The Eighth PART of the

REPORTS

OF

Sir *Edward Coke*, Kt.

Chief Juſtice of the COMMON PLEAS:

OF

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

Publiſh'd in the Ninth Year of the Moſt High and Moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the 44th, the Fountain of all Piety and Juſtice, and the Life of the LAW.

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

Nulli vendemus, nulli negabimus, aut differemus juſtitiam aut rectum.
Magna Charta, cap. 29.

Rex præcipit ut pax ſacroſanctæ Eccleſiæ & Regni ſolida conſervetur & colatur in omnibus, & quod Juſtitia ſingulis, tam pauperibus quam divitibus, adminiſtretur, nulla habita perſonarum ratione.
Weſtmonaſt. 1. cap. 1.

In the SAVOY:

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

Deo, Patriæ, Tibi.

QUOD ſcripſi (ut noverit Lector eruditus) priorum mearum in nonnullis Præfationum de Legum Angliæ, & antiquitate & excellentia, duas has produxit quæſtiones: 1. An Hiſtoriographi in hoc mihi conveniunt quod in illis adeo confidenter aſſerui: 2. Cum tam crebra facta ſit de Legibus Angliæ municipalibus repetitio, quodnam ſit corpus ſive textus Juris municipalis & ubi deinde inveniendum. Ad utraſque quarum reſponſion' tandem reddere viſum eſt. Primam qd' attinet, quanquam libri & acta publica (quæ ſunt & *vetuſtatis & veritatis veſtigia*) a me in præfationibus in tertiam & in ſextam Commenta-

THAT which I have written as you know (learned Reader) in ſome of my former Prefaces of the Antiquity and Excellency of our Laws of England, *hath produced theſe two Queſtions: Firſt, Whether Hiſtoriographers do concur with that which there ſo conſtantly hath been affirmed? Secondly, ſeeing ſo great and ſo often Rehearſal is made of the Common Laws of* England, *What the Body or Text of the Common Law is, and conſequently where a Man may find it? To both which in the End I yielded to make Anſwer. For the Firſt: Albeit the Books and Records (which are* & vetuſtatis & veritatis veſtigia) *cited by me in the Prefaces to the Third*

and Sixth Parts of my Commentaries, are of that Authority that they need not the Aid of any Hiſtorian: Yet will I with a light Touch ſet down out of the conſent of Hiſtory, *ſome Proofs of the* Antiquity *(and from the Cenſure of thoſe Perſons, who in reſpect of their Profeſſion (for they were Monks and Clergymen) may rather be ſuſpected of Reſervedneſs than Flattery) ſomewhat of the* Equity *and* Excellency *of our Laws; and that it doth appear moſt plain by ſucceſſive Authority in* Hiſtory *what I have poſitively affirmed out of Record, That the Grounds of our Common Laws at this Day were beyond the Memory or Regiſter of any Beginning, and the ſame which the* Norman *Conqueror then found within this Realm of* England.

Ex vita Abbaris ſancti Albani.

The Laws that William *the Conqueror ſwore to obſerve, were* bonæ & approbatæ antiquæ regni leges, *that is, the Laws of this Kingdom were in the Beginning of the Conqueror's Reign good, approved, and ancient. And, that the People might the better obſerve their Duty, and the Conqueror his Oath, he cauſed* Twelve of the moſt Diſcreet and Wiſe Men

Ex lib. Monaſt. de Litchfield.

riorum meorum partem prolata, ejus fidei ſunt & authoritatis, qd' Hiſtoriographi auxilio nequaquam opus eſt; leviori tamen ut dicam tactu, ex conſentiente Hiſtoriarum ſuffragio de Antiquitate, & (cenſura eor', quos forſan non immerito (ſi ſpectes eorum ordinem) ſuſpiceris potius de vitio reticendi quam blandiendi) de Æquitate & excellentia legum noſtrar', nonnulla adjiciam argumenta; & qd' teſtimoniis Hiſtoriæ omnium ſuperior' tempor' liquet hoc imprimis manifeſto, quod poſitive ex monumentis affirmavi, principia nempe Legum noſtrar' hodie municipalium tanto ævo inoluiſſe, quod nihil omnino illorum de origine oſtendi poteſt; hæcque illa fuiſſe eadem quæ victor ille Normannus in hoc Angl' regno inveniebat. Leges, quas *Gulielmus* gentis noſtr' ſubactor jurejurando ſe aſtrinxit obſervaturum, *fuerunt bonæ & approbatæ antiquæ regni Leges.* Et, quo rectius populus ſua officia & Victor jurament' ſanctius obſervarent, conſtituit, ut *de ſingulis totius Angl' comitatibus* 12, *viri ſapientiores* coram ſe jurarent, qd' nec ad dextram nec ad ſiniſtr' declinantes, hoc eſt, nec

prærogativæ blandientes, nec privilegia dilatantes, *Legum ſuarum ſanctitatem patefacerent; nil prætermittentes, nil addentes, nil prævaricando mittentes:* Et *Aldredus* Archiepiſc' (qui corona Regis caput cinxit triumphali) & *Hugo* Londinenſis Epiſcop', *per præcept' Regis ſcripſerunt propriis manibus omnia quæ præd' Jurati dixerunt.* Et has (teſte *Ingulpho*) *Authenticas eſſe & perpetuas per totum regnum Angl' inviolabiliter tenendas ſub pœnis graviſſimis proclamavit.* Summam cujus, cum digeſſiſſet in Magn' (ut loquimur) chartam, ſolum proculdubio & fundament' Leg' omnium poſterior' ſignaculo ſecuritatis & voto beavit æternitatis, hoc generali concludens edicto: *Hoc quoque præcipimus, ut omnes habent & teneant Legem* Edwardi *Regis in omnibus rebus:* Benignique ſui operis præluſtri hac ſua inſcrip' erexit frontiſpicium: Willielmus *Dei gratia Rex Anglorum, Dux Normannor', Omnib' hominib' ſuis Francis & Anglicis ſalutem. Statuimus imprimis ſuper omnia unum Deum per totum regn' noſtr' venerari, unam fidem Chriſti ſemper inviolatam cuſtodiri, pacem & concordiam, judicium & juſticiam* in every Shire throughout all *England, to be ſworn before himſelf, that, without ſwerving, either* ad dextr' *or* ſiniſtram, *That is, neither to flatter Prerogative, or extend Privilege,* they ſhould declare the Integrity of their Laws without concealing, adding, or in any Sort varying from the Truth. *And* Aldred, the *Archbiſhop that had crown'd him, and* Hugh, *the Biſhop of* London, by the King's Commandment wrote that which the ſaid Jurats had delivered: *And theſe (as ſaith* Ingulphus) by publick Proclamation, he declared to be Authentick, and, for ever, under grievous Puniſhment, to be inviolably obſerved. *The Sum of which, compoſed by him into a* Magna Charta, *(the Ground-work of all thoſe that after followed) he bleſſed with the Seal of Security, and wiſh of Eternity, cloſing it up with this general Edict:* And we further command that all Men keep and obſerve duly the Laws of K. *Edward: rearing up the Frontiſpiece of his gracious Work with his glorious Stile* Will'mus Dei gratia Rex Anglorum, Dux Normanor' omnibus hominibus ſuis Francis & Anglicis Salutem. Statui-

Ex Ingulpho Abbate Crovalandenſe. Ex libro Antiquarum legum.

Ex libro manuſcripto de legibus antiquis.

mus imprimis ſuper omnia unum Deum per totum regn' noſtr' venerari, unam fidem Chriſti ſemper inviolatam cuſtodiri, pacem & ſecuritatem & concordiam, judicium & Juſticiam inter Anglos & Normannos, Francos & Britones Walliæ & Cornubiæ, Pictos & Scotos Albaniæ, ſimiliter inter & Inſulanos, provincias & patrias quæ pertinent ad coronam & dignitatem, defenſion' & obſervation' & honorem regni noſt', & inter omnes nobis ſubjectos per univerſam Monarchiam regni Britaniæ firmiter & inviolabiliter obſervari.

Ex Mat. Par. monacho ſancti Albani.

W. Ruf. *that ſucceeded his Father, ſo exceeded himſelf in Miſrule and Oppreſſion, that there is left no Regiſter of his Goodneſs in this Kind, for in his Time* the Kingdom was oppreſſed with unjuſt Exactions, *and Juſtice itſelf corrupted with evil Uſages, as appeareth by the* Great Charter *of his ſucceeding Brother K.* Henry I. *who thereby took away* all the evil Cuſtoms wherewith the Kingdom of *England* was unjuſtly oppreſſed, and reſtored the Law of King *Edward, (ſuch Law as was in the Time of the holy Confeſſor)* with thoſe Amendments which his

Ex Rogero Hoveden, Preſbytero.

inter Anglos & Normannos, Francos & Britones, Walliæ & Cornubiæ, Pictos & Scotos Albaniæ, ſimiliter inter & Inſulanos, provincias & patrias, quæ pertinent ad coronam & dignitatem, defenſionem & obſervationem & honorem regni noſtri, & inter omnes nobis ſubjectos per univerſam Monarchiam regni Britaniæ firmiter & inviolabiliter obſervari. Patri qui ſucceſſit *Guilielmus Rufus*, rem male gubernando libertateſque omnes ſupprimendo ita ſe exceſſit, qd' virtutis ſuæ hujuſmodi ne reliquum omnino eſt veſtigium; ſub illo enim, *regnum oppreſſum erat injuſtis exactionibus*, juſticiaq; ipſa malis adulterabatur conſuetudinibus, ut plane conſtat ex Magna illa Charta ſuccedentis ſui fratris *Henrici* primi, qua penitus abrogavit *Omnes malas conſuetudines quib' regn' Angl' injuſte opprimebatur, reſtauravit legem Regis* Edwardi, (hanc nimirum, quæ ſancti illius Confeſſoris viguiſſet temporibus) *cum illis emendationib' quib' pater eam emendavit cum conſilio Baronum ſuorum.* Leges hæ a *Mat. Par.* (cujus hiſtoria hanc habet inſertam donationem) edocentur fore, *Libertates & Con-*

Conſuetudines antiquæ, quæ floruerunt in regno tempore Sancti Regis Edwardi. Hoc etiam teſtatur *Hoveden*, in hæc verba; *Rex* Henricus *primus omnes malas conſuetudines & iniquas exactiones, quibus regnum Angl' injuſte opprimebatur, abſtulit, pacem firmam in toto regno ſuo poſuit, & teneri præcepit legem Reg.* Edwardi, *omnibus in commune reddidit, &c.* Quod etiam *Florentius* monachus Wigorn' (qui vixit ſub *Henrico* primo) in iiſdem fere verbis demonſtrat. Quin &, injuſticia ſeculi ſuperioris unde extorta fuit, & unde & quomodo emendata *Guliel-mus* Monachus Malmeſburienſis his meminit verbis. Henricus *nat' in Anglia & regie nat', &c. edicto ſtatim per Angliam miſſo injuſtitias a fratre & Ranulpo inſtitutas prohibuit, &c. aliquarum moderation' legum revocavit inſolitam, ſacramento ſuo & omnium Procerum ne luderentur corrobor', &c.* Rex *Stephan'*, qui in avunculi ſucceſſit regnum, charta ſua magna libertatum, *Baronibus & hominibus de Anglia*, confirmavit his verbis, *omnes Libertates & bonas leges quas* Henricus *Rex Angliæ avunculus meus eis dedit & conceſſit, & omnes bonas* Father added by the Adviſe of his Barons. *What theſe were* Mat. Par. *(who hath inſerted the Charter in his Story) declareth to be* the ancient Liberties and Cuſtoms which flouriſhed in this Kingdom in the Time of holy King *Edward. And herewith agreeth* Hoveden *in theſe Words:* King *Henry* I. took away all the evil Cuſtoms and unjuſt Exactions wherewith the Kingdom of *England* was unjuſtly oppreſſed: He ſettled an aſſured Peace in his whole Kingdom, and commanded the Law of K. *Edward* to be obſerved, he reſtor'd to all, &c. *The which, almoſt in the ſame Phraſe,* Florentius, *a Monk of* Worceſter, *and living in the Reign of* Henry I. *alſo obſerveth. And by whom the Injuſtice of the foregoing Age proceeded, and by whom and how redreſſed,* William *the Monk of* Malmeſbury *delivereth in theſe Words: Henry* born in *England,* of kingly Birth, &c. by his Proclamation ſpeedily ſent thro' *England:* Reſtrained the Injuſtice brought in by his Brother, and *Ranulph, &c.* and aboliſhed the unwonted Lenity of ſome Laws, giving Aſſurance by his own and

Ex Mat. Par.

Ex Roger Hoveden.

Ex Florentio Monacho Wigorn.

Ex Willielmo Monacho Malmeſbury.

all the Nobility's Oath, that they ſhould not be deluded, &c. *King* Stephen *that ſucceeded his Uncle, confirmeth in his Great Charter of Liberties* to the Barons and Commons of *England in theſe Words*, All the Liberties and good Laws which *Henry* King of *England* my Uncle granted unto them: And I grant them all the good Laws and good Cuſtoms which they enjoyed in the Reign of King *Edward, and was ſo jealous of Innovation, as* Roger Bacon *the learned Fryar ſaith in his Book*, De impedimentis ſapientiæ: King *Stephen* forbad by publick Edict, that no Man ſhould retain the Laws of *Italy* formerly brought into *England. The next that ſucceeded was* Hen. 2. *who in another* Great Charter *eſtabliſhed the former Laws in theſe Words. Henry*, by the Grace of God King of *England*, Duke of *Normandy* and *Acquitain*, E. of *Anjou*, to all Earls, Barons, and his faithful Subjects of *France* and *England*, Greeting: Know ye that I, to the Honour of God and holy Church, and for the common Amendment of my whole Kingdom, have granted and

Ex libro legum Antiquarum.

Ex libro Rogeri Bacon de Impediment' ſapientiæ.

Ex libro leg' Antiquarum.

leges & bonas conſuetudines eis concedo quas habuerunt tempore reg. Edwardi: Curaque illi tanta imprimis fuit innovationi viam intercludendi, quod *Rogerus Bacon* Frater ille perquam eruditus, in libro ſuo *de impedimentis ſapientiæ*, dicit; *Rex quidem* Stephanus, *allatis Legibus Italiæ in Angliam, publico edicto prohibuit ne ab aliquo detinerentur.* Huic ſucceſſione proximus fuit *Henricus* ſecundus, qui alia Mag. Charta priores ſtabilivit Leges, in hæc verba: Henricus *Dei gratia Rex Angl', Dux Normanniæ & Aquitaniæ, Comes Andegaviæ, omnibus Comitibus, Baronibus, & fidelibus ſuis Francis & Angl' ſalutem. Sciatis me, ad honorem Dei & ſanctæ Eccleſiæ, & pro communi emendatione totius Regni mei conceſſiſſe & reddidiſſe, & charta mea confirmaſſe Deo & ſanctæ Eccleſiæ, & omnibus comitib' & Baron', & omnib' hominib' meis omnes conceſſiones & donationes, & Libertates & liberas conſuetudines quas Rex* Henr' *avus meus eis dedit & conceſſit. Similiter etiam omnes malas conſuetudines quas ipſe delevit & remiſit, ego remitto & deleri concedo pro me & hæredibus meis.* Unde liquet eum in Chartam avi ſui

fore

fore relaturum, qua iniquas exactiones & conſuetudines a regnante fratre inſtitutas aboleviſſet, & antiquiores præſtantioreſq; ſancti *Ed.* leges corroboraſſet. Nec minus antiquæ pari etiam teſtimonio conſtabunt nonnullæ civitatum noſtrarum conſuetudines: De Londino enim ait *Fitz-Stephen* monachus Cantuarienſis; *Prius condita eſt quam illa a* Remo & Romulo, (Romam intelligens) *unde & adhuc antiquis eiſdem utuntur Legibus communibus inſtitutis, &c.* Paulo inferius perveniamus uſque ad tempora regis *Johannis* filii regis *Henrici* ſecundi. Hic anno decimo ſeptimo a ſuſcepto gubernaculo, duas illas conſtituit magnas Chartas, unam, quam dicimus, Magnam Chartam (ob rei potius momentum quam ob quantitatem) aliam vero Chartam de Foreſta, quæ in hodiernum uſque extant diem: De quibus monachus ſancti *Albani: Quæ ex parte maxima Leges Antiquas & regni conſuetudines continebant.* Et non multo poſt inquit: *Capitula quoque Legum & Libertatum, quæ ibi Magnates confirmare querebant, partem in Charta Regis* Henrici *ſuperius ſcripta*

reſtored, and by my Charter confirmed to God and holy Church, and to all Earls and Barons, and to all my Subjects, all Grants and Donations, and Liberties and free Cuſtoms, which King *Henry* my Grandfather gave and granted unto them. And all thoſe evil Cuſtoms which he aboliſhed and remitted, I likewiſe do remit, and for me and my Heirs do agree ſhall be aboliſhed. *By which Words it appeareth, that he had Reference to that* Charter *of his Grandfather that aboliſhed the unjuſt Exaction and Uſages of his Brother's Reign, and confirmed the old and excellent Laws under S.*Edward's *Government. And no leſs antient, even by the like Authorities will appear the Cuſtoms of ſome of our Cities: For of* London * *ſaith* Fitzſtephen *(a Monk of* Canterbury) it was built before that of *Remus* and *Romulus (meaning* Rome) wherefore even to this Day they uſe the ſame antient Laws, publick Ordinances, &c. *Let us deſcend a little Lower to the Times of King* John, *the Son of* Henry *the Second, in the* 17*th Year of his Reign, made the two great Charters, the one called* Mag. Char. (*not*

Ex Stephanide monacho Cant'.

* See the Charter of K. *W.* 1. in the Preface to *Privilegia Londini.*

in

in reſpect of the Quantity, but of the Weight) and the other Charta de Foreſta, *which are yet extant to this Day. Of which the Monk of St.* Albans *ſaith,* Quæ ex parte maxima leges antiquas & regni conſuetudines continebant: *That is, which for the moſt Part did contain the ancient Laws and Cuſtoms of this Realm. And ſoon after he ſaith:* And thoſe Laws and Liberties which the Nobility of the Realm did there ſeek to confirm, are partly in the aboveſaid Charter of King *Henry,* and partly taken out of the antient Laws of King *Edward: Not that King* Edward *the Confeſſor did inſtitute them, but that he* out of the huge Heap of the Laws, &c. choſe the beſt and reduced them into one, *as in the Preface to the third Part of my Reports more at large it appeareth. The ſaid great Charters made by King* John *are ſet down* in hæc verba *in* Mat. Par. pag. 246. *and in Effect do agree with* Magna Charta *and* Charta de Foreſta *eſtabliſhed and confirmed by the great Charter made in* 9 Hen. 3. *which for their Excellency have ſince that Time been confirmed and commanded to be*

Mat. Par. An. Dom. 1215. p. 246, 247.

Mat. Par. pag. 246. Mag. Char. 9 H. 3.

ſunt, partimque Legibus Regis Edwardi *antiquis excerpta:* Non equidem quod has inſtituiſſe putes Regem *Edwardum,* ſed quod *ex immenſa Legum congerie, &c. optima quæque ſelegit, ac in unam cogit;* ut in tertiæ partis Relationum mearum Præfatione copioſe magis videri eſt. Quas quidem Magnas Chartas Regis *Johannis in hæc verba* habet *Mat. Par. p.* 246. & eædem plane ſunt cum Mag' illa Charta & Charta de Foreſta, quæ ſtabiliuntur firmæque redduntur in Magna Charta, anno nono *Henrici* tertii ſancita: Quarum tanta eſt excellentia, quod diverſorum exinde parliamentor' prudentia & authoritas ultra trigeſies illas approbaverunt & executioni mandaverunt. In *Regiſtro* præterea, Leges iſtæ in Reſcriptis quamplurimis dicuntur *Libertates*; ubi dicitur, *juxta tenorem Mag. Char. de Libertatibus Angliæ,* ab effectu, *quia liberos faciunt:* Quas *Mat. Par.* & alii (ut patet ſupra) ſub eodem habent nomine. Jam tandem, non ſolum ex Hiſtoriographis, quibus idem ac nobis in religione ſuadetur, ſed ex hiſce etiam monaſticis, Legum noſtrarum municipalium

cipalium excellentia & antiquas eluceant perſpicue. Hoc illi meis in prioribus Præfationibus aſſertioni fuſius ſubtexui, ut earum unita vis facilius utrinque adimat opinionum diſcrepantiam de veritate clariſſimis adeo multis firmiſſimiſq; argument' (in ſuprad' tertiæ partis proœmio, immo & teſtimonio *Johannis Forteſcue*, militis aurati (qui, regnante *Henrico* ſexto, e ſupremo Angliæ tribunali jus dixit) inter alia prolato in Præfatione ſextæ mearum Relationum partis) demonſtrata. Quæ omnia evincunt manifeſto Leg' municipalium corpus ante devictam hanc Nation' inſcript' non fuiſſe in fragmentis illis edictorum atque Conſtitutionum promulgatis ſub titulo Legum Regis *Alvredi*, *Edwardi* primi, *Edwardi* ſecundi, *Ethelſtani*, *Edmundi*, *Edgari*, *Ethelredi*, *Canuti*, *Edwardi* Confeſſoris, aliorumve regum Angliæ, gente hac nondum ſubjugata: Quin &, illa adhuc reliquia Legum perpauca capitula, majore ex parte ſunt Edicta quædam & Conſtitutiones, ab iiſdem regibus, ex aſſenſu Comitiorum regni, ſeparatim ſancita.

put in Execution by the Wiſdom and Authority of thirty ſeveral Parliaments, and above. And theſe Laws are in the* Regiſter *in many Writs called* Liberties, *for there it is ſaid*, according to the Tenor of the great Charter of the Liberties of *England*, *ſo called of the Effect*, becauſe they make free: *And* Mat. of Par. *and others (as it appeareth before) ſtileth them by the ſame Name. So as the Antiquity and Excellency of our Common Laws do not only appear by Hiſtorians of our own Perſuaſion in Religion, but by theſe monaſtical Writers: The which I have added the more at large in this Point to that which I affirmed in my former Prefaces, to the End that they agreeing together, may the better perſuade both Parties to agree to the Truth manifeſtly proved by many unanſwerable Arguments in the ſaid Preface to the 3d Part; and alſo by the Authority of Sir* John Forteſcue, *Chief Juſtice in the Reign of King* Hen. 6. *amongſt others at large, cited in my Preface to the 6th Part: By all which it is manifeſt, that in Effect, the very Body of the Common Laws before the Conqueſt are omitted out of the Fragments of ſuch Acts and*

* See the Preface to 2 Inſtit.

Or-

Ordinances as are publiſhed under the Title of the Laws of King Alvred, Edward *the Firſt*, Edward *the Second*, Ethelſtane, Edward, Edgar, Etheldred, Canutus, Edward *the Confeſſor, or of other Kings of* England *before the Conqueſt. And thoſe few Chapters of Laws yet remaining, are for the moſt Part certain Acts and Ordinances eſtabliſhed by the ſaid ſeveral Kings by Aſſent of the Common Council of their Kingdom.*

Ex Monacho Crowlandiæ. Ex Mat. Weſtm.

2dly, *As for the* Excellency *of our municipal Laws, I will add to that which hath been ſaid before, that the Monk of* Crowland *calleth them* the moſt juſt Laws, *and* Mat. *of Weſtm' of them ſaith,* They being by the Appointment of King *Knute* tranſlated out of *Engliſh* into *Latin*, were by him, for their Equity, commanded to be obſerv'd as well in *Denmark* as in *England. And of this Matter thus much ſhall ſuffice.*

But yet before I take my Leave of theſe Hiſtorians, I muſt encounter ſome of them in two main Points.

Trials by Jury appear to have been in Uſe among the old Britons. See *LL. Hoeli.*

Firſt, that the Trial by Juries of 12 *Men (which is one of the invincible Arguments of the Antiquity of the Common Laws, being only appropriated to them) was not inſtituted by the powerful*

2° De Præſtantia Legum noſtrarum communium, hoc adjiciam, quod *Monachus Crowlandenſis* illas nequaquam immerito appellavit *Leges æquiſſimas.* Et de illis ait *Matth. Weſtmonaſterienſis: Jubente Cnutone ab Anglica lingua in Latinam tranſlatæ, tam in Dacia quam in Anglia propter eorum æquitatem a Rege præfato obſervari jubentur.* Atque de hac re hæc, ſufficiant.

Miſſos tandem faciamus Hiſtoricos, ſi in duobus magni ponderis & momenti illis prius occurramus.

Primo, morem experiundi cauſas per duodecim viros juratos (qui firmiſſimorum unum eſt argumentor' Antiquitatis Legum Communium, ut his ſolis proprius) potentis

Sub-

Subjugatoris ex arbitrio non fuiſſe introductum ut eorum nonnulli audacter ſatis affirmarunt.

Secundo, Curiam Actionum Communium inſtitutam non fuiſſe poſt ſtatutum Magnæ Chartæ (anno nono *Henrici* tertii ſancitum) hoc quod opinioni quorundam aliorum penitus adverſatur. Ad primum quod attinet, conſulat Lector doctus procemium in tertiam Relationum mearum partem, ubi habeat in quo hac de re edoctus ſatis acquieſcat: Interea tamen magni illius (ſuo genere) hujus regni ornamenti attexam ſententiam in elaborata ejus *Britannia*, *pag.* 109. qua clauſam habes hanc rem. *Quod vero Polidorus Virgilius ſcribit, Gulielmum illum victorem duodecim virorum judicium primum induxiſſe, nihil a vero alienius; multis enim ante annis in uſu fuiſſe certiſſimum eſt ex Legibus Etheldredi: Nec eſt cur terribile judicium vocaret, e populo enim duodecim viri liberi & legales e vicinia rite evocantur; hi jurejurando obligantur vere de facto ſententiam dicere; advocatos coram Tribunali utrinque diſſerentes, & teſtes audiunt; inde, receptis utriuſque partis inſtrumentis, concludun-*

Will of a Conqueror, as ſome of them peremptorily affirm they were.

The 2d, that the Court of Common Pleas was not erected after the Statute of Magna Charta *(which was made in the ninth Year of King* Hen. 3.*) contrary to that which others do hold. For the firſt, I refer the learned Reader to the Preface before the third Part of my Reports, where he ſhall receive full and clear Satisfaction herein, and will only add the Judgment of the great Ornament (in his kind) of this Kingdom in his* Britannia, pag. 109. *with which I will conclude this Point:* But whereas Polidore Virgil *writeth*, that *William* the Conqueror firſt brought in the Trial by twelve Men, there is nothing more untrue, for it is moſt certain and apparent by the Laws of K. *Etheldred*, that it was in Uſe many Years before: Neither hath he any Cauſe to term it a terrible Judgment; for Free-born and lawful Men, are duly by order impannelled and called forth of the Neighbourhood, theſe are bound by Oath to pronounce and deliver up their Verdict touching the Fact; they hear

Cam. Brit. p. 109.

hear the Council plead on both Sides before the Bench or Tribunal, and the Depoſitions of Witneſſes; then taking with 'em the Evidences of both Parties, they are ſhut up together and kept from Meat, Drink and Fire, (unleſs Peradventure ſome one of them be in Danger of Death) until they be agreed of the Matter in Fact: Which when they have pronounced before the Judge, he according to Law giveth Sentence. For this Manner of Trial our moſt wiſe and provident Anceſtors thought the beſt to find out the Truth, to avoid Corruption, and to cut off all Partiality and Affections. *And for the Excellency and Indifferency of this Kind of Trial, and why it is only appropriated to the Common Laws of* England, *read Juſtice* Forteſcue, ca. 25, 26, 27, 28, 29, 30, 31, 32, &c. *which being worthy to be written in Letters of Gold for the Weight and Worthineſs thereof, I will not abridge any Part of the ſame, but refer the learned Reader to the Fountain itſelf.*

Forteſcue. See alſo Sir M. Hales's Hiſt. of the Law, cap. 13.

As to the Second, it is clearer than the Light at Noon Day, that the Court of

tur, ſine cibo, potu, & igne detinentur (niſi forte periculum ſit ne ex illis quiſpiam moriatur) donec de facto inter ſe convenerint, quod ubi coram Judice pronunciaverint, ille de Jure ſententiam profert. Hanc enim rationem prudentiſſimi Majores noſtr' optimam eſſe ad veritatem eliciendam, tum ad corruptelas evitandas, & affectus intercludendos exiſtimarunt. Et modus hic eruendi veritatem (præſtantiſſimus omnino, planeq; æquiſſimus) qua de cauſa juri municipali Angliæ peculiaris eſt, diſcas evoluendo hæc quæ ſcripſit Juſticiarius *Forteſcue, cap.* 25, 26, 27, 28, 29, 30, 31, 32, *&c.* Quæ cum, ut literis effingerentur aureis, optime pro meruerunt (ſi vel gravitatem vel excellentiam ſpectemus) nullam inde partem a me habes abſtractam, proptera quod fontes ipſos petat velim Lector eruditus.

Secundo loco, luce ipſa meridiana apparet clarius Curiam Communium placitorum

citorum originem neutiquam habuiſſe poſt ſtatutum, 9 *Hen.* 3. *Cap.* 11. *Communia placita non ſequantur Curiam noſtram, ſed teneantur in aliquo loco certo.* Primo eodem ipſo tempore, eademque Charta, capite decimo tertio, Curia Actionum communium expreſſim nominatur: *Aſſiſæ de ultima præſentatione ſemper capiantur coram Juſticiariis de Banco, & ibi terminentur:* Et dubium nemini eſt quin Juſticiarii de Banco ſint Communium Action' Juſticiarii, Secundo, Rex *Henricus* primus, filius Victoris, Chartam Abbati de B. fecit confirmation' omnium ſuarum conſuetudinum, &c. & ulterius ei conceſſit cognitionem Actionum omnium quarumcunque, adeo ut neutrius Banci, ſive Aſſiſar', Juſticiariis liceret interponere authoritatem ſuam: Et hoc perſpicuum eſt ex 26 *Aſſ. pl.* 24. Tertio, in 6 *E.* 3. *fol.* 54, 55. conſtat, 15 Michaelis anno ſexto regis *Richardi* primi, finem fuiſſe levatum (ut loquimur) inter Abbatem de S. & *Theobaud C.* de jure Patronatus Eccleſiæ de Preſton, coram Archiep' Catuarienſis, Epiſcop' Roffenſi; & aliis Juſticiariis

Common Pleas was not erected after the Statute of 9 *H.* 3. cap. 11. Common Pleas ſhall not follow our Court, but ſhall be holden in ſome Place certain. *Firſt, at the ſame Time, and in the ſame great Charter, and in the next Chapter ſaving one, the Court of Common Pleas is expreſly nam'd*; Aſſiſes of Darrein Preſentment ſhall always be taken before the Juſtices of the Bench, *and no Man doubteth but* Juſticiarii de Banco *are Juſtices of the Common Pleas.* 2. *K.* Henry *the Firſt, the Son of the Conqueror, by his Charter, granted to the Abbot of* B. *a Charter of Confirmation of all his Uſages,* &c. *And further granted, that he ſhould have Conuſance of all Manner of Pleas, ſo that the Juſtice of the one Bench, or of the other, or Juſtices of Aſſiſe, ſhould not meddle,* &c. *and this Charter appeareth in* 26 lib. Aſſ. pl. 24. 3. *In the Book Caſe of* 6 Ed. 3. fol. 54, 55, *it appeareth, that* 15 Mich. *in the ſixth Year of King* Richard *the Firſt, a Fine was levied between the Abbot of* S. *and* Theobaud C. *of the Advowſon of the Church of* Preſton, *before the Archbiſhop of* Canterbury, *the Biſhop of* Rocheſter, *and others,*

26 lib. Aſſi. pl. 24.
6 E. 3. 54, 55.
15 Mich.
6 Ri. primi.

others, (*Juſtices* del Banke, *that is, of the Court of Common Pleas.*) *And it appeareth in Maſter* Plowden's Com. *in* Stowel's Caſe, *that Fines were levied before the Conqueſt. In the Treaſury there are yet remaining ſome Fragments of Records and Judgments in the Reign of King* Richard *the Firſt, as well* coram Juſticiariis de Banco, *as* coram Rege. Martin de Pateſhull was made Juſticiarius de Banco, in the firſt Year of H. 3. *which was before the Statute of* Magna Charta. *And* in Anno 10 Ed. 4. fol. 53. *all the Judges of* England *did affirm, that the Chancery, King's Bench, Common Pleas and Exchequer, be all the King's Courts, and have been Time out of Memory of Man; ſo as no Man knoweth which of them is the moſt Antient. But in a Caſe ſo clear this ſhall ſuffice. And yet let me obſerve, that divers Biſhops and other Eccleſiaſtical Perſons in antient Time, did ſtudiouſly read over the Laws of* England, *and thereby attained to great and perfect Knowledge of the ſame. And the ſaid* Martin de Pateſhull *who was, as before is ſaid, Chief Juſtice of the Court of Common Pleas in the firſt Year of*

Pl. Com. in Stowel's Caſe.

Ex. rot. Pat. de anno 1 H. 3. 10 E. 4. f. 53.

de Banco, id eſt, de Curia placitorum ſive actionum communium. Quin & in Commentar' magiſt' *Plowden* in caſu *Stowell*, fines fuiſſe levatos, nondum hoc regno ſubjugato, manifeſtum eſt. In archivo, etiamnum hodie extant fragmenta nonnulla Actorum publicorum adq; Judiciorum ſub Rege *Richardo* primo, tam *coram Juſticiariis de Banco*, quam *coram Rege. Martinus de Pateſhull conſtitutus erat Juſticiariis de Banco, anno primo regis* H. *tertii*, nondum adhuc edito ſtatuto Magnæ Chartæ. Et in an. decimo *Edwardi quarti, f.* 53. omnes totius Angliæ Judices, Cancellariam, Bancum Regium, Bancum Communem, & Scaccarium, eſſe Regis fora affirmabunt, ſicque ex omni ætatum memoria extitiſſe; adeo ut dicitur nemo ſciat, quod eſt eorum antiquiſſimum. In hæc vero perſpicua veritate hæc nobis ſufficiant. Hic tamen obſervem Epiſcopos olim quamplurimos, alioſq; viros Eccleſiaſticos, ſtudio Legum municipalium Angl' cupide invigilaſſe, plenamque inde uberioremq; adeptos fuiſſe cognitionem: Idem enim *Martinus de Pateſhull* Capitalis de Banco Juſti-

ciarius

ciarius anno primo Regis *Henrici* tertii (ut ſupra memoratur) Decanus item fuit Eccleſiæ Sancti *Pauli:* De quo dicitur; *vir fuit ſummæ prudentiæ, & in legibus hujus regni peritiſſimus.* Et *Johannes Britton* Epiſcopus Herefordenſis, optime ſub Rege *Edwardo* I. ſcripſit de municipalibus Angliæ Legibus, cujus hodie habemus opera. Multi etiam Magnatum, in Legibus Angl' periti imprimis evaſerunt, utputa (qd' unum inſtar multor' habeas, ne hæc egrediatur ſuos fines præfatio) *Ranulphus de Meſchines*, clarus ille & illuſtris Comes Ceſtriæ, ejuſque familiæ tertius & poſtremus (vir niſi, me meus fallat Author, ſumma ſcientia & perita hujus regni Legum ſingulari) de eiſdem librum compoſuit, qui ſuam in illis cognition' abunde ſatis teſtatur: De quo *M. Par. p.* 350. meminit (effect' ejus doctrinæ Legumque hujus reg' prudentiæ certiſſimum:) *Solus autem Comes Ceſtrenſis* Ranulphus *ſtetit viriliter, nolens terram ſuam redigere in ſervitutem* (*i. decimas ſolvere Domino Papæ*) *nec permiſit de feodo ſuo viros religioſos vel Clericos decimas memoratas ſolvere, quamvis Anglia & Wallia, Scotia*

King Henry *the Third, was alſo Dean of* Paul's, *of whom it is ſaid that he was* a Man of great Wiſdom, and exceeding well learn'd in the Laws of this Land. *And* John Britton *Biſhop of* Hereford, *wrote an excellent Work in the Days of King* Edward *the Firſt, of the Common Laws of* England, *which remains to this Day. And many Noblemen have been excellently learned in the Laws of* England, *as taking one Example for many, leſt this Preface ſhould grow too large,* Ranulphus de Meſchines *the great and worthy Earl of* Cheſter, *and the third and laſt of that Family, (having as mine Author ſaith) great Knowledge and Underſtanding in the Laws of this Land, compiled a Book of the ſame Laws, as a Witneſs of his great Skill therein: Of whom* Mat. Par. p. 350. *reporteth (as an Effect of his Learning and Knowledge in the Laws of this Realm:)* But *Ranulph* Earl of *Cheſter* alone valiantly reſiſted, as not willing to bring his Country into Servitude (by paying of Tenths to the Pope:) And would not ſuffer the Religious or Clerks of his Fee to pay the ſaid Tenths, altho' all *England* and *Wales, Scot-*

Joh. Britton Epiſcopus Heref. 2.

Mat. Par. p. 350.

land and *Ireland*, were compelled to pay them. *And at a Parliament holden in the twentieth Year of King* Henry *the Third, the Act ſaith:* All the Biſhops deſired the Lords that they would Conſent, That all ſuch as were born afore Matrimony ſhould be Legitimate as well as they that be born within Matrimony, as to the ſucceſſion of Inheritance, foraſmuch as the Church acceptеth ſuch for Legitimate: And all the Earls and Barons with one Voice anſwered, That they would not change the Laws of this Realm, which hitherto have been uſed and approved. *Which uniform and reſolute Anſwer of all the Nobility of* England, nullo contradicente, *doth ſhew the inward and affectionate Love and Reverence they bear unto the Common Laws of their dear Country. The certain and continual Practice of the Common Laws of* England, *ſoon after the Conqueſt, even in the Time of King* Henry *the Firſt, the Conqueror's Son, (which almoſt was within the Smoak of that fiery Conqueſt) and continued ever ſince, do plainly demonſtrate that thoſe Laws were before the Days of* William *the*

See the Stat. of Merton.

& Hibernia, ad ſolutionem compellarentur. Et ad Comitium Parliamentarium Anno Regis *Henrici* tertii viceſimo, Actus ſic ſe habet: *Rogaverunt omnes Epiſcopi Magnantes ut conſentirent, qd' nati ante matrimon' eſſent legitimi, ſicut illi qui nati ſunt poſt matrimon' quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis; Et omnes Comites & Barones una voce reſponderunt, quod noluerunt Leges Angliæ mutare quæ hucuſque uſitatæ ſunt & approbatæ.* Fixa cujuſmodi & uniformis omnium Angliæ Magnatum reſponſio, *nullo contradicente*, interiorem eorum zelum & reverentiam, quæ medullitus (ſi dicam) in Patriæ ſuæ chariſſimæ Leges communes haberent, patefecit. Certa quidem & continua tam inde a devicta hac natione in municipalibus Angliæ Legibus praxis regnante ipſius victoris filio *Henrico* primo (cum flagrantis illius ſubjugationis vix adhuc evanuiſſet fumus) & abinde hucuſque deducta, illas ante ingreſſum Victoris *Gulielmi* in uſu fuiſſe evincit manifeſte. Nequaquam enim foret poſſibile, talem Leges attigiſſe perfection' ſub ſuccedente *Henrico* ſecundo,

cundo, qualem tunc habuiſſent, ſi a Victore adeo nuperrime introductæ vel inſtitutæ fuiſſent. De quibus Legibus hoc confidenter ſtatuam, Nullam eſſe Legem (humanam dico) in toto hoc terrarum orbe, qua cum honore, pace, & concordia res in hoc regno agantur publicæ, infinitis prorſus gradibus, æque commode atque his antiquiſſimis ac præſtantiſſimis Angliæ Legibus.

Ranulphus de Glanvilla, Juſticiarius Capitalis ſub *Henrico* ſecundo, Legum Angliæ partem doctiſſime pariter atque conſultiſſime literis commendavit (cujus opera in hodiernum uſque diem ſuperſunt) ejuſdemq; tractatus proœmio ſcribit, Regem hanc gentem gubernaſſe *Legibus regni & conſuetudinibus de ratione introductis & diu obtentis:* Ex quibus verbis, adeo multis abhinc ſeculis, emiſſis, manifeſtum eſt, qd' tunc fuerunt leges regni & conſuetudines ratione fundatæ & antiquis temporibus acquiſitæ; quæ proculdubio nec potuit nec aſſerere voluit, ſi adeo recenter & fere immediate ante per Expugnatorem *Conqueror. For it had not been poſſible to have brought the Laws to ſuch a Perfection as they were in the Reign of K.* Hen. 2. *ſucceeding, if the ſame had been ſo ſuddenly brought in or inſtituted by the Conqueror: Of which Laws this I will ſay, That there is no human Law within the Circuit of the whole World, by infinite Degrees, ſo apt and profitable for the honourable, peaceable, and proſperous Government of this Kingdom, as theſe antient and excellent Laws of* England *be.*

Ranulphus de Glanvilla, *Chief Juſtice, in the Reign of King* Henry *the Second, learnedly and profoundly wrote of Part of the Laws of* England (*whoſe Works remain extant at this Day:*) *And in his Preface he writeth, That the King did govern this Realm* by the Laws of the Kingdom, and by Cuſtoms founded upon Reaſon, and of antient Time obtained. *By which Words ſpoken ſo many hundred Years ſince, it appeareth, that then there were Laws and Cuſtoms of this Kingdom grounded upon Reaſon, and of antient Time obtained, which he neither could nor would have affirmed, if they had been ſo recently and almoſt preſently*

before that Time inſtituted by the Conqueror. And in Token of my Thankfulneſs to that worthy Judge, whom I cite many Times in theſe Reports, (as I have done in my former) for the Fruit, which I confeſs my ſelf to have reaped out of the fair Fields of his Labours, I will, for the Honour of him, and of his Name and Poſterity, which remain to this Day (as I have good Cauſe to know) impart and publiſh both to all future and ſucceeding Ages which I have found of great Antiquity, and of undoubted Verity; the Original whereof remaineth with me at this Day, and followeth in theſe Words. Ranulphus de Glanvilla Juſticiarius Angliæ, fundator fuit domus de Butteley in Com' Suff. quæ fundata erat anno Regis *H.* filii imperatricis 17, & Anno Dom. 1171. quo Anno *Tho. Becket* Cantuar' Archiepiſcopus erat occiſus. Et dictus *Ranulphus* naſcebatur in villa de Stratford in Com' Suff. & habuit manerium de Benhall cum toto Domino ex dono dicti regis *H.* Et duxit in uxorem quandam *Bertam* filiam Domini *Theobaldi de Valeymz* ſenioris, Dom' de Parham, qui *Theobald'* per chartam ſuam dedit dicto *Ran'* & *Bertæ* uxori ſuæ

He did bear Azure, a Chief indented, Or: Which Coat-Armour the *Paſtons* of Norf. do Quarter at this Day.

Juſtitiarius Angliæ.

Fundator prioratus de Butteley.

Donum Reg'.

Uxor ejus.

fuiſſent inſtitutæ. Et ne reverendiſſimo illi Judici videar ingratus (cujus teſtimonium hiſce meis lucubrationibus (ſicut alias) ſæpe a me habes prolatum) pro fructu quem ex pulcherrimis ejus operum arvis me collegiſſe confiteor, in honorem ejus, & nominis, & ſobolis hodie florentis (ſicut optima mihi cognoſcendi eſt occaſio) in ſecula futura emittere & in medium proferre viſum eſt, quæ magnæ fore vetuſtatis & exploratæ veritatis ſæpiſſime ſum expertus: Quorum origio apud me eſt, & hiſce verbis ſequuntur. Ranulphus de Glanvillæ *Juſtitiar' Angl', fundator fuit domus de Butteley in comitat. Suffol' quæ fundata erat an. Reg'* Henrici *filii Imperatricis decimo ſeptimo, & an' Dom'* 1171. *quo an'* Tho. Becket *Cantuarienſis Archiepiſ' erat occiſus. Et dictus* Ranulph' *naſcebatur in villa de Stratford in comitatu Suffol' & habuit manerium de Benhall cum toto Dominio ex dono dicti Reg'* Henrici: *Et duxit in uxorem quandam* Bertam *filiam Dom'* Theobaldi de Valeymz *ſenioris, Dom' de Parham; qui* Theobaldus *per Chartam ſuam dedit dicto* Ranulpho & Bertæ *uxori ſuæ totam terram de*

Brochous cum pertinent', in qua domus de Butteley ſita eſt, cum aliis terris & tenementis in libero maritagio. Prædictus vero Ranulphus *procreavit tres filias de dicta* Berta, *viz.* Matildam, Amabiliam, & Helewiſam, *quib' dedit terram ſuam ante progreſſum ſuum verſus terram ſanctam.* Matilda, *prima ſoror, habuit ex dono patris ſui totam villam de Benhall integraliter una cum advocatione Eccleſiæ ſive monaſterii beatæ Mariæ de Butteley, & nupſit cuidam militi nomine* Willielmo de Auberville, *de quibus proceſſit* Hugo de Auberville: *De ipſo* Hugone Willielmus de Auberville: *De ipſo* Willielmo *proceſſit quædam* Johanna *filia unica & hæres, quæ nupſit cuidam militi de Cancia nomine* Nicholao Kyryell, *qui duxit in uxorem* Margaretam *filiam Dom'* Galfridi Peche; *& ille* Nicholaus *vendidit Domino* Guydoni Ferr' *præd' manerium de Benhall: Et tum ille* Nicholaus *de uxore ſua genuit alium Dominum* Nicholaum *militem in Cancia, qui vixit ante primam peſtilentiam. Ipſe autem* Guido *talliavit præd' maner' in Curia Dom' regis apud Weſtmonaſtr' in craſtini Aſcenſionis Dom', Anno regni Regis* Edwardi *filii* Edwar-

totam terram de Brochous cum pertin', in qua domus de Butteley ſita eſt, cum aliis terris & tenementis in libero maritagio. Præd' vero *Ranulph'* procreavit tres filias de dicta *Berta*, viz. *Matildam*, *Amabiliam*, *& Helewiſam*, quibus dedit terram ſuam ante progreſſum ſuum verſus terram ſanctam, *Matilda*, prima ſoror, habuit ex dono patris ſui totam villam de Benhall integraliter una cum advocatione Eccleſiæ ſive monaſterii beatæ Mariæ de Butteley, & nupſit cuidam militi nomine *Will' de Auberville*, de quibus proceſſit *Hugo de Auberville*, de ipſo *Hugone Will' de Auberville*, de ipſo *Willielmo* proceſſit quædam *Johanna* filia unica & hæres, quæ nupſit cuidam militi de Cancia nomine *Nicholao Kyryell* qui duxit in uxorem *Margaretam* filiam Dom' *Galfridi Peche*; & ille *Nich'* vendidit Dom' *Guidoni' Ferr'* præd' manerium de Benhall: Et tum ille *Nich'* de uxore ſua genuit alium Dom' *Nich'* militem in Cancia, qui vixit ante primam peſtilentiam. Ipſe autem *Guido* talliavit præd' maner' in cur' Dom' Regis apud Weſtm' in craſtin' Aſcenſion' Dom', an'

Filiæ ejus.

Nuptiæ & donationes filiarum, & earum poſteritas.

regni regis *E.* filii *E.* primo, ſibi & *Alianoræ* uxori ſuæ & hæredibus de ſe exeunt': Et ſi ipſe *Guido* ſine hærede decederet, rem' *Wil' de S. Quintino* & hæredibus. *Amabilia*, ſecunda ſoror, habuit ex dono patris ſui medietatem vill' de Bawdeſeia & medietat' vill' de Fynbergh. *Amabilia* præd' habuit virum nomine *Radulph' de Ardern*, de quo proceſſit *Tho. de Ardern* filius & hæres, De *Tho' Radul'* filius & hæres, qui feoffavit priorem & conventum de Butteley de medietate villæ de Bawdeſey. De præd' *Radulpho* proceſſit quidam *Tho. Ardern* filius & hæres. *Helewiſa*, tertia ſoror, habuit ex dono patris ſui aliam medietat' villæ de Bawdeſey præd', & aliam medietatem villæ de Fynbergh præd'. *Helewiſa* prædicta habuit virum nomine *Robertum* filium *Rob.* de quo proceſſit *Rad'* filius & hæres, qui feoffavit *Warinum de Inſula* de medietate prædicta villæ de Fynbergh. De *Rad'* proceſſit *Rob.* filius & hæres qui feoffavit *Ran'* fratrem ſuum de medietate prædict' villæ de Bawdeſey. Et nota, quod præfatus *Raulph' de Glanvilla* fuit vir præclariſſimus genere, utpote de nobili

Vir præclariſſimus & de nobili ſanguine.

di *primo, ſibi & Alianoræ uxori ſuæ, & hæredibus de ſe exeunt': Et ſi ipſe* Guido *ſine hærede diſcederet, rem'* Willielmo *de ſancto* Quintino *& hæredibus*, Amabilia, *ſecundo ſoror, habuit ex dono Patris ſui medietatem villæ de Bawdeſeia, & medietatem villæ de Fynbergh:* Amabilia *prædicta habuit virum nomine* Ranulphum de Ardern; *de quo proceſſit* Tho. de Ardern *filius & hæres*; *de* Thoma Ranulphus *filius & hæres, qui feoffavit priorem & conventum de Butteley de medietate villæ de Bawdeſey. De prædicto* Ranulpho *proceſſit quidam* Tho. Ardern *filius & hæres.* Helewiſa, *tertia ſoror, habuit ex dona patris ſui aliam medietatem villæ de Bawdeſey prædicta, & aliam medietatem villæ de Fynbergh prædicta*: Helewiſa *prædict' habuit virum nomine* Robertum *filium* Roberti, *de quo proceſſit* Radulphus *filius & hæres, qui feoffavit* Warrinum de Inſula *de medietate prædict' villæ de Fynbergh. De* Radulpho *proceſſit* Robertus *filius & hæres, qui feoffavit* Ran' *fratrem ſuum de medietate prædicta villæ de Bawdeſey. Et nota quod præfatus* Ranulph' de Glanvilla *fuit vir præclariſſimus genere, utpote de nobili ſanguine,*

guine, vir inſuper ſtrenuiſſimus corpore, qui provectiori ætate ad terram ſanctam properavit, & ibidem contra inimicos crucis Chriſti ſtrenuiſſime uſque ad necem dimicavit. Fuit autem Berta *ex illuſtri proſapia orta, filia Dom'* Theobaldi Valeymz *ſenioris, Dom' de Parham, quorum &* Ranulp' & Bertæ *conſanguinei multi, de quibus plures milites, omnes vero gentiles & generoſi, iſtam partem Suffolciæ eorum incolatu & generoſa carnis propagine honorifice illuſtrabant annis multis.*

Et *Henricus de Bracton*, Regi *Hen'* tertii temporibus, hujus regni Judex, capite primo Libri ſui primi, numero tertio, inquit: *Ego* Hen. de Bracton *animum erexit ad vetera judicia juſtorum proſcrutanda diligenter, non ſine vigiliis & labore, &c.* adeo ut Leges Angliæ *vetera judicia juſtorum* ab illo nuncupantur. Author libri qui inſcribitur *Fleta* (qui regnante *Edwardo* primo ſcripſit) in operis ſui exordio idem ſentit quod & *Glanvilla* de Angliæ Legum tum antiquitate tum honore; & ibidem, libr' quem ſcripſit cur diſtinxit appellatione *Fletæ* plenitus tibi ſatisfaci-

ſanguine, vir inſup' ſtrenuiſſimus corpore, qui provectiori ætate ad terram ſanctam properavit, & ibidem contra inimicos crucis Chriſti ſtrenuiſſime uſque ad necem dimicavit. Fuit autem *Berta* ex illuſtri proſapia orta, filia Dom' *Theobaldi Valeymz* ſenioris Dom' de Parham, quorum & *Ranulphi* & *Bertæ* conſanguinei multi, de quibus plures milites, omnes vero gentiles & generoſi, iſtam part' Suff. eor' incolatu & generoſa carnis propagine honorifice illuſtrabant annis multis.

And Hen' de Bracton, *a Judge of this Realm, in the Reign of King* Henry *the Third, in his firſt Chapter of his firſt Book,* Numero tertio, *ſaith: I* Henry de Bracton have ſet my Mind to ſearch out diligently the antient Judgments of the Juſt, not without much Pains and Labour, &c. *So as he ſtileth the Laws of* England, *by the Name of* the antient Judgments of the Juſt. *The Author of the Book called* Fleta *(who wrote in the Reign of King* Edward *the Firſt) in his Preface to his Work agreeth with* Glanvill *concerning the Antiquity and Honour of the Laws of*

Vir ſtrenuiſſimus. Vide Pl.com. f. 368. b. obiit apud Acres. Ad terram ſanctam peregrinatus. Effuſio ſanguinis contra inimicos Chriſti. Proſapia uxoris Bertæ.

England, *and there ſheweth the Reaſon wherefore he intitled his Book by the Name of* Fleta: But this Treatiſe, which may worthily be called *Fleta*, becauſe it was compiled, in the *Fleet*, of the Laws of *England*. *I have a* Regiſter *of our Writs original, written in the Reign of King* Henry *the Second*, (*in whoſe Time* Glanvill *wrote*) *containing the Original Writs which were long before the Conqueſt, as in the ſaid Preface to the third Part appeareth, and yet alſo remaining in Force, ſuch excepted as have been inſtituted or altered by Acts of Parliament ſince that Time, which is the moſt antient Book yet extant of the Common Law, and ſo antient, as the Beginning whereof cannot be ſhewed.*

To the ſecond Queſtion I do affirm, That the Statutes of Magna Charta, Charta de Foreſta, Merton, Marlebridge, Weſtm' 1. De Bigamis, Glouc' Weſtm' 2. Articuli ſuper cartas, articuli Cleri, ſtatutum Eboraic', Prærogativa Regis, *and ſome few others, that be antient, amongſt which, the Statute of* 25 Ed. 3. *is not to be omitted, touching Treaſons* (*which for the moſt Part are but Declarations of*

as: *Tractatus autem iſte, qui* Fleta *merito poterit appellari; qui in Fleta, de jure* Anglorum, *fuit compoſitus.* Reſcript' mihi eſt originalium *Regiſtrum*, ſub Rege Henrico ſecundo literis conſignatum quo (tempore ſcripſit *Glanvilla*) brevia ſive Reſcripta continens originalia, quæ multo ante ſubactam hanc nation' (prout conſtat in memorata illa tertiæ partis præfatione) in vigore extiterunt pleno ut & hodie exiſtunt; eis modo exceptis quæ in Comitiis Parliamentariis inſtituta aut immutata fuere, qui liber, omnium de lege municipali extantium, eſt vetuſtiſſimus, adeoq; antiquus ut de origine ejus nihil prorſus oſtendatur.

Ad ſecundam quæſtion' affirmo, quod ſtatuta, quæ inſcribuntur, *Mag' Chart' Charta de Foreſta, Merton, Marlebridge, Weſtm' 1. De Bigamis, Glouceſt' Weſtm' Articuli ſuper Chartas, Articuli Cleri, Statutum Eboraicum, Prerogativa Reg'*, & antiqua alia nonnulla (inter quæ ſtatutum anno viceſimo quinto *Edwardi* tertii de crimine læſæ Majeſtatis ſancitum omittendum non eſt) plerifq; quorum

rum ſolummodo declaratur lex municipalis; una cum reſcriptis originalibus de actionibus ſive placitis (ut loquimur) communibus, quæ in *Regiſtro* comprehenduntur, cum & exquiſitæ & veræ indicandi crimina dilinquentium formulæ, ſunt corpus ipſum & quaſi textus legum *Angliæ* municipal': Cauſarumque & Judiciorum relatorum vetuſtiores libri olim editi, & monumenta ſeu acta publica, ab annis quadringentis & ultra in hunc uſque diem deducta & ſumma fide reſervata, ſunt Commentaria tantum, & ear' leg', reſcript' originalium, & indicandi formalarum expoſitiones. Et cum alias, tum præcipue ex duobus cauſis (altera, ſcil', *Jehu Webb*, altera *Blackamore*) jam prelo, ut & aliæ, commiſſis (vereque hoc fauſtiſſimo immo florentiſſimo Juſticiæ a Regia Majeſtate unicuique adminiſtratæ determinatis) patet clariſſime libros noſtros & monumenta, apta fore commentaria, & veras ſtatutorum decretorumq; comitialium explicationes. Et, ſi ſtudioſus Lector exemplum de reſcripto originali quæſi verit, caſum *Calye*, in termino Paſchæ 26 *Eliz.* Reginæ feliciſſimæ memo-

the Common Law) together with the Original Writs contained in the Regiſter *concerning Common Pleas, and the exact and true Forms of Indictments and Judgments thereupon in criminal Cauſes, are the very Body, and as it were the very Text of the Common Laws of* England. *And our Year Books and Records yet extant for above theſe Four Hundred Years, are but Commentaries and Expoſitions of thoſe Laws, Original Writs, Indictments and Judgments By two Caſes, the one of* Jehu Webb, *and the other called* Blackamore's Caſe, *now among others publiſhed and reſolved in this bleſſed and flouriſhing Spring-time of his Majeſty's Juſtice, ſpecially (among many others) it appeareth, that our Book Caſes and Records are alſo right Commentaries, and true Expoſitions of Statutes and Acts of Parliament. And for an Example of an Original Writ, among many others, I refer the ſtudious Reader eſpecially to* Caly's Caſe *in* Paſch' 26 *of the Reign of the late Queen* Elizabeth, *of ever bleſſed Memory, now publiſhed, whereby it more clearly appeareth how judicious the Opinion of Juſtice* Fitzh. *is in his Preface to his* Na. Br. *where he ſaith,*

that

that original Writs are the Foundations whereupon the Law dependeth, and how truly he calleth them the Principles of the Law, and fortifieth alſo the Opinion of Bracton, lib. 5. fol. 413. *where he ſaith, that* (Breve formatum eſt ad ſimilitud' regulæ juris) *which Caſe I have reported in that Form to this End, that Students ſeeing the ſingular Uſe of original Writs, will in the Beginning of their Study learn them, or at leaſt the principalleſt of them without Book, whereby they ſhall attain unto three Things of no ſmall Moment: 1. To the right Underſtanding of their Books: 2. To the true Senſe and Judgment of Law: And laſtly, to the exquiſite Form and Manner of Pleading. And the Caſe of* Barretry *ſtandeth for an Example of an Indictment.*

riæ agitatum, & jam editum, conſulat, ex quo clare patet conſultam imprimis fuiſſe Judicis *Fitzherbert* opinionem judicioque latam optimo in proœmio Libri ſui de *Natura brevium*, ubi aſſerit Reſcripta originalia fundamenta eſſe, & totius Legis quaſi cardines; & quam recte ab eo Juris principia appellantur: Firmat etiam hic caſus illud quod ſentit *Bracton, lib. 5. fol.* 413. ubi dicit, *Breve formatum eſſe ad ſimilitudinem regulæ Juris*, Quem caſum in medium proferendo hunc mihi propoſui finem, quod uſum ſingularem brevium originalium ex hoc perſpicientes ſtudioſi, dum adhuc in hoc literarum genere tyrones ſunt, ea vel ſaltem eorum in uſu frequentiora, memoriter ediſcerent; quod ſi faciant ad hæc tria plurimi momenti facillime perveniant. Primo, rectius librorum apprehendant rationem: Secundo, ſenſum ſententiamque Juris genuinam felicius intelligant: Exquiſitam denique cauſas agendi formam aſſequantur. Et caſus de Barratria (ut loquimur) formulam indicandi crimina recte tibi demonſtrat.

Aſſiſa-

Aſſiſarum Actionumque realium intermiſſio, bina in Rempub. induxerunt mala, & tertiam (ſi modo non ſurrepſerit) ſequi veriſimile eſt. Primo litium multitudo in actionibus perſonalibus quibus liberi tenementi & juris hæreditarii realitas controverſa eſt, in ſubditi impenſam & vexationem minime tolerandas. Secundo, contentiones multiplices in uno eodemque caſu, adeo ut ſententiæ duodecim virorum juratorum (quas veredicta vocamus) diverſæ ſæpius feruntur ex utraque parte; nec tamen lis demum inter partes aliquatenus dirimitur, nec fixa alterutri ſeu pacifica manet poſſeſſio, utrinque licet frequentius exploretur pariter ac judicetur.

The neglect of Aſſiſes and real Actions hath produced two Inconveniencies in the Commonwealth, and a 3d is (if it be not ſtept on already) like to inſue: 1. *The Multitude of Suits in perſonal Actions, wherein the reality of Freehold and Inheritance is tried, to the intollerable Charge and Vexation of the Subject.* 2. *Multiplicity of Suits in one and the ſame Caſe; wherein oftentimes there are divers Verdicts on the one Side, and divers on the other, and yet the Plaintiff or Defendant can come to no finite End, nor can hold the Poſſeſſion in Quiet, tho' it be often tried and adjudged for either Party.*

Et hoc fit, dum recta Legum inſtitutio declinatur: Unde Lex municipalis dente carpitur maledico, & detrimenta reipublicæ eveniunt non ferenda. In actionibus perſonalibus de ære alieno, bonis, & catallis (ut dicimus) recuperatio vel barra (ut apud nos eſt) in una actione, barra eſt & in alia, & hujuſmodi litis finis eſt. In actionibus vero realibus de libero tenemento &

And this groweth, for that the right Inſtitution of the Law is not obſerved, to the unjuſt Slander of the Common Law, and to the intollerable Hindrance of the Commonwealth. In perſonal Actions concerning Debts, Goods and Chattels, a Recovery or Bar in one Action is a Bar in another, and there is an End of the Controverſy. In real Actions for Freehold and Inheritance, being of a higher and worthier

thier Nature, and ſtanding upon greater Variery of Titles and Difficulties in Law, there could not be above two Trials, or at the moſt (and that very rarely) three, and in the mean Time, after one Recovery, the Poſſeſſion reſteth quiet: 3. *The Diſcontinuance of real Actions will produce in the End, two dangerous Effects*, viz. *want of true Judgment in the Profeſſors of the Law, and groſs Ignorance in Clerks of the right Entries and Proceedings in thoſe Caſes. We ſee that Works of Nature are beſt preſerv'd from their own Beginnings, Frames of Policy are beſt ſtrengthned from the ſame Ground they were firſt founded, and Juſtice is ever beſt adminiſtred when Laws be executed according to their true and genuine Inſtitution. And therefore to the End the antient and excellent Inſtitution of the Common Law might be recontinu'd for the Good of the Commonwealth*, (for it is convenient for the Commonwealth, that there be an End of Controverſies.) *I have therefore reported two Caſes of* Aſſiſes, *for that the Writ of* Aſſiſe *(in Caſe where it lieth) is* optimum & maxime feſtinum remedium: *And the Caſes of* Buckmere *and* Syms *of* hæreditate (quæ altioris prorſus ſunt naturæ & dignioris, & in quibus jura diſſimiliora decernuntur, ſubtilioreſq; agitantur in lege quæſtiones) ultra duas, vel tres (idque rariſſime) eſſe nequeant explorationes, & interim, una jam habita recuperatione, quiete agitur poſſeſſio. Tertio, actionum realium deſuetudo duo efficient periculoſa, videlicet, veri judicii in legum profeſſoribus defectum, & in Clericis, formularum rite intrandi, aptique in iiſdem cauſis proceſſus craſſam ignorantiam. Opera Naturæ ſuis a primordiis maxime præſervari perſpicimus, res politicæ ab iiſd' optime fundamentis muniuntur a quibus primo inſtituuntur, & Juſticia æquius ſemper adminiſtratur, quum Leges ſecund' veram & genuinam earum inſtitutionem executioni mandentur: Ideoque ut antiqua Legum municipalium & præclara inſtitutio, ad reipub' utilitatem retineatur (*expedit enim reipub', ut ſit finis litium*) duos in publicum protuli caſus de Aſſiſis, eo quod breve de Aſſiſa (in caſu quo habeatur) *optimum eſt & maxime feſtinum remedium:* Et caſus *Buckmere*, &

Syms

Syms de brevibus de Formedon (ut loquimur) in remanere: Et caſum *Edward Altham* de brevi de Dote recuperanda.

Writs of Formedon *in Remainder:* Edw. Altham's *Caſe of a Writ of Dower.*

Et nos, quos regia Majeſtas publicos in hoc ſuo regno ſubſtituit Judices, moras omnes ſupervacaneas & indebitas, omneſque fictas & curioſas nimis in placitando agitationes (quoad poſſumus) penitus amputare ſtetuimus: Quæ, dum irrepſerunt, multum nuper in cauſa fuerunt quare actiones reales & præſertim de Aſſiſis brevia, ut quondam fuerint, non adeo ſunt frequentia.

And we, that are Judges of the Realm, have reſolv'd to cut off all ſuperfluous and unjuſt Delays, and as much as we can, all fained Dilatory and curious Pleadings: The Admittance whereof, of late Time, hath been a great Cauſe why real Actions, and ſpecially Writs of Aſſiſe, *have not been ſo frequent as they have formerly been.*

Et quamv' in actionib' realib', ſicut cauſæ pondus in ſe exigit, longiora tempora in proceſſu, quam in actionibus perſonalib' concedantur, ſicut in libello Judicis *Forteſcue, cap* 53. manifeſtum eſt (ubi apparet dilationes illas nec nimis longas eſſe, nec juſta non niſi de cauſa admiſſas: *Crebro enim* (inquit ille) *in deliberationibus judicia matureſcunt, ſed in accelerato proceſſu nunquam:*) Petens tamen tempore opportuno per has reales Actiones ad finem litis pervenerit; ad quem per action' perſonalium proſecutionem de libero tenemento vel hæreditate

And though in real Actions, as the Weight of the Cauſe requireth, there are longer Times given in the Proceeding, than in perſonal Actions, as appeareth in Juſtice Forteſcue's *Book, cap.* 53. (*where it appeareth that thoſe Times are neither overlong, nor without juſt Cauſe*; for many Times in Deliberations, Judgments grow to ripeneſs, but in over-haſty Proceſs never:) *Yet ſhall the Demandant come to a timely final End by theſe real Actions, which he ſhall never do by Proſecution of perſonal Actions for the Trial of Freehold or Inheritance. And they that well* Forteſcue, cap. 53.

ob-

obſerve the three Parts of the Reports in the Reign of King Edward *the Third, ſhall find few or no Actions of Treſpaſs or perſonal Actions brought concerning any Lands or Tenements, but either where no Title of Freehold or Inheritance came in Queſtion, or where the Plaintiff could not have any real Action: And therefore amongſt many others it appeareth in an Action of Treſpaſs,* Quare clauſum fregit *brought by the Biſhop of* Coventry *and* Litchfield, *in* 6 Ed. 3. fol. 34. b. *Exception was taken to the Replication of the Biſhop for that he pleaded in the Reality, for always in thoſe Days real Caſes were determined in real Actions, which made Judges in thoſe Times to merit that honourable Teſtimony which* Thirning *Chief Juſtice attributeth to them in the* 12*th Year of the Reign of K.* H. 4. *that they were the greateſt Sages that ever were: And that in the Reign of K.* Ed. 3. *the Law was of the greateſt Perfection that ever it was; and that pleading (the greateſt Honour and Ornament of the Law) grew in the Reign of that King to that Excellency, as that the Pleading*

6 E. 3. fol. 34. b.

experiundo, nunquam poteſt. Tres autem Relationum partes regnante *Ed.* 3. promulgatas qui penſitaverint, paucas aut omnino nullas tranſgreſſion', aliaſque perſonales action' de terris ſeu tenementis latas invenerint, niſi ubi nulla de libero tenemento aut jure hæreditario quæſtio oriebatur, aut ubi Petenti nulla realis Actio data fuit. Liquet igitur, cum alias tum præcipue ex actione quadam tranſgreſſionis, *Quare clauſum fregit*, per Epiſcopum Covent' & Litchfield' profecuta in 6 *Edwardi* 3. *fol.* 34. *b.* ad Epiſcopi replicationem factam fuiſſe exceptionem, quod in realitate litem agitabat, ſemper enim, ut tunc ſe habuerunt tempora, caſus reales in actionibus realib' diſcuſſi fuerunt: Unde eorum temporum Judices præclarum illud meruere teſtimonium, qd' *Thirning*, Juſticiarius capitalis, illis attribuit anno *Hen.* 4. 12. videl't, quod aliorum omn' longe fuer' conſultiſſimi ſimul & ſapientiſſimi; & quod ſub Rege *Edw.* 3. majorem quam antea habuiſſet Lex perfectionem; & quod cauſarum in jure agitatio (ſummum legis decus & ornamen-

mentum) ad eam in ejuſdem Regis Temporibus creviſſet excellentiam, ut ſuperiorum temporum agitationes, ſi ad illas ſub Rege *Edwardo* 3. comparentur, mancas quaſi & imbelles á *Thirning* exiſtimarentur.

in former Times having Regard to the Pleadings in the Reign of King Ed. 3. *are holden by* Thirning *to be but feeble.*

Magnum Ducatus Cornubiæ caſum variis de cauſis retuli. Primo, quamvis ille idem caſus olim (ut hæc mearum Relationum parte conſtare poterit) adjudicatus fuerit; de eodem tamen jamdudum queſtio nova exorta eſt, partim quod judicia inter alia Regis monumenta, paucis cognita, clauſa aſſervantur, & partim quod judiciorum ration' & cauſæ (ut legis mos eſt) in iiſdem non expreſſæ monumentis, nulli plene & integre ſatisfecerunt; præſertim vero, quod nulla de eorum determinationum ac judiciorum veris cauſis & rationibus facta fuerit & divulgata Relatio. Secundo, quod illi qui nullam inde habent partem, de vero poſſeſſionum hujus Ducatus ſtatu inſtituantur, eoque moneantur ne cum iis pactionem ineant qui poſſeſſiones inde aliquas emerunt aut adepti fuerunt: Et qd' hi qui ullam ejuſdem par-

I have reported the great Caſe of the Dutchy of Cornwall *for divers Cauſes.* 1. *Altho' this very Caſe hath been long ſince (as ſhall appear in this Report) judicially adjudged, yet hath the ſame of late been call'd in Queſtion again, partly for that the ſaid Judgments remain privately amongſt the reſt of the King's Records, unknown but to a few, and partly, for that the Reaſons and Cauſes of the Judgments being (according to Law) not expreſſed in the Record itſelf, gave no full and clear Satisfaction: But principally for that there was no Report made and publiſhed of the true Cauſes and Reaſons of thoſe Reſolutions and Judgments.* 2. *To the End that ſuch as have not any Part thereof, may hereby be inſtructed of the true State of the Poſſeſſions of this Dutchy, and by this Means be admoniſh'd how they deal with any that have bought or purchaſed any of theſe Poſſeſſions; and that ſuch as*

have

have acquired or gotten any of them, knowing that the Judgment was given in this Caſe; both upon many direct Authorities in the Point, and upon plain and demonſtrative Reaſon (the two main Cauſes of true Satisfaction) may therewith reſt ſatisfy'd. The laſt, but not the leaſt, is, for that the moſt Noble and Excellent Prince, who is, omine, nomine, numine magnus, *and the greateſt that ever was before him, hath in his firſt Cauſe* in hoc forenſi dicendi genere *gotten Victory. I have for ſome Reſpects reported the ſame in Latin, wherein I have been contented,* potius ſcribere proprie quam Latine; *and for that the Words of Art which will bear no Tranſlation, are herein ſo many and ſo frequent, I have added the Report thereof in the Vulgar Language, that the Reader may uſe either of them at his Pleaſure. There are certain other Caſes now publiſh'd by me, concerning ſome of the moſt abſtruſe, dark and difficult Points in the Law, and yet very neceſſary to be known, as in* Arthur Blackamore's *Caſe concerning Amendments,* Beecher's *Caſe of a* Retraxit, *Departure in Deſpite of the Court, and of Fines and Amercements,*

tem acquiſiverunt, aliove pacto nacti ſunt, intelligentes ſententiam in hoc caſu latam fuiſſe cum ex quamplurimis directis admodum & luculentis Authoritatibus & indiciis, tum ex plena demonſtrativaque ratione (duobus veris & præcipuis ſatisfaciendi cauſis) habeant quo acquieſcant. Ultima hunc caſum referendi cauſa (nequaquam tamen minima) eſt, quod termaximus ille & excellentiſſimus Princeps, qui *omine, nomine, numine magnus,* & omnium qui anteceſſerunt illuſtriſſimus, in prima ſua cauſa palmam *in hoc forenſi dicendi genere* adeptus eſt. Nonnullæ mihi animum induxerunt rationes, ut Latine in ſcripta redigerem hunc caſum, quod dum facerem, contentus fui *potius ſcribere proprie quam Latine,* & quia voces artis (in aliam ſe converti Linguam minime patientes) adeo multæ ſunt & frequenter intercedentes, Lingua etiam aſſueta hæc loquitur Relatio; utraque igitur Lector pro animo ſuo utatur. Quoſdam alios a me modo relatus habes caſus de queſtionibus in Lege nonnullis abſtruſiſſimis, difficilimis, & ſpinoſiſſimis, intellectu

tellectu tamen valde neceſſariis, utputa caſum *Arthuri Blackamore* de amendationib', caſum *Beecher* de formula juris quam dicimus retraxit, de receſſu in contemptum Curiæ, & de mulctis (quas fines & amerciamenta vocamus) caſum *Grieſley* de amerciamentis afferendis, & nonnullos alios. Hos, de induſtria, tam perſpicue, luculenter, & ſummatim quam potui, perfeci: Leges enim plane ſunt diſſimiles illis Naturæ quæ *gratius per Chriſtallum aut ſuccinum pelluceant quam ſi nuda conſpiciantur*, nec pictis aſſimulentur tabulis quæ delicias tum afferunt maximas, quum recentibus adhuc & floridis poliantur coloribus, & umbris graphice inductis haud parum illuſtrantur & exornantur.

Greiſley's *Caſe of aſſeering of Amercements and ſome others. And I have of Purpoſe done theſe as plainly and clearly, and therewith as briefly as I could. For the Laws are not like to thoſe Things of Nature*, which ſhine much brighter thro' Chriſtal or Amber, than if they be beheld naked; *Nor like to Pictures that ever delight moſt when they are garniſhed and adorned with freſh and lively Colours, and are much ſet out and graced by artificial Shadows.*

Utrum res ipſa, ſive ætas mea provectior (anno jam ſexageſimo ætatis meæ propemodum acto) ſive aliud quicquam in cauſa eſt; labore magis, in hoc octavo opuſculo, quam ſuperiorum aliquibus, eniſum me fuiſſe pro certo ſcio: Deus tamen optimus maximus propitia ſua benignitate (dum in gravioribus reipublicæ negotiis verſatus

And whether it be in Reſpect of the Matter, or my Years growing faſt on, being now in the 60th Year of my Age, or for what other Reſpect ſoever it be, ſure I am, I have felt this Eighth Work much more painful than any of the other have been unto me. And yet hath Almighty God, of his great Goodneſs, (amidſt my publick Employments) enabled me hereunto. And as the Na-

turaliſts ſay, that there is no Kind of Bird or Fowl of the Wood or of the Plain that doth not bring ſomewhat to the Building and Garniſhing of the Eagle's Neſt, ſome Cinnamon, and others Things of Price, and ſome Juniper, and ſuch like of leſſer Value, every one according to their Quality, Power and Ability: So ought every Man, according to his Power, Place and Capacity, to bring ſomewhat, not only to the Profit and adorning of our dear Country (our great Eagle's Neſt) but therein alſo, as much as ſuch mean Inſtruments can, to expreſs their inward Intention and Deſire, to honour the peaceable Days of his Majeſty's happy and bleſſed Government to all Poſterity. And for that I have been called to this Place of Judicature by his Majeſty's exceeding Grace and Favour, I hold it my Duty, having obſerv'd many Things concerning my Profeſſion, to publiſh, amongſt others, certain Caſes that have been adjudged and reſolved ſince his Majeſty's Reign, in his higheſt Courts of ordinary Juſtice, in this calm and flouriſhing Spring-Time of his Majeſty's Juſtice, amounting with thoſe of my former Edition in all

ſui) hoc ut perficerem vires dedit. Et, ut dicunt Naturaliſtæ, ſicut nulla ſylvarum aut camporum volatilium genera ſunt, quæ non aliquid afferunt ad nidum acquileum conſtruendum & adornandum nonnulla cinnamonum aliaque magni pretii & momenti, nonnulla juniperum & talia id genus minoris pretii, ſecundum illorum qualitatem, potentiam, & facultatem: Ita cuilibet, ſecundum poteſtat', ordinem, & mentis acumen, addendum eſt aliquid, non ſolum patriæ noſtræ chariſſimæ (aliquæ noſtræ nido potentiſſimæ) ut profit & illuſtret, ſed in eo etiam pro virili, ut interiorem animi intentionem & affectum exprimat, ad Regiæ Majeſtatis dies pacificos, gubernationemque ejus feliciſſimam atque beatiſſimam in poſterum celebrandum. Ego vero, cum ſuæ Majeſtatis Gratia ad hanc ſedem Judiciariam ſummo cum favore me evocarit, in officio meo me defuiſſe exiſtimavi, ſi non, dum multa mea in profeſſione obſervavi, in lucem ederem caſus nonnullos inter alios) ſub Regia ſua Majeſtate in eminentiſſimis Juſtitiæ ordinariæ Curiis judicatos

judicatos & diſcuſſos, ſereniſſimo hoc florentiſſimoque vera Juſtitiæ a ſua Majeſtate pie adminiſtratæ; qui caſus cum illis editionum mearum ſuperiorum, numerum attingunt octaginta quatuor. Et (ſi Deo placeat) opus aliud poſthac edere inſtitui; cujus quidem elementa tantum collegi, non tamen ut propoſitum mihi eſt, formavi, ne forſan ſi relinquerem qualecunque ſit poſt meam ex hac vita emigrationem (qd' re pari accidiſſe vidimus) promulgaretur imperfectum. Singularis veſtrum ſuperior' mearum Relationum approbatio, continuis aliar' Lucubrationum aſſociata votis, ad onus hoc aggrediendum multum me incitavit. Et, ſi non minorem vos veſtris in ſtudiis fructum ex his perceperitis, quam ego exanimo vobis opto, voſque (ſcientiæ veſtra ex cupiditate) ſperatis, faciles meæ mihi erunt vigiliæ, votis enim meis abunde ſatisfactum erit.

to 84. *And* (*if it ſhall pleaſe God*) *I intend hereafter to ſet out another Work, whereof I have only collected the Materials, but not reduced them to ſuch a Form as I intend, leſt if I ſhould leave it as it is, it might, after my Death, be publiſh'd* (*as hath been done in the like Caſe*) *before it be perfected. Your extraordinary Allowance of my former Works, together with your continual and earneſt Deſire of other Editions, have much encourag'd me to undertake theſe Pains: And if you ſhall reap in your Studies ſuch Profits thereby, as I from my Heart deſire, and as you* (*from your Deſire of Knowledge*) *do expect, then ſhall my Labours ſeem light unto me, for my Expectation ſhall be ſatisfied.*

The PRINCE's *Caſe.*

Hill. 3 Jac. I.

In *Chancery.*

Pleas before the Lord the now King in his Chancery *at* Weſtminſter, *in the County of* Middleſex, *of* Hillary Term, *in the 3d Year of the Lord* James *by the Grace of God King of* England, France *and* Ireland; *and of* Scotland *the 39th.*

THE Lord the now King ſent his cloſe Writ, directed to the Sheriff of *Cornwall* in theſe Words. *James* by the Grace of God of *England*, *Scotland*, *France* and *Ireland*, King, Defender of the Faith, *&c.* To the Sheriff of *Cornwall* Greeting, Whereas in the Statute made in the Parliament of the Lord *Edward* the 3d, late King of *England*, in the 11th Year of his Reign, holden at *Weſtminſter* in the County of *Middleſex*, It was amongſt other Things Enacted by Authority of the ſaid Parliament, that the Eldeſt Son of the King of *England*, who ſhould be Inheritable to the Kingdom of *England*, ſhould be Duke of *Cornwall*, and that the Dutchy of *Cornwall* ſhould always be, from henceforth to the Eldeſt Son of the Kings of *England*, who ſhould be next Heir of the aforeſaid Kingdom, and that the aforeſaid Eldeſt Son of the Kings of *England*, ſhould have and enjoy towards their Maintenance and for Support of their Princely State and Dignity, all the whole Dutchy of *Cornwall*, and all Caſtles, Honours, Lordſhips, Manors, Lands, Tenements, and all other Hereditaments to the ſaid Dutchy belonging or appertaining, or reputed or taken to be Part, Parcel, or Member of the ſaid Dutchy. And whereas the ſaid late King *Edward* the 3d, in the aforeſaid Parliament, held in the ſaid 11th Year of his Reign, by his certain Charter, (made) with the common Aſſent and Council of the Prelates, Earls, Barons, and others of the King's Council in the ſaid Parliament called together, and by Authority of the ſame Parliament, had

Sci. Fac. To Repeal a Patent.

had given to *Edward* then Earl of *Cheſter* his firſt begotten Son, the Name and Honour of Duke of *Cornwall*, and him in the Dukedom of *Cornwall* eſtabliſhed, and by the ſame his Charter, with the common Aſſent and Council aforeſaid, gave and granted to his ſaid Son, in the Name and Title of the Dutchy aforeſaid, and under the Name and Honour of Duke of the ſaid Place, amongſt other Things the Caſtle of *Wallingford*, with its Hamblets and Members, and the Yearly Farm of the Town of *Wallingford*, with the Honours of *Wallingford*, and of St. *Walerie* with the Appurtenances in the County of *Oxford*, and other Counties, whereſoever the ſaid Honours were, To have and to hold to the ſame Duke and to the firſt begotten Sons of him and his Heirs, Kings of *England*, and of the ſame Place Dukes in the Kingdom of *England*, therein to ſucceed, together with the Knights Fees, Advowſons of Churches, Abbeys, Priories, Hoſpitals, Chapels, and with Hundreds, Fiſhings, Foreſts, Chaces, Parks, Warrens, Fairs, Markets, Liberties, Free Cuſtoms, Wards, Reliefs, Eſcheats, and Services of Tenants, as well Free, as Villains, and all other Things to the aforeſaid Caſtles, Towns, Honours, Lands, and Tenements, howſoever belonging or appertaining, of the aforeſaid King *Edward* the 3d, and his Heirs for ever. And the ſaid late King *Edward* the 3d, by his Charter aforeſaid, in Parliament aforeſaid, with the common Conſent aforeſaid, and by Authority of that Parliament, the aforeſaid Caſtle of *Wallingford*, and other the Premiſſes with the Appurtenances, amongſt other Things, to the ſaid Dutchy annexed and united, to remain to the ſaid Dutchy for ever; So as from the ſaid Dutchy at any Time by no Means they be ſeparated, nor to any other, or others, than to the Dukes of the ſame Place, by the aforeſaid late King, or his Heirs ſhould be given, or any Ways granted, ſo alſo that to the aforeſaid Duke, and other Dukes of the ſame Place, deceaſing, and to the Son or Sons to whom the aforeſaid Dutchy, by Colour of the Grants aforeſaid it ſhould belong, not appearing, the ſaid Dutchy with the aforeſaid Caſtle, and other the Premiſſes being granted, to the aforeſaid late King, or his Heirs, Kings of *England*, ſhould return into the Hands of him the ſaid late King, and of his Heirs Kings of *England* to be holden, until any of ſuch Son or Sons of the ſaid Kingdom of *England* Heredi-tably to ſucceed, ſhould appear (as is aforeſaid) to whom ſucceſſively the ſaid Dutchy with the Appurtenances, the aforeſaid late King for him and his Heirs, granted and would to be delivered, to be holden of the ſaid King, and his Heirs for ever. And whereas likewiſe, by a certain Act made in Parliament of the Lord *Henry*, late King of *England* the 8th, holden at *Weſtminſter* aforeſaid, that is to ſay, in the Second Seſſions of the ſame Parliament, begun and holden the 12th Day of *April*, in the 31ſt Year of the Reign of the ſaid Lord

Lord late King *Henry* the 8th and by divers, Prorogations until the 25th Day of *May*, in the 32d Year of the Reign of the ſaid late King *Henry* the 8th, and from thence holden and continued, until the Diſſolution of the ſaid Parliament, the 24th Day of *July*, in the 32d Year aforeſaid, reciting, That whereas in the Parliament holden, in the 11th Year of the Reign of the late King of famous Memory King *Edward* the 3d, amongſt other Things eſtabliſh'd; It was Enacted and Ordained, that the Eldeſt Son of the King of *England*, who ſhall be Inheritable to this Kingdom of *England*, ſhould be Duke of *Cornwall*, and that the ſame Dutchy of *Cornwall*, ſhould ever be to the Eldeſt Son of the King of *England*, who ſhould be next Heir of the ſaid Kingdom; and that he ſhould have and enjoy towards the Maintenance and Support of his Princely Eſtate, the whole and entire Dutchy of *Cornwall*, and all Caſtles, Honours, Dominions, Manors, Lands, Tenements, and all other Hereditaments belonging or appertaining to the ſaid Dutchy, or reputed and taken to be Part, Parcel, or Member of the ſaid Dutchy: And for that, the Honour and Caſtle of *Wallingford* in the County of *Berks*, then was, and long Time had been Part and Parcel of the Inheritance and Poſſeſſions of the ſaid Duke of *Cornwall*, and reputed and taken to be a Member of the ſaid Dutchy; which Honour and Caſtle, lay near to the Manor of the ſaid late King *Henry* the 8th of *Newelm*, otherwiſe *Ewelm*, in the County of *Oxford*, and was very Commodious, decent, and Pleaſant, for the ſaid late King *Henry* the 8th. In Conſideration whereof, and for other urgent Cauſes, the ſaid late King *Henry* the 8th, eſpecially moving, it was Enacted and Ordained by the Authority of the ſame Parliament, of the ſaid late King *Henry* the 8th. That the ſaid Honour and Caſtle of *Wallingford*, and all Dominions, Manors, Lands, Tenements, and other Hereditaments whatſoever they ſhould be, being Parts, Parcels, or Members of the ſaid Honour and Caſtle, or Appendant, or belonging to the ſaid Honour and Caſtle, or to any Lordſhip or Manor to the ſame appertaining, or reputed, or taken to be Part or Parcel of the ſaid Honour and Caſtle, or any Member thereof, ſhould be from thenceforth for ever by Authority of the ſaid Parliament ſevered, diſannexed and diſmembred from the ſaid Dutchy of *Cornwall*, and ſhould not be in any Manner from thence after reputed, called, accepted, or taken by the Name of the Honour of *Wallingford*, nor be any Part, Parcel or Member of the ſaid Dutchy of *Cornwall*: And that the aforeſaid Manor of the ſaid King of *Newelm*, otherwiſe *Ewelm*, from thence for everafter, ſhould be named, called, accepted, and be reputed and adjudged to be the Honour of *Newelm*, otherwiſe *Ewelm*. And that the ſaid late King *Henry* the 8th, ſhould have and enjoy the like Li-

berties, Franchiſes, Privileges, Royalties, and Juriſdictions, as well in the aforeſaid Honour of *Newelm* otherwiſe *Ewelm*, as in the aforeſaid, Manors, Caſtles, Lands, Tenements and Hereditaments, being Part, Parcel or Member of the ſaid Honour of *Wallingford*, to all Intents and Purpoſes as were in any Manner belonging, appertaining, or uſed in or to the ſaid Honour of *Wallingford*. Add that the like Proceſs, Suits and Pleas ſhould be for ever holden, received nd ſhould be uſed in the ſaid Honour of *Newelm*, otherwiſe *Ewelm*, as at the firſt Day of the ſame Parliament were uſed or exerciſed in the ſaid Honour of *Wallingford*: And that the ſaid late King *Henry* the 8th ſhould have to him, his Heirs and Succeſſors for ever, the ſaid Honour and Caſtle of *Wallingford*, and all Lordſhips, Manors, Lands, Tenements and other Hereditaments whatſoever, appertaining to the ſaid Honour or Caſtle, or reputed, or taken to be any Part of the Poſſeſſions, or Parcel or Member of the ſaid Honour or Caſtle, from thence for ever to be ſevered and divided from the aforeſaid Dutchy: And that the ſaid Honour and Caſtle of *Wallingford*, from thence forever ſhould be named and called the Caſtle and Manor of *Wallingford*. And alſo that the ſaid Caſtle and Manor of *Wallingford*, and all Lordſhips, Manors, Lands, Tenements, and other Hereditaments whatſoever, which then ſhould be belong or appertaining to the ſaid Caſtle and Manor, or reputed to taken to be any Part, Parcel or Member thereof; and all Manner of Liberties, Franchiſes, Privileges, Royalties and Juriſdictions before that Time uſed within the ſaid Honour of *Wallingford*, from thence for ever ſhould be united, annexed, knit, adjudged, deemed, accepted, reputed and called Part, Parcel and Member of the ſaid Honour of *Newelm*, otherwiſe *Ewelm*, in the aforeſaid County of *Oxford*: And further it was enacted by Authority of the aforeſaid Parliament of the aforeſaid late King *Henry* the 8th. That all and ſingular Perſon and Perſons who then held any Manors, Lands, Tenements, or Hereditaments of the aforeſaid late King *Henry* the 8th, and of the moſt excellent and undoubted Prince *Edward*, the Son and Heir apparent of the ſaid late King *Henry* the 8*th*, as of the ſaid Honour of *Wallingford*, or of any other Lordſhips or Manors being Parcel or Member of the ſaid Honour of *Wallingford*, from thence for ever after ſhould hold their ſaid Manors, Lands, Tenements, and Hereditaments of the ſaid late King *Henry* the 8th, his Heirs and Succeſſors, as of the aforeſaid Manor and his Caſtle of *Wallingford*, or of the ſaid Lordſhips or Manors being Parcel and Members of the ſaid Honour of *Wallingford*, Parcel of the ſaid Honour of *Newelm*, otherwiſe *Ewelm*, by the ſaid Rents, Suits, Cuſtoms and Services, as they and every of them held, payed, or did before the making of the ſaid Act of Parliament,

Parliament, and not by more, or other Rents, Suits, Cuſtoms or Services: Saving to every Perſon and Perſons, Bodies Corporate or Politick, their Heirs and Succeſſors, and to every of them, other than the moſt Excellent and undoubted Lord Prince *Edward* which then was, and his Heirs, and to any other who from thence for ever ſhould happen to be the King's Eldeſt Son, and next Heir of the Crown of this Kingdom of *England*, all ſuch Right, Title, Intereſt, Poſſeſſion, Fees, Offices, Annuities, Rents, Commons, and all otherCommodities and Hereditaments whatſoever, which they, or any other of them lawfully held, had, could, or ought to have had, if the ſaid Act of Parliament had never been had or made: And further, it was Enacted by the Authority of the aforeſaid Parliament, of the aforeſaid late King *Henry* the 8th. That the aforeſaid excellent, and undoubted Prince *Edward*, which then was, and every other who from henceforth forever, ſhould happen to be Eldeſt Son of the King, and next Heir of the Crown of this Kingdom, ſhould have, hold, and enjoy for ever annexed, united and knit, to the aforeſaid Dutchy of *Cornwall*, for and in full Recompence of the aforeſaid Honour and Caſtle of *Wallingford*, and other the Premiſſes in the ſaid Act before mentioned, to the ſaid Honour of *Wallingford* then before belonging as Part and Parcel of the ſaid Dutchy of *Cornwall*, The Manor of *Weſt Taunton*, *Trelowia*, and *Landalph*, with the Appurtenances in the County of *Cornwall*, amongſt other Things, in ſuch Manner and Form, and of ſuch like Eſtate, as the ſaid Excellent and undoubted Prince *Edward*, before the making of the ſame Act of Parliament, had, held, or enjoyed the aforeſaid Honour and Caſtle of *Wallingford*, and all other the Premiſſes, Parcel of the ſaid Honour. And that all and ſingular the aforeſaid Manors, with all and ſingular their Appurtenances, then amongſt other limited and aſſigned, by the ſaid Act in the aforeſaid Parliament of the aforeſaid late King *Henry* the 8th, to the aforeſaid Dutchy of *Cornwall*, and every of them, from thence forever, ſhould be reputed, deemed, adjudged, accepted and taken, by Authority of the ſame Parliament, as Part, Parcel, and Member of the ſaid Dutchy of *Cornwall*, in ſuch and the like Manner and Form, to all Purpoſes and Intents, as the ſaid Honour and Caſtle of *Wallingford*, and the Members and Parcels of the ſame, were before the making of the ſame Act, any Act, Law, Cuſtom, or Uſe to the contrary notwithſtanding, as by the ſaid Act in the aforeſaid Parliament of the aforeſaid late King *Henry* the 8th, made, amongſt other Things it more fully appeareth: And whereas before, and until the Time of the making of the aforeſaid Act of Parliament, made in the aforeſaid Parliament of the aforeſaid late King *Henry* the 8th, the aforeſaid Honour and Caſtle of *Wallingford*, and the Members and Parcel thereof, were Part, Parcel, and Mem-

bers of the aforeſaid Dutchy of *Cornwall*, according to the Form and Effect of the aforeſaid Charter and Grant by the aforeſaid late King *Edward* the Third, with the common Aſſent aforeſaid, and Authority of his Parliament aforeſaid, (as before is ſaid) made, and as in the aforeſaid Charter are mentioned, and above recited, and the aforeſaid excellent and undoubted Prince *Edward* in the aforeſaid Act made in the aforeſaid Parliament of the aforeſaid late King *Henry* the 8th, before the Time of making of the aforeſaid Act made in the Parliament aforeſaid, of the aforeſaid late King *Henry* the 8th, had held and enjoyed the aforeſaid Honour and Caſtle of *Wallingford*, and other the Premiſſes, Parcel of the ſame Honour, in ſuch Manner and Form, and of ſuch Eſtate as is enacted and limited in the aforeſaid Charter and Grant aforeſaid of the aforeſaid late King *Edward* the 3d, in the Year of his Reign the 11th aforeſaid, by the Authority of Parliament made as before is ſaid. And the aforeſaid Honour and Caſtle of *Wallingford* in the aforeſaid Act, made in the ſaid Parliament of the ſaid late K. *Henry* VIII. mentioned, and the aforeſaid Caſtle of *Wallingford*, with the Hamblets and Members thereof: And the aforeſaid Honour of *Wallingford*, with the Appurtenances in the aforeſaid Charter and Grant, by the aforeſaid late King *Edward* the 3d, as before is ſaid, made, ſpecified, are one and the ſame, and not others or divers. By Virtue of which the ſaid late Prince *Edward*, Eldeſt Son of the aforeſaid late King *Henry* the 8th, and Duke of *Cornwall*, was ſeiſed of the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph* with the Appurtenances, in his Demeſn as of Fee, as Parcel of his Dutchy of *Cornwall* aforeſaid, according to the Form and Effect of the aforeſaid Act of Parliament; and he thereof ſo being ſeized, the aforeſaid late King *Henry* the 8th, afterwards at *Weſtminſter* aforeſaid died, the ſaid *Edward* late Prince, being the Son and Heir of the aforeſaid late King *Henry* the 8th. And the ſaid *Edward* late Prince, to the ſaid King *Henry* the 8th, in the aforeſaid Kingdom of *England* by right of Inheritance ſucceeded, and King of the aforeſaid Kingdom of *England* by the Name of *Edward* the 6th King of *England* came to be. And afterwards the ſaid *Edward* the 6th late King of *England*, at *Weſtminſter* aforeſaid, died without Heir of his Body begotten; the Lady *Mary* late Queen of *England* being Siſter and Heir of the ſaid late King *Edward* the 6th; and the aforeſaid Lady *Mary* to the ſaid late King *Edward* the 6th in the aforeſaid Kingdom of *England* by Right of Inheritance ſucceeded, and became Queen of the aforeſaid Kingdom of *England*; and afterwards the ſaid Queen *Mary*, at *Weſtminſter* aforeſaid, died, without Heir of her Body begotten; the Lady *Elizabeth*, late Queen of *England* being Siſter and Heir of the aforeſaid late Queen *Mary*; the aforeſaid Lady *Elizabeth* to the ſaid late Queen

Mary in the aforeſaid Kingdom of *England*, by Right of Inheritance ſucceeded, and became Queen of the Kingdom of *England*: And afterwards, the ſaid Queen *Elizabeth* at *Weſtminſter* aforeſaid, died, without Heir of her Body begotten, we then, and yet being Couſin and Heir to the ſaid late Queen *Elizabeth*; and we ſucceeded to the ſaid late Queen *Elizabeth*, in Right of Inheritance, in the ſame Kingdom of *England*, and became, and now are King of *England*; and now the moſt excellent Prince *Henry* our Eldeſt Son, now Duke of *Cornwall* hath requeſted us, that, whereas, the aforeſaid Lady *Elizabeth* late Queen of *England*, by her Letters Patents, ſealed with the great Seal of *England* bearing date at *Weſtminſter* aforeſaid, the ſecond Day of *May* in the 37th Year of her Reign, granted to *Gellio Merick*, then Eſq; after Kt. now deceaſed, and *Henry Lindley* then Eſq; now Kt. the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, with the Appurtenances, To have and to hold, to them the ſaid *Gellio Merick*, and *Henry Lindley*, and their Heirs for ever, as in the Letters Patents thereof more fully it is contained. And whereas the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, to the aforeſaid Dutchy (as is ſaid) annexed and united, to the ſame now Duke by Colour of the Gift, Grant, and Union aforeſaid, by the Authority of Parliament aforeſaid, belonged, and yet ought to belong, and were Members and Parcel of the ſame Dutchy, and yet are, as the ſaid now Prince and Duke by Ways and Means convenient, is ready to ſhew; That we would the ſaid Letters Patents aforeſaid, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, as before is ſaid, made, revoke and annul, and the ſaid Manors with the Appurtenances ſeize into our Hands; that we cauſe the ſaid Manors to the ſaid now Duke, as Members and Parcel of the Dutchy aforeſaid, to have and to hold according to the Form and Effect of the Guift, Grant, and Union aforeſaid to be delivered: We willing to do in this Behalf what is juſt, command you that by good and lawful Men of your Bailiwick, you give warning to the aforeſaid *Henry Lindley*, Kt. and *John Hele* Kt. Serjeant at Law, Tenants of the ſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, and alſo to whoſoever other or others, are Tenants of the ſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, or any of them, that they be before us in our Chancery in eight Days of St. *Hillary* next coming, whereſoever it ſhall be, to ſhew what for us and themſelves they have or can ſay, wherefore the Letters Patents, aforeſaid, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, with the Appurtenances (as before is ſaid) made, ought not to be revoked and annulled, and the ſaid Manors with the Appurtenances into our Hands be ſeiſed, as before is ſaid, to the now Duke, as Members and

Parcel of the Dutchy aforeſaid, according to the Form and Effect of the Gift, Grant, and Union aforeſaid, to have and to hold, to be delivered, and to do and receive, what our ſaid Court then and there ſhall further grant in this Behalf: Witneſs myſelf at *Weſtminſter*, the 18th Day of *November* in the Year of our Reign of *England*, *France* and *Ireland*, the 3d, and of *Scotland* the 39th; and now at this Day, that is to ſay, the aforeſaid eight Days of St. *Hillary*, before the ſaid Lord the King that now is, in his ſaid Court of *Chancery*, here cometh *Edward Coke*, Kt. Attorney General of the ſaid Lord the King, that now is, who proſecuteth in this Behalf for the ſaid Lord the King, in his proper Perſon. And *Francis Godolphin*, Kt. being Sheriff of the County of *Cornwall*, now ſendeth here the Writ aforeſaid, ſerved and executed, in Form following, the 21ſt Day of *December*, in the 3d Year aboveſaid, by Virtue of the Writ aforeſaid, to him directed, that he gave Warning by *John Edgcombe* and *Walter Blunt*, good and lawful Men of his Bailiwick, to the aforeſaid *Henry Lindley*, Kt. and alſo the ſame Day and Year by the ſaid good and lawful Men, he gave Warning to the aforeſaid *John Hele*, Kt. and to one *Warwick Hele*, Kt. Tenants of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* abovementioned, to be before the ſaid Lord the now King here, at this Day, to ſhew, do, and receive, what that Writ in itſelf requireth and demands. And the aforeſaid *Henry Lindley*, Kt. *John Hele*, Kt. and *Warwick Hele*, Kt. the 4th Day of Pleas being ſolemnly called, by *Richard Wilkinſon* their Attorney come, and pray Licence to Imparl, and it is granted to them, *&c.* and upon this, Day is given to the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, before the ſaid Lord the King in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, until in eight Days of the Purification of the Bleſſed *Mary* then next, *&c.* whereſoever, *&c.* that is to ſay, to the aforeſaid *Henry*, *John* and *Warwick*, to imparl and then to anſwer, *&c.* The ſame Day is given to the aforeſaid *Edward Coke*, Kt. the Attorney General of the Lord the now King, who, *&c.* then to be here, *&c.* At which eight Days from the Purification of the Bleſſed Lady *Mary*, before the ſaid Lord the King in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, come as well the aforeſaid *Edward Coke*, Kt. who, *&c.* in his proper Perſon, as the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, by their Attorney aforeſaid, and upon this, the ſaid *Henry*, *John*, and *Warwick*, by their Attorney aforeſaid, pray farther Licenſe thereof to imparl, before the ſaid Lord the King now in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, until in 15 Days of Eaſter then next following, *&c.* whereſoever, *&c.* and then to anſwer, *&c.* and have it, *&c.* and the ſame Day is given to the aforeſaid *Edward Coke*, Kt. the Attorney General of the ſaid Lord the now King, who, *&c.* then to be here, *&c.* At which

15 Days of *Easter* before the ſaid Lord the King that now is, in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, come as well the aforeſaid *Edward Coke* Attorney General of the Lord the now King, who, *&c.* in his proper Perſon, as the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, by their Attorney aforeſaid, and upon this, the aforeſaid *Henry*, *John*, and *Warwick*, by their Attorney aforeſaid, further pray Leave thereof to imparl before the ſaid Lord the King, in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, until the Morrow of the *Holy Trinity*, then next following, whereſoever, *&c.* And then to anſwer, *&c.* and have it, *&c.* And the ſame Day is given to the aforeſaid *Edward Coke*, Kt. Attorney General of the Lord the King who, *&c.* then to be here, *&c.* At which Morrow of *Holy Trinity*, before the ſaid Lord the now King, in the ſaid Court, *&c.* that is to ſay, at *Weſtminſter*, aforeſaid, come as well the aforeſaid *Edward Coke*, Kt. Attorney General of the Lord the now King, who, *&c.* in his proper Perſon, as the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, by their Attorney aforeſaid; And upon this, the ſaid *Henry*, *John*, and *Warwick*, by their Attorney aforeſaid, pray further Licence thereof to imparl, before the ſaid Lord the now King in the ſaid Court here, that is to ſay, at *Weſtminſter*, aforeſaid, until the Morrow of *All-Souls* then next following, whereſoever, *&c.* and then to anſwer, *&c.* And have it, *&c.* And the ſame Day is given to *Edward Coke*, Kt. Attorney General of the Lord the now King, *&c.* then here, *&c.* At which Morrow of *All Souls*, before the Lord the King in the ſaid Court here, that is to ſay, at *Weſtminſter* aforeſaid, come as well *Henry Hobard*, Kt. then Attorney General of the ſaid Lord the now King, who for the ſaid Lord the now King, Proſecutes in his proper Perſon, as the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, by their Attorney aforeſaid, upon which, the ſaid *Henry Lindley*, by his Attorney aforeſaid, prayeth the Hearing of the ſaid Writ of *Scire Facias* abovementioned, and it is read unto him, *&c.* Which being read and heard, the ſaid *Henry Lindley* ſaith, that neither the aforeſaid Letters Patents, of the aforeſaid late Queen *Elizabeth*, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, with the Appurtenances in Form aforeſaid made, ought to be revoked or annulled, nor the ſaid Manors into the Hands of the ſaid Lord the now King ought to be ſeized; Becauſe he ſaith, that there is not any ſuch Record of any ſuch Act of Parliament, of the aforeſaid King *Edward* the 3d made, as in the aforeſaid Writ of *Scire Facias*, above thereof is recited and ſpecified; Nor is there any ſuch Record of the aforeſaid Charter, by the aforeſaid late King *Edward* the 3d, by Authority of the Parliament aforeſaid, above ſuppoſed to have been made, as in the ſaid Writ of *Scire Facias* above is likewiſe recited and ſpecified, and this the ſaid *Henry Lindley* is ready to aver, wherefore he demands

mands Judgment, if the aforeſaid Letters Patents of the aforeſaid late Queen *Elizabeth*, of the Manors aforeſaid with their Appurtenances, ſo as before is ſaid made, ought to be revoked or annulled, or the ſaid Manors with the Appurtenances, to be ſeized into the Hands of the ſaid Lord the now King, *&c.* And the aforeſaid *John Hele* and *Warwick Hele*, by their Attorney aforeſaid, by Proteſtation, That there is not any Record of any ſuch Act of Parliament of the ſaid 11th Year of *Edward*, late King of *England* the 3d, nor that there is any ſuch Record of the aforeſaid Charter, by the aforeſaid late King *Edward* the 3d, by Authority of Parliament aforeſaid, as in the ſaid Writ of *Scire Facias* is mentioned; For Plea they ſay, that neither the aforeſaid Letters Patents of the aforeſaid Lady *Elizabeth*, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances, in Form aforeſaid made, ought to be revoked or annulled, or the Manors aforeſaid with the Appurtenances, be ſeized into the Hands of the Lord the now King, or any of them ought to be ſeized, becauſe they ſay, that the aforeſaid late Lady Queen *Elizabeth*, before the making of the Letters Patents aforeſaid, to the aforeſaid *Gellio Merick*, and *Henry Lindley*, was ſeized in her Demeſn as of Fee, in the Right of her Crown of *England*, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances, in the aforeſaid Writ of *Scire Facias* mentioned and expreſſed, and ſo thereof being ſeized, the ſaid late Queen *Elizabeth*, by her Letters Patents under the Great Seal of *England* ſealed, bearing Date at *Weſtminſter* in the County of *Middleſex*, the 2d Day of *May*, in the 37th Year of her Reign, and here into Court brought, in Conſideration of the good, true, faithful, and acceptable Service to the aforeſaid Lady the Queen, by her then well-beloved and faithful Couſin and Counſellor, *Robert* late Earl of *Eſſex*, of the Moſt Noble Order of the Garter, Kt. and Maſter of her Horſe, before that many Times done and performed, as for other good Cauſes and Conſiderations, the ſaid late Lady the Queen then ſpecially moving; as alſo at the humble Requeſt of the ſaid late Earl of *Eſſex*, of her ſpecial Grace, certain Knowledge, and meer Motion, gave and granted the Manors aforeſaid with their Appurtenances, amongſt other to the aforeſaid *Gellio Merick*, and *Henry Lindley*, then Eſquires, and afterwards Kts. To have, and to hold the ſaid Manors with the Appurtenances, to the aforeſaid *Gellio Merick*, and *Henry Lindley*, their Heirs and Aſſigns for ever. And the aforeſaid late Lady the Queen, by the ſame her Letters Patents, granted for Her, her Heirs, and Succeſſors, That the aforeſaid *Gellio Merick*, and *Henry Lindley*, their Heirs and Aſſigns, ſhould have, hold and enjoy, the aforeſaid Manors with the Appurtenances, according to the Intent of the ſaid late Queen, in the ſaid Letters Patents contained, and that the

ſaid

ſaid Letters Patents ſhould be firm, valid, good, ſufficient and effectual in Law, againſt the ſaid Lady the Queen, her Heirs and Succeſſors, as well in all her Courts, as elſewhere within the Kingdom of *England*, without any Manner of Confirmations, Licences, or Tollerations of theſaid Lady the Queen, her Heirs and Succeſſors then for ever, by the aforeſaid *Gellio Merick*, and *Henry Lindley*, or their Heirs or Aſſigns to be procured or obtained, notwithſtanding the Statute in Parliament of the Lord *Henry*, late King of *England* the 8th, in the 37th Year of his Reign made, concerning the Dutchy of *Cornwall*, and Honour of *Newelm* otherwiſe *Ewelm*, as in and by the ſaid Letters Patents more fully appears. By Virtue of which ſaid Letters Patents, the aforeſaid *Gellio Merick* and *Henry Lindley*, into the aforeſaid Manors with their Appurtenances entred, and were thereof ſeiſed in their Demeſn as of Fee, and ſo thereof being ſeiſed, by their Writing indented, made between the aforeſaid late Earl of *Eſſex*, *Gellio Merick*, and *Henry Lindley* of the one Part, and *Auguſtine Steward* and *Michael Corſellis*, on the other Part, bearing date the 26th Day of *December*, in the 38th Year of the Reign of the ſaid late Lady Queen *Elizabeth*, in the Court of *Chancery* of the aforeſaid late Queen at *Weſtminſter* aforeſaid, within ſix Months then next following, according to the Form of the Statute thereof made and provided, in due Manner of Record inrolled, as well in Conſideration of the Sum of 3500 *l.* to the aforeſaid late Earl of *Eſſex*, by the aforeſaid *Auguſtine Steward*, and *Michael Corſellis* paid, as for 20 *s.* to the ſaid *Gellio* and *Henry*, by the aforeſaid *Auguſtine* and *Michael* likewiſe paid, bargained and ſold to the aforeſaid *Auguſtine* and *Michael*, the Manors aforeſaid, with the Appurtenances, to have and to hold, to the ſaid *Auguſtine* and *Michael*, their Heirs and Aſſigns for ever. By Virtue of which Bargain and Sale, and Inrollment, and by Force of a certain Statute in the Parliament of the Lord *Henry*, late King of *England* the 8th, the 4th Day of *February*, in the 27th Year of his Reign, of transferring Uſes into Poſſeſſion, at *Weſtminſter* aforeſaid, holden, made, and provided, the aforeſaid *Auguſtine* and *Michael*, were ſeized of the Manors aforeſaid, with the Appurtenances, in his Demeſn as of Fee: And ſo thereof being ſeized, the ſaid *Auguſtine* and *Michael*, in Conſideration of the Sum of 3500 *l.* to the aforeſaid *Auguſtine* and *Michael*, by the aforeſaid *John Hele* paid, afterwards of the ſaid Manors with the Appurtenances, enfeoffed them the ſaid *John Hele*, then Serjeant at Law, and the aforeſaid *Warwick Hele*, then Eſq; now Kt. To have and to hold, to the ſaid *John* and *Warwick*, and to the Heirs and Aſſigns of the aforeſaid *John*, to the ſole and proper Uſe and Behoof of the aforeſaid *John* and *Warwick*, and the Heirs and Aſſigns of the ſaid *John Hele* for ever. By Virtue of which Feoffment, The aforeſaid *John Hele*, and *Warwick Hele* were, and yet are ſeized

of

of the aforeſaid Manors with the Appurtenances, that is to ſay, The ſaid *John Hele*, in his Demeſn as of Fee, and the aforeſaid *Warwick*, in his Demeſn as of Freehold for the Term of his Life. And the aforeſaid *John Hele*, and *Warwick Hele*, further ſay, That afterwards, in and by a certain Act of Parliament of the aforeſaid late Queen at *Weſtminſter* aforeſaid, the 27th Day of *October*, in the 43d Year of the Reign of the ſaid late Queen *Elizabeth* holden made, (amongſt other) reciting, That whereas, the ſaid late Queen, from the 8th Day of *February*, in the 25th Year of her Reign, as well for divers, and great Sums of Money, as for divers other ſeveral Conſiderations, had bargained, ſold, given and granted, by divers her Letters Patents, Indentures, or other Writings under the Great Seal of *England* ſealed, or the Seal of the Dutchy of *Lancaſter*, or the Seal of the County *Palatine* of *Lancaſter*, as well to Bodies Politick, and Corporate, as to divers and ſeveral other Subjects, of the ſaid Lady the Queen, divers and ſeveral Honours, Manors, Lands, Tenements, Rents, Reverſions, Services, and other Hereditaments in Fee Simple, Fee Tail, or for Term of Life, Lives, or Years, as in the ſaid ſeveral Letters Patents, Indentures, and other Writings are mentioned and declared: It was Enacted by Authority of the ſame Parliament, to the Intent that the ſaid Letters Patents, Indentures, or other Writings, ſhould be of good, available, and perfect Force and Effect, to all and ſingular the ſaid late Queen's Subjects, according to the true Intent and Effect of the ſame; That as well all and ſingular Letters Patents, Indentures, and other Writings, ſealed under the Great Seal of *England*, or under the Seal of the Dutchy of *Lancaſter*, or the Seal of the County of *Palatine* of *Lancaſter*, before then made and granted, by the aforeſaid late Queen, for any Sum or Sums of Money whatſoever, or for or upon any other Conſiderations whatſoever, from the aforeſaid 8th Day of *February*, in the 25th Year aforeſaid, as all other Letters Patents, then after by the ſaid late Queen to be made, for any Sum or Sums of Money, or other Conſiderations before the laſt Day of the ſaid then preſent Seſſion of the ſaid Parliament: And moreover, all other Letters Patents, within the Space of one Year then next following, to be made, by Force, or according to the true Purport or true Meaning of a Commiſſion under the Great Seal of *England*, then in Being, for the Sale of the Land, of the ſaid late Queen, to any Body Politick, or Corporate, or to any other Perſon or Perſons whatſoever, of any Honours, Caſtles, Manors, Lordſhips, Granaries, Meſſuages, Lands, Tenements, Meadows, Paſtures, Rents, Reverſions, Services, Woods, Advowſons, Nominations, Patronages, Annuities, Rights, Intereſts, Entries, Conditions, Leaſes, Courts, Liberties, Privileges, Franchiſes, or of any

other

other Hereditaments with the Appurtenances, or of any Part or Parcel thereof, with or under the Great Seal of *England*, or under the Seal of the Dutchy of *Lancaſter*, or the Seal of the County *Palatine* of *Lancaſter*, of whatſoever Kind, Nature, or Quality, they or any of them are, or were reputed, known, or taken, with the Appurtenances, or any Part or Parcel thereof, ſhould be good, perfect, and effectual in Law, and ſhould ſtand, be taken, reputed, eſteemed, and ſhould be adjudged to be good; certain, perfect, available, and effectual in the Law, againſt the ſaid late Queen, her Heirs and Succeſſors, according to the Tenor and Effect of the aforeſaid Letters Patents and Indentures, or other Writings, and that the ſame ſhould be expounded, conſtrued, eſteemed, and ſhould be adjudged moſt beneficially for thoſe, to whom the aforeſaid Letters Patents, and Grants thereof ſo are made, the Heirs, Aſſigns, Executors, and Adminiſtrators of them, according to the Words and Purport of the ſaid Letters Patents, Indentures, or other Writings, without any Confirmations, Licences, or Tollerations of the ſaid late Queen, her Heirs or Succeſſors, any ill naming, ill reciting, or not reciting, of the ſaid Honours, Caſtles, Manors, Lands, Tenements, or other the Premiſſes, or of any Part or Parcel thereof, or any Defect in finding of Office or Inquiſition, of and in the Premiſſes, or any Part thereof, by which the Title of the ſaid late Lady the Queen, of and in the Premiſſes ought to be found, before the Publiſhing of the aforeſaid Letters Patents, Indentures, or other Writing, or any ill reciting, or not reciting, of Demiſes thereof made, as well of Record, as not of Record, or any ill reciting, or not reciting, or not true mentioning in any ſuch Letters Patents, Grants, or Writings of the Eſtate or Eſtates of the ſaid late Queen, of Freehold, or Inheritance, of or in the Premiſſes, or any Part thereof, to which the ſaid late Queen, after the Beginning of her Reign was, or then-after ſhould be intitled, by any Attainder, Eſcheat, Conveiance or Aſſurance whatſoever; and in which Letters Patents, Grants, or Writings, no Eſtate Tail then before made, or ſuppoſed to be made was recited, or from henceforth ſhould be, and the Reverſion or Remainder thereof expectant, in the ſaid Letters Patent, Grants or Writings, granted or mentioned to be granted, or any Defect of certainty, or ill computing, miſtaking, rating or ſetting forth of the yearly Value or Rate of the Premiſſes, or yearly Rents reſerved of and for the Premiſſes, or any Parcel thereof mentioned or contained in the ſame Letters Patents aforeſaid, or other Writings, or for that the Premiſſes then were, or any Part thereof, were then valued at a greater or leſſer Value, in the ſaid Letters Patents, or Writings, than the ſaid Manors, Lands, Tenements, and other Premiſſes then were, or were in yearly Value, or any miſnaming or not true naming,

naming, of any Town, Hamlet, Pariſh, or County where the ſaid Honours, Manors, Lands, Tenements, Rents, Hereditaments, and other the Premiſſes, and every Part thereof, or any Parcel thereof lay, or were, or any Defect of true naming of the Lands, Tenements, or Hereditaments, or any Parcel thereof, or of the Nature, Kind, Quality, or Quantity, of the aforeſaid Poſſeſſions or Hereditaments, or of any Parcel thereof, or any Default of true naming of any Corporation, or any Default of Attornment, Livery or Seiſin, or any ill naming of any the late Tenants of the aforeſaid Honours, Manors, Lands, Tenements and Hereditaments, or of any Part thereof, ſo ſold, granted, or given, or any ill naming of any Perſon or Perſons, Bodies Politick or Corporate, who any Time before the making of ſuch Letters Patents, were, or then after ſhould be proprietors of the Premiſſes, or any Part thereof to the contrary notwithſtanding; as by the ſaid Act, amongſt other Things, it more fully appeareth. And the ſaid *John Hele*, and *Warwick* further ſay, That the ſaid late Queen *Elizabeth* never had any Son; And that the aforeſaid *Gellio Merick*, and *Henry Lindley*, were at, and before the Time of the making of the ſaid Letters Patents, ſo as before is ſaid made, Subjects of the ſaid late Queen *Elizabeth*, and born at *Weſtminſter* aforeſaid; All and ſingular which, the ſaid *John Hele* and *Warwick*, are ready to aver; Whereupon they demand Judgment, if the ſaid Letters Patents of the aforeſaid late Queen *Elizabeth*, of the Manors aforeſaid with the Appurtenances, ſo as before is ſaid made, ought to be revoked and annulled, or the Manors aforeſaid, with the Appurtenances, or any of them, ought to be ſeized into the Hands of the Lord the now King, *&c.* And the aforeſaid, *Henry Hobert*, Kt. Attorney General of the Lord the now King, who, *&c.* preſent in Court in his proper Perſon, As to the aforeſaid Plea of the ſaid *Henry Lindley*, above in Form aforeſaid pleaded, for the ſaid Lord the King ſaith, That the ſaid *Henry Lindley*, ought not to be admitted to plead, That there is not any ſuch Record of any ſuch Act of Parliament, of the aforeſaid Lord King *Edward* the 3d made, as in the ſaid Writ of *Scire Fac.* is recited. Nor that there is not any ſuch Record of the aforeſaid Charter of the ſaid late King *Edward* the 3d, by Authority of Parliament made, as in the aforeſaid Writ of *Scire Facias* thereof is recited and ſpecified. Becauſe he ſaith, That the ſaid Lord King *James*, now King of *England*, (*Inſpexit*) hath ſeen the Inrollment of the aforeſaid Act of Parliament, of the ſaid late King *Edward* the 3d, as in the ſaid *Scire Facias* is alſo recited, in the Rolls of the *Chancery* of the now King, within his Tower of *London*, of the 11th Year of the Reign of the aforeſaid late King *Edward* the 3d inrolled, upon Record there remaining. The Tenor of the Inrollment of which

which Act of Parliament, and Charter aforeſaid, the ſaid *James*, now King of *England*, by his Letters Patents under the Great Seal of *England* ſealed, here in Court by the aforeſaid Attorney General of the Lord the now King, for the ſaid Lord the now King, now brings into Court, bearing date at *Weſtminſter* aforeſaid, the 5th Day of *March*, in the Year of the Reign of the ſaid Lord the King that now is, of *England*, *France* and *Ireland*, the 3d, and of *Scotland* the 39th, exemplified amongſt other Things, which Exemplification, as to the Inrollment of the aforeſaid Act of Parliament, and Charter aforeſaid followeth in theſe Words. *James* by the Grace of God of *England*, *Scotland*, *France* and *Ireland*, Defender of the Faith, *&c.* To all to whom theſe preſent Letters ſhall come Greeting, We have ſeen the Inrollment of a certain Charter, bearing date the 17th Day of *March*, in the 11th Year of the Reign of the Lord *Edward* the 3d, late King of *England*, To his well-beloved and faithful *Edward* Earl of *Cheſter*, his firſt begotten Son granted, in the Rolls of our *Chancery*, within the Tower of *London*, remaining of Record in theſe Words. *Edward* by the Grace of God, King of *England*, Lord of *Ireland*, and Duke of *Aquitain*, To the Arch-Biſhops, Biſhops, Abbots, Priors, Earls, Barons, Juſtices, Sheriffs, Provoſts, Miniſters, and all Bailiffs, and his faithful People, greeting; amongſt other the Enſigns of Honour of our Kingdom, we eſteemed it the chiefeſt, that the Order of Dignities and Offices of our Kingdom be fortified with the beſt and ſtrongeſt Counſels; Therefore there being many Degrees of Honour of Inheritance in our Kingdom, where by Deſcent the Inheritance, according to the Law of this Kingdom, to Co-heirs and Parceners, and for Want of ſuch Iſſue and Parceners and ſuch like various Events, the ſame came to our Royal Hands; whereby our ſaid Kingdom hath long and many Ways ſuffered a Defect in Names, Dignities, and Titles of Honour: We therefore deſiring to Beautify our Kingdom, and in the beſt Manner to defend our Kingdom, and the Holy Church thereof, and our Subjects and Dominions againſt the Endeavours of the Enemies and Adverſaries thereof, and conſidering and deſiring that Peace between us and our Subjects be inviolably maintained; and to dignify the Places of Honour of our Kingdom; and taking into Conſideration the Perſon of our well-beloved and faithful *Edw.* Earl of *Cheſter* our eldeſt Son, and intending to Honour the ſame our Son, with the Name and Honour of Duke of *Cornwall*, with the common Conſent and Council of the Prelates, Earls, Barons, and others of our Council in this our preſent Parliament at *Weſtminſter*, upon *Monday* next after the Feaſt of St. *Matthew* the Apoſtle laſt paſt, being aſſembled, we have given, and made him Duke of *Cornwall*, and girt him with a Sword as behoveth; And that there may be no Doubt hereafter, what, or how much

much the ſame Duke, or other Dukes of the ſame Place, who for the Time ſhall be, in the Name of the ſaid Dutchy ought to have: Our Will is, that all in Specialty, which to the ſaid Dutchy doth belong, be inſerted in this our Charter: Therefore for us and our Heirs, we have given and granted, and by this our Charter confirmed, to the ſame our Son under the Name and Honour of Duke of the ſaid Place, the Caſtles, Manors, Lands and Tenements, and other Things under written. That he the State and Honour of the ſaid Duke might uphold according to the Nobility of his Stock, and the Charges and Burthens thereof the better Uphold, that is to ſay, The Sheriffwick of the County of *Cornwall*, with the Appurtenances, ſo as the ſaid Duke, and other Dukes of the ſame Place for the Time being, make, conſtitute and appoint Sheriffs of the ſaid County of *Cornwall* at their Will and Pleaſures, and to do and execute the Office of Sheriffs there, as heretofore it uſed to be done, without any Hindrance of us, or our Heirs for ever. As alſo the Caſtle, Borough, Manor and Honour of *Launceſton*, with the Park there, and other, the Appurtenances in the County of *Cornwall*, and *Devonſhire*; the Caſtle and Manor of *Tremeton*, with the Town of *Salteſh*, and the Park there, and other the Appurtenances in the ſaid County; the Caſtle, Borough and Manor of *Tintagel*, with the Appurtenances in the ſaid County of *Cornwall*; the Caſtle and Manor of *Reſtormel*, with the Park there, and other the Appurtenances in the ſaid County; and the Manor of *Clymeſtond*, with the Park of *Keribullock*, and other their Appurtenances, *Tibeſte*, with the Bailywick of *Powderſhire*, and other their Appurtenances, *Tewynton* with the Appurtenances, *Helleſton* in *Kerrier* with the Appurtenances, *Moresk* with the Appurtenances, *Tewernaile* with the Appurtenances, *Pengkneth*, with the Appurtenances, *Penlyn* with the Park there, and other the Appurtenances, *Rellaton*, with the Bedelry of *Eſtwyneleſhire*, and other the Appurtenances, *Helleſton* in *Tringſhire*, with the Park of *Hellesbury*, and other its Appurtenances, *Lyskirett*, with the Park there, and other the Appurtenances, *Caliſtock*, with the Fiſhing there, and other the Appurtenances, and *Talskid* with the Appurtenances, in the ſaid County of *Cornwall*, and the Town of *Loſtwithiell* in the ſaid County, with the Mill there, and other the Appurtenances; And the Prizage and Cuſtoms of our Wines, in the ſaid County of *Cornwall*, and alſo the Profits of all the Ports within the ſame our County of *Cornwall*, to us belonging, together with *Wreck* of the Sea, as well of Whales and Sturgeon, and other Fiſhes which do belong to us, by Reaſon of our Prerogative, and whatſoever belongs to any *Wreck* of the Sea with the Appurtenances, in our ſaid County of *Cornwall*. And the Profits and Emoluments of our County holden in our County of *Cornwall*, and Hundreds and Courts in the ſaid County to us belonging; As alſo our Stannary in the ſaid County of *Cornwall*,

Cornwall, together with the Coinage of the ſaid Stannary, and all Iſſues and Profits thereof ariſing; and alſo all the Iſſues, Profits and Perquiſites to the Court of Stannary, and the Mines of the ſaid County, (except only 1000 Marks which to our well beloved and faithful *Will. de Monte acuto*, Earl of *Saliſbury*, we have granted for us and our Heirs, to be taken to him and the Heirs Males of his Body lawfully begotten, of the Iſſues and Profits of the aforeſaid Coinage, until the Caſtle and Manor of *Tonbridge*, with the Appurtenances in the County of *Wilts*, and the Manors of *Aldebourn*, *Ambreſbury* and *Winterbourn*, with the Appurtenances in the ſaid County, and the Manor of *Caneford* with the Appurtenances in the County of *Dorſet*, and the Manor of *Hengſtrig* and *Charleton*, with the Appurtenances in the County of *Somerſet*, which our beloved and faithful *John de Warren*, Earl of *Surry*, and *Joan* his Wife hold, for the Term of their Lives, and which after their Deaths to us and our Heirs, ought to return (but) after the Deceaſe of the ſaid E. and *Joan*, to the aforeſaid Earl of *Saliſbury*, and the Heirs Males of his Body lawfully begotten, to the Value of 800 Marks by the Year, we granted, to remain; and 200 Marks of Land and Rent, which to the ſaid Earl of *Saliſbury* to have in Form aforeſaid, we granted (when the ſame came to our Hands.) And alſo our Stannary in the aforeſaid County of *Devon* with the Coinage, and all Iſſues and Profits of the ſame: And alſo the Iſſues, Profits and Perquiſites of the ſaid Court of Stannary, and the Water of *Dertmouth* in the ſaid County; and the yearly Farm of 20 *l.* of our City of *Exeter*, and the Prizage and Cuſtoms of our Wines, in the Water of *Sutton*, in the ſaid County of *Devon*; as alſo the Caſtle of *Wallingford*, with its Hamblets and Members, and the yearly Farm of the Town of *Wallingford*, with the Honours of *Wallingford*, and *De Sancto Wallerico*, with the Appurtenances in the County of *Oxford*, and other Counties whereſoever thoſe Honours were, and the Caſtle, Manor, and Town of *Berkhamſtead*, with the *Park* there, together with the Honour of *Berkhamſtead*, in the Counties of *Hertford*, *Buck.* and *Northampton*, and other their Appurtenances, and the Manor of *Biflet*, with the Park there, and other the Appurtenances in the County of *Surry*, to have and to hold to the ſaid Duke, and of him, and his Heirs, Kings of *England*, eldeſt Sons, and Dukes of the ſaid Place in the Kingdom of *England*, by Inheritance to ſucceed, together with the Knights Fees, Advowſons of Churches, Abbies, Priories, Hoſpitals, Chapels, and with the Hundreds, Fiſhings, Foreſts, Chaſes, Parks, Woods, Warrens, Fairs, Markets, Liberties, Free-Cuſtoms, Wards, Reliefs, Eſcheats, and Services of Tenants, as well Free, as Villeins, and all other Things to the aforeſaid Caſtles, Boroughs, Towns, Manors, Honours, Stannaries and Coinage, Lands and Tenements howſoever and whatſoever

belonging or appertaining, of us and our Heirs for ever, together with 24 *l.* of yearly Farm, which our well beloved and faithful *John de Meere*, to us by the Year, for all his Life is bound to pay for the Caſtle and Manor of *Meere*, with the Appurtenances in the County of *Wilts*, granted to him by us for the Term of his Life, to be taken every Year by the Hands of the ſaid *John*, for the Term of his Life, and with the aforeſaid 1000 Marks yearly, to the aforeſaid Earl of *Surry*, of the Iſſues of the Coinage aforeſaid, by us ſo granted, after obtained by him, or his Heirs Males of his Body to be begotten, Seiſin of the ſaid Caſtle and Manor of *Tunbridge*, and the Manors of *Aldebourn*, *Ambreſbury*, *Winterbourn*, *Caneford*, *Hengſtrigg* and *Charleton*, after the Deaths of the ſame Earl of *Surry*, and *Joan*; and the ſaid 200 Marks, Land and Rent to the ſaid Earl of *Saliſbury*, and the Heirs Males of his Body begotten, ſo to be provided, for the Proportions of the ſaid Caſtles, Manors, Land and Tenements, with the whole, or Particulars which to the Hands of the ſaid Earl of *Saliſbury*, and the Heirs Males of his Body ſhould come: We have moreover granted, for us and our Heirs, and by this our Charter we have confirmed, That the Caſtle and Manor of *Knaresburgh*, with the Hamblets and Members thereof, and the Honour of *Knareſburg*, in the County of *York*, and other Counties whereſoever the ſame Honour ſhould be; the Manor of *Iſleworth*, with the Appurtenances in the County of *Middleſex*, which *Philippa* Queen of *England* our moſt dear Conſort holdeth for Term of Life; and the Caſtle and Manor of *Lydeford* with the Appurtenances, and with the Chace of *Dertmore* with the Appurtenances in the ſaid County of *Devon*, and the Manor of *Bradeneſhe* with the Appurtenances in the ſaid County, which our beloved and faithful *Hugh de Audley*, Earl of *Glouceſter*, and *Margaret* his Wife, have for the Life of the ſaid *Margaret*; and the ſaid Caſtle and Manor of *Meere* with the Appurtenances, which the aforeſaid *Joan* ſo for Life holdeth by our Grant, and which after the Death of the ſaid Queen *Margaret* and *Joan*, to us and our Heirs ought to revert, after the Deceaſe of the aforeſaid Queen aforeſaid, that is to ſay, the Caſtle and Manor of *Knareſburg*, with the Honours, Hamlets, and Members thereof aforeſaid, and other their Appurtenances, and the Manor of *Iſleworth* with the Appurtenances; and after the Death of the ſaid *Margaret*, the ſaid Caſtle and Manor of *Lydeford*, with the ſaid Chace of *Dertmore*, and other the Appurtenances, and the Manor of *Bradeneſhe* with the Appurtenances; and after the Death of the ſaid *Joan*, the ſaid Caſtle and Manor of *Meere* with the Appurtenances, ſhall remain to the aforeſaid Duke, and of him and his Heirs, Kings of *England*, eldeſt Sons, and Dukes of the ſaid Place, in the Kingdom of *England*, *hereditarily to ſucceed*, as before is ſaid, to have and to hold, together with the ſaid Knights Fees, Advowſons

vowſons of Churches, Abbies, Priories, Hoſpitals, Chapels, and with Hundreds, Wapentakes, Fiſhings, Foreſts, Chaces, Parks, Woods, Warrens, Fairs, Markets, Liberties, Free Cuſtoms, Wards, Reliefs, Eſcheats, Services of Tenants, as well Free as Villeins, and all other Things to the ſame Caſtles, Manors and Honours, howſoever and whereſoever belonging or appertaining, of us likewiſe, and our Heirs for ever; all which Caſtles, Boroughs, Towns, Manors, Honours, Stannaries, Coinage, Farms of *Exeter* and *Wallingford*, Lands and Tenements, as above are ſpecified, together with the Fees, Advowſons, and all other Things aforeſaid, to the aforeſaid Dutchy by our preſent Charter, for us and our Heirs, we do annex and unite to the ſame for ever to remain: ſo that from the ſaid Dutchy, at no Time they be any Ways ſevered, nor to any one other than Dukes of the ſame Place, by us, or our Heirs they be given, or any Manner of Way granted; ſo alſo as that to the aforeſaid Duke, and other Dukes of the ſame Place they do deſcend, and to the Son or Sons, to whom the ſaid Dutchy, by Colour of our Grant aforeſaid it ſhall belong, then not appearing, the ſaid Dutchy, with the Caſtles, Boroughs, Towns, and all other the aboveſaid, to us or our Heirs, Kings of *England*, ſhall return in our Hands; and in the Hands of our Heirs Kings of *England*, to be kept until ſuch Son or Sons, of the ſaid Kingdom of *England* hereditably to ſucceed ſhall appear, as it is ſaid, To whom, then ſucceſſively, the ſaid Dutchy with the Appurtenances, for us and our Heirs, we grant, and will, that they be delivered, to hold, as above is expreſſed. We have moreover, for us and our Heirs, and by this our Charter we have confirmed to the aforeſaid Duke, that the ſaid Duke, and the Heirs of him, eldeſt Sons, Dukes of the ſame Place for ever, have free Warren in all the Lordſhips, Manors, Caſtles, Lands and other Places aforeſaid, ſo as the ſaid Lands be not within the Bounds of our Foreſts; and that none enter into them, to hunt in them, or to take any Thing which to Warren appertaineth, without the Licence and Will of the ſaid Duke, or other Dukes of the ſame Place, upon Pain of Forfeiture of 10 *l.* Wherefore we Will, and firmly Command, for us and our Heirs, That the ſaid Duke have and hold to him and his Heirs, eldeſt Sons of the Kings of *England*, and Dukes of the ſaid Place, in the ſaid Kingdom of *England*, inheritably to ſucceed, the aforeſaid Sheriffalty of the aforeſaid County of *Cornwall* with the Appurtenances; ſo that they, and others, Dukes aforeſaid, at their Wills make and conſtitute the Sheriff aforeſaid, of the ſaid County of *Cornwall*, to do and execute the Office of Sheriff there, as hitherto it uſed to be done, without the Hindrance of us, or our Heirs for ever; as alſo the aforeſaid Caſtles, Boroughs, Manors and Honours of *Launceſton*, the Caſtle and Manor of *Tremerton*, with the Town of *Salteſh*,

the Caſtle, Borough, and Manor of *Tintagel*, the Caſtle and Manor of *Reſtormel*, and the Manors of *Clymeſtond*, *Tebeſte*, *Tewynton*, *Helleſton* in *Kerier*, *Moresk*, *Tewarnayl*, *Pengkneth*, *Penkyn*, *Rellaton*, *Helleſton* in *Trigſhire*, *Lyskiret*, *Caliſtock*, *Talskid*, and Town of *Loſtwithiel*, with the Appurtenances, together with the Parks, Bailiwicks, Bedelrie, Fiſhings, and other Things aboveſaid, in the aforeſaid County of *Cornwall*, and the aforeſaid Priſages, Cuſtoms, and Profits of Ports aforeſaid, together with the ſaid *Wreck* of Sea, and the ſaid Profits and Emoluments with the Hundreds and Courts aforeſaid to us belonging, and the ſaid Stannary in the ſaid County of *Cornwall*, together with the Coinage of the ſaid Stannary, and with all Iſſues and Profits thereof ariſing, and alſo the Explees, Profits and Perquiſites of the Courts aforeſaid (except only the ſaid 1000 Marks, which to our well beloved and faithful *William de Monte acuto*, Earl of *Saliſbury*, we granted for us and our Heirs, to be taken to him, and the Heirs Males of his Body lawfully begotten) of the Iſſues and Profits of the Coinage aforeſaid, *until* the ſaid Caſtle and Manor of *Tunbridge* with the Appurtenances, and the ſaid Manors of *Aldebourn*, *Ambreſbury*, and *Winterbourn*, with the Appurtenances, and the ſaid Manor of *Hengſtrig* and *Charlton* with the Appurtenances, which the aforeſaid Earl of *Surry*, and *Joan* his Wife, hold for the Term of their Lives, and which after their Deaths, to us and our Heirs, ought to revert, after the Deceaſes of the ſaid Earl and *Joan*, to the ſaid Earl of *Saliſbury*, and the Heirs Males of his Body lawfully begotten, to the Value of 800 Marks by the Year we have granted to remain; and the ſaid 200 Marks, Land and Rent, which to the ſaid Earl of *Salisbury*, to have in Form aforeſaid we granted, *come unto our Hand* (as before is ſaid) and the ſaid Stannary in the County of *Devon*, with the Coinage, and all Iſſues and Profits thereof; and alſo the Explees, Profits and Perquiſites of the Court of the ſame Stannary, Water of *Dertmouth*, and the ſaid yearly Farm of 20 *l.* of the ſaid City of *Exeter*, and the ſaid Prizage and Cuſtom of Wines, in the Water of *Sutton*, in the ſaid County of *Devon*; as alſo the aforeſaid Caſtle of *Wallingford*, with the Hamlets and Members thereof, the yearly Farm of the Town of *Wallingford*, with the ſaid Honour of *Wallingford*, and *De Sancto Walerico*, the Caſtle, Manor, and Town of *Berkhamſtead*, with the ſaid Honour of *Berkhamſtead*, and the Manor of *Biflet*, with the Parks and other their Appurtenances aforeſaid, together with Knights Fees, Advowſons of Churches, Abbies, Priories, Hoſpitals, Chapels, and with the Hundreds, Fiſhings, Foreſts, Chaces, Parks, Woods, Warrens, Fairs, Markets, Liberties, Free Cuſtoms, Wards, Reliefs, Eſcheats and Services of Tenants, as well Free as Villeins, and all other Things to the ſaid Caſtles, Boroughs, Towns, Manors, Stannaries and Coinage, Lands and Tenements whatſoever

and

and whereſoever belonging or appertaining, of us and our Heirs for ever, together with the ſaid 24 *l.* Farm, which the aforeſaid *John de Meere*, to us yearly, for his whole Life is bound to pay, for the ſaid Caſtle and Manor of *Meere*, granted to him by us, to hold for the Term of his Life, to be taken yearly by the Hands of the ſaid *John de Meere* all his Life; and alſo with the aforeſaid 1000 annual Marks, to the aforeſaid Earl of *Salisbury*, of the Profits of the Coinage aforeſaid, by us ſo granted, after *ſhall be* obtained by him, or the Heirs Males of his Body begotten, Seiſin of the aforeſaid Manor of *Tunbridge*, and Manors of *Aldebourn*, *Ambresbury*, *Winterbourn*, *Caneford*, *Hengſtreg* and *Charlton*, *after* the Deceaſe of the ſaid Earl of *Surry* and *Joan*; and the ſaid 200 Marks, of Land and Rent to the ſaid Earl of *Saliſbury*, and the ſaid Heirs Males of his Body ſo provided, for the like Proportion of the ſaid Caſtles, Manors, Lands and Tenements, with the Whole, and Particulars, when to the Hands of the ſaid Earl of *Saliſbury*, or the Heirs Males of his Body lawfully begotten, ſhould come as aforeſaid: And that the aforeſaid Caſtle and Manor of *Knareſburg*, with its Hamlets and Members, and the Honour of *Knareſburg*, and the Manor of *Iſleworth* with the Appurtenances, after the Death of our aforeſaid Conſort, the Caſtle and Manor of *Lydeford* with the Appurtenances, and with the ſaid Chace of *Dertmore* with the Appurtenances, and the Manor of *Bradneſh*, with the Appurtenances, after the Deceaſe of the aforeſaid *Margaret*, and the Caſtle and Manor of *Meere* with their Appurtenances, after the Death of the aforeſaid *John de Meere*, ſhall remain to the ſaid Duke, to have and to hold to him and his Heirs, eldeſt Sons of the Kings of *England*, and Dukes of the ſame Place in the Kingdom by Inheritance to ſucceed, together with Knights Fees, Advowſons of Churches, Abbies, Priories, Hoſpitals, Chapels, and with Hundreds, Wapentakes, Fithings, Foreſts, Chaces, Parks, Woods, Warrens, Fairs, Markets, Liberties, Free Cuſtoms, Wards, Reliefs, Eſcheats, and Services of Tenants, as well Free as Villeins, and all other Things to the ſaid Caſtles, Manors and Honours, howſoever and whereſoever belonging or appertaining, (to hold) of us likewiſe, and our Heirs for ever, as before is ſaid; all which Caſtles, Boroughs, Towns, Manors and Honours, Stannaries and Coinage, Farms of *Exeter* and *Wallingford*, Lands and Tenements, as above are ſpecified, together with the Knights Fees, Advowſons and all other Things aboveſaid, to the ſaid Dutchy by this our preſent Charter, for us and our Heirs, we do annex and unite, to the ſame to remain for ever; ſo as from the ſaid Dutchy, at no Time hereafter they be ſevered, nor to any Perſon or Perſons than the Dukes of the ſame Place, by us or our Heirs they be given, or in any Ways granted; ſo that to the aforeſaid Duke, or other Dukes of the ſame Place they do deſcend, and the Son

or Sons, to whom the ſaid Dutchy, by Colour of the aforeſaid our Grants it behoves to belong then not appearing, the ſame Dutchy with the Caſtles, Boroughs, Towns, and all other Things aforeſaid, to us, and our Heirs Kings of *England* ſhall revert, in our Hands, and in the Hands of our Heirs to be kept, until ſuch Son or Sons, in the ſaid Kingdom of *England* hereditably to ſucceed ſhall appear, as before is ſaid, to whom ſucceſſively the ſaid Dutchy with the Appurtenances, for us and our Heirs we grant, and will to be delivered, to be holden as above is expreſſed. And that the ſaid Duke and his Heirs, eldeſt Sons, Dukes of the ſaid Place for ever, have free Warren in all the Demeſns of the Lands aforeſaid, *ſo that* the ſame Lands are not within the Bounds of our Foreſts; ſo as none enter into thoſe Lands to hunt in them, or to take any Thing which to warren belongeth, without the Licence and Will of the ſaid Duke, and the other Dukes of the ſaid Place, upon Pain of Forfeiture of 10*l.* as before is ſaid; theſe being Witneſſes, the Moſt Rev. Father *John* Archbiſhop of *Canterbury*, Primate of all *England* our Chancellor, *Henry* Biſhop of *Lincoln* our Treaſurer, *Richard* Biſhop of *Durham*, *John de Warren* Earl of *Surry*, *Thomas de Bello Campo* Earl of *Warwick*, *Tho. Wake* of *Lydell*, and *John de Mowbray*, *John Darcy le Neuen* Steward of our Houſe, and others, given by our Hand at *Weſtminſter* the
Note. 17th Day of *March*, in the 11th Year of our Reign, by the King himſelf, and *the whole Council in Parliament.* But we, the Tenor of the Charter, Record, and Act of Parliament aforeſaid, at the Requeſt of our well-beloved and faithful *Tho. Stephens*, Eſq; Attorney General of our well-beloved, and moſt dear Son, our eldeſt Son *Henry*, Prince and Duke of *Cornwall*, cauſed to be exemplified by theſe Preſents. In Witneſs whereof we have cauſed theſe our Letters to be made Patents. Witneſs myſelf at *Weſtminſter* the 5th Day of *March*, in the Year of our Reign of *England*, *France* and *Ireland* the *Third*, and of *Scotland* the 39, as by the ſaid Letters Patents of Exemplification aforeſaid here into Court brought more fully appeareth. And the ſaid *Henry Hobert* Attorney General of the ſaid Lord the now King, for the ſaid Lord the now King ſaith, and will aver, That the aforeſaid Act of Parliament aforeſaid, of the aforeſaid late King *Edw.* 3. made, and the aforeſaid Charter, by the aforeſaid late King *Edw.* 3. by Authority aforeſaid, of the Parliament of the ſame late King *Edw.* 3. by Authority of Parliament aforeſaid made, whereof is the Enrolment aforeſaid, and in the aforeſaid Exemplification of the Enrolment aforeſaid, as before is ſaid, is made mention, are one and the ſame, and not other nor divers: Whereupon the ſaid Attorney General of the ſaid Lord the now King, for the ſaid Lord the King here demandeth Judgment, if the aforeſaid *Henry Lindley*, to ſay, that there is not any ſuch Record of ſuch Act of Parliament aforeſaid,

ſaid, of the aforeſaid late King *Edw.* 3. *or* that there is any ſuch Record of the aforeſaid Charter, by the ſaid late King *Edw.* 3. by Authority of the Parliament aforeſaid, in the Writ aforeſaid of *Sci. fac.* ſpecified, againſt the ſaid Letters Patens of Exemplification aforeſaid, here into Court, by the ſaid Attorney of the aforeſaid Lord the now King, for the ſaid Lord the now King ſhewed forth, ought to be admitted. And further, the ſaid *Henry Hobert*, the Attorney General of the ſaid Lord the now King, for the ſaid Lord the King prayeth that the ſaid Letters Patents of the aforeſaid late Q. *Eliz.* as unto the aforeſaid Manors of *Weſt Taunton*, *Trelowia*, and *Landalph*, with the Appurtenances, be revoked and annulled; and that the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* with the Appurtenances, into the Hands of the ſaid Lord the now King be taken and ſeiſed: And the aforeſaid *Henry Hobert*, Kt. Attorney General of the ſaid Lord the now King, who *&c.* As to the ſaid Plea of the aforeſaid *John Hele* and *Warwick Hele*, by them above in Form aforeſaid pleaded, for the ſaid Lord the King ſaith, That that Plea, and the Matter therein contained, is not ſufficient in Law to maintain, That the aforeſaid Letters Patents of the aforeſaid late Q. *Eliz.* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, ought not to be revoked and annulled, or that the Manor aforeſaid with the Appurtenances, into the Hands of the ſaid Lord the now King, ought not to be ſeiſed. To which Plea in Manner and Form aforeſaid pleaded, The ſaid Attorney General for the ſaid Lord the King needeth not, nor by the Law of the Land is bound to anſwer, and this he is ready to aver; wherefore for want of a ſufficient Plea of the ſaid *John Hele* and *Warwick Hele* in this Behalf, the ſaid Attorney General for the ſaid Lord the King demandeth Judgment, and that the ſaid Letters Patents of the aforeſaid late Q. *Eliz.* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* with the Appurtenances made, be revoked and annulled, and the Manors aforeſaid with the Appurtenances, be taken and ſeiſed into the Hands of the Lord the King, *&c.* Upon which the aforeſaid *Henry Lindley* ſaith, That the Plea of the aforeſaid Attorney General, for the ſaid Lord the now King, to the Plea of the ſaid *Henry Lindley*, above by Replication pleaded, and the Matters therein contained, are not ſufficient to bar him the ſaid *Henry Lindley*, to ſay, That there is not any ſuch Record of ſuch Act of Parliament, of the aforeſaid late King *Edw.* 3. made, as in the aforeſaid Writ of *Sci. fac.* thereof is recited and ſpecified. nor that there is any ſuch Record of the aforeſaid Charter, by the ſaid late King *Edw.* 3. by Authority of the Parliament aforeſaid made, as in the aforeſaid Writ of *Scire Facias* thereof above is recited and ſpecified. And that the ſaid *Henry Lindley*, to that Plea in Manner aforeſaid by Replication pleaded, needeth not, nor by the Law of the

Land is bound to rejoin, and this he is ready to aver; wherefore for want of a ſufficient Replication in his Behalf, the ſaid *Henry Lindley* as at firſt demandeth Judgment, if the aforeſaid Letters Patents of the aforeſaid late Q. *Eliz.* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* with the Appurtenances made, ought to be annulled, or the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances, or any of them, ought to be taken and ſeiſed into the Hands of the Lord the now King. And the aforeſaid *John Hele* and *Warwick Hele* for themſelves ſay, that inaſmuch as they ſufficient Matter in their Plea aforeſaid, by them above pleaded, have alledged, that is to ſay, the aforeſaid Seiſin of the aforeſaid late Q. *Elizabeth* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* with the Appurtenances in her Demeſn as of Fee, in the Right of her Crown of *England*, and the Grant aforeſaid, by the aforeſaid Letters Patents of the ſaid late Queen, and the reſt of the Matters by them above pleaded, which the aforeſaid *John Hele* and *Warwick Hele* are ready to aver, which Matter the aforeſaid Attorney General of the Lord the now King, doth not deny, nor to the ſame any ways anſwereth, but the ſame Averment to admit altogether refuſeth, as at firſt demands Judgment, if the aforeſaid Letters Patents of the aforeſaid late Q. *Eliz.* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances made, ought to be revoked or annulled, or the ſaid Manors with the Appurtenances, or any of them, into the Hands of the ſaid Lord the now King, ought to be taken or ſeiſed. And farther for the better Information, and more fully to inform the ſaid Lord the now King, and the Court here, of the State of the Lord the now King, to the aforeſaid Dutchy of *Cornwall*, and to other Manors to the ſaid late Dutchy any Manner of Way belonging or annexed, or any Part or Parcel thereof, the ſaid *John* and *Warwick* ſay, that in the Statute in Parliament of the Lord *Henry* late King of *England* the 7th, held at *Weſtminſter* in the County of *Middleſex*, the 7th Day of *November*, in the firſt Year of his Reign made, amongſt other Things ordained, it was enacted and eſtabliſhed by Authority of Parliament, that the ſaid Lord King *Hen.* 7. ſhould have, hold, enjoy and poſſeſs, to him and his Heirs for ever, from the 21ſt Day of *Auguſt* then laſt paſt, the aforeſaid Dutchy of *Cornwall*, and all and ſingular the Honours, Caſtles, Lordſhips, Manors, Lands, Tenements, Rents, Reverſions, Services, Poſſeſſions, Advowſons, and other Hereditaments, with all and ſingular their Members, and Appurtenances, to the aforeſaid Dutchy belonging and appertaining, or which were belonging, annexed, reputed or taken, Parcel of the ſame, any Time of the Reigns of *Hen.* 6. and *Edw.* 4. late Kings of *England*, in as ample and large Manner, with all Liberties, Franchiſes, and other Things to the ſame

belonging, in like Manner, Form and Condition as the aforeſaid Kings, or either of them had, held, occupied, uſed or enjoyed, or had, held, occupied, uſed and enjoyed in the ſame, in any Time during the ſaid King's Reigns, as in the Statute aforeſaid, in the firſt Year of the Reign of the aforeſaid late King *Hen.* 7. aboveſaid, amongſt other Things it is more fully contained, and appeareth: By which the ſaid King *James*, now King, was and yet is ſeiſed of the reſt of the Manors, Lands and Tenements, to the aforeſaid Dutchy of *Cornwall* belonging, by the aforeſaid late Q. *Eliz.* not aliened, in his Demeſn as of Fee, in the Right of his Crown of *England*, whereupon they pray that the Court here take Knowledge and Notice of the aforeſaid Statute in the ſaid firſt Year of the aforeſaid late King *H.* 7. as aboveſaid made, and of the aforeſaid Statute of the Lord the now King, to the aforeſaid Dutchy of *Cornwall* belonging, they would take accept, *&c.* And the aforeſaid *Hen. Hobert*, Attorney General of the aforeſaid Lord the now King, who, *&c.* as to that, whereupon the aforeſaid *Henry Lindley* above demurreth in Law, inaſmuch as, he ſufficient Matter in Law, for the ſaid Lord the King to bar the aforeſaid *Hen. Lindley* from ſaying, that there is not any ſuch Record of any ſuch Act of Parliament, of the aforeſaid late King *Edw.* 3. made, nor any ſuch Record of the aforeſaid Charter by the ſaid late King *Edw.* 3. by Authority of Parliament aforeſaid, made, as in the aforeſaid Writ of *Sci. fac.* thereof it is recited and ſpecified, above alledged, which Matter the aforeſaid *Hen. Lindley* doth not deny, nor to the ſame any Ways anſwereth, but that Averment to admit utterly refuſeth, the ſaid Attorney General of the ſaid Lord the now King, for the ſaid Lord the King demandeth Judgment, and that the aforeſaid Letters Patents of the aforeſaid late Q. *Eliz.* of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances made, be revoked and annulled; and that the ſaid Manors with the Appurtenances into the Hands of the ſaid Lord the now King, be taken and ſeiſed, *&c.* And becauſe the Court of the ſaid Lord the now King here, will adviſe of and upon the Premiſſes, before it proceeded to Judgment thereof, Day is given as well to the aforeſaid *Henry Hobert*, Kt. Attorney General of the ſaid Lord the now King, who, *&c.* as to the aforeſaid *Hen. Lindley*, *John Hele* and *Warwick Hele*, before the ſaid Lord the now King, in the ſaid Court here, until in eight Days of St. *Hillary* next, *&c.* whereſoever, *&c.* to hear their Judgment thereof, becauſe the ſaid Court here thereof not yet, *&c.* At which Day of eight Days of St. *Hill.* that is to ſay, at *Weſtminſter* aforeſaid, come as well the aforeſaid *Hen. Hobert*, Kt. Attorney General of the ſaid Lord the now King, who, *&c.* in his proper Perſon, as the aforeſaid *Hen. Lindley*, *John Hele* and *Warwick Hele*, by their Attorney aforeſaid; and upon this the Attorney General of the Lord the

the King, as at firſt demandeth Judgment, and that the aforeſaid Letters Patents, of the aforeſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph*, with the Appurtenances in Form aforeſaid made, be revoked and annulled, and that the ſaid Manors with the Appurtenances into the Hands of the ſaid Lord the now King, be taken and ſeiſed, *&c.* And becauſe the ſaid Court of the Lord the now King, here, will farther adviſe before that it proceed to Judgment thereof, Day farther is given as well to the aforeſaid *Henry Hobart*, Knt. Attorney General of the ſaid Lord the King, who, *&c.* as to the aforeſaid *Henry Lindley*, *John Hele*, and *Warwick Hele*, here until in 15 Days of *Eaſter* next, *&c.* whereſoever, *&c.* to hear their Judgment thereof, becauſe the ſaid Court of the ſaid Lord the now King here, thereof not yet, *&c.*

See the Form of the Judgment hereupon at the End of the Caſe, *viz. fol.* 30. *b.*

Caſus

Caſus Principis. The Prince's Caſe.

