THE

REPORTS

Of that late

REVEREND and LEARNED

JUDGE,

THOMAS OWEN

ESQVIRE;

One of the JUSTICES of the

COMMON PLEAS.

WHEREIN

Are many choice CASES, moſt of them throughly argued by the Learned Serjeants, and after argued and reſolved by the grave JUDGES of thoſe times.

WITH

Many Caſes wherein the differences in the Year-books are reconciled and explained

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With two exact Alphabeticall Tables, the one of the Caſes, and the other of the Principall Matters therein contained.

LONDON,

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TO THE READER:

THis Learned and Reverend Judge, the Author of the Reports following, as he was highly honoured for his profound knowledge in the Lawes of this Nation; and upon that account choſen one of the Queens Serjeants at Law, by that Wiſe Princeſſe, Queen *Elizabeth*: and not long after for his fidelity in that Service, preferred by her to be one of the Judges of the Court of *Common Pleas*; So he had the happineſs to have his Name and Memory perpetuated in thoſe Excellent Parts and Abilities of that accompliſht Gentleman, Sir *Roger Owen*, his Son and Heire, an Eminent Patriot of his Countrey, who performed the office of a pious and dutifull Son, in Erecting a Monument to the Memory of his worthy Father, in the Abby-Church at *Weſtminſter*; where you may ſee a ſhort Hiſtory of this Reverend Perſon. There yet remaines one Monument more, *Omni ære perennius*. Theſe excellent REPORTS drawn by his own hand in a Language then in uſe, and moſt expeditious for that purpoſe. The paines of an Induſtrious Gentleman hath tranſlated them into another Language, more proper to the *Meridian* of this Nation; which Work thou ſhalt find faithfully performed; and ſo ſtrickly and religiouſly, that even thoſe very

things that moſt required alteration, *Viz.* Such Caſes as are miſplaced in reſpect of order of time, keep ſtill the ſame place and ſtation that the Author left them in. The Work it ſelf is a Miſcellany and Collection of choice and ſelect Caſes in the Law, and beſpeaks thy acceptance and entertainment, not onely from the variety of the Subject and matter, which nevertheleſs is ſo comprehenſive, that there is ſcarce any doubt or queſtion in the Law can be raiſed, but it gives light towards the deciſion and reſolution of it: but from the Authority of the Authors ſage Wiſdome and Prudence, which, like a pretious Limbeck, derives unto thee the Spirit and Quinteſſence of thoſe many learned Arguments that were made in theſe Caſes, both at the Bar and Bench. If in naturall Births and Productions it gives value and eſteem to the Iſſue to be deſcended from wiſe and noble Parents, upon that common preſumption, that *Robora Parentum filii referunt.* The conſideration ſhould much more take place in the Reſults and Emanations of the mind and braine, wherein thoſe Tendeys and Traditions muſt neceſſarily be conceived to have the greateſt authority, which are moſt heightned with Experience and Obſervation. Such are the Reports of this Reverend Judge, from which I ſhall no longer detain Thee.

THE

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THE REPORTS OF JUDGE OWEN.

Termino Paſch. anno 26 Eliz.

Leonard *againſt* Stephens.

Rotulo. 1702.

LEONARD chief Prothonotary, brought an Action of Treſpaſſe againſt Stephens; who juſtified, &c. for that Sir Chriſtopher Heyden Knight, was ſeiſed in Fee, and enfeoffed the Defendant, and gave colour to the Plaintiff; The Plaintiff replied, that true it was that Sir Chriſtopher Heydon was ſo ſeiſed, but he being ſo ſeiſed, died ſeiſed of the Premiſſes, and that after his death, they did diſcend to his Son and Heire, who entred and was ſeiſed, and being ſo ſeiſed did enfeoff the Plaintiff: Without that, that the ſaid Sir Chriſtopher Heyden did enfeoff the Defendant, whereupon Iſſue was joyned, and the Jury gave an eſpeciall Verdict to this effect.

That the ſaid Chriſtopher Heyden was ſeiſed as aforeſaid, and made a Leaſe for years to the Defendant by Deed, containing theſe words, *Dedi & conceſſi & confirmavi* to the Defendant and his Heires, with a Letter of Attorney to make Livery.

The Queſtion was, whether this was a Feoffment, or but a Confirmation. Walmſley Serjeant, It is but Confirmation being by Deed, and hath the word Confirmation. Anderſon, By that reaſon he in the Reverſion cannot enfeoff his Leſſee for years by Deed as he may without Deed: but I conceive, that it is at the liberty and choice of the

Lessee either to take it as a Feoffment or a Confirmation. Walmsley, As soon as the Lessee hath accepted the Deed, by that he hath declared his meaning to have it as a Confirmation. Anderson, And when the Lessee doth accept the Livery, doth not that shew his expresse meaning to take it by the Livery, and shall the Livery signifie nothing?

And in Bracebridges Case, where the Tenant in tail made a Bargain and Sale, and made Livery, and the Deed was inrolled within the six months: this was adjudged to be a Discontinuance, and yet the Bargain and Sale makes no discontinuance, which little differs from the case in question. Walmsley, If Tenant in tail be disseised, and it is agreed between the Disseisor and the Disseisee, that the Disseisee shall make a Deed to the Disseisor, who makes a Deed accordingly, it is not in the election of the Disseisor to take this as a Feoffment. Anderson, The Cases differed, for the Disseisee hath no power to make a Feoffment. And adjudged by the Court that it was a good Feoffment, vide 17 Ass. 20. 22 H. 6. 43.

Scire facias by the Queen against Allen.

The Case was, A man recovers damages in an Action on the case, and he assignes parcell of his debt to the Queen before execution, and the Queen thereupon brought a Scire facias. Manwood chief Baron, and all the Court held clearly, that parcell, or a Moyety of this debt could not be assigned over to the Queen. See 22 H. 6. 47. where parcell of a debt upon an Obligation was attached by a forren Attachment.

Beverley against the Arch-bishop of Canterbury.

Quare Impedit,

THomas Beverley brought a Quare Impedit against John Arch-bishop of Canterbury, and Gabriel Cornwall, the case was, That the Queen being intituled to an Advowson by Lapse because that the Incumbent had two Benefices, each of them being of the value of eight pounds per annum, whereby the first by the Statute of 21 H. 8. became void, and after the said Incumbent died, and divers others were presented by the Patrons, who died also, whereby the Church becomes void againe. If the Queen may now take her turn to present, in regard she took not her turn when the first Lapse happened immediatly at the first avoidance, was the question. And after long and serious debate, all the Justices of the Common Pleas did resolve.

That the Queen shal not now have her Presentment, but the Patron, because the Queen hath such presentment by Lapse as the Bishop had, and no other, and could present but to the present avoidance then void: and although Nullum tempus occurrit Regi, yet we must distinguish it thus, for where the King is limited to a time certaine, or to that which in its self is transitory, there the King must do it within the time limited, or in that time wherin the thing to be done hath essence or consistence, or while it remaineth, for otherwise he shall never do it. For if the Grantee of the next avoidance, or Lessee Per auter vie be attaint,

taint, here the King muſt take his intereſt and advantage during the time, viz. during the life of Ceſtui que vie, or within the years of the next avoidance, or otherwiſe he ſhall never have it: the ſame Law is where a ſecond preſentment is granted to the King, and he does not preſent, he ſhall not preſent after. Shuttleworth, we have an Outlawry againſt the Plaintiff, whereupon Judgment was ſtaied: But after Hil. 29 Eliz. The Queens Serjeants ſhewing that the Plaintiff was outlawed; It was argued by Walmſley, that that could not now come into debate, for the plaintiff hath no day in Court after judgment, and it is but a ſurmiſe that the Plaintiff is the ſame party. Windham, In a debt upon an Obligation, the Serjeants may pray the debt for the Queen, and yet it is but a ſurmiſe.

And the opinion of three Juſtices was (for Anderſon was abſent) that the Writ to the Biſhop ought to be ſtaied; but in what manner proceſſe ſhould be made if the Scire facias ſhall iſſue againſt the Plaintiff, they ſaid, they would adviſe concerning the Courſe: But Periam ſaid, that a Scire facias might have iſſued againſt the ancient Incumbent, and then the Queen ſhall bring a Scire facias again, becauſe ſhe had no preſentation. And the Scire facias was brought againſt Beverly. Walmſley, I conceive the Queen ſhall have no Preſentation, for although we have acknowledged our Preſentment, yet before execution we have but a right; As if a Diſſeiſee be outlawed he ſhall not forfeit the profits of his Land; alſo he hath brought a Scire facias, and a Scire facias lies not but by him that is party or privy. Periam, After that we have this Chattell, it is forfeit by Outlawry. Anderſon, The Judgment that he ſhall recover, ſhall not remove the Incumbent, and then the Plaintiff hath but a right; to which Periam and Walmſley agreed: but as to the other point, that the Queen ſhall not have a Scire facias for default of privity, they ſaw no reaſon, for in many Caſes ſhe ſhall have a Scire facias upon a Record between ſtrangers: Anderſon, If I recover in debt and then I am outlawed, ſhall the Queen have this debt? Walmſley, If I recover in a Quare Impedit, and dye, who ſhall have the Preſentment my Executor or my Heire? To which no anſwer was made: But the Court would take advice for the rareneſſe of the Caſe. And it was ſaid to Walmſley that he might demur in Law, if he thought the matter inſufficient, to which Walmſley agreed, and did demur, &c.

An Annuity is granted to a woman for life, who after marries, the Arrears of the Annuity encur, and the wife dies, whereby the Annuity is determined. It was adjudged that the husband ſhall have an Action of Debt at the Common Law: for that an Annuity is more then a Choſe in Action, and may be granted over. And it was agreed by the Court in this caſe, That if a man grant an annuall Rent out of Land in which he hath no intereſt, yet this is a good Annuity to charge the perſon of the Grantor in a Writ of Annuity, 14 H. 4. 29 A. Coke 4th. Rep. 51. A.

Annuity to a woman who marries and dies.

Bragg againſt Brooke.

Second deliverance.

LUcas Bragg brought a Writ of ſecond deliverance againſt Robert Brook, for taking his Cattell in a place called Eaſt Burliſh in the County of Surrey, the Caſe was.

That Sir Thomas Speck was ſeiſed of a Mannor, containing in it ſeverall Copyholds, and the place where, &c. was Copyhold. And the ſaid Sir Thomas being ſo ſeiſed, married, and then died, and the wife 5 Edw. 6. demands the third part of the Mannor for her Dower. Per nomen centum Meſſuagium centum gardinum, tot. acr. terræ, prati, &c. And the wife had Judgment to recover; and the Sheriff aſſigned to her part of the Demeſnes and parcell of the Services and of the Freeholders and Copyholders. And it was reſolved clearly that the Copyholds did not paſſe by the aſſignment; and that ſhe could not grant a Copyhold, for when ſhe demanded her Dower it was at her election and liberty, to demand either a third part of the Mannor, or of the Meſſuages, and when ſhe demanded Per nomen Meſſuagiorum, &c. ſhe cannot then have the Mannor, nor can a Mannor be claimed unleſſe by his name of Corporation, as Anderſon termed it, and not otherwiſe. And the Lands and Acres cannot be called Mannors, and then the grant of a Copyhold by one who hath no Mannor cannot be good. And ſo was the opinion of the Court, and yet the Sheriff had aſſigned to her Demeſnes and Services, and all things which make a Mannor. And 29 Ed. 3. 35. If a Mannor to which an Advowſon is appendant be delivered by the Sheriff in execution by the name of a Mannor, cum pertinentiis, the Advowſon paſſeth alſo; but it is otherwiſe if it be delivered in extent, by the name of Acres, Lands, Meadow, Wood, &c.

Wakefeilds Caſe, 28 Eliz.

Rotulo 607.

Replevin.

WAkefeild brought a Replevin againſt Caſſand, who avowed for Damage-feaſant: And the Plaintiff preſcribed that D. is an ancient Town, &c. and that all the Inhabitants within the ſaid Town (except the Parſon, Infants, and ſome particular houſes) have uſed to have Common to their houſes, &c. The Avowant ſhewed that the houſe to which Common was claimed, was built within thirty years laſt paſt. And whether he ſhall have Common to this new erected houſe was the queſtion on a Demurrer?

Shuttleworth, he ſhall have this Common by preſcription, but not of common right. Gawdy, the Preſcription is againſt common reaſon that he ſhould have Common time out of mind, &c. to that which hath not been thirty years, and he hath excepted the Parſon, Infants, and ſuch particular houſes, and by the ſame reaſon may except all, and therefore it is not good. But it was adjudged no good Preſcription, for if this be a good Preſcription, then any body may create a new houſe, ſo that in long ſpace of time there will be no Common for the ancient Inhabitants. Periam, By ſuch Preſcription the Lord ſhall be barred to improve the Common, which is againſt reaſon. Anderſon, The Common is intire, for if H. hath Common appendant to three Meſſuages, and enfeoff one of one Meſſuage, another of the ſecond, and another

another of the third, the Common in this caſe is gone: But all agreed that it is impoſſible to have a Common time out of mind, &c. for a houſe that is builded within the thirty years.

Mich. 29, and 30 Eliz. Rot. 2299.

Biſhop of Lincolns Caſe.

THe Queen brought a Quare Impedit againſt the Biſhop of Lincoln, and Thomas Leigh, to preſent to the Church of Chalſenut Saint Giles in the County of Bucks. The caſe was thus; H. being qualified took two Benefices which were above the value of eight pounds, and after took a third Benefice above the ſaid value, whereby the firſt Benefice became void, and ſo remained for two years, whereby Title of Lapſe accrued to the Queen, and (before preſentment made by the Queen) the Patron did preſent one A. who being admitted, inſtituted, and inducted, did refuſe to pay 38 l. 2 s. ob. due to the Queen for the Tenths, which matter was certified by the Biſhop into the Exchequer, whereupon and by force of the Statute of the 26 H. 8. the Church is ipſo facto void; wherefore the Biſhop the now Defendant being Patron in right of his Biſhoprick, did preſent Thomas Leigh the other Defendant, againſt whom the Queen brought her Quare Impedit: And it was adjudged by the Court that the Quare Impedit very well lies; for the Recuſancy to pay the Tenths was his own act, and is a Reſignation, and by that reaſon the Church is void, and this ſhall not hinder the Queen of the Lapſe: But if A. the Incumbent who was preſented, dies, being preſented by uſurpation upon the Lapſe to the Queen, yet afterwards the right Patron ſhall preſent again: But when A. the Incumbent doth reſigne and make the Church void by his own Act, viz. by Recuſancy, as in this caſe is done, this may be done by Colluſion, and by ſuch means the Queen may be deprived of her Title by Lapſe: for if this Colluſion between the Biſhop and the Incumbent be ſuffered, then may a ſtranger preſent upon the Title of the Queen, and preſently ſuch Recuſancy and Certificate may be made, by which the Church ſhall become void, and ſo the Queen deprived of the Lapſe. Fenner, this Lapſe is given to the Queen by her Prerogative, but on condition that ſhe take it in due time, for ſuch is the nature of the thing Lapſed, as is in this caſe adjudged, viz. That when the Queen hath Title to preſent by Lapſe, and doth not preſent, but the Patron preſents, and after the Church becomes void by the death of the Incumbent: In this caſe (adjudged by the Court alſo) the Queen cannot preſent; but in this caſe, the avoidance being by privation and not by death, Judgment was entred for the Queen.

Quare Impedit.

Trin. 19 Eliz. in Com. B.

Hales Caſe.

Debt on a Bond.

SAmuel Hales brought an Action of Debt on a Bond againſt Edward Bell, and the Condition of the Bond was, that if the ſaid Bell ſhould pay to the ſaid Hales forty pounds within forty daies next after the return of one Ruſſell into England from the City of Venice beyond the Seas, that then the Obligation to be void: and the Defendant pleaded in Bar that the ſaid Ruſſell was not in Venice, upon which the Plaintiff demurred: And adjudged by all the Juſtices that it was no good plea; for in ſuch caſes where parcell is to be done within the Realm, and parcell out of the Realm, the tryall ſhall be within the Realm, 7 H. 7. 9.

Trin. 28 Eliz. in Com. Ban.

Haverings Caſe. 1974.

Debt by an Adminiſtrator.

HAverington and his wife as Adminiſtratrix of one Iſabell Oram, brought an Action of Debt againſt Rudyand and his wife, Executrix to one Laurence Kidnelly, the Caſe appeared to be thus.

Farmer for thirty years did deviſe to his wife ſo long as ſhe ſhall be ſole and a Widow, the occupation and profits of his terme: And after her Widowhood, the Reſidue of the terme in the Leaſe and his intereſt in it to Reynald his Son; the Deviſor dies, and the wife enters according to the Deviſe: And afterwards he in the Reverſion by Indenture *Dedit & conceſſit, vendidit & Barganizavit totum illud tenementum ſuum*, to the wife and her Heires, and did alſo covenant to make further aſſurance, and to diſcharge the ſaid Tenement of all former Bargains, Sales, Rights, Joyntures, Dowers, Mortgages, Statute-merchants, and of the Staple, Intruſions, Forfeitures, Condemnations, Executions, Arrearages of Rents; and of all other charges (except Rents Services which ſhall be hereafter due to the Lords Paramount) And then the Reverſioner and his wife levied a Fine to the uſes aforeſaid; and after the Deviſee takes husband, and thereupon the Son enters in the terme. And the Adminiſtrator of the wife brought an action of debt upon an Obligation, for the performance of the Covenants of the Indenture againſt the Adminiſtrator of the Reverſioner: And Judgment for the Plaintiff.

And it appeared by the Record that theſe points following were adjudged to be Law, although that the latter matter was onely argued.

1. That the wife of the Reverſioner who had Title of Dower in the Land, is concluded of her right of Dower, by the Declaration of the uſes of the Fine by the husband onely, which Fine is after levied by them joyntly, becauſe no contradiction of the woman appears that ſhe doth not agree to the Uſes which the husband ſolely by his Deed of Indenture had declared.

2. To Deviſe that the wife ſhall have the occupation and profits during

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ring her Widowhood is a good Deviſe of the Land it ſelf, during ſuch time. See Plow. 524. And that no Act which ſhe can do in purchaſing the Inheritance by which the Terme is extinct, ſhall bar the poſſibility which Reynald the Son hath to come, upon the womans marriage.

3. That a Leſſee for years being in poſſeſſion may take a Feoffment although it be by Deed, and may take Livery after the delivery of the Deed, and ſhall be deemed to be in by force of the Feoffment, as in this caſe is pleaded, although that the Leſſee may take the Deed by way of confirmation, and then the Livery is but Surpluſage and void.

4. It was reſolved, that this poſſibility which was in Reynald the Son to have the reſidue of the terme upon the inter-marriage, which at the time of the Feoffment and of the Fine, was but Dormant, ſhall be accounted a former charge and before the Covenant, becauſe of the will which was before the Covenant, and ſhall awake, and have relation before the marriage. As if Tenant in tail of a Rent, purchaſeth the Land out of which the Rent iſſueth, and makes a Feoffment, and covenants that the Land at that time is diſcharged of all former charges, although this charge is not in eſſe, but is in ſuſpence, as it is ſaid 3 H. 7. 12. yet if the Tenant in tail dye, his Iſſue may diſtrain for this Rent, and then is the Covenant broke, for now it ſhall be accounted a former charge before the Feoffment.

Mich. 29, and 30 Eliz. in Com. Ban.

Bretts Caſe.

BRett brought an action of Debt on a Bond againſt Averden, and the Condition of the Bond was to ſtand to the Arbitrement of J.S. who did award that the Defendant ſhould pay ten pounds to Brett, and no time was limited to pay it. The Defendant confeſt the Arbitrement but pleaded in Bar that the Plaintiff hath not required him to pay the money: And the Plaintiff hereupon demurred. Adjudged by the Court, that it is no good plea, for the Defendant at his perill ought to pay the money, and the Plaintiff need not make any requeſt, wherefore Judgment was given for the Plaintiff. Debt on a Bond.

Trin. 29 Eliz. in Com. Ban.

Bucknells Caſe.

BUcknell was robbed in a Hundred within the County of Bucks. and thereupon brought his Action upon the Statute of Wincheſter, becauſe the Theeves were not taken: And Not guilty being pleaded by the Inhabitants, the Jury gave this ſpeciall Verdict, viz. That he was robbed the ſame day alleadged in the Declaration, but in another place and within another Pariſh then that he hath alledged in the Declaration, but that both the Pariſhes were within the ſaid Hundred: Upon which they prayed the Judgment of the Court whether the Inhabitants were guilty. Adjudged by the Court for the Plaintiff, for it is not materiall in what Pariſh he was robbed, ſo it were within the ſame Hundred. Action for Robbery on the Statute of Wincheſter.

Hil. 30 Eliz. in Com. Banc. Rot. 904.

Spittles Caſe.

Replevin.

SPittle brought a Replevin againſt Davis, the Caſe was this. Turk being ſeiſed of Land in Fee, did deviſe parcell thereof to his youngeſt Son. Proviſo, and it is his intent, that if any of his Sons, or any of their Iſſues, ſhall alien or demiſe any of the ſaid Lands deviſed, before they ſhall attain the age of thirty years, that then the other ſhall have the Eſtate, and does not limit any Eſtate: And then the eldeſt Son made a Leaſe before his age of thirty years, and the youngeſt Son enters, and afterwards, and before the age of thirty years he aliens the Land he entred into by reaſon of the limitation: the elder Brother reenters, and demiſed to Spittle the Plaintiff for three years, who put a Horſe into the ground, and Davis by the commandment of the younger brother entred and took the Horſe Damage-feaſant; and Spittle brought a Replevin. And upon the whole matter there was a Remainder: It was reſolved.

1. That this is a limitation, and that the Eſtate ſhall be to ſuch uſe as by the Will is directed untill there be an Alienation, and upon Alienation the Land ſhall go to the other Brother.

2. When the youngeſt Brother hath once entred for the Alienation, then is the Land diſcharged of all Limitations, for otherwiſe the Land ſhall go and come to one and the other upon every Alienation ad infinitum, wherefore all the Judges agreed, that after the one Brother hath entred by reaſon of the limitation, the Land is then for ever diſcharged of the Limitation made by the Will: And Judgment was given accordingly.

Michaells Caſe.

Debt on a Bond;

THomas Michaell brought an Action of Debt on a Bond againſt Stockworth and Andrews; the Jury gave this ſpeciall Verdict: That the ſaid Stockworth and Andrews did ſeale a Bond and delivered it to the Plaintiff as their Deed: and after Iſſue joyned, and before the Niſi prius the Seale of Andrews was taken from the Bond.

Shuttleworth, The Plaintiff ſhall be barred, for it is one entire Deed, and the Seale of one is wanting. And admit (in caſe it goes againſt us) the Judgment be reverſed by Writ of Error, the Plaintiff can have no Action on ſuch Bond: But it was adjudged to be a good Bond; and Judgment for the Plaintiff. See the like caſe in Dyer, Trin. 36 H. 8. 59. A.

Hillari 33 Eliz. in Com. Ban. Rot. 1315.

Richmonds Caſe.

RIchmond brought an Action of Debt againſt Butcher, the caſe was; A man makes a Leaſe for years, reſerving Rent to him and his Executors and Aſſignes, and during the terme the Leſſor dies, and his Heire, who hath the Reverſion, brings an Action of Debt. And it was urged, that the Rent was incident to the Reverſion, and the Heire having the Reverſion ſhall have the Rent alſo as incident to it, as the caſe is in the 27 H. 8. 16. If H. makes a Leaſe for years, rendring Rent, without ſaying any more words, the Heire ſhall have this part, becauſe it ſhall go along with the Reverſion: So in the fifth of Edw. 4. 4. If two Joynt-tenants make a Leaſe for years, rendring Rent to one of them, yet the other ſhall have the Rent alſo, although no mention were made of him; ſo in the 7 H. 4. 223. By the Court, If I make a Feoffment in Fee, rendring a Rent to me, my Heires may diſtraine: And if I grant over this Rent, my Aſſignees in this caſe may diſtraine and avow: ſo in this caſe an Action will lye for the Heire, although he be not mentioned. But adjudged to the contrary by the Court; for when H. palleth Lands from himſelf, the Law gives him liberty to paſſe them in ſuch way and manner as he himſelf will, and this liberty ought to take effect according to the expreſſe words, for the Law will not extend the words further, for the intent ſhall appeare by the words, and then it cannot be here intended that his will was that his Heire ſhall have the Rent, becauſe the words are not ſufficient to give it to his Heire: And therefore note a diverſity when the Law makes a Tenure, and when the party; for if the Law makes a Tenure, the Heire ſhall have the Rent: but otherwiſe where the party makes it, unleſſe there be expreſſe words for the Heire, as in 10 Edw. 4. 19. by Moile, If H. makes a Gift in T. and reſerves no Rent: yet ſhall the Donee hold of the Donor and his Heires, as the Donor holds over; but if he make a Leaſe for yeares, rendring Rent to the Leſſor, the Heire ſhall not have this Rent, for it is a Tenure made by the act of the party. So in the Book of Aſſiſes 86. If a man lets two acres of Land, rendring Rent ten ſhillings for one of them to himſelf by name, without naming his Heires, it is adjudged that the Heire ſhall not have the Rent of this acre. And this is reſembled to the caſe of 12 Edw. 2. Where a man made a Leaſe for yeares, rendring Rent to the Leſſor and his Aſſignes, here none ſhal have the Rent but the Leſſor, and it is void by his death, for his Aſſignee cannot be privy to the Reſervation; and the words of the party ſhall not in any caſe be enlarged, unleſſe there be great inconvenience to be avoided: and his intent and will is performed if he himſelf have the Rent. And if a man reſerve ſuch Rent to him and his Executors, this word Executors is to no purpoſe, for that the Rent cannot be reſerved to them, but the Rent ſhall be extinct by his death: And if he reſerve the Rent to his Heire, and not to himſelf he ſhall not have it, but his Heire, for he ſhall be eſtopped to claime it, againſt his own words and reſervation. And if I make a Leaſe for years, rendring Rent to me during the terme, if I dye without Heire during the terme, the Lord by Eſcheat ſhall not have the Rent: which caſe may be compared to the caſe of Warranty, 6 H. 7. 2. That without mention of the

Debt for rent.

Heires, the Warranty ſhall not bind them: But if a Rent be reſerved to his Aſſignes, and he grants over the Reverſion, here becauſe the Aſſignes were mentioned in the Reſervation, and for that now there is a privity, the Aſſignees ſhall have the Rent, for it ſhall be intended that when he ſpeaks of Aſſignes in the Reſervation, he prefixeth thereby to whom he will Aſſigne the Reſervation, wherefore it was adjudged for the Defendant, vide Dyer 2 Eliz. 180, 181. H. bargaines and ſells Land: Proviſo, that if the Vendor ſhall pay a hundred pounds to the Vendee his Heires or Aſſignes, that then the Bargaine and Sale ſhall be void: by two Juſtices.

The Tender ſhall not be made to the Executors, becauſe the Law will determine to whom the Tender ſhall be made, when the parties themſelves are expreſly agreed.

Mich. 33, and 34 Eliz. in Com. Ban.

Goddard's Caſe.

Confirmation by the Leſſor to the Aſſignee of Tenant for years.

H. makes a Leaſe for years of twenty acres, rendring Rent, the Leſſee grants all his Eſtate in one of the acres to I.S. the Leſſor confirmes the Eſtate of I. S. Reſolved by the Court,

1. That by this confirmation the entire Rent is gone in all the other acres, for being an entire contract and by his own act, there cannot be an occupation for part, and an extinguiſhment for the other part; and in this caſe there is no difference between a ſuſpenſion in part, and an extinguiſhment. If A. makes a Leaſe for yeares of twenty acres, rendring Rent, upon condition that if he does not do ſuch a thing, that then the Leaſe ſhall be void for ten acres; if he performes not the condition, and the Leſſor enters, the entire rent is gone. And it was reſolved that a Leaſe for years was not within the Statute of Quia emptores terrarum, for that Statute extends to an Eſtate in Land of Fee-ſimple. See the Report of Serjeant Benlowes in 14 H. 7. A Warren did extend into three Pariſhes, And a Leaſe was made for years rendring rent, and after the Reverſion was granted to another of all the Warren in one of the Pariſhes, and the Leſſee did attorne. The queſtion was, if the Leſſor ſhould have any part of this rent during the terme, ſo that the rent may be apportioned or not. And the Juſtices ſaid in this Caſe, that neither the Grantor nor the Grantee ſhall have any rent, for the Law is, that no Contract ſhall be apportioned.

2. It was reſolved, that no Leſſor ſhall avow for the arrearages of rent, before the time of Confirmation and extinguiſhment; for H. ſhall not avow for the rent determined; but he may defend himſelfe by way of Juſtification. See where a man may juſtifie the taking by ſpeciall evidence, 19 H. 6. 41. by all the Court, except Askew.

Mich.

Mich 33, and 34 Eliz. in Ban. Reg. Rot. 471.

Wardfords Caſe.

HAddock brought a Writ of Error againſt Wardford upon a Judg- Error.
ment given in the Common Pleas; the caſe was thus: Two Coparceners of a houſe, one of them lets her part to a ſtranger, and the other lets her part to a ſtranger alſo, and then both Leaſes come to the hands of one H. and then one of the Coparceners bargaines and ſells her reverſion to the other Coparcener. The Leſſee commits Waſt Permittendo dictum Meſſuagium cadere, and the grantee of the Reverſion brought an action of Waſt. The Errors aſſigned were,

1. That he brought but one action of Waſt, although of ſeverall Demiſes by ſeverall Leſſors, whereas he ought to have two actions of Waſt. Godfrey, He cannot have an Action in other manner then his Grantor might have before the Grant, and when the reverſion came to him, it can be in other plight then it was before. Gawdy, There is a diverſity when the right is ſeverall, and when the poſſeſſion is ſeverall; for although the poſſeſſion be ſeverall, yet if the right be intire, but one action will lye, as appeares F. N. B. fol. 2: Godfrey, There is difference between the Writ of Right in F.N.B. and this action, for there he was never intituled but onely to the action, but in our caſe the action was once ſeverall, and is like the caſe in F.N.B. 60. where it is ſaid, that a man may have one action of Waſt, and declare upon divers Leaſes, but that is intended where the Leaſes are made by one perſon, and he cited the caſe in 21 H. 7. 39. where it is agreed by all the Juſtices, that if a man hold two acres of one H. by ſeverall Services, and dies without Heire, the Lord ſhall not have one Writ of Eſcheat, but ought to have two Writs.

Popham chief Juſtice did agree with Gawdy, for although that at firſt the Leſſors were intituled to ſeverall Actions, yet by matter ex poſt facto, the Actions may be united: and ſaid, that H. might have an action of Waſte, and declare ex aſſignatione, and alſo ex dimiſſione.

2. Error was aſſigned, that he had aſſigned the Waſte to be committed in the whole houſe, whereas he had but part of the houſe, and Waſte may be brought for part of a houſe.

3. Error was, becauſe the other Coparcener was not joyned with him in the Action. But reſolved that it was good enough: And the Juſtices made this diverſity, viz. When both the parties have an equall Eſtate and Inheritance, and when one of them hath but a particular Eſtate, as in the 27 H. 8. 13. Leſſee for life, and he in the remainder ſhall joyne in an Action of Waſte, but where they had equal eſtate of Inheritance, as two Coparceners, or two Tenants in Common, and one makes a Leaſe, and the Leſſee commits Waſte, there the Writ of Waſte ſhall be brought by the Leſſor only, for it is not like to a perſonall injury done upon an Inheritance; for an action of Waſte is now in the nature of the realty, although that at the Common Law (before the Statute of Gloceſter) there was but a Prohibition, yet the Statute gives the place waſted, and damages, and therefore it is mixt, wherefore both of them ſhall not joyne, and the Writ ſaies, to his diſheritance that made the Leaſe, vide 22 H. 6 24. by the Court, and agreeing with this reſolution.

4. Error

4. Error was, that the Waſte is a permiſſive Waſte, and no ſuch Waſte lies between Coparceners, for each of them are bound to contribution and reparation: but the Court would take no notice of this.

5. Error was in the entring Judgment, for Judgment was entred by default, whereupon a Writ of Inquiry of damages iſſued out to the Sheriff, and the Sheriff went to the place waſted, which he needed not have done. And the Judgment was Quod recuparet locum vaſtatum per viſum Juratorum, which was nought, for the going to the place was Surpluſage. But divers Preſidents were produced to prove that, that was the courſe: as Hilar. Rot. 501. between the Earl of Bedford and William Smith, upon a Demurrer, and a Writ of inquiry of damages, and the Judgment was, Quod recuparet locum vaſtatum per viſum Juratorum, and Trin. 31 H. 8. Rot. 142. and the book of Entries, fol. 620. wherefore Judgment was affirmed.

34 Eliz. in Com. Ban.

Gaytons Caſe.

Reſignation of a Benefice.

RObert Gayton Parſon of the Church of little Eyeſingham in the County of Norfolk, did by Inſtrument in writing reſign his Benefice before Edmund Langdon publick Notary, and others, into the hands of the Biſhop, and the reſignation was abſolute and voluntary, and to the uſe of Miles Moſſe, and Paul Britback, or either of them; And it was further inſerred in the ſaid Inſtrument of Reſignation, Proteſtatione & ſub conditione quod ſi aliqui eorum non admiſſi fuerant per aſſeſſionē Epiſcop. infra ſex menſes, quod tunc hæc preſent. reſignatio mea vacua & pro nulla habeatur, & nunc prout tunc, & tunc prout nunc: and Ceſtuy que uſe, came within the time limited to the Biſhop, and did offer to reſigne to him, which the Biſhop refuſed to except, &c.

Crooke for the Plaintiff, Foraſmuch as the Plaintiff may reſigne on Condition as well as a particular Tenant may ſurrender upon condition: and two Parſons may exchange, and if the eſtate be executed on the one part, and not on the other, that Parſon whoſe part was not executed may have his Benefice again, as it is adjudged in the 46 Ed. 3. But Coke Solicitor, and Godfrey were on the contrary opinion: For that the Incumbent may not transfer his Benefice to another without preſentation, as appeares in the recited caſe of 46 Edw. 3. Alſo the reſignation is not good, and the Condition void, becauſe it is againſt the nature of a Reſignation which muſt be Abſolute, ſponte, pure, & ſimpliciter and is not like to a Condition in Law, as in the ſaid caſe of Exchange in 46 Edw. 3. for the Law doth annex a condition to it, but a collaterall condition cannot be annext by the parties themſelves: Alſo this is an Act Judiciall to which a condition cannot be annext, no more then an Ordinary may admit upon condition, or a Judgment be confeſſed on Condition, which are judiciall Acts.

But admitting the Condition good, yet a new Induction ought to be made by the Ordinary, for the Church became one time void; and is not like to the caſe in 2 R. 2. Quare Impedit 143. where ſentence of deprivation was given, and the ſentence preſently reverſed by Appeal, there need no new Inſtitution, for that the Church was never void. And after in Eaſter Tearm, 36 Eliz. upon Argu-

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ments given in writing by the Civilians to the Judges, the Judgment was entred, Quod querens nihil capiat per billam.

Hiliar. 35 Eliz. in the Kings Bench. Rot. 56.

Carters Caſe.

WIlliam Crow brought an Action on the Caſe againſt Warham Carter for ſpeaking of theſe words; The ſaid William is forſworn and perjured in ſwearing at the common place Bar upon the Deeds which he then had in his hand. Action on the caſe for words.

Harris Serjeant did move in Arreſt of Judgment, for that the words ſhall be conſtrued according to the common and vulgar ſenſe, viz. That he is forſwoꝛne upon the Deeds. But the Court was againſt him: For the vulgar ſenſe is, that men do not uſe to ſweare but upon a Book, and the Plaintiff had Judgment.

Hil. 36 Eliz. in the Kings Bench.

William Bartues Caſe.

WOodroffe and Cooke brought a Prohibition againſt Bartue; the Caſe was thus. Prohibition.

The Abbot of Langley did let Land to one Kaſton for ninety nine years, who let the ſame to Woodroff for ſixty years, who granted parcell of the ſaid Land to Cooke during the whole terme. And Bartue did libell againſt them both in the Spirituall Court for Tythes, and they joyned in a Prohibition.

Godfrey, They may not joyne in a Prohibition, for by the Statute of 34 H. 6. 13. If two men are ſued in the Court Chriſtian for ſlander, battery, &c. which are ſeverall in themſelves, there they cannot joyne in a Prohibition: but where they be ſued for the finding of a Lampe, &c. by reaſon of their Land, there they ſhall joyne; but in this caſe the Tythes are ſeverall. But it was reſolved,

1. That their joyning in the Prohibition was good enough.
2. That the death of one of them ſhall not abate the Writ of Prohibition, becauſe nothing is by them to be recovered, but they are onely to be diſcharged of Tythes.

Paſch. 33 Eliz. in the Kings Bench, Rot. 292.

Haſlewoods Caſe.

THe Lord of a Mannor did avow on the taking of a Gelding as an Eſtrey within his Mannor, and had Judgment to have return and damage to twenty pounds: And hereupon a Writ of Error was brought, and adjudged that no Damages ſhall be had in ſuch caſe: For the Avowant Error in Avowry.

bowant cannot recover damages at the Common Law, and by the Statute of the 7 H.8. and 4. no damages shall be given to the Avowant for Damage-feasant; but where he avowes for Rents, Customes, or Services, and this is neither Rent, Custome, or Service, for that of common right the Estrey belongs to the King, and no common person may have it unlesse by grant, or by prescription, and the Statute is to be taken strickly: for the Avowant for Damage-feasant, or for Rent Charge should not recover Damage by this Statute, before the Statute of 21 H.8.19. where the Plaintiff hath remedy, as it is holden in Dyer 141.B. But because divers Presidents were shewn out of the Common Pleas from time to time since the making that Statute, that damages shall be recovered by the Avowant, who avowes for Amercements, &c. it was said, that it would be very difficult to controll so many Presidents.

Gawdy, no great credit is to be given to such Presidents as passe sub silentio, without any exception taken to them. Another Error was assigned, because the Judgment was to have return averiorum predictorum, whereas there was but one Gelding: wherefore Judgment was reversed, and the Roll markt.

Trin. 36 Eliz. in B. R.

Fulgeambs Case.

Trespass against the Constables of *Cambridge*.

FUlgeambe brought an Action of Trespasse against the Constables of Cambridge; the Case was.

The Plaintiffs horses estrayed into Cambridgeshire, and were thereupon Impounded in Cambridge, and then one A. came with a Commission from the Lord Hunsdon Captaine of Barwick, to take Horses to ride to Barwick, and the Constables delivered to him the Plaintiffs Horses, and then one of the Horses died.

And the opinion of all the Justices was, that the Action did well lye, for the Constables cannot take Horses out of the Pound to deliver them to any by vertue of such a Commission.

Trin. 36 Eliz. in B. R.

Tauntons Case.

Lease on condition.

COles made a Lease to Taunton for ninety nine years, on condition that if he demised it in other manner, then in such manner as he let the same to him, that then it should be lawfull for him to re-enter; the Lessee devises it by his Will to his youngest Son. Resolved, that Rigore Juris, this is a breach of the Condition: for a Devise is an Alienation, as is holden 31 H.8 Dyer 6. and although Conditions shall be taken strickly, yet not directly against the intent of the parties, and the reasonable disposition of the words; and therefore a Devise shall be intended to be within this word, Demise; yet it was said, that it was very hard according to equity that the Estate should be lost: For he intended

tended by this Will to prefer one of his youngeſt Children, and not to break the Condition, and thought not it was any breach of the condition, and for this cauſe ſome doubt was made of the Caſe, but Hil. 38 Eliz. Judgment was given as aforeſaid.

Paſch. 36 Eliz. in B. R. Rot. 41.

Leighs Caſe.

The Queen being ſeiſed of lands as Dutcheſſe of Lancaſter, did make a Leaſe thereof to the Plaintiff, the Leſſee is outed by A. the Plaintiff makes a Leaſe to B. for years, and B. being outed brought an Ejectione firmæ. Ejectment.

1. It was reſolved, that the Queen as Dutcheſſe of Lancaſter cannot be diſſeiſed, for although ſhe be not ſeiſed in jure Coronæ, yet is it in Seiſin of the Queen, and cannot be taken away from her in reſpect of her perſon.

2. Gawdy, and Fenner held that the Leſſee being outed, the terme is turned into a Right, and therefore it hath been adjudged that an Ejectment will lye: as the caſe is in Dyer 29 H. 8. If Tenant in taile, the reverſion in the King ſuffers a Recovery, although this ſhall not be to the prejudice of the Kings Reverſion, yet ſhall it bar the Eſtate-tail. So if a Parſon makes a Leaſe for years, and the Patron and Ordinary confirme it, and the Parſon dies, and during the Vacation the Leſſee is outed, he is hereby outed of his terme, yet is not the Frank-tenement touched.

Clench on the contrary, That he who is outed hath an Eſtate but at ſufferance, for he cannot have an Eſtate for years without a Leaſe, and it is agreed he ſhall not have an Eſtate of Freehold by reaſon of the Reverſion in the Queen, and the poſſeſſion of the Leſſor, ſhall maintain the poſſeſſion of the Leſſee, as well as the poſſeſſion of the Leſſee ſhall keep the Freehold of the Leſſor: and if he have but an Eſtate at ſufferance, then cannot the Leaſe to B. be good: For if Tenant at ſufferance of a common perſon makes a Leaſe for years, this is a Diſſeiſin.

And Popham was of opinion with Gawdy and Fenner, wherefore Judgment was given for the Plaintiff.

I have ſeen a Report 24 Eliz. in the Kings Bench, upon a Demurrer between Edmund Frough and Henry Dire, where the better opinion was, That if one enters on the terme of the Queen, he ſhall not thereby gaine any poſſeſſion; but notwithſtanding the Termor may grant over his Terme: but it was agreed that he ſhall have an *Ejectione firmæ*: for by Plowden an Aſſiſe will lye of a Mill, where the water is divers, for the poſſeſſion of the Mill continues in him. But the Juſtices doubted whether it was an Ejectment, wherefore the parties did compound. In the 4 H. 6. Intruſion. If Leſſee for life, the Remainder in the King be outed, he ſhall have an Aſſiſe.

Trin. 36 Eliz. in C.B. Rot. 134.

Thurſtons Caſe.

Ejectment. GOffe brought an Ejectment againſt Thurſton, the Caſe was this. The Abbot of Kingſwold in Wiltſhire, being ſeiſed of Land in the 28th yeare of H. 8. did (with conſent of the Covent) make a Leaſe for years by Deed indented, and then the Abby came into the hands of H. 8. and from him to Edw. 6 and from him to the preſent Queen.

And it was pleaded that the Defendant hath the Leaſe, and that Henry Thinne did intrude on the Defendant, and made a Leaſe to the Plaintiff, who being ejected by the Defendant brought this Action, and on this matter the parties demurred.

1. It was ſaid that the Plaintiff cannot bring this Action, inaſmuch as Henry Thinne by his entry on Leſſee for years, the Reverſion being in the Queen cannot gaine any poſſeſſion, ſo that nothing paſſeth by his Leaſe to the Plaintiff. But the Court was againſt this, for he is a ſufficient Leſſee to maintain an Action of Ejectment: And it was adjudged in the Exchequer Chamber, that the Queens Leſſee for years being outed may have an Ejectione firmæ, which proves that he is put out of poſſeſſion of his terme; and this very point was in a manner agreed the laſt terme, in the caſe of Norris.

Fenner, If H. enters on the poſſeſſion of the Queen, and makes a Leaſe for years, nothing doth paſſe, and the Leſſee cannot maintain an Ejectione firmæ, for he gains no poſſeſſion at all: but it is on the contrary here when he enters on the Queens Leſſee.

Gawdy, That is no difference, for the Leſſee for years of an Intruder ſhall maintain an Ejectione firmæ: And I have ſeen a Report 34 Eliz. between Badinton and Hawle in the Kings Bench, adjudged, that if the Queens Copyholder be outed, and a Leaſe be made for years by the Intruder, this Leſſee ſhall not have an Ejectment if he be outed, but he ſhall have an Action of Treſpaſſe againſt any ſtranger.

The ſecond exception was taken to the pleading, becauſe the Defendant pleaded in que eſtate del Leſſee del Abbe, without ſhewing how he came to the Eſtate. And by the Court a good exception, for he ſhall be compelled to ſhew how he came to an Eſtate in the terme, inaſmuch as it cannot be by loyall means, vide 1, & 2 Eliz. Dyer 171. that a Que Eſtate of a particular Eſtate of a terme is not good, and 7 Eliz. Dyer 238. where the Plea was of a que Eſtate of a Termor, and exception taken to it; and the difference between it and a Freehold, ſo in the 7 H. 6. 440. it was agreed that H. could not convey an Intereſt by a que Eſtate of a particular Eſtate, as Intail for life, or years, without ſhewing how he came by the Eſtate, be it on the part of the Plaintiff or the Defendant.

The third exception was, that the Defendant pleaded a Leaſe made by the Abbot and Covent by Indenture as it ought to be, without ſaying Hic in curia prolat. which exception was alſo clearly allowed by the Court, for he is privy to it, and therefore he ought to ſhew it. And for theſe two exceptions, but eſpecially for the former. Judgment was given for the Plaintiff.

Mich.

Mich. 36, and 37 Eliz. in C.B.

Palmers Caſe.

PAlmer an utter Barreſter of Lincolns-Inn, brought an Action on the Caſe againſt Boyer for theſe words; Palmer being Steward to I. S. the Defendant in diſcourſe had with I.S. ſaid; I marvail you will have ſuch a paltry Lawyer for your Steward, for he hath as much Law as a Jack a Napes: And the Plaintiff ſhewed all the matter in the Declaration, and that by reaſon of ſuch words he was diſplaced of his Office. Action on the caſe for words.

Williams Serjeant did move, in that the words were not, That he hath no more Law then,&c. for then thoſe words were actionable, but, that he hath as much Law as,&c. for which words no Action will lye. But reſolved by the Court that the Action will lye, for the words are ſlanderous and prejudiciall to his credit, and by reaſon of them he was diſcharged of his Stewardſhip, alſo an Action will lye for ſaying, That he hath as much Law as a Jack an Apes, or my Horſe; becauſe they are unreaſonable creatures, but if he had ſaid, that he hath no more Law then I.S. that is not actionable, although I.S. be no Lawyer. And Judgment was given for the Plaintiff.

Paſch. 35 Eliz. in B. R.

Audleys Caſe.

A Man brought an Action of Debt on an Obligation made by the Father of the Defendant, in which Writ the Defendant was named Son and Heir apparent of the Obligor, & Judgment was given againſt the Defendant, whereupon he brought a Writ of Error, for the Writ does imply that his Father was living, for he is his Heire in truth and in fact, if his Father be dead, and not apparent: To which was anſwered, that that was but Surpluſage which ſhall not abate the Writ, as appeares by the Book of the 10 Edw. 3. But the Court held that Judgment ſhould be reverſt, for he ought to be named Heire, as in debt againſt Executors, he ſhall be named Executor. And Judgment was reverſt.

Trin. 36 Eliz. in B. R.

Downinghams Caſe.

THe Defendant in an Ejectione firmæ pleaded that the Lord of the Manor did enter into the Land of a Copyholder by reaſon of forfeiture for Waſte committed in ſuffering the houſes to be uncovered, by which the timber is become rotten, and did not alledge in facto that the Cuſtome of the Manor is, that ſuch Waſte is a forfeiture, for it was ſaid, that although other Waſte by the Common Law is a forfeiture, Ejectment.

ture, yet this permiſſive Waſte is not. Sed non allocatur: for all Waſte done by a Copyholder is forfeitable.

2. It was reſolved, that if a Copyholder made a Leaſe for yeares which is not according to the Cuſtome of the Manor, yet this Leaſe is good; ſo that the Leſſee may maintain an Ejectione firmæ; for between the Leſſor and the Leſſee, and all other, except the Lord of the Manor, the Leaſe is good, and ſo hath it been ſeverall times adjudged in this Court.

Trin. 36 Eliz. in B. R.

Wiſdomes Caſe.

Action on the caſe for words.

STich brought an Action on the Caſe for ſlanderous words againſt Wiſdome, the words were, There is many a truer and honeſter man hanged, and that there was a Robbery committed whereof he thought him to be one, and that he thought him to be a Horſe-ſtealer.

And it was moved in Arreſt of Judgment that theſe words were not actionable; for it is not ſaid in facto, that he was in the Robbery, or that he was a Horſe-ſtealer in fact, but onely by imagination, that he thought he was ſuch a one: but Judgment was given for the Plaintiff.

Trin. 36 Eliz. in B.R. Rot. 815.

Palmers Caſe.

CHriſtopher Palmer brought an Ejectione firmæ againſt John Humphrey, and declared that one George Hanger the eighteenth day of May, in the ſix and thirtieth year of Eliz. by his Indenture did demiſe unto him a certain peece of Land called the great Aſhbroke, and other peece of Land called Stocking, and alſo divers other peeces of Land naming the peeces, and of one Garden called Muchins Gardein, and of another peece of Meadow called Michins Meade, and of ſeven acres of arable Land, for the terme of two years: by vertue whereof the ſaid Chriſtopher entred, untill the Defendant by force and armes, &c. did eject him, and did ſet forth in his Declaration that the Defendant ejected him out of the ſaid peeces of Land, and yet did not expreſſe the contents thereof in certainty: And upon not-guilty pleaded it was found for the Plaintiff, and for the ſeven arable acres of Land and the Garden, the Court gave their Judgment that it was certain enough, but as to the other peeces of land, the Court was divided: For Popham & Gawdy held that it was certain enough, being in an Ejectione firmæ, which is but in the nature of an Action of Treſpaſſe, and the damages are the principall, and a man may bring an Action of Treſpaſſe for a peece of land, without any other certainty: But Clench and Fenner were on the contrary, for he ought to ſet forth his terme in the land, and then to ſhew the contents thereof, as well in an Ejectment, as in a Precipe quod reddat, by which land is demanded, and a man ſhall have an Ejectione firmæ de una viſgata terræ, but ſhall not have a Precipe quod

quod reddat of one portion of land, by Skeene and Hill, 7 H.4.40. 9 H. 6. 3. 5 H.7.9. And afterwards vide Mich. 37, & 38 Eliz. It was adjudged that this was good enough in an Ejectione firmæ, for there the damages are the principall; but otherwise in a Precipe, for there ought to be a certainty: but in an Assise of Novel Disseisin it is good enough, but afterwards Mich.38,& 39 Eliz. the case was debated in the Exchequer Chamber by Writ of Error, and the Judgment was reversed.

Hil. 36 Eliz. in B. R. Rot. 34.

Walters Case.

LOve brought an Action of Debt against Wotton, who pleaded the Statute of Usury in Bar, and by reason of Misplender, it was awarded by the Court, that the parties should plead De novo, and this Award was entred in this manner, viz. Et quia placitum illud in modo & forma placitat. est sufficiens in lege, the Court awarded that the parties should replead; and hereupon they pleaded, and Judgment for the Plaintiff: and the Defendant brought a Writ of Error in the Exchequer Chamber, which was certified accordingly.

And there Gawdy moved that the Record in this point might be amended, and to have the Record certified de novo into the Exchequer Chamber; for that the first Award is repugnant in it self, for it is awarded that they shall replead, because the Plea est sufficiens, whereas it ought to be that they shall replead, because est minus sufficiens, as the paper books are, and the opinion of the Court was that it could not be amended, because that the fault is in the Judgement it self, which is the act of the Court, and therefore cannot be amended.

Glanvill, It is no Error in the Judgment, for the Judgment is only that they shall replead, but the Error is in the Judgment to the Judgment, and may be well amended, and of the same opinion was Popham.

Mich. 36, and 37 Eliz. in B.R. Rot. 579.

Bartwrights Case

BArtwright brought an Action of Debt upon a Bond against Harris, the Condition was, that if the Defendant did acquit, discharge, and save harmlesse the Plaintiff against an Obligation, in which he and the Defendant were bound to I. S. in 601 l. that then the Obligation should be void. The Defendant said, that Bartwright was sued on this Obligation by I.S. and upon default I.S. had Judgment to recover, and that the Defendant before execution did deliver to the Plaintiff the 601 l. and hereupon the Plaintiff demurred.

Humbert, It is no plea, for he confesseth that the Plaintiff was not yet taken in execution, yet inasmuch as he may be taken, therefore his body, goods, and lands are liable to the execution, and he hath not acquitted nor saved him harmlesse against the Bond of I.S. vide Dyer 186. And the Plaintiff had Judgment, &c.

Greyes

Mich. 36, and 37 Eliz. in B.R. Rot. 25.

Greyes Caſe.

GRey brought an action of Treſpaſſe againſt Bartholmew; the Caſe was: A man did purchaſe divers Fiſhes, *viz.* Carpes, Tenches, Trouts, &c. and put them into his Pond for ſtore, and then died.

The queſtion was, whether the Heire or the Executors ſhould have the Fiſh.

Popham, The Heire ſhall have the Deer in the Park, and by the ſame reaſon, the Fiſh.

Clench, If the Fiſh be ſtolne it is Felony, ſo that it appears there is a property in them, vide 18 Ed. 4. 10 Ed. 4. 14. 22 Aſſ. 98. that ſtealing of Tench out of a Pool is Felony, by which it ſeems they are but Chattels.

