The Sixth PART of the

REPORTS

OF

Sir *Edward Coke*, Kt.

Lord Chief Juſtice of ENGLAND.

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 Antient as Modern: And the PLEADINGS in *ENGLISH*, carefully Reviſed and Corrected.

Nemine oportet eſſe legibus ſapientiorem.
Non aliunde floret Reſp. quam ſi legum Vigeat Authoritas.

In the SAVOY:

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

TO THE

READER.

EX quo quintam Relationum mearum partem in lucem ediderim, quidam Juris noſtri Municipalis imprimis ſtudioſus a me petiit, ut ſcrupulum ipſi in hoc eximerem, quod in Præfatione in ſecundam Relationum mearum partem aſſeruerim, " Si antiquæ cele-
" berrimæ hujus Inſulæ
" leges cæteris omnibus
" (humanas dico) non
" præcelluiſſent, fieri non
" poterat, quin ex tot
" victoribus, Dominiſ-
" que, cum penes ſingu-
" los eſſet, ſive Romani,
" ſive Angloſaxones, ſive

SINCE the Publiſhing of the fifth Part of my Reports, a good Student of the Common Laws deſired to be ſatisfied, in one ſpecial Point, in my Epiſtle to the ſecond Part Pref. 2 Co. Rep. *of my Reports, where I affirmed, " That if the an-
" tient Laws of this noble
" Iſland, had not excelled
" all others (ſpeaking of
" human) it could not be
" but ſome of the ſeveral
" Conquerors and Gover-
" nors thereof, that is to
" ſay, the* Romans, Sax-
" ons, Danes, *or* Nor-
" mans, *and eſpecially*
" *the* Romans, *who (as*
" *they*

" *they juſtly may*) *do* " *boaſt of their Civil* " *Laws, would* (*as every* " *of them might*) *have* " *altered or changed the* " *ſame.*" *And* (*ſaith he*) *ſome of another Profeſſion are not perſuaded, that the Common Laws of* England *are of ſo great Antiquity, as there ſuperlatively is ſpoken. True it is, that the ſaid Period was my own Opinion, but not out of my own Head: For it is the Judgment of that moſt reverend and honourable Judge, Sir* John Forteſcue, *Knight, Chief Juſtice of* England *in the Reign of King* Henry *the Sixth*; *who* (*beſides his profound Knowledge in the Law, being alſo an excellent Antiquary*) *in his Book intituled,* De Politica adminiſtratione & Legibus Civilibus florentiſſimi Regni Angliæ Commentarius, cap. 17. *ſaith thus.* " *The Realm of* England " *was firſt inhabited of* " *the* Britons, *next after* " *them the* Romans *had* " *the Rule of the Land,* " *and then again the* Britons *poſſeſſed it*; *after* " *whom the* Saxons *invaded it, who chang-* " *ing the Name thereof,* " *did for* Britain, *call it*

Præf. 8 Co. Rep.

" Dani, ſive Normanni, " & potiſſimum Romani, " qui (quod jure poſſint) " de ſuo Jure Civili gloriantur, has immutaſſent, vel antiquaſſent." Præterea (addidit) nonnullos alterius eſſe profeſſionis, qui non inducuntur ut facile credant Municipalia Angliæ Jura tam profundæ eſſe antiquitatis, quam ibidem rei augendæ gratia dicatur. Verum ſane hoc eſt, comprehenſionem illam meam fuiſſe opinionem, non tamen ex meo ſenſu depromptam, ſed ex judicio Spectatiſſimi & Honoratiſſimi Judicis *Johannis Forteſcue*, Ordinis Equeſtris, qui regnante *Henrico* ſexto e ſupremo Angliæ tribunali jus dixit, & præter eximiam juris prudentiam in antiquitatis notitia excelluit, in libello cui titulum fecit, *De Politica adminiſtratione & Legibus Civilibus florentiſſimi Regni Angliæ Commentarius, cap.* 17. hæc habet. *Conſuetudines Angliæ antiquiſſimæ ſunt, & per quinque nationes viciſſim uſitatæ & acceptæ. Regnum Angliæ primo per Britannos inhabitatum eſt, deinde per Romanos regulatum, iterumque per Britannos, ac deinde per Saxones poſſeſſum, qui*

nomen

nomen ejus ex Britannia in Angliam mutaverunt; ex tunc per Danos idem regnum parumper dominatum eſt, & iterum per Saxones, ſed finaliter per Normannos, quorum propago regnum illud obtinet in præſenti. Et in omnibus nationum harum, & regnum eorum temporibus, regnum illud eiſdem, quibus jam regitur, conſuetudinibus continue regulatum eſt. Quæ ſi optimæ non extitiſſent, aliqui Regnum illorum, juſtitia, ratione, vel affectione concitati, eas mutaſſent, aut omnino deleviſſent, & maxime Romani, qui Legibus ſuis quaſi totum orbis reliquum judicabant. Similiter & alii Regum prædictorum, qui ſum gladio regnum Angliæ poſſiderunt, quo & potentia ſimili, ipſi Leges ejus exinaniſſe voluerunt. Neque vero tantorum temporum curriculis Leges Civiles, in quantum Romanorum, inveteratæ ſunt; neque Venetorum Leges, quæ ſuper alias antiquitate divulgantur, quorum tum inſula, in initio Britonum, inhabitata non fuit, ſicut nec Roma condita, nec ullorum mundi regnorum Deicolarum leges tanto ævo inolitæ ſunt: Quare, non bonas, immo non optimas eſſe

" England: *After them,*
" *for a certain Time, the*
" Danes *had the Domini-*
" *on of the Realm, and*
" *then* Saxons *again, but*
" *laſt of all the* Normans
" *ſubdued it, whoſe De-*
" *ſcent continueth in the*
" *Government of the King-*
" *dom at this preſent. And*
" *at all the Times of theſe*
" *ſeveral Nations, and of*
" *their Kings, this Realm*
" *was ſtill ruled with the*
" *ſelf-ſame Cuſtoms, that it*
" *is now governed withal:*
" *Which if they had not*
" *been right good, ſome of*
" *theſe Kings, moved ei-*
" *ther with Juſtice, or with*
" *Reaſon, or Affection,*
" *would have changed them,*
" *or elſe altogether aboliſhed*
" *them, and eſpecially the*
" Romans, *who did judge*
" *all the reſt of the World*
" *by their own Laws. Like-*
" *wiſe would other of the*
" *aforeſaid Kings have*
" *done, which by the*
" *Sword only poſſeſſing the*
" *Realm of* England,
" *might by the like Power*
" *and Authority have ex-*
" *tinguiſhed the Laws*
" *thereof. And touching*
" *the Antiquity of the ſame,*
" *neither are the* Roman
" *Civil Laws, by ſo long*
" *Continuance of antient*
" *Times confirmed; nor*
" *yet the Laws of the Ve-*
" *netians,*

" netians, *which above all* " *other are reported to be* " *of moſt Antiquity, foraſ-* " *much as their Iſland in* " *the Beginning of the* " Britains *was not then in-* " *habited, as* Rome *then al-* " *ſo unbuilded, neither the* " *Laws of any Nation of* " *the World which wor-* " *ſhippeth God, are of ſo* " *old and antient Years:* " *Wherefore the Contrary is* " *not to be ſaid nor thought,* " *but that the* Engliſh *Cu-* " *ſtoms are very good, yea* " *of all other the very beſt.*"

And albeit, I had ſo good a Warrant for the ſaid Aſſertion (for every Man that writes ought to be ſo careful of ſetting down Truth, as if the Credit of his whole Work conſiſted upon the Certainty of every particular Period;) yet was I right glad to hear of any Exception, to the End that ſuch as were not perſuaded, might either be rightly inſtructed, and the Truth confirmed; or that I might upon true Grounds be converted, and the Error reformed: I deſired to know ſome particulars, as many as they would (for Generalties never bring any Thing to a Concluſion.) At length (for this was remembred when I had almoſt forgotten it) their great Deſire was to

Anglorum conſuetudines, ſicut non dicere, ita nec ſuſpicari fas eſt.

Licet vero hujus aſſertionis tam locuples ſit mihi Author (quilibet enim Scriptor adeo anxie ſit ſollicitus, ut ad veritatem dicat, perinde ac ſi totius operis fides, uniuſcujuſque periodi fide niteretur) exceptionem tamen quancunque factam fuiſſe lætus audivi, ut qui non inducti erant ut crederent, edocerentur, & veritas confirmaretur; vel ut ego ex ſolidis fundamentis in viam revocarer, & Error corrigeretur. Petii autem ut particularia aliqua, quotquot voluerint, proponerent (Generalia enim concluſionem nunquam conficiunt.) Tandem vero (cum hoc mihi ex memoria fere excidiſſet) voto illis

illis imprimis erat, ut teſtimonia aliqua producerentur, quibus probaretur Jus Municipale, in his quatuor ſeorſim cauſis ante Normannicam victoriam, ut hodie ſe habet, viguiſſe. ¶ Primum, Reginam, Regis conſortem, ex Jure Municipali perſonam eſſe quæ in Jus vocaret & vocaretur, quæ daret & acciperet per ſe, Regis conſenſu non adhibito. ¶ Secundo, eum qui jure optimo terras tenet, eaſdem cum bonis amittere debere, ſi eſſet Feloniæ reus peractus aut exlex declaratus, & inde hæredes hæreditate excludendos. ¶ Tertio, Mulierem proditionis minoris convictam, ad palum ligatam cremandam eſſe. ¶ Quarto, an priſcæ Angliæ Leges Appellationes ad ſedem Romanam in cauſis Eccleſiaſticis admitterent.

ſee ſome Proofs, that the Common Law in theſe four particular Caſes was before the Conqueſt, as now it is:

¶ *Firſt, that the Queen, being Wife to a King regnant, was a Perſon Sole by the Common Law to ſue and be ſued, to give and take,* &c. *ſolely without the King.* Co. Lit. 133. a. Seld. Tit. of Honour 36. Fitz. Nonabilities 9. 4 Co. 23. b. 9 Co. 47. a. Co. Lit. 3. a. Plowd. 231. a. Seld. Epinomis 11.

¶ *Secondly, that a Man ſeiſed of Lands in Fee-ſimple, ſhall forfeit his Lands and Goods by Attainder of Felony, or by Outlawry, and that thereby his Heirs ſhould be diſinherited.* ¶ *Thirdly, that a Woman being attainted of Petit Treaſon ſhould be burnt.* ¶ *Fourthly, whether the antient Laws of* England *did permit any Appeal to* Rome *in Cauſes Spiritual or Eccleſiaſtical.*

Ubi primum haſce quæſtiones propoſitas eſſe viderim, reſponſa directa & demonſtrativa ſe mihi obtulerunt. Ad primum ecce tibi Diploma antiquum ante Normannorum ingreſſum in hæc verba. *Regnante in perpetuum Domino noſtro Jeſu Chriſto. Ego Æthelſwith Regina, Deo largiente,*

I had no ſooner ſeen theſe Queſtions, but inſtantly I found direct and demonſtrative Anſwers to the ſame. For the firſt, behold an ancient Charter made long before the Conqueſt, which ſoloweth in theſe Words. "*Our Lord Jeſus Chriſt* "*reigning for ever. I Æ-* "*thelſwith* * *Queen of the* "*Mercians by God's Grant,* "*with*

* This *Æthelſwith* was Wife to *Burghred* King of the *Mercians*, and it appeareth, that King *Burghred* was alive at this Time, for he was a Witneſs to this Grant: And the Law continueth ſo to this Day. Seld. Epinomis 11.

" *with the Conſent of my*
" *Ealdermen, will give by*
" *Grant to* Cuthwolph *my*
" *moſt faithful Servitor, a*
" *certain Piece of Land,*
" *being Part of my peculiar*
* i.e. Demeaſns. " *Power* * *(that is to ſay) a*
" *Piece of Land of fifteen*
" *Manſes, in a Place which*
" *is called* Laking, *for his*
" *Obedience, and payable*
" *Money in this Manner,*
" *that is to ſay, a Thou-*
" *ſand five Hundred Shil-*
" *lings of Silver and Gold,*
" *or fifteen hundred Sicles,*
" *that he may have, poſſeſs,*
" *and enjoy at his Pleaſure,*
" *as long as he liveth; and*
" *after his End, and Limit*
" *of his Days, he may leave*
" *it to whomſoever he will,*
" *for everlaſting Power and*
" *perpetual Inheritance.*
" *And this my Donation is*
" *covenanted in the Year of*
" *our Lord's Incarnation*
" DCCCLXVIII. *the firſt*
" *Indiction. And we do*
" *charge all ſecular Powers,*
" *in the Name of God the*
" *Father, the Son, and the*
" *Holy Ghoſt, to obſerve the*
" *aforeſaid inviolate. Theſe*
" *Witneſſes ſubſcribing and*
" *conſenting thereunto,*
" *whoſe Names here reci-*
" *ted are underwritten. I*
" Ethelred *King of the*
" Weſt Saxons *have con-*
" *ſented and ſubſcribed.* I
" Burghred *King of the*

Merciorum, cum conſenſu meorum ſenſorum, concedens donabo Cuthwulfo fideliſſimo miniſtro aliquam telluris partem meæ propriæ poteſtatis, id eſt, terram XV. *manentium in loco qui dicitur* Laking, *pro ejus hujuſmodi obedientia atque pecunia placabili, hoc eſt mille quingentis ſolidis argenti & auri, vel quindecies centum ſiclis, ut habeat & poſſideat quam diu vivat, perfruaturque voluntarie, & poſt finem illius terminumque dierum, liberam relinquat cuicunque voluerit in ſempiternam poteſtatem hæreditatemque perpetuam. Et hæc donatio pacto eſt anno Dominicæ incarnationis* DCCCLXVIII. *Indictione prima. Et præcipimus omnibus ſæculi poteſtatibus, in nomine Dei, Patris, & Filii, & Spiritus Sancti, hæc ſupradicta inviolata ſervare. His teſtibus ſubſcribentibus & conſentientibus, quorum nomina poſt-recitata conſcribuntur. Ego Ethelred Rex Occidentalium Saxonum conſenſi & ſubſcripſi, &c. Ego Burghred Rex Merciorum conſenſi & ſubſcripſi. Ego Ethelſwith Regina con-*

conſenſi & ſubſcripſi, &c.

" Mercians *have conſented*
" *and ſubſcribed. I* Æ-
" thelſwith *Queen have*
" *conſented and ſubſcribed,*
" &c."

Aliud etiam diploma ex ſacris ſcriniis, ante Normannorum etiam adventum, de verbo ad verbum proponam, quo quæſtioni ſecundæ directe ſatisfiat. *Ego Ethelredus totius Albionis Dei providentia Imperator cuidam dilectiſſimo mihi miniſtro, cui parentelæ nobilitas* Ulfric *indidit nomen, pro fidiſſimo, quo mihi affabiliter obſecundatus eſt obſequio, quandam ruris particulam, viz. duas Manſas & dimidium in loco ubi ſolicolæ* Æt Dunmalton *appellant, in perpetuam concedo hæreditatem, quatenus ille bene perfruatur ac proſpere poſſideat, quamdiu hujus ævi incolatum vitali flamine rotabilique meatu percurrere cernitur, & poſt iſtius labilis vitæ exceſſum, cuicunque ſibi libuerit ſucceſſori relinquat. Sit autem prædictum Rus quadam communi terra ſitum, liberum ab omni mundiali obſtaculo, cum omnibus quæ ad ipſum locum pertinere dignoſcuntur, tam in magnis quam in modicis rebus, campis, paſcuis, pratis,*

I have here ſet down another Charter of Record made alſo long before the Conqueſt, de verbo in verbum, *for a direct Anſwer to the ſecond.* " *I* Ethel-
" red *by God's Providence,*
" *Emperor of all* Albion,
" *do grant to my well-*
" *beloved Servitor, whoſe*
" *Nobility of Parentage*
" *hath given* Ulfric *for*
" *Name, for the faithful*
" *Service wherewith he*
" *hath courteouſly ſerved*
" *me, a certain Parcel of*
" *Land, that is to ſay, two*
" *Manſes* and an half, in* * i. e. Farms.
" *a Place where the Inha-*
" *bitants call* Æt Dun-
" malton, *in perpetual In-*
" *heritance, that he may*
" *well enjoy and proſpe-*
" *rouſly poſſeſs the ſame, as*
" *long as he is ſeen to run*
" *the Race of this Life*
" *with vital Breath, and*
" *may leave the ſame to*
" *what Succeſſor he pleaſe,*
" *after his Departure from*
" *this tranſitory Life. Let*
" *the ſaid Land ſituated*
" *in a certain Common, be*
" *free from all worldly Im-*
" *pediment, with all which*
" *are known to belong to*
" *the ſaid Place, as well*
" *in*

" *in great Matters, as in*
" *ſmall, in Fields, Paſtures,*
" *Meadows and Woods:*
" *(Expedition, Building of*
" *Bridges and Caſtles being*
" *excepted.) Such as ſhall*
" *diminiſh and violate this*
" *my Gift (which I wiſh*
" *may be far from the*
" *Minds of all the faithful)*
" *let them have their Part*
" *with them, of whom it*
" *ſhall be reſounded,* De-
" part from me ye curſed
" into everlaſting Fire,
" which is prepared for
" Satan and his Angels,
" *unleſs they do make A-*
" *mends by lawful Satis-*
" *faction, obtaining Par-*
" *don by due Penance to-*
" *wards God. Whereas that*
" *which Man's Memory*
" *doth overpaſs, the dili-*
" *gent Search of Writing*
" *doth preſerve: This is to*
" *be notified to the Readers,*
" *that the ſaid Land came*
" *to the Diſpoſition of my*
" *Right, by the Crime of a*
" *certain Man's unſpeak-*
" *able Preſumption, where-*
" *with boldly and feloni-*
" *ouſly he hath not abhor-*
" *red to incumber himſelf,*
" *which Man his Parents*
" *named* Ethelſig, *albeit*
" *he hath diſcredited his*
" *Name by a foul Fault:*
" *And by me (as is afore-*
" *ſaid) the ſaid Land is*
" *beſtowed upon my reve-*

ſylvis; (exceptis iſtis tribus, expeditione, pontis arciſve conſtructione.) Hanc vero meam donationem (quod opto abſit a fidelium mentibus) minuentibus atque frangentibus, fiat pars eorum cum illis de quibus echontiſatur, Diſcedite a me maledicti in ignem æternum qui paratus eſt Satanæ & ſatellitibus ejus, *niſi prius digna Deo pœnitentia veniam legali ſatisfactione emendent. Nam quod hominis memoria tranſilit, literarum indago reſervat. Unde hoc legentibus eſt intimandum, quia hoc præfatum rus per cujuſdam viri infandæ præſumptionis culpam, qua audacter furtive ſe obligavit, non abhorruit, cui nomen* Ethelſig *parentes indidere, licet fædo nomen dehoneſtaverit flagitio, ad mei juris devenit arbitrium atque per me reverendo, ut jam ante præfatus ſum, collatum eſt miniſtro, cujus culpæ notam Anglica relatione hic ratam duximus eſſe notandum.*

Hic erat ille fundus Dir pæſ þe land foris-

forisfactus apud Dunmal-
ꝼoꞃƿoꞃþ Æt Ðunmal-
ton, quem Æthelsigus fo-
ton, þe Æðelsiᵹe ꝼo-
riifecit Æthelredo Regi in
ƿꞃoꞃþ Æðelꞃedes Cynninᵹ
manus: Hoc erat ideo qd'
to handa: ðæs ƿæs ðen þ
ille furatus est Æthelwini
he ꝼoꞃstæle Æþelƿines
Porcos Æthelmeri filii Se-
sƿin Æþelmeꞃes suna
natoris. Tunc adequita-
Ealdeꞃmans. Ðaꞃidon
runt ejus famuli, & abstu-
his Men to ⁊ tu-
lerunt furto sublata ex Æ-
ᵹon ut ðe sƿic of Æ-
thelsigi domo, & ille erupit
þelsiᵹs hus, ⁊ he oþ-
in sylvam, & homines il-
beaꞃst to ƿuda, ⁊ Man
lum fugaverunt inde. Atq;
him aflynde þa. And
homines detulerunt Æ-
Man ᵹeꞃehte Æðel-
thelredo Regi illum fun-
ꞃed Cynninᵹ þat land,
dum & ejus bona. Tunc
⁊ his æƿa. Ða ꝼoꞃ-
donavit ille istum fundum
ᵹaꞃa he þ landa Haƿas
Hawaso suo famulo in per-
his Man on ece
petuam hæreditatem. Et
ynꝼe. And ƿulꝼꞃic
Wulfricus Wulfruni filius
ƿulꝼꞃuns sune hit
tenuit postea ab illo per-
syþan æt him ᵹe-
mutatione cum illis quæ
ƿiꞃꝼo Mid ðam ðe him

" *rend Servitor. The Manner of whose Fault we thought good to note here in* English.

" *This was the Land forfeited at* Dunmalton *that* Ethelsig *forfeited to King* Ethelred's *Hands. It was so then, that he stole* Ethelwin's *Swine, who was Son to* Elthelmere *Ealderman; then his Man did ride to him, and took the Things stolen out of* Ethelsig's *House, but he burst out to the Woods, and* * *Men outlawed him, and Men brought to King* Ethelred *his Lands and his Goods. Then gave he that Land to his Servant* Hawes *for a perpetual Inheritance. And* Wulfric, *Son to* Wulfrun, *after had it of him in Exchange for other Lands that pleased him better: And this was with the King's Leave, and with the Testimony of his Wise Men.*

Seld. Epinomis 11.

* *i. e. a Jury.*

" *This*

" *This Donation was* " *made in the Year from* " *the Incarnation of our* " *Ld.* DCCCCXCV. *the* " VIII. *Indiction, in the* " XVII. *Year of the said* " *King. This Charter was* " *written with the Consent* " *of them whose Names* " *are hereunder written.* " *I* Ethelred *King of* " Englishmen *have con-* " *stantly consented and* " *ratified this Donation* " *under the Sign of the* " *Holy Cross. I* Alfric *by* " *God's Grace elected unto* " *the Archbishoprick of* " Canterbury, *have esta-* " *blished this Gift with* " *the Sign of the Cross,* " &c."

ipsi gratiora eraunt, cum
ᵹeƿemen ƿæſ, be þe
Regis venia & ejus pru-
Cẏnninᵹſ leaf, ⁊ hiſ
dentum testimonio:
ƿıttenne ᵹeƿıtenes.

Acta est hæc præfata donatio Anno ab Incarnatione Domini nostri 995. *Indictione octavo, Anno vero Regni præfati Regis* 17. *Scripta est hæc cartula his consentientibus qui subternotantur. Ego Æthelredus Rex Anglorum præfatam donationem sub sigillo Sanctæ Crucis indeclinabiliter consensi atque roboravi. Ego Ælfricus Dei gratia electus ad Archiepiscopatum Dorobernensis Ecclesiæ ejusdem donum Crucis taumate stabilivi. Ego Aelfhell Wintoniensis Ecclesiæ Episcopus designavi. Ego Aescwith Dorcensis Episcopus Ecclesiæ adnotavi. Ego Athulf Herefordensis Ecclesiæ Episcopus imposui. Ego Vulfsig Scirburnensis Ecclesiæ Episcopus conclusi. Ego Athelwerd Dux. Ego Aelfric Dux. Ego Aelfhelm Dux. Ego Leoffig Dux. Ego Leofwin Dux. Ego Aelfwerd Abbas. Ego Aelffige Abbas. Ego Leofric Abbas. Ego Brithelm Abbas. Ego Wlfgar Abbas. Ego Athelmer Minister. Ego Ordulf Minister. Ego Aelfsige Minister. Ego Brithwolde Minister. Ego Milf-*

heb

heh Miniſter. Ego Vulfric Miniſter. Ego Wlfget Miniſter. Ego Leofric Miniſter. Ego Athelric Miniſter. Ego Leofric Miniſter. Ego Wlfmer Miniſter. Ego Frivena Miniſter.

Ad tertium Caius Julius Cæſar (qui ante Chriſtum natum annis jam MDC. tranſactis) prodit. De morte Mariti ſi compertum eſt, uxorem igni atque omnibus tormentis excrutiatam interficiunt; ut hodie in uſu eſt, apud nos.

Touching the Third, Cæſar *in his Commentaries* Lib. 6. pag. 68. (*who wrote before the Incarnation of Chriſt, above* 1600 *Years paſt*) *affirmeth, That if the Wife be ſuſpected of the Death of her Huſband,* Et ſi compertum eſt, igni, &c. interficiunt: *That is, and if ſhe be found Guilty of the Death of her Huſband, which is Petit Treaſon, the Wife is burnt to Death, as ſhe is (in that Caſe) at this Day.*

See in the Preface to the 3d Part of my Reports out of *Cæſar's Com. Diſciplin' Druidum in Britannia reperta, atq; inde Galliam tranſlata, &c.* Seld. Janus Angl. 17.

Ad quartum & poſtremum, authoritate Parliamentaria Anno 10 Regis Henrici ſecundi, qui fuit Domini MCLXIV. ſancitum eſt. *De appellationibus ſi emerſerint ab Archidiacono debet procedi ad Epiſcopum, ab Epiſcopo ad Archiepiſcopum, & ſi Archiepiſcopus defuerit in juſtitia exhibenda, ad Dominum Regem perveniendum eſt extremo, ut præcepto ipſius in Curia Archiepiſcopi controverſia terminetur: Ita quod non debeat ultra procedi abſque aſſenſu Domini Regis.* Et

For the Laſt, by an Act of Parliament holden in the tenth Year of King Henry *the Second, which was in* Anno Domini 1164. *it is enacted as followeth.* "*As* "*concerning Appellations,* "*if any ſhall ariſe from* "*the Archdeacon, they* "*muſt proceed to the Bi-* "*ſhop, from the Biſhop to* "*the Archbiſhop: And if* "*the Archbiſhop do fail in* "*doing Juſtice, it muſt* "*laſtly come to the King,* "*that by his Precept the* "*Controverſy may be end-* "*ed in the Archbiſhop's* "*Court, ſo that there ought* "*not*

Seld. Janus Angl. 72. Rog. Hovenden, f. 303.

" *not to be any Proceeding* " *farther without Aſſent of* " *the King.*" *And that this amongſt many other might not taſte of Innovation, the Record ſaith,* " *This Recognition or Re-* " *cord was made of a cer-* " *tain Part of the Cuſtoms* " *and Liberties of the Pre-* " *deceſſors of the King, to* " *wit, of King* Henry *his* " *Grandfather, and of o-* " *ther Kings, which ought* " *to be obſerved in the* " *Kingdom, and held of all* " *for the Diſſentions and* " *Diſcords often ariſing be-* " *tween the Clergy and* " *our Lord the King's Ju-* " *ſtices, and the Peers of* " *the Realm: And all* " *the Archbiſhops, Biſhops,* " *Abbots, Priors, Clergy,* " *with the Earls, Barons,* " *and all the Nobles, &c.* " *have ſworn and aſſured-* " *ly promiſed in the Word* " *of Truth, with one Con-* " *ſent to keep and obſerve* " *the ſaid Recognition to-* " *ward the King and his* " *Heirs in good ſooth with-* " *out evil Meaning for e-* " *ver.*" *But herein I perſuaded myſelf, that every Man that had adviſedly and with an equal Mind read* Caudry's *Caſe, publiſhed in my laſt Reports, would therewith in this Point have been ſatisfied.*

hoc inter alia, ne novum videretur, in ipſo autographo ſubjungitur. *Facta eſt hæc Recognitio ſive Recordatio cujuſdam partis Conſuetudinum & Libertatum anteceſſorum Regis, videlicet, Henrici Avi ſui, & aliorum, quæ obſervari debeant in Regno, & ab omnibus teneri propter diſſenſiones & diſcordias ſæpe emergentes inter Clerum & Juſticiarios Domini Regis, & Magnates Regni. Et hanc recognitionem ſive recordationem omnes Archiepiſcopi, Epiſcopi, Abbates, Priores, Clerici, cum Comitibus, Baronibus, Proceribus cunctis, &c. juraverunt & firmiter in verbo veritatis promiſerunt una voce tenendas & obſervandas Domino Regi & hæredibus ſuis bona fide, & abſque malo ingenio in perpetuum.* Ego autem hac in re mihi perſuadeo, quod quicunque conſiderate & æquo animo cauſam Caudrei in Relationibus meis poſtremis legêrit, ſibi abunde ſatisfactum putet. Nec poſſum non agnoſcere, me minime expectaſſe, ut Theologus aliquis ejuſmodi reſponſionem procudere voluerit, cujuſmodi in lucem prodiit, idque duabus de cauſis.

Primum

Primum, quod Veritatis & Charitatis lineas tranſiliendo, convitiis & calumniis a quæſtione omnino alienis ſit referta. Ingenium igneum & Salamandrinum Theologos minime decet; & Convitia effulminata ex ore efferveſcente, quod ſe, animi inquieti fræna ſpumantia mordendo, lancinot, quæque odii ſemina & lites in perpetuum ſerendi cauſas ſuggerunt, labiis Theologicis ſunt indigniſſima. Certo ſcio nec Syrtes quibus firmum ſolum non ſubeſt, nec ſepimenti ex carduis, paliuris, & ſpinis ad baſes, macerias vel mænia idonea eſſe, illi præſertim qui ſublime & *Theologi Catholici* nomen longe lareque patens ſibi arrogat. Qui reſponſionem ex conſcientia & charitate molitur ut alteri parti perſuadeat, argumenta ejus & rationes repeteret, & Categorice atque Chriſtiane *ad idem* reſponderet, nullis convitiis in eum evibratis quem in ſuam ſententiam perducere ſtudet, aut ſtudere debet. Tyrones in Dialectica convitiari ſolent (ut inſcitiæ notam ſubterfugiant) cum argumentum in illos con-

And I muſt freely acknowledge, that I never expected, that any Divine would have attempted to have made ſuch an Anſwer to that Caſe, as lately hath been publiſhed, for two Cauſes. Firſt, for that it (exceeding all Bounds of Truth and Charity) is full of Maledictions and Calumniations, nothing pertinent to the State of the Queſtion. It becometh not Divines, to be of fiery and Salamandrine Spirits: Neither are bitter Invectives foamed out of an hot Mouth, ever fretting itſelf upon the Bit of Diſcontentment (the Seeds of Hatred, and Means of making Controverſies immortal) beſeeming the Lips of any Man of that Profeſſion. Sure I am, that neither Quicksands having no ſtedfaſt Ground, nor Quickſets of Brambles or Briars, are fit either for Foundations, or for Fences or Defences, eſpecially for him that uſurpeth the ſublime and broad-ſpreading Name of the Catholick Divine. *He that will make any Anſwer out of Conſcience and Charity, to perſuade the adverſe Party, ſhould repeat his Authorities, his Arguments, his Reaſons, and categorically and chriſtianly Anſwer the Matter* ad idem, *without*

Father Parſons the Jeſuit.

any

any Invective againſt the Perſon, whom his End is (or ſhould be) to convert to his Opinion. Young Sophiſters are wont to rail (and by that Means keep themſelves from a Nonplus) when they are not able to anſwer the Argument inforced againſt them. Secondly, for that (as I publiſhed in my Epiſtle to the Reader) I dealt only with the Municipal Laws of England, *as a Subject proper to my Profeſſion.*

Expect not from me (good Reader) any Reply at all, for I will not anſwer unto his Invectives, and I cannot make any Reply at all to any Part of his Diſcourſe. True it is, That Calumniations be great Motives of Revenge, and conſequently a Breach of Charity, and of God's Commandment: And therefore David *pray'd,* Redime me a calumniis hominum, ut cuſtodiam mandata tua. *But it is far unbeſeeming a Man of my Vocation,* Convitium convitio regerere, *for that were* Lutum luto purgare. *And God hath left a Precedent of a Judge, (who alſo was the firſt Reporter of Law) that he was* Mitiſſimus ſuper omnes homines qui morantur in terra: *Whoſe Example all Judges*

Moſes.

tortum declinare neſciant. Secundo, quod in Epiſtola ad Lectorem jam tum præfatus fuerim, mihi rem eſſe cum Municipali Angliæ Jure, quod mei profeſſionis proprium eſt ſubjectum.

Reſponſum a me ne expectes velim (Candide Lector) calumniis enim & contumeliis ejus minime reſpondebo; & nullum ad ejus commentationes reſponſum referre viſum eſt. Verum eſt, calumnias vindictam provocare, & inde charitatem & Divina mandata violare, ideoque *David* precatus eſt, *Redime me a calumniis hominum, ut cuſtodiam mandata tua.* Mei autem loci homine plane indignum eſt, *Convitium convitio regerere:* Illud enim eſt *lutum luto purgare.* Deus ipſe exemplar Judici propoſuit, qui & ipſe primus erat Juris Relator, *Mitiſſimus ſuper omnes homines qui morantur in terra.* Ad cujus exemplum Judices ſinguli, etſi indies,

indies irritentur, quantum poſſunt ſe conformare debent. Hic illi & de illo tantum hac in cauſa dicam, *Ille didicit maledicere, & ego maledicta contemnere.* Cauſa cur reſponſionem reddere non poſſum, hæc eſt, ego tantum textum retulerim, & quaſi unum conſenſum & concentum antiquarum hujus Regni Legum, quæ comprobatæ omnium ſeculorum ſucceſſione, tam univerſali conſenſu in Parliamentis, quam judiciis & ſpectatiſſimorum Judicum & Juris noſtri Prudentum ſententiis in ordine judiciario, quæ ex jurejurando & conſcientia tulerunt.

Annum, Paginam, Caput, & alia certa indicia, ad faciliorem inventionem, adnotavi. Plura etiam attexere poteram, niſi cauſæ illius Relatio (quæ ſane perlonga eſt) plus nimio ſua prolixitate excurreret Cum librum introſpicerem, ſemper expectans aliquod ad rem reſponſum, in Authore tandem deprehendi ſummam Juris hujus Regni, de quo agebatur, ignorantiam cum ſumma audacia, quod plerumque fit, conjunctam: At per

(though they be provoked every Day) ought as much as they can to imitate and follow. This only will I ſay in this Cauſe, to him and of him, Ille didicit maledicere, & ego maledicta contemnere. *The Cauſe that I cannot reply is, for that I have only reported the Text, and as it were the very Voice of the antient Laws of this Realm, proved and approved in all Succeſſions of Ages, as well by univerſal Conſent in Parliaments, as by the Judgments and Reſolutions of the reverend Judges and Sages of the Common Laws, in their judicial Proceeding, which they gave upon their Oaths and Conſciences.*

I quoted the Year, the Leaf, the Chapter, and other certain References for the ready finding thereof. And I could have added more, if the Report of that Caſe (being very long, as it is) ſhould not have been drawn to an extraordinary Prolixity. But when I looked into the Book, ever expecting ſome Anſwer to the Matter; in the End I found the Author utterly ignorant (but exceeding bold, as commonly thoſe Qualities concur) in the Laws of the Realm, the only

Subject of the Matter in Hand, but could not find in all the Book any Authority out of the Books of the Common Laws of this Realm, Acts of Parliament, or any legal and judicial Records quoted or cited by him for the Maintenance of any of his Opinions or Conceits: Whereupon (as in Juſtice I ought) I had Judgment given for me, upon a Nihil dicit, *and therefore cannot make any Replication. For his Divinity and Hiſtories cited by him, only publiſhed in the ſaid Book* Ad faciendum populum, (*but how truly and ſincerely his own Conſcience knowing, he thought it beſt for the ſalving of his Credit to conceal his Name*) *I will not anſwer, for then I ſhould follow him in his Error, and depart from the State of the Queſtion, whoſe only Subject is the Municipal Laws of this Realm.*

I have (good Reader) brought this ſixth Work to a Concluſion, and publiſhed it for thy private Inſtruction, for the publick Good and Quiet of many, and for preventing of Danger, the Daughter of Error. I confeſs that Engliſhmens *Actions have been renowned in the Ear of the whole*

totum librum ne vel teſtimonium quidem ex Juris noſtri Municipalis Codicibus, Statutis Parliamentariis, aut ſcriniis legalibus & judiciariis ab ipſo prolatum, in ſuæ opinionis firmamentum comperi: Adeo ut (*Juſtitia* ipſa judicante) pro me ſententia lata ſit ex formula *Nihil dicit*, ideoque reſponſum reponere non licet. Ad Theologica & Hiſtorica ab illo prolata in eodem Libro, ſolummodo *Ad faciendum populum* (quam vere & ſincere ipſe ſibi conſcius, ut fidem ſane tueretur, nomen reticere conſultiſſimum putavit) haudquaquam Reſponſum referam: Hoc enim eſſet ipſum errantem conſectari, & a quæſtione propoſita, quæ in Jure noſtro Municipali verſatur, longe aberrare.

Jam ſexto huic operi (Benevole Lector) ſupremam manum impoſui, & ad tuam privatam informationem, bonum publicum, plurimorum ſecuritatem, & periculum avertendum, quod ex errore enaſcitur, in lucem edidi. Res geſtas Anglo-

rum

rum in univerſo Orbis terrarum theatro celeberrimus fuiſſe agnoſco; ac præclarius geſtas quam deſcriptas, quod Hiſtoria, quæ ornate narraret, deſtituimur: Leges etiam Anglorum preſtantiſſimas eſſe agnoſco; multo tamen præſtantiores quam videri poſſint ulli oculo (niſi quis Dioptica linea in eas intueatur) quia Styli ſplendor & Orationis compoſitæ ornatæque lumen abſit, quæ nunquam majori quam hodie pretio, Prudentes nihilominus ſcientiæ myſteria amplectentur, licet exiliori ſcribendi genere proponantur, nec pretioſas & nobiles gemmas recuſabunt, quamvis vilioribus thecis recondantur.

World, but far better done than they have been told, for want of a good Hiſtory; and their Laws moſt excellent, but far better than they ſeem to any Eye (unleſs he can look in the viſial Line) for want of good Stile, and fair falling Sentences (which never were at ſo high a Price as now they bear) but wiſe Men will embrace the Secrets of Skill, though they be written with an evil Pen, and will not refuſe precious Jewels, though they be brought in a plain and homely Receptacle.

Particularium cauſarum & exemplorum Relatio dilucidiſſima eſt docendi Methodus, & recta Juris ratio & regula: Sic enim Divinum Numen, cum judiciarias Leges per *Moyſen* promulgaret, exemplis docuit pro Legibus, ut videre eſt in *Exodo, Levitico, Numeris, & Deuteronomio.* Gloſſographi itidem, ut regulam Juris Civilis illuſtrent, ſæpenumero regulam ad exemplum revocant, ut cla-

The Reporting of particular Caſes or Examples, is the moſt perſpicuous Courſe of Teaching, the right Rule and Reaſon of the Law: For ſo did Almighty God himſelf, when he delivered by Moſes *his judicial Laws,* Exemplis docuit pro Legibus, *as it appeareth in* Exodus, Leviticus, Numbers, *and* Deuteronomy. *And the Gloſſographers, to illuſtrate the Rule of the Civil Law, do often reduce the Rule into a Caſe, for the more lively*

lively expreſſing and true Application of the ſame. In reading theſe and other of my Reports, I deſire the Reader, that he would not read (and as it were ſwallow) too much at once; for greedy Appetites are not of the beſt Digeſtion: The Whole is to be attained to by Parts; and Nature, (which is the beſt Guide) maketh no Leap, Natura non facit ſaltum. *And true it is that* Seneca *ſaith, (as in another Place I have ſaid)* Quo plus recipit animus, hoc ſe magis laxat: *The Mind, the more it ſuddenly receiveth, the more it looſeth, and freeth it ſelf. A curſary and tumultuary reading doth ever make a confuſed Memory, a troubled Utterance, and an incertain Judgment. If theſe or any other of my Works, may, in any Sort (by the Goodneſs of Almighty God, who hath enabled me hereunto) tend to ſome Diſcharge of that great Obligation of Duty wherein I am bound to my Profeſſion, and give Directions for the Eſtabliſhment of Inheritances, Poſſeſſions, and Intereſts, in Peace and Quietneſs, I ſhall reap ſome Fruits of*

rius explicetur, & verius applicetur. In his meis Relationibus legendis a Lectore contendo, ut non multa ſimul legeret (& quaſi deglutiret) avidi enim appetitus non optime digerunt. Univerſum per partes apprehendendum, & Natura, quæ Dux optima, ſaltum non facit. Verum eſt illud *Senecæ* (quod alibi protuli.)

Quo plus recipit animus hoc ſe magis laxat.

Deſultoria & tumultuaria lectio memoriam confuſam, elocutionem impeditam, & judicium incertum reddit. Si hoc vel aliud quodcunque ex meis opuſculis quovis modo (Dei optimi Maximi propitia benignitate, qui mihi ad hæc facultatem ſuppeditavit) ad fidem quam merito profeſſioni meæ debeo liberandam faciant, & ad hæreditates, poſſeſſiones, & ſua cuique jura in pace & ſecuritate conſtabilienda dirigant; aliquem vitalis arboris fructum mihi decerpam. Voti enim compos ero, & cumulate mihi pro ſuſcepto labore ſatisfactum erit. Scopum enim,

enim, quem mihi propoſui, attigi.

the Tree of Life; for my Deſire ſhall be accompliſhed, and I ſhall receive ſufficient Recompence for all my Labours, for their true and final End ſhall be effected.

Accipe, quo ſemper finitur Epiſtola verbo,
Et vigeant jura, & (Lector amice) Vale.

Where

Where Services intire ſhall be apportioned.

Hill. 36 Eliz. *in the Court of Wards.*

Reſolutions by the two Chief Juſtices and the whole Court of Wards, concerning Apportionment of intire Services, [and of Contribution thereto.]

BRUERTON's *Caſe.*

LORD and Tenant of three Acres of Land by Homage, Fealty, annual Service of a Hawk, and Suit of Court, the Tenant makes a Feoffment in Fee of one Acre, the Feoffee ſhall hold by Homage, Fealty, a Hawk, and Suit of Court by the Common Law, For (a) *Quæ in partes dividi nequeunt, ſolida a ſingulis præſtantur*, and therewith agree the Books in 2 *E.* 2. *Avowry* 184. 5 *E.* 2. *ibid.* 206. 11 *E.* 3. *Avowry* 101. 24 *E.* 3. 73. *a.* 34 *Aſſ. p.* 15. 22 *E.* 4. 36, 37. 29 *H.* 8. *Tenures* 64. and Tit. *Avowry*. And no Difference as to this Purpoſe between intire Services annual, as Suit, a Hawk, *&c.* and not annual, as Homage, Fealty, Heriot, *&c.* And as to Heriot, *vide* 34 *E.* 3. (b) *Heriot* 1. And the Statute of *Weſt.* 3. of (c) *Quia Emptores terrarum* cannot extend to intire Services to hold *pro* (d) *particula*, becauſe ſuch Services are not diviſible, and by Conſequence each ſhall hold by the Whole, as he ſhall hold by the Common Law. But in the Caſe of Suit, the Stat. of (e) *Marlbridge, cap.* 9. has altered the Law in two Caſes: 1. In Caſe of (f) Coparceners and their Vendees by Equity, as appears by the Regiſter and *F.N.B.* 159. *a.* & *b.* where the Writ recites, *Cum de communi conſilio regni noſtri proviſum ſit, ſi hæreditas aliqua, de qua unica ſecta debetur, ad plures hæredes*

8 Co. 105. b. 10 Co. 108. a.

(a) Co. Lit. 149. b.

(b) 8 Co. 105. a. 106. a.

(c) Co. Lit. 148. a.

(d) 2 Inſt. 503. Plowd. 249. a. Poſtea i. b.

(e) 2 Inſt. 116, 117, 118, 119, 120. Plow. 240. b.

F. N. B. 159. d.

(f) Co. Lit. 241.

2 Inſt. 149.

hæredes vel ad alios per venditionem devolvatur, &c. 2. The Stat. provides, *Et ſi plures feoffati fuerunt de hæreditate aliqua, de qua unica ſecta debeatur, Dominus unicam ſectam habeat, &c.* But that is meant when the Ten't who holds by Suit enfeoffs others ſeverally, *viz.* one of one Part, and another of another Part, *&c.* in certain; there *Dom' habebit niſi unicam ſectam*; and he who doth the Suit ſhall have *Contribution for his Charge againſt the others, and that appears by the Stat. of *Marlebridge*, and the Regiſter, and *F. N. B.* 159. *b.* But if the Tenant who holds by Suit enfeoffs many jointly, that is out of the Stat. as to Contribution, for without expreſs Agreement he ſhall not have Contribution. But yet all the joint Feoffees ſhall do but one Suit, as they ſhall pay or deliver but one Hawk, or other yearly intire Service, and therewith agrees *F. N. B.* 162. *c.* But if the Tenant makes a Feoffment of the Moiety or third Part in Common, and not in Severalty, it is out of the Purview of the Stat. of *Marlebridge*: For when the Poſſeſſion is intire and undivided, there cannot be Contribution, and therewith agrees *F. N. B.* 162. *d.* (That Tenant in Common ſhall do ſeveral Suit, and ſeveral Service.) As Feoffee of the Moiety or third Part is out of the Statute of *Quia Emptores terrar'* to hold *pro (a) particula*, as it is held in 29 *H.* 8. *Bro.* Tit. (*b*) *Tenures*. 2. Altho' the Tenancy and every Part of it is held and charged with intire Services; yet therein obſerve this Difference, between the Act of the Tenant by the Severance and Parcelling of the Tenancy to others (for that ſhall give Benefit to the Lord who is a Stranger to it) (*c*) *Res inter alios actæ nemini nocere debent, ſed prodeſſe poſſunt*; But the Act of the Lord himſelf to take any Parcel of the Tenancy, ſhall turn to his Prejudice; for by his Acceptance of any Part of the Tenancy, all the ſaid yearly intire Services are gone and extinct; and therefore if one holds his Land of his Lord by the yearly Service, of a Hawk, Horſe, or the like; if in ſuch Caſe the Lord purchaſes Part of the Tenancy, ſuch (*d*) intire Services are gone, becauſe ſuch Service cannot be ſevered or apportioned. And foraſmuch as he has diſcharged Part by his own Act, the whole intire Service is gone, in the ſame Manner as if he had releaſed his Seigniory in Part of the Tenancy, all the Seigniory by his own Act is gone. And therewith agrees (*e*) *Lit. fo.* 49. *a.* 5 *E.* 2. *Avowry* 206. 3. Another (*f*) Difference was taken between the ſaid intire Services, and other the like, which are only for the ſole Benefit of the Lord, and are a Charge to the Tenant, as the Services to render an Hawk, an Horſe, a Pair of gilt Spurs, *&c.* and intire Services which are for the (*g*) Benefit of the Commonwealth, or for the Defence of the Realm, or for the Advancement of Religion, and the Service of God, or for Works of Devotion, Piety, or Charity,

* See Sir M. Hale's F. N. B. 378, 379.

(*a*) Antea 1. a. 2 Inſt. 503. Plowd. 240. a.

(*b*) 29 H. 8. Br. Tenure 64.

(*c*) Co. Lit. 152. b. 1 Sid. 93. Poſtea 51. b. Hard. 385. 2 Inſt. 513. Jenk. 281.

(*d*) 8 Co. 108. b. 106. a. Mo. 203. Co. Lit. 149. a.

(*e*) Sect. 222.

(*f*) 10 Co. 108. b.

(*g*) Co. Lit. 149. a.

or for the Advancement of Juſtice: In ſuch and the like Caſes, altho' the Lord purchaſes Parcel; yet the intire Services remain. As if the Tenant holds by (*a*) Knight's Service, which is an entire Service to be done by the Body of a Man (for Eſcuage is but a Penalty for not doing of it) in this Caſe becauſe it is for the Defence of the Realm, and *pro bono publico*, altho' the Lord purchaſes Parcel of the Tenancy, yet the Service ſhall remain, and therewith agrees *Littleton*, *lib.* 2. *c. Rents*, *fol.* 49. The ſame Law of (*b*) Caſtleguard, Cornage, and the like. *Vide* 11 *H.* 7. 12. *b. Quia pro defenſione regni*; ſo if one holds of his Lord to make a Bridge, repair a Highway, or to make a Beacon (which Tenures you may ſee in 11 *H.* 7. 12. *b.* and 24 *H.* 8. *Br. Tenures* 53.) Altho' the Ld in ſuch Caſe purchaſes Parcel, the whole Service remains, *Quia pro bono publico*. So if one holds to (*d*) marry a poor Virgin yearly, as the Tenure is in 24 *H.* 8. *Br. Tenures* 53. *Quia opus Charitatis*; ſo if the Tenure to be to find a (*e*) Preacher in ſuch a Church, or to provide the (*f*) Ornaments of ſuch a Church, as the like Tenure is in 35 *H.* 6. 6. *b. Quia opus devotionis & pietatis*. So where the Tenure is to aſſiſt the (*g*) Sheriff, or to be High (*h*) Conſt. of *England*; for theſe are for the Advancement of Juſtice, for the Determination of divers Caſes doth belong to the Court of the Conſtable and Marſhal, and the Sheriff is the Miniſter of Juſtice. *Vide* 11 *Eliz. Dier* 285. and 16 *E.* 3. *Avowry* 93. Or if the Tenure be *ad cuſtodiend' (i) Recorda Domini Regis*, as the Abbot of St. *Bartholomew* in *Smithfield* held, as appears *inter Recorda in Turre London.* 7 *R.* 2. *membran.* 15. *in dorſo*; *Quia iſta concernunt adminiſtrat' juſtitiæ*. But if the Tenure be to be (*k*) Carver, or Butler, or Cook, *&c.* to the Lord, or to cover the Lord's Hall, or to attend upon him at ſome principal Feaſt, *&c.* in ſuch Caſes, by the Purchaſe of Parcel, all is extinct, for theſe are for the only Benefit of the Lord himſelf. 4. Another Difference was taken between intire Services, when the Doing of the Services by one Tenant of Part ſhall ſerve for all, and he who doth it ſhall have Contribution; and when every ſeveral Tenant ſhall do the ſeveral intire Services. As in the Caſe of Suit in the Caſes aforeſaid, one only ſhall do it, and the others ſhall make * Contribution. And therefore there, if any Parcel comes to the Lord, although it be by Diſcent, which is an Act in Law; yet all the Suit is gone, for there wants Contribution as well when Part comes by Act in Law, as when it comes by the Act of the Party, and therewith agrees 34 *Aſſiſe* 15 *&* 35 *H.* 6. *Execution* 21. But if Parcel deſcends to the Lord, where the Tenure is by a Hawk,

(*a*) 8 Co. 105. *b.* Co. Lit. 149. *a.*

(*b*) Co Lit. 149. *a.*

(*c*) Co. Lit. 149. *a.* Br. Tenure 109.

(*d*) Co. Lit. 149. *a.*

(*e*) Co. Lit. 149. *a.*

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

(*g*) Co. Lit. 149. *a.*

(*h*) Dyer 285. pl. 39. Kelw. 170. *b.* 171. *a. b.* Co. Lit. 106. *a.* 149. *a.* 165. *a.* Jenk. Cent. 236.

(*i*) Co. Lit. 149. *a.*

(*k*) 8 Co. 106 105. *b.*

(*l*) Co. Lit. 149. *a.*

* Hale's P. N. B. 378, 379.

a Horſe, *&c.* there it is otherwiſe, becauſe there every Parcel is ſeverally holden by a Hawk, a Horſe, *&c.* and therefore no *Contribution* ſhall be in ſuch Caſes. But as it has been ſaid) every ſeveral Feoffee ſhall hold by a Hawk, a Horſe, *&c.* 5. Another Difference, as to intire Services, is, where the Lord comes to part by a meer Act in Law, and in Part by the Act of the Party, and namely when the original Act is the Act of the Party, as Recovery in a *Ceſſavit* of Parcel of the Tenancy, all the intire Services, which are only for the Benefit of the Lord as Suit, Grain of Wheat, a Horſe, *&c.* are gone and extinct, and therewith agree. 40 *E.* 3. 40. *F. N. B.* 209. *a.*

Co. Lit. 149. a.

Br. Apportionment 2.

[*For the Writ of Contribution, See Sir* M. Hale's *F. N. B.* 378.]

Where

Where the Parol ſhall demur for the Nonage of the Demandant, and where the Tenant ſhall have his Age.

Paſch. 35 Eliz.

In the Common Pleas.

MARKAL's *Caſe.*

IN the Caſe of one *Markal* it was moved, Whether in a *Formedon* in Remainder by an Infant, of a Remainder limited to his Father, and his Heirs (whoſe Heir he is) The Tenant without any Plea pleaded might pray that the Parol might demur for the Nonage of the Demandant. And 3 *E.* 3. Age 72 was cited that the Parol ſhould demur; and it was objected, that although 8 *E.* 3. 59. be to the contrary, yet the Reaſon which (*a*) *Herle* there gives, upon which he grounds his Opinion, is againſt Law. For he ſaith, That when the Infant has recovered in his *Formedon* in Remainder, that he ſhall not be in Ward. And it is apparent in a *Formedon* in the Reverter brought by the Heir of the Donor, the Tenant may pray that the Parol may demur without any Plea pleaded. And therewith agree 18 *E.* 3. Age 11, and 12 *E.* 2. *ibid.* 145. But at laſt the Record of a Judgment was ſhewed *Paſch.* (*b*) 4 *Eliz.* where the Caſe was, that a *Scire facias* to execute a Fine brought by the Heir within Age, of him in the Remainder in Fee, which Remainder was limited to his Grandmother and her Heirs; the Tenant prayed that the Parol might demur for the Nonage of the Demandant. And after many Arguments and great Deliberat', it was adjudged, that the Prayer of the Ten't ſhould not be allowed, but that he ſhould anſwer preſently. And for the better underſtanding of the true Reaſon of this Judgment, the Rules of the Common Law as to this Purpoſe are firſt to be obſerved, and then what Alteration any Stat. has made in ſuch Caſe. And as to the firſt it is to be known, that every real Action is either (*c*) poſſeſſory, that is to ſay,

3 Bulſt. 139.

(*a*) Dy. 137. b. pl. 27.

(*b*) Mo. 16, 35. 1 Anderſ. 24. pl. 52. Dall. 37. pl. 4. Dall. in Kelw. 204. pl. 5. Dal. in Aſh. pl. 5. N. Bendl. 121. pl. 152.

Note.

(*c*) 2 Inſt. 241.

of his own Poſſeſſ. or Seiſin; or Aunceſtrel, *ſc.* of the Seiſin or Poſſeſſ. of his Anceſtor. And generally in all real (*a*) Actions, which an Infant brings of his Poſſeſſ. altho' he has the Land by Deſcent, and altho' the Tenant pleads the Deed or Warranty of his Anceſtor, the Parol ſhall not demur for his Nonage, for by the Preſumption of Law, the Granting that the Parol ſhall demur, for the Nonage of the Demandant, is in Favour, and for the Benefit of the Infant, leſt for Want of good Intelligence of his Eſtate, and of the Truth of the Matter he ſhould be prejudiced of his Right which deſcended to him from his Anceſtor, and therefore the Law in ſuch Caſe will rather ſuffer a Delay, than hazard the Right of the Land, the Poſſeſſ. whereof his Anceſtor had, by Negligence or otherwiſe, loſt. But when his Anceſtor dies ſeiſed, and the Land deſcends to the Infant, and he enters and takes the Explees and Profits, in this Caſe it would be a Prejudice to the Infant that he ſhould loſe his Poſſeſſ. which he had, and ſhould be thereof delayed till his full Age: But when only a bare Right deſcends to him he is not at any ſuch Prejudice. And therewith agrees 12 *E.* 4. 17. in a Writ of *Entre ſur diſſeiſin* (*b*) of a Diſſeiſin done to the Infant himſelf; and 41 *E.* 3. Age 39 in a Writ of Right (*c*) of a Deforcem. to an Infant himſelf of Land which he had by Deſcent. So in Eſcheat and *Ceſſavit*, and Writ of Right *ſur diſclaimer* brought by an Infant, becauſe he has the Seigniory in Poſſeſſ. which by Eſcheat, Ceſſer, or Diſclaimer he loſes, and his Anceſtor had not any Right to the Land, for this Cauſe the Parol ſhall not demur for his Nonage. So in a Writ of (*d*) Meſne brought by an Infant, becauſe the Cauſe of the Action and Wrong begins in the Time of the Infant himſelf. 21 *Edw.* 3. Age 85. *Tempore Edw.* 1. Age 119. 7 *Edw.* 2. Age 140. and as to Actions Anceſtrel, there are two Sorts of them; one called *Anceſtrel Rightful*, becauſe nothing deſcends from the Anceſtors but a bare Right; the other called *Action* (*e*) *Anceſtrel poſſeſſory*, becauſe the Anceſtor died in Poſſeſſ. and the Land it ſelf deſcended. In all Caſes when a bare Right in Fee-ſimple deſcends from any Anceſtor (who once was in Poſſeſſ.) to an Infant, there in any Action Anceſtrel brought by him, the Tenant without any Plea pleaded, may pray that the Parol demur. As if an Infant brings a *Writ of* (*f*) *Right* as Heir to his Anceſtor, and alledges the Explees in his Anceſtor, the Tenant (without any Plea) may pray that the Parol demur. So if an Infant brings a *Formedon* in (*g*) *Reverter*, as Heir to the Donor, for there he demands Fee-ſimple of the Seiſin of his Anceſtor, and there he ought to alledge the Explees in the Donor; and therewith agree 18 *Edw.* 3. Age 11. 12 *Edw.* 2. *ibid.* 145. But in *Formedon* in

(*a*) 1 Rol. 141. Cr. Jac. 467.

(*b*) 1 Rol. 141, 143. Dy. 137. a.

(*c*) 1 Rol. 137, 141. Dy. 137. a.

(*d*) Dy. 137. pl. 25. 1 Rol. 138, 139, 142.

(*d*) 9 Co. 85. a.

(*e*) Dy. 137. pl. 22. 2 Inſt. 240, 287.

(*f*) Dyer 107. pl. 22. 1 Rol. 137, 141.

(*g*) 1 Rol. 137. Dy. 137. pl. 22.

in (*a*) Rem'r, altho' he demands Fee-ſimple, yet becauſe his Anceſtor, to whom he is Heir, was never ſeiſed, nor took any Explees; (and therefore in ſuch Caſe he ſhall alledge Explees only in the particular Tenant who has the Eſtate on which the Remainder depends) for this Cauſe the Tenant (without Plea) cannot pray that the Parol demur, foraſmuch as the Rem'r never was in the Poſſeſſ. of any of his Anceſtors, and the Demandant himſelf will be the firſt in whom it will veſt, and that will have Seiſin of the Land in Demand; and this was the true Reaſon of the ſaid Judgm. And it is not called *Action Anceſtrel Rightful*, becauſe the Action deſcends, but becauſe the Right deſcends from the Anceſtor, for which an Action of the Seiſin of his Anceſtor is given to the Heir. And therefore if an Infant aliens within Age, and dies within Age, and his Heir brings a Writ of *dum* (*b*) *fuit infra ætatem*, the Tenant may pray that the Parol demur, and yet the Action doth not deſcend, for it doth not lie for him who aliened, becauſe he died within Age, and the * Writ ſaith *dum fuit infra ætat'*. So if the Heir within Age brings a Writ of *Non compos* (*c*) *mentis*, the Tenant may pray that the Parol demur, and yet a bare Right and no Action deſcends. *Vide* 30 *Ed.* 3. 7. In all (*d*) Actions Anceſtrel poſſeſſory, as in *Coſinage*, *Beſaiel*, *Aiel*, *&c.* where the Anceſt. died ſeiſed, there the Ten't can't (without Plea pleaded) pray that the Parol demur for the Nonage of the Demand'. But at the Com. Law, in ſuch Actions, if the Tenant had pleaded a Feoffm. or other Act of the Anceſtor in Bar, by which it appeared, that either nothing, or but a bare Right at moſt deſcended, which makes it equivalent to an Action Anceſtrel rightful, there the Tenant on ſuch Plea pleaded, may pray that the Parol demur; and the Demandant for the Tenderneſs of his Age, and in Reſpect whereof the Law preſumes Want of Underſtanding in him, ſhall not be hazarded to try that which may perpetually bar him; and that the Com. Law was ſuch, well appears by the Stat. of (*e*) *Glouceſter*, *cap.* 2. For there it appears, that in *Coſinage*, *Beſaiel*, *Aiel*, *&c.* brought by an Infant, the Tenant in Anſwering alledges a Feoffment, or pleads ſome other Thing, or the Inqueſt was delayed till the Age of the Infant, *&c.* that now he ſhall anſwer as if he were of full Age. But this Act extends only to Writs of *Coſinage*, *Beſaiel*, and *Aiel*, 8 *Ed.* 3. 36. againſt the Opinion in 34 *Hen.* 6. 3. that it extends to other Actions (*f*) 45 *Ed.* 3. In a *Quid juris clamat* by an Infant, the Defendant ſaid, that his Anceſtor by Deed demiſed to him for Life, without Impeachment of Waſte and Saving, *&c.* and becauſe the Plaintiff being within Age cannot confeſs a Deed within Age, it was adjudged, that he ſhould attend till his full

(*a*) Dyer 133. pl. 2. 138. pl. 27, 28. 8 E. 3. 59. 1 Rol. 137. Moor 35. 1 Anderſ. 24. 2 Inſt. 291.

(*b*) 1 Rol. 146. 2 Inſt. 291. Dyer 104. pl. 10. 137. pl. 25. * F. N. B. 192. G.

(*c*) Dyer 137. pl. 25. 2 Inſt. 291. 1 Rol. 147.

(*d*) Dyer 137 pl. 25. 2 Inſt. 291.

(*e*) 2 Inſt. 290, 291. Dyer 137. pl. 26. 6 E. 1. cap. 2.

(*f*) 43 E. 3. 5. 2. Co. Lit. 320. b. 9 Co. 85. b. 3 Bulſtr. 137. 1 Rol. 138.

Age, 6 *Edw.* 3, 48. agreed on the like Plea pleaded in Waſt by an Infant; for during his Nonage he ſhall not be Party to try the Deed of his Anceſtor in ſuch Caſes. In a *Formedon* (*a*) Deſcender in which the Demandant ſhall not recover the mere Right, but a limited Eſtate *per formam doni* of the Seiſin of the Donee, the Parol ſhall not demur by the Prayer of the Tenant, but he ſhall be anſwered within Age, unleſs ſomething be pleaded againſt him, to which he cannot be Party to try within Age; and therewith agree 8 *Ed.* 3, 9. 12 *Ed.* 4. 17. 34 *H.* 6. 3. 40 *Ed.* 3. 42 *Ed.* 3. 13 *Ed.* 3. *Formedon* 96. 3 *Ed.* 2. *ibid.* 133. But in (*b*) Aſſiſe, and Aſſiſe of *Mortdanceſtor* brought by an Infant, becauſe there is a Jury the firſt Day, and the Jury inquire of Circumſtances, the Parol on any Plea pleaded ſhall not demur, 8 *Ed.* 3. 36. And it is to be known, that the Stat. of (*c*) *Weſtm.* 1. *c.* 47, takes away the Age as well on the Part of the Tenant as of the Demandant in a Writ of *Entrie ſur diſſeiſin* to the Anceſtor, if freſh Suit be made, as it is adjudged in 24 *Ed.* 3. 46. For in ſuch Caſe becauſe a bare Right deſcended to the Heir at the Com. Law, the Parol ſhall demur for his Infancy. But the ſaid Act is taken ſtrictly, and doth not extend to any other Action than a Writ of *Entrie ſur diſſeiſin*, 46 *Ed.* 3. Age 76. But at the Com. Law, if the Grandfather was diſſeiſed, and brought an Aſſiſe and died pending the Writ, and afterwards the Father brings a Writ of *Entrie ſur diſſeiſin*, and pending the Writ the Father alſo dies, in that Caſe in a Writ of *Entrie* brought by the Son, of the Diſſeiſin done to his Grandfather, the Parol ſhall not demur for the Nonage of the Son, for the ſpeedy and freſh Purſuit which has been made, and therewith agrees 10 *Ed.* 3. 58.

Note. And it is to be obſerved that in all real Actions at the Common Law, if the Tenant (*d*) was within Age, and in by Deſcent, that he ſhould have his Age, 21 *Ed.* 4. 7, 8. in a (*e*) *Scire facias* on a Fine, 47 *Ed.* 3. 7. in (*f*) Error, if he be Tenant. *Vide* 8 *Ed.* 4. 19. 13 *Ed.* 3. Age 7. in *Formedon* in Deſcender. 45 *Ed.* 3. Age 40. in *Aiel*, unleſs the Action be grounded on his own Wrong, as in (*g*) *Ceſſavit* of his own Ceſſer, 2 *Ed.* 2. Age 132. 9 *Ed.* 3. 502. 14 *Ed.* 3. Age 88. *Vide* 28 *Ed.* 3. 99. 31 *Ed.* 3. Age 54. adjudged. And unleſs it be on a (*h*) *nuper obiit*, when he claims as Heir from the ſame Anceſtor. *Vide* 7 *Ed.* 3. 13. 4 *Ed.* 2. Age 137. 9 *Ed.* 2. *ib.* 142. 13 *Ed.* 2. *ib.* 146. *Vide* 5 *Ma.* 136. (*i*) in *Baſſet*'s Caſe; (for a *nuper obiit* is principally brought to try the Privity of the Blood) and unleſs it be in a (*k*) *Partitione facienda*, becauſe both are in Poſſeſſion. *Vide* 9 *H.* 6. 6. 10 *H.* 4, 5. and 8 *Ed.* 3. and unleſs it be in (*l*) Attaint, 9 *H.* 6. 46. for the Miſchief of the Death of the Petty Jury. So that the Law favours the Ten't within Age, who has the Poſſeſſion by Deſcent more than the Demandant, who has but a Right by Deſcent. But the ſaid Act of *Weſtm.* 1. takes away the Age of the Tenant in a Writ of *Entrie ſur diſſeiſin* in the *Per*, as is aforeſaid.

And

(*a*) 1 Rol. 137, 141.

(*b*) 1 Rol. 140, 141. Dy. 137. a. 2 Inſt. 291.

(*c*) 3 E. 1. cap. 47. 2 Inſt. 257, 258.

(*d*) Cr. Jac. 392. Moor 847.

(*e*) 3 Bulſtr. 141.

(*f*) 3 Bulſtr. 134, 135, 136, 137, 138, 139, 140. Jac. 392.

(*g*) 1 Rol. 138, 141. 2 Inſt. 401. 8 Co. 44. b. Dyer 137. pl. 25. 9 Co. 85. a. Raym. 118.

(*h*) 1 Rol. 143.

(*i*) 3 Bulſtr. 136. Dyer 136, &c. Hall. in Kelw. 205. Jenk. Cent. 212. Moor 35.

(*k*) Co. Litt. 171. a. Hob. 179. 1 Rol. 138.

(*l*) 2 Bulſt. 135, 136, 237, 140. Cr. Jac. 392, 393. 1 Rol. 137.

