Cr.El. 409,410. Hob. 86. Swinb. 328, 329. Fitzgib. 51, 76.

(*b*) 8Co. 126.a. Cr. Car. 347. Hard. 303.

1. That the ſaid Cuſtom (*c*) was good againſt the Opinion in *Dyer* 8 *El.* 247. (*d*) for although none was chargeable at the common Law by the Name of Adminiſtrator, becauſe before the Statute of (*e*) 31 *E.* 3. no Action lay againſt an Adminiſtrator by ſuch Name, and the Cuſtom cannot begin after 31 *E.* 3. which is within Time of Memory; yet foraſmuch as they were chargeable at the Common Law, as Executors for their Adminiſtration, & that the (*f*) Name of the Charge is only changed; and yet in Subſtance is all one, for every Executor is an Adminiſtrator of Goods; and the Pleading is *ne unques executor, ne unques admini-*

(*c*) Hob. 86. Cr. El. 410. 1Rol. Rep. 105. 1Rol. 551, 555, 556, 557

(*d*) Cr. El. 410. 1 Rol. 551. Dy. 247. pl. 73.

(*e*) 2 Inſt. 398. Selden. Juriſdict. the Teſtament. 24 Co. Lit. 133. b. 9 Co. 38. b.

(*f*) Cart. 118. Cr. El. 409.

adminiſtravit as Executor; and an Adminiſtrator has the Office or Quality of an Executor; therefore, the Cuſtom alledged in ſuch general Manner was reſolved to be good. Carth. 433. Skinner 27.

2. It was reſolved, if the Ordinary took the Goods into his Poſſeſſion, he was chargeable by the common Law. And the Statute of *Weſtm.* 2. *cap.* 19. *Cum poſt mortem alicujus*, was made in Affirmance of the common Law. *Vide* 17 *E.* 2. *Brief* 822. 24 *E.* 3. 55. 11 *E.* 3. *Executors* 77. 18 *H.* 8. 23. 9 *E.* 4. 33. 11 *H.* 7. 12. *F. N. B.* 120. *D.* Dyer 247. pl. 73. 2 Inſt. 397. Plowd. 277. a. b. 9 Co. 39. b. Dyer 196. pl. 42. 1 Rol. 556.

3. It was reſolved, although the Plaintiff was a Stranger and no Citizen, yet this Cuſtom was good to bind him. *Vide* 1 *E.* 4. 6. *a.*

[*For the Nature, &c. of Copyhold and Cuſtomary Lands, ſee* 4 Co. 31. Rep. Q. A. 53.]

The Caſe of Market-overt.

Hill. 38 Eliz.

AT the Seſſions of *Newgate* now laſt paſt, it was reſolv'd by *Popham* Chief Juſtice of *England*, *Anderſon* Ch. Juſtice of the Common Pleas, Sir *Thomas Egerton* Maſter of the Rolls, the Attorney General, and the Court, That if Plate be ſtolen and ſold openly in a Scrivener's Shop on the Market-Day, (as every Day is a (*a*) Market-Day in *London* except (*b*) Sunday) that this Sale ſhould not change the Property, but the Party ſhould have Reſtitution; for a (*c*) Scrivener's Shop is not a Market-overt for Plate; for none would ſearch there for ſuch a Thing; & *ſic de ſimilibus, &c.* But if the Sale had been openly in a (*d*) Goldſmith's Shop in *London*, ſo that any one that ſtood or paſſed by the Shop might ſee it, there it would change the Property. But if the Sale be in the Shop of a Goldſmith, either behind a Hanging, or behind a Cupboard upon which his Plate ſtands, ſo that one that ſtood or paſſed by the Shop could not ſee it, it would not change the Property: So if the Sale be not in the Shop, but in the Warehouſe, or other (*e*) ~~Place of the Houſe~~, it would not change the (*f*) Property, for that is not in Market-overt, and none would ſearch there for his Goods. So every Shop in *London* is a Market-overt for ſuch Things only which by the Trade of the Owner are put there to Sale; and when I was Recorder of *London*, I certified the Cuſtom of *London* accordingly. Note, Reader, the Reaſon of this Caſe extends to all Markets-overt in *England*.

(*a*) 1 And. 344. 345. 2 And. 115. Moor 625, 360. Pop. 84. Cr. El. 454. 3 Co. 78. b. 8 Co. 127. a. 9 Co. 66. b. 2 Brownl. 288. Dy. 122. pl. 16. 35 H. 6. 29. b. 2 Inſt. 713. 1 Jac. cap. 21.

(*b*) Hale's Pl. Cro. 45. Palm. 485. 2 Brownl. 288. 8 Co. 127. a. 9 Co. 66. b. Cr. Jac. 69, 280, 496. Jenk. Cent. 291. 1 Jones 156, 157. Cawly 78. Dy. 168. pl. 17. Pop. 84. Moor 624. 1 Anderſ. 344.

(*c*) Cr. Jac. 69. Poph. 84. 1 And. 344. Moor 360, 625. Cr. El. 454.

(*d*) Moor 360. Poph. 84. Godb 131. Palm. 485, 486. 1 Jones 164.

(*e*) 1 And. 345. Moor 360, 625. Cr. El. 454. Poph. 84.

(*f*) 1 Jac. cap. 21.

PERRY

PERRYMAN's *Caſe.*

See Carth. 432. 2 Ventr. 144.

Trin. 41 Eliz.

In the Common Pleas.

IN Replevin between *Bowyer* and *Perryman*, the Defendant did avow for Damage-feaſance in his Freehold; and Iſſue taken on the Freehold, and a ſpecial Verdict was found to this Effect; *R. R.* ſeiſed of the Land in Fee did enfeoff divers Perſons by Deed in Fee, and died without Heir, and found a Cuſtom in this Manner, *Infra maner' de Porcheſter, a tempore cujus contrarii, &c. habebatur conſuetudo, Quod ſi aliquis tenens aliquorum terrarum ſive tenementor' de manerio prædict' tent' alienaverit ſive conceſſerit hujuſmodi terr' ſive terram per ſcript' ſive feoffment' inde confect', vel per teſtament' ſuum hujuſmodi terr' ſive tenementa dederit ſive legaverit, quod tunc hujuſmodi alienatio, conceſſio, don', ſeu legatio fact', vel ad proxim' Cur' ejuſdem manerii fuerunt præſentat' & præſentari conſueverunt, vel ad aliquam Cur' ejuſdam maner' infra annum poſt hujuſmodi alienationem, conceſſion', ſive feoffment', donum, ſive legationem fact', vel ad proxim' Cur' ejuſd' manerii poſt annum illud tenend': Et ſi aliqua talis alienatio, conceſſio, &c. in forma præd' non præſentat' fuerit, tunc hujuſmodi alienatio, conceſſio, &c. ſic minime præſentat' per conſuetudinem manerii illius vacua fuerit:* And found that the ſaid Land was held of the ſaid Manor; and that the ſaid Feoffment was not preſented according to the Cuſtom. And whether this was a reaſonable or lawful Cuſtom or not was the Queſtion; and it was adjudged, that it was a (*a*) reaſonable Cuſtom: But againſt this Cuſtom it was objected: 2 And. 125, 126. Cr. El. 668, 669.

(*a*) Lit. Rep. 233. 2 And. 125. Lane 32. Bridg. 82, 83. Her. 127. Bridg. 51. 3 Bulſt. 215.

1. That if this Cuſtom ſhould be allowed, what Remedy (*b*) if the Tenants will not preſent it? Or if the Steward will reject the Preſentment? As to that it was anſwer'd by the Court, That the like Objection might be made on a Bargain and Sale by Deed, what Remedy if the Clerk will not inrol it? And in Caſe of Copyhold, what Remedy if the Copyholders will not preſent a Surrender made out of Court? *Et caveat (c) emptor*, and he at his Peril is to perfect all that is requiſite to his Aſſurance. And it is not like the Caſe in 2 *H.* 4. 24. *b.* where a Cuſtom was pleaded, that none ſhould uſe (*d*) his Common in ſuch a Place till the Lord enter'd

(*b*) 2 Bulſt. 337.

(*c*) 1 Rol. Rep. 125, 195. 4 Co. 26. a.

(*d*) Fitz. Cuſtom 10. Br. Cuſtom 12.

entered with his Cattle; and there *per totam Curiam* that can not be a Cuſtom, for if the Lord will not enter, it is not Reaſon that the Commoner ſhould loſe his Common.

2. It was objected, that once it was a Feoffment, then to ſay that the Cuſtom of the Manor ſhould deveſt an Eſtate of Freehold and Inheritance veſted by ſolemn Livery would be againſt Law. To which it was anſwered and reſolved, That the Reaſon of the common Law, that Land (a) Plow. 302. b. ſhould paſs by ſolemn (*a*) Livery, was to give Notice to the Country who were Owners of the Land, to the Intent that none might be deceived in Taking of Leaſes and Eſtates, and that every one might have Notice who ſhould be Ten. to the *Præcipe*; and Lords would have better Knowledge of their Tenants to have Wards, Eſcheats, *&c.* And therefore a Cuſtom, which fortifies the Reaſon of the common Law with greater Solemnity and Notice, is good, as in this Caſe, to have the Feoffment openly preſented in open Court, to the Intent that the Lord and all his Tenants might take Notice, and therefore if it be not preſented according to Cuſtom, then the Livery is become void, becauſe it wants Preſentment, which is Part of the Eſſence of the Livery; and it was ſaid, that there is not *plenum & perfectum feoffamentum* in this Caſe, till Preſentment made in Court ac- (b) Bridg. 82, 83, cording to the Cuſtom; but *opus* (*b*) *inchoatum & non per-* (c) Lane 32. Bridgm. 51. *fectum*; and yet if the Feoffor or Feoffee (*c*) dies, and af- (d) 9 Co 137. a. Co. Lit. 36. a. terwards it is preſented according to the Cuſtom, it is good. Cr. El. 529, 835. As if a Man delivers a Writing (*d*) as an Eſcrow, to be his 836, 884. 2 Rol. Deed on certain Conditions to be performed, and after- 26, 27. Moor wards the Obligor or Obligee dies, and afterwards the Con- 642, 699, 697. dition is performed, the Deed is good, for there was *tradi-* Noy 6. 50 Cr. *tio inchoata* in the Life of the Parties, *ſed poſtea conſum-* Jac. 85, 66. *mata exiſtens* by the Performance of the Condition takes its Sryle 251. Effect by Force of the firſt Delivery, without any new De- Hob. 246. livery: So in the Caſe at Bar, when the Feoffment is preſented according to the Cuſtom, then it takes its Effect by Force of the Livery before: And it was ſaid, there was a Cuſtom in *Kent*, That if the free Tenants of a Caſtle did not pay their Rents, that they ſhould loſe their Land held of it. And that the Cuſtom of *Lidford* Caſtle in the County of *Devon* is, That a Freeholder of Inheritance cannot paſs his Freehold, unleſs by Surrender into the Hands of the Lord, *&c.* And the Cuſtom of *London* is, That a Deviſe of Land by Will in Writing being inrolled is good, for it has greater Solemnity added to the Will than in other Boroughs where Lands are deviſable: And ſo Judgment was given in the principal Caſe, that the Cuſtom was good and lawful. And this Plea began *Hill.* 40 *Eliz. Rot.* 159. in the Common Pleas.

Sir

Sir HENRY KNIVET's *Caſe.*

Paſch. 38 Eliz.

In the King's Bench.

BEtween Sir *Henry Knivet* Plaintiff, and *Pool* and others Defendants, on a ſpecial Verdict the Caſe was ſuch: Tenant for Life, the Remainder in Fee to the Plaintiff, Tenant for Life leaſed for Years, the Leſſee for Years is ouſted, and the Tenant for Life diſſeiſed; the Diſſeiſor made a Leaſe for Years, and his Leſſee ſowed the Land; and Tenant for Life died. Sir *Henry Knivet* who had the Remainder in Fee entred; the Defendants took the Emblements, and for them Sir *Henry Knivet* brought an Action of Treſpaſs; and on Not guilty pleaded, the Jury found the ſpecial Matter aforeſaid. And it was adjudged, that the Plaintiff being he in the Remainder, had no Right to the Emblements. It was alſo reſolved, That the Defendants claiming by the Leſſee of the Diſſeiſor had not the mere Right to them, but in Reſpect of his Poſſeſſion ſhould bar the Plaintiff; but the mere Right was in the Leſſee of the Tenant for Life, and he might have an Action of Treſpaſs, and ſhould recover all the mean Profits againſt the Leſſee of the Diſſeiſor; therefore he in the Reverſion ſhould not have Remedy for them alſo, nor recover Damages for them, for then the Leſſee of the Diſſeiſor would be twice charged: But as to the Entry into the Land to take the Emblements, it was good Matter of Juſtification; but foraſmuch as they had pleaded Not guilty, the Plaintiff had Judgment for the Entry, and was barred for Reſidue.

Goldsb. 143, 144. Cr. El. 463, 464. 2 Inſt. 81. Hob. 132. Co. Lit. 55. b. Co. Lit. 282. b. Doct. pla. 200.

And note Reader in the principal Caſe, The Leſſee of

of the Tenant for Life had Right to the Land, and by Conſequence to the Emblements, as Things annexed to the
Co. Lit. 55. a. b. Land, and the Death of the Leſſee for Life determined his Intereſt to the Land; but his Right to the Emblements remained, and that was the principal Reaſon of the Judgment.

PENRYN's *Caſe.*

Trin. 38 Eliz.

In the King's Bench.

Moor 403. Jenk. Cent. 141, 142, 259. 2 Rol. Rep. 29.

IN a Writ of Error between *William ap Richard* and *William Penryn*, on a Judgment given in *Wales* in the County of *Montgomery*, before Sir *Richard Shutleworth* Juſtice there, in a *Quod ei deforceat* in the Nature of a Writ of Right, (as the Uſe and Precedents are there) the Error was aſſigned in the Matter in Law, which was ſuch; *William ap Richard* brought a *Quod ei deforceat* in the Nature of a Writ of Right of certain Lands in the County of *Montgomery* againſt *Penryn*, who appeared and joined the Miſe on the mere Right, and thereupon a Jury by *Venire fac.* was returned, whereof 12 were ſworn and charged; and before Verdict the Demandant was Nonſuit, on which final Judgment was given; *ſcil. Quod tenens teneat terram illam ſibi & hæred', in pace verſus petentem & hæred' ſuos imperpetuum.*

Cr. El. 503. Co. Lit. 295. b. Lit. ſect. 51.

And afterwards the ſame Demandant brought another *Quod ei deforceat*, in the Nature of a Writ of Right againſt the ſame Tenant of the ſame Land, who pleaded the final Judgment in Bar: On which the Demandant did demur. And Judgment was given againſt him; and on this later Judgment the Demandant brought a Writ of Error. And after many Arguments and long Deliberation the Judgment was affirmed. And in this Caſe three Points were reſolved.

Co. Lit. 295. b. Cr. El. 503.

1. That altho' by the Stat. of *Rutland*, made 12 *E.* 1. it is provided, that Trials in *Wales* in a Writ of Right ſhall be by common Jurors, and by 12, yet Judgment final ſhall be there given, as it was before the Stat. altho' the Manner

and Dignity of the Trial was altered; for the Statute has altered the Trial, but the Judgment which belongs to ſuch Action remains as it was before. Jenk. Cent. 259.

2. If Judgment final be given in a Writ of Right where it ought not to be, yet it ſhall bind till it be reverſed.

3. It was reſolved, That if Tenant after the Miſe joined make Default, Judgment final on this Default ſhall not be given (as *Fitzherbert* in his *N. B.* 6. holds) but a *petit Cape* ſhall iſſue; for Peradventure he may ſave his Default. See *Temps E.* 1. *Droit* 41. 13 *E.* 1. *Droit* 51. 7 *E.* 3. 67. 8 *E.* 3. 8. 11 *E.* 3. *Statham, Droit.* 27 *E.* 3. 85. 33 *E.* 3. *Judgment* 252. 44 *E.* 3. 13 *H.* 4. *Judgment* 245. 3 *H.* 6. 55. 10 *H.* 6. 2. 9 *E.* 4. 16. 12 *H.* 7. 26 *H.* 8. 8. 35 *H.* 8. *Dy.* 56. 1 *Mar. Dyer* 98, 103. where Judgment final in a Writ of Right ſhall be given. Co. Lit. 265. b. Cr. Jac. 293. 2 Sand. 46. Yelverton 211. 1 Bulſt. 159, 160, 161. F. N. B. 5. n. 11. a.

[*See* Carth. 47. *That in a Writ of Right a Default after Iſſue join'd on the mere Right is final.*]

CASES

CASES of EXECUTIONS.

BLUMFIELD's *Caſe.*

Mich. 38 & 39 Eliz.

In the King's Bench, Rot. 259.

(a) Moor 459. Cr. El. 478, 479, 555, 574. 3 Keb. 306.
(b) 1 Rol. 308. Cr. Jac. 338, 339, 532, 694. 2 Bulſt. 97, 98, 99, 100. 1 Rol. Rep. 8, 9. Godb. 257, 258. 1 Rol. Ab. 896. Cro. Car. 75. Cr. Execut. 145. 2 Show. 394.
(c) God. 208. Cr. Jac. 338. 2 Bulſtr. 98. Hob. 59.
(d) 1 And. 266. 1 Leon. 230. 2 Leon. 96. 1 Rol. Rep. 204.

IN an *Audita Querela* between *Blumfield* and (a) *Uſewick* the Caſe was: Two Men were bound jointly and ſeverally in a Bond, one was ſued, condemned, and taken in Execution; and afterwards the other was ſued, condemned, and taken in Execution; and afterwards the firſt eſcaped, and thereupon the other brought *Audita* (b) *Querela*: And although the Plaintiff might have an Action on the Eſcape againſt the Sheriff, yet until he be ſatisfied in Deed, the other cannot have *Audita Querela*; and Peradventure the Sheriff is worth nothing; and if the Defendants had been ſued by one Writ by ſeveral *Præcipes*, although the Entry ſhall be, *quod unica fiat executio*, that is to be intended of an Execution with Satisfaction, for he ſhall have both their Bodies in Execution, (c) 4 *H.* 7. 8. & 29 *H.* 8. *Execution Br. acc'* 132. And ſo is the Book in 4 *E.* 4. 38. & 5 *E.* 4. 4. to be intended. *Hill.* 33 *Eliz.* it was adjudged in the Common Pleas between *Linacre* and (d) *Rhodes*, That notwithſtanding the Conuſor on a Statute Staple be taken and eſcapes, yet his Goods and Lands on the ſame Statute may be extended, for the Eſcape, and the Action which the Plaintiff has againſt the Sheriff for the Eſcape, is no Satisfaction of the Debt. So if the Conuſor be taken and dies in Execution, the Conuſee ſhall have Execution of his Goods and Lands. And it was adjudged *Paſch.* 24 *Eliz.* in the Common Pleas between *Jones* and (e) *Williams*, That where two Men were condemned in Debt, and one was taken and died in Execution, yet the taking

(e) Cr. El. 851. Cr. El. 851. 1 Rol. 903. 1 Rol. Rep. 9. Hob. 59, 60.

of the other was lawful. And then it was reſolved by the whole Court, that if the Def. in Debt (*a*) dies in Execut. the Pl. may have a new Execut. by *Elegit*, or *Fi. fac.* for divers Reaſons.

1. Becauſe the Pl. ſhall not be prejudiced, nor the Def. benefited by the Act and Wrong of the Def. in Non-payment of his Debt, when no Default is in the Pl. he having purſued the due and ordinary Courſe of Law.

2. The Execution of the Body is no (*b*) Satisfaction (as appears in 4 *H.* 7. 8. & 33 *H.* 6. (*c*) 47. *Hillary*'s Caſe adjudged) but a Gage for the Debt; as where a Man has return irrepleviſable awarded, as it is ſaid in 33 *H.* 6. 46. and therefore after his Death he ſhall reſort to a new Execut. And the Words of the *Capias ad ſatisfac'* are, *Cap. I. de S. Ita qd' hab' corp' ejus cor' Juſtic' noſtr', &c. ad ſatisfac' G. de K. de debito & damn', &c.* So that his Body is taken to the Intent that he ſhall ſatisfy, and when the Def. pays the Money, he ſhall be diſcharged out of Priſon.

3. The Death of the Def. is the Act of God, which ſhall not turn to the Prejudice of the Pl. as it is ſaid in * *Trewinyard*'s Caſe, 38 *H.* 8. *Dy.* 60. the Pl. ſhall not be prejudic'd of his Execut. by Act of Law, which doth not Wrong to any one.

4. It would be miſchievous to the Pl. to loſe his Debt without any Default in him, and no Miſchief if a new Execution ſhould be done, for nothing would be liable to his new Execution, but the Lands and Goods of the Def. which in Law and all Equity ought to be ſubject to the Payment of his Debts. And is not like when the Pl. has Execut. of the Lands of the Def. and afterwards the Lands are evicted, there before the Stat. of 32 *H.* (*d*) 8. he ſhould not have any new Execut. for the Execut. of the Lands was valuable and accounted in Law for a Satisfaction, and for avoiding of Infiniteneſs there ſhould be but one valuable Execut. or Execut. with Satisfact. at the Com. Law; but Execut. of the Body is no valuable Execut. and therefore the Pl. after his Death ſhall have a new Execut. till he has had a valuable Execut. (*e*) which is the End and Fruit of his Suit: *Et finis rei attend' eſt, & fines mandator' Dom'Reg' per reſcript' ſua (ſc. brev') diligent' ſunt obſervandi.*

So note, Reader, good Differences between Execut. not valuable, (as of the Body of the Def.) and Execut. valuable, as of Lands, &c. And therefore if a Villein be delivered to one in Execut. on a Recovery in Value, and afterwards the Villein dies without Iſſue, yet the Demandant ſhall never have a new Execut. for his firſt Execut. was valuable, and by the Law a Man ſhall never have but one valuable Execut. Note alſo a Difference between an Execut. final, as where the Sheriff levies the Money of the Def. Goods, or extends his Lands and delivers them to the Pl. for that the Party accepts in Satisfaction, and that is the End of the Suit, and all that the King's Writ commands to be done; and between Execut. with a (*f*) *quouſq;* &c. tending to an End, and which is not final, as in

(*a*) Lit. Rep. 325, 326. 1 Rol. 903. Cr. Jac. 136, 143. Moor 857, 858. Cr. El. 850, 851.

Hob. 59, 60, 61. 21 Jac. c. 24. Hetl. 159.

(*b*) Cr. Jac. 338.

(*c*) 2 Bulſt. 97, 99. Hob. 59. 1 Rol. Rep. 9.

* Godb. 273.

(*d*) 32 H. 8. c. 5. Cr. Jac. 694. Co. Lit. 289. b. 4 Co. 66. a.

(*e*) Godb. 294.

2 Show. 394.

(*f*) 2 Bulſtr. 98.

in the Caſe of a *Capias ad ſatisfaciend'*, &c. it is not final, but his Body is to be taken to the Intent and Purpoſe that he ſhall ſatisfy the Party, and his Impriſonment is not abſolute, but *quouſque* the Defendant ſhall ſatisfy the Party: But Execution final is when the Party is ſatisfied; and becauſe he dies before Satisfaction, it conſiſts with Law and Equity, that the Plaintiff ſhould reſort to a new Execution. *Vide Regiſt.* & *F. N. B.* 246. If a Man has recovered Damages in Treſpaſs before Juſtices of *Oyer* and *Terminer*, and has the Body of the Party in Execution *quouſque ſatisfecerit* the Plaintiff, and he who is in Execution dies, he who recovered ſhall ſue a *Certiorari* to the Juſtices to remove the Record into the King's Bench, that the Juſtices there may do on that Record as the Law requires in ſuch Caſe; and that is to award a new Execution, 47 *E.* 3. Tit. *Execution* 41. If in Treſpaſs the Pl. recovers, and the Def. is taken for the King's Fine, if he pray that the Defendant may remain in Priſon till he be ſatisfied, he ſhall not have an *Elegit*, becauſe he has taken Execution of his Body and has it; but if the Party dies in Priſon, ſo that he has not Execution with Satisfaction, wherein is no Default of him, he ſhall have an *Elegit* afterwards, becauſe he cannot have Satisfaction according to the firſt Election; and theſe are the Words of the Book. And therewith agrees *Fitz. N. B.* 246. *B.* And if the Conuſor of a Statute-Merchant or Staple, &c. be taken and dies in Execution, yet the Conuſee ſhall have Execution without Doubt of his Goods and Lands, as it was reſolved in (*a*) *Linacre*'s Caſe. And ſo you will better underſtand your Books in 22 *Aſſ.* 43. 35 *H.* 6. 46, 47. 4 *E.* 4. 38. 5 *E.* 4. 4. *Br. Execution* 79. 41 *E.* 3. 13. *in Accompt*, &c.

(*a*) 1 And. 266. Hob. 60. 1 Leon. 230. 2 Leon. 96. 1 Rol. Rep. 204. Antea 86. b.

GARNON's

GARNON's *Caſe.*

Hill. 40 Eliz. Rot. 114.

BEtween *Layton* Plaintiff, and *Garnon* Sheriff of the County of, &c. Defendant, the Caſe was ſuch; *Layton* recovered againſt *Wallwen* in the Common Pleas in an Action of Debt, and ſued forth a *Capias ad ſatisfaciendum*, and *ex poſt Capias*, and outlawed the Defendant; the Defendant brought a Writ of Error, and the Judgment was affirmed: And thereupon within the Year a *Capias Utlagatum* was awarded, and the Defendant was taken, and the Sheriff ſuffered him to eſcape before the Return of the Writ; and on this Eſcape the Plaintiff brought this Action. And in this Caſe three Points were reſolved. Moor 566, 567; Cr. El. 706, 707. 1 Rol. 810, 895. 1 Leon. 263. Cr. Jac. 361.

1. If one at the Common Law had Judgment in an Action of Debt, and after the Judgment outlawed the Defendant, the Plaintiff was at the End of his Suit as to any Proceſs to be ſued by himſelf, for he could not have a *Scire facias*, nor any other Proceſs on the Judgment, but was put to his (*a*) new Original, as it is agreed in 13 *H.* 4. 1. *a.* 21 *E.* 3. 55. 20 *E.* 3. *Nonability* 8. *acc.* And although before the Statute of 25 *E.* 3. *Capias* did not lie in Debt, nor was the (*b*) Body of the Defendant before that Statute ſubject to Execution for Debt, as appears before in Sir *Will. Harbert*'s Caſe: Yet if the Defendant be taken by *Capias Utlagatum* at the King's Suit, no Laches being in the Plaintiff in continuing of his Proceſs, he ſhould be in (*c*) Execution for the Plaintiff, if he would: For inaſmuch as the King by the original Suit of the Party is intitled to have all his Goods and Chattels, and the Profits of his Lands by the Outlawry, and his Body alſo in Priſon, it is reaſonable that if the Defendant in ſuch Caſe be taken at the King's Suit, that as the King ſhall have Benefit by the Suit of the Party, ſo the Party ſhall have ſome Benefit by the Suit of the King. (*a*) Co. Lit. 291 a. 2 Bulſt. 63. Cart. 124. Cr. El. 706, 124. Cr. El. 706. (*b*) 1 Brown. 118. 2 Bulſtr. 63. 3 Co. 12. a. (*c*) Yelv. 19, 20. Bridg. 7. 1 Rol. 810, 895. Cr. El 706. Moor 567, 598. Hob. 57.

2. It was reſolved, That if Judgm. be given in the Com. Pleas, and removed by a Writ of Error, and Judgm. affirmed within the Year, and (*d*) they award a *Capias*, or a *Fi. fa.* the Plaintiff (*d*) Godb. 372, 373. Cr. El. 416. 2 Inſt. 471. Cart. 180.

Plaintiff is not put to a *Scire facias*, altho' it be in another Court, againſt the Opinion of 14 *H.* 7. 15, 19. *Vide* 21 *Aſſ. p.* 14. *F.N.B.* 267.

3. It was reſolved, That in the Caſe at Bar, when he was taken by *Capias Utlagatum*, which iſſued out of the King's Bench, he ſhould be in *(a)* Execution for the Plaintiff preſently after his Arreſt if he would, although his Body be never brought into Court, and altho' the Court do not commit him in Execution for the Party. *Vide* 7 *H.* 6. 6. *Nota bene*, in all Caſes when the Plaintiff may have a *Capias ad ſatisfaciendum*, and the Party Defendant is taken by *Capias (b) pro fine*, there the Defendant is in Execution preſently, if the Plaintiff will, without any Prayer of the Party. Alſo in all Caſes when the Plaintiff may have Execution preſently by *Fieri facias*, although he cannot have a *Capias*, nor does a *Capias* lie in ſuch Action; as in Aſſiſe with Force and Re-diſſeiſin, *&c.* and the Party is taken by *Capias pro fine*, and is committed at the King's Suit, there the Plaintiff may pray that he may remain in Execution for his Damages, but without Prayer he ſhall not be in Execution, altho' he may have Execution by *Fieri facias*. And when the Plaintiff has Judgment and *(c)* ſurceaſes his Time, ſo that he cannot have preſent Execution neither by *Capias* nor by *Fieri facias*, *&c.* but is put to a *Scire facias*, there if the Defendant be taken by *Capias (d) pro fine*, the Plaintiff may pray that he may remain in Execution for him, but that ſhall not be *(e)* without Prayer of the Party. See for Proof of theſe Differences 11 *H.* 7. 15. 13 *H.* 7. 21. 7 *H.* 6. 6. *a.* 36 *H.* 6. 23. *F. N. B.* 121. *P.* 6 *E.* 4. 4. *a.* 2 *R.* 3. *Execution* 16. 7 *H.* 4. 4. *b.* *&c.* Obſerve good Reader this Caſe well, and all theſe Books, for theſe Points touching Execution (which is the Life of the Law) are eſpecially neceſſary to be known.

(a) 1 Sid. 380. Cr. El. 652, 706, 850. Yelv. 19, 20. 1 Rol. 810, 895. Bridg. 7. Moor 567. Hob. 57, 115. Poſtea 89. a.

(b) Moor 567. Bridg. 7.

(c) Bridg. 7.

(d) Moor 567. Cr. El. 467. 1 Leon. 263. Bridg. 7. Hob. 57.

(e) Salk. 319. 5 Mod. 200. Comb. 373.

FROST's *Caſe.*

Trin. 41 Eliz.

In the Common Pleas.

FROST recovered Debt and Damages againſt *B.* in the Common Pleas, 29 *Eliz.* and on an *ex poſt Capias* the Defendant was outlawed, and after the Year the Plaintiff procured a *Capias utlagatum* againſt him, and delivered it to the Sheriffs of *London.* And that one *Laborn* one of the Serjeants of the Sheriffs of *London* had arreſted the ſaid *B.* in *Fleetſtreet* at the Suit of one *A. ad reſpondend'* &c. before the Sheriffs; *Laborn* kept *B.* in his Houſe, and then *Froſt* came to *Laborn* with the Sheriffs Warrant to arreſt him on the * *Capias utlagat'*, which he abſolutely refuſed. And afterwards the Sheriffs ſuffer'd the ſaid *B.* to go at large; and on this Matter *Froſt* brought an Action on the Caſe againſt the Sheriffs, and ſuppoſed that the Sheriffs arreſted the ſaid *B.* by Force of the ſaid *Capias utlagat'*, and that the Sheriffs ſuffered him to go at large: The Defendants pleaded, *Non permiſerunt cum ire ad largum*; and the Jury found all the ſpecial Matter. And Judgment was given for the Plaintiff. 1 Leon. 263. Bridg. 7. * 1 Salk. 319.

For, 1. They reſolved, That when a Man is in the Cuſtody of the Sheriff by Proceſs of Law, and afterwards another Writ is delivered to him to arreſt the Body of him who is in his Cuſtody, preſently he is in his (*a*) Cuſtody by Force of the ſecond Writ by Judgment of Law, although he do not actually arreſt him; for to what Purpoſe ſhould he arreſt him who is and was before in his Cuſtody? *Et* (*b*) *lex non præcipit inutilia, quia inutilis labor ſtultus:* And the Words of the *Capias ad ſatisfaciendum* are not only, *quod capiat*, &c. but *quod ſalvo cuſtodiat*, &c. *Ita quod habeat corpus*, &c. So that although he cannot take him (whom he has) in his Cuſtody, yet he may ſafely keep him; and therewith agrees 7 *H.* 4. 30. *b.* (*a*) Cr. Jac. 486. Antea 88. b. Comb. 435. (*b*) 2 Rol. Rep. 408. Ant. 21. a. Hardr. 387. Co. Lit. 127. b. 197. b.

2. The Verdict well warrants the Declaration, for in Judgment of Law it is equipollent, and amounts to as much as if the Sheriffs had arreſted the ſaid *B.*

3. That although the *Capias utlagat'* was ſued after the Year, ſo that the Defendant could not be in (*a*) Execution without Prayer of the Party, *&c.* yet the Plaintiff is prejudiced by his Eſcape, for he ought not to be diſcharged of the Impriſonment till he find Sureties to ſatisfy him by the Statute of 5 (*b*) *E.* 3. *cap.* 12.

(*a*) Cr. El. 467 Anrea 88 5 Mod. 200. Salk. 319. Comb 383.

(*b*) Dyer 172. pl. 11.

HOE's *Caſe.*

Trin. 42 Eliz.

In the Exchequer.

Moor 468. Cart. 19. See Mr. Strange's Argument in Caſes in Eq.

BEtween *Clement Hoe* Executor of *John Hoe* Plaint. and *Boulton* Defendant, the Caſe was ſuch; *John Hoe* the Teſtator had Judgment to recover in the King's Bench againſt *Boulton* 75 *l.* 3 *s.* 4 *d.* *John Hoe* aſſigned it by Deed inrolled to the Queen in Satisfaction of a Debt due to the Queen by him as Collector of Fifteens, with Proviſo, that if the Lord Treaſurer and Barons of the Exchequer, or any two of them, becauſe the Debt could not be levied in convenient Time, or for any other reaſonable Cauſe diſallow'd of the ſaid Aſſignment, and revoked it by Writing under their Hands, then the Aſſignment ſhould be void. And afterwards *Boulton* brought a Writ of Error according to the new Statute, and there Judgment was affirmed, and 5 *l.* Coſts on the Affirmance of the Judgment: And afterwards (on Proceſs which is called a Writ of Prerogative out of the Exchequer on the ſaid Aſſignment) the Lands of *Boulton* were extended, and his Goods which were of Value above the ſaid Debt aſſigned

27 El. cap. 8.

aſſigned were ſeiſed by the Sheriff by Force of the ſaid Writ, but the Writ was not returned. And afterw. *Periam*, *Ewens*, and *Southerton*, 3 of the Barons, revoked the Aſſignm. after the Teſtator's Death, becauſe the Teſtator had ſatisfied the Debt which was due to the Queen by him as Collector. And now the Pl. as Ex'or of *J. Hoe* ſued a *Scire facias* to have Execut. of the ſaid 75 *l.* 3 *s.* 4 *d.* and 5 *l.* Coſts: And the ſaid Matter being diſcloſed by ſpecial Pleading, a Demur. in Law was joined. And in this Caſe 3 Points were reſolved. See 1 Salk. 409, 410.

1. That the Execut. for the Queen was good without Queſtion, as to the Goods, altho' the Writ was not returned. And ſo it is in Caſe of a com. Perſon, if the Sheriff by Force of a Writ of *Fieri facias* levies the Debt, and delivers it to the Party, the Execut. is good without a Return of the Writ, as it is adjudged 20 *H.* 6. 24. *a.* and 21 *H.* 6. 5. *a.* And ſo was it adjudg'd in the Com. Pleas, *Paſch.* 23 *El.* between *Rook* and *Willimote*; and *Trin.* 23 (33) *El.* betw. *Mount* and *Andrews*; and therewith agrees 44 *E.* 3. 18. So if a Man be taken on a *Capias ad* (*a*) *ſatisfaciendum*, the Execution is well done, although the Writ be never returned: And the Difference is apparent between *Capias* in Proceſs, and *Capias ad ſatisfaciendum*; for if the *Capias* (*b*) in Proceſs be not returned, the Arreſt is tortious, for there the End of the Arreſt is to the Intent the Party ſhould appear and anſwer the Plaintiff, but in all Writs of Executions when the Sheriff alone does it, as *Capias ad ſatisfaciendum*, *Habere facias ſeiſinam*, or *poſſeſſionem*, *Fieri fac'*, *Liberat'*, &c. If the Execution be duly done it is good, although the Writ be not returned, for there the Plaintiff has the Effect of the Suit, and no other Thing is to be done on his Part after: But in Caſe of (*c*) *Elegit*, becauſe there the Extent is to be made by Inqueſt, and not by the Sheriff only, it ought to be returned, otherwiſe it is nought worth. So by theſe Reſolutions in the Caſe at Bar, and by the ſaid Judgments here cited, you will learn the Law, and better underſtand your Books in 19 *E.* 3. *Scire facias*, 11 *H.* 4. 73. *b.* and (*d*) *Fulwood*'s Caſe in the fourth Part of my Reports.

(*a*) Cr. El. 17. Lane 52. 21 H. 7. 23. a. 16 H. 7. 14. a. b. 20 H. 7. 13. Cro. Car. 447. Mo. 57. Owen 48. 4 Co. 67. a.

(*b*) 2 Rol. 563. Lane 52. 21 H. 7. 23. a. 4 Co. 67. a.

(*c*) 4 Co. 67. a.

(*d*) 4 Co. 67. a

Note, Reader, that the ſaid Judgments given in the Caſe of the *Fieri facias*, where Execution was done, and no Writ returned, were given on great Reaſon.

1. Becauſe the Levying of the Debt was lawful, and well done, and the Party Def. cannot reſiſt the Sher. to levy the Money. Cro. El. 208, 209. Cro. Car. 328, 539. Hob 206. Sav. 133.

2. The Effect of the Authority which the Sheriff had by Force of the *Fieri facias* was executed.

3. The great Prejudice that the Defendant, (whoſe Goods and Chattels are ſold by the Writ and Proceſs of Law, for the Satisfaction of his Debt) would have, if the Sheriffs not returning of the Writ ſhould cauſe a new Execution to be ſued forth againſt him, and leave the Defendant to his Action againſt the Sheriff. Cro. El. 390. Salk. 323. 2 Show. 166.

4. If the Sale of the Goods, by Force of the Writ, ſhould by the Non-return of the Writ be wrongful, then the Sheriff would never find Buyers of the Goods of any Def. by Force of any Writ of Execut. which would be inconvenient, and a great Delay of Execut. which are the Fruit and the Life of every Suit; and where the Words of the Writ of *Fieri fac'* are, *Ita qd' habeas denar'*, &c. they are but Words of Command to the Sheriff to make Return, which if he do not, he ſhall be amerced; but yet the Execut. ſhall ſtand in Force.

Cr. Car. 530. 2 Show. 79, 281.

2. It was reſolved, That after Execut. had by the Queen, the Revocat. came too late, for then the Queen had had the Effect and End of the ſaid Aſſignment, and that, which was executory when it was aſſigned, is now executed by lawful Proceſs of Law, and therefore cannot be revoked; for when one has a Power of (*a*) Revocat. yet if he ſuffers any Thing to be lawfully executed by Force of it, as to that he cannot make any Revocat.: As if a Man makes a Letter of Attorney to make Livery, before Execut. he may revoke it, but after Execut. lawfully had, it is executed, and cannot be revoked. *Vide* 7 (*b*) *H.* 6. 41, 42. in Detinue, where the Caſe was; In Detinue of a Statute-Merchant the Defend. prayed Garniſhm. the Pl. recovered againſt the Garniſhee by erroneous Judgm. by Force whereof the Defend. delivered the Statute to the Pl. who had Execution; and afterwards the Garniſhee reverſed the Judgment in a Writ of Error, by which he had reſtored all that he loſt, by that the Execut. ſhall not be avoided: But I conceive in ſuch Caſe he ſhall be helped by *Audita Querela*. *Vide* 7 *E.* 4. 2. If one, to whom another is indebted, be outlawed, and he who is indebted pays the Money to the Queen, and afterwards the Outlawry is reverſed, now the Creditor ſhall recover his Debt againſt him. So if the Goods of a Man (*c*) outlawed be ſold by the Sheriff on the Writ of *Capias utlagatum*, &c. and afterwards the Outlawry is reverſed by Writ of Error, the Defend. ſhall have Reſtitution of his Goods; but if the Sher. by Force of a *Fieri facias* (*d*) ſell Goods, and afterwards the Judgment is reverſed by Writ of Error, the Defendant ſhall not have Reſtitution of his Goods, but the Value of them for which they were ſold; and there are 2 Reaſ. of this Difference. 1. If the Sale of the Sher. by Force of a *Fieri fac'* ſhould be avoided by ſubſequent Reverſal of the Judgment, there would be no Buyer, and by Conſequence no Execution done. 2. In the Caſe of a *Fieri facias*, the Sheriff is compellable to make and levy the Debt of the Goods, &c. of the Defendant, and therefore it is great Reaſon that it ſhould ſtand: But in the Caſe of *Capias utlagatum*, the Sheriff or Eſcheator is not compellable to ſell them, but may keep them for the King's Uſe; and therewith agrees 20 *Eliz.* *Dyer* (*e*) 363. and *vide* 3 *Ed.* 3. 51. Recompence in Value

(*a*) Dy. 49. pl. 12.

(*b*) 7 H 6. 42. a b. 8 Co. 142. b. 143. b. Br. Error 66. 1 Rol. 777, 778, 308.

(*c*) 8 Co. 143. a. Cr El. 270, 278. Moor 270. 1 Rol. 778. Dy. 223. pl. 26.

(*d*) 8 Co. 96. b 143. a 1 Rol. 778. Dy. 363 pl. 24. Mo. 573. Jenk. Cent. 264. 2 Leon. 92. 3 Leon. 89, 90. Godb. 27, 28. Yelv. 180. Goldsb 103, 104. Cr. Eliz. 273. Cr. Jac. 246.

(*e*) Dyer 363. pl. 24.

on

on a Voucher once lawfully executed, ſhall not be deveſted although the Title of the Demandant to the Land, which he recover'd, be afterwards diſaffirmed and evicted.

3. It was reſolved, That the Revocation by three, if no Execution had been had, had been ſufficient; for if three (*a*) revoke, two do it; but if the Words of the Clauſe of Revocation had been by them jointly or ſeverally, then two of them could not have done it, for that had been neither jointly nor ſeverally. And therewith agrees 35 *H.* 8. *Dyer* 61, 62. & 27 *H.* 8. And ſo note a good (*b*) Difference.

(*a*) Cr. Jac. 254. 1 Rol. 328. (*b*) Co. Lit. 181. b. 1 Rol. 329. Yelv. 25, 26. Noy 47. Hurt. 127. 1 Rol. Rep. 399. 2 Inſt. 38. 27 H. 8. 6. b. 1 Co. 92. a. Dy. 62. pl. 34. 2 Rol. Rep. 101. 3 Bulſtr. 210.

SEMAYNE's *Caſe.*

Co. Ent. 12. pl. 11. Mo 668. Yelv 28, 29. Cr El. 908, 909. 2 Rol. Rep. 294.

Mich. 2 Jac. 1.

In the King's Bench.

IN an Action on the Caſe by *Peter Semayne* Plaintiff, and *Richard Greſham* Defendant, the Caſe was ſuch; The Plaintiff and one *George Berisford* were Jointenants of an Houſe in *Black Fryars* in *London* for Years, *George Berisford* acknowledged a Recognizance in the Nature of a Statute-Staple to the Plaintiff, and being poſſeſſed of divers Goods in the ſaid Houſe died, by which the Defendant was poſſeſſed of the Houſe by Survivorſhip, in which the Good continued and remained; the Plaintiff ſued Proceſs of Extent on the Statute to the Sheriffs of *London*; the Sheriffs returned the Conuſor dead, on which the Plaintiff had another Writ to extend all the Lands which he had at the Time of the Statute acknowledged, or at any Time after, and all his Goods which he had at the Day of his Death; which Writ the Plantiff delivered to the Sheriffs of *London*, and told them that divers Goods, which were the ſaid *George Berisford*'s at the Time of his Death, were in the ſaid Houſe: And thereupon the Sheriffs, by Virtue of the ſaid Writ, charged a Jury to make Inquiry according to the ſaid Writ, and the Sheriffs and Jury *acceſſerunt ad Domum prædictam oſtio Domus prædict' aperto exiſten' & bonis prædictis in 'prædicta Domo tunc exiſten'*, and they offered to enter the ſaid Houſe, to extend the

Where a Bailiff *&c.* may break a Houſe to do Execution or not. See 6 Mod. 105, *&c.* ibid.

Goods according to the ſaid Writ; and the Defendant *præmiſſorum non ignarus*, intending to diſturb the Execution, *oſtio præd' domus tunc aperto exiſten', claudebat contra Vicecom' & Jurator' præd'*; whereby they could not come, and extend the ſaid Goods, nor the Sheriff ſeiſe them, by which he loſt the Benefit and Profit of his Writ, *&c.* And in this Caſe theſe Points were reſolved.

(*a*) 3 Inſt. 162. Cr. El. 753. 2 Co. 32. a. 7 Co. 6. a. 8 Co. 126. a. 11 Co. 82. a. 1 Bulſtr. 146. Stanf. Cor. 14 b.

1. That the Houſe of every one is to him as his (*a*) Caſtle and Fortreſs, as well for his Defence againſt Injury and Violence, as for his Repoſe; and altho' the Life of Man is a Thing precious and favoured in Law; ſo that altho' a Man kills another in his Defence, or kills (*b*) one *per infortun'*, without any Intent, yet it is Felony, and in ſuch Caſe he ſhall forfeit his Goods and Chatt', for the great Regard which the Law has to a Man's Life; but if Thieves come to a Man's (*c*) Houſe to rob him, or murder, and the Owner or his Servants kill any of the Thieves in Defence of himſelf and his Houſe, it is not Felony, and he ſhall loſe nothing, and therewith agree 3 *E.* 3. *Coron.* 303, & 305. & 26 *Aſſ. pl.* 23. So it is held in 21 *H.* 7. 39. every one may aſſemble his Friends and Neighb. (*d*) to defend his Houſe againſt Violence: But he cannot aſſemble them to go with him to the Market (*e*), or elſewhere for his Safeguard againſt Violence: And the Reaſon of all this is, becauſe *domus ſua cuique eſt tutiſſimum refugium.*

(*b*) Co. Litt. 391. a. Hale's Pl. Cor. 32. Stanf. Cor. 15. c. 16 d.

(*c*) 3 Inſt. 56. Stanf. Cor. 14 a. Cor. 192. 3 E. 3. Cor. 205, 330. Br. Cor. 100. 1 Rol. Rep. 182 22 H. 8. c. 5.

(*d*) 11 Co. 82. b. Br. Riots, &c. 1. 21 H. 7. 39. a. Fitz. Treſp. 246. 2 Inſt. 161, 162.

(*e*) 11 Co. 82. b 1 Rol. Rep. 182.

2. It was reſolved, When any Houſe is recovered by any real Action, or by *Ejectt' firmæ*, the Sheriff may break the Houſe and deliver the Seiſin or Poſſeſſion to the Demandant or Pl. for the Words of the Writ are, *Habere facias ſeiſinam*, or *poſſeſſionem*, *&c.* and after Judgment it is not the Houſe in Right and Judgment of Law of the Tenant or Defendant.

(*f*) O. Benl. 112. 1 Bulſtr. 146 Cr. El. 908 909. Moor 606, 668. Yelv. 28, 29. Cr. Car. 537, 538. 3 Inſt. 161. Dy. 36. pl. 40. 12 Co. 131. 4 Inſt. 177. Goldsb. 79. 2 Jones 233 234. 4 Leon. 41. 13 E. 4. 9. a.

3. In all Caſes when the K. (*f*) is Party, the Sheriff (if the Doors be not open) may break the Party's Houſe, either to arreſt him, or to do other Execut. of the K.'s Proceſs, if otherwiſe he cannot enter. But before he breaks it, he ought to ſignify the Cauſe of his Coming, and to make Requeſt to open the Doors; and that appears well by the Stat. of *Weſtm.* 1. *c.* 17. (which is but an Affirmance of the Com. Law) as hereafter appears, for the Law without a Default in the Owner abhors the Deſtruct. or Breaking of any Houſe (which is for the Habitat. and Safety of Man) by which great Damage and Inconvenience might enſue to the Party, when no Default is in him; for perhaps he did not know of the Proceſs, of which, if he had Notice, it is to be preſum'd that he would obey it, and that appears by the Book in 18 *E.* 2. (*g*) *Execut.* 252. where it is ſaid, That the K.'s Officer who comes to do Execut. *&c.* may open the Doors which are ſhut, and break them, if he cannot have the Keys; which proves, that he ought firſt to demand them, 7 *E.* 3. (*h*) 16. *J.* beats *R.* ſo as he is in Danger of Death, *J.* flies, and thereupon Hue and Cry is made, *J.* retreats into the Houſe of *T.* they who purſue him, if the Houſe be kept and defended with Force (which proves that firſt Requeſt ought

(*g*) Yelv. 29. Poſtea 92. b. Cr. El. 909. Moor 668.

(*h*) 4 Inſt. 177.

to be made) may lawfully break the Houſe of *T.* for it is at the K.'s Suit. 27 *Aſſ. p.* 66. the K.'s Bailiff may diſtrain for Iſſues (*a*) in a Sanctuary. 27 (28) *Aſſ. p.* 35. by Force of a *Capias* on an Indictm. of Treſpaſs the Sher. may (*b*) break his Houſe to arreſt him; but in ſuch Caſe, if he breaks the Houſe when he may enter without Breaking it, (that is, on Requeſt made, or if he may open the Door without Breaking) he is a Treſpaſſor, 41 *Aſſ.* 15. on Iſſue joined on a Traverſe of an Office in Chancery, *Venire fac.* was awarded returnable in the King's Bench, without mentioning *non* (*c*) *omittas propt' aliquam libertat'*; yet foraſmuch as the K. is Party, the Writ of it ſelf is *non omittas propt' aliquam libertat'*, 9 *E.* 4. 9. that for Felony (*d*) or Suſpicion of Felony, the K.'s Officer may break the Houſe to apprehend the Felon, and that for 2 Reaſons: 1. For the Commonwealth, for it is for the Commonwealth to apprehend Felons. 2. In every Felony the King has Intereſt, and where the King has Intereſt, the Writ is, *non omittas propter aliquam libertatem*; and ſo the Liberty or Privilege of an Houſe doth not hold againſt the King.

(*a*) Br. Diſtreſs 35. Br. Treſpaſs 151.
(*b*) Fitz. Treſpaſs 232. Br. Treſpaſs 278.
(*c*) Br. Prerogative le Roy 109. Br. Franchiſe 18. Br. Proceſs 102. Fitz. Prerogative 21.
(*d*) 13 E. 4. 9. a. Fitz. Bar. 110. 4 Inſt. 177. 1 Bulſtr. 146. 2 Bulſtr. 61.

4. In all Caſes when the Door is (*e*) open the Sheriff may enter the Houſe, and do Execut. at the Suit of any Subject, either of the Body, or of the Goods; and ſo may the Lord in ſuch Caſe enter the Houſe (*f*) and diſtrain for his Rent or Service, 38 *H.* 6. 26. *a.* 8 *E.* 2. *Diſtr.* 21 & 33 *E.* 3. *Avowry* 256. the Ld. may diſtrain in the Houſe, altho' Lands are alſo held in which he may diſtrain. *Vide* 29 (*g*) *Aſſ.* 49. But the great Queſtion in this Caſe was, if by Force of a *Capias* or *Fieri fac'* at the Suit of the Party the Sheriff after Requeſt made to open the Door, and Denial made, might break the Def.'s Houſe to do Execut. if the Door be not opened. And it was objected, That the Sheriff might well do it for divers Cauſes: 1. Becauſe it is by Proceſs of Law; and it was ſaid, that it would be granted on the other Side, that a Houſe is not a Liberty, for if a *Fieri fac'* or a *Capias* be awarded to the Sher. at the Suit of a common Perſon, and he makes a Mandate to the Baily of a Liberty who has Return of Writs, who *nullum dedit reſponſ.* in that Caſe another Writ ſhall iſſue with *non omittas propter aliquam libertat'*; yet it will be ſaid on the other Side that he ſhall not break the Defend.'s Houſe, as he ſhall do of another Liberty; for whereas in the County of *Suffolk* there are 2 Liberties, one of St. *Edmund Bury*, and the other of St. *Etheldred* of *Ely*, ſuppoſe a *Cap'* comes at the Suit of *A.* to the Sheriff of *Suff.* to arreſt the Body of *B.* the Sheriff makes a Mandate to the Bailiff of the Liberty of St. *Etheldred*, who makes no Anſwer, in that Caſe the Pl. ſhall have a Writ of *Non omittas*, and by Force thereof he may arreſt the Def. within the Liberty of *Bury*, altho' no Default was in him: 2. Admitting it be a Liberty, the Defendant himſelf ſhall never take Advantage of a Liberty: As

(*e*) 1 Brown 50. Cr. Jac. 486.
(*f*) Br. Treſpaſs 226. Br. Iſſue 26.
(*g*) Br. Diſſeiſor 52. Fitz. Aſſiſe 286. Lucas 290.

if the Bailiff of a Liberty be Def. in any Action, and Proceſs of *Cap'* or *Fieri fac'* comes to the Sher. againſt him, the Sher. ſhall execute the Proceſs againſt him; for a Liberty is always for the Benefit of a Stranger to the Action. 3. For Neceſſity the Sher. ſhall break the Def.'s Houſe after ſuch Denial as is aforeſ. for at the Com. Law a Man ſhould not have any Execut. for Debt, but only of the Def.'s Goods. Suppoſe then the Def. would keep all his Goods in his Houſe, and ſo the Def. himſelf by his own Act would prevent not only the Pl. of his juſt and true Debt, but there would alſo be a great Imputat. to the Law, that there ſhould be ſo great a Defect in it, that in ſuch Caſe the Pl. by ſuch Shift without any Default in him ſhould be barred of his Execut. And the Book in 18 *E.* 2. (*a*) *Execut.* 252. was cited to prove it, where it is ſaid, that it is not lawful for any one to diſturb the K.'s Officer, who comes to Execute the K.'s Proceſs; for if a Man might ſtand out in ſuch Manner, a Man would never have Execution, but there it appears (as has been ſaid) that there ought to be Requeſt made before the Sheriff breaks the Houſe. 4. It was ſaid, that the Sheriff was an Officer of great Authority, in whom the Law repoſed great Truſt and Confidence, and were to be of Sufficiency to anſwer all Wrongs which ſhould be done; and they had *cuſtodiam Comitat'*, and therefore it ſhould not be preſumed that they would abuſe the Houſe of any one by Colour of doing their Office in Execution of the K.'s Writs againſt the Duty of their Office, and their Oath alſo: But it was reſolved, That it is not lawful for the Sheriff (on Requeſt made and Denial) at the Suit of a (*b*) common Perſon, to break the Defendant's Houſe, *ſc.* to execute any Proceſs at the Suit of any Subject; for thence would follow great Inconven. that Men as well in the Night (*c*) as in the Day ſhould have their Houſes (which are their Caſtles) broke, by Colour whereof great Damage and Miſchief might enſue; for by Colour thereof, on any feigned Suit, the Houſe of any Man at any Time might be broke when the Defendant might be arreſted elſewhere, and ſo Men would not be in Safety or Quiet in their own Houſes? And altho' the Sheriff be an Officer of great Authority and Truſt, yet it appears by Experience, that the King's Writs are ſerved by Bailiffs, Perſons of little or no Value: And it is not to be preſumed, that all the Subſtance a Man has in his Houſe, nor that a Man would loſe his Liberty, which is ſo ineſtimable, if he has ſufficient to ſatisfy his Debt. And all the ſaid Books, which prove, that when the Proceſs concerns the King, that the Sheriff may break the Houſe, imply that at the Suit of the Party, the Houſe may not be broken; otherwiſe the Addition (at the Suit of the King) would be frivolous. And with this Reſolution agrees the Book in (*d*) 13 *E.* 4. 9. and the expreſs Difference there taken between the Caſe of Felony, which (as has been ſaid) concerns the Commonwealth, and the Suit

(*a*) Yelv. 29. Antea 91. b. Moor 668. Cr. El. 409. O. Benl. 121.

The Reſolution of the Court. (*b*) 1 Jones 429. 430. 1 Brownl. 50. 1 Bulſtr. 146. Cr. Jac. 556. O. Benl. 121. 4 Inſt. 177. Palm 53. Dyer 36. pl. 41. Moor 668. Cr. Car. 537, 538. Cr. El. 908, 909. Yelv. 29. Hob. 62, 263, 264. 4 Leon. 41. 11 Co. 82. March 3, 4. 18 E. 4. 4. a. Br. Execut. 100. Br. Treſpaſs 390. (*c*) 9 Co 66. a. Cr Jac. 280, 486. Jenk. Cent. 291. Male's Pl. Cor. 45. Owen 63. (*d*) 13 E. 4. 9. a. Antea 92. a. Fitz. Bar, 110. 4 Inſt. 177.

of any Subject, which is for the particular Intereſt of the Party, as there it is ſaid in *(a)* 18 *E.* 4. 4. *a.* by *Littleton* and all his Companions it is reſolved, That the Sheriff cannot break the Defendant's Houſe by Force of a *Fieri facias*, but he is a Treſpaſſor by the Breaking, and yet the Execution which he then doth in the Houſe is good. And it was ſaid, that the ſaid Book of *(b)* 18 *E.* 2. was but a ſhort Note, and not any Caſe judicially adjudg'd, and it doth not appear at whoſe Suit the Caſe is intended, but it is an Obſervation or Collection (as it ſeems) of the Reporter. And if it be intended of a *Quo* *(c)* *minus*, or other Action in which the King is Party, or is to have Benefit, the Book is good Law.

(a) Cr. Eliz. 909. Yelv. 29. Br. Execution 100. Br. Treſpaſs 390.

(b) 18 E. 2. Execution 252. Yelv. 29. Moor 668. Cr. El. 909. Antea 91. b. 92. b. O. Benl. 121.

(c) Plowd. 208. a. 2 Show. 87.

5. It was reſolved, That the Houſe of any one is not a Caſtle or Privilege but for himſelf, and ſhall not extend to protect any *(d)* Perſon who flies to his Houſe, or the Goods of any other which are brought and conveyed into his Houſe, to prevent a lawful Execution, and to eſcape the ordinary Proceſs of Law; for the Privilege of his Houſe extends only to him and his Family, and to his own proper Goods, or to thoſe which are lawfully and without Fraud and Covin there; and therefore in ſuch Caſes after Denial on Requeſt made, the Sheriff may break the Houſe; and that is proved by the Statute of *Weſt.* 1. *c.* *(e)* 17. by which it is declared, That the Sheriff may break an Houſe or Caſtle to make Replevin, when the Goods of another which he has diſtrained are by him conveyed to his Houſe or Caſtle, to prevent the Owner to have a Replevin of his Goods; which Act is but an Affirmance of the Common Law in ſuch Points. But it appears there, that before the Sheriff in ſuch Caſe breaks the Houſe, he ought to demand the Goods to be deliver'd to him; for the Words of the Statute are, After that the Cattle ſhall be ſolemnly demanded by the Sheriffs, *&c.*

(d) Cr. Car. 544.

(e) 2 Inſt. 192, 193, 194.

