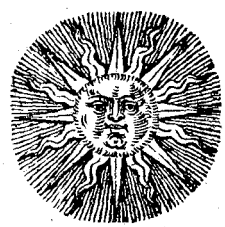
THE
REPORTS
of that Learned
Sir HENRY HOBART
Knight: late *Lord Chiefe Juſtice* of his
MAIESTIES Court of Common Pleas
at Weſtminſter.

Reſolved and Adjudged by himſelfe
and others the Judges and Sages of the
Law renowned for that Profeſſion
in his time.



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REPORTS
OF
Sr: HENRY HOBART
Lord Chiefe Iuſtice of the Common Pleas.

I. *Richard Earle of Clanrickard, and the Lady Francis his wife, againſt Robert Sidney.*

Suſſex. Mich. 11. Iac. rot. 66.

RIchard Earle of Clanrickard and the Lady Francis his wife brought a Formedon in Reverter, to the Wife only, vide Caſe. Formedon in Reverter againſt Robert Sidney Viſcount Liſley of diuers meſſuages, lands and tenements in Eirhirſt Watlington; and other Townes which Robert Earle of Eſſex and the ſaid Francis then his wife by fine, did give unto William Gerard and Francis Mill, and the heires of the ſaid William to the uſe of Elizabeth Sidney, daughter & heire of Sir Philip Sidney knight, and of the heires of her body, and for default of ſuch iſſue, to the uſe of the ſaid Lady Francis, and her heires: *Et quod poſt mortem pred. Eliz. ad prefatam Franc. revertere debent per formam donationis pred. ac vigore ſtat. &c. eo quod pred. Elizabetha obiit ſine hæred. de corpore ſuo exeun.*

Whereupon the ſaid Earle and Counteſſe counted accordingly, and the Viſcount Liſle defendant, pleaded in abatement of the writ, that the ſaid Counteſſe, at the time of the death of the ſaid Elizabeth was covert of the plaintife her now husband, ſo that the right of the ſaid *Tenements, ſi quod, &c.* to her husband and her did revert, and ſo by the ſaid writ it ought to have ſuppoſed,

Demurrer. 'whereupon the demandants demurred in law, and it was adjudged 'for them that the writ was ſufficient.

Differences. 1. And in the caſe, theſe differences were obſerved; that if it were Formedon in deſcender, upon a diſcent to the wife, there the diſcent muſt be made in the writ to the wife alone, for the deſcent followeth the bloud: and to that the husband is a ſtranger, and ſo is the booke of 19. H. 6. 4. 6. and 35. H. 6. fo. 10. 13. where a formedon in diſcender was brought by two husbands and their wives onely, and yet concluded, that the right ought to diſcend to the husbands and their wives, and exception taken with it, and ordered by the Court, that it ſhould be amended, and the diſcent made onely to the wives, one other in *ceſſavit* by the husband and the wife, or a writ of eſcheat or a *Conſimili caſu* or action of waſte, becauſe there is veſted in them already either a ſignory or reverſion actually, and therefore the land holden, or the preſent eſtate to returne is come into poſſeſſion, therefore in thoſe caſes, the Reverter is to be made to them both, and ſo are the bookes, 3. H. 6. 2. 20. E. 3. 372. regiſter 238. Nat. Br. 210.

19 H.6.4.6. 35.H.6.fol.10 13. 2. 3 H.6.2.20.E.3 372.Reg.138. Nat.Br.210.

But now in Formedon in reverter, wherein nothing is already inveſted but the right onely returnes, there the right may be laid to returne either to the wife alone, or to the husband and wife, as *Danby* reſolves plainly in 33. H. 6. fo. 34. vide *quelque ſoit al femme quelque ſoit tant al baron & femme*, 18. H. 6. 20. 3. H. 5. 15. 13. 38. E. 3. 16. & 18. E. 3. 3. *Report de R. Thorpe & ceo cas d'vn carbonell breve fait abate pur ceo & le Reverter fuit mis tant al baron & femme.*

33 H 6.fo. 34. 18 H.6.20. 3 H.5.15.13. 38E.3.16. 18 E.3.3.

Do plus Do ceſt ſes fol 381.

II. *Walter Widlake* Verſus *Harding*.

Trn's. *Somerſet.* Hill.8.Jac. rot.2069.

WAlter Widlake brought an action of treſpaſſe againſt 'Agnes Harding, for taking of a Porringer at *Baſſing*-'ton. The defendant pleaded, that one Iohn Francklin, 'was ſeiz d of an houſe and land in Baſſing in fee ſim-'ple, holden in ſocage and leaſed it to the plaintiffe for 99. yeares, 'yeelding ſeaven ſhillings a yeere rent, quarterly by even portions: 'and after by his will did deviſe the reverſion to Agnes Harding and 'her heires in fee ſimple; and that for a quarters rent behinde, ſhee 'diſtrained the porrenger in the houſe deviſed: the plaintiffe con-'feſſed the ſeiſin of Francklin, and the leaſe to himſelfe, and the 'death of Iohn Francklin, conveyed the reverſion to Edw. Franck-'lin, by deſcent, and traverſed the deviſe to the defendant, *modo & 'forma*. The Jury ſaid that Iohn Francklin did deviſe the houſe and 'land to Agnes in theſe words, viz. Item, I doe give & bequeath un-'to my coſin Agnes my now dwelling houſe, with all the lands,

Deviſe to A. for yeares, and the Inheritance in fee.

ninety

"nintynine yeares, And my ſaid Coſen Agnes Harding, ſhall have all "my Inheritance, if the Law will allow it. And they found the rent "behind, and that ſhee had diſtrained the diſh for the rent, and it was adjudged for Agnes *Harding*, that the deviſe gave the land to her and her heires. Judgement.

III. *Incerti nominis & temporis.*

MOnſieur Coke chiefe Juſtice, *reporta ceux points in Capias in Banco Regis*, That when two are bound in obligation joyntly and ſeverally, and the Obligee ſue one of them in the Common place, and the other in the Kings Bench, and had againſt him in the Kings Bench *a Capias*, and tooke him in execution, and after tooke an Elegit againſt the other, and had lands and goods delivered in execution, he might well, that thereupon the other in execution by his body, had an *Audita Querela* and was delivered, and becauſe the Judgement in that caſe muſt be, that hee be diſcharged of the execution, he ſhall never be taken againe, though the land taken in execution be evicted. Ba le Roy. Divers Executions upon divers and ſeverall obligations

And he ſaid alſo, that if an Elegit be ſued out and entred of record, though he get nothing for it, yet he ſhall never have other execution, till ſomewhat be found, and therefore no man will record the execution, untill ſomewhat be found; For it is no election of nothing. And as the record ſaith, that he did chuſe, which is not the writ, but lands and goods, For the ſame record upon the returne aſſures, that there are neither, and therefore all idle. Elegit peremptory.

III. *Iohn Thomas* Verſus *Axworth.*

Caſe Paſ. 11. Iac.

"IN an action upon the caſe in the Common Pleas, by Iohn Thomas an Attorney againſt Axworth for theſe words, this is *I. Thomas* his "writing *innuendo* the plaintife, & he *innuendo &c.* hath forged this "warrãt *Quoddã warrantũ per quendã Richardũ Butler Mil. tunc vic. Com. præd. exiſten. ſuper quoddam breve de Capias per quandam Margaretam Hog verſus præf. def. extra Curiam de Banco proſecut. eidem Vic. direct. innuendo*, upon not guiltie found for the plaintife, & found in arreſt of judgment, that the innuendo would not ſupport the Action, the word warrant alone being of uncertaine ſenſe, and the matter of the Action ſhall not be enlarged nor aſcertained by the *Innuendo* as *Pox innuendo* the French Pox, of which opinion I was & am; and note that after in Trinity terme, in the caſe of Yardwell Com. Pleas Paſche 12. Iac. Rot. 352. Innuendo will not inlarge words.

and Eltill, this caſe was touched as adjudged according to my opinion by Juſtice Nicholls and Winch, But it was not adjudged, but that ſhewes their opinions were concurring with me.

IV. *Yong* Verſus *Radford.*

Ejectione.

Pas. 11. Iac. Rot. 5. Brownlow.

EJectione firme by Charles Yong againſt Robert Radford, of a houſe and Garden in Long-ditch in Weſtm. of the demiſe of *Anne Holland* upon iſſue, not guilty by ſpeciall verdict, the caſe was found thus.

The wifes leaſe mortgaged by her husband.

"Elizabeth Radford was poſſeſſed of of a leaſe of the lands "in queſtion of the demiſe of y^e Deane and Chapter of Weſtmin- "ter, for thirty one yeares beginning the third of December 25. "yeere of the Qucene, and married one Iohn Holland, and then he "and his wife mortgaged their intereſt, and terme of yèares unto one "Iohn Emerſon, for payment of two and twenty pound, "and after and before the day of payment Elizabeth dyed, and Iohn "*Holland* the husband paid the money at the day, in redemption of "the mortgage, and entered and made *Anne* his wife his Executrix, "who entered, and then *Radford* tooke adminiſtration of the goods "of Elizabeth the wife of *Holland*, and entered upon the Leaſee, "upon whom the ſaid Anne reentred, and made the Leaſe unto "Yong the plaintife, who entered and was poſſeſſed, till the defen- "dant *Radford* ejected him. And it was adjudged that the plain- "tife ſhould not recover by our uniforme opinion. The Judge-

Iudgement.

ment was pronounced 12. the reaſon was, that though the leaſe was at the firſt the wives, and that the husband was poſſeſſed in her right, ſo as though he had purchaſed the Fee ſimple, the leaſe had beene extinct, yet by the entermarriage he hath full power to alien it, And if he ſurvive his wife, he is to enjoy it, her Executors or Adminiſtrators; ſo here when he ſurvives, the conditions revive to him, & reſtore him to the leaſe in ſtate as it ſhould have beene it it had not been aliened. Like to the caſe of 36. Aſſi. plaintife 25. where the husband and the wife, and a third perſon purchaſe lands joyntly, the husband aliened the whole. and then hee and his wife dyed, the third perſon ſurviving had an Aſſize of the whole. And the ra-

9. h. 7. 25.

ther here becauſe the husband paid all the money after the death of the wife; like the caſe 9. h. 7. 25. agreed in Shellies caſe. If a man make a feoffement of lands upon condition, that if the Feoffor or his Aſſignes pay ten pound that he may reenter, and dye, leaving a daughter who paid the money and enters, and then a ſonne is borne, yet the daughter ſhall retaine the lands, *for qui ſentit onus, ſentire debet commodum.*

Pincombe

V. *Pincombe* Verſus *Rudge.*

Covenant:

"AMy Pincombe and others plaintifes brought an accon of covenant againſt Iohn Rudge, and declared that *Rudge* the "defendant by his indenture dated 30, Octobris 32. Eliz. did demiſe unto them all his lands in South Molton in the County of D. by theſe words *Dedit, conceſſit, dimiſit & confirmavit* unto the ſaid plaintife *Habend. & tenend.* for their lives, rendring 30 pound a yeare rent, with this expreſſe clauſe of warranty following, and the ſaid Iohn *Rudge* and his heires all the ſaid premiſſes unto the ſaid Amy &c. againſt all perſons, claiming by from or under the ſaid Iohn his Anceſtors, or his heires ſhall and will warrant, acquite and defend, during the terme aforeſaid. This is a grant of a reverſion upon an eſtate for life, made to one Iohn Pincombe and others in 15. of the Queene, by the ſame Iohn *Rudge*, who did atturne the grant to Amy and others. And the ſame Iohn *Rudge* in the 30. yeare of the Queene had demiſed the premiſſes, unto one William *Hunt* for terme of yeares to begin after the death of the ſaid Iohn Pincombe and others. After all this, Iohn Pincombe the laſt tenant for life dyed, Amy Pincombe and the other grantees of *Reverſion*, entered, upon whom William *Hunt* entered, whereupon they brought their Action of Covenant againſt Iohn *Rudge*, and laid their dammage of two hundred pounds, the defendant pleaded in barre, that the plaintife had formerly brought a *Warrantia Charte* againſt him upon the warrantie aforeſaid for the ſame lands, and that it was yet hanging, and undetermined, whereupon the plaintife demurred in law, and judgement given for him and dammages and Coſts 28. pounds 6. ſhillings 8. pence, whereupon Rudge brought a writ of Error, in the Exchequer Chamber, and the onely queſtion was, whether upon this clauſe of warrantie well annexed unto a freehold, an action of covenant to recover dammages could be grounded. And it was agreed by all the Judges in the Exchequer Chamber, That this action of covenant will not lye, becauſe that though the warrantie was annexed to a freehold, yet the breach and impeaching was not of freehold, but of Chattell (that is to ſay) of a leaſe for yeares, for which there could neither be a voucher, Rebu ter, nor *Warrantia Charte*, ſo that though there had beene a judgement in the *Warrantia Charte* in this caſe, yet neither upon entry, nor upon recovery in Ejectione firme upon this leaſe, there could be neither voucher, nor Rebu ter, nor value upon the *Warrantia Charte*, and therefore a reall *Warrantie* is a covenant reall, when the freehold is brought in queſti-

Devon.

Hilb. 5. Iac. Rot. 94. B. Regis & Excheq. Cham. Mich. 11 Iac.

Action of covenant upon a warranty reall.

V. Caſe.

Error.

Queſtion.

on. But when a leaſe is in queſtion, or any other loſſe that doth not draw away the freehold, it may not be uſed as a perſonall covenant, whereupon dammages may be recovered, ſo it is both a reall and perſonall covenant to ſeverall ends and reſpects. And ſo it was adjudged for the defendant upon the writ of error. But another error was aſſigned, that there was not averrement that there were any lands in S. in the tenure of I. L. It was anſwered that it appeared ſufficiently that there were ſome. And that the declaration laid that he did deviſe, and that the tenant for life was ſeized, and that Hunt entred, and ſo of the other entries. By all which it appeares that there was ſome land. And if there were any land it is well enough, though it be not certaine what or how much, becauſe there was no land to be recovered, but damages only. And the aſſeſſing of damages proves alſo that there were ſome lands.

Iudgement. Error affirmed 2 Error.

VI. *Muſgrave* Verſus *Wharton.*

EDward Muſgrave had judgement againſt Thomas Wharton, Adm. of Edward Muſgrave of two hundred pounds, and the action was laid in the County of Cumberland. Afterwards the plaintife upon the ſame judgement brought a Scir. fac. in Weſtmerland and had judgement upon two nihils. And now upon a writ of error that judgement was reverſed in the Exchequer Chamber. For a Sci. fac. muſt be brought in the ſame County where the firſt Action was laid.

Error. Chec. Chamb. Weſtmerl. Trin. 9. Iac. R. 305. ſci. fac. muſt be where the firſt action was laid.

VII. *Lane* Verſus *Mallory.*

"RObert Lane brought an Aſſumpſit againſt Henry Mallory, "and ſhewes that William Mallory, father of the ſaid Hen- "ry deceaſed, was indebted unto the plaintife in two hundred "pounds, and that Sir Iohn Wentworth, and Sir Thomas Mildmay "were bound unto the ſaid William Mallory by two ſeverall ſtatute "ſtaples in two hundred pounds. And that the ſaid William Mal- "lory did deliver thoſe ſtatutes unto the ſaid plaintife to the intent "that he might be ſatisfied of the ſaid two hundred pounds due un- "to him by the ſaid Mallory, by force whereof he was poſſeſſed of "the ſaid ſtat. And the defendant Henry Mallory pretending him- "ſelfe to be executor to William the Father, in conſideration that "the plaintife at the ſpeciall inſtance of the defendant would deli- "ver unto him the ſaid ſtatute, he did promiſe to pay unto him "fifty pounds at one day, and fifty at another, and averres that he de- "livered

Aſſumpſit Chec. Chamb. London.

Paſſ. 11. Ia. Ro. 525. conſideration where one takes loſſe.

" livered the ſtat. and the defendant paid him forty pound of the firſt fifty pound, and the reſt he hath not paid upon iſſue *non aſſumpſit*, it was found for the plaintifes damages were one hundred eighty pounds, who had judgement in the Kings Bench. And now a writ of error being brought in the Exchequer Chamber, the judgement was affirmed. For though it doth not agree (*apparet*) that the defendant was but pretended only to be executor, and ſo could make no profit of the ſtat. yet becauſe they were delivered to the plaintife with intent to procure him ſatisfaction ſo as he might cancell them or take compoſition for them, and that at the inſtance of the defendant, and in hope of his promiſe he did deliver them out and deprive himſelfe of that meanes, it is a ſufficient conſideration.

VIII. *Gardiner* Verſus *Bellingham*.

Aſſumpſit. *Surrey.* Trin. 10. Jac. R. 492. B. le Roy Exchec. Ch.

In aſſumpſit for debts what certainty is requiſite.

" RIchard Gardiner brought an aſſumpſit againſt Thomas Bel-
" lingham and declared that the defendant in conſideration
" that he was indebted unto the plaintife in ten pounds foure ſhil-
" lings ten pence, for agiſtm. and feeding of certaine Beaſts of his
" in the plaintifes grounds and for wheat *& aliis mercimoniis per*
" *prædict. R. habitis & receptis*, did aſſume to pay to the plaintife the
" ſaid debt, that he hath not paid it. Vpon iſſue *non aſſumpſit* it was
" found for the plaintife, and ſeventeene pounds five ſhillings foure
" pence damages and coſts upon this writ of error, brought in the
" Exchequer Chamber, the error aſſigned was, that there muſt be
" ſome certaine cauſe of the debt aſſigned. For it is no ſufficient de-
" claration to ſay where the defendant was indebted to the plaintife
" in ten pounds and promiſed to pay it, but not ſufficient to ſay ge-
nerally that he was indebted, becauſe that may be for rents upon leaſes or debts upon ſpecialties, yet this is certaine enough, for as well the wares and merchandizes as the paſturing and wheat are perſonall things for which an aſſumpſit may lye, and may be turned into damages, and it requires not ſo much certainty, as if it were an action of debt upon the very contract.

IX. *Wilkes* Verſus *Iorden*.

Ejectione.

Salop. Error by the death of one not party to the writ.

" THomas Wilkes brought an ejectione firme againſt Rowland
" Iorden upon a demiſe made of certaine (*lands*) in Wharton Aſton by
" Edward Bridgeman upon iſſue not guilty, it was found for the
" plaintife, and judgement given that he ſhould recover the poſſeſsion
" of his Terme, and eighteene pound damages and coſts. Hereupon

error

Error in fact out of the Kings Bench.

'error assigned was that Edward Bridgeman was seized but in the 'right of Elizabeth his wife, and that he was dead before the day 'of the judgement, and so the lease determined. And therefore judgement to recover the terme erronious. It was overruled and judgement affirmed, for though it were agreed, that in the Exchequer Chamber judgement may be reversed for errors in law, as death of the parties. or the like, where the writ is absolutely abated, there is no colour in this case where the error depends upon the death of one that is not party to the suit, and upon the title of the land, for the defendant may say that Bridgeman was seised in his own right or the like, which was to re-examine the whole title in the writ of error.

Debt.

X. *Crow* versus *Edwards*.

London. B. le Roy. Exch. Cham. Pas. 7. Iac. Rot. 447. Wrong visne by consent. Visne from Towne or parish in the record.

'RObert Crow brought an action of debt upon an obligation 'of sixty pounds against William Edwards, for the payment 'of thirty one pounds ten shillings at Coventry, issue taken that the 'money was paid at Coventry, and yet by consent of parties and 'rule of Court, the issue was tryed at London and found for the 'plaintife and judgement given, and upon judgement a writ of er-'ror brought in the Exchequer chamber of the judgement reversed; 'for consent of parties may not change the law.

Case.

XI. *Miles* versus *Jacob*.

B. le Roy Exchequer Cha. Innuendo Thou hast poysoned Smith.

'EDward Miles brought an action of the case against Francis Ja-'cob for these words, Thou Innuendo, &c. hast poysoned 'Smith *quendam* Sam. Smith *adtunc defunct. innuendo*. And it shall 'cost me a hundred pounds but I will hang thee for it. And further declared that the defendant of meere malice at the next Assizes and Goale delivery holden at Bury, procured him to be falsely indicted that he had given poysoned drink to Smith, to the intent to poyson him, whereof he dyed. Whereupon Miles was afterwards acquitted. Upon issue not guilty it was found for the plaintife & damages severally for the words, and judgement, seven pounds a peece, and foure pound costs entire, whereupon Miles had judgement to recover the said damages and costs. And upon a writ of error in the Exchequer Chamber, it was adjudged that the words could beare no action for divers reasons. For it doth not appeare by the words that he poysoned him wittingly, neither that Smith was dead at the time of the words spoken and the Innuendo for that purpose is no

Damages severall and costs intire.

sufficient

sufficient averrement, but for the Indictment it is adjudged that the Action will not lye, so that for the damages, for the words being severall the judgement being reversed for that part failed. But the judgement for the indictment together with the damages was affirmed, also for all the costs, because there was just cause of suit which warranted the costs though part of the suit was without cause.

Costs entire though part of suit without cause.

XII. *Brooks* versus *Spencer*.

Trespasse.

Southhampton. B. le Roy. & L.Ex. Ch.

'William Brooke brought an action of tresp. against John 'Spencer for cutting downe of certaine Oakes, carrying a'way of timber at Hursley. And in the new assignement layes it in 'a Close called Newlands in Hursley aforesaid. To this the defen'dant pledeth that New lands was customary lands of the Manor of 'Marden in the Parish of Hursley aforesaid. And that there is a cu'stome within the said Manor of Marden that the Copyhold tenants 'of the same tenements might fell timber, &c. And the Plaintife 'traversed the custome, and it was found for him damages and costs 'eleven pounds in the Kings Bench. Then dyed Brook the plain'tife & Spencer brought a writ of error against Sir Thomas Savage, 'and others his executors, and one error assigned was, that the *ve'nire fac.* for triall of the custome was *de vicineto de Hursley*, and not '*de vicineto parochie de Hursley*. But all the Judges in the Exchequer Chamber overruled it to be good enough, for since it was first laid that the trespasse was done at Hursley which shall be understood a Towne, and then the defendant speakes of the Parish of Hursley aforesaid, they shall be understood all one, for two former judgements were cited according for the word aforesaid I couples them.

Hilar.8.Iac. Rot. 538. Visne whether from the Town or Parish.

XIII. Walsley versus *Wray*.

Error.

'And the very like was adjudged at the same time in the Exche'quer Ch. betweene Alice Walsley plaint. and William Wray 'Baronet, defendant, in a writ of error, in an action for grinding of 'corne at other Mils contrary to the custome, and the difference 'was, that in the pleas there was mention of Liskariad, and the Pa'rish of Liskariad. And the Venire fac. was *de vicineto* of Liskar'red, and judged good enough for the reason aforesaid.

Hillar.9.Iac. Cornub. B.le Roy. Et Exch. Ch.Hil.9.Iac. Rot.691. Visne whether from Towne or parish.

Nota, that both the towne and parish are upon record, I hold that it would be a fault to take the visne for the other, for it hath no warrant from the Record.

XIV. *Spendlowes* verſus *Burket*.

Treſpaſſe.

Not. Tr. 11. Jac. Rot. 346.

'IOhn Spendlowes brought an action of Treſpaſſe againſt Rich-
'ard Burket for breaking of his Cloſe and taking away twenty
'foure Lambes and certaine cartloads of Hay, Rye, Barley, Oates,
'Peaſe, and Wheat, and certaine ſtones of Wooll. In pleading upon
'Demurrer the caſe was thus, Robert Creſſey being Prebend of the

Leaſe by a Prebendary is totally defeated by his Succeſſor.

'Prebendary of Palderton and Farrington in the Church of the
'bleſſed Virgin Mary of Lincolne, was ſeaſed of the Rectory of
'Palderton with the appurtenances in his demeaſne as of fee in the
'right of his ſaid Prebendary, and ſo ſeiſed the twenty day of Fe-
'bruary, 13. *Eliz.* did demiſe the ſame Rectory by Indenture unto
'Sir Iarvaſe Knight, and George Clifton Eſquire for ſeventy years,
'then Thomas Biſhop of Lincolne who was Patron of the ſaid Pre-
'bend and Ordinary in the ſame Dioceſſe granted the next avoyd-
'ance of the ſaid Prebend unto one Humphrey Toy, 5 April, Anno
'1571, which grant was confirmed by Iohn Whitgift Deane and
'Chapter of the Cathedrall Church of the bleſſed Virgin Mary of
'Lincolne, the third day of Auguſt 1572. After which the ſame
'Thomas Biſhop of Lincolne, 20 die Iulii An. Reg. Eliz. 16. did
'confirme the leaſe made by Creſſey unto Sir Gervaſe and George
'Clifton, and the Deane and Chapter did likewiſe confirme it the
'18 day of September in the ſame 16 yeare: the ſame Robert Creſ-
'ſey being ſtill Prebend and alive. Then dyed Creſſey the Preben-
'dary in the 14 yeare of the Queene, and the next avoidance being
'brought downe unto one Thomas Fiſher and Raph Boyler Eſq;
'they preſented unto the ſame Prebendary Iohn Prat Clerk, who
'was admitted, inſtituted, inſtalled and inducted into the ſame. And
'after that the ſame Prat entered into the ſame Rectory, and was
P. 12. Jac. 'thereof ſeaſed in his demeaſne as of fee in the right of the ſaid
'Prebendary. Then dyed Thomas *Biſhop* of Lincolne, and Wil-
'liam Chatterton ſucceeded him, then dyed Prat the Prebend 7
'Sep. 1607. After whoſe death Chatterton the Biſhop did collate
'the ſame Prebendary unto one Thomas Burton, whom he cauſed
'to be inſtituted and inducted into the ſaid Prebendary, who entred
'into the ſaid Parſonage and leaſed the ſame 4 Ianu. An. Regis *Iac.*
'8. unto one Anthony Ward for five yeares, from the feaſt of Saint
'Martin then paſt. And then this leaſe was conveyed unto Spend-
'low, who entred upon *Burket*, who as ſervant unto Henry Carvill
'claimed under the leaſe made by Creſſey unto the Cliftons entred
'unto a cloſe being glebe and took the Lambes and corne being
'Tythes of the Parſonage of Balderton aforeſaid whereupon Spend-
'low brought his action of treſpaſſe. And

And now it was adjudged Paſch. 12. of the King, that the plaintife ſhould recover, for though the leaſe made by Creſſey for ſeventy yeares was not yet expired in time, and though Burton the Prebend came in after and under the confirmation of the leaſe, yet Prat the Prebend before him came in by the grant of the next avoidance by a grant made confirmed and perfected before the confirmation of the leaſe, and ſo conſequently was not ſubject unto it, and then when he entred upon the parſonage, he was ſeaſed in his demeans as of fee, and ſo did defeat the leaſe totally, ſo as it could never revive or take place againſt any ſucceſſor whatſoever, upon which reaſon there is a large diſcourſe in the Earle of Bedf. caſe, Co. l. 7. fo. 8. And though Littleton ſeemes to be of opinion that the perſon hath not the right of fee ſimple, he doth expound himſelfe as to the bringing of the writ of right, but otherwiſe the act of the patron is, as it charges or gives. And it ſufficeth that the Patron or Ordinary do either licenſe or aſſent. And therefore 6 E. 6. Dyer 69. If a Parſon make a leaſe or charge his glebe to begin after his death, and the Patron and Ordinary confirme it in his life, this ſhall binde his ſucceſſors.

Coſts intire though part of the Action faile.

Co. lib. 7. fo. 8.

XV. *Baker* verſus *Spaine.*

Debt.

'WIlliam Baker brought an action of debt upon an obligation of fifty pound againſt Simon Spaine. The condition was, 'that this defendant ſhould obſerve, performe, fulfill, pay, and keepe 'all and ſingular the covenants, graunts, payments, and agreements, 'expreſſed and contained in one paire of Indentures bearing date, '&c. The defendant pleads the Indenture, being an Indenture of 'leaſe and pleads generally the performance of all covenants, &c. 'The plaintife aſſignes the breach for non payment of a halfe yeares 'rent being thirteene pound ten ſhillings at our Lady day 9. Iac. 'the defendant rejoynes that the plaintife entred into the lands de'miſed before the ſaid feaſt ſc. 24. die Martii Anno Regis 9. Whereupon iſſue was taken, and it was ſaid in arreſt of judgement for the plaintife that there was no breach laid, becauſe there was no demand of the rent alleaged. And the reſt of the Iudges ſaid that it was no fault, becauſe the iſſue did not ariſe upon the rent not paid, but upon a Collaterall point that did admit the rent not paid, becauſe by the entry it was made not payable. But I hold that in this place the breach was plainly made in the replication when the plaintife ſaid that the rent was behinde, which implies that it was demanded and not paid, for in ſuch caſe the plaintife never pleads that he did demand it, and it was behinde. But if it were not indeed

Kanc. Com. Pleas Hil. 11. Jac. Rot. 3139.

Rent pleaded behind it needs not expreſſe demand expreſſly.

It is otherwiſe juſtifying of Entries for now payment of rent.

demanded then after the plaintife hath pleaded the rent behind, which is true *prima facie*, then the defendant rejoynes that he was there ready to pay it, and no man did demand it, and ſo the demand comes in iſſue, and ſo Judgement was given for the plaintife. And in this caſe Juſtice Warberton ſaid, that it was reſolved in a former caſe in this Court betweene that where a rent was reſerved upon a leaſe, & the leſſee bound by obligation to pay it, that now the leſſee muſt not pay it without demand, but he is not bound to ſeeke the leſſor, but to tender it upon the land, for hee hath bound himſelfe to pay it, but ſtill as a rent, and where the law will.

Judgement.

Bond to pay that it muſt be tendered upon the land but as rent.

XVI. *Caſe of Eſſoignes.*

Partition. Incertinominis.

Eſſoignes in writs of partition ſeverall.

Weſt. 1. ca. 42.

A Writ of partition was brought againſt three, whereof one was eſſoigned, and the other two likewiſe would caſt ſeverall Eſſoignes. the demandants Counſell ſaid that they could not have ſeverall Eſſoignes, becauſe that the ſtat. of Weſtm. 1. cap. 42. hath provided, that many Tenants ſhould have but one Eſſoine, as if they were but one Tenant, whereupon I looked upon the ſtatute in court, and ſaid that I was of opinion, that that ſtatute was not to bee underſtood of a writ of partition where nothing is in queſtion, but the diviſion of the land, but where the right of the land was in queſtion. And that the words of the ſtatute did import ſo much, which provides againſt the delay of right by ſeverall Eſſoines. And the Prothonotaries being asked, ſaid that their Preſidents were ſo, that they might ſever in Eſſoigne in a writ of partition, and that after apparance and after Trinity terme 12. Iac. motion was made, that two being vouched in the Formedon in Reverter, brought by the Earle of Clanrickard and his Lady, againſt the Lord Liſley before an apparance, one of the vouches caſt an eſſoine, and it was excepted unto upon the ſaid Statute. But it was reſolved, that the ſtat. was to be expounded of Eſſoines caſt by joyntenants, after apparance, for till then it could not appeare whether they were Tenants or no, which are the words of the Statute, and the ſtatute of Glouc. cap. 10. recites that the ſtatute is expreſly of Eſſoines after appearance.

Eſſoignes ſeverall for vouchees. 38. E. 3. 18.

Caſe.

XVII. *Yardley* Verſus *Ellill.*

Mid. Mich. 11. Iac. Rot. 1252. in Com. Banco.

"YArdley an Attorney of the Common pleas, brought an action of the Caſe againſt Ellill and ſaid, that whereas hee had beene

"beene ,and yet was an attorney, the defendant had ſpeech concer-
"ning him with one Bancroft, with whom he was before retained
"for his attorney, and ſaid unto the ſaid Bancroft, your attorney
"(meaning the ſaid Yardley) is a bribing knave, and hath taken
"twenty pound of you (meaning the ſaid Bancroft) to Coſen mee
"(meaning the ſaid Ellil!) upon iſſue not guilty, it was found for
the plaintife, and now it was ſpoken in arreſt of Judgement, two or
three ſeverall times by Serjeant Hutton. It was ſaid that theſe words
were ſpoken adjectively, that the word (bribing) might bee under-
ſtood doubtfully, either by giving or taking *Bribes*. Againe, that
the ſecond clauſe, ſhould be taken as a declaration of the former ge-
nerall, and therefore if they alone would not beare Action, they
would extenuate the former words, like to the common Caſes. Thou
art a theefe, for thou haſt ſtolne my Apples out of my Orchard, and
thou haſt ſtolne &c. as it is here ; for the ſenſe is all one, And there
it was ſaid, that an attorney could not take a Bribe, for hee is no
Judge, at leaſt he could not take a bribe of his owne Client. And of
that opinion was Juſtice Warberton ; And Juſtice Winch ſaid, that
the laſt words were not ſufficient of themſelves becauſe it was not
ſaid that the bribe was taken for any cauſe depending, but Juſtice
Nicholls and I were of opinion, that the Action would lye, and yet
the generall words [bribing knave] were ſufficient of themſelves, for
the word (bribing) is a word of certaine ſignification, and doth im-
port a cõmon practice in him, whereof he may take a denomination.
And whether he give or take a bribe, they are both unlawfull a-
gainſt his Oath, for he oweth to his client fidelity, ſecrecy diligence,
and skill, but hee oweth him not any diſhoneſt or undue practice;
For by this generall obligation to Juſtice and the court where hee
ſerveth, he is forbidden to doe any thing to pervert Juſtice, as appea-
reth by his oath, and juſtice Warberton ſaid, that theſe generall
words alone, would have borne an action ; and juſtice Winch ſee-
med not to deny it. Then to the ſpeciall, wee two were alſo of opi-
nion, that they did aggravate, and make them good in particular.
And I ſaid that an attorney may be ſaid to receive a bribe, for who-
ſoever hath ordinary intermedling in caſe of juſtice, bee he either
Judge Officer or attorney, if he receive an undue reward for any
thing againſt Juſtice, that is a bribe. Againe an attorney may re-
ceive a bribe of his owne client, when the reward exceeds not mea-
ſure, and the end of the cauſe of reward is not againſt juſtice, if hee
will take a reward to raiſe a record, or cauſe an attorney to appeare
on the other ſide, and confeſſe the action or the like ; both which
points are full in this caſe, that hee received twenty pounds for a
bribe to cozen the defendant, and I inſiſted much upon Burchleys
caſe, where the words were that *Burchley* being an attorney was a

Action ſur le caſe an attorney a bribing knave.

Burchleys caſe

corrupt man, and dealt corruptly; which words are ſo generall, as doe not pitch upon any certaine kinde of corruption as theſe doe. Onely they were informed in the declaration, that there was former ſpeech of *Burchleyes* dealing as an attorney: And juſtice Warberton after I had ſpoken, he began to ſtagger in his opinion. And after, Tr. 12. Jac. Judgement was given for the plaintife.

Iudgement.

XVIII. *Peaſe* and *Stileman* executors of *Elizabeth Hanchet* againſt *Mead*.

Debt.
Quer. ter.

Executor cannot claime money appointed to an actuall Aſſignee.

"PEaſe and Stileman executors unto Elizabeth Hanchet, "brought an action of debt againſt Meade, upon an Obligati- "on of thirty pound, the condition was, that Meade ſhould pay "twenty pound, to ſuch perſon or perſons as the ſaid Elizabeth "Hanchet ſhould by her laſt will and teſtament, in writing name "and appoint the ſame to be paid. The defendant ſaith, that ſhee "appoint no perſon to whom the ſame ſhould be paid, the plaintifes replied, that ſhee made her will in writing, and thereby made them her executors, whereupon the defendant demurred in law, and the opinion of the court was cleare, that the money is not payable unto the executors; for though where any teſtamentary is covenanted to be done unto a man or his Aſſignes, that is to be don to the executors, where there is no actuall Aſſignement, in chapman and Daltons caſe, and in H. 8. For the delivering of Rentalls to a man & his Aſſignes, the reaſon is, becauſe the word (aſſigne) is indifferent both to the aſſignee in deed and in law. And there when the executor takes it, hee hath it to the uſe of the teſtator. *But* here the word muſt needs bee underſtood of an aſſignee indeed, who ſhall take it to his owne uſe for the word [paying] carrieth property with it.

XIX. *Fryer* Verſus *Gildridge*.

Debt.

Hil. 11. Jac: Rot. 1990. Brownlow. One perſon is executor both to Obligor & Obligee.

"FRyer brought an action of debt, againſt Gildridge upon an "obligation, and the caſe fell out to be thus. Two were bound "to a third joyntly and ſeverally. The obligee made the wife of "one of the Obligors his executrix, and dyed. The woman execu- "trix adminiſtred, then the husband the obligor made her his execu- "trix and dyed, leaving aſſets to pay the debt, then ſhee dyed, and "the plaintife tooke adminiſtration of the goods and chattells of "the Obligee unadminiſtred, and brought his action againſt the de-

fendant

"fendant being the ſurviving obligor, and it was adjudged by all the Court, that the action would not lye upon two reaſons. The firſt that when the Obligee made the wife of one of the obligors his executrix, the action was ~~not~~ ſuſpended, and then the rule is, that a perſonall action once ſuſpended is extinct; *But* the other reaſon is the ſurer, when the obligor made the executrix of the obligee his executrix and left aſſets; the debt was preſently ſatisfied by way of reteyner, and conſequently no new action can be had for that debt. Iudgement.

XX. *Griſley* Verſus *Lother.*

Aſſumpſit. Hill. 11. Iac. Rot. 1866.