And the Statute of *Weſtm.* 2. *cap.* 40. ouſts the Age of the Vouchee being the Huſband's Heir, in a *Cui in vita*, and in *Sur cui in vita*. But both theſe Statutes are taken ſtrictly, as appears by many Books; and by theſe Differences, and the Cauſes, and the Reaſons of them you will better underſtand your Books, which are almoſt infinite, and *prima facie* ſeem to diſagree, but by theſe Differences may be well reconciled. *Vide* 8 *E.* 3. 10. if the Parol ought to demur for the Nonage of the Infant, altho' the Tenant would anſwer, yet the Court ought to award that the Parol demur. So when the Tenant vouches one as Heir within Age, he may pray that the Parol demur. But in ſuch Caſe he ought to plead more certain; for there he ought to ſhew how Coſin. *Vide* 7 *Edw.* 6. *Dyer* 79. 16 *Ed.* 3. Tit. *Age*, & 15 *Edw.* 4. 46 *Edw.* 3. 25 & 31 *Edw.* 3. *Voucher* 54. In Dower, if the Tenant vouches the Heir within Age in Favour of Dower, he ought to ſhew a Deed. *Vide* 11 *Edw.* 3. *Voucher* 13. 40 *Edw.* 3. 5. 50 *Edw.* 3. 25. 10 *Edw.* 3. 31.

13 E. 1. cap. 40.
2 Rol. Rep. 246.
1 Co. 15. a.
4 Co. 50. a.
17. b.
2 Inſt. 455.
2 Leon. 148.
18 E. 4. 16. a. b.
Br. Age 43.
Fitz. Age 2.
46 E. 3. Age 76.
7 E. 2. Age 139.
8 E. 2. Judgment 249.
14 H. 7. 18. b.
19. a.
6 E. 3. 216. b.

See Cro. J. 392.

Hill.

[*Where the King's Grant ſhall preſerve the Meſnes Tenure.*]

Hill. 40 Eliz.

In the Exchequer.

Sir JOHN MOLYN's *Caſe.*

2 Inſt. 500. 8 Co. 77. a. 9 Co. 131. a. 2 Rol. 502. Hard. 468. Lane 7. Poph. 138.

KIng *Edw.* 3. Lord, the Abbot of *Weſtminſter* Meſne, and *C.* Tenant of the Manor of *Chippenham* in the County of *Bucks.* The Tenant was attainted of Treaſon, and after Office found thereof, King *Edw.* 3. by his Letters Patents granted over the ſaid Manor to Sir *John Molyn*, and his Heirs, *Tenendum de nobis, Hæredibus & Succeſſoribus noſtris & aliis Capitalibus Dominis feodi illius, per ſervitia inde debita, & de jure conſueta:* Of whom, and how this Land ſhould be held, was the Queſtion. And it was objected that in this Caſe the Tenure ſhould be of the King, for three Reaſons; 1. Becauſe the Words of the *Tenendum* are, *per ſervitia inde debita, & de jure conſueta*; which Words could not either revive, or create a Tenure to the Meſne; for by the Attainder the Meſnalty was extinct, and therefore at the Time of the King's Grant, *nulla ſervitia fuer' debita & de jure conſueta*, for all Services were extinct: And therefore as in 27 *H.* 8. *Br. Parl.* 77. it is ſaid, That if the King has Land by Forfeiture of Treaſon, thereby all Tenures are determined, as well of the King as of others; and there, if this Land be afterwards given to another by Parliament, ſaving to all others their Rights, Rents, Services, *&c.* there the Seigniories of common Perſons are not revived: for no Seigniory was *in eſſe*, *tempore ſecundi actus facti.* So in the Caſe at Bar, *tempore confectionis Literarum patentium*, there was no Seigniory, or Service *in eſſe*, and therefore of Neceſſity the ſaid Mannor ought to be held of the King; but the Words ought to have been, *per ſervitia ante Proditionem*, or *ante Attincturam*, *inde prius debita*, *&c.* 2. In this Caſe an expreſs Tenure is reſerved to the King; for the *Tenendum* is, *Tenendum de Nobis*, *&c.* and therefore it ought to be held of the King; and foraſmuch as

2 Rol. 502, 514. Dav. 4. a. 1 Co. 47. a. 27 H. 8. Br. Parliament 77. B. N. C. 92. 9, 10 Co. 4. a. 11 Co. 73, 74.

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one and the ſame Land cannot be immediately held of many, therefore theſe Words *& aliis capitalibis Dominis, &c.* are void, and the firſt Words, *viz. Tenend' de Nobis* ſhall ſtand. 3. Divers Offices and Licences of Alienation, and other Records were ſhewed to the Court, by which it appear'd that the Law had been always ſo taken, that the ſaid Manor was held of the King *in Capite*; *& conſuetudo eſt optima interpres Legum.* As to the firſt, it was anſwered and reſolved by the Barons of the Exchequer, that the Words are (*a*) ſufficient to create a Tenure in the Meſne, as it was before the Treaſon; for ſo is the King's Meaning, and it is conſonant to Equity, *viz.* that the Meſne who did not offend, ſhould not loſe his Services; and therefore the Grant ſhall be taken beneficially for the Honour of the King, and for the Relief of the Meſne; and the Words of the *Tenendum* cannot have any other reaſonable Conſtruction; and as to this Point they ſtrongly rely'd on the Book in 33 *Hen.* 6. 7. *a.* where *Priſot* ſaith, That if the (*b*) King ſeizes any Lands by Forfeiture of Treaſon, grants the ſame Lands to another by theſe Words, *Tenendum de capitali Domino per ſervitia debita & conſueta,* That the ſame Lands are held of the Chief Lord, as it has been adjudged; and therewith agrees 8 *E.* 3. 283. *Vide* (*c*) 46 *E.* 3. *Petition* 19. *&* * 17 *E.* 3. 59. *b.* And as to the Caſe of 27 *H.* 8. (*d*) it was anſwered and reſolved, that it was not like this Caſe; for a Saving cannot ſave that which is not *in eſſe.* But in the ſaid Book it is further ſaid, *viz.* Here are not Words of Gift, or Reviving; but in the Caſe at Bar, the King's Grant doth in Judgment of Law amount to the reviving of the ancient Seigniory. Note the Gravity of the antient Sages of the Law, to conſtrue the King's (*e*) Grant beneficially for his Honour, and the Relief of the Subject, and not to make any ſtrict or literal Conſtruction in Subverſion of ſuch Grants. As to the ſecond Point, it was reſolved, That all the Words of the *Tenendum* in the Caſe at Bar might well ſtand; for the ſaid Manor ſhall be held of the King as Lord Paramount, and of the Abbot as Meſne, *viz.* of the Meſne immediately, and of the King by a Meſne, as it was held before the Attainder; and that was the honourable Intention of the King, and ſtands well with the Words: For as the Barons ſaid, divide the Words of the *Tenendum* into two ſeveral Caſes, and then join them together, and the Caſe would be without any Difficulty; Firſt, if the *Tenend'* had been, *de nobis hæred. & ſucc. noſtris per ſervitia inde debita, & de jure conſueta,* the Tenure ſhall be of the King immediately. 2. If the Words had been *De Capital' Dom' feodi illius per ſervitia inde debit', & de jure conſueta,* the immediate Tenure ſhall be of the Abbot, as it was before, then join them together,

(*a*) 8 Co. 56. a. b. 9 Co. 131. a. 11 Co. 11. b. 2 Rol. 502.

(*b*) 2 Rol. Rep. 148. 2 Rol. 502. B. N. C. 113. 2 Inſt. 501. Ley de Gards & Liveries 4. B. Tenures 3.

(*c*) 9 Co. 131. 2 Inſt. 501. Lit. Rep. 43. * 11 Co. 73. b. 74. a. b. 2 Inſt. 501.

(*d*) 27 H. 8. Br. Parliament 77.

1 Co. 47. a. 2 Rol. 502. Antea 4. a. 5. b. B. N. C. 92. Lit. Rep. 43.

(*e*) 2 Rol. 3, 4. A. B. 200. 1 Co. 49. a. Poſtea 7. a. 56. a. 8 Co. 77. a. 56. a. b. 166. b. 9 Co. 30. a. 123. a. 10 Co. 67. b. 11 Co. 11. a. 2 Inſt. 496. 497. 3 Bulſt. 6. Keilw. 175. a. 198. a. 3 Leon. 243. 2 Sid. 141. Plowd. 32. a. 126. a. 143. b. Hard. 500. Fitz. Grant 29. Br. Exemption 9.

(*f*) 2 Rol. 502.

together, as in the Case at Bar, and the Tenure shall be of the Abbot immediately, and of the King as Lord *Paramount*. As to the said Offices, Licences and other Records, the Barons said, That forasmuch as by Construction of Law on the said Letters Patents, it appears that there is no immediate Tenure of the King, although it has been otherwise found in Offices, or admitted in Licences, or other Records, that cannot alter the true Tenure, which originally appears (to them as Judges) of Record. And it was said, *Quod licet consuetudo est magnæ authoritatis nunquam tamen præjudicat veritati.*

4 Co. 18. a.

[*What Grant of the King makes a Tenure by Socage in Chief.*]

Pasch. 43 Eliz.

In the Exchequer.

WHEELER's *Case*.

Co. Lit. 77. b.

KIng *H.* 8. by his Letters Patents *ex certa scientia & mero motu* granted Lands in Fee, *Tenendum de nobis & Hæredibus nostris per servitium unius (a) Rosæ rubeæ annuatim ad Festum Nativit' S. Johan' Baptistæ solummodo pro omnibus & omnimodis aliis servitiis.* And it was adjudged in the Exchequer, that it was a Tenure by Socage in Chief. But it was objected, 1. That if the King grants Lands in Fee, and reserves *(b)* nothing, the Patentee should hold by Knight's Service *in Capite*. The same Law if the King grants Lands by expres Words *(c) absque aliquo inde reddendo*. Or if he grants Lands without any Reservation, the Tenure should be of the King by Knights Service for the Incertainty, and so it is held in 33 *H.* 6. 7. *a.* 2. It was objected, That in the Case at Bar the Tenure could not be by the Service of a Rose only *pro omnibus aliis servitiis*, according to the Words of the *Tenendum*, for to every Tenure there ought to be Homage, or Fealty at least; then forasmuch as the Tenure cannot be by a Rose only, the King is deceived in his Grant. 3. Forasmuch as a Service above the Rose, ought to be of Necessity, by

(a) Ley de Gards, &c. 3. Lit. Rep. 48.

(b) 29 H. 8. Br. Livery 57. Ley de Gards, &c. 3. 9 Co. 123. a. b. 2 Rol. 502. Plowd. 240.

(c) Ley de Gards, &c. 3. 9 Co. 123. a. b. 2 Rol. 502.

by Conſtruction of Law added to the Tenure; the beſt and higheſt Service ſhould be taken and added for the King, and that is Knights Service, for the Uncertainty: Yet it was reſolved, that foraſmuch as Fealty is incident to every Rent-Service, the Law annexeth Fealty to the ſaid Rent, and then theſe Words, *ſcil. pro omnibus* (*a*) *aliis ſervitiis*, is to be intended of other Services which the Law doth not imply or add to it, ſo that the Tenure ſhall be by a Roſe and Fealty, and that is the favourable (*b*) Conſtruction of the Law, as near the King's Intent as may be. And by this Conſtruction the ſaid Words *pro omnibus aliis ſervitiis* have ſome Effect, and ſhall not be rejected as idle, and of no Force. And *Priſot* ſaid, 33 *H.* 3. 6. 7. *a.* That if the King grants Land, and reſerves any ſpecial Rent, the Tenure ſhall be ſuch as he reſerves, be it Socage or other.

(*a*) Ley de Gards, &c. 6.

(*b*) 10 Co. 67. b. 2 Rol. 200. 2 Inſt. 496, 497. 3 Bulſtr. 6. 8 Co. 77. a. 56. a. b. 166. b. 11 Co. 11. a. Kelw. 175. a. 198. a. 3 Leon. 243. 2 Sid. 141. Plowd. 32. a.

126. a. 143. b. Hard. 500. Fitz. Grant. 29. Br. Exemption 9. 1 Co. 49. a. 2 R. 3. 4. a. b. Poſtea 56. a. 9 Co. 30. a. 123. a. Antea 6. a.

Reſolutions and Differences when a * Bar in one Action ſhall be a Bar in another.

* 3 Mod. 2. Skinner 57, 58, 120. 6 Mod. 157.

Mich. 40 & 41 Eliz.

In the Common Pleas.

FERRER's *Case*.

BEtween (*a*) *Ferrer* and *Arden* theſe Points were reſolved: 1. When one is (*b*) barred in any Action real or perſonal, by Judgment on Demurrer, Confeſſion, Verdict, *&c.* he is barred as to that or the like Action of the like Nature for the ſame Thing for ever. For * *Expedit reipubl. ut ſit finis Litium.* But there is a Difference between real Actions and perſonal Actions. For in (*c*) a perſonal Action, as Debt, Accompt, *&c.* the Bar is perpetual, for the Pl. cannot

(*a*) Cro. El. 667, 668. Co. Ent. 38. Nu. 31.

(*b*) Doct. pl. 65. Noy 51.

* 8 Co. 37. b. 98. b. 9 Co. 79. b. Co. Lit. 103. a.

(*c*) Poſtea 46. a. Doct. placit. 65. Præf. ad 8 Rep. 10.

Moor 458. pl. 633. 12 E. 4. 13. a. b. 4 Co. 43. a. Latch. 193.

cannot have an Action of an higher Nature, and therefore in ſuch Caſe he has no Remedy but by Error or Attaint. But (a) Doct. pl. 95. if the Demandant be (a) barred in a real Action by Judgm. on a Verdict, Demurrer, Confeſſion, *&c.* yet he may have an Action of an higher Nature, and try the ſame Right again, becauſe it concerns his Freehold and Inheritance. As if a Man (b) Doct. pl. 75. 12 E. 4. 13. b. 4 Co. 43. a. Cr. Car. 465, 466, 467. be barred in an (b) Aſſiſe of *Novel diſſeiſin*, yet upon ſhewing a Deſcent, or other ſpecial Matter he may have an Aſſiſe of *Mortdanceſter*, *Aiel*, or *Beſaiel*, *Entrie ſur diſſeiſin* to his Anceſtor. So it was ſaid, if a Man be barred in a *Formedon* (c) (c) Doct. pl. 65, 66. in Diſcender, he may have a *Formedon* in Reverter or Rem'r, for that is an Action of an higher Nature; for therein the Fee-ſimple is to be recovered, according to the Opinion in (d) 5 Co. 32. b. 33. a. Cr. Jac. 15, 194. (d) *Robinſon*'s Caſe in the 5th Part of my Reports *f.* 33. And if any one be (e) barred by Judgm. in any real Action of the (e) Doct. pl. 66. Cr. Jac. 464, 465, 466, 467. Seiſin of his Anceſt. or of his own Poſſeſſ. he may have a Writ of Right, in which the Matter ſhall be tried and determined (f) Doct. pl. 66. Cr. Jac. 465. Godb. 271. 2 Rol. Rep. 14, 15, 17. again. But a Recovery or Bar in an Aſſiſe, (f) is a Bar in every other Aſſiſe, and in a Writ of Entry in the Nature of an Aſſiſe; for both are of his own Poſſeſſ. and of one and the ſame (g) Doct. pl. 66. Nature between the ſame Parties. So a (g) Bar in a Writ of *Aiel*, is a Bar in a Writ of *Beſaiel*, or *Coſinage*, *&c.* for theſe are Anceſtrel, and of one and the ſame Nature, *& ſic de cæteris.* So that the Law has provided greater Safety and Remedy for Matters of Freehold and Inheritance than for Debts and Chattels; for there, once barred always barred, (as it has Dy. 371. pl. 6. 1 Mod. 207. been ſaid) unleſs it be in a ſpecial Caſe, as appears in the ſaid *Robinſon*'s Caſe. *Vide F.N.B.* 5 *N.* 30 *Aſſ. pl.* 5. 4 *Ed.* 3. *Eſtop.* 133. 5 *Aſſ. p.* 1. 11 *Ed.* 3. *Entre* 56. 12 *Ed.* 4. 13. *a.b.* 2 *R.* 3. 14. *a.b.* 33 *H.* 8. *Action ſur le Caſe Br.* 105. 29 *H.* 8. *Br. Det.* (h) Doct. pl. 66. Co. Lit. 393. b. 174. But in a (h) *Formedon* in Diſcender, if the Demandant be barred by Verdict or Demurrer, yet the Iſſue in Tail ſhall have a new *Formedon* in Deſcender on the Conſtruct. of the Stat. (i) Doct. pl. 66. Godb. 320. Cr. El. 388. of *Weſt.* 2. *c.* 2. So if he be barred in a Writ of (i) Error on the Releaſe of his Anceſtor, his Iſſue ſhall have a new Writ of Error, for he claims in not only as Heir, but *per form' doni*; (k) Doct. pl. 66. (l) Dy. 118. pl. 8. Co. Lit. 20. a. 392. b. Cr. El. 388. and by the Statute ſhall not be barred by (k) feigned Pleading, or falſe Pleading of his Anceſtor, ſo long as the Right of the Intail remains; and therewith agree 10 *Hen.* 6. 5. 3 *El. Dier* (l) 188. Sir *Ralph Rowlet*'s Caſe. Another (m) Difference is in real Actions or perſonal, between a Plea to the Action of the Writ, and a Plea to the Writ, for if the De- (m) Doct. pl. 66. (n) Doct. pl. 66. 4 Co. 39. b. 40. a. Cr. El. 668. 2 Vent. 169. mandant or Plaintiff has (n) miſtaken his Action, ſo as the Plea of the Tenant goes to the Action of the Writ, as *Formedon* in the Remainder, where it ſhould be *Formedon* in the Reverter, ſuch Action without Judgment upon Verdict or Demurrer, *&c.* doth not bar the Demandant of his rightful Action; and therefore if the Deman- (o) Doct. pl. 66. 5 Co. 33. a. dant (o) in ſuch Caſe be Nonſuit, or the Plea be diſcontinued

nued, he may bring his rightful Action; and therewith agree 27 *E.* 3. 84. 6 *H.* 4. 4. 2 *R.* 2. *Eſtoppel* 210. 4 *E.* 3. 54. But (*a*) if the Plea be but to the Writ, ſo that the ſame Nature of Writ remains, in ſuch Caſe altho' the Plea to the Writ be adjudged againſt the Demandant upon Demurrer or Verdict, *&c.* yet he ſhall maintain the ſame Writ again; for the Judgment extends but to the Writ; and therewith agrees 3 *E.* 3. *Eſtoppel* 134. 30 *Aſſ. pl.* 8. Another Difference in real Actions, between ſuch Perſons as have not the meer Right in them, but a qualify'd Right, altho' they be barred in real Actions (without making them Parties who have Intereſt) it ſhall not bind the Succeſſor, as (*b*) Parſon, Prebendary, *&c.* For in ſuch Caſe a new Action of the ſame Nature againſt the Succeſſor, he ſhall falſify; and the Recovery don't make any Diſcontinuance but the Succeſſor may enter. Otherwiſe of an Abbot, Biſhop, and ſuch like, who have the whole Fee-ſimple in them, in ſuch Caſes the Succeſſor at the Com. Law ſhall not falſify in a *Sci. fa.* or new Action of the ſame Nature. The ſame Law when Recovery is had againſt them, for it hath been adjudged that in a Writ of Right againſt a (*c*) Parſon, who after the Miſe joined, made Default, and Judgment was given againſt him, yet the Succeſſor had a *Juris utrum*, becauſe he had not the meer Right, nor had prayed in Aid of the Patron and Ordinary. The ſame Law of (*d*) Ten't in Tail; *Vide* 8 *E.* 3. 28, 29. 19 *H.* 6. 39. 7 *H.* 4. 20. 4 *H.* 7. 2. 12 *H.* 8. 8. 10 *H.* 6. 5, 6. 15 *E.* 3. *Fauxer de Recovery* 43. *F.N.B.* 49 *R.* And if a Parſon, Vicar, or Prebendary, *&c.* loſe by Default in a real Action, he himſelf may have a *Juris utrum*; for that is his Writ of Right, as it is ſaid in the Regiſter, 32. *b.* And it would be againſt Reaſon that he ſhould not have any Remedy, and eſpecially it being the Right of the Church, which is favoured in Law. And it is to be obſerved, that when any one brings an Aſſiſe of *Novel diſſeiſin*, *Mortdanceſter*, Writ of *Entry ſur diſſeiſin*, or any other real Action, and is barred by Judgm. upon Demurrer, or Verdict, *&c.* the Demandant and his Heirs are not only barred of the ſame Action, but alſo as long as the Record of the Judgm. ſtands in Force, he and his Heirs are barred of their Entry, and are put to their Action of an higher Nature; *Vid.* 25 *H.* 8. (*e*) *Dy.* 5. And where it is ſaid in the Books that Privies ſhall not (*f*) falſify in the Point tried, that is as much as to ſay, that they ſhall not falſify in a *Sci. fa* on the ſame Judgm. or in any other Writ of the ſame Nature. But he may bring an Action of an higher Nature, and therein try the Matter again, as it hath been ſaid before But in *Robinſon*'s Caſe, foraſm. as the Def. in the firſt Action gave the Pl. *&c.* an Act'n as Execut. and Peradvent. the Pl. at the Time

(*a*) Doct. pl. 66.

(*b*) Cr. Jac. 467.

(*c*) F.N.B. 50. d.

(*d*) Cr. Jac. 467.

(*e*) Dy. 5. pl. 1.

(*f*) 1 Sid. 55.

5 Co. 33. a. Antea 7. b. Cr. Jac. 15. 5 Co. 7. b.

Time he brought his Action as Adminiſtrator, did not certainly know of the Will, foraſmuch as (as it is ſaid in 27 *H.* 6. *Eſtoppel* 273.) he may be made Executor unknown to him; for this Cauſe there in the ſaid *Robinſon*'s Caſe it was adjudged for Pl. Note Reader, at the Com. Law. if one had ſuffered a Recovery againſt him in any real Action by Default (if he was lawfully ſummoned, and no Error was in the Proceeding) he had not (the Caſe of an (*a*) Infant only excepted for the Tenderneſs of his Years, and Defect of Underſtanding) any Remedy but by Writ of Right: And that was the Cauſe that (*b*) Ten't in Tail, Ten't by the Curteſy, Ten't in Dower, or Ten't for Life after Recovery by Default, had not any Remedy until the Stat. of *Weſt.* 2. (*c*) *c.* 4. gave them a Writ of *Quod ei deforceat*, the Words of which Act are; *Cum temporibus retroactis aliquis amiſiſſet terram ſuam per defalt', non habuit aliud recuperare quam per breve de Recto, quod eis competere non potuit qui de mero Jure loqui non potuerint, veluti tenentes ad term' vitæ &c. proviſum eſt quod de cætero non ſit eor' defalta tam præjudicialis, quin ſtatum ſuum ſi jus habeant recuperare poſſint per aliud breve quam per breve de Recto, &c. Nota*, If a Man loſes in an Aſſiſe, the Ten't is not put to his Writ of Right, but may have an Aſſiſe of *Mortdanceſtor*, 5 *Aſſ. pl.* 1. Nor is a (*d*) Recovery in an Aſſiſe a Bar in a *Formedon* in the Reverter, as it is held in 6 *H.* 4. 2. Note the Stat. ſaith (*per defaltam*) and that cannot be (*e*) in Aſſiſe; for the Aſſiſe ſhall be awarded. If a Recovery be againſt one by Default, or upon a Plea of the Bailiff in Aſſiſe, the Def. upon Releaſe, &c. (*Vide Weſt.* (*f*) 2. *c.* 25.) may have Certificate, and ſo relieve himſelf, *F. N. B.* 181. 26 *Aſſ. pl.* 5. *Regiſt. Judic.* 11. *b.* If the Huſband had ſuffered a Recovery by Default againſt him and his Wife, the Wife had not any Remedy but a Writ of Right, and that appears by the Stat. of *Weſt.* (*g*) 2. *c.* 3. *In caſu quando Vir amiſerit per defalt' Tenement' quod fuit jus uxor' ſuæ, dur' fuit quod uxor poſt mort' viri non habuerit aliqd. aliud recuperare quam per breve de Recto.* And the ſame Act gave a *Cui in vita* to the Wife in ſuch Caſe, and a Writ of Entry to him in the Rev'n upon a Recovery had by Default, or Render againſt the Ten't for Life, &c. *Vide F. N. b.* 8. *b.* If ſuch particular Ten'ts loſe by Action tried in a real Action at this Day it ſeems they are without Remedy, and therewith agree 50 *E.* 3. 7. *Vide Temp. E.* 1. *Eſtoppel* 171. *Vide Regiſt.* 171. & 235. & *vide Litt.* Chapter *Releaſes*, 112. *b.* That if the Ten't for Life, where the Rem'r was over in Fee, had ſuffered a Recovery, that he in the Remainder before the ſaid Statute was without Remedy; and the Reaſon of the Strictneſs of the Common Law in ſuch Caſe was to take away the Multiplicity and Infiniteneſs of Suits, Trials, Recoveries and Judgm. in one and the ſame Caſe, and therefore in the Judgm.

and

(*a*) 2 Rol. Rep. 18. Cr. Jac. 467.

(*b*) F. N. B. 155. b.

(*c*) 2 Rol. Rep. 16. 2 Inſt. 347, 348, &c. F. N. B. 155. b. Co. Litt. 331. b. 354. b. 335. a.

(*d*) Doct. pl. 65.

(*e*) 2 Rol. Rep. 15, 16.

(*f*) 2 Inſt. 409, 410, &c. F. N. B. 181. f. 182. a.

(*g*) 2 Inſt. 342, 343, &c. Co. Lit. 356. a. 280. a. b. 355. b.

and Policy of the Law, it was thought more profitable to the Commonwealth, and more for the Honour of the Law, to leave ſome without Remedy (as is aforeſaid) and to put others to their Writ of Right, without any Reſpect of Coverture, *&c.* than that there ſhould not be any End of Actions and Suits. *Vide* the Judgment in *Rediſſ. & poſt diſſeiſ. F. N. B.* 188 *&* 190. And the Puniſhment inflicted by the Law on him who ſhould diſſeiſe him who is in by Judgment of the Law in ſuch Caſe; and the *Regiſter* 206, 208. For as it hath been well ſaid (*a*) *Intereſt reipub. ut ſit finis litium*; otherwiſe great Oppreſſion might be done under Colour and Pretence of Law; for if there ſhould not be an End of Suits, then a rich and malicious Man would infinitely vex him who hath Right by Suits and Actions; and in the End (becauſe he cannot come to an End) compel him (to redeem his Charge and Vexat.) to leave and relinquiſh his Right, all which was remedied by the Rule and Reaſon of the ancient Com. Law, the Neglect of which Rule (by introducing of Trials of Rights and Titles of Inheritance and Freehold in perſonal Actions, in which there is not any End or Limitation of Suits) hath therewith introduced four great Inconveniencies. 1. Infiniteneſs of Verdicts, Recoveries and Judgments in one and the ſame Caſe. 2. Sometimes Contrarieties of Verdicts and Judgments one againſt the other. 3. The Continuance of Suits for 20, 30, and 40 Years, to the utter impoveriſhing of the Parties. 4. All this tends to the Diſhonour of the Common Law, which utterly abhors Infiniteneſs, and Delaying of Suits; wherein is to be obſerved the Excellency of the Common Law; For the Receding from the true Inſtitution of it introduces many Inconveniencies, and the Obſervation thereof is always accompanied with Reſt and Quietneſs, the End of all humane Laws. *Vide Reader in my Preface to the 4th Part of my Reports, f.* 1. *b.* for the Inconveniencies which enſue on the Breach of any of the ancient and fundamental Rules of the Com. Law. And by all theſe Differences and Reaſons you will better underſtand your Books, in 8 *Ed.* 2. *droit* 35. 4 *Ed.* 3: *droit* 31. 3 *E.* 3. 16. 7 *Ed.* 3. 19. 8 *Ed.* 3. 54. 9 *Ed.* 3. 13. 18 *Ed.* 3. 31, 35. 18 *Ed.* 3. *Eſtoppel* 221. 30 *Ed.* 3. 19. 13 *Aſſ. p.* 1. 17 *Aſſ. p.* 27. 27 *Aſſ. p.* 21. 28 *Aſſ. p.* 14. 30 *Aſſ. p.* 8. 30 *Aſſ.* 51. 31 *Aſſ.* 28. 32 *Aſſ.* 13. 31 *Aſſ.* 14. 33 *Aſſ.* 5. 19 *Ed.* 3. *Eſtoppel* 227. 40 *Ed.* 3, 21. 42 *Ed.* 3. 44 *Ed.* 3. 45. 45 *E.* 4. *Br.* 589. 7 *H.* 4. 15. 3 *H.* 6. 15. 22 *H.* 6. 27. 7 *E.* 4. 19. 2 *R.* 3. 14. 10 *H.* 6. 5. 37 *H.* 6. 31, 32. 12 *E.* 4. 13. 9 *H.* 7. 23. 21 *H.* 7. 24. 29 *H.* 8. *Br. Det.* 174. 33 *H.* 8. Action ſur le Caſe *Br.* 105. 7 *Ed.* 6. *Eſtoppel Br.* 162. 23 *Eliz. Dyer* 371. *Bracton, lib.* 4. *fol.* 262. Note, Reader, at the Common Law,

(*a*) Poſt. 45. a. 11 Co. 69. a. Hardr. 128. Godbol. 242. 3 Bulſtr. 98.

Præf. ad 8 Rep. pag. 10.

Note.

Co. Lit. 238. b. 2 Inſt. 153, 154. if Lands had been conveyed out of the Degrees, ſo that the Demandant could not have a Writ of Entry in the *per*, or *per & cui*, the Demandant was put to his Writ of Right; for no Writ of Entry in the *Poſt* was at the Common Law *, and the Reaſon thereof was as hath been ſaid *quod ſit finis litium*, and that he who had Right ſhould take his Remedy by Writ of Entry, before there ſhould be more than two Alienations, and all this appears by the Statute of *Marlebridge cap.* 30. *Vide F. N. B.* 192. 7 *Ed.* 3. 25. *&* 325. 17 *Ed.* 3. 69. 22 *Ed.* 3. 1. 7 *H.* 4. 17, *&c.* Sir *M. Hale's F. N. B.* 444.

* But it is by St. *Marlb. c.* 30. See 2 Inſt. 153, 154.

Co. Lit. 238. b. 52 H. 3. c. 29.

SPENCER's *Caſe.*

Hill. 45 Eliz. *Rot.* 36.

IN THE

COMMON PLEAS.

Where a Writ ſhall be brought by Journeys Accompts.

William Spencer, and *Mary* his Wife brought a *Formedon* in the Deſcender againſt *John Dalby*, who vouched *R. S.* the Demandant counterpleaded the Voucher ſpecially, and ſhewed, that the ſame Demandant *alias proſecutus fuit* a *Formedon* in the Deſcender againſt the ſame Tenant for the ſame Land, and had Judgment againſt him by Default upon *Grand cape*, which Judgment was reverſed by a Writ of *Diſceit* brought by the Tenant, becauſe the Summons was not duly made, and that this Writ was brought by Journeys Accompts, *viz.* *per dietas computat'.*

computat'. And the Demandants *ulterius dicunt*, that *præd'* R. S. *qui, &c. nec aliquis anteceſſorum ſuorum cujus hæres ipſe eſt unquam aliquid habuerunt in tenementis prædict' cum pertinen' in Dominico, reverſione, nec in ſervitiis poſt donum præd' uſque diem impetrationis præd' primi brevis, ita quod præd'* J. Dalby, *aut aliquem anteceſſorum ſuorum inde feoffaſſe potuit, & hoc petit qd' inquir' per patriam*, and *J. D.* demurr'd on the Counterplea. And in this Caſe two Points were reſolved by the Court. 1. A Difference was taken when the firſt Writ abates by Default of the Demandant himſelf, as by his Miſinformation of the Tenant's Name, or of the Town, *&c.* for there the Demandant ſhall never have a Writ by Journeys Accompts, as the Books are in 48 *E.* 3. 21. 14 *H.* 4. 23. *a.* 32 *H.* 6. 28. *Vide* 19 *Ed.* 3. *Brief* 244. But where the Writ abates for Default of the Clerk, as where it abates for falſe *Latin*, or Variance, or want of Form, *&c.* there the Demandant ſhall have the Benefit of a new Writ by Journeys Accompts, becauſe it was the Fault of the Clerk of the Chancery, and not the Fault of the Demandant himſelf, as the Books are agreed in 26 *Ed.* 3. *Quare Imped.* 163. 25 *Ed.* 3. 54. 38 *Ed.* 3. 5. 14 *H.* 4. 23. 22 *H.* 6. 62. 13 *H.* 4. *Executors* 118. *pari ratione* when the Writ abates for Want of good Summons, for that is the Fault of the Sheriff, and not of the Demandant, and therefore it was reſolv'd that in ſuch Caſe the Demandant ſhall have a new Writ by Journeys Accompts. *Vide* 4 *Ed.* 3. 130. 8 *Ed.* 3. 377. 42 *Ed.* 3. 16. 22 *Ed.* 3. 15. 14 *H.* 6. 4. 46 *Ed.* 3. 14. 21 *H.* 6. 8. 22 *H.* 6. 62. 11 *H.* 6. 42. But 41 *Ed.* 3. 2. 7 *H.* 4. 8. & 22 *H.* 6. 46, *&c.* are contrary. And ſo an old Queſtion in our Books well reſolved. If a Writ abates for Non-tenure of the Whole, the Demandant ſhall not have a new Writ by Journeys Accompts, becauſe the firſt Writ was begun without Cauſe, and without any probable Colour of Cauſe; and therewith agrees 33 *H.* 6. But a *Præcipe* of a Manor being abated by Non-tenure of Parcel, the Demandant ſhall have a Writ by Journeys Accompts, becauſe the Tenant was Tenant of the Reſidue for which the new Writ is brought; and it is hard to compel the Demandant to know in whom the Eſtate of every Part of the Manor is, and therewith agrees 4 *Ed.* 3. 159. So if the *Præcipe* be abated by Joint-tenancy of the Part of the Tenant, becauſe every Joint-tenant is ſeiſed of the Whole, and may occupy the Whole, he ſhall have a new Writ by Journeys Accompts 17 *E.* 3. 39. 38 *E.* 3. 16. 33 H. 6. 2. 41 *E.* 3. 4. A judicial Writ ſhall never be purchaſed by Journeys Accompts, as it is held in 22 *H.* 6. 62. 27 *E.* 3. 84. & 45 *E.* 3. Tit. *Journeys Accompts* 10. And the Reaſon is, be-

Cr. Jac. 590. 32 H. 6. 24. a.

Cr. Jac. 218.

cauſe a judicial Writ ſhall never abate for Form, 4 *H.* 6. 3, 4. Alſo a Man ſhall never have a Writ by Journeys Accompts in other Court than the firſt Writ was, as it is held in 8 *E.* 3. 386. 8 *Aſſ. p.* 8. 18 *Ed.* 2. *Eſtoppel* 263. A Writ by Journeys Accompts ought to be brought of the ſame Quantity that the firſt Writ contained, as it is adjudged in 13 *H.* 4. 12. *a.* And regularly a Writ of Journeys Accompts doth not lie but between thoſe who are Parties to the firſt Writ, as where one of the Plaintiffs dies, or one of the Defendants. *Vide* 8 *E.* 3. 428. 10 *E.* 3. 498. 8 *H.* 5, 6. *a.* 7 *H.* 6. 17, 24, 25. 15 *E.* 3. *Journeys Accompts* 14. 43 *E.* 3. 16. 48 *E.* 3. 22. 33 *H.* 6. 3. 21 *H.* 6. 46. And no Writ ſhall be brought by Journeys Accompts but where the firſt Writ is ſerved, and returned of Record, 14 *H.* 6. 7. But in no Caſe were there is a ſole Plaintiff or Demandant, and he dies, there his Heirs or Executors ſhall never have a Writ by Journeys Accompts, although it be in (*a*) *Qua. Imp.* where the Death after ſix Months is peremptory, as appears in 19 *E.* 2. *Darreine Preſentment* 21. *F. N. B.* 32. c. 10 *E.* 3. 16, 17. *Dennis de la Rivers* Caſe. 2. It was reſolved in the Caſe at Bar, that a Writ newly brought by Journeys Accompts is *quoddammodo* (*b*) a Continuance of the firſt Writ; and therefore if it be (*c*) againſt Executors, they ought to plead fully adminiſtred the Day of the firſt Writ purchaſed, 21 *H.* 6. 9. 13 *H.* 4. *Execution* 118. 9 *E.* 4. 5. *b.* Coſts of the firſt Writ ſhall be recovered. See the *Book of Entries* 382. *b.* And therefore it was reſolved in the principal Caſe, that the Tenant cannot vouch on Cauſe after the firſt Writ, And afterwards by Aſſent the Tenant pleaded in Bar. *Vide Dyer* 36 *H.* 8. 55. If the Pl. be made (*d*) a Knight, the Writ ſhall abate, and it ſeems he ſhall not have a Writ by Journeys Accounts, for it is his own Act.

Lutw. 260. Salk. 393. Comb. 428.

(a) F. N. C. 410. Br. Journeys Accompts 23. Br. Qu. Im. 160. Cr. El. 174. Dy. 55. pl. 7.

(b) Doct. pl. 170.

(c) 2 Rol. Rep. 204. Hob. 225. 248. Cr. Jac. 588, 589, 590. Br. Aſſets inter mains 4. 2 H. 4. 21. a. b. Fitz. Journeys Accompts 4. Br. Journeys Accompts 8.

(d) Dy. 55. pl. 7. 7 Co. 27. b. 32 H. 6. 29. b. 1 E. 6. c. 7.

Note Reader, I conceive it is requiſite to expound to you theſe Words, Journeys Accompts. 1. When a Writ is purchaſed by Journeys Accompts, it is ſaid in the Replication (reciting the former Writ that the ſame abated, and ſhew all in Certainty) *ſuper quo* the Demandant *per (e) dietas computat' recenter tulit quoddam aliud breve, &c.* For the Alledging of Journeys Accompts is always either by Way of Counterplea to ouſt the Tenant of Voucher, as in the Caſe at Bar; or by Way of Replication, as it is more commonly to ouſt the Tenant to plead Nontenure, or Joint-tenancy, or any other Plea which ariſes on Matter after the Date of the firſt Writ. See the *Book of Entries*, Tit. *(f) Journeys Accompts* 382. *b.* And Journeys Accomps, or by Accompt of Days, is to be *recenter*, and with Diligence. *Vide Bracton, lib.* 4. *fol.* 176. where he ſaith, *Eſto quod propter aliquem defectum cadit primum breve cum forte inepte ſit conceptum, vel alio modo vitioſum quod ſtare non*

(e) 2 Inſt. 567.

(f) 2 Inſt. 567.

non poſſit, & diſſeiſitus incontinenti impetrare incipiat aliud breve, &c. By which it appears, that the ſecond Writ ought to be brought in reaſonable and convenient Time to be diſcuſſed by the Juſtices; for which Cauſe the Demandant ought always to put in certain the Time of the Abatement of the firſt Writ, ſo that it may appear to the Court if the later Writ was purchaſed by Journeys Accompts, 5 *Ed.* 3. 203. *acc. Vide* 18 *Ed.* 3. 24 *&* 32 *Ed.* 3. *Journeys Accounts* 16. that fifteen Days were allowed. 2 Inſt. 567.

JENTLEMAN's *Caſe*.

Paſch. 25 Eliz.

Between *Crosby* and *Jentleman* in the King's Bench, divers Points were reſolved concerning Judges of Courts.

IT is to be obſerved, that the Words of a Writ of Right directed to the Lord of a Manor are, *Præcipimus tibi, quod (a) plenum rectum teneas* A. *de* B. *de uno meſſuagio, &c.* And the Words of a Writ of *Juſticies* are, *Rex vic' S. Salutem. Præc' tibi quod (b) Juſticies* A. *quod juſte & ſine dilatione reddat* B. 20 *l. &c* and ſo of other Writs which are Vicountiel. So the Writ of *Right (c) Cloſe* is directed to the Lord of the Manor; *Præcipimus tibi quod ſecundum conſuetudinem Manerii, &c. plenum rectum teneas, &c. de uno meſſuagio.* And the Writs are in the ſame Words when they are directed to the Bailiffs of a Manor, *&c.* And upon the Words aforeſaid it was objected, that in ſuch Caſes the Lord, or the Bailiffs, or the *(d)* Sheriff, are Judges, for they have Authority by the K.'s Writ, and the Writs are directed to them, and not to the Suitors, and therefore it was ſaid, That the Difference is when the Plea is in ancient

(a) F. N. B. f. 1. G. Reg. Orig. 1. a.

(b) F.N.B. f. 119. H. Reg. Orig. 139. a.

(c) F.N.B. f. 11. G. Reg. Orig. 9. a.

(d) 6 E. 4. 3. b. pl. 9.

Court-Baron Connty-Court. (a) 4 Co. 33. b. 8 Co. 60. b. 9 Co. 48. b. 49. a. Godb. 49. 7 Rol. 543. Cro. El. 792. Cro. Jac. 582. 6 Inſt. 266, 268. 7 E. 4. 23. a. 1 Mod. Rep. 171. 12 H. 7. 16, 17. Co. Lit. 58. (b) 31 E. 3. Reторn, 17. (c) 44 E. 3. 11. a.

Demeſne, Court-Baron, or County-Court without Writ, there the (a) Suitors are Judges; but when the Writ is directed to the Lord, or Bailiffs, or Sheriff, by which they only are commanded to do Right and Juſtice to the Parties, there they are Judges. Alſo it was ſaid, that by Force of *Juſticies* a Plea may be held in the County above 40 *s.* and therefore it is Reaſon that other Judges ſhould be appointed than the Suitors, who *de communi jure* are Judges of ſmall Things under 40 *s.* And to this Purpoſe are ſome Opinions in *temp. Ed.* 1. Tit. *Det.* 177. 21 *Ed.* 4. 66. *b.* & (b) 21 *H.* 6. Tit. *Retorn.* 17. 21 *H.* 6. 34. *a.* 44 *E.* 3. 10. where (c) *Finchden* holds, where the Admeaſurement of Dower is made before the Sheriff, the Sheriff is Judge. But on good Conſideration of all the Books it was reſolved, that in none of the ſaid Caſes, the Lord of a Manor, or the Bailiff, or Sheriffs are Judges; but be the Plea held by Writ, or without Writ, the (d) Suitors are Judges. And the Reaſon why the Writ ſhall be directed to the Lord, or Sheriff, *&c.* is becauſe the Court-Baron is the Lord's Court, and the County-Court is the Sheriff's Court, and therefore it is great Reaſon that the Writ ſhould be directed to him to whom the Court by Law belongs, to the End he ſee two Things performed: 1. To hold his Courts that Juſtice and Right be therein done to the Parties. 2. That he be anſwered the Profits of his Court which belongs to him. But yet in Caſes when they hold Plea by Force of the King's Writ, it doth not change the Nature nor the Juriſdiction of the Court: For as theſe without Writ are not Courts of Record, ſo when the Plea is held by Writ, the (e) Courts are ſtill of the (f) ſame Nature; for upon a Judgm. given in both Caſes, a Writ of (g) falſe Jndgment lies, and not a Writ of Error: But if the Writ which is of Record ſhould conſtitute a new Judge, *viz.* the Ld. in the one Caſe, and the Sheriff in the other, then the Authority of the Judge being by the K.'s Writ, which is of Record, the Court as to this Purpoſe would be alſo of Record *quod eſt perſpicue falſum.* For without Queſtion, as it appears by the Regiſter (h) *F. N. B.* and all our Books a Writ of falſe Judgment lies in ſuch Caſe, altho' the Plea be held by Writ. Alſo the K's Writ cannot alter the Juriſdict. of a Court-Baron, County, Hundred, *&c.* which are all Courts by the Com. Law, and have Judges authoriſed and appointed in them by the Law, and therefore all Things determined in thoſe Courts ought to be determined by the Judges of the ſame Courts; but it is true, the K. may create a new Court, and appoint new Judges in it; but after the Court is created and eſtabliſhed, the Judges of the Court ought to determine Matters in it; and therefore neither the Lord of ancient Demeſne, nor of a Court-Baron, nor the Sheriff in the County-Court, *&c.* when the

(d) Supra.

(e) Co. Lit. 260. a. (f) 1 Mod. Rep. 171. (g) Co. Lit. 117. b. 288. b.

(h) F. N. B. 17. I. 18. h. (i) Reg. Orig. 15. a.

Plea is held by Writ of Right, Juſtices, (*a*) Admeaſurement, *&c.* are Judges, but the Suitors, who are by the Com. Law the Judges of the Court. And therewith agree the Books in 34 *H.* 6. 35. 39 *H.* 6. 5. *a.* 7 *E.* 4. 23. *a.* 6 *E.* 4. 3. b. 12 *H.* 7. 16, *&c.* And obſerve well the Words of the Writ in the *Regiſter*, 10. *b. Rex ſectatoribus Cur'* J. *Manerii de* G. *quæ eſt de antiquo Dominico Coronæ* Angliæ, *ut dicitur, Salutem. Cum ſecundum legem & conſuetudinem infra maneria, quæ de hujuſmodi antiquo Dominico Coronæ* Angliæ *exiſtunt hactenus, ut dicitur, uſitat' in placitis in Curia eorundem Maneriorum pendentibus, cum ad judicium inde reddendum ſit placitatum, ſectatores hujuſmodi Curiæ ad judicia in placitis inde reddend' licite procedere debeant & conſueverunt totis temporibus retroactis.* And there it appears, that the Plea did there depend by a *petit* Writ of *Right Cloſe*, &c. *Vobis mandamus*, &c. *ad judicium inde reddendum cum omni celeritate procedatis, &c.* by which it appears, that although the Plea is held there by Writ, yet the Suitors are only Judges. It appears alſo by the ſaid Books, That in an Hundred Court the Suitors are Judges, and ſo the Law is well reſolved in a Caſe, wherein there was Variety of Opinions in our Books. But in ſome Caſes, the Sheriff is conſtituted Judge by Parliament, as in (*b*) Rediſſeiſin by the Statute of *Merton, c.* 3. And all his Proceeding, by Force of that Act, is of Record; and a Writ of Error lies on a Judgment given againſt him, *&c. Vide.* 44 *E.* 3. 10. In a Court of (*c*) Pipowders the Steward is Judge, 6 *H.* 4. 3. *acc.* 7 *E.* 4. 23. *a.* In (*d*) the Leet the Steward, and in the Tourn the Sheriff is Judge, 10 *H.* 6. 7. 7 *H.* 6. 12. 12 *H.* 7. 15. In the Court of (*e*) Marſhalſea, the Steward and Marſhal of the King's Houſe are Judges, 19 *E.* 4. 8. *b. F. N. B.* 241. *B.* 20 *E.* 4. 16. *b.* 7 *H.* 6. 30. 4 *H.* 6. 8. *Artic. ſuper Chartas*, (*f*) *cap.* 3.

(*a*) 4 Inſt. 266.

(*b*) 4 Inſt. 266.
(*c*) 4 Inſt. 272.
(*d*) 1 Rol. 541. 542.
(*e*) 1 Bulſt. 220. 10 Co. 72. a. 75. a. Cro. Jac. 314.
(*f*) 6 Co. 21. a. 10 Co. 69. b. 1 Bulſt. 208, 209, 210, 211, 212. Keb. 335. Cr. El. 502. 2 Inſt. 547, 548.

MORRICE's *Caſe.*

Paſch. 27 Eliz.

In the Common Pleas.

BEtween *Smith* and *Morrice*, the Caſe was ſuch, Two Joint-tenants are with Warranty, and Partition was made between them by Judgment in a Writ of *Partitione facienda*, by Force of the Statute of (*a*) 31 *H.* 8. *cap.* 1. And it was adjudged that the Warranty remained becauſe by the King's Writ they are compellable by the Statute, (to which every one is Party) to make Partition, and the Party has purſued his Remedy according to the Act, and therefore none can have Wrong by the Operation of the Statute, to which every one is Party: But if they had made Partition by Deed, by Conſent, after the ſaid Act, altho' they were compellable by Writ to make Partition, yet foraſmuch as they had not purſued the Statute to make Partition by Writ, therefore ſuch Partition doth remain at the Common Law, and by Conſequence the (*b*) Warranty is gone, as it is agreed in 29 *E.* 3. Tit. *Warranty* 70. And it was reſolved, that after the ſaid Statute, although now Joint-tenants are compellable to make Partition by Writ as Coparceners are, yet they may not make Partition by (*c*) Parol as Coparceners may by the Common Law; and the Reaſon was, becauſe the Statute doth not extend to any Partition, but by a Writ *de Partitione facienda* only, but leaves all other Partitions as they were before. And it was ſaid, if there are two Joint-tenants with Warrantry, and the one diſſeiſes the other, and the Diſſeiſee brings an Aſſiſe, and on his Prayer has Judgment to recover in Severalty, in this Caſe the Warranty is gone: For although he has Partition by Judgment, yet he who is bound by the Warranty is not Party, or privy, or conſenting to it, as he is when the Partition is made by Force of the Act of Parliament.

(*a*) O. Benl. pl. 20, 21. Godb. 84. pl. 97 Co. Ent. 410. Raſtal's Ent. 450. Hob. 179. Co. Lit. 179. a. 187. a. 2 Bulſtr. 104. Cro. El. 759. Dy. 128. pl. 58.

(*b*) Hob. 25. Co. Lit. 165. b. 187. a. Kelw. 16. b. Moor 203.

(*c*) 2 Rol. 225. Co. Lit. 169. a. 187. b. 1 And. 50. Dy. 179. pl. 43, 350. pl. 20. Godb. 94. Moor 29. 1 Leon. 103. Cro. El. 95. Lit. Sect. 250. 3 E. 4. 9. a.

(*d*) Co. Lit. 182. a.

liament. Note Reader, although ſome Books are, that Judgment ſhall be given to hold in (*a*) Severalty in the Caſe of Joint-tenants, as 10 *E.* 3. 40. & 10 *Aſſ. p.* 27. 17. yet I conceive it will be hard in Law to maintain the Judgment; For 1. the Plaintiff in Aſſiſe ought to recover according to (*b*) his Plaint, and that is of nothing in Several. 2. He ought to recover in the Aſſiſe by View of the Recognitors, and they have not the View of any Thing in Severalty. 3. It will be to the Plaintiff's Prejudice as well for the Survivor, as for Warranty and the like: And therewith agreeth 21, 28 *Aſſ. p.* 35. where the Caſe was adjudged not upon any Opinion at the Aſſiſes but upon Adjournment into the *Com. Pleas*, and there adjudged that the Plaintiff ſhould recover generally, although the Plaintiff himſelf prayed, that the Judgment might be, that he ſhould hold in Severalty; for the Prayer of the Party will not alter the Judgment of the Law in ſuch Caſe.

(*a*) 19 H. 6. 45. a. Br. Jointenants 43. Br. Partit. 16.

(*b*) Co. Lit. 167. b.

CASES of PARDONS.

Hill. 29 Eliz.

THE general Pardon of 28 *Eliz.* pardons all Felonies, &c. in which Burglary was excepted. In this Term it was asked of all the Judges of *England*, if the Attainder of one for Burglary be excepted? And it was objected, that by the Attainder and Judgment the Offence of Burglary which was but Matter in Fact, is now altered by the Judgment, and become of Record, and thereby the Offence utterly extinct; and then it is not (by the Name of Burglary) excepted, and by Conſequence he who is ſo attainted of Burglary ſhall be pardoned. But it was reſolved, That the Attainder was excepted; for if the Burglary be excepted, altho' it doth not appear to the Eye of the Law, but ſtands in Doubt, and is left to Trial, whether it be Burglary or not, *a fortiori*, when the Burglary appears of Record by Judgm. of Law, it ſhall be excepted. And it was ſaid, That the Burglary was not extinct,

3 Inſt. 234.

Hale's pl. Cor 251.

3 Inſt. 234, 238.

extinct, but had received ſuch Judgm. (by which it is manifeſt) as the Law requires, which Judgm. ſo long as it remained in Force, the Offender cannot be called in Queſtion for the Burglary, becauſe the Courſe of the Law has had its End; but that don't prove but that the Offence of Burglary remains, as in 20 *Aſſ. p.* 7. (*a*) *A.* was bound in a Stat. of 20 *l.* to *B. B.* ſued Execution, and the Land of *A.* was delivered to *B.* in Execution until he had levied the 20 *l.* and afterwards *B.* made a Defeaſance to *A.* by Indenture, that if *A.* paid him 8 *l.* at a certain Day, that then the Recognizance, *viz.* the Stat. of 20 *l.* ſhould be void: And it was adjudged that although the Stat. was executed, yet the Defeaſance of the Stat. is ſufficient in Law to defeat as well the Stat. as the Execution upon it; for the Stat. is the Foundation of the whole, and therefore if that is defeated, all which is built upon it ſhall be defeated alſo. So in the principal Caſe, altho' the Jury have found the Priſoner guilty of Burglary, and thereupon he has Judgment: Yet the Offence of Burglary is the Foundation of the whole, and therefore if that is excepted, the whole Proceeding upon it is excepted. Alſo ſee in my laſt Reports, where by the Exception of the Offence in the general Pardon, all (*b*) Dependants upon it are alſo excepted. And yet if a Man (*c*) be attainted of Felony by Judgment, Outlawry, or Abjuration, and afterwards the King pardons generally the Felony, it is nought worth, but the Reaſon thereof is not becauſe by the Attainder the Felony is extinct, but becauſe the King is not truly informed (as he ought to be) of the true State of the Caſe, for peradventure if he had been informed of the (*d*) Truth, and of all the Proceedings, he would not have pardon'd it. *Vide* 9 *E.* 4. 28. *a.* & 19 *E.* 3. *Coron.* 124. 11 *H.* 4. 16, 41. 48. *Stamf.* 102. *b.* But if a Man be (*e*) attainted of Felony, and the King pardons the Attainder, and the Execution of it alſo, the Pardon ſhall be diſallow'd, becauſe the King don't pardon the Felony by expreſs Words, as it is adjudged in 8 *H.* 4. 22. *b.* which proves that the Felony remains. But 33 *H.* 8. 50. (*f*) If Murder or Petit Treaſon be made High Treaſon, thereby the Murder or Petit Treaſon is extinct, for High Treaſon doth (*g*) drown every leſs Offence. *Vide M.* 6 & 7 *Eliz. Dyer* 235. (*h*) If a Man kills his Maſter, and Petit Treaſon is pardoned by the general Pardon, and Murder is excepted, he ſhall be diſcharged, for Petit Treaſon is Murder, and more. *Vide* 20 *Eliz.* 135 *Dyer.* One *Burton*, Parſon of *Iſbock* in *Leiceſterſhire*, was deprived, *Anno* 12 *Eliz.* for (*i*) Adultery committed *Anno* 11 *Eliz.* And afterwards by the general Pardon 2 *April* 13 *El.* the Offences of Adultery *inter alia* were pardoned before the 14th Day of *Feb.* then laſt paſt, and it was ſaid that before the Pardon, *Crimen adulterii prædt tranſivit in rem judicat'*, and therefore the Sentence remained in

(*a*) Br. Defeaſ. 7. Br. Debt 133.

(*b*) Latch. 81, 141. 5 Co. 47. a. 49. b. Palm. 412. Hob. 82. Cr. El. 72. 3 Inſt. 236.

(*c*) Stamf. Cor. 102. b. 3 Inſt 238. Latch. 181. Owen 87.

(*d*) Stat. 13. R. 2. cap. 1. 12 Co. 18.

(*e*) Fitz. Chart. 26. Br. Coron. 24. Br. Chart. de Pardon 13. Br. Appeal 27.

(*f*) Dyer 50. pl. 4, 5.

(*g*) Stile 347.

(*h*) Dyer 234. pl. 19.

(*i*) 3 Inſt. 238. Hob. 993. Latch 22, 141. 1 Sid. 164, 168. Palm. 412. Owen 87. Cro. El. 41, 279.

in Force; and it was ſtrongly urged, that the Sentence ſhould not by the Relation of the ſaid Pardon be made void, but at the moſt voidable, and therefore, until it be reverſed by another Sentence, the Deprivation ſtood in Force; and he who was after his Deprivation admitted, inſtituted, and inducted, remained Parſon till the firſt Sentence by another be annulled; but it was anſwered and reſolved, that the ſaid *Burton* who was deprived, by Force of the ſaid Pardon, is now become Parſon again without any Sentence, declaring the ſaid Deprivation to be void; for by the Pardon, the Adultery, which was the Cauſe and Foundation of the Sentence, is diſcharged, and by Conſequence all, that ſtands or depends upon the ſame Foundation, is alſo diſcharged. And no Laches was in the Parſon, or Fault in Pleading; for at the Time of the Sentence he had not any Matter in Diſcharge, but it came *ex poſt facto*, by Relation of the general Pardon and by Judgment in Law, and therefore the Validity of it ſhall be diſcuſſed by the Judges of the Law, and the Party deprived ſhall not be driven to a Suit in the Eccleſiaſtical Court to have Redreſs there. So it ſeems if one be attainted of Felony, and afterwards by Relation of a general Pardon the Felony is pardoned, that he ſhall be diſcharged, for he has not any Remedy by Error, or otherwiſe to reverſe the Attainder.

Cro. El. 41, 789. 9 Co. 119. b. Hob. 82, 293. Moor 132.

Plowd. 401. a.

ARUNDEL's *Caſe.*

Trin. 36 Eliz.

In the King's Bench.

John Arundel Eſquire, was indicted of the Murder of one *William Parker*, and the Murder was alledged to be done *apud Civitat' Weſtmonaſt' in Comitat. Midd', viz. in quadam platea ibidem vocat' King-ſtreet in Parochia ſanctæ Margaretæ in eodem Comitat' Midd':* And to this Indictment *Arundel* pleaded Not guilty, and for the Trial of this Iſſue a Jury was returned *de Viceneto civitatis Weſtmonaſter'*, and the Jury found the Defendant Guilty. And it was ſhewed in Arreſt of Judgment that the Venue ought to have been out of the Pariſh, and not out

Moor 594, 595. Golds. 133. Co. Lit. 125. a.b. 3 Inſt. 137. 2 Rol. 620, 621. Cro. Car. 164, 165. 1 Bulſt. 126, 127, 128. 1 Brownl. 190. 1 Jones 171. Yelv. 187. Hard. 18. 2 Rol. Rep. 271. Godb. 335. Cro. Jac. 308. 1 Sider. 19.

out of the City. And upon this Doubt all the Juſtices met at *Serjeants-Inn*, and after many Arguments, 1. They reſolved, That every (*a*) Trial ſhould be out of ſuch Place, which by Preſumption of Law can have the beſt and moſt certain Knowledge of the Fact, as in 22 *E.* 4. (*b*) Viſne 27. If Treſpaſs be brought in a (*c*) Town, and no ſuch Town be pleaded, the Venue ſhall come out of the Body of the County; but if Treſpaſs be brought in (*d*) two Towns, and no ſuch Town be pleaded as to one of them, the Venue ſhall be out of the other Town; for that is the moſt certain. And if Treſpaſs or any other Action be brought in (*e*) a Manor, *&c.* the Venue ſhall come out of the Manor: But if the Manor be alledged to be in (*f*) a Town, there, becauſe the Town is more certain than the Manor (for that may extend into many Towns) the Venue ſhall come out of the Town, as it is held in 6 *Hen.* 7. 3. *b.* 11 *H.* 7. 22. *b.* 9 *Ed.* 4. 3. *a.* 3 *Ed.* 4. 26. *&* 39 *Hen.* 6. Tit. *Tranſgreſ.* 93, *&c.* So in the principal Caſe, becauſe the Pariſh ſhall be intended to be more certain than the City, for this Cauſe the Venue ſhall be rather of the Pariſh than of the City. And although a Pariſh is a Place uncertain, and may comprehend divers Towns, as it is held in 4 *Ed.* 4. 41. 5 *Ed.* 4. 20, 125. 22 *Ed.* 4. 2. 35 *Hen.* 6. 30. 22 *Hen.* 6. *&c.* Yet when a Pariſh is alledged to be in a City, there the Venue ſhall come out of the (*g*) Pariſh, 1 *Ed.* 3. 8. 7 *H.* 6. 38. and it ſhall be intended that the Pariſh is leſs than the City. And afterwards it was awarded that the Trial was inſufficient, and a new *Venire facias* awarded to try the Iſſue again, for his Life was never in Jeopardy.

(*a*) 7 Co. 1. b. 11 Co. 25. b. Hard. 18. 1 Bulſt. 127.
(*b*) 1 Bulſt. 127.
(*c*) Co. Lit. 125. b. 1 Bulſt. 127. Cro. El. 32, 201.
(*d*) Co. Lit. 125. b. 1 Bulſt. 127.
(*e*) Palm. 390, 391. Co. Lit. 125. b. Cro. Jac. 302, 303. Yelv. 187. Cro. Car. 17, 312. 1 Jones 320. Godb. 257. 1 Bulſt. 127. 2 Rol. 621.
(*f*) Lane 89. Co. Lit. 125. b. 1 Bulſt. 127. 2 Rol. 621.
(*g*) Co. Lit. 125. b. Cro. Car. 150, 151, 164, 165. Cro. Jac. 263, 308, 340, 341. 11 Co. 25. b. 2 Inſt. 669. Godb. 335. Moor 559.

TREPORT's *Caſe.*

Mich. 36 & 37 Eliz.

In the King's Bench.

Poph. 57. 1 Jones 305; 2 Jones 99, 137. 1 Rol. Rep. 299. Raym. 142.

IN an *Ejectionæ firmæ*, the Plaintiff declared on a Leaſe made by *A.* and *B.* and on Not guilty pleaded, the Jurors gave a ſpecial Verdict, *viz.* That *A.* was Tenant for Life, the Remainder to *B.* in Fee, and that they both by Deed indented join'd in a Leaſe to the Plaintiff, and that *A.* the Ten't for Life was alive; and whether this ſhould be adjudged in Law, the Leaſe of both or not, the Jury doubted; and

and it was reſolved, That preſently by the Delivery of the Deed it is the Leaſe of *A.* during his Life, (*a*) and the Confirmation of *B.* and after the Death of *A.* it is the Leaſe of *B.* and the Confirmation of *A.* according to the Opinion of *Dyer* and *Brown*, *Mich.* 6 & 7 *Eliz.* (*b*) 234, 235. And becauſe the Plaintiff had declared on a joint Demiſe of *A.* and *B.* it was adjudged againſt the Plaintiff. It was alſo held *per Curiam*, That if (*c*) Leſſee for Life, and he in Remainder or Reverſion in Fee make a Feoffment by Deed, each of them gives his Eſtate, *viz.* Leſſee for Life his Eſtate by Livery, and the Fee-ſimple doth move and paſs from him in Remainder or Reverſion. But if it was by Parol, then it ſhall be the Feoffment of him in Remainder or Reverſion, and the (*d*) Surrender of Leſſee for Life, for otherwiſe nothing would paſs by Parol. And it was held by them, That in the Caſe at Bar, although the Leaſe was by Deed indented, it ſhould be no (*e*) Concluſion; for when the Deed enures by paſſing of an Intereſt (as in the Caſe here it doth) it ſhould not be taken for any Concluſion, no more than the Leaſe for Years of Leſſee for Life by Deed indented ſhall be an Eſtoppel after his Death, becauſe at the Commencement it took Effect by Way of paſſing of an Intereſt. And *Popham* Chief Juſtice ſaid, If Tenant for Life, and he in Reverſion make a Gift in Tail rendring Rent, the Leſſee ſhould have the Rent during his Life; for the making of a greater Eſtate than he has, is not any Forfeiture, becauſe he joins with him in Reverſion. And if Tenant for Life, and he in Reverſion had made a Feoffment by Deed at the Com. Law, (*g*) the Feoffee ſhould hold of the Leſſee for Life during his Life. *Nota bene.*

(*a*) 1 Rol. Rep. 402. Lit. Rep. 36. Doct. pl. 93. Lane 59. Cro. Car. 285, 406. Raym. 142. 27 H. 8. 13. a. 2 Rol. 64. Poph. 57. Moor 72. 2 Bulſt. 44. Co. Lit. 45. a. Winch 44. 1 Co. 76. a.

(*b*) 1 Bulſt. 44. Co. Lit. 45. a. Cro. Car. 285. Dyer 234, 235. pl. 18. Moor 72.

(*c*) 1 Co. 76. b. Raym. 142.

(*d*) 1 Co. 77. a. Raym. 142. Dy. 358. pl. 48.

(*e*) Co. Lit. 45. a. Winch 44. Dyer 257. b.

(*f*) Poph. 57.

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

EDEN's

EDEN's *Case.*

Mich. 36 & 37 Eliz.

In the King's Bench.

NOTE, *Mich.* 31 & 32 *Eliz. Rot.* 365. In the *King's Bench* in Treſpaſs *Quare Clauſum frégit apud Martham in Com' Norf'*, by *Thomas Eden*, and *William Franklyn*, againſt *Edward Brown*; the Defendant pleaded that the Queen was ſeiſed in Fee in Right of her Crown, and by her Letters Patent under the Great Seal, bearing Date at *Weldhall in Com' Eſſex'*, *&c. conceſſit tenement' præd' in quibus*, *&c. cuidam A. B. &c.* The Pl. took Iſſue, *quod non conceſſit tenement' præd' per prædictas literas patentes.* And this Iſſue was tried in the County of *Norfolk* where the Land lay, and not where the Letters Patent bore Date, and the Jury found for the Pl. and it was moved in Arreſt of Judgment, That it ought to have been tried where the Letters Patent bore Date; *& non allocatur per Curiam*; for the Letters Patent being Matter of Record, and ſhewed to the Court under the Great Seal, cannot be denied, nor can the Party plead *Nul tiel (a) record*, againſt them being ſhewed under the Great Seal, and therefore the Effect of the Iſſue of *(b) Non conceſſit* is, that the Queen had nothing in the Land, or that the Tenements did not paſs by the Letters Patent, in which Caſes it ſhall be tried where the Land lies; and ſo it was adjudged. *Vide* 1 (8) *Eliz.* 253. *Dy.* 3 *Mar.* 129. 17 *Eliz.* 342.

(a) Doct. pl. 307, 308, 352. Hard. 158. 2 Sid. 145. Cro. Jac. 375. Plowd. 231. b. 232. a. Co. Lit. 125. b. 260. a. Hob. 156.

(b) Hard. 158. Hob. 147, 156. Co. Lit. 125. a. 260. a. 4 Co. 71. b. Doct. pl. 308. 2 Cro. 376.

Hill.

* COLLIER's *Case.*

* 6 Mod. 111, 113. 253. R. Q. A. 103.

Hill. 37 Eliz.

In the Common Pleas.

BEtween (*a*) *Collier* and *Walker*, the Case was such; A Man has Issue a Daughter, and by his Will in Writing, devises Part of his Land to his Daughter, and the other Part to his Wife for Life, with the Profits whereof she should bring up his Daughter, and that after his (her) Death it should remain to his Brother, paying to one Twenty Shillings, and to others small Sums, amounting to 45 *s.* in all, and that the Land was of the Value of three Pounds *per Annum*. And it was adjudged, that the Brother had the Fee-simple. And this Difference was taken and resolved in this Case, That if the Devise had been to the Brother of the Land, to the Intent that with the Profits he should educate his Danghter, or of the Profits of the Land pay to one so much, and to another so much, that is but an Estate for Life; for he is sure to have no Loss. So if Land be of the Value of three Pounds *per Annum*, and he devise that he shall pay for it 20 Shillings, or 30 Shillings, or 40 Shillings, or 50 Shillings *per Annum* to another, it is but an Estate for Life; for he may pay it out of the Profits, and is sure to have no Loss. But in this Case at Bar, after the Payment he may die before Satisfaction; and therefore it is a Fee-simple; For the Law doth intend that the Devise was for his Benefit, and not for his Prejudice. And by this Difference you will better understand the Books in 4 *E.* 6. (*c*) *Estates* 78. 29 *H.* 8. *Testament* 18.