See 3 Caſes in Lucas 260, 412.

DOminus Rex, ad petitionem illuſtriſſimi principis Henrici, filii ſui primogeniti, Ducis Cornubiæ, proſecutus eſt breve de Scire facias verſus Henricum Lindley militem & Johannem Hele Servientem ad Legem, ad revocandum literas patentes nuper Reginæ Elizabeth, datas ſecundo die Maii anno regni ſui triceſimo ſeptimo (per quas dicta Regina conceſſit dicto Henrico Lindley & cuidam Gellio Mericke, (~~jam~~ defuncto) & hæredibus ſuis maneria de Weſt Taunton, Trelowia, & Landulph in com' Cornub') ut eadem maner' præf. Duci

THE King, at the Petition of the moſt Noble Prince HENRY, his firſt begotten Son, Duke of Cornwall, brought a (a) Scire facias againſt Henry Lindley, Kt. and J. Hele Serjeant at Law, to repeal Letters Patents of the late Queen Elizabeth, bearing Date the 2d of May, in the 37th Year of her Reign, by which the Queen granted to the ſaid H. Lindley, and to one Gelly Mericke (now dead) and their Heirs, the Manors of Weſt Taunton, Trelowia and Landulph, in the County of Cornwall, to the End the King might make Livery of them to the ſaid Duke, as Members and

(a) 1 Rolls 192.

and Parts of the Dutchy aforeſaid, and that by Force of three Acts of Parliament, two in 11 E. 3. whereof the one is in Form of a Charter by Authority of Parliament, by which the Prince was created Duke of Cornwall, and the Poſſeſſions of the Dukedom of Cornwall thereby given to him, with ſpecial Limitation, and the Poſſeſſions annexed to the ſaid Dutchy, ſo as they ſhall not be ſevered, with a ſpecial Clauſe of Revivification, altho' the ſpecial Limitation at any Time ſhould ceaſe, &c. and of the Act of 32 H. 8. by which the three Manors are made Parcels of the Dutchy of Cornwall for ever to all Intents and Purpoſes, &c. The Sheriff return'd Sir Henry Lindley, and Serjeant Hele and one Warwick Hele, Knt. Terre-tenants of the ſaid three Manors ſummoned; and after four Imparlances, Sir Henry Lindley, as to the ſaid two ſeveral Acts of Parliament, Anno 11 E. 3. ſeverally pleaded Nul tiel record: Serjeant Hele and the ſaid Warwick pleaded the ſaid Letters Patents of Queen Elizabeth with a non obſtante the ſaid Act of 32 Hen. 8. and conveyed to themſelves a joint Eſtate, to them, and to the Heirs of the ſaid Serjeant; and further pleaded the Act of Confirmation of Letters

tanquam membra & parcellas Ducatus prædicti liberati faceret: Et hoc vigore 3. ſtatutorum Parliamentariorum, ſcilicet duorum anno undecimo Edwardi tertii editorum; (quorum unum habet formam Chartæ authoritatæ Parliamenti factæ, per quod Princeps in ducem Cornubiæ præfectus fuit, ejuſdemque Ducatus poſſeſſiones illi datæ cum ſpeciali limitatione, & ſic Ducatui antedicto annexæ quod ab eo ſeparari minime poſſunt: idque cum ſpeciali clauſula Revivificationis, licet quandoque ſpecialis illa ceſſaret limitatio, &c.) Tertii vero ſtatuti anno 32 Henrici 8. per quod dicta illa maneria deveniunt parcell' Ducat' Cornubiæ imperpetuum ad omnia propoſita & intentiones, &c. Vicecomes returnat' dictos H. Lindley, & Jo. Hele, & quendam W. Hele mil', terr' tenentes prædict' trium maner', eſſe ſummonitos. Et poſt quatuor ad interloquendum dies datos, Hen. Lindley, quoad præd' duo Parl' ſtatuta, an. 11 E. 3. ſeparat' placit', quod nullum tale hab' record': J. Hele, & Warw. anted' reſpond' allegant' dict' reg' Eliz. liter' patent' cum clauſ. de Non obſt' præd' ſtat' de an' 32 H. 8. oſtend' ſeipſos conjunct' eſſe feoffat' ad ſolum ſui propr' uſum, & hær' ejuſd' J. Hele:

Actum

Actum inſuper allegant confirmationis literarum patentiam ad parliament' an' 43 Reginæ Eliz. edit'. Et quod placita Hen. Lindley, attorn' reg' replicando dic', & profert (per inſpexim) dict' chartæ de an' 11 E. 3. exemplificationem ſub magno angliæ ſigil' prout in recordo, i. actis publicis, ubi intratur in hæc verba: Et pet' jud', ſi, contra hanc exemplificat', ad dicendum, nullum tale record', admitti debeat. Et ſuper placito dicti J. Hele & Warw. dict' att' moratur in lege: Et illi ſcil. dicti Joh. & War' ſil'ter. Et ulter', ut amici cur', ad informand' cur' de verit' & de ſtatu regis in reſiduo dict' maner' parcell' dicti ducat', repet' cur' partem ſtatuti an' 1 H. 7. editi de antedict' duc' Cornub'. Et ſuper replicatione Attornati generalis dict' Henr. Lindley moratur in lege: Et ille, ſcilicet dict' attorn', ſil'ter. Re' hoc tantummodo compend' retuli, eo, quod latius totam ex record' adjeci: Et ſi caſum etiam fuſius dicere, prolixa nimis (ut caſus hic ſe habet) hæc eſſet relatio.

In hac cauſa 4 motæ fuerunt quæſt' conſiderat' dignæ. 1. Si inſtrum' fact' 17. die Martii, an' 11 E. 3. principi Ed. ſit charta tempore parliamenti fact' vel charta authoritate parliamenti ſtabilita. Et ſum' totius litis in hoc articulo conſtituta eſt.

Patents at the Parliament held 43 Eliz. And as to the Pleas of Sir Henry Lindley, the King's Attorney reply'd and ſhew'd an Exemplification by Inſpeximus of the ſaid Charter of 11 E. 3. under the Great Seal, (as in the Record where it is enter'd in hæc verba) and demanded Judgment if againſt the ſame he ſhould be admitted to plead Nul tiel record. And demurred in Law upon the Plea of Serjeant Hele and Warwick, who joined with him. And further, ut amici Curiæ, and to inform the Court of the Truth, and of the State which the King, that now is, hath in the Reſidue of the ſaid Manors, Parcel of the ſaid Dutchy, they repeated to the Court Part of the Act of 1 H. 7. concerning the ſaid Dutchy of Cornwall. And H. Lindley demurred in Law upon the Replication of the Attorney General, with whom the Attorney joined. Ante 8. Palm. 92.

The Reaſon why I have made an Abſtract of the Caſe, ſo compendious, is becauſe I have added the whole Record at Length, and if the Caſe ſhould be alſo put at large, it would extend, as this Caſe is, to an unneceſſary Prolixity. In this Caſe four Queſtions were moved being thought worthy of Conſid. 1. If the Inſtrument made 17 Mar. an. 11 E. 3. to P. Edw. be a Charter made in Time of Parl. or a Charter eſtabl. by Auth. of Parl. and this is the principal and fundamental Point on which the whole depends. 4 Points.

2. If

2. If there was any other Act of Parliament but the ſaid Charter; and if there is no other Act, if the King's Writ be good which alledges another Act. 3. Admitting the Prince to be Duke of Cornwall, what Eſtate has the Prince in the Honour and Dukedom of Cornwall? and how has it he? by Deſcent or by Purchaſe? For if the Prince has but a particular Eſtate, then, after the particular Eſtate ended, the ſaid Serjeant Hele and his Heirs ſhall have the ſaid Manors until, &c. And then a ſpecial Judgment ought to be given, with a Quoad, &c. and no general Judgment that the Letters Patents ſhall be void, nor the Inrolment cancelled. 4. If againſt ſuch Act of Parliament Nul tiel record may be pleaded. And the Lord Chancellor, becauſe the Cauſe was of great Importance and Conſequence, aſſiſted himſelf with a Judge of each of the Courts at Weſtminſter, ſcil. Coke, Chief Juſtice of the Common Pleas, Fleming Chief Baron of the Exchequer, and Williams one of the Judges of the King's Bench, (for Sir John Popham, Knight, late Chief Juſtice of the King's Bench, who was called to it, and heard ſome of the Argu-

2. Si præter dictam Chartam aliquod fuer' aliud ſtatutum parliam': & ſi non ſit, cujus deniq; valoris ſit breve dom' reg', in quo alterius mentio eſt ſtat'. 3. Si admittatur principem fuiſſe duc' Cornub', quem habet princeps ſtatum in dicto honore & ducatu Cornub'; & quonam habet modo, ſcil' per deſcenſum, vel per acquiſitionem: ſi enim princeps habeat ſolummodo particul' ſtat', tunc poſt particul' ſtatum finitum dict' Jo. Hele, & hæred' ſui haber' maner' præd' quouſque,. &c. & tunc judicium debet eſſe ſpeciale cum Quoad, &c. & non gener', quod irritæ ſint dict' liter patent', & eorundem irrotulament' cancelletur. 4. Si contra tale parliamenti ſtatutum nullum tale record' poſſit allegari. Et domin' cancellarius in re tanta tantiq; momenti, e ſingulis Weſtmonaſter' tribus curiis unum ſibi aſſociavit Judicem, ſcilicet, Coke capitalem Juſticiarium de Banco, Fleming capitalem Scaccarii Baronem, & Williams unum Juſticiarorum ad placita coram Domino Rege tenenda aſſignatum (Dominus enim Joh' Popham miles nuper Capitalis Juſticiarius, qui huc evocatus fuit, & argumento-

rum

rum nonnulla ad Barram audiverat, diem clauſit extremum pendente Placito.) Et hæc cauſa ſcite ad Barram argumentata fuit per Stephens, princ' attor' pro rege, & per Heron Servient' ad legem pro defendent'; & ſecunda vice p' Dodderidge ſolicitatorem regis generalem, & per Houghton ſervientem ad legem pro defendentibus; & deinde per Hobart generalem regis attornatum: Et poſtea iſto eodem termino cauſa hæc per Williams & capitalem Baronem prima vice diſceptata fuit; & per capitalem Juſticiarium de Banco & Dominum Cancellar' vice ſecunda. Et quoad Articulum primum, uno aſſenſu determinatum fuit per Cancellarium & dictos Juſticiarios, quod dicta Charta facta fuit authoritate Parliamenti. Et quoniam *Duo ſunt inſtrumenta ad omnes res aut confirmandas, aut impugnandas, Ratio & Authoritas*, ſuas firmarunt opiniones, 1. Ratione, 2. Ex legis Authoritate. Quoad primum duas afferunt rationes *ex viſceribus cauſæ*, primam *ex impoſſibili*; & hoc tribus de cauſis. 1. Impoſſibile foret, ſi dicta Charta non fuerit Parliamento ſtabilita, ſtatum, vel honoris præſ. in duc' Cornub', vel poſſeſſ. ind', iſto ſpecial' monments at the Bar, dieu pendente placito.) And this Caſe was argu'd very well at the Bar, by Stephens the Prince's Attorney, for the King, and by Heron Serjeant for the Defendants; and at another Day by Dodderidge the King's Solicitor, and by Houghton Serjeant for the Defendants; and, laſtly, by Hobart the K's Attorney General. And afterwards, the ſame Term, the Caſe was argued by Williams and the Chief Baron in one Day; and at another by the Chief Juſtice of the Common Pleas and the Lord Chancellor. And as to the first Point, it was unanimouſly reſolv'd by the Lord Chancellor and the ſaid Juſtices, That the ſaid Charter was made by (*a*) Authority of Parliament. And becauſe Duo ſunt inſtrumenta ad omnes res aut confirmandas, aut impugnandas, Ratio & Authoritas; They confirmed their Opinions, 1. by Reaſon, and then by Authorities in Law. For the firſt they gave two Reaſons, ex viſceribus cauſæ, 1. Ex impoſſibili, and that for three Cauſes: 1. It would be impoſſible if the ſaid Charter was not eſtabliſh'd by Parliament, that the Eſtate, either of the Honour to be Duke of Cornwall, or of the Poſſeſſions thereof being limited in ſuch ſpecial Manner as it is, ſhould be ſufficient in Law. For the Limitat. of both

1ſt Point. Co. Lit. 81. a. 98. b.

(*a*) 1 Jon. 104.

is,

(a) Jenk. Cent. Raym. 355.

is (a). Habendum & tenendum eidem Duci, & ipſius & hæredum ſuorum Regum Angliæ filiis primogenitis & dicti loci Ducibus, in regno Angliæ hæreditarie ſucceſſuris. So that he who ought to inherit by Force of this Grant, ought to be the firſt begotten Son and Heir apparent of the King of England, and of ſuch King as is Heir to Prince Edward, and that ſuch firſt begotten Son and Heir apparent to the Crown ſhall inherit the ſaid Dukedom in the Life-time of the King his Father. So that if there be K. Grandfather, Father and Son, now the Father being the firſt begotten Son of the Grandfather, is Duke of Cornwall in the Life of the King, and eo inſtante that the Grandfather dies, the Father is King, and eo inſtante alſo the Son is Duke of Cornwall; which Courſe of Inheritance being againſt the Rules of the Common Law,

(b) Co. Lit. 27. a. (b) cannot be created by Charter without the Force and Strength of an Act of Parliament. And in this Caſe the

(c) Co. Lit. 16. a. King's eldeſt Son has (c) this Dignity by Right of Inheritance, in like Manner as the eldeſt Sons of Grandees and Peers of the Realm who have ſupereminent Dignities in them, have in Appellation and Curteſy only; as ſuppoſe there be a Grandfather Baron, and a Father and Son; and the King creates the Grandfather an Earl, eo inſtante the Father is a Baron in Appellat. & Curteſy, & eo inſtante that the Grandf. dies,

do limitatarum quo hæ ſunt, fore ſufficient in lege; ambor' enim limitatio eſt. *Habendum & tenendum eidem Duci, & ipſius & hæredum ſuorum Regum Angliæ filiis primogenitis & dicti loci ducibus, in Regno Angliæ hæreditarie ſucceſſuris.* Ita quod hunc, qui hæreditare debet virtute hujus conceſſionis, oportet eſſe filium primogenitum & hæredem apparentem Regis Angliæ, immo hujuſmodi Regis qui hæres eſt dict' Principi Edwardo; & quod primogenitus ille filius & hæres coronæ apparens jure hæreditario haberet dictum ducat', vivente Rege ſuo patre: utputa ſit Rex avus, pater, & filius, hic pater (primogenitus exiſtens filius avi) eſt dux Cornubiæ vivente Rege; & eo inſtante quo avus decedit pater eſt Rex, & eo etiam inſtante filius eſt dux Cornub', qui hæred' ordo, cum ſit contra regulas legis communis, creari non poteſt charta, ſtat' parliament' virt' & vigore non adhibitis. Et in hoc caſu filius Regis natu maximus hanc habet dignitatem jure & hæred', eodem modo quo filii natu maximi Primatum & Procerum Regni (quorum ſupereminentes ſunt dignitates) habent appellat' & urbanitate tant'; utputa ſit avus baron, pater, & filius, & Rex avum creat' in comit', eo inſtante pater eſt baro appellat' & urbanitate, & eo etiam inſtante

quo

quo avus decedit, pater eſt Comes & filius Baro urbanitate: Et ſic de ſimilibus. 2. Impoſſibile foret poſſeſſiones Ducatus ſic eſſe annexæ dicta charta, eodem modo prout charta in ſe exigit; clauſula enim Connexionis eſt; *Quæ quidem omnia Caſtra, Burg', Vill', maneria, &c. prædicto Ducatui præſenti charta noſtra pro nobis & hæredibus noſtris annectimus & unimus eidem imperpetuum remanſur', ita quod ab eodem Ducatu aliquo modo nullatenus ſeparentur, nec alicui ſeu aliquibus aliis, quam dicti loci Ducibus per nos vel hæredes noſtros donentur, ſeu quomodolibet concedantur*, Quæ indiſſolubilis & inſeparabilis Connexio tali modo fieri non poteſt charta tantum, Parliamenti ſtatuto non adhibito. 3. Impoſſibile foret, legis regula, ſtatum in terra ceſſare & rurſus reviviſcere (ſicut clauſula Revivificationis intendit) charta tantum: quæ clauſula eſt, *Ita quod præfato Duce ſeu aliis ejuſdem loci Ducibus decedent', & filio ſeu filiis, ad quos dictus Ducatus prætextu, Doni & Conceſſionis noſtrorum prædictorum ſpectare dignoſcitur, tunc non apparentibus, idem Ducatus cum Caſtris, Burg', Villis, &c. ad nos vel hæredes noſtros Reges Angliæ revertatur, in manibus noſtris & ipſorum hæredum noſtrorum Regum Angliæ retinend', quouſque de hujuſmodi*

dies, the Father is Earl, and the Son Baron by Curteſy: & ſic de ſimilib'. 2. It would be impoſſible that the Poſſeſſions of the Dutchy ſhould be ſo annexed by the Charter in the ſame Manner as the Charter purports; for the Clauſe of Annexation is, Quæ quidem omnia Caſtra, Burg', Vill', Maneria, &c. præd' Ducatui præſenti Charta noſtra pro nobis & hæredibus noſtris annectimus & unimus eidem imperpetuum remanſur', ita quod ab eodem Ducatu aliquo modo nullatenus ſeparentur, nec alicui ſeu aliquibus aliis, quam dicti loci Ducibus per nos vel hæredes noſtros donentur, ſeu quomodolibet concedantur: Which indiſſoluble and inſeparable Annexation cannot be made in ſuch Manner by Charter only, without Act of Parliament. 3. * It would be impoſſible by the Rule of Law, That an Eſtate in Land ſhould ceaſe and revive again, as by the Clauſe of Revivication is intended, by Charter only; which Clauſe is, Ita quod præfat' Duce, ſeu aliis ejuſdem loci Ducibus decedent', & filio ſeu filiis, ad quos dictus Ducatus prætextu Doni & Conceſſionis noſtrorum prædictorum ſpectare dignoſcitur, tunc non apparentibus, idem Ducatus cum Caſtris, Burg', Villis, &c. ad nos vel hæredes noſtros Reges Angliæ revertatur,

* Co. Lit. 17. a. 1 Co. 87. a.

tatur, in manibus noſtris & ipſorum hæredum noſtrorum Reg' Angliæ retinend', quouſque de hujuſmodi filio ſeu filiis in dicto regno Angliæ hæreditarie ſucceſſur' appareat, ut dictum eſt, quibus tunc ſucceſſive Ducatum illum cum pertinentiis, pro nobis & hæredibus noſtris concedimus & volumus liberari, tenend' prout ſuperius eſt expreſſum.

(a) 1 Co. 87. a. 130. a. Perk. Sect. 327. Plowd. 156. a. 10 H. 7. 13. b. 5 E. 2. Dower 143. 12 E. 3. Condit. 11. 22 E. 3. 19. a. 4 Leon. 83. 6 Co. 41. a. 8 Co. 17. b.

For altho' a (a) Rent newly created (to which no Man can have an ancient Right) may ceaſe for a Time, and revive again, yet Land, which is of a more ſolid Nature, and to which another may have an ancient Right, cannot ſo do, as it is reſolved in Corbet's Caſe, in the firſt Part of my Reports.

The ſecond Reaſon was, ex abſurdo, That ſix others being created Earls at the ſame Time * for the Honour of the Prince, all their Creations and Donations ſhould be firm and good in Law to ſome of them and the Heirs of their Bodies; and to others in Fee-ſimple; and that the Creation of the Prince himſelf, and of ſuch a moſt noble Prince, and the Grant to him of the ſaid Caſtles, Manors, &c. ſhould be either void in Law, or but an Eſtate at Will; and eſpecially in ſuch a Time when the Judges (who always attended the Parliament) were the moſt wiſe and learned in the Law.

* Poſt. 21.

It remains then to ſee what Authorities and Precedents there are in Law to prove the ſaid Charter has the

filio ſeu filiis in dicto Regno Angliæ hæreditarie ſucceſſur' appareat ut dictum eſt, quibus tunc ſucceſſive Ducatum illum cum pertinentiis pro nobis & hæredibus noſtris concedimus, & volumus liberari: tenendum prout ſuperius eſt expreſſum. Quanquam enim redditus de novo creatus (ad quem nullus homo haber' poteſt jus ſuperius) pro tempore ceſſare poteſt & rurſus reviviſcere, terra tamen (quæ ſolidioris eſt naturæ, & ad quam alter habere poteſt jus ſuperius) ita facere non poteſt, ſicuti determinatum eſt in caſu *Corbet* in prima Relationum mearum parte.

Secunda ratio fuit *ex abſurdo*, eo quod, cum eodem tempore ſex alii fuerint creati Comites in honorem Principis, illorum omnes creationes & donationes firmæ forent & in lege validæ, quibuſdam eorum & hæredibus de corporibus ſuis exeuntibus, & aliis in feodo ſimplici, creatio vero Principis ipſius, Principiſque tam celeberrimi, & conceſſio dictorum caſtrorum, maneriorum, &c. in lege forent invalidæ, vel de ſtatu tantum ad voluntatem, & hoc tunc temporis quando fuerunt Judices (qui ſemper attendunt Parliamentum) optime eruditi & Juriſperitiſſimi.

Videre deinde eſt quæ ſunt in lege Authoritates & exempla ad proband' dict' chartam in ſe habere

vim ſtatut' Parliamentarii. Et hoc quadrupliciter probatum fuit: 1. Ex ipſa charta & ex authoritatibus in lege cum hac concurrentibus: 2. Ex conceſſionibus & ſtatibus per Principem factis, & ſub literis patentibus Regum: 3. Judiciis ſecundum uſitatum Legis modum latis, & determinationibus Judicum in Curiis Regiis: 4. Determinationibus in Parliamento per Regem & totum corpus Regni. 1. In ipſa charta facta Principi duæ clauſulæ fuerint obſervatæ: 1. In principio Chartæ dictum eſt, *Conſiderationis noſtræ intuitus ad perſonam dilecti & fidelis noſtri Edwardi, Comitis Ceſtriæ, filii noſtri primogeniti, intimos convertentes, volenteſque perſonam ejuſdem honorari, eidem filio noſtro nomen & honorem Ducis Cornubiæ de communi aſſenſu & conſilio Prælatorum, Comitum, Baronum, & aliorum de conſilio noſtro & præſenti Parliamento convocat' exiſtent', Dedimus, &c.* Ex quo manifeſtum eſt dictam chartam authoritate Parliamenti factam fuiſſe. Et determinatum fuit hanc clauſulam in omnes chartæ partes ſe extendere: quæ clauſula per ſe fuiſſet ſufficiens. 2. In concluſione & fine chartæ (quæ recordi eſt parcella) dict' eſt, *Datum per manum noſtram apud Weſtmonaſt' 17 die Martii, A. Reg.*

Force of an Act of Parliament. And that was proved four Manner of Ways. 1. Out of the Charter itſelf, and Authorities in Law agreeing to it. 2. By Grants and Eſtates made by the Prince, and by Letters Patents of Kings. 3. By Judgments given according to the ordinary Courſe of Law, and Reſolutions of the Judges in the King's Courts. 4. By Reſolutions in Parliaments by the King and the whole Body of the Realm. 1. In the Charter itſelf made to the Prince, two Clauſes were obſerved, which prove that it had the Authority of an Act of Parliament. 1. In the Beginning of the Charter it is ſaid, Conſiderationis noſtræ intuitus ad perſonam dilecti & fidelis noſtri Edwardi, Comitis Ceſtriæ, filii noſtri primogeniti, intimos convertentes, volenteſque perſonam ejuſdem honorari, eidem filio noſtro nomen & honorem Ducis Cornubiæ de communi aſſenſu & conſilio Prælatorum, Comitum, Baronum, & aliorum de Conſilio noſtro in præſenti Parliamento convocat' exiſtem' Dedimus, &c. * By which it appears, That the Charter was made by Authority of Parliament. And it was reſolved, That this Clauſe extends to all the Parts of the Charter, which Clauſe of itſelf had been ſufficient. 2. In the Cloſe and End of the Charter, which is Parcel of the Record, it is ſaid, Dat' per manum noſtram apud Weſtm. 17 die Martii

* Co. Lit. 81. a. 98. b.

Martii, anno regni noſtrii 11. Per ipſum Regem & totum Conſilium in Parliamento. Which alſo proves that it was made by Authority of Parliament. And it was more for the Honour of the King that the Creation and Donation ſhould be in the Form of a Charter, and that Witneſſes ſhould be called to it, ſo that nothing ſhould be omitted which belonged to a compleat Charter, and ſo principally to proceed from the King, as the Fountain of all Honour and Dignity; than if the Creation and Donation had been only by Act of Parliament; in which all would be Donors. Note Reader, If Letters Patents paſs by Bill ſigned without Privy Seal, the Patent is ſubſcribed, per ipſum Regem, (and then the Bill ſigned remains with the Chancellor for his Warrant:) and when it paſſes by Bill ſigned, and by Privy Seal alſo, then the Privy Seal remains with the Chancellor, and the Bill ſigned remains with the Clerks of the Signet, and the Lord Privy Seal has an Extract thereof to make the Privy Seal, and then the Letters Patents are ſubſcribed, per Breve de Privato Sigillo: And if authoritate Parliamenti be added, then it paſſes according to the Act of 27 Hen. 8. cap. 11. And when the King Signs the Patent itſelf in the upper Part, and the Signature and great Seal go together, then it is ſubſcribed, Per ipſum Regem manu ſua propria.

noſtri undecimo, per ipſum Regem & totum conſilium in Parliament': quo etiam probatur illam fuiſſe factam authoritate Parliamenti. Et in majorem fuit Regis honorem quod creatio & donatio foret in forma Chartæ, & teſtes ad hanc advocati, (ut nihil omitteretur quod ad perfectam ſpectat Chartam) & ſic præcipue e Rege, veluti e fonte totius honoris & dignitatis, emanaret, quam ſi creatio & donatio fuiſſet ſtatuto Parliamentario tantum, in quo omnes eſſent donatores. *Nota* Lector, ſi literæ patentes exituræ ſint ſub billa ſignata, & non ſub ſigillo privato, ſubſcribuntur, *Per ipſum Regem* (& tunc billa illa ſignata manet Cancellario in warrantum.) Et quando exituræ ſunt ſub billa ſignata & ſub ſigillo etiam privato, tunc privatum ſigillum manet Domino Cancellario, & billa ſignata manet Clericis ſignaturæ, & ex hac allatum eſt Domino privati ſigilli extractum ad faciend' breve de privato ſigillo: & tunc literæ patentes ſubſcribuntur, *Per breve de privato ſigillo*; & ſi hæc verba (ſcilicet, *authoritate Parliamenti*) apponantur, tunc exeunt ſecundum ſtatutum de Anno 27 *H.* 8. *cap.* 11. Et quando Rex ſignat literas ipſas patentes in ſuperiori parte, & ſignatura & magnum ſigillum paribus paſſib' incedunt uno & eodem tempore, tunc ſubſcribuntur; *Per ipſum Reg' manu ſua propria.*

Et quando authoritate & aſſenſu Parliamenti conficiuntur, tunc ſubſcribuntur, *Per ipſum Regem & totum Conſilium in Parliamento*, vel in hujuſmodi effectum. Et ſcire eſt, quod priſcis temporibus, tam quando terra, immunitas, ſive hæreditamentum de Rege transferebat' de ſtatu hæreditario, quam in creatione cujuſquam ad honorem & dignitatem, per literas patentes, concluſio fuit, *Hiis teſtibus*. A diu vero, pro terris, immunitatibus, vel hæreditamentis hæc formula intermiſſa fuerit, & nunc, & ſic a diu, literæ patent' concluduntur, *Teſte meipſo*, &c. At in omnib' ad honorem & dignitatem creationibus, per literas patentes, antiqua formula (ſcilicet, *Hiis teſtibus*) manet uſque in hodiernum diem. Et quod actus Parliamenti editi ſunt ſub formula Char' Reg' multa nobis in Lege ſunt teſtimonia. Primo, Magna Charta, edita 9 *H.* 3. cujus principium eſt, *Imprimis conceſſimus Deo & hac præſenti charta noſtra confirmavimus pro nobis & hæredibus noſtris imperpetuum*, &c. concluditur, *Hiis teſtibus, &c. & Datum per manum noſtram*, ut noſtræ etiam Chartæ concluſio eſt. Et quamvis in charta non liqueat, verbis expreſſis, quod facta fuit authoritate Parliamenti, quia tamen diverſæ ejus partes Legem communem & invertunt & mutant (quod charta tantum facere non poteſt) & conſtat ex capite ultimo, qd'

And when it is made by Authority and Conſent of Parliament, then it is ſubſcribed, Per ipſum Regem, & totum Conſilium in Parliamento, or to the like Effect. And it is to be known, That in ancient Times, as well when any Land, Franchiſe or Hereditament, did paſs from the King of any Eſtate of Inheritance, as in the Creation of any to Honour and Dignity by Letters Patents, the Concluſion was with (a) *Hiis teſtibus*: But of long Time for Lands, Franchiſes or Hereditaments, this Form has been diſcontinued, and now, and ſo it hath been of long Time, the Patent concludes, (b) *Teſte meipſo*, &c. But in all Creations to Honour and Dignity by Letters Patents, the ancient Form of Concluſion of *Hiis teſtibus* is continued to this Day; and that Acts of Parliament do go in the Form of the King's Charter, we have many Examples in Law. 1. (c) Magna Charta, made 9 Hen. 3. which begins, Imprimis, Conceſſimus Deo, & hac præſenti Charta noſtra confirmavimus pro nobis & hæredibus noſtris imperpetuum, &c. and the Charter concludes with Hiis teſtibus, & Datum per manum noſtram, as ours doth: And although it doth not appear in the Charter itſelf by expreſs Words, that it was made by Authority of Parliament, yet becauſe many Parts of it croſs and change the Com. Law, which a Charter alone cannot do, and it appears by the laſt Chapter,

(a) Co. Lit. 7. a. 2 Inſt. 77, 78.

(b) Co. Lit. 7. a. 2 Inſt. 77.

(c) Co. Lit. 81. a. 2 Inſt. 78.

That for the said Grand Charter, Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, liberi tenentes, & omnes de regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum: This Clause in the Conclusion of the Charter, proves it by Implication to be an Act in (a) Form of a Charter. And lastly, it hath always had the Allowance of an Act of Parliament, and therefore ought to be so taken; which is a stronger Case than ours is, for here are full and express Words; and Anno 21 H. 3. brev. 881. in the Earl of Chester's Case, the 11 Chapter of Magna Charta, Quod Communia Placita non sequant' Curiam nostram, is cited to take away the Jurisdiction of the King's Bench; and this Grand Charter hath been allowed and confirmed above (b) thirty Times by Acts of Parliament. So the Act of 21 H. 3. de anno Bissextili begins, Rex Justiciariis suis de Banco, &c. in the Form of a Patent or Writ. The Statute of Protections, Anno 33 E. 1. de conjunctim feoffatis, Anno 34 E. 1. which begins, Rex omnibus ad quos, &c. and concludes, In cujus rei testimonium has Literas nostras fieri fecimus Patentes. Teste, &c. So the Stat. de Artic' Cleri, 9 E. 2. begins E. Dei gratia &c. Omnibus ad quos &c. and concludes, In cujus, &c. Teste, &c. Two Statutes made Anno 14 E. 3. one pro Clero, and the other concerning England, that it should not be in Subjection

(a) 2 Inst. 78.

(b) Co. Lit. 81. a.

pro dicta Magna Charta *Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, Liberi tenentes, & omnes de Regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum:* hæc clausula in conclusione Chartæ implicite probat illam esse Actum sub Chartæ formula: Semper denique habuit approbationem Actus Parliamenti, ideoque sic haberi debet; qui casus nostro fortior est, hic enim plena & expressa sunt verba: Et 21 Hen. 3. titulo Breve 881. in casu Comitis Cestriæ, undecimum caput Magnæ Chartæ, *Quod communia placita non sequantur Curiam nostram*, citatur, ad Jurisdict' Banci Regii tollendam: Et hæc Magna Charta approbata & confirmata fuerit statutis Parliamentariis supra trigesies. Item, Actus de an. 21 Hen. 3. de an. Bissextili, incipit, *Rex Justiciariis suis de Banco*, &c. sub formula diplomatis seu brevis. Statutum de Protectionibus, an. tricesimo tertio Ed. 1. de conjunctim feoffatis, anno tricesimo quarto Ed. 1. qd' incipit, *Rex omnibus ad quos* &c. & concludit, *In cujus rei testimonium has literas nostras fieri fecimus patentes*, &c. *Teste*, &c. Item statutum de Articul' Cleri, 9 Ed. 2. exorditur, Edwar' *Dei gratia*, &c. *Omnib' ad quos*, &c. & desinit, *In cujus rei* &c. *Teste* &c. Duo stat. edita an. 14 Ed. 3. unum pro Clero, alterum de Angl', qd' non subjecta foret

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Galliæ, & multa alia ſtatuta parliamentaria edita ſunt ſub formula Chartæ Regiæ. Et determinatum fuit, hæc verba in Actu vel Charta (ſcilicet Authoritate Parliamenti) ſufficere ad illum faciendum Actum Parliamenti. *Bracton* Curiam Parliamenti appellat *Magna Curia, magnū Conſiliū, & commune Conſil' Regni.* Dictum ſtatutum, de an. Biſſextili, eſt, *Rex per conſilium fidelium ſubdito'.* Statutum de Bigamis, an. 4 Ed. 1. *In præſentia venerabilium patrum quorundam Epiſcopor' Angl' & alior', de conſilio Reg.* 7 *Ed.* 1. de Religioſis, *De conſilio Prælatoru', Comit', Baron', & aliorum fidelium Reg. noſtri, de Conſilio noſtro exiſtentium, providimus, ſtatuimus, & ordinavimus:* & in ſtatuti (ut dicam) fronte, *Dominus Rex in parliamento ſui ſtatuta edidit.* 13 *E.* 1. Statuto de Winton', in eodem ſtatuto dicitur, Domin' noſter Rex, ad minuendum vires Felonum, ſtatuit pœnam hoc caſu &c. & in concluſione ſtatuti antedicti, Rex mandat & prohibet, quodamodo neq; nundinum neq; mercatus teneatur in cœmiteriis. 20 E. 1. Statutum de vocatis ad warrant', *Dominus Rex de communi conſilio ſuo ſtatuit.* Statutum de Appellatis 28 E. 1. Domin' Rex in Parliament' Statuit. 27 E. 3. cap. 1. de Stapula, cur' Parliam' nominatur Mag' conſil'. Et multi Act', huc ſpectantes, ad demonſtrand' varietat' Contextus Statu'

to France, and many other Acts of Parliament are made in the Form of the King's Charter. And it was reſolved, That theſe Words in an Act, or Charter, (By Authority of Parliament) are ſufficient to make it an Act of Parliament. Bracton calls the Court of Parliament, Magna Curia, Magnum Conſilium, and Commune Conſilium regni. The ſaid Statute de anno Biſſextili, is Rex per Conſilium fidelium ſubditorum. The Statute de Bigamis, Anno 4 E. 1. In præſentia venerabilium patrum quorundam Epiſcoporum Angliæ, & aliorum de Conſilio Regis, 7 E. 1. De Religioſis, De Conſilio Prælatorum, Comitum, Baronum, & aliorum fidelium regni noſtri, de Conſilio noſtro exiſtentium, providimus, ſtatuimus & ordinavimus: And, as I may ſay, in the Front of the Act, Dom' Rex in Parliamento ſuo (a) Statuta edidit. 13 E. 1. The Statute of Wincheſter, in the ſaid Act it is ſaid, Our Lord the King, to abate the Power of Felons, hath eſtabliſhed a Pain in this Caſe, &c. and in the End of the ſaid Act the K. commands and forbids, That from henceforth neither Fair nor Market be holden in Church-yards. 20 E. 1. The Stat. De vocat' ad Warrant'. Domin' Rex de (b) Communi Conſilio ſuo ſtatuit. The Stat. de Appellatis 28 E. 1. Dom' Rex in Parl' (c) ſtatuit. 27 Ed. 3. c. 1. Staple, the C. of Parl. is called the Gr. Counc. and many Acts to this Purpoſe were cited to ſhew the Variety of Penning

(a) 2 Bulſt. 187.

(b) 2 Bulſt. 187.

(c) 2 Bulſt. 187.

of Acts of Parliament: and the original Writs which are founded on any Statute ſay, Quare cum de Communi Conſilio reg' noſtri Ang' proviſum ſit &c. and the Writ on the Stat. of Labourers ſaith, Cum per Conſilium noſtrum pro communi utilitate regni ordinatum ſit. 11 H. 7. 27. If an Act of Parliament be penned by aſſent of the King, and of the Lords Spiritual and Temporal, and of the Commons, or, it is enacted by Authority of Parliament, it is a good Act; but the moſt uſual Way is, that it is enacted by the King, by the Aſſent of the Lords Spiritual and Temporal, and of the Coms. 7 H. 7. 14. *a. b.* & (39.) 34 Ed. 3. 12. *acc.* and there it is ſaid, that there are many Statutes which are indited, Quod Dominus Rex ſtatuit: Yet if they be entred in the Parliament (*a*) Roll and always allowed for Acts of Parliament, it ſhall be (*b*) intended that it was by Authority of Parliament: But if an Act be penned, that the King with the Aſſent of the Lords, or with the Aſſent of the Commons, it is no Act of Parliament, for (*c*) three ought to aſſent to it, ſcil. the King, the Lords and the Commons, or otherwiſe it is not an Act of Parliament; and by the Record of the Act it is expreſſed which of them gave their Aſſent, and that excludes all other Intendments that any other gave their Aſſent: and ſo there is a Difference between a general and particular penning of an Act of Parliament. Vide 8 H. 6. c. 29. and 5 R. 2. c. 2. of

(*a*) Co. Lit. 98. a.

(*b*) Co. Lit. 98. b.

(*c*) Plowd. 79. a. b. Dyer 144. pl. 60. Moor 824. Co. Lit. 159. b. Hob. 111.

torum Parliamenti citat' fuerunt. Et originalia brevia Regis, ſuper aliquo fundata ſtatuto, dicunt, *Quare cum de communi Conſilio Regni noſtri Ang' proviſum ſit &c.* & breve ſuper ſtat' de Laborator' dic', *Cum per conſilium noſtrum pro communi utilitat' reg. ordinat' ſit.* 11 H. 7. 27. Si actus Parliam' ſcribatur, de aſſenſu Regis & Dominorum ſpiritual' & temporal' & comunitat' vel, Inactitat' eſt authoritate Parliam' hujuſmodi valet act'; formalis vero magis eſt qui ſancitur, per Reg' de aſſenſu Dom' ſpirit' & temp' & Comunit': 7 *H.* 7. 14. & 39 *E.* 3. 12. cum hoc concordant: & ibid' dicit', quod multa ſunt ſtatut' quæ ſcribunt', *Domin' Rex ſtatuit*, ſi tamen rotulo Parliamentario intrentur, & ſemp' ut act' Parliament' approbentur, intendetur hæc authoritat' Parliamenti fuiſſe: Si vero Actus ſcribatur, Rex cum aſſenſu Dom' vel cum aſſenſu Communitat', iſte nullus eſt Parliamenti Actus; huic enim tres aſſentire debent, ſcilicet, Rex, Domin', & Communitas, aliter actus Parliamenti non eſt; & per Recordum Act' exprimitur quis horum aſſenſit, & hoc omnes intentiones (quod aliqui alii aſſenſerunt) excludit. Et ſic eſt diverſitas inter generalem & particularem contextum Actus Parliament'. Vide 8 H. 6. c. 29. & 5 Ric. 2. c. 2. de Fugitivis, 21 E. 3. 6. Epiſcopi Norvicenſis caſum. Et hoc ipſo Parliament' de

11 *Ed.* 3. *Hen'* fil' *Henrici* Comitis Lancaſtriæ, creatus fuit per chart' (*ad requiſitionem Prælatorum & Procerum & Communitat' Regni noſtri in inſtante Parliamento noſtro apud Weſtm' convocat'*) in comitem Derb', ſibi & hæred' maſculis de corpore ſuo: Item per aliam Chartam Rex creat' *Willihelm'* de Bohun (*de communi aſſenſu Prælatorum, Comit', Baronum, & aliorum, de conſilio n'ro in præſenti Parliam' n'ro*) in Com' Northampt', ſibi & hæred' de corpore ſuo: Et iſto eod' Parliam' per chart' creat' *Hugonem de Audley* in Com' Glouceſt', *de definito dict' Parliam' n'ri conſilio, &c.* Et per chart' in verb' ſimilib' Rex in eod' Parliam' creat' *Willihelmum Clynton* in Com' Huntingd' in feodo talliat', *Robert'* de Ufford in Com' Suff' in feodo ſimplici, *Willihelm' de Monte acuto* in Com' Sar' in feod' ſimplici: & hæ omnes fuerunt creationes cum donationib' terrar' (*ad ſuſtinendum nomen & onus*) per authoritatem Parliam', ſub formula chartæ Reg' cum concluſione de *Hiis teſtibus*, & eor' nonnullæ cum ſubſcriptione, *Per Regem & Conſilium in Parliamento* aliæ vero, *Per Regem & Conſilium in pleno Parliam'* & aliæ etiam, *Per ipſum Regem & totum Conſilium in Parliam' &c.* quæ omnes vim habent unam & eandem. Et hæc fuerunt argumenta collecta ex ipſa charta, & aliis ſtatutis Parliamenti, quæ ſcribuntur in forma Chartæ Regis.

Fugitives: 21 E. 3. 6. (60.) The Biſhop of Norwich his Caſe. And at this very Parliament of 11 E. 3. Henry, Son of Henry, Earl of Lancaſter, was created by Charter, ad requiſitionem Prælatorum, & Procerum & Communitatis regni noſtri in inſtante Parliamento noſtro apud Weſtm' convocat' to be Earl of Derby, to him and the Heirs Males of his Body. Alſo by another Charter, the King created William de Bohun, de communi aſſenſu Prælat', Comit', Baronum, & aliorum de Conſilio noſtro in præſenti Parliamento noſtro, Earl of Northampton, to him and the Heirs of his Body. And at the ſame Parliament, he by Charter created Hugh de Audley Earl of Glouceſter, de definito dicti Parliam' noſtri Conſilio, &c. And by Charters with the like Words, the King at the ſame Parliament created Will. de Clynton Earl of Huntingdon in Tail, Robert de Ufford Earl of Suffolk in Fee-ſimple, Will. de Monte acuto Earl of Saliſbury in Fee-ſimple; and all theſe were Creations with Donations of Lands, ad ſuſtinend' nomen & onus, by Authority of Parliament, in Form of the King's Charter, with the Concluſion of Hiis teſtibus, and ſome with ſuch Subſcription, Per Regem & Conſil' in Parliamento; and ſome, Per Regem & Conſilium in pleno Parliamento; and others, Per ipſum Regem & totum Conſil' in Par. &c. all which are of one and the ſame Ef. And thoſe were the Proofs col. out of the Char. ic

Antea 17. b.

Poſt. 22.

itſelf, and other Acts of Parliament which are penned in the Form of the King's Charter.

2. The ſame is proved by Letters Patents, as Ex rotulo Patentium de anno 14 E. 3. num. 18. which was within three Years after this Charter: The King granted to the Prince, by the Name of Edward Duke of Cornwall, &c. to be Lieutenant of the Realm ſo long as the King ſhould be beyond the Sea. In anno 21 E. 3. ex rot' patent' in Turre, The ſaid Prince (within Ten Years after his Creation) for the Fine of a Thouſand Marks, did demiſe to Tideman de Limbergh, Cunagium Stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem totius Stanni tam infra dictum Ducatum Cornubiæ quam Com' Devon' foſſi & fodendi quod vendi debet, Reddendo annuatim three Thouſand Marks, which the Prince could not have done, if he had but an Eſtate at Will, as a greater he had not, if the ſaid Charter had not the Force of an Act of Parliament. Other Let. Pat. were cited in 5 H. 4. ex rot' patent' ibidem, Rex, &c. Sciatis quod Regum Angliæ primogeniti filii in Ducatum Cornub' hæreditarie ſunt ſucceſſuri: And divers other Let. Pat. were cited to the ſame Effect.

3. The ſame is proved by Judgments and Reſolutions of Judges: In (a) 18 Aſſ. pl. 5. Thorp ſaith, That it was adjudged in Parliament, That if a Gift be made to one and to his

(a) Raym. 55.

2. Hoc probatur literis patentib', ſicuti ex rotulo patent' de anno 14 *E.* 3. Nu. 18. (quod fuit infra tres ann' poſt confectionem chartæ) Rex concedit Principi, per nomen *Edwardi* Ducis Cornub', quod Locum tenens eſſet regni tam diu quam Rex foret ultra mare. In anno 21 *E.* 3. ex rot' Patentium in Turre, dictus Princeps (infra decem annos poſt creationem ſuam) pro fine mille marcarum, dimiſit cuidam Tideman de Limberg *Cunagium Stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem totius Stanni tam infra dictum Ducatum Cornubiæ quam com' Devon' foſſi & fodendi, quod vendi debet, Reddend' annuatim 3000 marcas:* quod Princeps facere non potuit, ſi habuiſſet ſtatum ſolummodo ad voluntatem, ſicuti majorem non habuerat, ſi dicta charta in ſe non habuiſſet vim Actus Parliamenti. Aliæ liter' patentes citabantur in an' 5 *H.* 4. ex rotul' Patentium ibidem, *Rex, &c. Sciatis quod regum Angliæ primogeniti filii in Ducatum Cornub' hæreditarie ſunt ſucceſſuri.* Et diverſæ aliæ literæ patentes citabantur in hoc propoſitum.

3. Hoc etiam probatur Judiciis & Determinationibus Judiciariis. 18 *Aſſ. pl.* 5. *Thorpe* dicit, quod adjudicatum fuit in Parliamento, ſi donatio facta ſit alicui & hæredibus ſuis maſculis, quod ſorores & alii hæredes colla-

collaterales perinde atque hæredes maſculi, hæreditabunt, quoniam per iſtiuſmodi donationem habet feodum ſimplex: & inferebatur, quod tal' determinatio bene eſſe poteſt ad parliamentum in anno undecimo *Edwardi* tertii, ubi dict' creatio princip' & annexatio dictarum terrarum per pendebantur: Et quoniam hoc effici non potuit donatione vel conceſſione, conſulebatur quod fieret Actu Parliamenti; eo quod non fuit aliquis hujuſmodi deſcenſus vel curſus hæreditarius ad communem Legem. 21 *Edwardi* 3. 41. manerio de Berkhamſted (per dictam chartam Ducatui Cornubiæ annexo) Judices approbant donationem dicti maner' fore in lege validam Principi; quod eſſe non potuit (ut ſæpi' dictum fuit) ſi ill' donatio non habuiſſet vim actus parliamenti. 39 *E.* 3. 12. Rex anno undecimo regni ſui ad parliamentum ſuum tentum apud Weſtmon' præfecit Principem in Ducem Cornubiæ, & diverſos alios in Comites regni ſui; inter quos fuit *Willihelmus de Monte acuto*, comes de Sarum. Et in 43 *Aſſ. pl.* 15. 45 *Aſſ. pl.* 6. Donatio & annexatio poſſeſſionum dicti Ducatus, Principi conceſſarum per dictam Chartam, approbantur foret in Lege validæ. 50 *E.* 3. inter Record' in Turre de eodem anno, *Johanna* uxor dicti Principis dotata fuit in Heirs (a) Males, that his Siſters and other Heirs collateral, as well as Heirs Males, ſhall be inheritable, becauſe by ſuch Gift he hath Feeſimple; and it was inferred, that ſuch Reſolution might well be at the Parliament 11 Edw. 3. where the ſaid Creation of the Prince, and Anneration of the ſaid Lands, were in Conſideration: And becauſe it could not take Effect by Gift or Grant, it was adviſed that it ſhould be by Act of Parliament, becauſe there was not any ſuch Deſcent or Courſe of Inheritance by the Common Law. 21 E. 3. 41. the Manor of Berkhamſted was by the ſaid Charter annexed to the ſaid Dutchy, the Judges there allowed the Gift of the ſaid Manor to be good to the Prince, which could not be, as it hath been often ſaid, if it had not the Force of an Act of Parliament. 39 Ed. 3. 12. The King, anno 11. of his Reign, at his Parliament held at Weſtminſter, made the Prince Duke of Cornwall, and many others, Earls of this Realm, amongſt which was Will. de Monte acuto, Earl of Saliſbury. And in 43 Aſſ. pl. 15. & 45 Aſſ. pl. 6. the Gift and Anneration of the Poſſeſſions of the ſaid Dukedom, granted by the ſaid Charter to the Prince, was allowed to be good. 50 E. 3. inter Record' in the Tower, in the ſame Year Johan the Wife of the ſaid Prince, was, by Order of Law endowed in Chancery,

(a) Raym. 55. Dav. 34. b. 35. a. 43. a. 27 H. 8. 27. a. Co. Lit. 13. a. 27. a. b. Br. Deviſe 1. Br. Eſtates 2. 33. 9 H. 6. 25. a. 18 E. 3. 45. b. 2 And. 138, 156. 1 Co. 43. b. 46. a. 49. a. 7 Co. 40. b. Moor 416. Hob. 224. Plow. 251. a. 335. a. Lit. Sect. 31. 1 Roll. 860 1 Bulſtr. 10, 222. 1 Mod. Rep. 196. B. N. C. 5. 1 Brownl. 45. 2 Brownl. 334.

Antea 21.

cery, of the Poſſeſſions granted by the ſaid Charter to the Prince her Husband; ergo, the Charter did convey an Eſtate of Inheritance to the Prince. Anno 5 H. 4. ex Rot' Parl' the ſame Year a Petition in Parliament was exhibited by the Commons, for the Reſumption of all Grants and Letters Patents before made, of the Lands of the ſaid Dutchy of Cornwall, to which the King and the Lords with great Gravity and Juſtice, knowing the Danger ſuch private Bills would introduce, although it concerned the King's eldeſt Son (an excellent Precedent to give a Caveat to paſs few or no private Bills between Subject and Subject, but to refer them either to the Courts of Equity, or of Law, where the Cauſe may be duly examined, and upon Deliberation diſcerned and adjudged) gave ſuch Anſwer, It is agreed by the King and the Lords in Parliament, that the ſaid Lord the Prince, by Advice of his Council, may have Writs of Scire facias, or other Recovery, the beſt he may have by the Statutes and Laws of the Kingdom, according as the Caſe requires: And thereupon a (*a*) Sci. fa. was brought in the Name of the King, at the Petition of the Prince, Trin. 5 H. 4. in the Chancery, to repeal a Grant which Rich. 2. made (and which was confirmed by King Hen. 4.) of the Manor of Riſberghe in the Coun. of Ox' Parcel of the ſaid Dut. to Sir Lewis Clifford, and

Note.

(*a*) 2 Rol. 192.

Cancellaria de poſſeſſionibus, Principi, ſuo marito, per dictam Chart' conceſſis: Ergo ill' chart' dat' Principi ſtat' hæreditarium. Anno 5 *H.* 4. ex rot' Parliam. eodem an' petitio in Parliamentum exhibita fuit per communitatem, ad reſumendas omnes conceſſiones & literas patentes ante tunc factas de terris dicti Ducatus Cornubiæ: ad quam Rex, & Domini, ſumma cum gravitat' & juſtitia (ſcientes periculum quod bill' hujuſm' privat' introduceret) quamquam ſpectabat ad fil' Reg' natu maxim' (ſingulare exempl' admonition' dandæ, quod perpauce aut nullæ edantur billæ privat' int' ſubdit' & ſubditum, ſed poti' quod referantur ad cur' vel Æquitat', vel Legis, ubi cauſa & recte exequi, & deliberatione diſcerni & adjudicari poteſt) reſponderunt, accordatum eſt per regem & dominos in Parl', quod dict' Dominus Princeps de adviſamento concilii ſui habeat brevia de Scire fac' vel aliam recuperation', optimam quam habere poteſt per ſtat' & Leges reg', ſecund' hoc quod caſus requir'. Et ſup' hoc brev' de Sci' fac' latum fuit Reg' nos mine ad petitio' Principi. Trin' 5 *H.* 4. in Cancellaria ad repellendum conceſſionem factam per *Ric.* 2. (& confirmatam per regem *H.* 4.) de manerio de Risberghe in com' Oxon', par' cell' dicti Ducatus, *Ludovico Clifford* milit' & hæredib' ſuis,

ſuis, qui returnat' fuit ſummonit', & fecit defaltam, *Per quod de adviſament' Juſticiarum, &c. conſideratum fuit tunc & ibidem, quod literæ prædict' præfato Ludovico ut præfertur factæ revocentur & adnullentur, &c.* Aliud breve de Sci' fac' latum fuit anno 6 *Hen.* 4. Regis nomine, ad petitionem Principis, in Cancell', ad repellendam cconceſſionem factam per Regem *Rich.* 2. (& confirmatam per Regem *Hen.* 4.) de manerio de Heleſton in Kerier in comitatæ Cornubiæ, Nicholao Sarnfield militi, & Margaretæ uxori ejus, pro vita eorum; & ad return' brevis de Scire fac', ſcilicet, octab' Hill', Princeps per Tho. Beſton Attor' ſuum apparet, & dicta etiam Margaretæ, marito ſuo defuncto, *Et prædict' Princeps petit quod literæ prædictæ in forma prædicta factæ revocentur & adnihilentur, & quod prædict' manerium, &c. in manus Domini Regis ſeiſiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni, conceſſionis, & unionis præfati avi Domini Regis, habendum & tenendum, liberetur:* Et hoc Recordum liberat' fuit per Cancellarium in bancum Regis (*Gaſcoigne* tunc temporis exiſten' capitali Juſticiario) & ſuper hoc Margareta placitando, producit Conceſſionem Reg' *Ric.* 2. ſibi pro vita factam, & precatur in auxilium de Rege, & habuit, &c. Et Curia dat diem, &c. Et Princeps

his Heirs, who was returned, ſummoned, and made Default; Per quod de adviſament' Juſticiarum, &c. conſideratum fuit tunc & ibidem, quod Literæ prædict' præfat' Ludovico ut præfertur factæ revocentur & adnullentur, &c. Another (*a*) Scire facias was brought An 6. H. 4. in the Name of the King, at the Petition of the Prince, in the Chancery, to repeal a Grant made by King Richard the Second, and confirmed by King Henry the Fourth, of the Manor of Heleſton, in Kerier in the County of Cornwall, to Nicholas (*b*) Sarnfield, Knight, and Margaret his Wife, for their Lives, and at the Return of the Scire fac', ſc. Octa. Hill. the Prince by Thomas Beſton his Attorney, appeared, and the ſaid Margaret alſo, her Husband being dead, Et prædictus Princeps petit quod Literæ prædictæ in forma prædicta factæ revocentur & annihilentur, & quod prædictum manerium, &c. in manus Domini Regis ſeiſiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni, conceſſionis, & unionis præfati avi Domini Regis, habendum & tenendum, liberetur. And that Record was delivered by the Chancellor into the King's Bench (Gaſcoigne being then Chief Juſtice) and thereupon Margaret pleaded the Grant of King Richard the Second, to her for Life, and prayed in Aid of the King; and had it, &c. and the Court gave Day, &c. And the Prince

(*a*) 2 Sand. 25. Hill. 6 H. 4. in Banco Regis, rot. 68.

(*b*) 2 Sand. 25.

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at the Day brought a Procedendo in loquela, dum tamen ad judicium reddendum Domino Rege inconſulto nullatenus procederetur: and thereupon Margaret made Default, and thereupon Day is given by the Court to the Prince, &c. At which Day the Prince brought a (a) Procedendo ad judicium, upon which the Court gave Judgment as follows: Conſideratum eſt, quod literæ prædict' in forma præd' factæ revocentur & adnullentur, & quod dictum manerium, &c. in manus Domini Regis ſeiſiatur, & eidem Principi tanquam membrum & parcell' Ducatus præd' juxta formam & effectum dict' doni, conceſſionis & unionis præfati avi dicti Regis, habendum & tenendum liberetur. And in Mich. 30 Hen. 8. in memorandis Scaccarii, Rot. 16. the Record ſaith, Ad Parliament' 11 E. 3. tent' inter alia ordinatum & inactitatum fuit, quod Comit' Cornubiæ imperpetuum moraretur ut Ducatus fil' ſenior' Regum Angliæ qui eſſent Hæred' propinquiores Regni abſque aliquo modo donari, &c. And there is no Opinion in Law againſt it; for the Caſe in 1 Mar. 94. *a. b.* Dyer is ſuch (the Record of which I have ſeen, which is entred Trin. 7 E. 6. Rot. 303.) In Replevin by Thomas Chaſine, Eſq; againſt the Lord Stourton, for taking, &c. at Mere in the County of Wilts: The Defendant did avow for Damage-Feaſant; and becauſe the Place where doth contain 200 Acres of L. whereof

(a) 2 Sand. 25, 26.

ad diem protulit breve *de Procedendo in loquela, dum tamen ad Judicium reddend' domino Rege inconſulto nullatenus procederetur*; & ſuper hoc Margaret' fecit defalt', & inde dies dat' eſt per cur' Principi, &c. Ad quem diem Princeps protulit breve' de *Procedendo ad Judicium*; ſuper quo Cur' Judicium reddidit, ut ſequitur: *Conſideratum eſt, quod literæ præd' in forma præd' fact' revocentur & adnullentur, & quod dict' manerium, &c. in manus dom' Reg' ſeiſiatur, & eid' Principi tanquam membrum & parcel' Ducatus præd' juxta form' & effectum dictorum doni, conceſſionis, & unionis præfat' avi dict' Reg' habend' & tenend', liberetur.* Et in Mich' 30 H. 8. in memorand' Scaccar' rot' 16. Record' dicit, *Al parl'* 11 Ed. 3. *tent', inter alia, ordinat' & inactitat' fuit, quod com' Cornub' imperpet' moraretur ut Ducatus fil' ſenior' Reg' Angliæ qui eſſent hæredes propinquior' reg' abſque aliquo modo donari, &c.* Et in lege nulla eſt opinio contra hoc: caſus enim an. primo *Mar'* fol. 94. *Dyer*, eſt (cujus record' ego vidi, quod intratur Trinitat' 7 *Edw. 6.* rot' 303.) In Replegiar' per Thom' Chafine armigerum, verſus domin' Stourton pro captione, &c. apud Mere in comitatu Wilts, defendens facit advocationem pro damno facto, & pro eo quod locus ubi, &c. continent 200 acras terræ, de quibus Rex *Henric'* 8. fuit ſeiſitus in feodo, &

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anno 35. ejuſdem *H.*8. dimiſit cuidam Pyſter pro annis, qui eos conceſſit Dom' Stourton: in barram cujus advocationis dict' Chafine quer' placitat, *Quod Dominus* Edward' *quondam Rex Ang' tertius, progenitor Domini Reg' nunc, fuit ſeiſitus de manerio de Mere in comitatu præd' unde, &c. in domin' ſuo ut de feodo in jure Coronæ ſuæ Angl', & ſic inde ſeiſitus exiſtens, ad Parliamentum ſuum tentum apud Weſtmonaſt' in Com' Middleſex', die Lunæ proxim' poſt feſt' Sancti Mathiæ Apoſtoli, anno regni ſui* 11. *inter cætera, per aſſenſum omnium tam Prælatorum, Comitum, Baronum, & alior', quam gentium de communitat', accordatum fuit, quod pro honore dict' nuper regis & terr' ſuæ, & ad fortificationem ejuſdem, & pro eo quod ex antiquo eſſet unus Dux Cornubiæ quod dictus quondam Rex præficeret Dominum* Edward' *filium ſuum, adtunc comitem Ceſtriæ, Ducem Cornubia, & quod filius ſenior Regnum Angliæ, videlicet, illi qui eſſent proximi hæredes de regn' Angliæ, eſſent Duces Cornubiæ, & quod dictus comitatus datus eſſet dicto Domino* Edwardo *in nomine Ducatus, & quod dictus Comitatus Cornub' imperpetuum moraretur ut ducatus filiorum ſeniorum Regum Angliæ qui eſſent proximi hæredes Regni abſque aliter donat' exiſten', prout in eodem actu', inter alia, plenius continetur: Poſteaque prædictus nuper Rex* Edwardus *tertius ſeiſitus exiſtens de præd' maner' de Mere*

King H. 8. was ſeiſed in Fee and 35 H. 8. demiſed to one Pyſter for Years, who granted it to the Lord Stourton; In Bar of which Avowry, the ſaid Plaintiff Chafine pleaded, Quod Dominus *Edward'* quondam Rex Angliæ tertius, progenitor domini regis nunc, fuit ſeiſitus de manerio de Mere in Comitatu prædicto unde, &c. in Dominico ſuo ut de feodo in jure Coronæ ſuæ Angliæ, & ſic inde ſeiſitus exiſtens, ad Parliamentum ſuum tentum apud Weſtmonaſt' in Comit' Midd', diæ Lunæ proxim' poſt feſtum Sancti Mathiæ Apoſtoli anno regni ſui undecimo, int' cætera, per aſſenſum omnium tam prælator', comitum, baronum, & aliorum, quam gentium de communitate, accordatum fuit, Quod pro honore dicti nuper regis & ter' ſuæ, & ad fortificationem ejuſdem, & pro eo quod ex antiquo eſſet unus Dux Cornubiæ, quod dict' quondam rex præficeret Dominum *Edward'* filium ſuum adtunc comit' Ceſtriæ, Ducem Cornub', & quod filius ſenior regum Angl', viz. illi qui eſſent proxim' hæred' de Regno Angliæ, eſſent Duces Cornub', & quod dictus comit' dat' eſſet dicto domino *Edwardo* in nomine ducat', & quod dict' com' Cornubiæ imperpetuum moraretur ut Ducatus filiorum ſeniorum regum Angliæ qui eſſent proxim' hæred' Regni abſque aliter donat' exiſten', prout in eodem actu' inter alia plenius continetur: Poſteaque præd' nuper Rex *E.* 3. ſeiſitus exiſtens de præd' maner' de Mere

cum

cum pertinentiis unde, &c. in dominico ſuo ut de feodo & jure, ut in jure Coronæ ſuæ Angliæ, per literas ſuas patentes, quarum dat' eſt apud Weſtmonaſter' decimo ſeptimo die Martii anno Regni ſui 11. & in curia hic prolat', recitans per eaſdem, quod cum nuper perſonam dilecti & fidelis ipſius nuper Regis *Edward'* tunc comitis Ceſtriæ filii ſui primogeniti honorare volens, eidem filio ſuo nomen & honorem Ducis Cornubiæ dederit, ipſumque in ducem Cornubiæ præfecerit, & gladio cinxerit, ut deceret, Dederit & conceſſerit, & per eaſdem literas ſuas patentes pro ſe & hæredib' ſuis confirmaverit, eidem filio ſuo ſub nomine & honore Ducis dicti loci, inter alia prædictum manerium de Mere cum pertinentiis: Habendum & tenendum eidem nuper Duci, & ipſius & hæred' ſuorum Regum Anglæ filiis primogenitis, dicti loci ducibus, in regno Angliæ hæreditarie ſucceſſur': quod quidem manerium cum pertinentiis idem nuper Rex *Edward'* 3. prædicto ducatui pro ſe & hæredibus ſuis per prædictas literas patent', inter alia, annexit & univit eidem imperpetuum remanſur', ita quod, &c. **And further pleaded the Clauſe of Revivification, as in the Charter: By Force of which Act, and of the ſaid Letters Patents, the ſaid** Edward **the Prince** fuit ſeiſitus de manerio prædicto, inter alia eidem ducatui unit' & annex' & ejuſdem ducatus parcell' in dominico ſuo ut

cum pertinentiis unde, &c. in Dominico ſuo ut de feodo & jure, ut in jure Coronæ ſuæ Angliæ, per literas ſuas patentes, quarum dat' eſt apud Weſtmonaſter' xvii. die Martii anno Regni ſui undecimo, & in Curia hic prolat', recitans per eaſdem, quod cum nuper perſonam dilecti & fidelis ipſius nuper Regis Ed. *tunc comitis Ceſtriæ filii ſui primogeniti honorare volens: eidem filio ſuo nomen & honorem Ducis Cornubiæ dederit, ipſumque in Ducem Cornubiæ præfecerit, & gladio cinxerit, ut deceret, Dederit & conceſſerit, & per eaſdem literas ſuas patentes pro ſe & hæredibus ſuis confirmaverit, eidem filio ſuo ſub nomine & honore Ducis dicti loci, inter alia, prædictum manerium de Mere cum pertinentiis: Habendum & tenendum eidem nuper Duci, & ipſius & hæredum ſuorum Regum Angliæ filiis primogenitis, dicti loci ducibus, in Regno Angliæ hæreditarie ſucceſſur'; Quod quidem manerium cum pertinentiis idem nuper Rex* Edward' tertius *prædicto Ducatui pro ſe & hæredibus ſuis per prædict' literas patentes, inter alia, annexit & univit eidem imperpetuum remanſur', ita qd' &c.* Et ulter' placitat clauſulam Revivificat' prout in charta: Virtute cujus act' & dict' literar' patent' dict' Princeps *Edw. fuit ſeiſitus de manerio præd' inter alia, eidem Ducat' unit' & an' & ejuſd' Ducat' parcell' in dom' ſuo ut de feodo & jur'* Et poſt' dict' Prin' *Ed'* obiit,

obiit, per quod Rex *Ed.* 3. fuit ſeiſit' de dicto manerio in feodo: Et quod ille obiit, & idem manerium deſcendebat Regi *H.* 8. *ut conſanguineo & hæredi ipſius E.* 3. Et poſtea Rex *H.* 8. exitum habuit *E.* 6. filium ſuum primogenitum; per qd' ille fuit Dux Cornubiæ &c. Et poſtea Rex *H.* 8. fecit dimiſſionem dicto *Pyſter* prout &c. Et poſtea Rex *Ed.* 6. an' 4. dimiſit dictas 200 acras dict' *Chafine* pro 21 annis. Super quo partes morabant' in lege; & quia dict' charta Reg' *E.* 3. placitabat' ſine authoritate ſeu vi Parliam', ibid' videbat', primo, quod Princeps non habuit niſi ſtatum ad voluntatem: 2. quod Rex non potuit unire & annectere dict' manerium dicto Ducatui per literas patentes abſq; authoritate Parliamenti, & idem facere parcellam Ducat', & mutare formam & curſum Ducat: 3. *Per mortem Ducis Cornubiæ*, manerium illud ad regem devenit ut eſchaeta pro defectu Ducis & primogeniti filii, & deinde annexum fuit & reunit' Coronæ loco Dom', & per nativitatem alicujus alius filii non poteſt ſeparari &c. Et totum hoc movebat' tantum per Juriſconſultum; liber enim eſt, *Et Juſtic' noluerunt arguere iſtum caſum ut credo, propter pregnantium Mariæ Reginæ.* Si vero dict' opinio admitteretur, nihil tamen probat cont' hanc determinatione; dict' enim actus in placito memorat' nihil transfert, ſed chartam oportet dictum ut de feodo & jure: And afterwards the ſaid Prince Edward died, by which King Edw. 3. was ſeiſed of the ſaid Manor in Fee, and that he died, and the ſame deſcended to King Henry the Eighth, ut conſanguineo & hæredi ipſius Edw. 3. and afterwards King Hen 8. had Iſſue Edw. 6. his firſt begotten Son, by which he was Duke of Cornwall, &c. And afterwards King Hen. 8. made the Leaſe to Pyſter, prout, &c. And aftetwards King Ed. 6. anno 4. demiſed the ſaid two hundred Acres to Chafine for one and twenty Years, upon which it was demurred in Law. And becauſe the ſaid Charter of King Edw. 3. was pleaded (without Authority or Force of Parliament) there it ſeemed, 1. That the Prince had but an Eſtate at Will. 2. That the King could not unite and annex the ſaid Manor to the ſaid Dutchy by Letters Patents without Authority of Parliament, and make it Parcel of the Dutchy, and to alter the Form and Courſe of the Dutchy. 3. Per mortem Ducis Cornubiæ, the Manor came to the King as an Eſcheat for want of a Duke and firſt begotten Son, and was then knit and rejoined to the Crown in lieu of the Seigniory, and by the Birth of any other Son it could not be ſevered, &c. And all that was moved only by one of the Council; for the Book ſaith, Et Juſtic' nolu' arguere iſtu' caſu' ut credo, propt' pregn' M. Reg' But if the ſaid Opin. ſhould be admit. yet it proves nothing againſt this Reſo. for by the ſaid

Act mentioned in the Plea nothing paſſes, but the Charter ought to paſs the ſaid Manor, &c. and the ſame cannot paſs in ſuch Manner without Authority of Parliament, nor can the Charter alone anner the ſaid Manor to be Parcel of the Dutchy, and the Charter was not pleaded to be made by Authority of Parliament. And as to the Opinion in the Caſe of Alton-Woods, in the firſt Part of my Reports, it is there alſo admitted, that the ſaid Grant was only by Charter.

4. It is proved by Judgments and Reſolutions in Parliament, That the ſaid Charter of Creation hath the Authority and Force of Parliament; 1. Ex Rot' Parliam' anno 5 Hen. 4. a Judgment given in Parliament againſt Sir John Cornwall and his Wife, Counteſs of Huntingdon, for certain Manors which ſhe had of the Dutchy of Cornwall, and which were annexed to it: Alſo by the Act of 33 H. 6. which ſee inter originalia de 35 H. 6. rot' 29. ex remem' Theſaurat' in Scaccario: Et ex Rot' Parliam' de 9 H. 5. where it is reſolved and affirmed by both Acts of Parliament, that the ſaid King Ed. 3. by his Charter 17 Mar' an. 11 E. 3. of the common Aſſent and Counſel of the Prelates, Earls, Barons, and others of his Council in his Parliam. gave, &c. as in the Chart. And it is provided by the ſame Act of Parliam. of 9 H. 5. That the Manor of Iſleworth, which was annexed by the ſaid Char. &c. ſhould be manerium transferre; & tali modo transferr' non potuit ſine authoritate Parliam' neq; char' tantum dictum maneriu' ut parcell' ducatus annectere potuit: & chart' non placitata fuit fieri authoritate Parl'. Et quoad opinionem in caſu de Alton-Woods in prima mearum Relationum parte, ibidem etiam admittitur, qd' dicta conceſſio fuit per chartam tantum.

4. Probatur Judiciis & determination' in Parliam' quod dict' charta creationis habet authoritatem & vim Parliam': Ex rot' Parl' an. 5 H. 4. Judicio in Parliam' reddito verſus *Johan' Cornwall* mil' & uxorem ejus Comitiſſam de Huntingdon', de quibuſdam maner' (quæ ill' habuit) Ducatui Cornubiæ pertin', & eidem annexis: Actu etiam de an. 33 *H.* 6. quem vide int' originalia de 35 *H.* 6. rot' 29. ex' remem' Theſaur' in Scaccario: Et ex rott' Parliam' de anno 9 *H.* 5. ubi determinatum & affirmatum fuit per utroſque Actus Parliamenti, quod dictus Rex. *Ed.* 3. per Chartam ſuam 17 die Martii anno 11 *Ed.* 3. de communi aſſenſu & conſilio prælatorum, Comitum, Baronum, & aliorum, de ſuo concilio in Parliamento ſuo, dedit, &c. prout in charta. Et proviſum eſt per eundum Actum Parliamenti de anno 9 *H.* 5. qd' manerium de Iſleworth, quod per dict' Chart' annectebatur, &c. rurſus ſepararetur

raretur & disjungeretur &c. in quo res duæ obſervatæ fuerunt: 1. quod dict' charta Regis *E.* 3. habet authoritatem & vim Parl': quod dictum manerium de Iſleworth ſic annectebatur &c. quod ſeparari ſeu disjungi non potuerat, ſi non per actum Parliamenti. Et totum hoc affirmatur etiam per alium Parliam' Actum anno 38 *H.* 6. ex rot' Parl' Vide Actum de 3 *E.* 4. ex rot' Parliam', & Actum de 22 *E.* 4. ex eodem rot', de excambio quodam prælongo inter Regem & Comitem de Huntingdon', qui Act' revocatur per quendam Actum anno 11 *H.* 7. editum. Et vide Actum de 1 *H.* 7. ex rot' Parliamenti de eodem anno (pars cujus placitatur per *Hele* Servientem ad legem & *Warwicum Hele*) per quem inactitatum eſt, quod Rex *Hen.* 7. haberet & teneret Ducatum Cornub' &c. ſibi & hæredibus ſuis in tam amplo & largo modo & forma &c. prout Reges *H.* 6. vel *E.* 4. aut eorum alter, gaviſi fuerunt dict' maneria &c. ſed omiſerunt hanc ſubſequentem clauſulam, ſcil. *And be it alſo ordained and eſtabliſhed by the ſame Authority, that whenſoever our Sovereign Ld. by the Grace of God, have firſt a Son of his Body lawfully begotten, that the ſame Son and Prince have and enjoy the ſaid Dutchy of* Cornwall, *&c. is as ample and large Form and Manner as any Prince firſt begotten Son of any King hath had*

ſever'd and diſannexed; in which two Things were obſerved: 1. That the ſaid Charter of King Ed. 3. hath the Authority and Force of Parliament. 2. That the ſaid Manor of Iſleworth was ſo annexed, &c. that it could not be ſevered or diſannexed but by Act of Parliament: And all this is likewiſe affirmed by another Act of Parliament, anno 38 Hen. 6. ex Rot' Parliamenti. Vide the Act of 3 Ed. 4. ex Rot' Parliamenti, and the Act of 22 Edw. 4. ex eodem Rot' of a very long exchange between the King and the Earl of Huntingdon, which Act is revoked by an Act made 11 H. 7. And ſee the Act of 1 H. 7. ex Rot' Parliamenti of the ſame Year, (Part of which is pleaded by Hele Serjeant, and Warwick Hele) by which it is enacted, that Hen. 7. ſhould have and hold the Dukedom of Cornwall, &c. to him and his Heirs, in as large and ample Manner and Form, &c. as the Kings H. 6. or Ed. 4. or any of them enjoyed the ſaid Manors, &c. But they omitted this ſubſequent Clauſe, ſcilicet, And be it alſo ordained and eſtabliſhed by the ſame Authority, that whenſoever our Sovereign Lord, by the Grace of God, have firſt a Son of his Body lawfully begotten, that the ſame Son and Prince have and enjoy the ſaid Dutchy of *(a)* *Cornwall*, &c. in as ample and large Form and Manner as any Prince, firſt begotten Son of any King, hath had or en-

(a) 1 E[illegible] 133.

joyed before this Act. And all that which hath been ſaid, is reſolved and affirmed by Authority of Parliament, anno 32 H.8. mentioned in the Scire facias: Wherefore it was reſolved by the Lord Chancellor, and the ſaid Juſtices, That the ſaid Charter hath the Authority and Force of an Act of Parliament.

2d Point. As to the ſecond Point it was reſolved, That the Charter having the Authority and Force of Parliament, is ſufficient in itſelf, without any other Act; and if the King's Scire facias hath ſufficient Matter it ſhall never abate for Surpluſage not material. Vide 4 Hen. 6. 16. b. 45 E. 3. 6. a. 40 Aſſ. pl. 26. Vide the Act of 9 Hen. 5. for there it is affirmed by the whole Parliament, That at the Parliament held at Weſtminſter, the Monday next after the Feaſt of Saint Matthias the Apoſtle, in the 11th Year of the Reign of King Edward the Third, amongſt other Things, it was agreed, That the eldeſt Sons of the Kings of England, ſcilicet, thoſe who ſhould be next Heirs to the Realm of England, ſhould be Dukes of (a) Cornwall, and that the County of Cornwall ſhould always remain as a Dutchy to the eldeſt Sons of the Kings of England, who ſhould be next Heirs to the ſaid Realm, without being given elſewhere. And thereupon K. Ed. by his Charter 17 Martii then next following, of common

(a) 1 Bulſtr. 133.

or enjoyed before this Act. Et totum hoc qd' dictum fuerit, determinatum eſt & affirmatum per authoritat' Parl' anno 32 *Hen.*8. memorati in breve de Scire facias. Unde determinat' fuit per dominum Cancellar' & dictos Juſticiarios, qd' dicta charta in ſe habet authoritat' & vim Actus Parliamentarii.

Quoad ſecundum Articulum determinat' fuit, quod dict' charta, in ſe habens authoritat' & vim Parl' ſufficiens eſt ex ſeipſa ſine aliquo alio Actu; & breve hoc de Sci' fac' qd' Rex protulit, ſi materiam in ſe habeat ſufficient', non cadet ob redundantia' nulli' momenti. Vide 4 *H.6. f.* 16. *b.* 45 *E.3. 6. a. & 40 Aſſ. pl.* 26. Vide actum antedictum de anno 9 *Hen.* 5. ibidem enim affirmatur per totum Parliamentum, quod ad Parliament' tent' apud Weſtm' die Lunæ proxim' poſt feſtum ſancti *Matthiæ* Apoſtoli, An. Regni Regis *Ed.* 3. 11. inter alia, accordatum fuit, quod filii ſeniores Regum Angl', ſcilicet, illi qui eſſent proxim' hæredes Regni Angliæ, eſſent Duces Cornub': & quod com' Cornubiæ imperpetuum moraretur ut Ducatus filiorum ſeniorum Regum Angliæ qui eſſent proxim' hæredes dicti Regni, abſque aliter donat' exiſten': Et ſuper hoc Rex idem *Edwardus* per chartam ſuam 17 Die Martii tunc proxim' ſequent' de com' aſſenſu & conſilio Prælatorum,

torum, Comitum, Baronum, & aliorum, de conſilio ſuo in dicto Parliam' exiſtentium, dedit &c. Curia vero judicium ſuum fundarunt ſuper Chartam Regis cum authoritat' & aſſenſu Parliament: quæ de ſe ipſa ſufficit.

Quoad tertium Articulum, determinatum fuit, quod Princeps habet ſtatum de feodo ſimplici in dicto ducatu: omnis enim ſtat' hæreditarius, eſt aut feodu' ſimplex, aut feodum talliatum, & ſtatus hic non eſt talliatus, non enim limitatur vel reſtringit', verb' ſive expreſſis ſive æquipollentib' hæredib' de corpore Principis, donatio enim eſt, Principi *& ipſius & hæredu' ſuorum Reg' Angl' filiis primogenitis*, ita quod illum, qui hæreditabit, oportet eſſe filium primogenitum hæred' Principis Nigri, hæres ſit ille linealis ſive collateralis talem vero hæredem oportet eſſe Reg' Angl': qui modus limitationis ſtatus fuit brevis, excellens, & accuratus; ad creandum enim ſtatum hæreditarium, hæc verb' eſſentialia (ſcilicet, hæredib' ſuis) non omiſſa fuerunt, quanquam ſubinde temperata fuerunt & modificata, ut per ipſam limitationem apparet: Et quod hic ſtatus fuit hæreditarius, per dictum Recordum anno 50 *E.* 3. probatur, ex quo liquet uxorem Principis Nigri fuiſſe dotatam. Et conſtat ex libro de Anno 21 *Edward* 3. 41. quod

Aſſent and Counſel of the Prelates, Earls, Barons, and others being of his Council in the ſaid Parliament, gave, &c. but the Court relied on the King's Charter, with the Authority and Aſſent of Parliament; for that of itſelf is ſufficient.

As to the third Point it was reſolved, That the Prince hath an Eſtate in Fee-ſimple in the ſaid Dukedom: For every Eſtate of Inheritance is either Fee-ſimple or Fee-tail, and this is not an Eſtate-tail, for it is not limited or reſtrained either by expreſs Words, or by any that tantamount, to the Heirs of the Body of the Prince; for the Gift is to the ſaid Prince, & ipſius & hæred' ſuorum Regum Angliæ filiis primogenitis. So that he who ought to inherit ought to be the firſt begotten Son of the Heirs of the Black Prince, be he Heir Lineal or Collateral; but ſuch Heir ought to be King of England. Which Manner of Limitation of the Eſtate was ſhort, excellent and curious; for to raiſe the Eſtate of Inheritance theſe eſſential Words (his Heirs) were not omitted, altho' afterwards they were qualified, as by the Limitation appears. And that this was an Eſtate of Inheritance, is proved by the ſaid Record of 50 Edward 3. by which it appears, That the Wife of the Black Prince was endowed. And it appears by the Book of 21 Edward 3. 41. that the

3d Point.

Co. Lit. 27. a. b.

Prince, in the said Manor of Berkhamstead (Parcel of the said Dutchy of Cornwall) had Fee. And the said Judgments in 5 and 6 H. 4. prove it; for there Judgment generally is given, That the Letters Patents should be revoked and made void, &c. which Judgment could not have been given, if any Estate or Reversion, or Possibility did remain in the Patentee; for then the Letters Patents should not be made void, but the Judgment should be, That the Letters Patents should be made void and annulled as to the Estate of the Prince. Also it appears by the Livery in 33 Hen. 6. ex Rot' Parl', and by Act of Parliament 38 Hen. 6. ex eodem Rot', that Edward, eldest Son of Hen. 6. had his Livery as inheritable by Descent due to him by Birth-Right; and so had Edward, the first begotten Son of Edward 4. and Arthur, the first begotten Son of Hen. 7. to whom Livery was made of the said Dutchy, which belonged to them jure hæreditario. In anno 22 E. 4. ex Rot' Parliament', in the said long Exchange between the King and the Earl of Huntingdon, there the Prince is adjudged to be seised of the Dutchy of Cornwall in Fee-simple; and so it was unanimously resolved by the L. Chancellor and the said Justices, That the Prince hath a Fee-simple by Descent, in the Honour and Possessions of the said Dutchy.

4th Point. As to the 4th Point it was

Princeps in dicto manerio de Berkhamstead (parcell' dicti ducatus Cornub') habuit feodum. Et dict' ill' Judicia in annis 5 & 6 *H.* 4. hoc probant; ib' enim generaliter Judic' redditur quod literæ patentes revocentur & adnullentur &c. qd' Judiciu' reddi non potuerat, si aliquis status, vel reversio, vel possibilitas, manet illi cui factæ fuerunt literæ patentes; tunc enim literæ illæ patentes non adnullarentur, sed Judicium esset, quod literæ patentes vacuæ sint & adnullatæ quoad statum Principis. Liquet etiam per liberationem in anno 33 *H.* 6. ex rot' Parliamen', & per Actum Parliamenti anno 38 *H.* 6. ex eodem rot', quod *Edwardus* senior filius Regis *Hen.* 6. *had his Livery as inheritable by Descent, due to him by Birth-Right.* Et sic habuit *Edw.* primogenitus filius *Edw.* 4. & *Arthurus* filius primogenitus *Hen.* 7. quibus facta fuit liberatio dicti ducatus, qui ad illos spectabat jure hæreditario. In an. 22 *E.* 4. ex rot' Parliam' in dicto excambio prælongo inter Reg' & comitem de Huntingd', Princeps adjudicatur fore seisitus de Ducatu Cornub' in feodo simplici. Et sic fuit unanimi assensu determinatum per Dominum Cancellarium & dictos Justiciarios, quod Princeps habet feodum simplex per descensu' in Honore, & possessionibus dicti Ducatus.

Quoad articul' 4. determinatum

natum fuit, quod contra generalem Actum Parliam' vel talem Actum, qualis notitiam Judices ex officio debent habere, pars altera non poteſt placitare Nullu' tale Recordum, horum enim Actuum Judices debent notitiam habere: ſi vero male recitatur, pars poteſt morari in Lege ſuper hoc. Et in hoc caſu Lex ſumma fundatur ratione; abſit enim, ſi Recordu' hujuſmodi ſtatuti perderet' vel conſumeret' igne vel alio modo, qd' hoc tenderet in generale Reipublicæ prejudicium; immo potius, quamvis perdatur vel conſumat', Judices, vel ex impreſione Typographica, vel ex recordo in quo placitat' fuit, vel alio modo, poſſint ſeipſos de hoc informare. Vide caſus de *Partridge & Croker*, &c. in Comentar' *owd.* fol. 78.

Et determinatum fuit, qd' hoc ſtatutum de Rege, & de Principe, qui eſt filius primogenitus Reg' pro tempore exiſtentis, & hæres apparens Coronæ, perpetuis futuris temporib' eſt hujuſmodi Act', cujuſmodi Judices & totum Reg' debent habere noticiam: omnis enim ſubdit' intereſſe habet in Rege, & null' ſubditorum (qui infra leges ejus eſt) dividitur ab illo, ſuo capite & Domino ſupremo: res itaque, & negotia Regis, ad totum ſpectant regnum, & præcipue quando aguntur de Principe, filio primogenit' Reg', & hæreresolved, * That againſt a general Act of Parliament, or ſuch an Act whereof the Judges ex officio ought to take Notice, the other Party cannot plead Nul tiel record; for of ſuch Acts the Judges ought to take Notice: † But if it be miſrecited, the Party ought to demur in Law upon it. And in that Caſe the Law is grounded upon great Reaſon; for God forbid if the Record of ſuch Acts ſhould be loſt, or conſum'd by Fire, or other Means, that it ſhould tend to the general Prejudice of the Commonwealth, but rather altho' it be loſt or conſumed, the Judges, either by the printed Copy, or by the || Record in which it was pleaded, or by other Means, may inform themſelves of it. See Partridge and Croker's Caſe, &c. Plowd. Com. fol. 78.

‡ And it was reſolved that this Act, which concerns the King, and the Prince who is the firſt begotten Son of the King, and Heir apparent to the Crown for the Time being, perpetuis futuris temporibus, is ſuch an Act whereof the Judges and all the Kingdom ought to take Notice: For every Subject hath an Intereſt in the King, and none of his Subjects, who is under his Laws, are divided from him, being their Head and Sovereign, ſo that the King's Affairs and Concerns touch the whole Kingdom, and eſpecially § when they regard the Prince,

* 3 Inſt. 98. God. 178. 4 Co. 76. a. b.

† Co. Lit. 260. a.

|| Cr. Car. 355.

‡ 4 Co. 77. a. Hob. 226. Doct. pla. 338. Plow. 231. a.

§ Hob. 226.

the firſt begotten Son of the King, and Heir apparent to the Crown, Coruſcat enim Princeps radiis Regis patris ſui, & cenſetur una perſona cum ipſo Rege, as it is ſaid in the Act of Parliament of 38 H. 6. And therefore if any one intends the Death of the Prince, and declares it by open Act, it is High Treaſon, by the ancient Common Laws of England, and ſo declared by the Statute of 25 Edw. 3. 1 Hen. 5. 7. b. If the Prince, as Prince of Wales, hath Judgment to recover, and afterwards the Crown deſcends to him, he, as King, ſhall ſue Execution. And with the Reaſon of this Reſolution in this Point agreeth the Rule of the Court in Plowd. Com. in the Lord Berkley's Caſe, 231. That the Act of 35 Hen. 8. which concerns the Capacity of the Queen, was ſuch an Act whereof the Judges ought to take Knowledge, becauſe it concerns the King's Wife; and by the * ſame Reaſon in this Caſe of the Prince. And it was agreed, That if Nul tiel record ſhould be admitted to be pleaded in this Caſe, that the Subſtance and Effect of the Record ſufficient to maintain the ſaid Scire fac. appears in the Record exemplified † under the Great Seal. It was alſo reſolved, that the Act of 43 El. of Confirmation of Letters Patents pleaded by Hele Serjeant, and War. Hele his Son, doth not extend to this Caſe for two manif. Reaſ. 1. Becauſe the Act ſuppl. only certain

* Hob. 226.

† Co. Lit. 225. b.

de apparente Coronæ, *Coruſcat enim Princeps radiis Regis patris ſui, & cenſetur una perſona cum ipſo Rege*, ut dict' eſt in actu Parliam' de an. 38 *H.* 6. Et proinde, ſi aliquis intendit mortem princip', & hoc apert' declarat' actione, eſt crimen læſæ Majeſtis, per antiquas communes Angl' leges, & ſic declarat' per ſtatut' de an. 25 *E.* 3. 1 *H.* 5. fol. 7. b. Si princeps, ut princeps Walliæ, Judicium habet recuperandi, & poſtea Corona illi deſcendit, ille, ut rex, proſequetur executionem. Et cum ratione huj' determinat' in hoc articulo concordat regula Cur' in Comment' *Plowd'* in caſu Dom' *Berkley*, f. 231. quod ſtatut' de an. 35 *H.* 8. de capacitate Reg', tal' eſt act', qualis Judices debent notitiam habere, quia ad uxorem regis ſpectat: & eadem ratione in hoc caſu de principe. Accordatum etiam fuit, ſi Nullum tale Recordum admitteretur ut placit' in hoc caſu, qd' ſubſtantia & effect' Recordi ſufficiens ad manutenend' dict' breve de *Scire facias*, apparet in Recordo exemplificato ſub magno ſigillo. Determinat' etiam fuit, quod Actus de anno 43 *Eliz.* de confirmatione literarum patent', placitatus per *Hele* Servientem ad legem, & *Warwicum* ejus filium, non ſe extendit ad hunc caſum, duas ob rationes manifeſtas. 1. Eo quod act' ille ſupplet tantum quoſdam defect' particula-

ticulares, ut male nominationem maneriorum, &c. male recitationem, vel non recitationem dimiſſionum, &c. & alias imperfectiones ſpeciales in ill' Actu memoratas: 2. Act' idem facit literas patent' in lege validas tantum contra Regem hæredes & ſucceſſores ſuos, cum Exceptione omnibus aliis, ideoque ſine dubio jus Principis in hoc caſu ligari per hunc non poteſt. Et quod ſtatutum de an' 1 *H.* 7. quod *Hele* ſerviens ad legem, & dic' *Warwicus* placitaverunt, ut amici Curiæ, ad informandum Curiam de veritate, non eis affert aliquod auxilii: per hoc enim inactatum eſt, Quod Rex *H.* 7. haberit ſibi & hæredibus ſuis dictum Ducatum &c. in tam amplo & largo modo prout *H.* 6. vel *E.* 4. habuit: quæ verba relationis præſervant Ducatum Cornub' ſecund' limitationem creationis per dict' chartam de an. 11 *E.* 3. Revera autem Serviens ille ad legem & fili' ej' non functi ſunt officio amici, vel probi Relator'; pretermiſerunt enim clauſulam in eod' ſtatuto expreſſe ſpectant' ad præſervand' dict' ducat' Cornub' fil' primogenito Regis, &c. & iſto modo moliti ſunt in Cur' decipiend' & veritat' ſupprim'd'. Determinat' denique fuit, quod (in hujuſmodi brevi de Scire facias per regem lato ad repellendas literas patentes factas de aliqua parcella dicti Ducatus, ea nimirum intentione ut Rex libe-

particular Defects, as Miſnomer of the Manors, &c. Miſrecital or Non-recital of Leaſes, and other ſpecial Imperfections mentioned in the Act. 2. The Act makes the Letters Patents good only againſt the King, his Heirs and Succeſſors, with a ſaving to all others, and therefore without Queſtion, the Right of the Prince in this Caſe cannot be bound thereby: And that the Act of 1 Hen. 7. which Hele Serjeant, and the ſaid Warwick have pleaded, ut amici Curiæ to inform the Court of the Truth, avails them not; for it is thereby enacted, That King Hen. 7. ſhall have to him and his Heirs the ſaid Dutchy, &c. in as ample and large Manner as H. 6. or E. 4. had it; which Words of Reference preſerve the Dutchy of Cornwall according to the Limitation of Creation by the ſaid Charter of 11 E. 3. But in Truth the Serjeant and his Son have not performed the Office of a Friend or of a good Informer, for they have omitted one Clauſe in the ſame Act which expreſſly concerns the Preſervation of the ſaid Dutchy of Cornwall to the firſt begotten Son of the King, &c. and have thereby endeavoured to deceive the Court, and ſuppreſs the Truth. And laſtly, it was reſolved, That (in ſuch Scire facias brought by the King, to repeal Letters Patents made of any Parcel of the ſaid Dutchy, to the End that the King may make

Livery

Livery to the Prince) the King or the Prince may reply to any Bar pleaded by the Defendants; and both ways are good in Law; but the better Form is, that the King's Attorney, till Livery be made, should reply, as he did in the Caſe at Bar. And as to the Clauſe of Non obſtante in the Letters Patents of Q. Eliz. it was reſolved, That it could not take away the Force of the ſaid Acts of Parliament, nor prejudice the Prince that now is of his Right in the ſaid Dukedom.

In this Caſe divers Things were obſerved: 1. That the eldeſt Son of every K. (ſince the ſaid Creation) has been Duke of Cornwall, and ſo allowed to be; as Hen. of Monmouth, firſt begotten Son of Hen. 4. and Henry of Windſor, firſt begotten Son of H. 5. and Ed. of Weſtmin', the firſt begotten Son of Hen. 6. and Edward of Weſtminſter, the firſt begotten Son of Edw. 4. and Arthur of Wincheſter, the firſt begotten Son of Hen. 7. and Edward of Hampton, the firſt begotten Son of Hen. 8. And all theſe have enjoyed the Style, Honour and Poſſeſſions of the ſaid Dutchy of Cornwall, ſo that the Poſſeſſion hath been always, without Interruption, with the firſt begotten Sons of the Kings, ever ſince the ſaid Creation, in 11 Edw. 3. which is about 300 Years: So that after the ſaid Creation there has been never a firſt

liberationem faceret Principi) Rex vel Princeps poteſt replicare ad barra' aliquam per defendentes placitatam; & utraque genera ſunt in lege valida; melior vero formula eſt, quod Attornatus Regius, quouſque liberatio facta ſit, replicaret, ut in caſu ad barram. Et quoad clauſulam de *Non obſtante* in literis patent' Reg' *El.* determinatum fuit, quod non poteſt vim tollere dicto' ſtatutor' Parl' nec præjudicium eſſe Princ' qui nunc eſt, de jure ſuo in dicto Ducatu.

In hoc caſu res diverſæ obſervat' fuerunt. 1. Quod filius primogenitus uniuſcujuſq; regis poſt dict' creationem fuit Dux Cornub', & ſic approbatus, ut *Henr'* de *Monmouth*, primogenitus filius *Hen.* 4. & *Hen.* de *Windſor* primogenitus filius Reg' *Hen.* 5. & *Edw.* de *Weſtm'* primogenitus filius Reg. *H.* 6. & *E.* de *Weſtm'* filius primogenit' Reg' *E.* 4. & *Arthurus* de *Wincheſter* primogenitus filius Regis *H.* 7. & *Ed.* de *Hampton* fil' primogenitus Reg' *Hen.* 8. Et hi omnes gaviſi ſunt Titul', Honor', & Poſſeſſionibus dicti ducatus Cornubiæ; ita quod poſſeſſio ſemper fuerit, ſine interruptione, primogenit' filiis Reg', omni tempore poſt dictam creationem in anno undecimo *Edwardi* 3. qui circa annos eſt trecentos, ita quod poſt illam creationem non unquam fuit filius pri-

primogenitus alicujus Reg' quin Dux fuerit Cornub'. 2. Quod *Ric'us de Burdeaux* qui filius fuit principis Nigri, non fuit dux Cornub' vi dict' creationis: quanquam enim poſt patris ſui obitum hæres Coronæ fuit apparens, eo tamen qd' non fuit filius primogenit' alicujus Regis Angliæ (ejus enim pater obiit vivente Rege *E.* 3.) dict' ille *Richardus* non fuit infra limitationem de 11 *Edw.* 3. & hac de cauſa in ann. 50 *E.* 3. charta ſpeciali creat' fuit dux Cornubiæ. Neque *Elizabetha*, filia primogenita Regis *Ed.* 4. fuit Duciſſa Cornubiæ, illa enim fuit filia primogenita reg. & limitatio eſt, filio primogenito. Neq; *Rex H.* 8. vivente ſuo patre poſt mortem Princip' *Arthri* fratris ſui, non fuit vi dictæ creationis dux Cornubiæ: Quanquam enim ill' fuit ſolus filius & hæres apparens regis *Henrici* 7. eò tamen quod non fuit filius primogenitus non fuit infra dictam limitationem; Princeps enim *Arthurus* filius fuit primogenitus. 3. Magna illa uniuſcujuſque Regis cura & reſpectus (a tempore dictæ Creationis) præſervandi dictum Ducatum filio ſuo primogenito. Et poſt diverſas continuationes, Judicium reddebatur, prout ſequitur.

begotten Son of any King, but he was Duke of Cornwall. 2. That Richard de Burdeaux, who was Son of the Black Prince, was not Duke of Cornwall by Force of the ſaid Creation; for altho' after the Death of his Father he was Heir apparent to the Crown, yet becauſe he was not the firſt begotten Son of any King of England (for his Father died in the Life-time of King Ed. 3.) the ſaid Richard was not within the Limitation of 11 Ed. 3. and therefore in an. 50 E. 3. he was created Duke of Cornwall by a ſpecial Charter: Nor was Elizabeth, the eldeſt Daughter of King Ed. 4. Dutcheſs of Cornwall, for ſhe was the firſt begotten Daughter of the King, and the Limitation is to the firſt begotten Son. Neither was King Hen. 8. in the Life of his Father, after the Death of Prince Arthur his Brother, by Force of the ſaid Creation, Duke of Cornwall; for altho' he was the ſole Son and Heir apparent of Hen. 7. yet foraſmuch as he was not the (a) firſt begotten Son, he was not within the ſaid Limitation; for Prince Arthur was his firſt begotten Son. 3. The great Care and Regard of every King, from the Time of the ſaid Creation, to preſerve the ſaid Dukedom to his firſt begotten Son. And after divers Continuances the Judgment was given as follows.

(a) F. N. B. 82. E.

Whereupon

Whereupon all and ſingular the Premiſſes being ſeen, and fully underſtood by the well-beloved and faithful Counſellor of the ſaid Lord the now King, *Tho.* Ld. *Elleſmere*, Chancellor of *England*, and by the ſaid Court here, and mature and diligent Deliberation and Adviſement being thereupon had by the ſame Ld. Chanc. and the ſaid Court here (together) with *Joh. Popham*, Kt. C. J. of the ſaid Lord the now King, aſſigned for Pleas to be held before the Ld. the King himſelf, *Edw. Coke*, Kt. C. J. of the ſame Ld. the K. of the (Court of) Com. Pleas, *Tho. Flemming*, Kt. Ch. Baron of the Exchequer of the ſame Ld. the King, and *David Williams*, Kt. one of the Juſtices of the ſaid Ld. the King, aſſigned for Pleas to be held before the K. himſelf, It ſeemeth to the ſaid Ld. Chan. and to the ſaid Court here, That the Plea of the aforeſ. *J. Hele* and *War. Hele*, by them above pleaded in Barr, and the Matter in the ſame Plea contained are not ſufficient in Law *to maintain* That the Let. Pat. of the ſaid late Q. *Eliz.* of the aforeſ. Manors of *Weſt Taunton*, *Trelowia* and *Landalph* with their Appurtenances, made in the Form aforeſ. ought to be revoked and cancelled, nor that thoſe Manors with their Appurtenances ought not to be taken and ſeiſed into the Hands of the ſaid Ld. the now K. as the ſaid *H. Hobart*, Att. Gen. of the ſaid Ld. the K. who ſues, *&c.* hath for the ſame Ld. the King thereof (*i.e.* touching the ſame) above alledged, And that the aforeſ. Plea

Super quo viſis & plenius intellectis omnibus & ſingulis præmiſſis per prædilect' & fidelem conſiliar' dicti domini Regis nunc Thomam Dominum Eleſmere *Cancellar' Angliæ & per dictam Cur' hic, habitaq; inde per eund' dom' Cancellar' & dict' Cur' hic matura & diligenti deliberat' & adviſamento cum* Johan' Popham *milit' capitali Juſtic' dicti dom' Regis nunc ad placita coram ipſo dom' Rege tenend' aſſignat'*, Edward' Coke *mil' capitali Juſtic' ipſius dom' Regis de Com. Banco*, Thom' Fleming *milite capitali Barone de Scaccario ejuſdem dom' Reg' &* David' Williams *milite, uno Juſtic' dicti dom' Regis ad placita coram ipſo dom' Rege tenend' aſſignat', videtur eidem dom' Cancellar' & dictæ Cur' hic, Quod placitum præd'* Johan' Hele, *&* Warwici Hele, *per ipſos ſuperius in barram placitat' ac materia in eodem placito content' minus ſufficiens in lege exiſt' ad manutenend', Quod præd' literæ patentes præd' nuper Reg'* Elizabethæ, *de prædict' maneriis de Weſt Taunton, Trelowia, & Landulph præd', cum pertinen', in forma præd' fact', revocari & cancellari, aut quod maneria illa cum pertin' in manus dicti dom' Reg' nunc capi & ſeiſiri non debeant, prout præd'* H. Hobart *Attor' dicti dom' Reg' general' qui &c. pro eod' dom' Reg' ſuper' inde alleg'. Et qd' præd'*

placitum

placitum præd' Hen. Hobart *Attornat' dicti domini Regis nunc generalis, per ipſum pro eodem dom' Reg' modo & forma præd'* (*ad barram præd'* Hen. Lindley) *ſuperius replicand' placitat', ac materia in eodem placito content', ſufficien' in lege exiſtunt ad præcludend' præfat'* Hen. Lindley *a dicendo, quod non habetur aliquod tale record' alicujus talis Actus Parliam' præd' nuper Regis* Edwardi *tertii edit', nec aliquod tale record' præd' chartæ per eundem nuper Reg'* Edwardum *tertium authoritate Parliam' prædicti confect', qual' in prædicto brevi de* Scire facias *inde ſuperius recitatur & ſpecificatur, prout præd'* Henricus Hobart *Attornat' dicti dom' Regis generalis, qui &c. pro eodem dom' Rege ſuperius inde allegavit. Ideo conſideratum & adjudicatum eſt per dictum dominum Cancellar', & per dictam Curiam hic, de Adviſamento prædicto, Quod præd' literæ patentes prædict' nuper Regin' præfatis* Gellio Merick & Hen. Lindley, *ut præfertur, fact' (quoad prædict' maner' de Weſt Taunton, Trelowia, & Landulph prædict', cum pertinen') revocentur, evacuentur, adnullentur, ac vacuæ & invalidæ & pro nullo penitus habeantur & teneantur. Ac etiam quod irrotulament' earundem (quoad eadem maneria) caſſetur cancelletur, & adnihiletur. Quodq; maneria illa cum pertinentiis in manus dicti dom' Regis nunc capiantur & ſeiſientur, ut ea præfato nunc Duci* of the ſaid *Hen. Hobart*, Attor. Gen. of the ſaid Ld. the now K. by him for the ſame Ld. the K. in Manner and Form aforeſaid, (to the Bar of the aforeſ. *Hen. Lindley*) above by replying pleaded, and the Matter in the ſame Plea contained are ſufficient in the Law to preclude the aforeſaid *Hen. Lindly* from ſaying, That there is not any ſuch Record of any ſuch Act of Parl' of the aforeſaid late King *Ed.* 3. made, nor any ſuch Record of the aforeſaid Charter by the ſame late King *Edw.* 3. made by Authority of the aforeſaid Parliament, as in the aforeſaid Writ of *Scire facias* is thereof recited and ſpecified, as the aforeſaid *Hen. Hobart*, Attorney General of the ſaid Lord the King, who ſues, *&c.* for the ſame Ld. the King, hath thereof above alledged: *Therefore it is conſidered and adjudged* by the ſaid Lord Chancellor, and by the ſaid Court here, by the Adviſement aforeſaid, That the aforeſaid Letters Patents of the aforeſaid late Queen (*Elizabeth*) to the aforeſaid *Gellio Merick* and *Hen. Lindley*, made as aforeſaid (as to the ſaid Manors of *Weſt Taunton*, *Trelowia* and *Landalph* aforeſaid, with the Appurtenances) be revoked, vacated and annulled, and had and held as void and invalid, and for a (mere) Nullity; and alſo That the Enrolment thereof as to the ſame Manors, be quaſh'd and annihilated, and that thoſe Manors with the Appurtenances be taken and ſeiſed into the Hands of the ſaid Lord the now King,

That

That the ſame to the aforeſaid now Duke (of *Cornwall*) as a Member and Parcel of his Dutchy aforeſaid, to have and to hold, according to the Form and Effect of the Gift, Grant and Union aforeſaid, may be by the ſaid Lord the now King delivered, *&c.*

(Cornub') *tanquam membrum & parcell' Ducatus ſui prædicti, ſecundum formam & effectum doni, conceſſion', & unionis prædict' habendum & tenendum, per dictum dominum Regem nunc liberentur &c.*

CALYE's

CALYE's *Caſe.*

Paſch. 26 Eliz.

In the King's Bench.

IT was reſolved, *per totam Curiam* this Term, That if a (*a*) Man comes to a common Inn, and delivers his Horſe to the Hoſtler, and requires him to put him to Paſture, which is done accordingly, and the Horſe is ſtol'n, the Innholder ſhall not anſwer for it; for the Words of the Writ, which lieth againſt the Hoſtler are, *Cum ſecundum legem & conſuetud' regni noſtri Angliæ* (*b*) *hoſpitatores qui hoſpitia com' tenent ad hoſpitandos homines, per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes, eorum bona & catalla infra hoſpitia illa exiſtentia abſque ſubtractione ſeu amiſſione cuſtodire die & nocte tenentur, ita quod pro defectu hujuſmodi hoſpitatorum ſeu ſervientum ſuorum hoſpitibus hujuſmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipſius A. precii* 40 s. *infra hoſpitium ejuſdem B.* &c. *inventum, pro defectu ipſius B. ceperunt*, &c. *Vide* Regiſtr' fol. 105. *inter Brevia de Tranſgr'* and *F. N. B.* 94. *a. b.* by which Original Writ (which is in ſuch Caſe the Ground of the Common Law) all the Caſes concerning Hoſtlers may be decided. For, 1. It ought to be a (*c*) Common Inn; for if a Man be lodged with another (who is not an Innholder) upon Requeſt, if he be robbed in his Houſe by the Servants of him who lodged him, or any other, he ſhall not anſwer for it; for the Words are, *Hoſpitatores qui com' hoſpitia tenent*, &c. And ſo are the Books in (*d*) 22 *H.* 6. 21. *b.* (*e*) 38. (*f*) 2 *H.* 4. 7. *b.* (*g*) 11 *H.* 4. 45. *a. b.* (*h*) 42 *Aſſ. pl.* 17. (*i*) 42 *E.* 3. 11. *a.* 10 *El.* (*k*) *Dyer* 266. 5 *Mar. Dyer* 158. (*l*) And the Writ need not mention that the Defen. keeps *Commune Hoſpitium*, for the

(*a*) 1 Rolls 3, 4. 4 Leon. 96. 2 Brownl. 255.

(*b*) Plowd. 9. b. the Regiſter is falſe printed, *ſcilicet, Diſtractione pro Subſtractione.* F. N. B. 94. a & b. Book of Entries, Tit. *Hoſteler*, f. 366 & 377. 1 And. 29. 3 Keb. 73. Dyer 266. b.

(*c*) 1 Rolls 2. d. 1. Dr. & Stud. 137. b. Hob. 245.

(*d*) Fitz. Hoſteler 2. Br. Action ſur le Caſe, 58.
(*e*) 22 H. 6. 38. b. Fitz. Hoſteler 1. Br. Action ſur le Caſe 59.
(*f*) Fitz. Hoſteler 4. Br. Action ſur le Caſe 28. Br. Action ſur le Statute 39. (*g*) Br. Action ſur le Caſe 41. Br. General Brief, 16. Fitz. Hoſteler 5. (*h*) Br. Action ſur le Caſe, 86. Palm. 523. 1 Roll. 3. (*i*) Fitz. Hoſteler, 6. Br. Action ſur le Caſe 15. Statham Action ſur le Caſe 6. (*k*) Dyer 266. pl. 9. Poſtea 33. a. 3 Keb. 73. (*l*) Dyer 158. pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Rolls 3, 4.

the Words of the Writ in the Regiſter are, *infra hoſpitium ejuſdem B.* but it is to be ſo intended in the Writ; for the Recital of the Writ is, *hoſpitatores qui communia hoſpitia teñent*, &c. and the one Part ought to agree with the other, and the latter Words depend on the other, and the Plaintiff ought to *declare* that he keeps *Commune Hoſpitium*: And ſo the ſaid Books in (*a*) 22 *H.* 6. 21. (*b*) 11 *H.* 4. 45. *a. b.* 10 *Eliz. Dyer* (*c*) 266. &c. are well reconciled.

(*a*) Antea 32. a. Fitz. Hoſtler 2. Br. Action ſur le Caſe, 58.

2. The Words are, *ad hoſpitandos homines per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes*; by which it appears that Common Inns are inſtituted for Paſſengers and Wayfaring Men; for the *Latin* Word for an Inn is, *Diverſorium*, becauſe he who lodges there is, *quaſi divertens ſe a via*; and ſo *diverſoriolum*. And therefore if a (*d*) Neighbour, who is no Traveller, as a Friend, at the Requeſt of the Innholder lodges there, and his Goods be ſtoln, *&c.* he ſhall not have an Action; for the Writ is, *ad hoſpitandos homines*, &c. *tranſeuntes in eiſdem hoſpitantes*, &c.

(*b*) 1 Roll. 4. Br. Action ſur le Caſe, 41. Br. Gen. Brief, 16. Fitz. Hoſteler, 5. (*c*) Antea 32. a. Dyer 266. pl. 9. Poſtea 33. a. 3 Keb. 73. (*d*) 1 Roll. 3 E. 4. 2 Brown. 254.

3. The Words are, *eorum bona & catalla infra hoſpitia illa exiſtentia*, &c. So that the Innholder, by Law, ſhall anſwer for nothing that is out of his Inn, but only for thoſe Things which are *infra hoſpitium*. And becauſe the Horſe, which at the Requeſt of the Owner is put to Paſture, is not *infra hoſpitium*, for this Reaſon the Innholder is not bound by Law to anſwer for him, if he be ſtoln out of the Paſture; for the Thing with which the Hoſtler ſhall be charged ought to be *infra hoſpitium*; and therewith agrees the Books in (*e*) 11 *Hen.* 4. 45. *a. b.* (*f*) 22 *Hen.* 6. 21. *b.* (*g*) 42 *E.* 3. 11. *a. b.* 42 *Aſſ. pl.* 17. where *Knivet* C. J. ſaith, That the Innholder is bound to anſwer for himſelf, and for his Family, of the Chambers and Stables, for they are *infra hoſpitium*: And with this Reſolution in this Point agreed the Opinion of the Juſtices of Aſſiſe (*viz.* the two Chief Juſtices, *Wray* and *Anderſon*) in the County of *Suffolk* in Lent Vacation, 26 *El.* That if an (*h*) Innholder lodges a Man and his Horſe, and the Owner requires the Horſe to be put to Paſture, and there he is ſtoln, the Innholder ſhall not anſwer for him. (*i*) But it was held by them, That if the Owner doth not require it, but the Innholder, of his own Head puts his Gueſt's Horſe to Graſs, he ſhall anſwer for him if he be ſtoln, *&c.* And it is to be obſerved, that this Word *Hoſtler* is derived *ab Hoſtle*; and *Hoſpitator*, which is uſed in Writs for an Innholdor, is derived *ab Hoſpitio*, and *hoſpes eſt quaſi Hoſpitium petens*.

(*e*) 1 Rolls 4. Supra in a. (*f*) Antea 32. a. (*g*) Antea 32. a.

(*h*) 1 Rolls 3, 4. 4 Leon. 96. 2 Brownl. 255. Antea 32. a.

(*i*) 1 Rolls 3, 4. 4 Leon. 96. 2 Brownl. 255.

4. The Words are, *Ita quod pro defectu hoſpitator', ſeu ſervientium ſuorum, &c. hoſpitibus hujuſmodi damn' non eveniat, &c.* by which it appears, that the Innholder ſhall not be charged, unleſs there be a Default in him or his Servants, in the well and ſafe Keeping and Cuſtody of their Gueſt's Goods and Chattels within his common Inn; for the Inn-keeper is bound in Law to keep them ſafe without any Stealing or Purloining; and it is no Excuſe for the Inn-keeper to ſay, that he deliver'd the (*a*) Gueſt the Key of the Chamber-door in which he is lodged, and that he left the Chamber-door open; but he ought to keep the Goods and Chattels of his Gueſt there in Safety; and therewith agrees 22 *H.* 6. 21. *b.* 11 *H.* 4. 45. *a.b.* 42 *Edw.* 3. 11. *a.* And altho' the Gueſt doth not deliver his Goods to the Inn-holder to keep, nor acquaints him with them, yet if they be carry'd away, or ſtolen, the Inn-keeper ſhall be charged, and therewith agrees 42 *Edw.* 3. 11. *a.* And altho' they who ſtole or carried away the Goods be unknown, yet the Inn-keeper ſhall be charged, 22 *H.* 6. 38. 8 *Rich.* 2. *Hoſtler* 7. *Vide* 22 *H.* 6. 21. But if the Gueſt's Servant, or he who (*b*) comes with him, or he whom he deſires to be lodg'd with him, ſteals or carries away his Goods, the Inn-keeper ſhall not be charged; for there the Fault is in the Gueſt to have ſuch Companion or Servant; and the Words of the Writ are, *pro defectu hoſpitator' ſeu ſervientium ſuorum. Vide* 22 *H.* 6. 21. *b.* But if the Inn-keeper appoints one to lodge with him, he ſhall anſwer for him, as it there appears. The Inn-keeper (*c*) requires his Gueſt that he will put his Goods in ſuch a Chamber under Lock and Key, and then he will warrant them, otherwiſe not, the Gueſt lets them lie in an outward Court, where they are taken away, the Inn-keeper ſhall not * be charged, for the Fault is in the Gueſt, as it is held 10 *Eliz.* (*d*) *Dyer* 266.

(*a*) Moor 78. pl. 207. 158. pl. 299. 2 Brownl. 255.

(*b*) Cro. El. 285.

(*c*) Moor 158.

* Vide Salk. 18.

(*d*) Antea 32. a. b.

5. The Words are, *hoſpitibus damnum non eveniat:* Theſe Words are general, and yet foraſmuch as they depend on the precedent Words they will produce two Effects, *viz.* 1. They illuſtrate the firſt Words. 2. They are reſtrain'd by them: For the firſt Words are, *Eorum bona & catal' infra hoſpitia illa exiſtentia abſque ſubtractione cuſtodire, &c.* which Words (*bona & catalla*) by the ſaid Words, *ita quod, &c. hoſpitibus damnum non eveniat,* altho' they don't of their proper Nature extend to (*e*) Charters and Evidences concerning Freehold or Inheritance, or (*f*) Obligations, or other Deeds or Specialties; being Things in Action, yet in this Caſe it is expounded by the latter Words to extend to them; for by them great Damages happen to the Gueſt: And therefore, if one brings a Bag or Cheſt, *&c.* of Evidences into the Inn, or Obligations, Deeds or other Specialties, and by Default of the Inn-keeper they are taken away, the Inn-keeper ſhall anſwer for them, and the Writ ſhall be *bona & catalla* generally; and the Declaration ſhall be ſpecial. 2. Theſe Words, *bona & catalla,* reſtrain the latter

(*e*) 2 Roll. 58. 22 E. 4. 12. a. b.

(*f*) Dyer 5. pl. 2. 2 Rolls 58. Yelv. 68.

Words to extend only to Moveables: And therefore by the latter Words, If the Gueſt be beaten in the Inn, the Inn-keeper ſhall not anſwer for it; for the Injury ought to be done to his Moveables which he brings with him; and by the Words of the Writ, the Inn-holder ought to keep the Goods and Chattels of his Gueſt, and not his Perſon; and yet in ſuch Caſe of Battery, *hoſpiti damnum evenit*, but that is reſtrained by the former Words, as hath been ſaid. And theſe Words aforeſaid, *abſque ſubtractione ſeu amiſſione*, extend to all moveable Goods, although of them Felony cannot be committed; for the Words are not, *abſque felonica captione*, &c. but *abſque ſubtractione*, which may extend to any Moveables, although of them *(a)* Felony cannot be committed, as of Charters, Evidences, Obligations, Deeds, Specialties, &c.

(a) Inſt. 109. 10 E. 4. 14. a. Fitz. Endict. 19. Br. Coron. 155.

PAINE's

PAINE's *Caſe.*

Trin. 29 Eliz. *Rot.* 721.

In the Common Pleas.

BEtween *(a) Paine*, Plaintiff in Treſpaſs, and *Sammes* and *Tanner*, Defendants, for Treſpaſs done in Lands in *B.* in the County of *Eſſex*; on Not-Guilty pleaded, the Jurors gave a Special Verdict to this Effect: A Man hath Iſſue two Daughters, the ſaid Lands in which, *&c.* were given to the elder Daughter, and to the Heirs of her Body begotten, the Remainder to the younger Daughter, and to the Heirs of her Body, *&c.* The elder Daughter took to Huſband the ſaid *Sammes*, one of the Defendants, who had Iſſue, which was heard cry, and died, and afterwards the elder Daughter died without Iſſue; after whoſe Death the ſaid *Sammes* held himſelf in, claiming to be Tenant by the Courteſy, upon whom the younger Daughter enter'd, and the ſaid *Sammes* and *Tanner*, as Servant to him, re-enter'd; upon which Re-entry the younger Siſter brought the ſaid Action of Treſpaſs: And it was objected for the Plaintiff, that the Huſband in this Caſe ſhould not be Tenant by the Curteſy, becauſe the Eſtate of the Wife was determined, and the Eſtate of the Huſband, which was deriv'd out of the Eſtate of the Wife, could not continue longer that the Primitive Eſtate endured; for *ceſſante ſtatu primitivo ceſſat derivatus*; and therefore if *(b)* Tenant in Tail makes a Leaſe for Lives, according to the Stat. of 32 *H.* 8. *cap.* 28. and afterwards dies without Iſſue, this Leaſe being deriv'd out of the Eſtate Tail, ſhall not continue longer than the Eſtate Tail, againſt the Opinion in 33 *H.* 8. 48. *a. Dyer, quod fuit conceſſum per totam Curiam.* And when the Wife dies without Iſſue, he in Remainder ſhall enter by Force of an immediate Gift to him, and his Iſſue ſhall have a Formedon in the Deſcender upon an immediate Gift;

(a) 1 Ander. 184, 185. 1 Leon. 167, 168. Goldſb. 81, 82.

(b) Co. Lit. 45. b. Noy b. 2 Rol. Rep. 491. Dyer 49. pl. 6. 1 E. 6. Br. Accept. 19. B. N. C. 370.

and it is not like the Caſe of Dower; for the Wife ſhall be endowed altho' ſhe hath no Iſſue; and theref. altho' the Eſtate determines or not, for Want of Iſſue, yet the Wife by the Law ſhall be endowed; but a Man ſhall not be Ten. by the Curteſy unleſs he hath Iſſue, nor if he hath Iſſue, unleſs the ſame Iſſue, or ſome other, ſupport the Eſtate which he ſhall hold by the Curteſy; and Dower is more favour'd than the Eſtate of a Ten. by the Curteſy; for a Woman ſhall be endow'd of Lands where the Huſb. had but a Seiſin in (*a*) Law; but a Man ſhall not be Tenant by the Curteſy of Land unleſs the Wife was (*b*) actually ſeiſed in Deed. To which it was anſwer'd and reſolv'd by the whole Court, That at the Com. Law, if (*c*) Lands had been given to a Woman, and the Heirs of her Body, and ſhe had taken a Huſb. and had Iſſue, and the Iſſue died, and the Wife alſo without Iſſue, whereby the Inher. of the Land did revert to the Donor, in that Caſe the Eſtate of the Wife is determin'd, and yet the Huſb. ſhall be Ten. by the Curteſy, for that is *tacite* implied in the Gift. It is adjudg'd in 21 *H.* 3. (*d*) *Dower* 198. That if a Man hath Iſſue by a Wo. Inheritrix, which is dead, which Iſſue might inherit the Land, he ſhall be Ten. by the Curteſy, altho' the Wife, by a former Huſb. have Iſſue inheritable, and altho' that Iſſue be dead. And therewith *Lit.* agrees, *lib.* 1. *cap. Dower*, *fol.* 10. *b.* (*e*) In every Caſe, where a Man takes a Wife ſeiſed of ſuch Eſtate for the Tenem. ſo that the Iſſue which he hath by his Wife might, by Poſſibility, inherit the ſame Tenem. of ſuch Eſtate as the Wife hath, as Heir to the Wife, in ſuch Caſe, after the Death of the Wife, he ſhall have the ſame Lands by the Curteſy of *Eng.* otherwiſe not. By which Maxim it appears, that the Seiſin of the Wife ought to be of ſuch Inherit. which ought to have this Incident amongſt others, that the Iſſue which the Huſband ſhall have by her, may, by Poſſibility, inherit; and that may fail, either in Reſpect of the Iſſue, or in Reſpect of the Manner of Inherit. In Reſpect of the Iſſue, if it be born dead. And theref. *Glanvil, l.* 7. *c.* 18. *Si ex uxore ſua hæred' habuerit filium vel filiam clamantem & auditum infra quatuor parietes, &c. Et* Bract. *l.* 5. *de except'*, c. 30. f. 437, 438. *Si quis uxor' duxerit habentem hæredit' vel maritagium, vel aliquam terram cauſa donationis, ſi liberos int' ſe habuerit ex juſtis nuptiis procreat', ſi uxor' præmoriat', remanebit viro hæredit' & terra ſua tota vita ipſius viri, ſive ſuperſt' fuerit liberi ſive mortui, dum tamen ſemel aut vocem aut clamorem diſmiſerint, quod audiatur int' quatuor parietes, ſi hoc probet': Et licet partus moriat' in ipſo partu, vel vivus naſcat', vel forte ſemimortuus, licet vocem non emiſerit, ſolent obſtetrices in fraud' veri hæred' proteſtari partum vivum naſci & legitim' & ideo neceſſe eſt vocem probare; & licet naturalit' mutus naſcatur & ſurdus, tamen clamorem emittere debet, ſive maſculus ſit ſive fœmina (unde verſus) Nam dicunt* E. *vel* A. *quotquot naſcuntur ab Eva.* And *Fleta, lib.* 6. *cap.* 56. and he agrees with *Bracton, fere eiſdem verbis.* So that *Litt. lib.* 1. *cap.* 4. *fol.* 7. *b.* might well ſay, (*) Some have ſaid, That he ſhall not be Tenant by the Curteſy unleſs the Child which he hath

(*a*) Co. Lit. 31. a. 358. b. F. N. B. 149. d. Perk. §. 304. Pr. & Stud. 84. a.

(*b*) Co. Lit. 29. a. 40. a. Perk. §. 457.

(*c*) Co. Lit. 30. a.

(*d*) Co. Lit. 30. a. Perk. §. 466.

(*e*) Co. Lit. 40. a. Lit. §. 52.

(*) Lit. §. 35. Co. Lit. 29. a. 30. a.

hath by his Wife be heard (*a*) to cry; for by the Cry it is proved, that the Child was alive; *ideo quære*, But he ſaith before in the ſame Chapter, If the Huſband have Iſſue crying, or alive, ſo that in his Opinion the Crying is not neceſſary; for it is true, if the Iſſue be born alive, it ſufficeth, and the Crying of the Child is but a Proof that it is alive: And this is well prov'd by the Form of Pleading (which is the ſtrongeſt Proof in Law) for the Pleading in ſuch Caſe is, *Quod quæd' A. G. fuit ſeiſit' de tenement' præd' in d'nico ſuo ut de feodo, & ſic inde ſeiſit' cepit in vir' J. W. per quod iidem J. & A. fuer' ſeiſit' de tenement' præd' cum pert' in d'nico ſuo ut de feodo in jure ipſius A. ipſiq; ſic inde ſeiſiti exiſtent' habuer' exitum inter eos, &c. poſteaq; præd' A. uxor' præd' J. obiit, idemq; J. ipſam ſupervix', & ſe ten' in tenem' præd' ac inde fuit ſeiſit' in d'nico ſuo, ut de lib' tenem', ut tenens inde per leg' Angl'.* And if in that Caſe Iſſue be taken, *quod non habuer' exitum, &c.* the Effect of the Iſſue ſhall be, whether they had Iſſue born alive, *quia mortuus exitus non eſt exitus*; and the Crying is but a Proof of the Life. *Vide* 28 *H.* 8. (*c*) *Dyer* 25. But in the Caſe at Bar, to remove all Scruples, it was found that the Iſſue was heard cry. And in this Caſe it was well obſerv'd, that *Glanvil*, *Bracton*, *Britton*, and *Fleta*, may be vouched for Antiquity and Ornament in Caſes where they concur with the later Authority of Law, and do not impunge the common Experience and Allowance in judicial Proceedings at this Day. 2. If a Wife be delivered of a (*e*) Monſter, which hath not the Shape of Mankind, it is no Iſſue in the Law; but altho' the Iſſue have ſome (*f*) Deformity or Defect in the Hand or Foot, and yet hath human Shape, it ſufficeth; and therewith agrees *Bracton ubi ſupra. Item, ſi cum partum ediderit, tamen prius declin' ad monſt', & cum clam' emitt' deber', emitt' rugit', & hinc videt' quod ten' non debet exceptio* (i. e. *ten' non debet per leg' angl'*) *quia partus monſtr' eſt cum non naſcat' ut homo; Sed non dico part' monſtr' licet natura memb' minuer' vel ampliaverit, minuer', ut in defect' digitor' vel hujuſmodi, ampliaverit, ut ſi plur' digitos vel articul' ſicut ſex vel plures, ubi non debet hab' niſi quinq; ſi inutila natura redd' memb', ut ſi curvus fuer', vel gibboſus, vel memb' tortuoſa habuer'.* 3. In ſome Caſe the Time of the Birth is material, and in ſome not; and therefore when the Lord *Dyer* was Serjeant, he was (as he himſelf ſaid in the Common Pleas) of Counſel with this Caſe: One *Reppes* of *Norfolk*, took to Wife an Inheritrix, who was great with Child by him, and died in her Travail, and the Iſſue was (*g*) ripped out of her Belly alive, and by Reference out of the Chancery to the Juſtice, they reſolved, That he ſhould not be Tenant by the Curteſy, for it ought to begin by the Birth of the Iſſue, and be conſummated by the Death of the Wife,

(*a*) 1 And. 35. Perk. §. 471. Co. Lit. 29. b. 30. a. Dyer 25. pl. 159. O.Ben.25.pl.103.

(*b*) Co. Lit.29.b.

(*c*) Dyer 25. pl. 159. O.Ben.25.pl.103. 1 And. 35.

(*d*) 10 Co. 73. a. Plowd. 357. a.

(*e*) Co.Lit. 29. b.

(*f*) Co.Lit. 29.b.

(*g*) Co.Lit. 29. b.

and the Eſtate of Tenant by the Curteſy ought to take away
(a) Co.Lit. 29. b. the immediate Deſcent. But if a (*a*) Man hath Iſſue by his Wife, and afterwards Land deſcends to the Wife, be the Iſſue alive or dead at the Time of the Deſcent, he ſhall be Tenant by the Curteſy, for the Time of the Birth of the Iſſue is not material, if it be in the Life of the Wife. 4. In re-
(b) Co.Lit. 29. b. ſpect of the Manner of Inheritance; as if (*b*) Lands be given to a Woman, and the Heirs Males of her Body, and ſhe takes a Huſband, and hath Iſſue a Daughter, the Huſband ſhall not be Tenant by the Curteſy; for the Iſſue cannot by any Poſſibility inherit the ſame Lands; and ſo out of the Rule of *Littl.* and of the Judgment in 21 *H.* 3. And at the
(c) Perk. §. 465. Com. Law, (*c*) if Lands had been given to Huſband and Wife, and to the Heirs of their two Bodies begotten, and they had Iſſue, and the Huſband died, and ſhe took another Huſband, and had Iſſue, the ſecond Huſband ſhould be Tenant by the
(*) Poſtea 36. a. Curteſy; and ſo is it adjudged in * 30 *E.* 1. *Form.* 66. which proves that the Iſſue by the 2d Huſb. might poſſibly inherit;
(d) Co.Lit. 19. a. 1 Roll. 840. 2 Inſt. 334. for at the Common Law after Iſſue, it was taken to (*d*) three Purpoſes, that the Tenant in Tail had a full Fee-ſimple, 1. To alien. 2. To forfeit it by Attainder of Felony, as the Book is in 7 *E.* 3. 6, & 7. b. So that altho' the Tenant in Tail afterwards died without Iſſue, the Land ſhould not revert to the Donor. 3. That the Tenant in ſpecial Tail, by having Iſſue, had a full Fee-ſimple to make the Lands deſcendable to her
(e) Co. Lit. 19. a. Iſſues by any other Huſband; for as by her (*e*) Alienation, ſhe might make Strangers to the Blood to be abſolutely inheritable; ſo by Conſtruction of Law, after Iſſue had, all lineal Heirs of her Body, by what Huſband ſoever they were begotten, ſhould inherit to her, as a Benefit and Incident *tacite* annexed to her Eſtate by the Law; for it was ſaid, that by the having of Iſſue, it was a Gift and Diſpoſition in Law to the Huſband for his Life; which Diſpoſition and Alteration of the Eſtate, altho' it be for Life, *tacite* as an Incident to it, makes the Iſſue of the ſecond Huſband inheritable. As if a
(f) Co.Lit. 15. a. (*f*) Man hath Iſſue a Son and a Daughter by one *venter*, and a Son by another *venter*, and dies, if the elder Son makes a Leaſe for Life, againſt whom the Wife of the Father recovers Dower, and afterwards the elder Son dies, the Siſter ſhall have the Reverſion in Fee, becauſe the elder Son hath alter'd the Reverſion by his Leaſe for Life, and the Tenant in Dower leaves the Reverſion in the Leſſee for Life, *Vide* 7 *H.* 5. 4. But that the Iſſue of the ſecond Huſband ſhall inherit in ſuch Caſe, is directly prov'd by the Statute *de Donis*
(g) 2 Inſt. 336. *conditionalibus*, (*g*) *Nec habeat de cætero ſecundus vir hujuſmodi mulieris aliquid in tenemento ſic dato per conditionem poſt mortem uxoris ſuæ per legem Angliæ, nec exitus de ſecundo viro & muliere ſucceſſionem hæred*': For if the Iſſue of the ſecond Huſb. ſhall not inherit, the ſecond Huſb. ſhall not be Tenant by the Curteſy; as it was adjudg'd in the ſaid Caſe in 21 *H.* 3. And *Fleta*, *ubi ſupra*, ſaith, *Lex tamen iſta ad ſecun-*

dos vires non extenditur, eo quod palam inhibetur per ſtatutum: But after Iſſue had, the Tenant in Tail at the Common Law had not ſuch a Fee-ſimple, that his (*a*) collateral Heir which is not Heir of his Body, ſhould inherit. And if Land were given before the Statute to Huſband and Wife, and the Heirs of their two Bodies, and they have Iſſue, and the Wife dies, and the Huſband takes another Wife, ſhe ſhall be endowed as it is held in 12 *H.* 4. 2. *Markham's* Caſe; and by Conſequence the Iſſue, which ſhe by Poſſibility might have, ſhall inherit the Land. And *vide Fitz. Tit. Tail* 2. and mark the Agreement of the Law in both the ſaid Caſes. And where *Littleton* ſaith, (*b*) as Heir to the Wife, theſe Words are very material; for that is the true Reaſon, that a Man ſhall not be Tenant by the Curteſy of a Seiſin in Law, for in ſuch Caſe the Iſſue ought to make himſelf Heir to him who was laſt actually ſeiſed, *&c.* *Vide* 11 *H.* 4. 11. 40 *E.* 3. 9, *&c.* And the Tenant by the Curteſy ſhall be attendant to the Lord paramount, which he cannot be, becauſe the Wife died before ſhe was actually ſeiſed: But Tenant in Dower ſhall not be (*c*) Attendant to Lord paramount, but to the Heir, and therefore ſhe ſhall be endowed of a Seiſin in Law. And the Caſe at Bar is directly within the ſaid Maxim, for the Iſſue of the Huſband which he had by his Wife, might by Poſſibility have inherited the Wife. 2. It appears, That at the Common Law the Huſband ſhall be Tenant by the Curteſy, if he hath Iſſue, altho' afterwards the Wife dies without Iſſue, as it is adjudg'd in (*d*) 30 *E.* 1. *ubi ſupra*, and this Caſe is not reſtrained by the Stat. aforeſaid. 3 *Litt. lib.* 1. *cap.* 4. *fol.* 7. agrees with this Judgment, for he ſaith, That (*e*) Tenant by the Curteſy of *England* is, where a Man takes a Wife ſeiſed in Fee-ſimple, or in Fee-tail general, or as Heir of the ſpecial Tail, and hath Iſſue by the ſame Woman, Male or Female, heard or alive, be the Iſſue afterwards dead *(note that)* or alive, if the Wife dies, the Huſband ſhall hold the Land during his Life, by the Curteſy of *England*. So that it appears by him that it is not material whether the Eſtate Tail continues or not. 4. It appears, That the true Reaſon of *Dower*, and the Reaſon of this Caſe, *(ſcilicet)* the Poſſibility of the Iſſue to inherit, *&c.* are all one. And if (*f*) Tenant in Tail takes a Huſband, and hath Iſſue and dies, now the Huſband is Tenant by the Curteſy; and altho' afterwards the Iſſue dies without Iſſue, ſo that the Eſtate Tail is determined, yet his Eſtate ſhall continue, for it is not deriv'd merely out of the Eſtate of the Wife, but is created by the Law, by Privilege and Benefit of Law *tacite* annexed to the Gift.