6. It was reſolved, admitting that the Sheriff after Denial made might have broke the Houſe, as the Plaintiff's Counſel pretend he might, then it follows that he has not done his *(f)* Duty, for it doth not appear, that he made any Requeſt to open the Door of the Houſe. Alſo the Defendant, as this Caſe is, has done that which he might well do by the Law, *ſcil.* to ſhut the Door of his own Houſe.

(f) Stile 447.

Laſtly, the general Allegation, *(g)* *præmiſſorum non ignarus*, was not ſufficient in this Caſe, where the Notice of the Premiſſes is ſo material; but in this Caſe it ought to have been certainly, and directly alledged; for without Notice of the Proceſs of Law, and of the Coming of the Sheriff's Jury to execute it, the ſhutting of the Door of his own Houſe was lawful. And Judgment was given againſt the Plaintiff. *See* 6 Mod. 105, &c. ibid.

(g) Hard. 2. 1 Mod. Rep. 286.

Skinner 464.

BARWICK's *Caſe.*

Trin. 39 Eliz.

In the Exchequer.

1 Co. 43. b. Moor 393, 394. 10 Co. 68. a. 2 Rol. Rep. 273. 3 Keb. 414. Stile 189. Hardr. 499. Lane 11.

IN an Information of Intruſion into a Houſe and certain Lands in *Sutton* in *Galtres* in the County of *York*, againſt *Peter Barwick* and others, the Caſe was ſuch: *E.* 6. by his Letters Patents 19 *Maii anno* 4. demiſed the Manor of *Sutton*, whereof, *&c.* to *Thomas Tirril* for 21 Years: And afterwards Queen *Elizabeth* having the Reverſion, by her Letters Patents 11 *Maii* in the 10th Year of her Reign, reciting the ſaid Leaſe, demiſed the ſaid Manor to *Humphrey Barwick* for 21 Years in Reverſion: *Humphrey Barwick* 2 *Auguſti* 10 *Eliz.* by Indenture granted to one *Story* a Houſe and Croft Parcel of the ſaid Manor, from the Feaſt of St. *Michael* 1597, for 21 Years, and 20 *Maii* 16 *Eliz.* demiſed to *John Ragget* another Parcel of the ſaid Manor for 21 Yeaas, from the ſaid Feaſt of St. *Michael*; and another Demiſe of another Parcel to *William Simpſon* for the like Term. And afterwards Queen *Eliz.* 21 *Nov. anno* 23. by her Letters Patents (reciting (*a*) the ſaid Leaſe to *Humphrey Barwick*) *pro & in conſideratione Surſum* (*b*) *redditionis totius ſtatus, tituli, termin' annor' & intereſſe, de & in præmiſſ. per præd' literas paten' eidem* Humfrido *conceſſ.* demiſed and granted the ſaid Manor to the ſaid *Humphrey* for 21 Years, whereas in Truth the ſaid *Humphrey* had not ſurrendred all the ſaid Term granted to him, for he had made divers Aſſignments and Demiſes, as is aforeſaid. And afterwards Queen *Eliz.* 28 *Julii anno* 26. in Conſideration of the Surrender of the ſaid Letters Patents *de anno* 23 *Eliz.* and of all the Eſtate, Term and Intereſt by them demiſed and granted, demiſed and granted the ſaid Manor to the ſaid *Humphrey*, *Habend' a* (*c*) *die confection' earund' literar' patent'*, for the Lives of 3 others and the Surviv. of them: And under this later Demiſe the Def.

(*a*) Cr. Car. 198.

(*b*) Godb. 442.

(*c*) Alein 77.

claimed. And whether this later Leaſe was good or not, was the Queſtion. And after many Arguments at Bar and Bench Judgment was given by Sir *William Periam* Chief Baron, and the whole Court of Exchequer for the Queen. And in this Caſe two Points were reſolved.

1. Inaſmuch as the valuable and material Conſiderat. of the ſaid Letters Patents for three Lives being falſe, and thereby the Queen deceived, by Conſequence the ſaid Leaſe for three Lives was void; for the Conſideration was, That the ſaid former Leaſe ſhould be ſurrendred, and in Truth the former Leaſe was void; ſo the Cauſe and Motive of making the Leaſe was falſe; and therefore the ſaid later Leaſe made on ſuch Conſideration was void alſo. And the former Leaſe *de anno* 23. was void, becauſe it was made in Conſideration of the Surrender of all the Eſtate, Term, and Intereſt demiſed by the Letters Patents *de anno* 10 *Eliz.* whereas in Truth all the Eſtate was not ſurrendred: For he had made divers Demiſes and Grants of certain Parcels of the ſaid Manor before, and that might be very miſchievous to the Queen, for her Leſſee might demiſe all the Land to him demiſed, ſaving a ſmall Parcel, and for a ſmall Term in Reverſion, and after ſurrender to the Queen, and take a new Leaſe with Reſervation of Rent, and Condition of Reentry; and in that Caſe neither the new Rent, nor the Condition would extend to the Eſtates and Intereſts derived out of the firſt Leaſe. And it is a Maxim, That if the Conſideration which is for the Benefit of the Queen, be it executed, or executory, or be it on Record or not on Record, be not true or not duly performed, or if Prejudice may accrue to the Queen by Reaſon of Non-performance of it, the Letters Patents are void. And in the Caſe at Bar it was for the Advantage and Benefit of the Queen, that the whole former Term *de anno* 10 *Eliz.* ſhould be ſurrendred according to the expreſs Conſideration, to the Intent that the Rent, and Condition reſerved on the new Leaſe *de anno* 23. ſhould extend to all the Land demiſed according to the Purport and true Intention of the ſaid Letters Patents. Alſo when the Queen made the Leaſe for three Lives in Conſideration of the Surrender of the ſaid Leaſe *de anno* 23. which Leaſe was void, thence it follows that the Demiſe made in Conſideration of that Surrender was void alſo, becauſe the Queen was deceived in the Conſideration of her Demiſe; for the Surrender of the former Term was a principal Motive to induce the Queen to make a new Leaſe, and perhaps to mitigate her Fine; which Conſideration being valuable and material, ought to be truly and duly performed.

2 Rol. Rep. 273. Davis 40. a. 1 Co. 43. b. Lane 3, 13, 76, 109, 112. Hard. 499. Hob. 204, 230. Moor 393. Hutt. 7.

2 Rol. Rep. 273.

Dy. 352. pl. 26. Carth. 351.

2. It was reſolved, That when the Queen 28 *Julii an.* 26. demiſed the ſaid Manor to *Humph. Barwick, Habend' ſibi a die confection' earund' literar' patentium*, that the ſaid 28 Day of *July* it ſelf is without Queſt. excluded, and that the Demiſe

Antea 1. a. b. Co. Lit. 46. b.

cannot

cannot begin, nor the Leſſee enter, before 29th of *July*; for this (*a*) [*a*] or [*ab*] *eſt dictio ſignificativa primi termini, a quo, ſicut dictio (uſque) termini, ad quem*; & [*a*] *vel* [*ab*] *accipitur excluſive.*

(*a*) Stile 189. Cr. Car. 94. Moor 759.

3. It was reſolved, That an Eſtate of Freehold could not by the Common Law begin (*b*) *in futuro*, but ought to take Effect preſently in Poſſeſſion, Reverſion, or Remainder. And the Difference is between a Leaſe for Life, and a Leaſe for Years: For a Leaſe for Years may begin *in futuro*, but not a Leaſe for Life. As if a Man makes a Leaſe for Years to begin at *Michaelmas* next enſuing, it is good; but if a Man makes a Leaſe for Life to begin at *Michaelmas*, it is void; And the Reaſons and Cauſes of this Difference are; 1. Becauſe a Leaſe for Years may be made without Livery of Seiſin; but ſo cannot an Eſtate of Freehold without Livery, either in Fact or in Law: And therefore when a Man makes a Leaſe for Life to begin at a future Day, he cannot make preſent Livery to a future Eſtate; and therefore in ſuch Caſe nothing paſſes: And it was ſaid, that Letters Patents under the Great Seal amount to a Livery in Law; and therefore by Letters Patents a Leaſe cannot be made for Life to (*c*) begin at a Day to come. 2. If any Freehold ſhould paſs preſently by the Letters Patents from a Day to come, then the Queen in the mean Time would have a * particular Intereſt and Term without any (*d*) Donor or Leſſor, which would be againſt the Rules of the Law. But no ſuch Conſequent will follow in the Caſe of a Leaſe for Years; and therefore it was reſolved in the Caſe at Bar, that the Leaſe for three Lives was void, becauſe it was to begin the next Day after the *Teſte* of the Letters Patents: And if the Leaſe ſhould be good, the Queen would have an Intereſt for the 28th Day; and altho' the Leaſe was to begin the next Day after the *Teſte* of it, it is all one in Law as if it had been to begin 20 or 40 Days, or Years to come, for the Diſtance of the Time doth not make an Alteration of the Law in ſuch Caſe: And in this Caſe it was agreed, That if a Man makes a Leaſe for Years to *A.* and *B.* the (*e*) Remainder to *C.* for Life, in that Caſe the Leſſor ought to make Livery to *A.* and *B.* before their Entry, and by the Livery to *A.* and *B.* *C.* ſhall take a preſent Eſtate for Life by Way of Remainder, by Force of the Livery made to the Leſſees for Years. And therewith agrees *Lit. Lib.* 1. *fol.* 12. *b.* And in ſuch Caſe a Difference was taken by ſome, between two joint (*f*) Attornies, who have expreſs Authority to take Livery and Seiſin by Deed, and two joint Leſſees in the Caſe aforeſaid who have Power to receive Livery for the Benefit of another by Warrant in Law; for Livery made to one Attorn. in the Name of both is not good, for he doth not purſue his expreſs Warrant, for he himſelf only has not a Warrant, for they both make but one Attorney: But in the Caſe of two joint Leſſees

(*b*) Moor 393, 394, 423, 424, 881. Cr. El. 29, 254, 255, 450, 585. 2 Anderſ. 29. Cr. Car. 547, 548. Cr. Jac. 376, 563. 1 Jones 437. Godb. 265, 451. 1 Rol. Rep. 109, 110, 138, 253, 254, 256, 261. 4 Leon. 8. Co. Lit. 48. b. 11 Co. 77. a. 78. a. 2 Rol. 10, 66. Br. Patent 29. 2 Bulſtr. 272, 273, 274, 275, 303. Hob. 171. Palm. 29, 30 Bridg. 108, 109. 2 Brownl. 299, 300. Hetl. 23. 2 Co. 55. a.

(*c*) Cr. Jac. 153, 563. Cr. Car. 94, 388. * Perk. ſect. 704.

(*d*) Palm. 30.

(*e*) Co. Lit. 49. b.

(*f*) Co. Lit. 49. b. Palm. 23.

Leſſees, the Livery made to one in the Name of both is good, for they two have an Intereſt in the Land before their Entry, and the Livery to one, in the Name of both, makes an actual Poſſeſſion in both, which is ſufficient to ſupport the Remainder to *C*. And in the one Caſe the Livery is made to the Leſſees who have Intereſt, and in the other to him who made the Warrant of Attorney by his Attornies, who have but a bare Authority. And although Livery cannot be made to one in the Name of him and of another who is abſent, whereby any Eſtate of Freehold ſhall paſs to him who is abſent without Deed, becauſe his Eſtate is only to begin by the Livery: Yet when a Leaſe is made to two for Years without Deed, the Remainder for Life, the Leſſees preſently have Intereſt in the Lands before any Livery made; and therefore Livery made to one who has an Intereſt in the Name of him and the other, is ſufficient to that Purpoſe.

Co. Lit. 49. b.

Co. Lit. 49. b.

Note (good Reader) I have reported this Caſe, to the Intent that the Imperfections in the Letters Patents made to *Barwick*, by which he loſt his Leaſe, ſhould be avoided in Leaſes, (and principally to poor Men) to be made in Times to come.

GOODALL's

GOODALL's *Caſe.*

Mich. 39 & 40 Eliz.

In the King's Bench.

Jenk. Cent. 261. 1 Rol 408, 421. Goldsb. 176, 177. Godb. 299, 449. Cr. El. 383, 384. Lit. Rep. 105, 175. Moor 708, 709. Poph. 99, 100.

BEtween *Cuthert Goodall* Plaintiff, and *John Wyat* Defendant, in an *Ejectione firmæ* of Lands in *Ailesbury* in the County of *Buck.* (which began *Hill.* 37. *Rot.* 805.) The Defendant pleaded Not guilty: And the Jurors gave a ſpecial Verdict to this Effect; Sir *John Packington* was ſeiſed of the Tenements aforeſaid in Fee, and by his Deed indented, 1 *Julii* 35 *Eliz.* did thereof enfeoff *Robert Woodcliff* and his Heirs, *Proviſo ſemper quod ſi præfat'* Johannes *infra unum annum poſt deceſſum ipſius* Roberti *ſolvat, ſeu ſolvi faciat hæred', executor', ſive adminiſtrator' ipſius* Roberti *ſumm' centum marcarum legalis monet'* Angl', *quod tunc & deinceps præſens charta indentata & ſeiſina inde habita, vacua ſit, & nullius vigoris, Robert Woodcliff* did thereof enfeoff *Edward Woodcliff*, whoſe Eſtate by divers mean Conveyances *Thomas Goodall* the Leſſor of the Plaintiff had: And afterwards 7 *Jan.* 35 *Eliz.* the ſaid *Robert Woodcliff* died, after whoſe Death *Drue Woodcliff* being his Son and Heir, and *Anne* his Wife took Letters of Adminiſtration of his Goods; by which *Drue* and *Anne* made a Letter of Attorney to *Tho. Goodall* to demand and receive the ſaid 100 Marks on the ſaid Proviſo or Condition, of which the ſaid *Thomas Goodall* gave Notice to the ſaid Sir *John Packington*; and afterwards, and within the ſaid Year, it was agreed between the ſaid Sir *John* and the ſaid *Drue*, that the ſaid Sir *John* ſhould pay to the ſaid *Drue* but 32 *l.* of the ſaid 100 Marks, and no more, and yet in Appearance for the better Performance of the Condition, that the whole Sum of 100 Marks ſhould be paid, and that the Reſidue above 32 *l.* ſhould be repaid to Sir *John*; upon which Sir *John* paid within the ſaid Year 100 Marks to the ſaid *Drue*, and preſently all was repaid to the ſaid Sir *John* but the ſaid 32 *l.* according

according to their preceding Agreement aforeſaid: And afterwards the ſaid Sir *John* did re-enter into the ſaid Tenements, pretending that he had performed the Condition, upon whom the ſaid *Thomas Goodall* enter'd, and made the Leaſe to the Plaintiff, who enter'd and was poſſeſſed, until the ſaid *John Wyat* ouſted him, (without conveying any Intereſt or Authority to the ſaid *Wyat* under Sir *John Packington*) but the Jury concluded, *Et ſi ſuper totam materiam, &c. præd' ſolutio præd' centum marcarum per præd'* Johannem Packington *Milit' præfat' Drugoni fact', ſit bona & legalis ſolutio in lege earundem centum marcarum, ſecundum formam proviſionis præd', Juratores prædicti ignorant: Et ſi, &c.* So that the Doubt which the Jury conceived, was only on the ſaid Payment; and whether the ſaid Payment, as is aforeſaid, was ſufficient in Law to give Title of Entry by Force of the ſaid Condition to the ſaid Sir *John Packington* on the ſaid *Tho. Goodall:* And it was objected on the Defendant's Part, That although before the Payment it was agreed between the ſaid Sir *John Packington* and the ſaid *Drue Woodcliff*, that the ſaid *Drue* ſhould have but 32 *l.* of the ſaid 100 Marks, yet Sir *John* paid the whole, and *Drue* received the whole, and the Property of all the Monies was in *Drue*; and if Drue would not have repaid him the Reſidue above 32 *l.* Sir *John* had not any Remedy, but an Action on the Caſe (if any Action on the Matter would lie.) And therefore they concluded that it was a good Payment to ſatisfy the ſaid Condition.

But to that it was anſwered and reſolved by *Popham* Chief Juſtice and the whole Court, that it was not any (*a*) Performance of the Condition, and their Reaſon was, becauſe an Eſtate of Inheritance was by the Payment of the ſaid Money to the Heir to be deveſted out of *Tho. Goodall* the Aſſignee of the Land; and therefore the Condition ought to be performed in Truth by a true and effectual Payment, and not by a Shadow or Colour of Payment: And in the Caſe at Bar the precedent Agreement guided the ſubſequent Payment, and their Intent was, that but the ſaid 32 *l.* ſhould be enjoyed and kept, although more was in Appearance paid; but the Eſtates of (*b*) third Perſons ſhall not be deveſted by colourable or covenous Payments, but by true and effectual Payments, as is aforeſaid. *Vide* 19 *H.* 6. 54. 20 *E.* 3. (*c*) *Accompt* 79. & 18 *E.* 4. 18. where it appears, That Conditions ought to be performed truly and effectually, *Quia factum non dicitur, quod non perſeverat*.

(*a*) Co. Lit. 209. b. 2 Rol. Rep. 303, 403. Godb. 229. Moor 709, Jenk. Cent. 261. Lane 48. Cr. El. 383, 384. Cr. Jac. 451. Lit. Rep. 129, 130.

(*b*) Jenk. Cent. 261. Poph. 100. 8 Co. 133. a, 2 Rol. Rep. 303. Lane 48. Co. Lit. 209. b.

(*c*) Co. Lit. 129.

2. It

2. It was reſolved, That if all the Money had been paid to the Heir (*a*) *bona fide* (altho' *Robert Woodcliff* his Father had conveyed over his whole Eſtate in the Land) it had been ſufficient. For the Heir is a Perſon expreſly named in the Condition to whom the Payment ſhall be made, and the Feoffor is a Stranger to the Conveyance that the Feoffee and his Aſſigns made, and the Feoffor ſhall not take Notice at his Peril of the Validity of them, nor of the Conditions or Limitations annexed to them.

(*a*) Co. Lit. 209. b. 210. a. Jenk. Cent. 261. 1 Rol. 421. Goldsb. 177, 178. Poph. 100. Hard. 11.

3. It was reſolved, That as this Condit. is in the Caſe at Bar, the Feoffor could not have paid it to *Goodall* (*b*) the Aſſignee of the Land, for Heirs, Executors, or Adminiſtrators were expreſſed in the Condition, and the Aſſignee not, as in the Caſe of *Litt. Lib.* 3. *cap. Condition* 78. If the Condition was, That if the Feoffor ſhall pay to the Feoffee, or to his Heirs, ſuch a Sum on ſuch a Day, there after the Death of the Feoffee, if he dies before the Day limited, the Payment ought to be made to the (*c*) Heir at the Day ſet, where this Word (ought) which imports Neceſſity in Law, was obſerved; and therefore in ſuch Caſe the Money ſhall not be paid to the Executors. And ſo the Doubt in 12 *E.* 3. *Condition* 9. and (*d*) *Dyer* 2 *Eliz.* 181. well reſolved: But (*e*) the Aſſignee of the Land, altho' he be not named in the Condition amongſt the Perſons who ſhall pay the Money, yet he may well pay the Money for the Saving of his Tenure, as *Litt.* (*f*) ſaith, *eodem Lib. fol.* 77. So note the Difference, that the Money ſhall not be paid to the Aſſignee of the Land without naming him in the Condition, for there the Payment goes to the Defeaſance of the Inheritance, but the Money ſhall be * paid by the Aſſignee in Salvation of his Inheritance. *Mich.* 23 & 24 *Eliz.* in the Court of Wards, the Caſe was ſuch; *Edw.* (*g*) *Randal* ſeiſed in Fee of certain Lands within the County of *Surry*, by Deed indented and inrolled according to the Statute, did covenant with *John Brown*, that if the ſaid *Brown* did pay to the ſaid *Randal*, his Heirs or Aſſigns 400*l.* the fourth Day of *March* then next following, at a certain Place, that then the ſaid *Edward* and his Heirs would ſtand ſeiſed of the ſaid Lands to the Uſe of *Brown* and his Heirs; and before the ſaid Day *Edw. Randal* died, and having Iſſue a Son, made his Will in Writing, and made *Alice* his Wife, *Ralph Hare*, and *Hugh Hare* his Executors, and deviſed the ſaid Land to his Wife during the Minority of his Son, and died, his Iſſue within Age, and in Ward to the Queen; and before the Day, the Wife renounced, and took Letters of Adminiſtration. And now the Queſtion was, to whom the Money ſhould be paid. And in that Caſe three Points were reſolved by the Chief Juſtices *Wray* and *Dyer*, and the whole Court of Wards, that is to ſay, That in the ſaid Caſe theſe Words (Aſſigns) ſhall be on-

(*b*) Jenk. Cent. 261. 1 Rol. 421. Cr. El. 384.

(*c*) Lit. ſect. 339. Co. Lit. 210. a.

(*d*) Dyer 181. pl. 50. Owen 10.

(*e*) Hardr. 425 Co. Lit. 207. b.

(*f*) Lit. ſect. 336.

* Co. Lit. 207. b.

(*g*) Mo. 243, 709. Co. Lit. 210. a Hard. 95. Palm. 482.

ly intended of the Aſſignees of the Eſtate of *Edw. Randal*, for he has an Eſtate in him aſſignable, and the Law will never ſeek out (*a*) an Aſſignee in Law, when there may be an Aſſignee in Fact: But if *Edward Randal* had made a Feoffment in Fee, on Condition that the Feoffee ſhould pay the Money to the Feoffor, his Heirs or Aſſigns, &c. there, becauſe he departs with his whole Eſtate in Fee, and has but a bare Condition which he cannot aſſign over, the Law, which will never reject any Word, if by any reaſonable Conſtruction it may take Effect, will make Conſtruction what Perſon will be moſt proper as his Aſſignee in Law to receive the ſaid Money; and thoſe the Law adjudges to be his (*b*) Executors, becauſe they repreſent the Perſon of the Teſtator for all Goods and Chattels; and in ſuch Caſe the Feoffor cannot have any Aſſignee in Fact. And ſo a good Difference; and therewith agrees 27 (*c*) *H.* 8. 2. *a.* 2. It was reſolved in the ſaid Caſe of *Randal*, that the Wife having by the Deviſe but a particular Intereſt in the Land, was not Aſſignee of the Land within the ſaid Proviſo: So if the ſaid *Edward* had made an Eſtate for Life or Years, &c. for none ſhall be Aſſignee in this Caſe: But when the Covenantor departs with his whole Eſtate, as if he makes a Feoffment in Fee, a Gift in Tail, or a Leaſe for Life, with the Rem'r over in Fee, in ſuch Caſe the Leſſee for Life, or Donee in Tail is the Aſſignee: But ſo long as the Covenantor has the Reverſion remaining in him, the Payment ought to be made to him. So it was ſaid, that if *Edward Randal* had made an Aſſignment of his whole Eſtate in Part, as long as any Part remained with *Edw. Randal*, the Tender ought to be made to him or his Heirs. 3. It was reſolved in the ſaid Caſe of *Randal*, That the Tender ought to be made to the (*d*) Heir, and not to the Executors, becauſe the Heir was expreſly named, which excluded Executors and Adminiſtrators. *Et* (*e*) *expreſſum facit ceſſare tacitum.*

4. It was reſolved, That although in the Caſe at Bar no Title was found for the Defendant, but he is as a meer Stranger, yet the Court in a ſpecial (*f*) Verdict will never doubt but of that only whereof the Jurors have conceived a Doubt: And therefore foraſmuch as they rely and conclude on the Payment, whether it be a good Performance of the Condition or not, the Court ought not to give Judgment till they have reſolved that which the Jurors have referred to their Conſideration, and all other Matters ſhall be intended and ſupplied, but only that which the Jurors have referred to the Conſideration of the Court. And ſo it was adjudged *M.* 30 & 31 *in B. R.* between (*g*) *Scovel* and *Cabel*: And afterwards Judgment was given for *Cuthbert Goodall* the

(*a*) Co. Lit. 210. a

(*b*) Co. Lit. 209. a. b.

(*c*) Br. Condition 5. Br. Expoſition 4. Br. Deputy 1.

(*d*) Lit. Sect. 339. Co. Lit. 210. a.

(*e*) Godb. 449. Co. Lit. 210. a. 183. b. Latch 265. Cart. 35. Palm. 497.

(*f*) Jenk. Cent. 262. Hob. 55. 262. Cr. Jac. 64, 437, 442. Cr. Car. 22, 302. 458. 2 Rol. 683. 702. Cr. El. 233. 239. 1 Cro. 65. Vaugh. 150. Salk. 249.

(*g*) Moor. 268.

Plaintiff: On which Judgment the Defendant brought a Writ of Error in the Exchequer-Chamber: And all the
2 El. cap. 8. Court on Argument and Debate of the Caſe there again did concur in Opinion with the Juſtices of the King's Bench, and affirmed the Judgment. And ſo this Caſe was reſolv'd by all the Judges of *England.*

The Counteſs of Northumberland's *Caſe.*

Mich. 39 & 40 Eliz.

In the Common Pleas.

(a) 2 And 48, 49, 50, &c. Moor 455, 456. Cr. El. 518.

Fitton and the Counteſs of *Northumberland* (*a*) his Wife, Sir *Thomas Cecil* Knt. and *Dorothy* his Wife, *William Cornwallis* Eſq; and *Lucy* his Wife, and the Lady *Davers*, Daughters and Heirs of the Lord *Latimer*, brought a *Quare impedit* againſt *Hall* and others, who pleaded a Releaſe of *William Cornwallis* pending the Writ; Judgment of the Writ; and thereupon the Plaintiffs demurr'd. And

(b) Doct. pl. 64. 2 Rol. 411. Moor 456. Cr. El. 65, 518. 2 Co. 68 a.

it was adjudged that it went in Bar (*b*) but againſt *William Cornwallis* and his Wife, and the Writ ſtood for the others: *Vide* 45 *E.* 3. 10. *a. in the Caſe of* (*c*) *Ward. Et nota*, That in all Caſes of a Thing intire, and in the Realty,

(c) Moor 456. Cr. El. 65. Fitz. Gard 100. Br. Gard. 13. B. Summons & Severance 5.

as Preſentation to a Church, Wardſhip of the Body, &c. the Releaſe of one ſhall enure to the Benefit of the others. Then it was moved, That the Declaration was inſufficient, for the Plaintiffs in their Declaration intitle themſelves, that the ſaid Lord *Latimer* was ſeiſed of the Advowſon in Fee, and granted the next Avoidance to Dean *Carew*; and afterwards the Church being void, Dean *Carew* preſented, and ſo convey the Deſcent to them without alledging any Preſent-

(d) Cr El. 518. Antea 57. b. 2 Rol. 377, 378. 6 Co. 57. b. Moor 456. 2 And. 49, 50

ment in the Lord *Latimer* or any other but only in the Grantee of the next Avoidance; and whether this Preſentment was good Title for the Grantor, and his Heirs or not, was the Queſtion; and it was adjudged that it was a (*d*) ſufficient Title, for he doth it in the Right and Title

Title of the Grantor, and therefore it ſhall ſerve for him to make a Title in a *Quare Impedit.* The ſame Law of Leſſee for Years, Leſſee for Life, Tenant in Dower, Tenant by the Curteſy, Guardian, Tenant by Statute Merchant, Staple, *&c.* and this agrees with divers Opinions in 7 *E.* 4. 20. 22 *E.* 4. 9. *b.* 16 *H.* 7. 18. *a.* 9 *H.* 7. 23. *Br. Quare Impedit* 122. 23 *Eliz. Dyer* 300. And true it is that it is a common Learning in our Books, that where Tenant for Years, or for Life, brings a *Quare Impedit*, he ought to alledge Seiſin in him who has Fee, *& hoc regulariter verum eſt.* And yet Preſentations by themſelves ſuffice, as appears 8 *H.* 5. 10. And this Reſolution doth not oppoſe that Rule; for the Preſentation of the Grantee of the next Avoidance being made in the Title and Right of the Grantor ſhall ſerve as well for him, as his own Preſentment, and is tantamount. As if Grantee for Years of a Seigniory, or Guardian, get Seiſin of the Services, it ſhall be a good Seiſin for him in Reverſion, and therewith agrees *F. N. B.* 179. *f.* 45 *E.* 3. 26. 11 *E.* 3. *Aſſiſe* 86. Alſo it is held in our Books, That if Preſentment be alledged in the Leſſor or Donor, and alſo in the Leſſee and Donee, it is not double, for the Preſentment of the Leſſor or Donor is only traverſable. And ſee for both theſe Points 18 *E.* 3. 15. 24 *E.* 3. 37. 40 *E.* 3. 10. 42 *E.* 3. 4. 33 *H.* 6. 32, 33, 34. 7 *E.* 4. 20. 9 *H.* 7. 23. 1 & 2 *Phil. & Ma. Dyer* 106. Note a Caſe adjudged in which was Diverſity of Opinions in our Books, in which the Law is now well reſolved.

Antea 57. b. 97. b. & Co. 57. b.

1 Rol. Rep. 235. 2 Bulſtr. 89 Cr. El. 518. Dod. pl. 146.

BURY's *Caſe.*

Mich. 40 & 41 Eliz.

In the Common Pleas.

Jenk.Cent.268, 269. Moor 225, 226, 227, 228. Noy 72. 2 Leon. 169, 170, 171, 172, &c. Dyer 179. pl. 40. 1 And. 185, 186.

BEtween *Webber* and *Bury* in an *Ejectione firmæ*, a ſpecial Verdict was given on a Divorce between *Bury* and his Wife, *cauſa frigiditatis*, and that the Wife for three Years after the Marriage *remanſit virgo intacta propter perpetuam impotentiam generationis in viro, & quod vir fuit ineptus ad generandum.* And in this ſpecial Verdict all the Examinations of the Witneſſes, on which the Judge in the Spiritual Court was moved to give his Sentence, and which were depoſed in the ſame Caſe, by which the perpetual Infirmity and Diſability of *Bury ad generandum* was manifeſt (which were not entered in a former Verdict, on which Judgment was given) by which it was pretended, that by Reaſon of his perpetual Impotency, the Iſſue which he had by the ſecond Wife was illegitimate; and that was the Doubt in this Cauſe which the Jury conceived: And it was adjudged, that the Iſſue by the ſecond Wife was legitimate; for it is clear that by the Divorce *cauſa frigiditatis* the Marriage was diſſolved *a vinculo matrimonii*, and by Conſequence each of them might marry again. Then admitting the ſecond Marriage was voidable, yet it remains a Marriage until it be diſſolved; and by Conſequence the Iſſue, which is had during the Coverture, if no Divorce be in the Life of the Parties, is lawful. See 36 *Aſſ.* 10. 39 *E.* 3. 32. 28 *H.* 8. *Baſtardy* 44. *Bracton, lib.* 2. *fol.* 29. 12 *H.* 7. 22. 22 *E.* 4. *Conſultation* 35. *Et ſemper præſumit' pro legitimatione puerorum, & filiatio non poteſt probari:* Alſo a Man may be *habilis & inhabilis diverſis temporibus*; and therefore (notwithſtanding the Depoſitions by which a natural and perpetual Inability before the firſt Sentence was depoſed) Judgment was given that the Iſſue was lawful, according to the firſt Judgment given. And on this Judgment a Writ of Error was brought, and after many Arguments and great Deliberation, the ſaid Judgment was affirmed by *Popham* Ch. Juſtice and the whole Court, for the Reaſons and Cauſes aforeſaid.

Jenk. Cent. 268, 269.

Moor 228. 3 Lev. 410. Salk. 120.

3 Bulſt. 42. 7 Co. 44 b.

FLOWER's *Caſe.*

Mich. 40 & 41 Eliz.

In the King's Bench.

LAncelot Flower was indicted on the Statute of 5 *Eliz.* for Perjury in giving falſe Evidence to the Grand Inqueſt at the Seſſions held at *Wisbich*, *&c.* on an Indictment of Riot, and the Indictment was removed into the King's Bench, and the ſaid *Flower* was by Judgment of the Court diſcharged of the Indictment; for the Statute of 5 *Eliz. cap.* 14. has two Branches: The firſt is againſt Procurers of Perjury, and that is in Matters depend. in Suit by Bill, Writ, Action, or Information; ſo that a Procurement of Perjury on an Indictment is out of that Branch. The ſecond Branch (on which the ſaid *Flower* was indicted) is enacted againſt them who commit Perjury *by his or their Depoſition in any of the Courts above mentioned, or being examined in perpetuam rei memoriam:* And altho' this Clauſe be general and not reſtrained by any Words to ſuch particular Suits, *viz.* by Bill, Writ, Action or Information, as the firſt was, yet in good Conſtruction this Branch ſhall have Reference to the firſt, and ſhall be expounded by it, and ſo one Part of the Act ſhall (*a*) expound the other. For otherwiſe the Party who commits the Perjury on an Indictment will be puniſhed by this Branch; and he who ſuborns and procures him to commit the Perjury will paſs with Impunity, which will be againſt Reaſon, and the Meaning of the Makers of the Act. For ſome ſay, *Quod plus peccat author quam actor.* And ſo it was adjudged in *Monday*'s Caſe in the King's Bench, *Mich.* 36 & 37 *Eliz.* And the like Judgment was given *Trin.* 39 *Eliz.* in the King's Bench in Caſe of Perjury ſuppoſed to be committed on an Indictment of Felony.

3 Inſt. 164. 5 El. cap. 9. 1 Rol. Rep. 175. 3 Leon. 201. Goldsb. 51.

3 Inſt. 164. Cr. Jac. 120, 212.

(*a*) Co. Lit. 381. a. 2 Co. 55. a. 3 Co. 59. b. 8 Co. 117. a. Godb. 324, 428. 2 Rol. Rep. 356.

Clin. 568.

ROOKE's *Caſe*.

Hill. 40 Eliz.

In the Common Pleas.

4 Inſt. 275. Hardr. 478. Palm. 133.

IN Replevin in the Common Pleas by *Rooke* againſt *Withers*; the Defendant juſtified the Taking by Authority of a Commiſſion of Sewers directed to *B. S.* and others, to ſurvey all Walls (*prout* in the Commiſſion) in the River of *Thames* in the Counties of *Kent* and *Eſſex*, becauſe one *Carter*, &c. was aſſeſſed to every Acre for Repairing of a Bank, &c. for the Non-payment of which he took the Diſtreſs; to which the Plaintiff replied, Of his Wrong, without ſuch Cauſe. And the Jurors found the Commiſſ. and

(a) 10 Co. 138. a. 139. a. 140. a. 13 Co. 36. Cr. Jac. 336. 2 Bulſt. 197. Callis Sect. f. 1.

the Stat. of *6 H. 6. c. 5.* & *23* (*a*) *H. 8. c. 5.* And that the Commiſſion. did impanel a Jury to inquire of Defaults, who preſented that ſeven Acres of Meadows in which the Diſtreſs was taken, was next adjoining to the River; and that the Bank of the River was adjoining to the ſaid ſeven Acres, for which they taxed *Carter* to pay 8 *s.* for every Acre: And the Jury further found, that the Occupiers of the ſaid ſe-

(b) 2 Rol. Rep. 289.

ven Acres (*b*) had uſed always to repair the ſaid Bank, ſometimes voluntarily, and ſometimes by Preſentment. And further that divers other Perſons had Lands to the Quantity of 800 Acres within the ſame Level, and ſubject to Drowning, if the ſaid Bank be not repaired: And whether this Aſſeſſment of the Owner of the Land next adjoining only, without any Aſſeſſment of the others, who had Lands ſubject to the like Danger of Drowning, was lawful or not, was the Queſtion. And in this Caſe three Points were reſolved:

1. That the Finding of the Repairing, &c. by the Occupiers of the ſaid ſeven Acres was not material, becauſe

(c) 2 Rol. Rep. 289.

the (*c*) Occupiers might be Tenants at Will, or other particular Tenants, who can't by their Act bind him who has the Inheritance.

(d) 10 Co. 139. a. 1 Rol. Rep. 32 2 Bulſtr. 199. Cr. Jac. 336.

2. That the Commiſſioners ought to tax (*d*) all who are in Danger of being damaged by the not Repairing equally, and not him who has the Land next adjoining to the River only; for the Statute of *6 H. 6. cap. 5.* on which the

the Commiſſion of Sewers is formed and ſpecified, has preciſe Words in the ſame Commiſſion, That no Perſon of any Eſtate or Condition ſhall be ſpared. *Ita quod aliquibus tenentibus terrarum ſive tenementorum, &c. diviti vel pauperi, vel alteri cujuſcunque conditionis, ſtatus, vel dignitat' fuerit, qui defenſionem, commodum, & ſalvationem per præd' Wallias, foſſata, gutteras, pontes, calceta, & gurgites, &c. habent vel habere poterint nullatenus parcatur in hac parte.* And if the Law ſhould be otherwiſe, Inconvenience might follow; for perhaps the Rage and Force of the Water might be ſo great, that the Value of the Land adjoining will not ſerve to make the Banks, &c. and therefore the Stat. will have all who are in Danger, and who are to receive Benefit by the Making of the Banks, to be contributory; for (*b*) *Qui ſentit commodum ſentire debet & onus:* And the ſaid Statutes require Equality, which well agrees with the Rule of Equity: *Vide* the Caſe of Bankrupts in the ſecond Part of my *Reports*. *Et vide* 35 *H.* 8. *Pr. Tit. Teſtam.* (*c*) 19. 4 *E.* 3. * *Aſſiſe* 178. † 11 *H.* 7. 12. *b.* ‖ 29 *E.* 3. 39. and Sir *William* (*d*) *Herbert's* Caſe in the third Part of my Reports; Caſes of Equality grounded on Reaſon and Equity, *Ipſæ* (*e*) *etenim leges cupiunt ut jure regantur*; and notwithſtanding the Words of the Commiſſion give Authority to the Commiſſioners to do according to their Diſcretions, yet their Proceedings ought to be limited and bound with the Rule of Reaſon and Law. For (*f*) Diſcretion is a Science or Underſtanding to diſcern between Falſity and Truth, between Wrong and Right, between Shadows and Subſtance, between Equity and colourable Gloſſes and Pretences, and not to do according to their Wills and private Affections; for as one ſaith, *Talis diſcretio diſcretionem confundit.* And *Walmeſley* Juſt. held, and it was not denied by any, That if the Owner of the Land was bound by (*g*) Preſcription to repair the River-Bank, that yet on ſuch Commiſſion awarded, the Commiſſioners ought not to charge him only with the Whole, but ought to tax all who had Land in Danger: And to this Purpoſe the Statutes were made; for otherwiſe (*h*) it might be that all the Land would be drowned before that one Perſon only could repair the Bank; and that appears by the Words of the Statutes; wherefore Judgment was given for the Plaintiff.

Cr. Jac. 336. 10 Co. 139 a. 1 Rol. Rep. 32. 2 Bulſtr. 199.

(*b*) 1 Co. 99. a. 5 Co. 24. b. 7 Co. 38. b. Co. Lit. 231. a. 2 Inſt. 489. Cart. 142. 3 Keb. 592.

(*c*) 2 Co. 23. b. Br. N. C. 275. 2 Bulſtr. 15.

* 2 Co. 25. b.

† 2 Co. 25. b.

3 Co. 13. a. 14. a. Co. Lit. 376. b. 386 b. Hob 25. 3 Bulſtr. 318. Cr. Jac. 218.

‖ 2 Co. 25. b.

(*d*) 3 Co. 13. 14.

(*e*) 10 Co. 138. a. 140 a. 4 Inſt. 41. 2 Bulſtr. 197, 198. Callis Sect. 112. Hob. 158 Hardr. 146. Cr. Jac. 335. 3 Bulſt. 128.

(*f*) 2 Co. 25. b. 8 Co. 152. a. 9 Co. 123. b. Co. Lit. 10. a. 42. a. 166. b. 274. b. 171. b.

(*g*) 10 Co. 140. a. Callis Sect. 144.

(*h*) 10 Co. 140. b.

PENRUDDOCK's *Caſe.*

Trin. 40 Eliz.

In the Common Pleas, &c.

Hill. 37 Eliz. Rot. 387. in the King's Bench, on a Writ of Error. Jenk. Cent. 260. 3 Inſt. 201, 202, 203, &c. Cr. El. 234. 9 Co. 53. b.

IN a *Quod permittat* between *Henry Clark* Plaintiff, and *Edward Penruddock* and *Mary* his Wife Defendants, which was adjudged in the Common Pleas, and removed by a Writ of Error into the K.'s Bench, *Hill.* 37 *El. Rot.* 387. the Caſe was ſuch; *John Cock* 2 *Oct. anno* 1 *Mar.* built on his own Freehold an Houſe in *St. John's Street* in the County of *Midd'* ſo near the Curtilage of the Houſe of *Thomas Chichely*, that *domus illa ſuperpendet, Anglice*, doth hang over *magnam partem, videlicet* 3 *pedes Curtilagii præd', &c.* And afterwards *John Cock* conveyed the Houſe which he had ſo built to *Penruddock* and his Wife; and *Thomas Chicheley* to whom the Nuſance was done, conveyed his Houſe to the ſaid *Clark* the now Plaintiff. And the Plaintiff in his *Quod permittat* (which he brought) *proſternere domum prædict'*, declared that the ſame Houſe *ſuperpendet tres pedes curtilagii prædict', ſic quod aquæ pluviales de eadem domo deſcendentes, ſolum ejuſdem curtilagii conterunt, ac magnopere, ac indies magis magiſque conſumunt & devaſtant, ac ea ratione curtilag' præd' quolibet pluviali tempore humectat' & inundat' exiſt', quod prædict'* Henric' *inhabit' in eodem meſſuagio, nullum profic' & eaſiament' de eodem curtilagio percipere poſſit, ad nocumentum liberi tent' prædicti, &c. in eiſdem.* And the firſt Queſt. was, if the Writ of *Quod permittat* lies in this Caſe for the Feoffee or not: And it was objected, that when a Wrong and Injury is done by levying of a Nuſance for which an Action lies, that if he, who has the Freehold to which the Nuſance is done, conveys it over, now this Wrong is remedileſs; as if the Lord incroaches Rent of his Ten't, the Tenant cannot avoid this Wrong in an (*a*) Avowry, but in an *Aſſiſe*, (*b*) or a *Ceſſavit*, or a *Ne* (*c*) *injuſte vexes*, he may. But if the Ten't to whom the Wrong is done enfeoffs another, his Feoffee ſhall never avoid this

(*a*) 4 Co. 11. b. 9 Co. 34. a. Doct. pl. 318. 2 Inſt. 21.

(*b*) 4 Co. 11. b. 9 Co. 34. a. Doct. pl. 318. 2 Inſt. 21.

(*c*) F.N.B. 11 c.

this Wrong; for he ſhall take the Land in the ſame Plight as it was given him; and that appears by 33 *E.* 3. *Avowry* 255. & 18 *E.* 2. *Avow.* 217. & 4 *E.* 2. *Avow.* 201. Alſo if a Man be ſeiſed of Land to which Common is appendant, and he is diſſeiſed of the Common, upon which he brings an Aſſiſe, and afterwards enfeoffs another of the ſaid Land, the Common is extinct for ever; and therewith agrees 4 *E.* 3. wherefore they conceived that the Feoffee ſhould not have the ſaid *Qd' permittat* to avoid the Wrong and Nuſance made in the Time of his Feoffor. But it was anſwered and reſolved, That the dropping of the Water in the Time of the Feoffee is a new Wrong, ſo that the Permiſſion of the Wrong by the Feoffor, or his Feoffee, to continue to the Prejudice of another ſhould be puniſhed by the Feoffee of the Houſe to which, &c. And if it be not reformed after Requeſt made, the *Qd' permittat* lies againſt the (*a*) Feoffee, and he ſhall recover Damages, if he do not reform it; but without Requeſt made, it doth not lie againſt the Feoffee, but againſt him who did the Wrong it lies without any Requeſt made, for the Law doth not require any (*b*) Requeſt to be made to him who doth the Wrong himſelf: And ſo this Caſe is not like any of the Caſes which have been put on the other Side. *Vide* 4 *Aſſ.* 3. (*c*) 4 *E.* 3. 36. *a. b.* 5 *E.* 3. 43. where it appears that the Feoffee ſhall have a *Quod permittat* of a Nuſance levied in the Time of the Feoffor: And with this Judgm. agrees a Judgm. given by Sir *Chriſt. Wray* Ch. Juſt. and the whole Court of *King's Bench*, *Mich.* 24 & 25 *Eliz.* where the Caſe was; *John* (*d*) *Rolf* the Father was ſeiſed of a Houſe in *Hemelhamſtead* in Fee; and *Ric. Rolf* the Father was alſo ſeiſed of a Piece of Land on the South and Eaſt Parts adjacent to the ſaid Houſe, and *Ric. Rolf* built a Houſe on his Piece of Land aforeſaid, ſo near the Houſe of the ſaid *John Rolf*, that the Eaves of the ſaid Houſe did hang over Part of the Houſe of the ſaid *John Rolf*, ſo that the Rain which deſcended from the ſaid Houſe of the ſaid *Rich. Rolf* fell on Part of the Houſe of the ſaid *J. Rolf*, and afterwards *J. Rolf* died, and his Houſe deſcended to his Son, and afterw. the ſaid *Rich.* died, and his Land deſcended to his Son, who on Requeſt made by the ſaid *John* the Son, did not reform the ſaid Wrong, but ſuffered the Eaves of his Houſe to hang over the Houſe of *John Rolf* the Son for a certain Time; the Wall of the Houſe of the ſaid *J. Rolf* the Son became rotten, &c. upon which Matter *John* the Son brought an Action againſt *Rich.* the Son, upon which *Rich.* the Son did demur in Law; and it was adjudged that the Action was (*e*) maintainable, becauſe the Def. on Requeſt made, did not reform the Nuſance which his Fath. made, but ſuffered it to continue to the Prejudice and Damage of the Pl. Son and Heir to him to whom the Wrong was done. *Vide* 7 *H.* 4. 13. 31 *E.* 3. *Voucher* 272. 20 *Aſſ. p.* 18. 19 *Aſſ. p.* 6. and with this Judgment in the principal Caſe agrees the *Regiſter* 199. *b.* & *F. N. B.* 124. *H.* And the Stat. of *Weſt.* 2. *cap.* (*f*) 24. by which it is enacted, *Quod ſi transferat' domus*,

(*a*) Jenk. Cent. 260. Raym. 424, 469. 2 Bulſt. 16. 2 Inſt. 405. 3 Inſt. 204. Cr. Jac. 231, 373. Cr. El. 191. Moor 353. F. N. B. 124. h.

(*b*) Cr. El. 269.

(*c*) 2 Bulſtr. 16. 9 Co. 54. a.

(*d*) Rolf's Caſe, 24 & 25 Eliz. Cr. Eliz. 402. Moor 353.

(*e*) Moor 118, 353. Cr. El. 191, 402. Cr. Jac. 231.

(*f*) 9 Co. 55. a. 2 Inſt. 405, &c. Cq. Lit. 54. b.

murus, &c. in aliam perſonam, breve non denegat', ſed de cætero, cum in uno caſu concedit' breve, in conſimili caſu ſimili remedio indigente, ſicut prius, fiat breve. Et ſi hujuſmodi levata ad nocumentum transferant' in aliam perſonam, de cætero fiat breve. By which it appears, That the Writ in our Caſe well lies, and ſo it was adjudged in the *Common Pleas*, that the *Quod permittat* in the Caſe at Bar did well lie. *Vide* 14 *Eliz. Dyer (a)* 319. Madam *Brown*'s Caſe. And *Hill.* 35 *Eliz. Rot.* 493. between *(b) Beſwick* and *Cumden* in the *King's Bench:* On which Judgment in the Caſe at Bar *Penruddock* and his Wife brought a Writ of Error in the *King's Bench*, where *Popham* Chief Juſtice, and all the Juſtices of the *King's Bench* did concur in Opinion with the Juſtices of the *Common Pleas*, as to the Point there adjudged: And it was moved in the *King's Bench*, If the Feoffee might abate the Nuſance as the Feoffor himſelf, and as well in the Hands of the Feoffee who did not the Nuſance, as in the Hands of the Tort-Feſor himſelf; and if the Feoffee of the Houſe to which the Nuſance was made might do it, (if he might do it) before he had ſome ſpecial Prejudice, as in the dropping of the Water, or if he ought to ſtay till he had ſpecial Prejudice. And *Popham* Chief Juſtice, held that in both Caſes the Feoffee might (c) abate the Nuſance, and that before any Prejudice; for it is reaſonable that he ſhould prevent his Prejudice, and not ſtay till it be done; which was granted by the whole Court. And afterwards the Judgment was affirmed: And ſo this Caſe was adjudged by all the Judges of *England.*

(a) Cr. El. 251, 402. 2 Leon. 103. Dyer 319, 320. pl. 17. Yelv. 144. Noy 112.

(b) Moor 353, 449, 450. Cr. El. 402, 403. Noy 68.

(c) 9 Co. 55. a. Cr. El. 269. 1 Rol. Rep. 394. 3 Bulſt. 197. 1 Jones 222. 2 Rol. 144, 145, 565. Cr. Jac. 555. 9 E. 4. 35. b. Cr. Car. 185. Jenk. Cent. 260.

[*See* 6 Mod. Caſe ult. &c.]

WINDSOR's

WINDSOR's *Caſe*.

See Fitzgib. 36.

Paſch. 41 Eliz. Rot. 513.

IN a *Quare Impedit* by *A. Windſor* againſt the Archbiſhop of *Canterbury*, *Fletcher*, &c. for the Church of *Buſcot* in the County of *Berks*: The Plaintiff declared that he had a Manor to which the Advowſon of two Parts of the Church was appendant, and that the Defendant had a Manor to which the Advowſon of the third Part was appendant; and on the Declaration, and the Bar, the Caſe was ſuch: The Plaintiff had the Advowſon of two Parts, and the Defendant of the third; the Plaintiff preſented once, and the Incumbent died, and afterwards he preſented in the Time of *E. 6. Parry* who was admitted, inſtituted, and inducted; and afterwards in the Time of Queen *Mary* he was deprived, becauſe he *fuit conjugatus, and a Favourer of the Religion tempore E. 6.* and the Church being void by his Deprivation, the Defendant preſented his Clerk, who was admitted, inſtituted, and inducted, & *remanſit in Eccleſia uſque* 1 *Eliz.* and then deprived by *Jewel* and others of the High Commiſſioners, and the firſt Sentence declared and adjudged to be void, and *Parry* the firſt Incumbent reſtored to the ſaid Church: And afterwards the Defendant's Clerk ſo deprived died, and then *Parry* died, and the Defendant preſented as in his Turn, foraſmuch as his Incumbent was deprived, and *Parry* the Incumbent of the Plaintiff reſtored, by whoſe Death the Church now becomes void; upon which the Pl. did demur in Law: And it was adjudged againſt the Pl. And in this Caſe it was agreed, If two have Title to preſent by Turns; and one preſents, who is admitted, inſtituted, &c. and afterwards is deprived for Crime or Hereſy, or any other Cauſe; yet he ſhall not preſent again, but it ſhall ſerve for his *(a)* Turn: So if he preſents a meer Lay-man, who was admitted, inſtituted, &c. altho' it be declared by Sentence that he was uncapable, and therefore void *ab initio*; yet becauſe the Church was full till the Sentence declaratory came; therefore, altho' this Deprivation relates to ſome Purpoſe, yet it ſhall ſerve for his Turn, becauſe it was but voidable, as in the Caſe of *Litt.* If the *(c)* Lord marries his Ward within Age of Conſent, and afterwards he diſagrees to it, now it is no Marriage *ab initio*, yet he

Co. Ent. 485. pl. 6. Moor 558, 559. 2 Rol. 347. Cr. El. 686, 687. 10 Co. 136. b. 2 Rol. Rep. 131. Lit. Rep. 304.

(a) 2 Rol. 347. Cr. El. 687, 811. Hob. 167.

(b) 2 Rol. 347. Hob. 148, 149.

(c) Co. Lit. 79 b. Lit. ſect. 105.

(a) Co. Lit. 79. b. Co. Lit. ſect. 105.

he ſhall not (*a*) marry him afterwards. So 27 *H.* 6. *Gard.* 118. If the Guardian marries his Ward, and afterwards they are divorced *cauſa præcontractus*, yet he ſhall not have the Marriage of him again. But when the Admiſſion and Inſtitution are meerly void, then without Doubt it ſhall not ſerve for a Turn; as if his Preſentee had been admitted, inſtituted, and inducted, but he had not ſubſcribed to the (*b*) Articles, *&c.* according to the Statute of 13 *Eliz.* whereby in ſuch Caſe the Admiſſion and Inſtitution and Induction are void; 23 *Eliz.* (*c*) *Dyer pl. ult. acc'*. But in the principal Caſe, altho' the Defendant's Clerk was Parſon for the Time to all Purpoſes, and during the firſt Deprivation *Parry* was not Incumbent; yet when the ſecond Sentence came, then *Parry* was Incumbent again by Force of his former Preſentation, Inſtitution and Induction, and needed no new Inſtitution, *&c.* And by Force of the ſecond Sentence the Preſentee of the Defendant was removed, and *Parry* reſtored; then when *Parry* died, who was the laſt Preſentee of the Plaintiff, the Defendant ſhall preſent as in his Turn, for the Preſentation which he made now on the Matter, during the Life of *Parry*, being the ſecond Preſentee of the Plaintiff, cannot be in his Turn, when *Parry* died Incumbent by Force of the Plaintiff's Preſentation: But if *Parry* had died (*d*) before the ſecond Sentence, or had not reverſed the former Sentence, then the Defendant had had his Turn: And note, that the Writ was *ad* (*e*) *Eccleſiam*, and the Declaration was *de advocatione duarum partium*, and well. *Vide Dyer* 6 *E.* 6. (*f*) 78. *b. F. N. B.* 39. *b. Vide Trin.* 14 *Eliz. Rot.* 1060. in the *Common Pleas*, and *Hill.* 38 *Eliz.* Sir *Thomas Stanhop*'s Caſe in the *Common Pleas*: And I conceive that the Writ ought to be (*g*) general, as *F. N. B.* and divers other Books are; but the Declaration ought to be according to his Title.

Vide 23 Eliz. Dyer pl. ult.

(*b*) 2 Rol. Rep. 3. 2 Rol. 347. 6 Co. 29. a. 2 Jones 19. Cr. El. 680. 1 And. 62, 63. Yelv. 7. Cawley 22.

(*c*) Dyer 377. pl. 31. 2 Anderſ. 183. Hob. 168. Cr. El. 680.

(*d*) 2 Rol. 347. Cr. El. 687.

(*e*) Doctrin. pl. 95, 385. 10 Co. 135, 136. Co. Lit. 17. b. 18. a.

(*f*) Dyer 78. pl. 34. 4 Co. 75. a. b. 10 Co. 136. b.

(*g*) F. N. B. 33. a.

HUNGATE's

HUNGATE's *Caſe.*

Trin. 43 Eliz. Rot. 1084. (1804.)

In the Common Pleas.

Hungate (a) brought an Action of Debt on a Bond againſt *Meſe* and *Smith*, the Condition of which was to perform the Arbitrement of two, between the Plaintiff of the one Part, and the Defendants of the other Part; *ita quod arbitrium præd' fiat & deliberetur utrique partium prædictorum* before ſuch a Day: And the Defendants pleaded that before the Day the Arbitrement was made, but was delivered to the Plaintiff, and *Meſe* one of the Defendants, and not to the ſaid *Smith*; upon which the Plaintiff demurr'd. And Judgment was given againſt the Plaintiff. And it was reſolved, that ſometimes this Word *(uterque)* is *diſcretive* and ſeveral, and ſometimes *collective*, and conjoined: As if two or three be bound in a Bond, *(b) & utrumque eorum*, this Word *utrumque* makes the Bond ſeveral, as it is held in 28 *(c) H.* 8. *Dy.* 19. *b.* But in the Caſe at Bar it ſhall be taken *collective.* And the Rule to know in what Senſe it ſhall be taken, and when it ſhall be taken either *(d)* ſeverally or * jointly is to conſider the ſubject Matter, and to make Conſtruction according to Congruity of Reaſon, and *ut evitetur abſurdum*, as in the Caſe of *(e)* 39 *H.* 6. 7. the Condition of a Bond was, *ſi uterque eorum, ſcil.* the Obligor and Obligee, *ſteterit arbitrio* Robert' Bozom, *&c.* and it was adjudged that each of them was bound *pro parte ſua*, and not one for the other; for that would be abſurd and unreaſonable. And in the Caſe at Bar, foraſmuch as each of the Parties is ſubject to Penalty and Danger, it is Reaſon that the Arbitrem. ſhould be delivered

(a) Moor 642. Cr. El. 885. 2 Rol. Rep. 87. Bridg. 63, 64. March Arbitrement 182, 183. 6 Mod. 160.

(b) 2 Rol. 148. 2 Bulſtr. 70. Cr. Jac. 322. 10 H. 7. 16. Dy. 310. pl. 80.

(c) Dyer 19. pl. 114. 2 Bulſt. 70.

(d) Cr. El. 797. * Moor 260.

(e) Bridg. 63, 64. 39 H. 6. 11. a. 10. b.

to

to each of the Parties, to the Intent that they might perform it, and avoid the Danger of Breaking of it. 2. It was reſolved, that if two be of one Part, and two of the other Part, and the Words are (as above) *ita qd' deliberetur utriq; partium*, that the Delivery of the Arbitrement to one of the one Part, and to another of the other Part, is not ſufficient; for Party is to be intended of the whole Party, and one is as well within the Penalty and Danger as the other. And foraſmuch as the Arbitrement was not delivered to the ſaid *Smith*, Judgment was given againſt the Plaintiff.

BAKER's *Caſe.*

Trin. 42 Eliz.

In the King's Bench.

UPon Evidence in an *Ejectione firmæ*, between *Middleton* and *Baker*, it was reſolved by the whole Court, That if the Plaintiff in Evidence (*b*) ſhews any Matter in Writing, or of Record, or any Sentence in the Eccleſiaſtical Court, upon which a Queſtion in Law ariſes, and the Defendant offers to demur in Law upon it, the Plaintiff cannot refuſe to join in Demurrer, (*c*) but he ought to join in the Demurrer, or wave his Evidence. So if the Plaintiff produces (*d*) Witneſſes to prove any Matter in Fact, upon which a Queſtion in Law ariſes, if the Defendant admits their Teſtimony to be true, there alſo the Defendant may demur in Law upon it, but then he ought to admit the Evidence given by the Plaintiff to be true; and the Reaſon thereof is, That Matter in Law ſhall not be put to Lay-men. So may the Plaintiff demur upon the Defendant's Evidence, *mutatis mutandis*: But if Evidence be given for the (*e*) King in an Information, or any other Suit, and the Defendant offers to demur upon it, the King's Counſel ſhall not be compelled to join in Demurrer, but in ſuch Caſe the (*f*) Court ought to direct the Jury to find the ſpecial Matter, and upon that they ſhall adjudge the Law, as it appears 34 *H.* 8. (*g*) *Dyer* 53. but that is by (*h*) the King's Prerogative, who alſo may wave (*i*) a Demurrer, and take Iſſue at his Pleaſure. *Nota bene.*

(*a*) Cr. El. 751, 752.
(*b*) Co. Lit. 72. a. Doct. pl. 118.
(*c*) Co. Lit. 72. a. 2 Rol Rep. 119. Doct. pl. 118.
(*d*) Doct. pl. 118.
(*e*) Cr. El. 752. Co. Lit. 72. a. Doct. pl. 119.
(*f*) Cr. El. 752. Doct. pl. 119. Co. Lit. 72. a.
(*g*) Cr. El. 752. Co. Lit. 72. a. Dyer 53. pl. 8.
(*h*) 1 Mod. Rep. 280.
(*i*) Hard. 83. Plowd. 85. a. 236. a.