(*a*) Cr. El. 378. Swinb. 113. (*b*) 3 Keb. 96. 1 Mod. Rep. 263. Lit. Rep. 259. Cro. El. 204, 205, 497, 498. Carr. 226. 2 Jones 107. 1 Vent. 227. Dyer 371. pl. 5. Br. N. C. 125. Co. Lit. 9. b. Hob. 65. Cro. Jac. 416, 527, 600. Godb. 280, 281. 2 Rol. Rep. 80. Moor 464, 852, 853. 3 Bulst. 194. Bridg. 85, 138. 3 Co. 21. a. 2 Leon. 114. Cro. Car, 158, 159, 369. Latch. 9. O. Benl. 24, 25.

(*c*) 3 Co. 21. a. Cro. Jac. 416, 527. Co. Lit. 9. b. Swinb. 118. Cr. El. 105. 3 Bulst. 194.

[See *Rep.* Queen *Anne* 102 to 104, and 208, where a Devise on Condition, *&c.* of paying, *&c.* gives a Fee by Implication.]

Hill.

WILD's *Caſe.*

Hill. 41 Eliz.

In the King's Bench.

Moor 397.
Golsb. 139.
Bridg. 85.
Swinb. 129.
Lucas 376.
Caſes in Law, &c. 182, 376.
1 Vent. 225.
2 Lev. 58.

Hill. 37 Eliz in Ejectione firmæ between *Richardſon* and *Yardly* in the *King's Bench*, on Not guilty pleaded the Jury gave a ſpecial Verdict to this Effect. Land was deviſed to *A.* for Life, the Remainder to *B.* and the Heirs of his Body, the Remainder to *Rowland Wild and his Wife, and after their Deceaſe to their Children*, *Rowland* and his Wife then having Iſſue a Son and Daughter; and afterwards the Deviſor died, and after his Deceaſe *A.* died, *B.* died without Iſſue, *Rowland* and his Wife died, and the Son had Iſſue a Daughter, and died; if this Daughter ſhould have the Land or not, was the Queſtion; and it conſiſted only upon the Conſideration what Eſtate (*a*) *Rowland Wild* and his Wife had, *viz.* If they had an Eſtate-tail, or an Eſtate for Life, with Remainder to their Children for Life; and the Caſe for Difficulty was argued before all the Judges of *England*; and it was reſolved, That *Rowland* and his Wife had but an Eſtate for Life with Remainder to their Children for Life, and no Eſtate-tail. And in the (*b*) Conſtruction of this Will, the Judges did firſt conſider the Judgment of the Common Law, If the Conveyance had been made by the Deviſor in his Life. And, 2. The Reaſon and Cauſe that the Judgment ſhall not be according to the Rule of Law: And it was reſolved, without Queſtion, that at the Common Law they had but an Eſtate for Life, the Remainder to their Children for Life. Then what ſhall be the Reaſon and Cauſe to give them an Eſtate-tail by Conſtruction in this Caſe? It will be anſwered, the Intent of the Teſtator. But it was reſolved, that ſuch (*c*) Intent ought to be manifeſt and certain, and not obſcure or doubtful: For at the (*d*) Com. Law Lands were not deviſable (but only by Cuſtom, and that in ancient Cities and Boroughs, of Houſes and ſmall Things) but by the Stat. of 32 & 34 *H.* 8. all Lands according to the Purview thereof are deviſable, which Stat.

(*a*) Bridg. 85, 86.
Cro. El. 10, 121.
Cro. Jac. 416.
1 Vent. 227.
1 Bulſt. 62, 220.
3 Keb. 42, 95, 97.
Lane 57.
(*b*) Cart. 5.
Cro. El. 696.

(*c*) Cro. El. 696. 742.
2 Sid. 26.
Cro. Jac 416.
Cro. Car. 369.
(*d*) Lit. Sect. 167.
1 Rol. 608.
Co. Lit. 111. a.

were

were made to the great Diſadvantage (*a*) of Heirs at the Com. Law by Wills for the moſt Part made in Extremity of Sickneſs, and that utterly againſt the Rule and Reaſon alſo of the Com. Law; for the ancient Com. Law did favour him who the Com. Law made Heir, becauſe he was to ſit in the Seat of his Anceſtor, and to ſerve the K. and Commonwealth in as good Eſtate as his Anceſtor did. And therefore it appears by *Glanvile*, who was Ch. Juſtice in the Time of *H.* 2. *lib.* 7. *cap.* 1. *fol.* 44. That every Freeman without the Aſſent of his Heir might diſpoſe of a reaſonable Part of his Lands with his Daughter in Frankmarriage, for the Advancement of his Blood, or to any Servant in Recompence of his Service, or in Frankalmoigne to any religious Houſe to have divine Prayers made for him. But all this he ought to do in (*b*) Health, and not in Extremity of Sickneſs, to the End that ſuch Gifts ſhould not be made more out of Rage and Fury of Mind, than of good Diſcretion, and ſo his Gift might exceed Meaſure. But if any ſuch Gift which was made in Time of Sickneſs ſhall be good and firm in Law, the Conſent and Confirmation of his next Heir was requiſite to it. Alſo if a Man who had Lands by Deſcent, had iſſue many Sons, he could not have given any of this Land to any of his younger Sons without the Conſent of the Eldeſt, to the End that the Father, who for the moſt Part bore moſt (*c*) Affection to the youngeſt Son ſhould not diſinherit the eldeſt. But of his Land which he had acquired by his own Purchaſe, he might have given a Part to his younger Sons; and if he had not any Iſſue, he might have given all of it to whom he pleaſed. And all this appears in * *Glanvile*, by which it appears, that the ancient Com. Law did (always) reſpect the Heir at Com. Law. Then in the Caſe at Bar, foraſmuch as by the Judgm. of the Com. Law on the like Words in a Conveyance, it would be but an Eſtate for Life, the Remainder to their Children for Life, thence it follows, that the Intent and not the Words only of the Deviſor ought to make it an Eſtate-tail in this Caſe. Then this Intent ought to be manifeſt and certain, and ſo expreſſed in the Will: And in this Caſe no ſuch Intent appears; for peradventure his Meaning was to agree with the Rule of the Law; and therefore this Difference was reſolved for good Law, That if *A.* deviſes his Lands to *B.* and to his Children or Iſſues, and he hath not any Iſſue at the Time of the Deviſe, that the ſame is an Eſtate-tail; for the Intent of the Deviſor is manifeſt and certain that his Children or Iſſues ſhould take, and as immediate Deviſees they cannot take, becauſe they are not *in rerum natura*, and by Way of Remainder they cannot take, for that was not his Intent, for the Gift is immediate, therefore there ſuch

(*a*) Co. Lit. 111. b. Cr. Car. 369, 450. Vaugh. 262, 267, 268. 1 Sand. 185. Dal. 13. pl. 22. Lane 57. Moor 774.

(*b*) 1 Rol. 608. b. B. 1.

(*c*) Cr. Car. 369.

Dyer 127. b. * Lib. 1. cap. 7. fol. 44, 45.

1 Ventr. 227, 231. 1 Bulſtr. 62. Lit. Rep. 8, 259, 346, 347. 3 Keb. 42, 53, 91, 99. Swinb. 120. Carter 183. Cr. El. 121, 334.

Lucas R. 376, &c. Fitzgib. 11, 12, 23.

Words ſhall be taken as Words of Limitation, *ſcil.* as much as Children or iſſues of his Body; for every Child or Iſſue ought to be of the Body, and therewith agrees a Caſe, *Trin.* 4 *Eliz.* reported by Serjeant *Bendloes*, where the Caſe was, that one deviſed Land (*a*) to Husband and Wife, *and to the Men-Children of their Bodies begotten*, and it did not appear in the Caſe that they had any Iſſue Male at the Time of the Deviſe; and therefore it was adjudged that they had an Eſtate-tail, to them and the Heirs Males of their Bodies: But if a Man deviſes Land to *A.* and to his Children or (*b*) Iſſue, and they then have Iſſue of their Bodies, there his expreſs Intent may take Effect, according to the Rule of the Common Law, and no manifeſt and certain Intent appears in the Will to the contrary. And therefore in ſuch Caſe, they ſhall have but a joint Eſtate for Life. But it was reſolved, that if a Man, as in the Caſe at Bar, deviſes Land to Husband and Wife, and after their Deceaſe to their Children, or the Remainder to their Children; in this Caſe, although they have not any Child at the (*c*) Time, yet every Child which they ſhall have after, may take by Way of Remainder, according to the Rule of the Law; for his Intent appears that their Children ſhould not take immediately, but after the Deceaſe of *Rowland* and his Wife.

(*a*) 1 Bulſt. 219. O. Benl. 30. 1 And. 43. pl. 110. 1 Vent. 227, 231. 3 Keb. 53, 97. Lit. Rep. 347. Owen 148. Moor 397.

(*b*) Cr. El. 743.

(*c*) Moor 220.

Vide 1 Vent. 229, &c.

See Fitzgerald's Caſe in F. Gibbons 219, 220, &c. 3 Salk. 124.

Sir EDW. CLERE's *Caſe.*

Mich. 41 & 42 Eliz.

Moor 476, 567. Cr. El. 877. Co. Ent. 128. Cr. Jac. 31. Co. Lit. 111. b. Hetl. 35. Jenk. Cent. 260. Hardr. 396. 3 Keb. 538. Lit. Rep. 288, 321. Hob. 160.

IN an Aſſiſe by *Parker* againſt Sir *Edward Clere*, Knight, of the Lands in the County of *Norfolk*, the Caſe in Effect was ſuch, *Clement Harwood* ſeiſed of three Acres of Land, each of equal Value, held *in Capite*, made a Feoffment in Fee of two of them to the Uſe of his Wife for her Life, for her Jointure, and afterwards made a Feoffm. by Deed of the 3d Acre, to the Uſe of ſuch Perſon and Perſons, and of ſuch Eſtate and Eſtates as he ſhould limit and appoint by his laſt Will in Writing, and afterwards by his laſt Will in Writing, he

he deviſed the ſaid 3d Acre to one in Fee (under whom the Pl. claimed.) And whether this Deviſe was good for all the ſaid 3d Acre, or not, or for 2 Parts of it, or void for the Whole was the Queſtion. And in thoſe Caſes 4 Points were reſolved by *Popham* Chief Juſtice, and Baron *Clark*, Juſtices of Aſſize of the ſaid County, upon Conference had with the other Juſtices: 1. If a Man ſeiſed of Lands in Fee, makes a Feoffment to the Uſe of ſuch Perſon and Perſons, and of ſuch Eſtate and Eſtates as he ſhall appoint by his Will, that by Operation of Law the Uſe doth veſt in the (*a*) Feoffor, and he is ſeiſed of a qualified Fee, that is to ſay, till Declaration and Limitation be made according to his Power. *Vide Lit. fol.* 109. *a.* When a Man makes a Feoffment to the Uſe of his laſt Will, he has the Uſe in the mean Time. 2. If in ſuch Caſe the Feoffor by his Will limits Eſtates according to his Power reſerved to him on the Feoffment, there the Eſtates ſhall take Effect by Force of the (*b*) Feoffment, and the Uſe is directed by the Will; ſo that in ſuch Caſe the Will is but declaratory: But if in ſuch Caſe the Feoffor by his (*c*) Will in Writing deviſes the Land itſelf, as Owner of the Land, without any Reference to his Authority, there it ſhall paſs by the Will, for the Teſtator had an Eſtate deviſeable in him, and Power alſo to limit an Uſe, and he had Election to purſue which of them he would; and when he deviſed the Land itſelf without any Reference to his Authority or Power, he declared his Intent, to deviſe an Eſtate as Owner of the Land, by his Will, and not to limit an Uſe according to his Authority; and in ſuch Caſe, the Land being held *in Capite*, the Deviſe is good for two Parts, and void for the 3d Part. For as the Owner of the Land he cannot diſpoſe of more; and in ſuch Caſe the Deviſe cannot take Effect by the Will for 2 Parts, and by the Feoffment for the 3d Part; for he made his Deviſe as Owner, and not according to his Authority, and his Deviſe ſhall be of as much Validity as the Will of every other Owner having any Land held *in Capite*. 3. If a Man (*d*) makes a Feoffm. in Fee of Lands held *in Capite*, to the Uſe of his laſt Will, although he deviſes the Land with Reference to the Feoffment, yet the Will is void for a 3d Part: For a Feoffment to the Uſe of his Will, and to the Uſe of him and his Heirs is all one. 4. In the Caſe at Bar, when *Clement Harwood* had (*e*) conveyed 2 Parts to the Uſe of his Wife by Act executed, he could not as Owner of the Land deviſe any Part of the Reſidue by his Will, ſo that he had no Power to deviſe any Part thereof as Own. of the Land, and becauſe he had not (*f*) Elect. as in the Caſe put before, either to limit it according to his Power, or to deviſe it as Owner of the Land (for in the Caſe at Bar, having, as Owner of the Land, conveyed two Parts to the Uſe of his Wife *ut ſupra*) he could not make any

Fitzgib. 223, 224. & Rep. TAR.

(*a*) 1 And. 24. Moor 280, 493, 516, 567. Hob. 349. Co. Lit. 111. b. 271. b. 10 Co. 85. b. Lit. Rep. 288, 321. Cro. Car. 39.

(*b*) 2 Brown. 52. 1 Bulſtr. 200. Cr. Car. 39. 10 Co. 86. a. Co. Lit. 111. b. Cr. Eliz. 878. Cr. Jac. 31. Jenk. Cent. 260. Hob. 160. Moor, 262, 567.

(*c*) Moor 262, 567. Co. Lit. 111. b. 271. b. Cr. Car. 39. Hob. 160.

(*d*) Cr. El. 878. Co. Lit. 112. a. Hob. 160. Moor 516.

(*e*) Cr. El. 877. Co. Lit. 111. b.

(*f*) Moor 646.

Deviſe (thereof) therefore the Deviſe ought of Neceſſity to enure as a Limitation of an Uſe, or otherwiſe the Deviſe ſhall be (*a*) utterly void; and Judgment was given accordingly for the Plaintiff for the whole Land ſo deviſed. And afterwards on the ſaid Judgment Sir *Edward Clere* brought a (*b*) Writ of Error in the *King's Bench*, *ſed non prævaluit*, but the Judgment was affirmed.

(*a*) Cr. Jac. 31. Cr. El. 878. Hob. 160.

(*b*) Cr. Jac. 31. Cro. El. 877.

PACKMAN's *Caſe.*

Hill. 37 Eliz. Rot. 416.

In the King's Bench.

Wilſon brought an Action on the Caſe on Trover againſt *Packman*, and the Caſe was ſuch; A Man died inteſtate, and the Ordinary committed Adminiſtration to a Stranger, and afterwards the next of Kin of the Inteſtate ſued a Citation in the Spiritual Court, to have it repealed; pending which Suit, the Adminiſtrator, to defeat the Plaintiff in the Spiritual Court of the Effect of his Suit, ſold the Goods of the Inteſtate to the Defendant: And afterwards the Letters of Adminiſtration are revoked by Sentence, and the firſt Sentence annulled and made void, and afterwards Adminiſtration was committed to the Plaintiff. And it was reſolved that the Action did not lie: And thereupon the Plaintiff diſcontinued his Action: And in this Caſe a Difference was taken between this Suit by Citation, which is to countermand or revoke the former Letters of Adminiſtration, and (*a*) an Appeal, which always is to reverſe a former Sentence, for the Appeal doth ſuſpend the former Sentence; otherwiſe of a Citation: And in this Caſe foraſmuch as the (*b*) firſt Adminiſtrator had the abſolute Property of the Goods in him, without Queſtion, he might give them to whom he pleaſed. And although the Letters of Adminiſtration be afterwards countermanded, and revoked, yet that cannot defeat the Gift. But if the Gift be by (*c*) Covin, it ſhall be void by the Statute of (*d*) 13 *Eliz.* againſt a Creditor, but it remains good againſt the ſecond Adminiſtrator; and if an Adminiſtrator (*e*) waſte the Goods, and afterwards Adminiſtration is committed to another, yet

Cr. El. 459, 460. Moor 396. Co. Ent. 37. b. nu. 30. 3 Keb. 206, 207. 1 Mod. Rep. 63.
(*a*) Palm. 412. 3 Bulſtr. 73. 1 Rol. Rep. 226. 1 Co. 21. b. 2 Jones 67. 3 Keb. 282. Cr. El. 460.
(*b*) Pl. Com. 279. a.
(*c*) Moor 396.
(*d*) 10 Co. 56. b. 13 El. cap. 5. Co. Lit. 3. b. 76. a. 290. a. b. 3 Co. 80, 81. a. 5 Co. 60. a. Co. Ent. 162. a. Cr. Jac. 270, 271. Yelv. 196, 197. 1 Brownl. 111, 112. Cr. El. 234, 645, 810. Dyer 295. pl. 17. 351. pl. 23. 1 Leon. 47, 308. 2 Leon. 8, 223. 3 Leon. 57. Lane 47, 103. Raſt. fraudulent Deeds 1. Raſt. Ent. 207. b. Moor 638. Doct. pl. 220. Latch. 222.
(*e*) Cr. El. 460. Latch. 268.

yet any Debtee (*a*) ſhall charge him in Debt; and if he pleads the laſt Adminiſtration committed to another, the other may reply, that before the ſecond Adminiſtration committed, he had waſted the Goods. *Vide* 17 *Eliz. Dy.* 339. (*b*) the like Caſe, and 34 *H.* 6. 14. *a. b.* Adminiſtration may be granted on (*c*) Condit. and it was holden in ſuch Caſe, if ſuch Adminiſtrator before the Condition broke, gives away the Inteſtate's Goods, and afterwards the Condition is broke, yet the Gift ſtands good. And obſerve Reader, a manifeſt Difference between this Caſe, and the Caſe of 17 *Eliz.* For in our Caſe the Adminiſtration granted was lawful, and the Gift alſo lawful, and the Donee claimed in under the firſt Adminiſtration, which the ſecond Adminiſtrator did intend to countermand and revoke; but in the Caſe of 17 *Eliz.* the ſecond Adminiſtrator (who obtained the ſecond Adminiſtration, by Covin had with the Defendant in the Action, without any Recital of the firſt Adminiſtration) did releaſe to the Defendant by Covin to bar the Plaintiff of his Execution: It is there adjudged, that the ſaid 2d Letters of Adminiſtration being by Sentence reverſed, and declared to be void, the Defendant who was Party to the Covin being in Execution ſhould not have an *Audita Querela*. But that is not to be likened to our Caſe, for there the Defendant claimed by the ſecond Adminiſtration, which is declared to be void, and the firſt always in Force, ſo that the ſecond Adminiſtration was never lawful; but in our Caſe the firſt Adminiſtration was lawful, until it was countermanded, and ſo a Difference. *Nota bene*.

(*a*) Latch 160, 267, 268. Noy 86. 1 Sid. 57. 1 Keb. 114. pl. 16. Cro. Car. 88, 89. Hob. 49. 266. Cr. El. 460. 5 Co. 34. a.

(*b*) 3 Co. 78. b. 8 Co. 135. b. 143. b. Cr. El. 460. 2 Keb. 12.

(*c*) 1 Rol. 908. Fitz. Adminiſtrator 3.

3 Salk. 350.

GREGORY's *Case.*

Hill. 38 Eliz.

In the King's Bench.

Moor 599, 412. (a) 2 Inst. 685. Godb. 169. Cr. Car. 172. 1 Rol. Rep. 91. 2 Rol. Rep. 175, 410, 423. Palm. 495, 542. 1 Co. 25. b. 8 Co. 137. b. 11 Co. 59. a. 62. b. 64. b. 12 Co. 8. Cr. Jac. 121, 481. Moor 412, 600. 1 Jones 186. Lit. Rep. 213. Dyer 50. pl. 3. Hob. 173. (b) Mo. 412, 600. 4 Leon. 98. Stile 91, 381. Cr. El. 600. (c) Mo. 247, 412. 1 Rol. 537. Cr. El. 76, 77. 3 Inst. 194. Godb. 390. Stile 381, 382. (d) Mo. 421, 600. 4 Leon. 98. 1 Rol. Rep. 51. 2 Rol. Rep. 231. 11 Co. 38. b. 12 Co. 98. Dyer 236. pl. 24. Cro. Car. 112, 113, 146. 1 Jones 193. Hetl. 101. Hutt. 99. Cr. Jac. 53, 85. 179, 538. Stile 383, 430. Cro. El. 737. 1 Vent. 8. Palm. 386. Cawley 82. Jenk. Cent. 228. Plowd. 208. a. b. 4 Inst. 65, 164, 165. Lit. Rep. 170. Calth. Lect. 248, 249.

GRegory brought a Writ of Error againſt *Blaſhfield*, and the Caſe was, that *B.* brought a Plaint in the Court of *Ludlow* (which is a Court of Record) againſt G. *tam pro Domina Regina, quam pro ſeipſo*, on the Statute of 4 & 5 *Ph. & Ma. cap.* 5. (which ſee in *Raſtal, Drapery* 135.) which prohibits that none ſhall weave any Woollen Cloth or Kerſies, unleſs he hath been Apprentice, or exerciſed the Trade, *&c.* by ſeven Years, upon Pain of Forfeiture of ſuch Cloth, or the Value of it, the Penalty to be recovered by Action, Bill, Plaint, or Information in any Court of Record, in which no Eſſoin, Protection, *&c.* And three Errors were aſſigned. 1. That the ſaid Branch of the Act was abrogated and taken away by the Stat of 5 *Eliz. cap.* 4. *Sed non allocatur.* For *inſpecto Statuto*, they both ſtand together. And it was ſaid, that a (*a*) later Statute in the Affirmative ſhall not take away a former Act: and *eo potius* if the former be particular, and the later general. The ſecond Error aſſigned was, that the Plaintiff by the Statute of 18 *Eliz. cap.* 5. ought to have ſued by (*b*) Original, or by Information, and ſo it was adjudged, *Hill.* 30 *Eliz.* in this Court between *Woodſon* (*c*) and *Clark*, where the Defendant was ſued by Bill upon the Statute of 23 *H.* 6. of Sheriffs, and adjudged the Action did not lie. The 3d Error was, that although *Ludlow* be a Court of Record, yet it is not ſuch a Court as is intended by the Statute, for ſeveral Reaſons: 1. The Courts intended by the Statute, *propter excellentiam*, are the (*d*) four Courts of Record at *Weſtm.* which are general Courts of Record, and therefore it ſhall be in general Speech ſo intended; as Eſcuage is either incertain, or certain; incertain is *ſervitium militare*; and certain is *ſervitium ſocæ, quia quemadmodum certitudo ſcutagii facit ſocagium, ita incertitudo facit ſervitium militare*: And *Littleton* ſaith, If a Man ſpeaks generally (*e*) of Eſcuage, it ſhall be intended

(e) Co. Lit. 73. a. 11 Co. 39. a. Lit. Sect. 99.

intended (*ſecundum excellentiam*) in common Speech, of the moſt excellent Service, and that is Knight's Service for the Defence of the Realm, and not *de ſervitio ſocæ*. And 10 *E.* 4. 11. *a. b.* If it be ſpoken (*a*) of Proof generally, although there are many Proofs in Law, yet it ſhall be intended of the beſt Proof, and that is by Jury. And 20 *H.* 6. 17. If it be ſpoken generally of the Feaſt of St. (*b*) *Michael*, where there are two Feaſts, it ſhall be intended of the moſt worthy and notorious Feaſt. And 37 *H.* 6. 29. *b.* 21 *H.* 6. 8. and 13 *H.* 4. 4. *b.* If Speech be of *J. S.* generally, it ſhall be intended of (*c*) the Father, or of the eldeſt Son, for they are the moſt worthy. And with the Caſe at Bar in Effect agrees *Mich.* 6. & 7. *Eliz.* (*d*) *fol.* 236. where any Court of the Queen of Record, ſhall be intended one of the four eminent and moſt excellent Courts at *Weſtminſter*. 2. If the Act ſhall be intended according to the Letter. *ſcil.* (in any Court of (*e*) Record) then the Court of *Oyer* and *Terminer*, Gaol-Delivery, Sewers, Sheriffs Turn, Leet, Pipowders, and others, will be within the Act; for theſe and many others are Courts of Record. Then it being left to the Conſtruction of the Law, the Rule is, (*f*) *quod verba æquivoca & in dubio poſita, intelliguntur in digniori & potentiori ſenſu.* 3. The ancient Uſage in all ſuch popular Actions or Informations has been, that although the Informer *tam pro Domina Regina quam pro ſeipſo* exhibits the Information, yet if the Defendant pleads a ſpecial Plea, the Queen's Attorney ſhall only reply. And it was intended by the Makers of the Act, that the Suit ſhould be in ſuch Court where the Queen's Attorney may attend, for the Benefit the Queen ſhall have by ſuch Suit, and that is in the four Courts of Record at *Weſtminſter*. And for theſe two laſt Errors the Judgment was reverſed.

(*a*) 4 Co. 74. b. 5 Co. 108. a. 11 Co. 39. a. Hob. 93, 217. 1 Rol. Rep. 222, 261. 2 Rol. Rep. 40. 2 Rol. 595. 1 Sid. 313. 3 Bulſtr. 55. 2 Brownl. 57. Cr. Jac. 188, 232, 381, 488. Cr. El. 723. Moor 113, nu. 253, 180, 181. nu. 322, 845. nu. 1140. 888. nu. 1250 Perk. Sect. 791. 3 Inſt. 98. Br. Condition 151.
(*b*) 11 Co. 39. a. Hob. 32. 20 H. 6. 23. a. 3 Leon. 7.
(*c*) 11 Co. 39. a.
(*d*) Cro. Car. 112, 146. Hutt. 99. 4 Inſt. 164. 165. Mo. 600. 1 Rol. Rep. 51. Stile 420. Lit. Rep. 170. 12 Co. 98. Dyer 236. pl. 24. Jenk. Cent. 288.
(*e*) Plow. 208. b. Cr. El. 530.
(*f*) Co. Lit. 73. a.
(*g*) 1 And. 49. Cr. Jac. 538.

MICHELBORN's *Caſe.*

Paſch. 38 Eliz.

In the King's Bench.

(a) Cr. El. 502. 1 Bulſtr. 208, 210, 213. 4 Inſt. 130.

(b) 4 Co. 46. a. 6 Co. 12. a. 10 Co. 69. b. 74. a. 208, 209, 210. 3 Keb. 335. 2 Inſt. 547, 548. 3 Inſt. 134. Cr. El. 502. 1 Bulſtr. 208, 209, 210, 211, 212. 2 Leon. 160. 5 E. 4. 129. a. Br. Action ſur le Stat. 38, 49. 10 H. 6. 13. a. Reg. 185. a. 191. b. F. N. B. 241. b. Raſt. Ent. 433. a.

(c) Cr. Jac. 314. Cr. El. 502. 1 Sid. 180.

(d) 1 Bulſt. 208, 209, 213. 10 Co. 76. a. Cr. El. 502.

IN a Writ of Error between (a) *Baptiſt* and *Michelborn*, the Caſe was, That an Action of Treſpaſs on the Caſe on Trover and Converſion, within the Verge, was brought in the Court of *Marſhalſea*, where none of the Parties was of the Houſhold; and upon Judgment given, a Writ of Error was brought in the King's Bench. It appears by *Britton* (who wrote in 5 *E.* 1.) *fol.* 1. and by *Fleta*, *lib.* 2. *cap.* 3, 4, 5, *&c.* that the Juriſdiction of the *Marſhalſea* at the Com. Law was doubtful; and therefore the Statute of 28 *Edw.* 1. *Articuli ſuper Chartas*, *cap.* 3. (b) ſet it certain; for the Preamble is of what Pleas they ought to hold; and therefore it is enacted, That they ſhall not hold Plea of Freehold, *viz.* where the Freehold will come in Debate, nor of Debt nor of Covenant, nor of Contract made between the K's People, but only (which are Words excluſory, and exclude all other Pleas, but only theſe which follow) *viz.* of Treſpaſs done within the Houſe (*viz.* where both (c) Parties are of the Houſhold) and of other Treſpaſs done within the Verge (*viz.* when one of the Parties is of the Houſhold) and ſo it has been always expounded. And therefore in the King's Bench, *Mich.* 32 *H.* 6. *Rot.* 47. In Error between *Read* (d) and *Purchaſe* in Treſpaſs in the *Marſhalſea*, no other Error was aſſigned, but only that none of the Parties were of the King's Houſe, and the Judgment for this Error was reverſed, and therewith agree 10 *H.* 6. 13. *a.* 7 *H.* 6. 30. *b.* 19 *Ed.* 4. 8. *b.* 20 *Ed.* 4. 16. *b.* 22 *Ed.* 4. 31. *Vide* 4 *H.* 6. 8. *b.* *F. N. B.* 241. *b.*

(e) 10 Co. 69. b. *Vide* (e) the Diverſity of Courts in his Chapter of *Marſhalſea*. And the Words of the ſaid Act are further, and of Contracts and Covenants that one of the King's Houſe ſhall have made with another of the ſame Houſe, and in the ſame Houſe, and no other where. So that for the

(f) 10 Co. 74. b. Nature of the Actions they only hold Plea in (f) three, *viz.* Treſpaſs, Contract, and Covenant, and of no Action which concerns the Reality. And for Perſons in Treſpaſs within the Verge, it is ſufficient if one be of the King's Houſe, but in Contract and Covenants both

both, *ſc.* the Pl. and Def. ought to be of the Houſhold. And it was obſerved, that the Stile and Title of the Court of Marſhalſea is, *Placita, &c. Aulæ Hoſpitii Dom' Regis cor' Seneſchallo & Mariſchal' Dom' Regis, &c.* whereby it appears that one of the Parties to the Pleading in the ſaid Court, ought at leaſt to be of the King's Houſhold; for otherwiſe it can't be ſaid *Placita, &c. Aulæ Hoſpitii, &c.* And *vide* a Bill which paſſed both Houſes, of the Lords of Parliament, and of the Commons, *Anno* 1 *Rich.* 2. By which it is declared, That of ancient Times their Juriſdiction was no other, nor had been but of Felony, Treſpaſs done within the Verge, and after their Venue, and of Covenant and Debt, due and made between the King's Servants and thoſe who followed the Court; and that Lords and others who have Franchiſes may have their Franchiſes as well within the Verge as out of it, *&c.* To which the King anſwered, Let the Marſhal have ſuch Juriſdiction as before this Time hath been reaſonably uſed; and if any will plead in ſpecial, let him complain to the Steward of the King's Houſe, and Right ſhall be done him. So that although it be not an Act of Parliament, it is a good Declaration of the Law by (*a*) both Houſes of Parliament. *Vide* a private Act for the City of *London* (*b*) 30 *E.* 1. remaining in the Treaſury, by which it is enacted, That where before the Steward and Marſhal, (the Court being often near the City of *London*) ſome Enqueſts are taken of Treſpaſs and other Things done within the ſaid City, betwixt ſome of the City only, and between them and Foreigners jointly, or betwixt Foreigners, and of which Treſpaſs and other Things to the Steward and Marſhal by Reaſon of the Verge, the Conuſance doth belong, (*Enacted*) that all ſuch Enqueſts ſhall be taken within the City of *London*, and not elſewhere, *&c.* By which it appears, that this Act (made within two Years of the ſaid Act of *Articuli ſuper chartas*) doth not take away the ſaid Act, nor give them more Authority than they had before: But the Purview of the Act only is; That ſuch Things done in *London*, whereof the Conuſance doth appertain to them, ſhall be tried within the ſaid City, and not elſewhere. Obſerve the ſaid Declaration, 1 *Rich.* 2. doth agree in Effect with the Act of *Articuli ſuper chartas*; and afterwards in the principal Caſe it was reſolved, that the (*c*) Judgment ſhould be reverſed; *ſed inſpecto Recordo non* (*d*) *intratur.*

(*a*) Co. Litl. 159. b.
(*b*) 10 Co. 70. a.
(*c*) 1 Bulſt. 208.
(*d*) 1 Bulſt. 210.

[*Quære* therefore how Error can be brought, or Execution had, where no Judgment is enter'd?

BUTLER

6 Mod. 64.

BUTLER *and* GOODALE's *Caſe.*

Paſch. 40 Eliz.

In the King's Bench.

(a) Moor 540. Cr. Eliz. 590, 591. 2 Brownl. 55. 3 Keb. 194, 195. Goldsb. 169.

BEtween (a) *Goodale* Informer, *tam pro ſe, &c.* on the Statute of 21 *H.* 8. of Non-reſidency, and *Butler*, Parſon of *Downham* in *Norfolk*; on a ſpecial Verdict it was reſolved by the Court, that the Parſon ought to abide on his Rectory, *viz.* the Parſonage-houſe, and not in another Houſe, altho' it be within the ſame Pariſh; for the Statute intended, not only for ſerving the Cure, and for Hoſpitality, but alſo for the maintaining of the Houſe and Habitation of the Parſon, not only for himſelf, but alſo for his Succeſſors, that they alſo may keep Hoſpitality there. And there it was agreed, that lawful * Impriſonment without Covin, is a good Excuſe of Non-reſidency; ſo if there be not any Parſonage-houſe there; for, (c) *Impotentia excuſat Legem*; and theſe Caſes are excepted out of the Act by Conſtruction of Law. And note, that it was held in the Exchequer, *Trin.* 39 *Eliz.* That (d) Sickneſs without Fraud, was alſo a good Excuſe, *viz.* If the Patient remove by Advice of his (e) Phyſician, *bona fide*, for better Air, and for Recovery of his Health.

(b) 21 H. 8. c. 13. Raſt. Ent. 599. pl. 5. Sav. 32. 3 Keb. 108. 2 Brown. 54, 55. 2 Bulſt. 18.

* 3 Keb. 47.

(c) 1 Co. 98. a. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 68. a. 9 Co. 73. a. 10 Co. 139. b. Co. Lit. 29. a. Hard. 387.

(d) 3 Keb. 47. 2 Bulſt. 18. 1 Vent. 245.

(e) 3 Keb. 194. 2 Bulſt. 18.

[Touching Reſidence and Non-Reſidence, ſee *Wood's Inſtitutes* 37, 38, 40. and 274. See alſo *The Clergyman's Law*, chap. 37. and from Page 362 to 371, *&c.*]

AMBROSIA GORGE's *Caſe.*

Mich. 40 & 41 Eliz.

In the Court of Wards.

THE Caſe of *Ambroſia* Daughter and Heir of *Dowglaſs* Wife of Sir *Arthur Gorge*, Daughter and Heir of Viſcount *Bindon*, was ſuch; The Viſcount *Bindon* was ſeiſed of divers Manors in Tail, ſundry of them held by Knights Service *in Capite*, and had Iſſue the ſaid *Dowglaſs*, who married Sir *Arthur Gorge*, and by him had Iſſue the ſaid *Ambroſia*; *Dowglaſs* died in the Life of her Father, and afterwards the Viſcount died; all which was found by Office, and that *Ambroſia* was Heir apparent to her Father, and of the Age of ſeven Years; and afterwards *Ambroſia* of tender Years, and *infra annos nubiles* was married by her Father to *Francis Gorge*, Son of Sir *Thomas Gorge*; and afterwards Sir *Arthur* took another Wife, and had Iſſue a Son; and afterwards the Huſband of *Ambroſia* died, the ſaid *Ambroſia* being yet *infra annos nubiles*, *viz.* at the Age of ten Years; and in this Caſe two Queſtions are moved: 1. If a Daughter be ſuch an Heir apparent to her Father, that during his Life ſhe ſhall not be in Ward to the King? And it was objected, That a Daughter is not ſuch an Heir apparent that the Father ſhall have the Wardſhip of her; but he ought to be ſuch Heir apparent, that during the Life of the Father, ſhall continue his Heir apparent; but a Daughter is not ſuch Heir; for a Son may be born, or another Daughter may be born. And it was ſaid, That of Land in (*a*) Borough-Engliſh, or Gavelkind, the Son cannot endow his Wife *ex aſſenſu patris*, becauſe by Poſſibility he will not continue Heir. So it was ſaid, That the Father ſhall not have the Wardſhip of his Son and Heir apparent of Land in (*b*) Borough-*Engliſh* held by Knights Service, becauſe by Poſſibility he will not continue Heir. But at length, after great Deliberation, it was reſolved by the two Chief Juſtices, *Popham* and *Anderſon*, and *Periam* Chief Baron, That (*c*) the Father ſhall have the Wardſhip of his Daughter and Heir apparent

2 And. 207. Moor 737.

(*a*) Co. Lit. 35. b. 3 Co. 38. a.

(*b*) Moor 739. Cr. Car. 412.

(*c*) 3 Co. 38. a. Co. Lit. 84. a. 2 Anderſ. 207. Ley Gards, &c. 7.

parent ſo long as ſhe ſhall continue his Heir apparent; and therewith agree the Books in 31 *Ed.* 1. *Gard.* 154. 8 *Ed.* 2. *Treſ.* (*a*) 235. *F.N.B.* 143. *o.* ¶. 2. It was reſolved, that when the Father has Iſſue a Son, that then the Daughter ſhall be in Ward to the King; for then the Son was his Heir apparent and not the Daughter. 3. It was reſolved, That the (*b*) Queen ſhould, notwithſtanding the ſaid Marriage, have the Wardſhip of the ſaid *Ambroſia*; for it was no compleat Marriage, becauſe to every Marriage there ought to be Conſent: For (*c*) *conſenſus, non concubitus facit matrimonium, & conſentire non poſſunt ante* (*d*) *annos nubiles*. And on Conference had with the Civilians, it was agreed, That after ſuch Marriage, if the Huſband dies, and the Wife marries again, it ſhall not be ſaid Bigamy. And the Book in the 30 *Edw.* 1. *Gard.* (*e*) 156. That if the (*f*) Anceſtor marries his Heir *infra annos nubiles*, and dies, the Lord ſhall recover the Body of the Infant, becauſe the Heir may diſagree. *Temp. E.* 1. *ibid.* 128. and 12 *E.* 1. *ibid.* (*g*) 138. (which is miſprinted, *viz.* ſeven Years for fourteen Years) *acc.* And no Difference, as to this Purpoſe, between Diſagreement to the Marriage at the Age of Conſent, and Death before the ſaid Age; for when the Heir is married by his Father *infra annos nubiles*, and Diſagreement is had, there clearly the Lord ſhall have the Ward. *Pari ratione* it was held by all, when ſuch imperfect Marriage is diſſolved by Death, *infra annos nubiles*, the Lord ſhall have the Wardſhip, (*h*) 7 *Hen.* 6. 11. *b.* by *Babthorp*, accorded in the Caſe of Death. And it was agreed in this Caſe, That the Grandfather ſhall not have the Wardſhip of the Son within Age, the Father being dead in his Life, and that the Statute of *Prærogativa* (*i*) *Regis*, *cap.* 6. is but an Affirmance of the Common Law; for the Law is ſuch in the Caſe of a Common Perſon, as appears by the Books aforeſaid.

(*a*) Moor 738, 739. 2 Anderſ. 207.

(*b*) 9 Co. 132. a. b. Moor 742. Ley Gards, &c. 7.

(*c*) Co. Lit. 33. a.

(*d*) Dyer 143. pl. 56. 7 H. 6. 11. b.

(*e*) Moor 740.

(*f*) Co. Lit. 79. b. 84. a.

(*g*) Moor 749.

(*h*) Ibid.

(*i*) Moor 740. Co. Lit. 79. b. Stamf. Prærog. 26.

PAWLET *Marqueſs of* Wincheſter's *Caſe.*

Trin. 41 Eliz.

In the King's Bench.

THE late Marqueſs of *Wincheſter*, as it was ſuppoſed, made his laſt Will and Teſtament in Writing, and thereby did deviſe divers Manors, Lands, and Tenements of great Value to his reputed Sons, and made them Executors. And further deviſed, that divers Manors, Lands, and Tenements of great Value alſo ſhould be ſold by them; and bequeathed alſo divers Legacies of Plate, Monies, *&c.* And this Will was endeavoured to be proved in the Prerogative Court by the reputed Sons. And becauſe it appeared by divers Witneſſes, and by many notorious Circumſtances, that the ſaid Marqueſs being ſick, *& multa provectus ſenectute*, was not of ſane and perfect Memory, ſuch as the Law requires at the Time of the Making of the ſaid ſuppoſed Will (for by Law it is not ſufficient that the Teſtator be of Memory when he makes his Will, to anſwer familiar and uſual Queſtions, but he ought to have a diſpoſing Memory, ſo that he is able to make a Diſpoſition of his Lands with Underſtanding and Reaſon; and that is ſuch a Memory which the Law calls ſane and perfect Memory) upon this Matter a Suggeſtion was framed in the Name of the now Marqueſs, as Son and Heir, to have a Prohibition out of the *King's Bench*, ſuppoſing that he was not of ſane Memory at the Time of the Making of his Will, which Matters the now Marqueſs had pleaded in the Spiritual Court, in Stay of the Probate of the ſaid Will. And it was moved in Court by the Attorney General, of Counſel with the Marq. to have a Prohibit. generally to ſtay all the Proceedings in the Eccleſiaſt. Court, as well for the Legacies and Bequeſts in the Perſonalty, as for the Lands, and the Reaſon and Ground

Hetl. 120. 2 Bulſt. 211. Orph. Leg. 273 28.

of

Hetl. 120. Hob. 290. Hard. 131. Cr. Jac. 346. 2 Bulſt. 210, 211. 1 Rol. Rep. 431, 358. 2 Rol. Rep. 431. Cr. Car. 94, 115, 166, 391, 396. Moor 873. 2 Rol. 315, 316. Stil. 228. Yelv. 92. 1 Jones 355. Vide Salk. 552. Comb. 46, 170.

of this Motion was, That foraſmuch as the Will concerning the Land, and the Teſtament concerning the Goods are mixed together in one Will, if the Eccleſiaſtical Court ſhould proceed concerning the Teſtament of the Goods, it would prevent and prejudice the Trial in this Court: For if he were of ſane Memory at the Time of Making of the Teſtament of the Goods, he could not be of *non ſane* Memory at the Time of Making of the Will of the Land, both being made at one and the ſame Inſtant; and the Com. Law ought to determine what ſhall be ſaid ſane and perfect Memory at the Time of the Making of the Will concerning the Land; and therefore the Prohibition ſhall be general, *quod fuit conceſſum per totam Curiam.* And the Attorney-General cited a Caſe between *Lloyd* and *Lloyd*, *Mich.* 38 *&* 39 *Eliz.* in this Court, where it was ruled accordingly *in terminis terminantibus*, and that no Conſultation ſhould be granted for any Part, till the Matter be tried in this Court, *quod nota.* And therefore a Prohibition was granted generally by the Rule of the whole Court. *Et poſtea partes concordaverunt.*

READ's

READ's *Caſe.*

Mich. 41 & 42 Eliz.

In the King's Bench.

IN Treſpaſs *Quare clauſum fregit* by *William Read*, Eſq; againſt *William Arminger*, Gent. The Defendant juſtified, that *A. Wheatly*, Eſq; was ſeiſed in Fee, and leaſed to him for Years and juſtified; The Plaintiff replied, That the Lady *Greſham* was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to the Plaintiff, and maintain'd his Count, without that, that *Wheatley* leaſed to the Def. upon which the Defendant demurred. And it was objected that the Seiſin in Fee was traverſable and not the Leaſe, for he alledged a Freehold in a Stranger: And if in Treſpaſs, the Defendant ſaith, that the Place where, is the Freehold of *A.* and he by his Commandment, *&c.* The Commandment is not traverſable, if the Plaintiff claims by a Stranger; for the Freehold being alledged in a Stranger, that ought to be anſwer'd. But it was adjudged that the Traverſe was good: And there is a great Difference between the ſaid Caſes; for in the one Caſe the Pleading is, that at the Time of the Treſpaſs ſuppoſed, it was the Freehold of *A.* But in the Caſe at Bar the Defendant pleads, that long Time before the Treſpaſs *Wheatley* was ſeiſed, *&c.* and ſo ſeiſed, demiſed. And that may be true, and that (afterwards) the Lady *Greſham* did diſſeiſe him, and a Deſcent was caſt: So that it is not alledged, that *Wheatley* was ſeiſed in Fee at the Time of the Treſpaſs (as in the other Caſe) and then the moſt material Thing to be traverſed is the Leaſe. *Vide* 4 *E.* 6. *Traverſe Br.* 372. That in this Caſe the Seiſin in Fee is traverſable. *Vide Br. Traverſe* 217. 21 *H.* 7. 23. *&* 26. 7 *E.* 4. 2. *b.* 8 *H.* 6. 34. 38 *H.* 8. *Traverſe* 26. 21 *Eliz. Dyer* 365. 14 *Eliz. Dyer* 312. 26 *H.* 8. 4. 22 *E.* 4. *Replic.* 59. 7 *E.* 3. 11. 2 *E.* 4. 11. and it ſeems upon all the ſaid Books, that the one or the other in many Caſes is traverſable at the Pleaſure of the Plaintiff. *Vide* 3 *E.* 4. 17. *Vide* 15 *H.* 7. 3. 16 *H.* 6. *Double Plea* 83. In Treſpaſs the Defendant

Moor 574. Nu. 792.

Dy. 112. pl. 48.

Doct. pl. 352.

Moor 574. Cr. Car. 174, 586. Cr. El. 288. Doct. pl. 363.

Cr. Jac. 685.

Godb. 427.

Defendant pleaded, That *A.* was ſeiſed, and enfeoffed *B.* who enfeoffed *C.* who enfeoffed *D.* whoſe Eſtate the Defendant had; the Plaintiff may traverſe (*a*) which of them he will, 18 *E.* 4. 26. In Treſpaſs, the Def. (*b*) pleaded, that *J.* was ſeiſed, and enfeoffed *B.* who enfeoffed the Defendant: The Plaintiff ſaid that one *R.* was ſeiſed, and died ſeiſed, and the Land deſcended to him, and traverſed, *abſque hoc*, that *J.* enfeoffed *B.* and it was adjudged a good Traverſe, and ſo is 21 *H.* 7. 33. And this is true in all Caſes, where the Defendant doth not claim by any mean Conveyances from the Plaintiff himſelf; For then that is traverſable.

(*a*) Doct. pl. 365.
(*b*) Doct. pl. 364. Cr. Jac. 44, 681. Cr. El. 754. Doct. pl. 365.

HELYAR's *Caſe*.

Hill. 41 Eliz.

IN THE

KING's BENCH.

HElyer Plaintiff in Replevin againſt *Whitier*, the Defendant made Conuſance as Bailiff to Sir *John Harbert* Maſter of Requeſts, becauſe *Richard Arch* was Prebendary of *T.* and 1 *E.* 6. leaſed the Land, where, *&c.* to *John Arch* for ninety Years, who 2 *Eliz.* granted the Term to *Johan Arch*, who 35 *Eliz.* granted it to *Sadlier*, who granted it to Sir *John Harbert*, and made Conuſance for Damage-feaſance. The Plaintiff confeſſed the Aſſignment to *John Arch*, *prout*, *&c.* But further ſaid, that *Johan* took to Husband one *Tarre*, who 9 *Eliz.* granted the Term to the Pl. and traverſed the Grant made to *Sadlier*, upon which the Avowant demurr'd. And it was adjudged, that the Traverſe made the Bar to the Avowry inſufficient. And *Popham* Ch. Juſt. delivered the Reaſon thereof; Becauſe a Leaſe for

Meor 551, 552. Cr. El. 650, 651. Yelv. 221. 3 Keb. 467. Lit. Rep. 15. Doct. pl. 365. 2 Ventr. 212. Cr. Car. 324, 494, 581. Cr. Jac. 221, 299. 2 Bulſt. 1, 2. 2 Rol. Rep. 87.

for Years cannot be gained but by Lawful Grant; and therefore when one claims a Leaſe for Years, and the other claims by an elder Grant, there he ſhall (*a*) traverſe the later Grant, but the other Party ſhall traverſe the elder Grant, or ſhew how he came to it again to enable the ſecond Grant. But it is otherwiſe in Caſe of a Feoffment; for there if the other Party claims by a former Feoffment, he ought to confeſs and avoid the later Feoffment as by Diſſeiſin, *&c.* For a Diſſeiſor may gain an Eſtate in Fee, but none can gain an Eſtate for Years, but by lawful Conveyance, and ſo is the Difference. And when he claims by a former Aſſignment of a Term, it will be impertinent to traverſe, *abſque hoc*, that he after that aſſign'd his Intereſt; for peradventure he aſſign'd all his Intereſt, and yet had nothing (therein.) *Vide* 2 *Ed.* 6. *Br.* 66. *Tit.* (*b*) Confeſs and Avoid.

(*a*) Cr. Jac. 681. Cr. Car. 32, 299, 494, 581. Moor 5, 55, 539. Yelv. 221. 1 Sid. 2. Dyer 312. pl. 10. 2 Bulſtr. 1. 1 Sand. 22. Cr. El. 651. Doct. pl. 365. Kelw. 41.

(*b*) Cr. Car. 581. Yelv. 221.

RUDDOCK's *Caſe*.

Trin. 41 Eliz.

In the King's Bench.

IN this Term between *Raſing* and (*a*) *Ruddock* in a Writ of Error, the Caſe was; In a Replevin againſt ſix, one avows and the other five make Conuſance as Bailiffs to the firſt, for an Amercement for the Breach of a By-Law in a Leet, and there Judgment was given againſt them, and the Plaintiff recovered his Damages and Coſts, upon which the ſix brought a Writ of Error in this Court. In Bar of which the now Defendant pleaded the Releaſe of one of the five, upon which the now Pl. demurr'd in Law. And it was objected, That foraſmuch as it ſounds only in the Perſonalty, in which no Summons and Severance lies, therefore the Releaſe of one ſhall bar all the others; and a Writ of Error and Attaint will follow the Nature of the Action upon which they are founded; *viz.* (*b*) If Summons and Severance lies in the firſt Action, it will lie alſo in the Writ of Error or Attaint, as it is agreed in (*c*) 34 *H.* 6. 42. So is it in a Writ of Champerty, it will follow the Nature of the firſt Action, as it is agreed in 47 *Ed.* 3. 6. *b. Vide* 26 *Hen.* 8. 3. *b. in Attaint*, *&* 35 *Hen.* 6. 19. *b.* by *Forteſcue*. But it was anſwered and reſolved, That it is true, when in the Writ of Error the Plaintiffs ſhall recover any Perſonal

(*a*) Cr. El. 648. Cr. Jac. 117. Yelv. 209. Jenk. Cent. 271. 3 Bulſtr. 111. Hard. 50. Palmer 152. 1 Rol. Rep. 246.

(*b*) Cr. El. 324. Co. Lit. 139. a.
(*c*) 34 H. 6. 33. b.

Thing, as if they were barred in an Action of Debt, Treſpaſs, *&c.* for there the Releaſe of the one ſhall not bar the others, but (only) when the Ground of Action is a joint Intereſt which may be releaſed. But when divers are charged in a joint Action and condemned, there they have not any ſuch Intereſt, tho' they are charged jointly; then when they bring a Writ of Error to diſcharge themſelves, the Releaſe of one cannot bar the other; for they have not any joint Intereſt or Benefit, but a joint Charge and Burthen, which cannot be releaſed or diſcharged, unleſs by the Plaintiff who has the Intereſt and Benefit of it. And this Difference is taken and (*a*) agreed in 2 *H.* 4. 16. *a. b. viz.* when Two are to recover a perſonal Thing, there the Default of the one is the Default of both; but when they are to diſcharge themſelves of a Perſonalty, there the Default of one is not the Default of both. And 15 *Ed.* 3. *Severance* 23. (*b*) in *Audita Querela*, the Nonſuit of one ſhall not grieve the other; for he is but to diſcharge himſelf of a Burthen and Charge. But it may be objected, that in the Caſe at Bar they ſhall be reſtored to the Damages and Coſts which they have loſt in the firſt Action, and therefore they have a perſonal Intereſt which may be releaſed; which Objection might be made in the *Audita Querela*, for there they ſhall be reſtored to the Value of the Goods which were taken in Execution. But foraſmuch as by common Intendment the Execution is done of Goods which the Defendants have in Severalty, and therefore there is no Reaſon that the Releaſe of one ſhall bar the others. And none will deny but when ſix are condemned in Damages and Coſts, and they before Execution bring a Writ of (*c*) Error, there the Releaſe of one ſhall not bar the others, for they ſue only to diſcharge themſelves; and by Conſequence the Suing of Execution afterwards will not alter the Caſe, unleſs Execut. be made of the Goods which they have in Jointure or in Common, and that will make a Queſtion. And as to the Book in 7 *H.* 4. 45. *b.* where in an Appeal four Men were outlawed, and they four join'd in a Writ of Error, and two made Default, it is agreed that it ſhould be the Default of all; for it was their Folly that they did join themſelves in one Writ, who might have had ſeveral. But in the Caſe at Bar they were compelled to join in one Writ, and ſo no Folly in them. And *Poph.* Ch. Juſt. ſaid, that it was the Pl's Folly in a perſonal Action to join with one who would releaſe. But in the Caſe at Bar no Folly can be imputed to the Def. for the Pl. might name which of them he would, and omit which of them he pleaſed; and he ſaid, by this Way he might by Confederacy join one with them who would releaſe all Errors to him. *Vide* (*d*) 35 *Hen.* 6. 19. *a.* If Damages be recovered againſt divers in a Writ of Conſpiracy, and one of them brings an Attaint, it is much debated if the Writ be well brought, or if all ought

Comb. 94.

(*a*) Cr. El. 649. Cr. Jac. 616.

(*b*) Cr. El. 448. 649. 2 Rol. 133. Co. Lit. 139. a. Cr. Jac. 19. 10 Co. 135. a.

(*c*) Cr. El. 469. Cr. Jac. 117, 616.

(*d*) Cr. El. 649. Hob. 304.

(*e*) Cr. El. 649. Yelv. 209.

to join. And there it is objected, if all ought to join, then by the Nonſuit or Releaſe of one of them, the others would be barred. And there *Forteſcue* Chief Juſtice ſaid, that the Nonſuit or Releaſe of the one would not hurt the others, no more than in *Audita Querela*, or *Scire facias* upon Releaſe. And by the Rule of the Book they ought to join in Attaint; ſo in the Caſe at Bar the Law compels the Defendants to join in the Writ of Error, not to reap any Benefit, but to diſcharge themſelves of a Charge impoſed upon them. And foraſmuch as the Law can do no Wrong, therefore the Releaſe of one who could not be omitted in the Writ of Error, ſhall not in this Caſe hurt the others. And ſo it was adjudged. *Vide (a) 29 Aſſ. p.* 35. (a) Cr. E. 649.

SHARP's *Caſe.*

Paſch. 42 Eliz.

In the Common Pleas.

IN Replevin between *(a) Sharp* and *Swan*, the Caſe was ſuch; *Michael Sharp* being Tenant in Tail of certain Lands within the County of *Suſſex*, the Remainder over, came upon the Land with the Plaintiff, and entered into the Houſe which was built upon it, and ſaid to him, *Brother, (b) I here demiſe unto you my Houſe as long as I live; paying twenty Pound by the Year to me, and finding me my Board and Waſhing, and Keeping of a Horſe:* And whether this amounted to a Leaſe of the Houſe and Land was the Queſtion. And it was agreed by the whole Court, that it was no Leaſe, for it wanted *(c)* Livery; for to every Livery is requiſite, either an Act which the Law adjudges Livery, or apt Words which amount to it; for the Delivery of the Deed of Feoffment is an Act; but the Law doth not adjudge it a Livery, becauſe it has another Effect, *viz.* to make the Charter his Deed. But if he delivers a Turf or *(d)* Twig, or other Thing which cometh off the Land, or the Ring of the Door, *&c.* in the Name of Seiſin, it is a good Livery. So if one ſaith, *Enter into this Land, and enjoy it during your Life*, it is a good Livery; for it is a Delivery of the Land it ſelf; and ſuch Livery is good when he doth it off the Land, if the Land be *(e)* within View;

(a) Moor 458. Cr. El. 482.

(b) 2 Rol. 7.

(c) 2 Rol. 9. 2 Sand. 97. Co. Lit. 48. a. 56. b. Owen 44. 9 Co. 137. b.

(d) Co. Lit. 48. 9 Co. 137. b. Poph. 49. Perk. 43. a.

(e) Cr. El. 482. Co. Lit. 48. b. 2 Rol. 6, 7.

View; *a fortiori* when he is upon the Land. So in the Caſe at Bar, when he ſaith, *I do here demiſe unto you my Houſe for the Term of your Life*, this is a good (*a*) Beginning, (and will avail) if he makes an actual Livery accordingly; or if he uſes apt Words which may amount to as much; but without Livery it amounts but to a Leaſe at Will, no more than when one delivers a (*b*) Charter of Feoffment upon the Land; the Deed imports that he gives and grants the Land to the Feoffee and his Heirs, but it doth not amount to a Livery, but it is (only) the Beginning, *viz.* the Delivery of the Deed which comprehends the Land and the Eſtate, *&c.* but all this amounts but to an Eſtate at Will without Livery; *a fortiori* in the Caſe of a Leaſe, or other Eſtate of Freehold or Inheritance by Parol. And it was agreed that the Caſe of the Delivery of the Charter upon the Land, has been adjudged to amount to no Livery. *Vide* (*c*) 38 *Aſſ. p.* 2. (*d*) 39 *Aſſ. p.* 12. where ſuch Words are underſtood to have been uſed as were apt, 27 *Aſſ.* 61. By which Books it appears, that after the Feoffor has delivered the Charter of Feoffment upon the Land, if he ſaith to the Feoffee, Hold and enjoy this Land, or Houſe, according to the Deed, this is a good Livery. So 41 *E.* 3. 17. *b.* After the Feoffor has delivered the (*e*) Charter upon the Land, if he ſaith, Enter into this Land, (*f*) God give you Joy thereof, that amounts to a Livery, *Vide* 43 *E.* 3. *Feoffments* (*g*) 51. 35 *H.* 8. *Br.* Tit. *Feoffments* 74.

(*a*) Co. Lit. 48. a.

(*b*) Ow. 44. Co. Lit. 56. b. 57. a. 9 Co. 136. b. 137. a. b. Cr. Jac. 80.

(*c*) Fitz. Feoffment. 88. Br. Feoffment de terres 33.
(*d*) Br. Feoffment de terres 28. Fitz. Feoffment 85.
(*e*) Co. Lit. 48. a. Cr. Jac. 80.
(*f*) 2 Rol. 7.
(*g*) Palm. 34. 9 Co. 137. b.

[*N. B.* If the Word *ſupra* had been, *Brother, I here deliver unto you my Houſe to hold for your Life, &c.* This ſeems a good Livery. *Q?*]

The Caſe of Soldiers.

Trin. 43 Eliz.

THIS Term all the Judges of *England* met to conſider upon the Statutes of Captains and (*a*) Soldiers; for divers Soldiers after they were preſſed and going towards *Ireland* to ſerve againſt the Rebels there, and before they did ſerve in the War, did depart and withdraw themſelves. And it was reſolved by them, that the Statute of 18 *H.* 6. *c.* 19. was now of little Force; for the (*b*) ancient Manner of Retaining Soldiers, to which the ſaid Act doth refer is now utterly changed; for then Knights or Gentlemen did covenant with the King to ſerve him in the War for ſo long Time, with ſuch a Number of Men; and the Soldiers made their Covenants with their Captains, as appears by many Precedents in the Excheq. and as appears by the Preamble and Body of the ſaid Act. And the Stat. of 2 *E.* 6. *cap.* 2. extends only when a Soldier departs, after he has ſerv'd the King in his War. But it was reſolved, That the Statutes of (*c*) 7 *H.* 7. *cap.* 1. *&* 3 *H.* 8. *cap.* 5. which are all of one and the ſame Effect, and penned in the ſame Words, were perpetual Acts, and were not made only for the Reigns of the ſaid ſeveral Kings, as it ſeemed to *Raſtal* in his Abridgments of the Statutes: For this Word [King] includes all his (*d*) Succeſſion; for the King dies not in Reſpect of his politick Capacity, and a Gift to the King enures to his Succeſſors. And according to this Reſolution divers Soldiers were attainted and executed. *Vide* 4 *Eliz. Dyer* 211. *Cheſter's* Caſe, the Opinion of all the Juſtices of both Benches, that the Stat. of 7 *H.* 7. *cap.* 1. has Continuance, againſt the Opinion of *Raſtal*.

(*a*) Jenk. Cent. 271. 2 And. 151. Cr. Car. 71, 72. Hutt. 134.

(*b*) Co. Lit. 71. a. Molloy 93. 3 Inſt. 86.

(*c*) Raſtal Captains 5. 3 Inſt. 73.

(*d*) Plowd. 176. b. 457. a. Finch Ley 21. a. 2 Inſt. 742. 3 Inſt. 6. 86. 4 Inſt. 352. Co. Lit. 9. b. Jenk. Cent. 209. 271. Yelv. 15. B. N. C. 203. Dyer 92. pl. 18.

Viſcount MOUNTAGUE'S *Caſe.*

Paſch. 43 Eliz.

In the Exchequer.

Fines for Alienations.

ANthony Viſcount *Mountague* ſeiſed of divers Manors in Fee, held *in Capite*, by Indenture 4 *Reginæ nunc*, did covenant with *William Brown* and *William Denton* to ſuffer them before the Feaſt of *Eaſter* next following, to recover againſt him the ſaid Manors by a Common Recovery, which Recovery ſhould be to the Uſe of himſelf for Life, and afterwards to the Uſe of *B.* in Tail, and afterwards to the Uſe of *C.* in Tail, and afterwards to the Uſe of *B.* in Fee, with Power of Revocat. and Declarat. of new Uſes by any Writing in his Life, *&c.* or by his laſt Will, *&c.* and that the Recoverers ſhould ſtand ſeiſed to the new Uſes ſo declared; the Queen licenſed the ſaid Viſcount to alien the ſaid Manors to the ſaid *William* and *William*, and their Heirs (without any Mention of Declaration of any Uſe in the Licence) and afterwards the Recovery was had accordingly. And afterwards 34 *Eliz.* the Viſcount by his laſt Will revoked the firſt Uſes and Eſtates, and declared, that preſently after his Death *C.* ſhould have the ſaid Manors in Tail, with divers Remainders over, and died. And if by Reaſon of this Revocation and new Limitation, the Queen ſhould have in this Caſe a Fine for (*a*) Alienation, was the Queſtion in the Exchequer. And on Conference had with *Popham* and *Anderſon* Chief Juſtices, and divers other Juſtices, it was adjudged in the Exchequer, That the Queen ſhould not have a Fine (*b*) for Alienation in this Caſe. And in this Caſe two Points were unanimouſly reſolved. 1. That although no Uſe was mentioned in the Licence, and the Licence was only to alien to *Brown* and *Denton*, and although the Eſtate of the Land was transferred to others, ſo as the Queen was not apprized of her very Tenant, yet foraſmuch as it was executed by Act of Parliament, *viz.* 27 *Hen.* 8. of Uſes; and an Act of Parliament to which every one is Party can do no Wrong, and every Alienation

(*a*) Co. Lit. 43. a.

(*b*) 2 Rol. Rep. 484.

nation without Licence is a Wrong to the King; for this Cauſe when the King gave Licence to alien to *Brown* and *Denton*, and the Statute executed the Poſſeſſion in others, there ſhall not be any Fine due to the King for this Execution of the Eſtates by Force of the ſaid Act of Parliament. And the Proviſo of the ſaid Act of 27 *H.* 8. was well explained, by which it is provided, *That the King's Highneſs ſhall not have, demand, or take any Advantage or Profit for or by Occaſion of the executing of any Eſtate, only by Authority of this Act to any Perſon, &c. which now have, or on this Side the 1ſt of* May, 1536, *ſhall have any Uſe or Uſes, Truſts or Confidences in any Manors*, &c. *holden of the King's Highneſs by Reaſon of any* Primer Seiſin, Ouſter le maine, Fine for Alienation, Relief *and* Heriot, *but that Fines for Alienation*, &c. *ſhall be paid to the King's Highneſs*, &c. *for Uſes, Truſts and Confidences to be made and executed in Poſſeſſion by Authority of this Act, after and from the ſaid 1ſt of* May, *of Lands*, &c. *holden of the King, in ſuch like Manner and Form to all Intents and Purpoſes, as hath heretofore been uſed and accuſtomed by the Order of the Laws of this Realm.* And foraſmuch as every Uſe ought to be raiſed, either by Covenant out of the Eſtate of the Covenantor, or by Feoffment, Fine, *&c.* (by Tranſmutation of Poſſeſſion) out of the Eſtate of the Feoffees, Conuſees, *&c.* in the one Caſe or in the other, but one Fine ſhall be paid to the King: For if the King's Tenant who holds in *Capite*, intends to alien to *I. N.* to the Uſe of *I. D.* and thereupon if he purchaſes a Licence to alien to *I. N.* and accordingly he aliens to *I. N.* to the Uſe of *I. D.* which Uſe is not mentioned in the Licence, in this Caſe he ſhall pay but one Fine, for it is but one Alienation. And the ſaid later Part of the Proviſo concerning Fines to be paid for Execution of Uſes in Poſſeſſion after the firſt Day of *May* 1536, is to be intended of Uſes raiſed by Covenant, or of Uſes declared upon Fine, Feoffment, *&c.* when no Licence to alien to the Feoffee or Conuſee is obtained. And it was ſaid, that if the ſaid Proviſo had not been, that no Fine for Execution of an Uſe upon a Covenant ſhould be paid to the King, becauſe he was in by Force of an Act of Parliament, which cannot, (as hath been ſaid) do Wrong, for Remedy of which the ſaid Proviſo was made. 2. It was reſolved in the Caſe at Bar, when the Viſcount had Licence to alien to *Brown* and *Denton*, and accordingly he ſuffered a Recovery, which Recovery was to the ſaid Uſes, with Power of Revocation and Alteration. In this Caſe, although he alters the former Uſes, and declares new, and thereby alters the Queen's Tenant, yet foraſmuch as the Queen hath given Licence to alien to *Brown* and *Denton*, out of which Alienation all 8 Co. 85. a

the Uſes, as well future as preſent, as out of one and the ſame Fountain, ariſe, (and they all ſpring out of the Recovery as out of one Root) for this Cauſe there needs no new Licence for Limitation of any new Uſe riſing out of the ſaid Recovery. *Vide Cole's* Caſe, *Plow. Com.* 401.

Smith's Caſe. And in this Term another Caſe was adjudged in the Exchequer, and 'twas ſuch: *Rich. Smith* being ſeiſed of Lands held *in Capite*, *anno 6 Eliz.* levied a Fine thereof without Licence, which Fine was to Uſes contained in certain Indentures; that is to ſay, to the Uſe of himſelf for Life, and afterwards to the Uſe of his firſt Son in Tail, and afterwards to the Uſe of his ſecond Son in Tail, with divers Remainders over, with a Proviſo that it ſhould be lawful for him to limit by Writing the ſame Lands to the Uſe of any Wife he ſhould after marry for her Life in Name of her Jointure; and that the ſaid Fine ſhould be to the ſaid Uſe, *&c.* The ſaid Alienation is pardon'd by the Act of 13 *Eliz.* Then he marries *Dorothy*, and afterwards, *anno* 31 *Eliz.* by Writing limits the ſame Lands, according to the ſame Proviſo to the ſaid *Dorothy* for her Life, and dies, after whoſe Death ſhe took to Husband Sir *William Mounſon*, and it was adjudged that for the ſaid Limitation to *Dorothy*, no Fine ſhould be paid to the Queen, *cauſa qua ſupra.* Which Caſe being openly adjudged, I have reported, to the Intent the King's Officers in theſe Caſes ſhould take heed that the King be not deceived of an ancient Flower of his Crown by any Device or Invention more than duly by Law ought to be.