(*a*) Co. Lit. 19. a.

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

(*c*) 9 Co. 135. b. 1 Rol. 685.

(*d*) Antea 35. b.

(*e*) Co. Lit. 29. a. Lit. §. 35.

(*f*) Co. Lit. 30. a.

The Case of BARRETRY.

Paschæ 30 Eliz.

NOTA, On Evidence upon a Traverse of an Indictment of Barretry, it was held *per Curiam*, that a common (*a*) Barretor is a common Mover or Stirrer up, or Maintainer of Suits, Quarrels, or Parties, either in Courts or in the Country: In Courts of Record, and in the County, Hundred, and other inferior Courts: In the Country in (*b*) three Manners: 1. In Disturbance of the Peace. 2. In taking or detaining of the Possession of Houses, Lands, or Goods, &c. which are in Question or Controversy, not only by Force, but also by Subtilty and Deceit, and for the most Part in Suppression of Truth and Right. 3. By false Invention, and sowing of Calumny, Rumours and Reports, whereby Discord and Disquiet arise between Neighbours. And all the said Qualities of a common Barretor are proved by the Indictment of one for Barretry, and by our Books: For first it is said in the Indictment, *Quod est communis Barrettator*, within which Word is included a Quarreller in his own Cause, and a Mover or Maintainer of Quarrels between others, for the most Part in Suppression of Truth and Right: And this appears by the Statute of *Westm.* 1. (*c*) *cap.* 33. It is provided, That no Sheriff suffer any Barretors or Maintainers of Quarrels in their County-Courts, &c. In 40 *Edw.* 3. 33. *b.* the (*d*) Plaintiff counted in a *Decies tantum*, that the Recognitors in an Assise took of certain People who were Barretors and Embracers of the said Suit, *scilicet*, of every one 20 *s.* which was in a Cause depending in a Court of Record. The Stat. of (*e*) *Ragman* the King wills and enjoins the Justices, that none in complaining nor in answering, be

(*a*) Co. Lit. 368. a. 3 Inst. 175.

(*b*) Co. Lit. 368. a. b.

(*c*) 2 Inst. 225.

(*d*) Fitz. Decies tantum 8. Br. Decies tantum 3.

(*e*) 3 Inst. 175.

be not ſurpriſed nor encompaſſed by (*a*) Hocketters or Barretors; that the Truth be not followed, and the Treſpaſſes remain unpuniſhed. And the Stat. of *Weſt.* 1. *c.* 6. (*b*) 18. Foraſmuch as the common Fine and Amerciament of the whole County in Eyre of the Juſtices for falſe Judgments, and other Treſpaſſes, is unjuſtly aſſeſſed by Sheriffs and Barretors of the Counties, ſo that the Sum is many times increaſed, and the Parcels otherwiſe aſſeſſed than they ought to be, to the Damage of the People. And that will be ſufficient to excite or maintain Quarrels in Courts: And for moving or maintaining Quarrels in the Country, *Littleton, lib.* 3. *cap. Warranty, fol.* 158. If (*c*) *A. de B.* be ſeiſed of a Houſe, and *F. de G.* who hath no Right, enters in the ſame Houſe, claiming the Houſe to him and his Heirs; but the ſaid *A.* continually dwells in the ſaid Houſe; in that Caſe the Poſſeſſion of the Freehold ſhall be continually adjudg'd in *A. &c.* But if the ſaid *F. G.* makes a Feoffment to certain Barretors in the Country, to have Maintenance of them in the ſame Houſe, by a Deed of Feoffment with Warranty, by Force whereof *A. de B.* dares not ſtay in the ſaid Houſe, but goes out of it, *&c.* this Warranty commences by Diſſeiſin. By all which, and by many other Authorities which might be cited, it appears, That a common Barretor is a common Mover or Maintainer of Quarrels, either in Courts, or in the Country. If it be aſked why this Buſy-Body is called Barretor? Some derive a (*d*) Barretor from the *French* Word (*Barrateur*) which ſignifies a Deceiver: Others from the *Latin* Word (*Baratro*) which ſignifies a vile Knave, or Unthrift: Others, becauſe they maintain Pleas at Bars in Courts, or ſtir Cauſes of Suits, derive this Word (*Barretor*) from two legal Words; (*Barra*) which ſignifies the Bar in Courts, where Cauſes are debated, *&c.* and (*Rettum*) which, as appears in the Writ *de Homine Replegiando*, in the *Regiſter*, ſignifies a Crime or Offence; and becauſe a common Barretor is principally an Offender in moving or maintaining of Quarrels at Bars, *ſcil.* in Courts, or in the Country, which are Cauſes of Suits in Courts, he is called a Barretor, or bar Offender. In the Civil Law, *Barrataria dicitur quando Judex petit aliquid idebitum ut Juſtitiam faciat.* But in the Law of *England*, this Word (*Barrett*) doth ſignify a Quarrel, whence he who moves or maintains Quarrels is called a Barretor, and it is ſo expounded by the whole Parliament, in 33 *E.* 1. *in Stat' de Conſpir'* where the Act ſaith; Stewards and Bailiffs of Great Lords, who by their Seigniory, Office, or Power, take upon them to maintain or ſuſtain Pleas or Barrets, for other Parties than thoſe

(*a*) 3 Inſt. 175. b.

(*b*) Poſtea 39. b. 2 Inſt. 196, 197.

(*c*) Lit. 158. b. 159. a. Sect. 701. Co. Lit. 368. a. b.

(*d*) Co. Lit. 368. b.

those which touch their Lords or themselves. Where it is manifest, that Barrets signifies Quarrels; but he ought to be *Communis Barrectator, scil.* not in one or two, but in many Causes, so that he may be proved a common Barretor. 2. The Words of the Indictment are, *Pacis Domini Regis Perturbator, scil.* a common Mover or Maintainer of Brawls and Frays, by which the Peace is broken. The other Words of the Indictment are, *Communis Malefactor, Calumniator, & Seminator litium & discordiarum inter vicinos suos:* Malefactor, because he willingly and maliciously doth Wrong to his Neighbours, either openly after Warning, or secretly, as in the Night, *&c. quia (a) qui male agit odit lucem: Calumniator*, so called, because by false and malicious Scandals, he endeavours to rob his Neighbour of his good Name, which is a great Motive of Discords and Quarrels, and is against the Law of God, *Levit.* 19. *Non facias Calumniam proximo tuo: Seminator litium & discordiarum inter vicinos*; and from such Seeds presently grow up many ill Herbs, *Inimicus homo superseminavit zizania.* And that is against the Commonwealth; for *(b) Expedit reipublicæ, ut sit finis litium.* And this Barretor is *Seminator litium, &c.* and that is likewise against the Law of God, *Levit.* 19. *Non eris susurro in populo.* In ancient Indictments, after these Words, *Pacis Domini Regis Perturbator*, these Words are added, *& Oppressor vicinorum suorum*, and that is either by Force, as in the Case of *Littleton*, in taking or keeping of Possession, or by Fraud and Malice, under Colour of Law, as by Multiplicity of unjust and feigned Suits, or by Information on Penal Laws, either in his own Case, or in malicious bringing of a special *Supplicavit*, or *Latitat*, of the Peace; and all this by Fraud and Malice, to enforce the poor Party *ad redimendam vexationem*, to give him Money, or to make other Composition; and this is the most dangerous Oppressor, for he oppresses the Innocent by Colour and Countenance of the Law, which was instituted to protect the Innocent from all Oppression and Wrong: And therefore the said Words in the old Indictments (if the Truth of the Case be such) are material to be inserted in the Indictment of Barretry.

(a) 9 Co. 66. a. Postea 127. a.

(b) 5 Co. 73. a. 6 Co. 7. a. 9 Co. 79. b. Postea 98. b. Co. Lit. 103. a. 2 Inst. 411.

GRIESLEY's *Caſe.*

Trin. 30 Eliz. *Rot.* 1012.

In the Common Pleas.

IN a Replevin brought by *Thomas Kingſton* againſt *Richard Baily* the Elder, and *Richard Baily* the Younger, in a Place called *Stockings* in *Kingſton*, in the County of *Stafford*; the Defendants, as Bailiffs to *Thomas Grieſley*, Eſq; did acknowledge the taking of the ſaid Cattle in the ſaid Place, where, *&c.* For they ſaid, That the ſaid Place, where, *&c.* contained ſix Acres; and that the ſaid *Thomas Grieſley* was ſeiſed of the Manor of *Kingſton*, within which Manor, the ſaid Place where, *&c.* is, in his Demeſne as of Fee, and preſcribed to have *Curiam viſus franc' pleg' coram ſeneſchallo ſuo infra manerium illud tenend' bis per annum, viz. ſemel infra menſem proximum poſt feſtum Paſchæ, & iterum infra menſem proximum poſt feſtum Sancti Michaelis Archangeli de omnibus inhabitantibus & reſidentibus infra manerium prædict' tanquam ad manerium illud pertin': Quodque infra manerium præd' habetur, & a tempore cujus contrarii memoria hominum non exiſtit, habebatur talis conſuetudo, quod inhabitantes & reſidentes infra manerium præd' ad inquirendum & præſentandum ea quæ ad viſum fran' plegii pertinent onerati & jurati, annuatim ad Curiam viſ' franc' plegii illius apud manerium illud, infra menſem proxim' poſt feſtum Sancti Michaelis Archangeli tent', elegerunt & eligere conſueverunt unum idoneum hominem de inhabitantibus infra manerium prædict' ad eſſendum Conſtabularium de Kingſton pro ann' tunc proximum ſequen', qui quidem homo ſic electus officium*

Co. Ent. 573. pl. 2. Sav. 93, 94.

cium illud pro uno anno exercere per totum tempus præd' conſuevit, & ſi præſens fuerit hujuſmodi electioni tunc per totum tempus præd' jurari conſuevit per ſeneſchallum curiæ præd' in aperta curia ad officium illud exercendum. And that at the Court of View of Frankpledge held at the ſaid Manor, 5 *Octob.* 28 *Eliz.* before *John Newport*, then Steward of the ſaid *Thomas Grieſley* of the ſaid Court, the ſaid *Thomas Kingſton* being an Inhabitant within the ſaid Manor, was, according to the ſaid Cuſtom, choſen to be Conſtable of *Kingſton, præd' pro uno an' tunc proxim' ſequen'* by the Jurors and Preſenters of the ſaid Court, and he being preſent in Court, was charged by the ſaid Steward to take the ſaid Oath, which he utterly refuſed to do, and departed in Contempt of the Court, *ob quod præd' Johannes Newport, adtunc ſeneſchallus ejuſdem Curiæ finem centum Solidorum ſuper præd' Thom' Kingſton adtunc in eadem Curia impoſuit.* And becauſe the ſaid Fine of 5 *l.* was not paid to the ſaid *Tho. Grieſley*, the Defendants made Conuſans, as Bailiffs of the ſaid *Tho. Grieſley*, of the Diſtreſs of the Plaintiff's Cattle, in the Place where, *&c.* upon which the Plaintiff did demur in Law: And in this Caſe theſe Queſtions were moved and debated; 1. Whether the Steward might impoſe a Fine in this Caſe. 2. Whether this Fine ought to be affered or not. 3. Whether the Lord of the Leet might diſtrain for ſuch Fine, without a Cuſtom enabling him ſo to do. As to the firſt it was reſolved, *per totam Curiam*, That if any Contempt or Diſturbance to the Court be committed in any Court of Record, that the Judges might ſet upon the Offender a reaſonable Fine, and a Leet is a Court of Record, and the Steward is Judge there; and therefore, if any Contempt *(a)* or Diſturbance to the Court be made before him, he may ſet a reaſonable Fine upon the Offenders; As if the Bailiff of a Leet refuſes in Court to execute his Office, the Steward may ſet a reaſonable Fine upon him; and therewith agrees the Book in *(b)* 7 *H.* 6. 12. *b.* So if a Tithingman refuſes to make a Preſentment in a Leet, the Steward ſhall ſet a reaſonable Fine upon him, as it is held in *(c)* 10 *H.* 6. 7. *a.* So if one of the Jurors in a Leet departs without giving his Verdict, he ſhall be fined by the Steward, as appears in the Book of *Entries*, Title *Amerciament in Debt, fol.* 149. *Et ſic de Similib'.* But Courts which are not of Record, cannot impoſe a Fine, or commit any to Priſon. As to the ſecond, it was objected, That the Fine in the Caſe at Bar ought to be affered; and to prove that, the Statute of *Magna Charta, cap.* 14. *Liber homo non amercietur pro parvo Delicto niſi (d) ſecundum modum illi' delicti, & pro magno delicto ſecundum magnitudinem delicti, ſalvo, &c. & nulla præd' miſericordia-*

Carth. 494. Poſt. 60. b. &c. ib. Fitzgib. 192.
(a) Dyer 221. pl. 31. 233. pl. 14. Owen 113. Moor 470. 1 Rol. Rep. 33, 74. 2 Rol. Rep. 3. Cro. El. 241, 581. Cr. Car. 567.
(b) 11 Co. 43. b. 2 Roll. Rep. 3. Br. Det. 85. Br. Leet 14, 36.
(c) Br. Leet 36. Br. Ley gager 99. 2 Roll. Rep. 3. 11 Co. 43. b.
(d) 11 Co. 43. a. 44. a. 13 Co. 3. Selden's Table Talk, Flues 61. F. N. B. 75. a.

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rum ponatur niſi per Sacrum' probor' & legal' Hom' de vicineto: Comites autem & Barones non amercientur niſi per pares ſuos, &c. And by the Stat. of *Weſt.* 1. (*a*) *cap.* 6. it is provided, No City, Borough, or Town, nor any Man, ſhall be amerced without a reaſonable Cauſe, and according to the Quantity of the Treſpaſs; a Freeman, ſaving his Contenement, a Merchant, ſaving his Merchandize, and a Villain, ſaving his Gainage, and that by their Equals. And (*b*) 10 *E.* 3. 9, and 10. was cited, and ſtrongly urged, where the Caſe was, That *William Freeman* brought a Replevin againſt the Abbot of *Ramſey*, and others, that they had wrongfully taken his Cattle, *&c.* The Abbot avowed the taking, by Reaſon he is Lord of the Hundred of *F.* within which Hundred he hath a Leet in the Town of *M.* (where the Plaintiff is reſiant) to hold once a Year, *ſcil.* every Year after the Feaſt of St. *Michael*, when he will warn it, *&c.* and at the Leet warned and held there at ſuch a Day, *&c.* twelve were ſworn to preſent Things preſentable, which belong'd to their Oath, and that the ſaid *William* was one of them; and after they had receiv'd the Articles, they were commanded to anſwer to the Articles, and to preſent, *&c.* and they refuſed; for which Cauſe the ſaid *William*, and the others, were amerced, and the Amercement of him was affered to half a Mark; and for the ſaid half Mark he did avow: And there Exception is taken by *Aſhton* to the Avowry, becauſe the Amercement was upon them all in common, and the Afferance of the Amercement was ſeveral, *ſcil.* upon *William* half a Mark, *&c.* *Parning*, It ſhould be thus, according to Law; for becauſe all refuſed, all ſhall be amerced, but every one ſhall be affered by himſelf, *ſecundum quantitatem delicti*; as in Aſſiſe of *Novel diſſeiſin* all the Diſſeiſors ſhall be amerced, and each affered each by himſelf. *Aſhton*, If a Decenary or a Town is amerced in Eyre, the Afferement ſhall be in common, *&c.* *Parning*, It is not like the Caſe, for when a Decenary or Town is amerced, there is no certain Perſons named, as there is in this Caſe; and the Avowry was awarded to be good: By which it appears, that a Fine impoſed for a Contempt in Court ought to be affered. To which it was anſwered and reſolved, That in the Caſe at Bar, the Fine impoſed by the Steward was well enough without any Afferance, and therefore a (*c*) Difference between a Fine and an Amercement; for a Fine is always impoſed and aſſeſſed by the Court, but an Amercement, which is called in *Latin* *Miſericordia*, is aſſeſſed by the Country. And this Word (*afferer*) is as much as to ſay, *ponere in certitudinem, ſeu taxare, ſcil.* to aſſeſs or tax, and the Afferance as much as to ſay Aſſeſſment, or Taxation. And Afferors are Aſſeſſors, or Taxers, and are derived from this ancient *French* Word (*afferer*) which ſignifies *taxare, &c.* And this appears by the Stat.

(*a*) 2 Inſt. 169, 170.

(*b*) 11 Co. 43. a. Poſtea 40. b. 1 Roll. Rep. 73.

Fitzgib. 46.

(*c*) 11 Co. 43. b. Co. Lit. 126. b. Br. Amerciament 25, 65. Kelw. 65. a. Palm. 7. Cro. Car. 275. Cart. 28. 2 Inſt. 196. 10 H. 6, 7. b. Cro. El. 241. 1 Roll. Rep. 74.

(a) Antea 37. a. 2 Inſt. 196, 197.

of *Weſtm.* 1. *cap.* (*a*) 18. whereby it is enacted, that Amercements before Juſtices in Eyre, *&c.* ſhall be aſſeſſed by the Oaths of Knights and of honeſt Men; where this Word aſſeſſed is as much as to ſay affered. And the Statutes of *Magna Charta*, and *Weſtm.* 1. (*b*) extend to Amercements, and not to Fines; for Amercements ought to be affered, or taxed, or aſſeſſed *per Pares*, as if the Demandant or Plaintiff be Nonſuit, or if Judgment be given againſt the Tenant or Defendant, or upon the Bail becauſe the Principal doth not appear, or upon the Plaintiff *quia non eſt proſecut'*, or *pro falſo clamore*, or the like, *&c.* the Juſtices ſhall never aſſeſs any Amercement, but by the ſaid Statutes they ought to be aſſeſſed *per Pares*. But the Court in ſuch Caſes ſaith, *Ideo in miſericordia* generally, without taxing or aſſeſſing any Sum certain; and the (*c*) Clerk of the Warrants in the Common Pleas makes Eſtreats of theſe Amercements, and delivers them to the Clerk of the Aſſiſe within every Circuit, to deliver them to the Coroners in every County to affere, *i. e.* to aſſeſs the Amercements, which they do accordingly; and ſuch Aſſeſſment by the Coroners in every County hath been held a Satisfaction of the ſaid Statute of *Magna Charta*, by which it is enacted, *Quod null præd' miſericordiarum ponatur niſi per Sacrum probor' & legal' Hom' de vicineto:* And the Coroners of the County were thought moſt indifferent, becauſe they are choſen by the whole County: But if a Man be Nonſuit after the Jury be ready to give their Verdict, the Court may cauſe the Amercement to be preſently affered in the Court by the ſame Jury, as it is held in (*d*) 18 *Ed.* 3. 13. *a.* And it ſeems the Statute of *Magna Charta* was but an Affirmance of the Common Law, for *Glanvile*, who wrote in the Time of *Hen.* 2. *lib.* 9. *cap.* 11. ſaith, *Eſt autem miſericordia Domini Regis, qua quis per juramentum legalium hominum de vicineto eatenus amerciandus eſt, ne aliquid de ſuo honorabili contenemento amittat.* And *Fleta*, *lib.* 1. *cap.* 48. recites the Statutes of *Magna Charta*, and *Weſtm.* 1. *Liber Homo non amercietur, &c. niſi per Sacrum Parium ſuorum, viz. probor', & legal Hom' de vicineto, qui facultatum ſuarum noticiam habeant pleniorem.* And *Bracton*, *lib.* 3. *cap.* 1. *fol.* 116. *b.* ſays, *De illis qui ſunt in miſericordia Dom' Regis, & non ſunt amerciati, ad hoc videndum qualiter quis ſit amerciand'. Et ſciendum eſt, quod miles & liber homo non amerciabitur niſi ſecundum modum delicti, ſecundum quod delictum fuit magnum vel parvum & ſalvo Contenemento ſuo; mercator vero non niſi ſalva merchandiza ſua: Et villan' autem, non niſi ſalvo wainagio ſuo: Et hoc per judicium proborum Hom' de viſneto qui affidabunt ſimulcum ſerviente. Comites vero vel Barones non*

(b) 2 Inſt. 27. Fitzgib. 46.

(c) F. N. B. 76. a. See Hiſt. View of the Exchequer, cap. 8.

(d) 11 Co. 43. b.

non ſunt amerciandi, niſi per pares ſuos, & ſecundum modum delicti, & hoc per Barones de ſcaccario, vel coram ipſo Rege. * *Clericus vero non amerciabitur ſecundum beneficium ſuum Eccleſiaſticum, ſed ſecundum quantitatem laici feodi ſui, & ſecundum modum delicti: Et ad hoc fideliter faciendum affidabunt Amerciatores quod neminem gravabunt per Odium, nec alicui deferent propter amorem, & quod celabunt ea quæ audiverunt.* * F. N. B. 76. b.

Vide 38 *Ed.* 3. 31. *a.* (*a*) 9 *Hen.* 6. 2. *b.* 19 *E.* 4. 9. *a.* 21 *Ed.* 4. 77. *b.* An Earl, Baron, or Biſhop, ſhall be amerced 100 *s.* and 19 *Ed.* 4. 9. A Duke to 10 *l.* *Vide* (*b*) 1 *Hen.* 6. 7. *b.* in the Earl of *Northumberland*'s Caſe. Note, that altho' the Statute of *Magna Charta, cap.* 14. be in the Negative, *Comites & Barones non amercientur niſi per pares ſuos, & non niſi ſecundum modum delicti*, yet (*c*) Uſage hath reduced it to a Certainty. But note, Reader, as to Amerciaments, this Difference between Amerciaments in Actions real or perſonal, of the Demandant, or Tenant, *&c.* or upon a Preſentment or Indictment, as for not repairing a Bridge, or a Highway, *&c.* and the like; for as it is aforeſaid, ſuch Amercements, according to the ſaid Acts, ought to be affered *per pares*; and Amercements of any who hath Adminiſtration of Juſtice, or of any Officer or Miniſter who hath the Execution of the King's Writs, *&c.* for ſuch Amercements ſhall be affered (aſſeſſed) by the Juſtices or Judges of the Court where the Cauſe depends. And there are two Reaſons of this Difference. 1. Theſe later Sorts of Amercements are out of the ſaid Statutes of *Magna Charta* and *Weſtm.* 1. for two Reaſons. 1. The Words are (*d*) *Liber homo non amercietur, &c.* extend to private Men, and not to thoſe who have Adminiſtration of Juſtice, nor to Officers or Miniſters who have Execution of the King's Writs, *&c.* 2. The Words are, *Per Sacrum' proborum & legalium Hom' de vicineto*, which may have Knowledge of the Abilities of the Parties, as *Fleta* ſaith, but that doth not extend to the Offences of Commiſſion or Omiſſion done by thoſe who have Adminiſtration of Juſtice, or by Officers and Miniſters who have Execution of Writs, *&c.* which Offences are done to the Court itſelf, and therefore by the Court ought to be affered and aſſeſſed. The ſecond Cauſe of the ſaid Difference is, *Quia eventus judiciorum ſunt incerti*, and the Plaintiff or Defendant may have a probable Cauſe of Suit or Defence 'till he hears what the adverſe Party can alledge and prove to the contrary; and therefore it is great Reaſon that ſuch Amercements which ariſe upon ſuch Cauſes ſhould be affered *per pares* in the Country, according to the ſaid Statutes, and not by the Court. But the Offence of one who hath the Adminiſtration of Juſtice, or of an Officer or Miniſter who hath Execution of the King's Writs, in Point of his Office, is *malum in ſe*, and hath not any Probability or Colour of Excuſe; and yet both the Kinds of Amercements are ſtiled with this Word, *ſc. miſericordia*, becauſe whoſoever hath the affering of them, ought

(*a*) Br. Amercement 2. 47. Br. Nonſuit 62. Br. Amercement 48. 6 Co. 45. a. 54. a. 2 Inſt. 28.
(*b*) Br. Amercement 33. 11 Co. 43. b.
(*c*) 2 Inſt. 28.
(*d*) 2 Inſt. 27.
3 Salk. 33.

to

to uſe great Moderation: And this Difference appears in our Books, and therefore in 22 *Ed.* 3. 2. *a.* *John* of *London*'s Caſe, in a falſe Judgment, if the Judgment be reverſed, the Suiters, who were the Judges, ſhall be amerced, and this Amercement ſhall be aſſered by the Juſtices, for the Suiters had the Adminiſtration of Juſtice; and therewith agrees the Book of Entries, *titulo Falſe Judgment, pl.* 13. *Et quod ſectatores Curiæ prædictæ ſunt in miſericordia, quæ afferatur per Curiam domini Regis, hic ad, &c.* And if the Sheriff returns, *cepi Corpus*, and hath not the Body at the Day, the Entry is, *Ideo idem Vicecomes in miſericordia, & afferatur per Juſtic' hic ad, &c.* And therewith agrees the Book of Entries, *Capias* 19, 20. So if a Writ be deliver'd of Record to the Sheriff to be executed, *& Vicecomes non miſit Breve*, the Record ſaith, *Ideo Vicecomes in miſericordia, & afferatur per Juſticiarios ad, &c.* and this appears in the ſaid Book, *Record* 2. So if a *Habeas Corpus* be directed to a Sheriff, Gaoler, or Keeper of a Priſon, *&c.* and he brings not the Body, *&c.* the Entry is, *Ideo idem A. in miſericordia, & afferatur per Juſtic' ad, &c. Et ſic de Similib'.* And in *lib.* 5. *E.* 4. 6. *a.* it is reſolved by the Juſtices, That that which is aſſeſſed on an Officer or Miniſter of the Court, is called an Amercement, and not a Fine; but on a Stranger to the Court for a (*a*) Miſdemeanor it is called a Fine, and not an Amercement. But upon a Nonſuit in a real or perſonal Action, or Bar to the Demandant or Plaintiff, or Judgment againſt the Tenant or Defendant, the Entry is *Ideo in miſericordia* generally, and that ought to be aſſered *per pares*, *F. N. B.* 76. So if *A.* be amerced on a Preſentment, for not repairing a Bridge, or a Highway in a Leet; *Ideo A. in miſericordia, & amerciamentum inde afferatur per afferatores in eadem Curia adtunc electos & juratos ad, &c. Vide* the Book of *Entries*, Title *Treſpaſs in Amercements* 2. So if one be amerced for Default of Suit at a Leet, the Amercement ought to be aſſered *per probos & legales homines*, Book of *Entries*, *Repl' Amercement* 2. And as to the ſaid Book of (*b*) 10 *E.* 3. 9. it appears, That the Amercement was aſſered, but it doth not appear by whom it was aſſered or aſſeſſed, and therefore it ſhall be intended to be done by the Steward; for in Truth it was a Fine: And it is to be known, That if a Jury, or a Leet, tax an Amercement, it is ſufficient without other Afferement; for the Amercement is the Act of the Court and the Afferement of the Jury, and therewith agrees 8 *H.* 7. 4. *Vide* 7 *Edw.* 3. 15. *b.* *Aſtelie*'s Caſe. 45 *Edw.* 3. 26. *b.* 27. *a.* But if the Steward aſſeres an Amercement upon the Preſentment of the Jury, it is void, and ſhall not bind, *vide* 45 *Edw.* 3. 27. But the Court ſhall aſſeſs Fines, and they ſhall not be aſſered by any others, unleſs it be in Special Caſes; and that not only upon Contempts and Miſdemeanors done in Court, but upon Writs of *Capias pro fine*, or upon Confeſſions, *&c.* as appears *Trin.* 22 *Hen.* 7 *Rott.* 510. in

(*a*) Br. Fine pour Contempt 39. Br. Amercement 45.

(*b*) 10 E. 3. 9, 10. Antea 39. a. 11 Co. 43. a. 1 Rolls Rep. 73.

in Communi Banco, where he who was taken by *Capias pro fine* prayed that he might be admitted *ad finem ſuum cum dom' reg' faciend', & admittitur pro* 5 s. *ſolut' hic in cur' ad manus* J. R. *Cler'* Rob' Read *capit' Juſtic' dom' reg' hic in partem ſolut' pro reparatione & emendatione ciſtarum pro record' de banco hic in eiſdem cuſtod' ordinat' ex præcepto curiæ.* And *Trin.* 4 *H.* 8. *Rot.* 306. in the like Caſe, *& ſuper hoc finis eorundem* T. *&* J. *occaſione præd' afferatur per Juſtic' hic ad* 2 s. &c. But if a Juror appears, and is adjourn'd upon a Pain, and makes Default, in that Caſe, becauſe he ſhall be fined according to the yearly Value of his Land, it ſhall be enquired of by the other of his Companions of the Jury; for in ſuch Caſe the Court cannot know it, and therewith agrees 4 *Ed.* 4. 6. & 9 *H.* 4, 5. (*a*) *Vide* 20 *Aſſ. pl.* 11. And (*b*) *finis dicitur quia finem litibus imponit*, and is not traverſable, as it is held in 7 *H.* 6. 13. *a. i. e.* the Party redeems his Offence for a Sum of Money, and which makes an End of it, and of his Impriſonment for it, and for that Reaſon it is called alſo *Redemption*, as appears in the Judicial Regiſter 31 *ad ſatisfac' nobis de Redemptione ſua pro quadam tranſgreſſ.* &c. And this Writ is called *Capias pro fine*, which Fine is expreſſed in the Writ by this Word *Redemption*; and the Stat. of *Marlebridge*, cap. 3. (*c*) *Non ideo puniatur Dominus per redemptionem, i. e. per finem.* Another Difference is, if a Man be convicted before the Sheriff in the County, of a (*d*) Recaption, he ſhall be only amerced, but if he be convicted thereof in the Com. Pleas, he ſhall be fined; and the Reaſon of this Difference is, becauſe the County Court is not a Court of (*e*) Record, and therefore cannot impoſea Fine; for no Court can fine but ſuch Court which is a Court of Record. *Vide F. N. B.* 73 *d.* And by theſe Differences you will the better underſtand your Books, which are plentiful in theſe Matters. As to the third Point it was objected, that for an Amercement of Things preſentable in the Leet, the Lord may (*f*) diſtrain, but not for a Fine impoſed by the Steward; but of that an Action of Debt lies. To that it was anſwer'd and reſolv'd, that there are two Manner of Offences, ſome done out of Court and ſome done in Court; of thoſe which are done out of Court, the Jurors of the Leet have Conuſance, and therefore Power to preſent them, and to aſſeſs an Amercement for them; but for Contempts (*g*) and Miſdemeanours in Court before the Steward himſelf, he hath Conuſance of them, and therefore may impoſe a Fine for them, and thereof need not make Enquiry; ſo that thoſe who have Conuſance of the Thing are fit to impoſe a Fine or Amercement for the ſame Thing; and if for the Leſs, *ſcil.* for an Amercement of Offences out of Court, a (*h*) Diſtreſs ſhall be incident of common Right, *a fortiori*, for Fines impoſed for Offences done in the very Court

Note.

(*a*) Br. Amercement 55. 60. Br. Challeng. 109. in Fine.
(*b*) Co. Lit. 120. b. 262. a. 3 Bulſt. 144. Hard. 121.
(*c*) 2 Inſt. 105.
(*d*) 11 Co. 43. b. Poſtea 60. b. 120. a. F. N. B. 73. d.
(*e*) Poſtea 60. b. 120. a.
(*f*) Cr. Jac. 382. 1 Rolls Rep. 201. Cr. Car. 533. 1 Rolls 665.
(*g*) Cr. Eliz. 241. Dyer 233. pl. 14. 211. pl. 31. Owen 113. Moor 470. Cr. El. 581. 2 Rol. Rep. 3. Cr. Car. 567. 1 Rolls Rep. 33. 34.
(*h*) 11 Co. 45. a. 1 Rolls 665. 1 Rol. Rep. 201. Dr. & Stud. 74. a. Cr. Jac. 382.

a Diſtreſs ſhall be incident, *quia quod licitum eſt pro minore, & pro majore licitum eſt*; and a Fine is more than an Amercement, and both impoſed by Authority of the Leet: And, as nothing is more naturally to be puniſhed by the Court Leet than Offences committed in the Court itſelf; ſo for no Sum impoſed for any Offence, by Authority of the Leet, a Diſtreſs is more incident than for ſuch as is impoſed for Offences done in the Leet itſelf. *Vide* 8 *Rich.* 2. *Avowry* 194. 41 *Ed.* 3. 26. 45 *E.* 3. 8. 47 *E.* 3. 12. 2 *H.* 4. 24. 11 *H.* 4. 89. 7 *H.* 6. 12. 10 *H.* 6, 7. 12 *H.* 7. 15. 3 *H.* 7. 4. 21 *H.* 7. 40. *F. N. B.* 100. 23 *H.* 8. *Br. Leet.* 37. And it would be hard to drive the Lord to his Action of Debt for every ſmall Fine or Pain, but the Lord may diſtrain and ſell them, or diſtrain and put them in the Pound, at his Pleaſure.

Note, Reader, The ſaid Cuſtom, *&c. Eligere unum idoneum hominem de inhabitantibus infra manerium ad eſſendum Conſtabularium*, &c. well agrees with the Law; for the Com. Law requires, that every Conſtable ſhould be *idoneus homo*; *i. e.* apt and fit to execute the ſaid Office; and he is ſaid in Law to be *idoneus* who has theſe three Things, Honeſty, Knowledge, and Ability; Honeſty, to execute his Office truly without Malice, Affection, or Partiality; Knowledge, to know what he ought duly to do; and Ability, as well in Eſtate as in Body, that he may intend and execute his Office, when need is, diligently; and not for Impotency or Poverty to neglect it; for if poor Men ſhould be choſen to this Office, who live by the Labour of their Hands, they would rather ſuffer Felons and other Malefactors to eſcape, and neglect the Execution of their Office in other Points, than leave their Labour, by which they, their Wives and Children live: And the Commonwealth conſiſts in the well ordering of particular Towns, and Order will not be well obſerv'd in them but where the Officers are *idonei*, *i. e.* Honeſt, Knowing, and of Ability. And this Word *(a) idoneus* is oftentimes in Law attributed to thoſe who have any Office or Function; and therefore if a *(b)* Coroner, who is alſo an ancient Officer, be *(c) minus idoneus ad Officium illud exequendum*, it is a good Cauſe to remove him. *F. N. B.* 163, 164. *Regiſter* 177. *i. e.* If the Coroner be *(d) ſenio confractus, aut morbo paralyſis percuſſus, aut terras & tenementa in eodem Comitatu non habet, aut electus eſt in officio Vicecomitis*, &c. for he ought to be choſen Coroner, *qui melius ſciat, & poſſit officium illud intendere*, as appears by the Words of the Writ *de Coronatore eligendo*, *F. N. B.* 163. *Regiſt.* 177. And ſo he who is Conſtable ought to be *idoneus*, i. e. *qui melius ſciat, & poſſit Officium illud intendere.* And in Letters Patents of incorporating of Inhabitants of a Town

(a) 5 Co. 57. b. 2 Inſt. 631, 632.

(b) 5 Co. 57. b.

(c) F.N.B.163. n.

(d) F.N.B.163. n.

into Mayor, or Bailiff and Burgeſſes; the Words are, *Quod ipſi de ſeipſis eligere poſſunt unum hominem idoneum*, or, *duos homines idoneos*, &c. and the Law requires, that he whom the Patron preſents to a Benefice be *perſona idonea*, for the Words of the Writ of *Quare impedit* are, *Preſentare idoneam perſonam ad Eccleſiam* de, &c. *& proprie dicuntur idonei, qui poſſunt & volunt in Eccleſiis deſervire*, ſcil. *qui moribus, honeſtate, & literarum ſcientia ſunt decorati.* And if one be elected Conſtable who is not *idoneus*, he by the Law may be diſcharged of his Office, and another Man who is *idoneus* appointed in his Place.

WHITTINGHAM's *Caſe.*

Hill. 45. Eliz.

THE Caſe in the Star-Chamber, Hill. 45 *Eliz.* was, That *Richard Whittingham* was ſeiſed of three Meſſuages, *&c.* in *Craford*, in the County of *Kent*, held of the Queen in Socage, as of the Manor of *Newbery* in *Craford* in Fee; and by his Will in Writing deviſed them to *Prudence*, his Baſtard Daughter, and her Heirs, and died. *Prudence*, being within Age of 21 Years, by Deed, as was pretended, did enfeoff *Stephens* and others of the ſaid Tenements in Fee, and died within the Age without Iſſue, and whether this Feoffment ſhould prevent the Queen of her Eſcheat was the Queſtion; and on Conſideration had with the two Chief Juſtices, it was reſolv'd, That if there be Lord and (*a*) Infant-tenant, and the Infant makes a Feoffment in Fee, and executes it by Livery of Seiſin by his own Hands, and afterwards dies without Heir, that the Lord ſhould not take Benefit of any Eſcheat in that Caſe. And as to that, it is to be known, that there are three Manner of (*b*) Privities; *ſcil.* Privity, in Blood; Privity in Eſtate; and Privity in Law. Privies in Blood are meant of Privies in Blood inheritable, and that is in three Manners, *ſc.* inheritable as General Heir; inheritable as Special Heir, and inheritable as General and Special Heir. Privies in Eſtate are, as Joint-tenants, Huſband and Wife, Donor and Donee, Leſſor and Leſſee, *&c.* Privies in Law are, when the Law without Blood, or Privity of Eſtate, caſts the Land upon one, or makes his Entry lawful; as the Lord by Eſcheat, the Lord who enters for Mortmain, the Lord of a Villain, *&c.* And firſt, Privies (*c*) inheritable, as General Heir, ſhall take Benefit of Infancy; and therefore if an Infant, Tenant in Fee-ſimple, makes a Feoffment and dies, his Heir ſhall enter.

(*a*) Dyer 10. pl. 38. 4 Co. 125. a. 7 Co. 7. b. Poſt. 45. a. 2. Inſt. 483. 49 E. 3. 13. a. 39 H. 6 42. b. 7 H. 5. 9. b. 3 Bulſtr. 272.

(*b*) Co. Lit. 271. a. 1 Jones 32. 3 Co. 23. a. 4 Co. 123. b. 124. a. 2 Inſt. 516. 547.

(*c*) 3 Bulſtr. 272. 2 Inſt. 483. 1 Rolls Rep. 401. Palm. 234. 254.

The

The ſame Law of him who is Heir General and Special. As if a Man gives Land to one and the Heirs Male of his Body, and the Donee within Age makes a Feoffment in Fee, his Son, who his Heir General and Special, ſhall enter: The ſame Law of him who is ſpecial Heir, and not general; as if in the ſame Caſe the Donee had Iſſue two Sons, and the elder had Iſſue a Daughter, and the Donee died, and the elder Son, within Age, made a Feoffment, and died without Iſſue Male, the younger is Special Heir *per formam doni*, and ſhall avoid his Brother's Feoffment, altho' he be not General Heir, becauſe he is Privy in Blood, and has the Land by Deſcent: So if Lands be given to one, and the Heirs (*a*) Females of his Body, and the Donee having Iſſue a Son and Daughter, makes a Feoffment within Age and dies, the Daughter being Heir Special, (to whom the Right of Entry deſcends) ſhall enter, and not the Son, who has nothing by Deſcent: So of the Heir in (*b*) *Borough Engliſh*; for in all Caſes, when any claims by Deſcent, as Special Heir, he ſhall take Benefit of a Right of Entry, which deſcends to him, for the Infancy of his Anceſtor: The ſame Law if his Anceſtor were *Non compos mentis* at the Time when he made the Feoffment, becauſe in theſe and the like Caſes the Heir General cannot enter, becauſe no Right or Title deſcends to him, but the Right deſcends to the Special Heir. So if Tenant in Tail, within Age, makes a Feoffment in Fee, and is (*c*) attainted of Felony, in that Caſe the Iſſue ſhall enter for the Infancy, yet he is not General Heir, for the Blood is corrupted.

6 Mod. 122.

(*a*) Co. Lit. 337. b.

(*b*) Co. Lit. 337. b.

(*c*) Co. Lit. 337. a. Palm. 254.

Alſo Privies in (*d*) Eſtate (unleſs it be in ſome ſpecial Caſes) ſhall not take Advantage of the Infancy of the other. And therefore, if Donee in Tail within Age makes a Feoffment in Fee, and dies without Iſſue, the Donor ſhall not enter, becauſe there was Privity betwixt them only in Eſtate, and no Right accrued to the Donor by the Death of the Donee. So if (*e*) two Joint-tenants be in Fee, within Age, and one makes a Feoffment in Fee of his Moiety, and dies, the Survivor cannot enter by Reaſon of the Infancy of his Companion, for by his Feoffment the Jointure was ſevered ſo long as the Feoffment remains in Force; and therefore in ſuch Caſe the Heir of the Feoffor ſhall have *Dum fuit infra ætatem*, or ſhall enter into the Moiety: But if (*f*) two Joint-tenants be within Age, and they join in a Feoffment, in ſuch Caſe a Joint-right remains in them; and therefore if one dies, the Right ſhall ſurvive, and the Survivor ſhall have the Right of the Land as from the firſt Feoffor: And thereof I conceive with *Littl. cap.* (*g*) Diſcont. 44. that the Survivor may enter in reſpect of the Right accrued to him, otherwiſe this Miſchief will follow, That the Heir of that Feoffor who died can't enter, becauſe the Right doth ſurvive, nor ſhall the

(*d*) 4 Co. 124. a. 1 Rolls Rep. 401. 442. 3 Bulſt. 272. 2 Inſt. 483.

(*e*) Co. Lit. 337. b. 39 H. 6. 42. b. 1 Roll. Rep. 401.

(*f*) 1 Rolls Rep. 401. Lit. S. 634. Co. Lit. 337. a. Palm. 254.

(*g*) Lit. S. 3. S. 64. Lit. fol. 142. a. b. Co. Lit. 337. a.

the Survivor enter, becauſe he ſhall not take Benefit of the Infancy of his Companion; but that the Survivor ſhall be driven to his Writ of Right, which without Doubt he may have, becauſe, after the Feoffment, the Joint-tenants might have joined in it. And if the Huſband within Age makes a Feoffment in Fee and dies, the Heir of the Huſband cannot enter to avoid this Feoffment, becauſe nothing deſcended to him from the Huſband; for the Law doth not reſpect what Eſtate the Anceſtor gives, but what Eſtate he had before the Gift, and what Right and Title the Anceſtor leaves to deſcend to his Heir: And therefore if an Infant be Tenant in Tail, and makes a Feoffment in Fee, and dies without Iſſue; his (*a*) collateral Heir cannot enter to avoid this Feoffment; for although by his Feoffment he gave Fee-ſimple, yet when he died without Iſſue, nothing deſcended to the Heir, in reſpect of which he could enter: So if Lands be given to one and the Heirs Females of his Body, and he has Iſſue a Son, and makes a Feoffment in Fee, and dies within Age without Iſſue Female, the Son ſhall not enter in this Caſe for the ſaid Infancy, becauſe no Right deſcended to him. So if an Infant be Tenant *pur* (*b*) *auter vie*, and make a Feoffment in Fee, and *Ceſtuy que vie* dies, the Infant or his Heir ſhall never enter upon the Feoffee, but he in Reverſion or Remainder: But foraſmuch as the Infant himſelf, during his Life, might have entred upon the Feoffee in the Right of his Wife only, and not in reſpect of any Right which he himſelf had, it ſeems reaſonable with *Littleton, fol.* 43. That the Wife in the ſaid Caſe, when the (*c*) Huſband within Age makes a Feoffment in Fee, may enter in her own Right, in which Right her Huſband might have entred; and *eo potius*, becauſe the Huſband's Heir cannot enter: But if the Huſband within Age takes a Wife Tenant in General Tail, and makes a Gift in Tail to another, by which he gains a new Reverſion in Fee, there the Entry is given to the Wife for the Cauſe aforeſaid, *i. e.* that the Huſband might have entred in her (*d*) Right; alſo the Heir of the Huſband who has the new Reverſion deſcended to him, may alſo enter; but if he enters, and defeats the Eſtate Tail given by the Infant, preſently the new Reverſion by Act in Law vaniſhes from the one, and veſts in the other, (*e*) and the Wife by Operation in Law ſhall be preſently ſeiſed of her ancient Eſtate; for when the Eſtate tail is defeated, which was the Cauſe of gaining the new Reverſ. the Heir cannot have the Eſtate which his Anceſtor had bef. the Gift; for his Anceſt. before the Gift had nothing, but in the Right of his Wife, which determined by his Death, as it is held in * 4 *H.* 6. 2. where the Caſe was, That a Man ſeiſed of certain Lands in the (*f*) Right of his Wife, made a Feoffm. thereof by Deed indent. to certain Perſons, upon Condition that

(*a*) 1 Roll. 676, 677.

(*b*) Co. Lit. 336. b.

(*c*) Lit. § 633. Co. Lit. 336. b. 337. a. Lit. 142. a. Palm. 254.

(*d*) Co. Lit. 336. b. 337. a.

(*e*) Co. Lit. 336. b. 202. a.

* 4 H. 6. 2. a. b. Fitz. Entre congeable 1. Br. Entré congeable 38. Br. Condit. 71. Br. Diſcontinuance 8.

(*f*) Co. Lit. 232. a.

that they ſhould leaſe the Lands again to the Huſband and Wife for their Lives, with divers Remainders over in Tail, the Remainder to the Right Heirs of the Huſband, and afterwards the Huſband died, the Feoffees leaſed the Land to the Wife for Life, with Remainders over in Tail, the Remainder to the right Heirs of the Wife, where it ſhould be to the right Heirs of the Huſband: And in that Caſe it is reſolv'd, That for the Condition broken, the (*a*) Huſband's Heir might enter; for altho' no Right deſcended to him from the Huſband, whoſe Eſtate determined by his Death, yet the Title of Condition, which he himſelf created on his Feoffment, and reſerved to him and his Heirs, ſhould deſcend after his Death to his Heir; and ſo a Difference between a Title of Entry by Reaſon of a Condition, and a Right of Entry by Reaſon of Infancy; for none ſhall take Benefit of the Infancy of his Anceſtor, but he who has a Right deſcended to him from the ſame Anceſtor; but the Heir may take Benefit of a Condition, altho' no Right deſcends to him from the ſame Anceſtor. Three other Points are in a Manner reſolv'd in the ſaid Caſe of (*b*) 4 *H.* 6. 1. That when the Huſband's Heir enters for the Condition broken, thereby the Feoffment which made the (*c*) Diſcontinuance is defeated, and by Conſequence, the Diſcontinuance itſelf is defeated: 2. That after the Heir of the Huſband hath entred for the Condition broken, the Eſtate of the Heir vaniſhes, and the Eſtate is (*d*) immediately reveſted in the Wife, without Entry or Claim made by her; for the Heir enters by Force of the Condition, and not in Reſpect of any Right, and there two Caſes are put to prove it: 1. If Tenant for Life makes a Feoffment in Fee upon Condition, who enters for the Condition broken, now the Feoffment is avoided, and by Conſequence the Reverſion preſently by the Entry reveſted. 2. If the Huſband himſelf had entred for the Condition broken, it had reveſted the Eſtate in the Wife. The third Point obſervable in the ſaid Caſe of (*e*) 4 *H.* 6. is, That altho' the Wife had accepted an Eſtate for Life, and ſo concluded herſelf by Acceptance to have any *Cui in vita*, yet when the Eſtate which ſhe had taken is defeated by the Condition, the Concluſion by the Acceptance is alſo avoided. *Vide Littleton, cap. Diſcontinuance* 43. Privies (*f*) in Law, as Lord by Eſcheat, *&c.* ſhall never take Benefit of the Privity of Infancy, becauſe he is a Stranger to him; and when the Infant dies without Heir, the Feoffment is unavoidable. The ſame Law of (*g*) Coverture, and *Non ſanæ memoriæ*, and ſo you will better underſtand your Books in 14 *Ed.* 3. *Dum fuit infra ætatem* 6. *F. N. B.* 192. 22 *E.* 3. 50. *Dum fuit infra ætatem* 2. 18 *E.* 2. (*h*) *Brev.* 831. 39 *E.* 3. 29. 45 *Edw.* 3.

(*a*) Co. Lit. 336. b. 202. a. Fitz. Entry congeable 1. Br. Entry congeabl. 38. Br. Condit. 71. Br. Diſcontinuance 8.

(*b*) 4 H. 6. 2. b. 3. a. b.

(*c*) Br. Diſcontinuance 8.

(*d*) Co. Lit. 202. a. 336. b.

(*e*) 4 H. 6. 2. b. 3. a. b.

(*f*) Palm. 254. 7 Co. 7. b. 4. Co. 124. a. 1 Roll. Rep. 401. 442. 22 H. 6. 27. a. Br. Entry congeable 129. Palm. 234. 3 Bulſtr. 272. 2 Inſt. 483.

(*g*) 1 Roll. Rep. 401. 3 Bulſt. 272.

(*h*) Palm. 254.

49 Edw. 3. 13. *39 H.* 6. 42. *34 H.* 6. 31. *6 H.* 4. 3. *9 H.* 6. 6. *7 H.* 4. 5. *2 H.* 4. 13. *32 H.* 6. 27. *The Abridgment of the Book of Aſſiſes*, 87. *b.* *7 H.* 5. 9.

(*a*) 3 Bulſt. 55. It was alſo reſolv'd, That if the Eſtate of the (*a*) Infant had been upon Condition to be performed by the Infant, and the Condition had been broken during his Minority, that the Land had been loſt for ever. Note, Reader, As to that, it is to be known, that there are (*b*) two Manner of Conditions, *ſcil.* a Condition in Fact, that is, expreſſed, as to pay Money, or to do, or not to do ſome other Act, *&c.* and Condition in Law, that is implied: Alſo Conditions in Law are of two Natures, *ſcil.* (*c*) by the Common Law and by the Statute: And Conditions in Law by the Common Law are in two Sorts, one which is founded upon a Confidence and Skill, and the other without Confidence or Skill; Conditions in Law by Statute Law are alſo of two Qualities, *ſcil.* When the Statute for Execution of the Condition in Law gives Recovery, and when the Statute gives an Entry and no Recovery; as to the Condition in Law, which is founded upon (*d*) Skill and Confidence, as the Offices of Parkerſhip, Stewardſhip, *&c.* in Fee, which deſcend to an Infant, or a Feme-Covert, if the Condition in Law annexed to the ſaid Offices be broken, it ſhall bar the Infant and Feme-Covert for ever; the ſame Law of Liberties and Franchiſes: But if the Infant or Feme-Covert be Leſſee (*e*) for Life, or Tenant by the Curteſy, or Tenant in Dower, and the Infant, or the Huſband of the Wife makes a Feoffment in Fee, and the Leſſor enters for the Forfeiture, as he may, yet it ſhall not bar the Infant or Feme-Covert, but that the Infant or Feme-Covert, after the Death of the Huſband, may enter, for that is by Force of a mere Condition in Law, without any Skill and Confidence annexed to the Eſtate. If an Infant, or a Feme-Covert, Leſſee for Life, commits Waſte, and the Leſſor recovers in an Action of (*f*) Waſte, it ſhall bind the Infant and Feme-Covert; For the Statute gives the Action to recover the Land. The ſame Law of (*g*) *Ceſſavit*, and of other like Caſes: As if an Infant be Gaoler, and ſuffers an Eſcape, there an Action lies. But if the Condition in Law be by Force of a Stat. Law, which gives an Entry, and no Action; as (*h*) if an Infant, or the Huſb. ſeiſed in the Right of his Wife, aliens in Mortmain, there, altho' the Lord, of whom the Land is held, enters; yet the Right of the Infant or Feme-Covert is not barred, no more than in the Caſe of a Condition in Law by the Common Law, which is grounded upon the Alienation of the Infant Tenant for Life, or of the Huſband *&c.* where Entry to the Leſſor is given by the Common Law. And ſo you will better underſtand your Books in 31 *Aſſ. pl.* 17. *Br. Covert* 71. *Plow. Com. Stowell's* Caſe 355. *Doctor and Student*, *lib.* 2. *fol.* 113. *Vide* 13 (31) *Edw.* 3. *Age* 54. 14 *Edw.* 3. 88. 28 *Edw.* 3. 99. 2 *Edw.* 2. *Age* 132. 9 *Edw.* 3.

(*b*) Hard. 11. 1 Rolls Rep. 198.

(*c*) Hard. 11. Co. Lit. 233. b.

(*d*) Co. Lit. 233. b. Hard. 11. Cr. Car. 556.

(*e*) 1 Rol. 151. Co. Lit. 233. b. Godb. 345, 365.

(*f*) Plowd. 364. b. Co. Lit. 233. b. Co. Lit. 54. a. F. N. B. 59. l.

(*g*) Plowd. 364. b. 2 Inſt. 401.

(*h*) 2 Inſt. 382. Co. Lit. 233. b.

Note,

Note Reader, That a Condition in Law by Force (*a*) of a Statute which gives a Recovery, is ſtronger than a Condition in Law without a Recovery; for (*b*) if Leſſee for Life makes a Leaſe for Years, and afterwards enters into the Land and commits Waſte, and the Leſſor recovers in an Action of Waſte againſt the Leſſee for Life, he ſhall avoid the Leaſe for Years, made before the Waſte committed: (*c*) But if Leſſee for Life makes a Leaſe for Years, and afterwards enters and makes a Feoffment in Fee, the Leſſor ſhall not avoid the Leaſe for Years. So if the Tenant makes a Leaſe for Years, and afterwards is attainted of Felony, or dies without Heir, the Lord by Eſcheat, altho' he recovers by Writ of Eſcheat, ſhall not avoid the Term. But afterwards it appeared in the principal Caſe, that the ſaid ſuppoſed Feoffment of the ſaid *Prudence* was executed by Letter (*d*) of Attorney made by the ſaid *Prudence*; wherefore it was reſolved, That it was void, and that the Land did eſcheat to the Queen.

(*a*) Co.Lit.233.b.

(*b*) Co.Lit.233.b.

(*c*) Co.Lit.333.b.

(*d*) Ant. 42. b. 2 Inſt. 483. 9 Co. 76. b.

See 1 *Salk.* 386. *Poſt.* 99. *Carthew* 43.

JEHU

JEHU WEBB's *Caſe.*

Mich. 6 Jacobi I.

In the Common Pleas.

JEHU WEBB brought an Aſſiſe againſt Sir *Thomas Knyvet*, Knt. Lord *Knyvet*, *John Freeburne*, and *Roger Rolles*, *de libero tenemento ſuo* in *Weſtminſter*, and made his Plaint *de Officio Magiſtr. ludorum pilarum palmarium* (*Anglice*, the Office of the Maſter of the Tennis Plays) *Domini Regis nunc* in *Weſtminſter*; and for his Title ſaid, *Quod Officium præd' eſt antiquum Officium in Weſtm' præd', quodq; Dominus Rex nunc* 27 *Nov. Anno* 5. by his Letters Patents, *&c. ex certa ſcientia & mero motu dedit & conceſſit eidem Jehu præd' Officium Magiſt' Ludorum pilarum palmarium tam infra palatium de Weſt' præd', quam alibi dicti Dom' Regis nunc Angliæ, habend' & gaudend' præd' Officium eidem Jehu, &c. durante Tempore vitæ ipſius Jehu, &c.* by Force whereof the ſaid *Jehu* was ſeiſed of the ſaid Office, with the Appurtenances, for his Life, and that he took and received the Profits thereof to his own Uſe, until the Defendants wrongfully, and without Judgment, diſſeiſed him, *&c.* and the Defendant pleaded, No Wrong, No Diſſeiſin. And upon the Evidence to the Recognitors of the Aſſiſe in this Term, it was held *per totam Curiam*, That where the Grant was in *Engliſh*, *Of the Office of the King's Tennis Plays in Weſtminſter*, *&c.* that this Grant ſhould be taken in a reaſonable Senſe; that is to ſay, The Tennis Plays for the King's Houſhold, and not only for the Tennis Play when the King himſelf plays in his Royal Perſon; for the King is the Head of his Houſhold, and therefore a *digniori parte*, The Tennis Plays for his Houſhold, may be well called, *The King's Tennis Plays:* So where a Commiſſion is made to take Boys ſinging in Cathedral Churches, *&c.* or other Places where Children are taught to ſing, to furniſh the King's Chapel, theſe general Words

Words by Conſtruction of Law, have a reaſonable Intendment; *ſcil.* that ſuch Boys as are brought up and taught to ſing, to ſeek and get their Living by it, may be taken for the King's Service, and it will be a good Preferment for them to ſerve the King in his Chapel; but the Son of a Gentleman, or any other, who is taught to ſing for his Ornament, Delight, or Recreation, and not thereby to get his Living, cannot be taken againſt his Will, or the Conſent of his Parents or Friends; and ſo it was reſolved by the two Chief Juſtices, and the whole Court of Star-Chamber, *Anno* 43 *Eliz.* in the Caſe of one *Evans*, who had by Colour of ſuch Letters Patents taken the Son of *Clifton* (a Gentleman of Quality of *Norfolk*) who was taught to ſing for his Recreation; which *Evans*, for the ſaid Offence, was grievouſly puniſhed. And in the Caſe at Bar, divers Queſtions were moved, in what Caſes an (*a*) Aſſiſe lay by the Common Law, and in what by the Stat. of *Weſtm.* 2. *cap.* (*b*) 25. It is to be obſerv'd, That at the Common Law there was but two Forms of Writs of Aſſiſe of *Novel Diſſeiſin*, *ſcil.* *Aſſiſe de libero tenemento*, and *Aſſiſe de Communia Paſturæ* for his Cattle, *&c.* which was ſo (*d*) neceſſary, that without it his Freehold could not be manured, and therefore it appears in 35 *Aſſ. pl.* 11. 4 *Edw.* 2. *Aſſ.* 451. 11 *Hen.* 6. 22. *a.* and other Books; that *Aſſiſe de libero tenemento* lay of Land, Rent, and all other Things whereof a (*e*) *Præcipe quod reddat* lay at the Common Law. But of (*f*) Profits apprender in *certo loco*, the Statute of *Weſtm.* 2. *cap.* 25. gave an Aſſiſe of *Novel Diſſeiſin*, in lieu of a *Quod permittat*, which was the Remedy for them at the Common Law, before the ſaid Statute, as is to be ſeen in 4 *Ed.* 2. *Aſſ.* 449. 8 *Ed.* 2. *Aſſ.* 385. 16 *Ed.* 2. *Aſſ.* 370. 31 *Ed.* 1. *Aſſ.* 440. *&c.* And in ſome Caſe the Statute gives an Aſſiſe in Caſe where there was not any clear and certain Remedy at the Common Law; for if one had not ſuch Profits apprender but for Term of his Life, it was held, That he ſhould not have a *Quod permittat* for them, becauſe ſuch Writ was in the Nature of a Writ of Right, as appears in 30 *Ed.* 1. *Quod permittat* 9. where in a *Quod permittat* Battle was waged. *Vide* 4 *Ed.* 3. 38. 32 *Ed.* 1. *Juris utrum* 14. *F. N. B.* 124. *B. C.* And therefore the Stat. ſaith, *Quod breve Aſſiſæ novæ Diſſeiſinæ locum habeat* (*g*) *in plurib' Caſib' quam prius habuit:* And firſt the Statute begins, *Cum proficuis capiendis, colligendis, aut recipiendis in alieno ſolo, &c. ut in Boſcis, ſcil't, de Eſtoveriis boſci, & proficuo capiend' in Boſco.* 2. *De* (*h*) *nucib' & Glandib' & aliis fructib' in alieno etiam Solo colligendis*, which are Examples of Profits to be taken in Woods. 3. *De* (*i*) *Corrodio*, and of the Parts thereof, *quæ pertinent ad Victum & Veſtitum, ſcil't Liberatione*

(*a*) Co. Lit. 159. a.
(*b*) 2 Inſt. 409, 410, 411, 412, *&c.*
(*c*) 2 Inſt. 411.
(*d*) 2 Inſt. 411.
(*e*) 2 Inſt. 411.
(*f*) 2 Inſt. 411.
(*g*) 2 Inſt. 411.
(*h*) 2 Inſt. 411. F. N. B. 78. f.
(*i*) 2 Inſt. 411.

ratione bladi ac aliorum Victualium ac neceſſariorum, as Apparel, Lodging, Waſhing, *&c. in certo loco annuatim recipiend'* which is well explain'd by this Word *recipiend'*, for a Corody is properly to be received, and Eſtovers, and the other Profits to be taken, *ſcil. capiend' & colligend'*. So the firſt Profits are, *proficua capiend' ſeu colligend'*, and the Corody, *&c.* is *proficuum recipiend'*.

(a) 2 Inſt. 58. 219. 412. Davis 13. a. 12 Co. 33. F. N. B. 178. g. (b) Moor 46.

4. *De (a) Tolneto, (& ut Specieb' ejuſdem) Tronagio, Paſſagio, Pontagio, (b) Pannagio & hiis ſimil' in certis Locis capiendis. Tolnetum*, i. e. *Theolonium*, i. e. Τέλος. *Græce, & Latine Vectigal, quod dicitur a vehendo, quia præſtatur de rebus quæ vehuntur, a vehendis mercibus, ſic dictum, unde dicuntur Vectores qui vehunt, & Bracton, lib. 2. cap. 24. numero 3. Si cui concedatur talis libertas, &c. quod Theolonium & Conſuetudines capiat*, (which is the Word that the Statute uſes, *ſcil. Capiendis*) *infra libertatem ſuam de ementibus & vendentibus, &c. Vide Fleta, lib. 1. cap. 47. & Nota, Bracton* wrote in the End of *Henry* the Third, Father of King *Edward* 1. and *Fleta* wrote in the Reign of King *Edw.* 1. who made the ſaid Act. And in the Goſpel of St. *Matthew, cap. 9. ver. 9. Jeſus tranſiens vidit hominem ſedentem ad telonium*: Mark ii. 14. Luke v. 27. *Vide* 30 *Edw.* 1. *Aſſiſe* 401. No Aſſiſe lies of Suit to a Mill, but a Writ *de Secta ad Molendinum*, but of the Toll of a Market an Aſſiſe lies; and ſo of the Toll of a Mill. *Vide* 23 *H.* 3. † 435. *Tit. Aſſiſe* 427. *acc.* So of Toll thorough, Toll traverſe, and Toll turn, and all theſe a Man ſhall have in his own Land; and yet he being diſſeiſed of them, ſhall have an Aſſiſe of them. *Tronagium eſt ſpecies Tolneti & dicitur a Trona*, which ſignifies a Beam with which Things are to be weighed, *& proprie tronagium exigi debet de ponderatione lanarum, & peſagium* exigi debet de mercibus*, as appears by a Record in the Treaſury, *Hill.* 5 *Ed.* 3. *Lincoln' numer'* 32. but the one is often taken for the other. And it appears by *Fleta. lib.* 2. *cap.* 12. which was written in the Time of *Ed.* 1. in which Time the Statute was made, that *Trona* ſignifies a Beam. *Paſſagium*, that is properly a Ferry for the Paſſage of Men and Cattle over a Water, for which the Owner has a Toll; for if a Man has Paſſage in the Barge or Veſſel of another, to the Church, or elſewhere, it is not any Profit, but an Eaſement, whereof no Aſſiſe lies, as it is adjudg'd in 31 *Ed.* 3. *Aſſ.* 44. and 19 *Edw.* 2. *Aſſ.* 309. and 34 *Aſſ. pl.* 13. an *Aſſiſe de Novel Diſſeiſin* doth not lie of a (c) Way, becauſe it is but an Eaſement, and no Profit to be taken, *nullum proficuum recipiend'*, as the Statute ſpeaketh. *(d) Pontagium, Pontage* is a Toll for Paſſage or Carriage over a Bridge, and thereupon it is called *Pontage*, as appears 3 *Ed.* 3. *Aſſ.* 445. and *F. N. B.* 227. and *Regiſter* 259. *Rex Collectoribus, &c. Pontag' in villa de S. &c.*

† (Q.)

* i. e. *Poizage.*

(c) Br. Aſſiſe 337. Br. Chimini 8. Br. Pleint in Aſ. 31. Fitz. Aſſiſe 317. (d) Davis 13. a. b.

(a) *Pannagium*,

(a) *Pannagium* is properly a Liberty for Hogs to feed on Acorns, *&c.*

(*a*) *Pannagium* is a Toll for the Paving of a City, or a Cawſey, or a Way, as appears in 3 *Edw.* 3. *Aſſiſe* 445. *F. N. B.* 227. *Reg.* 259. and in old Times it was written *pavagium*, or *pauvagium*, or *paviagium*, and by Corruption, *pannagium*, ſcil. *nn* for *uu*, *&c.* The Statute goes farther, *& his ſimilibus*, as for (*b*) *Murage*, *ſcil.* Toll for making of a Wall for Safeguard of Men in Time of War or Tumult, as appears in the ſaid Books of 3 *Ed.* 3. and *F. N. B.* 227. *Regiſter* 259. (*c*) *Cranage* is a Toll for drawing of Merchandize out of Veſſels to the Wharf, *&c.* and ſo called, becauſe the Inſtrument is in the Form of a Crane. *Vide Dyer* 18 *Eliz.* 352. and the Book of Entries 3. So of *Stallage*, (*d*) *Picage*, *Wharfage*, *Anchorage*, *Pedagium*, *a pede dictum*, *quod a tranſeuntibus ſolvitur*.

(*a*) Davis 13. a.

(*b*) Dav. 13. a. b.

(*c*) Dyer 352. pl. 27.

(*d*) Davis 13. b.

5. *De* (*e*) *Officiis*, *ſcil. Cuſtodiis Boſcorum*, *Parcorum*, *Foreſtarum*, *Chacearum*, *Warrennarum*, *Portarum*, *& aliis Ballivis & Officiis in feodo*, *jacet de cætero Aſſiſa novæ Diſſeiſinæ*; which Words (*de cætero*) have perſwaded divers, that an Aſſiſe of an Office did not lie at the Common Law, and ſo are ſome Opinions in 16 *Ed.* 2. *Aſſ.* 370. and that no Aſſiſe by the Statute lay of any Office, but of an Office in (*f*) Fee, becauſe the Aſſiſe came in lieu of a *Quod permittat*, which none could have at the Time of making the Act, as hath been ſaid, but Tenant in Fee. *Vide* 4 *Ed.* 2. *Aſſiſe* 449. and 8 *Ed.* 2. *ibid.* 385. But it appears by our Books, that an Aſſiſe lay of an Office *ut de* (*g*) *libero tenemento*, at the Common Law, for of all that a *Præcipe quod reddat* lay at the Common Law, an Aſſiſe lay. 7 *Edw.* 3. 63. *b.* in *Henry de Parker*'s Caſe, a Writ of Entry in the *Per* and *Cui*, *de Balliva cuſtodiendi parcum de Charkell cum pertinentiis*; and 8 *Edw.* 3. 55. *b.* 56. *a.* the Biſhop of *Saliſbury*'s Caſe, a Writ of *Aiel de Bedelria Hundredi de Cademinſter*, *& nota* there *Dictum Stoufe*, 10 *Edw.* 3. 27. *b. acc.* and 19 *Edw.* 3. *View* 77. *Ad terminum qui præteriit* brought *de Bedelria de Soke* of *Wincheſter*; and Exception was taken, That it was a Profit iſſuing out of no Freehold, *& non allocatur.* (*h*) 18 *Edw.* 3. 27. *a.* A Formedon of the Office of Serjeanty in the Cathedral Church of *Nichol'*. *Vide* (*i*) 27 *H.* 8. 12. *a.* 7 *H.* 6. 8. *b.* 7 (*k*) *Aſſ. pl.* 12. 10 (*l*) *Aſſ. pl.* 11. The Statute ſaith, *Office in Fee*; yet an Aſſiſe lies of an Office, altho' the Diſſeiſee has but an Eſtate for (*m*) Life; for the Statute was made as to that in Affirmance of the Com. Law, as in 30 *Aſſ. p.* 4. *Officium* (*n*) *Meſſoris*; 22 *H.* 6. 9. *b.* the Office of (*o*) Packing of Cloths, *&c.* and if the Office of Sheriff is granted for Life, an Aſſiſe lies of it, 9 *Ed.* 4. 6. *a. b.* the Office of one of the (*p*) Clerks of the Crown in the Chancery, 18 *Ed.* 2. *Aſſie* 377. *Aſſiſe* of the Office of the Bedel of the Hundred (Honour) of *Weſtm'* and *Midd'*, and 4 *Ed.* 2. *Aſſiſe* 449. and *ibid.* 8 *Ed.* 2. 385.

(*e*) F.N.B. 178. f. Poſtea 55. a. 2 Inſt. 412.

(*f*) 2 Inſt. 412.

(*g*) F.N.B. 178. f. 2 Inſt. 412.

(*h*) Co. Lit. 20. a. 1 Roll. 838. 7 Co. 33. b. Nevil's Caſe.

(*i*) Poſtea 47. b. 49. b. Br. Præcipe quod reddat 1.

(*k*) Br. Aſſiſe 121. Br. Plainr, &c. 9.

(*l*) Br. Præcipe quod reddat 19.

(*m*) 2 Inſt. 412.

(*n*) Fitz. Aſſiſe 296.

Br. Aſſiſe 307. Br. Plaint, &c. 16.

(*o*) Fitz. Aſſiſe 10. Br. Aſſiſe 76.

(*p*) Br. Aſſiſe 95. Fitz. Aſſiſe 29.

The

The Archbiſhop of *Canterbury*, by Deed *dedit Johanni Porteriam Curæ ſuæ Cantuarienſis*, which Grant was but for Life, and yet an Aſſiſe lay. 8 *Ed.* 4. 16. *b.* an Aſſiſe of an Office (*a*) in the Common Pleas, 28 *H.* 8. *Dyer* 7. and 3 *Mar. Dyer* 114. an Aſſiſe lies of the Office of a (*b*) Philizer in the Com. Pleas, and the Poſt where he ſits ſhall be put in View, 5 *Mar. Dyer* 153. Aſſiſe lies of the Office of the (*c*) Regiſter of the Admiralty, which the Plaintiff had for Life. Note, although the Proceedings in that Court be according to the Civil Law, yet the Offices are determinable by the Common Law: So of a Regiſter of the Conſiſtory of a Biſhop, 31 *H.* 8. *Br. Grants* 134. Aſſiſe lieth of the Office of Steward, Bailiff, or Receiver of a Manor; and all this is meant of Offices of (*d*) Profit, and not of an Office of Charge and no Profits, as it is held in 27 *Hen.* 8. 12. and 31 *Ed.* 1. *Aſſiſe* 440. *Vide* 21 *Ed.* 3. 4. *b.* And where ſome ſay in the Time of *Ed.* 2. as is aforeſaid, that an Aſſiſe was given by the ſaid Statute in lieu of a *Quod permittat*, there is (*e*) no Writ in the *Regiſter* of a *Quod permittat* of an Office; and yet I have a *Regiſter* of *Henry* II. which was long before the ſaid Act; and I conceive, that no Writ of *Quod permittat* lay of an Office, becauſe a *Præcipe quod reddat* lay of it, as before is ſaid; and therefore a Man ſhall have an Aſſiſe of an Office *ut de libero tenemento*, at the Common Law. And the Statute, as to Offices, was but a Declaration of the Common Law, as hath been ſaid, and to remove a Doubt which then was. And ſo the ſaid Words (*jacet de cætero, &c.*) are to be intended, that *jacet de cætero abſque difficultate*. And it appears by the principal Caſe at Bar, and by the ſaid Books of Offices in the Chancery, King's Bench, and Common Pleas, that altho' the Courts are removeable in which the Offices are, yet if they be in a certain Place at the Time of the Diſſeiſin, it ſufficeth: For the Words *de proficuo in certo loco capiend'*, extend to Eſtovers, *&c.* and not to the Clauſe of Offices. *Vide* 4 *Ed.* 4. 2. And the Statute ſaith, *in omnib' ſupradictis Caſib' modo conſueto fiat breve de libero tenemento:* So that now of all Profits apprender *in certo* (*f*) *loco*, the Writ ſhall be *de libero tenemento:* And the old Writ is given in a new Caſe; and therefore in 11 *Aſſ. pl.* 13. the Writ was general *de libero tenemento*, and the Plaint *de quatuor acris ſaliceti*; that is four Acres of (*g*) Willows, and to have reaſonable Eſtovers in 100 Acres of Wood, *ſcil.* Houſebote and Haybote, and the Plaint was challenged, 1. Becauſe the Plaint ought not to be *de quatuor acris ſaliceti*, but *terræ* or *prati*. 2. Becauſe the Plaintiff had joined in one Plaint two Freeholds, one *ſcil.* the four Acres of Willows at the Common Law, and the other, *ſcil.* the Eſtovers by the Statute, *ſcil.* the

(*a*) Fitz. Aſſiſe 28.
(*b*) Dyer 7. pl. 10. 114. pl. 63. Godb. 48. Dyer 152. pl. 9. 2 Brown. 12.
(*c*) 2 Inſt. 412.
(*d*) 2 Inſt. 412.
(*e*) 2 Inſt. 412.
(*f*) 2 Inſt. 411. Moor 46. 6 Mod. 118.
(*g*) Fitz. pleint. 14. Br. Aſſiſe 167. Br. Plaint, &c. 29.

the Statute of *Weſtm.* 2. (*a*) *cap.* 25. & *non allocatur.* And there it is ſaid, *Quod iſto Termin'*, a Plaint of two Rents Service was adjudged good, for *liberum tenement'*, although it be in the Singular Number, yet is *nomen collectivum.* *Vide* (*b*) 7 *Aſſ.* 18. and the Statute farther ſaith, *& ſicut prius jacuit, & locum habuit in Com' Paſturæ, ita de cætero locum habeat in Com' Turbariæ, Piſcariæ, & aliis Com' hiis Similib', quas quis habet pertin' ad liberum Tenemen', vel etiam ſine Tenemento per ſpeciale factum ad minus ad Terminum vitæ.* And the Reaſon wherefore an Aſſiſe lay at the Com. Law, of Common of Paſture, and not of other Commons, was, becauſe there was a ſpecial Writ in the *Regiſter* for Common of Paſture, and not for any other Common; and *in dict' illis* they held themſelves (*c*) ſtrictly to the Form and Order of the *Regiſter*, which is mentioned in the Statute of *Weſtm'* 2. made 13 *Ed.* 1. *cap.* (*d*) 24. *Vide temp' R.* 2. *Grants* 104. A Man ſhall not have a Writ of Aſſiſe, *quod diſſeiſivit eum de libero eſtoverio*, and yet *Bracton* held. *l.* 4. *f.* 231. *quod* (*e*) *locum habet Aſſiſa de qualibet communia pertin' ad liberum tenementum*, ſc. *Communia paſturæ, turbariæ, &c.* and 12 *Hen.* 3. *Aſſiſe* 417. That an Aſſiſe lay of Common of * Piſcary, *&c.* And theſe Opinions had great Probability of Reaſon, but becauſe there wanted a Writ for them in the *Regiſter*, for that Cauſe before this Statute an Aſſiſe did not lie of them, but a *Quod permittat*; and it appears by *Bracton*, *lib.* 5. *Tract' de Exceptionibus*, *cap.* 17. *fol.* 413. who wrote a little before the making of the ſaid Act, That Original Writs cannot be (*f*) changed, but by Act of Parliament. For there he divides Writs into three Branches. *Sunt quædam Brevia formata* (id eſt *originalia*) *ſeu de curſu*; (which as appears there, were firſt formed and made by Authority of Parliament:) *Quædam judicialia ex eis* (id eſt, *ex originalibus*) *ſequentia, &c. Quædam magiſtralia, (quæ nec ſunt de curſu, nec formata,* id eſt, *de aliqua certa forma) & ſæpius variant, ſecundum varietatem caſuum factorum & querelarum:* (as are Actions on the Caſe, Actions of Deceit, Prohibitions, *&c.* which have not any certain Form, *&c.*) And of Writs or Originals formed or of courſe, *Bracton* wrote divers remarkable Things, (*g*) *Breve quidem cum ſit formatum ad ſimiltudinem regulæ juris, quia breviter & paucis verbis intentionem proferentis exponit & explanat, ſicut regula juris rem quæ eſt breviter enarrat, &c. Sunt* (*h*) *quædam brevia formata ſub certis Caſibus de curſu, & de Communi Conſilio totius regni conceſſa & approbata, quæ quidem nullatenus mutari poterint abſque conſenſu & voluntate eorum.* By which it appears, That Writs formed, and of Courſe, that is, Originals, were at firſt authorized by Parliament, and without Parliam. cannot be alter'd or (*i*) chang'd, and therewith agree our Books, for inaſmuch as the Original Writ of *Aſſiſa ultimæ præſen-*

(*a*) 2 Inſt. 409, 410, &c.

(*b*) Br. Aſſiſe 126. Br. Plaint, &c. 10.

(*c*) 2 Inſt. 407.

(*d*) 2 Inſt. 405, 406, &c.

(*e*) 2 Inſt. 412.

* 2 Inſt. 412.

(*f*) 2 Inſt. 407. Co. Lit. 73. b.

(*g*) Co. Lit. 73. b.

(*h*) Co. Lit. 73. b.

(*i*) 2 Inſt. 407. Co. Lit. 73. b.

præsentationis was formed in these Words, *Quis advocatus tempore pacis præsentavit ultimam personam quæ mortua est*, this Form shall hold, and cannot be changed, although the Incumbent resigns, as appears in 18 *Ed.* 2. *Assise de Darrien presentment* 20. *&c.* and *F. N. B.* 31 *H.* 3. (6.) Also the Writ of *Warrantia Chartæ* is framed in these Words, *Quod juste, &c. Warrantizet B. unum messuagium in D. &c. unde chartem habet, &c.* And yet if he be bound to Warranty by Force of an Exchange, or by (*a*) Homage ancestrel, the Form of the Writ shall not be altered, 9 *Ed.* 4. 49. *b.* 21 (*b*) *H.* 6. 8. *a. &c.* *Fitz. Nat. Br.* 134. and many other Cases may be put upon the same Ground. Also *Bracton* further saith, *Communia Brevia inter omnes pro jure generaliter observari debent cum sunt originalia, & actionibus originem præstent:* And therewith agrees *Fitzherbert* in his Preface to his *Nat. Brevium:* "In "every Art and Science there are certain Rules and Fundamentals, to which a Man ought to give Credit and Belief, "and which he cannot deny: In like Manner there are divers "Rules and Fundamentals in the Knowledge of the Common Law of the Land, to which a Man ought to give "Credit and Belief, and not deny them, which are very "necessary for those who will understand the said Law, espe- "cially at the Beginning, for upon those (*c*) Foundations "the whole Law depends; for which Cause in Times past, "a very profitable Book was composed, called the *Register*, "which contains divers Principles, by which he shall be "well instructed who would understand the said Laws.

(*a*) Dyer 8. pl. 16. 7 H. 7. 2. a. Br. General brief, &c. 13 in medio. Br. General brief, &c. 8. 24 E. 3. 35. b. F. N. B. 134. f. 2 And. 96.

(*b*) Br. Warrantia Chartæ 18.

(*c*) Co. Lit. 73. b. 3 Co. 38. a.

And that was the Reason, that forasmuch as there was no Original Writ formed of *Assise* of *Novel Disseisin*, of Common of Turbary, Piscary, *&c.* but only of Common of Pasture, for that Reason no *Assise* of *Novel Disseisin* lay of them before the said Statute of 13 *Ed.* 1. And with *Bracton* agrees *Fleta*, which Book was wrote a little after the said Act of 13 *Edw.* 1. *Dicuntur brevia cum sint formata ad similit' regulæ juris quæ brev' & paucis verbis intent' proferent' exponit & explan': sicut regula juris rem quæ est brev' enarrat, &c. Et sunt quædam Brevia formata sub certis Casibus, & quædam de cursu, quæ Consilio totius regni sunt approbata, quæ quidem mutari non poterint absque eorundem contraria voluntate. Sunt & Brevia ex eis sequentia, quæ dicuntur judicalia.* And whereas afterwards, at the same Parliament of *Westm.* 2. 13 *Edw.* 1. (*d*) *c.* 24. it is enacted, *Et* (*e*) *quotiescunq; de cætero evenerit in Cancell' quod in uno casu reperitur Bre', & in consimili casu cadente sub eodem jure & simili indigente remedio non reperitur, Concordent Clerici de Cancell' in Bre' faciendo, vel atterminent quærentes in proxim' Parliament', & scribantur Casus in quibus concordare non possunt,*

(*d*) 2 Inst. 405, 406, &c.

(*e*) 2 Inst. 407.

possunt & referant eos ad proxim' Parliament' & de Consensu Jurisperitorum fiat Breve ne contingat de cætero quod Curia Domini Regis deficiat Conquerentibus in Justitia perquirenda: And the Preamble of the said 24th Chapter was consonant to the Conclusion, *de cætero non* (*a*) *recedant querentes a Curia Regis sine remedio.* By Force of which Act the Writ called the Writ *de Ingressu in consimili casu*, was formed by the Clerks of the Chancery, as it is adjudged in 3 *E.* 2. *Entry* 8. which was given in the same Age that the said Act was made, and *F. N. B.* 206. *f. Vide* 38 *E.* 3. 13. Note, Reader, at the Time of the making of the said Act, as it appears in *Fleta*, *lib.* 2. *cap.* 13. The Clerks of the Chancery (which are meant in the said Act) were grave, wise, and circumspect Men, sworn to the King, and of profound Knowledge in the Laws and Customs of *England*; for the Words of the Book are, *Est inter cætera quoddam Officium dicitur Cancellaria quod viro provido & discreto, &c. magnæ dignitatis debet committi, &c. cui associentur Clerici honesti & circumspecti, Domino Regi jurati, qui in Legibus & Consuetudinibus Anglicanis notitiam habeant pleniorem, &c.* And the Writs which they form, are called (*b*) *Brevia Magistralia*, because these Clerks, for their Knowledge, were called *Magistri Cancellariæ*, as those who wrote *Brevia de Cursu* were, and yet are called *Cursitorii*. And as the Writs which the Cursitors write are called *Brevia de Cursu*; so the Writs which the Masters draw in difficult Cases, are called *Brevia Magistralia*. But when such Clerks, so knowing of the Law, failed, then the Judges in many Cases, gave Allowance to ancient Forms of Writs, and drove the Party to make a (*c*) special Count when the Writ doth warrant the Count in Substance, although there be Variance in Circumstance, as in the said Cases of *Darrien Presentment*, and (*d*) *Warrantia Chartæ*, and many others, the Substance of the one is the Avoidance; and Death or Resignation, but the Circumstance; and in the other Warranty is the Substance, and the Manner of it but the Circumstance. But when the Case will not bear it, (as in Assise *de Communia Pasture*, he cannot make his Plaint of common Piscary, Turbary, *&c.*) then *ultimum refugium* is to refer it *ad proximum Parliamentum*, as the Statute speaks. *Nota*, Reader, in the said Statute of *Westm.* 2. *cap.* 24. a little before it is said, *Et in Registro de Cancellaria non est inventum aliquod Breve in isto Casu speciali:* And therefore the Statute provides Remedy in it, by which it appears also the Antiquity of the (*e*) Register, which is as ancient as Original Writs, the Antiquity whereof see in the Preface to the Third Part of my Reports. And in the principal Case, Exception was taken to the Plaint, because in his Title he saith,

(*a*) 2 Inst. 406.

(*b*) 2 Inst. 407.

(*c*) F. N. B. 33. b. c.

(*d*) 2 And. 96. F. N. B. 134. f. 24 E. 3. 35. b. Br. Gen. Brief, &c. 8. 7 H. 7. 2. a. 9 E. 4. 49. b. 21 H. 6. 8. a. Br. Gen. Brief, &c. 13. in Medio.

(*e*) Co. Lit. 16. b. 73. b. 159. a.

Quòd Officium prædictum eſt antiquum Officium in Weſtm' præs dict': quodque prædictus Dominus Rex nunc, &c. per Literas ſua Patentes, &c. conceſſit eidem Jehu *Officium Magiſtri Ludorum pilarum palmarium, &c. Habend' idem Officium eidem* Jehu, *durante vita ſua, &c.* And doth not ſhew that any Profit belongs to the ſaid Office, and a Man ſhall not maintain an Aſſiſe of an Office without Profit, as the Book is in (a) 27 *H.* 8. But it was anſwered and reſolved, That the Plaint was well enough: For true it is, that of an Office of Charge no Aſſiſe lies, as it is held in 30 *Aſſ. pl.* 4. 8 *E.* 4. 22. and 27 *H.* 8. 12. and 30 *Aſſ. pl.* 4. There Aſſiſe was brought of the Office of Reaper of the Manor of *D. cum pertinen'*, and there *Shard* took a Difference between an ancient Office and a new Office; for in an Aſſiſe of a new Office firſt erected and appointed, there the Plaintiff ought to ſhew what Fee or Profit is granted for the exerciſing of it, for it cannot have a (c) Fee and Profit begonging to it, as an ancient Office may. And there *Burton* ſaith, that their Opinion was, That if a Man makes Plaint of the Office, and of the Profit, the Plaint had abated; for by the Recovery of the Office, the Fee and Profit, as Parcel of it, ſhall be recovered; and therewith agrees the Book in 8 *E.* 4. 22. *b.* where in an Aſſiſe of an (d) Office in the Com. Pleas, he made his Plaint of the Office and Fee, and Wages and Commodities; and *Choke* excepted againſt it, becauſe he complained of one Thing twice, *ſcil.* of the Office and of the Fee: *Jenny*, who was of Counſel with the Plaintiff, we have amended our Plaint; for it is but of the Office, with the Appurtenances. *Pigot*, Then the Plaint is not good: For a Man ſhall not maintain an Aſſiſe of an Office without Profit: And the Court held the Plaint good as to that and therewith agree 5 *Ed.* 4. 3. (e) 22 *H.* 6. 9. *b.* 9 *Ed.* 4. 6. *a. b.* And it is to be known, that if a Man be diſſeiſed of the whole Office, he ſhall have an Aſſiſe *de Officio cum Pertinentiis*; but if he be diſſeiſed of Parcel of the Profits, he may have an Aſſiſe of theſe Parcels only, 22 *H.* 6. 11. *b.* 13 *Edw.* 3. *Plaint* 23. If a Man gives me the Keeping of his Park, taking Two-pence *per Diem*, and a Robe, the Plaint ſhall not be of the Office or Keeping, if I be not diſſeiſed of the whole Office: But if I be diſſeiſed of the Robe or Fee, the Plaint ſhall be only thereof. And 3 *Edw.* 3. *Aſſiſe* 175. An *Aſſiſe* of *Novel Diſſeſin* was brought, and he made his Plaint of a Profit aprender, for the Keeping of the Park and Wood of *Preſton*, every Day of the Year a Penny Half Penny for his Poulter, and

(a) 27 H. 8. 12. a. Antea 47. a. Br. Præcipe quod reddat 1.

(b) Fitz. Aſſiſe 296. Antea 47. a. Br. Aſſiſe 307. Br. Pleint, &c. 16.

(c) Cr. Car. 50, 51.

(d) Fitz. Office del Court 6. Fitz. Pleint 4. Br. Pleint, &c. 19.

(e) Antea 47. a. Fitz. Aſſiſe Br. Aſſiſe 76.

(f) Br. Aſſiſe 95. Fitz. Aſſiſe. Antea 47. a.

and a Robe, and the Aſſiſe was maintained: And there *Scrope* held, That if I have a Corody to take four Loaves, and four Flagons of Ale in the Week, altho' they are but one Corody and one Freehold, yet if I be diſſeiſed only of the Bread, I ſhall not complain of both, *ſcil.* of the Ale and the Bread, but only of the Bread, otherwiſe my Plaint ſhall abate: But if I be diſſeiſed of two of the Loaves only, I ſhall make my Plaint of all the four Loaves, with which agree (*a*) 22 *H.* 6. 9. *b.* and 12 *Aſſ. pl.* 23. Aſſiſe was brought of Meat and Drink as appurtenant to an Office. And in the principal Caſe at Bar, the Aſſiſe found for the Plaintiff againſt *Roger Rolls*, *in duobus Sphæriſteriis*, *Anglice*, Tennis-Courts, *quorum unum vocatur*, the Cloſe Tennis-Court, *& alterum vocatur*, the Brake in *Weſtm' præd'*, and aſſeſſed Damages and Coſts, and acquitted the Lord *Knyvet* and *John Freeborn*, of the Diſſeiſin of the Office aforeſaid. *Ideo conſideratum eſt quod prædictus* Jehu *recuperet ſeiſinam ſuam verſus præfatum* Rogerum *de Officio prædicto in prædictis duobus Sphæriſteriis per viſum recognitorum Aſſiſæ prædictæ*, with Damages and Coſts, *& prædictus* Rogerus *in miſericordia*, *& prædictus* Jehu *in miſericordia pro falſo clamore ſuo verſus præfat'* Tho. Knyvet, *&* Johannem Freeborn, *eo quod ipſi de diſſeiſina prædict' ſuperius acquietati exiſtunt*, *& prædict'* Thomas *&* Johannes Freeborn *eant inde ſine die*, *&c.* And it is to be known, that at the Common Law, the Aſſiſe was *remedium maxime* * *feſtinum*, *& maxime beneficiale*: *feſtinum*, for therein the Defendant ſhall not be (*b*) eſſoigned, nor caſt a (*c*) Protection; alſo the Defendant ſhall not pray in (*d*) Aid of any but only of the King, neither ſhall he (*e*) vouch a Stranger nor any Party to the Writ, unleſs he enters preſently into the Warranty: The ſame Law of (*f*) Receipt: Alſo the (*g*) Parol ſhall not demur for Nonage, either of the Plaintiff or Defendant; and in many other Reſpects the Aſſiſe is *Remedium maxime feſtinum:* It is alſo *maxime beneficiale*; for in no Action at the Common Law, a Man ſhall recover the Land it ſelf and Damages, but only in an Aſſiſe againſt the Diſſeiſor. *Vide* the Statute of *Glouceſter*, *cap.* 1. And in ſome Caſe a Man ſhall have an Aſſiſe of *Novel diſſeiſin* at the Common Law, when he himſelf is ſeiſed of the Freehold of the Land: As where the Lord, *&c.* doth often diſtreign, (*h*) that the Ter-tenant cannot manure his Land; in that Caſe the Ter-tenant may have an Aſſiſe, and the Writ ſhall be general; but he ſhall make a ſpecial Plaint, that the Lord, *&c.* did

(*a*) Antea 47. a. 49. b. Fitz. Aſſiſe 10. Br. Aſſiſe 76.

* Poſtea 66. a. 2 Inſt. 410.

(*b*) 1 Roll. 822. 14 H. 6. 22. b. 2 Inſt. 410. 21 H. 6. 42. a.

(*c*) 21 H. 6. 42. a. 2 Inſt. 410. Plowd. 89. Br. Protect. 53. Co. Lit. 131. a.

(*d*) 2 Inſt. 410. 9 H. 5. 14. a. 14 H. 6. 22. b.

(*e*) 2 Inſt. 410. F. N. B. 78. c. 2 Roll. 745. 748. Plowd. 89. b. Br. Voucher 146. 9 H. 5. 14. a.

(*f*) 2 Inſt. 410.

(*g*) 2 Inſt. 410.

(*h*) F. N. B. 178. 2 Inſt. 414. 27 Aſſiſe 51. Br. Aſſiſe 273. 28 Aſſ. 50. Br. Aſſiſe 290. 4 Co. 11. b. 11 Co. 44. a.

did often diſtrain, *&c.* and the Judgment ſhall not be *quod Querens recuperabit ſeiſinam tenementorum prædictorum*, for the Plaintiff himſelf is ſeiſed of the Freehold; but the Judgment ſhall be, that he ſhall have and hold the Land, *abſque multiplici diſtrictione*, &c. So *in caſu quo quis paſcit alterius ſeperale*, the Ter-tenant ſhall have an Aſſiſe by the Common Law. And the Statute of *Weſtm.* 2. (*a*) *cap.* 25. is but an Affirmance of the Common Law; for in the ſame Manner he ſhall have an Aſſiſe for Fiſhing in his ſeveral Piſcary or Turbary, and the Writ ſhall be general, as appears by the Statute. But the Plaintiff in his Plaint ought to ſhew, that the Defendant claiming Common of Paſture in his ſeveral Grounds, with his Cattle, *&c.* and the Judgment ſhall not be, that he ſhall recover the Seiſin of the Tenements, *&c.* but that he ſhall have and hold them in Severalty; for the Plaintiff himſelf is in Seiſin of the Freehold, and therefore he cannot make his Plaint to be diſſeiſed of his Freehold, for it is not ſo; and then the Judgment would not purſue it. *Vide F. N. B.* 178. *b.* 27 *Aſſ. pl.* 30. *&* 51. 28 *Aſſ. pl.* 50. *Weſtm.* 2. *cap.* 25.

(*a*) 2 Inſt. 409, 410, 411, 412, &c.

SYMS's

SYMS's *Case.*

Mich. 6 Jacobi I.

Which began Hill. 5. *Rott.* 2541.

James Game brought a Formedon in the Remainder against *William Syms* and *Mary* his Wife, and demanded a Houſe, forty five Acres of Land, ſix of Meadow, *&c.* in *Wethermonford*, *&c.* in *Eſſex*, of a Gift made by *Henry Winter* to *Stephen* his Son, and to the Heirs Males of his Body, *&c.* the Remainder to *John* his Son, and to the Heirs Males of his Body, *&c.* the Remainder to *Alice Winter*, and her Heirs; and that the Demandant was Son and Heir to *Alice*, and that *Stephen* and *John* were dead without Iſſue, *&c.* The Tenant pleaded in Bar a Fine levied by the ſaid *Stephen* to *William Brown*, of the Tenements aforeſaid; by which he did grant, That he and his Heirs *Warrant' tenementa præd' com' pertinen', &c. contra omnes Homines*; after which Fine the ſaid *John* died without Iſſue, and afterwards the ſaid *Stephen* died without Iſſue. *Poſt cujus mortem Warrantia ipſius Stephani prædicta in fine prædict' ſuperius ſpecificat' deſcendebat præfatæ Aliciæ ut ſorori & Hæredi prædict' Stephani*, and after the Deſcent of the Warranty the ſaid *Alice* died, *Poſt cujus mortem Warrantia prædict' deſcendebat præfat' Jacobo ut filio & Hæredi præd' Aliciæ, & petit Judicium ſi præd' Jacob' Actionem ſuam præd' contrà Warran' præd' habeat, &c.* The Demandant confeſſed the Fine aforeſaid, *&c.* and the Death of *John Winter* without Iſſue, and that the ſaid *Stephen* died *prout, &c.* *Sed ulterius dicit quod prædicta Warrantia prædicti Stephani deſcendebat præfatæ Aliciæ ut ſorori & uni Hæredi prædicti Stephani, ac cuidam Thomiæ Rampton ut alteri Cohæredi præd' Stephani*, and ſhewed Cro. Jac. 217, 218.

ſhewed how, and after the Death of the ſaid *Alice*, the ſaid Warranty *quoad un' medietat' Tenement' prædict' deſcendebat eidem Jacobo ut Filio & Hæredi prædict' Aliciæ, &c.* Upon which the Tenant did demur in Law, Whether the Warranty which deſcended on both the Heirs, ſhould bar the ſaid *Alice* and her Heir for the Whole, or but for the Moiety, foraſmuch as the Warranty deſcended on both, and *Alice* only had Right to the ſaid Land, was the Queſtion. And it was objected, That it ſhould be a Bar but for one Moiety, becauſe the Warranty doth not only deſcend on her, but on the other Siſter: And the Caſe in (*a*) 45 *Edw.* 3. 23. *a. b.* was cited, which is abridged by *Br.* **Garrantie* 14. where he abridges the Caſe to this Effect: Huſb. and Wife, Tenants in ſpecial Tail, to them and the Heirs of their Bodies, have Iſſue a Daughter, the Huſband diſcontinues the Eſtate Tail with Warranty, and the Wife dies; and he took another Wife, and had Iſſue another Daughter, the Huſband dies, the elder Daughter took Huſband and they brought a Formedon, and the Tenant did rebut for one Moiety by Reaſon of the Warranty and Aſſets, and recovered for the other Moiety, for he could not rebut for the other Moiety, becauſe the Warranty did not deſcend only on her. But it was reſolved by *Coke*, C. J. *& tot' Cur'*, That in the Caſe at Bar *Alice* and her Heir was barred for (*b*) the Whole; for the Warranty is entire, and extends to the whole Land, and is a Bar to every Perſon on whom it deſcends, of all the Right which ſhe had in the Land; and if each of them had Right jointly or ſeverally, each is barred; and if one only had Right, and the other nothing, ſhe which had the only Right ſhall be barred of the Whole, for as to that Purp. the whole Warranty deſcends to each of them. And therewith agrees a Caſe adjudged in the Point in 5 *Ed.* 2. *Warr.* (*c*) 78. where *Sibil* brought a *Sur cui in vita*, of the Seiſin of *Margery* her Grandm. the Tenant pleaded, That the ſaid *Sibil* is Coheir with *Elin* and *Maud*, to one *Walter* their Couſin, whoſe Heirs they are, and that the ſaid *Walter* did enfeoff the Tenant with Warranty, Judgment, *&c.* and there it is objected, That in the Manner as one ſhall vouch, he ought to rebut, but you can't vouch us, (*quaſi diceret*, that he ſhould not vouch one only, becauſe the Warranty deſcends on all, and in the like Manner, that he ſhould not rebut only againſt one, but it ought to be for a third Part, becauſe the Demandant is not ſole Heir to the Warranty.) To which (*d*) *Hervy*, C. J. anſwered, You are three Coheirs, and the Tenant may bar you all, *ergo*, one alone; and he ſhews the Deed with Warranty, of *Walter*, whoſe Heirs you are, which you do not deny; wherefore, by Judgment of the Court, you ſhall take nothing, *&c.* And therewith agrees 4 *H.* 7. 18. *b.* where it is held, That if three (*e*) Coparceners alien in Fee with Warranty, every Warranty ſhall be collateral to the other, and yet the Warranty of her who dies firſt, deſcends on both the others. The Caſe in 6 *Edw.* 3. 50. *a. b.* was in effect, That *A.* ſeiſed

(*a*) Fitz. Vouch. 73. Poſtea 52. a. 1 Mod. Rep. 182. * Poſtea 52. a. b.

(*b*) Cr. Jac. 218.

(*c*) Co. Lit. 373. b. 1 Mod. Rep. 182.

(*d*) 1 Mod. Rep. 182, 183.

(*e*) Fitz. Garranty 6. Br. Garranty 56.

A. ſeiſed of three Acres made a Feoffment of one to *B.* with Warranty, and died ſeiſed of the other two, having Iſſue two Daughters, who made Partition, and each had one Acre, the Wife of *A.* purchaſed the Part of one Coparcener, and afterwards brought a Writ of Dower againſt *B.* who vouched the two Daughters and Heirs of *A.* The one (who had enfeoffed the Demandant of her Part) entred into the Warranty as one who had nothing by Deſcent, the other pleaded all the ſaid Special Matter, pretending, that foraſmuch as the Demandant had purchas'd the Part of one, that ſhe ſhould not recover the Whole in Value againſt the other, but for a Moiety, becauſe the Warranty did deſcend on both: But it was adjudged, That ſhe ſhould recover the whole Value againſt her who had by Deſcent, for when two Heirs are vouched, and the one hath nothing, the other who hath ſhall anſwer the Whole in Value, and yet the Warranty did not deſcend upon him alone. And it was lawful for the Woman Demandant to purchaſe the Part of one, and therefore it ſhall not prejudice her. *Vide* (*a*) 11 *H.* 4. 20. *a. b.* 41 *Ed.* 3. 3. (*b*) 10 *H.* 7. 13. And it was ſaid, That the Book in (*c*) 45 *Ed.* 3. 23. *a. b.* doth not warrant any ſuch Opinion as hath been collected, for the principal Caſe in the Book at large (which is the Fountain it ſelf) is, That in a *Præcipe quod reddat* the Tenant did vouch two as Heirs, and ſaid, that one was within Age, and prayed that the Parol might demur; the Demandant ſaid, That he was full of Age, and prayed that he might be inſpected in Court; upon which Proceſs was awarded 'till *Sequatur ſub ſuo periculo*, at which Day he came not, nor no Writ was return'd, and the Demandant prayed Judgment for the Moiety, becauſe one of them who was vouched made Default, and prayed *Summons ad War'* againſt the other; to which the Demandant ſaid, That *Summons ad War'* he could not have, becauſe he who is vouched is Demandant: To which the Tenant ſaid, That the Anceſtor of thoſe who are vouched by Deed which here is, did enfeoff one *R.* with Warranty, whoſe Eſtate we have, Judgment if againſt the Deed; with Averment that he had Aſſets by Deſcent. To which the Demandant ſaid, That he had nothing by Deſcent. And the Court gave Judgment for one Moiety in Reſpect of the Default of one of the Vouchees which the Tenant had loſt by his Voucher, for which Moiety he could plead nothing; and for the other Moiety, altho' he had vouched the Demandant by a ſtrange Name, and ſo in a Manner pleaded in Chief, yet foraſmuch as the Demandant had toll him of this Voucher as to him, becauſe he is Demandant himſelf, he might plead the Warranty and Aſſets in Bar for the other Moiety: Upon which Plea no Judgment is given in the Book, and therefore the Court regarded not the ſaid Collection or Inference of the Lord (*d*) *Brook*, foraſmuch as the Book is adjudged on another Point, *ſcil.* on Default of one of the Vouchees; but it was affirmed *per totam*

(*a*) Br. Garranty 21. Br. Recovery in Value 38.
(*b*) Br. Garranty 77.
(*c*) Antea 51. b. Fitz. Vouch. 73. Br. Garranty 14. 1 Mod. Rep. 182.
(*d*) Br. Garranty 14. Antea 51. b. Poſtea 52. b.

tam Curiam, That in the ſaid Caſe of Warranty and Aſſets, the lineal Warranty is as entire as the colateral Warranty; but inaſmuch as the (*a*) lineal Warranty is not a Bar to the Iſſue in Tail without Aſſets, and Aſſets are to be adjudged according to the Value, which may be more or leſs; for this Reaſon the lineal Warranty ought to follow the Aſſets, becauſe without Aſſets the (lineal) Warranty is no Bar. As if Warranty and Aſſets be pleaded in a Formedon brought of four Acres, each of the yearly Value of twelve Pence, and Iſſue is taken on the Aſſets, and it is found that but one Acre of the Value of twelve Pence deſcends, it is no Bar but for one Acre, as it is held in 40 *E.* 3. 15. *a.* (*b*) 21 *E.* 3. 9. *b.* againſt the Book in 21 *Ed.* 3. (28.) 38. *b.* But otherwiſe it is in Debt or * Annuity brought againſt the Heir, becauſe Lands of their Nature are diviſible, and the Demandant in Formedon may recover Part, and be barred of the Reſidue; but Debt and Annuity in ſuch Caſe are entire, and not diviſible, as it is ſaid in 5 *R.* 2. *Annuity* 21. *Annua nec debitum* (*c*) *Judex non ſeparat ipſum.* And the Opinion of the Lord *Brook*, altho' it was not well collected out of the Book, was affirmed for good Law, if the juſt Aſſets of the Land in demand, and no more deſcends on the Demand. and the other Daugh. for then the Demand. ought to recover the Moiety, becauſe ſhe hath no Aſ. but as to one Moiety, and the lineal Warranty only, is no Bar. But if the Moiety of the Land, which deſcends on the Demandant be of equal Value to the Land in demand, ſhe ſhall be barred of the Whole, for a lineal Warranty, when Aſſets to the Value of the Land in demand deſcend, is as entire and full a Bar as to the Demand. as a colateral Warranty, deſcended the Warranty in the one Caſe or in the other, on the Demandant only, or on her and any other. And the Statute of *Glouceſter*, *cap.* 3. (*e*) enacts, That if the Warranty of the Tenant by the Curteſy be pleaded, the Heir of the Wife ſhall not be barred by the Deed of his Father, from whom no Inheritance deſcends, *&c.* And if Inheritance doth deſcend from the Part of the Father, then he be barred of the Value of the Inheritance which deſcends to him: By Force of which Stat. the collateral Warranty, which without Aſſets was a Bar entirely to the Whole by the Common Law, is now but a proportionable Bar, having reſpect to the Aſſets deſcended, and the lineal Warranty and Aſſets pleaded in Formedon in Deſcender, is taken within the Equity of the ſaid Act; as it is reſolved in 11 *Edw.* 2. (*f*) *Statham Gar.* 21 *Edw.* 3. 28. *b.* 38 *Edw.* 3. 23. *a. b. &c. Plowd. Com. in Fulmerſton's Caſe, fol.* 110. *a.* But where in the ſaid *Fulmerſton's* Caſe it is ſaid, If in the one Caſe or the other, there be no Aſſets deſcended at the Time of the Aſſiſe of *Mortdanceſter*, or *Formedon* brought, but (*g*) afterwards Aſſets deſcend, that the Tenant ſhall have a *Scire facias* in the Caſe of Warranty made by Tenant by the Courteſy, to have the Land which was of the Seiſin of his Mother, and not of the Aſſets by the expreſs Purview of the ſaid

(*a*) Co.Lit.374.b.

(*b*) Plow.440.a.b. Poſtea 134. b. Br. Warrantia Chartæ 30. In Medio. * 2 Inſt. 293.

(*c*) Hetl. 53. Lit. Rep. 61. Co. Lit. 150. a.

(*d*) Antea. 51. b. 52. a. Br. Garranty 14.

(*e*) Co. Lit. 365. a. b. 366. a. 2 Inſt. 292, 293, 294. Plowd. 110. a. 21 H. 7. 11. a. Wing. Max. 23.

(*f*) 11 Edw. 2. Statham Garranty 24. 21 E. 3. 28. b. 29. a.

(*g*) Co.Lit.366.a. Plowd. 110. a.

Statute of *Glouceſter*, and in the Caſe of Warranty made by Tenant in Tail, which is taken within the Equity of the ſaid Act, the Iſſue in Tail ſhall have a (*a*) *Scire facias* to have the Aſſets which afterwards deſcend, and not the Land given in Tail; and Equity is the Reaſon that the Caſe taken within the Equity of the form. Law, ſhall not follow the Purview thereof, but ſhall have another and diverſe Conſtructions, for Equity requires that Incertainty ſhould be avoided as the Author of Contention, and that there ſhould be an End of Controverſies, according to Equity and Right, the final End of all Laws: And therefore the ſaid Stat. of *Glouceſter* well provided an abſolute and juſt End in the Caſe of Tenant by the Courteſy of Land in Fee-ſimple; for when the Tenant in ſuch Caſe after Aſſets deſcended, recovers the Inheritance of the Mother which he hath purchaſed, it makes an End of that Controverſy, ſo that the Demandant or his Heirs ſhall be by Force of the Act barred for ever to claim the Land. But if in the ſaid Caſe of * Formedon, the Tenant, after Aſſets deſcend, ſhall have a *Scire facias* for the Land intailed, then if the Aſſets ſhall be aliened, the Iſſues inherit. to the Eſtate-tail, may by Writ of Formedon in Deſcender recover the Land in Tail, which will be Cauſe of new Suit and Contention, and will not anſwer the final Intention of the Purview of the ſaid Act; and therefore, according to the Rule of Wiſdom (*b*) *Sapiens incipit a fine*, to make a perpetual Bar as well in that Caſe as in the other, it was adj. reaſonable and conſon. to the final Intent of the Makers of the ſaid Act, That in that Caſe of an Eſtate Tail the Ten. ſhould have a *Sci' fac'*, to have the Aſ. which deſc. to the Iſſue in Tail in Fee-ſimp. which as to them ſhall be a perpet. Bar againſt him and his Heirs, which in juſt and proport. Equity, agrees with the oth. Caſe. *Vide* (*c*) 43 *E.* 3. 26. *a.* and (*d*) 40 *E.* 3, 39, *&c.* Where it is held, That if War. and Aſ. be pleaded againſt the Iſſue in Tail, and if the Demand. hath nothing by Deſc. and Land deſc. to the Iſſue afterwards, he ſhall have a *Sci' fac'* to have the Value. But it is in none of the ſaid Books expreſſed, how the Ten. ſhall demean himſ. in Pleading to take Adv. of the Aſ. which deſc. aftw. And theref. if in a (*e*) *Mordan'*, *Coſinage*, *Aiel*, *Beſaiel*, *&c.* the Ten. pleads the War. of the Ten. by the Courteſy, with Aſſets or in a Formed. the Ten. pleads a lineal War. and Aſ. and the Demand. takes Iſſue on the Aſ. and it is found by Inq; that nothing deſc. whereby the Demand. recov. and after that Recov. Aſ. deſc. the Ten. ſhall never have a (*f*) *Scire fac'* to take the Benefit of the ſaid Act, for divers Reaſ. 1. Becauſe the ſaid Trial is (*g*) as peremp. to him, as if Aſ. had been found by the Inq. it had been to the Demand. 2. There is no Record on which he can ground his *Scire fac'*. 3. By the putting himſ. upon the Trial of Aſ. he hath waved the Advice which he might have taken upon the ſaid Act. 4. He who will take Benefit of that Act, ought not to begin with a Falſity. But if the Tenant will take Benefit of the ſaid Act, he ought to plead the War. and acknowledge the Demand.

(*a*) Co. Lit. 366. a. Plowd. 110. a. 2 Inſt. 293.

* 2 Inſt. 293. Plowd. 110. a. Co. Lit. 366. a.

(*b*) 10 Co. 25. b. Co. Lit. 70. b. 127. b.

(*c*) Br. Scire fac'. 29. 17. Br. Aſſets per Diſcent 32. Br. Diſcontinuance de Poſſ. 30.

(*d*) Statham Formedon 2. Br. Aſſets per Diſcent 17.

(*e*) 2 Inſt. 293, 294.

(*f*) Co. Lit. 366. a. Cr. Car. 373. 2 Inſt. 293.

(*g*) 4 Leon. 136. Noy 149.

Demand. Title, and pray that the Advant. of the Stat. when Aſ. ſhall deſc. be ſaved to him, *&c.* and upon that Record, when Aſ. deſc. he ſhall have (*a*) *Sci' fac'* and that ſtands with the Let. and Intent. of the ſaid Act; for the Words are *(by Writ of (b) Judgm. which ſhall iſſue out of the Rolls of the Juſtices.)* So that the *Scire fac'* ought to be grounded on the Rolls of the Juſtices. Alſo the Stat. goes farther. To reſummon the War. as it hath been done in other Caſes, *ſcil.* where the Warrantee or Vouchee comes into Court and ſaith, That nothing is deſc. to him from him by whoſe Deed he is vouched, *&c.* which if the Tenant doth not deny, *&c.* he ſhall have the Ben. of the Aſ. which ſhall afterw. deſc. to the Vouchee; but if he takes Iſſue that Aſ. deſc. to him, and that by Inq. be found againſt him, that nothing deſc. he ſhall never have any Ben. of the Aſſets which ſhall afterw. deſc. to the Vouchee. But it was ſaid, If Aſ. be found by Inq. but not to the (*c*) Value, there the Demand. ſhall have Ben. of the Aſ. which afterw. deſc. becauſe the Vouchee's Plea is falſe; and on the oth. Part, it would be hard to drive the Demand. who is a Stranger, to know the preciſe Value of the Land which the Vouchee hath by Deſc. but he may well take Knowledge, whether he hath any Land by Deſc. from the ſame Anceſtor or not. And in this Caſe divers good (*d*) Differences were obſ. which do appear in our Books. 1. Between a collat. War. and an Eſtoppel; for a collateral War. binds the Right of him who claims not by him who makes the War. but an Eſtoppel ſhall bind only the Heir who claims the Right of him to whom the Eſtop. was: As at the Com. Law. bef. the ſaid Stat. of *Glouceſter*, *cap.* 3. If the Huſb. had aliened the Land which he had in the Right of his Wife, with War. and the Huſb. and Wife died, in that Caſe the Right deſc. from the Wife, and yet that War. being collat. to the Title of the Land, ſhould bar the Wife's Heir: But it is adjudg'd in 18 *Edw.* 3. 9. *b.* That where (*e*) Lands were convey'd to the Huſb. and Wife, and to the Heirs of the Huſb. and the Huſb. gave them in Tail, and the Huſb. died, the Wife ſhould recover the Land againſt the Donee by Writ of *Cui in vita*, ſuppoſing that ſhe had the Lands to her and her Heirs in Fee; the Wife after the Recover. enfeoffed another, and died, the Donee in Tail died without Iſſue, the Iſſue of the ſaid Huſb. and Wife brought a Formedon in the Reverter againſt the Feoffee of the Wife; and altho' the Iſſue was Heir to the Wife who was eſtopped by the ſaid Recov. in the *Cui in vita*, to ſay that ſhe had a leſſer Eſtate than a Fee-ſimple, yet the Iſſue who claims the Rever. of the Land as Heir to the Huſb. ſhall not be (*f*) bound by that Eſtop. made by the Wife, altho' he be Heir to her alſo, for then by her own Act, the Wife who had but an Eſtate for Life, might bar the Heir who had Right, and who claim'd as Heir to his Father. But a collat. War. cannot take Effect without the Act of God, *ſcil.* the Death of him who makes it, and in the mean Time the Eſtate to which, *&c.* may be debated. But in this Point the Warranty and the Eſtoppel concur,

(*a*) Cr. Car. 373. Co. Lit. 366. a. 2 Inſt. 293, 294.
(*b*) Plowd. 110. a. 2 Inſt. 294. Co. Lit. 366. a. 365. b.
(*c*) Co. Lit. 366. a.
(*d*) Co. Lit. 365. b.
(*e*) Co. Lit. 365. b. Fitz. Eſtop. 219.
(*f*) 1 Jones 459. Cr. Car. 525. Co. Lit. 365. b.

concur, both which ſhall deſcend on the general (*a*) Heir, to him who made the Warranty or Eſtoppel, and not on the particular Heir, as on the younger Son, and not on the Siſter of the half Blood, *&c.* as appears in (*b*) 35 *H.* 6. 34. and as the Heir who doth not claim the Land as Heir to him who made the Eſtoppel, as hath been ſaid, ſhall not be bound thereby for his Diſadvantage. So in the ſame Caſe he ſhall not be capable of Advantage, unleſs it be in ſpecial Caſes; and therefore it is adjudg'd in 38 *Ed.* 3. 10. *a. b.* That if a Woman (*c*) *Meſne* binds herſelf to acquittal to the Tenant and his Heirs, and after the Woman takes a Huſband, and the Tenant by his Deed grants to the Huſband, that he nor his Heirs ſhall be bound to the ſaid Acquittal, and afterwards the Huſband and Wife have Iſſue and die, this Iſſue, altho' he be Heir to the Huſband, yet becauſe the Line of Acquittal deſcends to him as Heir to his Mother, he ſhall not be capable of the ſaid Advantage of the ſaid Diſcharge, *quia* (*d*) *Hæres dicitur ab hæreditate, & non hæreditas ab Hærede.* But therein alſo there is a Difference between Advantages in groſs, as in the Caſe of (*e*) 38 *E.* 3. and Advantages, which by the Grant are made appurtenant or incident to another thing: As if a Man be ſeiſed of a Houſe in the Right of his Wife, and another grants to the Huſb. and his Heirs, to have ſuffici. Eſtovers to burn in the ſame Houſe, in that Caſe the Eſtovers are appurtenant to the Houſe, and ſhall deſcend to the Iſſue of the Huſband and Wife. So if one hath a Houſe of the Part of his Moth. and one grants to him, that he and his Heirs ſhall have competent Houſebote to be burnt in the ſame Houſe, this is appurtenant to the Houſe; and altho' it be a new Purchaſe, yet it ſhall go with the Houſe to the Heir of the Part of the Mother. The ſame Law if a Man hath a (*f*) Rent-ſeck by Deſcent of the Part of his Mother, and the Ter-tenant grants to him and his Heirs, that they ſhall diſtrein for the Rent, *&c.* this is as appurtenant to the Rent, and ſhall go with the Rent to the Heir of the Part of the Mother; and ſo it is held in (*g*) 5 *E.* 2. *Avowry* 207. in *Jordan*'s Caſe. That where *Alice* was ſeiſed of a Manor in Fee, and took to Huſband one *Jordan*, and had Iſſue *Sibil*; and afterwards *Jordan* and his Wife died, and *Sibil* was ſeiſed of the Manor, as Heir of the Part of her Mother, who before the Statute of *Quia Emptores terrarum*, did enfeoff *P.* of Parcel of the Manor by four Shillings Rent, and afterwards *Sibil* died without Iſſue: And there the Queſtion was, Who ſhould have this Seigniory and Rent of four Shillings newly created, whether the Heir of the Part of the Mother, or the Heir of the Part of *Jordan* the Father? And there *Beresford*, Chief Juſtice of the Bench, ſaid, When *Sibil* enfeoffed *P.* of Parcel of the Manor which deſcended to her from *Alice*, theſe Services were then appurtenant to the Remainder of the Manor, wherefore the Death of *Sibil*, without Heir of her Body, could not defeat that Appendance.

(*a*) Co. Lit. 12. a. 337. b. Hob. 31.

(*b*) Hob. 31. Br. Eſtoppel 23. 9 Co. 9. a. Plow. 136. a. b. 35 H. 6. 33. b. 34. a. Fitz. Eſtop. 57.

(*c*) Co. Lit. 13. a. Fitz. Meſne 24.

(*d*) Co. Lit. 8. a. 3 Co. 89. a.

(*e*) 38 E. 3. 10. a. b. *ſupra*.

(*f*) Co. Lit. 12. b. 13. a.

(*g*) Co. Lit. 12. b. Br. Tenure 86.

pendance. So it is held in 7 *H.* 6. 4. *b.* That if a Man be (*a*) Co. Lit. 12. b. 1 Co. 100. b. Br. Diſcent 11. ſeiſed of Land of the Part of his (*a*) Mother, and maketh a Gift in Tail rendring Rent, this new Rent which is incident to the Reverſion, ſhall go with the Reverſion to the Heir of the Part of the Mother. And it is to be known, (*b*) 2 Bulſtr. 43. that there is a (*b*) Difference between Eſtoppels or Concluſions which ſtand upon Recompence, and other Eſtoppels which ſtand upon Affirmance or Admittance of any Matter, by Matter of Record: As if an Abator marries with the right Heir, and has Iſſue by her, and the Abator makes a Leaſe for Life rendring Rent, and he and his Wife die, in this Caſe the Iſſue has the meer Right of the Part of his Mother; and yet if he accepts the Rent, and makes Acquittance, it ſhall eſtop him and his Heirs to avoid the ſaid Leaſe, in reſpect of the Acceptance of the Recompence; and therewith agrees 39 *H.* 6. 27. *Vide* (21) 28 *H.* 6. 24. But an Eſtoppel (*c*) 18 E. 3. 9. b. Antea 53. b. Co. Lit. 365. b. Fitz. Eſtop. 219. which accrues by Admittance, *&c.* of Record, ſhall not conclude the Heir who claims not the Right by the ſame Anceſtor, as it is adjudged in (*c*) 18 *E.* 3. aforeſaid.

ROGER

ROGER *Earl of* Rutland's *Caſe.*

Mich. 6 Jacobi 1.

ROger Earl of (a) *Rutland*, brought an *Aſſiſe of Novel Diſſeiſin* againſt *Gilbert* Earl of *Shrewſbury*, and others, complained he was diſſeiſed of his Freehold in *Clipſon*, in the County of *Nottingham*, and made his Plaint to be diſſeiſed *de* (b) *Officio Cuſtodis parci, vocat' Clipſon Park, ac de Pannagio & Herbagio præd' parci de Clipſon præd' cum pertinen', & pro Titulo Liberi Tenementi de Officio præd' ac de Pannagio & Herbagio præd'*, the Plaintiff ſaid, That Queen *Elizabeth* was ſeiſed of the ſaid Park in Fee, in the Right of her Crown, and 19 *March*, *Anno* 10. by her Letters Patents granted to *Thomas Markham*, *Ar' Officium Cuſtodis parci ſui, vocat' Clipſon Park*, (without ſaying *prædict'*) *ac eundem Tho' Markham præd' parci ſui vocat' Clipſon Park, fecit, ordinavit, & conſtituit per eaſdem Literas Patentes*, To have and to hold to him for Term of his Life, with all Fees due and accuſtomed: And further granted by the ſaid Letters Patents, to the ſaid *Thomas Markham*, *Pannagium & Herbagium prædict' parci ſui de Clipſon*, To have and to hold the ſaid Pannage and Herbage to the ſaid *Thomas Markham* for Term of his Life. And afterwards Queen *Eliz.* ſo ſeiſed of the ſaid Park as is aforeſaid, died thereof ſeiſed. After whoſe Death the ſaid Park deſcended to the King that now is; *Ac præd' Tho. Markham de præd' Officio & Pannagio & Herbagio præd' in forma præd' ſeiſit' exiſten', idem Dominus Rex 9 die Junii An. Regni ſui primo, per Literas ſuas Patentes, &c. recitando præd' Statum præd' Tho' Markham de & in Præmiſ. præd' Sic, ut præfert', Sibi conceſſis, conceſſit eidem Com' Rutland' præd' Offic' Cuſtodis præd' parci voc' Clipſon Park*, To have and to hold to him for his Life, *quam cito Officium præd' per Mortem, Surſum reddition em, Forisfacturam vel aliquo alio modo quocunq; vacaverit*, with all Fees, *&c.* and further granted by the ſame Letters Patents, the ſaid Herbage and Pannage to the ſaid E. of *Rutland*, for Term of his Life (without ſhewing when the Eſtate of the Herb. and Pan. (c) ſhould begin)

(a) 1 Bulſt. 4, 5. 2 Brownl. 229, 230. Jenk. Cent. 283.

(b) Antea 47. a.

(c) 2 Brownl. 229, 230. 234. 242. Jenk. Cent. 283. 1 Brownl. 27.

udco

adeo plene & integre prout præd' Tho. Markham, &c. habuit, tenuit, seu gavisus fuit, &c. And afterwards the said *Tho. Markham, 9 Martii, Anno quarto Regis nunc* died, after whose Death the Plaintiff was seised of the said Office, and of the Herbage and Pannage, 'till disseised by the Defendants. To which the Defendants pleaded the general Issue, *Nul tort, nul disseisin*; and as to the Office, the Recognitors of the Assise found for the Plaintiff; and as to the Herbage and Pannage, they found the Letters Patents at large *ut suprà*, and if the Herbage and Pannage pass'd by the said Letters Patents to the Plaintiff, they found for the Plaintiff, *&c.* And the Matter in Law was such, The King grants the Herbage and Pannage of the Park of *C.* to *Markham* for Life, and afterwards the King reciting the Grant to *Markham*, and that he is living, grants the Herbage and Pannage of the said Park to *R.* Earl of *Rut.* for his Life, without shewing when it shall (*a*) begin. And if the Grant of the Herbage and Pannage to *R.* Earl of *Rut.* were good or not, was the Question. And it was objected, That the said Grant to *R.* Earl of *Rut.* was void for the Incertainty of the Beginning thereof, for it cannot begin presently, because *Markham* had it then for his Life, and it doth not appear whether the King intended it should begin after the Death of *Markham*, or Forfeiture, or Surrender, or when it should begin, and for such Incertainty the Grant in the King's Case shall be void. And the Cases in (*b*) 3 *H.* 7. *casu ult.* (*c*) 6 *H.* 7. 14. *a.* and (*d*) 8 *H.* 7. 12. *b.* were cited, that the King cannot grant the (*e*) Reversion of an Office which one hath for the Term of his Life; but may recite that such a one, *habeat & teneat tale Officium pro termino vitæ suæ*, and grant *Offic' præd' tali, habend' post mortem, &c.* but if the King grants the Office to another (without such special Recital) for Life, the second Grant is void. *Vide* 11 *E.* 4. 1. *b.* 32 *E.* 3. *Advowry* 112. But it was resolved by *Coke*, Chief Justice, *Walmsley*, *Warburton*, *Daniel*, and *Foster*, Justices, that the said Grant of the Herbage and Pannage was good; and in this Case divers Points were resolved: 1. That the K. has divers Manners of Inherit. 1. Some to give only in Possession, and not in Rever. as a Corody in a House of Religion, or to present one to a Church of his Patronage, as it is agreed in 39 *H.* 6. 48. for in these Cases, and other like, the K. has but a Presentation or Commendation of a Person, when the Corody or Church is void, and not bef. and can't give the Corody, or present to he Church in Rever. 2. The K. has some Inherit. which the K. may grant as well in Rever. as in Pos. but he cannot use or exer. them himself. as (*f*) Offices. *vide* 1 *H.* 7. 29. *b.* a Man grants an Office of Serv. as Forestership, *&c. cum omnibus terris eidem Officio pertinentibus*, the Remaind. to the K. in Fee; in this Case, altho' the K. cannot be Officer to any one, yet the K. is capable thereof, to grant the Office to anoth. which he himself. cannot use or exer. also such Office may be forfeited to the King, and the King shall have an Inheritance in it to give,

(*a*) 2 Brownl. 229, 240. 234. 242. Jenk. Cent. 283. 1 Brownl. 27. Postea 56. b.

(*b*) Br. Patent 52. Fitz. Grant. 35.
(*c*) Br. Paten. 54.
(*d*) Br. Paten. 57. Fitz. Grant 42.
(*e*) Postea 57. a. 10 Co. 61. a. Dyer 80. pl. 58. 11 Co. 4. a. March. Rep. 41. Cr. Car. 279. Dyer 259. pl. 18. 2 Rolls 154. Co. Lit. 3. b. Hob. 150, 151. 4 Inst. 202. 11 E. 4. 1. b. Cr. Jac. 17, 18.

(*f*) 10 Co. 61. a. Co. Lit. 3. b. Bridg. 30. 1 H. 7. 29. b. Br. Prerog. 125. Br. Grant 83. Fitz. Grant 32. Plow. 381. 3-9. b. 10. H 7. 18. b.

give, *&c. Vide* (a) 3. 6. (b) and (c) 8 *H.* 7. before. 3. Other Inheritances the King has, as well to uſe and enjoy himſelf, as to grant to another, *ſcil.* the Poſſeſſion, Remainder, or Reverſion; as Houſes, Lands, Rents, Commons, Herbage and Pannage, and the like, which are Parcels of his Inheritance. 2. It was reſolved, That the King was not (d) deceived in his Grant, for he has recited the Eſtate of *Markham* which he had in the Herbage and Pannage, for Term of his Life, and that *Markham* was then living, ſo that the King well knew that he could not grant that in Poſſeſſion, which another then held for his Life, but it ought to take Effect as it might by Law. And the Caſe of the Lord *Chandos*, in the ſixth Part of my *Reports*, was reſolved to be a ſtronger Caſe, for there the King miſtook the Law, thinking, that by the Surrender of the Letters Patents, the Eſtate Tail was extinct, and that he thereupon was ſeiſed in Fee, and therefore he granted the Manor in Poſſeſſion, and yet the (e) Reverſion did paſs without any Word of Reverſion, for the Grant ought to take Effect, as by Law it may; which Caſe of the Lord *Chandos* was affirmed to be good Law, *per totam Curiam.* But in the Caſe at Bar the King miſtook nothing, nor took upon him to grant that which he could not grant, nor was deceived in any Part of his Grant: And when the King's Charter may be taken (f) to two Intents good, in many Caſes it ſhall be taken to ſuch Intent as is moſt beneficial for the King; but if it may be taken to one Intent good, and to another Intent void, then for the King's Honour, and for the Benefit of the Subject, it ſhall be taken in ſuch Manner as the King's Grant may take Effect, for it was not the King's Intent to make a void Grant. And therewith agree the Reaſon and Rule of the Book of (g) 21 *E.* 4. 44. *b.* where King *Richard* II. granted to the Abbot of *Waltham*, That he and his Succeſſors ſhould not be *Collectores Decimarum, &c. Conceſſ. Regi per Clerum Angliæ, nec alicujus inde parcell.* in that Caſe, if the Grant be taken literally *per Clerum Angliæ*, that is, *per totum Clerum Angliæ*, the Grant is void; for all the Clergy of *England* never met at one Convocation, but every Province has a ſeveral Convocation, and therefore the King's Grant ſhall not be taken in ſuch Senſe, for then the Grant will be void; but it ſhall be taken in ſuch Senſe as it may ſtand with Law, and that is by the Clergy, as the Clergy can grant Tenths, and that is in their ſeveral Provinces; and that is alſo a ſtronger Caſe than the Caſe at Bar, for here the Words of the Grant may well ſtand with the King's Meaning, *ſcil.* to grant the Herbage and Pannage in Reverſion, for in Poſſeſſion he cannot grant it; but in the Caſe of 21 *E.* 4. the Words of the Grant, and the King's Intent varying, the Letter gives Place to the King's Intention. And the Caſe of Sir (h) *John Molyns*, in the Sixth Part of my *Reports*, was

(a) 3 H. 7. caſu ultim. Br. Patent 52. Fitz. Grant 35. Antea 55. b.
(b) 6 H. 7. 14. a. Br. Patents 54. Antea 55. b.
(c) 8 H. 7. 12. Br. Patents 57. Fitz. Grant 42.
(d) 1 Co. 46. a. 51. a. 52 b. Moor 45. 164. 9 H. 6. 28. b. Lane 110. 2 Co. 33. b. 5 Co. 94. a. 6 Co. 29. b. 55. b. 7 Co. 12. a. 10 Co. 112. b. 11 Co. 4. b. 90. a. Hob. 223. 229. Cr. Car. 198. Yelv. 48. 2 Rolls 188. Dyer 339. pl. 47. 352. pl. 26. Co. Ent. 384. a. 41 Aſſ. 19. Br. Patent 38. Br. Alienat. 21. Plow. 132. a. Mod. Rep. 196. Kelw. 8. b. 12. b.
(e) 6 Co. 55. b. 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. Plowd. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feoff. 22. Fitz. Grant 97. 35 H. 8. Br. Grant 50. 2 Rol. Rep. 180. 277, 278. Hob. 224. Lane 37. Br. N. C. 267. Lit. Rep. 18. 2 Brownl. 234.
(f) 1 Co. 45. a. 8 Co. 167. a. 11 Co. 11. a. b. 1 Bulſt. 6. 10 Co. 67. b. Kel. 175. a. 198. a. 2 Sideſ. 141. 3 Leon. 243. 2 Rolls 3, 4. a. b. 200.
(g) 3 Keb. 234. Dyer 269. pl. 19. Br. Patent 71. 90. 1 Co. 45. a. Br. Exemption 9. 8 Co. 167. a. 11 Co. 11. b. Plow. 32. a. 126. a. 143. b. 331. b. Fitz. Gr. 29. Br. Expoſit. 28. Moor 165. Hard. 500. 2 Rol. Rep. 275. 2 Sideſ. 82.
(h) 6 Co. 6. a. Poſtea 77. a.

was cited, in which Case also the Words were against the King's Intent, for at the Time of the Grant there was not any Chief Lord, for then all Seigniories were extinguished; but yet for (a) the King's Honour, and to make his Grant take Effect, it was adjudged, that the Tenure was revived.

(a) 6 Co. 6. a.

3. It was resolved, That there was not any Incertainty in the said Grant of the Herbage and Pannage to the Plaintiff, when it should take Effect in Possession; for it shall (b) begin when the first Grant shall be ended or determined; and although it may determine by sundry Ways, *scil.* Death, Surrender, or Forfeiture, yet it can determine but once, and which of them first happens, then the Grant to the Plaintiff shall begin; so that there is not any Incertainty in this Grant, for it is implied in Law, that the second Grant shall begin after the Determination of the first Grant, & (c) *expressio eorum quæ tacite insunt nihil operatur.* And therefore, if the King reciting that such a one holds the Manor of *D.* for his Life, grants the said Manor to *B.* for his Life; in this Case the Law implies, that the second Grant shall take Effect after the Determination of the first Grant; the same Law of a Gift in Tail, or a Grant in Fee. And it was said by *Coke*, (d) Chief Justice, and affirmed by the other Justices, That of late Times such nice and strict Construction hath been strained by some of Letters Patents, to subvert the Force and Effect of them; that many good Letters Patents are drawn in Question, which is to the King's Dishonour, the Disinherisin of the Subject, and against the true Reason and ancient Rule of the Law, as appears in all our Books, & *talis certitudo certitudinem confundit*, such nice and captious Pretence of Certainty, confounds true and legal Certainty, & (e) *maledicta Expositio est quæ corrumpit & confundit Textum.* And it was said, That it was resolved in Auditor *King*'s Case. That where Queen *Eliz.* granted a Manor to *B.* (f) and his Heirs, (in the Premisses of the Letters Patents) To have and to hold the said Manor to *B.* and his Assigns (leaving out Heirs in the *Habendum*) that the Fee of the Manor did pass by the Premisses of the Letters Patents, and the *Habendum* was void; for the Premisses were certain enough to pass the Fee-simple, and the Omission of Heirs in the *Habendum* should not overthrow that which was certain in the Premisses. Which Case was affirmed for good Law, *per totam Curiam*, for the Queen's Intent appeared to pass the Fee-simple by the Premisses, and her Grant ought to be construed (g) *secundum intentionem Regis, & non deceptionem Regis*; and when a literal and strict Construction is made to make his Grant void, *contra intentionem Regis*, it sounds in Deceit of the King, and is a great Indignity to him; *propter apices juris* to make his Charter under the Great Seal, of Things which he may lawfully grant, void and of none Effect, *quia* (h) *apices juris non sunt jura.*

(b) Antea 55. a. b. 2 Brownl. 229, 230. 234. 242. Jenk. Cent. 283. 1 Brownl. 47.

(c) 10 Co. 39. a. Hob. 170. 1 Mod. Rep. 190. Lit. Rep. 111. Hard. 92. 1 Rolls Rep. 310. 2 Rol. Rep. 393. Palm. 433. 437. Wing. Max. 235. 4 Co. 73. b. 5 Co. 11. a. 8 Co. 145. a. 11 Co. 60. a. Co. Lit. 191. a. 205. a. 2 Inst. 365. 2 Sand. 351. 2 Bulst. 131. Latch. 25.

(d) Wing. Max. 27.

(e) Wing. Max. 26. 2 Co. 24. a. Postea 154. b. 3 Bulst. 105. 107, 108. 1 Rol. Rep. 319.

(f) Jenk. Cent. 283. 2 Rol. Rep. 361.

(g) 3 Bulst. 3. 14. 2 Co. 49. a. 1 H. 7. 13. a.

(h) 2 Rol. Rep. 361. 6 Co. 65. a. Co. Lit. 283. a. b. 304. b. Noy. 30. 10 Co. 126. a.

And

And as to the Caſe of Office, it was ſaid, That the ſaid Books which were cited, prove that the King can't grant (*a*) *reverſionem Officii*, for he has no Reverſion, but an Inheritance grantable in Reverſion. Alſo when one is Officer for Life, if the King, without (*b*) reciting it, grants the Office to another for Life, the ſecond Grant is void for want of a Recital: But no Book ſaith, That if the King recites the firſt Grant of the Office, *&c.* and that the Officer is living, and grants the Office to another for Life, that this laſt Grant ſhall be void, for want of Certainty of the Beginning, for the Law, upon the Matter which appeareth, ſhall limit the Beginning, to the End the King's Grant ſhall not be void. And Exception was taken to the Plaint, foraſmuch as in alledging the Grant made to the ſaid *Tho. Markham*, The Plaint is, That Q. *Eliz.* did grant *Officium* (*Cuſtod.*) *Parci ſui vocati Clipſon Park* (without ſaying (*c*) *prædict'*) and therefore it was objected, It ſhall be intended another Park. But it was reſolved, That upon Conſideration of all the Parts of the Plaint, it appears, that it was the ſame Park: For the Plaintiff begins his Plaint, *Pro titulo liberi tenementi de Officio prædicto*: Alſo he ſhews, that Queen *Eliz.* was ſeiſed, *&c. de Parco prædicto*, and ſo ſeiſed, granted *Officium Parci ſui de Clipſon*, which ought to be intended the ſame Park whereof the Seiſin was alledged at the Time of the Grant, and *eo potius* in reſpect of this Pronoun Poſſeſſory (*ſui*) and in all other Parts of the Plaint (*prædict'*) is added: So that it is well ſaid in *Long*'s Caſe, in the Fifth Part of my *Reports*, That there are Three Manners of (*d*) Certainties: 1. Certain to a common Intent, and that ſufficeth in Bars for thoſe who defend themſelves: 2. To a certain Intent in general, and that is ſufficient in Indictments, Plaints, Counts, Replications, *&c.* 3. To a certain Intent to every particular Intent, and that is rejected in Law, for there it is ſaid, *Quod talis certitudo certitudinem confundit*; and ſo it was adjudg'd in the Point, in the Aſſiſe brought by the Lady (*e*) *Ruſſel*, againſt the Lord Admiral; and this Aſſiſe being (after a general Verdict for the Plaintiff for Part, and a ſpecial Verdict for the Reſidue) adjourned into the Common Pleas, Judgment was there given: But Aſſiſes ought to be brought *in* * *proprio Comitatu*, by the Statute of *Magna Charta* (*f*) *cap.* 12.

And afterwards on this Judgment, a Writ of (*g*) *Error* was brought, and all that which was reſolved by the Court of Common Pleas, was affirmed for good Law, by *Fleming* Chief Juſtice; *Fenner*, *Yelverton*, *Williams* and *Crook*, Juſtices of the King's Bench. But for other *Errors* not aſſigned nor moved in the Common Pleas, in which the Juſtices of the King's Bench were not unanimouſly agreed, the Judgment was reverſed. And ſo this Caſe, as to the

(*a*) Antea 55. b. 10 Co. 61. a. Dyer 80. pl. 58. 259. pl. 18. 11 Co. 4. a. March. Rep. 41. Cr. Car. 279. 2 Rolls 154. Co. Lit. 3. b. Hob. 150, 151. 4 Inſt. 202. 11 E. 4. 1. b. 3 H. 7. caſu ultimo. 6 H. 7. 14. a. 8 H. 7. 12. b. Br. Pat. 52, 54, 57. Fitz. Grant 35, 42. Cr. Jac. 17, 18.

(*b*) 2 Rolls 190.

(*c*) Cro. El. 97. 2 Ventris 197. Cr. Jac. 289. Palm. 499.

(*d*) 5 Co. 121. a. 2 Bulſt. 77, 78. Co. Lit. 303. a.

(*e*) Cr. Jac. 17, 18.

* 10 Co. 105. a.

(*f*) 2 Inſt. 24, 25.

(*g*) 1 Bulſt. 45. 2 Brownl. 229, 230.

Points reported by me, was unanimouſly reſolved by both Courts: And afterwards, on a new Aſſiſe brought before *Warburton* and *Foſter*, Juſtices of Aſſiſe in the County of *Derby*, at the next Aſſiſes, the Plaintiff had a general Verdict, according to the Opinion of all the Juſtices, and Judgment alſo at the ſame Aſſiſes, and Execution awarded, *&c. Et ſic finita eſt iſta Quæſtio.*

BEECHER's

BEECHER's *Caſe.*

Mich. 6 Jac. 1.