"GRiſley brought an aſſumpſit againſt Lother and declared, that "where ſhee had a daughter which was heire apparent to her "husband the defendants Teſtator in conſideration, that ſhe at his "ſpeciall inſtance and requeſt would give and conſent, that hee "ſhould have that daughter to wife, that hee would give her one "hundred pounds, and then layeth that ſhe did ~~not~~ give her conſent "&c. And the defendant pleaded *non aſſumpſit*, it was found againſt "her. Aſſumpſit in conſideration the mother ſhould conſent to the marriage of her daughter.

"And now it was ſpoken in arreſt of Judgement, that this was "no conſideration at all, that there was nothing to be done of "the part of the plaintife actually, that was to bee done unto "her, either for travell or charge, but to give a naked conſent, which "was not in law neceſſary to the marriage. Neither is the daughter "laid to be heire apparent to the mother, nor in her power or guard "to nurture, or otherwiſe; neither doth it appeare that ſhe was any "advancement to the defendant, for a woman is acknowledged in "law to be advanced in marriage alone, but ſo is not the man, and "and therefore ſhe hath the writ *Cauſa Matrimonii prelocuti*, but ſo "hath not the man. And of this opinion was Juſtice Winch. But my ſelfe and other two Judges were of the contrary opinion, for it is apparent that the Mother hath by the law of nature power in the daughter, and in the affection of the daughter, and the confidence ariſing thereof in her counſell and direction, a ſpeciall ſtroke to incline the daughters mind either one way or other, and the deſire of her conſent, and the working of it, that ſo the plaintife might have her ends, therefore it ſhall be preſumed of importance to have her conſent, which being granted at his ſuit and requeſt, ſhall bee accounted conſideration ſufficient. And ſo it was adjudged for the plaintife, Tr. 12. Jac. Now the husband being Father who hath all power over the Child and not the mother legally was alive the time of the promiſe, but now her power is alſo great in nature. Iudgement.

Libel.Eccl.

XXI. *Doctor Leifeild* verſus *Tyſdale.*

Diſm. the rent of houſes by preſcription

'DOctor Leifeild Parſon of S. Clements without Temple bar, 'ſued one Tyſdale his pariſhioner for tithes of certaine ſta- 'bles, and libelled that of common right, and by preſcription time 'out of minde the Parſons there uſed to have a *modus decimandi* for 'the houſes, ſtables, and buildings, that is to ſay, after the rate of the 'tenth part of the yearely rent or value of the ſame. And ſo he pro- 'ceeds to demand accordingly, whereupon prohibition was deſi- 'red, and the opinion of the Court was, that a prohibition for *de* 'communi jure, no tithes are to be paid for the yearly rent or value of 'houſes, for tithes are paid for the revenue and increaſing of things: And therefore no tithes are paid in any ſuch caſe in any Cities or towns in England, ſaving in London, and the liberties thereof. Now where there is no tithe at all *de communi jure*, there can never be a *modus decimandi*, for that is with an abatement, correction, or alteration of the tithe *in ſpecie*. And yet it ſeemes that this kinde of payment had beene long uſed here about London, which certainly was by uſe; for when the ſtatute gave it in London, the parts adjoyning gained the ſame by that colour, and even in London it muſt be uſed, for according to the forme preſcribed by the ſtatute. But for houſes oblations were paid in all places, and now by the ſtatute were brought to a certainty, that is, a groat for a houſe.

And in this caſe Juſtice Warberton ſaid, that it had beene lately adjudged in this Court, that a copyhold could not lay a cuſtome to fell and ſell timber upon his copyhold.

And in the twelfth Jac. the caſe was moved againe by Harris who ſaid that by a ſpeciall cuſtome ſuch a forme of tithing would ſtand in any place, and ſaid that Doctor Grant had a conſultation in this Court upon Argument in the very ſame caſe for two ſhillings in the pound in S. Martins le Grand which was not within the ſtatute, for it is a liberty exempted from London, and is no part of London nor of the liberties of London, and the reaſon was becauſe it may be ſuppoſed that ſuch forme of tithing was uſed for the land it ſelfe on which it was built, and then the building cannot take it away. And therefore it is now directed by the Court that he ſhall declare upon prohibition, and then proceed to judgement.

Nota. That Modus decimandi can hardly ſtand to riſe and fall according to the rent by preſcription.

Admiralty cannot hold plea for things at land.

XXII. Bridgemans Caſe.

'PHilip Bridgeman ſued one Williams in the Admiralty Court, 'and the caſe was this; that one Philip Bernard was owner of a 'ſhip called the *Bonaventure*, and ſent her into Spaine, and made

'' Williams

'Williams Maſter of her, who (as is alleaged in the Admiralty 'Court) did upon the high Sea borrow of Bridgeman certain Roy- 'als of A. to the value of fifty pounds ſterling, for repayment where- 'of he did impawne the ſaid ſhip, and returning now home, and the 'ſhip lying in the Thames, Bridgeman obtained a warrant from the 'Admiralty Court, to arreſt the ſame ſhip, and did ſo, whereupon 'Bernard came into the Admiralty Court and claymed his proper- 'ty, denying that he was owner or had any power to pawne it, yet 'nevertheleſſe the Court proceeded to judgement againſt the ſhip 'for his debt, whereupon a prohibition was granted by the Court, whereof the reaſons were, that by the common law by which properties were to be tryed, the Maſter of the ſhip could not impawne the ſhip, for no property generall or ſpeciall or ſuch power is given unto him by the conſtituting of him Maſter. Alſo it was alleaged that the contract (if any were) was made in civill upon the land; and it was held that the Admiralty Court could hold no plea of things though done upon forraine lands; and it was alſo ſaid that it had beene often reſolved, that if any obligation were made at Sea, yet it could not be ſued in the Admiralty Court, becauſe it is an obligation which takes his courſe, and binds according to the common law. But it was ſaid by the councell of Bridgeman, that by the civill law the maſter of the ſhip hath power to impawne the ſhip and tackle in caſe of neceſſity, and he hath no other meanes to provide ſuch things as are neceſſary for her. And I gave opinion Hobard. generally upon the whole caſe thus; that the Admiralty Court hath no power over any cauſe at land, for both by the nature of the court and by the ſtatute it is onely to meddle with things ariſing upon the high ſeas. And further that theſe things at the ſea done, muſt be alſo of the ſame nature and reſpect. And therefore if a man ſhould make an Obligation at ſea for ſecurity of a debt growing before at land, or ſhould make a promiſe to pay the ſame, this cannot be ſued in the Admiralty Court, becauſe it is not for a marine cauſe; as a court of Piepowder for market cauſes. But I was of opinion cleerely, that the Admirall law is, that if a ſhip be at ſea and take leake, or otherwiſe want victuall, or other neceſſaries, whereby either her ſelfe be in danger or the voyage defeated, that in ſuch caſe of neceſſity the Maſter may impawne for money or other things to relieve ſuch extremities by imploying the money ſo: for he is the perſon truſted with the ſhip and voyage, therefore reaſonably may be thought to have that power given to him imployed, rather then to ſee the whole loſt. But in this caſe the faults were that neither the contract nor the impawning were ſaid to be for any ſuch cauſe, neither was the impawning laid to be at ſea, neither was there any colour that for the generall debt of the Maſter they

ſhould proceed againſt the ſhip of another man. And I am of opinion cleerely, that if this cauſe had beene within the juriſdiction of the Admiralty, that we ſhould prohibit them, becauſe they gave ſentence againſt our law in this point of impawning, for it ſhall be preſumed according to their law, or elſe an appeale.

Covenant.

XXIII. Holder Verſus *Taylor.*

Paſc. 11. Iac.

HOlder brought an action of covenant againſt Tayler, and declared for a leaſe for yeares made by the defendant by the

Parol. Demiſe.

word [Demiſi] which imports a covenant, and ſhewes that at the time of the leaſe made, the leſſor was not ſeiſed of the land but a

Covenant broken before eviction.

ſtranger, and ſo the covenant in law broken. But he did lay no actuall entry by force of his leaſe, nor any ejectment of the ſtranger, nor any clayming under him, whereupon it was objected, that no action of covenant would lye, becauſe there was no expulſion. But the whole Court was of opinion that an action did lye; for the breach of covenant was, in that the leſſor had taken upon him to demiſe that which he could not; for the word [*demiſi*] imports a power of letting, [*dedi*] a power of giving. And it is not reaſonable to inforce the leſſee to enter upon the land, and ſo to commit a treſpaſſe. But if it were an expreſſe covenant for quiet injoying, there perhaps it were otherwiſe.

Obligation. Trin. 12. Iac.

XXIV. Sir *Daniel Norton* late Sheriffe of Hampſhire againſt *Simmes.*

Southhamp. Paſch. 11. Jac. Rot. 346.

'SIr Daniel Norton Knight, late Sheriffe of Hampſhire, brought 'an action upon an obligation of an hundred pounds againſt 'Richard Simmes for performance of covenants, whereof the effect 'was. That whereas Sir Daniel Norton had made Bryan Chamber-

Bond by under-ſheriffe to the high Sheriffe.

'laine his under-ſheriffe at his will, the ſame Chamberlaine by in-'denture did covenant with the Sheriffe to diſcharge and ſave him 'harmeleſſe of all eſcapes of priſoners that ſhould be arreſted by 'him or any Bayliffe or officers appointed by him. And another co-'venant was, that he would not execute any extent, liberate, elegit, 'or any other execution above the ſum of twenty pounds, before 'he had firſt made knowne to the ſaid Sheriffe the nature and quality 'of the ſaid writ, and if any ſuch execution were above twenty 'pounds, then he ſhould not execute it without the ſpeciall warrant 'of the ſaid Sir Daniel Norton the high Sheriffe. And there were 'alſo divers other covenants, & the defendant pleaded that Cham-'berlaine the underſheriffe had performed all the covenants, where-'upon the plaintife replyed, that one White *Anno* 44 Eliz. had

"recovered

'recovered in the Common Pleas 203 pounds debt againſt one Feilder,
'and that he had gotten 52 pounds thereof by an execution of *Fieri fa-*
'*cias* in the ſaid County of Southhampton and dyed, and that Francis
'White his executor had ſued a *Scir. Fac.* againſt the ſaid Feilder for
'the reſidue ſcil. 151 pounds, and had judgement, and tooke out a *Ca-*
'*pias ad ſatisfaciendum* and delivered it to the ſaid Chamberlain who ar-
'reſted him by force thereof, and ſo he was in the cuſtody of the ſaid
'Sheriffe for the ſaid debt, and ſo being, and Chamberlaine remaining
'underſheriffe, the ſaid Feilder eſcaped out of the cuſtody of the ſaid
'Sheriffe, the debt not ſatisfied. By meanes whereof, the ſaid Sheriffe
'was chargeable to pay the ſaid debt, and did pay it unto the ſaid Fran-
'cis White. And all this was in the Sheriffewick of the ſaid Sir Daniel
'Norton, and while the ſaid Chamberlaine was u derſheriffe, *viz.* 6.
'Iac. Reg. Hereupon the defendant demurred in law and in Trin. Terme
12 Iac. the whole Court upon publick argument gave judgement for the
plaintife, and in this caſe theſe points were reſolved.

Firſt that this caſe was not within the ſtat. of 23 H. 8. 6. both becauſe it Iudgement.
was not a bond made by or in the behalfe of a priſoner as Beanfage his caſe is, as alſo becauſe the ſtatute is not pleaded, being a penall law. And alſo becauſe it was not directly pleaded that Norton was high Sheriffe, or Chamberlaine underſheriffe, but only by way of recitall in the Indenture which was pleaded.

It was alſo reſolved that the Sheriffe might grant his under-ſheriffewick to hold at his will only; for it was in his choice to make or not to make an underſheriffe, but to exerciſe it himſelfe. That an underſheriffe is in effect but another Sheriffes Deputie, and therefore according to the nature of a deputation muſt be removeable as an Attourney is; ſo as if the Sheriffe ſhould make him irrevocable, yet he may revoke him. There is neither common law nor ſtatute law that makes him immoveable. He is but in nature a generall Bailife errant to the Sheriffe and the whole Shire, as others are over the hundred. H. 5. his oath appointed by the ſtatute the 27 Eliz. is, that he ſhall beare himſelfe well for ſo long as he ſhall continue in the office. It is neceſſary both for the publick ſervice and for the indempnity of the Sheriffe that he be removeable by the Sheriffe.

Yet it is true that under-ſheriffes have beene long in uſe, and experience proves that many Sheriffes cannot well execute it themſelves, ſo this point was reſolved, that he was a perfect under-ſheriffe, and ſo the arreſt well made by him, and ſo an eſcape upon it.

Next it was reſolved that a Sheriffe making an under-ſheriffe did impliedly give him power to execute all the ordinary Offices of the Sheriffe himſelfe, that might be transferred by the law. As ſerving of proces, and executions, and the like. But he could not deale in a writ of *Redisſeiſin*, becauſe in that the Sheriffe is a Judge; nor in that caſe of the

writ of waſte, where the Sheriffe is commanded to goe to the place waſted, becauſe it is perſonall unto the Sheriffe himſelfe; hereof it followes, that if a Sheriffe will make an under-ſheriffe, proved that he ſhall not ſerve executions above twenty pound, without his ſpeciall warrant, this proviſo will be void. For though he may chuſe not to make an under-ſheriffe at all, or may make him at his will & ſo remove him wholy, yet he cannot leave him an under-Sheriffe, and yet abridge his power more then the King may, in caſe of the Sheriffe himſelfe. But it was ſaid here, that the caſe here was not ſo, That the reſtraint of executions, above twenty pound, grew not on the part of the Sheriffe, but on the part of the under-ſheriffe by his covenant, which might ſtand for good, notwithſtanding the repugnancie to his Office; As a Feoffee in fee ſimple, may bind himſelfe to the feoffor not to alien, though the feoffor cannot reſtraine himſelfe by condition for the repugnancie. *But* the covenant here was holden voyd as being againſt law and Juſtice. For ſince by being made under-ſheriffe, he is lyable by law to execute all proces, he could no more then the Sheriffe himſelfe covenant not to execute proces without anothers ſpeciall warrant; for that is to deny or delay Juſtice, ſo this being a covenant againſt law, and being in the negative, needed no anſwer at all as being a voyd covenant in law. And though it were not void, yet the generall Plea of performance of all covenants will ſerve in the caſe of a negative covenant, *Tamen quære de ceo.*

Obligation for covenants part of law.

Underſheriffes power not to be reſtrained.

Covenants negative void in law.

But it was reſolved though this covenant were void in law, yet the *Bond* was good for the reſt of the covenants agreeable to law. *And* difference was taken between a bond made voyd by ſtatute and by Common law; for upon the ſtatute of 23. *H.* 6. if a Sheriffe will take a bond for a point againſt that law, and alſo for a due debt, the whole bond is void, for the letter of the ſtatute is ſo, for a ſtatute is a ſtrict law, but the common law doth divide according to common reaſon, and having made that void that is againſt law, lets the reſt ſtand as is 14. *H.*8.fo.15.

Hereof it followeth that if the Covenant for diſcharge of eſcapes (*ut ſupra*) were good in law and broken, that then the plaintife ought to have Judgement, and it was agreed, that if a man will take a bond to be ſaved harmeleſſe of ſuffering one to have eſcaped, or for enlarging him out of priſon againſt the law, that theſe bonds are void. And ſo are the caſes of Deane and Manning in Plo. and the caſe of Thower and Whetſtone Mich. 2. & 3. Ph. & Mar. Dyer 118. and ſo is the caſe of 2. H. 4. fo. 9. for the Withernam.

Bonds to ſave harmeleſſe of eſcapes difficult.

But this caſe is cleane otherwiſe and was reſolved by the whole court, to be lawfull for the Sheriffe to take bond of his underſheriffe, to diſcharge and ſave him harmeleſſe of eſcapes upon arreſts made by himſelfe; for ſince he transfers his authority unto him, it is reaſon he take ſecurity of him to performe all juſtly and faithfully to himſelfe and others, and there is nothing done or intended againſt law, for there is no

lawfull

lawfull permiſſion of any to eſcape already done or to be done. As in the other eaſes where the fault is committed by the party that takes the bond upon confidence of that ſecurity. But here the beſt performance of the covenant is, that no eſcape be ſuffered. And the next, that if any be ſuffered, that then he ſatisfie the party as is juſt, that the Sheriffe take no loſſe. It was alſo reſolved, that the Sheriffe in this caſe was not bound, either to give notice to the underſheriffe of the eſcape or to make requeſt for diſcharge, for the covenant hath no ſuch thing, but binds him to diſcharge at his perill. And I was of opinion, that if that had not beene againſt law for the executions above twenty pound, that the barre had beene inſufficient, becauſe it did not plead ſpecially to that negative covenant, that yet if the replication were naught and aſſigned no ſufficient breach, the plaintife could not have had Judgement; for though the action were well brought upon the obligation alone, yet when it appeareth that the condition was for performance of covenants, now there can be no cauſe of action without ſome covenant broken. And obſerve well Tilly and Woodlyes Caſe 7 E. 4. For this purpoſe, that if it doth appeare to the Court, that the plaintife hath ~~a~~ not cauſe of action, he ſhall never have Judgement, though he had a verdict for him againſt one of the defendants.

Not requiſite to give notice where one is bound to doe an Act by bond.

XXV. A Caſe of Burgeſſes of Parliament.

Parliament.

"MAny Townes in Ireland were erected into new *Boroughes*, and power given them to elect & ſend *Burgeſſes* into the Parliament, all in one forme, whereof for example, For the Towne of Dungannon the Patent runs thus, *Statuimus, ordinavimus & declaramus per præſentes*, that the Towne of Dungannon ſhall be for ever a free Borough, & that within the ſaid Borough, there ſhall be a body corporate by the name of Provoſt, Free *Burgeſſes* and communalty of the *Borough* of Dungannon, and may by that name ſue and be ſued, purchaſe & alien &c. And then followeth this clauſe. *Et quod ipſi prefati prepoſit. & liberi Burgenſis predicti & ſucceſſores ſui imperpetuum habeant plenam poteſtatem & Authoritatem Eligendi mittendi & returnandi duos diſcretos & idoneos viros ad ſerviend. & Attendendum in quolib. parlamento in dicto regno noſtro Hiberniæ impoſter. tenend.* and ſo proceeds to give them power to treate and give voyce in Parliament, as other *Burgeſſes* of any other ancient *Borough*, either in Ireland or England have uſed to doe, and upon doubt conceived, whether that forme had ſufficiently enabled this and the reſt of the new *Boroughes* to ſend *Burgeſſes*, it was referred to all the Judges, and it was reſolved by them all but two, that it was not ſufficient.

Burgeſſes of Parliament & forme of electing of them:

The objection was, that the corporation being provoſt free *Burgeſſes* or communalty, this liberty or privilege was granted to them and paſſed,

ſed by the word of corporation, not ſaying to whom, for then the grant muſt ſettle in the body incapable of a grant by application of law, though it were not ſo ſaid directly.

But it was anſwered two wayes, firſt, that the King might by his letters Patents ordaine, that from a Towne not corporate, ſhould come *Burgeſſes* to be choſen by the inhabitants, and ſo is the caſe of many *Boroughs* and Townes in England, that have no *Burgeſſes* by preſcription, that never were incorporate, and therefore this liberty could not commence by grant but by ordinance, as the King may erect a faire, or a market, a warren, Parke, Forreſt, Chaſe, Piſcary, or the like, by ordinance without granting it unto any.

The other anſwer was, that when there was a corporation made by the Charter, and by the ſame an ordinance that the Provoſt and *Burgeſſes* onely ſhould chuſe &c. the law ſhould avoid and overthrow this privilege in the whole corporation in point of Intereſt, though the execution of it be committed to ſome perſons, no members of the ſame corporation.

26. Huttons *Caſe. Quare Imped.*

Prohibition lyes if the Eccleſiaſticall Court will queſtion inſtiſtution and induction after notice.

SIr Timothy Hutton brought a *Quare Imped.* before the Judges of Lancaſter, and the truth of the caſe was thus; that he had preſented one *North* his Clerke to the *Biſhop* of Cheſter being ordinary, who refuſed his Clerke, and thereupon hee complained to the Archbiſhop of York, who ſent an *Inuoteſcimus* to the *Biſhop* to receive the Clerke within a time, or elſe to appeare before him and anſwer, who did neither, and thereupon the Archbiſhop did receive the Clerke and inſtituted him, and by his warrant he was alſo inducted.

Now the *Biſhop* and King a great Scholler, preſented by the King, ſued in the Delegates, ſuppoſing that the inſtitution by the Archbiſhop was void, and by conſequence, meant to avoid the induction too, as being without warrant, whereof the reaſon was, becauſe the Archbiſhop did inſtitute, &c. here at London being here in parliament time, And they pretended that theſe Acts of his being out of the Dioceſſe were nullities: whereupon Serjeant Hutton prayed a prohibition, and this Court was of opinion, that this ſuit was not to be prohibited, for ſince by induction which is a temporall Act, and tryable by temporall law, the Church is full, it is not to be avoided, but by a ſuit of *Quare imped.* or the like at the Common law, and not to bee undetermined by alleaging inſufficiencie in the inſtitution in the court Eccleſiaſticall, for that may not come in queſtion upon the tryall of the induction at the common law, which will not bee good if the inſtitution were not good, whereupon it was granted. But if this courſe might be admitted, they might avoid all plenarties in the Eccleſiaſticall Court, or queſtion them

Void.

at

at leaſt upon quarrell to the inſtitution. But it was ſaid to Sergeant *Hutton* that he could not pray his Prohibition in reſpect of his *Quare Imped.* hanging, becauſe of his owne ſuing the *Quare Imped.* muſt abate for the Church is full of his preſentation, but he muſt make his ſurmiſe, that the Church being voyd (*ut ſupra*) that they ſeeke (*ut ſupra*) with mention of the *Quare Imped.* Although this advouſon and Church were in the County of Lancaſter and the *Quare Imped.* there to be brought and not here and there alſo, a Prohibition might be had, granted alſo, that the opinion was, that the Prohibition might not be had in this Court, becauſe the title of the advouſon is hereby queſtioned, but the intruſion upon the common Law, whereof this Court hath ſpeciall care, and is to be reſtrained; and the Protonotaries ſaid, that they have no prohibition into Cheſter upon it. This act of Court was complained of to the King, and he ſignified his pleaſure both by Sir Thomas Lake and the Lord Archbiſhop of Canturbury, that hee would have a conſultation granted. But we anſwered his Majeſty by letter, that we could not doe it by the Law, and in the end, after many paſſages to and fro, it was left and ſo it ſtood.

Prohibition for cauſe ariſing in the Courts of Lancaſter.

The opinion of the Court was, that if a ſuite be before an Archdeacon, whereof by the Statute of 23. H.8. the Ordinary may not licenſe the ſuite to an higher Court; that the Archdeacon cannot in ſuch caſe balk his Ordinary, and ſend the cauſe immediately into the Arches: for he hath no power to keepe a Court, but to remit his owne Court, and to leave it to the next; for ſince his power was derived from the Biſhop to whom he is ſubordinate, he muſt yeeld it to him of whom he received it, and it was ſaid, that ſo it had been ruled heretofore.

Every Eccleſiaſticall Court muſt remit to the next Court.

XXVII. *Read* Verſus *Hawke.*

Replevin.

"*John Read* brought a Replevin againſt *Leonard Hawke* for taking of his beaſt at Ocolt, *viz.* one Gelding and one Mare, to his damage, "&c. The defendant demurred upon the declaration, becauſe there was "no place aſſigned where the King was, but onely a towne. After argument at the barre, it was adjudged by the Court, that the declaration was naught for the cauſe aforeſaid; for the generall Preſidents of the Court and forme of declarations in Replevin is to aſſigne a place as well as a towne, and in ſuch a caſe, as well the place as the towne are traverſable by the avowant, wherein the Replevin differs from an action of treſpaſſe, wherein the plaintife may aſſigne his treſpaſſe onely in one towne, and if he doe not aſſigne a place, the defendant may plead another place without traverſing the place aſſigned by the plaintife, and then the plaintife may take a new aſſignment, and the reaſon is, becauſe the Replevin is an action of more certainty, and muſt of neceſsity containe a place in the Court, as is ſaid by Bryan and Starkie in the 22. E. 4. fo. 57.

Suff.

Trin. 19 Jac. Rot. 2418. or 2508.

Replevin muſt aſſigne a place as well as a towne.

Of

or 22. H. 7. fol. 51. But the caſe that rules this, was the caſe in 36. H. 6. fol. 45. or 35. H. 6. fol. 40. which you may ſee in the booke, &c. 35. 1. 6. Rot. 66. whereof the Record it ſelfe is found Hill. 30. lib. 6. Rot. 306. ſurr. ff. *Alias prout patet termino ſancti Mich. Anno reg. Dom. Regis nunc* 36. *Rot.* 241. *continetur ſic, Iohannes Aſtead ſummonitus fuit ad reſpondendum Iohanni Dimmocke de placito quare cepit averia ipſius Iohannis Dimmock, & ea injuſte detinet vad. & plag. & unde idem Iohannes Dimmock in propria perſona ſua queritur quod pred. Aſted ultimo die Iunii Anno reg. dicti Domini Regis nunc xxxiiii°. apud Totting in quodam loco vocat. &c. cepit averia,* viz. *tres vaccas, & quatuor boviculos ipſius Johannis Dimmock & ea injuſte detinuit contra ten. & pleg. quouſque, &c. Unde dicit quod deterioratus eſt, & dampuum habet ad valentiam xvi^l. & inde producit ſectam & pred. Iohannes Aſtead per* W^m. *Twayles per Atturnatum ſuum venit & defendit vim & injuriam quando, &c. Et petit licentiam inde interloquendi hic uſque à die S. Hillar. in xv. dies, & habet, &c. Ex aſſenſu pred. Iohannis Dimmock, idem dies dat. eſt eidem prefato Iohanni Aſtead hic, &c. Et modo hic ad eandem* 15. *diem ſci. Hill. venit tam pred. Iohannes Dimmock in propria perſona ſua quam pred. Iohan. Aſtead per Atturnatum ſuum pred. ſuper quo viſo lecto & intellecto, &c. per juſtic. hic plac. pred. quia in narratione pred. nulla fuit mentio in quo loco averia pred. capta fuer' eiſdem Iuſticiariis videtur quod debit. advocationem per pred. Ioh. Aſtead. pro returno Averiorum pred. habend. primitus fact. extunc idem Iohan. pro inſufficienti ratione pred. return. averiorum illorum habere debet, &c. Et ſuper hoc idem Ioh. Aſtead pro return. averiorum pred. habend. bene advocat. captionem eorundum averiorum in villa pred. in quodam loco vocat.* The Vicars land. *Et injuſte, &c. quia dicit quod quidam Ioh. Careles vicarius Eccleſiæ S. Mich. de Totting diu ante tempus quo ſupponitur captionem pred. fieri fuit ſciſitus de duabus acris terræ cum pertinentiis in Totting pred. unde pred. locus in quo, &c. Eſt parcella Glebi Eccleſiæ pred. in Dominico ſuo, aut de feodo in jure Eccleſiæ, & ſic inde ſeiſitus diu ante captionem, &c. demiſit prefato* W^mo. *Aſtead pred. duas acras terræ habend. ab eodem die per quinque annos tunc prox. ſequen.* Quel. W^m. *demiſe ouſtre al. defend. & iſſint averia pred. damage feaſant & petit returnum eorundem averiorum, &c. Ideo conſideratum eſt quod pred. Ioh. Aſtead habeat returnum averiorum pred. &c. Et pred. Iohannes Dimmock nimiam.*

But yet it is true that ſome declarations in Replevins are found without any other pleas and advowries and other pleas made upon them without Demurrer or exception to that point, and then they are good enough.

XXVIII. Doctor *James's Caſe.*

Stat. 33. H. 8. cap. 9. Mich. An. 19. Jac.

'THat whereas the Dioces of the Biſhop of Wincheſter did extend it ſelfe to the Borough of Southwarke as part of the County of Surry,

'ry, that Doctor James Judge of the audience of the Archbiſhop of 'Canter. did of late uſe to keepe a Court ſometimes in Southwarke, and 'cite men thither from the remoteſt parts of the Dioceſſe of Winche- 'ſter, being ſometimes 60 miles. And that further, if they keepe not 'their day and houre of appearance, they were excommunicated, and 'then could not be abſolved except they would yeeld to the tranſmit- 'ting of their cauſe into the Archbiſhops Court, whereby the ſtatute of '28 H.8. was utterly illuded, and this he moved aſwell in the behalfe of 'the Biſhop of Wincheſter, as of the parties cited, and prayed a prohi- bition.

Prohibition where one Eccleſiaſticall Court intrudes upon another.

Stat. 28. H.8.

'Whereupon, on the part of the Archbiſhop it was anſwered, that 'no ſuch act of tranſmitting was uſed, but it was true that ſuch Courts 'had beene kept in Southwark by the ſpace of 40 yeares and better, and 'that by law they might be kept; for the Archbiſhop may ſit in any 'part of his owne Province, and may heare cauſes ariſing within that 'Dioceſſe by his prerogative, for he hath a concurring juriſdiction with 'the inferiour Ordinary, but he cannot call them out of the Dioces by 'reaſon of the ſaid ſtatute of 28 H. 8. And ſo the Biſhop of Wincheſter 'had no wrong, and the party had no hurt, and he is not called out of 'his Dioces. Whereupon it was anſwered by the Court, that firſt the tranſmitting of cauſes (*ut ſupra*) was expreſſely againſt the ſaid ſtatute of 28. H.8 next; that the party in this caſe hath a kinde of wrong. For whereas the *Biſhop* of Wincheſter himſelfe could not draw the people out of the heart of the Dioces where he lives himſelfe, the Archbiſhops officers would draw them thither as more commodious for them if it were permitted, beſides it deprives the ſubject of an appeale which he ſhould have had, if the cauſe had begun with the inferiour Ordinary.

And though the controverſie concerning the juriſdiction be betweene ſpirituall perſons, yet the King is the indifferent Arbitrator in all juriſdictions aſwell ſpirituall as temporall, and that is a right of his Crown to diſtribute to them, that is, to declare their bounds. And it hath heretofore been held in this Court, that the ſuppoſed concurrent Iuriſdiction that the Archbiſhop of Canterbury is ſuppoſed to have in the inferiour Dioces was not as he was Archbiſhop, but as he was *Legatus natus* to the Pope, for the Archbiſhop of York neither hath nor claimeth any ſuch, and then that power is ceaſed, being abrogated with the Pope, and the late practiſe (if any hath beene) is but an uſurpation. And if it be permitted to be in the Archbiſhops meere power, hee may erect a Court of audience in every Province, and cal all cauſes from other Court Barons.

Caſe.

29. *Rich* verſus *Keeling*.

Trin. 11. Jac. *London.* B. R. Trin. 21. Jac. Rot. 1699. 1599

Action againſt a common Carrier for goods loſt.

'IOhn Rich brought an Action upon the caſe againſt Arthure Keeling 'in *Banco Regis*, and declared that whereas the ſaid Keeling was the 'twenty day of Ianuary in the ninth yeare of the King, and long before 'had beene a common Hoyman to carry goods by water for hire from 'London to Milton in Kent, and from thence to London, and where by 'the cuſtome of England, ſuch Carriers ought to keepe the goods deli- 'vered to them to be carried ſafely, ſo as they ſhould not be loſt by the 'default of them or their ſervants, that he had delivered to the defen- 'dant the ſame twenty day of January a Portmantell with 50 l. in it to 'be carried for which he gave him two pence, and that the defendant 'ſuffered the goods to be loſt, through default of him and his ſervants. 'The 25 of the ſame January, the defendant pleadeth that the plaintife 'the 21 of the ſame January did diſcharge him of the keeping of them, 'which the plaintife traverſed. Nota. he pleads no diſcharge of the 'carrying: alſo the defendant by demurrer in law confeſſeth, that there 'was no diſcharge, and the defendant demurred in law, and it was ad- 'judged for the defendant. And now in the Exchequer Chamber upon a writ of error the judgement is affirmed, & it was reſolved that though it was laid as a cuſtome of the Realme, yet indeed it is Common law.

Oxon.

30. *Loggin* verſus *Tetherton*. Debt.

B. R, Mich. 9. Jac. Rot. 819. or 826

Triginta libris

'WIlliam Loggin brought an action of debt of 30 pound againſt 'William Tetherton, and upon Oyer of the Obligation, it was 'in *triginta libris*, the defendant demurred in law, ſuppoſing the obliga- 'tion void. And it was adjudged good for 30 pound, and now upon a 'writ of error in the Exchequer Chamber the judgement was affirmed.

Aſſumpſit Mich. 9. Jac.

Woolaſton verſus *Webb*.

B. R. & Exch. Chamb.

Aſſumpſit to pay debt upon conſideration of further day no cauſe of debt aſſigned.

'HEnry Woolaſton brought an aſſumpſit againſt Edward Webb, 'and declared that whereas Webb promiſed him 30 pound in 'conſideration that the plaintife the 28 day of Auguſt 1610, had given 'day to the defendant for payment of the ſame money untill the 9th of 'October following. That the defendant did aſſume to pay it him the 'ſame 9th day, and upon iſſue *non aſſumpſit* it was found for the plain- 'tife, and damages given. Now it was aſſigned for error, becauſe it was not ſhewed for what the defendant was indebted. Now the judgement was affirmed, for the debt was not in queſtion, as if it had beene an ordinary *indebitatus aſſumpſit* where the debt it ſelfe is the only conſideration of the promiſe, for there it muſt appeare to the Court, but here is the day given

given, that is the expreſſe conſideration. And though it be true that there muſt alſo be a debt, yet this is allowed, the promiſe being actuall, and alſo found by implication in the verdict.

32. *Thomas Moore* verſus *John Muſgrave.*

Ejectione.

'THomas Moore debitor le Roy fuit plt. in ejectione firme per quo minus Excheq;
'in Leſcheq. verſus Johannen Muſgrave defend. & count. q. un. W.
'Moore 5 Maii Anno 10. Regis nunc ad Clergill in Com. Cambria lea-
'ſed al dit Thomas Moore le plt. un mas 40. acr. terre 20 acr. pred. & 50
'acr. paſture ove les appurtenances in Clergill pred. habend. del Feaſt jour Leaſe which
'del Annunciation del bleſſed virgin S. Mary Donques darreine paſſe pur ſeemeth doubt-
'viginti vn annis extunc prochein enſuant & le ejectment eſt allege d' eſtre le full in the li-
'dit 5 Maii 10 Regis Sur rien culpable trove fuit un eſpecial verdict a ceo mitation of
'effect. viz. Que devant le dit demiſe le dit W. Moore fuit ſeiſie del dits ter- the Terme.
'res in fee & ſeiſeiſit. le dit W. le dit 15 die Maii 10. Reg. ſupra dict le quel
'eſt troue in hec verba, ſſs. demiſit tenementa pred. habend. le dit meas on te-
'nement, ove les appurtenances from the feaſt of the Annunciation of the
'Virgin Mary laſt paſt, for and during the terme of 21 yeares next inſu-
'ing the date hereof fully to be compleat and ended. Per force de que le
'plaint. fuit poſſeſſe tanq; fuit eject. per le defend. le dit 15 Maii 10 Regis
'Mes quel ſur tout le matter le defend. fuit culp. del treſpas & ejectment en
'le Count mencon. il ceo referre al Court.

Enq. le queſtion fuit, ſi le leaſe troue per le Iurie accord ove le leas menc-
con. in le count per un terme d'ans ou ne my eò q. le leas per count fuit un leas
fait 5 Maii 10. Reg. habendum de le feaſt d'annunciation donques darreine
paſſe pur 21. ans extunc ſcil. del dit feaſt d'annunciation prochein enſuant al
S. Martin Mes le leas troue per le Iurie fuit un leas fait le dit 13 Maii 10
Regis per Indenture geren. dat. 5. Maii Anno 10 Regis habendum de feſto
annunciationis beate Marie virginis tunc ult. preterito pro term. viginti uni-
us annor. prox. ſequen. dat. dictæ Indenture. It was adjudged for the defen- Judgement.
dant in the Exchequer, and now affirmed by the opinion of the Chiefe Juſtice and my ſelfe, by the Lord Chancellor and Treaſurer.

33. *Fitzhughes* Caſe.

Obligation.