GREEN's *Caſe.*

Carthew 354. Fitzgib. 32.

Trin. 44 Eliz.

In the King's Bench.

John Green brought an Action of Treſpaſs againſt *W. Baker* and others, for breaking his Cloſe, and carrying away his Hay and Corn at *Coſington* in the County of *Somerſet.* The Def. pleaded Not guilty; and the Jurors found a ſpecial Verdict to this Effect: *Thomas* Lord *Pawlet* was Tenant for Life of the Manor of *Coſington*, to which the Advowſon of the Church of *Coſington* was Appendant, the Remainder to *J. Brent*, Eſq; in Fee, which Rectory was a Benefice with Cure. The Lord *Pawlet* 6 *Aprilis* 1574, preſented to the ſaid Church one *J. Durſton*, who was thereunto admitted, inſtituted and inducted, and did not read the (*a*) Articles according to the Statute of 13 *Eliz. cap.* 12. For which Cauſe 10 *Martii* 1583, at the Suit of the ſaid *Thomas* Lord *Pawlet*, he was deprived by Sentence declaratory before the Biſhop; from which Sentence he appealed to the Arches; and it was further found, That no Notice was given by the Ordinary to the Patron of the ſaid Deprivation. The Lord *Pawlet*, 7 *Martii* 28 *Eliz.* died. The Queen *jure Prærogativæ ſuæ Regiæ*, by her Letters Patents, 30 *Junii*, 28 *Eliz.* by Title of Lapſe (and ſo expreſſed in the Patent) preſented *William Baker*, one of the Def. who was admitted, inſtituted and inducted. *Durſton* 5 *Octob.* 34. *Eliz.* died; and afterwards, 1 *Maii* 1597, the ſaid *John Brent* preſented *John Green* now Pl. who was admitted, inſtituted and inducted, and enter'd into the ſaid Rectory, and *Baker* and the other Def. in his Right, and by his Commandment did enter upon the Pl. into the ſaid Cloſe, being Parcel of the Glebe of the ſaid Rectory, and took the Hay and Corn, *&c.* And if the Entry of *Baker* was lawful or not was the Queſtion; and after many Arguments it was adjudged for the Pl. And in this Caſe five Points were reſolved. 1. Altho' the Patron was Party to the Suit in which the declaratory Sentence was had, and thereby took Notice that *Durſton* did not read the Articles according to the ſaid Stat. of 13 *Eliz.* yet after ſuch Notice Lapſe ſhall not incur; but Notice of not

Yelv. 7. Cr. El. 679. Co. Ent. 686. Nu. 23. 2 Rol. 369.

(*a*) 5 Co. 102. b. 2 Jones 19. Cr. El. 680. 2 Rol. Rep. 3. 1 And. 62, 63. Yelv. 7. Cawly 22.

not reading of the Articles ought to be given him by the Ordinary, and after such Notice the Lapse shall be accounted; for the Stat. saith, *Notice given by the Ordinary*; and such Notice ought to have two Qualities, 1. It ought to be given by a Person certain, and that is by the Ordinary; for if any other of his own Head gives Notice to the Patron, it is not material. 2. The (*a*) Notice ought to be certain and particular; and therefore it is not sufficient for the Ordinary in such Case to give Notice that the Presentee has not read the Articles and subscribed generally, but he ought particularly to inform the Patron that he has not read the Articles, *&c.* for which Default he is deprived, and that thereupon it belongs to the Patron to present; for *noticia dicitur a noscendo, & ex vi termini* ought to be special, *& notitia non debet claudicare*; and therewith agrees 22 *Eliz. Dy.* 369. 2. That the Church is (*b*) void presently by the Stat. of 13 *Eliz.* without any declaratory Sentence; for it is enacted by the Stat. that he shall be *ipso facto* deprived, and that the Admission, Institution and Induction shall be merely void in Law; and an Avoidance by Act of Parliament need not have any (*c*) Sentence declaratory. But it is enacted by the same Stat. that no Lapse shall incur without Notice given, and yet the Church is void: For if such Parson libels against any of his Parishioners for Tithes, (*d*) they may plead against him the not Reading of the Articles, as it was adjudged in a Prohibition, *Trin.* 30 *Eliz.* between (*e*) *Maurice* and *Eaton*. 3. That if the Queen in her Letters Patent of Presentation (*f*) mistakes her Title, as if she has Title to present, in Respect she is very Patron, and she presents *ratione* (*g*) *Lapsus*, such Presentation is void; for the Queen is deceived in her Presentation. So 17 *Eliz. Dy.* 339. a Presentation obtained (*h*) from the Queen (pending a *Quare Impedit*) in Deceit of the Queen is void; *a fortiori*, when the Queen has not Title to present by any Means, and she presents (as in the Case at Bar) *ratione Lapsus*, it is utterly void, in the same Manner as if the Queen presents, and afterwards (*i*) repeals her Presentment, and yet the Ordinary institutes and inducts him. 4. That in such Cases, altho' the Bishop admits, institutes and inducts the Incumbent, yet the Church doth (*k*) remain void, and the rightful Patron is not put to a *Quare Impedit* to remove such Incumbent. And so it was held, that if the Ordinary (*l*) collates within the six Months, and his Clerk is inducted, yet the rightful Patron is not put out of Possession, nor put to his *Quare Impedit*, but may present, as it was adjudged in *Jurden*'s Case, in a Writ of Error in the King's Bench, *Mich.* 29 & 30 *Eliz.* for the Church of (*m*) *Aylesham*, where the Pleading was, that the Ordinary *usurpando condulit*: For no Church can be full but by Presentation, or rightful Collation. 5. It was resolved, That

(*a*) Goldsb. 35, 141. Dy. 293. pl. 3. 369. pl. 54. 4 Co. 75. b. 79. b. Cr. Car. 35. 2 Rol. Rep. 3. 1 And. 62, 63. Yelv. 7. Dr. & Stud. lib. 2. fol. 116. b. F. N. B. 35. h. i. Cro. El. 119. 1 Leon. 31. Cawly 23.

(*b*) Dyer 369. pl. 54. 371. pl. 31. 4 Co. 75. b. 5 Co. 102. b. Hob. 168. 2 Anderf. 183. Cro. El. 680, 699. Cro. Car. 357. Cawly 22, 23. 3 Inft. 177.

(*c*) 4 Co. 75. b. 79. b.

(*d*) Hob. 168.

(*e*) Hetley 87. Cawly 23. Cr. El. 511, 680. 2 Co. 45. a. Hob. 168.

(*f*) Hetly 51. Lit. Rep. 60. Lane 77, 104. 2 Rol. 351, 353. Vaugh. 14. Cr. Car. 99, 100, 592. 1 Co. 46. a. Cr. Jac. 252. and see *infra*.

(*g*) 2 Rol. 250, 354. Hob. 302. 1 Rol. Rep. 236. Vaugh. 14.

(*h*) Dyer 339. pl. 47. 1 Anderf. 38. 2 Rol. 183, 188, 190, 354. 1 Rol. Rep. 236. 467. 3 Co. 78. b.

(*i*) 2 Rol. 188, 351 353, 354. Co. Lit. 344. b. Dy. 292. pl. 70. Lane 37.

(*k*) 2 Rol. 350. Hob. 302. 6 Co. 50. a.

(*l*) 2 Inft. 377. Hob. 242. Heul. 125. Cro. El. 241, 811. Co. Lit. 344. b. Poſtea f. 50. a.

(*m*) 2 Anderſ. 182.

That if a common Perſon (*a*) uſurps upon the King, and his Clerk is admitted, inſtituted and inducted, the King is put to a (*b*) *Quare Impedit*, and cannot preſent till the Incumbent be removed by Judgment. But in ſuch Caſe the common Perſon by double or treble Uſurpation by ſeveral Perſons doth not gain the Inheritance of the Advowſon out of the King, for that is permanent, and is not in ſuch Caſe diveſted out of the King. And ſo was it adjudged, *Paſch.* 25 *Eliz.* Between *Peſcod* and *Yardly* (*c*) in the Common Pleas for the Vicarage of *Newton Valence*, but the Plea begun, *Mich.* 21 & 22 *Eliz.* Rot. 2218. But as to the Preſentation he is put out of Poſſeſſion, for that is (*d*) tranſitory, and he cannot remove the Incumbent but by *Quare Impedit*, and ſo are all the Books to be intended, 4 *E.* 3. *Quare Impedit* 33. 18 *E.* 3. 16. 43 *E.* 3. 14. 47 *E.* 3. 4. *Br. Quare Impedit* 39. *F. N. B.* 36. 1 *H.* 7. 19. 18 *Eliz. Dyer* 351. 18 *E.* 3. *Quare Impedit* 151. And with this Diſtinction they are well reconciled. And it is to be obſerved, that the Statute of *Weſtm.* 2. *cap.* 5. ſaith, *Cum aliquis jus præſentandi non habens, præſentaverit ad aliquem Eccleſiam (cujus præſentatus ſit admiſſus) ipſe qui eſt verus patronus per nullum aliud breve recuperare potuit advocationem ſuam, quam per breve de Recto.* By which it appears, that without a Preſentation the very Patron cannot be put out of Poſſeſſion. And *vide* 6 *Ed.* 3. Although the Admiſſion, Inſtitution and Induction be in Time of Peace, (*e*) yet if the Preſentation be in Time of War, all ſhall be avoided. But *vide* (Reader) the Caſe in 17 *E.* 3. 64. Although Plenarty (*f*) by Collation doth not put him who has (*f*) Title to preſent, out of Poſſeſſion, as it has been twice adjudged, yet Plenarty by Collation will put him who has Title to collate out of Poſſeſſion, as appears by the ſaid Book, which is ruled in the Point. And *vide* (*g*) 11 *H.* 4. *Fitzgib.* 32.

(*a*) Cro. El. 241, 519. Cro. Jac. 54. 123, 385. 2 Rol. 349, 371. Moor 338. Hob. 242. Owen 7, 8. 4 Leon. 118. 2 Rol. Rep. 7. 1 Mod. Rep. 277. Poſtea 49. b.

(*b*) F. N. B. 36. 2 Rol. 372. Co. Lit. ſect. 133. a. 344. b.

(*c*) Moor 338. Hob. 242. Yelv. 91. Owen 43. 1 And. 81. Cr. Jac. 123, 124.

(*d*) Popht 198. Poſtea. 50. a.

(*e*) Vaugh. 54. 1 Mod. Rep. 230. 6 E. 3. 41. 1 Co. 99. b. 2 Co. 93. a. F. N. B. 31. I. Darrein Preſentment 4. 7 E. 3. Darrein Preſentment 2. 2 Rol. 351. Co. Lit. 249. b. 18 E. 2. Quare Impedit 175. 6 E. 3. 44. b. 1 Jones 428.

(*f*) Poſtea 50. a. 2 Rol. 350.

(*g*) Poſtea 52. a.

[Add *pag.* 29. *b.* (*f*) Where the King is miſtaken in his Grants, they are always held void, *vide Carthew* 351. 3 *Leon.* 5. 1 *Inſt.* 57. *a.* 2 *Brownl.* 241. *Dyer* 195. 5 *Co.* 94. 1 *Co.* 46. *a.*]

BOTHY's *Caſe*.

Mich. 3 Jacobi,

In the Common Pleas.

IN Debt upon a Bond by *Bothy* againſt *Smith*, which began *Hill.* 1 *Jacobi*, Rot. 725. The Condition was, *That if the Defendant deliver to the Plaintiff one Obligation of the Sum of ten Pounds, wherein the Plaintiff ſtood bound with one* T. *to the Defendant, for Payment of five Pounds, and alſo if the Defendant do acknowledge Satisfaction of a Judgment upon the ſaid Bond, and alſo deliver true Notes of all Bills of Charges, as do concern the ſame, that then*, &c. The Defendant pleaded in Bar, *quod non fuer' aliquæ Billæ Miſarum pro & concernen' fact' præd'*, and did not anſwer, *ad reſiduum conditionis*, pretending that he need not, inaſmuch as they were collateral Acts, and no Time was limited when they ſhould be performed. And it was adjudged againſt the Def. for he ought to have performed the Reſidue of the Condition in convenient Time, and that without any Requeſt. And the Difference was taken and agreed, when the Act by the Condition of a Bond, to be performed to the Obligee is of its Nature a tranſitory Act (as Payment of Money, Delivery of Charters, and the like) and no Time is limited, although a Place be expreſſed; there the Act ought to be performed in convenient Time. And when the Act to be performed is of its own Nature local, without expreſs Limitation of any Place. But in ſuch local Acts there is a Difference; for when the Concurrence of the Obligor and the Obligee is requiſite, there the Obligor ſhall have Time to do it during his Life, if the Obligee doth not haſten it by Requeſt. But when the Act is local, and the Obligor may perform it for the Benefit of the Obligee in his Abſence, there the Obligor ought to do it in convenient Time. In this Caſe at Bar there are Examples of both; for firſt, the Delivery of the Bond is tranſitory, and therefore the Oblig. ought to have deliver'd it in convenient Time. 2. Altho' the Acknowledgm. of Satisfact. be local, yet

Co. Lit. 208. a. 1 Rol. 436.

1 Rol. 436. Moor 472. Cro. El. 798.

Co. Lit. 208. b.

Co. Lit. 208. a. b. 1 Rol. 436.

yet it may be performed in the Abſence of the other Party; and therefore in both thoſe Caſes the Obligor ought to perform the Acts in convenient Time without any Requeſt. But when the Act is of its own Nature local, and to be done to the Obligee, and to the Performance thereof, the Concurrence of the Obligor and Obligee is requiſite, there the Obligor ſhall have Time to perform it during his Life, unleſs he be haſtned by Requeſt, as before is ſaid. As if a Man be bound in a Bond to enfeoff the Obligee of the Manor of *D.* without Limitation of any Time, there foraſmuch as the Eſtate ought to paſs by Livery and Seiſin, ſo that there ought to be a Concurrence of both Parties, and the Obligor cannot do it without the Obligee, and it cannot be done but upon the Land, the Obligor has Time during his Life, if the Obligee doth not haſten it by Requeſt made to the Obligor: For it is not reaſonable, that the Obligee may make Requeſt upon the Land when he will; for then the Obligor will be forced to ſtay always upon the Land, which will be inconvenient; but in ſuch Caſe the Obligee ought to make Requeſt to the Obligor, and appoint a certain Time when the Feoffment ſhall be made unto him. But there is a Difference in ſuch Caſe between the Concurrence of the Obligor and a Stranger, and of the Obligor and Obligee; for if I be bound to you to enfeoff a Stranger, and no Time is limited, although the Concurrence of the Obligor and the Feoffee is requiſite, yet the Obligor ſhall not have Time to perform it during his Life, but he ought to do it in convenient Time; for in ſuch Caſe the Obligor has taken upon him to do it to a Stranger, and may do it without the Concurrence of the Obligee. But when the Obligee himſelf is Party, and the Act cannot be done without his Concurrence, there it's reaſonable that the Obligor ſhould have Time during his Life, unleſs the Obligee haſtens it by his Requeſt: For in ſuch Caſe the Obligor doth not take upon him for the Obligee, who is Party to the Deed, as he doth in the other Caſe for the Stranger. But it was ſaid, if the Concurrence of a Stranger, and of the Obligee be requiſite, in ſuch Caſe, the Obligee being a Party he ought to haſten it by Requeſt. As if I be bound to you that *J. S.* ſhall enfeoff you without Limitation of any Time, *J. S.* ſhall have Time during his Life, unleſs you haſten it by Requeſt. Alſo it was reſolved, That when the Act which the Obligor by the Condition ought to do, doth not in any Manner concern the Obligee, nor his Benefit, but is to be done by the ſole Act or Labour of the Obligor himſelf, and no Time is limited in the Condition in which it ſhall be performed; there the Obligor has Time during his Life; and the Performance thereof cannot be haſtned by Requeſt. As if I am bound to you that I will go to *Rome*, or *Jeruſalem*, &c. In the ſame Caſe, and all ſuch Caſes,

Co. Lit. 208. b. Cro. El. 798. Hard. 10. Bridgm. 40, 41.

Hob. 51. 8 E. 4. 14. a. b. Co. Lit. 208. b. 209. a. 2 Co. 79. b. 1 Rol. 439.

5 Co. 23. b. 3 Bulſtr. 30. Co. Lit. 209. a. 1 Rol. Rep. 196. Dyer 139. pl. 32.

Co. Lit. 208. b.

Moor 183.

Co. Lit. 208. b.

Co. Lit. 208. b.

Caſes, the Obligor has any Time during his Life to do it. So when the Act to be done by the Condition, is to be done by the ſole Act or Labour, or Induſtry of a Stranger; which in no Manner concerns the Obligor, Obligee, or any other Perſon, and no Time is limited when it ſhall be done, it is ſufficient to the Obligor, if the Act is done in his Life-time who ought to do it. As if I am bound to you upon Condi-
Co. Lit. 209. a. tion] that *J. S.* ſhall go to *Rome*, or *Jeruſalem*, &c. or that ſuch a Student in Divinity in the Univerſity of *Cambridge*, ſhall preach at St. *Paul*'s Croſs, or ſuch a Student of the Law in the Inner Temple, ſhall argue a Matter in Law in *Weſtminſter* Hall; in theſe, and the like Caſes, no Time being limited, they have Time to do it during their Lives, and the Performance thereof cannot be haſtned by Requeſt. And by theſe Differences and Reaſons you will better underſtand your Books, which *prima facie* ſeem to diſagree, *viz.* 33 *H.* 6. 48. *Hillary*'s Caſe, 21 *E.* 4. 39, 42. 22 *E.* 4. 25. Sir *James Harrington*'s Caſe, 9 *E.* 4. 22. 15 *E.* 4. 30. *Lit. fol.* 77, 79. 9 *H.* 7. 16. 3 *Mar. Dyer* 139. 14 *Eliz.* *Andrew*'s Caſe, & 18 *Eliz.* 354. 44 *E.* 3. 9. 27 *H.* 8. 1.

[See the Difference where the Duty is payable on Demand, &c. and where 'tis no Duty till Demand, &c. 6 *Mod.* 200, 227, 260.]

FITZ-

FITZ-WILLIAM's *Caſe.*

Trin. 2 Jacobi.

In the King's Bench.

IN Treſpaſs for breaking his Cloſe called *Gameſpark* in *Eſſex*, by *John Fitz-William*, againſt *William Fitz-William*, Eſquire, now Knight, on Not guilty pleaded, the Jurors gave a ſpecial Verdict, which was of great Prolixity. In which Caſe theſe Points were reſolved. 1. That whereas Sir *William Fitz-William*, Father of the Plaintiff and Def. was ſeiſed of the Manor of *Gameſpark* amongſt others, *viz.* to him, and *Anne* his Wife, and to the Heirs Males of the Body of the Father; and afterwards the Father, by Deed indented and inrolled, bargain'd and ſold the ſaid Manor to one in Fee, who ſuffered a Common Recovery, in which Sir *William* the Father was only vouched, and he vouched over the Common Vouchee: Sir *William* the Father and *Anne* having Iſſue the Defendant the elder Son, and *John* the Plaintiff the younger, died. It was adjudged, that altho' Sir *William* the Father was only vouched, and not *Anne*, yet the Eſtate-tail was barred, for the Cauſes and Reaſons alledged in *Cuppledick*'s Caſe, *Paſch.* 44 *Eliz.* the third Part of my Reports, *fol.* 6. 2. Where the ſaid Recovery was to divers Uſes declared by certain Indentures, *viz.* to the Uſe of Sir *William* the Father for Life, and afterwards to the Uſe of the ſaid *Anne* for Life, and ſix Months after her Deceaſe, and afterwards to the Uſe of *William Fitz-William* the Defendant in Tail, and afterwards to the Uſe of the ſaid *Anne* and her Heirs in Fee, with this Proviſo following; *Provided always, That it ſhall be lawful to and for the ſaid Sir* William *and Dame* Anne, *at any Time or Times hereafter, and from Time to Time, during their joint natural Lives, at their free Will and Pleaſure, by any their Deed or Writing by the ſaid Sir* William *and Dame* Anne, *ſealed and publiſhed in the Preſence of three credible Witneſſes at the leaſt, to alter, change, determine, revoke or make void,*

Moor 682

Co. Lit. 372. b.

2 Rol. 395

Of revoking old Uſes, and declaring new, ſee Lucas Rep. 73. 478, *&c.* 2 Salk. 590. 675, *&c.* 3 Salk. 384, *&c.* Parl. Caſes 104. 1 Mod. 143. 153.

void, all, or any of the Uſe or Uſes, Eſtate or Eſtates, in theſe Preſents before declared or mentioned, or limited of the ſame Premiſſes, or any Part of them; and that at all Times, from and after ſuch Time as the ſaid Sir William *and Dame* Anne *ſhall by any ſuch Deed or Writing ſo expreſs and declare their Pleaſure and Mind to be to alter,* &c. *That then, and from thenceforth, ſuch of the ſaid Eſtate and Eſtates, Uſe and Uſes herein declared, as ſhall be ſo declared to be altered,* &c. *ſhall ceaſe, determine and be void. And that then, and from thenceforth, the ſaid Recovery and Recoveries ſhall be, and all and every Perſon and Perſons,* &c. *ſhall thereof ſtand and be ſeiſed to the Uſe of ſuch and thoſe Perſon or Perſons, and to and for ſuch and thoſe Uſe and Uſes, and in ſuch Manner and Form, as by ſuch Deed or Writing,* &c. *as is aforeſaid, ſhall be declared or limited only, and not to any other Perſon or Perſons, Uſe and Uſes.* And afterwards the ſaid Sir *William* and Dame *Anne* by their Writing indented, by them ſealed, ſubſcribed and publiſhed in the Preſence of three credible Witneſſes, reciting the ſaid Indenture, the Uſes, and the ſaid Power, did revoke the ſaid Uſe and Eſtate in Tail, limited to *William Fitz-William* now Defendant, and the Remainder limited to Dame *Anne* in Fee, ſaving the Uſe and Eſtate limited to himſelf for his Life, the Remainder to the Wife for Life; and by the ſame Writing declared, That the ſaid Recovery ſhould be to the Uſe of the ſaid Sir *William Fitz-William* for Life, the Remainder to the Lady *Anne* for her Life, and ſix Months after, and afterwards to the Uſe of *John Fitz-William* the Pl. in Tail, and afterwards to the Uſe of Sir *William Fitz-William* the Father in Fee, with the like Power of Revocation, as before; and afterwards Sir *William* the Father and *Anne* died; and whether the Revocation, and new Declaration, and Limitation of the ſaid new Uſes were good and effectual in Law, was the Queſtion; and it was ſtrongly urged, that the new Declaration of Uſes was not ſufficient in Law, for two Reaſons. 1. Becauſe the Revocation and Limitation (as this Proviſo is penned) cannot be in one and the ſame Deed; for in that three Times are to be obſerved, *tempus revocandi, tempus ceſſandi veteres uſus, & tempus declarandi novos uſus.* The Act of Revocation ought to be by Writing, ſealed and publiſhed in the Preſence of three Witneſſes; and then comes the ſecond Time, *viz. And that at all Times from and after ſuch Time as Sir* William *and* Anne *by any ſuch Writing ſo expreſs and declare, &c.* So that there is a Diſtinction of Times, *viz. from and after ſuch Time,* &c. the former Uſes ſhall ceaſe; and after they are ceaſed, then follows the third Time, *And that then, and from thenceforth, viz.* after the Time of the Ceſſer, the ſaid Recovery ſhall be, *&c.* to ſuch Uſes *as by any ſuch Deed or Writing,* &c. *ſhall be declared and limited.* In which Caſe (*by ſuch Deed*) which is as much as to ſay, *per hujuſmodi,*

hujuſm', or *conſimile ſcript'*, it ought to be like in all Circumſtances as to be their joint Writing, to be ſealed and publiſhed as the other; but cannot be in the ſame Deed; for the 1ſt Deed is finiſhed when it is ſealed and publiſh. and after that, nothing can be added to it; for that by the Publiſhing is completed, and its Time paſt: Then after that Time, the Time of the Ceſſer ought to paſs, and then comes the Time to declare new Uſes, ſo that it is not poſſible that the Declarat. of the new Uſes can be in the Deed of Revocation, but it ought to be in another Deed. And it is much inforc'd by this Word (*ſhall be*) which is the future Tenſe; and thereby it appears, that the Revocat. ought to be paſt before the new Declarat. ſhall be made; for the Words are, *ſhall be declared or limited*. And it was ſaid, that theſe and the like Powers by which the Eſtate or Intereſt of Strangers ſhall be changed or charged, ſhall be taken ſtrictly, becauſe they extend to the Defeating or Change of the Eſtate of a 3d Perſon, and as to that a Judgm. was cited, *Trin.* 30 *El.* in Replevin between * *Leaper* Pl. and *Richard Wroth* Def. where the Caſe was; *H.* Earl (*a*) of *Suff.* conveyed the Manor of *Burnham* in *Eſſex* to the Uſe of himſelf for Life, and afterwards to the Uſe of the Counteſs of *Suff.* for Life, with divers Rem'rs over, with Proviſo, that it ſhould be lawful for the Earl to make Leaſes for 21 Years, rendring, *&c.* And afterwards the Earl, *viz.* 3 *Apr.* *&c.* made a Leaſe of the ſaid Manor for 21 Years, to begin at the Feaſt of St. *Mich.* the Archangel then following, and altho', the Power was general to make Leaſes for 21 Years, without being reſtrained to make them in Poſſeſſion or any Number of them, but indefinite to make Leaſes for 21 Years, yet it was adjudged that the ſaid Leaſe was void for two Reaſons. 1. If by the ſaid Power he might make any (*b*) future Leaſe, or Leaſe in Reverſion, then he might make a Leaſe for 21 Years in Poſſeſſion, and afterwards infinite Leaſes for 21 Years in Reverſion, which would be contrary to the Meaning of the Parties, and then the Expreſſing of one and twenty Years was in vain, and by ſuch Conſtruction the Text and Letter of the Proviſo would be idle and vain. The ſecond Reaſon was, becauſe foraſmuch as this Proviſo gave Power to charge the Eſtate of three Perſons with Terms of one and twenty Years, ſuch Proviſo ſhould be taken ſtrict, and ſhould not be extended beyond the Letter and Meaning of the Parties. And if I am bound or contract with you to make a Leaſe to you for one and twenty Years indefinitely, the Leaſe ought to be made to begin preſently, and not *in* (*c*) *futuro*. 2. It was objected, that although *ex indulgentia Legis*, the Law in divers Caſes will in Conſtruction conſider two diſtinct Times in one Inſtant (which in Truth is not any Time) yet no Caſe can be put, that by any Conſtruction three Times may be admitted in one Inſtant. And therefore it was ſaid, that this

* See Fitzg. 22c.

(*a*) 2 Rol. 261. 1 Brownl. 149. Cro. El. 5. 1 Leon. 35. 3 Leon. 130, 144. 4 Leon. 65. Yelv. 222. 2 Rol. Rep. 170. Moor 494. 199. Cro. Jac. 319. Poph. 9. Raym. 132. Latch. 269.

(*b*) Cr. Jac. 5, 319. Yelv. 222. 1 Brownl. 148, 149. Poph. 9. 2 Rol. Rep. 402. 1 Vent. 246.

(*c*) 2 Rol. Rep. 402.

3 Co. 174. Caſe differeth from *Digges's* Caſe, publiſhed by me in the firſt Part of my Report, *f.* 174. for there was but two Times which well ſtood with the Learning of Inſtants, and with the Caſe of the Fine there put. But put the Caſe there are three Conuſors of a Fine, and that the Conuſee renders to one of the Conuſors for Life, or Years, a Rent, and grants the Reverſion to another of the Conuſors for Life, or Years, rendering Rent, and by the ſame Fine grants a Reverſion in Fee, or in Tail, to the third Conuſor; it was ſaid that ſuch Fine ſhould not be received, becauſe that an Inſtant cannot be of more than two Times. 2. It was ſaid, that in *Digges's* Caſe the Uſes were raiſed by Covenant out of the Eſtate of the Covenantor, which may be more eaſily determined again in his Poſſeſſion, than when Uſes are raiſed out of a Recovery, by which there is a Tranſmutation of Poſſeſſion, and all the Eſtate diveſted out of him who limits and declares the Uſes. But it was anſwered and reſolved by the whole Court, That the ancient Uſes in the Caſe at Bar were revoked and the new Uſes well declared in the (*a*) ſame Deed: For 1ſt in Judgment of Law there were not in this Caſe but two Times concurrent in one Inſtant, *viz.* the Time of the Ceaſing of the former Uſes, and the Declaration of the new; for although the Revocation and the Ceaſing of the former Uſes are diſtinguiſhed in Words; yet in Truth they are one: For the Uſe which is revoked ceaſes, and the Uſe which ceaſes is revoked. 2. It was reſolved, That altho' no Uſe ceaſes till the Writing of Revocation is ſealed and publiſhed, and after the Sealing and Publication thereof nothing can be added to it, yet it well ſtands with the Words of the Proviſo, and the Intention of the Parties, that the new Declaration may be in the ſame Deed; for both being contained in one and the ſame Writing, firſt its Operation ſhall be to make a Deſtruction of the former, and *eo inſtante* a Creation of the new Uſes; and this Word *(ſuch)* more properly extends to the ſame Writing in which the Revocation is, than to another; for *(by ſuch Writing)* is as much as to ſay, *per idem vel hujuſmodi ſcriptum*; and ſo it ſhall be taken in this Caſe. And this Word *(ſhall be)* ſhall be ſaid future in Reſpect of the Indenture, and in Judgment of Law ſubſequent alſo to the Revocation, and altho' theſe Clauſes are contradictory, and *ex diametro pugnant*, for the one deſtroys and the other creates, yet the Conſtruction of the Law (which delights in making Reconcilement) makes a good Accord betwixt them. For to the Intent that the new Uſes ſhall be created, the Law adjudges that the Clauſe of Deſtruction ſhall have the (*b*) Priority, although both be contained in one and the ſame Deed, and take Effect by one and the ſame Delivery. And as to the Difference as to Ceaſing of the Eſtate moved in *Digges's* Caſe (where the Uſe was raiſed by Covenant) and this Caſe where the Uſe was declared upon a Recovery, it was reſolved

(1.)

(*a*) Moor 682. Hob. 313. 1 Co. 174. a. 10 Co. 144. a. 3 Keb. 510. 1 Sid. 343. Winch 83. Co. Lit. 237. a. 2 Rol. 263. Hob. 313.

(2.)

(*b*) 1 Co. 76. a. b. 174. b.

(3.)

reſolved that it was all one, when he who makes the Revocation is ſeiſed or poſſeſſed of the Land for the Reaſon and Cauſe given in *Digges*'s Caſe; for it was agreed in that Caſe, that the beſt Conſtruction of the Statute of 27 *H.* 8. of Uſes, is to make them ſubject to the Rules of the Common Law which are certain and well known to the Profeſſors of the Law, and not to make them ſo extravagant that none ſhall know any Rule to decide the Queſtions which ariſe upon them, which will produce Incertainty, the Cauſe of infinite Troubles, Controverſies and Suits, which agrees with the Reſolutions in (*a*) *Dillon* and *Frein*'s Caſe, in the firſt Part of my Reports, *fo.* 137. *b.* and in *Butler* and *Baker*'s Caſe in the third Part of my Reports, *fo.* 25. and in *Cholmeley*'s Caſe in the ſecond Part, *fo.* 50. where it is reſolved, that although Uſes at the Common Law might have ceſſed without Claim, yet now the Uſe is transferred to the Poſſeſſion; for the Pleading is, *vigore ſtatuti, &c. de uſibus in poſſeſſ. transferendis.* So that now after the Statute, to ſuch (*b*) Qualities to which Eſtates at the Common Law are ſubject, to ſuch Qualities, Uſes after they are transferred into Poſſeſſion are ſubject; for the Uſe is transferred and incorporate in the Poſſeſſion, which agrees with the Reſolution in this Caſe. And on the ſame Reaſon it has been adjudged, That if a Man bargains, and ſells his Lands to another and his Heirs, by Deed indented and inrolled, with Proviſo, that if ſuch Act is done, that the Bargain and Sale ſhall be void; and afterwards the Bargainor takes a Wife, and afterwards the Proviſo is broken, before Entry the Huſband dies, and it was adjudged that the Wife ſhould not be endowed; for altho' the Eſtate of the Bargainee veſts by the Statute of 27 *H.* 8. by Execution of the Eſtate of the Land to the Uſe raiſed by the Bargain and Sale; yet foraſmuch as the Huſband did not re-enter, he had not any Eſtate in the Land, whereof the Wife might be endowed. *Nota.*

(*a*) Co. Lit. 23. a.

(*b*) 1 Co. 137. b. 138. a. 2 Co. 53. b. 54. a Co. Lit. 23. a.

The Biſhop of BATH's *Caſe,*

Trin. 3 Jac. 1.

In the Common Pleas.

Cr. Jac. 71, 72.

IN Replevin between *Bellamy* Pl. and *Fiſh* Defend. *Fiſh* made Conuſance as Bailiff to *William* Lord *H.* for Damage-feaſance; the Plaintiff ſaid, That before the Lord *W. H.* had any Thing, the Biſhop of *Bath* and *Wells* was ſeiſed of the Manor of *Blackford*, whereof, *&c.* in his Demeſne as of Fee in the Right of his Biſhoprick; and afterwards the laſt of *September*, 18 *H.* 8. by Writing made a Leaſe to *Elizabeth Coſin*, Widow, and *Robert Coſin* her Son, of the ſaid Manor for 60 Years, *a die confectionis ejuſdem ſcripti, abſq; impetitione vaſti*, with Reſervation of Rent: And further *proviſum fuit per idem ſcriptum, qd' ſi præd' Eliz. & Robert. infra dict' termin' 60 annor' obierint qd' tunc ſtatim & immediate poſt deceſſum eorundem* E. & R. *& eor' alterius diutius viven. bene liceat præfato Epiſcopo & Succeſſorib' ſuis, in manerium præd' cum pertinen' reintrare.* The ſaid *Elizabeth* died, and *Robert* ſurvived her; the Biſhop died, and another is elected and conſecrated, *&c.* who, the laſt of *Auguſt*, 22 *H.* 8. by Writing demiſed the ſaid Manor to one *Clark*, *habend' & occupand' manerium præd' eidem Clark Executoribus & Aſſignatis ſuis, cum poſt ſive per mortem ſurſum reddit', vel furisfacturam præd' Rob. Coſin acciderit vacare*, for threeſcore Years, with Confirmation of the Dean and Chapter. And afterwards the Biſhop granted the Reverſion of the ſaid Manor to the ſaid Lord *W. H* and the Tenant attorned, and afterwards *Robert Coſin*, within the ſaid firſt threeſcore Years died, and the ſecond Leſſee died, and the Intereſt of the ſecond Leſſee came to the Plaintiff, and the Defendant demurred on the Bar to the Avowry. The Queſtions in this Caſe were two. 1. Whether the ſecond Leaſe ſhould ever commence. 2. Admitting it ſhould commence, when it ſhould commence. As to the firſt it was objected, inaſmuch as the ſecond Leaſe is limited

Co. Lit. 300. b.

limited to commence on one of three Accidents, that is to ſay, when the former Leaſe ſhall determine by Death (*a*) or Surrender, or Forfeiture; if none of theſe Accidents happen, that the ſecond Leaſe which is to commence on one of them ſhould never commence: For it was ſaid, ſuppoſe that the Leſſees had ſurvived the firſt Term without any Surrender or Forfeiture, the ſecond Term ſhould never commence, for the Term ought to commence at the Time that the Leſſor himſelf limits it, and at no other Time; and if the Commencement be uncertain, or on an Accident which never happens, or on a contingent, or a Condition impoſſible, the Leaſe is void: For every Leaſe for Years ought to have (*b*) a certain Beginning, Continuance and End. *Vide Say*'s Caſe, *Pl. Com.* 270. 14 *H.* 8. 10. *b.* 21 *H.* 7. 38. *b.* 2 *Mar. Br. Leaſes* 67. 2. It was objected, That if the ſecond Leaſe ſhould commence at all, it ſhould commence by the (*c*) Death of the Leſſees, for this Accident happened, and not the other two, and by their Deaths it ſhould not commence, for by the Death (as this Caſe is) it could not commence in Poſſeſſion; for the ſaid Proviſo in the firſt Leaſe doth not make the Leaſe void on the Death of the Leſſees, but gives Re-entry to the Leſſor and his Succeſſors. So that 'till Re-entry (notwithſtanding the Death of the Leſſees) the Leaſe continues. And therefore, foraſmuch as the ſecond Leaſe is to commence after the Avoidance of the firſt Leaſe by the Death of the Leſſees, for this Cauſe, either it ſhall never commence, or the Term of the ſecond Leaſe ſhall commence from the Time of the Death of the Survivor of the Leſſees. As to the firſt, it was anſwered and *reſolved*, That it is, true, that every Leaſe for Years ought to have (*d*) a certain Beginning, but that is to be intended when it is to take Effect in Intereſt or Poſſeſſion, then the Commencement ought to be certain; for a Leaſe for Years may be made on a Condition or contingent Precedent; as if I (*e*) grant to you, that if you pay me twenty Pounds at *Michaelmas* next following, that you ſhall have my Manor of *D.* for one and twenty Years; now it is uncertain whether it will commence or not, and in the mean Time 'till the Payment of the Money, it is not any Leaſe, but it is ſufficient that the Commencement be certain when it is to take Effect in Intereſt or Poſſeſſion. So it is true, that the Continuance of it ought to be certain; but that is to be intended either when the Term is made certain by expreſs Numbering of Years, or by Reference to a Certainty, or by Reducing it to Certainty by Matter *ex poſt facto*, or by Conſtruction in Law, by expreſs Limitation. As firſt, if a Leaſe be made for twenty-one Years, or any

(*a*) Cr. Jac. 71. 2 Rol. Rep. 357. Godb. 419.

(*b*) Co. Lit. 45. b. Plowd. 272. a. Carter 148.

(*c*) Cr. Jac. 71.

(*d*) Co. Lit. 45. b. 1 Rol. 848, 849.

(*e*) 1 Rol. 849. Co. Lit. 45. b. Pl. Com. 272. a.

Carter 148.

other certain Term, *&c.* it is good for the certain Enumeration at the firſt. 2. By Reference to Certainty; as if one leaſe the Manor of *D.* to *I. S.* for (*a*) as many Years as *I.* has in the Manor of *S.* and he has a Term for ten Years, *I. S.* ſhall have the like Term. So if a Leaſe be made to another during the (*b*) Minority of *I. G.* and he is of the Age of ten Years, now this is a good Leaſe for eleven Years, if *I. G.* ſhall ſo long live. But if the Wife of *I.* be great with Child with a Son, and a Leaſe be made until the Iſſue *in ventre ſa mere* ſhall come to full Age, this is not a Leaſe for Years; for at the Time when the Leaſe is to take Effect, it is incertain when the Son will be born, and by Conſequence the Commencement, Continuance and End thereof is incertain. And when a Leaſe for Years ſhall be made good by Reference, the Reference ought to be to a Thing which has expreſs Certainty at the Time of the Leaſe made, and not to a poſſible or caſual Certainty. And therefore if (*c*) I have a Rent of twenty Shillings *per Annum* in Fee iſſuing out of *Black Acre*, payable yearly at the Feaſt of *Eaſter*, and I grant the ſame Rent to you till you ſhall have received of the ſame Rent one and twenty Pounds; in this Caſe you ſhall have this Rent for 21 Years, for it has Reference to an expreſs Certainty, *viz.* to a yearly Rent which is twenty Shillings *per Annum* in certain. But if a Man (*d*) leaſes Lands of the Value of twenty Shillings *per Annum* till one and twenty Pounds be levied of the Iſſues and Profits, it is but a Leaſe at Will without Livery; for it is not certain that the Land ſhall be every Year of one annual Value. And ſo it was reſolved, *Paſch.* 24 *El. per totam Curiam, in Communi Banco.* 2. When a Leaſe ſhall be made good by Matter *ex poſt facto.* It was *reſolved*, if a Man makes a Leaſe from the Feaſt of St. *Michael*, for as many Years as *I.S.* ſhall (*e*) name, in this Caſe, if *I.S.* name a certain Term (in the Life of the Leſſor) it is a good Leaſe by Matter *ex poſt facto.* So it is of all Leaſes which are to commence on a Condition precedent. And as to *Potkin's* Caſe in (*f*) 14 *H.* 8. 10. *b.* which was cited by the Counſel on both Sides in this Caſe, where the Caſe was, That *Potkin*, 10 *H.* 7. demiſed a Wood to the Defendant to commence at the Feaſt of St. *Michael* next following, *pro term. unius anni* (*g*) *& ſic de uno anno in annum, quamdiu ambabus partibus placuerit*, and there two Juſtices againſt two. It was now *reſolved, per totam Curiam*, that in ſuch Caſe after three Years *ad maxium*, it was but a Leaſe at Will, becauſe beyond that, the Term has not any certain Continuance or Determination; and on the Matter is no other, than if one demiſes Lands for ſuch Term as (*h*) both Parties ſhall pleaſe, this is but a Leaſe at Will, becauſe the Term is altogether incertain. But if a Man leaſes his Land for Years, it is a good Leaſe for

(*a*) 1 Rol. 849. Co. Lit. 45. b. 2 Rol. Rep. 402. 1 Bulſt. 219.
(*b*) Pl. Com. 273. a.
(*c*) 1 Rol. 845. Pl. Com. 273. b. Co. Lit. 42. a. B. N. O. 462, 468.
(*d*) 1 Rol. 845. B. N. C. 462. 3 Bulſt. 300. 3 Leon. 157.
(*e*) 1 Rol. 849. Co. Lit. 45. b. Plowd. 13. a. 372. b. Cr. Eliz. 561. Moor 479. 1 Co. 155. b.
(*f*) 1 Rol. 851. 14 H. 10. b. Palm. 203.
(*g*) 1 Rol. Rep. 287. 1 Bulſtr. 190. 3 Bulſtr. 158. Co. Lit. 45. b. 1 Rol. 851. Noy 143. Lutw. 214. Salk. 413, 414.
(*h*) 1 Rol. 851.

for two Years, becauſe it ſhall be taken good for ſuch a Number with which at leaſt the plural Number will be ſatisfied, and that is with two Years. It was alſo *reſolved*, That it is uſual when the (*a*) King's Leaſe is doubtful, whether it be good or not, and another is to take a Leaſe of the ſame Lands, he will make his *Habendum* to commence (if any former Leaſe be) *&c.* after the End or Determination of the former Leaſe; and if there be no Leaſe, then from ſuch a Feaſt for a certain Number of Years, and (God forbid) but that theſe Leaſes ſhall be good and effectual; for in the Judgment of Law it has a Commencement ſufficiently certain; for in the Eye of the Law the former Demiſe is either good or void, and therefore in the King's Caſe, which is ſtronger than the Caſe of a common Perſon, ſuch Leaſe has by Conſtruction of Law a Commencement certain enough. So if *A.* (*b*) reciting that *B.* has a Leaſe for Years, demiſes the Land to *C.* for Years, to commence after the End or Determination of the former Leaſe, and in Truth there is not any former Leaſe, the Leaſe to *C.* ſhall commence preſently; for in Judgment of Law, a void Limitation of a Commencement, and no Limitation, is all one. As to the ſecond Objection, it was *reſolved*, that in Conſtruction of Law on the Commencement of Leaſes, the ſtrongeſt ſhall be taken againſt the Leſſor, and moſt beneficially for the Leſſee. And in this Caſe it is true, that the firſt Leaſe cannot determine by the Death of the Leſſees, becauſe on their (*c*) Deaths a Re-entry is given; ſo that till Re-entry the Leaſe cannot determine by their Deaths; and foraſmuch as there was not any Re-entry in Truth, the firſt Leaſe determined by Effluxion of Time, and not by (*d*) Death, Surrender, or Forfeiture. But the Words of the *Habendum* of the ſecond Leaſe, are not only *cum per mortem, &c. vacari contigerit, ſed cum poſt, ſive per mortem, &c. vacari contigerit*; and altho' the firſt Leaſe doth not become void *per mortem*, yet certain it is that it becomes void, (*viz.* by Effluxion of Time) *poſt mortem* of the Leſſees; foraſmuch as both died before the Determination of the Leaſe, and, as has been ſaid, the ſtrongeſt Conſtruction ſhall be taken againſt the Leſſor, and the moſt beneficial for the Leſſee, and that is, that the ſecond Leaſe ſhall commence either after the Re-entry by Force of the Proviſo, if any be, and if there be none, then after the Determination and End of the firſt Term. And *Wroteſley*'s Caſe in *Pl.* 192. *a.* was cited, (*f*) where a Woman Leſſee for Years, took Huſband, and the Wife dy'd, and he in Rev'n leaſed the Land for Years, to commence after the Term demiſed to the Huſband, where in Truth the firſt Demiſe was made to the Wife, and by Act in Law transferred

(*a*) 4 Co. 35. b. 38 H. 6. 37. b. 8 Co. 166. b. 6 Co. 55, 56. a. Plowd. 192. a.

(*b*) O Penl. 35. pl. 143. 2 Rol. 52, 55. pl. 5. 682. B. N. C. 395. Cart. 148, 149, 150, 151, 152, 153, 154, 155, 156, 157. Cro. Car. 399, 502. Hob. 73, 128, 129. Co. Lit. 46. b. 4 Co. 74. a. Dyer 93. pl. 28. 116. pl. 70. 1 Rol. 849. 1 And. 3. pl. 5. 3 H. 6. Br. Leaſes 62.

(*c*) Cr. Jac. 71.

(*d*) Cr. Jac. 72.

(*e*) Cr. Jac. 72.

(*f*) Cart. 149. Dyer 278. pl. 3.

to the Husband; and yet by reaſonable Conſtruction it was there reſolved, that the Land was by the Woman demiſed to the Husband to make the Leaſe have a good Commencement. It was alſo agreed in this Caſe, that the ſecond Leaſe did veſt preſently in Point of Intereſt, and did not depend in Contingency, to take Effect in Poſſeſſion, or at the End of the former Term, if by none of the three Accidents the firſt Leaſe became void in the mean Time; and which of them ſhould firſt happen, the Leaſe ſhould commence; for it was reſolved, that if a Man (*a*) makes a Leaſe for Years to commence after the Surrender, Forfeiture, Determination or End of a former Leaſe, in this Caſe the Leſſee has not any Election to have the ſecond Leaſe either on the Surrender or Forfeiture, or End, as he ſhall elect, but which of them ſhall firſt happen, the ſecond Leaſe which before conſiſted in *interreſſe termini*, ſhall begin in Poſſeſſion. And therefore ſuppoſe that in ſuch Caſe the firſt Leſſee ſurrenders to the Leſſor, the ſecond Leſſee cannot elect that his Leaſe ſhall commence after the Expiration of the Term, but preſently by the Surrender his Leaſe comes in Poſſeſſion, and from that Time the Years of the ſecond Leaſe ſhall incur; for theſe Words (which of them ſhall firſt happen) are implied in Law.

(*a*) Lit. Rep. 370. 2 Sid. 165, 166.

Raymond 82.

The

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

Trin. 3 Jacobi 1.

In the King's Bench.

THE Dean and Chapter of *Worceſter* were ſeiſed of the Manor of *Hambleton* in Fee, in Right of their Church, of which Manor one *Henry Gardiner* was a Copyholder for Life of certain Land whereof the ancient Rent was eight Shillings and eight Pence, payable at four Days of the Year, *viz.* Quarterly, and Heriotable at the Death of the Tenant, the Copyholds of which Manor were grantable by the Cuſtom of the Manor for three Lives. The Dean and Chapter, *Anno* 24 *Eliz.* by Deed indented under their common Seal demiſed the ſaid Lands to the ſaid *Henry Gardiner* and his Aſſigns for the Lives of *John*, *Richard*, and *Margaret Gardiner*, and the Survivor of them; and afterwards the Dean died, the Succeſſ. and the Chapter entered to avoid this Leaſe, and the Queſt. was, Whether this Leaſe was to be avoided by the Stat. of (*a*) 13 *Eliz. cap.* 10. or not? And it was argued, that this Leaſe ſhould be avoided for four Reaſons. Firſt, That the ſaid Leaſe was made for the (*b*) Lives of others, in which Caſe it might happen that there might be an Occupant who would not be ſubject to Waſt, no more than Tenant by Statute-Merchant, or Tenant by (*c*) Elegit, *&c.* who come in by the Law without any Demiſe. *Vide* 16 *Ed.* 3. *Waſt.* 100. 21 *Ed.* 3. 26. For although there is not any expreſs Clauſe of Reſtraint of Leaſes without Impeachment of Waſt, as in the Statute 32 *Hen.* 8. *cap.* 28. yet ſuch Leaſe is againſt the Intent and Equity of the ſaid Statute of 13 *Eliz.* for as it appears by the Preamble, The Statute was made againſt unreaſonable Leaſes; and it is unreaſonable that a Leſſee ſhould at his Pleaſure commit Waſt and Deſtruction, which is againſt the Commonwealth, for *Intereſt Reipublicæ ne ſua re quis male utatur.* Alſo it appears by the Preamble, That the Stat. was made againſt Decay of Spiritual Livings; and therefore, if Dean and Chapter make a Leaſe for Life, the Rem'r for Life, the Rem'r for Life, this Leaſe is not warranted by the ſaid Act, becauſe it is diſpuniſhable

Occupancy of a Copyhold, 6 Mod. 63, 64, 66, *&c. ib.*

(*a*) 3 Co. 6. b. Moor 459, 593. nu. 802. 1 Leon. 306. Sav. 128, 129. 4 Co. 76. a. Doct. pl. 337. 1 Rol. Rep. 151, 152, 154, 161, 168, 171, 403. Cr. Car. 259. Cr. Jac. 76. Cr. El. 18, 430. 10 Co. 60. b. 2 Rol. Rep. 169. 1 Jones 263, 264. Vaugh. 197, 204. 2 Co. 46. b. 11 Co. 67. a. Co. Lit. 43. a 44. a. 301. a. 342. a. Goldsb. 171. 5 Co. 14. a. b. 1 Brownl. 182. 3 Keb. 108. 3 Bulſtr. 291. (*b*) Cr. Jac. 76. Cr. Car. 95. (*c*) F. N. B. 58. h. Reg. Orig. 75. a. 2 Rol. 826.

Co. Lit. 41. b. Cr. Eliz. 95. a.

niſhable of Waſte. 2. It was objected, That this Land had not been (*a*) uſually demiſed; for a Demiſe in this Caſe is to be intended of a Demiſe at Common Law, and not a cuſtomary Demiſe, whereof the Common Law doth not take any Notice. 3. That the antient Rent was not reſerved, nor was the Benefit which the Copyhold Eſtate yields to the Lord, (*b*) reſerved; for the Heriot thereby is loſt; and it was not the Intent of the Act, that any Prejudice of any Benefit which is of Continuance, as doubling of the Rent, every 3 or 4 Year, or a Heriot, or other Benefit at the Death of every Tenant ſhould be loſt. 4. The Rent reſerved was not (*c*) payable as it accuſtomably had been paid; for now it is reſerved to be paid every half Year at two Feaſts, where it was payable at four Feaſts of the Year before. And it was ſaid, that it was more beneficial for them in Reverſion, to have it payable at four Days in the Year, than at two Days; and all beneficial Incidents to the Rent are to be reſerved: And to that Purpoſe the Lord *Mountjoy*'s Caſe was cited, which you may ſee in the fifth Part of my Reports; for by the ſame Reaſon where the Rent has been reſerved at two Days, it may now be reſerved at one Day, which will be prejudicial to them in Replevin in Hindrance of Hoſpitality, which the Statute (as appears by the Preamble) intended to advance. As to the firſt, it was *anſwered* and *reſolved*, That a Dean and Chapter, *&c.* are reſtrained by the Equity of the ſaid Act to make Leaſes diſpuniſhable of Waſte, for the Cauſes alledged on the other Side. But it was alſo *reſolved*, That an (*d*) Occupant ſhould be puniſhed for (*e*) Waſte, becauſe he has the Eſtate of the Leſſee for Life; for the Statute of *Glouceſter*, *cap.* 5. gives an Action of Waſte againſt him who holds in any Manner for Term of Life or Years, and an Occupant holds for Term of Life; but Tenant by Statute-Merchant, Statute-Staple, or (*f*) Elegit, do not hold for Life, or Years, and therefore they are out of the Statute. And therefore Leaſes for the Lives of others, are within the ſaid Act of (*g*) 32 *H.* 8. *cap.* 28. concerning Leaſes made by Tenant in Tail, as well as they are within this Act of 13 *Eliz.* As to the ſecond Objection, it was anſwered and *reſolved*, That the ſaid Eſtate granted by (*h*) Copy, was in Judgment of the Common Law an Eſtate at Will; and without Queſtion, Lands which have been accuſtomed to be demiſed at Will by thoſe who have the Inheritance of the Lands, rendring Rent, are Lands *accuſtomably letten to farm* within the ſaid Act. And according to this Reſolution was the Opinion of the whole Court of Common Pleas, *Paſch.* 3 *Jacobi.* *Vide Heydon*'s Caſe in the 3d Part of my Reports. As to the third Objection, it was anſwered and *reſolved*, That the ſaid Act of 13 *Eliz.* doth not avoid the Leaſe, if the (*i*) accuſtomed Yearly Rent or more be reſerved;

(*a*) Cr. Jac. 50, 76.

(*b*) 2 Rol. Rep. 407. Cr. Jac. 76. Palm. 106.

(*c*) Cr. Jac. 76, 77. Co. Lit. 44. b. 5 Co. 5. b. 3 Chan. R. 110.

(*d*) Moor 363, 664. 2 Bulſt. 11, 12, 13. Bridgm. 27. Cr. Car. 477. Cr. El. 58, 721. 2 Brownl. 202. Vaugh. 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 200, 201, 202, 203, 204, 205.

(*e*) Vaugh. 204. 2 Rol. 826. Co. Lit. 41. b. 44. b. 54. a. 2 Inſt. 301. 10 Co. 98. a. Plowd. 556. b.

(*f*) F.N.B. 58. h. 2 Rol. 826. Reg. Orig. 75. a.

(*g*) Moor 759. Cr. Jac. 76, 77. Co. Lit. 44. b.

(*h*) Raym. 167. 3 Co. 8. a. Moor 759. 2 Jones 29. Co. Lit. 44. b. Cr. Jac. 76, 77. Dyer 106, 107.

(*i*) Co. Lit. 44. b. Cro. Jac. 76, 77.

reſerved; and foraſmuch as the ſaid Heriot was not an annual Thing, nor a Thing depending on the Rent, it is ſufficient if (*a*) the yearly Rent be reſerved. As to the fourth Objection, it was alſo anſwered and *reſolved*, That it is ſufficient, if the accuſtomed Rent be reſerved Yearly at one Time; for the Words of this Act are, *whereupon the accuſtomed yearly Rent or more ſhall be reſerved*; and therefore if the Rent be Yearly reſerved, the Statute is ſatisfied, by Reaſon of this Word (*Yearly*); and ſo there is a Difference between this Caſe and the Lord *Mountjoy*'s Caſe; for there wanted the Word (*Yearly*) which explains the Intention of the Makers of the ſaid Act of 13 *Eliz.*

(*a*) Co. Lit. 44. b. 2 Rol. Rep. 171, 407. Ley 72, 73. Degge 107. Cr. Jac. 76, 77. Cr. Car. 17. 3 Bulſtr. 291. 3 Keb. 107, 108. 5 Co. 7. b.

[See 6 *Mod.* 64. No Occupancy can be of a Rent-Charge, nor of a Copyhold ſans ſpecial Cuſtom.]

BELLAMY's *Caſe.*

Paſch. 3 Jac. 1. *Rot.* 980.

In the Common Pleas.

WAlker brought Treſpaſs againſt *Bellamy* for carrying away his Goods, *&c.* The Defendant conveyed to himſelf a Houſe by Feoffment, and juſtified for Damage-feaſance; the Plaintiff, pleaded a Leaſe made to one, of this Houſe, for Years, by the Feoffor, by Deed indented, before the Feoffment, which the Leſſee did aſſign to him; the Defendant confeſſed the Leaſe, but ſaid, that the Leaſe was on Condition that he ſhould not let or aſſign over his Leaſe without Licence by Deed of the Leſſor, and alledged that the Leſſee without Licence did aſſign to the Plaintiff; the Plaintiff pleaded the Licence of the Leſſor to the Leſſee by Deed, without ſaying (*a*) *hic in cur. prolat.* and for that Cauſe the Def. did demur in Law. And altho' of Neceſſity the Licence ought to be by Deed, and the Reaſon and Cauſe that Deeds are ſhewed to the Court is, becauſe it belongs to the Judges to adjudge of the (*b*) Sufficiency or Inſufficiency of them; yet it was *reſolved*, that the Pl. need not ſhew it in this Caſe for three Reaſons. 1. Becauſe the Pl. doth not (*c*) claim by the ſaid Deed of Licence any Intereſt in the Houſe, but the Licence is meer collateral to the Intereſt of it, and pleaded only to excuſe the Forfeiture of the Leaſe, and is not like a Releaſe or Confirmation, for they transfer the Right. 2. A good Difference was taken

Cr. Jac. 102. 1 Rol. 471.

(*a*) Stil. 193. Cr. Jac. 70, 102.

(*b*) Co. Lit. 35. b. 121. b. 225. a. 9 Co. 25. a. 10 Co. 92. b. Hob. 1. 7.

(*c*) Cr. Jac. 120, 103. Plowd. 149. a. Yelv. 201. Cro. Jac. 70.

taken and agreed when a Deed is requiſite *ex inſtitutione Legis*, and when *ex proviſione hominis*; for when it is requiſite *ex inſtitutione Legis*, there it ought to be ſhewed in Court; although it concerns a collateral Thing, and transfers or conveys nothing. As if the Mayor and Commonalty of *London* have an Eſtate for the Life of *J. S.* if in that Caſe the Mayor and Commonalty attorn to the Grantee of the Reverſion, the Law requires that it ſhould be by Deed; for, notwithſtanding the Grantee doth not claim in by them who attorn, and that an Attornment is but a Conſent; yet in Pleading, the Deed of Attornment ought to be ſhewed, for the Deed is requiſite *ex inſtitutione Legis* in ſuch Caſe. But when a Deed is requiſite *ex proviſione hominis*, there the Proviſion of Man ſhall not change the Judgment of Law in ſuch Caſe; As if a Man makes a Leaſe for Years of Land to *A.* on Condition that he ſhall not aſſign it over but by Deed only, and not by Parol; in this Caſe *ex proviſione hominis*, the Aſſignment ought to be by Deed, but becauſe *ex inſtitutione Legis*, a Deed is not neceſſary to the Aſſignee, he may plead the Aſſignment without ſhewing the Deed. And if the King's Fermor brings a (*a*) *Quo minus* in the Exchequer, he ought to (*b*) alledge that he is the King's Fermor to enable him to ſue there; but he need not ſhew it to the Court, for that is meer collateral to the Action. 3. In the principal Caſe the Licence was (*c*) executed, and had not Continuance. *Vide 6 Rich.* 2. *Monſtrance des Faits* 157. 28 *Hen.* 8. 29 *Dyer.* 18 *Ed.* 3. 56. 44 *Ed.* 3. 11. 22. 45 *Ed.* 3. 28. 18 *Hen.* 4. 11 *Hen.* 4. 39. 8 *Ed.* 3. 19. 18 *E.* 4. 12. 40 *Ed.* 3. 10. *Plowd. Com.* 149. 21 *Hen.* 7. 9. *per Frowike.* 43 *Aſſ. p.* 24. 8 *Aſſ. p.* 11. 24 *Aſſ. p.* 2. 20 *Aſſ. p.* 19. 24 *E.* 3. 52.

(*a*) 2 Rol. 159. Plowd. 208. a. Dy. 328. pl. 9. 2 Inſt. 551. 4 Inſt. 112.
(*b*) Doct. pl. 87.
(*c*) Cr. Jac. 103.

HENRY

HENRY FINCH's *Caſe.*

Hill. 3 Jacobi 1.

In the King's Bench.

THomas Moon brought a Replevin againſt *Daniel Crat*, and *Thomas Baldwin*, who made Conuſance as Bailiffs to *Henry Finch*, Eſq; becauſe the Place where, *&c.* was Parcel of the Manor of *Eaſtwell*, whereof the Lady *Finch* was ſeiſed in Fee, and by her Deed dated 6 *Eliz.* did grant to the ſaid *Henry Finch* her younger Son, an yearly Rent of 20 *l. exeunt de prædict. Manerio de Eaſtwell inter alia, per nomen maneriorum de Eaſtwell, Otterplea, Pothery, & Seton, & meſſuagiorum, terrarum, tenementorum, & hæreditamentorum dictæ Katherinæ, ſcituat. jacen. & exiſten. in parochiis de Eaſtwell, Weſtwell, & Challock in Com. Kanc. aut alibi in eodem Com. dict. Maneriis ſive eorum aliqui quoquo modo ſpectant. vel pertinent.* to the ſaid *Henry Finch*, and the Heirs of his Body, payable at the Feaſts of the Annunciation and St. *Michael*, by even Portions, with Clauſe of Diſtreſs, *&c.* And for Rent arrear they made Conuſance. The Plaintiff prayed Oyer of the Deed, which was entred, in *hæc verba*, *& habuit*, and ſaid, that *præter & ultra* the ſaid Manors of *E. O. P.* and *S.* and the Premiſſes appertaining to the ſaid Manors, the ſaid Lady *Finch* at the Time of the granting of the ſaid Rent, was alſo ſeiſed of one Acre of Land in Fee in *Challock* aforeſaid, and died ſeiſed, which deſcended to Sir *Moile Finch* as her Son and Heir; and that the ſaid *Henry Finch* had abated in the ſaid Acre, and ſo continued ſeiſed by Abatement: Upon which the Defendants did demur in Law. And the Queſtion was, whether the ſaid Acre of Land (which was not Parcel, nor appertaining to the ſaid Manors) was by the Words aforeſaid charged with the ſaid Rent, or not; or whether the ſaid Manors and the Land thereunto belonging ſhould be only charged, or not. And after many Arguments at the Bar, and the Caſe well debated at the Bench, it was adjudged, That

2 Rol. 51. Yelv. 82. Co. Ent. 590. nu. 9. 1 Brownl. 184, 185. Winch. 91, 92. 2 Brownl. 53. 2 Rol. Rep. 261. Hob. 175.

That the ſaid Rent was not iſſuing out of the ſaid Acre of Land, but (*a*) only out of the ſaid Manors and Land appertaining to them. And the chief Reaſon and Cauſe of their Judgment was, becauſe in this Caſe there is but one Grant, and one and the ſame Sentence; for there is not a full Period nor an End of the Sentence, before the Concluſion of theſe Words *(aut (b) alibi, &c.)* And the Difference is between two diſtinct Sentences importing ſeveral Grants, and one and the ſame Sentence; as if the Grant had been *Dedi & Conceſſi annualem redditum* 20 l. *exeunt de manerio de D. & terris & tenementis meis in D. S. & D. in Com. K. & de terris & tenementis meis alibi in eodem Com. dict. Manerio ſpectant. & pertin.* In that Caſe there are two Sentences, and each one may well ſtand by itſelf, for there is a Repetition *De terris & tenementis*, which amplifies and enlarges the Lands and Tenements, out of which the Rent ſhall iſſue; but in the Caſe at Bar there is not any Repetition or Enlargement of Lands or Tenements after the *aut (c) alibi*; but the *aut alibi* doth not enlarge the Grant of the Rent to iſſue out of other Lands or Tenements, but enlarges the Towns or Places, in which the Lands before charged extend; as if he had ſaid, *in Parochia de E. W. & C. aut alibi in Com. K. dict. maner. ſpect. ſeu pertin'*, for *hæc verba in hoc caſu tranſpoſita idem ſignificant:* Alſo, altho' this Conjunction disjunctive *(aut)* in this Caſe amounts in Law to a Copulative; yet it was well obſerved that *(d)* *(aut)* was never put for the Beginning of a Sentence, but always as a Continuance of a former Sentence, in the ſame Manner as *(una cum)* conjoins the Matter ſubſequent to the Matter precedent. Alſo here in the principal Caſe, theſe Participles *ſpectan' & pertinen.* in Conſtruction, agree to theſe Words *Meſuag. terr. tenement. & hæreditament.* for there are no other Nouns to which they can properly agree; but as it has been ſaid, if there had been after the *(aut alibi)* any new Iteration, or Mention of Lands or Tenements, with which theſe Participles *ſpectan. & pertinan.* might agree in true Conſtruction, then there might be a Difference.

Note Reader, although (*e*) *Mala grammatica non vitiat inſtrumenta*, yet *in expoſitione inſtrument. mala (f) grammatica, quod fieri poſſit, vitandu eſt.*

(*a*) 2 Rol. Rep. 261. Winch. 90, 92. Hob. 175.

(*b*) Lit. Rep. 208.

(*c*) Lit. Rep. 208. Winch. 74.

(*d*) 1 Brownl. 185. Yelv. 82. Lit. Rep. 210.

(*e*) 11 Co. 3. b. 10 Co. 133. a. Co. Lit. 146. b.

(*f*) Co. Lit. 223. b.

Sir

Sir ANTHONY MILDMAY's *Caſe.*

Mich. 3 Jacobi I.

In the King's Bench.

THIS Term, the Caſe on a ſpecial Verdict in an Action of Treſpaſs, done at *Newton* in the County of *Northampton*, between *James Hetherſall*, Leſſee of *Humphrey Mildmay*, Eſq; Plaintiff, againſt Sir *Anthony Mildmay*, Knt. Def. (which was *mutatis mutandis* all one with (*a*) *Corbet's* Caſe reported by me in the firſt Part of my Reports, *f.* 84.) was argued at the Bar, as it had been in ſundry Terms paſt; and was alſo argued by the Judges: And this was adjudged againſt the Plaintiff according to the Judgment given in *Corbet's* Caſe. And in this Caſe ſome Points on great Conſideration were reſolved, which were not moved in *Corbet's* Caſe; 1. That all theſe (*b*) Perpetuities were againſt the Reaſon and Policy of the Common Law; For at Common Law (*c*) all Inheritances were Fee-ſimple, as *Littleton* ſaith, *lib.* 1. *cap. Eſtate-tail*; and the Reaſon thereof was, that neither Lords ſhould be defeated of their Eſcheats, Wards, *&c.* nor the Farmers or Purchaſers loſe their Eſtates or Leaſes, or be evicted by the Heirs of the Grantors or Leſſors; nor ſuch infinite Occaſions of Troubles, Contentions and Suits ariſe. But the true Policy and Rule of the Common Law in this Point, was in Effect overthrown by the Statute *de* (*d*) *Donis conditionalibus*, made *Anno* 13 *E.* 1. which eſtabliſhed a general Perpetuity by Act of Parliament, for all who had or would make it, by Force whereof all the Poſſeſſions of *England* in Effect were entailed accordingly, which was the Occaſion and Cauſe of the ſaid and divers other Miſchiefs. And the ſame was attempted and endeavoured to

This Caſe begun Hill. 45 El. Rot. 439.