BEecher brought Debt on two Bonds, one of 3000 *l.* the other of 2000 *l.* by *Quo minus* in the Exchequer, againſt Sir *Thomas Shirley*, Knight, who *Trin.* 41 *Eliz.* pleaded in Bar, Payment according to the Conditions of the Bonds, *&c.* and the Parties were at Iſſue, and tried for the Plaintiff; but for Default of a good Viſne, Judgment was arreſted, and afterwards, *ſcil. Hill.* 44 *Eliz.* the Plaintiff *per Johannem Oſborne, Attornatum ſuum, venit hic in Curia, & fatetur ſe in Curia hic ulterius nolle proſequi:* Upon which Judgment was given, that the Defendant *eat ſine Die*, and no Amercement upon the Plaintiff. Upon which Judgment the Plaintiff brought a Writ of *Error* in the Exchequer Chamber; and upon ſundry Arguments by the Plaintiff's and Defendant's Counſel, at ſeveral Days, It was reſolved by the Court, and the two Chief Juſtices, That the Judgment was erroneous, for divers Reaſons. 1. It was reſolved, That a (*a*) *Retraxit* cannot be, unleſs the Plaintiff or Defendant be in Court in proper Perſon, for the Entry is in divers Manners, (as it appears after) as, *Quod Querens in propria perſona ſua venit & dicit, quod ipſe placitum ſuum prædict' ulterius proſequi non vult, ſed abinde omnino ſe retraxit, &c.* or being preſent in Court and demanded, where the Entry is (*b*) *a ſecta ſua prædicta in contemptum Curiæ ſe retraxit, &c.* or, *fatetur ſe ulterius nolle proſequi, &c.* and therewith agrees (*c*) 3 *H.* 6. 14. *a.* 21 *E.* 4. 3. 43. *a.* & 4 *E.* 3. 23. *a.* where the Caſe was, That three Coparceners were Plaintiffs in a Writ of *Deceit*, and two of them did appear in Perſon, and the third by Attorney; and ſaid, That they would not ſue further, and could

Cro. Jac. 211. 3 Salk. 245. Skin. 593.

(*a*) 1 Roll. 584. Co. Lit. 138. b. 139. a. Cro. Jac. 211. Jenk. Cent. 283. 3 Salk. 50.

(*b*) Co. Lit. 139. a. Poſtea 62. a.

(*c*) Fitz. Retraxit 4.

not, becauſe one was by Attorney; wherefore they were Nonſuit. *Vide Lib. Intrat' 92. Title Attaint, Bre'.* 5. and *Title Appeal*, 56. and *Title Treſp.* 589. *a.* 13, 14, 15, 16. and *Title Conſpiracy*, 125. *b.* 6 *Ed.* 3. 30. *b.* and 31. *a. John Fremd's* Caſe, in a *Formedon*, the Attorney of the Tenant cannot depart in deſpight of the Court, but a *Grand Cape* ſhall be awarded.

(*a*) F.N.B. 25. C. Co. Lit. 128. a. 2 Inſt. 249. 10 Co. 101. a. b. Cawly 164. 2 Inſt. 377, 378.

And it is to be known, that at the (*a*) Com. Law, when any one was, by the King's Writ, commanded to appear, it was always taken that he ſhould appear in Perſon, and could not appear by Attorney; but after he had appeared, the Courts of Chancery, King's Bench, and Com. Pleas, and all other Judges who held Plea by Writ, might, after Appearance, have admitted him by Attorney: Otherwiſe when Plea was held without Writ, unleſs the King granted a Writ *De Attornato faciendo*, and that appears by *Britton*, *c.* 126. *f.* 287.

(*b*) W. 2. c. 10. 2 Inſt. 376, 377, 378.

But *vide* the Stat. of *Weſtm.* 2. (*b*) *c.* 11. and other Statutes, which gave Remedy in many Caſes; but the ſaid Caſe at Bar is not remedied by any Statute. But it was objected, That it is true, that *de rigore Juris*, the Plaintiff in the Caſe at Bar ought to have appeared in proper Perſon; but yet it is not Error; for if the Court admits the Plaintiff or Defendant by Attorney, where he ought to appear in Perſon, it is not Error; as in 37 *H.* 6. 27. *b.* If the Court admit one upon a *Capias*, or *Exigent*, by Attorney, where *de rigore Juris*, he ought to appear in Perſon, it is not (*c*) Error, (*d*) *F.N.B.* 25. *acc.* To that, it was anſwered and reſolved, That there is a Difference between Caſes where the Defendant or Tenant cannot by the Law appear by Attorney, and Caſes where the Defendant or Tenant may appear by Attorney; but upon ſome Proceſs, by Reaſon of ſome Default or Contempt, he ought to appear in Perſon. In the firſt Caſe, if the Court admit the Defendant or Tenant by Attorney, it is Error; but in the other not: (*e*) As if an Infant is admitted to appear by Attorney, it is Error, *&c.* but when the Defendant may make an Attorney, and the Reaſon that compels him to appear in Perſon, is the Contempt to the Court; there the Court may diſpence with the Contempt, in their Diſcretion, and admit him by Attorney, and that is no Prejudice to the Plaintiff: But in the Caſe at Bar, the Law requires him to appear in proper Perſon to make the *Retraxit*, becauſe it ſhall be a perpetual (*f*) Bar, and in a Manner as a (*g*) Releaſe, and the Admittance of the Court cannot prejudice the Plaintiff in ſo high a Degree. But in dilatory Matters, the Admiſſion of the Court may turn the Plaintiff or Demandant to delay, but ſhall never Bar the Plaintiff or Demandant: As if the Court grants Proceſs againſt the (*h*) Witneſſes, or grants View, or Aid, (*i*) where it is not grantable,

(*c*) Fitz. Attorney 20. Br. Attorney 56. Br. Error 98.

(*d*) F.N.B. 25. C.

(*e*) 1 Roll. 287, 208, 796. 1 Roll. Rep. 305, 380. Cr. El. 377, 378, 424, 541, 542, 551, 569. Cr. Jac. 420, 441, 442, 581. Poph. 130. 2 Sand. 212, 213. 1 Sid. 449. 1 Mod. Rep. 47, 72. 296, 297. Styles 318. 3 Bulſtr. 180. Bridgm. 73, 74, 75. Dyer 262. pl. 63. 9 Co. 30. b. Cr. El. 551. Palm. 228, 232, 233, 245, 252.

(*f*) 1 Roll. 584. Poſtea 62. a. Cr. Jac. 211. March. 95. Br. Departure in deſpite, &c. 13. 21 E. 4. 39. a.

(*g*) Cro. Car. 551. March 95. (*h*) 5 H. 7. 9 a. Fitz. Proceſs 111 (*i*) 21 E. 4. 65. b.

grantable, it is not (*a*) Error, as it is held in 5 *H.* 7. 8. *b.* and 8 *H.* 7. 9. *b.* and the Reaſon is given there, becauſe the Demandant has not any Prejudice of his Right, but only a Delay. But if the Court admit a (*b*) Voucher, where it ought not to be, it is Error, as it is held 8 *H.* 7. 11. *a.* The ſame Law if an * Eſſoin be caſt and allowed where it is not allowable, it is not Error: But to deny any of theſe † Dilatories, where of Right the Court ought to grant them, is Error, as appears in the ſaid Books, and 21 *E.* 4. 65. *b.* 22 *E.* 4. 15, &c. And a (*c*) *Retraxit* is always on the Plaintiff or Demandant's Part, and a (*d*) Departure in deſpight of the Court, is always on the Defendant or Tenant's Part, and the Entry there is, *Quod Tenens receſſit in Contemptum Curiæ*, and in one Caſe the Plaintiff or Demandant is barred, and in the other Caſe the Plaint or Demandant ſhall have Judgment preſently; (*e*) *Qui ſemel Actionem renunciavit amplius repetere non poteſt.* Vide for theſe Matters, 20 *E.* 2. *Excommengement* 28. 4 *E.* 3. 23. *in Formedon.* 6 *E.* 3. 31, 32, 34. *a. in Quare Impedit.* 8 *E.* 3. 3. *b.* and 68. 38 *E.* 3. 13. 16 *R.* 2. *Tit. Cauſe de remover Plea* 12. 3 *H.* 4. 2. 11 *H.* 4. 94. 3 *H.* 6. 13. 9 *H.* 6. 58. 39 *H.* 6. 16, 33. *Priſot.* 7 *H.* 7. 39. *Vide Tit. Departure en deſpite del Court*, Brooke.

(*a*) 5 H. 7. 8. b. 9. a.

(*b*) Br. Error, 151.

* Hob. 47.

† 9 Co. 16. a.

(*c*) 1 Roll. 584. Co. Lit. 139. a.

(*d*) F.N.B. 78. F. Co. Lit. 139. a. 19 E. 2. Fitz. Villenage, 3 f.

(*e*) Co. Lit. 139. a.

2. It was reſolved, That the Plaintiff in this Caſe ought to be (*f*) amerced, for it is a ſtronger Caſe than the Caſe of a Nonſuit, which is but a Default, or Non-appearance; but a *Retraxit* is a voluntary Acknowledgment that he hath no Cauſe of Action, and therefore he will no farther proceed, *&c.* and therefore it is a Bar for ever. And it was objected, that the Plaintiff ſhould not aſſign that for Error, becauſe it was for his Advantage that he was not amerced, and a Man ſhall never aſſign that for Error which is for his (*g*) Advantage, 7 *E.* 3. 25. *b.* by *Herle*, 8 *H.* 5. 2. *b.* 11 *H.* 4. 8. *F. N. B.* 21. as to ſay, that he was eſſoigned, where he ought not to be aſſoigned; or that he had a longer Day than the common Day; or that Aid was granted to him where it was not grantable. To which it was anſwered and reſolved, That it is true, that in Proceſs, or Delay, which is for the Advantage of the Party, he ſhall not aſſign it for Error; but in the Caſe at Bar the Judgment is not * perfect, for the Amercement ought to be Parcel of the Judgment; and it is alſo for the King's Advantage, and therefore divers Judgments have been reverſed in the King's Bench, becauſe the Judgment was, *Ideo in* † *miſericordia*, where it ſhould be, *Capiatur*; and yet it was for the (*h*) Parties Advantage; but becauſe the Judgment was erroneous, and the Error of the Court in giving it; for this Cauſe it hath been often adjudged, that it is not amendable, but the whole Judgment ſhall be reverſed. *Vide* 29 *Aſſ. pl.* 26. 7 *E.* 6. *Dyer* (*i*) 89. 14 *El. Dyer* (*k*) 315. *vide* now the Doubts there well explained. And becauſe it is ſo material

(*f*) Cr. Jac. 211. 1 Roll. 759. Jenk. Cent. 283.

(*g*) F.N.B. 21. f. 5 Co. 39. b. 7 Co. 4. b. Palm. 39, 40. 2 Sand. 46. 1 Roll. 757, 759, 760. Fitz. Error 92.

* 1 Roll. 769.

† 1 Roll. 769.

(*h*) Cro. El. 84. Cro. Jac. 211. Cro. Car. 505. 2 Sand. 47. 1 Roll. 759, 760. Jenk. Cent. 283.

(*i*) Dyer 89. pl. 111.

(*k*) Dy. 315. pl. 99. 1 Roll. 769. Moor 768.

material in all Judgments to know when the Plaintiff or Demandant, and when the Defendant or Tenant ſhall be amerced or fined, inaſmuch as the miſtaking thereof makes the Judgment erroneous, it is very neceſſary to underſtand the true Senſe of the Law in theſe Caſes.

(a) Co. Lit. 126. b.

And this Word (*a*) *(Finis)* hath divers Significations in Law, *quia aliquando ſignificat Pretium, aliquando Pœnam, & aliquando Pacem.* For 1. the Price, or Sum, which is the Cauſe of obtaining of a Benefit, is called a Fine, as Fine in the Hamper for the King's Writs, Fine for Alienation, Fine for Admiſſion to a Copyhold, Fine for obtaining Leaſes, and ſuch like. 2. That which the Offender gives in Satisfaction of his Offence, is alſo called a Fine, and in that Senſe, *dicitur Pœna.* And 3. The Aſſurance which makes Men enjoy their Lands and Inheritances in Peace, is called *Finis, quia finem litibus ponit.* And all theſe are called Fines, becauſe they are the End, or Cauſes of the End of all the ſaid Buſineſſes.

(b) Co. Lit. 126. b. 8 Co. 39. a.

(*b*) *Amercement* is in *Latin* called *Miſericordia,* and the Cauſe thereof is, becauſe by the Common Law (which is a Law of Mercy) no Man ought to be amerced ſo much as he deſerves, but leſs. *Vide F. N. B. 76.*

1. Force.

1. In all Actions *Quare vi & armis,* as *Reſcous, Treſp. vi & armis,* &c. If Judgment be given againſt the Defendant, he ſhall be fined and impriſoned, for to every Fine (*c*) Impriſonment is incident; and always when the Judgment is, *quod Defendens capiatur,* it is much as to ſay, *quod Capiatur quouſque finem fecerit. Vide* 19 *H.* 6. 8. *b.* 34 *H.* 6. 24. 11 *H.* 4. 25. 30 *Aſſ. pl.* 28. And if there be divers Defendants, they ſhall be ſeverally fined. So in an *Aſſiſe,* if the Diſſeiſin be found with Force, the Defendant ſhall be fined and impriſoned; otherwiſe it is if the Diſſeiſin be found without Force; for there he ſhall only be amerced, for the Writ of *Aſſiſe* doth not mention *vi & armis,* but, *injuſte & ſine judicio diſſeiſivit,* 33 *H.* 6. 21. *a.*

(c) Co. Lit. 126. b.

2. Fraud and Deceit to the Court.

2. In a Writ of *Deceit* upon a real Action upon a Recovery by Default, if it be found on Examination, that the Tenant was not lawfully ſummoned, the Judgment ſhall be, *Et prædict' Defend' pro falſitate & deceptione prædict' capiatur:* And the Writ of *Deceit* is, *Oſtenſum eſt nobis ex parte A. quod B. in Curia noſtra falſo & indeceptione Curiæ recuperavit ſeiſinam,* &c. and that is the Cauſe, *ſcilicet,* the Deceit to the Court in obtaining the ſaid Judgment, that he ſhall be fined and impriſoned; but in an Action perſonal, the Deceit between Party and Party, which is in the Nature of an Action upon the Caſe, there the Defendant ſhall not be fined and impriſoned, but only amerced, for there is no Deceit done to the Court, but to the Party.

3. If the Defendant, or Tenant, pleads a falſe Deed to him, or (*a*) denies his own Deed, and it is found againſt him, or if he, (*b*) *relicta verificatione cognoſcit Actionem*, he ſhall be fined for his Falſity, *quia certi debemus eſſe de proprio facto*; but if he denies his (*c*) Anceſtor's Deed, or pleads a Deed to his Anceſtor, and it is found againſt him, yet he ſhall not be fined, but amerced only, *quia de alieno facto*. And ſo you will better underſtand your Books in 3 *E.* 6. *Dy.* 67. 26 *Aſſ. p.* 5. 33 *H.* 6. 54. *b.* 34 *H.* 6. 20. *a. b.* But if he denies a Recovery, or other Record to which he is Party, he ſhall not be fined, 10 *Aſſ. p.* 10. 16 *Aſſ. p.* 19. for it is not his Act, but the Act of the Court, and he doth not deny the Record abſolutely, but, *non habetur tale recordum*.

3. Falſhood in denying his own Deed. (*a*) 1 Roll. 219, 224. 33 H. 6. 54. b. Br. Amercem. 5. Br. Confeſſion 3. Br. Fine pur Contempt 3. Fitz. Fines 16. 9 E. 4. 24. a. b. Fitz. Fines 25. Dy. 67. pl. 19. Cro. El. 844, 845. Cro. Jac. 64, 420. Kelw. 42. a. (*b*) 1 Roll. 224. 33 H. 6. 54. b.

2 Roll. Rep. 45. Fitz. Fines 16. 9 E. 4. 24. a. b. Fitz. Fines 25. Dy. 67. pl. 19. Noy 4, 31. Cro. Jac. 64, 420. 2 Sand. 191. Raym. 195, 202. 1 Mod. Rep. 73. (*c*) Br. Amercement 5. Cr. Jac. 255. 2 Sand. 192.

4. If the Defendant in a *Replevin* claims Property falſly, and it is ſo found in (*d*) *proprietate probanda*, he ſhall be fined and impriſoned, 11 *H.* 4. 4.

4. Falſe Claim of Property of Cattle, *&c.* in voluntary Delay of Juſtice, ſo that he can't have the Uſe of the Cattle of his Plough, or other Goods. (*d*) 11 H. 4. 4. b. 5. a. Br. Fine pur Contempt 14. Br. Retorn de Brief 108. Fitz. Proprietate probanda 1. Br. Propr' prob. 14.

5. In (*e*) *Appeal* of Death, Robbery, or any other Appeal of Felony or Maihem, if the Plaintiff be barred, or if he be * Nonſuit, or if the Writ abate by his own Default, he ſhall be fined and impriſoned, 8 *H.* 4. 17. *a.* 20. for the Malice is the higheſt which concerns Life or Member.

5. For malicious Suit in Law, which concerns a Man's Life. (*e*) Fitz. Corone 73. Br. Appeal 25. Br. Fine pur Contempt 11. Br. Impriſ. 106. * Co. Lit. 127. a.

6. So in Attaint 32 *Aſſ. p.* 9. 42 *E.* 3. 26. *b.* if the Plaintiff be Nonſuit, or barred, he ſhall be fined and impriſoned. So if the *Attaint* paſs againſt the Defen. if he were Party to the firſt Record, he ſhall be fined and impriſ. but if he were not Party to the firſt Record, as Ten. by Receit, or other Ter-tenant, he ſhall not be fined, 14 *Aſſ. p.* 2. 42 *E.* 3. 26. *b.* 9 *E.* 4. 33.

6. Malicious Suit in Law to attaint a Jury of Perjury.

7. Where any uſes the Countenance of the Law (which was inſtituted to make an End of Controverſies and Vexation) for double Vexation, he ſhall be fined: As if a Man (*f*) ſues in the C. Pleas, and afterwards, for the ſame Cauſe, ſues him in *London*, or any ſuch Court, the Plaint. ſhall be fined for this unjuſt Vexation, 9 *H.* 6. 55. 14 *H.* 7. 7. *a.* and in a (*g*) *Recaption* the Plaintiff ſhall recover Damages, and the Defendant ſhall be fined and impriſoned for his double Vexation.

7. For doub. Vexation by Colour of Law. (*f*) Br. Fine pur Contempt 24. 7 H. 6. 36. b. (*g*) 11 Co. 43. b. Antea 41. a. F. N. B. 73. d.

8. For all Contempts done to any Court of Record, againſt the K's Command by his Writ under his G. Seal, the Offender ſhall be fined and impriſ. as in *Quare non admiſit*, *Quare incumbravit*, *Attachment upon Prohibition*, &c. *Vide* 19 *E.* 3. *Quare non admiſit*, 7. 23 *E.* 3. 22. 26 *E.* 3. 75. 20 *E.* 2. *Coron.* 233. *Stampf.* 132. *The Stat. of* 25 *E.* 3. *c.* 6. &c. but when the Demandant, or Plaintiff, or the Tenant or Defendant *ſe retraxit*, or *receſſit in contemptum Curiæ*, yet there is no Contempt

8. Contempts againſt the King's Writs.

againſt the King's Command by his Writ. And by theſe Differences you will better underſtand your Books in Caſes of Fines and Impriſonment, and learn the true Reaſon and Senſe of the Law.

9.
Contempt againſt a Statute.
(a) 2 Inſt. 131. Cro. Jac. 538. Cro. Car. 560. 2 Bulſt. 328. 1 Sid. 233. 12 Co. 134. 2 Roll. 222.
(b) 2 Inſt. 131.

2. In all Caſes, where a Thing is forbid by any (a) Statute, the Offender ſhall be fined and impriſoned, 35 *H.* 6. 6. *b.* 19 *H.* 6. 4. in *Maintenance*. *Vide* 9 *E.* 4. 28. And that is the Reaſon, That where the Statute of *Marlebridge*, *c.* 15. forbids, *Quod nulli de cætero liceat ex quacunque cauſa diſtrict' facere extra feodum ſuum, nec in Regia via, vel communi Strata*; that the Party who is diſtreined in the Highway cannot plead it in Bar of the (b) Avowry, for then the King ſhould loſe his Fine; but ſhall be driven to an Action on the Statute, in which the King ſhall have his Fine, and therewith agreeth 11 *R.* 2. *Avowry* 87. *Vide* 19 *E.* 2. *Brief.* 842. 21 *E.* 3. 11. 39 *E.* 3. 20. 43 *E.* 3. 30. *F. N. B.* 90, *&* 173. *Regiſter* 97.

10.
A Court which is not of Record ſhall never impoſe a Fine.
(c) 11 Co. 43. b. Poſtea 120. a. F. N. B. 73. d. Antea 41. a.
(d) Co. 10. 103. a. Poſtea 120. a. Antea 41. a. Salk. 200. 1 Salk. 200. Ante 38. b.
(e) 6 Co. 11. b. Co. Lit. 58. a. Godb. 49. 1 Roll. 543. 4 Co. 33. b. Cr. El. 792. Cr. Jac. 582. 4 Inſt. 266, 268. 21 E. 4. 66. b. 9 Co. 48. b. 49. a. 1 Mod. Rep. 171. 12 H. 7. 16, 17. 7 E. 4. 23. a.

10. In ſome Action the Defendant ſhall be fin'd in one Court, and but amerced in another Court, and yet the Offence ſhall be all one; as in a Writ of (c) *Recaption*, if it be brought in the Common Pleas, and Judgment be there given, the Defendant ſhall be fined and impriſoned as hath been ſaid, but if the Writ be brought in the County Court, and the Defendant be convict before the Sheriff in the County, the Judgment ſhall not be, *Quod capiatur, quia nulla Curia quæ (d) recordum non habet, poteſt imponere finem, neque aliq' mandare carceri, quia iſta ſpectant tantummodo ad Curias de Recordo*, and therefore in ſuch Caſe he ſhall be only amerced. And altho' the Writ, *ſcil.* the Recaption is of Record, yet foraſmuch as the Judges in the Court, *ſcil.* the Suitors, are not Judges of Record, nor the Court is of (e) Record, they cannot impoſe a Fine, or commit any to Priſon. And ſo in all the like Caſes. *Vide F. N. B.* 73. *d.* 8 *E.* 4. 5. 34 *H.* 6. 24.

Amercement.

1.
In all Writs of Præcipe quod { reddat / permittat / faciat.
On Nonſuit, Bar, or Writ abated for Want of Matter or Form, the King ſhall have Amerciament. Writ abated by Act of God, &c. no Amerciament. Fitz. Amerciament 13. Br. Amerciament 12. Co. Lit. 127. a.

And now concerning Amercement.

1. In all Writs of *Præcipe quod reddat*, as Writ of Right, Formedon, or Writ of Aiel, *&c.* Writs of Entry, *&c. præcipe de quod permittat*, as to have Eſtovers, Common, *&c.* Or, *Præcipe quod faciat*, as Writ of Cuſtoms and Services, *&c.* If the Demandant be barred, or if he be Nonſuit, or if his Writ abate becauſe it is ill in Matter or Form, the Demandant ſhall be amerced. But if there be two Demandants, and the Writ abate for the Death of one of them, the other ſhall not be amerced, 28 (48) *E.* 3. 23. *a.* 46 *E.* 3. *Tit. Accompt* 40. 5 *E.* 3. 3. 22 *H.* 6. 7. 38 *E.* 3. 31. 7 *H.* 6. 36. 41 *Aſſ.* 14. So in all the ſaid Writs of *Præcipe*, if Judgment be given againſt the Tenant, he ſhall be amerced.

2. In all Perſonal Actions, as Debt, Detinue, and the like Actions, without Force or Deceit to the Court, and alſo in Actions which comprehend Force or Deceit to a Court of Record; if the Plaintiff be barred, nonſuit, or the Writ abate becauſe it is vicious in Matter, or Form, he ſhall be amerced only, and not fined; but if the Write abate by the Death of one Plaintiff, or if one Plaintiff appeareth, and the other be (*a*) nonſuit, (which in Law in Perſonal Actions is a Nonſuit of both) he who ſurviveth, or appeareth, ſhall not be amerced; for no Default is in him, but he only who appeareth not. 47 *E.* 3. 6. *b.* & 43 *Aſſ. pl.* 3. 7 *H.* 6. 36. 38 *E.* 3. 31. 41 *Aſſ.* 14. And in the ſame Actions which are without Force or Fraud to the Court, the Defendant ſhall be amerc'd.

2. In Perſ. Actions.

Death or Nonſuit of one of the Plaintiffs.
(*a*) Co. Lit. 127. a. Br. Amercement 11. Fitz. Amerc. 11.

3. If one Demandant in a (*b*) Real Action, or one Plaintiff in a Perſonal Action where (*c*) Summons and Severance lieth, as in Debt by Executors, if one Demandant or Plaintiff be nonſuit, and the other ſueth forward, he who is nonſuit ſhall not be amerced, 28 *H.* 6. 11. *b.* 21 *E.* 4. 77. *b.*

3. One Demandant or Plaintiff nonſuited.
(*b*) Br. Amer. 3.
(*c*) Br. Amer. 48.

4. In all judicial Proceſs, if the Plaintiff be barred, nonſuit, or if the Writ abate, the Plaintiff ſhall not be amerced, becauſe the Proceſs is founded upon a Judgment and Record, 11 *H.* 4. 55. *b.* in (*d*) *Quid Juris clamat, Scire facias, &c.* 21 *E.* 3. 23. 9 *E.* 3. 32. in *Per quæ ſervicia*, 18 *Hen.* 6. *Tit. Pledges* 1. And in theſe Actions the Plaintiff ſhall not find (*e*) Sureties, becauſe he ſhall not be amerced.

4. In judicial Proceſs no Amercement.
(*d*) 11 H. 4. 7. a. Br. Amercement 16.
(*e*) F.N.B. 31. f. Cro. Jac. 414.

5. In all Actions Real and Perſonal, if Part be found for the Demandant or Plaintiff, and Part againſt him, or all or Part againſt one Tenant or Defendant, and nothing, or but Part, againſt the other, the Demandant or Plaintiff ſhall be (*f*) amerced; unleſs no Default be in the Demandant or Plaintiff, and therefore in Treſpaſs of Battery againſt Huſband and Wife, ſuppoſing the Battery to be done by them both, and the Wife is only found guilty, *&c.* and the Huſband acquitted, yet the Plaintiff ſhall not be amerced, for the Plaintiff could not have another Writ in ſuch Caſe, and therefore no Default in him. *Vide* 22 *Aſſ.* 8. 7 *Aſſ. pl.* 14. 31 *Aſſ. pl.* 31. *Br. Amercement* 42. 40 *E.* 3. 40. *a.* 21 *H.* 6. 41. *a.*

5. Part found for the Demandant or Plaintiff, &c. and where Part againſt one Tenant or Def. &c.
(*f*) Cr. Jac. 630. 1 Roll. 787. Cro. Car. 178. 453. Cro. El. 257. 1 Sid. 232. Br. Amercement 2, 7, 29. Br. Executors 76.

6. In all Actions Real or Perſonal, where there is but one Tenant or Defendant, he ſhall not be twice amerced, but there where there is but one Demandant or Plaintiff, and divers Defendants, the Plaintiff may be divers Times (*g*) amerced, 9 *E.* 3. 6. 31 *Aſſ. pl.* 31. 21 *H.* 6. 41. *a.* 40 *E.* 3. 40. *a.*

6. One Ten. or Def. ſhall not be twice amerced.
(*g*) 5 Co. 58. b. Cro. Car. 178.

7. Upon Diſcon. in a Real or Perſonal Action, the Dem. or Plaintiff ſhall not be amerced, for that is the Act of the Court, 38 *E.* 3.

7. On Diſcontinuance, or when the Court is ouſted of Juriſdiction, no Amerc.

38 *E.* 3. 31. *a.* The ſame Law, and for the ſame Cauſe, when the Court is ouſted of Juriſdiction, 18 *E.* 3. 7.

8. Tenant or Def. comes the firſt Day, &c. ſhall not be amerced unleſs the Action imports Force or Fraud. (*a*) Cr. Car. 564. Co. Lit. 126. b. 1 Roll. 212. 8 R. 2. Amercement 26. Cr. El. 65. 14 E. 3. Amercement 16. (*b*) Jenk. Cent. 258. Moor 394.

8. In all Actions Real or Perſ. (in which there is not contain'd any certain Force or Deceit to the Court) if the Ten. or Def. comes the firſt (*a*) Day, and render the Thing in Demand to the Demandant or Plaintiff, he ſhall not be amerced; for he doth what the King commands by his Writ; for where the Writ is, *Præcipe quod reddat, &c.* that in Judgment of Law is, that he render it at the Return of the Writ in Court, and not in the Country, as it is reſolv'd in (*b*) *Vaughan's* Caſe, in the Fifth Part of my *Rep. fol.* 49. and there the Cauſe of the Amercement of the Tenant or Defendant is well explain'd. But in Actions in which the Offence is ſuppoſed with Force, or in Deceit of the Court, if the Defendant at the firſt Day confeſſes the Action, yet he ſhall be fined and impriſoned, for his Appearance and Confeſſion are a Manifeſtation of, and no Satisfaction for his Offence.

9. The Judgment when the Writ abates by Matter or Form, or when the Demand. is barr'd.

9. In all Caſes when a Real or Perſonal Writ doth abate for want of Form or Matter, or the Demandant or Plaintiff be barred, the Judgment is, *Quod Petens, ſive Querens nihil cap. per breve ſuum præd' ſed ſit in Miſericord' pro falſo clamore ſuo inde, & præd' Ten' ſeu Def' eat inde ſine die.* And in all ſuch Caſes the Eſtreat out of the Common Pleas into the Exchequer, which the Clerk of the Warrants makes in ſuch Caſes is, *De A. pro falſo clamore ſuo verſus S. in placito*, &c. *Vide F. N. B.* 76. *A.* But if the Demandant or Plaintiff be * nonſuit in any Action (certain ſpecial Caſes excepted) the Judgment is, *Ideo conſideratʳ eſt quod præd' (c) Querens & Plegii ſui de proſequendo ſint inde in miſericordia*, &c. *& præd' Def. eat inde ſine die*; and there the Eſtreat is, *De Johanne N. pro ſe & pleg. ſuis, quia non eſt proſequutus breve ſuum verſus B. in placito*, &c. *Vide* (*d*) *F. N. B.* 76. † But in Caſe of *Retraxit* the Judgment is, *Quod nihil capʳ per breve ſuum præd', ſed ſit in miſericor' pro falſ' clam'*, &c.

* The Judgment on a Nonſuit. (*c*) Cr. Jac. 713. (*d*) F. N. B. 76. a. † The Judgment in a Retraxit.

10. Perſons who ſhall not be amerced. (*e*) Co. Lit. 127. a. 133. a. Cr. Car. 161. Cr. Jac. 414. 3 Bulſt. 276. 1 Roll. 214. Palm. 518, 519, 520. (*f*) Co. Lit. 127. a. 3 Bulſt. 276. 1 Roll. 215. (*g*) Co. Lit. 126, 127. a. Cr. Car. 160, 410. 3 Bulſt. 276. b. Reg. Orig. 224. a. 1 Roll. 214, 215. Palm. 518, 519, 520.

10. There are ſome Perſons who ſhall not be amerced, and therefore they ſhall not find (*e*) Sureties; ſome for the Dignity of their Perſons, as the King, (*f*) and ſo the Queen, for as to that ſhe partakes of the King's Prerogative. *Vide F. N. B.* 31. *f.* 47. *C.* 101. *A.* 18 *E.* 3. 2. *Br. Tit. Amercement* 53. Some for Imbecility of Age, as (*g*) Infants, and therefore they ſhall not find Sureties; but the Entry is, *Ideo in Miſericord', ſed pardonatur quia Infans. Vide* 43 *Aſſ.* 45. 44 *E.* 3. *Tit. Amerce.* 10. 3 *E.* 3. *Infant* 14. 14 *Aſſ. pl.* 17. 41 *Aſſ. p.* 14. 17 *E.* 3. 75. *Bract. folio* 254. *F. N. B.* 195. *h.*

3. True it is, if the Ten. (*h*) diſcla. he ſhall not have a Writ of Error againſt his own Diſclai. becauſe by his Diſclai. he hath barred

Mo. 394. 1 Mod. Rep. 47. 206. Dyer 338. pl. 41. 2 Keb. 698. 1 Bulſtr. 172. 5 Co. 49. a. (*h*) Cr. Jac. 548. 2 Rolls Rep. 128. Fitz. Err. 78. poſtea 92. a. Jenk. Cent. 283.

barred himſelf of the Right of the Land, for the Words of Diſclaimer of the Tenant are, *Nihil habet, nec habere clamat, in terra illa, nec die Impetrationis brevis originalis præd' &c. habuit, ſive clamavit, ſed aliquid in terra illa habere de advocat & diſclamat*; And againſt that he cannot have a Writ of (*a*) Error to have Reſtitution of the Land againſt this Diſclaimer. *Vide 6 Edw. 3. 7. & F. N. B. 22. C.* And if the *Retraxit* in the Caſe at Bar had been duly made, it was objected, That againſt it no Writ of Error lay; but here the *Retraxit* itſelf was erroneous; becauſe the Attorney did it where it ought to be done in (*b*) proper Perſon. Alſo the Plea was diſcontinued, as appears by the Record. And foraſmuch as the Tenant or Defendant after Departure in Deſpight of the Court might have a Writ of Error, or if he had an Eſtate for Life or in Tail, *quod ei deforceat, F. N. B.* 155. *I.* and the Defendant or Tenant againſt his own (*c*) Confeſſion may have a Writ of Error; It was reſolv'd, That altho' the Plaintiff in proper Perſon had made a *Retraxit*, yet he might have a Writ of (*d*) Error, either in the Judgment or in the Proceeding: for no Imperfection is ſav'd in ſuch Caſe by any Statute when Judgment is given upon *Retraxit*, and it is no more than Confeſſion on the Part of the Defendant; for the Effect of the Entry of a *Retraxit* is, *Quod idem* (*e*) *Querens fatetur (ſeu cognovit) ſe ulterius nolle proſequi verſus Def. de placito præd'* which Confeſſion is (*f*) a Bar in all Actions, although the Words are *de placito ſuo prædicto*, and therefore it is not like a Diſclaimer, by which the Tenant diſclaims and bars himſelf abſolutely of all his Right in the Land.

(*a*) Cr. Jac. 548. 2 Roll. Rep. 188. Fitz. Error 78. Antea 61. b. Jenk. Cent. 283.

(*b*) Antea 58. a. 1 Roll. 584. Co. Lit. 138. b. 139. a. Cro. Jac. 211. Jenk. Cent. 283.

(*c*) F. N. B. 21. k.

(*d*) Antea 59. a.

(*e*) Co. Lit. 139. a.

(*f*) Antea 58. b. 1 Roll. 584. Co. Lit. 139. a. Cro. Jac. 211. March 95. Br. Departure in Deſpight, &c. 13. 21 E. 4. 39. a.

4. It was reſolv'd; That the Entry of the ſaid *Retraxit* was inſufficient; for it appears by the Precedents that there are ſundry Manners of Entries of a *Retraxit*: After both Parties have appeared in Court, the Entry is, *Et* (*g*) *poſtea eodem die revenit hic ad barram præd' Tenens per Attorn' ſuum præd' & præd' Petens tunc ſolemniter exactus non venit, ſed a ſecta ſua præd' in contempt' Cur' ſe retraxit, Ideo conſideratum eſt quod Petens nihil capiat per breve ſuum præd' ſed ſit in miſericordia pro falſo clamore ſuo inde, & quod prædictus Tenens eat inde ſine die.* And that appears, *Trin. 5 H. 6. Rot. 320. in Com' Banco.* Another Form of a *Retraxit* is, *Et ſuper hoc idem Quer' dicit, quod* (*h*) *ipſe non vult ulterius placitum ſuum præ' proſequi, ſed abinde omnino ſe retraxit*, &c. *Ideo*, &c. Another Form is, *Quod idem* (*i*) *Querens fatetur ſe (ſeu cognovit ſe) ulterius nolle proſequi verſus præd' Defendent' &c. de placito præd'.* And the Entry of Departure in Deſpight of the Court on the Part of the Tenant is, (*k*) *Et prædictus A. licet ſolemniter exactus non revenit, ſed in contempt' Cur' receſſit & defalt' fecit.* And that is when in Judgment of Law he is preſent in Court, and being demanded

(*g*) Co. Lit. 139. a.

(*h*) Antea 58. a. Co. Lit. 139. a.

(*i*) Co. Lit. 139. a.

(*k*) Co. Lit. 139. a.

demanded, departs in Deſpight of the Court, that amounts to a Bar, in Reſpect of the Deſpight and Contempt of the Court; and yet the Judgment is there given upon his Default, as appears before. Otherwiſe where he imparles to a certain Day, for there he is not, in Judgment of Law, preſent in Court; and ſo the Difference. *Vide* 20 *Edw.* 2. *Excom.* 28. and all the Books aforeſaid. And if the Writ abates for falſe *Latin*, or other Matter of Form, upon Plea to the Writ, the Judgment is, *Quod præd' Tenens*, or *Defendens*, *eat inde ſine die.* And alſo if the Demandant, or Plaintiff, be upon a Bar pleaded, *&c.* by Judgment to be barred, the Words of the Judgment are all one, *ſcilicet*, *quod præd' Tenens*, or *Defendens*, *eat inde ſine die*; and always the Judgment ſhall have Relation to the Plea, *ſcil.* if upon a Plea in Bar, then the Judgment ſhall be applied to it: If to the Writ, then the Judgment ſhall be applied to the Writ only, and not in Bar; and therewith agree the Books in 3 *H.* 4. 1. and 3 *H.* 4. 11. *Vide* upon Plea of Excommunication, which doth not (*a*) abate the Writ, 11 *R.* 2. *Excom.* 25. the Entry is, *Remaneat loquela ſine die quouſque*, &c.

(*a*) Poſtea 69. a. Lit. Sect. 201. Co. Lit. 134. b.

SWAYNE's

SWAYNE's *Caſe.*

Mich. 6 Jac. 1.

Richard Swayne, Eſq; brought an Action of Treſpaſs againſt *Walter Becket*, *quare Clauſum fregit*, at *Hannington* in the County of *Wilts*, and lopped, *&c.* 10 Oaks and 15 Aſhes, *&c.* And upon Not Guilty, the Caſe, as it was ſpecially found, was ſuch; Queen *Elizabeth* was ſeiſed of the Manor of *Hannington* in the County of *Wilts*, in Fee, in the Right of her Dutchy of *Lancaſter*; and that the ſaid Oaks and Aſhes ſo lopped, were growing upon a Yard and half of Land, Parcel of the ſame Manor and Copyhold Land, *&c.* and demiſeable for one, two, or three Lives; and afterwards the Queen, by Indenture under the Seal of the Dutchy of *Lancaſter*, *Anno 29 Regni ſui*, demiſed the ſame Manor to *John Wolly*, Eſq; *exceptis omnibus boſcis, ſubboſcis, arboribus, & marem*, &c. To have and to hold to him (except before excepted) for 21 Years; who, 35 *Eliz.* aſſigned all his Intereſt to *John Plumer* and others; and afterwards the Queen died; and afterwards the King that now is, by his Letters Patents under the Dutchy Seal, granted to *Alexander*, Lord *Finy*, *Richard Swayne*, and *Peter Whetcombe*, *reverſionem prædict' ac præmiſſa ſic, ut præfertur, excepti*, to them and their Heirs, to whom the Leſſees attorn'd; and afterwards the Lord *Fivy*, and *Whetcombe*, by their Deed releaſed to *Richard Swayne*, and his Heirs: And at a Court held by the Leſſees, 17 *Oct.* 3 *Jac. Regis*, their Steward granted by Copy of Court Roll, to the ſaid *Walter Becket*, now Defendant, *&c.* a Houſe, and the ſaid Yard and a half of Land upon which the ſaid Oaks and Aſhes were growing, for Term of Life, *ſecundum conſuetudinem Manerii*; and that within the ſaid Manor there has been ſuch a Cuſtom, That every Copyhold-Tenant for Life hath uſed to take all Trees growing upon his Copy-hold Lands, to be employed for Fewel in his Copyhold-Houſe, and for Bounds and Fences, and other neceſſary Reparations to be in and upon

Moor 811, 812.
1 Brownl. 231.
2 Brownl. 308.
1 Roll. Rep. 96.
2 Roll. Rep. 179.
11 Co. 50. b.

upon the Cuſtomary Lands and Tenements; and that the Defendant did lop the ſaid Trees upon his Copyhold, and imploy'd them for Bounds and Fences in and upon his Copyhold Lands and Tenements, *&c.* And the Doubt was, That foraſmuch as the ſaid Leſſees held the Court by Virtue of the ſaid Leaſe of the Manor (out of which Leaſe the ſaid Trees were excepted) if the Defendant to whom they, by their Steward, granted the ſaid Tenement by Copy, might lop the ſaid Trees, which, by the ſaid Exception, were divided from the ſaid Leaſe. And in this Caſe divers Points were reſolved by *Coke* C. J. *Walmſley*, *Warburton*, *Daniel* and *Foſter*, as after appears.

(*a*) 4 Co. 24. b. 5 Co. 113. a. 6 Co. 57. b. 68. b. Co. Lit. 309. b. But firſt it was objected, *Quod* (*a*) *nemo poteſt plus juris in alium transferre quam ipſe habet*; and the Lords *pro tempore* who held the Court, and made the Grant to the Defendant, had nothing in the Trees, for they were excepted out of their Leaſe; *Ergo*, the Copyholder who claims by Grant of the Leſſes could not meddle with the Trees. But it was anſwered and reſolved *per totam Curiam*, that notwithſtanding the Severance by the (*b*) Exception, and notwithſtanding the Defendant came in by a voluntary Grant of the Lords for Life, and not by Surrender, yet ſuch Grantee by Copy, ſhould have Eſtovers; for the Eſtate of the Copyholder (who comes in by voluntary Grant) is not derived out of the Eſtate or Intereſt of the Lord of the Manor, for the Lord of the Manor is but as an (*c*) Inſtrument to make the Grant: But the Cuſtom of the Manor (after the Grant made) eſtabliſhes and makes it firm to the Grantee: So that altho' the Grant be new, yet the Title of the Copyholder is ancient, and ſo ancient, that by Force of Cuſtom it exceeds the Memory of Man. And therefore neither for Infancy *Non ſanæ memoria*, Coverture, nor other ſuch Diſabilities, neither in Reſpect of Exility, Baſeneſs, or (*d*) Incertainty of the Intereſts or Eſtates of the Lords (as at Will, or upon Condition, *&c.*) the Grants by Copy ſhall not be avoided, becauſe they Claim in, by Force of a good and ancient Cuſtom, which hath no Diſability of Perſon, or Defect of a perfect Intereſt. And *Paſch.* 26 *El. in Banco Regis*, it was adjudg'd, that if the Lord takes a Wife, and afterwards grants the Land by Copy, according to the Cuſtom, and dies, his Wife being (*e*) endowed of the ſaid Land amongſt other, ſhall not avoid the Eſtate by Copy, for altho' her Title of Dower was before the Grant, yet the Title of the Copyholder, which is the Cuſtom, is ancienter than the Title of Dower; and ſo the Copyholder, who comes in by voluntary Grant, ſhall not be ſubject to the Charges or Incumbrances of the Lord before the Grant. And all that, in this Caſe was affirmed for good Law, *per totam Curiam*. 2. It was reſolv'd, That when the Copyholders * for Life, according to the Cuſtom, have uſed to have Common in the (*f*) Waſtes of the Lord of the Manor, or Eſtovers in his Woods, or any other Profit *apprender* in any Part of the Manor, and afterw. the L. aliens the Waſtes or Woods, to anoth. in Fee, and

(*b*) Moor 812. 1 Brownl. 231. 11 Co. 50. b.

(*c*) 4 Co. 27. b. Co. Lit. 59. b. 1 Roll. 503. Cro. El. 361. Bridgm. 51. Moor 112.

(*d*) 1 Roll. 499. 4 Co. 23. b. Co. Lit. 58. b. Cr. Jac. 98, 99.

(*e*) Mo. 758, 812. 2 Brownl. 208. Bridgm. 51. 1 Leon. 16. 2 Siderf. 82.

* Doct. pla. 81.

(*f*) 1 Brownl. 231.

and afterwards grants certain Copyhold-Houſes and Lands for Lives, ſuch Grantees ſhall have Common of Paſture, or Common of Eſtovers, *&c.* notwithſtanding the Severance, for the Title of the Copyholder is paramount the Severance; and the Cuſtom unites the Common, or Eſtovers, which are but Acceſſaries, or Incidents, as long as the Houſe and Lands, being Principal, is maintained by the Cuſtom, which cuſtomary Appurtenances are not appertaining to the Eſtate of the Lord, for he is the Owner of the Freehold and Inheritance of all the Manor, but they are appertaining to the cuſtomary Eſtate of the Copyholder, after the Grant made unto him; which Profit apprender being due by Cuſtom to the Copyhold Tenement, (notwithſtanding the Feoffment or Fine, *&c.* of the Waſte or Woods, made by the Lord) remains and is preſerved by the Cuſtom, which is, as hath been ſaid, the Title of the Copyholder, and is paramount the Severance: But if the Copyholder had derived his Intereſt from the Eſtate of the Lord, then clearly by the Feoffment or Fine, *&c.* of the Lord, all thoſe who after claim by him, ſhall be barred of any Profit apprender in the ſame Waſtes or Woods: *Vide* (*a*) *Murrel*'s Caſe, in the fourth Part of my Reports, that after the Cuſtom hath fixed a cuſtomary Intereſt, no Severance of the Inheritance ſhall overthrow the Copyhold: And *vide* (*b*) *Brown*'s Caſe, *ibid.* And if a Man grants a Rent to another out of his Land, on Condition, and afterwards make a Feoffment of the Land, yet the Condition to determine the Rent remains, and is not extinct by the Feoffment, for it is collateral to the Title of the Land. And note a Difference between (*c*) Preſcription which is made in the Perſon of any, as he and all his Anceſtors, *&c.* or all thoſe whoſe Eſtate he hath, *&c.* and Cuſtom which lies upon the Land, as *infra Manerium talis habetur Conſuetudo*, &c. and this Cuſtom binds the Land, as *Gavelkind*, *Borough-Engliſh*, and the like. (*d*) But after ſuch Severance of the Waſte, or Woods, *&c.* the Copyholder, when he entitles himſelf to Common, or Eſtovers, *&c.* in pleading, ſhall not plead generally, *quod infra Manerium prædict' talis habetur*, &c. *Conſuetudo*, &c. for after the Severance, the Waſte or Wood, *&c.* is not within the Manor, but abſolutely divided from it; but (*e*) ſhall plead that until ſuch a Time, *ſcil.* before the Severance, *talis habebatur*, *& toto tempore*, &c. *Conſuetudo*, &c. and then ſhew the Severance, as he ought in the ſaid Caſe of *Murrell*, where the Lord of the Manor aliened the Freehold and Inheritance of the Copyhold. *Vide* 2 *H.* 6. 9. 11 *H.* 6. 23. 39 *H.* 6. 13, 14. 7 *E.* 4. 32. 20 *E.* 4. 6. *b.* 22 *E.* 4. 44. And *Coke* C. J. ſaid, That the ſaid Caſe at Bar was a general Caſe, for in all (*f*) Leaſes of Manors made by Q. *Eliz.* or the King that now is, ſuch Exception of Trees and Timber, *&c.* is. And Judgment was given for the (*g*) Defendant.

(*a*) 4 Co. 21. b. Cr. El. 252. 2 Leon. 209.

(*b*) 4 Co. 21. a. Moor 125.

(*c*) 6 Co. 60. b. Co. Lit. 113. b. 4 Co. 32. a.

(*d*) Doct. pl. 81.

(*e*) Doct. pla. 81.

(*f*) 11 Co. 50. b.

(*g*) Moor 812.

Sir WILLIAM FOSTER's *Caſe.*

Mich. 6 Jac. 1.

1 Brownl. 169, 170.

IN a *Replevin* between *Barnard Cowper*, Plaintiff, and Sir *William Foſter*, Defendant, for taking his Cattle, *ultimo die Auguſti, anno quarto Jacobi Regis, apud Stratfield, in Com' Berks, in quodam loco vocat'* the *Rye-piddle*, the ſaid Sir *William* avow'd the taking, as Bailiff of *Ed. Gregory*, Eſq; and *Mary* his Wife, Adminiſtratrix of the Goods and Chattels which were *Tho. Foſter*'s Gent. and ſaid, That the Place where contain'd three Acres of Land, Parcel of the Manor of *Bechilwick*, in the ſaid County, whereof *Charles Forſter*, Eſq; was ſeiſed in Fee, and 30 *Jan. Anno* 4 *Ed.* 6. by his Deed indented, enfeoff'd of the ſaid Manor *Richard Pattenham*, to him and his Heirs, yielding therefore yearly to the ſaid *Charles*, his Heirs and Aſſigns, 6 *l.* 13 *s.* 4 *d.* at the Feaſt of St. *Michael*, and the *Annunciation* of our Lady, by equal Portions, with Clauſe of Diſtreſs; and afterwards the ſaid *Charles Foſter* died ſeiſed of the ſaid Rent, after whoſe Death it deſcended to the ſaid *Thomas Foſter*, as to his Son and Heir; and afterwards, *ſcil.* 10 *Julii*, *anno* 25. he died inteſtate, and becauſe 100 *l.* of the Rent aforeſaid was behind, for 15 Years, ended 10 *El.* he avowed the taking, as Bailiff to the ſaid Huſband and Wife, Adminiſtratrix of the ſaid *Thomas Foſter*. The Plaintiff, in Bar of this Avowry, pleaded, *Quod* (*a*) *nec prædictus Tho. Foſter nec anteceſſores ſui, nec aliqui alii quorum ſtatum præd' Tho. Foſter habuit in reddit. præd' unquam fuerunt ſeiſiti de eodem redditu infra* 40 *annos jam ultimos elapſos ante prædictum tempus quo*, &c. Upon which the Avowant demurr'd in Law. And this Avowry is grounded on the Statute of 32 *H.* 8. 37. which gives Diſtreſs to an Executor or Adminiſtrator, *in like Manner and Form as the Teſtator*, &c. *might or ought to have done.* But the Matter

(*a*) 1 Brownl. 170.

Matter in Law was founded on another Act made at the same Parliament, (*a*) *cap.* 2. (3.) of Limitations, for by the same Act it is enacted, *That no Person or Persons shall hereafter make any Avowry, or Conusans for any Rent, Suit, or Service, and alledge any Seisin of any Rent, Suit or Service in the same Avowry or Conusans, in the Possession of his or their Ancestor or Predecessor, &c. above forty Years next before the making of the said Avowry or Conusans.* And it was resolv'd *per totam Curiam*, That these Words ought to be intended where the Avowant was driven to alledge any Seisin by Force of any old Statute of Limitation; and that was when the (*b*) Seisin was material, and of such Force that it should not be avoided in Avowry, altho' it were by Encroachment, as of Rent between the Lord and Tenant: But in the Case of * Reservation or Grant of a Rent, there the Deed is the Title, and the Beginning thereof appears, no Encroachments in that Case shall hurt, nor is any Seisin material: The same Law of a Gift in Tail, after the Statute *de Donis conditionalibus* rendring Rent; there no Encroachment shall be prejudicial, or Seisin requisite, for the Reservation is the Title, and the Beginning thereof appears within Time of Memory: And this Construction stands with the Words of the said Act, for the Words are, *No Man shall make Avowry, and alledge any Seisin, &c.* By which it appears, that that Branch extends only where the Avowant ought to alledge Seisin; but when no Seisin is requisite, it is out of the Words and Intent of the Act, for it intends to limit a Time for the Seisin, when Seisin is required by the Law to be alledged, and not to compel any one to alledge Seisin where Seisin was not necessary before. *Vide Plow. Com.* 94. in *Woodland's* Case, *acc.* And so you will better understand your Books in 22 *Ass.* 68. 22 *Ed.* 3. 18. 30 *H.* 6. 5. *b.* 7 *Ed.* 4. [illegible] 7. 20 *Ed.* 4. 17. 11 *H.* 7. 11 *b.* 10 *Ed.* 3. 25: 20 *Ed.* 3. *Avow.* 131. 10 *H.* 6. 3. 4 *Ed.* 2. *Avow.* 204. *F. N. B.* 10. & 163. *Vide* 8 *Ed.* 3. 18. *b.* 1 *Ma. Br. Avow.* 107. & 14 *El. Dyer* (*c*) 315. & 16 *Eliz.* in (*d*) *Warring's* Case, in the Common Pleas adjudg'd, That the Avowant need not in his Avowry shew Seisin within 40 Years, but the same shall come on the other Part, *scil.* not seised of the Services after the Limitation. Note Reader, Lessee for Life, or Donee in Tail, shall not have (*e*) *Ne injuste vexes* against the Donor, for inasmuch as the Reservation is the Title, no Encroachment upon them shall hurt them, but they shall avoid it in Avowry; and the Stat. of *Magna Charta*, *cap.* 10. on which the Writ of *Ne injuste vexes* is (*f*) grounded, scil. *quod nullus distringatur ad faciend' majus servitium de libero tenemento quam inde debetur*, doth not extend to Donee in Tail, Lessee for Life, or Grantee of a Rent-charge, which appears by these Words, *majus servitium*, which is meant between very Lord and very Tenant.

(*a*) Dyer 315. pl. 101. 330. pl. 19. 32 H. 8. cap. 2. 9 Co. 36. a. 1 Rolls Rep. 50.

(*b*) 1 Brownl. 176. 10 Co. 108. a. Cr. Car. 81. 1 Anders. 16. Hetl. 41. 1 Jones 237. * Doct. pl. 317, 318.

(*c*) 9 Co. 36. a. Cr. Car. 83. Hetl. 41. Dyer 315. pl. 101.

(*d*) Cr. Car. 83. Hetl. 41.

(*e*) F. N. B. 11. d.

(*f*) 2 Inst. 21. 9 Co. 33. b. Plowd. 243. b.

LOVEDAY's *Case.*

Mich. 6 Jacobi 1.

Cr. Jac. 210, 211. Jenk. Cent. 283. Co. Ent. 393. nu. 17.

IN an Information in the Exchequer upon the Statute of *Usury*, by *C. qui tam, &c.* againſt *Loveday*, the Defendant pleaded to Iſſue, and a Jury was return'd who gave an imperfect Verdict, for they found an Acceptance, *&c.* and no (*a*) Loan, *&c.* wherefore the Court awarded a *Venire facias de novo*, and thereupon another Jury was returned and appear'd; and when they were ready to give their Verdict, the Plaintiff was nonſuit, upon which Judgment was given: And now the Plaintiff brought a Writ of *Error* in the Exchequer-Chamber, and aſſign'd for *Error*, that the Court of Exchequr in the ſaid Caſe did err in granting a *Venire facias de novo*; but ought to have granted a new *Niſi prius*; for an imperfect Verdict is as no Verdict, as *Anno* 20 *Edw.* 4. 6. *a.* an inſufficient Indictment is as no Indictment. And at the Common Law, if the Recognitors of an Aſſiſe give a Verdict which is not well examined by the Juſtices who take the Aſſiſe, but is imperfect, for want of good Examination, in that Caſe the Plaintiff ſhall have a Certificate of Aſſiſe, and the firſt Imperfection ſhall be enquired by the firſt Jurors; and that appears in *F. N. B.* 181. *b.* 7 *H.* 4. 45. *a.* 43 *Aſſiſe. pl.* 5. 12 *H.* 4. 9. and the Words of the Writ are, *Quia ſuper quibuſdam Articulis contingent' Aſſiſam novæ diſſeiſin, &c. quædam ſubſunt dubitationes, &c.* But it was reſolv'd by the Court, and the two Chief Juſtices, That the *Venire facias de novo* was well awarded: For when a (*b*) Jury (return'd by Force of any *Venire facias* to try an Iſſue, has given a Verdict which is accepted and recorded by the Court; be it perfect or imperfect, the Jurors are diſcharged thereof for ever, and ſhall never be call'd back in the ſame Cauſe to try the ſame Iſſue; but if the Verdict be ſo imperfect that Judgment cannot be given

(*a*) Bridg. 112, 113.

(*b*) Cr. Jac. 210, 211.

upon it, then the Court ſhall award a *Venire facias de novo*, to try the ſaid Iſſue by others; and therewith agreeth the Book in 18 *Ed.* 3. 48. *b.* where it is reſolv'd, that in a *Ceſſavit*, becauſe the Enqueſt found Part to be held of the Demandant, and found not by what Services it was held, nor what Arrearages were behind, and for that Reaſon was not fully taken, that a *Venire facias de novo* ſhould be awarded to return a new Jury, and not a new *Niſi prius* to try the ſame Iſſue again by the ſame Jury. So in (*a*) 27 *H.* 6. 4. *a. b.* In Conſpiracy againſt divers, all plead Not-guilty, and one *Venire facias* was awarded againſt all, and the Sheriff returned not the Writ; and the Sheriff prayed ſeveral *Venire facias* againſt the Defendants, and had it, and it was found for the Plaintiff, and all the Juſtices adjudg'd it a Jeofail, ſo that the Plaintiff could not have Judgment upon the ſaid Verdict, which was fully found, foraſmuch as the firſt Award was of one joint *Venire*, the Plaintiff could not vary, (to have ſeveral Writs *de Venire facias*) from the firſt Award; and therefore the Court did award *Venire facias de novo*, 21 *Hen.* 6. 21. 21 (*b*) *Edw.* 4. 26. *b.* 27. *a.* And as to the Caſe (*c*) of Aſſiſe, the Recognitors are not returned to try any certain Iſſue, for there is a Jury the firſt Day before any Plaint, Plea, or Iſſue. 2. There no new Proceſs can be awarded; for the Recognitors who are once return'd, ſhall ſtand; but when a Jury is return'd on a *Venire facias*, which is a judicial Proceſs for the Trial of a certain Iſſue, there the Court, if the Verdict be imperfect, may award a new judicial Proceſs, *ſcil. Venire facias de novo*; but the Court cannot do ſo in Caſe of Aſſiſe, for they are return'd on the Original; and becauſe the Writ of Aſſiſe *de nova Diſſeiſina* is (*d*) *feſtinum remedium*, the Plaintiff ſhall have a Writ of *Certificate* of *Aſſiſe*, to ſupply the firſt Imperfections (which happen for Default of good Examination) according to the Truth of the Matter. And Judgment was affirmed.

(*a*) Fitz. Proceſs 94. Br. Replead. 30. Br. Venire fac' 2, 35.

(*b*) Br. Enq. 49

(*c*) Cr. Jac. 210, 211.

3 Salk. 371.

(*d*) Ant. 50. a.

EDWARD CROGATE'S *Case.*

Mich. 6 Jacobi I.

Doct. pl. 114. See 2 Salk. 628.

EDward Crogate brought an Action of Treſpaſs againſt *Robert Marys*, for driving of his Cattle in *Townbarningham* in *Norfolk*, *&c.* The Defendant pleaded, That a Houſe and two Acres in *Baſingham* in the ſaid County, were Parcel of the Manor of *Thurgarton* in the ſame County, and demiſed, and demiſable, *&c.* by Copy, *&c.* in Fee-ſimple, *&c.* according to the Cuſtom of the Manor, of which Manor *William* late Biſhop of *Norwich* was ſeiſed in Fee in the Right of his Biſhoprick, and preſcribed to have Common of Paſture for him and his cuſtomary Tenants of the ſaid Houſe and two Acres of Land *in magna pecia paſturæ vocat' Baſſingham* Common, *pro omnibus averiis, &c. omni tempore anni*, and the ſaid Biſhop at ſuch a Court, *&c.* granted the ſaid Houſe and two Acres by Copy to one *William Marys*, to him and his Heirs, *&c.* And that the Plaintiff put his ſaid Cattle in the ſaid great Piece of Paſture, wherefore the Defendant, as Servant to the ſaid *William*, and by his Commandment, *molliter* drove the ſaid Cattle out of the ſaid Place, where the ſaid *William* had Common *in præd' villam de Townbarningham*, adjoining to the ſaid Common of *Baſſingham*, *&c.* The Plaintiff reply'd, *de injuria ſua propria abſque tali cauſa:* Upon which the Defendant demurr'd in Law. And it was objected on the Plaintiff's Part, that the ſaid Replication was good, becauſe the Defendant doth not claim any Intereſt, but juſtifieth by Force of a Commandment; to which *de injuria ſua propria abſque tali cauſa*, may be fitly applied: And this Plea, *De injuria ſua propria*,

ſhall refer only to the Commandment, and to no other Part of the Plea, and they cited the Books in 10 *H.* 6. 3. *a. b.* 9. *a.* 16 *H.* 7. 3. *a. b. &c.* 3 *H.* 6. 35. *a.* 19 *H.* 6. 7. *a. b. &c.* But it was adjudged, That the Replication was inſufficient. And in this Caſe divers Points were reſolved. 1. That *abſque tali cauſa*, doth refer to the (*a*) whole Plea, and not only to the Commandment, for all maketh but one Cauſe, and any of them, without the other, is no Plea by itſelf. And therefore in (*b*) a falſe Impriſonment, if the Defendant juſtifies by a *Capias* to the Sheriff, and a Warrant to him there, *De injuria ſua propria* generally is no good Replication, for then the Matter of Record will be Parcel of the Cauſe (for all makes but one Cauſe) and Matter of (*c*) Record ought not to be put in Iſſue to the Common People, but in ſuch Caſe he may reply, *De injuria ſua propria*, and traverſe the Warrant, which is Matter in Fact. (*d*) But upon ſuch a Juſtification by Force of any Proceeding in the *Admiral* Court, Hundred or County, *&c.* or any other which is not a Court of Record, there *De injuria ſua propria* generally is good, for all is Matter of Fact, and all makes but one Cauſe. And by theſe Differences you will agree your Books in 2 *H.* 7. 3. *b.* 5 *H.* 7. 6. *a. b.* 16 *H.* 7. 3. *a.* 21 *H.* 7. 22. *a.* (33.) 19 *H.* 6. 7. *a. b.* 41 *E.* 3. 29. *b.* 17 *E.* 3. 44. 18 *E.* 3. 10. *b.* 2 *E.* 4. 6. *b.* 12 *E.* 4. 10 *b.* 14 *H.* 6. 16. 21 *H.* 6. 5. *a. b.* 13 *R.* 2. *Iſſue* 163.

(*a*) Cr. Jac. 599. 2 Leon. 81. 2 Sand. 295. Doct. pl. 114. 3 Bulſtr. 285. Cr. Car. 138.
(*b*) Doct. pl. 114. 2 Leon. 81.
(*c*) 4 Co. 71. b. 9 Co. 25. a. Co. Lit. 260. a.
(*d*) Doct. pl. 114.

2. It was reſolved, That when the Defendant in his own Right, or as a Servant to another, claims any (*e*) Intereſt in the Land, or any Common, or Rent going out of the Land; or any (*f*) Way or Paſſage upon the Land, *&c.* there *De injuria ſua propria* generally is no Plea. (*g*) But if the Defendant juſtifies as Servant, there *De injuria ſua propria* in ſome of the ſaid Caſes, with a Traverſe of the Commandment, that being made material is good; and ſo you will agree all your Books, *ſcil.* 14 *H.* 4. 32. 33 *H.* 6. 5. 44 *E.* 3. 18. 2 *H.* 5. 1. 10 *H.* 6. 3. 9. 39 *H.* 6. 32. 9 *E.* 4. 22. 16 *E.* 4. 4. 21 *E.* 4. 6. 28 *E.* 3. 98. 28 *H.* 6. 9. 21 *E.* 3. 41. 22 *Aſſ.* 42. 44 *E.* 3. 13. 45 *E.* 3. 7. 24 *E.* 3. 72. 22 *Aſſ.* 85. 33 *H.* 6. 29. 42 *E.* 3. 2. For the general Plea *De injuria ſua propria, &c.* is properly when the Defendant's Plea doth conſiſt meerly upon Matter of (*h*) Excuſe, and of no Matter of Intereſt whatſoever; *& dicitur de injuria ſua propria, &c.* becauſe the Injury properly in this Senſe is to the Perſon, or to (*i*) the Reputation; as Battery or Impriſonment to the Perſon; or Scandal to the Reputation; there, if the Defendant excuſe himſelf upon his own Aſſault, or upon Hue and Cry, levied there properly (*k*) *De injuria ſua propria* generally is a good Plea, for there the Defendant's Plea conſiſts only upon Matter of Excuſe. 3. It was reſolv'd, That (*l*) when by the Defendant's Plea any Authority or Power is mediately or immediately derived from the Plaintiff, there, altho' no Intereſt be claimed,

(*e*) Doct. pl. 114. Cr. Eliz. 539, 540. Cr. Jac. 225. Yelv. 157. 1 Brownl. 215.
(*f*) Cr. Jac. 599.
(*g*) Doct. pl. 114. g.
(*h*) Doct. pl. 115.
(*i*) Doct. pl. 115. Cr. Eliz. 607.
(*k*) Doct. pl. 115.
(*l*) Doct. pl. 115.

the Plaintiff ought to anſwer it, and ſhall not reply gene-
(a) Doct. pl. 115. rally *De injuria ſua propria*. The ſame Law of an (*a*) Authority given by the Law; as to view Waſte, *&c.* *Vide* 12 *E.* 4. 10. 9 *Ed.* 4. 31. 20 *Ed.* 4. 4. 42 *Edw.* 3. 2. 16 *H.* 7. 3.

Laſtly, It was reſolv'd, That in the Caſe at Bar, the Iſſue would be full of Multiplicity of Matter, where an Iſſue ought to be full and ſingle for Parcel of the Manor, demiſeable by Copy, Grant by Copy, Preſcription of Common, *&c.* and Commandment would be all Parcel of the Iſſue. And ſo by the Rule of the whole Court, Judgment was given againſt the Plaintiff.

JOHN

JOHN TROLLOP's *Caſe.*

Mich. 6 Jacobi 1.

Lancelot Richeſon brought Debt on a Bond of 34 *l.* by *Quo minus* in the Exchequer, againſt *John Trollop*, Eſq; and upon Iſſue and Verdict had Judgment againſt *Trollop*, upon which *Trollop* brought a Writ of *Error* againſt the ſaid *Richeſon*, who pleaded an Excommunication, *& profert hic in Curia literas Clementis Colnor, Legum Doctoris, Reverendi in Chriſto patris, Tobiæ nuper Dunelm' Epiſcopi vic' in ſpiritualibus generalis, & officialis principalis legitime fulciti, ſigillo conſiſt' Dunelm', ſignat', viz. Clemens Colnor, &c. univerſis & ſingulis Clericis & literalis quibuſcunque per totam diœceſin Dunelm' ubilibet conſtitut' ſalut' :* and recited that he did proceed againſt him for Recuſancy, and that *propter ipſi' contumaciam in non comparendo, &c.* being lawfully cited and forwarn'd, he was excommunicated, *Vobis igitur tenore Præſentium mandamus quatenus præfat' Joh' Trollop, ſic ut præmittitur per nos excommunicatum fuiſſe & eſſe, in Eccleſia veſtra Parochial' diebus Dominicis, & aliis feſtivis, &c. publice dununcietis, & cum effectu declaretis, &c.* and demanded Judgment if he ſhould be anſwered. The Plaintiff ſaid, That after the ſaid Excommengement, the King by his general Pardon in his Parliament, *Anno* 3, did pardon all Contempts, *&c.* and all that he might pardon; and averred that neither the Offence nor the Perſon *&c.* is excepted, *&c.* Upon which the Def. in the Writ of Err. did demur in Law. And it was reſolv. by the Court, and the two Ch. Juſtices, that the ſaid Plea of Excomm. was inſuf. for two Cauſes. 1. Becauſe the Excommeng. is certified by the Official or Commiſſary of the Bp. where it ought to be certified by the (*a*) Biſhop, who is the immediate Officer to the Court, for none ſhall certify an Excommu. whereby any ſhall be diſabled, but he to whom the Court may write to abſolve him who was excommunicated, as the Biſhop, Guardian of the (*b*) Spiritualties, *&c.* and therewith agree the Books in the Point in 44 *E.* 3. *Excommengement* 23. 20 *Ed.* 3. *Excommengement* 24. 41 *Aſſ. p.* 29. (*c*) 20 *H.* 6. 1. *a.* (*d*) 8 *H.* 6. 3. (*e*) 7 *E.* 4. 14. *a.* 14 (*f*) *H.* 4. 14. *a. b. Vide* 11 *H.* (4.) 6. 64. *a. Hunk.* That it was ſo ordained by the (*g*) Parliament, (*h*) 12 *Ed.* 4. 15. *b.* 16. *a. F. N. B.* 64. *c.* 65. *a.* But the

Cr. Jac. 212. See Carth. 132.

(*a*) 2 Brown. 301. Co. Lit. 134. a.

(*b*) F.N.B. 62. n.

(*c*) Fitz. Excom. 11. Br. Excom. 2. 19. Br. Certificate del eveſque 1.

(*d*) Br. Excom. 7. Br. Certificate del eveſque 26.

(*e*) Br. Excom. 14. Fitz. Excom. 16. (*f*) Fitz. Excom. 21. Br. Excom. 5. Co. Lit. 134. a. (*h*) Fitz. Excom. 17. Br. Excom. 15. Br. Nonability 33. (*g*) Fitz. Excom. 20.

(a) Reg. Orig. 67. b. the (a) Chancel. of the Univerſ. of *Cambr.* or *Oxf.* may certify an Excom. for they do it by the King's Charter, *Regiſter*, *F. N. B.* 64. *c.* 2. 2. If the Biſhop himſelf had certified it, yet it had been inſufficient, for the Direction ought to be either to * this Court in particular, or at leaſt, *Univerſis ſanctæ matris Eccleſiæ filiis:* But in the Caſe at Bar it is directed, *Univerſis & ſingu' cler' & literat' quibuſcunq' per totam diœceſin Dunelm' ubilibet conſtitut'*, by which partic. Direct. this Court is exclud. as a Certific. of an Excom. in the Chanc. ſhall not ſerve in any other Court; neither ſhall a (b) Protection directed to one Court, ſerve in another; for always a Certific. directed to a particular Court, and in a partic. Manner, ſhall not be extended farther; and therewith agree (c) 20 *H.* 6. 25. *a.* (d) 2 *E.* 4. 4. And it was objected, That an Excom. is a Spiritu. Judgment, and theref. the Temp. Judges ſhall not diſpute upon the Manner of it. To which it was anſw. and reſol. That the Judges of the Common Law ſhall adjudge upon the Manner, and (in ſome Caſes) of the Matter alſo of the Certific. in Caſe of Excommu. as if the Biſhop himſ. be ſued, and he pleads an Excom. (e) by himſ. or his Commiſ. (who is as his Deputy) altho' it be for another Cauſe than is then in Queſtion, it ſhall not diſable the Plain. becauſe he himſelf is Party, and therew. agree 16 *E.* 3. *Excom.* 5. 5 *E.* 2. *Excom.* 27. 5 *E.* 3. 8. 8 *E.* 3. 69. 18 *E.* 3. 58. 9 *H.* 7. 21. *b.* 10 *H.* 7. 9. *a.* Alſo if a Prohibition be brought againſt a Bp. and he ſhews forth the Letters of the Abp. that the Plain. is excom. *propter (f) diverſas contumacias*, without ſhewing any Cauſe in Special of the Excommun. it ſhall not diſable the Plain. The ſame Law if any other be Def. in any Acti. and would diſable the Plain. by Excommunication, he ought to ſhew the Bp's Certificate, containing the Specialty of the principal Cauſe for which the Plaintiff is excommunicated, to the End that the Judges of the Law may know whether the Spiritual Court have Conuſans of the original Cauſe, and if the Excommunication be againſt Law, the Court ought to write to them to abſolve the Party; which they can't do if the Certificate be general; and if the Biſhop refuſes it, his Temporalties at the Common Law ſhall be ſeiſed, 28 *Ed.* 3. 97. *a.* 22 *Ed.* 4. 20. *b.* 20 *Ed.* 3. *Excom.* 9. 13 *H.* 7. 16. *b.* and in 14 *H.* 4. 14. *b.* *Hanks* there ſaith, That a (g) Doctor of the Civil Law told him, That no Letter of Certificate of Excommunication, (altho' it be of the Biſhop) ſhould be allow'd, if the principal Cauſe be not cont. in the Writ; *F. N. B.* 64. *f.* The Biſhop ought to expreſs the Cauſe and Suit againſt the Plaintiff ſpecial in the Certificate. *Vide* 3 *H.* 4. 3. *b.* miſtaken in the Rep. For the Opinion there is reform'd in 14 *H.* 4. 14. as appears before, *Vide Fleta*, *lib.* 6. *cap.* 26. *Weſt.* 2. *cap.* 43. Alſo the Biſhop ought to certify that which hath been ſentenced in his own Court, and not in another Court. And therefore he cannot certify, that (h) another Biſhop hath certified to him, or that he hath ſeen a Sentence of Excommunication made by anoth. Biſhop; but

* 20 H. 6. 25. a. Fitz. Excom. 12. Br. Excom. 3. 13.

(b) Fitz. Excom. 15. Co. Lit. 131. a. 2 E. 4. 4. b.

(c) Br. Excom. 3. Fitz. Excom. 12.

(d) Fitz. Excom. 15. Br. Excom. 15. Br. Excom. 13.

(e) Br. Excom. 12. Swinb. 305. 3 H. 4. 3. b. Co. Lit. 134. a. Br. Nonabil. 55. Cawly 217.

(f) Fitz. Exc. 3. 28 E. 3. 97. a. 2 Bulſtr. 139. Salk. 293, 294. Farr. 57. 117.

(g) Fitz. Excom. 21.

(h) F. N. B. 65. a. Co. Lit. 134. a.

but the Biſhop may certify an Excommengement made by his Commiſſary or Official, for that the Biſhop's Court and his Commiſſary doth is in his Right, *F. N. B.* 65. *a.* 33 *E.* 3. *Excom.* 29. 9 *H.* 7. 21. *b.* 10 *H.* 7. 8. *b.*

If the Biſhop makes a Certificate, and (*a*) dies before it be receiv'd, it is nothing worth, but his Succeſſor ought to certify it, *F. N. B.* 65. 8 *E.* 2. *Excom.* 26. 14 *E.* 3. *ibid.* 8. But note Reader, that in ſome Caſe the Vicar General may certify an Excommengement; but that is when the Biſhop is in (*b*) *remotis agendis*, which is as much as to ſay, *extra Regnum* in the King's Service; but the Court will be apprized of it by Matter of Record, *ſcil.* by Writ out of the Chancery directed to them, and not by the Surmiſe of the Party, and then for Neceſſity (which is always the Law of Time, for *Neceſſitas eſt Lex Temporis*) the Certificate of the Vicar General ſhall be allow'd, becauſe no other can make it, And therewith agree 31 (41) *Ed.* 3. 10. (*b*) *F. N. B.* 64. And after a Biſhop is elected, and before he is (*c*) conſecrated, he may certify an Excommengement, for the Power of the Guardian of the Spiritualties * ceaſes after he is elected by the King's *Conge de Eſlire*: And therefore for Neceſſity he ought to certify it. *F. N. B.* 62. *N.* and *Regiſter*.

(*a*) Co. Lit. 134. a.

(*b*) Co. Lit. 134. a. F. N. B. 62. n.
(*c*) 2 Rol. Rep. 454. F. N. B. 62. n. Larch. 32.
* Palm. 464.

And it is to be known, That when a Plea of Excommengement is allow'd, the Writ ſhall not abate, but the Entry is, (*d*) *Quod remaneat loquela ſine die quouſque, &c.* 3 *Hen.* 6. 3. 3 *Edw.* 4. 8. 3 *Aſſ. p.* 12.

(*d*) Lit. Sect. 202. Antea 62. b. Co. Lit. 134. b.

The Point in Law in the Caſe at Bar, if the Certificate had been good, was, If the general (*e*) Pardon diſcharged a Man excommunicated of the Excommunication or not, and by the Award of the Court the Defendant was ruled to anſwer over.

(*e*) Cr. Car. 199. Cr. Jac. 359, 212.

[Note, It appears by *F. N. B.* the *Regiſter*, and many other Books, That even after his Election, *&c.* he is not to be named *Biſhop* 'till the King has given him the Temporalties of the Biſhoprick, for theſe only make him a Biſhop; ſo that a Biſhop here in *England* is a mere Temporal Magiſtrate by the Common Law. *Vide* 12 *Co.* 8, 9.]

WHIT-

WHITLOCK's *Caſe.*

Hill. 6 Jac. 1.

Which began Mich. 6 Jacobi 1. Rott. 1316.

In the Common Pleas.

Co. Entries 600. Numero 15. 1 Brownl. 169. 2 Roll. Rep 274. 2 Bulſtr. 273.

IN a *Replevin* between *John Chappel*, Plaintiff, and *William Whitlock*, Defendant, for taking of a Gelding in *Rings-Aſh*, in the County of *Devon*, in a Place called *Cunny-Park*; the Defendant avow'd the taking in the Place where, &c. as in his Freehold, for Damage Feaſant. The Plaintiff in Bar of the Avowry pleaded, That one *William Whitlock* the Elder, was ſeiſed of a Meſſuage, 20 Acres of Land, 12 Acres of Wood, and 20 Acres of Heath, in *Rings-Aſh* aforeſaid in Fee, whereof the Place where is Parcel, and demiſed the ſaid Tenements to one *John Bullhead* for his Life, by Force whereof he was ſeiſed for Life, the Reverſion expectant to the ſaid *William Whitlock* the Elder, and the ſaid *William Whitlock* the Elder, 11 *Marcii*, 18 *Eliz.* by his Indenture Tripartite, in Conſideration of a Marriage to be ſolemnized between *William Whitlock* the Younger, and *Margaret*, Daughter of *John Bolter*, covenanted and agreed by the ſaid Indentures, That the ſaid *William Whitlock* the Elder, before the Feaſt of the Birth of Chriſt next enſuing, would aſſure and convey to *Leonard Yeo*, and *Anthony Whitlock*, and their Heirs, the Tenements aforeſaid, to the Uſes, Intents and Purpoſes expreſſed and declared in the ſaid Indentures, and to no other Uſes or Intents, *viz.* 'till the ſaid Marriage, to the Uſe of the ſaid *William Whitlock* the Elder, and his Heirs; and after the ſaid Marriage, to the Uſe of *William Whitlock* the Elder, for his Life, without Impeachment of Waſte, and afterwards to the Uſe of the ſaid *William Whitlock* the Younger, and the Heirs of his Body, and afterw. to the

the Uſe of *J. Whitlock* and his Heirs: *Et per eand' Indenturam ulterius proviſum, conceſſum & agreatum fuit, quod liceret & licitum foret præd' Will' Whitlock, ſen. ad aliquod Temp' extunc facere dimiſſionem, (Anglice Leaſe) ſive dimiſſiones, conceſſionem ſive conceſſiones, tam in poſſeſſione quam in Reverſione de Tenementis præd' cum pertin', unde, &c. inter alia, ſive de aliqua parte inde. Proviſo ſemper quod præd' dimiſſio ſive dimiſſiones, conceſſio ſive conceſſiones non excederent ſuper numerum trium vitarum ad majus vel viginti & unius annorum, & ita quod ſuper quamlibet talem demiſſionem & demiſſiones, conceſſionem & conceſſiones, maxime antiq' & conſuet' annual' reddit', heriot' & ſervitia ſive plus redderentur & reſervarentur, ſolubil' duran' dict' demiſſione ſive demiſſionibus, conceſſione ſive conceſſionibus:* And that the ſaid *Leonard* and *Anthony*, and their Heirs, ſhould ſtand ſeiſed, *&c.* to the Uſe of every ſuch Fermor, *&c.* And afterwards, 18 *Maii*, 18 *Eliz.* the ſaid *William* the Younger, and *Margaret*, intermarried; and afterwards, *Trin.* 18 *Eliz. William Whitlock* the Elder, levied a Fine of the Tenements aforeſaid, according to the ſame Indentures, to the Uſes therein contained, by Force whereof, and of the Statute of *Uſes*, the ſaid *William Whitlock* the Elder was ſeiſed of the Reverſion of the ſaid Tenements, *&c.* for his Life, the Remainder over according to the ſaid Indentures. And the ſaid *William Whitlock* the Elder ſo ſeiſed, 1 *Sept.* 31 *Eliz. dimiſit cuidam Chriſtian' Hearne tenem' præd' cum pertin', unde, &c inter alia habend' & occup' eidem Chriſtianæ & Aſſignat' ſuis pro term' 99 annor' plenarie complend' & finiend', Si præd' Chriſtiana & quid' Petr' Rattenbury, ſive eorum alter, tam diu vivere contingeret:* The ſaid Term to commence after the Death or Determination of the Eſtate of the ſaid *John Bullhead*, *reddendo & ſolvendo proinde annuatim poſt inceptionem dictæ dimiſſionis, præfato Will' Whitlock, ſen. hæred' & aſſign' ſuis & tali perſonæ & perſonis quib' hæreditament' præmiſſorum poſt mortem præd' Will' Whitlock, ſen. de jure ſpectaret ſeu pertineret durante dicto Termino* 14 s. *ad quatuor maxime uſualia feſta annuatim ſolvendo, &c.* And the Plaintiff juſtified under the ſaid Leaſe, and averred the Life of the ſaid *Peter Rattenbury*, and that the moſt ancient and accuſtomed yearly Rents, Heriot and Services, *&c.* were reſerved, *&c.* upon which the Avowant did demur in Law. And in this Caſe two Queſtions were moved. 1. Whether *Will. Whitlock* the Elder had purſued his Authority or not, in making the ſaid Leaſe for 99 Years, determinable on the ſaid two Lives? 2. Whether the ſaid Reſervation of the Rent was according to the ſaid *Ita quod, &c.* And as to the firſt it was objected, That the Authority was diſtinguiſh'd, *ſc.* either to make a Leaſe not exceeding the Number of three Lives, or for 21 Years, by which

2 Roll. Rep. 274. 2 Roll. 260.

Poſtea 71. 2.

2 Roll. Rep. 174. 2 Roll. 260.

1 Co. 139. 2. Poſtea 71.

it

it appears that the Intention was either to make a Leaſe for three Lives, *&c.* or if he would make a Leaſe for Years, that it ought to be for 21 Years; but in the Caſe at Bar, the Leaſe is not for three Lives, *&c.* nor for 21 Years, but for 99 Years, if two or either of them ſhall ſo long live, and ſo his Authority not purſued. And if (*a*) one hath Power to make a Leaſe for three Lives, he cannot make a Leaſe for 99 Years determinable upon three Lives, *&c. quod fuit conceſſum per totam Curiam.* But it was anſwered and reſolv'd by the Court, that in the Caſe at Bar the Leaſe was good, and the Power which the Leſſor had was well purſued; for the Proviſo of Creation of his Power to make Leaſes, is in the Beginning abſolute, affirmative, and indefinite, *ſcil.* to make a Leaſe or Leaſes, Grant or Grants, *&c.* as well in Poſſeſſion as in Reverſion of the Tenements, or any Parcel thereof, *&c.* which is without any Limitation. Then the Proviſo of Correction is added, *ſcil.* That ſuch Leaſe or Leaſes, Grant or Grants, ſhall not exceed the Number of three Lives at moſt, or 21 Years, which Clauſe is negative, and qualifies the Generality of the firſt Proviſo: So that the Power by the firſt is general, and by the ſecond the Leaſe ought not to exceed three Lives, *&c.* And when the Leaſe is made for 99 Years determinable upon two Lives, it doth not exceed the Number of three Lives, altho' in Truth it is not a Leaſe for Lives. 2. The Power is to make Leaſes as well in Poſſeſſion as in Reverſion, with the Limitation aforeſaid; and a Leaſe for three Lives cannot be made in Reverſion, but a Leaſe for Years determinable upon Lives may, and the Leſſor himſelf had but a Reverſion expectant on an Eſtate for Life at the Time of the Creation of the ſaid Power: So that the Intention of the Parties was (not) to make a Leaſe for Years abſolutely for 21 Years; but any Term of Years determinable upon three Lives, *&c.* which is in Equipage with 21 Years, he well might. And the Difference was taken and agreed between a particular Power affirmative, and a general Power reſtrained with a Negative: For it is true, that if one hath Power to make a Leaſe for three Lives, or 21 Years, he can't make a Leaſe for 99, if three ſhall ſo long live, *&c.* but if he has Power to make any Leaſe or Grant, provided ſuch Leaſe or Grant ſhall not exceed the Number of three Lives, or 21 Years, there he may make a Leaſe for 99 Years, if three ſhall ſo long live, for that doth not exceed the Number of three Lives, but in Truth is leſs; for every Term for Years, which is but a Chattel, is leſs in Eſtimation of Law, than an Eſtate for Life, which is a Freehold. As to the ſecond Point, it was objected, That the ſaid Reſervation was ſuch, that it was not payable during the ſaid Leaſe, as it ought, but only during the Life of the Leſſor; for he having but an Eſtate for Life, reſerved the Rent to him and his Heirs, and his Heirs cannot have it, and the latter

(*a*) 2 Roll. 260. 2 Roll. Rep. 274. 2 Roll. 260.

Cro. Car. 285.

latter Words, *ſcil.* To ſuch Perſon and Perſons who ſhall have the Inheritance of the Premiſſes, *&c.* are meerly void, for no Rent can be (*a*) reſerved but to the Leſſor, Donor, or Feoffor, and his Heirs, who are Privies in Blood, and not to any who is Privy in Eſtate, as to him in Reverſion, Remainder, *&c.* But it was reſolved, That the * Reſervation in the Caſe at Bar is good. For the ſaid Leaſe hath not its Eſſence from the Eſtate of the Leſſor, which he hath for Life, but the Leaſe hath its Eſſence out of the ſaid Fine, and in Conſtruction of Law (*b*) preceeds the Eſtate for Life and all the Remainders; for after the Leaſe made, it is as much as if the Uſe had been limited originally to the Leſſee for the ſaid Term, and then the other Limitations in Conſtruction of Law follow it: And that is the Reaſon that the uſual Clauſe in ſuch Indentures is, That the Conuſees and (*c*) their Heirs ſhall ſtand ſeiſed to the Uſe of ſuch Leſſees, *&c.* So that the Leſſee, in the Caſe at Bar, derives his Eſtate out of the Eſtate which paſſed by the Fine. Then when the Leſſor reſerves Rent to him and his Heirs, it is good, for that by Conſtruction of Law precedes the Limitations of the Uſes, and then it being well reſerved, it is well transferred to every one to whom any Uſe is limited. So if the Reſervation be to the Leſſor, and to every Perſon to whom the Inheritance or Reverſion of the Premiſſes ſhall appertain during the Term, that is likewiſe good, for the Law will diſtribute it to every one to whom any Limitation of the Uſe ſhall be made. And in ſuch Caſe no Rent is reſerved to a Stranger, for the Reſervation preceeds the Limitation of the Uſes to Strangers. But it was agreed, That the moſt clear and ſure Way was to (*d*) reſerve Rent yearly during the Term, and leave the Law to make the Diſtribution, without an expreſs Reſervation to any Perſon. But it was reſolved, That all the ſaid three ſeveral Ways were good enough and effectual in Law.

(*a*) Hob. 130. 2 Roll. 447, 450. Co. Lit. 47. a. 143. b. 213. a. Cro. Car. 289.

* Antea 70. a.

1 Co. 139. a.

(*b*) Moor 383.

(*c*) Antea 70. a.

(*d*) 1 Inſt. 47. a. Hardres 90. 1 Jones 309. Plowd. 171. 2 Sand. 369. 21 H. 7. 25. b. Goldſb. 148.

GRENELEY's

GRENELEY's *Case.*

Pasch. 7 Jacobi 1.

Brownl. 131. IN an *Ejectione firmæ* between *Owen Greneley*, Plaintiff, and *Philip Greneley*, and others, Defendants, on a Demise made by *Stephen Greneley* of three Acres of Land in St. *Super Arrow in Com' Hereford'*, and on Not Guilty pleaded, the Jury gave a Special Verdict to this Effect: *William Woodhouse* and *John Badland* were seised of the said three Acres in Fee, and *Octob.* 20. 38 *Hen.* 8. did thereof enfeoff *Philip Greneley* the Elder, and *Isabel* his Wife, To have and to hold to the said *Philip* and *Isabel*, and to the Heirs of their two Bodies lawfully begotten: The said *Philip* the Elder, 1 *Decemb.* 17 *Eliz.* did enfeoff *Philip Greneley* the Younger, of the said three Acres in Fee; and afterwards, 20 *Eliz.* *Philip* the Elder died, and *Isabel* survived him; and afterwards the said *Isabel* (before any Entry made by her, *viz.* 26 *Eliz.*) died; and the said *Stephen Greneley*, the Lessor of the Plaintiff, was Heir of their two Bodies begotten, *&c.* And the only Question in this Case was, Whether the said Feoffment of *Philip* the Elder to *Philip* the Younger, had tolled the Entry of the said *Stephen*, or that the Entry of *Stephen* was lawful or not. 1. It was resolved, That at the Common Law this (*a*) Feoffment was a Discontinuance to the Issue, for the Issue ought to claim as Heir of their two Bodies individually, and as Heir to one only he cannot inherit, and by Consequence cannot enter; for his Entry ought to ensue his Title and his Action, and the Formedon in the Descender in such Case is, *Quod C. dedit D. & E. uxori ejus & hæredibus de corporibus ipsorum D. & E. exeuntibus, & quod post mortem prædict' D. & E. præfato K. filio & hæred' eorundem D. & E. descendere debet per formam donationis prædict', &c. Regist' Orig'* 238. *b.* By which it appears, that in his Formedon

(*a*) 1 Roll. 634. Co. Lit. 326. a. b. Plowd. 112. b.

Formedon he ought to make himſelf Heir to both, and not to the Survivor: So if the ſaid Donees had been diſſeiſed, and a Deſcent caſt, and afterwards the Father died, and before Entry the Mother died, the Entry of the Iſſue is not congeable, becauſe he ought to claim as Heir of both their Bodies, and as Heir to the Father he is bound by the Deſcent, as his Father himſelf was, and as Heir to his Mother only he cannot enter, for he hath not any ſuch Title. *Vide* 35 *Hen.* 6. 45 *b.* in Aſſiſe; but if the Mother in ſuch Caſe had entred, and re-continued the Eſtate-tail, then the Diſcontinuance was purg'd, and utterly removed, and the Eſtate-tail actually reveſted in the Wife; which after her Death deſcends to the Iſſue. 2. It was reſolved, That altho' the Huſb. and Wife had a (*a*) joint and undivided Eſtate-tail, and that the Words of 32 *Hen.* 8. *cap.* 28. are, *That no Fine, Feoffment, or other Act or Acts hereafter to be made, ſuffered, or done by the Huſband only, of any Manors, Lands, Tenements, or Hereditaments, being the Inheritance or Freehold of his Wife, during the Coverture between them,* &c. That this joint Eſtate was within theſe Words, (*the Inheritance* (*b*) *or Freehold of his Wife*) for ſhe hath a Freehold and Inheritance in the Land, altho' ſhe hath not the ſole Freehold or Inheritance. So hath it been always taken upon the Stat. of *Weſtm'* 2. (*c*) *cap.* 3. *In caſu quando vir amiſerit per defalt' tant', quod fuit jus uxoris ſuæ, &c. propter quod Rex ſtatuit, quod mulier poſt mortem viri ſui habeat Recuperare per breve de Cui in vita, &c.* that a joint Eſtate to Huſband and Wife hath been always taken within theſe Words (*jus uxor'*) and yet *non fuit ſol' aut' unic' (d) jus uxor'*; and according to this Reſolution in the principal Caſe was it adjudg'd in (*e*) *Beaumont's* Caſe, and therewith agree (*f*) 3 *Eliz. Dyer* 191. *b.* *Hawtry's* Caſe. 3. It was reſolv'd, That by the ſaid Act the (*g*) Entry of the Iſſue in Tail was lawful in the Caſe at Bar; for the Words of the Act go farther, *ſhall in any wiſe be or make any Diſcontinuance, or be prejudicial or hurtful to the ſaid Wife, or to her Heirs, or to ſuch as ſhall have Right, Title, or Intereſt to the ſame, by the Death of ſuch Wife or Wives: But that the ſame Wife or her Heirs, and ſuch other to whom ſuch Right ſhall appertain after her Deceaſe, ſhall or may then lawfully enter into all ſuch Manors, Lands, Tenements, and Hereditaments, according to their Rights and Titles therein.* So that if the Iſſue in Tail ſhall not be within theſe Words, (*her Heirs*) becauſe he is Heir to both, *ſc.* to Father and Moth. yet, without Queſtion, he is within theſe Words, (*or to ſuch as have Right by the Death of ſuch Wife.*) And in this Caſe a Difference was taken and agreed between a Diſcontin. which implies a Wrong, and a lawful Bar, which implies a Right; and theref. if Lands are given to Huſb. and Wife, and to the Heirs of their two Bodies begotten, and the (*h*) Huſb. levies a Fine with Proclamations,

(*a*) Co. Lit. 326. a.

(*b*) Cro. Car. 22.

(*c*) 2 Inſt. 342, 343.

(*d*) 2 Inſt. 343.

Cro. Car. 22.

(*e*) 9 Co. 138. b. 139.

Cro. Car. 476.

1 Jones 393.

(*f*) Dyer 191. pl. 22.

Hob. 71, 255, 256.

(*g*) Co. Lit. 326. a.

1 Brownl. 131.

(*h*) 1 Co. 87. b.

9 Co. 139. a.

Dyer 351. pl. 24.

2 Inſt. 681. Hob. 257, 333. Moor 147. 1 Brownl. 140. 1 Leon. 84, 157. Dall. in Kelw. 205. pl. 7. Dall. in Aſh. pl. 7. Dall. 50. pl. 16. 1 And. 39. pl. 101 Godb. 312. N. Bendl. 225. pl. 257. Bendl. in Aſh. pl. 27. Bendl. in Kelw. 213. pl. 27. 1 Roll. Rep. 424. 2 Roll. Rep. 321. Moor 28. pl. 90. 114. pl. 256. Cr. Car. 478. 1 Jones 40. Lit. Rep. 291.

139. a. 140. a. Dyer 332. pl. 227. Hob. 257, 346. 1 And. 39. pl. 102. Godb. 312. Raym. 6, 7. 2 Roll. Rep. 321. Mo. 114. pl. 256. Moor 147. 1 Brownl. 139, 140. Cro. Car. 478. 1 Jones 40.

tions, and commits High (*a*) Treaſon, and dies, and the Wife before, or after Entry, dies, there the Iſſue is barred; and the Conuſee, or the King hath Right to the Land, becauſe the Iſſue cannot claim as Heir to both; and therewith agrees 18 *Eliz.* 351. *b.* adjudged. *Vide* 5 *Hen.* 7. 32. (*b*) *Colt's Aſſize.* And it was reſolved, That the Stat. of 32 *Hen.* 8. extends only to Diſcontinuances, altho' the Act hath general Words, *or be prejudicial or hurtful to the Wife or her Heirs*, &c. But the Concluſion is, *ſhall lawfully enter*, &c. *accord. to their Rights and Titles therein*, which they cannot do, when they are barr'd, and have no Right, Title, or Intereſt; and this Stat. gives Advantage to the Wife, *&c.* ſo long as ſhe hath Right, but it doth not extend to take away a future Bar, altho' the Stat. gives Entry without Limitat. of any Time, but the Entry ought to wait upon the Right. And theref. if the Huſb. levies a Fine with Proclamat. to another, and dies, now the Wife (*c*) may enter by Force of the Stat. For yet the Fine is not any Bar to her, but her Right remains, which ſhe may re-continue by Entry; but if ſhe ſurceaſes her Time, (*d*) and five Years paſs without Entry, *&c.* now by Force of the Fine with Proclamation, and five Years paſs'd after the Death of her Huſb. ſhe is barr'd of her Right, and by Conſequence ſhe cannot enter; and the Stat. ſpeaks of Fine only, and not of Fine with Proclamations; and therewith agrees the 6 *E.* 6. *Dy.* 72. *b.* And it was reſolv'd, that if the Huſb. be Tenant in Tail, the Remainder to the Wife in Tail, that if the Huſb. makes a Feoffm. in Fee, and dies without Iſſue, the Wife may enter, becauſe it was the Inheritance of the Wife; but if the Huſb. ſuffers a Common Recovery, and dies without Iſſue, there the Wife is barr'd, and cannot enter by Force of this Statute: But this Statute was made to relieve him who has Right, and to ſuppreſs Wrong, and to advance Right without any Reſpect to the Warranty of the Diſcontinuee, if he hath any. And if (*e*) before the Statute *De Donis Conditionalibus*, Lands had been given to Huſband and Wife, and the Heirs of their two Bodies begotten, and they have Iſſue, and the Huſband *poſt prolem ſuſcitatem* aliens, and dies before the Statute, and the Wife ſurvives and dies after the Statute, the Iſſue ſhall have a Formedon: For notwithſtanding the ſaid Alienation, a Right remains, foraſmuch as the Huſband only aliens, which Right is entailed by the Statute; and before the Statute, the Iſſue in ſuch Caſe might have a *Sur cui in vita*, and claim as Heir of the Body of both, for the Feoffment was no Bar, but a Diſcontinuance: And therewith agrees 21 *Ed.* 3. 45. *a. b.* 12 *Hen.* 4. 7. And in all Caſes where the Wife might have a *Cui in vita* at Common Law, ſhe ſhall enter by Force of this Statute of 32 *Hen.* 8. and where the Iſſue cannot have *Sur cui in vita*, or Formedon, there he ſhall not enter within the Remedy of this Statute. And therefore if the Huſband has Iſſue, and aliens, and the Wife dies, the Iſſue ſhall not enter (*f*) during the

(*b*) Dyer 122. pl. 22.

(*c*) 1 Roll. Rep. 91, 92, 160. 9 Co. 140. b. 10 Co. 49. b. Co. Lit. 326. a. Dyer 72. pl. 3. Cro. Car. 201.

(*d*) 2 Co. 93. a. 10 Co. 49. b. 99. a. Dy. 224. pl. 28. Palm. 235. Goldſb. 148. 4 Leon. 221. Moor 53. 2 Rol. Rep. 409. 3 Inſt. 216. Cro. Jac. 333.

(*e*) 9 Co. 140. a. Co. Lit. 19. a.

(*f*) Moor 58. Co. Lit. 326. a.

the Life of the Huſband, becauſe at the Common Law he had no Remedy to recover the Land during the Huſband's Life, and the Words of the Act are, *according to their Right and Title therein.* But if the Huſband aliens, and afterwards the Wife (*a*) is divorced *cauſa præcontractus*, or any other Divorce which diſſolves the Marriage *a vinculo Matrimonii*, there the Wife during the Huſband's Life may enter, for the Words of the Act are, *no Fine, Feoffment*, &c. during the Coverture between them. And altho' afterwards the Huſband and Wife are divorced, yet the Feoffment was made during the Coverture *between them.* And altho' the Statute ſaith, *But that the ſame Wife*, &c. that is to be intended of her who was his Wife at the Time of the Alienation; for when the Huſband dies, ſhe is not then his Wife, but ſhe is called Wife to deſcribe the Perſon only who ſhall enter; and it is not ſaid in the Statute that the Wife ſhall enter after the Death of her Huſband, but generally that ſhe ſhall enter *according to their Right and Title*; be it in the Life of the Huſband after a Divorce *a vinculo Matrimonii*, or after his Death.

(*a*) Co. Lit. 326. a. Moor 58.

The Lord STAFFORD's *Caſe.*

Trin. 7 Jac. I.

Co. Ent. 577. num. 6. 2 Brown. 248, 249.

BEtween *Thomas Malym* Plaintiff, and *Thomas Tully* Defendant, in a Replevin, which began in the Common Pleas, *Trin. 6 Jacobi, Rot.* 2341. upon the pleading the Parties demurred in Law, and upon the whole Record the Caſe was ſuch: Queen *Mary* was ſeiſed of a Park called *Eſtwood Park*, within the Manor of *Thornbury*, in the County of *Glouceſter*, in Fee; and by her Letters Patents, 10 *Julii, anno Regni ſui* 2. granted the ſaid Park to *Henry* Lord *Stafford*, and *Urſula* his Wife, and to the Heirs of the Body of *Henry* Lord *Stafford*, by Force whereof the Lord *Stafford* and *Urſula* his Wife were ſeiſed thereof accordingly, the Reverſion over expectant to the ſaid Queen *Mary*, her Heirs and Succeſſors, which Reverſion of the Fee-ſimple by the Death of Queen *Mary*, deſcended to Queen *Elizabeth*. *Hill.* 3 *Eliz. Tyndal* levied a Fine to the Lord *Stafford*, and *Urſula* his Wife, *come ceo*, and to the Heirs of the Lord *Stafford*, of the ſaid Park, by which Fine the Lord *Stafford* and his Wife render'd it to *Tyndal* for 25 Years: And afterwards *Henry* Lord *Stafford*, *ultimo Jun.* 7 *Eliz.* died, and *Urſula* ſurvived him, and held in by Survivorſhip, and the Remainder of the ſaid Eſtate-tail deſcended to *Henry* Lord *Stafford* the Son: And afterwards Queen *Eliz.* by her Letters Patents, 10 *Jul.* 7 *Eliz.* reciting the former Eſtate, the Reverſion and Reverſions thereof to the ſaid Queen *Eliz.* her Heirs and Succeſſors expectant, the ſaid Queen *Eliz.* by the ſaid Letters Patents, and for the Sum of 53 *l.* 18 *s.* paid by *Thomas Tyndal*, Gent. did grant to the ſaid *Thom. Tyndal Reverſionem præd' parci, &c. habend' & tenend' ſibi & hæred' de corpore ſuo legitime procreatis: Et ulterius præ-*

dicta nuper Regina Elizabetha voluit & declaravit per eaſdem Literas Patentes, quod ſi præfat' Thomas Tyndal Hæredes vel Aſſignati ſui ad aliquod Tempus impoſterum ſolverent ſeu ſolvi facerent, aut eorum aliquis ſolveret ſeu ſolvi faceret, ad Receptum Scaccar' præd' nup' Reginæ Hæred' vel Succeſſor' ſuor' ad uſum ipſius nup' Regi' Hæred' vel Succeſſor' ſuor', ſummam viginti ſolidor' legalis Monetæ Angliæ pro præmiſſis, ultra præd' Summam 53 l. 18 s. *tunc eadem nup' Regina Elizabetha de ampliori Gratia ſua ſpeciali, ac ex certa Scientia & mero motu ſuis voluit & per eaſdem Literas ſuas Patentes pro ſe Hæredib' & Succeſſorib' ſuis conceſſit & declaravit quod extunc idem Tho. Tyndal & hæredes ſui haberent & tenerent, ac habere, tenere, & gaudere valerent & poſſent, ſibi & hæredib' ſuis imperpetuum virtute earundem Liter' Patent' ſuar' præd' reverſionem præd' Parci cum pertinent' inter alia: Habend' tenend' & gaudend', ea omnia & ſingula Præmiſſa cum pertinent' præfat' Tho. Tyndal hæredib' & aſſignat' ſuis:* By Force whereof the ſaid *Tho. Tyndal* was ſeiſed of the ſaid Reverſion in Tail, and he being thereof ſo ſeiſed, the Reverſion over to the Queen as aforeſaid, the ſaid *Tho. Tyndal*, 23 *Feb.* 8. *Eliz.* at the Receipt of the Exchequer at *Weſtminſter*, paid to *Tho. Gardiner*, then one of the Tellers of the Exchequer, to the Uſe of the ſaid Queen, the Sum of 20 *s.* for the ſaid Park, above the ſaid Sum of 53 *l.* 18 *s.* which 20 *s.* were then receiv'd, *prout per record' Receptionis inde in Curia Scaccarii Domini Regis nunc apud Weſtm' præd' remanen' plene liquet & apparet*, by Force whereof he was ſeiſed of the ſaid Reverſion in Fee expectant on his Eſtate-tail: And afterwards *Henry* Lord *Stafford*, 8 *Eliz.* died; after whoſe Death the ſaid Remainder deſcended to *Edward* Lord *Stafford* his Son, who, *Paſch.* 8 *Eliz.* levied a Fine to *Clark*, and others, of the ſaid Park, with Proclamations, and afterwards the ſaid *Urſula*, 10 *Eliz.* died, and afterwards *Edward* Lord *Stafford* died, and *Edward* Lord *Stafford* that now is, his Son and Heir, pretending that the ſaid Reverſion in Fee did not accrue to *Tho. Tyndal* by the Payment of the ſaid 20 *s.* but remain'd in the Crown, by the ſaid *Thomas Malym* diſtrein'd the Cattle of *Tully* the Plaintiff, in the ſaid Park, who claimed under the ſaid Fine; and to enforce the Letters Patents of Q. *Eliz.* the Statute of Confirmation of Letters Patents made (*a*) 18 *Eliz.* was pleaded; which was not pertinent to this Caſe; but the principal Point of this Caſe was, Whether by the Payment of the ſaid 20 *s.* the ſaid *Tho. Tyndal* had gained the Reverſion of the Fee-ſimple, out of Q. *Eliz.* For if no Reverſion remained in the Queen, then the (*b*) Fine with Proclamations barred the Lord *Stafford* that now is, who claimed as Iſſue in Tail; and if the Reverſion remain'd in her at the Time of the Fine, then the Fine levied by *Edward* Lord *Stafford* the Father did not bar him.

(*a*) 18 Eliz. cap. 2.

(*b*) Raym. 271. 34 & 35 H. 8. cap. 20.

And this Caſe was very well argued by the Serjeants, *ſcil. Hutton*, *Nichols*, *Harris* the younger, and *Houghton*, and afterwards this Term the Caſe was argued by all the Juſtices of the Bench, *ſcil. Coke* Chief Juſtice, *Walmeſley*, *Warburton*, *Daniel*, and *Foſter*. And two Objections were made againſt the Subſtance of the Grant; and two againſt the Form of the Grant. The Objections againſt the Subſtance were, 1. That ſuch Condition cannot be annexed to a Thing which lies in Grant, but to a Thing which lies in Livery; and therefore it was ſaid, that Rents, Commons, Advowſons, Reverſions, *&c.* cannot be granted for Life or Years, with Condition to have Fee, but only Land which lies in Livery, for the Increaſe of ſuch future Eſtate rather takes Effect by Livery, than by Grant; for without Livery ſuch future Eſtate will not paſs in Caſe of Land, and it ought to paſs *ab initio* by the firſt Livery; and a Man cannot grant a Rent *in eſſe*, or a Common, or Advowſon, or (*a*) a Reverſion, or any Thing which lies in Grant to begin *in futuro*, as from *Michaelmas* next following, or after ſuch an Act done, *&c.* And all the Books in the Law which ſpeak of ſuch Condition for Increaſe of an Eſtate, put the Caſe always of Land, to which Livery is requiſite, 31 *Edw.* 1. *Voucher* 285. 31 *E.* 1. *Feoffments & Faits*, 119. 2 *E.* 2. *Quid juris clamat* 38. 12 *E.* 2. *Voucher* 265. 7 *E.* 3. 10. 10 *E.* 3. 40, 55. 10 *Aſſ. p.* 15. & 19. 12 *Aſſ. p.* 5. 32 *E.* 3. *Garr.* 30. 43 *E.* 3. 35. 43 *Aſſ. p.* 41. 44 *E.* 3. *Attaint* 22. 50 *E.* 3. 27. 6 *R.* 2. *Quid juris clamat*, 20. 27 *H.* 6. 7. *Plow. Com. Saye*'s Caſe, 272. *Plow. Com.* the Lord *Lovel*'s Caſe 487. The ſecond Objection was, That ſuch Condition which increaſes an Eſtate, ought always to merge the firſt Eſtate upon the Increaſe, and make all but as one Eſtate and one Grant, and therefore it ought to be annexed to an Eſtate for Years or Life, which ſo may merge on the Performance of the Condition, that all ſhall be but one Eſtate by one Grant, and not ſeveral and divided Eſtates; and therefore in all the ſaid Books ſuch Condition is always annexed to an Eſtate which may merge; but in the Caſe at Bar the Condition is annexed to an Eſtate-Tail, which cannot merge (*b*) by the Acceſs of the Fee-ſimple to it; and ſuch Condition was never annexed to an Eſtate-Tail, in any Book or Precedent which can be ſhewed. As to the Objections to the Form of the Grant, the firſt was, That after the Queen had granted the Reverſion to *Thomas Tyndal*, and to the Heirs of his Body, ſhe now upon the *Contingit* grants to him *prædictam Reverſionem* to him and his Heirs: In which it was ſaid, the Queen was deceiv'd in her Grant, for *prædicta reverſio*, is that which the Queen had granted before to *Thomas Tyndal* in Tail, which now ſhe can't grant in Fee-ſimple, for *inten' Regin' non conv' cum lege*, for that which ſhe hath granted firſt in Tail,

(*a*) Plowd. 155 b. 156. a. 197. a. Cro. El. 152. 1 Leon. 171.

(*b*) 2 Co. 61. a.

ſhe cannot afterwards grant in Fee, and the Eſtate-tail was granted abſolutely, and cannot be merged or deſtroyed by the ſaid Grant upon the ſaid Contingency. The ſecond Objection, as to the Form of the Grant, was, That the ſaid Grant founded only in Covenant, which in the Caſe of Inheritance ſhall not transfer it in the King's Caſe, as it may in Caſe of a Chattel, and for that the Words are, That the Queen wills and declares, That if the ſaid *Tho. Tyndal* ſhall pay 20 *s.* then the ſaid Queen grants, That the ſaid *Thomas Tyndal* and his Heirs ſhall have the ſaid Reverſion; ſo that the Reverſion itſelf is not granted, but it is a Grant which ſounds in Covenant, that he ſhall have the ſaid Reverſion. But it was reſolv'd by the whole Court upon ſolemn Argument, That the ſaid Grant was good. (†) And as to the two firſt Objections, it was reſolv'd, That ſuch Grant with a Condition precedent may be made, as well of Things which lie in Grant, as of Land which lies in Livery, and may be (‡) annexed as well to an Eſtate-tail, which cannot be merged, as to an Eſtate for Life, or Years, which may be merged by the Acceſs of a greater Eſtate; but ſuch Increaſe of an Eſtate by Force of a Condition precedent, ought to have four Incidents; 1. (*) It ought to have a particular Eſtate, as a Foundation upon which the Increaſe of the greater Eſtate ſhall be built. 2. That ſuch particular Eſtate ought to continue in the Leſſee or Grantee, 'till the Increaſe happens. (‖) 3. It ought to veſt at the Time the Contingency happens, or otherwiſe it ſhall never veſt. 4. The Particular Eſtate and the Increaſe ought to take Effect by one and the ſame Inſtrument or Deed, or by ſeveral Deeds deliver'd at one and the ſame Time, and not by ſeveral Deeds deliver'd at ſeveral Times. As to the firſt, it is proved by all the ſaid Books, that there ought to be a precedent Eſtate, upon which the Eſtate, as upon a Foundation, may encreaſe: But *Coke* Chief Juſtice ſaid, That ſuch Foundation ought to be permanent and not revokable at the Will of the Grantor or Leſſor; and therefore if a Man grants an Advowſon to another at Will, upon Condition that if he do ſuch a Thing that he ſhall have Fee, in that Caſe the Eſtate at Will is not any ſuch Foundation as the Law requires to ſupport an Increaſe of an Eſtate of Freehold or Inheritance, for the Grantor may determ. the Will, bef. the Condit. perform. and ſo avoid his own Grant, and a Leaſe at Will can't ſupport a Remainder over. And if a Man grants an Advowſon, or a Rent, *&c.* for Years upon Condit. that if the Leſſee pays 10 *s.* within one Year, that he ſhall have for Life, and if after the Year he pays 20 *s.* that he ſhall have Fee; the Leſſee pays the 10 *s.* within the Year, and after the Year he pays the 20 *s.* according to the Condition, yet he ſhall have but for Life, for the Eſtate for Life at the Time of the Grant, was but in Contingency, which is not a Founda. upon which a greater can increaſe, for a Poſſib. can't increaſe upon a Poſſib. and the Eſt. of

(†) Co. Lit. 217. b.

(‡) 2 Co. 61. a.

(*) 2 Brownl. 251.

(‖) Plowd. 485. a. 489. a.

Co. Lit. 217. b.

Cr. Jac. 461. Cr. Car. 577. 10 Co. 50. b. 1 Rol. Rep. 321. Co. Lit. 25. b. 1 Co. 156. b. 1 Sid. 451.

Fee-ſimple cannot increaſe upon the Eſtate for Years, for that is merged by the Acceſs of the Eſtate for Life, as ſhall be afterwards ſaid. As to the ſecond, the Privity of Eſtate ought to (*a*) continue; and that is proved by the ſaid Caſe of the Lord *Lovell:* And therefore if the Leſſee for Life, or Years, or the Donee in Tail who has ſuch a Condition annexed to his Eſtate, aliens before the Condition performed; or if Leſſee for Life, or Years, ſurrenders to the Leſſor, he ſhall never take Benefit of the Condition afterwards, for the Privity of Eſtate in ſuch Caſe ought to continue, for the Increaſe of the Eſtate ought to enure upon the particular Eſtate, as upon a Foundation; and therefore if in ſuch Caſe the Leſſee for Life or Years, or the Donee aliens all his Eſtate, and takes back an Eſtate, and afterwards performs the Condition; yet nothing ſhall thereby accrue to him, becauſe by the abſolute Alienation, the Privity was once abſolutely deſtroyed, which can't by any Repriſal of an Eſtate be revived: As if one Coparcener after Partition makes a Feoffment in Fee, and takes back an Eſtate to herſelf again, and her Heirs, yet the Privity of the Eſtate to have (*b*) Aid to deraign the Warranty paramount is deſtroyed, 11*H.*4. 22. *b. Vide* 38*E.* 3. 20. *b.* So if Tenant by Homage (*c*) anceſtrel makes a Feoffment in Fee, and takes back an Eſtate to him in Fee, he ſhall not hold by Homage anceſtrel, *Litt.* 32. *lib.* 2. 33. *b.* But if Leſſee for Life, *&c.* grants his Eſtate upon Condition, and enters for the Condition broken, and afterwards performs the Condition, there peradventure the Fee ſhall accrue to him; for the Poſſibility was not abſolutely deſtroy'd; and when he enters for the Condition broken, he is in his old Eſtate; and that the particular Eſtate ſhould continue to all Reſpects is not neceſſary; but if ſuch a Privity of Eſtate continues as is capable of an Increaſe, it is ſufficient. And therefore, if ſuch Leſſee for Life makes a Leaſe for Years, or if Leſſee for Years makes a Leaſe for a leſſer Term; or if ſuch Donee makes a Leaſe for his own Life, or for Years, yet for the Privity of Eſtate which continues in them, they are capable of an Increaſe of an Eſtate: But if ſuch Tenant in Tail makes a Leaſe for the Life of another, there he is not capable of any Increaſe, becauſe he has gain'd a new Reverſion in Fee, and the firſt Privity doth not remain; and yet in ſuch Caſe if the Leſſee for Life dies, there the firſt Privity of Eſtate is revived. So if a (*d*) Man makes a Gift to one, to have and to hold to him, and his Heirs of the Body of his Wife begotten, with ſuch Condition *ut ſupra*, and afterwards the Wife dies without Iſſue, ſo that now he is become Tenant in Tail after Poſſibility; in that Caſe, altho' the Eſtate be changed, yet foraſmuch as the Privity remains, he may by the Performance of the Condition have Fee after. So if a (*e*) Leaſe be made to two, with Condition to have Fee, and one dies, the Survi. may perform the Condit. and have Fee. But if the ſaid Joint-

(*a*) 35 H. 8. Br. Expoſit. de parols 44. 1 Co. 154. b. 8 Co. 145. b. Plowd. 483. b. Cr. Car. 359.

(*b*) Br. Aid. 46. 1 Roll. 182, 183. Br. Perempt. 10. Br. Coparcen. 5. Br. Counterplea. de Aid 24. Fitz. Counterplea. de Aid 14.

(*c*) Lit. Sect. 147. Co. Lit. 103. a. 202. b.

(*d*) 2 Brownl. 251. Raymond 414.

(*e*) 2 Brownl. 251.

Jointenants have made Partition of the Term, the Condition is deſtroy'd; for the Eſtate in Fee ought to increaſe to them jointly, and not in Severalty. And in the Caſe at Bar, altho' *T. Tyndal* had died before the Performance of the Condition, his Heir of his Body might have perform'd it, for altho' the Perſons were altered, yet the ſame Eſtate continued; and this Power to perform the Condition deſcended (*a*) to his Heir, as an Inheritance annexed to the Foundation which deſcended to him, and he, after the Condition perform'd, ſhould have the Reverſion in Fee *quodam modo* by Deſcent, as in *Shelley*'s Caſe, in the firſt Part of my *Reports*. And altho' it is requiſite that Privity of Eſtate ſhould continue; yet it is not requiſite that the Increaſe ſhould merge the particular Eſtate, for if a Man makes a Leaſe for Life, the Remainder for Life, or in Tail, on Condition that if the firſt Leſſee doth ſuch a Thing, that he ſhall have Fee; in that Caſe by the Performance of the Condition he ſhall have Fee; and yet it ſhall not merge the Eſtate for Life, *quod fuit conceſſum per Curiam*. And if a Man makes a Leaſe for Years, on Condition, that if the Leſſor (*b*) ouſts him within the Term, that he ſhall have Fee; in that Caſe, if the Leſſor ouſts him, now the Intereſt of the Term is turned into a Right; and yet the Leſſee in ſuch Caſe ſhall have Fee, for two Reaſons, 1. Becauſe it is the Act and Wrong of the Leſſor himſelf, whereof he ſhall not take Advantage. 2. *Eo inſtante* that the Leſſor ouſts him *eo inſtante* the Leſſee hath Fee, and the Title of the Leſſee is by Force of the Condition, which is paramount the Ouſter: and therewith agrees 6 *R.* 2. (*c*) *Quid juris clamat.* 20. And that a Poſſeſſion in an Inſtant is ſufficient to ſupport the Increaſe of the Fee, appears in 12 *E.* 2. *Voucher* 265. A Man (*d*) makes a Leaſe for Years on Condition that if the Leſſor doth not pay to the Leſſee 100 Marks at the End of the Term, that he ſhall have Fee, there the End of the Term conſiſts on an Inſtant of Time. And if the Eſtate-tail of the Lord *Stafford* had determined for Want of Iſſue, and *Urſula* had died, ſo that the Reverſion of *T. Tyndal* had come in Poſſeſſ. yet foraſmuch as the Privity of the Eſtate continueth, altho' the Quality of the Reverſion is altered to a Poſſeſſion, the Condition remaineth. But there is a Difference between the Continuance of the Privity of the Eſtate of the (*e*) Leſſor or Grantor, and the Privity of the Eſtate of the Leſſee or Grantee; for the Privity of the Eſtate on the Part of the Leſſor needs not be continued; for altho' the Leſſor or Grantor aliens his Reverſion, or is attainted, *&c.* yet the Condition remains; for by no Act that he can do can he fruſtrate or derogate from his Grant; and therewith agree 31 *Edw.* 1. *Feoffments & Fails*, * 119. 6 *R.* 2. *Quid juris clamat* (*f*) 20. and *Plowden*'s *Com.* in the ſaid Caſe of the Ld. *Lovel*. But if Leſſee for Years, with Condition to have Fee, accepts a Releaſe from the Leſſor to him for his Life, or in Tail, and afterwards the Condition is performed, he ſhall never have Fee, becauſe

(*a*) 2 Roll. Rep. 484.

(*b*) Co. Lit. 217. a.

(*c*) Co. Lit. 217. a. 378. b. Plowd. 26. a. 34. b. 487. a. Dyer 209. pl. 21. Perk. Sect. 729. 1 And. 316. Cr. Jac. 698. 1 Jones 58, 59. Godb. 105. 1 Rol. Rep. 478, 485. 21 H. 7. 11. b. Goldſb. 6. 1 Co. 84. b. 2 Brownl. 227, 294.

(*d*) Co. Lit. 217. a.

(*e*) Plowd. 486. b. 487. a.

(*f*) Plowd. 487. a. * Co. Lit. 216. b.

the Eſtate for Years, which is the Foundation upon which the Fee ſhould increaſe, is, by his own Acceptance of a greater Eſtate, merged, and has no Continuance: As if Leſſee for Years without Impeachment of Waſte (*a*) takes Confirmation for Life, the Privilege, which was annexed to the Eſtate for Years, is loſt, 5 *H.* 5. *9. a.* 3 *Ed.* 3. 44. *a. b.* in *Mary de la* * *Idle's* Caſe, 28 *H.* 8. *Dyer* 10. *b. &c.* And it was reſolv'd, that if Q. *Eliz.* had died before the Condition performed, that yet *Tyndal* might have perfor. the Cond. and if Q. *Eliz.* under her Gr. Seal had refuſed to take the ſaid Money (*b*) yet if *Tyndal* had tendred it at the Receipt of the Exchequer, that he had gained the Fee-ſimple, for the Queen by no Means could countermand or hinder the Increaſe of the Eſtate in ſuch Caſe.

(*a*) Dy. 10. pl. 37. 11 Co. 83. b. 5 Co. 13. a. 1 Bulſt. 136. 19 H. 6. 23. a. Poph. 194. Latch. 269. * 11 Co. 83. a. Poph. 194.

(*b*) 2 Brownl. 252.

As to the Third, It was reſolv'd, That if the Condition had been that when *Tyndal* ſhould pay to *I. S.* 20 *s.* that he ſhould have Fee, that preſently by the Payment by Operation of Law, the Fee would be (*c*) diveſted out of the Queen, and veſted in *Tyndal*, and that for Neceſſity, for if it ſhould not veſt at the Time of the Condition performed, it ſhould never veſt; and therefore if Office, or Petition, *Monſtrans de droit*, or other Thing ſhould be requiſite, it would make the Queen's Grant void, and diſable the Queen to make ſuch Grant, and therewith agrees *Plowd. Com.* in the ſaid Caſe of the Lord *Lovel*; for there it is ſaid, when the Condition is performed, the Fee-ſimple ſhall be immediately out of the King without Petition or *Monſtrans de droit*, or other Circumſtances, for if he ought to ſtay to uſe ſuch Circumſtances, then it will not veſt preſently; and if it will not veſt preſently, *ergo* it will never veſt; for if an Eſtate cannot be enlarged at the Time of the Enlargement appointed, it ſhall never be enlarged; and theſe are the Words of the Book; and therefore for Neceſſity the Fee-ſimple ſhall paſs in the Caſe at Bar out of the Queen without any Circumſtance; for the Law will never require Circumſtance when it will ſubvert Subſtance. And therefore there is a notable Caſe in 49 *E.* 3. 16. *a. b.* where the Caſe was, That *Iſabel* (*d*) *Goodcheap* was ſeiſed in Fee of a certain Houſe in *London*, and by her Will in Writing and enrolled, deviſed the ſaid Houſe held of the King, to *Rich. Goodcheap*, to him, and to the Heirs of his Body: So that if he died without Iſſue, that the ſaid Lands ſhould be ſold by her Executors, or Executors of Executors, *&c.* and made *W. D.* and *W. W.* and *I de T.* her Executors, and died without Heir; *Richard Goodcheap* died without Iſſue, by which the Houſe eſcheated to the King, and afterwards *I.* one of the Executors died, *W. W.* refuſed, and *W. D.* ſold, *&c.* And there it is made a Queſtion whether the Sale by one Executor be good, or not? But it is agreed by all, That if the Sale be good, it ſhall diveſt the Land out of the King, and the Reaſon is for Neceſſity of Law, for if the Sale doth not diveſt the Land at the Time of the Sale, no Sale ſhall be made at all, and the Executors,

(*c*) Plowd. 489. a. Co. Lit. 354. b. 2 Co. 53. b.

(*d*) 2 Brownl. 252. 2 Co. 53. a. b. Lit. Rep. 123. Godb. 443. Cr. Eliz. 640. Br. Eſcheat 32. Br. Devi. 10. Fitz. Deviſe 8. Plowd. 259. a. 4 Co. 58. a. Raym. 83. 29 Aſſ. 31. Hard. 13, 14. Swinb. 335. 2 Rol. Rep. 351.

tors, who have but a Power, cannot have a Petition, *Monſtrans de droit*, or other Remedy.

As to the fourth Incident, it was reſolv'd, That it ought to be by one and the ſame Deed or Grant, or by two Deeds deliver'd at (*a*) one Time, which is all one in Effect; for, (*b*) *Quæ incontinenti fiunt ineſſe videntur*; and the Reaſon thereof is, becauſe the Foundation, *ſcil.* the particular Eſtate, and the Increaſe of the Eſtate thereupon, is but one Grant to take Effect out of one and the ſame Root, altho' it veſts at ſeveral Times, yet when it is veſted, it has its Vigour and Force of one and the ſame Grant; and therefore it is well ſaid in 27 *H.* 6. 7. *a.* (*c*) that when he has perform'd the Condition he has Fee from the Time of the Commencement of the Leaſe, as by one and the ſame Grant, and as one and the ſame Eſtate.

(*a*) Co. Lit. 217. a. (*b*) 2 Brownl. 252. 2 Brownl. 255. 2 Co. 71. a. Co. Lit. 272. a.

(*c*) B. Relation 1.

As to the firſt Objection againſt the Form of the Grant, *ſcil. prædictam reverſionem*, to conſtrue it to extend to the Eſtate-tail granted before to *Tyndal*, (which the Queen cannot grant again) and not to the Reverſion of the Fee; (which the Queen may grant, and which is mention'd before) will be a (*d*) Conſtruction tending in great Diſhonour to the Queen, and in great Damage and Diſenheriſon of the Subject: In Diſhonour to the Queen for three Cauſes; 1. To have her Grant under the Great Seal by captious and nice Conſtructions avoided; 2. To preſume ſuch Ignorance in the Queen (who was a wiſe, learned and moſt excellent Princeſs, and the Phœnix of her Sex) that ſhe intended to grant that which ſhe could not grant, and not that which ſhe could. 3. That the Queen (as it was objected) could not make ſuch Grant *in futuro*, when a Subject might do it without Queſtion; therefore *a fortiori*, the Queen might do it in ſuch Caſe. Alſo it would tend to the Damage of the Subject who ſhall have the King's Charter under the Great Seal, but by a nice and captious Conſtruction he ſhall loſe the Land contained therein; which will ſometimes tend to the Ruin of him and his Poſterity; and the Caſes of Sir *John* (*e*) *Molyns*, the Lord (*f*) *Chandos*, and the Earl of *Rutland*, were affirmed for good Law. But, Note, the Queen grants not only *præd' reverſion'* but alſo *omn' & ſingul' præmiſſa, &c.* which Words make this Point clear. And as to the laſt of the ſaid two Objections, it was reſolved *per tot' Cur'*, That the Words were ſufficient to paſs the Inheritance of the Land, for to paſs a future Eſtate upon a Contingent, Words *in futuro* are apt and ſufficient enough, as in all Charters and Letters Patents of Lands, the Clauſe of Grant of Liberties and Franchiſes are all with ſuch Words in Effect, as theſe are, becauſe they are contingent and *de futuro*. And the (*h*) Invention of this Grant to *Tyndal* was commended by the Juſtice, for when the Lord *Stafford* was Tenant in Tail the (*i*) Reverſion to Q. *Mary*, if the Queen had granted the whole Fee-ſimple to *Tyndal*, then by a common Recovery or Fine levied, the

(*d*) 11 Co. 11. b.

(*e*) 6 Co. 5. b. 6. a. 11 Co. 11. b. (*f*) 6 Co. 55. a. b. 56. a. 11 Co. 11. b. (*g*) 8 Co. 55, 56. 11 Co. 11. b.

(*h*) 2 Brownl. 253.

(*i*) 34 & 35 E. 8. cap. 20.

Lord

Lord *Stafford* might have barred his Iſſues, and by a common Recovery the Reverſion to *Tyndal* in Fee, which was neither the Queen's nor *Tyndal's* Intention; but the Purpoſe was, that it ſhould be in the Power of *Tyndal*, and the Heirs of his Body, to hold and reſtrain the Lord *Stafford* and the Heirs of his Body, that they ſhould not alien or bar his Reverſion in Tail, or by taking the Fee-ſimple out of the Crown by the Performance of the Condition to enable them to alien. But *Coke*, Chief Juſtice in his Argument mov'd a Queſtion on the Statute of (*a*) 34 *H.* 8. *c.* 20. That if the Lord *Stafford* and his Wife had ſuffered a common Recovery with Voucher, if that ſhould not bar the Reverſion which *Tyndal* had in Tail, the Reverſion in Fee being in the Crown: And thereupon he conſider'd the Words of the ſaid Act, the Preamble of which ſeems to provide for the Heirs of the Bodies of the King's Donees. And the Queſtion mentioned in the Preamble is, *Whether ſuch feigned and untrue Recoveries againſt ſuch Tenant in Tail*, &c. *ſhould after the Death of the Tenant in Tail, bind the Heirs in Tail, or not:* And the Body of the Act is, *For the plain Declaration whereof, and to avoid and extinct from henceforth Diverſity of Opinions in ſuch Caſes, Be it ordained and enacted, that no ſuch feigned Recovery, hereafter to be had by Aſſent of Parties, againſt any ſuch Tenant in Tail of any Lands, &c. whereof the Reverſion or Remainder at the Time of ſuch Recovery had, ſhall be in the King, ſhall bind or conclude the Heirs in Tail, whether any common Voucher be had in any ſuch feigned Recovery or not, but that after the Death of every ſuch Tenant in Tail, &c. the Heirs in Tail may enter*, &c. So that by the Letter of the Act no Remedy is provided for him in Reverſion or Remainder in Tail, altho' the Reverſion of the Fee be in the King. But yet the Chief Juſtice held, that by neceſſary Conſequence (*b*) ſuch Reverſions and Remainders in Tail are preſerved by the ſaid Act: For when there is Tenant in Tail, the Remainder in Fee, and Tenant in Tail ſuffers a common Recovery, the Reaſon of the Bar of the Eſtate of him in the Remainder who is a Stranger to the Recovery is, by Conſequence, becauſe the common Recovery bars the Eſtate of the Tenant in Tail, who is Party to the Recovery, and by Conſequence, all Reverſions and Remainders of common Perſons expectant thereupon: But when the Act of 34 *H.* 8. provides, That no common Recovery had againſt Tenant in Tail, who is Party to the Recovery, ſhall bar his Iſſues when the King has the Reverſion, *&c.* thereby *incluſive* the Act preſerves the Reverſions and Remainders in Tail of the King's Grant, for they cannot be barred, but when the Eſtate-tail, upon which they depend, is barred; and that is the Reaſon that when Tenant in Tail is in of another Eſtate, and ſuffers a common Recovery as Tenant, it ſhall not bar any

(*a*) Co. Lit. 372. b. 2 Co. 15. b. 34 & 35 H. 8. c. 20. 10 Co. 37. a. 1 Anderſ. 46. 141. 2 Co. 52. a. 6 Co. 55. a. Hob. 299. 2 Rolls Rep. 417. Moor 115, 195. 1 Anderſ. 46, 47, 142, 143, 171. Cr. Car. 430. Plowd. 555. a. Yelv. 149. Noy 132. Co. Lit. 335. a. 1 Leon. 85. 3 Leon. 57. 4 Leon. 40. Benl. in Kelw. 213. a. b. O. Ben. 32. Ben. in Aſh. 26. N. Ben. 223. pl. 254. 2 Rolls Rep. 108. Raym. 349. Cr. Eliz. 595.

(*b*) Co. Lit. 372. b. 2 Rolls Rep. 68.

any Reverſion or Remainder, becauſe the ſame ſhould bar the Eſtate of the Tenant in Tail, who is Party to the Recovery; for, (*a*) *Quod non valet in principali in acceſſorio ſeu conſequenti non valebit, & quod non valet in magis propinquo, non valebit in magis remoto.* And if the Lord *Stafford* might have barred the Reverſion in Tail of *Tho. Tyndal* before the Condition perform'd, the Invention of the ſaid Grant had fail'd of its final Purpoſe: For which Cauſe it ſeemed to the Lord Chief Juſtice, that the ſaid Act preſerves the ſaid Reverſion of the ſaid *Tho. Tyndal*; *quod fuit conceſſum per totam Curiam.* Laſtly, it was reſolv'd *per totam Curiam*, That if the (*b*) Reverſion in Fee had remained in the Crown, That the Fine levied by the ſaid *Edward* Lord *Stafford*, the Father, had not barred the Lord *Stafford* that now is, but that he might enter according to the Reſolution in (*c*) *Notley*'s Caſe, *Paſch.* 31 *Eliz. in Communi Banco, & præcipue* by Reaſon of theſe Words in the ſaid Act of 34 *H.* 8. *The ſaid Recovery, or any other Thing or Things hereafter to be had, done, or ſuffered, by or againſt the ſuch Tenant in Tail, to the contrary notwithſtanding.*

(*a*) 2 Brownl. 253.

(*b*) Mo. 115, 467. Ben. in Kel. 213. Cr. El. 595, 612. Cr. Car. 430. 4 Leon. 40. 1 Anderſ. 46.

(*c*) Hob. 333. Co. Lit. 373. a. Raym. 323, 324. Say. 105.

WYAT

WYAT WILD's *Caſe.*

Trin. 7 Jac. I.

1 Brownl. 180. IN a *Replevin* between *William Wood*, Plaintiff, and *William Norton*, Eſq; Defendant, upon taking of his Sheep at *Croydon* in the County of *Surry*, in a Place called *Norwood*: The Defendant ſaid, That the Place where, *&c.* doth contain 200 Acres, Part of the Manor of *Croydon*, and entituled himſelf to have Common there, and avowed for Damage-feaſant. The Plaintiff, in Bar of the Avowry, ſaid, That before and at the Time of the taking, he himſelf was, and yet is ſeiſed of five Arces of Land in *Croydon* aforeſaid in Fee, and that he and all thoſe whoſe Eſtate he has in the ſaid five Acres *a tempore cujus*, *&c.* have uſed to have Common of Paſture in the ſaid 200 Acres for all his Cattle commonable, upon the ſaid five Acres of Land, levant and couchant at all Times of the Year, as to the ſaid five Acres of Land appertaining; for which Cauſe he put in his Sheep, *&c.* To which the Defendant ſaid, That before the ſaid *William Wood* had any Thing in the ſaid five Acres of Land, one *Wyat Wild* was ſeiſed of a Meſſuage and 40 Acres of Land in *Croydon* aforeſaid, whereof the ſaid five Acres were Parcel, in Fee, and that the ſaid *Wyat*, and all thoſe whoſe Eſtate he had in the ſaid Meſſuage, and 40 Acres of Land, whereof, *&c.* *a tempore cujus*, *&c.* had Common of Paſture in the ſaid 200 Acres for all his Cattle commonable upon the ſaid Meſſuage, and 40 Acres of Land, whereof, *&c.* levant and couchant, as to the ſaid Meſſuage and 40 Acres of Land appertaining, and the ſaid *Wyat* ſo ſeiſed, of the ſaid five Acres, enfeoffed one *John Wood* in Fee, whoſe Eſtate the ſaid *William Wood* before the Time of the taking, *&c.* had, *Idemque Willielmus Wood, colore inde clam' Commun' Paſtu'* in the ſaid 200 Acres, *&c.* *pro omnib' aver' ſuis Communic' ſup' præd' quinq' acr' ter'* levant and couchant, *&c.* put

put in his Cattle, and he took them as Damage-feasant, *&c.* upon which the Plaintiff demurr'd in Law. And the last Term and this Term this Case was argued by the Serjeants at the Bar, and now at this Term it was argued at the Bench by all the Justices, *sc. Coke* Chief Justice, *Walmesley*, *Warburton*, *Daniel*, and *Foster*: And in this Case two Points were resolved. 1. That (be the said (*a*) Common appendant or appurtenant) the Common in the Case at Bar is apportionable. 2. That the pleading thereof was sufficient. As to the first it was well agreed that Common appendant was of Common Right, and severable, and altho' the Commoner in such Case purchases Parcel of the Land in which, *&c.* yet the Common shall be apportioned, but in such Case Common appurtenant, and not appendant, by (*b*) Purchase of Parcel of the Land in which, *&c.* is extinct for the Causes and Reasons given in *Terringham*'s Case, all which was affirmed for good Law by the whole Court. And it was strongly urged, that Common appurtenant shall not be severable in the Case at Bar for divers Reasons. 1. Because this Common appurtenant wholly belonged to a House and 40 Acres of Land by Prescription; and he by his own Act cannot make this entire Thing several. 2. The Feoffee of Parcel shall not have Common, because the Prescription fails, for no Common was ever appurtenant to that Parcel, but to the Messuage and all the Land. 3. Common appurtenant is a Thing against Common Right, and therefore by the Act of the Party shall be no more severed or divided, than a Condition or *Nomine pœnæ*, or any other Thing against Common Right. As to that it was answered and resolved, That it appears by the Prescription, that the said Common is severable, for the Prescription is to have Common in the Land, in which, *&c.* to be taken by the Mouths of his Beasts which are (*c*) levant and couchant on the Land, to which, *&c.* and that extends to the whole, and to every Parcel, and it can be no more Damage or Charge to the Tenant of the Land in which, *&c.* after the Severance, than it was before, for no other Beasts can pasture there, but those which are levant and couchant on the Land, to which, *&c.* But if he who has Common appurtenant (*d*) purchases Parcel of the Land in which, *&c.* all the Common is extinct; Or, if he takes a (*e*) Lease of Parcel of the Land, all is suspended, because it is the Folly of the Commoner to intermeddle with Part of the Land in which, *&c.* which belongs not to him: But when the Commoner intermeddles but only with his own Land, by Alienation thereof, that shall not in such Case turn to his Prejudice, for that is not against any Rule of the Law, as the other Case, when he purchases Part of the Land, in which, *&c.* because his Common appurtenant was against com-

(*a*) Hob. 235. Noy 30. 1 Jones 397. 1 Roll. 234.

(*b*) Winch. 45. Hob. 235. 4 Co. 38. a. Co. Litt. 122. a.

(*c*) Cr. Car. 482. Noy 30. Hob. 235.

(*d*) 1 Anders. 159. 1 Leon. 43, 44. Goldsb. 53. Winch. 45. Noy 30. Co. Lit. 122. a. 4 Co. 38. a.

(*e*) 9 Co. 135. a. Co. Lit. 148. b. 1 Rolls 938.

common Right; and he cannot common in his own Land which he has purchaſed. And it will be a great Inconvenience, If by the Alienation of Parcel the Alienee ſhall loſe the Common which belongs to him, for then the Alienor ſhall loſe his Common alſo, for by the Reaſon which has been made, *Wyat Wild* can't preſcribe to have Common to the Houſe and 35 Acres, becauſe the Common was entirely appurtenant to the Meſſuage and 40 Acres, and if the Law ſhould be ſuch, all Common appurtenant in *England* would be (*a*) deſtroyed (which would be againſt the Commonwealth) for no Land continues in ſo entire a Manner, every Acre together with another, as it has been *ab initio*, but for Preferment of younger Sons, Advancement of Daughters, Payment of Debts, or other neceſſary Conſiderations, Part has been ſevered; and therefore this Caſe is not like a Condition, or *Nomine pœnæ*, which are entire, and not ſeverable by the Act of the Parties, but is like a Rent reſerved on a Leaſe for Years: And therefore, If a Man makes a Leaſe of three Acres, each of equal yearly Value, rendring 3 *s.* Rent, and the Leſſor grants the Reverſion of one Acre, and the Tenant attorns, the Grantee ſhall have 12 *d.* Rent, for altho' it was one Leaſe, one Reverſion, and one Rent, yet that was incident to the Reverſion, which was ſeverable, and the Rent ſhall wait upon the Reverſion, and upon every Part of it. So in the Caſe at Bar, altho' at the Beginning there was but one Common attendant upon one Tenancy; yet foraſmuch as it is attendant upon the Tenancy which is ſeverable, and upon every Part of it, the Alienee of Part of the Tenancy ſhall have Common. So if he who has ſuch Common appurtenant to Land, leaſes Part of the Land to another, the Leſſee ſhall have Common for the Beaſts levant and couchant; and if an Advowſon be appendant to a Manor which deſcends to divers Coparceners, and the Coparceners make Partition of the Manor to which, *&c.* without ſpeaking of the Advowſon, the Advowſon, notwithſtanding the Diviſion and Severance of the Manor to which, *&c.* remains appendant, 13 *E.* 3. *Quare Imp.* 58. 19 *Ed.* 3. *ibid.* 59. 17 *Ed.* 38. 43 *Ed.* 3. 35. 13 *E.* 2. *Quare Imp.* 170. 2 *H.* 7. 5. *Vide* 4 *Eliz. Dy.* 213.

(*a*) Noy 30. 4 Co. 38. a. Hob. 235.

Moor 114. Co. Lit. 148.

Moor 463.

VYNIOR's *Case.*

Trin. 7 Jac. 1. *Rot.* 2629.