EDwardus Bridge de, &c. gen. & Franciſca uxor ejus alias dict. Fran- 3. & 4. El. Rot.
ciſca Fitzhugh de &c. gen. ſumm. fuer ad reſpond. Nichol. Fitzhugh 1988.
gen. de placito quod reddant ei octogint. libras quas ei debent & injuſte deti-
nent, &c. Et unde, &c. Et count ſur obligation fait per femme dum ſola fu- In an obligati-
it. Quando, &c. Et petunt auditum ſcripti pred. & eis legitur in hæc verba. on octogentas
Noverint univerſi per preſentes me Franciſcum Fitzhugh de Goodwick in for octoginta.
Com. Bed. gen. teneri & firmiter obligari Nicholao Fitzhugh de Eaton in
dicto com. gen. in octogint. libris bonæ & legalis monetæ Angliæ ſolvend.

eidem Nicholao aut ſuo certo Attornato vel executoribus ſuis in Feſto S. Mich'is Archangeli prox. futuro. Ad quam quidem ſolutionem bene & fideliter faciend. Obligo me, heredes, executores & Adm. meos firmiter per preſentes ſigillo meo ſigillat. dat. viceſimo tertio die Novemb. Anno regnor. Phi. & Mariæ Dei gratia Regis & Reginæ Angliæ, Hiſpaniæ, Franciæ, utriuſque Ciciliæ, Ieru. & Hiberniæ, Fidei defenſor. Archiduc. de Auſtriæ, Duc. Burgundiæ, Mediolan Brabantiæ, Comitum Hauſbury, Flandriæ & Tyroll quarto & quinto, quo l'co & audito iidem Edr. & Franciſca petunt Iudicium de brevi & narr. pred. quia dicunt quod pred. N. per br. & Narrationem ſuam pred. ſuppon. quod pred. E. & F. debent prefat. octogint. libras quas eidem N. redderent, ubi revera non habetur aliquod tale verbum in ſcripto pred. continens & warrantizans hoc verbum in br. & narratione pred. ſpecificat. vizt. octogint. & in eodem ſcripto obligatorio pred. hæc duo verba, viz. octogint. ſunt ſcript. Quæ quidem duo verba octoginta nullam habent in ſe ſignificationem de aliqua ſumma certa, ſicq; br. & narratio pred. non warrantizabunt de & ſuper ſcript. pred. per prefat. N. hic in Curia probat. Per quod iidem E. & F. petunt Iudicium, & de breve & narr. pred. &c. Et quia pred. N. exceptionem pred. q. per inſpectionem brevis narr. & ſcript. pred. Cur. hic ſatis conſtat non dedicit, ideo conſideratum eſt pred. N. nihil capiat per billam ſuam, ſed ſit in unam pro falſo clamore ſuo &c. Et quod pred. E. & F. eant inde ſine die &c. conſideratum eſt etiam quod pred. E. & F. recuperent verſus prefat. N. dampna ſua occaſione premiſſorum ad tempus eiſdem E. & F. per diſcretionem Iuſtitiariorum ad requiſitionem ſuam pro miſis & cuſtagiis ſuis in ea part ſuſtentat. juxta formam ſtat. &c. per Curiam hic adjudicat.

Obligation.

Tr. 16. Iac. Rot. 1929.

34. *Parker* Verſus *Keneday.*

Seſſante libr.

NArr. per Parker *verſus* Keneday, *& ſa femme ſur deux* obligations *vn de* 60. *lib. & l'auter de* 40. *lib. defendens petit auditum pred. primi ſcripti & ei legitur in hæc verba, Noverint &c. in ſex libris &c. quoad pred.* 60. *lib. de pred.* 100. *lib. defendens demurre & quoad alteram obligationem non eſt factum, & Iudicium ſur demurrer pro quer.*

Obligation.

Hill. 10. Iac. rot. 1986. or 1830.

35. *Maſdame* verſus *Iolly.*

NArr. per *Maſſam verſus* Jolly, *ſur bond pro* 60. *lib. defendens petit auditum ſcripti &c. & ei legitur &c. Noverint &c. in ſexaginta libris &c. & ſur ceo Demurrer & Iudicium pro quer.*

Warrant. Chart.

North. Trin. 9. Iac. Rot. 2008.

36. Sir *Henry Roll the younger Knight againſt* Sir *Robert Osborne.*

'SIr Henry Roll the yonger Knight, brought a *Warrantia Charte* a-'gainſt Sir Robert Osborne and Magaret his wife, that they ſhould

'warrant

'warrant unto him one Meſſuage, forty Acres of Meadow, and ſeven
'hundred Acres of paſture in kill Marſh, and declared that Robert Oſ-
'borne, Margaret, and one Iohn Gobert did levy a fine, *an.* 2. of the
'King unto the ſaid Henry Roll of the ſaid Tenements, *inter alia* by the
'name of the mannor of Kilmarſh, and divers other quantities of lands,
'and by that fine *Robert* Osborne and Margaret did grant for them and
'the heires of Robert, that they ſhould warrant the Mannor and other
'the premiſſes to the ſaid Henry and his heires againſt him & his heires,
'and againſt all men; which fine as to the Meſſuage and lands in queſti-
'on was to the uſe of Henry Roll and his heires, and then ſhewes that he
'being ſo ſeiſed, one *Ralph* Perne did implead him by writ of *Entrie ſur*
'*diſſeizin in le Per* in the common Pleas, for the houſe and lands in queſti-
'on (but doth not tell otherwiſe when) hanging, which plea Henry
'*Roll* required the ſaid Robert and Margaret to warrant unto him the
'ſaid Meſſuage and lands in queſtion, or to miniſter unto him a Plea
'in barre of the ſaid action, which to doe they refuſed to his dammage
'of one hundred pound.

The learning of warrantia Charte and of warranties generall at large. Iudgement was given for the defendant.

'To this the defendant pleaded, confeſſing the fine, warrantie, and uſe,
'but further ſaith, that *Henry* Roll being ſeized of the tenements in
'queſtion by force of the ſaid fine, that one William Gills, and Tho-
'mas Stephens Eſquires, before the purchaſe of this writ of *Warrantia*
'*Charte*, ſcili. the ſeventh day of November, in the ſecond yeare of the
'King, did ſue a writ of entrie in the Poſt, againſt the ſaid Henry Roll
'of the ſaid Meſſuage, and lands in queſtion, *inter alia per nomina Mane-*
'riorum Kilmarſh &c. retor. xv. *Martini*; At which day the demand-
'dants, and the ſaid Henry Roll *adtunc tenens liber tent. Maneriorum &c.*
'*exiſtens* did appeare. And the writ was returned, and the demandants
'declared and demanded all the mannors, &c. And *Henry Roll* the te-
'nant called to warrantie *Robert* Osborne Knight, without ſaying
'pred. Robert Osborne, and he the common vouchee, and then the *Re-*
'covery. And ſo the recovery paſſed, and a writ of ſeizure of all the
'Mannors &c. And that the ſame recovery as to the Meſſuage and lands
'in queſtion, was to the uſe of Sir Henry *Roll* for his life, and after his
'deceaſe if a marriage ſhould bee had betweene him and one Katherine
'Haſelwood, then to the uſe of her for life, and after to the uſe of any o-
'ther woman that he ſhould marry, and then to the uſe of the firſt ſonne
'of his body by Katherin Haſelwood, and ſo to the tenth, one after ano-
'ther, and then to the uſe of ſuch perſon as ſhould be heire male, of the
'body of the ſaid Henry Roll and the heires males of his body, and af-
'ter to the uſe of *Henry* Roll, Father of the ſaid *Henry* the plaintife,
'and ſweres that Henry the plaintife, is not alive, and ſo demands Judge-
'ment of the action, and the plaintif thereupon demurres in law, and
'ſo the demurrer is joyned.

I will handle this caſe ſo as beſides the points concluding, I will by

the way diſcuſſe all incidents to a writ of warranty of Charters.

Bract. tr. de warr. Ch. cap. ult. The caſe is rare and of importance, for a ſuit is *pugna civilis*, whereof Bracton ſpeakes prettily, *tractatu de warrantiis Charte capitulo ultimo: ſicut actores armantur actionibus & quaſi gladiis accinguntur, ita rei muniuntur exceptionibus & defenduntur quaſi Clypeis.*

The writ of warrantie of Charters, as to the fixing of the warrantie, & binding the poſſeſſion of the warrãtor, is either proviſionall or remediall.

The firſt is in caſe of feare and proviſion.

The ſecond in caſe of loſſe already ſuffered and to be recompenſed by value *per excambium*, as Bracton ſpeakes.

Bracton. I hold therefore firſt that nothing appeares in the Count in the principall Cauſe, but that the plaintife ought to have warrantie.

I hold againe that upon the barre confeſſed by the plaintife demurred Judgement is to be given againſt the plaintife.

A writ and Count in a *Warrantia Charte* muſt have foure points compleat in them, that is to ſay.

Point. 1 Firſt, he that brings it muſt be tenant of the land, the day of the writ purchaſed.

Point. 2. It muſt bee by a conveyance, whereby the land whereunto the warrantie is annexed muſt paſſe, or at the leaſt if right be releaſed, or confirmation made with warrantie, hee muſt be Tenant of no part of the land to whom it is made in warrantie.

Point. 3. This writ muſt be brought hanging the principall Plea.

Point. 4. It muſt not containe the ſpecialty of the warrantie and lieu.

All theſe parts this writ and Count doth containe, & yet being theſe rules receive diſtinctions, I will explaine them, that it may appeare how it ſtands with their diſtinctions.

And as to the firſt point.

Explanation of the 1. point The plaintife is made tenant of the land in demeaſne for of that there hath beene great queſtion whether the plaintife in the *Warrantia Charte* that hath a Warrantie over, may have a *Warrantia Charte*, whereof I make the reſolution upon the bookes thus. That it is a good Plea in the *Warrantia Charte* that the plaintife was not tenant of the land the day of the writ purchaſed, and ſo are the bookes of the 24. E. 3. 25. 7. E. 4. 12. & 18. E. 3. 44. 16. H. 8. F. *Garrantie des Charters* 29. *Bracton tractatu de Warrantiis Charte* 18. Thus in *Warrantia Charte defendens poteſt excipere quod querens non tenet terram de qua petit Warrantiam.*

But it ſeemes to be a Plea but *prima facie*, for ſo it is allowed 7. H. 4. 18. And yet it is concluded, that the vouchee may have the writ, when he cannot vouch herein, as a ſecond or third meane, Lord may have a writ of meſne aſwell as the Tenant in demeaſne. & ſo 3. E. 3. Fitz. *Warr. Charte* 4. the defendant pleaded, that the plaintife was not tenant the day of the writ & iſſue upon it; But Fitz. abridging the caſe ſaith, that if he had pleaded himſelfe Tenant by voucher, the day of the writ purchaſed, it would have

have ſerved,& 31.E.3.Fitz.*Warr.Charte* 22. in fine *Bract.* ſaith that the defendant in *Warr. Charte* ſhall have a writ of warrantie of Charters hanging the writ againſt him, and reaſon and Juſtice requires it, for ſince this writ is ſupplementary in place of voucher where that cannot bee had, therefore is this writ as well to bee allowed, for alienation cannot be imparted unto folly, for as a man may vouch comming in as vouchee; ſo this writ as it is in nature of a voucher,is equally to bee allowed, And therefore 41. E. 3. 7. if Tenant by the Courteſie grant his eſtate with warrantie unto I. S. and comes in as vouchee,he ſhall have aide of him in reverſion, as if he were Tenant in poſſeſſion, and 43. E. 3. 23. If a Co-partner make a feoffement with warrantie, and comes in as a vouchee, he ſhall have aide to deraigne the warrantie paramount, as if hee were in poſſeſſion, but if where it hath beene ſaid, that upon a releaſe or confirmation with warrantie, a man cannot vouch and therefore he ſhall have a warrantie of Charters, 12. H. 7. 12.

If it be cleare that as to him that warranted hee may, 4. E. 4. Fitz. voucher, 244. & 11. H. 4. 19. 38. E. 3. 13. But the cauſe may bee that the demandant may counter-plead the voucher, and then the tenant is driven to his warrantie of Charters, for default of his voucher in deed: And ſo the booke 12. H. 7. is in that ſence true, for if the defendant ſhould vouch as hee may againſt the vouchee,and be counter-pleaded by the demandant, truly hee ſhould looſe his land and the aide of voucher too, for he were paſſed the requiring of a new Plea of the warrantor, when he had beene by the voucher counter-pleaded before.

As to the ſecond point, ſee 24. E. 3. 35. where the plaintife in warrantie of Charters counted, that the demandant infeoffed him by the Charter with warrantie, the defendant pleaded *riens paſſa per le fait & Bracton tractatu de Warrantia cap. 9. Sect. 5. Excipere poteſt Warrantus quod licet Charta de Feoffamento ſufficiens quia donatur nunquam habuit ſeiſinam in vita donatoris, ſed poſt mortem ſuam intruſit.* Explanation of the 2 point.

Alſo 44. E. 3. Fitz. *Garr. Char.* 18. upon a releaſe with warrantie pleaded, that the party to whom the releaſe was made, had nothing at the time of the releaſe made.

And to the third point, the Regiſter 158. affirmes that Rule,and addeth, *ſi judicium inde redditum ſit, non valet hoc breve.* But this muſt bee well underſtood, for clearely it may bee brought before any principall Plea, and after if the Plea take any other then by Judgement or diſcontinuance and the like. And I am of opinion, that before execution it may be brought if the party prayed his Plea in time,for till execution,he is of the eſtate warranted: but if the execution be had, then the warrantie failes with the eſtate. Explanation of the 3. point.

To the fourth point, This writ and Count is in place not to the vouchee, for this is generall, but of the deraigning of the warrantie in caſe of a voucher, and yet in ſome caſes it ſhall not need to be ſo ſpeciall Explanation of the fourth point.

as

as the deraigning, and therefore if a man bring a *Warrantia Charte* upon a warrantie of land and ſhall have judgement, hee ſhall uſe that Judgement after for rent demanded or recovered, if the warrantie did extend unto the rent 31. E. 3. Fitz. Garr. Chart. 22.

And yet upon a voucher in like caſe it ſhould have been more ſpeciall, the reaſon is apparent, for the rent is demanded when he voucheth, but it may be it was not fore-knowne that rent ſhould be demanded when the writ of warrantie of charters was brought, but if it were, hee ought to declare ſpecially the rather, if he cannot vouch in the principall plea of the rent, for there muſt be a meanes to diſcuſſe whether the rent in demand be to be warranted as a rent ſuſpended when the warrantie was made, ſo as the land was warranted and diſcharged of rent.

Now, to the objections that have beene, or may be made againſt the Count.

Object. 1. Firſt, it may be objected, that he made the cauſe of action, becauſe he was impleaded in a writ of entrie in le Per, in which action hee may vouch, and then by Fitz. N. br. 134. D. & S. it may ſeeme hee cannot have the writ of entrie in le per doth admit a voucher, indeed that might be in the per by ſome other, and not by Osborne, and then by that meanes deprived of voucher, he muſt be admitted to this writ; for ſo it is provided by the Stat. of Weſtm. 1. cap. 30. expreſly.

Anſw. But my plaine Anſwer is, that the writ of warrantie of Charters will lie upon all actions, though a voucher lie in the actions, and ſo it is reſolved 9. E. 2. Fitz. warr. Char. 30. 18. E. 3. 42. Fitz. Garr. Chart. 8. though it be in a formedon, this is beſt in the abridgement, and 2. E. 2. fol. 6. in warrantie of Charters againſt the heire, he pleads that the Formedon is hanging of the ſame land, *& non allocatur*, although he may rebut. 4. E. 3. of Garr. Char. 19. in Formedon, and Fitz. Nat. 135. where his words are, that a man ſhall have a writ of warrantie of Charters, though he may vouch in the action that is brought againſt him, and if he recover and vouch in the action wherein he voucheth, he ſhall have a *Warrantia Chartæ*, and the reaſon of this is cleare, for hee ſhall bind the land for the *teſte* of the warrant, though hee cannot have execution untill he take loſſe; And upon the voucher which may be delayed; And therefore I am of opinion, that he may bring even after voucher, becauſe that action may be diſcontinued and faile many wayes, and ſo the warrantie of Charters be neceſſary, and this reaſon is expreſly, both in 9. E. 2. by Fitz. Nat. br. And Fitz. Na. br. in other places 135. muſt be underſtood that he muſt not relie upon this warrantie of Charters, but he muſt alſo vouch and requeſt Plea according to his caſe, as he ſaid, 135. And ſo it is 9. E. 3. F. Garr. Chart. 22. & 18. E. 3. 41. Garr. Char. beſt in the abridgement as before I have ſaid, and it is beſt for him that is to warrant, to make entry of the plea that he tenders in the record of the action which he is to plead per Brian. 16. H. 7. 6. yet I ſee not well how that

that can be, for both requeſt and tender are matter of fact.

And thereupon another objection may be made, that ſince he ought to vouch and hath not, hee can have no benefit of *warrantia chartæ*. *Object.* 2.

This is already anſwered in part by the nature of the voucher in the fine, and alſo it appeares not that it was come ſo farre as hee might vouch. *Anſw.*

If it be objected that he hath laid that he did requeſt to have a plea in barre miniſtred where the vouchee may plead in abatement as well as in barre as an entrie of the demands ſince the voucher: For if it were before, it muſt be pleaded by him to extort the warrantie, becauſe the tenant did not plead it himſelfe. *Object.* 3.

It is anſwered that he counts that he did require the defendant to warrant the land which is enough; And ſo is the booke of preſidents, for that imports that he ſhall warrant according to the nature of the caſe by voucher, if it be vouched, or otherwiſe by plea, and therefore the adding of requeſt by plea in law is ſurpluſage, it is ſuſpected that hee hath declared to his damage where no loſſe appeares. Surpluſage hurts not in the Count, or the like.

It is true that he ſhall recover no damages but where hee hath taken loſſe by recovery already had againſt him 41. E. 3. 7. —3. E. 3. 21. & 8. E. 3. 42. F. Garr. Chart. 8. and therefore he ſhall not have damage where the warrantie of Charters is brought before the action *quia timet*. And ſo is 21. H. 6. 22. and therefore if it be pleaded by the defendant, that the plaintife is not impleaded, the plaintife ſhall preſently have his Judgement, but no damages. But yet hee ſhall declare to damage according to the forme, which is not ſtrange in other caſes as in a *Quare Imped.* for the King.

The loſſe whereupon the plaintife may have damage, is not onely where in the principall action damages were recovered againſt him as in aſſ. or the like 44. E. 3. F. Garr. Char. 19. 42. E. 3. fol. 20. *inter anomala*, for there the caſe was, that where one Charnell had made a warrantie againſt himſelfe and his heires, and all ſuing by his colluſion upon warrantie it was found that the ſame in formedon principall was by his colluſion, yet he could have no damages, becauſe he had not loſt the land, whereupon hee had now brought a writ of deceit upon the trouble and charge by he ſuffered that colluſion and ſuit, and declared upon the verdict in the word *Chartæ*, finding the colluſion as binding the defendant for that point. And ſo becauſe the defendant could not deny that the Court gave judgement and 20l. damages. But note that this forraigne action is no ground for the like in other ſuits of warranties of Charters; for this particular warrantie grew upon a colluſion, which is nothing to other warranties; and ſuch a practice by colluſion will beare an action without warrantie. The onely uſe of that caſe was, that they allowed the verdict in one action to be a conviction of colluſion in another which was hard enough.

Object. 4. As to the objection made by my brother Nichols, that by the Count it ſelfe appeares the warrantie is loſt, by reaſon that this part of the land is declared upon the fine, is to be to the uſe of the plaintife, and the reſt ſhall be intended to the uſe of the defendant who made the warrantie.

I anſwer it three wayes.

Anſwer 1. Firſt, that there can be no inference touching the uſe of the reſt, becauſe there is no mention of it in the Count, but a mere omiſſion, neither is there any cauſe that it ſhould be holden confeſſed and not divided, for it is in no ſort within the count as the reaſon of it, which is to demand onely warrantie of this parcell of land which was put in ſuit in the writ in the *Per*, ſo there is no cauſe for this purpoſe to ſpeake of the reſt of the lands, ſaving the neceſſity of the forme in pleading as fine or recovery, which is a record which muſt lie entire, whereas if it had beene a feofment, it might have beene pleaded for this parcell of land onely, 33. E 4. 8.

Anſwer 2. Another anſwer is, that it appeares out of the barre of Osborne, that the whole Manor, &c. was demanded in the writ of entrie in the poſt againſt the plaintife Sir Henry Roll being tenent of it, and that hee vouched of the whole, & judgment paſſed, which proved by the confeſſion of Osborne (that is, to impeach the warrantie) that he was tenant of all, ſo muſt have the uſe of all.

Anſwer 3. Another anſwer is, That a warrantie may be extinguiſhed in deed by reſeofment to him that warrants, but it is againſt nature to ſay, that any thing can be extinguiſhed that never was, for here the cogniſor ſhould make a warrantie, provided that it ſhould be no warrantie or voyd, ſo the ſame man that makes it ſhould kill it in the birth, therefore I hold it plaine that the warrantie which ſeemeth literally intire, ſhall by act of the party, and conſtruction of the law be divided in this caſe, ſince it cannot take effect according to the entire word; as if I infeoffe H. of two acres in fee to the uſe of himſelfe for 50. acres certaine, and warrant the lands to the feoffee and his heires; this warrantie is clearely divided by the meaning againſt the letter for the warrantie, for ſo much as it is to the uſe of the feoffer himſelfe and his heires, that warrantie never tooke effect; and when it is denyed to two, that word that ſeemeth entire at the firſt, is to be taken *reddendo ſingula ſingulis*; for this purpoſe, the caſe of the Lord Dacres 26. Eliz. was reſolved thus, William Lord Dacres made a deed of feofment of lands in divers Counties dated 16. Oct. to Mary upon condition that the feoffee ſhould infeoffe him in the *Rem.* amongſt others to Francis Dacres his ſonne, of all the lands within 20. dayes after the date of that deed, and it was reſolved, that if William Lord Dacrees did make his feoffement, but of parts within the 20. dayes according to the letter of the condition which is intire as the warrantie, the reaſon was, becauſe it was his owne fault, that it was not conveyed, without which it could not be recovered, and therefore the letter was abridged

abridged to the condition being taken that he ſhould convey ſo much as was conveyed. But now the caſe ſtanding thus upon the predeclaration, all the impediments ariſe upon the Plea of the defendant, which is confeſſed by the demurrer. Out of which ariſe theſe points:

That the plaintife having the whole Manor conveyed unto him by fine with warantie from Osborne. Now to the Barre.

He hath divided the land. 1

Next he hath divided and changed the eſtate. 2

Then he hath done this by common recovery, by which they that come in are in the poſt. 3

Againe he hath vouched the land to Osborne once already in that common recovery, and ſo hath had recompence or poſſibility of judgement. 4

This point is to be underſtood of the vouchee of Osborne, as is already alleaged, ſhall be underſtood of the ſame Osborne, becauſe it wants the word pred.

But if it ſhall not be underſtood the ſame, then it will come to this queſtion. If a man have divers warranties againſt divers perſons, and then in an Action brought againſt him voucheth one, and omits the other, and ſo a recovery paſſeth with a judgement of a value, whether he can ever have benefit of the other warrantie. 5

And upon this will ariſe a queſtion by way of diſtinction, whether this will be all one where the recovery is upon the title, and where it is a common recovery, and under what difference. And firſt in generall which is a kinde of *præludium* to the particulars that ſhall follow, I obſerve that a warranty is a great ſervitude upon him that warrants, and upon his eſtate, and is a ſervitude againſt common right, and hangs like a cloud on him and his inheritance, as Hanniball ſaid of Fabius Maximus, ſo it is law taken ſtrictly and literally.

And therefore if a man convey land with warranty againſt him and his heires on the part of the Mother, ſhall not be vouched by this, as long as there is an heire on the part of the father, 19. R. 2. ff. Garr. 100. 49. E. 2. except it be by reaſon of a Signiory of lands of the part of the Mother 5 E. 2. Fitz. Avowry 207. And if he that warranted have no lands but Gavelkinde, yet the tenant may vouch the very heire alone 32 E. 3. 22. but it is true that he may vouch alſo the other heires for poſſeſſion, and ſo he may vouch together with the brother which is heire unto the father warrantor, the ſiſter who hath the land by *poſſeſſio fratr.* 32 E. 3. ff. voucher 94. 43 E. 3. 3. But if the land warranted comes unto a ſiſter by *poſſeſſio fratris* or to a younger brother by Borough Engliſh or Gavelkinde, ſhe is without remedy, for ſhe cannot vouch for a poſſeſſion with the very heire 32 E. 3. Fitz. voucher 94 & 35. H. 6. 33. yet note if a man binde himſelfe and his heires in an Obligation, and leaves land at common law and land in Gavelkinde, the creditors muſt ſue all the heires

11 E. 3. 4. debt 7. 11. H. 7. 12. And ſo in that caſe if he have one heire on the part of the father, and another heire on the part of the mother, and both have land by diſcent, he ſhall have ſeverall actions, and executions ſhall ceaſe till he may take it againſt both; ſo it appeares that the conſtruction of law is ſtricter where the heire is charged with a chattell upon the ſame reaſon is the caſe adjudged 18 H. 2. 3. ff. voucher 28. & 23 E. 3. ff. Garis. 37. If a man grant a ſignory with warranty and the lands Eſcheats, the warranty is utterly loſt, and not only for the over value though it come by act in law for the book 13 E. 3. ſayes, that a covenant ſhall be taken *ſtrict. per Wilby*, and that the warranty is loſt and adjudged 18 E. 3.

To the firſt objection, viz. The dividing of the lands.

Now to the firſt objection that the demandant hath divided the land by his owne act ſcil. the recovery after the warrantie created. It is to be obſerved that the warrant muſt remaine entire as it was created without the voluntary diviſion of the party. And therefore if land be given to two joyntly with warranty, if the one make a feoffement of his part, he hath loſt his warranty, but the other may vouch for his moity, but if they make partition, both have loſt it by common law. And if the warranty were to the Joyntenants and their aſsignes, the aſsignement muſt alſo be joynt 29 E. 3. ff. Gar. 70. 11 E. 4. 8. Coke lib. fol 36. Terringhams caſe. If a man have a common appendant of 40 Acres, belonging unto 20 Acres, if he ſell 10 of his Acres or buy part of the 40 Acres, the common may be divided and apportioned *prorata*; but if it be a common appurtenant becauſe it is againſt common right it is loſt.

If a man have a rent charge granted him, and he grant 5 pound a year to a ſtranger by fine, the tenant is not compelled to Attorne.

So in theſe and the like caſes of common right, I muſt not be made ſubject to divers vouchees or ſuits of warranties of Charters, or to ſundry diſtreſſes where my grant made and meant but one.

To the ſecond objection, viz. the changing of the ſtate.

Now ſecondly where he hath changed hi eſtate, the caſe is worſe, for the eſtate muſt remaine the ſame in the privity, as muſt be made the ſame in repreſentation that it was in the time of the warranty created, when you come to vouch or to bring your *warrantia charte*; and therefore if the husband and wife be joyntenants and a releaſe be made to them with warranty, and then the husband alone makes a feoffement over with warranty and is thereupon vouched alone, he cannot vouch over, 10 E. 3. 52. Fitz. Counterplea of warrantie 15.

So if a woman tenant intaile make a leaſe pu'ant, or if in action they be recreated they cannot vouch over, 45 E. 3. 18 & 46. E. 3. 24. But if the leaſe had beene only for the life of a woman upon the receipt they might have vouched, for by repreſentation they were in of the firſt eſtate.

And when lands and warranties diſcend to two parties, and they make partition and one of them is impleaded, he ſhall not vouch alone, and

and ſhall pray aid of his fellow, and ſo ſhall put themſelves in repreſentation of one heire, and then vouch together. But if one partner alien his part or make default upon aide prayed, the other ſhall vouch alone, 27 H.8.54.4.H.7.2. 2 H.8. 2 & 43.E.3.13.

If two copartners be, and one of them alien with warrantie & comes in a vouchee, now he ſhall pray in aide of his fellow, and either have *pro rata* upon his loſſe or vouch over with him upon Garrantie paramount.

But now in this caſe that the vouchee when he will avoid the warrantie by change of eſtate, he muſt ſhew how the eſtate is changed 3 E.3.51. And ſo hath the defendant done here in the principall caſe.

And in this caſe here it is more dangerous to the defendant, for though it be true that if a man enter into a warrantie generall, he ſhall warrant no other eſtate then the tenant hath, 44 E.3. 38. 41. E.3.7. where the vouchee demands not the heire, nor the tenant makes not any ſpeciall declaration of it, as in the warrantie of Charters he doth, yet ſpeciall circumſtances may work the contrary. And therefore 41 E.3.25. if the voucher enter with a Proteſtation of an eſpeciall eſtate in the tenant who admits it, the vouchee ſhall warrant no other eſtate, though it be greater.

So likewiſe if the tenant prayeth warrantie of an eſtate certaine, and the voucher admits it, it ſhall make that good, though the eſtate in truth be leſſe, and therefore 38 E.3.9.4. if one hold land only for terme of his life, and warrant the land to him and his heires: if I ſhew this upon the voucher, he ſhall recover but for life, but if the deed be entered, and I except not to it, Brook recovery in value 8. I ſhall anſwer fee ſimple.

Much more plainly here in fee ſimple in the principall caſe where the declaration is expreſſly upon the fine and warrantie in fee ſimple truly; upon which he demands judgement accordingly for a warrantie of fee, and that if there were nothing elſe, this alone were cauſe in barre of this action, ſince in truth he hath but an eſtate for life. And if the defendant ſhould yeeld to his demand, he ſhould anſwer fee ſimple, and if judgement ſhould have paſſed according to the declaration in this caſe, and execution ſhould have beene after ſued upon it, it had beene then too late to have pleaded before in the former action 21 H.6.41 & 22 H.6.22. Garr. Char. If a diſſeiſor in an action brought againſt him vouch or make requeſt to have plea miniſtred unto him or bring a writ of war. charte, and then after that the diſſeiſee enter upon him and put him out and reenters, ſo that he is in another eſtate then was warranted, yet hee ſhall recover. But otherwiſe it would have beene if the entrie of the diſſeiſor had beene before the requeſt and writ, for then the vouchee or defendant might have beene ſhewed, that he had beene in another eſtate at the time of the voucher and writ. Out of which cited and allowed by ff. Na. br. in this writ de war. Char. I am cleare of opinion that if a

man

man have land conveyed unto him with warranty, whereupon a ſtranger hath right to enter, and he bring his writ of warrantie of charters, and hath judgement, though the ſtranger after brings no action but enters, he ſhall have his execution for a voucher and requeſt of plea is required where they may be had: but in caſe of entry it may not be, and the warrant is againſt all eviction by iſſue or title, either by entrie or by action, which I note to warrant men how they proceede againſt an *Ejectione firmæ*, where no voucher nor requeſt for plea can be had, but if a man foreſeeing that his title is defeaſible by entrie bring his writ of warrantie of charters againſt his feoffor, and hath judgement, if the ſtranger that hath right of entrie ſeale his leaſe, this entrie gives cauſe of recompence, but let him looke that he bring his action in time.

To the third objection. vizt. the doing it by Common Recovery.

The next is, becauſe the plaintife and his Father were in the laſt Rem. in fee, and the reſt come in by Recovery in the poſt, in which they can take no benefit of the warrantie, which can be extended no further then as it is limited, that is, either to the parties or their heires or Aſſignes, and he that recovers is neither, but above that eſtate, and where one comes under the eſtate, yet if hee bee not in the *per* by whom his warrantie was made, he is out of the benefit.

And therefore 22. Aſſ. 37. & 22. Aſſ. 69. If tenant in Dower in feoffe a villaine and dye, and then the lord enter and be impleaded, hee cannot vouch the heire of the tenant in Dower, that made the warranty, and then ſhe had dyed, the Lord could not ſo much as rebutt the heire.

But becauſe this is a common Recovery, I will ſpeake a little at large in it for learning ſake and for uſe, though it makes not directly for the caſe. I am of opinion, that if a man convey land to me and my heires with warranty, and I make a Feoffement or levy a fine, or ſuffer a recovery without vouching any Feoffor, to the uſe of my ſelfe and my heires, that yet I may vouch my Feoffor as I might doe before, for this is my owne fee ſimple, in the degrees and privitie in effect as before.

And therefore if I have lands that I hold in Knights ſervice by priority or poſteriority, and doe make no joynt Feoffement of them to mine owne uſe, yet the priority ſhall remaine as before, according to the former prioritie, it is *actum agere*, as it is holden in the caſe of the Abbot of Bury, for the wardſhip of the heire of Buckingham Dyer 28. H. 8. fo. 7. But this caſe of Priority is there cited, as a caſe ruled betweene the Lord Roſſe, and the Lord Dacres, for the wardſhip of the heire of Conſtables, for it was holden that the now uſe and ſtate was in the degree the ſame as before. And for the principall caſe there is ſaid, that if he infeoffe I. S. to the uſe of himſelfe in tayle remainder to mine owne right heires, there is a Reverſion. Pattenham and Cuffers caſe: This point is cleare in point of Recovery upon title, and ſo it is alſo in caſe of a ſtate truly in the poſt, as tenant in Courteſie, Dower, Lord of a villein, or by Eſcheat, but if one levy a fine to me in fee, with warrantie to

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me and my heires, And I ſuffer a common Recovery, againſt mee to mine owne uſe, as before, my warranty remaines, for I am in by them, as I was in before, and if the warrantie were therein to me, my heires and Aſſignes, and I ſuffer the Recoverie, is indeed an Aſſignement. As to the point of vouching Osborne, or ſuing *Warr.* of *Charters* againſt him, having formerly vouched him and had judgement and recompence, it is cleare he cannot have recompence againe, for the warrantie is executed, ſatisfied and ſerved in the firſt, as in a *Scir. fac.* to execute a fine, it is a bar to plead, that it is executed already, and that the demandant and his Anceſtors have beene ſeiſed by force of the fine 23. E. 3. *Garr. Ch.* 77. expreſſe. If I have recovered in value, I ſhall never vouch againe, for thoſe lands by force of the firſt warrantie, becauſe it was once executed. And by the ſame reaſon, if I once have had judgement to have taken upon warranty, I ſhall not vouch againe upon the ſame warranty for the ſame land. And if you will reply to me that the warranty in queſtion is by Osborne and his wife, and the former voucher was of the husband only.

I anſwer, that then it muſt be underſtood that they are two ſeverall warranties, and then in vouching the husband onely, hee renounceth the warrantie of him and his wife, and after ſhall be ſued. But yet it cannot be ſaid in this caſe, that the warrantie from the wife ſhould be voyd, or ſo purpoſed, as in the caſe 10. E. 3. 52. where warrant upon a releaſe being made to the husband and the wife, the husband alone vouched and averred that the wife had nothing, and therefore the warrantie was voyd unto her which is alſo the reaſon in the judgement of the caſe of Evan and Snow Plow. 540. That the common Recovery againſt Tenant in taile and his wife having nothing ſhall binde the taile. But where the woman warrants on the contrary part, ſhe is bound though ſhe hath nothing, yet it is true that to ſeverall reſpects a warrantie may receive ſeverall ſatisfactions by parcels, but not totally. And therefore Hill. 5. Jac. Regis rot. 941. in the Kings Bench the caſe was this; That one John Rudge did grant certaine lands in Southampton in com. Devon. unto John Pincombe for his life, who in the 13. yeere demiſed the ſame unto one William Hunt for 21. yeeres to beginne after the death of the ſame Pincombe, and after 32. Eliz. granted the reverſion of their lands with this expreſſe clauſe of warrantie following. And the ſaid Joh. Rudge and his heires all the premiſſes unto the ſaid Amy againſt all perſons claymming by the ſaid John his anceſtors or heires ſhall and will warrant and defend during the ſaid terme. John Pincombe Attourned and died, Amy and the reſt entered, upon whom William Hunt the leſſee entered, whereupon Amy and the reſt brought their action of covenant againſt John Rudge to the damage of 200. pounds, And the defendant pleaded in barre, that the plaintife had formerly brought a *warrantia charta* againſt him upon the ſaid warrantie for the ſame land, and that it was yet hanging undetermined; and the plaintife demurred in Law, and it

was

was adjudged for the plaintife, and upon a writ of error brought in the Exchequer Chamber, the former judgement was affirmed; the reaſon was, that though the warrantie was annexed to the freehold, yet becauſe the impeachment was onely by a leaſe for yeeres, for which there could neither be voucher nor *Warr. Char.* nor if judgement had beene given in the *warrantia chartæ*, could any exception, execution be made in value for a leaſe, therefore it was holden as a warrantie reall, if the freehold were brought in queſtion taken out of the freehold, it is to be uſed as a perſonall covenant, and to be ſatisfied in damages.

Out of which Judgement, it appeares, that it was allowed by both Courts, that a warrantie of charters will give remedy for a ſtate of freehold defeated by entrie; and that a warrantie may have a double execution for ſeverall eſtates, and that a warrantie of it ſelfe reall may be uſed as a covenant to recover damages: and by the ſame reaſon, if a man convey lands in fee with warrantie, and the tenant bring a *Warrantia chartæ*, and hath judgement *pro loco & tempore*, and that then a ſtranger recovers eſtate for terme of life, he ſhall ſue an execution for recompence for ſuch eſtate; and if he die, and another recover eſtate for life, he ſhall ſue another execution for like recompence, for his recompence ſhall be according to his loſſe, as the bookes before cited doe prove; for he loſeth not the land warranted, but ſome leſſe eſtates out of it, and ſo the inheritance of the warrantie remaines ſtill with the judgement of the land. But if a whole fee ſimple be recovered, and recompence for it, then the warranty is wholy executed and ſatisfied, and ſo extinct.

But now of the other point:

To the fourth Objection, viz. his vouching the land to Osborne once already.

If Osborne in the common recovery ſhall be underſtood another Osborne, and not the ſame Osborne, then it muſt be underſtood in the Roll: the plaintife had ſeverall warranties againſt ſeverall perſons, and when action was brought againſt him, he could not have advantage of both, but muſt hold himſelfe to one. And therefore 9. H. 5. 12. One brought a *Scir. fac.* upon a fine as heire to two parceners, the tenant pleaded in barre a fine levied by the two parceners with warrantie, and relied upon the warrantie, and the plea was holden double, and he forced to relie upon the warranty onely of one. And ſo likewiſe 31. E. 3. Fitz. voucher 25. If one have divers warranties, and they fall by diſcent upon a perſon, heire unto them both, yet hee muſt be vouched onely as heire unto one, and the reaſon is apparent, whether the record or the vouchee, for as to the demandant it is a kinde of plea in barre, and therefore ought to be ſingle, for the demandant may counterplead the poſſeſſion of the vouchee and his anceſtors which hee cannotdoe if they be divers.