(*a*) 1 Co. 83. b. Moor 601, 632, 633. Co. Ent. 678. nu. 21. 10 Co. 37. a. 42. b. 2 Anderſ. 134. Cro. Car. 479. Winch. 56. 3 Keb. 177. 4 Leon. 246.

(*b*) 10 Co. 42. b. Cr. Jac. 697, 698.

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

(*d*) 10 Co. 37. a. Doct. & Stud. lib. 1. cap. 27, 28, 29, 30, 31, 32. Plowd. 13. b. 53. b. 59. a. 160. b. 178. b. 235. b. 246. a. 250. b. Maxel's Caſe, ibid. 3. a. Præfat. ad 4 Co. 1. b. 1 Co. 44. b. 48. a. 88. a. 96. a. 103. a. b. 131. b. 2 Co. 46. b. 3 Co. 8. a. 85. b. 88. b. 89. a. 4 Co. 4. b. 5 Co. 14. b.

6 Co. 41. a. 7 Co. 21. a. 32. a. 41. a. 8 Co. 35. b. 72. b. 9 Co. 105. a. 11 Co. 72. a. 12 Co. 81. 1 Rol. Rep. 48, 153, 155, 162, 385. 2 Rol. Rep. 197, 317, 318, 383, 410, 417. 1 Leon. 83, 282. Raſtal's Entr. 360. b. &c. Hob. 293. 2 Inſt. 332, &c. Savil 67, 88. Poph. 34, 128. Cro. Car. 42, 43, 45, 533. Co. Lit. 18. b. 19. a. b. 24. a. 60. a. 224. a. 262. a. 327. b. Carter 23. Latch. 67. Godb. 308, 567. O. Benl. 163. Vaugh. 365, F. N. B. 211. b. 3 Bulſtr. 186. Vet. Nat. Br. 100. a. 143. b. Raſtal Tail 4. Lit. ſect. 13, 362, 441. 2 Anderſ. 113, 14.

(a) Godb. 303.

to be remedied at divers Parliaments and divers (*a*) Bills were exhibited accordingly (which I have ſeen) but they were always on one Pretence or other rejected. But the Truth was, That the Lords and Commons knowing that their Eſtates-tail were not to be forfeited for Felony or (*b*) Treaſon; as their Eſtates of Inheritances were before the ſaid Act, (and chiefly in the Time of *H.* 3. in the Barons War) and finding that they were not anſwerable for the Debts or Incumbrances of their Anceſtors, nor did the Sales, Alienations or Leaſes of their Anceſtors, bind them for the Lands which were entailed to their Anceſtors, they always rejected ſuch Bills: And the ſame continued in the Reſidue of the Reign of *E.* 1. and of the Reigns of *E.* 2. *E.* 3. *R.* 2. *H.* 4. *H.* 5. *H.* 6. and 'till about the (*c*) 12th Year of *E.* 4. When the Judges on Conſultation had amongſt themſelves, *reſolved*, That an Eſtate-tail might be dockt and barred by a Common Recovery; and that by Reaſon of the intended Recompence, the Common Recovery was not within the Reſtraint of the ſaid Perpetuity made by the ſaid Act of 13 *E.* 1. By which it appears, That many Miſchiefs ariſe on the Change of a Maxim, and Rule of the Common Law, which thoſe who altered it could not ſee, when they made the Change; for (*d*) *Rer' progreſſ. offendunt multa, quæ in initio præcaveri ſeu prævideri non poſſunt.* 2. It was *reſolved*, That it was (*e*) impoſſible and repugnant, that an Eſtate-tail ſhould ceaſe as if the Tenant in Tail was dead, (had he Iſſue or no) for an Eſtate-tail cannot ceaſe, ſo long as it continues; but here his Intent was to continue the Eſtate-tail; and to ceaſe it in Reſpect of the Party offending only, and not as to any other, which is impoſſible, repugnant and againſt Law; For every Limitation or Condition ought to defeat the (*f*) whole Eſtate, and not to defeat Part of the Eſtate, and leave Part not defeated; and it cannot make an Eſtate to ceaſe *quoad unam perſonam*, and not *quoad alteram:* But an (*g*) Act of Parliament may make an Eſtate ceaſe as if one were dead, 21 *H.* 8. that by the Acceptance of a ſecond Benefice, the firſt ſhall be void as if he were dead, and in 10 *Eliz. Dyer* 274. (*h*) there is Reſtitution by Parliament with a *Quoad.* So the Policy of the Common Law may make a *Quoad*, as in 22 *Eliz. Dyer* 369. (*i*) a Marriage *infra annos nubiles*, is perfect *quoad dotem*, and *quoad* other Purpoſes it is but *inchoatum & imperfectum.* So if two are jointly and ſeverally bound in a Bond, and Judgment is given againſt one, by which it is become of Record as to one, but as to the other it remains a Writing as it was before: But no Condition or Limitation framed by the Parties Words in his Deed, can make one and the ſame Eſtate in any Lands (*k*) ceaſe as to one

(b) Godb. 303. Co. Lit. 392. b. 26 H. 8. c. 13. 33 H. 8. c. 20.

(c) 10 Co. 37. a. b. 1 Co. 131. b. Co. Lit. 361. b. 372. b. Godb. 308. Hard. 209. 1 Bulſtr. 159. 12 E. 4. 19, 20, 21.

(d) 11 Co. 69. a. 12 Co. 48. 2 Inſt. 26. Hawk. Max. 311, 452.

(e) 1 Co. 84. a. 85. b. 130. a. Moor 364. Cr. Jac. 697, 698. 8 Co. 17. a.

(f) 1 Co. 85. 4 Co. 119. b. 1 Rol. 71. Cr. Jac. 398.

(g) Cr. El. 379. Co. Lit. 27. a. Raym. 355. 1 Co. 87. b. 13 Co. 64. 8 Co. 1. Lucas 412.

(h) Raym. 355. Dyer 274. pl. 40, 41. 1 Jones 460. 1 Keb. 265. 606. Cro. Car. 543.

(i) Dyer 369. pl. 48, 49. 1 Leon. 54.

(k) Moor 364, 544, 632, 633. 1 Co. 86. b. 87. a. 130. a. 138. b. 8 Co. 17. a. b. Cro. El. 379. Raym. 355.

one Perſon, and be in *eſſe* as to another, or ceaſe for one Time, and revive afterwards (as a Rent (*a*) newly created may.) And none can have an Eſtate in Tail, but Parties in Eſtate *ſecundum formam doni* 3. It was *reſolved*, that if a Man makes a Gift in Tail, on Condition, that he ſhall not ſuffer a (*b*) Com. Recovery, that this Condition is repugnant to the Eſtate-tail, and againſt Law. For there are divers Incidents to an Eſtate-tail. 1. To be diſpunilhed for (*c*) Waſt. 2. That his Wife ſhall be (*d*) endowed. 3. The Husband of a Woman Tenant in Tail after Iſſue, ſhall be Tenant by the (*e*) Curteſy. 4. That Tenant in Tail may ſuffer a Common Recovery, and thereby bar the Eſtate-tail, and the Reverſion or Rem'r alſo. And theſe inſeparable Incidents which the Law annexes to an Eſtate-tail, cannot be prohibited by Condition. And therefore if a Man makes Gift in Tail on Condition that the Donee ſhall not commit Waſt, or that his Wife ſhall not be endowed, or that the Huſband of a Woman Tenant in Tail after Iſſue ſhall not be Tenant by the Curteſy, or that Tenant in Tail ſhall not ſuffer a Common Recovery, theſe Conditions are repugnant and againſt Law, becauſe by the Gift in Tail, he tacitly enables him to commit Waſt, that his Wife ſhall be endowed, and to ſuffer a Common Recovery. And therefore it is repugnant to reſtrain it by Condition, for that would be to give a Power, and to reſtrain the ſame Power in one and the ſame Deed. And as to the Caſe of Dower, *vide* 22 *E.* 3. 19. *Accord*, 17 *El. Dyer* 343. the Earl of (*f*) *Arundel*'s Caſe. And altho' a Com. Recovery is but a common Aſſurance, yet by the Law every Tenant in Tail has Power to ſuffer it to bar as well the Eſtate-tail, as the Rev'n or Rem'r over; and ſuch Act in Reſpect of the intended Recompence, is not reſtrained by the Stat. *de Donis conditional'* as it has been ſaid. But Tenant in Tail by a Common Recovery has *poteſtatem alienandi*, notwithſtanding the ſaid Stat. As if a Man (*g*) before the ſaid Stat. had made a Gift to one and to the Heirs of his Body, in this Caſe *poſt prolem ſuſcitatam*, he had by the Com. Law *poteſtatem alienandi*; and therefore in the ſame Caſe, if the donor add ſuch a Condition, that after Iſſue the Donee ſhould not alien, it was reſolved that the Condition in ſuch Caſe had been repugnant, becauſe after Iſſue, by the Common Law, the Donee had *poteſtatem alienandi*, and then in one and the ſame *Deed* to give him Power *poſt* (*h*) *prolem ſuſcitatam poteſtatem alienandi tacite* by the Law, and in the ſame *Deed* to reſtrain him of that Power, is repugnant and againſt Law. *Pari ratione* after the Stat. if a Man makes a Gift in Tail, on Condit. that he ſhall not ſuffer a Common Recovery, it is repugnant; for by the Gift in Tail he has given Power *implicite* to ſuffer a Recovery. So if a Man makes a Proviſo, That Warranty and Aſſets ſhall not bar the Iſſue in Tail, or

(*a*) 1 Co. 87. a. 130. a. b. 5 E. 2. Dower 143. Perk. Sect. 327. Plow. 156. a. 10 H. 7. 13. b. 12 E. 3. condit. 11. 22 E. 3. 19. a. 14 Leon. 83. 8 Co. 17. b.

(*b*) Hob. 170. 9 Co. 128. a. b. 10 Co. 37 a. 38. b. 39. a. Co. Lit. 223. b. 224. a. 2 Brownl. 67. 1 Rol. 418. Cart. 23.

(*c*) 2 Brown. 67. 10 Co. 39. a. 1 Rol. 418. 2 Rol. 826. Lit. Sect. 34. Co. Lit. 27. b. 2 Inſt. 302. 9 Co. 139. a. Dr. & Stud. lib. 2. cap. 1. F. N. B. 59. b. 3. 1 Ed. 3. Waſt. 12. 10 H. 6. 1. b.

(*d*) 2 Brown. 67. 10 Co. 38. b. 1 Rol. 418. Co. Lit. 224. a. Dy. 343. pl. 57.

(*e*) 10 Co. 38. b. Co. Lit. 224. a. 1 Rol. 418. 2 Brownl. 67.

(*f*) Jenk. Cent. 242. 3 Co. 34. a. 10 Co. 37. a. 40. a.

(*g*) Co. Lit. 224. a.

(*h*) Co. Lit. 224. a.

(a) Co. Lit. 224. a. 1 Rol. 418. 10 Co. 39. a. 13 H. 7. 24. a.

that a collateral (*a*) Warranty ſhall not bar the Iſſue, or the *Donor*, theſe Proviſoes are againſt Law and repugnant, 6 *Eliz. Dyer* 227. A Proviſo good at the Beginning, by Conſequence may become repugnant, as if a Man by his Deed grants a Rent for Life (*b*), Proviſo that he ſhall not charge his Perſon, this is a good Proviſo, yet if the Rent is arrear and the Grantee dies, his Ex'ors ſhall charge the Perſon of the Grantor in an Action of Debt; for otherwiſe they would be without Remedy, and therefore now it is become repugnant, and by Conſequence void: But it was *reſolved*, that if a Man makes a Gift in Tail, on (*c*) Condit. that he ſhall not alien, this Condition to ſome Intent is good, and to ſome void. And therefore if he makes a Feoffm. in Fee, or any other Eſtate, by which the Rev'n is wrongfully diſcontinued, the Donor ſhall enter for the Condition broken; for every Act which is prohibited by the Law, or which doth Wrong, a Man may prohibit by Condit. *Vide* 10*H.*7. 11. *a.* but (as it has been ſaid) if in (*d*) ſuch Caſe, the Donee ſuffers a Common Recovery, the Condit. by the Law cannot extend to it, *cauſa qua ſupra.* In the ſame Manner is a Deed of Feoffm. to Husband (*e*) and Wife in Fee, on Condit. that they ſhall not alien, this is a good Condit. to reſtrain a Feoffm. or Alienation by Deed, for that is wrongful, but not to reſtrain an Alienation by them both by Fine, for that is lawful and incident to their Eſtate. So if a Man enfeoffs an (*f*) Infant in Fee, on Condition that he ſhall not alien, it is a good Condition to reſtrain an Alienation during his Minority, for that is wrongful, but not to reſtrain him to alien, when he is of full Age, for that is repugnant to his Liberty, which the Law gives him, in Caſe of Fee-ſimple; and with theſe two Caſes agree 10*H.* 7. 11 *a.* & 13*H.* 7. 23. *a.* and ſo you will better underſtand your Books in 33 *Aſſ. p.* 11, 24. 11 *H.* 6. 6. 21 *H.* 6. 30, 33, 39. 10 *H.* 7. 11. *a.* 11 *H.* 7. 6. *b.* 13*H.* 7. 23 *a.* 21 *H.* 7. 11. *a. b.* And it is to be obſerved, that before the Reign of *E.* 4. it was not reſolved, as hath been ſaid, that a Common Recovery ſhould bar the Eſtate-tail, and the Reverſions and Remainders depending thereupon: And therefore the ſaid old Books which ſpeak of Alienations made by Tenant in Tail, cannot be intended but to reſtrain Diſcontinuance and Alienations which did Wrong, and not to prohibit a Common Recovery, the Operation of which was not then known, and which, 'till the Reign of *E.* 4. was not in Uſe. And the Reaſon of *Littleton*, *lib.* 3. *cap. Condit. fol.* 84. *a.* was well obſerved, who ſaith, That if a Man makes a Feoffment on Condition, that the Feoffee ſhall not (*g*) alien to any, the Condition is void; becauſe when a Man is enfeoffed of Land, or Tenements, he has Power to alien them to any Perſon by the Law: For if ſuch Condition ſhould be good, then the Condition would ouſt him of the whole Power, which the Law gives him, which would be againſt Reaſon, and therefore ſuch Condition is void; all

(b) Co. Lit. 146. b. 7 Co. 38. b. Dy. 227. pl. 43.

(c) Co. Lit. 223. b. 1 Rol. 418.

(d) Co. Lit. 223. b.

(e) Co. Lit. 224. a. b. Br. Condit. 239. 11 H. 7. 11. a.

(f) Co. Lit. 224. a.

(g) Co. Lit. 223. a. 4 Co. 3. b. Hob. 170. Br. Condit. 82, 135. Dr. & Stud. 39. a. 123. a. 21 H. 7. 8. a. Br. Prerogative 102. 21 E. 4. 47. a. Plowd. 77. a. Lit. Sect. 360. 21 H. 6. 33. b. 8 H. 7. 10. b. 13 H. 7. 23. a.

which are the very Words of Mr. *Lit.* the Reaſon of which agrees intirely with the Reſolut. of this Point in this Caſe. And it was ſaid, that the Law favours Eſtates-tail in Poſſeſſ. and doth not regard Rem'rs or Rev'ns expectant on the Eſtate-tail. For it was adjudged in *Capel's* Caſe, as appears in the firſt Part of my Reports, That if (*a*) Tenant in Tail ſuffers a Common Recovery, it ſhall bar not only the Eſtate-tail, and Rem'r or Reverſion, but the Rent alſo that he in Rem'r or Reverſion has granted. So it was adjudged in 12 *El.* between *Terling* and *Trafford* in the K's Bench (*b*), That a Rem'r or Rev'n expectant on an Eſtate-tail is no *Aſſets* to the Heir in Debt on a Bond made by his Father. So *Hill.* 14 *El.* it was reſolved by all the Juſt. of the Com. Pleas in *Copwood's* Caſe (*c*), That if there be Tenant in Tail, the Rem'r to the right Heirs of *I. S.* and Tenant in Tail ſuffers a Common Recovery, *I. S.* being then alive, it ſhall bar the Rem'r which was in Abeyance and Conſideration of the Law. 4. Where the Proviſo is, *That if when and as often as the ſaid* Anthony Mildmay, *&c. ſhall be fully and finally reſolved and determined, and ſhall adviſedly, determinately and effectually deviſe, conclude and agree, or enter into any Communication, Promiſe, or Covenant whatſoever, or ſhall adviſedly attempt, procure, go about, or aſſent to or for any Act or Acts, Thing or Things, for or touching any Bargain, Sale, Diſcontinuance, Alienation, Conveyance or Aſſurance to be had or made of any of the ſaid Manors, &c. whereby any Eſtate, &c. may, ſhould or might in any wiſe, or by any Means be undone, diſcontinued, &c. and the ſame Bargain, &c. or ſhall adviſedly and effectually attempt, procure, go about, to or for any Act or Thing for or touching any Bargain, Sale, Diſcontinuance, &c. and the ſame Bargain, or any other open Matter, &c. ſhall attempt, go about, cauſe, &c. by Acknowledgment of any Note of any Fine, or any Warrant or Warrants of Attorney for any Recovery or Voucher, or by Acknowledgment of any Deed, or by any other Act or Acts, Thing or Things whatſoever, in Deed or in Law, &c. That then immediately after ſuch Time of ſuch Procuring, Attempting, or Going about in Form aforeſaid, and before any ſuch Bargain, Sale, Diſcontinuance, &c. had, made, &c. or done, the ſaid Uſe and Uſes, Eſtate and Eſtates, &c. ſhall from Time to Time ceaſe, as only in Reſpect, and having Regard to ſuch Perſon or Perſons ſo attempting, going about, &c. in ſuch Sort as if ſuch Perſon or Perſons, &c. were naturally dead, and no otherwiſe.* It was reſolved, That theſe Words (*Attempt*), *&c.* or (*go about*) *&c.* or (*enter into Communication*) *&c.* are Words incertain, and void in Law, and God forbid that the Inheritances and Eſtates of Men ſhould depend upon ſuch (*d*) Incertaint. for it is true, *Qd'* (*e*) *miſera eſt ſervitus, ubi jus eſt vagum; & qd' non definit in jure quid ſit conatus, ne quid eſt a going about, &c.* or *Communication;*

(*a*) Mod. 154, 155, &c. 345. 4 Leon. 150, 151, &c. Cr. Car. 103. 1 Ander. 282. Goldsb. 4. 6, &c. Jenk. Cent. 250. 1 Co. 62. a. 127. b. 128. a. Winch. 41. Cr. Jac. 592. 2 Co. 52. b. 2 Rol. Rep. 221. Palmer 139. 2 Rol. 396. 10 Co. 37. b. Cr. El. 718. Noy. 10. 3 Keb. 288. 289. Popham 5, 6. Moor. 158.

(*b*) 1 Rol. Rep. 234, 357. 2 Rol. Rep. 129. 1 Rol. 269. Poſtea 58. b. Carth. 127, 8.

(*c*) 2 Rol. Rep. 217, 221. Palm. 139. 1 Co. 136. a.

(*d*) 1 Co. 85. 2 Cr. Jac. 698.

(*e*) 2 Co. 52. 2 Mod. Rep. 234

nication: And therefore the Rule of Law decides this Point (*a*) *Non efficit conatus niſi ſequitur effectus*: And the Law (*b*) rejects *Conations*, *Goings about*, as Things uncert. which cannot be put in Iſſue. For if one who is bound with ſuch a Perpetuity goes to (*c*) Counſel learned, to know whether he might alien Part for Payment of his Debts, or for Advancement of his younger Children, or for any other needful Uſe, is that a Breach of the Proviſo or not? Or if the Heir or other in Rem'r who knew not of the Proviſo, *& qui habet juſtam ignorantiam*, thinks that he may levy a Fine, and thereupon a Note of a Fine is drawn, *&c.* and before it be recorded, he knows of the Proviſo, and then all is cancelled, is that a Breach of the Proviſo? And an hundred ſuch like Queſtions, where nothing is done, may ariſe, which the Eye of the Law never ſaw, but of late Times are invented; and ſuch Proviſo is full of Cruelty, and againſt the Freedom and Liberty of a Freeman: For this (as if he had Bolts of Iron on his Legs) reſtrains him *to go about*; and alſo it ſeals up his Lips, and deprives him of the Uſe of his Tongue; for it reſtrains him to enter *into Communication*. And in the ſaid Books aforeſaid, where the Alienation of Tenant in Tail is reſtrained, no Mention was ever made of Reſtraining a Going about, or entering into Communication to alien, for that was then thought ſo idle, that there is not any Touch of any ſuch Matter in any of the ſaid Books, or in any other Book of the Law. And in the Caſe of (*d*) *Richil*, reported by *Litt. l. 3. c.* Warranty 162. *Richil* reſtrained his Sons from aliening, and not from going about, or entering into Communicat. of aliening, and yet if he could have reſtrained the Going about, *&c.* it had avoided one of the Cauſes, that his Conveyance was againſt Law. For *Littleton* ſaith, That if the (*e*) firſt Son aliened the Tenements in Fee, then is the Freehold and Fee-ſimple in the Alienee, and in no other, *&c.* then how can it by any Reaſon be, that ſuch Rem'r ſhould commence its Being and its Eſſence immediately after ſuch Alienation made to a Stranger, who had by the ſame Alienation the Freehold and Fee-ſimple? But if Juſt. *Richil* could have reſtrained the *Going about*, or *entering into Communication*, or the Making of a Charter of Feoffm. or a Note of a Fine, *&c.* he might have avoided the principal Cauſe, for which his Conveyance was inſufficient in Law. And in the ſame Manner it may be ſaid of the Conveyance of (*f*) *Thirning* Ch. Juſtice, reported in 21 *H.* 6. 33. *b.* And it was ſaid, that a *Going about*, or *entering into Communication* was not iſſuable. Farther, it was ſaid, if a Man makes a Gift in Tail, on Condition that he ſhall not make a Feoffment, it is a good Condition; but if the Condition be that he ſhall not make a Charter of Feoffment, that is not good, for that without Livery, (as *Littleton* ſaith, *fol.* 15.) amounts but

(*a*) 1 Rol. Rep. 226. 11 Co. 98. b.
(*b*) Cr. Jac. 697, 698. 10 Co. 38. b.
(*c*) Moor 633.
(*d*) Lit. Sect. 720. 2 And. 135, 138. 1 Co. 88. a. 130. a. 131. b. 1 Rol. Rep. 485. Co. Lit. 377. b.
(*e*) Co. Lit. 378. b. Lit. Sect. 722.
(*f*) Co. Lit. 377. b. 10 Co. 38. b.
(*g*) Moor 632, 633, 634.

to a Tenancy at Will, which Tenant in Tail cannot be reſtrained from making. So if a Man makes a Gift in Tail, on Condition that he ſhall not make a Leaſe for (*a*) his own Life, it is void and repugnant; but if a Man makes a Leaſe for Life or Years, on Condition that he ſhall not alien or leaſe the Lands, it is good. For at the Com. Law, Leſſee for Life or Years might commit Waſt, which was *ad exhæreditationem* of the Leſſor, and therefore there was a Confidence betwixt the Leſſor and Leſſee, and therefore the Leſſor might (*b*) reſtrain the Leſſee from aliening or demiſing to another, in whom perhaps the Leſſor had not ſuch Confidence. And therefore it is reaſonable, that when he who has the Inheritance makes a Leaſe for Life or Years, that he may reſtrain ſuch particular Tenants from aliening or demiſing for the Benefit of his Inheritance. But when a Man makes (*c*) a Gift in Tail (which is an Eſtate of Inheritance, and by Poſſibility may continue for ever) and thereby makes the Donee chief Owner of the Land, he cannot reſtrain him from making any lawful Act or Eſtate which doth no Wrong to any, and which by Law he may do of the ſame Land. So it is for the ſame Reaſon, if a Man makes a Gift in Tail of a Manor, on Condition that he ſhall not make any voluntary Grant of any Lands by Copy according to the Cuſtom of the Manor, *&c.* it is not good. But if he makes a Leaſe for Years or Life with ſuch Condition, it is good, *cauſa qua ſupra.* And by theſe Differences you will better underſtand your Books in 21 *H.* 6. 33 *b.* 8 *H.* 7. 10 *b.* 11 *H.* 7. 6. *b.* 13 *H.* 7. 23. *a.* Laſtly the Intent of the Stat. 27 *H.* 8. (as appears by the Preamble) was to reſtore the antient Com. Law, and to root out and extinguiſh all ſubtle Inventions, Imaginations and Practices of Uſes which had introduced many Miſchiefs and Inconveniences mentioned in the Preamble. And that was very good and neceſſary for the Commonwealth: For the Com. Law has certain (*d*) Rules to direct the Eſtates and Inheritances of Lands, and therefore it is without any Compariſon better to have Eſtates and Inheritances directed by the certain Rules of the Com. Law, (which has been an old, true and faithful Servant to this Commonwealth) than by the incertain Imagination and Conjecture of any of theſe new Inventors of Uſes, without any approved Ground of Law or Reaſon. *Note Reader*, this Judgment agrees with the former Judgments, as well in (*e*) *Corbet*'s Caſe, as the Caſes between *Humble* and (*f*) *Cholmeley*, and *Germin* and (*g*) *Aſcot* there cited, and with the Judgment in (*h*) *Dillon* and *Frein*'s Caſe. And in this Caſe it was obſerved, That in the ſaid Proviſo found at large by the Special Verdict, there are more than a thouſand Words; whereas in our Books, when Tenant in Tail was reſtrained from Alienation,

(*a*) Co. Lit. 223. b. 10 Co. 39. a. 1 Rol. 418.

(*b*) 4 Co. 119. b. Hob. 170. Co. Lit. 223. b. Moor 11, 881. 1 Leon. 3. Cr. El. 26. 1 And. 133. 3 Leon. 67. 4 Leon. 5.

(*c*) Co. Lit. 223. b. Cont.

(*d*) Co. Lit. 23. a. 379. b.

(*e*) Mo. 601, 633. 2 And. 134. Cr. Car. 479. 1 Co. 83. b. 2 Co. 42. b. 3 Keb. 177. 4 Leon. 346. Winch. 56.

(*f*) Cr. El. 378. 1 Co. 86. a. 10 Co. 42. b. 1 And. 346. 2 And. 142, 149. Moor 471, 592, 633.

(*g*) Mo. 364. 633. 1 Co. 85. a. 10 Co. 42. b. 4 Leon. 83. 1 And. 7, 186. 2 And. 142. 1 Jones 59. Bridgm. 135.

(*h*) Jenk. Cent. 276. Poph. 72. 1 And. 309. Moor 546. 10 Co. 42. b. 11 Co. 80. a.

there were not twelve Words, *hæc fuit (a) candida illius ætatis fides & simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt.* And so has this Case now been adjudged in both Courts.

(a) Co. Lit. 6. a.

BLAKE's *Case.*

Mich. 3 *Jac.*

In the Common Pleas.

Cr. Jac. 99. Noy 110. 2 Rol. Rep. 188.

EDen brought a Writ of Covenant against *Blake*, Assignee of *Price*, and the Breach was for not repairing of the House, the Defendant pleaded an Accord between him and the Plaintiff, and Execution thereof in *satisfactione & exoneratione decasus reparationum predict'* upon which the Plaintiff demurr'd; which Plea began in the Common Pleas, 3 *Jac. Rot.* 1033. And it was objected, That this Action of Covenant was founded on the Deed, which could not be discharged but by Matter of as high a Nature, and not by any Accord or Matter in *pais*; for *Nihil (a) tam conveniens est naturali æquitati, ut unumquodque dissolvi eo ligamine quo ligatum est.* And it appears by all our Books, that neither Arbitrament, nor Accord with Satisfaction is a Plea, when the Action is grounded on a *(b)* Deed. *Vide* 1 *H.* 7. 14. *b.* 33 *H.* 8. 51. 59. *Dyer (c)* 1 *H.* 5. 6, 7, (67.) 45 *E.* 3. 4. *b.* 25 *H.* 8. *Br. Det.* 173. 2. When the Action is in the Realty, or mixt with the Realty, Accord with Satisfaction is no Plea; for Accord with Satisfaction is a Bar for the *(d)* Personalty, and not of the Realty, and when the Personalty, is mix'd with the Realty, it is no Bar for the Personalty; for *(e) omne majus trahit ad se minus. Vide* 11 *H.* 7. 13. *b.* 13 *H.* 7. 20. *a. b.* in Wast. So in a Ravishment of Ward, *Quare Impedit, &c.* But it was *resolved* by the whole Court, that the Defendant's Plea was good in the Case at Bar; for there is a Difference, when a Duty accrues

(a) 2 Co. 53. a. 4 Co. 57. b. 5 Co. 26. a. 2 Inst. 359, 573. Davis 33, b.
(b) 2 Rol. 265.
(c) 33 H. 8. 51. pl. 14. Dyer.
(d) 1 H. 5. 6. b. 7. a.
(e) Cr. El. 356. 9 Co. 78. a.
(f) Cr. El. 357. 4 Co. 1. b. 9 Co. 79. b. * 3 Inst. 109. 5 Co. 115. a. 2 Co. 68. a. Co. Lit. 52. b. 285. a. 1 Bulstr. 105. 2 Bulst. 48.
(g) 2 Rol. Rep. 187, 188. Palm. 110, 111. 9 Co. 79. b. Yelv. 125. 2 Rol. 265.

accrues by the Deed in (*a*) Certainty, *tempore confectionis ſcripti*, as by Covenant, Bill, or Bond, to pay a Sum of Money, there this certain Duty takes its Eſſence and Operation originally and ſolely by the Writing; and therefore it ought to be avoided by a Matter of as high a Nature, altho' the Duty be merely in the Perſonality; but when no (*b*) certain Duty accrues by the Deed, but a Wrong or Default ſubſequent together with the Deed, gives an Action to recover Damages which are only in the Perſonalty, for ſuch Wrong or Default, Accord with Satisfaction is a good Plea; as in the Caſe at Bar, the Covenant doth not give the Plaintiff at the Time of the Making of it any Cauſe of Action, but the Wrong or Default after in not repairing of the Houſe, together with the Deed, gives an Action to recover Damages for Default of Reparations. And foraſmuch as the End of the Action is but to have (*c*) Amends, and Damages in the Perſonalty for this Wrong, therefore Amends and Satisfaction given the Plaintiff is a good Plea. For the Action is not merely grounded on the Deed, but alſo on the Deed and the Wrong ſubſequent, which Wrong is the Cauſe of the Action, and for which Damages ſhall be recovered, as in 13 *E.* 4. 1. *b.* & 5. *a, b.* in Treſpaſs the Plaintiff recovered by Verdict, the Defendant brought Attaint againſt the Plaintiff and Petit Jury, and one of the Petit Jury pleaded Accord between the Plaintiff and Defendant and Satisfaction, and held a good Plea. For the Writ of (*d*) Attaint is not only grounded on the Record, but on Matter in Fact alſo, for the Suppoſition of the Falſity in the Oath, is Matter in Fact. And in 35 *H.* 6. 30. *a.* in Attaint brought on falſe Oath in Appeal of *Mayhem*, one of the Petit Jury pleaded Arbitrament between the Plaintiff and Defendant; and in all Caſes where Arbitrament is a good Plea, Accord with Satisfaction is a good Plea. *Vide* (*f*) 6 *H.* 7. 10. *a. b. acc'*. And generally in all Actions where (*g*) Damages only are to be recovered, Arbitrament or Accord with Satisfaction, is a good Plea; as in an Action of Waſt in the (*h*) *tenuit*, where Damages are only to be recovered; and ſo is the Report of Serjeant *Bendlow*'s to be underſtood: For, in an Action of Waſte againſt Leſſee for Years in the (*i*) *tenet*, Accord is no Plea, as it hath been before ſaid. So it is to be collected on the Book of 35 *H.* 6. 30. *a.* that in Appeal of (*k*) *Mayhem* Accord with Satisfaction is a good Plea, becauſe in the ſame Action Damages are only to be recovered. And ſo is the general Rule put in 6 *E.* 6. *Dyer* (*l*) 75. in *Andrew*'s Caſe. *Vide* 47 *E.* 3. 20. *b.* Accord for a Rent (*m*) reſerved on a Leaſe for Years, 7 *E.* 3. *Iſſue* 9. (*n*) 11 *H.* 7. 4.

(*a*) 1 Rol. 265. Cr. El. 304, 306. Doct. pl. 17. Cr. Jac. 100.

(*b*) Doct. pl. 17. 1 Rol. 265. Lutw. 359.

(*c*) Yelv. 125. 9 Co. 78. a.

(*d*) Hetl. 112. Cr. El. 357. Doct. pl. 18, 19. Dyer 75. pl. 27. Fitz. Bar. 111. Br. Accord 9. Br. Attaint. 91.

(*f*) 6 H. 7. 10. a. b. Br. Treſpaſs 279. Br. Accord. 3 Plowd. 11. b. 9 Co. 79. b. Doct. pl. 15. Fitz. bar. 150.

(*g*) 9 Co. 78. a. Cr. El. 357. Dyer 75. pl. 27. Cr. Jac. 100. 4 Co. 1. b.

(*h*) Doct. pl. 17. 1 Brownl. 239. 1 Rol. 266.

(*i*) 9 Co. 8. b. Cont. Cr. Jac. 100. 2 Inſt. 307. Doct. pl. 17. Moor 6. O. Benl. 4. N. Benl. 35.

(*k*) Doct. pl. 17. 18. 9 Co. 78. b.

(*l*) 2 Rol. Rep. 188. 9 Co. 78. a. Cr. Jac. 100.

(*m*) Doct. pl. 18. 1 Rol. 266.

(*n*) 10 H. 7. 4. a.

HIGGENS's *Caſe.*

Mich. 3 Jac.

In the Common Pleas.

IN Debt by *Randal* and his Wife Executrix of *Themilthorpe* againſt *Higgens*, on a Bond made to the Teſtator, the Defendant pleaded that the Teſtator *in vita ſua in curia de banco hic recuperavit debitum prædictum, ac 60 s. pro damnis*, (without alledging any Execution,) *quod quidem recordum recuperationis*, was removed, *extra bancum per br. de Errore coram Rege, & ibidem remanet minime reverſatum ſeu adnullatum*; and thereupon it was demurred. And it was objected, That if a Man recovers Debt on a Bond, or Rent on a Leaſe for Years, it is at the Plaintiff's Election to ſue Execution on that Judgment, or to have a new Action; and that for divers Reaſons. 1. By the Judgment, the Deed or Rent is not changed, but continues a Deed and a Rent notwithſtanding the Judgment; as if a Man be indebted in (*b*) Arrearages on Accompt, and takes a Bond for the Payment of them, yet he may have an Action on the one or the other, as it is agreed in 11 *H.* 4. and *Mich.* 2 *Jac. Rot.* 3272. in this Court, in Debt by *Richard* (*c*) *Branthwait* againſt Sir *William Cornwalleys* the younger, on a Bond for Payment of Money, the Defendant pleaded in Bar, *qd' Querens poſt diem ſolutionis pecuniæ*, and before the Purchaſe of the Writ did accept of a Statute-Staple for the ſame Debt, and in full Satisfaction of the Bond, on which the Plaintiff demurr'd: And it was adjudged for the Plaintiff. For although he had taken a Statute for the ſame Debt, which is a Matter of Record, and of a higher Nature than the Bond is, yet the Bond did remain in Force; and it was in the Plaintiff's Election to take his Action or Remedy on the one or the other. 2. It was objected, That it would be againſt Reaſon to compel the Plaintiff to ſue Execution on the firſt Judgment, for perhaps the Plaintiff knows that the firſt Judgment is erro-

Doct. pl. 306.

(*b*) 1 Rol. 604. Br. Det. 64. 11 H. 4. 79. b. Fitz. Bar. 185. 22 H. 6. 55. b. Dyer 21. pl. 132. 51. pl. 14.

(*c*) Cr. Car. 85. 86. Poſt. 45. b. 1 Rol. 470, 471. 1 In. Rep. 58. 1 Inſt. 212. b. 9 Co. 79. Law. 466.

erroneous, or that he has recovered by falſe Oath, in which Caſe the Judg. is reverſable by Error, or Attaint, and therefore if he ſhould ſue Execut. it would be in vain; for he ought to reſtore (when the Judg. is reverſed) all that which he has received. 3. It was objected, if in Debt on a Bond the Def. denies his Deed, and it be found his Deed, in that Caſe the (*a*) Deed ſhall be delivered to the Pl. and the Reaſon is, to the End that he may have a new Action if he will; but if it be found not his Deed, the Deed ought always to remain in Court, till the Pl. has reverſed the Judgm. *Vide* 9 *E.* 4. 50. *a. b.* If two be bound in a Bond jointly and ſeverally, and the Obligee recovers againſt one of them on this Bond, the Nature of the Bond is not ſo changed by this Recovery, but he may on the ſame Bond have an Action againſt the other. But it was reſolved, that as long as the (*b*) Judgm. remains in Force, he cannot have a new Action upon the ſame Bond; for as he who has a Debt by ſimple (*c*) Contract, and takes a Bond for the ſame Debt, or any Part of it, the Contract is determined, 3 *H.* 4. 17. *b.* 11 *H.* 4. 79. *b.* 9 *E.* 4. 50. *b.* 51. *a.* So when a Man has a Debt on a Bond, and by ordinary Courſe of Law has Judgm. thereon, the Contract by Speciality which is of an inferior Nature, is by (*e*) Judgm. of Law changed into a Matter of Record, which is of a higher Nature. 2. If he who recovers may have a new Action and a new Judgm. he may have infinite Actions, and infinite Judgm. to the perpetual Vexation and Charge of the Def. *&* (*e*) *infinitum in jure reprobatur.* 3. On every Judgm. the Def. ſhall be (*f*) amerced, and if he be a Duke, Marq. Earl, Viſc. or Baron, he ſhall be amerced to 100 *s.* and ſo the Def. might be infinitely amerced on one and the ſame Obligation, which would be miſchievous, *&* (*g*) *intereſt Reipublicæ ut ſit finis litium.* And if a Man has a Liberty by Preſcription, and takes Letters Patents thereof, the Matter of Record drowns the Preſcription which was the Inferior, as it is held in 33 *H.* 8. *Br.* (*h*) *Preſcription* 102. *Vide* 10 *H.* 7. 21. *a. b. &* 24. *b.* 2 *E.* 4. 14. *b.* 22 *H.* 6. 56. 8 *H.* 4. 16. 34 *H.* 6. 26, *&c.* And if a Man has an Annuity by Deed or Preſcription, and brings his Writ of Annuity and has Judgm. ſo long as this (*i*) Judgm. doth remain in Force, he ſhall never have a Writ of Annuity, (altho' it be an Annuity of Inheritance) but a *Sc. fa.* on that Judgment; becauſe the Matter of the Speciality or Preſcription, is by the Judg. altered into a Thing of a higher Nature. *Vide* 37 *H.* 6. 13. *b.* (*k*) Judgm. in an Action of Forgery of a falſe Deed, is a good Bar in another Action on the ſame Forgery. But if (*l*) Recovery be in Debt on a Bond in the County by *Juſticies*, there, notwithſtanding ſuch Judgment, the Plaintiff may have an Action of Debt on the Bond in a Court of Record; for the County Court is not of Record, and therefore the Bond is not changed into any Thing of a higher Nature; but

(*a*) Co. Lit. 231. b. 5 Co. 74. b. Palm. 41. 1 Sid. 131, 170.
(*b*) 2 Rol. Rep. 108. Yelv. 133. Cr. Jac. 338. Cr. El. 608, 817. Doct. pl. 67. Owen 37. Latch. 193. Moor 545.
(*c*) 1 Rol. 604. Br. Det. 64. Br. Contract 8, 33. Obligation 21. Det. 57, 64. Fitz. Bar. 175. 13 H. 4. 1. a. Dyer 21. pl. 131. B. N. C. 105. 2 E. 4. 14. a. b. 29 H. 8. Br. Contract 29. Dall. 53.
(*d*) 21 H. 7. 5. b. Cr. Car. 415. 9 E. 4. 50. b. Dy. 21. pl. 131. 16 E. 4. 3. b. Cr. Jac. 481. Hard. 368.
(*e*) 8 Co. 168. b. 12 Co. 24. 2 Inſt. 340. 2 Bulſtr. 99. Hob. 159.
(*f*) Poſtea 54. a. 8 Co. 40. a. 2 Inſt. 28. 19 E. 4. 9. a. 21 E. 4. 77. b.
(*g*) 11 Co. 69. a. 3 Bulſtr. 98. Godb. 242. Hardr. 128. 6 Co. 9. a.
(*h*) Palm. 83.
(*i*) Doct. pl. 66. Co. Lit. 145.
(*k*) Doct. pl. 67.
(*l*) Doct. pl. 67.

but so long as such Judm. remains in Force the Pl. shall not have another Action by *Justicies* in the same Court for the infinite Vexation of the Party, as hath been said. And as to the said Case of (*a*) *Branthw.* it was agreed to be good Law; for a Stat. (*b*) Staple, or Bond in the Nat. thereof, is but a Bond recorded, and one Bond, be it of Record, or not of Rec. (*c*) cannot merge another. Also a Bond, and Bond in the Nature of a Statute Staple are two distinct Liens, made by Assent of the Parties without Process of Law, whereof the one hath no Dependency on the other. But in an Action brought on a Bond, the Suit is grounded on the Bond, as a Building upon a Foundation; and the Pl. hath Judgm. to recover the Debt due by the Bond; so that by judicial Proceeding, and Act in Law, the Debt due by the Bond is transformed and metamorphosed into a Matter of Record; and Judgm. in a Court of Record is of an higher Nature than a Stat. Staple, Stat. Merchant, or any Recognizance acknowledged by Assent of the Parties, without judicial Proceedings. And as to the Objection which was made, that perhaps the Recovery is erroneous; to that it was answered, That that was the Pl. Fault, and altho' it be erroneous, yet so long as it remains in Force, it ought to be executed; and when it is reversed, then the Obligee is restored to his new Action on the Bond. And it is true, that in old Books, after Judgm. given in an Action of Debt on a Bond; the Bond shall be * *damned*, because the Duty was changed into another Nature, and that was the true Reason of the old Books, and not the Reason which *Brook* supposes in abridging the Case of 11 *H.* 4. *faits* 19. that otherwise the Obligee might again recover thereupon. And therewith agree 9 *E.* 4. 51. *a.* 7 *H.* 4. 39. *b.* 11 *H.* 4. 73. *b.* 45 *E.* 3. 11, *&c.* And the Court had Consideration of the Book in 17 *E.* 3. 24. where *Ed. Devon* brought an Action of Debt on a Bond of 20 *l.* against *Richard Scot*, who pleaded, that before the Mayor and Bailiffs of *Newcastle* upon *Tine*, the Plaintiff by Plaint on the same Bond, recovered and had Execution; and there because the Defendant did not procure the Bond to be *damned*, the Plaintiff had Judgment to recover again, notwithstanding the former Judgment and Execution. And there *Shard* said to the Defendant, see now the Deed be *damned*. But the Court said, that that Judgment was given because it was the Defendant's Folly that the Deed was not *damned* on the former Judgment. For in the Time of *E.* 3. *R.* 2. and *H.* 4. It was held, That when a Man did recover on a Bond, that the Deed (as hath been said) should be *damned*. Wherein the Content and Quietness of Men in old Times ought to be observed, that when Judgm. was given against them by Course of Law, they

(*a*) Ant. 44. b. 1 Rol. 470, 471. Lit. Rep. 58. Cr. Car. 85, 86.
(*b*) Bridgm. 123.
(*c*) 11 H. 4. 79. b. 1 Rol. 604. Br. Contract 33. Br. Det. 64. Br. Obligat. 23. 13 H. 4. 1. a. Lit. Rep. 58. Cr. Car. 85, 86. 193. 1 Brown. 47. Hob. 68, 69. Cr. Jac. 579, 649, 650. Cr. El. 716, 727. Mo. 872. Style 339, 340. 1 Mod. Rep. 221. 4 Co 59. b. 60. a 5 Co. 28. b.

* i. e. cancelled.

they were ſatisfied therewith, without prying with Eagles Eyes into Matters of Form, or the Manner of Proceeding, or of the Trial, or Inſufficiency of the Pleading, *&c.* to the Intent to find Error to force the Party to a new Suit, and himſelf to a new Charge and Vexation. But ſince Men became more contentious, and not ſatisfied with any Trial or Judgment, but Writs of *Error* and *Attaints* (which in old Times were rare, and eſpecially Writs of *Error*) were ſo frequent, as of more late Time they were, the Judges thought it dangerous to *cancel* the Deed, either where the Plaintiff recovered, or where he was barred by Judgment, for in both Caſes the Judgment might be reverſed by Error or Attaint, and therefore the Reaſon and Cauſe of the ſaid Judgment in 17 *E.* 3. is now changed, and there is not any Queſtion but Judgment and Execution upon a Bond, is a good Bar in a new Action thereupon; and therefore the ſaid Book of 17 *E.* 3. is not to be urged againſt this Judgment. Alſo the Court ſaid, that if a Man brings an Action of Debt on a Bond, and is barred by Judgment, ſo long as the Judgment ſtands in Force, he cannot have a new Action: *Pari ratione* when he hath Judgment in an Action on the ſame Bond ſo long as the Judgment ſtands in Force, he ſhall not have a new Action. And as to the Caſe which has been objected, that where two are bound jointly and ſeverally, and the Obligee has Judgment againſt one of them, that yet he may ſue the other, it was well agreed. For againſt him the Nature of the Bond is not changed, for notwithſtanding the Judgment, he may plead that it is not his Deed. And afterwards in the Caſe at Bar, Judgment was given againſt the Plaintiff, and the Doubt in 9 *E.* 4. 50. b. 51. *a.* where this Matter is very well debated on both Sides, well reſolved.

17 E. 3. 24. a. Antea 45. b.

Antea 7. a.

5 Co. 86. b. Antea 45. a. Cr. Jac. 338. Godb. 257. Hob. 2. 4 H. 7. 8. a. b. 1 Rol. Rep. 8.

[See the Caſes of *Putt* and *Rawſtern*. *Pollexf.* 641. and 2 Cro. 73. *Factum Tranſit in Rem Judicatam, &c.*]

DOW-

* 3 Salk. 381. 6 Mod. 195.

* DOWDALE's *Caſe.*

Mich. 3 Jac.

In the Common Pleas.

Cr. Jac. 55.

IN Debt by *Richardſon* againſt *Dowdale*, Executor of *Lante*, the Defendant pleaded, fully adminiſtred, and the Plaintiff ſaid, that he had Aſſets at *Exceſter*, and the Jury found that the Teſtator died *infra regnum Hiberniæ*, and that the Defendant after the Teſtator's Death, divers (e) Cr. Jac. 503. of the Teſtator's Goods within the Realm of (a) *Ireland* took and adminiſtered, to the Value of the Debt, and that the Def. *Nulla alia ſive plura bona quæ fuer' præd' teſtatoris, poſt mortem teſtatoris infra regnum Angliæ unquam adminiſtravit, Et ſi, &c.* And it was objected by the Defendant's Counſel, that it had been a Queſtion in old Books, whether the Jury can find tranſitory Things in a foreign County, and (b) Cr. El. 842. 5. N. C. 451. in 2 *Ma. Br. Att.* (b) 104. it is held that the Jury of one County (c) Kelw. 51. a. are not (c) compellable to find tranſitory Things in another County, but at their Pleaſure; and it was ſaid, as a Jury of one County cannot find a Thing which is local in another County, ſo a Jury cannot find any Thing although it be tranſitory, done in another Realm; for by Preſumption of Law they can in neither Caſe take Conuſance of the Thing. (a) Dy. 271, 272. pl. 29. 2 Rol. 689. Palm. 366. Poſtea 47. a. As in 10 *El. Dyer* 271. (d) In Debt brought in *London* againſt one as Son and Heir on a Bond made by his Father, who pleaded nothing by Deſcent at the Time of the Writ purchaſed, nor ever after, *&c.* and the Plaintiff averr'd Aſſets by Deſcent in *London*, in *Parochia & Ward' prædict'* and gave in Evidence Aſſets in *Cornwall*, and whether that were good Evidence, or whether the Jury might find it or not was the Queſtion; and there it ſeems it was not good Evidence; nor could the Jury find this local Matter in a foreign County. And 47 *E.* 3. 2. 21 *E.* 4. 10. *a.* 22 and 36. *b.* 10 *H.* 7. 22. *a. b.* 11 *H.* 7. 16. *a. b.* and many other Books are, that a Thing merely done beyond Sea, ſhall not be tried here. But after many Arguments and good Conſideration it was reſolved,

ſolved; that Judgment ſhould be given for the Pl. And in this Caſe theſe Points were reſolved for good Law. Firſt, when the Place is material, as when it is made Parcel of the Iſſue, there the Jury cannot find the Point in Iſſue in any other Place, for by ſpecial Pleading, the Point in Iſſue is reſtrained to a cert. Place. 2. There is a Difference when the Place is named but for Conformity and Neceſſity; and when (as it hath been ſaid) it is Parcel of the Iſſue, as in the Caſe which hath been put in 10 *Eliz.* in Debt againſt the Heir, he pleadeth nothing by Deſcent generally, in that Caſe the Plaintiff could not reply in ſo general a Manner, for then no Trial could be had thereof; but in ſuch Caſe, for Conformity and Neceſſity of Trial, he ought to name a certain Place, as there he did, within a Pariſh and Ward within *London*. But God forbid, but that the Jury may find Aſſets by Deſcent, in any other County within *England*; for the Law is, that the Pl. in ſuch Caſe ſhall have in Execution all the Lands which the Heir has, and perhaps he has Lands in divers Counties, and therefore altho' one Place be named for Neceſſity, yet the Jury may find all that which by Law ſhall be chargeable in ſuch Caſe, in what Town or County ſoever it lies, and ſo was the principal Caſe reſolved afterwards in 10 *Eliz.* altho' it be not there ſo reported; and therewith in Effect agrees 10 *H.* 6. 13. *b.* adjudged, and therefore the ſaid Conceit of *Brook* 2. *Ma. Attaint* 104. was utterly denied *per totum Cur'*, for they are bound under Pain of Attaint, to find Aſſets in any County whatſoever. For, (as it hath been ſaid) it may be that the Ex'or has Goods of the Teſtator in divers ſeveral Counties, and which in none of the ſaid Counties by it ſelf is ſufficient. So if a Man has 20 Acres of Land in Tail in the County of *N.* and 20 Acres of equal Value in Fee-ſimple in 20 ſeveral Counties, and makes a Feoffment in Fee of the Land in Tail with Warranty and dies, the Iſſue in Tail brings a Formedon for the Land in *N.* in this Caſe the Feoffee can alledge Aſſets but in one County only; but the Jury are bound on manifeſt Proof, upon Pain of Attaint, to find the Aſſets in all the ſeveral Counties in which the Feoffor had Lands in Fee-ſimple. 3. On every general Iſſue, the Jury ought to find all local Things in any other County, which are material in Law for the Matter in Queſtion, as Warranty and Aſſets in another County: So where Lands are exchanged for Lands in another County, and the like. 4. When a Bar is pleaded in a real or perſonal Action, as a Releaſe, *&c.* in a foreign County, there the Jury that try it ſhall aſſeſs Damages for the Profits of the Lands in another County, and ſo by a Mean ſhall enquire of Things local in another County, which originally they cannot do, *quia multa conceduntur per obliquum, quæ non*

1 Bulſt. 130. Hob. 170.

Dyer 30. pl. 206. Hutt. 8. 7 Co. 27. a. Calvin's Caſe. Cr. Jac. 503. Co. Lit. 282. b. Hardr. 61.

2 Rol. 689. 3 Co. 12. Plowd. 440.

Co. Lit. 282. b.

Cr. El. 842. b.

B. N. C. 451. Moor 47, 207.

Co. Lit. 261. a. b. 282. b. 7 Co. 27. Calvin's Caſe 2 Sid. 113.

Cr. El. 842.

non conceduntur de directo. And when they try the Matter of the Bar on good and pregnant Evidence, they ought to find all Dependants thereupon, as Damages, *&c.* And by theſe Differences you will better underſtand your Books, which at firſt ſeem to diſagree, 3 *E.* 3. *Aſſiſe* 446. 18 *E.* 3. 38. 21 *E.* 3. 11. 1 *Aſſ. p.* 16. 3 *Aſſ. p.* 4. 6 *Aſſ. p.* 4. 5 *Aſſ. p.* 7. 21 *Aſſ. p.* 8. 29 *Aſſ. p.* 5. 44 *E.* 3. 6. *b.* 14 *H.* 4. 35. 5 *H.* 5. 2. 10 *H.* 6. 13. 21 *H.* 6. 51. 33 *H.* 6. 37 *H.* 6. 2. 7 *E.* 4. 45. 18 *E.* 4. 1. 22 *E.* 4. 19. 13 *H.* 7. 17 *Br. Iſſue* 82. 2 *Mar. Br. Attaint.* 104. and ſo the *Quære* in *Dyer* 10 *Eliz.* 271, 272. well reſolved. But it was *reſolved*, That in the Caſe of Felony the Trial ſhall be always by the Com. Law in the ſame Place where the Offence was, and ſhall not be ſuppoſed in any other Place: For in Criminal Cauſes the Rule holds *Ubi quis delinquit, ibi punietur*. Laſtly it was *reſolved*, That the Jurors have found the Subſtance of the Iſſue, that is to ſay, Aſſets; and the finding that they are beyond Sea, is Surpluſage. For, if the Executors have Goods of the Teſtator's in any Part of the World, they ſhall be charged in Reſpect of them. For many Merchants and other Men, who have Stocks and Goods to a great Value beyond Sea, are indebted here in *England*; and God forbid, that thoſe Goods ſhould not be liable to their Debts, for otherwiſe there would be a great Defect in the Law. *Vide M.* 30 *&* 31 *Eliz.* in an Action on the Caſe on *Aſſumpſit*, (which Action was grounded on an Inſtrument called a Policy, commonly made between Merchants for Aſſurance of their Goods) the Pl. declared, that if the Def. at *London* did aſſume, that ſuch a Ship ſhould ſail from *Melcomb Regis* in the County of *D.* to *Abvile* in *France* ſafely, without Violence, *&c.* And the Pl. declared, that the ſaid Ship in ſailing towards *Abvile*, *ſc.* in the River of *Soame* in the Realm of *France*, was arreſted by the King of *France*, &c. and the Parties came to iſſue, whether the ſaid Ship was ſo arreſted or not: And this Iſſue was tried by *Niſi prius* before *Wray* Chief Juſt. in *London*, and found for the Pl. And it was moved in Arreſt of Judgm. that this Iſſue ariſing merely from a Place which is out of the Realm, could not be tried: For whether the Ship was arreſted in the River of *Soame* in *France*, or not, is merely and wholly out of the Realm, and therefore it could not be tried; and thereupon the Books were cited in 10 *H.* 7. 22. *a. b.* 11 *H.* 7. 16. *a. b.* 21 *E.* 4. 10. *a.* 47 *E.* 3. 2. 12 *H.* 4. 16. 13 *E.* 1. *Mortdanceſt.* 47. 12 *H.* 3. *ib. p. ult.* 29 *Aſſ. p.* 11. And if it could be tried, it was ſaid, That the Jury ſhould come from *Melcomb*, for by common Intendment they may have beſt Knowledge of the Arreſt. But it was anſwered and *reſolved*, That this Iſſue ſhould be tried where the Action was brought; and it was agreed, That where as well the Contract as the Performance of it is wholly made, or to be done beyond Sea, and it ſo appears, there it is not triable in our Law;

1 Brownl. 32.

Cr. Jac. 55. Hard. 64, 346.

4 Inſt. 142.

Selden ſur Forteſcue 31. 10 H. 7. 22. a. b. Owen 6. Moor 178. Vaugh. 413. Godb. 76. 1 Mod. Rep. 37. Co. Lit. 261. b. 7 Co. 26, 27. Calvin's Caſe. 1 Sand. 247. 16 17 Car. 2. c. 8.

But

But here the Promiſe was made here in *London*, which is the Ground and Foundation of the Action: And therefore there is in this Caſe of Neceſſity it ſhall be tried, or otherwiſe it ſhould not be tried at all. And the Arreſt which is in Iſſue is not the Ground of the Action, but the *Aſſumpſit*, and the Arreſt is the Breach of the *Aſſumpſit*; and therefore in this Caſe of Neceſſity it ſhall be tried where the *Aſſumpſit*, which is the Ground and original Cauſe of the Action, was made. And the Record of a Caſe in an Action of Debt of 500 *l.* between *Hugh Gynn*, Plaintiff, and *Evangeliſt Conſtantine*, Defendant, *Paſch.* 28 *Eliz.* was ſhewed the Court; which was, That *Conſtantine* by Indenture of Charter-party made at *Thetford* in *Norfolk*, did covenant with *Hugh Gyn*, that ſuch a Ship ſhould ſail from *Blackney* in *Norfolk* to *Muttrel* in *Spain*, and ſhould there ſtay for a certain Time, and bound himſelf in 500 *l.* to perform it. In which the Iſſue was, Whether the Ship did ſtay at *Muttrel* aforeſaid for a certain Time; which Iſſue was tried for the Plaintiff by a Jury *de vicineto de Thetford*, where the Charter-party was made; and after long Deliberation, Judgment was given in the King's Bench for the Plaintiff. Note Reader, this Point hath been twice adjudged. *Vide* 7 *H.* 6. 14. *Quare Impedit.* *Vide* 5 *R.* 2 *Trial* 54.

Co. Lit. 261. b. Yelv. 202.

Godb. 204. 2 Leon. 22. 3 Leon. 172. 4 Inſt. 141, 142. Co. Lit. 261. b.

1 Brownl. 22.

Co. Lit. 261. b.

[See the Caſe of *Wey* ver. *Yalley.* 6 *Mod.* 194, 195. 2 *Salk.* 651. Debt brought in *London*, on a Demiſe of Lands in *Jamaica*, *&c.*]

BOS-

BOSWEL's *Caſe.*

Mich. 3 Jac.

In the King's Bench.

Qua. Imped. Cr. Jac. 92. Co. Ent. 264. nu. 14. 1 Sid. 94. Jenk. Cent. 281.

ANthony Lowe brought a *Quare Impedit* of the Church of *Wymbiſh*, againſt *Richard* Biſhop of *London*, and *John Lancaſtre*, and counted, That *Henry* Earl of *Suſſex* was ſeiſed in Fee of the Manor of *Wymbiſh*, to which the ſaid Church is appendant, who preſented *John Lancaſtre*, one of the Defendants, who was admitted, inſtituted and inducted, and afterwards the ſaid Earl died ſeiſed, after whoſe Death the Manor to which, *&c.* deſcended to *Robert* now Earl of *Suſſex*, who levied a Fine of the ſaid Advowſon to *Edward Hamond* in Fee, who granted the next Avoidance to *Anthony Lowe* the Plaintiff, and afterwards the ſaid *John Lancaſtre* reſigned to the ſaid *Richard* Biſhop of *London* the other of the Defendants, whereby the Church became void by the ſaid Reſignation, and ſo it did belong to the Plaintiff to preſent, and the Defendant did diſturb him. The Biſhop pleaded, *Quod ipſe nihil habet, nec habere clamat in Eccleſia prædict' niſi admiſſionem, inſtitutionem & deſtitutionem perſonarum, &c. & petit judicium ſi abſque ſpeciali impedimento, &c. John Lancaſtre*, the other Defendant pleaded, That before the Writ purchaſed, he was in the ſaid Church by the Space of ſix Months, of the Preſentment of the ſaid *Henry* Earl of *Suſſex*, *abſque hoc*, that the Church was void *modo & forma*; as the Plaintiff had declared. As to the Plea of the Ordinary, the Plaintiff prayed a Writ to the Biſhop againſt him, *& conceditur, ſed ceſſet executio quouſque* the Plea between the Plaintiff and the other Defendant be determined. As to the Plea of *Lancaſtre*, the Plaintiff did maintain that the Church was void *modo & forma, &c.* on which they were at Iſſue, and at *Niſi prius* it was found for the Pl. And farther the Jury did enquire of the three ordinary Points, 1. *Si Eccleſia plena ſit, &*

3 Bulſt. 174.

3 Bulſt. 174. N. Bendl. 45. pl. 79. F. N. B. 38.

Cr. Jac. 93.

& ſi ſic, ex cujus præſentatione. 2. The yearly Value of the Church. 3. *Si tempus ſemeſtre tranſierit* after the Avoidance. As to the firſt, they found that the Church was full of *Lawrence Boſwel, ex præſentatione Dominæ Eliz. Reginæ Angl' pendente brevi de Quare Impedit.* As to the ſecond, that the Church was of the yearly Value of 80 *l.* As to the third, that the Action was brought within ſix Months after the Avoidance; on which Verdict Judgment was given in this Manner. *Ideo conſideratum eſt, quod præd' Anthonius recuperet verſus præfat. Johannem Lancaſtre. præſentationem ſuam ad Eccleſiam prædict' quæ modo plena exiſtit de præfato Laurentio Boſwell, ex præſentatione dict' nuper Reginæ Eliz. pendente præd' breve de Quare Impedit inter ipſum Anthonium & præfat. Johan', & damna ſua ad valorum Eccleſiæ præd' per dimid' anni, quæ in ſe attingunt ad* 40 *l. per juratores præd' in forma præd' aſſeſſ. & habeat breve præſ. Epiſcopo London illius Ordinar', quod non obſtante reclamat' ſua, aut reclamat' præd' Joh' & Laur', ſeu eorum alterius (licet idem Laurentius ad Eccleſiam præd' pendente breve prædict' admiſſus, inſtitutus, & in eadem inductus exiſtat) eundem Laurentium ab Eccleſia prædict' removeat', ac ad Eccleſiam illam ad præſentation' ipſius Anthonii idon' perſonam admittat'. Et præd' Johan' in miſericordia.* And on this Judgment a Writ of Error was brought, and divers Errors aſſign'd. And now, this Term, after many Arguments at the Bar and Bench, theſe Points were reſolved *per totam Cur'*. 1. That at the Common Law before the Stat. of *Weſt.* 2. *cap.* 5. If one common Perſon had preſented to a Church which did belong to another common Perſon, and his Clerk had been admitted and inſtituted, (in which Caſe, in the Caſe of a common Perſon, the Church was full) preſently thereby the rightful Patron was out of Poſſeſſion, and the Uſurper had gained the Inheritance of the Advowſon by Wrong, and the lawful Patron had loſt the Preſentment *hac vice* for ever. For he had no other Remedy but a Writ of Right of Advowſon, in which the Inheritance of the Advowſon ſhould be recovered, but the Incumbent ſhould not be removed. And that is the Reaſon why full or not full, ſhall be tried by the Biſhop, becauſe the Church is full by Inſtitution which is a ſpiritual Act; For if it ſhould not be full till Induction, then full or not full, ſhould be tried by the Verdict of twelve Men, according to the Common Law: For Induction is a Thing notorious, and ſhall not be tried by the Biſhop, *Vide* 22 *H.* 6. 27, *&c.* And yet in ſome Caſe a Jury ſhall enquire of the Plenarty, as in this Caſe; and in all *Quare Impedits*, one of the three Points enquirable is, if the Church be full, or not. And at the Common Law as well Infants as Feme-coverts, were put to their Writs of

Cro. Jac. 93. Dyer 185. pl. 15.
Co. Lit. 344. b.
2 Rol. 389.
Cr. Jac. 92.
2 Inſt. 353, 354, &c.
Co. Lit. 344. a. b.
2 Rol. 583. 1 Sid. 390.
Hob. 2. 8.

Inſt. 359. Right in the ſame Caſe, and there were two Reaſons at the Common Law in the ſaid Caſe. 1. That he who came in by Admiſſion and Inſtitution, came in by a judicial Act, and the Law preſumes, that the Biſhop, who has the Cure of the Souls of all within his Dioceſe, for which he ſhall anſwer at his fearful and final Account (in Reſpect of which he ought to keep and defend them againſt all Hereticks and Schiſmaticks, and other Miniſters of the Devil) will not do or aſſent to any Wrong to be done to their Patronages, which is of their earthly Poſſeſſion; but if the Church be litigious, that he will inform himſelf of the Truth by a *Jure Patronatus*, and ſo do Right. 2. Another Reaſon was, that by the Com. Law, in every Pariſh there ought to be *idonea perſona:* For ſo it appears by the Words of the *Quare Impedit*, *Quod permittat' præſentare idoneam perſonam, &c.* which Epithet *Idonea* includes Ability in Learning and Doctrine, Honeſty in Converſation, and Diligence in his Function, and all that to inſtruct the People of God in true Religion and good Converſat. and to avoid Contention; and to the Intent that he who has ſo great a Charge might effectually and peaceably attend his Charge, the Com. Law did provide, that after Inſtitution he ſhould not be ſubject to Actions; and ſo neglect his Duty, in loſing his Time in Suits and Troubles in Law; and that was the Reaſon of the Com. Law, That after Inſtitution into the Church at the Preſentation of another, altho' he had no Right, that the Incumbent ſhould not be removed at the Suit of any common Perſon; but to recover his Right, he might have a Writ of Right of Advowſon, by which the Incumbent ſhould not be removed. And it is to be obſerved in theſe Caſes, foraſmuch as the final Intent of the Law was to have *idoneam perſonam*, and that no Profit might by any Means ariſe to the Patron (for that would be deteſtable Simony) the Com. Law did prefer the Service of God to be celebrated, and the People of God inſtructed *per idoneam perſonam* in Peace and Quietneſs before any Right of any other common Perſon, and without any Regard to Infancy, Coverture, or any ſuch like Diſability of the Patron. But at the Com. Law, if one had (*a*) uſurped on the King, and his Preſentee had been admitted, inſtituted and inducted, (for without Induction the Church is not full againſt the King) yet the King at the Common Law might have a *Quare (b) Impedit*, and thereby remove the Incumbent; for no Act of the Biſhop or any other could bar the King of his Right; *& (c) nullum tempus occurrit Regi.* But in ſuch Caſe, altho' it concern'd the King, if the Preſentee of another be admitted, inſtituted and inducted, the King could not preſent 'till he had removed the Uſurper's Incumbent by *Quare Impedit*, and

Co. Lit. 17. b.

(*a*) Ant. 30. a. Cr. El. 241, 519. Cr. Jac. 54, 123, 385. 2 Rol. 349, 371. Moor 338. Hob. 242. Owen 7, 8. 4 Leon. 118. 2 Rol. Rep. 7. 1 Mod. Rep. 277.

(*b*) Cr. Jac. 385. Antea 30. a. Co. Lit. 133. a. 2 Rol. 349. 3 Bulſtr. 90. Lit. Rep. 354.