Popham, the Book is ſo, and ſo is the Law, but that is of ſtealing Fiſh out of a Trunk, or ſome narrow place where they are put to be taken at will and pleaſure; but otherwiſe it is where they are put into a Pond.

Fenner, He which hath the water ſhall have the Fiſh: And Popham ex aſſenſu curiæ gave Judgment for the Heire. And in the principall caſe the Executors did take the Fiſh with Nets, and the Heire brought a Treſpaſſe and adjudged maintainable. See what Chattels Executors ſhall have, and what not, in 21 H. 7. 26, 10 H 7. 6. & 30. an account will lye for Fiſh in a Fiſh-pond, ſo in the 5 R. 2. Waſte 97. an Action of waſte did lye againſt a Guardian in Chivalry for taking Fiſh out of a Pool by the Statute of Magna Charta; but quære if it lies againſt a Termor or Guardian in Socage upon an Account for Fiſh.

36 Eliz. in B. R. Rot. 767.

Leighs Caſe.

LEigh brought an Ejectione firmæ for a Chamber againſt Shaw, the Caſe was; A Leaſe was made of the Rectory of Thingford in Eſſex, and of the Glebe, excepting the Parſonage houſe, ſaving and allowing to the Leſſee a Chamber over the Parlor next the Chuch.

It was adjudged that the Leaſe of the Chamber was good, for as well as a man by his exception may except part of a thing, ſo as it ſhall be intended that it was never let or granted; ſo in this caſe when he ſales, except the Parſonage houſe, ſaving and allowing to the Leſſee a Chamber, this ſaving makes the Chamber, as it were excepted out of it, as if it had been leaſed; ſo a ſaving out of a ſaving, is as much as there had been no ſaving at all, and then this Chamber not being excepted out of the Leaſe ſhall paſſe clearly by the Leaſe of the Rectory. And Judgment was given for the Plaintiff.

37 Eliz. in B. R. Rot. 242.

Wrights Caſe.

WRight brought a Writ of Error againſt the Mayor and Commualty of Wickombe, to reverſe a Fine levied by his Anceſtor of twenty acres of Land, the Defendants in abatement of the Writ of Error did plead that the Plaintiff after the death of his Anceſtor did diſſeiſe the Defendants of the Land, and made a Feoffment to a ſtranger. Judgment, &c. The Plaintiff replied, that they did re-enter upon him, without that, that he did enfeoff a ſtranger modo & forma. The Jury found, that there was a Fine of twenty acres, and that the Plaintiff being Diſſeiſor of all, made a Feoffment of ſix of the acres to a ſtranger. Et ſi ſupra totam materiam, &c. And it was objected that the Record was intire, and the Error is a Choſe in Action, and not a Choſe in Droit, and therefore cannot be divided, but if it were a Choſe in Droit, it is otherwiſe, as if a Diſſeiſee of twenty acres releaſeth all his right in five acres, this doth extinguiſh all his right in the five acres: ſo upon a Feoffment of parcell, yet the right remaineth as to the remnant: But of a Choſe in Action which is meerly entire, no apportionment can be, as in the 31 Eliz. in the Kings Bench, between Charnock and Wrotheſley, the caſe was; Husband and Wife levied a Fine of the Wives Land, and after becauſe the Wife was within age, they ſued a Writ of Error to reverſe the Fine. The queſtion was, If this ſhould be reverſed as to the Wife onely, or againſt the Husband according to the opinion of Belknap in the 50 Ed. 3. And after long debate it was reſolved that it ſhould be againſt both, for it is intire, and cannot be affirmed in part and diſaffirmed in another part. And the Lord Norris caſe is very agreeable to this, where Tenant for life did levy an erroneous Fine, and then was attaint by Parliament, and all the right which he had to any Land was given to the Queen; and it was adjudged that there is no title of Error, nor was it given to the Queen by this word, Right, and then if it be ſo, the Title of Error is not of any right in the land, but onely to the Suit, and if it be a Suit, it is a Suit intire, for he cannot have ſeverall Suits, as is agreed in Sir Richard Knightleys caſe. A man had judgment to recover 150 l. and did releaſe 20 l. of it, and after ſued execution, and the other brought an Audita querela upon the Releaſes, and defeated all the execution. But it is otherwiſe where ſuch apportionment of ſuch Suit is done by act in Law, as in 7 Ed. 4. fol. ultimo. The Sheriff levied parcell of the debt by Fieri facias, yet ſhall he have an Action of Debt for the Reſidue upon the Record: But in this caſe it is the act of the party himſelf that deſtroies his Suit for part of the Land, for which it ſhall deſtroy the other ſuit, for the Error is intire as to all the land and cannot be divided; as in the 38 Ed. 3. and 12 H. 6. if a falſe Verdict be found, and the party grieved does make a Feoffment of parcell, he ſhall not have an attaint for any part: So in the 19 H. 6. and the 39 Aſſ. If he who hath cauſe to bring a Writ of Error or Attaint, does take a Leaſe for years of parcell, he doth ſuſpend his Action, and if he takes in fee, it is quite gone,. But it was reſolved by the Court that the Feoffment does not deſtroy the Title of the Writ of ~~Dower~~ Error, for more then ſo much as a Feoffment was made of; and thereupon they firſt took a difference be-

tween ſuſpenſion and extinguiſhment of an Action, for peradventure if he ſuſpend his Action as to any part for any time, this is a ſuſpenſion unto all, but extinguiſhment of part; is a Bar to that part onely; and Gawdy cited the caſe in 9 H.6. where Judgment was reverſt for part only, and it is not unuſuall to have a Fine reverſed for part: as if a fine be levied of lands in ancient Demeſne, 47 Ed.3.9. a. there by Parſley, If there be Error in Law as to one parcell, and Error in Fact as to another parcell, the Judgment as touching the matter of Law may be reverſed.

Fenner, He who hath Title to reverſe a Fine, or recovery by Writ of Error, hath right in the Land, and if he releaſe all his right in the land, the Error is extinct, and the reaſon of the Lord Norris Caſe was not that the Title to the Error was an Action in privity annexed to the party to the Record and his Heires, and cannot be transferred over to another, no more then a Writ of partition between Coparceners, or a Nuper obiit.

Popham, He who hath Title to have the Writ of Error hath no Title to the Land, although that thereby he be to be reſtored to the Land: for if the Land diſcend to one who hath Title to have the Writ of Error, without doubt it ſhall not be accounted a remitter: But as to the matter now in queſtion, he ſaid, that if two men bring a Writ of Error in the Realty, and the Tenant plead the releaſe of one, this is a good Bar againſt both, becauſe the Error in the Record is releaſed: But if one who hath Title to a Writ of Error, does make a Releaſe of all his Right in one acre, this is a Bar but for ſo much, inaſmuch as the Releaſe is a Bar but as to the Reſtitution of the Land onely, and no Releaſe of Errors in the Record, for by the Reverſall of a Fine or Recovery, the party may annihilate the Record, and have Reſtitution of that which the Record before took from him, and therefore it ſhall bar the Plaintiff. And the opinion of all the Court was, that the Fine ſhould be reverſed for that part of the Land onely, whereof no Feoffment was made, but for ſome defects in the Writ of Error, Judgment was ſtayed.

Mich. 37, and 38 Eliz. in B. R.

Barnards Caſe.

SMith brought an Action of Debt upon a Bond againſt Barnard, the Defendant pleaded that the Plaintiff was outlawed, and a day was given him to bring in the Record, at which day he made default.

Daniel moved that the Judgment for the Plaintiff in this caſe ſhould be that the Defendant ſhould anſwer, for that the plea of Outlawry was but a dilatory Plea, and no Plea in Bar, as appears 21 Ed. 4 15. but this difference was taken by the Court. In an Action of Debt upon a Bond, Outlary of the Plaintiff is a Plea in Bar, and the reaſon is, becauſe all the Debts in ſpecialties are forfeited to the Queen by reaſon of the Outlawry, and becauſe the Queen is to have them, it is a good Plea in Bar: But in a Treſpaſſe or Debt upon a Contract, the Outlawry is but to the abatement of the Writ, and the Queen ſhall not have Debts upon ſimple Contracts, but after the Outlawry pardoned, the Plaintiff may have an Action for them again. And becauſe he

failed

failed to bring the Record at his day appointed, the Plaintiff recovered, vide Dyer 6 Eliz. 227, 228.

Hil. 32 Eliz. in C.B.

Lord Dacres Caſe.

GRegory Lord Dacres was ſummoned to anſwer Richard Gawton in a Plea of Debt for 26 l. 14 s. and did declare, that the Defendant did retain the Plaintiff to be his Bayliff of his Manor of Moreford, &c. and to receive the Defendants money for a certain time, and to do other buſineſſes for the Defendant, and to render an account: and afterwards before one Launcelot Love, the Auditor aſſigned by the Defendant, the Plaintiff did account. Super quo computo præfatus Richardus pro diverſis coſtagiis & expenſis quæ idem Richardus circa proſecutionem & executionem negotiorum præfati Gregorii in ſurpluſagiis in prædict. 26 l. 14 s. erga ipſum Gregorium, ultra omnes denariorum ſummas per ipſum Richardum ad ipſum dicti Gregorii recept. permanſiſſet. And thereupon he brought his Action; and the Defendant pleaded Nil debet, and it was found for the Plaintiff, and yet he had not Judgment.

Firſt, becauſe the Declaration was inſufficient, becauſe the Plaintiff was not in Surpluſage to the Defendant, but the Defendant to the Plaintiff, and ſo are all the Preſidents directly; and he ought to alledge he was in Service, and that he had received Goods, whereof no mention is made.

Secondly, Becauſe neither day nor place is alledged where the Auditor was aſſigned.

Paſch. 33 Eliz. in C. B. Rot. 409.

Owſeleys Caſe

ROger Owſely brought a Replevin againſt Edmund Brach and others, the Defendant made Conuſance as Baily to John Leviſon; and ſaid, that long time before the taking, &c. one William Coup was ſeiſed of a houſe and eight acres of Meadow, &c. whereof the place is parcell, in his Demeſne as of Fee, and did demiſe the ſame to Richard Coup for one and twenty years, reſerving Rent, and the Leſſee died, and the Land came to his Wife as his Executrix, who married Roger Owſeley, and that William Coup did levy a Fine of the Premiſſes to Stephen Noke and others, to the uſe of Stephen and his Heires, and after Stephen entred and outed the Termor, and infeoffed John Leveſon and his Heires, and then the Termor re-enters, claiming his Terme; and for Rent arreare the Defendant made Conuſans as aforeſaid, and it was adjudged againſt the Defendant, becauſe this entry and Feoffment by Noke to Leveſon, and the re-entry of the Termor is no Attornment, and this varies from Littleberries caſe, where the Leſſor entred and made a Feoffment, and the Leſſee re-entred, for Noke the Leſſor had

not

not any Attornment, and can have no Diſtreſſe, and his Feoffee cannot be in better caſe then he himſelf: And if the firſt Feoffee makes Feoffment to B. who enfeoffs C. and the Leſſee re-enters, that is Attornment but to the firſt Feoffee, and not to the other, for he may be miſconuſant of it, becauſe he was outed by the Leſſor, but note Judgment was not given till Trin. 36 Eliz.

Paſch. 36 Eliz. in C. B.

Owens Caſe.

EDward Owen brought an Action of Waſte againſt Peerce for land in Ancient Demeſne, the Defendant made defence, and pleaded to the Juriſdiction of the Court, becauſe the land was ancient Demeſne, and the Defendant was ruled to plead over, for it is but a perſonall Action, and the Statute is a beneficiall Statute for the Common-wealth, and (by the opinion of all the Court, except Walmſley) does extent to ancient Demeſne, ℣ 40 Ed. 3. 4. Ancient Demeſne is a good plea in Replevin, 2 H. 7. 17. 21 Ed. 4. 3. it is no good plea in an action upon the Statute of Gloceſter.

Mich. 33, and 34 Eliz. in C. B. Rot. 2122.

Sir Edward Cleeres Caſe.

SIr Edward Cleere brought a Quare Impedit againſt the Biſhop of Norwich, Edward Peacock, and Robert Hinſton Clerk, to preſent to an Advowſon holden in Capite.

Anderſon. A Deviſe of an Advowſon in groſſe is void, becauſe it is of annuall value, whereof the King ſhall have the third part. But Owen, Beaumont, and Walmſley held the contrary, and ſo it it was adjudged. See the Caſe of the Earle of Huntington againſt the Lord of Montjoy, of a Deviſe of Liberties of Cramford, which were not of any annuall value, and yet the opinion of Wray and Anderſon Juſtices was certified to ſome of the Councell being Arbitrators, that the Deviſe was not good.

Trin. 36 Eliz. in C. B. Rot. 2145.

Brownes Caſe.

ANthony Brown brought an Action of Treſpaſſe againſt Richard Peaſe, the Caſe was this; John Warren was ſeiſed in fee of the Manno of Warners, and of the Manno of Cherchall, and demiſed his Manno of Warners to the youngeſt Son of Richard Foſter his Coſin in fee, at which time Richard the Father had iſſue George Foſter and John Foſter. And he demiſed his Manno of Cherchall in hæc verba.

I will

I will my Mannor of Cherchall to Margery Mafer for her life, and if ſhe die, and then any of my Coſin Fofters Sons then living, then I will my foreſaid Mannor of Cherchall unto him that ſhall have my Manner of Warners, and after the Deviſor died without iſſue, and the Reverſion of the Mannor of Cherchall diſcended to Henry Warner as Brother and Heire of the Deviſor. And after the ſaid Henry Warner by Deed Inrolled, did bargain and ſell the Mannor of Cherchall to Anthony Browne, who deviſed it to the Plaintiff: And then George Foſter dies without iſſue, and the Mannor of Warners does diſcend to John Foſter his Brother and Heire, who enters and enfeoffs the Lord Rich, and after marriage the Tenant for life of the Mannor of Cherchall dies, and the Plaintiff enters, and the Defendant enters upon him as Servant to John Foſter, whereupon the Plaintiff brought this Action: And Judgment was given for the Plaintiff, becauſe that the words and the intent of the Deviſe was, that the Mannors of Warners and Cherchall ſhould go together, and therefore the Mannor of Warners was ſold before the death of Margery, by John Foſter, and after the death of Margery, John can take nothing by the Deviſe.

Mich. 29, and 30 Eliz. Rot. 2325. or 2929.

Hambletons Caſe.

JOhn Hambleton had iſſued foure Sons, John the eldeſt, Robert the ſecond, Richard the third, and Thomas the fourth, and deviſed to each of them a parcell of land, to them and the Heirs Males of their body begotten, and if it happen that any of their Heirs dye without iſſue Male of his body lawfully begotten, then the Survivor to be each others Heire. If theſe words make a Remainder, or are void, was the queſtion. And it was adjudged againſt the Plaintiff, for the Court held that all thoſe that ſurvived were Joynt-tenants, and one Joynt-Tenant cannot have a Treſpaſſe againſt the other, for by the intent of the Will, it appears that the Survivors ſhould have that part, and the ſurvivority of each other Heire, each Survivor, that is, all that ſurvive ſhall be each others Heire, and ſo the remainder ſhould be to every one of them.

29 Eliz.

Fenners Caſe, argued before the Lord Mayor of London at Guildhall.

IN this Caſe it was adjudged, that if a man Covenants that his Son then within age, and infra annos nubiles, before ſuch a day ſhall marry the Daughter of I.S. and he does marry her accordingly, and after at the age of conſent he diſagrees to the marriage, yet is the Covenant performed, for it is a marriage, and ſuch a one as the Covenantee would have, untill the diſagreement, vide 7 H. 6. 12. Dyer 143. 313. & 369.

25 Eliz.

Webbe againſt Potter.

IN an Ejectione firmæ by Webbe againſt Potter, the Caſe was; Harris gave Land in Frank-marriage to one White, and the Deed was Dedi & conceſſi Iohan. White in liberum maritagium Iohannæ filiæ meæ habend. dictæ Ioannæ & heredibus in perpetuum tenend. de capitalibus Dominis feodi illius, with Warranty to Iohn White and his Heires. Periam, The uſuall words in Frank-marriage ſhall not be deſtroyed, for the words of Frank-marriage are, Liberum maritagium cum Ioanna filia mea, in the Ablative caſe, and although here it be in the Dative caſe, it is good. And of the ſame opinion were all the Judges.

Alſo a Gift in Frank-marriage made after the Eſpouſals was held good by all the Juſtices, 2 H. 3. Donor 199. 4 Ed 3. 8. Dyer 262 B. And a Gift in Frank-marriage before the Statute was a Fee-ſimple, but now ſpeciall taile, and if it be not a Frank-marriage, he ſhall have an Eſtate for life, and to prove this his opinion, he relied upon the intention of the Donors which ought to be obſerved: For if the Habendum does croſſe the Premiſſes it ſhall be void, but a Remainder is good for the benefit of a ſtranger, but a Rent cannot be reſerved upon ſuch a Gift, during the foure degrees, but after the Reverſion is good, if he do attorne to the Grantee of the Reverſion.

Windham, Frank-marriage is not an Eſtate in taile, for there wants the word, Heires, Coke lib. 1. 103. So a Gift to a man & ſemini ſuo, 10 Aſſ. 26. and after Meade agreed with Windham although the grounds of Frank-marriage were not obſerved, yet that it was good; for although there be no Tenure between the Donor and Donee, yet is it a good Frank-marriage.

Dyer, It is no good Frank-marriage, becauſe the uſuall words are not obſerved, and if the word Liberum be omitted, it is not Frank-marriage, neither is it good given to a man, but it muſt be to a woman, for a man cannot give land to a woman Cauſa matrimonii prælocuti: And in this caſe the party ought to be of the blood of the Donor, who by poſſibility may be inheritable to him, and there ought to be a Tenure between them, and an acquittall, and if any faile, it is no Frank-marriage, and he ſaid further, that if it once takes effect as Frank-marriage, and then the Donor grants the Reverſion, or the Reverſion diſcends to the Donees, yet it ſhall not be deſtroyed, but ſhall remaine as an Eſtate in taile, and not for life, becauſe it once took effect in the Donees and their iſſues, and if land be given to a man in Frank-marriage, the remainder in taile, yet this ſhall not deſtroy the Frank-marriage, and the Donee ſhall hold of the Donor, and not of him in the remainder: And if one give land in Frank-marriage, the remainders to the Donees in taile, yet is this a good Frank-marriage, and if the Donor grants over his Services, yet doth the Frank-marriage continue, although the Donees attorn, for they are incident to the Reverſion, and therefore the Grant is void, but if the Reverſion be granted the Services will paſſe, and he concluded that the Husband had all, and the Wife nothing, becauſe no Eſtate to her is mentioned in the Premiſſes, and he could not conſtrue the words to be the intent of the Donor, for here is an expreſſe limitation of the fee to the Husband

and

and his Heirs, which cannot be controlled by intendment. And after 25 Eliz. It was adjudged to be no Frank-marriage, nor gift in taile, but a Fee-ſimple: And the Juſtices ſaid, that the ancient Books were that where it took not effect as a Frank-marriage, it ſhould be in eſpeciall taile, yet thoſe at this time are not Law: But they agreed, that this at one time took effect as Frank-marriage, and by matter ex poſt facto may be made an Eſtate in taile.

Mich. 30 Eliz.

Gibbs Caſe.

GIbbs brought an Action of Trover againſt Baſil, for a Gelding; the Caſe was.

One Porter ſtole this Gelding from the Plaintiff, and ſold him to the Defendant in open Market, by the name of Liſter, and it was entred ſo in the Toll Book that Liſter ſold him.

The queſtion was, if this alteration of his name ſhall make any alteration of the property, although the ſale was in open Market.

Windham and Rhodes Juſtices, held this no good ſale to bar the Plaintiff, and grounded their opinion on the Statute of the 2, and 3 Phil. and Mar. cap. 7. which provides that no property of ſtollen Goods ſhall be altered that are ſold, unleſſe the name and ſurname of the parties to the ſale be written in the Toll-book: And Shuttleworth moved, that it ſhould be in the Market, and walked there for an houre together, which is not ſet forth by the Defendant in his Bar; but the Juſtices ſaid, that ſuch ſpeciall plea need not to be, but ſhall be intended.

Rouſes Caſe.

IT was moved in this Caſe, that if Tenant for terme Dauter vie, does continue and hold in his Eſtate, after the death of Ceſtuy que vie: If he be a Diſſeiſor, and whether in pleading, the plea ought to be ſeiſed and not poſſeſſed,

Shuttleworth, He was legally in at firſt, and therefore cannot be a Diſſeiſor, 15 Ed. 4. 41. A Freehold could not be gained where he came in by the agreement of the party, and 12 Aſſ. 22. Where the Husband and Wife were ſeiſed of a Freehold, and after were divorced by Suit, on the womans part, whereby the woman is to have all the land, yet if the Husband continue poſſeſſion and dies ſeiſed, this diſcent ſhall not take away entry, becauſe he was no Diſſeiſor.

Gawdy, He is Tenant at ſufferance and no Diſſeiſor, and there it was moved, that if Tenant at ſufferance, or a Diſſeiſor makes Copies of Copyhold Lands, if they be good or voidable: And note that Wilde took here a diverſity between a Termor that holds over, and a Tenant at ſufferance; for in caſe of a Tenant at ſufferance, there is no Freehold taken from the Leſſor, which the continuance of poſſeſſion doth not take from him, but where the Tenant holds over his terme, there the Freehold is diſturbed, and therefore there is a diſſeiſin: But at that preſent it ſeemed to the Judges that there was no diverſity. But

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the next terme Godfrey moved, that if Tenant for anothers life held over his Eſtate he had Feeſimple, and he granted that it was otherwiſe in ſome caſes, for if he claim to be Tenant at the Will of the Leſſor, he ſhall not gaine a Fee-ſimple: For Littleton in his Chapter of Releaſes. 108. ſaith, that Tenant at ſufferance is where a man in his own wrong doth convey Lands and Tenements at the will of him that hath the Freehold, and ſuch Occupyer claimeth nothing but at Will. But in this caſe the Tenant claimes otherwiſe then at Will of the Leſſor, he does not claim any thing but at the Will of the Leſſor; as in the caſe of Littleton, but claimes to hold over againſt the Will of the Leſſor, which is no Tenant at ſufferance, and 10 Ed. 4. If a man makes a Leaſe at Will, and the Leſſor dies, and he continues poſſeſſion and claims fee, the Heire ſhall have a Mortdanceſter, and 18 Ed.4.25. If Ceſtuy que uſe dies, and the Tenant continues in, and the Tenant is impleaded, the Leſſor ſhall not be received, and the reaſon is, becauſe there is no reverſion in him, but the Tenant hath it, and 22 Ed. 4. 38. by Huſſey Juſtice, If a Termor holds over his Terme, there an Eſtate in fee is conſeſt to be in him by matter of Law, but it is a doubt whether he be a Diſſeiſor or not, but it ſeemeth not, for a Treſpaſſe doth not lye againſt him before Regreſſe, and in the 7 H.4.43. If a Guardian holds the poſſeſſion at the full age of the Heir, or Tenant for years after his terme expired, the Eſtate ſhall be judged in Fee. And in our caſe he hath not claimed to hold at Will, for he hath done contrary; for he hath made Copies.

By all the Juſtices, if Tenant at will, or for years, or at ſufferance, make a Leaſe for years, this is a Diſſeiſin, and a Tenant at will doth thereby gaine a Freehold, and thereby doth claim a greater Eſtate then he ought, and ſo it is in this caſe.

2. Admitting him to be Tenant at ſufferance, the queſtion is, if he may grant Copies, and if whether they be good: and it ſeems he may, for no treſpaſſe lies againſt him, becauſe he is Dominus pro tempore, and it is not like a Copy made by an Abator or Diſſeiſor, for it hath been adjudged that Copies made by them are void, but in this caſe his act of making Copies agrees with the Cuſtome; as in Grisbrooks caſe, If an Adminiſtrator ſells Goods, and paies debts with the money, and after he who is Executor proves the Will, he ſhall never avoid this ſale, for that it was done according to the Will which the Executors were compelled to do: So in the 12 H.6. If a Baily cuts Trees and repaires an ancient Pale, this is good, and 6 R.2. if he paies quit-rents it is good.

Coke, He comes in by right, and therefore is Tenant at ſufferance, and like this caſe is Dyer 35 H.8.57. Lord Zouches caſe, where Ceſtuy que uſe for life, the remainder over in tatle, made a Leaſe for the terme of the life of the Leſſee, and dies, and the Leſſee continues his Eſtate. And the opinions of the Juſtices of both Benches were, that he is but Tenant at ſufferance.

Popham, If a Mannor be deviſed to one, and the Deviſee enters and makes Copies, and then the Deviſe is found to be void, yet the Copies of Surrender made by ſuch Deviſee are good; but contrary where new or voluntary Copies are made by him, 7 Eliz. and in the Lord Arundells caſe, a Feoffment in fee was made of a Mannor upon condition, the Feoffee upon Condition grants voluntary Copies, thoſe are good.

Atkins, on the contrary: And he made a difference between a Tenant at will, and a Tenant at ſufferance, for a Tenant at will ſhall

have

have aid, but ſo ſhall not the other, as in the 2 H. 4. and a Releaſe to one is good, to the other not, &c. and when he holds over he doth aſſume an Intereſt which ſhall not be thought wrongfull, for he is neither Abator nor Diſſeiſor, and therefore Dominus, and therefore the Copies made by him are good, 4 H. 7. 3. Tenant at ſufferance may juſtifie for Damage-feaſant. And all the Juſtices held for the Plaintiff, and that he that made the Copy was but Tenant at ſufferance, and not Diſſeiſor, and that he had no Fee. And the Judgment was to be entred, unleſſe the Defendant ſhewed better matter.

Trin 28 Eliz. Rot. 329.

Smiths Caſe.

SMith aſſumed upon himſelfe, that when I.N was indebted to I. D. in an Obligation of forty pounds, that if I.D. would not implead the ſaid I.N. that then if the money were not paid at ſuch a day, that then he, viz. the ſaid Smith would pay the money: Upon which Aſſumpſit after the day I.D. brought his Action on the caſe, and did ſet forth in his Declaration that he did not implead I. N. and it was moved by Kingſmill, that he could not have this Action untill I.N. be dead, for ſo long as he lives I.D. hath time to implead him. As if a man promiſeth another that he will be named in his Action that he hath againſt a third perſon, and if the third perſon payes not the money at ſuch a day, then he will, he cannot ſue unleſſe he ſhewes he hath diſcharged the other of the Obligation.

Clench, It is implied that he will never implead him.

Shuttleworth Juſtice, not ſo, for if hereafter he ſue him contrary to his promiſe, then the other who made the Aſſumpſit ſhall have his Action on the caſe, and recover to the value of the ſumm in the Bond. And after the caſe was moved again, and the Plaintiff brought the Obligation in Court, and thereupon the Obligation was entred, ſo that now the Plaintiff could not implead I.N in poſterum, for which Judgment was entred for the Plaintiff.

29 Eliz.

Coſens Caſe.

COſen the Father had iſſue three Sons, John, George, and Thomas, John the eldeſt died in the life-time of his Father, his Wife Enſeint with a Daughter, the Father makes a Deviſe in theſe words:

That if it ſhall pleaſe God to take to his mercy my Son Richard, before he ſhall have iſſue of his body, ſo that my Lands ſhall deſcend to my Son George before he ſhall be of the age of one and twenty years, then my Overſeers ſhall haue my Land untill George come to the age of one and twenty years.

If Richard who is yet living had an Eſtate in taile by theſe words, was the queſtion. And all the Juſtices agreed that it was a plain implication to make an Eſtate-taile in Richard the ſecond Son, 13 H. 7. 17.

29 Eliz. in C. B.

Warrens Caſe.

William Warren brought an Action of Debt for forty pounds, and in his Declaration confeſſed ſatisfaction of twenty pounds, and hereupon a Writ of Error was brought in the Kings Bench, and the Judgment reverſed: For by his Declaration he had abated his owne Writ, and he ought to have Judgment according to his Writ, and not to his Count. And Error was brought upon the Outlawry; for if the firſt Record was reverſed, the Outlawry thereupon is reverſed.

4, and 5 Phil. & Mar.

Benlowes Serjeant moved this caſe, a man ſeiſed of Lands and Tenements in London, deviſes them by theſe words.

I will and bequeath unto my Wife Alice my livelyhood in London for terme of her life. By this Will the lands in London paſſe to the Wife by this word, Livelyhood. Nota, for Brook Juſtice ſaid, that it was in ancient time uſed in divers places of this Realm, and had been taken for an Inheritance: To which Dyer agreed.

Caſe of Slander.

Brook ſaid, that if a man ſpeak many ſlanderous words of another, he who is ſlandred may have an Action on the caſe for any one of theſe words, and may omit the others: But if a man write many ſlanderous things of another in a Letter to a friend, an action upon the caſe will not lye, for it ſhall not be intended that it is done to the intent to have it publiſhed.

Mich. 1, and 2 Eliz.

N. Archbiſhop of York, and I.B. Executors of the laſt Will and Teſtament of Thomas Duke of Norfolk, did bring a Writ of Raviſhment de Guard, and then he was deprived by his own conſent: The queſtion is, if the Writ ſhall abate.

Benlowes, It ſhall abate, for if a Dean and Parſon of a Church bring an Action for ſuch a Cuſtome, and then reſigne, the Writ ſhall abate, becauſe it is their own Act.

Dyer, The Writ ſhall not abate; for the Action is not brought in their

their own perſons, but in their Teſtators, and therefore the Action ſhall continue. And if a man be outlawed he may bring an Action as Executor, and the Writ ſhall not abate.

Browne, If I make I.S. my Attorney, and he (the Warrant of Attorney ſtill continuing) is made a Knight, yet is not the Warrant of Attorney determined, although the word Knight, which is now part of his name be not in the Warrant, therefore in this caſe the Writ is good.

Mich. 7 Eliz.

NOte, it was ſaid by Browne, that if H. does let the Cite of his Mannor, with all his Lands to the ſaid Mannor appurtenant, hereby all the Demeſne lands do paſſe; but if it were with all the Lands appertaining to the ſaid Cite, nothing paſſeth but the Mannor-place.

Paſch. 6 Eliz.

A Man ſeiſed of the Mannor of Dale, doth let the ſame with all the Members and Appurtenances to the ſame, to have and to hold all the members of the ſaid Mannor to the Leſſee, for terme of years.

Walſh and Weſton were of opinion that this was a Leaſe for years of the Mannor onely, and that the limitation of the word, Members, being after the Habendum was void. But Dyer and Browne were of the contrary opinion: And Browne ſaid, that when the Habendum is uſed by way of limitation, it ſhall not be void. As if he let his Mannor of Dale, to have and to hold one acre parcell thereof for a terme of years, the Leaſe is void for all, but if there had been no Habendum but the Leaſe for years had been limited in the Premiſſes of the Leaſe, that is good enough: And if the Leaſe had been Habendum every part thereof, that had been a good Leaſe of the Mannor, for all the parts comprehend all the Mannor. And Dyer ſaid, that the word, Members, ſhall be taken for the Townes and Hamblets wherein the Mannor hath Juriſdiction.

Note, it was ſaid by Dyer, that if partition be made by the Sheriff, although the Writ be not returned, yet it is good enough, and none of the parties ſhall except againſt it, and ſo was the better opinion concerning the Eſtate of Culpeper and Navall in the County of Kent.

Sutton brought a Writ of Raviſhment of a Ward againſt Robinſon, wherein it was reſolved by Dyer, Carus, Weſton, and Benlowes, That if the Tenant enfeoff his Lord and others, all the Seigniory is extinct: alſo if the Tenant does infeoff the Lord but of a Moyety, yet is all the Seigniory extinct: And Dyer ſaid, that if the Tenant does infeoff the Lord and a ſtranger to the uſe of another and his Heires, and makes Livery to the ſtranger, this is no extinguiſhment of the Seigniory, but if the Livery were made to the Lord, it is otherwiſe; and yet is the poſſeſſion inſtantly carried away to the ſtranger by the Statute of 2 H. 7. 13.

A man

A man ſeiſed of lands deviſes the ſame to his Wife, to diſpoſe and imploy them for her ſelf and her Son, according to her will and pleaſure.

Dyer, Weſton, and Walſon held that the Wife had a Fee-ſimple by the intendment of the Will, and the Eſtate is conditionall, for ea intentione will make a Condition in a Deviſe, but not in Grant, vide Dyer 20.6.

A woman Tenant in taile makes a Leaſe for one and thirty years, and after takes a Husband, who have iſſue, the Husband (being Tenant by the Curteſie) ſurrenders, the Heire doth ouſt the Leſſee, and the Leſſee brings an Ejectment: And it was held that the Surrender was good, and that the Privity was ſufficient.

Mich. 40 Eliz.

IN an Action of the Caſe for calling one Baſtard; Dyer and Walſh ſaid an Action would lye, but Browne on the contrary, becauſe it ſhall be tried in the Spirituall Court. And Dyer ſaid, That at Barwick Aſſiſes a Formedon in the Diſcender was brought, and one ſaid, that his Father by whom he claimed was a Baſtard, and thereupon he brought an Action againſt him for thoſe words, and recovered.

Catlin ſaid, That if Lands be given to a man and to the Heires, he ſhall engender on the body of an Engliſh woman, and he marries a French woman, and ſhe dies, and then he marries an Engliſh woman, that now this is a good Eſtate in ſpecial taile.

Paſch. 7 Eliz.

THe Prior and Monks of the Charter-houſe (before the diſſolution) made a Leaſe for foure years, reſerving the ancient rent of twenty five Quarters of Wheat per annum, and then the houſe was ſurrendered into the hands of King Henry the eighth, and then the Lord Chancellor did let the ſaid rent of twenty five Quarters of Wheat to I.S. for foure and twenty years. And it came into queſtion between I.S. and the Termor, if this was warranted by the 27 H 8 28 Harper and Portrell, it is not, for the Statute is, that they may make Leaſes of any Manors, Lands, Tenements, and Hereditaments for one and twenty years, &c. and this Wheat is neither Land, Tenement, nor Hereditament, but a Chattell, and ſhall be demanded in an Action of debt. But the opinion of all the Court was, that the Leaſe was good, and they did agree that it was directly within the word Hereditaments, for it may diſcend or eſcheat, and the wife ſhall be endowed thereof. Alſo upon a Leaſe of Corne a Rent may be reſerved, for a man may reſerve a Rent upon a Leaſe of a Rent, and the Rent is not parcell of the Reverſion, but onely incident thereunto, and the Leſſor hath the ſame inheritance therein as he hath in the Reverſion.

Trin.

Trin. 7 Eliz.

AN aſſurance was made to a woman, to the intent it ſhould be for her Joynture, but it was not ſo expreſſed in the Deed. And the opinion of the Court was, that it might be averred that it was for a Joynture, and that ſuch averment was not traverſable; and ſo was it in the caſe between the Queen and Dame Beaumont.

Winter brought an Action of the Caſe againſt Barnam for theſe words; viz. Thou Murtherer: Dyer and Walſh ſaid, that the Action would lye, for there are ſome words that cannot be qualified, as Murtherer, Theef, Extortioner, falſe Knave, and in ſuch Caſe an Action will lye, but contrary where ſuch words are ſpoken in a jeſting way.

Note by Dyer, that the Lord Fitz-James, late Lord chief Juſtice of England, did deviſe his land to Nicholas Fitz-James in tatle, with divers remainders over, and in the ſame deviſe he deviſed divers Jewels and peeces of Plate, viz. the uſe of them to the ſaid Nicholas Fitz-James, and the Heires Males of his body. In this caſe it was the opinion of the Court, that the ſaid Nicholas had no property in the ſaid plate, but onely the uſe and occupation. And the ſame Law where the Deviſe was that his Wife ſhould inhabit in one of his houſes which he had for terme of years, during her life, becauſe the Wife takes no intereſt in the terme, but onely an occupation and uſage, out of which the Executors cannot eject her during her life, but Walſh held the contrary.

Hil. 8 Eliz.

IF a Biſhop make a Leaſe for years the ſecond of May, and the Dean and Chapter confirme it the firſt of May, this is a good Leaſe after the Biſhops death by Catlin and Southcote.

Wray, How can a Leaſe be confirmed before it be made. Catlin and Southcote, The aſſent before is a good confirmation after.

Hil. 40 Eliz.

AN Obligation wanted theſe words, In cujus rei Teſtimonium, and yet adjudged to be good, 7 H. 7. 14. Dyer 19 A.

It was ſaid by Catlin in the Star Chamber, that if an Infant being a Feme Covert, or other Infant does levy a Fine by grant and render to her or him in tatle, or for life, and the Husband dye, the Wife ſhall not have a Writ of Error, becauſe ſhe is Tenant of the land, and ſhe cannot have a Writ of Error againſt her ſelfe, ſo that ſhe is without remedy, ſo in the caſe of the other Infant.

Cardell, Maſter of the Rolls, in the caſe between Stinkley and Chamberlain ſaid, that when Executors had Goods of their Teſtator, to diſpoſe of to pious uſes, they cannot forfeit them, for that they have them not to their own uſe, but their power is ſubject to the controle-

ment of the Ordinary, and the Ordinary may make distribution of them to pious uses. And it was said at the Bar, that the Ordinary might make the Executors account before him, and to punish them according to the Law of the Church if they spoile the Goods, but cannot compell them to imploy them to pious uses.

Hil. 28 Eliz.

IN an Action of Slander, the words were, Thou art an arrant Whore and hadst the French Pox. It was moved in Arrest of Judgment, that the words were not actionable, because part of them relate to the time past, but by the Court adjudged that the action is well brought, because it is a discredit to the woman, and thereby others will shun her company.

Trin. 31 Eliz.

Inter Winter and Loveday.

IN this Case which was put by Coke, it was agreed, that a stranger as Cornwall in this Case was, could not tender the money to be paid upon the Mortgage, for it ought to be one who hath interest in the land: and so was it in the 28 H.8. between Whaydon and Ashford, where the Mother ought to have made the tender for her Son within age, and because it did not appear within the Verdict what age the Infant was, whether he was of the age of fourteen years, or more, so that his Mother could be Guardian to him by reason of his Nurture or not, It was awarded that she could not make a loyall tender.

In an Assumpsit for a hundred pounds, the case was; That the Defendant in consideration of a French Crown given him by the Plaintiff, did assume and promise, that if he did not such an act before such a time, that then, &c. It was moved by Godfrey, that the Plaintiff can onely recover so much as he is damnified by the French Crown: and the like case was before the Chancellor, where a Gentlewoman took the death of her Husband so heavily, that she said, she would never marry againe; and her Son comforted her, and said, God will provide a new Husband, and said, that he would give her ten pounds to pay a hundred, when she should marry, which money she accepted of, and then the Son brought an Assumpsit for the hundred pounds within half a year after she married. And the matter was brought into the Chancery: And the Master of the Rolls awarded ten pounds onely, and said, he would give never a penny more, because it was unreasonable to bar a Gentlewoman from marriage.

The Lord Rich was seised of Hadley Park, and of all the Tythes thereof, and payed for the Tythes but one Buck in the Summer, and a Doe in the Winter for thirty years past. The Park was disparked and turned into arrable land, and the Parson would not receive this Fee Buck and Doe, but would have tythe Corne, and thereupon brought

brought him into the Spirituall Court, and he brought a Prohibition: And Carus and Catlin ſaid, that he need not pay other Tythes but Buck and Doe, for although they be not tythable, yet may they be paid by compoſition, and he may not take them, but they are to be delibered to him: and in like manner Partridges and Pheaſants in a Garden are not tythable, yet may they be paid in lieu of Tythes, and ſhall be brought dead to the Parſon, and although there be no Park, yet may he give a Buck out of another Park, and perhaps it may be made a Park agen.

Mich. 13, and 14 Eliz.

NOte, it was ſaid by Dyer, that an Adminiſtrator durante Minoritate, cannot bring an Action of debt, for he is but as a Servant or Bailiff in ſuch caſes.

A Deviſe was made to the Maior, Chamberlaine, and Governors of the Hoſpitall of Saint Bartholmews: whereas they were Incorporate by another name, yet the Deviſe held good by Dyer, Weſton, and Manwood, for it ſhall be taken according to the intent of the Deviſor: And Weſton ſaid, that a Deviſe to A.B. a mans eldeſt Son is good, although his name be not B. becauſe the other words do make a ſufficient certainty.

It was ſaid, That by the Grant Panagium Hoggs may eat the graſſe, but if a man grant his Acrons, the Grantee muſt gather them; and where Panagium is granted the Grantee may put in his Hoggs into the place granted.

If Tenant for years hold over his terme, he is Tenant at ſufferance, and his deſcent ſhall not take away entrie: But if Tenant for terme of anothers life holds over his terme, he is an Intruder, and his deſcent ſhall take away entrie. Quod fuit conceſſum per Dyer.

A Court Baron may be holden at any place within the Manor, but not out of the Manor, and ſo a Leete may be held in any place within the Liberty and Franchiſe, and although no Court hath time out of mind been holden within the Manor, yet it is not thereby loſt, for it is incident to a Manor of common right, Coke L.4.26.6.27.A.

Mich. 14, and 15 Eliz.

AN account was brought by Tottenham againſt Bedingfeild, who pleaded Ne unques ſon Baily pur account render.

Gawdy prayed the opinion of the Court if the Action would lye. And the Caſe was thus.

The Plaintiff had a Leaſe of a Parſonage, and the Defendant, not being Leſſee, nor claiming any intereſt, took the Tythes being ſet forth, and carried them away. If the Leſſor may have an account againſt ſuch Treſpaſſor, was the queſtion.

Manwood Juſtice, An Account will not lye becauſe there is no priv-

vity;

vity, and wrongs are always without privity, yet I will grant that if H. receive my Rents, I may have an account against him, for my assent to have him receive it makes a privity, and when he hath received the Rent, he hath not committed any wrong against me, because it is not my money till it is paid: and therefore in this case I may resort to my Tenant, and compell him to pay the Rent to me because the receit is no wrong: But it is otherwise in the first case, for when the Tithes are set forth, they are presently in the possession of the Parson, so that when the Defendant takes them, he is a wrong Seisor of them, and therefore no account will lye against him. And so was it adjudged in a case of a Mannor in London, where one under colour of a Devise did occupy the Land for twenty years, which Will afterwards was made void; and thereupon he to whom the right of the land belonged brought an account, and it was adjudged that it would not lye.

Harper, An Account will lye against a Procter, so that the Plaintiff may charge him as Procter, and it is no plea for him to say he is no Procter, no more then it is for a Guardian in Socage to say, he is not Prochein amy.

Dyer, there are three Actions of Account. One against a Baily, another against a Receiver, the third against a Guardian in Socage. And if an Account be brought against a man as Receiver, he must be charged with the receipt of the money: but if the Defendant pretends he is Owner of it, it is contrary to the nature of an account, and therefore he is not chargable in such Action, but he may plead Ne unque son Baily pur account render: for in an Account (as my Brother Manhood said) there must be privity: But an Abator or an Intruder shall not be charged in an Account, because they pretend to be Owners. But in this case the Lessee may have an Action of Trespasse against him, for the Tythes were immediatly upon the setting forth in the possession of the Lessee, and by the Statute of the 31 H.8.7. he may have an Ejectione firmæ: but an account will not lye in this case.

Mich. 14 Eliz.

TEnant in Dower commits Waste, and the Waste was assigned in this Case, that the Lessee had destroyed a hundred Does of the Plaintiffs, whether this was Waste or no, was the question.

Dyer, I think it no Waste, unlesse he had destroyed all the Deer.

Manwood, If a Lessee of a Pigeon house destroy all the old Pigeons, except one or two, yet it is a Waste, and so is this, although all be not destroyed.

Mich. 15 Eliz.

A Man is indebted by Obligation in a hundred pounds to a Testator, this Obligation is not Assets in the hands of the Executors untill it be recovered by them, because it is but a Chose in Action; but if in such case the Executor release the Debt now he hath determined the Action, and hath made it Assets in his hands to the whole value of the Bond.

Bliss

Bliſs againſt Stafford.

MArgaret Bliſs who was in Remainder after an Eſtate in taile, did bring an Action on the caſe againſt Edward Strafford, for ſlandring her Title in affirming that A. had iſſue one B. who is alive, and the Defendant pleaded not guilty, and the Action adjudged good by all: But did abate for an exception to the Count.

Paſch. 13 Eliz.

UPon the Statute of Recuſancy made the 29. of Elizabeth, Thomas Salherd and Henry Evered, being committed of Recuſancy, for not paying twenty pounds for every month, a Commiſſion was awarded to enquire of their Goods and Lands in Suffolk to levy the ſaid Debt; and amongſt other Lands certain Copyhold Lands were ſeiſed, and being returned, the parties came in, and by way of plea did ſet forth, that ſome of their Lands ſeiſed were Copyhold, and did pray Quod manus Dominæ Reginæ amoveantur, and hereupon the Queens Attorney demurred; upon which the queſtion was, if Copyhold Lands were within the ſaid Statute of the 29 Eliz.

Snagge, The Lands and Hereditaments which the Statute ſpeaks of, are ſuch as are known by the Common Law, and not by Cuſtome, for if I grant all my Lands & Hereditaments in D. my Copyhold lands will not paſſe: ſo that it ſeems to me Copyholds are not within the Statute.

Popham contra. If Copyhold Lands are not within the Statute, ſome perſons ſhall be free; and he held that Lands in ancient Demeſne were within the meaning of the Statute, although not within the words: and he agreed, that where a Grant is made of all my Lands and Tenements in D. that Copyhold Lands paſſe not, becauſe they cannot paſſe by ſuch aſſurance, and that Copyhold Lands were not within the Statute of Bankrupts, if they be not particularly expreſſed, and a Copyhold cannot paſſe by grant but by ſurrender. But after great debate it was adjudged, that Copyhold Lands are not within the Statute by reaſon of the prejudice that may come thereby to the Lord, who hath not committed any Offence, and therefore ſhall not looſe his Cuſtomes and Services.

Trin. 30 Eliz.

IN the Caſe of Viſcount Bindon, it was holden that if a man hath Judgment in Debt upon an Obligation and no execution, yet he may commence another Action upon the ſame Obligation, but otherwiſe of Contract, 9 Ed. 4. 51.

A queſtion was moved, that if a man grants Veſturam terræ what doth paſſe: and it was ſaid by Clerk, that one man may have the Veſture & another the Soil. Lord chief Baron, he who hath Veſturã terræ cannot dig the Land: And if many have a Meadow together, viz. to be divided amongſt them every year by lots how much every one ſhall have of graſſe in ſuch a place, and how many in ſuch a place, and ſo to change

every year according to the lots, they have not a Freehold, but onely veſturam terræ, Dyer 285.6.14 H.7.4.& 6.21 H.7.37.Dyer 375.6,13 H. 6.13.14 H.8.6.

In the Caſe of a Dean and Chapter, the queſtion was, that if Leſſee for years be rendring Rent with clauſe of re-entry for non-payment, and then the Reverſion or Rent be extended by a Statute, or ſeiſed into the hands of the King for debt, if the Leſſee ſhall pay the Rent according to the extent, and no breach of the Condition although he pay not the Leſſor. And the chief Baron held it was no breach of the Condition, becauſe he is now compellable to pay it according to the extent.

Caltons Caſe.

IT was moved by Serjeant Fenner, and agreed by all the Barons, that if the King make a Leaſe to A. rendring Rent, and there the Leſſee lets parcell hereof, rendring Rent, in this caſe the ſecond Leſſee ſhall not have the priviledge of the Exchequer to ſly thither to be ſued concerning this Land, becauſe that by ſuch means all the cauſes in England, may be brought into the Exchequer, and hereupon Fenner ſaid, that he had demurred upon a Bill exhibited into the Exchequer Chamber by ſuch a Leſſee, and prayed the Court that he might not anſwer, and he was thereupon diſmiſt.

Upon not guilty pleaded, the parties joyned iſſue, and after evidence given, and the Jury diſmiſt from the Bar, ſome of them had Apples, and Figgs, whereof the Court taking notice when they came to give their Verdict, did examine them upon their Oathes, and they who had eaten were fined five pounds, and committed to the Fleet. And ſome of the Juſtices did doubt if the Verdict were good; and upon many Preſidents had, it was adjudged good: and they relyed much on the Preſident of the 12 H.8. Rot. 102. where one of the Jury did eat before they were agreed, and yet the Verdict was good: And after a Writ of Error was brought, and the Judgment affirmed, 20 H.7.3.13 H.4.13.

Paſch.27 Eliz.

A Man gives land to I.S. in the Premiſſes, Habendum to him and three others for their lives, Et eorum diutius viventium ſucceſſive: The queſtion was, what Eſtate I.S. had, and whether there be any occupancy in the caſe.

Coke held, that I.S. had but an Eſtate for his own life, becauſe he cannot have an Eſtate for his own and anothers life, where the intereſt of both begin at one inſtant, and the Habendum by no means can make a Remainder; as if a Leaſe be made to one for life, habendum to him and his firſt begotten Son, this makes no remainder to the Son, although ſome have held to the contrary: ſo of a Leaſe to one for years, habendum to him and another, does not make any remainder to the other: alſo the word, Succeſſive, will not make a remainder, as in the 30 H 8.Br.Joynt-tenant 53. Alſo one cannot have an Eſtate for life, and

for

for another's life alſo in preſent intereſt, for the greater doth drowne the leſſe, but if the greater be preſent and the other future, as a Leaſe to him for life, the remainder to him for another's life, or a Leaſe for life and three years over, this is good; but if a Leaſe be made for life and for years, the Leaſe for years is drowned, 19 Ed.3. Surrender 8. where Tenant for life of a Manor did ſurrender to him in the Reverſion, &c.

Gawdy, If a Leaſe be made to one for life, and ſo long as another ſhall live, quære, what Eſtate he hath.

And as to the ſecond point, certainly there cannot be an Occupancy, for if the Eſtate be void, the Limitation is void; alſo the Occupancy is pleaded Que un tiel, and does not ſay, Claymant comme occupant, &c. for if a man comes a hawking on Land, he is not an Occupant, and the Book of Entries is, that he ought to plead it.

Clinch Juſtice, every Occupant ought to be in poſſeſſion at the time of the death of the Tenant, for otherwiſe the Law calls the Intereſt upon him in the Reverſion. But Gawdy and Chute denied this: and after, viz. 29 Eliz. the Caſe was moved again by Popham, and he made three points.

1. If the other three had a joynt Eſtate.
2. If they had a Remainder.
3. If there be an Occupancy. And he was of opinion that they had nothing by the habendum, for they were not named in the Premiſſes, & they cannot have a Remainder for the incertainty, but if thoſe three had been named in the Premiſſes, habendum to them Succeſſive, as they had been named, there they had a Remainder, for there the certainty appeared, 30 H.8.8. Dyer 361. Alſo there can be no Occupancy during the lives of the other three: but he agreed to the Book of the 18 Ed.3.34. that a Leaſe for life, the Remainder to him for another's life was good: And that if a Leaſe be made to I.S. and a Monk, it is void to the Monk, and the other hath all, and that during the life of the Monk there can be no Occupancy. And if I make a Leaſe to I. S. for the life of a Monk, it is a good Leaſe: And till the ſame terme Judgment was given, that they could take nothing in poſſeſſion joyntly, nor by way of Remainder, and that no Occupancy could be in the Caſe, and that I.S. had Eſtate for terme of his owne life onely.

Stile againſt Miles.

STile Parſon did ſuggeſt that the Land was parcell of the Glebe of the Parſonage, and that the ſaid Stile did let the ſaid Glebe, being foure and twenty acres to Miles for years, rendring thirteen ſhillings foure pence Rent; and in a Prohibition the caſe was, if Tythes were to be paid. And Wray ſaid, that although it was parcell of the Glebe, yet when it was leaſed out Tythes ought to be paid, and if no Rent be reſerved, Tythes ought to be paid without queſtion: but there may be a doubt where the Rent is reſerved to the true value of the Land; but here the Rent is of ſmall value, wherefore Tythes ſhall be paid alſo. And the Reſervation of the Rent was Pro omnibus exactionibus & demandis; yet the Juſtices took no regard of thoſe words. But Godfrey ſaid, that thoſe words would diſcharge him; but Wray on the contrary, for that this Tythe is not iſſuing out of the Land, but is a thing collaterall, and if a Parſon do releaſe to his Pariſhioners

all

all demands in the Land, yet Tythes are not thereby releaſed, for ſuch generall words will not extend to ſuch a ſpeciall matter. And in the 15 of R.2. Avowry 99. one held of another by ten ſhillings for all Services, Suits, and Demands; yet the Tenant ſhall pay Relief, becauſe it is incident to the Rent, and 8 Ed.3. 26.

Mich. 29 Eliz. Rot. 2574. or, 2375.

Stephens againſt Layton.