To the fifth Objection, viz. of divers warranties.

And againe, the voucher of the tenant againſt the vouchee, is a kinde of demand or ſuit, and therefore ought to be ſingle, and the vouchee may counterplead them which he cannot do if they be divers. Hereof it followeth

followeth that when he hath his choyce of vouchees and takes him to the one, and thereupon proceeds to judgement, he looseth the other, and can never resort to it againe, as in case of divers pleas of barre where the actions come to a finall judgement upon one. But if a man have divers warranties for the same lands, he may have severall writs of warrantie of Charters and Judgement upon them, and so is Fitz. N. br. 135. and that may give him double remedy, or not as the case may be. For if he be after sued for that land in an action wherein he can never take advantage against the other, because hee did not vouch him according to the former rules. But if he sued in an action wherein he cannot vouch, but may require plea, and he doth require plea of them both, and they both advise one plea, and he plead that, and lose, he shall have severall recompence against either, but if they advise of severall pleas, he can have no recompence against him by action, but by entry and eigne title, then he may sue severall executions upon the severall Judgements in the writ of *Warrantia charte* against either of them for full recompence, and so he shall have double value for his losse, for either of them warranted the whole, and either of them hath colour to pray ayd, or make use of the recompence that the other hath yeelded to his owne use.

37. *Counden* versus *Clerke*.

Ejectione. Surr. Hill. 10. Jac. Rot. 3315.

Deviſe to the heire of the name of the Deviſor muſt finde a very heire.

GEorge Counden the younger, brought an *Ejectione firme* against Thomas Clerke of 3. acres of pasture in Newington, of the devise of George Counden the elder, upon an issue of not guilty, the Jury found a speciall verdict, that one Will. Counden was seised of the said land in fee, and held them with others in soccage, and had issue one John Counden and Eliz. Counden, and that Eliz. tooke to husband one George Dalton and had issue of him Jane Dalton and Eliz. Dalton, and died, and that William Counden made a Will, and gave thereby unto Jane and Eliz. to either of them 10. pounds a yeere during their lives, issuing out of lands in Southwarke, called the Woolsack rents, and therein had this clause.

Item, as touching lands in Southwarke, and in Newington Lambeth, and Greenwich, whereof I now stand seised, which of right will and my onely intent and meaning is, shall descend unto John Counden my sonne after my decease, this is my devise. And then appoints certaine friends of his shall receive the profits of them till his sonne shall come to 24. yeeres, and then they to make an account and satisfie him. And then addes this clause, Provided alwayes, that if my sonne John shall happen to decease without issue of his body lawfully begotten, that then I will all and singular my lands, tenements and hereditaments, and every parcell thereof unto the right heires males, and posterity of mee and my name for ever, equally and amongst them part and portion like.

Judgement was in this case given for Clerk, that is for the ground, Children, all heires in default of the will because the Deviſors brother could not take by it.

And then in ſuch caſe I will and bequeath unto Iane and Eliz. Dalton, and either of them one Annuity or yearely rent of 5 pounds a yeare a peece more, iſſuing out of the Woolſack rents for terme of their lives. Then the deviſor dyeth, and Iohn Cownden the ſonne dyeth without iſſue, then the two grand-children, Iane and Elizabeth Dalton enters as heires, and make a leaſe of the lands in queſtion to the defendant. Thomas Clerke who enters upon George Cownden the elder, being brother of William Cownden, the deviſor of his name and whole blood entire, entred, upon whom Clerk the defendant reentred. And if upon the whole matter the entry of George Cownden the elder, upon Clerke the defendant was lawfull, then they ſaid for the plaintife, if not for the defendant.

I will make in this caſe theſe queſtions.

I. Whether the limitation to the heires males, &c. upon the dying of Joh. Cownden the ſonne without iſſue, ſhall take effect by way of reverſion or remainder, or elſe by way of originall or expectant deviſe. For upon that point decided one way, will fall a certaine conſequence.

2. The next point is whether the limitation if it were a deed, could carry the land to the brother.

3. And the third is whether it can carry the land to the brother in caſe of deviſe as that is.

To the firſt. And to the firſt I am of opinion that the ~~ſame~~ ſonne is by the proviſo of this will tenant in tayle to him and the heires of his body. For this implication (which in a will is ſufficient for the purpoſe) is plaine. Hereof it will follow that the limitation after following to the right heires males, &c. will be but a reverſion and will veſt alſo in the ſonne; for this is a poſitive rule, that a man cannot raiſe a fee ſimple to his owne right heires by the name of his heires as a purchaſe, neither by conveyance of land, nor by uſe, nor by deviſe 28 H. 8. The caſe of the *Abbot* of Bury, &c.

Maxime.

And the Lord Boroughs caſe 35 H. 7. Dy. 54. Nay more 4 H. 8. If a man deviſe lands to a perſon that is next heire and his heires, the deviſe is voyd, and it works by deſcent Mich. 2 & 3. Phi. & Mar. Dyer 126. Debt againſt an heire. The defendant pleaded that he had but the third part of 20 Acres by diſcent, the iſſue was whether he had the whole, and it was found that the obligor his father deviſed the whole to his wife, untill the defendant his ſonne and heire ſhould come unto the full age of 24 yeares, and from thenceforth to him and his heires, and judgement was given for the plaintife. *But* it may be ſo limited unto heires entaile M. 4 & 5. Phi. & M. Dyer 156. the caſe of Greſhold. He made a feoffement to A. for life, the remainder unto the heires males of the body of the feoffer, the remainder to his owne heires in fee. The father the feoffer had two ſonnes, and the elder had a daughter and dyed, and it was adjudged for the daughter againſt the uncle, either becauſe

cauſe the entaile to the heires males was void, or becauſe it ceaſed in the elder ſonne. But Paſſ. Eliz. Dy. Fiſh levied a fine to the uſe of himſelfe in tayle and a Formedon brought upon it by the iſſue. And the precedent words touching the deſcent of the land to him changeth not the caſe for theſe reaſons.

Firſt, it is no expreſſe gift aſſertive but a report emanative thus. Firſt touching my land, which meaning is ſhall deſcend and come to my ſon, this is my will, and ſo proceeds to diſpoſe it to his friends for a time, and then chargeth with the rents, and then diſpoſeth of the inheritance *ut infra*, not agreeing in appearance with the deſcent. *Reaſon* 1.

A ſecond reaſon is, becauſe the declaring that the lands ſhall deſcend to his ſonne, is juſt the ſame that the Law ſpeaks, it is utterly void and idle, and then the reſt of the deviſes muſt proceed as if that had not been ſpoken at all, as the caſes are before. Thus I deviſe that if my ſonne dye without iſſue, then my land ſhall go to my heires males. And therefore the caſe in 4 H. 6. & 2 & 3. Ph. & Mar. Dyer 126. before is ſtronger then this, where it is reſolved that a deviſe made to the ſonne and heire, and his heires is utterly void, for then it is not to the heires collective, but to the perſon that is heire in fee. And though the limitation to the heires males be ſpoken conditionally by the word, if Iohn dye without iſſue, that is an ordinary limitation of a rem. as in fine *ſi contingat*, yet the rem. or reverſion takes place preſently. *Reaſon* 2.

A third reaſon is that that part of the will may take effect in all the words, and yet it may ſtand as I take it, for the words are, that the land ſhall deſcend and come to the ſonne, which is in all parts true, for it ſhall come to him in taile by the deviſe, and the reverſion by diſcent. *Reaſon* 3.

Now if the caſe ſhall be taken thus, then clearely if the reverſion veſted in the ~~ſame~~ ſonne in fee, it muſt of neceſſity diſcend from him to the daughter of his father, and not to his uncle.

To the ſecond point when the limitation is made to the heire male or female, whether it be by way of purchaſe, or by way of diſcent, they that will take muſt have both words verified in them, that they muſt be heires and alſo males or females. But this hath a divers conſideration, and upon divers reaſons in caſe of diſcent, and in caſe of purchaſe, for the word heire is ſometimes taken alſo largely, and as the Grecians call it κεφάλαιοι, or *ſimpliciter* καπὰ τὶ or *ſecundum quid per accidens*: ſometimes in *abſtracto* ſtanding naked by it ſelfe, and of it ſelfe. And ſometimes in *concreto* cloſed with land or rent, in reſpect of which he may be heire, that is not right heire, as the word is here. For example the younger ſonne in Borough Engliſh is heire, and all the ſonnes in Gavelkinde, whereof the reaſon is, becauſe the cuſtome is, and ſo muſt be pleaded, that the cuſtome of thoſe lands is, that they muſt deſcend to the younger brother, or all the ſonnes, ſo they are heires *ſecundum quid* of theſe lands in point of deſcent, or when they deſcend, for then they are within the To the ſecond point.

cuſtome that gives the inheritance, *Tum demum ſcimus cum cauſam ſcimus.* But now to make the limitation even of the land of that nature to heires in point of diſcent, and it will be otherwiſe. And therefore if I give land in Gavelkinde or Borough Engliſh to one for life, the remainder to the right heires of I. S. the true heires ſhall take it, for it is out of the caſe of cuſtome, and ſo muſt runne to the heire at the Common Law 37 & 38. H. 5. B. diſcents 59. & Don. 42.

Note alſo that warranties and eſtopples doe alwayes deſcend upon the right heires generall as being ſimple heires 38 E. 3. 23. If there be a warrantie, or where one hath lands in Gavelkinde, the eldeſt ſonne ſhall be vouched alone, and the tenant may alſo vouch the others for the poſſeſſion, 33 E. 3. ff. voucher 94. that the heire generall ſhall take advantage of ſuch warrantie and no other, except he comes in as vouched by poſſeſſion with the true heire. Alſo eſtopples fall upon the heire at common law, and alſo the daughter that comes in by poſſeſſion *fratris*, ſhall eſcape an eſtopple of the father 35 H. 6. 33.

Nay more particularly, I convey lands that I have on the part of the Mother or in Borough Engliſh to I. S. and his heires without conſideration, the uſe ſhall be void, and ſo the land ſhall returne againe to me and to my heires of the mother, or in Borough Engliſh as before, for the ſame law doth conſtrue the uſe of the ſame in ſtate & quality as the land was. But if I do declare the uſe to me and my heires, or upon ſuch feoffement reſerve a rent to me & my heires at common law, for it is not within the cuſtome, but it is a new thing deviſed from the land it ſelf, Tri. 4. & 5. Ph. & Mard. D. 16. and that is the reaſon of another difference, 9 H. 7. 24. Shellies caſe, that land by diſcent falling upon one ſhall be taken from him by a neerer heire after borne. Not ſo of theſe purchaſes.

So it is in the caſe of entailes whereof the ſtat. of Weſtm. 2. gives example, which were fee ſimples conditionall at the common law, they take their effect by that ſtatute in caſes of diſcent, but the limitation is immediately and by way of purchaſe to the heire male or female of the body that ſhall take, for this is cleerely out of the letter and intent of the ſtat. of Weſtm. The caſes of 37 H 8. B. number 7. 40. Sir John Huiſſey made a feoffement to his wife for life, the rem. to his owne heires males of his body, the rem. to his right heires after he was attainted of treaſon. The wife dyes, Sir William *Huiſſey* prayes an *Ouſter le maine*, and Whorewood the Kings Attourney was of opinion, that he ſhould have it, comparing it to an entraile in deſcent, and yet granted that the rem. in fee failed for want of heire. it is clearely contrary opinions there. And ſo in Shellies caſe, which in a controverſie that the fee ſimple veſted in Sir John Huſſey, and ſo was by him forfeited and that the heire male of the body failed in purchaſe, and ſo all came to the King.

And

And this caſe is yet more cleare, for here the heires males are not reſtrained to any body, which might have had ſome colour of helpe from the ſtatute of Weſtm. But this muſt be a meere fee-ſimple being without body.

And againe, if it had beene to the heires males of the body of the deviſor, as here it is to the right heires males of the name of the deviſor, it could not have ſerved this brother, being collaterall, as it might have ſerved an iſſue male of himſelfe, if this deviſe to a man and his heires males in which the body ſhall be underſtood, as I will ſhew you after in a caſe of deviſe.

And to the third point, whether this ſhall paſſe betweene the two meane grounds, but ſo as wee offend neither. One that the deviſe muſt be taken according to the intent of the party deviſor. The other, that ſuch intent muſt be ſo expreſſed in the Will written, that it may be certaine to the Court, and not againſt law. To the third point.

Now we are in caſe of names and nominations of perſons or bodies politique or temporall that may take, whereof there are divers ſorts, as firſt the Proper names and ſurnames wherein notwithſtanding there may be ambiguity, and if I deviſe land to my ſonne John, having two of that name, averment, who was meant, makes this certaine.

There are alſo more nominations or deſcriptions as by the ~~fame~~ *nature of* dignity, office, or the like, as to deviſe land to the Earle of Hertford, the Lord Treſurer, or the like, and this will admit a deſcription made good by reputation though not by truth, as land will paſſe ever by conveyance to one by the name of ſonne which is a Baſtard, or by the name of wife, which is not lawfull, if they be ſo reputed or knowne by that name, 27. E. 3. 83. A grant by an Abbot without any other name good, 10. H. 4. 5. ſo one may take by the name of ſonne or daughter if he be ſo knowne, although there were no marriage between the father and mother, 41. E. 3. 19. 13. E. 3. 24. There are names or deſignations that have an equivocall amphibologie in them, *Puer* for male or female, and if it be no way cleared to the contrary, it will *prima facie* be taken for a ſonne, 16. Eliz. Dyer 337. make this the like of the word heire, Feaſt of S. Michael by preheminence of the Archangel. I grant, that if a deviſe doe ſufficiently and certainly appeare, then the intent of the deviſor in the ſubſtance though the circumſtance fail or be defective I care not. A deviſe *Eccleſiæ* in Holborne 21. Reg. F. Demiſe, 27. a Deviſe unto a College by name knowne, although it be not by the very name of a corporation as to Trinity College in Cambridge it is good, the caſe of the univerſity of Oxford Co. lib. 10. 57. Note by the ſtat. 1. Mar. Deviſes by ſpirituall corporations enabled M. 8. & 9. Eliz. Dyer 255. A Deviſe to my ſonne after the death of my wife gives an eſtate to my wife 11. H. 8. 17. & 29. H. 8. B. Deviſe 28.

If ſince the ſtatute A. deviſe that his feoffees ſhall convey the land to I. and

and his heires, this is an immediate deviſe of the land 29. H. 8. B. 20. Deviſe. *Quære* if the land were never in feoffment. If I deviſe lands to one and his heires males without ſaying of his body, the Law makes it an entaile (by the apparent intent) to him and to the heires males of his body, 27. H. 8. 27. by Fitz. and Shilty.

Therefore I hold the booke, 28. H. 8. Fitz. Demiſe 18. and Babingtons opinion 9. H. 6. fo. 13. to be no law; which are thus, that if a man demiſe land to I. S. and his heires males, and he have iſſue a daughter, and that daughter have a ſonne, that ſonne ſhall inherite by force of that demiſe as an heire male which cannot be, for it is *oppoſitum in objecto*, to ſay, that there ſhould be an intaile to heires males of a body (as clearly it is) and yet that an iſſue by a female ſhould inherit, for that were to make it a fee-ſimple, and where ſhall the land reſt in the meane time, while the mother lives, and before the ſonne is borne; and what warrant is there, when the deviſor doth ſpeake ſenſibly and certainly to enlarge his gift for ought appeareth beyond his meaning, which is as great an injury as to abridge his meaning. I would rather grant, that if a man fortune to deviſe land to I. S. for life, the rem. to the next heire male of I. D. having iſſue a daughter, who had iſſue a ſonne, and then the daughter of I. D. die, and then I. D. himſelfe die, and then the tenant for life die, that the ſonne of I. D. ſhall have the land.

The caſe 30. aſſ. 47. & 30. E. 3. 27. where one having two ſonnes and a daughter, deviſed it to a ſtranger for life the *Rem. propinquioribus de ſanguine puer.* of the deviſor and died, his ſonnes having no children, but his daughter having two daughters, and it is holden that neither the ſonnes nor the daughter can take, for they are *pueri*, and not *de ſanguine puerorum* but the two daughters of the daughter ſhall take for their lives, and if there were alſo ſons of the ſons, or daughters, they ſhould all take together. And that children borne after the rem. veſted (which was after the Teſtator) ſhould take nothing, and that the neereſt of degree in blood ſhould take, and not the worthieſt in order of deſcent; for the words here doe import no reſpect of dignity, but of proximity of blood. But a deviſe made in rem. to a corporation where there is no ſuch, it is voyd, though there be ſuch a corporation made before the rem. F. 9. H. 8. & 49. E. 3. otherwiſe if the corporation be begun, but one head, yet choſe, And 39.

So by Keble 2. H. 7. 13. If I deviſe lands in Rem. to the heires of I. S. it is voyd, if there be no ſuch I. S. though there be one, and heires of him before the rem. fall 19. H. 8. 8. If I deviſe land to the Abbot of S. Peter where it is S. Paul, it is voyd. 9. H. 6. 23. 11. H. 6. 12. Farrington and Danlyes caſe, one ſeiſed of land deviſed it to A. for life, the rem. unto B. in taile, the reverſion unto the next heire male of the deviſor, and the heirs males of his body lawfully begotten, the deviſor dieth without iſſue at all, the next heire of the deviſor was a daughter. The cleare opinion of the

the caſe is, that the daughter ſhall have the land by way of reverſion, and though ſhe have a ſon after, he ſhall not take away the land. Chapmans caſe, if land be deviſed to a ſtocke or family, it ſhall be underſtood of the heire and principall of the houſe, much more where the proper word of heire is expreſſed; where the caſe is doubtfull, the Law ſhall prevaile, as Mich. 15. & 16. Eliz. Dyer 326. One Huntly having demiſed land for yeeres, rendering a rent, and after having a ſonne and daughter, deviſeth the reverſion to them, and to the heirs of their bodies, and for default of iſſue to the brother and ſiſter, the rem. to the right heires of the deviſor, the brother dies without iſſue, the ſiſter hath iſſue and dies. It was adjudged that the moytie of the reverſion and rent ſhould returne to the heire of the deviſor, yet the implication may be ſo expreſt, that it ſhall change the law, Mich. 13. & 14. Eliz. Dyer 303. One having lands, wills that a third part ſhall goe to his eldeſt ſonne, and the other two parts to foure younger ſonnes, and the heires males of their bodies. And if a child be borne, he ſhall be heire, and if all the five happen to die without iſſue male of their or any of their bodies, then he willed that the other two parts ſhould revert to the heires of the deviſor. All the ſonnes but one die; The opinion was, that the ſurvivor had an eſtate taile in all the five Parts and nothing ſhould revert as yet.

Alſo Hil. 5. Eliz. Dyer 220. one having land, part in fee ſimple, and part in fee taile, reciting by his Will, that his wife was dowable of the third part of all his lands, yet ſhe ſhall have but the third part of his fee ſimple: But if it had been, I give unto her ſo much of my lands as ſhall amount unto a full third part of all my lands, it had been otherwiſe; ſo here, I grant, that though this deviſe will carry it but to the very heire, becauſe no other ſenſe appeares to the court, yet if I ſaid by my Will, I make I.S. my heire, and I give unto my ſaid heire my land, and indeed he is not ſo much as of my blood, (as it is here) I give to my heire male, which is my brother, George Counden; or if a man have an houſe or land in Borrough Engliſh, and buy land lying within it, and then by his Will gives his new purchaſed lands to the heire of his houſe and land in Borrough Engliſh, for the more commodious uſe of it, it will be otherwiſe for, his heire *factitius* or *factus*, not *natus* or *legitimus*: ſo the intent is certaine, and not conjecturall.

And that is the reaſon of the caſe of 7. E. 6. where land is deviſed to three brethren in taile, and that one ſhall be heire to the other, this makes croſſe rem.

Now, the clauſe that the land ſhall be to the heires males part and part like, makes it the more repugnant and inſenſible; for if it ſhall fortune or happen that the heire ſhall be preferred, that ſhould be an intaile, and then none can part with him. And if hee meant that all were males of the name and poſterity ſhould take together, then the word heire is wiped out, and then the ſonnes ſhall take equally with the father like

Will unſenſible and repugnant is voyd.

like the caſe of 30. *Aſſ.* (as before) of *proximioribus de ſanguine*, and therefore ſince the will is unſenſible, repugnant in it ſelfe, and of no certainty, it ſhall be voyd in law.

Laſtly Archenhurſts caſe is even the ſame, judged in the Kings Bench, *Term. ſancti Mich. Anno. Iac. Reg.* 7. *rot.* 115. which was thus; William Beard ſeiſed in Fee of a Meſſuage called Beard-Hall with the Appurtenances in Beard in Com. Derby held in ſoccage, having iſſue Elizabeth, Emme, and Katherine, deviſed the ſame after his deceaſe to Emme his wife for Terme of her life, and after her deceaſe, his executors ſhould receive the profits thereof, untill the full ſumme of nine hundred pounds was received, for the preferment of his daughters in marriage over and above all Charges, and the nine hundred pound levied, the ſaid Meſſuage ſhould remaine to his right heires Males for ever. And if his heires Males ſhould diſturbe his executors in receiving the profits, that their eſtates ſhould ceaſe, and the land ſhould be divided amongſt the daughters then living, and dyed; One William Beard was found his heire male, Emme his wife entred and dyed, Elizabeth his daughter after his deceaſe, married Ralph Archenhurſt, and Francis Curtis, the plaintife by a leaſe from William Beard the heire Male, brought his Action of *Ejectione* firme againſt Ralph Archenhurſt, whereupon the ſpeciall verdict, was found *ut ſupra*. And concluded that if William Beard took eſtate by will in Rem. then *pro Quer'* otherwiſe *pro defend.* And upon argumẽt, the Judges gave Judgement againſt the plaintife.

But note, that upon that judgement, a writ of error was brought in the Exchequer Chamber; And this Judgement of *Comndens*, being thus urged to maintaine the other, there was much labour to make differences, but in the end *Paſche* 17. *Iac.* the Judgement was affirmed.

Iudgement.

Covenant.

38 *Elias Tisdale* verſus Sir *William Eſſex.*

ELias Tisdale brought an Action of Covenant, againſt Sir William Eſſex a Baronet, & declared that it was well agreed betweene them, by a Bill of Articles indented, in manner and forme following. Firſt, the ſaid Sir william Eſſex, *convenit, promiſit & agreavit ad & cum prefato Elia, quod ipſe idem Elias haberet, occuparet & gauderet*, certaine lands for ſeven yeares from the feaſt of the Anuntiation next enſuing the date of the bill, and covenanted, that he ſhould quietly remove ſuch buildings, as hee ſhould ſet up at that time, within three moneths after the time, and that hee would make him as good and certaine demiſe of the premiſſes, or ſecuritie for the quiet enjoying of it, as his councell ſhould thinke fit, and the plaintife covenanted, that he ſhould pay him 220. pound a yeare for it during the Terme, and that he would deliver up the quiet poſſeſſion of the land, to Sir Will. Eſſex at the end of the Terme. And declared that he entered into the lands, the next day after our Lady day,

day, & that one Henry Elſington entredupon him and ejected him, and hath held him out ever ſince ; which he layes to be the breach of his covenant to his dammage of one thouſand pound, and produced in Court his bill of Articles dated in February 10. *Jacobi*, whereupon the defendant did demurre in law, and the queſtion were made too.

The firſt, whether this were a naked covenant, or amounted to the leaſe of the land.

The ſecond, whether the ejectment by Elſington, being taken to bee by wrong, becauſe no title was laid in him (and the worſt ſhall be taken againſt the pleader) ſhall be judged to the breach of covenãt in this caſe. And it was adjudged, that there was a leaſe of the land for the 7. yeares, for the words *haberet, occuparet & gauderet*, the lands are the perfect words of the Intereſt. And therefore 5. H. 7. 2. a Lycence to occupy though 10. E. 4. 4. ſeemeth to make the doubt, that the leſſor may alſo occupy with him and 21. H. 6. 37. Patrons opinion I allow, that if one lycence me to ſow his land, that is no leaſe. And therefore if I ſow the land, the owner ſhall reape it alſo, 3. & 4. Ph. & Mar. 150. One made a leaſe to another for life, *& proviſum eſt*, that if the leſſee dye within ſixty yeares, that then his executors and Aſſignes, ſhould enjoy the land in his right for ſo many yeares as ſhould be behind, from 60. from the date of the leaſe. And the opinion of the Court was, that it was but a covenant. *But* here is a contrary terme from the beginning, and certaine rents and covenants on both ſides, importing preſent poſſeſſion of the land, and the covenant following, is but in *majorem cautelam*, that hee might require better aſſurance by fine or the like, or by collaterall ſecurity. And the word *convenit* in this place, ſounds not full and properly in covenant, but in agreement. And ſo 1. E. 6. & 37. H. & *Broo.* leaſes 60. *convenit & conceſſit* to one that he ſhall have my land is to leaſe. And yet in that caſe, *conceſſit* is not ſo much a grant as an agreement.

To the ſecond point. it was adjudged no breach of covenant ; yet it was agreed, as the bookes 20. *H.* 7. 12. & 6. E. 3. 4. If the leſſor eject his leſſee, he may have an action of covenant, and 12. H. 4. 3. If a Parſon make a leaſe for yeares and then reſigne, it is a breach of covenant, but the law ſhall never judge, that I covenant againſt the wrongfull Act of ſtrangers, except my covenant expreſſe to that purpoſe ; for the law it ſelfe, doth defend every man againſt wrong, and therefore 26. H. 8. 3. If I warrant land unto you expreſſely, yet I ſhall not defend againſt tortious entries, and Mich. 15. & 16. Eliz. Dye 328. an expreſſe Aſſumpſit, that the leſſee ſhall enjoy *quietè & pacificè abſq. interruptione alicujus*, will bind mee againſt wrongs. And Hill. 30. Eliz. Foſter brought an Action of covenant againſt Leonard Mayes in the Kings Bench, and the caſe was thus, that Maies had leaſed unto him, the perſonage of Brankeſter for a yeare, and covenanted to ſave him harmeleſſe, concerning the premiſſes and the profits of the ſame to be received, againſt one.

Covenant that the leſſee ſhall enjoy, bindeth not againſt wrongfull Ejectment.

Blunt Parſon of Brankeſter, and hee alleaged that *Blunt* the Parſon had ejected him within the yeare, and though that were taken by the Court to be a wrongfull ejectment, for though he were parſon, yet there might be many wayes to his ejectment wrongfull, and the worſt ſhall be taken againſt the pleader, yet it was adjudged that the covenant was broken for two reaſons onely, it was to ſave him harmeleſſe by that Parſon, touching the profite.

Accompt. Goldsborough London. Accompt. Receipt By whoſe hands, and to whoſe uſe.

39. *Harrington* verſus *Deane.*

Termino S. Hill. An. 10. *Jac. Reg. rot.* 3230.

"THomas Harrington brought an action of accompt againſt Iohn "Deane, to render him an accompt of two hundred pound of mo-'ney, received by the hand of Sir Iohn Rotheram Knight, &c. The de-'fendant pleaded that he was never his receiver of any ſuch ſome, or any 'part thereof, by the hands of the ſaid Sir Iohn Rotheram.

'The Jury find that the ſaid Sir Iohn Rotheram was indebted unto 'Harrington two hundred pound, and that Harrington willed Deane to 'require and receive the ſumme of money of Rotheram for him, and to 'pay it over from him unto Harrington, and hee accordingly borrowed 'two hundred pound, of one Miſtris Stanhop for Rotheram, and recei-'ved it of her to pay over unto Harrington, and he appointed his wife 'accordingly to pay it over unto Harrington, and Rotheram gave bond 'to Miſtris Stanhop for it &c. *And* if upon the whole matter &c. And it was adjudged *una voce*, that the Action was well brought, and that the verdict did maintaine it, ſo as it was laid, for it appeares plainely from the beginning to the end of the caſe, that Deane the defendant was and tooke upon him to be ſervant as well as Harrington, to aske and receive two hundred pound as to Rotheram, to borrow where he could two hundred pound, and that not onely to the intent, to pay it over unto Harrington, but with an expreſſe Commiſſion to pay it over indeed. Both which Commiſſions he did accordingly execute in all the parts, ſo that though it appeares not that Miſtris Stanhop lent the money, to be paid over unto Harrington, yet it is found that Deane received it, and as lent to Rotheram, whereby it became Rotherams money, the rather where he had given bond for it, And that the ſame receipt, was to pay over unto Harrington, as by force of the firſt Commiſſion received from Rotheram, and the intention of Deane himſelfe.

Commiſſion workes upon that that was not then in being.

So now at the ſame inſtant it became firſt *Rotherams* money, and by him as it were delivered over unto Deane to be paid unto Harrington for his debt, though it never came to Rotherams owne hand actually. And ſo it became Harringtons money received by the hands of Rotheram, as by the Declaration.

And though the books of 1 E. 3. and other books be, that if A deliver money

money over to *B*, to deliver and pay over to C, in this caſe alwayes B is anſwerable to two actions of account conditionally as the books are, yet as this caſe is Rotheram could never have had an action of account againſt Deane for his money, becauſe he had put himſelfe out of the property of it, by appointing Deane to pay it over unto Harrington for his debt, and Harrington had accepted it, and made it his ſatisfaction by appointing Deane to receive it by the hands of Rotheram, and Deane had received it to that intent, and in execution of all parts of that agreement, and ſo all parties were bound by it.

40 *Prenry* verſus *Kent*. Q. Imped.

PRenry brought a Quare Imped. againſt Kent the Incumbent and others; and upon ſurmiſe made to the Court, that Kent did fell timber upon the glebe, and upon the lands of coppyholders holding of a manor parcell of the Rectory, and upon motion made accordingly, the Court granted a prohibition.

Prohibition for waſt in a Quare imped. by the plaintif.

41. *Pine* againſt the Counteſſe of *Leiceſter*. Debt.

'HUgh Pine of Lincolns Inne brought an action of debt in the County of againſt the Counteſſe of Leiceſter, and declares that the Earle of Leiceſter being ſeiſed in fee of the Mannor of Glebery in the County of Salop, granted a rent charge of 100 pounds *per annum* out of the Mannor, unto one Foſter and his wife for their lives, and layes the death of the Lord of Leiceſter, and how the Mannor came to my Lady, and then the death of Foſter and his wife laſt, and how he is the executor of Foſter and his wife, laſt brought her action for arerages of rent incurred in their life, while the Mannor was in the hands of the Lady, and this action being laid in a County where it was ſuppoſed Pine was ſtrong; it was moved to be laid in a more indifferent ſhire, whereupon I ſaid that they were not well adviſed; for this kinde of action of debt was locall, and muſt needs be layd where the land was, becauſe the Lady was not chargeable, but in reſpect of the poſſeſſion, whereupon Serjeant *Harris* being not of Councell in this caſe, confeſſed it had beene ſo adjudged in another caſe.

Debt for arerages of rent is ſtill locall.

Hobard.

42. *Cumberland* verſus *Cumberland*.

Waſt.

THe Earle of Cumberland brought an action of waſte againſt the Counteſſe of Cumberland dowager, and layd the waſte in the writ among other things in the Caſtle of Burleigh, and did no otherwiſe aſſigne any Towne where the Caſtle ſtood, and other waſtes in the Towns of Durham, Flaxbridge, and Appleby, and then in his declaration aſ-

ſigned waſts in the places and townes mentioned in the writ, and one other towne called Langton, not and contained in the writ, whereupon 18 ſeverall iſſues were joyned, whereof none was concerning any thing of Flaxbridge. And there was one *ver. fac.* for the triall of all thoſe iſſues which did ariſe from the Townes of Durham, Appleby, and Flaxbridge. Whereupon after tryall of all thoſe iſſues whereof 14 were found for the Counteſſe, and foure for the Earle ~~had mention~~ a motion was made in arreſt of judgement for miſtriall by the counſell of the defendant. It was reſolved by the Court though they were all ſeverall iſſues & might be tried by ſeverall *ven. fac.* and then every *ven. fac.* ſhould have come from the place where the particular iſſue did ariſe, yet in ſuch caſes as this one *ven. fac.* was allowed to try them all for avoyding of multiplicity, but then that *ven. fac.* muſt ariſe from all the places from whence all the iſſues did ariſe, and from no more, as a common *ven. fac.* for any iſſue ought to be. Now here the *ven. fac.* offended in both theſe, for the *ven. fac.* did not come *inter alia de vicineto Caſtri de Burleigh*, for a Caſtle will beare a venne but from the Towne of Durham, as if it muſt be underſtood to be in the Towne of Durham, which is not ſo, though a Pariſh Church may be extended within the Pariſh.

So fa: Lord D^r touts cases.

The other fault was, that the *ver. fac.* was awarded from one Towne *inter alia* from whence no iſſue did ariſe, which alſo was not allowable; whereunto the plaintifes Counſell gave this anſwer, that this *ven. fac.* though it were but one *in facto*, yet in the law and effect it was as ſeverall, and then it might be void and avoided for one iſſue, and yet ſtand good for other iſſues wherein theſe faults were not. And the rather as this caſe was, becauſe theſe faults of the *ven. fac.* were concerning theſe iſſues only that were found for the defendant, and ſhe ſhould not be received to aſſigne fault or error in that made for her. Whereunto it was anſwered by the Court that the *ven. fac.* being one in deed, could not be made good in part, and void in part, & eſpecially where a Town was added to the *ven. facias*, which could not be applyed more to one iſſue then to another, and therefore was vicious to all, and being the fault of the Court, was to be diſallowed of them *ex officio*, though the defendant ſaid nothing.

Variance betweene the writ originall and the Declaration.

The other fault was that no an aſſignement of waſt in the declaration in a Towne not mentioned in the writ was various from the originall and a fault uncurable to the whole writ, and the fault in the declaration, and it is to be pleaded in abatement of the writ, whereupon judgement was given *qd. ceſſet Brc.* and the plaintife reſolved to take a new writ and begin againe.

43. *Cape* verſus *Lewyn.* Aſſumpſit.

CApe brought an Aſſumpſit againſt Lewyn, and declared upon promiſe made unto the inteſtate, and then layeth the death of the inteſtate, and that the adminiſtration of his goods was committed to him by the Biſhop, &c. All well, ſaving that he did not ſay that he produced his letters of adminiſtration in Court, upon iſſue *non aſſumpſit* it was found for the plaintife, and upon motion of Hutton in arreſt of udgement, the Court was of opinion that the plaintife could not have judgement, for it is of the ſubſtance of the ~~motion~~ declaration, that he be a ſufficient Adm. though he hath pleaded as upon plea upon a deed, the deed muſt be ſhewed in Court, and the defendant may deny the committing of the adminiſtration, notwithſtanding that he hath letters. Yet Serjeant Harris produced a preſident out of the Kings Bench, Tr. 12. Jac. where one Barret brought an action upon the caſe againſt one Winchcombe Sheriffe of Oxfordſhire, and declared that whereas upon an action of debt brought by him as executor unto one Long the defendant had him in cuſtody upon a *capias utlagatum*, and ſuffered him to eſcape, notwithſtanding the exception to it judgement was given for the plaintife. But the caſe differs from the former, for the eſcape was a wrong done to the executor himſelfe, though it be true that the damages to be recovered ſhall be aſſets in his hands; for ſo it ſhall be in all poſſeſſory treſpaſſes, and alſo for producing of his letters in his firſt action is ſomewhat.

Tr. 12 Iac. Rot. 1704.

Execu. brings action of eſcape not ſhewing the Teſtament.

44. *Iohn Ions's Caſe.*

Court of War.

Out of the Court of Wards came this caſe unto us.

VPon a *Mandamus* after the death of *I*ohn Ion, it was found that *die obitus ſui*, he was ſeiſed in *Dom. ſuo ut de feodo* of the Mannor, called Sottons Mannor in Barrow. And that he being ſo ſeized *poſtea ſcilicet* 10. *Martij.* 42. *Eliz.* did thereof infeoffe one Winchcombe to the uſe of himſelfe, for life the Rem. to Welcome in fee, and then concludes *quod pred. Ioh. Jon ſic de omnibus dict. premiſſis, modo & forma ſupradictis ſeiſitus exiſtens de tali ſtatu ſuo de eiſdem obiit ſic inde ſeiſitus* 12. *Martii* 8. *Jac.* And my Lord Chiefe Baron and I ruled the office voide, for the repugnancy of the finding of the eſtate whereof he died ſeiſed, and ſo ordered a new Office to be found.

Lincoln. Repugnancy in office makes it void.

45. *Dawtries* Caſe. Wards.

AN another caſe was this. An office was found by Commiſſioners, after the death of William Dawtrey Eſquire, at Chicheſter, whereupon a *Melius Inquirend.* went forth and recited, but this *Cum per quandam*

quandam inquiſitionem captam apud Chicheſter compertum exiſtit, &c. And doth not ſay that it was either by commiſſion or writ, or before whom, whereupon we held it void, and the office that was taken upon the *Melius Inquirend.* For by the *Melius* it muſt appeare, that the firſt office was by warrant. But if it had been *Virtute commiſſionis*, or *de mandato noſtro*, which is to be underſtood by writ, it would have beene good enough, although it had not beene ſaid before whom, for ſo the Preſidents are uſuall.

Melius inquirend. not ſhewing the warrant of the firſt office.