(*c*) Hob. 347. Lit. Rep. 99, 340. Co. Lit. 41. b. 90. b. 118. a. 294. b. Hard. 24, 25. 1 Jones 79. 2 Inſt. 273, 360. Godb. 297, 305, 312, 217. Plowd. 321. a. 1 Rol. Rep. 165. Palm. 354, 357. 2 Rol. Rep. 422.

and that was (as hath been ſaid) to avoid Contention in the Church; ſo that he who is in, in ſuch Manner, ſhall not be removed but by Proceſs and Courſe of Law, altho' it were in the King's Caſe. But if a Biſhop (*a*) collates without Title to a Church preſentable, and his Clerk is inducted, yet that ſhould not put the rightful Patron out of Poſſeſſion; for that is but a Proviſion for the Celebration of Divine Service, in the mean time till the Patron preſents, and that belongs to his Office, and therefore ſhall not put the Patron to a *Quare Impedit* in ſuch Caſe, but his Preſentee ought to be received without any Proceſs of Law; and therefore in ſuch Caſe no Plenarty by Collation can be pleaded againſt the Patron; for no Plenarty is available in Law, againſt him who has Title to preſent, but only Plenarty by Preſentation. And therewith agree the Words of the Stat. of (*b*) *Weſtm.* 2. *c.* 5. *Cum aliquis, &c. præſentaverit ad aliquam Eccleſ.* But Plenarty by (*c*) Collation at the Com. Law, did put him who had Right to collate, to his Writ of Right at the Com. Law. For as Plenarty by Preſentation did put him who ought to preſent out of Poſſeſſ. at the Com. Law, *pari ratione & jure*, Plenarty by Collation put him who ought to collate out of Poſſeſſion. For (*d*) *eadem lex eſt ubi eadem eſt ratio.* And that appears by the Judgment in 17 *E.* 3. 64. *b.* in the Dean of *Lincoln*'s Caſe. But foraſmuch as Biſhops would admit and inſtitute Preſentees, without informing themſelves, (as they ought to do) of the Right of him who preſented, many Patrons loſt their Preſentment without any Regard to Infancy, Coverture, *&c.* For that Reaſon the ſaid Act of (*e*) *Weſtm.* 2. *cap.* 5. was made, and that recites. *Cum aliquis jus præſentandi non habens preſentaverit ad aliquam Eccleſiam, cujus præſentatus ſit admiſſus, (id eſt inſtitutus) ipſe qui eſt verus Patronus per nullum aliud breve recuperare potuit advocationem ſuam quam per breve de recto.* By which Act (*f*) three Points amongſt others were provided. 1. If an Uſurpation be made on an Infant, or Feme-covert, who has an Advowſon by Deſcent, the Infant after his full Age, and the Wife after the Death of her Husband, ſhall have the ſame Action by *Quare Impedit*, or *Aſſiſe* of *Darrein* Preſentment as her late Anceſtor might have had. So if Tenant in Dower, or Tenant by the Courteſy, or Tenant for Life, or in Tail, ſuffers an Uſurpation, he in Rev'n who claims it by Deſcent, ſhall have the ſame Remedy. So the ſame Law of an Uſurpat. in the Time of the (*g*) Vacancy of the Biſhoprick, Archdeaconry, Rectory, *&c.* but in all theſe Caſes the Uſurper has gained the Inheritance by Wrong, and the Stat. will not reveſt the Right, but only gives a poſſeſſory Action to remove the Incumbent; where, by the Com. Law, they had not any Remedy, but by Writ of Right, in which they ſhould recover their Inheritance, but not their Preſentment. 16 *Edw.* 3. *Quare*

(*a*) 2 Inſt. 357. 2 Rol. 350. Hob. 242, 302. Co. Lit. 344. b. Antea 29. b.

(*b*) Ant. 30.

(*c*) Antea 30. a. 2 Rol. 350.

(*d*) 7 Co. 18. b. Calvin's Caſe. Co. Lit. 10. a. 191. a. 232. a.

(*e*) 2 Inſt. 353, 354, 355, &c.

(*f*) Vide B. tit. Preſent' al Egliſe 46. 14 H. 8. 31. Hob. 238. Hetl. 160. 2 Inſt. 350. 1 Jones 48. Cart. 34, 35.

(*g*) Hob. 240. Cr. Jac. 673. 2 Inſt. 357. Cart. 34.

(a) Hob. 240, 241. 1 Jones 46, 48. Hetl. 160. F. N. B. 34. x. 2 Inſt. 358.

Impedit (a) 67. *Adams*'s Caſe. *D.* was ſeiſed of a Manor to which an Advowſon was appendant, and died; the Manor to which, *&c.* deſcended to an Infant, the Church became void and *Adam* uſurped during the Infancy of *E.* *E.* at full Age enfeoffed *F.* of the Manor, and afterwards the Ch. became void, and *F.* preſented, and the Aſſignee of *Adam* brought a *Quare Impedit*, and it was adjudged, that by the Uſurpat. the Infant was out of Poſſeſſ. of the Advowſon, ſo that by his Feoffm. of the Manor at his full Age, nothing in the Advowſon paſs'd to the Feoffee, becauſe the Feoffor had but a Right, and the Uſurpation was voidable by Action, which could not be tranſferred to a Stranger. And it ſeems alſo by the Book that *E.* was likewiſe without Remedy in ſuch Caſe. But it is agreed

(b) 2 Inſt. 356.

per totam Curiam, in 50 *E.* 3. 14 *b.* (b) That if Ten't for Years or Guardian, brings a *Quare Impedit*, altho' the Def. has a Writ to the Biſhop againſt the Termor or Guardian, and his Preſentee be admitted, inſtituted and inducted, yet the Tenant of the Freehold is not thereby put out of Poſſeſſ. *Note* a good Difference betwixt him who uſurps by Wrong, as in 16 *E.* 3. aforeſaid, and him who has no Right, and yet his Preſentee comes in by Courſe of Law: *Et nota*, that the Words of the Stat. are general, *Jus præſentandi non habens.* The ſecond Thing which is enacted by the ſaid Act is, that Plenarty is no Plea in an Aſſiſe of *Darrein* Preſentment, or *Quare Impedit*;

(c) 2 Inſt. 356.

for the Words of the Stat. are, *Dummodo breve infra Tempus ſemeſtre impetretur, quanquam infra tempus ſemeſtre præſentation' ſuam recuperare non poſſit.* The third Thing is, *de cætero in brevibus ultimæ præſentation' & quare impedit adjudicentur Dampna, viz. ſi tempus ſemeſtre tranſierit per impedimentum alicujus, ita qd' Epiſcop' Eccleſiam conferat, & verus patronus ea vice præſentation' ſuam amittat, adjudicent' damna ad valor' Eccl' de duob' annis: Et ſi tempus ſemeſtre non tranſierit, ſed diſrationetur præſent' infra tempus præd', tunc adjudicentur damna ad valorem Medietatis Eccleſ. per unum annum, &c.* If an (d) Infant, or a Feme-covert, hath an Advowſon by Purchaſe, they are not within the ſaid firſt Purview of the ſaid Act, but they are within the ſaid ſecond Branch, if they purſue their Remedy within the ſix Months, by *Quare Impedit*, or Aſſiſe of *Darrein* Preſentment. So of an Advowſon which they have by Deſcent, they may by the ſecond Purview have a *Quare Impedit*, or Aſſiſe of *Darrein* Preſentm. within the 6 Months; but if they ſurceaſe that Time then the Infant, *poſtquam hæres ad ætatem pervenerit*, ſhall have alſo his Remedy, the ſame Law of a Feme-covert after the Death of her Huſb. See *Bract. lib.* 4. *fol.* 244. 1 *E.* 2. *Quare Impedit* 43. 20 *E.* 2. *Common* 22. 44 *E.* 3. 18. 34 *H.* 6. 28. 30. 35 *H.* 6. 63. And note, (e) if Ten't in Tail ſuffers an Uſurpat. and dies, the (f) Iſſue in Tail is remedied by the Equity of the firſt Branch; which Eſtate-tail was created at the ſame Parliam.

(d) 2 Inſt. 357, 359. Hob. 239. Dyer 259. pl. 20. 2 Inſt. 358.

(e) 2 Inſt. 359. Hob. 239.

(f) 1 Jones 49. Hob. 241. 2 Inſt. 358.

For, after the Stat. the Iſſue in Tail cannot have a Writ of (*a*) Right of Advowſon, and therefore ſhall be aided by the ſaid firſt Branch, as it is held in 43 *E.* 3. 24. and 25. *Vide* 46 *Aſſ. p.* 4. 8 *E.* 2. *Quare Imp.* 167. 34 *H.* 6. 20. 28. Alſo it was reſolved, that in a *Quare Imp.* or Aſſiſe of *Darrein* Preſentm. at the Com. Law, the ſaid 3 Points (*b*) were not inquirable *ex officio* (as appears by *Bract. lib.* 4. *tract.* 2. *c.* 6. & 7. *fol.* 246) who wrote in the Time of *H.* 3. before the ſaid Act of *Weſt.* 2. but now they are inquirable by Force of the third Branch of the ſame Act. For inaſmuch as the Pl. is thereby to recover the Value of the Church for two Years, if he cannot recover his Preſentment and the Value of the Church by half a Year, it is needful for the Court to inquire, if the Ch. be full, or void. 2. If full, of whoſe Preſentment it is full, to the Intent it may appear to the Court, if he may recover the Preſentment or not; and laſtly, the Inquiry of the Value of the Church is needful, foraſmuch as according to that he ſhall recover Damages. *Vide* 8 *E.* 3. 5. 27 *E.* 3. *Damages* 106. 43 *E.* 3. 11. 11 *H.* 4. 40. 80. 3 *Eliz. Dyer* 194. And at the Com. Law before that Stat. in a *Quare Imp.* the Patron did not recover any (*c*) Damages; for the Law doth ſo abhor Simony, that it gives the Patron no Recompence either for his Preſentment, or for any Diſturbance thereof. But at the Com. Law a *Quare Impedit* lies, when the Biſhop for any Colour or Cauſe, will not admit his Clerk, or when any other diſturbs him, ſo that he cannot prefer his Clerk; then before the Ch. is full, he may have a *Quare Impedit*, and have a Writ to the Biſhop, but ſhall recover no Damages. Note Reader, it was adjudged, *Paſch.* 32 *El.* in a Writ of Error in the K's Bench, between (*d*) *Buckberd* and the Queen, on a Judgm. given in a *Quare Impedit* in the Com. Pleas againſt him for the Ch. of *Rettingden*, in the County of *Eſſex*, That the Q. ſhould not recover (*e*) Damages in a *Quare Impedit*, and the Reaſon and Cauſe thereof was ſhewed by *Wray* Ch. Juſt. 1. Becauſe at the Com. Law no Damages were recovered in a *Quare Impedit*, and at this Day no Damages can be recovered but only in Caſes where they are given by the ſaid Stat. of *Weſt.* 2. & *ideo* the Qu. cannot recover any by the Com. Law. 2. The Queen is (*f*) not within the ſaid Clauſe of the Act of *Weſt.* 2. which giveth the Damages, for the ſaid Clauſe, as appears before, hath two Branches: 1. *Si tempus ſemeſtre tranſierit per impedimentum alicujus, ita qd' Epiſcop' Eccleſiam conferat, & verus patronus præſentationem ea vice amittat, &c.* and the Queen is not within this Branch; for ſhe cannot loſe her Preſentment, and by Conſequence cannot have double Damages; and the ſecond Branch, *Et ſit tempus ſemeſtre non tranſierit, &c.* depends on the other; ſo that foraſmuch as the Queen is not within the firſt, ſhe cannot be within the ſecond. And ſo the Doubt in 7 *El.* (*g*) *Dyer*, in

(*a*) F.N.B. 30. b. 1 Jones 49.

(*b*) 10 Co. 118. b. Dyer 135. pl. 12. 2 Rol. 722. 2 Keb. 409. Co. Lit. 344. b.

(*c*) Co. Lit. 17. b. 344 b. 2 Inſt. 362. 3 Inſt. 156. 5 Co. 59. a. Cr. El. 162.

(*d*) 1 Leon. 149. Cr. El. 162.

(*e*) Dyer 236. pl. 28. 2 Inſt. 362. Cr. El. 162. 2 Leon. 149, 150.

(*f*) 2 Inſt. 362. Cr. El. 162.

(*g*) Dyer 236. pl. 28. Cr. El. 162. 1 Leon. 1[illegible]

in Sir *J. Thinn*'s Case, now on the true Sense and Understanding of the Law, is well resolved against the Judgment given in *temp. E.* 1. *Quare. Imped.* 181. which seemeth to be the Error of the Clerk or of the Reporter; for all the Precedents in the same Time, and all Times after are to the Contrary, except two or three only of later Time which passed in Silence. But with this Judgm. agrees 3 *H.* 6. Damages 17. adjudg'd 34 *H.* 6. 3. 12 *E.* 3. Champerty 9. 18 *E.* 3. 2. and all the Precedents as is aforesaid. And the Judgment given in such Case of the Queen *in Com' Banco* which was entered by the Clerks without Advice of the Court was reversed. Yet note, That all the *(a)* Counts of the King in *Quare Impedit* are to his Damage, and yet no Damages shall be recovered. It was further resolved in the Case at Bar, that at the Common Law in some Cases he who was admitted, instituted and inducted at the Presentment of another, should be removed by Judgment in a *Quare Impedit*; as in a *Quare Impedit*, if the Disturber being Defendant presents pending the Writ, and his Clerk is admitted, instituted and inducted, and afterwards Judgm. is given against the Def. such Clerk shall be removed: The same Law if a Stranger usurps *(b)* pending the Writ, his Clerk shall be removed by the Judgm. at the Com. Law, and so in all Cases when any Clerk cometh in by the Presentment of any Stranger against whom the Pl. hath good Title, his Clerk shall be removed. So if the *(c)* Queen usurps, and a *Quare Impedit* is brought against her Incumbent (for it doth not *(d)* lie against the Queen) and pending the Writ, the Queen presents another who is instituted and inducted, he shall be removed, for he cometh in under the Title of the Pl. But if a Stranger to the Writ, who hath good Right, presents his Clerk pending the Writ, and his Clerk is admitted and instituted, he shall not be removed; for then by such Device the rightful Patron may be defeated of his Presentment. And that was one of the Causes, that after the said Act of *Westm.* 2. it shall be inquired, if the Church be full, of whose Presentment, to the End it may appear whether the Plaintiff shall recover his Presentment or not, and that agreeth well with the Reason of the Com. Law; for in every *Præcipe* where any Land, or other Thing is recovered, when Judgment is given for the Demandant, if it be pleaded in Bar of any other Action, the Tenant ought to aver, that the Title of the now Demandant is mean between the Judgm. and the Title of the Demandant in the first Action; so that altho' there be 20 Descents, *&c.* it shall not hurt. *Vide* 33 *E.* 3. Tit. *Title* 3. 21. 22 *E.* 4. 52. 27 *H.* 8. 13. So that altho' there be 20 Usurpers pending the Writ, they shall not hurt at the Com. Law. It was also resolved, that no Incumbent shall be removed by the said Stat. by *Quare Imp.* or Assise of *Darrein* Presentm. purchased within the six Months, unless the Incumb. be named in the Writ, *quia (f) res inter alios acta alteri nocere non debet.*

(a) Jenk. Cent. 281. Hob. 23.

(b) Cro. Jac. 93. 1 Rol. 390. Co. Lit. 344. b. Hob. 320.

(c) 1 Rol. 390. 1 Mod. Rep. 255, 256. Dyer 364. pl. 28.

(d) Hob. 193.

(e) 2 Rol. 390. Cr. Jac. 93. Co. Lit. 344. b.

(f) Antea 5. b. 1 Sid. 93, 94. Jenk. 281. Co. Lit. 102. b. Hard. 285.

debet, although the Incumbent be in by defeaſible Title; and therewith agree 30 & 46 *Edw.* 3. 15. 9 *H.* 6. 30. & 56. 19 *H.* 6. 68. *b.* 5 *Edw.* 4. 115. 9 *Edw.* 4. 30. *Quia quicunq; aliquid ſtatuerit parte inaudita altera, æquum licet ſtatuerit, haud æquus fuerit.* Alſo when the *Quare Impedit* is brought againſt the Diſturber and the Biſhop, and ſix Months paſs as hath been ſaid, the Biſhop cannot collate by Lapſe. Then admit the other ſix Months paſs, ſo that the Time is devolved to the Metropolitan, who is not named in the Writ, whether ſhall he preſent by Lapſe? And it was reſolved, That he cannot; for he ſhall never preſent by Lapſe but when the inferior Ordinary might have collated by Lapſe, and ſurceaſed his Time; ſo that the firſt Degree in ſuch Caſe fails; and therewith agree 11 *H.* 4. 8. It was alſo reſolved, That in the Caſe at Bar, altho' it was found *ex officio*, that the Church was full of *Boſwel*, who was a Stranger to the Writ, and it doth not appear whether he came in by better Title than the Plaintiff had, yet the Plaintiff ought to have a Writ to the Biſhop generally, and the Biſhop ought to execute it; (avail it what it can) and he cannot return on the Writ directed on him, That the Church is full of another; for no Iſſue can be taken between the Plaintiff and him; for he hath no Day in Court, no more than the Sheriff on an *Habere facias ſeiſinam* can return that another is Tenant of the Land by Right; for that cannot come in Iſſue between the Demandant and him, and therefore he ought to execute the King's Writ, and ſo ought the Biſhop in the other Caſe. And altho' the third Perſon hath Right, yet they are excuſed, becauſe they have their Warrant by Proceſs of Law, and then the Parties may try their Rights, as the Law requireth. And ſo you will better underſtand the Books in 18 *E.* 2. Tit. *Darrein Preſentment* 20. 50 *E.* 3. *Incumbent* 10. 21 *H.* 7, 8. *a.* & *b.* 9 *El. Dyer* 260. 14 *H.* 8. 31. 19 *E.* 2. *Darr. Preſentment* 21. 10 *E.* 3, 17. 9 *H.* 6, 31. 6 *E.* 6. *Dyer*, *Henſlowe's* Caſe.

Co. Lit. 344. b. Cr. Jac. 93. Hob. 201, 320.

3 Bulſtr. 175.

Co. Lit. 344. b. 345. a.

Antea 30. a.

1 Sid. 93, 94.

F. N. B. 47. k. Moor 572. Hob. 320. Cr. Jac. 93. Dyer 260. pl. 22. Doct. pl. 191.

ISABEL, *Counteſs of* Rutland's *Caſe.*

Mich. 3 Jacobi I.

In the Star-Chamber.

1 Inſt. 165, 187. Moor 765. 106, 163. Skin. 418. 445. 3 Salk. 45. 12 Co. 94, 98. Ibid. 106 to 112. Caſes in Parl. 1, to 11.

IN the great Caſe this Term in an Information preferred by the Attorney General againſt *S.* and divers Serjeants at Mace, and others, for Arreſting the Body of *Iſabel* Counteſs of *Rutland*, late the Wife of *Edward* Earl of *Rutland*, by Force of a *Capias ad ſatisfaciend'* on a Judgment in Debt given in the Common Pleas againſt her, theſe Points were reſolved for good Law by the Lord Chancellor *Egerton*, *Popham* and *Gawdy* Chief Juſtices, *Fleming* Chief Baron, and by the whole Court of Star-Chamber, although ſome Precedents by Ignorance of Clerks are to the contrary.

(a) 9 Co. 68. a.

1. That the *(a)* Perſon of one who is in Law a Counteſs by Marriage, or by Deſcent, is not to be arreſted for Debt or Treſpaſs; for altho' in Reſpect of her Sex ſhe cannot ſit in Parliament, yet ſhe is a Peer of the Realm, and ſhall be tried by her Peers, as appears by the Statute of *(b)* 20 *H.* 6. which was but a Declaration of the Common Law. And there are two Reaſons why her Perſon ſhould not be arreſted in ſuch Caſes; one in Reſpect of her Dignity, and the other in Reſpect that the Law doth preſume that ſhe hath *(c)* ſufficient Lands and Tenements in which ſhe may be diſtrained. 2. It was reſolved that the *(d)* Perſon of a Baron who is a Peer of Parliament, ſhall not be arreſted in Debt or Treſpaſs by his Body for the Cauſes aforeſaid; for none of the Nobility, who is Lord of Parliament, and by the Law ought to be tried by his Peers, ſhall in ſuch Caſes be arreſted by his Body. And both theſe Points are well confirmed by our Books, 11 *H.* 4. 15. *b.* in a *Homine replegiando* againſt the Lady *(e) Spencer*, it appears that the Lady *Spencer* was a Peer of the Realm, and that in Debt or Treſpaſs, *Capias* lieth not againſt an Earl, Baron, or Baroneſs, *& hujuſmodi*, for becauſe of their Eſtate

(b) Moor 769. 2 Inſt. 45. Stamf. 152, 153. 20 H. 6. c. 9.

(c) Stile 222. Hob. 61. Moor. 76. 7 Co. 34. a. Nevil's Caſe.

(d) 9 Co. 49. a. 60. a. 68. a. Cro. Arg. 106. 2 Leon. 174. Hob. 61. Stile 222.

(e) Moor 769. Hob. 61.

Eſtate and (*a*) Dignity they are intended to have ſufficient, 3 *H.* 6. 48. *a.* A Writ of Debt upon Arrearages of Accompt was brought by the Lady *Daburgaveny* againſt another; the Def. pleaded he owed her nothing, and was ready to wage his Law, and prayed by Force of the Stat. of 5 *H.* 4. *cap.* 8. that the Pl. ſhould be examined, which Act is general, that Examination ſhall be made, which is always intended upon Oath. And there *Cokein*, who gave the Rule, ſaid, That the Lady *Daburgaveny* is a Peer of the Realm, and it would not be well to make her come to be examined; for by the ſame Reaſon we ought to make every Duke, or Earl of *England* come. *Rolf*, Serjeant, Why not? Sir, the ſaid Act of (*c*) 5 *H.* 4. *c.* 8. is general, and is made for every Man, high and low. To which *Cokein* ſaid, The Law will have a Difference between a Lord or a Lady, *&c.* and another common Perſon. By which Book it is to be obſerved, That a Lady, who was but the Wife of a Baron, is a Peer of the Realm, and is in Equipage as to Nobility and Privileges incident to their Dignities with Dukes, Earls, *&c.* 48 *E.* 3. 30. *b.* *Ralph Everden*, Kt. brought a Writ out of the *Chancery*, and alſo a Writ of Privy Seal to the Juſtices, reciting that he was a Baron, commanding them to diſcharge him of ſwearing in (*d*) *Jurat' Aſſiſ. ſeu recognitionib' quibuſcunq;* becauſe the Barons ought not to ſwear in any Inqueſt or Aſſiſe without their Will, and upon good Advice he was abſolutely diſcharged. *Vide Regiſt.* (*e*) 179. 35 *H.* 6. 46. *a.* in (*f*) Attaint in the King's Bench, the Grand Jury appeared, and one of the Grand Jury challenged himſelf, foraſmuch as his Anceſtors had been Barons and Lds. of Parliam. and that they have had their Place in the ſame Houſe of Parliam. and this Matter was tried by ſix Triers of the ſame Jury, wherefore he prayed Allowance of his Challenge, and that he might be diſcharged. *Forteſcue* Ch. Juſt. We cannot allow it without a Writ teſtifying it, for we ought to be informed of your Challenge by Matter of Record, or otherwiſe we cannot allow it, *ad quod tota Cur' conceſſit. Nota*, Duke or not Duke, Earl or not Earl, Baron or not Baron, ſhall not be tried by the Country, but by (*g*) Record; for if they be Lords of Parliam. it appears by Record, and therefore by Record, *viz.* by the King's Writ it ought to be certified. But a Woman who is a Dutcheſs, Counteſs, or Baroneſs, by Marriage, which is a Matter in Fact, in ſuch Caſe, not Dutcheſs, *&c.* ſhall be tried by the Country,; for their Dignity accrued to them by Matter in Fact. *Vide* 2 *H.* 6. 11. *a.* The Wife of the Earl of *Arundel* ought to be (*h*) named Counteſs, in an Action brought againſt her, or by a Name which is tantamount, 12 *E.* 3. brev. 254. accord. *Vide Plowd. Com.* 223. *Hen. Barkley*, *Miles*, *Dom. Barkley*, *&c.* 14 *H.* 6. 2. *b.* An Action of Debt was brought againſt a Man and Wife, (*i*) Counteſs of *D.* againſt whom an *Exigent* was prayed. *Newton*, You cannot have an *Exigent* againſt an Earl, and

(*a*) 14 H. 6. 2. b. Moor 767.

(*b*) Br. Examination 25. Moor 769. 1 Jones 154.

(*c*) 10 Co. 103. 2. Dyer 145. pl. 63.

(*d*) 27 H. 8. 22. b. Br. Exemption 3. F. N. B. 165. e. Co. Lit. 156. b. Moor 767.

(*e*) 9 Co. 49. a. 2 Rol. 646. Dy. 314. pl. 98. Doct. & Stud. 15. a. b. Br. Challenge 37. 1 Jones 153.

(*f*) Dyer 314. pl. 98. Fitz. Challenge 44. Br. Challenge 18.

(*g*) 12 Co. 70, 94, 95. 2 Inſt. 50. 9 Co. 31. a. 49. a. 2 Rol. 575. 22 Aſſ. 24. Moor 767. Co Lit. 16. b. 7 Co. 15. a. Calvin's Caſe.

(*h*) Fitz. Brief 8. Stil. 252, 253.

(*i*) Br. Exigent 37. Poſtea 53. b.

no

no more againſt a Counteſs: And *Fulthorpe* there ſaid, that the Reaſon thereof was not only, becauſe it cannot be intended that an Earl can be without Lands, but another Reaſon is for the Dignity of his Name. For an *Exigent* is not awardable againſt a Duke, Earl, or Baron. *Martin*, in this Caſe the Woman hath loſt the Name of Counteſs by taking of Husband; for by taking of Huſband all the Names which ſhe had before are loſt; *quod Paſton affirmavit*, wherefore the Writ ſhall (*a*) abate, foraſmuch as ſhe is therein named Counteſs. But *nota* a Difference between a Baroneſs or Counteſs by Marriage, and by Deſcent; for it is true, *ſi Baroniſſa, &c.* by Marriage, marrieth again under the Degree of Nobility, ſhe hath loſt her Name of Dignity; for in ſuch Caſe, *Si* (*b*) *mulier nobilis nupſerit ignobili, deſinit eſſe nobilis:* But if ſhe be noble by Birth or Deſcent, whoſoever ſhe marrieth, yet ſhe remains noble, for Birthright is *caracter indelebilis*; but that which is gained by Marriage may alſo be loſt by Marriage; for (*c*) *eodem modo quo quid conſtituitur, diſſolvitur.* And as to the Book in 8 *H.* 6. 9. *b.* & 10. *a.* where the Caſe was, that a Writ was, *Præcipe Joh. Lovel, Militi, & B. Dominæ Abergaveny, unum meſſuagium*, and the Defendant demanded Judgment of the Writ, for this *John Lovel*, Knt. is Lord, not ſo named; Judgment of the Writ, *& non allocatur* by the whole Court. *Rolf*, Then Judgment of the Writ; for no more than he ſhall be called Lord, ſhall ſhe be called Lady; Judgment of the Writ. *Babington*, At the moſt it is but Surpluſage, and the Writ is not the worſe. And it was reſolved, that this Book was good Law, but ill reported: For as to the Plea to the Writ, that the ſaid Sir *John Lovel* was *Dominus*; it was inſufficient for three Reaſons. 1. He ought to have pleaded that he was a Baron of Parliament; for (*d*) *Dominus* is too general. 2. If he had ſo pleaded, he ought to have ſhewed a Writ under Seal, teſtifying the ſame, becauſe it was dilatory in Abatement of the Writ, for 'tis only triable by Record as before appears. 3. If the ſaid Woman being the other Defendant, was not Baroneſs in Law, without Doubt the Naming of her Baroneſs ſhould (*e*) abate the Writ, as appears by the ſaid Book of (*f*) 14 *H.* 6. 2. *b.* And peradventure this *Lovel* was Lord only in Reputation, as many are at this Day, and not a Lord of Parliament; As the eldeſt Son of a Viſcount, Earl, *&c.* who are not Barons in Law but Reputation; and therefore in Legal and Judicial Proceedings ſhall not be ſo named. And if the ſaid Book ſhould be otherwiſe intended, it would be erroneous, and againſt all the other Books in all Succeſſions of Ages. And every Baron of Parliament ought to have a (*g*) Knight returned of

(*a*) 2 Inſt. 50. Co. Lit. 16. b. 4 Co. 118. b.

(*b*) Owen 81. Br. Noſme de Dignity 69. 4 Co. 118. b. Cawley 247. Co. Lit. 16. b.

(*c*) Cawley 247. 4 Co. 118. b. Co. Lit. 16. b. 2 Bulſtr. 284. 2 Rol. Rep. 39.

(*d*) Stil. 254.

(*e*) Moor 769. B. N. C. 499. Dyer 79. pl. 51. Noy 88. Poph. 209. Latch. 174. Owen 81, 82. N. Benl. 62. pl. 109. 4 Leon. 196. Br. Noſme de Dignity 31, 69. O. Benl. 37.

(*f*) Antea 53. a.

(*g*) Cr. Eliz. 869. 17 H. 8. 22. b. Co. Lit. 156. a. Plowd. 117. a. b. Dyer 107. pl. 27. 208. pl. 18. 246. pl. 70. 318. pl. 10. B. N. C. 84, 465. 2 Rol. 636, 637. Br. Enqueſt 110.

of his Jury, as appears in 13 *E.* 3. *Inqueſt* 43. 27 *H.* 8. 22. *b.* 4 *Eliz. Dy.* 208. 14 *El.* 3. 107. 111. And an Earl or Baron ſhall be amerced (*a*) 100 Shillings, 9 *E.* 4. 50. *b.* ¶ 3. It was reſolved, That foraſmuch as in the Caſe at Bar, a (*b*) *Capias* was awarded againſt the Counteſs by the Court of Com. Pleas, That the Sheriff or his Officer by his Warrant might, without any Offence execute it; for they ought not to (*c*) diſpute the Authority of the Court, but execute the Writs directed to them, and to that they are ſworn; and altho' it appears in the *Capias* that ſhe was a Counteſs, againſt whom by the Law no *Capias* in ſuch Caſe lies, *& ignorantia juris non excuſat*, and eſpecially Sheriffs and other Miniſters of Law and Juſtice, as was objected, yet, foraſmuch as in ſome Caſes, as in Caſes of Contempt, *&c.* a *Capias* (*d*) lieth againſt them, it was therefore reſolved, That the Sheriff and his Officers ought not to examine the judicial Act of the Court, but execute the Writ, and therewith agreeth the Opinion in 36 *H.* 8. *Dy.* 61. *pl.* 26. If a *Capias* or *Exigent* cometh to the Sheriff againſt a Duke, Earl, *&c.* where it lieth not againſt them, he ought to execute the Writ, and not argue and diſpute the Validity of it. But the Truth of the Caſe of the Counteſs of *Rutland* was, That the Serjeants who had the Sheriff's Warrant to arreſt the ſaid Counteſs on the ſaid *Capias ad ſatisfaciendum*, being fearful that ſhe would be reſcued by her Servants and Friends, and ſo eſcape, for which the Sheriffs (if ſhe ſhould be arreſted on the *Capias ad ſatisfaciendum*, and eſcaped) would be charged. The Serjeants at Mace adviſed the ſaid *S.* to enter a feigned Action of 1000 *l.* before the Sheriffs in *London*, according to their Cuſtom, upon which they would firſt arreſt the ſaid Counteſs, and by Force thereof carry her to the Compter, and then take her Body in Execution on the *Capias ad ſatisfaciendum.* And afterwards the ſaid Serjeants in *Cheapſide*, with many others, came to the Counteſs in her Coach, and ſhewed her their Mace, and touching her Body with it, ſaid to her; We arreſt you *Madam*, at the Suit of the ſaid *S.* which were all the Words they uſed, and thereupon they compelled the Coachman to carry the ſaid Counteſs to the Compter in *Woodſtreet*, and at the Door thereof the Sheriff came, and carried the Counteſs to his Houſe, where ſhe remained ſeven or eight Days, 'till ſhe paid the Debt. And it was reſolved, That the Sheriff, or any other by his Authority, who makes an Arreſt of the Perſon of another, (*e*) ought on the Arreſt, to ſhew at whoſe Suit it is; out of what Court, for what Cauſe he makes it, and when the Proceſs is returnable, to the Intent that, if it be for any Execution, he might pay it and free his Body (if he will) from Impriſonment; and if it be on Meſne Proceſs, either to agree with the Party, or to

(*a*) 9 H. 6. 2. b. Br. Amercement 2.
21 E. 4. 77. b.
19 E. 4. 9. a.
1 H. 6. 7. b.
2 Inſt. 28.
8 Co. 40. a.
Antea 45. a.
(*b*) 9 Co. 68. a. Latch. 223.
2 Rol. Rep. 493, 494.
10 Co. 76. b.
Cr. Jac. 3.
Moor 767.
(*c*) Cr. Car. 393, 602.
Lane 49.
Hob. 48.
2 Sand. 193.
(*d*) Cr. Eliz. 170, 503.
3 Salk. 45.
(*e*) 2 Rol. 279. Cr. Jac. 485, 486.
9 Co. 68. b. 69. a.

to put in Bail according to Law, and to know when he ſhould appear. And therefore it was reſolved, that the ſaid (a) general Arreſt cannot be ſaid by Force of the ſaid Writ of Execution; and that the ſaid Arreſt of the Counteſs by the Serjeants at Mace of their own Heads, without other Warrant, is againſt Law, and the ſaid Counteſs was falſely impriſoned. (And ſo in Summons in real Actions, the Summoners in the Preſence of the Pernors and Viewers, *&c.* ought to ſummon the Tenant. 1. To keep his Day of Return, and name it in Certainty, to render, *&c.* 2. They ought to name the Name of the Demandant, *&c.* 3. The Land in Demand. *Vide* 3 *E.* 3. 48. 43 *E.* 3. 32. *a.* 50 *E.* 3. 16. *b.* *&c.*) And that was the chief Reaſon that a ſevere Sentence was given againſt *S.* the Serjeants, and the others their Confederates; and the entring of ſuch feigned Actions in *London*, was utterly condemned by the whole Court: For by Colour of Law and Juſtice, they by ſuch feigned Means do againſt Law and Juſtice, and ſo make Law and Juſtice the Author and Cauſe of Wrong and Injuſtice. *Vide* the Statute of 5 *H.* 4. *cap.* 8. in the Preamble.

(a) 2 Rol. 279.

By. 244. pl. 61, 62.

The

The Lord CHANDOS's *Caſe.*

See Skin. 447. 655, 656, 663.

Trin. 4 Jacobi 1.

KIng *Hen.* 7. by his Letters Patents, in the 19th Year of his Reign, granted to *Giles Bridges*, Eſq; the Manor of *Blunſden* in the County of *Wilts*, to have and to hold to him and his Heirs Males of his Body. The ſame King, *Anno* 24. of his Reign, by his Letters Patents reciting the former Letters Patents of Intail, *Ac cum poſtmodum, idem Egidius ven' in Cancellar' noſtram coram Willihelm' Cantuarienſi Epiſcopo Cancellario noſtro, & ibidem ſurſum reddidit dictas literas patentes ad opus noſtrum cancellendas, virtute cujus eadem literæ patentes tunc & ibidem fuer' cancellat'; virtute cujus nos de manerio prædicto ſeiſiti fuimus & ad præſens ſumus in Dominico noſtro ut de feodo. Sciatis quod nos de gratia noſtra ſpeciali, certa ſcientia & mero motu, dedimus & eonceſſimus præfato Egidio Bridges & Iſabellæ Uxori ſuæ manerium prædictum cum pertinen'* (without any Grant of the * Reverſion of the ſaid Manor,) to have and to hold to them and to the Heirs of *Giles*. And whether the Reverſion ſhould paſs or not by this Grant, was the Queſtion, between *Grey* Lord *Chandos*, Iſſue and Heir of the ſaid Intail, and Sir *Thomas Lowe*, Knt. Alderman of *London*, who had taken a Leaſe for Years of the ſaid Manor of *William* Lord *Chandos*, Father of the ſaid Lord that now is; and a Fine was levied by the ſaid Lord *William* for Aſſurance of the ſaid Leaſe: But if the Reverſion remain'd in the King, then the ſaid Leaſe was voidable, and the ſaid (*a*) Fine could not make it good, for that was reſtrained by the Statute of (*b*) 34 *H.* 8. And upon a Petition made to the King by the ſaid Sir *Thomas Low*, who was diſpoſſeſſed by the ſaid *Grey* Lord *Chandos*, the King referred it to the Conſiderat. of the Ld. Chancel. and Ld. Treaſurer of *England*, who heard Counſel on both Parts: And becauſe the Caſe was difficult,

8 Co. 56. a. 77. a. Lane. 3, 7, 9, 76, 112. Hob. 224. 11 Co. 11. b. 2 Rol. Rep. 277, 278, 360.

* 2 Rol. Rep. 180, 277, 278. Poſtea 56. 2. 8 Co. 56. a. Lane 3, 7. Dyer 232. pl. 10, 11. B. N. C. 262. Hob. 224.

(*a*) Raym. 271.

(*b*) 34 & 35 H. 8. c. 20. 2 Co. 15. b. 16. a. 52. a. Moor 115, 195. 1 And. 46, 47, 142, 143, 171. Cr. Car. 430.

Plowd. 555. a. Yelv. 149. Noy 132. Co. Lit. 335. a. 372. b. 1 Leon. 85. 3 Leon. 57. 4 Leon. 40. Benl. in Kelw. 213. a. b. O. Benl. 32. Benl. in Ath. 2[illegible] N. Be[illegible]. 223, pl. 254. 8 Co. 77. b. 10 Co. 37. a. Hob. 299. 2 Rol. Rep. 108, 417. Raym. 349.

they

they referred it to the Lord Ch. Juſt. of *England*, and Lord Ch. Baron, who oftentimes heard the Caſe debated betwixt the Counſel of both Parties. And it was objected by the Counſel of the Lord *Chandos*, that the ſaid Grant of the ſaid Manor by the ſaid Letters Patents of 24 *H.* 7. were void for divers Reaſons. 1. That the ſaid Eſtate-tail was not recited, as an Eſtate-tail continuing, whereupon the Rev'n might be granted, but as an Eſtate-tail determined; and therefore the K. granted it as a Thing in Poſſeſſ. when in Truth he had but a Rev'n expectant on an Eſtate-tail. 2. The King was deceived in his grant, for the King by the Suggeſtion of the Party thought that by the Surrender of the ſaid Letters Patents of 19 *H.* 7. the Eſtate-tail was thereby defeated and determined, by Reaſon whereof the King was ſeiſed thereof in his Demeſne as of Fee, in which the King was deceived: For by the Surrender of the ſaid Letters Patents the Eſtate-tail was not determined, nor the King ſeiſed in his Demeſne as of Fee, but the King had only a Rev'n in Fee expectant on the Eſtate-tail. 3. The King was (*a*) deceived in the Eſtate he granted, for he intended to grant an Eſtate in Fee in Poſſeſſ. and not a Rev'n expectant on an Eſtate-tail; and the K. granted *Manerium de Blundſden*, and not *reverſion' Manerii*. And after many Arguments and good Deliberation had with divers other Juſt. it was reſolved, that the (*b*) Rev'n ſhould paſs by the ſaid Letters Patents of 24 *H.* 7. And as to the ſaid three Objections, it was conſidered, how much of the ſaid Recital was the Suggeſti. of the Party, and (*c*) how much the Affirmation of the King himſelf. And as to that, it was reſolved, That the Recital of the Eſtate-tail, and that the (*d*) Patentee had ſurrendered or delivered the ſaid Letters Patents to the Chancellor to be cancelled, both theſe were in Judgm. of Law the Informat. and Suggeſtion of the Party; but the Clauſe *virtute cujus* (we were ſeized in our Demeſne as of Fee) was but the Collection of the King himſelf, as a Conſequence on the Surrender, in which the King miſtook the Law. Alſo the Party inform'd the King, that he had delivered the Letters Patents to the Chancellor to be cancelled; upon which the King affirmeth (*quæ* (*c*) *quidem literæ patentes adtunc & ibidem cancellat' fuer'*) that is not the Information of the Party, but the Affirmat. of the King; and the Collect. or Affirmat. of the King, (on the Informat. of the Party) when it is not made any Part of the Conſiderat. ſhall not avoid his Grant. For all that the Party had informed was true; and the Error was in the Conſequent or Collect. which the K. made upon it; then foraſmuch as the Party had truly informed the King of the Eſtate-tail, and of the Delivery of his Letters Patents to be cancelled; altho' the King hath miſtaken the Law, or the Matter in Fact, in that Caſe it being no Part of the Conſiderat. ſhall not avoid his Grant, for no Fault was in the Party.

(*a*) Br. Patent 38. Plow. 332. a. 1 Mod. Rep. 196. Kelw. 8. b. 12. b. Moor 45, 164. 9 H. 6. 28. b. Lane 12, 110. 2 Co. 33. b. 54. a. 6 Co. 29. b. 10 Co. 112. b. 11 Co. 4. b. 74. b. 87. a. 90. a. Hob. 223, 229. Cr. Car. 198. 2 Rol. 188. Dyer 339. pl. 47. 352. pl. 26. Co. Ent. 384. 41 Aſſ. 19. 1 Co. 43. a. 7 Co. 12. a. 4 Co. 35. b. 5 Co. 94. a. Yelv. 48.

(*b*) Poſtea 56. a. 66. b. Co. Lit. 324. b. 10 Co. 107. a. b. Cr. Car. 400. 5 Co. 124. b. 4 Co. 36. a. Dyer 125. pl. 45. 233. pl. 10, 11. Plow. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feoffment 22. Fitz. Grant. 97. 35 H. 8. Br. Grant 50. Hob. 224. 2 Rol. Rep. 180, 277, 278. Antea 55. a. 8 Co. 56. a Lane 3, 7. B. N. C. 267. Lit. Rep. 18.

(*c*) 2 Rol. Rep. 355. Lane 12, 13, 75. Godb. 415.

(*d*) 1 Co. 43. a. 49. b. Hob. 224. Lane 12, 13, 75. Dyer 352. pl. 26. 5 Co. 94. a. 10 Co. 68. a. 2 Rol. Rep. 273. Cr. Car. 198.

(*e*) Cr. Jac. 34, 35. 10 Co. 109. a. b. 113. a. Lane 13. Plowd. 191. b. Car. 548. Yelv. 28.

Party. Alſo it was reſolved, that by the Grant of the Manor, without a Word of the Reverſion, the (*a*) Reverſion ſhould paſs; for this Word Manor includeth all Eſtates, and Degrees of Eſtates of or in the Manor; as if *A.* gives the Manor of *D.* to *B.* in Tail, and afterwards the Donor is (*b*) attainted of Treaſon, by which the King is ſeiſed of the Reverſion, and afterwards by his Letters Patents grants *Manerium de D.* to another and his Heirs: In that Caſe, although the King grants the Manor of *D.* as in Poſſeſſion, yet the Reverſion ſhall paſs, for the King had an Eſtate (*viz.* the Reverſion in Fee) grantable in him; and the Eſtate-tail by a common Perſon need not be recited. And it is not like the Caſe of (*c*) *Alton Woods*, for there the King was not Conuſant, nor informed of his true Eſtate, *ſcil.* that he was ſeiſed in Tail, with the Reverſion expectant to his Heirs and Succeſſors, and his Grant in the ſame Caſe, could not take Effect without Fraction of Eſtates, or Wrong done, and therefore the Caſe of *Alton Woods*, was not to be likened to this Caſe. For in our Caſe, the Party hath informed the King of the Truth of all Matters in Fact, *ſcil.* of the Eſtate-tail, and of the Delivery of the former Letters Patents, ſo that in true Judgment of Law on the Matter contained in the Patent, the King hath but a Reverſion in Fee expectant on an Eſtate-tail: And in this Caſe no Wrong is done to any, nor is there any (*d*) Fraction of Eſtates. And here the King's Intent was to depart with all his Eſtate, and (*e*) leſs paſſeth by this Grant, (*ſcil.* the Reverſion) than he did intend to paſs; for he did intend to paſs the Poſſeſſion; and ſo it is not any Prejudice to the King. But if more would paſs, than he intended to paſs, as where he intended only to paſs the Reverſion, and the Words will paſs the Poſſeſſion, there it will be otherwiſe. Alſo this Grant was made *ex certa ſcientia, & mero motu*, which ſhall be taken in the moſt (*f*) liberal and beneficial Senſe, according to the King's Intent and Meaning expreſſed in his Grant.

(*a*) Cro. Car. 400. 5 Co. 124. b. 4 Co. 36. a. Dyer 125. pl. 45. 233. pl. 10, 11. Plowd. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feoffment 22. Fitz. Grant 97. 35 H. 8. Br. Grant 50. Lit. Rep. 18. 2 Rol. Rep. 180, 277, 278. Co. Lit. 324. b. Poſtea 66. b. 10 Co. 107. a. b. 8 Co. 56. a. Lane 3, 7. B. N. C. 267. Hob. 224.

(*b*) 2 Rol. 190.

(*c*) 1 Co. 43, &c.

(*d*) 1 Co. 52. a.

(*e*) 2 Rol. Rep. 180. Hob. 224.

(*f*) 8 Co. 56. a. 167. a. Antea 6. a. 5 Co. a. 10 Co. 67. b. 2 R. 3. 4. a. b.

56. a. 1 Co. 49. a. 51. b. 3 Leon. 243, 249. Kelw. 7. b. 175. a. 198. a. 11 Co. 11. 2 Sid. 141. 2 Rol. 200. Hard. 500. Plowd. 32. a. 126. a. 143. b. Fitz. Grant 29. 3 Bulſtr. 6. 2 Inſt. 496, 497.

BREDI-

BREDIMAN's *Caſe.*

Hill. 4 Jacobi 1.

In the Common Pleas.

2 And. 185. Cr. Jac. 142. 2 Rol. Rep. 181.

HILL. 45 *Eliz. Rot.* 105. *Charles Brediman* did arrain an *Aſſize* of *Novel diſſeiſin* againſt *Robert Bromley*, *Thomas Reyner*, and *Francis Cotton*, of a Rent of 10 *l.* in *H. &c.* in the County of *Middleſex*, and made his Title, that Sir *Richard Pexal*, Knight, was ſeiſed of the Manor of *Swacliff*, in *H. &c.* in his Demeſne as of Fee, and held it in Socage of *Michael Shoreditch*, and 9 *Oct.* 13 *Eliz.* made his Will in Writing, and thereby deviſed to the Plaintiff a Rent of 10 *l.* iſſuing out of the ſaid Manor of *Swacliff* for his Life, yearly to be payed, and by the ſame Will deviſed to Dame *Eleanor* his Wife the ſaid Manor, to have from the Day of his Death, for 15 Years; and afterwards the ſaid Sir *Richard*, 10 *Octob.* 13 *Eliz.* died. *Eleanor* entered into the ſaid Manor, and paid the ſaid Rent of 10 *l.* and for the Rent of 10 *l.* due the 10th of *October*, 40 *Eliz.* and for the Arrearages of 16 Years before: The Plaintiff the ſaid 10th Day of *October*, 40 *Eliz.* half an Hour before Sun-ſet of the ſame Day, came to the capital Houſe of the ſaid Manor, and there remained till after Sun-ſet, *petendo tam prædict.* 160 l. *de arreragiis prædict. redditus, quam prædict. decem libras in prædicto decimo die Octobris, anno* 40 Eliz. *ſupradict. eidem* Carolo *tunc ſit debit. exiſten. ſibi ſolvi.* And the Defendants *adtunc tenentes, &c. ſeu eorum aliquis, nec aliquis alius Arreragia prædicta ſeu redditum prædict' aut aliquam inde parcellam eidem* Carolo *adtunc ſic ut præfert' debit. & inſolut' exiſten' eidem* Carolo *ſolverunt ſeu ſolvit, ſed illa ei adtunc & ibid. ſolvere denegaverunt, & eorum quilibet ſolvere denegavit, & ſic prædict.* Robertus, Thomas & Franciſcus, *ipſum* Carolum *de redditu præd' adtunc & ibid. injuſte & ſine judicio diſſeiſiver. & hoc, &c.* And the Aſſize was taken againſt the ſaid *Tho.* and *Franc.* by Default, and

and *Rob.* pleaded *Nul Tort*, and the Recognitors of the Aſſize found for the Pl. *ſc.* the Seiſin and Diſſeiſin of the Rent, and the only Point which was debated at the Bar and at the Bench was, if the Payment of the ſaid Rent by *Eleanor*, who was Termor for Years were a ſuffic. Seiſin of the Rent to maintain an Aſſize againſt the Ter-tenant after the Years determined. And this Caſe was oftentimes argued at the Bar in the Time of the Ld. *And.* in the Time of the Ld. *Gawdy*, and of *Coke* now Ch. Juſt. And it was objected at the Bar, that the Seiſin had by the Hands of Ten't for Years, is ſuffic. to have an Aſſize, for it appears by 33 *E.* 3. Verd. *47. That Seiſin by the Hands of a (a) Baily or Procurat. is ſuffic. and 8 *H.* 6. 17. *a. b.* in ſome Caſe Seiſin by the Hands of him who hath nothing in the Land is ſuffic. As if there be (b) Lord and Ten't, and the Ten't makes a Feoffment in Fee, before Notice made by the Feoffee, the Paym. of the Feoffor is a good Seiſin. And 27 *E.* 3. 83. *a.* in a *Scire Facias* on (c) a Fine levied of a Rent, the Tenant ſaid, That the Demandant had received 16 *s.* Parcel of the ſame Rent pending the Writ, by the Hands of one who held the Land (out of which the Rent iſſued) at Will, and took his Plea to the Whole, becauſe the ſaid Rent was a Rent-ſervice, and (d) Seiſin of Parcel gave Seiſin of the Whole, and ſo the Fine executed by that Seiſin; upon which the Pl. demurr'd, and it was awarded that he ſhould anſwer to the Remnant, by which it appears (as it was objected) that Seiſin by the Hands of a Tenant at Will, was a ſufficient Seiſin as to that which was paid. And 8 *Aſſ. pl.* 16. 8 *E.* 3. 53. *& F. N. B.* 179. f. that Paym. of the Rent by Tenant for Years is ſufficient Seiſin to have an Aſſize for the Rent. And it was ſaid, that other Seiſin the Deviſee of the Rent could not have, during the Term, by other Hands than by the Ten't for Years, and the Paym. of the Rent was a lawful Thing, and which of Right ought to be done, and therefore the ſaid Payment by the Tenant for Years ſhall bind the Ten't of the Freehold, and ſhall give him ſuffic. Seiſin to have an Aſſize. And upon ſolemn Argument this Term by the Judges of the Com. Pleas, it was reſolved by the whole Court, *ſc. Coke* Ch. Juſt. *Walmſ. Warburt.* and *Daniel*, That the ſaid Paym. of the Rent by the ſaid Ten't for (f) Years was no Seiſin to bind the Ter-tenant after the Years determined for ſeveral Reaſons. 1. In Reſpect of the (g) Imbecillity and Smallneſs of the Intereſt of Tenant for Years, who at the Com. Law could neither prejudice nor draw the Eſtate of Freehold in Queſtion, For altho' the Recovery againſt the Ten't of the Freehold was by Agreement, Ten't for Years could not be received before the Stat. of (h) *Glouc.* nor could he (i) falſify the Recovery before the Stat. of (k) 21 *H.* 1. So that by the Com. Law, Ten't for Years was ſubject to the Pleaſure of the Tenant of the Freehold; for he could not falſify a Recovery of the Freehold in Reſpect of the Feebleneſs of his Eſtate, and none by the Com. Law could falſify a Recovery of the Freehold, but he who had a Freehold. *Vide* 7 *H.* 7. 12. *a.* 9 *E.* 4. 37. *b.* 30. *H.* 6. 16. 7 *H.* 4. 17. *b.* 19 *E.* 3. *Aſſ.* 82. The ſecond Reaſon was, *ex Etymologia & vi termini*,

* Cr. Jac. 142.
(a) Poſtea 5 9 Cr. Jac. 142.
(b) Poſtea 58. a.
(c) Fitz. Scire Fac. 132.
(d) 4 Co. 9. a. Co. Lit. 153. a. 315. a. 2 Rol. 463. 1 E. 4. 7. b. Br. Seiſin 31.
(e) F. N. B. 179. f.
(f) Cr. Jac. 142. 2 Rol. Rep. 181. 2 Rol. 465.
(g) Cr. Jac. 142. 2 Rol. 465.
(h) 6 E. 3. c. 11. 2 Inſt. 321, 322, &c.
(i) 9 Co. 135. a. Cr. El. 284, 718. Co. Lit. 46. a.
(k) F. N. B. 98. e. 220. i. 21 H. 8. 215. 11 Co. 33. b. 2 Inſt. 321, 322, 323. 9 Co. 135. a. Co. Lit. 46. a.

ſc. that he who hath not Seiſin in the Land charged, cannot give a Seiſin of the Rent; for *nemo poteſt* (*a*) *plus juris in alium transferre quam ipſe habet.* And that is the Reaſon that a *Præcipe* lies not againſt a Termor, becauſe he cannot give Seiſin, and yet in one Caſe one Manner of *Præcipe* only lies againſt him who hath but a Chattel, and no Freehold; and that is, that a Writ of *Dower* lies againſt (*b*) Guard. in Chivalry, as appears in *Temp. E.* 1. *Brief.* 863. 8 *E.* 2. *ibid.* 809. 6 *E.* 3. 8, *&c.* but if ſuch Guard. makes a Leaſe for Years of the Land, no Writ of Dower lies againſt the (*c*) Leſſee, as appears in 8 *E.* 3. 384. And a Writ of Dower lies againſt Guard. in Chivalry for two Reaſons. 1. Otherwiſe the Ten't in Dower would be without Remedy, for in ſuch Caſe no Writ of Dower lies againſt the Heir, as it is adjudged in 9 *H.* 6. 6. *b.* in *Frevil's* Caſe. 2. The Guardian may pray, (if the Caſe ſo require) that the Demandant may endow herſelf *de le pluis beale*; but no other *Præcipe* lies againſt ſuch Guardian. And no Writ of Dower lies againſt Guard. in (*d*) Socage, nor can he aſſign Dower, as appears in 29 *Aſſ.* 68. And it was ſaid, as *Poſſeſſio* is derived, *a pos & ſededo*, becauſe he who is in Poſſeſſ. may ſit down in Reſt and Quiet: So *Seiſina* alſo is derived *a Sedendo*, for till he hath Seiſin all is *labor & dolor, & vexatio Spiritus*; but when he hath Seiſin, he may *ſedere & acquieſcere.* In all Suits to recover Seiſin or Poſſeſſ. he who proſecutes them ought to labour, but when he has obtain'd Seiſin he may *ſedere & accumbere* in Peace and Tranquility. The 3d Reaſon was a manifeſt Difference (*e*) between receiving and giving Seiſin; for it is true, that he who hath but a Term for Years may take Seiſin for the (*f*) Benefit of him who hath the Freehold, 45 *E.* 3. 26. *a.* If Grantee for Years of a Common uſeth it, that giveth Seiſin to him in the Rev'n, 22 *Aſſ.* 84. *acc'.* 12 *E.* 3. *Aſſ.* 86. Payment to the Grantee for Years of a Rent, is a ſuffic. Seiſin for him in the Rev'n, *M.* 39. & 40 *El. in the* 5*th Part of my* (*g*) *Rep.* Preſentment by the Grantee of the next Avoidance, or for Years, is a ſufficient Title in a *Quare Impedit* for the Grantor; and all our Books are, That the Poſſeſſ. of Leſſee for Years, or (*h*) Guardian, *&c.* is ſuffic. Seiſin for him in the Rev'n to have an Aſſiſe. But *ſicut beatius eſt, ita majus eſt dare, quam accipere.* For in the firſt Caſe he who giveth Seiſin is Ten't of the Freehold, and he who receiveth, Ten't for Years; but in this Caſe, he who maketh the Paym. is but Tenant for Years of the Land, and he who receiveth it claimeth a Freehold in the Rent, and therefore the Tenant for Years by his Payment cannot give Seiſin to bind him who hath the Freehold; and therewith agree 2 *H.* 6. 3 & 8 *H.* 6. 17, or 7, 31. *Vide* 11 *H.* 4. 29. *a. b.* Homage done by the (*i*) Huſband before Iſſue, ſhall not bind the Wife; but Seiſin by the Hands of a (*k*) Diſſeiſor, or by one who hath a defeaſible Title, is ſufficient and ſhall bind him who hath Right, for he is

(*a*) 4 Co. 24. b. 5 Co. 113. a. 6 Co. 68. a. 8 Co. 63. b.

(*b*) 9 Co. 16. b. Co. Lit. 35. a. 38. b. 1 Rol. 681. 9 H. 6. 6. b. 24. b. 47 Aſſ. 15. per Finchden.

(*c*) 9 Co. 17. a. 8 E. 3. 15. b.

(*d*) Br. Dower 63. 31 E. 1. Dower 151. Co. Lit. 35. a. 1 Rol. 682.

(*e*) Cr. Jac. 142.

(*f*) Cr. Jac. 142.

(*g*) 5 Co. 57. b. 97. b. 98. a. 2 Rol. 378, 379. Cr. El. 518. Moor 456. 2 And. 49, 50. F. N. B. 33. h.

(*h*) 1 Rol. 270.

(*i*) Cr. Car. 521.

(*k*) 2 Rol. 464.

Tenant of the Land, and the Act is lawful; but Incroachment of Rent by his Hands ſhall not bind him who hath Right, for that is not lawful, and therewith agree 8 *H.* 6. 18. *a.* 39 *H.* 6. 2. *b.* 33 *E.* 3. *Avowry* 255. 8 *Aſſ.* 6. 16. 31. but in the ſame Caſe, if there be any Covin between the Diſſeiſor and him who hath the Rent, and that the Purpoſe of the Diſſeiſin was, that the Diſſeiſor ſhould give Seiſin of the Rent, there ſuch Seiſin ſhall not bind the Diſſeiſee, or him who hath Right, for the Covin maketh it unlawful in the ſame Manner as Dower aſſigned by ſuch (*a*) Diſſeiſor, or Recovery againſt him, if the Diſſeiſin was had by Agreem. or Covin. But it was ſaid, When there are (*b*) Ld. and Ten't, and the Ten't makes a Feoffm. in Fee, before Notice and Tender of the Arrearages, the Feoffor may give Seiſin, for he is Ten't as to Avowry, 8 *H.* 6. 18. for in ſuch Caſe, if the Lord ſhould avow on the Feoffee before Tender of the Arrearages, he would (*c*) loſe them, as it is agreed in 7 *E.* 3. & 7 *H.* 4, *&c.* And therefore, foraſmuch as in ſuch Caſe the Common Law doth compel the Ld. to avow on the Feoffor, for this Cauſe at the Com. Law ſuch Seiſin by the Feoffor, *cauſa neceſſitatis*, was good. And in this Caſe Difference was taken and agreed between Attornm. and Seiſin; for in Caſe of a Grant of a Seigniory or Rev'n, *&c.* to Attorn. Privity of Eſtate was requiſite; but not to a Seiſin: But at the Common Law, the Lord was not (*d*) compellable to take his Rent of any other but of him who was his immediate Tenant in Privity; and therefore at the Common Law the Lord paramount was not compellable to accept his Rent by the Hands of the Ten't peravail, or by the Hands of a Ten't for Life, where the Rev'n was over, and that well appears by the Stat. of (*e*) *Weſt.* 2. *cap.* 9. *Capitalis Dom' ſervitia & conſuetudines ſibi debit. renuebat accipere per manus alterius quam per manus proximi tenentis ſibi, & ſic tenentes in dominico amiſerunt proficua tenement' ſuorum; non habeat capitalis Dom' poteſtatem diſtringendi tenentes in dominico, dum præd' tenens offerat ei ſervitia debita & conſueta:* And yet Seiſin had by the Hands of the Ten't peravail, or Leſſee for Life, was good, if the Lord accepted it. And it was ſaid, that if Tenant in (*f*) Tail makes a Feoffm. in Fee, if the Donor obtains Seiſin of his Rent by the Hands of the Diſcontinuee, it is ſufficient to have an Aſſiſe, and yet he cannot avow on the Diſcontinuee, nor is there any Privity between them. The 4th Reaſon was drawn from the (*g*) Nature of the Rent in the Caſe at Bar, which as it was ſaid, hath three croſs Aſpects. 1. It is againſt Com. Right. 2. It is in Creation *reddit* (*h*) *ſiccus*, barren without Fruit, and for its Drineſs is compared to a Stone: *Summa petit ſcopuli, ſiccaque in rupe reſedit.* 3. It is *Redditus cæcus & ſiccus*; for it is a Rent remedileſs, which cannot ſee any (*i*) Way or Remedy to attain to it. And it is to be obſerved, That a Right (without any Eſtate

(*a*) 1 Rol. 549. 8 Co. 132. b. 15 E. 4. 4. b. Br. Dower 15, 59. Br. Aſſ. 181. Co. Lit. 35. a. 357. b. 2 Co. 67. a. 3 Co. 78. a. 5 Co. 30. b. 2 Rol. Rep. 17. Plow. 51. a. 54. b. Poph. 64, 100. Br. Damages 96.

(*b*) Ant. 57. a. 2 Rol. 464.

(*c*) Co. Lit. 269. b. 3 Co. 65. b. 66. a. 1 Rol. 317.

(*d*) 2 Inſt. 373.

(*e*) 2 Inſt. 373, 374. Co. Lit. 100. a. b.

(*f*) 2 Rol. 464. Co. Lit. 269. a.

(*g*) Cr. Jac. 142.

(*h*) Lit. Sect. 218. Co. Lit. 144. a.

(*i*) Lit. Sect. 217.

in Poſſeſſion, Rev'n, or Rem'r) for which good Remedy by Action is given, is not yet Aſſets, until it be recovered and reduced into Poſſeſſ. So an Eſtate as in Rent-ſeck, which deſcendeth, for which the Heir hath not Remedy, is not Aſſets until he hath gained Seiſin; for want of Right, and Want of Remedy are in one Equipage. So one ſhall not be (*a*) remitted to a Right remedileſs, as appears in the *Marq. of Wincheſt. Caſe, in the 3d. Part of my Rep. & M.* 12 & 13 *El. int' Terling & Trafford*, it was adjudged, That a Rev'n expectant on an Eſtate Tail was not (*b*) Aſſets, becauſe it lay in the Power of Ten't in Tail to dock and bar it at his Pleaſure: And thereupon it was concluded, That foraſmuch as ſuch firſt Seiſin which ſhould give Vigour and Life to this remedileſs Rent, and ſhould charge the Freehold, ought to be given by him who hath a Freehold at leaſt, and not by him who hath but a Chattel; therefore Seiſin given by him who had but a Term for Years, was not ſuffic. And it was ſaid, that the Rent-ſeck in the Caſe at Bar was remedileſs in its Creat. becauſe it was created by Will; ſo that not only a Remedy for the Rent, but a Writ of Annuity alſo failed. But if a Man grants a Rent by Deed out of cert. Lands, there as to charge the Land it is remedileſs, but the Grantee may charge the Perſon of the Grantor in a Writ of Annuity; and therefore it was ſaid, that in ſuch Caſe, if he added a Proviſo, that it ſhall not charge his Perſon, it is void, unleſs he gives him Seiſin upon the Delivery of the Deed; for ſuch Proviſo doth take away from the Grantee all his Remedy; and to avoid that, *Litt.* in his *Chap. of Rents*, puts his Caſe of a Rent-charge, in which there was ſuch Proviſo, in which Caſe the Grantee was not (*c*) deprived of his whole Remedy. It was further agreed, That foraſmuch as a Rent-charge, or a Rent-ſeck was againſt com. Right, that in an Aſſiſe thereof all the Tertenants, *ſc.* the Tenants of the Freehold (who always are in Law intended within theſe Words Tertenants) ought to be (*d*) named; as it is agreed in 9 *E.* 3. 13. 22 *H.* 6. 24. *a.* 33 *E.* 3. *Aſſ.* 456, *&c.* And thereupon it was concluded, that if in Caſe of Diſſeiſin which is tortious, and Privation of Seiſin, the Ten'ts of the Freehold ought to be named and made Party, *a fortiori*, in the Caſe of Seiſin, which in this Caſe is Creation of Remedy for the Rent, the Ten't of the Freehold ought to be Party and princip. Agent in the Perfect. thereof; and he who hath a Rent hath not taken the Explees thereof, until he hath Seiſin by the Hands of the Tenant of the Freehold; for *explctia derivantur de verbo expleo*, that is, to fill or make up, or to make perfect; for he who hath a Rent, (and eſpecially a Rent-ſeck) hath not a perfect and expleat, or compleat Eſtate in the Rent, until he had Seiſin thereof, and when he hath Seiſin, his Eſtate is compleat and perfect, for he hath reaped the

(*a*) 3 Co. 3. a. Co. Lit. 349. a. b.

(*b*) Antea 42. a. 1 Rol. 269. 1 Rol. Rep. 234, 357. 2 Rol. Rep. 129. 6 Mod. 53.

(*c*) Co. Lit. 146. a. Sect. 220.

(*d*) Co. Lit. 259. b.

(*e*) Co. Lit. 159. b. 160. a.

the Explees, *ſc.* the Fruit and Commodity thereof. *Vide Bract. lib.* 2. *fol.* 40. *Item nec explotia capere poſſit, quia nond' venit tempus meſſium nec vindemiarum: ſi autem fructus non maturos percepit, vel arbores proſtraverit, iſta non debent dici explotia cum ſint potius ad damnum quam ad commodum.* And *Litt. cap. Attornm.* 125. was cited, if there be (*a*) Lord, Meſne and Ten't, and the Ld. will grant the Services of the Meſne, altho' in his Grant he doth not make Mention of the Meſne, yet it is neceſſary that the Meſne Attorn, and not the Ten't peravail, becauſe the Meſne is Ten't to him; but (*b*) otherwiſe it is where certain Land is charged with a Rent-charge, or Rent-ſeck; for in ſuch Caſe, if he who hath the Rent grants it to another, the Ten't of the Freehold ought to attorn to the Grantee, becauſe the Freehold is charged with the Rent, *&c.* And if the Ten't of the Freehold ought to attorn to a Grant (as *Litt.* holds) *a fortiori*, the Ten't of the Freehold ought to give Seiſin, for Seiſin is more than Attornment; for every lawful Seiſin includes Attornment, but Attornm. doth not include Seiſin. And it appears by 21 *H.* 6. 9. *b.* That if the Tertenant, out of which the Rent-charge is iſſuing, be diſſeiſed, and he who hath the Rent grants it over, the Diſſeiſee cannot attorn, becauſe he hath not the Freehold, although he hath the mere Right to it, *a fortiori* Ten't for Years who hath no Freehold, nor Right of Freehold, ſhall not give (Seiſin of) it. Laſtly, It was agreed, that it would be full of many (*c*) Inconveniences; if he who hath not the Freehold ſhall give Seiſin; for then Ten't by Stat. Merchant, or Staple, Tenant by *Elegit*, Guardians, Grantees of Wards, *&c.* alſo if the K. extends and leaſes over, all theſe might put Lords or Owners of Rents in Poſſeſſ. of the Rent or Services, of which they had not any Seiſin within Time of Limitation, which will be very dangerous, and the Cauſe of many Suits and Troubles: And as to the Objection. *ſc.* That Payment by a (*d*) Bailiff would be a ſufficient Seiſin, it was agreed, unleſs it works a ſpecial Prejudice to the Lord; as, if the Ld. hath not been ſeiſed of his Rent within (*e*) 60 Years, and the Tenant makes one his Bailiff generally of his Manor, he cannot, without expreſs Commandment of his Maſter, pay this Rent remedileſs to the Ld. for that would be a ſpecial Prejudice to him, which a Bailiff without Commandment cannot do. And as to the Caſe of (*f*) 27 *E.* 3. 83. *a.* it was agreed, for there the Ten't pleaded the Paym. of the Rent by the Hands of Ten't at Will, and ſo avowed the Paym. as his own Paym. by the Hands of Ten't at Will. 4 *H.* 6. 29, *b.* 30. *a.* in (*g*) Replevin againſt *W.* he made Conuſance as the King's Bailiff; and ſaid, That the King was ſeiſed of the Caſtle of *Lanceſton* as Parcel of his Dutchy of *Cornwall*, and of a Rent [illegible] iſſuing out of the Town of *T.* and that

(*a*) Lit. Sect. 555. Co. Lit. 311. a. b.