IN an Ejectione firmæ upon iſſue joyned, the caſe in a ſpeciall Verdict was, that a Leaſe by Indenture was made by William Beale to one William Pyle and Philip his Wife & primogenito habend. to them, & diutius eorum viventi ſucceſſive for terme of their lives, and then the Husband and Wife had iſſue a Daughter: The queſtion was, if the Daughter had any Eſtate. And three Juſtices held that ſhe had no Eſtate, becauſe ſhe was not in being at the time of the Leaſe made, and a perſon that is not in eſſe cannot take any thing by Livery, for Livery ought to carry a preſent Eſtate, where the Eſtate is not limited by way of Remainder, 18 Ed.3.3. 17 Ed.3.29, & 30. adjudged: but it was ſaid at the Bar, that if the Eſtate had been conveyed by way of uſe, it is otherwiſe. And the ſaid Juſtices held clearly that the word Succeſſive, would not alter the caſe: And the caſe was further found, that William Beale and Sampſon Beale did covenant with one Lendall, that if Tho. Beale Son of Sampſon Beale, ſhould marry Margaret the Daughter of the ſaid Lendall (if ſhe would aſſent) and alſo that the ſaid Lendall did covenant that the ſaid Margaret ſhould marry the ſaid Thomas (if he would aſſent) Pro quo quidem Maritagio ſic tum poſtea habendo, the ſaid William Beale covenanted, that he would make, or cauſe to be made an Eſtate to the ſaid Thomas and Margaret, and to the Heirs of their bodies for the Joynture of the ſaid Margaret, and it was further found, that afterward a Fine was levied between the ſaid Thomas and Margaret Plaintiffs and Sampſon Beale and William Beale Defendants, Qui quidem finis fuit ad uſus & intentiones in Indentura prædict. ſpecificat. by force whereof the ſaid Thomas and Margaret were ſeiſed: but the Jury found nothing of the Marriage, whether it took effect or not; and further found that William Pile and Philip his Wife had Primogenitam prolem a Daughter, and then died, and then Thomas Beale died, and his Wife intermarried with one Lamock, who made a Leaſe to the Plaintiff, who was ouſted by Layton the Leſſee of Philip Pile. And hereupon it was moved by Gawdy Serjeant, that inaſmuch as the Marriage took no effect between Thomas and Margaret, the uſes cannot be in them, but the Fine ſhall be to the uſe of the Conuſor, which was oppoſed by Walſhey Serjeant, who ſaid, that it was not like a Covenant in conſideration of marriage to ſtand ſeiſed of ſuch a Manor, for there if the conſiderations faile, the uſes faile alſo, for the conſideration onely is the ſole and entire cauſe that makes the uſes to ariſe: but in this caſe the conſideration is not materiall, but the Fine effectuall, without conſideration of money paid: and if a Feoffment be made to the uſe of I S. although no money be paid, yet I. S. ſhall have the Land.

Windham,

Windham, The Caſes differ much, for here the Fine is not expreſt to be levied to the uſe of Thomas and Margaret, but to the uſes and conſents contained in the Indenture: but he ſaid, that the common courſe was to limit the uſe to the Conuſor, untill the Marriage took effect, and after, as before was urged by Walmſley. And the Jury found that Thomas and Margaret, were ſeiſed accordingly.

Winham, They are no Judges to determine doubts in Law.

Rhodes Juſtice, Herein they have taken notice but of the matter in fact, and he affirmed the difference put by Walmſley.

Windham, The caſe de matrimon: prælocut: is ſtronger then this Caſe, for the ſecret intention ſhall reduce the Land, if the marriage take no effect. And after (the Court being full) they all agreed to the difference put by Walmſley, and alſo that the ſale afterwards was not good by reaſon of this Limitation. And Judgment was given for the Plaintiff accordingly.

Hil. 26 Eliz.

Britman againſt Stanford.

UPon a ſpeciall Verdict, the Caſe was. A Houſe, Stable, and Hayloft were demiſed to one for yeares, rendring foure and twenty pounds Rent *per annum*, and foure and twenty pounds for an In-come, quarterly by equall portions, upon Condition that if any of the Rent, or In-come be behind at the time it ought to be paid, that then the Leaſe ſhall ceaſe and determine. The Leſſee makes a Leaſe of the Stable to the Leſſor, and after part of the In-come is behind and unpaid, and the Leſſor enters for the Condition broken, into the houſe: And if this was a good entry, was the queſtion. And Judgment was given that the Condition was gone and void, by reaſon of the Leſſors taking part of the thing demiſed, becauſe a Condition is ſpeciall and intire, and not to be ſevered. And in this Caſe Fenner ſaid, that a Grantee of a Reverſion cannot take benefit of a collaterall Condition, as in caſe of a groſſe ſumme, but in caſe of a Rent, waſte, &c. it was otherwiſe.

Mich. 29, and 30 Eliz. Rot. 2529.

Doctor Lewin againſt Munday.

IN a Replevin by Lewin againſt Munday, it was found by Verdict, That a Fine was levied the 14th. of Elizabeth, between Lowla and Rutland, Plaintiffs, and Fook and ſeven others Defendants of the Mannors of Gollochall, whereby the Defendant did grant the Mannor to the Plaintiffs, and the Heires of one of them, who granted and rendred twenty pounds per annum to the ſaid Fook and his Heires, with a Diſtreſſe for non-payment. Fook ſeiſed of the Rent, makes a grant to a ſtranger in this manner; That whereas a Fine was levied the 14. of Eliz. of the Mannor aforeſaid, and divers other lands, &c. and miſtook the Mannor, for he put the names of the Conuſees in place

of the Connſors, and ſo e contra, and that it was levied of the Mannor, and divers other lands, whereas the Fine was levied of the Mannor ſolely; and that he did grant the ſaid Rent granted unto him to the ſaid ſtranger and his Heires: And this grant was adjudged by Anderſon who ſaid, that if one recite that he hath ten pounds of the grant of I. S. whereas it was of the grant of I. D. yet it is good.

Hil. 30 Eliz. Rot. 17. 32.

Hunts Caſe.

HUnt brought an Action on the Caſe againſt Torney, and declared that he being ſeiſed of lands in Swainton in Norf. in fee, Secundum conſuetudinem Mannerii; the Defendant did promiſe to the Plaintiff, in conſideration the Plaintiff would permit him to occupy the ſame for the ſpace of five years, that he would pay him at the Feaſt of All-Saints next coming, and ſo yearly twenty pounds at the Feaſts of the Annunciation, and All-Saints by equall Portions, during the terme aforeſaid, and alledged that he had injoyed the lands by the ſpace of a year and half, and ſo brought his Action on the Aſſumpſit. And Anderſon was of opinion that untill the five years were expired, no money was to be paid, becauſe the Contract was intire. But all the other Juſtices on the contrary, for the conſideration was to pay a certain ſumme yearly, which made ſeverall duties and ſo ſeverall Actions. For by Periam, if a man be bound to pay I.S. twenty pounds in manner and forme following, viz. ten pounds at ſuch a day, and ten pounds at ſuch a day, in this caſe the Obligee cannot have an Action of Debt for the firſt, before the day of payment of the laſt ten pounds be paſt, becauſe the duty in it ſelf is an intire duty, but if a man be bound to pay I. S. ten pounds at ſuch a day, and ten pounds at ſuch a day, here the Obligee ſhall have his Action for the firſt, becauſe the duty was in it ſelf ſeverall.

Anderſon at another day ſaid, that if a man makes a Leaſe for ten years, rendring Rent, in that caſe he may have an Aſſumpſit for the Rent due every year: So if I covenant with you to build you twenty houſes, the Covenantee ſhall have a ſeverall action for each default.

Periam, That Caſe of the Aſſumpſit is much to the purpoſe, for an Aſſumpſit is in the nature of a Covenant, and is indeed a Covenant without writing.

Rhodes cited this Caſe. Gaſcoigne promiſed in conſideration of a marriage of his Daughter with ſuch a mans Son, to give ſeven hundred marks, and to pay a hundred marks every year, untill all the ſumm were paid, and it was held clearly in this Court, that a ſeverall action might be brought upon every hundred pounds, but becauſe the action was brought for all the ſeven hundred marks before the ſeven years were out, Judgment was given againſt him, for if a man be bound in a Bond of a hundred pounds to pay twenty pounds for ſo many years, he ſhall not have an Action of Debt untill the laſt year expired. And after Judgment was given for the Plaintiff, viz. Mich. 29. Eliz. Rot. 2248.

28 Eliz.

Between Sticklehorne and Hatchman.

ADjudged by the Court, that if for not ſcouring of a Ditch or Mote, the Groundſells of the houſe are putrified, or Trees cut downe which are in defence of the houſe, whereby the houſe by tempeſts is blown down, Waſte ſhall be aſſigned in Domibus pro non Scourando, &c.

IN an Ejectione firmæ, Broker Prothonotary ſaid, that where the title of him in the Reverſion is not diſcloſed in pleading, nor cometh in queſtion, aid ſhall not be granted.

Paſch. 28 Eliz. in C.B.

Yardley againſt Peſcan.

THe Queen ſeiſed of an Advowſon being void, the Anceſtor of Peſcan preſented, and ſo gained it by uſurpation, and then the Church being void, he preſented again, and his Clark is now dead, and then the Queen grants the Advowſon to Yardley the Plaintiff, and he brings a Quare Impedit in the name of the Queen, ſuppoſing that this uſurpation did not put the Queen out of poſſeſſion, and it was argued that the Grant could not paſſe without ſpeciall words, becauſe it is of the nature of a Choſe in Action, and this was moved the laſt terme, and then Dyer, Meade, and Windham held that this uſurpation did gaine poſſeſſion out of the Queen, and that ſhe ſhould be put to her Writ of Right of Advowſon, and now this terme Fenner moved the caſe againe, and the opinion of Anderſon that was the chief Juſtice of the Common Pleas, was clearly, that the Queen was not out of poſſeſſion, for he ſaid, that it was a rule in our Books, that of a thing which is of Inheritance, the act of a common perſon will not put the Queen out of poſſeſſion, but if ſhe had but a Chattell, as the next Advowſon, then perhaps it is otherwiſe: But Meade, and Windham held very earneſtly the contrary, and they relied on the Book of 18 Ed. 3. 15. where Shard ſaid, that if the King had an Advowſon in his owne right, and a ſtranger who had no right did happen to preſent, that put the King out of poſſeſſion. And the King ſhall be put to his Writ of Right, as others ſhall. vide 47 Ed. 3. 14 B. 18 Ed. 3. 16. The Defendant there did alledge two Preſentments in his Anceſtor after the Title of the King, and demanded Judgment if the King ſhould have a Writ of poſſeſſion, and the plea was admitted to be good; but after Paſch. 25 Eliz. Judgment was given for the Queen, for that ſhe might very well maintain a Quare Impedit, and the two Preſentments did not put her out of poſſeſſion.

31 Eliz. Rot. 211.

Sir Robert Rowley made the Lord Keeper Sir Robert Catlin, and the Maſter of the Rols, his Executors, and did deviſe a terme to Sir Robert Catlin, and died: and they writ their Letters to the Ordinary, certifying that they were made Executors, but that they could not attend the executing of the Executorſhip, and therefore they required him to commit the Adminiſtration to the next of kin, ut lex poſtulat. The Ordinary enters in the Regiſter, Quia Executores prædicti per teſtamentum prædictum diſtulerunt, &c. and thereupon committed the Adminiſtration over: Afterwards the Lord Catlin received the Rent of the Farme, and after granted it to a ſtranger; The Adminiſtrator ouſted the Leſſee, and he brings an Ejectment. And if this writing was a refuſall in the Executors, or not, was the queſtion: And it was ſaid by Ford Doctor of the Civill Law, that it was a refuſall, and he ſaid, that if Legatees being Executors do refuſe to prove the Will, yet by the Civill Law they ſhall have their Legacies. But adjudged by the Court, that if Legatees do refuſe to prove the Teſtament, that by the Common Law they have no remedy for their Legacies, for by the refuſall there is a dying Inteſtate, and then nothing could be deviſed; and alſo, ſaid, that this Writing was a refuſall of the Executors, ſo that the Ordinary might preſently commit Adminiſtration, and therefore Sir Robert Catlin could take nothing as Legatee.

Paſch. 31 Eliz.

The Array of a Pannell was challenged, becauſe the Sheriff was Coſin to the Plaintiff, and upon a Traverſe it was found that they were Coſins, but not in ſuch manner as the Defendant had alledged; and per curiam the Array was quaſht, for the manner is not materiall, but whether he be a Coſin, or not, 18 H. 6. 18.

Paſch. 31 Eliz.

It was reſolved in the caſe of Miles againſt Snowball, that if the Sheriff return one who hath no Freehold, yet he ſhall be ſworne in the Jury, if he be not challenged by the parties: And after upon the evidence it was moved, If a woman make a Deed of Feoffment to ſeverall perſons, of a houſe and land, wherein ſhe her ſelf inhabiteth, and is ſeiſed, and delivers the Deed to the Feoffees, without ſaying any thing, if this be a good Feoffment: of which Periam doubted, becauſe ſhe did inhabit there all the time, but if it were of other lands on which ſhe did not dwell, and ſhe comes there to make Livery, and delivers the Deed upon the land and ſaies no words, yet is this a good Feoffment, becauſe ſhe comes thither to make Livery.

Anderſon, The Feoffment in this caſe is good, for if ſhe hath an intent to make Livery, the delivery of the Deed is good Livery, Quod Periam & tota Curia conceſſerunt, if ſhe had intended to make Livery, vide Co. lib. 6 26. & lib. 9. 136, Dyer 192.

Paſch.

Paſch. 31 Eliz.

A Woman brought an Action of Debt as Adminiſtratrix to another, the Defendant pleaded that the Plaintiff was an Alien born in Gaunt, under the obedience of Philip King of Spaine, the Queens enemy. And Walmſley moved for the Plaintiff that this was no plea, becauſe that the recovery is to anothers uſe: but the Court was againſt him, for the Court will not ſuffer that any enemy ſhall take advantage of our Law; and then he moved that that King was no enemy, becauſe Wars were not proclaimed. But Anderſon ſaid, that a more open enemy then King Philip cannot be, who had conſpired the death of the Queen, and had endeadoured to invade the Realm, and ſubvert the State: which Windham granted; but Periam hærebat aliquantulum whether he could be called enemy in law before ſuch proclamation. But Walmſley ſaid, that the plea was that the woman was born under the obedience of the Emperor, who was in amity with the Queen, and the Court replied, Plead as you will abide by it.

Paſch. 13 Eliz.

IN a treſpaſſe of Aſſault and Battery, the Plaintiff declared to his damages of twenty pounds, and the Jury found for the Plaintiff, and gave thirty pounds damages, And by the Court the Plaintiff ſhall recover no more then he hath declared for, and this ought to be done of courſe by the Clarks, 2 H.6.7. 8 H.6.4. 42 Ed.3.7.

Mich. 30. and 31 Eliz. Rot. 610.

Bond againſt Richardſon.

IN Debt, the Defendant pleaded payment at the day, and gave in evidence payment at another day, before the day of payment, and ſo was it found by the Jury in a ſpeciall Verdict. And Anderſon ſaid, We are all agreed that Judgment ſhall be given againſt the Plaintiff, for payment before the day, is payment at the day, and Judgment was given that the Plaintiff ſhould be barred.

Willis againſt Whitewood.

A Man was ſeiſed of lands in Socage, and made a Leaſe for years by Paroll, and died, & his wife was Guardian in Socage to his Son, and the Leſſee accepted of a new Leaſe by Deed of the Guardian in Socage, and then the Guardian died, and a new Guardian entred, and outed the Leſſee; and if the ſecond Guardian could do this, was the queſtion.

Anderſon, It cannot be a ſurrender, for a Guardian hath no Eſtate that may be ſurrendred, but it is an extinguiſhment of the Leaſe; and

if a Woman Guardian in Socage takes Husband, and dies, the Husband ſhall not be Guardian in Socage.

Almeskey againſt Johnſon.

JOhnſon had a ſecond deliverance returned, which was returned Averia eloigniata,&c. whereupon he prayed a Withernam of the Cattle of the Plaintiff, and it was granted; and then came the Plaintiff and ſatisfied the Defendant, his damages and charges, and prayd a Writ of Reſtitution to have his Cattle again taken in Withernam.

Fleetwood, Cattle taken in Withernam are not repleivisable, how then can you have your Cattle, and then we ſhall not be paid for the meat. And the Court held, that the Cattle were not repleivisable, but for ſatisfaction of damages he ſhall have reſtitution of the Cattle, and ſo is the courſe, which was confirmed by the Clarks. And Walmeſley cited 16 H.6. Replevin to warrant this: And as to the meat, he had the uſe of the Cattle, whereby it was reaſon he ſhould ſuſtain them: And a Writ of Reſtitution was granted.

Mich. 31, and 32 Eliz.

IN caſe of a Farmer of Dame Lineux Manwood, it was ſaid, that the Order called the Ciſtrenſes Order, had a privilege that they ſhould pay no Tythes for the lands that Propriis manibus excolunt: but if they let it to Farmers, then they were to pay Tythes, and now comes the Statute of Monaſteries 31 H.8. If the Queen ſhould pay Tythes, was the queſtion. And it was ſaid, that the Queen, and her Farmers alſo ſhould hold the land diſcharged of Tythes as well as the particular perſons of the Order ſhould, for the King cannot be a Husband, and therefore his Farmers ſhall hold the land diſcharged, ſo long as the King hath the Freehold in him, although he make a Leaſe thereof for years, at will, but ſo if the King ſell the land to another, or the reverſion to another, then the Farmers ſhall pay Tythes.

Mich. 31 Eliz.

IT was ſaid by the Barons in the caſe of one Beaumont, that a Debt which is not naturally a Debt in it ſelf, but a Debt onely by circumſtance may be aſſigned to the Queen. As where a man is bound in a Bond to ſave another harmleſſe, and failes thereof, the Obligation may be aſſigned to the Queen. But in ſuch caſe a preſent extent ſhall not be awarded but the Proceſſe ſhall be onely a Scire facias againſt the party, to ſee if he hath any thing to plead againſt it, which note well.

And where a man recovers damages in an Action on the caſe, parcell of the damages cannot be aſſigned to the King before execution, for he muſt bring a Scire facias upon ſuch Record. And Manwood chief Baron held clearly that a moyety thereof could not be aſſigned over, 22 H. 6. 47.

One was indicted of Treaſon at S. Edmundsbury, Coram Juſticiariis ad diverſas felonias, &c. audiendas, and after the Indictment made mention of Bury, and did not ſay prædict. and by the opinion of the Juſtices the Judgment was quaſht.

Trin. 30 Eliz.

AN Action of the Caſe was brought againſt one Gilbert, for ſaying that the Plaintiff was a Suitor to a Widow in Southwark, and that he coſened her of her money in procuring falſe witneſſes to coſen her: And a Verdict found for the Plaintiff. And in Arreſt of Judgment it was ſaid, that in the caſe of Kerby it was adjudged that Couſener will not beare Action, and ſo was it adjudged in this caſe.

Moſſe againſt Reade.

THe Defendant called him Theef, and thou forgeſt a Deed; and a Verdict was found for the Plaintiff: and in Arreſt of Judgment, it was ſaid, that Theef generally, without ſaying of what nature ſpecially, will not bear Action. But Wray chief Juſtice denied that, and ſaid that it had of late been adjudged to the contrary; and Gawdy againſt him. But as to the words, that he had forged a Deed, adjudged that the Action will lye, although it be not ſpecially alledged what manner of Deed was forged.

Paſch. 32 Eliz.

COllings informed upon the Statute of buying of Tythes againſt Robert Davyes and Stock: And it was ſaid by Periam, that although the words of the Statute be Pro termino diverſorum annorum, yet if a Leaſe be made but for one year, yet is it within the penalty of the Statute.

Mich. 31, and 32 Eliz.

CRipps brought a Quare Impedit againſt the Biſhop of Canterbury, and others, and declared upon a Grant of the next avoidance, and the Defendant demanded Oyer of the Deed, and the Plaintiff ſhewed a Letter which was written by his Father to the true Patron, by which he had writ to his Father that he had given to his Son that was the Plaintiff the next avoidance; and upon this there was a Demur. And the whole Court for the Demur, for that ſuch Letter was a mockery, for the Grant was not good without Deed: and Judgment was given accordingly.

In Tymbermans Caſe it was ſaid, that if a Sheriff took one in Execution by force of a Capias, although he return not the Writ, yet an Action of Debt will lye againſt him upon an eſcape; and Periam ſaid it had been ſo adjudged.

Katherine Gilham brought an Ejectment as Adminiſtratrix to her Husband, Quare determino eject. & bona & catalla ſua ibidem inventa cepit &c. and a Verdict for the Plaintiff, and it was alledged in Arreſt of Judgment, that this word Sua ſhall not be intended her own Goods, and not the Teſtators. And the Court was of opinion that Sua ſhall be intended in ſuch manner as Adminiſtrator, and no otherwiſe. And therefore Judgment was affirmed.

Mich. 31, and 32 Eliz.

Baldwin againſt Mortin.

Uſe to the Husband and Wife, habendum to the Husband for thirty years, the Wife ſhall take nothing thereby, and this caſe was argued at the Bar and Bench, and was called the Earl of Cumberlands caſe.

Fleetwood moved that an Action was brought againſt the Husband and his Wife, and dit declare a trover of the Goods of the Plaintiff by the Wife, which ſhe converted to her own uſe, and prayed that the Action might be againſt the Husband onely, becauſe that the woman could not convert them to his own uſe during the Coverture, but onely to the Husbands uſe. And the opinion of the Court was, that the Writ was good againſt them both, and that the converſion was in nature of a Treſpaſſe, and ſo the Action would well lye.

Mich. 32. and 33 Eliz.

Kent againſt Wichall.

In a Treſpaſſe Quare clauſum fregit & herbam conculcavit, the Defendant pleaded that he tender'd ſufficient amends to the Plaintiff, and he refuſed the ſame, and demanded Judgment, &c. And upon a Demurrer, the opinion of the Court was, that this is no plea in Treſpaſſe, but in a Replevin it is a good plea. Sed non dierunt cauſam diverſitatis, 21 H.7. 30. 9 H.7. 22. F.N.B. 69. G. 31 H.4. 17.

Drew demanded of the Court, that whereas Edmund Leuſage had bound himſelf in an Obligation by the name of Edward Leuſage, if this was good or not; and it ſeemed to the Court Quod non eſt factum, and Anderſon and Walmeſley ſaid expreſly that it was void, 34 H.6. 19 6. Dyer 279, 21 H.7. 8.

Sir

Sir John Arrundell and his Wife, brought a Quare Impedit againſt the Biſhop of Gloceſter and others, who pleaded in Bar that William Sturton was ſeiſed of a Manno; to which the Advowſon was appendant, and bound himſelf in a Statute-merchant of two hundred pounds to one Long, and the Statute was extended, and conveyed the intereſt of the Statute to one of the Defendants, and then the Church became void: And by the Court the Advowſon may be extended, and if it become void during the Conuſees Eſtate, the Conuſee may preſent.

Note, it was ſaid by the Juſtices of the Common Pleas, that if a man promiſe another that he ſhall have a Leaſe in his land for eight years, or it is agreed amongſt themſelves that one ſhall have a Leaſe of the others land for eight yeares, that is no leaſe of the land, but onely a Contract and Agreement; but if one promiſe another that he ſhall have his land for eight years, or openly agree that one ſhall have the others land for eight years, this is a good leaſe for eight years by force of the agreement.

A. came before the Major of Lincolne, and acknowledged a Statute-merchant, and the Seal of the Major was not put to it: and it was adjudged that the Statute was not good, but a man may ſue upon it as an Obligation, becauſe the Seal of the party is to it.

Paſch.36 Eliz.

IN a Waſte the Caſe was, that a Leſſee for yeares purchaſed Trees growing upon the land, and had liberty to cut them within eighty yeares, and after the ſaid Leſſee purchaſed the inheritance of the land and deviſed it to his Wife for life, the Remainder to the Plaintiff in fee, and made his Wife Executrix, and died, who after married with the Defendant, who cuts the Trees, whereupon the Action is brought. And by opinion of all the Court the Action was maintainable, for although the Trees were once Chattels, yet by the purchaſe of the Inheritance they were united to the land: and Judgment was given for the Plaintiff accordingly.

Paſch. 36 Eliz.

UPon an Exigent, the Sheriff returned, that after Divine Service made proclamation, and did not ſay, that there was no Sermon: and therefore the Judges held that the return was not good; for by the Statute, if there be a Sermon in the Church, the Sheriff ſhall make his proclamations after the Sermon, and if there be no Sermon, then after Divine Service: and becauſe it did not appeare whether there were any Sermon or not, the opinion of the Court was ut ſupra.

It was ſaid that a man ſhall not aver againſt a Poſtea in the Kings Bench, or the Common Pleas, to ſay that it was contrary to the Verdict, nor ſhall he be received to ſay, that the Judges gave a Judgment,

and the Clarks have entred it contrary to their Judgment: but otherwiſe is it in Court Barons, or other baſe Courts, not Courts of Record, 10 Ed. 3. 40.

35, and 36 Eliz.

Newman againſt Beaumond.

If the Ordinary grants the Adminiſtration of the Goods of B. to A. and after grants the Adminiſtration to R. this ſecond Grant is an appeale of the firſt, without any further ſentence of repeale, for the Adminiſtrator is but a ſervant to the Ordinary, whom he may charge at any time.

In an Action of Debt on a Bond bearing date the nineth of July, the Defendant pleaed a Releaſe of all Actions the ſame day. uſque diem dati ejuſdem ſcripti, and it was adjudged that the Obligation was not diſcharged, becauſe the Releaſe does exclude the nineth day on which it was made.

Mich. 37, and 38 Eliz. Rot. 211.

Holman againſt Collins.

HOlman brought a Writ of Error againſt Collins, upon a Judgment given in the Court of Plymmouth, in the County of Devon, the caſe was;

Collins was poſſeſſed of a peece of Ordnance, and in Conſideration that he would tender this to Holman for to put into his Ship which was then going to Sea, and that Collins would ſtand to the hazard of loſing it: The ſaid Holman did aſſume upon himſelf, and did promiſe to give Collins certain Goods which he ſhould gain by the Voyage, and after the ſaid Ship did return laden with certain Goods, and for non-ſatisfaction the ſaid Collins brought his Action on the Aſſumpſit, and had Judgment to recover. And Crook aſſigned theſe Errors;

1. That the Stile of the Court was not good, for it was Curia Dominæ Reginæ Burgi prædict. tent. coram Majori de Plymmouth, without ſaying, ſecundum conſuetudinem villæ prædict. and he who is Judge of the Court, ought to be either by Patent or Preſcription, and then for not expreſſing the ſtile of the Court, nor by what authority they held their Court, it is error; and he cited the caſe in the Lord Dyer 262. and a Judgment, 30 Eliz. Rot. 32. given in the very point: Another Error was, that no day was preſixed for the Defendant to appear, but generally ad proximam curiam, which is Error, although it be held every munday. And for theſe Errors Judgment was reverſed.

Trin.

Trin. 28 Eliz. Rot. 948.

Mercer againſt Sparks.

MErcer had Judgment to recover againſt Sparks in the Common Pleas, upon an Action of the Caſe for words; and Sparks brought a Writ of Error in the Kings Bench, and aſſigned for Error, that the Plaintiff did not expreſſe in the Declaration that the Defendant ſpake the words malitioſe, but it was adjudged, that it was no Error, becauſe the words themſelves were malicious and ſlanderous, wherefore Judgment was affirmed.

Savacres Caſe.

IT was adjudged in the Common Pleas, that if a Baron, or others mentioned in the Statute of 21 H 8. take divers Chaplaines which have many benefices, and after they diſcharge their Chaplaines from their Service, they ſhall retain their Benefices during their lives, and if the Baron takes others to be his Chaplaines, they cannot take many Benefices during the lives of the others, which are beneficed and diſcharged of their Services; for if the Law were otherwiſe, the Lords might make any capable of holding Benefices by admitting them to be their Chaplaines.

In an Action of falſe Impriſonment brought againſt the Major, Citizens, Sheriffs and Commonalty of Norwich; it was moved where the Iſſue ſhould be tried: And by the Court the Iſſue ſhall not be tryed there; and in the ſame caſe it was moved, whether the Sheriff could ſummon himſelf, and it was anſwered by the Court that he could not: and Periam ſaid that ſo it had been after adjudged.

Mich. 29. and 30 Eliz.

IN an Avowry adjudged by the Court (Anderſon being abſent) that in an Avowry it is ſufficient for the Avowant to ſay, Son Franktenement, but if the Plaintiff traverſe it, it is no plea without he makes to him a Title, & that is the difference of pleading Son Franktenement, on the part of the Avowant, and on the part of the Plaintiff. And Welſon ſaid, that ſo were all the Preſidents, that it is no plea to traverſe the War in the Avowry, without making Title: And Periam ſaid, that it is no Title to plead De ſon ſeiſin demeſne, but he muſt make out his Title Paramount, his Seiſin Demeſne.

Mich.

Mich. 29, and 30 Eliz.

Bloſs againſt Holman.

JOhn Bloſs brought an Action of Treſpaſſe Quare vi & armis for taking of his Goods, againſt Holman, and the Defendant pleaded not guilty, and the Jury gave a ſpeciall Verdict, viz. That the Plaintiff at the time of the Treſpaſſe was of the Myſtery of the Mercers, and that at that time the Defendant was his Servant, and put in truſt to ſell his Goods and Merchandizes in Shopa ſua, ibidem de tempore in tempus, and that he took the Goods of the Plaintiff named in the Declaration, and carried them away, and prayed the advice of the Court, if the Defendant were culpable or not; and upon the Poſtea returned, Shuttleworth prayed Judgment for the Plaintiff. And the doubt was becauſe the Declaration was Quare vi & armis, becauſe it appeared that the Defendant had cuſtody of the Goods: but Shuttleworth doubted whether he had Cuſtody, and cited the caſe of Littleton, viz. If I give my Sheep to Compaſture, &c. and he kills them, an Action of treſpaſſe lies: and the Juſtices held that in this caſe the Action did well lye; and Periam ſaid, that the Defendant had onely an authority, and not cuſtody or poſſeſſion, and Judgment was given for the Plaintiff, 3 H.7.12.21 H.7.14. And Windham ſaid, that if he had imbezelld his Maſters Goods, without queſtion it was felony. Quod fuit conceſſum, (Anderſon abſente) and the Law will not preſume that the goods were out of the poſſeſſion of the Plaintiff; and the next day came the Lord Anderſon and rehearſed the caſe, and ſaid, that the Defendant had neither generall nor ſpeciall property in the Goods, for it is plaine, he could have no generall property, and ſpeciall he had not, for he could not have an action of Treſpaſſe if they were taken away, then if he had no property, a treſpaſſe lies againſt him, if he take them; ſo if a Shepheard ſteal Sheep, it is felony, for he hath no property in them, wherefore he gave Judgment accordingly.

Mich. 29, and 30 Eliz. Rot. 1410.

Cooke againſt Baldwin.

A Leaſe was made for one and twenty years, to one Truepenny and Elizabeth, if ſhe, and he, or any Child, or Children between them lawfully begotten, ſhould ſo long live, and then they were married, and the Wife died without Iſſue. If the Leaſe be determined or not, was the queſtion. And it was moved that it was determined, becauſe it is conjunctive, if he and ſhe, &c. and now one of them is dead without iſſue, and it is not like the caſe of Chapman, where a man covenants to enfeoff one and his Heires, for it is impoſſible to enfeoff his Heires, he living, and therefore in that caſe it ſhall be taken for a diſjunctive: and if I make a Leaſe for years to two, if one of them dye, the other ſhall have all, becauſe they take by way of intereſt; but if a Leaſe be made to two, during the life of one of them, if one dye, the

Leaſe

Leaſe is gone. Quod fuit conceſſum: And here the meaning is, that the Leaſe ſhall be determined if one of them dye.

Rhodes Juſtice, The meaning is againſt you, for by the word (or) which comes after, it appears that they are to have their lives in it.

Anderſon, By the words it is plain, that after the death of one the Leaſe is determined, and that which moves me to think it was ſo intended, is, becauſe it was intended (as it ſeems to me) to be a Joynture for the wife, which was made by them before marriage; and then if by the death of one it ſhould be gone, and ſhe have nothing, could not be the meaning; To which the other Juſtices aſſented. And all the Judges agreed that the Leaſe was not determined by the death of one; and Judgment given accordingly.

Mich. 29, and 30 Eliz.

IN a Quare Impedit by Sir Thomas Gorge Knight, againſt the Biſhop of Lincolne, and Dalton Incumbent, the Caſe was; That a Manor with the Advowſon appendant was in the hands of the King, and the Church became void, and the King grants the Manor with the Advowſon: If the Grantee ſhall have the Preſentation, or the King, was the queſtion. And all the Juſtices held clearly that the avoidance would not paſſe, becauſe it was a Chattell veſted. And Periam ſaid, that in caſe of a common perſon without queſtion an Advowſon appendant would not paſſe by ſuch Grant; for if the Father dye, it ſhall go to his Executor, but if it be an Advowſon in groſſe in caſe of a common perſon, there is ſome doubt: But in the principall caſe all the Judges held ut ſupra, and ſaid, that ſo it was in 9 Ed. 3. 26. Quare Impedit 31. And in Dyer in the caſe of the Church of Weſtminſter, but F. N. B. is contrary, 33 N.

Mich. 29, and 30 Eliz. Rot. 728.

HOuſe and Elkin brought an Action of Debt upon an Obligation made to them, againſt Roger Grindon, as Sheriffs of London, upon condition of appearance at a certain day in the Kings Bench: The Defendant pleaded that he being arreſted by a Precept out of the Kings Bench appeared at the day: And upon this they were at iſſue to be tried by the Country: And a Repleader was awarded, becauſe it was triable by Record, for although the Sheriff do not return the Proceſſe, yet the Defendant ought to come into the Court at the day, and there ſpeciall entry ſhall be made of his appearance. And ſo was it adjudged this terme in the Caſe between Bret and Shepheard: But Bradford Prothonotary ſaid it was well enough, for it may be that he appeared there, and there was no Record of it, To which it was anſwered, that it was no apparance unleſſe there were a Record: But the Caſe in Court was ut ſupra.

Hil. 30. Eliz.

IN an Ejectment by Dorothy Michell against Edmund Dunton, the Case was; A woman makes a Lease for years, rendring Rent, with a Covenant that the Lessee should repaire the house, with other Covenants, and then devised the same lands to the same Lessee for divers years more, yelding the like rent, and under such Covenants as were in the first Lease, the Remainder over in fee, and dies, and then the first Lease for years does expire, and the Lessee continues in by force of the second Lease by vesture of the devise, and repaires not the houses, so that if the first Lease had been in being, he had broke the Covenant. If this shall be such condition as he in the remainder may enter, was the question.

Shuttleworth, It is a Condition, for he cannot have a Covenant, and then it shall be intended that it is conditionall: But by all the Court, There appears no such intent, for it appears that he holds under like Covenants.

Anderson, The nature of a Covenant is to have an Action, but not an entry, and therefore there shall be no entry.

Shuttleworth, To what end then serves these words (under like Covenants) Periam, They are void. And at last it was resolved by all the Justices, that the Will expressing that the first Lessee should have the Land observing the first Covenants, it shall not be now taken to be a Condition by any intent that may be collected out of the Will: for a Covenant and Condition are of severall natures, the one giving Action, the other entry, and here the intent of the Will was, that although the Covenants were not performed, yet the Lessee should not forfeit his terme, but is onely bound to such paine as he was at the beginning, and that was to render damages in an Action of Covenant. And Judgment was given that the Plaintiff should be barred.

Mich, 29, and 30 Eliz. Rot. 2449.

THe Earle of Kent brought an Action of Debt upon a Bond against William Bryan, which was indorsed with a Condition, That if the Defendant did permit the Plaintiff, his Executors or Assignes, not onely to thresh Corn in the Defendants Barn, but also to carry it away from time to time, and at all times hereafter convenient, with free egresse and regresse, or else to pay eight pounds upon request, &c. that then, &c. And in truth the Defendant permitted the Corn to lye there two years, in which time the Mise and Rats had devoured a great part of it, and then the Defendant thresht it, and the Earle therefore brought this Action: And upon Demur it seemed to Walmsley that there was no forfeiture of the Bond, because the Earl took not the Corn away in convenient time, for convenient time is such as shall prejudice no person (Quod fuit negatum per Justitiar.) and here is great prejudice to the Defendant, because the Plaintiff did not carry away the Corn: And he put many cases, where things ought to be done in convenient time, as in the 21 Ed. 4. where an Arbitrement ought to be performed in convenient time. But the opinion of the Court was, that he might come in convenient time, although he comes long after, and

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the words are not within convenient time. Windham said, That if the words had been within convenient time, it would have made a difference.

Anderson, If the words of the Condition had been, that he should suffer the Plaintiff in time convenient to come, and thresh and take away his Corn, then perhaps he ought to send within a year according to Walmsleys saying, but the words here are at all convenient times, and that day that the Servant came was a convenient day to thresh and carry away; and the words, At all convenient times shall be construed, that at any time when it pleaseth the Earl he may come, unlesse it be night, or Sabboth day, and if the word, convenient, had not been mentioned, then by the words, from time to time, and at all times after, then the Earl may come at any time either in the day or night, and that a hundred years after as he pleaseth, and then the word, convenient, does restrain him that he cannot come but in the working daies, but does not restrain any time in which he shall come, but onely in convenience of time, which is at times of labouring and watching. And so was the opinion of the Court. ut supra.

An Action of Debt was brought upon a Lease for years, the Defendant pleaded Nihil debet per patriam, and did intend to give in evidence an entry of the Plaintiff before any Rent behind. And by the Court he could not do it, for it is contrary to the issue.

Hil. 30 Eliz. Rot. 904.

Between Spittle and Davis.

IN a Replevin, the case was; One Turk seised of lands in fee, devised parcell thereof to his eldest Son in taile, and the other parcell to his youngest Son in fee. Provided, and his intent was, that if any of his Sons or any of their Issues, do alien or demise any of the said lands, before any of them comes to the age of thirty years, that then the other shall have the Estate, and does not limit what Estate, and then one of the Sons makes a Lease for years before such age, whereupon the other enters, and before he comes to the age of thirty years, he aliens that part into which he made entry, and the other brother being the eldest enters and makes a Lease to Spittle the Plaintiff for three years, and Davies by commandment of the younger brother enters, and takes the house Damage-feasant, and Spittle brought a Replevin: And upon Demur, it seemed to the Court, that this was a limitation, and by vertue of the Will the Estate devised to them untill they alened, and upon the alienation to go to the other, & upon such alienation the land is discharged of all limitations, for otherwise the land upon one alienation shall go to one, and upon another alienation shall go back again, and so to and fro ad infinitum, vide Dyer 14. & 29. And afterwards all the Judges agreed, that after one brother had entred into the land by reason of the alienation, that land was discharged forever of the limitation by the Will; And Judgment was given accordingly.

Trin.

Trin. 27 Eliz. Rot. 190.

Carter againſt Lowe.

IN an Ejectment, the Caſe was; A Termor deviſed his terme to I.S. and made his Wife Executrix and died, the Woman enters and proves the Will, and takes Husband, who takes a Leaſe of the Leſſor, and after the Deviſee enters and grants all his Eſtate to the Husband and wife, and herein two queſtions were moved.

1. If by this acceptance of the new Leaſe by the Husband, the term which the woman had to another uſe, viz. to the uſe of the Teſtator ſhall be deemed a ſurrender: And the opinion of the Court was clearly without argument, that it was a ſurrender. But admitting it was no ſurrender, but the firſt terme continues, then the ſecond queſtion is,

2. If when the Deviſee enters into the terme deviſed to him, without conſent of the Executor, by which entry he is a wrongfull Seiſor, and a Diſſeiſor, and after he grants his right and intereſt to the Executor; if this Grant be good or no, becauſe he had not any terme in him, but onely a right to the terme ſuſpended in the land, and to be revived by the entry of the Executor, And adjudged that it was a good Grant, and it ſhall inure firſt as the agreement of the Executor by the acceptance of the Grant, that the Deviſee had a terme in him as a Legacy. And ſecondly the Deed ſhall have operation by way of Grant to paſſe the Eſtate of the Deviſee to the Executor, and ſo no wrong, and the caſe was reſembled to the caſe of ſurrender to the grantee of a Reverſion, which firſt ſhall inure as attornment, and after as ſurrender, and ſo was it adjudged.

Trin. 37 Eliz.

IN an Action on the Caſe for theſe words; *Carter* is a prigging pilfering Merchant, and hath pilfered away my Corne and my Goods from my Wife and my Servants, and this I will ſtand to: And the Action was commenced in a baſe Court in the Country, and Judgment given and the Record removed by Writ of Error: And it ſeemed to the Court that the words were not actionable, wherefore Judgment was reverſt. Sed quære rationem.

Gowood againſt Binkes.

A Man did aſſume and promiſe to I.S. in conſideration that he would forbeare a Debt due to him untill ſuch a time: That he would pay the Debt if A.B. did not pay it, and he that made the promiſe died, and the money was not paid, and therefore an Action was brought againſt his Executors, who traverſed the Aſſumpſit, and a Verdict found againſt

againſt them, and in Arreſt of Judgment it was moved, that an Action grounded on a ſimple Contract, lies not againſt Executors unleſſe upon an Aſſumpſit for a Debt or Duty owing by the Teſtator himſelf, and not of ſuch a collaterall matter as the forbearance of the Debt of another: but by Gawdy, Judgment was given for the Plaintiff; whereupon Popham ſaid, that he believed this Judgment would be reverſed by Writ of Error in the Exchequer Chamber, and the ſame day at Serjeants-Inn ſuch a caſe was depending in the Exchequer Chamber to be argued, and reverſed for the cauſe ut ſupra. And the caſe was between Jordan and Harvey, and entred Trin. 36 Eliz. Rot. 384.

Hil. 37 Eliz. Rot. 34.

Caſtleman againſt Hobbs.

IN an Action of the Caſe for ſaying, Thou haſt ſtollen half an acre of Corne, (*innuendo*) Corne ſevered, the Defendant demurred upon the Declaration.

Fenner, It is not Felony to move Graine and take it away.

Popham agreed to it, and that the word Innuendo would not alter the Caſe, unleſſe the precedent words had vehement preſumption, the Corne was ſevered; and in this caſe no man can think that the Corne was ſevered, when the words are, half an acre of Corne: on the contrary, if the words had been, that he had ſtollen ſo many loads, or buſhels of Corne; And Gawdy was of the ſame opinion: and Judgment againſt the Plaintiff, &c.

Hil. 38 Eliz.

IN an Account the Plaintiff declared, that he delivered Goods to the Defendant to Merchandize for him, the Defend. ſaid, that the Goods with divers other of his own proper goods were taken at Sea, where he was robbed of them. And it was moved that this was no plea in Bar of an Account, but if it be any plea, it ſhall be a plea before Auditors in diſcharge: But admitting it be a good Bar, yet it is not well pleaded, for the Plaintiff as it is pleaded cannot traverſe the robbing and try it, for things done ſuper altum mare is not tryable here, wherefore the Defendant ought to have pleaded that he was robbed at London, or any other certain place upon the Land, and maintain it by proofs that he was robbed on the Sea.

Gawdy, It is no good plea, for he hath confeſt himſelf to be accountable by the receipt, 9 Ed. 4., and it is no plea before Auditors, no more then the Caſe was in 9 Ed. 4. for a Carrier to ſay, that he was robbed.

Popham, It is a good plea before Auditors, and there is a difference between Carriers and other Servants and Factors; for Carriers are paid for their carriage, and take upon them ſafely to carry and deliver the things received.

Gawdy, If Rebels breake a Priſon, whereby the Priſoners eſcape, yet the Goaler ſhall be reſponſible for them, as it is in the 33 H. 6.

Popham, In that caſe the Goaler hath remedy over againſt the Rebels, but there is no remedy over in our caſe.

Gawdy, Then the diverſity is when the Factor is robbed by Pyrates, and when by enemies.

Popham, There is no difference.

Hil. 38 Eliz. Rot. 40.

IN a Writ of Error upon a Judgment given in Nottingham, the Error aſſigned was; becauſe the Defendant had no addition, for it appeared the Action was in Debt; and the Record was, that H. Hund complained againſt Richard Preſton of, &c. in the County of Nottingham, Husbandman, the which addition is not in his firſt name, but in the alias, and that could not be good, and therefore it was prayed that Judgment might be reverſed. But by the Court, the Court of Nottingham had no authority to outlaw any man, ſo that addition is not requiſite, wherefore it is no Error: and Judgment was affirmed.

Trin. 37 Eliz. Rot. 553.

Browne againſt Brinkley.

IN an Action of the Caſe for words; the Declaration was, That the Plaintiff was produced as a Witneſſe before the Juſtices at the Aſſiſes at Darby, where he depoſed in a certain cauſe, and the Defendant ſaid, Browne was diſproved before the Juſtices of Aſſiſe at Darby, before Mr. Kingſley (Innuendo) that he was diſproved in his Oath, that he took before the Juſtices: And adjudged againſt the Plaintiff; for although he was diſproved in his Oath, yet it is not actionable in this caſe, for that diſproof might be in any collaterall matter, or any circumſtance; but otherwiſe if the words had been, that he was perjured, and the (Innuendo) will not help the matter, and ſo was it adjudged. The chief Juſtice and Fenner being onely in the Court.

Trin. 36 Eliz.

Higham againſt Beaſt.

IN an Action of Treſpaſſe by the Parſon of Wickhambrooke in the County of Suffolk, againſt the Vicar of the ſame place, for taking of Tythes, and on the generall iſſue the Jury gave this ſpeciall Verdict:

That the place where, &c. was a place called B. the Freehold of I. S. and parcell of the Manor of Badmanſhall, and found that the Pope as ſupreame

ſupream Ordinary, heretofore made ſuch an Indowment to the Vicaridge in theſe words; Volumus quod Vicarius, &c. habebit tertiam partem decimarum Bladorum & Fœni quomodocunque pervenientem de maneriis de Badmanſhall; and the queſtion was, If the Vicar by this Indowment ſhall have the third part of the Tythes growing upon the Land of the Freeholders within the Manor, or not. And it was ſaid, by the Court, that a Manor cannot be without Freeholders, and inaſmuch as they are to be charged with the payment of Tythes, one and the other together ſhall be ſaid to be the Tythes of the Manor, and ſo it was adjudged that the Vicar ſhould have Tythes of the third part of the land of the Freeholders, as well of the Demeſnes, and Copyholders.

Trin. 37 Eliz. Rot. 438.

Willoughby againſt Gray.

A Venire facias did beare Teſte out of the Terme, and alſo there was no place mentioned in the Writ, here the Viſne ſhould be impannelled, and after the Writ ſaid Coram Juſticiariis, and did not ſay, apud Weſtmonaſterium, and a tryall was had hereupon, and Judgment given which was prayed might be reverſed for theſe cauſes. But it ſeemed to the Court, that notwithſtanding all that was alledged, it was good enough, for although the Venire facias was not good, yet if the Diſtringas had a certain return and place therein: And the Jury appeared and gave their Verdict, ſo that a Verdict was had, the Statute will aide the other defects: as in the caſe adjudged between Marſh and Bulford, where the Venire bore Teſte out of the Term. But Fenner ſaid, that the Teſte was in the Term but on the Sabboth day, which was not Dies Juridicus.

Trin. 38 Eliz. Rot. 622.

KInton brought an Appeal of Mayhem, againſt Hopton, Flam, and Williams; Hopton pleaded, not guilty; Flam pleaded that he was miſnamed, and demanded Judgment, &c. Et quoad feloniam & mahemium, not guilty, & de hoc ponit ſe ſuper patriam, & prædict. Kinton ſimiliter: And Williams pleaded, no ſuch man in rerum natura, as Flam, and demanded Judgment of the Writ, and as to the Mayhem and Felony, not guilty, Et de hoc ponit ſe ſuper patriam, &c. And as to the other two pleas to the Writ Kinton demurred, & prayed that the Writ might be awarded him, and a Venire facias to try the iſſue. For Tanfeild urged, that by pleading over to the felony, he waved the plea to the Writ, for there was a diverſity between an appeal of Murther, and of Mayhem, for in Murther, as it is 7 Ed. 4. and 3 Ed. 6. although he plead to the Writ of appeal, yet of neceſſity he muſt plead over to the Murther, becauſe it is in favorem vitæ, or elſe if he will ſoyne in Demurrer upon the plea to the Writ, he doth confeſſe thereupon the Felony, and therefore he muſt plead over, not guilty. But in Mayhem it is other-

wiſe

wiſe, for although the Declaration was for Felony, yet is a Mayhem but a Treſpaſſe onely, and all are principalls, and the life of the Defendant is not queſtioned, but he ſhall onely render damages, and therefore if he plead over to the Felony that is a waver of the plea, and ſo a Venire facias ought to iſſue out, to try if he be culpable or not, and of this opinion were Popham, Fenner, and Gawdy clearly, and agreed to the diverſity between the appeal of Mayhem and Murther.

Mich. 38, and 39 Eliz.

King againſt Braine.

A Man ſells Sheep, and warrants that the yare ſound, and that they ſhall be ſound for the ſpace of a year, upon which Warrant an Action of the Caſe was brought, and it was moved that the Action did not lye, becauſe the Warranty is impoſſible to be performed by the party, becauſe it is onely the act of God to make them ſound for a year. But Clench and Fenner on the contrary; for it is not impoſſible, no more then if I warrant that ſuch a Ship ſhall return ſafe to Bruges, and it is the uſuall courſe between Merchants to warrant the ſafe return of their Ships.

Mich. 38, and 39 Eliz.

Wentworth and Savell againſt Ruſſell.

IN a Writ of Parco fracto, the Plaintiffs declared that they were Tenants pro indiviſo, of a Manor in Yorkſhire, and that the Defendant held of them certain lands as of their Manor, rendring Rent, which Rent was behind, and for which they diſtrained and impounded the Diſtreſſe, and the Defendant broke the Pound and reſcued the diſtreſſe, and thereupon they brought this Action; and the Defendant demurred on the Declaration, becauſe the Plaintiffs did not ſhew how they were Tenants pro indiviſo, or Tenants in Common, or Coparceners. But the Court ruled the Declaration to be good: And Gawdy ſaid, that a Tenant in Common alone, without his companion, may have an Action De parco fracto. And Judgment was given for the Plaintiff.

Hil. 39 Eliz.

POphamſaid, that in Lancaſhire there is a Pariſh called Standiſh, within which are many Townes, and one of the Townes is called Standiſh: And if a man ſeiſed of lands in the Town of Standiſh, and alſo

alſo of land in the other Townes, do let all his land in Standiſh onely, his land within the Town of Standiſh doth paſſe, and not all his land within the Pariſh of Standiſh in the other Townes. For where a man ſpeaks of Standiſh or of Dale, it ſhal be intended to be a Town and not a Pariſh, unleſſe there be expreſſe mention of the Pariſh of Standiſh, or of Dale. Gawdy and Fenner on the contrary, for the Grant of every man ſhall be taken ſtrongeſt againſt himſelf, and therefore all the land as well within the Pariſh of Standiſh, as within the Town of Standiſh ſhall paſſe: And Fenner ſaid, that when Dale is mentioned in any Precipe, it ſhall be intended the Town of Dale, becauſe Towns are noted at the Common Law, and not Pariſhes, for Pariſhes were ordained by the Councell of Lyons, but notwithſtanding in Grants, there ſhall be no ſuch intendment, but the intendment ſhall be according to the common uſage and underſtanding of the Country, and Country-men in favour of the Grantee: and when a man ſpeaks of Standiſh, or any ſuch place, it ſhall as well be intended to be a Pariſh as a Town.

Hil. 29, Eliz.
Clarentius againſt Dethick.

CLarentius brought an Action of the Caſe againſt Dethick, by the name of Dethick, alias Garter: The Defendant demanded Judgment of the Writ, for the Queen by her Letters Patents had created him King at Armes, Et quod nuncuparetur Garter principalis Rex armorum, and that he ſhould ſue and be ſued by ſuch name, and becauſe he was not ſued according to his creation, he demanded Judgment, &c.

Tanfeild prayed that the Writ might abate, for this caſe had been here in the Court in queſtion before, where Dethick was indicted by the name of Dithick onely, and becauſe he was not named according to his creation, he pleaded that matter, and the Indictment was quaſhed.

Gawdy, I remember the caſe very well, and it was adjudged at my firſt coming to this Court, and in truth the Judgment paſſed againſt my opinion, which then and ſtill is, that when he is ſued as King at armes, in ſuch caſe wherein his Office or other thing belonging to his Office comes in queſtion, then he ought to be named according to his Patent, but when he is ſued as I.S. then it is ſufficient to name him by his proper name.

Popham, Upon the creation of any Deanery which is ordained and granted by Patent of the King, the Dean ſhall ſue and be ſued by the name of Dean of ſuch a place, yet if ſuch Dean doth ſue or is ſued about any matter concerning his naturall capacity, it is not neceſſary to name him Dean. Fenner. But this is a name of dignity, and by his inſtallation is made parcell of his name, and if a man be made a Knight, in all Actions he ſhall be ſo named; wherefore it ſeemed to him that the Writ ought to abate. Et Adjournetur.

Hil. 37 Eliz.
Hugo againſt Paine.

HUgo brought a Writ of Error againſt Paine, upon a Judgment given in the Common Pleas upon a Verdict, the Error aſſigned was,

That one Tippet was returned in the Venire facias, but in the Habeas Corpus and the Diſtringas he was named Tipper, and ſo another perſon then was named in the Venire tryed the iſſue. Curia, Examine what perſon was ſworne, and what was his true name, to which it was anſwered that his name was Tippet according to the Venire facias, and that he was ſummoned to appeare to be of the Jury, and he inhabits in the ſame place where Tipper was named, and that no ſuch man as Tipper inhabited there, and therefore it was awarded by the Court that the Habeas Corpus and Diſtringas ſhould be amended, and his true name put in, and Judgment was affirmed, &c.