Prohibition.

46. *Cowper* verſus *Andrewes.*

Mich. 10. Jac. Rot. 1223. Suſſex.

OKenden Cowper brings a Prohibition againſt Roger Andrewes, Vicar of Cowfield, that whereas Thomas Lord De la ware was heretofore ſeiſed in fee of an 100. acres of land in Cowfield, late parcell of an antient Parke called Enhurſt parke, lately impailed and repleniſhed with Deere, and ſo ſeiſed, he and all thoſe whoſe eſtate hee had in the ſame 100. acres, and all the Farmers and Occupiers thereof have uſed time out of mind, to pay to the Vicar of Cowfield for the time being two ſhillings a yeere, and a ſhoulder of every third Deere that within the ſame Parke ſhould be killed, in full ſatisfaction of all tythes remaining upon the ſame hundred acres, which the Vicars have alwayes accepted in diſcharge of all tythes; And then deduceth downe 100. acres to himſelfe, and then ſhewes, that though in the ſame there were Deere killed, yet the defendant refuſed to receive the ſumme of two ſhillings before mentioned to be tendered, and ſues him for tythes in kind for thoſe yeeres.

Modus decimandi for a Parke, two ſhillings a yeere, and a ſhoulder of every third Deer killed in the Parke which is now diſparked.

The defendant by proteſtation denying the preſcription for plea, ſaith, that the Parke long before the time of the ſubtraction of the tythes aforeſaid, was diſparked, and the Deere in the ſame being utterly deſtroyed and killed by the Occupiers and Poſſeſſors of the ſaid Parke, and all the lands lying within the ſaid Parke, were converted into arable land and paſture, and ſo remaine; and becauſe the ſaid plaintife after the diſparking of the Parke would not pay tythes for the cattle and corne, and therefore he ſued him, whereupon the plaintife demurred in Law.

L: The firſt great point is:

If a Parke have beene ſo time out of mind, and a certaine ſumme of money have likewiſe beene paid time out of minde for all tythes of it, and then the Parke is laid open, and all the Deere deſtroyed by the owner. And further, by Judgement in a *Quo warranto*, the Parke forejudged, and the liberties of a Parke reſeiſed. The queſtion is now, whether the forme of tything be periſhed, and the tyth in kinde may be required as of other land, becauſe now it is no Parke, neither *de jure*, nor *de facto*.

The

The ſecond great point:

2:

Againe, this is a great caſe, if the preſcription have been to pay money, and a part of every third Deere killed in that ground, then if the Parke be totally diſparked as before, by the owner, and by Judgement of the Law; Then whether the preſcription be ſeiſed, and the tythes demandable in kind from thenceforth.

To the firſt point.

As to the firſt point, that the forme of tything remaines, though the liberty of parke, and ſo the legall parke be loſt, for it is the land whereof the parke conſiſts, that is to yeeld tythe or any thing in lieu of it, and the Parke, as it is but a liberty is a thing incorporall and an imaginary priviledge concerning that land, and can yeeld no profit to the owner, and therefore no tenth of the profit to the Parſon.

And therefore in this preſcription, he might have laid it in the land, and might have omitted the name of parke; for if the parke were enlarged or ſtraitened, the preſcription holds for the old ground.

Suit for eſtovers when the houſe is down.

And in this caſe, Lutterals caſe is to all purpoſes more ſtrong than this caſe; yet I grant, if a man have common of Eſtovers to his houſe, and ſuffer his houſe to fall downe, he can now clame no eſtovers; and yet if he ſue for it, and the other plead that his houſe is downe, he ſhall have Judgement with a ceaſing of execution, till he have re-edified his houſe, as in a *Warrantia Chartæ*, or a writ of Meſne where the defendant pleads, that he is not ſued nor diſtrained, he ſhall have judgement, but no execution for the preſent.

Alſo note, that the defendant may plead in the caſe of Aſſets and in aſſize of eſtovers.

So in a writ of Dower againſt the heire, if he plead in *the caſe of Aſſets*, that the demandant detaines the evidence, ſhe ſhall have judgement preſently with a *Ceſſet executic*. But in the caſe of Eſtovers, the plaintife ſhall be barred, for at the action brought he hath no right of Eſtovers, but it is in ſuſpence, and therefore it is not perpetuall, but a temporall barre, and if he re-edifie his houſe in the ſame place, he ſhall have his Eſtovers againe. And ſo I thinke, if he had pulled downe his houſe and built it againe. *Tamen quære.* If he bring an aſſize, or *Quod permittat* for his Eſtovers where his houſe is downe, and Judgemnt paſſed againſt him; if he ſhall not be barred finally, rather than where iſſue in taile in Formedon is barred by warranty and aſſets, and then alyens the aſſets againſt the iſſues, yet the barre ſtands, which ſhould not be but for the Judgement.

Quare.

As to the ſecond point.

Upon the ſecond point two ſeverall branches are, beſides the firſt point is before ſpoken of.

1. *Branch.*

Firſt, if that part of the manner of tything by the veniſon be not ſo arbitrary and at the choyce of the owner of the Parke, that if there be no Deere killed, that the Vicar cannot complaine, but muſt content himſelfe with the two ſhillings.

2. *Branch.*

Againe, though the veniſon cannot be had in kind out of that ground, yet whether the Parſon may not have recompence for it by ſuit in the Eccleſiaſticall

Eccleſiaſticall Court according to a valuation, as it was *communibus annis*, when the Parke ſtood.

The firſt branch of the ſecond point.

As to the firſt branch of this point, proved by degrees.

Firſt, if all the Deere ſhould die of ſome diſeaſe, I am of opinion, that the owner were not bound to repleniſh it to ſupport his forme of tything, no more than the leſſee to repaire his houſe deſtroyed with tempeſt.

Alſo the owner may kill two Deeres there, and pay no ſhoulder; and I am of opinion, that the cuſtome were as good as if it were to pay a ſhoulder of the twentieth Deere yeerely, and then he might kill nineteene without paying any tythe Veniſon.

So the ſecond queſtion muſt reſt unmoved there upon the wilfull default of the owner, diſparking whereupon is to be marked, that the two ſhillings a yeere is certaine and ſufficient of it ſelfe to have a *Modus decimandi* without the caſuall veniſon, ſo as it cannot fall into a *Non decimandi* for want of the veniſon.

But if all had beene caſuall and failed, it had beene doubtfull, not onely becauſe of the failing, but becauſe of the originall weakneſſe of ſuch a compoſition of *Modus decimandi*; for ſince the tythe in kinde is an inheritance certaine, it is againſt nature that it ſhould be extinguiſhed by a recompence that is not perdurable, though not ſo valuable as it ſelfe, like the very caſe of an exchange, and upon the reaſons of Vernons caſe *of an exchange*, Co. lib. 4. where it is reſolved, that a joynture made to a woman, muſt be for her owne life, and not the life of another. But ſuppoſe there were an antient compoſition, that the Parſon ſhould have the third part of the profit of a Court of a Manour for his tythes, and then the tenancies ſhould eſcheat, ſo as the Court were diſſolved, whether the tythe ſhould revive. And now, to the caſe in queſtion, the compoſition in the creation did carry in it recompence upon the tythe, part certaine, that is two ſhillings a yeere, and part uncertaine, caſuall and viſible, depending upon the will of the owner of the land; as if a Parſon had ſaid in the beginning (for now you muſt imagine the forme of the agreement or compoſition by conſent of the Patron and Ordinary, as the preſcription layes it) I will take for my tythes of this ground two ſhillings a yeere, and if you kill any Deere in it, you ſhall give me of every third Deere a ſhoulder; for, *Modus & conventio faciunt legem*, 9. H. 6. 36. is granted to J. N. common in his land, *quandocunque averia ſua ferunt*; if he imploy the land to till, or let it lie freſh, the grantee hath no remedy. And ſo is the booke 17. E. 5. 26. Now, ſuppoſe that ſuch a common were granted for compoſition of tythe, 3. E. 3. Fitz. Annuity 28. I grant an annuity to B. till he ſhall be promoted to a Benefice, *quod duxerit acceptand.* Election is given to him, and therefore he may refuſe for ever, 6. E. 6. Dyer 70. If a man grant the office of a keeper of his Parke, yet he may diſparke. So, if he grant the ſtewardſhip of his Courts, hee may releaſe his rents and ſervices. If I were bound in an Obligation

Obligation to give you a ſhoulder of every third Deere which I keepe in my Parke, yet I may diſpark it. So theſe are not within the rule. That a man ſhould not by his owne act defeat or fruſtrate his own grant, but it is to uſe the liberty that I reſerved to my ſelfe upon my grant ſtanding with my grant, which was at the firſt made arbitrary. And therefore is not like the caſe of Davenport, Co. lib. 8. 144. where the words there are no more then the Law ſpeaks, and therefore were void. But it ſhould have beene otherwiſe if the caſe had beene thus. If the Vicaridge fall voide whileſt the Parſonage ſhall remaine in his hand unalyened; and the like I ſay of 6 E. 3. 24. in the caſe of Theobald.

A ſecond reaſon is, that the compoſition is on both ſides executed, fixed, and ſtated, ſo that the Parſon cannot enjoy his *Modus Decimandi*, yet cannot reſort to the tithes in kinde the rather as the caſe is, where a part, that is to ſay, 2 ſhillings, is ſtill due and payable, ſo as it is not fallen into a *Non Decimandi*, wherein firſt to remove that, that bleareth, which is becauſe the tithe is ſuppoſed to be given originally for this recompence of money and Veniſon. And therefore if the recompence be detained, the title muſt be even. And it is compared to annuities granted *pro conſilio impendendo*, that for default of counſell the annuity ſhall ceaſe. And ſo of ſome other caſes which have beene put, whereof I will make mention in particular, and therefore I muſt begin with the conſideration of the nature and operation of one thing for another. *Reaſon* 2.

Parol (pro) Calthrops caſe the 16 of Eliz. D. 335. Outreds caſe Co. lib. 7. condition ſubſeq. 15 H. 7. 1. Annuity granted to have a ſenſer through my lands 14 & 15. E. 4. 45. E. 3. 8. one granted a wardſhip for good ſervice to be done by the grantee for certaine time he faileth of ſervice and loſeth the wardſhip. This book is plain ſo and put in iſſue withoutdoubting whether the grant were ſimple or conditionall, yet note the word proper is not a thing executory, but the ſervice is a thing for which there is no remedy.

Whereupon I lay this ground, That regularly this word (*pro*) or in conſideration doth not import a condition or make the grant voide or diſable, though the thing taken in lieu be either taken away by the giver wrongfully, or any other perſon upon a juſt title, ſo as the thing given be wholly loſt. And therefore if I. S. give 10 Acres to I. N. for B. Acre, and ſo *e converſo*, without the word of exchange, it will be defeizable, nay more if they uſe the proper word of exchange, and that be executed by a wrongfull entry of either party, it will doe no hurt, but a rightfull eviction will, but without the proper word of exchange, though perhaps it were meant in the nature of an exchange, it will not defeat.

But it is true that the word (*pro*) in ſome caſes hath the force of a condition, when the thing granted is executory, and the conſideration of a grant is a ſervice or ſome other like thing, for which there is no remedy but the ſtopping of the thing granted, as in the caſe of Annuity granted for councell, as for doing the office of a Steward of a Court, or the ſervice of a Captaine, or Keeper of a Fort. Outreds Caſe 7 lib. in thoſe caſes the condition is not precedent, and therefore needs not to be averred or performed when the Annuity is demanded: and theſe caſes are within the reaſon of an exchange, where the land given is evicted, for here the faile of councell or ſervice is a kinde of eviction of that that is to be done, for the Annuity is as much as that he hath no meanes ei-

ther to exact the councell or recompence for it, is but to ſtop the Annuity. And it is to be noted, that this hath ſo farre the force of a condition, that it being denied once it doth avoid the Annuity, not for that one payment which is to be noted for uſe, either in the principall caſe 5.H. 7.10. I covenant with I. S. to give him 10 pounds to ſerve me a yeare, in this ſo it ſeemes, though he had covenanted *è converſo*, to ſerve me, for though in that caſe he might have an action for the ſervice, yet it is not as of an eſtate uſed of land of inheritance, as the caſe is here.

In another caſe it works by condition precedent, as in all perſonall contracts, as I ſell you my horſe for 10 pounds, you ſhall not have my horſe except you pay me 10 pounds, 18 E. 4, 5. & 14 H.8.22. except I doe expreſſely give you day, and yet in this caſe you may let your horſe go, and have an action of debt for your money; and ſo may the Taylor retaine the garment till he be paid for the making, by a condition in law.

So if I retaine one to ſerve me a yeare for 10 pounds, he cannot demand the 10 pounds but he muſt averre he hath ſerved me out the year. And 13 E. 1. ff. *Avowry* 245. an avowry was made for not repairing a Parke pale a new, the tenant anſwered that his tenure was to repaire for the old pale. And Catsby 15 E. 4. puts it of a grant to make a new pale for the old, and holden in both caſes that if the old pale be withholden, he needs not to make a new, for here is no remedy for the old pale, and perhaps neither in caſe of tenur nor of grant; in this caſe the detaining of the old pale will diſcharge more then for that one time, for in that caſe old is allowed towards, or for the new pale; not ſo in the annuity granted *pro conſilio*, which is totally for counſell, and therefore will extinguiſh wholly. And the caſe 9 E.4. fo.20. & 15 E.4. fo.4. is full in this point; for there was a compoſition betweene the Abbot of Sempringham and the Maſter of Burton-Lazer, whereupon the Maſter granted that the Abbot ſhould have certaine tithes without condradiction, and the Abbot paid him forty ſhillings a yeare out of the houſe for the ſame. And the opinion was, though the Maſter take away the tithes, yet the Abbot muſt pay the rents, for both parties are excluded, and either party hath remedy for the detaining; and Needham ſayes, if the rent had beene granted *pro decimis abſque calumnia*, it would have beene otherwiſe perhaps. Grayes caſe, Co.lib.5. fo.78.16. full to this. If one had a common in my ground time out of minde, and hath of me for it Hens and egs, yet his is not entire, that he need declare of both parts, becauſe it is no condition, and conſequently, though he refuſe to pay the egs, yet he ſhould hold the common. But if it were conditionall, as in the caſe of Potwater there paying, or he to pay, becauſe in that caſe there is no remedy as in the former by diſtreſſe it will be taken conditionally.

It is true that an Appropriation at the common law might be made preſentable, for that was ſpirituall ſtill while it was appropriate, but ſo is not this ff.N.br.fo. 35. & Grindons caſe Plo. Comm.

3. Another reaſon that the tithe in kinde cannot be reſtored is, becauſe the tithe in kind is actually diſcharged and extinct, for now that which

is of common right ſhould have beene the tithe, is made of the ſame nature with all the reſt of the fruits lay fee, ſo as if the owner through ignorance of this caſe ſet out a tenth, yet if the Parſon ſhould take it, the owner might bring an action of treſpaſſe as for any other part of the fruit, and if the Parſon ſue for tithes in kinde, the owner ſhall have a Prohibition for driving his lay fee and a time examine.

The caſe 18. Eliz. Dy. 389. where it is adjudged that *modus decimandi* of wooll and lambe doth diſcharge the naturall tithe of Graine and hay.

On the other ſide, that that was given in liew of tithe is become part of the inheritance of the Parſon, and part of his ſpirituall fee, for which he ſhall have remedy in the Eccleſiaſticall Court. So the caſe of the Biſhop of Wincheſter Co. lib. 2. fo. 45. where the Biſhop being diſcharged of tithes can be diſcharged in the lands of lay-Farmers as meere lay fee, and the Biſhop could not demand tithe of his Farmers, for there is no tithe for all his lay.

And ſo alſo the caſe of Pigot and Herne there, where it is preſcribed, that the Lord of a Manor had uſed to pay time out of minde a penſion to the Parſon for tithes of his Manor and tenements, and had the tithes of it for it, and he ſues for thoſe tithes in the ſpirituall Court, for it was inſtead of the true and ſpirituall tithes, though in lay land, and otherwiſe where it is diſcharged.

And 8 E. 4. & 13. ff. N. 41. 9. & 43. H. 8. a Prohibition upon a preſcription upon a diſcharge of tithes for lands given to the parſon, and if the parſon alien the land without conſent of the Patron and Ordinary, and ſuffer a recovery whereof aid is praid of them as Fitz. N. 48. b. 11. I am of opinion, that as his ſucceſſor can have no *Iuris utrum*, ſo he cannot reſort to his tithe.

And the Reg. fo. 36. upon diſcharge of tithe by Parſon, Patron, and Ordinary, for land given unto the Parſon and his ſucceſſors runs thus. *Et quia diſcuſſio habend. donationis & conceſſionis de laico feodo in curia noſtra & non alibi tractare debet, vobis prohibemus, &c. ne placitum aliquid laicum feodum tangens, &c.*

Alſo the writ of counts, as well of the grant of the land, as the grant of tithes, lay fee. In all theſe caſes, if the thing given were allied which cannot be without the Parſon, Patron, and Ordinary, which have abſolute power or were evicted, yet the diſcharge muſt ſtand for the reaſons mentioned. And becauſe there is nothing in preſcription that inforceth a condition, but rather only a conſideration, and the meere difference whereupon Grayes caſe Coke lib. 5. fo. 78 ſtands. Now there is nothing in this caſe that can inforce an abſolute diſſolution of the compoſition. For as it is ſaid, there is nothing to let but the Parke, and ground may anſwer hereafter. And to ſay that tithe in kinde may be required in the meane time is abſurd, both becauſe I obſerved if it be a condition it ~~may~~ must deſtroy the whole eſtate; and alſo becauſe there cannot be an inheritance in *Modus Decimandi*, and at the ſame time tithe in kinde *contra modum decimandi*. And if it be a reaſon ſufficient in this

caſe to demand tithes in kinde, becauſe the *Modus* is defrauded, by the ſame reaſon every wilfull deniall of a *Modus* will give the like advantage, whereas though it be alwayes laid in the prohibition, that the *modus* is tendred, yet that is never traverſed, but only the preſcription it ſelfe *de modo*, becauſe that the deniall doth not alter the right, but you may and muſt, for it is in other wrongs.

And though for the time that there was no Deere in the Parke, there can be no veniſon according to the *Modus Decimandi*, yet the Parke may be reſtored and repleniſhed at any time, and therefore there can be no extinguiſhment of the *Modus*, and both tithes cannot ſtand together, the *Modus Decimandi* and the inheritance, as being extinct, and the tithe in kinde as it were *hac vice*.

The laſt great queſtion.

The laſt great queſtion is, whether the Vicar in this caſe can have any remedy for the loſſe he ſuſtaines, in that he hath not the ſhoulders, nor cannot have them, becauſe there are none. Wherein the doubt conſiſts in this, how he can have recompence for that which is not.

Remedy inlaw for a thing not in eſſe, much more reaſonable to have damage for it, then the thing it ſelfe adjudged in the aſſets of the eſtouer. There the incertainty together with the quality of the thing payable muſt make the difference which alſo is nothing. 76 Fitz. Na. 58. eſtouers. As there is no tenant in tayle without poſſibility of iſſue as long as the perſons live be they never ſo old, ſo as long as there is poſſibility of wood, much more here poſſibility of Deer

I anſwer, that whereſoever I ſuffer an injury joyned with a loſſe, the law ſhall give me a remedy or recompence according to my certaine or uncertaine loſſe, yea and to tye me where the thing is not in being, but utterly extinguiſhed. If the caſe here were, that he ſhould have yearely two Deere out of the ſame Parke, the diſparking would not hurt, for he ſhould have the value ever. As where he ſets not out his tithes, or payes not the *Modus*, for *nummos eſt mos*, it is the law and meaſure of all things, for no man ever doubted that the non-payment of the *Modus* reſtored the tithe in kinde, though it be alleaged of forme that he was ready. And therfore if a man have common of eſtouers in my woods, ſo many loads by the yeare certaine, or elſe uncertaine, as much as he ſhall ſpend in fiers, and in repaires of his houſe; if I ſtub up this wood, ſo as there neither is nor will be any wood againe, yet he ſhall have an aſſize from yeare to yeare of his common and eſtouers, whereof theſe conſequents follow; Firſt that the inheritance of the common of eſtouers doth remaine notwithſtanding that there are no eſtouers, for elſe he could not have an aſſize: wherein he muſt declare of his inheritance or Freehold at leaſt by grant, or by preſcription. Next he ſhall recover a ſeiſin of thoſe eſtouers which are not in being, whereof he is ſuppoſed to be diſſeiſed and alſo damages, not according to the value that it yeeldeth *communibus annis*, though it were uncertaine! So in Murries caſe, Coke lib. 9. fo. 111. If any man feed in a common wrongfully, every commoner may have an action of the caſe againſt him, and by the ſame reaſon if the Lord of the ſoyle plough up or make a cloſe of it, every freeholder may have an aſsize, and every copyholder an action of the caſe, and therefore there can be no reviving of the very tithe which muſt be for the inheritance, or not at all.

Touching

Touching the Inheritance, if a man grant an Advouſon with warranty, and the tenant in a writ of right of Advouſon vouch, he ſhall have (if he loſe recompence) in value in land, or other certaine profit, and yet the Advouſon it ſelfe is utterly of an uncertaine value. So of a liberty *bona & catalla felonum, &c.* which may be valued by eſtimate *Communibus annis*; if I let my *bona & catalla* in Court rendering rent, it is no plea in debt for my rent, that he had no profits that yeere; but if the leſſor diſcharge or releaſe all, otherwiſe it may be, but here is no perpetuall diſcharge.

And from Advouſon recover as in a writ of right of advouſon upon voucher, and may have land in value for recompence 3. E. 5. 8. H. 2. Rot. in value 9. & 12. & Bracton.

But the very caſe ſeemes to be P. 18. Eliz. Dyer 349. where the caſe is, That the manner of Ellington, whereof an Abbot was ſeiſed at the time of the diſſolution lying within ſeven pariſhes of Dykerke, and uſed to pay onely tythe wooll and Lamb time out of minde, and now the land being uſed to meadow, and tythe, the Parſon demands, the tenth of hey and corne, and by the opinion of the Juſtices and Clerkes of the Kings Bench, Prohibitions be uſuall in ſuch caſes by force of the word (diſcharged) in the Stat. 31. H. 8. For *Modus decimandi* diſchargeth all other manner of tythings *quod nota* for the uſe before, that where there is a *Modus decimandi*, the tyth in kinde is utterly exinct and diſcharged, and ſo note, that if a man have a manner of tything of Lambe, ariſing upon the ground, and he turne his ground to another uſe, it ſhall never fall to a *non* decimation, nor to a reſtitution of the tythe in kinde, but to an allowance by eſtimate of the ordinary profit that the forme of tything was wont to yeeld. But *Quare*, whether that caſe ſhall not be holpen by force of the Statute 31. H. 8. by which alſo unity of the poſſeſſion is holden a diſcharge of payment of tythe, though no diſcharge in right. And although it may be true, that in that caſe the land lay alway to wooll and Lambe, ſo as there could be no other, but it was indeed the tythe in kinde, and ſo not preſcriptible, yet when the preſcription is beyond memory, it may well ſtand that it was ſo, when the land was imployed to the corne, for the contrary appeares not. And againe, if the owners had not uſed to pay time out of mind the juſt tenth of the wooll and Lamb, but a leſſe proportion, ſo as it were truly a *Modus decimandi* of a ſpeciall commodity, if the land be turned to other uſe, as of graine, of hey, the forme of tything cannot change, except you will ſay, he ſhall pay ſuch a proportion of the fruits it now yeelds, as it did of the other; ſo the *Modus* ſhould be in the proportion, not in the kinde of profit, yet that will not ſerve as the caſe may be: as if there be ſuch a proportion of Lambe, or ſo much in money for them at the pleaſure of the tenant. And note, that the Statute, 31. H. 8. was neceſſary in that caſe, becauſe the diſſolution elſe would have ceaſed the priviledge, whereas in the caſe there is no cauſe of ſeiſure, becauſe it dependeth not upon any thing that ceaſeth. But it ſeemes, that had not the Statute of diſſolution provided for the continuance of the priviledge of Abbots, they had all dyed, ſo then it ſeemes that the very tyth hath revived.

Now

Now a word of the exception:

It hath beene ſaid, that the preſcription of the *Modus decimandi* is not wel laid, becauſe the Park concerning which the preſcription ſhould be, is not layd to be by preſcription, but onely laid to be *antiquus parcus*.

Whereunto I anſwer two things:

Firſt, that the preſcription is laid not in the Parke, but 140. acres in Cowfield, late parcell *cujuſdam antiqui Parci*, and that the tenant and Farmers of the ſame 140. acres haved uſed to pay unto the Vicar of Cowfield two ſhillings yeerely, and one ſhoulder of every third Deere killed within the Parke for ſatisfaction of all tythe payable for the 140. acres.

Againe, the liberty of Parke is not in queſtion, but a forme of tything concerning the Parke, and therefore no cauſe to lay the preſcription in the Parke, according to the rule in the Biſhop of Salisburies caſe, C. lib. 10. fol. 59. where one claimes the office of a Surveyor by grant from the predeceſſors Biſhop with a fee, and avers, that the ſame was *Antiquum officium*, and it was held nought, becauſe he claimed the office by preſcription; ſo here, if he were impleaded in a *Quo warranto*; for the Parke it ſelfe, it ſhall be no plea, to ſay that it was *Antiquus parcus*, but there he muſt plead a preſcription for the Parke; but where another thing was claymed as incident to the ſame, otherwiſe it is, and where a keeper claimes profit of a Parke by preſcription in the Parke, but *antiquus parcus* generall, 6. E. 6. Dyer 71.

But if the diſparking be a point materiall, it is utterly inſufficiently pleaded; for it is a word vulgar, and even in vulgar ſpeech uncertaine; for common ſpeech takes a ground diſparked, when onely the Deere are taken away, though the Pale ſtand, and the liberty of the Parke be ſound. But it is a word utterly unknowne to the Law, and therefore can beare no iſſue without more certainty, and the particulars of diſparking are onely that the Deere were utterly deſtroyed, and the ground turned to arable and paſture, ſo the Pale ſtand and liberty perfect, and ſo may be reſtored *ab integro* at any time. Another groſſe fault is, that he laid the diſparking by occupiers and poſſeſſors, and not by the owners.

Quare Imped.

47. Sir *Marmaduke Wivels* Caſe.

Tenant in taile his ſonne joyned in a grant of an Avoydance.

IN caſe of *Quare Imped.* brought by Sir Marmaduke Wivell, this was the point. Tenant in taile of an Advouſon, and his ſonne and heire joyned in a grant of the next Avoydance, Tenant in taile died, and it was adjudged, that the grant was utterly voyd againſt the ſonne and heire that joyned in the grant, becauſe he had nothing in the Advouſon, neither in poſſeſſion or right, either in actuall poſſibility at the time of the grant. Hereupon a writ of error was brought, and the error was aſſigned

aſſigned onely in diſcontinuance, for the Judgement was given upon a Demurrer. Error.

48. *Harvy* verſus *Duckin*, Paſ. 13. *Iac.*

Caſe.

HArvie an Attorney brought an account upon the Caſe againſt one Duckin, and declared; That whereas one White had made him a Bill of forty pounds debt, and had ſealed and delivered the ſame, the defendant ſpake theſe ſlanderous words of him; That hee had ſhewed him a Bill of forty pounds (meaning that Bill) ~~releaſed~~ *counterfeit* and after ſhewed it him ſealed. And that he had forged the ſaid ſeale to the ſaid writing, the defendant by inducement of other words, traverſed theſe words. And it was found for the plaintiſe, and yet Judgement was given againſt him, for the *Innuendo* was of no uſe, for ſince the words were onely a writing, which is utterly uncertaine, an *Innuendo* will not change the matter of the words, for that is to make the words otherwiſe than they were by an *Innuendo*. *Innuendo.* Action of the caſe that he had forged a ſeale.

Out of the Court of Wards came this Caſe. Checquer.

49. Sir *William Fleetwoods* and Sir *Roger Aſtons* Caſe.

SIr William Fleetwood, late Receiver, there being indebted to the King for arrerages of his receits, and being ſeiſed in fee of the Manor of Cranford le Mot in Mid. did convey the ſame to Sir Roger Aſton in fee, and he conveyed it to the King, his heires and ſucceſſors, and preſently tooke it againe from the King to him and his heires, *Reddendo annuatim pro Manerio de Cranford S^t. Iohn* 34. ſhillings, *& pro Cranford le Mot.* 20^s. *pro omnibus aliis redditibus & ſervitiis, & omnibus clameis quibuſcunq;*. And after Sir William Fleetwood became farther indebted in his account to the King. The queſtion hereupon made by Maſter Attorney of the Wards was; *Whether the ſame Manors were extendible, and lyable to any of the debt aforeſaid.* My Lord Coke and I were of opinion, that they were not chargeable for it ſelfe, but in reſpect of the perſon which was debtor; as in the caſe of the Statut. So as when the King takes the land, the debt is not thereby diſcharged, but may be recovered againſt the debtor himſelfe, but the land it ſelfe in the Kings hand is not chargeable, and then, when the King conveys the land over, he cannot againſt his owne conveyance charge his land, although the debt be of ſuch a nature that it gives no right, and therefore a releaſe made by the King to the tenant of the land of all rights and tythes, doth not diſcharge it againſt his owne conveyance. The Conuſee of a Statute in ſuch a caſe, cannot require contribution, which is the reaſon of the bookes, that all other lands in the hands of other feoffees, are by that occaſion

occaſion diſcharged though ſuch as be in the hands of the debtor himſelfe are ſtill chargeable, and we made no regard of the *reddendo* here as of no uſe in this Caſe.

But [*my Lord Chiefe Baron*] made a doubt of this in reſpect (as hee ſaid) that he tooke the uſe of the Exchequer to be otherwiſe, except the Kings Patent had the ordinary clauſe of covenant and grant to be diſcharged of all duties, debts and demands.

And therefore we all agreed, that our opinion in this caſe ſhould be made up in the decree for the diſcharge of this land, without prejudice to the uſe of the Exchequer for the Kings debt there.

50. *The Kings Ward Knighted.*

THe Attorney of the Wards asked another queſtion by word of mouth, which was: *If the king knights his ward within age after the death of his father, whether thereby he loſt the wardſhip of the land, ſo as thereby the ward may preſently require livery, though he be within age.*

And we were of opinion, that though the value of the marriage remained due, yet notwithſtanding the ſame knighting, becauſe the ſaid marriage was inveſted in the King before, as it was reſolved in Drewries caſe; yet the reaſon of that caſe will guid this: for by the making him a Knight, the King allowes him to be of full age, and ſo for the time paſt the profits are well received; but from thenceforth the wardſhip is to ceaſe, and ſo conſequently the profits, and he to have his livery preſently.

51. The Earle of *Clanrickard* & uxor verſus *Robert* Viſcount *Liſley.*

For. Reverter. Co. B. v. Caſe. *Aſſoigne.* 6. for 1:

For the day of appearance for vouchees.

THe Earle of Clanrickard and his wife, brought a Formedon in reverter againſt Robert Viſcount Liſley, *ut ſupra*, where as he was eſſoigned after the view, and then pleaded abatement of the writ *ut ſupra*, and then vouched too, whereof one was firſt aſſoigned, and then the other with an *idem dies* alwayes to the demandant tenant and vouchee. And now *Quindena Paſ.* which was the laſt day of the eſſoigne, both the vouchees appeared, and at the ſame day my Lord Liſleys Tenant caſt an eſſoigne both for himſelfe and his Attourney. And it was excepted unto, that this eſſoigne lay not according unto the booke, 3. 7. H. 13. which being ſpoken to at the barre twice or thrice, was at laſt ſpoken to by the Court, *una voce* [by my ſelfe] [Winch.] [and Nichols] that the eſſoigne did lye. And firſt there is no Statute that takes away the eſſoigne in this caſe, ſo it is to be judged by reaſon, bookes and preſidents of Court.

Now, for bookes, 22. H. 8. is directly the principall caſe, and the eſ-

ſoigne

ſoigne excepted there as it is here, and it was allowed clearely by the Court with this reaſon, That the tenant may ſay, that the vouchee is not the ſame perſon, and may have divers other pleas againſt the vouchee: And 5.E.3. Eſſoine 54. is the like, where the firſt vouchee was eſſoyned after an eſſoyne of his vouchee. And 13 E. 3. eſſoyne 6.

Now the preſidents are cleare and common to the ſame purpoſe, and a roll of that book 22 *H.* 8. which is the very laſt caſe was found according to that booke betweene Cole & Manſell, Mich. 22 H. 6. in the eſſoine Roll. And ſo Hill 43. B. betweene Belgrave and Harding, and divers others, but the Book of H.7. was not warranted by any roll, for I cauſed it to be ſearched.

Now the reaſon is this, that though the tenant had no eſſoyne before, that was in another reſpect, that is to ſay, betweene him and the other demandants: but now he was in another order and degree of plea, betweene him and the other vouchee, who being not yet entred into the warrantie, might (as before) either himſelfe vouch or the tenant; but if he were once actually entred into the warrantie, then he would be no more aſſoyned, nor the tenant, who had now done with the vouchee, and was alſo out of pleading againſt the demandants, becauſe his plea was put into the Mouth of the vouchee.

And therefore the book 29 E.3.48. Ienkin Simons caſe it is reſolved, that the vouchee and tenant may have either of them one eſſoyne before they enter into the warrantie. But now though the eſſoyne be granted in reſpect of the pleas that may ariſe betweene the vouchee and tenant as hath beene ſaid, yet is it to be entred betweene the tenant and demandant, and not betweene the tenant and vouchee, as the ſaid book is 29 *E.* 3. 48, an *idem dies* is ſtill to be given to the parties not eſſoyned. And though the eſſoyne here were caſt both for his tenant and Attourney, yet it was good enough being but a ſurpluſage for one.

So the eſſoyne was adjudged and adjourned here as due, and is alſo the moſt ſafe, becauſe it is error to deny the eſſoyne when it ought to be granted, and not *è contra.*

52. *Richard Cox* verſus *Wil. Barnsby*, & alios.

Treſpaſſe. Co. B. Wigorn. Hil. 10. Jac. Rot. 1541. vel. 2541. Ancient demeane barres not execution by Elegit.

RIchard Cox brought an action of treſpaſſe againſt Wil. Barnsby and others for breaking his cloſe at Bramſgrove, whereunto the defendant pleaded not guilty, and the Jury found a ſpeciall verdict thus: that Barnsby the defendant was ſeiſed of the land in queſtion, and held the ſame of the Manor of B. which is ancient demeane, and that Cox recovered againſt him 400pounds in the Common Pleas, and tooke out an elegit, by force whereof the Sheriffe delivered him the land in queſtion, and he entred, upon whom Barnsby and the reſt reentred, whereupon Cox brought his action of treſpaſſe, *& ſic, &c.*

So the whole queſtion was: *Whether the lands in ancient demeaſne may be delivered in execution by the ſheriffe by force of an Elegit out of the Kings Court.* [Warberton] being abſent through ſickneſſe that terme ſaid, that the execution was well done. It was agreed.

Firſt, that no freeholds holden in ancient demeaſne could be recoverable in the Court of the King.

Secondly, that though the freehold were not to be recovered by the action, yet the poſſeſſion was to be recovered by the action brought in the Kings Court. Ancient demeaſne is a good plea, and that is Eldens Caſe Co. lib. 5. though the *ejectione firmæ* be brought by the leſſee againſt the leſſor, and 44 E. 3. fo. 1. A writ of ward lyeth not in the Kings Court nor a writ of waſt, though it be a leaſe for yeares. 8 *H.* 6.

Thirdly, ſome actions lye not at the Common law though they touch not the poſſeſſion, for the preſumption that they would bring the title of the freehold in queſtion, becauſe they commonly do ſo; as a Replevin, and an action of account of profits of lands, 40 E. 3. 40. 46 E. 1. 21. E. 4. Fitz. ancient demeaſne is no plea, 46 E. 3 1. 2 H. 7. 47. The cauſe is, as one book ſayes, that the iſſue is a plea upon the wrong. And the other Book ſaith Court of ancient demeaſne hath no juriſdiction.

Another point conſiderable is this.

That if a new action be given by ſtatute which lyeth in the Kings Court, and will not lye in ancient demeaſne, yet if the action meddle directly with the poſſeſſion, you ſhall rather loſe there then have it in the Kings Court to the prejudice of the privilege of the ancient demeaſne. And that is the caſe of an action of waſte, 7 H. 6. 35. & 8 H. 6. 34. But the reaſon is given in Bookes, that the Tenant in ancient demeaſne ſhould not be ſubject to ſtatute lawes, becauſe they do not contribute to fees of Knights of Parliament, and ſo may ſeeme to have no voice there. I hold that conceipt void, for that is but an eaſe granted them in favour of their labours of the earth, as many others have freedome from ſerving in Juries, Pontage, Murage, and many ſuch F. N. B. Villains of Lords of Parliament are freed from contribution of Knights fees as well as they, and we ſee they are ſubject to all other ſtatutes concerning their freehold as well as others.

Againe, actions at common law upon which no remedy could be had in ancient demeaſne do lye in the Kings Court though they ſtirre the poſſeſſion, as *Quare imped.* 7 H. 6. 35. becauſe they cannot write to the Biſhop, whereof the reaſon is, becauſe the Common law being as ancient as their priviledge, it may not indure, that by a pretence of priviledge that there be a failer of originall right, as that caſe is. But of new right or remedies brought in by the ſtat. which are not preſumed to intend their priviledge it is otherwiſe.