(*b*) Lit. Sect. 556. Co. Lit. 311. b.

(*c*) Cr. Jac. 142.

(*d*) Antea 57. a. Cr. Jac. 142.

(*e*) 4 Co. 10. a.

(*f*) Antea 57. a. Fitz. Sc. fac. 132.

(*g*) Fitz. Avowry 7. Br. Avowry 71.

all who had been Dukes there had been ſeiſed Time out of Mind, by the Hands of thoſe who were dwelling and reſident within the ſame Town, and preſcribed to diſtrain for it *quoties, &c.* And it was held a good Seiſin, for the Rent was iſſuing out of the whole Town, and that all the Reſidents and Dwellers ought to pay it; in which Caſe he could not alledge Seiſin by the Hands of any Perſon in certain, for the Seiſin given by one ſhall bind all, and it cannot be intended, that a Man can have Knowledge of all the Inhabitants; wherefore, by the Advice of the whole Court, the Conuſance in ſuch Caſe was awarded good.

Cr. Jac. 665.

Where Seiſin given by one Inhabitant, binds all.

GATEWARD's *Caſe*.

Hill. 4 Jac. I.

In Communi Banco.

Heb. 86. 1 Buſſt. 283. Cr. Jac. 152.

IN Treſpaſs by *Robert Smith* againſt *Stephen Gateward*, Gent. *Quare Clauſum fregit apud Horſington in Com' Lincoln' vocat' Horſington Holmes, cum quibuſd' averiis, viz. equis, vaccis & bidentibus depaſtus fuit* 1 *Aug. An.* 43 *El.* with Continuance. The Defendant *quoad porcos*, pleaded not guilty: And as to the Reſidue of the Treſpaſs he pleaded, *quod villa de Stixwold eſt antiqua villa, & contigue adjacet prædict' Clauſ. vocat' Horſington Holmes, quodque infra eandem villam habetur, & a toto tempore cujus contrar' memoria hom' non exiſtit talis habebatur conſuetudo, viz. quod Inhabitantes infra eandem villam de Stixwold prædict' infra aliquod antiquum meſſuagium ibidem ratione commorantiæ, & reſident' ſuæ in eadem habuerunt & uſi fuerunt & conſueverunt habere Com. Paſtur' in præd' loco in quo, &c. pro omnibus & omnimodis bobus & equis & aliis groſſis animal' communical' ſuper hujuſmodi antiqua meſſuagia ſua infra præd' villam de Stixwold præd' modo & forma ſequente, viz.*

viz. quolibet anno ad omnia tempora anni, necnon pro bidentibus ſuis levant' & cubant', &c. quolibet ann. ſuper primum diem Auguſti, & abinde uſque Feſtum Annunciationis beatæ Mariæ Virginis tunc prox' ſequen'. And pleaded that he *præd' tempore quo fuit & adhuc eſt commorans & inhabitans* in the ſaid Town of *Stixwold*, in an ancient Houſe *in* S. *præd'*, and ſo juſtified; upon which the Pl. did demur in Law. And this Plea began, *Trin.* 3 *Jac.* and was oftentimes argued at the Bar, and now this Term was openly argued at the Bench by all the Juſtices; and it was unanimouſly reſolved by all the Juſtices of the Common Pleas, That the (*a*) Cuſtom was againſt Law for ſeveral Reaſons. 1. There are but * four Manner of Commons, *ſc.* Common appendant, appurtenant, in groſs, and by Reaſon of Vicinage, and this Common *ratione commorant' & reſident'* is none of them, and (*b*) *argumentum a diviſione eſt fortiſſimum in jure.* 2. What Eſtate ſhall he have who is (*c*) Inhabitant in the Common, when it appears he hath no Eſtate or Intereſt in the Houſe, (but a mere Habitation and Dwelling) in Reſpect of which he ought to have his Common? For none can have Intereſt in Common in Reſpect of a Houſe in which he hath no Intereſt. 3. Such Common will be tranſitory, and altogether incertain, for it will follow the (*d*) Perſon, and for no certain Time or Eſtate, but during his Inhabitancy, and ſuch Manner of Intereſt the Law will not ſuffer, for Cuſtom ought to extend to that which hath Certainty and Continuance. 4. It will be againſt the Nature and Quality of a (*e*) Common, for every Com. may be ſuſpended or extinguiſhed, but ſuch a Common will be ſo incident to the Perſon, that no Perſon certain can extinguiſh it, but as ſoon as he who (*f*) releaſes, *&c.* removes, the new Inhabitant ſhall have it. 5. If the Law ſhould allow ſuch Common, the Law would give an Action or Remedy for it; but he who claims it as Inhabitant, can have no Action for it. 6. In theſe Words, Inhabitants and Reſidents, are (*g*) included Tenant in Fee-ſimple, Ten't for Life, for Years, Tenant by *Elegit*, *&c.* Tenant at Will, *&c.* and he who hath no Intereſt, but only his Habitation and Dwelling; and by the Rule of all our Books without Queſtion, (*h*) Tenant in Fee-ſimple ought to preſcribe in his own Name, Tenant for Life, Years, by *Elegit*, *&c.* and at Will, *&c.* in the Name of him who hath the Fee; and as he who hath no Intereſt can have no Common; ſo none that hath no Intereſt, if it be but at Will, ought to have Common; but by good Pleading he may enjoy it. 7. No (*i*) Improvement can be made in any Waſtes, if ſuch Common (Cuſtom) ſhould be allowed, for the Tenants for Life, for

(*a*) Cr. Jac. 152, 665.
* Cr. El. 363.
(*b*) Co. Lit. 213. b.
(*c*) Cr. El. 180, 363. 1 And. 152. 2 Leon. 44. Godb. 96, 97.
(*d*) Cr. Jac. 152.
(*e*) Cr. Jac. 152.
(*f*) Cr. Jac. 152.
(*g*) Cr. Jac. 30.
(*h*) 2 Rol. Rep. 288. Doct. pl. 102. Dyer 71. pl. 42. 15 E. 4. 29. b.
(*i*) 1 Vent. 397.

Years, at Will, Tenant by *Elegit*, Stat. Staple, and Stat. Merch. of Houſes of the Lord himſelf, would have Common in the Waſts of the Ld. himſelf, if ſuch Preſcript. ſhould be allowed, which would be inconvenient. But two Differences were taken and agreed by the whole Court. 1. Between a Charge in the Soil of another, and a Diſcharge in his own Soil. 2. Between an (*a*) Intereſt or Profit to be taken or had in another's Soil, and an Eaſement in another's Soil; and therefore a Cuſtom, that every Inhabitant of a Town hath paid a *Modus Decimandi* to the Parſon in Diſcharge of their Tithes, is good; for they claim not a Charge, or Profit apprender in the Soil of another, but a Diſcharge in their own Land: So of a Cuſtom that every Inhabitant of ſuch a Town ſhall have a Way over ſuch Land, either to the Church or Market, *&c.* that is good, for it is but (*b*) an Eaſement, and no Profit; and a Way or Paſſage may well follow the Perſon, and no ſuch Inconvenience as in the Caſe at Bar. 8. It was reſolved, That Copyholders in Fee, or for Life, may by Cuſtom of the Manor have Common in the Demeans of the Lord of the Manor, but then they ought to alledge the (*c*) Cuſtom of the Manor to be, *quod quilibet tenens Cuſtomarius cujuſlibet antiqui meſuagii cuſtomar'*, *&c.* and not *quod quilibet inhabitans infra aliquod antiquum meſuagium cuſtomar'*, *&c.* For a Copyholder hath a cuſtomary Intereſt in the Houſe, *&c.* and therefore he may have a cuſtomary Common in the Lord's Waſts; and in ſuch Caſe he cannot preſcribe in the Name of the Lord, for the Lord cannot claim Common in his own Soil, and therefore of Neceſſity ſuch Cuſtom ought to be alledged. *Vide* 21 *E.* 3. 34. See the 4th Part of my Reports, *Foiſton*'s Caſe, 31, 32. Another (*d*) Difference was taken and agreed, between a Preſciption which always is alledged in the Perſon, and a Cuſtom, which always ought to be alledged in the Land: For every Preſcription ought to have by Common Intendment a lawful Beginning, but otherwiſe it is of a Cuſtom; for that ought to be reaſonable, *& ex certa cauſa rationabili* (as *Littleton* ſaith) *uſitata*, but need not be intended to have a lawful Beginning, as Cuſtom to have Land deviſable, or of the Nature of Gavelkind, or Borough Engliſh, *&c.* Theſe and the like Cuſtoms are reaſonable, but by Common Intendment they cannot have a lawful Beginning, by no Grant, or Act, or Agreem. but only by Parliam. See alſo for this Matter *Foiſton*'s Caſe. Alſo it was agreed, that the Cuſt. of a Manor that *Dom' pro tempore* ſhall grant Lands cuſtomary, is good, and Tenant at Will may do it: And ſo 20 *H.* 6. 8 *b.* by the Cuſtom of the Court of Common Pleas, the

(*a*) Hob. 86, 118. Cr. Jac. 152. Cr. Car. 419. Cr. El. 180, 363. 2 Bulſtr. 195.

(*b*) Co. Lit. 110. b. Cr. Jac. 152. Cr. El. 180, 363. Cr. Car. 419. Dyer 71. pl. 42. 15 E. 4. 29. b. Hob. 118. 1 Jones 256, 297.

(*c*) Doct. pl. 81. Hob. 86. 4 Co. 31. b. 32. a.

(*d*) 4 Co. 32. a. 8 Co. 64. a. Co. Lit. 113. b.

the Chief (*a*) Juſtice grants divers Offices for Life, and theſe Cuſtoms are good: But in ſuch Caſes, he who grants them hath an Intereſt in the Manor or Office, and their Grant is made good by the Cuſtom. And 19 *R.* 2. *Action ſur le Caſe* 52. A Beadle of the Hundred ſhall have three Flaggons of Beer of every Brewer who ſells within the Hundred, *cauſa qua ſupra*. But a Cuſtom, That an Inhabitant or Reſident, ſhall grant or take any Profit, is merely void. 9. It was reſolved, That if the Cuſtom had been alledged, That *quilibet pater familias infra aliquod antiquum Meſſuag. &c.* it would be alſo inſufficient for the Cauſes and Reaſons aforeſaid; and if he hath any Intereſt, he may be relieved as aforeſaid. *Vide* 7 *E.* 4. 26. *a.* 15 *E.* 4. 29. *b.* & 32. 18 *E.* 4. 3. *b.* 20 *E.* 4. 10. *b.* 18 *H.* 8. 1. *b.* 19 *H.* 8. reported by *Spilman*, that ſuch Cuſtom is not warranted by Law, and ſo was it adjudged in this Court, *Trin.* 33 *Eliz. Rot.* 422. See the Book of *Entries*, *Treſpaſs*, *Common* 6. *Vide* 9 *H.* 6. 62. *b.* 7 *E.* 6. *Dyer* 70. *Iſam's* Caſe. Note Reader, the Law in this general Caſe well reſolved, and no Book in the Law is adjudged againſt it; and hereby it appears how Pleaders may ſafely plead in theſe and the like Caſes; and obſerve well, That the Cuſtom in the Caſe at Bar was inſufficient and repugnant in itſelf; for it was alledged, that the Cuſtom of the Town of *S.* was, that every Inhabitant thereof had uſed, *&c.* to have Common within a Place in the Town of *H.* which was another Town. *Vide* 21 *Eliz. Dyer* 363. *pl.* 27.

(*a*) 4 Co. 23. b. Dyer 71. pl. 44. 20 H. 6. 8. b.

1 Rol. 106. 9 Co. 51. a.

1 Bulſtr. 183.

Dyer 70, 71.

Skin. 399.

[What Cuſtoms are good or not, ſee *Rep. Q. A.* 68. 161, 168. *&c.*]

CATES-

CATESBY's *Caſe.*

Mich. 4 Jacobi.

In Communi Banco.

Cr. Jac. 141, 166. Jenk Cent. 282. Yelv. 100. See Skin. 313, 314. po. 62. b.

GEorge *Catesby* brought a *Quare Impedit* of the Church of *Wiſhton* in the County of *Northampton*, againſt the Biſhop of *Peterborough*, and *Walter Baker*, Clerk, and the Plaintiff counted, That *Thomas Catesby*, his Father, was ſeiſed of the Manor of *Wiſhton*, *&c.* to which, *&c.* in Fee, and preſented *Francis Foſter*, his Clerk, to the ſaid Church, who was admitted, inſtituted and inducted. *Paſch.* 34 *Eliz.* *Thomas Catesby* levied a Fine of the ſaid Manor, to which, *&c.* to *Henry Yelverton*, Eſq; and *Thomas Haſilrigge*, and to the Heirs of the ſaid *Henry*, to the Uſe of himſelf for Life, and after his Deceaſe, to the Uſe of the Plaintiff for Life, and afterwards *Thomas* died; after whoſe Death the Church became void, by Deprivation of *Francis Foſter* canonically made, 15 *Januarii* 1604. and yet is void, and ſo it did appertain to him to preſent; and the Defendants did diſturb him. The Biſhop confeſſed the Seiſin of *Thomas*, and the Fine, and the Uſes thereof; and that the Church is now void by the ſaid Deprivation, as the Plaintiff hath counted; and farther pleaded, that at the Time of the ſaid Deprivation, (*a*) *ſcil.* 24 *Feb.* 1604. he gave Notice of the ſaid Deprivation to the ſaid *George Catesby*, then Patron, *&c.* and that the ſaid Church remained void *per ſex Menſes* after the ſaid Notice, wherefore the ſaid Biſhop, as Ordinary, after the ſaid ſix Months, *viz.* 12 *die Auguſti*, 1605. *per lapſum temporis*, did collate the ſaid *W. Baker*, the other Defendant, *&c.* as it was lawful for him to do. To which the Plaintiff ſaid, that it appeared by the Plea of the Biſhop, that he did collate (*b*) *infra tempus ſemeſtre proximum poſt diem notitiæ: Et nota* that, the other Defendant pleaded the like Plea; and the Plaintiff made the like Replication; and on the ſaid Replications, the Defendants did ſeverally demur in Law. And the only Point in this Caſe was, whether the ſix Months ſhould (*c*) be accounted according to the Computation of 28 Days to a Month; for then the ſix Months were paſt, and the Ordinary had well collated; or whether the Computat. ſhould be according to the Kalendar, and then the ſix Months accord. to ſuch Computat. were not

(a) Palm. 310, 312.

(b) 2 Inſt. 360. (c) Yelv. 100. Co. Lit. 135. Poſtea 62. b. 2 Inſt. 360, 674. Cr. Jac. 141, 166, 167. 1 Leon. 31. 4 Leon. 180. Poph. 104. Dyer 218. pl. 6. Moor 40. Dall. in Keilway 205. 2. Dall. in Alh. 6. Latch. 14, 16. Dall. 42.

not paſt. And this Plea began, *Trin.* 4 *Jacobi, Rot.* 1928. and upon Argument at Bar and Bench, it was adjudged for the Pl. and the principal Cauſes and Reaſons of their Judgment were theſe. 1. (*a*) *Tempus ſemeſtre*, being ſpoken in the Singular Number (as it appears by the Dictionaries) ſignifies *Half a Year, or ſix Months, ſcil. tales ſex menſes, qui conficiunt dimidium anni.* And there is a great Difference in our ordinary Speech, between the Singular Number, as a Twelve-Month, includes all the Year, according to the Kalendar, but twelve Months ſhall be reckoned according to twenty-eight Days to each Month. 2. (*b*) *Verba accipienda ſunt ſecundum ſubjectam materiam*, and becauſe this Computation of Months concerns thoſe of the Church, there is great Reaſon that the Computation ſhould be according to the Computation of the Church, which they beſt know. 3. It appears by the Stat. of *Weſt.* 2. *cap.* 5. that ſuch Computation ought to be made, *&c.* For, *ſi tempus ſemeſtre non tranſierit, &c. tunc adjudicentur damna ad valorum medietatis Eccleſiæ per unum annum*; ſo that the Statute intended to reckon by the Year, and not by Months. 4. It is commonly ſaid in our Books, that if a Year and a Half be paſt, Title is devolved to the King to preſent by Lapſe; whereby it appears, that the Computation ſhall be according to the Kalendar, and not according to twenty-eight Days to the Month, for that doth not amount to a Year and a Half. 5. When the Computation is doubtful, it is good to determine it for the Relief and Remedy of him who hath Right, and for the Advantage of Right, to give him the longeſt Time; to the End that he loſe not his Right: And theſe were the Reaſons that were given of this Judgment. For Authorities, a Reſolution of this Court *tempore E.* 2. in the (*c*) written Book of Caſes in his Time; in which Book, (which belongs to *Walmeſley* Juſt.) appears a Writ awarded out of this Court, in theſe Words. *Rex venerabili in Chriſto, W. eadem gratia* Lincoln. *Epiſcopo ſalut'. Cum Magiſter militiæ Templi in* Anglia *quand' Aſſiſ. ultimæ præſentationis quam per breve noſtr' arraniavit coram dilecto & fideli noſtro* I. of C. *Juſticiario noſtro, &c. verſus* G. *de* W. *de Eccleſia de* M. *vacante, & ad ſuam præſentation' ſpectant' ut dicebat, Advocationem illius Eccleſiæ diſrationavit in Curia noſtra per breve noſtr' de Judicio. Vobis obtinuerit demandare quod ad præſentationem ſuam idoneam perſonem admitteretis ad Eccleſiam ſupradict', vos ut accepimus lapſis & computatis ſingulis diebus a morte Rectoris Eccleſiæ illius uſque ad numer' octies viginti & octo dier' continue ſequentium qui ſex menſes facere videntur aſſerentes præd' Eccleſ. authoritate Conſilii, ratione lapſus hujuſmodi ſemeſtr' temporis ad vos ea vice legitime fuiſſe devolut', idoneam perſon' ad mandat' noſtr' præd' ad præſentat' præd' Magiſtri admittere diſtuliſtis ad eand', in ipſius Magiſtri præjudic', & exhæreditat' manifeſt' Vos igitur quia in vacationib' Eccleſiar', ſecund' legem & conſuetudinem*

(*a*) Cr. Jac. 141, 166. Yelv. 100. 1 Inſt. 135. b. Lutw. 1139. Comb. 419.

(*b*) 2 Inſt. 361. Hob. 179. Lit. Rep. 19. 3 Keb. 355.

(*c*) Cr. Jac. 167. Yelv. 100. 2 Inſt. 360. 2 Rol. 362, 363, 364.

ſuetudinem hactenus obtentam & uſitatam in regno noſtro hujuſmodi tempus computari debet, non a die mortis Rectoris, ſed a die ſcientiæ Patroni, uſque ad ſex menſes completos non juxta numerum ſingulorum dierum, ſed juxta numerum ſex menſium, qui menſes in Kalendario computantur, eundem magiſtrum præſentationem ſuam ad Eccleſiam illam indebite defraudare volentes, vobis mandamus firmitur injungentes, quod ad præſentationem prædictam idoneam perſonam admittere non differatis ad Eccleſiam ſupradictam. Teſte, &c. And altho' now the Law is taken, that the ſix Months ſhall be (a) accounted from the Death, and that in ſuch Caſe there needs no Notice. Yet, (begin it when it will) it appears there, by the Award of the Court, that the ſix Months ſhall be accounted according to the Kalendar, and not *ſecundum numerum ſingulorum dierum, &c.* Alſo *Marrow* in his Reading in the Time of *H.* 7. was of the ſame Opinion. And *Spelman*, Juſtice, reports a Caſe (which I have ſeen in the Book of *Yelverton* Juſt.) reſolved in the Time of *H.* 8. in theſe Words: A Matter in Law was put to two Juſtices in the Time of K. *H.* 8. to have their Opinion and Reſolution, between the Biſhop of *Lincoln* and one Dr. *White*, how the ſix Months ſhould be accounted in a *Quare Impedit*, whether according to four Weeks to a Month, or according to the Kalendar, *ſcil. Sept. Oct. &c.* and they by the Advice of their Companions ſaid, that the ſix Months ſhould be accounted according to the Kalendar, and not by the Weeks. And of ſuch Opinion was *Wray*, Chief Juſtice, which I my ſelf heard. And with this Reſolution agreed *Popham*, Chief Juſtice of *England*, *Flemming*, Chief Baron, and all the other Juſtices at *Serjeans-Inn* in *Fleet-ſtreet*. But notwithſtanding a Writ of (b) *Error* was brought on this Judgment in the King's-Bench, where the Judges for the Reaſons and Cauſes aforeſaid affirm'd the Judgment.

(a) Cart. 44. Cawley 13, 14. Lit. Rep. 19. 1 Leonard 31. Cr. Eliz. 835. Co. Lit. 135. b. Cr. Jac. 141, 166. Jenk. Cent. 282. 2 Inſt. 360, 674. Yelv. 100. 2 Rol. 521. 522, 363 364. Poph. 104.

Dr. & Stud. 116. b.

(b) Cr. Jac. 166, 167.

[For the Computation of Time, as Days, Months, *&c.* See *Bract.* 264, 344, 359. *Britton* 209. *Fleta lib.* 6. *c.* 11 Stat. *de Anno Biſſext.* 21 *H.* 3. *Dyer* 345. *Salk.* 624 to 627. N.B. *Pryns El.* 1. *p.* 1220, *&c.*]

* *Sir*

*Sir MOYLE FINCH's *Caſe.* * Carth. 148. Skin. 661.

Mich. 4 Jacobi 1.

In Communi Banco.

IN a Replevin between *Avery* and *Daniel Crat*, which began in *Communi Banco*, *Paſch.* 1 *Jacobi*, *Rot.* 1610. upon long and intricate Pleading, the Caſe was ſuch: *Katharine* Lady *Moyle* was ſeiſed of the Manor of *Beamſton* in the County of *Kent*, for the Term of her Life, the Rem'r to *Katharine* Lady *Finch* in Fee: And afterwards the Lady *Finch* took to Husband *Nicholas Seintleger*, *Hill.* 10 *El. Seintleger* and his ſaid Wife, and one *Anth. Deal*, levied a Fine of all the Demeans of the ſaid Manor, (by certain Quantity of Acres which included all the Demeans of the Manor to *T. Finch*, and his Heirs, who granted and rendred the Demeans of the ſaid Manor to the ſaid *Deal* for fifty Years, from the Feaſt of St. *Michael* then laſt paſt, rendring 5 *l.* Rent, and granted the Reverſion to *Seintleger*, and the Lady *Finch*, and to the Heirs of the Lady *Finch*) which Fine was levied according to certain Indentures before made between the Parties, whereby, among other Covenants, it was agreed, That the ſaid *Nicholas Seintleger*, and the Lady *Finch*, &c. ſhould have free Ingreſs and Egreſs, in and out of the ſaid Manor, for them, their Steward, Servants and Tenants, to hold the Court Baron, in and upon the ſaid Demeans: And it was averr'd, that the ſaid Demeans, together with the Services, were *a tempore levationis finis, durante tota vita* of the ſaid *Katharine* Lady *Finch*, at *Eaſtwell*, *& alibi* in the County of *Kent*, *communiter*, *cognita*, *habita*, *reputata & nuncupata per nomen Manerii de Beamſton.* And afterwards by Indenture tripartite, *Anno* 16 *Eliz.* between Sir *Thomas Heneage* and *Anne* his Wife, of the firſt Part, *Seintleger*, and his ſaid Wife of the ſecond Part, and Sir *M. Finch* of the third Part, it was covenanted and agreed, that *Seintleger* and the ſaid *Katharine* his Wife, ſhould levy a Fine of the Manors

Co. Ent. 591. nu. 10. 1 Siderf. 190.

Where a Grant, &c. of Demeſnes deſtroys the Manor, &c.

of

of *Eaſtwell*, *Potbury*, *Setons*, *Willington*, *Ucking* and *Ulley*, in the County of *Kent*, and of all other Lands, Tenements and Hereditam. of the ſaid *Katharine* in the ſaid County of *K.* except the Manor of *Beamſton* in the ſaid County, to the Uſe of *Kath.* Lady F. for Life, and afterwards to the Uſe of the ſaid Sir *M. Finch* in Tail, with diversRem'rs over, which Fine was levied accordingly, in which as many Acres were contained, as were ſufficient to paſs the ſaid Demeans. *Ant. Deal* being poſſeſſed of the ſaid Intereſt of the Term as aforeſaid, made his Will in Writing, and thereof made *Moyle Deal* his Son his Executor, and *Anno* 19 *Eliz.* died, the ſaid *M.* then being of the Age of 3 Years; and immediately after his Death, Adminiſtration of the Goods of the ſaid *Anth. Ratione minoris ætatis* of the ſaid *M. Deal*, was committed to one *Robert Thomas*, and afterwards, *Anno* 23 *Eliz. Seintleger* and *Kath.* his Wife, levied a Fine of the Manor of *Beamſton*, and of divers Acres ſufficient to paſs all the Demeans, to the Uſe of *Scintleger*, and *Kath.* his Wife, and to the Heirs of the ſaid *Kath.* until the ſaid *Seintleger*, with the Aſſent of the ſaid *Kath.* his Wife in Writing, ſigned and ſealed by him, ſhould declare to what other Uſes, and then to the ſame Uſes. *Rob. Tho.* the Adminiſtrator, demiſed the Tenem. aforeſaid, to *Pa. Lofty* for 10 Years, and afterwards the ſaid *K.* Lady *Moyle*, *Anno* 26 *Eliz.* died; *Pa. L.* entered, *Anno* 27 *Eliz. Seintleger*, with the Conſent of his ſaid Wife, accord. to the ſaid Limitat. declared the Uſes of the Tenem. aforeſaid, to be to *Hancock* and *Sturges*, and their Heirs, who ejected *Pa. L.* and did thereof enfeoff *Glanvile* and *Sturges*, and their Heirs, to the Uſe of *K.* Lady *Finch* for her Life, and after to the Uſe of *H. Finch*, her younger Son, and *Urſula* his Wife, and the Heirs of their two Bodies. *Pa. Lofty* the Leſſee of the ſaid Adminiſtrator, re-enter'd, *K.* Lady *Finch* died, the Rent reſerved by the ſaid Fine, *de Anno* 10. was arrear for 13 Years ended 44 *Eliz.* and for the ſaid Arrearages, the Def. as Bailiff to *H. Finch*, diſtrein'd, and the Pl. Leſſee of Sir *M. F.* brought a Replevin. And in this Caſe 4 Points were moved, and argued as well at the Bar, as this Term, by *Daniel*, *Warberton*, *Walmſley* and *Coke* Ch. Juſt. at the Bench. The firſt Point was, Whether by the Fine of 10 *Eliz.* in which was ſuch a Grant and Render, as is aforeſaid, the Manor was deſtroyed for ever, and that was called the deſtroying Point. 2. Admitting the Manor was for ever deſtroyed, whether the Except. in the ſaid Indenture of 16 *El.* by the Name of the Manor of *Beamſton*, be ſufficient to except, and ſave the Manor out of the Fine of 16 *Eliz.* levied to the Uſe of the ſaid Indentures; and that was called the ſaving Point. 3. Whether the Leaſe made by the Adminiſtrat. *ratione minoris ætatis*, for 10 Years, be good or not, and that was called the making Point. The fourth and laſt Point was, Whether there needed any Attornm. or that the Regreſs of *Pa. Lofty* the Leſſee for Part of the Term, *ſcil.* for 10 Years, ſhould amount to an Attornment; and that was called the perfecting Point.

Point. As to the firſt, It was reſolved *per tot' Cur'*, that altho' at one Inſtant the Demeans were granted and render'd to *S.* and *K.* Lady *F.* and to the Heirs of *K.* ſo that there was not any Tranſmutat. of any Poſſeſſ. yet the Demeans being once by the Act of the Party abſolutely ſevered in Fee-ſimple from the Services of the Manor, the Manor is deſtroyed for ever. And a Differ. was taken between the Act of the Parties and the Act of the Law: For if there be 2 Coparceners of a Manor, and on a (*a*) Partit. the Demeans are allotted to one, and the Services to the other, in that Caſe, altho' there is an abſolute Severance, yet if one dies without Iſſue, and the Demeans deſcend to her who hath the Services, the Manor is revived again; becauſe on the Partit. they were in by Act of Law, and the Demeans and Services were united again by Act of Law. And ſo was the clear Opin. of *Thorpe* and the other Juſt. in the Time of *E.* 3. as *Thirning*, Ch. Juſt. of *C. B.* reports in (*b*) 12 *H.* 4. 25. *b.* And the Caſe intended was the Caſe of *Hugh Audley* E. of *Glouceſter*, which began 17 *E.* 3. 72. *a. b.* but there was not reſolved. *Vide* 18 *H.* 6. 26. *a. acc.* So if on a Partition an Advowſon appendant is allotted to one, and the Manor to the other, and afterwards one dies without Iſſue, whereby the Law unites them again, in that Caſe the Advowſ. which was once ſevered, is now appendant again. Alſo it is agreed in 26 *H.* 8. 4. *a.* that if a (*c*) Partit. be made of a Manor betwixt 2 Coparceners, and on the Partit. each hath Parcel of the Demeans, and Parcel of the Services, becauſe each of them is in by Act of Law, each of them has a Manor. But if a Man has a Manor, and he grants Part of the Demeans, and Part of the Services to another, he ſhall not have a Manor, for a Man by his own Act cannot create a Manor at this Day; and ſo it appears, that (*d*) *fortior & potentior eſt diſpoſitio legis quam homin'*. As to the ſecond Point, it was objected, That foraſmuch as in *Anno* 10 *El.* the Manor was deſtroyed, it could not be excepted by the Name of the Manor in *Anno* 16 *El.* and that for 3 Reaſons. 1. The Time of 5 or 6 Years is not a (*e*) ſuffic. Time to gain a Reputat. but it was urged it ought to be *a tempore cujus, &c.* As when Land paſſeth as appertain. to a Houſe, it ought to be averred to be uſually occupied with the Houſe *a tempore cujus, &c.* as appears in *Hill* and *Gr.* Caſe, *Plow. Com.* 170. *b.* 2. The Averm. that from the Time of the Levying of the Fine, during the Life of the Lady *F.* it was *known* and *reputed* for a Manor was impoſſib. for it could not be reputed and known immediat. after the Fine levied, but Time ought to give a Name and Reputat. *& eo optius*, becauſe the ſaid Fine was levied of the Reverſion; for the Lady *M.* had the whole for the Term of her Life, and ſuch Reputation and Knowledge could not be of a Rev'n expectant on an Eſtate for Life, as it might be of a Poſſeſſ. 3. Altho' the (*f*) Reputat. of a vulgar Name will ſerve in Grants or Conveyances, yet it will not ſerve in judicial Proceed. of the Law, which are framed by learned Men; and theref. by the ſaid Fine of 23 *El.* which is a judicial Proceed. of Law, that ſhall not paſs by the Name of a (*g*) Manor, which in Truth and in Law is not a Manor. But it was

(*a*) 18 H. 6. 26. a. 2 Rol. 122.

(*b*) Br. Extinguiſhment 13. Fitz. Extinguiſhment 5.

(*c*) 2 Rol. 122. Davis 61. b. Cr. El. 39. Br. Manor 1.

(*d*) Poſtea 69. b. 8 Co. 152. a. 2 Rol. 315. Hutton 18. 2 Sid. 59.

10 Co. 67. b. Co. Lit. 338. a.

(*e*) 2 Rol. Rep. 347. Cr. Car. 308.

Skin. 661.

(*f*) Yelv. 191.

(*g*) 2 Rol. Rep. 67. Cr. El. 514. 707, 708 Palm. 378.

Reſolved, That the Exception as this Caſe is, is inſufficient to except the Demeans and Services by the Name of the Manor, notwithſtanding the Manor was deſtroyed. It was the (*a*) good and true Intent of the Parties: For the Lady *Finch*, and the others who were Parties to the Fine and Indentures of 10 *El.* did not think of any diſmembring or deſtroying of the Manor: For in the ſame Indenture Proviſion was made to have ingreſs and egreſs to hold the Courts of the Manor. Alſo the Parties to the Indenture of 16 *El.* thought that it was a Manor, (of whom Sir *Moyle F.* was one) for by the expreſs Words it is excepted by the Name of a Manor, and in the Fine of 16 *El.* divers Manors are named, but no Mention of the Manor of *Beamſton*, for that was intended to be excepted; but it is by the expreſs Name of the Manor of *Beamſton* mentioned in the Fine of 23 *El.* ſo that the true Intention of all the Parties appears, that it ſhould be excluded out of the Fine of 16. and included in the Fine of 23. And it is well ſaid in *Hill* and *Grange*'s Caſe, *Plow. Com.* 170. *b.* It is the (*b*) Office of Judges to take and expound the Words which the common People uſe to expreſs their Meaning, according to their Intents, and not according to the very Definition. And *Bracton* ſaith, *Nihil tam conveniens eſt naturali æquitati, quam voluntat' Dom' volentis rem ſuam in alium transferre ratam habere.* And altho' *generalis regula generaliter* (*c*) *eſt intelligenda*, yet the ſaid (*d*) Rules are principally to be obſerved in Wills, and alſo in Caſes of Uſes which were but (*e*) Truſts and Confidences between Man and Man. And to that Purpoſe *Shelley*'s Caſe in the firſt Part of my Reports, and (*f*) *Carter* and *Ringſtead*'s Caſe there vouched were cited and applied to that Purpoſe. 2. Foraſmuch as the true Intent and Meaning of the Parties appears, why ſhould not we as Judges adjudge it good? It has been objected, That the Thing excepted is not well named: For in Law *Beamſton* is not a Manor, for it was deſtroyed by the Fine of 10 *El.* and for that Deſtruction the Exception of it by the Name of a Manor ſhall be void. In the Argument of which Point it was ſaid, That the Law doth not favour Advantages of Miſnoſmer more than the ſtrict Rule of Law requires, neither in Writs which may be abated, and new purchaſed, nor (eſpecially) in Grants or other Conveyances, in which Caſe the Party has not Remedy to have new. And therefore, if two be joined in one Writ, the one ſhall not plead (*g*) Miſnoſmer of the other, as it is agreed in 14 *H.* 6. 3. *b.* In an Action againſt (*h*) Husband and Wife, altho' they are one Perſon in Law, yet the one ſhall not plead Miſnoſmer of the other. 33 *E.* 3. *Maintenance de bre'* 63. In Treſpaſs in *Holderneſs apud W.* the Def. pleaded (in Reſpect of ſome Miſnoſmer) that there was no ſuch Town, Hamblet, or Place known, *&c.* The Pl. replied there was, without ſhewing in certain, either that it was a Town, Hamlet, or Place known, and all

(*a*) Yelv. 191. Cr. El. 524, 707, 708. Palm. 376. 2 Rol. Rep. 67.

(*b*) Wing. Max. 23.

(*c*) 1 Co. 100. a. Co. Lit. 36. a.
(*d*) Co. Lit. 313. a. Moor 138. 1 Co. 95. b. Cr. El. 208.
(*e*) 1 Co. 121. b. 127. a. 2 Co. 58. b. Bacon's Lect. 5, 6, 7, 8, &c.
(*f*) Cr. El. 208. 2 Leon. 47. 8 Co. 118. b. 1 And. 245. Owen 84.

(*g*) Br. Miſnoſmer 69. 29 Aſſ. 70. 21 H. 6. 27. b. 21 E. 4. 71. b. 22 E. 4. 44, 45. Lutw. 36.
(*h*) Doct. pl. 244. 33 H. 6. 22. b. Fitz. miſnoſm. 4.

all this in Deteſtation of nice and dilatory Exceptions. And it was alſo obſerved, That 'till this Generation of late Times it was never read in any of our Books, that any Body Politick or Corporate, endeavour'd or attempted, by any Suit, to avoid any of their Leaſes, Grants, Conveyances, or other of their own Deeds, for the Miſnoſmer of their true Name of Corporation; but after that a Window was opened to give them Light to avoid their own Grants for the Miſnoſmer of themſelves, what Suits and Troubles thence enſued, every Body knows: But it was ſaid, for every curious or nice Miſnoſmer, God forbid, that their Leaſes, or Grants, *&c.* ſhould be defeated; for there will be a found Difference between Writs and Grants, and in all Caſes this is true, *quod* (*b*) *apices juris non ſunt jura.* But it was reſolved, that as this Caſe is, there was a ſufficient Name in Law to make the Exception good. For *nomen dicitur a noſcendo, quia notitiam facit*; and in this Caſe it is averred, *quod cognitum fuit per nomen, &c.* So that it is not only *notum*, but *cognitum*, which is more; and by true Etymology and Senſe, *Cognom' majur' eſt ex ſanguine tractum, hoc intrinſec' eſt, agnomen extrinſec' ab eventu*; and yet the Law doth not regard this preciſe Propriety of Words. For if a Grant be made to a Baſtard by the Sirname of him who (as is ſuppoſed) begot him, it is good, if he be known by ſuch Name. So if a Remainder be limited *Rich. filio Rich. Marwood*, it is good, altho' he be a (*c*) Baſtard, if in vulgar Reputation and Knowledge he be known by ſuch Name, as the Book is in 39 *E.* 3. 11. *a.* and yet in Truth and in Law he is *nullius fil'*, for of a Baſtard it is ſaid,

Cui pater eſt populus, pater eſt ſibi nullus, & omnis;
Cui pater eſt populus, non habet ille patrem.

In 41 *E.* 3. 19. *a.* there is a notable Caſe. (*d*) *Richard Thompſon* had Iſſue by one *Johan*, before Marriage, *Agnes*, and afterwards married *Johan*, and made a Feoffment in Fee, and took back an Eſtate to himſelf for Life, *remanere inde Agnetæ fil' præd' Richardi & Johann'*, and agreed that it is a good Remainder, without any Averm. that ſhe was known to be their Daughter, as it was in the ſaid Caſe of 39 (*e*) *E.* 3. but there it was objected, that a Baſtard is not their Daughter in Law, and therefore the Rem'r void: But there *Finchd.* gave the Rule, and ſaid, it is found that the Daughter was born before the Marriage, ſo that by their Marriage after, ſhe was their Daughter. In which it is to be obſerved, that altho' by the Com. Law ſhe was not their Daughter, yet becauſe ſhe had Colour by the Eccleſiaſt. Law, which ſaith, (*f*) *Quod ſubſequens matrimonium tollit peccatum præcedens*, this Colour is ſufficient, in Caſe of a Conveyance, to make the Remainder good. And ſo note a Difference between a Deſcent and a Purchaſe; and therewith expreſly agreeth 35 *Aſſ.* 13. In 27 *E.* 3. 85. *a. b. W.* Abbot of *Worceſt.* by the (*g*) Name of *W.* Abbot of *W.* by his Deed, with the Conſent of his Convent, granted to the Burgeſſes of *W.* Common of Paſture

(*a*) 10 Co. 132. b.

(*b*) Co. Lit. 283. a. b. 304. b. Noy 30. 10 Co. 126. a. Skin. 188.

(*c*) 41 E. 3. 19. a. 1 Rol. 359. Co. Lit. 3. b. Br. grant. 17. Hob. 32. Swinb. 52, 310. Cr. El. 509, 510. 2 Rol. 43, 44. Moor 430. Poſt. 67. a. Nov. 35.

(*d*) Swinb. 310. 2 Rol. 43.

(*e*) 39 E. 3. 11. a. Antea.

(*f*) Swinb. 310.

(*g*) Hob. 32. Co. Lit. 3. a. 9 Co. 48. a. 11 Co. 21. a.

in cert. Lands, and altho' his Chriſt. Name was miſtaken, yet foraſmuch as there was a ſuffic. (*a*) Certainty to aſcertain the Name of the Grantor, *ſc.* Abbot of *W.* for that Reaſon the Grant was adjudg. good; for in this Leaſe it is true, (*b*) *Nihil facit error nominis cum de corp. conſtat*, but otherwiſe it is of a Writ; for there if the Abbot be named by a falſe Chriſtian Name, the Writ (*c*) ſhall abate, becauſe he may purch. a new Writ, and therewith agree 18*E.*4.8.*b.* 15*H.*7. 1. *b.* & 22*H.*6, *&c:* As to the ſecond Object. which has been made, that in this Caſe there was not a ſuffic. Time to make the Reputat. of a Manor, and that Time out of Mind is requiſite in this Caſe; it was anſwered and reſolved, that there is a Difference between a Title to a Thing to be created and claimed by Preſcript. of Time, and the Name of a Thing in *eſſe* to make it paſs in a Conveyance, for no Man can claim Rent, Common, or other Profit of Inherit. by Uſage, but he ought to claim it by Preſcript. *a temp. cujus memor'*, *&c.* for ſuch Time is requiſite by the Law; but to make a Thing in *eſſe* paſs by a Name, there needs not Time whereof, *&c.* but ſuch conven. Time that it may be known by ſuch Name. And if it be asked to what Places ought ſuch Knowledge to extend? *Anſw.* To all *England.* Or to all the County in which the Land lies. Or if to what Place? To that it was anſwered and reſolved, that it extends only in Law *ad vicinetum* of the Town where the Land lies, for there the Knowledge ought to be, where it ought to be tried, and that is *in vicineto* of the Place where the Land lies. For the Name of a Manor or Land, or other local Thing is to be tried where it lies, becauſe it is local; as the Name of the Perſon is to be tried where the Writ is brought, becauſe it is tranſitory; and therefore it was agreed, that the Houſe in the *Strand* now of late called *Exeter* Houſe, and the Houſe in *Fleet-ſtreet*, now called *Dorſet* Houſe, have within theſe three Years gained ſuffic. Names amongſt all their Neighb. to know it by ſuch Name, and thereby to diſtinguiſh the ſame Houſe from other Houſes. In 41 *E.* 3. *Maintenance de bre'* 49, the Caſe was, that in Truth there was a Manor call'd *Aſplegiſe*, and it was alſo known by the Name of *Aſple* only, and there in a *Præcipe* brought of the Manor by the Name of the Manor of *Aſple* without Addit. the Tenant after the View, demanded Judgm. of the Writ, becauſe the Manor put in View was the Manor of *Aſplegiſe*; to which the Demandant ſaid, that the Manor put in View is known by the Name of *Aſple*, and thereupon Iſſue was taken. In which it was obſerved; 1. That the Plea for the Maintenance of the Writ was, That the Manor is known in the Preſent Tenſe, which is intended, the Day of the Writ purchaſed without any Preſcription. 2. That altho' a Manor cannot begin within Time of Memory, yet a Manor may acquire a Name to be demanded in a *Præcipe* within convenient Time. And, 3. That ſuch Name acquired by Knowledge of the Country is ſuffic. without the true and proper Name. *Vide* 8*H.*6 32. *b.* for in that Senſe it is true, *de nom' propr' non eſt*

(*a*) Co. Lit. 3. a.

(*b*) 13 Co. 21. a.

(*c*) 5 Co. 121. a. 9 Co. 48. a. 10 Co. 126. a. 11 Co. 21. b.

curandum, dum in ſubſtantia non erretur, quia (a) nomina mutabil' ſunt, res autem immobiles, In (b) 45 *E.* 3. 6. *a.* in a *Quare Impedit* of the Church of *B.* the Def. pleaded, that there was no ſuch Church in the County where the Writ is brought; afterwards Iſſue was joined that there was a Church in the ſame County known by the Name of *B.* for *Finchd.* who gave the Rule there ſaid, if any Ch. in the County be known by ſuch Name, it is ſuffic. to maintain the Writ, which agreeth with the Book of (c) 41 *E.* 3. In 21 *H.* 6. 4. *a. b. In Treſp. verſus Johann' Arderne Abbatem S. Johannis Baptiſt' de Colcheſt.* The Abbot pleaded, that he was founded by the Name of the Abbot of the Church and Monaſt. of St. *John Bapt. &c.* The Pl. ſaid, that this Abbot was known by the one Name and the other, and ſo to Iſſue; in which it was obſerved, that it is ſuffic. to ſay, that this Abbot (without ſaying and his Predeceſſ.) was known by ſuch Name. *Ergo,* there needs not Time whereof, *&c.* 47 *E.* 3. 5. *a.* there it appears, if a Chapel be in the Time of *H.* 3. and when it became void K. *H.* 3. preſented to it as to a Ch. and ſo did *E.* 1. and *E.* 2. and afterwards *E.* 3. being diſturbed, brought a *Quare Imp.* as to a Ch. and there *Cavendiſh* Ch. Juſt. ſaid, That after the ſaid Preſentments had been received to the ſame Chapel as to a Church, I ſay it is not now a Chapel but a Ch. By which it appears, that the ſaid Rule is true, that *nom' ſunt mutabil' res autem immobiles.* And therewith agreeth 11 *H.* 6. 18. *b.* where the Caſe was, that a Parſon had an Annuity by Preſcript. of a Vicar, and afterwards *E.* 3. when the Vicar died, preſented one *I.* as Parſon, and ſo were all his Succeſſors preſented as Parſons, and the Parſon made a ſpecial Preſcript. *ſc.* That *A.* was Vicar, and that he and all his Predeceſſors, Vicars, *&c.* And that after the Death of *A.* the King preſented as to a Parſonage, and ſo that he and his Succeſſors Parſons had payed, *&c.* and charged the Defendant as Parſon in a Writ of Annuity, and there it appears that by the ſaid Preſentment the Name of Vicarage was changed into a Parſonage. As to the ſecond Objection, That the Averment was impoſſible and repugnant, that from the Time of the Levying of the Fine it was known, reputed, *&c.* To that it was anſwered and reſolved, That there was not any Impoſſibility or Repugnancy, for in the Averment there are four Words, *cognit. habit. reputat. & nuncupat.* and they were true before 10 *El.* for then, and time whereof, *&c.* it was *revera* a Manor, ſo that the Knowl. Reputat. or Appellat. did not begin from the Fine in 10 *Eliz.* but this Averment continues that which was in Truth before the Fine a Manor, from the Time of the Fine, to be known, reputed and called a Manor. And always the Reputat. is better, when it hath a Ground and is founded on Truth. And therefore if a Man marries with a Woman (d) precontracted, and has Iſſue by her, this Iſſue in Law and Truth bears the Sirname of his Father. But if after the Husband and Wife be divorced for the Precontract,

(a) Stile 391.
(b) Br. Quar. Imp. 33.
(c) 41 E. 3. Maintenance de brief 49. Antea 65. b.
(d) 2 Inſt. 684.

now the Iſſue has loſt its Sirname; for, as it has been ſaid, *Cognomen majorum eſt ex ſanguine tractum*, and now the Iſſue is Baſtard *& nullius filius*; and yet becauſe he once had a lawful Sirname, it is a good Ground of Reputation ſubſequent. So if I have a Park by the King's Licence and Grant, and it is commonly known by the Name of a Park, and afterwards I ſurrender my Patent to the King, whereby in Law it is no Park, yet having once the Name of a Park in Truth, it is a good Ground for Reputation, and Continuance of the Name of a Park after; and the Avowant might have preſcribed as this Caſe is, that the ſaid Deméans and Services had *a tempore cujus, &c.* been known by the Name of the Manor; for before the Fine it was known in Truth, and after the Fine in Reputation; ſo that it is not a Creation of a new Name, but a Continuance of the old Name. *Vide 7 Eliz. Dyer* 233. (*a*) The King ſeiſed of a Manor, whereof all the Demeans are leaſed for Life by the Leaſe of an Abbot, rendering Rent, in that Caſe the King has not a Manor in Poſſeſſion, nor can hold Court; and yet if the King leaſes the Manor to another for Years, as a Manor in Poſſeſſion, the Leſſee ſhall have the (*b*) Reverſion and the Rent: For altho' it is not a Manor in *eſſe*, yet it is well known that it was intended to be demiſed. And to that Purpoſe is the Caſe in 20 *El. Dyer* 362. where the Caſe was, That (*c*) *Edw* 6. was ſeiſed of the Manor of *Clevery*, of which a Wood containing 300 Acres, was Parcel, *Ed.* 6. by his Letters Patents granted the ſaid Wood in Fee, and afterwards the ſaid Wood eſcheated to him for Treaſon. Afterwards the Queen granted the ſaid Wood in Fee, the Grantee regranted it to Queen *Eliz.* who by her Letters Patents granted the ſaid Manor, *& omnes boſcos modo vel antehac cognit. vel reputat. ut pars membrum, vel parcell' ejuſdem manerii* to the Earl of *Leiceſter* in Fee: And altho' *in rei veritate*, before the Severance made of the Wood by King *E.* 6. it was always Parcel of the Manor, yet in good Propriety of Speech it was then, *cognit. ut pars & membrum dicti manerii*; for altho' *ut* is a Word of Similitude, and not of Identity, yet Truth is the moſt ſure Foundation of Knowledge and Reputation, and therefore it was there adjudged that the Wood did paſs. As to the third Objection, that a Manor in (*d*) Reputat. and not in Truth, ſhall not paſs by Fine, which is a legal Proceeding drawn by Men learned in the Law, and therefore vulgar Reputation will not ſerve in it: To that it was anſwered and reſolved, that the Rule which *Stonor* gave in 9 *Edw.* 3. 38. in the like Caſe, was true, That the Proceſs of this Court ſhould not be maintained by Uſage in *pais*; but there is a Difference (*e*) *inter Brevia adverſaria, ſc.* brought as an Adverſary to recover the Land, *&c. & brevia amicabilia, ſc.* brought by Conſent and Agreement amongſt Friends; for it is true in *brevibus*

(*a*) Dyer 233. pl. 10, 11.

(*b*) Ant. 55. a. b. 56. a. Co. Lit. 324. b. 4 Co. 26. a. 5 Co. 124. b. 8 Co. 56. a. 10 Co. 107. a. b. Cr. Car. 400. Dyer 125. pl. 45. 233. pl. 10, 11. Plow. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feoffment 22. Fitz. Grant 97. 35 H. 8. Br. Grant 50. 2 Rol. Rep. 180, 277, 278. Lane 3, 7. Lit. Rep. 18. B. N. C. 267. Hob. 224.

(*c*) Dyer 362. pl. 17. Cr. Car. 169. 2 Rol. 186. Moor 190, 191. 1 Leon 15.

(*d*) 2 Rol. Rep. 67. 1 Sid. 190. Cr. El. 524, 707, 708. Noy 7. Moor 190.

(*e*) 5 Co. 38. b. 45. b. 2 Sid. 68.

brevibus adverſariis, the Proceſs of this Court ſhall not follow the Cuſtom or Reputation of the Country, as in 6 *E.* 3. 11. The Demandant in a Writ of Entry demanded the Manor of *C.* the Tenant ſaid that the Tenements put in View, are a Houſe and a Carve of Land, called, *&c.* and not a Manor, *&c.* By which it appears, that if it were not in Truth a Manor, altho' it were in Appellation, the Writ ſhall abate: But it was adjudged in Sir *John Bruyn*'s Caſe, in the Beginning of the Reign of Queen *Eliz.* That in a Common Recovery, which is had by Agreement and Conſent of the Parties, of Acres of Land, they ſhall be accounted according to the cuſtomary and uſual Meaſure of the Country, and not according to the Stat. *de terris menſurand'*, made *Anno* 33 *E.* 1. So it is agreed in 47 *E.* 3. 18. *a.* That if a Man bargains and ſells ſo many Acres of Wood, it ſhall be (*a*) meaſured according to the Uſage of the County, *ſc.* according to 20 Foot to the Rod, and not according to the ſaid Act, for (*b*) *conſuetudo loci eſt obſervanda.* And it appears by the Book in 39 *E.* 3. 11. *a.* that a Remainder limited to a (*c*) Baſtard, by the Name of Son of *R. Marwood*, whereas in Truth he was *nullius fil'*, was good, becauſe he was known and reputed as his Son. And *M.* 22 *&* 23 *El.* in the King's Bench, *in Eject' firmæ* between *Vines* and (*d*) *Durham*, a Leaſe was pleaded of a Manor, *&c.* whereof the Tenements in which, *&c.* were Parcel, and Iſſue was joined, *quod non demiſit manerium*; and on that Iſſue the Jurors gave a Special Verdict, *ſc.* that there were not any Freeholders, but divers Copyholders of the ſaid Manor, and that it was known by the Name of a Manor, and after good Conſideration, it was adjudged by Sir *Chr. Wray*, Ch. Juſt. *&* *totam Curiam*, that altho' it was not a (*e*) Manor in Law for want of Freeholders; and altho' it was in Pleading, which is always drawn by learned Men, and that it was in an Action adverſary, and not amicable; yet that foraſmuch as an Iſſue is triable by Lay-men, and that in Truth the Tenements, in which did paſs by the Leaſe, and therefore not like to a Writ, it was adjudged for him who pleaded the Demiſe of the Manor. *Hill.* 25 *Eliz.* in this Court *Carter*'s Caſe was, that where it is required by the Stat. of 1 *H.* 5. *c.* 5. that in every Writ, original, *&c.* in which an Exigent ſhall be awarded, that Additions ſhall be given to the Defendants of their Eſtates and Degrees, or of their Trade, *&c.* and the Caſe was, that one was (*f*) Yeoman by his Birth, and yet commonly call'd Gent. in that Caſe, in ſuch Writ brought againſt him, he may have the Addition of Gent. altho' in Truth he is not a Gent. but only by vulgar Reputation; but foraſmuch as the Intent of the Act is to have ſuch a Name, by which he may be known, it is ſufficient to ſatisfy the Act of Parliament. Another Reaſon was added, that in this Caſe there was, at the Time of the Making of the Indentures in *Anno* 16 *Eliz.* a Manor in Truth, *ſcil.* in the Lady *Moyle* for the Term of her Life, which was ſufficient to ſupport the Name

(*a*) Cr. El. 267. Poph. 55.
(*b*) 10 Co. 140. a. 4 Co. 28. b. 7 Co. 5. a.
(*c*) 1 Rol. 359. 41 E. 3. 19. a. Co. Lit. 3. b. Br. Grant 27.
Hob. 32. Antea 65. a. Swinb. 310. Cr. El. 509, 510. Moor 430. Noy 35. 1 Rol. 43, 44.
(*d*) 2 Rol. 45, 712.
(*e*) Doct. pl. 180.
(*f*) 2 Inſt. 668.

of the Manor, and to make the Demeans and Services pass by the Name of it: Wherefore it was concluded, that by the Name of the Manor of *Beamston*, the said Demeans and Services, late Parcel of the Manor, were excepted by the Indenture *de anno* 16 *El.* As to the third Point it was resolved, that the Lease made by the Administrator *ratione minoris ætatis* was good; altho' it was not necessary that the Lease should be made; for the Lady *Moyle* was then alive; so that that Lease enured as an *Interesse termini* to begin after the Death of the Lady *M.* But this Differ. was taken, that when a Man makes an *(a)* Ex'or of such tender Years, (as in this Case of three Years) that he cannot execute the Will, then if the Administrat. *(b)* *ratione minoris ætatis* be granted specially, as it was *M.* 41 & 42 *El.* in *Prince*'s Case, *Administr' omnium bonorum, ad opus, commodum, & utilitatem executor' durante minore ætate, & non alit', nec alio modo committimus, &c.* there such special Administrator cannot make such Lease, as in the Case at Bar: But when the Administration is committed generally *ratione minoris ætatis*, without any Restraint or Limitation, there such Lease made, as in the Case at Bar is good. For by the Ecclesiastical Law, *Minor* 17 *annis non admittitur fore executorem*; and such general Administrator, *ratione minoris ætatis*, shall not only have an Action to recover Debts and Duties for the Interest of the Actions is in him, and also shall be liable to all Actions; (for during that Time the Testator died *quasi intestatus*) but also he may make Leases or Demises, and they shall be good, wherefore the Lease in the Case at Bar was good; and *eo potius* in the Case at Bar, because no Entry is pleaded by the Executor, and he who pleads the Demise is a Stranger to it, and therefore he cannot know what Rent is reserved; and therefore when he pleads *demisit*, if it was for any Cause void, he might take Issue *quod non demisit*, or shew the Special Matter, but it shall be intended *prima facie*, that the Lease is good, and without Question it is good till the Ex'or attains to 17 Years, and also till he enters, as some said. As to the last Point, 1. it was resolved, That forasmuch as *Paul Lofty* had but an *Interesse termini* during the Life of the Lady *Moyle*, therefore as to the said Interest upon the Fine *de anno* 23 *Eliz.* (which was levied in the Life of the Lady *Moyle*) no Attornment could be. 2. When after the Death of the Lady *Moyle* the Lessee entered, he made the Reversion in *Seintleger*, and the Lady *Catharine* his Wife, and when they made Declaration of Uses to *Hancock* and *Sudger*, those Uses arose out of the Fine, to which Fine no Attornment could be made by him who had a future Interest, as is aforesaid: For when Attornment is not requisite to a Fine, which is the Root, no Attornment is requisite to the Declaration of the Uses, which are but the Branches.

(a) 2 Inst. 397.

(b) 5 Co. 29. b. Cr. El. 678, 679. 718, 719. 2 And. 132. Raym. 484. Swinb. 288. 3 Leon. 278. 8 Co. 135. b. 2 Inst. 398. March 138. Owen 35. Dall. 85.

Branches. 3. It was reſolved, that if a Man be ſeiſed of a Manor, Part of which is in Leaſe for Life, and Part in Leaſe for Years, and he levies a Fine to *A.* to the Uſe of *B.* in Tail, with divers Rem'rs over, in that Caſe *B.* ſhall avow for the Rent, or have an Action of (*a*) Waſt without any (*b*) Attornm. for when a Rev'n is ſettled in any one in Judgm. of Law, and he has no poſſible Means to compel the Ten't to attorn, and no Lacheſs or Default is in him, there he ſhall avow, and ſhall have an Action of Waſt without Attornm. for the Rule is, *quod remedio deſtituitur ipſa re valet ſi culpa abſit*, as in (*c*) 20 *E* 3. *contra form' collat'* becauſe the Founder cannot have *contra form' collat'* of an Advowſon, he ſhall preſent without any Suit, ſo 7 *E.* 3. & 3 *H.* 7. A Man ſhall be Tenant by the (*a*) Curteſy of a Rent or Advowſ. altho' the Wife dies before the Day incurs, or the Preſentm. falls; ſo the Lord in Mortmain, or of a Villain, claims a Rev'n, by the (*e*) Claim, the Law veſts the Rev'n in him, and he has no Means to compel the Ten't to attorn, and therefore he ſhall avow and ſhall have an Action of Waſt, without Attornm. the ſame Law of Letters Patents, and of a Deviſe of a Rev'n, as appears in 34 *H.* 6. for in all the ſaid Caſes *culpa abeſt.* But it was objected, that in the ſaid Caſe of the Fine there was Default and Lacheſs in the Cognuſee, for he might have made Mention of the Leaſes in the Fine, and then he might have brought a *Quid juris clamat*, and compelled the Leſſees to attorn, and ſo he had Means to have compell'd them to attorn, wherefore in Regard he had omitted it, there was a Default in him, and by Conſequence he ſhall neither have an Action of Waſt, nor avow without Attornm. no more than if one levies a Fine to another of Land, which is in Leaſe for Life, he is without Remedy for Rent or Waſt without Attornment. To which it was anſwered and reſolved, that in the ſaid Caſe the Conuſee could by no Poſſibility have a *Quid juris clamat*, for altho' he had recited the particular Eſtates in the Fine, yet he could not have a *Quid juris clamat*, for after the Conuſance or Concord, and before the Fine engroſſed, he ought to ſue the *Quid juris clamat*, and immediately by the Conuſance or Concord, the Reverſion paſſed to the Conuſee, *Vide F. N. B.* (*f*) 147. *a.* & 22 *Hen.* 6. 57. and *eo inſtante*, it is executed by the Stat. of (*g*) 27 *H.* 8. of Uſes; ſo that it is not poſſible for him to have a *Quid juris clamat*, nor any Remedy to compel the Tenants to attorn. And foraſmuch as by the Act of Parliament, which is an Act in Law, *ſc.* by the Execut. of the Poſſeſſion to the Uſe, the Benefit of the Conuſee to have a *Quid juris clamat* is toll'd, it is reaſonable in Regard every Subject, *ſc.* the Conuſor, Conuſee, particular Tenants, and all others, who are Parties or Privies to the Act of Parliament, that it ſhould not turn to the Prejudice of any, for (*h*) *impotentia excuſat legem*, and an Act in Law ſhall prejudice no Man. It was adjudged in the King's Bench, *Paſch.* 41 *Eliz.* between (*i*) *Heſton* and *Ruddleſton.*

1. At Com. Law, a Man by a Convict. of Felony, although

(*a*) 2 Jones 3. (*b*) 4 Co. 70. b. Co. Lit. 309. b. 321. b. Cr. El. 285. Raym. 91. Cr. Jac. 193. Vaugh. 50. (*c*) 20 E. 3. Fitz. contra form' collat. 6. (*d*) 1 Co. 97. b. Fitz. bar. 293. Co. Lit. 15. b. 29. a. 7 E. 3. 66. a.b. 3 H. 7. 5. a. F. N. B. 149. d. Fitz. Diſcent. 3. Br. Tenant per le Curteſie 5. Perk. Sect. 468, 469. Dr. & Stud. 84. a. (*e*) Co. Lit. 119. a. Lit. Sect. 179.

(*f*) 5 Co. 19. b. (*g*) Co. Lit. 309. b. Cr. El. 285. (*h*) 1 Co. 98. Co. Lit. 29. a. Hard. 387. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 9 Co. 73. a. 10 Co. 139. b. (*i*) 5 Co. 110. a. 3 Inſt. 114. Raym. 370, 380. Hob. 292.

he has his Clergy, ſhall forfeit all his Goods which he had at the Time of the Conviction, or which he ſhall acquire after, and ſhall remain diſabled to acquire Goods to his own Uſe, till he has made his Purgation. 2. That where by the Statute of (*a*) 18 *El. c.* 7. it is enacted, That after Clergy allowed, he ſhall not be delivered to the Ordinary, as before was uſed, to make his Purgation, but ſhall be burnt in the Hand, and delivered; which Act has taken away his Means to enable himſelf again; therefore it was adjudged, that after he is delivered by Force of the Act, he ſhall be enabled in the ſame Manner as if he had made his Purgation. And it is in Effect all one with a Bargain and Sale by Deed indented and enrolled, for there the Uſe paſſeth from the Party, and the Statute executes the Poſſeſſion, and the Party has no Remedy, nor is there any Default in him, and therefore the Rev'n ſhall be in him without Attornment. So in the ſaid Caſe of the Fine, the Limitation of the Uſe is declared by the Conuſor, and *Ceſtuy que uſe* has the Uſe by him, and that is executed by the Statute; and *B.* in the ſaid Caſe ſuppoſeth the Gift to be made by the Conuſor, as it is adjudged in (*b*) 7 *E.* 6. *Br. Form.* 46. And for the ſame Reaſon it was reſolved, that in the Caſe at Bar, when *Seintleger* and his Wife levied the Fine in 16 *Eliz.* and by Enumeration of Acres and Towns, all the Demeans of *Beamſton* did paſs, and the Law (foraſm. as they were excepted out of the Uſes in the Indentures in 16 *El.*) did create and veſt the Uſe in *Seintleger* and his Wife again, as it was before, that they ſhould have an Action of (*c*) Waſt, as they might have before the Fine levied, or otherwiſe there would be great Miſchief in innumerable ſuch Caſes: So, be the Uſe limited on the Fine to a Stranger, or to himſelf, created by Act in Law, or limited by Declarat. of the Party, it is all one. But (*d*) *Owſey*'s Caſe, *Mich.* 36 & 37 *El.* reported by me in my 5th Part of Reports in *Mallory*'s Caſe, where the (*e*) Conuſee of a Rev'n by Fine diſſeiſes the Leſſee for Life, and makes a Feoffm. in Fee, the Leſſee re-enters, that is no Attornm. for he cannot (*f*) *plus juris in alium transferre quam ipſe habet.* So in *Knottisford*'s Caſe there cited, if ſuch Conuſee of a Rev'n before Attornm. (*g*) bargains and ſells the Rev'n by Deed indent. and inroll. that ſuch Bargainee ſhall not avow, or have an Action of Waſt without Attornm. *cauſa qua ſupr'*. And *Walm.* ſaid, that the Caſe of Limitat. of a Uſe on a Fine had been adjudg. in this Court, according to this Reſolut. Note, a good Reſolut. for all Conveyances on Conſiderat. of Marriage or otherwiſe, upon Limitat. of Uſes on Fines levied, or Recoveries, *&c.* And obſerve, by this Reſolut. there is great Facility and Safety for them to whom Uſes are levied; which is alſo good for the Benefit of the Commonwealth, that particular Eſtates ſhould not be diſpuniſhable of Waſt, nor thoſe in the Rev'n barred from recovering their Rents, which in all Equity and Reaſon are due to 'em, and no Inconven. to the partic. Ten'ts. For upon Execut. of Eſtates by the Stat. of 27 *H.* 8. of Uſes, (as upon Covenants in Conſiderat. of Blood, or upon (*h*) Bargain and Sale by

(*a*) Cr. Jac. 430, 431. 2 Rol. 222. 5 Co. 50. b. 110. a. b. Hob. 294.

(*b*) 7 E. 6. Br. Formedon 46.

(*c*) Vaugh. 43.

(*d*) 5 Co. 113. a. Cr. El. 264, 354. Owen 23. 2 Anderſ. 15.

(*e*) Co. Lit. 309. b. 321. b.

(*f*) Co. Lit. 300. b. 4 Co. 24. b. 6 Co. 57. b. 8 Co. 63. b. 5 Co. 113. a.

(*g*) 5 Co. 113. a.

(*h*) 5 Co. 113. a. b. Co. Lit. 309. b. 2 Co. 36. a. 9 Co. 94. a.