Norfolk ff. WIlliam *Wilde*, late of *Themilthorp* in the County aforeſaid, Yeoman, otherwiſe called *William Wilde* of *Themilthorp* in the County aforeſaid, Yeoman, was ſummoned to anſwer to *Robert Vynior* of a Plea, that he renders unto him 20 *l.* which to him he oweth, and unjuſtly detaineth, *&c.* And whereupon the ſaid *Robert*, by *Thomas Vynior* his Attorney, ſaith, That whereas the ſaid *William*, the 15th Day of *July*, in the 6th Year of the Reign of the Lord the now King, of *England*, *France* and *Ireland*, at *Themilthorp*, by his certain Writing Obligatory, granted himſelf to be bound unto the ſaid *Robert* in the aforeſaid 20 *l.* to be paid to the ſaid *Robert* when he was thereof required; yet the aforeſaid *William*, altho' often required, the aforeſaid 20 *l.* to the ſaid *Robert* not yet hath rendred, but the ſame to him hitherto hath denied, and as yet doth deny, whereupon he ſaith that he is the worſe, and hath Damage to the Value of 10 *l.* and thereof he bringeth Suit; and he brings here into Court the Writing aforeſaid, which the Debt aforeſaid in Form aforeſaid doth teſtify, whoſe Date is the Day and Year aboveſaid, *&c.* And the aforeſaid *William*, by *John Ruſſel* his Attorney, cometh and defends the Force and Injury when, *&c.* and prayeth the hearing of the Writing aforeſaid, and it is read unto him; he alſo prayeth the hearing of the Condition of the ſame Writings, and it is read unto him in theſe Words: **The Condition of this Obligation is ſuch, that if the abovebounden** Wil. Wilde, **do and ſhall from Time to Time, and at all Times hereafter, ſtand to, abide, obſerve, perform, fulfil and keep, the Rule, Order, Judgment, Arbitrament, Sentence, and final Determination of** Will. Rugge, **Eſq; Arbitrat. indifferently named, elected and choſen, as well of the Part and Behalf of the ſaid** W. Wilde, **as of the Part and Behalf of the abovenamed** Robert Vynior, **to rule, order,**

order, adjudge, arbitrate, and finally determine, all Matters, Suits, Controverſies, Debates, Griefs and Contentions heretofore moved and ſtirred, or now depending between the ſaid Parties, touching or concerning the Sum of two and twenty Pence, heretofore lared upon the ſaid W. Wilde, for divers Kind of Pariſh Buſineſs within the ſaid Pariſh of Themilthorpe; ſo as the ſaid Award be made and ſet down in Writing, under the Hand and Seal of the ſaid Will. Rugge, at or before the Feaſt of St. Michael the Archangel next enſuing after the Date of theſe Preſents, That then this preſent Obligation to be void and of no Effect, or elſe the ſame to ſtand, abide, remain, and be in full Force, Power, Strength and Virtue. Which being read and heard, the ſaid *Will. Wilde* ſaith, that the aforeſaid *Robert* his Action aforeſaid againſt him ought not to have, becauſe he ſaith, that the Arbitrator aforeſaid, after the making of the Writing, and before the aforeſaid Feaſt of St. *Michael the Archangel*, in the Condition aforeſaid above ſpecified, did not make any Arbitrament in Writing, under the Hand and Seal of the ſame Arbitrator, between him the ſaid *William* and the aforeſaid *Robert*, of and upon the Premiſſes aforeſaid, in the Condition aforeſaid above ſpecified, according to the Form and Effect of that Condition; and this he is ready to aver; whereupon he prayeth Judgment if the aforeſaid *Robert* his Action aforeſaid againſt him ought to have. And the aforeſaid *Robert* ſaith, That he by any Thing before alledged, from having his Action aforeſaid ought not to be barred, becauſe he ſaith that the ſaid *William Wilde* after the making of the Writing aforeſaid, and before the aforeſaid Feaſt of St. *Michael the Archangel*, then next following, that is to ſay, the 22d Day of *Auguſt*, in the 6th Year of the Reign of the Lord the now King of *England*, &c. aforeſaid, at *Themilthorpe* aforeſaid by a certain his Writing, which the ſaid *Robert* with the Seal of the ſaid *William* ſealed, brings here into Court, whoſe Date is the ſame Day and Year, reciting, That whereas he the ſaid *Will.* then ſtood bounden to the aforeſaid *Robert*, by the Name of *Robert Vynior*, in one Writing Obligatory in the Sum of 20 *l.* with Condition in the ſaid Writing for the Performance and fulfilling of the Arbitrament, Rule, Order, Judgment, Sentence and final Determination of *Will. Rugge*, Eſq; Arbitrator, choſen as well on the Part of the ſaid *Will. Wilde*, as on the Part of the abovenamed *Robert Vynior*, as in the ſaid Writing Obligatory more fully is appeared, or might appear, then the ſaid *William* intending the Revocation thereof, by the ſaid Writing of Revocation, revoked and did call back all the Authority whatſoever which the ſaid *Will-Wilde* by the ſaid Writing Obligatory had given and committed

mitted to the aforeſaid *William Rugge*, his Arbitrator, and then altogether diſallowed and held void, and all and whatſoever the aforeſaid *Will. Rugge*, after the Delivery of the ſame Writings of Revocation, ſhould do to (for) him in and about the ſaid Arbitrament, Rule, Order, Judgment, Arbitrament, Sentence, and Determination of all Matters, Suits, Controverſies, Debates, Griefs, and Contentions, then before moved and ſtirred, or then after depending between the ſaid Parties, touching or concerning the Sum of 22*d.* taxed upon the ſaid *Will. Wilde*, according to the aforeſaid Writing obligatory, as it was in the ſame Writing mentioned and declared, as by the ſaid Writing of Revocation more fully appeareth, and this he is ready to aver; whereupon, inaſmuch as the aforeſaid *Will. Wilde*, after the making of the Writing aforeſaid, before the ſaid Feaſt of St. *Michael* the Archangel then next following, in Form aforeſaid, diſcharged and diſallowed the Arbitrator aforeſaid, of all Authority of arbitrating of and upon the Premiſſes in the Condition aforeſaid above ſpecified, contrary to the Form and Effect of the Condition and Submiſſion in the ſame mentioned, the ſaid *Robert* prayeth Judgment and his Debt aforeſaid, together with his Damages, by Occaſion of detaining of the ſame Debt to be adjudged unto him, *&c.* with this, that the ſaid *Robert* will aver that the aforeſaid Writing obligatory here into Court brought, and the aforeſaid Writing in the aforeſaid Writing of Revocation ſpecified, is one and the ſame Writing, and not other, nor divers, *&c.* And the ſaid *Will. Wilde* ſaith, that the Plea of the ſaid *Robert* above, by Replication pleaded, is not ſufficient in Law to bar him the ſaid *Robert*, his Action aforeſaid, againſt the ſaid *William* to have, and maintain, and that he to that Plea, in Manner and Form aforeſaid pleaded, needeth not, nor by the Law of the Land is bounden to anſwer, and this he is ready to aver; whereupon, and for want of a ſufficient Replication in this Part, the ſaid *William* prayeth Judgment, and that the ſaid *Robert*, from his Action aforeſaid, againſt him to have, be barred, *&c.* and the ſaid *Robert*, inaſmuch as he ſufficient Matter in Law for him the ſaid *Robert*, his Action aforeſaid, againſt the ſaid *William* to have and maintain above, by replying, hath alledged, which he is ready to aver, which Matter the aforeſaid *William* doth not deny, nor to the ſame in any Ways anſwereth, but the Averment aforeſaid to admit doth altogether refuſe, as at firſt prayeth Judgment, and his Debt aforeſaid, together with his Damages, by occaſion of detaining his Debt, to be adjudged unto him, *&c.* And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, Day is given to the Parties aforeſaid here in eight Days of St. *Michael*, to hear their Judgment thereof, becauſe the Juſtices here thereof, not yet, *&c.*

VYNIOR's *Case.*

Trin. 7 Jacobi 1.

1 Brownl. 62. 2 Brownl. 290. See Rep. Q. A. 170.

TRin' 7 Jacobi, Rot. 2629, Rob. Vynior brought an Action of Debt againſt *William Wilde*, on a Bond of 20 *l.* 15 *Julii, Anno 6 Regis nunc.* The Defendant demanded Oyer of the Bond, and of the Condition thereon endorſed, which was, *That if the above bounden* William Wilde *do, and ſhall from Time to Time, and at all Times hereafter, ſtand to, abide, obſerve, perform, fulfil and keep, the Rule, Order, Judgment, Arbitrament, Sentence, and final Determination of* William Rugge, *Eſq; Arbitrator indifferently named, elected, and choſen, as well on the Part of the ſaid* William Wilde, *as on the Part of the ſaid* Robert Vynior, *to rule, order, adjudge, arbitrate, and finally determine all Matters, Suits, Controverſies, Debates, Griefs, and Contentions heretofore moved and ſtirred, and now depending between the ſaid Parties, touching or concerning the Sum of Two and Twenty Pence heretofore taxed upon the ſaid* William Wilde, *for divers Kinds of Pariſh Buſineſs, within the Pariſh of* Themilthorpe *in the County of* Norfolk, *ſo as the ſaid Award be made and ſet down in Writing under the Hand and Seal of the ſaid* William Rugge, *at or before the Feaſt of St.* Michael *the Archangel next enſuing, after the Date of theſe Preſents, That then,* &c. And the Defendant pleaded, That the ſaid *William Rugge, nullum fecit arbitrium de & ſuper Præmiſſis, &c.* The Plaintiff replied, That after the making of the ſaid Writing obligatory, and before the ſaid Feaſt of St. *Michael, ſcil.* 22 *Aug. Anno* 6. *ſupradicto, apud* Themilthorpe *præd' prædict'* Willihel' Wilde *per quodd' ſcript' ſuum cujus datus eſt eiſdem die & anno* (a) *revocavit & abrogavit,*

(a) March. Arbt. 167.

gavit, *Anglice*, did call back, *omnem authoritatem quamcunque quam idem* Willielmus Wilde *per præd' ſcriptum obligatorium dediſſet, & commiſiſſet præfat'* Willielmo Rugge *arbitratori ſuo, & adtunc totaliter deadvocavit, & vacuum tenuit totum & quicquid dict'* Willielmus Rugge *poſt deliberationem ejuſdem ſcripti ſibi faceret in & circa dict' arbitr' regulam, &c. unde ex quo præd'* Willielmus Wilde *poſt confectionem præd' ſcripti, & ante præd' Feſtum Sancti* Michaelis *tunc prox' ſequen' in forma præd' exoneravit, & abrogavit arbitratorem præd' de omni authoritate arbitrandi de & ſuper Præmiſſis in condit' præd' ſuperius ſpecific' contra formam & effectum conditionis illius, & ſubmiſſionis in ead' mention' idem* Robertus *petit judicium, &c.* Upon which the Defendant demurr'd in Law. And in this Caſe three Points were reſolv'd, 1. That altho' *William Wilde* the Defendant was bound in a Bond *to ſtand to, abide, obſerve,* &c. *the Rule,* &c. *Arbitrament,* &c. yet he might (*a*) countermand it; for a Man cannot by his Act make ſuch Authority, Power, or Warrant not countermandable, which is by the Law and of its own Nature countermandable; As if I make a (*b*) Letter of Attorney to make Livery, or to ſue an Action, *&c.* in my Name; or if I aſſign Auditors to take an Account; or if I make one my Factor; or if I ſubmit my ſelf to an Arbitrament; altho' theſe are made by expreſs Words irrevocable, or that I grant or am bound that all theſe ſhall ſtand irrevocably, yet they may be revok'd: So if I make my Teſtament and Laſt Will (*c*) irrevocable, yet I may revoke it, for my Act or my Words cannot alter the Judgment of the Law to make that irrevocable, which is of its own Nature revocable. And therefore (where it is ſaid in 5 *Ed.* 4. 3. *b.* (*d*) if I am bound to ſtand to the Award which *I. S.* ſhall make, I could not diſcharge that Arbitrament, becauſe I am bound to ſtand to his Award, but if it be without Obligation it is otherwiſe) it was there reſolv'd, That in both Caſes the Authority of the Arbitrator may be revoked; but then in the one Caſe he ſhall forfeit his Bond, and in the other he ſhall loſe nothing; for, *ex* (*e*) *nuda ſubmiſſione non oritur actio:* and therewith agrees *Brooke* in abridging the ſaid Book of 5 *Ed.* 4. 3. *b.* and ſo the Book of 5 *Ed.* 4. is well explain'd. *Vide* (*f*) 21 *H.* 6. 30. *a.* 28 29 (*g*) *H.* 6. 6. *b.* 49 *E.* 3. 9. *a.* 18 *E.* 4. 9. 8 *Ed.* 4. 10. 2. It was reſolv'd, That the Plaintiff need not aver, that the ſaid *Will. Rugge* had (*h*) Notice of the Countermand, for that is implied in theſe Words, *revocavit & abrogavit omnem authoritatem, &c.* for without Notice it is no (*i*) Revocation or Abrogation of the Authority: And therefore if there was no Notice, then the Def. might take (*k*) Iſſue, *quod non*

(*a*) 2 Vent. 117. 1 Brownl. 62. 2 Brownl. 290, 291. March Arbitrament 165. Br. Arbit. 49. Doct. pl. 40.

(*b*) March Arbit. 165.

(*c*) Mar. Arb. 165. Bac. Max. Reg. 19.

(*d*) Mar. Arbit. 164. 1 Roll. 331. Br. Arbit. 35.

(*e*) Mar. Arb. 164.

(*f*) Poſtea 82. b. Br. Arbit. 49.

(*g*) Fitz. Arb. 12. Br. Arbit. 4.

(*h*) 1 Brownl. 62. 2 Brownl. 290, 291.

(*i*) Mar. Arbit. 167.

(*k*) 1 Roll. 331.

(*k*) March. Arb. 167, 168.

non revocavit, *&c.* and if there was no Notice, it ſhould be found for the Defendant; as if a Man pleads, *quod* (*a*) *feoffavit*, *dedit*, or *demiſit pro termino Vitæ*, it implies Livery, for without Livery it is no Feoffm. Gift or Demiſe; but there is a Difference when two Things are requiſite to the Performance of an Act, and both Things are to be done by one and the ſame Party, as in the Caſe of Feoffment, Gift, Demiſe, Revocation, Countermand, *&c.* And when two Things are requiſite to be perform'd by ſeveral Perſons; as of a Grant of a Reverſion, Attornment is not implied in it, and yet without Attornment the Grant hath not Perfection, but foraſmuch as the Grant is made by one, and the Attornm. is to be made by another, it is not implied in the Pleading of the Grant of one; but in the other Caſe both Things are to be done by one and the ſame Perſon, and that makes the Difference. And therew. agrees (*b*) 21 *H.* 6. 30. *a.* where *W. Bridges* brought an Action of Debt for 200 *l.* on an Arbitrament againſt *William Bentley*; the Def. pleaded, that before any Judgment or Award made by the Arbitrators, the ſaid *William Bentley* diſcharged the ſaid Arbitrators at *Coventry*, in the County of *Warwick*; and it was held a good Bar, and yet he did not aver any Notice to be given. So it is adjudg'd in (*c*) 28 *H.* 6. 6. *b.* 6 *H.* 7. 10, *&c.* 3. It was reſolv'd, That by this (*d*) Countermand or Revocation of the Power of the Arbitrator, the Obligee ſhall take Benefit of the Bond, and that for two Reaſons: 1. Becauſe he has broken the Words of the Condition, which are, *That he ſhould ſtand to, and abide*, &c. *the Rule, Order*, &c. and when he counterm. the Authority of the Arbitrator, *he doth not ſtand to and abide*, &c. which Words were put in ſuch Conditions, to the Intent that there ſhould be no Countermand, but that an End ſhould be made, by the Arbitrator, of the Controverſy, and that the Power of the Arbitrator ſhould continue till he had made an Award; and when the Award is made, then there are Words to compel the Parties to perform it, *ſcil. obſerve, perform, fulfil, and keep the Rule, Order, &c.* and this Form was invented by prudent Antiquity; and it is good to follow in ſuch Caſes the ancient Forms and Precedents, which are full of Knowledge and Wiſdom; and with this Reſolution agrees the ſaid Book of (*e*) 5 *Ed.* 4. 3. *b.* which is to be intended *ut ſupra*, That the Obligor cannot diſcharge the Arbitrament, but that he ſhall forfeit his Bond, and the Book gives the Reaſon, which is the Cauſe of this Reſolution, *ſcilicet* (*f*) Becauſe I am bound to ſtand to his Award, *ſcilicet, to ſtand to his Award*, which I do not when I diſcharge the Arbitrator. The other Reaſon is, becauſe now the Obligor has by his own Act made the Condition of the Bond (which was endorſed for the Benefit of the Obligor, to ſave him from the Penalty of the Bond) impoſſible to

(*a*) Cro. El. 401. Cr. Jac. 411, 637. Cr. Car. 101, 170. Kelw. 7. a. Noy 118. Doct. pl. 48, 49, 239. Yelv. 135. Br. Pleadings 145 in Fine. 22 E. 3. 15. b. per Tremail. Plowd. 149. b. Co. Lit. 303. b.

(*b*) Antea 82. a. Br. Arbitr. 49.

(*c*) Antea 82. a. Fitz. Arbit. 12. Br. Arbit. 4.

(*d*) 1 Brown. 62. 2 Brownl. 290. March Arb. 165, 166.

(*e*) Antea 82. a. March Arb. 164. 1 Roll. 331. Br. Arbit. 35.

(*f*) March Arbit. 165, 166.

to be perform'd, and by Conſequence his Bond is become (*a*) ſingle, and without the Benefit or Help of any Condition, becauſe he has diſabled himſelf to perform the Condition. *Vide* (*b*) 21 *Ed.* 4. 55. *a. per Choke*, (*c*) 18 *Ed.* 4. 18. *b.* & 20. *a.* If one be bound in a Bond, with Condition that the Obligor ſhall give Leave to the Obligee for the Space of ſeven Years to carry Wood, *&c.* in that Caſe, although he gives him Leave, yet if he countermands it, or diſturbs the Obligee, the Bond is forfeited. And afterwards Judgment was given for the Plaintiff.

(*a*) 2 Brownl. 290.

(*b*) 5 Co. 21. a.
(*c*) 1 Brownl. 62. Br. Condit. 163.

Sir RICHARD PEXHALL'S *Caſe.*

Trin. 7 Jac. 1. *Rot.* 3649.

Co. Ent. 585. mu. 7.

IN a *Second Deliverance* brought by *Euſtace Barton* againſt *Nicholas Moore*, for taking of his Cattle the 17th of *April*, *Anno* 5 *Jacobi Regis*, at *Broxhead* in the County of *Southampton*, in a Place called *Gate*. The Defendant avow'd the taking, becauſe Sir *Richard Pexhall*, Knt. was ſeiſed of the Manor of *Broxhead* in the ſaid County, whereof the Place in which, *&c.* was Parcel in Fee; and held it of the Biſhop of *Wincheſter* in Socage, as of his Manor of *Sutton*, and was alſo ſeiſed of the Manors of *Beauraper*, *Cranes*, *Chinham*, *Steventon*, and divers other Manors, Lands and Tenements, and of a Houſe in *London* deviſable by Cuſtom in Fee, and held the ſaid Manor of *Steventon* of the Queen by Knights Service *in capite*, and ſo ſeiſed, made his Will in Writing, and thereby deviſed to *Eleanor* his Wife, the ſaid Houſe in *London*, and two Parts of the other Manors, Lands and Tenements, for 13 Years, and added a Proviſo, that the ſaid Deviſe ſhould not be prejudicial to any Eſtate, Title or Intereſt for Year or Years, Life or Lives, which ſhould be after deviſed in the ſame Will; and after in the ſame Will, *dedit & legavit eidem Nicholao Moore Conſanguineo ſuo* 10 *l. exeun' & ſolubil' de & ex præd' Meſſuag' & de & ex præd' duabus partibus maneriorum & cæterorum tenementorum præd'* quarterly, *ad maxime uſualia Feſta, & pro non ſolutione inde, ad diſtring' & diſtrict' detinend' quouſque, &c.* And that the ſaid Sir *Richard* ſo ſeiſed, died ſeiſed, *&c.* and for 20 *l.* for two Years, ended *Anno* 16 *Eliz.* he avowed and averred the Value of the ſaid Manors and Tenements aforeſaid, at the Time of the Will, *&c.* to be 200 *l. per Ann.* above all Repriſals, and it appears by the Bar to the Avow. that the Words

of

of the Will were, *I will and bequeath to Dame* Eleanor *my Wife, all my Manors, Lands, Tenements, &c. for the Term of thirteen Years next after my Deceaſe: Provided, that this Gift, Deviſe and Bequeſt, made to the ſaid* Eleanor, *ſhall not be prejudicial to any of the Eſtate or Eſtates, Titles, or Intereſts, for Year or Years, Life or Lives, that ſhall be hereafter in this preſent Will given or bequeathed.* And further in the ſame Will deviſed, *Item, I give and bequeath to my Couſin* Nicholas Moor *a hundred Sheep and ten Bullocks, and* 10 *l. iſſuing and payable out of my Lands and Tenements quarterly, at the moſt uſual Feaſts, and for Nonpayment to diſtrein, and the Diſtreſs to detain, until he be ſatisfied of the Arrearages, and to keep the Court and Courts of all my Manors, upon lawful Requeſt to the ſaid* Nicholas, *by him or his Deputy, during his Life, and when the ſaid* Nicholas *ſhall think it moſt convenient and mete, to keep.* And upon the whole Record, the Queſtions which aroſe out of this Part of the Will, were two: 1. If Sir *Richard Pexhall* had Power, by the Act of 34 *Hen.* 8. *cap.* 5. to deviſe this Rent of 10 *l.* to *Nicholas Moore*, out of all his Lands? 2. What Eſtate *Nicholas Moore* had in the Rent?

As to the firſt it was objected, That Sir *Richard Pexhall* had not purſued the Power which the ſaid Act of 34 *Hen.* 8. gave him; for the Words of the Act are, *That every one*, &c. *may deviſe any Rent, Common, or other Profit, out of the ſame two Parts*, (viz. *out of his Manors, Lands, Tenements and Hereditaments in three Parts to be divided*) *or out of any Part thereof, or as much thereof as ſhall amount to the full clear yearly Value of two Parts thereof:* And the ſole Queſtion depends upon the ſaid Clauſe of 34 *H.* 8. for the Statute of 32 *H.* 8. gives no Power to the Owner of the Land, to deviſe Rent, Common, or other Profit out of it: And in this Caſe, where Sir *Richard* had a Power to deviſe a Rent, *&c.* out of two Parts, by that Act, he has deviſed a Rent out of all his Lands, and ſo has not purſued the Authority which the Act gave him, and the Clauſe of 34 *Hen.* 8. which follows next after the ſaid Branch of the Act, by which it is enacted, *That by the Authority aforeſaid, the ſaid Will ſo declared ſhall be good and effectual for two Parts of the ſaid Manors, Lands, Tenements, or Hereditaments, altho' the Will declared be made of the Whole, or of more than of two Parts*, extends only to a Deviſe of the Land itſelf, and not to any Rent, Common, or Profit out of it, as appears by the Letter thereof, and by all the ſubſequent Branches concerning the Diviſion; and this Clauſe is an Explanation of the Act of 32 *Hen.* 8. when all is deviſed, but, as hath been ſaid, the Power to deviſe a Rent, *&c.* out of the Land, is only given by the Statute of 34 *Hen.* 8. And the Opinion in *Butler* and *Baker*'s Caſe, in the Third Part of my *Reports*, 33. *a.* was cited, where Co. Lit. 111. b.

(a) 3 Co. 33. a. Hob. 80. Co. Lit. 111. b.

it is ſaid, that if a Man (*a*) ſeiſed of three Acres, (held by Knights Service) each of the yearly Value of 12 *d.* and he deviſes a Rent of 3 *s.* out of theſe three Acres, this Deviſe is void for the Whole, becauſe he doth not purſue the Power which the Statute preſcribes; but in ſuch-Caſe, if he deviſes a Rent of 3 *s.* which is the Value of all, out of two Parts, it is good, becauſe in that Caſe, the Value extends to the Land, and not to the Rent, for the Words are, *any Rent*, without any Reſtraint: As to that it was anſwered and reſolv'd by the Court, That it is true, that the Statute of 32 *Hen.* 8. doth not extend to a Deviſe of any Rent, *&c.* out of the Land, but the Power, as to that, is given by the Statute of 34 *H.* 8. which has four diſtinct Branches as to this Point: 1. That every one having a ſole Eſtate in Fee-ſimple, *&c. of and in any Manors*, &c. *and having no Manors*, &c. *holden of the King, or of any other Perſon by Knights Service, ſhall have full and free Liberty, Power, and Authority to give, diſpoſe, will, or deviſe*, &c. *all his Manors*, &c. *or any Rent, Common, or other Profit, out of or to be perceived of the ſame, or out of any Parcel thereof, at his own free Will and Pleaſure, any Clauſe in the ſaid former Act notwithſtanding.* By this Branch it appears, That he who has no Lands held by Knights Service, may deviſe any Rent, Common, or Profit, out of his Lands whereof he is ſeiſed in Fee, to what Value he will, altho' the Rent, Common, or Profit, exceeds the Value of the Land; for the Words are, *at his own free Will and Pleaſure.* The ſecond Branch is, When any is ſole ſeiſed of any Manors, *&c.* held of the King *in capite by Knight Service, ſhall have full and free Liberty to deviſe*, &c. *by his Laſt Will in Writing*, &c. *two Parts of all his Manors*, &c. *or any Rent, Common, or Profit, out of, or to be perceived of the ſame two Parts, or out of any Parcel thereof in three Parts to be divided, or as much thereof as ſhall amount to the full and clear yearly Value of two Parts thereof, in three Parts to be divided at his own free Will and Pleaſure.* The third Branch is, *That all and ſingular Perſon and Perſons having a ſole Eſtate in Fee-ſimple*, &c. *of and in any Manors*, &c. *holden of the King by Knights Service, and not in Chief, or holden of any other Perſon by Knights Service, ſhall have full and free Liberty to deviſe*, &c. *by his Laſt Will and Teſtament in Writing*, &c. *two Parts of the ſaid Manors*, &c. *or any Rent, Common, or other Profit out of, or to be perceived of the ſame two Parts, or out of any Parcel thereof in three Parts to be divided, or as much thereof as ſhall amount to the full and clear yearly Value of two Parts thereof in three Parts, to be divided at his free Will and Pleaſure.* The fourth Branch is, *And that the ſaid Will ſo declared ſhall be good for two Parts of the ſaid Manors*, &c. *altho' it be declared of the Whole.*

And also for the Whole of all other such Manors, &c. not holden by Knights Service, and of any Rent, Common, or other Profit, out of, or to be perceived of the same, or out of any Parcel thereof, at his free Will and Pleasure. By all which Branches it appears, that it is chiefly for the Benefit of the King or Lord (of whom the Land is held by Knights Service, *&c.*) that the Owner of the Land has Power by his Will to charge but two Parts, and by Consequence it tends to the Benefit of the Heir; for in Case when there is not any Tenure to draw Wardship, *&c.* there the Owner may, at his free Will and Pleasure, charge the Whole. Then in the Case at Bar where the Manor of *Steventon* was held of the King in Chief by Knights Service, Sir *Richard* had (*) Power to charge but two Parts; yet when he charged the Whole, he charged two Parts and more, and therefore it shall be good, for so much as the Statutes enables him, and void for the Residue, *Quia (a) quand' plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est*; but forasmuch as Sir *Richard* had Power by his Will to charge but two Parts, the Charge of the Whole is void for the third Part, not only as to the King, or other Lord, but as to the Heir also, because, as to the third Part, the Will remains at the Common Law, which was utterly void; and according to this Judgment, and for the same Reason it was adjudged, *M.* 3 *&* 4 *Ph. & Mar. in Com' Banco, Rot.* 126. in (*b*) *Umpton* and *Hide*'s Case, That a Will in Writing after the Statute of 32 *H.* 8. and before the Statute of 34 *H.* 8. declared of the whole Land, whereof Part was held of the King by Knights Service *in Capite*, was good for two Parts: And so it had been if the Statute of 34 *H.* 8. had never been made, which is all one in Reason with the Case at Bar; and by this Construction the true Intention, as well of the Testator in his Will, as of the said Acts of Parliament, without Prejudice to any, is well observed: And there is a Difference between the common Case of Licence, and the Case at Bar. For if the King (*c*) licences one to alien two Parts of his Manor of *D.* which is held of him *in Capite*, and he aliens the whole Manor, he has not pursued the Licence, for by his Alienation the whole Manor passes; which is not according to his Licence: But when an Act of Parliament authorizes the Owner of Land held *in Capite* to charge two Parts thereof, which he could not do by the Common Law, in this Case, if he charges his whole Land, it is meerly void for the third Part, and therefore he has well pursued the Authority which the Statute has given to him, to charge two Parts. So if a Man has the Moiety of the Manor of *D.* known by the Name of the Manor of *D.* and the King licences him to alien the Moiety of the Manor and he aliens the Manor, he has well pursued the Licence, for in Truth nothing passed but the Moiety, and so you will better understand the Law, amongst the various Opinions. *Obiter* in *Plow. Com.* 68. *b.* and in *Butler* and *Baker*'s Case.

(*) Co. Lit. 111. b.

(*a*) 5 Co. 115. a.

(*b*) 1 And. 3, 4. Plowd. 564. a. B. N. C. 486. 3 Co. 33. b. Br. Testam. 26. N. Bendl. 49, 50. pl. 88. Dy. 150. pl. 86. 1 Leon. 76. 3 Leon. 29. Jenk. Cent. 115.

(*c*) Plowd. 68. b.

And

And as to the ſecond Point, it was agreed *per totam Cur'*, that he had an Eſtate for Life in the ſaid Rent of 10 *l. per Ann.* 1. Becauſe if it had been in a Grant, the Grantee ſhould have it for Life: For if a Man by his Deed grants a Rent of 10 *l.* iſſuing and payable out of all his Lands quarterly at the uſual Feaſts, and for Nonpayment to diſtrein for the Rent, and all the Arrearages, in that Caſe the Grantee ſhall have the Rent (*a*) for Life: Alſo in Reſpect thereof, he ought to hold the (*b*) Courts of all his Manors for his Life, *Et officium & feodum ſunt concommitantia*, and he ſhall have the like Eſtate in Fee, as he has in the Office. But it was objected, that then the Deviſee ſhould have alſo 100 Sheep and Bullocks yearly for his Life, as well as the Rent; *quod fuit negat' per tot' Cur'*, and that for two Cauſes: 1. The ſecond (*c*) (*Et*) in the ſaid Sentence, disjoins and ſevers the Rent from the Sheep and Bullocks; as in the Caſe 9 *Ed.* 4. 43. *b.* where two were bound to ſtand to the Arbitrament of *I. S. de* (*d*) *omnib' actionib' perſonalibus & ſectis & Querelis*, this Word (*Perſonalibus*) ſhall be referred to all: But if the Words were, *de omnibus actionibus & ſectis & querelis*, it ſhall be otherwiſe; for there the laſt (*Et*) disjoins *querelis* from the whole firſt Part of the Sentence, and ſhall be taken generally, without any Reference to *perſonalibus*. So in the Caſe at Bar, when Sir *Richard* deviſed 100 Sheep and 10 Bullocks, and 10 *l.* the laſt (*Et*) disjoins the Rent from the Sheep and 10 Bullocks: 2. Theſe Words (*payable*, (*e*) *quarterly*) at the uſual Feaſts, ought to have Reference to the Rent, for 10 Bullocks *per Ann.* cannot be delivered quarterly. And Judgment was given for *Nicholas Moore* the Avowant.

(*a*) 7 Aſſ. pl. 1. 1 Roll. 845, 849. Plowd. 152. b. Cr. El. 330. Br. Eſtate 30. Perk. Sect. 104. Co. Lit. 42. a. 3 Bulſt. 194.

(*b*) 3 Bulſtr. 194.

(*c*) Wing. Max. 12. Lit. Rep. 66, 67.

(*d*) Lit. Rep. 63. Fitz. Arbit. 16. March Arb. 172.

(*e*) Lit. Sect. 66, 67.

BUCK-

BUCKMERE'S *Caſe.*

Mich. 7 Jacobi I.

IN a *Formedon* in *Remainder*, brought by *George Buckmere*, *Oliver Fowler*, *William Buckmere*, *Chriſtopher Buckmere*, and *Nicholas Buckmere*, againſt *Robert Sayer*, and *Urſula* his Wife, of a Houſe in the County of *Kent*, of the Nature of Gavelkind, the Caſe was ſuch; *Thomas Bole* had Iſſue three Daughters, *Marion*, *Johan*, and *Catharine*, and gave the ſaid Houſe to *Marion*, and the Heirs of her Body begotten; the Remainder of one Moiety of the ſaid Houſe to *Johan*, and to the Heirs of her Body begotten, and the Remainder of the other Moiety to *Catharine*, and to the Heirs of her Body; and if the ſaid *Johan* ſhould die without Iſſue, the Remainder of her Moiety to *Catharine*, and to the Heirs of her Body, with the like Remainder for want of Iſſue of *Catharine* to *Johan:* And afterwards *Marion* diſcontinued, and died without Iſſue, *& de eadem* Mariona *eo quod obiit ſine hærede de corpore ſuo exeunte remanſit jus* (which proves ſhe diſcontinued, for otherwiſe it ſhould be *tenementa præd' remanſ.) unius medietatis tenementorum præd' cum pertin' per formam, &c. præd'* Johannæ Bole; *& remanſit jus alterius medietatis eorundem tenementorum cum pertinentiis, per formam, &c. præfat'* Catharinæ Bole, and afterwards *Johan* died without Iſſue, by which the Right of her Moiety remain'd to the ſaid *Catharine*, and after the Death of *Catharine*, *deſcendit jus integrorum tenementorum iſtis Georgio, &c.* and the Tenants demurr'd in Law on this Account, becauſe the Demandants demanded by one Writ of *Formedon* ſeveral Remainders where the Demandants ought to

2 Brownl. 274, 275.

to have demanded the ſeveral Remainders by ſeveral Writs. And becauſe we muſt ſhew in what Caſes the Demandant or Plaintiff ſhall join divers Cauſes of Action in one and the ſame Writ againſt the Tenant or Defendant, it muſt be obſerved, That there is a Difference between Actions real, and Actions perſonal, and between Actions real which are founded on a Title in the Writ, and Actions real meerly founded upon a Tort or Deforcement. Real Actions, which are founded upon Title are, as in a Writ of (*a*) Eſcheat. *Præcipe A. quod reddat B.* 10 *acras terræ, &c. quas C. de eo tenuit, & quæ ad ipſum B. reverti debent tanquam eſcaeta ſua, eo quod præd' C. obiit ſine hærede.* So the (*b*) *Ceſſavit, Præcipe A. quod reddat B. unum meſſuagium quod idem A. de eo ten' per certa ſervitia, & quod ad ipſum B. reverti debet, &c. eo quod idem A. in faciend' ſervitia per biennium jam ceſſavit.* So the Writ of Ward, and the Writ of Meſne, and the Writs of *Formedon* in Deſcender, Remainder, and Reverter. Then ſuppoſe, that *B.* before the Statute of (*c*) *Quia Emptores terrarum*, had by one Deed enfeoffed *A.* of *Black Acre*, to hold by Fealty and 3 *d.* and by another Deed had enfeoffed him of *White Acre*, to hold of him by Fealty and 6 *d.* and afterwards *A.* had died without Heir, *B.* ſhould not have one Writ of (*d*) Eſcheat of theſe two Acres; for the Writ ſhall ſay, *Præcipe C. quod reddat B. duas acras, &c. quas A. de eo tenuit*, which ſhall be intended one intire Tenure; and therefore in ſuch Caſe the Demandant is driven to ſeveral Writs upon the two ſeveral Tenures; and therewith agrees 21 *H.* 7. 39. *b.* So, and for the ſame Reaſon, upon a Ceſſer in ſuch Caſe the Lord ought to have (*e*) ſeveral Writs of *Ceſſavit*; and therewith agrees 3 *Ed.* 3. 47. *a. b.* * 18 *Ed.* 3. *Ceſſavit* 20. (*f*) 10 *Ed.* 4. 1. *b.* & 2. *a.* (*g*) 10 *Hen.* 7. 24. *a.* So upon ſeveral Tenures the Tenant ſhall have ſeveral Writs of Meſne againſt the Meſne, and ſhall not join them in one Writ; and therewith agrees (*h*) 2 *H.* 5. 2. *b.* And one ſhall not have one Writ of Ward of the Body and Land upon ſeveral Tenures, as it is held in 6 *Ed.* 3. 48. *a. b.* 3 *Hen.* 6. 53. 17 *H.* 6. *Gard.* 117. But a Writ of Ward of Land was founded upon two ſeveral Tenures in 46 *Ed.* 3. *Tit. Brief* 619. but there it is held, that if he had demanded the Body, the Writ ſhould have abated. Then ſuppoſe *B.* by one Deed gives the Manor of *D.* to *A.* and to the Heirs of his Body, and afterwards *B.* by another Deed gives 50 Acres of Land to *A.* and to the Heirs of his Body, and afterwards *A.* dies without Iſſue, the Donor upon theſe two diſtinct Gifts, ſhall not have one Writ of *Formedon* in Reverter, ſuppoſing *Quod idem B. dedit prædict' Manerium & quinquaginta acras terræ cum pertinentiis eidem A. & quæ ad præfat' B. reverti debent, &c.* no more than upon ſeveral Feoffments, *ut ſupra*, and Tenures reſerved, he ſhall have one Writ of (*i*) Eſcheat, or one Writ of (*k*) *Ceſſavit*; both which Writs

(*a*) F. N. B. 144. c. f. Reg. Orig. 164. b.

(*b*) F.N.B.208. h. 2 Inſt. 401, 402.

(*c*) 2 Inſt. 500, 501, *&c.*

(*d*) Br. Eſcheat 13. Br. Joynder in Action 46.

(*e*) F.N.B. 209. b. Fitz Ceſſavit 40. * 18 E. 3. 48. b. Ceſſavit 20.

(*f*) Br. Ceſſavit 24. Fitz. Ceſſavit 3.

(*g*) Br. Ceſſavit 42.

(*h*) Fitz. Meſn. 6.

(*i*) 21 H. 7. 39. b. Br. Eſcheat 13. F. N. B. 209. b. Br. Joynder enaction 46.

(*k*) 3 E. 3. 47. a. b. 10 E. 4. 1. b. 2. a. 10 H. 7. 24. a. Br. Ceſſav. 24, 42. Fitz. Ceſſavit 3. 18 E. 3. 48. b. Ceſſavit. 20.

Writs ſuppoſe, *quod tenementa prædicta reverti debent.* So of two ſeveral diſtinct Gifts to one, with ſeveral Remainders over to one, he ſhall not have one Writ of Formedon in Remainder, nor the Iſſue of ſuch Donee one Writ of Formedon in Deſcender, for the Foundation of theſe Writs is the Gift which is diſtinct and ſeveral; and therefore in ſuch Caſes, upon the ſeveral Foundations, there ought to be ſeveral Writs founded. But if Land be given to a Man, and to his Siſter, and to the Heirs of their Bodies iſſuing, in that Caſe they are Joint-tenants for Life, and have (*a*) ſeveral Inheritances, *ſc.* the Brother one Moiety to him and to the Heirs of his Body, and the Siſter the other Moiety to her and to Heirs of her Body; in that Caſe, altho' the Inheritances were ſeveral, yet becauſe the Foundation was one, and at one Time, and as out of one Root, for that Reaſon the Donor ſhall have one Writ of Formedon in the Reverter, and therein ſhall ſhew the Gift as it was to the Brother and Siſter, *&c.* and conclude in the Cloſe of the Writ, *Quia uterque eorum obiit ſine hærede de corpore, &c.* which Words prove that each of them had a ſeveral Right; and ſo is the Book adjudged in *Roger Dardene's* Caſe, in * 17 *Ed.* 3. 51. *a.* & 78. *a. b.* & 18 *Ed.* 3. 39. *a. b.* which is all one Caſe. So, if Lands be given to (*b*) Father and Son, and to the Heirs of their two Bodies begotten, the Remainder over in Fee, and afterwards the Father dies without any Iſſue but the Son, and afterwards the Son dies without Iſſue, and a Stranger abates, he in the Remainder ſhall have one Formedon in the Remainder, altho' the Eſtates Tail were ſeveral; yet foraſmuch as well the ſeveral Eſtates in Tail, and the Remainder alſo depend upon one joint Eſtate in the Father and Son for their Lives, and all begin at one Time, for this Reaſon one Formedon in the Remainder lies. So in the ſaid Caſe of (*c*) 17 *E.* 3. If Land had been given to Brother and Siſter, and to the Heirs of their two Bodies begotten, the Remainder over in Fee, if the Brother dies without Iſſue, now the Siſter has an Eſtate for Life in one Moiety, the Remainder over in Fee, and for the other Moiety an Eſtate Tail, the Remainder in Fee, and afterwards the Siſter has Iſſue and dies, and a Stranger abates, now for one Moiety the Remainder begins, and after the Iſſue dies without Iſſue, altho' the Remainder falls at ſeveral Times, yet he in Remainder ſhall have one Formedon for both Remainders, which depend upon one and the ſame Eſtate, come to one and the ſame Perſon. And ſo is the Book to be intended in (*d*) 31 *Hen.* 6. 14 *b.* where it is ſaid, a Man may have one Formedon of divers Gifts. *Vide* 44 *Ed.* 3. *Tit.* Tail 13. a good Caſe, and 50 *Ed.* 3. *Tit. Feoffments & Faits*, 97. & 7 *Hen.* 4. 88.

(*a*) Co. Lit. 184. a. 18 E. 3. 39. a. b. 7 H. 4. 16. b. Br. Tail. 9. Br. Eſtate 11. Br. Deraignm. 13. 5 Co. 8. a. 1 Leon. 213.

* 1 Leon. 213.

(*b*) Dyer 145. pl. 64. 1 Leon. 213.

(*c*) 17 E. 3. 51. a. 78. a. b.

(*d*) Fitz. Brief 113. Poſtea 65. b.

So

(a) 2 Brownl. 275. So it was (a) reſolv'd in the Caſe at Bar, That when the Whole is deviſed to *Marion* in Tail, altho' the Deviſor divides the Remainders by Moieties, yet, when the whole Land remains to *Catharine*, and all the Remainders depend upon one Eſtate, and begin by Deviſe at one Time, the Heirs of the Body of *Catharine* ſhall have one Formedon in the Remainder, in the ſame Manner as if the Remainder had been limited to *Catharine* and *Johan*, and to the Heirs of their two Bodies, the Remainder for Default of Iſſue of *Johan* to *Catharine*, and to her Heirs for ever.

Q. Carthew 454. But ſuch Actions real, which are founded upon a Tort or Deforcement, and do not comprehend any Title in them, there the Demandant may demand in one Writ divers Lands and Tenements, which come to him by ſeveral Titles: As if divers Manors deſcend to me from ſeveral Anceſtors, and I am diſſeiſed or deforced of them, I may have a Writ of Right, or a Writ of Entry in the Nature of an Aſſiſe, or a Writ of Aſſiſe, and comprehend all theſe Rights in one and the ſame Writ, becauſe in theſe Caſes no Title is made in the Writ. *Vide L.* 5 *Ed.* 4. 80. 12 *Ed.* 4. 1. *a.* 17 *Ed.* 3. 52. 17 *Aſſ.* 10. 12 *Ed.* 3. *Aſſ.* 112. 22 *Aſſ. p.* 52. 66. 7 *Aſſ. p.* 18. 7 *Ed.* 3. *Aſſiſe* 138. 15 *Ed.* 3. *Charge* 9. 15 *Aſſ. pl.* 11. But if I bring a Writ of Entry on a Diſſeiſin done to my Mother and Aunt, Coparceners in Fee-ſimple, the Writ ſhall abate, for here Title is made in the Writ, and it appears that there were ſeveral Cauſes of Action, becauſe the Title is by ſeveral Anceſtors, and therewith agrees the Book in

(b) Antea 87. a. Fitz. Brief 113. (b) 31 *Hen.* 6. 14. *b.* and 43 *Ed.* 3. 17. *a.* So if an Eſtate Tail deſcends to two Daughters Coparceners, and one enters into the Whole, and the other has Iſſue, and ſhe who enters dies without Iſſue, in that Caſe the Iſſue ſhall have ſeveral Writs of *Formedon* in the Deſcender of one Moiety of the Poſſeſſion of his Mother, *quam inſimul tenuit*, and of the other Moiety of the Poſſeſſion of his Grandmother; and

(c) Fitz. Formed. 22. Br. Formed. 54. Br. Brief 504. therewith agrees (c) 43 *Ed.* 3. 16, & 17.

And in perſonal Actions the Plaintiff may comprehend ſeveral Wrongs, and ſeveral Cauſes of Actions, as one Action of Treſpaſs for ſeveral Treſpaſſes committed at

(d) Fitz. Brief 113. ſevery Days, and in ſeveral Places. *Vide* (d) 31 *Hen.* 6. 14. *b.* (e) 8 *Ed.* 4. 5. *a.* & 44 *Ed.* 3. 34. 14 *Hen.* 8. 12. *b.*

(e) Fitz. Treſp. 116. *F. N. B.* 60. An Action (f) of Waſte upon ſeveral Leaſes,

(f) F.N.B. 60. f. Cro. Jac. 330. Popham 25. for in the Prohibition of Waſte at the Common Law againſt Tenant in Dower, &c. Damages were only recovered, which

was

was in the Perſonalty: So of Debt (*a*) upon ſeveral Leaſes.

(*a*) 31 H. 6. 14. b. Yelv. 63. Fitz. Br. 113. 8 E. 4. 5. a. Mo. 914. Fitz. Treſp. 116. Cr. Jac. 68. Noy 3. 1 Brownl. 86, 87.

Note, Reader, As to the bringing of Writs of *Formedon*, theſe Differences; 1. If a Remainder be executed in a Writ of *Formedon* in the (*b*) Deſcender, he ſhall never ſpeak of this Remainder, but the general Writ of *Formedon* in the Deſcender ſhall ſerve in that Caſe, and he ſhall count of an immediate Gift; for he cannot have a *Formedon* in the Remainder, when the Remainder is once executed. But if a Leaſe for Life be made, the Remainder in Tail to *A.* the Remainder in Tail to *B.* if *A.* dies without Iſſue in the Life of the Tenant for Life; if *B.* be driven to his *Formedon* in the Remainder, in his *Formedon* he ought to mention the Remainder to *A.* altho' it was determined and ſpent, as is aforeſaid. For the Demandant in the *Formedon* in the Remainder ought to make (*c*) mention of all the precedent Remainders in Tail, 8 *E.* 3. 19. *a. b.* 38 *E.* 3. 26. *a. b.* * 44 *E.* 3. 8. *a.* 50 *E.* 3. 1. *b.* 11 *H.* 4. 39. *a.* 18 *H.* 8. 4. *F. N. B.* 219. *Vide Regiſter* 239. *b.* & 243. *b.* & 244. *a. brevia nunquam faciunt mentionem de remanere quando breve eſt* in the Deſcender. 2. If a Man brings a *Formedon* in (*d*) Reverter or Remainder as Heir, the Omiſſion of the eldeſt Son who ſurvived the Father, or the like in the Pedigree, on the Part of the Donor, of him in the Remainder, ſhall abate the Writ; but of the Part of the Donee, altho' the Donee had many Iſſues in lineal Deſcent inheritable to the Eſtate Tail, and who held the Eſtate, the Demandant need not name any of the Iſſues in the Clauſe & *quæ poſt mortem*; but ſhall ſay, & *quæ poſt mortem* of the Donee *ad ipſum reverti debet, eo quod* the Donee died without Iſſue; and that for two Reaſons: 1. Becauſe the Demandant is a Stranger to the Pedigree of the Donee. 2. Becauſe if the Iſſue ſhall be ſuppoſed by the Writ to die without Iſſue, yet it may be that the Eſtate Tail is not ſpent, for the Iſſue may have Brothers, or Couſins, inheritable to the Donee, and the Land ought not to revert to the Donor ſo long as the Eſtate Tail continues. And in ſome old written *Regiſters* the Clauſe is, *eo quod* the Iſſue died without Iſſue. But the printed *Regiſter*, which imitates the moſt ancient and moſt true Precedents; & *quod poſt mortem* of the Donee *reverti debet, eo quod* the Donee died without Iſſue, and therewith agree 22 *Hen.* 6. 36. by the Juſtices, 4 *Eliz.* * *Dyer* 216. by the Juſtices, & 28 *Hen.* 8. *Dyer* 14, 16. *Vide* 18 *Edw.* 3. 42. 26 *Ed.* 3. 75. 25 *Ed.* 3. 44. 42 *Edw.* 3. 20. 44 *Edw.* 3. 40. 10 *Ed.*

(*b*) 1 Mod. Rep. 219, 220. Palm. 224. F. N. B. 219. a. b. d. Reg. Orig. 244. a.

(*c*) Hob. 282. * Fitz. Formed. 26, 28. Br. Formed. 14.

(*d*) F. N. B. 220. d. 18 E. 2. Fitz. Formed. 59. Carth. 128. Lucas 362.

* Dy. 216. pl. 56.

10 *Ed.* 3. 35 *Ed.* 3. *droit* 30, 47. 11 *Ed.* 2. *Formedon* 58, 59. *Regiſter* 239. *a. b.* 3. In a *Formedon* in the (*a*) Deſcender, the Demandant (becauſe he is Privy, and ought to know his Pedigree and Deſcent) ought to make mention of every one to whom any Right did deſcend; as after a Diſcontinuance made by the Father, if the elder Son ſurvived his Father, and died without Iſſue, yet the younger Brother ought to make mention of him in a *Formedon* in the Deſcent, otherwiſe, if the elder Brother died without Iſſue in the Life of the Father: *a fortiori* he ought to make mention of every Heir in Tail who held the Eſtate; that is, who was ſeiſed by Force of the Tail: But obſerve alſo therein a Difference; for if any of the Heirs in Tail ſurvive their Father, and hold the Eſtate Tail, he ought to be named in the Writ Son and Heir; but if he ſurvives, and dies before he was ſeiſed, he need not name him Heir, but may name him Son only, *Et quod poſt mortem præd' D. & E. filii ejuſdem D. & E. filii & hæredis præd' D. &c.* So is the Writ when the elder Son doth not enter, and when the younger Son enters and is ſeiſed. *Vide Regiſter* 238. *b. F. N. B.* 212. *f.* 10 *E.* 3. 49, 50. 44 *E.* 3. 21, 40. 4 *E.* 2. *Formedon* 48. 11 *E.* 2. *ibid.* 56. 46 *E.* 3. 9. 6 *E.* 3. 261. 8 *E.* 3. 379. 11 *H.* 4. 72. *b.*

(a) Cr. El. 842. Cr. Car. 435. Cr. Jac. 412. Hob. 51, 52, 282. F. N. B. 220. d.

(b) Hob. 51, 52. F. N. B. 212. b.

4. In a *Formedon* in the Deſcender, the Demandant (*b*) ought always to make himſelf Son and Heir, or Couſin and Heir to him who was laſt ſeiſed by Force of the Tail, for a later Seiſin of any Heir in Tail after ſhall abate the Writ. 2. He who was laſt ſeiſed ought to be made Heir in Tail to the Donee, or otherwiſe the Writ is vicious, and it is not ſufficient that he be named Son, for he may be Son and not Heir. But the ſureſt Way for the Demandant, is to make every one he names in the Writ to be Son and Heir in the Writ, altho' they were never ſeiſed by Force of the Tail; and it is not material, altho' he names them Heirs, whether they were ſeiſed or not, and thereby the Demandant will be certain to make himſelf Heir as well to the Donee *per formam doni*, as to him who was laſt ſeiſed. And therewith agree (*c*) 22 *H.* 6. 36. *a.* 8 *Hen.* 6. *Formedon* 4. 11 *H.* 6. 20. 8 *Ed.* 3. 11. 10 *Ed.* 3. 49. 27 *Ed.* 3. 81. 31 *Ed.* 3. 29. 48 *Ed.* 3. 7. 49 *Ed.* 3. 21. *Reg.* 238. *F. N. B.* 212. And note, in the *Formedon* in Deſcender there is the Clauſe, *Et quod poſt mortem, &c.* and then the Deſcent, and no Clauſe, *De eo quod, &c.* for that ſerves moſt convenient when the Eſtate Tail is ſpent, which ſerves well in a *Formedon* in the Reverter and Remainder, but not in Deſcender, unleſs in ſpecial Caſes. And ſo by theſe Differences, and the Reaſon

* F. N. B. 212. f.

(c) Br. Form. 37.

ſon of them, you will better underſtand your Books. Note in the Caſe at Bar, altho' the Heirs of the Body of *Catharine* claim the Remainder by Deſcent, yet foraſmuch as *Catharine* was never ſeiſed in Poſſeſſion of the Eſtate Tail, but only of the Remainder; for this Cauſe the Writ ſhall ſay, *remanere debet*, and not, *deſcendere debet*; for the Writ ſhall never ſay, that the Thing ought to deſcend to one as Son and Heir, if the Anceſtor was not ſeiſed, by the Rule in the *Regiſter*, 241. *a.* & *b.*

N FRAUN-

FRAUNCES's *Caſe.*

Mich. 7 Jacobi 1.

2 Brownl. 277.
3 Bulſtr. 327.
Cart. 1-2.
1 Rolls 430, 431.

IN a *Replevin* between *Richard Milner* Plaintiff, and *Tho. Fraunces* Defendant, which began *Mich.* 6 *Jacobi*, *Rot.* 2220. of his Cattle taken at *Bloxwich* in the County of *Staffordſhire*, in a Place called *Newland*, the Defendant did avow the taking of the Cattle in the Place where, which contained ſix Acres, *&c.* becauſe it was his Freehold, and ſo did avow for Damage feaſant*. The Plaintiff in Bar to the Avowry pleaded, That one *Richard Fraunces* was ſeiſed of the ſaid ſix Acres in Fee, and held them in Socage, and 7 *December* 45 *Eliz.* by his Will in Writing (whereof he made *Richard*, *Edward*, and *James* his Sons, his Executors) deviſed them to *John Fraunces* his eldeſt Son for the Term of ſixty Years, if the ſaid *John* ſhould ſo long live, the Remainder thereof to the ſaid *Thomas Fraunces* for his Life, the Remainder to the Heirs Males of the Body of the ſaid *John Fraunces*, the Remainder to the Heirs Males of the Body of the ſaid *Tho.* with divers Remainders in Tail to his other Sons, the Remainder to the right Heirs of the Deviſor: And afterwards, 30 *Jan.* next follow. the Deviſor died, by which *John Fraunces* entred into the ſaid ſix Acres, and was thereof poſſeſſed, and 25 *Martii*, 5 *Jac.* demiſed the ſaid ſix Acres to the Plaintiff for one Year next enſuing, wherefore he put in his ſaid Cattle, *&c.* In Anſwer to the Bar of the Avowry the ſaid *Tho. Fraunces* ſaid,

* 6 Mod. 158.

That the ſaid *Richard Fraunces* the Father was ſo ſeiſed, *&c.* and made his Will, as in the Bar to the Avowry is alledged. And further, That the ſaid *Richard Fraunces* the Father was ſeiſed in Fee of twenty Acres of Paſture in *Tibbington*, and of a Houſe and five Acres of Land in *Dorlaſton* in the ſaid County, and alſo of the ſaid ſix Acres, in which, *&c.* And the ſaid *Richard* the Father, after the making of the ſaid Will, 8 *Jan.* 45 *Eliz.* by his Deed of all the ſaid Lands, did enfeoff *Richard Fraunces* his Son, and *John Alport*, and their Heirs, to the Uſes and Intents following, *ſcil.* to the Uſe of *Richard Fraunces* the Father for his Life; and after his Death, of the Lands in *Tibbington*, to the Uſe of the ſaid *Thomas Fraunces* and his Heirs; and of the Lands in *Dorlaſton*, to the Uſe of the ſaid *James Fraunces*, his Heirs and Aſſigns; and of the ſaid Lands in *Bloxwich*, in which, *&c.* to the Uſe of the ſaid *John Fraunces* for ſixty Years after the Death of the ſaid Deviſor, if the ſaid *John* ſo long ſhould live; and after to the Uſe of the ſaid *Thomas* for Life; and after to the Heirs Males of the Body of the ſaid *John*; and afterwards to the Heirs Males of the Body of the ſaid *Thomas*, with divers other Remainders in Tail to his other Sons; the Remainder to the right Heirs of the Feoffor, with this Proviſo in the Deed: *Et ulteriu' per Script' præd' (a) proviſum fuit, quod ſi præd' Johan' Fraunces diſturbaret eund' Thomam Fraunces, vel præd' Jacobum Fraunces vel Hæred' vel Aſſign' eorum, vel alicuj' eorum, &c. Sic quod non poterint quiete habere, tenere & gaudere talia Terras, Tenementa & Hæreditamenta, qualia ipſe idem Richardus Fraunces pater conveiaſſet eis & cuilibet vel alicui eorum, vel aliquam partem & parcellum hujuſmodi terrarum tenementorum & hæreditamentorum, vel ſi præd' Johan' Fraunces, Executores, Adm'ores ſive Aſſign' ſui, &c. non permitter' Executores ipſi' Rich' Fraunces vel eorum Aſſign' quiete habere, removere, capere & aſportare omnia & quælibet bona & catalla ipſi' Rich' Fraunces Patris quæ eſſent & remanerent in tunc ſua domo menſionali, &c. vel facerent aliquam rem ad impedendum vel deteriorandum Intentionem ipſi' Richardi Fraunces Patris concernen' eadem in ejus ultima voluntate & Teſtamento expreſſa, quod tunc præd' uſus limitat' præfato Johanni Fraunces & hæredib' ſuis ceſſarent & penitus vacui eſſent ad omnes Intentiones:* And afterwards, 30 *Jan.* 45 *Eliz.* *Richard* the Father died, and the ſaid *John* entred into the ſaid ſix Acres, and was thereof poſſeſſed, the Remainder over as aforeſaid; and that the ſaid *Richard* the Father, at the Time of the ſaid Feoffment, did dwell in a Houſe in *Bloxwich* aforeſ. which is the Meſſuage mention'd in the ſaid Proviſo. And that the ſaid *Rich.* the Father was poſſeſſed of a Bedſtead, a Table-board, and a Cup-board, as of his proper Goods, and died thereof poſſeſſed in the ſaid Houſe;

(a) Co. Lit. 203. b. 2 Brownl. 277. Cart. 172. Cr. Car. 129. 1 Rolls 430, 431.

after whoſe Death the ſaid *John* entred into the ſaid Houſe where the ſaid Goods were, and took them, and was thereof poſſeſſed; and the ſaid Executors, 12 *Feb.* 45 *El.* came to the ſaid Houſe, and there then would have taken and carried away the ſaid Goods, and requeſted the ſaid *John*, *ad permittendum ipſos bona & catalla præd' capere & aſportare, prædict'* Johan' Fraunces *adtunc & ib' non permiſit ipſos Execut' capere & aſportare bona & catalla præd' ſecund' formam & effectum præd' ſcripti Feoffamenti, ſed idem* Johan' *ne ipſi bona & catalla præd' in eod' meſſuagio, ut præfertur exiſtent' caperent vel aſportarent penitus prohibuit & impedivit*; by which the ſaid Term of ſixty Years limited to the ſaid *John* ceaſed; whereupon the ſaid *Thomas*, as in his Remainder, enter'd, and was thereof ſeiſed for Life, *&c.* Upon which the Plaint. demurr'd in Law. And it was objected on the Plaint. Part, That the ſaid Proviſo was utterly void to ceaſe the Uſe limited by the ſaid Deed to the ſaid *John*, for nothing by the ſame Deed is limited to him but for 60 Years, for inaſmuch as he took but a Leaſe for Years, the Remainder limited to his Heirs Males of his Body, after the Death of *Tho.* did not veſt in him, but remain'd in contingency: Otherwiſe if *John* had taken an Eſtate for Life, and the Proviſo made void the Uſe and Uſes limited to the ſaid *J. Fraunces* and his Heirs, where no ſuch Uſe was limited to him; and theref. the Proviſo void: And Proviſoes and Condit. which go in Deſtruction and Defeazance of Eſtates are odious in Law, and ſhall be taken ſtrictly, and ſhall not be conſtrued to make void any other Uſe or Eſtate, which is not within the Words of the Proviſo; for, (*a*) *Conditio beneficialis quæ ſtat' conſtruit, benigne ſecund' verbor' intentio' eſt interpretanda, odioſa autem quæ ſtatum deſtruit, ſtricte ſecund' verbor' proprietatem eſt accipienda:* As if a Feoffm. be made on ſuch (*b*) Condition that the Feoffee ſhall give the Land to the Feoffor, and to the Wife of the Feoffor, and to the Heirs of their two Bodies begotten, the Remaind. to the right Heirs of the Feoffor, if the Huſband dies, living the Wife, the Feoffee by the Law ought to make the Eſtate to the Wife, &c. as near the Condit. and alſo as near the Intent of the Condit. as he can make it (as *Littleton* holds, *lib.* 3. *cap. Condition, fol.* 82.) *ſcil.* to demiſe to the Wife for Term of her Life, without (*c*) Impeachment of Waſte, and after her Deceaſe to the right Heirs of her Huſband and her begotten, the Remainder to the right Heirs of her Huſband: So *Littleton* ſaith there, If the Huſband and Wife die before the Deed made, *&c.* And therewith agrees the Book in (*d*) 2 *H.* 4. 5. by all the Juſtices, although it was ſaid, (*e*) 18 *Aſſ. pl. ult.* & 19 *E.* 3. *Entre congeable* 39. are contrary: But when Conditions enure in Deſtruction of Eſtates, then they ſhall be taken ſtrict; as if a Man makes a Feoffment in Fee of certain Lands, upon Condition that

(*a*) Co. Lit. 218. a.

(*b*) Lit. 82. a. b. Co. Lit. 218. b. 219. a. b. Lit. Sect. 352.

(*c*) 11 Co. 82. b. 83. a. 2 Co. 23. a. 72. a. 82. a. 4 Co. 63. a. 1 Rolls Rep. 182. Moor 18, 327. 2 Inſt. 146. Hob. 132. Poph. 193, 194, 195. Latch. 269, 270. Bridg. 192. Dyer 47. pl. 11. Plowd. 332. b. Cr. Jac. 216. Co. Lit. 219. b. 220. a.

(*d*) 1 Co. 137. b. Br. Condition 33. 2 H. 4. 5. b. Fitz. Condition 5.

11 Co. 83. b. 2 Co. 81. a. b. 1 Jones 181. (*e*) 18 Aſſ. 18. 2 Co. 80. a. 81. a. Br. Condition 105. Poſtea 91. a. Co. Lit. 222. a. b. 6 Co. 74. a. 1 Roll. 438.

that the Feoffee ſhall not give the Land to Huſband and Wife, and to the Heirs of their two Bodies begotten, if the Huſb. dies without Iſſue, and the Feoffee makes a Leaſe for Life to the Wife, without Impeachment of Waſte, *&c. ut ſupra*, it is no Breach of the Condition, for it is taken ſtrict, becauſe it extends to the Deſtruction of the Feoffment. So in the Caſe at Bar, foraſmuch as the ſaid Proviſo extends to the Deſtruction of a former Uſe and Eſtate, it ſhall be taken ſtrictly, and ſhall not deſtroy another Uſe by Conſtruction, than that only to which in Words it extends. To which it was anſwered and reſolved by the whole Court, That it is true, that Conditions or Proviſoes which will deſtroy former Eſtates, ſhall be taken (*a*) ſtrictly; but in this Caſe the Words of the Proviſo were ſufficient to ceaſe the Uſe limiten to *John* for Years, and the Uſe limited to the Heirs Males of his Body; for the Words of the Proviſo are *quod tunc præd' uſus limitati præfato Johan' Fraunces & Hæredib' ſuis ceſſarent*, and therefore, if it be aſked what Uſes ſhall ceaſe? The Proviſo will anſwer, *prædicti Uſus:* If it be further aſked, To whom are *prædicti Uſus* limited? The Proviſo will anſwer, To the ſaid *John*, and to his Heirs. And if it be further aſked, What Uſe expreſſed before in the Indenture is limited to *John*? The Deed will anſwer, To *John* for ſixty Years. And What Uſe beforementioned in the Indenture to his Heirs? The Deed will anſwer, A Remainder to the Heirs Males of his Body: So theſe Words (*prædicti Uſus*) by Reference to the Uſes before expreſſed in the ſame Deed, make the Words of the Proviſo to be ſufficient to ceaſe the Uſe before limited to the ſaid *John*, and the ſaid Uſe before limited to his Heirs to ceaſe: And it is all one to ſay *prædicti Uſus* before limited to his Heirs, and to ſay the Uſes before limited *prædictis Hæredibus:* In both which Caſes this Word (*prædicti*) has as ſtrong a Reference, as if the Uſes before limited had been particularly recited in the Proviſo; and *verba accipienda ſunt cum effectu.* But note Reader, the ſaid Books in (*b*) 18 *Aſſ. pl. ult.* & 19 *E.* 3. *Entr. Cong.* 39. are not contrary to *Littleton*, & (*c*) 2 *H.* 4. in the Caſe aforeſaid, but are ruled upon another reaſon, *& hæc ſunt diverſa, & non adverſa*, as it appears in the ſecond Part of my *Reports*, in the Lord *Cromwell*'s Caſe, *fol.* 80. *a.* where the ſaid Caſes are very well and at large explained; and therefore the outward ſemblance of Diſcord between our Books, in this and other Caſes, doth ariſe from the Ignorance of the inward underſtanding of the ſaid Caſes, and of the true Reaſon and Rule of them; for, for the moſt Part, every particular Caſe is adjudged upon a particular Reaſon. 2. It was reſolved, That denial by Parol is not (*d*) any Breach of the Condit. but there ought to be ſome Act done; as aft. Requeſt made by the Execut. to (*e*) ſhut the Door aga. them, or to lay his Hands upon them, and to have reſiſted them, or ſuch like

(*a*) Co. Lit. 205. b. 218. a. 219. b.

(*b*) 18 Aſſ. 18. Antea 90. b. 2 Co. 80. a. 81. a. 6 Co. 74. a. Co. Lit. 222. a. b. Br. Condition 105. 1 Rolls 438.

(*c*) 2 H. 4. 5. b. 1 Co. 137. b. Br. Condition 33. Fitz. Condit. 5. 11 Co. 83. b. 2 Co. 81. a. b. 1 Jones 181. Antea 90. b.

(*d*) 9 Co. 51. a. 1 Rolls 430, 438. 1 Anderſon 137. 16 E. 4. 10. b. 11 a. 1 Jones 169. 2 Brownl. 277.

(*e*) 1 Rolls 430, 431. Cr. Jac. 679. Cr. El. 219. Cr. Jac. 679. Cr. El. 694. 1 Leon. 230.

like Acts, ſo that by Reaſon of ſome ſuch Act, he would not ſuffer them to take or carry away the ſaid Goods, according to the ſaid Proviſo. And *Coke* C. J. held, That in ſuch Caſe it is not ſufficient to ſay, *quod præd' Johan' non (a) permiſit præd' Extores, &c. quietate habere, remov' & cap' præd' bona*, or that *præd' Johan' imped' illos, &c.* but he ought to alledge a *ſpecial Breach*, by Reaſon of ſome ſpecial Diſtur. or Interr. in ſuch Caſe by ſome Act, to which the other Party may have a certain Anſwer, and upon which a certain Iſſue may be taken, of which the Jury may inquire, and the Court may judge if it be a ſufficient Breach of the Proviſo, or not; and he cited the Book in 10 *E.* 3. 40. *Roger Fannell's* Caſe, in an Aſſiſe brought by *John* againſt *Rog. Fannell* of 20 Acres of Land, and upon *nul tort* pleaded, the Aſſiſe found this ſpecial Matter, That *Rog. Fannell* leaſed by Deed to *John* the Plaint. a Houſe and the 20 Acres of Land for 12 Years, and in Surety of his Term made him a Charter of Feoff. (*b*) upon ſuch Condition, That if the Leſſee was diſturbed within the Term, that he could not have the Tenem. till the End of the Term, that he ſhould hold the Tenem. to him and his Heirs for ever: And further ſaid, That *John* was diſturbed of the Tenem. by which he was ſeiſed by the Manner, and prayed the Opinion of the Court, and this finding was inſufficient for three Cauſes. 1. Becauſe the Recognitors have found a Diſturbance, and have not found by whom the Diſturbance was made; for if the Diſturbance was made by a Stranger, without the Aſſent or Procurement of the Leſſor, the Leſſor ſhall not loſe his Inheritance. 2. They have not found how the Diſturbance was made, but generally, that the Leſſee was diſturbed; ſo that the Court cannot judge that it was a Diſturbance to make the Leſſor loſe his Inheritance. 3. Whether and how Livery and Seiſin were made, *&c.* and therefore it appears in the Book, that *Shard* aſked the Recognitors, 1. By whom he was diſturbed? 2. How he was diſturbed? 3. If Livery was made on both Charters? To the 1ſt they anſwered, By the Leſſor. To the 2d, By the Sale, *ſc.* by Feoffm. in Fee. To the 3d, On both. And thereupon *John* recover'd *quod nota*, a very good Caſe to this Purpoſe. And he cited alſo the Caſe in 35 *H.* 6. *Barr.* 162, (*c*) the Maſter of St. *Catharine's* leaſed three Houſes to one by Indenture, on Condit. that he ſhould not permit or harbour any lewd Woman within the ſaid Houſes, if he be warned thereof by the Maſter, or his Servant, and if *he did not turn her out within ſix Weeks* after Warning by the Maſter or his Serv. that then the Maſter and his Succeſſors ſhould re-enter: And it was ſhewed, that the Leſſee did ſuffer ſuch a lewd Wom. to dwell there, wherefore ſuch a Servant of the Maſter gave Warning to him, (*that he ſhould turn her out*); and he would not, but ſuffered the ſaid Woman to continue there by the Space of ſix Weeks, wherefore the ſaid Maſter ouſted him, *&c.* To which the Leſſee ſaid,

(a) 2 Ventr. 139. 6 Mod. 150.

(b) Co. Lit. 217. a. Plowd. 34. a. 135. a. b. Fitz. Aſſ. 161. Br. Condit. 101. 10 Aſſ. 15. Plowd. 482. b. 10 E. 3. 39. b. 40. a.

(c) 2 Brownl. 277. Godb. 70. Moor 404. Owen 66. Co. Lit. 206. b. 1 Rol. 454. Orig. (ſi el demurr. la.)

Orig. (que il ne luy ſuffer a demurr. la.)

ſaid, That after the ſaid Warning given, the Maſter commanded the ſaid lewd Woman to be in one of the ſaid Houſes, and to continue there for ſix Weeks after; without that, that ſhe was continued there by the ſaid Plaintiff: And it was held by the whole Court, that that Replicat. was not good, becauſe the Indent. is, *Quod non permittat* any lewd Woman to continue there: As if I am (*a*) bound to you, to enfeoff you of one Acre of Land before ſuch a Day, within which Time you diſſeiſe me, that is not to the Purpoſe, for you had no Colour to enter upon me, and I may re-enter and make the Feoffm. So in the ſame Caſe, that Maſter had no Colour to put the lewd Wom. into Poſſeſſion; for which Cauſe the Leſſee might well put her out. So it is no Plea, without (*b*) ſpecial Matter ſhewed: Wherefore the Leſſee ſaid, That the Maſter ouſted him, and with Force, and againſt the Will of the Leſſee, put her in Poſſeſſion, and made her continue there with Force, againſt the Leſſee's Will, for ſix Weeks, *&c.* and that was held a good Plea. And ſo it is in the Caſe of the Feoffm. before, ſuch ſpecial pleading is good, *ſc.* that he diſſeiſed him, and kept it with Force, ſo that he could not Enter: And theſe are the Words, Word for Word of the ſaid Caſe: *a fortiori* in the Caſe at Bar, the ſaid Prohibi. by Words, without an Act done by which the Executors cannot take the Goods, is no Breach of the Proviſo. 3. It was reſolved, That altho' the Defendant in the Caſe at Bar had particularly ſhewed a ſpecial Act of Diſturb. againſt the Words of the Proviſo, That yet the ſaid *John* ſhould not loſe his Term; for none ſhall loſe any Eſtate, or Intereſt which he lawfully has, without ſome Act or Default in himſelf; and therefore in this Caſe, foraſmuch as *John* the eldeſt Son was a Stranger to this Feoffment he ſhall not loſe his Eſtate, without (*c*) Notice given him of the Proviſo, and of the Will of his Father. (*d*) *Qd' noſtrum eſt ſine facto ſive defectu noſtro amitti ſeu ad alium transferri non poteſt.* And the Opinion of (*e*) *Popham*, C. J. in (*f*) *Mallorie*'s Caſe, in the fifth Part of my *Reports*, *f.* 113. That the (*g*) Feoffee of Land, or (*h*) Bargainee of a Reverſion by Deed indented and enrolled, ſhall not take advantage of a Condition for Non-payment of Rent reſerved on a Leaſe, on demand by them, without (*i*) Notice thereof given to the Leſſee; nor ſhall the Leſſor, by acceptance of Rent, diſpence with a collateral Condition, broke by the Leſſee, without Notice given to the Leſſor, as it is adjudg'd in *Penant*'s Caſe in the third Part of my *Reports*, 64. *a. b.* and the Judgm. *Hill.* 1 *Jac.* in Treſp. betw. *Beconſhaw* Plaintiff and *Southcote* and others Defendants, in this Court, that if the Eſtate of the Lord of the Manor ceaſes by Limitation of an Uſe, and the Uſe and Eſtate thereof are transferred to another who demands the Rent of a Copyholder, who denies to pay it him, it is no Forfeiture, without Notice given the Copyholder of the Alteration of the Uſe and Eſtate: And another

(*a*) Cr. El. 694. 374. Moor 404. Owen 65, 66. Co. Lit. 206. b. 1 Rolls 453.

(*b*) Cr. Jac. 679. Cro. El. 374.

(*c*) 1 Mod. Rep. 87. Palm. 164. 2 Bulſt. 144, 277. 1 Jones 390. Cart. 93, 172. Winch. 116, 118. 3 Keb. 19. Matt. Par. f. 246. 3 Mod. 28, 29.

(*d*) Cro. Argument. 19.

(*e*) Cr. Jac. 193.

(*f*) Cart. 93. 172. Cr. Jac. 617 Mod. Rep. 87. Palm. 209, 210. Godb. 162. Bridgman 130. 5 Co. 113. a. b.

(*g*) Co. Lit. 215. b. Cr. Jac. 392. 5 Co. 113. a. b.

(*h*) Co. Lit. 215. b. Cr. Jac. 392, 476. 2 Rolls Rep. 143. 5 Co. 113. b. Poph. 165. Latch. 15. Palm. 434. 3 Keb. 19.

(*i*) Mod. Rep. 88. Palm. 434. Moor 426, 456. Cr. El. 553, 572, 528. 2 And. 90, 91. Hard. 48. Doct. pl. 189.

(*k*) Co. Lit. 594.

another Judgment in this Court, That the Bargainee of a Manor by Deed indented and enrolled, ſhall not take Advantage of a Forfeiture of (*a*) a Copyholder for denial of Payment of Rent to him, without Notice given him of the Bargain and Sale, were all affirmed for good Law by the whole Court. And this agrees with the Reaſon of *Barrough*'s Caſe, *Mich.* 18 & 19 *El. Dy.* (*b*) 354. *a.* where Uſes were limited by Fine under this Proviſo, *That if* B. *at any Time during his Life*, &c. *do pay, or cauſe to be paid to the ſaid* A. 20 *l. at the Fontſtone within the Cathedral Church of* Sarum, *that then*, &c. *the Conuſees in the ſaid Fine, and their Heirs, ſhould ſtand ſeiſed to the Uſe of* B. *and his Heirs.* And it was reſolved by *Wray*, *Dyer*, and *Manwood*, that Tender of the 20 *l.* at the Place, according to the Proviſo, in the Abſence of *A.* and no Notice of the Time of the Tender before given by *B.* to *A.* is not good in Law to make the firſt Uſes ceaſe, for the incertainty of Time during the Life of *B.* and therefore in ſuch Caſe Notice of the Time of the Tender ought to be given, altho' he to whom the Payment ſhould be made was Party to the Conveyance; but in ſuch Caſe, when *B.* will make a Tender, he ought to give Notice to *A.* that he will at ſuch Time make the Tender to him, and require him to be there to receive it; and then if he, at the Time appointed makes a Tender, altho' *A.* abſents himſelf, it is a good Performance of the Proviſo to make the Uſes ceaſe. But if a Man binds himſelf in a Bond to perform the Award of *J. S.* and *J. S.* makes an Award, the Obligor ought to take (*c*) Notice thereof at his Peril, for he has bound himſelf thereto; and in ſuch Caſe no Notice is requiſite to be given him, as it is held in (*d*) 1 *H.* 7. *f.* 5. *a. b.* A Man was bound in a Bond, on Condition that if he ſhould accompt before an Auditor by the Obligee to be aſſigned, when he ſhould be by him required, of certain Receipts of the Manor of *D.* and ſhould pay him the Arrearages that ſhould be found on his Accompt before the ſaid Auditor; that then the Obligat. ſhould be void: In Debt on that Bond, the Defendant pleaded, That the Plaintiff did aſſign him ſuch an Auditor, before whom he accompted, and that he has been always ready to pay the Arrearages found before the Auditor, if the ſaid Auditor had given him Notice; and it was held by the whole Court, in (*e*) 18 *E.* 4. 18. *a.* & 24. *a.* that the Plea was inſufficient, for inaſmuch as he has bound himſelf thereto, he has taken upon him to take Notice at his Peril; and there *Brian*, *Vavaſor*, and *Catesby* Juſtices agreed, That in the ſaid Caſe of Arbitrament, the Obligor ought to take Notice at his Peril, and ſo they ſaid it was adjudg'd in the ſame King's Time in the King's Bench; and ſo is the Law without Queſtion, againſt a ſudden Opinion in (*f*) 8 *E.* 4. 1. *a.* So *nota* a good Difference, when a Man binds himſelf to do or perform any Thing to be awarded, *&c.* by a Stranger,

(*a*) Co. Lit. 59. a.

(*b*) 3 Bulſtr. 326. 1 Mod. Rep. 88. Cart. 93. Palm. 434. Dyer 354. pl. 32. Cr. El. 299. 13 Co. 2. 2 Keb. 816. 2 Bulſtr. 143. 1 Rolls 449. 3 Keb. 19. Cr. El. 298. Co. Lit. 211. a.

(*c*) Cr. Car. 133. 4 Co. 82. b. 2 Bulſtr. 144. Cr. El. 97. Owen 7. Cr. Jac. 391.

(*d*) Br. Condit. 124. 4 Co. 82. b. March. Arbitr. 191.

(*e*) Br. Det. 169. Br. Notice 13. Cr. Jac. 391. March. Arbitr. 191.

(*f*) Cr. Jac. 146. Br. Notice 12. 18. Fitz. Arbit. 15. Br. Arb. 15. Br. Arb. 37. March. Arb. 190. 4 Co. 82. b. Hutt. 81.

ger, he thereby takes upon himſelf to take Notice at his Peril of all Things incident thereunto for the ſaving of his own Bond; but, as appears in the Principal Caſe, and in the other Caſe beforeſaid, the Law will not compel one to take (*a*) Notice of Acts done between Strangers, or of any Incertainty on Pain of Forfeiture of his Eſtate, or Intereſt; but in ſuch Caſe Notice ought to be given them who are to have the Loſs. 4. It was reſolved, That altho' now it (*b*) appears, that the Title by which the Plaintiff claims in his Bar to the Avowry was utterly deſtroyed, (for the Plaintiff claims by the Will of *Rich. Fraunces* the Father, which Will as appears was afterwards countermanded by the ſaid Feoffment, which the Avowant after pleads, and which the Plaintiff confeſſes by his Demurrer) yet the Plaintiff ſhall have Judgment, becauſe his Count is good, and the Avowant in the Replication to the Bar of his Avowry has done two Things; One, he has deſtroyed the Title which the Plaintiff made by the Will; the other, he has given the Plaintiff another Title, *ſcil.* to have the Land for ſixty Years, *&c.* by Force of the Uſes declared on the Feoffment. So that upon the (*c*) whole Record it appears (upon which the Court ought to judge) that the Plaintiff has a lawful Term in the Land; and that the Defendant has taken his Cattle wrongfully, and therefore Judgment ought to be given againſt the Avowant, and for the Plaintiff, altho' the Title which he made for himſelf was deſtroyed. And Judgment was entred accordingly. [See *Skinner* 181.]

(*a*) Cr. Jac. 146. Cr. Car. 577. Winch. 118. 1 Mod. Rep. 87.

(*b*) Wing. Max. 238. 7 Co. 25. a. Poſtea 120. b. 3 Co. 52. b. 11 Co. 85. b. Hob. 14.

(*c*) Winch. 75.

EDWARD

EDWARD FOX's *Caſe*.

Hill. 7 Jac. I.

2 Brownl. 291. Hard. 49. Lit. Rep. 279. Skinner 316.

IN a Writ of *Second Deliverance* by *Eliz. Smalman* Widow, and *Tho. Powys* Defendant, which began in *Communi Banco*, 7 *Jac. Rott.* 1546. the Defendant demurr'd on the Bar to the Avowry; and on the Record the Caſe was ſuch, *Edward Fox* ſeiſed of four Acres of Meadow, fifty Acres of Paſture, and ten Acres of Underwood, in *Snitton* in the County of *Salop*, *Anno* 31 *Eliz.* demiſed them to *Gilb. Smalman*, and to the ſaid *Elizabeth* his then Wife, and to *Thomas Smalman*, *Habendum* to *Gilbert* and *Elizabeth* for their Lives, the Remainder to the ſaid *Thomas* for his Life, yielding during their Lives, the yearly Rent of four Marks, at the Feaſts of the Annunciation of our Lady, and St. *Michael* the Archangel, by equal Portions; and afterwards the ſaid *Gilbert Smalman* died; after whoſe Death, *Scilicet* 20 *Sept. Anno* 3 *Regis Jacobi*, the ſaid *Edward Fox* by Indenture, for the Conſideration of 50 *l. præd'* by the ſaid *Thomas Powys* to the ſaid *Edward Fox* paid, * demiſed, ‡ granted, ſet, and to farm let to the ſaid *Tho. Powys* the ſaid Tenements aforeſaid; To have and to hold to the ſaid *Thomas Powys* from the Day of the Date of the ſaid Indenture, for the Term of ninety-nine Years, yielding and paying therefore during the ſaid Term, to the ſaid *Edw. Fox* and his Heirs, the yearly Rent of 40 *s.* at the Feaſts of the Annunciation of our Lady, and St. *Michael* the Archangel, or within twenty-eight Days after every of the ſaid Feaſts, and that the ſaid *Eliz.* did never Attorn. And the only Point in this Caſe was, Whether the ſaid Demiſe and Grant to *T. Powys* ſhould amount to a Bargain and Sale, ſo that the Reverſ. with the Rent ſhould paſs to *T. Powys* by the Stat. of Uſes without any (*a*) Attornm. And it was adjudg. that this

* 1 Mod. Rep. 87.
‡ 1 Roll Rep. 73.

(*a*) Cr. E. 166.

this Demiſe and Grant upon Conſideration of 50 *l.* amounts to a (*a*) Bargain and Sale for the ſaid Years; for in Caſe when a Freehold or Inheritance ſhall paſs by Deed indented and inrolled, it need not have the preciſe Words of Bargain and Sale, but Words (*b*) equipolent, or which do *tantamount* are ſufficient; as if a Man (*c*) covenants in Conſideration of Money to ſtand ſeiſed to the Uſe of his Son in Fee; if the Deed be enrolled, it is a good Bargain and Sale, and yet there are not any Words of Bargain and Sale, but they amount to ſo much, as it is held in *Bedel*'s Caſe, in the Seventh Part of my *Reports*, 40. *b.* So if a Man for Money (*d*) aliens and grants Land to one and his Heirs, or in Tail, or for Life, by Deed indented and enrolled, it amounts to a Bargain and Sale, and the Land ſhall paſs without any Livery and Seiſin. And at the Common Law before the Statute of (*e*) 27 *H.* 8. of Uſes, If a Man for Money had aliened and granted Lands to one and his Heirs, *&c.* by that the Uſe of the Land ſhould paſs, for it is a full Bargain, and all this was unanimouſly agreed; but foraſmuch as the (*f*) Intention of the Parties is the Creation of Uſes, (*g*) if by any Clauſe in the Deed it appears, that the Intent of the Parties was to paſs it in Poſſeſſion by the Common Law, there no Uſe ſhall be raiſed; and therefore if any Letter of (*h*) Attorney be in the Deed or Covenant to make Livery of the Lands, according to the Form and Effect of the Deed, or other ſuch like, there it ſhall not paſs by Way of Uſe; *quia, verba intentioni non econtra debent inſervire; & verba debent intelligi, ut aliquid operentur.* But in the Caſe at Bar, the Intent of the Grantor may be well collected, that he did intend that the Grant ſhould take effect preſently, and ſhould not depend upon any ſubſequent Attornment; for the Rent reſerved thereupon was payable preſently; and therefore it will be reaſonable, that *Tho. Powys* the Leſſee ſhould have the Rent reſerved on the firſt Leaſe for Lives preſently; and that he cannot have before Attornment (which peradventure will never be made) and *eo potius* becauſe the ſaid *Tho. Powys* has no Means to compel the firſt Leſſees to attorn; but if it ſhall paſs as a Bargain and Sale, it ſhall be preſently executed by the Stat. of 27 *Hen.* 8. for there needs no (*i*) Inrollment in this Caſe, becauſe but a Term for Years paſſes, and no Eſtate of Freehold, and there needs no (*k*) Attornment, becauſe it is executed by the Statute. And by this Conſtruction every one will have Remedy for that which he ought to have. *Vide Sir* Rowland (*l*) Heyward's *Caſe, in the Second Part of my Reports, fol.* 35. *b.*

(*a*) 1 Mod. Rep. 177. 1 Vent. 138. 2 Ventr. 318. 1 Roll. Rep. 73. 2 Brownl. 291, 292. 2 Inſt. 672. 1 Jones 206. 1 Siderf. 26.
(*b*) 2 Inſt. 672. 2 Ventr. 318.
(*c*) 2 Brownl. 291, 292. 2 Inſt. 672. 1 Ventr. 138. 2 Ventr. 318.
7 Co. 39. b. 11 Co. 24. b. 25. a. Cro. El. 394. Cart. 138, 146. Palm. 214, 215. Jenk. Cent. 289.
(*d*) 2 Inſt. 272.
(*e*) 27 H. 8. c. 10.
(*f*) Co. Lit. 49. a. 2 Inſt. 272. 1 Co. 100. a.
(*g*) 2 Inſt. 272.
(*h*) 2 Brownl. 291. 2 Inſt. 272. 2 Roll. 787. Co. Lit. 49. a.
(*i*) 2 Co. 36. a. 2 Roll. Rep. 204. 2 Inſt. 671. 2 Brownl. 292.
(*k*) 2 Co. 36. a. 6 Co. 68. b. 69. a. 2 Brownl. 291, 292.
(*l*) 1 Brown. 142. 2 Brownl. 292. 1 Jones 206.

2 Roll. 787. Hob. 159. Poph. 95. 2 Anderſ. 202, 203. 2 Inſt. 671, 672. Yelv. 123, 124. 1 Mod. Rep. 176.

MATTHEW

MATTHEW MANNING'S *Caſe.*

Trin. 7 Jacobi I.

Skinner 545. Co. Ent. 149. b. Num. 29. Swinb. 334, 335.

IN Debt for 200 Marks by *William Clark* Plaintiff, and *Matthew Manning* Adminiſtrator of *Edward Manning* deceaſed, upon *plene adminiſtravit* pleaded, the Jury gave a ſpecial Verdict to the Effect following, which Plea began *Mich.* 4 *Jacobi*, *Rott.* 1829. *Edward Manning* the Inteſtate, *Anno* 30 *Eliz.* was poſſeſſed of the Moiety of a Mill in *Clifton*, in the County of *Oxford*, for the Term of fifty Years, of the clear yearly Value of 40 *l.* and afterwards the ſaid *Edw. Manning*, 30 *Eliz.* made his Will in Writing, and thereby deviſed his Indenture and Leaſe of the Farm and Mill in *Clifton*, and all the Years therein to come to *Matthew Manning* after the Death of *Mary Manning* my Wife, (which Farm and Mill my Will is, that *Mary Manning* my Wife ſhall enjoy during her Life) conditionally, that the ſaid *Matthew* ſhall not demiſe, ſell, or give the ſaid Leaſe, but to leave it wholly to *John* his Son, *&c. In the mean time my Will and Meaning is, That* Mary Manning *my Wife ſhall have the Uſe and Occupation both of the Farm and Mill*, &c. *during her natural Life: Yielding and paying therefore yearly to the ſaid* Mat. Manning, &c. *during her natural Life ſeven Pounds at the Feaſts of St.* Michael *the Archangel, and the Annunciation of our Lady*, and made *Mary* his Wife his ſole Executrix, and died; *Mary* took upon her the Charge of the Will, and had not ſufficient to pay the Debts of the ſaid *Ed. Manning* above the ſaid Term; but ſhe entred into the ſaid Farm and Mill, and paid to *Mat. Manning* the yearly Sum of 7 *l.* according to the ſaid Will; and (*a*) ſaid, That if ſhe died, the ſaid *Mat. Manning* ſhould have the Farm and Mill aforeſaid; and afterwards the ſaid *Mary*, 16 Years after the Death of her Huſbband died inteſtate, after whoſe Death the ſaid *Mat. Manning* entred into the ſaid Farm and

(*a*) 2 Brownl. 353.

and Mill, and was thereof poſſeſſed *pront Lex poſtulat*; and afterwards Adminiſtration of the Goods of the ſaid *Edw.* by the ſaid *Mary* not adminiſtred was committed to the ſaid *Matth.* and that none of the Profits of the ſaid Farm and Mill, which accrued in the Life of the ſaid *Mar.* came to the Hands of the ſaid *Mat.* beſides the ſaid 7 *l.* yearly as aforeſ. And the Doubt of the Jury was, If the Reſid. of the ſaid Term in the ſaid Farm and Mill ſhould be Aſſets in the Hands of the ſaid *Mat.* But I conceived on the Trial of the Iſſue at *Guild-hall* in *London*, That the Deviſe to *Matt.* was good, and that there was ſufficient * Aſſent to the Legacy, by the ſaid Paym. of the Rent of 7 *l.* But yet upon the Motion of the Plaintiff's Counſel, I was contented, that the whole ſpecial Matter ſhould be found as is aforeſ. And the Caſe was argued at the Bar, and at divers ſeveral Days debated at the Bench, and *prima facie Walmſley* Juſt. conceiv'd, That the Deviſe to *Matt. Manning* after the Death of the Wife was void, for the Wife having it deviſed to her during her Life, ſhe had the whole Term, and the Deviſor could not deviſe the (*a*) Poſſibility over, no more than a Man can do by Grant in his Life; for that which the Teſtator cannot do by no Advice of Counſel in his Life, (*b*) the Teſtator, who is intended to be *inops conſilii*, ſhall not do by his Will; but by Grant in his Life he could not grant the Land unto the Wife for her Life, the Remainder over to another, for by the Grant the Wife had the whole Term at leaſt if ſhe ſo long lived, and a Poſſibility cannot be limited by Way of Remainder; and altho' the later Opinions in the Caſe (where a Man poſſeſſed of a Leaſe for Years, deviſes it to one for Life, the Remainder to another) have been, that the Remainder was good; yet he ſaid that the old Opinion, which hath more Reaſon, as he conceived, was, that the Remainder in ſuch Caſe was void, 28 *H.* 7. (*c*) 7 *Dyer*, *Baldwyn* and *Shelley*, that the Remainder is void, *Engelfield* contrary. (*d*) 6 *E.* 6. 74. *acc.* by *Hales* and *Montague*: 2 *E.* 6. *Tit. Deviſe*, *Brook* 13. that the Remainder is void, for the Deviſe of a Chatt. for one Hour is good for ever. But *Coke* Ch. Juſt. *Warburton*, *Daniel*, and *Foſter* contrary, that the Deviſe was good to *Matt. Manning*; and five Points were by them reſolved. 1. That *Matt. Manning* took it not by Way of Remainder, but by Way of an (*e*) executory Deviſe, and one may (*f*) deviſe an Eſtate by his laſt Will in ſuch Manner, as he can't do by any Grant or Conveyance in his Life, as if a Man is ſeiſed of Lands in Fee held in Socage, and deviſes, that if *A.* pays ſuch a Sum to his Executors, that he ſhall have the Land to him and his Heirs, or in Tail, or for Life, *&c.* and dies, and afterw. *A.* pays the Mon. he ſhall have the Land by this executory Deviſe, and yet he could not have it by any Grant, or Conveyance executory at the Comm. Law; but it ſtands well with the Nature of a Deviſe; So in the Caſe at

* 1 Lev. 25.

(*a*) Cro. El. 9. 217. Cro. Jac. 198.

(*b*) 1 Co. 85. b.

(*c*) Dy. 7. pl. 8, 9. 1 Bulſtr. 191. 192. Mo. 758. Poſtea 97. a. Wentw. 334. Palm. 334.

(*d*) Dy. 74. pl. 18. 1 Bulſtr. 195.

(*e*) 2 Bulſtr. 28. 1 Jones 15. 1 Mod. Rep. 52, 115. Moor 635, 748, 758. 4 Co. 66. b. 2 Rol. Rep. 218, 220, 427. Cr. El. 796. Cr. Jac. 198, 460, 461. Cr. Car. 230. B. N. C. 209. 10 Co. 47. a. b. Swinb. 134, 135. 2 Brownl. 173. 33 H. 8. Br. Chat. 23. 1 Bulſtr. 191, 192, &c. 1 And. 122. c. 170.

(*f*) Swinb. 135. 2 Brownl. 309.

at Bar when the Wife dies it ſhall veſt in *Mat. Manning* as by an executory Deviſe, as if he had deviſed that after his Son has paid ſuch a Sum to his Executors, that he ſhall have his Term; or that after the Death of *A.* that *B.* ſhall have the Term; Or that after his Son ſhall return from beyond the Seas, or that *A.* dies, that he ſhall have it, in all theſe Caſes and other like, upon the Condition or Contingent performed, the Deviſe is good, and in the mean Time the Teſtator may diſpoſe of it, and therefore in Judgment of Law, (*a*) *ut res magis valeat*, the executory Deviſe ſhall precede, and the Diſpoſition of the Leaſe, till the Contingent happen, ſhall be ſubſequent, as in the Caſe at Bar it was, and ſo all ſhall well ſtand together; for when he made the executory Deviſe he had a lawful Power, and might well make it; and afterwards in the ſame Will he had lawful Power, and might well deviſe the Leaſe 'till the Contingent happen'd, and therefore it is as much, (*b*) as if the Teſtator had deviſed, that if his Wife died within the Term, that then *Mat. Manning* ſhould have the Reſidue of the Term; and farther deviſed it to his Wife for her Life. 2. The Caſe is more ſtrong, becauſe this Deviſe is but of a Chattel, whereof no *Præcipe* lies; and which may (*c*) veſt, and reveſt at the Pleaſure of the Deviſor, without any Prejudice to any. And therefore if a Man makes a Leaſe for Years, on Condition, that if he do not ſuch a Thing, the Leaſe ſhall be void, and afterwards he grants the Reverſion over, the Condition is broken, the Grantee ſhall take (*d*) Benefit of this Condition by the Common Law, for the Leaſe is thereby abſolutely void; but in ſuch Caſe, if the Leaſe had been for (*e*) Life, with ſuch Condition, the Grantee ſhould not take Benefit of the Breach of the Condition; for a Freehold (of which a *Præcipe* lies) cannot ſo eaſily ceaſe; but is voidable by Entry, after the Condition broken, which cannot by the Common Law be transferred to a Stranger; and therewith agrees (*f*) 11 *H.* 7. 17. *a.* & *Br. Conditions* 245. 2 *Mariæ*, by *Bromly* the ſame Difference. 3. There is no Difference when one deviſes his Term for Life, the Remainder over; and when a Man deviſes the Land, or his Leaſe, or Farm, or the Uſe (*g*) or Occupation, or Profits of his Land; for in a Will the Intent and Meaning of the Deviſor is to be obſerved, and the Law will make Conſtruction of the Words to ſatisfy his Intent, and to put them into ſuch Order and Courſe, that his Will ſhall take Effect. And always the (*h*) Intent of the Deviſor expreſſed in his Will, is the beſt Expoſitor, Director and Diſpoſer of his Words: And when a Man deviſes his Leaſe to one for Life, it is as much as to ſay, he ſhall have ſo many of the Years as he ſhall live, and that if he dies within the Term, that another ſhall have it for the Reſidue of the Years; and altho' at the Beginning it be uncertain how many Years he ſhall live, yet when he dies it is

(*a*) 1 Co. 76. a. 3 Keb. 288. 2 Jo. 69. 5 Co. 55. b. 2 Mod. Rep. 109.

(*b*) Swinb. 135.

(*c*) Swinb. 135.

(*d*) 3 Co. 64. b. 65. a. 10 Co. 48. b. Co. Lit. 214. b. 219. a Plowd. 135. b. 136. a. Cr. El. 649, 650. 1 Roll. 473, 474. 1 Leon. 61.

(*e*) 10 Co. 48. b. Co. Lit. 214. Plowd. 135. b.

(*f*) 3 Co. 65. a.

(*g*) 1 Bulſtr. 192. 2 Bulſtr. 28. March 106. Poſtea 96. b. Godb. 26. Swin. 135. Jenk. Cent. 264. 10 Co. 47. a. b. Plowd. 524. Cro. El. 190. Co. Lit. 4. b.

(*h*) Plow. 522, b. 523. a. Bridgm. 135. Co. Lit. 112. b. Cro. Car. 9.

is certain how many Years he has lived, and how many Years the other ſhall have it, and ſo by a ſubſequent Act all is made certain. 4. That, after the Executor has aſſented to the firſt Deviſe, it lies not in the Power of the firſt Deviſee to (*a*) bar him who has the future Deviſe, for he can't transfer more to another than he has himſelf. 5. In many Caſes a Man by his Will may create an Intereſt, which by Grant or Conveyance at the Common Law he cannot create in his Life; And therefore when Sir *Will.* (*b*) *Cordell* Maſter of the Rolls, deviſed his Manor of *Melford*, *&c.* in the County of *Suffolk*, to his Executors for the Paym. of his Debts, and until his Debts ſhould be paid, the Remainder to *Edward* his Brother, *&c.* and made *George Carey* and others his Executors, and died, and after his Death the Debts were paid; and his Wife demanded Dower, and one Queſtion amongſt others was mov'd, What Intereſt or Eſtate the Executors had? for if they had a Freehold, then the Wife ſhould not have Dower, and if they had but a Chattel determinable upon the Payment of the Debts, then ſhe ſhould be endowed; and this Caſe was referred to *Anderſon* Ch. Juſt. of the Common Pleas, and *Francis Gawdie* Juſt. of the King's Bench, before whom the Caſe was at ſeveral Days debated *Paſch.* 36 *Eliz.* and I was of Counſel with the Executors; And it was reſolv'd by them, that the (*c*) Executors had but a Chattel, and no Freehold, for if they ſhould have a Freehold for their Lives, then their Eſtate would determine by their Death, and not go to the Executors of the Executors, and ſo the Debts would remain unpaid; but the Law adjudges it a particular Intereſt in the Land, which ſhall go to the Executors of the Executors, as Aſſets for Payment of his Debts. But if ſuch Eſtate be made by Grant, or Conveyance at the Common Law, the Law will adjudge it an Eſtate of Freehold, and ſo a more favourable Interpretation is made of a Will in Point of Intereſt or Eſtate to ſatisfy the Will of the dead for the Payment of his Debts, than of a Grant or Conveyance in his Life; which he may enlarge, or make other Proviſion at his Pleaſure, And ſo was it reſolved in the Beginning of the Reign of Q. *Elizabeth*, that where a Man had Iſſue a Daughter, and deviſed his Lands to his Executors for the Payment of his Debts, and until his Debts were paid, and made his Executors and died, the Executors entred, the Daughter married, and had Iſſue and died, and after the Debts were paid, it was Reſolved in the Caſe of one *Guavarra*, that he ſhould be Tenant by the Courteſy, *Vide* 3 *H.* 7. 13. 27 *H.* 8. 5. 21 *Aſſ. p.* 8. 14 *H.* 8. 13.

Note Reader, it has been of late oftent. adjudg'd according to theſe Reſolutions, *ſc.* in *Weldon's* (*d*) Caſe, *Plow. Com' in Communi Banco.* In *Paramour's* (*e*) Caſe, *Plow. Com.* in the K's Bench, *Mich.* 26 & 27 *Eliz.* in a Writ of (*f*) Error in the K's Bench, on a Judgm. given in the Com. Pleas, the Caſe was ſuch, *Tho.*

(*a*) *Amner*

(*a*) 10 Co. 47. a. b. Dy. 74. pl. 18. 140. pl. 41. Cr. Jac. 460, 461. Moor 748. 2 Brownl. 173. Cro. Car. 293. 1 Bulſtr. 194. 3 Bulſtr. 123. 1 Roll. 620.

(*b*) Co. Lit. 42. a. Cro. El. 315, 316. 1 Jones 25. 1 Roll. 829, 830. Raym. 136, 137. 1 Sid. 224. 2 Bulſtr. 273. Aleyn 47.

(*c*) 1 Roll. 130. Co. Lit. 42. a. Aleyn 47. Cr. El. 315, 316.

(*d*) 2 Brownl. 309. Plowd. 516, 519. 2 Leon. 92. 3 Leon 89.

(*e*) 2 Brownl. 309. Plowd. 539, 540. 2 Leon. 92. 3 Leon. 89.

(*f*) 2 Leon. 92. 3 Leon. 89. Godb. 26. 1 And. 60. 1 Roll. 612.

(a) Jenk. Cent. 264. Moor 758. 1 Bulſtr. 192. 1 Roll. 612. 2 Leon. 92. 1 Leon. 82. Co. Lit. 351. a. Godb. 26. 1 And. 60, 61.

(a) *Amner* brought an *Ejectione firmæ* againſt *Nich. Loddington* on a Demiſe made by *Alice Fulleſhurſt* for ſeven Years of certain Houſes in *London*, and on Not guilty pleaded, the Jury gave a Spec. Verd. *Hugh Weldon* was ſeiſed of the ſaid Houſes in Fee, and 24 *H.* 8. demiſed them to *Tho. Perpoint* for 99 Years, who by his Will in Writing 1544. deviſed his ſaid Leaſe in theſe Words, *I deviſe my Leaſe to my Wife during her Life, and after her Death I will it go to her Children unpreferred*, and made his Wife his Executrix, and died, his Wife entred and was poſſeſſed *ratione doni & legationis*, and married with Sir *Tho. Fulleſhurſt*, and afterwards 2 & 3 *Phil. & Mar. Beſtwick* recover'd againſt Sir *Tho.* 140 *l.* Debt in the Common Pleas, and by Force of a *Fi. fa.* directed to *Altham* and *Mallory* Sheriffs of *Lond.* the ſaid * Term was ſold to *N. Loddington* the now Defend. and afterw. the Judgm. againſt the ſaid Sir *Tho. F.* was reverſed in a Writ of Error in the King's Bench, & *quod ad omnia que amiſit ratione judicii præd' reſtituatur*, and afterw. *Alice* the Wife and Executrix died, *Alice Fulleſhurſt* being then the only Daughter who was unpreferred, entred, and made the Leaſe to the Plaintiff *Tho. Amner*. And this Caſe was often argued at Bar by the Serjeants in the Common Pleas, and at laſt by the Judges, and in this Caſe three Points were by them reſolv'd. 1. That the ſaid (b) Executory Deviſe of the Leaſe after the Death of the Wife to the Daughter unpreferred, was good; and there is no Difference when the Term, or Leaſe, or Houſes, (c) and when the Uſe, or Occupation, &c. is deviſed, and that in all theſe Caſes the executory Deviſe is good. 2. That the Sale either by *Alice* the Wife, or by the Sheriff on the *Fieri facias*, after the Wife was poſſeſſed as Legatory, ſhould not (d) deſtroy the Executory Deviſe, altho' the Perſon to whom the executory Deviſe was made, was then uncertain, as long as *Alice* the Wife lived; for the ſaid *Alice* the Daughter might have been preferred in her Life, and then ſhe ſhould take nothing, ſo that ſuch Executory Deviſe which has Dependance on the firſt Deviſe may be made to a Perſon incertain, and this Poſſibility cannot be defeated by any Sale made by the firſt Deviſee, &c. 3. That the Sale by the Sheriff by Force of the *Fieri facias* (e) ſhould ſtand, altho' the Judgment was after reverſed, and the Plaintiff in the Writ of Error reſtored to the Value, for the Sheriff who made the Sale, had lawful Authority to ſell, and by the Sale the Vendee had an abſolute Property in the Term during the Life of *Alice* the Wife; and altho' the Judgment, which was the Warrant of the *Fieri facias*, be afterwards reverſed, yet the Sale which was a collateral Act done by the Sheriff, by Force of the *Fieri facias*, ſhall not be avoided; for the Judgment was, that the Plaintiff ſhould recover his Debt, and the *Fieri facias* is to levy it of the Defendant's Goods and Chattels, by Force of which the Sheriff ſold the Term which the Defendant

* Co. Lit. 351. a.

(b) 1 Roll. 612. 2 Leon. 92. 3 Leon. 92. Godb. 28. 1 And. 61, 62. Jenk. Cent. 264. Cro. El. 796.

(c) Antea 95. b. 1 Bulſtr. 192. 2 Bulſtr. 28. March 106. Godb. 26. Swinb. 135. 10 Co. 47. a. b. Plowd. 524. a. Cro. El. 190.

(d) 1 Roll. 937. 1 Bulſtr. 192. 2 Leon. 93. 1 And. 61, 62.

(e) Poſtea 143. a. 1 Roll. 778. Mo. 573. Dy. 363. pl. 24. Cr. El. 278. Cro. Jac. 246. 5 Co. 90. b. Jenk. Cent. 264. Yelv. 180. 2 Leon. 92. 3 Leon. 89, 90. Godb. 27, 28. Poſtea 143. a.

Defendant had in the Right of his Wife, as he (*a*) well might, and the Vendee pay'd Money to the Value of it. And if the Sale of the Term ſhould be avoided, the Vendee would loſe his Term, and his Money too, and thereupon great Inconvenience would follow, that none would buy of the Sheriff Goods or Chattels in ſuch Caſes, and ſo Execution of Judgments (which is the Life of the Law in ſuch Caſe) would not be done. And according to theſe Reſolutions Judgment was given in the Common Pleas for the Plaintiff, and in the King's Bench upon a Writ of Error the Caſe was often argued at the Bar before Sir *Criſtopher Wray*, and the Court there, and at length the Judgment was affirmed, and ſo the ſaid three Points were adjudged by both Courts: And by theſe latter Judgments you will better underſtand the Law in the Books, in which there are Variety of Opinions. 37 *H.* 6. 30. 33 *H.* 8. *Br. Tit. Chattels* 33. 2 *E.* 6. *Tit. Deviſe. Br.* 13. 28 *H.* 8. (*b*) *Dyer* 7. 10 *Eliz. Dyer* 277. *Plow. Com. in* Weldon's *and* Paramor's *Caſe*, &c. *Quia judicia poſteriora ſunt in lege fortiora.*

(*a*) Co. Lit. 351. a. Poſtea 171. a.

(*b*) Dy. 7. pl. 8, 9. Antea 95. a. 1 Bulſt. 191, 192. Moor 758. Wentw. 334. Palm. 334.

O BASPOLE's

BASPOLE's *Case.*

Hill. 7 Jacobi 1.

2 Brownl. 309, 310. Cr. Jac. 285, 286. 1 Bulſtr. 144, 145. See 1 Salk. 71. 6 Mod. 35.

William Freeman brought an Action of Debt on a Bond of 25 *l.* bearing Date 9 *Aprilis*, *An.* 6. *Jac.* againſt *John Baſpole*: The Defendant demanded Oyer of the Condition, which was, **That if the within bounden** John Baſpole, **&c. ſhall well and truly ſtand to, abide, fulfil and keep the Award, Arbitrament, Order, Rule, Judgment, and final Determination of** Francis Theobald, **Gent. indifferently named, elected and choſen, as well on the Part and Behalf of the ſaid** John Baſpole, **as of the ſaid** William Freeman, **for to order, judge, rule, and final Determination to make of all Matters, Suits, Debts, Duties, Actions and Demands whatſoever had, made, or depending between the ſaid** John **and** William **from the Beginning of the World until the Day of the Date hereof, ſo as the ſaid Award, Order, and final End be made and given up under the Hand and Seal of the ſaid** Francis Theobald, **to either of the ſaid Parties, at or before the Feaſt of St.** James the Apoſtle, **next enſuing, that then this preſent Obligation to be void**; and pleaded, That the Arbitrator *nullum fecit Arbitrium*, &c. *de & ſuper Præmiſſis in Conditione præd' ſpecificat'*: The Plaintiff replied, that the Arbitrator 25 *Junii*, *an.* 6. *Reg. nunc*, by his Writing made an Order and Award between the ſaid *William* and *John*, *de & ſuper Præmiſſis prædict' modo & forma ſequentibus*, viz. That whereas a Suit was depending between the ſaid *John Baſpole* and *William Freeman*, for a Debt due by *William Baſpole*, Father of the ſaid *John Baſpole*, deceaſed, to *Robert Freeman*, Father of the ſaid *William Freeman* deceaſed, which juſt Debt was 20 *l.* to be paid by 7 Years then paſt to the ſaid *Rob. Freeman*, and now due to *Will. Freeman*, as Adminiſtrator of his Father, which Debt the ſaid *J. Baſpole*, *pro bona conſideratione* promiſed

promiſed to pay to the ſaid *Will.* as upon good Proof appear'd to the Arbitrator; That the ſaid *J. Baſpole* ſhould pay to the ſaid *W. Freeman*, in Conſideration of the ſaid Debt long due, and for his great Coſts in that Part ſuſtain'd, the Sum of 22 *l.* and that after he requeſted the ſaid *J. Baſpole* to pay the ſaid Sum of 22 *l.* which he refuſed, *&c.* upon which the Defendant demurr'd in Law. And two Objections were made againſt this Arbitrament; 1. Becauſe the Arbitrament was made of (*a*) the one Part, and not of the other, as in 7 *H.* 6. 40. *b.* that one Party ſhould go quit of all Actions had by the other againſt him; and nothing is ſpoken of the Actions which he had againſt the other, and therefore void. 2. It doth not appear that this Matter of which he makes the Arbitrament, was the Matter only which was between them, for the Submiſſion is general of all Actions and Demands, (*b*) *ſo as the ſaid Award be*, &c. So that if he doth not make the Award of all Matters in Controverſy, the Award is void. To which it was anſwer'd and reſolv'd, That as to the firſt, the Award was ſufficient (*c*) and good; for here the Award is as well of the one Part as of the other, for the one receives Money, and the other is diſcharged of the Debt, and of his Promiſe to pay it, and is not like the ſaid Caſe of 7 *H.* 6. for there one would be diſcharged of the Actions, and the other would receive nothing in Satisfaction thereof, *Vide* (*d*) 22 *E.* 4. 25. *b.* As to the 2d Objection it was anſwer'd and reſolv'd, 1. That it appears by the Award, that it was made, (*e*) *de Præmiſſis præd' in conditione præd' ſpecificat'*, which Words imply, that he had made an Arbitrament of all that which was referr'd to him, and ſo ſhall it be intended 'till the contrary be ſhew'd and alledg'd by the other Party; for when the Submiſſion is general of all Actions, *&c.* (*f*) *generale nihil certi implicat*, and therefore it may well ſtand with the Generality of the Words, that there was but one Cauſe depending in Controverſy between 'em; but where the Submiſſion is of (*g*) certain Things in ſpecial, and with a Proviſo or Condition, that the Award be made, *de Præmiſſ'*, &c. or Words which tantamount, there the Arbitrator ought to make the Award of all, otherwiſe it is void. But if diverſe Things in ſpecial are ſubmitted (*h*) without ſuch conditional Concluſion, the Arbitrator may make the Award of any of them. And as it is of diverſe particular Things, ſo it is of diverſe particular Perſons. And therefore if two on the one Part, and one on the other Part ſubmit themſelves, the Arbitrator may make an Arbitrament between one of the two of the one Part, and the other of the other Part, and it will be good. 2. Altho' there were many Matters in Controverſy; yet if one only be (*i*) ſignified to the Arbitrator, he may make an Award of that, for the Arbitrator is in lieu of a Judge, and his Office is to determine *ſecund' allegata & probata*, and the Duty of the Parties who are grieved, and know their particular Griefs, is to ſignify their

(*a*) 1 Sand. 327. 1 Rol. Rep. 1. 270. Cro. Jac. 200, 286, 354, 355, 447, 448, 664. Cr. El. 904.
7 H. 6. 40, 41. a. Hob. 49. Fitz. Arbitrement 2. Br. Arbitrem. 17. Poph. 134.
1 Leon. 72, 73. 1 Roll. 253. Dy. 356. pl. 39.
(*b*) Cr. El. 838, 839, 858. 1 Cr. Jac. 200, 278, 285, 355, 578. Cr. Car. 216. March. Arbitre. 177. Noy 62.
1 Brownl. 58, 112. 2 Brownl. 309, 310. 1 Roll. 256, 257. 1 Roll. Rep. 437. 1 Bulſtr. 123. Aleyn 32. 1 Sand. 32, 33. 1 Sid. 252. Hutt. 9, 29. Yelv. 203. Hard. 45. 4 Leon. 94.
(*c*) Dyer 356. pl. 39. 1 Bulſtr. 145. Hob. 49. 1 Roll. 253. 1 Brownl. 58. March. Arbitre. 210. 2 Brownl. 310. Cro. Jac. 447, 448.
(*d*) 2 Rol. Rep. 1. 1 Bulſtr. 123.
(*e*) 1 Sid. 252. Hutt. 9. 1 Roll. Rep. 437. Hob. 191. Cr. El. 839, 858. Cr. Jac. 200, 278, 578, 664. Cr. Car. 216, 217.
(*f*) 2 Co. 33. b. 2 Roll. Rep. 360. 3 Keb. 414. 2 Sid. 36.
(*g*) Cr. El. 839. 858. Hob. 49. Hardr. 45. Dy. 242. pl. 52. March. Arbitre. 183, 184, 185. Cr. Jac. 200, 355. 4 Leon. 94.
(*h*) Cr. El. 839. Cr. Jac. 200, 355, 664. Hob. 49.
(*i*) Cr. Jac. 200. Hob. 49. March. Arbitrem. 180.

Cauſes of Controverſy to the Arbitrator, for they are privy to them, and the Arbitrator a Stranger, and each ought to do that which lies in his Knowledge; and if other Conſtruction ſhould be made, many Arbitraments might be avoided; for one might conceal a Treſpaſs committed, or other ſecret Cauſe of Action given him, and ſo avoid the Award, *Et expedit Reipublicæ* (a) *ut ſit finis Litium.* And this is like *Cullamor*'s Caſe on the * Statute of Bankrupts, in the Second Part of my *Reports*, *fol.* 25. & 26. *b.* which provides, that equal Diſtribution ſhall be made of the Bankrupt's Goods between all the (*b*) Creditors, but that is, (as it is there reſolv'd) to be intended of thoſe who will come in and ſignify their Debts. And hereby you will better underſtand your Books in 39 *H.* 6. 9. 22 *E.* 4. 25. 19 *H.* 6. 6. *b.* 2 *R.* 3. 18. 4 *Eliz. Dyer* 216. 8 *Eliz. Dyer* 242.

(a) 6 Co. 7. a. 9. a. 45. a. 8 Co. 37. b. 9 Co. 79. b. 11 Co. 69. a. 3 Bulſtr. 98. Godb. 242. Hard. 128. Co. Lit. 103. a.

* 13 El. cap. 7.

(*b*) Cr. Jac. 200. 2 Brownl. 210, 211. Hob. 287. Hutt. 37, 38.

Sir

Sir RICHARD LECHFORD'S *Caſe.*

Carthew 42, 43.

Hill. 7 Jac. 1.

IN an Ejectment in the King's Bench by *Thomas Undrell*, Plaintiff, and *Briſtow Elſey*, Defendant, on a Demiſe made by *Will. Copley*, 2 *N. Anno* 2 *Jac. Reg.* of a Houſe, and 20 Acres of Land, *&c.* in *Lee* in the County of *Surry*, for the Term of one Year; the Defendant pleaded, that *R. Lechford*, Knt. was ſeiſed of the Tenements in which, *&c.* in his Demeſne as of Fee, and leaſed them to the Defendant for his Life, and that *Will. Copley* diſſeiſed him, and made the Leaſe to the Plaintiff, and that the Defendant re-enter'd, *&c.* and the Plaintiff reply'd and ſaid, that the Tenements in which, *&c.* are, *& a tempore cujus*, &c. were Parcel of the Manor of *Sherwood* in *Lee* aforeſaid, whereof *Henry Lechford*, Eſq; was ſeiſed, and that the ſaid Tenements in which, *&c.* are, *& a tempore cujus*, &c. were demiſed and demiſeable, *&c.* by Copy of Court-Roll, *&c.* And that the ſaid *Henry Lechford* at the Court of his Manor, *Anno* 2 *Eliz.* granted the ſaid Tenements to *Tho. Copley*, Father of the ſaid *William Copley*, to have and to hold to him and his Heirs, by Copy of Court Roll, *&c.* And afterwards the ſaid *Thomas Copley* dy'd ſeiſed thereof of ſuch Eſtate, which deſcended to the ſaid *William Copley* his Son and Heir, the Leſſor, *&c.* the Eſtate of the ſaid *Henry Lechford* in the ſaid Manor the ſaid Sir *Rich. Lechford*, Kt. now has, who entred upon the Poſſeſſion of the ſaid *William Copley* the Son, and ouſted him of the Tenements, in which, *&c.* and demiſed them to *Briſtow Elſey*, as is aforeſaid, upon whom the ſaid *William Copley* re-enter'd and demiſed them to the Plaintiff, *&c.* To which the Defendants rejoin'd and confeſs'd, that the Tenements in which, *&c.* were Parcel of the Manor, and demiſed and demiſeable, *&c.* and the Grant by Copy made to

Cr. Jac. 226, 227.

the ſaid *Thomas Copley*, and the Deſcent to *William Copley*, *prout*, &c. But further he ſaid, That within the ſaid Manor there is, *& a tempore cujus*, &c. was ſuch a Cuſtom, That if any cuſtomary Tenant of the ſaid Manor dies ſeiſed of any Lands, or Tenements, held by Copy, *&c.* in Fee-ſimple, *&c.* that every Heir of ſuch Tenant ſo dying ſeiſed, ſhall pay a (*a*) Cr. Jac. 226. reaſonable (*a*) Fine for his Admittance to be in full Court of the ſaid Manor by the Lord or his Steward impoſed and aſſeſſed; and further within the ſaid Manor there is another Cuſtom *a tempore cujus*, &c. That if any Copyhold Tenant, ſeiſed of any Lands or Tenements held by Copy, *&c.* of the ſaid Manor in Fee-ſimple dies thereof ſeiſed, and his Heir doth not come at the next Court of the ſaid Manor, and claim the ſaid Tenements, and pray to be admit- (*b*) Cr. Jac. 226. ted to them, *&c.* then a (*b*) publick Proclamation ſhall be made in full Court that the ſaid Heir come at the ſame Court to claim the ſame Lands, and to pray to be admitted, and ſo at two other Courts following of the ſaid Manor, the like Proclamation ſhall be made; and if ſuch Heir at any of the ſaid Courts in which Proclamation ſhall be ſo made, comes not to claim the ſaid Tenements, and pray to be admitted to them, then the Lord of the Manor has always uſed and accuſtomed to ſeiſe them into his Hands, as forfeited to him; and pleaded, that three Proclamations were made at three ſeveral Courts, *&c.* according to the Cuſtom; and the ſaid *William Copley*, Son and Heir of the ſaid *Thomas* Ante 44, *&c.* *Copley*, came not to any of them to claim the ſame Lands, and pray to be admitted to them; wherefore the ſaid Sir *Richard Lechford* then and yet Lord of the ſaid Manor, ſei- (*c*) Co. Lit. 59. a. Bridgm. 52. ſed the Tenements aforeſaid, in which, *&c.* as (*c*) forfeited to him, and leaſed them to the Defendant, as aforeſaid. To which the Plaintiff ſaid, That the ſaid *Thomas Copley*, *primo Julii*, 27 *Eliz.* dy'd, as is aforeſaid, ſeiſed of the ſaid Tenements, after whoſe Death the Tenements aforeſaid, in (*d*) Carth. 74. which, *&c.* (*d*) deſcended to the ſaid *Will. Copley*, as aforeſaid; and that at the Time of the Death of the ſaid *Thomas Copley*, and at the Time of the ſaid ſeveral Proclamations, the ſaid *Will. Copley* was Reſident at *Bruxels* beyond the Seas, *extra quatuor maria, & ibi per totum tempus remanebat*, and there for all the ſaid Time remained 'till the firſt Day of *September*, *Anno* 1 *Jac. Reg.* which Day he returned from *Bruxels* aforeſaid, into *England*; and that immediately after his Return to *Lee* aforeſaid, then having Notice, and not before, of the Death of the ſaid *Thomas Copley*, the ſaid *William* 30 *Sept.* 1 *Jac.* came to the ſaid Sir *Richard Lechford*, then Lord of the ſaid Manor, and prayed to be admitted to the Tenements aforeſaid, in which, *&c.* and offer'd the ſaid Lord any reaſonable Fine for his Admittance to them, which the ſaid Lord utterly refuſed, *&c.* Upon which the Defendant demurred in Law; and it was adjudged,

that this Custom and Non-Claim * should not bar him, who was beyond Sea *(extra maria)* at the Time of the Proclamations made, of his Inheritance; because he who is out of the Realm could not have *(a)* Knowledge by Intendment of Law of the Death of his Father, nor of the Proclamations made, to warn him to come to claim his Inheritance, and pray to be admitted to it. And it appears by the Statute *de modo levandi fines*, made *(b)* 18 *E.* 1. That a Fine levied of Lands in the Common Pleas, is as high a Bar, and of as great Force, and of so high Nature in itself, that it bars not only those who are Parties and Privies to the Fine and their Heirs, but all other People of the World who are of full Age, out of Prison, of good Memory, and within the four Seas the Day of the Fine levied, if they do not make their Claim within the Year and Day, *&c.* And it appears also by the Statute *de Donis Conditionalibus*, made *(c)* 13 *E.* 1. upon which it was concluded, That if the Sublimity of a Fine, which is so high a Bar, and of so great Force, and of so puissant a Nature, and which hath such Solemnity in so high a Court of Record, shall not bar him who is out of the Realm of his Right; *a fortiori* Proclamations made in a base Court in a private Corner, shall not bar him. So Judgment final in a Writ of *(d)* Right in the Common Pleas shall bind all Strangers, if they make not their Claim within the Year and Day after the Judgment and Execution; and yet the Common Law excepts Infants, those who are out of the Realm, or are imprisoned, *&c.* and therewith agree 5 *E.* 3. 222. and 7 *E.* 3. 335. that the Year and Day shall be accounted after the *(e)* Execution, for by the Transmutation of the Possession, the Country has Notice of it. *Vide* 4 *E.* 3. 46. *&* 11 *R.* 2. *Escheat* 13. *Plow. Com.* 356. And the Reason why a Recovery in a Writ of Right where the Trial was by Battle or Grand Assise, was final to all Strangers, is, for the grand Notice that Men have of Battle, and of the Trial by Grand Assise, their Proceedings and Performance are with so notorious, famous, and publick Solemnities, and if such Recovery with such Solemnities should not bar him who was out of the Realm, nor Infants, nor a Man *non sanæ memoriæ*, nor a Man in Prison; *a fortiori* Custom and Proclamations in a private Court of a Manor shall not bind them. And the Law in these Cases was grounded upon great Reason; for he who is out of the Realm, in another Country, can't by Intendment of Law have Notice of Things done within this Realm; an Infant has not Understanding, nor can know his Right either to follow it by Entry, or Action; so of a Man *non sanæ memor'* who wants Reas. and Sense to make a Claim; so of him who is impris. who by Judgm. of Law ought to be in *salv' (f) & arct' Custod' sc. Salv'* as to the Party at whose Suit he

* Cr. Jac. 226.

(a) Cr. Jac. 226.

(b) 2 Inst. 510, 511.

(c) Co. Lit. 260. a. 2 Inst. 331, 332, 333.

(d) Co. Lit. 254. b. 5 Co. 107. b.

(e) 1 Co. 96. b. 97. a. Plowd. 337. b.

(f) 3 Co. 44. a. Hard. 30. 2 Inst. 381.

[Dalt. Sher. 147. Cr. Car. 466. 1 Rolls 807. 3 Inst. 35. Co. Lit. 260. a. 9 Co. 87. b.

he is impriſon'd, becauſe he ought to be impriſon'd ſo ſtrong that he may not eſcape; and *arcta*, in Reſpect he ought to be kept cloſe, without Conference with others, or (*a*) Intelligence of Things abroad; and he ought not to go out of the Priſon to make his Claim. And that is the Reaſon that a Recovery (*b*) by Default againſt him in a real Action ſhall not bind him, but he ſhall reverſe it by Error, as it appears in 5 *Ed.* 3. 50. *b.* 4 *Ed.* 2. *Diſceit* 51. *Lit.* 102. *b. Nota*, Reader, that a (*c*) Feme Covert is not mention'd in any of the ſaid Acts, but was bound at Com. Law by Non-claim, becauſe ſhe had a Huſb. who might make it, and that was one of the Reaſons that the Stat. of 34 *Ed.* 3. *c.* 16. ouſted Non-claim: but the Stat. of 4 *H.* 7. *c.* 24. excepts (*d*) Feme Coverts who are Strangers to the Fine, ſo that ſhe makes her Claim within five Years after the Death of her Huſb. And at the Com. Law, Men out of the (*e*) Realm, Infants, Men *non ſanæ memoriæ*, and in Priſon, who were not bound to make Claim within the Year and Day, were perpetually for them and their Heirs exempted from making Claim. And therefore it was reſolv'd, That the ſaid Cuſtom in the Caſe at Bar is ſo to be intended, that it ſhall bind him who doth not make his Claim, *&c.* if he be within the Realm, * of full Age, of perfect Memory, and out of Priſon; for no Cuſtom by the Law can extend to bar thoſe, who by Judgment of Law are not bound to make Claim. But it was reſolved, that if *Will. Copley* had been within the Realm at the Time of the firſt Proclamation, and afterwards (*f*) gone out of the Realm, that the Proclamation ſhould bind him, altho' he be *extra quatu' maria*, at the Time of the other Proclamations, for he ſhall not defeat the Lord of his Fine or Forfeiture by his own Act. *Vid.* 9 *H.* 7. 24. *a.* and the Reaſon of *Litt. lib.* 3. *fol.* 104. *a.* was well obſerv'd, who having put the Caſe of Non-claim of him who is out of the Realm that it ſhall not hurt him in the Caſe of Fine, he ſaith as follows, by greater Reaſon, *&c.* (*g*) That a Diſſeiſin and a Deſcent, which is Matter in Fact, ſhall not ſo much grieve him who is ſo diſſeiſed when he was out of the Realm at the Time of the Diſſeiſin, and alſo at the Time that the Diſſeiſor died ſeiſed, but that he may well enter notwithſtanding the Deſcent; upon which two Things were collected. 1. That as at the Common Law, If a Man was within the Realm at the Time of the Fine levied, and within the Year went bey. the Seas he ſhould be bound: So if a Man be diſſeis'd, and afterw. goes bey. the Seas, a Deſc. caſt afterw. ſhall toll the Entry, as appe. alſo by *Litt.* 103. *b.* (*h*) The 2d Thing is, That if he who is out of the Realm ſhall not be bound by Non-claim on a Fine, which is a Matter of Record, *a fortiori* he ſhall not be bound by Non-cl. on a Deſc. which is a Matt. in *Pais.* (*i*) If a Man be diſſeiſed and afterwards is impriſoned, and afterwards a Deſcent is caſt, it ſhall toll his Entry, and therewith agrees 9 *H.* 7. 24. *a.* And (*k*) ſome ſay in this Caſe, that if a Man be ſeiſed of Land, and has Iſſue two Sons, Baſtard eigne and Mulier puiſne, and the Fath. dies ſeiſed, the Mulier being beyond

(*a*) 9 Co. 87. b. Co. Lit. 259. a. Plowd. 360. a.
(*b*) Lit. Sect. 438. Co. Lit. 259. b. Lit. 102. b. 7 H. 6. 38. a. b. Fitz. Default 1. Br. Default 33. Plowd. 360. a.
(*c*) Hob. 95. Plowd. 360. a. Co. Lit. 262. b.
(*d*) 9 Co. 140. b.
(*e*) 1 Roll. 567. Plowd. 360. a. Hob. 95.
* 3 Mod. 221. &c. 1 Show. 31, 83. Salk. 386. Comb. 118. Lutw. 765.
(*f*) Cr. Jac. 101.
(*g*) Co. Lit. 262. b. Lit. Sect. 441.
(*h*) Co. Lit. Sect. 440.
(*i*) Lit. Sect. 437.
(*k*) Plowd. 372 a.

beyond Sea, or within Age, or impriſon'd, or *non ſane memoriæ*, and the Baſtard eigne enters, and continues in peaceable Poſſeſſion of the Lands, and has Iſſue, and dies, and the Lands deſcend to his Iſſue, the Right of the Mulier in all the ſaid Caſes is bound for ever; and ſome hold the contrary. 2. It was reſolved, That foraſmuch as *Will. Copley* was out of the Realm at the Time of the Death of his Father, altho' he was not in the King's Service, yet he ſhall not be (*a*) barred by the ſaid Cuſtom and Proclamations, becauſe he could not by Intendment of Law have Notice; and at the Common Law he ſhould not be barred by Non-claim on a Fine, or Writ of Right, *Bract. lib.* 5. *tract. de Exception' cap.* 29. *fol.* 436. (*b*) *Excuſatur quis quod clameum non appoſuerit, ut ſi in toto tempore litigii fuit ultra mare quacunq; occaſione: Littl. acc. fol.* 103. *a. Vide* 9 *H.* 4. 3. *a.* 26 *H.* 6. *Error* 27. 33 *H.* 6. 1. 1 *Aſſ. p.* 2. 21 *H.* 6. 24. 2 *E.* 3. *Coron.* 153. *The Preamble of the Statutes of* 26 *H.* 8. *cap.* 13. *&* 5 *&* 6 *E.* 6. *cap.* 11. Note, Reader, as to thoſe Caſes which have been put of Baſtard eigne and Mulier puiſne, I conceive that the better Opinion is, That in ſuch Caſes the (*c*) Mulier ſhall be barred for ever; and the Reaſon is, becauſe the Continuance in Poſſeſſion, and dying ſeiſed in Peace, and Deſcent to his Iſſue makes him Heir, and his Iſſue ſhall inherit as Heir, becauſe he was legitimate by the Law of Holy Church; for (as *Bracton, lib.* 2. *fol.* 63. ſaith) (*d*) *Matrimonium ſubſequens legitimos facit quoad ſacerdotim* (becauſe they are legitimate by the Canon Law) *non* (*e*) *quoad ſucceſſionem, propt' conſuetudinem regni quæ ſe habet in contrarium.* And by the Law of *England* by the Continuance in Poſſeſſion, and dying ſeiſed in Peace and Deſcent, *&c.* he is adjudged (*f*) Heir to his Father, for altho' the Baſtard dies ſeiſed without Iſſue, ſo that the Land doth not deſcend, the Mulier ſhall have it; and therewith agrees *Abridgm. Aſſiſ. fol.* 3. and the Rule in 13 *E.* 1. *Baſtardy* 28. is ſo to be intended, (*g*) *Juſtum non eſt aliquem antenatum mortuum facere Baſtardum, qui toto tempore ſuo, pro legitimo habeat'. Vide* 39 *E.* 3. 14. *&* 39 *Aſſ. p.* 10. And in the Caſe of Legitimation (which is in Law ſo precious and of ſo great Eſtimation) the Law doth not reſpect Infancy, or other Defects in the Mulier, but prefers Legitimation of Blood before any Benefit of temporal Inheritance, and therefore the Law ſaith, That by the Death of the Baſtard eigne in Peace, he becomes right Heir, and by Conſequence the Mulier is barred. *Vide* 5 *E.* 2. *Br. Deſcent* 49. * 31 *Aſſ. p.* 18. *&* 22. *John Alleyn's* Caſe; *&* 33 *E.* 3. *Verdict* 48. the ſame Caſe. * 36 *Aſſ. p.* 2. *Plowd. Com. Stowel's* Caſe. *Vide* 10 *E.* 3. 2. the dying ſeiſed of the Baſtard eigne binds the (*h*) Right, and the Deſcent not only takes away the Entry, but the Right alſo; and therefore a Deſcent in that Caſe may be a Bar to the Right, when it ſhall not take away the Entry in Caſe of Diſſeiſin, as a Deſcent of (*i*) Services, Rent, Reverſion expectant on an Eſtate-tail, *&c.* ſhall

(*a*) Cr. Jac. 226. Palm. 533.

(*b*) Co. Lit. 260. b. 261. a.

(*c*) Co. Lit. 244. a.

(*d*) Co. Lit. 245. a.

(*e*) Co. Lit. 245. a.

(*f*) Co. Lit. 244. a.

(*g*) Co. Lit. 244. a.

* Plowd. 372. a. Br. Age 37. Br. Diſcent 26. Br. entre congeable 68.

* Plowd. 372. a. Fitz. Baſtard. 17. Br. Diſcent 29. Br. Ent. congeable 75.

(*h*) Co. Lit. 244. a. Plowd. 372. a.

(*i*) Co. Lit. 244. a.

(a) Co.Lit. 15. a. 244. a. ſhall bar (*a*) the Right of the Mul. as appears in (14) 18 *E.* 2. *Baſt.* 26. but ſuch Deſcent ſhall not take away the Entry or Claim of the Diſſeiſee; and ſo in many other Caſes, as appears by the Books afterwards cited in this Caſe. And if a Man has (b) Co.Lit.244.a. two (*b*) Daughters, Baſtard eigne, and Mulier puiſne, and they enter and occupy as Heirs, now the Law in Favour of Legitimation will not adjudge the whole Poſſeſſion in the Mulier, who then had the ſole Right, but in both: So that if the (c) Co.Lit. 244.a. (*c*) Baſtard dies ſeiſed, her Iſſue ſhall inherit; and therewith agrees 17 *E.* 3. 59. abridg'd by *Fitz.* Tit. *Baſt.* 32. And if in the ſame Caſe the Daughters, *ſcil.* the Baſtard eigne and Mulier (d) Co. Lit. 37d. b. 244. b. puiſne enter, and make (*d*) Partition, this Partition ſhall bind the Mulier for ever, 2 *E.* 2. *Baſt.* 19. 21 *E.* 3. 34. *b.* 30 *Aſſ. p.* 7. but if Partition be made betwixt two Daughters, where one has no Colour, as to a ſpecial Eſtate-tail, there the Partition is void, 11 *Aſſ. p.* 23. *Hugh de Wimondham's* Caſe. And an Aſ- (e) Co.Lit.244.b. 2 Inſt. 97. ſiſe of (*e*) *Mortdanceſter* doth not lie betwixt the Mulier and the Baſtard eigne, no more than betwixt two Brothers; and therewith agrees *Britton*, *c.* 70. and if the Baſtard eigne enters, and is ſeiſed of Lands as Heir, he ſhall be vouched as Heir, (f) Br. Voucher 154. Co. Lit. 244. b. 2 Rolls 749. 21 E. 3. 46. a. 5 H. 7. 2. a. and if he be within Age the Parol ſhall demur, 20 *Ed.* 3. *Voucher* 129. And if a Man has Iſſue Baſtard eigne and Mulier puiſne, and dies, and the Baſtard within Age enters and is impleaded, he ſhall have (*g*) Age; and therewith agrees the Book in 11 (g) Co. Lit. 244. b. 7 Rolls 145. *E.* 3. *Age* 3. Which Caſes prove, That when the Baſtard * Co. Lit. 244. a. eigne enters into the Lands, until he be interruped, he is accounted Heir, altho' the Mulier be within Age, for when the Baſtard eigne is within Age, of Neceſſity the Mulier puiſne alſo ought to be within Age. *Vide* 5 *H.* 7. 2. And if a Man has Iſſue Baſtard eigne and Mulier puiſne, and the Baſtard has Iſſue, and dies, in the Life of his Father, and afterwards the Father dies, and the Iſſue of the Baſtard enters and dies without Interruption; ſome ſay it ſhall bar the Mulier. So if a Baſtard born before Marriage enters, and has Iſſue, and dies ſeiſed, it (h) Co.Lit. 244.a. ſhall bar (*h*) the collateral Heir, and the Lord by Eſcheat, as well as the Mulier puiſne: So if the Baſtard eigne enters and dies ſeiſed, his Wife with Child with a Son, and afterwards the Son is born, he ſhall inherit the Land, for inaſmuch as his Father died in Poſſeſſion without Interruption, the Mulier ſhall not alledge againſt the Iſſue Baſtardy in his Father who is dead. And if the Baſtard eigne dies ſeiſed, and his (i) Co.Lit. 244.a. Iſſue (*i*) endows the Wife of the Baſtard; yet the Mulier ſhall not enter upon the Tenant in Dower, for the Right of the Mulier was barred by the dying ſeiſed and the Deſcent: Otherwiſe it is of a Deſcent which tolls Entry only, and not the Right. The ſame Law in the Caſe aforeſaid, if the Wife of the Father of the Baſtard eigne and Mulier puiſne be endowed, yet the Iſſue of the Baſtard ſhall have the Reverſion of it, *Cauſa qua ſupra Vide* 10 *E.* 3. *Waſte* 142. 20 *H.* 3. *Baſt.* 29. 2 *Aſſ. p.* 9. 14 *E.* 2. *Baſt.* 26. 13 *E.* 1.

13 *E.* 1. *Baſtardy* 28. 32 *E.* 1. *Baſtardy* 31. 39 *E.* 3. *The laſt Caſe.* 39 *Aſſ. p.* 2. 6 *E.* 3. 54. Abridg. tit. *Faux Recov.* 2. 10 *E.* 3. 2. *Plow. Com. Talbois's* Caſe 57. and *Stowell's* Caſe 373, 374. Note, Reader, the Reaſon why the younger Son who is born during the Marriage of a lawful Wife is called Mulier puiſne, *ſeu Filius Mulieratus*, is, becauſe this Word (*a*) (*Mulier*) in *Latin* has three Significations. 1. *Sub nomine Mulieris continetur quælibet Fœmina.* 2. *Proprie continetur Mulier quæ Virgo non eſt.* 3. *Appellatione Mulieris in Legibus Angliæ continetur Uxor.* (*b*) So that, *Filius natus ex juſta Uxore appellatur in Legibus Angliæ, Filius mulieratur*; (*c*) *ſicut Baſtardus dicitur a Græco vocabulo, Baſſaris*, i. e. *Meretrix, ſeu Concubina, quia procreatur ex Meretrice ſive Concubina.* And therewith agrees *Glanvil.* l. 7. c. 1. *Quod ſi verum eſt*, &c. *tunc melioris conditionis eſt in hoc baſtardus Filius quam mulieratus*, &c. where he makes an Oppoſition of a Son Mulier, to a Baſtard Son, and there Mulier is taken for Legitimate, *procreat' de Uxore, & Baſtardus ex Meretrice ſive Concubina.* And therewith agrees *Britton, cap.* 70. of *Mortdanceſter, fol.* 81. *b.* where he ſaith, in the ſame Manner, of two Brothers of divers Mothers, and between a Brother Mulier and a Brother Baſtard, *&c.* And ſo the Books in 32 *E.* 1. *Baſtardy* 31. 6 *E.* 2. *Baſtardy* 24. 39 *E.* 3. 14. 39 *Aſſ. p.* 10. 44 *E.* 3. 12, &c. *Littleton ubi ſupra*, &c.

(*a*) Co.Lit.243.b.

(*b*) Co.Lit.243.b.

(*c*) Co.Lit.243.b.

JOHN

JOHN TALBOT's *Caſe.*

Trin. 7 Jac. 1. Rot. 3661.

In the King's Bench.

Narr. in ſecond Deliverance.