Now to the caſe in queſtion. Though it be true that the queſtion in land of ancient demeaſne be named by the Sheriffs as following upon award

award of the Kings Court, yet the land it ſelfe was never put in plea directly in the Kings Court, and therefore differs from all other caſes before mentioned; and therefore touching that it is in 2 E.2.Fitz. execution 118 expreſſed, that the cognizee of a ſtatute had taken land in ancient demeaſne in execution, and an aſſize of it in the Kings Court, and had judgement. And 7 H.7.10. it is admitted that ſuch an execution is good, for otherwiſe the diſputation were vaine to preſerve it againſt the freeholder. And Aldens Caſe is an opinion for it; and 7 H.4. fo.44. it is ruled, that upon an action of debt brought againſt the heire in the Kings Court for the debt of his anceſtors lands in ancient demeaſne diſcended, ſhall be lyable to the execution againe; in which bookes there is only 8 E. 2. Fitz. execution 26, which is ſleight, for 22 Aſsiz. 45. is no other but that one Aſsize lies not for him that ſues an execution in the Kings Court. Whereupon the Reporter inferres his ſingle opinion that therefore execution cannot be of ſuch lands, which is not conſequent, for a man may take a leaſe of ſuch lands though he cannot have an *ejectione firmæ* of them. And the Chiefe Juſtice ſaid he was of opinion, that though an *A*ſsize in this caſe could not lye in the Kings Court for him that hath ſuch an execution, yet he may have an Aſsize in the Court of the Manor by writ of right cloſe and proteſtation to ſue it in the nature of an Aſsize, though the Aſsize in this caſe be given by ſtatute like to the caſe 14 H.4.20. where Stamford is of opinion, that if a man have cognizance of Pleas, it ſhall not ſerve him for a new action created afterwards by a ſtatute, but of an old action afterwards given by ſtatute, in a new caſe it will ſerve, and ſo here. *A*nd the Chiefe Juſtice further ſaid, for another reaſon he held this caſe cleere, that ſince the judgement was good, that Cox ſhould recover the debt, & that the Elegit did warrant the extending & delivering half his land, & the ancient demeane is his land, as well as other, ſo as he had warrant to deliver it; and it is not to be diſputed what is lyable, & what not; neither is the Sheriffe, nor he that receives it of him ſubject to an action of treſpaſſe, as if it were *nullitie* in the act, but perhaps if it were releevable, the way to releeve it, were by *Audita Querela*, becauſe there was no time to plead it before.

43. *William Keble* Executor of *Robert Keble* againſt *Osbaſton.*

Debt.

Co. B.

London: Waller.

WIlliam Keble executor of *R*obert Keble brought an action of debt upon a Bill of obligatory of 31 pounds 13 ſhillings 4 pence, againſt Francis Osbaſton executor of the Teſtament of another William Keble. The defendant pleaded that the ſaid William Keble the ſuppoſed teſtator dyed inteſtate, and that before this writ purchaſed, the adminiſtration of the goods was committed to one Edward Keble who adminiſtred and ſtill doth. The plaintife replyeth, that William Keble

died inteſtate, and that after his death, and before the adminiſtration aforeſaid granted, divers goods of his and names them particularly) to the value of his debt, came to the hands of this defendant, which goods the defendant, as executor to the ſaid Keble *Adminiſtravit ſeu aliter ad uſum ſuum proprium diſpoſuit & convertit, & hoc &c.* Whereupon iſſue was taken and found it againſt the defendant in the diſjunctive as aforeſaid, and it was adjudged for the plaintife for the point in iſſue is directly found, and ſo it is within the Statute of Jeoffailes, and the iſſue alſo is not improper, for though the verdict be true, if either hee did adminiſter, or otherwiſe convert it to his uſe, yet both muſt be as executor, for ſo is the pleading and the verdict, and then it is but the ſame thing ſpoken two wayes, one according to the proper ſtile of Law, the other according to the common ſpeech; and therefore if iſſue had beene taken onely that hee had converted the goods to his owne uſe, perhaps it would have beene good enough, eſpecially, if it were added as executor, as here it is. And ſure there was an executorſhip in wrong before the adminiſtration granted after, though it be before the actions brought, the rather, becauſe thoſe goods are taken away by wrong, before the adminiſtration till they be converted, or damage for them.

Iſſue that the defendant did adminiſter or convert to his owne uſe as executor.

Executors by wrong and then adminiſtration taken.

Debt.

54. *Nichols* verſus *Grummon.*

'THomas Nichols brought an action of debt againſt John Grummon, the condition was, to performe an Award to be made and 'delivered in writing. The defendant pleaded that they made no A-'ward. The plaintife ſhewed the Award made *De & ſuper præ-'miſſis in Conditione, &c.* in writing, which was, that the defendant John 'ſhould depart from his houſe wherein he dwelt, and other things which 'appeared not to concerne the plaintife three pounds ten ſhillings, 'and aſſigned the breach in that. The defendant rejoyned that the wardſman made no ſuch Award, whereupon iſſue was taken and found for the plaintife, and yet it was adjudged againſt him, becauſe it was but an arbitrement but only on one ſide, and ſo voyd, and none in law according to the booke 7. H. 6.

Arbitrement on the one ſide onely voyd.

For, though as Baſe Pooles caſe ſayes, an Award may be made by parties, the ſubmiſſion being by Award, and though it be upon bond in the common forme of all caſes, ſo as the ſame Award ſhall not be extended further than the cauſes made knowne to the wardſman, yet it muſt in that caſe end all controverſies appearing to the Court, or elſe it ſatisfies not the Condition of the Obligation whereof it followes, becauſe that every controverſie cannot be ended, except it be ended in reſpect of them both, & that may be either expreſſed or implyed. Expreſſed, as if an Award be, that an Obligor in a ſingle obligation ſhall pay the debt,

debt, this is no Award, except it be provided, that if he be diſcharged, becauſe payment is in diſcharge in that caſe, but if the Award be, that he ſhall pay ten pounds for treſpaſſe, it is good, for a ſatisfaction implyes a diſcharge. And that is the reaſon of the Judgement in Baſe Pooles caſe. Now here in the principall caſe there is nothing awarded for the defendant, and the three pounds ten ſhillings appointed to be payd is not ſaid for what; ſo it can imply nothing, neither can it be holden by any averment; for the arbitrement is conditioned to be in writing, and yet indeed there is no averment that the three pounds ten ſhillings is awarded for any cauſe certaine: But if another action were brought for the treſpaſſe, no doubt this Award may be pleaded in averment.

There was no judgement in this caſe, for though I was cleare, and am cleare of that opinion, and the reſt concurred, yet there was ſome wrangling after; and ſo it hung, and I thinke was compounded, for I heard no more of it.

Checq.

55. *Inke* verſus *Roll.*

Out of the Court of Wards came this cauſe betweene the Attourney at the relation of William Incke Committee of William French the Kings Ward plaintife, and Andrew Roll defendant.

Upon a *Diem clauſit extremum*, after the death of John French, father of the ward, it was found that he had one Meſſuage, & twenty acres of land in Bittiſham in Cornwall of the ſame defendant in knight ſervice, and that the ſaid John French did likewiſe hold one Meſſuage and eight acres of land in Wharpſtone in Cornwall of the late Queene Eliz. as of her Manor of Rentergen in Cornwall by fealty, and three ſhillings rent *per annum, & per quæ alia ſervitia Iuratores ignorant.*

Afterward a *Melius inquirend.* was awarded upon ſuppoſall, that the land was holden of the King by knights ſervice; upon which *Melius Inquirend.* it was found that he held the ſaid Meſſuage and eight acres of land in Wharpſton of the Queen by knights ſervice. The queſtion is, *whether the lands are holden of the King by knights ſervice in capite or not.* It was ſaid for the King, that an originall office found as this office upon the *Melius Inquirend.* would have made a tenure in Chiefe. And it is alſo ſaid, that *Trin.* 12. Eliz. Dyer 292. it was reſolved, That where an office was found that lands were held *de Domina Regina, ſed per quæ ſervitia Iuratores ignorant*, and thereupon a *Melius Inquirend.* was awarded, whereby the tenure was found to be of a ſubject, That now the firſt office was voyd, and the *Melius Inquirend.* was in the nature of the firſt writ of *Diem clauſit extremum.*

Melius inquirend. at the Common law is but additionall to the firſt Office.

But it was now reſolved by [Hobart] and [Tanfield] Coke being abſent, that in this caſe, the tenure of the knights ſervice of the Queene, found

found by the *Melius Inquirend.* is in his owne nature at the common Law, but a ſupplement to a defect or uncertainty of a former office, and ſo here the tenure being firſt found certainly of the Queen, as of a Manor, and by ſome ſervice certainly, and the uncertainty only for ſome other part, when the *Melius Inquirend.* comes and perfects that, and ſo doth make both one office, and muſt be joyned together. Now, in the caſe of the 12. of the Queene, it was nothing to the purpoſe; for it is a *Melius Inquirend.* not at common Law, but grounded upon the Statute of and taking his nature and force from thence. Therefore the reſolution is expreſly, that the *Melius Inquirend.* here, is as the firſt office, and abſolute of it ſelfe by ſenſe of that Statute, which is but in two caſes mentioned in the Statute.

56. *Holmes* verſus *Twiſt.*

Trin. 12. Jac. 1758.

THomas Holmes brought an aſſumpſit againſt John Twiſt, and declared that he was poſſeſſed of a heape of woad, and ſold him one tonne of the ſaid woad, and he ſhould pay him for it ſix moneths after the rate that he ſhould ſell the reſt, and ſhewed that he ſold and delivered unto Twiſt the tonne of woad, and after ſold unto one Collins the reſidue after the rate of 23. pounds a tonne, and the defendant paid him not the 23. pounds according to his promiſe, and thereupon judgement was given for the plaintife in the Kings Bench, and now upon a writ of Error in the Exchecquer Chamber, the Judgement was reverſed, becauſe the plaintife had not alleaged that he had given notice to the defendant of the ſale and price of the reſt, being a thing of his private knowledge, and not like the caſe of a Bond to performe the award. And ſome Judges of the Kings Bench allowed of the reverſall, and tooke no knowledge of the Judgement.

Notice muſt be of a thing ſecret.

57. *See & Menfield.*

EDward See ſold the Manor of Buckland in Kent, being holden in chiefe, to Thomas Menfield and Dorothy his wife, and to the heires of the ſaid Thomas and Dorothy, levied a fine of the ſaid Manor to A. B. to the uſe of them during lives, the remainder to the uſe of Thomas in taile, the rem. to the uſe of a ſtranger in taile, Thomas died. It was reſolved by [*Hobart*] and [*Tanfield*] that Dorothy was not to ſue livery of any part of the land, for it was no advancement to her from her husband of his lands within the Statute.

58. *Freake*

58. *Freak & Mabell* Vxor *against Edward Binford.* Co. B.

IOhn Freake and Mabell his wife, brought a *Formedon* in Remainder, against Edward Binford of 3. Meſſuages, &c. in Alfrington, which Roger Kingſley did give to Elizabeth Coxon, and the heires of her body, the rem. to Iohn Porriſing and his heires, *Et quod poſt mortem predictorum Eliz. & Johan. Porriſing prefato Iohanni Freak & Mabell fil. & hered. Iohan. Porriſing gen. fratris & hæred. Iohan. Porriſing gen. fil. & hæredis pred. Iohan. Porriſing remanere debet per formam donationis pred. & pred. Eliz. obiit ſine hered. de Corpore ſuo exeunte &c.* The Tenant pleaded in Abatement of the writ, that the demandant ſhould by the forme of the Regiſter have ſuppoſed that the Meſſuage &c. *poſt mortem pred. Eliz. & Iohn. Porriſing prefato Iohanni Freake & Mabell ut Conſanguin. & hæred. predict. Ioh. Porriſing remanere debet per formam donationis pred.* which concluſion hee hath not made. And it was ſaid, that the writs of *Formedon* in Remainder in the Regiſter fo. 243 244. & 246. were all ſo concluded, And of that opinion was Juſtice [*Warburton*] but [*my ſelfe*] and [*Winch*] and [*Nichols*] held the writ good enough, in as much as it appeares to the Court, by the Pedegree as it is ſet downe, that ſhe is and needs muſt be Cozen, and heire unto Iohn Porriſing, ſo as it is not *palma pro pugno*, the ſame thing more largely ſpoken, and the forme of the Regiſter, may beare ſuch an Alteration, And therefore 2. E. 3. 35. & 7. E. 3. 47. 48. Stiled in the Regiſter.

A briefe varying from the Regiſter but *equivalent.*

Formedon in rem. in an eſtate taile, limited to K. and B. the rem. to F. in fee, *& quæ poſt mortem* K. & B. to T. Sonne and heire of F. ought to remaine; And the writ was adjudged good, without laying expreſſely the death of F. though it were urged, that the forme of the Regiſter was ſo, becauſe the laying of T. to be heire of F. doth import as much.

And the 11. H. 6. 20. in Formedon in diſcender the demandant made himſelfe heire unto every one that had beene inheritable to th'intaile, though by the Regiſter, hee ſhould make himſelfe heire onely unto them that were ſeiſed. And 2. *H.* 6. 11. an Action of waſte was brought, and the writ was *vaſtum in domibus & hominibus* and allowed good though it wanted the word *exilium* which is the word of the Regiſter.

59. *Richard Foſter Doctor of Phiſick plaintife — Anne Iackſon widdow defendant.*

Sci. fac. Crompton. London. This was adjudged againſt *Foſter* the plaintife Trin. 13. Jac. upon open and large Argument at the Bench. Warburton & Winch to the contrary.

RIchard Foſter, brought a *Sci. fac.* againſt Anne Jackſon widdow, and Miles Jackſon, executors of the laſt will and Teſtament of Thomas Jackſon containing. That whereas the plaintife in *Mich.* Terme 6. Jac. had recovered againſt the ſaid Thomas in the Common pleas as well a certaine debt of 23 oc. pound as 16. pound for dammages, why

why he ſhould not have execution againſt them of the goods and Chattells of the dead. For they ſay that the ſaid plaintife after Judgement, in the life of the Teſtator did the 13. day of *Feb.* proſecute *quoddam brc. ipſius domini Regis de Capias ad ſatisfaciendum* againſt the ſaid Thomas upon the ſaid Judgement, to the then Sheriffe of London returnable xv. *Paſche*, by force of which the ſame Sheriffe, before the returne thereof, that is to ſay, 11. *die Martii* tooke the ſaid Thomas, and had him in Priſon, and kept him for the debt, and dammages aforeſaid. And the ſaid Thomas ſo being in execution of the ſaid writ, dyed in execution, and that the Sheriffe returned the writ ſo, and demanded judgement, and the plaintife ſaith, that the ſame Sheriffe of London, did not take the ſaid Thomas Jackſon and him in Priſon, under their cuſtody in execution, keepe for the debt and dammages aforeſaid, had and detained by vertue of the ſaid writ of *Capias ad ſatisfac. infra ſpecificat. non ceperunt &c. ſed dicunt quod ceperunt &c. virtute cujuſdam brevis de alias Capias ad ſatisfaciend. in Recordo prædicto minime ſpecificat.* And ſo ſet downe the writ of *Alias Capias* at large of the ſame Teſte, the ſame returne and all things, onely it had not any avertment, that the perſons and Judgement and all things are the ſame and concluded, *ſi ſuper tota materia*, the Court ſhall thinke that the Sheriffe tooke him by force of the *Capias* within mentioned, then they find for the defendants; if otherwiſe, then for the plaintife.

A large caſe judged of a man dying in execution, the party, by his heires executors &c. and no further chargeable. Of execution generally at large.

Executions & their natures at large.

The Caſe depends upon two points.

First point. Second point.

Firſt, whether the verdict be found for the plaintife, or the defendant.

The Second, whether the death of Thomas Iackſon in execution bee an abſolute diſcharge of the debt, againſt him, his heires executors and Adminiſtrators, ſo as no new action or execution, can bee had againſt them or any of them.

Touching the firſt point there ariſeth theſe Queſtions.

1. Firſt, whether the former part of the verdict be peremptory, which finds that the Sheriffe tooke not Iackſon, by vertue of the writ of *Capias* mentioned in the Plea, or whether the reſt that followes, that hee tooke him by vertue of an *Alias Capias*, not mentioned in the Record, and ſets forth that ſpecially with concluſion, if upon the whole matter, and leave it to the Court, to Correct the firſt part.

2. Next whether the *Alias Capias*, being underſtood of the ſame cauſe, [redacted] and will maintaine the defendants plea.

3. Laſtly, whether the *Alias Capias* ſhall bee underſtood of the ſame Judgement mentioned in the defendants plea, becauſe the verdict hath no Averment expreſſed, nor by the *pred.* &c.

And to the firſt queſtion upon the firſt point.

To the firſt Queſtion upon the firſt point.

If the verdict had proceeded no further, then to the generall negative, that the Sheriffe did not take him by vertue of that writ, it had beene cleare againſt the defendant.

But

But whereſoever a Iury doth begin a ſpeciall matter, and after makes a generall concluſion upon it, contrary to that which the Law and the Court do judge upon the ſpeciall matter found by them, or on the other ſide when they begin with a direct, and yet after deduce a ſpeciall matter which is contrary to their direct verdict, or in the law proves the truth contrary to their generall verdict premiſed and cloſed them up, with ſubmitting the whole to the judgement of the Court, as in this caſe it is; in both theſe caſes the ſpeciall matter makes the verdict overrule the generall. As for example.

20 Eliz. Dyer 262 in debt againſt executors the defendant pleaded pleniement adminiſter whereupon iſſue was taken, the Jury finde that the teſtator had made a leaſe for yeares of a houſe and implements of houſehold rendring rent and dyed, and that the executors had received the rent and concluded if ſint aſſets, yet the Court judged upon the ſpeciall matter it was no aſſets, becauſe the rent ranne with the reverſion, and ſo belonged not to the executor.

So Paſch. 22. Eliz. *Rot.* 1. One brought a writ *de plegiis acquietandis*, and the Jury found that the plaintife was bound for the defendant, as his ſurety in an obligation with him joyntly & ſeverally, & that being impleaded he prayed a plea, and yet judgement was given againſt the plaintife; for as this caſe is they were both principall, and neither pledge nor Fidejuſſor to the other. And this action lyes not but where one is named expreſſely as ſurety in the bond.

And Paſch. 2 & 3. Ph. & Mar. rot. 113. debt in an Obligation for performance of covenants, whereof one was that he ſhould do no waſt, and iſſue taken whether he felled 20 Oakes, but he had felled 10. and it was adjudged for the plaintife, yet if upon the firſt point it had reſted there, it had beene found for the defendant.

Note that 10 did not prove the iſſue of 20 literally, but it proved the breach cleare within the iſſue. Quere, if it had beene Oakes for aſhes or the like, for either had beene waſt, and the very iſſue in contemplation of law is waſt or no waſt, and the reſt is a certainty of forme, ſee in Towneſends caſe and in Plo. 111.

As to the ſecond branch of the firſt point, whether the *Alias Capias* can be holden within the iſſue. Firſt, lay this for a ground, that if the Jury finde any thing that is meerely out of the iſſue, that ſuch a verdict, for ſo much is utterly void, though it proceed in generall, for or againſt the plaintife or defendant, whereof the reaſon is plaine, which is, that Iurors are tryers of matters of fact put in iſſue betweene the parties, and their oathes which containe the commiſſion that they ſhall truly trie the iſſue betweene party and party. And ſo is the *ven. fac. ad triand. exitum, non ad triandum jus*, as in a writ of right, ſo that whatſoever they do try beſides the iſſue is *per non juratores*, is a cauſe judged by the Court that hath no juriſdiction of the cauſe, *coram non Iudice*, and utterly void,

The ſecond queſtion upon the firſt point. Verdict out of the iſſue void.

for a verdict muſt not be to the action what might have beene pleaded, but to the iſſue what is pleaded, and in their charge. And if that other point had beene pleaded it might have had an other anſwer and evidence. And therefore the entry of the verdict in the record is, *Quoad veritatem de infra content. Iuratores dicunt ſuper ſacramentum ſuum, &c.* And ſo upon the matter, if that extravagant part of the verdict be falſe, it is no perjury, neither doth any attaint lye upon it, for there is no party grieved nor any thing to be reſtored, neither can it be uſed as in evidence in any other triall, becauſe there is no redreſſe if it be falſe.

And I hold it plaine, you cannot juſtifie to call him perjured upon ſuch a point being falſe. And ſo it is concerning a point of diſcourſe by Judges out of the point of judgement it may be a judicious and ſtudied opinion, and of ſome authority, but it is no point of the judgement, for no writ of error lyes upon it, and therefore it ought not to preoccupate or prejudicate a judgement. And therefore 39 H 3.38. a writ of annuity was brought upon a preſcription, the defendant traverſed the preſcription, whereupon iſſue was taken and found for the preſcription. And further the Jury found that there was nothing of annuity behinde, yet judgement was given for the plaintife.

So 43 aſſ. in aſsize the defendant pleads himſelfe a villaine, the plaintife that he was free, and iſſue taken upon it; the Iury found him a villaine, and added that he was ſeiſed and diſſeiſed by the defendant. And the writ imported that the Lord of the villaine had not entred. And yet it was not adjudged againſt the plaintife, for jurors are bound to their iſſues, but Judges have power over the whole matter, and that hath alſo his bounds, all the matter within the record not at large.

Verdict unformall.

But howſoever the verdict ſeeme to ſtand, and conclude not formally or punctually upon the iſſue in the verdict, yet a verdict may be concluded, if it be to the point in iſſue, the Court both ſhall and will worke it into forme, and make it ſerve. And therefore 47 E.3.fo.19. In a *Præcipe* one came in and ſaid, that the tenant was tenant for life, and prayed to be received for his reverſion. The demandant on the other ſide pleaded that the tenant in action had fee, whereupon iſſue was taken that ſhe had no fee, and it was found that neither the tenant nor he in reverſion had ever any thing, which is cleane beſides the iſſues, and againſt the reaſon of the *Præcipe*. And it was adjudged that he ſhould be received, for by this verdict it was found, that the tenant had no fee, which was all that was put in iſſue, both for the demandant and the party praying receipt allowed him tenant to the action, which muſt be at leaſt freehold, and that being agreed by the parties, the Iurors could not falſifie. And therefore the Book 19 E.3. tit. receipt 178. being adjudged contrary I do condemne, but on the contrary where an iſſue is well found it ſhall ſometimes relieve a ſtranger, as in the caſe of Tilly and Wood, 7 E. 4.31. Where an action of treſpaſſe was brought againſt

two

two for taking of goods, the one pleaded not guilty, and it was found againſt him, and the other pleaded, that the plaintife had given him the goods, whereupon iſſue was taken, and that found againſt the plaintife, and therefore judgement was given againſt him, for the iſſue was well found, and the action being the ſame and both the defendants parties to it, and the Court ſeeing that no judgement could be given for him againſt the other. But if the plaintife had brought actions ſeverally, againſt either defendant (as he might) he ſhould have had his judgement though perhaps the defendant might have beene relieved by us. And *quære* upon the other judgement, *tamen quere* of that.

Now admitting that a meere forraine matter is void, yet in this caſe to the ſecond branch of the firſt point, I am of opinion that the *alias capias* doth maintaine the plea of the defendant which is but thus. That whereas the plaintife had ſet forth his judgements and demands why he ſhould have no execution againſt the executor, the defendant ſhewes that the plaintife had ſued forth a *cap.* againſt the ſaid T. Iackſon in his life *quoddam breve de Capias adſatisfaciend. al.* a certaine writ of *Capias ad ſatisfaciendum ſuper Judicium predictum, &c. virtute cujus brevis*, the Sheriffe took and had him in execution for the ſame debt and damage, and he died in execution, &c. And the plaintife ſayes that the Sheriffe *virtute brevis pred. de cap. adſatisfaciendum predictum Tho. Iackſon non cepit*, and thereupon iſſue is taken, ſo he denies that he was taken *virtute cujuiſdam brevis de cap. &c.*

Verdict fines in al. cap. that was pleaded a Cap. generall.

In every act there is a ſubſtance, a body a principall, and there are certaine acceſſaries, or Accidents. And concerning this, it is a true *Axiome unumquodq; maximè eſt id quod principio ipſo*, & therefore things are nominated *eò quod ſunt per ſe, non per accidens.* Now then this ſubſtance is *Capias*, whether it be the firſt *Alias*, or *pluries*; thoſe are but disjunctions of number in order, there might have beene more Colour, if he had pleaded it an *al. Cap.* where it was the firſt, for that had not beene true in the words though in ſubſtance, and to the effect of the execution, it had beene all one; But here as it is full to the ſubſtance, ſo it is not untrue, nor ſo much as miſtaken in a word, for it is a *Capias* with a little addition, that may be ſpared. And *Capias* is the *Genus*, and *Genus continet plura quam ſpecies, ſed ſpecies plus quam genus* 36. *H.* 6. 2. A Recognizance pleaded, the iſſue, *nul tiel* Record certified upon the Record, and yet good, 36. E. 3. 5. In an Account the defendant pleaded, that he accounted before K. and W. upon which iſſue joyned; and it was found, that he accounted before Rouely, and it was adjudged for the defendant, 19. aſſ. 19. In aſſize the tenant vouched, the vouchee pleades, that there after the plaintife, brought an Aſſize againſt his Father, who pleaded that the plaintife did infeoffe him by the Aſſize, and he demanded judgement, and upon iſſue *nultiel* Record; the Record was, that the ſaid Aſſize was againſt the Father and Mother, and yet adjudged no

failer, but the verdict muſt not wholly depart from the word of the aſſize, 40. aſſ. 31. In an aſſ. the defendant pleaded the deed of the brother of the plaintiſe with warranty, and the plaintife denyed the deed, and it was found not to be the deed of the brother, but the deed of the father, and it was adjudged adviſe in the booke, ſaith one reporteth plainly againſt the defendant, and I am of cleare opinion, that if the Jury had found, that if hee had beene taken with a *Capias pro fine*, or by a *Capias utlagat.* after Judgement, and the plaintife had proved that he ſhould remaine for his ſatisfaction, yet this had beene againſt the defendant; for though he were taken by a *Capias*, and were alſo holden *ad ſatisfaciend.* yet it was not *quoddam brc. de Cap. ad ſatisfaciend.* which is a kinde of a writ certaine, yet it amounts to ſo much in effect, and the prayer for his remanding is a kinde of taking of charge of the nature of the writ. On the other ſide, if the Sheriffe had had this Jackſon in execution by one *Cap.* at another mans ſuit, and then this *Cap.* had beene delivered unto him, and he had alſo charged him with that, I hold that that would have maintained this iſſue; for though he were taken before, yet this is a new taking in the law, as to this execution.

Hobart.

The third queſtion upon the firſt point.

Verdict ſpeciall taken to common intent.

And to the third branch concerning the faults of averment, to apply the *Capias* as is found in the caſe in queſtion, if the uncertainty had been in the plea of the defendant, it would no doubt have made it vicious, but being in a ſpeciall verdict, it muſt be taken according to the common intent, therefore, when the queſtion, whether he were taken by force of the *Capias* mentioned in the plea, which is named without addition, and they give their verdict, that he was not taken by force of an *Alias Capias ad ſatisfaciendum*, not mentioned in the record at the ſuit of the ſame perſon of the ſame teſte and returne of the ſame ſumme of debt, damages and judgement. It appeares plainly, that they underſtand it to be the ſame; for it is againſt ſenſe, that either the Jury would have made, or the Court have ſuffered a ſpeciall verdict, as a doubt, if this *alias Cap.* had come upon another Judgement, or betweene other parties.

If a Plea of *Capias* may be maintained by an *al. Cap.* which being the onely doubt the Court muſt make, no more doubts of the finding and tryall of the matter of fact, being onely the juries office, and not the Courts, upon which point, ſee Goodales caſe, Co. 5. fo. 17. where in an *Ejectione firmæ per* Goodale againſt Wyat upon not guilty the Jury concluded their doubt upon performance of a Condition by payment of money by Sir John Packington to one Woodcliffe; but yet in making up their verdict, they had given poſſeſſion to the plaintife by leaſe, and laid the Entry upon him by Wyat, without title under Packington, but that was not included, and ſo not regarded.

And Fulfords caſe, Co. lib. 4. fol 65. where it was found that one *Recognovit coram recordatore & majore ſtapulæ ſe debere* to another 200. pounds,

pounds, without ſaying, *per ſcriptum Obligatorium*, or *ſecundum formam ſtatuti*, and yet holden good and effectuall according to common ſpeech and intent, and the Earle of Shrewesburies caſe, Co. lib. 9. fol. 51. where the verdict ſaid, *acceſſit ad locum uſualem* to hold Court Baron; It was found that Sterne as Deputy to the Earle of Rutland *acceſſit ad Villam de Mansfield ad uſualem locum ubi Cur. baronis Manerii de Mansfield communiter tenta fuit ad cuſtod. il. Cur.* and that he was diſturbed by Woodward, Steward to the Earle of Shrewesbury. And holden well; for though this would not have ſerved in pleading, for it muſt have beene that the place was part of the Manor, or holden of it at leaſt, where the Court was to be holden in verdict. But now, if this were no Demurrer upon matter in Law, though the parties will joyne in one point, upon which, if it ſtood alone, Judgement ſhould be given for the one party, yet, if upon the whole Record in matter in Law why Judgement ſhould be given againſt the ſame party, the Court muſt judge ſo, for it is the Office of the court to judge the Law upon the whole Record, and conſent of parties cannot prejudice their opinions, nor guilt them of their office in that point.

And therefore Mountague in Donne, and Mountagues caſe does ſtagger a little upon that point, upon lib. Pl. 34 H. 6. yet in concluſion judges, that the Court muſt of office judge upon the whole Record. Now, though the iſſue of this caſe be whether the Sheriffe tooke him by force of the writ, and had him by execution of debt and damages, and the verdict onely findes, that the Sheriffe tooke him onely by vertue of the *al. Cap.* and ſay nothing to the having and holding in execution, yet it is well enough, for the conſequence is neceſſary, becauſe they could not take him by the writ, but he muſt be in execution. And alſo, becauſe they conclude their verdict, that if the Sheriffes tooke him by force of the *Cap.* within mentioned, then they tooke him in forme and manner as the defendants doe, and have pleaded with rules and points at the whole, as well for the taking as the detaining, keeping and holding in execution.

Nota. That the dying in execution was not put in the execution, nor in the iſſue, but admitted, therefore of that there is no verdict, ſo that there is no cauſe to argue it. But if the death be not a diſcharge, but a reviver of a new execution, then was the plea a kinde of confeſſing of the action, as the plaintife might then have demurred: So the Court ought not to judge for him howſoever the verdict be, except the Stat. of Jeofailes helpe the defendant, like to 9. H. 6. 37. If in debt the defendant plead that he delivered his deed as his deed to be delivered upon condition performed, and not elſe; ſo it was not his deed, upon which iſſue being joyned, and found not his deed, yet it ſhall be judged for the plaintife upon the matter appearing to the Court to be confeſſed.

Now,

The ſecond great point.

Now, upon the ſecond great point, which is the maine queſtion of the caſe, whether a man may take in execution, the debt being not abſolutely diſcharged by his death, we would ſpeake a little largely, becauſe it is of great conſequence, execution being the life of Juſtice, and neceſſary to be determined. And ſtrange it is, that it hath not beene hitherto brought to certainty, being a caſe that muſt needs often happen.

Of execution perſonall.

And therefore, firſt of executions in generall, I meane an execution perſonall, as I may call them, for debt and damage, for of executions upon reall actions, whereby land is recovered, and damages ſometimes withall, or of executions upon *Ejectione firmæ*, I will not ſpeake.

Executions, as I call them perſonall, *levari fac.* or *fieri fac.* by common Law; *Elegit* by the Stat. of Weſtm. 2. *cap.* 18. and *Capias ad ſatisfaciend.* by the common Law in treſ. *vi & armis* being a direct and wilfull wrong. And by the Statute of 25. E. 3. in other caſes.

For, at the common Law, upon an action of the caſe againſt an Hoaſt for goods loſt in the Inne, or againſt the Sheriffe for an eſcape, no *Capias* lay, 42. E. 3. 11. & 42. aſſ. Pl. 17. for it was but *culpa* ſometime, late a negligence, but not a wilfull wrong.

There is alſo ſometimes execution of the body without a *Capias ad ſatisfaciend.* as where the defendant is taken by *Capias pro fine*, for the King, which was alſo in caſes of mere wrong, or upon a *Capias utlagat.* for the King after judgement; In which caſes the plaintife may pray the defendant in execution for his debt, or may refuſe it.

So the forme of the Entry of the prayer of the plaintifes in ſuch caſe, that the defendant may remaine in execution for him, for as much is implied in taking the *Capias ad ſatisfaciendum ſcilicet*, an election for his execution, now election implies rejection of the reſt, for there is no election of all, neither can the land be taken for a time, or for a part as the *Fieri fac.* but it muſt be *totalitie* and finally during the life.

Of writs of execution ſued forth, failing wholy of their effect.

Here I will conſider two things.

Firſt, where writs of execution being ſued forth, doe utterly faile of their effect, what is their conſequence, to other writs of execution.

Of executions having their effect in part.

Next when they be executed in part, and not to the whole demand.

Now touching the relation of thoſe executions amongſt themſelves, and their correſpondency.

If I take out a *Cap.* or *Fieri fac.* and they take not effect, I may have one of them after another, or an *Elegit* after both if they fayle. 13. H. 7. 14. 47. E. 3. 26. and therefore though H. 5. & 6. E. 6. of executors 1321. as my Brother Nichols ſaid, and *Fairefax.* 15. H. 7. 15. be of opinion that after a *Capias* returned *non eſt inventus*, the plaintife ſhall have no other execution, the law is not ſo. But if I take out an *Elegit*, and enter it of Record, and it be returned *Nihil* without effect. Now the Queſtion is, whether I be remedileſſe; And in this divers bookes are peremptory, that I am without remedie, becauſe I have made (ſay they)

Elegit, whether it barres other executions.

my

my election, and that entered upon Record, and therefore I can never resort to any other ; and to this effect are the bookes of 19. H. 6. 4. Newton. 5. E. 4. 41. a great opinion against two Judges that had granted it. And it is cited D. *H.* 4. 41. and 13. H. 7. 15. *Fairefax* accordeth, but also saith, That after a *Capias*, you shall not have an *Elegit*, but an *al. Capias*, or an *Elegit* in divers Counties one after another, the plaintife may have as the bookes are, H. 7. 19. 4. E. 5. *Phil. & Mar. Dyer* 162. but of these bookes notwithstanding, whereof there is never a Judgement but *scilicet* 30. H. 3. cited, which I find not, I hold the law to be cleane contrary. And where the party takes an *Elegit*, and can have no fruit of it, he may resort to another execution, though the election be entered of Record, yet is the 3. E. 2. of execution 140. One had an *Elegit* into Norff. The Sheriffe returned execution of halfe 24. Acres, the plaintife prayed a new *Elegit* in Norff. and was denyed it, which is an Error.

And first for authorities directly to the point 17. E. 4. 4. *per Curiam*, Judgement after *Elegit* taken forth, the yeare expired before it was served, whereupon a *Scire facias* was sued forth, and upon that a *Capias* by judgement, notwithstanding the execution taken *ut supra*, for it was said that *Westm.* being affirmative, tooke not away the execution at common law. And it must bee understood of an *Elegit* entered of Record, for otherwise there were no question or ground for it. And 47. E. 3. Fitz. execution 41. the opinion of Piercey and Finchden is, that whereas an *Elegit* is taken out and not served, the plaintife may have another execution. And 1. E. 3. 4. when Kirton said, that because an *Elegit* was awarded, and was returned in Hil. yet no *Cap.* could be awarded, nor *Capias pro Fine* served. Belknap answered, they would be advised of that. It seemes that this peremptory issue of the Election entered, hath beene the cause, that the entrie of latter times, hath beene forborne of Record, till first it appeare, whether any thing can be had by the *Elegit*, and then to enter the choice upon the Court Roll, when the *Elegit* is returned upon the Record, and filed, and not kept in the attorneys pockets to hide and returne, when he findes his advantage. Now the reason of law in this case, there is none why a man should be prejudiced by ignorance *alias* in facts or cases, and therefore if I plead joynt entry in my selfe, I must shew of whose Feoffement, not so of Joyntenancie in a stranger.

Nextly, it is mistaken if it be received, that the election that is made and recorded, is to be taken in an execution, of the very writ of *Elegit*. Now it is an execution of the land &c. If he defend *& ante Eligit executionem medietatis terræ &c.* Executions severall upon one Bond.

The words of the Statute of W. 2. *cap.* 18. are, that it shall be in the Election of the plaintife to have a writ of *Fieri fac.* to the Sheriffe, to levy the debt upon the lands and Chattells of the Debtor, or that the Sheriffe

Sheriffe ſhall deliver him all the Chattells, and one halfe of the land untill the debt be levied, out of theſe words I note, that the election is applyed to the *Fieri fac.* as well as to the *Elegit*. A gaine, that of the two, the Caſe of the *Fieri fac.* is the worſt, For it is ſaid, that he may Elect the writ of the *Fieri fac.* but for the other that he may not elect the writ, but the land it ſelfe of the debtor, to hold till he be ſatisfied with ſuppoſed land to be choſen, for if there be none, the choice is no choice; and the word *Elegit* is not the matter, but the Act of election, which is in both executions alike. And therefore ſee *Mich.* 17. & 18. *Eliz. Dyer* 344. Where one granted a rent out of the land, without ſaying *pro ſe & heredibus*, & then the grantor dyed, the grantee brought the writ of Annuity againſt the heire of the Grantor, who appeared and imparled till next terme, and then the plaintife diſcontinued, and after diſtrained, but made Avowry, and then the plaintife in the Replevin pleaded the writ of Annuitie in barre; whereupon it was demurred, and it was adjudged for the grantee, for the perſon of the heire was not chargeable, and therefore the Election was void, and none in law, and therefore *per curiam*, though they had proceeded to judgement, in the writ of annuity; yet the land might ſtill have beene charged.