BOULSTON's

6 Mod. 46.

BOULSTON's *Caſe.*

Mich. 39 & 40 Eliz.

In the Common Pleas.

BEtween *Boulſton* and *Hardy* it was adjudged in the *Com. Pleas*, That if a Man makes (*a*) Cony-boroughs in his own Land, which increaſe in ſo great Number that they deſtroy his Neighbours Land next adjoining, that his Neighbours cannot have an Action on the Caſe againſt him who makes the ſaid Cony-boroughs; for ſo ſoon as the Conies come on his Neighbour's Land he may (*b*) kill them, for they are *feræ naturæ*, and he who makes the Cony-boroughs has no Property (*c*) in them, and he ſhall not be puniſhed for the Damage which the Conies do wherein he has no Property, and which the other may lawfully kill. And it was reſolved in this Caſe, That none may new erect a (*d*) Dove-cote but the Lord of a Manor; and if any do it, he may be puniſhed in the Leet, but no Action on the Caſe lies by any particular Man, for the (*e*) Infiniteneſs of Actions that may be brought: And of ſuch Opinion, as to the new Erection of a Dove-cote was Sir *Roger Manwood* Chief Baron, and the Barons of the Exchequer in the Exchequer-Chamber.

(*a*) Cr. El. 547, 548. Moor 420, 421, 453. 1 Rol. 90, 405. 1 Jones 356. Yelv. 104. 2 Leon. 201. 4 Leon. 7. Godb. 122, 123 Owen 114. 2 Bulſt. 115, 116

(*b*) 1 Rol. 90. 4 Leon. 7. Cr. El. 548. Cr. Car. 388.

(*c*) 4 Inſt. 305.

(*d*) Moor 238, 421, 453. Cr. El. 548. 2 Rol. 138, 139, 265. Cr. Jac. 382, 491. Godb. 259. 1 Rol. Rep. 136, 200, 201.

2 Rol. Rep. 3, 4, 5, 30, 31, 32. Poph. 141. See 2 Rol. Abr. 132. con. (*e*) Cr. Car. 388. Antea 73. a. See 3 Salk. 248, &c. ibid.

ALDEN's *Caſe.*

Hill. 43 Eliz. *Rot.* 1807.

In the Common Pleas.

IN *Ejectione firmæ* by *Smith* againſt *Alden*; (*a*) the Defendant pleaded that the Tenements in which, &c. were Parcel of the Manor of *Odiham* in the County of *Southampton*, &c. *quod quidem manerium eſt de antiquo dominico*, &c. and demanded Judgm. if this Court would take Conuſance; upon which the Pl. did demur in Law: And it was objected that this Action was but in the Nature of Treſpaſs, and that in old Time, in it the Term was not recovered, but only againſt him in the Reverſion; and in (*b*) Treſpaſs for Breaking of a Cloſe and Felling of Trees, ancient Demeſne is no Plea, as it is adjudged in 46 *E.* 3. 1. *b.* Alſo Lands in ancient Demeſne ſhall be (*c*) extended by *Elegit*, becauſe the Freehold doth remain as it was before, and yet the Intereſt of the Land is charged by * this Execution, 7 *H.* 7. 1. But it was anſwered and reſolv'd that the Plea was good.

1. Becauſe the common Intendment (*d*) is, that the Title and Right of the Land will come in Debate, as in a Replevin, in a Writ (*e*) of Meſne, in a Writ of (*f*) Ward, in Accompt (*g*) againſt Guardian in Socage, ancient Demeſne is a good Plea, for the Appearance and common Intendment that the Realty will come in Debate, 21 *E.* 3. 10. (4) 40 *E.* 3. 4. 46 *E.* 3. 1. So in Accompt againſt a Baily, for it is brought for the Iſſues and Profits of the Land, which is ancient Demeſne, which ought to be determined in the Court of ancient Demeſne. *Vide* 21 *E.* 4. *Ancient Demeſne* 6.

2. In this Action of *Ejectione firmæ*, the Plaintiff ſhall recover the Poſſeſſion of the Land, and ſhall have Execution alſo *per habere facias poſſeſſionem*, and not like an Execution by *Elegit*; for there no Judgment is

(*a*) 2 And. 178. Cr. El. 826.
(*b*) Cr. El. 826. Hob 47. 1 Rol. 322 Doct. pl 52. Br. Ancient Demeſne 7. 4 Inſt. 270.
(*c*) Hob 47, 48. Dyer 373. pl 13. Doct. pl. 51. 2 Inſt. 397. 4 Inſt. 270. Palm. 541. Br. Ancient Demeſne 33. 22 Aſſ. pl. 45. Poſtea 105. b. 1 Ro. 888.
* 2 And. 178. Cr. El. 826. Cr. Jac. 559. Hob. 47. 9 Co. 77 b. Doct. pl. 51. Latch 83, 84. 2 Brownl. 129, 130, 133. 2 Rol. Rep. 181. Cr. Car. 9. Palm. 406. 1 Bulſt. 108. 4 Inſt. 270.
(*d*) Cr. El. 826. Hob. 47. 1 Rol. 322. 1 Bulſt. 108. 46 E. 3. 1. b. 2. a. Br. Ancient Demeſne 47. 4 Inſt. 270.
(*e*) 1 Rol. 322. 4 Inſt. 270.
(*f*) Hob. 47. Brownl. 131

1 Rol. 322. 56 E. 3. 1. b. 2. a. Br. Ancient Demeſne 7. (*g*) Hob. 47. a. 1 Rol. 322. 46 E. 3. 2. a. 4 Inſt. 270.

given to recover the Poſſeſſion of the Land in a Court of Record, but only Execution done by the Sheriff in the Country: But in an Aſſiſe brought by Tenant by *E-*

(a) Hob. 47,48. Antea 105. a. Dy 373. pl. 13. Doct pl. 51. 2 Inſt. 397. 4 Inſt. 270. Palm. 541. Br. Ancient Demeſne 33. 1 Rol. 888.

legit (a) ancient Demeſne is a good Plea, as it is held 22 *Aſſ.* 45. And there ſome ſay, That Land in ancient Demeſne is not ſubject to *Elegit*, but the Contrary is at this Day held for Law for the Reaſon aforeſaid. And where any Intereſt in the Land ſhall be bound, or the Realty come in Debate, it will be reaſonable that thoſe in ancient Demeſne, who beſt know to try and determine it, ſhould have the Conuſance of it. And if this Action proceeds in this Court, the Sheriff cannot return any Perſons within ancient Demeſne; and if he returns any, they may be challenged and withdrawn, and thereby the true Inſtitut. of the Law will be defeated, *ſcil.* That the Intereſt of every Land (holder) ſhall be tried *per probos & legales homines de vicinet'*, *&c.* who beſt know the Truth of the Matter. And foraſmuch as at this Day all Titles of Lands are for the greateſt Part tried in Actions of Ejectments, if in them ancient Demeſne ſhould not be a good Plea, the ancient Privileges (which the Law for the Repoſe and Quiet of thoſe of ancient Demeſne hath allowed to them, to the Intent that they ſhould apply themſelves to Tillage and Husbandry, and therefore are ſo greatly regarded and favoured in our Books) would be utterly taken away and defeated. *Vide* 44 *E.* 3. 22.

Cr. El. 104. Cr. Jac. 261. Cumberb. 10. 9 Co. 78.

Sir

Sir Henry Conſtable's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

SIR *Henry Conſtable* brought an Action of Treſpas againſt *Gamble*, and declared, That King *Philip* and Queen *Mary* were ſeiſed of the Manor and Fee of *Holderneſs* in the County of *York* in their Demeſne as of Fee, as in Right of the Crown of *England*; and by their Letters Patents granted the ſaid Manor and Fee with Wreck of the Sea within the ſaid Manor and Fee, to *Henry* Earl of *Weſtmorland* in Fee, who conveyed them to Sir *John Conſtable* Father of the Plaintiff, whoſe Heir he is, in Fee: And further declared, that certain Goods, *ſcil.* twelve Shirts and five Cloaks were Wreck and caſt on the Land within the Manor of *Barneſton*, which is within the ſaid Fee of *Holderneſs*, and that the Defendant took the ſaid Goods, &c. The Defendant pleaded to Iſſue, and thereupon a ſpecial Verdict was found to this Effect; *ſcil.* That the Conveyance to the Pl. of the Manor and Fee aforeſaid was true as he had declared; and that the ſaid Manor of *Barneſton* was within the ſaid Fee: And further, that Parcel of the ſaid Goods were Wreck, and caſt *ſuper arenas aqua ſalſa minime coopertas Manerii de* Barneſton *infra fluxum & refluxum maris in Manerio de* Barneſton, and for other Parcel of the Goods, that they were floating *ſuper aquas maris refluentes ex arenis ejuſd' Manerii de* Barneſt. *infra fluxum & refluxum maris*, &c. And that the Defendant took all the ſaid Goods and ſeiſed them to the Uſe of the Lord Admiral, &c. And aſſeſſed Damages entirely for all: And *ſi ſuper totam materiam*, &c. And this Caſe was often well argued at Bar and Bench, and at laſt Judgment was given againſt the Plaintiff. And in this Caſe five Points were reſolved. 1 And. 86, 87.

1. That nothing ſhall be ſaid *Wreccum* (a) *maris*, but ſuch Goods only which are caſt or left on the Land by the Sea; for *Wreccum maris ſignificat illa bona, quæ naufragio ad terram appelluntur*: (b) *Flotſam* is when Wrecc' Maris. (a) 2 Inſt. 167. Flotſam, Jetſ. (b) Dalt. Sher. 90.

when a Ship is ſunk, or otherwiſe periſh'd, and the Goods float on the Sea; *Jetſam* is when the Ship is in Danger of being ſunk, and to lighten the Ship the Goods are caſt into the Sea, and afterwards notwithſtanding the Ship periſh. *Lagan (vel potius Ligan)* is when the Goods which are ſo caſt into the Sea, and afterw. the Ship periſhes, and ſuch Goods caſt are ſo heavy that they ſink to the Bottom, and the Marin. to the Intent to have them again, tie to them a Buoy, or Cork, or ſuch other Thing that will not ſink, ſo that they may find them again, & *dicitur Lig. a ligando*; and none of theſe Goods which are called *Jetſam*, *Flotſam* or *Ligan*, are call'd Wreck ſo long as they remain in or upon the Sea; but if any of them by the Sea be put upon the Land, then they ſhall be ſaid Wreck. So *Flotſ. Jetſam*, or *Ligan*, being caſt on the Land paſs by the Grant of Wreck: And where it is provided by the Stat. of 15 *R.* 2. *c.* 3. that the Court of Admiralty ſhall not have Cogniſance or Juriſdict. of Wreck of the Sea, yet it ſhall have Conuſance and Juriſdict. of *Flotſ. Jetſ.* and *Ligan*; for Wreck of Sea is, when the Goods are by the Sea caſt on the Land, and ſo *infra Comitat'*, whereof the com. Law takes Conuſance, but the other 3 are all on the Sea, and therefore of them the Admiral has Juriſdiction. *Bracton, lib.* 3. *c.* 3. *fol.* 120. *Item magis proprie dici poterit wreccum, ſi navis frangatur, & ex qua nullus vivus evaſerit, & maxime ſi domin' rerum ſubmerſus fuerit, & quicquid inde ad terram* (note theſe Words) *venit, erit Domini Regis.* And that alſo appears by the Book of Entries, *fol.* 611, 612. *Treſpaſs in Wreck.* Always when Wreck is claimed by Preſcript. (as by Law it may be) the Plead. is, *bona wreccata ſuper mare, & ad terram projecta'.* And another Preſcript. is there, *habere omnimod' wreccum maris infra præcinctum Manerii, ſive Dominii præd' projecta', & flotſam maris infra eund' præcinct' devenient'*; by which the Difference betw. Wreck and *Flotſ.* appears. *Vide* 9 *E.* 4. 22. Wreck is when it is caſt on the Land. 11 *H.* 4. 16. 5 *E.* 3. 3. & 29. 21 *H.* 6. *Preſcript.* 14 *E.* 2. *in Treſpaſs* 236. 5 *H.* 7. 36. (35) 39 *H.* 6. 37. & 9 *H.* 7. 20. *acc'*. *Vide Regiſt. int' brevia de tranſgreſſ.* 102. *b.* the Writ ſaith, *Oſtenſurus quare cum idem* Tho. *Dominus Manerii de Eſtombavent exiſtat & ibidem habere debeat, ipſeque & anteceſſores ſui Domini Manerii præd' a tempore quo, &c. non exiſtat memoria, hucuſque habere conſueverunt wrecc' maris infra præcinct' Maner' præd', præd'* Joceus & *Robert. bona & catalla ad valenc' cent' ſolid' apud S. infra præcinct' ejuſd' Manerii ad terram projecta' & quæ ad ipſum* Tho. *tanquam wreccum pertinere deberent, vi & armis ceperunt & aſportaverunt.* Alſo the Stat. of 15 *R.* 2. *c.* 3. proves it alſo, where it is enacted and declared, That Wreck of the Sea ſhall be tried and determin'd by the Laws of the Land, which cannot be extended to *Flotſ. Jetſ.* or *Ligan*, for they are in or upon the Sea, and therefore cannot be tried and determin'd by the Com. Law, (for there Trial fails,) but are to be determin'd before the Admiral.

Dalt. Sher. 90. Spelm. Gloſſ. verb. Flotſam.

Dalt. Sher. 90. 1 Sid. 178. Palm 96.

4 Inſt. 154. F. N. B. 112. C. Doct. & Stud. 156, 157.

Raſt. Ent 684.

F. N. B. 91. d.

2. In

2. In this Caſe it was reſolv'd by the whole Court, that the Soil on which the Sea flows and ebbs; *ſc.* betw. the high Water Mark and low Water Mark, may be Parcel of the Manor (*a*) of a Subject, 16 *El. Dy.* 326. *b. acc'*. And ſo it was adjudged in (*b*) *Lacy*'s Caſe, *Trin.* 25 *El.* in this Court. And yet it was reſolved, That when the Sea flows, and has *plenitud' maris*, the Admiral ſhall have Juriſdict. of every Thing done on the Water, betw. the high Water Mark and low Water Mark, by the ordin. and natural Courſe of the Sea: And ſo it was adjudg'd in the ſaid Caſe of *Lacy*, that the Felony committed on the Sea *ad plenitud' maris*, betw. the high Water Mark and the low Water Mark, by the ordin. and natural Courſe of the Sea, the Admiral ſhould have Juriſdict. of; and yet when the Sea ebbs, the Land may belong to a Subject, and every thing done on the Land when the Sea is ebbed ſhall be tried at the com. Law, for it is then Parcel of County, and *infra corp' Comitat'*, and therew. agrees 8 *E.* 4. 19. *a.* So note, that below the low Water Mark the Adm. has the ſole and abſolute Juriſdict. betw. the high Water Mark and low Water Mark, the com. Law and the Admiral have *diviſum Imperium*, interchangeably, as is aforeſ. *ſc.* one *ſup. aquam*, and the other *ſup. terram*. And Sir *J. Popham* Ch. Juſt. ſaid, That on a Trial at *Niſi prius* betw. the City of *Briſtol* and the Ld. *Berkley*, it was held by the Juſtices of Aſſiſe, that where the Ld. *Berkley* had a Manor adjoining to the *Severn*, and preſcribed to have Wreck within his Manor, and certain Goods floated between the high Water Mark, and low Water Mark, and the City of *Briſt.* had *Flotſ.* there; that the ſaid Goods were not Wreck as long as they were floating upon the Water betw. the high Water Mark and low Water Mark. See the Book in (*c*) 5 *E.* 3. 3. *a.* in a Replev. brought by *Will. de Newport* of *London* againſt Sir *Hen. Nevil*, and declared that the Def. took 3 Laſts of Herrings, and a Ship; the Def. pleaded that he was Ld. of the Manor of *Walring*, and preſcrib'd to have Wreck within his Manor *a tempore cujus*, *&c.* and that the Herrings and Ship were Wreck within his Manor. To which the Pl. ſaid, that they were our Goods in the Keep of our Mariners which arrived by the Sea, and we ſay that he took 'em out of their Cuſtody: Judgment if he can claim as Wreck? To which the Def. ſaid, we took 'em as Wreck, out of all Cuſtody; on which Book I obſerve 3 Things, 1. That Wreck may be claim'd by Preſcript, 2. That foraſmuch as a Ship cannot be Wreck, *ſc.* caſt on the Land, but betw. the high Water and low Water Mark, thence it follows, that that was Parcel of the Manor: 3. If the Ship periſhes, yet if any of the Servants eſcape, the Law ſaith, that they have the Cuſtody of the Goods, and they are not Wreck, 39 *E.* 3. 35. *a. b.* One (*d*) preſcribed to have royal Fiſh, as Porps, *&c.* found within his Manor, which ſeems to be between the high Water and low Water Mark.

Terra inter fluxum & refluxum maris.
(*a*) 2 Rol. 170. (*b*) 3 Inſt. 48. 113. 2 Co. 93. a. 13 Co. 53. 1 Leon. 270. Moor 121, 122. 1 Rol. Rep 139. 1 Bulſtr. 203. Dalt. Juſt 340. 2 Brownl. 34.
(*c*) Fitz Replev. 41. 2 Inſt. 167.
(*d*) 3 Bulſt 5, 6. Co. Lit. 114. b.

3. It was reſolv'd, That the K. ſhould have *Flotſ. Jetſ. & Ligan*, when the Ship periſhes, or when the Owner of the Goods

is not known, for in 46*E.*3.15. it appears, that Goods caſt into the Sea for Fear of Tempeſt are not forfeited. *Vide F.N.B.*112. *c.* 5*E.*3.33*. 9 *F.*4.22. that the Ship ought to periſh, which is called Shipwrack: And that is alſo proved by the ſaid Act of *Weſt.* 1. *c.* 4. (*a*) where it is ſaid, if a Man, Dog, or Cat eſcape alive, (which is to be intended when the Ship periſhes) and therewith agrees *Bract. lib.* 2. *c.* 18. *fol.* 41. *Item ſine tradit' res habita pro derelict', ubi Dom' ſtatim deſinit eſſe Dom', ſi autem cauſa navis alleviandæ, non ſic, quia non ea voluntate ejecit quis, ut deſinat eſſe Dom', &c.* And a Man may have *Flotſ.* and *Jetſ.* by the K.'s Grant, and may have *Flotſ.* within the high Water and low Water Mark by Preſcript. as appears before. And thoſe of the Weſt Country preſcribe to have Wreck in the See ſo far as they may ſee an *Humber* Barrel.

* The Orig. is 23 but Q. if it ſhould not be 3

(*a*) 2 Inſt. 166, 167 Dalt. Sher. 89. Vaugh. 168.

4. It was reſolved, that the Stat. of *Weſt.* 1. *c.* 4. by which it is enacted, that of Wreck of the Sea it is agreed, that where a Man, a Dog, or a Cat eſcape alive out of the Ship, that ſuch Ship, nor Barge, nor any Thing within them ſhall be adjudg'd Wreck, but the Goods ſhall be ſaved and kept by View of the Sheriff, Coroner, or King's Bailiff, &c. ſo that if any ſue for thoſe Goods, and after can prove that they were his, or periſhed in his Keeping within a Year and a Day, they ſhall be reſtored to him without Delay, &c. was but a Declaration of the com. Law; and therefore all that which is provided as to Wreck, extends alſo to *Flotſ. Jetſam* and *Lagan. Bract.* who wrote in the Time of *H.* 3. before the Making of the ſaid Act, ſpeaking of Wreck before ſaith, *Et qd' hujuſm' dici debet wreccum, verum eſt, niſi ſit, qd' verus Dom' aliunde veniens & certa indicia & ſigna donaverit res eſſe ſuas, ut ſi canis vivus inveniat', & conſtare poterit, qd' talis ſit Dom' illius canis præſumptive, ex hoc illum eſſe Dom' illius canis & illarum rerum; eod' modo ſi certa ſigna impoſita fuerint mercibus:* By which it appears, that the Stat. of *Weſtm.* 1. which was made 3*E.*1. was but a Declarat. of the (*b*) com. Law againſt the Opinion in *Dr.* and *Stud. lib.* 2. *f.* 118. and if the Owner dies, his Ex'ors or Adminiſtrat. may make their Proofs. And in many Caſes concerning Time, the Common Law gives a Year and a Day for a convenient Time; as in the Caſe of a Stray, if the Own. (Proclamation being made) don't claim it within a Year and a Day, it is forfeited. So a Year and a Day is given in Caſe of Appeal, and in a Caſe of Deſcent after Entry or Claim; of Nonclaim on a Fine, or Writ of Right at the com. Law; of a Villain dwelling in (*c*) ancient Demeſne; of the Death of a Man who has a Blow or Wound; of Protections, Eſſoins of the K.'s Service, and in many other Caſes: And the Year and Day in Caſe of Wreck, ſhall be (*d*) accounted from the Taking or Seizure of them as Wreck; for altho' the Property is in Law veſted in the Ld. before Seizure, yet until the Ld. ſeiſes, and takes it into his actual Poſſeſſ. it is not notor. who claims the Wreck, nor to whom the Own. ſhall repair to make his Claim, and to ſhew to him his Proofs. And if the

(*b*) 2 Inſt. 165, 168. Dalt. Sher. 91. Dr. & Stud. lib. 2. cap. 51.

(*c*) Co. Lit 254.

(*d*) 2 Inſt. 168. Dalt. Sher. 91. Vaugh. 168.

Wreck belongs to the K. the Party may have a Commiſ. (*a*) to hear and determ' the Truth of it, and that by the Verd. of 12 hon. Men, for no (*b*) Proof is allow. by Law, but the Verd. of 12 Men: And if it belongs to other than the K. then if the Own. cannot ſatisfy him who claims them as Wreck by his Mark or Cocket, or by the Book of Cuſt. or by Teſtimony of honeſt Men, then the Own. may have ſuch Commiſ. or bring his Act. at the Com. Law, and prove it by the Verd. of a Jury; and if the Commiſ. be awarded, or the Act. be brought within the Year and Day, altho' the Verd. be given for him afterwards, it is ſuffic. *Vide Regiſt.* and *F. N. B.* 12. For the Commiſ. *vide Stat. Weſt.* 1. *c.* 4. 4 *E.* 1. *de Offic. Coronat.* 15 *R.* 2. *c.* 3. 27 *E.* 3. *c.* 13. *Britton*, *c.* 17. 33 *Stamf. Prærog. Regis. Et nota*, that the Act (*c*) *de Prærog. Regis* made in 17 *E.* 2. *c.* 11. enacts, *Qd' Rex hab' Wrecc. maris per tot. regn' &c.* is but a Declarat. and an Affirm. of the com. Law. For notwithſtand. that Stat. being made within Time of Memory, a Man may preſcribe to have Wreck, as appears in 11 *H.* 4. 16. *Stamf.* 38. *F. N. B.* 91. *d.* 5 *H.* 7. 36. 5 *E.* 3. 3. & 59. 9 *E.* 4. 12, *&c.*

(*a*) Dalt. Sher. 71.
(*b*) 4 Co. 74. b. 9 Co. 20 a. 11 Co. 39. a. Hob. 93, 217. 1 Rol Rep 221, 261 2 Rol. Rep. 40. 2 Rol. 595. 1 Sid. 313. 3 Bulſtr. 55. Cr. Jac. 188, 232, 381, 488. 2 Brownl. 57. Cr. El. 723 Mo. 113. pl. 253, 180, 181 pl. 322, 845 pl. 1140. 485 pl. 1250. Perk. Sect. 791. 3 Init. 98. Br. condit. 151.
(*c*) Dal. Sher. 92. Stanf. Prerog. 37. b. 38. a. 2 Bulſt. 36. Spelm. Gloſſ. verb. Wreccum.

5. It was reſolv. in the Caſe at Bar, that Part of the Goods paſſed by the Name of Wreck, and Part of the Goods were *Flotſ.* and did not paſs by the Grant of Wreck, and Damages were intirely aſſeſſ. for all. And in Treſp. the Pl. ſhall recover Dam. only for the Val. of the Goods; wherefore here Judgm. was given againſt the Pl. And the Book 21 *H.* 7. 34. *b.* was cited, where the Caſe is, that in Treſp. the Def. juſtified as to one Thing, and pleaded Not guilty to another, and they were at Iſſue, and the Jury inquired of one Thing only, and taxed the Damages for both intirely. *Fineux* held the Verd. good for the Thing found, and of that he ſhould have a Writ of Inquiry of Damages, *Qd' fuit negatu' per tot. Cur. Dy.* 22 *El.* 269. *in Eject. (d) cuſtod.* agrees with this Judgm. And it was adjudg'd *M.* 14 & 15 *El.* in this Court in Treſpaſs by *Pooly* (*e*) againſt *Osburn* for breaking his Cloſe and beating his Serv. and doth not ſay, *per qd' ſervit. amiſit*, the Def. pleaded Not guilty, and the Jurors found him guilty and aſſeſſed Damages intirely; and becauſe the Pl. had not Cauſe of Act. for beating of his Servant, becauſe he had not averred that he loſt his Service, for that Cauſe the Pl. took noth. by his Bill. And *Catl.* then Ch. Juſt. cauſed the Reaſon and Cauſe of the Judgm. to be noted in the Margent of the Record, 9 *H.* 7. 3. in *Reſcous acc'*. And it was adjudg'd accordingly *M.* 30 & 31 *El.* betw. *More* and (*f*) *Bedell*, in an Action on the Caſe on *Aſſumpſ.* which began in the King's Bench, *M.* 28 & 29 *El. Rot.* 476. where the Defendant promiſed to do divers Things, and the Plaintiff alledged two Breaches, one whereof was inſufficient, the Defend. pleaded *Non aſſumpſit*, the Jury gave Damages generally. It was reſolved, 1. That it ſhould be intended that they gave Damages for both: 2. That foraſmuch as the Plaintiff had no (*g*) Cauſe of Damages for the one, for that Cauſe the Judgment given for the Plaintiff

Carth. 20, 21.
(*d*) 10 Co. 115, 130, 133. a. 1 Co. 45. b. 56. a. 1 Rol. 784. Dy. 369, 370. pl. 56 Hardr. 166. Style 399. 2 Bulſt. 28. 1 Leon. 92. pl. 118.
(*e*) 10 Co. 130. b. 2 Bulſt. 102. 2 Rol. Rep. 52. Hard. 166.
(*f*) 10 Co. 131. a. 1 Rol. 242, 243, 244, 245, 246. Goldsb. 91. 1 Leon. 170. 1 Rol. Rep 270, 437. 2 Rol. Rep. 2, 192 Jenk. Cent. 264. Winch 33. 3 Bulſtr. 258. Hard. 399. Palm. 107. Bridg 58, 60.
(*g*) Cr. Jac. 115 Cr. Car. 327. 10 Co. 132. a

in the King's Bench was reverſed by a Writ of Error in the Exchequer-Chamber.

(*a*) Dalt. Sher. 91. Eſtray, Animalia vagantia, ſive vacantia.

Note, Reader, at firſt (*a*) the Common Law gave as well *Wreck*, *Jetſam*, *Flotſam*, and *Lagan* upon the Sea, as Eſtray, (which *Bracton* calls *animalia vagantia*, or as others call them *animalia vacantia*, *quia Domino vacari debent*,) Treaſure-trove, and the like to the King, becauſe by the Rule of the Common Law, when no Man can (*b*) claim Property in any Goods, the King ſhall have them by his Prerogative. And therefore *Bract. lib.* 3. *cap.* 3. ſaith, *Sunt alia quædam quæ in nullius bonis eſſe dicunt', ſicut wreccum maris groſſus piſcis, ſicut ſturgio, & balæna, & aliæ res quæ Dominum non habent, ſicut animalia vagantia, quæ ſunt Dom. Regis propter privilegium.* So that it appears by *Bracton* that the King ſhall have Wreck, as he ſhall have great Fiſh, &c. becauſe they are (*c*) *nullius in bonis*, or as he ſhall have *animalia vagantia, ſive vacantia, ſcil.* Eſtrays, becauſe none claims the Property. And note, that Wreck is Eſtray on the Sea coming to Land (*d*), as Eſtray of Beaſts is on the Land coming within any privileg'd Place; and the Law gives in both Caſes a Year and a Day to claim them. And *Bracton in eod' lib.* 3. *cap.* 33. *fol.* (120) 135. ſaith, *Navis, nec batellus, nec alia catalla de his qui ſubmerſi ſunt mari, nec in ſalſa nec in dulci aqua, wreccum erit, cum ſit qui catalla illa advocet, & hoc docere poterit*; and ſo he properly before reſembled it to an Eſtray: And if the Goods of an Infant (*e*), Feme covert Executrix, Man in Priſon, or beyond Sea, Eſtray and are proclaim'd according to the Law, if none claim them within the Year and the Day, they ſhall be all bound. The ſame Law of Wreck of Sea, for the Law is (*f*) ſtrict and binding in both Caſes; but it appears by the Opin. of *Bract.* and *Britt.* alſo, that *Flotſ. Jetſ.* and *Lag.* ſo long as they are in or upon the Sea, do not belong to the King, *ſed occupanti concedunt', quia non eſt aliquis qui inde privileg' habere poſſit, Rex non magis quam privata perſona propter incert' rei eventum (& paulo ante reddit inde ration') eo qd' conſtare non poſſit ad quam regionem eſſent applicanda.* And *Britton lib.* 1. *c.* 17. of Treaſure hid in the Ground, we will that it be ours; and if it be found in the Sea, be it to the Finder. But as it appears before by the Reſolut. of the whole Court, the K. ſhall have *Flotſ. Jetſ.* and *Lagan*, as is aforeſ. by his Prerogative, altho' they be in or upon the Sea; for the Sea is of the K.'s Allegiance, and Parcel of his Crown of *Engl.* as it is held 6 *R.* 2. *Protect.* 46. & *Britton*, *c.* 33. well agrees with the Opin. of *Bract. ſc.* that Wreck is of a Thing *in nullius bonis*; for there he ſaith, it is alſo purchaſed by Franchiſe granted, by Name of a Thing found in no Man's Goods, as Wreck of Sea, and Cattle Eſtraying, Conies, Hares, Partridges, and other ſavage Beaſts, by Franchiſe to have Wreck found in his Soil, and Waif and Stray found in his Fee, Warrens, and in his Demeſne Lands.

(*b*) Dr. & Stud. 156. b. 2 Vent. 188. 3 Inſt. 132.

(*c*) Vent. 188.

(*d*) Dalt. Sher. 91.

(*e*) Dalt. Sher. 91, 92, 79.

(*f*) Dalt. Sher. 91, 92.

Bract. lib. 2. fol. 41. b.

Note.

Fox-

FOXLEY's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

Foxley brought an Action of Trover and Converſion of 20 Sheep; the Def. pleaded, that the Queen was ſeiſed of the Manor of *Newport-panel* in the County of *N.* and that certain Perſons unknown ſtole the ſaid Sheep from the Pl. and brought them within the ſaid Manor, and there left, and waived them; wherefore the Def. as the Queen's Bailiff of the ſaid Manor, ſeiſed them to the Queen's Uſe, as Goods waived there, which is the ſame Trover and Converſion, and demanded Judgment, *ſi Regina inconſulta?* upon which the Pl. demurr'd. And he was ouſted of the (*a*) Aid by Judgment, for it doth not appear by the Def. bar that theſe Goods were forfeited to the King; for it was reſolved, if a Man ſteals my Goods, and brings them into a Manor, and there leaves them in his Houſe, or in the Houſe of any other, or in the Cuſtody of any other, or hides them in the Ground, or other ſecret Place, and afterwards flies, theſe Goods are not forfeited, nor ſhall be ſaid Waif in Law, for (*b*) Waif is where the Felon in purſuit waives the Goods, or when the Felon for fear of being apprehended, thinking that Purſuit was made, having them with him in his Poſſeſſion flies, and waives the Goods, in theſe Caſes they ſhall be ſaid waived in Law: But if he has not the Goods with him when he flies being purſued, or for fear of being apprehended, they are not waived nor forfeited, but the Owner may take them when he will without any freſh Suit. But if the Thief in his Flight waives them, there the Goods are forfeited by the Com. Law, if the Felon on freſh Suit was not attainted at the Suit of the Owner of the Goods. And the Reaſon (*c*) that Waif is given to the King, and that the Party ſhall loſe his Property in ſuch Caſe is, for Default in the Owner that he doth not make freſh Suit to apprehend the Felon; for (*d*) *intereſt Reipublicæ ne maleficia remaneant impunita, & impunitas ſemper ad deteriora invitat*; and therefore the Law has impoſed this Penalty on the Owner, that if the Thief by his Induſtry and freſh Suit be not attainted at his Suit, (*ſcil.* in Appeal of the ſame Felony)

Moor 572. Cr. El. 693, 694.

(*a*) 1 Rol. 150. Cr. El. 693, 694. Moor 572. 2 Inſt. 269.

(*b*) Dalt. Sher. 78. Moor 572. Yelv. 5. Bona waiviata ſive derelicta.

(*c*) Cr. El. 694.

(*d*) Godb. 240.

Felony) he ſhall for his Default loſe all his Goods which the Thief at the Time of his Flight waived. But if the Thief has them not with him when he flies, having perhaps hid them (as it is ſaid) there no Default can be in the Party; and therefore they ſhall not be forfeited, for if he makes freſh Suit after Notice of the Felony, it is ſufficient.

Bona fugitivorum. So note, Reader, *bona waviata ſeu derelicta*, are Goods which are ſtollen and waived by the thief in the flight; and *bona fugitiv'* are the proper Goods of him who flies for Felony. But it is to be obſerved, that if a Man flies for Felony, his proper Goods are not forfeited until it be found by Indictment before the Coroner, in Caſe of Death; or otherwiſe lawfully found of Record on Acquittal, that he fled for the Felony: For if the Goods of any ſhould be forfeit. only for the Flight, without more, then a Man might have ſuch Goods ſo forfeited by Preſcription, in the ſame Manner as he may have Goods waived, eſtray, or Treaſure found, &c. But foraſmuch as *bona fugitivor'* are not forfeited, until the flying be lawfully found of Record, and becauſe Things forfeited by Matter of Record cannot be claimed by Preſcription, which is but Matter in Fact, for this Cauſe they cannot be claimed by Preſcript. (*a*) 46 *E.* 3. 16. *b.* & 9 *H.* 7. 20. *a. acc'*. But waif, eſtray, Treaſure found, wreck of the Sea, &c. which may be gained by Uſage without Matter of Record, there a Man may preſcribe to have them, 21 *H.* 6. *Preſcription*, 1 *H.* 7. 23. *b.* 9 *H.* 7. 20. *a.* 46 *E.* 3. 16. *b.* 22 *E.* 3. *Coron.* 241. Alſo he ſhall not (*b*) forfeit the Goods which he had at the Time of the Flight (as he ſhould do if they were abſolutely forfeited by the flying) but thoſe (only) which he has at the Time of the Indict. or Acquittal. *Vide* 3 *E.* 3. *Cor.* 344. & 8 *E.* 2. *Cor.* 296. 5 *H.* 4. *Forf.* 52. 33 *E.* 3. *Forfeit.* 30. 42 *Aſſ.* 5. *Vide Stamf. Pl. of the Cro.* 15, 184. *c.* 192. And the flying of a Felon, either ought to be found by Verdict on his Acquittal (for altho' he be found Not guilty, yet he ſhall forfeit his Goods by the flying, *Quia* (*c*) *fatet' facin', qui judiciu' fugit*, and the Law will not admit any Proof againſt this Preſumpt.) or on Indict. found *ſuper viſ. corpor'* before the Coron. if it be in Caſe of the Death of a Man, *Vide* 22 *Aſſ.* 76. 13 *H.* 4. 13. 3 *E.* 3. *Forf.* 35. and it appears there, that altho' the Jury that tried him find him Not guilty, and further that he did not fly, yet the Goods are forfeited by Force of the finding of the flying before the Coron. But on no other Indictm. the flying ſhall be found, unleſs it be in ſpecial Caſes. As if a Felon be arreſted of Felony, and as he is carrying to Gaol, in flying, thoſe who purſue him cannot apprehend him without killing him, wherefore they kill him; if all this Matter and the Flying be preſented before the Coroner, or any other who has Authority to enquire of Felonies, the Party ſo killed ſhall forfeit all his Goods and Chattels, and therewith agrees 3 *E.* 3. *Coron.* 287, 312, & 328. And there it appears, that in ſuch Caſe it is not Felony in them that purſued him. 3 *E.* 3. *Forfeit.* 25. If a true Man kills a Thief who would (*d*) rob him, if the Thief does not retreat, he ſhall forfeit nothing. And the Reaſon

Vide infra.

(*a*) Dalt. Sher. 79. 9 Co. 24. b. 2 Inſt. 281. 3 Inſt. 55, 227, 133. Co. Lit. 114. a. Stanf. Prærog. 28. a. 50. a. 46 E. 3. 16. b. 1 H. 7. 23. b. 9 H. 7. 11. b. 20. a. 27 H. 7. 33. b. 2 Rol. 270. Br. Corone 129. Fitz. Preſcript. 27. 8 H. 4. 2. a. Br. Eſtray 13. Cr. El. 560. Moor 707. Kelw. 150. b.

(*b*) Co. Lit. 391. a. ſupra.

(*c*) 11 Co. 60 b

(*d*) 3 Inſt. 56.

of the Book in 45 *E.* 3. *Coron.* 100. that if a Man ſteals divers Goods, and the Owner in his Appeal (*a*) omits ſome Part, the King ſhall have all that which is omitted, is becauſe by his Omiſſion the Thief may eſcape, and becauſe the Owner cannot have them, the King ſhall have them: And as in theſe Caſes the Law puniſhes the Owner for his Negligence or Connivance, ſo the Com. Law abhors Malice in ſeeking the Blood of any without juſt Cauſe. And therefore if *A.* has the Goods of *B.* by Bailment or Trover, and *B.* brings an Appeal of Robbery againſt *A.* for taking them felonioufly, and it is found that they were the Plaintiff's Goods, and that the Defendant came to them lawfully; in this Caſe the Plaintiff ſhall forfeit the Goods to the King for his (*b*) falſe and malicious Appeal, as it is adjudged in 3 *E.* 3. *Coron.* 367. Alſo *bona & catalla felonum* in ſome Caſes ſhall be (*c*) forfeited by Conviction, and ſometimes without Conviction. But always, when any Forfeiture is of any Felons Goods, it ought to appear of Record, and that is the Reaſon that ſuch Goods cannot be claimed by (*d*) Preſcription, as appears by the ſaid Books. At Com. Law the Goods of a Clerk convict, by Verdict or Confeſſion were forfeited to the King, not only all which he had at the Time of the Conviction, but all the Goods which he ſhould acquire afterwards until he had made his Purgation, or obtain'd his Pardon; for at the Com. Law every Clerk convict, who had the Benefit of his Clergy either could make his Purgation, or could not make it; if he could make his Purgation, then the Entry was, *Quod talis commiſſus eſt ordinario*; and if he could not make his Purgation, then the Entry was, *quod talis commiſſ. fuit ordinar' abſq; purgat' facienda.* And in Caſe when he could not make his Purgation, or in Caſe when he could make Purgation, till Purgation made, he remained a Perſon diſabled to take Goods to his own Uſe: And therefore Queſtion has been made on the Stat. of (*e*) 18 *Eliz. cap.* 7. by which it is enacted, That after Clergy allowed, and burning in the Hand, the Priſoner ſhall be preſently enlarged and delivered out of Priſon: If one after the Stat. is convicted of Felony, and has his Clergy, and is burnt in the Hand, and afterwards acquires Goods, if he ſhall forfeit his Goods which he acquires after till he obtains his Pardon; for now he cannot make Purgation, and Peradventure the Cauſe or Offence was ſuch, that he could not make Purgation. And *Paſch.* 41 *Eliz.* in *B. R.* this Doubt was reſolved; for in Action on the Caſe on Trover, brought of certain Goods by (*f*) *Heſdon*, as Adminiſtrator of *Riddleſon* againſt *Maſterſon*; The Defendant pleaded that before the Trover the Inteſtate was convicted of Felony, and burnt in the Hand; and afterwards acquired the ſaid Goods, on which the Plaintiff demurr'd in Law; and it was adjudged for the Plaintiff, for inaſmuch as the Statute has taken away the ordinary Means and Power from him who might make Purgation,

Bona confiſcata. ſeu forisfacta.
(*a*) 3 Inſt. 227. Dalt. Sher. 80.
(*b*) Dalt. Sher. 81. 3 Inſt. 227.
Bona felonum.
(*c*) Co. Lit. 114. a. 391. a.
(*d*) 9 Co. 24. b. 2 Inſt. 281. Co. Lit. 114. a. Dalt. Sher. 79. Stanf. Prærog. 28. a. 50. a. 46 E. 3. 16 b. 1 H. 7. 23. b. 2 Rol. 270. Br. Coron. 129. 9 H. 7. 11. b. 20. a. 27 H. 7. 33. b. Fitz. Preſcription 27. Br. Eſtray 13. 8 H. 4. 2. a. 3 Inſt. 55, 133, 227. Cr. El. 560. Moor 707. Kelw. 150. b.
(*e*) 5 Co. 50. b. Raym. 370. 6 Co. 68. b. Cr. Jac. 430, 431. 2 Rol. 222. Hob. 291, 294. Hale's Pl. Cor.
(*f*) Hob. 292. 6 Co. 68. a. b. Raym. 370, 380. 3 Inſt. 114, 242.

which was the ordinary Means to make himſelf capable of Goods to his own Uſe: And as to him who could not make his Purgation, foraſmuch as by the ſaid Act it is enacted, That he ſhall be preſently enlarged and delivered, which is in Lieu of a Pardon by good Conſtruction, the ſame Act of 18 *Eliz.* has made him as capable in both Caſes to purchaſe Goods to all Purpoſes, as if he had made his Purgation in the one Caſe, or obtained his Pardon in the other: But it is to be known, that altho' the Felon had made his Purgation at Common Law, that was only to (*a*) enable him to purchaſe Goods and Chattels; for notwithſtanding the Purgation he forfeited his Goods which he had before his Purgation, and the Profits of his Land alſo till Purgation made, againſt the Book in 3 *E.* 3. *Corone* 365. *Vide* 8 *E.* 2. *Forfeiture* 34. But now preſently by his Delivery on the ſaid Act of 18 *Eliz.* he is diſcharged againſt the King of the Profits which ſhall come after: And if the King pardons the Burning of the Hand, it is within the ſaid Act, altho' the Words are after Clergy allowed, and Burning of the Hand, for the Pardon has diſcharged the Puniſhment. And there it was reſolved, That if a Man obtains a Pardon before Conviction, he ſhall not forfeit his Goods, nor the Profits of his Lands. (*b*) *Laughton's* Caſe, *Hill.* 37 *Eliz.* in the *King's Bench* it was reſolved by *Popham* Chief Juſtice, and the whole Court of *King's Bench*, That if a Man be *felo de ſe*, his Goods are not (*c*) forfeited till it is preſented or found of Record, and that is the Reaſon that ſuch Goods cannot be claimed by Preſcription. Then it was moved if one be *felo de ſe*, and caſt into the Sea, (*d*) or conveyed or buried in ſo ſecret a Manner that the Coroner cannot have the View of the Body, and by Conſequence he cannot enquire of it: It was reſolved, that the Juſtices of Peace, Juſtices of *Oyer* and *Terminer*, and all others who have Power and Authority to enquire of Felonies, may take a Preſentment of it, for it is Felony, and that ſhall ſerve to entitle the King to his Goods and Chattels. And (*e*) *Deodanda* are Goods which occaſion the Death of a Man by Miſadventure, and are not forfeited till the Matter is found of Record, and therefore they cannot be claimed by Preſcription. And the Jury who find or preſent the Death by ſuch Miſadventure, ought (*f*) to find and value the *Deodand* alſo: *Omnia quæ movent ad mortem ſunt Deodanda. Vide* 3 *E.* 3. *Corone* 326, 341, 342. 8 *E.* 2. *Corone* 401. *Vide* 12 *R.* 2. *Forfeit.* 20. There are alſo *bona & catalla in exigendo poſitorum*; and theſe are when any one is appealed or indicted of Felony, and he withdraws and abſents himſelf for ſo long Time that an (*g*) *Exigent* is awarded againſt him, by this Retreat (which is a flying in Law) he ſhall forfeit all his Goods and Chattels which he had at the Time of the *Exigent* awarded, altho' he renders himſelf on the *Exigent*, and

(*a*) Hale's Pl. Cor. 241.

Note.

(*b*) Langhton's Caſe, Hill. 37 Eliz. in B.R. Swinb. 72. 3 Inſt. 55.

Bona felon' de ſe.

(*c*) Stanf. Prærog. 46. a. 3 Inſt. 54, 55. Poph. 209. 1 Rol. Rep. 217

(*d*) 2 Rol. 96.

(*e*) Deodanda. Stanf. Cor. 20, 21. Dalt. Sher. 81. 3 Inſt. 57.

(*f*) Dalt. Sher. 81. Cumberb. 31. 9 Co. 24. b.

Bona in exigendo poſitorum.

(*g*) Dalt. Sher. 82. Stanf. Prærog. 47. a. 3 Inſt. 232.

and is afterwards found Not guilty; and that appears by 22 *Aſſ.* where the Caſe was, That a Man indicted of the Death of a Man did render himſelf, on the Exigent, and was preſently arraigned, and found Not guilty, and becauſe he came by *Exigent*, by which it was ſufficiently proved that he withdrew himſelf, his Chattels were forfeited, and the Jury who acquitted him valued the Goods. And in 41 *Aſſ. pl.* 13. at the Time of the *Exigent* awarded againſt divers in an Appeal of Death, a Writ was awarded to the Sheriff to enquire of their Goods and Chattels, and to ſeiſe them: But peradventure at the Time of the *Exigent* awarded the Def. was in Priſon, or beyond Sea, what Remedy has the Party to have his Goods again? For as *Knivet* in 43 *E.* 3. 17. ſaith, the Party ſhall not have (*a*) Reſtitution of his Goods (altho' the Writ of *Exigent erronice emanavit)* ſo long as the Award of the *Exigent* (which is there called a Judgment) ſtands in Force not defeated. And in the ſame Book it is ſaid, That if a Man has a Charter of Pardon, of elder Date (*b*) than the *Exigent*, his Goods are ſaved, for the Cauſe of Salvation appears of Record: But it doth not appear by the Book what Remedy the Party has, if the Cauſe of ſaving them be by Matter in Fact, as by Impriſonment, or that the Party was beyond the Sea, *&c.* And *Mich.* 33 & 34 *Eliz.* in the *King's Bench* in (*c*) *Marſhe's* Caſe it was reſolved, That in ſuch Caſe the Party or his Executors or Adminiſtrators ſhould have a Writ of Error to reverſe the ſaid Award of the *Exigent*: And a Precedent in 18 (*d*) *H.* 7. in this Court in the Caſe of one *Eaton*, againſt whom on an Indictment of Death, an *Exigent* was awarded in the County of *Lincoln*, and the ſaid *Eaton* died, and was never convicted or attainted, and his Executors brought a Writ of Error to reverſe the ſaid Award of the *Exigent*; for inaſmuch as the King is intitled by Matter of Record, of Neceſſity it ought to be avoided by a Matter of as high a Nature. And foraſmuch as the Words of a general Writ of Error are *(ſi* (*e*) *judicium inde redditum ſit)* which is not in ſuch Caſe, he ſhall have a ſpecial Writ reciting the whole ſpecial Matter, as by the Precedent appears. *Vide* 30 *H.* 6. *Forfeiture* 31. 19 *E.* 3. *Forfeiture* 19. 8 *E.* 3. 11. 29 *E.* 3. 29 & 30. 37 *H.* 8. *Eſtray*, *Br.* 9. *Stamford's Pleas of the Crown* 186. And ſo it was reſolved, that in the Caſe at Bar there was no Cauſe of Aid, and therefore by the Rule of the Court he was ouſted of the Aid.

(*a*) 3 Inſt. 232, 242.

(*b*) Dalt. Sher. 87.

(*c*) 1 Leon. 325, 326. Owen 147, 148. Cr. El. 225, 273, 274. 1 Rol. 912. God. 377, 380.

(*d*) Eaton's Caſe, 18 H. 7. in B. R. 2 Sid. 93. 11 Co. 41. a. Cr. Jac. 357. 1 Rol. Rep. 85.

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

2. It was agreed, That the Demurrer was not peremptory, but to anſwer over. See now the Statute of 21 (*f*) *H.* 8. *cap.* 11. concerning Goods waived, and for the Reſtitution of them.

Yelv. 112.

(*f*) 3 Inſt. 242.

MALLORY's *Caſe.*

Paſch. 43 Eliz.

In the King's Bench.

Cr. El. 805, 806, 832, 833.

IN Replevin between *Mallory* Plaintiff, and *Payn* Defendant, the Caſe was ſuch: The Abbot and Covent of *Sawtry* by Deed indented, demiſed the Place, where, &c. to *Anthony Mallory* for 121 Years, rendring Yearly during the ſaid Term to the Abbot and Covent, or their Succeſſors, the Rent of eight Marks, to be paid at the Feaſt of St. *Michael* and the Annunciation of our Lady by equal Portions, on Condition that if the Rent be behind, and a Diſtreſs taken by the Leſſor, &c. and not redeemed within ſix Weeks, that it ſhould be lawful to the Leſſor, &c. to reenter. The Abbot and Covent ſurrender their Monaſtery and all their Poſſeſſions to King *H.* 8. The Term by divers mean Aſſignments was aſſigned to *Mallory* the Plaintiff, and the Reverſion by divers mean Conveyances to one *S.* who levied a Fine thereof to Dr. *Bellay*, who before any Attornment granted the Reverſion by his Deed to *Thomas Bellay* his Son and his Heirs, to whom the Tenant attorned: And for Rent arrear, and Diſtreſs taken according to the Condition, &c. *Payn* by the Commandment of *Thomas Bellay* the Son, re-entred and diſtrained the Plaintiff's Cattle Damage-feaſant: And the Queſtion was, whether the Reentry of *Thomas Bellay* the Son be lawful or not. And after divers Arguments at Bar and Bench, it was reſolved by the whole Court that the Entry was lawful. And in this Caſe four Points were reſolved:

(*a*) Cr. Eliz. 832. 1 Vent. 148. Hardr. 91, 94. 2 Sand. 369. 1 Bulſt. 175. Ley 79. 3 Bulſt. 328. Palm. 482. 1 Jones 309. Godb. 363, 449, 450. Latch 99.

1. That the ſaid (*a*) Reſervat. in the Disjunct. was good, for in the firſt Part of the Reſervat. the Words are, rendring Yearly during the Term; and the ſubſequent Words ought to have ſuch Interpretat. that they do not confound them which precede, but that all together may ſtand and ſatisfy the Intent and Meaning of the Parties. And ſuch Conſtruct. the Judges made in *Hill* and *Graunge*'s Caſe, *Plow. Com.* 164.

where a Leaſe was made in *January* for Years, rendring Yearly during the Term to the Leſſor a Rent, payable at the Feaſts of St. *Michael* and the (*a*) *Annunciation*, which laſt Words ſhall be ſo marſhalled and tranſpoſed, that the firſt Words, *ſcil.* rendring Yearly, ſhall not loſe any of their Force: And therefore the Law ſhall make Conſtruction, that the Rent ſhall be paid at the Feaſts of the *Annunciation* and of St. *Michael*. And it was agreed, that rendring Rent Yearly during the Term to one and his Succeſſors, and rendring Rent during the Term to him or his Succeſſors are all one; for if the Rent be reſerved to him and his Succeſſors, altho' the Words are joint and in the Copulative, yet in Conſtruction of Law the Leſſor ſhall have it during his Life; and his Succeſſor after his Deceaſe. So when Rent is reſerved Yearly during the Term to (*b*) one or his Succeſſors, theſe Words (to him or his Succeſſors) are Words of Explanation, *ſcil.* to direct the Leſſee to whom he ſhall pay the Rent during the Term, *viz.* to the Leſſor during his Life, and after his Death to his Succeſſors, for without theſe Words, *ſcil.* to the Leſſor or his Succeſſors, the Reſervation had been good by Force of theſe Words (rendring Yearly during the Term) as it is agreed in 10 *E.* 4. 14. & 27 (*c*) *H.* 8. 19. But if a Feoffment be made to *A.* to have and to hold to him, (*d*) or to his Heirs, there he has but an Eſtate for Life, for there want precedent Words to direct the Words in the Disjunctive: And theſe Words (his Heirs) are of the Eſſence of the Eſtate, and without them no Eſtate of Inheritance ſhall paſs. So and for the ſame Reaſon, if a Reſervation on a Feoffment in Fee be made to one or his Heirs, ſuch Reſervation is not good but during the Life of the Feoffor. And ſo note the Difference. *Vide Chapman*'s Caſe, *Plow. Comm.* 284. where a Copulative ſhall be taken for a Disjunctive; but here the Disjunctive doth amount in Conſtruction to a Copulative. See the Caſe in (*e*) 21 *E.* 3. 29. *b.* where one was bound that when the Obligor ſhould come to his Aunt, he would enfeoff the Obligee, or the Heirs of his Body of certain Lands; and the Obligee when the Obligor came to his Aunt requeſted him to enfeoff him, which the Obligor refuſed to do: And it was adjudged that he had forfeited his Obligation; for although the Condition was in the Disjunctive, and that the Condition is always for the Benefit of the Obligor, yet foraſmuch as the Feoffment was to be made when he came to his Aunt, and when he came to her the Obligee was alive; and therefore it was not poſſible then to enfeoff his Heir; for this Cauſe he ought to perform ſuch Part of the Disjunctive, that then was poſſible to be performed. Note, Reader, a good Caſe to prove the principal Caſe; for inaſmuch as the Rent

(*a*) Cr. Eliz. 832. Hob. 172. Co. Lit. 217. b. 2 Rol. Rep. 213. Plowd. 171. a. 2 Sand. 368. 10 Co. 106. b.

(*b*) Cr. Eliz. 832. Hardr. 91, 94. Ley 79. 1 Ventr. 148. 2 Sand. 369. Palm. 482. 1 Bulſtr. 175. 3 Bulſt. 328. Godb. 363, 449, 450. 1 Jones 309.

(*c*) 27 H. 8. 18. b.

(*d*) Co. Lit. 8. b. 214. a.

(*e*) Plow. 289. a. 1 Rol. 450. Antea 22. a. Br. Condition 47. Bridg. 40.

Rent was to be paid Yearly during the Term at ſuch Feaſts in certain to the Leſſor, or his Succeſſors, the Leſſee at the ſame Feaſts ought to pay the Rent to that Perſon which then might receive it, and that is the Leſſor himſelf, and the Leſſee cannot chooſe to pay it at the ſame Feaſts to him or his Succeſſors as long as the Leſſor lives, for it is not poſſible that he who is not then *in rer' natura* ſhould receive it.

2. It was reſolved, That altho' the Words of the Stat. of 32 *H.* 8. *c.* (24) 34. are general ("As all other Perſons being "Grantees or Aſſignees to or by any other Perſon or Perſons, "&c. ſhall and may have like Advantage, as the Leſſors or "Grantors themſelves, &c. ought, ſhould, or might have had "or enjoyed at any Time or Times, &c. Yet the Grantee or Aſſignee by Fine ſhall not take Advantage of a Condition without (*a*) Attornment. For when a Stat. ſpeaks of an Aſſignee, &c. it is to be intended of ſuch complete Aſſignee, who has all the Ceremonies and Incidents requiſite by the Law to ſuch Aſſignee, and not to take away any Ceremony or (*b*) Circumſtance, which the Law requires, nor to do any Thing contrary to the com. Law; as it is agreed in 28 *H.* 8. 28. That where the Stat. of 27 *H.* 8. *cap.* 10. of Uſes, enacts that the actual Poſſeſſion ſhall be adjudg'd according to the Uſe, yet it ought to have the Circumſtance which is requiſite by the com. Law, *ſcil.* actual Entry in Fact. So it is agreed in (*c*) 4 *E.* 4. 31. *a. b.* it was ordained by the Stat. of (*d*) 1 *E.* 4. that all Inquiſitions taken before the Sheriff in his Turn, or County, ſhould be delivered to the Juſt. of Peace at the next Seſſions; to whom they ſhould make Proceſs on them, as on Inquiſitions taken before themſelves: A Preſentment was made in the Turn on the Stat. of Liveries, which was delivered according to the Stat. to the Juſt. of Peace at the next Seſſions who proceeded thereon; and it was held that it was againſt Law, for the Stat. of 1 *E.* 4. is intended of lawful and ſufficient Preſentments in Law, and not of Preſentments which the Sheriff cannot take by the com. Law. So it is held in 22 *E.* 3. *Corone* 276. that the Stat. of *Weſt.* 2. *cap.* 12. ſhall not make a Monk, who was appealed and acquitted, capable of Damages; for he was diſabled by the com. Law. And it was ſaid, that on the ſame Reaſon it was adjudg'd in *Duke's* Caſe, That the Conuſee of a Fine before Attornment ſhould not take (*e*) Benefit of a Condition by the ſaid Stat. of 32 *H.* 8.

(*a*) Co. Lit. 215. a. 309. b. Hob. 178.

(*b*) Dyer 28. pl. 182.

(*c*) 9 Co. 26. b.
(*d*) 2 Inſt. 190, 191. 9 Co. 26. b. Stanf. Cor. 85. b. 86. a. b.

(*e*) Co. Lit. 215. a. 309. b. Hob. 178.

3. It was reſolved, That although Doctor *Bellay* himſelf could not have taken Advantage of the Condition becauſe he had not Attornment; yet foraſmuch as by the Fine the Reverſion and the Rent was veſted in him, which he has granted to his Son, to whom the Tenant has attorned, for this Cauſe he ſhall take (*f*) Advantage of the Condition, which his Father could not, becauſe he wanted Attornment, which his Son has. And the Words of 32 *H.* 8.

(*f*) Cr. El. 832.

"That

" That the Grantees or Aſſignees ſhall and may have and " enjoy like Advantage, *&c.* as the ſaid Leſſors or Grantors " themſelves, *&c.* if the Rev'n had not come to the Hands " of our Sovereign Lord, *&c.* are well ſatisfied; for here in this Caſe is a complete Grantee and Aſſignee; and therefore he ſhall take the ſame Benefit as the Abbot himſelf, who made the Leaſe, might. Alſo it was reſolved, that theſe Words (*as the ſaid Leſſors or Grantors, &c.*) ſhould not (only) be intended of the immediate Grantor of the Reverſion, but of any Grantor before, who might have taken Benefit of the Condition.