Hil. 38 Eliz. Rot. 944.
Rainer againſt Grimſton.

RAiner brought an Action of the caſe againſt Grimſton in the Kings Bench, for theſe words, He was perjured, and I will prove him ſo by two Witneſſes; without ſpeaking in what Court he was perjured, and the Plaintiff had Judgment, and upon Error brought by the Defendant, it was moved that the words were not actionable: But in the Exchequer Chamber, the firſt Judgment was affirmed.

Hil. 39, Eliz. Rot. 859.
Chandler againſt Grills.

IN a Treſpaſſe, the parties were at iſſue, and a Venire facias was awarded on the Roll returnable Octabis Trinitat. and the Venire was made ſix daies after the day of Octabis returnable at a day out of the terme, and the Diſtringas was made, and the Jury Impanelled, and a Verdict and Judgment for the Plaintiff: And in a Writ of Error brought this matter was aſſigned. And the firſt Judgment affirmed, for this is aided by the Statute, being it is the default of the Clark: and the caſe was cited between Thorne and Fulſhaw in the Exchequer Chamber, Mich. 38, & 39 Eliz. where the Roll being viewed, and the Venire not good, it was mended and made according to the Roll, being that which warrants it and is the act of the Court, and the other matter but the miſtake of the Clarks. But if the Roll were naught then it is erroneous, becauſe the Venire is without warrant, and no Record to uphold it, and ſo was it held in the caſe of Water Hungerford and Beſie.

Hil. 39 Eliz.
During againſt Kettle.

DUring brought an Action againſt Kettle after a Tryall by Verdict in London, and in Arreſt of Judgment, it was alledged, that the Venire facias is, Regina vicecomit. London ſalut. præcipimus tibi quod, &c. where it ſhould be præcipimus vobis, &c. But ruled by the Court that this Venire being as it were a Judiciall Writ that ought to enſue the other proceedings, it was holden to be amendable, and ſo it was accordingly.

Paſch. 39 Eliz.
Eaſt againſt Harding.

IT was moved, Whether if a Lord of a Manno⁊ makes a Leaſe fo⁊ years, after a Copyholder commits a Fo⁊feiture, the Leſſee fo⁊ years ſhall take advantage hereof: and it was ſaid by Popham, that the Feoffee o⁊ Leſſee ſhall have advantage of all Fo⁊feitures belonging to Land, as in caſe of Feoffment, and the like, but on the contrary fo⁊ not doing of Fealty.

Mich. 39 Eliz.
Collins againſt Willes.

THe Father makes a p⁊omiſe to Willes, that if he would marry his Daughter, to pay him 80 l. fo⁊ her po⁊tion, but Willes demanded a 100 l. o⁊ elſe did refuſe to marry her, wherupon the daughter p⁊ayed her Father to pay the 100 l. and in conſideration therof ſhe did aſſure him to pay him 20 l. back again. The 100 l. is paid, and the marriage took effect. And the Father b⁊ought his Action on the caſe againſt the Husband and Wife, fo⁊ the 20 l. Gawdy, and Fenner ſaid, that the Action would lye: but Popham held the conſideration void.

Mich. 39, and 40 Eliz.
Penn againſt Merivall.

IN an Ejectment the Caſe was, If a Copyholder makes a Leaſe fo⁊ years which is a fo⁊feiture at the Common Law, and after the Lo⁊d of a Manno⁊ makes a Feoffment, o⁊ a Leaſe fo⁊ years of the Freehold of this Copyhold to another; if the Feoffee o⁊ Leſſee ſhall take advantage hereof was the queſtion. Popham, He ſhall not, fo⁊ the leaſe of the Freehold made by the Lo⁊d before entry, is an aſſent that the Leſſee of the Copyholder ſhall continue his Eſtate, and ſo is in nature of an affirmance and confirmation of the Leaſe: to which Clench and Fenner agreed; and therefo⁊e upon motion made by Yelverton Serjeant, and Speaker of the Parliament, Judgment was given, Quod querens nihil capiat per Billam.

Mich. 6 Eliz.

ONe enters a plaint in a baſe Court to purſue in the nature of a w⁊it of entry in the Poſt, and had Summons againſt the party untill ſuch a day, at which time, and after Sun-ſet, the Steward came and held the Court, and the Summons was returned ſerved, and the party made default, and Judgment given: the queſtion was, If the Judgment was good. Dyer, Welch, and Benlowes held the Judgment good, although the Court was held at night: and Dyer ſaid, that if it were erroneous, he could have no remedy by W⁊it of falſe Judgment, no⁊ otherwiſe, but onely by way of petition to the Lo⁊d, and he ought in ſuch caſe to do right according to conſcience, fo⁊ he hath power as a Chancello⁊ within his own Court.

Lane

Lane againſt Coups.

IN an Ejectment by John Lane againſt Coup, and the Plaintiff declared on a Leaſe made by William Humpheſton, the Caſe was; William Humpheſton being ſeiſed of land in fee, ſuffered a common recovery to the uſe of himſelf and his wife for life, the remainder Seniori puero de corpore Gulielmi Humpheſton, and to the Heirs Males of the body dicti ſenioris pueri. Plowden, One point is, that when a remainder is limitted Seniori puero in tail, if Puer ſhall be intended a Son, or a Daughter alſo; and methinks it ſhall be intended a Son onely, for ſo are the words in common and uſuall ſpeech, and words in Deeds ought to be expounded as they are commonly taken, and not to go to any ſtrict conſtruction of the words as (Heirs) in the Latine is uſed alſo for goods by the Civill Law, but we uſe it only for lands, and ſo Libra in Latine ſignifies a Weight; and yet if I am bound in Vigint. Libris, if I forfeit my Bond, I muſt pay money, and not Lead, or the like. And ſo the word Puer is ſomtimes taken for a ſervant. Claudite jam rivos pueri, &c. and the ſame reaſon that it may be intended for a Daughter, may be for a Servant alſo. Gawdy, I ſuppoſe the Son ſhall have it and not the Daughter, for although Pueri was taken for Male and Female, yet now it is taken for Male in any Modern Author, but to omit curioſity of words, we ought to conſider rather the intent of the parties, and there are many circumſtances to prove that he intended this to his Son, and not to his Daughter, for he made it for ſetling his Inheritance, and it ſhall not be ſuppoſed that he intended his Daughter ſhould have it. Alſo where the caſe may be taken two wales, the moſt uſuall ſhall be intended; as in caſe of a reſervation of a Rent at Michaelmas, that ſhall be intended at the chiefeſt Feaſt: alſo in this caſe it ſhall be intended that he would advance the moſt worthy of his blood, and therefore to that purpoſe the conveyance ſhall be expounded; for if there be two I. S. and I give land to I.S. it ſhall be intended to my next Neighbour, but if one be my Coſin, although he dwells forty miles from me, yet he ſhal have the land: And to this Southcote accorded.

31 Eliz. in B. R. Hone againſt Clerk.

A Woman Leſſee for life takes Husband, who by Indenture makes a Feoffment of the land to I.S. for theſe words; Sciant per Servantes Richardum How & Katherin. uxor. ejus dediſſe I.S. unum meſſuagium habendum prædict. I.S. heredibus ſuis ad ſolum opus & uſum of the ſaid I.S. and his Heirs, during the life of Katherine. The queſtion was, if this was a forfeiture becauſe the wife was Tenant for life; and the Attorney argued that it was, for the words Pro termino vitæ Katherin. are referred to the uſe only and not to the eſtate; for by theſe words habendum to him and his Heirs the eſtate is limited, and therefore it is a forfeiture: but after comes the limitation of the uſe, ad uſum I. S. and his Heirs during the life of the woman, and after the death of the woman the uſe remaines in the Feoffor: and he cited the Lord Sturtons caſe, in the beginning of the Queens Raign; The Lord Sturton gave land to Clerk and his Heirs, to the uſe of Clerk and the Heirs of his body, and adjudged that it was not an eſtate in taile, for the limitation of the eſtate was before in the Premiſes. Coke, on the contrary, and

ſaid,

ſaid, that thoſe words, For life of the wife, are to be referred to the limitation of the Eſtate, for if a double ſenſe be in words, ſuch ſenſe ſhall be taken as ſhall avoid all wrong, and therefore it ſhall not be ſo expounded, as that the Grant ſhall not take effect, and that a forfeiture ſhall enſue, 4 Ed. 2. and ſee a notable caſe for expoſition of words, and for relation of words and ſentences, 34 Ed. 3. Avowry 58. 28 H. 8. Dyer. Gawdy, It is a forfeiture. Clench ſaid he would adviſe; but afterwards it was adjudged a forfeiture: for as Wray ſaid, the eſtate given was forfeit.

Mich. 36, & 37 Eliz. Bagnall againſt Porter in B. R.

Rot. 353.

A Man by Indenture bargains and ſells his land, and if the Bargainor pay 100 l. at ſuch a day, that then he ſhall be ſeiſed to the uſe of the Bargainor and his heirs, and did aſſume to make ſuch aſſurance for the ſecurity of the land as ſhould be adviſed by the Councell of the Bargainor, and the Bargainee bound himſelf in a Recognizance to performe the ſaid Covenants. And in debt upon the Recognizance, it was ſhewn that the Bargainor paid the money at the day, and had tendred to the Bargainee a Deed in which was compriſed an acquittance of payment of the money, and alſo a releaſe of all his right, and the Bargainee refuſed to ſeale it. Coke was of clear opinion that he ought to have ſealed it, for it is neceſſary to have the Deed to mention payment of the money, for otherwiſe the Bargainee and his heirs may claim the land for default of payment. Gawdy of the ſame opinion, and cited 19 Ed. 4. Popham, The caſe is not ſo clear, for if he had tendered an acquittance only, there is no doubt but the Bargainee might refuſe to ſeale it, and by the ſame reaſon he may refuſe when it is joyned to a thing that he is bound not to do, viz. to ſeal the releaſe: but at laſt the matter was referred to Arbitration.

Hillar. 37 Eliz.

Coke demanded this queſtion, A man having two Daughters his Heires, does demiſe his Land to them in Fee; What eſtate had they by this Demiſe? For if a man deviſeth Land to his eldeſt Son, it is voyd, and he is in by deſcent. That it was holden by the Court, that they ſhall hold by the Deviſe, becauſe that he gives another eſtate to them then deſcended, for by the deſcent each of them had a diſtinct moyety, but by the Deviſe they are Joyn-tenants, and the ſurvivor ſhall have all. And *Fenner* ſayd, If a man had Land in Burrow-Engliſh and Guildable Lands, and deviſed all his Land to his two Sons, and dyes, both of them ſhall take joyntly, and the younger ſhall not have a diſtinct moiety in the Burrow-Engliſh, nor the elder in the Guildable Land, but they are both Joyn-tenants.

Paſch. 37 Eliz. Carrell againſt Read, in B. R.

Rot. 270.

A Leaſe for years was made of divers Fenny grounds in Cambridge ſh. and the Leſſee covenanted to defend the ground, for being ſurrounded with water, and to drain the water out of other lands that were demiſed to him in the ſaid County. And upon an Action of Covenant for not performing, the Defendant pleaded that the Plaintiff had entred in the land demiſed. And adjudged no plea by the Court, becauſe the Covenant was not in reſpect that the Leſſee ſhould enjoy the land, nor was it a Covenant adhering to the land, but to a collaterall thing; but if it had been in reſpect of enjoying the land, there it is a good plea to ſay that the Plaintiff had entred

tred, but where the thing to be done is collaterall, it is otherwiſe, and alſo if he did plead ſuch plea, yet it is not a bar, unleſſe he holds him out of poſſeſſion, Coke lib. 3. 221. 4 Ed. 3. 29. the Lord ſhall not have a Ceſſavit after entry in parcel, 10 Ed. 4. 11. 35 H. 6. Bar 162. 19 Ed. 4. 2.

Trin. 37 Eliz. in B. R. Rot. 1076.
Dogrell againſt Perks.

IN an Action of Covenant, The Defendant pleaded, that it was enacted by the Major of London, and common Councel, that if any Citizen takes the Son of an Alien to be his Apprentice, that the Covenants and Obligations ſhall be void, and he ſhewed that he was the Son of an Alien, and became an Apprentice to the Plaintiff who is a Citizen, and made the Covenants with him for his Apprentiſhip: And demanded Judgment. And it was held no Bar; for notwithſtanding the Act, the Covenant is good, for it is the Act of the Defendant, although the Act of the Common Councell be againſt it: but the ſaid Act may inflict puniſhment on any Citizen that breakes it. And Judgment was given for the Plaintiff.

Trin. 41 Eliz. in B. R.
Knotts againſt Everſtead.

LEſſee for life, the remainder for life, the remainder in taile, he in the reverſion who had the fee does enter and enfeoffs the Leſſee for years; and adjudged that by this Feoffment Nihil operatur. Popham ſaid, that he who hath a term cannot licenſe another that hath nothing in the land to make a Feoffment, for he who hath the Freehold wants nothing but poſſeſſion to make a good Livery: but in this caſe he who makes the Livery had not the Freehold, and therefore the licenſe is void. But Tanfeild ſaid, that if Leſſee for life gives leave to a ſtranger to make Livery, it is void, but if he conſent that the ſtranger ſhall make a Feoffment, it ſhall amount to a Diſſeiſin, and the Feoffment is good. Which was denied by the Court. And Clench ſaid, if a Leſſee for ten years makes a Leaſe for one year to him in reverſion, there he in the reverſion who hath the land for a year, may make a Feoffment to the Leſſee for ten years, and it is good.

Trin. 41 Eliz. Moyle againſt Mayle.

MOyle brought an Action of Waſte againſt Mayle, and declared that he had leaſed to him a Manno and a Warren, and that he had deſtroyed a Cony-borough and ſubverted it, and aſſigned otherwaſtes in cutting down certain Thornes. Williams, The Action of waſte will well lye, and ſaid that a Warren conſiſted of two things, of a place of Game, and of liberty, and to prove that a waſte did lye for a liberty, he cited the Statute of Magna Charta, Cap. 5. in which a Warren is intended, alſo the Statute of Marlebridge, cap. 24. and the Statute Articuli ſuper Chartas, cap. 18. by which Statutes it is evident that a waſte does lie for Warrens, and a Warren is more then a liberty, for a Writ lies Quare warrenam ſuam intravit, and by the 12 H. 8. if Leſſee of a Warren does break the Pale, it is a waſte, alſo if Leſſee of a Pigeon-houſe ſtop the holes, ſo that the

the Pigeons cannot build, a waſte doth lye, as it hath been adjudged. Alſo if Leſſee of a Hop-yard ploweth it up and ſowes Graine there, it is waſte, as it hath been adjudged. Alſo the breaking a Weare is waſte, and ſo of the Banks of a Fiſh-pond, ſo that the water and fiſh run out: To all which caſes the Court agreed, except to the principal. For the Court held it was not waſte to deſtroy Cony-boroughs, for waſt will not lye for Conies, becauſe a man hath not inheritance in them, and a man can have no property in them but only poſſeſſion, and although by a ſpeciall Law, Keepers are to preſerve the land they keep, in the ſame plight they found it, yet this does not bind every Leſſee of land. Walmſley, The ſubverſion of Cony-boroughs is not waſte, and it was uſuall to have a waſte againſt thoſe who made holes in land, but not againſt thoſe who ſtop them up, becauſe therby the land is made better: And it was ſaid, that to dig for ſtones was a waſte, unleſſe in an ancient Quarry, although the Leſſee fill it up againe. And Walmſley ſaid, that in Lancaſhire it is waſte to dig Marle, unleſſe it be imployed upon the land: And ſaid it was not waſte to cut thornes, unleſſe they be in a Wood ſtubbed and digged up by the roots; but if they grow upon the land then they may be ſtubbed, and it is no waſte: But to cut down Thorne-trees that have ſtood ſixty or a hundred years, it is waſte.

Hil. 32 Eliz. in B. R.
Sir George Farmer againſt Brook.

IN an Action of the Caſe the Plaintiff claimeth ſuch a Cuſtome in the Town of B. that he and his Anceſtors had a bake-houſe within the Town to bake white bread and houſhold-bread, and that he had ſerved all the Town, with bread, & that no other could uſe the Trade without his licenſe, and that the Defendant had uſed the Trade without his licenſe upon which the Defendant demur'd. Morgan, This is a good Preſcription, and it is reaſon that a Preſcription ſhould bind a ſtranger, vide 11 H. 6. 13 A. preſcribed to have a Market, and that none ſhould ſel but in a Stall, which A. had made, and was to pay for the Stall, and held there a good Preſcription. And the Arch-biſhop of Yorks Caſe in the Regiſter. 186. is a good caſe. A man preſcribed that he had a Mill, and he found a horſe to carry the Corn thither, and that therfore they ought to grind there, and becauſe they did not, he brought his Action on the caſe. Buckley contra. It cannot be intended to have any commencement by any Tenure, 11 H 4. A. procured a Patent that none ſhould ſell any thing in London without paying him a penny, adjudged not good, and the caſe of the Arch-biſhop was good, becauſe he had it ratione dominii & tenuri. And adjudged the principall caſe, that the action will not lye.

23 Eliz. in C. B.
Farrington againſt Charnock.

KIng Henry the 8 granted Turbariam ſuam in D. at Farrington rendring rent for 21. years and then the Leſſee imployed part of it in arable land, and relinquiſht part of it in Turbary: and then Q. Mary grants Totam illam Turbariã before demiſed to Farrington; and adjudged that that paſſed only which was Turbary, and the other part, that was converted into Tillage did not paſſe. Mich.

Mich. 18 Eliz. in B. R.

SIr Arthur Henningham brought an Action of Error against Francis Windham to reverse a common recovery had against Henry Henningham his brother: and the Error assigned was, that there was no warrant of Attorney of the Record. And it was agreed by the Bar and Bench, and adjudged error. But the great point was, if the Plaintiff could have a writ of Error? The Case was; Henry the Father had Henry his Son and three Daughters by one Venter, and the Plaintiff by another Venter, and died seised of the land intailed to him, and the Heirs Males of his body. Henry enters and makes a Feoffment, the Feoffee is impleaded, and voucheth Henry, who looseth by default in the recovery, and dies without issue, and whether the Daughters which are Heirs generall, or the Plaintiff which is Heir in tail shall have the Error. Gawdy and Baker for the Defendant, who said, that the Plaintiff could not have the Error, but the Daughters who were the Heirs to Henry, for an Action alwaies discends according to the right of land, and it seems that the Heir in Burrow English shall have Error or Attaint, and not the Heir at the Common Law, which was agreed by all on both sides: but it was said, that this varies much from the present case, for two reasons; One, because he came in as Vouchee which is to recover a Fee-simple, and he shall render a Fee-simple in value, which is discendable to the Heirs at the Common Law. Secondly, he hath no Estate-tail. Bromley Solicitor, and Plowden contra, and laid this ground, that in all cases where a recovery is had against one by erroneous processe, or false verdict, he which is grieved shall have redresse of it, although he be not party or privy to the first Judgment, and therefore at the Common Law if a Recovery be had against Tenant for life, he in the Reversion shall have Error or Attaint after his death, and now by the Statute of R 2. in his life, so in a Precipe, if the Tenant vouches, and the Vouchee looseth by default, the Tenant shall have Error, for the Judgment was against him, and he looseth his term: and in the 44 Ed:4.6. in a Trespasse of Battery against two, one pleads, and it is found against him, and the plea of the other not determined, damages by the principall Verdict is given against them both, which (if they be excessive) the other shall have an Attaint. And Bromley said, there could not be a case put, but where he that hath the losse by the recovery should have also the remedy; and Baker cited 9 H.7.24.6. that if a Recovery be had against a man that hath land on the part of the Mother, and he dies without issue, the Heir of the part of the Father shall have the Error. But Bromley and Plowden denied this case, and that 3 H 4.9. it was adjudged to the contrary: And Wray said to Baker, that he ought not much to rely on that case, for it was not Law, and said, that if Tenant for life makes a Feoffment, and a Recovery is had against the Feoffee, the first Lessor shall not avoid this. Bromley there is no use, for he may enter by forfeiture; but in our case, of whatsoever estate it be at the time of the recovery, the right of the Estate-tail is bound, and therefore it is reason that the Heir in tail shall avoid it. Jeffrey of the same opinion, and cited 17 Ass. A Conusor makes a Feoffment, and then execution is sued against the Feoffee by erroneous processe, the Feoffee shall have the Writ of Error, although he be not party to the first Record, but the reason is, because of his interest in the land. And Bromley and Plowden said further, that notwithstanding the Feoffee recovers against the Vouchee, and the Vouchee recover over the land, yet this recovery shall go to the Estate-tail. And Judgment was given for the Plaintiff.

Trin.

Trin. 32 Eliz. in B. R.

TRuſſell was attainted of Felony by Outlawry, and after an Execution is ſued againſt him at the ſuit of a common perſon, and he is taken by force thereof, and after he takes a Habeas Corpus out of the Kings Bench, and Coke prayed that he might be diſcharged of this execution, for where a man is attaint of Felony he hath neither Goods nor Lands, and his body is at the Kings diſpoſall, and ſo is not ſubject to the execution of a common perſon, 4 Ed. 4. But Harris Serjeant and Glanvill on the contrary, For although he be attaint of Felony, yet may he be in execution, for his own offence ſhall not aid him: and ſo was it in Croſs caſe in the Common Pleas; where a man being attaint of Felony was taken in execution at the ſuit of a common perſon, and he eſcaped out of Priſon, and an eſcape was brought againſt the Sheriffs of London, and a Recovery againſt him. And at laſt by advice of the Court, becauſe he was indebted to many perſons, and to diſcharge himſelf from his Creditors, intended to have a pardon for his life, and ſo deceive them, therefore he was committed to the Marſhalſey upon this execution.

Trin. 42 Eliz. Malloy againſt Jennings. Rot. 1037.

IN a Replevin the Caſe was; A man ſeiſed of land in fee, is bound in a Recognizance of 100 l. and then bargains and ſells all his land to the Plaintiff, and then the Recognizance is forfeit, and the Conuzee ſues out a Scire facias againſt the Conuzor before the Deed was inrolled, and had Judgment to have Execution. And the queſtion was, if the Bargainor was a ſufficient Tenant againſt whom the Execution was ſued. Williams Serjeant, The Bargainor was Tenant at the time of the Scire facias before inrolement, and although it was inrolled after, ſhall have relation to the firſt livery to prevent any grant or charge: And if an Action be brought againſt an Executor, as in his own wrong, and the Suit depending he takes Letters of Adminiſtration, this ſhall not abate the Writ. So in our caſe, the Bargainor was ſeiſed of the land when the Scire facias was brought; and if a man makes a Leaſe for life, rendring Rent, and then the Leſſor bargains and ſells the Reverſion, and before the Inrolement the Rent is behind, and the Bargainee demands the Rent which was not paid, and then the Deed is inrolled, yet he cannot enter for the forfeiture, which I have ſeen adjudged: ℣ in the 28 H. 8. Dyer. Diſſeiſee of one acre makes a Releaſe to the Diſſeiſor of all his lands, and delivers it as an Eſcroll to be delivered to the Diſſeiſor, and then he diſſeiſeth him of another acre, and then the Deed is delivered to the Diſſeiſor,, yet the right in the ſecond acre ſhall not paſſe. And he much relied on Sir Richard Brochets caſe, 26 Eliz. who made a Recognizance to Morgan upon condition to convey unto him all his lands whereof he was ſeiſed the firſt day of May, and it hapned that one Corbet had ſold him land by Indenture the 24. day of April, but the Deed was not inrolled untill the 24. day of May after: And the queſtion was, if the Conuzor was bound to convey theſe lands, or not, and adjudged that he was not, for inaſmuch as the Deed was not inrolled the firſt day of May, he was not ſeiſed, and great miſchief would enſue if the Law ſhould be other-

wiſe: for no man will know againſt whom to bring his Action, for a Bargain and Sale before Inrolement may be done ſecretly. Herne Serjeant, The Bargainee is ſeiſed before Inrolement, and by the Statute of 5 Eliz. which wills, that none ſhall convert land uſed to tillage, unleſſe he puts other land to tillage within ſix months, yet none will ſay that it is a breach of the Statute, although Paſture be preſently converted to tillage, and he cited Chilburns caſe, 6 Eliz. Dyer 229. that proves that before the Inrolement land paſſeth to the Bargainee, and the Bargainee hath a Freehold in him before the Inrolement, and whereof his wife ſhall be endowed, and if the Bargainor levies a Fine, or acknowledge a Statute, the Bargainee ſhall avoid them, and denied the caſe of Morgan, cited by the other ſide, and cited the caſe of 6 Ed. 6. where were two Joynt-tenants, and one of them bargained and ſold his Moyety, and then the other Joyntenant died, and then the Deed was inrolled, there nothing paſſed but a Moyety, but it ſeems in that caſe that by the Bargain and Sale the Joynture is ſevered before the Inrolement, ſo that there is no Survivorſhip, but the Book ſpeaks not of it; and if a Bargainee be of lands held of the King without license of a alienation, there the forfeiture to the King ſhall relate to the firſt delivery of the Deed. Warberton contra. Before the Inrolement there is but a commencement of the Bargain, and before all circumſtances in the Deed mentioned, are performed, it is no Bargain; and I hold the Deed ſhall have relation to the delivery to prevent all Charges, & Contracts, but as to ſtrangers it ſhall not have ſuch relation. If Tenant for life bargains and ſells his land to another and his Heirs, and then makes a Feoffment in fee to another before inrolement, this is no forfeiture. Anderſon, A releaſe made to a Bargainee before inrolement is void, then if this Scire facias be well brought, no Act of the Bargainee ſhall avoid it. Walmſley, If there be a Bargainee, and before the Inrolement the Bargainor enfeoffs him, he is in by the Feoffment and not by the Bargain, which proves that no eſtate is really in the Bargainee before Inrolement. Kingſmill, The reaſon of that is, becauſe it is out of the Statute, for the Bargain and Sale was onely delibered, and he ſaid that the wife of the Bargainee in ſuch caſe ſhall be indowed: But the Court denied that, and all agreed that the wife of the Bargainee before Inrolement ſhall not be indowed. Kingſmill ſaid. that it was a uſuall courſe in a Recovery to make the Bargainee Tenant to the Precipe. And it was ſaid by all the Juſtices, that if Tenant for life be impleaded, the Bargainee of the Reverſion after Inrolement ſhal be received, and yet (if hanging the Writ) he purchaſe the Reverſion, he ſhall not. And after many arguments it was adjudged that the Scire facias was not well awarded: And Judgment given for the Plaintiff.

37 Eliz. in C. B. Day againſt Auſtin.

IN a Treſpaſſe, the Defendant juſtified the taking of a Furnace fixt to the earth; becauſe the Sheriff upon an intent ſold it to him. And by the Court it was held a good diſcharge: for if a ſtranger takes my Horſe, and ſells him, a Treſpaſſe will not lye againſt the Vendee, but a Detinue. But if one ſells my Horſe, and a ſtranger takes him, he is a Treſpaſſor. Walmeſley and Beaumond, Although ſuch Furnace be fixed by the Termor, yet he may take it away within the term, but the

the Sheriff cannot attach it; and the Termor may pull down a Wall made by him, and it is not waſte. And at another day the caſe was recited to be thus. The Leſſee made a Furnace for the uſe of a Dyer, and fixed it to the wall of his houſe, and the Leſſee being condemned in debt, the Sheriff came to the Furnace, and put his hands upon it, and delivered it to the Defendant; and the Leſſee brought a Treſpaſſe. Glanvill, A Furnace may be delivered in execution, and the houſe never the worſe, but otherwiſe of the doors, becauſe the Leſſee cannot be without them, 42 Ed. 3. 6. it is not waſte to take away a Furnace, 21 H. 6. 26. ſaid there that the Heir ſhall have ſuch Furnace, but this does not prove that it is not a Chattell, but the cauſe wherefore the Heir ſhall have it, it is becauſe it is annext to the land, as in the caſe of writings which are meer Chattels. Beaumound, It is doubly fixt, to the land and to the wall; and it is clear that the Sheriff cannot take it from the wall. Dyer, The diverſity is when the Furnace is fixt to the middle of the houſe, and when to the wall, for the Termor may take it from the middle of the houſe, but not from the wall, for the wall is worſe for taking it away, and therefore it is waſte: And to this Owen agreed.

Paſch. 35 Eliz. in B.R. Rotheram againſt Crawley.

Rot. 332.

In debt upon a Bond, the caſe was; Divers queſtions were made between the Plaintiff Lord, and the Defendant Tenant, concerning Relief, whereupon they referred themſelves to the Arbitrement of I.S. who did award, that the Plaintiff ſhould make a Releaſe to the Defendant (which was done) of all Actions, Duties, and Amercements: and then upon this Action brought by the Plaintiff for a collatterall thing, the Releaſe was pleaded in Bar. Coke Attorney, The Plaintiff ſhall not be barred by this Releaſe, for Deeds ought to be expounded according to the intent of the parties, and the intent of the party was to releaſe no Duty but the Relief, which was only in queſtion, & this word, Duties, being interpoſed between Reliefs and Amercements, ſhall be intended Duties of ſuch nature as Reliefs and Amercements, and no otherwiſe, as it is in Dyer 23 Eliz. A man grants and to farm lets ſuch land with wood, this is no grant of the wood, and yet there are words ſufficient to paſſe the wood, but being conjoyned with the words, And to farm let, it ſhall be expounded that it was not intended to have it be an abſolute Grant. But adjudged that it was a good Bar, and Judgment was given accordingly.

Hil. 37 Eliz. Goodway againſt Michell

Goodway brought a treſpaſſe againſt divers perſons, Quare clauſum fregerunt & duas Ramas & perches of hedge, fregerunt The Defendant by way of juſtification ſaid, that the place was in the Pariſh of Hadnam in Ely, and that all the Pariſhioners time out of mind, have uſed to have paſſage through the ſaid Cloſe in Rogation week, to make their Perambulation of the Pariſh, & becauſe that the Plaintiff hindred the Defendants as Pariſhioners, Ramas & ſepes fregerunt, whereupon the Plaintiff demurred. Sperling, The juſtification is not good, for although Pariſhioners may juſtifie the having a way over my ground, yet they cannot break the Hedges; Alſo they have broken two Perches, and two Gates, which is exceſſive for a foot-path, 15 H. 9. 10. 6. A Commoner cannot break all the hedge upon the land where he hath Common. Savile cont. All the Pariſhioners ought to go their Perambulation, and being a great number they may well enough juſtifie, for

for they are not compelled to keep the foot-path. 6 Ed. 2. F.N.B. 185. b. Pariſhioners may pull down a wall that hinders them in their way to the Church: and in the book of Entries, there is a Preſident where the Vicar and Pariſhiones did juſtifie an entry for this very cauſe, & preſcribed as we do in this caſe; ſo they may preſcribe in a way, or other thing of eaſement or pleaſure, 7 Ed. 4. 26 a. 15 Ed. 4. 29. a. Anderſon, There is no queſtion but Pariſhioners may juſtify their going over any bodies land in their Perambulation. Warberton, Pariſhioners ſhall not preſcribe in an eaſement, as in ny way to the Church. Owen, The books make a difference between things of intereſt, as in common, for in ſuch things Pariſhioners cannot preſcribe, and things of eaſement, as a waſte, for in ſuch things a man may preſcribe. Anderſon, It is plain that Pariſhioners cannot preſcribe, for none may preſcribe but thoſe that have perpetuall continuance, and therefore Tenant for years or for life, or Pariſhioners cannot preſcribe, but muſt be aided by cuſtome. Walmſley of the ſaid opinion, for there is no deſcent or ſucceſſion in Pariſhioners. And Judgment was given for the Plaintiff.

Rot. 178. Trin. 37 Eliz. in B. R. Norton and Sharp againſt Gennet.

A Prohibition was ſued by the Plaintiffs as Executors to I. S. who ſurmiſed that the Defendant ſued them in the Court Chriſtian for a Legacy of 200 l. and that the Teſtator had goods but to the vale of 350 l. and ſet forth how he was Keeper of the Priſon of Ludgate, & that he was bound to A. and M. Sheriffs of London, to diſcharge and ſave harmleſſe the ſame Sheriffs from all eſcapes, which bond was to the value of a 1000 l. And ſhewed that one Holmes was taken by a Capias utlegatum at the ſuit of a ſtranger, and how the Teſtator ſuffered him to eſcape, whereupon an action of debt was brought againſt the Sheriffs, and a Judgment, whereby the Obligation made to them by their Teſtator is forfeit, and pleaded riens intermaines, and becauſe the Court Chriſtian would not allow this plea, they prayed a Prohibition, upon which Coke Attorney-generall demurred. And it was agreed by Gawdy Juſtice, Coke, and Tanfeild, that if the Bond to the Sheriff be not forfeit, then is the Surmiſe good, and the Legacy ſhall be paid: But Fenner ſaid to Coke, Quomodo probas? Who anſwered, The difference is when a bond is made by the Teſtator for payment of money in a Suit at the Court Chriſtian for a Legacy, ſuch a bond is a good plea, although the bond be not forfeit, as in the 9 Ed. 4. 12, & 13. for the Condition of the Bond is part of the Bond, and a duty, but otherwiſe it is where the Condition is collaterall for the performance of Covenants: but in our caſe the Condition is not broken as is ſuppoſed, for the Capias utlegatum iſſued the 25 of Eliz. and ſo the Arreſt meerly void, for every Capias ought to be returned the next term after the Teſte, 21 H. 7. 16. 6, & 8 Ed. 4. 4. & 6. Sed alii contra. But after a Conſultation was moved for, if a Recovery was afterwards had againſt the Executors: And it was anſwered, that it was not the courſe to make a Bond to the party but to the Court. But Fenner ſaid, that if ſuch courſe be allowed, no Legacy would be paid. And Judgment was given that a Conſultation ſhould be awarded if the Legatee would enter into a Bond to the Executor to make reſtitution if, &c. or otherwiſe not.

Hil. 38 Eliz. in B. R. Haddon againſt Arrowſmith.

IN an Ejectment, the caſe was; The Queen being Lady of the Manor of Winterburne in the County of Berks, by her Steward did licenſe a Copyholder for life to make a Leaſe for three years, if he ſhould ſo long live, the Copyholder did make a Leaſe generally to the plaintiff for three years, who being

being ejected brought this Action. Stephen, The Action will not lye becauſe the Copyholder hath not purſued his licence, for licenſe or authority muſt be purſued very ſtrictly as well in form as ſubſtance, 10 H. 7. licenſe to enfeoff by Deed, or licenſe to impark 300. acres, he cannot enfeoff by paroll, or impark but 100. acres, and it was reſolved the laſt Terme in the Exchequer, that if the King licenſe his Tenant to alien, he cannot alien to one in tail, the remainder to the Donor in fee: And ſo in our caſe where he makes a Leaſe for 3. years abſolutely, he hath not performed his licenſe. Gawdy contra, for when his licenſe is to make a Leaſe for yeares, if he ſo long live, theſe words (If he ſo long live) are but Surpluſage; for the Law ſaies, that if Copyholder for life makes a Leaſe for years, and dies, the Leaſe is determined, and therfore the clauſe in the Licenſe is no more then the Law ſaies, and ſo is void. Quod fuit conceſſum per totam curiam. Fenner, The Condition in the Licenſe is meerly void, for the Lord gives nothing by the Licenſe, but only doth diſpence with the forfeiture, and the Leſſee is in by the Copyholder and not by the Lord, for the Lord cannot condition with him in his Licenſe. Clench, The Lord may licenſe on Condition, as where the Lord doth licence his Copyholder on condition that the Leſſee ſhall repair the houſe, or ſhall not cut Trees, for otherwiſe the Copyholder may cut them, and the Lord hath no remedy, for his Licenſe is a diſpenſation of the forfeiture. Popham contra, A Condition to a Licenſe is void, as a Licenſe to make a Leaſe for years, on condition that he pay 20l the ſecond year, this is void for the reaſon given by my brother Fenner, for the licenſe does not give a right, but only executes it, as a Livery, or Attornment; but a Limitation to ſuch Licenſe is good, as licenſe to alien for two years, he cannot alien for three, but in our caſe the Condition & the Limitation made by the Lord is void: and the difference is between a Copyholder in fee, and a Copyholder for life, for if the Lord doth licenſe his Copyholder in fee to make a Leaſe for three years if he ſo long live, and he makes a Leaſe abſolutely, this is no forfeiture, for this Leaſe ſhall be a good intereſt againſt the Heir of the Copyholder, but otherwiſe of a Copyholder for life. And Judgment was given for the Plaintiff.

Paſch 38 Eliz. in C. B. Biſhop of Rocheſters Caſe.

THe Biſhop of Rocheſter brought a Writ of Annuity againſt the Deane and Chapter of Rocheſter, and declared of an Annuity by Preſcription, from the Prior of S. Andrewes of Rocheſter, wch Priory was diſſolved the 28 H. 8. & 31 H. 8. their poſſeſſions were committed by the King to the Dean & Chapter of Rocheſt. Anderſon, The Annuity does not remain, for an Annuity chargeth the party and not the poſſeſſion, and therfore when the Corporation is diſſolved which is the perſon, the Annuity is gone. Walmeſley, But in 2 H. 6 9. it is ſaid there, If a Priory be charged with an Annuity, the Annuity ſhall continue, although it be charged to an Abby. Anderſon, That is true, for there the Corporation is changed only, but here it is diſſolved. Williams, But that is ſaved by the 31 H. 8 for Annuities are expreſt in the ſaving. Anderſon, But this is an Annuity or Rent with which the land is charged. Beaumond, If it be any thing wherewith the land is charged, it is ſaved, but the perſon is only charged with this Annuity. Walmſley, But the 21 H. 7. is, that an Annuity out of a Parſonage is not a meer perſonall charge, but chargeth the Parſon only in reſpect of the land. And the Court would conſider on the caſe.

Paſch. 38 Eliz. in B. R.
The Caſe of the Dean and Chapter of Norwich.

THe Caſe was, A Church in which there had been a Parſon and a Vicar time out of mind, and the Parſon uſed to have the great Tythes, and the Vicar the ſmall, and for the ſpace of forty years laſt paſt, it was proved that the Parſon had Tythes paid him out of a feild of twenty acres of Corne, and now the feild is ſowed with Saffron, and the Vicar ſued for the Tythes of Saffron in the Court Chriſtian, and the Parſon had a Prohibition. Coke, I conceive the Parſon ſhall have the Tythes, for by the Statute of 2 H. 6. it is enacted that Tythes ſhall be paid as hath been uſed the laſt forty years, and this hath been alwaies tythable to the Parſon, and although the ground be otherwiſe imployed, yet the Parſon ſhall have the Tythes; and ſo was it in Norfolk, in the Caſe of a Park, where the Parſon preſcribed Pro modo decimandi, to be paid three ſhillings foure pence, for all Tythes riſing out of the ſaid Park, and although the Park was after converted to arable, yet no other Tythes ſhall be paid.

Popham, It hath been adjudged otherwiſe in Wroths Caſe of the Inner Temple in the Exchequer. But the Law is clearly as hath been ſaid; and the difference is, when the Preſcription is to pay ſo much money for all Tythes, or when the Preſcription is to pay a ſhoulder of every Buck, or a Doe at Chriſtmas, for there if the Park be diſparkt, Tythes ſhall be paid, for Tythes are not due for Veniſon, and therefore they are not Tythes in Specie. And I conceive that Tythes of Saffron-heads ſhall be comprehended under ſmall Tythes, and although the Tythes of this Feild have been paid to the Parſon, yet it being converted to another uſe, whereof no groſſe Tythes do come, the Vicar ſhall have the tythes: and ſo if arable land be converted into an Orchard, the Vicar ſhall have tythe of the Apples; and ſo if the Orchard be changed to arable, the Parſon ſhall have tythes. Quod Fenner conceſſit.

36 Eliz. Higham againſt Deff.

IN a Treſpaſſe, the Caſe was, That a Vicaridge by compoſition was indowed of the third part, Omnium Bladorum decimarum, of the Mannor of D. If he ſhall have tythes of the Freeholders of the Mannor, was the queſtion. Johnſon, He ſhall not have them, for a Mannor conſiſteth of two things, viz. of Demeſns and Services, & the Freeholders are neither parcel of the Demeſnes nor the Services, and therefore no parcell of the Mannor, and this is proved in 12 Aſſ. 40. a Rent-charge was granted out of a Mannor, the Tenancy eſcheats, it ſhall not be charged with the Rent.

Tanfeild contra, For this word, Mannor, does extend to the Precincts of the Mannor, and not to the Demeſnes and Services onely, and therefore if a Venire facias be awarded De viceneto Manerii de D. the Freeholders ſhall be returned; alſo a ſurvey of a Mannor ſhall be as well of the Freehold lands, as of the Demeſnes. and if the King grants a Leet within the Mannor of D. all the Freeholders are bound to appear.

Fenner, Grants ought not to be reſtrained to their ſtrict words, but are to be conſtrued according to the intent of the parties.

Trin. 38 Eliz. in B. R. Ewer againſt Henden.

Rot. 339.

IN an Ejectment the Jury found that I.S. being ſeiſed of a Capitall Meſſuage in the County of Oxford, and alſo of a houſe and land in Walter,

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in the County of Hartford, makes a Leaſe for years of his houſe and land in the County of Hartford, and then by Will does demiſe his houſe in the County of Oxon,. Together with all other his Lands, Meadowes, Paſtures, with all and ſingular their Appurtenances in Walter in the County of Hartford, to John Ewer: and whether the houſe in Walter, in the County of Hartford does paſſe, or not, was the queſtion.

Tanfeild, The houſes ſhall paſſe, for if a man builds a houſe upon Black acre, and makes a Feoffment of the acre, the houſe ſhall paſſe, and ſo if a man does deviſe una jugata terræ of Copyhold Land, the houſe of the Copyhold does paſſe alſo, for ſo is the common phraſe in the Country; and ſo if a man be rated in a 100l. ſubſidy, that does include houſes, and by the grant of a Tenement the houſe paſſeth, but if a man demand a houſe in a Precipe, there the houſe ought to be named.

Whiſtler contra, It is true that if a man generally does deviſe his Land, the houſes paſſe: but in this caſe the Deviſee hath particularized his Land, his Meadow, and his Paſture, and if he intended to have paſſed his houſes he would have mentioned them as well as his Lands.

Fenner, I am of the ſame opinion, for this ſpeciall numbring of particulars, does exclude the generall intendment; and if the Deviſor had a Wood there, that would not paſſe by theſe words.

Popham contra, For if a man ſells all his Lands in D. his houſes and woods paſſe by this word, Lands, and ſo was it agreed in a caſe which was referred to Dyer and Wray chief Juſtice, and there reaſon was, becauſe that a Warrant of Attorney in a Precipe of a Houſe, Woods, and Land, is onely of Land, which proves that land does comprehend all of them, and therefore I conceive, if a man does deviſe, or bargain and ſell all his lands in D. the Rents there ſhall paſſe, for they were iſſuing out of the land: But if a man be ſeiſed of three houſes and three acres, and he deviſeth all his land in D. and one of his houſes, the other houſes will not paſſe, for his expreſſe meaning is apparant, but here the words are in generall as to the lands in Walter, and therefore the houſes do paſſe. But afterwards it was adjudged that the houſe did not paſſe, for by the particular mentioning of all his Lands, Meadowes and Paſtures, the houſe is excluded.

Paſch. 4 Eliz. Hunt againſt King.

IN a Writ of Error upon a Judgment given in the Common Pleas in a Formedon brought there; the Caſe was, Tenant in tail enfeoffs his Son, and then diſſeiſeth his Son, and levies a Fine to a ſtranger, and before the Proclamations paſſe, the Son enters and makes a Feoffment to a ſtranger, the Father dies, and the Son dies, and the Iſſue brings a Formedon. The queſtion was, Whether by the entry of the Son the Fine was ſo defeated that the Eſtate-tail was not barred. Dyer, The Eſtate-tail is barred, and made a difference where the Fine is defeated by entry, by reaſon of the Eſtate-tail, and where it is defeated by entry by reaſon of another eſtate-tail, as in 40 Eliz. Tenant in tail diſcontinues, and diſſeiſeth the Diſcontinuee, and levies a Fine to a ſtranger, and retakes an Eſtate in Fee, before the Proclamations paſſe, the Diſcontinuee enters, and then the Tenant in tail dies ſeiſed, and adjudged that the Iſſue is not remitted, for the Statute 32 H. 8. ſaies, That a Fine levied of lands any way intailed by the party that levies the Fine ſhall bind him, and ſo it is not materiall whether he were ſeiſed by force of the Eſtate-tail, or by reaſon of another Eſtate, or whether he have no Eſtate.

And

And all the Juſtices were of opinion that the Eſtate was barred, for although the diſcontinue had avoided the Fine by the poſſeſſion, yet the Eſtate-tail remains concluded, and the ſame ſhall not enter by force of the Eſtate-tail, but by force of the Fee which he had by diſcontinuance.

Popham, Avoidance of a Fine at this day differs much from avoidance of a Fine at the Common Law, for it appears by the 16 Ed. 3. that if a Fine at the Common Law be defeated by one who hath right, it is defeated againſt all, but at this day the Law is contrary, for if a man be diſſeiſed, and the Diſſeiſor die ſeiſed his Heir within age, and he is diſſeiſed by a ſtranger who levies a Fine, and then five years paſſe, the Heire ſhall avoid this by his nonage, yet the firſt Diſſeiſee is bound for ever, for the Infant ſhall not avoid the Fine againſt all, but only to reſtore the poſſeſſion. And therefore it was adjudged in the Lord Sturtons Caſe, 24 Eliz. where Lands were given to him and his Wife, and the Heires of him, and he died, and his Iſſue entred and levied a Fine to a ſtranger, and before the Proclamations paſſed, the Mother enters, it was adjudged that the Iſſue was barred, for the Wife ſhall not avoid this but for her own Eſtate: And ſo if a ſtranger enters to the uſe of him who hath right, this ſhall not avoid the Fine.

Fenner did agree to this, and ſaid that it had been ſo adjudged; but all the Juſtices agreed, that the Eſtate-taile being barred, the entry ſhall go to the benefit of him who hath moſt right to the poſſeſſion, and that is the diſcontinue; and therefore the Plaintiff in the Formedon hath good Title to the Land, but onely to the Fee, and not to the Intaile, for that is barred by the Fine.

28 Eliz. in C. B. Rot. 2130.

Gibſon againſt Muteſs.

IN a Replevin the Caſe was; John Winchfeild was ſeiſed of Lands in Fee, and by his Will did deviſe all his Lands and Tenements to Anthony Winchfeild and his Heires, and before his death made a Deed of Feoffment of the ſame Lands, and when he ſealed the Feoffment, he asked, If this Feoffment will not hurt this laſt Will, & if it will not, I will ſeal it? And then he ſealed it, and made a Letter of Attorney to make Livery in any of the ſaid Lands, the Attorney made Livery, but not of the Lands which were in queſtion, and then the Teſtator died. And the queſtion was, if the Deviſee or Heire of the Deviſor ſhould have the Land. And it was ſaid in behalf of the Heire, that if the Teſtator had ſaid, It ſhall not be my Will, then it is a Revocation. Quod curia conceſſit: But it was the opinion of the Court, that it appears that it was the intent of the Teſtator that his Will ſhould ſtand, and if it be not a Feoffment it is not a Revocation in Law, although that the Attorney made a Livery in part, ſo that the Feoffment was perfect in part, yet as concerning the Land in queſtion, whereof no Livery was made, the Will is good; and the Jury found accordingly that the Land does not deſcend to the Heire.

Fenner cited a Caſe of Serjeant Jeffereys, where it was adjudged, that where one had made his Will, and being demanded if he will make his Will, doth ſay, he will not, that this is no Revocation.

Sir Wolſton Dixy againſt Alderman Spencer, 20 Eliz. in C. B.

IN a Writ of Errour brought upon a Judgement given in an Aſſize of Freſh-force in London, The caſe was, Sir Wolſton Dixy brought an Action of Debt for rent arrear againſt Spencer upon a Leaſe for years made to him by one Bacchus, who afterwards granted the reverſion to Dixy, and the Tenant attorned, and for rent arrear Dixy brought an action, &c. The Defendant pleaded in Bar, that before the Grant made to Dixy, the ſaid Bacchus granted it to him by parole, according to the cuſtome of London; whereupon he demanded Judgement, if &c. and the Plea was entred on Record, and hanging the ſuit, Dixy brought an aſſize of freſh force in London, and all this matter was here pleaded, and it was adjudged a forfeiture of the Land; and hereupon Spencer brought a Writ of Errour, and aſſigned this for errour, that it was no forfeiture.

Serjeant [illegible]. It is no forfeiture untill a Triall be had whether the reverſion be granted, or not; as in waſt: the Defendant pleads that the Plaintiff had granted over his eſtate, this is no forfeiture; and in the [illegible] in a *Quid Juris clamat*, the Defendant pleaded that he had an eſtate Tail, and when he came to have it tryed, he acknowledged he had an eſtate but for life, and that was no forfeiture. But the Court ſaid they could remember no ſuch Caſe.

Walmeſley. It was ſo adjudged, and I can ſhew you the names of the parties.

Periam Juſtice. If there be ſuch a Caſe, we would doubt of it, for there are Authorities to the contrary as the 8 Eliz. and 6 Rich. 2.

Anderſon. If the Defendant in a Treſpaſs prayes in aid of an eſtranger, this is a forfeiture; and if it be counter-pleaded, it is a forfeiture, and the dental alters not the Caſe.

Walmeſley. The Books in 15 Ed. 2. Judgement 237. and 15 Ed. 1. that Judgement in a *Quid Juris clamat*, ſhall be given before the forfeiture.

Anderſon. In my opinion he may take advantage before Judgement as well as after, if the Plea be upon Record. And ſo was the opinion of the Court.

The Dutcheſs of Suffolks Caſe. Paſch. 4 & 5 Ph. & Mary, in C. B.

IN a *Quare impedit* againſt the Biſhop of Exeter, the Writ was *ad reſpondendum* Andrew Stoke *&* Denniſæ Franciſcæ *de* Suffolk *Uxori eius*. Benlowes demanded Judgement of the Writ, &c. becauſe ſhe loſt her name of dignity by marriage with a baſe man, as it was adjudged. 7 Ed. 6. Dyer 79. where Madam Powes and her husband brought a Writ of Dower, and the Writ abated, becauſe ſhe called her ſelf Dame Powes, whereas ſhe had loſt her dignity by marrying with her husband.

Stanford agreed, for *Mulier nobilis, ſi nupſerit ignobili, deſinit eſſe nobilis.*

Brookes. There is a difference where a noble woman marries a noble man of leſs noble degree than ſhe is, and when ſhe marries one that is not at all noble; for in the firſt caſe ſhe ſhall hold the dignity of her ſecond husband, but in the laſt caſe ſhe ſhall retain her antient dignity. And ſo it was obſerved, where the Marquis of Dorſet had two daughters, the elder was married to the Lord Audley, and the youngeſt to a Gentleman, and the eldeſt took place alwayes, as wife to a Baron, but the youngeſt kept her place as a Marquiſſes daughter.

Dyer. I was of Counſel in the Caſe of the Lady Powes already mentioned, and ſhe would by no means loſe her dignity, and an Herauld was brought into Court, that ſaid ſhe had ſuch dignity, although it was held clearly on the contrary by our Law by Montague and Hales, and the Writ did abate.

Stanford. A noble man loſeth his honour by his own act, as by attaint, and ſo hath the woman here by taking ſuch husband, and the nobility of ſuch woman is loſt alſo by attainder.

Brookes ſaid, That he knew where the ſons of a Duke and Marquis had a treſpaſs brought againſt them for hunting a Park by the name of Squires, and it was good; wherefore it was ſaid to Benlows, that he muſt plead to the Writ.

Paſch. 4 & 5 Ph. & Mary in C. B.

A Feme ſole having the cuſtody of the land, and body of an Infant took husband, and ſhe and her husband did tender convenient marriage to the Infant, which he refuſed, and married himſelf elſewhere, and at his full age entred into the land; if it be neceſſary that both ſhall joyn in a Writ of forfeiture upon the marriage, or that the husband alone ſhall have it, was the queſtion.

Brown Juſtice. Both ſhall joyn, and ſo is it ruled in a Book.

Dyer contr. The husband alone ſhall have this Writ, for he may diſcharge it, or releaſe it; and by the 5 Ed. 3. 14 & 6. the husband alone may have a Writ of Treſpaſs; and if the wife have an advouſon, and a ſtranger preſent, the husband alone ſhall have a *Quare impedit*; and the ſame Law is, where the woman hath a Rent, and the husband diſtreyns, and Reſcous is made, the husband alone ſhall have a Reſcous.

Prideaux. The Wardſhip of a Ward and Land is a thing real, and the Survivor ſhall have it, and not the Executors of the Baron; and if an Action be accrued before marriage, as if a Bond be made to her before marriage, ſhe ſhall joyn with her husband in the Action upon the Bond: but if a right to an Action does accrew after marriage, there ſhe ſhall not joyn, as here the right of the husband does not accrew untill marriage; for the Action is not in reſpect of the Wardſhip, but of the tender and refuſal, and his marriage elſewhere, all which do accrew after the Coverture.