Salop, ſſ. JOHN *Pendleton* was attached by the Writ of the Lady the Queen of ſecond Deliverance, to anſwer to *John Chapman*, of a Plea, wherefore he took the Cattle of him the ſaid *John Chapman*, and them unjuſtly detained againſt Gages and Pledges, *&c.* And whereupon the ſaid *John Chapman* by *Tho. Salter* his Attorney complaineth, That the aforeſaid *J. Pendleton* the 2d Day of *Sept.* in the 6th Year of the Reign of the Lord the now King, at *Albrighton*, in a certain Place there called *Bromley* in the County aforeſaid, took his Cattle, that is to ſay, two Bullocks, and them unjuſtly detained againſt Gages and Pledges, until, *&c.* whereupon he ſaith that he is the worſe, and hath Damage to the Value of 20*l.* and hereof he bringeth Suit, *&c.* And the aforeſaid *J. Pendleton*, by *Nich. Gibbens* his Attorney, cometh and defendeth the Force and Injury when, *&c.* and as Bailiff of *J. Talbot*, Eſq; doth well avow the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* and juſtly, *&c.* becauſe he ſaith, That the Place in which it is ſuppoſed the aforeſaid taking was done, doth contain, and at the Time of the taking thereof above ſuppoſed to be done, did contain in itſelf three Acres of Paſture, lying in the aforeſaid Field called *Bromley* in *Albrighton* aforeſaid, and that long before the taking of the Cattle aforeſaid ſuppoſed to be done, one *John Chapman*, Father of the now Plaintiff, was ſeiſed of the aforeſaid three Acres of Paſture, with the Appurtenances, in which, *&c.* in his Demeſn as of Fee, and the ſaid three Acres of Paſture with the Appurtenances, in which, *&c.* held of the aforeſaid *John*, as of his Manor of *Albrighton* in the County aforeſaid, by Fealty and Service of doing Suit at the Court of the ſaid *J. Talbot* of his Manor aforeſaid, from

Plea.

from three Weeks to three Weeks, at that Manor to be holden, as alſo by the Service of Rendring after the Death of every Tenant of the ſaid three Acres of Paſture with the Appurtenances in which, *&c.* dying thereof ſeiſed, the beſt Beaſt which ſhould be of ſuch Tenant at the Time of his Death in the Name of a Heriot, of which Services the aforeſaid *John Talbot* was ſeiſed by the Hands of the aforeſaid *J. Chapman* the Father, as by the Hands of his very Tenant, that is to ſay, of the Fealty and Suit of Court aforeſaid, as of Fee and of Right, and of the Heriot aforeſaid, in his Demeſn as of Fee. And the ſaid *J. Chapman* the Father, of the three Acres of Paſture with the Appurtenances, in which, *&c.* in his Demeſn as of Fee being ſeiſed in Form as aforeſaid, afterwards, and before the Time in which, *&c.* at *Albrighton* aforeſaid, of ſuch his Eſtate, died thereof ſo ſeiſed. And the ſaid *John Pendleton* further ſaith, That the aforeſaid *J. Chapman* the Father, at the Time of his Death, at * *Albrighton* aforeſaid, was poſſeſſed of an Ox, of the Price of 100 *s.* as his proper Ox, which Ox was the beſt Beaſt of the aforeſaid *J. Chapman* the Father, at the Time of his Death, whereupon fell the Heriot thereof to the aforeſaid *J. Talbot*; and becauſe the Heriot aforeſaid, after the Death of the aforeſaid *J. Chapman* the Father, the ſaid Time in which, *&c.* was behind not delivered; the ſaid *J. Pendleton*, as Bailiff of the aforeſaid *J. Talbot*, doth well avow the taking of the Cattle aforeſaid, in the aforeſaid Place in which, *&c.* and juſtly, *&c.* for the Heriot aforeſaid not delivered, as within his Fee and Lordſhip, *&c.* And the ſaid *J. Chapman* now Plaintiff ſaith, That the aforeſaid *J. Pendleton*, as Bailiff of the aforeſaid *J. Talbot*, in the Cauſe (*avow*) above before alledged, ought not avow the taking of the Cattle aforeſ. to be juſt, becauſe he ſaith, That long before the aforeſaid Time of the taking aforeſaid done, and before the aforeſaid *J. Chapman* the Father, had any Thing in the ſaid three Acres of Paſture, with the Appurtenances in which, *&c.* one *John Barney* was ſeiſed of a Meſſuage, and of half a Yard Land of Meadow and Paſture, with the Appurtenances, containing by Eſtimation 50 Acres in *Albrighton* aforeſaid, whereof the ſaid three Acres of Paſture, with their Appurtenances in which, *&c.* were Parcel, in his Demeſn as of Fee; and the ſaid Meſſuage, and one half Yard Land, Meadow, and Paſture wholly, with the Appurtenances whereof, *&c.* held of the aforeſaid *J. Talbot*, as of his Manor of *Albrighton* aforeſaid by Fealty, and doing Suit at the Court of the ſaid *J. Talbot* of his Manor aforeſaid, from three Weeks to three Weeks, at that Manor yearly to be holden, as alſo by the Service of rendring after the Death of every Tenant of the ſaid Meſſuage, and half Yard Land of Meadow and Paſture wholly with the Appurtenances whereof, *&c.* dying thereof ſeiſed, the beſt Beaſt that was

* Cro. Car. 268. pl. 94. poſt. 104.

to

to ſuch Tenant, at the Time of his Death in the Name of a Heriot. And the ſaid *John Barny*, of the Meſſuage, and half Yard Land, of ſuch Meadow and Paſture, with the Appurtenances, wholly in Form aforeſaid, being ſeiſed, long before the Time of the taking, *&c.* that is to ſay, the firſt Day of *May*, in the 32d Year of the Reign of the Lady the now Queen, of the ſaid three Acres of Land, Parcel of the aforeſaid half Yard Land, of Land, Meadow, and Paſture, with the Appurtenances whereof, *&c.* enfeoffed the aforeſaid *John Talbot*, to have and to hold to the ſaid *J. Talbot*, his Heirs and Aſſigns for ever: By Virtue of which Feoffment, the aforeſaid *J. Talbot* was, and yet is ſeiſed of the aforeſaid three Acres of Lands, Parcel, *&c.* in his Demeſn as of Fee; and he the ſaid *John* ſo being thereof ſeiſed, and the aforeſaid *John Barny* of the Meſſuage aforeſaid, and the reſt of the aforeſaid half Yard Land, of Meadow and Paſture, with the Appurtenances whereof, *&c.* in Form aforeſaid being ſeiſed, the ſaid *J. Barny* afterwards, and before the Time of the taing aforeſaid done, that is to ſay, the firſt Day of *May*, in the 36th Year of the Reign of the ſaid Lady the now Queen, of the aforeſaid three Acres of Paſture with the Appurtenances, in which, *&c.* enfeoffed the aforeſaid *J. Chapman* the Father, and his Heirs for ever; by Virtue of which Feoffment, the ſaid *J. Chapman* the Father, was ſeiſed of the ſaid three Acres of Paſture with the Appurtenances in which, *&c.* in his Demeſn as of Fee, and ſo thereof being ſeiſed, the ſaid *J. Chapman* the Father, after, and before the Time of the taking, *&c.* at *Albrighton* aforeſaid, of ſuch his Eſtate, of and in the ſame three Acres of Paſture, with the Appurtenances in which, *&c.* died thereof ſeiſed, after whoſe Death the ſaid three Acres of Paſture with their Appurtenances in which, *&c.* deſcended to the ſaid *J. Chapman* now Plaintiff, as Son and Heir of the ſaid *J. Chapman* the Father: By which the ſaid *J. Chapman* now Plaintiff, into the three Acres of Paſture, with the Appurtenances in which, *&c.* entred, and was, and yet is thereof ſeiſed in his Demeſn as of Fee; and ſo thereof being ſeiſed, the ſaid *J. Chapman* the now Plaintiff, before the Time of the taking, *&c.* put his Cattle into the aforeſaid Place in which, *&c.* to eat the Graſs in the ſame then growing, as it was lawful for him to do, which Cattle were in the Place aforeſaid, in which, *&c.* eating the Graſs there growing, until the ſaid *John Pendleton*, the aforeſaid 2d Day of *Sept.* in the 6th Year of the Reign of the Lord the now King aboveſaid, at *Albrighton* aforeſaid, in the aforeſaid Place called *Bromley*, did take the Cattle of him the ſaid *J. Chapman* aforeſaid, and them unjuſtly detained, againſt Gages and Pledges until, *&c.* as he above againſt him complaineth; and this he is ready to aver: Wherefore inaſmuch as the aforeſaid *John Pendleton*, the taking of the Cattle aforeſaid, in the afore-

aforeſaid Place in which, *&c.* hath not alledged ſufficient to Bar, *&c.* and that he to that Plea in Manner and Form aforeſaid pleaded needeth not, nor by the Law of the Land, is bound to anſwer; wherefore, for want of a ſufficient Plea in Bar in this Behalf, the ſaid *John Pendleton* demands Judgment, and a Return of the Cattle aforeſaid, together with his Damages to be adjudged unto him: And the aforeſaid *John Chapman* now Plaintiff, inaſmuch as he ſufficient Matter in Law, to bar the aforeſaid *J. Pendleton*, from juſtly avowing the taking of the Cattle aforeſaid, in the Place in which, *&c.* above hath alledged, which he is ready to aver, which Matter the aforeſaid *J. Pendleton* doth not deny, nor to the ſame any ways anſwereth, but doth refuſe to admit the ſame Averment, as at firſt demandeth Judgment, and his Damages, by the Occaſion of the taking and unjuſt detaining of the ſame Cattle, to be to him adjudged, *&c.* And becauſe the Juſtices here, will adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof; Day is given to the Parties, *&c.*

JOHN

JOHN TALBOT's *Case.*

Hill. 7 Jacobi I.

2 Brownl. 293, 294. 10 Co. 108. a. b.

F. N. B. 72. d.

JOHN Chapman brought a Writ of *Second Deliverance* againſt *John Pendleton*, of two Heifers taken at *Albrighton*, in a Place called *Bromley* in *Albrighton*, in the County of *Salop*, *&c.* The Defendant made Conuſans as Bailiff to *John Talbot*, Eſq; and ſaid, That the Place where, *&c.* contain'd three Acres of Paſture, lying in a Field called *Bromley*, in *Albrighton*; and that one *John Chapman*, Father of the ſaid *John Chapman*, whoſe Heir he is, was ſeiſed of the ſaid three Acres of Paſture in Fee, and held them of the ſaid *John Talbot*, as of his Manor of *Albrighton* in the ſaid County by Fealty, and Suit of Court to the Manor from three Weeks to three Weeks, and by the Service to render after the Death of every Tenant of the ſaid three Acres of Paſture, in which, *&c.* dying thereof ſeiſed, *optimum Animal* ſuch Tenant had at the Time of his Death *nomine Heriotti*, of which Services he was ſeiſed by the Hands of the ſaid *John Chapman* the Father, as by the Hands of his very Tenant, *&c.* and the ſaid *John Chapman* the Father ſo being thereof ſeiſed, died ſeiſed thereof, and that at the Time of his Death he was poſſeſſed of an Ox, of the (*a*) Price of 100 *s.* as of his proper Ox, which Ox *fuit optim' Animal* of the ſaid *J. Chapman* the Father, which he had at the Time of his Death, *&c.* And becauſe the ſaid Heriot was behind, and not delivered, the Defendant, as Bailiff of the ſaid *John Talbot*, acknowledg'd the taking of the Cattle aforeſaid, in the Place where, *&c.* as *infra feodum & dominium ſuum*, &c. In Bar of which the ſaid *J. Chapman*, now Plaint. ſaid, That bef. the ſaid *J. Chapman* his Father had any Thing in the ſaid three Acres of Paſture, one *John Barny* was ſeiſed of a Houſe, and a half Yard

(*a*) Antea 103. a. Cr. Jac. 260. Plowd. 94. a.

of

of Land, Meadow and Paſture, containing by Eſtimation fifty Acres, in *Albrighton* aforeſaid, whereof the ſaid three Acres of Paſture in which, *&c.* were Parcel, in his Demeſn as of Fee, and the ſaid Houſe and Half Yard Land, Meadow and Paſture intire, held of the ſaid *John Talbot*, as of his ſaid Manor by Fealty, Suit to Court, and Heriot Service, after the Death of every Tenant dying thereof ſeiſed; and the ſaid *John Barny* being ſo ſeiſed of the ſaid Meſſuage and Half Yard entire, *Anno* 32 *Eliz.* of three Acres of Land, Parcel of the ſaid Half Yard Land, enfeoffed the ſaid *John Talbot*, to have and to hold to him and his Heirs: And afterwards, *Anno* 36 *Eliz.* of the ſaid three Acres of Paſture, in which, *&c.* enfeoffed the ſaid *John Chapman* the Father, to have and to hold to him and his Heirs, who died thereof ſeiſed, and they deſcended to *John Chapman* the now Plaintiff, *&c.* Upon which the Avowant demurr'd in Law. And the only Queſtion in this Caſe was, If the Lord had, by the Purchaſe of the ſaid three Acres of Paſture, in which, *&c.* Parcel of the Tenements held of him by Heriot Service, extinguiſhed his Heriot or not? And the Avowant's Council did inſiſt ſtrongly upon the Words of *Littleton*, *lib.* 2. *cap. ult. fol.* 49. where he ſaith, That notwithſtanding the Purchaſe of Parcel, *&c.* by the Lord, the (*a*) Homage and Fealty remain entire to the Lord; for the Lord ſhall have the Homage and Fealty of his Tenant for the Remnant of the Lands and Tenements held of him, as he had before, becauſe ſuch Services are not Annual Services, and can't be apportioned; which Reaſon proves (as it was urged) that the Heriot Service in the Caſe at Bar continues, for this Service is not annual, being due only on the Death of the Tenant, and can't be apportioned becauſe it is entire, *ſcil. optimum Animal.* So they ſaid, That it appears by *Littleton*, *lib.* 2. *cap.* 3. *&* (*b*) 7 *Ed.* 3. 29. *a. b.* That he who holds by Knights Service, ought to go in Perſon, or find another able Perſon for him, properly arrayed for the War, *&c.* which is an entire Service: And yet *Littleton* ſaith, *ubi ſupra*, *fol.* 49. That if the Lord purchaſes Part of the Land ſo held (*c*) the Eſcuage ſhall be apportioned; which proves that the Tenure by Knights Service remains for the Reſidue, and the Reaſon is, as it was urged, becauſe the entire Service was not annual, and the Service by the Body of a Man can't be apportioned. Alſo they cited the Book in 34 *Ed.* 3. (*d*) *Heriot* 1. where it is held, That if my Tenant, who holds of me by a Heriot, aliens Parcel of his Land to another, each of them is chargeable to me of a Heriot, becauſe it is entire; and altho' the Tenant purchaſes the Land again, *&c.* I ſhall have of him, for each Portion, a Heriot. So in the Caſe at Bar, altho' the Lord purchaſes

(*a*) Lit. Sect. 223. Co. Lit. 149. a. b. Lit. 49. a. 2 Brownl. 294, 295.

(*b*) Lit. Sect. 96. Lit. 20. a. 9 Co. 49. b. Co. Lit. 70. a.

(*c*) Lit. Sect. 223. Co. Lit. 149. b. Lit. 49. a.

(*d*) 6 Co. 1. a.

Parcel of the Land, yet he ſhall have a Heriot for the Reſidue, for it is entire, and not annual. But it was anſwered and adjudged, *per totam Curiam*, That in the Caſe at Bar, the (*a*) Co. Lit. 149. b. Heriot (*a*) Service was extinct. And firſt, the Reſolutions (*b*) 6 Co. 1, 2. in (*b*) *Bruerton*'s Caſe, in the ſixth Part of my *Reports*, were affirmed to be good Law by the whole Court. And in this Caſe theſe Points were reſolved. 1. That ſome entire Ser- (*c*) Co. Lit. 149. a. vices by Alienation of Parcel of the Tenancy ſhall be (*c*) multiplied, *ſcil.* that every ſeveral Alienee ſhall pay ſeveral entire Services; and ſome entire Services, by Alienation of Parcel, ſhall not be multiplied, but the Lord ſhall be content with one amongſt all the ſeveral Alienees: And as to that, it muſt be known, that there are four Manner of entire Services: 1. When a Thing entire, be it a Chattel valuable, or a Thing of Pleaſure, ſhall be rendred and paid by the Tenant to the Lord, a Chattel valuable, as an Horſe, an Ox, gilt Spurs, a Bow or Arrows, a Sword, a Gauntlet, or ſuch like; Things of Pleaſure, as a Faulcon or other Bird, a Dog, or ſuch Things of Pleaſure: All ſuch entire Services by Alienation of Parcel of the Tenancy ſhall be multiplied, and every Alienee ſhall render the entire Service: And yet, by the Purchaſe of (*d*) 6 Co. 1. b. Parcel by the Lord, the Whole is (*d*) extinct, as it is reſolved Moor 203. Co. Lit. 149. a. in the ſaid Caſe of *Bruerton*. The ſecond is a perſonal Service to be done by the Tenant to the Perſon of the Lord, as (*e*) 6 Co. 2. a. Homage, Fealty, Knights Service, to be (*e*) Carver, Sewer, Butler, or ſuch perſonal Services, to the Lord, and ſome of theſe ſhall multiply, and ſome not; and therefore Homage and Fealty by Alienation of Parcel, ſhall multiply, becauſe when the Tenant doth Homage or Fealty, he doth them for all the Tenements which he holds of the Lord, ſo that theſe Services extend to the entire Tenancy, and every Parcel of it, and altho' the Lord purchaſes Part, yet the Homage and Fealty remain for the Reſidue: So that altho' *Littleton*, *ubi ſupra*, holds, That the Homage and Fealty by Purchaſe of Parcel, ſhall not be extinct, but ſhall remain for the Reſidue, becauſe ſuch Services are not annual, and can't be appor- (*f*) Co. Lit. 149. a. tioned, (yet) that is (*f*) *ratio una, ſed non unica*, as appears before. So Knights Service, which is an entire Service to be performed by the Body of a Man, ſhall be alſo multiplied by the Alienation of Parcel; and although the Lord purchaſes Parcel, the Knights Service ſhall not be ex- (*g*) Co. Lit. 149. a. b. 6 Co. 2. a. tinct, but ſhall remain for the Reſidue, *quia* (*g*) *pro bono publico & pro Defenſione Regni*, and the Eſcuage ſhall be apportioned. But the perſonal Service of Sewer, Carver, Butler, *&c.* or when the Tenant is bound by his Tenure *ad convivandum Dom' ſuum & familiam ſuam ſemel in anno, & ad equitandum*

equitandum cum Domino ſuo in Com' N. ſumptibus ſuis propriis, &c. (*vide* 10 *Ed.* 3. 23. in *John de Brompton*'s Caſe) by Alienation of Parcel, it ſhall not be apportioned nor multiplied: For ſuch Services which are for the private Benefit of the Lord, and are perſonal to be done by a Man, ſhall not be multiplied, becauſe they are to be perſonally done by one Man only, and Multiplication of them would be a Prejudice, and chargeable to the Tenant, and the Purchaſe of Parcel of the Tenancy by the Lord, will extinguiſh all ſuch perſonal private Service. The 3d is, When the Tenant is to exerciſe a perſonal Office, as to be Steward of the Court of the Manor, or Bailiff of the Manor, or Collector of the Rents of the Manor, or Woodward of the Manor, or the like Offices, they, by Alienation of Parcel of the Tenancy, ſhall not be multiplied, but the Lord may diſtrein each of them, in theſe Caſes, to do it, but one only ſhall exerciſe it: And if the Lord purchaſe any Part of the Tenancy, the whole Service is extinct. The 4th is, When the Tenant by his Tenure is to do manual Labour, or Work touching Houſes, Lands or Tenements; as to cover or repair the (*a*) Hall of the Lord's Houſe, or to make or repair his Park Pale, or to plough or ſow the Lord's Demeſn, *&c.* or to reap his Corn, or to cut his Graſs, or *molere blada ſua*, or ſuch like; theſe, or other Services by Alienation of Parcel ſhall not be multiplied; for theſe Works are to be done on a certain Thing, which can't be multiplied.

(*a*) 6 Co. 2. a.

2. It was reſolved, That there is no Difference between entire Annual Services, be they valuable, or Things of Pleaſure, and which ſhall be multiplied, as aforeſaid, and between ſuch entire Services not Annual: As if Lord and Tenant be to render a Horſe every three, four, or five Years, or upon Alienation or Death; in theſe and the like Caſes, if the Lord purchaſes Parcel of the Tenancy, ſuch entire Services, not annual, ſhall be as well extinct as the like annual Services.

3. It was reſolved, That if *John Barny* had firſt enfeoffed *John Chapman* the Father, of the ſaid three Acres of Paſture, and afterwards had enfeoffed the Lord of the ſaid three Acres of Land, that notwithſtanding, the Heriot Service had remained for the Land which *John Chapman* the Father held; and the Reaſon is, becauſe *John Chapman*, by his Purchaſe of three Acres, held by one ſeveral and diſtinct Tenure of Heriot Service, and therefore the Purchaſe of the Lord of any Part of the Reſidue which *John Barny* held, would extinguiſh only the Heriot which he ought to render, and not the Heriot which *John Chapman*, by Reaſon of his diſtinct and ſeparate Tenure, ought to pay.

4. There is a Difference between Heriot Service, and Heriot (*b*) Cuſtom as to the Extinguiſhment thereof, when the

(*b*) Co. Lit. 145. b. 2 Brownl. 296.

the Lord purchaſes Parcel of the Tenancy: For if the Lord purchaſes Parcel of the Tenancy, the Heriot Service is extinct: But if the Cuſtom of the Manor be, That upon the Death of every Tenant of the Manor, who dies ſeiſed of any Lands held of the ſame Manor, the Lord ſhall have a Heriot; altho' the Lord purchaſes Part of the Tenancy, yet the Lord ſhall have a Heriot by the (*a*) Cuſtom of the Manor for the Reſidue, for he remains Tenant to the Lord, and the Cuſtom extends to every Tenant: *Vide* Reader, the Books cited in the ſaid Caſe of *Bruerton*, * by which theſe Differences, with the Reaſon of them, will appear.

(*a*) Co. Lit. 149. b. 2 Brownl. 296.

* 6 Co. 1, 2, &c.

Dr. BON-

Dr. BONHAM's *Caſe.*

Mich. 6 Jacobi I.

In the Common Pleas.

London, ſſ. *HENRY ATKINS*, of *London*, Doctor of Phyſick; *George Turner* of *London*, Doctor of Phyſick; *Thomas Moundford* of *London*, Doctor of Phyſick; *John Argent* of *London*, Doctor of Phyſick; *John Taylor* of *London*, Yeoman; and *William Bowden* of *London*, Yeoman, were attached to anſwer to *Thomas Bonham* of *London*, Doctor in Philoſophy and of Phyſick, of a Plea, wherefore they, together with *William Dun* of *London*, Doctor of Phyſick, and *Richard Ware* of *London*, Skinner, with Force and Arms, him the ſaid *Thomas Bonham* took, impriſoned, evilly treated, and him in Priſon, againſt the Law and Cuſtom of the Kingdom of *England*, did long detain, and other Harms to him did, to the great Damage of him the ſaid *Thomas Bonham*, and againſt the Peace of the Lord the now King, *&c.* And whereupon he the ſaid *Thomas Bonham*, by *Richard Coke*, his Attorney, complaineth, That the aforeſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, together with, *&c.* on the 10th Day of *November*, in the 4th Year of the Reign of the ſaid Lord the now King, with Force and Arms, him the ſaid *Thomas*, in the Pariſh of the *Bleſſed Mary* of the *Bows*, in the Ward of *Cheap*, took and impriſoned, and evilly treated, and him there ſo in Priſon, for a long Time, that is to ſay, by the Space of ſeven Days, againſt the Law and Cuſtom of this Kingdom of *England*, detained, and other Harms, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* Whereupon he ſaith, That he is the worſe, and hath Damage to the Value of 300 *l.* and therefore he bringeth Suit, *&c.* And the aforeſaid

False Impriſonment.

ſaid, *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, by *Francis Barker* their Attorney, come and defend the Force and Injury, when, *&c.* And as to the coming with Force and Arms, they ſay, That they are not thereof Guilty, and of that they put themſelves upon the Country; and the aforeſaid *Thomas Bonham* likewiſe: And as to the reſt of the Treſpaſs and Impriſonment aforeſaid, above ſuppoſed to be done, the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, ſay, That the aforeſaid *Thomas Bonham*, his Action aforeſaid, againſt them, ought not to have, becauſe they ſay, That before the aforeſaid Time in which it is ſuppoſed the aforeſaid Treſpaſs and Impriſonment to be done, the Lord *Henry* the 8th, late King of *England*, *&c.* on the 23d Day of *September*, in the Year of his Reign, by his Letters Patents (which the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, with his Great Seal of *England* ſealed, bearing Date at *Weſtminſter* the ſame Day and Year, brought here into Court) reciting (that) *Whereas* he thought it the Duty of his kingly Office, in all Reaſon, to provide for the Good and Welfare of his People, *That* would (*i. e.* ought) firſt of all to be done, if he might in due Seaſon meet with the Enterprizes of wicked Men: Firſt therefore, he held it neceſſary to reſtrain the Boldneſs of wicked Men, who profeſſed Phyſick more for Avarice than out of Confidence of a good Conſcience; whereupon very many Incommodities did ariſe, to the rude and credulous common People: Therefore, partly imitating the Example of the well-governed Cities in *Italy*, and many other Nations, and partly inclined thereunto, at the Requeſt of the grave Men and Doctors, *John Chambre*, *Thomas Linacre*, *Ferdinand de Victoria*, his Phyſicians, and of *Nicholas Hatſwel*, *John Franciſco*, and *Robert Yaxley*, Phyſicians, and chiefly of the Right Reverend Father in Chriſt, and Lord, *Thomas* (*Wolſey*) titled of the Holy Church beyond *Tyber*, Prieſt of the moſt Holy Church of *Rome*, Cardinal of *York*, Arch-biſhop, and our well-beloved Chancellor of our Kingdom of *England*; A College perpetual of Doctors and grave Men, who Phyſick in his City of *London*, and the Suburbs, and within ſeven Miles from the ſaid City every Way, might publickly exerciſe, he willed and commanded to be inſtituted, to whom, both for his Honour, and in the Name of the Publick Good, and Care (as he hoped) the Ignorance and Raſhneſs of the Malicious (which he remembred) as well by their Example and Gravity to deter, as by his Laws late made, and by Conſtitutions to be made by the ſame College to puniſh; which that they might more eaſily well accompliſh, to the remembred Doctors *John Chambers*, *Thomas Linacre*, *Ferdinand de Victoria*, his Phyſicians, *Nicholas Hatſwel*, *John Franciſco*, and *Robert Yaxley*, Phyſicians, he granted,

That they, and all Men of the ſame Faculty, of and in the City aforeſaid, ſhould be in Deed and Name, one Body and Communalty perpetual, or College perpetual, and that the ſaid Communalty or College every Year for ever, might chuſe and make of that Communalty, any prudent Man, and ſkilful in the Faculty of Phyſick, to be Preſident of the ſaid College or Communalty, to overſee, recognize, and govern, for that Year, the College or Communalty aforeſaid, and all Men of the ſaid Faculty, and their Buſineſſes; and that the ſaid Preſident and College or Communalty, ſhould have perpetual Succeſſion, and a common Seal, to ſerve for the Buſineſſes of the ſaid Communalty and Preſident for ever; and that they and their Succeſſors for ever ſhould be Perſons able and capable to purchaſe and poſſeſs in Fee and Perpetuity, Lands, Tenements, Rents, and other Poſſeſſions whatſoever: He alſo granted to them and their Succeſſors, for him and his Heirs, that they and their Succeſſors might purchaſe to them and their Succeſſors, as well in the ſaid City as out of it, Lands and Tenements whatſoever, not exceeding the yearly Value of 12 *l.* notwithſtanding the Statute of Alienation in *Mortmain:* And that they, by the Name of Preſident of the College or Communalty of the Faculty of Phyſicians, *London*, might plead, or might be impleaded, before whatſoever Judges, in all Courts and Actions whatſoever; and that the aforeſaid Preſident and College, or Communalty, and their Succeſſors, lawful Aſſemblies, and honeſt of themſelves, and Statutes and Ordinances for the wholeſome Government, Overſight, and Correction of the College or Communalty aforeſaid, and of all Men the ſame Faculty in the ſame City, or within ſeven Miles circuit of the ſaid City exerciſing, according to the Exigence or Neceſſity (as often, and when need was) might lawfully, and without Peril make, without the Hindrance of the ſaid late King, his Heirs or Succeſſors whatſoever, his Juſtices, Eſcheators, Sheriffs, and other his Bayliffs and Miniſters, his Heirs and Succeſſors whatſoever: He alſo granted to the ſaid Preſident and College, or Communalty, and their Succeſſors, that none in the ſaid City, or ſeven Miles in Circuit thereof, do exerciſe the ſaid Faculty, unleſs to this, by the ſaid Preſident or Communalty, or their Succeſſors, (who for the Time ſhould be) he be admitted by the Letters of the ſaid Preſident and College, with their common Seal ſealed, upon the Penalty of 100 Shillings for every Month, that not being admitted, he ſhould exerciſe the ſame Faculty, half thereof to the Lord the King, and his Succeſſors, and half thereof to the ſaid Preſident and College, to be applied: He beſides, willed and granted, for him and his Succeſſors (as much as in him was) that by the Preſident and College of the aforeſaid Communalty for the Time being, and their Succeſſors for ever, four (Perſons) every Year by them to be choſen,

ſhould have the Overſeeing, Searching, Correction, and Government of all and ſingular the Phyſicians of the ſaid City, exerciſing the Faculty of Phyſick within the ſaid City; and ſo of other Phyſicians foreign whom ſoever, the ſaid Faculty of Phyſick any wiſe frequenting and uſing within the ſaid City, and the Suburbs thereof, or within ſeven Miles in Circuit of the ſaid City, and the Puniſhment of them for their Offences, in not well exerciſing, doing, and uſing the ſame; as alſo the Overſight and Searching of all Medicines, and the Reception (*Recipes*) of them by the ſaid Phyſicians, or any of them, to the Leige People of the ſaid late King, for curing and healing their Infirmities, to be given, put, and uſed, as often, and when need ſhall be, for the Commodity and Profit of the ſaid Liege People of the ſaid late King, ſo as the Puniſhments of the ſaid Phyſicians, uſing the ſaid Faculty of Phyſick, ſo in the Premiſſes offending, by Fines, Amercement, and Impriſonment of their Bodies, and by other Ways reaſonable and fitting, be executed: He alſo willed and granted, for him, and his Heirs and Succeſſors, (as much as in him was) that neither the Preſident, nor any of the College aforeſaid of Phyſicians, nor their Succeſſors, nor any of them, exerciſing the ſame Faculty any Way in future, within the City aforeſaid, and the Suburbs thereof, or elſewhere, ſhould be ſummoned or put, nor any of them ſhould be ſummoned or put in any Aſſiſes, Juries, Inqueſts, Inquiſitions, Attaints, and other Recognitions within the ſaid City, and the Suburbs thereof, hereafter to be taken before the Mayor, or Sheriffs, or Coroners of the ſaid City for the Time being, or by any their Officer, or Miniſter, or Officers, or Miniſters, altho' the ſaid Juries, Inquiſitions, or Recognitions, were ſummoned upon the Writ or Writs of the ſaid late King, or his Heirs, of Record: But that the ſaid Maſter or Governors, and Communalty of the Faculty aforeſaid, and their Succeſſors, and every of them the ſaid Faculty exerciſing, againſt the ſaid late King, his Heirs and Succeſſors, and againſt the Mayor and Sheriffs of the ſaid City aforeſaid for the Time being, and whatſoever their Officers or Miniſters, ſhould be thereof acquitted and diſcharged for ever, as by the ſaid Letters Patents, amongſt other Things more fully appeareth. And the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William*, further ſay, That by Virtue of the Letters Patents aforeſaid, the aforeſaid *John Chambre*, *Thomas Linacre*, *Ferdinand de Victoria*, *Nicholas Halſwel*, *John Franciſcus*, and *Robert Yaxley*, Phyſicians, and all Men of the ſaid Faculty in the City aforeſaid, were one Body and Communalty perpetual, or College perpetual; and that afterwards, by a certain Act of Parliament of the ſaid late King *Henry* the 8th, holden at *London* the 15th Day of *April*, in the 14th Year of his Reign, and from thence adjourned unto *Weſtminſter*,

in the County of *Middlesex*, the last Day of *July*, in the 15th Year of the said late King, and then there holden, amongst other Things, It was enacted by Authority of the same Parliament, *That for that, that the making of the said* Corporation of Physicians was meritorious, and very good for the Commonwealth of this Kingdom of *England*; and besides, it was expedient and necessary to provide, That no Person of the said Body Politick and Communalty aforesaid, should be suffered to exercise and *to practice Physick*, but only such Persons as should be profound, *sad, and discreet, groundedly learned, and deeply studied in Physick*, In Consideration whereof, and for the further authorizing of the said Letters Patents, and also for the enlarging and amplifying of further Articles for the aforesaid Common-wealth, to be had and made by the said late King, with the Consent of the Lords Spiritual and Temporal, and Communalty in the said Parliament assembled, It is Enacted amongst other Things, That the aforesaid Corporation of the Communalty and Fellowship of the Faculty of the Art of Physick aforesaid, and all and every Grant, Article, and other Things contained and specified in the said Letters Patents, should be approved, granted, ratified and confirmed in the aforesaid Act, and should clearly be authorised and admitted by the same, good, lawful, and available to the aforesaid Body Corporate, and their Successors, for ever, in as ample and large Manner as it might be taken, thought, and construed by the said Letters Patents: And further it is enacted, ordained, and established by the said Act, That the aforesaid six Persons, in the aforesaid Letters Patents named as Principal, and first named of the aforesaid Communalty and Fellowship, should choose to them two other of the said Communalty, who from thenceforth should be called and named *Elects*, and the aforesaid *Elects* yearly should choose one of them to be President of the said Communalty: And as often as any of the Rooms and Places of the said *Elects* should happen to be void by Death, or otherwise, then the *Supervisors* of the said *Elects*, within 30 or 40 Days next after their Deaths, or of any of them, should choose, name, and admit one or more, as need should require, of the most learned and expert Men of and in the aforesaid Faculty in *London*, to supply the Place and Number of eight Persons, so that he or they who should be chosen, be first examined strictly by the said *Supervisors*, according to the Form devised by the said *Elects*, and also by the said *Supervisors* approved, as by the said Act amongst other Things more fully appeareth. And the said *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William*, further say, That afterwards, and before the Time in which, *&c.* By another Act of Parliament of the Lady *Mary*, the Queen

Queen of *England*, the 24th Day of *October*, in the firſt Year of her Reign, at *Weſtminſter* aforeſaid, reciting, That whereas in the Parliament holden at *London*, the 5th Day of *April*, in the 14th Year of the Reign of the Lord *Henry* the 8th, late King of *England*, and from thence adjourned unto *Weſtminſter*, the laſt Day of *June*, in the 15th Year of his Reign, and there holden, It was enacted, That a certain Grant by Letters Patents of Incorporation, made and granted by the aforeſaid late King, to the Phyſicians of *London*, and all Clauſes and Articles contained in the ſaid Grant, ſhould be approved, granted, ratified, and confirmed by the ſaid Parliament; in Conſideration whereof, It was enacted by the Authority of the ſame Parliament, That the aforeſaid Statute and Act of Parliament, in all the Articles and Clauſes in the ſame contained, from thenceforth for ever ſhould ſtand and continue in full Strength, Force, and Effect, any Statute, Law, Cuſtom, or any Thing made, had, or uſed to the contrary, in any Thing notwithſtanding: And for the better Reformation of divers Enormities happening to the Commonwealth, by the evil Uſage and undue Adminiſtration of Phyſick, and for the amplifying and enlarging of the laſt Articles, for the better Execution of the Things in the aforeſaid Grant contained, It was further enacted, That whenſoever the Preſident of the College, or Communalty of the Faculty of Phyſick in *London*, for the Time being, or ſuch as the aforeſaid Preſident and College yearly, according to the Tenor and Meaning of the ſame Act, ſhould authorize to ſearch, examine, and correct, and puniſh all Offenders and Tranſgreſſors in the aforeſaid Faculty, within the ſame City and Precinct in the aforeſaid Act expreſſed, ſhould ſend, or commit ſuch Offender or Offenders, for his or their Offences or Diſobedience, contrary to any Article or Clauſe contained in the aforeſaid Grant, or Act, to any Ward, Gaol, or Priſon, within the aforeſaid City and Precinct aforeſaid (the Tower of *London* excepted) that then, and from Time to Time, the Warders, Gaolers, and Keepers of the Wards, Gaols, and Priſons within the City, or Precinct aforeſaid (the Tower of *London* excepted) ſhould receive into his or their Priſons, all and every ſuch Perſon or Perſons ſo offending, which ſhould be ſent, or committed to him, or them, as aforeſaid, and there ſafely ſhould keep the Perſon or Perſons ſo committed into any of their Priſons, at the proper Coſts and Charges of the Perſon or Perſons ſo committed, without Bail or Mainprize, until ſuch Offender and Offenders, or Diſobedients, be diſcharged of the aforeſaid Impriſonment, by the aforeſaid Preſident; and ſuch Perſons as by the aforeſaid College ſhould be authorized, upon Pain, that every ſuch Warder, Gaoler, or Keeper, doing the

the contrary, ſhould loſe and forfeit double of ſuch Fine and Amercement as ſuch Offender or Offenders, or Diſobedients, ſhould be aſſeſſed to pay, by ſuch as by the ſaid Preſident and College, as ſhould be authoriſed, as before is ſaid, ſo as the ſaid Fine and Amercement ſhould not be at any Time above the Sum of 20 *l.* the Moiety whereof to be employed to the Uſe of the ſaid late Queen, her Heirs and Succeſſors, and the other Moiety to the aforeſaid Preſident and College, all which Forfeitures ſhould be recovered by Action of Debt, Bill, Plaint, or Information, in any of the ſaid late Queens, her Heirs or Succeſſors, Courts of Record, againſt any ſuch Warden, Gaoler, or Keeper, ſo offending, in which no Eſſoin, Wager of Law, nor Protection, ſhould be allowed, nor be admitted for the Defendant: And further it was enacted, by the Authority of the ſaid Parliament, That all Juſtices, Mayors, Sheriffs, Bayliffs, Conſtables, and other Miniſters and Officers within the City and Precinct aforeſaid, upon Requeſt to them to be made, ſhould help, aid, and aſſiſt the Preſident of the aforeſaid College; and all Perſons, by them from Time to Time authorized, for the due Execution of the ſaid Act, or Statute, upon Pain, for not giving Help to them, of being in Contempt of the ſaid late Queen, her Heirs or Succeſſors, as by the ſame Act, amongſt other Things, more fully appeareth. And the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William*, further ſay, That by Virtue of the ſaid Letters Patents, and by Force of the Statutes aforeſaid, one *Thomas Langton*, Doctor of Phyſick, a Man prudent and ſkilful in the Faculty of Phyſick, and then one of the Communalty of the College of Phyſicians, in *London* aforeſaid; and then alſo being one of the eight Electors of the College aforeſaid, before the ſaid Time in which, *&c.* that is to ſay, the 30th Day of *September*, in the Year 1605, at the College of Phyſicians, ſituate in *London*, in the Pariſh of St. *Bennet*, *Paul's-Wharf*, in the Ward of *Baynards-Caſtle*, was duly choſen and preferr'd to the Office of Preſident of the College aforeſaid, and then and there held the ſaid Office of Preſident of the College aforeſaid: And the ſaid *Thomas Langton* being Preſident of the College aforeſaid, the ſame Preſident and Communalty of the College aforeſaid, the ſame 30th Day of *September*, in the Year 1605, aboveſaid, at the College aforeſaid, did chooſe *Ralph Wilkinſon*, *William Dun*, *Richard Palmer*, and *John Argent*, prudent Men, and ſkilful in the Faculty of Phyſick; and then being four Doctors of the College aforeſaid, to be the four Cenſors or Governors of the Communalty aforeſaid, to overſee, ſearch, correct, and govern, all and ſingular Phyſicians of the ſaid City, uſing the Faculty of Phyſick in the ſaid City, and other foreign Phyſicians whomſoever, frequenting

quenting to, and uſing the ſaid Faculty of Phyſick, any Ways within the ſaid City, and the Suburbs thereof, or within ſeven Miles in Circuit of the ſame City, and to puniſh their Defects in not well exerciſing, doing, and uſing the ſame; as alſo to overſee, and ſearch all Manner of Medicines, and their *Receipts*, by the ſaid Phyſicians, or any of them, for curing of Infirmities, as often as need ſhould be; and to puniſh the ſaid Phyſicians, Delinquents, exerciſing the ſaid Faculty of Phyſick, by Fines, Amercements, and Impriſonment of their Bodies, and other Ways reaſonable and fitting, according to the Form and Effect of the ſaid Letters Patents, and the Statutes aforeſaid: And the ſaid *Thomas Langton* being Preſident of the College aforeſaid, and the aforeſaid *Ralph Wilkinſon*, *William Dun*, *Richard Palmer*, and *John Argent*, being likewiſe the four Cenſors or Governors of the College aforeſaid, the aforeſaid *Thomas Bonham*, within the aforeſaid Time in which, *&c.* That is to ſay, the 10th Day of *April*, in the Year of our Lord 1606, within *London* aforeſaid, in the aforeſaid Pariſh of the Bleſſed Lady of *Bows*, in the Ward of *Cheap* aforeſaid, contrary to the Form and Effects of the Letters Patents aforeſaid, and the aforeſaid Statute made in the Parliament aforeſaid, of the ſaid King *Henry* the 8th, did practiſe Phyſick, not admitted by the Letters of the aforeſaid Preſident and College, ſealed with their Common Seal; whereas in Truth, the aforeſaid *Thomas Bonham* was inſufficient to practiſe Phyſick; by reaſon whereof, the ſaid *Thomas Bonham* afterwards, that is to ſay, the 13th Day of *April*, in the Year of our Lord 1606, at *London*, in the Pariſh and Ward aforeſaid, was ſummoned by the aforeſaid Cenſors or Governors of the College aforeſaid, to appear before the Preſident and Cenſors, or Governors of the College aforeſaid, at the College aforeſaid, in the Pariſh and Ward aforeſaid, the 14th Day of *April*, in the Year of our Lord 1606, aboveſaid, then next following, to be examined upon the Premiſſes: At which 14th Day of *April*, in the Year of our Lord 1606, aforeſaid, at the College aforeſaid, came the aforeſaid *Thomas Bonham* in his proper Perſon, before the aforeſaid Preſident and Cenſors, or Governors of the ſaid College, and then there was examined of his Science in his Faculty in Phyſick to be adminiſtred, by the aforeſaid Cenſors or Governors of the College aforeſaid; and becauſe the ſaid *Thomas Bonham* ſo examined anſwered leſs aptly and inſufficiently in the Art of Phyſick, he then and there upon his Examination aforeſaid, was found by the aforeſaid Preſident and Cenſors, or Governors of the College aforeſaid, leſs ſufficient and unſkilful to adminiſter Phyſick; and for that the aforeſaid *Thomas Bonham* being many Times examined, and forbidden by the Preſident and Cenſors, or Governors aforeſaid, for the Cauſes aforeſaid, to adminiſter Phyſick

Phyſick for a Month, or more, after ſuch forbidding of him within *London* aforeſaid, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bows*, in the Ward aforeſaid, without the Licence of the aforeſaid Preſident and College, under their Common Seal, contrary to the Form of the Letters Patents aforeſaid, and the Statutes aforeſaid did practiſe, then and there it was granted, by the aforeſaid Preſident and Cenſors, or Governors of the College aforeſaid, that the aforeſaid *Thomas*, for his ſaid Diſobedience and Contempt, be amerced to 100 Shillings, in the next Aſſembly of the aforeſaid Preſident and College, at the College aforeſaid to be paid: And then and there it was commanded to the ſaid *Thomas Bonham*, by them the Preſident and Cenſors, or Governors of the College aforeſaid, That the aforeſaid *Thomas Bonham*, from thenceforth, ſhould forbear to practiſe Phyſick within the aforeſaid City of *London*, and the Suburbs thereof, and ſeven Miles circuit of the ſaid City, until the ſaid *Thomas Bonham*, were found to be ſufficient, and ſhould be admitted to practiſe the ſaid Art of Phyſick, within the City and Circuit aforeſaid, by the Preſident and College aforeſaid, under the Pain of being caſt into Priſon, if in the Premiſſes, as is aforeſaid, he ſhould offend. And the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden* further ſay, That after and before the aforeſaid Time in which, *&c.* That is to ſay, the firſt Day of *October*, in the Year of our Lord 1606, aboveſaid, at the College aforeſaid, at *London* aforeſaid, in the Pariſh and Ward aforeſaid, the aforeſaid *Thomas Langton*, Doctor of Phyſick, a Man prudent and ſkilful in the Faculty of Phyſick, and then one of the Communalty of the College of Phyſicians in *London* aforeſaid, and one of the Electors of the College aforeſaid, was elected and choſen into the Office of Preſident of the College aforeſaid, for one Year then next following, and the Office of Preſident of the College aforeſaid, then and there held: And the ſaid *Thomas Langton* being Preſident of the College aforeſaid, the ſame Preſident and Communalty of the College aforeſaid, the ſaid firſt Day of *October*, in the Year of our Lord 1606, aboveſaid, at the College aforeſaid, choſe the aforeſaid *George Turner*, *Thomas Moundford*, *William Dun*, and *John Argent*, Doctors, Men prudent and ſkilful in the Faculty of Phyſick, and then being four of the College aforeſaid, to be the four Cenſors or Governors of the ſaid College, to ſuperviſe ſearch, correct, and govern, all and ſingular the Phyſicians of the ſaid City, and other foreign Phyſicians whomſoever, frequenting to, and exerciſing the ſaid Faculty of Phyſick within the ſame City, and the Suburbs of the ſame City, or within ſeven Miles circuit of the ſaid City, and to puniſh their Defects, in not well exerciſing, doing and uſing the ſame; as alſo to overſee, and ſearch all

Manner

Manner of Medicines and Receipts by the ſaid Phyſicians, exerciſing the ſaid Faculty of Phyſick within the City of *London* aforeſaid, and the Circuit aforeſaid, or any of them, for the curing of Diſeaſes, as often as need ſhould be required, and to puniſh the ſaid Phyſicians exerciſing the Faculty of Phyſick in the Premiſſes, Delinquents, by Fines, Amercements, and Impriſonments of their Bodies, and other Ways reaſonable and fitting, according to the Form and Effect of the Letters Patents aforeſaid, and the Statutes aforeſaid: And the ſaid *Thomas Langton* being Preſident of the College aforeſaid, and the aforeſaid *George Turner*, *Thomas Moundford*, *William Dun*, and *John Argent*, being likewiſe the four Cenſors, or Governors of the College aforeſaid, the ſaid *Thomas Bonham*, before the Time in which, *&c.* that is to ſay, the 20th Day of *October*, in the Year of our Lord 1606, aboveſaid, within *London* aforeſaid, that is to ſay, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bows*, in the Ward of *Cheap* aforeſaid, did practiſe Phyſick, contrary to the Form of the aforeſaid Letters Patents, and the Statutes aforeſaid, and the aforeſaid Forbidding and Command of the aforeſaid Preſident and Cenſors; and afterwards, that is to ſay, the ſame 20th Day of *October*, in the Year of our Lord 1606, aforeſaid, the ſaid *Thomas Bonham*, at *London* aforeſaid, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bows*, in the Ward of *Cheap* aforeſaid, was ſummoned by the aforeſaid Cenſors, or Governors of the College aforeſaid, to appear before the ſaid Cenſors, at the College aforeſaid, in the Pariſh and Ward aforeſaid, the 22d Day of the ſaid Month of *October*, upon the Premiſſes to be examined, at which 22d Day of *October*, in the Year of our Lord 1606, aboveſaid, at the Aſſembly of the College aforeſaid, holden at the College aforeſaid, at *London* aforeſaid, in the Pariſh and Ward aforeſaid; afterwards, that is to ſay, the ſame 22d Day of *October*, in the Year of our Lord 1606, aboveſaid, before the ſaid *George Turner*, *William Dun*, *Thomas Moundford*, and *John Argent*, then Cenſors and Governors of the College aforeſaid, becauſe that the ſaid *Thomas Bonham*, by the aforeſaid Cenſors or Governors of the College aforeſaid, as it is ſaid, being warned to appear at the College aforeſaid, before the Preſident and Cenſors, or Governors of the College aforeſaid, the aforeſaid 22d Day of *October*, in the ſame Day, did not appear, then and there it was granted by the ſaid Cenſors or Governors of the College aforeſaid, that the ſaid *Thomas Bonham*, for his Diſobedience and Contempts, ſhould be amerced to 10 *l.* and that the ſaid *Thomas Bonham*, for the Cauſes aforeſaid, ſhould be arreſted, and delivered into Cuſtody, and the ſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William* (*Bowlen*) further

ſay,

ſay, That afterwards, and before the Time in which, *&c.* that is to ſay, the 24th Day of *October*, in the Year of our Lord 1606, aboveſaid, the ſaid *Thomas Langton*, Preſident of the College aforeſaid, at *London*, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bows*, in the Ward of *Cheap* aforeſaid, died; after whoſe Death, and before the Time in which, *&c.* That is to ſay, the 25th Day of *October*, it the Year of our Lord 1606, aboveſaid, the ſaid *Henry Atkins*, a prudent Man, and ſkilful in the Faculty of Phyſick, and one of the Communalty of the College aforeſaid, and one of the then eight Electors of the College aforeſaid then being, at the College aforeſaid, within *London* aforeſaid, in the Pariſh and Ward aforeſaid, was in due Manner choſen, and into the Office of Preſident of the College aforeſaid, for one whole Year then next following, and then and there held, and as yet doth hold the ſaid Office of Preſident of the College aforeſaid; and the ſaid *Henry Atkins* being Preſident of the College aforeſaid, and the aforeſaid *George Turner*, *William Dun*, *Thomas Moundford*, and *John Argent*, being Cenſors or Governors of the College aforeſaid, at an Aſſembly of the College aforeſaid holden, at the College aforeſaid, within *London* aforeſaid, in the Pariſh and Ward aforeſaid, the 7th Day of *November*, in the Year of our Lord 1606, aboveſaid, before the aforeſaid *Henry Atkins*, then Preſident of the College aforeſaid, and the aforeſaid *George Turner*, *William Dun*, *Thomas Moundford*, and *John Argent*, then Cenſors or Governors of the College aforeſaid, came the aforeſaid *Thomas Bonham* in his proper Perſon, of which *Thomas Bonham*, when the aforeſaid *Henry Atkins*, then Preſident of the College, and the aforeſaid *George Turner*, *William Dun*, *Thomas Moundford*, and *John Argent*, then Cenſors or Governors of the College aforeſaid, they aſked whether he would ſatisfy to the College aforeſaid, for his Diſobedience and Contempts aforeſaid, and again ſubmit himſelf to be examined, and to obey the Judgment of the College aforeſaid; and the aforeſaid *Thomas Bonham*, then and there anſwered, that he, before that had within *London* aforeſaid, done and practiſed, and then after within *London* aforeſaid, would do and practiſe Phyſick, no Leave being aſked of the ſaid College, and that he would not, in any thing, to the Preſident and Cenſors, or Governors of the College aforeſaid, yield Obedience; and then and their affirming the aforeſaid Preſident and Cenſors, or Governors aforeſaid, to have no Authority over thoſe who are made Doctors in the Univerſity; by which, the ſaid Cenſors or Governors, for the Offences and Diſobedience aforeſaid, then and there ordained and decreed, That the aforeſaid *Thomas Bonham* ſhould be ſent to Priſon, there to remain, until from thence, by the Preſident and Cenſors,

Cenſors or Governors of the College aforeſaid, for the Time being, he ſhould be delivered, as by the ſaid Letters Patents, and the Statutes aforeſaid, it is ordain'd and eſtabliſhed; and then and there made their Warrant, with the common Seal of the ſaid College or Communalty ſealed, and to the Keeper of the Priſon of the Lord the King, in the *Compter*, *London*, in the *Poultry*, in the Pariſh of St. *Mildred*, in the Ward of *Cheap* directed, and commanded by the ſaid Warrant to the Keeper of the Priſon aforeſaid, that the ſaid Keeper of the Priſon aforeſaid, ſhould receive the Body of the ſaid *Thomas Bonham*, and him, in the Priſon aforeſaid, of the ſaid Lord the King, there ſhould ſafely keep, without Bail or Mainprize, at the proper Coſts and Charges of the aforeſaid *Thomas Bonham*, until the aforeſaid *Thomas Bonham*, by the Command of the Preſident and Cenſors, or Governors aforeſaid, or their Succeſſors, he ſhould be delivered; which *Thomas Bonham*, for his Offences and Diſobedience aforeſaid, together with the Warrant aforeſaid, in Form aforeſaid made, the ſaid *Henry Atkins* then being Preſident of the College aforeſaid, and the aforeſaid *George Turner*, *William Dun*, *Thomas Moundford*, and *John Argent*, then being the four Cenſors or Governors of the College aforeſaid, by Virtue of the Letters Patents and Statutes aforeſaid, and the aforeſaid *William Bowden* and *John Taylor* as Servants of the ſaid *Henry Atkins*, Preſident, and of *George*, *William Dun*, *Thomas Moundford*, and *John Argent*, and by their the ſaid Preſident, and four Cenſors or Governors aforeſaid, Warrant, the aforeſaid Time, in which, *&c.* to one *Richard Ware*, then Keeper of the ſaid Priſon of the Lord the King, of the *Compter* aforeſaid at *London*, in the Pariſh of St. *Mildred* the Virgin, in the *Poultry*, in the Ward of *Cheap* aforeſaid, did commit and deliver into ſafe Cuſtody, according to the Form and Effect of the Letters Patents, and Statutes aforeſaid, as to them it was lawful to do; which Commitment of the aforeſaid *Thomas Bonham*, for the Cauſes aforeſaid, in Form aforeſaid done, is the ſame Treſpaſs and Impriſonment whereof the aforeſaid *Thomas Bonham* above complaineth: And this they are ready to aver, and thereupon demand Judgment, if the ſaid *Thomas Bonham*, his Action aforeſaid againſt them ought to have, *&c.* And the aforeſaid *Tho. Bonham* ſaith, that he, for any thing before, *&c.* alledged, to have his Action, ought not to be barred, becauſe (by Proteſtation he ſaith) That he the ſaid *Thomas Bonham*, was not inſufficient, nor was found by the aforeſaid Preſident and Cenſors, or Governors of the College aforeſaid, to practiſe Phyſick, nor unfitly or inſufficiently to the aforeſaid Preſident and Cenſors, or Governors of the College aforeſaid, in the Art of Phyſick did anſwer, as the ſaid *Henry Atkins*, *George Turner*, *Thomas Moundford*, *John*

John Argent, *John Taylor*, and *William Bowden*, above hath allegded, for Plea, the ſaid *Thomas Bonham* ſaith, That by the aforeſaid Act in the aforeſaid Parliament, of the aforeſaid late King *Henry* VIII. holden at *London* aforeſaid, the aforeſaid fifth Day of *April*, in the 14th Year of his Reign, and from thence adjourned to *Weſtminſter*, in the aforeſaid County of *Middleſex*, until the laſt Day of *July*, in the 15th Year of the Reign of the ſaid King, and there and then holden, It was further enacted by Authority of the ſame Parliament, That whereas in the Dioceſes of *England*, out of *London*, it was not then very likely always to find Men able ſufficiently to examine, according to the Statute, ſuch as ſhould be admitted to exerciſe Phyſick in them, That no Perſon then after be ſuffered to exerciſe Phyſick through *England*, until the ſaid Perſon ſhould be examined at *London*, by the aforeſaid Preſident, and three of the aforeſaid Electors, and ſhould have from the ſaid Preſident and Electors, Letters Teſtimonial of their Approbation and Examination, except he ſhould be a Graduate of *Oxford* or *Cambridge*, who had accompliſhed all Things for his Form without any Grace. And further, the ſaid *Thomas Bonham* ſaith, That he the ſaid *Thomas*, the ſecond day of *July*, in the Year of our Lord 1595, in the Univerſity of *Cambridge* aforeſaid, took the Degree and Dignity of a Doctor in Phyſick, and then and there, that is to ſay, the ſaid ſecond Day of *July*, in the Year of our Lord 1595 aboveſaid, in the Univerſity aforeſaid, at *Cambridge* aforeſaid, in the County of *Cambridge*, was duly and lawfully ordained, and made a Graduate of the Univerſity aforeſaid, that is to ſay, Doctor in Phyſick, according to the Laws, Statutes, Conſtitutions, and Ordinances of the ſaid Univerſity of *Cambridge* aforeſaid, and that he the ſaid *Thomas Bonham*, then and there had accompliſhed all Things concerning his Degree aforeſaid, by his Form, without Grace, from Time to Time, according to the Laws, Statutes, Conſtitutions, and Ordinances of the ſaid Univerſity of *Cambridge* aforeſaid: By Colour whereof, the ſaid *Thomas Bonham*, a Graduate of the Univerſity of *Cambridge* aforeſaid, that is to ſay, being Doctor in Phyſick in the Form aforeſaid, who had accompliſhed all Things concerning his Degree aforeſaid, for his Form, without any Grace, The ſaid Faculty of Phyſick from Time to Time in the ſaid City of *London*, that is to ſay, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bow*, in the Ward of *Cheap* aforeſaid, did exerciſe, as it was lawful for him to do, until the aforeſaid *Henry Atkins*, *George Turner*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, together with, *&c.* the aforeſaid tenth Day of *November*, in the fourth Year aboveſaid, with Force and Arms, him the ſaid *Thomas Bonham*, at *London* aforeſaid, in the aforeſaid Pariſh of the Bleſſed *Mary* of *Bow*, in the Ward of *Cheap*, took and impriſoned, and

him there in Priſon long, that is to ſay, by the ſpace of ſeven Days, againſt the Law and Cuſtom of this Kingdom of *England*, did detain, as the aforeſaid *Thomas Bonham* above againſt them complaineth, and this he is ready to aver; whereupon, inaſmuch as the aforeſaid *Henry Atkins*, *George Turner*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, the Treſpaſs and Impriſonment aforeſaid, above have acknowledged, the ſaid *Thomas Bonham* demandeth Judgment, and his Damages, by Reaſon of the Treſpaſs and Impriſonment aforeſaid, to be adjudged unto him, *&c.* And the aforeſaid *Henry Atkins*, *George Turner*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden* ſay, That the aforeſaid Plea of the aforeſaid *Thomas Bonham*, above by Replication pleaded, is not ſufficient in Law, to the Action of the aforeſaid *Thomas Bonham*, againſt them the ſaid *Henry Atkins*, *George Turner*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, to maintain, and that they to that Plea in Manner and Form aforeſaid by Replication pleaded, need not, nor by the Law of the Land are bound to anſwer, and this they are ready to aver, whereupon they demand Judgment, and that the ſaid *Thomas Bonham*, from having his Action aforeſaid againſt them to be barred, *&c.* And the aforeſaid *Thomas Bonham*, foraſmuch as he ſufficient Matter in Law, to maintain his Action aforeſaid, againſt the ſaid *Henry Atkins*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, above hath alledged, which he is ready to aver, which Matter the aforeſaid *Henry*, *George*, *Thomas Moundford*, *John Argent*, *John Taylor*, and *William Bowden*, do not deny, nor to the ſame any Ways anſwer, but the ſame Averment altogether to admit, do refuſe, as at firſt, he demands Judgment and his Damages, by Occaſion of the Treſpaſs and Impriſonment aforeſaid to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes aforeſaid, whereof the Parties have put themſelves to the Judgment of the Court aforeſaid, before that they give their Judgment thereof, Day is given to the Parties here, until in eight Days of *St. Hillary*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.*

Dr. BONHAM's *Case.*

Hill. 7 Jac. 1.

THomas Bonham, Dr. in Philoſophy and Phyſick, brought an Action of falſe Impriſonment againſt *Henry Atkins*, *George Turner*, *Thomas Moundeford*, and *John Argent*, Drs. in Phyſick, and *John Taylor*, and *William Bowden* Yeomen; for that the Defendants, the 10 *Nov. Anno* 4 *Jacobi*, did impriſon him, and detain him in Priſon ſeven Days. The Defendants pleaded the Letters Patents of King *H.* 8. bearing Date 23 *Septemb. Anno* 10 of his Reign, by which he recites, (*a*) *Quod cum regii officii ſui munus arbitrabatur ditionis ſuæ hominum fœlicitati omni ratione conſulere, id autem vel imprimis fore ſi improborum conatibus tempeſtive occurreret*, &c. And by the ſame Letters Patents, the King granted to *John Chambre*, *Thomas Linacre*, *Ferdinando de Victoria*, *John Halſwel*, *John Frances*, and *Robert Yaxley*, *quod ipſi omneſque homines ejuſdem facultatis de & in civitat'* London *ſint in re & nomine unum corpus & communitas perpetua, per nomen Præſidentis & Collegii, ſive communitatis facultatis medicinæ* London, *&c.* And that they might make Meetings and Ordinances, *&c.* But the Caſe at Bar doth principally conſiſt on two Clauſes in the Charter. The firſt, *Conceſſimus etiam eiſdem Præſidenti & Collegio ſeu Communitati & ſucceſſoribus ſuis, quod nemo in dicta Civitate, aut per ſeptem miliaria in circuitu ejuſdem, exerceat dictam facultatem Medicinæ, niſi ad hoc per dict' Præſident' & Communit' ſeu ſucceſſores ſuos, qui pro tempore fuerint, admiſſus ſit per ejuſdem præſidentis & Collegii Literas ſigillo ſuo communi ſigillat' ſub pœna centum*

Skinner 568. 4 Inſt. 251. 2 Brownl. 255, 256, &c.

(*a*) 2 Brownl. 256, 260.

tum ſolidorum pro quo libet menſe quo non admiſſus eandem facultatem exercuerit, dimid' inde Dom' Regi & hæredibus ſuis, & dimidium dict' Præſidenti & Collegio applicand', &c. The ſecond Clauſe is, which immediately follows in theſe Words, *Præterea voluit & conceſſit pro ſe & ſucceſſoribus ſuis, quantum in ſe fuit, quod per præſident' & Collegium Prædict' Communitat' pro tempore exiſt' & eorum ſucceſſores imperpetuum, quatuor ſingulis annis per ipſos eligerent' qui haberent ſuperviſum & ſcrutinium, correctionem & gubernationem omnium & ſingulorum dict' Civitatis Medicorum, utentium facultat' medicinæ in eadem Civitate, ac aliorum Medicorum forinſecorum quorumcunque facultatem illam Medicinæ aliquo modo frequentantium & utentium infra eandem Civitatem & ſuburbia ejuſdem, ſive infra ſeptem milliaria in circuitu ejuſdem Civitatis, ac punitionem eorundem pro delictis ſuis in non bene exequend' faciend' & uten' illa: necnon ſuperviſum & ſcrutinium omnium medicinarum, & earum receptionem per dictos Medicos ſeu aliquem eorum hujuſmodi ligeis dicti nuper Regis pro eorum infirmitatibus curand' & ſanand' dand' imponend' & utend' quoties & quando opus fuerit, pro commodo & utilitat' eorundem ligeorum dicti nuper Regis: Ita quod punitio eorundem Medicorum utentium dicta facultate Medicinæ ſic in præmiſſ' delinquentium per fines, amerciamenta & impriſonament' corporum ſuorum, & per alias vias rationabiles & congruas exequeretur, prout* by the ſaid Charter *plenius liquet. Et quod virtute præd' literarum patentium præd' Johan' Chambre, Tho. Linacre, &c. & omnes Homines ejuſdem Facultatis in Civit' præd' fuer' unum Corpus & communitas perpet' ſive Collegium perpetuum.* And afterwards, by Act of Parliament made *An.* (*a*) 14 *H.* 8. It was enacted, That the ſaid Corporation, and every Grant, Article, and other Things in the ſaid Letters Patents contained aad ſpecified, ſhould be approved, granted, ratified and confirmed, *&c. in tam amplo & largo modo prout poterit acceptari, cogitari, & conſtrui per eaſdem Literas Patentes.* And further it was enacted, That the ſaid ſix Perſons named in the ſaid Letters Patents, as Principal of the ſaid College, ſhould elect to them two others of the ſaid College, who ſhould be named *Electi*, and that the ſaid Elects ſhould chooſe one of them to be Preſident, as by the ſaid Act appears: And further, they pleaded the Act of (*b*) 1 *Mariæ*, by which it is enacted, *Quod quædam conceſſio per Literas Patentes de incorporatione facta per prædict' nuper Regem Medicis* London. *Et omnes clauſulæ & articuli content' in eadem conceſſione approbarentur, concederentur, ratificarentur & confirm' per prædict' Parliam'; in conſideratione cujus inactitat' fuit authoritate ejuſdem Parliamenti. Quod præd' ſtatut' & Actum Parliamenti in omnibus articulis & clauſulis in eodem content' extunc impoſterum ſtarent & continuarent in pleno robore,* &c. And further it was enacted,

(*a*) 14 & 15 H.8. cap. 5. 1 Roll. 598. 4 Inſt. 251. Raſtal's Phyſicians 3. 2 Bulſt. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jones 261. Cr. Jac. 121, 159, 160. Cr. Car. 256. Palm. 486.

(*b*) 1 Mar. c. 9. Raſtal's Phyſicians 7. Lit. Rep. 169, 172, 173, 212, 213, 215, 248, 249, 350, 351. 1 Jones 263. Cr. Car. 257. Cr. Jac. 121. 4 Inſt. 251. 2 Brownl. 257, 262, 265, 266.

ed, *That whenſoever the Preſident of the College, or Commonalty of the Faculty of Phyſick of* London *for the Time being, or ſuch as the ſaid Preſident and College ſhall yearly, according to the Tenor and Meaning of the ſaid Act, authorize to ſearch, examine, correct and puniſh all Offenders and Tranſgreſſors in the ſaid Faculty,* &c. *ſhall ſend or commit any ſuch Offendor or Offendors for his or their Offence or Diſobedience, contrary to any Article or Clauſe contained in the ſaid Grant or Act, to any Ward, Gaol or Priſon within the ſame City (the Tower of* London *except) that then from Time to Time the Warden, Gaoler or Keeper,* &c. *ſhall receive,* &c. *ſuch Perſon ſo offending,* &c. *and the ſame ſhall keep at his proper Charge, without Bail or Mainprize, until ſuch Time as ſuch Offender or Diſobedient be diſcharged of the ſaid Impriſonment by the ſaid Preſident, and ſuch Perſons as ſhall be thereunto authoriſed, upon pain that all and every ſuch Warden, Gaoler,* &c. *doing the contrary, ſhall loſe and forfeit the double of ſuch Fines and Amerciaments as ſuch Offender and Offenders ſhall be aſſeſſed to pay, by ſuch as the ſaid Preſident and College ſhall authorize as aforeſaid, ſo that the Fine and Amerciament be not at any one Time above the Sum of* 20 l. *the one Moiety to the King, the other Moiety to the Preſident and College,* &c. And further pleaded, That the ſaid *Thomas Bonham,* 10 *April'* 1606, within *London*, againſt the Form of the ſaid Letters Patents, and the ſaid Acts, *exercebat artem Medicinæ, non admiſſus per Literas præd' Præſidentis & Collegii ſigille eorum communi ſigillat' ubi revera præd'* Tho. Bonham *fuit minus ſufficiens ad artem Medicinæ exercend'.* By force of which, the ſaid *Thomas Bonham,* 30 *Aprilis* 1606, was ſummoned in *London* by the Cenſors or Governors of the College, *ad comparend' coram Præſiden' & Cenſor' ſive Gubernatorib' Collegii præd'* at the College, *&c.* the 14 Day of *April* next following, *ſuper præmiſſis examinand'.* At which Day the ſaid *Thomas Bonham* came before the Preſident and Cenſors, and was examined by the Cenſors *de ſcientia ſua in facultate ſua in Medicin' adminiſtrand'. Et quia præd'* Thomas Bonham *ſic examinatus minus apte & inſufficienter in præd' arte medicinæ reſpondebat, & inventus fuit ſuper examinationem præd' per præd' Præſident' & Cenſores minus ſufficiens & inexpert' ad artem Medicinæ adminiſtrand' ac pro eo quod præd'* Tho. Bonham *multoties ante tunc examinatus, & interdictus per Præſident' & Cenſores, de cauſis præd' ad artem medicinæ adminiſtrand' per unum menſem & amplius poſt talem interdictionem facultatem illam in* Lond' *præd' ſine licentia, &c. ideo adtunc & ibid' conſideratum fuit per præd' Præſident' & Cenſores, quod præd'* Thomas Bonham *pro inobedientia & contempt' ſuis præd' amerciaretur to* 100 s. *in proximis comitiis præd' Præſident' & Collegii perſolvend' & deinceps abſtineret, &c. quouſque inventus fuerit ſufficiens, &c. ſub pœna*

conjiciendi in Carcerem ſi in præmiſſis delinqueret. And that the ſaid *T. Bonham*, 20 *Octo.* 1606, within *London* did practiſe Phyſick, and the ſame Day he was ſummoned by the Cenſors to appear before the Preſident and them, 22 *Octob.* then next following, at which Day *Bonham* made Default: *Ideo conſideratum fuit per præd' Cenſores*, that for his Diſobedience and Contempt he ſhould be amerced to 10 *l.* and that he ſhould be arreſted and committed to Cuſtody; and afterward, 7 *Nov.* 1606, the ſaid *T. Bonham*, at their Aſſembly came before the Preſident and Cenſors, and they aſked him if he would ſatisfy the College for his Diſobedience and Contempt, and ſubmit himſelf to be examined, and obey the Cenſure of the College, who anſwer'd, That he had practiſed and would practiſe Phyſick within *London*, *nulla a Collegio petita venia*, and that he would not ſubmit himſelf to the Preſidents and Cenſors, and affirm'd, that the Preſident and Cenſors had no Authority over thoſe who were Doctors in the Univerſity; for which Cauſe, the ſaid four Cenſors, *ſc.* Dr. *Turner*, Dr. *Moundford*, D. *Argent*, and Dr. *Dun*, then being Cenſors, or Governors, *pro offenſis & inobedientia præd' adtunc & ib' ordinaverunt & decreverunt, quod præd'* T. Bonham *in carcerem mandaretur ib' remanſur' quouſque abinde per Præſident' & cenſores, ſeu gubernatores Collegii præd' pro tempore exiſten' deliberaretur*, and there then by their Warrant in Writing, under their Common Seal, did commit the Plaintiff to the Priſon of the *Compter* of *London*, &c. *abſq; ballivo ſive manucapt' ad Cuſtagia & onera ipſius* T. Bonham, *donec præd'* T. Bonham *per præcept' Præſiden' & Cenſor Collegii præd' ſive ſucceſſor' ſuor' liberatus eſſet*; and Dr. *Atkins* then Preſident, and the Cenſors, and *Bowden* and *Taylor* as their Servants, and by the Commandment of the ſaid Preſident and Cenſors, did carry the Plaintiff with the Warrant, to the Gaol, *&c.* which is the ſame Impriſonm. The Plaintiff replied and ſaid, That by the ſaid Act of 14 *H.* 8. it was further enacted, *And where that in the Dioceſes of* England, *out of* London, *it is not like to find alway Men able ſufficiently to examine (after the Statute) ſuch as ſhall be admitted to exerciſe Phyſick in them, that it may be enacted in this preſent Parliament, That no Perſon from henceforth be ſuffered to exerciſe or practiſe Phyſick through* England, *until ſuch Time that he be examined at* London *by the ſaid Preſident and three of the ſaid Elects, and to have from them Letters Teſtimonial of their approving and examination, Except he be a Graduate of* Oxford *or* Cambridge, *which have accompliſhed all Things for his Form without any Grace:* And that the Plaintiff, *Anno Dom.* 1595, was a Graduate, *ſc.* a Doctor in the Univerſity of *Cambridge*, and had accompliſhed all Things concerning his Degree for his Form without (*a*) Grace, by Force whereof he had exerciſed and practiſed Phyſick within the City of *London* 'till the Defendants had impriſon'd him, *&c.* upon which the Defend. demurr'd in Law. And this Caſe was often argued

(*a*) 2 Brownl. 261, 262.

argued by the Serjeants at Bar in divers ſeveral Terms; and now this Term the Caſe was argued by the Juſtices, and the effect of their Arguments who argued againſt the Plaintiff (which was divided into three Parts) ſhall be firſt reported. The firſt was, Whether a Doctor of Phyſick of the one Univerſity or the other, be by the Letters Patents, and by the Body of the Act of 14 *H.* 8. reſtrain'd from practiſing Phyſick within the City of *London*, &c. The ſecond was, If the Exception in the ſaid Act of (*a*) 14 *H.* 8. has excepted him or not. The third was, That his impriſonment was lawful for his ſaid Diſobedience. And as to the firſt, they relied upon the Letter of the Grant, ratified by the ſaid Act of 14 *H.* 8. which is in the Negative, *ſc. Nemo in dicta civitate, &c. exerceat dictam facultatem niſi ad hoc per prædict' Præſidentem & communitatem, &c. admiſſus ſit, &c.* And this Propoſition is a general Negative, and (*b*) *Generale dictum eſt generaliter intelligendum*; and *nemo* excludes all; and therefore a Doctor of the one Univerſity or the other, is prohibited within this Negative Word *Nemo*. And many Caſes were put where negative Statutes ſhall be taken *ſtricte & excluſive*, which I do not think neceſſary to be recited here. Alſo they ſaid, that the Statute of (*c*) 3 *H.* 8. *c.* 11. which in Effect is repealed by this Act of (*d*) 14 *H.* 8. has a ſpecial Proviſo for the Univerſities of *Cambridge* and *Oxford*, which being here left out, doth declare the Intention of the Makers of the Act, that they did intend to include them within this general Prohibition, *Nemo indicta Civitate, &c.* As to the ſecond Point they ſtrongly held, That the ſaid latter Clauſe, *And where that in the Dioceſes of* England, *out of* London, *&c.* this Clauſe, according to the Words, extends only to Places out of *London*, and ſo much the rather, becauſe they provided for *London* before, *Nemo in dicta Civitate, &c.* Alſo the Makers of the Act put a Diſtinction betwixt thoſe who ſhall be licenſed to practiſe Phyſick in *London*, &c. for they ought to have the Admittance and Allowance of the Preſident and College in Writing, under their Common Seal; but he who ſhall be allowed to practiſe Phyſick throughout *England*, out of *London*, ought to be examined and admitted by the Preſident and three of the Elects, and ſo they ſaid, that it was lately adjudged in the King's Bench, in an Information exhibited againſt the ſaid Dr. *Bonham* for practiſing Phyſ. in *Lon.* for divers Months. As to the third Point they ſaid, That for his Contempt and Diſobedience bef. them at their Aſſembly in their College, they might well commit him to Priſ. for they have Authority by the Let. Pat. and Act of Parl. and theref. for a Contem. or Miſdem. bef. them they may commit him. Alſo the Act of (*e*) 1 *M.* has giv. them Power to commit them for every Offen. or Diſob. *contrary to any Artic. or Clauſe contain'd in the ſaid Grant or Act.* But there is an expre. neg. Artic. in the ſaid Grant, and ratified by the Act of 14 *H.* 8.

(*a*) 14 & 15 H. 8. cap. 5.

(*b*) 11 Co. 59. a. Co. Lit. 36. a. 2 Inſt. 81. Hard. 305.

(*c*) Raſtal. Phyſician 1.

(*d*) 14 & 15 H. 8. c. 5. 1 Rolls 598. 4 Inſt. 251. Raſtal's Phyſician 3. 2 Bulſtr. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jones 261. Cr. Jac. 121, 159, 160. Cr. Car. 256. Palm. 486. Cart. 115.

6 Mod. 125.

(*e*) 1 Mar. c. 9. Raſtal's Phyſician 7. Lit. Rep. 169, 172, 173, 212, 213, 215, 248, 249, 350, 351. 1 Jones 263. Cr. Car. 257. Cro. Jac. 121. 4 Inſt. 251. 2 Brownl. 257, 262, 265, 266. Cart. 115.

Quod nemo in dicta Civitate, &c. exerceat, &c. and the Defendants have pleaded, that the Plaintiff had practiſed Phyſick in *London* by the Space of one Month, *&c.* and therefore the Act of 1 *Mariæ* has authoriſed them to impriſon him in this Caſe; wherefore they concluded againſt the Plaintiff. But it was argued by *Coke* Chief Juſtice, *Warburton* and *Daniel* Juſtices of the Common Pleas, to the contrary. And *Daniel* Juſtice conceived, That a Doctor of Phyſick, of the one Univerſity or the other, *&c.* was not within the Body of the Act, and if he was within the Body of the Act, that he was excepted by the ſaid latter Clauſe; but *Warburton* argued againſt him for both the Points; and the Chief Juſtice did not ſpeak to thoſe two Points, becauſe he and *Warburton* and *Daniel* agreed, that this Action was clearly maintainable for two other Points, and therefore in this Action the Chief Juſtice omitted to ſpeak to the ſaid two Points; but to two other Points, he and the ſaid two other Juſtices, *Warburton* and *Daniel*, did ſpeak, *ſc.* 1. Whether the Cenſors have Power, for the Cauſes alledged in their Bar, to fine and impriſon the Plaintiff. 2. Admitting that they have Power to do it, if they had purſued their Power. But the Chief Juſtice, before he argued the Points in Law, becauſe much was ſaid in Commendation of the Doctors of Phyſick of the College in *London*, and ſomewhat (as he conceiv'd) in Derogation of the Dignity of the Doctors of the Univerſities, he firſt attributed much to the Doctors of the ſaid College in *London*, and confeſs'd that nothing was ſpoke in their Commendation which was not due to their Merits; but yet that no Compariſon was to be made between that private College, and any of the Univerſities of *Cambridge* and *Oxford*, no more than between the Father and his Children, or betw. the Fountain and the ſmall Rivers which deſcend from it; the Univerſity is *Alma* (a) *mater*, from whoſe Breaſts thoſe of that private College have ſuck'd all their Science and Knowledge (which I acknowledge to be great and profound) but the Law ſaith, *Erubeſcit lex filios caſtigare parentes:* The Univerſity is the Fountain, and that and the like private Colleges are *tanquam rivuli*, which flow from the Fountain, *& melius eſt petere fontes quam ſectari rivulos.* Briefly, *Academiæ* (b) *Cantabrigiæ & Oxoniæ ſunt Athenæ noſtræ nobiliſſimæ, regni ſoles, oculi & animæ regni, unde Religio, humanitas, & doctrina in omnes regni partes uberrime diffunduntur:* But it is true, *Nunquam ſufficiet copia laudatoris, quia nunquam deficiet materia laudis*; and therefore thoſe Univerſities exceed and excel all private Colleges, *quantum inter viburna cupreſſus.* And it was obſerv'd that K. *H.* 8. in his ſaid Let. Pat. and the K. and the Parliament in the Act of 14 *H.* 8. in making of a Law concer. Phyſicians, for the more Safety and Health of Men, therein follow the Order of a good Phyſic. (*Rex* (c) *enim omn' artes cenſetur habere in ſcrinio pect' ſui*) for, *medicina*

(a) 2 Brownl. 264.

(b) 2 Brownl. 264.

(c) 2 Brownl. 264.

eſt

eſt duplex, removens, (*a*) *& promovens; removens morbum, & promovens ad ſalutem:* And therefore five Manner of Perſons (who more hurt the Body of Man than the Diſeaſe itſelf, one of which ſaid of one of their Patients, *fugiens morbum incidit in medicum*) are to be removed; 1. *Improbi.* 2. *Avari, qui medicinam magis* (*b*) *avaritiæ ſuæ cauſa quam ullius bonæ conſcientiæ fiducia profitentur.* 3. *Malitioſi.* 4. *Temerarii.* 5. *Inſcii.* And of the other Part, five Manner of Perſons were to be promoted, as appears by the ſaid Act, *ſc.* thoſe who were, 1. *profound.* 2. *ſad.* 3. *diſcreet.* 4. *groundly learned.* 5. *profoundly ſtudied.* And it was well ordained, That the Profeſſors of Phyſick ſhould be profound, ſad, diſcreet, *&c.* and not Youths, who have no Gravity and Experience; for as one ſaith, (*c*) *In juvene Theologo conſcientiæ detrimentum, in juvene legiſta burſæ detrimentum, in juvene Medico cœmiterii incrementum.* And it ought to be preſumed, every Doctor of any of the Univerſities to be within the Statutes, *ſc.* to be *profound, ſad, diſcreet, groundly learned, and profoundly ſtudied,* for none can there be Maſter of Arts (who is a Doctor of Philoſophy) under the Study of ſeven Years, and cannot be Doctor in Phyſick under ſeven Years more in the Study of Phyſick; and that is the Reaſon that the Plaintiff is named in the Declaration Doctor of Philoſophy, and Doctor of Phyſick; *quia oportet Medicum eſſe Philoſophum,* (*d*) *ubi enim Philoſophus deſinit, Medicus incipit:* As to the two Points upon which the Chief Juſtice, *Warburton* and *Daniel,* gave Judgment. 1. It was reſolved by them, That the ſaid Cenſors had not Power to commit the Plaintiff for any of the Cauſes mentioned in the Bar; and the Cauſe and Reaſon thereof ſhortly was, That the ſaid Clauſe, which gives Power to the ſaid Cenſors to fine and impriſon, doth not extend to the ſaid Clauſe, *ſc. Quod nemo in dicta Civitate, &c. exerceat dictam facultatem, &c.* which prohibits every one from practiſing Phyſick in *London,* &c. without Licenſe from the Preſident and College; but extends only to puniſh thoſe who practiſe Phyſick in *London, pro delictis ſuis in non bene* (*e*) *exequendo, faciendo & utendo facultate Medicinæ,* by Fine and Impriſonment: So that the Cenſors have not Power by the Letters Patents, and the Act, to fine or impriſon any for practiſing Phyſick in *London,* but only *pro delictis ſuis in non bene exequendo, &c. ſc.* for ill, and not good Uſe and Practice of Phyſick. And that was made manifeſt by five Reaſons, which were called *vividæ rationes,* becauſe they had their Vigour and Life from the Letters Patents, and the Act itſelf; and the beſt (*f*) Expoſitor of all Letters Patents, and Acts of Parliament, are the Let. Pat. and the Acts of Parliam. themſelves, by Conſtruction, and conferring (*g*) all the Parts of them together,

(*a*) 2 Brownl. 264.

(*b*) 2 Brownl. 258.

(*c*) 2 Brownl. 264.

(*d*) 2 Brownl. 263.

(*e*) 2 Brownl. 258.

(*f*) Godb. 418. 2 Rolls Rep. 356. Wing. Max. 239.

(*g*) 2 Co. 55. a. 3 Co. 59. b. Godb. 324. Co. Lit. 381. 5 Co. 99. a.

(*a*) Wing. Max. 239.
(*b*) Wing. Max. 239.

together, (*a*) *Optima Statuti interpretatrix eſt (omnibus particulis ejuſdem inſpectis) ipſum Statutum*; and (*b*) *Injuſtum eſt niſi tota lege inſpecta una aliqua ejus particula propoſita judicare vel reſpondere.* The firſt Reaſon was, that theſe two were two abſolute, perfect and diſtinct Clauſes, and as Parallels, and therefore the one did not extend to the other; for the ſecond begins, *Præterea voluit & conceſſit, &c.* and the Branch concerning Fine and Impriſ. is Parcel of the 2d Clauſe. 2. The firſt Clauſe prohibiting the Practice of Phyſick, *&c.* comprehends four Certainties: 1. Certainty of the Thing prohibited, *ſc.* Practice of Phyſick. 2. Certainty of the Time, *ſc.* Practiſe for one Month. 3. Certainty of Penalty, *ſc.* 5 *l.* 4. Certainty in Diſtribution, *ſc.* one Moiety to the King, and the other Moiety to the College, and this Penalty he who practiſes Phyſick in *London* incurs, although he practiſes and uſes Phyſick well, and profitable for the Body of Man; and on this Branch the Information was exhibited in the King's Bench. But the Clauſe to puniſh *delicta in non bene exequendo, &c.* on which Branch the Caſe at Bar ſtands, is altogether incertain, for the Hurt which may come thereby may be little or great, *leve vel grave*, exceſſive or ſmall, *&c.* and therefore the King and the Makers of the Act could not, for an Offence ſo uncertain, impoſe a certainty of the Fine, or Time of Impriſonment, but leave it to the Cenſors to puniſh ſuch Offences, *ſecundum quantitatem delicti*, which is included in theſe Words, *per fines, amerciamenta, impriſonamenta corporum ſuorum, & per alias vias rationabiles & congruas.* 2. The Harm which accrues by *non bene exequendo, &c.* concerns the Body of Man; and therefore it is reaſonable that the Offender ſhould be puniſhed in his Body, *ſc.* by Impriſonment; but he who practiſes Phyſick in *London* in a good Manner, altho' he doth it without Licenſe, yet it is not any Prejudice to the Body of Man. 3. He who practiſes Phyſick in *London*, doth not offend the Statute by his Practice, unleſs he practiſes it by the Space of a Month. But the Clauſe of *non bene exequendo, &c.* doth not preſcribe any certain Time, but at what Time ſoever he miniſters Phyſick *non bene, &c.* he ſhall be puniſhed by the ſaid ſecond Branch: And the Law hath great Reaſon in making this Diſtinction, for divers Nobles, (*c*) Gentlemen and others, come upon divers Occaſions to *London*, and when they are here they become ſubject to Diſeaſes, and thereupon they ſend for their Phyſicians in the Country, who know their Bodies, and the Cauſe of their Diſeaſes; now it was never the Meaning of the Act to bar any one of his own Phyſician; and when he is here he may practiſe and miniſter to another by two or (*d*) three Weeks, *&c.* without any Forfeiture; for any one who practiſes Phyſick *bene, &c.* in *London* (altho' he has not taken any

(*c*) 2 Brownl. 264. Cart. 115.

(*d*) 2 Brownl. 264.

any Degree in any of the Univerſities) ſhall forfeit nothing, unleſs he practiſes it by the Space of a Month; and that was the Reaſon, that the Time of a Month was put in the Act. 4. The Cenſors can't be (*a*) Judges, Miniſters, and Parties; Judges to give Sentence or Judgment; Miniſters to make Summons; and Parties to have the Moiety of the Forfeiture, *quia* (*b*) *aliquis non debet eſſe Judex in propria cauſa, imo iniquum eſt aliquem ſuæ rei eſſe Judicem*; and one cannot be Judge and Attorney for any of the Parties, *Dyer* 3 *E.* 6. 65. 38 *E.* 3. 15. 8 *H.* 6. 19. *b.* 20. *a.* 21 *E.* 4. 47. *a.* *&c.* And it appears in our Books, that in many Caſes, the Common Law will (*c*) controll Acts of Parliament, and ſome times adjudge them to be utterly void: For when an Act of Parliament is againſt Common Right and Reaſon, or repugnant, or impoſſible to be performed, the Common Law will controll it, and adjudge ſuch Act to be void; and therefore in 8 *E.* 3. 30. *a. b. Thomas Tregor's* Caſe on the Statute of *W.* 2. *c.* 38. *& Artic' ſuper Chartas*, *c.* 9. *Herle* (*d*) ſaith, Some Statutes are made againſt Law and Right, which thoſe who made them perceiving, would not put them in Execution: The Stat. of *W.* 2. (*e*) *c.* 21. gives a Writ of *Ceſſavit hæredi petenti ſuper hæredem tenent' & ſuper eos quibus alienatum fuerit hujuſmodi tenementum:* And yet it is adjudged in 33 *E.* 3. (*f*) *Ceſſavit* 42. where the Caſe was, Two Coparceners Lords, and Tenant by Fealty and certain Rent, one Coparcener had Iſſue and died, the Aunt and the Niece ſhall not join in a *Ceſſavit*, becauſe the Heir (*g*) ſhall not have a *Ceſſavit* for the Ceſſer in the Time of his Anceſtor, *F. N. B.* 209. *F.* and therewith agrees *Plow. Com.* 110. *a.* and the Reaſon is, becauſe in a *Ceſſavit* the Tenant before Judgment may render the Arrearages and Damages, *&c.* and retain his Land, and that he cannot do when the Heir brings a *Ceſſavit* for the Ceſſer in the Time of his Anceſtor, for the Arrearages incurred in the Life of the Anceſtor do not belong to the Heir: And becauſe it would be againſt Common Right and Reaſon, the Common Law adjudges the ſaid Act of Parliament as to that Point void. The Statute of (*h*) *Carliſle*, made *anno* 35 *E.* 1. enacts, That the Order of the *Ciſtertians* and *Auguſtines*, who have a Covent and Common Seal, that the Common Seal ſhall be in the keeping of the Prior, who is under the Abbot, and four others of the moſt grave of the Houſe, and that any Deed ſealed with the Common Seal, which is not ſo in keeping ſhall be void: And the Opinion of the Court, (*in An.* 27 *H.* 6. *Annuity* 41.) was, that this Statute was (*i*) void, for it is impertinent to be obſerved, for the Seal being in their keeping, the Abbot cannot ſeal any Thing with it, and when it is in the Abbot's Hands, it is out of their keeping *ipſo facto*; and if the Statute ſhould be (*k*) obſerved, every Common Seal ſhall be defeated upon a ſimple Surmiſe, which cannot be tried. Note Reader the Words of

(*a*) Co. Lit. 141. a. Hob. 87. Bridg. 11. 2 Brownl. 265. Dyer 220. pl 14.
(*b*) Co. Lit. 141. a.
(*c*) 7 Co. 14. a. Calvin's Caſe. Hob. 87. 2 Brownl. 198, 265. Hard. 140.
(*d*) 8 E. 3. 30. b.
(*e*) 2 Inſt. 401, 402.
(*f*) 2 Brownl. 265. 2 Inſt. 402. F. N. B. 209. f.
(*g*) 2 Brownl. 265. Vet. N. B. 138. b. 2 Inſt. 442.
(*h*) 2 Inſt. 580, 581, 582, &c. Skinner 464.
(*i*) 2 Inſt. 588. 2 Brownl. 196. 265.
(*k*) 2 Brownl. 265. 2 Inſt. 587.

of the ſaid Statute at *Carliſle, anno* 35 *E.* 1. (which is call'd *Statutum Religioſorum*) are, *Et inſuper ordinavit Dominus Rex & ſtatuit, quod Abbates Ciſterc' & præmonſtraten' ordin' religioſorum, &c. de cætero habeant ſigillum Commune, & illud in Cuſtodia Prioris Monaſterii ſeu Domus, & quatuor de dignioribus & diſcretioribus ejuſdem loci conventus ſub privato ſigillo Abbatis ipſius loci cuſtod' depo', &c. Et ſi forſan aliqua ſcripta obligationum, donationum, emptionum, venditionum, alienationum, ſeu aliorum quorumcunque contractuum alio ſigillo quam tali ſigillo communi ſicut præmittit' cuſtodit' inveniant' a modo ſigillata, pro nullo penitus habeantur omnique careant firmitate.* So the Statute of 1 *E.* 6. *c.* 14. gives Chauntries, *&c.* to the King, ſaving to the Donor, *&c. all ſuch Rents, Services, &c.* and the Common Law controlls it, and adjudges it void as to Services, and the Donor ſhall have the Rent, as a Rentſeck, diſtrainable of common Right, for it would be againſt common Right and Reaſon that the (*a*) King ſhould hold of any, or do Service to any of his Subjects, 14 *Eliz. Dyer* 313. and ſo it was adjudged *Mich.* 16 *&* 17 *Eliz. in Com' Banco in* (*b*) *Strowd's Caſe.* So if any Act of Parliament gives to any to hold, or to have Conuſans of all Manner of Pleas ariſing before him within his Manor of *D.* yet he ſhall hold no Plea, to which he himſelf is party; for, as hath been ſaid, *iniquum eſt aliquem ſuæ rei eſſe Judicem.* 5. If he ſhould forfeit 5 *l.* for one Moiety by the firſt Clauſe, and ſhould be puniſh'd for practiſing at any Time by the ſecond Clauſe, two Abſurdities ſhould follow, 1. that one ſhould be puniſhed not only twice, but many times for one and the ſame Offence, And the Divine ſaith, *Quod* (*c*) *Deus non agit bis in idipſum*; and the Law ſaith, *Nemo debet bis puniri pro uno delicto.* 2. It would be abſurd, by the firſt Clauſe, to puniſh practiſing for a Month, and not for a leſſer Time, and by the 2d to puniſh practiſing not only for a Day, but at any Time, ſo he ſhall be puniſh'd by the firſt Branch for one Month by the Forfeit of 5 *l.* and by the ſecond by Fine and Impriſonment, without Limitation for every Time of the Month in which he practiſes Phyſick. And all theſe Reaſons were proved by two Grounds, or Maxims in Law; 1. (*e*) *Generalis Clauſula non porrigitur ad ea quæ ſpecialiter ſunt comprehenſa:* And the Caſe between *Carter* and (*f*) *Ringſtead, Hill.* 34 *Eliz. rot.* 120. *in Communi Banco*, was cited to this Purpoſe, where the Caſe in Effect was, That *A.* ſeiſed of the Manor of *Staple* in *Odiham* in the County of *Southampton* in Fee, and alſo of other Lands in *Odiham* aforeſaid in Fee, ſuffered a Common Recovery of all and declared the Uſe by Indenture, That the Recoverer ſhould ſtand ſeiſed of all the Lands and Tenements in *Odiham*, to the Uſe of *A.* and his Wife, and to the Heirs of his Body begotten; and further, that the Recoverer ſhould

(*a*) Dy. 313. pl. 91. 1 Co. 47. a. Dav. 2. a. Co. Lit. 1. b. Cro. Car. 82, 83. 2 Roll. Rep. 246, 247. 1 Jones 234. Lit. Rep. 43.

(*b*) 1 And. 45. 3 Leon. 58. 4 Leon. 40, 41.

(*c*) 4 Co. 43. a.

(*d*) 2 Ventr. 170. 4 Co. 43. a. 5 Co. 61. a. 11 Co. 59. b. 1 Roll. Rep. 95. Cawly 78. Noy 82. Bridgm. 122. Cro. Jac. 481. Wing. Max. 695.

(*e*) Poſtea 154. b. Raymond 330. Hawkes's Max. 21. Styles 391.

(*f*) Cr. El. 208. 2 Leon. 47. Owen 84, 85. 1 And. 245. 6 Co. 64. b. 3 Bulſtr. 66, 185. 2 Roll. Rep. 276. Winch. 92. Lane 69. Lit. Rep. 64, 67, 289. Styles 391.

ſhould ſtand ſeiſed to the Uſe of him, and to the Heirs of his Body, and died, and the Wife ſurvived, and entred into the ſaid Manor by Force of the ſaid general Words; but it was adjudged, That they did not extend to the ſaid Manor which was ſpecially named: And if it be ſo in a Deed, *a fortiori*, it ſhall be ſo in an Act of Parliament, which (as a Will) is to be expounded according to the Intention of the Makers. 2. (*a*) *Verba poſteriora propter certitudinem addita ad priora quæ certitudine indigent ſunt referenda.* 6 *E.* (*b*) 3. 12. *a. b.* Sir *Adam de Clydrow* Knight, brought a *Præcipe quod reddat* againſt *John de Clydrow*, and the Writ was, *Quod juſte, &c. reddat Manerium de Wicomb & duas carucatas terræ cum pertinentiis in Clydrow*, in that Caſe the Town of *Clydrow* ſhall not relate to the Manor, *quia non indiget*, for a Manor may be demanded without mentioning that it lies in any Town, but *cum pertinentiis*, although it comes after the Town, ſhall relate to the Manor, *quia indiget*. *Vide* 3 *E.* 4. 10. the like Caſe. But it was objected, That where by the ſecond Clauſe it was granted, that the Cenſors ſhould have *ſuperviſum & ſcrutinium, correctionem & gubernationem omnium & ſingulorum Medicorum, &c.* they had Power to fine and impriſon. To that it was anſwered, 1. That that is but Part of the Sentence, for by the entire Sentence it appears in what Manner they ſhall have Power to puniſh, for the Words are, *ac punitionem eorum pro delictis ſuis in non bene exequendo, faciendo, vel utendo illa facultate*; ſo that without Queſtion all their Power to correct and puniſh the Phyſicians by this Clauſe is only limited to theſe three Caſes, *ſc. in non bene exequendo, faciendo, vel utendo, &c.* Alſo this Word *punitionem*, is limited and reſtrained by theſe Words, *Ita quod punitio eorundem Medicorem, &c. ſic in præmiſſis delinquentium, &c.* which Words, *ſic in præmiſſis delinquentium*, limit the former Words in the firſt Part of this Sentence, *ac punitionem eorum pro delictis ſuis in non bene exequendo, &c.* 2. It would be abſurd, That in one and the ſame Sentence the Makers of the Act ſhould give them a general Power to puniſh without Limitation; and a ſpecial Manner how they ſhall puniſh, in one and the ſame Sentence. 3 *Hill.* 38 *Eliz.* in a *Quo Warranto* againſt the Mayor and Commonalty of *London*, it was held, That where a Grant is made to the Mayor and Commonalty, that the Mayor for the Time being ſhould have (*c*) *plenum & integrum ſcrutinium, gubernationem, & correctionem omnium & ſingulorum Myſteriorum, &c.* without granting them any Court, in which ſhould be legal Proceedings, that it is good for Search, whereby a Diſcovery may be made of Offences and Defects, which may be puniſhed by the Law in any Court, but it doth not give, nor can give them any irregular or abſolute Power to correct or puniſh any of the Subjects

(*a*) Wing. Max. 67. Lit. Rep. 66.
(*b*) Lit. Rep. 66. Wing. Max. 67. Styles 78.
(*c*) Cart. 120, 121.

Subjects of the Kingdom at their Pleasure. 2. It was Objected, That it is incident to every Court created by Letters Patents, or Act of Parliament, and other Courts of Record, to punish any Misdemeanor done in Court, in Disturbance or Contempt of the Court, by Imprisonment. To which it was answered, That neither the Letters Patents nor the Act of Parliament has granted them any Court, but only an (*a*) Authority, which they ought to pursue, as it shall be afterwards said. 2. If any Court had been granted them, they could not by any incident Authority *implicite* granted them, for any Misdemeanor done in Court, commit him to Prison without Bail or Mainprize, 'till he should be by the Commandment of the President and Censors, or their Successors, delivered, as the Censors have done in this Case. 3. There was not any such Misdemeanor for which any Court might imprison him, for he only shewed his Case to them, which, he was advised by his Counsel, he might justify, which is not any Offence worthy of Imprisonment. The second Point was, Admitting that the Censors had Power by the Act, If they had pursued their Authority, or not? And it was resolved by the Chief Justice, *Warburton*, and *Daniel*, that they had not pursued it for six Reasons. 1. By the Act, the Censors only have Power to impose a Fine, or Amerciament; and the President and Censors imposed the Amerciament of 5 *l.* upon the Plaintiff. 2. The Plaintiff was summoned to appear *coram Presidente & Censoribus, &c. & non comparuit*, and therefore he was fined 10 *l.* whereas the President had no Authority in that Case. 3. The Fines or Amercements to be imposed by them, by Force of the Act, do not belong to them, but to the King, for the King had not granted the Fines or Amercements to them, and yet the Fine is appointed to be paid to them, *in proximis Comitiis*, and they have imprisoned the Plaintiff for Non-payment thereof. 4. They ought to have committed the Plaintiff presently, by Construction of Law, although that no Time be limited in the Act, as in the Stat. of *W.* 2. *cap.* 11. (*b*) *De Servientibus, Ballivis, &c. qui ad compotum reddend' tenentur, &c. cum Dom' hujusmodi servientium dederit eis auditores compoti, & contingat ipsos in arrearagiis super compotum suum omnibus allocatis & allocandis, arrestentur corpora eorum, & per testimonium auditorum ejusdem compoti mittantur & liberentur proximæ Gaolæ Domini Regis in partibus illis, &c.* In that Case, although no Time be limited when the Accomptant shall be imprisoned, yet it ought to be done (*c*) presently, as it is held in 27 *H.* 6. 8. *a.* and the Reason thereof is given in *Fogassa*'s Case, *Plow. Com.* 17. *b* that the generality of the Time shall be restrain'd to the present Time, for the Benefit of him upon whom the Pain shall be inflicted, and therewith agrees *Plow. Com.* 206. *b.* in *Stradling*'s Case.

(*a*) Postea 121. a.

The second Point.

(*b*) 2 Inst. 379, 380. W. 2. c. 11. Plowd. 17. b. Rast. Account 2.

(*c*) Postea 120. b. 2 Brownl. 266. 2 Inst. 380. 2 Bulstr. 139. Fitz. Barr. 44. Br. Account 6. Br. Det. 16. Br. Execution 135. Br. Faux Imprisonment 32.

Case. And a Justice (*a*) of Peace upon View of the Force, ought to commit the Offender presently. 5. Forasmuch as the Censors had their Authority by the Letters Patents and Act of Parliament, which are high Matters of Record, their Proceedings ought not to be by *Parol, & eo potius*, because they claim Authority to fine and imprison, and therefore, if Judgment be given against one in the Common Pleas in a Writ of (*b*) Recaption, he shall be fined and imprisoned, but if the Writ be Vicontiel in the County, there he shall not be fined nor imprisoned, because *a Writ of* the Court is not of Record, *F. N. B. in Recaption*; so in *F. N. B.* 47. *a.* A Plea of Trespass *vi & armis* doth not lie in the County Court, Hundred Court, *&c.* for they cannot make a Record of Fine and Imprisonment; and regularly they who cannot make (*c*) a Record cannot fine and imprison. And therewith agrees 27 *H.* 6. 8. Book of Entries, Tit. Account, fol. — The Auditors make a Record when they commit the Defendant to Prison; A Justice of Piece upon View of the Force may commit, but he ought to make a Record of it. 6. Forasmuch as the Act of 14 *H.* 8. has given Power to imprison 'till he shall be delivered by the President and the Censors, or their Successors, Reason requires that it should be taken strictly, for the Liberty of the Subject (as they pretend) is at their Pleasure: And this is well proved by a Judgment in Parliament in this very Case; for when this Act of 14 *H.* 8. had given the Censors Power to imprison, yet it was taken so literally, That the Gaoler was not bound to receive such as they should commit to him, and the Reason thereof was, because they had Authority to do it without any Court: And thereupon the Statute of 1 *Ma.* (*d*) *cap.* 9. was made, that the Gaoler should receive them upon a Penalty, and yet none can commit any to Prison, unless the Gaoler receives him: But the first Act, for the Cause aforesaid, was taken so literally, that no necessary Incident was implied. And where it was objected, that this very Act of 1 *Mariæ, cap.* 9. has enlarged the Power of the Censors, and they urged it upon the Words of the Act; It was clearly resolved, that the said Act of 1 *Mariæ* did not enlarge the Power of the Censors to fine or imprison any Person for any Cause for which he ought not to be fined and imprisoned by the said Act of (*e*) 14 *H.* 8. For the Words of the Act of Queen *Mary* are, *according to the Tenor and Meaning of the said Act:* Also, *shall send or commit any Offender or Offendors for his or their Offence or Disobedience, contrary to any Article or Clause contained in the said Grant or Act, to any Ward, Gaol,* &c. But in this Case *Bonham* has not done any thing which appears within this Record, contrary to any Article or Clause contained within the Grant or Act of 14 *H.* 8. Also the Gaoler who refuses shall forfeit the double Value of the

(*a*) 2 Brownl. 266. 15 R. 2. c. 2. 8 H. 6. c. 9. 6 Mod. 125.

(*b*) Antea 60. b. 41. a. 11 Co. 43. b. F. N. B. 73. d.

(*c*) Antea fo. 38. b. 41. a. 60. b. F. N. B. 73. d. 10 C. 103. a.

Rep. Q. A. 146.

(*d*) 2 Brownl. 257, 262, 265, 266. Raft. Phyf. 7. Lit. Rep. 169, 172, 173, 212, 213, 248, 249, 350, 331. Cr. Jac. 121. Cr. Car. 257. 1 Jones 263. Car. 115. 4 Inft. 251.

(*e*) 14 & 15 H. 8. cap. 5. Roll. 598. 4 Inft. 251. Raft. Phyfi. 3. 2 Bulftr. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jon. 261. Cro. Jac. 121, 159, 160. Cr. Car. 256. Palm. 486. Cart. 115.

the Fines and Amerciaments that any Offender or Diſobedient ſhall be aſſeſſed to pay; which proves that none ſhall be received by any Gaoler by Force of the Act of 14 *H.* 8. but he who may be lawfully fined or amerced by the Act of 14 *H.* 8. and that was not *Bonham*, as by the Reaſons and Cauſes aforeſaid appears. And admitting that the Replication be not material, and the Defendants have demurred upon it; yet foraſmuch as the Defendants have confeſſed in the Bar, that they have impriſoned the Plaintiff without Cauſe, the Plaintiff ſhall have Judgment: And the Difference is, when the Plaintiff (*a*) replies, and by his Replication it appears that he has no Cauſe of Action, there he ſhall never have Judgment: But when the (*b*) Bar is inſufficient in Matter, or amounts (as the Caſe is) to a Confeſſion of the Point of the Action, and the Plaintiff replies, and ſhews the Truth of the Matter to enforce his Caſe, and in Judgment of Law it is not material, yet the Plaintiff ſhall have Judgment, for it is true that ſometimes the Declaration ſhall be made good by the Bar, and ſometimes the Bar by the Replication, and ſometimes the Replication by the Rejoinder, *&c.* but the Difference is, when the Declaration wants Time, Place, or other (*c*) Circumſtance, it may be made good by the Bar, ſo of the Bar, Replication, *&c.* as appears in 18 *E.* 4. 16. *b.* But when the Declaration wants Subſtance, no Bar can make it good; ſo of the Bar, Replication, *&c.* and therewith agrees 6 *E.* 4. 2. a good Caſe, and *nota* there *Dictum Coke. Vide* 18 *E.* 3. 34. *b.* 44 *E.* 3. 7. *a.* 12 *E.* 4. 6. 6 *H.* 7. 10. 7 *H.* 7. 3. 11 *H.* 4. 24. *&c.* But when Plaintiff makes Replication, Sur-rejoinder, *&c.* and thereby it appears, that upon the ‡ whole Record the Plaintiff has no Cauſe of Action, he ſhall never have Judgment, although the Bar or Rejoinder, *&c.* be inſufficient in Matter; for the Court ought to judge upon the whole Record, and every one ſhall be intended to make the beſt of his own Caſe. *Vide* (*d*) *Ridgeway's Caſe, in the third Part of my Reports* 52 *b.* and ſo theſe Differences were reſolved and adjudged between * *Kendal* and *Helyer*, *Mich.* 25 *&* 26 *Eliz.* in the King's Bench, and *Mich.* 29 *&* 30 *Eliz.* in the ſame Court, between (*e*) *Gallys* and *Burbry*. And *Coke* Chief Juſtice, in the Concluſion of his Argument obſerved ſeven Things for the better Direction of the Preſident and Commonalty of the ſaid College for the future. 1. That none can be puniſhed for practiſing Phyſick in *London*, but by Forfeiture of 5 *l.* by the Month, which is to be recover'd by the Law. 2. If any practiſe Phyſick there for a leſs Time than a Month, that he ſhall forfeit nothing. 3. If any Perſon prohibited by the Stat. offends *in non bene exeq'*, *&c.* they may puniſh him according to the Stat. within the Month. 4. Thoſe who they may commit to Priſon by the Stat. ought to be commit. (*f*) preſently. 5. The Fines which they ſet

(*a*) Cro. Jac. 133. Doct. Pla. 70, 325. Lit. Rep. 172. Moor 464. 1 Sid. 336. Dyer 39. pl. 62. Firzgib. 250.

(*b*) Cr. Jac. 133. Cr. Car. 5. Mo. 464. Poſtea 133. b. 9 Co. 110. b. Doct. pla. 70, 325. Palm. 287. Lit. Rep. 172, 252. 2 Bulſtr. 94. Antea 93. a. 1 Sid. 336.

(*c*) 7 Co. 25. a. Dyer 15. pl. 78. Cr. Car. 209. Co. Lit. 303. b. & Mod. 119.

‡ Hob. 199. Hard. 38.

(*d*) Styles 354.

* 3 Co. 52. b.

(*e*) 3 Co. 52. b. Cr. El. 62. 1 Leon 242.

(*f*) Antea 119. b. 2 Brownl. 266. 2 Inſt. 380.

ſet, according to the Statute, belong to the King. 6. They can't impoſe a Fine, or Impriſonment without a Record of it. 7. The Cauſe for which they impoſe Fine and Impriſonment ought to be certain, for it is (*a*) traverſable: For altho' they have Letters Patents, and an Act of Parliament, yet becauſe the Party grieved has no other Remedy, neither by Writ of Error, or otherwiſe, and they are not made Judges, nor a Court given them, but have an (*b*) Authority only to do it, the Cauſe of their Commitment is traverſable in an Action of falſe Impriſonment brought againſt them; as upon the Statute of (*c*) Bankrupts, their Warrant is under the Great Seal, and by Act of Parliament; yet becauſe the Party grieved has no other Remedy, if the Commiſſioners do not purſue the Act and their Commiſſion, he ſhall traverſe, that he was not a Bankrupt, altho' the Commiſſioners affirm him to be one; as this Term it was reſolved in this Court, in Treſpaſs between *Cutt (d)* and *Delabarre*, where the Iſſue was, whether *Will. Cheyney* was a Bankrupt or not, who was found by the Commiſſioners to be a Bankrupt; *a fortiori* in the Caſe at Bar, the Cauſe of the Impriſonment is traverſable; for otherwiſe the Party grieved may be perpetually, without juſt Cauſe, impriſoned by them: But the Record of a Force made by a Juſtice of Peace is not traverſable, becauſe he doth it as Judge, by the Statutes of (*e*) 15 *R.* 2. and 8 *H.* 6. and ſo there is a Difference when one makes a Record as a Judge, and when he doth a Thing by a ſpecial Authority, (as they did in the Caſe at Bar) and not as a Judge. And afterwards, for the ſaid two laſt Points, Judgment was given for the Plaintiff, *nullo contradicente*, as to them. And I acquainted Sir *Thomas Fleming*, Chief Juſtice of the King's Bench, with this Judgment, and with the Reaſons and Cauſes of it, and he well approved of the Judgment which we had given: And this is the firſt Judgment on the ſaid Branch concerning Fine and Impriſonment which has been given ſince the making of the ſaid Charter and Acts of Parliaments, and therefore I thought it worthy to be reported and publiſhed.

(*a*) 2 Brownl. 266. Hardr. 482.

(*b*) Antea 119. b.

(*c*) 13 El. cap. 7. 1 Jac. cap. 15.

(*d*) 4 Inſt. 277. & 278.

(*e*) 15 R. 2. c. 2. 8 H. 6. c. 9.

See *Carthew* 492. 6 *Mod.* 125.

The CASE *of the City of* LONDON.

Hill. 7 Jacobi I.

Skin. 374. Lucas 131, *&c.* Rep. Q. A. 49. 147. 2 Brownl. 278, 284. Raymond 394. 2 Sid. 120, 121. 3 Bulſtr. 190. 2 Roll. Rep. 158. Styles 479, 480. 11 Co. 53, *&c.*

AN *Habeas Corpus* was directed *Mich.* 7 *Jacobi*, out of this Court, to the Mayor, Aldermen, and Sheriffs of *London*, to have the Body of *James Wagoner*, who was arreſted in *London*, and remained in the Cuſtody of them, or ſome of them: Sir *Thomas Campbel*, Kt. Mayor of *London*, and the Aldermen, and *Sebaſtian Harvey* and *William Cokein*, Sheriffs of *London*, make ſuch a Return, That the City of *London eſt antiqua Civitas, quodque in eadem Civitate talis habetur, & a toto tempore cujus contrarium memoria hominum non exiſtit habebatur conſuetudo, uſitata & approbata*, viz. *quod ſi aliquæ conſuetudines in dicta Civitate obtent' & approbat' in aliqua parte difficiles ſive defectivæ exiſtant, ſeu extiter', aut aliqua in eadem Civitate de novo emergentia ubi remedium prius non exiſtit ſeu extiterit ordinat' emendatione indigeant ſive indigerunt, Major & Aldermanni Civitatis præd' pro tempore exiſtent' de aſſenſu Communitatis ejuſdem Civitatis remedium (a) congru' bonæ fide & rationi conſonum, pro communi utilitate Civium dict' Civitatis, & aliorum fidelium Domini Regis nunc & progenitorum ſuorum ad eandem confluent', apponere poſſint & potuerunt ordinat' quoties & quando eis videbitur expediri, dum tamen ordinatio hujuſmodi Domino Regi nunc & progenitoribus ſuis, & populo ſuo utilis, & bonæ fidei & conſona ſit rationi. Et ulterius ſignificamus quod dicta conſuetudo, & omnes aliæ conſuetudines Civitatis præd' a tempore*

(a) 2 Brownl. 284, 285. Raym. 326, 327.

tempore præd', &c. *uſitatæ*, *Authoritate Parliamenti Domini* Richardi *nuper Regis Angliæ Secundi poſt Conqueſtum*, *apud* Weſtm' *anno regni ſui* (*a*) *ſeptimo tent' tunc Majori & Communitati ejuſdem Civitatis & ſucceſſoribus ſuis ratificat' & confirmat' fuer'. Et nos præfat' Major & Aldermanni ac Vic' Civitat'* Lond' *præd' ulterius certificamus, quod in Communi Concilio tent' ſecundum conſuetud' Civit'* Lond' *in Camera* Guildhalda *ejuſdem Civitat' decimo quinto die* Aprilis, *anno regni Domini noſtri* Jacobi *nunc Regis Angliæ*, &c. *quarto*, *per* Leonardum Halliday, *Militem, nuper Majorem Civitatis* Lond' *præd', & ejuſdem Civitatis Aldermannos, de aſſenſu Communitatis ejuſdem Civitatis in eodem communi concilio aſſemblat' exiſt' ſecundum præd' conſuetudinem Civitatis præd', ordinat', inactitat' & ſtabilit' fuit, modo & forma, prout in Anglican' verbis ſequit'*, viz. Where by the ancient Charters, Cuſtoms, Franchiſes, and Liberties of the City of *London*, confirmed by ſundry Acts of Parliament, no Perſon, not being free of the City of *London*, may or ought to ſell or put to Sale any Wares or Merchandizes within the ſaid City, or the Liberties of the ſame, by Retail, or keep any open or inward Shop, or other inward Place or Room, for Shew, Sale, or putting to Sale of any Wares or Merchandizes, or for Uſe of any Art, Occupation, Myſtery, or Handicraft within the ſame. And whereas alſo *Edward*, ſometime King of *England*, of famous Memory, the Third of that Name, by his Charter made and granted to the ſaid City in the fifteenth Year of his Reign, confirmed alſo by Parliament, amongſt other Things granted, That if any Cuſtoms in the ſaid City before that Time obtained and uſed, were in any Part hard or defective, or any Things in the ſame City newly ariſing, where Remedy before that Time was not ordained, ſhould need Amendment, the Mayor and Aldermen of the ſaid City, and their Succeſſors, with the Aſſent of the Commonalty of the ſame City, might put and ordain thereunto fit Remedy, as often as it ſhould ſeem expedient to them, ſo that ſuch Ordnance ſhould be profitable to the King, for the Profit of the Citizens, and other his People repairing to the ſaid City, and agreable to Reaſon. And whereas by Force of the ſaid Cuſtoms, Franchiſes, and Liberties, and of the Charter laſt before mentioned, confirmed as is aforeſaid by Parliament, The Lord Mayor, Aldermen and Commons of the ſaid City, did the 12th Day of *October*, in the Third Year of the Reign of *Edward*, ſometime King of *England* the Fourth, as a Thing thought fit and convenient for that Time (amongſt other Things) agree and ordain, That the Baſket-makers, Gold-Wyer-drawers, or other Foreigners, contrary to the Liberties of the ſaid City, holding open Shops in divers Places of the City, and uſing (*b*) Myſteries within the ſaid

(*a*) 2 Brownl. 284, 285.

(*b*) Cart. 180.

City, ſhould not from thenceforth hold Shops within the Liberty of the City aforeſaid; but if they would hold any Shop, or dwell in the ſame Liberty, they ſhould dwell at *Blanch-Appleton*, and there hold Shops, ſo as they might have ſufficient dwelling there. And where alſo the Lord Mayor, Aldermen, and Commons of the ſame City did afterwards, the 16th Day of *May*, in the 17th Year of the Reign of our late Sovereign Lord of famous Memory, King *Hen.* 8. as a Matter thought fit and agreeable for that Time, ordain, eſtabliſh, and enact, That no Manner of Perſon or Perſons being eſtrange from the Liberties of the ſaid City, from thenceforth ſhould hold and keep any open Shop within the ſaid City or Liberties of the ſame, neither with any Latteſſes before, nor yet without Latteſſes (certain Numbers of poor Men occupying the Feat of Botchers, Taylors, and Coblers only excepted) upon Pain of Impriſonment, and alſo to forfeit and to pay 40 *s.* to the Uſe of the Commonalty of this City, as often as he or they ſhould do the contrary. And where alſo the Lord Mayor, Aldermen and Commons of the ſame City did afterwards the 20th Day of *January*, in the ſaid 17th Year of King *Hen.* 8. (reciting that where at a Common Council holden the 16th Day of *May*, in the 17th Year of the Reign of King *Hen.* 8. it was ordained and enacted, That no Manner of Perſon or Perſons, being eſtrange from the Liberties of this City, from thenceforth ſhould hold or keep any Shop or Shops within this City or Liberties of the ſame, neither with any Latteſſes before, nor yet without any Latteſſes, upon Pain of Impriſonment) further ordain and eſtabliſh, That if any Perſon or Perſons, being Foreigners, ſhould hold and keep open any Shop or Shops, as is aforeſaid, he ſhould forfeit for every Time ſo doing 40 *s.* to be levied by Diſtreſs, to the Uſe of the Commonalty of the ſaid City, by the Chamberlain for the Time being, or other Officer of this City, and alſo have Impriſonment by the Diſcretion of the Mayor and Aldermen for the Time being. Now foraſmuch as divers and ſundry Strangers and Foreigners from the Liberties of the ſaid City (nothing regarding the ſaid antient Charters, Franchiſes, Cuſtoms or Liberties of the ſaid City, and Acts and Ordinances heretofore made according to the ſame, but wholly intending their private Profit) have of late Years deviſed and practiſed by all ſiniſter and ſubtil Means how to defraud the ſaid Charters, Liberties, Cuſtoms, good Orders and Ordinances, and to that End do inwardly, in private and ſecret Places, uſually and ordinarily ſhew, ſell, and put to ſale their Wares and Merchandizes, and uſe Arts, Trades, Occupations, Myſteries, and Handicrafts within the ſaid City and Liberties of the ſame, to the great Detriment

and Hurt of the ſaid City, who pay Lot and Scot, bear Offices, and undergo other Charges which Strangers and others not free are not chargeable withal, nor will perform. For Reformation of which Diſorders, and for avoiding of ſuch Prejudice and Damage as thereby groweth to the Freemen of the ſaid City, and is now more of late than was in any Time heretofore ſuffered, and to provide for the common Profit and Good of the Freemen and Citizens of this City; it is therefore by the Lord Mayor, Aldermen, and Commons in this Common Council aſſembled, ordained and eſtabliſhed, That no Perſon whatſoever (not being free of the City of *London*) ſhall at any Time after the Feaſt of St. *Michael* now next enſuing, by any Colour, Way or Mean whatſoever, either directly, or indirectly, by himſelf, or by any other, ſhew, ſell, or put to Sale, any Wares or Merchandizes whatſoever, by Retail, within the City of *London*, or the Liberties or Suburbs of the ſame, upon Pain to forfeit to the Chamberlain of the City of *London* for the Time being, to the Uſe of the Mayor and Commonalty, and Citizens of the ſaid City, the Sum of 5 *l.* of lawful Money of *England*, for every Time wherein ſuch Perſon ſhall ſhew, ſell, or put to Sale any Wares or Merchandizes by Retail, within the ſaid City, Liberties, or Suburbs thereof, contrary to the true Intent and Meaning hereof; and it is further ordained and eſtabliſhed, That no Perſon whatſoever (not being free of the City of *London*) ſhall at any Time after the ſaid Feaſt of St. *Michael* now next enſuing, by any Colour, Way or Mean whatever, directly or indirectly, by himſelf or any other, keep any Shop or other Place whatſoever, inward or outward, for Shew or putting to Sale of any Wares or Merchandizes whatſoever by Way of Retail, or uſe any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever, within the ſaid City, or the Liberties or Suburbs of the ſame, upon Pain to forfeit the Sum of 5 *l.* of lawful Money of *England*, for every Time wherein ſuch Perſon ſhall keep any Shop or other Place whatſoever, inward or outward, for Shew, Sale, or putting to Sale of any Ware or Merchandizes whatſoever by Way of Retail, or uſe any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever within the ſaid City, or Liberties or Suburbs of the ſame, contrary to the true Intent and Meaning hereof: All which Pains, Penalties, Forfeitures and Sums of Money to be forfeited by Virtue of this Act and Ordinance, ſhall be recovered by Action of Debt, Bill, or Plaint, to be commenced and proſecuted in the Name of the Chamberlain of the City of *London* for the Time being, in the King's Majeſty's Court to be holden in the Chamber of

the *Guild-Hall* of the City of *London*, before the Lord Mayor and Aldermen of the ſaid City, wherein no Eſſoin or Wager of Law ſhall be admitted or allowed for the Defendant: And that the Chamberlain of the ſaid City for the Time being ſhall in all Suits to be proſecuted by Virtue of this Act or Ordinance againſt any Offender, recover the ordinary Coſts of Suit to be expended in and about the Proſecution thereof: And further, that one equal Third Part of all Forfeitures to be recovered by Virtue hereof, (the Coſts of the Suit for the Recovery of the ſame being deducted and allowed) ſhall be, after the Recovery and Receipt thereof, paid and delivered to the Treaſurer of *Chriſt's Hoſpital*, to be employed towards the Relief of the poor Children to be brought up and maintained in the ſaid Hoſpital. And one other equal third Part, to him or them which ſhall firſt give Information of the Offences for which ſuch Forfeitures ſhall grow, and proſecute Suit in the Name of the Chamberlain of the ſaid City for Recovery of the ſame (any Thing in this Act to the contrary notwithſtanding.) Provided always, That this Act or Ordinance, or any Thing therein contained, ſhall not extend to any Perſon or Perſons for bringing or cauſing to be brought any Victuals to be ſold within this City and the Liberties thereof, but that they and every of them may ſell Victuals within the ſaid City and the Liberties thereof; as they might lawfully have done before the making hereof; any Thing herein contained to the contrary thereof in any wiſe notwithſtanding. *Ulteriuſque nos præfat' nunc Major & Aldermanni ac Vicecom' Civitatis præd' certificamus, quod ante adventum Brevis dicti Domini Regis nobis directi, & hic huic ſchedulæ conſut'* Jac' Wagoner *in Brevi illo nominat' captus fuit in Civitat' præd' & in priſona dicti Dom' Regis nunc ſub cuſtod' noſtrum præfat' Vic' detent' fuit virtute cujuſdem Billæ original' de pl' debiti ſuper demand' quinque librarum legalis monetæ Angliæ verſus ipſum, 9 die menſis Sept' anno regni Domini Regis nunc ſeptimo, ad Cur' præd' Dom' Reg' coram* Humfredo Weld *Milite, nuper Majore, & Aldermannis Civitat' præd' in præd' Camera* Guildhalda *ejuſd' Civitatis, ſecund' conſuet' Civitat' præd' tunc tent' ad ſectam* Cornelii Fiſh, *Camerarii Civitat'* Lond' *ſuper Act' Communis Concilii præd' præd'* 15 *die* Aprilis, *an'* 4. *præd' ut præf' confect' affirmat', cujus quidem billæ orig' tenor ſequitur in hæc verba, ſcil'* Cornel' Fiſh, *Camerarius Civitat'* Lond' *qui 7 die* Sept' *anno regni Dom' noſtri* Jacobi *nunc Regis Angliæ,* &c. *ſeptimo, & ſemper poſtea hucuſque fuit & adhuc exiſtit Camerarius dictæ civit', per* Robertum Smith *attornat' ſuum petit verſus* Jac' Wagoner *quinque libras legalis Monetæ Angliæ quas ei debet & injuſte detinet,* &c. *eo quod cum in communi concilio ſecund' conſuet' civitat' præd' in Camera* Guildhalda

Guildhalda *dictæ civitat' ſituat' in parochia ſancti* Michael' *in* Baſſieſhaw *in Warda de* Baſſieſhaw Lond' *præd' decimo quinto die* Aprilis, *an' regni Dom' noſtri* Jacobi *nunc Regis Angl'*, &c. *quarto, vigore & authoritate communis concilii illius ordin' & ſtabilit' extitit, quod nulla perſona quæcunque non exiſtens liber civitat'* Lond' *ad aliquod tempus poſt feſtum ſancti* Mich' *tunc prox' ſequen' per aliquem colorem, viam aut modum, quæcunquæ ſive directe vel indirecte, per ſe vel per aliquem alium, oſtenderet, venderet, aut ad venditionem poneret, aliqua mercimonia aut merchandiſas quæcunque per retal' infra civitat'* Lond' *aut libertates aut ſuburb' ejuſd' ſub pœna forisfacere Camerario civit'* Lond' *pro tempore exiſten' ad uſum Majoris & Commun' ac Civium dict' civitat' ſummam quinque librarum legalis monetæ Angliæ pro quolibet tempore quo talis perſona oſtenderet, venderet, aut venditioni exponeret, aliqua mercimonia aut merchandiſas per retal' infra dict' civitat' libertat' aut ſuburb' ejuſdem, contra veram intentionem actus communis concilii præd'. Cumque tunc & ibid' authoritate præd' ulterius ordinat' & ſtabilit' extitit, quod nulla perſonæ quæcunque non exiſtens liber civit'* Lond' *ad aliquod tempus poſt dictum Feſtum ſancti* Mich' *tunc prox' ſequent' per aliquem colorem, viam aut modum, quæcunque directe vel indirecte, per ſe vel per aliquem alium, teneret aliquam ſhoppam aut alium locum quemcunque intra vel extra, Angl'* inward or outward, *pro oſtenſione, venditione, aut poſitione aliquorum mercimoniorum aut merchandiſarum quorumcunque ad venditionum per viam retal', Angl'* by Way of Retail, *aut uteretur aliqua arte, artific', occupation', myſter', aut manuali occupatione, quibuſcunque, Angl'* any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever, *infra civitat'* Lond' *aut libertat' aut Suburb' ejuſd' ſub pœna forisfacere ſummam quinque librarum legalis monetæ Angliæ, pro qualibet tempore quo talis perſona teneret aliquam ſhoppam, aut alium locum quemcunque, infra vel extra, Angl'* inward or outward, *pro oſtenſione, venditione, aut poſitione aliquorum mercimoniorum aut merchandiſarum quorumcunque ad venditionem per viam retal', aut uteretur aliqua arte, artificio, occupatione, myſterio, aut manuali occupatione, quibuſcunque Angl'* any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever, *infra dict' Civitatem, aut libertat' aut ſuburb' ejuſdem, contra veram Intentionem actus præd'. Cumque tunc & ibidem Authoritate præd' ulterius inactitatum extitit, quod omnes quæ quidem pœnæ, pœnalitates, forisfacturæ & pecuniæ ſummæ forisfaciendæ virtute dicti actus ſive ordinis, Angl'* Ordinance, *recuperarentur per actionem debiti, bill', ſive querel', commenſand' & proſequend' nomine Camerarii Civit'* Lond' *pro tempore exiſtentis, in curia regiæ Majeſtatis*

tenend' in Camera Guildhalda *civitat'* Lond' *coram Domino Majore & Aldermannis ejusdem civitat' in quibus null' esson' aut legis vadiatio admitteretur aut allocaretur pro defend'. Et quod Camerarius dictæ Civitatis pro tempore existens in omnibus Sectis prosequend' virtute dict' act' sive ordinis, Angl'* or Ordinance, *contra aliquem offensorem, recuperaret ordinar' custag' Sectæ. expendend' in & circa prosecutionem ejusdem. Et ulterius, quod una æqualis tertia pars omnium forisfactur' recuperand' virtute dict' act' (custag' Sectæ pro recuperatione earum existent' deduct' & allocat') post recuperationem & receptionem inde solveretur & deliberaretur Thesaurario Hospitalis* Christi *disponenda, Ang'* to be employed, *erga opem pauper' puerorum educandorum & manutenendorum in dicto Hospitali: Et una alia æqualis tertia pars illi vel illis qui primum daret information' de offensis pro quibus tales forisfacturæ surgerent, Angl'* should grow, *& prosequer' Sectam in nomine Camerarii dicta civitatis pro recuperatione earund', aliquo in dicto actu in contrar' non obstante, prout per præd' actum communis concilii præd' plene liquet. Præd' tamen defendens, actum communis concilii præd' minime ponderans, nec pœnam in eodem contentam aliqualiter verens post dict' festum Sancti* Michaelis *in actu præd' mentionat' & ante affirmationem hujus bille originalis,* scil. *dicto septimo die* Septembris, *anno regni Domini nostri* Jacobi *nunc Regis Angliæ,* &c. *septimo, præd', infra dict' civitatem* London, viz. *in parochia Sancti* Christopheri London' *non existens persona liber dictæ civitatis usus est manuali occupatione* of a Tallow Chandler *contra veram Intentionem actus communis concilii præd' per quod actio accrevit præfato quærenti ad petend' exigend' & habend' de præfato defend' dict' quinque libras modo petit' quas dict' defend' præfato quærenti nondum solvit, licet sæpius,* &c. *ad damnum ipsius querentis quinque solidorum & inde producit Sectam,* &c. *super quam quidem billam original' partes præd' placitavtrunt, & sic indeterminat' dependit,* &c. *Et hæc est unica causa captionis & detentionis præd'* Jacobi Wagoner *in prisona & sub custodia præd' quam una cum corpore suo coram dict' Justiciariis dicti Domini Regis apud Westmonaster' ad diem in brevi præd' content' parat' habemus, una cum dicto brevi, prout nobis interius per idem Breve præcipitur.*

Cro. El. 352, 353. See 3 Cases in Law, &c. 339, &c.

In this Case it was resolved, That the said Custom of *London, That no Person whatsoever, not being free of the City of* London, *shall by any Colour, Way, or Mean whatsoever, directly or indirectly, by himself or any other, keep any Shop or any other Place whatsoever, inward or outward, for Shew or putting to Sale of any Wares or Merchandizes whatsoever by Way of Retail, or use any Trade, Occupation, Mystery or Handicraft, for Hire, Gain or Sale, within the City of* London, is, upon the whole Matter disclosed in the Return, a good

(*a*) Cu-

(*a*) Cuſtom; and that ſuch Conſtitution made according to the Cuſtom alledged in the Return, upon Pain of Forfeiture of 5 *l.* was alſo good. And as to that, 1. It was reſolved, That there is a Difference between ſuch a Cuſtom within a City, *&c.* and a Charter granted to a City, *&c.* to ſuch Effect; for it is good by Way of Cuſtom (*b*) but not by Grant; and therefore no Corporation made within Time of Memory can have ſuch Privilege, unleſs it be by Act of Parliament. So a Cuſtom, that Goods foreign bought (*c*) and foreign ſold within a City ſhall be forfeited, is good, as appear *Dyer, Mich.* 10 *&* 11 *Eliz.* 279. But ſuch Privilege can't begin by Charter. And therefore in the 5th Part of my *Rep. Trin.* 41 *Eliz.* between *Waltham* and *Auſtin, in Com' Banco*, the Caſe was, That King *H.* 6. granted to the Corporation of (*d*) *Dyers* in *London*, Power to ſearch, *&c.* and if they found any Cloth dy'd with *Logwood*, that the Cloth ſhould be forfeited; and it was adjudged, That by the Patent no Forfeiture can be impoſed on the Goods of a Subject, and therefore *in hujuſmodi Caſubus fortior & potentior eſt vulgaris Conſuetudo, quam regalis Conceſſio.* So it appears by the *Reg.* 105. *b.* the Cuſtom of *Rippon* is, *Quod Archiepiſcopus* (*e*) *Eborum ratione Dominii ſui de Ripon talem Libertatem in Villa præd' habeat & a tempore &c. habuit quod nullus in ead' Villa uti debeat ſeu conſuevit officio ſive myſterio Tinctoris ſine licentia ipſius Archiepiſcopi.* But *Trin.* 44 *Eliz.* in an Action on the Caſe between *Edw. Darcy*, Eſq; Plaintiff, and *Tho. Allen* Defendant, the Caſe was, That Queen *Eliz.* granted to the Plaintiff, that he ſhould have the ſole Traffick with (*f*) Playing-cards, and ſhould only import them from beyond the Sea into this Kingdom, alſo that he ſhould have the ſole making of Playing-cards in this Realm, in ſuch ample Manner as *Ralph Bows* had it before; and it was adjudged, that that Grant to make Playing-cards only, and to reſtrain Trade and Traffick was void, becauſe Trade and Traffick is the Life of every Commonwealth, and eſpecially of an Iſland. And it is true, Trade and Traffick can't be maintained or increas'd without Order and Government; and therefore the King may erect *Gildum mercatorium, i. e.* a Fraternity or Society or Corporation of Merchants, to the End that good Order and Rule ſhould be by them obſerved for the Encreaſe and Advancement of Trade and Merchandize, and not for the Hindrance or Diminution of it. And it is to be known, That (*g*) *Guildan* is a *Saxon* Word, and ſignifies *ſolvere, i. e.* That all of ſuch Fraternity ſhall be ſubject to pay Scot and Lot: And therefore at this Day ſuch Part of the Country which is contributary among themſelves to pay common Charges, is called the *Guildable*; and if there be any ſpecial Liberty, it is called the Franchiſe, 8 *E.* 3. (*h*) 37. *a. b. Jeffery at Hay* brought an Action of Treſpaſs againſt *William at Ford* and *Robert Gray*, that they wrongfully with Force had broken his Fold at *Haſtings*: The Defendant pleaded, That *Johan de Frichborn* was and

(*a*) Bridgm. 140. 4 Inſt. 249. Carth. 169.

(*b*) Lutw. 564. Salk. 204. 2 Rol. Rep. 203. Mod. Rep. 18. 11 Co. 54. a. 87. b. Bridgman 140. Cart. 115. Cr. El. 803.

(*c*) Moor 581. 2 Keb. 397. 2 Rol. 597. Poſtea 126. a. 128. a. 2 Brownl. 287. 1 Jones 162. Dy. 279. pl. 10.

(*d*) 2 Inſt. 47. Poſtea 127. b. Palm. 5.

(*e*) 2 Brownl. 178, 179. Owen 67.

(*f*) 2 Inſt. 47. 2 Brownl. 287. Hob. 212. 11 Co. 84. b. 86. a. Moor 671, 672, &c. Noy 173, 174, &c. 3 Inſt. 182. 3 Keb. 269. Hard. 55. 2 Roll. 214. Poſt. 129. Caſes in Law, *&c.* 131. Lucas 131.

(*g*) 2 Brownl. 286.

(*h*) 2 Brownl. 287. 178. 2 Bul. 195.

and yet is ſeiſed of the Manor of *Haſtings* in Fee, and that the ſaid *Johan* and her Anceſtors, and all the Lords of the ſaid Manor whoſe Eſtate ſhe has, *a tempore cuj' &c.* have uſed to have this Franchiſe, *i.* to have a free Fold, (*i. liberam Faldam*) thro' the whole Town of *Haſtings*, and to have a Lock of Wool of the Sheep, ſo that none in the Town of *Haſtings* ought to have a free Fold without Agreement made with her; and if any did erect a Fold without Agreement, *&c.* that the Lords for the Time being had uſed to abate it, and that *Jeffery at Hay* the Plaintiff, ſet up a new Fold without Agreement, wherefore the Defendants, as Servants to the ſaid *Johan*, came and disjoined the Hurdles, and abated them, *&c.* And there *Parning* Serjeant took two Exceptions to this Preſcription, 1. That it is in the Negative, *ſcil.* That none ought to have a Fold. 2. Becauſe every one of common Right might have a Fold in his own Land, and therefore it would be againſt Reaſon to ouſt him of that which the Common Law gives him; and altho' he ſaid that the Lords have uſed to have a free Fold, that is of common Right alſo, *yet that* can't take from a Man that which common Right gives him: *Et non allocatur*, becauſe the Preſcription contains an Affirmative with a Negative, and every Preſcription is againſt common Right: Then the Plaintiff replied and ſaid, that the Defendants have juſtified the abating of the Fold, by Reaſon of the Seigniory of *Johan:* To which we ſay, that the Place where the Fold is ſet, is out of the Lordſhip of *Johan*, *&c.* and no Plea, becauſe the ſaid *Johan* claims the ſaid Franchiſe thro' the whole Town of *Haſtings*, as well out of her Lordſhip as within; whereupon the Plaintiff made another Replication, by which Caſe it appears, That altho' folding of Sheep is for the Maintenance of Tillage (which is ſo much eſteemed and favoured in Law) yet by Cuſtom and Uſage a Man may be barred thereof upon his own Land, and another than he, of whom the Land is held, may have it; and therewith agree 3 *E.* 3. 3. *a. John de Sedgeford's* (*a*) Caſe, where the Prior of *Trinity* of *Norwich*, Lord of the Manor of *Sedgeford*, made the like Preſcription, *Mich.* 32 & 33 *Eliz. in Banco Regis*, Sir *George* (*b*) *Farmour* brought an Action on the Caſe againſt *Brook*, and ſhewed that he was ſeiſed of the Manor of *Torceſter* in the County of *Northampton*, in Fee, and that all the Tenements of the ſaid Town are held of his ſaid Manor, and ſhew'd that *a temp' cuj' &c.* he, and all thoſe, *&c.* had had a Bake-houſe Parcel of the ſaid Manor, maintained at their Charge; and that this Bake-houſe was ſufficient to bake Bread for all the Inhabitants, and for all Paſſengers thro' the ſame Town; and the Bread ſo baked, had uſed, *&c.* to be ſold at reaſonable Prices, and that no other Perſon within the ſaid Town has uſed to bake any Bread to ſell to any Perſon; And it was adjudged a rea-

(*a*) 2 Brownl. 287.

(*b*) 1 Rol. 559. 1 Leon. 142. Owen 67. Raym. 327. Bridg. 140. 2 Brownl. 179. 2 Bulſt. 195. Cr. El. 203, 204. Styles 421. 2 Rol. Rep. 201. Lit. Rep. 250.

a reaſonable Cuſtom by * Sir *Chr. Wray, & totam Curiam*, and yet this Cuſtom reſtrains a Man from exerciſing his Trade within a certain Place. *Vide Regiſt'* 105, 127. 11 *H.* 6. 19. 9 *E.* 3. 4. There are divers Cuſtoms in *London* which are againſt common Right, and the Rule of the common Law, and yet they are allowed in our Books, and *eo potius*, becauſe they have not only the Force of a Cuſtom, but are alſo ſupported and fortified by Authority of (*a*) Parliament. 1. They have a Cuſtom concerning the Arreſt and Impriſonment of the Body of a Man, as the Creditor may arreſt the (*b*) Debt. before the Day of Payment to drive him to find Sureties, L. 5 *E.* 4. 30. *a.* 11 *H.* 6. 3. *a.* and 2 *Hen.* 7. 15. 2 *Hen.* 4. 12. *b.* 2. They have a Cuſtom to enter the Houſe of another which is his (*c*) Caſtle; and therefore the Cuſtom of *London* is, That when a Chaplain or a Prieſt has a Woman in his Houſe or Chamber, and one hath an ill Suſpicion thereof, he who hath ſuch Suſpicion may come to the Conſtable of the Ward (*d*) or Beadle, and with him may enter into the Houſe or Chamber of the Chaplain or Prieſt, and commit the Offender to Priſon, 2 *H.* 4. 12. *b.* 2 *H.* 7. 15. 3. By their Cuſtom the Goods of a Man in which he hath an abſolute Property may be forfeited, as in the Caſe before of Foreign bought and Foreign ſold. 4. They have a Cuſtom which alters the Courſe of Juſtice, *ſcil.* where an Action is brought before one Judge, to remove it pending the Plea before another, as 10 *H.* 6. 15. *a.* In an Action of Debt on an Eſcape of a Man taken by *Capias* on a Statute Merchant at the Plaintiff's Suit, The Defendant ſaid, That the Cuſtom of *London* is, that where a Plaint is affirmed before the Sheriff of *London* (*e*) that the Mayor at the Suggeſtion of the Plaintiff or Defendant may ſend for the Parties, and if it be found on Examination before the Mayor, that the Plaintiff is ſatisfied he may award that the Plaintiff ſhall be barred; and that the Plaintiff affirmed a Plaint of this Matter, and was examined before the Mayor, and on Examination it was found that Part was paid, and that the Plaintiff had taken a Bond for the Reſidue, *ideo* the Mayor awarded that he ſhould be barred, and it was adjudged, that the Cuſtom was good, for that Examination was pending the Action; and *e contra*, if they preſcribe to examine it after (*f*) Judgment. *Vide* 1 *E.* 4. 6. *b.* Executors charged in *London* on a ſimple (*g*) Contract; 15 *Eliz. Dyer*, in *London* the Mayor (*h*) who is the Coroner ſhall not pronounce the Judgment upon the Outlawry, but the Record. And many Exceptions were taken to the Return, becauſe the Cuſtom alledged in the Beginning of the Return was not purſued. For the Cuſtom there alledged conſiſts upon two general Parts, *ſcil.* the Miſchief and the Remedy; the Miſchiefs were three. 1. If any were difficult. 2. If defective. 3. If a new Caſe ariſes which *emend' indigeat*; the Remedy is, that the Mayor and Alderm. with the Conſ. of the Commonal. have Pow. by the Cuſt. *apponere*

* 2 Cro. 596. Cumberb. 53. Lucas

(*a*) Cr. Car. 347. Hardr. 303.

(*b*) Hard. 303. Br. London 24.

(*c*) 2 Co. 32. a. 5 Co. 91. b. 7 Co. 6. a. Cr. Eliz. 753. 1 Bul. 146. 11 Co. 82. a.

(*d*) Hard. 303. Br. Treſpaſs 74. Br. London 5. Br. Cuſtom 10.

(*e*) 4 Inſt. 248. 10 H. 6. 14. b. 15. a. Fitz. Preſcription 4. Br. London 30. Br. Cuſtom 60.

(*f*) Hard. 303. 4 Inſt. 248.

(*g*) 5 Co. 82. b. Cr. Eliz. 409. Noy 53. Swinb. 328, 329. Poſtea 133. a.

(*h*) Dy. 317. pl. 6. Co. Lit. 288. b.

ponere remedium, which Remedy ought to have five Qualities; 1. *Remedium debet esse congruum*, It ought to have fit Proportion and Congruity. 2. It ought to be *bonæ fidei consonum.* 3. It ought to be *rationi consonum.* 4. *Pro com' utilitâ' Civium & aliorum fidelium ad eandem Civitatem confluentium.* 5. *Quod sit utile Regi & populo.* And it was objected, that the said Constitution appoints a Remedy which has but one of the said five Qualities; for it provides only, as appears by the express Words of the Constitution for the Benefit of the Freemen of the said City, *scil. for avoiding of such Prejudice and Damage as groweth to the Freemen of the said City*, &c. *and to provide for the common Profit and Good of the Freemen and Citizens of this City, It is therefore*, &c. by which it appears that this Remedy was only made for the Freemen of the City, and so not pursuant, *& non allocatur*, because it appears to the Court, that this Remedy has all the said five Qualities, and therefore it was resolved, that it need not be averr'd by the Party. *Vide* 46 *E.* 3. 16. *b.* no Price (*a*) of Money shall be expressed in the Writ, because it appears of itself, 12 *H.* 4. 17. the Son (*b*) within Age brings an Assise of *Mortdancester*, he need not averr, that it is within the Time of Limitation, for it appears, *Vid. Plow. Com.* (*c*) *Partridge*'s Case, 87. the same Ground, *Vide* 26 *H.* 6. Gard (*d*) 58, *&c.* But for the better Understanding of the true Reason of the Resolution in this Case; First, It was observed, That one may be *Liber* (*e*) *homo*, that is, a Freeman of *London* by three Ways, *scil.* 1. By Service, as he who serves his Apprenticeship. 2. By Birthright, as he who is the Son of a Freeman of *London*; 3. By Redemption, that is, by Allowance of the Court of Mayor and Aldermen, and all these three Ways are allowed by the Custom of the City of *London*, and by no other Means can a Man become a Freeman of *London*: For none can be made free of the City of *London* by Charter; and therefore it appears in *Rot. Pat.* 32 *E.* 3. *in Turri London*, That King *Ed.* 3. granted to *John* (*f*) *Falcount de Luca* Apothecary, Citizen of *London*, *Quod ipse omnibus Libertatibus quas Cives Civitatis prædʼ habent eadem Civitate & alibi infra regnum nostrum Angliæ, habeat, gaudeat, & utatur, & quod de tribus denariis de libra, & omnibus aliis præstationibus & custumis quas alienigenæ de bonis & Merchandisis suis infra regʼ Angliæ solvere tenentur, de propriis bonis & merchandisis ipsius* Johannis *infra idem regnum ad totam vitam suam sit quietus, & quod plus quam alii Cives nostri* London *indigenæ pro custumis merchandisarum & aliorum bonorum suorum nobis solvunt solvere non teneatur, nec ad hoc aliqualiter compellatur.* But all these Words do not make him a Freeman of *London*, for he ought to attain unto it by one of the said three Ways, according to the said Custom. And it was said, that he was the first Apothecary that ever was in this Kingdom.