4. This Difference was taken and agreed for Law, that is to ſay, between an expreſs Attornment of the Party, and an Act which amounts in Law to an Attornment: For if a Leaſe for Life, or for Years be made rendering Rent, *&c.* and afterwards the Reverſion is granted, *&c.* to *B.* by Fine, and before Attornm. *B.* diſſeiſes or ouſts the Leſſee, and enfeoffs *C.* the Leſſee re-enters, it ſhall not amount to an Attornment in Law to make Privity to *C.* that he may diſtrain for the Rent, for he ſhall not be in a better Caſe than his Feoffor was, as it was adjudged in the Common Pleas, *Mi.* 36 & 37 *El. Rot.* 420. in (*a*) *Owſey's* Caſe. But otherwiſe it is if the Leſſee had expreſly attorned to the Feoffee. So *Popham* Chief Juſtice ſaid it was adjudg'd in (*b*) *Knottiſford's* Caſe, with whom he was of Counſel 30 Years paſt. That where the Conuſee by Fine of a Reverſion before Attornment, bargained and ſold the Reverſion to another by Deed indented and inrolled according to the Statute, That the Bargainee ſhould not diſtrain for the Rent reſerved on the Leaſe; for he ſhould not be in a better Condition than he who made the Grant to him, for (*c*) *nemo poteſt plus juris in alium transferre, quam ipſe habet*; but if the Conuſee had had an expreſs Attornment, then the Bargainee ſhould diſtrain without any Attornment. But if the Conuſee of a Reverſion by Fine dies without Heir before Attornment, by which the Eſtate which he has Eſcheats to the Lord, the Lord in that Caſe ſhould diſtrain without Attornment, as *Lit.* 131, 132. & 39 *H.* 6. 32. & 38. *Priſot* holds; yet the Conuſee himſelf could not; and the Reaſon is, becauſe the Lord by Eſcheat has loſt his Seigniory, and he doth not claim as Heir or Aſſignee to the Conuſee, but by Virtue of his Seigniory paramount.

(*a*) Owſey's Caſe Mich. 36 & 37 El. 6 Co. 68. b. Cr. El. 264, 354. Owen 123. 2 Anderſ. 15.

(*b*) Cr. El. 832. 6 Co. 68. b.

(*c*) 4 Co. 24. b. 6 Co. 57 b. 68. b. 8 Co. 63. b. Co. Lit. 309. b.

Note Reader, otherwiſe it is, as it hath been ſaid, if the Conuſee before Attornment bargains and ſells the Reverſion by Deed indented and inrolled; for the Statute of 27 *H.* 8. executes the Poſſeſſion in the ſame Quality, Manner, Form, and Condition as he had the Uſe; and when the Conuſee before Attornment bargains and ſells the Reverſion, the Uſe which is derived out of his Eſtate,

Lit. lib. 3. tit. Attornment.

1 Anderſ. 15. Cro. El. 285, 673. 3 Leon. 103, 104. 4 Leon. 34, 50. Vaugh. 36, &c. 49, 50.

which wanted Attornment, ought to be of the ſame Nature and Quality as that was, out of which it was derived: But if the Bargainee in ſuch Caſe had obtained an expreſs Attornment, it is ſufficient: And ſo obſerve theſe good Differences. And in this Caſe it was ſaid by *Popham* Ch. Juſt. and not denied by any, That if the Leſſor in the Abſence of the Leſſee enters as it is aforeſaid, and makes a Feoffment in Fee, and the Leſſee re-enters, altho' it amounts to an Attornment in Law, yet without Notice given of this Feoffment to the Leſſee, the Feoffee ſhall not make a Demand of the Rent reſerved on the Leaſe for Entry for Condition broken: For true it is that the Feoffee may diſtrain or have an Action of Debt for the Rent, or have an Action of Waſt in ſuch Caſe, for in his Avowry or Declaration he ought to alledge the Feoffment whereof the Leſſee had Notice: But if he may demand the Rent on the Condition without Notice, it is not poſſible that the Leſſee ſhould know to whom he ſhould pay his Rent to ſave his Term, nor have Notice of the Feoffment in ſuch Caſe before he has forfeited his Term: So if the Leſſor bargains and ſells the Reverſion by Deed indented and inrolled, the Bargainee (although there needs no Attornment) ſhall never take Benefit of a Condition on a Demand of Rent, without giving Notice to the Leſſee of the Bargain and Sale; for although the Bargain and Sale by Deed indented and inrolled be of Record; yet foraſmuch as it may be inrolled in ſo many Courts in ſo ſecret a Manner, the Law will not compel all the Farmers in *England*, who have conditional Leaſes to make every ſix Months ſuch infinite Search to ſave their Terms; but the Law for the Salvation of the Intereſt and Term of the Leſſee, will compel the Bargainee, who is to take Benefit of the Condition to give Notice thereof to the Leſſee who is altogether a Stranger to it.

8 Co. 92 a. Cr Jac. 146, 193, 476. 2 Rol. Rep 143 Bridg 130. 1 Mod. Rep. 87. 2 Co. 68. b. 4 Co. 70. b. Cart. 93, 172. Co. Lit. 215. b. Hob. 178. Latch 15. Cr. Car. 392. Godb. 162. Palm. 207, 210, 434. Poph. 165.

Note Reader, The Leſſee, as *Littleton* ſaith, ſhall not be by the Law miſconuſant of Feoffments made on the ſame Lands, that is to be intended as to Diſtreſs, Action of Debt, and Action of Waſt, in which Caſes the Law will compel the Feoffee in his Avowry and Declaration to give Notice as has been ſaid. But *Littleton* is not to be intended, as to Demand of Rent to have Advantage of a Condition without Notice thereof given, as is aforeſaid. And *Littleton* there ſaith, that in ſuch Caſe the Feoffee after Regreſs made by the Leſſee ſhall have an Action of Waſt: But neither *Littleton*, nor any of the Books in 18 *E.* 3. 47. *Robert Bowſer's* Caſe, 46 *E.* 3. 30. *Pomeray's* Caſe, 34 *H.* 6. 6. 5 *H.* 5. 12. nor any other Book ſpeak of Demand and Entry upon the Condition broken.

Lit. lib. 3. cap. Attornment fol. 130 Fit. Sect. 576 Co. Lit. 318. b.

WADE's *Caſe.*

Trin. 43 Eliz. *Rot.* 406.

In the Common Pleas.

IN Replevin between *Foxcroft* Plaintiff, and *Wade* Defendant, the Caſe was; *Foxcroft* Copyholder in Fee ſurrendered to the Uſe of *William Wade* the Defendant's Father and his Heirs, on Condition that if the Plaintiff ſhould pay to the ſaid *William Wade* 250 *l. legalis monetæ Angliæ* the 24th Day of *Nov. &c. ad dom' ſuam manſional, &c.* that then the Surrender ſhould be void. And a Tender and Refuſal was alledged, and Iſſue was taken on the Tender to the ſaid *William Wade:* And the Jurors gave a ſpecial Verdict, *ſcil.* That *Foxcroft* the ſaid 24th Day of *Nov. inter horas* 7 & 8 *ante meridiem ejuſdem diei deliberavit cuidam M. filio ſuo, & cuidam A. S.* 250 *l. in monet'* (*Anglice* Money) *ſc. quinque ſolid' de Hiſpanico argento* (*Anglice* in Spaniſh Silver) & *duo duplices auri ſclopi* (*Anglice* two double Piſtolets) & *reſid' præd' ſummæ* 250 *l. fuit in bona legal' monet' Angl', ac etiam deliberavit præfat. M. & A.* 34 *s. legalis monetæ Angliæ*; and that the Plaintiff required them and each of them to tender and pay the ſaid 250 *l.* according to the Form and Effect of the Condition. And it was further found, that they *inter horas* 9 & 12 *ante meridiem ejuſdem diei ſuper quandam menſam ibidem obtulerunt* 250 *l.* And that *Will. Wade* there then counted 244 *l.* but in reſpect of the ſaid 5 *s.* in *Spaniſh* Money, and the ſaid two Piſtolets, he refuſed to receive the Money; upon which *M.* and *A.* offered the ſaid 34 *s.* in Silver to the ſaid *W. Wade*, requiring him to take Silver in Lieu of the Piſtolets and *Spaniſh* Money, which alſo he refuſed; and afterwards *circa horam duodecimam* they tendered to the ſaid *William Wade* the Reſidue in Silver, *French* Crowns and Angels, current Money of *England*, which he in like Manner refuſed to accept: And afterwards *ante occaſum ſolis ad oſtium domus* they offered to him to pay the 250 *l.* all

Co. Ent. 657. pl. 10.

Co. Lit. 202.

See Noy 74. Co. Lit. 208. in Silver *being in Bags*, but did not ſhew any Part of it, and he ſaid, that *recip' vellet, ſed non recepit*. And at Sun ſet, the ſaid *A.* entered into the Houſe, and *ſup. quand' menſam depoſuit præd'* 250 *l.* being in Bags, *ſed ill' extra baggas præd' non oſtendit, quodque præd' W. Wade differebat recipere præd'* 250 *l. uſque poſt occaſum ſolis, & adtunc requiſitus ad recipiend' recuſavit, allegando*, that the Sun was ſet, *& ea de cauſa recipere noluit*: And if on the whole Matter there was any good Tender or not was the Queſtion. And in this Caſe 4 Points were reſolved.

1 Point. (*a*) Co. Lit. 202. a. 7 Co 28. b. 1 r. El. 14. Moor 122. 10 Co. 129. 1. Although the laſt Time of Payment of the Money by Force of the Condition (*a*) is a convenient Time, in which the Money may be counted before Sun ſet, yet if the Tender be made to him who ought to receive it at the Place ſpecified in the Condit. at any Time of the Day, and he refuſe it, the Condit. is for ever ſaved, and the Mortgagor or Obligor, *&c.* needs not to make a Tender of it again before the laſt Inſtant, for by the expreſs Words of the Condit. the Money is to be paid on the Day indefinitely, and a conven. Time before the laſt Inſtant is the extreme Time appointed by the Law, to the Intent that the one ſhould not prevent the other, the one being ſometimes there, and the other not, and the other being ſometimes there, and not the other; and therefore the Law appoints the extreme Time of the Day, to the Intent that both Parties may certainly meet together; for the Law, which always requires Convenience, and is grounded on the Experience of the Sages, will not compel any of the Parties to make an Attorney, or to repoſe Confidence or Truſt in any other to pay it for him when he will do it himſelf, (for *non temere credere eſt nervus ſapientiæ*.) But if both the Parties meet together any Time of the ſame Day, and the Obligor or Mortgagor, *&c.* makes a * Tender in the Place, *&c.* to the Mortgagee, *&c.* and he refuſes it, the Penalty is for ever ſaved, and he need not make a new Tender by a convenient Time before the laſt Inſtant. And ſo on theſe Reaſons you will better underſtand your Books 19 *H.* 6. 76. 20 *H.* 6. 32. 22 *H.* 6. 46. 7 *H.* 7. 7. 6 *H.* 7. 2. 32 *H.* 8. *Br. Condition* 192. *Plow. Com. Kidwelly's* Caſe 70. and *Hill* and *Grange's* Caſe 173. 4 *E.* 6. *Br. Tender* 41. 19 *Eliz. Dyer* † 354.

*Co. Lit. 202. a. †Co. Lit. 211. a. 3 Keb. 19. 1 Rol. 449. 2 Bulſtr. 145. 13 Co. 2. 2 Keb. 816. 8 Co. 92. Cr. El. 298, 299. Dyer 354. pl. 32. 3 Bulſt. 326. 1 Mod. Rep. 88. Carter 93.

2 Point. (*b*) Co. Lit. 207 a. b. 208. a. Dyer 82. b. (*c*) Co. Lit. 207 a. Dav. 19. b. 2. Where the Condition was, that he ſhould pay to him 250 *l. legalis monet' Angliæ*; it was reſolved that the ſaid *Spaniſh* Silver ſo tendered was lawful (*b*) Money of *England*, for it was made current by Proclamation in the Time of the Reigns of *Ph.* and *Mary*: Alſo that *French* Crowns were current and lawful Money of *England* by Proclamation alſo. And the King (*c*) by his abſolute Prerogative may make any foreign Coin lawful Money of *England* at his Pleaſure, by his Proclamation; *quod nota. Sed quære, & vide Salk.* 446, 525. 5 *Mod.* 7, *&c.*

3. That

3. That if a Man tenders more than he ought to pay, it is good, for (*a*) *omne majus continet in ſe minus*, and the other ought to accept ſo much of it as is due to him (*b*) *quando plus ſit quam fieri debet, videtur etiam illud fieri quod faciendum eſt. Et in majore ſumma continetur minor.*

(*a*) 4 Co. 46. a. (*b*) Co. Lit. 52 b. 285. a. 2 Co. 68. a. 6 Co. 43. b. 3 Inſt. 109. 1 Bulſtr. 105. 2 Bulſtr. 48.

4. That where the Plaintiff did tender all the 250 *l.* in (*c*) Bags without ſhewing it, or counting it; it was reſolved that the Tender was good, if the Truth was that there were 250 *l.* in the Bags: And ſo it has been adjudged in the K.'s Bench in *Winter*'s Caſe; for when the Condition is, that he ſhall pay 250 *l.* the Mortgagor doth all that is requiſite by the Law for him to do, if he provides the Money, and offers it to the Mortgagee in Bags, which is the uſual Manner to carry Money. And then it is the Part of the Mortgagee to count it if he will, or if he will credit the Mortgagor he may accept of it without telling it; then if the Telling it belongs to the Mortgagee, by Conſequence he ought to put it out of the Bags, which is incident to it, for without ſo doing he cannot tell it: And if the Mortgagor puts the Money out of the Bags, yet it is at the Peril of the Mortgagee to look upon it, for perhaps they may be Counterfeits, and yet have a great Shew of good and lawful Money, and alſo it is at his Peril to count it: And if a Man be bound to pay 40000 *l.* at ſuch a Day, if he tenders it in Bags it is ſufficient, for it cannot be counted in one Day. And ſo hereby you will underſtand the better Opinion in 22 *E.* (*d*) 4. 21. And it was ſaid that it was adjudged between *Vane* and *Studley*, that where the Leſſor demanded Rent of his Leſſee according to the Condition of Re-entry, and the Leſſee paid the Rent to the Leſſor, and he received it, and put it in his Purſe, and afterwards in Looking it over again at the ſame Time, he found amongſt the Money that he had received ſome counterfeit Pieces, and thereupon he refuſed to carry away the Money, but re-entered for the Condition broken: And it was adjudged that the Entry was not lawful; for when the Leſſor had accepted the Money, it was at his Peril, and after that Allowance he ſhall not take Exception to any Part of it.

(*c*) Co. Lit. 208. a. Noy 74.

(*d*) 22 E. 4. 41. a.

FOLIAMB's *Caſe.*

Trin. 43 Eliz.

In the Common Pleas.

IN an Action of Waſt by *Foliamb* againſt Sir *Will. Bowes* and his Wife, the Plaintiff had an Eſtrepment directed to the Sheriff. And in this Caſe two Points were reſolved.

(*a*) Cr. El. 393, 774. Mo 622. 2 Inſt. 304, 329. 12 R. 2 Eſtrepement 6.

1. That a Writ of Eſtrepment lies in an Action of Waſt (*a*), as well at any Time before Judgment, as after Judgment and before Execution: For without Queſtion he cannot recover Damages for more than he has contained in his Count, and he cannot aſſign any Waſt made after the Writ purchaſed, for the Words of the Writ are *fecit vaſtum* in the preterperfect Tenſe; and therefore he cannot aſſign Waſt made after the Writ.

2. Where the Words of the Writ are, *Tibi præcipimus, quod ad meſſuagium præd' perſonaliter accedan', totaliter ordinari facias, quod vaſtum ſeu eſtrepamentum de eodem meſſuagio, contra formam Statuti præd' non fiat, pendente placito prædict' indiſcuſſo:* It was reſolved, that the Sheriff by Force of this Writ might reſiſt (*b*) them who would do Waſt. And if he otherwiſe could not, he might impriſon them, and make a Warrant to others to do it; and if it be neceſſary, he might take the *Poſſe Comitatus* to help him. *Quia quando aliquid mandatur, mandatur & omne per quod pervenitur ad illud.* And ſo a Doubt in divers Books, *ſcil.* 4 *E.* 3. 32. 21 *E.* 3. 3. 22 *E.* 3. 2. 6 *H.* 4. 1. *b.* 33 (*c*) *H.* 6. 6. *a.* 14 (*d*) *H.* 7. 7, 8. & 16. *F. N. B.* (60) 66. *Y.* & 61. *C. K. L.* well reſolved.

(*b*) 2 Inſt. 299, 329. 3 Bulſt. 200. Hob. 85.

(*c*) Fitz. Eſtrepement 5. Br. Eſtrepem. 6.

(*d*) 14 H. 7. 10. a. Br. Eſtrepem. 9.

OLAND's *Caſe.*

Hill. 44 Eliz.

In the King's Bench.

IN Treſpaſs by *Oland* againſt *Burdwick*, which began in the K.'s Bench *Hill.* 37 *El. Rot.* 924. on a ſpecial Verdict, the Caſe was ſuch; A Woman Copyholder of certain Land, *durante Viduitate ſua*, according to the Cuſtom of the Manor ſowed the Land, and before Severance of the Emblements, took Husband. And whether the Husband or the Lord of the Manor ſhould have the Emblements was the Queſtion. And it was adjudged that the (*a*) Lord ſhould have the Emblements; for although at the Time of the Sowing, the Eſtate of the Wife was incertain, and although her Eſtate determin'd by Limitation and not by Condition, either in Fact (as in Caſe of Re-entry) or in Law (as Forfeiture) yet becauſe it determined by the Act of the Leſſee her ſelf, therefore the Lord ſhall have the Emblements, and not the Husband: So if a Woman, ſeiſed of Land *durante Viduitate ſua*, makes a Leaſe for Years, and the Leſſee ſows the Land, and afterwards the Woman who made the Leaſe takes Husband, the (*b*) Leſſee ſhall not have the Emblements; for although his Eſtate is determined by the Act of a Stranger, yet he ſhall not be (as to the firſt Leſſor) in a better Condition than his Leſſor was. It is commonly held in our Books, That if a Man leaſes Land at Will, and afterwards the Leſſee ſows the Land, and afterwards the (*c*) Will is determined, that the Leſſee ſhall have the Emblements; but it was agreed that if the Leſſee (*d*) himſelf determines the Will before the Severance of the Corn, he ſhall not have the Emblements, becauſe he has determined his Intereſt by his own Act.

Goldsb. 189. 190. Moor 394, 395. Cr. El. 460, 461.

(*a*) 1 Rol. 726. Co. Lit. 55. b. 2 Bulſtr. 213. 2 Inſt. 81.

(*b*) Goldsb. 189. 1 Rol. 727. Cr. El. 460, 461.

(*c*) Cr. El. 461.

(*d*) Goldsb. 190. 1 Rol. 726. Cr. El. 461. Co. Lit 55. b.

(*a*) 3 Keb. 166. 207. Coldsb. 109. 1 Rol. 861. 2 Rol. 807. (*b*) 1 Rol. 861. 2 Rol. 807. If a Man makes a Leaſe at Will, and the Leſſor is (*a*) outlawed, by which the Will is determined, the King ſhall have the Profits; yet the Leſſee at Will ſhall have the Corn which was ſowed: But if the Leſſee at Will be (*b*) outlawed, by which the Will is determined, yet the King ſhall have the Emblements. *Vide* 9 *H.* 6. 20, 21. But it was held, If a Leaſe be made to Husband and Wife during the Coverture, and the Husband ſows the Land, and afterwards they are (*c*) divorced *cauſa prætontractus*, the Husband ſhall have the Emblements, and not the Leſſor; for although the Suit is the Act of the Party, yet the Sentence which diſſolves the Marriage is the Judgment of the Law, & *judicium redditur in invitum*; and therefore the Husband in ſuch Caſe ſhall have the Emblements; but if a Leaſe be made to one until he doth (*d*) Waſt, and he ſows the Land, and afterwards doth Waſt, he ſhall not have the Emblements, *cauſa qua ſupra.*

(*c*) Goldsb. 190. Moor 395. 1 Rol. 726. Cr. El. 461.

(*d*) 1 Rol. 726. Cr. El. 461.

PINNEL's

PINNEL's *Case.*

Trin. 44 Eliz. Rot. 501.

In the Common Pleas.

Pinnel brought an Action of Debt on a Bond against *Cole* of 16 *l.* for Payment of 8 *l.* 10 *s.* the 11th Day of *Nov.* 1600. The Defendant pleaded, that he at the Inſtance of the Plaintiff, before the ſaid Day, *ſcil.* 1 *Octob. Anno* 44. *apud W. ſolvit querenti* 5 *l.* 2 *s.* 2 *d. quas quidem* 5 *l.* 2 *s.* 2 *d.* the Plaintiff (*a*) accepted in full Satisfaction of the 8 *l.* 10 *s.* And it was reſolved by the whole Court, That Payment of a leſſer Sum on the Day in Satisfaction of a greater, cannot be any Satisfaction for the whole, becauſe it appears to the Judges that by no Poſſibility, (*b*) a leſſer Sum can be a Satisfaction to the Plaintiff for a greater Sum: But the Gift of a Horſe, (*c*) Hawk, or Robe, &c. in Satisfaction is good. For it ſhall be intended that a Horſe, Hawk, or Robe, &c. might be more beneficial to the Plaintiff than the Money, in Reſpect of ſome Circumſtance, or otherwiſe the Plaintiff would not have accepted of it in Satisfaction. But when the whole Sum is due, by no Intendment the Acceptance of (*d*) Parcel can be a Satisfaction to the Plaintiff: But in the Caſe at Bar it was reſolved, that the Payment and Acceptance of Parcel before the (*e*) Day in Satisfaction of the whole, would be a good Satisfaction in Regard of Circumſtance of Time; for Peradventure Parcel of it before the Day, would be more beneficial to him than the whole at the Day, and the Value of the Satisfaction is not material: So if I am bound in 20 *l.* to pay you 10 *l.* at *Weſtminſter*, (*f*) and you Requeſt me to pay you 5 *l.* at the Day at *York*, and you will accept it in full Satisfaction of the whole 10 *l.* it is a good Satisfaction for

Moor 677, 678. See 3 Caſes in Law, &c. 304. Lucas 224, 304.

(*a*) Doct. pl. 267.

(*b*) Perk. ſect. 749. Co. Lit. 212. b.

(*c*) 9 Co. 79. a. Perk. ſect. 749. Co. Lit. 212. b. Yelv. 11. 1 Bulſtr. 66. Cr. El. 46, 193. Cr. Jac. 254.

(*d*) Co. Lit. 212. b. Yelv. 11. Perk. ſect. 749. Dall. 49. pl. 13. Moor 48 utw. 466.

(*e*) Moor 677. Co. Lit. 212. b. Cr. El. 304.

(*f*) Moor 678. Cr. El. 304. Co. Lit. 212. b.

for the whole: For the Expences to pay it at *York*, is ſufficient Satisfaction: But in this Caſe the Plaintiff had Judgment for the inſufficient Pleading; for he did not plead that he had paid the 5 *l.* 2 *s.* 2 *d.* in full *(a)* Satisfaction (as by the Law he ought) but pleaded the Payment of Part generally; and that the Plaintiff *(b)* accepted it in full Satisfaction. And always the Manner of the Tender and of the Payment ſhall be directed (*c*) by him who made the Tender or Payment, and not by him who accepts it. And for this Cauſe Judgment was given for the Plaintiff. *(Q.)*

5 Mod. 86.

(*a*) 9 Co. 80. b. Doct. pl. 19. Winch 76. Style 263.

(*b*) Doct. pl. 267. Cr. El. 193. Style 263.

(*c*) Cr. El. 68. 2 Brownl. 107, 108. Style 239.

See Reader *(d)* 26 *H.* 6. *Barre* 37. in Debt on a Bond of 10 *l.* the Defendant pleaded, that one *F.* was bound by the ſaid Deed with him, and each in the whole, and that the Plaintiff had made an Acquittance to *F.* bearing Date before the Obligation, and delivered after, by which Acquittance he did acknowledge himſelf to be paid 20 *s.* in full Satisfaction of the 10 *l.* And it was adjudged a good Bar; for if a Man acknowledges himſelf to be ſatisfied by *(e)* Deed, it is a good Bar, without any Thing received. *Vide* 12 *R.* 2. *Barre* 243. 26 *H.* 6. *Barre* 37. & 10 *H.* 7, *&c.*

(*d*) 9 Co. 79. b. Dall. 49. pl. 13.

(*e*) Doct. pl. 267. Co. Lit. 212. b. Dall. 49. pl. 13. Moor 47, 48.

[*See* Carth. 238.]

EDRICH's

EDRICH's *Caſe*.

Paſch. 1 Jacobi 1.

In the Common Pleas.

BEtween *Edrich* and *Smith* in Replevin, a Caſe was adjudged on the laſt Clauſe of the Stat. of 32 *H.* 8. *c.* 37. and the Caſe was ſuch: *A.* ſeiſed in Fee of Land held in Socage, by his Will in Writing deviſed a Rent, with Clauſe of Diſtreſs to *B.* for the Life of *C.* and died. The Heir leaſed the Land charged for Life to *D.* the Remainder to *E.* in Fee, the Rent is behind for divers Years in the Life of *D.* *D.* died, and afterwards *C.* died, *B.* diſtrained him in the Remainder for all the Arrearages incurred in the Life of *D.* And whether he ſhould be charged in this Caſe for all the Arrearages by the ſaid Act, was the Queſtion. The Branch of which Act as to this Purpoſe conſiſts on two Parts; by the firſt, Action of Debt is given to the Tenant *per auter vie*, after the Death of *Ceſtuy que vie*, againſt the Tenant in Demeſne, (who ought to have paid it when it was firſt due) his Executors or Adminiſtrators. The ſecond is, "And alſo ſhall diſtrain for the "ſame Arrearages upon ſuch Lands and Tenements out of "which the ſaid Rents or Fee-Farms were iſſuing, in ſuch "like Manner and Form as he might or ought to have "done, if *Ceſtuy que vie* had been alive.' And it was objected, that by a former Part of the Act, which gave Diſtreſs to Executors of Tenant for Life, there the Diſtreſs is given againſt him in whoſe Time the Arrearages incurred due, and all others claiming the Land only *by or from the ſaid Tenant, by Purchaſe, Gift, or Deſcent*, in the ſame Manner as the Tenant for Life might have done; ſo that by this Branch, he in the Reverſion or Remainder ſhall not be charged for the Arrearages incurred in the Life of Tenant for Life, for he in the Reverſion or Remainder doth not claim *by or from him*: And in this ſame Caſe at Bar the Action of Debt by the firſt Part of the ſaid Branch is given on

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10 Co. 68. a. Lit. Rep. 93. Co. Lit. 162. b.

1 Leon. 302.

† Co. 50.

ly againſt the Tenant who ought to have paid it, his Executors or Adminiſtrators, and not againſt him in Remainder, *&c.* And in that it was ſaid, the Statute has great Reaſon, for otherwiſe he in Reverſion or Remainder would not only be charged by the Statute for the Arrearages (if any ſhould be) which incur in their own Time, but alſo for the Arrearages incurred in the Life of the Tenant for Life, where in the one Caſe or the other he in Reverſion or Remainder was not charged by the Common Law, and the Tenant for Life may leave all the Rent for his Time unpaid, and by that Means charge him in Reverſion or Remainder for all; and the Grantee in this Caſe may have his Remedy againſt the Executors of the Tenant for Life: But it was reſolved and adjudged, That he in Remainder in this Caſe, by the laſt Part of the ſaid Branch ſhould be charged. And the Judges ſaid they ought not to make any Conſtruction againſt the expreſs Letter of the Statute; for nothing can ſo expreſs the Meaning of the Makers of the Act, as their own direct Words, for *Index animi ſermo.* And it would be dangerous to give Scope to make a Conſtruction in any Caſe againſt the expreſs Words, when the Meaning of the Makers doth not appear to the contrary, and when no Inconvenience will thereupon follow; and therefore in ſuch Caſes, *a verbis legis non eſt recedendum.* And the ſeveral Inditing and Penning of the former Part concerning Diſtreſs given to Executors, and of this Branch, doth argue that the Makers did intend a Difference of the Purviews and Remedies, or otherwiſe they would have followed the ſame Words. And in the principal Caſe all the Land was charged with the Rent, and the Heir held all his Eſtate charged with it; and when he made the Leaſe for Life, the Remainder in Fee, he in Remainder was chargeable, and in this Caſe might have been diſtrained by the Common Law for the Arrearages; but by the Act of God by the Death of *C. D.* was prevented; which Prevention, the ſaid laſt Part of the ſaid Branch has ſupplied and remedied in this Caſe, giving the Grantee Power to diſtrain, as if *Ceſtuy que vie* had been alive. And according to this Reſolution Judgment was entred.

Co. Lit. 162. b.
1 Vent. 92.
2 Sand. 176.
Hard. 342.
Palm. 433.
Owen 117, 118.
10 Co. 86. a.
Wing. Max. 24, 25.
2 Rol. Rep. 246, 278.
March 37.

WHELP-

WHELPDALE's *Case.*

Trin. 2 Jacobi I.

In the King's Bench.

IN Debt by *Whelpdale* againſt *Whelpdale*, which began *Hill.* 45 *Eliz. Rot.* 1503. The Plaintiff declared on a Bill obligatory made by the Defendant to the Plaintiff; the Defendant pleaded, *Non eſt factum*; and the Jury found that the Bill was a joint Bill made by the Defendant and another to the Plaintiff; and if on the Matter the Bill mentioned in the Declaration be the Deed of the Defendant, the Jurors prayed the Advice of the Court. And it was adjudged that the Plaintiff ſhould recover. And in this Caſe four Points were reſolved:

1. When two Men are jointly bound in a Bond, altho' neither of them is bound by himſelf, yet neither of them can ſay, That the Bond is (*a*) not his Deed, for he has ſealed and delivered it, and each of them is bound in the whole. And therefore if they are both ſued, and one appears, and the other makes Default, and by Proceſs of Law is (*b*) outlawed, he who appears ſhall be charged with the whole, as appears in 40 *E.* 3. 36. 41 *E.* 3. 3. But in the Caſe at Bar, he might have pleaded in (*c*) Abatement of the Writ, but cannot plead *non eſt factum.*

(*a*) 2 Rol. 707. Co. Lit. 283. a. Cr. Jac. 152. Dyer 310. pl. 8. Doct. pl. 260. Sav. 92. 1 Sid. 420.
(*b*) 1 Jones 442.
(*c*) 1 Sand. 291. Doct. pl. 260. 1 Sid. 420. Co. Lit. 283. a.

2. It was reſolved, that in all Caſes when the Deed is voidable, and ſo remains at the Time of the Pleading (as if (*d*) an Infant ſeals and delivers a Deed, or a Man of full Age by (*e*) Dureſs, in theſe and the like Caſes, the Obligee cannot plead *non eſt factum*, for it is his Deed at the Time of the Action brought, and ought to be avoided by ſpecial Pleading, with Concluſion of Judgment, *ſi Actio*, 1 *H.* 7. 15. *a. b.*

28 H. 6. 3. a. Cro. El. 494, 544. 1 Ven. 34. Lutw. 695, 696.
(*d*) Plowd 66 b. 35 H. 6. 18. a. Moor 43.

3. When a Bond or other Writing is by an Act of Parliament enacted to be void, the Party who is bound cannot plead *non eſt factum*; (*f*) but in Conſtruction of Law the Deed is to be avoided by the Party who is bound by it, by Pleading the ſpecial Matter, taking Advantage of the Act of Parliament; for although the Act makes the Bond or other Writing void, yet thereto the Law doth *tacitly* require Order and Manner, which the Obligor ought to follow: As if a Bond be made to a Sheriff againſt the Statute of

2 Inſt. 483. Doct. pl. 259. 14 H. 8. 28. a. 1 H. 7. 15. b.
(*e*) 14 H. 8. 28. a. 1 H. 7. 15. b. 2 Inſt. 483.
(*f*) Doctrin. pl. 259, 260, 262. Hob. 72. 14 H. 8. Fitzgib. 45.

of 23 (*a*) *H.* 6. *cap.* 10. or to one againſt the Stat. of 13 *El. cap.* 8. of Uſury, in theſe and other like Caſes the Obligor ought to plead the ſpecial Matter, with Concluſion of Judgment, if Action; and not to plead *non eſt Factum*, and therewith agrees 7 (*b*) *E.* 4. 5. *b.* 7 *E.* 6. *Br. non eſt Fact'* 14. againſt the Opinion of *Mountague*, *Plow. Comm. in Dive* and *Manningham*'s Caſe. In all Caſes when the Bond was (*c*) once his Deed, and afterwards before the Action brought becomes no Deed, either by Raſure, or Addition, or other Alteration of the Deed, or Breaking off the Seal; in this Caſe, although it was once a Deed, yet the Defendant may ſafely plead *non eſt Factum*, for without Queſtion at the Time of the Plea, which is in the preſent *Tenſe* it was not his Deed, 36 *H.* 8. *Dyer* 59. In an Action of Debt on a Bond againſt *Harwood*, the Defendant pleaded, *non eſt Factum*, and before the Day of Appearance of the Inqueſt (*d*), Rats did eat the Label by which the Seal was fixed, by the Negligence of the Clerk in whoſe Cuſtody it was, the Juſtices charged the Jury, that if they ſhould find that it was the Deed of the Defendant at the Time of the Plea pleaded, that they ſhould give a ſpecial Verdict, and ſo they did: But if one commits Waſte, and before any Action brought, the Leſſee repairs, and afterwards the Leſſor brings an Action of (*e*) Waſte, there the Action is not maintainable, becauſe the Jurors ought to view the Waſte: But the Defendant in the ſame Caſe ought to plead the ſpecial Matter, and cannot plead that he did no Waſte, for the Entry is in the preterperfect Tenſe, *ſcil. quod non fecit vaſtum*; and therewith agrees 10 *Eliz. Dyer* 276. and ſo a good Diverſity; and the *Quære* 2 *Mar. Dyer* (*f*) 112. well reſolved.

And if a Bond be delivered to another, to the (*g*) Uſe of the Obligee, and it is tendered to him, and he refuſes it, now the Delivery has loſt its Force, and the Obligee can never after agree to it; and therefore the Obligor may ſay it is not his Deed, againſt the Opinion in 1 *Eliz. Dyer* 167. So if a Bond be made to a Feme covert, and the Husband diſagrees to it, the Obligor may plead *non eſt Factum*, for by the Refuſal, the Bond loſt its Force, and became no Deed. And ſo the diſagreeing Opinions in 14 *H.* 8. 28. *a. Dive* and *Manningham*'s Caſe 66. 1 *H.* 7. 15. *a. b.* 1 *Eliz. Dyer* (*h*) 167. *a.* and other Books are well reconciled.

[*See* 1 Salk. 307, 674.]

(*a*) Hob. 72. 166. 3 Co. 59. b. Br. non eſt fact' 14. 7 E. 4. 5. b. Style 234. Plowd. 66. b. Doct. pl. 263. 1 Ven. 85. 2 Sand. 155.

(*b*) 3 Co. 59. b. Br. non eſt fact. 14. 10 Co. 100 b. Fitz. Det. 80. Plow. 66. b. 68. a. b. Dyer 120. pl. 8.

(*c*) 11 Co. 27. a. Sav. 71. Dall. 33. pl. 21. 105 pl. 50 Doct. pl. 259, 260. Cr. El. 120, 627, 800. Ow. 8. 2 Bulſt. 247. Dyer 112. pl. 5. 12 Co. 16. Moor 30.

(*d*) Doct. pl. 262. 1 Rol. Rep. 40. 2 Bulſtr. 247. Dy. 59. pl. 12, 13

(*e*) Co. Lit. 53. a. 283. Doct. pl. 199. Dy. 276. pl. 51. 2 Rol. 682.

(*f*) Dyer 112. pl. 50. Doct. pl. 260.

(*g*) 3 Co. 26. b. Doct. pl. 260, 261. Cr. El. 54. 1 And. 4. Dy. 167. pl. 14, 15, &c. 2 Leon. 100, 111. N. Benl. 75. pl. 117.

(*h*) Dyer 167. pl. 14, 15, &c.

LONG's *Case.*

1 Salk. 328.
10 Co. 133.
Firzgib. 263.
Rep. Q. A. 55.

Mich. 2 Jacobi.

In the King's Bench.

Coroner's Inquest of Murder.

Wilts, ff. *INquiſitio indentata capta apud* Coſſam *in Com. præd'*, 5. *die* Octobr', *anno Regni Dominæ* Eliz. *Dei gratia* Angliæ, Franciæ, & Hiberniæ *Reginæ, fidei defenſor', &c. triceſimo ſexto, coram* Willielmo Snelling *coronat. Dominæ Reginæ infra libertat. dict. Domin. Regin. villæ ſuæ de* Coſſam *præd', ſuper viſum corporis* H. Long *armig. ibid. exiſten. mortui per Sacrament.* 12. *Jurat. exiſt. præſentat', quod quidam* Henricus Danvers *nuper de* C. *in Com.* E. *miles,* C. D. *nuper de* C. *præd' in dicto Com.* E. *miles,* G. L. *nuper de* Colkidge *in Com.* W. *Yeoman, &* R. P. *nuper de* L. *in dict. Com.* W. *Yeoman, &c. timorem Dei præ oculis ſuis non habentes, ſed inſtigatione diabolica ſeduct'i, quarto die* Octobr' *anno Regni dict. Domin. Regin. nunc triceſimo ſexto ſupradict', inter horas undecimam & duodecimam ejuſdem diei, apud* Coſſam *præd' in dict. Com.* Wilts, *vi & armis,* viz. *gladiis, pugionibus, armacudiis & torment', in dict.* Henricum Long, *in pace Dei & dict. Domin. Regin. adtunc eodem* 4. *die* Octobr' *anno triceſimo ſexto ſupradict', apud* Coſſam *præd. exiſten', inſult. fecerunt, & prædictus* H. D. *quoddam tormentum (vocat.* a Dagge) *ad valentiam* 6 s. 8 d. *cum pulvere & pellet. plumbeo, Anglice dict',* charged with Powder and a Bullet of Lead, *quod idem* H. D. *tunc,* viz. *dict. quarto die* Octob', *anno triceſimo ſexto ſuprad', apud* Coſſam *præd', in manu ſua dextra habuit & tenuit, in & ſuper ipſum* H. Long *adtunc eod' quarto die* Octob' *anno triceſimo ſexto ſuprad', apud* Coſſam *præd' in dict. Com.* Wilts, *felon. voluntar', & ex malicia ſua præcogitata exoneravit, Anglice* did diſcharge, *dans eid.* H. Long *adtunc apud* Coſſam *præd', cum pellet. plumbeo præd', ſic extra torment. præd', per ipſu' emiſſo, unum vulnus mortale, in & ſuper anterior' part' corporis ipſius* H. Long, *ſubter ſiniſtr' mamill' ipſius* H. Long, *totalit' penetrans in & per corp' dict'* H. Long: *De quo quid'* 1 Bulſtr. 203.

vulnere mortali idem H. L. *adtunc cod' quarto die* Octob. *anno* 36. *ſuprad', apud* Coſſam *præd. inſtanter obiit. Et quod præd.* C. D. *miles*, G. L. *&c. dict. quarto die* Octob. *anno* 36. *ſupradict', ac inter horas præd. ejuſdem quarti diei, apud* Coſſam *præd' in dict. Com.* Wilts. *felonice, & ex malitiis ſuis præcogitat. fuerunt præſentes, abettantes, procurantes, comfortantes, & manutenentes dict.* H. D. *ad feloniam & murdrum præd', modo & form. præd. felonice faciend. & perpetrand', contra pacem dict. Domin. Regin. nunc, coron. & dignitat. ſuas. Et ſic Jurator. præd', dicunt ſuper ſacrament. ſuum præd' quod præd'* H. D. C. D. G. L. *&c. dict.* H. L. *eodem* 4. *die* Octob. *anno* 36. *ſuprad' apud* Coſſam *præd. in dict. Com.* Wilts. *felonice, voluntarie, & ex malitiis ſuis præcogitat. felonice interfecerunt & murdraverunt, contra pacem dict. Domin. Regin' coron. & dignitat. ſuas: Et ulterius Juratores præd. dicunt ſuper ſacrament. ſuum præd', quod immediate poſt felon. & murdrum præd. in forma præd. commiſſ. fidem* H. D. C. D. G. L. *&c. fuger', & ſe retraxer. pro felonia & murdro præd'. Ac quod ipſi, aut eorum aliquis, tempore feloniæ & murdr. præd. in forma præd. commiſſ. nulla habuerunt bona aut catalla, terr', aut tenementa, ad notitiam Jur' præd'. In cujus rei teſtimonium tam Jurator. præd', quam præd. coronator', die & anno prius ſuprad', alternatim huic inquiſitioni ſigilla ſua appoſuer', & quilibet eorum appoſuit.*

Upon which Indictment the ſaid *H. D.* was outlawed, and brought a Writ of Error, and divers Errors were aſſigned in the Indictment; 1. Becauſe in the beginning of the Indictment it is alledged, that the Indictment was taken before *W. S. Coron. Domin. Regin. infra libertat. dict. Domin. Regin. villæ ſuæ de* Coſſam *præd', ſuper viſum corporis*; and it is not alledged to what Places (*a*) the ſaid Liberty doth extend, nor what Part, or nothing of the Town of *Coſſam* be within the Liberty; and ſo it doth not appear that the Coroner had Juriſdiction in the Place where the Inquiſition was taken, nor where the Murder was committed, nor where the dead Body lay, for all is alledged by the Indictment to be at *Coſſam*; and Indictments of Felony, which are as Counts (*b*) and Declarations for the King againſt the Parties for their Lives, ought to have Certainty expreſſed in the Record of the Indictment, and ſhall not be ſupplied or maintained by Intendment or Argument. For if the Counts between Party and Party for Land or Chattels ought to have two Things, *ſcil.* Truth and Certainty, as it is held in *Plow. Comm.* 84. *a. &* 202. *b.* 5 *E.* 4. 21. in Debt, 3 *H.* 6. 1. in *Forcible Entry.* 38 *H.* 6. 35. 9 *H.* 6. 18. becauſe the Counts are the Foundations of the Suits, to which the Party ſhall anſwer, and on which the Judges ſhall adjudge; *a fortiori* Indictments, *eſpecially* thoſe which concern the Life of a Man, and which are the King's Counts, to which the

1 Exception.

(*a*) Poph. 208. Kelw. 89. pl. 9.

(*b*) Cr. Jac. 588. 5 Co. 34. b. 35. a. Br. Count 54, 58, 63. 3 H. 7. 12. a. 1 Rowd. 84. a. 193. a. 202. b. 3 E. 4. 21. a. b. 38 H. 6. 1. a. 8 Co. 57. a. 2 Bulſtr. 77. 78. Co. Lit. 303. a. 2 Sid. 175. 4 Co. 44. b. Q. 3 Mod. 7.

Party ſhall anſwer, and on which the Court ſhall adjudge for his Life, ought to have full and preciſe Certainty, and ſhall not be taken by Argument, as appears 2 *E.* 3. 31. 18 *Aſſ. p.* 15. 29 *Aſſ.* 45. 2 *E.* 3. 28. *per Scrope*, 27 *Aſſ.* 73. 38 *Aſſ.* 11, 12. 47 *E.* 3. 17. 7 *H.* 6. 42. 8 *E.* 4. 3. 3 *H.* 7. 5. And becauſe it is not expreſſed in the Indictm. that *Coſſam* was within the Liberty of *Coſſam*, for this Cauſe the Indictm. was incertain and inſufficient. To which it was anſwer'd and reſolved by the Court, that the Indictm. notwithſtanding this Exception was ſufficient; for true it is that the Rule of Law is, that Indictments ought to be certain: But there are 3 Manner of Certainties; 1. To a common Intent; 2. To a certain Intent in general; 3. To a certain Intent in every Particular: The firſt Intent is ſuffic. in (*a*) Bars which are to defend the Party and excuſe himſelf: The ſecond is required in Indictments (*b*), Counts, Replications, &c. becauſe they are to accuſe or charge the Party; the third is rejected in Law, for (*c*) *nimia ſubtilitas in jure reprobatur, & talis certitudo certitudinem confundit:* And in this Caſe at Bar there is a ſufficient certain Intendment in general, that *Coſſam* is within the Liberty of *Coſſ.* but peradventure the Liberty may reach beyond the Town, but that the Town it ſelf ſhould be preſumed to be out of the Liberty of the Town is a ſtrain'd and captious Intendm. which the Law will not allow: And ſo Sir *J. Pop.* Ch. Juſt. ſaid it was reſolved in the ſame Point in the Caſe of *Lewes* in the County of *Suſſex*; and there the Indictment was, *Inquiſitio capta apud* Lewes *coram Coronatore rapæ ſuæ de* Lewes, and adjudged good in Law.

The 1ſt Object. anſwered.

(*a*) Doct.pl.58. 195. Plow.26.a. b. 56. a. 8 Co. 57.a. 2 Bulſt.77. Co.Lit. 303. a.
(*b*) Cr.Jac.588. 4 Co. 44. b. 5 Co.34.b.35.a. 8 Co. 57. a. Plowd.84. a. 193. a. 202. b. Br.Count 54, 58, 63.
3 H. 7. 12. a. 3 E. 4. 21. a. b. 38 H. 6. 1. a. 2 Bulſt. 77, 78. Co.Lit. 303. a. 2 Sid. 175.
(*c*) Wing. Max. 26. 4 Co. 5. b. 41.b. 3 Bulſt 65.

The ſecond Objection was, That whereas the Indictment was, *Quod prædictus* H. D. *quoddam tormentum, vocatum* a Dagge, *ad valentiam 6* s. 8 d. *cum pulvere & pelletto onerat', &c. in & ſuper ipſum* Henr. Long *adtunc, &c. felonice, voluntarie, & ex malitia ſua præcogit. exoneravit, dans eidem* Henr. Long *adtunc, &c. cum pellet' plumbeo, &c. unum vulnus mortale ſuper anteriorem partem corporis ipſius* H. L. *ſubter mamillam:* It was objected, that this Word *(Mamillam)* is a Word inſenſible, being no *Latin* Word, for the *Latin* Word was (as it was ſaid) *Mammilla*, with a double [*m*:] And it was ſaid, that falſe *Latin* ſhall abate Writs, and quaſh Indictments, becauſe he who proſecutes may purchaſe a new Writ, and frame a new Indictment. (*d*) But otherwiſe it is of Grants and Deeds, for the Party cannot have new when he will. And *Hill.* 28 *Eliz. Vaux's* Caſe was cited, where the Count in Appeal was held inſufficient by Reaſon of the Word *burgaliter*, (*f*) where it ſhould be *burglariter*; to which it was anſwered and reſolved by the Court: 1. That falſe *Latin* ſhall not quaſh an Indictment, nor abate any Count, for although an original Writ ſhall abate for falſe *Latin*, as it is held (*g*) 9 *H.* 7. 16. *b.* 2 *H.* 4. 8. *a.* 44 *E.* 3. 18. 10 *E.* 3. 1.

2 Objection.

(*d*) Cr. El. 137, 231. 10 Co. 126. a. Yelv.
(*f*) 4 Co. 39. b. 11 Co. 32. a. Cr. El. 920. Doct. pl. 84. Hale's Pl. Cor. 84, 207.

The 2d Obj. anſwered.

(*g*) 8 Co. 159. b. B. Faux Lat. 78. 2 Vent. 173. Br. Amendm. 62. Br. Obligat. 71. 2 Sand. 39.

& 553. Yet judicial Writs or a Fine ſhall not be impeached for falſe *Latin*, as it is held 9 *E.* 3. 467. The ſame Law of an Indictment; as if in an Indictm. it be *præfato Reginæ* where it ſhould be *præfatæ Reginæ*, or *præfatæ Regi* for *præfato Regi*, or the like, foraſmuch as the Word is *Latin* and ſignificant; and altho' it be not true *Latin*, the Indictm.
10 Co. 133. a. for ſuch Incongruity ſhall not be quaſhed. But if the Word be not *Latin*, nor allowed by the Law, as *vocabul' artis* (for every Art and Science has *propr' vocabula artis*) but is inſenſible, there if it be in a Point material, it makes the Indictm. inſuffic. as *burglaria*, *burglariter*, *murdrum*, *felonice*,
2 Co. 39. b. & 42. 3 Sal. 30. and the like are *vocabula artis*, known to the Law, and therefore if ſuch Words, or the like, are miſtaken in an Indictm. ſo that in a material Place a Word inſenſible, which is not *Latin*, nor any Word known in Law, it makes the Indictm. vicious and inſufficient, as *murdredum* for *murdrum* or *burgariter* for *burglariter*, *felonter* for *felonice*. But in the Caſe
4 Co. 39. b., 2 a. at Bar it was reſolved, that *mamilla* with a ſingle [*m*] is as good *Latin* as *mammilla* with a double [*m*], as *defamo* and *diffamo*, *definitio* and *diffinitio*. Alſo *Poph.* Ch. Juſt. *Gawdy*, *Yelvert.* and *Williams* held, that theſe Words *ſuper mamillam* were abundant, and more than were neceſſary, and
4 Co. 42. a. therefore if *mamilla* was inſenſible, and no *Latin*, yet it doth not make the Indictment vicious: For it was held by them, that *ſuper anteriorem partem corporis* was certain e-
* Co. 42. a. nough and ſufficient; for *corpus* in an Indictment (which is found by Lay-people) is to be intended of the Trunk of the Body, between the Neck and the Thighs, which is the uſual and vulgar Meaning of the Body: So it was reſolved, *Q. d' ſuper caput*, or *ſuper faciem*, or *in dexteriori parte corporis*,
4 Mod. 290. Salk. 59, 60. Comb. 293. Cr. Jac. 95. or *in ſiniſtra parte corporis*, or *ſuper ſiniſtr' manum*, or *ſuper dextram manum*, or *dextrum* or *ſiniſtrum brachium*, &c. or *in pectore*, or *ventre*, are certain enough and ſufficient. But *ſuper brachium*, or *ſuper manum*, or *ſuper latus*, &c. without ſaying *dextr'* or *ſiniſtr'* is not ſufficient, becauſe in ſuch Caſes the Part of a Man in which the Wound is, is not certain.

The 3d Object. 1 Salk. 686. Another Exception was taken, becauſe in the ſaid Indictment it was ſaid, *dans eidem* Henr. Long, &c. *unum vulnus mortale*, &c. where it ought to be *unam plagam*, which is the Word uſed in all Indictments, and that *vulnus* ſhould not be uſed in Indictments no more than *ictus*, which alſo
The 3d Object. anſwered. ſignifieth a Stroke: But this Exception was diſallowed *per totam Curiam*, for *plaga* and *vulnus* are *ſynonyma*, & *idem*
* 4 Co. 42. a. Godb. 65, 66. Stanf. Cor. 79. a 2 Inſt. 318. *ſignificant*, although *plaga* is the more uſual Word in Indictments. A Further Exception was taken, becauſe the Length or * Depth of the Wound was not ſhewed,
The 4th Object. which ought to be in every Indictment of Death, for

this

this Cauſe the Indictment was inſufficient. But this Exception was diſallowed *per totam Curiam*, for the Length and * Depth of the Wound ought to be alledged, to the Intent that it may appear to the Court that the Wound was mortal, ſo that it may appear to be the Occaſion of the Death But in this Caſe the Wound was through the whole Body. *ſcil. totaliter penetrans, & per totum corpus*, ſo that it was apparent to be mortal; and in ſome Caſes the Dimenſions cannot be alledged; *ſcil.* when a Member, as the Knee, or the Hand, or the Foot, or the Head, *&c.* are cut off, there any of the ſaid Dimenſions cannot be ſhewed. So in the Caſe at Bar. *Vide Trin.* 28 *Eliz. Heydon's* Caſe agrees with the Reſolution in this Point. Another Exception was taken, becauſe the Indictment was, *dans eidem* Henrico Long, *&c. cum pelletto plumbeo præd', &c. vulnus mortale, &c. totaliter penetrans in & per corpus præd'* Henr' Long: And becauſe *penetrans* ought of Neceſſity to agree with *vulnus*, and not with *pelletto*, not only becauſe *vulnus* is the laſt Antecedent, but becauſe otherwiſe will follow Incongruity: For *penetrans* agrees well with *vulnus*, and not with *pelletto*, for that is the Ablative Caſe, and ſo cannot be *penetrans*, for then it ſhould be *penetrante*: And it was ſaid, that the Wound did not penetrate or pierce the Body, but the Pellet pierced the Body, and made the Wound; but it was not allowed, for the Senſe is ſignificant enough to ſay that the Wound pierced the Body; for if the Depth of the Wound ſhould be asked, it might well be anſwered that it pierced the Body. And *penetro derivat' a penitus & intro.* And ſo the Words are ſignificant enough, without any Abſurdity or Incongruity, to ſay *dans, &c. vulnus mortale totaliter penetrans in & per corpus, & eo magis*, being the Words of Lay-people. For the Pellet gave the Wound, which Wound did pierce through the whole Body. But the great Objection, and moſt difficult againſt the Indictment was, becauſe the Indictment wanted *percuſſit*; for the Effect of it, as to this Purpoſe is, *Præd'* H. D. *quoddam tormentum, &c. cum pulvere & pelletto plumbeo onerat', &c. in & ſuper ipſum* Henr' Long *exoneravit, dans eidem* Henrico long *adtunc & ibidem cum pellet' plumbleo præd' extra torment' præd' per ipſum dimiſſo unum vulnus mortale, &c.* And it was ſaid, that although *percuſſit* is wanting, yet here is *tantamount*; and it is a Rule of Law and Reaſon, *Non refert quid ex æquipollentib' fiat.* And when it appears that *H. D. torment' cum pulv' & pelletto, &c. in ipſ.* H. L. *exonerav. dans eidem*

The 4th Object. anſwer'd.

* 4 Co. 42. a. Godb. 65, 66. Stanf. Cor. 79. a. 2 Jac. 318.

4 Co. 42. a.

The 5th Obj.

The 5th Obj. anſwered.

1 Salk. 686.

The 6th Obj.

Cr. Jac. 635.

eidem Henr' Long, *&c. cum pellet' plumbeo præd', &c. unum vulnus mortale, &c.* by that it appears to the Court, that *H. D.* was the Occaſion of the Wound, and on the Matter gave (in this Manner) the Wound. And it was ſaid, that *percuſſit* is not properly ſaid, but when one with his Hand, or with ſome Weapon which he holds in his Hand, wounds another, and not when he gives a Wound by a Means, as out of a Gun with a Bullet, or out of a Bow with an Arrow. This Word *Percutio* is derived and compounded, as it was ſaid, from *per* and *quatio*: But it was reſolved by the whole Court, that for this Cauſe the Indictment was inſufficient. And this Part of the Indictment concerning the ſaid Objection was divided into two Parts: 1. The Clauſe before *dans eidem, &c.* and the Clauſe containing *dans eidem, &c.* And it was reſolved that the firſt Clauſe was not ſufficient of it ſelf, for although *H. D.* diſcharged the Dagge upon him, yet it may be he was not ſtruck by it; then the ſecond Clauſe, *ſcil. dans eidem, &c.* cannot make it good, for the Clauſe of *dans, &c.* depends on the ſaid firſt Clauſe, and deſcribes only the Wound, to manifeſt it to be mortal; which ought to appear by the firſt Sentence to be given, becauſe *in hoc caſu participium determinat verbum*: But here it doth not appear by the firſt Clauſe that there was a Stroke given; and then *dans, &c.* cannot ſupply it; for that is a Participle depending upon the Verb precedent, and the Verb precedent is *exoneravit*, and *exoneravit* may be without Stroke: And if one be indicted that he did aſſault another with an Ax in his Right Hand, giving him a mortal Wound, it is inſufficient, becauſe this Participle (giving) has no Verb before with which it can participate: And it was ſaid, that if the ſecond Clauſe had been in the Caſe at Bar, *& dedit adtunc & ibidem unum vulnus mortale*, it had been inſufficient; for *dedit* doth not imply a violent and voluntary Stroke, as *percuſſit*, and if *dedit* would have been ſufficient, yet *dans* by the whole Court for the Cauſe aforeſaid was inſufficient. And it was reſolved the Indictment might ſay *percuſſit*, as well of a Wound given out of a Gun, or Bow, as with the Hand. And a Precedent in 10 *E.* 4. in the King's Bench was ſhewed, where the Wound was out of a Gun, and the Indictment had the Word *percuſſit*, 1 *Ma. Dyer* 99. That an Indictment that ſuch a Perſon *ex malitia ſua præcogitata felonice murdravit, &c.* is not good without ſaying *percuſſit*, becauſe an Indictment of Murder and Manſlaughter ought to have expreſly a Stroke to be ſuppoſed. And true it is, that in all Indictments of Murder, or Man-

Palm. 282. Cr. Jac 635. See 1 Salk. 636.

Cr Jac. 635. Palm. 284. Dy 99. pl. 63. 1 Bulſtr. 144.

Manſlaughter a Stroke ought to be alledged, unleſs in Caſe of Poiſoning. And for this laſt Error the Outlawry was reverſed, and the ſaid *H. D.* diſcharged and there are many Precedents of Indictments of Death, where the Wound was given with a Bullet out of a Gun, or by an Arrow out of a Bow; and all thoſe (which I ſaw) had this Word *percuſſit*. 4 Co. 44. a. b.

[*Yet, Quere, whether the Words*, (He of his Malice, &c. ſhot him with a Gun, &c.) *are not tantamount to* (He of his Malice, &c. ſtruck him with a Sword, &c.]

SAFFYN's *Case.*

Paſch. 3 Jac. 1.

In the Common Pleas.

Cr. Jac. 60, 61. Lit. Rep 18. Cart. 196. cited, Cumberb. 64, 67, 78, &c. Skinner 555.

IN Replevin between *Saffyn* Plaintiff, and *Adams* Defendant, which began *Trin.* 44 *Eliz. Rot.* 1242. on a ſpecial Verdict found, the Caſe was ſuch; A Man made a Leaſe for Years of certain Land to begin after the End or Determination of a Term for Years then in Being; the firſt Years determined, the ſecond Leſſee did not enter, but he in the Reverſion entered and made a Feoffment, and levied a Fine of the Land with Proclamations, according to the Statute of 4 *H.* 7. *cap.* 24. And five Years paſt after the Proclamations without Entry or Claim made by the ſecond Leſſee: And whether the Leſſee for Years was barred or not by the ſaid Fine with Proclamations, and the ſaid Act of 4 *H.* 7. was the Queſtion; and it was objected that the Leſſee for Years ſhould not be barred for two Cauſes:

(*a*) 9 Co. 105. a.

1. Although the (*a*) Word (*Intereſt*) is in the ſaid Act, yet it is to be intended of ſuch Intereſt that the Owner thereof may thereof levy a Fine; but he who has a Leaſe or Intereſt for Years cannot levy a Fine, but every one ſhall ſay againſt it, *quod partes finis nihil habuerunt*, becauſe a Leaſe for Years is but a Chattel, and a Fine is in the Realty, and the Law requires that one of the Parties have a Freehold. And that this Word (*Intereſt*) in the Act ſhall be intended of an Intereſt of Freehold whereof a Fine may be levied. And it was ſaid that *Mich.* 21 *Eliz.* in the King's Bench, it was adjudged in (*b*) *Saunder*'s Caſe, That a Leaſe for Years was not an Intereſt within the ſaid Statute 4 *H.* 7.

(*b*) Goldsb. 171, 172. Cr. Jac. 60, 61. Cart. 82. 1 Leon. 99. 2 Leon. 157. Raym. 149. Poſtea 124. b.