Stanford. If a man bring a *Quare impedit* for an Advowſon which he hath in right of his wife, and hath Judgement to recover, and dyes, the wife ſhall preſent, and not the Executors of the husband; ſo if he recover in a Treſpaſs, the wife ſhall have execution for the damages.

Prideaux. If a Leaſe be made to a woman, and a Rent reſerved *nomine pœnæ*, and ſhe takes husband, and the Rent is behind, both ſhall

ſhall joyn in the Action for the pain. Dyer. This Action is grounded upon a real Covenant. Stanford. Damages recovered in a Treſpaſs are not real, yet the wife ſhall have them, if the husband dye before Execution. Dyer. The Treſpaſs is done to the inheritance of the wife, and therefore ſhe ſhall have damages; and in 43 Ed. 1. Statham. The husband alone brought a raviſhment of a Ward, for a Ward he had in right of his wife and the Writ held to be good; but there it is ſaid, that otherwiſe it is in right of a Ward; and if they joyn in a Writ of raviſhment of Ward, and recover, and the husband dye before Execution, his Executors ſhall have Execution, and not the wife: but it is ſaid there (*Quære*) and at laſt it was agreed that the Action ſhould be allowed: but the ſureſt way is to have both joyn.

Paſch. 6 Eliz. Powtrells Caſe in C. B.

IN an Ejectment the caſe was, a woman-tenant in Tail did make a Leaſe for 31 years, and took husband, and had iſſue; the wife dyes, and the husband is tenant by the curteſy, and ſurrenders to the heir, who puts out the Leſſee, who brings this Action.

Dyer. I doubt whether this ſurrender be good, for tenant by the curteſy is but in reverſion, and hath nothing in poſſeſſion, and it is dubious how he can ſurrender.

Weſton and Brown. He may ſurrender for a term, or frank-tenement may be ſurrendred to him that hath the eſtate in reverſion or remainder, if it be not a mean eſtate, as tenant for life, the remainder for life, the remainder in fee, the firſt tenant for life cannot ſurrender to him that hath the fee. But the great point of the Caſe was, if the iſſue could avoyd the Leaſe during the life of the tenant by curteſy; and the Court held he could not, for the tenant is in as a purchaſer. And by Walſh and Carus. If tenant by the curteſy grants over his eſtate, and then enters into religion, the Grantee ſhall have his eſtate during the tenants natural life, *Quod omnes conceſſerunt*; and it was ſaid alſo, that if the heir had been impleaded during the life of the tenant by curteſy, he ſhall not have his age, *quod fuit conceſſum*.

Mich. 14 & 15 Eliz. Tottenham againſt Bedingfield.

IN an Account the Defendant pleaded he was never his Baily for to render account.

Gawdy prayed the opinion of the Court if the Action would lye, for otherwiſe he would not trouble the Court. The Caſe was, the Plaintiff had a Leaſe of a Parſonage, and the Defendant being no Leſſee, nor claiming any intereſt, takes the Tithes being ſet forth, and carries them away, if the Plaintiff could have this Action was the queſtion.

Manwood. It will not lye; for an account lyes where there is privity, but wrongs are alwayes without privity; but I agree, that if

one receive my rents, I ſhall have an account againſt him, for by my conſent afterwards I do make a privity; for although that he hath received the Rent, he hath not done wrong to me inaſmuch as it is not my money untill it be paid to me: but otherwiſe it is where a man diſſeiſeth me of land, for that is meerly a wrong, and ſo is it in this caſe; for when the Tithes were ſet forth by the Pariſhioners, the Law ſayes they are in the poſſeſſion of the Parſon; and therefore when the Defendant took them away, he does it wrongfully, and therefore no account will lye againſt him; and ſo was it adjudged in London in the Caſe of one Monax, who under colour of a Deviſe, did occupy land for 20 years, and after the Deviſe was adjudged voyd, he that had right to the land, brought an account againſt him, and adjudged that it does not lye.

Harper contr. For an account does lye againſt a Proctor, and the Plaintiff may charge him as Proctor, and it is no Plea for him to ſay that he did not occupy as Proctor, no more than it is a Plea for him who occupies as Guardian, to ſay he was not the prochein amy.

Dyer. There are three Actions of Account. 1. Againſt a Baily. 2. Againſt a Receiver. 3. Againſt a Guardian in ſocage; and if an Account be brought againſt one as Receiver, he ought to charge him with the receipt of money, and I conceive that there ought to be a privity to charge one with the receipt of money: but if one claim as Baily, or as Guardian in ſocage, he is chargeable in account: but an Abator or a Diſſeiſor is not, becauſe they pretend to be owners and in this caſe, becauſe by the ſetting forth the Tithes the property is in the Parſon, therefore he being Leſſee for years, he ſhall have an ejectione firma, and not an Account.

Rotulo 120.

Hillar. 32 & 34 Eliz. Carter againſt Kungſtead, in C. B.

In a Treſpaſs the Jury gave this ſpecial Verdict. John Berry was ſeizin of the Mannour of Stapeley *in Odiam*, and of other lands *in Odiam*, and the 32 H. 8. ſuffered a common recovery of all his lands *in Odiam*, Stapeley and Winkfield, to the uſe of himſelf and his wife for life, the remainder to the heirs males of his body, *& quod ulterius ſtarent* of the Mannour of Stapeley, with the appurtenances, to the uſe of himſelf for life, the remainder to the heirs males of his body, whereby they were ſeized *prout Lex poſtulat*. The husband dyes, the wife makes a Leaſe for 19 years, and whether the Mannour of Stapeley were conveyed or not, was the queſtion.

Harris. She ſhall have all; for when the whole eſtate is limited at the beginning of a Deed, it ſhall not be abridged afterwards.

Periam. The eſtate is by way of uſe, which ſhall be expounded according to the intent and will of the Limiter; and if this had been done by will, it is clear the woman ſhould not have the Mannour of Stapeley.

Anderſon. If I deviſe my land to J. S. and afterwards by the ſame Will I deviſe it to J. D. now J. S. ſhall have nothing, becauſe it was my laſt Will that J. D. ſhould have it: But otherwiſe it is of a uſe; for if I do limit an eſtate to the uſe of J. S. and in the laſt clauſe do limit the ſame eſtate to J. D. the limitation to J. D. is voyd for the repugnancy.

Periam.

Periam. As to the caſe of the Will, I conceive it is voyd to both, becauſe it cannot be known who ſhall have it.

Anderſon. I am ſure the Law hath been taken as I have ſaid; and there was a Caſe in the Upper Bench, where a man one day made part of his Will, and another day made another part, which was repugnant to the firſt part, and adjudged that the laſt was good, and the firſt voyd.

Periam. I agree to this Caſe, for here is a difference in time.

Anderſon. So is there in my Caſe; for when I am writing my Will, I am thinking how I ſhall diſpoſe of my eſtate, and it ſhall be intended that I have leaſt adviſed concerning that which I have done laſt.

Walmeſley. A Uſe is not to be compared to a Will, for the Statute of 27 H. 8. hath made it an eſtate and then by the 19 of Edw. 3. If a man limits an eſtate at the beginning of a Deed, he cannot after abridge it.

Periam. I put this Caſe: If a man covenants upon conſideration to be ſeiſed to the uſe of himſelf for life, and after to the uſe of his ſon: but he further ſayes, that his meaning is, his wife ſhall have it for her life, this is not a voyd Clauſe, but good to the wife; and the Caſe was adjourned till next Term. And Harris argued again, and ſaid, that a Uſe was but matter of truſt, and for that it is apparent that the intention was that the wife ſhould have nothing, there is no reaſon that another conſtruction ſhould be made.

Walmeſley. The limitation of the Uſe is but a declaration how the Uſe ſhall be, and does not give any thing; and the opinion of the Court was againſt the Plaintiff who was Leſſee of the woman, and that the laſt Clauſe does countermand the firſt, as to the Mannour of Stapeley.

Michael. 31 & 32 Eliz. Brokesbyes Caſe, in C. B.

Rot. 18. 15.

BArtholomew Brokesby brought a *Quare impedit*, and it appeared by his Declaration, that the next avoydance was granted to him, and one Humphrey Brokesby, and then the Church became voyd, and Humphrey did releaſe to Bartholomew *totum ſtatum & titulum, &c.* and then Bartholomew being diſturbed, brought a *Quare impedit* in his name alone.

Harris. The Plaintiff ſhall be barred, for the other ſhall be named with him, for the Releaſe is voyd; for when the Church becomes voyd, it is a thing in action, and of privity and confidence, and cannot be releaſed nor transferred.

Dyer 283. a. 28 H. 8. 26. a. Where it is ſaid, that it cannot be granted over, no more than an Executor may releaſe his Executorſhip to his companion.

Beaumont. In my opinion it is not a Choſe in action, but an intereſt which the Executors have; and by the 14 H. 4. and 14 H. 6. If a man be ſeiſed of an Advowſon in the right of his wife, and the Church is voyd, and the wife dyes, yet the husband ſhall preſent, which proves it is not a Choſe in action; for in the 49 Edw. 3. 23. the husband ſhall not have an obligation that was made to his wife;

and in our caſe by this avoydance the Church is become an intereſt and a Chattell: and therefore one Joyntenant may releaſe to another by reaſon of their privity, although they have no poſſeſſion.

Fenner. The releaſe is *Totum Statum jus & titulum*, but here he hath no eſtate nor poſſeſſion, and therefore the releaſe is void. And to prove that there is no eſtate nor poſſeſſion, it is proved by the pleadings of the grant of the next avoydance, for he ſhews that the Church became voyd, and that *ea ratione pertinet ad ipſum preſentare*, and not by force, whereof he was poſſeſt, and if none hath the advowſon which becomes voyd, and the Lord claymes the advowſon, yet he ſhall not have the preſent avoydance, and as to the caſe of the Joyntenants, one cannot releaſe to the other for default of poſſeſſion for the releaſe mannes by reaſon of their joynt poſſeſſion which is out of them, but releaſe of the Demandant to the Vouchee is good by reaſon of the privity of Law that is betwixt them; and in 11 H. 4. He who hath right after the Incumbent is inſtituted and inducted, may confirme his eſtate, and therefore the Releaſe here is good.

Anderſon. We are all agreed that the Releaſe is void, and gave Judgment that the Plaintiff ſhould be baned.

Bretton againſt Barnet. Mich. 41. & 42. Eliz.

A Man delivers money to J.S. to be redelivered to him when he ſhould be required: which J. S. refuſed, and therefore an action of debt was brought, and the defendant demurred, for that an action of debt would not lie, but an account, as in the 41 Ed. 3. 31. & 33.

Walmeſley. An action of debt will very well lie. And he took a difference between goods and money: for if a horſe be delivered to be redelivered, there the property is not altered, and therefore a Detinue lies, for they are goods known: but if money be delivered, it cannot be known, and therefore the property is alterd, and therefore a Debt will lie. And if Portugalls or other money that may be known be delivderd to be redelivered, a Detinue lies.

Owen and Glanvill agreed to this, and Glanvill cited a Judgment given in Hilary Term, wherein he was of Councell, which was that a man delivers money to another to buy certain things for him, and he does not buy them, the party may bring an action of debt, but he ſaid that the Plaintiff ought to aver that the Defendant had not redelivderd them. And Judgment was given for the Plaintiff.

Mich. 41. & 42. Eliz. Green againſt Wiſeman. in C. B.

IN an Ejectment. The Defendant pleaded, that a Feoffment was made to the uſe of J. S. the Lord of the Defendant, who by force thereof, and of the Statute, was ſeiſed, and made a leaſe to the Defendant; and that one Green entred and made a Leaſe to the Plaintiff, and did not ſay that he entred upon J. S. And all the Queſtion was, whither when a feoffment is made to the uſe of another, if he have ſuch a ſeiſin before his entry, whereof he may be diſſeiſed.

Glanvill.

Glanvill. He hath no freehold, neither in Deed nor in Law before entry.

Walmeſley. This is contrary to all the Books: for a poſſeſſion in Law is ſo tranſlated from the Feoffee to Ceſtuy que uſe, that the wife of the feoffee ſhall not be endowed.

Owen. He ought to have alledged a Diſſeiſin.

Anderſon. As he might have poſſeſſion by force of a Deviſe at Common Law, ſo he ſhall have poſſeſſion of the land here by force of the Statute, and it is in Ceſtuy que uſe, before agreement or entry, but if he diſagree, then it ſhall be out of him preſently, but not before he diſagree. And after viz. Hillar. 42. Eliz.

Williams moved the caſe again, and Walmeſley ſaid then, that he might be diſſeiſed before his entrie or agreement, and the pleading ſhall be that he did enter, and did diſſeiſe him, but he ſhall not have a treſpaſs without actuall entrie, for that is grounded on a poſſeſſion: Glanvill agreed to this, and adviſed Williams to adventure the caſe thereupon.

Hillar. 41 Eliza. Smiths Caſe in C. B.

The Patron of an advouſon before the Statute of 31 Eliz. For Symony, doth ſell *Proximam advocationem*, for a ſum of money, to one Smith, and he ſells this to Smith the Incumbent: After which comes the generall pardon of the Queen, whereby the puniſhment of Smith the Incumbent is pardon'd, and of Smith the Patron alſo. If the Incumbent may be removed was the Queſtion: Williams ſaid, that the Doctors of the Civill Law informed him, that the Law Spirituall was that for Symony the Patron loſt his preſentment, and the Ordinary ſhall preſent, and if he preſent not within ſix months, then the Metropolitan, and then the King.

Spurling Serjeant. This puniſhment cannot diſcharge the forfeiture, although it diſchargeth the puniſhment.

Glanvill contra. And ſaid that this point was in queſtion, when the Lord Keeper was Atturney, and then both of them conſulted thereupon, and they made this diverſity viz. between a thing void and voidable, and for Symony the Church is not void untill ſentence declaratory, and therefore they held, that by the pardon before the ſentence all is pardon'd, as where a man commits Felony, and before conviction the King pardons him, by this pardon the Lord ſhall loſe his Eſcheate, for the Lord can have no Eſcheate before there be an attaindor, but that is prevented before by the pardon, and ſo here this pardon prevents the ſentence Declaratory, and ſo no title can accrue to the Ordinary.

Walmeſley cont. If the patron be charged by the ſentence, he may plead the pardon. But if a *Quare Impedit* be brought by a third perſon, the pardon of the King ſhall be no bar to him, for the title appeares not to him, but only the puniſhment.

Anderſon. They may proceed to ſentence Declaratory, notwithſtanding the pardon; for the pardon is of the puniſhment, but the ſentence does not extend to that, but only to declare that the Church is void.

Glanvill in 16 Eliz. a man was deprived of his Benefice for incontinency, and after he was pardond and reſtor'd.

Walmſley. I doubt much whither the King can pardon Symony: And

And Williams ſaid, that the Doctors of Civill Law ſaid, that neither the Pope nor the King could pardon Symony, *quoad culpam*, but only *quoad pœnam* they may. And the Court at laſt ſaid, that if the parties would not demur, they would hear the Doctors upon this matter.

Rot. 704. & 1544.

Jelſey againſt Robinſon. Trinit. 25. Eliz. continued untill Paſch. 28 Eliz. in C. B.

UPon a ſpeciall verdict upon an Ejectment, the Jury gave this ſpeciall verdict. That the King was ſeiſed of the Mannor of Freemington, and of the hundred there, and granted this to Hampton to hold of the Mannor of Eaſt-Greenwich by fealty, and 13 l. Rent, and then the King being ſeiſed of the Mannor of Crankford, of which the place in Queſtion was parcell, does grant his Mannor of Crankford, and his Mannor of Freemington, to the Marquels of Exceter and his heirs, who by his Will does deviſe Legacies to his ſervants, and does deviſe that all his Legacies ſhall be payd out of the Mannors of Freemington Uplaing and Crankford. All which Mannors I give to my Coſen Blunt and his heires. And the Defendant, as ſervant to Baker who was heir to the Marquels, did eject the Plaintiff; the queſtion was, if by the Deviſe of the Mannor of Freemington the Rent of 13 l. did paſſe or not, if it does not paſſe, then by the Statute of 32 H. 8. the 3. part of the Mannor of Crankford does not go to the deviſee, but deſcends to the heire at the Common Law.

Shuttleworth for the Plaintiffe. The ſeigniory does not paſſe by the deviſe of the Mannor, for the intent thereof ſhall be collected, by the words of the Will. 15 H. 7. 12. a. 19 H. 8. 9. & 6. but here he limits a diſtreſſe out of a Lordſhip, which cannot be 3 H. 6. Alſo it is doubtfull if the ſeignory being entire, may be divided by force of the Statute of the 32 H 8. And I think not; for when the Statute ſayes that the lands deviſed ſhall be deviſed into three parts, and that is to be underſtood of ſuch an eſtate as may be divided, but ſo cannot a Seigniory: For put the caſe that the Lord held by a Hauke, the whole Mannor ſhall deſcend and cannot be divided, and ſo de catalla Felonum. Fenner contra. For it ſeems to me that the ſeignory paſſeth, and ſo it ſhall be, if he held but a meſualty, 7 Ed. 4. A man held by Frankalmoigne, he ſhall ſay, nſra feodum ſuum, and in reputation amongſt men a ſeigniory is a Mannor: for if a man makes a feoffment of a Mannor, with livery where he hath no Mannor, yet ſhall it paſſe, 7 E. 3. Where a Mannor paſſeth by the name of Knights Fee. And as to the intirenes of the ſeigniory it is eaſily anſwered, for although the rent were entire, yet it may be ſevered, for a Rent Charge is entire, yet a proportionment may be made thereof 44 Ed. 3. To which the Court agreed that the Rent without doubt might be ſevered.

Walmeſley. For the Plaintiff, the Queſtion is if the Rent paſſeth by the name of a Mannor to the Deviſees. If a Grandmother deviſeth land to her daughter J. S. Whereas ſhe is her daughters daughter: yet this is good, becauſe in common ſpeaking ſhe is ſo called, but here the words are not apt, nor uſed in common ſpeaking, viz. That Rent ſhould be taken for a Mannor, and therefore it is voyd, as a gift to the right heirs of J. S. who is attaint 19 H. 8. And he concluded with this difference: that where the words have any affinity or likelihood

to

to the Mannor, then it will paſſe by the name of a Mannor. As if a man deviſeth his houſe and land by the name of a Mannor it ſhall paſſe. But here being but a ſervice, it is otherwiſe.

Gawdy cont. For if the Rent paſſe not nothing ſhall paſſe, which is a hard conſtruction on a Will. For 21 Rich. 2 Deviſe 27. a Deviſe Eccleſiæ ſancti Andreæ is a good deviſe to the Parſon of the Church.

And in Brett and Rigdens Caſe a man deviſed a Mannor in which he had nothing, and after purchaſed the Mannor, the deviſe is good. And in 26 H. 6. Feoffment 12. Land will not paſſe by deed by the name of a houſe, but land will paſſe by the name of a Carue, and a Carue by the name of a Mannor, and I hold that the Rent in this caſe will paſſe by the name of the Mannor, for a Mannor does conſiſt of Demeſnes ſervices, and rent may be called a Mannor aſwell as a Carue, and and the King gives it by the name of a Mannor to the Deviſor, and that is the reaſon that the Deviſor calls it a Mannor: And if you grant to me an Advowſon by the name of the Church and Rectory, and I deviſe the Rectory, the Advowſon and the Church will paſſe by the name of Rectory: And in Plouden. 194. A man did let his houſe and great demeſnes rendring Rent, and did deviſe to another all his Farme; there the Deviſee ſhall have all the Rent and the Reverſion alſo.

Michaelm. 29. & 30. Biſhop of Lincolnes Caſe.

Rot. 1528. & 2202.

IN a quare impedit, brought by the King, againſt the Biſhop of Lincoln and Leigh, the Incumbent: The Caſe was. The Biſhop had an Advowſon in groſs, and preſented J. S. who took a ſecond Benefice with cure, whereby the firſt became void, and continued ſo untill Lapſe fallen to the Queen, and after the title of Lapſe fallen to the Queen the Biſhop preſented one J. who was inducted, and by reaſon of Recuſancy to pay Tythes, was deprived, and by the Statute 26 H. 8. the Church became void ipſo facto, whereupon the Biſhop preſented one Leigh within ſix months, and now the Queen would preſent. Fenner. This Caſe is the ſame with Boſherulls, lately adjudged. But the Court ſaid, that here was a privation for Recuſancy; and therefore it would make a difference. And afterwards Paſch. 30 Eliz.

Walmeſley. For the Queen ſaid. That if a Lapſe be fallen to the Ordinary, if the Patron doth preſent before the Biſhop hath Collated, he ought to receive his Clerk, but where it is divolved to the King, the Patron by no means can defeate the King, but he may remove his Clerke at his pleaſure, but if ſuch Incumbent be preſent after ſuch Lapſe, and die, then the title of the King is gone, and his time paſſed by the act of God: but in our Caſe the avoydance which does ouſt the King from his Lapſe, is avoidance by reaſon of Recuſancy to pay Tithes, which is the proper act of the Incumbent, as is a reſignation, and no ſuch avoydance being by the act of the party himſelf ſhall ouſt the King of his Preſentation, for in the 1 H. 9. In annuitie againſt an Abbot, who reſigns the Writ ſhall not abate, for then the Plaintiff ſhall never have a good Writ. So in our caſe, if the King be outed of his Lapſe by ſuch deviſes, he ſhall never have a Lapſe, for every one will uſurp upon the Kings

Lapſe, and will preſently reſign or miſdemein himſelf whereby to avoid the Lapſe. And in the 18 Ed. 4. the 19.

By Pigot. A writt brought againſt a Prior ſhall not abate, although the Prior be not deposed, for it is his own fault.

Fenner. This Lapſe is given the King by his prerogative, but on this Condition, that he take it in due time: for ſo is the nature of things lapſed, for if after a title accrued to the King he ſuffer uſurpation, and the Incumbent die, his Lapſe is loſt, for the nature of the Lapſe is ſuch that it muſt be taken at its time, and where the title of the King is limited to a time, there he ſhall not have his prerogative: for a prerogative cannot alter eſtates. As if the King grant a ſeigniory in groſs rendring Rent, and the Tenant to the Lord dies without heir, whereby the tenant eſcheates the ſeigniory is extinct, and the Rent of the King is gone, aſwell as it is in the caſe of a Common perſon. And ſo if the King have a Rent ſeck for life out of my land, if I die he cannot diſtreine in my land for the arrerages as he may in my life time. And ſo where the Statute gives Annum diem & vaſtum to the King, yet he ſhall not have it after the death of the Tenant for life, ſo if the King reſerve a Rent upon a Leaſe to an Eſtranger, and the ſtranger enters in reſpect of the land, whereby his entire rent is ſuſpended, now the condition as to the King alſo is ſuſpended during that time, for the nature thereof is to be attendant upon the rent 22 H. 3. If a man grant a Rent upon condition to ceaſe during the minority of his heir, and after this Rent comes to the King, and the Grantee dies, the Rent ſhall ceaſe during the minority of his heir: ſo that by all theſe caſes the reaſon appears that the nature of the Lapſe is to be taken nec vice, and the King muſt take it then, or not at all: and where it is objected that by this means every Lapſe may be taken from the King: I conceive that far greater inconvenience will be to the Patrons on the other ſide: for when a Lapſe is devolved to the King, and a ſtranger preſents, if then the true Patron may not preſent untill the death of ſuch Incumbent, perhaps the Incumbent will reſign, or be deprived, and a ſtranger ſhall be preſented again and again in like manner, and ſo by this means the Patron ſhall never continue his advowſon, for by the Couin between the ſtranger, and the neglect of the King to take his Lapſe, the Incumbent ſhall never die. And afterwards in this term, it was adjudged that ſuch uſurpation ſhall not take away the Lapſe from the King, becauſe the avoydance accrued by the act of the Incumbent. Cook lib. 7. 27. a.

Hillary. 29 Eliz. Laſſell's Caſe.

LAſſell brought an action of debt upon an obligation, the Defendant pleads, that the condition was, that he ſhould perſonally appear before the Juſtices, and ſet forth, how he was taken by a Latitat by the Plaintiff who was Shirriff, who took this obligation upon his deliverance: and urged the Statute of 23 H. 6. and ſaid that the obligation was not according to the Statute. And by the Opinion of three Juſtices (Anderſon being abſent) If it were in ſuch an action wherein a man may appear by Attorney, then it is void. And the Plaintiff ſhewed a Judgment given in the Kings Bench, wherein in ſuch caſe Judgment was given for the Sheriffs, and it was between Seekford and Cutts 27. & 28. Eliz. Rot. 373. And the next Terme it was moved again.

Anderſon.

Anderſon. The Obligation is voyd; for when an expreſs form is limited by the Statute, no variance ought to be from it. But the other three Juſtices were againſt him, for they held that he ought to appear in his proper perſon in caſe of a Latitat.

Anderſon. I deny that, for Latitats have not been of above 60 years continuance; Vid. Cook, lib. 10. Beufages Caſe; and his firſt Inſtitutes, 225. a.

Paſch. 25 Eliz. Kayre againſt Deurat, in C. B.

Rot. 603.

IN a Waſte, the Plaintiff declared how the Defendant was ſeized in Fee, and made a Feoffment to the uſe of himſelf for life, the remainder to the Plaintiff in Fee, after which he committed waſte. The Tenant ſaid, that he was ſeized in Fee, without that he made a Feoffment as the Plaintiff declared; and upon iſſue joyned, it was found that the Defendant was ſeized in Fee, and that he made a Feoffment to the uſe of himſelf for life of J. S. without impeachment of waſte the remainder in tanto; and whether this was the Feoffment which the Plaintiff alledged, they prayed the advice of the Court.

Anderſon, Chief Juſtice. If the impeachment of waſte be not part of their iſſue, then the Verdict is voyd for that point, and that which is found more than their iſſue is voyd, 33 H. 6. the Defendant pleaded that he was not Tenant of the Free hold, and the Jury found that he held jointly with another, there the Plaintiff ſhall recover. And then at another day it was ſaid by the Juſtices, that the Jury had found ſuch an eſtate as was alledged by the Plaintiff; and although that they further found this privilege to be diſpunisht of waſte, which upon the matter proves that the Plaintiff hath no cauſe of action, yet becauſe the Tenant may chooſe whether he would take hold of this privilege or not, the Jury cannot finde a thing that is out of their Verdict, and whereof the Defendant will not take advantage by pleading, and for this cauſe their Verdict was voyd. 7 H. 6. 33. 21 H. 7. 12. where one pleaded in Bar a Feoffment, and traverſed the Feoffment, and hereupon they were at iſſue, and the Jury found that he had enfeoffed the Tenant after the Fine levyed to the Plaintiff this cannot be found becauſe it is out of their iſſue, 31 Aſſ. 12. and Judgement was given for the Demandant.

Hillar. 29 Eliz. Michell againſt Donton, in C. B.

Rot. 639.

IN an Ejectment a man makes a Leaſe, rendring Rent, with a Covenant that the Leſſee ſhall repair the houſes, with other Covenants and Conditions of re-entry for not performance, and then he deviſed the ſame land to the ſame Leſſee for divers years after the firſt years expired, yielding the ſame Rent, and under the ſame Covenants as in the former Leaſe, and he deviſed the remainder in fee to the Plaintiff, and the firſt Leaſe expires, and the Defendant being poſſeſt

by force of his ſecond Leaſe, doth not repair the houſes; and if the Plaintiff might enter, was the queſtion.

Shuttleworth. In as much as he deviſed the land under the ſame Covenants as the firſt Leaſe was, and the firſt was with Covenants and Conditions, the ſecond ſhall be ſo alſo, the rather becauſe he deviſeth the remainder over, ſo that the Deviſee cannot take advantage of the Covenants, but of the Conditions he may, and the ſecond Leaſe is conditional. But the whole Court was againſt him.

Shuttleworth. To what purpoſe then are theſe words in the Deviſe, Under the ſame Covenants.

Periam. They ſhall be voyd. And by all the Juſtices the intent of the Will was not that the Leaſe ſhould be conditional, for Covenants and Conditions differ much, for the one gives an action, but not the other; but the intent was, that he ſhould perform the Covenants upon pain to render damages in a Writ of Covenant.

Rot. 1620.

Bottenham againſt Herlakenden, 29 & 30 Eliz. in C. B.

HErlakenden was ſeized of land, and deviſed the ſame to the Plaintiff for years, the remainder to his wife for life, Proviſo, that the Plaintiff ſhould pay to the woman 20 l. per annum; and if he failed of his payment, &c. wherefore the woman entred, and if this ſhall be called reſervation or reverſion, was the queſtion.

Anderſon. A man cannot make a Reſervation on a Deviſe.

Periam. A man may to himſelf and his heirs, but not to a ſtranger.

Anderſon. Every Deviſee is in, in the ſier by the Deviſor, and why ſhall not this then be a reſervation to the Deviſor, and a grant of the reverſion to the woman.

Gawdy. Wherefore cannot a man deviſe land, reſerving rent, when by the Statute 32 H. 8. he may deviſe at his pleaſure?

Periam. Becauſe his pleaſure muſt correſpond with the Law.

Anderſon. If I deviſe land to another, reſerving rent to me and my heirs and then deviſe the reverſion, he ſhall have the rent as incident to the reverſion, and the Judges were divided, wherefore, &c.

Rot. 838.

29 Eliz. Glover againſt Pipe, in B. R.

IN debt upon a Bond the Condition was, that where Glover the Plaintiff had a Copyhold of inheritance, and had leaſed it to the Defendant, if the Defendant ſhould not commit any manner of waſte, and ſhould do no other thing that ſhould be forfeiture of the Copyhold, that then, &c. The Defendant pleaded conditions performed, the Plaintiff replyed, and alledged waſte committed in a ſhop that fell down during the term for want of reparation: but the Defendant in reſoynder alledged, that the ſhop was ruinous at the time of the Leaſe, and by reaſon thereof fell down.

Tanfield. It is no waſte, as the Books are, 42 Ed. 3. 19 Ed. 3. 2 H. 7. 3. a. 12 H. 8. 11. a. If a houſe be ruinous at the time of the Leaſe,

Leaſe, and fall during the term, it is no waſte: yet the Book in 7 H. 6. is otherwiſe. And in the 12 H. 4. a man lets his houſe, promiſeth that the Leſſee ſhall not ſuffer any voluntary waſte, if the timber be ſo good as it will endure the whole term, although it be not covered, yet is the Leſſee bound to reſerve it during the term.

Godfrey for the Plaintiff, and agreed to all the caſes aforeſaid. But here the Defendant is bound by his obligation, and therefore it differs from the caſe in 42 Ed. 3. 6. and of Perkins 142. where a diverſity is between a waſte and a covenant; for if a man makes a Leaſe for years, and by ſudden chance waſte is committed, this ſhall excuſe the Leſſee: but if he covenant to leave the houſe in as good a condition as he found it, if the houſe fall down by tempeſt, yet he ought to re-edify it. Alſo in this caſe it is a waſte in Law, although the houſe were ruinous at the beginning of the Leaſe; for in a waſte brought in ſuch caſe, if he pleads nul waſte fait, he ſhall not give ſuch matter in evidence, but it is onely to excuſe him. And with him agreed all the Court, and Judgement was given for the Plaintiff.

Auſtin againſt Courtney, 30 Eliz. in B. R. Rot. 165.

AUſtin and his wife, as daughter and heir of one Webb, brought a Writ of Errour againſt Thomas Courtney to reverſe a Fine leavied in a baſe Court by the ſaid Webb to himſelf.

Cook aſſigned theſe errours, 1. Becauſe the Fine was levied de uno tenemento, which is not good for the generality, for it may be land, or common, or rent. And in 3 Ed. 4. a Plea in Bar was rejected, becauſe it was pleaded that one was ſeized de uno tenemento, for this is uncertain. And in 38 H. 6. an Action is brought upon the Statute of 8 H. 6. for entry into certain tenements, that is not good, for it ought to be brought of ſo many acres. The ſecond errour was, becauſe Webb the Conuſor did acknowledge the land to be his right, whereas it ought to be the right of Courtney the Conuſee. The third errour was, becauſe the Fine was levied in a baſe Court, which preſcribes to hold Pleas but they cannot levy Fines there, for then the King ſhall loſe his ſilver 50 Aſſis. And ſo was it adjudged between Bambury and Peres, that a Fine levied in Cheſter which had ſuch preſcription, is not good: wherefore Judgement was given that the Fine ſhould be reverſt.

Trinit. 30 Eliz. Ireland againſt Higgins. Rot. 403, vel 43.

IN an Action of the Caſe the Plaintiff declared, that whereas a dog came to the hands of the Defendant which belonged to the Plaintiff, the Defendant did aſſume to deliver the ſaid dog to the Plaintiff upon requeſt, and that the Plaintiff had requeſted him, and he did not deliver the dog, ad damnum, &c. and hereupon the Defendant demurred.

Leigh for the Defendant. Here is no conſideration; for when the Plaintiff is out of the poſſeſſion of his dog, he hath loſt his intereſt in him,

him, for a dog is feræ naturæ, and therefore when he is out of poſſeſſion, he hath no remedy. 22 H. 6. 10 H. 7. 16 Ed. 4. and he cited Fynes and Sir John Spencers Caſe in Dyer, where a Treſpaſs will not lye for a hawk. Alſo, by the Grant of omnia bona & catalla, dogs do not paſs, nor are tithable nor are Aſſets.

Tanfield contra. Horſes, cows, and all cattel which are moſt profitable for ſervice of man, were at firſt feræ naturæ, and ſo were dogs alſo: but ſince by uſe nothing is ſo familiar and domeſtick to man than is a dog, and then he cannot be feræ naturæ; and therefore a Treſpaſs will lye for a dog, if he declare his dog, for that word does imply it is his domeſtick dog; and he much relyed on a Book, the Roll whereof he had ſeen, Trin. 15 H. 7. R. 35. where a man juſtified in a Treſpaſs of Battery in defence of his dog. And in 2 Ed. 2. Avowry 182. a Replevin was brought of a Ferret. And in 23 Eliz. Leeks Caſe, where one had Judgement to recover great damages for a bloodhound And as to the Caſe of Fynes and Spencer the reaſon why the Plaintiff had not Judgement was, becauſe he did not ſhew that the hawk was reclaimed, but after he brought a new Action, and had great damages. And at laſt it was adjudged by all the Court that the Action is maintainable, and Judgement commanded to be entred, niſi, &c.

Rot. 771.

Trinit. 30 Eliz. Stone againſt Withepoole, in B. R.

IN an Action of the Caſe the Plaintiff declared, that J. S. was indebted to him for velvet and other things to ſuch a value, and was bound in a Bond to pay money for them, and that afterwards the Defendant (being his Executor) did aſſume and promiſe to pay the money. The Defendant pleaded that the Teſtator was within age at the time of the making the Bond, and hereupon the Plaintiff demurred.

Egerton Solicitor for the Plaintiff. A Contract made by an Infant is not voyd, but voydable; and if the Infant at his full age had aſſumed as the Defendant hath, it had been good, and by the ſame reaſon the Executors aſſumſion is good, 9 Eliz. 13. where the Lord Gray, being heir to the former Lord Gray, although he was not bound to pay the debts of his father upon ſimple contract, yet in regard he did aſſume to pay them, he was made chargeable. And in 15 and 16 Eliz. it is a good conſideration where an Adminiſtrator undertakes to pay debts upon a ſimple contract: but admitting the Executor be not chargeable by Law, yet in equity and conſcience he is chargeable in Chancery; and when he promiſeth in conſideration that the Plaintiff will not ſue him, that is a good conſideration.

Coke. The conſideration is the ground of every Action on the Caſe, and it ought to be either a charge to the Plaintiff or a benefit to the Defendant, 17 Ed. 4. 5. where a man promiſed and aſſumed to a Chyrurgean money for curing a poor man: that was a good conſideration; for although it is no benefit to the Defendant, yet it is a charge to the Plaintiff and where there is no conſideration there can be no good action; as where a man promiſeth a debt that he never owed, this is voyd. And after, viz. 31 Eliz. It ſeemed to all the Juſtices,

ſtices, that the conſideration was not good, and therefore the contract voyd: But if goods be delivered to an Infant to be re-delivered, if afterwards his Executor aſſumeth to re-deliver them, this is good.

Gawdy, in the 13 H. 6. If a man be indebted in a ſimple Contract, and dye, and his Executors aſſume to pay the debt, it is good: but this ſeems to be contrary to the Law, for it is contrary to that which hath been lately adjudged in the Common Pleas. And Egerton cited a Caſe, 10 H. 6. where an Infant brought an Action of Treſpaſs, and ſubmitted himſelf to an arbitrement, this ſhall binde him at his full age; and this was agreed by the Court, but differs much from the Caſe at Bar; for when an Infant commits a Treſpaſs, he is chargeable in an Action of Treſpaſs, and ſhall loſe damages: but it is not ſo here. Wherefore Judgement was given, that the Plaintiff ſhould be barred.

Mich. 30 Eliz. Stanton againſt Chamberlain. Rot. 636.

IN an Action of Debt upon a Bond, upon non eſt factum pleaded, the Jury found, that the Defendant ſealed the Bond, and caſt it on the Table, and the Plaintiff came and took up the Bond, and carried it away without ſaying any thing; and if this ſhall amount to a Delivery by the Defendant to the Plaintiff, was the queſtion. And it was reſolved by all the Juſtices, that if the Jury had found that he had ſealed the Bond, and caſt it on the table towards the Plaintiff, to the intent that the Plaintiff ſhould take it as his Deed, who took the Bond and went away, that had been a good delivery; or that the Plaintiff, after the ſealing and caſting on the table, had taken it by the commandment or conſent of the Defendant: but becauſe it is found that the Defendant onely ſealed it, and caſt it on the table, and the Plaintiff took it and went away with it, this is not a ſufficient delivery, for it may be that he ſealed it to the intent to reſerve it to himſelf untill other things were agreed, and then if the Plaintiff take it, and go away with it without the Defendants conſent, that will not make it the Defendants Deed. But it was ſaid, that it might be accounted to be the Defendants Deed, becauſe it is found that he ſealed it, and caſt it on the table, and the Plaintiff took it, &c. and it is not found that the Defendant ſaid any thing, and therefore becauſe he did not ſay any thing, it will amount to his conſent, Nam qui tacet conſentire videtur. But to this it was anſwered, that it is not found that the Defendant was preſent when the Plaintiff took it; and if the Defendant had ſealed, and caſt the Bond on the Table when the Plaintiff was not there, and then the Defendant went away, and then the Plaintiff came and took it away, then clearly it is not the Deed of the Defendant.

Hill. 31 Eliz. Beron againſt Goodyne.

IN an Ejectment the Caſe was, the King was ſeized of lands in Fee, and a ſtranger intruded, and the King grants this land to J. S. in Fee, and the Intruder continues poſſeſſion, and dyes ſeized: The queſtion was, if this deſcent ſhall take away the entry of I. S.

Johnſon.

Johnſon. It ſhall not; for none will affirm that an Intruder ſhall gain any thing out of the King, but that the land ſhall paſs to the Patentee, and the continuance of the Intruder in poſſeſſion, and his dying ſeized, ſhall not take away the entry; for he cannot be a Diſſeiſor, becauſe he gained no eſtate at the beginning; as if a Guardian continues poſſeſſion after the heir is of full age, he is no Diſſeiſor, nor ſhall gain any eſtate. And 10 Ed. 3. 2. where a tenant of the King dyes, his heir within age, and a ſtranger enters, and after the heir is of full age dyes ſeized, this ſhall not take away the entry of the heir.

Cook contr. By his continuance of poſſeſſion he ſhall be accounted a Diſſeiſor, and the Free-hold out of the Patentee, for another eſtate he cannot have, for tenant at ſufferance he is not, for he comes in at firſt by a title, as in the 12 Aſſi. The Dona's in Frank-marriage are divorced, and the husband continues the poſſeſſion; and ſo where a Leſſee continues poſſeſſion after the death of the tenant for life, theſe are tenants at ſufferance; and the Patentee hath a Free-hold in Law, which is taken away by deſcent, and denyed there was any ſuch caſe as was vouched in the 10 Ed. 3. but compared the caſe to the 21 Ed. 3. 2. where a Fine was levyed per conuſans de droit come ceo, &c. if before the Conuſee enters, a ſtranger enters, and dyes ſeized, the entry of the Conuſee is barr'd. So is it where an Advowſon is granted to J. S. and his heirs, and a ſtranger uſurps, the Grantee hath no remedy. And if a man deviſeth land to J. S. and before he enters, a ſtranger doth enter, and dyes ſeized, the entry of the Diſſeiſee is taken away; and ſo it is in our caſe. But a further day was given Cook to ſhew cauſe why Judgement ſhould not be given againſt him.

Rot. 533.

Hillar. 31 Eliz. Suttons Caſe, in C. B.

IN an Ejectment, the Jury gave a ſpecial Verdict, that the Defendant (nihil habens in terra) did make a Leaſe thereof to the Plaintiff by Indenture, according as the Plaintiff had declared, and then the Defendant entred on the Plaintiff; and whether this entry be good, was the queſtion.

Walmeſley for the Defendant. Jurors are ſworn ad veritatem dicendum, and therefore they ſhall not enquire of Eſtoppels, becauſe it is not in evidence. But the whole Court was againſt him, who held that the Jury might finde a matter that is not ſhewed in evidence; for by Anderſon, in an Aſſize they may finde a Releaſe, although it be not given in evidence; and he and Periam held, that the Plaintiff ought to have Judgement, for that there was a good Leaſe between the parties, and if Rent were reſerved, an Action of Debt would lye.

Windham contr. For it is onely an Eſtoppell between the parties: but the Court is at liberty, and are not eſtopped, when the truth appears to them; and it is a Maxim in Law, that he who hath nothing in the land cannot make a Leaſe, and then the Plaintiff hath no cauſe of Action. And afterwards, viz. 32 Eliz. Anderſon and Periam were expreſly for the Plaintiff; for whereas it hath been ſaid that it was a Leaſe by Eſtoppell, they held it was not ſo, for that in Debt the Rent ſhould be recovered. And Anderſon ſaid, If I levy a Fine of your land to you for years, if you be put out, I ſhall have an Aſſize: but Windham was of opinion with Walmeſley: wherefore Periam ſaid, we will have the opinion of the other Juſtices in the Exchequer Chamber; wherefore, &c.

Trinit.

Trinit 30 Eliz. Perryn againſt Allen in C. B.

Rot. 611. & 612.

IN a debt upon a Leaſe for years, It was found that one Gibſon was ſeiſed of Land in Leaſe for thirty years, and he let the Land to Perryn for 19. years rendring 10. l. rent, and that afterwards, it was articled and agreed between Gibſon and one J. S. that Perryn ſhould have and hold the Lands which he had, and alſo other lands which he had, for terme of 3. years rendring a greater rent, to which Articles Perryn at another time and place afterwards agreed, but the intent of the articles and agreement betwixt them, was not that the firſt Terme to Perryn ſhould be extinct. That afterwards Perryn letted this Land to the Defendant Allen for 17. years rendring Rent, and then the three years expired, and Gibſon grants his term to J. S. who enters, &c. If this agreement amounts to a ſurrender, was the queſtion.

Hanam, for the Plaintiff. It is not; for to a ſurrender three things are incident. Firſt an actuall poſſeſſion in him who ſurrenders. Secondly, an actuall remainder or reverſion in him, to whom the ſurrender is made. Thirdly, conſent and agreement between the parties: But to all theſe, the Plaintiff was a ſtranger, and therefore no ſurrender. For if I let land to you for ſo many years as J. S. ſhall name, if he names the years, it ſhall be good from that time, and not before: but if I let land for ſo many years as my Executors ſhall name, this is not good, for I cannot have Executors in my life time, and when I am dead I cannot aſſent. ſo in this caſe there ought to be a mutuall aſſent between the Leſſor and Leſſee.

Harris Cont. It is a ſurrender, for if he concluded and agreed at another time or accepted a new Leaſe, it is a ſurrender. 37 H. 6. 22 Ed. 4. 14 H 7. and then when a ſtranger does agree that he ſhall have other lands and pay a greater Rent, this is a ſurrender.

Anderſon. If I covenant with you that J. S. ſhall have my land for ten years, this is only a Covenant and no Leaſe, quod Walmeſley conceſſit. And ſo if I covenant that your Executors ſhall have my land for a term of years after your death, this is no Leaſe. And all the Court held, that this was not a good Leaſe, for the act of a ſtranger cannot make a ſurrender of the Terme.

Peryam. You at the Bar have forgotten to argue one point materiall in the Caſe, videlicet. If Leſſee for 20. years make a Leaſe for ten years if the Leſſee for ten years may ſurrender to the Leſſee for 20. years. And Hanam ſaid privately, that he could not ſurrender, for one Term cannot merge in the other. And Anderſon ſaid, that by opinion of them all, that the Leſſee for 10. years cannot ſurrender. But to the other point. All the Judges agreed that it was no ſurrender. And Judgment was given for the Plaintiff.

Dabridgecourt againſt Smallbrooke.

IN an action of the Caſe, the Plaintiff declared that he was Sheriff of the County of Warwick, and that a writ came down to him to arreſt J. S. at the ſuit of the Defendant, who requeſted the Plaintiff to make Ruſſell, who was the Defendants friend, his ſpeciall Bailly, in conſideration of which the Defendant did aſſume, that if the ſaid J. S. did eſcape, that he would take no advantage againſt the Plaintiff, where-

upon he made Ruſſell his Bailiff, who arreſted the ſaid J. S. who afterwards eſcapt from him, and that notwithſtanding the Defendant had charged the Plaintiff for this. And a verdict was found for the Plaintiff. And in this caſe it was agreed, that where a Sheriff did make a Bailiff upon requeſt of any one, it is reaſon that the party ſhould not charge the Sheriff for an eſcape, by reaſon of the negligence of ſuch Bailiff: for the Sheriff hath ſecurity from every one of his Bailiffs to ſave him harmeleſs: wherefore it is great reaſon that if upon requeſt he makes a ſpeciall Bailiff, that the party ſhould not take advantage of ſuch an eſcape, but that the Sheriff may have his action againſt him again, upon his promiſe. And Judgment was given for the Plaintiff.

Hillar. 31 Eliz. Beale againſt Carter.

Rot. 331.

IN an action of falſe impriſonment. The Defendant juſtified the impriſonment for two hours, becauſe the Plaintiff brought a little infant with him to the Church intending to leave it there, and to have the Pariſh keep it: and the Defendant (being Conſtable of the Pariſh) becauſe the Plaintiff would not carry the child away with him again, carryed the Defendant to priſon, all the ſaid time, untill he took the child away with him. And hereupon the Plaintiff demurred. And it ſeemed to the Juſtices that it was no good plea: for although the Conſtable at the Common Law is keeper of the Peace, yet this does not belong to his Office, but if he had juſtified as Officer, then perhaps it had been good. And afterwards, viz. Hillar. 33 Eliz. the Caſe was argued again, and then Glanvill ſaid. That it was a good juſtification, for any perſon may do it. For if I ſee A. ready to kill B. I ought to hinder him of his purpoſe. And in the 22 Aſſ. 50. the Defendant juſtified becauſe the Plaintiff was madd and did a great deale of miſchief, wherefore he impriſoned him. And in 10 Eliz. which caſe I have heard in this Court. The Conſtable took a madd man, and put him in priſon where he dyed, and the Conſtable was indicted of this, but was diſcharged: for the act was legall, and ſo here in this Caſe, if the infant had dyed for want of meat, it had been murder in the Plaintiff. For it was held in 20 Eliz. at Wincheſter before the Lord Bacon, if one brings an infant to a deſert place, where it dyes for want of nouriſhment, it is murder.

Gawdy. It was ill done of the Plaintiff, but that ought to be reformed by due courſe of Law. for a Conſtable cannot impriſon at his pleaſure, but he may ſtay the party, and carry him to a Juſtice of Peace to be examin'd.

Wray. Then ſuch matter ought to be pleaded. Quod Gaudie conceſſit.

Fenner. If he had pleaded that he refuſed to carry the infant away, then it had been a good juſtification, for a Conſtable is Conſervator of the peace, but becauſe it was not ſo pleaded, the Plea is naught; But the Judges would not give Judgment, for the ill Examples ſake, and therefore they moved the parties to compound.

Paſch. 31 Eliz. Sale againſt the Biſhop of Lichfield in C. B.

SAle Executor of J. S. who was Grantee of the nomination and preſentation to the Archdeaconary in the County of Derby, brought a Quare impedit againſt the Biſhop of Lichfield, and declared of a preſentment and diſturbance in vita Teſtatoris, & quod Eccleſia vacavit & adhuc vacata eſt. The Defendant pleaded Plein d'Incumbent, before the writ purchaſed, and Judgment was given for the Plaintiff. And it was moved, If a Quare Impedit does lye of an Archdeaconary, for it is but a function or dignity, and therefore a Quare Impedit will not lie of an office of a Commiſſary, but the 24 Ed. 3. 42. is expreſs in the point. And 30 Edw. 3. 21. a Qure Impedit did lye of a Priory. And therefore notwithſtanding this exception, Judgement was given for the the Plaintiff. But there were two other doubts in the Caſe. Firſt, If a Quare Impedit will lie for an Executor for diſturbance done in vita Teſtatoris, and that by the Statute of 4 Ed. 3. 7.

Snigge. The action will lye by the Executors, for in all Caſes where damages are to be recovered, they ſhall have an action by that Statute. 11 H. 7. 2. An action of treſpaſs was brought for taking of goods in the life of the Teſtator, but no action will lie for entrie into land in the life of the Teſtator, for it ought to be ſuch an action as will ſurvive in damages, and may be a damage to the Executor 7 H. 42. An ejectement lies for Executors upon an ejectment in the life of the Teſtator. And if an ejectment be maintenable in which a Terme ſhall be recover'd, it ſhall be alſo maintenable in a Quare Impedit, in which a preſentment may be recovered.

Drew cont. At the Common Law Executors have no remedy for a perſonall wrong, quia moritur cum perſona: for upon the death of the Teſtator. Executors have no remedy for arrears of Rent at the Common Law, but only the Statute of 32 H. 8. And it cannot be that the Executors in this caſe are within the Statute of 4 Ed. 3. For that Statute intends onely to remedy ſuch things as are avaylable to the Teſtator, and are aſſets to pay debts: and although Executors may have a Quare Impedit, that is intended of a diſturbance, fait al eux, but contra, if it be done in vita Teſtatoris.

Walmſley. I conceive no actions will lie. For the Statute gives an action for the taking of goods and ſuch like things, but here is no taking, but only a diſturbance, which may be done by Parol.

Perryam Juſtice cont. For the Statute, ſays that they ſhall have an action of treſpaſs for a treſpaſs done to their Teſtator, and not for taking goods, ſo that the taking of goods is but by way of reſemblance and not that they ſhall have an action of treſpaſs for taking of goods onely.

Windham, and Anderſon. agreed with Perryam, and whereas it hath been ſaid, that this cannot be Aſſetts. But the caſe that the Teſtator had judgment to recover damages, ſhall not that be Aſſetts? and why may the damages here recovered be Aſſetts, and why ſhall not the grant of the Advowſon be Aſſetts in the hands of the Executor aſwell as in the hands of the iſſue. And ſo was the opinion of the Court.

32 Eliz.

32 Eliz. Foſter and Wilſon againſt Mapps. in B. R.

Rot. 71.

The Caſe on a ſpeciall verdict was thus, Mapps the Defendant made a Leaſe of the Parſonage of Broncaſter by Indenture, and Covenanted by the ſame Deed, to ſave the Plaintiff harmleſs and indemnified: and alſo all the profits thereof and premiſſes, againſt Philip Blount, the Parſon of Broncaſter; and hereupon a writ of Covenant was brought againſt Mapps, and the breach aſſigned was, that Blount had entred and ejected the Plaintiff. And one point was, if this ſhall be accounted the Deed of the Defendant, becauſe the Defendant delivered his part of the Indenture to the Plaintiff as his Deed, but the Plaintiff did not deliver the counterpart to him. But the opinion of the Court was, that this was a good Deed of the Defendants, and Gawdy ſaid, that the ſafeſt way had been to deliver his part as an Eſcroll to be his Deed, when the Plaintiff delivered the Counterpaine: But a great doubt was made in this caſe, becauſe it was not helped that Blount entred by a Title, and then he ſhall be taken to have entred by wrong, and ſo the Covenant not broken, for to ſave harmleſs is only from legall harmes, as it is in Swettenhams Caſe Dyer 306. Where the Warden of the Fleet ſuffered a priſoner to eſcape, and took a bond of him to ſave him harmleſs, and then the Warden was ſued upon an eſcape, and thereupon he ſued the Obligation, and adjudged that the bond was not forfeit, becauſe the partie was not legally in execution, and therefore the Warden could not be damnified for the eſcape.

Pasly cont. The Diverſitie is where the Covenant is generall, and where it is ſpeciall, for in this caſe it being ſpeciall to ſave harmleſs from Blount, he ought to defend againſt him his entry, be it by good title or by wrong, and ſo is Catesbies Caſe. Dyer 3. 28. Where the Leſſor covenanted, that the Leſſee ſhould inioy his terme ſine ejectione vel interruptione alicujus, the Leſſee brought an action of Covenant becauſe a ſtranger entred, and did not ſay he had any title, and Judgment was given for the Plaintiff.