But now in the ſame caſe, if the writ of Annuity, had beene brought againſt the Grantor himſelfe, it would have beene bound for ever, and ſo it would have turned the rent Charge into Fee ſimple, into an Annuity, onely for the life of the Grantor. So you ſee that the election ſtands not in the choice of the writ of Annuity, for that may be idle and miſtaken, but of the Annuity it ſelfe, when it is in being.

In Raviſhment of a ward, where the Jury found the infant within age & aſſeſſed damages to one hundred pound, if he were not married, but if he were married, to three hundred pound, the plaintife could not have a double conditionall Judgement, although he could not know whether hee were married or not, and therefore hee was inforced to make election, and yet if chuſe judgement of marriage, and the hundred pound of the Sheriffe, that he is married, he ſhall have execution for the 3 hundred pound, for the election of the marriage is voyd. 36. E. 3. F. *Garr.* 33. *H.* 6. 14. If the tenant in fee his heire within age, and the Lord receive of him his ſervice, in the life of the Father, yet he may take him in ward, after the death of the Father; otherwiſe it is if he receive his ſervice of him, after the death of the Father, for there are divers things to make choyce of, not ſo before.

Thus farre of writs of executions, that being ſued forth, faile of their effect wholly.

Now of executions that have their effect in part.

If upon a *Fieri fac.* the debt be ſatisfied in part, the reſt may be ſerved, either by *Capias* or *Elegit*. 18. E 4. 11 47. E. 3. 26. & 14. *H.* 7. 28. But in this caſe one had ſued forth a *Fieri fac.* and before the returne he prayed

prayed a *Capias*, but it was denyed him, till it ſhould appeare upon the returne of the *Fieri fac.* whether he had execution by that, ſo that it ſeemes that there was ſome entrie of it of Record. For there is a kind of barre upon the electing of the *Fieri fac.* if it may be ſerved, for there ſhall not be two ſeverall kindes of executions out at once.

And upon the *Elegit*, if there be no execution but upon goods, becauſe there is no land, and the goods appeare, And I am of opinion hee may have a *Capias*, for now it is in effect but a *Fieri fac.* though the word be *Elegit*.

But if there be land extended, it is otherwiſe, and yet *quære* if the debt be 40. pound and nothing extended, but a leaſe for three yeares and five pound a quarter, or the like, for then as to that it remaines, the *Elegit* failes as in the other Caſe, where nothing at all is to be had.

But if a *Capias* be executed, which is in Law ſufficient for the whole debt; for *Corpus humanum non recipit eſtimationem*, ſo as if you take it at all, you muſt take it for the whole debt.

Now, to the maine Queſtion:

Firſt, it is agreed on all ſides, that whereas the *Elegit*, or *fieri fac.* are both executions and ſatisfactions to all purpoſes, and againſt all perſons, the *Capias* is a full execution, as the booke 22. aſſ. 43. ſaies; but it is not a perfect ſatisfaction in nature to all purpoſes, and againſt all perſons.

Now how, and to what purpoſes, and in what caſes it is not a ſatisfaction, is the queſtion:

Firſt, I agree clearly, that it is not an actuall ſatisfaction, no not betweene the parties according to Hillaries caſe 36. H. 8. 41. where one was bound to ſatisfie for goods that he had imbeſilled, and in debt upon an Obligation he pleaded that upon a ſuit for thoſe goods, he was taken in execution for the damage, and it was adjudged no plea. But this is nothing to the caſe in queſtion; for without doubt it is no ſatisfaction to common ſpeech, nor to a forraine plea.

But the Queſtion is, whether it be not enough for ſatisfaction in law to that very ſuit.

Quære, if an Executor releaſe a debt, or diſcharge one in execution, it ſhall be accounted in law aſſets as received.

Againe, it is no ſatisfaction clearely, as to barre one to ſeeke a ſatisfaction againſt another, lyable to the ſame debt or damages. And therefore, 29. H. 8. Brooke execution 132. 4. H. 7. 21. 20. H. 6. 11. 36. H. 6. 47. 14. H. 4. 19. and Plomfields caſe principally Co. lib. 5. fol. 8. Jones and Williams caſe cited there, are all cleare law, and yet make nothing to the caſe in queſtion. Note 4. E. 4. 36. 5. E. 4. 4. being all to one effect.

Againe, I am of opinion, that if two be bound joyntly and ſeverally to me, and I ſue them joyntly, I may have a *Capias* againſt them both, and

the death or eſcape of the one ſhall not diſcharge the other.

But I cannot have a *Capias* againſt the one, and another kinde of execution againſt the other, becauſe though they be two ſeverall perſons, yet they make but one debtor when I ſue them joyntly, but if I ſue them ſeverally, I may ſever them in their kindes of execution; for though the Obligation be but one, yet the originalls, the ſuits, pleadings, judgements and executions are ſo divers, as if they were upon ſeverall Obligations. But yet ſo as if once a very ſatisfaction of one, or againſt the Sheriffe upon an eſcape of one, the reſt may be relieved upon an *Audita Querela*.

But now, ſingling out the very point, I hold that a *Capias ad ſatisfaciend.* is as againſt that party and not onely in execution, but in full ſatisfaction by force and Act and Judgement of Law, ſo as againſt him he can have no other, nor againſt his heire, or executor, for theſe make but one perſon in law.

For where the law gives three or foure kindes of executions not altogether, but by way of choyce, whereof the *Capias ad ſatisfaciend.* is one, and when the body is taken, it is a full execution, and cannot be for part, as a *fieri fac.* It is an election of it ſelfe of that kind of execution, and ſo a renouncing of the reſt as well as an *Elegit*, though it uſe not the very word &c. for if the defendant had lands and goods when the plaintife tooke the body, he made a plaine preferment of that execution before the other. And if they came after, they prevented his choyce by haſt with expedition alone, as a great advantage in executions.

And it is eſpecially to be noted, that the debtor hath not the choyce to put the creditor upon his execution; for then it had ſome colour of reaſon, but the choyce is taken by the creditor. If the party in execution eſcape of his owne wrong, yet the plaintife cannot have againſt him any other kinde of execution, nor againſt his executors, whereof the reaſon is, becauſe, that where he hath begun, and choſen the body, he can never reſort to any other execution againſt the ſelfe-ſame party; but the reaſon is not becauſe he hath an action againſt the Sheriffe, for ſo hath in the former caſe of ſeverall execution againſt ſeverall debitors by one Obligation, as well after as before the eſcape.

And therefore, if hee take one in execution who eſcapes, hee hath choyce to take another, or to get ſatisfaction from the Sheriffe upon the eſcape.

But now, as to the party himſelfe, though he make an eſcape (which is one wilfull wrong) yet the plaintife can have no other execution againſt him. And if he ſaith he hath remedy againſt the Sheriffe, yet that may faile, either by death, or diſability of the Sheriffe. And by the ſame reaſon, that here is difference betweene the ſame party and another in caſe of eſcape. I hold it much more reaſonable of death 41. aſſ. Pl. 15. One in execution for debt eſcaped, and the Sheriffe dyed, whereupon the

the plaintife prayed a new *Capias* againſt the priſoner, and had it in this caſe of miſchiefe, but other execution I hold hee could not have had in that caſe.

When the plaintife taken in execution makes a wilfull eſcape, and that againſt the keepers will, yet the plaintife can take no other execution; this cannot be in the favour of the priſoner, for he is the onely wrong doer both to the parties and to the Law, and is the cauſe why that execution is defrauded, and ſo gives cauſe of another.

There is no cauſe to impute any fault to the plaintife, why he may not now take a new execution, ſince by the defendants fraud hee could not reape the benefit of this.

Likewiſe there is no cauſe to acquit the defendant, and ſo lay the charge upon the Sheriffe who conſented not to the eſcape, whom the plaintifes would free by taking another execution againſt the party himſelfe.

Therefore there can be no other reaſon of that poſition, but that the *Capias* executed, and the body taken, ſtops as againſt him all other executions but it ſelfe and the conſequence of it, which is the action of debt, or action upon the caſe upon the eſcape.

Now in the principall caſe, all theſe conſiderations move mainly, and are without exception more cleare and juſt to quit the defendant, being in no fault, and to ſatisfie the plaintife by his owne choyce, whereof he hath had the full effect directly, that is, his body.

It is a Prerogative to the King, to have execution of body, lands and goods, not communicated to the ſubject, but in caſe of Stat. Merchant and Staple: and Recognizances of that nature, which is by Statute law. And therefore the caſe put in Broomfields caſe; That where the party was taken in execution upon a Statute and dyed, and yet execution was had againſt goods and lands after, is nothing in this caſe, for they were all due at the firſt, and therefore might be taken at once or ſeverally. But if this opinion ſhould hold a man, beginning with a *Capias*, may ſue upon death, to and with a *Fieri fac.* or *Elegit.* = = = = = = = = = = And ſo if many be found, and all taken in execution, upon the death of every one a new execution may be againſt the executor; which is abſurd and full of miſchiefe, when the plaintife tooke him in execution, as he choſe that his beſt remedy, ſo he could not but fore-ſee that he might die under his hand, ſo it was his folly to chooſe that kinde of execution which was *executio caduca.*

4. *Reaſon. Statutum eſt omnibus ſemel mori.*

The *heriot* by Law is *optimum animal in rei veritate*, but if the Lord will, he may take the worſt. And as it was ſaid by a father that loſt his ſonne in battell *Novi me genuiſſe mortalem*, ſo here Foſter may ſay, *novi ne cepiſſe mortalem.*

Now, ſince the execution of the body ſtands as a ſatisfaction betweene the ſame parties while the party lives, there is no feare, but that the

party yeelding to execution, and ending his life in it, and the other accepting it, and ſo both agreeing upon it, it ſhould make a finall diſcharge touching himſelfe; for it cannot be truely ſaid, that the defendant is in fault, when being not able to pay his debt inſtantly he yeelds his body and lands, and goods, if he have any, by the courſe of Law and his creditors choyce, and endures with patience without flight or eſcape after the creditor choſe his body: For, it is infancy, to ſay, the debtor ought to pay his debt, for the law muſt be the ſame, whether he were able or not to pay.

The example of the fellow ſervant that made his ſuit. Hive patience with me and I will pay thee all.

6. Reaſon. And of all executions, that of the body is in law eſteemed the beſt, and moſt forcible, and therefore, 7. H. 6. by the opinion of Cotiſmore, if two Executors have Judgement, and the one pray a *Capias*, and the other a *Fieri fac.* the *Capias* ſhall be awarded as beſt for the Teſtator. And the common law gave not that execution, as being too hard and heavie, but onely in the caſe of wilfull wrong, *vi & armis*, for which, none was thought too hard. And therefore, Barons were not ſubject to it, but upon great contempts; and yet, ſince the Statute, 25. E. 3. though they be not ſpecially exempted.

Though the plaintife have no direct intereſt in the body as in his ward or villany to buy or ſell it, yet he hath intereſt in it for liberty or reſtraint by ward, till he pay *ultimum quadrantem in ſalva & arcta cuſtodia*. Reade the caſe in the 4th. Chap. of the ſecond booke of Kings, the creditor would take the two ſonnes for bond-men.

Although in treſpaſſe *vi & armis* at the common law againſt a Baron a *Capias* lyeth not, nor after by the equity of the common law upon the Statute, becauſe the eſtate of a Baron is intended ſufficient, yet 11. H. 4. 15. *in homine replegiando*, againſt Dame Spencer a Peere of the Realme, for to a Baronneſſe born, it was granted, becauſe it was an high injury to the perſon whom ſhe eloyned. Alſo the common law holdeth the body the greateſt prey and higheſt coercion.

And the reaſon is apparent; for as Chriſt ſaith: The body is of more worth than rayment. And as it is ſaid in Job, *Pellis pro pelle*, and all that a man hath hee will give for his life, but touch his fleſh or his bones, &c.

It is more fit compariſon to ſpeake of beaſts taken in execution by *fieri fac.* and dying, though there be a property which is not in the body of of a ſeeman.

Now impriſonment toucheth both in *ſalva & arcta cuſtodia*. Now touching the caſe that is agreed, 14. H. 4. 4. 15. E. 4. 10. That where a man takes diſtreſſe for a rent, and upon a vowry hath returne irrepleviſable, that if the beaſt die in the pound, that now he may diſtraine a new, and this ſhould much convince the caſe in queſtion: He that lookes neere unto it ſhall find it nothing like; for beſides that, there is no compariſon betweene the body of a man and a beaſt, touching valuation, and ſo touching ſatisfaction, it is to be noted that the ſumme of rent, or the valuation of the damage is not adjudged to the Avowant in the *Replevin*, and then the beaſt taken by him in execution

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as in the caſe in queſtion, but where hee had taken the beaſt by diſtreſſe, and that is replevied from him. Now upon the right of diſtraining appearing, the beaſts are reſtored unto him, in that ſtate as they were before, to remaine with him as a diſtreſſe, lawfully taken by a Judgement of the Court and not to be replevied, for this hath no colour of an execution, but is onely the effect of the agreement of the parties, or *Act* of Law; be it in rent ſervice, or rent charge, or damage feſant, that he may diſtraine and retaine, till the rent or damage be ſatisfied, ſo that even as the beaſt that dyed before Judgement; he might have diſtrained againe, ſo after Judgement, for it is alike in both Caſes.

But the body of a freeman cannot bee made ſubject to diſtreſſe or impriſonment by Contract, but onely by judgement.

But in this caſe the debt is adjudged, and the body taken by a warant of the Court, and of the law in execution for it.

60. *Anne Williams againſt Edmond Cuttoyes. and Conſtance his Wife.*

Scire fac.

P. *Aſche.* 43. *Eliz, Rot.* 88. Anne Williams brings a *Scire fac.* againſt Edmond Cuttoyes, and Conſtance his wife, Adminiſtratrix of Richard Lambe, to have execution of 88. pound debt and dammages recovered againſt Lambe. The defendants pleaded, that the plaintife by *Capias ad ſatisfaciendum*, had taken Lambe himſelfe in execution, in which execution he dyed, and demanded Judgement, and then demurred *Hil.* 4. *Jac.* It was adjudged againſt the plaintife in the Kings Bench.

A man dyes in execution his adminiſtrators are no further Chargeable.

61. *Spicer and Reade. Trin. Terme Ann.* 13 *Jac. Regis.*

Star-chamber. Perjurie not legall yet puniſhed in Star-chamber.

Maſter Spicer was ſentenced in Starchamber, at the ſuit of Thomas Read Eſquire to 400. pound fine, for that he had taken Oath before Baron Snig, according to the order, taken upon the Commiſſion for defective titles, That I. Spicer his father, was ſeiſed of a mannor of ſome eſtate of inheritance, if his Majeſties title hinder not, whereas in truth the mannor was the ſaid Reads, and ſo obtained the letters Patents from the king, but this was puniſhed, not as a direct and judiciall Perjury, but as a miſdemeanor in abuſe of the Kings gracious Commiſſion to the diſturbance of the poſſeſſions, which was inſtituted and appointed for the quieting of poſſeſſions, in ſupply and imitation of the Statute of 32. H. 8. cap. 9. whereby men are forbidden to buy and ſell Titles, ſaving ſuch as are in the poſſeſſion of the lands, And becauſe Read the plaintife had beene ſued and troubled by colour of his new Patent, 100. markes damages was given to him, and the ſentence ordered to be puniſhed through the kingdome.

Star-chamber. Breaking an houſe upon private proces.

62. *Parke and Percivall* verſus *Evans underſheriffe.*

Sheriffe fined for outrage in executing proces.

HUgh Evans an underſheriffe of Stepnie and others, were fined at the ſuit of Parke and Percivall in two hundred pound a peece, at the ſuit of one Bracklesbury againſt one Porter, who lay in the houſe of Parke, came and knockt at Parkes doore, whereupon Parkes wife came to the doore, and opened it a little to ſee who was there, and they preſently with their ſwords drawne, ruſht in upon her whether ſhee would or no, and bare her downe and brake open the Chamber doore, where Porter lay, and brake alſo Percivalls houſe adjoyning to it, to get inſtruments to breake doores withall, and did hurt divers in the houſe. And my Lord [chiefe Baron] and [my ſelfe] held the firſt entry unlawfull, for the opening of the doore was occaſioned by them by craft, and then they uſed the violence they intended.

63. *Barrow* againſt *Lewellin.*

Star-chamber Libell by privy letter to the party himſelfe.

PAul Barrow preferred a Bill in the Star-chamber againſt Maurice Lewellin, for writing unto him a ſpightfull and reproachfull letter, which being brought, it appeared to the Court, that it was ſealed and delivered to his owne hands, and never otherwiſe publiſhed. And it was reſolved though the plaintife, in this caſe could not have an action of the caſe; becauſe it was not publiſhed, and therefore could not be to his defamation, without his owne fault of divulging of it. And all Actions of that kind doe ſuppoſe in *auditu quamplurimum propalavit, &c.* Yet the Star-chamber for the King doth take knowledge of ſuch cauſes and puniſh them, whereof the reaſon is, that ſuch quarrellous letters tend to the breach of the peace, and to ſtirring of Challenges and quarrells, and therefore the meanes of ſuch evill, as well as the end are to be prevented.

Falſe impriſonment. Co. B. Court of Chancery at Yorke whether it may be by preſcription.

64. *Martin* verſus *Marſhall and Key.*

MArtin brought an Action of falſe impriſonment againſt Marſhall and Key, who juſtified and ſaid, that Yorke was a Citie by preſcription incorporate, by the name of Major and Alderman and Comunaltie, and that they had had time out of mind, a Court called a chancery Court, for all cauſes of equity ariſing within the Citie, betweene Citizens, to heare and determine by bill and anſwer. And that the Mayor had alwayes uſed to direct precepts to appearance and contempt of orders, and to impriſon for contempt of orders, and to proceed according to the courſe of Chancery; and then ſhewes that one Marſhall the now defendant being then Mayor, and the Aldermen and tells the effect, whereupon the defendant being ſummoned, appeared but could not anſwer,

anſwer, and thereupon an order was made againſt him, that hee ſhould anſwer or be commited ; and becauſe hee did wilfully ſtill refuſe to anſwer, commandment was given by the Mayor to Key the other defendant, being Serjeant at Mace to take him who did ſo, and brought him into the Court before the Mayor and Aldermen, where he was in open Court committed for his contempt, which taking and commitment was the ſame impriſonment ; whereupon the plaintife demurred, and it was adjudged againſt the defendants upon one groſſe fault, that where the preſcription was for precepts to be directed (which muſt be underſtood by writing) the precept to Key the defendant, here to take the plaintife, was taken by word. And if that were void, which is made part of the Cauſe of the Judgement, the whole plea is vicious, though the committing in open Court be good.

But in the handling of this cauſe it was argued by Serjeant Hitcham that the ſubſtance of the Plea was faulty, for he argued that the Court of equity could not lye in grant, much leſſe in preſcription being a juriſdiction to be derived from the Crowne, and ſo he ſaid it was reſolved by Popham, *Anderſon*, Gawdy, and walmſley, that the King could not grant to the now Queene to hold a Court of Equity, and that alſo it could not be by preſcription, for the King cannot grant any thing in derogation of the common law, but *tenere placita*, according to the courſe of law may be granted and preſcribed, and the Chancery in Cheſter and Durham are incidents to a County Palatine with *Iura regalia*. And London and the Cinque Ports have Acts of Parliament for them. And indeed I hold this to be a great queſtion, and of great conſideration to be admitted, that a Court of equity ſhould ſtand upon grant or preſcription only. For though it be that the Court of Chancery hath beene, and ſo in effect ſtands by a preſcription, yet that is not well reſolved, for in pleading of any thing done in Chancery, you doe not begin your plea with a preſcription, as in inferiour Courts, but you plead a thing done in Court of Chancery as you do all things done in the Courts of Common Pleas, or K. Bench, whereof the reaſon is, that they are fundamentall Courts, and as ancient as the kingdome it ſelfe, and knowne to the law, for all kingdomes in their conſtitution are furniſhed with the power of Iuſtice both according to the rule of law and equity, which being both in the King as Soveraigne, were ſetled in ſeverall Courts, as the light being firſt made by God was after ſetled in the great bodies of the Sunne and Moone. But that part of equity being oppoſite to regular law, and in a manner an arbitrary diſpoſition is ſtill miniſtred by the King himſelfe and his Chancellor, in the name *ab initio*, as a ſpeciall truſt committed to the King, and not by him to be committed to any other. And it is true, that the one is bound to rules, the other abſolute and unlimited, though out of diſcretion they entertaine ſome formes which they may juſtly leave in ſpeciall caſes.

65. *Arundells*

65. *Arundels Caſe.* Replevin.

Viſne from two places in reſpect of two defendants.

IN a Replevin by Arundell againſt two for taking his Beaſts at a place called Horſidowne in Southwarke, one of the defendants pleaded *non cepit*, whereupon iſſue was taken, the other pleaded that the place lay in the Pariſh of S. Olave in Southwarke, and was the Freehold of the Governours of the Schole of S. Olaves, and ſo made cognizance. The plaintife replyed, claiming a way over the place, to another place in the ſame pariſh, and iſſue taken upon that preſcription. And one *venire fac.* was awarded for triall of both iſſues from Southwarke and the pariſh of S. Olaves. It was excepted that it ſhould have beene only *de vicineto parochiæ*, becauſe the place appeares to lye there, and therefore that was the neereſt *venne* to the *fact.* But the Court ruled the *ven.* well, for though it ought to have beene ſo, if both the defendants had joyned in the plea of preſcription, becauſe that then they had both agreed that it had lien in the Pariſh, yet becauſe the one iſſue was not *cepit* to the place, as it was laid in Southwarke generally, and he was not bound by his fellowes confeſſion that it lay in the pariſh, and there was but one *ven. fac.* therefore that muſt fit both their caſes, which was to have it both from Southwarke, and from the pariſh in Southwarke, and it was alſo ruled that it is not to be ſhewed that the Governours were incorporated, for it ſhall be preſumed by the plea, 19 H. 6. 80. though 20 E. 4. where one brought by name of Alderman as ſucceſſor, for a ſucceſſion of one perſon of chattels will not be preſumed without ſpeciall obligation. But in caſe of *Abbot* or Prior, corporations are knowne in law to reſt in one perſon aſwell for chattels as inheritances, for otherwiſe Biſhops, Deanes, Parſons, Vicars, and the like cannot take obligations to them and their ſucceſſors, but they will go to the executors. *And* Liſney in the *Habeas corpus* was made Liſtney to agree with the *ven. fac.* though the true name was Liſney, becauſe they ſound ſo alike.

Plea of Corporation without ſhewing the creation of it v. 9 E. 3. 19. cap. ſubdean 12. aſſi by comminalty ſubmayor 7 E. 3. 4. 19. probis hominibus.

Replevin.

Goldborough.

66. *Iohnſon* verſus *Throughgood.* Trin. 12. Jac. Rot. 1734.

IN a Replevin by Iohnſon againſt Throughgood, iſſue was taken whether one and all whoſe eſtate he had in a Mannor, had uſed to tether their horſes to ſtakes in a place called the *Brook*, *ab & poſt feſtum Pent. annuatim*, and the verdict found that they had uſed to doe ſo in *vigil. Pentecoſtes die lunæ ſeptimana Pentecoſtes & poſtea ad ſuum libitum annuatim.* And it was adjudged for the Parſon that did preſcribe, and that the verdict did maintaine the preſcription as it was pleaded, becauſe it was more large, and alſo gave a choice.

Election in iſſue for ſundry formes.

Preſcription to tether Horſes.

67. *A. B.* verſus *Webb.*

Award proces to the Coroner or Sheriffe croſſe.

ACtion was brought by *A.* B. againſt Webb, and iſſue joyned, and then the plaintife made ſurmiſe, that he was *Bayliffe* and ſervant unto Grimſtone, the Sheriffe of Eſſex, and therefore prayed, &c. to the Coroners, which being confeſſed, the entry was *& ei conceditur.* And yet afterwards the *venire fac.* went to the Sheriffe, and the Iury paſt for the plaintife. And this was moved in arreſt of judgement by Serjeant Towſe, and the queſtion was whether this grant to the Coroners being meerely in favour to the plaintife to avoid his delay by challenge, may not as well be left after it is granted, as before have beene required at the firſt.

Nextly, whether this be not a miſawarding of proces remedied by the ſtatute of Ieoffailes.

68. *Greene* verſus *Armeſteed.* Trin. 12. Iac. Rot. 1703.

Treſpaſſe. Goldsborough

Deviſe land to A except B purchaſe as much for him, and then B may ſell the other.

IN treſpaſſe by *Robert* Greene againſt William *Armeſteed* for lands in Clay, the caſe was thus, That *Raph* Greene had iſſue William, and William had iſſue Robert, the plaintife, and Thomas his younger ſon, and being ſeiſed of theſe lands in Clay, and of certaine lands in Stukey, did make his will concerning the ſame as followeth. Item, I will that William Greene my ſonne ſhall have my houſe and land in Clay for the terme of his naturall life, and then to remaine to Thomas Greene his ſonne, except the ſaid William Greene doe purchaſe another houſe with ſo much land, and ſo good in value as the ſaid houſe and land in Clay, for the ſaid Thomas his ſonne, and then the ſaid William ſhall ſell the ſaid houſe and lands in Clay as his owne. And the ſaid Thomas Greene ſhall pay or cauſe to be paid to his ſiſters 10 pound of good Engliſh money in forme following, that is to ſay, to each of them 20 ſhilby the yeare, untill the ſaid ſumme of 10 pound be fully contented and paid to the ſaid ſiſters.

Item, I give my land and houſe in Stukey and elſewhere to Richard Manſer for terme of his life, and then to remain to Robert Green and the heires males of his body, and for default of ſuch iſſue to Thomas, and he to pay 40 pound to the children of Robert. The only queſtion was whether Thomas under whom the defendant claimes, took a fee-ſimple in the lands of Clay, or but for terme of his life, and William purchaſed no other lands for him, and both William and Thomas are dead, and it was adjudged without difficulty that he took a fee-ſimple after the death of William; for though the firſt words taken by themſelves would have given him but an eſtate for life, yet the word [purchaſe] in the ſe-

ſecond clauſe imports in common ſpeech an abſolute purchaſe in fee, though a purchaſe may be alſo for life; as fee imports fee-ſimple, and the feaſt of Saint Michael the moſt notorious and eminent feaſt, except it be otherwiſe ſpecified. And therefore if a man appoint his executors to purchaſe 100 pound land for a younger ſon, no doubt it will import a fee ſimple. Alſo he ſayes that if William purchaſe, then he ſhall ſell the land in Clay as his own, that is, he ſhall have power to ſell them then, & not before. Whereas if Thomas took an eſtate but for life, he might have ſold them before as his owne.

Againe, he was appointed to purchaſe other houſe and land of as good value (not yearely value) as the houſe and land in Clay. Now the value of the land is according to the value of the whole eſtate. *And* ſo it is apparent that the meaning was, that the one ſhould have land of as good value and eſtate as the other. And that appeared alſo in that he was to pay the tenne pound howſoever. And it was urged, that the payment of tenne pound, did alſo inferre a fee ſimple, which was cleare, if the will be underſtood, that he ſhould pay his twenty ſhillings a yeare, from the death of the Teſtator before his eſtate fell in poſſeſſion. But becauſe I rather take the meaning otherwiſe, the paying of twenty ſhillings yearely, could bee no perill unto him, becauſe if his eſtate ſhould ceaſe, he would ceaſe his payment, otherwiſe if he had beene to pay his tenne pounds at twice, but yet it would have made the legacie of twenty ſhillings a yeare unto the daughters uncertaine, which the teſtator made certaine, for otherwiſe he would have ſaid, that he ſhould have paid it by twenty ſhillings a yeare, if the eſtate came to him, and they live ſo long. And for the other clauſe it was holden cleerely, that although it ſpake of the lands in Stukey, or elſewhere, that [elſewhere] can never extend to the lands in Clay upon all the parts of the Will, as before, though hee have no lands but in Clay and Stukey. But the word [elſewhere] ſhall be rather ſurpluſage and void, then by ſuch a looſe word to alter a large, plaine, and particular deviſe before.

Deviſe expreſſe ſhall not be altered by doubtfull words.

69. *Coke* verſus *Iennor*. Treſpaſſe.

Releaſe to one treſpaſſe or diſchargeth all.

THomas Cock brought an action of treſpaſſe againſt Kenelme Jennor for breaking his houſe at Dunmow, and beating him the laſt day of October, in the tenth yeare of the King. The defendant pleads that he together with one Robert Milborne in the time of the treſpaſſe ſuppoſed, did joyntly breake the plaintifs houſe, and beat him, and that afterwards, on the thirteenth day of June 11 Jac. R. the plaintife did releaſe unto the ſaid Milbourne by his writing, which the defendant ſhewes in Court, all actions reall and perſonall, &c. and averres that the treſpaſſe whereof the plaintife complaines, and which he and Milbourne did, *eſt una & eadem, & non alia neque diverſa*, whereupon the plaintife

See fol 93.

plaintiſe demurred, and it was adjudged for the defendant, for though a treſpaſſe be joynt, and ſeverall to this purpoſe that he may ſue either one or all, yet when two joyne in a treſpaſſe, they ſo make one treſpaſſer as either of them is as well anſwerable for his fellowes fact as for himſelfe. And therefore a releaſe to one diſchargeth the whole treſpaſſe. And alſo a releaſe is a good ſatisfaction in law as a ſatisfaction in deed; And therefore if an executor releaſe, the debt releaſed is judged aſſets in his hand. Now againſt joynt treſpaſſors, there can be but one ſatisfaction. And therefore if they bee ſued in one action, though they may ſever in Pleas and iſſues, yet one Jury ſhall aſſeſſe dammages for all; And as to the dammages, he that is no party to the iſſue, ſhall have an attaint as well as his fellowes, and if they be ſued in ſeverall actions, though the plaintife may make choyce of the beſt dammage, yet when he hath taken one ſatisfaction he can take no more, if hee require two, *an and.* *Quer.* will lye.

70. *Ledſham* againſt *Rowe and Mudge.*

Co. B. Treſpaſſe. *Venire fac.* awarded *ad triandum exitum* where there are divers iſſues.

THomas Ledſham brought an action of treſpaſſe, againſt Iohn Rowe and Chriſtopher Mudge, for impriſoning of him five dayes, Iohn pleaded not guilty for foure dayes whereupon iſſue, and to the other day a juſtification, and thereupon another iſſue, and then Chriſtopher divided his Pleas in like manner into two, whereof the latter was a juſtification and thereupon iſſues taken, and then followes the Award of the *Ven. fac.* in theſe words, *Ideo quoad triandum tam exitum iſtum quam predictum Thomam & prefatum Iohan. Rowe ſuperius mentionat. præceptũ eſt vic. &c,* And it was excepted, that this Award was inſufficient, as being uncertaine, and could not be applied to all, though the Jurie had given verdict for all, but it was ruled good, becauſe *exitus* may reſpectively ſerve for all, *reddendo ſingula ſingulis.*

Church and Chappell the precincts and ſeparations.

The caſe was in the County, that there was a pariſh called Aſton, and a pariſh Church there; there was alſo in the pariſh a Chappell called Caſtle Bermidge Chappell, and a certaine precinct called *Birmidge.* The inhabitants whereof did reſort to the Chappell, and there married, Chriſtened and received Sacraments and ſacramentalls, & had Churchwardens there, and a perambulation there of it ſelfe, but they buried not there, but at Aſton, for the Parſon was appropriate, and the Vicar found them a Curate at his Charge, to ſerve them at his Chappell. Now the Church of Aſton being in decay, the pariſhioners of Caſtle Birmidge were taxed towards the reparation thereof with the reſt of the Pariſh of Aſton, and obtained a Prohibition upon ſurmiſe, that there was a Chappell parochiall, & they alone had uſed time out of mind, to repaire that at their owne charge, and by reaſon thereof had beene diſcharged of the reparation of Aſton Church, yet in their prohibition, they confeſſed

they were within the pariſh of Aſton, and that they buryed there. Now motion was made for a conſultation, and day given to both parties, and being heard it appeared to be as before, ſaving that there was ſhewed on the behalfe of Aſton two ſentences in the Eccleſiaſticall Court, one in the 16. of Eliz. whereby the pariſhioners of the Chappell, were ſentenced to pay towards the reparation of the Church, and another in the 30. of Queene Elizabeth, whereby they were ſentenced, to beare the Office of Churchwardens, at the Church of Aſton. And now where there were five ſentences on the contrary, on the behalfe of the pariſhioners of the Chappell, they were all by appeale diſannulled; whereupon the Court awarded a conſultation, for though the ſurmiſe were matter of fact, and tryable by Jury, yet it is in the diſcretion of the Court to deny a prohibition, when it appeares unto them that the ſurmiſe is not true, eſpecially in a Caſe of this nature, when the delay of reparation may turne to a finall decay of the Church, and the intollerable charge of the Pariſhioners both in repairing and amending the ſame, for the ſuit in this caſe had coſt already (as was ſaid) three hundred pound. Now it was apparent to the Court, that they were to all purpoſes, part of the Pariſh of Aſton, and therefore *de Communi Iure*, were lyable to reparation with the reſt; For though they had this Chappell for their eaſe, yet they might reſort if they would, to the Mother Church, and the reſervation of buriall was a ſaving to the old right, and no doubt but the Vicar might ſerve them as Parſon of their Chappell, as well as his Curate heretofore, ſince the proofe lay on their ſide of their diſcharge, and ſo much ſhewed to the contrary on the other ſide, and nothing of theirs, ſave only an Acquitance in the 11. yeare of the Queene, that forty ſhillings was received of them as of Benevolence, and not of duty, made by two men Collectors for the reparations; which moved the Court nothing, becauſe the folly of two men could not change the right, nor bind the Pariſh. And the ſame *Acquitance* appeared to have beene pleaded and over-ruled in the ſentence, in the 16. yeare of the Queene. Therefore the Conſultation was awarded as before, yet it was holden, that if two Churches parochiall be united, the reparation ſhall be ſeverall as before. *And* in the principall caſe if the men of Caſtle Birmidge had been time out of mind diſcharged of the repaire of the Church of Aſton, the prohibition might have lien.

It is in the diſcretion of the court, to deny a prohibition.

Caſe. Calling a man Theefe after a pardon generall or ſpeciall. 9. Caſe. fol. 112

71. *Cuddington* verſus *Wilkins*.

CUddington brought an action of the caſe againſt Wilkins, for calling him Theefe; the defendant juſtified, becauſe before time hee had ſtolne ſomewhat, the plaintife replied, that ſince the ſuppoſed felony the generall pardon in the ſeventh yeare of the King was made, and makes the uſuall averrement to bring himſelfe within the pardon. Where-

Whereupon the defendant demurres ; ſee Stamford *Plac. Coronæ* 180. That if a man arreſted for felony, breake Priſon hee ſhall looſe his battaile, but yet if the King pardon him that he is reſtored *pla. Coronæ* 281. 1. E. 3. a *Coronæ* 54. 2. E. 3. ſo here the felony is by the pardon extinct.

And in the end this caſe was adjudged for the plaintife, though it may be, he knew him not to be within the pardon, for there is no cauſe to pardon idle and injurious words ; But perhaps if he had arreſted him for the felony after pardon, it might have beene excuſed if hee knew it not, becauſe it is an act of Juſtice.

72. *Worthington* verſus *Garſtone.*

Kings Bench.

MIch. 22. & 23. El. Rot. 378. William Worthington brought an action of the Caſe in the Kings Bench againſt Iohn Garſtone, and declared, that where hee at the requeſt of the defendant, did ſollicite and proſecute an action of treſpaſſe, betweene the ſaid Garſtone plaintife, and Iohn Saunders defendant : The ſaid Garſtone did promiſe to pay to the ſaid Worthington one hundred pound ; the defendant pleaded, that hee made no ſuch promiſe, and it was found for the plaintife, and aſſeſſed dammages to ſeventy pound, and it was alleged in Arreſt of Judgement, that the ſolliciting and proſecuting of another mans ſuit, is not lawfull for any, but for an Attorney, or Counſellor at law. But the Court did agree without argument (Wray being abſent) that it is lawfull to be a Sollicitor, if it be not for maintenance.

Sollicitor brings an action for a ſumme promiſed for ſolliciting.

73. *Iohn Richards* Verſus *Math. Carvamell.*

Co. B, Aſſumpſit.