2. It was objected, That although Leſſee for Years, when he is ouſted and ejected ſhall be within the ſaid Act; yet in this Caſe the Leſſee ſhall not be bound, for no Fine levied with Proclamations ſhall bind any, but thoſe who are put out of Poſſeſſion, and have but a Right; for

for if their Eſtate or Intereſt be not deveſted out of them, but remains in them as it was *ab initio*, they need not make an Entry or Claim to that which never was deveſted; and therefore it is agreed in *Plow. Com.* 373. in *Stowel's* Caſe, That a Fine levied of Land, with Proclamations, and five Years paſt, without (*a*) Claim made by him who has Common of Paſture, Rent, or the like, ſhall not bind them, for their Eſtate is not deveſted out of them, but always remains in them. So it was ſaid in the Caſe at Bar, until the ſecond Leſſee enters he has but *Intereſſe termini*, as he had before the firſt Leaſe determined, which (as it was ſaid) continues in him notwithſtanding the Feoffment or Fine. As if a Man makes a Leaſe for Years to begin at a Day to come, and before the Day the Leſſor is diſſeiſed, yet the Leſſee may grant over his Intereſt, for ſuch *Intereſſe termini* cannot by Diſſeiſin or Feoffment be deveſted, and put to a Right, more than a Rent or Common, or the like; and this was briefly the Effect of what was ſaid on this Side. But it was reſolved, That the (*b*) Fine and Proclamations, and the Nonclaim of the Leſſee had barred him of his Term by the Act of 4 *H.* 7. And as to the firſt Objection it was anſwered and reſolved, that notwithſtanding a Leſſee for Years has not ſuch Eſtate that he can levy a Fine yet *non ſequitur*, that his Term and Intereſt ſhall not be bound and barred by the ſaid Statute, and that for two Reaſons: 1. It is within the Letter of the Act, for the Words of the Act are general (*the ſaid Fine with Proclamation ſhall be a final End, and conclude as well Privies as Strangers to the ſame*) which Words are general, and extend to all: And the Words of the Saving are (*ſuch Right, Claim, and Intereſt, &c.*) and he who has a Term for Years has an Intereſt, and therewith agrees (*c*) *Catlyn* in *Plow. Com.* 373. 2. It is within the Miſchief; for it appears by the Preamble, (*That Fines ought to be of the greateſt Strength to avoid Striſes and Debates, and to be* (*d*) *the final End and Concluſion, &c.*) And great Miſchief, Trouble and Vexat. will enſue, if Leaſes for Years which now are made for a great Numb. of Years, ſometimes abſolute, ſometimes determinable on Lives, ſhall not be within the ſaid Act; and therefore it was reſolved, That the Intereſts of Tenant by Statute Merchant, (*e*) Statute Staple, Elegit, Guardian by Knight's Service, Executors who have Lands till Debts and Legacies are paid, and every other ſuch Intereſt are within the ſaid Act of 4 *H.* 7. for all theſe have Intereſt in the Land; and he, who has a bare Right or Title to any Inheritance or Freehold, cannot levy a Fine to any Stranger, but it ſhall be ſaid, *qd' partes finis nihil habuer'*; and yet he ſhall be bound by a Fine levied by the Ter-tenant: So although Leſſee for Years cannot levy a Fine to any Stranger

(*a*) Cr. Jac. 60 Raym. 149.

(*b*) 1 Sid. 459. Cr. Jac. 60, 61. Cart. 82. 1 Vent. 56. 2 Inſt. 517. 9 Co. 105. a. 2 Rol. Rep. 402, 405. 3 Keb. 288. Plowd. 374, a. Noy 23. Hardr. 400. 413. Co. Lit. 262. a. 7 Co. 32.

(*c*) Plow. 354. a.

(*d*) 9 Co. 105.

(*e*) 2 Inſt. 517. Plowd. 374. a. Mod. Rep. 217.

but it ſhall be ſaid, *quod partes finis nihil habuerunt*; yet *non ſequitur* but that he ſhall be bound by the Fine with Proclamations levied by the Tenant of the Land.

As to the ſecond Objection it was anſwered, and reſolved by the Court, that in the Caſe at Bar by the ſaid Feoffment, the ſecond Leſſee had but a Right, for when his future Intereſt had Commencement, then he had ſuch preſent Eſtate in the Land which might be deveſted, and which he might reveſt by his Entry. As if a Man makes a Leaſe for Years, in this Caſe before the Leſſee enters he has an Eſtate for Years in the Land which he may (*a*) grant. And the Words of *Littleton* were well obſerved, *lib.* 1. *c.* 7. *fol.* 13. *b.* If a Man makes a Leaſe for Years, and before the Leſſee enters the Leſſor dies, yet the Leſſee may (*b*) enter, becauſe the Leſſee by force of the Leaſe has a preſent Right to have the Tenements according to the Form of the Leaſe. And *Lit. lib.* 3. *cap.* 8. *fol.* 107. If a Man leaſes his Land for Years, if the Leſſor releaſes to the Leſſee all his Right before the Leſſee has entered into the Land, ſuch (*c*) Releaſe is void, becauſe the Leſſee had not Poſſeſſion in the Land at the Time of the Releaſe made, but only a Right to have the ſame Land by Force of the ſame Leaſe: And *eodem lib. fol.* 127. if a Man leaſes Tenements for Years, by Force of which the Leſſee is ſeiſed, that is, poſſeſſed, and afterwards the Leſſor by his Deed grants the Reverſion to another for Life, *&c.* it is neceſſary in ſuch Caſe that the Tenant for Term of Years (*d*) attorn: By which it appears, that before the Leſſee enters, he has not actual Poſſeſſion, nor (as it ſeems) the Leſſor has not ſuch a Reverſion that he can grant it over by the Name of the (*e*) Reverſion, but yet ſuch Leſſee has more than he who has a future Intereſt, for he may preſently enter and take the Profits, ſo that his Intereſt, accompanied with preſent Entry and Ability to take the Profits which he may transfer to another, may be deveſted out of him, and put to a meer Right not grantable: And ſo the Difference appears between the Caſe at Bar, and (*f*) *Saunder's* Caſe, which was adjudged in 21 *Eliz.* for there at the Time of the Fine levied the Leſſee had not Power to enter or take the Profit, but only a future Intereſt, which (if it could be deveſted) he had not any Means poſſible to reveſt in him again.

(*a*) Cr. Jac. 60. Cr. El. 15, 127.

(*b*) Lit. Sect. 66. Co. Lit. 51. b.

(*c*) Lit. Sect. 459. Hetl. 81. Co. Lit. 46. b. 270 a Lit 108 b. Perk. Sect 603.

(*d*) Co. Lit 315. b. Lit. Sect. 567. Lit. 128. b.

(*e*) Cr. Car. 110 400. Cr. Jac. 604. God b. 451. 10 Co. 171. b.

(*f*) Goldsb 171, 172. Cr. Jac 60. 61. Cart. 82. 2 Leon. 157. 1 Leon. 99. Raym. 149.

The

The Caſe de Libellis famoſis; *or of* Scandalous Libels.

Paſch. 3 Jacobi 1.

IN the Caſe of *L. P.* in the *Star-Chamber* this Term, againſt whom the Attorney General proceeded *ore tenus* on his own Confeſſion, for compoſing and publiſhing an infamous Libel in Verſe, by which *John* Archbiſhop of *Canterbury* (who was a Prelate of ſingular Piety, Gravity, and Learning, now dead) by Deſcriptions and Circumlocutions, and not in expreſs Terms; and *Richard* Biſhop of *Canterbury* who now is, were traduced and ſcandalized: In which theſe Points were reſolved:

3 Inſt. 174. 9 Co. 53. b. 59. Moor 813, 627. March fur Slander 131, 132. 4 Co. 14, 15.

1. Every Libel (which is called *famoſus Libellus, ſeu infamatoria ſcriptura,*) is made either againſt a private Man, or againſt a Magiſtrate or publick Perſon. If it be againſt a private Man it deſerves a ſevere Puniſhment, for altho' the Libel be made againſt one, yet it incites all thoſe of the ſame Family, Kindred, or Society to revenge, and ſo tends *per conſequens* to Quarrels, and Breach of the Peace, and may be the Cauſe of Shedding of Blood, and of great Inconvenience: If it be againſt a Magiſtrate, or other publick Perſon, it is a greater Offence; for it concerns not only the Breach of the Peace, but alſo the Scandal of Government; for what greater Scandal of Government can there be than to have corrupt or wicked Magiſtrates to be appointed and conſtituted by the King to govern his Subjects under him? And greater Imputation to the State cannot be, than to ſuffer ſuch corrupt Men to ſit in the ſacred Seat of Juſtice, or to have any meddling in or concerning the Adminiſtration of Juſtice.

2. Although the private Man or Magiſtrate be dead at the Time of the Making of the Libel, yet it is puniſhable; for in the one Caſe it ſtirs up others of the ſame Family, Blood, or Society to revenge, and to break the Peace, and in the other the Libeller traduces and ſlanders the State and Government, which dies not.

3 Inſt. 174.

3. A Libeller (who is called *famoſus defamator*) ſhall be puniſhed either by Indictment at the Common Law, or by Bill, if he deny it, or *ore tenus* on his Confeſſion,

ſion, in the *Star-Chamber*, and according to the Quality of the Offence he may be puniſhed by Fine or Impriſonment; and if the Caſe be exorbitant, by Pillory and Loſs of his Ears.

4. It is not material whether the Libel be true, or whether the Party, againſt whom it is made, be of a good or
Hob. 253. ill Fame; for in a ſettled State of Government the Party grieved ought to complain for every Injury done him in an ordinary Courſe of Law, and not by any Means to revenge himſelf, either by the odious Courſe of Libelling, or otherwiſe: He who kills a Man with his Sword in Fight is a great Offender, but he is a greater Offender who poiſons another; for in the one Caſe he, who is openly aſſaulted, may defend himſelf, and knows his Adverſary, and may endeavour to prevent it: But poiſoning may be done ſo ſecretly that none can defend himſelf againſt it; for which Cauſe the Offence is the more dangerous, becauſe the Offender cannot eaſily be known; and of ſuch Nature is libelling, it is ſecret, and robs a Man of his good Name, which ought to be more precious to him than his Life, *& difficillimum eſt invenire Authorem infamatoriæ ſcripturæ*; and therefore when the Offender is known, he ought to be ſeverely puniſhed. Every infamous Libel, *aut*
3 Inſt. 174. *eſt in ſcriptis, aut ſine ſcriptis*; A ſcandalous Libel *in*
9 Co. 59. b. *ſcriptis* is, when an Epigram, Rhime, or other Writing is compoſed or publiſhed to the Scandal or Contumely of another, by which his Fame or Dignity may be prejudiced. And ſuch Libel may be publiſhed, 1. *Verbis aut cantilenis*: As where it is maliciouſly repeated or ſung in the Preſence of others. 2. *Traditione*, when the Libel, or any Copy of it is delivered over to ſcandalize the Party. *Famoſus Libellus ſine ſcriptis* may be, 1. *Picturis*, as to paint the Party in any ſhameful and ignominious Manner. 2. *Signis*, as to fix a Gallows, or other reproachful and ignominious Signs at the Party's Door or elſewhere. And it was reſolved, *Mich.* 43 & 44 *Eliz.* in the *Star-Chamber* in *Halliwood*'s Caſe, That if one finds a Libel (and would keep himſelf out of Danger) if it be compoſed againſt a private Man, the Finder either may burn it, or preſently deliver it to a Magiſtrate: But if it concern a Magiſtrate,
Hob. 253. or other publick Perſon, the Finder ought preſently to
9 Co. 59. b. deliver it to a Magiſtrate, to the Intent that by Examination and Induſtry, the Author may be found out and puniſhed. And Libelling and Calumniation is an Offence againſt the Law of God. For *Leviticus* 17. *Non facias calumniam proximo.* Exod. 22. ver. 28. *Principi populi tui non maledices.* Eccleſiaſtes 10. *In cogitatione*

tua ne detrahas Regi, nec in ſecreto cubiculi tui diviti maledices, quia volucres cæli portabunt vocem tuam, & qui habet pennas annuntiabit ſententiam. Pſal. 68. 13. *Adverſus me loquebantur qui ſedebant in porta, & in me pſallebant qui bibebant vinum.* Job 30. ver. 7 & 8. *Filii ſtultorum & ignobilium, & in terra penitus non parentes, nunc in eorum canticum verſus ſum, & factus ſum eis in proverbium.* And it was obſerved, that *Job*, who was the Mirrour of Patience, as appears by his Words, became *quodammodo* impatient when Libels were made of him; and therefore it appears of what Force they are to provoke Impatience and Contention. And there are certain Marks by which a Libeller may be known: *Quia tria ſequuntur defamatorem famoſum:* 1. *Pravitatis incrementum*, Increaſe of Lewdneſs: 2. *Burſæ decrementum*, Decreaſe of Money, and Beggary: 3. *Conſcientiæ detrimentum*, Shipwrack of Conſcience.

[*See the Caſe of the King againſt* Payne, Carth. 405. *See alſo* 5 Mod. 163. 1 Salk. 211. Fitzgib. 121, 253.]

PALMER's

PALMER's *Caſe.*

Paſch. 3 Jacobi 1.

In the King's Bench.

(a) Cr. Jac. 66. Yelv. 59. 6 Co. 70. b.

BEtween *(a) Palmer* and *Wilder* for a Ward in the County of *Oxford*, the only Queſtion in the Caſe was, If the Guardian in Chivalry, ſhall have the ſingle Value of the Heir without any Tender: And it was objected, that the Guardian ſhould not have it without a Tender for four Reaſons.

1. *Litt. lib.* 2. *cap.* 4. *fol.* 21. and all the Books agree, that Knight's Service draws to it Ward, Marriage, and Relief; and the Stat. of *Merton, (b) cap.* 7. ſaith, *Quod maritagium ejus qui infra ætatem eſt de mero jure pertinet ad Dominum feodi*, ſo that the Marriage of the Heir within Age doth belong by the Law in ſuch Caſe to the Lord; then if the Heir will perform that which the Law requires, *ſcil.* to be married by his Guardian, there is no Reaſon that he ſhould render any Value for it; for *Littleton* doth not ſay, that Knight's Service draws to it the Value of the Marriage, but the Marriage it ſelf; and the Statute of *Merton* doth not ſay, *Quod valor maritagii ejus de mero jure pertinet ad Dominum feodi, ſed maritagium ejus de mero jure pertinet, &c.* Suppoſe then that *A.* covenants with *B.* that *B.* ſhall have the Marriage of *A.* and that he will be married to her whom *B.* will nominate to him; In this Caſe if *A.* be ready to be married according to his Covenant, and *B.* will not nominate any, he ſhall never render any Value for it: So in the Caſe at Bar, foraſmuch as the Law gives the Lord the Marriage, if the Heir be ready to perform it, he is excuſed, and ſhall not be charged with any Value. So if the Tenant be ready to do Homage, or any other corporal Service, which by his Tenure he ought to do, the Lord cannot refuſe or waive it, and take amends for it.

(b) 2 Inſt. 92, 93, &c. Cr. El. 469.

2. In this Caſe of Marriage which the Law gives, the Lord is to have the Benefit, and he ought to do the firſt Act; for the Heir cannot perform the Duty which the Law in ſuch Caſe requires, without the firſt Act done by the Lord, *ſcil.* Tender of a Woman that the Heir ſhall marry; and in all Caſes when the Default is in him who ought to do the firſt Act, the other Party is excuſed. As if a Man be bound to levy a (*a*) Fine to the Obligee before ſuch a Day; in this Caſe foraſmuch as by the Law the Obligee ought to do the firſt Act, *ſcil.* to ſue forth a Writ of Covenant before the Day, if no Writ of Covenant be ſued, the Obligor is excuſed, as it is held 4 *E.* 3. 39. *b.* 18 *E.* 3. 27. *b.* & 11 *H.* 4. 18. *a.* *Vide* 21 *E.* 4. 2. 2 *E.* 4. 3, 4. 20 *Eliz.* 361. *Dyer*, *Windſor*'s Caſe, and 22 *Eliz.* *Dyer* 371, &c.

(*a*) 1 Rol. 458. Hutt. 48. Winch 29. 8 E. 4. 2. b. 21. b.

3. The Words of the Writ *de valore maritagii* are, *Quare cum* (*b*) *maritagium præd'* B. *ad ipſum* A. *pertineat, eo quod præd'* B. *terram ſuam de eo tenuit per ſervitium militare, & idem* A. *præd'* B. *dum fuit infra ætatem in cuſtodia ſua, competens maritagium abſque diſparagatione, &c. ſæpius obtulerit, idem* B. *maritagium illud renuens, de eodem maritagio præfat'* A. *cum ad plenam ætatem pervenerit ſatisfacere recuſavit, & adhuc recuſat minus juſte, &c. ad dampnum, &c.* By which Writ, and alſo by the Writ of Intruſion of Ward it appears, that the Lord ſhall not have the Value without Tender of Marriage, and a Default in the Heir; and if the Tender in ſuch Caſe ſhould not be requiſite, great and tedious Surpluſage would be contained in the Writ, which of its Nature, and according to its Name, ought to be brief and ſubſtantial; *Dicitur enim breve, quia rem breviter enarrat.*

(*b*) Dyer 361. pl. 9. F. N. B. 141. d.

4. Upon the Reaſons aforeſaid are divers expreſs Authorities in the Point, 21 *E.* 4. 43. *a.* *per totam Curiam*, that it ought to be tender'd, *F. N. B.* 141. (*c*) 40 *E.* 3. 6. *b.* Iſſue taken on the Tender, 11 *H.* 4. 82. Tender alledged, (*d*) 43 *E.* 3. 20. and the Statute of *Merton*, *cap.* 7. *Si quis hæres, &c. pro Domino ſuo noluerit maritare, non compellatur hoc facere, ſed cum ad ætatem pervenerit det Domino ſuo & ſatisfaciat ei, &c.* all which prove that there ought to be a Tender. As to the firſt and ſecond Objections, it was reſolved (*e*) *per totam Curiam*, That at the Common Law it was at the Lord's Election to have the Marriage of the Heir, or to ſuffer the Heir to marry whom he pleaſed, and to have Recompence, *ſcil.* the Value of it; and that at the Common Law lay not only the Writ *De valore maritagii*, but alſo the Writ *Quare ſe intruſit maritagio non ſatisfacto*; and therewith agrees (*f*) 31 *Aſſ. p.* 26. And at the Common Law if the Heir within Age had been raviſhed and married, the Guardian ſhould recover in an Action of Treſpaſs the Value of the Marriage in Damages; and therewith agrees 29 *E.* 3. 37. & 29 *Aſſ.* which is a notable

(*c*) Fitz. Action ſur le Stat. 9. Br. Forfeiture de Marriage 3.

(*d*) Fitz. Action ſur le Stat. 11. Br. Forfeiture de Marriage 5.

Le Reſolution del Court.

(*e*) 6 Co. 70. b. Cr. Jac. 66, 151.

(*f*) Br. Forfeiture de Marriage 7. Br. Tender 44.

notable Proof, that the Value of the Marriage belongs to the Lord without Tender; (*a*) for if the Value ſhould not be due without Tender, then if the Raviſher of a Ward married him, the Lord ſhould not receive the Value; or if the Heir married himſelf before the Lord could make a Tender; or if he went beyond (*b*) Sea, or to Places unknown, the Act and Wrong of the Heir, if a Tender were neceſſary, might prevent the Guardian of the Benefit of the Marriage, which *de* (*c*) *mero jure* belongs to him, which would be inconvenient. As to the third Exception it was anſwered, That many Times Writs are framed according to that which moſt uſually happens. And where the Rule is, *ad* (*d*) *ea quæ frequentius accidunt jura adaptant*'; it may be well ſaid, *ad ea quæ frequentius accidunt reſcripta ſive brevia adaptant*'; and a ſpecial Caſe ſhall have the uſual Writ and a ſpecial Count: As to the Authorities, *ſcil.* of (*e*) 40 *E.* 3. 6. *b.* there it appears that the Iſſue was taken on the Tender, which many Times is done by good Advice, *ſcil.* firſt to try the Matter in Fact, if the Plaintiff's Counſel will admit it, and then to take Advantage of the Matter in Law, which joining of Iſſue by the Plaintiff's Counſel, is not any Authority to Prove that a Tender is requiſite. And as to the Book of (*f*) 21 *E.* 4. 43. *a.* which is but an Opinion *obiter* without Argument or Deliberation, in the debating of another Caſe, is to be underſtood of the Forfeiture of Marriage; and in the other Books, Tender is only alledged, and no Authority that it is requiſite: But the Book of (*g*) 31 *Aſſ. p.* 26. is adjudged, That for the ſingle Value a Tender is not requiſite; and therewith agrees 2 *H.* 7. 9. *a.* *Et hoc communi juris peritorum calculo comprobatur:* And ſo the Doubt in 9 *Eliz. Dyer* 255. *b.* (*h*) well reſolved.

(*a*) Cr. El. 335, 468, 469. Yelv. 59. Moor 22, 65, 593. Co. Lit. 82. a. 6 Co. 70. b. 71. a. 2 Inſt. 93. Cr. Jac. 66. Cr. Car. 103, 503.

(*b*) Yelv. 59. 6 Co. 71. b. Cr. Jac. 151.

(*c*) Cr. Jac. 66, 151. Yelv. 59. 6 Co. 71. b. Cr. El. 468.

(*d*) 6 Co. 77. a 7 Co. 28. a. Calvin's Caſe. Co. Lit. 238. a. 2 Inſt. 137. Cart. 13.

(*e*) Antea 127. a. Fi z. Action ſur le Statute 9. Br. Forfeiture de Marriage 3.

(*f*) Ant. 127. a

(*g*) Antea 127. a. Br. Forfeiture de Marriage 7. Br. Tender 44.

(*h*) Dyer 255. pl. 6. Doct. pl. 94.

Finis Libri Quinti.

In thoſe Years, wherein the precedent CASES were adjudged, the following Perſons were Judges of the reſpective Courts, *viz.*

Juſtic' de Banco Regis.

CHriſt. Wray Miles, qui obiit anno 34 Eliz. Et poſt eum, Johannes Popham Miles.
Johannes Southcote.
Thomas Gawdy Miles.
Willielmus Ayloffe.
Robertus Shute.
Johannes Clench.
Franciſcus Gawdy Miles.
Edwardus Fenner Miles.
Chriſtoph. Yelverton Miles.
David Williams Miles.

Juſtic' de Communi Banco.

JAcobus Dyer Miles, qui obiit poſt Hill' 24 Eliz. Et Paſch. 24. Edmundus Anderſon Miles.
Ann' 19 Eliz. Rog. Manwood, qui receſſit in Scacc' Hill. 24 Eliz. Robertus Munſon, ceſſit Paſc. 22.
Hill' 20 Eliz. Thomas Meade, obiit Paſc. 27 Eliz.
Trin' 21 Eliz. Franciſcus Windham, obiit poſt Trin. 34 Eliz.
Hill' 23 Eliz. Will' Periam, Hill' 35. receſſit in Scaccario.
M. 27 & 28 El. Francis Rodes, obiit an' 31 Eliz.
Paſch. 31 Eliz. Thomas Walmeſley Miles.
Hill' 35 Eliz. Franciſcus Beamont, obiit ante Paſc. 40 Eliz.
Hill' 36 Eliz. Thomas Owen, obiit ante Hill' 41 Eliz.
Trin' 40 Eliz. Johannes Glanvil, obiit poſt Trin' 42 Eliz.
Hill' 41 Eliz. Georgius Kingeſmill Miles.
Mich' 43 Eliz. Petrus Warburton Miles.
Hill' 1 Ja. Reg. Willielmus Daniel Miles.

Baron' in Scaccario.

JOh. Jeffrey Miles. T. Fleming Miles.
Robertus Shute.
Johannes Clench.
Edw. Flowerdew.
Rob. Clark Miles.
Thomas Gent.
Matthæus Evans.
Joh. Savill Miles.
Georg. Snig Miles.
Johan' Sotherton.

Servientes ad Legem.

ROb. Gardiner Miles. Tho. Harris Miles.
Rich. Lewkenor Miles.
Johannes Hele Miles.
Edw. Herne Miles.
Edm. Pelham Miles.
Edw. Philips Miles.
Joh. Crook Miles.
Johannes Sherley.
Tho. Coventry.
Edw. Houghton.
Laur' Tanfield Mil'.
Tho. Foſter Miles.
Thomas Harris.
Jacobus Altham.
H. Hobart Mil'.
Auguſt' Nichols.
Robert' Barker.
Rich. Hutton.
Jacob. Lea Miles.
Joh. Dodderidge.

A TABLE of the CASES contained in this Book; ſhewing in what Court they were adjudged, in what Term recorded, and in what Folio of this Book they begin.

Of the King's Eccleſiaſtical Law.

Caſes of Leaſes.

Caſes of Covenants, Agreements, &c. concerning Leaſes, Aſſurances, &c.

Caſes of Executors.

Caſes of Conſtructions of the Statutes of Jeofails, &c. *Amendment of Fines, Records, Common Recoveries,* &c.

Caſes of Pardons.

Caſes of By-Laws and Ordinances, &c.

Caſes of Uſury.

Caſes of Cuſtom.

Caſes of Executions.

F I N I S.

Caſus CAUDREII.

CAUDREY's *Caſe.*

Skin. 468; 486, 490, 493, &c. 1 Sal. 134.

De Jure Regis Eccleſiaſtico.

TErmino Hillarii, anno 33 regni Elizabethæ Rotulo 340 *Robertus Caudrey* Clericus in jus vocavit *Georgium Aton* de actione tranſgreſſionis, quod Clauſum ſuum ad Northluffenham in Comitat' Rutlandiæ perfregiſſet die ſeptimo Auguſti, anno regni prædictæ Reginæ triceſimo primo: Defendens reſpondit ſe minimè eſſe reum; juratores evocati & jurati veredictum dederunt ſpeciale, videlicet rem eſſe veram comperuerunt, de jure autem ad judicium curiæ referentes in hanc ſententiam, comperuerunt querentem ante tranſgreſſionem fuiſſe rectorem rectoriæ de Southluffenham in Comitatu Prædicto, & locum in quo damnum fuit illatum, eſſe partem ejuſdem Rectoriæ, comperuerunt item ſtatutum factum anno ejuſdem Reginæ primo, quo ſancitum in hanc ſententiam fuit, Quod ea Eccleſiaſtica juriſdictio, quæ aliqua poteſtate Spirituali, vel

Of the King's Eccleſiaſtical Law.

IN the Term of St. Hillary, in the 330 Year of the Reign of Q. Elizabeth, Rotulo 340, Robert Caudrey Clerk brought an Action of Treſpaſs againſt George Atton, for breaking of his Cloſe at Northluffenham in the County of Rutland, the 7th Day of Auguſt in the 31ſt Year of the Reign of the ſaid late Queen: The Defendant pleaded not guilty, and the Jury returned and ſworn for Trial of this Iſſue gave a ſpecial Verdict, that is, they found the Truth of the Caſe at large referring the ſame for the Law to the Judgment of the Court, to this Effect: They found that the Plaintiff before the Treſpaſs ſuppoſed to be done, was Parſon of the Rectory of Southluffenham in the County aforeſaid, whereof the Place wherein the Treſpaſs is alledged was Parcel, and found the Statute made in the * firſt Year of the ſaid late Queen's Reign by which in effect it is enacted, that ſuch Juriſdiction Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical

Poph. 59. Inſt. 198. Mo. 228.

* 1 Eliz. c. 1. 16 & 17 Car. c. 11 Cawly 1. 2, 3, &c. 4 Inſt. 324, 525. Cr. Jac. 37. Moor 755. Parſon's Anſwer 57.

a

ſtical Power hath heretofore been, or may lawfully be exerciſed for the Viſitation of the Eccleſiaſtical Eſtate and Perſons, and for Reformation, Order, and Correction of the ſame, and of all Manner of Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities, within this Realm, ſhould for ever be united and annexed to the Imperial Crown of this Realm. And that her Highneſs, her Heirs and Succeſſors, ſhould have full Power and Authority, by Virtue of that Act, by Letters Patents under the Great Seal of England, to aſſign, nominate and authoriſe ſuch Perſons, being natural-born Subjects, as her Highn. her Heirs or Succeſſ. ſhould think meet, to exerciſe and execute under her Highneſs, her Heirs and Succeſſors, all and all Manner of Juriſdiction, Privileges and Preheminences in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within this Realm of England and Ireland, and to viſit, reform, redreſs, order, correct, and amend all ſuch Errors, Hereſies, Schiſms, Abuſes, Offences, contempts, and Enormities whatſoever, which by any (Manner) Spiritual or Eccleſiaſtical Power, Authority or Juriſdiction can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended to

Repeal'd by Stat. 17 Car. 1. cap. 2, &c.

Eccleſiaſtica jam ant' exercebat', vel legitimè exerceri poterat ad viſitand' Eccleſiaſticum ſtatum & ordinem, item ad reformandum, in ordinem redigendum, & corrigendum homines Eccleſiaſticos, omnimodos errores, hæreſes, ſchiſmata, abuſus, offenſas & enormitates intra hoc regnum, imperiali hujus Regni diademati in perpetuum uniretur & adjungeretur. Et quod ejuſdem Reginæ celſitudo, hæredes & ſucceſſores, virtute hujus ſtatuti, plenam poteſtatam & auctoritatem haberent, per literas patentes ſub magno Angliæ ſigillo, aſſignandi, nominandi, & anthoritate muniendi ejuſmodi perſonas, nativos hujus regni ſubditos, quos ſua celſitudo, hæredes & Succeſſores idoneos exiſtimarent, ad exercendum & exequendum ſub ſua celſitudine, hæredibus & ſucceſſoribus omnimodam juriſdictionem, privilegia, prærogativas, ullo modo ſpectantes ad juriſdictionem Spiritual' vel Eccleſiaſticam infra hoc regnum Angliæ & Hiberniæ, & ad viſitandum, reformandum, componendum, corrigend' & emendand' omnes ejuſm' errores, hæreſes, ſchiſmata, abuſus, offenſas, contemptus, & enormitates quaſcunq; quæ ulla poteſtate ſpirituali vel eccleſiaſtica poteſtate

ſtate, authoritate, aut juriſdictione legitimè reformari, componi, corrigi, coerceri, vel emendari poſſint, ad omnipotentis Dei beneplacitum, virtutis incrementum, & pacis unitatiſq; hujus regni conſervationem. Et quod etiam ejuſmodi perſonæ ita nominatæ, aſſignatæ, & authoritate munitæ, virtute Stat. & ejuſm' literarum Patent' plenam poteſtat' & authoritat' haberent ſub ſua Celſitudine, hæredib' & Succeſſoribus, ad omnia præmiſſa exercenda, utenda, & exequenda juxta tenor' præd' Literar' Patentium, ulla re, vel cauſa in contrarium non obſtante. Poſtea autem præfata Reg' per literas Patentes ſub magno Angl' ſigillo datas nono die Decembris anno regni ſui viceſim' ſexto juxta tenor' præd' ſtatuti Archiepiſcopo Cantuarienſi, Epiſc' Londinenſi, & quibuſd' aliis, vel eor' tribus aut plurib' authoritat' dedit inquirendi ad ſtatut. anni primi regni ſui de libro prec' publicar', cum hac etiam clauſula in iiſd' Literis Patentibus comprehenſa, viz. Præterea, plen' poteſtatem & authoritatem damus & concedimus reformandi, ordinandi, corrigendi, emendandi in ſingulis hujus Regni locis, omnes errores, hæreſes, ſchiſmat', abuſus, contemptus, enormitat' ſpiritu-

the Pleaſure of Almighty God, the Encreaſe of Virtue, and the Conſervation of the Peace and Unity of this Realm. And alſo that ſuch Perſons ſo to be named, aſſigned and authoriſed, ſhould have full Power and Authority by Virtue of that Act, and of ſuch Letters Patents under her Highneſs, her Heirs and Succeſſors, to exerciſe, uſe or execute all the Premiſſes, according to the Tenor and Effect of the ſaid Letters Patents, any Matter or Cauſe to the contrary notwithſtanding. And afterwards the ſaid Queen by her Letters Patent under the Great Seal of England, bearing Date the ninth Day of December in the ſix and twentieth Year of her Reign according to the Tenor of the ſaid Act, did authoriſe the Archbiſhop of Canterbury, the Biſhop of London, and divers others, or any three or more of them, to inquire, amongſt others, of the Statute of the firſt Year of her Reign concerning the Book of Common Prayer, with this Clauſe alſo contained in the ſaid Letters Patents, videlicet, Alſo we give and grant full Power and Authority to reform, redreſs, order, correct and amend in all Places of this Realm, all Errors, Hereſies, Schiſms, Abuſes, Contempts, and Enormities, Spiritual or Eccleſiaſtical whatſoever, which by any

Spiritual or Eccleſiaſtical Power and Authority of Juriſdiction, can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended by the Cenſures Eccleſiaſtical, Deprivation, or otherwiſe, &c. And upon Proof thereof had, and the Offences aforeſaid, or any of them ſufficiently proved againſt any Perſon or Perſons, by Confeſſion, lawful Witneſs, or by any due Manner, &c. That then you or three of you ſhall have full Power and Authority to order and award ſuch Puniſhment to every ſuch Offender by Fine, Impriſonment, Cenſure of the Church, or otherwiſe, or by all or any the ſaid Ways, and to take ſuch Order for the Redreſs of the ſame, as by your Wiſdoms and Diſcretions ſhall be thought meet and convenient, as by the ſaid Letters Patents more at large appeareth. And further they found the Statute of the firſt Year of the Reign of the ſaid late Queen, by which it is enacted; That the Offender againſt that Act concerning the Uniformity of Common Prayer, and being thereof lawfully convicted, according to the Laws of the Realm, by Verdict of twelve Men, or by his Confeſſion, or by the notorious Evidence of the Fact, ſhould forfeit for the firſt Offence the Value of his Spiritual Living for one whole Year, and ſhould ſuffer ſix Months

Stat. 1 El. c. 2. Sect. 4, 5, 6.

ales vel Eccleſiaſticas quaſcunque, quæ aliqua authoritate vel juriſdictione Spirituali, vel Eccleſiaſtica, reformari, ordinari, corrigi, coerceri, vel emendari, legitimè poſſint cenſuris Eccleſiaſticis, deprivatione, vel alias, &c. Cumque hæc & offenſæ prædictæ, aut earum aliqua contra ullam perſonam aut perſonas, confeſſione, legitimo teſtimonio, aut quavis debita forma ſufficienter probent', &c. Quod tunc vos vel tres ex vobis plenam poteſtatem & Auctoritatem habebitis in ordin' redigendi, & pœnas infligendi ſingulis ſic delinquentibus, mulcta, incarceratione, cenſura Eccleſiaſtica, vel aliàs, vel illis omnibus, & ſingulis, & ad eorum reformationem eam rationem ineundi, quæ veſtra prudentia æquum & bonum videbitur, ut ex iiſd' literis Patentib' plenius patet. Ad hæc comperuerunt Statut. anni primi regni ejuſd' Reginæ, quo ſancitum eſt, quod qui offenderit contra Statutum de precum publicarum uniformitate, & legitimè juxta leges regni duodecim virorum veredicto convictus, vel ſua ipſius confeſſione, vel perſpicua facti evidentia, prima vice amitteret emolumenta beneficior' Eccleſiaſticor' quæ habuit, & ſex totos menſes incarceretur

tur. Si ſecunda vice deliquerit, poſtquam convictus fuerit, *ipſo facto* omnibus Spiritualibus promotionibus deprivaretur. Tertia autem vice ſi deliquerit poſt duas convictiones, ut prædicitur, omnibus Eccleſiaſticis promotionibus deprivatus ad vitam incarceretur. Et quod præfatus *Robertus Caudrey* ante tempus tranſgreſſionis præſuppoſitæ prædicta rectoria ſeu beneficio coram Commiſſariis prædictis privatus fuerit, tum quod contra precum publicarum librum concionatus ſit, tum quod rem divinam juxta præſcriptum ejuſdem libri celebrare recuſaverit, & in quibus ſigillatim oſtenſum erat: Quæ deprivationis ſententia per Epiſcopum Londinenſem, cum aſſenſu A. B. C. D. collegarum ſuorum lata. Jurati autem veredictum ſuum concluſerunt; Quod ſi prædicta deprivatio non legitima eſſet, ſed irrita, tunc defendentem tranſgreſſionis reum invenerunt. Sin autem deprivatio illa irrita non erat, tunc defendentem non reum invenerunt. Et hæc cauſa pro Tribunali per Advocatos utriuſque partis, & de Tribunali per Judices ſæpius tractata eſt, & poſt magnam & maturam deliberationem, & cum cæteris Judicibus conſultationem, Termino Hillarii anno ejuſdem

Impriſonment. For the ſecond Offence to be committed after ſuch conviction, he ſhould be deprived, *ipſo facto*, of all his Spiritual Livings. And for the third Offence to be committed after two Convictions, as is aforeſaid, he ſhould be deprived of all his Eccleſiaſtical Livings, and be impriſoned during his Life. And that the ſaid Robert Caudrey, before the Time of the Treſpaſs ſuppoſed, was deprived of his ſaid Benefice before the ſaid high Commiſſioners, as well for that he had preached againſt the ſaid Book of Common Prayer, as alſo for that he refuſed to celebrate Divine Service according to the ſaid Book, and ſhewed particularly wherein: Which ſaid Sentence of Deprivation was given by the Biſhop of (a) London, cum aſſenſu A. B. C. D. &c. collegarum ſuorum. And the Jury concluded their Verdict; That if the ſaid Deprivation were not warranted by Law, but void, then they found the Defendant guilty of the Treſpaſs: And if the Deprivation were not void in Law, then they found the Defendant not guilty. And this Caſe was ſolemnly and oftentimes debated at Bar by the Counſel of either Party, and at the Bench by the Judges, and after great and long Deliberation and Conſultation had with the Reſt of the Judges, was in the Term of St. Hilary in the 37th Year of

(a) Poph. 59. poſt. 4.

The Objections of the Counſel of the Plaintiff.

the ſaid Queen adjudged. And it was argued by the Counſel of the Plaintiff, that the ſaid Deprivation was void for 4 Cauſes. Firſt, the ſaid Book of Common Prayer being authoriſed and commanded to be obſerved by the ſaid Act of the firſt Year of the Queen, upon the Forfeitures and Puniſhments therein comprized, the Offence of the Plaintiff is againſt that Act: for that Act only doth command the Obſervation of the ſaid Book and inflicteth Puniſhments in ſeveral Degrees for depraving or not obſerving of the ſame, and conſequently, if the Offence be againſt that Act, the Plaintiff ought to have been proceeded withal, and puniſhed according to the ſame: And it was ſaid that the ſaid Act was an Act of great Moderation and Equity; for the Offender for the firſt Offence ſhould not be ipſo facto deprived, but ſhould only loſe the Profits of his Eccleſiaſtical Livings for one Year, and ſuffer impriſonment for ſix months, to the End that ſuch as were froward might have a Time to repent, and the well minded a Time to conſent; and ſuch Care had the Act of the Offenders in this Behalf, as if they committed one Offence, and then another, and after the ſecond many more; yet ſhould not the Offender be deprived for any of the latter Offences, unleſs he had been firſt judicially convicted of Record

Reginæ 37 adjudicata fuit. Per Advocatos querentis argumentatum eſt, deprivationem quatuor de cauſis eſſe irritam. *Primum*, cum ſancitum eſſet, & ſcitum, ut liber ille publicarum precum ſtatuto illo anni primi Reginæ obſervaretur ſub mulctis & pœnis ibidem comprehenſis, & querens peccavit contra illud ſtatutum: Statutum etenim illud obſervationem tantummodo illius libri imperat, pœnamque infligit diverſis gradibus pro eodem depravato vel non obſervato, & conſequenter ſi violatum ſit ſtatutum, querens juxta ſtatutum tractandus & plectendus erat: Dictum inſuper erat, ſtatutum illud fuiſſe admodum moderatum & æquum, nam delinquens pro primo delicto non erat *ipſo facto* deprivandus, ſed tantum emolumenta Eccleſiaſticorum ſuorum beneficiorum ad unum annum amitteret, & ad ſex totos menſes incarceretur, ut pervicaces ſpatium reſipiſcendi, & moderatiores tempus ad conſentiendum haberent: eamq; delinquentium rationem ſtatutum illud habuit, ut ſiquis primo, ſecundo, vel tertio deliquerit, non tamen deprivaretur, pro poſterioribus delictis, priuſquam judicialiter convictus fuiſſet ex recordo perduode-

duodecim virorum veredictum, vel ſui ipſius confeſſione, vel perſpicua facti evidentia: Ità ut ſecundum delictum, pro quo deprivandus ſit ex illo ſtatuto, committendum eſt poſt ejuſmodi judicialem & ſolemnem convictionem & pœnam juxta ſtatutum: Si ejuſmodi publica pœna & inflictio non intellectum daret, & cor ad reſipiſcendum non aperiret, tunc poſt ejuſmodi convictionem pro ſecundo delicto incarcerandus, & poſt ejuſmodi convictionem deprivandus. Quod ſi in hac cauſa *Caudrey* querens beneficio illo Eccleſiaſtico, ſive rectoria de *Southluffenham* pro primo dilecto deprivatus erat, cùm nunquam antea in quæſtionem vocatus aut convictus fuiſſet pro ejuſmodi delicto. Concluſum igitur erat pro hac prima parte, quod ſupremi illi commiſſarii formam & ordinem ſtatuto preſcriptum non obſervarunt: *Et non obſervata forma infertur adnullatio Actus*, & ex conſequentia deprivatio eſt irrita, ideoque ſententia pro eo ferenda. Allegatum etiam erat per Querentis advocatos per anticipationem, quod etiamſi in eodem ſtatuto erat *Proviſo*, pro Archiepiſcopis, Epiſcopis, eor' Cancellariis, Commiſſariis, Archidiaconis, & aliis Ordinar' peculiarem ju-

by Verdict of xii. Men, or by Confeſſion, or notorious Evidence of the Fact: So as the ſecond Offence, for which he muſt be deprived by the ſaid Act, muſt be done and committed after ſuch a judicial and ſolemn Conviction and puniſhment according to the ſaid Act: And then if ſuch an open Puniſhment and Infliction ſhould not give him Underſtanding, and open his Heart to repent: Then upon a like Conviction for a ſecond Offence, to be committed after ſuch a Conviction, Deprivation ſhould follow. But in the Caſe now in Queſtion, Caudrey the Plaintiff was deprived from his ſaid Parſonage of Southluffen' for his ſaid firſt Offence, being never convented or convicted for any ſuch Offence before. And therefore it was concluded for this firſt Point, That the ſaid high Commiſſioners had not purſued the Form and Order preſcribed by the ſaid Act; Et non obſervata forma infertur adnullatio Actus, and conſequently the Deprivation of the Plaintiff is void, and therefore Judgment ought to be given for him. And it was ſaid by the Plaintiff's Counſel, by Way of Anticipation, That albeit there was a Proviſo in the ſame Act for Archbiſhops, Biſhops, and their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having peculiar Jurisdiction,

yet that did not give any Strength to the ſaid Deprivation for two Cauſes. Firſt, that the Commiſſioners, by Force of the ſaid Act of 1 El. and of the ſaid Letters Patents, are not within the ſaid Proviſo, but only Archbiſhops and Biſhops, their Chancellors, Commiſſaries, &c. in reſpect of their ordinary Juriſdiction. 2. Admitting it ſhould extend to the ſaid High Commiſſioners, yet ought they to proceed according to the Form and Order of the ſaid Act, for an Offence done againſt that
2. Act. Secondly, it was objected by the Counſel for the Plaintiff, that Caudrey the Plaintiff was not deprived either by the Verdict of xii Men, or by Confeſſion, or by the notorious evidence of the Fact, but by Default in reſpect he appeared not, being duly precognizated or warned, which Caſe as it was objected, was
(a) 5 Co. 2. b. 37. b. (a) Caſus omiſſus, & oblivioni datus, and not within the ſaid
3. Act. Thirdly, It was objected on the Behalf of the Plaintiff; That the ſaid Sentence, given by the ſaid high Commiſſioners was utterly void, for that they or any three or more of them having Authority by Force of the ſaid Act, and of the ſaid Letters Patents under the Great Seal, ought to join in the Sentence, and that one alone
(b) Poph. 59. Antea 3. a. Poſtea 7. a. with the (b) Conſent of two or more of the other Commiſſioners cannot give a Sentence, for that every Commiſſo-

riſdictionem exercentibus, nullam tamen vim præd' deprivationi dedit, idque duabus de cauſis: *Primum*, quod prædicti commiſſarii virtute ſtatuti anni primi Elizabethæ & prædictarum literarum Patentium in iſto Proviſo non comprehenduntur, ſed ſolummodo Archiepiſcopi, Epiſcopi, eorum Cancellarii, & Commiſſarii, &c. ratione juriſdictionis eorum ordinariæ. *Secundo*, ſi modo detur quod ad ſupremos Commiſſarios extenderit, illi tamen juxta formam & ordinem ſtatuti pro delicto contra ſtatutum procederent. *Secundo*, per advocatos querentis, quod *Caudrey* non deprivatus erat vel duodecim virorum veredicto, vel confeſſione, vel perſpicua facti evidentia, ſed quod citatus & admonitus non comparuerit, quod, ut illi objecerunt, *Caſus erat omiſſus & oblivioni datus*, & non ſtatuto puniendus. *Tertio*, ex parte querentis objectum erat ſententiam à primis illis Commiſſariis latam omnino eſſe irritam, quod illi vel tres, aut plures illorum authoritatem habentes ex illo ſtatuto, & literis illis Patentibus ſub magno ſigillo, debent junctim ſententiam ferre, & quod unus ſolus cum conſenſu duorum aut plurium Commiſſariorum ſententiam ferre non poſſit, quia ſinguli æqua-

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lem habent authoritatem, & per eaſd' literas Patentes tres vel plures ſententiam ferre debent cum aliorum conſenſu, & quod ejuſmodi ſententia lata per Commiſſarios ad audiendum, & determinandum, vel per alios Commiſſarios aut Judices legis communis omnino erat irrita. *Quarto*, & poſtremo objectum erat, quod prædicti Commiſſarii non erant juxta ſtatutum illud nominati, & conſtituti: Juriſdictio enim, & poteſtas coronæ per illud ſtatutum data eſt ejuſmodi Commiſſariis qui ſunt naturalis & nativi ſubditi, & ex ſpeciali illo veredicto non conſtat, quod Commiſſarii illi fuerunt naturales & nativi ſubditi; & quamvis Judices ut viri privati in particulari ſcientia illos naturales & nativos ſubditos cognoſcerent, cum tamen Judices ex recordo exiſterent judicialibus tantum oculis intueri, & nihil aliud cognoſcere, quam quod in recordo illis apparet, nam ex illo non ex privata ſcientia ſine recordo ſententiam ferre debent, & ex illo record' judicium ſuum in record' inſcribere. Et quandoquidem Regina prædict' (ut à Conſiliariis querentis dictum erat) Eccleſiaſticam juriſdictionem ex illo ſtatuto parliamentario haberet, & ex eod' poteſtas ipſi data eſſet

ner hath equal Authority, and by the ſaid Letters Patents three or more muſt give the Sentence with Conſent of others, and ſuch a Judgment given by any Commiſſioners of Oyer or Terminer, or other Commiſſioners or Judges of the Common Law, were utterly void and of none Effect. Fourthly, and laſtly it was objected, that the ſaid Commiſſioners were not nominated and appointed according to the ſaid Act; for the Juriſdiction and Power given by the ſaid (*a*) Act to the Crown, is to name ſuch Commiſſioners as be natural-born Subjects; and it doth not appear by the ſaid ſpecial Verdict that the ſaid Commiſſioners were natural-born Subjects: And albeit the Judges as private Men in their particular Knowledge did know them to be (*b*) natural-born Subjects, yet they being Judges of Record ought only to ſee with judicial Eyes, and to take Knowledge of no more than doth appear to them within the Record; for upon that, and not upon private Knowledge out of the Record, they only muſt give their Judgment, and upon that Record enter their Judgment alſo of Record. And ſeeing that the late Queen had, as it was ſaid by the Plaintiff's Counſel, Eccleſiaſtical Juriſdiction by the ſaid Act of Parliament, and by the ſame Power was given unto her to name Eccleſiaſtical

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(*a*) 1 El. c. 1.

(*b*) Poph. 59, 60.

ſiaſtical Commiſſioners, the of Neceſſity muſt make her Nomination according to the ſaid Act, having no other Power, as was objected, but by the ſaid Act: And ſeeing it was not ſpecially found that they were natural-born Subjects:

(*a*) 4 Co. 47. a. Vaugh. 72. 12 Co. 52. Hob. 295. Palm. 15. 3 Bulſt. 100. 2 Inſt. 20.

Et (*a*) de non apparentibus & non exiſtentibus eadem eſt ratio: For this Cauſe alſo the ſaid Sentence of Deprivation was void, as given by Commiſſioners not warranted by the ſaid Act.

The Reſolutions of the Court to the 1ſt and 2d.

(*b*) 2 Rol. 222. 1 Jones 393.

As to the firſt and ſecond Objection, both being grounded upon the ſaid (*b*) Act of Parliament, it was reſolved by the whole Court, that notwithſtanding theſe two Objections, the Sentence was not to be impeached for either of them, and that for three Cauſes. Firſt, for that the ſaid Act concerning the Uniformity of Common Prayer, being in the (*c*) Affirmative,

(*c*) 2 Rol 222. Poph. 60. 11 Co. 64. a.

doth not abrogate or take away the Jurisdiction Eccleſiaſtical, unleſs Words in the Negative had been added, as, and not otherwiſe, or in no other Manner or Form, or to the like Effect: And this appeareth by the general Rule of all our Books, as it appeareth in 46 Ed. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 Ed. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. Stradling's Caſe Pl. Com. 207. &c. ¶. 2. The Eccleſiaſtical Law and the

Q. how the Com. Law could be extended to the Book of Com. Prayer which was only conſtituted by Stat. 6.

Eccleſiaſticos Commiſſionarios nominandi, illa neceſſario juxta illud ſtatut', cum aliam poteſtat', niſi inde, ut objectum erat, non haberet, eos nominaret: Cumq; non ſpeciatim inventum fuerit eos nativos fuiſſe ſubditos: *Et de non apparent', & non exiſtentib' eadem eſt ratio:* Hanc etiam ob cauſ. deprivation' ſententia irrita erat, utiq; lata per Commiſſionarios non ſufficient' authoritat' munitos ex eod' ſtatuto.

Quod ad primam & ſecundam objectionem ſpectat, quorum utraque illi Parliamenti ſtatuto innititur, determinatum erat de totius Curiæ ſententia, quod objectionibus illis non obſtantibus ſententia lata in quæſtionem non eſſet vocanda, idque tribus de cauſis. Primum quod ſtatutum illud de publicarum precum uniformitate, cum eſſet in parte affirmativa, juriſdictionem Eccleſiaſticam non abrogat aut tollit, niſi verba in parte negativa adjuncta fuiſſent, utique, *& non alias, vel ullo alio modo vel forma*, aut ad eundem ſenſum: Hoc manifeſto appareret, & clare conſtat ex generali omnium codicum noſtrorum regula, uti etiam in 46 E. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 E. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. ¶. 2. Lex Eccleſiaſtica

ſiaſtica & temporal' ſuas ſeorſim procedendi formulas habent, & diverſos reſpiciunt ſcopos; altera temporalis ad pœnam infligendam corpori, terris, & bonis; altera ſpiritualis pro ſalute animæ; altera ad externum hominem plectendum, altera ad internum reformandum: Et hoc perſpicuum eſt in 12 *H.* 7. 22. & 10 *E.* 4. 10. *&c.* Hæ igitur diſtinctæ & ſeparatæ juriſdictiones apte cohærent, & in hoc coeunt, ut homo totus externe & interne reformetur. *Tertio*, Proviſo in prædicto ſtatuto hanc quæſtionem omni quæſtione liberat, nam ex eo proviſum, decretum, & ſancitum eſt authoritate præfata, quod omnes & ſinguli Archiepiſcopi & Epiſcopi, & ſinguli eorum Cancellariorum, Commiſſariorum, Archidiaconorum, quibus aliqua eſt ſpiritualis juriſdict' vigore ejuſdem ſtatuti plenariam poteſtatem, & authoritatem haberent, tam inquirendi in viſitationibus, Synodis, & alibi intra ipſorum juriſdictionem, quam alio quovis tempore & loco, accipiendi information' omnium & ſingularum rerum, quæ ſupra memorantur commiſſæ vel perpetratæ intra limites & juriſdictionis & authoritatis eorum, eaſque puniendi admonitione, excommunicatione, ſequeſtratione, vel deprivatione, aut

Temporal Law have ſeveral Proceedings, and to ſeveral Ends: The one being Temporal to inflict Puniſhment upon the Body, Lands or Goods: The other being Spiritual, pro ſalute Animæ, the one to puniſh the outward Man, the other to reform the inward: And this appeareth in 12 H. 7. 22. & 10 Ed. 4. 10. &c. Then both theſe diſtinct and ſeveral Jurisdictions conſiſt and ſtand well together; and do join in this: To have the whole Man inwardly and outwardly reformed. ¶ 3. The Proviſo in the ſaid Act doth make this Queſtion without Queſtion, for by it is provided, ordained, and enacted by the Authority aforeſaid, That all and ſingular Archbiſhops and Biſhops, and every of their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries having any peculiar Eccleſiaſtical Jurisdiction, ſhould have full Power and Authority by Virtue of that Act, as well to enquire in their Viſitation, Synods, and elſewhere within their Jurisdiction, as at any other Time and Place, to take Accuſations and Informations of all and every the Things abovementioned, done, committed or perpetrated within the Limits of their Jurisdiction and Authority, and puniſh the ſame by Admonition, Excommunication, Sequeſtration, or Deprivation, and other Cen- To the 3d.

Cenſures and Proceſs in like Form as heretofore had been uſed in like Caſes by the Queen's Eccleſiaſtical Laws, as by the ſaid Act appeareth. So as ſeeing, if that Act had never inflicted any Puniſhment for depraving or not obſerving the Book of Common Prayer, yet the ſame being allowed and commanded to be obſerved for Uniformity of Common Prayer, and the Unity and Peace of the Church; The Eccleſiaſtical Judge may deprive ſuch Parſon, Vicar, &c. as ſhall deprave or not obſerve the ſaid Book, as well for the firſt Offence, as he might have done by the Cenſures of the Church, and the Eccleſiaſtical Laws, as if no Form of Puniſhment had been inflicted by that Act; and this doth evidently appear by the ſaid Proviſo: For thereby, notwithſtanding any Thing in that Act contained, they may puniſh ſuch Offenders by Admonition, Excommunication, Sequeſtration, or Deprivation, and other Cenſures and Proceſs, in like Form as heretofore hath been uſed in like Caſes by the Queen's Eccleſiaſtical Laws, and are not bound to purſue the Form preſcribed by the ſaid Act, which is to puniſh the Offender according to the temporal Law. And it was reſolved, that if the Juriſdiction of the Archbiſhops and Bi-

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See Skin. 491. 493, &c.

See the Quære before 5. b.

aliis cenſuris, & procedendi formulis, perinde ac hactenus in uſu fuiſſet in ejuſmodi cauſis, regiis legibus Eccleſiaſticis, ut ex eod' ſtatut' manifeſte conſtat. Adeo ut ſi ſtatutum illud nunquam ullam pœnam pro depravando, vel non obſervando publicarum precum libro inflixiſſet, attamen cum liber ille approbatus, & ex mandato Regis obſervandus eſſet pro precum publicarum uniformitate, & unitate, ac pace Eccleſiæ conſervanda; Judex Eccleſiaſticus ejuſmodi Rectorem, Vicarium, &c. deprivare poteſt, qui eundem librum depravabit, vel non obſervabit, tam pro primo delicto, ut per Eccleſiæ cenſuras, & leges Eccleſiaſticas facere potuiſſet, quaſi nulla pœnæ aut puniendi forma per ſtatutum inflicta fuiſſet; & hoc per præfatum Proviſo dilucide manifeſtum eſt. Ex eo enim nihilo obſtante in præd' ſtatuto, delinquentes admonitione, excommunicatione, ſequeſtratione, deprivatione, & aliis cenſuris, & procedendi formulis, perinde ac ante in uſu fuerit in ejuſm' cauſis, per Eccleſiaſticas Regin' leges punire poſſunt, & non obſtricti ſunt ad formam proſequendam in eod' ſtatuto præſcript', quæ eſt delinquent' juxta legem temporal' punire. Determinat' etiam erat, quod ſi eodem

dem ſtatuto proſpectum fuiſſet juriſdictioni Archiepiſcoporum, & Epiſcopor' & Cancellariorum, Commiſſariorum, Archidiaconorum, & aliorum Ordinariorum, quibus eſt peculiaris juriſdictio Eccleſiaſtica; *à fortiori* ſupremis Commiſſionariis authoritate munitis ex alio ſtatuto in eodem Parliamento *tacite* proviſum erat: *Quia cui licet quod majus eſt, non debet quod minus eſt non licere.* Ad objectionem vero tertiam per totam etiam Curiam determinatum erat, quod ſententia ab Epiſcopo cum Collegarum aſſenſu lata ejuſmodi erat ut communis legis Judices approbare debeant juxta Eccleſiaſticas leges latam fuiſſe: Cum etenim illis ſit authorit' procedendi, & ſentent' ferendi in cauſis Eccleſiaſt', juxta leges Eccleſiaſticas, & illi ſententiam tulerint in cauſa Eccleſiaſtica, juxta eor' procedendi formulam vi & virtute ejuſdem legis: Communis legis Judices ipſorum ſententiæ fidem adhibere & eandem approbare, juxta legem Eccleſiaſticam latam fuiſſe debent. Et hæc eſt recepta opinio in libris noſtris omnibus, ut liquet in 11 H. 7. 9. 34 H. 6. 14, &c. Et in cauſa *Bunting* & *Leppinwel* in 4 part' relation' mear'. Hæc eſt uſitata ſententiar' forma in Eccleſiaſticis ipſor' curiis: Et in hoc ipſo An. 23

ſhops and their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having any peculiar Eccleſiaſtical Juriſdiction were provided for by the ſaid Act; à fortiori the high Commiſſioners authoriſed by another Act in the ſame Parliament were tacite provided for; Quia (*a*) cui licet quod majus eſt, non debet quod minus eſt non licere. As to the third Objection it was alſo reſolved by the whole Court, that the Sentence given by the Biſhop, by the Conſent of his (*b*) Colleagues, was ſuch as the Judges of the Common Law ought to allow to be given according to the Eccleſiaſtical Laws: For ſeeing their Authority is to proceed and give Sentence in Eccleſiaſtical Cauſes, according to the Eccleſiaſtical Law, and they have given a Sentence in a Cauſe Eccleſiaſtical upon their Proceedings by Force of that Law; The Judges of the Common Law ought to give (*c*) Faith and Credit to their Sentence, and to allow it to be done according to the Eccleſiaſtical Law; For (*d*) cuilibet in ſua arte perito eſt credendum. And this is the common received Opinion of all our Books, as appeareth 11 H. 7. 9. 34 H. 6. 14. &c. And in (*e*) Bunting and Leppingwel's Caſe, in the fourth Part of my Reports: And this is the uſual Form of all the Sentences in their Eccleſiaſtical Courts: And this very Point, Tr. 23. Re-

(*a*) 4 Co. 23. a. 9 Co. 48. b. Father Parſon's 86. To the 3d.