Gawdy. The Covenant is broke. For if Blount diſturbe him ſo that he cannot take the profits, this is a breach of the Covenant, for hereby the Plaintiff is damnified. 2 Ed. 4. 15. where the Condition of a Bond was, that the Obliger ſhould warrant and defend the Obliged for ever, and againſt all, and the Defendant pleaded, that he had ſuch a Warrant, and there it was held by Danby to be no plea, becauſe he cannot warrant unleſs the other be impleaded. And there it was ſaid by Danby and Needham, that if the obligee be outed by a ſtranger, who hath no title, the Obligation is forfeit by reaſon of this word defend.

Wray agreed, and ſaid, that this caſe was not like to the Caſe of 26 H. 8. 3. where the Leſſor Covenanted to warrant the land to the Leſſee, for there he ſhall not have a Covenant, if he be wrongfully outed; but our caſe is to ſave harmleſs, which is of greater force than to warrant, for to warrant Land is only upon the title, but here, be the Leſſee outed by wrong or by title, yet is the Covenant broken, to which the other Juſtices agreed.

Fenner Mouncht. 18 Ed. 4. 27. where a man is obliged to ſave J. S. harmleſs

harmleſs againſt me, if I doe arreſt J. S. although wrongfully, the obligation is forfeit, which the other Juſtice denied, And at laſt Judgment was given for the Plaintiff.

Paſch. 33 Eliz. Elmer and his wife againſt Thatcher in C. B.

Rot. 1125. And Cooks 1. Inſt. 355.

IN a Quod ei deforceat of a third part of an acre of Land whereof the wife was tenant in Dower: The defendant confeſs'd ſhe was tenant in Dower, but ſhewed how ſhe committed waſte, wherefore he brought his action of waſte, to which ſhe appeared and pleaded nothing, for which he had Judgment to recover. The Plaintiff ſaid that no waſte was committed, and the Defendant Demurred. Statut Weſtm. 2. cap. 4.

Owen for the Defendant. a Quod ei deforceat, lies not in this caſe, for ſuch Writ is grounded upon a recovery by default in a reall action, but a waſte is a meere perſonall action. And therefore in the 2 H. 4. in a waſte againſt the husband and wife, the wife ſhall not be received: alſo it will not lie in this caſe, becauſe here is no default within the intent of the Statute, for the Statute intends to relieve defaults after appearance, and therefore all the Judgment in this Writ is that the recovery was by default, and if there was a default in pleading, it is a default, but not within the Statute.

Glanvill cont. No waſte is committed, and ſo the recovery ſhall not bind, for it appears in the 8 Ed. 4. by Welt. That this action was provided inſtead of a Writ of right, and there is no queſtion but a Writ of right will lie here, and this Writ is of the ſame nature. And Mr Plowden in his Reading ſaid, that this action will lie upon a recovery upon a Writ of waſte, aſwell as in other actions, for the recovery is not upon the Inquiry of the Jury, but upon default. And it is alſo a reall action 7 Ed. 3. 28 Ed. 3. 30. If the husband make default herein, the wife ſhall be received.

Anderſon. There is no queſtion but this action lies upon a recovery in waſte, but if this be a default within the Statute is a doubt, for if this ſhould be ſuffered, it were very miſchievous: for then contempts ſhall be favoured, which was never the intention of the Statute, and therefore it will not lie where there is a default after appearance.

Walmeſley. of the ſame opinion, for this caſe differs much from the Statute of Glocester, for this Statute gives remedy to a third perſon upon default of the particular Tenant, and therefore upon this Statute the intent of the partie, who makes default, is more regarded, than the manner of the default, and therefore it ſhall be taken largely. But here is default in the party himſelf, and he ſhall have no favour againſt his willfull default for every nihil dicit, is a confeſſion of it ſelf, for thereupon it is ſuppoſed that nothing can be ſaid.

Windham. I hold that a Quod ei deforceat will not lie in a Writ of waſte, for the inquiry of the Jury is the cauſe of the Judgment. But he agreed that default within the Statute is intended ſuch default, that in it ſelf is the cauſe of the Judgment, but here the Judgment is given upon contempt and refuſall of the party and therefore no favour.

Perryam. This action cannot be compar'd to a writ of right which is grounded upon the right, and not on the Judgment, but the form in the Quod ei deforceat is ſet down in the Statute which ought to be obſerved, and the Statute gives this action upon a default, and here is no

default, for it cannot be a default where the partie appears and hath no day in Court, but he doubted much if it lay in awrit of waſte, becauſe thedamages are the principall: but as the caſe is here, it will not lie. And to prove that a nihil dicit is a confeſſion he cited Pepys Caſe in the Comentaries 438. And at laſt Judgment was given that the Writ would not lye.

Paſch. 35 Elizab. James againſt Portman.

William James and Thomas James Joyntenants for life of a leaſe made by Portman, William James doth aſſent, covenant and agree that Thomas James occupy all the land alone, and ſow it with his own Corn: After the land is ſowed Thomas James dyes, William James the ſurvivor grants the Corne to Portman, who takes it, and the Plaintiff as executor to Thomas brought an action of treſpaſs.

Ewens, for the Defendant, one Joyntenant cannot make a Leaſe to his companion, no more than one may infeof the other, by reaſon they have joynt poſſeſſion 10 Ed. 4. 3. 2 R. 2. Extinguiſhment 3. Alſo the words here are not ſufficient to make a Leaſe, but admitting this, yet the ſurvivor ſhall have the corn of that part which belongs to him, for by this Leaſe the Joynture is ſevered, and then the Survivor ſhall have that which grows on his part: For if two Joyntenants ſowe theſe land, and one of them letts his moytie for years; and he, who did not let, dyes, the other ſhall have the corn as Survivor.

Pyne contr. Although one Joyntenant cannot infeof another, becauſe he cannot make livery, becauſe he hath poſſeſſion before, yet may he Releaſe to his companion, and ſo may he make a Leaſe for years, for there is no need of any livery, and by the 22 H. 6. 43. If one Joyntenant inleaſe another, this ſhall enure by way of confirmation. And 14 H. 6. 10. One Joyntenant may put out his companion by this means, for he may clayme a Leaſe from him, and then a Releaſe, and if it be a good Leaſe, then the Executors ſhall have it.

Popham. The action is good, for one Joyntenant may make a Leaſe to the other, although he cannot infeof, for a Leaſe is but a contract. And 11 H. 6. 33. one Joyntenant commanded the other to occupy all, and in a treſpaſs he was compelled to plead this as a Leaſe, and then if one Joyntenant does ſow all and dyes, the other ſhall have the Corne by Survivor: and it is not as in caſe where a man hath an eſtate determinable upon uncertainty, for there his Executors ſhall have the Corn, but in our caſe, the Survivor had contracted with his companion, and thereby had bound himſelf not to meddle with the land, and the other beſtowed great coſts in manuring and ſowing the Land, and therefore the Executors ſhall have the Corn.

Fenner agreed, but doubted whether one Joyntenant could make a Leaſe to the other: but ſaid, that by the contract he had excluded himſelf from the profits; and by the 39 Ed. 3. 27. one Joyntenant may have an account againſt the other. And he ſaid, that if I agree that you ſhall ſow my Land with me, you ſhall gain no intereſt in the land, and yet you ſhall have the corne. And one Joyntenant may diſtreyn for himſelf, and as Bayly for the other. And the Cauſe was adjourned: and afterwards viz. Hillary 36 Eliz. the caſe was repeated.

Gawdy

And Gawdy ſaid. That if there be two Joyntenants, and one grants to the other that he may ſow the Land, yet may the other occupie with him, for theſe words do not transfer any ſole intereſt, but if he ſayes that he ſhall occupy all the Land, and ſhall ſow it ſolely, this does exclude him from having any intereſt with him.

Popham. Agreed, becauſe this is but a contract, and ſo of a Leaſe for years.

Gawdy. If one Joyntenant ſayes to the other, that he will not occupie the Land with him, or that he will not put in his Cattle, this does not transfer any intereſt, but that he may occupie with him, and ſo in this caſe, if it had not been ſaid that he ſhould occupy ſolely.

Popham of the ſame opinion: for where he ſayes he will not occupy, the words are in the negative, which will not exclude him of his intereſt, but in the Caſe at Bar they will, becauſe they are in the affirmative ſo. That he ſhall occupy the Land ſolely. And Judgment was given for the Plaintiff.

Paſch. 3. Eliz. Woodward againſt Nelſon in B. R.

WOodward, Parſon of Wotton in conſideration, of 12l. payd by Bretman, one of his Parſhioners, did accord and agree with him, that he and his aſſignes ſhould be diſcharged of Tythes during the time that he ſhould be Parſon. Bretman made a Leaſe to Nelſon, Woodward did libell againſt him for Tythes and Nelſon prayed a prohibition upon the ſaid contract. And if this was ſufficient matter for a prohibition was the Queſtion, becauſe it was by word only, and without writing, which amounts only to a cauſe of action upon a promiſe for Bretman, but no action for his leſſees, neither can this amount to a Releaſe of Tythes, for as Tythes cannot be leaſed without Deed, ſo they cannot be releaſed or diſcharged without Deed.

Gawdy Juſtice. Tythes cannot be diſcharg'd without Deed, unleſs by way of contract for a ſum of money, and he cited the 21 H. 6. 43.

Fenner: for that year in which the diſcharge was made, it was good by way of diſcharge without Deed, becauſe the Parſon for that year had as it were an Intereſt, but ſuch diſcharge can have no continuance for another year, for default of a Deed; and ſo a promiſe being no diſcharge, it is no cauſe of a prohibition. But Gawdy, held as afore. And about this time Wray Chief Juſtice dyed, and Popham ſucceeded, and the ſame day he was ſworn, Cook moved this Caſe again. And the Court held that the agreement being by parol was not good: And Fenner, then, ſaid that without writing the agreement could not be good between the parties but for one year. And the Court awarded a conſultation. But upon ſearch made, no Judgment was entred in the Roll.

Trinit.

Rot. 367. Trinit. 35 Eliz. Dr. Foord againſt Holborrow, in B. R.

IN an Action of Debt upon a Bond, the caſe was, Dr. Drury (to whom the Plaintiff was Executor) made a Leaſe to Holborrow of the Mannour of Golding for years, and Holborrow the Leſſee entred into a Bond, that if he, his Executors or Aſſigns, did pay to Anne Goldingham, widow, the ſum of 20 l. for 17 years, if the ſaid Goldingham ſhould ſo long live, and ſo long as Holborrow the Leſſee, or any claiming by or under the ſaid Holborrow ſhall or may occupy or enjoy the ſaid Mannour of Goldingham; and then Holborrow ſurrendred his Leaſe to the Obligee, prætextu cujus the Defendant pleaded, quod non occupavit, nec potuit occupare, &c. wherefore he did not pay the ſaid ſum to Anne Goldingham, and the Executor of the Obligee brought an Action of Debt upon this Obligation.

Johnſon for the Defendant. The term is gone, for he cannot occupy after the ſurrender, and alſo the Obligee is a party to the cauſe why it is not performed, and therefore he ſhall take no advantage, 4 H. 7. 2. But the whole Court was againſt him, for he to whom the ſurrender is made, cometh in quodammodo by him, and is his Aſſignee, for he ſhall be ſubject to the charge that was before the ſurrender; and alſo the Defendant ſhall be bound by theſe words in the Obligation, viz. ſo long as he ſhall or may: and although theſe words were not inſerted, yet he ſhall pay the annuity: for where the firſt Cauſe does commence in himſelf, he ſhall not have advantage thereby: but otherwiſe, where he is not party to the firſt Cauſe. As if two Joynt-tenants with Warranty make a partition, the Warranty is gone, becauſe they are parties to the act which made the extinguiſhment: but if one makes a Feoffment of his part, the Warranty as to the other remains, 11 Ed. 4. 3. and in the Caſe at Bar, the Obligor made the ſurrender, and therefore he is party, and the firſt cauſe: and there is a diverſity when the thing to be done is collateral, and when not: for if a Leſſee does oblige himſelf to do a collateral thing, as payment of money, there he ought to do it, although that he ſurrender: for although the Obligee do accept of the ſurrender, yet no act is done by him to hinder the performance of the condition: but where the Obligee does any act to hinder the performance of the Condition, the Condition is ſaved: as if the Leſſee be bound to the Leſſor to ſuffer J. S. to enter into a Chamber during the Leaſe, and he ſurrenders to the Obligee, who will not ſuffer J. S. to enter, the Obligation is ſaved, and Judgement was given for the Plaintiff.

36 Eliz. Bedford againſt Hall, in B. R.

IN an Action of Covenant, wherein the Plaintiff declared, that the Defendant did deviſe and grant to him certain land, with all his goods contained in a certain Inventory for 20 years, and ſaid, that in the Inventory, amongſt other things, were five Cows, which the De-

fendant

fendant ſeized, and that one J. S. took them away as his proper goods, as indeed they were, and hereupon he brought this Action.

Fenner. The Action will not lye, for no intereſt in the Cows doth paſs to the Leſſee by this Leaſe, neither was there any right to them in the Leſſor: As if I demiſe to you the land of J. S. by theſe words, Dem ſi & conceſſi, and you enter, and J. S. re-enters, no Covenant lyes againſt me. And ſo in the 11 H. 4. a Prebend made a Leaſe for years, and reſigned, now is the term of the Leſſee quite deſtroyed; and if after he be outed by a new Prebend, yet he ſhall have no Action of Covenant. And ſo is it, 9 Eliz. Dyer 257. Leſſee for life makes a Leaſe for years and dyes, the Leſſee ſhall not have a Covenant if he be outed by him in the reverſion, becauſe he is not in as a Termor at the time of the diſturbance. But if in the principal Caſe the Leſſor had been poſſeſt of the goods although by a wrong title and the Owner had ſeized them, then a Covenant would lye. And ſo if a Diſſeiſor makes a Leaſe, and the Diſſeiſee re-enters, the Leſſee ſhall have a Covenant.

Gawdy. If a man lets lands wherein he hath no eſtate together with his goods, although the land will not paſs, yet the goods do; and if a man lets goods for a year, and re-takes them within the year, no Covenant will lye, for the property was never in the Leſſee.

Clench. If a man lets anothers goods to me by Deed if I ſeize them, and the Owner re-takes them a Covenant will lye, and ſo will an Action on the Caſe, if it be without Deed, 42 Aſſi. 8. If I be in poſſeſſion of anothers goods, and ſell them, a deceit lyes againſt me by the Vendee; and ſo is the Book of Aſſ. 42. 8. contra, where the Vendor hath not poſſeſſion at the time of the ſale. And if I ſell goods by Deed which are in my poſſeſſion, and they are evicted by the right Owner, a Covenant will lye: contra. If I have not poſſeſſion at the time of the letting them, and if I let land and J. S. enter before the Leſſee, the Leſſee cannot have a Covenant, Quod nota. Et adjournetur.

35 Eliz. Scarret againſt Tanner, in C. B. Rot. 1458.

In a falſe Impriſonment, the Defendant juſtified that he was High Conſtable of the Hundred of E. in the County of Salop, and that the Plaintiff made an affray within the ſaid Hundred upon one Wynn, who came preſently to the Defendant, and told him of it, and took his oath that he was in fear of his life: whereupon the Defendant came to the Plaintiff, and arreſted him and carried him to Priſon untill he could finde ſufficient Sureties of peace.

Glanvill. A Conſtable cannot arreſt one to finde ſurety of the peace upon a complaint made to him, unleſs he himſelf ſees the peace broken. 7 Ed. 4.

Kingſmill contr. For he is at Common Law Conſervator pacis, 12 H. 7. 18. and how can he keep the peace if he may not compell them to finde ſurety. 44 Ed. 3. Barr. 202. If a man that is threatned complain to the Conſtable, he may compell the party to finde ſurety for his good behaviour, and may juſtifie the impriſoning him, or putting him in the Stocks, 22 Ed. 4. 35. 10 Ed. 4. 18. where a Conſtable in ſuch caſe may take a Bond.

Anderſon. I grant that Conſtables are keepers of the peace at the Common Law, and are to keep the peace as much as in them lyes; and that is, to take men that they finde breaking the peace, and to carry them to a Juſtice of peace to finde ſurety: but the Conſtable cannot take ſecurity, nor recognizance, nor bail, for he is not an Officer upon Record; and if he do take a Bond, how ſhall he certifie it, and unto what Court?

Walmeſley contr. Who ſaid, that the Conſtable might take ſecurity by bond, although not by recognizance or bail.

Beaumond. A Conſtable may put him that breaks the peace within the Stocks, but it muſt be where the breach of peace is committed in his view, for he hath no authority to take an oath that a man is in fear of his life, and then the foundation of his juſtification doth fail.

Owen. The oath is not material; for although he cannot take ſuch oath, yet his taking of ſurety is good; and before Juſtices of peace were made, the peace was preſerved by Conſtables; and the Statute that creates Juſtices, does not take away the power of Conſtables, and therefore he may juſtifie. Sed adjournatur.

Paſch. 38 Eliz. Worſley againſt Charnock, in C. B.

IN an audita quærela the Caſe was thus, The father and ſon were bound in a Statute-Merchant to Charnock, who ſued out an Execution againſt them, and their lands were ſeverally extended; and they ſuppoſing that the Statute was not good, becauſe it was not ſealed with both their ſeals, according to the Statute, they both brought a joynt audita querela; and whether they could joyn in this Action, or not, was the queſtion.

Warburton. They ſhall not joyn; for in all caſes a man muſt make his complaint according to his grief; and here their grief is ſeveral, as if two men be impriſoned, they ſhall not joyn in a falſe impriſonment. The ſame Law in a Battery, 8 Ed. 4. 18 H. 6. 10 Ed. 4. If J. S. hath goods of divers men, they ſhall not joyn in a Replevin; and 33 H. 6. two men ſhall not joyn in an audita quærela, unleſs the land in execution is in them joyntly; and 29 Ed. 3. two Joynt-tenants Infants alien they ſhall have ſeveral Writs of Cum fuit infra ætatem: But he confeſſed the Caſe in 30 Ed. 3. Fitzherbert, audita quærela, where two men were in Execution, and the Conuſor did releaſe to one, and then to another by another Releaſe, yet both ſhall joyn in an audita quærela: but this is not Law: and beſides, they cannot recover damages joyntly by reaſon of their ſeveral vexations; and this Action being perſonal, damages cannot be ſevered. Vid. 2 Ed. 3. Execution 45. 9 Ed. 4. 31. 12 Ed. 4. 6.

Harris contra. And as to the laſt reaſon, the Book in the 20 of Elizabeth is, that no damages ſhall be recovered in an audita quærela, which (if it be Law) then is the doubt at an end. And whereas it hath been ſaid, that they ſhall not joyn becauſe their griefs are ſeveral, methinks there is no reaſon, but that if he that ſurvives ſhall be charged with the whole, that they ſhall joyn alſo in their diſcharge; for if their charge be joynt, their diſcharge ſhall be joynt alſo. And in the 34 H. 6. and 30 Ed. 3. where an audita quærela may be brought joyntly; and he reſembled this to the Caſe of a Monſtraverunt, where if a Tenant

in

in antient demeſn be diſtreyned, all the Tenants ſhall joyn, becauſe the grievance to one may be a grievance to all the reſt.

Yelverton of the ſame opinion. The ſuing of the Execution was the cauſe of the audita quærela, but not the ground, for the ground was the Statute-merchant, and therefore it is here brought according to the Statute.

Anderſon. If two men do me ſeveral Treſpaſſes, yet I may have a joynt Action againſt them, and the death of one of them ſhall not abate the Writ: but if two are Plaintiffs in a perſonal Action, the non-ſuit of one ſhall be the non-ſuit of the other; and in our caſe the Statute was joynt, and alſo the Execution: then if all the Writs are ſo, the audita quærela which is to diſcharge them ſhall be joynt alſo eſpecially in this Writ where they are as it were Defendants; and therefore he reſembled this Caſe to a Writ of Errour, or an Attaint brought by two joyntly, and one is non-ſued, yet this ſhall not abate the Writ, becauſe they are in a manner Defendants.

Walmeſley contr. The Action ought to be brought according to the cauſe of the wrong, and the wrong begun in ſuing the Execution, and that was ſeveral, and therefore the audita quærela ought to be ſeveral alſo: but if this Statute had been good, and had been diſcharged by releaſe or defeaſance, then the audita quærela might be brought joyntly, for then the ground of the execution was joynt: but here is but a colourable Statute, and the cauſe of the Action is not begun before the Execution ſued.

Owen and Beaumond agreed: and after by aſſent of Anderſon, Judgement was given that they ought to have ſeveral Writs.

Note, Paſch. 36 Eliz. in B. R. & Rot. 323. or 511. between Curteiſe and Overſcot. If A. did recover againſt B. by two ſeveral Judgements, whereby B. is in Execution, it was adjudged that he ſhall not have one audita quærela, but two ſeveral Writs.

Paſch. 37 Eliz. Sawer againſt Hardy, in B. R. Rot. 254.

IN an Ejectment, the Caſe was this; A woman was Leſſee for forty years, ſub hac conditione, ſi vixerit vidua & inhabitaret ſuper premiſſ: the woman dyed before the Leaſe expired, and her Executors entred, and being outed, they brought this Action; and the queſtion was, if the Leaſe were determined by the death of the woman, by limitation, or by condition, or if it yet remain.

Gawdy. It cannot be a condition, becauſe the ſentence is imperfect; for if a man makes a Leaſe for life, rendring rent, ſub hac conditione, that if the rent be behind, without any further words, this cannot be a condition, by reaſon of the imperfection of the ſentence; and without doubt, if a Leaſe for years be made to a woman, if ſhe ſo long live, and inhabit the premiſſes, this is a limitation, ſo that the term is ended by her death.

Clench. It is neither condition nor limitation; for a condition ought alwayes to be a full and perfect ſentence, and not uncertain. As a Leaſe for years, upon condition that the Leſſee ſhall pay 18 l. at the houſe of the Leſſor, this is a full ſentence: but a Leaſe made, rendring rent and if it be behind, (and no more ſaid) this is no condition. And in all caſes where theſe words, quod ſi, do make a condition, it is re-

quiſite that theſe words, quod tunc, do enſue. Neither can it be a limitation, becauſe the words, quod ſi, ſpoyl the ſentence. And Popham was alſo of opinion, that it was neither condition nor limitation: but if the words had been ſub conditione quod tamdiu vixerit & inhabitaret, &c. this is a perfect ſentence, and by her death, or not inhabiting, the eſtate might be determined; and he put this difference, that if a Leaſe had been for 20 years, ſi tamdiu vixerit ſuper præmiſſos, the Leaſe had been determined by her death: but if a Leaſe had been for 20 years, ſi tamdiu inhabitaret, quamdiu vixerit, vel durante vita ſuper præmiſſos; there if ſhe dyes within the term, yet the term continues, for in the firſt caſe the limitation goes to the intereſt, and in the other to the time; and Judgement was given, that the Plaintiff ſhould recover, for that the term continued.

Michaelm. 37 & 38 Eliz. Mark Ives Caſe, in B. R.

IN a Debt upon a Bond the Condition was, that if the Obligee ſhould go to Rome, and return from thence again before the 5. of July after the date of the Bond, that the Obligor ſhould pay to him 20 l. upon the 20. day of July at Pauls. And it was moved by Williams Serjeant, that if the Obligee returned within the time, whether he ought to give notice of his return to the Obligor, for otherwiſe by his ſecret return he may make a forfeiture of the Obligation; for if the Obligor of neceſſity be to tender this money without notice of his return, inconvenience would enſue; for perhaps the Obligee is not returned at the time the money is due, and then the tender is in vain, and the Law will not compell a man to make a tender, unleſs it be to ſome purpoſe, and therefore the Obligee ought to give notice, to the intent that the Obligor may know whether the money be due to him or not. And it is like a Mortgage upon condition, that if the Mortgager does pay 20 l. before Michaelmas at Pauls, that then, &c. here the Mortgager ought to give notice at what day before Michaelmas he will tender the money, or otherwiſe he cannot enter, for the time that the Law preſcribes to make the tender, is the laſt inſtant before Michaelmas; and if the Mortgager will make his election to tender it before the day, he ought to give the Mortgagee notice thereof. And the Caſe of one Gurney was cited by Cook, Adjudge 27 Eliz. where a Leaſe was made for years, and the Leſſor made another Leaſe for years, to commence after the ſurrender, determination, &c. of the firſt Leaſe, and then a private ſurrender is made to the Leſſor of the firſt Leaſe, the ſecond Leaſe ſhall not begin untill the Leſſee hath notice of the ſurrender of the firſt Leaſe. But Tanfield ſaid, that the Caſe was ruled contrary, and that the Leaſe did begin preſently without notice, (ideo quære) and as to the principal point, the Court was divided. But Fenner ſaid, that if the Obligee ſhould give notice, perhaps the Obligor will not be found, and therefore good reaſon that the Obligor ſhould make tender to the Obligee at his peril.

Trinit 36 Eliz. Eſcot againſt Lanreny. in B. R.

IN an action on the Caſe the Plaintiff declared that the Lord Barkley by his Indenture, dimiſit & ad firmam tradidit totam firmam ſuam tolnetum & proficuum nundinarum & dierum Fœrialium infra manerium & Bergum de Thetbury. for 21. years, and that the Defendant had diſturbed and hindred him, from taking of divers pieces of Wool infra manerium & Burgum, prædict. &c. and after Iſſue joyned, exception was taken to the Declaration: becauſe he declared of a demiſe made by the Lord Barkley, and did not ſet forth, that the Lord Barkley was ſeiſed at the time of the Demiſe 7 H. 7 3. 34 H. 6. 48. But the exception diſallowed by all the Court, becauſe the Plaintiff in this action is to recover damages only, and the right or title of Land does not come in debate, but contra, if it were in ſuch action where the right of the Toll did come in debate, and to prove this Glanvill cited 20 Aſſiſ. 3. 47 Ed. 3. and 33 H. 6. and upon this reaſon he ſaid that the Plaintiff of neceſſity is not bound to ſet forth the Market day, nor the quantity of the Toll. 34 H. 6. 48. Where it was pleaded that J. S. made a Leaſe to him and did not ſhew that he was ſeiſed, and yet held good.

Clench took another exception, becauſe he did not ſet forth that Toll was to be payd by common uſage, for no Toll is due for Hens or Geeſe, or for many other things of ſuch nature, and ſo it might be that Toll was not due for wooll.

Fenner was of the ſame opinion, but Popham Contra, who ſaid that the Plaintiff had declared that the Defendant had diſturbed him from the Toll of divers pieces of Wooll, and by that is implyed, that Toll ought to be payd for Wooll. And at another day Judgment was given for the Plaintiff.

Paſch. 36 Eliz. Sackford againſt Philipps. in Camera Scaccarii.

Rot. 484.

IN a debt, this Caſe was moved by Williams Serjeant. A. is indebted to B. in 10 l. upon a Bond, and R. did promiſe to B. that if he would forbear A, that if A. did not pay him, he would, B. for non-payment by A. does recover ſo much in damages upon the aſſumpſit againſt R. If in Debt upon this obligation againſt A, A. may plead this recovery in Bar.

Walmſley, he cannot, for he is a ſtranger to the recovery (ideo Quære:) And it was aſſign'd for errour that it was alledged in the Declaration, that the Defendant did promiſe to pay the 10 l. before Michaelmaſs, in conſideration the Plaintiff would forbeare to ſue A. and that he hath forborn & adhuc abſtinet, and does not ſay that he made requeſt as he ought to have done But the Court held it was well enough, and there is a difference when the Defendant does promiſe to pay generally and at a certain day named, there the Plaintiff ought preciſely to alledge a requeſt made in certain: but when the Defendant promiſeth to pay at a day certain, he is bound to pay it at his perill without requeſt, and therefore to alledge quod ſæpius requiſitus, is ſufficient without alledging a ſpeciall requeſt, otherwiſe it is if the Defendant aſſume to

pay it upon requeſt, for there it ought to be ſpecially pleaded. Another errour was becauſe the conſideration was that the Plaintiff ſhould forbeare to ſue A. and does not ſet forth for how long time, for perhaps the forbearance was but for a quarter of an houre.

Peryam. The conſideration upon which an aſſumpſit is grounded ought to be of value, but of what value is it, where the forbearance is but for half an houre?

Fleming. By his promiſing not to ſue, he is ingaged never to ſue.

Peryam. There is great difference between a promiſe not to ſue, and a promiſe to forbeare to ſue, for a promiſe not to ſue excludes him from ſuing at all, but a promiſe to forbeare to ſue, is only to forbeare for a time; ſo that notwithſtanding ſuch promiſe he may ſue after; and it being not here expreſt how long he will forbeare, there is no conſideration.

Walmeſley. There is a difference when the Defendant ſpeaks the words, and when the Plaintiff. For if the Plaintiff ſayes I will forbeare to ſue you, ſo you will promiſe to pay me, and upon this the Defendant makes a promiſe accordingly, the Plaintiff in this Caſe ought to forbear to ſue him for ever. But if the Defendant only ſpeaks the words, as here he does, If you will forbeare to ſue, I will promiſe to pay you, and the Plaintiff agrees and forbeares a certain time, yet he may have his action afterward, ſed adjournatur.

Rot. 66.

Paſch. 38. Eliz. Stroud againſt Willis in B. R.

IN Debt upon a Bond, the Condition was: If the Obligor ſhall well and truly pay the Rent, or ſum of 37 l. yearly at two feaſts according to the tenure and true intent of certain articles of agreement indented and made between the Obligor and Obligee during the terme therein mentioned, that then &c. The Defendant pleaded that theſe articles ut ſupra, contain that the ſaid Stroud the Obligee, Dimiſit & ad firmam tradidit to the Defendant, Omnia talia domus tenementa & terras in Parochia de Petminſter, de & in quibus, the ſayd Stroud hath an eſtate for life by Copy according to the Cuſtome of the Mannor. Habendum to the Defendant for 21 years, if Stroud ſhould ſo long live, rendring to the ſaid Stroud during the ſaid terme 37 l. to be paid at the Caſtle of Cinton; and pleaded further that at the time of the making the ſaid Articles, the ſaid Stroud had not any eſtate in any Lands, houſes &c. in Petminſter aforeſaid, for the term of his life or by Copy. And upon this plea the Plaintiff demurred, and Judgment was given for the Plaintiff in the Common Pleas and now was removed by Writ of Errour. And in this Caſe were two queſtions. Firſt, If nothing paſſe by theſe Articles, and ſo the reſervation of the Rent is alſo voyd. Secondly, If the Obligation for payment of the ſaid ſum be alſo voyd, and it was ſaid, that this could not be payable as a Rent upon the 14 H. 4. & 4. 20 Ed. 4. 20 H. 6. 23. for no Rent is reſerved, becauſe there is no land out of which it can come, and then the obligation is alſo diſcharged. 2. Admitting the Rent is not payable as Rent, then whether it be an Eſtoppell to plead (as here is done) againſt the Articles, and therefore, they took a difference where the recitall is generall, and where

where not; as if A. be bound to infeof me of all his lands of the part of his Mother, and he hath no lands of the part of his Mother: but otherwiſe if it were to infeof me of Black acre, for he ſhall be eſtopped to ſay that he had not Black acre, and ſo here he ſhall be eſtopped to ſay, that there are no Articles: but he may plead that he hath no land by Copie: Cook 2 R. p. 33. 6.

Fenner. When a man makes a voyd Leaſe, rendring Rent, the Reſervation is alſo voyd, becauſe the land is the conſideration and recompence for the Rent: but where a man reſerves Rent upon a grant or Leaſe, which grant and Leaſe are good, but the thing out of which the Rent is iſſuing cannot be charged with the Rent, there the reſervation is good, as where a Rent is reſerved out of an advowſon or menaltie, but in the Caſe at Bar the Leaſe did never begin and therefore Rent ſhall not, then is it to be conſidered whether the Rent is to be payd by reaſon of the bond as a ſum in groſs or not, and as to that matter the condition of the bond is to pay the Rent according to the true meaning of the Articles which is, that if the Leſſee have not the Land, the Leſſor ſhall not have the Rent, therefore it ſhall not be paid as a ſum in groſs.

Popham cont. But he agreed that the reſervation was voyd, for if no Land do paſs, no Rent is reſerved, and the reſervation only does not make any eſtoppell and he took a difference upon the 14 Ed. 4. A man makes a Leaſe generally, and the Leſſee is bound to pay the Rent in ſuch manner as it was reſerved, there ſuch Rent ought to be demanded, otherwiſe the Obligation is not forfeit, and the demand ought to be upon the Land; but if ſuch Leſſee for years do oblige himſelf to pay the Rent at a Collaterall place out of the land, there he ought to pay it at his perill without any demand, for now he payes it in another nature than as Rent; ſo here if the payment had been limited at a place out of the Land, the Obligor is bound to pay it, although nothing were demiſed to him, for by the bond he hath made it a ſum in groſs. And it is altered from the nature of Rent upon the firſt reſervation, and he is bound alſo to pay the Rent or ſum, and if this be any of them, he muſt pay it: As to the ſecond point: he made this difference. A his bound to J. S. to Releaſe to him all his right which he hath in the Land deſcended to him, on the part of his Mother; there, in Debt upon this bond, the Obligee cannot plead that he hath no right deſcended to him on the part of his mother, but muſt Releaſe at his perill. But if he binds himſelf to infeof the Obligee of all the Land which he hath by deſcent of his Father, there he may plead that he hath no Land from his Father: for all may be Releaſed, although the Releaſor hath no right: but a feoffment cannot be made of land which a man hath not.

Paſch. 38 Elizab. Holcombe againſt Rawlins. in B. R.

Rot. 401.

IN a treſpaſs Quare Clauſum fregit, with a continuando from the 31 Elizab. to the 36 the Defendant pleaded that J. S. was ſeiſed in Fee and made a Leaſe to him &c. The Plaintiff replyed, that long time before J. S. was ſeiſed, he himſelf was ſeiſed, untill the ſaid J. S did diſſeiſe him; and J. S. being ſo ſeiſed did make the Leaſe to the Defendant for years, whereupon the Plaintiff reentred.

Tanfield,

Tanfield. It appears by the Plaintiffs Replication that the Defendant was in under the title of J. S. viz. the Leſſee of the Diſſeiſor of the Plaintiff, and therefore he cannot be a Treſpaſſor to the Plaintiff, notwithſtanding his regreſs. 34 H. 6, 30. 37 H. 6, 35. 2 Edw. 4, 17. 13 H. 7. 15.

Atkinſon contra. At the Common Law the Diſſeiſee being out of poſſeſſion ſhall not recover any damages, but only againſt the Diſſeiſor, and not againſt any other that comes to the land afterwards, and for this cauſe the Statute of Gloceſter was made. But at the Common Law when the Diſſeiſee re-enters, he is remitted, as if he had not been out of poſſeſſion at all, and he ſhall have a treſpaſs againſt the meane occupiers as in the 4 H. 7. A man was reſtored to his land by Parliament, as if he had never been out of poſſeſſion at all, and he ſhall have a treſpaſs againſt the occupiers that are in by title, as well as here he had againſt the Kings Patentee.

Gawdy. If a Diſſeiſor be diſſeiſed, and the firſt diſſeiſee enter, he ſhall have a treſpaſs againſt the ſecond Diſſeiſor.

And Popham and Fenner agreed, but Clench cont. But at laſt adjudged for the Plaintiff. vid. Cook. 2. Rep. fol. 57. Lyfords Caſe, to the contrary.

Rot. 341.

Paſch. 37. Eliza. VViſeman againſt Baldwin. in B. R.

IN a writ of errour to reverſe a judgment given in the Common Pleas, the Caſe was thus. Richard Baldwin did demiſe his land in Talle upon condition, that the Deviſee, ſhould pay to J. S. 20 l. and if he failed of the payment, that then the land ſhould remain to J. S. and his heires for ever, and whether this be a Condition in Law, that the heir ſhall take advantage of, or a limitation of the eſtate, ſo that J. S. ſhall take advantage, was the Queſtion.

Gawdy. It is a limitation and not a condition as is apparent in Dyer, Wilfords Caſe 7. 128. and Pewis and Scholaſticas Caſe in the Comentaries, and there is great diverſity between an eſtate in Law, and a deviſe, in which the intent of the Deviſor is to be obſerved, and here if this ſhall be taken for a condition, the intent of the Deviſor is defrauded.

Clench agreed. For this ſhould be as a new deviſe to J. S. and not as a remainder, as a deviſe to a Monk, the remainder to J. S. the remainder is not good, as a remainder, but as a new deviſe.

Fenner of the ſame opinion, and ſaid, it had been ſo adjudged in this Court in an Attournies Caſe of Devonſhire, and alſo in Sir Edward Cleeres Caſe.

Gawdy. The received opinion of all learned Lawyers hath been ſuch as hath been ſaid, viz. that to the end the intent of the Deviſor ſhould be obſerved, it ſhall be a limitation. Then I put this Caſe. A man deviſeth his Land to J. S. upon condition, and for non-payment, he deviſes that his Executors ſhall ſell the Land, if J. S. fails of the payment, it is cleere that the Executors may ſell the Land.

Godfrey. I agree, becauſe the Executors have nothing deviſed to them, but only an authority given them by the Will to ſell.

Gawdy. But when the Executors have ſold, the Land is in by the Deviſor, and then it is no other than a deviſe to one in Fee on condition

of

of payment, &c. and if he fail, then to another. And the three Juſtices agreed; but becauſe the Chief Juſtice was abſent, it was adiourned to another day, at which time Fenner ſaid, that he had ſpoken with Owen, one of the Juſtices of the Common Pleas, who ſaid, he never agreed to the Judgment, but in caſe of a perpetuity. And therefore the Judgment in the Common Pleas was reverſt.

The Earl of Lincolne againſt Fiſher.

THe Steward of the Leete being in Court, did ſay to Fiſher who was reſident within the precinct of the Leet, that he muſt be ſworn for the Queen to make preſentments at the ſaid Court. To which Fiſher replyed, in ſaying I ought to be ſworn, you lie. For which Fiſher was fined at the Court 20 l. And the Earl who had the Leet brought his action for the ſame.

Yelverton. The action will not lie, for he is not finable for ſuch words, for they are no diſturbance to the Court, nor hinderance of Juſtice: for this word, you lie, in ancient ſpeaking is no more than to ſay, you do not ſay true.

Gawdy agreed that the action would not lie. But Fenner, Clench, and Popham cont. For this is a miſdemeanor for which the defendant is finable: for every Leet is the Queens Court, and a Court of Juſtice, to which reſpect and reverence ought to be given, and theſe words are in great contempt to the Court, and the authority thereof, which is ſupreme: And Popham, that he ſhould here ſay to the Judge of a Court when he delivered his opinion in any Caſe. Mr. Judge, you lie, without queſtion he may be fined and impriſoned; and as it is of a Judge here, ſo is it of a Judge of any inferiour Court, becauſe it is a Court of Juſtice.

And Popham ſaid, That if any miſdemeaned himſelf in the Leet in any outragious manner, the Steward may commit him.

And Gawdy changed his opinion. Wherefore the Plaintiff had judgement to recover.

Paſch. 36. Eliz. Allens Caſe.

A Scire facias iſſued out in the name of the Queen to ſhew cauſe why execution of a debt which is come to the Queen by the attainder of J. S. ſhould not be had: The Defendant pleaded that the Queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions & demands, &c. upon which the Plaintiff demurr'd. And the queſtion was, if the Patentee might ſue for this in the name of the Queen, without ſpeciall words. And two preſidents were cited, that he may. 1 Paſch. 30 Eliz. rot. 191. in the Exchequer, where Greene to whom a debt was due, was attainted and the Queen granted over this debt, and all actions and demands, and a Scire facias was ſued for him in the name of the Queen, alſo in the 32 Eliz. rot. 219.

Mabb of London was indebted by bond, and the debt came to the Qu. by the attainder and ſhe granted it to B[illegible], and all actions & demands, and a Scire facias was iſſued out in the name of the Queen. And the principall caſe was adjourned: but the Patentee had expreſs words to ſue in the name of the Queen, although it was not ſo pleaded.

Rot. 438.

43 Eliz. Pelling againſt Langden. in B.R.

IN a treſpaſs for breaking his Cloſe, and killing 100 Conies. The Defendant juſtified, becauſe he had common time out of mind, and becauſe the Conies were damage Feaſant in the place where he killed them. The Plaintiff demurr'd, and judgment given for the Plaintiff: for Conies are beaſts of Warren, and profitable as Deer and are not to be compar'd to Fores and vermine which may be kill'd, but the Owner of the ſoil may keep Conies where the Common is as well as other cattle, alſo he may make Fiſh-ponds in the Common, and the Commoner cannot deſtroy them Cook 5. Rep. 104. 22 H. 6. 59. & ſo it was adjudg'd.

Rot. 1295.

Trinit. 43 Eliz. Greſham againſt Ragge. in B.R.

IN trepaſs for entring into a houſe. The Defendant pleaded that the Plaintiff was indebted to the Defendant in 100 l. and that he by the permiſſion of the Plaintiffs ſervant, (the doores being open) did enter to demand his debt: Upon which the Plaintiff demurred. And adjudged for the Plaintiff. For the ſervant of the Plaintiff could not licence any to enter into the houſe of his Mr. alſo a man cannot enter into anothers houſe to demand money, unleſs the debtor be within the houſe.

Gawdy. If it had been averred, that the Plaintiff had been then in the houſe, the Plea had been good.

Hillar. 44. Eliz. Streetman againſt Everſley. in B.R.

IN an ejectment, the Caſe was, a Leſſee for 80. years upon condition, that if the Leſſee his Executors or Aſſignes did not repaire the houſe within ſix weeks after warning, that the Leaſe ſhould be void the Leſſee made a Leaſe for ten years, who ſuffered J. S. to occupie the houſe, and then the Leſſor came to the ſaid occupation of the houſe, and at the houſe gave notice, and ſaid, that the houſe was defective in reparations and did ſhew in what, and ſo gave warning to have it repaired, and after for default of reparations he entred, and the Defendant as ſervant to the Leſſee re-entred: And his entry adjudged lawfull, for notice given to J. S. who was but an Occupier of the houſe, and not Leſſee or Aſſignee of any intereſt of the terme, was not ſufficient; but it ought to be to the perſon intereſted in the terme, who is liable to reparations. Vid. Cooks 6. Rep. Greens caſe. Alſo the notice at the houſe is not ſufficient, but it ought to be to the perſon of the Leſſee, and Popham agreed to this.

Trinit.

Trinit. 1 Jacobi. Shopland againſt Radlen, in C. B.

Rot. 853.

IN a Replevin the queſtion was, when a Guardian in ſocage holds a Court in his own name, and does grant Copies in reverſion; if this be a good Grant or not, and adjudged to be good againſt the Heir.

Walmeſley. Dominus pro tempore of a Mannour may hold a Court, and make a Grant of Copyholds, but this is to be underſtood of perfect Lords which a Guardian is not, but onely ad commodum hæredis, and is rather a ſervant to the Lord, than Dominus pro tempore; and he cannot be called Dominus, becauſe he can neither grant nor forfeit his eſtate, and hath nothing to do to meddle in the Mannour but to account for the profits: and a Writ of Ward does not lye for the land, but onely for the body.

Gawdy chief Juſtice, Warburton and Daniel Juſtices to the contrary. Who held, that a Guardian in ſocage is Dominus pro tempore, and that he hath intereſt in the land, and may make a Leaſe thereof for years, Commentar. 293. and may avow in his own name. 19 Ed. 3. Avowry 298. But a Guardian in ſocage cannot preſent to an Advowſon, becauſe he cannot be accountable. But Daniel Juſtice ſaid, that the Guardian may preſent where the heir is not of years of diſcretion, and a Guardian in ſocage ſhall have a Treſpaſs, and a ravithment of Ward. 24 Ed. 3. 52. and he hath the Ward by reaſon of looking to him, and therefore he hath intereſt ſufficient to keep Court, and admit Copyholders, who are not in by him, but by the cuſtome. But a Bailiff of a Mannour hath no intereſt, and therefore cannot make Grants and Copies: but a Guardian hath intereſt provſione legis, although it be ſuch intereſt as cannot be forfeit, and the heir cannot be at any prejudice, for he ſhall have an account made to him of ſuch Fines; for the heir himſelf cannot grant them, and the Law cannot compell the Guardian to occupy them; neither can the Court be held in the name of the heir, but the Guardian, and therefore he may grant Copies. And if a Guardian in ſocage hath ſuch intereſt that he can make a Leaſe for years and his Leſſee ſhall maintain an Ejectment a firmori, he may grant Copies. Neither is it any argument at all to ſay that a Guardian in ſocage hath no intereſt, becauſe he cannot grant or forfeit his eſtate; for the reaſon is, becauſe theſe things are annexed to his perſon. And after, Mich. 3 Jacob. it was adjudged, that the Grant was good, and ſhall binde the heir. Vid. Keloway, 46. 6.

37 Eliz. Brown againſt Hercey, in C. B.

Rot. 620.

IT was found by office, that J. S. who held the Mannour of D. of the King, did dye without heir; whereupon W. S. as heir to him, did traverſe the ſaid Office, and hereupon was at iſſue with the Queen, if he were heir or not: (and depending this ſuit) he made a Feoffment in Fee, with a Letter of Attorney to make Livery, and after it was found for him againſt the Queen, and Judgement given

againſt the Queen: but before the Writ of Amoveas manum, the Attorney made Livery, and adjudged good, for it cannot be ſaid that the heir at the time of the Feoffment had nothing, or that the Queen at the time of the Livery was in poſſeſſion, for by the Judgement given, the poſſeſſion of the Queen was utterly defeated, and poſſeſſion in the party before any amoveas manum ſued out, for that ſerves but to compell the Eſchaetor to avoyd the poſſeſſion, if he hold the land after Judgement. Vid. Stanford, prærogat. 78. 10 Aſſ. 2. 10 Ed. 3. and the difference is where the King is ſeized by title, and where without title; for when the King is ſeized by title, and his title is determined, he ought to make Livery to him that hath right: but when he is ſeized without title, and he who hath right hath Judgement againſt him, he may enter without Livery, 5 Ed. 5. Quare impedit 34. But it was here ſaid by Owen Juſtice, that if a man makes a Feoffment of White-acre, with a Letter of Attorney to make Livery, and then he purchaſe White-acre, this is not a good Feoffment for White-acre.

Michaelm. 29. & 30. Eliz. Knowles againſt Powell, in Scaccario.

THe Queen ſeized in Fee, made a Leaſe for years to one who was out-lawed at the time of the Leaſe, rendring rent; and after he was out-lawed again, and before ſeizure, comes out the general pardon of all Goods and Chattels forfeited; and in this Caſe it was agreed, that a man out-lawed was capable of a Leaſe from the Queen, as Farmer to the Queen. And Manwood ſaid, that the pardon with reſtitution is ſufficient to revive the term forfeited by the ſecond out-lawry; and it was alſo agreed, that a man out-lawed and pardoned had property in his goods.

Egerton Solliciter ſaid, that in the 4 Eliz. it was adjudged in the Common Pleas, that if the Queen made a Leaſe under the Exchequer-ſeal to begin immediatly after forfeiture, ſurrender, or expiration of a former term, and the Leſſee is out-lawed, that the ſecond Leaſe ſhall not commence, for it is a Royal forfeiture.

Rot. 185.

Trinit. 41 Elizab. Ferrers againſt Borough, in B. R.

UPon a ſpecial Verdict the Caſe was thus, A man makes a Leaſe for years, upon condition that if he paid 10 l. before Michaelmas, that it ſhould be lawfull for him to re-enter; and before Michaelmas, he lets the land to another by Indenture for years, and then performed the Condition, and entred; the firſt Leſſee brought a Treſpaſs, and it was adjudged that it does not lye.

Trinit.

Trinit. 35 Elizab. Lambert againſt Auſten, in B. R.

Rot. 185.

IN a Replevin the Caſe was thus; A man ſeized of land in Fee, grants a Rent-charge out of it to A. for life, with a Clauſe of Diſtreſs, and then makes a Leaſe to B. for years, and grants the reverſion for life to J. S. the Rent becomes behind the 15 of Eliz. untill the 18 of Eliz. and the Grantee makes the Defendant his Executor, and dyes, the term of B. ends in the 33 Eliz. and then J. S. enters, and makes a Leaſe to the Plaintiff; the Executor of A. diſtreyns for the arrearages, and the Plaintiff brings a Replevin.

Gawdy and Fenner. This Diſtreſs is well taken for the arrearages upon the Statute of the 32 H. 8. cap. 37. for the Rent doth not iſſue out of the term for years, but out of the Free-hold: and upon grant thereof, as Littleton ſaith, the Tenant of the Free hold ought to attorn, and not the Termor; and ſo is it, 9 H 6. and if an Aſſize be brought for this Rent, it ought to be brought againſt the Tenant of the Free-hold, and all the Tenants of the Free-hold ought to be named in a Rent-charge, by Cook, 6 Rep. 58. but otherwiſe for a Rent ſervice, for that is againſt the Termor onely, and a Termor cannot give ſeizin of the Rent to maintain an Aſſize, by Cook, 6 Rep. 57. and for the ſame reaſon Executors ſhall have an Action of Debt at the Common Law for arrearages, becauſe the eſtate is determined, Cook, 4 Rep. 49. but an Avowry is given by this Statute, Onely ſo long as the land ſhall continue in the ſeiſin and poſſeſſion of the ſaid Tenant in demeſn And they much relyed on this word demeſn) which ought to be intended of a Free-hold; and of a Reverſion upon a Leaſe for years, it is pleaded, quod ſeiſitus in dominico ſuo, &c. and ſo cannot a Tenant for years ſay; for which reaſons it ſeemed to them that the Diſtreſs was well taken.

Clench contr. For the Termor ought to pay it, for he takes the profits of the land: as if a Leaſe be made to a woman, rendring Rent, who takes husband, and dyes, the husband ſhall pay the Rent, by the 10 H. 6. for he hath taken the profits; and by the words of the Statute, they are (in the poſſeſſion or ſeiſin) and ſeiſin refers to the Tenant of the Free-hold, and poſſeſſion to the Tenant for years, and the words are, (which ought immediatly to pay the Rent) and ſo ought the Termor in our Caſe, who is chargeable to the Diſtreſs of the Teſtator.

Popham chief Juſtice, of the ſame opinion. The Diſtreſs is not well taken; for he who hath the profits of the land, ought to anſwer for the Rent.

Gawdy. Although the Cattel of the Leſſee be diſtreynable by the Teſtator, that is onely becauſe they are upon his land; as a ſtrangers Cattel may be ſo diſtreyned, and therefore this proves not that the Leſſee ſhould pay the Rent And if a man grants a Rent-charge, and lets the land at will afterwards, the Rent is behind, and the Grantee dyes, and the Leaſe at will determines without queſtion in that Caſe the Leſſor is ſubject to the Diſtreſs of the Executor. And in our Caſe, if the Grantee had releaſed to the Tenant for life, this had extinguiſht the Rent, otherwiſe of a Releaſe to Tenant for years.

Fenner. If Tenant in Tail grants a Rent-charge, and after

makes a Leaſe for 21 years according to the Statute, and dyes, the Rent by the death of the Tenant in Tail is determined. To which Gawdy agreed; which proves, that the Rent iſſues out of the Free-hold. Vid. Cook, 5 Rep. 118.

Hillar. 37 Eliz. Butler againſt Ruddiſley.

IN a Treſpaſs, the Defendant pleaded the Free-hold of Edward Devereux, and ſo juſtified as his Bailiff, without ſaying (at his commandment) the Plaintiff replyed, that the ſaid Edward was ſeized in Fee, and made a Leaſe to him, by vertue whereof he was poſſeſt abſque hoc, that the Leſſor made the Defendant his Bailiff poſt dimiſſionem; and hereupon the Defendant demurred.

Crook. By this Leaſe a Free-hold paſſeth to the Plaintiff, and then the Plaintiffs traverſe is naught, for he hath now traverſt that the Defendant is Bailiff, whereas he ought to traverſe the Free-hold in the Leſſor, for that would have deſtroyed the juſtification of the Defendant. And to prove that the Free-hold doth paſs, he cited the Caſe of Littleton, where if a Leaſe be made to the husband and wife during Coverture, they are Joynt-tenants for life. So in the 30 H. 6. a Leaſe to a woman, dum ſola vixerit. And 14 Ed. 2. a Grant to a man till he be promoted to ſuch a Benefice, or dummodo ſe bene geſſerit, all theſe are Free-holds. And it is clear, that a Tenant at will cannot aſſign over. And alſo an eſtate at will is an eſtate at the will of both parties: but here it is at the will of the Leſſor onely, when he will make a Bailiff.