And

(*a*) 9 Co. 54. b. Doct. pl. 86. Fitz. Brief. 602. Br. faux Latin &c, 13. 46 E. 3. 15. a.
(*b*) 9 Co. 54. b. Doct. pl. 86. 13 H. 4. 17. a. Br. Mortdauncester 8. 7 Co. 39. b. 11 Co. 25. a.
(*c*) 9 Co. 54. b.
(*d*) 9 Co. 54. b.
(*e*) 2 Brownl. 286. 4 Inst. 250. 2 Anders. 276, 277. 2 Bulstr. 189, 190. 3 Keb. 225.
(*f*) 2 Brownl. 286, 287.

And it was resolved, That it appears that the Remedy appointed by the said Constitution has all the said five Qualities. 1. *Quod Remedium præd' fuit congruum*, that is, apt and proportionable to the Offence, for it appears by Act of Common Council in 3 *E.* 4. which inflicts the Penalty of 40 *s.* upon a Foreigner who keeps an open Shop, *&c.* that he who keeps an inward Shop is a greater Offender than he who keeps an open Shop; for *London* is a Market (*a*) Overt every Day, except only the (*b*) Sabbath-day, but secret Places in Corners, as the Case of the said *James Wagoner* is, is more dangerous and offensive than outward Shops, for there he may use Deceit, and is not subject to any Search; (*c*) *Qui male agit odit lucem*, and, *omnia delicta in aperto leviora sunt.* In 11 *H.* (6.) 7. 19. *a. b.* The Prior of *Dunstable* brought an Action on the Case against *J. B.* Butcher, and declared that he was Lord of the Town of *D.* and that he, *&c.* had a Market twice in the Week, and the Correction of the said Market, and that all Butchers, and all others who sell Meat or any other Commodity which came to the said Market, that they ought to sell them in the High-street of the said Town, upon the Prior's Stalls, paying 1 *d.* to the Prior; and that the Defendant is a Butcher, and sold his Meat such a Market-day within his own House *occulte*, and had procured others so to do, by which, *&c.* the Defendant pleaded that he was a Housholder in the said Town of *D.* and all those who are Housholders in the said Town have used *a tempore cujus, &c.* to sell their Wares, *&c.* every Market-day in their own Houses, or where ever else they pleased; and there *Cotesmore* who gave the Rule in the Case, and the Reason of it, said, this Prescription is not to the Purpose; for if the Prior had a Market within the Town, and is Lord of the Town, you can't prescribe to sell Meat in your own House on the Market-day; for or the Market can't be but in an open Place, and the Prior then would lose the Benefit of his Market, if they might sell their Wares in their Houses, and also where he has the Correct. of the Mark. and to see if the Things which shall be sold are lawful and vendible, which can't be tried by his Officer if it be not in open Market, and also he would lose his Toll of the Things sold; so that when the Market belongs to the Prior, which ought to be held in the Market-place appointed for that Purpose, he can't hold a Market in his own House, but in the common Place, upon the Market-day; wherefore, *&c.* And as it hath been said, *London* has a Market every Day in the Week, *Sunday* only excepted. *Vide Mich.* 32 *&* 33 *Eliz.* in the fifth Part of my *Reports*, 63. *a.* a Constitution (*d*) in *London*, That all Broad-cloth by Cit. or For. shall be put up to Sale at *Blackwell-hall*, so that it may ap. to be saleable. And note there a Penal. infli. for the Restra. of a lawf. Act, but here of an unlaw. And theref. if a Foreigner who keeps an open Shop shall forf. 40 *s.* he who is a Foreigner

(*a*) 2 Brownl. 288. 5 Co. 83. b. Dyer 122. pl. 16. Cr. Eliz. 454. 35 H. 6. 29. b. Moor 360, 625. 2 Inst. 713. Poph. 34. 1 Anders. 344. 2 Anders. 115. 3 Co. 78. b. 9 Co. 66. b.

(*b*) 9 Co. 66. b. Cr. Jac. 280, 496. Jenk. Cent. 291. 1 Jones 156, 157. Cawly 78. Dy. 168. pl. 17. Hales pl. Co. 47.

(*c*) 8 Co. 37. b. 9 Co. 66. a. 2 Brownl. 288. 1 Leon. 143. Br. Prescription 98.

(*d*) 1 Rol. 365. 3 Leon. 264. Hob. 212. Moor 580. 2 Jones 145. Cr. Car. 498. Treb. Argument in quo Warranto 33. Pollexfen's Argument in quo Warranto 81. [Hard. 56, 210. Lane 24. Bridgm. 143, 141. 2 Rol. Rep. 115. 1 Rolls 366. 2 Brownl. 287, 288.

and offends in ſecret Corners is worthy to forfeit 5 *l.* And it was alſo obſerved, That the Value of an Ounce of Silver ſince 3 *E.* 3. has been raiſed. Alſo *remedium fuit congruum* in Reſpect of the Manner of Puniſhment, *ſcil.* by impoſing a pecuniary Pain, and not a corporal Pain, *ſcil'*, Impriſonment; and therewith agrees the ſaid Caſe of *Blackwell-hall*, *Mich.* 32 *&* 33 *Eliz.* and *Trin.* 38 *Eliz.* in the Fifth Part of my Reports, *fol.* 64. *a. Clark*'s Caſe, (*a*) a Conſtitution can't be made on Pain of Impriſonment; and the Caſe cited before of *Trin.* 41 *Eliz. inter Waltham* (*b*) *& Auſten*, that a Conſtitution can't be made on Pain of Forfeiture of Goods, therefore it ought to be on a reaſonable pecuniary Pain, or not at all. 2. *Remedium fuit bonæ fidei conſonum*; for the Remedy is to ſuppreſs that which is done *mãle fide* and in Deceit to defraud the ſaid Cuſtom. 3. *Remedium fuit rationi conſonum*; for it is the Rule of Law and Reaſon, *quod* (*c*) *clam delinquens magis punitur quam palam.* 4. *Remedium fuit pro utilitate Civium & aliorum*, 1. *Civium*, for Foreigners are not ſubject to Scot and Lot, *&c.* 2. *Aliorum*, for the Confluence of People from all the Parts of the Realm to *London* produces three great Inconveniencies; 1. *Depauperationem*, *ſcil.* impoveriſhing of all the good Towns in *England.* 2. *Depopulationem*, Depopulation of Towns in every Country. 3. *Deſtructionem*, Deſtruction in the End of all Trades and Tradeſmen in every Part of the Realm. 4. *Civium & aliorum*, by the Peſtilence, by Reaſon of the Multitude of People, and peſtring of the Air, whereby it is dangerous, not only to the Subjects, but alſo to the King himſelf, and the great Lords who attend upon his Royal Perſon. 5. *Remedium fuit utile Regi & Populo*; not only for avoiding the Peſtilence as before is ſaid; but alſo, if *London* ſhould daily increaſe, it would be in Time ſo populous, that it would become ungovernable by the Magiſtracy of the City: And as, when the City of *London* (which is *tanq'* (*d*) *Epitome totius Regni*) is not well governed, all the Parts of the Kingdom find the Inconvenience thereof; ſo when this City is well governed, all the Parts of the Kingdom are kept in better Order, *quod utile eſt Regi & Populo.* Alſo the City would become ſo populous, that it would not be ſubject to ſearch, *&c.* whereby Fraud and Deceit would increaſe in all Wares and vendible Commodities, not only to the Prejudice of the City itſelf, but alſo of the King and the whole Realm. Secondly, It was objected, That the ſaid Return conſiſts much in Recital, which ought to have been directly and certainly alledg'd. To which it was anſwered and reſolved, that this is not on a Demurrer in Law, but a Return on a Writ of Privilege, upon which no Iſſue can be taken, or Demur. join. neither upon our Award herein doth any Writ of Error lie, and therefore the Return

(*a*) 2 Inſt. 54. 1 Rol. 363, 366, 367. Moor 411, 580, 412. 2 Bul. 328. Stiles 85. 1 Rolls 599. 1 Jones 162. Cr. Argument 22. 2 Brownl. 288. Bridg. 141, 142.

(*b*) Antea 125. a. Palm. 5. 2 Inſt. 47. Dyer 279. b. in Marg.

(*c*) 2 Brownl. 288.

(*d*) Poſtea 130. a.

Return is no other, but to inform the Court of the Truth of the Matter, in which ſuch a (*) preciſe Certainty is not required as in pleading. Thirdly, It was objected, That by the Statutes of *9 E. 3. c. 1. & 2. 25 E. 3. c. 2. 27 E. 3. c. 11. &c.* it was enacted, That every one might ſell any Commodities, or Things ſaleable in any City, *&c.* in Groſs, or by Retail, and that every Statute, Charter, Letters Patents, Proclamations, Uſage, Allowance, or Judgment to the contrary are void. To which it was anſwered and reſolved; 1. That the Statutes extend only to Merchants, Aliens, and Denizens, which import and export vendible Things, and do not extend to take away the Cuſtom of a City of foreign bought (*a*) and foreign ſold, as it was reſolved, *ut ſupra, Mich.* 10 *&* 11 *Eliz. Dyer*, in the Caſe of the City of *York*; and *vide* the Statute of 2 *Rich.* 2. *cap.* 1. which reſtrains the Sale of Wares by Retail, *&c.* by Merchants, Aliens, *&c.* 2. Theſe Statutes do not extend to Tallow-Chandlers, or other ſuch like Artificers, nor to any Manufactures made by them within the Realm. 3. It appears by the Judgment of the whole Parliament, *Anno* (*b*) 7 *H.* 4. *cap.* 9. That notwithſtanding all the ſaid Statutes, it was not lawful within the City of *London* (the Charters whereof are eſtabliſhed and confirmed by many Parliaments) for any, be he Merchant Alien, Denizen, or other Leige Man whatſoever, who was a Stranger or Foreigner to the Liberty of the City of *London*, *ſcil'* who was not a Freeman of the ſaid City, to ſell any Merchandizes by Retail, *&c.* within the ſaid City: And by the ſame Act it was ordained and eſtabliſhed, That as well the Drapers and Sellers of Cloths, as other Merchants with other Merchandizes, as Wine, Iron, Oyl, Wax, and other Things appertaining to Merchandize, be free, to ſell in Groſs their Merchandize, *ſcil'* their Cloths, Iron, Oyl, Wax, and other their Merchandizes, as well to any of the King's Subjects as to the Citizens of *London*, notwithſtanding any Liberty or Franchiſe granted to the contrary, which Act had been made in vain, if the City of *London* had been reſtrained by the ſaid former Acts: But becauſe the ſaid Act did tend to the great Hindrance of the Mayor and Citizens aforeſaid, and very like to be the Deſtruction of the Citizens, and againſt their Grants and Confirmations, at the next Parliament, *ſcil. Anno* (*c*) 9 *H.* 4. an Act of Parliament not printed was made, (which is to be ſeen in *Rot' Parliamenti apud Glouc'* 28 *Octobr' anno* 9 *H.* 4.) in theſe Words following. *Item*, The Commons pray, That as by diverſe Kings of *England*, your Progenitors and Predeceſſors, our Sovereign Lords, by their Charter confirmed by you by Authority of Parliam. amongſt other Franchiſes and Liberties to the

(*) 2 Rolls Rep. 158.

(*a*) Antea 125. a. 2 Brownl. 287. Dy. 279. pl. 10. Moor 582. 2 Rol. 597. 1 Sand. 212. Cr. El. 110.

(*b*) 4 Inſt. 249.

(*c*) 4 Inſt. 249. Cotton Records 466.

Note.

the Mayor and Citizens of *London*, and their Succeſſors, it has been granted, That no Merchant Eſtranger to the Liberty of the ſaid City ſhould ſell any Merchandizes within the Liberty of the ſaid City to other Merchant Stranger, nor ſuch Merchant Stranger ſhould buy of other Merchant Stranger any Merchandizes, under Forfeiture of the ſaid Merchandizes: Which Franchiſes and Liberties the ſaid Mayor and Citizens of *London* which now are, and their Predeceſſors, by Authority of the ſaid Grants and Confirmations have had and enjoyed ever ſince 'till at your laſt Parliament holden at *Weſtminſter*, in the which by Authority of the ſame Parliament the ſaid Article of their ſaid Liberties was revok'd and annull'd by Statute, ſo that as well Drapers and Sellers of Cloth, as other Merchants, with their divers Merchandizes, as Wine, Iron, Oil and Wax, and other Things belonging to Merchandizes, are free to ſell, in groſs their Cloths and other their Merchandizes aforeſaid, as well to any the King's Liege People, as to the ſaid Citizens of *London*, notwithſtanding any Franchiſe or Liberty granted to the contrary; to the great Prejudice of the Mayor and Citizens aforeſaid, and the likely Deſtruction of the ſaid Citizens againſt the Grants and Confirmations aforeſaid: That it would pleaſe you our Sovereign Lord, with the Aſſent of the Lords Spiritual and Temporal in this Parliament, to repeal and annul the ſaid Statute in your ſaid laſt Parliament touching that Article: So that the ſaid Mayor and Citizens, and their Succeſſors, be entirely reſtored to their ſaid Liberties and Franchiſes by Statute: So that from henceforward no Merchant being a Stranger to the Liberty of the ſaid City ſell any Merchandizes within the Liberty of the ſaid City to other Merchant Stranger; nor that ſuch Merchant Stranger buy of other Merchant Stranger any ſuch Merchandizes within the Liberty of the ſaid City under Forfeiture thereof. Saving and reſerving to all Lords, Knights, Eſquires, and all other Leige Denizens of our Sovereign Lord the King, Power at their Will to buy within the Liberty of the ſaid City of any Merchant Stranger, Merchandizes in Groſs to their own Uſe, ſo that they do not ſell them again to any other.

Anſw. The King wills, that the Citizens of *London* have their Liberties and Franchiſes touching this Article, as entirely as they had before the laſt Parliament held at *Weſtminſter*, the Statute made at the ſaid Parliament notwithſtanding. *Nota*, Reader, this Act is not only a good Expoſition and Explanation of the former Statutes touching

touching this Matter; but alſo a good Demonſtration of the Cuſtom and Liberty of the City of *London* in theſe Points. In *London* a Citizen and Freeman may, by their Cuſtom, deviſe in (*a*) Mortmain, notwithſtanding the Statute of Mortmain be to the contrary; and ſo in other like Caſes. *Vide* 8 *Hen.* 7. 4. *b.* 9 *Hen.* 6. 58. 7 *Hen.* 6. 1. *a.* 45 *Ed.* 3. 26. *b.* 28 *Aſſ.* 25. 5 *H.* 7. 10. *a.* 11 *H.* 7. 21. *a.* 23 *Eliz. Dyer* 373. for all the Cuſtoms of *London* are eſtabliſhed and confirmed by Act of Parliament, as appears by this Retorn. And it was obſerved, That in the Caſe at Bar, in the ſaid Retorn there are five general Parts; 1. The Cuſtom. 2. The general Act to enable and preſerve this Cuſtom, which was before all the ſaid Statutes. 3. A particular Charter, *Anno* 15 *Ed.* 3. which of itſelf was not ſufficient, and therefore it was confirm'd and eſtabliſh'd by Act of Parliament. 4. Former Precedents of Conſtitu. in the like Caſes, *viz.* in 3 *E.* 4. & 17 *H.* 8. 5. The Conſtitution upon which the Action was brought in *London*. But the Court took Adviſement upon one Part of the Retorn, by which it is averr'd, *Quod* Jacobus Wagoner *uſus eſt manuali occupatione de Tallow Chandler, &c.* and doth not ſhew that he ſold any Candles, *&c.* for if he made them for his own Uſe, (*b*) without ſelling any for Lucre or Gain, he might well do it, as every one may Bake or Brew, *&c.* for his own Uſe, without ſelling Bread or Beer: But it ſeems that is implied by the ſaid Averment, that it is his Trade; by which he lives by Sale of his Commodities of his Trade, and not only to make them for his own Uſe, for it is not properly ſaid, that one uſes a manual Occupation; when he makes no more than for himſelf, as he who Brews or Bakes for his own Uſe, it is not properly ſaid, that he uſes the manual Occupation of a Brewer or Baker, and that appears by the Statute of 5 *Eliz. cap.* 4. (*c*) for there it is enacted, *That every Perſon being an Houſholder and four and twenty Years old,* &c. *and uſing and exerciſing any Art, Myſtery, or manual Occupation, ſhall,* &c. *have and retain,* &c. *an Apprentice,* &c. But without Queſtion, he who uſes the making of any Manufacture for his own Uſe, as making of Candles, *&c.* can't retain any Apprentice within the Statute of 5 *Eliz.* So in another Part of the Act it is enacted, *That it ſhall not be lawful to any Perſon or Perſons,* &c. *to ſet up, occupy, uſe, or exerciſe any Craft, Myſtery, or manual Occupation, except he ſhall have been brought up therein ſeven Years at the leaſt, as an Apprentice,* &c. And yet he who Bakes, Brews, makes Candles, *&c.* for his own Uſe, is not ſaid in Law to uſe any manual Occupation: And upon this Branch, and much to this Purpoſe, a Judgment was given in the Court of Exchequer, and afterwards affirmed in a Writ of Error in the Exchequer-chamber, *Mich.*

(*a*) 2 Bulſtr. 189. 1 Rolls 556. Dyer 255. pl. 3. 373. b. pl. 13. Br. Cuſt. 41. 7. Br. Dev. 51. 22. 5 H. 7. 19. b. 7 H. 6. 1. a. 20 Aſſ. 24.

(*b*) Bridg. 140, 141. 11 Co. 54. a. Hob. 111, 183. Moor 886. Cr. Car. 499. Jenk. Cent. 284. 13 Co. 12. Palm. 544. Lit. Rep. 251.

(*c*) 11 Co. 54. a. Moor 869. Godb. 253. Hard. 56. Cart. 119. Palm. 396. Hob. 183, 211. 2 Rolls Rep. 391. 1 Sid. 303. 2 Keb. 125. 2 Bulſtr. 186. 1 Rolls Rep. 10. Calthorp 9. 3 Bulſtr. 179. Styles 223, 383, 479. Cr. Jac. 85, 179. Cr. El. 737. Cr. Car. 316, 347, 499, 516. 2 Rolls 579. 1 Jones 412. Noy 5. Hutt. 99, 102. 5 Co. 63. b.

6 Jacobi, and the Caſe, worthy to be known, was ſuch. *Taylor* did inform in the Exchequer, on the Stat. of 5 *Eliz. c.* 4. (a) Cr. Jac. 178, 179. Jenk. Cent. 284. 13 Co. 11, 12. Shoile's Caſe. M. 6 Jac. * Salk. 611. Palm. 393. *tam pro Dom' Rege, quam pro ſeipſo*, againſt (*a*) *Shoile*, that he had exerciſed the Art and Myſtery of a Brewer, *&c.* for divers Months, againſt the ſaid Act; and * averred, that the Defendant did not uſe or exerciſe the Art or Myſtery of a Brewer at the Time of the making of the ſaid Act, nor had been an Apprentice for ſeven Years at the leaſt, in the Art and Myſtery of a Brewer, according to the ſaid Act, *&c.* The Defendant demurr'd in Law upon the Information, and Judgment was given againſt him by the Barons of the Exchequer, on which Judgment a Writ of Error was brought in the Exchequer-Chamber, and *Mich.* 6 *Jacobi Regis*, the Matter was argued by Counſel on both Sides; and two Errors were aſſigned, one, that a Brewer is not within the ſaid Branch of the ſaid Act, on which the Information is conceived, for the Words are, *That it ſhall not be lawful to any Perſon or Perſons, other than ſuch as now do lawfully uſe or exerciſe any Art, Myſtery, or manual Occupation, to ſet up, uſe, or exerciſe any Art, Myſtery, or Occupation, except he ſhall have been brought up therein ſeven Years at the leaſt, as an Apprentice:* And it was ſaid, that the Trade of a Brewer is not any Art, Myſtery, or manual Occupation within the ſaid Branch, becauſe it is eaſily and preſently learned, and need not have ſeven Years Apprenticeſhip to be inſtructed in it, for every Houſewife in the Country can brew; and the Statute of (*b*) 22 *Hen.* 8. *cap.* 13. declares, that a Brewer is not a Handicraft Artificer. The other Error was, That the ſaid Averment was not ſufficient, for the (*c*) Averment ought to be as general as the Exception in the Statute is. *ſc.* That the Defendant did not uſe any Art, Myſtery, or Occupation, at the Time of the making of the Act; for by their Pretence, if he exerciſed any Art, Myſtery, or manual Occupation then, as a Taylor, Carpenter, *&c.* he might now uſe any other Art, Myſtery, or manual Occupation whatſoever. As to the firſt, it was reſolved, That the Art of a (*d*) Brewer, *ſcil.* to keep a common Brew-houſe to ſell Beer to any other, is an Art, Myſtery, and manual Occupation within the ſaid Branch of the Act; for in the Beginning of the Act it is enacted, *That no Perſon ſhall retain for leſs Time than a whole Year in any of the Sciences, Crafts, Myſteries, or Arts of Clothing*, &c. *Bakers, Brewers*, &c. *Cooks*, &c. So that by the Judgment of that very Parliament, the Trade of a Brewer is an Art and Myſtery: Which Words are in the ſaid Branch upon which the ſaid Information is grounded. And it was reſolved, That he who brews or bakes, *&c.* for his own (*e*) Uſe, doth not uſe or exerciſe any Art, Myſtery, or manual Occupation againſt the ſaid Act, for the ſaid Words imply, that he

(b) 13 Co. 12.

(c) 13 Co. 12.

(d) Palm. 542. Cr. Jac. 178. 13 Co. 12. Hetl. 102. 2 Bulſtr. 189, 190. Jenk. Cent. 284.

(e) Lit. Rep. 251. 11 Co. 54. a. Bridg. 140. 141. 11 Co. 54. a. Hob. 183, 211. Moor 886. Cr. Car. 499. Jenk. Cent. 284. 13 Co. 12. Palm. 544.

ſo uſe or exerciſe the Art, Myſtery, or manual Occupation, that by Sale of the Commodities of his Occupation he gets his Living; but to ſay, that it is not any Art, Myſtery, or manual Occupation, becauſe every Houſewife brews for her (*a*) private Uſe; ſo likewiſe ſhe bakes and dreſſes Meat, *&c.* and yet none can keep a common Bake-houſe, or Cook's-ſhop, to ſell to others, unleſs he has been an Apprentice, *&c.* according to the ſaid Act, for they are expreſly named alſo in the Act, as Arts and Myſteries: And the Act of 22 *Hen.* 8. explains, that a Brewer, Baker, Chirurgion, (*b*) or Scrivenor alien, *&c.* are no Handicraftſmen within the Purview and Intention of certain Penal Laws, but that doth not prove that they are not Arts or Myſteries; for Art or Myſtery is more general than Handicraft, for that is reſtrain'd to Manufactures, but not within the Penalty of the ſaid Statutes; and it is no Queſtion, that in Truth they all are Arts, Myſteries, or manual Occupations. As to the ſecond, it was reſolv'd, That (*c*) the Intent of the Act was, that none ſhould take upon him any Art, Myſtery, or manual Occupation, but ſuch in which he had Skill and Knowledge: And therefore the Statute intended, That he who uſed any Art, Myſtery, or manual Occupation at the Time of the ſaid Act, might uſe the ſame Art or Myſtery; for (*d*) *quod quiſque norit in hoc ſe exerceat*; and the Words of the ſaid Branch are, *as now do lawfully uſe*, &c. And it was ſaid, That it was very (*e*) neceſſary that Brewers ſhould have Skill and Knowledge in brewing good and wholſome Beer, for that doth much conduce to Mens Health. And ſo the firſt Judgment was affirmed. And in this Caſe at the Bar, as well by the Serjeants as by the Juſtices in their Arguments, much was ſaid of the Antiquity of the City of *London*. *Ammianus Marcellinus*, who wrote about 1200 Years paſt, ſaith, That then it was (*f*) *Oppidum vetuſtum*. *Cornelius Tacitus*, (who married the Daughter of *Cneius Lucius Agricola*, and who was in this Kingdom with *Agricola* ſeven Years) ſaith, *Quod* Londinum *tempore Neronis* (which is above 1500 Years ago) was (*g*) *Copia negotiatorum & commeatu maxime celebre*. And omitting all that (*h*) *Stephanides* (who wrote in the Reign of *Hen.* 2.) has ſaid of the Honour and Antiquity of this City, I ſay, *Quod hæc eſt Camera Regis, Cor Reipublicæ, & tanquam* (*i*) *Epitome totius regni*. [See *Carthew* 163.]

(*a*) Lit. Rep. 251. Cro. Jac. 178. Cro. Car. 499. 11 Co. 54. a. 13 Co. 12. Bridgm. 140, 141. Hob. 183, 211. Moor 886. Jenk. Cent. 284. Palm. 544.

(*b*) 13 Co. 12.

(*c*) 13 Co. 12.

(*d*) Co. Lit. 125. a. 9 Co. 13. a. 12 Co. 66.

(*e*) 13 Co. 12.

(*f*) 4 Inſt. 247. 2 Brownl. 286.

(*g*) 4 Inſt. 247. 2 Brownl. 286.

(*h*) 4 Inſt. 247.

(*i*) Antea 127. b.

The Caſe of THETFORD SCHOOL, *&c.*

Paſch. 7 Jacobi I.

Popham 6, 7. Moor 594. Cr. El. 288. Duke ſur Charitable Uſes 78, 79, 80.

UPON a private Bill exhibited in the Parliament for Erection of a Free-School, Maintenance of a Preacher, and of four poor People, *ſcil.* two poor Men, and two poor Women, according to the Will of Sir *Thomas Fulmerſton*, Kt. a Queſtion was moved by the Lords, and was ſuch: Land of the Value of 35 *l.* *Anno* 9 *Eliz. Reginæ*, was deviſed by Will in Writing to certain Perſons and their Heirs, for the Maintenance of a Preacher four Days in the Year, of a Maſter and Uſher of a Free Grammer-School, and of certain poor People; and a ſpecial Diſtribution was made by the Teſtator himſelf, in the ſame Will, amongſt them, of the Revenues, *ſcil.* To the Preacher a certain Sum, and certain Sums to the School-maſter and Uſher, and to the poor People, amounting in the Whole to 35 *l.* *per Annum*, which was the yearly Profit of the Land at that Time; and afterwards the Land became of greater Value, *viz.* of the Value of 100 *l.* *per Annum*. Now two Queſtions were moved, 1. Whether the Preacher, School-maſter, Uſher, and Poor, ſhould have only the ſaid certain Sums appointed to them by the Founder, or that the Revenue and Profit of the Land ſhould be employ'd to the Increaſe of the Stipend of the Preacher, School-maſter, Uſher and Poor? 2. If any Surpluſage

remain'd, How it ſhould be employ'd? And it was reſolv'd, on hearing of Counſel learned on both Parts, ſeveral Days at *Serjeant's-Inn*, by the two Chief Juſtices, and *Walmſley*, Juſtice (to whom the Lords referred the Conſideration of the Caſe) that the Revenue and Profit of the ſaid Land ſhould be employed to the Encreaſe of the Stipend of the Preacher, School-maſter, *&c.* and Poor, and if any Surpluſage remain'd, it ſhould be expended for the Maintenance of a greater (*a*) Number of Poor, *&c.* and nothing ſhould be converted by the Deviſees to their own Uſes. So in the Caſe in Queſtion, Where Lands in *Croxton*, in the County of *Norfolk*, were deviſed by Sir *Richard Fulmerſtone*, to his Executors, to find the ſaid Works of Piety and Charity, with ſuch certain Diſtribution as is aforeſaid; and now the Value of the Manor was greatly encreaſed, that it ſhall be imployed in Performance and Increaſe of the ſaid Works of Piety and Charity inſtituted and erected by the Founder: For it appears by his Diſtribution of the Profits, that he intended the Whole ſhould be employed in Works of Piety and Charity, and nothing ſhould be converted to the private Uſe of the Executors, or their Heirs. And this Reſolution is grounded on evident and apparent Reaſon; for, as if the Lands had decreaſed in Value, the Preacher, School-Maſter, *&c.* and poor People, ſhould loſe, ſo when the Lands increaſe in Value, *pari ratione*, they ſhall gain. And they ſaid, That this Caſe concern'd the Colleges in the Univerſities of *Cambridge* and *Oxford*, and other Colleges, *&c.* For in antient Time, when Lands were of ſmall yearly Value, (Victuals then being cheap) and were given for the Maintenance of poor Scholars, *&c.* and that every Scholar, *&c.* ſhould have 1 *d.* or 1 *d. ob.* a Day, that then ſuch ſmall Allowance was competent in Reſpect of the Price of Victuals, and the yearly Value of the Land; and now the Price of Victuals being encreaſed, and with them the annual Value of the Lands, it would be now injurious to allow a poor Scholar 1 *d.* or 1 *d. ob.* a Day, which can't keep him, and to convert the Reſidue to private Uſes, where, in Right, the Whole ought to be employed to the Maintenance or Increaſe (if it may be) of ſuch Works of Piety and Charity which the Founder has expreſſed, and nothing to any private Uſe; for every College is ſeiſed *in jure Collegii, ſcilicet*, to the Intent that the Members of the College, according to the Intent of the Founder, ſhould take the Benefit, and that nothing ſhould be converted to private Uſes. *Panis*

(*a*) 10 Co. 30. b.

egentium (a) *vita pauperum, & qui defraudat eos homo ſanguinis eſt.* And afterwards, upon Conference had with the other Juſtices, they were of the ſame Opinion; and according to their Opinions, the Bill paſſed in both Houſes of Parliament, and afterwards was confirmed by the King's Royal Aſſent. Note, Reader, there is a good Rule in the Act of Parliament called, *Statutum Templariorum: Ita ſemper quod pia & celeberrima voluntas Donatorum in omnibus teneatur & expleatur, & perpetuo ſanctiſſime perſeveret.*

(a) Duke ſur Charitable Uſes 72. Hern ſur Charitable Uſes 80. Co. Lit. 342. a. 4 Co. 106. a.

TUR-

TURNOR's *Caſe.*

Paſch. 8 Jacobi 1.

In the Common Pleas.

TErmino Michaelis, Anno 6 Jacobi, Rot' 1811. *Edward Turnor*, Gent. Executor of *E. Turnor*, brought an Action of Debt againſt *Ed. Lawrence*, and others, Adminiſtrators of *Richard Booker*, on a Bond of 100 *l.* made by the ſaid *Richard Booker* to *E. Turnor*, the Teſtator: The Defendants pleaded in Bar a former Judgment in the King's Bench, upon ſeveral Bills, which amounted to 60 *l. &c. Et ulterius dic' quod alias ſcilicet ad Curiam Domini Regis tent' apud Civitatem* Ciceſtr' *in* Guildhalda *Civit' præd' coram* Roberto Adams *tunc Majore dictæ Civit' die Lunæ, videlicet* 23 *die* Febr' *anno Regni ipſius Dom' Regis quarto,* Thomas Billet *querebatur verſus ipſos* Edw' *& alios Defendentes Adminiſtratores dicti* Richardi Booker *de placito quod iidem* Edward', *&c. redderent ei centum libras quas ei adtunc injuſte detinuerunt, ſuper quo ad eandem Curiam iidem* Edw' Lawrence, *&c. Solemniter exacti fuerunt, & per* Leonard Smith, *Attorn' ſuum comperuerunt & tunc' dixerunt quod ipſi non potuerunt dedicere Actionem præd'* Thomæ Billet *præd', nec quin Scriptum obligator' virtute cujus idem* Thomas Billet *debitum præd' de eiſdem* Edwardo, *&c. exigebat, fuit Factum præd'* Rich' Booker, *nec quin præd'* Richard' Booker *in vita ſua debuit præd'* Thomæ Billet *præd' debitum centum librarum, modo & forma prout præd'* Thomas Billet *adtunc verſus eos querebatur:* Whereupon Judgment was given in the ſame Court for the ſaid *Tho. Billet*; and pleaded another Judgment for 60 *l.* in the ſame Court, at the Suit of *John Githens*; and pleaded divers other former Recoveries in Actions of Debt in the ſame Court againſt the ſame Adminiſtrators,

Bridgm. 80. See Skinner 407. 496. Carthew 431. Lucas 191. 205.

miniſtrators, amounting in the Whole to 514 *l.* 8 *d.* and that they have not Goods or Chattels of the Inteſtate in their Hands to be adminiſter'd, *præterquam Bona & Catalla quæ* (*a*) *non attingunt ad valentium præd'* 514 l. 8 d. *verſus ipſos in forma præd' recuperat'*, which are chargeable and liable to the ſaid ſeveral Executions. The Plaintiff replied and ſaid, That the ſaid Recovery of the ſaid *John Githens* (*b*) *habita fuit per Fraudem & Covinam, &c. ad ipſum* Edw. Turnor *de debito ſuo præd' defraudand' & decipiend'*, upon which they were at Iſſue to be tried by the Country: And as to the ſaid Recovery of the ſaid 100 *l.* againſt the Defen. that the Defen. after the Death of the ſaid *Rich. Boote*, and after the ſaid Recovery, and before the Purchaſe of the ſaid original Writ, 24 *Feb. Anno* 4 *Reg. nunc*, have paid to the ſaid *Tho. Billet* 60 *l.* Parcel of the ſaid 100 *l.* recovered by him as is aforeſaid, in full Satisfaction and Diſcharge of the ſaid Judgment, with which Payment the ſaid *Thomas Billet* held, and yet holds himſelf contented and ſatisfied, and then and there offered, and yet offers to releaſe the ſaid *Edward Lawrence, &c.* the ſaid 100 *l.* or to acknowledge Satisfaction thereof in the ſaid Court of our Lord the King at *Chicheſter*, at the Charges of the ſaid Adminiſtrators: But the ſaid *Edward, &c.* deceitfully, and to the Intent (*c*) defraud and deceive the ſaid *Edw. Turnor Executorem de juſto debito ſuo, Cognitionem Satisfactionis, de præd' centum libris, &c. Sive de judicio præd' relaxari, &c. diſtulerunt & adhuc differunt & Judicium præd' inde in ſuo robore & vigore permanere ſinunt ad Intentionem prædictam.* And made the like Replication to the other Recoveries: Whereupon the Defendant demurr'd in Law; and the Point in Law was, When a Judgment is given againſt an Adminiſtrator or Executor, for a juſt Debt, due by the Inteſtate or Teſta. if the ſaid ſubſequent Agreem. as is before alledg'd, ſhall avail the Plaintiff or not? And it was objected, That forasmuch as the Judgment was obtained *bona fide* for a juſt and true Debt, the ſubſequent Agreement can't make the Recovery covenous, and ſo long as it remains in Force, unleſs the Executors have Goods and Chattels in their Hands above that Judgment, they are not bound by Law to pay any other Debt, and Covin can't be alledged in doing of a lawful Act; A. in a Writ of Dower (*d*) againſt a Diſſeiſor, if the Tenant pleads in Abatement of the Writ an Entry by the Diſſeiſee, the Demandant ſhall not be receiv'd to aver the Entry to be by Covin to abate his Writ, becauſe the Entry is congeable and lawful, and mixt with no Wrong, as it is held in 15 *Ed.* 4. 4. *b.* but if a Woman has lawful Title (*e*) of Dower, and cauſes another to diſſeiſe the Tenant againſt whom ſhe recovers upon a good Title, it ſhall not bind the Diſſeiſee, as

(*a*) Vaugh. 104. Bridgm. 80. 9 Co. 108. b.

(*b*) Bridgm. 80.

(*c*) 3 Keb. 577. 1 Rol. Rep. 504. Jatck. 111. 9 Co. 109. a. 1 Jones 92.

See Rep. C. A. 146.

(*d*) Plow. 43. b. 44. a. 48. a. Br. Colluſion 20.

(*e*) Plowd. 51. a. Fitz. Dower 42. Br. Dower 15. Br. Fauxifier de Recovery 6. Br. Colluſion 10. Plowd. 54. b.

3 Co. 78. a. 5 Co. 31. a. 11 E. 4. 2. a. 6 Co. 58. a. 44 E. 3. 45. b. 46. a. Co. Lit. 35. a. 357. b. 1 Siderf. 21. Lane 44. 1 Rol. 549. 2 Rol. Rep. 17. Perk. Sect. 396. 44 Aſſ. 29. 18. H. 8. 5. a.

as it is held in 44 *Ed.* 3. 45. *b.* The ſame Law of him who is put to his *Formedon*, or any other real Action; and the Reaſon is, becauſe the Demandant's Right is mix'd by Covin with a Tort, which is an ill Herb, and makes the whole Act tortious. *Vide* 25 *Aſſ. pl.* 1. 22 *Aſſ. pl.* 92. 27 *Aſſ. pl.* 74. 41 *Aſſ. pl.* 28. 44 *Aſſ. pl.* 29. 11 *H.* 4. 60, 61. 15 *E.* 4. 4. *b.* 11 *E.* 4. 2. 7 *H.* 7. 11. 1 *H.* 8. 5. 19 *H.* 8. 13. But it was anſwered and reſolved, and ſo adjudged, That the Plaintiff ſhould (*a*) recover; for an Execu. or Admini. ought to exe. his Office, and admin. the Goods of the Decea. (*b*) lawfully, truly, and diligently: Lawfully, in paying of all Duties, Debts and Legacies, in ſuch Precedency and Order as they ought to be paid by the Law: Truly, to (*c*) convert noth. to his own Uſe; for an Execu. or Admi. hath not the Deceaſed's Goods to his own Uſe, but in ano. (*d*) Right, and to ano. Uſe, and ought not, by any Prac. or Device, to bar or hinder any Credi. of his Debs, but ought truly to execute his Office, according to the Truſt which is repoſed in him: Diligently, *quia* (*e*) *negligentia ſemper habet Comitem infortunium.* Then in the Caſe at Bar, when the Admi. compound with one who has a Judgment of 100 *l.* for 60 *l.* and the Plaintiff offers to (*f*) rele. or to acknow. Satis. and they defer it, to the Intent that the Judgment may ſtand in Force, by which the Plaintiff will be defrau. of his true Debt, and the Admini. convert the Deceaſed's Goods to their pri. Uſe, which is alto. aga. their Of. and the Truſt repoſed in them; and therefore be ſuch Agreem. either precedent bef. the Reco. or ſubſe. after the Reco. it's all one as to the Cred. who is a third Perſon, for he is defrauded as well by the ſubſequ. Agreem. as by the Agreem. precedent, and thereby the Admini. aga. their Office and the Truſt repo. in them, would make a priv. Gain, where they ought not, and the Cred. who is a Stranger, would loſe his Debt, which is by the Law due to him: And an Agreem. between two ſhall not hurt or preju. a third Perſon. And (*g*) *Goodale*'s Caſe, in the 5th Part of my *Reports*, *fol.* 95. was cited and well applied to this Caſe. And if any Prejudice accrues to the Admini. in this Caſe, it is their own Fault, for *Billet* the Plaintiff would have releaſed to them or acknow. Satis. but they deferred it, to the End by this Means to bar the Plaintiff of his juſt and true Debt. 2. It was reſolved, That the Bar as to all the Recov. pleaded in the Court of *Chicheſter* was inſufficient, for the Validity of the ſaid Recov. was all the Life and Force of the Bar: And, 1. It doth not ap. that the Mayor had Juriſd. * or Power (*h*) to hold a Court, either by Preſcrip. or Patent. 2. It ap. by the Decla. in the ſaid Court, that the Action of Debt was brought for 100 *l.* without making Mention of any Bond, and therefore it ought not to be intended, that there was any Bond, and then the ſaid Adminiſtrators were not chargeable in an Action of Debt with a ſimple (*i*) Contract, and

(*a*) Bridgm. 80.
(*b*) 5 Co. 27. b.
(*c*) Cart. 127.
(*d*) Cart. 134.
(*e*) 3 Bulſtr. 110.
(*f*) 1 Jones 91, 92.
(*g*) Poph. 99, 100. Cr. El. 383, 384. Jenk. Cent. 261. Goldſb. 176, 177. Co. Lit. 209. b. Moor 708, 709. 1 Rol. 421. Hob. 72.
* 6 Mod. 72.
(*h*) Vaugh. 93, 94. 1 Jones 451. Cro. El. 489. Cro. Jac. 184, 493, 532. Cro. Car. 46. Yelv. 46.
(*i*) Antea 126. a. Hard. 303. Yelv. 22. Vaugh. 93, 94, 95. 5 Co. 82. b. 9 Co. 86. b. 87. a. Cro. El. 121, 409. Noy 53. Poph. 32. 1 And. 182, 183. 1 Leon. 165. Mo. 366. 1 Sid. 333. Goldſb. 106, 107. Swin. b. 328, 329.

and altho' the Defendant in his Bar doth confeſs that the Debt was due by Bond, yet that will not make the Declaration good; for when the Declaration wants (*a*) Circumſtance of Time or Place, *&c.* it may be made good by the Bar: But when a Declaration, Bar, or Replication, *&c.* wants (*b*) Subſtance, it can't be made good by the other's Plea. And ſo you will better underſtand your Books in 18 *Ed.* 4. 16. *b.* 22 *E.* 4. 2. *b.* 6 *E.* 4. 2. 11 *H.* 7. 24. 6 *H.* 7. 6. 10. 5 *H.* 7. 12. 38 *H.* 6. 17, 18, 19. 18 *E.* 3. 30., 38 *E.* 3. 34. *b.* *Plow. Com.* 229. *Vide F. N. B.* 21. 3. It was reſolved, That in the Caſe at Bar, if the (*c*) Replication had been inſufficient, *ſcil.* that the ſaid Agreement ſubſequent ſhould not avail the Plaintiff; yet upon the whole Record the Plaintiff ſhould have Judgment, becauſe the Bar was inſufficient in Matter: And a Difference was taken, when by the Replication it appears that the Plaintiff has no Cauſe of Action, there the Plaintiff ſhall never have Judgment, altho' the Bar be inſufficient; as in Debt on a Bond, with Condition to perform (*d*) Covenants in an Indenture; the Defendant pleads Performance of all the Covenants generally, where it appears that divers of them are in the Negative or Disjunctive, and ſo the Plea in the general Affirmative is inſufficient; yet if the Plaintiff replies, and ſhews a Breach of one of the Covenants, which on his own ſhewing is no Breach; upon which the Defendant demurs, Judgment ſhall be given againſt the Plaintiff, becauſe upon the whole (*e*) Record, it appears that the Plaintiff has no Cauſe of Action; for the Bond is endorſed with Condition to perform the Covenants, ſo that the Plaintiff has no Cauſe of Action 'till there be a Breach of Covenant; and on the Plaintiff's own ſhewing there is not any Breach, which is ſufficient in Law to give the Plaintiff Cauſe of Action; and it ſhall be always intended, that every Man will ſhew the beſt of his Caſe: But when the Defendant's (*f*) Bar is inſufficient in Subſtance, and the Plaintiff replies, and ſhews the Truth of his Caſe, whereby he ſhews no Matter againſt himſelf, but Matter explanatory, or perhaps not material, there the Court ſhall adjudge upon the whole Record, and (the Declaration being good) for the Inſufficiency of the Bar, without any Regard to the Replication, Judgment ſhall be given for the Plaintiff: As if a Man pleads a Grant by Letters Patents in Bar, which are not ſufficient, the Plaintiff, by Replication ſhews another Clauſe in the ſaid Letters Patents, which Clauſe is not material, and the Defendant demurs in Law, in this Caſe Judgment ſhall be given againſt the Defendant, *& ſic in ſimilibus.* And ſo you will better underſtand your Books in 7 *E.* 4. 28. *Tilly* (*g*) and *Woody*'s Caſe, 11 *H.* 7. 28. and the Books aforeſaid; and other Books vouched in Dr. *Bonham*'s Caſe.

(*a*) Co. Lit. 303. *b.* Doct. pl. 69. 7 Co. 25. *a.*

(*b*) Cro. Car. 209. Co. Lit. 303. *b.* Doct. pl. 69. 7 Co. 25. *a.*

(*c*) Cr. Jac. 221, 133. Cro. Car. 6. Doct. pl. 70, 325. Lit. Rep. 130, 172. Mo. 464. 1 Sid. 336. Dyer 39. pl. 62. Antea 120. *b.* 9 Co. 53. *a.* 110. *b.* Godb. 138. Hob. 14. Yelv. 152, 153. Palm. 287. Winch. 37.

(*d*) Cro. El. 232. Cro. Jac. 560. Cro. Car. 422. Co. Lit. 303. *b.* 2 Roll. Rep. 159. Hob. 14.

(*e*) Poſtea 163. *a.* 3 Co. 52. *b.* 1 Sand. 285. Hob. 199. Cro. Jac. 133, 221, 312. Hard. 32. 2 Bulſtr. 94. Styl. 354. Palm. 287. Lit. Rep. 172.

(*f*) Cro. Jac. 133. Cro. Car. 5. Poph. 42. Antea 120. *b.* 9 Co. 110. *b.* Doct. pl. 70. 325. Lit. Rep. 341. Godb. 138. Palm. 287. Winch. 37. Fitzgib. 250.

9 Co. 110. *b.*

(*g*) Hob. 14. Plow. 66. *b.* 7 Ed. 4. 31. *a. b.* Fitz. Judgm. 50. Moor 105. Dyer 119. pl. 6. 1 And. 168.

MARY

MARY SHIPLEY's *Caſe.*

Paſch. 8 Jacobi 1.

TRinity, 4 *Jacobi*, *Rot.* 28. in the *King*'s *Bench*, *Mary Shipley* brought an Action of Debt on a Bond of 200 *l.* againſt *Chriſtopher Beane* and *Ann* his Wife, Executrix of *Francis Haſlwood* the Obligor; the Defendants pleaded fully adminiſtred, and ſo nothing in their Hands. The Plaintiff replied, that they had Aſſets. The Jurors found Aſſets to the Value of 172 *l.* and Judgment was given to recover the (*a*) whole Debt of 200 *l.* and Damages and Coſts of the Goods of the Teſtator, *Si*, *&c.* (*b*) *& ſi non*, *tunc* the Damages of their own proper Goods. Upon a Writ of *Error* brought upon the ſame Judgment in the Exchequer-Chamber, the ſaid Judgment was affirmed *Hill.* 7 *Jac.* For upon the Bar, the Effect of which is, nothing in their Hand, the Plaintiff might have prayed her Judgment (*c*) preſently; for thereby he confeſſes the Debt, but that he cannot have Execution 'till the Defendants have Goods of the Deceaſed; as in a Writ of (*d*) Meſne, if the Defendant pleads, not diſtreined in his Default, he may pray Judgment preſently, for this Plea will ſerve him only to ſave him from Damages. *Vide* 11 *H.* 4. 52. *a.* So in a (*e*) *Warrantia Chartæ* againſt the Heir, the Defendant pleads nothing by Deſcent, *&c.* the Plaintiff ſhall thereupon recover *pro loco & tempore.* So in Debt againſt (*f*) the Heir, if he pleads nothing by Deſcent, the Plaintiff may have Judgment preſently, and a *Scire facias* when

(*a*) Allen 37. 38. Styles 88. 1 Vent. 94. 9 H. 7. 15. a. Raſt. Ent. 328. b. Cro. Eliz. 592. Cr. Car. 167, 373. 1 Roll. 929. 1 Leon 68.

(*b*) Cro. Jac. 647, 648. Palm. 314. Dyer 185. pl. 67. 1 Roll. 928, 932. Noy 120. 2 E. 4. 4. a. 7 E. 4. 9. a. Kelw. 61. a. 11 H. 4. 5. a. Br. Exec. 51. Fitz. Judg. 68.

(*c*) Hob. 199. 1 Sid. 448. 1 Sand. 226. Office Exec. 274. Co. Lit. 366. a. Moor 246. Swinb. 329. Cr. El. 592, 887. 1 Vent. 94, 95, 96.

(*d*) Co. Lit. 100. a. Hob. 39, 217. Br. Meſne 5. Fitz. Meſne 23. (*e*) F. N. B. 134. K. 1 Vent. 94. Noy. 149. Hob. 39, 199, 217. Co. Lit. 266. a. (*f*) Vent. 95, 96. Dyer 373. pl. 14.

when Aſſets deſcend. *Vide Old N. B. in Warrantia Chartæ &*
(*a*) Antea 52. b. Plowd. 440. a. b. 21 (*a*) *Ed.* 3. 9. *b. Br. Tit. Warrantia Chartæ* 30. But the Trial (*Verdict*) in the Caſe at Bar, is a good Direction to the Sheriff what he is to do; but yet that doth not alter the Judgment of the Law; and it is the better Form, and more agreeable to Law to have Judgment for the Whole,
(*b*) Co Lit. 366. b. Antea 53, 54. than for Part of the Debt, according to (*b*) the Aſſets found. *Vide Sym's* Caſe before for this Matter.

Sir

Sir JOHN NEDHAM's *Caſe.*

Paſch. 8 Jacobi 1.

In the Common Pleas.

ARthur Poſt and *Catharine* his Wife, Adminiſtratrix of *Eliz. Weldiſh*, brought an Action of Debt againſt Sir *John Nedham* (which Plea began *Mich.* 7. *Jacobi*, *Rot.* 332) on Bond of 200 *l.* made to the ſaid *Eliz. Cui quidem Kath' adminiſtratio omnium & ſingulorum bonorum, &c. quæ fuer' præfat' Eliz. tempore mortis ſuæ per Willihel' permiſſione divina Roffens' Epiſcopum apud Roffen poſt Mortem præd' Eliz. commiſſa fuit* 5 *Febr'*, 1605. The Defendant pleaded, *quod poſt Mortem dictæ Eliz. & ante Commiſſionem Adminiſtrationis, præd' ſcilicet*, 13 *Maii*, 1604. The Dean and Chapter of *Canterbury* being Guardians of the Spiritualties (*a*) *ſede vacante* of the Archbiſhop of *Canterbury*, committed Adminiſtration of the Goods, *&c.* of the ſaid *Elizabeth* to the Defendant, *eo quod eadem Eliz. tempore Mortis ſuæ habuit bona notabilia in divers' Dioces' Provinciæ Cant'*, which Adminiſtration committed by the ſaid Dean, *&c.* doth yet remain in Force, and demanded Judgment of the Action. The Plaintiff replied, That after the ſaid Adminiſtration granted by the ſaid Dean, *&c.* to the Defendant, and before the Purchaſe of this original Writ, *ſcil.* 4 *Nov.* 1607. before Dr. *Bennet*, Commiſſary of the Prerogative Court of *Canterbury*, at the Suit of the ſaid *Catharine*, againſt the ſaid Defen. the Adminiſtration granted to the Defendant was pronounced and declared *pro nulla & invalida ad omnem juris effectum:* Upon which the Defendant demurr'd in Law. And in this Caſe three Points were reſolved. Foraſmuch as the Defendant has not ſhewed in his Bar, that the Inteſtate had not *bona notabilia* in (*b*) certain, for this Cauſe it ſhall be taken that the Adminiſtration was granted where the Inteſtate had not *bona notab'* in ſeveral Dioceſes: But yet it was agre. That ſuch Adminiſtration was not void, (*c*) but voidable, as it was adju. in (*d*) *Hugh Vere's* Caſe, as ap. *in the 5th Part of my Reports, fol.* 29 & 30.

Carthew 512. Rep. Q. A. 41. Swinb. 355, 357.

(*a*) Swinb. 355, 357.

(*b*) Swinb. 355, 357.

(*c*) Cr. El. 283, 457. Hob. 185. Swinb. 355. 1 Rol. Rep. 423.

2. It

(*d*) Swinb. 357. Moor 145. 5 Co. 30. a. 2 Jones 78. 3 Bulſtr. 176. Dav. 44. a. 47. a. 4 Leon. 212.

2. It was objected, That forasmuch as the Administr. granted to the Def. was not void, but (*a*) voidable, so long as it was in Force, the inferior Ordinary ought not to have commit. Administration, for the prerogative Administr. granted by the Archbish. and the Administr. granted by the inferior Ordinary can't (*b*) stand and be both of Effect together; for thereupon Confusion will ensue; and therefore the Administration granted by the inferior Ordinary was utterly void; and altho' the said prerogative Administration be afterwards revoked, that shall not make the other Administration of any better Effect than it was at the Time it was granted, *quia* (*c*) *quod in initio non valet, tractu temporis non convalescit.* But it was answered and resolved, that now inasmuch as the Ecclesiastical Judge has pronounced and declared the Letters of Administration granted to the Defendant *pro nulla & invalida ad omnem juris effectum*, we must give Credit to them, that it was for Causes not appearing to us void *ab initio*. *Vide* 17 *Eliz. Dyer* (*d*) 339. the like Judgm. upon the same Reason. Also the Administration is but an Authority, because he has nothing to his (*e*) own Use, but all to the Use of another, and an Autho. may expect and commence *in futuro*, and therefore it shall be suspended 'till the other be repleaded or declared void. And it was said, that there are *tria genera Executorum, primus a Lege constitutus, & ideo dicitur legitimus, ut Episcopus; secundus a Testatore constitutus, & ideo dicitur Testamentarius, ut Executor; tertius ab Episcopo constitutus, & ideo dicitur dativus, ut Administrator.* And it is to be observed, That the Bishop who is Execu. appointed by the Law, is not permitted by the Law to make a Release of any Debt, (*f*) or Gift of any Goods; for he has a special Property in the Deceased's Goods for the Benefit of the Dead, and nothing to his own Use; and it appears in 9 *Eliz. Dyer* 255. that the Ordinary has not (*g*) Power to give Autho. to ano. to sell the Deceased's Goods, because he himself has no such Autho. and the Stat. of *West.* 2. *cap.* 10. (*h*) *Bona deven' ad manus Ordinarii disponenda*, that is, for the Good of the Deceas'd, and as to this Purpose, he is like an Administrator, *duran'* (*i*) *min' ætate*, who has a special Power committed to him to dispose of the Deceas'd's Goods for his Benefit, and nothing in Prejudice of the Executor, as it is held in *Prince's* Case, in the 5th Part of my *Reports*, 29. *b.* So the Lord who takes a Surrender of Lands held by Copy of Court Roll, to the Use of another, has Power (*k*) only to grant it according to the Use of the Surrender, and not to any Stranger as it is held in the 4th Part of my *Reports* in *Wistwick's* Case. *Vide* 7 *Hen.* 4. 18. *b.* the (*l*) Ordinary shall not have an Action of Trespass for carrying away the Goods before an actual Possession of them, (as Executors or Administrators may have) but before Possession the Ordinary shall sue for them in the Spiritual Court; and *Fitzherbert* in abridging the Case, *Tit. Trespasse* 97. *ex hoc sequitur*,

(*a*) Cr. El. 283, 457. Hob. 185. Swinb. 355. Moor 693. 1 Rol. Rep. 423.
(*b*) Plow. 281. a.
(*c*) 2 Co. 55. b. 4 Co. 2. b. 90. a. Cro. Eliz. 585. Co. Lit. 35. a. 10 Co. 62. a. Hutt. 51. Dav. 32. a. Cawly 214. 2 Bulstr. 304, 305. 3 Bulstr. 192.
(*d*) 3 Co. 78. b. 9 Co. 19. a. Dyer 339. pl. 46. 1 Sid. 21. 2 Keb. 12. Postea 143. b. Cro. El. 460.
(*e*) Antea 133. a. Cart. 134.
(*f*) 9 Co. 39. a. Swinb. 351. Co. Lit. 292. a.
(*g*) 5 Co. 34. a. 9 Co. 39. a. 1 Rol. 918. Swinb. 351, 352. Dyer 355, 356. pl. 8. 1 Keb. 854. Wentworth 250. 2 Inst. 398. Kelw. 81. a. b.
(*h*) West. 2. c. 19. 2 Inst. 397.
(*i*) 5 Co. 67. b. Cro. El. 678, 679, 718, 719. 2 And. 132. Raym. 484. Swinb. 288. 2 Leon. 278. March. 138. 2 Inst. 398. Owen 35. Dal. 85.
(*k*) Co. Lit. 59. b.
(*l*) P. N. B. 120. d. Br. Trespass 83. Br. Jurisdict. 23. Dr. Ordi. 5.

ſequitur, That the Ordinary ſhall not have an Action of Debt, (*a*) as Ordinary. 3. It was reſolved, That the committing of (*b*) Adminiſtration by the Archbiſhop to the Obligor, ſhall not extinguiſh the Debt, but the Debt remains; but if the Obligee makes the Obligor his Executor, it is a Releaſe in Law of the Debt, for it is the Act of the Obligee himſelf, and therewith agrees 8 *Ed.* 4. 3. *a.* 21 *Ed.* 4. 2. *b.* *&c.* in the ſame Manner as if a Woman (*c*) Obligee marries the Obligor, or one of the Obligors, it is a Releaſe in the Law of the Debt, for it is by the Act of the Obligee herſelf, and therewith agree 11 *Hen.* 7. 4. and 21 *Hen.* 7. 29. But if a Woman (*d*) Executrix marries the Debtor, it is no Releaſe in Law, becauſe ſhe has the Debt in another Right, and if it ſhould amount to a Releaſe in Law, it would amount to a *Devaſtavit*, which is a Wrong, which the Law will not ſuffer. And ſo it was adjudged in the King's Bench, *Mich.* 30 *&* 31 *Eliz.* where in Debt againſt a Woman (*e*) Executrix, ſhe pleaded fully adminiſtred, and it was found that the Defendant had married the Obligor, and that the Huſband was dead, and it was adjudged to be no Releaſe in Law, nor the Debt extinct, but only ſuſpended during the Coverture, and ſo a Difference. Note, that *Fleta*, *Lib.* 2. *cap. de Teſtamentis*, ſays, *De bonis defuncti trina debet eſſe Diſpoſitio*; 1. *Neceſſitatis*, *ut* (*f*) *funeralia*; 2. *Utilitatis*, that every one ſhall be paid in ſuch Precedency as he ought to be. 3. *Voluntatis*, as Legacies, *&c.*

(*a*) 1 Rolls 906.
(*b*) 1 Siderf. 79. 1 Leon 90, 91. 1 Roll. 934. Swinb. 325, 300, 301. Salk. 303. 1 Salk. 327. 3 Salk. 163.
(*c*) 1 Brownl. 76. Cr. Car. 373. Co. Lit. 264. b. 1 Rolls 934. Plowd. 184. b. 186. a. Hob. 10. Cr. Car. 373. Went. 45. Yelv. 160. Moor 236, 855. 2 Jones 345. Hutt. 128. 1 Rol. 940. Br. Execu. 112. 8 E. 4. 3. a. Swinb. 300. 301. Hutt. 17.
(*d*) 1 Rol. 934, 940. Co. Lit. 264. b.
(*e*) Cr. El. 114. 1 Roll. 934, 935. Co. Lit. 264. b. Moor 236. 1 Leon 320.
(*f*) 20 H 7. 5. 2. 3 Inſt. 202.

Sir

Sir Francis Barrington's *Caſe.*

Paſch. 8 Jacobi 1.

In the Common Pleas.

2 Brownl. 289, 322, 323, 324, &c. Godb. 167, 168.

BEtween *Richard Chalke*, Plaintiff in Replevin, and *Will. Peter*, and *Nicholas White*, Defendants, which began *Hill.* 6 *Jacobi*, *Rot.* 157. on a long and impertinent Pleading, the Caſe was ſuch; Sir *Robert Rich*, Lord *Rich*, was ſeiſed of the Foreſt or Chace of *Hatfield* (whereof the Place where, *&c.* was Parcel) in Fee, and by his Deed indented, bearing Date 30 *Jan.* 19 *Eliz.* for good Conſideration granted to Sir *Thomas Barrington*, Kt. and his Heirs, *omnes boſcos arbores tam marem' ſubboſcos & ſpinas quam alia genera quorumcunque, adtunc creſcent' ſtant' & exiſtent' ſimul cum omnibus arboribus, vocat'* Timber Trees, *boſcis, ſubboſcis, & ſpinis quibuſcunque, quæ ad aliquod tempus extunc impoſterum forent creſcent' ſtant' renovant' ſive exiſtent' in & ſuper illis partibus foreſtæ præd' communiter vocat'* Buſhend Quarter, *& Quarterium vocat'* Takely Quarter (except the Land and Soil of the ſame Wood) with Liberty to encloſe them, and to hold them incloſed for the Preſervation of the Spring of Wood which ſhould be for ſuch Time, as by the Laws and Statutes of the Realm is appointed and enacted, and not otherwiſe *abſque moleſtatione ſeu interruptione* of the ſaid Lord *Rich*, his Heirs or Aſſigns, and to exclude the Deer, and all other Cattel, out of the Wood ſo incloſed, and to have the Herbage and Feeding thereof, as any Owner of the Wood might do, by the Laws and Statutes of this Realm, without

without Interruption of the ſaid Lord *Rich*, his Heirs or Aſſigns. And that the Plaintiff is ſeiſed of a Houſe and ſix Acres of Land in *Hatfield* in Fee, to which he has common Appurtenant for all Cattle levant and couchant, *&c.* in and through the whole Foreſt or Chaſe of *Hatfield*; which Grant made by the Lord *Rich*, was in Performance of an Award made between the ſaid Lord *Rich*, and Sir *Tho. Barrington*, by the Lord *Burghley* Lord Treaſurer of *England*, *Thomas* Earl of *Suſſex*, Sir *Willam Cordel* Maſter of the Rolls, and Sir *Gilbert Gerrard* Attorney General, which Arbitrament and Grant was confirmed and eſtabliſhed by (*a*) Act of Parliament, *Anno* 27 *Eliz.* with a * Saving to all Strangers, *&c.* And that the ſaid Sir *Tho. Barrington* died, after whoſe Deceaſe the ſaid Wood deſcended to Sir *Francis Barrington*, as to his Son and Heir, who, 1 *Feb.* 1 *Jacobi*, fell'd the Wood in the Place in which, *&c.* and took it to his own Uſe, and 10 *Mar.* following incloſed it for the Preſervation of the Spring, and ſo has maintain'd it, according to the Laws and Statutes of this Realm: And the Parties demurr'd in Law: And if the Plaintiff was barred of his Common or not was the Queſtion. And in this Caſe the Defendants pleaded the ſaid Arbitrament, and the ſaid Act of Parliam. at large; but to no Purpoſe, for without Queſtion, neither the Arbitrament nor the Act (in Reſpect of the Saving) can bar the Plaintiff of his Common: But all the Doubt of the Caſe ariſes upon two Acts of Parliam. not pleaded, *ſc.* the Act of (*b*) 22 *E.* 4. *c.* 7. and the Act of 35 *H.* 8. *c.* 17. And firſt it was objected, That the ſaid Act of 22 *E.* 4. has barred the Plaintiff of his Common; for by the ſame Act it is enacted, That if any of the King's Subjects having Woods growing in his own Ground, within any Foreſt, Chaſe, or Purlieu, *&c.* cauſes the ſame Wood, or any Part thereof to be fell'd by Licence of the King, or his Heirs, in his Foreſts, Chaſes or Purlieus, or without Licence, in the Foreſt, Chaſe or Purlieu of any other Perſon, or make Sale of the ſame Wood: Be it lawful for the ſaid Subjects Poſſeſſors of the ſame Ground whereupon the Wood grew, and to other Perſons to whom ſuch Wood ſhall be ſold, immediately after the Wood ſo fell'd, to coppice and encloſe the ſame Ground with ſufficient Hedges able to keep out all Manner of Beaſts and Cattle out of the ſame Ground, for the Preſervation of their young Spring: And the ſame Hedges ſo made, the ſaid Subjects may keep continually by the Space of ſeven Years next after the ſame incloſing; and there is no Saving in the Act for the Commoners; and therefore (as it was urged) they ſhall be excluded of their Common during the ſeven Years; for every one is party and privy to an Act of Parliament, and the Rights and Intereſts of thoſe which are not ſaved by the Act of Parliament are bound: And the Makers of the Act have greater Regard to the Preſervation of the Spring of Woods for the Common-

(*a*) 2 Brownl. 289, 323, 324, 325. Godb. 167, 168. * 1 Jones 235.

(*b*) 2 Brownl. 290, 322, 323, 324, 325, 326, 327, 328. Godb. 167, 168, 169, 170, 171. 4 Inſt. 304. 1 Rolls Rep. 92. 1 Jones 235.

Wealth in Maintenance of Timber and Woods, than to Common in the Woods of Subjects within Foreſts or Chaſes after a reaſonable Time, till the Spring be of ſuch Growth that Beaſts or Cattle cannot hurt or hinder it. And theſe Words, To incloſe the ſame Land with ſufficient Hedges able to exclude all Manner of Beaſts or Cattle out of the ſame Ground, were ſtrongly urged to prove the Intent of the Makers of the Act, to exclude not only the Beaſts of the Foreſt, or Chaſe, but alſo Cattle of Commoners; for Beaſts of the Foreſt are not called Cattle; and the Words are, able to exclude all Manner of Beaſts and Cattle out of the ſame Ground; which general Words extend to Beaſts and Cattle of the Commoner. To which it was anſwered by the Plaintiff's Counſel: 1. That the ſaid Act of 22 *E.* 4. doth not extend to this Caſe, becauſe the Statute extends only to thoſe who are Owners of the Ground; for the Words of the Act in divers Parts thereof are, growing on their proper Ground, and in this Caſe Sir *Francis Barrington* has but a Profit apprender in another's Ground, for the Ground remains to the Lord *Rich.* 2. It was anſwer'd, That the Stat. of (*a*) 35 *H.* 8. *cap.* 17. which is in the Negative, *That it ſhall not be lawful to any Perſons which have or ſhall have any Woods wherein any ought to have any Common,* &c. *to fell and cut down the ſame Woods (except it be to his own Uſe and Occupation) until ſuch Time as the fourth Part of the ſaid Ground or Soil,* &c. *be divided,* &c. *fenced and incloſed,* &c. *Et* (*b*) *leges poſteriores, priores contrarias abrogant.* To which it was anſwered by the Defendant's Council, That Sir *Francis* was out of this Prohibition, and within the Exception of this Branch; for he has taken the ſaid Wood to his own Uſe; and he who takes Wood wherein others have Common is out of the Prohibition of this Act. And now this Term the Caſe was argued at the Bench by the Judges, and in this Caſe theſe Points were reſolved. 1. That Sir *Francis Barrington* has an (*c*) Inheritance as Profit apprender *in alieno ſolo,* and that the Soil remains to the Lord *Rich.* 2. That the Statute of 22 *E.* 4. ſhall extend to Sir *Francis Barrington,* notwithſtanding he has not the Soil; for the Words are, that it be lawful for the ſaid Subjects Poſſeſſors of the ſame Soil, or to other Perſons to whom ſuch Wood ſhall be ſold; and the ſaid Grant for the Conſiderations in the ſaid Award mentioned to Sir *Thomas Barrington* and his Heirs, was a perpetual Sale to him within the Words and Intention of the Act. 3. The ſaid Act doth not extend to the Wood of a Subject, in which any other has Common, but only to a ſeveral Wood: For by the Common Law, he who has a Wood in which another has Common cannot encloſe it to exclude the

(*a*) 35 H. 8. c. 17. 2 Brownl. 290, 322, 322, 324, 325, 328. Godb. 167, 169, 171.

(*b*) 11 Co. 59. a. 62. b. 64. b. 1 Jones 186. 1 Co. 25. b. Cr. Jac. 121. 12 Co. 8. 2 Brownl. 324. Godb. 169. 2 Roll. Rep. 410. 423. Stanf. Pref. 69. b. Hawks Max. 452. 2 Inſt. 685.

(*c*) 2 Brownl. 324, 325. 11 Co. 49. b. 1 Rolls Rep. 96, 99, 137.

the Commoner of his Common, be it in Foreſt or Chaſe, or out of Foreſt and Chaſe. But he who has a ſeveral Wood in a Foreſt, may after the Fall incloſe it for three Years *parvo foſſato* (*a*) *& baſſa haia ſecundum aſſiſam foreſtæ*, as appears by the *Ad quod Damnum* in the Regiſter 257. Then it appears by the Preamble of the ſaid Act, that it extends only to a ſeveral Wood; for it recites, That where Subjects have fell'd their Woods, *&c.* they could not heretofore encloſe their Ground to preſerve the Germens longer than three Years, which proves what the Common Law was before in ſuch Caſe; but without Queſtion that extends only to a ſeveral Wood; for none could incloſe a Wood wherein another had Common for a Day, *&c.* But now this Statute has enlarged the Time to ſeven Years, and has alſo raiſed the Hedges; for where he might before encloſe it *parvo foſſato* (*b*) *& baſſa haia*, he may now make *magnam & altam haiam*, ſufficient to exclude all Manner of Beaſts and Cattle. 4. It appears by the Preamble, between what Perſons, and for and againſt what Perſons this Act was made; and the Parties to this great Contract by Act of Parliament are, the Subjects having Woods, *&c.* within Foreſts, Chaſes, or Purlieus of one Part, and the King and other Owners of Foreſts, Chaſes and Purlieus of the other Part; ſo that the Commoners are not any of the Parties between whom this Act was made: And therefore the Caſe well argued in 21 *H.* 7. 1. *a. b. inter the Prior of* (*c*) *Caſtleacre, and the Dean of St. Stephens*, and left at large in the printed Report, was afterwards adjudged, as appears by the Record thereof, which began *Paſch.* 18 *H.* 7. *Rot.* 416. that the Act of * 2 *H.* 5. being made between the King and Priors Aliens, by which the Priory's Aliens were given to the King, did not extinguiſh the Annuity of the Prior of *Caſtleacre* which he had out of a Rectory Parcel of a Priory Alien, although there was not any Saving in the Act. And *Mich.* 25 *&* 26 *Eliz.* (*d*) *Boſwel's* Caſe, *in Curia Wardorum*, where it was reſolved, That when an Act makes any Conveyance good againſt the King, or any other Perſon or Perſons in certain, it ſhall not take away the Right of any other, altho' there be not any Saving in the Act. 5. If the Act had extended to Wood in which others had Common; yet the Concluſion reſtrains the Generality of the precedent Words; for the Statute doth not give an abſolute and indefinite Power to the Owners of Wood to encloſe, *&c.* but to encloſe the Ground, to keep it encloſed, and to repair it, without (*e*) ſuing the King's Licence, or other Perſons, or their Officers, of the ſame Foreſts, Chaſes, or Purlieus, ſo that this Concluſion limits the precedent Words only againſt the King, and other Owners of Foreſts, Chaſes, and Purlieus; but no Word in the whole Act gives Authority to them to encloſe againſt any Commoner. And where it was ſaid, that this Word Cattle cannot be applied

(*a*) 2 Brownl. 326. Godb. 170.

(*b*) 2 Brownl. 326.

(*c*) 2 Brownl. 326, 327. Godb. 170. 1 Jones 235, 236.

* 1 H. c. 7.

(*d*) 2 Brownl. 323, 327. Godb. 168, 170. Moor 131, 132. Cr. El. 808. 2 Anderſ. 190, 191.

(*e*) 2 Brownl. 326.

to Beaſts of the Foreſt; it was anſwered, that they might fitly and properly be called Beaſts and Cattle of the Foreſt. And ſo it is ſaid in the Preamble of this very Act, Beaſts and Cattle of the Foreſt. And it is to be known, that there are five Manner of Beaſts of the Foreſt, *ſc.* Hart, Hind, Hare, Wild Boar and Wolf; (*a*) and five Manner of Beaſts of Chaſe, *ſc.* Buck, Doe, Fox, Martin and Roe; and Beaſts and Fowls of Warren are, Hare, Coney, Pheaſant, and Partridge, *Vide Regiſt.* 96. 43 *E.* 3. 13. 38 *E.* 3. 10. 3 *H.* 6. 12, 15. *Liber Intr. Treſpaſs in Hunting*, 585. 12 *H.* 8. 9. *b.* (*b*) *Holinſhed's Chronicle* 306. *num.* 30. 6. it was reſolved, That the ſaid Clauſe of the Act of 35 *H.* 8. in the Negative, reſtrains only the Owner of the Wood from felling his own Wood on a Penalty, which without Queſtion doth not exclude the Commoner of his Common: And the ſaid Words (*c*) (*except it be to his own Uſe or Occupation*) ſerve to exclude the Owner out of this Penalty, and are to be intended of his own proper neceſſary Uſe; as to repair his Houſe, or to burn in his Houſe, *&c.* Then there is another Clauſe which prohibits the Commoner *that after the ſaid felling* (that is to ſay, after the Diviſion and Felling, for the Diviſion of the fourth Part ought to precede the Felling) *in any ſuch Part*, i. e. *in the fourth Part*, ſo divided, no Beaſts or Cattle, during ſeven Years, ſhall be ſuffered to feed there, upon Penalty, *&c.* and the Lord is excluded to feed with his Cattle in the three Parts during the ſeven Years, and after the ſeven Years (until a new Felling, according to the Act) the Commoner ſhall have his Common again. And it is to be obſerv'd, That by the Statute of 22 *E.* 4. the Owner of the Wood ought firſt to fell the Wood, and after encloſe, and by the Statute of 35 *H.* 8. he ought firſt to encloſe, and after, within four Months, fell the Wood. 7. It was reſolved, That the Stat. of *Weſtm.* 2. * *de malefactoribus in parcis*, *Charta de Foreſta*, and theſe Acts of 22 *E.* 4. and 35 *H.* 8. are general Laws concerning all Perſons, whereof the Court *ex Officio*, ought to take Notice, and *eo potius*, becauſe this Act of 22 *E.* 4. concerns the King.

(*a*) Co. Lit. 233. a.

(*b*) 2 Brownl. 327.

(*c*) Hard. 368.

* Weſt. 1. c. 20. 2 Inſt. 198, 199.

(*d*) 2 Brownl. 222, 324, 325, 327. Godb. 168, 169, 171. 4 Co. 76. a 77. a. 2 Rolls 465, 466. 8 Co. 28. a. Doct. pla. 336, 337. Yelv. 106. Hob. 310.

Dr. DRURY's

Dr. DRURY's *Caſe.*

Paſch. 8 Jacobi I. Rot. 3642.

In the Common Pleas.

AT another Time as appeareth in the Term of the Holy Trinity, in the Year of the Reign of the Lord, the now King of *England*, &c. the ſeventh, and of *Scotland* the forty-ſecond, *Rot.* 3642. it is contained thus, *viz. Surry*, ſſ. It was commanded to the Sheriff, That whereas of the grievous Complaint of *Owen Bray* of *Cobham* in the County aforeſaid, Gent. to the Lord the King, grievouſly complaining, it was ſhewed, That whereas *John Drury*, Doctor of Law, in the Court of the Lord the King of the Bench here, That is to ſay, in the Term of *St. Michael*, in the fifth Year of the Reign of the ſaid Lord the now King of *England*, before the Juſtices of the ſaid Lord the King, of the Bench aforeſaid here, that is to ſay, at *Weſtminſter*, by Judgment of the ſaid Court had recovered againſt the ſaid *Owyn*, as well a certain Debt of two hundred Pounds, as thirty-three Shillings, four Pence, which to the ſaid *John* in the Court aforeſaid, of the ſaid Lord the King here were adjudged for his Damages which he had by Occaſion of the detaining of the ſaid Debt, whereof he is convicted: And whereas alſo the ſaid *Owyn*, for that that he did not come unto the ſaid Court of the Lord the King here, to ſatisfy the aforeſaid *John* of the Debt and Damages aforeſaid, was put in exigent in the County of the ſaid Lord the King of *Suſſex*, to Outlawry, and for that Occaſion afterwards, that is to ſay, the nineteenth Day of *May*, in the ſixth Year of the Reign of the Lord the now King, was outlawed; and notwithſtanding the ſaid *Owyn*, in Execution for the Debt and Damages aforeſaid, by Virtue of a certain Writ of the ſaid Lord the King of *Capias Utlagatum* thereof to the late Sheriff of the aforeſaid County of *Surry*, by *Herbert Morley*, Eſq; then Sheriff of the aforeſaid County of *Surry*, at the Suit of the ſaid *John* was taken, and impriſoned: And after he was ſo taken and impriſoned, was by the ſaid Sheriff out of

the ſame Priſon at large, where he would, freely and voluntarily ſuffered to go, and from the Execution aforeſaid was delivered, as the ſaid *Owyn* by Ways and Means convenient, was ready to ſhew; yet the aforeſaid *John* ſueth forth Execution of the Debt and Damages aforeſaid, againſt him the ſaid *Owyn*, by Reaſon of the Recovery aforeſaid, and endeavoureth, and threatneth unjuſtly, him the ſaid *Owyn*, to be taken and impriſoned, to his no ſmall Damage and Grievance; whereupon he had ſupplicated the Lord the King congruous Remedy for him to be provided. The ſaid Lord the King, willing, what is juſt to be done to the ſaid *Owyn* in this Behalf, ſent to the Juſtices here, that the Complaint of the ſaid *Owyn* in this Part being heard, and calling before them the Parties aforeſaid, and others which in this Behalf they ſhall ſee fit to be called, and their Reaſons thereof here being heard; to the ſaid *Owyn* full and ſpeedy Juſtice they ſhould cauſe to be done in this Behalf, which of Right, and according to the Law and Cuſtom of the Kingdom of the Lord the King of *England* ſhould be done. And that they cauſe to come here at this Day, that is to ſay, from the *Holy Trinity* in fifteen Days, the aforeſaid *John*, to anſwer, of and upon the Premiſſes, and further to do and receive, what the Court of the ſaid Lord the King here ſhall conſider in that Behalf: And now here, at this Day, come as well the aforeſaid *Owyn*, by *Otho Gayer* his Attorney, as the aforeſaid *John*, by *John Nye* his Attorney; and upon this, the ſaid *Owyn* ſaith, That whereas the aforeſaid *John*, in the Court of the ſaid Lord the now King here, that is to ſay, in the Term of *St. Michael*, in the fifth Year of the Reign of the ſaid Lord the now King of *England*, &c. before *Edward Coke*, Knt. and his Companions then Juſtices of the ſaid Lord the King of the ſame Bench here, that is to ſay, at *Weſtminſter*, by the Conſideration of the ſaid Court, recovered againſt the ſaid *Owyn*, as well the aforeſaid Debt of two hundred Pounds, as the aforeſaid thirty-three Shillings and four Pence, which to the ſaid *John* in the ſame Court of the ſaid Lord the King here was adjudged for his Damages, which he had by Occaſion of detaining the ſame Debt whereof he is convicted; and whereas alſo the ſaid *Owyn*, for that he did not come into the ſame Court of the ſaid Lord the King here, to ſatisfy the ſaid *John* of his Debt and Damages, he was put in Exigent in the aforeſaid County of *Suſſex* to be outlawed, and for that Occaſion afterwards, that is to ſay, the ninth Day of *May*, in the ſixth Year of the Reign of the Lord the now King, was outlawed, upon the ſaid Outlawry, the aforeſaid *John Drury*, afterwards, that is to ſay, in the Term of the *Holy Trinity*, in the Year of the Reign of the Lord the now King aboveſaid, ſued forth out of the Court of the Lord the King of the Bench here, a certain Writ of the ſaid Lord the King of *Capias Utlagatum* againſt him the ſaid *Owyn*, then to the

Sheriff of the aforeſaid County of *S.* directed, by which Writ the ſaid Lord the King then commanded the ſaid Sheriff of *S.* that he do not omit for any Liberty within his County, but that he take the ſaid *Owyn* outlawed in the ſaid County of *Suſſex*, the ſaid 19th Day of *May*, in the ſixth Year of the Reign of the ſaid Lord the now King aboveſaid, at the Suit of *John Drury*, of the Plea of Debt, whereof he is convicted, *&c.* And him ſafely to keep, *&c.* ſo as he have his Body before the Juſtices of the ſaid Lord the King here in the Morrow of *All Souls* then next coming, to do and receive what the Court of the ſaid Lord the King thereof ſhould conſider in that Behalf: By Virtute of which Writ, the ſaid *Owyn* afterwards, that is to ſay, the ſeventh Day of *October*, in the ſixth Year aforeſaid, at *Guilford*, in the aforeſaid County of *Surry*, by the aforeſaid *Robert Morley*, then being Sheriff of the aforeſaid County of *Surry*, was taken and impriſoned, and after he was ſo taken and impriſoned, the ſaid *Owyn* by the ſaid Sheriff the ſame Day and Year, *&c.* at *Guildford* aforeſaid, out of that Priſon at large, where he would freely and voluntarily to go was ſuffered, and from the Execution aforeſaid was delivered: And this he is ready to aver: Whereupon he prayeth Judgment, and that the aforeſaid *John* from having his Execution aforeſaid by Colour of the Judgment aforeſaid be barred, and that the ſaid *Owyn* thereof be diſcharged, *&c.* And the aforeſaid *John* prayeth Licence thereof to imparl here, until eight Days of *St. Michael*, &c. and hath it, *&c.* And the ſame Day is given to the aforeſaid *Owyn* here, *&c.* at which Day the Plea aforeſaid was adjourned, by Writ of the Lord the King of common Adjournment here, until from the Day of *St. Michael*, in one Month then next following, at which Day, here cometh as well the ſaid *Owyn*, as the ſaid *John* by their Attornies aforeſaid, and upon this, further prayeth Licence thereof to imparl here, *&c.* until from *Eaſter* Day in fifteen Days, and hath it, *&c.* And the ſame Day is given to the ſaid *Owyn* here, *&c.* at which Day of fifteen Days of *Eaſter*, came as well the aforeſaid *Owyn*, as the aforeſaid *John* by their Attornies aforeſaid, and upon this the ſaid *Owyn* prayeth that the aforeſaid *John*, to his Writ and Declaration aforeſaid do anſwer: And the ſaid *John Drury* ſaith, That he for any thing before alledged from having Execution of his Debt and Damages againſt him the ſaid *Owyn*, ought not to be barred or delayed, becauſe he ſaith, That after the aforeſaid Time, in which it is ſuppoſed the aforeſaid *Owyn* out of the Cuſtody of the aforeſaid Sheriff of *Surry*, to have eſcaped, and before any further Execution againſt the aforeſaid *Owyn*, by him the ſaid *John*, by Colour of the Judgment aforeſaid, was ſued forth and had, that is to ſay, in the Term of *St. Michael*, in the ſixth Year of the Reign of the ſaid Lord the now King aboveſaid, out of the aforeſaid Court of the ſaid Lord the now King, of the Bench here,

upon the Outlawry (as is before ſaid) pronounced, iſſued forth a certain Writ of the ſaid Lord the King, of *Capias Utlagatum*, againſt him the ſaid *Owyn*, at the Suit of the ſaid *John*, then to the Sheriff of the County of *Middleſex* directed; by which Writ the Lord the King commanded the aforeſaid Sheriff of *Middleſex*, that he ſhould not omit for any Liberty of his County, but that he take the ſaid *Owyn*, by the Name of *Owyn Bray*, late of *Cobham* in the County of *Surry*, Gent. outlawed in the aforeſaid County of *Suſſex*, the aforeſaid nineteenth Day of *May*, in the ſixth Year of the Reign of the Lord the now King aboveſaid, at the Suit of him the ſaid *John*, by the Name of *John Drury*, Doctor of Law, of a Plea of Debt whereof he was convicted, if he ſhould be found in his Baliwick; and him ſhould ſafe keep, *&c.* ſo as he have his Body here, that is to ſay, at *Weſtminſter* aforeſaid, in the aforeſaid Morrow of *All Souls*, the ſelf ſame Term of *St. Michael*, in the Year aforeſaid, to do and to receive what the Court of the ſaid Lord the King, thereof ſhould conſider in that Behalf: At which Morrow of *All Souls* here, that is to ſay, at *Weſtminſter* aforeſaid, cometh the aforeſaid *Owyn*, by *William Brown* then his Attorney; and the Sheriffs, that is to ſay, *George Bolles* and *Richard Farrington*, then Sheriffs of the aforeſaid County of *Middleſex*, then here ſent, that the aforeſaid *Owyn* was not found, *&c.* and upon this the ſaid *Owyn*, then prayed the Hearing of the Writ of *Exigent*, upon which the ſaid *Owyn*, at the Suit of the ſaid *John Drury* aforeſaid, in Form aforeſaid ſtood outlawed. And it was then read to him in theſe Words, '*James* by the Grace of God, of *England*, *Scotland*, '*France* and *Ireland* King, Defender of the Faith, *&c.* To the 'Sheriffs of *Suſſex*, greeting: We command you that you put 'in *Exigent Owyn Bray*, late of *Cobham* in the County of '*Surry*, Gent. from County to County, until according to 'the Law and Cuſtom of our Kingdom of *England* he be 'outlawed, if he ſhall not appear; and if he ſhall appear, then 'that you him take, and cauſe ſafely to be kept ſo as you 'have his Body before our Juſtices at *Weſtminſter*, in the Morrow of (the *Holy*) *Trinity*, to ſatisfy to *John Drury*, Doctor of 'Laws, as well of a certain Debt of two hundred Pounds, 'which the ſaid *John* in the ſaid our Court, before our Juſtices at *Weſtminſter* recovered againſt him, as of thirty-three 'Shillings and four Pence, which to the ſaid *John*, in the 'ſame our Court were adjudged for his Damages, which he 'had by occaſion of the detaining the ſame Debt, whereof he 'is convicted. And ſent to our Juſtices at *Weſtminſter*, in 'eight Days of *St. Hillary*, that the aforeſaid *Owyn* is not 'found in your Baliwick, and have here this Writ. Witneſs 'Edward Coke at *Weſtminſter*, the twenty-fifth Day of *January*, 'in the Year of our Reign of *England*, *France* and *Ireland*, 'the fifth, and of *Scotland* the forty-firſt.' Which being read and heard, the ſaid *Owyn* ſaid, that he of the Outlawry

aforeſaid, ought not to have himſelf charged, becauſe the ſaid Writ of *Exigent* had not any certain Day of Retorn, this Word (Holy) between the Words, *Morrow* and *Trinity*, not having any Signification, as by the Writ aforeſaid then it appear'd, and for the ſame Cauſe the ſaid *Owyn* then prayed Judgment, and that the Outlawry aforeſaid, in Form aforeſaid pronounced and had, be annulled, made void, and altogether holden for naught. Upon which, the Writ aforeſaid then being ſeen, and by the Juſtices here then fully underſtood, to the ſame Juſtices it then appeared, that the Allegation of the aforeſaid *William Brown* in Diſcharge of the aforeſaid *Owyn* out of the Outlawry aforeſaid was true: Therefore then it was conſidered in the ſaid Court here, that the ſaid *Owyn* by Occaſion of the Outlawry aforeſaid, ſhould not be moleſted or tronbled, but ſhould go thereof acquitted, *&c.* as by the Record thereof in the ſaid Court here remaining fully appeareth: And ſo the ſaid *John Drury* ſaith, that there is not any ſuch Record of the Outlawry aforeſaid, as the ſaid *Owyn* by his Writ and Declaration aforeſaid above ſuppoſeth: And this he is ready to aver: Whereupon he prayeth Judgment, if he from Execution of his Debt aforeſaid and Damages aforeſaid againſt the aforeſaid *Owyn* ought to be barred, *&c.* and the aforeſaid *Owyn* ſaith, that the aforeſaid Plea of the aforeſaid *John* in Form aforeſaid above pleaded, is not ſufficient in Law to the ſaid *John* his Execution by Colour of the Judgment aforeſaid to have, and maintain, and that he to that Plea in Manner and Form aforeſaid above pleaded, needs not, nor by the Law of the Land is bound to anſwer; and this he is ready aver: Wherefore for Default of a ſufficient Plea of the aforeſaid *John* in this Behalf, the ſaid *Owyn*, as at firſt prayeth Judgment; and that the ſaid *John* from his Execution by Colour of the Judgment aforeſaid be barred; and that the ſaid *Owyn* be thereof charged, *&c.* and the aforeſaid *John* inaſmuch as he ſufficient Matter in Law for him the ſaid *John*, his Execution by Colour of the Judgment aforeſaid againſt the ſaid *Owyn* to have and maintain, above hath alledged, which he is ready to aver, which Matter the ſaid *Owyn* doth not deny nor to the ſame any ways anſwereth, but the ſaid Averment altogether refuſeth, as before, prayeth Judgment and Execution of his Debt and Damages aforeſaid, againſt the ſaid *Owyn* to him to be adjudged, *&c.* and becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes, before that they give their Judgment thereof, Day is given to the Parties aforeſaid, until the Morrow of the *Holy Trinity* to hear their Judgment thereof, *&c.* becauſe the ſame Juſtices here thereof not yet, *&c.*

Paſch.

Dr. DRURY's *Caſe.*

Paſch. 8 Jacobi 1.

OWYN BRAY brought a Writ of *Audita Querela* againſt *John Drury*, Doctor of the Civil Law, ſetting forth, That whereas the ſaid Dr. *Drury*, *Mich.* 5 *Jac. Regis*, in this Court, had recovered againſt the ſaid *Owyn* a Debt of 200 *l.* and 33 *s.* 4 *d.* for Damages and Coſts, and whereas the ſaid *Owyn*, becauſe he came not into Court to ſatisfy the ſaid Debt and Damages, was put in Exigent, and thereupon 19 *Maii*, *Anno* 6 *Regis nunc*, was outlawed: And that the ſaid *Owyn*, by Force of a Writ of *Capias Utlagatum*, *ad ſectam præd' Johannis Drury capt' & impriſonatus fuit*, and in Execution for the ſaid Debt and Damages; and ſo being in Execution, was delivered out of Priſon by the Sheriff from the ſaid Execution, and ſuffered to go at large, *&c.* The Defendant pleaded, That after the ſaid Eſcape, and before the Purchaſe of the ſaid Writ of *Audita Querela*, *ſc. Mich.* 6 *Jac.* The ſaid Writ of *Capias Utlagat'* was awarded out of this Court returnable *Craſtino animarum*, at which Day the Sheriff retorn'd *Non* (*a*) *eſt inventus*; and thereupon the ſame Day the ſaid *Owyn* appeared, and demanded Oyer of the Exigent, which was read to him; and thereupon it appeared, that the Retorn of the ſaid Writ of Exigent was incertain; and thereupon he prayed, *quod utlagaria prædicta in forma præd' promulgata & habita adnullaretur, evacuaretur, & pro nullo pœnitus teneretur: ſuper quo viſo brevi præd' & per Juſticiar' hic tunc plene intellecto, eiſdem Juſticiar' hic tunc conſtabat, quod allegatio præd'* Owyni *in exonerationem ſuam de utlagar' præd' vera extitiſſet*; *Ideo tunc conſid' fuit in eadem Curia*

(*a*) Vaugh. 158.

hic

hic qd' idem Owynus *occasione utlagar' præd' in aliquo non molestaretur, nec gravaretur, sed iret inde quietus prout per record' inde in eadem Curia hic residen' plenius liquet: Et sic idem* Johan' Drury *dicit quod non habetur aliquod tale recordum utlagariæ præd' quale præd'* Owynus *per breve & narrationem suam præd' superius supponit: & hoc paratus est verificare: Unde petit judicium si ipse ab executione sua præd' de debito & dampnis præd' versus præd'* Owynum *habend' præcludi debeat, &c.* And thereupon the Plaintiff demurr'd; and it was objected that the said Outlawry was not void, but (*a*) voidable, and that at the Time of the Escape (by which the said Dr. *Drury* was entitled to an Action of Debt, upon the Escape, against the Sheriff) the Outlawry was in Force, and the Sheriff * shall never take Advantage of Error in the proceeding against the Defendant, but shall be charged for the Escape, notwithstanding the Record be erroneous. And so it was adjudged in the Exchequer, *Trin.* 31 *Eliz.* by Sir *Roger Manwood*, and the other Barons, where the Case was, that *Edward Clere*, *Francis Woodhouse*, and *William Gervys*, 18 *Aug.* 28 *Eliz.* acknowledged a Recognizance of 200 *l.* in the Chancery, to *George* (*b*) *Ognell*, upon which Recognizance *George Ognell*, 16 *Jan.* 29 *Eliz.* sued a *Scire facias* out of the Chancery against the said Recognizors, upon which *Nihil* was returned; and so upon another *Scire facias*, whereupon *Mense Paschæ* 29 *Eliz.* Judgment was given, *sc. Ideo consideratum fuit per Curiam, quod præd'* Georgius *recuperaret versus prædictos* Ed. Fr. *&* Will. 200 *l.* &c. And that the said *George* have Execution against them, whereupon he sued forth a *levari facias*, upon which it was returned, that they had nothing, for which the Court did award a *Capias ad satisfaciend'* retornable *Octab. Hill.'* directed to the Sheriff of *Norfolk*, *Clement Paston*, Esq; then Sheriff of the same County; by Force whereof the said Sheriff arrested the said *Francis Woodhouse*, and *William Gervys*, 16 *Jan.* 30 *Eliz.* And that the said *Francis Woodhouse*, at the Time of the said Arrest, was in Prison under the Custody of the said Sheriff, being Attainted of Felony; and afterwards the said *Francis* and *William* escaped out of the Custody of the said Sheriff; upon which Escape *G. Ognell* brought an Action of Debt against the said *Clem. Paston*, being an Accomptant in the Exchequer. And in that Case it was resolved, that the Award of the (*c*) *Cap' ad satisfac'* was Erroneous; for by the Law the Bodies of the Recognizors were not liable to Execution, and yet, because the Sheriff could not take Advantage of the (*d*) Error, it was adjudg'd, that he should answer for the Escape; and therewith agrees 21 *E.* 4. 23. *b.* But it was adjudg'd, that in the Case at Bar, the *Audita Querela* doth not lie; and in this Case two Points were resolv'd. 1. (*e*) A Difference was taken and agreed between a Thing Colla-

(*a*) Hard. 27.

* Cro. Eliz. 893. Poph. 205. Salk. 273. Fares. 29. Comb. 69.

(*b*) 2 Leon. 84, 85. &c. Moor 274. Cr. El. 213, 214, 707. Yelv. 42. Godb. 403. 2 Bulstr. 64, 65.

(*c*) 1 Roll. 897. Yelv. 42. Mo. 274. Cr. El. 3. Cr. Jac. 3.

(*d*) Cr. El. 165, 576, 707. Cr. Jac. 3, 280, 289. 2 Leon. 85. Dyer 67. pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403. Hard. 85.

(*e*) 2 Roll. Rep. 254.

Collateral executory, and executed; for when an erroneous Judgment is given, and afterwards the Judgment is reverſed by a Writ of Error, collateral Acts executory are barred thereby, as if a Man has Judgment in a *Quare Impedit*, and has a Writ to the Biſhop, and the Biſhop refuſes to admit the Plaintiff's Clerk, now the Plaintiff upon this collateral Refuſal, may have a Writ of *Quare non admiſit*; but if the Defendant reverſes the Judgment in a Writ of Error, and afterwards the Plaintiff in the *Quare Impedit* brings a Writ of *Quare non admiſit*, the Defendant may plead *nul tiel Record: Vide* 26 *E.* 3. 75. *b.* by *Wilby* and *Hill.* So it was reſolved, if *A.* be in Execution at the Suit of *B.* upon an erroneous Judgment, and afterwards eſcapes, and afterwards the Judgment is reverſed by a Writ of Error, the Action upon the Eſcape is gone; for he may plead *Nul tiel* (*a*) *Record*, becauſe without a Record the Action is not maintainable; but yet it is true, that 'till the erroneous Judgment, or Execution, is reverſed by a Writ of Error, the Sheriff or Gaoler, ſhall not take (*b*) Benefit thereof; for there he cannot plead *Nul tiel Record*, becauſe 'till it is reverſed, it remains of Force, altho' there is apparent Error, as it is held in 34 *H.* 6. 2. *b.* and (21) 22 *E.* 4. 23. *b.* But in the ſame Caſe, if the Plaintiff brings an Action of Debt againſt the Sheriff or Gaoler, upon the Eſcape, and has Judgment and Execution, and afterwards the firſt Judgment is reverſed; yet foraſmuch as this Judgment upon this (*c*) collateral Thing is executed, notwithſtanding the Reverſal of the firſt, it remains in Force, as appears in the like Caſe (*d*) 7 *H.* 6. 42. *a.* where the Caſe in effect is, That the Conuſee of a Statute Staple in a Writ of Detinue of the ſaid Statute upon Garniſhment, recovers by erroneous Judgment againſt the Garniſhee, and has the Statute delivered to him; the Garniſhee brings a Writ of Error, and the Conuſee ſues Execution upon the Statute and has it; there it is held, that altho' the Garniſhee doth reverſe the Judgment, yet foraſmuch as the Statute is now executed, this Execution ſhall not be avoided by the Reverſal of the Judgment; for the Judgment was only to have the Statute delivered, and the Execution on the Statute is a Thing executed, not depending upon the Judgment. So if a Man recovers by erroneous Judgment, and preſents to a Benefice, or enters into the Perquiſite of a Villein, and afterwards the Judgment is reverſed by Writ of Error, becauſe theſe collateral Things are executed, they ſhall not be deveſted, as it is held in 4 *H.* 7. 11. and there *fol.* 12. *a. Brian* ſaith, that it was adjudged, That if the Defendant pleads that the Plaintiff is outlawed, and the Plaintiff replies, *quod non habetur aliquod recordum, &c.* and the Defendant has a Day to bring in the Record, and before the Day the Record is reverſed, the Juſtices ſhould certify *Nul tiel Record:* And therewith agrees 6 *El. Dyer* (*e*) 228.

(*a*) 1 Sand. 38. Kelw. 18. b.

(*b*) Hardreſs 85. Cr. Jac. 3, 280, 289. Cro. El. 163, 576, 707. 2 Leon. 85. Dyer 67. pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403.

(*c*) Cr. Jac. 646.

(*d*) Poſtea 143. b. 5 Co. 90. b. 2 Roll. 777, 778.

(*e*) Cr. Jac. 484. Yelv. 36. 1 Brownl. 83.

So

So in the Case at Bar, forasmuch as the Record is defeated and avoided before the Defendant is oblig'd to plead, he may well plead *Nul tiel* (*a*) *record*, *Vide* 13 *E.* 3. *Barr* 253. But if two Judgments are given, and the last depends meerly upon the first as upon its Foundation, there if the first fundamental Judgment is (*b*) reversed by Writ of Error or Attaint, the latter (which appears in the Record to be dependant upon it) shall be revers'd also, as in *Assise* & (*c*) *Redisseisin:* So of a Judgment upon the Original, and another Judgment in a (*d*) *Scire fac.* the same Law of one Judgment given against the Tenant and another against the Vouchee and the like, 43 *E.* 3. 3. *a.* 13 *E.* 4. 4. *a.* 8 *H.* 4. 4. 4 *E.* 3. 36. 8 *H.* 7. 10. *a.* 11 *H.* 4. 4. 6. *a. b.* 4 *E.* 4. 29. *a.* 6 *E.* 4. 9. *b.* 9 *H.* 6. 38. *b.* 10 *H.* 6. 6. And *vide* * 26 *E.* 3. 57. (75.) *a. b.* that by the Reversal of the Judgment given in a *Quare Impedit*, the Judgment given in a *Quare non admisit* is also reversed. 2. There is a Difference between mean Acts done in the Execution of Justice, which are Compulsive, and Acts which are Voluntary: And therefore, if an erroneous Judgment is given in Debt, and the Sheriff, by Force of a *Fi' fac'* (*e*) sells a Term of the Defendant and afterwards the Judgment is reversed by a Writ of Error, yet the Term shall not be restored, but only the Sum, *&c.* because the Sheriff was commanded and compelled by the King's Writ to sell it, *&c.* But if a *Capias* (*f*) *Utlagat'* is awarded, whereby the Sheriff is commanded to take the Body, *&c.* & *bona & catalla, quæ per inquisition' invenerit in manus nostras capias ut de vero valore, &c.* and by Force of that Writ, the Sheriff, by Inquisition takes the Goods and Chattels of the Man outlaw'd and sells them, and afterwards the Outlawry is revers'd, the Party shall be restor'd to his Goods and Chattels, because the Sheriff was not commanded nor compell'd by the K.'s Writ to sell them; and therewith agrees 5 *El. Dy.* 223. (*g*) *Proctor*'s Case. And according to this Resolution it was adjudg'd in *C. B.* betw. *Amner* (*h*) and *Loddington*, and afterwards *Mich.* 26 & 27 *El.* in a Writ of Error affirm'd in the King's Bench. 3. There is a Difference between a Recovery upon an elder Title, and a Reversal of a Record by a Writ of Error: And therefore if *A.* recovers Dower in an antient Demesn against *H.* and has Execution, the Tenant reverses the Judgm. in a Writ of false Judgm. and because the Woman has held the Land for two Years, between the first Judgm. and the Reversal, it was inquired of the yearly Value of the Land, and the two Years tax'd to 20 Marks; and thereupon the Tenant sued a *Scire fac.* against the Woman to have Execution of the said 20 Marks. In Bar of which she pleads, That she has brought a Writ of Right close, in the Nature of a *Cui in vita*, against the said *H.* the now Plaintiff, and Process continu'd till she recover'd the Land by elder Title, and demands Judgment if of the Issues of the same Lands by any Judgment recovered since, *H.* ought to have Execution: But it was adjudged, That forasmuch as the Judgment given for *H.* remain'd in Force, by Force of which he should have the said 20 Marks as Damages

severed

(*a*) Cro. El. 270.

(*b*) Cro. Jac. 646. Plowd. 266. 2 Bulstr. 175.
(*c*) 1 Roll. 777. Yelv. 155.
9 Co. 119. b.
43 E. 3. 3. a. Palm. 187.
Br. Error 23, 47.
8 H. 7. 10. a
9 H. 6. 38. b.
11 H. 6. 17. b.
2 Bulstr. 175.
4 E. 4. 29. a.
6 E. 4. 10. a.
* Palm. 302.
(*d*) Cro. Jac. 645. 646.
2 Bulst. 175.
13 E. 4. 4. a.
Br. Error 46, 170.
(*e*) Antea 96. b.
1 Roll. 778.
5 Co. 90. b.
Dy. 363. pl. 24.
Moor 573.
Cro. El 278
Cro. Jac. 246.
Jenk. Cent. 264.
2 Leon. 92.
3 Leon. 89, 90.
Godb. 27, 28.
Yelv. 180.
Goldsb. 103, 104.
(*f*) Cr. El. 270, 278.
Moor 270.
1 Roll. 778.
Dy. 223. pl. 26.
(*g*) 1 And. 36. pl. 91.
O. Bendl. 27. pl. 108.
Godb. 84.
Co. Lit. 128. b.
Postea 143. b.
(*h*) 1 And. 60.
Co. Lit. 351. a.
Godb. 26.
1 Leon. 92.
2 Leon. 82.
8 Co. 96. b.
Jenk. Cent. 264.
Moor 758.
1 Bulstr. 192.
1 Roll. 612.
Co. Lit. 351. a.
Goldsb. 103, 104.

severed from the Land, and the Recovery in the *Cui in vita* doth not refer to them, for this Reason, altho' *A.* had recovered by elder Title, *H.* should have Execution of the Damages, 20 *E.* 3. *Sci. fac.* 123. * in *Herbert*'s Case. 4. The Case at Bar is stronger, because the Judgment to avoid the said Outlawry is declaratory, which declares the Outlawry to be null, and the Proceeding therein to be without Warrant, and void, and all that without a Writ of Error, because there is a Nullity in the Outlawry, forasmuch as the Writ of Exigent, which is the Warrant to proceed to Outlawry, wants Substance, and by Consequence no Warrant in Law; and therefore when it is so declared by the Judgment of the Court, it is void *ab initio. Vide* (*a*) *Proctor*'s Case, 5 *El. Dy.* 223. In 38 *H.* 6. 4. *b.* & 12. *b.* One who had Cause of (*b*) Privilege in the Common Pleas, was arrested in *London*, and before Judgment the Defendant deliver'd a Writ of *Supersedeas* in the inferior Court, and notwithstanding that, the Recorder proceeded to Judgment, and thereupon his Body was taken in Execution, and afterwards his Body was brought into *C. B.* by a Writ of (*c*) *Corpus cum causa*; and because after the (*d*) *Supersedeas* there was a Nullity in the Proceeding as well to Judgment as in Execution, the Court awarded, that the Party should be discharged of the Execution; and so he was dismissed without suing any Writ of Error; for by this declaratory Award, the Judgment and Execution are utterly void. And *vide* 17 *El. Dyer* 339. (*e*) Administration is committed to the Wife, of the Goods, *&c.* of the Husband, who recovers Debt as Administratrix, depending which Suit, the Son of the Intestate, by Covin betwixt him and the Defendant procures new Administration to him and his Mother, no Cause of Revocation of the first expressed in the second, and after Judgment Releases to the Def. the Wife sues Execution, the Def. upon this Release brings an *Audita Querela*, and the Def. pleads the Matter *supra*, and Sentence declaratory that the second Administration was void, and adjudged *pro Defendente*. But if the Letters of Administration had been good, and the Administrator makes a Release, and afterwards the Letters of Administration are repealed, there the Release is good: So there is a Difference between a Sentence declaratory, by which Letters of Adminstration are declared to be void, and a Sentence of Repeal, which allows them good 'till they are repealed. *Nota* Reader, where it is said before in the first Difference, That collateral Things executed by Execution upon Escape, or upon the Statute recovered in the Writ of *Detinue*, in (*f*) 7 *H.* 6. 42. *a. b.* shall not be avoided by the Reversal of the first Judgment, the same is true; and yet I conceive, That he shall have Remedy upon the Reversal of the Judgment, by (*g*) *Audita Querela*, because the Cause and Ground of the Collateral Action is disproved and avoided by the Reversal of the first Judgment;

* Palm. 302.

(*a*) Antea 143. a. 1 And. 36. pl. 91. O. Bendl. 27. pl. 108. Co. Lit. 128. b. Godb. 84.

(*b*) Br. Privilege 28, 29. Fitz. corpus cum causa, 8, 9.

(*c*) 2 H. 5. c. 2. Cro. Car. 261.

(*d*) Cro. El. 33. Cro. Jac. 43. Yelv. 57.

(*e*) Dyer 339. pl. 16. Antea 135. b. 3 Co. 78. b. 6 Co. 19. a. 1 Sid. 21. 2 Keb. 12. Cro. El. 460.

(*f*) Antea 142. b. 3 Co. 90. b. Br. Error 66. 1 Roll. 308, 777, 778.

(*g*) Cro. Jac. 640.

Judgment; and the firſt Plaintiff reſtored to his former Action, upon which he may have his juſt and due Remedy. And it is like the Caſe in *Dyer* 3 *Eliz.* 203. Executors have Judgment in Accompt, and have the Defendant in Execution for the Arrearages; now the Will is annulled, *quia* the Teſtator an Ideot, and the Record Spiritual was remov'd into the Chancery by Writ, and ſent into the King's Bench, where the Action was brought; and thereupon the Defendant brought an *Audita Querela*, becauſe the Will was diſapproved: And it was reſolved, in *Camera Scaccari*, *Anno* 35 *H.* 8. (as I have heard, it appears by the Record) that the *Audita Querela* did well lie.

Dyer 203, 204. pl. 75. Wentw. 21. Swinb. 47. Yelv. 83. 2 Sand. 149. Orph. Leg. 26. 1 Brownl. 91. Co. Ent. 89. 90. Noy 15.

DAVEN-

DAVENPORT's *Case.*

Trin. 8 Jacobi 1.

Robert Bradſhaw brought a *Quare Impedit* againſt *John Davenport*, *George Wood*, Clerk, and the Biſhop of *Lincoln*, of the Vicarage of the Church of *Orton ſuper Monton*, in the County of *Leiceſter* (which began *Trinit'* 7 *Jacobi*, *Rot'* 1008.) And the Caſe was ſuch, *George Haſtings* Earl of *Huntingdon*, was poſſeſſed of the Rectory of *Orton*, to which the Advowſon of the ſaid Vicarage was appendant for fifteen Years; and by his Deed, 18 *Maii*, 19 *Eliz.* granted to *Robert Bradſhaw* now Plaintiff, as he alledged in his Declaration, *Primam & (a) proximam advocation' & donationem præd' vicariæ de Orton cum eadem prim' & proxim' extunc vacare contingeret per aliquas vias ſeu media quæcunque, ſi ead' contingeret fore vacua durante termino annorum adtunc in eſſe de rectoria de Orton conceſſ. præfato Comiti per præfatum nuper Epiſcopum Oxonien'.* The Defendants pleaded, That after the ſaid Grant of the next Avoidance, the ſaid Earl ſo being of the ſaid Rectory, to which, *&c.* poſſeſſed, died thereof poſſeſſed, inteſtate, *poſt cujus mortem, ſcil' primo die Maii*, 1605, Adminiſtration of his Goods, *&c.* was committed to *Henry* now Earl of *Huntingdon*; and afterwards the ſaid now Earl, 9 *Feb.* 3 *Jacobi*, (*b*) ſurrender'd his ſaid Term in the ſaid Rectory, to which, *&c.* to the Biſhop of *Oxford* then in Reverſion, which he accepted, *per quod præd' terminus annorum de & in rectoria præd' cum pertin' ad quam, &c. determinavit*, and the Biſhop demiſed the ſaid Rectory, with the Appurtenances, to *Davenport*, one of the Defendants, for his Life; and afterwards the ſaid Vicarage became void, *&c.* upon which the Plaintiff demurr'd; and the ſole Queſtion of

(a) Cro. Jac. 691.

(b) Palm. 484.

of this Case was, if by the said Surrender the said Grant of the next Avoidance was void or not. And it was objected, that the said Grant of the next Avoidance was upon expres's Limitation, if the Vicarage became void during the Term then *in esse*, and by the Surrender the Term was merg'd and extinct; so that the Vicarage became not void during the Term, because that happen'd after the Surrender. But if the Limitation had been during the Years, there it had been otherwise, for the Years could not determine but by (*a*) Effluxion of Time. But it was answered and resolved, That notwithstanding the Surrender, yet the Pl. should have the next (*b*) Avoidance, and that for three Reasons: 1. The said Limit. implies no more than the Law would have said; for if Tenant for Years grants the next (*c*) Avoidance, the Law implies this Limitation, If the Church becomes void during the Term, and therefore (*d*) *Expressio eorum quæ tacite insunt nihil operatur.* 2. The Grantor himself wou'd derogate from his own Grant, and would make it void at his Pleasure, and that is against the Rule of Law, *&c.* That the Grant of every one shall be taken most * strong against himself, and most beneficially for the Grantee. And as to that, the notable Case of (*e*) *Thurston de Holland*, Parson of *Preston*, in 6 *Ed.* 3. 54. *b.* & 55. *a.* was cited, where the Case was; That in the Time of *R.* 1. Debate was between the Abbot of *S.* and *Theoband C.* upon the Advowson of the Church of *Preston*, and thereupon they agreed, and a Fine was levied between them 15 *Mich.* 6 *R.* 1. before the Archb. of *Canterbury*, the Bishop of *Rochester*, *&c.* then Justices of *C. B.* between the aforesaid Abbot and the said *Theoband*; by which Fine the Abbot granted the Advowson to *T.* and to his Heirs for ever, so that at every Presentation by *T.* or his Heirs, the Clerks so presented, *&c.* should pay to the said Abbot and his Successors for ever 10 Marks *per Ann.* which Accord was made in the Presence of the Ordinary of the Place, who assented to it, at which Time the Church of *Preston* was void; and upon that Fine the Successors of the Abbot of *S.* brought a Writ of Annuity against the said *T. de Holland*, Parson of *P.* And there *Parning*, Serjeant, took Exception to the Declaration, that forasmuch as the Grant of the Annuity is in a special Manner to be paid by the Clerks who should be presented by *T.* or his Heirs, that the Plaintiff ought to have shewed in his Declaration, that the Defendant was presented by the said *T.* or his Heirs. To which *Sadlier* said, we conceive that the Parson shall be charged by whomsoever he is presented. And *Herle*. C. J. who gave the Rule, said, That altho' had *T.* aliened the Advowson, the Annuity would not be thereby extinct; wherefore *Parning* passed over to another Matter: By which Case it appears, that altho' *T.* had aliened the Advowson, and altho' the Annuity in the Body of the Grant is limited to be paid by the Presentees of *T.* or his Heirs, yet the Presentee of his Alienee should pay it, for otherwise,

(*a*) Co. Lit. 45. b. 1 Co. 154. a.
(*b*) Palm. 484.
(*c*) Cr. Jac. 691. Co. Lit. 379. a. Palm. 484. Hob. 41.
(*d*) 1 Rol. Rep. 310. 2 Rol. Rep. 393. Latch. 25. Palm. 433, 437. Antea 56. b. Wing. Max. 235. 4 Co. 73. b. 5 Co. 11. a. 11 Co. 60. a. 10 Co. 39. a. Co. Lit. 191. a. 205. a. Lit. Rep. 111. 2 Inst. 365. 2 Sand. 351. 2 Bulstr. 131. 1 Mod. Rep. 190. Hard. 92. Hob. 170. * Winch. 96.
(*e*) Hob. 41.

by his own Grant, he would defeat the Annuity which he himſelf had granted. Note Reader, in this Caſe of 6 *E.* 3. there are divers Things worthy Obſervation, and amongſt them the Antiquity of the (*a*) Common Pleas; for it appears thereby that it was a Court long before the Statute of *Magna Charta*, made in 9 *Hen.* 3. as appears alſo in (*b*) 26 *Aſſ. pl.* 24. where it appears, that King *Hen.* 1. made Letters Patents of Confirmation to the Abbot of *B.* of all Uſages; and that they ſhould have Conuſans of all Manner of Pleas, ſo that the Juſtices of one Bench, nor the other, nor Juſtices of Aſſiſe, ſhould nothing intermeddle, *&c.* which is a direct Proof, that in the Time of King *Hen.* 1. there were Courts of the one Bench and the other, and alſo Juſtices of Aſſiſe, *&c.* 3. The Term for the Benefit of the Grantee, has ſo ſome Reſpect Continuance, and therefore if Leſſee for Years grants a Rent-charge, and afterwards ſurrenders, yet for the Benefit of the Grantee the (*c*) Term has Continuance; although *in rei Veritate* it is determined; and therewith agrees 5 *Hen.* 5. 10. *a.* But it is true, that the Leſſee himſelf, by his Surrender may prejudice himſelf of an (*d*) Encreaſe of an Eſtate to be made to himſelf, as it is reſolved in 35 *H.* 8. (*e*) *Expoſition de parols* 44. *Vide the Rector of Cheddington's Caſe, M.* 38. *Eliz. in the Firſt Part of my Reports, fol.* 154. *a.*

(*a*) Co. Lit. 71. b. Pref. to 8 Co.

(*b*) Præf. 3. Rep. p. 5. Fitz. Conuſans 57. Br. Conuſan. 40.

(*c*) 1 Jones 62. Cro. Car. 102. Lit. Rep. 336. Dall. 65. Poph. 40. 1 Co. 67. a. 9 Co. 107. b. Plowd. 198. a. Co. Lit. 338. b.

(*d*) Antea 75. b.

(*e*) Br. Expoſition de parols 44. 1 Co. 154. a. Bridgm. 102. Co. Lit. 45. b.

The

The Six CARPENTERS *Caſe.*

* See 6 Mod. 70. 216. Fitzgib. 86, 185.

Mich. 8 Jacobi I.

IN Treſpaſs brought by *John Vaux* againſt *Tho. Newman*, Carpenter, and five other Carpenters, for breaking his Houſe, and for an Aſſault and Battery, 1 *Sept.* 7 *Jac.* in *London*, in the Pariſh of St. *Giles's extra Cripplegate*, in the Ward of *Cripplegate*, *&c.* and upon the (*a*) new Aſſignment, the Plaintiff aſſign'd the Treſpaſs in a Houſe called the *Queen's Head*. The Defendants to all the Treſpaſs *præter fractionem Domus* pleaded Not Guilty; and as to the breaking of the Houſe, ſaid, That the ſaid Houſe *præd' tempore quo*, *&c.* *& diu antea & poſtea*, was a common *Wine Tavern*, of the ſaid *John Vaux*, with a common Sign at the Door of the ſaid Houſe fixed, *&c.* by Force whereof the Defendants, *præd' tempore quo*, *&c.* *viz.* *hora quarta poſt meridiem* into the ſaid Houſe, the Door thereof being open, did enter, and did there buy and drink a Quart of Wine, and there paid for the ſame, *&c.* The Plaintiff, by Way of Replication, did confeſs, that the ſaid Houſe was a common (*b*) Tavern, and that they entred into it, and bought and drank a Quart of Wine, and paid for it; but further ſaid, That one *John Ridding*, Servant of the ſaid *John Vaux*, at the Requeſt of the ſaid Defendants, did there then deliver them another Quart of Wine, and a Pennyworth of Bread, amounting to 8 *d.* and then they there did drink the ſaid Wine, and eat the Bread, and upon Requeſt did refuſe to pay for the ſame: Upon which the Defendants did demur in Law: And the only Point in this Caſe was, If the denying to pay for the Wine, or Non-payment, which is all one (for every Non-payment, upon Requeſt, is a Denying in Law) makes the Entry into the Tavern tortious. And firſt, It was reſolv'd when Entry, Authority or (*c*) Licence is given to any one by the Law, and he doth abuſe it, he ſhall be a Treſpaſſer *ab initio*:

(*a*) 2 Co. 6. a. 18. b.

(*b*) Kelw. 38. a.

(*c*) 2 Roll. 561. Yelv. 96, 97.

tio: But where an Entry, Authority, or Licence is given by the (*a*) Party, and he abuſes it, there he muſt be puniſhed for his Abuſe, but ſhall not be a Treſpaſſer *ab initio.* And the Reaſon of this Difference is, That in the Caſe of a general Authority or Licence (*b*) of Law, the Law adjudges by the ſubſequent Act, *quo animo*, or to what Intent he enter'd for *acta exteriora indicant interiora ſecreta. Vide* 11 *H.* 4. 75. *b.* But when the Party gives an Authority or Licence himſelf to do any thing, he can't, for any ſubſequent Cauſe, puniſh that which is done by his own Authority or Licence, and therefore the Law gives Autho. to enter into a common Inn, or Tavern, ſo to the Lord to diſtrein; to the Owner of the Ground to diſtrein Damage-feaſant; to him in Reverſion to ſee if Waſte be done; to the Commoner to enter upon the Land to ſee his Cattel, and ſuch like: *Vide* 12 *E.* 4. 8. *b.* 21 *E.* 4. 19. *b.* 5 *H.* 7. 11. *a.* 9 *H.* 6. 29. *b.* 11 *H.* 4. 75. *b.* 3 *H.* 7. 15. *b.* 28 *H.* 6. 5. *b.* But if he who enters into the Inn or Tavern, doth a Treſpaſs, as if he (*c*) carries away any Thing; or if the Lord who diſtreins for Rent, or the Owner for Damage-feaſant, works or kills the (*d*) Diſtreſs; or if he who enters to ſee Waſte breaks the Houſe, or (*e*) ſtays there all Night; or if the Commoner cuts down a Tree, in theſe and the like Caſes, the Law adjudges that he entred for that Purpoſe; and becauſe the Act which demonſtrates it is a Treſpaſs, he ſhall be a Treſpaſſer *ab initio*, as it appears in all the ſaid Books. So if (*f*) a Purveyor takes my Cattle by Force of a Commiſſion, for the King's Houſe, it is lawful; but if he ſells them in the Market, now the firſt Taking is wrongful; and therewith agrees 18 *H.* 6. 19. *b.* *Et ſic de ſimilibus.*

2. It was reſolv'd *per totam Curiam*, That (*g*) Not doing, can't make the Party who has Authority or Licence by the Law, a Treſpaſſer, *ab initio*, becauſe Not doing is no Treſpaſs; and therefore if the Leſſor diſtreins for his Rent, and thereupon the Leſſee tenders him the Rent and Arreas, *&c.* and requires his Beaſts again, and he will not deliver them, this Not doing can't make him a Treſpaſſer *ab initio*; and therewith agrees 33 *H.* 6. 47. *a.* So if a Man takes Cattel Damage-feaſant, and the other offers ſufficient Amends, and he refuſes to re-deliver them, now if he ſues a *Replevin*, he ſhall recover (*h*) Damages only for the detaining of them, and not for the Taking, for that was lawful; and therewith agrees *F. N. B.* 69. *g. Temp' E.* 1. *Replevin* 27. 27 *E.* 3. 88. 45 *E.* 3. 9. So in the Caſe at Bar, for not (*i*) paying for the Wine, the Defendants ſhall not be Treſpaſſers, for the denying to pay for it is no Treſpaſs, and therefore they can't be Treſpaſſers *ab initio*; and therewith agrees directly in the Point, (*k*) 12 *Edw.* 4. 9. *b.* For there *Pigot*, Serjeant, puts this very Caſe, If one comes into a Tavern to drink, and when he has drunk he goes away, and will not pay the Taverner,

(*a*) 5 H. 7. 11. a. Perk. Sect. 191. Yelv. 96, 97. 21 E. 4. 19. b.

(*b*) 2 Roll. 561. 21 E. 4. 19. b. Yelv. 96, 97. Perk. Sect. 191. 5 H. 7. 11. a.

(*c*) Perk. Sect. 119. Cro. Car. 196. Yelv. 96.

(*d*) 12 E. 4. 8. b. 9 Co. 11. a. 1 And. 65. Cro. Jac. 148. Perk. Sect. 191.

(*e*) 2 Roll. 561. 11 H. 4. 75. b. Fitz. Treſp. 176. Br. Treſp. 97. Br. Replica. 12.

(*f*) 2 Roll. 561. 18 H. 6. 9. b. 2 Inſt. 546.

(*g*) Cr. Car. 196. 2 Bulſtr. 312. 1 Rol. Rep. 130.

(*h*) Lit. Rep. 34. Dr. & Stud. lib. 2. 112. b. Heil. 16.

(*i*) 1 Rol. Rep. 60. 2 Bulſtr. 312.

(*k*) 1 Sid. 5. 22 E. 4. 9. a. b.

verner, the Taverner ſhall have an Action of Treſpaſs againſt him for his Entry. To which *Brian*, Chief Juſtice, ſaid, the ſaid Caſe which *Pigot* has put, is not (*a*) Law, for it is no Treſpaſs, but the Taverner ſhall have an Action of Debt: And there before (*b*) *Brown* held, That if I bring Cloth to a Taylor to have a Gown made, if the Price be not agreed in certain before how much I ſhall pay for the Making, he ſhall not have an Action of Debt againſt me; which is meant of a general Action of Debt; but the Taylor in ſuch a Caſe ſhall have (*c*) a ſpecial Action of Debt; *ſcil.* that *A.* did put Cloth to him to make a Gown thereof for the ſaid *A.* and that *A.* would pay him as much for making, and all Neceſſaries thereto, as he ſhould deſerve, and that for Making thereof, and all Neceſſaries thereto, he deſerves ſo much, for which he brings his Action of Debt: In that Caſe, the putting of his Cloth to the Taylor to be made into a Gown, is ſufficient Evidence to prove the ſaid ſpecial Contract, for the Law implies it: And if the Taylor over-values the Making, or the Neceſſaries to it, the Jury may mitigate it, and the Plaintiff ſhall recover ſo much as they ſhall find, and ſhall be barred for the Reſidue. But if the Taylor (as they uſe) makes a Bill, and he himſelf values the Making and the Neceſſaries thereof, he ſhall not have an Action of Debt for his own Value, and declare of a Retainer of him to make a Gown, *&c.* for ſo much, unleſs it is ſo eſpecially agreed. But in ſuch Caſe he may (*d*) detain the Garment 'till he is paid, as the Hoſtler may the Horſe. *Vide Br. Diſtreſs.* 70. and all this was reſolved by the Court. *Vide the Book in* 30 *Aſſ. pl.* 38. *John Matrever's* Caſe, it is held by the Court, that if the Lord, or his Bailiff comes to diſtrein, and (*e*) before the Diſtreſs the Tenant tenders the Arrears upon the Land, there the Diſtreſs taken for it is tortious. The ſame Law for Damage-feaſant, if before the Diſtreſs he tenders ſufficient Amends; and therewith agrees 7 *E.* 3. 8. *b. in the Mr. of St. Mark's* Caſe, and ſo is the Opinion of *Hull* to be underſtood in 13 *H.* 4. (*f*) 17. *b.* which Opinion is not well abridged in *Title Treſpaſs* 180. Note Reader this Difference, That Tender upon the (*g*) Land before the (*h*) Diſtreſs, makes the Diſtreſs tortious; Tender after the Diſtreſs, and before the Impounding, makes the Detainer, and not the Taking wrongful; Tender after (*i*) the Impounding, makes neither the one nor the other wrongful; for then it comes too late, becauſe then the Cauſe is put to the Trial of the Law, to be there determined. But after the Law has determined it, and the Avowant has Return irrepleviſable, yet if the Plaintiff makes him a ſufficient Tender, he may have an Action of *Detinue* for the Deteiner after; or he may, upon Satisfaction made in Court, have a Writ for the Re-delivery of his Goods; and therewith agree the ſaid

(*a*) 12 E. 4. 9. b.

(*b*) 12 E. 4. 9. b.

(*c*) 1 Sid. 5.

(*d*) Hob. 42. Yelv. 67. Cro. Car. 271, 272. Br. Diſtreſs 71. Palm. 223. Hutt. 101. 22 E. 4. 49. b. Moor 877. 5 Ed. 4. 2. b. 1 Rol. Rep. 449. 2 Rol. Rep. 438. 2 Roll. 85, 92. 3 Bulſtr. 269, 270.

(*e*) Br. Diſtreſs 37. Br. Tender, &c. 18.

(*f*) 2 Roll. 561

(*g*) 2 Sid. 40.

(*h*) 5 Co. 76. a. 2 Inſt. 107.

(*i*) 2 Roll. 561. 1 Brownl. 173. 2 Inſt. 107. 5 Co. 76. a.

Books in 13 *H.* 4. 17. *b.* 14 *H.* 4. 4. *Regiſtr' Judic'* 37. 45 *E.* 3. 9. and all the Books before. *Vide* 14 *Ed.* 4. 4. *b.* 2 *H.* 6. 12. 22 *Hen.* 6. 57. *Doctor and Student, lib.* 2. *cap.* 27. *Br. Diſtreſs* 72. and *Pilkington's* Caſe, *in the* 5*th Part of my Reports, fol.* 76. and ſo all the Books which *prima facie* ſeem to diſagree, are upon full and pregnant Reaſon well reconciled and agreed.

EDWARD

EDWARD ALTHAM's *Caſe.*

Trin. 8 Jac. I.

In the Common Pleas.

THomas Lawrence, and *Marcey* his Wife, by *Charles Cardinal* their Attorney, demand againſt *Edw. Altham*, Gent. and *Margaret* his Wife, the third Part of 100 Acres of Land, 10 Acres of Meadow, and 60 Acres of Paſture, with the Appurtenances in *Goſfield*, as the Dower of the ſaid *Marcey*, of the Endowment of *Thomas Naſh* the Elder, ſometimes her Huſband, *&c.* And the aforeſaid *Edward* and *Margaret*, by *John Rowley* their Attorney, come and ſay, That the aforeſaid *Thomas Lawrence*, and *Marcey*, the Dower of the ſaid *Marcey*, of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* of the Endowment of the ſaid *Thomas Naſh*, ſometimes Huſband, *&c.* againſt them ought not to have, becauſe they ſay, That the ſaid *Thomas Naſh*, ſometimes the Huſband, *&c.* was ſeiſed of the Tenements aforeſaid, wherefore, *&c.* in his Demeſn as of Fee, and held the ſame of *John Wentworth*, Eſq; as of his Manor of *Goſfield*, with the Appurtenances in the County aforeſaid, in Fee Socage, that is to ſay, by Fealty only, for all Manner of Services and Demands; and the ſaid *Thomas* ſo of the ſaid Tenements and Appurtenances whereof, *&c.* being ſeiſed, the 10th Day of *April*, in the Year 1592, at *Goſfield* aforeſaid, made his Teſtament and Laſt Will in Writing, and by the ſame his Laſt Will, willed and bequeathed the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* to one *Zachary Naſh*, younger Son of the ſame *Tho. Naſh*, to have and to hold to the ſaid *Zachary*, for Term of his Life, and afterwards there died of ſuch Eſtate thereof ſo ſeiſed; after whoſe Death the ſaid *Zachary*, into the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* entred, and was thereof ſeiſed, in his Demeſn as of Freehold, for the Term of his Life, by Virtue of the Bequeſt aforeſaid, Dower.

and the Reverſion of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* after the Death of the ſaid *Thomas*, did deſcend to one *Thomas Naſh*, as Son and Heir of the aforeſaid *Thomas Naſh*, ſometimes Huſband, *&c.* By which the ſaid *Thomas* the Son was ſeiſed of the ſaid Reverſion of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* as of Fee and Right; and the ſaid *Thomas* ſo thereof being ſeiſed, and the aforeſaid *Zachary* of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* ſo as before is ſaid, being ſeiſed, the aforeſaid *Marcey*, after the Death of the ſaid *Thomas Naſh*, ſometimes her Huſband, *&c.* in the Widowhood of the ſaid *Marcey*, whilſt ſhe was ſingle, that is to ſay, the 27th Day of *April*, in the 35th Year of the Reign of the Lady *Elizabeth*, late Queen of *England*, at *Gosfield* aforeſaid, by her Writing of Releaſe, which the ſaid *Edward* and *Margaret*, with the Seal of the ſaid *Marcey* ſealed, bring here into Court, whoſe Date is the ſame Day and Year, by the Name of *Marcey Naſh*, the Widow of *Thomas Naſh*, late of *Feringe* in the County of *Eſſex*, deceas'd, remiſed, releaſed, and altogether for her, her Heirs, Executors, and Adminiſtrators, for ever quit claimed, to the aforeſaid *Thomas Naſh*, Son and Heir of the aforeſaid *Thomas Naſh*, ſometimes the Huſband of the ſaid *Marcey*, by the Name of *Thomas Naſh* of *Wethersfield* in the County aforeſaid, Yeoman, Son and Heir of the ſaid *Thomas Naſh*, late her Huſband, all and all Manner of Actions, as well Real as Perſonal, all Suits, Quarrels, and Demands whatſoever, which ſhe the ſaid *Marcey*, or her Executors, againſt the ſaid *Thomas Naſh* the Son, or his Executors, they ever have or had, then had or ought to have, or any Ways then might or would have by Reaſon of any Thing, Cauſe or Deed whatſoever, from the Beginning of the World, unto the Day of the Date of the ſame Writing of Releaſe; after which Writing of Releaſe to the aforeſaid *Thomas* the Son, made by the ſaid *Marcey*, as before is ſaid, the aforeſaid *Thomas* the Son, of the Reverſion of the Tenements aforeſaid, with the Appurtenances, whereof, *&c*, in Form aforeſaid being ſeiſed, at *Gosfield* aforeſaid, died of ſuch his Eſtate thereof ſeiſed; after whoſe Death the ſaid Reverſion of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* did deſcend to the aforeſaid *Margaret*, as Daughter and Heir of the aforeſaid *Thomas* the Son, by which the ſaid *Margaret* was ſeiſed of the ſaid Reverſion of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* as of Fee and Right, and ſhe the ſaid *Margaret* ſo of the ſame Reverſion, as before is ſaid, being ſeiſed; and the aforeſaid *Zachary* of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in Form aforeſaid being ſeiſed, the ſaid *Zachary*, afterwards, at *Gosfield* aforeſaid, died of ſuch his Eſtate thereof ſeiſed: After whoſe Death the ſaid *Margaret*, into the Tenements afore-

aforeſaid, with the Appurtenances, whereof, *&c.* entred, and was thereof ſeiſed in her Demeſn as of Fee (and Right) and ſo thereof being ſeiſed, the ſaid *Margaret* afterwards, and before the Day of bringing the original Writ as aforeſaid, of the ſaid *Thomas Lawrence* and *Marcey*, at *Gosfield* aforeſaid, took to Huſband the aforeſaid *Edward Altham*, by which the ſaid *Edward* and *Margaret* were, and yet are, ſeiſed of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in their Demeſn as of Fee in the Right of the ſaid *Margaret*: And this they are ready to aver; whereupon they demand Judgment if the aforeſaid *Thomas Lawrence* and *Marcey*, Dower of the ſaid *Marcey*, of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* Of the Endowment of the ſaid *Thomas Naſh*, ſometimes the Huſband, *&c.* againſt them ought to have: And the aforeſaid *Thomas Lawrence* and *Marcey* demand the Hearing of the aforeſaid Writing of Releaſe; and it is read unto them in theſe Words, 'To all faithful People to whom this preſent Writing ſhall come, *Marcey Naſh*, the Widow of *Thomas Naſh*, late of *Feringe* in the County of *Eſſex*, deceas'd, Greeting in our Lord God everlaſting, Know ye, Me the aforeſaid *Marcey* being in my pure Widowhood, and full Power, to have remiſed, releaſed, and altogether for me, my Heirs, Executors, and Adminiſtrators, for ever quit claimed, to *Thomas Naſh* of *Wethersfield* in the County aforeſaid, Yeoman, Son and Heir of the ſaid *Thomas* my late Huſband, all and all Manner of Actions, as well real as perſonal, Suits, Quarrels and Demands whatſoever, as alſo all my Dower, and Title and Action of Dower, to me appertaining, by the Death of the ſaid *Thomas* my Huſband, of any of his Lands and Tenements in *Wethersfield* aforeſaid, what or which, I the ſaid *Marcey*, or my Executors againſt him the ſaid *Thomas Naſh* the Son, or his Executors, I ever had, have, or any Ways hereafter may have, (have or may have) by Reaſon of any Thing, Cauſe, or Deed whatſoever, from the Beginning of the World, unto the Day of the Date of this preſent Writing of Releaſe. And further know ye, Me the aforeſaid *Marcey*, to have given and remiſed to the ſaid *Thomas Naſh* the Son, all the Goods late of the ſaid *Thomas* my Huſband, which were in the Poſſeſſion of the ſaid *Thomas* the Son, or his Aſſignes, at the Time of the making of this Writing of Releaſe: In Witneſs whereof to this my preſent Writing, I have ſet my Seal, dated the 27th Day of *April*, in the 35th Year of the Reign of our Lady *Elizabeth*, by the Grace of God of *England*, *France*, and *Ireland*, Queen, Defender of the Faith, *&c.*' Which being read and heard, the ſaid *Thomas Lawrence* and *Marcey* ſay, That they for any thing before alledged, from having the Dower of the ſaid *Marcey*, ought not to be barred, becauſe they ſay, That the aforeſaid

Thomas

Thomas Naſh, ſometimes Huſband, *&c.* in his Life-time, and at the Time of his Death, was ſeiſed as well of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, as of two Meſſuages, and 200 Acres of Land, with the Appurtenances in *Wethersfield* aforeſaid, in his Demeſn as of Fee; and ſo thereof being ſeiſed at *Gosfield* aforeſaid, by his Laſt Will and Teſtament in Writing deviſed the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, to the aforeſaid *Zachary Naſh*, younger Son of the ſaid *Thomas Naſh*, ſometimes Huſband, *&c.* And afterwards at *Gosfield* aforeſaid, died; after whoſe Death the ſaid *Thomas Naſh* the younger, as Son and Heir of the ſaid *Thomas Naſh*, ſometimes Huſband, *&c.* into the Tenements aforeſaid, with the Appurtenanees in *Wethersfield* aforeſaid entred, and was thereof ſeiſed in his Demeſn as of Fee (and Right.) And the ſaid *Zachary* into the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid enter'd, and was thereof ſeiſed in his Demeſn as of Freehold for the Term of his Life; and the ſaid *Thomas Lawrence* and *Marcey* further ſay, That at the Time of the Death of the aforeſaid *Thomas Naſh*, ſometimes Huſband, *&c.* the aforeſaid *Zachary* was within the Age of 21 Years, that is to ſay, of three Years, by which the ſaid *Marcey*, whilſt ſhe was ſingle, as Guardian and for Nurture of the ſaid *Zachary*, into the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, entred, and was thereof poſſeſſed, the aforeſaid *Thomas Naſh*, the Son of the Tenements aforeſaid, with the Appurtenances in *Wethersfield* aforeſaid, being ſeiſed, and that the ſaid *Zachary* of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, in Form aforeſaid, being ſeiſed; and the ſaid *Marcey* in Form aforeſaid ſo being poſſeſſed, afterwards, and before the Making of the aforeſaid Writing of Releaſe here in Court brought, at *Gosfield* aforeſaid, It was concluded and agreed between the ſaid *Marcey*, whilſt ſhe was ſingle, and the aforeſaid *Thomas Naſh* the Son, that the ſaid *Marcey* ſhould releaſe to the ſaid *Thomas Naſh* the Son, all her Dower happening to her by the Death of the aforeſaid *Thomas Naſh* ſometimes the Huſband, *&c.* of all Lands and Tenements of the ſaid *Thomas*, in *Wethersfield* aforeſaid; and that the ſaid *Thomas Naſh* the Son, ſhould enfeoff *John Tiler* the elder, and *John Tiler* the younger, and their Heirs, of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, to the Uſe of the ſaid *Zachary*, and the Heirs of his Body lawfully begotten: And the ſaid *Thomas Lawrence* and *Marcey* farthey ſay, That the aforeſaid *Thomas Naſh* the Son, of the Tenements aforeſaid, in *Wethersfield* aforeſaid, in the Form aforeſaid being ſeiſed; and the aforeſaid *Marcey* of the Tenements, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, being poſſeſſed, the ſaid

Marcey

Marcey afterwards, that is to ſay, the aforeſaid 27th Day of *April*, in the 35th Year of the Reign of the ſaid Lady *Elizabeth*, late Queen of *England* aboveſaid, whilſt ſhe the ſaid *Marcey* was ſingle, at *Gosfield* aforeſaid, the aforeſaid Writing of Releaſe to the aforeſaid *Thomas* the Son, ſealed and delivered: And the aforeſaid *Thomas Naſh* the Son, the 28th Day of *April*, in the 35th Year of the Reign of the ſaid late Queen aforeſaid, at *Gosfield* aforeſaid, enfeoffed the aforeſaid *John Tiler* the elder, and *John Tiler* the younger, and their Heirs, of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, to the Uſe of the aforeſaid *Zachary*, and the Heirs of his Body lawfully begotten; and afterwards he the ſaid *Zachary*, at *Gosfield* aforeſaid, died without Heir of his Body lawfully begotten; And this they are ready to aver; whereupon they demand Judgment and Seiſin of the third Part of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* in *Gosfield* aforeſaid, to be adjudged to them, *&c.* and the aforeſaid *Edward* and *Margaret* ſay, That the aforeſaid Plea of the ſaid *Thomas Lawrence* and *Marcey* pleaded in Manner and Form aforeſaid; and that the Matters above in the Replication aforeſaid, are not ſufficient in Law, for them the ſaid *Thomas* and *Marcey*, the Dower of the ſaid *Marcey*, in the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* againſt the ſaid *Edw.* and *Margaret*, to have and maintain; and that they need not, nor by the Law of the Land are bound thereto to anſwer; and this they are ready to aver; wherefore, for Default of a ſufficient Replication of the aforeſaid *Thomas* and *Marcey*, in this Part, the ſaid *Edward* and *Margaret*, as at firſt, demand Judgment: And that the ſaid *Thomas Lawrence*, and *Marcey*, from the Dower of the ſaid *Marcey*, of the Tenements aforeſaid, with the Appurtenances, whereof, *&c.* againſt them ought to be barred; and the ſaid *Thomas* and *Marcey*, foraſmuch as they ſufficient Matter in Law, for the ſaid *Thomas* and *Marcey*, to have and maintain their Action aforeſaid, againſt the ſaid *Edward* and *Margaret* above, by Replication, have alledged, which they are ready to aver; which Matter the ſaid *Edward* and *Margaret* do not deny, nor to the ſame any ways anſwer; but the Averment aforeſaid do altogether refuſe to admit, as before, demand Judgment, and Seiſin of the third Part aforeſaid, to be adjudged unto them: And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes, before that they give their Judgment thereof, Day is given to the Parties aforeſaid here, until within eight Days of St. *Michael*, to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof, not yet, *&c.*

EDWARD

EDWARD ALTHAM's *Caſe.*

Mich. 8 Jacobi 1.

In the Common Pleas.