(*b*) Poph. 59. Antea 3. a. 4. b.

(*c*) 2 Rol. 7. 7 Co. 42. b. 4 Co. 29. a. 8 Co. 135. b. 2 Vent. 43. Cawly 31.

(*d*) 4 Co. 29. a. 7 Co. 19. a. Calvin's Caſe, Co. Lit. 125. a. 2 Leon. 176. Cawly 31.

(*e*) 4 Co. 29. a.

ginæ Eliz. in this Court between (a) Cheyney and Frankwell, all the Matter being found, as this Caſe is by ſpecial Verdict, was adjudged.

(a) 2 Leon. 176, 177. 2 Rol. 224.

To the 4th. As to the fourth Objection, videlicet; That the ſaid late Queen had only Power by Force of the ſaid Act, to nominate Commiſſioners for Eccleſiaſtical Cauſes, and therefore the aforeſaid nominat' not purſuing the Authority given unto her by that Act ſhould be void. Hereunto a threefold Anſwer was given and reſolved by the whole Court. 1. That they which were Commiſſioners, and had Places of Judicature over the King's Subjects, ſhould be (b) intended to be Subjects born and not Aliens: But if in verity they were Aliens, yet in reſpect of the general Intendment to the contrary, it ought to be alledged and proved by the other Party; For (c) Stabitur præſumptioni donec probetur in contrarium. Secondly the Jurors have found that the Queen by her ſaid Letters Patents did authoriſe them ſecundum formam Statuti prædicti; And therefore it doth by neceſſary Conſequence amount to as much as if they had found they had been Subjects born: For if they were not Subjects born, they could not be authoriſed ſecundum formam Statuti prædicti. Vide 11 H. 4. 4. 13 Elizab. Dyer fol. And the rather for that this is found by ſpecial Verdict. ¶ 3. It

(b) 1 Jones 68.

(c) 2 Co. 48. a. 4 Co. 71. b. 6 Co. 73. b. Co. Lit. 373. b. 2 Bulſt. 314. Hob. 297.

Reginæ Eliz. in hac cur' inter *Cheney* & *Frankwell* adjudicatum erat, cum res tota, ut in hac cauſa, ſpeciali veredict' compert' fuerit. Ad quart' vero objectionem, viz. *Quod præd' Regina virtute præd' ſtatuti ſolummodo poteſtatem habuit nominandi Commiſſarios ad cauſas eccleſiaſticas & igitur præfata nominatio non ſubſequens authoritat' illi datam iſto ſtatuto irrita eſſet.* Huic triplicitur reſponſum eſt, & per totam Cur' determinat'; Primo quod illi qui erant Commiſſarii, & locum judicandi int' Regis ſubditos tenerent, nativi eſſe ſubditi, & non exteri intelligi deberent: Sin aut' revera exteri eſſent, tamen eo quod generatim contra intellect' erat, ab alt' parte allegandum & proband' erat: Nam *ſtabitur præſumptioni donec probetur in contrarium.* Secundo, Juratores invener' Reginam authoritat' per Literas Patentes dediſſe *ſecund' formam ſtatuti prædicti*; & igitur ex conſequentia neceſſaria tantum valet, ac ſi eos ſubditos nativos fuiſſe inveniſſent: Si enim Nativi ſubditi non erant, authoritate non inſtructi fuiſſent *ſecundum authoritatem Statuti prædicti.* Vide 11 H. 4. 4. & 13 Elizab. Dyer Fol. Et potius cum hoc ſpeciali veredicto inventum ſit. Tertio

determinat' erat, quod ſtatutum anni primi Reg' Elizabethæ de juriſdictione Eccleſiaſtica, non erat ſtatutum quod novam legem introduxerit, ſed antiquam declaraverit quod perſpici poteſt tam ex ipſo titulo ejuſd' ſtatuti, viz. *Statutum reſtituendi ad coronam juriſdictionem antiquam ſuper ſtat. Eccleſiaſtic' & Spiritualem:* Quam etiam ex ipſius ſtatuti context' in diverſis ejuſdem partibus. Statutum enim illud non aliam juriſdictionem coronæ annectit quam quæ antea revera erat, aut eſſe debuit juxta antiquas hujus regni leges, particula regiæ juriſdictionis, & unita coronæ imperali, quæq; antea legitime exercebatur, & exerceri poterat intra regnum, cujus juriſdictionis, & formularum procedendi in ead' ſcopus erat, ut omnia in cauſis Eccleſiaſticis fierent ad divini numinis gloriam, virtutis incrementum, & pacis atque unitatis hujus regni conſervation', ut ex diverſis partibus ejuſdem ſtatuti liquet: Igitur, ut ex illo ſtatuto nulla prætenſa juriſdictio intra hoc regnum exercita, quæ vel impia, aut prærogativæ vel antiq. legi coronæ hujus regni adverſa & repugnans reſtituebatur, vel reſtitui poterat prædictæ coronæ, ſecund' antiquum ejuſd' jus & legem: Ita ſi ſtatut' il-

was reſolved; That the ſaid Act of the firſt Year of the ſaid late Queen concerning Eccleſiaſtical Jurisdiction, was not a Statute introductory of a new Law, but (*a*) Declaratory of the Old, which appeareth as well by the Title of the ſaid Act, Videlicet, An Act reſtoring to the Crown the antient Juriſdiction over the State Eccleſiaſtical and Spiritual, &c. As alſo by the Body of the Act in divers Parts thereof. For that Act doth not (*b*) annex any Jurisdiction to the Crown, but that which in Truth was, or of Right ought to be by the antient Laws of the Realm Parcel of the King's Jurisdiction, and united to his Imperial Crown, and which lawfully had been, or might be exerciſed within the Realm: The End of which Jurisdiction, and of all the Proceeding thereupon was, that all Things might be done in Cauſes Eccleſiaſtical to the Pleaſure of Almighty God, the Increaſe of Virtue, and the Conſervation of the Peace and Unity of this Realm, as by divers Parts of the ſaid Act appeareth: And therefore as by that Act no pretended Jurisdiction exerciſed within this Realm, being either ungodly or repugnant to the Prerogative or the antient Law of the Crown of this Realm, was or could be reſtored to the ſame Crown, according to the ancient Right and Law of the ſame: So if that Act

(*a*) 4 Inſt. 325. Cawley 5, 6. Cr. Jac. 37. Moor 755.

(*b*) Cawley 8.

Act of the firſt Year of the late Queen had never been made, it was reſolved by all the Judges, that the King or Queen of England for the Time being may (*a*) make ſuch an Eccleſiaſtical Commiſſion as is before mentioned, by the antient Prerogative and Law of England. And therefore by the antient Laws of this Realm, this Kingdom of England is an (*b*) abſolute Empire and Monarchy conſiſting of one Head, which is the King, and of a Body politick, compact and compounded of many, and almoſt infinite ſeveral, and yet well agreeing Members: All which the Law divideth into two ſeveral Parts, that is to ſay, The Clergy and the Laity, both of them, next and immediately under God, ſubject and obedient to the Head: Alſo the Kingly Head of this politick Body is inſtituted and furniſhed with (*c*) plenary and entire Power, Prerogative and Juriſdiction to render Juſtice and Right to every Part and Member of this Body, of what Eſtate, Degree, or calling ſoever in all Cauſes Eccleſiaſtical or Temporal, otherwiſe he ſhould not be a Head of the whole Body. And as in temporal Cauſes, the King by the Mouth of the Judges in his Courts of Juſtice doth judge and determine the ſame by the temporal Laws of England: (*d*) So in Cauſes Eccleſiaſtical and Spiritual, as namely, Blaſphemy,

(*a*) 4 Inſt. 326. Cr. Jac. 37. Hetl. 19.

(*b*) Poſt. 28. b.

(*c*) Hob. 17.

(*d*) Co. Lit. 96. a. b. 344. a. What Cauſes belong to the Eccleſiaſtical.

lud anni primi prædictæ Reginæ nunquam ſancitum fuiſſet, determinat' & judicatum erat, quod Rex vel Regina Angliæ, qui pro tempore fuerit, ejuſmodi Eccleſiaſticam Commiſſionem (cujuſmodi antea memorata eſt) per antiquam prærogativam, & Angliæ legem inſtituere poſſit. Juxta igitur leges hujus regni antiquas, hoc Angliæ Regnum abſolutum eſt Imperium & monarchia, ex uno capite, viz. Rege, & ex corpore politico compacto & compoſito ex membris diſtinctis quam plurimis, & fere infinitis, nihilominus inter ſe cohærentibus, conſiſtens. Quæ omnia lex bifariam in Clericos & Laicos dividit, qui utrique proxime & immediate ſub Deo ſuo capiti ſubjiciuntur & obſequuntur. Regium etiam hujus politici corporis caput plenaria & integra poteſtate prærogativa, & juriſdictione ad ſuum cuique hujus corporis membro diſtribuend' cujuſcunque loci ac ordinis, in omnibus cauſis Eccleſiaſticis, vel ſecularibus inſtructum eſt, & armatum; alias totius corporis caput non eſſet. Et perinde ac in ſecularibus cauſis, Rex in foris judicialibus cauſas temporales judicat & determinat juxta leges Angliæ temporales: Ita in cauſis Eccleſiaſticis & ſpiritualibus, ſcilicet blaſphemia, Apoſtaſia, Hæreſibus,

Schiſ-

Schiſmatibus, Ordinibus conferendis, Clericorum admiſſionibus, & inſtitutionibus, rerum divinarum celebratione, ritibus matrimonialibus, divortiis, baſtardiis generalibus, decimarum jure, & earundem Subſtractionibus, oblationibus, obventionibus, dilapidationibus, Eccleſiarum reparationibus, teſtamentorum probationibus, adminiſtrationibus, ſimoniis, inceſtibus, fornicationibus, adulteriis, caſtitatis oppugnationibus, penſionibus, procurationibus, appellationibus Eccleſiaſticis, Pœnitentiæ commutatione, & aliis, (quorum cognitio ad communes leges Angliæ non ſpectat) a judicibus Eccleſiaſtic' determinandæ & decidendæ ſunt juxta hujus Regni regias leges Eccleſiaſtic'. Quemadmodum enim leges, quas Athenis Romani tranſtulerunt, cum ab ipſis comprobatæ & confirmatæ fuiſſent, eas nihilominus *Jus civile Romanorum* nominarunt, uti etiam Normanni pleraſque ipſor' leges ex Anglia mutuo acceptas nomine legum vel conſuetudin' Normanniæ inſignierunt: Sic licet Angliæ Reges, Eccleſiaſticas quas habent leges, ab aliis deduxerunt, ex illis tamen quotquot hic generali omnium & conſenſu approbatæ fuerunt, appoſite & recte *Angliæ leges reg' Eccleſiaſticæ* appellantur; qd' Apoſtaſy from Chriſtianity, Hereſies, Schiſms, ordering Admiſſions, Inſtitutions of Clerks, Celebration of divine Service, Rights of Matrimony, Divorces, general Baſtardy, Subtraction and Right of Tithes, Oblations, Obventions, Dilapidations, Reparation of Churches, Probats of Teſtaments, Adminiſtrations and Accounts upon the ſame, Simony, Inceſts, Fornications, Adulteries, Solicitation of Chaſtity, Penſions, Procurations, Appeals in Eccleſiaſtical Cauſes, Commutation of Penance, and others (the Conuſance whereof belongs not to the Common Laws of England) the ſame are to be determined and decided by Eccleſiaſtical Judges, according to the King's Eccleſiaſtical Laws of this Realm: For as the Romans fetching divers Laws from (*a*) Athens, yet being approved and allowed by the State there, called them notwithſtanding Jus Civile Romanorum: And as the (*b*) Normans borrowing all or moſt of their Laws from England, yet baptized them by the Name of the Laws or Cuſtoms of Normandy: So albeit the Kings of Engl. derived their Eccleſiaſtical Laws from others, yet ſo many as were proved, approved and allowed here, by and with a general Conſent, are aptly and rightly called, The (*c*) K.'s Eccleſiaſtic' Laws of England, which whoſoever

Courts, See Circumſpecte agatis, 13 E. 1. W. 2. 13 E. 1. c. 5. verſus finem. Artic. cleri 9 E. 2. 15 E. 3. c. 6. 31 E. 3. c. 11. 2 H. 5. cap. 7. 1 H. 7. cap. 4. 23 H. 8. cap. 9. 24 H. 8. c. 12. 27 H 8. c. 20. 32 H. 8. c. 7. 1 E. 6. cap. 2. 2 E. 6. cap. 13. 1 Mar. cap. 3. 1 Eliz cap. 1. 5 Eliz. c. 23. 13 Eliz. c. 10. Lit. lib. 2. cap. Frankal. f. 30. F. N. B. f. 41. 42, 43, 44, 45, 46, 47. Reg. f. 33, 34, 44.

(*a*) Dav. 71. a.

(*b*) Præf. ad 3. Rep. circa finem.

(*c*) Co. Lit. 11. b. Dr. Couſins's Apology 102.

ſoever ſhall deny, he denieth that the King hath full and plenary Power to deliver Juſtice in all Cauſes to all his Subjects, or to puniſh all Crimes and Offences within his Kingdom: For that as before it appeareth the Deciding of Matters ſo many, and of ſo great Importance, are not within the Conuſance of the Common Laws, and conſequently that the King is no complete Monarch, nor Head, of the whole and intire Body of the Realm. But (*a*) to confirm thoſe that hold the Truth, to ſatisfy ſuch as being not inſtructed, know not the ancient and modern Laws and Cuſtoms of England, (every Man being perſuaded as he is taught:) Theſe few demonſtrative Proofs out of the Laws of England, inſtead of many in Order, & ſerie temporum, are here added.

(*a*) Parſon's Anſwer to the 5th Rep. 93.

(*b*) King *Kenulph*, &c. by his Letters Patents hath, with the Advice and Conſent of his Biſhops and Senators of his People (i. e. *in a Parliament*) granted to the Monaſtery of *Abindon* in the County of *Berks*, and to one *Ruchny* then Abbot of the ſaid Monaſtery a certain Portion of his (Demeſn) Lands, *viz.* 15 Tenements (or Farms) in a Place which by the Country People was then called *Culnam*, with all the Profits thereto belonging, as well in great Things as in ſmall, for an eternal Inheritance; and that the ſaid *Ruchny*, &c. ſhall be for ever *free from all Epiſcopal*

(*b*) This King reigned A. D. 755. Stamford lib. 3. c. 38. f. 111. Full. Ch. Hiſt. 101, 102. Parſon's Anſwer 93, 94, 95. Dav. 73 a. Br. Coron. 129. Moor 120. Stanf. Coron. 111. b. Burn. Reform Pars 1. lib. 3. f. 187. This Chapter was pleaded 1 H. 7. 23, 25.

quicunq; denegaverit, idem denegat Regem plenariam habere poteſtatem, juſtitiam in omnibus cauſis ſuis ſubditis adminiſtrandi, vel crimina & delicta infra hoc regnum puniendi: Quia, ut jam liquido conſtat, determinario tot & tanti momenti cauſaram in cognitionem legum communium non cadit, & conſequenter Rex non eſt abſolutus Monarcha, nec caput totius integri corporis hujus regni. Sed ad eos confirmandos, qui veritatem agnoſcunt, & ad ſatisfaciendum illis, qui nondum inſtructi antiquas & modernus Angliæ leges & conſuetudines ignorant, cum ſinguli ita ſint perſuaſi ut informati: Hæc paucula argumenta certiſſima & quaſi Apodeictia, quæ inſtar multor' eſſe poſſint, ſuo ordine, & tempor' ſerie hic ſubjiuntur.

Kenulphus *Rex, &c. per Literas ſuas Patentes, conſilio & conſenſu Epiſcopor', & Senatorum gentis ſuæ, largitus fuit Monaſterio de* Abindon *in Comitatu* Berk. *ac eidem* Ruchnio *tunc Abbati Monaſterii, &c. Quandam ruris ſui portionem, id eſt, quindecim Manſias in loco, qui a ruricolis tunc nuncupabatur* Culnam, *cum omnib' utilitat' ad eandem pertinentib', tam in magn' quam in modic' rebus in ætern' hæreditat'. Et qd' præd'* Ruch. *&c. ab omni epiſcopali jure in ſempiternu' eſſet quietus, ut inhabitatores*

res ejus nullius Epiſcopi, aut ſuorum officialium jugo inde deprimantur, ſed in cunctis rerum eventibus & diſcuſſionibus cauſarum, Abbatis Monaſterii prædicti decreto ſubjiciantur. Ita qd'; &c. Ut ex eadem Charta anno 1 *Hen.* 7. producta, & a *Stanfordo* allegata plene apparet: Quæ Charta conceſſa ante annos 850, confirmata fuit *per Edwinum Britanniæ Anglorum Regem & Monarcham:* Ex qua perſpicuum eſt, Regem charta ſua in Parliamento confecta, conſilio & conſenſu Epiſcoporum & Senatorum gentis ſuæ, qui in Parliamento convenerant, prædict' Abbatem Epiſcopi juriſdictione liberaſſe & exemiſſe, &c. Et eadem charta Abbati intra ejus Monaſterium Eccleſiaſticam juriſdictionem conceſſit: Quæ Eccleſiaſtica juriſdictio a corona derivata, uſq; ad diſſolutionem ejuſdem Monaſterii tempore H. 8. permanſit.

Juriſdiction; So that the Inhabitants thereof may not (hereafter) *be oppreſſed with the Yoke of Biſhops or their Officials*; but in all Events of Things and Diſcuſſion of Cauſes be ſubject (only) to the Abbot of the Monaſtery aforeſ. *So that*, &c. As by the ſaid Charter pleaded in 1 Hen. 7. and vouched by Stanford, at large appeareth: which Charter granted above 850 Years ſince, was after confirmed per Edwinum Britanniæ Anglorum Regem & Monarcham: By (a) which it appeareth that the King by his Charter made in Parliament (for it appeareth to be made by the Counſel and Conſent of his Biſhops and Senators of his Kingdom which were aſſembled in Parliam.) did diſcharge and exempt the ſaid Abbot, &c. from the Juriſdiction of the Bp. &c. And by the ſame Charter did grant to the ſaid Abbot Eccleſiaſtical Juriſdiction within his ſaid Abby, which Eccleſiaſtical Juriſdiction being derived from the Crown, continued until the Diſſolution of the ſaid Abby, in the Reign of King Henry the eighth. Note.

Rex Edwin. regnavit anno Dom. 955.

(a) Full. Ch. Hiſt. 102. Parſon's Anſw. 94.

Regnante Anglor' Rege Edwardo Confeſſore.

REX autem, qui Vicarius ſummi Regis eſt, ad hoc conſtitutus eſt, ut regnum & popul' Domini & ſuper omnia ſanctum Eccleſ. regat & defen' ab injuriosis, maleficos autem deſtruat.

In the Reign of King *Edward the Confeſſor.*

THE King, who is the Vicar of the higheſt King, is ordained to this End, that he ſhould govern and rule the Kingdom and People of the (a) Land, and above all Things the holy Church, and that he defend the ſame

S. K. Edw. Laws, c. 19.

(a) Spelm. Coun. Tom. 1. pag. 63.

from wrong Doers, and deſtroy and root out Workers of Miſchief. And this ſhall ſuffice for many before the Conqueſt.

Et hoc pro multis ante Conqueſtum ſufficiat.

In the Reign of K. *William* I.

Regnante Gulielmo *Primo.*

7 E. 3. Tit. Quare Impedit 19.

(*a*) Dav. 73. a.

(*b*) Seld. Not. ad Eadmer. 165

(*c*) Burnet's Reform. Pars 1. lib. 3. f. 187.

IT is agreed that no Man can make any Appropriation of any Church having Cure of Souls, (*a*) being a Thing Eccleſiaſtical, and to be made to ſome Perſon Eccleſiaſtical, but he that hath Eccleſiaſtical Jurisdiction: But (*b*) William the firſt of himſelf without any other, (as King of (*c*) England) made Appropriation of Churches with Cure to Eccleſiaſtical Perſons; wherefore it followeth that he had Eccleſiaſtical Jurisdiction.

INter omnes convenit, qd' nemo poſſit appopriare ullam Eccleſiam, cui animarum cura incumbit, cum ſit res Eccleſiaſtica, & Eccleſiaſticæ perſonæ approprianda, niſi illè qui juriſdictionem habet Eccleſiaſticam: Sed Rex *Gulielmus* primus ex ſe ſine quovis alio, Eccleſias cum cura perſonis Eccleſiaſticis ut Rex Angliæ appropriavit, unde ipſum Eccleſiaſt' juriſdictionem habuiſſe conſequitur.

In the Reign of K. *Henry* I.

Regnante Henrico Primo.

The Charter of H. 1. Founder of the Abbey of Reading in the 26th Year of his Reign, and in the Year of our Lord 1125.

HEnry by the Grace of God King of England, Duke of Normans: To all Archbiſhops, Biſhops, Abbots, Earls, Barons, and to all Chriſtians as well preſent as to come, &c. We do ordain as well in Regard of Eccleſiaſtical as Royal Power, that whenſoever the Abbot of Reading ſhall die, that all the Poſſeſſions of the Monaſtery whereſoever it is, do remain intire and free with all the Rights and Cuſtoms thereof, in the Hands and Diſpoſition

HEnric' Dei gratia Rex Angliæ, Dux Normannorum, Archiepiſcopis, Epiſcopis, Abbatibus, Comitibus, Baronibus ſuis, & omnibus, Chriſtianis tam præſentibus quam futuris ſalutem perpetuam, &c. Statuimus autem tam Eccleſiaſticæ quam Regiæ proſpectu poteſtatis, ut decedente Abbate Radingenſi, omnis poſſeſſio monaſterii ubicunq; fuerit, remaneat integra & libera cum omni jure & conſuetudine ſua, in manu & diſpoſitione

poſitione Prioris & Monachorum capituli Radingenſis; hoc autem ideo ſtatuimus, ſtatutumq; perpetuo ſervandum firmavimus, quia Abbas Radingenſis non habet proprios redditus ſed communes cum fratribus; qui autem Deo annuente Canonica electione Abbas ſubſtitutus fuerit, non cum ſuis ſecularibus conſanguineis ſeu quibuſlibet aliis, eleemoſynas monaſterii male utendo diſperdat, ſed pauperibus & peregrinis, & hoſpitibus ſuſcipiendis curam gerat, terras cenſuales non ad feudum donet, nec faciat milites niſi in ſacra veſte Chriſti, in qua parvulos ſuſcipere modeſte caveat, maturos autem ſeu diſcretos, tam Clericos quam Laicos ſuſcipiat.

of the Prior and the Monks of the Chapter of Reading: We do therefore ordain and eſtabliſh this Ordinance to be obſerved for ever, becauſe the Abbot of Reading hath no Revenues proper and peculiar to himſelf but common with his Brethren: Whoſoever by God's Will ſhall be appointed Abbot in this Place by Canonical Election, may not diſpend the Alms of the Abbey by ill Uſage with his ſecular Kinſmen, or any other, but in entertaining the poor Pilgrims and Strangers, and that he have a Care not to give out the Rent-lands in Fee, neither that he make any Servitors or Soldiers, but in the ſacred Garment of Chriſt, wherein let him be adviſedly provident he entertain not young ones, but that he entertain Men of ripe Age or diſcreet, as well Clerks, as Laymen.

Regnante Henrico *Tertio.*

TEmpore H. 3. & progenitorum ejus Regum Angliæ, & jam inde, ſiquis aliquem in jus vocaret coram Judice Eccleſiaſtico intra regnum ulla de re, cujus cognitionem legitimam illa curia approbatione & conſuetudine non haberet, Rex ſemper per breve ſub magno Sigillo procedere prohibuit: Quod ſi ſuggeſtio illa Regi facta, in

In the Reign of King *Henry* III.

IN all the Time of H. 3. and his Progenitors Kings of England, and ever ſince, if any Man did ſue before any Judge Eccleſiaſtical within the Realm for any Thing whereof that Court by Allowance and Cuſtom had not lawful Conuſance, the K. did ever by his Writ under his Great Seal prohibit them to proceed: And if the Suggeſtion made to the King, whereupon

2 H 3. Tit. Prohibit. 13. 4 H 3. ib. 15. 15 H 3. Tit. Prohib. 22. Regiſter fol. F. N. B. Tit. Prohibition 40, 41, &c.

the Prohibition was grounded, were after found untrue, then the King by his Writ of Conſultation under his great Seal, did allow and permit them to proceed. Alſo, in all the Reign of H. 3. and his Progenitors Kings of England, and ever ſince, if any Iſſue were joined upon the Loyalty of Marriage, general Baſtardy, or ſuch like, the King did ever write to the Biſhop of that Dioceſe, as immediate Officer and Miniſter to his Court to certify the Loyalty of Marriage, Baſtardy, or ſuch like; all which do apparently prove, that thoſe Eccleſiaſtical Courts were under the K.'s Jurisdict' and Commandment and that one of the Courts were ſo neceſſarily incident to the other, as the one without the other could not deliver Juſtice to the Parties, as well in theſe particular Caſes, as in a Number of Caſes before ſpecified, whereof the K.'s Eccleſiaſtical Court hath Jurisdiction: Now to command, and to be obeyed, belong to ſovereign and ſupreme Government.

Vide Poſt. xv. b.

By the ancient Canons and Decrees of the Church of Rome the Iſſue born before Solemnization of Marriage, is as lawful inheritable, (Marriage following) as the Iſſue born after Marriage; But this was never allowed or appointed in England, and therefore was never of any Force here: And this appeareth by the Statute of

quam prohibitio innixa erat minime vera, comperta eſſet, Rex per breve ſuum conſultationis ſub magno ſuo ſigillo procedere permiſit. Præterea tempore hujus H. 3. & progenitorum ejus Regum Angliæ, & jam inde, ſi de bigamia, generali baſtardia, vel hujuſmodi ad litis conteſtationem preventum eſſet, Rex ſemper Epiſcopo ejus Dioceſios, ut immediato officiario & miniſtro imperat, ut de bigamia, barſtardia & hujuſmodi ſignificaret: Quæ omnia plane comprobant Eccleſiaſtica illa fora Regis Juriſdictioni & imperio ſubjici, & eadem fora ita neceſſario coincidere, ut alterum ſine altero jus ſuum cuique tribuere non poſſet, tam in hiscauſis particularib', quam in pluribus aliis prius memoratis, quarum regia fora Eccleſiaſtica habent juriſdictionem. Ad Reges autem & Monarchas ſolummodo ſpectat, ut ipſi imperent, & ipſis imperantibus alii obtemperent.

Juxta antiq' Romanæ Eccleſ. Canones & decreta, proles ante matrimon' celebratum nata, perinde legitima eſt & hereditat' adeat, (matrimonio ſubſequente) quam quæ poſt matrimon' nata ſit: Verum enimvero hoc in Angl' nunquam approbat' vel admiſſum, & igitur vim nullam hic habuit, qd'

ex

ex ſtatuto de Merton anno viceſimo H. 3. perſpicue hiſce verbis eluceat.

Ad breve Regis de Baſtardia, utrum aliquis natus ante matrimonium habere poterit hæreditatem, ſicut ille qui natus eſt poſt matrimon', reſponderunt omnes Epiſcopi quod nolunt nec poſſunt ad iſtud breve reſpondere, quia hoc eſſet contra communem formam Eccleſ. Et rogaverunt omnes Epiſc' magnates, ut conſentirent, quod nati ante matrimonium eſſent legitimi ſicut illi qui nati ſunt poſt matrimonium, quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis. Et omnes Comites & Barones una voce reſponderunt; Nolumus leges Angliæ mutare quæ hucuſque uſitatæ ſunt & approbatæ.

Merton, made in the 20th Year of King Henry III. The Statute of Merton an. 20. H. 3.

To the King's Writ of Baſtardy, whether one being born before Matrimony may inherit in like Manner, as he that is born after Matrimony; all the Biſhops anſwered that they would not, nor could not anſwer to it, becauſe it was directly againſt the common Order of the Church; and all the Biſhops inſtanced the Lords, that they would conſent, that all ſuch as were born before Matrimony ſhould be legitimate, as well as they that be born within Matrimony, as to the Succeſſion of Inheritance, foraſmuch as the Church accepteth ſuch to be legitimate: And all the Earls and Barons with one Voice anſwered, We *(a)* will not change the Laws of England which hitherto have been uſed and approved.

(a) Moor 120. Præf. 4 Rep. Co Lit. 245 a. 2 Inſt. 96, 97.

Regnante Edwardo *Primo.*

E Dwardo ejus nominis primo regnante, ſubditus quidam excommunicat' bullam contra alterum hujus Regni ſubditum intulit, & coram Domino Theſaurario Angliæ divulgavit, hoc læſæ Majeſtatis crimen contra Regiam Coronam & dignitat' judicatum eſt;

In the Reign of King *Edward* the Firſt.

In the Reign of King Edward the firſt, a Subject brought in a Bull of Excommunication againſt another Subject of this Realm, and publiſhed it to the Lord Treaſurer of England; and this was by the antient common Law of England adjudged Treaſon againſt the King, his Crown and Dignity, for the

Vide 30 E. 3. lib. Aſſ. pl. 19. Brooke Tit. Præmunire pl. 10

Note this was by the common Law of England before any Stat. made.

which the Offender ſhould have been drawn and hanged; but at the great Inſtance of the Chancellor and Treaſurer, he was only abjured the Realm for ever.

19 E. 3. Tit. Quare non admiſit 7.

Vide 39 E. 3. 20.

The ſaid King Edward I. preſented his Clerk to a Benefice within the Province of York, who was refuſed by the Archbiſhop, for that the Pope by Way of Proviſion had conferred it on another; The King thereupon brought a Quare non admiſit, the Archbiſhop pleaded that the Biſhop of Rome had long Time before provided to the ſaid Church as one having ſupreme Authority in that Caſe, and that he durſt not nor had Power to put him out, which was by the Pope's Bull in Poſſeſſion: For which his high Contempt againſt the King, his Crown and Dignity, in refuſing to execute his Sovereign's Commandment, fearing to do it againſt the Pope's Proviſion, by Judgment of the Common Law, the Lands of his whole Biſhoprick were ſeiſed into the King's Hands and loſt during his Life; which Judgm. was alſo before any Statute or Act of Parliament was made in that Caſe. And there it is ſaid, that for the like Offence, the Archbiſhop of (Canterb.) had been in worſe Caſe by the Judgment of the Sages of the Law, than to be

York.

pro quo delinquens extremo ſupplicio afficiendus erat, trahendus ſcilicet & ſuſpendendus. Sed Cancellario & Theſaurario intercedentibus, Regnum ſolummodo in perpetuum abjuravit.

Idem Rex *Edward'* Clericum ſuum ad Beneficium in Provincia Eboracenſi nominavit, qui ab Archiepiſcopo rejectus, quoniam Papa per Proviſionem idem beneficium alteri contulerat; Hinc Rex emiſit breve *Quare non admiſit*, allegavit Archiepiſcopus, qd' Pontifex Romanus jam antea eidem beneficio alterum providiſſet, utique qui ſupremam in illa cauſa authoritatem haberet, & qd' ipſe minime auſus ſit, nec poteſtatem habuerit ipſum amovendi, qui per Bullam papalem jam poſſederat. Pro hoc contemptu in Regem, coronam, & dignitat', eo quod recuſaverit ſupremi ſui Domini mandatum exequi contra proviſionem papal', Commun' Legis judicio poſſeſſiones totius Epiſcopatus in Regis manus fuere redactæ, & ad ejus vitam amiſſa: Quæ ſententia lata fuit priuſquam aliqd' Parliamenti ſtatutum hac de re factum fuerit. Ibid' etiam memoratur, quod pro ejuſmodi delicto aſperius actum fuiſſet cum Archiepiſcopo, (Cantuar.) Juris conſultiſſimorum judicio, quam pro con-

contemptu puniri, niſi Rex in gratiam accepiſſet.

De *Bigamis* quos Dominus Papa in Concilio ſuo Lugdunienſi omni privilegio Clericali privavit, per Conſtitutionem inde editam, & unde quidam prælati illos qui effecti fuerunt Bigami ante prædictam Conſtitutionem, (quando de felonia rectati fuerunt) tanquam Clericos exigerunt ſibi liberandos. Concordatum eſt & declaratum coram Rege & Concilio ſuo, quod Conſtitutio illa intelligenda ſit, quod ſive effecti fuerint Bigami ante prædictam Conſtitutionem, ſive poſt, de cætero non liberentur Prælatis, immo fiat eis juſtitia ſicut de Laicis.

punished for a Contempt, if the King had not extended Grace and Favour to him.

The Statute of Bigamis in An. 4 E. 1. Obſerve how the King by Advice of his Council (that is by Authority of Parliament) expounded how the ſaid Counſil ſhould be underſtood, and in what Senſe it ſhould be received and allowed here.

Concerning Men twice married (called Bigami) whom the Biſhop of Rome by a Conſtitution made at the Council of Lions hath excluded from all Privilege of Clergy, whereupon certain Prelates (when ſuch Perſons have been attainted for Felons) have prayed for to have them delivered as Clerks which were made Bigami before the ſame Conſtitution. It is agreed and declared before the King and his Council, that the ſame Conſtitution ſhall be underſtood in this wiſe, that whether they were Bigami before the ſame Conſtitution or after, they ſhall not from henceforth be delivered to the Prelates, but Juſtice ſhall be executed upon them as upon other Lay People.

In Statuto Parliamenti Carleoli habito anno regni ejuſdem Regis *Edwardi primi* 25. declaratum eſt, quod Sacroſancta Eccleſia Anglicana in ſtatu Præſulum intra regnum Angliæ, per Angliæ Regem & ejus progenitores ad populum in Lege Dei inſtituend', hoſpitalitatem colendam, eleemoſynam erogandam, & ad alia charitatis opera exercenda, &c. fundata fuiſſet; Eoſdemque Reges temporibus retroactis ſolere Præſulum & Clericorum, quos evexer', concilio & judicio uti ad Regni incolumitat'

Statutum de Anno 25 E. 1. Carliſle. Vide 20 E. 3. Tit. Eſſoin 24.

In an Act made at a Parliament holden at Carliſle in the xxv. Year of the ſaid King Edw. the Firſt, It is declared, that the holy Church of England was founded in the State of Prelacy within the Realm of England, by the King and his Progenitors, &c. for them to inform the People in the Law of GOD, and to keep Hoſpitality, give Almes, and do other Works of Charity, &c. And the ſaid Kings in Times paſt were wont to have their Advice and Counſel for the Safeguard of the Realm when they had need of ſuch

Pre-

Note; The firſt Attempt was to uſurp upon ſuch Eccleſiaſtical Things as pertained to the Clergy of England, who at that Time ſtood in great Awe of the Church of Rome.

Prelates and Clerks ſo advanced; The Biſhop of Rome uſurping the Seigniories of ſuch Benefices, did give and grant the ſame Benefices to Aliens which did never dwell in England and to Cardinals which might not dwell here &c. in Annullation of the State of the holy Church of England, Diſheriſon of the King; Earls, Barons and other Nobles of the Realm, and in Offence and Deſtruction of the Laws and Rights of this Realm, and againſt the good Diſpoſition and Will of the firſt Founders; It was enacted by the King, by Aſſent of all the Lords and Commonalty in full Parliament: That the ſaid Oppreſſions, Grievances, and Damage in this Realm, from thenceforth ſhould not be ſuffered, as more at large appeareth by that Act.

Poſt. f. 18. a.

cum opus fuerit; quodque Pontifex Romanus ſibi uſurpans ejuſmodi beneficiorum Eccleſiaſticorum ſuperioritatem, eadem beneficia exteris qui nunquam in regno Angliæ habitabant, & Cardinalibus qui hic habitare non poterant, &c. contulerit, ad ſtatum Sacroſanctæ Eccleſiæ Anglicanæ ſubvertendum, ad Regem cum Comitibus, Baronibus, & Regni Proceribus hæreditate avita deprivandum, ad leges & conſuetudines hujus Regni tollendas, & ad conſilia voluntateſq; fundatorum infringenda: Unde ſancitum erat per Regem cum aſſenſu Procerum & Communitatis in pleno Parliamento, quod prædictæ oppreſſiones, gravamina, & detrimenta in hoc Regno jam inde amoverentur & tollerentur, ut plenius ex ipſo ſtatuto apparet.

In the Reign of King *Edw.* the Second.

Regnante Edwardo *Secundo.*

ALbeit by the Ordinance of Circumſpecte agatis made in the xiii. Year of Edward I. and by general Allowance and Uſage, the Eccleſiaſtical Court held Plea of Tithes, Obventions, Oblations, Mortuaries, Redemptions of Penance, laying of violent Hands upon a Clerk, Defamations, &c. yet did not the Clergy think themſelves aſſured nor quiet from Prohibit.

ETſi ex Decreto *Circumſpecte agatis* facto anno *Edw. primi* 13. recepta approbatione & conſuetudine fora Eccleſiaſtica placita tenuerint, & judicia exercuerint de Decimis, obventionibus, oblationibus, mortuariis, pœnitentiæ redemptionibus, violenta manus injectione in Clericos, defamationibus, &c. Clerici tamen ſe minime ſecuros a Prohi-

Prohibitionibus per Subditos procuratis exiſtimarunt donec *Rex Edwardus ſecundus* per Literas Patentes cum conſenſu Parliamenti ad Cleri petitionem, illis juriſdictionem in Prædictis cauſis exercere conceſſiſſet. Rex in Parliamento anno regni ſui nono, poſt particularia reſponſa ad petitiones eorum de rebus præfatis concedit, & Regium aſſenſum hiſce verbis præbuit.

Nos deſiderantes ſtatui Eccleſiæ Anglicanæ, & tranquilitati & quieti Prælatorum Cleri prædictorum, quatenus de jure poterimus, providere, ad honorem Dei, & emendationem ſtatus dictæ Eccleſiæ & Prælatorum & Cleri prædicti, omnes & ſingulas reſponſiones, prædictas quæ patent in eodem Actu, ac omnia & ſingula in eiſdem reſponſionibus contenta ratificantes & approbantes; ea pro nobis & hæredibus noſtris concedimus & præcipimus imperpetuum inviolabiliter obſervari: Volentes & concedentes pro nobis & hæredibus noſtris, Quod prædicti Prælati & Clerus, & eorum Succeſſores, imperpetuum in præmiſſis Juriſdictionem Eccleſiaſticam exerceant, juxta tenorem reſponſionis prædictæ.

purchaſed by Subjects, until that King Edw. the 2d. by his Letters Patents under the Great Seal, in and by Conſent of Parliament, upon the Petitions of the Clergy, had granted unto them to have Juriſdiction in thoſe Caſes. The King in a Parliament holden in the 9 Year of his Reign, after particular Anſwers made to their Petitions, concerning the Matters abovesaid, doth grant and give his Royal Aſſent in theſe Words.

The Statute of 9 E. 2. Artic. Cleri. 16.

See the Ordinance of Circumſpecte agatis 13 E. 1. to this Effect.

We deſiring, as much as of Right we may, to provide for the State of the Church of England, and the Tranquility and Quiet of the Prelates of the ſaid Clergy to the Honour of God, and the Amendment of the State of the ſaid Church, and of the Prelates and Clergy, ratifying and approving all and ſingular the ſaid Anſwers which appear in the ſaid Act, and all and ſingular Things in the ſaid Anſwers contained; we do for us and our Heirs grant and command, that the ſame be inviolably kept for ever: Willing and granting for us and our Heirs; That the ſaid Prelates and Clergy and their Succeſſors for ever, do exerciſe Eccleſiaſtical Juriſdiction in the Premiſſes according to the Tenor of the ſaid Anſwer.

By this Statute of 9 E. 2. and the Statutes of 15 E. 3. c. 6. 31 E. 3. c. 11. and by other Statutes herefore mentioned, the Juriſdiction of the Eccleſiaſtical Courts is allowed and warranted by Conſent of Parliament, in all Cauſes wherein they now have Juriſdiction, ſo as theſe Laws may be juſtly called, the King's Eccleſiaſtical Laws of England.

[*Note*; *This pretended Stat. of Articuli Cleri was one of the Grievances of K.* E. *the 2d's Reign. See* Cotton's *Records and* Bohun's *Law of Tythes*, c. 8.

In

In the Reign of King *Edw.* the Third.

Regnante Edwardo *Tertio.*

16 E. 3. Tit. Excom. 4.

An Excommunication by the Archbiſhop, albeit it be diſſannulled by the Pope or his Legates is to be (*a*) allowed: neither ought the Judges give any Allowance of any ſuch Sentence of the Pope, or his Legate.

(*a*) Co. Lit. 134. a. F. N. B. 64. f. Poſtea 16. a.

EXcommunicatio facta per Archiepiſcopum, licet adnullata ſit per Papam, aut ejus a latere Legatum, eſt approbanda, nec Judices ullo modo ſententiam Papæ, aut ejus a latere Legati in Anglia approbare debent.

In the Reign of E. 3.

It is often reſolved that all the (*b*) Biſhopricks within England were founded by the King's Progenitors, and therefore the Advowſons of them all belong to the King, and at the firſt they were Donative; And that if an Incumbent of any Church with cure die, if the Patron preſent not within 6 Months, the Biſhop of that Dioceſe ought to collate, to the End the Cure may not be deſtitute of a Paſtor: If he be negligent by the Space of 6 Months, the Metropolitan of that Dioceſe ſhall confer one to that Church: And if he alſo leave the Church deſtitute by the Space of 6 Months, then the Common Law giveth to the King as to the Supream within his own Kingdom, (and not to the Biſhop of Rome) Power to provide a competent Paſtor for that Church.

(*b*) Co. Lit. 134. a. 3 Co. 75. b.

Sæpius determinatum eſt omnes Epiſcopatus Angliæ per Regis Progenitores fundatos fuiſſe, & igitur advocationes eorum omnium ad Regem ſpectare; principio etiam donativos fuiſſe, & quod ſi Incumbens alicujus Eccleſiæ cum Cura diem obierit, ſi Patronus intra ſex menſes non præſentaverit, Epiſcopus Dioceſios conferre debet, ne Eccleſia paſtore ſit deſtituta: Si autem ille ſex menſes neglexerit, Metropolitanus Provinciæ aliquem ad illam Eccleſiam præſentabit: Si autem Archiepiſcopus Eccleſiam ſex Menſes deſtitui ſinat, lex regni Communis poteſtatem providendi idoneum paſtorem eidem Eccleſiæ concedit Regi, tanquam ſupremo intra Regnum ſuum, & non Pontifici Romano.

17 E. 3. 23.

The King may not only exempt any Eccleſiaſtical Perſon from the Jurisdict. of the Ordinary, but may grant unto him Epiſcopal Jurisdict. As thus it appeareth there the

Rex non ſolum Eccleſiaſticam perſonam quamcunq; ab Ordinarii juriſdictione eximere, verum etiam juriſdictionem Epiſcopalem ipſi concedere poteſt; ut eo loci conſtat

conſtat Regem Archidiacono Richmondiæ olim feciſſe.

Singula ædes Religioſæ vel Eccleſiaſticæ, quarum Rex fundator extitit, ab ipſo Rege omni jurisdictione ordinaria ſunt exemptæ & per Eccleſiaſticam Regis commiſſionem ſunt ſolummodo viſitandæ & corrigendæ.

Abbas Burgi Sancti Edmundi in Suffolcia diplomate regio ab omni Epiſcopali juriſdictione exemptus erat.

Qui fuerat præſentatus ad Eccleſiam per Dominum Regem impeditus fuit per quendam qui impetraverat Bullas a Curia Romana, quapropter carceri perpetuo emancipatus fuit, &c.

Decimas ex locis extra aliquam parochiam Rex habebit, quoniam cum illi ſit ſuprema juriſdictio Eccleſiaſtica, obligatus eſt ſufficientem Paſtorem providere, qui curam ejuſmodi loci qui intra alicujus Parochiæ limites non comprehenditur habeat. Juxta etiam communes leges clarum eſt, quod nemo jus hæreditarium in decimis habeat, niſi ſit Eccleſiaſticus, aut Eccleſiaſticam habeat juriſdictionem.

Rex ratione ſupremæ ſuæ Eccleſiaſticæ Juriſdictionis præſentabit ad liberas capellas ſuas (in defectu Decani &c.) per lapſum. Et *Fitzherbertus* dicit, quod in hac cau-

King had done of antient Time to the Archdeacon of (*a*) Richmond. (*a*) Co. Lit. 134. a.

All (*b*) Religious or Eccleſiaſtical Houſes, whereof the King was Founder, are by the King exempt from ordinary Jurisdiction, and only viſitable, and corrigible by the King's Eccleſiaſtical Commiſſion. 20 E. 3. Excom. 9. (*b*) Dav. 46. b. 16 E. 3. 11. Tit. Bre. 660. 21 E. 3. 60. 6 H. 7. 14. F. N. B.

The Abbot of Bury in Suffolk was exempted from Epiſcopal Jurisdiction by the King's Charter. 20 E. 3. Tit. Excom. 6.

The King preſented to a Benefice, and his Preſentee was diſturbed by one that had obtained Bulls from Rome, for which Offence he was condemned to perpetual Impriſonment, &c. 21 E. 3. 40.

Tithes (*c*) ariſing in Places out of any Pariſh the King ſhall have, for that he having the ſupreme Eccleſiaſtical Jurisdiction, is bound to provide a ſufficient Paſtor that ſhall have the Cure of Souls of that Place which is not within any Pariſh; And by the common Laws of England it is (*d*) evident, that no Man unleſs he be Eccleſiaſtical, or have Eccleſiaſtical Jurisdiction, can have Inheritance of Tithes. Quære de hoc? 22 E. 3. lib. Aſſ. pl. 75. (*c*) Seld. decimis 365. (*d*) Co. Lit. 139. a. 2 Co. 44. a. Cr. El. 512.

The King ſhall preſent to his free Capels (in Default of the Dean) by lapſe in Reſpect of his ſupreme Eccleſiaſtical Jurisdict. And Fitzh. ſaith, that the King in that Caſe doth pre- 27 E. 3. f. 84. F. N. B. f. 34.

(a) Flowd. 498. b.

preſent by Lapſe as (a) Ordinary.

30 E. 3. lib. Aſſ. pl. 19. 12 H. 4. 16. 14 H. 4. 14. 8 H. 6. fol. 3. 35 H. 6. 42. 28 H. 6. 1. 7 E. 4. 14. 12 E. 4. 16. F. N. B. f. 64. F. Vid. 9 E. 4. f. 3. Hereafter f. 11. It ought to be determined in the Eccleſiaſtical Courts in England.

An Excommunication under the Pope's Bull, is of no Force to diſable any Man within England: And the Judges ſaid, that he that pleadeth ſuch Bulls, though they concern the Excommunication of a Subject, were in a hard Caſe, if the King would extend his Juſtice againſt him. If Excommunication being the extream and final End of any Suit in the Court at Rome, be not to be allowed within England; It conſequently followeth, that by the antient Common Laws of England, no Suit for any Cauſe though it be Spiritual, riſing within this Realm, ought to be determined in the Court of Rome; Quia fruſtra expectatur eventus cujus effectus nullus ſequitur: And that the Biſhops of England are the immediate Officers and Miniſters to the King's Courts.

Poſt. f. 23. b. 26. a.

Vide ante

31 E. 3. Tit. Excom. 6.

In an Attachment upon a Prohibition, the Defendant pleaded the Pope's Bull of Excommunication of the Pl. The Judges demanded of the Defendant if he had not the Certificate of ſome Biſhop within the Realm, teſtifying this Excommunication: To whom the Counſel of the Defendant anſwered, that he had not, neither was it as he ſuppoſed neceſſary: For that the Bulls of the Pope under Lead were notoria Rex ut ordinarius per lapſam præſentat.

Excommunicatio ſub bulla Papali, nullam habet vim reddendi aliquem incapacem intra Angliam, & Judices pronunciarunt, quod qui ejuſmodi Bullas ad cauſam ſuam ſtabiliandam producit, quanquam erant ad ſubditum excommunicandum, male cum illo ageretur, ſi Rex ſummo jure ageret. Si excommunicatio, quæ ſumma & ſuprema eſt cenſura & coertio in Curia Romana, intra Angliam non ſit approbanda, ex conſequentia colligitur, quod per antiquas communes Angliæ leges nulla controverſia ulla de cauſa, licet illa ſpiritualis, intra regnum exorta, in Romana Curia dijudicari debeat; *Quia fruſtra expectatur eventus, cujus effectus nullus ſequitur*: Quodque etiam Angliæ Epiſcopi ſunt immediati officiarii & miniſtri ad curias Regis.

In apprehenſione ex prohibitione, defendens quidam Bullam Papalem excommunicationis contra Actorem ſive Querentem produxit: Judices defendentem rogarunt, ſi certificationem ab aliquo intra Regnum Epiſcopo ad excommunication' teſtificand' haberet: Defendentis advocati reſponderunt, quod non haberet, neque neceſſarium eſſe exiſtimarunt ut haberet quia Bulla Papalis ſub Sigillo

Sigillo plumbeo ſatis ſuperque nota erat & omnibus conſtaret. Verum adjudicatum erat Bullas Papales minime ſufficientes eſſe, quia Curia Regia nullam habere debet rationem alicujus excommunication' extra Regnum factæ, & igitur ex Curiæ regula, Querens inde ſuo jure non erat excluſus.

Reges ſacro oleo uncti, ſunt ſpiritualis juriſdictionis capaces.

Cum Prior Regi debitor eſt, & Decimas ab alia perſona ſpirituali accipere debet, in ejus eſt electione de ſubtractione Decimarum, vel in Curia Eccleſiaſtica, vel in Saccario in jus vocare, cum & perſonæ & res itidem fuerunt Eccleſiaſticæ: Quandoquidem enim res mediate ad Regem ſpectat, ille in Scaccario perinde ac in Curia Eccleſiaſtica in jus vocare poteſt, & ibi jus de Decimis decidatur. *Fitzherbertus* etiam in ſuo Nat. Bre. fol. 30. affirmat, quod ante ſtatutum 18 Edwardi 3. cap. 7. jus de Decimis decidendum erat in Curiis temporalibus pro arbitrio agentium; Et per illud ſtatutum ſancitum eſt, ut in Eccleſiaſtica Curia decideretur, & temporalis Curia inde erat excluſa. Curiæ etiam quorundam Maneriorum Regis, & aliorum Magnatum, ſuperioribus ſæculis teſtamenta probarunt: & ex 11 H. 7.

ous enough: But it was adjudged that they were not ſufficient, for that the Court ought not to have regard to any Excommunication (*a*) out of the Realm. And therefore by the Rule of the Court the Plaintiff was not thereby diſabled.

(*a*) Antea xiv. b. Co. Lit. 134. a. F. N. B. 64. f.

Reges (*b*) ſacro oleo uncti, ſunt ſpiritualis Juriſdictionis capaces.

(*b*) 2 Rol. Rep. 451. Dav. 4. a. 33 E. 3. Tit. Aid Roy 103. 38 Aſſ. pl. 20.

Where a Prior is the King's Debtor, and ought to have Tithes of another Spiritual Perſon, he may chooſe either to ſue for Subtraction of his Tithes in the Eccleſiaſtical (*c*) Court, or in the Exchequer, and yet the Perſons and Matter alſo was Eccleſiaſtical: For ſeeing the Matter by a Mean concerneth the King, he may ſue for them in the Exchequer as well as in the Eccleſiaſtical Court, and there ſhall the Right of Tithes be determined. And Fitzherbert in his Na. Bre. fol. 30. holdeth, that before the Statute of 18 Edw. 3. cap. 7. that Right of Tithes were determinable in the Temporal Courts at the Election of the Party; And by that Statute aſſigned to be determined in the Eccleſiaſtical Court, and the Temporal Court excluded thereof: And the Courts of divers Manors of the Kings, and of other Lords in antient Times had the (*d*) Probates of laſt Wills and Teſtaments, and it appeareth by 11 H. 7.

(*c*) Co. Lit. 149. a. 2 Co. 44. a.

See Bohun of Tythes ch. 8. (*d*) Perk. ſect. 486. 9 Co. 37. b. 2 Rol. 217. 2 Inſt. 231, 488. 11 H. 7. 12. b. Br. Teſtament 27. 1 Sid. 46. Vaug. 207. Seld. Juriſd. de Teſtamentis 9, 10.

See the Statute of 15 E. 3. c. 6. 31 E. 3. c. 11.

H. 7. fol. 12. That Probate of Teſtaments did not appertain to the Eccleſiaſtical Court, but that of late Time they were determinable there: So as of ſuch Cauſes, and in ſuch Manner as the Kings of the Realm by general Conſent and Allowance have aſſigned to their Eccleſiaſtical Courts, they have Juriſdiction by Force of ſuch Allowance.

fol 12. liquet, probationem teſtamentorum ad Curias Eccleſiaſticas non ſpectaſſe, ſed non ita pridem ibi fuiſſe decidendam; adeo ut in ejuſmodi cauſis, & eo modo, quo regni hujus Reges unanimi conſenſu & approbatione Eccleſiaſticis Curiis attribuerunt, virtute ejuſdem approbationis juriſdictionem habeant.

38 Lib. Aſſ. pl. 22.

The King did by his Charter tranſlate Canons ſecular into regular and religious Perſons; which he did by his Eccleſiaſtical Juriſdiction, and could not do it unleſs he had Juriſdiction Eccleſiaſtical.

Rex ſuo diplomate Canonicos ſeculares in regulares & religioſas perſonas tranſtulit, quod ex juriſdictione ſua Eccleſiaſtica fecit, & minime facere poterat, niſi juriſdictionem habuiſſet Eccleſiaſticam.

46 E. 3. Tit. Præmun. 6.

The Abbot of Waltham died in the 45th Year of E. 3. and one Nicholas Morris was elected Abbot, who for that the Abbey was exempt from ordinary Juriſdiction, ſent to Rome to be confirmed by the Pope: And becauſe the Pope by his Conſtitutions had reſerved all ſuch Collations to himſelf, he did recite by his Bull that he having no regard to the Election of the ſaid Nicholas, gave to him the ſaid Abbey, and the Spiritualties and Temporalties belonging to the ſame, of his Spiritual Grace, and at the Requeſt (as he fained) of the King of England. This Bull was read and conſidered of in Council, that is, before all the Judges of England, and it was reſolved by them

Abbas Walthamiæ diem obiit 45 E. 3. & quidam Nicholaus Morris erat Abbas electus, qui quoniam Abbatia illa ordinaria juriſdictione exempta erat, Romam miſit ut a Papa confirmaretur. Quoniam autem Papa ex ſuis conſtitutionibus omnes id genus collationes ſibi reſervaſſet, in Bulla ſua recitavit, Quod ipſe nulla habita ratione ad electionem præd' Nicholai, dedit ipſi præd' Abbatiam cum ſpiritualibus & temporalibus ad eandem ſpectantibus ex gratia ſua ſpirituali, ad petitionem (uti finxit) Regis Angliæ. Hæc Bulla in Concilio, id eſt, coram univerſis Angliæ Judicibus lecta & perpenſa erat, &

ab illis univerſis pronunciatum eſt, hanc Bullam eſſe contra leges Angliæ, & Abbatem pro impetratione ejuſd' eſſe in Regis miſericordia, unde omnes ejus poſſeſſiones in Regis manus ſunt captæ, ut plenius in eadem cauſa apparet.

Cum Abbas Weſtmonaſterii haberet priorem & conventum regularem in lege mortuum, Rex tamen ſuo diplomate corporationem illam diviſit, & fecit priorem & conventum corpus diſtinctum & capax, qd' ex ſe in jus & vocare, & vocari poterat.

Parliamento anno Regis *Edwardi* tertii 25. habito, ſancitum eſt totius Parliamenti conſenſu, qd' tam illi, qui proviſiones Romæ procurarent, quam qui eas exequerentur, non eſſent in Regis protectione, ſed eo loco quo hoſtes Regis haberentur, & qui contra ejuſmodi proviſores offenderint, contra omnes excuſarentur, & nunquam inde in crimen vocarentur, aut moleſtarentur. Ex qua lege quilibet ejuſmodi proviſorem legitime tanquam profeſſum Regis & patriæ hoſtem tollere poterat, tanta & tam atrocia hæc habebantur flagitia.

Poſtmodo eod' *Edwardi* tertii 25. an. in pleno Parliamento demonſtratum erat all, that this Bull was againſt the Laws of England, and that the Abbot for obtaining the ſame was fallen into the K.'s Mercy, whereupon all his Poſſeſſions were ſeiſed into the K.s Hand, as more at large by the ſaid Caſe appeareth.

Where the Abbot of Weſtminſter had a Prior and Covent who were regular and mort (dead) in Law, yet the K. by his Charter did divide that Corporation, and made the Prior and Covent a diſtinct and capable Body, to ſue and be ſued by themſelves. 49 E. 3. lib. Aſſ. pl. 8.

At (*a*) a Parliament holden in the xxv. Year of K. Edw. the third: It was enacted by conſent of the whole Parliament, that as well they that obtained Proviſions from Rome, as they that put them in Execution, ſhould be out of the K.'s Protection: And that a Man might do with them, as with the Enemies of the K. and he that offended againſt ſuch Proviſors in Body, Goods, or other Poſſeſſions, ſhould be excuſed againſt all People, and ſhould never be impeached or griev'd for the ſame. By which Law every Man might lawfully kill ſuch an Offender, as a com. Enemy againſt the K. & his Country, ſo hainous were ſuch Offences then holden. Statute de 25 Ed. 3. de proviſoribus. (*a*) 3 Co. 76. a. 1 Jon. 160.