Haughton contr. An eſtate at will doth paſs, and not a Free-hold; for here he hath not pleaded that Livery was made; and Livery ſhall not be intended in this caſe, unleſs it be ſpecially alledged: but if Livery had been made, then he agreed that a Free-hold conditional had paſt; and for the pleading of a Livery, he took a difference, that where an expreſs eſtate either in fee or for life be pleaded, there Livery ſhall be intended: but where a Free-hold paſſeth by implication or operation of Law, and not by expreſs words, there Livery ought to be pleaded, as a Leaſe to one for years, the remainder to another for life, there Livery ought to be pleaded. So in the 21 Aſſi. If a man pleads a Feoffment and Livery within the view, he muſt plead Livery within the view expreſly; and ſo upon Grant of a reverſion, attornment ought to be pleaded. And whereas it was ſaid, that it cannot be an eſtate by will, becauſe it was not the will of both parties. Vid. 9 Ed. 4. 1. and 15 Ed. 4. But Gawdy and Fenner denyed the diverſity put by Haughton, for in pleading of an eſtate for life, all neceſſary circumſtances in pleading ſhall be intended. And ſo it was agreed, that an eſtate for life ſhould paſs, for Livery ſhall be intended. Sed adjournatur.

Paſch.

Paſch. 35 Eliz. Pendigate againſt Audley, in B. R.

Rot. 242.

IN a Writ of Errour upon recovery of a Debt, the Errour was aſſigned, becauſe the Action of Debt upon the Obligation was brought againſt the Father of the Plaintiff, and in the Writ he was named the Son and Heir apparent of the Obligor, for this implyes that the Father was alive; for if he were dead, then is the Plaintiff Heir in facto, and not apparent.

Gawdy. It is but Surpluſage; and in the 11 Ed. 3. the Writ was good, although he was not named Son and Heir omnino. But this was denyed, and agreed, that he ought to be named Heir; and Judgement was reverſt.

Hillary 37 Eliz. Tanfield againſt Rogers, in B. R.

IN a Replevin, the Caſe was thus: Tenant in Tail ſeized of a Mannour with 3 Acres thereof in Demeſn, makes a Leaſe of the three Acres alſo of the Mannour, habendum the three Acres, and the Mannour for 21 years, rendring Rent for the 3 Acres, and all other the premiſſes, therewith demiſed 5 l. The queſtion was, if this be a good Leaſe within the Statute of the 32 H. 8.

Stephens. This Leaſe is not within the Statute, for this Leaſe of 3 Acres, and of the Mannour whereof they are parcel, is an entire Demiſe, and not ſeveral, as in 13 H. 4. Grants 88. A man ſeized of a Mannour, with an Advowſon appendant, makes Feoffment of one Acre of the Mannour; and then in the ſame Deed he grants the Advowſon appendant, and not in groſs, and yet they are in ſeveral clauſes. Vid. 48 El. 3. 41. 33 H. 8. Dyer 48.

Gawdy and Clench. When the Leaſe is of three Acres, and of the Mannour, although the Mannour comprehends the three Acres, yet in conſtruction of Law they ſhall be taken as ſeveral Demiſes.

Fenner. I am of the ſame opinion; and as I remember, in the 10 Aſſiſ. is this Caſe; A Leaſe is made of the Grift, and alſo of the Mill, reſerving by the year 5 s. and for the other 10 s. they are ſeveral Leaſes; and ſo is it here. Note, that Popham was abſent. But after in the ſame term he declared, that he agreed with the other Juſtices; and Judgement was given, that the Leaſe was good for the three Acres.

Paſch. 37 Eliz. Carus Caſe.

PEter Carus was indicted for drawing his Sword in Weſtminſter-hall, the Court then ſitting, in reſiſting the Sheriff who was making an Arreſt; and being found guilty upon his Arraignment, it did appear that this fact was done upon the ſtairs of the Court of requeſts, out of the view of the Courts: yet it was held, that being in the Hall, it was as much as if it had been in view of the Court. But becauſe the Indictment was not good, for it was not coram Regina, as it ought to be, the Judgement was only to have perpetual Impriſonment, and to pay 1000 l. Fine to the Queen. But if the Indictment had been as we have ſeen a preſident in 1 Ed. 4. then the Judgement ought to be, to have his hand cut off, and to forfeit all his lands and goods, and to have perpetual Impriſonment, 22 Ed. 3, 13. Cromptons Juſtice, 246.

Rot. 174. Mich. 3 Jacob. Walgrave againſt Skinner, in B. R.

IN a Treſpaſs, the Plaintiff declared that he was robbed of 20 l. and that he purſued the Felon with hue and cry to ſuch a Town, where he diſcovered the Felon to the Defendant, who was Conſtable of the ſaid Town; whereupon he apprehended the Felon, and found the 20 l. about him, which ſum the Defendant took, and detained in his own poſſeſſion. The Defendant confeſt the taking the 20 l. ut ſupra: but becauſe the Town was of no ſtrength, he carried the 20 l. to the next Town, and as he was going upon the High-way, he was robb'd of it; and ſo he concluded that he ought not to be charged in this Action.

Johnſon for the Plaintiff. It appears in 4 H. 7. that the Thief hath no property in the money which is found in his poſſeſſion: and in the 15 Ed. 4. it is reſolved, that if A robs B, and C robs A, yet C hath not gained any property; and if the Conſtable takes this out of his poſſeſſion, he cannot ſeize it to any other uſe than to the uſe of the King; and therefore if he takes Felons goods, and does not keep them ſafe, the firſt Owner ſhall have a Treſpaſs againſt him; for by the 21 H. 7. If a man does carry the Parſons tithe to the Parſons barn becauſe it is like to periſh, yet the Parſon may have a Treſpaſs againſt him. And by the opinion of Stanford, 44 Aſſi. If goods are taken from a Felon, and he will give ſufficient ſurety, he himſelf ſhall have the keeping of them, or elſe the Town, and therefore the Conſtable hath no authority to meddle with them.

Erby contr. For a Conſtable is Conſervator pacis; and preſerving the peace does conſiſt as much in keeping of goods, as of the body of a Felon. And here the Conſtable doubting of the ſtrength of the Town by reaſon of the Inhabitants who were riotous, and of ill fame, be-

he thought it the beſt courſe to carry them to the next Town, and ſo no default was in him, for his taking and meeting with them was lawfull. And 22 Aſſ. 96. If a Felon flying be taken in any Village, the Bailiff thereof may take the cuſtody of the goods; and I ſuppoſe that a Conſtable may keep goods as well as a Bailiff, for he is a Miniſter of the Law; and if they be taken from him, he is no more chargeable than if goods were taken out of the poſſeſſion of my ſervant.

Williams Juſtice, Paſch. 2 H. 7. Common fame is enough to apprehend any man; but if you arreſt a perſon who is poſſeſt of money, and he dye, you are chargeable with the money. And ſo here, although the taking of the Felon by the Conſtable be juſtifiable, yet he is to keep ſafe the money at his peril; and becauſe he hath not, he is liable to this Action.

Popham. He might have pleaded not guilty; for he ſaid, that if a Town hath the poſſeſſion of my goods a Detinue lyes, and not a Treſpaſs: but if a ſtranger takes them out of their poſſeſſion, there a Treſpaſs lyes; and therefore he conceived in this Caſe, that the Plaintiff ſhould have brought a Trover and Converſion, and not a Treſpaſs, quod alii Juſticiarii conceſſerunt; and therefore the Caſe was deferred till next term, to be argued upon the general iſſue.

Mich. 3 Jacob. Jorden againſt Atwood, in B. R. Rot. 581.

The Caſe upon the whole pleading appeared to be thus, A ſeized of a Meſſuage called Bodwich, had a way appendant to it in the land of J. S. in a Cloſe called B. acre; after A purchaſed the ſaid Cloſe, and infeoffed the Plaintiff thereof; and this Action was brought by the Feoffee againſt the Feoffor for uſing the ſaid way; and the queſtion was, if the way were extinguiſht, or not, and it was argued at the Bar, that unity of poſſeſſion doth make no extinguiſhment, 3 H. 6. 31. where A preſcribed to have a way to a Wood in a place called England; againſt which was pleaded, that time out of minde J. S. was ſeized of the ſaid place, and of the ſaid Wood, and held no plea. 21 Ed. 3. 2. 11 H. 7. 25. it was argued on the other ſide, that the Caſe of 31 H. 6. was a quære; and becauſe the Feoffor had not reſerved a way, it did paſs by the Feoffment.

Twiſden Juſtice. Unity of poſſeſſion does not confound a way; and he cited 19 Ed. 2. 21 Ed. 3. 2. A way was appendant to a Mill which was alotted to one partner, who aſſigned over her intereſt, and the Aſſignee brought an Aſſize of nuſance, and unity of poſſeſſion was pleaded in Bar, but not allowed.

Yelverton Juſtice contr. For the 21 Ed. 3. 2. confirms my opinion; for Brook in his abridgement of the Caſe ſaith, that the partners have that as in caſe of a new Grant, which proves if they had it as heir, it ſhou'd be gone. And the Caſe of Gutter in 4 H. 7. is only by reaſon of the Cuſtome. But here the Feoffor might have reſerved his way upon the Feoffment, and it was his folly he did not.

Williams of the ſame opinion. And he took a difference between the Caſe of Gutter which is preſerved by Cuſtome, and the Caſe of a

way or Common which are extinguiſht by way of unity of poſſeſſion, according to the 35 H. 6.

Fenner contr. For the caſe of a Way differs from the caſe of a Common, for unity will extinguiſh a Common, but not a Way, for then he ſhall loſe the profit of all the land to which the Way is appurtenant, for without the Way he cannot uſe the Cloſe, and therefore there is no reaſon that the Law ſhould extinguiſh it.

Popham accorded, and took a difference between a Common appendant, which is of neceſſity, and a Common in groſs; for in caſe of a Common appendant, if one Tenant of the Mannour doth purchaſe the Seigniory, and then grants over the Tenancy, the Common which he had before ſhall be ſtill appendant, for it is not extinguiſht by the unity, but ſhall paſs with the Tenancy: but otherwiſe of a Common in groſs: and ſo he ſaid was the ſame difference in this Caſe, for if the way be a way of eaſe or pleaſure, there it ſhall be extinguiſht by unity: but if it be a way of neceſſity, there it is otherwiſe, for without it a man ſhall loſe the benefit of his land or houſe. And he compared this ad viam Regiam, which lyes by my houſe: yet if I do make a Feoffment of the land, I ſhall have a paſſage alſo. And he ſaid, that if a man had three Fields adjoyning, and makes a Feoffment of the middle Field, the Feoffee ſhall have a way to this through the other Cloſe, where it ſhall be moſt eaſy and beneficial for him. And at laſt, becauſe the two Juſtices agreed, although others were of the contrary opinion, Judgement was given, Quod quærens nil capiat per billam, and that the way is not extinguiſht. Vid. 11 H. 4. 5.

Michaelm. 7 Jacob. Leigh againſt Burley.

LEigh ſued Burley and Cradock in the Court of Admiralty, whereupon a Prohibition was prayed. The Caſe was thus; Burley, Maſter of a Ship, gave money to Cradock to buy Sailors Cloaths for him; Cradock bought ſuch Cloaths for him of Leigh in the Parish of Saint Katherines near the Tower in London, whereby Leigh delivered the Cloaths to Burley in his Ship that was in the Thames adjoyning to Saint Katherines; and becauſe the money was not paid, he ſued Burley in the Admiralty Court; and a Prohibition was awarded for two cauſes; 1. becauſe the Contract was made on land, and infra corpus comitatus, and therefore the Admiral can have no juriſdiction; for the Statutes of the 13 and 15 of Rich. 2. and 2 H. 4. cap. 11. are, that the Admiral ſhall not have conuſſance but of things done ſuper altum mare. Vid. Cook, 5 Rep. 107. And ſo was it reſolved by the Juſtices; and they ſaid, that the 15 of Richard the 2. is miſ-printed, viz. that the Admiral ſhall have Juriſdiction to the Bridges; for the Tranſlator miſtook Bridges for Points, that is to ſay, the Lands-end. And Cook ſaid, that the Admiral ſhould have no Juriſdiction where a man may ſee from one ſide to the other: but the Coroner of the County ſhall enquire of Felonies committed there; which was held to be good by all the other Juſtices;

and

And he gave this difference, that where the place was covered over with ſalt water and out of any County or Town, there eſt altum mare: but where it is within any County, there it is not altum mare, but the Tryall ſhall be par vicenetum of the Town. Doderidge ſerjeant demanded this Queſtion. The Iſle of Lunday is de Corpore Comitatus of Devonſhire and lyes twenty miles within the Sea. Whether is that within the County.

Foſter. If the Sea there be not of any County, the Admirall hath Juriſdiction or els not. And note Cook and Foſter ſaid, that the ſtatute 25 H. 8. cap. 15. for criminall offences upon the Sea is to be intended if Felony be ſuper altum Mare, for if it be committed in a Creek or a place where the Admirall hath not Juriſdiction, the Commiſſioners have nothing to do to meddle with it. And the Prohibition was granted.

Michaelm. 7 Jacob. Mores againſt Conham in C. B.

IN an action on the Caſe upon an aſſumpſit, the Plaintiff declared that Lovet was indebted to him in a certain ſum, for which he pawned to the Plaintiff certain goods to the value of 100 l. and the Defendant promiſed the Plaintiff to pay the debt, if he would deliver the pawn, and hereupon the Defendant demurred. And two points were moved, one to the forme, and the other to the matter. Firſt, the Plaintiff declared that the aſſumpſit was pro diverſis bonis & Catallis delivered to Lovet without ſhewing what goods or of what kinde for this is the conſideration of the contract, and therefore ought to be pleaded in certainty. But reſolved by the Court that the plea was good: for the goods themſelves are not to be recovered in this action nor damages for them, and ſo they are but collaterall to the action, as in 10 Ed. 3. 30. in a Reſcous: the Court was for taking of Cattle, without ſhewing what Cattle, and the Jury found them to be two horſes, and the Plaintiff had judgment; where note that a verdict did help an inſufficient Court, and 22 Aſſi. 21 Ed. 3. a treſpaſs was brought for taking away of Writings concerning land, without ſhewing what they were, or the quality of the land: But otherwiſe in a detinue for Charters, for there the Writings themſelves are to be recovered. The ſecond and great doubt was, when a man doth promiſe to another that if he will deliver the pawn, he will pay the debt, if this be a ſufficient conſideration to maintain an Aſſumpſit.

Foſter Juſtice, It is not: for he that hath the pawne hath not ſuch an intereſt in it as he may deliver it over to another, or make a legall contract for it, and that his delivery being illegall, he cannot by his own wrong raiſe an action to himſelf, and a man ſhall never maintain any action, where the conſideration is illegall and not valuable. 9 Ed. 4. In an action on the Caſe the Defendant pleaded an accord, and that he delivered the writing to the Plaintiff which concern'd the land, and it was held no plea, becauſe the Plaintiff having land, the writings belonged to it. And cited Reynolds Caſe: where a man promiſed another 100 l. to ſolicite his buſineſs, and it was holden that no action would lie for

the money, becauſe the ſoliciting his buſineſs was illegall, he being no man of Law. Dier 355, 356.

Cook, Warburton and Daniell cont. Who ſaid, that the conſideration was good, legall and profitable, and ſufficient to maintain an aſſumpſit: for he who hath goods at pawn hath a ſpeciall property in them, ſo that he may work ſuch pawn, if it be a Horſe or Oxe, or may take the Cowes milk, and may uſe it in ſuch manner as the owner would: but if he miſuſeth the pawn, an action lyes, alſo he hath ſuch intereſt in the pawn as he may aſſign over, and the aſſignee ſhall be ſubject to a detinue, if he detaines it upon payment of the money by the owner as in the 2. aſſiſe. Land was leaſed untill he had raiſed 100 l. he hath ſuch intereſt as is grantable over. And Foſter agreed to this, becauſe he had power to ſatisfie himſelf out of the profits. And it was agreed by the Court, that if a man takes a diſtreſs, he cannot work the diſtreſs, for it is only the act of the Law that gives power to the diſtreſs, for he hath no propertie in the diſtreſs, nor poſſeſſion in jure as in the 21 H. 7. Replevin. A man hath returne Irrepleviſable, he cannot worke them, for the Judgment is to remit them to the pound, ibid. remanſurum. vid. 13 R. 2. Brook. 20 H. 7, 1, a. 34 H. 8. B. pledges 28. 22 Edw. 4, 11. goods pawned ſhall not be put into execution untill the debt be ſatisfied. And it was agreed by Cook and Warburton, that when a man hath a ſpeciall intereſt in a thing by act in Law, that he cannot work it, or otherwiſe uſe it: but contrary upon a ſpeciall intereſt by the act of the partie as in caſe of a pawn.

Daniell. There is difference between pawns, which are chargeable to the parties as Cowes and Horſes, and things that are not chargeable, and alſo there is a difference between pawnes that will be the worſe by uſage as Clothes, &c. For if the pawn be the worſe by uſage an action of the Caſe will lie againſt him that hath them pawned to him: But contra of goods that are not the worſe for uſage.

Cook. If I deliver goods to you, untill you are promoted to a benefice, you may uſe them, which Foſter denied.

And Judgment was given for the Plaintiff, and that they may be granted over, and ſo a good aſſumpſit will lie.

26 Eliz. Earl of Northumberlands Caſe.

This caſe was privately argued before the Lord Treaſurer, becauſe the parties agreed to refer themſelves to the opinion of Wray and Anderſon. And the caſe was this, the Earl of Northumberland deviſed by his will, his Jewells to his wife. And dyed poſſeſſed of a Collar of Eſſes, and of a Garter of gold and of a Buckle annexed to his bonnet, and alſo of many other buttons of gold and pretious ſtones annexed to his robes, and of many other chains, bracelets and rings of gold and pretious ſtones. The queſtion was if all theſe ſhould paſſe by the deviſe, under the name of Jewells. And both Juſtices did Reſolve that the Garter and Collar of Eſſes did not paſs, becauſe they were not properly Jewells but enſignes of Honour and State, and that the Buckle in his bonnet, and the buttons did not paſs, becauſe they were annexed to his

his Robes, and were therefore no Jewells. But for all the other chaines, rings, braceletts and Jewells, they paſſed by vertue of the ſaid Will.

Michaelm. 40 & 41 Eliz. Sperke againſt Sperke. in C. R.

Rot. 2215.

IN an ejectment, the Caſe was this. M. Sperke made a Leaſe of the land in queſtion to William Sperke for 89. years if William ſhould ſo long live, the remainder after his death to the Executors or Aſſignes of the ſaid William for 40. years: afterwards William dyes Inteſtate and adminiſtration is committed to Grace Sperke his wife, who entred claiming the 40. years, and the Defendant claiming by another Leaſe entred upon him and he brought this action.

Anderſon. Executor is as good a name of purchaſe as Heire is. And I conceive the points in this caſe are two. Firſt, if the Adminiſtrator be an aſſignee. Secondly, If the leaſe for 40. years, be a Chattell veſted in the Inteſtate in his life, for if it be, then his Adminiſtrator ſhall have it. And as to the firſt. I conceive that he is not aſſignee to take theſe 40 years. For in the 19 Ed. 3. It is there ſaid that Adminiſtrators are not aſſignees, for adminiſtration is appointed by the ordinary and aſſignees muſt be in by the party himſelf and not by a ſtranger, and therefore an Adminiſtrator cannot be an aſſignee, as an Executor that comes in by the partie, or as a husband for his wife.

Walmſley and Glanvill accorded. But Kingſmill cont. for he ſaid, that although one could not be aſſignee in Deed without the act of the partie, yet one may be aſſignee in Law by the act of the Law. And ſo the opinion of the 3. Juſtices to the firſt point was, that the Adminiſtrator could not have it as aſſignee, and as to the ſecond point. Anderſon ſaid, that it could not veſt: for if a man have a Leaſe for life, the remainder for 40. years, the remainder is voyd, becauſe there is no perſon named to whom it is limited: but if a man make a Leaſe for life, and after his death to his leſſee for 21. years, that is good. and the Executor ſhall have it as in right of his Teſtator. But where a man makes a Leaſe for years or life, the remainder after his death for 40. years to his Executors, the Executors ſhall have it as purchaſors, for this word remainder divides it from the Teſtator, and makes the Executors purchaſors.

Walmeſley, Glanvill and Kingſmill cont. And their chief reaſon was from the intent of the parties, and their intent was that the Leſſee ſhould have an eſtate during life, for it is to him for 89. years, if he ſo long live, and becauſe by common intendment he cannot ſurvive thoſe years, their intent was that his Executors ſhould have it after his death, and that the certainty of the time might be known it was limited for 40. years.

And Winſley ſaid, that the Adminiſtrator could not have this by purchaſe, for when a man takes by purchaſe, he muſt be named by an apt name of purchaſe, by which he may be known; as if there be tenant for life, the remainder to the right heirs males of J. S. and J. S. hath iſſue two ſons, and the eldeſt hath iſſue a daughter, and J. S. dies, this daughter ſhall never take any eſtate, becauſe ſhe is not heir male, ſhe

hath no name of purchaſe, and therefore here the Adminiſtrator cannot take by purchaſe, for the Adminiſtrator comes in by the ordinary, and therefore cannot be an aſſignee. And at laſt, Judgment was given. That the Adminiſtrator ſhould hold it, as a thing veſted in the Inteſtate.

Rot. 366. Michaelm. 41 & 42 Eliza. VWhite againſt Geriſh. in C. B.

IN a Replevin the Defendant avowd for Rent. The caſe was this. Two perſons did joyne in leavying a fine to J. S. in Fee ſur conuſans de droit come ceo, &c. J. S. by the ſame Fine renders the Lands to one of the Conuſors in taile, reſerving Rent and further would quod tenementa prædicta remanerent to the other who is the avowee.

Walmeſley. The Rent ſhall paſſe: as if a man grants land for life, and alſo grants quod tenementa prædicta remanebunt to another, theſe words (Quod tenementa prædicta) do make a grant of the reverſion: and alſo theſe renders are as ſeverall Fines, and ſo it ſhall be taken as a grant in Taile rendring Rent, and after a grant of the reverſion.

Glanvill accorded. Warburton. If a man makes a gift in Taile rendring rent, the remainder over in Fee, the Donor ſhall have the Rent and not he in the remainder.

Walmeſley. That is true in a grant, but not in a Fine.

Anderſon. If a man makes a gift in Taile rendring rent, and at the ſame inſtant grants the Reverſion, and the Deeds are delivered, accordingly, this ſhall paſſe as a reverſion. And after it was adjudged to be a grant of the reverſion, and that the rent paſſeth.

Crawleys Caſe.

IN Replevin the caſe was thus. A Rent is granted to two during the life of J. S. to the uſe of J. S. the grantee dieth, and if the Rent were determined was the Queſtion.

Walmſley. The rent remains to J. S. for the grantees have an eſtate during the life of J. S. and by the Statute of the 27 H. 8. the uſe is raiſed and conjoyned with the poſſeſſion, whereby the Rent it ſelf is carryed to J. S. whereby J. S. hath an abſolute eſtate for his life, and the life of the grantees is not materiall. : as if Rent be granted to two for the life of J. S. if he does not grant over the rent, their lives are not materiall. And if they grant over and die, the Rent ſhall not ceaſe, but the grantee ſhall have it during the life of J. S. And here the Statute 27 H. 8. veſts this in ceſtuy que vie, otherwiſe if it were before the Statute of uſe, quod fuit conceſſum per curiam.

Paſch

Paſch. 41 Eliz. Shaw againſt Sherwood.

Rot. 2504.

The Executors of Shaw brought an Action of Debt for 20 l. upon a Bill, and the Bill was thus, I William Shaw have received of Thomas Pret 40 l. to the uſe of Robert Shaw and Elizabeth Shaw, equally to be divided; which ſaid ſum I acknowledge my ſelf to have received to the uſe aforeſaid, and the ſame to re-deliver again at ſuch time as ſhall be moſt fit for the profit and commodity of the ſaid Robert Shaw and Elizabeth. Cro: El: 729.

Walmeſley. Two points are here; Firſt, if this be a Debt to ceſtuy que uſe, or to him who gave it. Secondly, if it be divided, ſo that each of them ſhall have an Action for 20 l. And as to the firſt, he held, that it was a debt to him for whoſe uſe the money was delivered; and as to the ſecond that they ſhall have a debt as of ſeveral debts, by reaſon of theſe words, equally to be divided.

Kingſmill. Here is no Obligation, for the words are not obligatory, but onely an acknowledgement of the receipt. Glanvill accorded.

Walmeſley. When he acknowledged the receipt to both their uſes, without queſtion ſuch Receiver is a Debtor. And agreed by the Court, that admitting it was a Debt, that then it ſhall be a divided Debt, and not joynt. Quod nota.

Lane againſt Cotton.

In Debt upon a Bond, on condition to pay 20 l. within a month after, the Obligee had a ſon that did or could ſpeak the Lords Prayer in Engliſh, that he could be underſtood; the Plaintiff pleaded, that he had a ſon, qui loqui potuit præcationem Domini, ut intelligi poterit; and the Defendant demurr'd, becauſe it was pleaded that he had a ſon qui loqui potuit, for that is a ſecret ability that cannot be known.

Kingſmill. The plea is good, and ſhall be tryed, as in caſe of a Writ of non compos mentis.

Glanvill accorded: for it may be proved by the teſtimony of thoſe who have heard him ſpeak; and if he ever ſpoke it, it is good evidence that he had ability to ſpeak.

Walmeſley contr. Becauſe it is a ſecret thing, it cannot be tryed.

Kingſmill. A man is bound in a Bond to give me 20 l. when the River of Ware is navigable, it is a good plea to ſay that the River is navigable, without ſaying that ſome have navigated upon it.

Hern Serjeant cited a Caſe adjudged in a Quare impedit by the Patron againſt the Biſhop, who had pleaded that the Pariſhioners were Welſhmen, and that they could not underſtand Engliſh, and

that

that the Clerk he preſented could not underſtand Welſh; and the Patron pleaded, that the Clerk could ſpeak Welſh; and upon Demurr it was adjudged a good iſſue, and that ſuch matter might be tryed.

Anderſon. The iſſue is good, and it is at the election of the party to plead quod loqui potuit, vel loquutus eſt. And if I am obliged to you to give you a 100 l. when I am able to go to Pauls, this may be tryed, although in facto I never went to Pauls; and if I am able, I ſhall pay the money. And he cited Broughtons Caſe, where in Maintenance the Defendant pleaded that he was peritus in legibus Angliæ, and that he was retained to be of Counſel, and adjudged no good plea, for he ſhould alledge that he was Student for a certain time, and was elected by the Benchers to be a Barreſter. And Judgement was given for the Plaintiff.

Rot. 3267, or 3667.

Michaelm. 41 & 42 Eliz. Swan against Gateland.

In a raviſhment of Ward, the Plaintiff demurred, that T. B. was ſeized of land in ſocage, and dyed, and J B his ſon is of the age of two years, and that the Guardianſhip belongs to him, becauſe he is next friend ex parte matris J. B. viz. the brother of E. B. the infants mother. The Defendant pleaded, that E. B. the infants mother was his mother alſo, and that he was begotten by one Gateland on the ſaid E. B. and the ſaid Gateland dyed, and the ſaid E. B. did marry the ſaid T. B. and had iſſue the infant, and ſo concluded, quod erat propinquior amicus ejus abſque hoc, that the Plaintiff is propinquior amicus; and upon this was a Demurr.

Hern for the Plaintiff. The queſtion is, whether the uncle ſhall be Guardian in ſocage, or the brother of the half blood, and he ſaid, the uncle ſhould have the Wardſhip, becauſe there is a more natural affection between the uncle and the infant, than between the infant and the brother of the half blood; and if there be not love, he cannot be the procheine amy, although in judgement of Law he be the next of kin. 31 Ed. 3. Gawdy 157. In a Writ of Ward, the Plaintiff declared that he was next of kin of the Plaintiff the mother of the infant, and it was pleaded againſt him, that the infants mother was alive; but he replyed, that the mother had made a Charter of Feoffment to the diſheriſon of the infant, and that ſhe was attaint of Treaſon. And in 15 Ed. 2. the brother who claimed the Wardſhip of his younger brother, was alſo within age, and therefore it was ruled that the uncle ſhould have the Wardſhip, becauſe alterum nequit regere qui ſeipſum nequit. And 5 Ed. 6. the brother of the half blood is next of kin, to whom adminiſtration ſhall be given before the mother; for the Statute of 27 H. 8. 15 ſayes, that the next of kin ſhall have it, and the brother of the half blood is the next of kin: but Guardianſhip ſhall be given by the Law to the neareſt friend and that is the uncle.

Williams contr. For although the brother be but of the half blood, yet he ſhall have the Wardſhip, for the brother is the next of kin, to whom the inheritance cannot deſcend; and the 31 Ed. 1. does not gainſay

gainſay this, for the mother was denyed the Wardſhip, becauſe ſhe was attaint of Treaſon: for the Law will not ſuffer that the infant ſhall be in Ward to any, who may be ſuſpected to do wrong to the infants land, or to his perſon, and therefore he ſhall not be in Ward to any that may inherit him, for there is a ſuſpicion that he may kill the infant. And 5 Ed. 6. Brook, Adminiſtration 47. it is agreed that the brother of the half blood is next of kin, and that is the cauſe of the nearneſs of love; and it cannot be intended that there ſhould not be love between perſons ſo nearly allyed. And 30 Aſſi. 47. a remainder was limited propinquioribus de ſanguine, and there it is agreed that the brother is next of blood.

Warburton contr. The uncle ſhall have the Wardſhip for two cauſes, for there is not ſuch natural love between two brothers of the half blood, as is between the uncle and the infant of the whole blood. Alſo, the Statute ſayes, that he ſhall be in cuſtody parentum hæredis, and therefore he ought to be in cuſtody of thoſe who are of moſt antient degree, who are the parents: but one brother cannot be parent to the other.

Walmeſley contr. For the brother is the procheine amy; and ſo hath it been ruled in the time of the Lord Dyer, in 7 Eliz. in C. B. for he ought to be in Ward to him that is next of blood, and moſt remote in ſucceſſion. And the 5 Ed. 6. proves, that he is next of kin, and ſuch nearneſs muſt needs procure love: and although it ſometimes happens that there is not ſuch love, yet this cannot alter the Law that alwayes intends amity; and although the Statute of Marlebirdge ſpeaks of parents, that is intended of ſuch as are of full age, and of ſound memory; for if he be not, then ſome other that is the next of kin ſhall have the Wardſhip; and he told Warburton, that he would ſhew him a report of ſuch a Caſe, where it was ruled accordingly before the Lord Dyer.

Hillar. 43 Eliz. Peck againſt Charnell, in C. B. Rot. 1703.

In an Eſcheatment upon a ſpecial Verdict, the Caſe was this; John Burly ſeized in Fee of land, doth deviſe it to his wife for life, the remainder to William Burly in tail, the remainder to his next heir-male, being of his ſirname, in Fee, and dyes, and then his wife does intermarry with William Burly, who had the remainder in Tail, and then they levyed a Fine come ceo, &c. to J. S. and by the ſame Fine J. S. rendred to the wife for life, the remainder to the husband in Fee, and then a common recovery was had againſt the husband and wife, and that was to the uſes contained in the Fine: then the wife dyes, and the husband dyes without iſſue, and the right heir male of the ſirname of the Deviſor enters, and makes a Leaſe to the Plaintiff, who being outed by the Leſſee of William Burly, brought the Action.

Williams. Here are two points; firſt, if this be a diſcontinuance by the wife; ſecondly, if the recovery barrs him in the remainder.

And as to the firſt point, when woman tenant for life, and he in the remainder in Tail being her husband, do joyn in a Fine, this ſhall not be a diſcontinuance of the eſtate Tail; for by Littleton, diſcontinuance cannot be by way of grant, although it be in caſe of a Fine, but ought to be by Livery. And as to the ſecond point, Knivetons Caſe, B. 252. is expreſs in the point, that notwithſtanding the common recovery, yet the entry of him in the remainder is legal; for as to the point of recovery, a baſe Fee doth paſs to the Conuſee of the Fine, which is rendred back again to the woman for life, and her husband in Fee; and by the Common Law there was no remedy for him in the reverſion againſt a recovery had againſt Tenant for life, 7 H. 7. 12. 5 Ed. 4. 2. untill the Statute of Weſtminſter the 2. which gives to him a Writ of ad terminum qui præteriit, and by the Statute of the 23 of H. 8. he may enter: but now the queſtion is, whether this recovery will bar him in the remainder of his entry, becauſe the recovery was of another eſtate, and not againſt his Tenant for life. But I conceive that the wife is not in her former or antient eſtate, but takes hereby a new eſtate; for if Tenant for life grants his eſtate to J. S. and his heirs, and J. S. grants a Rent, and then re-grants an eſtate to the Tenant for life, the Tenant for life ſhall be liable for the Rent, Dyer 252.

Harris contr. For by the rendring of the eſtate by the Fine, ſhe ſhall be in her antient ſtate; and he cited the Caſe of Peter Cary here adjudged, who being Tenant in T. the remainder to the Earl of Devonſhire, was attainted, and then the King pardon'd him, and gave him his land again, and then he ſuffered a common recovery, and thereby barred the remainder in the Earl of Devonſhire.

But Anderſon was againſt this Caſe, and ſaid, that by the render the woman was in her antient eſtate, and ſo the remainder diſcontinued, and the entry of him in the remainder taken away.

Warburton. The Fine does make no diſcontinuance, for they give away but that which they may lawfully do; and ſo is Bredons Caſe, Cook, 1 Rep. 67. and as to the common recovery, it is out of the Statute of the 32 H. 8. becauſe ſhe remains party to the Fine; and by the render upon the Fine, they ſhall be as in by a new eſtate, and then the recompence ſhall not be to the antient eſtate, and therefore he in the remainder is not barred nor impeached by this Fine, but he may enter within five years.

Kingſmill accorded; for it is plain, that by the render to the husband and wife, they are in a new eſtate, and the recompence ſhall go as to that, and not to the antient eſtate: but contr. if it had been by way of voucher.

Walmeſley accorded: but notwithſtanding the Fine, and recovery, the entry of him in the remainder is good; and as to the woman, it is clear, that there is no diſcontinuance to him in the remainder in Fee, for he in the remainder in Tail cannot diſcontinue, becauſe he is ſeized by force of the eſtate Tail; as the 4 H. 7. 17. Tenant in Dower, and he in the reverſion in Tail, joyn in a Fine, this is no diſcontinuance of the eſtate Tail, becauſe he was never ſeized, and therefore it is a forfeiture in the Tenant for life, although he in the remainder joyn'd with him, by the 41 Ed. 3. but otherwiſe if Tenant for life, and he in remainder in Fee, joyn in a Fine. Vid. Bredons Caſe, 1 Rep. 76.

Anderſon. I conceive he in the remainder may enter, for all paſſeth from the Tenant for life, and it is her Feoffment, and the confirmation of the other, and ſo the eſtate Tail being ſpent, he in the remainder

ſhall

ſhall enter for forfeiture, and the recovery ſhall be no bar, becauſe it was of another eſtate: and alſo this title of entry for forfeiture ſhall not be barr'd by the common recovery, no more than if a Feoffee upon condition does ſuffer a common recovery, yet may the Feoffor enter for the condition broken: and Judgement was given for the Plaintiff: ſo that his remainder was neither diſcontinued by the Fine, nor his entry taken away by the Recovery.

43 Eliz. Hall againſt VVood, in C. B.

IN an Action on the Caſe for a Trover, and converſion of 40l. on not guilty pleaded, it was found for the Plaintiff.

Walmeſley. How can an Action lye for a Trover of money, if it be not within a bag? for this Writ ſuppoſeth a loſs; and when the money was loſt, how doth it appear that the money found is the ſame money that was loſt?

Davies. There are many preſidents in the Kings Bench to prove that this Action will well lye for corn and money, and I have been of Counſel in many of thoſe Caſes.

Warburton. If the money were loſt in view of a third perſon, upon ſuch Trover the Action will lye, for there it may be proved that it was the money of the Plaintiff. And Walmeſley agreed. And note, that a preſident was ſhewn, tempore 40 & 41 Eliz. inter Holloway and Higgs, which was thus; a maſter delivered to his ſervant 30 quarters of corn to be ſold, and the ſervant ſold them, and converted the money, and the maſter brought his Action on the Caſe for the Trover and converſion againſt the ſervant, who pleaded, not guilty, and it was found againſt him; and two things were moved in arreſt of Judgement; firſt, that the maſter was never poſſeſſed of the money, and therefore could not loſe it; ſecondly, becauſe the money cannot be known, and ſo non conſtat whether it was the money of the maſters, or no. But notwithſtanding this Caſe, Judgement was given for the Plaintiff, becauſe the poſſeſſion of the ſervant was the poſſeſſion of the maſter; and when the ſervant converts this to his own uſe, by this the maſter loſeth the property, and is alſo a converſion in the ſervant.

Mich. 42 & 43 Eliz. Leeke againſt the Biſhop of Coventry, in C. B. Rot. 3579

IN a Quare impedit the Caſe was thus; Langford and Buſſy were Patrons of an Advowſon, to which they and their Miniſters uſe to preſent by turn. Langford preſented according to his turn, and his Clerk dyed, and then Buſſy preſented in his turn alſo, and his Clerk was deprived, after which Langford grants his Advowſon in Fee to Leeke the Plaintiff, and then the Biſhop without any notice does collate Dr. Babington, who dyes; after whoſe death the queſtion was, if Leeke ſhould preſent, or Buſſy; and Judgement was given for the Plaintiff, becauſe that notwithſtanding the Church was voyd by deprivation, yet the Patron may tranſpoſe his Advowſon over.

Bethell againſt Sir Edward Stanhop.

IN Debt againſt Sir Edward Stanhop, as Executor to Francis Vaughan, he pleaded that he is not Adminiſtrator; and the ſaid Vaughan gave 40 l. to his daughter within age, with power of revocation upon the payment of 20 s. and it was found that this was done to defraud Creditors, and then he dyed poſſeſt of the goods, and the Defendant ſold theſe goods, which made him Executor in his own wrong, and afterwards takes Letters of Adminiſtration.

Warburton. I conceive the Plaintiff ought to have Judgement, for the Statute of 21 Eliz. of fraudulent conveyances, annuls this gift of the Inteſtate, becauſe he did it to defraud his Creditors, and then when he dyed it was Aſſets in the hands of the Adminiſtrator. And if a Teſtator have goods wrongfully taken from him out of his poſſeſſion, theſe are not Aſſets to the Executors or Adminiſtrators: but if they be taken out of the poſſeſſion of the Adminiſtrators or Executors, they ſhall be Aſſets, for they may take them again: but for goods taken from the Teſtator, they have but an Action. But here the Adminiſtrator may take the goods which were given by the Inteſtate to defraud Creditors, for the gift was voyd, and therefore they ſhall be accounted Aſſets. And as to the Action, it is well brought; for when a man does adminiſter as Executor, and then takes Letters of Adminiſtration, it is at the election of the Plaintiff to ſue him as Executor or Adminiſtrator, 9 Ed. 4. 33. 21 H. 6. 8. 2 Rich. 2. 20. 18 Ed. 4.

Walmeſley agreed; for the Statute of the 27 Eliz. hath made voyd the Teſtators gift, and ſublata cauſa tollitur effectus, and the gift being taken away, the property is alſo taken away from the Donee, and ſetled in the Donor, as to any Creditor: To which the other Juſtices agreed; and Judgement was given for the Plaintiff.

Rot. 1822.

Trinit. 43 Eliz. George Brooks Caſe, in C. B.

GIbſon recovered in a Debt againſt Brook, as Executor to J. S. 60 l. and 6 l. damages, and upon a ſcire facias to the Sheriff, he returns no Aſſets, and then upon the eſtate which was in London, which the Defendant had waſted and ſold, a fieri facias was awarded to the Sheriff of London, with a Commiſſion to the Sheriff of London, to enquire if he had Aſſets at the day of the Writ, &c. and by the inqueſt it was found that he had Aſſets at the day of the Writ purchaſed, &c. and that he had waſted the eſtate, which was thus return'd by the Sheriff, againſt which the Defendant took iſſue that he had not Aſſets; and upon this was a a Demurr.

Walmeſley. A man may averr againſt the return of a Sheriff, if the return be a matter collateral; as if upon a Capias the Sheriff returns a Reſcous, there may be an averment againſt this, 4 Eliz. 212. a. But if it be in purſuance of the Writ, as non eſt inventus, there no averment ſhall be taken againſt this: but here the return is the ſaying of the Inqueſt, and not his own ſaying.

Warburton.

Warburton. I conceive he ſhall have an averment and traverſe, or elſe he ſhall be without remedy, for he cannot have an Action on the Caſe againſt the Sheriff, becauſe he returns that which was found by the Inqueſt, and ſo not like where the Sheriff returns falſly without ſuch Inqueſt; and no attachment lyes, becauſe it is but an Inqueſt of office; and after it was moved at another day, and a preſident ſhewn, 33 Eliz. in B. R. between Weſtner and Whitenore, and there it was adjudged that ſuch return of the Sheriff was traverſable: and Anderſon and Kingſmill agreed to it; wherefore Judgement was given for the Defendant, and that the iſſue was well taken.

Day againſt Fynn.

IN an Ejectment, the Plaintiff declared of a Leaſe for years of a houſe and 30 acres of land in D. and that J. S. did let to him the ſaid Meſſuage, and 30 acres by the name of his houſe in B. and ten acres of land there, five plus, five minus, it was moved in arreſt of Judgement, becauſe that 30 acres cannot paſs by the name of 10 acres, five plus, five minus, and ſo the Plaintiff hath not conveyed to him 30 acres; for when 10 acres are leaſed to him, five plus, five minus, theſe words ought to have a reaſonable conſtruction to paſs a reaſonable quantity, either more or leſs, and not twenty or thirty acres more.

Yelverton agreed, for the word 10 acres, five plus, five minus, ought to be intended of a reaſonable quantity, more or leſs by a quarter of an acre, or two or three at the moſt: but if it be 3 acres leſs than 10. the Leſſee muſt be content with it. Quod Fenner & Crook conceſſerunt; and Judgement was ſtaid.

Smith againſt Jones.

IN an Action of the Caſe upon an Aſſumpſit, the Caſe was; that the wife of Jones was Executrix to J. S. and had Aſſets to ſatisfie all Debts and Legacies. The woman dyes, and the goods remained in the hand of her husband, who was the Defendant; and Smith the Plaintiff being a Legatee, demanded his debt of the husband, who ſaid to him, Forbear till *Michaelmas*, and I will pay you; and if this was ſufficient cauſe of Action, was the queſtion on a Demurrer.

Davies. The promiſe is voyd, becauſe it is after the death of the wife.

Yelverton. The Action will lye, becauſe he hath the goods in his poſſeſſion, and therefore is chargeable, and muſt anſwer for them, and therefore there is a good conſideration. And he cited Godfreys Caſe, who laid claim to a Copyhold, and the Copyholder in poſſeſſion ſaid to him, If the opinion of the Lord *Cook* be, that *Godfrey* hath a good title to it, I will ſurrender it to him; and becauſe he did not ſurrender to him, Godfrey brought an Action on the Caſe, and it was adjudged that the ſaying of the ſuit was a ſufficient conſideration to have an Action on the Caſe.

Yelverton. If the promiſe had been to pay this Legacy in conſideration he would not ſue him, then it had been good.

Williams. If there be no cauſe of ſuit, there is no aſſumpſit, and here is no juſt cauſe, for he cannot be ſued for Legacies.

Flemming of the ſame opinion, for the husband cannot be ſued by the Plaintiff, and although perhaps the Legatee may ſue him in the ſpirituall Court, yet that is only for the temporall adminiſtration. And afterwards Judgment was given for the Defendant.

Rot. 3648.

Michaelm. 9. Jacob. Kempe and James againſt Laurence in C. B.

IN a ſcire facias the caſe was thus, Gant having two daughters made his wife Executrix, untill his daughters came to the age of 21. years, or ſhould be married, and then the Executorſhip ſhould ceaſe, and that then his daughters ſhould be his Executors; and the woman did recover a debt upon a bond made to the Teſtator, after which the daughters marryed the Plaintiffs, and they brought the ſcire facias upon the ſaid Judgment againſt the Defendants as terre-tenants, and the Sheriff return'd the Defendants terre-tenants, and no others, and upon Dyer of the ſcire facias the Defendants pleaded, that H. was ſeiſed of thoſe lands die Judicii reddit, and made a Leaſe for years to them: Judgment, &c.

Nichols. The daughters ſhall have this judgment as Executors, for they are in privity and in by the Teſtator, and are not like an Adminiſtrator who comes in by the Ordinary after the death of the Executor. 6 H. 8. 7. Cook. 5. Rep. Brudnells Caſe: and the daughters are Executors and ſubject to debts of the Teſtator. And as to the plea he ſaid, that foraſmuch as the Defendants are returned terre-tenants, they cannot plead that they are but tenants for years, and that their Leſſor is not warned: for the ſcire facias is a perſonall action to have execution, but of the goods: but in a reall action it is a good plea, becauſe the leſſor himſelf cannot plead in diſcharge of ſuch action 8 H. 6. 32. And note that Michaelm. 43 & 44. Eliz. Rot. 834. Judgment in the very ſame point was given accordingly.

Rot. 1246.

Trinit. 9 Jacob. Information againſt Weſt. in C. B.

IN an Information upon the Statute of the 5 of Ed. 6. cap. 14. for buying of wheate-meale, and converting it into ſtarch. It was reſolved by three of the Juſtices (Cook being againſt it) that this is not within the Statute: but they agreed, that if one bought corn and thereof made meale or oat-meale, and ſold it, that this was within the Statute, for that is uſuall, and is no alteration, and therefore remaines the ſame corn, but ſtarch is altered by a trade or ſcience, which

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is a myſterie, and ſo it is not the ſame thing that was ſold. But Cook Chief Juſtice contra. And cited one Franklinghams Caſe Michaelm. 39 & 40 Eliza. in B. R. where one bought Barley, and becauſe it was of ſuch Quantity that he could not make Malt of it in his own houſe, he made Malt thereof in anothers houſe by his own ſervants. And it was reſolved.

Firſt, That the converſion of corn into Malt, in his own houſe, with an intent to ſell it was within the Statute, unleſs there be a ſaving for it.

Secondly, Foraſmuch as it was in anothers houſe, he is out of the proviſo, and ſo within the penalty of the Statute. And in Paſch. 42 Eliz. between Reynolds and Gerret. That if a Miller buyes corne, and grinds it and ſells it within his houſe, this is within the Statute. And in the Chequer Chamber in a writ of Errour there between Baron and Briſe, adjudged there, that a Coſter-monger, who buyes Pippins to ſell them again was out of this Statute, becauſe they are neceſſary victuall. And divers exceptions were taken to the Information: viz. where he ſaith Ligamen anglicè Starch, whereas there is no ſuch word, but it is Ligumen, and the anglicè will not help this miſtake. Cook 10. Rep. 134. and this exception was taken by Juſtice Winch.

But Warburton Juſtice cont. for Starch is a thing newly deviſed, and there is no Latin word for it, and therefore the anglicè there is good.

Foſter Juſtice took an exception, becauſe the Information concluded contra formam Statuti, whereas it ought to have been contra formam Statutorum. For this Statute was of force untill the 8 Elizab. and then was determined untill the 13th of Elizabeth, and then it was revived, ſo there are two Statutes; but 'twas agreed, that where a Statute continued de tempore in Tempus, and was never diſcontinued, nor determined, there it ſhall be ſaid contra formam Statuti, and this diverſity hath been twice adjudged upon this very Statute. viz. 9 Eliz. in Palmers Caſe, and in the 35 Eliz.

Warburton. cont. for the Information doth intend only the Statute of 5 Ed. 6, and 14. and he did recite the words thereof in his Information: alſo this Statute only makes the offence and declares the manner of it, and no other Statute makes any addition to it, or increaſeth the penalty, but only revives it to endure in perpetuum. But if a Statute doth prohibit a thing, and another Statute gives a penalty, there, upon Information upon the penalty, both Statutes ought to be recited and to conclude contra formam Statutorum, vid. Commentar. 206. Morgans Caſe. And ſo the Statute of Uſury, 37 H. 8. is revived the 13th Eliz. and an addition made to it, there ſuch inclusion ought to be contra formam Statutorum, but where the Statute is only revived, it is otherwiſe: as the Statute of Perjury 5 Eliz. was continued untill the 14 Eliz. and then it was determined, and 27 Eliz. was revived, yet all informations upon that Statute, are contra formam Statuti 5 Elizab. Cook. This is no good exception and cited Talbot and Sheldens Caſe. Hillar. 33 Eliz. who were indited for Recuſancy contra formam Statuti 23 Eliz. and in a writ of Error, the Judgment was reverſed, becauſe the penalty was demanded: for the 10th Eliz. made the Offence, and the 23 Eliz. gave the penalty, but if the Information be for the offence only, there it had been good. See the new Book of Entries 182. but if there be divers Statutes in the point of Information contra formam Statuti is good, becauſe the beſt ſhall be taken for the King. Vid. 5 H. 7. 17, 8 Ed. 3. 47. a.

Paſch.

Paſch. 10 Jacob. VValler againſt the Deane and Chapter of Norwich.

IN an action of Covenant the Plaintiff declared on a Leaſe made from the Deane, the Caſe was thus. The Deane in the 38 Eliz. had made a Leaſe for 99. years, to one Themilthorpe, and then in the 42 Eliz. made a Leaſe to the Plaintiff for three lives, rendring Rent, with a Letter of Attorney to make livery, and a Covenant to ſave the Plaintiff harmeleſſe againſt Themilthorpe, afterwards the Attorney makes livery ſc. after Michaelmaſs which was a Rent day, and he being diſturbed by Themilthorpe, brought this Covenant. And two points were moved in the Caſe.

Firſt, Inaſmuch as the Leaſe was voyd to Walter, whether that the Covenant was voyd alſo.

Secondly, If the livery made after the Rent day be voyd.

Hoghton Serjeant, If the Covenant depended on the intereſt of the Leaſe, as a Covenant to repay the thing deviſed, or to pay rent, theſe had been voyd, becauſe the Leaſe it ſelf is voyd, for they do immediatly depend upon the Leaſe, but where the Covenant is for a thing collaterall, as a Covenant that the Leſſor is owner at the time of the Leaſe, or that the Leſſee ſhall enjoy it, or ſhall be diſcharged and ſaved harmeleſs, theſe Covenants being collaterall to the Leaſe and intereſt are good, although the Leaſe be voyd, and the 43 Ed. 3. proves this: where a Leaſe was made by a Baron and Feme, a Covenant by them ſhall not binde the wife, contra where the Covenant concernes the intereſt, as payment of Rent, &c. Alſo the Covenant was broken immediatly upon the ſealing of the Leaſe to the Plaintiff. And as to the ſecond point, he held it was a good livery, becauſe no time was limited in the Letter of Attorney.

Dodderidge Serjeant; The Covenant is voyd, becauſe the Leaſe is voyd, but contra, if it had been a Covenant to enjoy for three lives, and he relyed much on the difference between tempus annorum and terminum annorum in Cook 1. Rep. 124.

Nichols cont. The Covenant is good, and yet in force, for when an eſtate is created in which is implyed a Covenant in Law, there if the eſtate be voyd, the Covenant is voyd alſo, but when there is an expreſs Covenant in Deed, there it is otherwiſe, although the Leaſe be voyd or voydable, as if he Covenant that the Leſſee ſhall enjoy during the terme, and the leſſee reſign, yet is the Covenant good although the terme is gone. And as to the ſecond point. The livery is good, for untill the livery be made, the leſſor ſhall retaine his land, and no Rent is due. vid. Commentat. 423. for by intenoment the poſſeſſion is better than the Rent. And Cook agreed to this. And the Juſtices agreed with Nicholls.

Trinit.

Trinit. 10 Jacob Barnes Caſe.

TEnant for life the Reverſion in the Lefſor, a Formedon is brought againſt the tenant for life, who prays in ayde of him in the remainder for life without him in the Reverſion.

Warburton. I conceive he ſhall have the Ayde 7 H. 4. 2. where ayde is prayed againſt him in the Remainder and Reverſion, and and he cited a Manuſcript 11 R. 2. direct in the point that the ayde would lye. But the other Juſtices cont. for the Tenant for life hath as high an eſtate as he in the remainder, and may plead all that the other may, but if there be Tenant for life, the remainder in Taile, there he ſhall have ayde of the Tenant in Taile. 23 H. 6. 6. 11 Edw. 3. 16. If there be Tenant for life, the remainder for life the remainder in Fee, tenant for life ſhall have ayde of them both, for elſe he in the remainder ſhall not come in to plead. 11 E. 3. ayde 32. Where it is reſolved, that tenant for life ſhall have ayde of the Reverſioner for life.

Hillar. 28 Eliz. VVatkins againſt Aſtwick.

A Man makes a feoffment on condition that if he, his heirs or Executors do pay the Rent of 100 l. before ſuch a day, that he may re-enter, the Feoffer dyes, his heire within age, the mother (without any notice of the ſon) requeſts J. S. that he would pay the money for her ſon. And all this was found by ſpeciall verdict, but it was not found of what age the ſon was.

Clinch. If the Jury had found that the ſon was of the age of 17 years, the payment had been good.

Wray. If a Bond be upon condition that the Obligor or his heirs ſhould pay 100 l. and the Obligor dyes, his heire within age, I conceive payment by the Guardian, or by ſome other friend is good. And afterwards all the Juſtices agreed. That if the Infant were within the age of 14. years, the tender of the money by his mother had been good, but contra, if he had been more than 14 years, and becauſe no age was proved here, but that he was within age, it ſhall not be intended that he was within the age of 14. years. and therefore they adviſed the party to begin de novo, and that it may be found that the Infant was within the age of 14. years.