Deed indented and inrolled, and the like) there needs no Attornm. 4. It was reſolved, that altho' there was not any Privity between them in the Reverſion, and *Pa. Lofty*, for he had but a particular Term for 10 Years out of the ſaid Leaſe of 50 Years, and if the Reverſion had been granted over, that he could never have attorned; yet when thoſe in Rev'n ejected the ſecond Leſſee, and enfeoffed *Glanvile* and *Sturges*, &c. that by the Regreſs of the ſecond Leſſee, thoſe in Rev'n by Force of the Feoffm. ſhould avow for the Rent, and that for divers Reaſons: 1. Becauſe that Re-entry is not in all Reſpects to be reſembled to an expreſs Attornm. for to an expreſs Attornm. (*a*) Notice is inſeparably Incident, as appears in *Tooker*'s Caſe, but he who re-enters may be ignorant of the Feoffm. 2. Thoſe who claim by the Feoffment have the Reverſion in them, and have not Means to compel the particular Tenant to attorn, as hath been ſaid before: But when a Man makes a Feoffm. of a Manor, there the (*b*) Services do not paſs till Attornm. but remain till Attornm. in the Feoffor, as *Litt.* holds: And ſo it was adjudged in the *Common Pleas*, 15 *El.* in (*c*) *Bracebridge*'s Caſe. But in Pleading of a Feoffm. of a Manor, he need not alledge (*d*) Attornment of the Tenants of the Manor, but that ſhall come in on the other Part. And ſo the Books 21 *E.* 3. 19 *E.* 3. the Biſhop of *Canterbury*'s Caſe, 30 *E.* 3. *in Droit de Gard*, 8 *H.* 4. 1. 9 *E.* 4. 33. 42. *Aſſ.* 6. 20 *H.* 6. 7. 37 *H.* 6. 24. 1 *H.* 7. 3. 13 *H.* 7. 14. 34 *E.* 3. *Double Plea* 24. 43 *Aſſ.* 20. *Temp. E.* 1. Tit. *Attornm.* are well reconciled. 3. By the (*e*) Regreſs of the ſecond Leſſee, it reveſts all Intereſts, and ſettles a Reverſion, which Act ſubjects not only the ſecond Leſſee to diſtreſs, but the firſt Leſſee to Waſt, and after the ſecond Term ended, to diſtreſs alſo: For the firſt Leſſee hath put this Act, *ſcil.* to make Re-entry, in the Power of the ſecond Leſſee, and therefore his Re-entry, which is the Act which makes a Reverſion, ſhall bind both: And the Re-entry of one may ſubject himſelf to a Diſtreſs, and an Action of Waſt, who of himſelf could not attorn; and therefore it is held in 32 *E.* 3. *Age* 80. that a Man (*f*) *non compos mentis*, cannot attorn, for he who is *a mens* (without a Mind) cannot make an Attornm. which is an Agreement; and yet if a Man, *non compos mentis*, be Leſſee for Years rendring Rent, and the Leſſor ejects him, and makes a Feoffm. and afterward the Leſſee, *non compos mentis*, re-enters, this Act of Re-entry ſubjects himſelf to Diſtreſs, and an Action of Waſt, altho' he could not make an expreſs Attornm. So in the Caſe at Bar, altho' the ſecond Leſſee could not make an expreſs Attornm. yet his Re-entry reveſting all Intereſts and Eſtates which were diveſted by the Act and Wrong of the Feoffor, ſhall ſubject both the Leſſees to Diſtreſs, *&c.* And as the ſecond Leſſee might aſſent, that he in Reverſion ſhould made a Feoffm. and Livery and Seiſin thereupon, and that ſhould bind the firſt Leſſee, foraſmuch as he had given him the Poſſeſſion;

(*a*) 2 Co. 67. b. 68. b. 5 Co. 113. b. Palm. 207. Dyer 302. pl. 43. Co. Lit. 309. b.

(*b*) 1 Rol. 293. Cr. El. 401. Co. Lit. 310. b.

(*c*) Co. Lit. 317. b. 318. a. 1 Rol. 293. 1 Leon. 5, 264. 1 Anderſ. 113. 1 Co. 133. b. Moor 99.

(*d*) Cr. El. 401. Co. Lit. 303. b. 310. b. Yelv. 135. 8 Co. 82. b.

(*e*) Co. Lit. 318. b. 319. a.

(*f*) 1 Rol. 296.

(*) 10 Co. 83. a. (a) Co. Lit. 319. a. (b) 2 Co. 68. b. (c) 8 Co. 162. a. Co. Lit. 338. a. 2 Rol. Rep. 315. Hutt. 18. 2 Sid. 59. 10 Co. 67. b. 6 Co. 64. a. (d) Co. Lit. 218. b. 338. a. 2 Rol. 496. 5 Co. 11. b. 54. b. Cr. El. 264, 522, 605, 873, 874. Poph. 8, 9. 10 Co. 52. b. 53. a. 67. b. 2 Leon. 188. 3 Leon. 247. Dall. 74. 4 Leon. 30. Moor 196, 358, 636, 637. 2 And. 52, 192. Dyer 46. pl. 9. 112. pl. 49. 140. pl. 43. 177. 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. Lane 7. Lit. Rep. 273, 282. 37 H. 8. 18. a. Plowd. 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. (e) 37 H. 6. 17. b. 18. a. (f) 1 Co. 98. a. 11 Co. 81. a. 1 Rol. Rep. 180. 2 Rol. 742. Co. Lit. 384. b. (g) 43 E. 3. 23. b.

So in the Caſe at Bar, the firſt Leſſee having made a Leaſe to the ſecond Leſſee, he hath thereby given him Power of Reentry, which Act ſubjects both to diſtreſs, *&c.* 4. The Law is grounded on great Reaſon and Equity in this Point, for perhaps the Feoffee being a Purchaſer, and a Stranger, knew nothing of the Leaſe, or knew of it, and thought that it was void, or defeated; God forbid, if after the Leſſee hath evicted, or lawfully taken the Poſſeſſ. from him, which he thought to have enjoyed, (*) *qd' afflictio adderet' afflicto, ſc.* to loſe the Poſſeſſ. and alſo to be without Remedy, either for the Rent reſerved, (which the Leſſee enjoying the Land in conſcience ought to pay) or for Waſt (which the Leſſee is by Law prohibited to commit.) And (*a*) *Coke* Ch. Juſt. ſaid, That be the Evict. by the Leſſee by Entry or Action, that the Rev'n remains in the Feoffee, and he ſhall avow, and have an Action of Waſt, againſt the Opinion of *Aſhton*, in (*b*) 34 *H.* 6. 6. *b.* according to the Opinion of *Thorpe* Juſt. in 41 *E.* 3. 18 *b.* who ſaid, That if he in Rev'n diſſeiſes the Ten't for Life, and aliens in Fee, altho' the Ten't recovers the Freehold, yet the Rev'n is not reſtor'd; ſo ſaid *Seton*, in 18 *E.* 3. 48. *b.* that if I diſſeiſe my Ten't for Life, and make a Feoffm. to another in Fee, altho' my Ten't for Life recovers afterwards by Aſſiſe, the Rev'n remains in the Feoffee. 5. (*c*) *Fort' & æquior eſt diſpoſit legis quam hominis*; and therefore he who has a future Intereſt, cannot ſurrender it by any expreſs Surrend. but by taking a new Leaſe (which is an Act, and amounts to a (*d*) Surrender in Law) it may be ſurrendred and determined, as it is held in 37 (*e*) *H.* 6. &c. So if the (*f*) Father be enfeoffed in Fee, and the Feoffor warrants the Land to him and his Heirs, now his Aſſignee ſhall not vouch; but if the Father enfeoffs his Son and Heir apparent with Warranty, and dies, in that Caſe the Heir being in Truth Aſſignee, ſhall vouch: For the Law which has determined the Warranty of the Father to the Son, will give the Son the Benefit of the firſt Warranty, as it is adjudged in (*g*) 43 *E.* 3. 5. by which it appears, that the Act of Law is ſtronger, and more equal than any Act which the Party could have done. So in the Caſe at Bar, the Entry of the Leſſee (by which by the Act and Judgm. of Law, all Intereſts and Eſtates are ſettled according to the Law) is ſtronger than an expreſs Attornm. for that the 2d Leſſee could not make; and more equal, for inaſmuch as the Poſſeſſ. is evicted by the 2d Leſſee, and thereby the Intereſt of the 1ſt Leſſee reveſted, and a Rev'n ſettled in the Feoffee, Equity requireth, that the Feoffee, who hath loſt the Poſſeſſ. ſhall not be without Remedy to recover the Rent, and to puniſh Waſt, 18 *E.* 3. 47. *a. b. Audley* Earl of *Glouceſter*'s Caſe, (*h*) The Leſſor diſſeiſes his Leſſee for Life, and makes a Leaſe for Life to another, the firſt Leſſee re-enters, he leaves the Rev'n in the 2d Leſſee for Life, and he ſhall have the Rent reſerved, 46 *E.* 3. 30. *b.* If he in the Rev'n ouſts Ten't by Statute-Merchant, and makes a Feoffm. in Fee, and the Tenant by Statute Merchant re-enters, that makes the Reverſion in the Feoffee, yet there is not any Attendance. *Vide*

(*h*) Co. Lit. 318. b. 319. a. (*i*) Co. Lit. 318. b.

44 *Aſſ. p.* 11. *Baſſingborn Aſſiſe*, 2 *H.* 5. 5 *H.* 5. 12. 9 *H.* 6. 16. and 34 *H.* 6. 6. *Vide* (*a*) 9 *H.* 7. 25. *a.* where the Caſe is miſprinted; for the true Caſe is, as I have ſeen it in the Manuſcript; That if he in Reverſion diſſeiſes the Donee, and makes a Feoffment in Fee, and the Donee re-enters, he leaves the Reverſion in the Feoffee: But if the Donee be diſſeiſed, and the Donor diſſeiſes the Diſſeiſor, and makes a Feoffment in Fee, and the Donee doth make Regreſs, the Feoffee ſhall not have the Reverſion but the Diſſeiſor: For the Difference between an Eſtate and a Right, an Eſtate may well paſs to the Feoffee by the Feoffment; as where he in Reverſion diſſeiſes the Donee, or the Leſſee for Life; but where the Donee or Leſſee is diſſeiſed, now he in Reverſion hath but a Right, which he cannot transfer to another, and therefore when he diſſeiſes the Diſſeiſor, and makes a Feoffment that paſſes the Eſtate which he gained by Diſſeiſin, and extinguiſhes his antient Right, which he could not transfer to another; and then the firſt Diſſeiſor hath the firſt Poſſeſſion, and better Right than the Feoffee of him in Reverſion, for he comes in under him who diſſeiſed the firſt Diſſeiſor, and the antient Right is extinct. So if the Diſſeiſee diſſeiſes the Heir of the Diſſeiſor, now he hath gained an Eſtate by Diſſeiſin, and hath an antient Right, if he makes a Feoffment in Fee to another, he thereby paſſes the Eſtate which he gained by Diſſeiſin, and extinguiſhes his antient Right, which he could not transfer to another: For there is ſuch an extreme and natural Enmity between the Eſtate by Wrong gain'd by Diſſeiſin, and the antient Right, that the Right cannot incorporate itſelf in the Eſtate by Wrong and paſs with it, but in ſuch Caſe rather ſuffers (*b*) Extinguiſhment than to paſs with it; ſo that when the Heir re-enters, he ſhall hold the Land for ever, as well againſt the Feoffor as the Feoffee: So if Lord and Tenant be by Fealty and Rent, and the Lord diſſeiſes the Tenant of the Land, and makes a Feoffment in Fee, the Seigniory is thereby extinguiſhed: But if a (*c*) Man makes a Gift in Tail, or a Leaſe for Life, *&c.* rendring Rent, and diſſeiſes the Tenant in Tail, or for Life, *&c.* and makes a Feoffment in Fee, there the Eſtate paſſes to the Feoffee; and when the Donee or Leſſee re-enters, he revives the Rent as incident to the Reverſion. The ſame Law of a Leaſe for Years in the Caſe at Bar. So there is a Difference between a Reverſion with (*d*) Rent incident to it, and a Right, or Seigniory, or Rent in Fee, 28 *H.* 8. (*e*) *Dy.* 33. *b.* 4 *Eliz.* (*f*) *Dy.* 212. the Caſe of the *Greyhound.* And Judgment was given for the Defendant, who made Conuſance in the Right of *Henry Finch*; And this was the firſt Matter in Law, that *Coke* Chief Juſtice argued in the Common Pleas after he was Chief Juſtice.

(*a*) Co. Lit. 277. a. 266. a. Hob. 258, 278, 279.

Difference between an Eſtate and a Right. See Gilbert's Com. Law Tenures.

(*b*) Hob. 258.

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

(*d*) Dyer 31. pl. 212.
(*e*) Dy. 33. 16.
(*f*) Dyer 212. pl. 37, 38.

The

The Lord DARCY's *Caſe.*

Hill. 4 Jacobi I.

In the Common Pleas.

Cr. Jac. 151. 2 Inſt. 91, 93. Co. Lit. 82. a.

THomas Lord *Darcy* of *Chicheſter*, brought a Writ *de Valore Maritagii* againſt *Stephen Page*, Brother and Heir of *Brian Page*, *Quare cum Maritagium ipſius Stephani ad ipſum Tho. Dominum Darcy pertineat, pro eo quod prædict' Brianus terram ſuam de eo tenuit per ſervitium Militare, & idem Tho. Dominus Darcy præfat. Stephan. dum fuit infra ætatem & in cuſtodia ſua, competens Maritagium abſque diſparagatione, juxta formam Statuti de communi concilio regni Domini Regis Angliæ inde proviſ. ſæpius obtulerit, idem Stephanus maritagium illud renuens, præfat' Tho. Domino Darcy de maritagio ſuo non ſatisfacto, ſe in terras & tenement' illa intruſit & de maritagio ſuo eidem Tho. Domino Darcy ſatisfacere contradicit, &c.* And counted that the ſaid *Brian* held twenty-five Acres of Land in *Peldon* in the County of *Eſſex*, of the Plaintiff, as of his Manor of *Newhall* in *Peldon* aforeſaid, by Knights Service, *&c.* and afterwards the ſaid *Brian* died in his Homage without Iſſue, the Defendant being his Brother and Heir, and of the Age of twenty Years and ſix Months; and that the Plaintiff tendered to him, being then within Age, a competent Marriage, *ſc. Mary Mannock*, Daughter of *Anthony Mannock*, Gentleman, then of the Age of eighteen Years, without Diſparagement, and that the Defendant refuſed. The Defendant denied the Tender; upon which the Pl. demurred. And this Caſe had been many Times argued at the Bar, and this Term was argued by the Juſt. at the Bench, and upon open Argum. it was adjudged for the Plaintiff for the Reaſons and Cauſes reported in (*a*) *Palmer*'s Caſe, in the fifth Part of my Reports. And ſo this Queſt. is now in Peace, being adjudged by both Courts. Note Reader, The Caſe of the Heir (*b*) Female, differs much from the Caſe of the Heir Male. 1. Becauſe, for the Heir Female the Guardian ſhall never have the Forfeiture of Marriage; for at Com. Law

(*a*) Cr. Jac. 66. 5 Co. 126. b. 127. a. Yelv. 59. 2 Inſt. 93. Moor 22.

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

Law the full (a) Age of the Heir Female was 14 Years, as it is reſolved in 35 *H.* 6. 52. *Litt. lib.* 2. *f.* 22. *Stamf. Prærog.* 13. *b. F. N. B.* 256. *c. &* 259. and many other Books; ſo that if ſhe be of the Age of 14 Years at the Time of the Death of her Anceſtor, ſhe ſhall be out of Ward, and if ſhe be within the Age of 14 Years, ſhe ſhall have (b) Livery by the Com. Law at the Age of 14 Years, for that makes as to this Purpoſe her full Age. And at the Com. Law there was not in any Caſe any (c) Forfeit of Marriage, but only the ſingle Value, 16 *E.* 3. *Action ſur le Stat.* 14. But the Forfeiture of the Marriage is given by the Stat. of *Merton, c.* 6. made 20 *H.* 3. the Words of which Stat. are, *De hærede autem cum ſit quatuordecim annor' vel ultra uſq; ad plen' ætat', ſi ſe maritavit ſine Licentia Dom' ſui, &c. Dom. ſuus tunc teneat terr' ejus ultra termin' ætatis ſuæ, ſcil.* 21 *annor' per tant' tempus, &c.* which Act without Queſtion, cannot (d) extend to the Heir Female, for it extends only where ſuch Heir is 14 *annor', vel ultra*, and the Heir Female at ſuch Age is out of Ward; alſo the Stat. ſpeaketh *ultra termin' ætatis ſuæ, ſc.* 21 *annor'*, and that is the full Age of the Heir Male as to Wardſh. and not of the Heir Female. And *vide* the Stat. of (e) *Weſt.* 1. *c.* 22. where the Statute of *Merton* is recited, and then it is provided as follows. And of Heirs Females, after they have accompliſhed the Age of 14 Years, *quaſi diceret*, The Statute of *Merton* has provided for the Heir Male; and becauſe no Proviſion is yet made for Heirs Females, by the ſame Act it is provided, That the Lord ſhall (f) not have or keep by Reaſon of Marriage, the Lands of ſuch Heirs Females, above two Years after the Age of 14 Years; and if the Lord, within the two Years, do not marry them, then ſhall they have an Action to recover their Inheritance quietly, without giving any Thing for the Wardſh. or the Marriage; which two Years is given by the ſaid Statute for the Benefit of the Lord, as appears by (g) 35 *H.* 6. 52, 53. *& Litt.* f. 23. And if within theſe two Years the Lord tenders a Marriage to the Heir Female, and ſhe refuſes, and marries elſewhere within the two Years, yet the Lord ſhall not have the Forfeiture of the Marriage, for the Statute gave it only to make a Tender; and therewith agrees the Book in 35 *H.* 6. *Gard* 71. by the Opinions of *Priſot, Markham, Yelverton* and *Danby*. The ſecond Difference between the Heir Male and the Heir Female was, That at the Common Law, if the Guardian had not made Tender to the Heir Female before 14 Years, the Lord could not have held the Land of ſuch Heir, (as he might of the Heir Male) *Nom' pœne*, till the Value were paid. For the Law did tender their ſpeedy Advancement; *quia maturiora ſunt vota mulier' quam viror.* And therefore the Heir Female might have entered into her Land immediately after the Age of fourteen Years, for her better Preferment in Marriage, and therewith agreeth (h) *Litt.* 22. *b.* expreſly, and 35 *H.* 6. 52, 53. yet in ſuch

(a) Co. Lit. 78. b.
Hob. 278, 279.
(b) Co. Lit. 79. a.
(c) 2 Inſt. 90, 91. Co. Lit. 82. b. 4 Co. 82. a.
(d) Cr. Jac. 151.
(e) 2 Inſt. 202, 203.
(f) Cr. Jac. 151.
(g) Co. Lit. 79. a. Moor 22. nu. 74. 2 Inſt. 203.
(h) Co. Lit. 79. a.

Caſe

Caſe the Lord without any Tender before fourteen Years, ſhall recover the ſingle Value, for that *de mero jure pertinet.* 3. If the (*a*) Lord holds the Land over 14 Years, during the two Years by Force of the Statute of *Weſtm.* 1. and within the two Years makes no Tender, but takes the Profits of her Land, and ſo hinders her Preferment in Marriage by receiving all the Profits of her Land, in that Caſe, as the Statute ſays, if he doth not make (within theſe two Years) any Tender, then he ſhall loſe by expreſs Proviſion the Value of the Marriage, and ſhall content himſelf with the Profits by the two Years for his Value given him in Lieu thereof by the Statute; ſo that every Guardian who holds the Land in ſuch Caſe, ought to take heed that he makes Tender within the two Years, or elſe he will loſe the Value; but if he will wave the Benefit of the two Years, or if he cannot hold the ſaid two Years, as Guardian of the Body of the Heir Female only, there he ſhall have the Value of the Marriage without any Tender. And to the principal Caſe, *Coke* Chief Juſtice, added this Reaſon, (*b*) That if the Common Law would have compell'd the Lord to have made a Tender to his Ward to have the ſingle Value, the Common Law would have given all neceſſary Circumſtances to the Performance and Accompliſhment thereof, as to have appointed a certain Place, *&c.* where the Tender ought to be made; and not leave the Lord, who was the Superior, to ſeek the Ward, who was the Inferior, and who might, if he would, take Advantage of his own Flight, or *ſubterfuge*, when no Laches could be in the Lord.

(*a*) Co. Lit. 79. a. Moor 593. nu. 800. 22. nu. 74. 1 Cr. El. 468, 469.

(*b*) 5 Co. 127. b.

BUR-

BURREL's *Caſe.*

Paſch. 5 Jacobi 1.

In the Common Pleas.

IN an *Ejectione firmæ* between *Thomas Burrel*, Plaintiff, and *Seth Holmes* and *Robert Holmes*, Defendants, of Lands in *Huntingdon* in the County of *York*, on a Demiſe made by *Richard Burrel* and *William Allein*, to which Not-guilty was pleaded; on the Evidence the Caſe was ſuch: Grandfather, Father, and Son, the Grandfather on the Marriage of the Father, made the Father's Wife a Jointure of other Lands, and at the ſame Time, *ſcil.* 8 *Septemb.* 23 *Eliz.* covenanted to demiſe the Tenements in which, *&c.* to the Father; and 10 *Septemb.* next following, according to the Covenant, the Grandfather by Indenture made a Demiſe of the Moiety of the Tenements, in which, *&c.* to *Seth* the Father, to begin after the Death of the Grandfather, for 1000 Years, and of the other Moiety for 1000 Years, to begin at a Day to come; in both which Demiſes were Proviſoes, That if the Father ſhould die without Iſſue, or if he ſhould make any Leaſe upon which the ancient Rent ſhould not be reſerved, that the ſaid Leaſes made to the Father ſhould be void. The Father 10 *Feb.* 30 *Eliz.* aſſigned over the ſaid Leaſes to the Uſe of *Robert* his Son, an Infant, to the Intent that they might not be merged by the Deſcent of the Reverſion; and with this colourable Purpoſe and Intent, that the Infant ſhould pay Debts; and within a ſhort Time after the Grandfather died; the Father entred into the Land, and took the Profits, and made Leaſes, and did other Things, as Owner of the Land, and neither the Aſſignees nor the Infant took any Profit, nor paid Debts. Alſo in the ſaid Aſſignment of the ſaid Leaſes, divers Perſons of good Credit were named amongſt others; but the Aſſignment was delivered in a ſecret Manner to a Perſon of mean Quality; for which, and other Circumſtances, it was taken, that as well the ſaid firſt Leaſes (being of a Form and Device unuſual) as the Aſſignment were fraudulent; and after the Death of

Fraud. Leaſes, Jointures, &c. Co. Lit. 3. b. Lane 48. 113. Hob. 166.

of the Grandfather, the Father for a great Sum of Money, bargained and ſold the Tenements by Deed indented and enrolled, 2 *Sept.* 44 *El.* to *Richard Burrel* and *William Allen* and their Heirs; in which the Father covenanteth with *Burrel* and *Allen*, that the Lands ſhould be clear of all Leaſes, *&c.* And if the ſaid original Leaſes, or the Aſſignment ſhould be avoided by the Purchaſers by the Statute of *(a)* 27 *Eliz. c.* 4. was moved and debated: And in this Caſe, on Evidence given at the Bar of the Common Pleas, two Points were unanimouſly reſolved by *Coke* Chief Juſtice, *Walmſley*, *Warberton* and *Daniel*, That where the Words of the ſaid Statute of 27 *Eliz.* are ("That all and every Conveyance, "Grant, Charge, Leaſe, Incumbrance and Limitation of "Uſe, of, in or out of any Manors, Lands, *&c.* for the In- "tent and Purpoſe to defraud and deceive ſuch Perſon, *&c.* "as have purchaſed or ſhall purchaſe, *&c.* the ſame Lands, "*&c.* ſhall be deemed, *&c.* only againſt ſuch Purchaſer, *&c.* "void, fruſtrate, and of none Effect.") 1. It was reſolved, That if the Father makes a Leaſe by Fraud and Covin of his Land, to defraud others to whom he ſhall demiſe or ſell it (as all fraudulent Leaſes ſhould be ſo intended) and before the Father ſells or demiſes it he dies; and the Son knowing, or not knoing of the ſaid Leaſe, ſells the Land on good Conſideration; in that Caſe the Vendee ſhall avoid that Leaſe by the ſaid Act: For inaſmuch as it is intended and preſumed in Law, That every fraudulent Leaſe is made to the Intent, generally to defraud Purchaſers, Farmers, *&c.* within this Generality, every particular Purchaſer, Farmer, *&c.* is included; and the ſaid Act is very well penned, for the Words of the Act are *(b)* general; and it is not neceſſary that he who ſells the Land ſhould make the former fraudulent Eſtate, or Incumbrance; but be the Eſtate, *&c.* fraudulent *ut ſupra*, whoſoever ſells (makes) it, the Purchaſer ſhall avoid ſuch fraudulent Eſtate, *&c.* and therefore in the Caſe at Bar, the ſaid Leaſes being on the Evidence thought *(c)* fraudulent, the Vendee of the Father and Heir ſhall avoid them. 2. It was reſolved, That although the Father had nothing in the Inheritance of the Land at the Time of the Aſſignment of his Term, but the whole Eſtate of Inheritance was then in the Grandfather; yet when the Grandfather died, and the Father ſold the Land, his Vendee ſhall avoid the ſaid Term by the ſaid Act, (the ſaid Aſſignment on the Evidence being taken to be fraudulent) for if he had bargained and ſold the ſaid Term only, the Bargainee ſhould avoid the ſaid fraudulent Aſſignment, and by Conſequence the Vendee of the whole Fee-ſimple ſhall avoid it. And it was ſaid by the Chief Juſtice, That that which is called *(d)* Truſt between the Father and the Son, is in Judgment of Law fraudulent as to a Purchaſer. And I acquainted *Pophs* Ch. Juſt. with this Reſolution, and he allowed well of it, and ſaid it was well

(a) Moor 602. nu. 833, 615, 616. nu. 843. 1 Rol. Rep. 167. Bridgm. 22. Goldsb. 8. pl. 11. 118. pl. 2. Cr. El. 447. 5 Co. 60. b. Cr. Jac. 158, 180. 3 Co. 80. a. Co. Lit. 3. b. 2 Rol. Rep. 305. 11 Co. 74. a. b. Lane 47, 102.

(b) 11 Co. 74. a. b.

(c) 5 Co. 60. a. Doct. pl. 200. 2 Inſt. 425. Hob. 72. 2 Rol. 684.

(d) 3 Co. 81. b.

well done to conſtrue the ſaid Act in Suppreſſion of Fraud; and (as he told me) it was adjudged before him and his Companions, Juſtices of the King's Bench, That where a (*a*) Man in a ſecret Manner made an Eſtate to the Uſe of his Wife for her (*b*) Jointure by Fraud and Covin, to defraud a Purchaſer, to whom he intended to ſell the Land, that in ſuch Caſe, if the Fraud be proved in Evidence, or confeſſed in Pleading, the Purchaſer ſhould avoid ſuch Eſtate.

(*a*) 5 Co. 60. 2.
(*b*) Cr. Jac. 158.

Sir DREW DRURY's *Caſe.*

Paſch. 5 Jac. I.

In the Court of Wards.

THE Caſe between Sir *Drew Drury*, the Elder, Plaintiff, and Sir *Drew Drury*, the Younger, Defendant, in the Court of Wards, was ſuch. It was found by Inquiſition *virtute Brevis*, before the Eſcheator of the County of *Norfolk*, *Anno* 41 *Eliz.* after the Death of *Roger Drury*, Eſq; That the ſaid *Roger* was ſeiſed of a Houſe in *Yarmouth*, in the ſaid County, Parcel of the diſſolved Monaſtery of *Black-Friars* in *Yarmouth*, and thereof died ſeiſed, the Defendant being his Son and Heir, and of the Age of 14 Years and 7 Months; That the ſaid Houſe at the Time of his Death was held *in capite* by Knight's Service; and that the ſaid *Roger* was alſo ſeiſed of the Manor of *Barking* in the County of *Norfolk*, held of the King by Knight's Service, and not *in capite*; and after Office thereof found, Queen *Elizabeth*, under the Great Seal, granted the Cuſtody and Wardſhip of the Body of the Defendant to the Plaintiff. The Plaintiff made a Tender of a Marriage to the Defendant, being within Age, which he refuſed; and afterwards the King that now is, made him a Knight, being then alſo within Age, and afterwards he married elſewhere within Age. The ſaid *Roger* was a free

Cr. Jac. 156.
8 Co. 173.

Burgeſs of the Town of *Yarmouth*; King *Edw.* 1. made ſuch a Charter to the Burgeſſes of the ſaid Town in theſe Words, *Conceſſitus etiam pro nobis & hæredib' noſtris, quantum in nobis eſt, Burgenſibus, & probis hominib' ſupradict' de magna Jernemutha, quod omnes illi de villa præd' oriundi, licet, ipſi terras vel tenementa extra libertatem vill' tenuerint per tale ſervitium per quod maritagia eorum ratione minoris ætatis ipſorum ad nos vel hæredes noſtros pertinere deberunt, ſecundum legem & conſuetud' regni noſtri, nihilominus juxta libertates vill' præd' ſe maritare poſſint ſine occaſione vel impedimento noſtro vel hæredum noſtrorum in perpetuum: Salvo jure alterius cujuſlibet.* And in this Caſe two Queſtions were moved. 1. Whether the ſaid Charter has diſcharged the Defendant from Wardſhip or not? And as to that, it was clearly reſolved by *Popham* and *Coke* Chief Juſtices, and *Fleming* Chief Baron, and the Court of Wards, that the ſaid Charter has not diſcharged him, for divers Reaſons. 1. Becauſe it is not an abſolute Diſcharge of itſelf, but hath Reference, *ſc. juxta libertates vill' præd'* which ought to be ſhewed. 2. The Tenure was created on a Grant made of the Houſe after the Diſſolution of the Monaſtery, and the ſaid Grant cannot extend to a Tenure created after. 3. It is not ſet forth in the Caſe that the ſaid *Roger* was born in *Yarmouth*, for the Charter is *de villa præd' oriundi.* The ſecond and great Queſtion was, Whether, by the making the Defendant Knight, he was diſcharged in Law of the Value of his Marriage? And this Caſe was referred to the ſaid Chief Juſtices and Chief Baron, who *Hill.* 4 *Jac.* at *Serjeants Inn* heard the Caſe argued and debated by *Topham* of Counſel with the Defendant, and *Fr. Bacon* with the Plaintiff. And afterwards in *Eaſter* Term it was again argued by Serjeant *Hutton* for the Defendant, and Serjeant *Nichols* for the Plaintiff. After which Arguments the Judges had Conſideration of the Caſe, and upon Conference amongſt themſelves it was unanimouſly reſolved, and ſo openly declared in the Court of Wards, in the Preſence of *Robert* Earl of *Salisbury* Maſter of the Court of Wards, That the Defendant ought to pay the Value of his Marriage; and that his Creation of Knight had not (*a*) diſcharged him from it. And in this Caſe theſe Points were reſolved. 1. That the Intendment of the Law is, That the Heir within Age of 21 Years is not (*b*) able to do Knights Service, till his full Age of 21 Years, and therewith agreeth *Lit. lib.* 2. *c.* 4. *f.* 22. *a.* but ſuch Preſumption of Law gives Place to a Judgment and Proof to the contrary, as it is ſaid (*c*) *Stabitur præſumptioni donec probetur in contrarium*; and therefore when the King who is Sovereign and the ſupreme (*d*) Judge of *Chivalry* has dubbed him a Knight, he has thereby adjudged him able to do Knights Service, and all are concluded

(*a*) 2 Inſt. 12. 1 r. Jac. 156.
(*b*) Co. Lit. 74. b. 75. b. 78. b. Cr. Jac. 156, 389. Lit. Sect. 103. 3 Co. 34. b.
(*c*) 5 Co. 7. b. Cawd. Caſe. 4 Co. 71. b. 2 Co. 48. a. Co. Lit. 373. Hob. 298. 2 Bulſtr. 314.
(*d*) 2 Inſt. 11, 12. 2 Sid. 82. 8 Co. 175. a.

cluded to ſay the contrary, and therefore ſuch Heir ſo made Knight ſhall be out of (*a*) Ward and Cuſtody. But if the King creates ſuch Heir within Age a (*b*) Duke, or Marqueſs, or Earl, or Viſcount, or Baron, he ſhall not thereby be out of Ward or Cuſtody. For in antient Time every Baron, *&c.* held his Barony, *&c.* by grand Serjeanty, as appears 18 *Aſſ. pl. ult.* in (*c*) *Clifford*'s Caſe, and the Lord *Cromwel*'s Caſe in the 2d Part of my Rep. 80. *a.* which Service (as *Litt.* ſays, *lib.* 2. *c.* 8. *f.* 35.) is called (*d*) Grand Serjeanty, or *magna Serjeantia*, as *Fleta* calls it, *lib.* 1. *c.* 9. becauſe it is a greater or more worthy Service than Knight's Service, as to bear the King's Banner or his Lance, or to lead his Hoſt, or to be his Marſhal, *&c.* as *Lit.* ſays, or to be High Steward of *England*, as 11 *El. Dyer* (*e*) 285. is, *&c.* And the Son and Heir within Age, of a Duke, Marqueſs, Earl, Viſcount and Baron, ſhall be in (*f*) Ward, notwithſtanding their Dignities. 2. It was reſolved, That when (*g*) Tenant by Knight's Service dies, his Heir within Age, immediately the Value of the Marriage as a Chattel is veſted in the Lord, 24 *E.* 3. 25. *b. Old N. B.* 27 *E.* 3. *acc'.* Then when (*h*) ſuch Heir is made Knight, he is to this Purpoſe made of full Age, and as much is done in Judgment of Law, as if he attained to his full Age of 21 Years, for at ſuch Age the Law intends him able to do Knights Service. And now when the King makes him Knight before ſuch Age, the Intendment or Preſumption of Law gives Place to this Judgment, and Proof to the contrary. And now he is to this Purpoſe ſet and computed of full Age. Then admit he hath accompliſhed his Age of 21 Years, without Queſtion the Lord ſhall have the Value of his Marriage: But at (*i*) Common Law it was taken, that by the making of him a Knight being in Ward, (foraſmuch as now in Judgment of Law he was eſteemed as to this Purpoſe as of full Age for his Ability to do Knights Service) his Land would be immediately out of Wardſhip. And therefore it was provided by the Stat. of *Magna Charta*, *cap.* 3. *Ita tamen quod ſi ipſe dum infra ætatem fuerit fiat Miles, nihilominus terra ramanéat in Cuſtodia Dominorum ſuorum.* So that altho' ſuch Heir within Age be made a Knight, and therefore to that Purpoſe eſteemed of full Age, (*k*) yet the Lands ſhall remain in the Lord's Cuſtody till his Age of 21 Years by the Purview of the ſaid Act; and if the Law had not been clear for the Value of the Marriage, for the Cauſe and Reaſon aforeſaid, without Doubt the Makers of the ſaid Act would have made Proviſion, as well for that as for the Land. 3. It was reſolved, That when the King makes the (*l*) Heir apparent within Age of a Tenant by Knights Service, a Knight in the Life of his Anceſtor,

(*a*) 2 Inſt. 11.
(*b*) 2 Inſt. 11. Cr. Jac. 256.
(*c*) 2 Co. 80. a. 81. a. 18 Aſſ. 18. Co. Lit. 222. a. b. 8 Co. 90. b. 91. a 1 Rol. 438. Br. condit. 105.
(*d*) Lit. Sec. 153. Co. Lit. 105. b.
(*e*) Dy. 285. pl. 39.
(*f*) 2 Inſt. 11.
(*g*) 2 Inſt. 11, 12. Antea 70. b. Hob. 46. Cr. Jac. 156. 2 Rol. 39.
(*h*) Cr. Jac. 156.
(*i*) Cr. Jac. 156.
(*k*) Hob. 46, 91.
(*l*) 2 Inſt. 12.

ceſtor, and afterwards the Anceſtor dies, the ſaid Heir within Age, in that Caſe he ſhall be out of Ward, and ſhall pay no Value of his Marriage, neither ſhall the Lord have the Cuſtody of the Land; for in ſuch Caſe, by the making of him (*a*) Knight in the Life of his Anceſtor, he is made as of full Age, ſo that when his Anceſtor dies, no Intereſt either in the Body or the Land, ſhall ever veſt in the Lord. And the Stat. of *Magna Charta* for the Cuſtody of the Land doth not extend to it, for the Purview thereof extends only when the Heir in Ward (*infra ætatem*) is made Knight, then *remaneat in Cuſtodia, &c.* but when the Heir is made Knight in the Life of his Anceſtor, then the Cuſtody cannot remain or continue, which never had any Beginning or Eſſence, and therewith agreeth *Radcliff*'s Caſe; (*b*) *Plow. Com.* 4. The Juſtices ſaid, they ought to have good Conſideration in all Caſes depending before them, not only of the antecedent (*ſc.* of the preſent Caſe in Queſtion) but alſo of the Conſequent, *ſc.* what general Prejudice will enſue thereupon, either to the King or Subject; and ſurely great Prejudice would enſue to the King, if the Law ſhould be otherwiſe in the principal Caſe; for it might be great Prejudice to the King in his Wards, not only of Knights made by himſelf, but alſo by his Lieutenants in *Ireland* and elſewhere. Alſo none would buy any Wardſhip of the King, when notwithſtanding they have paid the Value thereof to the King, and have them paſſed under the Great Seal (as the Plaintiff hath in the Caſe at Bar) that by making him a Knight it ſhould bar him of the Value of the Marriage: For a Man would give little or nothing for a Thing which depends upon ſuch an Incertainty. It would alſo be very prejudicial to the Subjects, if, after their Wards are lawfully veſted in them, they ſhould be deprived and defeated of them by making them Knights, and eſpecially when it appears by (*c*) 7 *H.* 4. that a Man may be made a Knight as ſoon as he is baptized. 5. It was reſolved, that when the Heir within Age is made Knight after Tender made to him, (as in the Caſe at Bar he was) altho' he within Age marries elſewhere, yet he ſhall not pay the Forfeiture of the Marriage; for by making him Knight he is out of the (*d*) Wardſhip and Cuſtody of his Lord; for after he is Knight he ought to be *ſui juris*, and may employ himſelf in Feats of Arms to defend the Realm, *&c.* and therefore ought not to be in the Wardſhip or Cuſtody of any; and none ſhall pay any Forfeiture, but when after Refuſal he marries himſelf, during the Time he is under the Cuſtody and Wardſhip of his Lord, and that appears by the Statute of *Merton, cap. 6. Si ſe maritaverit ſine licentia Domini ſui, ut ei auferat maritagium ſuum, &c.* which Words cannot be underſtood when he is out of Wardſhip and Cuſtody, no more than when he is married after his Age of 21 Years; but as the Guard. has ſome Prejudice by the Loſs of his Forfeit. in ſuch Caſe by the making of his Ward a Kt. ſo hath he thereby alſo a Benefit;

(*a*) 2 Inſt. 12.

(*b*) Plow. 267. b. 268.

(*c*) 7 H. 4. 7. b. Br. noſme de dign. 10. Br. Addit. 17.

(*d*) 2 Inſt. 91. Cr. Jac. 389, 390. Hob. 90, 91.

For

For altho' the Guardian in Chivalry cannot have a Writ *de valore maritagii*; nor compel the Heir to ſatisfy him the Value of his Marriage 'till his full Age; *ſc.* 'till his Body is out of his Cuſtody; and if ſuch Heir dies before ſuch Age, the Lord ſhall loſe the Value; yet in this Caſe, immediately after the Heir is made Knight he may have a Writ *de valore maritagii*, becauſe he is thereby out of the Wardſhip and Cuſtody of his Guardian; and the uſual Writ *de valore maritagii*, when he accompliſheth his Age of 21 Years, is, *dum fuit infra ætatem in Cuſtodia, &c. F. N. B.* 141. and *Regiſter*, and there ſhall be a ſpecial Count upon the Caſe; for note, it is not *dum fuit infra ætatem* generally, but *dum fuit infra ætatem in Cuſtodia*; and thoſe Words well ſtand, for now he is out of Cuſtody. And two Precedents were cited, one of *Robert* Earl of *Eſſex*, in 29 *Eliz.* the other of one *Ratcliff*, in *Mich.* 1 *Jac.* who were both made Knights during the Time they were in Ward, and were by the Order of the Court of Wards diſcharged of the Value of their Marriages. But on good Conſideration of the ſaid Precedents, it appeared, that they paſſed *(a) ſub ſilentio*, without Argument or any Reſolution of any of the Judges of the Law; and a great Number of Precedents were ſhewed, which agreed with the Reſolution of the ſaid Juſtices in this Caſe. *V.* 15 *E.* 4. 10. *b.* & *Br. (b) Gard.* 2 *E.* 6. in abridging the Caſe of 15 *Ed.* 4. and *Radcliff*'s Caſe, *Plow. Com.* 268. And this was the laſt Caſe that Sir *John (c) Popham*, Knt. the venerable and honourable Chief Juſtice of *England*, and Counſellor of State to Queen *Elizabeth*, and to our Lord the King that now is, reſolved, who was a moſt reverend Judge, of a ready Apprehenſion, profound Judgment, moſt excellent Underſtanding in the true Reaſon of the Law, and of univerſal and admirable Experience and Knowledge of all Buſineſs which concerned the Commonwealth; accompanied with a rare Memory, with perpetual Induſtry and Labour for the Maintenance of the Tranquility and publick Good of the Realm, and in all Things (behaving) with great Conſtancy, Integrity and Patience.

(a) Hard. 98.

(b) 2 Inſt. 11. Br. Gard. 42, 72.

(c) Car. Jac. 166.

Sir GEO. CURSON's *Caſe.*

Paſch. 5 Jacobi.

In the Court of Wards.

Cro. Jac. 157.

IN the great Caſe in the Court of Wards this Term, between Sir *Geo. Curſon*, Knight, and his Wife Defendants, in an Information *ex parte Johannis Leveſon*, Knight, and between Sir *Jo. Leveſon*, Plaintiff, and *Sackvile*, Eſq; and *Mary* his Wife, Defendants, it was reſolved by the two Chief Juſtices, and Chief Baron, upon Argument and View of Precedents, That where Sir *Walter Leveſon* was ſeiſed of a Reverſion in Fee held *in capite* expectant on an Eſtate-tail (which he had made to *Richard* his Son) he, by Indenture, in Conſideration of Blood, did covenant to ſtand ſeiſed of the ſaid Reverſion, to the Uſe of *Mary* his Niece, *ſc.* Daughter and Heir apparent of the Lady *Curſon*, Siſter of the ſaid Sir *Walter*; and afterwards Sir *Richard Leveſon* the Son died without Iſſue; That in this Caſe the King ſhould not have Primer Seiſin by the Statutes of 32 and 34 *Hen.* 8. and that depends upon Conſideration and Conſtruction of the Words, and Purview of the ſaid Statutes, which in Effect are, "Every Perſon having any Manors, Lands, *&c.* holden "*in Capite, &c.* ſhall have full Power and Authority, to give, "diſpoſe, will, or aſſign, by his laſt Will in Writing, or "otherwiſe by any Act or Acts lawfully executed in his Life, "two Parts of the ſame Manors, Lands, *&c.* in three Parts "to be divided, *&c.* to and for the Advancement of his "Wife, Preferment of his Children, and Payment of his "Debts, or otherwiſe at his Will and Pleaſure; ſaving al-"ways and reſerving to the King our Sovereign Lord, the "Cuſtody, Wardſhip, and primer Seiſin, or any of them, "as the Caſe ſhall require, of as much as ſhall amount to "the clear yearly Value of the third Part, *&c.*" Then it was in Conſideration how the Law ſtood concerning Wardſhip and primer Seiſin in this Caſe, before the Statutes of 32 and 34 *H.* 8. And 1. It was reſolved, That by the Statute

10 Co. 83. a.
8 Co. 163, 164, *&c.*
32 H. 8. c. 1.
Cr. Jac. 157.
34 H. 8. c. 5.
Poſtea 77. a.
3 Co. 27. a.
1 Sid. 56.
Co. Lit. 76. b. 111. b.

tute of (*a*) *Marlb. de hiis qui primogenitos feoffare solent*, it was Colluſion apparent to enfeoff his eldeſt Son; for without Queſtion every one would (to prevent the Lord of his Ward) enfeoff his eldeſt Son, if the giving of his Land to him, to whom the Land would deſcend by the Common Law, would ſerve in ſuch Caſe. The ſame Law, and the ſame Reaſon, if the Tenant enfeoff his collateral Heir apparent, as it is alſo ſaid, and not denied in *Plowden's Com.* in *Patridge's* Caſe, 82. *a.* Alſo Proviſion was made when the Tenant enfeoff'd others upon Colluſion, *&c.* which was averrable; but it was doubted, whether (*b*) Colluſion could be averred upon particular Eſtates, as an Eſtate for Life, or in Tail, and it was held clearly that no Colluſion could be averred, when, upon an Eſtate for Life, or in Tail, the Remainder or Reverſion was limited or left in another, 27 *H.* 8. 10. *&* 33 *H.* 6. 14. *b.* So when a (*c*) Stranger was joined with the Heir, although the Inheritance was limited to the Heirs of the Heir, and that the Stranger had but for Term of Life, as it is agreed in 31 *E.* 3. *Colluſion* 29. *&* 33 *H.* 6. 14. *b.* So it was taken, that if * *Ceſtui que Uſe* had deviſed his Uſe by his Will, no Colluſion could have been averred upon a Will. For *Nemo præſumitur eſſe immemor ſuæ ætern' ſalutis, & maxime in articulo mortis, & omne* (*d*) *teſtamentum morte conſummat' eſt.* And therefore the Statute of 4 *H.* 7. *c.* 10. which gave the Wardſhip of *Ceſtuy que Uſe*, made an Exception when any Will is by him declared. *Vide* 27 *H.* 8. 10. 14. So if the Father had enfeoffed another, either for the Advancement of his Daughters, or his younger Sons, or for Payment of his Debts, and afterwards to enfeoff his Heir; it was not any (*e*) Colluſion, for he was bound to provide for them, and therewith agree 33 *H.* 6. 14. *b.* *&* 27 *H.* 8. 7. *b.* *Vide Mich.* 9 *&* 10 *El. Dy.* 260. 2 *&* 3 *El.* 193. 20 *El.* 361. 19 *El.* 276. 5 *Ma.* (*f*) 158. Then ſecondly it was reſolved, That as the Stat. of 32 *H.* 8. gave Benefit to the Subject, to have Power to make a Deviſe of his Lands by his laſt Will in Writing; ſo by the Saving, it gave Benefit to the King in the ſaid three Caſes, *ſc.* Advancement of his Wife, Preferment of his Children, and Payment of his Debts, in (*g*) none of which Caſes the King (as it appears before) ſhould have Benefit of Ward, or Primer Seiſin before this Statute. And it is to be known, that theſe Words in the ſaid Purview of the Act (*or otherwiſe at his Will and Pleaſure, any Law, Statute, Cuſtom, or other Thing to the contrary thereof notwithſtanding*) have Reference and Relation only to laſt Wills, and not to Acts executed, and that for two Reaſons. 1. It was neceſſary to add thoſe Words to Wills, for otherwiſe none could have deviſed two Parts, but only either for the Advancement of his Wife, or Preferment of his Children, or Paym. of his Debts,

(*a*) 52 E. 3. c. 6. Co. Lit. 76. a. 2 Inſt. 109, 110, 111, 112.

(*b*) 8 Co. 164. a. b.

(*c*) Co. Lit. 78. a. 8 Co. 163. b.

* 2 Inſt. 112.

(*d*) 3 Co. 29. b. 32. a. 34. a. 4 Co. 61. b.

(*e*) 10 Co. 83. a. Co. Lit. 78. a. 8 Co. 164. b.

(*f*) Dyer 158. pl. 33. 3 Co. 30. b. 2 Brownl. 105. 10 Co. 83. b.

(*g*) 10 Co. 83. a. Co. Lit. 78. a.

and it was not the Intention of the Act, but that he might deviſe two Parts to whom he would, ſo that a third Part deſcended. But it was in vain to refer thoſe Words, (*or otherwiſe at his Will and Pleaſure*) to Acts executed, for he might do that without any Authority or Power given him by that Act. *Et quando* (*a*) *diſpoſitio referri poteſt ad duas res ita quod ſecundum relationem una vitatur, & ſecundum aliam utilis eſt, tunc facienda eſt relatio ad illam ut valeat diſpoſitio, & ſemper ita fiat relatio, ut valeat diſpoſitio.* 2. Theſe later Words do likewiſe illuſtrate it, (*ſc. any Law, Statute, Cuſtom, or other Thing*) for no Law did reſtrain a Man by Act executed, to convey his Land to whom he would by Act in his Life. But the Law and general Cuſtom of the Realm did reſtrain Men to deviſe Lands to any, unleſs it was by ſome ſpecial (*b*) Cuſtom in ſome particular Place; and that appears by ſeveral Statutes and Acts of Parliament: ſo that the ſaid Words (*or otherwiſe*, &c.) having ſuch Concluſion, refer only to laſt Wills. Alſo in the third Article of 34 & 35 *H.* 8. of Explanation, it is declared, *That all Perſons holding any Lands in chief*, &c. *have, and by Authority of this preſent Parliament, ſhall have full and free Power*, &c. *to give, diſpoſe*, &c. *to any Perſon*, &c. *by his laſt Will, or otherwiſe by any Act lawfully executed in his Life, two Parts of his Lands*, &c. *at his free Will and Pleaſure*, omitting the Words of 32 *H.* 8. *ſc. Advancement of his Wife, Preferment of his Children, and Payment of his Debts.* But that doth not take away the Act of 32 *H.* 8. as to the ſaid three particular Caſes, in which Ward and Primer Seiſin is by the Saving given to the King; but all other Caſes are explained, notwithſtanding theſe Words (*or otherwiſe*) by the ſaid Act of 34 & 35 *H.* 8. 3. It was reſolved, that the ſaid Saving of Ward and Primer Seiſin in the ſaid Act of 32 *H.* 8. ſhould have Relation only to Acts executed, and not to Wills; for always in Statutes Relation ſhall be made according to the Matter precedent, for the Act gives the Owner of the Land Power by his Will to deviſe but two Parts, ſo that the third Part ought of Neceſſity to deſcend; and in ſuch Caſe the King ſhall be aſſured of the Wardſhip, or primer Seiſin of a third Part. But in the Caſe of Deeds executed, he may convey all, and therefore it was needful to add the ſaid Saving as to that: But the Saving extends only to one of the ſaid three Caſes before particularly mentioned, which (as hath been ſaid) gives great Benefit to the King more than he had before, and ſo as to this Purpoſe to make Acts (Deeds) executed in Equipage with Wills. And there was great Reaſon to provide for the ſaid three Caſes, becauſe they were ordinary and uſual; and every Man by the Law of God, of Nature and of Nations, was bound to provide a com-

(*a*) Lit. Rep. 66.

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

§ Co. 164. a.

1 Inſt. 112. Co. Lit. 78. a.

a competent Living for his Wife, his Children, and for the Payment of his Debts. And if the ſaid Words (*or otherwiſe*) ſhould refer as well to Acts executed, as to Wills, and ſhould give Wardſhip and primer Seiſin to the King, not only in the ſaid particular Caſes, but in all others; then if any one conveys his Lands to the Uſe of his (*a*) Baſtard, or to a meer Stranger, or any Conſideration whatſoever, it would be within the Saving, which hath oftentimes been reſolved and adjudged to the contrary. *Vide Mich.* 12 and 13 *Eliz. Dyer* (*b*) 296. 14 *Eliz.* 313. and 18 *Eliz.* (*c*) 345. And therefore the Opinion in 2 *E.* 6. **Teſtament*, was utterly denied by all, unleſs it be intended that it was given to a Stranger by Deed executed, to one of the ſaid three Purpoſes, or upon Colluſion. 4. It was reſolved, That if there be (*d*) Grandfather, Father, and divers Sons, and the Grandfather in the Life of the Father, conveys his Lands to any of the Sons, it is out of the ſaid Act of 32 *H.* 8. for it is not common nor uſual. *Et* (*e*) *ad ea quæ freventius accidunt jura adaptantur*; and the Father ought to have the immediate Care of his Sons and Iſſue: But if (*f*) the Father be dead, then the Care of them belongs to the Grandfather, and then if he conveys any of his Lands to any of the ſaid Sons, it is within the ſaid Statute. But it was reſolved clearly, That a voluntary Conveyance to the Uſe of any of his (*g*) collateral Blood, who is not his Heir apparent, is not within the ſaid Act: For none could intend, that he would diſinherit his Heir on Purpoſe to take away the Wardſhip from the King, (when every one hopes to live till the Age of his Heir) much leſs to defeat him of the Primer Seiſin. And if other Conſtruction ſhould be made, the ſaid three Examples, and the naming of his Children would be vain, if the Act ſhould extend to every other of the Blood. And according to this Reſolution in the principal Caſe, the Experience of the Court of Wards hath always been: And a great Number of Subjects who are now in Peace, would be vexed and moleſted if the common received Opinion ſhould be now changed. And accordingly it was reſolved in the Court of Wards, in Sir *Rowland Hill's* Caſe, in *Matthew* (*h*) *Draper's* Caſe, *Mich.* 22 *Eliz.* and divers others. And ſo the Doubts in *Dyer* 2 *Eliz.* (*i*) 181, in *Modie's* Caſe, and 8 *Eliz. Dyer* 252. in (*k*) *Kniveton's* Caſe, *&c.* well reſolved.

(*a*) Co. Lit. 3. b. 78. a. 123. a. 10 Co. 83. a. Jenk. Cent. 239. Cr. El. 358, 509. Poph. 188. Goldsb. 191. Moor 430. 2 Rol. 43, 44. Noy 35. 1 Anderſ. 79.
(*b*) Dyer 296. pl. 23. 10 Co. 83. b.
(*c*) Dyer 345. pl. 4. Co. Lit. 78. a. 10 Co. 83. b.
* Br. Teſtament 24.
(*d*) Co. Lit. 78. a.
(*e*) Co. Lit. 238. a. 2 Inſt. 137. 5 Co. 127. b. 7 Co. 28. a. Calvin's Caſe, Carter 13.
(*f*) Co. Lit. 78. a. Cr. Jac. 157.
(*g*) Co. Lit. 78. a. Cr. Jac. 157. Antea 75. b.
(*h*) Cr. Jac. 157.
(*i*) Dyer 181. pl. 51.
(*k*) Dyer 252. pl. 97. 10 Co. 46. a. Co. Lit. 78. a. 2 Rol 395, 493. Goldſb. 27. 3 Co. 6. b.

BULLEN's *Caſe.*

Paſch. 5 Jacobi.

In the Common Pleas.

(a) 1 Brownl. 189, 190. Yelv. 186.

BEtween *Robert* (*a*) *Bullen* Plaintiff, and *Richard Godfrey*, Eſquire, Defendant, Lord of the Manor of *Bale* in *Norfolk*, it was agreed, that the Lord of a Leet, might well have a certain Sum, as 10 *s. pro* (*b*) *certo Letæ*, of all the Reſiants within his Leet, called ſometimes *Capitagium*, &c. and ſometimes *Certum Letæ*, and by other Names, and it might have a reaſonable Beginning, *ſcil.* When the Lord purchaſed and acquired the Leet for the (*c*) Eaſe of the Reſiants therein, ſo that they need not go to the Sheriff's Torn, but to do their Suit real at the Lord's Leet; alſo the Lord of a Leet was at every Eyre obliged at his own Coſts to claim this Franchiſe, *&c.* And in the Caſe at Bar the Iſſue was, whether the Plaintiff at the Court-Leet mentioned in the Record, was a chief Pledge of the ſame Court or not: And thereupon a ſpecial Verdict was found, that the Plaintiff was Reſiant, and that he was certified in the ſaid Leet, to be a chief Pledge, by the chief Pledges of the Leet; but he made Default, and was (*d*) amerced for his Default 2 *s.* 6 *d.* ſo that he did not appear, nor was ſworn as chief Pledge, *& ſi, &c.* And it ſeemed to the Court, that they could not adjudge him a chief Pledge upon this Verdict; for Leets were divided *in decurias* or *decennas*, (*unde dicitur decennarii* to this Day:) And out of every ten, (each of them being Pledge for the other, from whence the Court was called (*e*) *Curia viſus franci plegii*) one was called *Capitalis plegius*, *ſeu Primarius fidei juſſor*; and in ſome Places at this Day, he is called the *Tythingman*, and in *Yorkſhire* (*f*) *Tenmantale*. And therewith agreeth *Lambert* in his Book *de priſcis Anglor' legibus*, and *Fleta*, *lib.* 2. *c.* 45. and Reaſon proves it; for he can't be

(b) 11 Co. 42. a. 45. a. 1 Brownl. 190. 1 Rol. Rep. 32, 73. 2 Inſt. 71. Yelv. 186.

(c) 1 Rol. Rep. 32. 2 Inſt. 71.

(d) 8 Co. 41. a.

(e) 2 Inſt. 73.

(f) 2 Inſt. 73.

be called capital Pledge, but in Reſpect that others are inferior Pledges. *Vide* the Statute of 28 *E.* 2. *de viſu franci pleg.* of chief Pledges: And our Books ſpeak of chief Pledges. *Vide* 4 *E.* 3. 125, 126. and 4 *E.* 3. 30. 45 *E.* 3. 23. of the old Impreſſion, 13 *H.* 4. 12. *b.* So that the Return of the Conſtable, or the Preſentment of the Jury in the Leet, doth not make a Man chief Pledge. And it appears by the ſaid Act of 18 *E.* 2. that it ought to be enquired at the Leet, if all the chief Pledges with their Decenners, that is, the other nine, appear, by which it appears, that the tenth principal Man was the chief Pledge; *Sed tempora mutantur, & nos mutamur in illis.* So that *vera inſtitutio hujus curiæ evanuit, & velut umbra ejuſdem adhuc remanet.* And this Caſe was very obſcure and doubtful at the firſt, and afterwards, *materia iſta conſopita fuit in arbitrio.* *Vide* 30 *E.* 3. 23. of the Franckpledge of the Town, and his Authority. 2 Inſt. 72.

The

The Lord ABURGAVENY'S *Caſe.*

Paſch. 5 Jacobi.

In the Common Pleas.

7 Co. 37. b.

BEtween *Richard Michelborn*, Plaintiff, and *George Overy*, Defendant, in Replevin, which Plea began *Trin.* 4 *Jac. Rot.* 1146. *in Communi Banco*, the Caſe was ſuch; *Margaret Pool* and *Frances Pool* were Tenants for Life of 12 Acres of Land in *Keym* in *Suſſex*, the Reverſion to the Lord *Aburgaveny*. Afterwards, *ſcil. Hill.* 34 *Eliz. Richard Michelborn*, the Plaintiff, had Judgment in the Commons Pleas againſt the ſaid *Margaret*, in an Action of Debt of 200 *l.* 24 *Maii* 37 *Eliz.* the ſaid *Margaret* did releaſe to the ſaid *Frances Pool* all her Eſtate and Right in the ſaid Land, and afterwards, *ſcil* 27 *Jun.* 37 *Eliz.* The Plaintiff ſued Execution out of the ſaid Judgment for the ſaid Debt, by *Elegit*, and the ſaid 12 Acres amongſt others, as a Moiety of the other Lands, *&c.* were delivered to the Plaintiff, and the Plaintiff in Bar of the Avowry, (which was for Damage-feaſance in his Freehold) averred the Lives of the ſaid *Margaret* and *Frances*: The Avowant pleaded, that *Frances* aſſigned her Intereſt to the Lord *Buckhurſt*, who before the taking, had ſurrendered to the Lord *Aburgaveny*, and traverſed the Life of *Frances*, upon which Plea, the Plaintiff did demur in Law, and after Argument at Bar and Bench, Judgment was given againſt the Plaintiff, becauſe he had traverſed the Life of *Frances*, which was not a Thing material, nor iſſuable; for *non refert* whether ſhe was living or dead: And in this Caſe theſe Points were reſolved. 1. When Judgment is given againſt *Margaret* one of the Jointenants for Life, in an Action of Debt, and afterwards ſhe releaſes to her Jointenant before Execution, altho' *Frances* to whom the Releaſe is made between them, is now in by the Leſſor, and not by the ſaid *Margaret*, yet as to the Pl. who has Judgm. in the Action of Debt,

1 Rol. Rep. 310.
1 Jones 62.
3 Bulſtr. 132.

Debt, (by which the Moiety of *Margaret* was charged to his Execution) ſhe by her own Act ſhall not defeat the Plaintiff of his Execution, but (*a*) as to him the Eſtate of *Margaret* hath Continuance in Law, altho' in Truth *Frances* for the Releaſe made, had but an Eſtate for her own Life: But if *Margaret* had died (*b*) before Execution, the Survivor ſhould hold it diſcharged of any Execution to be ſued againſt her. *Vide* 13 *H.* 7. 22. *a.* 5 *H.* 5. 8. *b.* 10 *E.* 3. *Charge* 13. 17 *E.* 2. *Charge* 15. 18 *E.* 3. *Execution, Stath.* 10 *E.* 4. 3. *b.* 40 *E.* 3. 31. 41. 37 *H.* 8. *Br. Alienation* 31. And upon all the ſaid Books it was collected for good Law, that if (*c*) two Jointenants be in Fee, and one grants a Rent-charge in Fee, and afterwards releaſes to the other, in that Caſe, altho' to ſome Intent, he to whom the Releaſe is made, is in by the firſt Feoffor, and no Degree is made betwixt them, yet as to the Grantee of the Rent-Charge, he is under the Jointenant who (*d*) releaſed; and he who ſurvives, ſhall not avoid it after the Death of him who releaſed; for he who ſurvives, by Acceptance of the Releaſe, has deprived himſelf of the Ways and Means to avoid the Charge; for *jus acreſcendi, &c.* the Right of Survivorſhip, was the ſole Means to have avoided it, and the Right of Survivorſhip is utterly taken away by the Releaſe, and ſo the Doubt in 33 *H.* 6. 5. *a.* well reſolved. 2. It was reſolved, that when the Releaſe is made to *Frances*, by which ſhe has a ſole Eſtate for Life, when ſhe dies, and he in Reverſion enters, and is in of his old Eſtate, yet as to *Michelborn*, the Eſtate of *Margaret* who is yet living, hath Continuance. As if the Huſband ſeiſed of a Rent, or Common in Fee, releaſes to the Terre-tenant, this Rent is extinct, and yet having regard to the Wife, it hath Continuance, for ſhe ſhall be thereof (*e*) endowed, as it is adjudged in 5 *E.* 2. *Dower* 143. 10. 20 *E.* 3. 27. 24 *E.* 3. 29. 34 *Aſſ.* 15. 22 *E.* 3. *Dower* 131. 44 *E.* 3. 32. *Vide* 31 *E.* 3. *Aſſ.* 5. 11 *H.* 7. 12. *a.* A Meſnalty deſcended to the Tenant paravail within Age, 26 *Aſſ.* 60. the Caſe of the *Honour* of *Pickering*.

(*a*) 1 Jones 62.

(*b*) Co. Lit. 184. b. 2 Rol. 88.

(*c*) Co. Lit. 185. a.

(*d*) Co. Lit. 185. a. Dyer 2 & 3 El. 187. a. pl. 5. Bridgman 28. Finch's Ley 4. b. 1 Rol. Rep. 309, 311. 2 Rol. Rep. 491. 3 Bulſtr. 132. Moor 139. Cr. Jac. 417.

(*e*) Co. Lit. 32. a. 7 Co. 37. b. (*f*) 3 Co. 31. a. Br. Incidents 11. Br. Parents 35. Moor 161.

Sir

See 1 Sand. 362.

Sir EDW. PHITTON's *Caſe.*

Trin. 5 Jacobi,

In the Common Pleas.

SIR *Edward Phitton* was outlawed at the Suit of one *R.* after Judgment before the general Pardon of (*a*) 43 *El.* for 18 *l.* and after the Pardon Sir *Edward* died, and now his Executors made Satisfaction, which was acknowledged of Record and without any Proceſs, (for no Proceſs could be awarded againſt them on the *Outlawry*) they pleaded the general Pardon, and with an Averment, that they are not any of the Perſons excepted, *&c.* and in this Caſe theſe Points were reſolved. 1. That the Executors ſhould (*b*) take Benefit of the ſaid general Pardon, by which it is enacted, that all the King's Subjects, their Heirs, Succeſſors, Executors, and Adminiſtrators, ſhall be acquitted and pardoned, releaſed and diſcharged of all Offences, Contempts, and all other Things, *&c.* and that it ſhall be expounded moſt (*c*) beneficially and availably for the Subject, *&c.* and further gives and grants all Goods, Chattels, Debts, *&c.* forfeited, and doth prohibit any Clerk *to make out any Writ*, &c. provided that every Clerk may make (*d*) *Capias utlag.* at the Plaintiff's Suit againſt ſuch Perſons outlawed, to the Intent to compel the Defendant to anſwer: And that the Party ſhall ſue a *Scire facias*, *before the Pardon in that Behalf ſhall be allowed*; which is as much as to ſay, having regard only to the Plaintiff; but having regard to the King, it is an abſolute Pardon and Grant of his Goods, *&c. Nota hoc*, Then comes another *Proviſo*, *That this Act ſhall in no wiſe extend to any Perſon outlawed upon any Writ of* Capias ad ſatisfaciendum, *until ſuch Time as the Perſon ſo outlawed, ſhall ſatisfy, or otherwiſe agree with the Party*; and that is intended always as to the Party Plaintiff; for, for him the Proviſion is made. (*e*) But againſt the King, he is a Perſon able to take Benefit of the Pardon,

(*a*) 43 El. c. 19. Hard. 304.

(*b*) Latch. 167. Palm. 514. Hardr. 370. Poph. 191. 1 Leon. 51.

(*c*) 5 Co. 50. a.

(*d*) Hard. 304.

(*e*) 1 Leon. 51.

Pardon, and capable of his Goods againſt the King: So note, he is a Perſon (*a*) able by the Pardon, againſt the King, but not as to the Party Plaintiff; as a Villain is diſabled againſt his Lord, but not as to any other: And that appears by Conſtruction upon the whole Act, for if the Party (*b*) outlawed ſhould remain outlawed againſt the King, then the Gift and Grant of his Goods and Chattels would be void. It was reſolved, altho' the Words of this latter Proviſo are, *until ſuch Time as the Perſon ſo outlawed ſhall ſatisfy*, it is ſuch Intereſt in the Perſon outlawed, that altho' he dies after the Pardon, yet his Executors may ſatisfy, and have Benefit of the Pardon. 3. Foraſmuch (as this Caſe is) as no *Scire facias*, nor *Capias utlagatum*, nor other Proceſs lies againſt the Executors, they may, (after Satisfaction acknowledged) come in *gratis*, (for Neceſſity without Proceſs) and plead the general Pardon, with Averment, that they are not any Perſons excepted. And ſee a Clauſe in the Beginning of the Act, that every Subject by himſelf, or his Attorney, may plead this preſent Act *for his or their Diſcharge*, &c. *Vide* 3 *El. Dyer* 201. upon the Statute of 23 *H.* 8. Executors ſhall have (*c*) Attaint. 6 *E.* 6. *Bendloes*, Executors ſhall have Reſtitution upon the Statute of (*d*) 21 *H.* 8. Alſo Adminiſtrators ſhall have a Writ of Error upon 27 *El.* as it was adjudged 36 *El.* in the Lord (*e*) *Mordaunt*'s Caſe in the Exchequer Chamber; yet thoſe Statutes ſpeak only of the Party, and not of his Executors or Adminiſtrators. *Vide* 28 *Aſſ. p.* 7. 11 *E.* 3. *Executors* 77.

(*a*) 1 Leon. 51. Cr. Jac. 271. Yelv. 197.

(*b*) Winch. 33, 58. Hutt. 53.

(*c*) O Benl. 4. pl. 11. N. Benl. 87. c. 132. Benl. in Aſſ. 14. Benl. in Kelw. 210. pl. 14. Moor 17. nu. 60. 1 And. 24, 25. c. 53. Co. Lit. 294. b. Dyer 201. pl. 65.

(*d*) Poph. 191. 3 Inſt. 242. 21 H. 8. c. 11.

(*e*) Cr. El. 294, 295.

The

The Order of the CASES reported in this *Sixth* Book.

Mich.

F I N I S.