Afterwards in the ſame xxv. Year of K. Edward the Third, It was in open Parliament, Statut. de 25 E. 3. Note.

by the grievous Complaints of all the Commons of this Realm, ſhewed that the Grievances and Miſchiefs aforeſaid did daily abound, to the great Damage and Deſtruction of all this Realm, more than ever were before, viz. That of late the Bp. of Rome by Procurement of Clerks and otherwiſe, had reſerved and did daily reſerve to his Collation, generally and ſpecially, as well Archbiſhoprics, Abbies and Priories, as all other Dignities, and other Benefices of Engl. which were of the Advowry of People of holy Church, and gave the ſame as well to Aliens as to Citizens, and taketh of all ſuch Benefices the Firſt-fruits, and many other Profits, and a great Part of the Treaſure of the Realm was carried away and diſpended out of the Realm, by the Purchaſors of ſuch Graces; and alſo by ſuch Provy Reſervations, many Clerks advanced in the Realm by their true Patrons, which peaceably holden their Advancements by long Time, were ſuddenly put out. Whereupon the ſaid Commons did pray their ſaid Sovereign Lord the King, that ſithence the Right of the Crown of Eng. and the Law of the ſaid Realm was ſuch, that upon the Miſchiefs and Damages which happened to his Realm, he ought and was bound of the Accord of his ſaid People, therefore to provide reme-

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communitatis hujus regni graviſſimis querelis, quod prædicta gravamina & detrimenta, ad hujus regni maximum damnum & ſubverſionem, indies magis magiſque quam unquam antea, ingraveſcerent, viz. Quod nuper pontifex Romanus clericis procurantibus, & aliis, tam archiepiſcopatus, abbatias, ac prioratus, quam reliquas omnes dignitates, & Angliæ beneficia, quæ ad jus cleri ſpectarent, ſibi, & quotidie reſervaret ad ſuam collationem generatim & ſpeciatim, & ead' tam exteris, quam indigenis conferret, & ex ejuſmodi beneficiis primitias & multa alia emolumenta ſibi attraheret, unde per ementes ejuſmodi gratias expectativas, magna vis opum ex hoc regno deportaretur, extraque regnum diſtraheretur, ac etiam hujuſmodi occultis reſervationibus quamplurimi clerici per indubitatos patronos promoti, qui pacifice diu ſua beneficia tenuerant, ex improviſo erant exturbati. Hinc prædicta communitas regem ſupplex rogavit, ut quandoquidem jus coronæ Angliæ, & lex Angliæ ejuſmodi erat, ut ipſe deberet & obligatus eſſet, ex conſenſu communitatis ſuæ, damnis & detrimentis quæ in regno acciderunt, proſpicere legemq; ferre, ad dam-

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na & detrimenta quæ inde profluxerunt evitanda, ut ſibi placeret his malis remedium adhibere. Præfatus Rex Edwardus tertius proſpiciens hæc damna & detrimenta, & ad ſtatutum tempore avi ſui *Edwardi primi*, & cauſas in eo comprehenſas reſpiciens, quod ſtatutum vim ſuam habet, & nunquam ulla in parte antiquatum erat aut abrogatum: Et quandoquidem ille jurejurando obſtrictus erat ad idem ut regni legem obſervandum, etſi quadam incuria & negligentia quidam contra ierant: Querelas etiam communitatis ſuæ in diverſis Parliamentis prius habitis perpendens, nihil magis in votis habuit, quam magnis illis damnis & detrimentis, quæ inde acciderant, & quotidie Eccleſiæ Anglicanæ accidunt, conſulere & mederi, aſſenſu procerum & communitatis regni, ad Dei honorem, Eccleſiæ Anglicanæ, & totius regni ſui emolumentum, ordinavit & ſanxit, quod libera electio archiepiſcoporum, epiſcoporum, & reliquarum dignitatum, & beneficiorum electivorum in Anglia jam inde permaneret eo modo, quo per Regis progenitores fuerit conceſſa, & aliorum anteceſſores fundata. Quod

by and Law for the avoiding the Miſchiefs and Damage which thereof came; that it might pleaſe him thereupon to ordain remedy. The ſaid King E.III. ſeeing the Miſchiefs and Damages before named, and having Regard to the Statute made in the Time of his Grandfather K. Ed. I. and to the Cauſes contained in the ſame, which Stat. holdeth always his force, and was never defeated nor annulled in any point: and foraſmuch as he was bound by his Oath to ſee the ſame to be kept as a law of this Realm, tho' that by ſufferance and negligence it had been ſithence attempted to the contrary, alſo having regard to the grievous complaints made to him by his people in divers his Parliaments holden heretofore, willing to ordain remedy for the great damage and miſchiefs which had happened, and daily did happen to the Church of England by the ſaid cauſe, by the aſſent of all the great men, and the commonalty of the ſaid realm, to the honour of God, and profit of the ſaid Church of Eng. and of all his realm did order and eſtabliſh, that the free election of Archbiſhops, Biſhops, and all other dignities and benefices electory in England, ſhould hold from thenceforth in the manner as they were granted by the King's progenitors,

Antea xiii. b. Nota.

Vide 10 E. 3. fol. 1 & 2.

and founded by the Anceſtors of other Lords: And that all Prelates, and other People of the holy Church, which had Advowſons of any Benefices of the K.'s Gift or of any of his Progenitors, or of other Lords and Donors, to do Divine Service and other Charges thereof ordained, ſhould have their Collations and Preſentments freely, in the Manner as they were infeoffed by their Donors. And in Caſe that Reſervation, Collation or Proviſion be made by the Court of Rome, of any Archbiſhoprick, Biſhoprick, Dignity, or other Benefice in Diſturbance of the Election, Collations, or Preſentations aforenamed: That at the Time of the Avoidance, that ſuch Reſervations, Collations, and Proviſions ought to take Effect, the ſaid K. Edw. III. and his Heirs ſhould have and enjoy for the ſame Time Collations to the Archbiſhopricks and other Dignities elective, which be of his Avowry, ſuch as his Progenitors had before that free Election was granted, ſithence that the Elections were firſt granted by the K.'s Progenitors, upon a certain Form and Condition, as to demand Licence of the King to chuſe, and after the Election to have his royal Aſſent, and not in other Manner: Which Conditions not kept, the King ought by reaſon to reſort to his firſt Nature, (In-

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omnes prælati, & alii ordinis eccleſiaſtici, qui jus patronatus habuerunt in ullis beneficiis ex dono Regis, aut alicujus progenitorum ejus, vel aliorum magnatum ad rem divinam celebrandam, & alia quæ ad eandem pertinent, collationes atque nominationes libere haberent eo modo quo a donatoribus data, & donata fuerint: Quod ſi reſervatio, collatio vel proviſio ullius archiepiſcopatus, epiſcopatus, dignitatis, vel alterius cujuſpiam beneficii per curiam Romanam facta fuerit, ad diſturbandum electiones, collationes, aut nominationes antedictas, qd' quandocunq; vacaverint, & ejuſmodi reſervationes, collationes, proviſiones, effectum ſuum ſortiri debuerint, præd' Rex Edw. 3. & hæredes haberent & fruerentur iiſdem collationibus ad archiepiſcopatus & alias dignitatis electivas, quæ ſunt ex patronatus ſui jure, cujuſmodi jus progenitores ejus habuerant priuſquam ejuſmodi libera electio conceſſa fuiſſet: Quandoquidem elections ſub certa forma & conditione a Regis progenitoribus conceſſæ fuiſſent, viz. ut eligendi venia a rege peteretur, & poſt electionem regius aſſenſus adhiberetur & non alio quovis modo: Quæ condition' cum minime obſervatæ

ſervatæ fuerint, Rex recte ad primam inſtitutionem redire debet, ut plenius ex ipſo ſtatuto clariſſime patet.

Anno 27. ejuſdem Regis graviſſima querela ab hujus regni magnatibus, & communitate regni in Parliamento exhibita fuit, qd' plurimi ſubditorum ex regno evocati eſſent ad reſpondendum de rebus quarum cognitio ad curiam Regis ſpectabat, & quod judicia data in eadem curia in aliis curiis impedita & infirmata eſſent, in Regis coronæq; ſuæ & univerſi populi ſui præjudicium & exhæreditationem, atque etiam in communis legis ejuſdem regni, quæ ſemper in uſu fuerat, ſubverſionem: Unde magna & matura deliberatione magnatum, & aliorum ex ejus prædicto conſilio aſſenſum & concordatum eſt per regem, magnates, & communitatem, quod omnes populi ſub Regis fide, cujuſcunque loci & conditionis, qui aliquem extra regnum in jus vocarent de cauſa cujus cognitio ad curiam Regis ſpectaret, vel de rebus de quibus judicia in Regis curia data fuerint, aut qui jus ſuum perſequerentur in ulla alia curia, ad infringenda infirmanda & reſcindenda judicia in Regis curia data, pœnam *Præmunire* incurrere deberent, ut ex eodem ſtatuto videre eſt.

ſtitution) as by the ſaid Act more at large appeareth.

In the 27th Year of the Reign of the ſame K. it was grievouſly complained to the King in a Parliament then holden, by the great Men and Commons of the Realm, how that divers of the People were and had been drawn out of the Realm, to anſwer to Things whereof the Conuſance pertained to the K.'s Court: And alſo that the Judgments given in the ſame Court, were impeached in other Courts, in Prejudice and Diſheriſon of the K. and his Crown, and of all the People of his ſaid Realm, and in the Undoing and Deſtruction of the Com. Law of the ſame Realm at all Times uſed: Wherefore, upon good Deliberation had with the great Men and others of his ſaid Council, it was aſſented and accorded by the K. and the great Men and Commons aforeſaid, that all the People of the K.'s Allegiance of what Condition that they be, which ſhould draw any out of the Realm, in Plea whereof the Conuſance pertained to the King's Court or of Things whereof Judgments were given in the King's Court, or which did ſue in any other Court, to defeat or impeach the Judgment given in the K.'s Court, ſhould incur the Danger of Præmunire, as by the ſaid Act appeareth. Statutum de 27 E. 3. Stat. of Præmunire.

28 Ed. 3. c. 1 & 2.

To nouriſh Love, Peace, and Concord, between holy Church and the Realm, and to appeaſe and ceaſe the great Hurt and perils, and inſupportable Loſſes and Grievances that had been done and happened in Times paſt, and that ſhould happen hereafter, if the Thing from henceforth be ſuffered to paſs, becauſe of perſonal citat. and other matters, that be paſſed before this Time, and commonly did paſs from Day to Day out of the Court of Rome, by feigned and falſe Suggeſtions and Propoſitions, againſt all manner of Perſons of the Realm, upon Cauſes whoſe Cogniſance and Final diſcuſſing pertained unto the King and his Royal Court: And alſo of Impetrations and Proviſions of Benefices and Offices of holy Church, pertaining to the Gift Preſentation, Donation, and Diſpoſition of the K. and that other lay Patrons of this Realm as of Churches, Chapels, and other Benefices appropriated to Cathedral Churches, Abbies, Priories, Chauntries, Hoſpitals, and other poor Houſes, and of other Dignities, Offices, and Benefices occupied in Times paſt, and preſented by divers and notable Perſons of the ſaid Realm: For which Cauſes, and diſpenſing whereof, the good antient Laws, Uſages, Cuſtoms, and Franchiſes of the ſaid Realm, had been and were greatly appaired, blemiſhed &

Ad mutuum amorem, pacem & concordiam, intra ſacroſanctam Eccleſiam & regnum fovendam & confirmandam, nec non ad magna damna, detrimenta intolerabilia, & gravamina amovenda, ſedanda, & tollenda, quæ ſuperioribus temporibus illata fuerant & acciderant, & poſtea accidere poſſent (ſi res quo cœpit pergere toleretur) ex citationibus perſonalibus, & aliis, quæ & ſuperioribus temporibus provenerunt, & indies proveniunt ex curia Romana per fictas & falſas Suggeſtiones, contra quaſlibet hujus regni perſonas, de cauſis quarum cognitio & finalis diſcuſſio, ad regem & regiam ipſius curiam attinet: Ac etiam ex beneficiorum, & eccleſiaſticorum officiorum impetrationibus, & proviſionibus, quæ ad præſentationem, donationem, & diſpoſitionem Regis ſpectant, & ad alios in hoc regno patronos laicos, utique eccleſiarum, capellarum, & aliorum beneficiorum eccleſiis cathredralibus, abbatiis, prioratibus, Hoſpitalibus adnexorum, aliarumque dignitatum, officiorum, & beneficior' quæ jam antea tenebantur, & ad quæ præſentationes factæ fuerint per quoſdam eximios hujus regni viros: Quibus de cauſis, & earandem diſpen-

penſationibus, cum bonæ & antiquæ leges, conſuetudines, & libertates ejuſdem regni fuiſſent imminutæ, infirmatæ, & confuſæ, corona ſupremi Domini Regis acciſa, ejuſque perſona infamia aſperſa, theſaurus & opes regni deportatæ, incolæ & ſubditi ad paupertatem redacti & divexati, beneficia ſanctæ Eccleſiæ direpta & vaſtata, divinus cultus, hoſpitalitas, eleemoſynæ & charitatis opera ſublata, regni communitas & laboribus confecta, & bonis exhauſta, &c.

Rex in Parliamento Weſtm' habito Octob' Hill' anno 38. regni, populi ſui commodis, & tranquilitati conſulens, quem placida pace & tranquillitate tueri in votis habuit, & rempublicam adminiſtrare ſecundum regni leges, conſuetudines & libertates, ut jure-jurando cum inauguraretur obſtrictus erat; progenitorum ſuorum veſtigiis inſiſtens, qui ſuis temporib' ſalutares leges, ordinationes, & proviſiones, contra prædicta gravamina & pericula tulerunt; quas leges, ordiationes, & proviſiones ſingulas, & alias ſuo tempore, potiſſimum anno regni ſui 25 & 27. latas, Rex aſſenſu, expreſſa ſententia, & unanimi conſenſu ducum, comitum, baronum, & communitatis hujus regni atque aliorum omnium ad quos hæc ſpectarunt

confounded, the Crown of their Sovereign Lord the K. minished, and his Perſon falſly defamed, his Treaſury and Riches of the Realm carried away, the Inhabitants and Subjects of the Realm impoveriſhed and troubled, the Benefices of holy Church waſted and deſtroyed, Divine Services, Hoſpitalities, Alms-Deeds, and Works of Charity withdrawn and miſapplyed, the Com. and Subjects of the Realm in Body and Goods conſumed, &c.

The K. at his Parliament holden at Weſtminſter in the Utas of S. Hillary the xxxviii. Year of his Reign, having Regard to the Quietneſs of his People, which he chiefly deſired to ſuſtain in Tranquility and Peace to govern according to the Laws, Uſages and Franchiſes of his Land, as he was bound by his Oath made at his Coronation; following the Ways of his Progenitors, which for their Time made certain good Ordinances and Proviſions againſt the ſaid Grievances and Perils: Which Ordinances and Proviſions, and all the other made in his Time, and eſpecially in the 25 and 27 Years of his Reign, the K. by the Aſſent and Expreſs Will and Concord of the (Dukes) Earls, Barons, and the Commons of this Realm, and of all other whom theſe Things touched, by good and meet Deliberation and Adviſement, did approve, accept, Stat. de 38 E. 3. cap. 3. Note.

and confirm, as by the ſaid Act appeareth.

But thoſe which ſhould execute the ſaid good Laws againſt ſuch capital Offenders, were curſed, reproved, and defamed, by ſuch as maintained the uſurped Juriſdiction of the Biſhop of Rome, againſt which an eſpecial Act of Parliament was made by the King and his whole Realm, prohibiting thereby ſuch Defamations and Slanderous Reports.

ſalutari & matura deliberatione & conſultatione approbaverunt, acceptaverunt, & confirmaverunt, ut ex eodem ſtatuto omnibus manifeſtum & teſtatum eſt. Veruntamen illi qui ſalutares illas leges contra tam nefarios delinquentes exercerent, diris erant devoti, maledictis violati, & in calumniam rapti ab illis, qui uſurpatam pontificis Romani juriſdictionem propugnabant: Contra quos ſpeciali ſtatuto parliamentario, per regem & univerſum regnum facto, ejuſmodi maledicta, calumniæ, & defamationes prohibita fuerunt.

King *Richard* the Second.

Regnante Richardo *Secundo.*

12 R. 2. Tit. Juriſdiction 18.

AGainſt an Incumbent of a Church in England, another ſueth a Proviſion in the Church of Rome, and there purſueth until he recovereth the Church againſt the Incumbent, and after brought an Action of Account againſt him, as Receiver of divers Sums of Money (which in Troth were the Oblations and Offerings which the Incumbent had received: And the whole Court was of Opinion againſt the Plaintiff, and thereupon he became Nonſuit.

REctorem Eccleſia in Anglia alter in jus vocavit per proviſionem in curia Romana, & ibidem ſectam ſuam adeo proſecutus eſt, quouſque in curia Romana ſententia lata fuit contra rectorem: Et poſtea action' ſuam de compoto contra eundem rectorem, quaſi retentorem diverſarum pecuniarum ſummarum producit: Quæ pecuniæ erant oblationes & obvention' per rectorem receptæ, &c. In hoc caſu tota curia ſententiam contra querentem in actione de compoto proferebat, ſuper quo querens ulterius non proſecutus eſt, ſed cauſa cecidit.

Par-

Parliamentaria authoritate hoc anno declaratum erat, qd' Angliæ corona omnibus temporibus adeo libera fuit, ut nulli regno ſubdita ſed immediate Deo, & non cuivis alteri ſubjecta fuerit, quodque eadem, quantum ad majeſtatem ejuſdem ſpectat, in nulla re Romano pontifici ſubmitti debeat, nec leges aut ſtatuta hujus Regni per ipſum antiquari, aut imminui, ad perpetuam Regis ejus coronam, & majeſtatis ejus, & totius Regni ſubverſionem. Ad hæc Regni communitas in eo parliamento affirmanter aſſeveravit, quod quæ Romanus pontifex attentaverit, ſunt manifeſto contra Regis coronam, & majeſtatis jura, temporibus omnium ejus progenitorum uſitata & approbata: Quapropter & ipſi, & univerſa fidelis communitas ejuſdem regni, a rege, ejus corona, & majeſtate ſtarent in cauſis præfatis, & aliis quibuſcunque ſuſceptis contra ipſum, ipſius coronam, & majeſtatem, in ſingulis uſque ad mortem. Regem præterea orabant, & juſtitiæ nomine obſecrabant, ut ſeorſim examinaret ſingulos proceres in parliam', tam ſpirituales quam temporales, & omnes parliamenti ordines, quid in prænominatis ſentirent, quæ tam aperte Regiæ coronæ adverſabantur,

It is declar'd by that Parliament, that the Crown of Engl. hath been ſo free at all Times, that it hath been in Subjection to no Realm, but immediately ſubject to God, and none other, and that the ſame ought not, in any Thing touching the Regalty of the ſame Crown, be ſubmitted to the Bp. of Rome, nor the Laws & Stat. of this Realm by him fruſtrated or defeated at his Will, to the perpetual Deſtruction of the K. his Sovereignty, Crown, and Regalty, and of all his Realm. And the Commons in that Parliam. affirmed, that the Things attempted by the Bp. of Rome be clearly againſt the King's Crown and his Regalty, uſed and approved in the Time of all his Progenitors: Wherefore they and all the liege Commons of the ſame Realm, would ſtand with the King, and his ſaid Crown, and his Regalty, in the Caſes aforeſaid, and in all other Caſes attempted againſt him, his Crown, and his Regalty, in all Points to live and to die. And moreover they did pray the King, and him required by Way of Juſtice, that he would examine all the Lords in the Parliament, as well Spiritual as Temporal ſeverally, and all the States of the Parliament, how they thought of the Caſes aforeſaid, which were ſo openly againſt the King's Crown and in

Statutum de 16 R. 2. cap. 5.

Nota.

in derogation of his Regalty, and how they would ſtand in the ſame Caſes with the King, in upholding the Rights of the ſaid Crown and Regalty: whereupon the Lords temporal ſo demanded, did anſwer every one by himſelf: That the Caſes aforeſaid were clearly in derogation of the King's Crown and of his Regalty, as it was well known, and had been of long Time known; and that they would ſtand with the ſame Crown, and Regalty in thoſe Caſes eſpecially, and in all other Caſes which ſhould be attempted againſt the ſaid Crown and Regalty in all Points, with all their Power. And moreover it was demanded of the Lords Spiritual there being, and the Procurators of others being abſent, their Advice and Will in all thoſe Caſes, which Lords, that is to ſay, the Archbiſhops, Bps. and other Prelates being in the Parliam. ſeverally examined, making Proteſtations, that it was not their Mind to deny or affirm that the Bp. of Rome might not excommunicate Bps. nor that he might make tranſlation of Prelates, after the Law of holy Church, anſwered and ſaid, that if any Executions or Proceſſes made in the King's Court as before were made by any, and Cenſures of Excommunications be made againſt any Biſhop of Engl. or any other of the

& majeſtati Regiæ derogabant; Quodmodo etiam in prædictis cauſis cum rege concurrerent in coronæ & majeſtatis jure ſuſtentando, qua de re domini temporales interrogati ſinguli ſeorſim reſponderunt, qd' cauſæ præd' manifeſto tenderent in Regiæ coronæ & ejuſdem majeſtatis derogationem, ut explorate cognitum eſt, et jam diu cognitum erat: Quodque ipſi omnibus viribus firmiter ſtarent ab eadem corona & majeſtate in cauſis potiſſimum prædictis, & omnibus aliis, quæcunq; contra eandem coronam & majeſtatem ſuſciperentur. Domini ſpirituales ibidem præſentes, & procuratores aliorum qui aberant, interrogati erant, quid ſentirent & fieri vellent in cauſis illis omnibus: Qui domini, viz. archiepiſcopi, epiſcopi, & cæteri prælati in parliamento ſeorſim examinati, proteſtationibus prius factis, quod non erat ipſis in animo negare aut affirmare, pontificem Romanum non poſſe epiſcopos excommunicare, aut prælatos transferre juxta ſanctæ Eccleſiæ leges, reſponderunt & dixerunt, quod ſi ullæ executiones vel proceſſus in curia Regis, ut antea, ab ullo factæ fuerint, & excommunicationes cenſuræ contra ullum Angliæ epiſcopum, vel alium quemvis

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ex fidelibus Regis ſubditis, quod ejuſmodi mandata executi fuerint. Præterea ſi ullæ executiones ejuſmodi tranſlationum aliquorum prælatorum prædicti Regni, qui regi & regno ſuo in primis uſui erant & neceſſarii, factæ fuiſſent; vel ſi prudentes ex ejus concilio evocati ſint & longe a regno abducti ſine aſſenſu ejus, & contra quam voluerit, ita quod opes & theſaurus regni imminuerentur, ea omnia eſſe contra Regem ejuſque coronam ut in prædicta petitione memorabatur: Similiter procuratores ſinguli per ſe de iiſdem rebus examinati, idem in nomine dominorum ſuorum reſponderunt, perinde ac præfati epiſcopi pronunciaverant, & reſponderant; Quodq; etiam prædicti domini ſpirituales, & vellent & deberent ſtare a Rege in hiſce cauſis, in corona ejus ſarta tecta conſervanda, & omnibus aliis cauſis quæ ad coronam ejuſque majeſtatem ſpectarunt, ut fide quam Regi debebant obligati fuerant. Unde Rex ex aſſenſu præfato, & prædictæ communitatis petitione ſtatuit, & ſanxit, quod ſi quis in Romana curia vel alibi ejuſmodi tranſlationes, proceſſus, excommunicationis ſententias, bullas, inſtrumenta, aut alia quæcunque quæ ad Regem dominum

King's liege People, for that they had made execution of ſuch Commandments: And that if any Executions of ſuch tranſlations be made of any Prelates of the ſame Realm, which Prelates were very profitable and neceſſary to the King, and to his ſaid Realm; or that his ſage Men of his Council, and without his Aſſent, and againſt his Will be withdrawn and eloyned out of the Realm, ſo that the Subſtance and Treaſure of the Realm might be deſtroyed, that the ſame was againſt the K. and his Crown, as it was contained in the Petition before named: And likewiſe the ſame Procurators, every one by himſelf examined upon the ſaid Matters, did anſwer and ſay in the Name and for their Lords, as the ſaid Biſhops had ſaid, and anſwered; And that the ſaid Lords Spiritual would and ought to ſtand with the King in theſe Caſes, lawfully in maintaining of his Crown, and in all other Caſes touching his Crown and his Regalty, as they were bound by their Allegiance. Whereupon the King by the Aſſent aforeſaid, and at the Prayer of his ſaid Commons, did ordain and eſtabliſh: That if any purchaſe or purſue, or cauſe to be purchaſed or purſued in the Court of Rome or elſewhere, any ſuch Tranſlations, Proceſſes, and Sentences of Excommunication, Bulls, Inſtruments, or a-

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ny other Things which touched the K. their Lord, againſt him his Crown and his Regalty, or his Realm, as is aforeſaid: And they which bring within the Realm, or them receive, or make thereof Notification, or any other Execution within the ſame Realm, or without; that they, their notorious Procurators, Maintainers, Fautors, and Counſellors, ſhould be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeit to the King, and they be attached by their Bodies if they may be found, and brought before the King and his Council, there to anſwer to the Caſes aforeſaid; or that Proceſs to be made againſt them by præmunire facias, as it is ordained in other Statutes of Proviſors, and others which do ſue in any other Court in derogation of the Regalty of the K. as by the ſaid Act alſo appeareth.

Co. Lit. 130. a. F. N. B. 169. f.

ſuum ſpectarint, contra ipſum, ejus coronam & majeſtatem, vel ejus regnum, ut prædict' eſt, procuraverit, vel procurari fecerit: Et qui ea in regnum intulerint, vel receperint, vel publicaverint, vel quovis modo in prædicto regno, vel extra executi fuerint; quod ipſi, eorum notarii procuratores, adjutores, fautores, conſultores, Regis protectione excluderentur, & eorum terræ, tenementa & bona in Regis poteſtatem redigerentur, ipſiq; ſi inveniri poſſint apprehenderentur, & coram Rege & ejus concilio ſiſterunter ad reſpondendum de prædictis, vel ut proceſſus contra eos fieret per *præmunire facias*, ut ſancitum eſt in aliis ſtatutis de proviſoribus, & aliis qui in alia curia ad Regiæ dignitatis derogationem jus ſuum perſequuntur, ut ex eodem ſtatuto plenius patet.

In the Reign of King Henry IV.

Regnante Henrico *Quarto.*

1 H. 4. fol. 9.

IT is reſolved that the Pope's Collector, tho' he have the Pope's Bulls for that purpoſe, hath no Juriſdiction within this Realm, and there the Archbiſhops and Biſhops, &c. of this Realm are called the King's ſpiritual Judges.

DEterminatum eſt quod collector papal', vigore alicujus bullæ, nullum intra hoc regnum habet authoritatem, & ibidem archiepiſcopi, epiſcopi, &c. intra hoc regnum ſpirituales judices Regis nuncupantur.

F. N. B. 269. 2 H. 4. c. 15.

By the antient Laws Eccleſiaſtical of this Realm, no

Per antiquas eccleſiaſticas hujus regni leges, nemo hære-

hæreticæ pravitatis, quæ crimen eſt læſæ majeſtatis contra divinum numen, convinci poterat, niſi ab archiepiſcopo & univerſo ejuſdem provinciæ clero, & inde abjuratus, poſtea de integro convictus & condemnatus a clero ejuſdem provinciæ in ſynodo generali: Sed ſtatutum 2 *H.* 4. *c.* 15. authoritatem epiſcopo diœceſios hæreticos condemnandi tribuit: Quodq; ante ſtatutum illud hæreticus ſeculari brachio ad concremandum committi non poterat, donec ſemel abjuraſſet, & in eandem vel aliam hæreſin relapſus fuiſſet: Unde luce clarius eſt, quod Rex conſenſu parliamenti direxit formulas procedendi curiis eccleſiaſticis in hæreſios cauſis, & aliis magis ſpiritualibus.

Papa non poteſt mutare leges Angliæ.

Judices pronunciarunt, quod ſtatuta, quæ ad papales proviſiones ad beneficia ex eccleſiaſticorum hominum patronatu coercendas facta fuerint, eo quod eccleſiaſtici in ſua juſta cauſa papalibus proviſionibus contradicere non auderent: Adeo ut illa ſtatuta tantum ad leges communes confirmandas fuerit ſancita.

Excommunicatio per papam facta nullam vim in Anglia habet, & eadem ſigni-

Man could be convicted of Hereſy, being High Treaſon againſt the Almighty, but by the Archbiſhop and all the Clergy of that Province, and after abjured thereupon, and after that newly convicted and condemned by the Clergy of that Province, in their general Council of Convocation: But the Stat. 2 H. 4. c. 15. doth give the Bp. in his Diocese Power to condemn an Heretick; And that before that Stat. he could not be committed to the ſecular Power to be burnt, until he had once abjured, and was again relapſed to that, or ſome other Hereſy; whereby it appeareth that the K. by Conſent of Parliament directed the Proceedings in the Eccleſiaſtical Court in Caſe of Hereſy, and other Matter more ſpiritual. 3 Inſt. 40.

On the Stat. was the Writ de Heretico Comburendo founded, which is now annulled by St. 13 Car. 2. c.

The Pope cannot alter the Laws of England. 11 H. 4. 37.

The Judges ſay, that the Statutes which reſtrain the Pope's Proviſions to the Benefices of the Advowſons of Spiritual Men, were made, for that the Spiritualty durſt not in their juſt Cauſe ſay againſt the Pope's Proviſions: So as thoſe Statutes were made, but in Affirmance of the Common Laws *. 11 H. 4. 69. 76.

* And ſo are all Statutes which reſtrain Eccleſiaſtical Juriſdiction.

Excommunication made by the Pope is of no Force in England, and the ſame being certified 14 H. 4. f. 14. Vide 30 E. 3. lib Aſſ. pl. 19. before. Vide 13 E. Certificat. 6.

Vide 20 H. 6. 1. 35 H. 6. 42. 7 Ed. 2. 14. F. N. B. 64. F. Antea 15. b. Poſt. 26. b. 27. E.

fied by the Pope into any Court in England ought not to be allowed, neither is any Certificate of any Excommunication available in Law, but that which is made by ſome Biſhop of England, for the Biſhops are by the Common Laws the immediate Officers and Miniſters of Juſtice to the King's Courts in Cauſes Eccleſiaſtical.

Note; Biſhops are Temporal Officers.

14 H. 4. 14.

If any Biſhop do excommunicate any Perſon for a Cauſe that belongeth not unto him, the King may write unto the Biſhop, and command him to abſolve and abſolve the Party.

Statute de 2 H. 4. cap. 3.

If any Perſon of Religion obtain of the Biſhop of Rome to be exempt from Obedience regular or ordinary, he is in Caſe of Præmunire, which is an Offence, as hath been ſaid, contra Regem, coronam, & dignitatem ſuas.

Statute de 6 H. 4. cap. 1.

The Commons did grievouſly complain to the King, at the Parliament holden in the ſixth Year of H. 4. of the horrible Miſchiefs and damnable Cuſtoms which then were introduct of new in the Court of Rome, that no Perſon, Abbot or other ſhould have Proviſion of any Archbiſhops. or Biſhops. which ſhould be void, till he had compounded with the Pope's chamber, to pay great and exceſſive Sums of

ficata per papam alicui curiæ in Anglia admitti & approbari non debet, neq; alicujus excommunicationis ejuſmodi ſignificatio in lege vim habet, ſed quæ per aliquem Angliæ epiſcopum facta ſit: Epiſcopi enim per leges communes ſunt officiarii immediati, & Juſtitiæ adminiſtri ad curias Regis in cauſis eccleſiaſticis.

Si epiſcopus perſonam quamcunque excommunicaverit, pro cauſa ad eundem epiſcopum non ſpectante; Rex in eo caſu ſcribat hujuſmodi epiſcopo, ei præcipiens perſonam illam nodo excommunicationis ſic innodatam abſolvere.

Siqua religioſa perſona a pontifice Romano impetraverit, ut ab obidentia regulari eximatur, incurret *Præmunire*, quod eſt crimen ut jam antea dictum contra Regem, ejus coronam, & dignitatem.

In Parliamento habito anno 6 *Henrici quarti*, communitas Regni querelam graviſſimam regi exhibuit de flagitiis atrocibus, & damnanda conſuetudine, tum temporis in Romanam curiam recens introductis, viz. Quod nulla perſona, abbas, vel quiſpiam alius, proviſionem alicujus archiepiſcopatus, vel epiſcopatus vacantis haberet, priuſquam cum papali

pali camera transegerit, ad magnam vim pecuniæ persolvendam, tam pro primitiis ejusdem archiepiscopatus vel episcopatus, quam pro aliis minoribus pensitationibus in eadem curia: Et quod ea vis pecuniæ, vel major pars ejus præ manibus solveretur, quæ pecuniæ summa duplo vel triplo ad minimum major erat quam quæ superioribus temporibus in eadem camera & alibi, ratione ejusmodi provisionum solvi solebat, unde magna pars opum hujus regni ad prædictam curiam asportata fuerat, & futuris temporibus asportanda esset, ad archiepiscopatus, vel episcopatus intra prædictum regnum, & alibi intra Regis dominia exhauriendos, si modo salutare remedium non adhiberetur. Rex ad honorem Dei omnipotentis, tam ad damna & detrimenta regni, quam ad pericula animarum ipsorum, qui ad archiepiscopatus & episcopatus intra regnum Angl', & alibi intra Regis dominia extra prædictum regnum, propulsanda, concilio & assensu magnatum regni sui in Parliamento statuit & sanxit, quod ipsi & ipsorum singuli, qui prædictæ cameræ, vel alibi, pro ejusmodi primitiis & servitiis majorem vim pecuniæ solverent quam retroactis tempo-

Money, as well for the first Fruits of the same Archbishoprick or Bishoprick, as for the other less Services in the same Court: And that the same Sums, or the greater Part thereof be paid before-hand, which sums passed the Treble or the Double at the least of that that was accustomed of old Time to be paid to the said Chamber, and otherwise by the Occasions of such Provisions, whereby a great Part of the Treasure of this Realm had been brought and carried to the said Court, and also should be in Time to come, to the great impoverishing of the Archbishops and Bps. within the same Realm, and elsewhere within the K.'s Dominions, if convenient Remedy were not for the same provided. The King to the Honour of God, as well to eschew the Damage of this Realm as the Perils of their Souls, which owen to be advanced to any Archbishopricks and Bishopricks within the Realm of Engl. and elsewhere within the K.'s Dominions out of the same Realm, by the Advice and Assent of the great Men of his Realm in the Parliament, did ordain and establish, that they and every of them that should pay to the said Chamber or otherwise, for such Fruits and Services greater Sums of Money than had been accustomed to be paid in old time past, they and

every

every of them ſhould incur the Forfeiture of as much as they may forfeit towards the King, as by the ſaid Act appeareth.

Statute de 7 H. 4. cap. 6.

No Perſon religious or ſecular, of what Eſtate or Condition that he were, by colour of any Bulls, containing Privileges to be diſcharged of Tithes pertaining to Pariſh-Churches, Prebends, Hoſpitals, Vicarages, purchaſed before the firſt Year of King Richard the ſecond, or after, not executed, ſhould put in execution any ſuch Bulls ſo purchaſed, or any ſuch Bulls to be purchaſed in Time to come, upon the Pain of a Præmunire, as by the ſaid Act appeareth.

ribus ſolvi conſuevit, ipſi & ipſor' ſinguli incurrerent tantam mulctam quantam erga Reg' mulctari poſſent, ut ex eod' ſtatuto liquido conſtat.

Nemo religioſus vel ſecularis cujuſcunque loci vel conditionis, ſub obtentu bullarum quarumqunque cum privilegiis, ut exonerarentur decimis ad Eccleſias parochiales, præbendas, hoſpitalia, vicariaſque ſpectantibus (quæ quidem bullæ impetratæ fuiſſent ante Regis *Richardi ſecundi* annum primum, vel poſtea, & non executioni mandatæ fuerant) exequeretur ullas ejuſmodi bullas ita impetratas, aut in futurum impetrandas, ſub pœna *Præmunire*, ut ex eodem ſtatuto clare elucet.

In the Reign of King *Henry* V.

Regnante Henrico *Quinto.*

Statut de 3 H. 5. cap. 4.

In an Act of Parliament made in the third Year of King H. 5. It is declared, that whereas in the Time of King H. 4. Father to the ſaid K. the 7th Year of his Reign, to eſchew many Diſcords and Debates, and divers other Miſchiefs which were likely to ariſe and happen becauſe of many Proviſions then made, or to be made by the Pope, and alſo of Licence thereupon granted by the ſaid late King, amongſt other Things, It was ordained and eſtabliſhed,

In ſtatuto parliamentario anno tertio Regis *Henrici quinti* facto declaratur, quod quandoquidem tempore Regis *Hen.* 4. patris ejuſdem Regis, ſcilicet anno ſeptimo regni ejuſdem, ad evitandâ multas contentiones, lites, & varia alia mala probabiliter tunc exoritura ex multis proviſionibus per papam tunc conceſſis, & concedendis, & etiam ex licentia inde per eundem nuper Regem conceſſa, inter alia ſcitum & ſancitum erat,

erat, quod nulla ejuſmodi licentia aut facultas, ita conceſſa ante prædict' ſtatutum, aut poſtea concedenda, vim haberet ad conferendum aliquod beneficium plenum, quod ſuum habuit incumbentem die quo ejuſmodi licentia aut facultas data fuerit; nihilominus diverſæ perſonæ, quæ papales proviſiones ad diverſa beneficia in Anglia & alibi, & regiam licentiam eaſdem proviſiones exequendi habent, ſub prætextu earundum proviſionum, facultatum & acceptationum prædictorum beneficiorum nonnullos ſuis beneficiis dolo malo excluſerunt quibus longo jam tempore gaviſi ſint, & incubuerint ex collatione indubitatorum patronorum ſpiritualium ipſis cogitato & debite facta, ad eorundem incumbentium ſtatum enervandum & diſturbandum. Rex ſummo ſtudio ejuſmodi mala propulſandi ſtatuit & ſanxit, quod omnes incumbentes cujuſlibet beneficii eccleſiaſtici, ex patronatu, collatione, vel præſentatione eccleſiaſticor' patronor', quiete & pacifice iiſd' fruerentur ſine ulla inquietatione, moleſtatione, aut vexatione, ſub ejuſmodi proviſionum, facultatum & acceptationum prætextu: Et qd' omnes licentiæ, ac facultates ex ejuſmodi proviſionibus

that no ſuch Licence or Pardon ſo granted before the ſame Ordinance, or afterwards to be granted, ſhould be available to any Benefice full of any Incumbent, at the Day of the Date of ſuch Licence or Pardon granted: Neverthleſs divers Perſons, having Proviſions of the Pope of divers Benefices in Engl. and elſewhere, and Licences Royal to execute the ſame Proviſions, have by Colour of the ſame Proviſions, Licences and Acceptations of the ſaid Benefices, ſubtilly excluded divers Perſons of their Benefices, in which they had been Incumbents by a long Seaſon of the Collation of the very Patrons ſpiritual, to them duly made to their Intent, to the utter Deſtruction and Enervation of the Eſtates of the ſame Incumbents. The King willing to void ſuch Miſchiefs, hath ordained and eſtabliſhed, that all the Incumbents of every Benefice of Holy Church, of the Patronage, Collation, or Preſentation of ſpiritual Patrons, might quietly and peaceably Enjoy their ſaid Benefices, without being inquieted, moleſted, or any ways grieved, by any Colour of ſuch Proviſions, Licences and Acceptations: And that all the Licences and Pardons upon and by ſuch Proviſions made in any Manner, ſhould be void, and of no Valour; and if any feel himſelf

Note.

grieved, moleſted or inquieted, in any wiſe from thenceforth by any, by Colour of ſuch Proviſions, Licences, Pardons or Acceptations, that the ſame Moleſtors, Grievors, or Inquietors, and every of them, have and incur the Pains and Puniſhments contained in the Statutes of Proviſors before that Time made, as by the ſaid Act appeareth.

ullo modo factæ irritæ ſint, & nullius momenti: Qd' ſi quis ſe ab aliquo divexatum, exagitatum, aut moleſtiis affectum ullo modo jam inde ſentiret, ſub ejuſmodi proviſionum, licentiarum, facultatum, aut acceptationum prætextu, qui ita moleſtias faceſſerent, gravamina injicerent, aut quietem diſturbarent, ipſorum ſinguli pœnam & animadverſionem quæ in ſtatuto de proviſoribus facto ſubeant, ut ex eodem ſtatuto planiſſime liquet.

Statut. de 2 H. 5. cap. 7.

(a) Lollardy a Lolio. For as Cockle is the Deſtruction of the Corn, ſo is Hereſy the Deſtruction of true Religion. *

A Statute was made for Extirpation of Hereſy, and Lollardy (a) whereby full Power and Authority was given to the Juſtices of Peace, and Juſtices of Aſſize to Inquire of thoſe that hold Errors, Hereſies, or Lollardy, and of their Maintainers, &c. And that the Sheriff or other Officers, &c. may arreſt and apprehend them.

Statutum ad extirpandam hæreſin, & hæreticam pravitatem factum erat, quo plenaria poteſtas & authoritas Eirenarchis, & aſſiſarum juſticiariis data, inquirendi de illis qui errores, hæreſes, vel hæreticam pravitatem defendunt, & de eorum fautoribus, &c. Et qd' vicecomes, vel alius officiarius, eos apprehendere poſſit, (i. e. ad *Comburendos.)*

En Diabolicæ Fructus Religionis.

* *Perperam ſane, ſed potius a Gualtero Lollhard Germanico quodam, qui floruit circa annum Dom.* 1315. *Spelm. Gloſſ. Tit. Lollardia.* 3 *Inſt.* 43 *Linwod* 300. 3 *Inſt.* 43.

Infœlix lolium, & ſteriles dominantur avenæ. Virgilius.
Et careant loliis oculis vitiantibus agri. Ovidius.

Stat. de 2 H. 5. cap. 1.

The King by Conſent of Parliament giveth Power to Ordinaries to enquire of the Foundation, Erection and Governance of Hoſpitals, other than ſuch as be of the K.'s Foundation, and thereupon to make Correction and Reformation according to the Eccleſiaſtical Law.

Rex aſſenſu parliamentario dat ordinariis poteſtatem inquirendi de fundatione, erectione, adminiſtratione hoſpitalium, præterquam eorum quæ ſunt ex Regis fundatione, & etiam corrigendi & reformandi juxta legem Eccleſiaſticam.

Regnante

Regnante Henrico *Sexto.*

EXcommunicatio facta, & ſignificata per papam nullam vim habet ad aliquem incapacem in Anglia reddendum: Et hoc per antiquas leges communes, priuſquam ſtatutum de juriſdictione externa factum erat.

Rex ſolummodo poteſt concedere & licentiam dare fundandi incorporationem ſpiritualem.

Tempore Regis *Hen.* 6. Pontifex Romanus literas ſcripſit ad derogation' Reg' & majeſtatis ejus, & Eccleſiaſtici ne hiſcere quidem contra auſi ſunt; verum *Humfridus* Dux Gloceſtriæ, (ſcil't ne perirent) in ignem projecit.

In the Reign of King *Henry* VI.

EExcommunication (*a*) made and certified by the Pope, is of no Force to diſable any Man within England: And this is by the ancient Common Laws before any Statute was made concerning foreign Juriſdiction. 8 H. 6. f. 3. (*a*) Ant. 15. B. 23. b. Poſtea 27. a.

The (*b*) King only may grant or licence to found a Spiritual Incorporation. 9 H. 6. f. 16. b. (*b*) 4 Co. 107. b. Dy. 81. pl. 64.

In the Reign of K. Henry the Sixth, the Pope writ Letters in Derogation of the K. and his Regalty, and the Churchmen durſt not ſpeak againſt them; but Humfrey Duke of Glouceſter for their ſafe keeping put them into the Fire. 1 H. 7. 10.

Regnante Edwardo *Quarto.*

Edw'do quarto regnante, Pontifex Romanus Priori Sancti Johan' Aſylum infra prioratum ſuum conceſſit; hoc diſceptatum erat, & Prior ſibi vendicavit; verum jucices pronunciarunt Papam nullam habuiſſe poteſtatem concedendi aliqua aſyli jura in hoc regno, & igitur legis ſententia improbatum erat, & minime permiſſum.

In the Reign of King *Edward* IV.

IN the Reign of K. Edward the Fourth, the Pope granted to the Prior of St. John's, to have Sanctuary within his Priory; and this was pleaded and claimed by the Prior; but it was reſolved by the Judges, that the Pope had no Power to grant any Sanctuary within this Realm, and therefore by Judgment of the Law the ſame was diſallowed. 1 H. 7. 20.

9 E. 4. 3. Vide F. N. B. f. 44. H. agreeing herewith.

There it appeareth, that the Opinion of the King's Bench had been oftentimes, that if one Spiritual Perſon ſue another ſpiritual Man in the Court of Rome for a Matter Spiritual, where he might have Remedy before his Ordinary, that is the Biſhop of that Diocese within the Realm, Quia trahit ipſum in placitum extra regnum, incurreth the Danger of a Præmunire: An hainous Offence, being contra ligeantiæ ſuæ debitum, in contemptum Domini Regis, & contra Coronam & Dignitatem ſuas; by which it appeareth, how grievous an Offence it was againſt the King, his Crown and Dignity, if any Subject, although both the Perſons and Cauſe were Spiritual, did ſeek for Juſtice out of the Realm, as though either there wanted Jurisdiction, or Juſtice was not executed in the Eccleſiaſtical Courts within the ſame; which (as it hath been ſaid) was an high Offence contra Regem, Coronam & Dignitatem ſuas.

Nota.

9 E. 4. 28. Boon's Exam. Leg. Angliæ p. 15. 2 Inſt. 114. Hale's Pl. Cor. 240.

In the K.'s Courts of Record, where Felonies are determined, the Bp. or his Deputy ought to give his Attendance, to the End that if any that is indicted and arraigned for Felony, do demand the Benefit of his Clergy, that the Ordinary may inform the Court of his Sufficiency or Inſufficiency, that is, whether he can read as a Clerk or not, whereof notwithſtand-

Eo loci perſpicuum eſt, quod tribunal regium ſæpenumero in ea fuit opinione; qd' ſi aliquis eccleſiaſticus alium eccleſiaſticum in jus vocaverit in curia Romana de re aliqua Eccleſiaſtica, cum coram ordinario qui eſt Ep'us diœceſios intra regnum ſibi remedium compararet, quia trahit ipſum in placitum extra regnum, pœnam præmunire incurrit: delictum ſane atrox contra ligeantiæ ſuæ debitum, in contempt' Dom' Regis, & contra Coronam & Dignitatem ſuam: Unde patet quantum erat delict' contra Regem, ſuam Coronam & dignitatem, ſi quis ſubditus (quamvis & perſona & cauſa eſſet eccleſiaſtica) jus ſuum extra regnum perſequeretur, quaſi vel juriſdictio deeſſet, vel juſtitia non coleretur in curiis Eccleſiaſticis intra regnum, quod ut jam diximus nefarium erat delict' contra Regem, Coronam & Dignitatem ſuas.

In curiis Domini Regis (ad quarum cognitionem crimina feloniæ ſpectant) Epiſcopus ejuſve Deputatus intereſſe & attendere debet, eo nimirum propoſito, quod ſi aliquis ibidem de felonia indictatus & arrectatus exiſtens clericale privilegium petierit, ordinarius ſuperinde curiam illam de habilitate ſive inhabilitate hujuſmodi delinquentis

quentis poterit informare, ſcil't utrum legere valeat ut clericus ſive non; & tamen ordinarius in eo caſu ſententiam ſuam ut judex ferre non poteſt, ſed tantummodo officio miniſtri curiæ regalis fungitur; & judicium utrum hujuſmodi perſona ſit habilis aut inhabilis, ad judices curiæ illis ſolummodo ſpectat: Ac quodcunq; illis ab ordinario informatum erit, ipſi judices ſuper debit' examinatione delinquentis, ſententiam ſuam contra ordinarii relationem promulgare poſſint, quia judices illi a Rege aſſignati ſunt ejuſd' cauſæ proprii & ſoli judices.

Excommunicatio papalis nullius eſt momenti aut authoritatis in regno Angliæ.

Tempore hujus Reg' *Ed.* quarti legatus papalis Calitium venit, animo in Angliam trajicendi, verum Rex & qui ab ejus concilio, noluerunt permittere ut Angliam ingrederetur, priuſquam jusjurandum præſtitiſſet ſe nihil contra Reg' vel ejus Coronam machinatur'; qd' etiam alteri Legato Papali ipſo regnante fact': Et hoc ita relatum eſt 1 *H.* 7. f. 10.

ing the Ordinary is not to judge, but is a (a) Miniſter to the King's Court; and the Judges of that Court are to judge of the Sufficiency or Inſufficiency of the Party, whatſoever the Ordinary do inform them, and upon due Examination of the Party, may give Judgment againſt the Ordinary's Information, for the King's Judges are the proper and only Judges of the Cauſe.

(a) Stanf. Cor. 132. a.

12 E. 4. f. 16.

The Pope's Excommunication is of no Force within the Realm of England.

In the Reign of King Edward the Fourth, a Legate from the Pope came to Calais, to have come into England, but the King and his Council would not ſuffer him to come within England, until he had taken an Oath, that he ſhould attempt nothing againſt the K. or his Crown: And ſo the like was done in his Reign to another of the Pope's Legates: And this is ſo reported in 1 Hen. 7. fol. 10.

Regnante Richardo *Tertio.*

JUdices pronunciarunt, qd' judicium vel excom-

In the Reign of King *Richard* III.

IT is reſolv'd by the Judges, that a Judgment or Excom-

2 R. 3. f. 22.

communication in the Court of Rome ſhould not bind or prejudice any Man within Engl. at the Common Law.

municatio in Curia Romana non obligaret vel præjudicaret cuipiam in lege communi in regno Angliæ.

In the Reign of King *Henry* VII.

Regnante Henrico *Septimo.*

1 H. 7. f. 10.

IN the Reign of K. H. VII. the Pope had excommunicated all ſuch Perſons whatſoever, as had bought Allom of the Florentines; and it was reſolved by all the Judges of England, that the Pope's Excommunication ought not to be obeyed, or to be put in Execution within the Realm of England.

Henrico ſeptimo regnante, Pontifex Romanus ſacris interdixit quotquot alumen a Florentinis emiſſent; ab omnibus tamen Angliæ judicibus pronunciatum eſt, quod papalis interdictio non obediretur, aut executioni mandaretur in regno Angliæ.

Statut. de 3 H. 7. c. 4.

In a Parliament holden in the firſt Year of K. H. VII. for the more ſure and like Reformation of Prieſts, Clarks, and religious Men, culpable, or by their Demerits openly noiſed of incontinent living in their Bodies, contrary to their Order; it was enacted, ordained and eſtabliſhed, by the Advice and Aſſent of the Lords Spiritual and Temporal, and the Commons in the ſaid Parliament aſſembled, and by Authority of the ſame; that it be lawful to all Archbiſhops and Biſhops, and other Ordinaries, having epiſcopal Jurisdiction, to puniſh and chaſtiſe Prieſts, Clarks, and religious Men, being within the Bounds of their Jurisdiction, as ſhall be convicted afore them by Examination, and

In Parliamento an' Primo Regis *Henrici* ſeptimi habito ad majorem & efficaciorem reformationem ſacerdotum, clericorum, & perſonarum religioſarum, qui ob incontinentiam vel in crimen vocati, vel vulgo male audierunt contra ipſorum profeſſion', ſtatutum, ordinatum & ſancitum erat concilio & aſſenſu dominorum ſpiritualium & temporalium, & communitatis eodem Parliamento, & ejuſdem authoritate, quod omnes Archiepiſcopi & Epiſcopi, & alii Ordinarii, quibus eſt juriſdictio epiſcopalis, poſſint ex jure punire & caſtigare ſacerdotes, clericos & perſonas religioſas, intra juriſdictionis ipſorum limites, quotquot coram illis examina-

minatione, vel alia legitima probatione requiſita per legem eccleſiaſticam, convicti fuerint adulterii, fornicationis, inceſtus, vel alicujus incontinentiæ carnalis, eoſdem incarcerando, & in carcere detinendo, quamdiu illis pro prudentia viſum fuerit juxta delicti gravitatem: Quodq; nullus prædictorum Archiepiſcoporum, Epiſcoporum, aut Ordinariorum in jus vocentur ulla actione de incarceratione injuſta: Sed qd' in cauſis præd', virtute hujus ſtatuti, ſint omnino inde exonerati.

Rex eſt perſona mixta, quia cum eccleſiaſticam tum temporalem juriſdictionem habeat.

Per leges Eccleſiaſticas in hoc regno approbatas, unus ſacerdos duo beneficia habere non poteſt, nec Baſtardus ſacris initiari: Verum Rex eccleſiaſtica poteſtate & juriſdictione quam habeat, in utroque diſpenſare poteſt; quia mala ſunt prohibita, & non mala per ſe.

lawful Proof requiſite by the Law of the Church, of Adultery, Fornication, Inceſt, or any other fleſhly Incontinency, by committing them to Ward and Priſon, there to abide for ſuch Time as ſhall be thought to their Diſcretions convenient for the Quality and Quantity of their Treſpaſs: And that none of the ſaid Archbiſhops, Biſhops, or Ordinaries aforeſaid, be thereof chargeable, of, to or upon any Action of falſe or wrongful Impriſonment, but that they be utterly thereof diſcharged in any of the Caſes aforeſaid, by Virtue of this Act.

Rex (*a*) eſt perſona mixta, becauſe he hath both Eccleſiaſtical, and Temporal Juriſdiction.

(*a*) 10 H. 7. 18. 1 Rol. 657. 2 Co. 44. a. 13 Co. 17. Davis 4. a.

By the Eccleſiaſtical Laws allowed within this Realm, a Prieſt cannot have two (*b*) Benefices, nor a (*c*) Baſtard can be a Prieſt. But the K. may by his Eccleſiaſtical Power and Juriſdiction diſpence with both of theſe, becauſe they be mala prohibita, and not mala per ſe.

(*b*) Hob. 147.

(*c*) Hob. 147.

Regnante Henrico *Octavo.*

STatuto Parliamenti habiti 24. Regis *Hen.* octavi facto per Regem, Epiſcopos 24. Abbates & Priores 29. (totidem enim tunc erant Domini Parliamentarii) per

In the Reign of King *Henry* VIII.

BY an Act of Parliament made the 24th Year of K. H. 8. that is to ſay, by the K. xxiv Biſhops, xxix Abbots and Priors, (for ſo many were then Lords of Parliament,)

Statute of 24 H. 8. 12. This Statute is declaratory of the ancient Laws of Eng. as manifeſtly appeareth by

that which hath been ſaid. See Br. Abr. Tit. Preſentment al Eſgliſe pl. 12.

The Pope was permitted to do certain Things within this Realm by Uſurpation, and not of Right, until the Reign of H. 8.

ment,) by all the Lords Temporal and the Commons in that Parliament aſſembled, It is declared, That where by divers ſundry old authentick Hiſtories and Chronicles, it was manifeſtly declared and expreſſed, that this Realm of Engl. is an Empire, and ſo hath been accepted in the World, governed by one ſupreme Head and King having the Dignity and royal Eſtate of the (a) imperial Crown of the ſame, unto whom a Body politick compact of all Sorts and Degrees of People, divided in Terms and by Names of Spiritualty and Temporalty, been bound and ought to bear next to God, a natural and humble Obedience, he being alſo inſtitute and furniſhed by the Goodneſs and Furtherance of Almighty God, with plenary, whole, and entire Power, Preheminence, Authority, Prerogative and Juriſdiction, to render and yield Juſtice and final Determination to all manner of Folks, Reſiants or Subjects within this his Realm, in all Cauſes, Matters, Debates and Contentions, happening to occur, inſurge or begin within the Limits thereof, without Reſtraint or Provocation to any foreign Princes or Potentates of the World: The Body Spiritual whereof having Power when any Cauſe of the Law divine happened to come in Queſtion, or of ſpiritual Learning,

(a) Ant. viii. b.

omnes Dominos temporales, & communitatem in eodem parliamento declaratum eſt, quod cum ex variis hiſtoriis ac chronicis antiquis & fide dignis clariſſime conſtat, hoc Angliæ regnum imperium eſſe, & ita per univerſum orbem terrarum habitum fuiſſet, qd' adminiſtratum ab uno ſupremo capite & rege, qui imperialis coronæ ejuſdem dignitatem & regiam habet majeſtatem, cui corpus politicum, ex populo cujuſcunque loci & ordinis compactum, nominibus eccleſiaſticorum & laicorum diſtinctum, obſtrictum eſt, ac naturalem ſubmiſſamque obedientiam proxime a Deo præſtare debet; cum ille etiam divini numinis benignitate & gratia, inſtructus & munitus ſit poteſtate, præheminentia, authoritate, prærogativa plenaria integra & omnimoda, ad juſtitiam reddendam, & jus decidendum omnibus ſubditis & reſidentibus intra hoc ſuum regnum, in omnibus cauſis, litibus, & contentionibus exorientibus & pullulantibus, intra ejuſdem limites, ſine prohibitione aut provocatione ad quoſvis exteros orbis terrarum principes aut monarchas: Cum corpus item Eccleſiaſticum poteſtatem habeat, quando ulla cauſa legis Divinæ vel Eccleſiaſticæ diſciplinæ

ciplinæ in quæſtionem venir; quod declaratum, explicatum, & demonſtratum erat per eam præd' corporis politici partem, qui eccleſiaſtici vocantur, tunc vulgo vocitata *Eccleſia Anlicana*, quæ ſemper talis habita, & etiam agnita, ut ſcientia, integritate, & ſuo numero ſemper haberetur, & hodie habeatur ex ſe ſufficiens & idonea ſine exterorum adminiculo, ad declarandum & determinandum quæcunque in quæſtionem venerint, & ad adminiſtrandum omnia munia, quæ ad ſpiritualem ordinem ſpectant: Quæ ut quam commodiſſime & recte adminiſtrentur, & ipſi a corruptione & prava affectione deterreantur, Regis progenitores illuſtriſſimi, & procerum hujus Regni anteceſſores, præd' eccleſiam Angl' cum honore, tum poſſeſſionibus ſatis ſuperq; dotarunt: Leges etiam temporales ad terrarum & bonorum proprietatem decidendam & ad populum hujus Regni in unitate, pace, ſine prædatione & expilatione conſervandum adminiſtrabantur, & executioni mandabantur per diverſos judices & miniſtros alterius partis præfati corporis politici, quæ temporalitas appellatur, & utriuſque authoritates & juriſdictiones in debita juſticiæ adminiſtratione mutuo con-

That it was declared, interpreted and ſhewed by that Part of the ſaid Body politick, called the Spiritualty, then being uſually called the Engliſh Church, which always had been reputed and alſo found of that Sort, that both for knowledge, Integrity, and Sufficiency of Number, it had been always thought, and was alſo at that Hour ſufficient and meet of it ſelf, without the intermedling of any exterior Perſon or Perſons, to declare and determine all ſuch Doubts, and to adminiſter all ſuch Offices and Duties as to the Rooms ſpiritual did appertain: For the due Adminiſtration whereof, and to keep them from Corruption, and ſiniſter Affection, the K.'s moſt noble Progenitors, and the Anceſtors of the Nobles of this Realm, did more than ſufficiently indow the ſaid Church both with Honour and Poſſeſſions: And the Laws temporal for Trial of Property of Lands and Goods, and for the Conſervation of the People of this Realm in Unity and Peace, without Rapine or Spoil, was and then was adminiſtred, adjudged, and executed by ſundry Judges and Miniſters of the other Part of the ſaid Body politick called the Temporalty, and both their Authorities and Juriſdictions did conjoin together in the due Adminiſtration of Juſtice, the one to help the other: And

where-

whereas the King his moſt noble Progenitors and the Nobility and Commons of the ſaid Realm, at divers and ſundry Parliaments, as well in the Time of King Edw. 1. Edw. 3. Rich. 2. H. 4. and other noble Kings of this Realm, made ſundry Ordinances, Laws, Statutes and Proviſions, for the entire and ſure Conſervation of the Prerogatives, Liberties and Preheminences of the ſaid imperial Crown of this Realm, and of the Juriſdict. Spiritual and Temporal of the ſame, to keep it from the Annoyance as well of the See of Rome, as from the Authority of other foreign Potentates, attempting the Diminution or Violation thereof, as often and from Time to Time as any ſuch Annoyance or Attempt might be known or eſpied: And notwithſtanding the ſaid good Statutes and Ordinances made in the Time of the King's moſt noble Progenitors, in Preſervation of the Authority and Prerogative of the ſaid imperial Crown as aforeſaid: Yet nevertheleſs ſithence the Making of the ſaid good Statutes and Ordinances divers and ſundry Inconveniencies and Dangers not provided for plainly by the ſaid former Acts, Statutes and Ordinances, have riſen and ſprung by Reaſon of Appeals ſued out of this Realm

currerunt. Quandoquid' etiam Regis progenitores ſereniſſimi, regniq; proceres, & communitas, variis & diverſis parliamentis, temporibus Regis *E.* 1. *E.* 3. *R.* 2. & *H.* 4. & aliorum ſereniſſimorum hujus Regni regum, varias ordinationes, leges, ſtatuta & proviſiones ſanxerint, ad ſolidam & ſalutarem prærogativarum, libertatum, præheminentiarum præfatæ coronæ imperialis hujus Regni, & juriſdictionum ſpiritualium & temporalium ejuſdem conſervationem, ut defenderetur tam a detrimentis quæ a ſede Romana imminebant, quam ab authoritate aliorum principum exterorum, qui eandem imminuere aut violare machinarentur, quoties ſingulis temporibus ejuſmodi detrimenta aut machinationes proſpicerentur aut detegerentur; quamvis autem ſtatuta illa ſalutaria & ordinationes temporibus ſereniſſimorum progenitorum Regis, ad authoritatem & prærogativam præfatæ coronæ imperialis firmandam facta fuerint, ut jam antea dictum: Nihilominus ex quo illa facta fuerint, qumplurima incommoda & pericula non plane proviſa in ſuperioribus illis ſtatutis & ordinationibus pullularint per appellationes ad ſedem Romanam in cauſis teſtamentariis,

tariis, matrimonialibus, divortiis, jure decimarum, oblationibus & obventionibus, non ſolum ad perturbationem, vexationem, & impenſas Regiæ celſitudinis & quam plurimorum ejus ſubditorum & reſidentium in hoc Regno; verumetiam ad magnam protractionem & impeditionem in cauſis illis vere & brevi tempore decidendis: Quoniam qui ad Romanam curiam appellarunt, id plerumque fecerunt, ad juſtitiam protelandam; cumque tantum erat intervallum inter hoc regnum & Romam, ut neceſſariæ probationes ex certa cauſæ ſcientia tam perfecte haberi, aut teſtes tam recte examinari non poſſent, quam intra hoc regnum; uſque adeo, ut qui illis appellationibus divexati fuerint nullum plerumq; remedium ſuis malis invenerint. Unde Rex, regni proceres, & communitas perpendentes magnas enormitates, pericula, procraſtinationes & detrimenta, quæ tam ſuæ celſitudini, quam ſuis proceribus, ſubditis, & intra regnum ſuum reſidentibus, in præd' cauſis teſtamentariis, matrimonialibus, divortiis, decimis, oblationibus & obventionibus, indies exorirentur, Regio ſuo aſſenſu & dominorum ſpiritualium ac temporalium, nec non communitatis con-

to the See of Rome, in Cauſes teſtamentary, Cauſes of Matrimony and Divorces, Right of Tithes, Oblations and Obventions, not only to the great Inquietation, Vexation, Trouble, Coſts and Charges, of the King's Highneſs and many of his Subjects and Reſiants in this his Realm, but alſo to the great Delay and Let to the true and ſpeedy determination of the ſaid Cauſes: Foraſmuch as the Parties appealing to the ſaid Court of Rome, moſt commonly did the ſame for delay of Juſtice: And foraſmuch as the great Diſtance of Way was ſo far out of this Realm, ſo that the neceſſary Proofs nor the true Knowledge of the Cauſe could neither be ſo well known, or the Witneſſes there ſo well examin'd, as within this Realm: So that the Parties grieved by Means of the ſaid Appeals, were moſt Times without Remedy. In Conſideration thereof, the K. his Nobles and Commons, conſidering the great Enormities, Damages, long Delays and Hurts, that as well to his Highn. as to his noble Subjects, Commons, and Reſiants of this his Realm, in the ſaid Cauſes Teſtamentary, Cauſes of Matrimony and Divorces, Tithes, Oblations and Obventions, did daily enſue, did therefore by his Royal Aſſent, and by the Aſſent of the Lords Spiritual and Temporal, and the Commons

in

in that Parliament aſſembled, and by Authority of the ſame, enact, eſtabliſh, and ordain, that all Cauſes Teſtamentary, Cauſes of Matrimony, and Divorces, Rights of Tithes, Oblations, and Obventions, the Knowledge whereof by the Goodneſs of Princes of this Realm, and by the Laws and Cuſtoms of the ſame, appertained to the Spiritual Jurisdiction of this Realm, then already commenced, moved, depending, being, happening, or hereafter coming in Contention, Debate, or Queſtion within this Realm, or within any of the King's Dominions, or Marches of the ſame, or elſewhere, whether they concern the King his Heirs or Succeſſors, or any other Subjects or Reſiants within this Realm, of what Degree ſoever they be, ſhould be from thenceforth heard, examined, diſcuſſed, clearly, finally, and definitively adjudged and determined within the King's Juriſdiction and Authority, and not elſewhere, in ſuch Courts Spiritual and Temporal of the ſame, as the Natures, Conditions, and Qualities of the Caſes and Matters aforeſaid in Contention, or thereafter happening in Contention ſhould require, without having any Reſpect to any Cuſtom, Uſe, or Sufferance, in Hindera. Let, or Prejud. of the ſame, or to any other thing uſed or ſuffer'd to the contrary there-

This alſo is declaratory of the ancient Law, as it appeareth both by 9E.4.3, F. N. B. 44. and many other Caſes and Stat. aboveſaid.