Trinit. 25. Eliz. Moris againſt Paget. in C. B.

Rot. 2215. IN a Replevin, a ſpeciall Verdict was found, that Sir Francis Aſcough was ſeiſed of the Mannor of Caſtor in Lincolne, which Mannor extended it ſelf into four Towns viz. Caſtor, North Kelſey, Dale, & Sale: and that there were demeſne lands and Freeholders in each of the ſaid Towns, and that Moris the Plaintiff held the land where, &c. by Fealty and ſuit of Court to the Mannor of Caſtor, and the lands did lie in one of the Towns viz. in North Kelſey: And Aſcough being ſo ſeiſed, ſold to the Defendant Totum illud Manerium ſive Dominium de North Kelſey cum pertinentiis in North Kelſey, ac omnia ac ſingula Meſſuagia, redditus, Herriot, and all other things uſed or reputed as parcell thereof, with all Courts &c To have and to hold to the Vendee and his heires: and Moris the Plaintiff and other freeholders in North Kelſey, did attorne to the Vendee. The Queſtion was, if the Vendee had the Mannor of North Kelſey, or not.

Peryam, He has not; yet by the feofment and attornment all the Tenants and ſervices are conveyed to him: but not as a Mannor: for a Mannor is made and incorporate by continuance of time, and this entire Mannor of Caſtor cannot be divided no more than other liberties; as if the King grant to three partners, who have three Mannors, a Leet or Warren, and one of them makes a feofment, the Feofee ſhall not have the Leet, and he cited Dyer 362. a. and he ſayd, if I grant my Mannor of Dexcept certain Demeſn lands and ſervices, the feofee ſhall have the Mannor, and I ſhall have the Lands and ſervices in groſſe: and ſo if I have a Mannor that extends into two Towns, and I grant my Mannour to you in one Town, you ſhall have no Mannor, but the lands and ſervic[illegible] groſs.

Windham [illegible]ſtice cont. For where he grants his Mannor of North Kelſey in North Kelſey, there it ſhall be conſtrued his Mannor in reputation.

Anderſon agreed, for although a Mannor cannot be created at this day, yet is it not ſo intire but it may be divided.

Hillar. 30. Elizab. Sir Thomas Howards Caſe.

A Man makes a Leaſe for years the 10th of May, and then the Leſſor bargains and ſells this to another by Deed enroll'd, bearing date the 10th of Aprill, and it was entred to be conveyed the 10th of Aprill before, but in truth it was delivered and acknowledged and enrolled afterwards: And it was held that the bargaine was without remedy at the Common Law, for he cannot plead that it was acknowledged or delivered after the date of the day of acknowledging it, and ſo was the opinion of Rhodes.

Peryam and Windham, Anderſon being abſent: for he cannot aver, that it was inrolled or acknowledged at another day then it is record-

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red, becauſe it is contrary to the Record, for it is entred, that it was acknowledged the 10 of April, and then if ſuch a plea ſhould be admitted, it would ſhake moſt of the Aſſurances in England.

Note, Huttleworth put this caſe. A man makes a Leaſe, rendring Rent at two Feaſts, and if the Rent be behind at any of the ſaid Feaſts or 40. dayes after, and no diſtreſs to be found, that the Leſſor ſhall re-enter, the Leſſor comes upon the ground the laſt day of the 40. and demands his Rent, and becauſe no diſtreſs was found on the land at the time of his demand, he entred. But it was averred that always before this day there was ſufficient diſtreſs, and the queſtion was, if his entry were good.

Fenner and Rhodes ſaid they had ſeen a Report of the ſame Caſe. 8 Eliz. That the diſtreſs ought to be on the Land on the laſt day, yea at the laſt inſtant of the day, which is a legall time to make a demand, or elſe the Leſſor may enter.

Walmſley. The ſame Caſe was reſolved a year agoe in the Kings Bench between Ward and VVare. But if it were, (and no diſtreſs to be found at any time within forty dayes) there if there be a diſtreſs found at any time, it is ſufficient. Vid. 1. Inſt. 202. a.

28 Eliz. VVood againſt Aſh.

IN a Replevin, the Caſe was thus. Puttenham made a Leaſe of Land with a Stock of Sheep for 20. years rendring Rent, and the Leſſee doth Covenant to render back to him at the expiration of the Leaſe 1000 Sheepe of the age of three or four years, and that the Leſſor grants all his Chattells and this ſtock of Sheepe to Elizabeth Vavaſor the Defendants now wife: but in Truth, the Sheepe of the old ſtock were all ſpent, and others ſupplyed, part by increaſe, and part by buying of other Sheepe.

Walmeſley, for the Defendant. The grant made by the Leſſor is good; for the generall propertie does remain in him, although that the Leſſee hath a ſpeciall propertie. To which it was anſwered, that if the ancient ſtock of Sheepe were ſtill, it had been good; but it was not, and therefore the grant is voyd.

Walmeſley. Although the firſt ſtock was changed, yet the new ſtock does ſupply it, and is in place thereof, and ſhall be in the ſame condition as the other ſtock is, and therefore the Leſſor ſhall have propertie in it. But the whole Court was againſt him: for they ſaid, that the increaſe of the ſtock of Sheepe ſhould be to the Leſſee, and the Leſſor ſhall never have them at the end of the terme: but they agreed, that if the leaſe were of the ſtock with Lambs, Calves, and Piggs, there the increaſe belongs to the Leſſor. And all the Court took this difference, ſc. when a leaſe is made of dead goods, and when of living; for when the leaſe is of dead goods, and any thing is added to them for reparations or otherwiſe, the Leſſor ſhall have this addition at the end of the terme, becauſe it belongs to the principle: but in caſe of a ſtock of Cattle, which hath an increaſe, as Calves and Lambs, there theſe things are ſevered from the principle, and Leſſor ſhall never have them, for then the Leſſor ſhall have the Rent, and the Leſſee ſhall have no profit.

Rot. 1454

Trinit. 29 VViſeman againſt Rolfe. in in C. B.

IN a Writ of right the Caſe was this. A man ſeiſed of Land in Fee makes his will, and gives to D. his wife ſuch Land for life, the remainder to T. his ſon and heires of his body, and alſo gives to T. his ſon his Land in B. and alſo his Land in C. and alſo he gives his Land called Odyum to the ſeed of his ſon habendum all the demiſed premiſſes to his T. ſon and the heires males of his body. The Queſtion was if T. ſhould have an eſtate in Taile in B. and C. or if the laſt words ſhall relate only to that which was laſt named.

Fenner for the Plaintiff For the laſt Clauſe is a new Clauſe, and ſhall not be preferred to the firſt, for it begins with a verbe viz. I give my Land called Odyum, and therefore the limitation afterward ſhall be referred only to this. And 10 H. 7. 8. There was a grant by Dedi cuſtodiam Parci & Arbores vento proſtrat. The Grantee ſhall have the trees by this Clauſe, and 14 Eliz. A man deviſeth thus. I give my Mannour of C. to my ſecond ſon; Item I give my Mannor of S. to my ſecond ſon to have and to hold to him, and to his heirs. And by Dyer, Welſh and Weſton he had an eſtate but for life; but Brown cont. for if a Leaſe be made to A. B. and C. ſucceſſively, it is adjudged that they are Joyntenants, but if it be to them as they are named, they ſhall have it one after the other: and if a deviſe be to one and his heirs, and after to another for life, the Law will conſter that the eſtate for life is to precede, for that words of Relation in Wills ſhall be taken ſtrictly, as if a deviſe be to A. and his heirs of his body, and he does deviſe other land in Forma prædicta, this ſhall be but for life.

Walmeſley cont. and ſaid that this limitation did go to all, whereof no limitation was made before; for the rules of reaſon are uncertain, and therefore ſuch matters ſhall be expounded according to the beſt ſenſe that may be, and here the ſenſe is moſt naturall to refer it to all, and the word all impoſts this: and the Caſe of the fourth of Elizabeth (under favour) accords with this viz. that the Deviſee ſhall have Fee in both. But if the Deviſe had been, I deviſe D. to my ſon Thomas, and alſo to him and his heirs the Mannor of S. there he ſhall have D. but for life. And if a man deviſe to his 4. ſons A. B. C. and D. to have to the perſons laſt named to them and their heirs, there all ſhall have Fee. 19 Ed. 4. In a precipe of a houſe and an acre of land in three ſeverall Towns, and that the Defendant Ibidem ingreſſus eſt, and did not ſay into the houſe and land, and yet it was held good.

Periam and Rhodes. He ſhall have an eſtate Taile in all, and the relation ſhall be to all. Anderſon doubted at firſt, but agreed afterwards and Judgement was given accordingly.

32 & 33 Eliz. Mathewſon againſt Trott. in C. B.

Rot. 1904.

Upon a ſpecial verdict, the Caſe was this. A man ſeiſed of land in ſoccage deviſed it to his yonger ſon, and died ſeiſed, the elder ſon enters and dies ſeiſed, and his heir enters, and the yonger ſon enters upon him, the Queſtion was, if his entry be taken away by this deſcent.

VValmeſley. It is not, and he compar'd this caſe, to a title of entry for a condition broken, or a Conuſee of a Fine upon grant and render &c. in which Cales no deſcent ſhall take away entry.

Anderſon. The Deviſee hath intereſt preſently, and the land does not deſcend; for the deviſe prevents the deſcent, and the Freehold is preſently in the Deviſee, and the Statute 32 H. 8. which gives power to Deviſe lands, does make a Title in the Deviſee as a Title of entry for condition of Mortmaine, and the Deviſee ſhall not have an ex gravi querela upon this Statute, but he muſt enter.

Walmeſley. The Deviſee hath not a Freehold preſently, for if it were ſo, the Deviſee at the Common Law ought not to ſue an Ex gravi Querela: but certainly if the freehold be in the Deviſee, his entry is taken away. And afterwards Judgment was given by Anderſon that deſcent does not take away the entry of the Deviſee, but delivered no reaſon for it.

Hillar. 33 Eliz. Moſgrave againſt Agden.

Rot. 2529.

In an action of the Caſe on a Trover and converſion of ſix barrells of Butter. The count was that they came to the hands of the Defendant, and after the trover they were impared, and decayed, ratione negligentiæ cuſtodiæ. And the Court held cleerly that the action would not lie, for he who finds goods, is not bound to preſerve them from putrefaction, but it was agreed, that if the goods were uſed, and by uſage made worſe, the action would lie.

44 Eliz. Ayer againſt Joyner, in C. B.

Rot. 2529.

In a ſecond Deliberance, it was ſaid by the Court, that if Leſſee for years does aſſign over his terme, and yet continues poſſeſſion, that he hath but a naked poſſeſſion, and no intereſt nor eſtate, but the eſtate and intereſt does remain in the grantee, ſo that he may grant it over.

And Walmeſley ſaid, that if the Leſſee makes waſte, the Leſſor may have an action of waſte againſt him: and there is a caſe that if a man makes a Leaſe, and the Leſſee waves the poſſeſſion, and a ſtranger commits waſte, the Leſſor ſhall have an action of waſte againſt the Leſſee, but the principall queſtion was upon the pleading.

Taylor being Leſſee for years, 9 Elizabeth did grant and aſſigne this to Ayer the Plaintiff. The Defendant pleaded, that before the grant made to Ayer &c. 8 Elizabeth Taylor did grant and aſſigne his eſtate to the Defendant, without traverſing the gift made to the Plaintiff.

Williams. There needs no traverſe, for being granted the 8 Elizab. it is impoſſible it ſhould be granted 9 Eliz. 2 Edw. 6. and 1 H. 5.

Anderſon. He ought to travers, for it is impoſſible to confeſſe and avoyd a grant by confeſſion that was granted to another before, for if it were ſo, the ſecond grant is voyd, and ſo being ſo, confeſt, here ought to be a travers.

Walmeſley cont in 32 H. 6. it is ſufficient to ſay, that at another day, &c. there was another arbitrement, &c. for by that the firſt arbitrement is voyd in Law. And it is a good plea in a Will, that after that, there was another Will made, without Traverſing, and there is difference between Lands and Chattells: for land may be gotten out of a man by wrong, and therefore it may be that after the feoffment the Feoffor entred and it diſſeiſed the Feoffee, and did infeoffe another, but it cannot be ſo here of a terme for years, for no man can take it away from the Leſſee by wrong.

Glanvill and Kingſmill cont. There muſt be a Traverſe, for there ought to be a confeſſion before there can be an avoydance, but here he does not confeſs the grant, but pleads matter that denies it being granted. And at laſt Anderſon gave Judgment that he ought to Travers.

Rot. 135.

42 Eliz. Rudd. againſt Topſey. in C. B.

IN a Quare Impedit. The Jury found that Edward Capell was ſeiſed of an Advowſon in Fee, and did let it to the Defendant for years, and during the Leaſe he preſented the Defendant, and the doubt was whether this were a ſurrender or an Extinguiſhment. And it was held by all the Juſtices, that this could not be a ſurrender, but is cleerly an extinguiſhment: For if a man does preſent to his own Church as Proctor to another, by this he looſeth his advowſon. Nat. Br. 25. 17 Ed. 33. 24. H. 6.

Rot. 2480.

Hillar. 42 & 43 Eliz. Forreſt againſt Ballard.

AN Audita querela was brought upon a Statute, which was acknowledged before a Maior, who had no power to take it.

Anderſon. An Audita querela will not lie upon a voyd Statute.

But Kingſmill, Walmeſley and Warburton cont. and Walmeſley citeth Na. Br. 102. where an Audita querela was brought upon a forg'd Statute, and there it would lie upon a Statute made by Dureſs: 20 Ed. 3. 28.

Trini

Trinit. 40. Eliz. Goodrick againſt Cooper. in C. B.

Rot. 1259.

IN a Replevin the Defendant juſtified for Rent granted to the Maſter and Schollers of Emanuell College in Cambridge. And the Jury found, that one Spendloſe being ſeiſed of the land where &c. by his Deed did grant to the ſaid Maſter and Fellowes, a Rent Ch. of 40 l. per annum for ever: and that Spendloſe did leale his part of the Indenture, and delivered it to the uſe of the Maſter and Fellowes to one J. S. to deliver it accordingly, but there was no deed to ſhew their receit thereof: and then they ſealed the other part but they made no Attorney to deliver it, and it was found that the Rent was payd for divers years after.

VValmeſley. Although no Letter of Attorney were made, yet it is good, for by their ſealing of the Counterpart there is a ſufficient agreement to the grant. As if a Reverſion be granted to a Corporation by Deed, although they cannot accept of this, but by Attorney, yet if they bring a waſte, this is a ſufficient agreement to veſt it in them Quod alii Juſticiarii conceſſerunt, And judgment was given for the Avowant.

Michaelm. 43 & 44. Eliz. Claygate againſt Batchelor. in C. B.

Rot. 3217.

IN debt upon a Bond of thirty pound, the Condition was, that if Robert Batchelor, ſon to the Defendant, did uſe the Trade of Haberdather as Journeyman ſervant, or Apprentice, or as a Maſter, within the County of Kent, within the Cities of Canterbury and Rochester, within four years after the date, that then, if he pay twenty pound upon requeſt, the Obligation to be voyd. And all the Juſtices agreed that the condition was againſt Law, and then all is voyd, for it is againſt the liberty of a Free-man, and againſt the Statute of Magna Carta cap. 20. and is againſt the Common-wealth. 2 H 5. & 5. And Anderſon ſaid, that he might aſwell bind himſelf, that he would not go to Church. And Judgment was given againſt the Plaintiff.

Rot. 654.

Michaelm. 43 & 44 Eliz. Dogget againſt Dowell. in C. B.

IN an action on the Caſe upon an Aſſumpſit, The Plaintiff declared, that at the requeſt of the Defendant he had lent to him 30l. the 10th day of May 5 Eliz. and the Defendant in conſideration thereof, viz. the ſecond day of May aforeſaid did promiſe and aſſume upon himſelf, that he at the end of the yeare would lend the Plaintiff other thirty pounds for a year, or give to him five pound. It was ſaid, that the conſideration is good, for although the promiſe was made at another day, yet is it in purſuance thereof, ſo that in Law it ſhall be accounted all at one time, and is not like to the caſe in Dyer 372. where the Maſter promiſed one who was bayle for his ſervant, that he would ſave him harmleſs, this is no conſideration, for the Bailment was of his own will, and was executed before the Aſſumpſit, but if the Maſter had firſt requeſted, and afterwards aſſumed, there it is good; and ſo was it adjudged in the caſe of one Sydenham againſt Worthington, Trinit. 27 Eliz. Rot. 748. Where the requeſt was before, and the promiſe after, and there it was a good Aſſumpſit.

VVarburton agreed. And it is like as if I ſhould ſay to you, do ſuch a thing, and I will give you five pound, this is no good contract.

But all the Juſtices on the contrary; for when at the firſt day the Plaintiff did lend to the Defendant thirty pound that was abſolute, and the ſpeaking on the ſecond day cannot have ſuch reference to the firſt agreement, that it ſhall be accounted all one.

Anderſon. If I ſay to one: In conſideration you will ſerve me, for a year, I will give you five pound, here is no cauſe of action, for the conſideration is precedent and not mutuall, and ſo judgment was entred for the Defendant.

Rot. 2529.

Hillar 41 Eliz. VVentworth againſt VVright.

IN a Quare impedit, two points were moved 1. If the Parſon be made Biſhop, whether the Patron ſhould preſent or the King by his prerogative.

VVilliams. The King ſhall, for before the Statute the Pope ſhould preſent, and the reaſon was, becauſe the Biſhop had received his preſentment gratis from the Pope: and by the ſame reaſon the King now ſhall preſent, for there is no reaſon the patron ſhould, for by his precedent preſentment he hath diſmiſt himſelf untill reſignation or death, as if a man lets land for another mans life, he ſhall not have the land during the life of Ceſtuy que vie, & great miſchief would be, if it ſhould not be ſo, for els all the preſentments, that the King hath made, ſhalbe uſurpations.

The

The ſecond matter was, that no preſentment is pleaded againſt the King by the Patron, for it is pleaded that the Parſon was admitted and inſtituted, but not that he was inducted (but the Court held it good notwithſtanding that omiſſion) But as to the firſt point, the Court asked Williams, if he could ſhew preſidents that the King ſhould have ſuch preſentment, for they ſaid, that the uſage by the Pope is no argument at all, for that he uſed to uſurpe many things.

Walmeſley, I conceive this cuſtome began by the Popes uſurpation, but he ſaid, there is a Book in the time of Edw. 2. where this point is argued and adjudged, that the Patron ſhall preſent and not the King.

VVilliams ſhewed eight or nine Preſidents in the time of H. 8. that the King uſed to preſent in ſuch caſe, but all of them were between ſpirituall perſons. And the Court ſaid, they did not regard thoſe preſidents, for all ſpirituall perſons were the Popes ſervants vid. 6 Elizab. 72. 8.

South againſt Whitewit.

IN a prohibition, the caſe was thus, the wife of VVhitewit had ſpoken ſcandalous words of South, and therefore ſhe was excommunicated by the high Commiſſioners, and by Letters Miſſive a Purſevant came at twelve of the clock at night, and broke the houſe of VVhitewit and tooke the body of VVhitewits wife, who was reſcued: wherefore VVhitewit her husband was called before the Commiſſioners, and hereupon VVhitewit prayed a prohibition. And the queſtion was, if a Purſevant could break a houſe by ſuch Commiſſion or not. And it was agreed, that by the Common Law, neither the Pope, nor any other ſpirituall Judge had any thing to do with the body and goods of any one, for only the ſword ſpirituall belongs unto them.

VValmeſley: At the Common Law, after Excommunication a Capias Excommunicatum was awarded, and I conceive this writ is of force at this day, and is not taken away by the Statute of 5 Eliz.

Kingſmill agreed, for this Statute gives power onely to correct the ſpirituall law, and to take away the authority of the Pope, but gives the ſame means to execute it as before, and he further ſaid, that the Statute that did erect the Court of Wards, doth appoint a Seale belonging to it, and other proceſs according to the courſe of the Common Law: and therefore by the ſame reaſon, if this Statute of 5 Eliz. intended to give them ſuch authoritie, they would have appointed a Seale alſo, and a courſe according to the Common Law, but as the courſe is here uſed, a man may be robb'd in his houſe by a beggerly Purſevant which is no Officer known by the Law. And ſo was the opinion of the Juſtices.

Paſch. 40 Eliz. Gooſey againſt Pot, in C. B.

IN a Replevin the Caſe was thus; two Hundreds were adjoyning together to two ſeveral Mannours of two ſeveral perſons, and the avowant was ſeized of one of them, and he preſcribed that all the Tenants of the other Hundred have uſed to make ſuit to the Leet within his Hundred; and alſo that the Lord of the other Hundred uſed to appear, or to pay him 4 s. pro anno futuro; and if it were not paid, the Defendant preſcribed, that he and all thoſe, whoſe eſtates he hath, have uſed to diſtreyn any Inhabitant within the Hundred for the ſame; and therefore for 4 s. not paid, he did avow the Diſtreſs within the Mannour of the Plaintiff, who was one of the Inhabitants.

Williams. A man may preſcribe by a que eſtate in a Hundred, for a man may have it by diſſeiſin, and there are divers preſidents which the Prothonotaries have ſhewed me to warrant this in a Replevin, for the ſeiſin is the matter of the title. And to this Littletons rule may be added, that of all things which lye in grant, and whereof a man cannot be diſſeiſed againſt his will, a man ſhall not plead a que eſtate.

Kingſmill. A que eſtate cannot be pleaded of a Hundred, unleſs it be appendant to the Mannour; and a ſecond matter was moved in this Caſe, viz. that he preſcribed to diſtreyn the Cattle of a ſtranger for the offence of the Lord.

Williams. It is not good, by the 41 Ed. 3. but by the 47 Ed. 3. for ſuit and ſervice, the Cattle of the Lord may be diſtreyned on any land within the Hundred.

Anderſon. I do agree to the Caſe of my Lord Dyer, that the Cattle of a ſtranger cannot be taken for a Herriot.

Walmeſley. In the 12 of H. 7. it is ſaid by Fineux, that a Lord of a Mannour may inlarge his ſervices by preſcription, and ſo the Cattle of a ſtranger may be taken: but for a perſonal matter, as for amercement in default of ſuit, no ſtranger may be diſtreyned. And afterwards agreed by all the Juſtices, that the ſtrangers Cattle could not be diſtreyned.

Holt againſt Liſter.*

IN a Replevin the Caſe was thus, he in the reverſion after Tenant in Dower, grants it over to the uſe of himſelf for life, the remainder to his next ſon in Tail, the remainder to the uſe of himſelf in Fee, and after this he levyes a Fine to the Plaintiff and his heirs of land which he claimeth de hæred tate ſua, after the death of the Tenant in Dower. The Plaintiff brought a Quid Juris clamat againſt the Tenant in Dower, and upon non ſum informatus, Judgement was given that the Tenant ſhould attorn, and now he prayed that ſhe ſhould not attorn, for if ſhe attorns, ſhe will forfeit her eſtate.

Walmeſley. If he in the remainder for life grants over by Fine, it is no forfeiture, for he gives no more right than he hath; and ſo hath it been adjudged in the time of my Lord Dyer.

Glanvill.

Glanvill. I agree to that: but in this Caſe he grants that which he hath de hæreditate ſua, and this recital will make a forfeiture; and then if the Tenant in Dower attorn, this is a forfeiture.

Anderſon. This attornment is no forfeiture, becauſe it is by judgement of the Court.

Walmeſley. I agree, for the Grant it ſelf is no forfeiture, unleſs it be by reaſon of the recital, but the Attornment ſhall have relation onely to the ſubſtance of the Grant. And it was much diſputed between Walmſley and Glanvill, If Leſſee for life of a Rent grants this in Fee by Fine, if this be a forfeiture; and Walmeſley vouched a Judgement, that it was no forfeiture; and Glanvill vouch't 31 Ed. 3. Grant 60. to the contrary, and 15 Ed. 4. 9. by Littleton. If Leſſee for life of a Rent grants this by Fine in Fee it is a forfeiture, by reaſon of the Eſtoppell, otherwiſe if it were by Deed. Vid. 1 H. 7. 12.

Mich. 32 & 33 Eliz. Marſhes Caſe, in B. R.

Rot. 1011.

MArſh and his wife brought a Writ of Errour as Executors to Nicholſon to reverſe an Outlawry upon an Indictment of Felony pronounc'd againſt the Teſtator.

Altham of Grayes-Inne. The ſole point was, whether the Executors may have a Writ of Errour, and I hold that they may; for if there be no heir, it is great reaſon that the Executors ſhould have it, for otherwiſe the erroneous judgement cannot be at all reverſt; and every one ſhall have a Writ of Errour that is damaged by the erroneous judgement, and Executors have right to the perſonal eſtate to have Errour: For if a man recovers damages in a Writ of Coſenage, and the land alſo, and dyes, his heir ſhall have Execution for the land, and the Executors Execution for the damages, by the 19 Ed. 4. 5. 43 Ed. 3. 13 Ed. 4. 2. If a man does recover my villain by a falſe Verdict, the heir ſhall have an attaint for the villany, and the Executors for the damages, and a Writ of Errour ſhall be given to him to whom the right of the thing loſt doth deſcend, as it was adjudged in the Caſe of Sir Arthur Henningham, and he cited two preſidents in the point, 1 Trinity, 11 H. 8. Rot. 3. where an Adminiſtrator brought a Writ of Errour to reverſe a Judgement given in an exigent. Vid. 2 Rep. 41. a.

Cook contr. In Natura Brevium, 21 M. he ſayes, an Executor ſhall have a Writ of Errour upon a Judgement given in Debt againſt the Teſtator, and the heir ſhall have Error to reverſe Outlawry in Felony, and to reſtore him in his blood, and he ſaid that it was part of the puniſhment in Felony to have the blood corrupted, & ſic filius portat iniquitatem patris; and by reaſon of the attainder, he cannot inherit any Anceſtor; wherefore he having the damage, it is reaſon that he ſhould reverſe it. And although Executors ſhall have a Writ of Errour for Chattels perſonal, yet they ſhall not have one when they are mixt with things real, 5 H. 7. 15. 18 Ed. 4. If Writings be in a Box, the heir ſhall have the Box, becauſe real things are more regarded than perſonal.

Nevertheleſs in this Caſe the Writ of Errour is in a real Action, for the Law ſayes, that it is in the ſame nature as in original action, whereupon it is brought; as if Errour be brought to reverſe a Judgement given in a perſonal action, the Writ of Errour is perſonal; and ſo in like manner is it real, if the firſt action be real, 47 Ed. 3. 35. 35 H. 6. 19, & 23. and although the firſt action be mixt, yet the Law does rather reſpect the reality, 30 H. 6. Barr. 59. where two brought an aſſize, and one did releaſe, and there it was ſaid, that although this were a mixt action, yet it ſhall be according to the moſt worthy, and that is the reality: and 16 Aſſi. 14. divers Diſſeiſors being barr'd in an aſſize, did bring a Writ of attaint for the damages, and ſummons and ſeverance was ſuffered, for damages were joyned with the reality: and Stanford, 184. If a man be indicted before a Coroner, quod fugam fecit, if he after reverſe the Indictment, yet he ſhall have his goods, for de minimis non curat Lex: But note, that the Juſtices ſaid, that the fugam fecit was the cauſe of forfeiture of the goods, and not the Felony. And as to the preſidents, he agreed to the Caſe of the 18 H. 7. for an Executor ſhall have a Writ of Errour to reverſe Judgement given in an exigent, for there nothing but the goods are forfeit, 30 H. 6. Forfeiture 31. and for the preſident in 11 H. 8. it cannot be proved that the Outlawry was for Felony. Vid. Rep. fol. 3.

Rot. 467.

33 Eliz. Lilly againſt Taylor, in B. R.

MArſh ſeized of the land in queſtion, did deviſe this to Roſe Lilly for life; and if ſhe fortun'd to marry, and after her deceaſe ſhould have any heirs of her body lawfully begotten, then that heir ſhould have the land, and the heirs of the body of ſuch heir; and for default of ſuch iſſue, the land ſhall revert to Philip Marſh, his ſon and his heirs, and the queſtion was, if the husband of Roſe ſhall be Tenant by the curteſy, or not; and ſo if Roſe had eſtate Tail, or for life onely.

Godfrey. She hath eſtate but for life; and he cited a Caſe adjudged in Benlowes Reports, 40 Eliz. where lands are deviſed to A for life, and after his deceaſe to the male children of his body, and it was adjudged that the male children have an eſtate Tail by purchaſe, and nothing by deſcent, and ſo A had nothing but for life.

Gawdy agreed, for ſhe hath but for life, and when ſhe dyes, her iſſue ſhall have it.

Popham agreed, if the words were, that if ſhe had iſſue, that he ſhould have it.

But Clench held, that ſhe had an eſtate in Tail executed, and that her husband ſhall be Tenant by the curteſy.

Fenner. The iſſue is as a Purchaſer, for the Deviſor intended that Roſe ſhould not have a greater eſtate than for life. And alſo it was agreed by all the Juſtices, that a Deviſe to a man and his heir ſhall be accounted a Fee-ſimple, for that the word, heir, is collective: and ſo is the 29 Aſſi. where land was given to a man, and to the heir of his

body,

body, & uno hæredi ejuſdem hæredis, this is an eſtate Tail.

Popham. He ſhall be Tenant by the curteſy; and he agreed, that heir of the body was a good name of purchaſe: but if a Frank-tenement be limited to his Anceſtor, and by the ſame Deed it is alſo limited to his heir, the heir ſhall be in by deſcent. But Fenner on the contrary.

Paſch. 38 Eliz. Bolton againſt Bolton.

Rot. 882. & 582.

TEnant for life being impleaded, doth pray in aid of him in the Reverſion, who joyn and loſe, &c. and the Tenant for life brings a Writ of Errour, and the Record is removed, and he in the remainder brings a Writ of Errour alſo, De Recordo quod coram vobis reſidet; and the queſtion was, upon which Writ of Errour the Judgement ſhould be reverſt: and it was objected, that if it ſhould be reverſt by the Tenant for life, that he in the remainder ſhould be reſtored.

But Gawdy, Fenner, and Clench contr. Who held, that it ſhould be reverſt at his ſuit who firſt brings the Writ, as in caſe of Interpleader, it ſhall be alwayes upon the firſt Writ. And notwithſtanding the removing of the Record by the Tenant for life at the next term, the Court ſaid, it was at their diſcretion to reverſe this at ſuit of any of the parties, as they pleaſed: and becauſe they obſerved ſome indirect practices by him in the remainder, it was reverſt at ſuit of Tenant for life.

Paſch. 5 Jacob. Sir Henry Dimmocks Caſe, in the Court of Wards.

TEnant of the King by Knights ſervice, bargains and ſells his land to Sir Henry Dimmock and his heirs, and Sir Henry Dimmock dyes, his heir within age, and then the Deed is inrolled; the queſtion was, if the King ſhould have premier teſin.

Triſt. The King ſhall not, becauſe Sir Henry did not dye within his homage, but the land was in the Bargainor; as if there be a Bargainee of the reverſion, and the Tenant makes waſte, the Bargainee ſhall not have waſte, unleſs the Deed be inrolled before the waſte committed, 2 Jacobi. Bellingham againſt Aſſop. Bargainee before inrolment ſells the land over, and it was adjudged that the ſecond bargain was voyd, 10 Eliz. Mockets caſe. Diſſeiſee releaſeth to the Bargainee of the Diſſeiſor before inrolment, and adjudged voyd, 5 Eliz. in Pophams Caſe it was ſaid, that the Statute of inrolments had altered the Common Law; for now by the delivery of the Deed, no uſe is raiſed untill it be inrolled. But all the Juſtices held, that the heir

ſhould be in Ward, and pray premier ſeiſin if he were of full age; for the Statute ſayes, that no uſe ſhall be, unleſs the Deed be inrolled: but if it be inrolled, it paſſeth ab initio, and then the Bargainee ſhall be Tenant ab initio. But it was alſo agreed by all the Juſtices, that the wife of Sir Henry ſhall not be indowed, and that Rent paid to the Bargainor at the Rent-day incurr'd after the bargain is good, and the Bargainee hath no remedy, becauſe it is a thing executed.

Ror. 924.

Trinit. 12 Jacobi. Cuddington againſt VVilkin, in C. B.

IN an Action of the Caſe for calling the Plaintiff Thief, the Defendant juſtified, becauſe the Plaintiff had ſtollen Sheep, 37 Eliz. the Plaintiff replyed proteſtando, that he had not ſtollen Sheep, and pleaded the General Pardon, 7 Jacobi, upon which the Defendant demurred, and adjudged for the Plaintiff, for the Pardon had ſo purged and aboliſhed the Offence, that now he was no Thief, 1 Ed. 3. Corone 15. 2 Ed. 3. Corone 81. 1 Aſſi. 3. So if one call another Villain after he is infranchiſed. And in one Baxters Caſe, in Banco Regis, it was adjudged, that where a man was accuſed for Perjury, and acquitted by Trial, if he be afterwards called perjur'd, he ſhall have his Action on the Caſe. And Judgement was given for the Plaintiff.

Seaman againſt Cuppledick.

IN a Treſpaſs of Aſſault and Battery, the Defendant juſtified in defence of his ſervant, ſcil. that the Plaintiff had aſſaulted his ſervant, and would have beaten him, &c. and the Plaintiff demurr'd.

Yelverton. The bar is good, for the maſter may defend his ſervant, or otherwiſe he may loſe his ſervice, 19 H. 6. 60. a.

Crook Juſtice. The Lord may juſtifie in defence of his villain, for he is his inheritance.

Williams contr. The maſter cannot juſtifie, but the ſervant may juſtifie in defence of his maſter, for he owes duty to his maſter, 9 Ed. 4. 48.

Yelverton. The maſter may maintain a plea perſonal for his ſervant, 21 H. 7. and ſhall have an Action for beating his ſervant; and alſo a man may juſtifie in defence of his cattle.

Cook. A man may uſe force in defence of his goods, if another will take them; and ſo if a man will ſtrike your cattle, you may juſtifie in defence of them; and ſo a man may defend his ſon or ſervant, but he cannot break the peace for them: but if another does aſſault the ſervant,

ſervant, the Maſter may defend him and ſtrike the other, if he will not let him alone.

Williams. It hath been adiudged in Banhams Caſe, that a man cannot juſtifie a batterie in Defence of his ſoil, a fortiori he cannot in defence of his ſervant. vid. 19 H. 6. 31. 9 Ed. 4. 48.

Trinit. 12. Jacob. Drury againſt VValler.

IN an action on the Caſe upon a trover and converſion of 200 l. deliuered by the Plaintiff to the Defendant; and upon not guilty pleaded, the Queſtion was, if denyall by the Defendant to pay it upon requeſt, would beare this action. And the caſe of Iſaac was urged, who brought an action of Trover, &c. for 200 l. in a bag, and by verdict it was found that demand was made thereof, and a deniall to pay it. And by Dodderidge it was a Converſion.

Crooke accorded, but Haughton doubted the caſe. And Man Prothonotarie ſaid, that he remembred a preſident in the Caſe, where it was reſolved, that in ſuch caſe deniall of a horſe was a converſion.

Haughton. I remember an action of Trover was brought for a Trunk, and it was ruled there, that if one hath Timber in my land, and he demands liberty, to carry it off my Land, and I deny it, this is not a ſufficient converſion.

Dodridge, there is great difference in the Caſes, for a Horſe or money cannot be known, if they be uſed, but Timber may. Et adjournatur.

Michaelm. 8 Jacobi. Alſo and Dennis againſt Henning. in B. R.

Rot. 969.

IN an action of Covenant, the Caſe was thus. Thomas Tavener by Indenture primo Jacobi, did demiſe land to one Salisburie for 7. years: and by the ſame Indenture Salisburie did Covenant, grant, condeſcend and agree with Taverner his heirs and aſſignes, that he, his Executors and Adminiſtrators ſhould pay to Taverner his heirs and aſſigne 75 l. per annum. And after Taverner demiſed the ſame land, to Mary Taverner for life, and he demiſed the reverſion for 40. years to the Plaintiff, if he ſo long lived, and the tenant attorned, and for rent due at the Feaſt of St Michaell he brought his action of Covenant. And the firſt queſtion was, if this were a ſum in groſs, becauſe the Leſſee covenanted to pay this as a Rent. And reſolved by Cook Chief Juſtice, and the Court, that this is a good reſervation of Rent, for it is by Indenture, and their intention was to have it as a Rent, and the words of the Indenture ſhall be accounted to be his, who may moſt properly ſpeak them. 26 H. 8. 2. 10 Eliz. 275. 22 H. 6. 58. 28 H. 8. 6. And the Caſe between Whitchett

Whitchett and Fox in Replevin this terme, where a man made a Leaſe for 99. years rendring rent, and the Leſſee covenanted by the ſame deed with the Leſſor, that he would not alien without his aſſent upon paine of forfeiture, and after he alienes, and the Leſſor entred And it was held by the Court that this was a condition, although the Plaintiff did covenant: for being by Indenture, they ſhall be the words of both, and the words ſub pœna forisfacturæ are the words of the Leſſor. The ſecond point was, if the aſſignee for 40 years, may have a Covenant, and it was held he might; for it is for payment of rent, and if the Leſſee covenants to do any thing upon the land, as to build or repaire a houſe, there a covenant will lie for the aſſignee by the common Law but if it do not by the Common Law, yet it is cleere that it will lie by the Statue of the 32 H. 8. And the Court held, that an Aſſignee of part of the reverſion might take advantage of the condition or covenants, ſo that he hath part of the reverſion of all the thing demiſed. And Cook, Chief Juſtice ſaid, that the opinion of Mourſon 14 Eliz. 309. a. is good Law.

Paſch. 36 Eliz. Butler againſt. Archer.

IF two Joyntenants be of land holden by Herriot ſervice, and one dies, the other ſhall not pay Herriot ſervice, for there is no change of the tenant, but the ſurvivor continues tenant of the whole land But if a man ſeiſed of land in Fee, makes a feofment to the uſe of himſelf and his wife, and the heires of their two bodyes begotten, the remainder to the right heires of the husband, and the husband dyes, a Herriot ſhall be paid, for the ancient uſe of the reverſion was never out of the husband

Michaelm. 29 & 30 Elizab. Stephens Caſe. in C. B.

IN an Eſcetment, the Caſe was. Sir William Beale made a Leaſe by Indenture to William Pile and Philip his wife, et primogenito eorum Habendum to them and the longer liver of them ſucceſſively during their lives, and then the husband and wife had iſſue a daughter. And it was holden by three of the Juſtices, that the daughter had no eſtate, for that ſhe was not in eſſe, at the time of the grant.

Michaelm.

Michaelm. 30 & 31. Eliz. Lewin againſt Mandy. in C. B.

Rot. 2529.

IN a Replevin the Defendant avowed for 20 l. Rent, which was pleaded to be granted by Lovelace and Rut and by Fine to Stukeley and his heires, who being ſeized thereof, did recite that he with 7 others were Plaintiffs in a Writ of Covenant againſt Lovelace and Rutland, upon which a Fine was levyed, by which Fine the ſaid Lovelace and Rutland amongſt other things, did grant a rent of 20 l. out of the Mannor of D. and other Lands to the ſaid Stukely, who granted it to Hoveden, under whom the Defendant claymes in Taile. The Queſtion was if this were a good grant, becauſe, there are many miſrecitalls in the Indenture: for whereas he recited that in the Writ of Covenant for the fine Lovelace and Rutland were Defendants, in truth they were Plaintiffs, and Stukely and the others Defendants, and whereas he recited that the ſaid grant was made to him, it was made to him and his heires, alſo he ſaid, that the ſaid Rent Charge amongſt other things was granted. whereas nothing but the 20 l. Rent was granted, and that only out of the Mannor of D. and not out of other Lands.

Anderſon. If a man recites that he hath a Rent of 10 l. of the grant of J. S. whereas he hath this of the grant of J. D. yet is the grant good. And at laſt it was adjudged that the grant was good.

Note that Fenner at this time ſaid, that it had been reſolved by Anderſon and Gawdy and other Juſtices very lately. That if the Kings Tenant dies, his heir within age, yet the heir at full age before livery ſued may bargain and ſell by Deed inrolled, or make a Leaſe for years and it is good: but if he makes a feoffment or leavie a fine ſur conuſance de droit come ceo, &c. this is voyd, becauſe it cannot be without inſtruction upon the King.

Trinit. 39 Eliz. Öldfeild againſt VVilmore. in C. B

Rot. 2715.

IN Debt upon a Bond to performe the award of J. S. who did award that the Defendant ſhould pay 10 l. or cauſe two ſtrangers to be bound for the payment thereof, the Defendant pleaded performance, the Plaintiff replyed that he had not payed the money, and the Defendant demurred.

Walmeſley for the Plaintiff. For although the award be in the diſiunctive, yet foraſmuch as it is voyd as to one part, now upon the matter it is ſingle, and on the non payment of the ten pound is forfeit 17 Ed. 4. 5.

Windham and Rhodes, held that the Plaintiff ſhould have pleaded ſo much of the award as was for it is a thing intire, and the Law will

adjudge that one is only to be done, becauſe the other is contrary to the Law.

Anderſon and Peryam. The plea is good, for a man ſhall not be compelled to ſhew a voyd matter, and although the Defendant had cauſed the two ſtrangers to be bound, the obligation is broken, for as to this arbitrement, it is meerely voyd, and at another day the Plaintiff had judgment.

Goodridge againſt VVarburton.

In an Ejectment. The Jury gave a ſpeciall verdict, that Francis was ſeiſed of the land in Tayle, and ſuffered a Recovery to the uſe of him and his heirs, and afterwards did deviſe the ſame lands to his wife Margery untill his daughter Prudence came to the age of 19. years, and then that Prudence ſhould have the Land to her and the heirs of her body, upon condition to pay twelve pound per annum to the ſaid Margaret during her life in recompence of her dower, and if ſhe failed of payment, then Margaret ſhould enter, and hold the Land during her life, and afterwards, it ſhall go to Prudence as before. And after this John Francis the heire did reverſe this recovery, by a Writ of Errour, and entred upon Margaret, and ſhe brought her Writ of Dower, and was indowed of the third part, and then ſhe levyed a Fine of that third part to the ſaid John Francis, and he infeoft Tyndall, who made the Leaſe to Goldſing, and then Margaret marryed Warburton, and Prudence came to the age of 19. years, the Rent of twelve pound is not payd, and Warburton and his wife entred, and Goldſing brought this action.

VValmeſley. By the recovery of the third part in the Writ of Dower, the Rent of twelve pound, which was in recompence thereof is gone. For at the Common Law, if a woman recover in Dower, ſhe hath waived that which was aſſigned to her in lieu of her Dower, as in caſe of Dower ad oſtium Eccleſiæ, and 10 Edw. 4. If the husband diſcontinues the Land of his wife, and ſhe brings a Writ of Dower, ſhe is concluded to have a Cui in vita.

Shuttleworth cont. By this recovery the eſtate taile is revived, yet as this caſe it is is, not materiall, for becauſe he entred without a ſuit, he is a Diſſeiſor, and that was agreed by all at the Bar and the Bench. And he cites 25 H. 8. 3^t. 4^th H. 7. 11. And I conceive that the Dower will not conclude her of the twelve pound per annum, for it is not a Rent, and the title to have the Land for her Joynture for non-payment the Rent was not in eſſe at the time of the recovery of her Dower, but afterwards, as if a Leaſe be made to a woman who marries the Leſſor, who dies within the terme, and the wife enters, this ſhall not conclude her Dower, after the Leaſe is expired by the eleventh of H. 4. Alſo the twelve pound is not appointed to be iſſuing out of the Land, and ſo it cannot be a Joynture, and therefore, the wife is at large to have the twelve pound, and her Dower alſo. But the Court held, that ſhe could not have her joynture, for by the recovery of the Dower her joynture is barred, for the Rent was given her in recompence of her Dower, ſo that it cannot be intended that ſhe ſhall have Rent & Dower alſo, wherefore it was adjudged that her entry on the Land was not good.

30 & 31 Eliz. The King againſt the Biſhop of Canterbury and Hudſon.

Rot. 1832.

IN a Quare impedit, Hudſon the Incumbent did plead, that King Edw. the 4th did grant the Rape of Haſtings, Et bona & catalla Fellonum Fugitivorum & ategat of all Reſidents and non-reſidents within the ſaid Rape to the Earl of Huntington. And pleaded that John Aſhborne was ſeiſed of the Mannor of Aſhborne, and of the advowſon appending to it, and held the ſame of the Earl of Huntington as of his Rape of Haſtings, and that the ſaid John Aſhborn, was outlawed, during which, the Incumbent of the ſaid Church dyed, and the Earl preſented the ſaid Hudſon.

Shut. I conceive this avoydance does not belong to the Earl, by reaſon of this grant, for by the ſame Patent libertie is given to the ſaid Earl & his heirs to put himſelf into poſſeſſion, and of ſuch things as he cannot put himſelf into poſſeſſion, they will not paſſe, and here this is a thing in action, which by theſe words will not paſſe. 19 H. 6. 42. by the grant, de Catalla Fellonum obligations do not paſſe.

VValmeſley, Stanford in his prerogative, ſaith, that by the words, Bona & catalla the King ſhall have the preſentation to the Church of him that is outlawed or Attaint, and by the ſame reaſon he may grant it by ſuch a name, and although the party cannot ſeiſe ſuch a thing, yet it ſhall paſſe 39 H. 3. 35. Rent for years ſhall paſſe by the grant of bona & Catalla.

Periam. It will paſſe by theſe words, for it is an ancient grant, for in that time the Patents, of the King were not ſo ſpecially penned, as now they are.

Anderſon. I conceive the avoydance will not paſſe by theſe words, for within this word bona moveables are contained both dead and living, and Avoydance is no Chattell nor right of Chattell. Quod Peryam negavit, &c.

Mich. 37 & 38 Eliz. Townſend againſt VVhales.

IN an Ejectment, the Jury found that J. S. was ſeiſed of land in poſſeſſion, and alſo in reverſion for terme of life, and made a Deviſe by theſe words, That his Executors take the profit of all his Lands and tenements Free and Copy, for ten years for the payment of his debts, and Legacies, and after the end of the ſaid ten years, that all the aforeſaid lands and tenements with their appurtenances, ſhould be ſold by his Executors or one of them, and the ſilver to be beſtowed in the performance of his Will, or by the Executors of his Executors, or any of them, and then one of the Executors dyed within the ten years, and the two ſurviving Executors did grant all, aſwell in poſſeſſion as in reverſion to Houſe, who made a Leaſe to the Plaintiff. And two points were reſolved.

1. That the Executors may grant the reverſion (34 H. 6.) for by theſe words (Free and Copy) his intent appears, that all ſhould be granted.

2. That although one of the Executors died, yet the other two Executors may ſell.

Anderſon. If ſuch deviſe had been at the Common Law, and one Executor had refuſed, the two others could not ſell, but if one die, the ſurvivors may ſell the land, for there the authority doth ſurvive. Which difference the other Juſtices agreed to. And at another day Anderſon ſaid, there was difference, where the Deviſe is, that Executors ſhould ſell his and the money divided between them, there if one die, the others ſhall not ſell, but otherwiſe here, becauſe the money is the performance of his will.

Walmeſley. The ſale by the two Executors is good, for it is ſaid; the Executors or any of them &c. And Beaumond agreed, Wherefore judgment was given for the Plaintiff. Note that there were two verdicts in this caſe, and the firſt only found, that the Executors ſhould ſell after the ten years, and that one dyed, and the other two did ſell within the ten years, and the opinion of the Court was that the ſale was voyd but in the 39 and 40 Eliz. all the whole will was found and Judgment given ut ſupra.

The Earle of Rutlands Caſe.

ROger Earl of Rutland, and John Manners and others Executors to John late Earl of Rutland Executor to Edward Earl of Rutland, brought an action on the caſe againſt Isabell Counteſs of Rutland. And Declared for divers Jewells and goods, &c. that came to the hands of John Earl of Rutland as Executor to the ſaid Edward, and the ſaid John the 10th of July 29 Eliz. did caſually looſe them, which after came to the hands of the Defendant, & licet ſæpius requiſita, ſhe would not deliver them to the ſaid John in his life time, nor to the ſaid Plaintiffs after his death, but knowing the goods did belong to the Plaintiffs in D. in the County of Nottingham converted them to her proper uſe. And a verdict for the Plaintiff. And it was moved often in arreſt of Judgment, but all the Juſtices agreed, that the action of Trover and converſion would lie by the Executors upon the Statute of the 4 Ed. 3. upon a converſion in vita Teſtatoris, and ſo hath it been adjudged in the Kings Bench, and although the Statute mentions onely a Writ of treſpaſs, that is only put for example. Alſo they all agreed, that the ſole cauſe of action is the Converſion, for if there were no converſion, they ſhall be put to their Detinue, therefore the great doubt did ariſe becauſe the day and time of the converſion was not ſhewed, for perhaps it was after the Writ and before the Declaration: And alſo if it was in vita Teſtatoris they ſhould have this action by the 4th of Ed. 3. But at length Walmeſley ſaid, That all Juſtices of the Common Pleas and of Serjeants Inne in Fleet-ſtreet (beſides Peryam Chief Baron) were of opinion that Judgment ſhould be given for the Plaintiffs, for that ſome of them held, that the day of the Converſion is not materiall to be ſhewn, and others that of neceſſity as this caſe is, it ſhall be intended that the converſion was in the Plaintiffs time, wherefore Judgment was entred for the Plaintiffs, but a Writ of Errour was brought, and the Caſe much debated.

Mich-

Michaelm. 38 & 39 Eliz. Carew againſt Warren. in C. B.

Rot. 1945.

GUnter Tenant in Talle of Lands in antient Demeſn made a Leaſe for 60. years to J. S. and for ſecurity thereof levied a Fine to Lee and Loveland, who rendred to Gunter in Fee, who deviſed the reverſion to his wife for life the remainder in Fee and dyed. And then the Lord of Andover, (which is an ancient Mannor) by an Oſtenſum eſt nobis, returned in the Common Bench againſt Lee and Lovelace, upon a ſcire Facias awarded againſt them. and two Nihils return'd, the Fine was reverſed.

Anderſon. The ſcire Facias is not well awarded, for it ought to be brought as well againſt thoſe in poſſeſſion, as the Conuſors, and this appears by the 21 Ed. 3. 56. by which they in poſſeſſion and thoſe in remainder ought to be made privy.

Walmeſley agreed, for the Freehold, which is in me ſhall not be taken from me without making me privie, no leſſe, then if A. bring a Precipe againſt B. of my land and recover, for I ſhall have an Attile upon this. Alſo another matter is in the Caſe. For the land now in queſtion is alledged to be parcell of the Mannor of Andover, and therefore cannot be ancient Demeſne. But no Judgment was at this time given, becauſe there were but two Juſtices.

Halling againſt Comand.

IN an action of Covenant, the caſe was thus. Comand the Defendant did covenant with the Plaintiff, that at the Coſts and charges of the Plaintiff he would aſſure certaine land for the Joynture of the Plaintiffs wife before Michaelmas. And the Plaintiff declared that no aſſurance was made, nor tender before the ſaid Michaelmas. And hereupon the Defendant demurred, for that the charges ſhould have been offered before the aſſurance, 3 H. 74. 23 Eliz. Dyer. Anderſon in the 35 & 36 Eliz. Foſter did covenant with Franke to make an aſſurance at the coſts and charges of Franke, and Franke brought a Covenant, and Foſter Demurred becauſe no charges were tendred to him, & it was adiudge againſt Foſter, for Franke could not have cognizance what manner of aſſurance ſhould be made, and ſo could not tell what charges to tender, and therefore he ought firſt to ſhew him what manner of aſſurance he ſhould make, and according to that he ought to tender reaſonable Charges.

Walmeſley. But the charges ought to precede the aſſurance, but the declaring of what manner of aſſurance ſhould be made ought firſt to be done. Beaumond of the ſame opinion.

Michaelm. 38 Eliz. Damport againſt Sympſon.

IN an action on the Caſe, the Plaintiff declared that he had given to one Spilman certain Jewells to Traffique with them beyond the Seas, and that he had not ſold them, but had delivered them to the Defendant, who had ſpoild them, whereupon the Plaintiff brought an action againſt the ſaid Spilman, and upon not guilty pleaded they were at iſſue: and the now Defendant at that evidence did Depoſe upon his oath, that the Jewells were worth but 200 l. whereas they were worth 800l. by reaſon whereof the Jury gave indeed but 200 l. damages, and for this falſe oath he brought this action: and the Jury upon not guilty pleaded, found for the Plaintiff, and aſſeſſed 300 l. damages. And now it was moved in arreſt of Judgment that the action would not lie, no more than againſt thoſe informe a Juſtice of Peace of Felony upon his oath againſt J. S. 20 H. 7. 11. Alſo the party grieved hath his remedy in the Star-Chamber. And Walmeſley ſaid that for perjury there was no remedy, and ſo is it in the 7th Eliza. Dyer 243. a. for it is not to be thought that a Chriſtian would be perjur'd, and in the 2d H. 6. 5. a Conſpiracy will not lye againſt Indictors, who informe their company of their oath. Wherefore, It was adjudg'd that this action did not lie. Note that Anderſon was againſt this Judgment: but Walmeſley Owen and Beumond were againſt him.

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FINIS.