1 Brownl. 62, 63. 10 Co. 51. a.

Thomas Lawrence, and *Marcey* his Wife, brought a Writ of Dower againſt *Edward Altham*, and *Margaret* his Wife, and made Demand to be endowed of the third Part of 100 Acres of Land, 10 Acres of Meadow, and 60 Acres of Paſture, with the Appurtenances, in *Goſfield*, in the County of *Eſſex*, as the Dower of the ſaid *Marcey*, of the Endowment of *Thomas Naſh* the elder, her late Huſband: The Tenants pleaded in Bar, that the ſaid *Thomas Naſh* was ſeiſed of the Tenements aforeſaid in Fee, and held them in Socage; and afterwards, 10 *Aprilis*, 1592, by his Will in Writing, deviſed the ſaid Tenements, whereof, *&c.* to *Zachary Naſh*, his younger Son, for the Term of his Life, and afterwards died thereof ſeiſed, after whoſe Death the ſaid *Zachary* entered, and was thereof ſeiſed for the Term of his Life; and the Reverſion of the ſaid Tenements deſcended to *Thomas Naſh*, Son and Heir of the ſaid *Thomas* the Huſband, and afterwards the ſaid *Marcey* one of the Demandants in her Widowhood, when ſhe was ſole, *ſcil.* 27 *Aprilis*, 35 *Eliz.* by her Deed did remiſe, releaſe, and for her, her Heirs, Executors and Adminiſtrators, for ever quit Claim to the ſaid *Thomas Naſh* the Son, *omnes & omnimodas Actiones, tam reales quam perſonales, Sectas, Querelas & Demanda quæcunque quæ ipſa Marcia vel Executores ſui verſus præfat' Thomam Naſh Filium vel Executores ſuos unquam habuiſſet ſeu habuiſſent, tunc habuit vel habuerunt ſeu quoviſmodo tunc in futurum habere potuiſſet vel potuiſſent, ratione alicuj' rei, Cauſæ vel Facti cujuſcunque ab Origine Mundi uſque Diem Dat' ejuſdem ſcripti Relaxationis:* And afterwards the ſaid *Thomas* the Son died ſeiſed of the ſaid Reverſion, after whoſe Death it deſcended to the ſaid *Margaret*, Wife of

of the ſaid *Edward Altham*, the other of the Tenants, and afterwards the ſaid *Zachary* died, and the ſaid *Margaret* enter'd, *&c.* And the Demandants demanded Oyer of the ſaid Deed, which was read to them in theſe Words, *Omnibus Chriſti fidelibus ad quos, &c.* as in the Record here before at large. And the Demandants reply'd and ſaid, That the ſaid *Tho. Naſh* the Father, was ſeiſed in his Demeſn as of Fee, as well of the Tenements, whereof, *&c.* in *G.* aforeſaid, as of two Meſſuages, and 200 Acres of Land in *Wethersfield* aforeſaid, and by his Will in Writing deviſed the ſaid Tenements, whereof, *&c.* in *G.* to the ſaid *Zachary Naſh*, as is aforeſaid, and afterwards died; after whoſe Death the ſaid *Tho. Naſh*, the Son, entred into the ſaid Tenements in *Wethersfield*, as his Son and Heir, and was ſeiſed thereof in Fee, and the ſaid *Zachary* enter'd into the ſaid Lands in *Goſfield*, *&c.* And that the ſaid *Zachary* was, at the Time of the Death of the ſaid *Thomas* the Father, of the Age of three Years, wherefore the ſaid *Marcey*, as Guardian by Nature, entered into the ſaid Tenements in *G.* and that afterwards, and before the ſaid Releaſe, it was concluded and agreed by the ſaid *Marcey*, when ſhe was ſole, and the ſaid *Tho. Naſh* the Son, That the ſaid *Marcey* ſhould releaſe to the ſaid *Tho. Naſh* the Son, all her Dower of the Tenements in *Wethersfield* aforeſaid, *&c.* and that the ſaid *Thomas* the Son ſo ſeiſed of the Tenements in *Wethersfield*, and the ſaid *Marcey* ſo poſſeſſed of the Tenements in *G.* ſhe made the ſaid Releaſe, *&c.* and afterwards the ſaid *Zachary* died, *&c.* upon which the Tenants demurr'd in Law. And in this Caſe two Queſtions were moved and argued at the Bar and Bench. The firſt was, Whether the ſaid Releaſe made by the Wife to him in Reverſion expectant on an Eſtate for Life, ſhould extinguiſh her (*a*) Dower? The 2d, Whether the ſaid foreign Concord and Agreement of the Parties ſhould qualify the Force of any of the Words of the Releaſe. As to the firſt, The ſaid Deed of Releaſe was divided into three Parts; in the firſt was conſider'd the Words of the Releaſe; in the ſecond the Words of Qualification; and in the third, the Words of Relation. As to the Words of the Releaſe, they appear to be of two Sorts, the one general, the other ſpecial: The General contains four Words, *Actiones, Sectas, Querelas & Demanda:* The Special contains three, *Dotem, Titulum, & Actiones Dotis:* The Words of Qualification are, *Mihi contingent' per mortem dicti Thomæ nuper viri mei, de aliquibus terris & tenementis ſuis in W. præd'.* The Words of Relation, or Relative Words, are, *quæ vel quas ego præfat' Marcia vel executores mei verſus ipſum Tho. &c. unquam habui, habeo, ſeu quoviſmodo in futurum habere potero ratione alicujus rei, &c.* As to the firſt Word (*Actiones*) it was reſolv'd, That in this Caſe, the Releaſe of all Actions Real to *Thomas* the Son, having but a Reverſion expectant on a Freehold, did not extinguiſh the Dower, becauſe (*b*) *Actio eſt jus proſequendi in judicio quod alicui debetur*, as it is deſcribed

(*a*) 1 Co. 112. b. Co. Lit. 265. a. 5 Co. 71. a. 16 E. 3. Bar. 245. Poſtea 151. b. 154. a. Doct. pl. 149.

(*b*) Co. Lit. 285. a. Dyer 217. pl. 2. 10 Co. 51. b. Poſtea 152. a. 2 Inſt. 40.

* See 4 & 5 El. Dyer 207.

(a) 4 & 5 Eliz. Dyer 217. pl. 2. Moor 34. Poſtea 153. b. 1 And. 8. 5 Co. 71. a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5.

(b) Lit. Sect. 495. Co. Lit. 286. a. Lit. fol. 116. a.

deſcribed in (a) *Dyer* 4 & 5 *Ph. & Mar.* * 217. out of *Bracton*, *lib.* 3. *cap.* 1. And the Wife can't ſue *Thomas* the Son, to recover her Dower by Judgment, becauſe he is not Tenant to the *Præcipe*, nor can he render Dower to her, for at the Time of the Releaſe, *Zachary* was Tenant of the Freehold, and *Litt. Releaſe*, *fol.* 115. holds, That in Actions real, which (b) ought to be ſued againſt the Tenant of the Freehold, if the Tenant has a Releaſe of Actions real of the Demandant made to him before the Writ purchaſed, and he pleads it, it is a good Plea for the Demandant to ſay, that he who pleads the Plea had nothing in the Freehold at the Time of the Releaſe made, for then he had no Cauſe to have any Action real againſt him. And therefore *Coke*, Chief Juſtice, ſaid, the Opinion in 14 *Hen.* 6. 11. *a.* was of great Difficulty, *ſcil.* If one releaſes to him in the Reverſion expectant on an Eſtate for Life all Actions real, and afterwards Tenant for Life is impleaded, and prays in Aid of him in Reverſion, or vouches him, or he is receiv'd in theſe Caſes (as it is there ſaid) although *Præcipe* be not begun againſt him, yet foraſmuch as by the Receipt or Voucher he is become Tenant to the *Præcipe* of him who made the Releaſe, and ſhall be bound by the Judgment, he ſhall have Advantage to plead the Releaſe of all Actions real: But the Doubt is, becauſe at the Time of the Releaſe made, he had no Cauſe (as *Litt.* ſaith) to have any Action againſt him: But doubtleſs, after Receipt or Entry into the Warranty by the Vouchee, a Releaſe by the Demandant to the Tenant by Receipt, or the (c) Vouchee, is good, becauſe both, at the Time of the Releaſe made, were Tenants in Law to the Demandant, but a Releaſe to them by any Stranger is not good: *Vide* 7 *Ed.* 3. 46. 18 *Ed.* 3. 12. 8 *H.* 4. 5. *a.* 7 *Ed.* 4. 13. *b.* 20 *Hen.* 6. 29. 22 *Hen.* 6. 12. 5 *Hen.* 7. 41. *a.* *Lit.* 114. *b.* *lib.* 1. *in my Reports*, *fol.* 87. & *lib.* 3. *fol.* 29. But if the Wife had releaſed *totum jus*, all her Right to him in the Reverſion, her (d) Dower had been extinct, becauſe her Dower would accrue to the Demandant, not only out of the Eſtate for Life, but alſo out of the Reverſion, and that was affirmed for good Law, as well at the Bar by both Parties, as at the Bench, according to the Book of (e) 16 *Ed.* 3. *cited in* Hoe's *Caſe*, *in the* 5*th Part of my Reports*, *fol.* 70, 71. *a.* For when the Right, which is the Foundation and Principal, is releaſed, by Conſequence the Action, which is but the Mean to recover it, *i. Jus proſequendi*, is alſo releaſed; and that appears in 9 *Hen.* 6. 47. 10 *H.* 4. 6. 21 *H.* 7. 23. 19 *H.* 6. 4. and therefore *Jus* is well divided in *Plow. Com.* in *Nichols*'s Caſe 487. *b.* where it appeas that *Jus eſt ſextiplex*, *ſcil.* 1. (f) *Jus recuperandi*, *i. e. proſequen'*: 2. *Jus intrandi*: 3. *Jus habendi*: 4. *Jus retinendi* 5. *Jus percipiendi*: 6. *Jus poſſidendi*: And therefore when a Man releaſes *totum Jus* generally, all his Rights are thereby releaſed. But if the (g) Diſſeiſee releaſed to the Diſſeiſor, *omnes Action' i. Jus recup' ſive proſequen' in Judic'*, his Right of Entry is not thereby

(c) 3 Co. 29. b. Hob. 222. 1 Co. 87. b. Lit. Sect. 191. fol. 115. b. Co. Lit. 265. b. 284. b. 10 Co. 48. b. 9 H. 7. 26. a. 7 E. 4. 13. b. 2 Rolls Rep. 323. Br. Releaſe 9, 13, 53. 20 H. 7. 10. a.

(d) Antea 151. a. 1 Co. 112. b. Co. Lit. 265. a. 5 Co. 71. a. 16 E. 3. Fitz. Bar. 245. Poſtea 154. a. Doct. pl. 149.

(e) Fitz. Bar. 245.

(f) Co. Lit. 345. b.

(g) 4 Co. 63. a

thereby releaſed: For when a Man has (*a*) divers Means to come to his Right, he may releaſe one of them ſpecially, and yet take Benefit of the other; and therewith *Littl.* agrees, *fol.* 115. *b.* and 19 *Aſſ. pl.* 3. 19 *H.* 6. 4. 21 *H.* 6. 23. 21 *H.* 7. 23. But when a Man has not any Means to come to the Land (*b*) but by Way of Action, there if he releaſes all Actions, thereby his Right, incluſive by Judgment of Law, is gone, becauſe by his own Act he has barred himſelf of all Means and Remedies to recover or attain to it: For a Releaſe of all Advantages upon the Account, is a good Bar in an Action of Debt upon the Account, 9 *Ed.* 4. 49. And therefore if the Diſſeiſee releaſes all Actions (*c*) to the Heir of the Diſſeiſor, thereby his Right in Judgment of Law is gone. But if the Heir of the Diſſeiſor makes a Leaſe for Life, the Remainder in Fee, and the Diſſeiſee releaſes to the (*d*) Tenant for Life all Actions which he has againſt him; and afterwards Tenant for Life dies, the Diſſeiſee, notwithſtanding this Releaſe, ſhall have an Action againſt him in Remainder, for he releaſes but the Action; and the Act in Law never extends the Act of the Party farther than his expreſs Words, as if the Lord diſſeiſes his Tenant, and makes a Leaſe for Life, this Releaſe in Law ſhall be but for the Life of the Leſſee; for it is true, that (*e*) *Fortior & potentior eſt depoſitio Legis quam hominis*, and ſo it is true, that (*f*) *Fortior & æquior eſt depoſitio Legis quam hom'.* (*g*) *Ipſæ etiam Leges cupiunt ut jure regantur.* But if the Diſſeiſee releaſes all Actions to the Diſſeiſor, and afterwards the Diſſeiſor dies ſeiſed, (*h*) and afterwards the Diſſeiſee dies, there a Right deſcends to the Heir of the Diſſeiſee; becauſe, notwithſtanding the Releaſe, a Right remained. *Vide* (*i*) 21 *Hen.* 6. 1. the Opinion of *Newton*: And it was obſerved, (*k*) *Actio eſt Jus proſequendi in Judicio*; and therefore by the (*l*) Judgment, the Action is determined, for the Judgment is the End of the Action (*jus proſequendi in judicio*) and therefore a Releaſe of all Actions is no Bar (*m*) of Executions; and therewith agrees 26 *H.* 6. *Execution* 7. and *Br. Releaſes* 87. and 19 *Hen.* 6. 4. and *Litt.* 116. *b.* But in a (*n*) *Scire facias* grounded upon a Judgment, a Releaſe of all Actions is a good Plea, becauſe he ſhall have a new Judgment; and therefore there it may well be call'd *jus proſequendi in judicio*, and therewith agrees 18 *E.* 4. 7. *b.* Then the Words farther are, *quod alicui debetur*, *i. e.* which is due to any, ſo that by releaſe of all Actions, (*o*) real and perſonal, ſuch Actions are only releas'd in which the Plaintiff ſhould recover any Thing in the Realty or the Perſonalty which is due to him, which is included in theſe Words, *quod ſibi debetur.* And therefore if a Man is outlawed in a perſonal Action by Proceſs upon the Orignal, and brings a Writ (*p*) of Error, and he pleads againſt him a Releaſe of all Actions perſonal, that is no Plea;

(*a*) Co. Lit. 286. b. 4 Co. 63. a. Lit. Sect. 496. fol. 116. a. b.

(*b*) Co. Lit. 286. a.

(*c*) Co. Lit. 286. a.

(*d*) Co. Lit. 275. b. 285. b.

(*e*) 10 Co. 67. b. 6 Co. 64. a. 2 Rol. Rep. 315. Hutt. 18. 2 Siderf. 59.

(*f*) Co. Lit. 234. a. 338. a. 6 Co. 69. b.

(*g*) 2 Co. 25. b. 5 Co. 100. a. 9 Co. 123. b.

(*h*) Co. Lit. 10. a. 143. a. 166. b. 174. b. 271. b.

(*i*) 10 Co. 51. b.

(*k*) Antea 151. a. Co. Lit. 285. a. Dyer 217. pl. 2. 10 Co. 51. b. 2 Inſt. 40.

(*l*) Co. Lit. 289. a.

(*m*) Poſtea 153. a.

(*n*) Co. Lit. 290. b. Lit. Sect. 505. Br. Scire fac. 188. Br. Releaſe 57.

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

(*p*) Co. Lit. 288. b. Lit. Sect. 503.

Plea; for by the ſaid Action he ſhall recover nothing that is due to him, but he ſhall only reverſe the Outlawry to diſcharge himſelf of that Diſability. So that the ſaid Writ of Error doth not agree with the ſaid Deſcription of an Action; for it is not (*a*) *jus proſequendi in judicio quod ſibi debet:* But in ſuch a Caſe a Releaſe of Writ of Error is a good Plea; and therewith *Littleton* agrees, 116. *b.* and the Book in (*b*) 11 *Hen.* 4. 6. *a. b.* where the Caſe was, *Treſcullard* brought a Writ of Error againſt *T.* Son and Heir of *John Penros*, upon a Judgment againſt him in a Writ of Rediſſeiſin, at the Suit of the ſaid *J. Penros*, and alſo of an Outlawry thereupon againſt him pronounced for that Cauſe, and aſſigned two Errors; one, becauſe the Sheriff took the Inqueſt in the Town, and not on the Land, according to the Statute. 2. Becauſe the Sheriff made a Precept to a Bailiff to ſummon the Jury, who return'd a Pannel, which was remov'd hither as Parcel of the Record, and the Sheriff took the Inqueſt by ſome who were not returned by the Bailiff. And there *Huls*, as to the firſt Error, ſaid, If the Sheriff cauſe the Jury to view the Waſte, he may take the Inqueſt at another Place, ſo here. And as to the ſecond Error, he ſaid, That the Sheriff may vary from the Return of the Bailiff; for the Sheriff himſelf is the Perſon who makes the Array, who is alſo a Judge in the Caſe: *Gaſcoign*, If the Sheriff had not made the Precept, and the Return by the Bailiff had not been made Parcel of the Record, it would be as you ſay; but he has ſent this Return as Parcel of the Record, whereby he affirms the Return of the Bailiff; and if he had made Proceſs againſt the Jury by *Hab. Corp.* and had taken the Inqueſt by others, 'tis Error, *quod Huls conceſſit*; and *Rolfe* of Coun. with the Def. in the Writ of Error pleaded, that the Pl. ſhould not be receiv'd to aſſign Error, for after the Judgm. the Pl. in the Writ of Error, by his Deed which is here, releaſed to the ſaid *J. Penros*, who recovered in the Writ of Rediſſeiſin all his Right in the Land, and all Actions and Demands; and altho' both the Errors were aſſigned in the principal Record, and thereof by the ſaid Releaſe he is ſtopped to aſſign Error; and altho' the Outlawry was good in Proceſs, yet becauſe the Record and Judgment are the Original of the Proceſs of the Outlawry; therefore if there be Defect in the original Judgment, the Outlawry which is depending upon it, is reverſible by *Gaſcoigne*, *quod Huls affirmavit:* Wherefore he revers'd the Outlawry, notwithſtanding the Releaſe. Which Judgm. agrees with *Littleton*, and is worthy Obſervation in the principal Point of Judgment. So if the Body of a Man condemned in Debt be in Execution, and the Plaintiff releaſes the Debt, and all Executions, and the Def. releaſes to the Pl. all Actions, yet upon the Releaſe of the Pl. he ſhall have an (*c*) *Audita querela*; for thereby he ſhall recover nothing, but diſcharge his Body of Impriſonment.

(*a*) Co.Lit.288.b. Lit. 117. b. Lit. Sect. 503.

(*b*) Poſtea 154. a. Fitz. Error 64. Antea 143. a. Br. Error 47.

(*c*) Co. Lit.289.a.

But

But if the Plaintiff after Judgment releaſes to the Defendant all Actions, and afterwards his Body is taken in Execution, he ſhall not have an *Audita Querela* thereupon, for (*a*) an Execution is no Action, as has been ſaid before; and therewith agrees 13 *H.* 4. *Releaſe* 53. Alſo it was obſerved, upon theſe Words (*quod alicui debetur*) That in ſome Caſe a Debt or (*b*) Duty ſhall be barred by a Releaſe of (*c*) all Actions, altho' no Action at that Time lies for the Debt: As if a Man be bound to another in a certain Sum, to be paid at the Feaſt of Saint (*d*) *Michael* next following, if the Obligee before the Feaſt releaſes to the Obligor all Actions, he ſhall be barred for ever of the Duty, for it is * *debitum* preſently, although it be not preſently *ſolvend'*: And therefore if one be bound to another in 40*l.* to be paid at four uſual Feaſts of the Year, and three of the Feaſts are paſt, in that Caſe for 30*l.* there is *debitum* and *ſolvend'* alſo, and yet the Obligee ſhall not have an Action of Debt (*e*) till the laſt Feaſt be paſt, and notwithſtanding that, a Releaſe of all Actions before the laſt Feaſt diſcharges all; (*f*) but if a Man leaſes Land to another for the Term of a Year, rendring 40*l.* Rent, to be paid at the four uſual Feaſts by equal Portions, in this Caſe, if one Feaſt be paſt, he ſhall have an Action of Debt preſently, and ſhall not tarry till all the Days be paſt, for there the Duty accrues upon the receiving of the Profits of the Land, and till the Feaſt incurred in which it is to be paid, there is neither *debitum* nor *ſolvend'*, and therefore there a Releaſe of all Actions before the Feaſt is no Bar, but in Reſpect of the ſev. Perception of the Profits of the Land, the Rent after every Feaſt is demandable by Action of Debt: And ſo *ſtude Cauſam Diverſitatis* made in (*g*) *Litt.* 117. (which was never added by *Litt.* himſelf) is well explain'd. And therewith agree 7 *H.* 6. 26. *a.* 45 *E.* 3. 8. *a. L.* 5 *E.* 4. 41. *b.* 13 *H.* 4. *Avowrie* 240. *Vide* 3 *Ma. Dyer* (*h*) 113. 5 *Ma.* (*i*) *Dyer* 108. upon *Aſſumpſit* or Coven. in which Damages are to be recover'd, an Action lies after the 1ſt Day, & *F. N. B.* 267. & 16 *E.* 3. *Fieri fac.* 4. That upon (*k*) a Recognizance which is a Judgment in Law, Execution lies after the 1ſt Day, and ſo all the Books are well reconciled and agree; wherefore it was concluded in the Caſe at Bar, That by the Releaſe of all Actions made to him in Rever. the Dower of the Wife was not barr'd, becauſe at the Time of the Releaſe ſhe had no Cauſe of Action againſt him. As to this Word (*Querelas*) (*l*) it is to be known, that *Quarrels* extend not only to Actions as well Real as Perſonal, as it is held in 9 *E.* 4. 44. *a.* but alſo to (*m*) Cauſes of Action and Suits, as it is held in 39 *H.* 6. 9. *b.* So that by Releaſe of all *Quarrels*, not only Actions depending in Suit, but Cauſes of Action and Suit alſo are releaſed. And ſo it is where one releaſes to another all Actions, not only Actions depending, but alſo (*n*) Cauſes of

(*a*) Lit. Sect. 504. Co. Lit. 209. *a.*

(*b*) Cro. El. 370.

(*c*) Co. Lit. 285. *a.*

(*d*) 1 Brownl. 62.

* 1 Bulſt. 67. 178. Co. Lit. 292. *b.*

(*e*) 1 Brownl. 62, 63. 5 Co. 81. *b.* Co. Lit. 47. *b.* 292. *b.* F. N. B. 131. *a.* 10 Co. 128. *b.* 2 Leon. 107, 108, 131. Owen 42. F. N. B. 130, 131. *h.* Benl. in Aſh. pl. 10. O. Benl. 3. pl. 8. Yelv. 67. Cr. Eliz. 118, 119, 776, 807. 4 Co. 94. *b.* N. Benl. 57. pl. 93. 3 Leon. 4. 4 Leon. 13. Moor 13. Benl. in Kelw. 208, 209. 3 Co. 22. *a.* Cr. Car. 241. Cr. Jac. 505. 2 Sand. 337. 1 Rolls 29, 601. 1 Rolls Rep. 221. 2 Rolls Rep. 47. Br. Action Sur le Caſe 108. in fine. 1 Leon. 300.

(*f*) 1 Brownl. 62, 63. 5 Co. 81. *b.* Co. Lit. 47. *b.* 10 Co. 128. *b.* 2 Leon. 108. Owen 42. Cr. El. 118, 119. 3 Co. 22. *a.* 1 Rolls Rep. 221.

(*g*) Lit. Sect. 513. Co. Lit. 292. *b.* Lit. 118. *b.*

(*h*) Dyer 113. pl. 55, 56.

(*i*) Br. Action ſur le Caſe 108. 1 Leon. 300.

(*k*) Co. Lit. 47. *b.* F. N. B. 130. *h.* 1 Rolls Rep. 221. Co. Lit. 292. *b.* Cr. Jac. 505.

10 Co. 128. *b.* 2 Inſt. 395. F. N. B. 267. *b.* (*l*) Co. Lit. 292. *a.* Lit. Sect. 511. (*m*) Co. Lit. 292. *a.* (*n*) Co. Lit. 285. *a.*

(a) Co.Lit.285.a. (b) 10 Co. 51.b. Dyer 57.a.b. Co. Lit. 285. a. (c) 1 And. 8. 4 & 5 Eliz. Dyer 217. pl. 2. 5 Co. 71. a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5. Antea 151. b. Moor 34. (d) Co. Lit. 292. a. (e) Co. Lit. 291. a. 2 Rolls 404. 26 H. 6. Fitz. Execut. 7. (f) 2 Rolls 404. Fitz. Execut. 7. Co. Lit. 291. a. (g) Co. Lit. 292. b. 5 Co. 71. a. 1 Co. 112. b. 2 Rolls 404. 10 Co. 51. b. Cr. Jac. 170. Mo. 34. Hutt. 17. 2 Bulstr. 231. 1 Anders. 8. Poph. 136. Lit. R. 87. Yelv. 156. (h) Co. Litt. 345. b. 292. (i) Co. Lit. 345. b. (k) Co. Lit. 345. b.

(a) Actions are releaſed. *Vide* 35 H. 8. 57. 4 & 5 *Eliz.* (c) 217. *b. Trinit'* 4 *Eliz. Rot.* 1027, *&c.* And this Word *Querela* is deriv'd a *querendo, unde etiam Querens* who is the Plaintiff, and *Quarrels*, Controverſies and Debates, are (d) *Synonima*, and of one and the ſame Signification. And for this Word (*Sectas*) it is to be known that by Releaſe of all (e) Suits, Executions are barr'd, for none ſhall have Execution without Suit or Prayer; and therewith agree 9 *H.* 6. 4. 26 *H.* 6. *Execution* 7. and *Br. Releaſes* 87. So by Releaſe of all (f) Duties, as well Executions as Actions are releaſed. But a Releaſe of Suit or Quarrel is not in this Caſe any Bar of Dower, no more than by a Releaſe of them, a (g) Covenant before the Breach thereof is releas'd, becauſe the Covenantee has no Cauſe of Action or Suit before the Covenant broke. As to this Word (h) (*titulum*) (which is mentioned in the particular Clauſe) it has two Significations, one properly and ſtrictly, as for a Title for which no Action lies, as for a Condition broke, or upon Alienation in Mortmain, *&c.* and ſo it is taken in *Plow. Com.* in *Nichol's* Caſe, *fol.* 484. In another Signification it is taken largely, and in this Senſe, *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt*, and ſignifies the Title which one has to Land, as by Fine, Feoffment, *&c.* or by Deſcent, *&c.* and therefore when the Plaintiff makes a Title in an Aſſize, the Tenant may ſay, let the Aſſize come upon the Title, which is as much as to ſay, upon the particular Conveyance, *&c.* which he makes to the Land, *&c.* and it is called (k) *Titulus a tuendo, quia* thereby he defends his Land, *& plerumque conſtat ex munimentis quæ muniant & tuentur cauſam.* By Releaſe of all Title to Land, *&c.* all his Right is extinct, for it ſhall be taken ſtrongly againſt him, and in the largeſt Senſe.

(l) Co. Lit. 345. b.

So when a Man has Title in the proper Senſe, (l) either by a Condition or by Alienation in Mortmain, the Releaſe of all his Right will extinguiſh this Title, for he has *Jus Poſſidendi*, and therewith agrees 6 *H.* 7. 8. *a.* And the *Engliſh* Poet ſaith,

(m) 1 Brownl. 63.

For true it is, that neither (m) *Fraud nor Might, Can make a Title where there wanteth Right.* The laſt of the four general Words in the Deed is (n) (*demanda*) *quod eſt vocabulum artis*: And if one releaſes to another all Demands, it is (as *Littleton* ſaith, 117. *a.*) the beſt Releaſe to him to whom the Releaſe is made, that he can have, and ſhall enure moſt to his Advantage; for thereby not only all Demands, but alſo all (o) Cauſes of Demand, are releaſed. And there are (p) two Manner of Demands, *ſcil.* in Deed, and in Law; in Deed; as in every *Practice* there is an expreſs Demand; and thereupon in real Actions he is called Demandant; in Law, as every Entry into Land, Diſtreſs for Rent, Taking or Seiſure of Goods, and the like Acts in *Pais*, which may be done without any Words,

(n) 1 Brownl. 63, 80, 115. Co. Lit. 291. b. Lit. Sect. 508. Poph. 136. 2 Rolls Rep. 20. Cr. Jac. 170, 300, 486, 487. 2 Rolls 406, 407, 408. Bridg. 124, 125. 20 Aſſ. 5. Fitz. Releaſe 39. Br. Releaſe 36. Long. quinto E. 4. 42. a. 40 E. 3. 48. a. 34 H. 8. Br. Releaſe 90. Yelv. 156, 214, 215. Hob. 216. Noy 26. Hutt. 17.

(o) 1 Brownl. 63.

(p) Co. Lit. 291. b.

1 Bulſtr. 178. Cr. El. 552. Lit. Rep. 87. 11 Co. 82. b.

are Demands in Law. And as a Releaſe of Suits is (a) larger and more beneficial than a Releaſe of Quarrels, or of Actions; ſo a Releaſe of Demands is more large and beneficial than any of them, for thereby is releaſed all that is by the others releaſed, and more: By Releaſe of all Demands, all Freeholds and Inheritances executory are releaſed, as (b) Rents, and the like, 20 *Aſſ. p.* 5. 14 *H.* 8. 9, 10. By Releaſe of all Demands, all (c) Executions are releaſed, 26 *H.* 6. *Execution* 7. 19 *H.* 6. 4. *Litt.* 117. 40 *Edw.* 3. 51. by Releaſe of all Demands, to the Diſſeiſor, the Right of Entry to the Land, and all that is contained in it is releaſed, 6 *H.* 7. 15. So it is reſolved by all the Juſtices in (d) *Chauncey*'s Caſe, 34 *H.* 8. *Br. Releaſe* 90. that he who releaſes all Demands excludes himſelf from all Actions, Entries and Seiſures. *Litt. cap. Warranty* 170. *a.* holds, That if Tenant in Tail enfeoffs his (e) Uncle, who enfeoffs another in Fee with Warranty, if afterwards the Feoffee by his Deed releaſes to his Uncle all Manner of Warranties, or all Manner of real Covenants, or all Manner of Demands, by ſuch Releaſe the (f) Warranty (which is a Covenant real and executory) is extinct; and the Reaſon of all this was, becauſe by Releaſe of Demands, all the Means and Remedies, and the Cauſes of them, which any one has to Lands, Tenements, Goods, Chattels, *&c.* are extinct; and by Conſequence the Right and Intereſt itſelf to the Thing. Wherefore it was reſolved, that in the Caſe at Bar, by the Releaſe of all Demands to him in the Reverſion, if the Deed of Releaſe had not gone farther, the (g) Dower of the ſaid *Marcey* had been barred. Note, Reader, altho' a Releaſe of all Demands be of ſo great Extent, yet it doth not extend to ſuch Writs, by which nothing is demanded neither in Fact, nor in Law, but lie only to relieve the Plaintiff by Way of Diſcharge, and not by Way of Demand, as appears before, by the Judgment in (h) *Treſcullard*'s Caſe, in 11 *H.* 4. 6. where a Releaſe of all Demands is no Bar in a Writ of Error to reverſe an Outlawry, *Et ſic in ſimilib'. Vide* 40 *E.* 3. 22. 13 *R.* 2. *Avow.* 39. (89.) 18 *E.* 3. 59. 14 *H.* 4. 4. *&c.* where by Releaſe of all Demands, future (i) Incidents are releaſed, and where not. And *Vide Plow. Com.* 484. in *Nichol*'s Caſe for this Word *(intereſſe.)* Now as to the 2d Part of the Deed, *ſcil'* to the Words of Qualification, it was reſolved, That as well the firſt Words, as the ſubſequent Words ſpecial, extend only to releaſe all Actions, Suits, Quarrels, Demands, Title and Dower, *&c. de aliquibus terris & tenementis ſuis in* Wethersfield, (k) and not to any Lands and Tenements in *Gosfield*, for the ſaid latter Words, *mihi contingent per mortem dicti Thomæ, &c.* qualify the ſaid general Words and reſtrain all the firſt Words to the Lands or Tenements in *Wethersfield*,

(a) 1 Brownl. 63.
(b) Cro. Jac. 487. Bridgm. 124. Co. Lit. 291. b. 1 Brownl. 63. 2 Roll 407.
(c) 1 Brownl. 63. Cro. El. 40. Lit. Sect. 508.
(d) 11 Co. 82. b. Co. Lit. 292. a.
(e) Co. Lit. 392. b. Lit. 171. a. Lit. Sect. 748.
(f) 1 Co. 112. b. 5 Co. 71. a.
(g) 1 Co. 112. b. 5 Co. 71. a. Antea 151. a. b. Co. Lit. 265. a. 16 E. 3. Fitz. Bar. 245. Doct. pla. 149.
(h) Antea 152. b.
(i) 1 Brownl. 63.
(k) 3 Keb. 58.

and that for three Reaſons: 1. Becauſe all the ſaid three Parts of the Deed, *ſcil'*, the Words of Releaſe, the Words of Qualification, and the Words of Relation are but one Period and one Sentence; for this Conjunction *(necnon)* conjoins the general Words to the Words of Qualification, and the relative Words refer to all the Words, as *(a)* well general as ſpecial, and alſo to the Words of Qualification, as ſhall hereafter appear, and therefore the whole is but one and the ſame Sentence. 2. If the general Words ſhould ſtand without any Qualification, then the ſpecial Words would be altogether vain and of no Effect, *& (b) maledicta expoſitio eſt quæ corrumpit textum.* The third and the principal Reaſon is upon a Maxim and Principle of the Law, *ſcil' (c) Quando carta continet generalem clauſulam, poſteaque deſcendit ad verba ſpecialia, quæ clauſulæ generali ſunt conſentanea, interpretanda eſt carta ſecundum verba ſpecialia.* The ſame Rule almoſt Word for Word is put and agreed on both Sides in 7 *E.* 3. 10. *a. Margery (d) Mortimer's Caſe, ſc. where a Deed ſpeaks by general Words, and afterwards deſcends to ſpecial Words, if the ſpecial Words agree to the general Words, the Deed ſhall be intended according to the ſpecial Words:* As if a Man grants a Rent in *manerio de D' percipiend'* in 100 Acres of Land, Parcel of the ſame Manor, with Clauſe of Diſtreſs in the 100 Acres, the Rent ſhall iſſue out of the 100 Acres only, and the general Words ſhall be conſtrued according to the ſpecial Words: So it is there alſo ſaid, If a Man grants a Rent, (and goes no farther) theſe *(e)* general Words ſhall create an Eſtate for Life, but if the *Habendum* be for Years, it ſhall qualify the general Words; and all this appears in the ſaid Book of 7 *E.* 3. So if a Man *(f)* gives Land to one and his Heirs, *Habendum* to him and the Heirs of his Body, he ſhall have but an Eſtate in Tail, and no Fee expectant; for the *Habendum* qualifies the general Words precedent; and therewith agree 35 *Aſſ. p.* 14. 37 *Aſſ. p.* 5. *& Perkins* 35. *b.* againſt the Opinion *obiter in* 21 *H.* 6. 24. But if a Man gives Lands in the Premiſſes to one and *(g)* the Heirs of his Body, *Habendum* to him and his Heirs, he has an Eſtate-tail, and a Fee-ſimple expectant; for that ſtands upon another Rule or Principle in Law, *ſcil. (h) generalis clauſula non porrigitur ad ea quæ antea ſpecialiter ſunt comprehenſa:* And therefore when the Deed at the firſt contains ſpecial Words, and afterwards concludes in general Words, both Words as well general as ſpecial ſhall ſtand: And it is well ſaid in 35 *H.* 8. *Dyer* 56. ſubſequent Words may qualify and *(i)* abridge, but not deſtroy the Generality of the Words precedent. *Vide Dyer* 33 *H.* 8. *fol.* 50. 21 *Aſſ. p.* 10. *&* 2 *E.* 3. 33. *b.* To the laſt Part of the Deed, *ſcil.* the relative Words, (*quæ vel quas, &c.*) It was reſolved, that they refer

(a) Wing. Max. 15.

(b) 1 Roll. Rep. 319. Wing. Max. 26. 2 Co. 24. a. 4 Co. 35. a. 8 Co. 56. b. 3 Bulſtr. 105, 107, 108.

(c) Winch. 92. 2 Roll. Rep. 279.

(d) Lit. Rep. 345. Hob. 172.

(e) 2 Co. 24. a. 55. a. Winch. 92. Perk. Sect. 167, 174. Co. Litt. 183. a. 196. b.

(f) 2 Roll. Rep. 19, 23. 2 Roll. 66, 68. Godb. 272. 2 Sid. 78. Poph. 138. Lit. Rep. 260, 345. Perk. Sect. 170. 1 Brownl. 45. Co. Lit. 21. a. Cro. Jac. 476. Dyer 126. pl. 50. 1 Sid. 78. 3 Bulſtr. 195.

(g) Lit. Rep. 345. Co. Lit. 21. a. 2 Jones 4.

(h) Antea. 118. b. Raymond 330. Hawk's Max. 21. Styles 391. 2 Rol. Rep. 279. Lit. Rep. 345. 4 Co. 80. b. Hard. 108.

(i) Co. Lit. 299. a. 1 Sid. 117. Dyer 56. pl. [illegible]

refer as well to Actions, *&c.* and Demands, as to the ſpecial Words, for it wou'd be againſt Reaſon that they ſhould refer to general Words, which are more remote, and not to the Words of Qualification which are immediate, and next to them: And that is ſo clear and perſpicuous of itſelf that it is not worthy of any Argument, or Proof, to confirm it. For the ſecond Point of the Caſe it was reſolved, That the ſaid foreign or collateral Averment out of the ſaid Deed was not of any Force or Effect in Law; for every Deed conſiſts upon two Parts, *ſcil.* Matter of Fact, and upon the Conſtruction in Law. Matter of Fact is to be averr'd by the Party, and triable by the Jurors: The other, being Matter in Law, is to be diſcuſſed by the Judges of the Law, and *quemadmodum* (*a*) *ad quæſtionem facti non reſpondent Judices; ita ad quæſtionem juris non reſpondent Juratores.* And therefore if *A.* levies a Fine to *William* his Son, to have and to hold to him and his Heirs, upon this Fine the Judge can't make Queſtion for any Matter of Law; but now the Party comes and averrs Matter in Fact; and ſaith, That *A.* had two Sons named *William*, (*b*) an elder, and a younger, and his Intent was to levy the Fine to *William* the younger; this (*c*) Averment out of the Fine is good of this Matter of Fact, which well ſtands with the Words of the Fine, and ſhall be tried by the Country; and therewith agrees 47 *E.* 3. 16. *b.* But if a Man by Deed gives Goods to (*d*) one of the Sons of *I. S.* who has divers Sons, here he ſhall not aver which Son he intended; for by Judgment in Law upon this Deed, this Gift is void for the Incertainty, which can't be ſupply'd by Averment. *Vide* 11 *E.* 4. 2. *a.* So if a Man levies a Fine of the Manor of *Soure*, or of the Manor of *Dirtleby*, to two *& Hæredib'*, and in Truth there is the (*e*) Manor of North *Soure* and South *Soure* or *Great Dirtleby* and *Little Dirtleby*, in this Caſe Iſſue may be taken *dehors* which Manor the Conuſor intended to paſs, for that is Matter of Fact not apparent in the Fine, whereof the Judge can't take Conuſans; but it ſtands well with the Fine, and ſhall be tried by the Jury, and therewith agree 12 *H.* 7. 7. 26 *H.* 8. 6. *a.* 19 *E.* 2. *Grants* 93. but where the Words are in the Limitation of the Eſtate to two (*f*) *& hæredibus*, that is apparent in the Fine, and by Judgment of Law, theſe Words *& hæredibus* are uncertain and void, as it is adjudged in 22 *H.* 6. 15. *b.* *Vide* 19 *H.* 6. 73. *b.* 20 *H.* 6. 35. *b.* 36. 22 *E.* 4. 6. (16.) *b.* and no Averment, *dehors* can make that good, which upon Conſideration of the Deed is apparent to be void. So if a Man makes a Feoffment to one and his Heirs, no Averment can be taken that the Intent of the Parties was, that the Feoffee ſhould have but an Eſtate to him and the Heirs of his Body, for

(*a*) 9 Co. 13. a. 25. a. 11 Co. 10. b. 2 Bulſtr. 204, 251, 305, 314. 1 Sid. 127. Co. Lit. 125. a. 155. b. 226. a. 1 Roll. Rep. 132.

(*b*) Br. Noſme 63. 5 Co. 68. a. b. Br. Fine 28. Fitz. Feoffment 56.

(*c*) Moor 105. Hob. 32. Styles 293.

(*d*) Br. Done 31.

(*e*) Kelw. 49. a.

(*f*) 1 Co. 85. a. Hob. 174. Co. Lit. 8. b. Br. N. C. 156. Br. Eſtate 4, 18, 73. Fitz. Feoffments & Faits 8. Plowd. 28. b. Bridgm. 134, 135. 1 Roll. 133. Perk. Sect. 181. Kelw. 108. pl. 26. 1 And. 225. 2 And. 141, 142. 3 Bulſt. 126. 4 Leon. 246. Godb. 121, 220.

for ſuch Averment would be againſt the Judgment of the Law, which appears to the Judges upon the View of the Deed; ſo in the Caſe at Bar, if the general Word (*demanda*) had in Law, by the Judgment of the Judges, upon the Conſideration of the whole Deed of Releaſe barred her of her Dower, no foreign or collateral Averment *dehors* could qualify or abridge the Force and Operation of the ſaid Word, but it ought to be qualified by apt Words contained in the Deed itſelf, as in this Caſe it was. And afterwards Judgment was given for the Demandant.

[A Parol Agreement can't controul a Bond, *&c. Fitzg.* 75.]

ARTHUR

ARTH. BLACKAMORE'S *Caſe.*

Mich. 8 Jac. 1.

AN Original Writ was brought in *London: Jacobus Dei gratia Angliæ*, &c. *Præcipe* Leventhorp Franke *nuper de* Hatfield Brodock *in Comitatu* Eſſex *generoſo, alias dicto* Leventhorp Franke *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo, quod reddat* Arthuro Blackamore, & Johanni Whittingham, 100 *l. quas eis debet & injuſte detinet*, returnable *menſe Michaelis*; the Entry of the *Capias, Alias, & Pluries*, was according to the ſaid Original; but in the Exigent and Proclamation, and the Entry thereof, the Defendant (as the Truth was) was named *Knight*, and in *Eaſter* Term, *Anno* 8 *Jac.* he put in a *Superſedeas* by the Name of *Knight*, and ſo the Plaintiff declared againſt him: And the Defendant imparl'd till *Trinity* Term following, in which Term Judgment was given againſt him by Default, by the Name of *Knight*. And this *Mich.* Term, *Anno* 8 *Jacobi Regis* a Writ of Error was brought, and it was moved by *Houghton*, Serjeant, that the ſaid Original might be amended, becauſe *John Bunbury*, the Plaintiff's Attorney, drew a Note or Title of the Writ in this Form; London: Leventhorp Franke *nuper de* Hatfield *in Comitatu* Eſſex *militi, alias dict'* Leventhorp Franke *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, &c. *ut ſupra*, and delivered this Note or Title to the Curſitor of *London*, and he miſtook it *in hoc*, that where *in primo nomine* he ought to be named *Militi*, *in primo nomine* the Curſitor named him *Generoſo*, as he was named in the Obligation, and this was the true Caſe, as appears on the Examination of the Curſitor, and of the ſaid Attorney, upon their Oaths, and

1 Roll. 198.

Of Amendments, &c. ſee 5 Co. 121. Rep. Q. A. 131, 132. 6 Mod. 156. 269 to 287. Cumberb. 73. 3 Salk. 30, 31. Lucas 270, &c. poſt.

1 Roll. 198.

upon View of the Note or Title in full Court. And whether this was amendable or not by this Court, the Original being purchaſed out of another Court, *ſcil.* the Chancery, was the Queſtion. And the Caſe was well argued at the Bar by Counſel on both Sides; and at laſt it was reſolved, *per totam Curiam*, That the Record ſhould be (*a*) amended by the ſaid Curſitor, and made according to the Note or Title delivered him by the Attorney. And for the better underſtanding of the Law, and of the true Reaſon of the Rule of our Books in this and other Caſes of Amendments, 1. We muſt conſider, if in this Caſe the ſaid Original Writ was amendable by the Common Law, or by any Statute, and by what Statute? And it was reſolved, That an Original Writ was not amendable by the Common Law in the Caſe of a Common Perſon*: *Vide* 13 *E.* 3. *Amendment* 63. which was before any Statute made concerning Amendments, *&c.* and 16 *E.* 3. *Variance* 59. 29 *E.* 3. *Amendment* 68. But in the King's Caſe, in a *Quare Impedit*, where the Writ of *Quare Impedit* was (*b*) *præſentcre* for *præſentare*, after Exception taken to it, and before Anſwer, by the Advice of the Chancellor (out of which Court this Writ iſſued) and of the Judges of the King's Bench, the Writ was amended in the Chancery, and the Defendant was put to anſwer it by Award. *Vide* (*c*) 4 *H.* 6. 16. *b.* *&* (*d*) 40 *Aſſ. p.* 26. And where there appears in (*e*) 20 *E.* 4. 7. 10 *H.* 7. 25. *a. b.* a Diverſity of Opinions, Whether there were any Amendment at the Common Law, or not? It is without Queſtion, That at the Common Law a Fault of Entry of a Continuance, or of an Eſſoign, which was the Miſpriſion of the Court itſelf, in the Form of Entry was amendable by the Court; as appears by 5 *Ed.* 3. 25. (*f*) where *W.* brought a *Præcipe* againſt *B.* who vouched to warranty *C.* who entred into the Warranty and pleaded to iſſue, a *Venire fac.* iſſued, *&c.* and the Jury was reſpited, and in the Roll it was entred, *Jur' inter B. & C.* (which was between the Tenant and the Vouchee) in ſuch a Plea, *ponitur in reſpect'* where the Entry ought to be, *Jur' inter W. & C. quem B. vocavit ad warrant' & qui ei warr'*; and becauſe this Miſpriſion of the Entry in the Roll was taken to be the Default of the Court, it was (as in the Caſe of an Eſſoign) amended by the Court. So in 10 *E.* 3. 20. *a.* The Miſpriſion of the Court, in the Entry of an Eſſoign, was amended by the Court. And 12 *E.* 3. *Amendment* 62. *acc.* which Books were before any Statute of Amendment. *Vide* (*g*) 2 *H.* 4. 4. *a.* 18 *E.* 3. *Amendment* 56. 19 *E.* 3. *Tit. Amendment* 65. And at the Common Law, Variance in any Part of the Record of the Original was amendable by the Common Law, as it is ſaid in (*h*) 7 *H.* 6. 45. *a.* So at the Common Law, the Judges might amend as well their Judgment, as any other Part of the Record, *&c.* in the ſame (*i*) Term, for

(*a*) 1 Roll. 198. Popham 203.

Q. If in the King's Caſe? See 6 Mod. 269 to 287. Cumb. 73. 1 Sal. *&c.*

(*b*) Fitz. Amendment 19. 45 E. 3. 6. b. 8 Co. 26. b.

(*c*) 8 Co. 26. b. 9 Co. 48. a. Fitz. Amendment 22. Br. Eſſoign 67. Br. Brief 212. Br. Office del Court 6. Br. Faux Latin 96.

(*d*) Antea 26. b. Br. Amend. 59. Br. Faux Latin 74. Poſtea 162 b.

(*e*) Br. Amend. 74.

(*f*) 6 E. 3. 25. a. Fitz. Amendm. 73.

(*g*) Br. Amendment 26. Fitz. Amendm. 7.

(*h*) Br. Amendm. 34. Poſtea 158. a.

(*i*) Co. Litt. 260. a. 5 Co. 74. b.

for during the Term the Record is in the Breaſt of the Judges, and not in the Roll, *Vide* 7 *H.* 6. 29. *a. b.* (*a*) 9 *E.* 4. 3. *b.* 2 *R.* (*b*) 3. 11. *a. b.* But at the Common Law, the Miſpriſion of Clerks in another Term in the Proceſs was not amendable by the Court, for in another Term the Roll is the Record, and therefore by the Statute of (*c*) 14 *E.* 3. *cap.* 6. (which was the firſt Act of Amendment) it is enacted, by the Miſpriſion of Clerks in every Place whereſoever it be, no Proceſs ſhall be annulled or diſcontinued by miſtaking in writing one Letter, or one Syllable too much or too little, *&c.* but ſhall be haſtily amended in due Form, but this Statute extends only to the Amendment of the Miſtake of the Clerk in Proceſs to be amended in due Form, for *Anno* 15 *E.* 3. *Amendment* 58. which was the next Year after the Statute made, in *Detinue* of three Writings, by Omiſſion of one Writing in the Continuance, all the Proceeding was diſcontinued, notwithſtanding the new Statute, (*ſcil.* 14 *E.* 3.) which gave that the Proceſs ſhould be amended, *Vide* (*d*) 45 *E.* 3. 19. *b.* And this Statute extends to a Writ Judicial, or Proceſs, as in Treſpaſs the *Niſi prius* was *ad damnum* 100 *s.* where the Record was 100 *l.* and the Jury at the *Niſi prius* found 20 *l.* and the Writ of (*e*) *Niſi prius* was amended by Force of this Statute, and made 100 *l.* according to the Record, 2 *H.* 4. 6. *a. vide* 45 *E.* 3. 19. And in 44 *E.* 3. 18. it is obſerved, That a Man has often ſeen the Judicial Writs amended by the Roll, but the Roll never (before the ſame Caſe, as it is there ſaid) was amended, *vide* 40 *E.* 3. 15, 36. 19 *H.* 6. 15. 3 *H.* 4. 8. *&* 11. 47 *E.* 3. 14. * 7 *E.* 4. 15. *b.* 9 *H.* 7. 8. 4 *H.* 6. 6. But this Statute doth not extend to an Original Writ, nor to a Writ which is in the Nature of an Original, for that is not included within this Word *Proceſs*. And therefore (*g*) *Finchden* ſaith, in 41 *E.* 3. 14. *a.* if an Original Writ wants Form it is abateable, becauſe an Original is made in one Place, and pleadable in another, and by Conſequence can't be amended; otherwiſe it is of a Writ Judicial, *Vide* 11 *H.* 4. 70. *a.* (*h*) A Protection ſhall not be amended in the Common Pleas, becauſe made in another Court. So it is held in 4 *H.* 6. 4. *a.* Every Original Writ ſhall abate for want of Form (as if the Wife be named before (*i*) the Huſband) as well as if it wants Matter, without any Amendment: But a Judicial Writ ſhall not abate for want of Form, if it has ſufficient Matter, (*k*) 3 *H.* 4. 4. *a.* An Original, or that which is in the Nature of an Original, ſhall not be amended, and therewith agree 29 *E.* 3. *Amendment* 68. in *Waganer*'s Caſe, 22 *E.* 4. 47. *vide* 8 *H.* 6. 37. *a.* So in (*l*) 46 *E.* 3. *Amendment* 53. in a Writ of Entry *ſine aſſenſu Capituli* brought by an Abbot againſt *R.* who pleads *Non dimiſit, &c. & de hoc ponit ſe ſuper patriam, & præd' R. ſimiliter*; where it ſhould be, *& præd Abbas ſimiliter*, and the Jury was diſcharged, and it was not amended, for it

(*a*) Fitz. Amendm. 2.
(*b*) Br. Amendm. 87.
(*c*) 5 Co. 45. a.
(*d*) Fitz. Amend. 52. Br. Amendm. 24.
(*e*) Br. Amend. 27. 1 Roll. 202. Fitz. Amend. 8. Poſtea 162. a. Dyer 261. pl. 25. Moor 681.
(*f*) 2 Vent. 171.
* Poſtea 162. Fitz. Amend. 51. Br. Amend. 71.
(*g*) Br. Amend. 20. Br. Faux Latine 9.
(*h*) Br. Amend. 101. Poſtea 158. 2 Roll. 329. Br. Protection 35. Br. Miſnomer 22. Br. Variance 33. Fitz. Variance 45.
(*i*) 4 H. 6. 3. b. 4. a. Palm. 33. 2 Leon. 59. Br. Brief 208. Br. Faux Latin 3, 49. Br. Scire facias 129. Fitz. Brief. 23.
(*k*) Br. Miſnoſm. 18. Br. Variance 26. Fitz. Variance 29.
(*l*) Poſtea 157.

was

was not within the Statute which gave, that Proceſs ſhould be amended in due Form, and therefore the Parties repleaded. And it is to be known, That this Word (*Proceſs*) which is the only Word in this Statute which is to be amended, is taken in Law in two Significations, in one largely, and in the other ſtrictly; and in the large Senſe it is taken for all the Proceedings in all Real and Perſonal Actions, and in all Criminal and Common Pleas: *& proceſſus derivatur a procedendo ab originali uſque ad finem. Vide Britton* 138. And in this Senſe it is taken in the *Regiſter Original* 128. *a.* in the Writ *De continuando proceſſum poſt mortem Capitalis Juſtic'* in a Writ of *Oyer* and *Terminer*, within which Words (*Proceſſus*) as it there appears, is included not only the Judicial Proceſs, but alſo the Commiſſions, Indictments, Rolls, *& alia memoranda:* And *in alio ſenſu*, this Word (*Proceſſus*) is taken more ſtrictly, *ſc.* for the Proceedings after the Original upon the Plea-Roll before Judgment, and that appears in the Writ of Error in the *Regiſter* 216. and (*a*) *F. N. B.* the Words of which are, *Quia in recordo & proceſſu, ac etiam in redditione Judicii*, &c. where *recordum* contains the Plea-Roll, and *Proceſſus* all the Proceeding upon it 'till the Judgment. See the Writ of *Certiorari* in the *Regiſter* 167. *a.* And in this Senſe, in all Actions real, perſonal, and mixt, and not in Pleas of the Crown, is the ſaid Act of 14 *E.* 3. to be intended. And this appears by the ſaid Book in (*b*) 46 *E.* 3. *Amendment* 53. for the Miſpriſion was in the Plea-Roll, and therefore it was not amended, and 46 *E.* 3. 19. *a. b.* in *Treſpaſs*, Diſtreſs iſſued (*c*) *Quindena Trin'* retornable *Quind' Mich.* and the Roll was, *de quinden' Trin' ad Quinden' Hillar'* and at *Quinden' Mich'* it was pleaded to Iſſue, and found for the Pl. and the Def. ſhewed this Matter in Arreſt of Judgm. and the Juſtices would not amend the Roll (which there is called the Original) but awarded the Parties to replead. But in 18 *E.* 3. *Amendment* 56. the Miſtake was in the Entry of the Eſſoign, which was out of the Record or Plea-Roll, and that was Part of the Proceſs, *i. e.* proceeding amendable by the ſaid Act; and that appears more fully after. But upon this Statute there were Diverſity of Opinions in divers Points, *ſc.* If the Juſtices before whom the Plea ſhould be depending by Adjournment, Error, or otherwiſe (*Vide* 17 *Aſſ. p.* 2.) ſhould have Power to amend the Miſtake of the Clerk in Proceſs in Writing a Letter or Syllable, *&c.* alſo, if they might amend it as well after Judgment as before; and theſe Doubts were explained and declared by the Statute of 9 *H.* 5. *c.* 4. *&* 4 *H.* 6. *c.* 3. to extend to all the Juſtices, and as well after as before Judgm. And alſo a great Doubt was conceiv'd on theſe Words, *Writing a Letter or Syllable too much or too little*, if a Word might be amended; and (*d*) 40 *E.* 3. 34. *b. Belknap* ſaith, That the Stat. of

(*a*) F. N. B. 22. i. 24. d.

(*b*) Antea 157. a.

(*c*) Br. Amendment 110.

(*d*) Fitz. Amendment 15. Br. Amendm. 18.

of 14 *E.* 3. *c.* 6. that a (*a*) Letter or Syllable too much or too little in a Word may be amended, but where there wants a Word, of that the Statute ſpeaks nothing. *Thorp*, It was heretofore debated here before us, If a Word fail in the Record, if it might be amended, as if it had failed but in a Syllable or Letter; and Sir *Hugh Green* and I went together to the Counſel, and they were 24 of the Biſhops and Earls, and we (*b*) demanded of them who made the Statute, if the Record might be amended; and the Archbiſhop, or Metropolitan ſaid, That it was a nice Demand, and a vain Queſtion of them, if it might be amended or not; for he ſaid, that it might be as well amended in this Caſe, as if it were but one Letter, for if a Letter or Syllable fail in a Word, it is no Word, wherefore if all the Word fail it may be amended as well as if it failed but of a Letter, or of a Syllable, for there is no more Difference in the one Caſe than in the other. And 39 *E.* 3. 21. *a.* the Queſtion alſo was, if a Word might be amended by the Statute of 14 *E.* 3. and there *Thorp* ſaid, That it ſhall be amended by the Statute, for heretofore we were in doubt of it; and becauſe there was Diverſity of the Sirname in a Writ, it was brought for the ſame Cauſe into Parliament; and the Lords who made the Statute ſaid, Their Meaning was, that in all theſe Caſes the Proceſs ſhould be amended. *Note*, where it is ſaid in 40 *E.* 3. 34. *b.* That the Juſtices went to Counſel; it appears by 39 *E.* 3. 21. *a.* that they went to the Parliament to know the Opinion of thoſe who made the Law, 11 *H.* 4. 70. *a.* In a *Præcipe* the Original was, *Mich. de T.* and the mean Proceſs was, *Mich. T.* and (*c*) (*de*) omitted, and a Protection was caſt by the Name of *M. T.* and the Meſne Proceſs was amended by the Statute of 14 *E.* 3. and that a Word ſhall be amended, within theſe Words *Letter or Syllable*, and *eo potius*, becauſe (*de*) is a Word and Syllable alſo; but the Protection was not amended, becauſe it was made in another Court. 7 *H.* 6. 45. it ſeems that a (*d*) Title ſhall be amended within theſe Words, *Letter or Syllable*. To take away all which Doubts, and to enlarge the Power of the Juſtices in Amendments, the Statute of 8 *H.* 6. *cap.* 12. * was made, and that ſtands upon two general Parts, *ſc.* 1. Againſt corrupting and falſifying of Records, by raſing, interlining, *&c.* which Clauſe doth not concern the Caſe in Queſtion. 2. Againſt the Miſtake of Clerks (by Force of which the Amendment was in the Caſe at Bar) the Words of which Branch are, *And that the King's Judges of the Courts, and Places in which any Record, Proceſs, Word, Plea, Warrant of Attorney, Writ,* (Original, *or* Judicial, for ſo the Statute ſpeaks in the firſt Clauſe) *Pannel, or Return, which for the*

(*a*) Br. Amendment 18. Fitz. Amendment 25.

(*b*) 1 Mod. Rep. 153. See 3 Salk. 30.

(*c*) 2 Roll. 329. Antea 157. a. Br. Protection 35. Br. Miſnomer 22. Br. Variance 33. Fitz. Variance 45. Br. Amend. 101.

(*d*) Antea 156. b. Br. Amend. 34.

* Cumberb. 86.

the Time ſhall be, ſhall have Power to examine ſuch Record, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel and Return, by them, or by their Clerks, and to reform and amend in Affirmance of the Judgment of ſuch Records and Proceſſes, all that to them, in their Diſcretion, ſeemeth to be the Miſpriſion of the Clerk in ſuch Records, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel, and Return, &c. *So that by ſuch Miſpriſion of the Clerk, no Judgment ſhall be reverſed, or annulled.*

Q. Cumberb. 34.

Note Reader, Where the Act of (*a*) 14 *E.* 3. ſpeaks only of Proceſs, this Act of (*b*) 8 *H.* 6. is of far greater Extent, for it extends to Proceſs, and to ſeven other Things, *ſcilicet*, 1. To any Record. 2. Word. 3. Plea. 4. Warrant of Attorney. 5. To a Writ Original and Judicial, as appears by the firſt Branch of the Act. 6. Pannel. 7. Return. So that the Power of the Juſtices, as to Amendment, is by this Statute greatly enlarged. Alſo, 1. This Statute gives them Power of Examination. 2. Of Reformation and Amendment. 3. The Statute expreſſes the Matter which they ſhall reform and amend; *ſcil.* all that which to them, in their Diſcretion, ſeems to be the Miſpriſion of the Clerk in ſuch Records, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel and Return: As to the firſt, they have Power to examine ſuch Records, Proceſs, *&c.* in two Manners: 1. By themſelves. 2. By their Clerks. As to the Power of Reformation and Amendment, they have Power only to do it in Affirmance of the Judgments of ſuch Records, and Proceſſes; but although their Power be thus enlarged, yet the Miſpriſion of the Clerk (as it was in the Act of 14 *E.* 3.) is only to be amended. And becauſe there appears *prima facie*, great Incertainty in our Books concerning Amendments (whereas in Truth there are not any more certain Rules in the Law, if they are well obſerved and underſtood, than in Caſe of Amendment) it will be neceſſary briefly to collect them out of the Books at large, touching the Conſtruction of this Statute. And becauſe this principal Caſe was of the Amendment of an Original; 1. It ſhall be ſhewed in what Caſes the Miſpriſion of the Clerk in Original Writs, ſhall be amended within this Statute, and in what not. Every Original Writ ſtands upon two Parts, one upon an Artificial Form, according to the *Regiſter*, and that the (*c*) Clerk ought *ex Officio* to do by his Knowledge and Skill, without any Inſtruction of the Party: The other upon the true Inſtruction by the Party, of the Truth and Particularity of his Caſe, requiſite to the Compoſing of the Writ, and that the Clerk cannot do

(*a*) 14 E. 3. cap. 6.
(*b*) 8 H. 6. cap. 12.
(*c*) 2 Roll. Rep. 285.

do without the Party: So that an Original Writ may be vicious, by Miſpriſion either of the Clerk, or of the Party: By Miſpriſion of the Clerk in five Manners: 1. By miſtaking the legal Form, 2. By miſtaking of one Word which is not any *Latin* for another; 3. By Omiſſion or Addition of Words; 4. By miſtaking the Record, Specialty, Writing, Copy, Inſtruction, Note or Titling of the Writ delivered to the (*a*) Clerk, or taken by the Clerk for framing the Writ; 5. By Miſpriſion of the Clerk, or Officer, in negligent keeping, or voluntary defacing, *&c.* of a Record, *&c.* And becauſe the Caſe of Amendment in the Caſe at Bar was not for any Miſpriſion of the Bond on which the Writ was grounded (for he has purſued it in all) in which Bond the Defendant was named *Generoſus*, as he was in the Writ. But the Miſpriſion of the Clerk of the Chancery was in this, that he did not purſue the Note or Inſtruction in Writing delivered him, *ſcil.* to name the Defendant Knight *in primo nomine*, becauſe after the making of the Bond, he was made Knight: This Difference is firſt to be obſerved, That if the Original Writ wants legal Form, it is ſuch a (*b*) Miſpriſion which is not amendable by this Act, for the Officers and Clerks of the Chancery are bound by the Duty of their Offices to have Skill and Knowledge in the true Form of Original Writs (which are the (*c*) Foundations upon which the whole Law depends) and therefore if Form of Original Writs ſhall be neglected, Ignorance, the Mother of Error and Barbarouſneſs, will follow, and in the End all will be involved in Confuſion, in Subverſion of the antient Law of the Land, for in this Caſe it is true that *forma dat eſſe*; and therefore it was never the Meaning of the Makers of the Act within theſe general Words, (Miſpriſion of the Clerk in Original Writ) to (*d*) extend it to Miſpriſion of the Form of the Original Writ, which would introduce ſo great Inconvenience; and therewith agrees a notable Judgment, in 22 *E.* 4. 21. *b.* & 22. *a.* in *Eliz. Hatley*'s Caſe, where a Writ of Debt was brought againſt Executors for a Debt due by the Teſtator in the (*e*) *Debet & Detinet*, where by the Form of the Regiſter it ought to be in the *Detinet only*, and there it is reſolved by the whole Court, that it ſhall not be amended, for there a Difference is taken and reſolved, between (*f*) Negligence, and Ignorance of the Clerk; for Negligence, that is, the Overſight of the Clerk in miſtaking, as if he has the Bond or a Copy of the Bond, and doth not follow it, (*g*) the miſtaking, that is Overſight and Negligence in this Caſe, and in all like Caſes, ſhall be amended by the Statute of 8 *Hen.* 6. But (*h*) Ignorance, or not knowing, (for *ſcientia Sciolorum eſt mixta ignorantia*) of the Clerk in the

(*a*) Cr. El. 79.

(*b*) Cr. El. 170. 5 Co. 45. a. b.

(*c*) 3 Co. 38. a. Co. Lit. 73. b. Præf. F. N. B.

(*d*) Cr. El. 119. 402.

(*e*) Br. Amendm. 78. Fitz. Amend 4. 5 Co. 35. b.

(*f*) Cr. El. 170.

(*g*) Cro. El. 79. 258. 435.

(*h*) Cr. El. 119.

the legal Form, and Courſe of the Original, is not a Miſpriſion amendable by the ſaid Statute. So if the Writ be *Præcipe quod ſolvat*, for (*a*) *Præcipe quod reddat*, or *Warr' Chartæ unde pactum habet*, for *unde Chartam habet*, theſe are Faults of Form, and therefore are not amendable by this Act. And for the firſt Part of this Difference, as to the Copy of the Bond, it is held, in 38 *H.* 6. 4. *a.* That where the Clerks of the Chancery uſe to take Titling of the Matter which the Party ſhews them, If the Party to have a *Formedon in Deſcender* ſhew the Clerk that the Land deſcended to one as Son and Heir of the Donees, *&c.* and the Clerk draws the Writ, that the Land deſcended to him as Son, (and omits (*b*) Heir) if the Clerk ſhews his Titling and will teſtify it, it ſhall be amended in the Common Pleas, and that is, by the ſaid Statute of (*c*) 8 *H.* 6. *Vide* 22 *E.* 4. 48. *b.* 38 *H.* 6. 39. *a. b. &* 11 *H.* 7. 41. *b.* agree to the Caſe of a Copy. But if the Writ wants legal Form, it is not amendable, *Vide* 14 *H.* 4. 10, 11. (*d*) 27 *H.* 6. 6. *b.* 11 *H.* 6. 14. 34 *H.* 6. 26. 28 *H.* 6. 11. and upon this Reaſon it has been often adjudged ſince this Stat. of (*e*) 8 *H.* 6. that falſe *Latin* * in an Original Writ ſhall not be amended, becauſe it wants legal Form, and is to be imputed to the Ignorance of the Clerk, 9 *H.* 7. 16. *b.* as (*f*) *hos breve*, for *hoc breve:* And the Common Law is curious in obſerving the Form of the *Regiſter*, and therefore it is adjudged in 6 *E.* 3. 36. *b.* 37. *a.* That where a Treſpaſs done by divers is joint or ſeveral, at the Will of the Plaintiff, yet in an Action againſt *John*, Guardian of the Hoſpital of *B.* and Brother *Rob. L.* and Brother *Rich. F.* inaſmuch as this Default of the Clerk for Want of Form, that theſe Brethren are not named Confrerers, as it ought to be by the Form of the *Regiſter*, the Writ ſhall abate againſt all, altho' the Guardian be well named. But in Treſpaſs againſt two, Miſnoſmer of one of the Defendants ſhall not abate the whole Writ, but it ſhall ſtand againſt the other who is well named; for there *Herle* took the Difference, when the Writ abates by the Plea of the one for Want of Form, altho' the others have pleaded to Iſſue, the Writ ſhall abate againſt all; but altho' one may abate the Writ for Matter in Fact, as by Reaſon of the Miſpriſion of his Name, nevertheleſs the Writ ſhall ſtand againſt the others. *Vide* 2 *H.* 7. 16. 11 *H.* 7. 5, 6. 21 *H.* 7. 31. 7 *E.* 4. 10. 5 *E.* 4. 2. 11 *Aſſ.* 15. 12 *Aſſ. p.* 14. 27 *Aſſ. p.* 45. 9 *H.* 6. 36. 12 *E.* 3. *Brief* 670. 12 *E.* 3. *Brief* 481. 27 *H.* 8. 26. 5. *Plow. Com. in Aſſiſe of Freſh Force.*

But as to the 2d Manner of Miſpriſion in negligent writing of a Word which is not a *Latin* Word, that is amendable, as (*g*) *imaginavit*, for *imaginatus eſt*, it ſhall be amended, as it is adjudged in 11 *H.* 6. 3. 17. So was it adjudg'd in 3 *E.* 6. as *Bendloes*, Serjeant, reports, That where in a Writ of *Aiel* the Writ was *avæ*, (*h*) for *aviæ*, it was amended.

As

(*a*) 22 E. 4. 21. b. Br. Amendm. 78.

(*b*) Fitz. Amendm. 44. Br. Amendm. 56.

(*c*) 8 H. 6. cap. 12.

(*d*) Fitz. Amend. 35. Br. Amend. 6. Br. Brief. 519. Poſtea 161. b.

(*e*) 8 H. 6. cap. 12.

* 1 Lev. 2. &c. ib.

(*f*) Br. Faux Latin. 78. 2 Vent. 173. 2 Sand. 39.

1 Lev. 2. &c.

(*g*) 2 Vent. 173. Fitz. Amendm. 24. Br. Amendment 81.

(*h*) 5 Co. 45. b. Moor 5. 1 And. 24. N. Benl. 33. pl. 53.

As to the third Manner of Miſpriſion in negligent Omiſſion or Addition of a Thing which it appears he himſelf ought to have added, or omitted of Courſe; as by the Omiſſion of *Dei gratia* in the King's Stile, it ſhall be amended. 22 *H.* 6. 8. So 3 *E.* 6. as *Bendloes* Serj. reports, theſe Words in a *Partitione faciend.* (*a*) (*oſtenſur' quare non fecerit*) were left out, and it was amended. *Vide* 35 *H.* 6. 6. 10. *a.* 2 *H.* 7. 11. *b.* 9 *H.* 7. 19. for Addition of that which is apparent ought to be omitted. But the (*b*) Omiſſion, or Addition of any Thing which alters the Form of the Writ, is not amendable, as the Addition, or Omiſſion of (*c*) *Detinet*, as appears in 11 *H.* 6. 14. *a. b.* or the Addition of *debet*, as appears in 22 *E.* 4. 21. *b.* 22. *a.*

(*a*) 5 Co. 45. b. Moor 5. 1 And. 24. Daliſ. 5. pl. 9. N. Bern. 33. pl. 53.

(*b*) Cr. El. 119.

(*c*) 5 Co. 35. b.

As to the fourth Manner of Miſpriſion, *ſc.* of the Record or Speciality, *&c.* *Vide* 21 *H.* 6. 8. 22 *H.* 6. 43. 37 *H.* 6. 34. 19 *H.* 6. *Amendment* 47. 8 *E.* 4. 4.

As to the fifth Manner of Miſpriſion, in Negligence of a Clerk or Officer, not in Writing, *&c.* but in negligent keeping of the Records, or in voluntary defacing of them, whereby the Record becomes imperfect, or erroneous, in *Trin.* 24 *Eliz.* the Caſe was, that *Henry Fitz-allein* late Earl of (*d*) *Arundel*, in the Reign of Queen *Mary* ſuffered a common Recovery of divers Manors, and of Lands and Tenements in the County of *Suſſex*, and the original Writ upon which the Recovery was had, being greater and broader than the other Writs of the ſame File, by the Negligence of the Officer by continual handling of it, a great Part of this Writ, which was more ſpacious than the reſt was obliterate, and worn out, ſo that but one Letter of many of the Names of divers of the ſaid Manors could be perceiv'd, but the Names of the Manors were truly recited as well in the Count (which always briefly recites the Writ) as in the *Habere facias ſeiſinam:* And whether this Original was amendable, or not, was a great Queſtion between *P. Howard* Earl of *Arundel*, Couſin and Heir of the ſaid *Henry* Earl of *Arundel*, and the Lord *Lumley*, to whom the ſaid *Henry* Earl of *Arundel* had conveyed divers of the ſaid Manors, *&c.* And to reſolve this Queſtion, Sir *Chriſtopher Wray* Chief Juſtice of *England*, Sir *Ed. Anderſon*, Ch. Juſt. of the Common Pleas, Sir *Roger Manwood*, Chief Baron of the Exchequer, and all the Juſtices of *England*, aſſembled themſelves rogether. And it was reſolved by them all *una voce*, That the Original Writ ſhould be amended according to the other Parts of the Record, *ſcil.* the Count, and the *Habere facias ſeiſinam*; and that this Miſpriſion and Negligence of the Clerk in keeping of the Original Writ ſhould be amended by this Statute of 8 *H.* 6. for here doth not appear any Want of Knowledge in the Clerk, but Miſpriſion and Negligence in keeping of the Writ, which is a Miſpriſion within the Letter and

(*d*) 1 And. 79, 80.

6 Mod. 138.

Cumberb. 34. & 6 Mod. Turſton's Caſe.

and Meaning of the Act; and *eo potius* in this Case, because it was in a common Recovery suffered by Assent of the Parties for Assurance of Lands. And although it is enacted, That if any Record, or Parcel thereof, Writ, Return, Pannel, Process, or Warrant of Attorney in the King's Courts, *&c.* are voluntarily (*a*) stol'n, carried away, withdrawn, or avoided by any Clerk, that it shall be Felony; that doth not prove, That if the original Writ, or other Part of the Record be voluntarily stolen, *&c.* that it can't be supplied and amended by the other Parts of the Record: For it was resolved that in both Cases, as well where the Record becomes imperfect and erroneous by voluntary Offence of the Clerk, as by his careless Negligence that it should be amended, for all is within this general Word, Misprision of the Clerk. But if such Part of the Record which is so stolen, *&c.* or which appears not, can't be supplied by the other Parts of the Record, nor by any Exemplification made of the Record, then it can't be amended; and *vide* the first Clause of this Act of 8 *H.* 6. gives Remedy amongst others, where any Substraction or Diminution is of any Record, Process, Warrant of Attorney, Original Writ, *&c.* And according to this Resolution a Fine was amended of *Mich.* 8 *Jac.* as appears by the Order and Rule of Court following.

(*a*) Palm. 199. 11 Co. 34. b. 3 Inst. 70, 71, 72, 73. Standf. Pl. Cor. 36. b. Dalt. Just. 386.

6 Mod. 280.

Crompton. *Mich.* 8 Jacobi *Regis.*

Lincoln ff. *In fine levat' in Cur' hic in Octab' Sancti* Hillarii, *Anno Regni Dom'* Eliz' *nuper Reginæ Anglia* 16. *inter* Robertum Tyrwhite *Militem & al' Quer' &* Edmund Dighton, *Armiger' & al' deforc' de Maneriis de Magna* Sturton, *Parva* Sturton, *& al' in Com' præd'*; *Quia constat Cur' super visum pedis ejusdem Finis, quod per humiditatem aeris, & pluviam super illam descenden' idem pes Finis adeo obliteratus est, ut multæ lineæ ejusdem totaliter deletæ, ita ut legi non possunt; tamen per Breve de Conventione, & Dedimus potestatem de cognitione inde capiend' ac per concordiam & notam ejusdem Finis satis liquet & apparet quæ fuerunt verba in eodem pede prius scripti'. Ideo ordinat' est, quod præd' pes Finis cum Proclam' superinde indorsat' per Chirographar' de novo rescribatur, ita quod concord' cum præd' Brevi de Convent', Dedimus potestatem, Concordia, & nota ejusd' Finis, & cum aliis Proclam' indorsat' super pedes Finium ejusd' Term' Et quod præd' pes Finis sic obliterat' a filac' inde abstrahatur, Et præd' pes Finis sic de novo rescript' in loco ejusdem affiletur.*

And this briefly shall suffice for Amend. of the Misp. of the Clerk in an Original Writ. And as to the Case at Bar, the Rule

Rule of the Court was in these Words: *Crompton. Ordinatum est per Cur' hic super auditu Concilii utriusque partis & examinatione Clerici Curssiar' London & attornat' Quer' super Sacramenta sua in Cur' hic, quod hæc additio (Generoso) nomini Defend' in priori parte Brevis original' de debito* 100*li. inde retorn' & affilat' in Banco hic mense Michaelis anno Regni Regis nunc septimo, & omnes mispriſiones in Recordo & proceſſ' ejusd' placiti proinde subsequen' emendentur, & fiat (Militi) secundum instructiones in script' prius deliberat' præf. Curssiar', viz. præd' Breve Originale per præfat' Curssiar' & Recordum, & proceſſ. præd' per Philizar' hujus Curiæ.*

The next Word in the Act of (*a*) 8 *H.* 6. is (Record) and the first Part of the Record is the Count; and briefly a Count which wants Substance shall not be amended in another Term, as appears (*b*) 7 *H.* 6. 26. *a.* (*c*) 35 *H.* 6. 37. *b.* (*d*) 38 *H.* 6. 1. *a.* (*e*) 7 *Ed.* 4. 26. *b.* 9 *Ed.* 4. 5. (*f*) 33 *H.* 6. 2. *a. Vide* 38 *H.* 6. 2. 33. and 30 *H.* 8. *Br. Amendment* 80. for the King's Case.

(*a*) 8 H. 6. cap. 12.

(*b*) Fitz. Count 12. Br. Amendment 30.

(*c*) Br. Amendment 15. Br. Count 22. Br. faits 5. Fitz. forger de Faux. faits 14.

(*d*) Br. Count 504.

(*e*) Br. Count 92.

(*f*) Br. Amendment 8.

But it is enacted by the Statute of (*g*) 36 *E.* 3. *cap.* 15. That by the antient Forms and Terms of Pleaders no Man be prejudiced, so that the Matter of the Action be fully shewed in the Declaration and in the Writ. *Vide Eveleigh's* Case, 13 *Eliz. Dyer* 299. by the Stat. of 36 *E.* 3. *c.* 15. the Declaration having Substance shall (*h*) nor abate for Form. *Vide* 28 *H.* 6. 8. *a.* In a Writ brought by *John Gargrave* against *The. Beamond* on a Bond, and the Bond was, *Noverint, &c. me* Tho. Beamond, *teneri, &c. Jo. Gargrave* (without Addition) and the Writ was, *Præcipe, &c. quod reddat* Joh. Gargrave (*i*) *Armig.* with Addition; and it was moved, that it might be amended by the Stat. for it is the Mispriſion of the Clerk; But it was adjudg'd, That the Writ should abate for this Variance and should not be amended, as it should if it was on the Defendant's Part; for where the Surpluſage is on the Plaintiff's Part, as well in the Writ as in the Count, a Man cannot mend his own Count. And this Judgment was after the said Stat. of (*k*) 8 *H.* 6. which proves that the said first Clause of this very Act, which speaks of Addition or Dimunition, *&c.* extends only to Corruption, and Misdemeanor in Addition or Diminution, and in viciating of a Record, and not where it is done in *rei veritate*, altho' it be by Mispriſion. *Vide* 4 *E.* 4. 14. *b.* (*l*) A Space in the Declaration for the Place where the Obligation was made, was not amendable in another Term. And this which has been said of the Count shall suffice. Other Parts of the Record are, Plea in Bar, Replication, *&c.* and regularly Matter of Substance in them, and especially Matters of Fact shall not be amended in another Term, as Omiſſion of Averment, *Et hoc parat' est verificare, &c.** for in some Cases, as in Avowry, *&c.* it is not of Neceſſity, but Colour which is of Course, and in which there is a Mispriſion of the Clerk, shall

(*g*) 10 Co. 132. b. Cr. Eliz. 85. 2 Bulstr. 214. Dyer 299. pl. 32. Co. Lit. 301. b.

(*h*) Plowd. 83. b. 2 Bulstr 214. Dyer 299. pl. 32.

(*i*) Fitz. Amendment 37. Br. Amendment 93. Fitz. Brief 109. Br. Brief 28. Br. Nugation, &c. 23.

(*k*) 8 H. 6. cap. 12.

(*l*) Fitz. Amendment 49. Br. Amendment 68. Br. Brief 478. Br. Count 64. 1 Rolls 208. 20 H. 6. 18. a. Br. Amend. 5. Fitz. Amendment 28.

* Vide Stat. 4 & 5 Annæ, c. 16.

be amended. And the Record in another Term may be amended by the (*a*) Paper Book of the Office, for it was the Miſpriſion of the Clerk in the entring of it, and no Fault in the Party or his Counſel, (*b*) 27 *H.* 6. 6. *b.* (*c*) 10 *H.* 7. 23. *a. b.* 25. *a.* 11 *H.* 7. 2. *a. b.* (*d*) 20 *H.* 6. 18. *a.* (*e*) 27 *H.* 8. 1. *b.* the Miſpriſion of a Certificate of a Record on a Writ of Error ſhall be amended according to the Record, 22 *E.* 4. 46. and 21 *H.* 7. 41. but that is by the expreſs Proviſion of the ſaid Statute of 8 *H.* 6. for it was the Act of the Judge, which was not amendable by the ſaid Branch of the Act, as ſhall be ſaid after. A Thing apparent to be a Miſpriſion, which the (*f*) Clerk of Courſe ought to have added, without any Inſtruction of the Party, although it be in a material Point, ſhall be amended in another Term. As if in Debt brought, the Defendant pleads *nil debet, & de hoc ponit ſe ſuper Patriam, & præd' Defendens ſimiliter*; where it (*g*) ought to be, *& præd' Querens ſimiliter*, it ſhall be amended by this Act of 8 *H.* 6. 11 *H.* 7. 2. *acc.* which Caſe was not amendable by the Act of 14 *E.* 3. as appears by the Book in 46 *E.* 3. before; for the firſt Act ſpeaks only of Proceſs, and this Act ſpeaks of the Record and Plea. So in an Action brought againſt Sir *Rog. Townſend*, he pleaded in Bar, and concluded, which Matter *præd' Johan'* is ready to aver, where it ſhould be *Rogerus*, and it was amended by the Advice of all the Juſtices; as it is reported in 11 *H.* 7. 25. *a.* And as to the Writ of *Niſi prius*, it is to be known, That the Miſpriſion of the Clerk of the Treaſury, who writes it, is alſo therein amendable by this Statute, and to be made according to the Record, but with this Caution, *ſcil.* That the Record of *Niſi prius* have ſufficient Matter in it either expreſſed or implied, to give Authority to the Juſtices of *Niſi prius* to try the Iſſue; for they cannot try any Iſſue by Force of the Statutes made thereof, without Authority given to them by Writ of *Niſi prius*, and ſo it is adjudged in 11 *H.* 6. 11. *a. b.* in Debt againſt *J. S.* Huſbandman; Iſſue was taken, if he was Huſbandman *die impetrati' Brevis*; and the Writ of *Niſi prius* was, whether he was Huſbandman (omitting theſe Words, *die* (*h*) *impetrationis Brevis*) which was the material Point of the Iſſue; but the Roll was well, and the Jury paſſed for the Plaintiff, and found that the Defendant was Huſbandman *die Impetrationis Brevis*, and the Writ of *Niſi prius* could not be amended by the Stat. of 8 *H.* 6. becauſe the Juſtices of *Niſi prius* have no Power to try the Iſſue contain'd in the Record, becauſe *die impetr' Brevis* was omitted in the *Niſi prius*; and if the Juſtices of *Niſi prius* had taken the Verdict according to the Iſſue in the Writ of *Niſi prius* that he was Huſbandman generally, without ſaying *die impetrat' Brevis*, it had been contrary to the Roll: wherefore it was awarded, That the Plaintiff ſhould ſue a *Venire facias de novo*. But 9 *Eliz. Dyer* 260, 261. *in partitione fac'* by *Wolton* againſt (*i*) *Anthony Cook* and *Temple*, who appeared, and *Temple*

(*a*) Cr. Eliz. 258. Salk. 50. 51.

(*b*) Fitz. Amendment 35. Br. Amendm 6. Br. Brief 519. Antea 159. b.

(*c*) Br. Amendment 112.

(*d*) Br. Amendment 5. Fitz. Amend. 28.

(*e*) Br. Amend. 1.

(*f*) Cr. Car. 38. Cr. Jac. 64, 65.

(*g*) Cr. Jac. 587. 1 Rolls 200. 3 Salk. 31. Skinner 591.

(*h*) Fitz. Amendment 25. Br. Amend. 82. Salk. 48, 49.

(*i*) 1 Rolls 202. Dyer 260, 261. pl. 24, 25. Cr. Car. 54, 278.

2 Brownl. 47. 3 Bulſtr. 161. Yelv. 109. Cr. Eliz. 776. Palm. 524. Moor 681.

confeſſed the Partition, and Judgm. given accordingly, *ſed ceſſet executio*. *Cook* convey'd Title in ſeveralty, and traverſed the Suppoſal of the Writ and Count by *abſque hoc*, the Pl. maintained the Writ and Count, *& hoc petit quod inquiratur per Patriam, & præd'* Anthonius *ſimiliter, ideo* 12, *&c.* And in the Record of *Niſi prius* the Iſſue was well recited and no Part of it omitted; but where the Pl. concluded, *& hoc petit quod inquiratur per Patriam*, by the Negligence of the Clerk of the Treaſury, the Writ of *Niſi prius* was, *& præd' ſimiliter*, omitting this Word *Anthonius* in the cloſe and joining of the Iſſue. And farther, the Jury entred in the Record of *Niſi prius* was, *Inter Wotton* Plaintiff and *Cook* and *Temple* Defen. where *Temple* had made a Confeſſion of the Partition before, and ſo a Stranger to the Iſſue: But the Record which warranted it was well enough; and notwithſtanding theſe Faults and Miſpriſions, the Iſſue was tried at *Niſi prius*, and afterwards by the Rule of the Court of Common Pleas, the Verdict was well taken, and the ſaid Miſpriſions were amended; for ſufficient Authority was given by the Writ of *Niſi prius* (which is but the Tranſcript of the Record) to try the Iſſue, and to take the Verdict. If a Man declare of Damages of 100 *li.* and the Record of *Niſi prius* is 100 *s.* and the Jury give Damages 20 *li.* the (*a*) *Niſi prius* ſhall be amended and made 100 *li.* according to the Roll; for it is the Miſpriſion of the Clerk, which doth not change the Iſſue. *Vide* 11 *H.* 7. 1. *b.* 10 *H.* 7. 25. *a. b.* and ſo was it adjudged in 2 *H.* 4. 6. *a. Vide* 39 *E.* 3. *Br.* 105. (*b*) 7 *E.* 4. 15. *vide* after, when Miſpriſion of the Clerk in the Entry of the Verdict or Judgment, which are other Parts of the Record, ſhall be amended. As to (Word) that has been explained before.

As to this Word (Plea) that has been explained before in the Word (Record) which includes it.

As to (*c*) (Warrant of Attorney) See * 23 *Hen.* 8. *Amendment* 85. 24 *Hen.* 8. *Amendment* 47. 2 *Ma. Dyer* (*d*) 105. 2 *Eliz. Dyer* (*e*) 180. 5 *Eliz. Dyer* (*f*) 225. 6 *Eliz. Dyer* (*g*) 231. But when no Warrant of Attorney is put in, it is not remedied by this Act. As to Pannel and Return, in what Caſes Miſpriſions of them ſhall be amended within this Stat. *Vide* (*h*) 2 *E.* 4. 7. *a. b.* 9 *E.* 4. 14. *a.* 33 *H.* 6. 42. after the Sheriff is removed, or dead, *&c.* 37 *H.* 6. 12. 3 *H.* 7. 14. 12 *H.* 7. 19. But no Return is not helped by this Statute.

And it is to be obſerved, That (*i*) thoſe Things which are amendable before the Writ of Error brought, are amendable after the Writ brought; and if the (*k*) inferior Court doth not amend them, the ſuperior Court may amend them.

It is neceſſary now to ſhew two Things; 1. What Things are not amendable by this Act of *H.* 6. 2. How many of them, not remedied by this Act, are remedied by other Stat. As to the firſt, This Act of 8 *H.* 6. *c.* 12. nor the Act of 8 *H.* 6. *c.* 15. do not extend to 14 Miſpriſions. 1. They do not extend to Want of an Original, but to Miſpriſion of the Clerks, as

(*a*) Antea fol. 157. a. Dyer 261. pl. 25. Br. Amendment 27. 1 Rolls 203. Fitz. Amend. 8. Moor 681.

(*b*) Antea 157. a. Fitz. Amendm. 51. Br. Amendm. 71.

(*c*) Palm. 231. B. N. C. 43.

* 23 Hen. 8. Br. Amendm. 85. in medio. 24 H. 8. Br. Amendment. 47. in fine.

(*d*) Dyer 105. pl. 16. 1 Rolls 289. 1 Rolls Rep. 16.

(*e*) Dyer 180. pl. 48. 1 Roll. 290. Vide 32 H. 8. c. 30. and 28 Eliz. c. 14.

(*f*) Dyer 225. pl. 34. 1 Rolls 290.

(*g*) Dyer 230, 231, pl. 58. 1 Roll. 290. 1 Rolls Rep. 305.

(*h*) Fitz. Amendm. 48. Br. Amend. 67.

(*i*) 2 Rolls Rep. 253.

(*k*) 2 Rolls Rep. 253.

is aforesaid in an Original. 2. They do not extend to Misprision of (*a*) Form in the Original, either false Latin, or Variance from the Register. 3. They do not extend to a material Variance betwixt the Original and the Count. 4. They do not extend to insufficient Trial, *scil.* when the Venue is mistaken; but Misprision of the Clerk in the Entry of the (*b*) Verdict shall be amended in another Term, according to the Note found by the Jurors: So was it adjudged in *Rawlin's Case, in the fourth Part of my Reports* 29 & 30 *Eliz.* 52. *b.* 5. They do not extend to a Jury returned by the Coroners, where the Sheriff ought to return it, or *e contra*. *Vide Bainham's Case, in the fifth Part of my Reports, fol.* 36. *b.* *Vide* 21 & 22 *Eliz. Dyer* 367. 6. They do not extend to a Trial where no Return is endorsed on the *Venire facias*, (*c*) *Rowland's Case, in the fifth Part of my Reports, Mich.* 35 & 36 *El. fol.* 41. *b.* 7. They do not extend to a Trial, where one appears who was not return'd on the *Venire facias*. The Countess of *Rutland's Case, in the fifth Part of my Reports, fol.* 42. 8. They do not extend to a Return of the *Venire facias* without the * Name of the Sheriff. 9. They do not extend to a Jeofail, Want of Colour, insufficient Pleading, or to any other Default of the Party, or of his Counsel. 27 *H.* 6. 10. 18 *E.* 4. 3. 20 *E.* 4. 6. 11 *H.* 6. 28. For the Statute extends only to Misprision of Clerks. 10. For the same Reason they do not extend to any Error or Misprision of the Judges in any Term past. 2 *R.* 3. 11. 9 *E.* 4. 3. *Vide* 30 *H.* 6. 1. But Misprision of the Clerk in the Entry of the Judgment of a Thing which is apparent, (*d*) and not of Necessity, is amendable, as the Misprision of the summing of the Arrearages before and pending the Writ of Annuity, shall be amended, 35 *H.* 8. *Dyer* 55. 11. They do not extend to that, where the Justice of *Nisi prius* takes the Verdict *post ipsum diem* in Bank, 1 *Ma. Dyer* 97. and 33 *H.* 6. 25. 12. They do not extend to Want of Warrant of Attorney. 13. This Stat. nor the Stat. of 32 *H.* 8. *c.* 30. do not extend to help any of the Imperfections or Misprisions, where a Verdict is given on an Issue joined betwixt the Demandant and the (*e*) Vouchee, or the Tenant and the Vouchee, as it was resolv'd *Mich.* 1 & 2 *Phil. & Mar. Bendloe*. But if any Error in Law be in the Judgment, as *ideo in misericordia*, for *pro capiatur*, or *e contra*, or the like; * that is not amendable in another Term, as it has been oftentimes adjudg'd. 14. Nor do they extend to an Appeal, nor to Pleas of the Crown, nor to any Proceeding upon them, for they are excepted, nor to the Amendment of any Exigent, to make any one to be outlawed, &c. 20 *H.* 6. 18. 7 *E.* 4. 16. 22 *E.* 4. 7. 38 *H.* 6. 3. 21 *H.* 7. 34. *Vide* 7 *H.* 4. 27. Now as to Misprisions not remedied, neither by the Statute of 32 *H.* 8. *c.* 30. nor by the Statute of 18 *El. c.* 14. 1. All the said Misprisions not remedied by the said Statute of 8 *H.* 6. remain yet not remedied by any Law or Statute where no Verdict is given upon Issue joined: As if Judgment be

(*a*) 5 Co. 45. a.

16, 17 C. 2. c. 8.

(*b*) Palm. 260. Salk. 53.

(*c*) 5 Co. 41. b. 42. a.

* Palm. 151, 152. 5 Geo. c. 13.

(*d*) 2 Roll. Rep. 253, 254.

(*e*) 11 Co. 6. b. 5 Co. 36. b. 1 Anderf. 26. 27. pl. 60. O. Benl. 12. N. Benl. 37. Benl. in Kelw. 207. b. Benl. in Affi. pl. 5. Hob. 281. 21 Jac. c. 13. * Vide Stat. 4 & 5 Annæ, c. 16.

be given upon Confeſſion, Demurrer, *Nihil dicit*, *non ſum informatus*, or otherwiſe than by Verdict of twelve Men upon Iſſue joined. 2. When a Verdict upon Iſſue tried is given, ten Miſpriſions are not remedied by the Statutes of 32 *H.* 8. 18 *Eliz.* or any other Statute, but yet remain not amendable. 1. Material Variance betwixt the Original and the Count, as it is reſolved in *Biſhop's Caſe*, *in the Fifth Part of my Reports* 37. 2. When the Original or Count wants Subſtance: *Vide Freeman's Caſe*, *Paſch.* 41 *Eliz.* *in the Fifth Part of my Reports*, *fol.* 45. 3. Inſufficient Trial, *ſcil.* when the (*a*) Venue is miſtaken, and Verdict paſſes. 4. When the Return of the Jury is by the Coroner, (*b*) where it ought to be by the Sheriff, or *e converſo*. 5. When the Sheriff doth not put his * Name to the Return of the Jury, 6. Where on the *Venire facias*, *&c.* no Return is endorſed, altho' Verdict paſſes. 7. When one appears, and is ſworn, and amongſt the others gives Verdict who is not (*c*) returned on the *Venire facias*, *&c.* 8. In an Appeal, or Plea of the Crown, as Indictments, *&c.* or any Proceeding upon them; for they are excepted in the Acts of 8 *H.* 6. and 18 *Eliz.* and the Statute of 32 *H.* 8. doth not extend to them. 9. Although Verdict on Iſſue tried be given for the Plaintiff, yet if on (*d*) the whole Record it appears to the Court, that the Plaintiff has no Cauſe of Action, he ſhall never have Judgment, and that is not remedied by any Statute, as it has been oftentimes adjudged. 10. An Error in Law by Miſpriſion of the Judges in the Judgment entred in another Term is not amendable by any Statute. If the Plaintiff in an Aſſize recovers, and has not put in any Warrant of Attorney, this Error was not remedied by the Statute of 32 *H.* 8. as appears 20 *Eliz.* *Dyer* (*e*) 363. for the Words of that Act are, *for Lack of any Warrant of Attorney of the Party againſt whom the Iſſue ſhall be tried*: So that when the Verdict paſſes for the Plaintiff, the Lack of Warrant of Attorney for the Plaintiff is not aided by that Statute, nor *e contra*, but it is helped by the Statute of (*f*) 18 *Eliz.* for there the Words are general, *for Want of any Warrant of Attorney*, ſo that theſe Words extend as well to Lack of Warrant of Attorney of the Party for whom as againſt whom the Verdict paſſes.

(*a*) 21 Jac. c. 13 Hob. 77.
(*b*) 5 Co. 36. b.
* Palm. 151, 152
(*c*) Cr. Car. 278, 279. 1 Jones 302.
(*d*) Antea 120. b. 133. b. 3 Co. 52. b. Wing. Max. 240
(*e*) Dyer 363. pl. 23. Bridg. 73. 1 Rolls Rep. 305. 2 Bulſtr. 245.
(*f*) 18 Eliz. c. 14.

[See now the Stat. of 4 *&* 5 *Annæ*, For the Amendment of the Law, and Quære if that Statute makes the Want of a Warrant of Attorney Error. And note 4 *Mod.* 6. and 5 *Mod.* 258. Damages recovered, and 5 *l.* Coſts *per Jur' hic de incremento adjudicat*; for *per Cur'*, *&c.* and held not Amendable. See 2 *Salk.* 660, *&c.*]

Caſes in the Court of Wards.

MYGHT's *Caſe.*

Trin. 7 Jacobi I.

IN *Curia Wardorum hoc Termino*, It was reſolved by the two Chief Juſtices, and the Chief Baron, and by the Court of Wards, That where *Jeffery Myght* with his own proper Money purchaſed twelve Acres of Land, late *Lumners* to him and *Simond Mond*, an Infant, to them and their Heirs, held of Queen *Eliz.* by Knights-ſervice; That this original Purchaſe could not be averred to be by Colluſion, to take away the Wardſhip which might accrue after the Death of *Jeffery Myght*, becauſe the ſaid *Jeffery* was never ſole Tenant to the King, nor by the Death of *Jeffery* in Reſpect of the Survivor, by Force of Jointenancy, any Wardſhip or Primer Seiſin could accrue to the King. 2. It was reſolved, That no Feoffment which *Jeffery* could make of his Moiety could be averred to be by Colluſion, to take away the Wardſhip or Primer Seiſin due by his Death; for if no Feoffment was made, no Benefit could accrue to the Queen by his Death. Alſo he is out of the Stat. of (*a*) 32 & 34 *H.* 8. for the Stat. of 34 *H.* 8. which is a Stat. of (*b*) Explanation, ſpeaks only of a (*c*) ſole Seiſin in Fee; for the Words are, *having a ſole Eſtate or Intereſt in Fee-ſimple*, &c. 3. It was reſolved, That when the Father makes a Feoffment for the Advancement of his Wife, Preferment of his Children, or Payment of his

Godb. 293. 6 Co. 76. a. Co. Lit. 78. a. 76. a. b. 1 Rolls Rep. 303.

(*a*) 32 H. 8. c. 1. 34 H. 8. c. 5.
(*b*) 3 Co. 31. a. Cr. Car. 34.
(*c*) Cr. Car. 33, 34.

his Debts, that that cannot be averred to be upon Covin or Colluſion, to give Cauſe to the Queen to ſeiſe all the Land; for the Statute of 32 gives Power to the Tenant to diſpoſe two Parts to ſuch Uſes; and the Statute of 34 *H.* 8. explains, That if all be diſpoſed, it ſhall be good for two Parts; and ſo upon the Conſideration of both the Statutes, no Averment can be of any Covin in ſuch Caſes, for the Clauſe of 34 *H.* 8. concerning Covin is: *If any Perſon*, &c. *having Eſtate of Inheritance, of or in any Lands*, &c. *holden of the King by Knights-ſervice in chief, or otherwiſe of the King by Knights-ſervice, hereafter ſhall give, will, deviſe, or aſſign, by Will, or other Act executed in his Life, his Manors*, &c. *by Fraud or Covin to any Perſon for Years, Life or Lives, with one Remainder over in Fee, or with divers Remainders over for Term of Years, Life, or in Tail, with a Remainder over in Fee-ſimple*, &c. *or ſhall convey or make by Fraud or Covin, contrary to the true Meaning of this Act, any Eſtates, Conditions, Meſnalties, Tenures or Conveyances, to the Intent to defraud or deceive the King of his Prerogative, Primer Seiſin*, &c. *which ſhould or ought to accrue or grow*, &c. *by or after the Deceaſe of his or their Tenant by Force, and according to the former Statute, and of this preſent Act and Declaration, and the ſame Eſtates, and other Conveyances, being found by Office to be ſo made and contrived by Covin, Fraud and Deceit, as is aboveſaid, contrary to the true Meaning of the ſaid former Act, and of this Act, that then the King ſhall have as well the Wardſhip of the Body, and Cuſtody of the Lands*, &c. *as Livery, Primer Seiſin*, &c. *which ſhould or ought to appertain to the King, according to the true Intent and Meaning of the ſaid former Act, and of this preſent Act, as though no ſuch Eſtates or Conveyances by Covin had never been had or made.* So that this Branch oftentimes refers this Clauſe of Covin to be contrary to the true Intent and Meaning of the former Act, and of this Act: And therefore it is firſt to be known, what is the true Intent and Meaning of the Act of 32 *H.* 8. And that appears by the Words thereof, ſcil. *That all and ſingular Perſon and Perſons having*, &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, two Parts*, &c. *to or for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts, or otherwiſe, at his Will and Pleaſure.* And the Words of the Statute of 34 *Hen.* 8. *ſhall have full and free Liberty, Power and Authority to give, diſpoſe, will, or aſſign to any Perſon or Perſons*, &c. *two Parts*, &c. Upon which Acts being conſidered together in all their Parts, it was reſolved by the two Chief Juſtices, and the Chief Baron, and the Court of Wards, That in all Caſes when the King's Tenant conveys his Land for

Co. Lit. 78. a. 10 Co. 83. a. 2 Inſt. 110.

Life, Years, or in Tail to his Children, or when a Stranger was joined with the Heir in Eſtate, or when a Remainder was limited in Fee, or when an Eſtate was declared by Will (all which Caſes were out of the Stat. of *Malbridge*, and in which Caſes no Colluſion could have been averred, as appears by Sir *George Curſon*'s Caſe, in the ſixth Part of my *Reports*, and by our Books there cited) that in all ſuch Caſes, now by the expreſs Letter of the Clauſe of 34 *H.* 8. concerning Covin and Colluſion, Covin may be averred for the King but only for a third Part, and not for the two Parts, for both the Acts have enabled the King's Tenants to diſpoſe of two Parts at their Wills and Pleaſures, as appears by the expreſs Letter of both the Acts; and therefore where no Covin could have been alleged for the King in the Caſes aforeſaid, before this Act, now Covin may be alledg'd for the third Part only, and thereof the Act of 32 *H.* 8. puts Example, *ſcil.* That he may convey two Parts for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts (againſt which no Colluſion could be averred at the Common Law) and concludes with general Words, *or otherwiſe at his Will and Pleaſure*: And it was objected, That in Caſe where the King may take Advantage of Colluſion apparent, or averable within the Statute of *Marlbridge*, *c.* 6. *de his qui primogenitos & hæredes infra ætatem exiſtentes feoffare ſolent, &c. ſcil.* to advance only his Son and Heir of an Eſtate in Fee-ſimple, if ſuch Covin be found by Office, the King ſhall take Benefit thereof. To which it was anſwered and reſolved, That by the expreſs Letter of 32 *H.* 8. which enables the Tenant to convey two Parts for the Preferment of his Children, the Queen ſhall have but the third Part in ſuch Caſe, for the ſaid Branch of 32 *H.* 8. concludes, *any Law, Statute, Cuſtom, or other Thing to the contrary notwithſtanding*. And ſo the Statute gives in many Caſes Remedy to the King, where he had not any before; and in ſome Caſe more Benefit to the Subject than he had before. And the Caſe of *Myght* as to this Point was ſuch, That *Jeffery Myght* being ſeiſed of divers Lands and Tenements in the County of *Norfolk*, in Fee, ſome of them held of Queen *Elizabeth in Capite*, made Feoffments of divers Parts of them to divers particular Uſes, to his Brother and others of his Blood, to ſome of them for Life, and to ſome for Years, the Remainder to *Tho. Myght* his Son and Heir apparent in Tail, the Remainder to *Jeffery* his younger Son in Tail, the Remainder to *Anne* his Daughter in Tail, the Remainder to *Ed. Money* in Tail, the Remainder to *Jeffery* his Son in Tail, with ſeveral Remainders over in Tail, the Remainder to *Thomas Myght* in Fee. And it was found by Office after the Death of *Jeffery*, that all the ſaid Eſtates and Feoffments were made by Fraud and Covin, to deceive

6 Co. 76. a. Co. Lit. 78. a.

Co. Lit. 78. a.

1 Co. 94. a. 2 Inſt. 109, 110.

and defraud the late Queen of her Prerogative, Ward and Marriage, and that *Thomas* was within the Age of twenty-one Years, and afterwards accompliſh'd his Age of twenty-one Years, and before Livery *Thomas* the Son died without Iſſue; after whoſe Death another Office was found, *Anno tertio Jacobi*, with all the Special Matter, and Queen *Elizabeth* granted the Ward and Marriage of *Thomas* the Son, to *R. Chamberlain*, &c. and that *Thomas* the Son, after his full Age, died without Iſſue of his Body, before any Livery proſecuted, and that *Jeffery* the Son is his Brother and Heir, and within Age, and alſo next Heir to the ſaid *Jeffery* the Father. And it was reſolved by the Court of Wards, in the Time of Queen *Elizabeth*, That altho' the Covin was found by Office, that yet the Queen ſhould have but a third Part of the Profits, and not the whole, for the Cauſes and Reaſons aforeſaid, and accordingly the Queen had but the third Part of the Profits, which concurs with the Reſolution before. It was alſo reſolved by the Juſtices, That after the Death of *Thomas* without Iſſue, *Jeffery* ſhould not be in Ward, for the Covin could not extend to *Jeffery* as Heir to *Jeffery* the Father, for at the Time of the Feoffment he was the youngeſt Son, and the Remainder was limited to him to take Effect after the Death of *Thomas* the eldeſt Son without Iſſue, and the Queen had once taken Advantage of the Statute after the Death of *Jeffery*, and after the Death of *Thomas* the Son, he could not be in Ward; for *Jeffery* the Son claimed by Force of a Remainder, and *Thomas* had nothing but in Tail, and he is dead without Iſſue. And it was alſo reſolved by the ſaid Juſtices, That if the King's Tenant leave a third Part to the King, that no Covin or Colluſion can be averred for the two Parts, for the Letter and Intent of both the Acts was, that the King ſhould be ſatisfied with the third Part; and therewith agrees *Dyer*, 10 *Eliz.* in the Lord *Dacres* Caſe, where it is ſaid, That this is the very Meaning of both Statutes joined together.

Co. Lit. 78. a. 2 Co. 93. b. 10 Co. 80. b. Dyer 378. pl. 74.

Dyer 276. pl. 50.

DIGBY's *Case.*

Mich. 8 Jac. I.

SIR *Everard Digby* ſeiſed in Fee of the Manor of *Stoke* in in the County of *Rutland*, and of the Manor of *Tilton* in the County of *Leiceſter*, held (by Way of Admittance) of the King by Knights-ſervice *in Capite*, by Act executed in his Life-time, and before any Treaſon by him committed, convey'd the ſaid Manors to the Uſe of himſelf for Life, and afterwards to the Uſe of his Eldeſt Son and Heir apparent in Tail, with divers Remainders over to his other Iſſues; and afterwards the ſaid Sir *Ev. Digby* was attainted and executed for the Heinous and Horrible (*a*) Powder Treaſon, committed after the ſaid Conveyance, his eldeſt Son being then within Age. The Queſtion was, Whether the Wardſhip of the Body, or of the third Part of the ſaid Manors ſhould be to the King, by Force of the Statutes of 32 & 34 *H.* 8. And it was reſolved by the two Chief Juſtices, the Chief Baron, and the whole Court of Wards, That the King ſhall never have (*b*) Wardſhip or Primer-ſeiſin, but where there is an Heir general or ſpecial. For the ſaid Statutes of (*c*) 32 & 34 *H.* 8. give Wardſhip or Primer-ſeiſin to the King in divers Caſes where there is no Deſcent; as if the King's Tenant conveys his Land for the Advancement of his Wife, Preferment of his Children, or Payment of his Debts; but doth not give Wardſhip or Primer-ſeiſin in any Caſe where there is not any Heir general or ſpecial; becauſe Wardſhip or Primer ſeiſin ought to be of the Land of ſome Anceſtor who has an Heir. And the Words of the Writ of *Diem clauſit extremum*, or *Mandamus*, as well after as before the ſaid Statutes are, *Et quis propinquior Hæres ejus ſit.* Alſo Livery ought to be ſued in the Name of their Heir: But it was agreed, that in ſome Caſe the King ſhall have Wardſhip, or Primer-

Neiſin

(*a*) Baker's Chron. 433. Wilſon's Hiſt. 29.

(*b*) 10 Co. 85. a.

(*c*) 32 H. 8. c. 1. 34 H. 8. c. 5. Co. Lit. 78. a.

Co. Lit. fol. 78. a.

10 Co. 85. a. F. N. B. 251, 252. k. 353. b. Dy. 155. pl. 22.

Seiſin of the Son, altho' the Father be Attainted of Treaſon; and thereby the Blood corrupt. And therefore, if (*a*) Tenant in Tail of the King's Gift, to hold by Knights-ſervice *in Capite*, had been Attainted of Treaſon before the Stat. of (*b*) 26 *H.* 8. and died, his Son within Age, in that Caſe, altho' the Blood is corrupt, yet, becauſe by Force of the Statute *de Donis conditionalibus*, the Land notwithſtanding ſuch Attainder deſcends to the Son, he ſhall be in Ward to the King, becauſe he is a ſpecial Heir in ſuch Caſe, and that is proved by the Book of 7 *H.* 4. 32. *a. b.* where the Caſe was, King *R.* 2. by his Letters Patents granted divers Manors, *&c.* to *Thomas Holland* Earl of *Kent*, to have and to hold to him and the Heirs of his Body; and afterwards the Earl, 1 *H.* 4. made an Inſurrection, and levied War againſt the King, and, committing the ſaid Treaſon, was killed without Judgment, his Son *Edw.* within Age; after whoſe Death the ſaid *Thomas* Earl of *Kent* was attainted by Parliament of High Treaſon: And farther it was ordained, That all his Lands in Fee-ſimple, and no other ſhould be forfeited; by Reaſon of which Act of Parliament the King ſeiſed the ſaid Manors, and they were in the King's Hands during the Nonage of *Edw.* the Son, and afterwards the ſaid *Edw.* at his full Age, ſued out of the Chancery a Writ of *Mandamus*, by which the ſaid Gift and Tenure, and that the ſaid *Edward* was Heir *per formam doni* was found; and thereupon the ſaid *Edw.* came into the Chancery, and prayed to have Livery: And there it was reſolved by *Norton*, *Tremain*, *Hulls*, *Hankford* and *Thrining*, That in ſuch Caſe the Son ſhall be in Ward, and altho' the King ſeiſed as for Forfeiture of Treaſon, yet when the King is in Poſſeſſion, the Law will adjudge him in by Reaſon of Wardſhip, becauſe this is his beſt Right; for the Law more reſpects a ſmall Eſtate during the Minority of the Iſſue by right, than a great Eſtate in Fee-ſimple by wrong. But there *Markham* held, That when the King ſeiſes any Land by Forfeiture of Treaſon, or other Cauſe claiming Fee, altho' one who claims a Right in the Land comes into the Chancery, and prays a *Mandamus*, thoſe of the Chancery ſhall not grant it: And *Gaſcoign* ſaid, That all the Matter in this Caſe is, If the Writ of *Mandamus* iſſued well out of the Chancery, or not; and all this appears by the ſaid Book. And it was agreed, That if there be (*c*) Grand-father, Father and Son, and the Grand-father is Tenant in Tail, and the Father is attainted of High Treaſon, and dies, and afterwards the Grand-father dies ſeiſed, altho' the Blood be corrupt, yet the Land ſhall deſcend to the Son *per formam doni*, and this Deſcent ſhall toll an Entry, for the Son is in by Deſcent.

(*a*) 2 Roll. 38.

(*b*) Co. Lit. 392. b. 3 Inſt. 19. 4 Inſt. 42. 1 Co. 22. a. 7 Co. 33. a. 34. b. 9 Co. 140. a 12 Co. 6. 3 Co. 10. b. 26 H. 8. c. 13. 1 Leon. 21. 1 Roll. Rep. 162. 2 Roll. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508. 1 Jones 70, 71, 75, 76, 77, 80. Cro. Car. 428. 2 And. 34. Palm. 439. Hetl. 151, 157, Godb. 300, 303, 307, 308, 309, 311, 313, 315, 321, 322, 323, 324. Co. Lit. 372. b. Plowd. 552. b. Hob. 334, 339, 340, 341, 343, 344, 346, 347, 348. Dyer 332. pl. 27. 343. pl. 46. Co. Ent. 422. a.

(*c*) 3 Co. 10. b. Godb. 315, 316. 2 Roll. Rep. 321, 325, 418, 428, 496, 504, 508. 2 And. 34. Hob. 343. Cro. El. 28. 1 Jones 82. 1 Sid. 199.

The

The Earl of Cumberland's *Case.*

Mich. 7 Jacobi I.

See Skinner 655. Lane 39, 40, 41. IN the great Case of the Earl of *Cumberland*, heard in the Court of Wards this Term, before the Earl of *Salisbury* Master of the Wards and Liveries, with the Assistance of the two Chief Justices and Chief Baron, for the Castle and Manor of *Skipton* in *Craven*, &c. in the County of *York*: It was held by the two Chief Justices and Chief Baron, That where King *E.* 2. by his Letters Patents had granted the said Castle and Manor of *Skipton* in *Craven*, &c. to *Robert de Clifford* in Tail, King *H.* 6. *concessit* (as it was found by Office) *Tho. Domino Clifford* (Cousin and Heir of the Body of the said *Robert de Clifford*) *reversion' præd' Castri & Manerii de Skipton in Craven*, &c. *cum suis pertinen' necnon Castrum & Manerium præd'*, that admitting that the said Grant in Tail to the said *Robert de Clifford* was void (which was only put by Way of Admittance, without Prejudice to any of the Lane 39, 40. Parties) that yet the said Castle and Manor did pass by the later Grant to *Thomas* Lord *Clifford* in Fee-simple in Possession. For the Intent of King *H.* 6. was, that be it in Possession or Reversion, it should pass, and his Words agree with his Intent; for first, he grants the Reversion, if the first Estate Tail was good; and if the Estate Tail was not good, then he farther grants the said Manor in Possession, and so his Words in his Letters Patents agree with his Intention, and both agree with the Law. As many Leases made by the King, and other his Progenitors before him, to one to begin after the Determination of such a Lease, if the Lease be good, and if the Lease be not good, from such a Feast, and such Leases are good. Note Reader, As to the

the Recital of an Eſtate Tail, or Leaſe for Life or Years, by theſe Words, *mentionatur fore concedi*, or *dimitti*, *&c.* it was but of late, (and yet of good) Invention, but the antient Form was to recite the firſt Grant, and to grant the Reverſion, and farther to grant the Lands in Poſſeſſion, and theſe ſeveral Grants in (*a*) a Patent are as good and ſtrong in Law as if the King by a Patent had recited the Eſtate Tail, and granted the Reverſion, and by another Patent had granted the Land in Poſſeſſion; without Queſtion the one or the other will be good; ſo is it when the ſeveral Grants are contained in one and the ſame Patent; for (*b*) *fruſtra fit per plura, quod fieri poteſt per pauciora.* And the Opinion of (*c*) *Huſſy*, C. J. in 9 *H.* 7. 2. *a. b.* is good Law, if it be well underſtood, for *non in legendo, ſed in intelligendo leges conſiſtunt.* For where he ſaith, It is clear, if the King intending to ratify and confirm a Grant made by his Predeceſſor of a Franchiſe by his Letters Patents, and he ratifies and confirms the Eſtate, and farther adds this Clauſe, *Damus & Concedimus*; this is but a void Grant, which ought to be thus intended, that for Fear of a Forfeiture of the Franchiſe, the Patentee took a Confirmation of the Succeſſor King, which is ſufficient (before Office found of the Forfeiture) to diſcharge the Patentee of any Forfeiture; and therefore he well ſaid, that the ſubſequent Words, *Damus & Concedimus*, are but void, for the King in ſuch Caſe has not any Eſtate grantable in Law before Office found, and therefore of Neceſſity it ought to take Effect by Way of Confirmation, and cannot enure by Way of Grant, and all this appears by *Huſſey*'s Reaſon expreſſed in the ſaid Book, why *Damus & Concedimus* in ſuch Caſe are void: For (as he ſaith) (if) it ſhall not paſs by this Confirmation and by Grant, then it ſhall enure by Way of Confirmation, and not by Way of Grant, *Vide* 11 *E.* 4. 1. *b.* 7 *H.* 7. 14. *a. b. Plow. Com.* 397. But in the Caſe at Bar, there is not any Confirmation which preſuppoſes that the King has but a Title or Right not grantable, but both Eſtates as well of the Reverſion as of the Poſſeſſion are grantable Eſtates, and ſo not like the ſaid Caſe put by *Huſſy*. And when the King's Charter may be taken to (*d*) two Intents, and both Intents are of Effect and good, in many Caſes it ſhall be taken to ſuch Intent which is moſt beneficial for the King; but if it may be taken to one (*e*) Intent of Effect and good, and to another Intent void and of none Effect, it ſhall be taken and conſtrued according to ſuch Intent, that the King's Grant ſhall take Effect, and which in Judgment of Law ſtands with the King's Intent, for it was not the King's Intent to make a void Grant; and therewith agrees the Book in (*f*) 21 *E.* 4. 44. in the Abbot of *Waltham*'s Caſe: The Reaſon and Rule of which

(*a*) Cart. 140.

(*b*) 9 Co. 95. b. Co. Lit. 362. b. 3 Bulſtr. 170. Noy 164. 1 Roll. Rep. 85. Hard. 113.

(*c*) Plowd. 397. b.

(*d*) 1 Co. 45. a. 8 Co. 56. a. 10 Co. 67. b. 11 Co. 11. a. b. Bulſtr. 6. Kelw. 175. a. 198. a. 2 Sid. 141. 3 Leon. 243. 2 Roll. 200. 2 R. 3. 4. a. b.

(*e*) Antea 56. a. 6 Co. 56. a. 11 Co. 11. a. b.

(*f*) 1 Co. 45. a. 8 Co. 56. a. 11 Co. 11. b.

3 Keb. 234. Dyer 269. pl. 19. Br. Patent, 71, 90. Br. Exemption 9. Br. Expoſition 28. Plowd. 32. a. 126. a. 143. b. 331. b. Fitz. Grant 29. Moor. 165. Hard. 500. 2 Roll. Rep. 275. 2 Sid. 82.

Book

Book over-rule the Caſe now in Queſtion: *ſcil.* either to make the Grant good, either of the Reverſion, if the former Grant in Tail was good, or of the Poſſeſſion, if the former Grant was void, or if no Grant was made *omnino*; but not to make the King's Grant utterly void, as well of the Reverſion as of the Poſſeſſion, when the King has either the Reverſion or the Poſſeſſion in him. So it was held, If the King grants *totum illud Maneriam ſive firmam de D.* or *totam illam Rectoriam ſive Advocationem de D.* that if the King has a Manor, or a Farm and no Manor, or a Rectory Impropriate, or an Advowſon and no Rectory, that which the King has ſhall paſs; for the Effect of the Grant is, be it a Manor or Farm, Rectory Impropriate or Advowſon, that which the King in Truth has, ſhall paſs.

Paris Stoughter's *Caſe.*

Hill. 7 Jacobi 1.

Which began Mich. 7. *of the ſame King.*

PAris Stoughter was ſeiſed of the Manor of *Over-ſtoughter* in the County of *Glouceſter*, to him and the Heirs Males of his Body, and had Iſſue *Chambers Stoughter*, and died: By Writ of *Mandamus*, *Anno* 2 *Jac.* it was found, That the ſaid *Paris* was ſeiſed of the ſaid Manor, as is aforeſaid, and died ſeiſed the 22d *Feb. Anno* 40 *Eliz.* and that *Chambers* was his Son and Heir; and that the ſaid Manor was held at the Time of the Death of the ſaid *Paris* of Queen *Eliz.* as of her Manor of *Nether-hall* in the ſaid County, by Fealty and Rent, in free and common Socage, *&c. Trin.* 7 *Jacobi* a *Melius inquirendum* was awarded, reciting the former Office to enquire only of this Point, Whether the ſaid Manor of *Over-ſtoughter* at the Time of the Death of the ſaid *Paris* was held of our Sovereign Lord the King *in Capite* by Knights-ſervice, or otherwiſe by Knights-ſervice. By Virtue of which Writ it was found, that the ſaid Manor was held, at the Time of the Death of the ſaid *Paris*, of the late Queen *Elizabeth* by Knights-ſervice, as of her Manor of *Nether-ſtoughter*, and that at the Time of the taking of the ſame Inquiſition, the ſaid Manor of *Over-ſtoughter* was held of the King which now is, by Knights-ſervice, as of his ſaid Manor of *Nether-hall.* And it was clearly reſolved by the two Chief Juſtices and the Chief Baron, That the ſaid Writ of *Melius inquirendum* was repugnant in itſelf, and gave not Authority Ley. 34.

rity to find such Office as was found. For the said *Paris* died 40 *Eliz.* and the Writ of *Melius inquirendum* was to enquire whether at the Time of the Death of the said *Paris* the said Manor of *O.* was held of our Lord the King which now is, which was impossible and repugnant, that in *Ann.* 40 *El.* the said Manor of *O.* should be held of our Lord the King, who then was King only of *Scotland*, and not of *England*. And altho' the finding was well, yet forasmuch as it was without the Warrant of the Writ, all was insufficient and void, and a new Writ of *Melius inquirendum* ought to be awarded. *Vide F. N. B.* 255. *D.* that a *Melius inquirendum* shall be awarded on a surmise in Court that the Lands are of greater (*a*) yearly Value than is declared in the Office, and by the like Reason on a Surmise that they are held by other Services; or that he is seised of another Estate than is recited in the Office. But it was resolved, That if on the Writ of *Melius inquirendum* in these Cases it be again found against the King, the King shall not have a new Writ of *Melius inquirendum*, and that for three Reasons: 1. Because then there would be no End thereof; but such Writs would issue infinitely, *&* **infinitum in jure reprobatur*. 2. As if a Writ of *Diem clausit extremum*, or *Mandamus*, *&c.* is found against the King, there shall not be a new Writ of *Diem clausit extremum*, or *Mandamus* awarded; so if upon the *Melius* it be found against the King, no *Melius* shall be farther awarded. *Vide* 12 *Eliz. Dyer* (*b*) 292. the *Melius* is in the Nature of the first Writ of *Diem clausit extremum*. 3. If Office be found for the King, the Party grieved may traverse it, and if the Traverse be found against him, it makes an End of the Business. So if it be found for him who tenders the Traverse, it shall bind the King as to this Matter. And so when the first Office is found against the King, and the *Melius inquirendum* also, the King thereby is bound from having another *Melius inquirendum* for the same Matter, for the Comparative Degree is above the Positive, and the Superlative above the Comparative, and not Comparative upon Comparative, no more than Superlative upon Superlative. But if upon the *Melius inquirendum* it be found for the King, yet the Party grieved may traverse it: And it stands with Reason, That when Office is found for the King, that forasmuch as the Party grieved is not concluded by it, but may traverse it; so when it is found against the King, forasmuch as the King cannot traverse it, that he should have a Writ of *Melius inquirendum*, and yet the *Register* has not any Writ in such Case. Note Reader, It appears by the Statute of (*c*) *Lincoln*, made 29 *E.* 1. that at the Common Law, the Escheators used to seise the Lands of the King's Tenants before Office; and therefore it is enacted

(*a*) Dyer 155. pl. 22. F. N. B. 255. b. d. 13 Co. 92.

* 6 Co. 45. a. 7 Co. 44. b. 12 Co. 24. 2 Inst. 340. 2 Bustr. 99. Hob. 159.

(*b*) Co. Lit. 77. b. Dyer 292. pl. 71.

(*c*) Ley. 28. 2 Inst. 206, 689. 28 H. 6. 9. b. Standf. Prær. 81, 82.

enacted by the Statute, That when Inquiſitions are found by Writ before Eſcheators, *quod nihil tenetur de ipſo Dom' Rege, &c. quod ſtatim abſque dilatione mandetur per breve Dom' Reg' de Cancell' præcipiend' quod Eſcheatores de terris & tenementis ſic in manus Dom' Regis per ipſos capt' manus ſuas amoveant omnino, &c. ſalvo ſemper Domino Regi quod ſi poſtea Eſcheatores ſuas manus amoverint per breve ipſius Domini Regis, ut præd' eſt, aliquid contigerit inveniri in Cancellaria vel ad Scaccarium, vel alibi in Cur' ipſius Dom' Regis per quod cuſtodia terrarum aut tenementorum eorundem, de quibus Eſcheatores manus ſuas amoverint in forma præd' Dom' Regi pertineat, quod ſtatim præmuniatur ille per breve de Cancellaria, &c.* And this Act doth not make againſt the ſaid Reſolutions, for two Reaſons. 1. It is a Rule in Law, and affirmed by this Act, that where the King's Hands are once removed by Matter of Record, there for any Title ancienter than the Amover, the King ſhall not reſeiſe upon any new Office found without a *Scire facias*; and that appears in (*a*) 28 *Hen.* 6. 9. *b.* (*b*) 9 *Ed.* 4. 51. *b.* *Vide* 5 *Hen.* 5. 2. *a.* But in the Caſe at Bar there was never any Seiſure into the King's Hands, and by Conſequence there could be no *Amoveas manus*, and therefore this Caſe is clearly out of that Statute. At this Day the Eſcheator (*c*) before Office found, can't ſeiſe any Lands into the King's Hands; but the Seiſure ought to be after Office found; and that appears by the Statute of *W.* 1. *cap.* 24. *Vide* 5 *Ed.* 6. *Br. Office* 55. and many other Books, and ſo is the common Experience at this Day; and therefore the Caſe at Bar is out of the ſaid Statute. And true it is, that after a *Diem clauſit extremum*, or *Mandamus*, *&c.* awarded and found againſt the King, no new Writ of *Diem clauſit extremum*, or *Mandamus*, ſhall iſſue, as it is held in (*d*) 4 *Hen.* 7. 15. *b.* & 16. *a.* 14 *Ed.* 4. 5. *a.* 15 *Ed.* 4. 11. 8 *Eliz.* *Dyer* (*e*) 248, & 249. But in ſuch Caſe a Writ of *Melius inquirendum* ſhall iſſue, as is aforeſaid, and as the common Courſe in the Court of Wards is, and always has been: And with this Difference all the Books are well reconciled, and agreed; *& ſic interpretare & concordare Leges Legibus eſt optimus interpretandi modus.* But in good Diſcretion no *Melius inquirendum* ſhall be awarded after Office found againſt the King, without ſight of ſome Record, or other pregnant Matter for the King, for avoiding of Vexation of the Subject. *Vide* 12 *Eliz.* *Dyer* (*f*) 292. It is found by Office, on a *Diem clauſit extremum*, that the Land was held *de Domina Regina ſed per quæ ſervitia Juratores ignorant*, whereupon a *Melius inquirendum* was awarded, by which the Tenure was found of a Subject, and all other Points certainly found, by that the firſt Office is void in all *per ſenſum Statuti de* 2 *Edw.* 6. (*g*) *cap.* 8. And all theſe Reſolutions were affirm'd for good Law. *Mich.* 8 *Jac.*

(*a*) Br. Scire facias 9. Br. Reſeiſer 1.
(*b*) Br. Scire facias 135. Scanf. præ. 82. b.
(*c*) 2 Inſt. 206, 573. Plowd. 486. a. Br. Office, &c. 55.
(*d*) Br. Office, &c. 33.
(*e*) 2 Inſt. 572. Dyer 248, 249. pl. 81, 82.
(*f*) Hob. 50. Dyer 292. pl. 71. Co. Lit. 77. b.
(*g*) 2 Inſt. 688, 689.

(a) Ley 27, 28. by the ſaid Chief Juſtices and Chief Baron in *Stephen* (a) *Garner*'s Caſe *in Curia Wardorum*, for Lands in *Furſeby* and *Steeping* in the County of *Lincoln*, as to the ſaid Writs of *Melius inquirendum*, where it was found by the firſt Office, that the Lands were held of *Euſtace Hart*, Eſq; and his Wife, as in the Right of his Wife of their Manor of *Steeping*: And upon the *Melius* it was found that the ſaid Lands were held of Sir *Edw. Carre*, Knt. as of his Manor of *Monkthorp*; and notwithſtanding this Variance of the Offices, yet it was reſolv'd *ut ſupra*, That no new Writ of *Melius* ſhould iſſue, for the Reaſons and Cauſes before alledged.

TOUR-

TOURSON's *Caſe.*

Paſch. 8 Jacobi I.

William Tourſon, an Ideot, *a Nativitate*, by Force of a Remainder after the Death of his Father, was jointly ſeiſed with his elder Brother for Term of their Lives; the Leſſor purchaſed the Eſtate of the elder Brother, and took the Body of the Ideot, and all the Profits of the Land, and afterwards *William Tourſon* was found an Ideot *a Nativitate* by Inquiſition: The Queſtion was, Whether the King ſhould have the Meſn Profits of the Moiety from the Time of the firſt Seiſin of the Ideot, or from the Time of the Office; and it was reſolved, that the King ſhould not have the Profits, but after the Office; and yet to ſome Intent the Office ſhall have Relation from the Time of the Birth, *ſcil.* to avoid all Meſn Acts done by the Ideot; and therewith agree *F. N. B.* 202. *e.* and (*a*) 18 *E.* 3. *Scire fac.* 10. 32 *E.* 3. *Scire fac.* 106. 50 *Aſſ. pl.* 2. *&c. Vide Beverley's* Caſe, *in the 4th Part of my Reports* 124, 125. But for the Meſn Profits, it ſhall not have Relation but from the Time of the Office found; for thereby it appears of Record, that the King has Right to ſeiſe the Lands; as if the King's Tenant commits Felony, *Anno* 1 *Jac.* and afterwards *Anno* 3. he is attainted for the ſame Felony, and afterwards *Anno* 4. all is found by Office: Now this Office ſhall have Relation to the Time of the Felony, to avoid all Meſn Alienations and Incumbrances; but for the Meſn Profits, it ſhall have Relation to the Time of the Attainder, for then the King's Title appeared of Record; and therewith agree *Plow. Com.* 488. *&* 38 *Ed.* 3. 31, 32. by *Kirton. Vide* 29 *Hen.* 8. *Br. Chart' de Pardon* 52. and there is a Difference when the King ſhall have the Cuſtody, by Reaſon of a Seigniory, as in Caſe of Wardſhip, there the King after Office found, ſhall have the Meſn Profits from the Time of the Death of the Anceſtor, for there the King has the Cuſto-

(*a*) 4 Co. 126. b. Co. Lit. 247. a. Stanf. Præ. 33. b. 34, 35. 2 Inſt. 14.

Co. Lit. 390, b. 391. Poſtea 171. b.

dy, by Reaſon of his Seigniory, and he loſes his Rent and Services in the mean Time. But the King has the Cuſtody of an Ideot, not in Reſpect of any Seigniory, but *Jure Protectionis ſuæ regiæ*, becauſe his Subject is not able to govern himſelf, nor the Lands or Tenements which he has; and this Protection begins by the Office found. And the Statute *de Prærogativa Regis*, *cap.* 9. ſaith, *quod Rex habebit Cuſtodiam terrarum fatuorum, capiendo Exitus, &c. & inveniet eis Neceſſaria ſua, &c.* by which it appears, that the King ſhall take the Profits from the Time that he is charged with the finding of the Ideot and his Family Neceſſaries, and that is after the Office found; ſo that when the King ſeiſes *Jure Protectionis regiæ*, as in the Caſe at Bar, or *nomine diſtrictionis*, as in Caſe of Alienation of Land *in Capite* without Licence, or of Marriage of his Widow without Licence, there, after Office found, the King ſhall not have any Meſn Profits before the Office, as it is held in 8 *E.* 4. 4. 40 *Aſſ. pl.* 36. But when the King ſeiſes *Ratione prioris Recti ſeu Tituli*, by Reaſon of a former Right or Title, there the King ſhall have the Meſn Profits from the Time of his Right or Title firſt accrued, as 18 *Aſſ. pl.* 18. from the Time of the Condition broke, 41 *Ed.* 3. 21. from the Time of the Alienation of his Tenant in Mortmain; and if the Lands are held of others, from the Time of the Title devolv'd to him, 46 *E.* 3. *Forfeiture* 18. upon the Statute of *Weſtm.* 2. *cap.* 45. which gives the *Contra formam Collationis*, from the Time of the Alienation; for by thoſe Acts the King's Title and Right accrues: *Vide* 35 *E.* 3. *Vill* 22. 40 *Aſſ. pl.* 36. 9 *E.* 4. 5. And in the principal Caſe no Precedent can be found, that the King was anſwered the Meſn Profits before the Office found, but only after the Office, and ſo the *Quære* in *Stamford's Prerogativa Regis*, 34. *b.* is well reſolved.

1 And. 23. Moor 4. Dyer 25, 26. pl. 164.

Stanf. præ. 33. b. 34, &c.

1 Leon. 4. pl. 50. 3 Leon. 175. pl. 226.

Moor 293.

Sir

Sir Gerard Fleetwood's *Caſe.*

Paſch. 8 Jacobi 1.

SIR *William Fleetwood*, *Anno* 35 *Eliz.* was poſſeſſed of an Houſe and certain Lands in *Pynner* in the Pariſh of *Harrow*, in *Harrow* in the County of *Middleſex*, for certain Years yet during, and *Anno* 36 *Eliz.* he became Receiver-General of the Revenue of the Court of Wards, *&c.* and entred into 20 Bonds, each of them 200 *l.* with Condition to make a yearly perfect Accompt before the 20th of *June*, *&c.* and afterwards upon ſeveral Accompts in the Years 36, 37, 38, and 39 *Eliz.* he became indebted to the Queen in great Sums of Money; and he being ſo indebted, by his Indenture, 10 *Feb.* 40 *Eliz.* in Conſideration of 1100 *l.* bargained and ſold the ſaid Leaſe to *James Pemberton*, by Force whereof he entred, and was thereof poſſeſſed; which mean Conveyance, and in Conſideration of 1300 *l.* was ſold to Sir *Gerard Fleetwood*. The Queſtion was, Whether the ſaid Meſſuage and Lands are now extendable, or liable to the King's Debt? And altho' it is at the Election of the Sheriff, either to extend or to ſell a Leaſe, ſo long as it remains in the Debtor's Hands, as appears in the Books of (*a*) 31 *Aſſ. p.* 6. 38 *Aſſ. p.* 4. 44 *E.* 3. 16. 7 *H.* 6. 2. *&c.* yet it was reſolv'd, That the ſaid Sale of the Term ſhould bind the King, becauſe the Term was but a Chattel, and there was no Covin in the Caſe, and a Sale (*c*) *bona fide* of Chattels is good after Judgment, but not (*d*) after Execution awarded, as appears in 2 *Hen.* 4. 14. *per Cur'*, 9 *H.* 6. 58. 11 *H.* 4. 7. and of the Freehold or Inheritance which he has at the Time of the (*e*) Judgment, in Caſe of a common Perſon, and from the Time one becomes the King's Debtor, 5 *Eliz. Dyer* 224, 225. Sir *William* (*f*) *Cavendiſh*'s Caſe. And the Caſe in (*g*) 50 *Aſſ. p.* 4. was urged to the contrary, where the King's Debtor took a Leaſe to him and his Wife for Years, and before Execution the Huſband died, Execution was ſued againſt the Wife, for it was the Act of the Huſband, and he had Power of the Term at

(*a*) Br. Execut. 84. Br. Aſſiſe 318. Br. Extinguiſhment 61.
(*b*) Br. Aſſiſe 347.
(*c*) 2 Roll. 157.
(*d*) Cro. Jac. 451. Cro. El. 174, 181, 440. 2 Roll. 157. Cro. Car. 149. 1 Leon. 145, 304. Kelw. 87. a. 29 Car. 2. c. 3. Moor 352, 873. 1 Roll. 893.
(*e*) Cro. Jac. 451, 452. Cr. Car. 140. Kelw. 87. a. 29 Car. 2. cap. 3.
(*f*) 3 Co. 12. b. 11 Co. 93. a. Plowd. 321. a.
(*g*) 1 Roll. 346.

Godb. 292, 297. 2 Roll. Rep. 300, 302. Hard. 25, 26. Dyer 224, 225. pl. 32, 33. 2 Roll. 156, 157. Plowd. 261. a. 50 Aſſ. pl. 3. Fitz. Execut. 113. B. Execution 143.

at the Time of his Death, and the Wife came to it without valuable Conſideration, and *quodammodo* continued in of the Intereſt of her Huſband. And *Coke*, Chief Juſtice, ſaid, That a Receiver, or other Accomptant who is indebted, ſhall not be in a worſe Caſe than a (*a*) Felon or Traytor, who may, after the Felony or Treaſon, and before Conviction, ſell *bona fide* for his Suſtenance, *&c.* his Chattels, be they real or Perſonal.

(*a*) Co.Lit.391. a. Plowd. 68. a. Antea 270. a.

HALE's

HALE's *Caſe.*

Paſch. 8 Jacobi 1.

BY Office after the Death of Sir *James Hale*, it is found that he died ſeiſed of divers Lands in the County of *Kent* in Fee-ſimple, whereof Part was held of Queen *Eliz.* by Knight's Service *in Capite*, and that *Cheyny Hale* was his Son and Heir, and within the Age of 21 Years, and in Ward to the Queen; and afterwards *Cheyny Hale* accompliſh'd his full Age, as appeared by the Computation of the firſt Office, and ſo he was in Truth, and he tendred his Livery, and was admitted to it, and within the uſual Time given him for the Proſecution of the Livery, by Deed indented and inrolled, he bargained and ſold Part of his ſaid Lands to another in Fee, and died alſo within the ſaid Time. And two Queſtions were moved; 1. If the Livery of the ſaid *Cheyny Hale* be loſt by his Death? 2. Whether the Iſſues and Profits of the Lands ſo aliened, after the Tender of the Livery and Death, are to be anſwered to the King for want of Livery, and for what Time? And it was agreed, That at the Common Law, the King ſhall have Primer Seiſin when the Anceſtor dies, his Heir within Age, and was in Ward, and that the Statute of *Prærogative Regis*, *cap.* 3. is but an Affirmance of the Common Law, *ſcil. Rex habebit primam ſeiſinam, poſt mortem eorum qui de eo tenent in capite de omnibus Terris de quibus, &c. Cujuſcunq; ætatis Hæredes fuerint, cap' Exitus, &c. donec, &c. ceperit homagium hujuſmodi Hæredis.* For when he has been in Ward, he upon his Livery ſhall pay but half a Year's Profit; and when he is of full Age, a whole Year's Profit; and that was the Common Law, for no ſuch Diſtinction is made by the ſaid Act. And it appears by the ſaid Act, That Primer Seiſin is, That the King ſhall take the Profits of the Land, *donec ceperit homagium*, which is as much as to-

1 Leon. 157. Rep. 340.

Lit. Rep. 340. Stamf. Præf. 11. b. 12, &c.

Co. Lit. 77. a.

to ſay, until he has ſued Livery, for upon his Livery he doth Homage; ſo that the King's Intereſt is ſubject to this *donec*, which is a Limitation in Law; then when the Heir, at his full Age, tenders his Livery, which includes tendring of his Homage, it is all that the Heir can do; and therefore if no Laches be afterwards in the Heir in the Proſecution of his Livery, he ſhall have as much Advantage by his Tender, as if he had done Homage, and had had his Livery when he made his Tender, and the convenient Time which the Law gives the Heir to proſecute his Livery out of the King's Hands after Tender, is three (*a*) Months, becauſe many Things are requiſite and neceſſary, with great Care and Diligence, to be well and duly purſued in the Proſecution thereof, than when the Heir dies within the ſaid Time: So that the doing of his Homage, and ſuing out of his Livery without Fault in him, is become impoſſible by the Act of God, (*b*) *impotentia in hoc caſu excuſat legem*, and in Judgment of Law, (*c*) the King's Intereſt by the ſaid Limitation is determined, as if the King had taken the Homage of the Heir when he made the Tender. And with this Reſolution agree all the Precedents of the Court; and therefore when the Heir tenders his Livery, the Court of Wards, for fear of Death, have uſed to take collateral Aſſurance for that which is due to the King. But if the Heir, after he comes of full Age, or if he be of full Age at the Time of the Death of his Anceſtor, dies without any Tender, the Livery is gone, as is aforeſaid. But the King ſhall have all the Meſn Profits 'till the Death, for default of Tender; but the Tender, if it be purſued, or if within the Time it becomes impoſſible, by the Act of God, *ſcil.* the Death of the Heir, there the King by Law is barred from having the Meſn Profits, as is aforeſaid. *Vide Stamford Prærog.* 12, 13, *&c.* And it was reſolved, That in this Caſe the King's Intereſt, by the ſaid Limitation and Act in Law, was determined by the Death of the Heir, ſo that the Bargainee might enter and occupy the Land without any *Monſtrans de droit*, or *Amoveas manum*, *&c.*

(*a*) 6 Mois Lit. Rep. 340.

(*b*) 4 Co. 11. a. 5 Co. 22. a. 4 Co. 11. b. 68. a. 1 Co. 98. a. 9 Co. 132. b. Hard. 387. 1 Co. 98. a. Co. Lit. 29. a.

(*c*) 9 Co. 132. a.

Co. Lit. 77. a. 9 Co. 132. a.

Sir

Sir HENRY CONSTABLE'S *Caſe.*

Paſch. 8 Jacobi 1.

SIR *Henry Conſtable*, Knight, 15 *Decembris*, *Anno* 5 *Jac.* died ſeiſed of an Eſtate in Fee-ſimple of Lands held of the King by Knights Service *in capite*, *Henry Conſtable* his Son and Heir being within Age, and made a Knight in the Life of his Father, 1 *Julii*, *Anno* 7 *Jac.* *Henry* the Son accompliſh'd his Age of 21 Years. *Henry* the Son tender'd his Livery after the Death of his Father before his Age of 21 Years, and continued it: And the Queſtions were, 1. Whether the Profits of the Land ſhould be ſaved to him by the ſaid Tender and Continuance? 2. Whether the King ſhould have the Rates within the Age of 21 Years? And both Queſtions were clearly reſolved againſt the King, and that the King ſhould have Primer Seiſin, as if he had been of 21 Years at the Time of the Death of his Father, becauſe the King, being the Sovereign of Knighthood, has adjudged him of full Age to (*a*) do Knight's Service in the Life of his Father, for the Reaſons reported at large in Sir *Drue Drurie*'s Caſe, *in the Sixth Part of my* Reports, *fol.* 73. All which were affirmed for good Law by the Chief Juſtices, and Chief Baron.

6 Co. 73. &c.

(*a*) Lit. Sect. 103. 6 Co. 73, 74. b. 75. b. 78. b. Cr. Jac. 156, 389. 3 Co. 34. b. Hob. 46, 91. 6 Co. 74. a. Plowd. 268. a.

VIRGIL PARKER's *Case.*

Trin. 8 Jac. I.

(a) 10 Co. 84. a. b.

VIRGIL PARKER, (a) ſeiſed of the Manor of *Fuſhil* in Fee, held of the King by Knight's Service, as of his Dutchy of *Lancaſter*, *Anno* 27 *Eliz.* made a Feoffment of one Half of the ſaid Manor to *John Coxwell*, and others, before Marriage, to the Uſe of himſelf for Life, and afterwards to the Uſe of *Mary Coney*, whom he then intended to marry, for Life, for her Jointure, and afterwards to the Uſe of himſelf in Tail, with divers Remainders over, and afterwards he married the ſaid *Mary*; after which Marriage, *ſc.* 39 *Eliz.* the ſaid *Virgil* leaſed the other Half of the ſaid Manor to the ſaid *John Coxwell*, and *Edward Long*, for divers Years, for Payment of his Debts and Legacies, and afterwards made his Will, and thereby deviſed 1000*l.* in Portions to his younger Children, and died, his Son and Heir within Age. And the Queſtion was, If the King ſhould have the third Part out of the Half of the Manor in Leaſe only, or out of the Wife's Half and this Half alſo? And it was reſolved, That foraſmuch as the Advancement of his Wife is as well within the Statute, as (b) Payment of his Debts, and Preferment of his Children, and foraſmuch as the Operation of the Statute principally takes its Effect by the Death of the King's Tenant; for this Reaſon, altho' the Eſtate of the Wife has the Precedency, it was reſolved, That the King's third Part ſhould be taken (c) equally out of both Halves, and not out of the Half ſo leaſed only. And ſo was it reſolved in *Mich.* 41 & 42 *Eliz.* betwixt *Remington* and *Savage*, and 23 *Eliz.* in *Thynne*'s Caſe; and therewith agrees the Common Experience of the Court of Wards.

(b) Co. Lit. 76. b. 78. a.

(c) 10 Co. 84. a. b. 9 Co. 133. b. Moor 741.

FINIS

The Order of the CASES in this 8th Book.

30 City

The Caſe of the Court of Wards.

F I N I S.