ſenſu in pleno parliamento ſciverunt, ſanxerunt, & ſtatuerunt, quod omnes cauſæ teſtamentariæ, matrimoniales, divortia, jus decimarum, oblationum & obventionum, quorum cognitio ex beneficentia principum hujus regni, & ex ejuſdem legibus & conſuetudinibus ad ſpiritualem hujus regni juriſdictionem ſpectarunt, tunc exortæ & dependentes, vel exorituræ in poſterum, controverſæ aut controvertendæ in hoc regno, vel in ullis Regis Dominiis, aut eorundem limitibus vel alibi, ſive ad regem ipſum, ejus hæredes vel ſucceſſores vel quemvis alium ſubditorum, aut intra hoc Regnum reſidentium, cujuſcunque loci vel ordinis ſpectent, jam inde audiantur, examinentur, diſceptentur, clare, finaliter & definitive adjudicentur & determinentur intra Regis juriſdictionem & authoritatem nec alibi, in ejuſmodi curiis eccleſiaſticis & temporalibus ejuſdem, juxta cauſarum quæ ſunt controverſæ & controvertendæ naturam, conditiones & qualitates, nulla habita ratione cujuſcunque conſuetudinis aut tolerationis, vel rei in contrarium uſitatæ aut toleratæ in earundem obſtaculum, impedimentum, aut præjudicium, quocunque alio modo quibuſcunque perſonis quovis pacto;

pacto; quibuſcunque exteris inhibitionibus, appellationibus, reſtrictionibus, judiciis, vel ullis aliis proceſſibus vel impedimentis, cujuſcunque naturæ, nominis, qualitatis, fuerint, a ſede Romana, aut quibuſcunque curiis exteris aut orbis terrarum principibus, aut ex hoc regno aut Regis Dominiis, aut eorundem limitibus ad ſedem Romanam, vel ad alias quaſcunque curias exteras, aut principes, ad ejuſdem obſtaculum aut impedimentum, ullo modo non obſtantibus, ut ex eodem ſtatuto clare elucet.

Ex ſtatuto parliamentario anno 25 *Henrici* octavi, per Regem, dominos ſpirituales, temporales, ac communitatem in parliamento convenientes, declaratum eſt, quod neque Rex, ſui hæredes, ſucceſſores hujus regni Reges, neque ulli ſubditi hujus regni, aut aliorum ejus dominiorum quorumcunque jam inde peterent a pontifice Romano, vel ſede Romana, vel authoritate ejuſdem, vel alicujus prælati hujus regni, vel ab aliqua perſona ſive perſonis, qui inde authoritatem habent, aut prætendunt, venias, diſpenſationes, compoſitiones, facultates, conceſſiones, reſcripta, delegationes, aut alia inſtrumenta aut ſcripta cujuſ-

of, by any other Manner, Perſon or Perſons, in any Manner of wiſe: Any foreign Inhibitions, Appeals, Sentences, Summons, Citations, Suſpenſions, Interdictions, Excommunications, Reſtraints, Judgments, or any other Proceſs or Impediment, of what Natures, Names, Qualities or Conditions ſoever they be, from the See of Rome, or any other foreign Courts or Potentates of the World, or from and out of this Realm, or any other the King's Dominions or Marches of the ſame, to the See of Rome, or to any other foreign Courts or Potentates, to the Let or Impediment thereof, in any wiſe notwithſtanding, as by the ſaid Act appeareth.

By an Act of Parliament in 25 H. 8. It is declared by the K. the Lords Spiritual and Temporal, and the Commons in that Parl. aſſembled; that neither the K. his Heirs, nor Succeſſors King's of this Realm, nor any his Subjects of this Realm, nor of any other his Dominions, ſhould from thenceforth ſue to the ſaid Biſhop of Rome called the Pope, or to the See of Rome, or to any Perſon or Perſons having or pretending any Authority by the ſame, for Licences, Diſpenſations, Impoſitions, Faculties, Grants, Reſcripts, Delegacies, or any other Inſtruments, or Writings, of what Kind, Name, Nature, or Quality ſoever they

Stat 25 H. 8. c. 21. This was alſodeclaratory of the antient Law, as by that which hath been ſaid appeareth.

they be of, for any Cauſe or Matter, for the which any Licence, Diſpenſation, Compoſition, Faculty, Grant, Reſcript, Delegacy, Inſtrument, or other Writing theretofore had been uſed and accuſtomed to be had and obtained at the See of Rome, or by Authority thereof, or of any Prelate of this Realm: Nor for any Manner of other Licences, Diſpenſations, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, or any other Inſtruments or Writings, that in Cauſes of Neceſſity might lawfully be granted, without offending of the Holy Scripture and Laws of God, but that from thenceforth every ſuch Licence, Diſpenſation, Compoſition, Faculty, Grant, Reſcript, Delegacy, Inſtrument, and other Writing afore named and mentioned, neceſſary for the King, his Heirs and Succeſſors, and his and their People and ſubjects, upon due Examination of the Cauſes and Qualities of the Perſons procuring ſuch Diſpenſations, Licences, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, Inſtruments, or other Writings, ſhould be granted, had, and obtained from Time to Time within this his Realm, and other his Dominions, and not elſewhere, in Manner and Form following, and not otherwiſe, that is to ſay: The Archbiſhop of Canterbury, for the Time being, and

cunque generis, nominis, naturæ, aut qualitatis, ulla de cauſa vel re, pro qua ulla venia, diſpenſatio, compoſitio, facultas, conceſſio, reſcriptum, delegatio, inſtrumentum, aut aliud ſcriptum, quæ hactenus uſitata fuerant, & a ſede Romana impetrari conſueverant: Neque pro quibuſcunque aliis veniis, diſpenſationibus, compoſitionibus, facultatibus, conceſſionibus, Reſcriptis, delegationibus vel aliis quibuſcunque inſtrumentis aut ſcriptis, quæ neceſſitatis cauſa ex jure, ſine ſacrarum literarum aut legum divinarum præjudicio concedi poterant; ſed qd' jam inde quælibet ejuſmodi venia, diſpenſatio, compoſitio, facultas, conceſſio, reſcriptum, delegatio, inſtrumentum, aut alia ſcripta prænominata & memorata, Regi, ſuis hæredibus & ſucceſſoribus, ſubditiſque ſuis, examinatione debita cauſarum & qualitatum eorum, qui ejuſmodi diſpenſationes, venias, compoſitiones, facultates, conceſſiones, reſcripta, delegationes, inſtrumenta, vel alia ſcripta procurant, concederentur, haberentur, & impetrarentur deinceps intra hoc ſuum regnum & alia ſua dominia, & non alibi, juxta formam quæ hic ſubjicitur & non aliter, viz. Archiepiſcopus Cantaurienſis qui pro tempore fuerit, & ejus

ſucceſſores deinceps poteſtatem & authoritatem habeant, prout ipſis viſum fuerit, dandi, concedendi, & diſponendi, per inſtrumentum ſub ejuſdem archiepiſcopali ſigillo, Regi, & ejus hæredibus & ſucceſſoribus hujus regni Regibus, tam omnimodas ejuſm' licentias, venias, diſpenſationes, compoſitiones, facultates, conceſſiones, reſcripta, delegationes, inſtrumenta, & quævis alia ſcript' de cauſis ſacris ſcripturis, & divinis legibus non contradicentibus, quæ hactenus impetrari ſolita ſunt per Regem & ſereniſſimos progenitores, vel quemvis illorum ſubditum, a ſede Romana, vel a quacunque perſona, authoritate ejuſdem, necnon quaſlibet alias venias, diſpenſationes, facultates compoſitiones, conceſſiones, reſcripta, delegationes, inſtrumenta, & quævis alia ſcripta, quæ in ejuſmodi cauſis & rebus ſingulis ad Regis, ſuorum hæredum & ſucceſſorum honorem & ſecuritatem, hujuſque regni opulentiam & emolumentum ſint conſentanea & neceſſaria; ita tamen, quod præfatus archiepiſcopus aut ejus ſucceſſores, nullo modo ulla de cauſa aut re divini numinis legibus repugnante, aliquam diſpenſationem, veniam, reſcriptum, aut quodvis aliud ſcriptum prius me-

his Succeſſors, ſhould have Power and Authority from Time to Time by their Diſcretions, to give, grant, and diſpoſe by an Inſtrument under the Seal of the ſaid Archbiſhop, unto the K. and unto his Heirs and Succeſſors K.'s of this Realm, as well all Manner ſuch Licenſes, Diſpenſations, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, Inſtruments, and all other Writings, for Cauſes not being contrary or repugnant to the Holy Scriptures and Laws of God, as theretofore had been uſed, and accuſtomed to be had and obtained by the King, or any his moſt noble Progenitors, or any of his or their Subjects at the See of Rome, or any Perſon or Perſons by Authority of the ſame; and all other Licenſes, Diſpenſations, Faculties, Compoſitions, Grants, Reſcripts, Delegacies, Inſtruments, and other Writings, in, for, and upon all ſuch Cauſes and Matters as ſhould be convenient and neceſſary to be had for the Honour and Surety of the K. his Heirs and Succeſſors, and the Wealth and Profit of this his Realm; ſo that the ſaid Archb. or any his Succeſſors, in no manner wiſe ſhould grant any Diſpenſat. Licence, Reſcript, or any other Writing before rehearſed, for any Cauſe or Matter repugnant to the Law of Almighty God, as by the ſaid Act alſo appeareth. Q. Note.

If

If it be demanded what Canons, Conſtitutions, Ordinances, and Synodals provincial, are ſtill in force within this Realm; I anſwer that it is reſolved and enacted by Authority of Parliament, that ſuch as have been allowed by (*a*) general Conſent and Cuſtom within the Realm, and are not contrariant or repugnant to the Laws, Statutes, and Cuſtoms of the Realm, nor to the Damage or Hurt of the King's Prerogative Royal, are ſtill in force within this Realm, as the King's Eccleſiaſtical Laws of the ſame. Now, as Conſent and Cuſtom hath allow'd thoſe Canons, ſo no Doubt by general Conſent of the whole Realm, any of the ſame may be corrected, inlarged, explained, or abrogated. For Example, there is a Decree that all Clarks that have received any manner of Orders, greater or ſmaller, ſhould be exempt, pro cauſis criminalibus before the temporal Judges. This Decree never had any force within England: Firſt, for that it was never approved and allowed of by general Conſent within the Realm: Secondly, it was againſt the Laws of the Realm, as it doth appear by infinite Precedents: Thirdly, it was againſt the Prerogative and Sovereignty of the King, that any Subject within this Realm

(*a*) Co. Lit. 344. a.

This appeareth by the Reſolution of all the Judges in 7 H 8. Lib. Kelw. fol. 18. And this was long before any Act of Parliament was made againſt foreign Juriſdiction by King H. 8.

moratum concedet, ut ex eodem ſtatuto clariſſim' patet.

Si quis quærat, qui canones, conſtitutiones, ordinationes, & ſynodi provinciales vires in hoc regnum habeant; reſpondeo, Parliamentaria authoritate judicatum & ſancitum eſſe, qd' quæ generali conſenſu & conſuetud' intra hoc regnum approbantur & regni legibus, ſtatutis, & conſuetudin' non adverſantur, neq; regiæ prærogativæ fraudi ſunt, vim ſuam & virtutem intra hoc regnum habent, ut ejuſd' Regis leges eccleſiaſticæ. Cum autem, ut conſenſus & conſuetudo hos canones comprobaverint, ita proculdubio generali totius regni conſenſu quivis eorum canonum corrigi, adaugeri, explicari, aut abrogari poſſit. Verbi gratia, decretum extat, quod ſinguli clerici, qui ſacris ullo modo ſunt initiati, pro cauſis criminalibus coram judice temporali exempti eſſent. Hoc decretum nullas in Anglia vires unquam habuit. Primum, quia nunquam generali conſenſu in hoc regno acceptum & approbatum erat. Secundo, quod regni legibus adverſabatur, ut ex innumeris exemplis luce clarius eſt. Tertio, quod contra Regiam prærogativam & majeſtatem erat, quod aliquis ſubditus infra

hoc regnum legibus hujus regni non ſubjaceret.

Regnante Elizabetha.

STatuto Parliamento præfato (ex quo cauſa principalis tunc controverſa partim dependet) ſancito anno primo regni *Elizabethæ* declaratum eſt; quod cum regnante *Henrico* octavo variæ leges ſalutares, & ſtatuta lata & ſancita erant, tam ad extirpandam & penitus tollendam omnimodam uſurpatam & exteram poteſtatem & authoritatem ex hoc regno, & aliis ejus Dominiis & territoriis, quam ad reſtituendam & aduniendam antiquam juriſdictionem, authoritatem, ſuperioritatem, & præheminentiam hujus regni coronæ imperiali, quæ de jure ad eandem ſpectant & pertinent; unde ab anno 25. ejuſdem Regis *Henrici* octavi ſubditi hujus regni devotiſſimi, ordine & recte in officio continebantur, & quamplurimis magnis & intolerandis expenſis & moleſtiis liberati fuerint, quibus antea injuſte oppreſſi & conflictati fuerint, per poteſtatem & authoritatem exteram eo uſq; uſurpatam; utque omnimoda uſurpata & extera poteſtas, authoritaſque ſpiritualis & temporalis, in perpetuum exter-

ſhould not be ſubject to the Laws of this Realm.

In the Reign of Q. *Elizabeth.*

BY the ſaid Act of Parliament (whereupon the principal Caſe then in Queſtion partly dependeth) made in the firſt Year of the Reign of the late Queen Elizabeth, it is declared; That where in the Time of the Reign of K. Henry the Eighth, divers good Laws and Statutes were made and eſtabliſhed, as well for the utter Extinguiſhment and putting away of all uſurped foreign Powers and Authorities of this Realm, and other her Dominions and Countries, as alſo for the Reſtoring and Uniting to the imperial Crown of this Realm, the ancient Juriſdiction, Authorities, Superiorities, and Preheminences, to the ſame of Right belonging and appertaining; by Reaſon whereof her moſt humble Subjects, from the 25th Year of the ſaid King Henry the Eighth, were continually kept in good Order, and were diſburdened of divers great and intollerable Charges and Vexations, before that Time unlawfully taken, and exacted by ſuch foreign Power and Authority, as before that was uſurped; and to the Intent, that all uſurped and foreign Power and Authority, Spiritual and Temporal, might

The Statute of 1. of Queen Elizabeth.

for ever be clearly extinguiſhed, and never be uſed or obeyed within this Realm, or any other her Dominions or Countries; it was by the Authority of that Parliament enacted, That no foreign Prince, Perſon, Prelate, State or Potentate, Spiritual or Temporal, ſhould at any Time after the laſt Day of that Seſſion of Parliament uſe, enjoy or exerciſe any Manner of Power, Juriſdiction, Superiority, Authority, Preheminence, or Privilege Spiritual or Eccleſiaſtical within this Realm, or within any other the Q.'s Dominions or Countries, that then were, or hereafter ſhould be, but from thenceforth the ſame ſhould be clearly aboliſhed out of this Realm, and all other her Dominions for ever; any Statute Ordinance, Cuſtoms, Conſtitutions, or any other Matter or Cauſe whatſoever to the Contrary in any wiſe notwithſtanding. And it was then alſo eſtabliſhed and enacted by the Authority of that Parliament, that ſuch Juriſdictions, Privileges, Superiorities, and Preheminences, Spiritual or Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical Power or Authority, had heretofore been, or might lawfully be exerciſed or uſed for the Viſitation of the Eccleſiaſtical State and Perſons, and for Reformation, Order, and Correction of the ſame, and of all

minaretur, & nunquam in hoc regno vel aliis ejus Dominiis aut territoris ſit in uſu, aut obſervetur; authoritate ejuſdem Parliamenti ſcitum & ſancitum erat: Quod nullus exterus princeps, prælatus, ſtatus vel Dynaſta ſpiritualis aut temporalis, a poſtremo die ſeſſionis hujus Parliamenti, ulla poteſtate & juriſdictione, ſuperioritate, authoritate, præheminentia, aut Privilegio ſpirituali aut Eccleſiaſtico intra hoc regnum, aut alia Reginæ Dominia aut territoria, unquam uteretur, frueretur, aut eadem exerceret; ſed qd' deinceps eadem in perpetuum ex hoc regno & aliis ejus Dominiis in æternum exterminarentur, quocunque ſtatuto, ordinatione, conſuetudine, conſtitutione, aut re quavis alia non obſtante. Eadem etiam authoritate Parliamentaria ſcitum & ſancitum erat, qd' ejuſmodi juriſdictiones, privilegia, ſuperioritates, præheminentiæ Spirituales vel Eccleſiaſticæ, quæ per aliquam Spiritualem vel Eccleſiaſticam authoritatem hactenus in uſu eſſent, vel de jure eſſe poſſent, ad viſitationem Eccleſiaſtici ſtatus Spiritualium, atque ad ejuſdem etiam ſtatus & ejuſmodi perſonarum, atque etiam omnium error', Hereſium, Schiſmatum,

tum, abuſuum, offenſarum, contemptuum, & enormitatum reformationem, coertionem & correctionem, imperiali hujus regni coronæ adunirentur & adnecterentur. Quodque Regina, hæredes & ſucceſſores hujus Regni Reges & Reginæ, virtute hujus ſtatuti plenariam poteſtatem & authoritatem haberent per literas patentes ſub magno Angliæ ſigillo, aſſignandi, nominandi, & authoritate inſtruendi, quando & quoties & quamdiu Reginæ, hæredibus ſuis vel hujus regni ſucceſſoribus viſum fuit, ejuſmodi perſonam aut perſonas nativas ad exercendum & exequendum ſub præd' Regina, hæredibus ſuis vel ſucceſſoribus, omnimodas juriſdictiones, privilegia & præheminentias quovis modo ad aliquam Spiritualem vel Eccleſiaſticam juriſdictionem pertinentes intra hæc Angliæ & Hiberniæ Regna, aut quævis alia ipſius Dominia vel territoria: Atq; etiam ad viſitand', reformandum, ordinandum, corrigendum, & emendandum omnes errores, hæreſes, ſchiſmata, abuſus, offenſas, contemptus, & enormitates quaſcunq; quæ Spirituali vel Eccleſiaſtica aliqua poteſtate, authoritate vel juriſdictione, reformari, ordinari, corrigi, coerceri, vel emandari legitime

Manner of Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts, and Enormities, ſhould for ever by Authority of that Parliament, be united and annexed to the imperial Crown of this Realm. And that the Queen, her Heirs and Succeſſors, Kings or Queens of this Realm, ſhould have full Power and Authoriy by Virtue of that Act, by Letters Patent under the Great Seal of *Eng.* to aſſign, name, and authoriſe, when and as often as the Queen, her Heirs or Succeſſors ſhould think meet and convenient, and for ſuch and ſo long Time as ſhould pleaſe the Queen, her Heirs or Succeſſors, ſuch Perſon or Perſons being natural born Subjects to the Queen, her Heirs or Succeſſors, as the ſaid Queen her Heirs or Succeſſors ſhould think meet, to exerciſe, uſe, occupy, and execute, under the ſaid Queen her Heirs and Succeſſors, all manner of Juriſdictions, Privileges, and Preheminencies, in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within theſe Realms of *England* and *Ireland*, or any other her Dominions or Countries, and to viſit, reform, redreſs, order, correct and amend, all ſuch Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities whatſoever, which by any manner Spiritual or

Vide ante

Eccleſiaſtical Power, Authority, or Juriſdiction, could or might lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended, to the Pleaſure of Almighty God, the Encreaſe of Virtue, and the Conſervation of the Peace, and the Unity of this Realm: And that ſuch Perſon or Perſons ſo to be named, aſſigned, authoriſed and appointed by the ſaid Queen, her Heirs or Succeſſors, after the ſaid Letters Patent, to him or them made and delivered as is aforeſaid, ſhould have full Power and Authority by Virtue of that Act, and of the ſaid Letters Patent under the ſaid Q. her Heirs or Succeſſors, to exerciſe, uſe, and execute all the Premiſſes according to the Tenor and Effect of the ſaid Letters Patent, any Matter or Cauſe to the Contrary in any wiſe notwithſtanding, as by the ſaid Act alſo appeareth.

12 Eliz. Reg. Dyer.

It was adjudged in the Court of Com. Pleas, by Sir James Dyer, Weſton, and the whole Court, that a Dean or any other Eccleſiaſtical Perſon may reſign, to the K. (as (a) divers did to K. Ed. VI.) for that he had the Authority of the ſupream Ordinary.

(a) 2 Bulſtr. 4.

From the 1 until the 11 Year of the late Q. Eliz. Reign, no Perſon of what Perſuaſion of Chriſt. Religion ſoever, at any Time refuſed to come to the publick divine ſervice, celebra-

poſſint, ad divini numinis gloriam, virtutis incrementum, & pacis unitatiſq; in hoc regno conſervationem. Porro qd' ejuſmodi perſona vel perſonæ nominandæ, aſſignandæ, authoritate inſtruendæ & inſtituendæ per præfatam reginam, hæredes vel ſucceſſores, poſtquam præd' literæ patentes ipſi fuerint confectæ, & ipſi vel ipſis in manus traditæ, ut jam dictum eſt, virtute ejuſdem ſtatuti & literarum patentium, plenariam poteſtatem & authoritatem haberent exercendi & exequendi omnia præmiſſa ſub prædict' Regina, hæredibus vel ſucceſſoribus, juxta prædictarum literarum patentium tenorem & ſententiam, quavis re aut cauſa in contrarium non obſtante, ut ex eodem ſtatuto eſt etiam perſpicuum.

De communium placitorum tribunali per Dominum *Jacob. Dyer*, *Weſton*, & univerſam curiam pronounciatum erat: Qd' decanus vel quævis alia perſona Eccleſiaſtica Regi poſſit reſignare, (ut nonnulli Regi Edwardo ſexto reſignarunt) eo quod ſupremi Ordinarii poteſtatem habuerit.

Ab anno Regni Reginæ Elizab' primo uſq; ad undecimum nemo quacunq; fuerit de Chriſtiana Religione perſuaſione, ad rem Divi-

nam in Anglicana Eccleſia publice celebratam, & in ſacroſancto & certiſſimo Dei verbo fundatam, & publica authoritate intra hoc Regnum confirmatam accedere recuſavit. Poſtquam autem *Pii Quinti* Bulla contra prædict' Reginam, anno Regni undecimo publicata fuerat, continens (inter alia quæ nimis longum eſt pro noſtro inſtituto jam percurrere) hæc ipſiſſima verba: *Pius Epiſcopus, ſervus ſervorum Dei, &c. Miſſæ ſacraficium, preces, jejunia, ciborum delectum, cælibatum, illa Regina* Elizabetha *abolevit; eadem occupato Regno ſupremi Eccleſiæ Capitis locum in omni Anglia, ejuſque præcipuam authoritatem atque juriſdictionem ſibi uſurpans, Regnum ipſum rurſus in miſerum exitium revocavit:* " *Ad quam* " *velut ad aſylum omnium* " *infeſtiſſimi perfugium in-* " *venerunt, &c. Declara-* " *mus præd'* Elizabetham " *eiq; adhærentes, in præd'* " *Anathematis ſententiam* " *incurriſſe: Quin etiam* " *ipſam prætenſo Regni* " *præd' jure, necnon omni* " *& quocunque Dominio,* " *dignitate, previlegioque* " *privatam: Præcipimus* " *& interdicimus univerſis* " *& ſingulis proceribus,* " *ſubditis, & populis, & a-* " *liis præd', ne illi ejuſve* " *monitis, mandatis, & le-* " *gibus audeant obedire;* " *qui ſecus egerint eos ſimi-* " *li Anathematis ſententiæ*

ted in the Church of England, being evidently grounded upon the ſacred and infallible Word of Almighty God, and eſtabliſhed by publick Authority within this Realm: But after the Bull of Pius Quintus was publiſhed againſt her Majeſty in the 11 Year of her Reign, containing (amongſt other Things too long to be repeated for this purpoſe) in theſe Words: *Pius* Biſhop, Servant of God's Servants, *&c.* She (Queen *Elizabeth*) hath clean put away the Sacrifice of the Maſs, Prayers, Faſtings, Choice or Difference of Meats, and ſingle Life: She poſſeſſing the Kingdom, and by uſurping the Place of the ſupream Head of the Church in all *England*, and the chief Authority and Juriſdiction of the ſame, hath again brought the ſaid Realm into miſerable Deſtruction. Unto her all ſuch as are the Worſt of the People reſort, and are by her received into ſafe Protection, *&c.* We make it known, that the ſaid *Elizab.* and as many as ſtand on her ſide in the Matter above named, have run into the Danger of our Curſe: We make it alſo known, that we have deprived her from that Right ſhe pretended to have in the Kingdom aforeſaid, and alſo from all and every her Authority, Dignity and Privilege. We charge and forbid all and every the Nobles and Subjects, and People, and others aforeſaid, that they be

Pſalm 109. 28. Though they Curſe, yet bleſs thou (O Lord) and let them be confounded that riſe up againſt me, but let thy Servant Rejoice.

Which was the Prayer her Majeſty made when this Bull was publiſhed againſt her.

not ſo hardy as to obey her or her Admonitions, Commandments, or Laws upon Pain of the like Accurſe upon them. We Pronounce that all, whoſoever by any Occaſion have taken their Oath, unto her, are for ever diſcharged of ſuch their Oath, and alſo from all Fealty and Service, due to her by Reaſon of her Government, &c. As by the ſaid Bull more at large appeareth. After this Bull, all they that depended on the Pope obeyed the Bull, diſobeyed their gracious and natural Sovereign, and upon this Occaſion refuſed to come to the Church. The publiſhing of this Bull by a Subject againſt his Sovereign (as appeareth by that which hath been oftentimes ſaid) was Treaſon in the higheſt Degree, by the ancient Com. Laws of Engl. For if it were Treaſon to publiſh a Bull of Excommunication within this Realm againſt a Subject thereof, as it was adjudged in the Reign of K. Ed. I. a fortiori it is Treaſon in the higheſt Degree to publiſh ſuch a Bull againſt the Sovereign and Monarch her ſelf. After this Bull many Bulls of Abſolution and Reconciliation to the Church of Rome were publiſhed and diſperſed amongſt her Majeſty's Subjects, to withdraw them from their natural Loyalty and Allegiance to their Sovereign; whereupon no ſmall Inconveniencies (as

" *innodamus: Omnes qui illi*
" *quomodocunq; juraverunt*
" *ajuramento hujuſmodi, ac*
" *omni prorſus Dom' fide-*
" *litatis & obſequii debito*
" *perpetuo abſolutos decla-*
" *ramus, ut ex ipſa Bulla*
" *plenius videre eſt.*" Hac Bulla publicata, omnes qui Pontifici Romano adhæſerunt, Bullæ obtemperarunt, obedientiam erga principem benigniſſimam, & nativam Dominam, hac arrepta occaſione abjecerunt, ad Eccleſiam Anglicanam accedere recuſarunt. Publicatio hujus Bullæ per ſubditum contra ſuum principem, ut manifeſtum & teſtatum eſt ex illis, quæ ſubinde jam dicta fuerunt, crimen erat Majeſtatis læſæ & imminutæ juxta antiquas communes Angliæ leges: Etenim ſi læſæ Majeſtatis crimen erat, excommunicationis Bullam in hoc Regno contra ſubditum publicare, ut regnante *Edwardo Primo* adjudicatum fuerit; a fortiori Bullam contra Regem & ipſum Monarcham publicare, Majeſtatis læſæ in ſummo gradu crimen eſt. Poſt hanc Bullam publicatam, plurimæ abſolutionis, & ad Romanam Eccleſiam reconciliationis, Bullæ publicatæ & diſperſæ erant inter Majeſtatis ſuæ ſubditos, ad eos a fidelitatis & obſequii debito abſtrahendos, unde cum magna mala & incommoda (ut

con-

5 Inſt. 101.

conſtat) promanârint: In Parliamento anno decimo tertio ejuſdem Reginæ habito, declaratum erat per univerſos Regni ordines: Quod plurimi ſeditioſi & ſcelerati, machinantes & molientes ſeditioſe & ſcelerate non ſolum hoc Regnum & imperialem ejuſdem Coronam (quæ revera ex ſe ſunt liberrima) ſub jugum exteræ, uſurpatæ & injuſtæ juriſdictionis, præheminentiæ, & authoritatis a Romana ſede ſibi arrogatæ redigere: Verum etiam ſubditorum animos a ſuo Principe, & a debita obſervantia abalienare, ſeditionemq; turbulentam & rebellionem intra hoc Regnum concitare, nuper procurarunt & impetrarunt ſibi a Romano Pontifice, & ejus ſede, diverſas Bullas, eo conſilio ut eos abſolverent & reconciliarent, quotquot parati eſſent debitam erga Principem obedientiam projicere, & ſemetipſos ementitæ, injuſtæ & uſurpatæ illius authoritatis jugo ſubjicere. Sub obtentu etiam earundem Bullarum & reſcriptorum illi clandeſtine & ſeditioſiſſime in illis Regni hujus partibus, ubi populus minus inſtructus, infirmiſſimus, ſimpliciſſimus, & imperitiſſimus erat, atque inde ſuum officium erga Deum & principem minus intellexit, ſubdolis nefariis & clan-

hereafter appeareth followed: And therefore at a Parliament holden in the xiii Year of her Reign, it was declared by the whole Body of the Realm: That divers ſeditious and very ill diſpoſed People, minding very ſeditiouſly and unnaturally, not only to bring this Realm, and the imperial Crown thereof (being in very Deed of it ſelf moſt free) again into the Thraldom and Subjection of the foreign uſurped and unlawful Juriſdiction, Preheminence, and Authority claimed by the ſaid See of *Rome*, but alſo to eſtrange and alienate the Minds and Hearts of ſundry the Queen's Subjects, from their dutiful Obedience, and to raiſe and ſtir Sedition and Rebellion within this Realm, did then lately procure and obtain to themſelves, from the ſaid Biſhop of *Rome*, and his ſaid See, divers Bulls and Writings, the Effect whereof had been, and then was, to abſolve and reconcile all thoſe that would be contented to forſake their due Obedience to the Queen, and to yield and ſubject themſelves to the ſaid fained, unlawful and uſurped Authority: And by Colour of the ſaid Bulls and Writings, the ſaid Perſons very ſecretly and moſt ſeditiouſly in ſuch Parts of this Realm, where the People for want of good Inſtruction were moſt weak, ſimple and ignorant, and thereby furtheſt

The Statute of 13 Eliz.

from the good Underſtanding of their Duties towards God and the Queen, did by their lewd and ſubtil Practiſes and Perſuaſions ſo far forth work, that ſundry ſimple and ignorant Perſons had been contented to be reconciled to the ſaid uſurped Authority of the See of *Rome*, and to take Abſolution at the Hands of the ſaid naughty and ſubtil Practiſers, whereby did grow great Diſobedience and Boldneſs in many not only to withdraw and abſent themſelves from all Divine Service, then moſt godly ſet forth and uſed within this Realm; but alſo have thought themſelves diſcharged of and from all Obedience, Duty and Allegiance to her Majeſty; whereby a moſt wicked and unnatural Rebellion did enſue, and to the further Danger of this Realm, was thereafter very like to be renewed, if the ungodly and wicked Attempts in that behalf were not by Severity of Laws in Time reſtrained and bridled: For Remedy and Redreſs whereof, and to prevent the great Miſchiefs and Inconveniences that thereby might enſue; **It was enacted by the Queen, with the Aſſent of the Lords Spiritual and Temporal, and the Commons in that Parliament aſſembled, and by the Authority of the ſame; That if any Perſon or Perſons, after the firſt Day**

Note the Fruits of the Bull.

1.

The Parts of the Act.

deſtinis machinationibus & perſuaſionibus eo uſq; proceſſerunt, ut nonnulli ſimplices & imperiti prædictæ uſurpatæ authoritati ſedis Romanæ ſeſe reconciliari, & a nefariis illis & ſubdolis machinatoribus abſolvi voluerint; unde magna inobedientia & audacia in multis adeo prorupit, ut non ſolum a Divino cultu religioſe inſtituto, & in hoc Regno uſitato abeſſent; verumetiam ſe omni obedientia, obſequio, & fide erga Principem ſolutos exiſtimarint, & hinc ſeditio nefaria & rebellio concitata fuit, & ad majus hujus Regni diſcrimen poſtea (ut probabile eſt) concitanda eſſet, niſi nefarii illi conatus legum ſeveritate opportune cohibiti fuiſſent: Quibus incommodis & malis inde emergentibus ut provideretur, & remedium adhiberetur, per Reginam cum aſſenſu Dominorum Spiritualium & Temporalium, necnon Communitatis in Parliamento, & ejuſdem authoritate ſancitum eſt; quod ſi quis a primo die Julii proxime ſubſequente in quocunque hujus Regni loco, & Reginæ Dominiis, uteretur aut exequeretur aliquam ejuſmodi Bullam, reſcriptum, vel inſtrumentum abſolutionis vel reconciliationis, ſcripto vel typis

typis impreſſa, antea impetrata, & poſtea impetranda a Pontifice Romano, ejus ſucceſſoribus, vel a quibuſcunque aliis, qui authoritatem a Pontifice Romano, ejus prædeceſſoribus, vel ſucceſſoribus, vel ſede Romana, habent, vel ſibi aſſumunt; Vel ſi quis a primo illo die Julii ſub prætextu alicujus ejuſmodi bullæ, reſcripti, inſtrumenti, aut authoritatis, aliquem abſolvere, aut reconciliare ſuſceperit; vel concedere aut promittere alicui in hoc regno, aut aliis Reginæ Dominiis, ullam ejuſmodi abſolutionem vel reconciliationem, loquendo, prædicando, docendo, ſcribendo, vel quovis facto aperto; Vel ſi quis in hoc regno, vel aliis Reginæ Dominiis, a primo illo die Julii aliquam ejuſmodi abſolutionem vel reconciliationem ſponte acceperit: Vel ſi quis impetraverit a poſtremo die parliamenti anno primo ejus regni habiti, vel a primo illo die Julii impetrabit a Pontifice Romano, vel ejus ſucceſſoribus, aut ſede Romana, aliquam bullam, ſcriptum, inſtrumentum ſcriptum, vel typis impreſſum, de re vel cauſa quacunq; vel aliquam ejuſmodi bullam, reſcriptum, vel inſtrumentum, ullo modo publicaverit, qd' omnia & ſingula ejuſmodi

of July then next coming, ſhould uſe or put in ure in any Place within this Realm, or in any the Q.'s Dominions, any ſuch Bull, Writing, or Inſtrument, written or printed of Abſolution or Reconciliation at any Time theretofore obtained and gotten, or at any Time thereafter to be obtained or gotten from the ſaid Bp. of Rome, or any his Succeſſors, or from any other Perſon or Perſons, authoriſed or claiming Authority, by or from the ſaid Bp. of Rome, his Predeceſſors or Succeſſ. or See of Rome: Or if any 2.
Perſon or Perſons, after the ſaid firſt Day of July, ſhould take upon him or them by Colour of any ſuch Bull, Writing, Inſtrum. or Authoz. to abſolve or reconcile any Perſon or Perſons, or to grant or promiſe to any Perſon or Perſons, within this Realm, or any other the Q.'s Domin. any ſuch Abſolut. or Reconciliat. by any Speech, Preaching, Teaching, Writing, or any 3.
other open Deed; Or if any other Perſon or Perſons within this Realm, or any the Q.'s Dominions, after the ſaid firſt Day of July ſhould willingly receive and take any ſuch abſolution or Reconciliation: Or elſe if any Perſon or Perſons had obtained or gotten ſithence the laſt 4.
Day of the Parliament holden in the firſt Year of her Reign, or after the ſaid firſt Day of July ſhould obtain

or

or get from the ſaid By. of Rome, or any his Succeſſors, or See of Rome, any Manner of Bull, Writing, or Inſtrument, written or printed, containing any Thing, Matter or
5. Cauſe whatſoever. Or ſhould publiſh, or by any Way or Means put in ure any ſuch Bull, Writing, or Inſtrument; That then all and every ſuch Act or Acts, Offence and Offences, ſhould be deemed and adjudged by the Authority of the ſaid Act to be High Treaſon, and the Offender and Offenders therein, their Procurers, Abettors and Counſellers to the Fact and committing of the ſaid Offence or Offences, ſhould be deemed and adjudged High Traitors to the Q. and the Realm; and being thereof lawfully indicted and attainted, according to the Courſe of the Laws of this Realm, ſhould ſuffer Pains of Death; and alſo loſe and forfeit all their Lands, Tenements, Hereditaments, Goods and Chattels, as in Caſes of High Treaſon by the Laws of this Realm ought to be loſt and forfeited, as by the ſaid Act appeareth.

And albeit many of her Subjects, after the ſaid Bull of Pius Quintus, adhering to the Pope, did renounce their former Obedience to the Q. in reſpect of that Bull, yet all this time no Law was either made or attempted againſt them for their Recuſancy, tho' it were grounded upon ſo diſloyal a Cauſe.

facta & delicta, authoritate ejuſdem ſtatuti, crimen læſæ Majeſtatis habeantur & adjudicentur. Quodque, qui in his deliquerint, & eorum procuratores, fautores, & conſultores in his factis, & delictis, læſæ Majeſtatis rei contra Reginam & regnum habeantur & adjudicentur; atque inde legitime accuſati & condemnati, juxta legum hujus regni præſcriptum, extremo ſupplicio afficiantur; terræ, tenementa, hæreditamenta, bona & facultates in fiſcum redigantur, ut in cauſis læſæ Majeſtatis per leges hujus regni fieri ſolet, ut ex eodem ſtatuto liquido apparet.

Quamvis autem ex hac *Pii Quinti* bulla, quamplurimi ſubditi Pontifici Romano adhærentes priſtinam obedientiam erga Reginam reliquerint, nulla tamen lex lata aut rogata fuit contra eos de recuſatione, quamvis illa tam injuſtæ cauſæ inniteretur. Cum autem Statuto parli-

parliamentario declaratum eſſet, hoc brutum bullarum fulmen tot & tanta pericula Reipublicæ intuliſſe, in earum loco Jeſuitæ, & Sacrifici Romanenſes huc ſunt miſſi, qui latitantes in animos quamplurimorum imperitorum ſubditorum hujus regni immurmurarunt & inſtillarunt, quod Pontifex Romanus authoritatem Reges & Principes excommunicandi & abdicandi habeat; quod ille Reginam excommunicâſſet, regno abdicâſſet, ſubditoſque omnes fidelitatis & obſequii vinculo abſolviſſet; & proinde nec ipſi nec ejus mandatis aut legibus ſub pœna anathematis obtemperandum. Hoc per antiquas Angliæ leges crimen erat Majeſtatis læſæ in ſummo gradu: Et inde *Campianus*, *Sherwinus*, & plures alii Sacerdotes Romanenſes apprehenſi, & confeſſi quod in Angliam venerint ad Cauſam Catholicam Romanam firmandam cum opus eſſet, anno prædictæ Reginæ 21 per antiquas communes Angliæ leges fuerunt in queſtionem vocati, accuſati, auditi, condemnati, & extremo ſupplicio affecti, ob crimen læſæ majeſtatis, contra fidem quam ſuo Principi debeant. Nec adhuc aliquod ſtatutum parliamentarium contra Recuſantes, Jeſuitas, aut

Now that theſe ſpeechleſs Bulls were declared by Act of Parliam. to be ſo dangerous; then in place of them Jeſuits and Romiſh Prieſts were ſent over, who in ſecret Corners whiſpered and infuſed into the Hearts of many of the unlearned Subjects of this Realm, that the Pope had Power to excommunicate and depoſe Kings and Princes; that he had excommunicated the late Q. deprived her of her Kingdom, and diſcharged all her Subjects of their Oath, Duties and Allegiance to her; And therefore they ought not to obey her, or any of her Commandments or Laws, under pain of the Pope's Curſe. This was High Treaſon by the antient Laws of England; And thereupon Campion, Sherwin, and many other Romiſh Prieſts being apprehended, and confeſſing that they came into England to make a Party for the Catholick Cauſe when need ſhould require, were in the 21 Year of the ſaid laid Q.'s Reign, by the antient Common Laws of England, indicted, arrained, tried, adjudged, and executed, for High Treaſon againſt their natural Allegiance which they ought their Leige Sovereign. But all this Time there was no Act of Parliam. made either againſt Recuſants, or Jeſuits, or Prieſts, her Majeſty ſtill deſiring and expecting there Conver-

Converſion, and that by Clemency and Mildneſs they might be reclaimed to their former Obedience and Conformity before the ſaid Bull. After Prieſts and Jeſuits were puniſhed by Sentence of Law, according to their Demerits, then great Numbers of ſlanderous and ſeditious Books (libri falſidici) againſt her Majeſty and the State were diſperſed and ſcattered within this Realm, tending to the inciting and ſtirring of the Subjects to Inſurrection and Rebellion.

The Statute of Anno 23 Reg. Eliz.

Her Majeſty in open Parliament, having with the Lords Spiritual, Temporal, and Commons, mature Conſideration of ſo weighty and important Cauſes, in the 23 Year of her Reign made two ſeveral Laws: One againſt the Makers and Publiſhers of ſeditious Books, ordaining that Offence to be Felony: Another againſt Recuſants, inflicting the Penalty of twenty Pounds the Month for their Recuſancy: And yet upon their Submiſſion according to the Act, to be thereof freely and abſolutely diſcharged: (a mild and merciful Law, conſidering their former Conformity, and the Cauſe of their Revolt:) But after theſe Jeſuits and Romiſh Prieſts coming daily into and ſwarming within the Realm, inſtilling ſtill this Poiſon into the Subjects Hearts, that by Rea-

Sacerdotes ſancitum erat, cum ſereniſſima Regina nihil magis in votis habuit, quam ut converterentur, & ad priſtinam obedientiam, quam ante illam Bullam emiſſam præſtiterant, clementia & lenitate revocarentur. Poſtea autem in Sacerdotes illos & Jeſuitas merito legis ſententia animadverſum erat; inde famoſi & ſeditioſi libelli, (*libri falſidici*) contra Regiam Majeſtat' & Statum editi in hoc reg', & diſperſi erant, ad tumultum conflandum, & ſeditionem concitandum.

Regina in pleno parliamento, matura diliberatione habita cum Dominis Spiritualibus & Temporalibus, de rebus tantis tantique momenti, anno 23 regni duo ſanxit ſtatuta: Alterum contra authores & divulgatores ſeditioſorum librorum, feloniæ pœnam illis infligens: Alterum contra Recuſantes viginti librarum mulctam in ſingulos menſes pro recuſatione imponens, nihilominus ſi ſe ſubmiſerint juxta ſtatutum illud, inde eſſe abſolutos & liberatos: (mitis ſane & benigna lex, ſi ad priſtinam conformitatem & defectionis eorum cauſam reſpiciamus:) Poſtea autem Jeſuitæ & Sacerdotes Romanenſes indies in hoc regnum influentes, & in animos homi-

hominum hoc venenum infundentes, quod per illam *Pii Quinti* bullam Regina fuerat excommunicata, regno abdicata, ſubditiq; ſui omni erga ipſam fide & obſequio exempti, omne ſaxum moverant, ut ipſos a fide qua Regiæ Majeſtati erant obſtricti abſtraherent, & Eccleſiæ Romanæ reconciliarent. Hinc anno regni ſui 27. parliamentaria authoritate ſtatuit, crimen eſſe læſæ Majeſtatis, ſi quis Jeſuita vel Sacerdos Romanenſis nativus hujus regni ſubditus ſacris Romanis initiatus, aut in Jeſuitarum ſocietatem admiſſus jam inde a regni ſui initio, Dominia ſua adiret, eo concilio ut ipſos inde arceret, ne ſubditos perfidis illis & pernitioſis perſuaſionibus & machinationibus, ut jam dictum eſt, contaminarent, quæ proculdubio læſæ Majeſtatis in ſummo gradu erant crimina per antiquas communes Angliæ leges: Nec quis ſane Regum Angliæ animo erecto, ex quo hæc Monarchia primum firmata fuerit, eorum vitæ (potiſſimum ſi nativi ſubditi erant) peperciſſet, qui ſubditis perſuaſiſſet illum de jure non fuiſſe Regem, molituſq; fuiſſet intra hoc regnum eos a fide & obſequio erga Regem ſuum abducere, qd' per antiquas

ſon of the ſaid Bull of Pius 5. her Majeſty was excommunicated, deprived of her Kingdom, and that her Subjects were diſcharged of all Obedience to her, and by all Means endeavoured to withdraw them from their Duty and Allegiance to her Majeſty, and to reconcile them to the Church of Rome. In the 27 Year of her Reign, by Authority of Parliam. her Majeſty made it Treaſon for any Jeſuit or Romiſh Prieſt being her natural-born Subject, and made a Romiſh Prieſt or Jeſuit ſithence the Beginning of her Reign, to come into any of her Dominions, intending thereby to keep them out of the ſame, to the End that they ſhould not infect any other Subjects with ſuch treaſonable and damnable Perſuaſions and Practiſes, as are aforeſaid, which without Controverſy were High Treaſon by the ancient Common Laws of England: Neither would ever any magnanimous King of England, ſithence the firſt Eſtabliſhment of this Monarchy, have ſuffered any (eſpecially being his own natural-born Subjects) to live, that perſuaded his Subjects that he was no lawful King, and practiſed with them (within the Heart of this Realm) to withdraw them from their Allegiance, and Loyalty to their Sovereign, the ſame

The Statute de Anno 27 Eliz. Reginæ. 3 Inſt. 10.

ſame being crimen læſæ Majeſtatis by the ancient Laws of this Realm.

By this and by all the Records of the Indictments it appeareth, that theſe Jeſuits and Prieſts, are not condemned and executed for their Prieſthood and Profeſſion, but for their treaſonable and damnable Perſuaſions and Practices againſt the Crowns and Dignities of Monarchs, and abſolute Princes, who hold their Kingdoms and Dominions by lawful Succeſſion, and by inherent Birth-right and Deſcent of Inheritance, (according to the fundamental Laws of this Realm) immediately of Almighty God, and are not Tenants of their Kingdoms (as they would have it) at the Will and Pleaſure of any foreign Potentate whatſoever.

Now albeit the Proceedings and Proceſs in the eccleſiaſtical Courts be in the Name of the Biſhops, &c. It followeth not therefore, that either the Court is not the King's, or the Law whereby they proceed is not the (*a*) King's Law: For taking one Example for many, every Leet or View of Frank-pledge holden by a Subject, is kept in the (*b*) Lord's Name, and yet it is the King's Court, and all the Proceedings therein are directed by the King's Laws, and many Subjects in Engl. have

(*a*) Cawley 142.

(*b*) Cawley 142.

hujus regni leges crimen erat læſæ Majeſtatis.

Hinc ex actis publicis, in quæ eorum accuſationes relatæ ſunt, luce clarius eſt, quod Jeſuitæ & Sacerdotes illi non ſunt condemnati & ſupplicio affecti, eo quod ſint Sacerdotes, & contrariam religionem profeſſi, ſed quod proditoriis & execrandis perſuaſionibus & machinationibus moliti ſint contra Coronam & Majeſtatem Monarcharum, & Principum abſolutiſſimorum, qui ſua Regna & Dominia immediate a ſummo Deo legitima ſucceſſione, & jure avito atq; hæreditario, juxta leges fundamentales tenent & non (ut ipſi ſomniant) ex alterius cujuſcunq; Principis exteri nutu & arbitrio.

Quamvis autem procedendi formulæ & proceſſus in Curiis Eccleſiaſticis ſint ſub Epiſcoporum, &c. nominibus; non igitur ſequitur Curias illas non eſſe Regis, vel legem juxta quam procedunt non eſſe Regis legem: Sit hoc exemplum inſtar multorum; quilibet viſus Franc' pleg' a ſubdito in nomine Domini ſui tenetur, & tamen Regis eſt Curia, & omnes in ea proceſſus ad Regis leges diriguntur, ſubditiq; quamplurimi Curias

ex

ex recordo, & alias in Anglia tenent, juxta tamen Regis leges, & Regni conſuetudines in iis procedunt.

Obſerves hic (candide lector) quandoquidem deciſio & determinatio hæreſium, ſchiſmatum, & errorum in religione, ordinationum, examinationum, admiſſionum, inſtitutionum, & deprivationum hominum eccleſiaſticorum (quæ ad Dei cultum & veram religionem ſpectant,) matrimoniorum, divortiorum, baſtardiæ generalis (unde ſtirpium & hæreditatum validitas dependet,) probationis teſtamentorum, literarum adminiſtrationum (ſine quibus nullum debitum defunctis per legem communem recuperari poſſit,) mortuariorum, penſionum, procurationem, reparationum Eccleſiarum, ſimoniæ, inceſtus, adulterii, fornicationis, incontinentiæ, & quorundam aliorum ad communem legem non ſpectant, quam neceſſarium fuerit ad juſtitiam exercendam & adminiſtrandam, quod Regiæ Majeſtatis Progenitores hujus regni Monarchæ Eccleſiaſticas ſub ipſis Curias authoritate armaverint determinandi cauſas illas Eccleſiaſticas tanti momenti (a communis legis juriſdictione exemptas,) per

and hold Courts of Record, and other Courts, and yet all their Proceedings be according to the King's Laws and Cuſtoms of the Realm.

Obſerve (good Reader) ſeeing that the Determination of Hereſies, Schiſms, and Errors in Religion, Ordering, Examinat. Admiſſ. Inſtitut. and Deprivation of Men of the Church (which do concern God's true Religion and Service,) of Right of Matrimony, Divorces, and general Baſtardy, whereupon depend the Strength of Mens Deſcents and Inheritances,) of Probate of Teſtam. and Let. of Adminiſtrat. (without which no Debt or Duty due to any dead Man can be recovered by the Com. Law,) Mortuaries, Penſions, Procurat. Reparat. of Churches, Simony, Inceſt, Adultery, Fornication, and Incontin'cy, and ſome others, doth not belong to the Com. Law, how neceſſary it was for Adminiſtration of Juſtice, that his Majeſty's Progenitors Kings of this Realm did by publick Authority authoriſe eccleſiaſtical Courts under them, to determine thoſe great and important Cauſes Eccleſiaſtical, (exempted from the Juriſdiction of the Com. Law,) by the King's Laws Eccleſiaſtical; which was done originally for two Cauſes. 1. That Juſtice ſhould be adminiſtred under the Kings of this Realm, within Q.

within their own Kingdom, to all their Subjects, and in all Cauſes. 2. That the Kings of England ſhould be furniſhed, upon all Occaſions either foreign or domeſtical, with learned Profeſſors as well of the Eccleſiaſtical as Temporal Laws.

Thus hath it appeared as well by the ancient Common Laws of this Realm, by the Reſolutions and Judgments of the Judges and Sages of the Laws of England, in all Succeſſion of Ages, as by Authority of many Acts of Parliament, ancient, and of later Times, that the Kingdom of England is an abſolute Monarchy, and that the King is the only ſupream Governor, as well over eccleſiaſtical Perſons, and in eccleſiaſtical Cauſes, as temporal within this Realm, to the due Obſervation of which Laws, both the King and the Subject are ſworn. I have herein cited the very Words and Texts of the Laws, Reſolutions, Judgments, and Acts of Parliament, all publick and in print, without any Inference, Argument, or Amplification; and have particularly quoted the Books, Years, Leaves, Chapters, and ſuch like certain References, as every Man may at his Pleaſure ſee and read the Authorities herein cited. This Caſe is reported in the Engliſh and Latin Tongues (as ſome other

leges Regis eccleſiaſticas; qd' initio duabus de cauſis factum. Primo ut juſtitia ſub regni hujus Regibus, omnibus ſuis ſubditis, & in omnibus cauſis adminiſtretur. Secundo, ut Angl' Reges peritos profeſſores legum tam eccleſiaſticarum, quam temporali' in promptu ſemper haberent, quæcunq; occaſio tulerit, ſive illa externa, ſive domeſtica.

Jam pateat, & in promptu ſit, tam ex antiquis communibus hujus regni legibus, Judicum & Juriſprudentiſſimorum in Angliæ ſententiis & judiciis, ſingulis ſeculis, quam ex authoritate plurimorum ſtatutorum parliamentarior' priſcis temporibus, & recenti memoria, quod Regnum Angliæ ſit Monarchia abſoluta, quodque Rex ſolus & ſummus ſit gubernator tam perſonarum eccleſiaſticarum, & in cauſis eccleſiaſticis, quam temporalium, & in temporalibus intra hoc regnum: Ad quas leges ſancte & inviolate obſervandas, & Rex & ſubditi jurejurando obſtricti tenentur. Legum autem, ſententiarum, judiciorum, & ſtatutorum parliamentarior', quæ ſingula publice typis impreſſa proſtant, ipſiſſima verba & textus ſine ulla illatione, argumentat', aut amplificatione allegavi; libros vero,

annos

annos, paginas, & id genus alia ſigillatim adnotavi, ut quilibet pro arbitrio oculis intueatur & legat: Anglice & Latine edidi (qd' & nonnulli noſtri juris ſcriptores fecerunt) eo conſilio, ut concives chariſſimi in Reg' hujus legibus, ipſorum jure avito & hæreditario, necnon illuſtribus ejuſd' juris indiciis hac in parte non ſint peregrini: Ad veritatem perſuaſus, quod nemo ex Anglorum gente, modo ſanus & ingenue ſincerus, qui perſuaſus antequam informatus fuerat, in veritate (quam ipſe occulis intueatur ſuis) abnuet, ne ab errore diſſuaderetur, quo obcæcatus ſit abductus; Miſere enim cum illo agitur, & miſericordia dignus, qui fuit perſuaſus priuſquam informatus, & nunc informari abnuit, quia perſuaderi nolit.

Writers of the Law have done to the End that my dear Countrymen may be acquainted with the Laws of this Realm, their own Birth-right and Inheritance, and with ſuch Evidences as of Right belong to the ſame; Aſſuring my ſelf that no wiſe or true hearted Engliſhman, that hath been perſuaded before he was inſtructed, will refuſe to be inſtructed in the Truth, (which he may ſee with his own Eyes) leaſt he ſhould be diſſuaded from Error, wherewith blindfold he hath been deceived: For miſerable is his Caſe, and worthy of Pity, that hath been perſuaded before he was inſtructed, and now will refuſe to be inſtructed, becauſe he will not be perſuaded.

Caſes