HIll. 12, Jac. Rot. 790. Iohn Richards brought an Aſſumpſit againſt Math. Carvamell an Attorney of the Common Pleas, And declared that whereas he had informed in the Exchequer againſt one Milton for ingroſſing of Corne. And already for tryall, that the defendant in Conſideration, that the plaintife ſhould not proceed in this tryall, but ſhould deſiſt from his proceeding and ſhould alſo deliver him a note of his Coſts and Charges expended in the ſuit, did promiſe to pay him ſuch his Charges expended in the ſuite at the plaintifes firſt comming into Somerſetſhire, and then laid the performance of the Conſideration on his part, and that ſuch a day after, and before his action he came firſt into Somerſetſhire, that is to ſay, to Taunton, and yet the defendant paid him not his charges being ſix pound od money, which hee had diſburſed and made knowne unto him, by his note delivered (as aforeſaid) And upon *Non Aſſumpſit*, it was found for the plaintif, And it was ſaid in Arreſt of Judgement, that the plaintife ought to have given notice unto the defendant of his firſt comming into Somerſetſhire, becauſe it was a

Brownlowe:

Notice when neceſſary.

thing lying beſt in his owne notice, and that alſo becauſe the defendant undertook not the payment by bond, but by aſſumpſit only. And to this opinion Warburton agreed.

74. *Priddy* Verſus *Maſſie*. Ejectione.

Ven.fac. forme amended.

AN *Ejectione firmæ* by Priddy againſt Maſſie. In arreſt of judgement after a verdict, it was ſhewed that in the *ven. fac.* the concluſion was, *Et habeas ibi hoc bre.* omitting *nomina juratorum.* Alſo whereas one was put only *taler*, the title of addition was *nomina juratorum, &c.* And yet judgement was given for the plaintife, for the *ven. fac.* is warranted, and muſt be amended by the roll, and the other exception is nothing.

Amendment cannot be of the roll.

Debt.

75. *Leiceſter* againſt Sir *William Reade*.

LEiceſter brought an action of 500 pounds debt, againſt Sir William Reade, as Executor, in London, *de bonis teſtatoris*, and 5 pounds damages, *de bonis propriis, ſi non, &c.* upon *fieri fac.* into London, the Sheriffes return that he had waſted the goods, and that he had no goods of his owne. Whereupon Leiceſter took a *Fieri fac.* againſt him into Dueham, *de bonis propriis*, and the writ was *quod teſtatum eſt*, that he had goods there, but indeed there was no *teſtatum* on the Roll, nor warrant for the Writ. Whereupon a *ſuperſedeas* was awarded, and an execution upon the writ made by ſale of a leaſe diſcharged. And it was a caſe of great extremity proſecuted by Leiceſter againſt conſcience.

Teſtatum eſt not warranted by the roll.

Brownlow.

76. Sir *Richard Lovelace* and his wife againſt *Arthure*.

MIch. 6. Jac. Rot. 1000. Sir Richard Lovelace and his wife, brought an action of debt upon an obligation of an 100 pounds, made to her, when ſhe was ſole, for the payment of 52 pounds 10 ſhillings, by Arthure the defendant, who pleaded at the day of payment, 52 pounds 10 ſhillings, he and ſuch an one, his ſonne did make another bond of another 100 pound, to the ſaid wife, being then alſo ſole for the payment of 52 pounds 10 ſhillings at another day, then to come in full ſatisfaction of the 52 pounds 10 ſhillings, and that ſhe ſo accepted it, whereupon it was demurred, and judged for the plaintife, for it was holden no ſatisfaction actuall and preſent as it ought to be.

New bond given diſcharg-eth not another.

77 *Rawden*

77. *Rawden* Verſus *Strate.*

TR. 13 Jac. Rot. 1011. Rawden brought an action of debt againſt one Strate, upon an Obligation for payment of a leſſe Summe. And the defendant pleaded a new bond given at the day in full ſatisfaction, and ſo accepted, as in the former caſe, but the plaintiſe did not demurre upon the plea, but took iſſue that it was not accepted, &c. And by verdict it was now found againſt the plaintife. And yet Hutton for the plaintiſe prayed judgement, becauſe the new bond whereupon the action was brought, and the action it ſelfe was denied, but as good as confeſſed, and the plea to diſcharge it was none in law. And reſembled it to the caſe of 9 H. 6. fo. 37. but it was ſaid on the other ſide that by the ſtat. of 32 H. 8. of Ieoffailes judgement ought to be given for the defendant, according to the verdict. Note that the caſe was miſtaken, for the plaintife was nonſuit before verdict.

Verdict that new bond was given for another, whether this amount to a confeſſion of the action. V. Caſe.

78. *Boothby* verſus *Baily.*

BOothby an Executor of Gilbert, brought a Prohibition againſt Baily and his ſurmiſe was, that whereas Sir Barnard Whetſton was ſeiſed of the Manor of Woodford Hall, and that hee and thoſe whoſe eſtate he hath in the ſame, had uſed time out of mind to have a peculiar Pew in the body of the Church, & that the defendant by ſuit in the Eccleſiaſticall Court, ſought to diſpoſſeſſe them of the ſame.

And by the opinion of the whole Court, this was no ſufficient ground of Prohibition, for though the Church and Church-yard be in law the ſoyle and freehold of the Parſon, yet the uſe of the body of the Church, and the repaire and maintenance of it is common to all the pariſhioners. And for avoyding of confuſion, the diſtribution of ſeats and charges of repaire belong to the Ordinary, and therefore no man can challenge a peculiar ſeat without a ſpeciall reaſon. But if it had beene preſcribed, that Sir Bernard Whetſton, &c. had uſed time out of minde at their onely coſts to maintaine that Pew, and had therefore had the ſole uſe of it, the preſcription might have ſtood and had beene warrant for a Prohibition, though the Pew were in the body of the Church. And ſo it is in the like caſe of an Iſle or chancell adjoyning to the body of the Church upon the ſame difference, whether it have been maintained by the whole Pariſh, or by ſome particular perſons, like unto the reaſons of a Chappell of eaſe.

The Court ſhall judge by diſcretion, the convenience of things uncertaine.

Ile due in the body of the Church.

79. *Auſtin* verſus *Iervoyſe.*

TRin. 13. Jac. Rot. 2180. John Auſtin being within age brought an *Aſſumpſit* by prochein Amy, againſt Jervas, and declared where-

Aſſumpſit.

Aſſumpſit to give bonds for 11 pound, not ſaying what ſumme.

V. Caſe. fol 105.

as

as he bought of the defendant a Horſe for a piece of gold of 22. ſhillings paid in hand, and for 11. pounds more to be paid at the death or marriage of the ſaid John for which he ſhould become bound with ſufficient ſurety by their writing Obligatory. The defendant in conſideration thereof promiſed to deliver him the Horſe when he ſhould be required, and ſayes afterwards, he offered to become bound to him, but ſayes not by his writing Obligatory, with a ſufficient ſurety for the payment of the ſaid 11. pounds (as aforeſaid) but yet he hath not delivered him the Horſe, though he were required.

The iſſue *non aſſumpſit*, and the verdict for the plaintife. But he moved not to have Judgement, for he ſhould have tendered the Obligation ſealed, he ſhould ſet downe the ſumme that the Court might judge of it were ſufficient for the 11. pounds, the ſurety ſhould have beene named.

Checq. Chamb. Treſpaſſe.

80. *Parker* verſus Sr. *Ioh. Lawrence, & Nevill, & Wood.*

IOhn Parker brought an action of treſpaſſe againſt Sir John Lawrence, and one Nevill and Wood, Lawrence pleaded not guilty, whereupon iſſue, Nevill and Wood made a juſtification, wherunto the plaintife replyed, and thereupon a demurrer joyned. Hanging the Demurrer, the iſſue was tryed againſt Lawrence, and damages given, and judgement againſt him. And after judgement the plaintife entred a *Nolle Proſequi* againſt Nevill and Wood, whereupon this being in the Kings Bench, they all brought a writ of error againſt Parker, in the Exchequer Chamber, and alleaged for error, that the *Nolle proſequi* diſcharged all the defendants, and it was agreed by the Court, that if the *Nolle proſequi* had beene before judgement, it had diſcharged the whole action, and ſo had it, if judgement had beene entred againſt them all, and then had entred the *Nolle proſequi* againſt the two as before, for non ſuit or releaſe or other diſcharge of one diſcharges the reſt. But becauſe in the principall caſe the action was at an end againſt Lawrence, and no judgement had againſt the other two, ſo as they are divided from Lawrence, and are not ſubject to the damage found againſt him, it was adjudged that he was not diſcharged, and ſo no error.

= vide fol. 90

Diſcontinuance judgment againſt one in treſpaſſe, and nonſuit againſt the other.

Note alſo that it ſeemes that Nevill and Wood ſhould not have joyned in this writ of error. For there was no judgement againſt them, nor they grieved.

Note the writ of error *ad grave damnum eſt.*

Error.

81. Lady *Plat* Verſus *Plummer.*

Bayle entered laſt day of the Terme.

IN the Exchequer Chamber in a writ of error by the Lady Plat againſt one Plummer, it was ruled by the practiſe of the Kings Bench, that though the defendants bayle be taken and entred but the laſt day of the terme

terme, and the bill be put in any time that terme it is good enough, yet from the time of the baile the defendant is anſwerable, as in *cuſtodia mareſcalli*, and not before in ſtrictneſſe of law.

82. *Lambe* verſus *Wiſeman.* Error.

LAmbe brought a writ of error againſt Wiſeman upon a judgement given againſt him in the Kings Bench upon an Obligation, iſſue taken upon payment, upon a good ſurmiſe the *ven. fac.* was awarded to the Coroners, and verdict found, and judgement for the plaintife. The error aſſigned was, that where the *ven. fac.* was returned by two Coroners only, and the Diſtringas by three Coroners, there were at the time of the award and returne of the *ven. fac.* and Diſtringas 4. and it was agreed that this was at the common law plaine error, for Coroners and Miniſters they muſt all joyne, but as Judges they may divide. But by the ſtatue of Ieoffailes it was made good by the words of imperfect and inſufficient returning of Proces by Sheriffs or other Officers, yet the Court was of opinion that if one Sheriffe of London make his returne without his fellow, that this would not be holpen as being no returne at all; or a returne without the Sheriffes name ſubſcribed, becauſe the Court knowes that one Sheriffe that is two perſons, but it appeares not to the Court that there are more Coroners.

Ven: fac. returned by two of 4 Coroners.

Verdict remedileſſe.

83. Sir *John Sherley* Knight, and *Dorothy* his Wife, late wife of Sir *Hen. Bowyer*, againſt *Barbara Wood* Widow. Co. B.

SIr John Sherley Knight and Dorothy his wife, late wife of Sir Henry Bowyer, brought a writ of Dower againſt Barbara Wood widow, of lands in *Hartfield*, *ex dotatione* Bowyer, being ſeiſed of the Mannor of Wilborough in the ſame County, did make a feoffement thereof to the uſe of himſelfe, and the ſaid Dorothy then his wife, for terme of their lives for the joynture of the wife, the rem. to one Bowyer, and then dyed. And that the ſaid Dorothy held her in by ſurvivor, clayming her ſaid eſtate, and ſo demanded judgement. The demandant replyed that before the ſaid feoffement made by the ſaid Sir Henry Bowyer, being ſeiſed of the ſaid Mannor, he did covenant to ſtand ſeiſed thereof, by way of all his land in Suſſex, except ſuch as he had deviſed or ſhould deviſe by his laſt will and teſtament. And in the end of his plea averres that he made no deviſe thereof to the uſe of himſelfe in taile, the rem. to his ſaid wife for terme of life, the rem. to Sir Tho. Hendley in taile, and afterward made the feoffement prout, and then dyed without iſſue. And if ſhe entered and was ſeiſed by force of a *Remitter*, whereunto the tenant rejoynes that ſhe held her in claiming her eſtate by the feoffement in joynture, and demands judgement whether againſt that

Dower.

claime ſhe could be remitted, upon which plea the demandants demurred. And [Nicholas Winch] and [my ſelfe] held the tenants plea inſufficient. And firſt was held that the remitter to the woman could not make till her husband was dead without iſſue, becauſe till then the poſſeſſion and right did not meet together in her. Alſo we held that becauſe both the eſtates were made unto her during coverture, and therefore regularly upon the death of her husband ſhe might claime which eſtate ſhe would, according to the books of Mich. 2. & 3. Eliz. Dyer 191. & 18 Eliz. Dyer 351. But I ſpeaking laſt added this diſtinction, that though this were true where the election did concerne no body but her ſelfe (and ſo are thoſe two caſes there without prejudice to a third perſon) yet here Hendly was in the remainder by the firſt conveyance, and not ſo for the ſecond. And therefore it ſhould be a prejudice to him in this remainder (which roſe together with the firſt eſtate, and they two together make but (as it were) one eſtate to ſome purpoſes, for perhaps upon a grant of reverſion it might be otherwiſe) if the law ſhould not judge her in her remitter at the firſt, *volens nolens*. And ſo is the judgement expreſſely 41 E. 3. 17. in Iohn Sayes caſe, and never judgement to the contrary. And ſo I hold with Littleton, If a tenant in taile infeoffe his ſonne within age, and dye, the iſſue in taile ſhall be remitted, being in kind of the third perſon by the intent of the ſtatute of Weſtm. though temps E. 1. Fitz. Remitter 13. the Reporter be of a contrary opinion. Now according to my opinion, a plea of claime by force of the remitter, is utterly by the neceſsity of the remitter wrought by act in law. But if the election be allowed free, yet the claime by force of the joynture was pleaded out of time, and ſo is idle, and requires no traverſe, whereof the reaſon is plaine, for the ſtatute of uſes hath a generall Purview. That joyntures made for wives, without diſtinguiſhing before or after coverture, ſhall barre dower, and then comes with a proviſo, that if it be made during coverture, ſhe may refuſe it and take her dower, which is a kinde of remedy provided for her out of the generality of the law, and therefore muſt be pleaded by her. And in this caſe there appeared nothing to the Court when the tenant firſt pleaded of any other eſtate that the demandant had, only the title of dower, and therefore it is in vaine to pleade that ſhe claimed by her joynture, becauſe there appeared no other eſtate to claime by, like unto the point in the latter end of Walſinghams caſe, where the averrement that Sir Thomas Wyat had iſſue alive was holden void. And ſo there if a man bring an action upon an Obligation by I. S. and averre that he was then of full age, or pleade a feoffement abſolute and without condition, theſe averrements are out of their place, and therefore void, and ſo the other part ſhall pleade nonage or condition, and ſhall not traverſe, but be traverſed. And this was the maine point wherefore judgement was given for the demandant, becauſe that the remitter and the claime by force of that amounted to

Remitter *volens nolens* for benefit of a third perſon.

Pleas out of time are idle and not traverſable.

the

the Refuſall of the Joynture, and therefore that ſhould have beene traverſed.

Laſtly the exception I held to be voyd, for there could be no lands at that time deviſed, becauſe Bowyer was alive, and the exception of ſuch lands, as he ſhould after deviſe was repugnant, becauſe the covenant was to take effect from the making of the indenture. As if a man ſhould bargaine and ſell all his land (except ſuch as he ſhould after deviſe) And beſides, ſuch an exception undoeth the whole grant or pretendeth to put it to his power to revoke all, and therefore is voyd as 18. of Eliz. lib. as If I S. make a leaſe of all his land in Dale, except the mannor of Dale, and he hath no lands therebut the mannor, the exception is voyd, and all will paſſe. But here this point of the caſe was cleared, becauſe it was averred that this mannor was not deviſed. So judgement was given for the demandants, Warburton being to the Contrary.

Exception that croſſeth the grant.

84. *Foreſt* verſus Sir *Iames Sandland* Knight.

Checq; chamb; Error.

FRancis Foreſt a French-man, brought an Aſſumpſit againſt Sir Iames Sandland, and one Doctor Tenant was his Baile, and Judgement was given in the Kings Bench againſt the principall, and after by *Scire fac.* againſt the Baile, and now the principall and Bayle joyned in one writ of Error in the Exchequer, & it was abated by Judgement, becauſe they could not joyne; and it was deſired, that the baile might have a new writ of Error by himſelfe, *Quod coram vobis reſidet*, but it was denyed him, both becauſe the *Scire fac.* is none of the Action, wherein the writ of Error is given in the Exchequer Chamber. And alſo becauſe the Record doth not abide before theſe Judges, but in the Kings Bench; yet it was ſaid, that it was otherwiſe ruled heretofore, in the caſe of one Matthewes, but it paſſed *ſub ſilentii nota*.

One writ lyeth not upon the ſeverall judgements againſt Principall and Bayle.

Error out of the Kings Bench, *Quod coram vobis reſidet.*

85. *Humberton* Verſus *Howgill.*

'HUmberton recovered a debt againſt Howgill by Judgement who 'dyed, and upon a *Scire fac.* againſt the Terre tenants, the *Sher.* 'returned Iohn Howgill Tenant of an houſe that was his, at the time of 'judgement in Yarmouth: Iohn Howgill came in and pleaded that 'Thomas infeoffed him long before the judgement in fee *abſq; hoc*, that he 'was ſeized at the time of the judgement or any time after; Whereupon 'iſſue was taken, and the Jury found the feoffement, but farther ſaid, 'that it was made by Covin, to defraud the plaintife and other Creditors. And it was judged for the plaintife, for Thomas remained ſtill ſeized, as to the Creditors, notwithſtanding the Feoffement. But if the iſſue had beene taken directly infeoffed, or not infeoffed, it had beene found againſt the plaintife, for in that caſe hee muſt avoyd the Feoffe-

Covenous conveyance, is no conueyance, Checquer chamber.

Judgement.

fement by Covin eſpecially pleaded, for it is a Feoffement in *tiel* plight, as you cannot plead *non eſt factum* generally upon the Statute of uſurie, or the Statute of Sheriffes ; But now the iſſue is generally ſeized, or not ſeized by the Feoffement like Gookyes Caſe, Co. lib. 5. fo. 60. And there the Covin may be given in evidence, when the Feoffement is given in Evidence.

Checquer chamber.

86. Pope Verſus Skinner. Repleuin.

POpe brings a Replevin againſt Skinner, who avowes the taking as a Commoner, becauſe the plaintifes beaſts, were in the Common dammage feſant in *Aprill* 11. Jac. The plaintife in barre ſayes. That one Williams was ſeized of an houſe and land &c. Whereunto hee had Common &c. and demiſed the ſame unto him, the 30. day of *March*, in the ſame 11. yeare, to hold from the Feaſt of the Annunciation, next before for a yeare. The Avowant traverſeth that leaſe *modo & forma*, whereupon iſſue is taken, and the Jury ſaid, that Williams made a leaſe to the plaintife, on the 25. day of *March* for one yeare, from thence next enſuing, And though this be not the ſame leaſe, that the plaintife pleaded (for this begins on the day, and the other begins not ſo ſoone) nor was to take his limitation, but from the day excluded, yet the Court gave judgement for the plaintife, for the iſſue is whether the plaintife have ſuch a leaſe or no from Williams, as by force thereof hee might common at the time, which appeared for him in this caſe, and the *Modo* and *forma*, and the reſt is not materiall, yet it muſt not depart altogether from the forme of this iſſue, for if it had beene found that hee had right of Common, by a leaſe from any other, or as owner, it would not have ſerved his turne, for that had beene cleare out of the iſſue, both in matter and forme, yet it was granted, that if he had declared in *Ejectione firmæ* thus, I would have beene againſt him clearely, for there hee demands and recovers the terme, and therefore muſt take his title truly. Note that in this caſe, the Jury might have found directly againſt the plaintife *non dimiſit modo & forma*, and could not ſafely have found a generall verdict for the plaintife, ſo that the Judgement of law upon the verdict is in manner againſt the verdict.

Leaſe miſrecited and yet well.

Out of the Court of wards. In this caſe there was an iſſue found by writ of *Mandamus*, before the Eſcheator of Launceſton in Cornwall, after the death of one Curtice that he dyed ſeized of certaine lands (*ſed de quo vel de quibus, vel per quæ ſervitia ignorant*) whereupon a *Melius Inquirend.* was awarded, reciting the place and time of the former inquiſition, *virtute brevis de Mandamus* and that ignoramus of the tenure, and ſay not that it was found before the Eſcheator, and then proceeded *& quia jam accepimus*, that the ſaid lands or ſome of them were holden of us by Knight ſervice, *Tibi precepimus* that you ſhall require, whether the

Curtice, his caſe.

ſaid

ſaid lands or any of them be ſo, [The chiefe Baron Tranfeild] [& I.] (Coke abſent) were of opinion, the want of *Coram* was well enough, both becauſe it was *virtute brevis*, which muſt bee before the Eſcheator, and becauſe there is a *Melius Inquirendum* in the Regiſter, and a *Quæ plura* in *Fitz. Na. Br.* But we held the writ vicious, becauſe in an Ignoramus the enquirie of the Tenure ought to be free and at large, and ought not to bee reſtrained to the Kings Tenure onely which is both without Preſident and prejudiciall to the truth.

87. *Tredwayes Caſe.*

Checquer.

EDward Tredway being the Kings ward of lands, holden of the King by Knights ſervice in chiefe, dyed the Kings ward; and by Devenerunt after his death, it was found in the 13. yeare of the King, that Lettice and Elizabeth, were his Siſters and heires, and both of full age. And that Lettice the elder, in the time of her brother, departed the Realme without licenſe, to prevent her religious education, and was & remaines a Nun profeſt at Doway, and that the profits of all the lands, by the Statute of 3. of the King cap. 5. belong unto her other Siſter Elizabeth.

The lands of one departing the Realme, for Popery ſhall accrue to the next heire expounded for the heire, and of the King.

The Queſtion now is, what ſhall become of the part of Lettice. And my Lord [Chiefe Baron] [Tranfeild] and I agreed clearely, that the moity of Lettice, as to the ſtate of the land was not forfeited, nor ſetled in Elizabeth, for the ſtatute is, that ſhe ſhall take no benefit by deſcent, &c. not that ſhee ſhould not take by deſcent and then proceeds to ſhew the meaning thereof, that the ſaid profits during her unconformity, ſhall be received by the next of kin, and they alſo ſhall be anſwerable unto her after her conformity, and therefore this Statute, differs both from the Statute of 5. R. 2. of conſenting to raviſhing, & 11. H. 7. of diſcontinuances by women; ſo if this were in common lands, we doubt not but that Elizabeth might enter into all, and take the profits by force of the ſtatute; but now here is a third perſon, that is the King, that is intereſſed in the profits till livery ſued. And he is not bound to give livery to the heire, till the oath of ſupremacie bee taken, ſo as the very heires cannot enter in this caſe upon the King, nor ſue livery, neither ſeemes it the meaning of this law by generall words which are ſatisfied in other caſes, to change the former law in that point, either to give the Siſter power to take that halfe, without livery in her Siſters name, without her Siſters performing of the due ceremonies, and the profits received by the King, anſwer the ſcope of the law, that the Recuſant hath not taken them for her puniſhment, and not to beſtow in ill uſes, and make the caſe, that this were a ſonne and heire, I hold, the next of kin can neither require livery out of the kings hands, nor enter without livery. And it is confeſſed, that if the Siſter beyond Sea were within age, and ſo in ward to the King, that the other Siſter comming to full Age, could not demand livery of that part in her Siſters name, during

Checq. her minority, and yet the words will carry it. And by this conſtruction it ſhall be better with a Recuſant flying the Realme then abiding here. And it may be made a practiſe, that the Kings tenant or a Recuſant may ſend his heire apparent over, and then the next of kin ſhall receive the profits, who may perhaps imploy them underhand to the uſe of the heires in all, or in part, which bargaine may eaſily be made, conſidering that he is but tenant at will to the heire that is abroad, who returning and conforming ſhall both take the land, and recover the mean profits; and ſo the former ſtatute that requires the Oath of Supremacy before livery made, as well for their puniſhment as the Kings profits deluded. And ſuppoſe that ſuch an heire beyond ſea ſhall ſell his land to a ſtranger, which he may doe, ſince his eſtate remaines (as aforeſaid) I hold that the bargaine in ſuch caſes ſhall prevent the next of kin, and alſo take the law out of his hand if he have entred in the common caſes. But yet I hold cleerely that the King in ſuch caſes may refuſe to give livery to the bargainee, ſuing it in the name of the heire, except he come and take the Oath of Supremacy in his owne perſon, according to the Law.

88. *Barnes* his Caſe.

THis was the ſole queſtion in the Court of wards, whether an uſe riſing by covenants, to the right heires of a daughter yet alive ſhould ſo farre transferre the remainder in abeyance that it ſhould not be as a reverſion ſtill in the covenantor, whereby livery ſhould be ſued after his death, becauſe there is no perſon in being (which is the word of the ſtatute of uſes) to whom the land may reſt.

Vſe upon the remainder in Abeyance.

Checq.

89. *Knightleyes* Caſe.

RIchard Knightley was to ſue a generall livery as heire to his father Edward, and a ſpeciall livery as heire to his mother the Lady Bevill, & ſued a ſpeciall livery in theſe words, *Concedimus Richardo Knightley filio & hæredi Dominæ Mar. Bevil*, that he without any livery of his inheritance, or any part thereof may enter into all and ſingular the Mannors, &c. *Quæ fuerunt dictæ Dominæ Mar. Bevill, & de quibus eadem Maria aut aliqua anteceſſorum prod. R. Knightley cujus hæres ipſe eſt, fuit qualitercunque ſeiſitus diebus quibus obierunt ſeparatim, vel de quibus aliqua perſona ſeiſita fuit ad uſum dictæ Mariæ vel aliquorum Anteceſſorum dicti Richardi Knightley* [Tanfield and I] held cleerely, that upon the conſideration of the connexion and coupling of theſe words, this ſpeciall livery would be extended no further then to the inheritance of Dame Mary Bevill.

A ſpeciall livery how far extended.

90. *Roy* verſus Biſhop *Norwich.*

Co. B.

IN a *Quare Impedit*, in the Kings Bench, by the King againſt the Biſhop of Norwich, and one *ſacre Incumbent*. It was reſolved by the Court, that if an Incumbent were guilty of Simony about a Benefice, that he was made incapable of that Benefice for ever, by the words of the ſtatute, 31 Eliz. which are to be largely expounded. And the caſe of Sir Arthure Ingram was thereupon remembred, who having bought the office of Cofferer, being an office handling the Kings treaſure, was holden by Egerton Lord Chancellor, and Cooke Chiefe Iuſtice, not only removeable for the preſent, but alſo for ever uncapable of that office by force of the ſtat. of 5 Eliz. though he had a *Non obſtante*, for the perſon being diſabled by the ſtatute, could not be inabled by the King.

Q. Impedit. Diſablement for Simony.

Non obſtante helps not diſablement of perſon.

91. *Iohn Sparke* againſt *Tho. Burrell.*

Ejectione: Deviſe. Sentences transpoſed to ſerve meaning.

IOhn Sparke brought an *Ejectione firmæ* againſt Thomas Burrell for lands in Ryehault, upon not guilty, the caſe by ſpeciall verdict was found thus. One Iohn Forman was ſeiſed of the lands in queſtion, and of twenty acres of land more in fee, and had iſſue three ſonnes, James, William, and Anthony, and by his Will gave to William his ſecond ſonne ten acres of the twenty, and that he gave to James his eldeſt ſon the lands in queſtion, & willed that if James ſhould dye without heires of his body, that William ſhould be his heire, and Anthony ſhould have his part; and if either the ſaid William or Anthony ſhould dye, then one of them ſhould be the others heire, and dyed. Then James dyed without iſſue, then dyed William, leaving iſſue Robert, under whom the defendant claimes, upon whom Anthony entred and made the leaſe, upon whom the defendant entred. And it was adjudged that the plaintife ſhould be barred; for, the laſt clauſe that William and Anthony ſhould be one anothers heires, was to be applyed to the firſt Clauſe of the diviſion of 20 acres betweene them, though the gift to James, and ſo to William for the lands in queſtion, came betweene, could not be applyed to that part, becauſe that laſt clauſe was reciprocall for lands, either of them might take from other, which fitted well the 20 acres, becauſe William might take from Anthony by ſurvivor, as well as Anthony from William, which could not be ſo in lands given to James, and ſo to William, for William could take no part of them from Anthony.

Then touching thoſe ſince, there was an eſtate taile given unto Iames, and that for default of iſſue William ſhould be his heire, that gave William an eſtate of inheritance, either in fee ſimple, or ſuch in taile as Iames had, for though none can be truly heire, but he that the law makes

ſo.

ſo, yet there is an heire by appellation and vulgar acceptance, which imitates the ſtate of a true heire. And therefore if by my will I appoint that I. S. ſhall be heire of my land, he ſhall have it in fee, for ſuch eſtate as the anceſtor hath, ſuch he is to inherit. And therefore the ſaid word [heire] in the latter clauſe betweene William and Anthony ſhall give but one eſtate for life to the ſurvivor, becauſe the brother to whom he is made heire, had but an eſtate for terme of life before.

The word heire how it ſhall be taken.

92. *Vernon* Verſus *Onſlow.* Debt.

Octogeſſimo for Octoginta.

VErnon brought an action of debt againſt Onſlow upon an Obligation, and demands 80 pounds, and upon Oyer of the Obligation, it was found *teneri & fermiter obligari in octogeſimo libris.*

93. *Bray* Verſus *Haynes.* Caſe.

An action for words, for ſaying thou ſelleſt by falſe meaſure.

BRay brought an action of the caſe againſt Hayne, and declared, that where he had beene Bayliffe to Sir William M. Knight for 3 yeares laſt paſt, of his land in C. and had the ſelling of his corne and graine, and that the defendant had ſaid theſe words unto him, thou art a couſoning knave, and thou haſt couſoned me in ſelling falſe meaſure in my barley, and the Countrey is bound to curſe thee for ſelling with falſe meaſures, and I will prove it, and thou haſt changed my barley; upon not guilty the verdict was found for the plaintife, and yet judgement was given againſt him that thoſe words beare no action, for every falſehood charged upon a man in his private dealings will not beare action. And therefore if this man had beene a common Ridder or Badger, and had beene charged with ſelling falſe meaſure, it would have borne action. And I was of opinion, and ſo am, that if I have a Bailiffe, to whom I commit the buying and ſelling of my corne and graine, and give him the greater wages, in reſpect of that truſt and imployment, and charges him to have deceived me in his office, by buying and ſelling of falſe meaſure, to my loſſe or damage, this will beare an action, for this diſcredits him in his meanes of living. This offence may not only be cauſe to put him out of that ſervice, but to be refuſed of all others. But that could not be applyed to this caſe, for it doth not appeare that theſe words were ſpoken of any ſale of corne whileſt he was Bailiffe, nor of his Maſters corne, nor to the damage of his maſter.

94. *Parker* Verſus *Parker.*

Amendment cannot be of an imparlance roll.

PArker brought an action of the caſe upon a Trover, and converſion againſt Parker, and the Declaration upon the imparlance Roll had ſpaces for the day and yeare. Note no want of place for the viſne of loſing,

ſing finding, and converſion of the goods, but the iſſue Roll, and all the reſt were perfect in this point.

And the Court was of opinion, that the imparlance Roll could not be amended, and made perfect by the iſſue Roll, becauſe it was the originall, and was to warrant the other, and not *è converſo*. But yet becauſe upon iſſue not guilty, verdict was given for the plaintife, the Court gave judgement for him, becauſe the declaration, as it was in the imparlance Roll, was good enough in matter, for the Trover and converſion, was laid in the preterperfecttenſe, and ſo before the action brought, and ſo the fault in the declaration being but in forme, was holpen by the ſtatute of Jeoffailes.

Viſne too large or too ſtraite.

95. *Banks* Verſus *Parker.* *Treſpaſſe.*

AN Action of treſpaſſe was brought for taking of a Kettle at Weſtowne, the defendant juſtified by reaſon of a Cuſtome in the Manor of Tiddeſwell, and the plaintife joyned iſſue *de injuria ſua propria abſque tali cauſa*. The *ven. fac.* was awarded *de vicineto de Weſtowne & Manerio de Tiddeſwell* by the Roll, and a verdict for the plaintife, and though the plaintife ſhould not have traverſed the cauſe generally, but the Cuſtome, yet that was judged, holpen by the Statute of Jeoffailes as matter of forme, becauſe *abſque tali cauſa* conteyned the Cuſtome and more, but becauſe the Sheriffe had returned his pannell *de vicineto de* Weſtowne onely, that was incurable, though it were moved, that the Award was by the Roll *de vicineto de* Weſtowne and Mannor both. Alſo the *venire fac.* might be amended, according to the roll. It was denyed, and reſolved for two reaſons, firſt, that it ought not to be from Weſtowne at all, becauſe the taking was confeſſed on both ſides, ſo that required no tryall, but the cauſe was onely controverted, which was the cuſtome; and other things ariſing from the Mannor of Tiddeſwell. And though the Roll had beene perfect from the Mannor onely (as it ought to have beene) ſo that the *ven. fac.* might have beene amended by warrant of it (if nothing had beene done upon it) yet now when it appeares to the Court, that the tryall was not had by ſuch a Jury, as the Roll and the law required, to the prejudice of the truth in ſhew, it ought not to be allowed, and therefore ought not to be amended.

Verdict helpe imperfect iſſues.

96. *Auſten* Verſus *Geruas.*

IN the Aſſumpſit before, by Auſtin plaintife againſt Gervas, judgement was given againſt the plaintife, becauſe he did not averre, that he did offer the Bond ready ſealed, and to deliver the ſame to the ſaid Jervas, neither did ſet downe the ſumme, in which he ſhould be bound for the ſame 11. pound, for though it were expreſſed in the ſaid conſidera-

Caſe. fol. 95

tion laid onely, that he ſhould be bound for the payment, yet the law required, that he be bound in a Competent ſumme, which is under the Judgement of the Court, and therefore muſt be pleaded expreſſely, that the Court may judge of it.

It was farther moved, that the conſideration of the money paid in hand by the plaintife, being an infant, was void. But to that I anſwer, that becauſe it was delivered by his owne hands, it was but voidable to be recoverd againe by an Action of Account.

96. *Swinfeilds Caſe.*

VPon occaſion of a Prohibition ſued by Swinfeild executor of Swinfeild againſt Evans to the Court of Requeſts.

Court of Requeſts not ſo ſtiled.

Brownloe remembred the Court, that the prohibition did not uſe to ſtile it by the name of a Court, but did deliver it thus. That the party did preferre a Bill to the Maſters of requeſts, and therefore it was appointed, that the Terme ſhould be ſtill obſerved.

97. *Adrian Coote* Verſus *Adrian Gilbert.* Caſe.

Action for words for ſaying, thou art a Theefe, and haſt ſtolne a tree.

Expoſition of words according to the beſt ſenſe.

ADrian Coote, brought an action upon the Caſe againſt Adrian Gilbert, for ſaying thou art a Theefe, and haſt ſtolne a tree. Iſſue not guiltie was found for the plaintife, and yet it was adjudged againſt him for the ſpec. words, though they come under the word [&] are in common ſence to be underſtood, to be but a verifying and making good of the generall word [Theefe] and then [a tree] ſhall be underſtood, rather a tree ſtanding then felled, which is wood, and the law ſtraines not to hurt, but to heale. Yet Towſe cited a Judgement in the Kings Bench, 7. Jac. given for the plaintife, upon theſe words; thou art a Theefe, and haſt ſtolne trees out of I.S. his Orchard, and I have ſpent one hundred pound, and will ſpend another to hang thee. Which caſe we allowed not, though it were ſomewhat ſtronger, then the Caſe at the barre.

So note words are taken beſt for the ſpeaker, and though ſome cannot ſtand with that conſtruction, as here the word [ſtolne] ſo here is one Rule for deeds, another for words. Note that, &c.

Obligation.

98. *Owen an Attorney* verſus Maſter *Holt of Grayes Inne.*

Duchie Court their Juriſdiction.

OWen an Attorney of this Court, ſued Maſter Holt of Grayes Inne, upon a Bond of 80. pound, Maſter Holt exhibited a Bill againſt him in the Duchie Court, to be releeved in way of equity, pleading that it was made, concerning an extent of land, lying within the County Palatine of Cheſter, and ſome cauſe of equity in it; whereupon the Court awarded a Prohibition, becauſe the Duchie Court hath no Juriſdicti-

on,

on in reſpect of the perſon, as becauſe the perſons ſuitors, dwell not within the county Palatine of Cheſter, nor upon the lands of the Subject any where, but upon the Kings owne lands, and his owne Revenue, and perhaps upon bonds and aſſurances given for the revenue of the Duchie. Whereupon Holt being preſent, finding the opinion of the Court, ſaid he would forceaſe there without writ. And ſo the Court Compounded the Cauſe.

99. *Saint Iohn* againſt *Saint Iohn.* Debt.

SAint Iohn brought an action of debt, for 40. pound, againſt Saint Iohn Bayliffe of Stockbride upon the Statute of 31. H. 6. For not returning him Burgeſſe of the ſame Towne, for the laſt intended Parliament. And where the words of the Statute are, that the Sheriffe ſhall ſend his precept to the Mayor, if there be no Mayor, then to the Bayliffe. And the plaintife declared, that the Sheriffe had made his precept unto the Bayliffe without averring, that there was no Mayor. And now after a verdict for the plaintife, this was moved in arreſt of judgement; But the Court was of opinion clearely, that it was good, for we ſhall not intend that there is a Mayor except it be ſhewed, that if there were one, it ſhould come properly in the other ſide.

Action on the ſtatute 21. H. 6. for not returning one Burgeſſe.

And though the Parliament was as none, becauſe there was no Act, nor Record of it, yet this action may lye, for there was a returne of the writs and many ſittings.

100. *Don Diego Serviento de Acuna Embaſſador Legier for the King of Spaine, againſt Iolliff Tucker and* Sir *Richard Bingley.*

Admiralty.

DOn *Diego Serviento de Acuna* Embaſſador Legier for the King of Spaine libelled in the Admirall Court, as Procurator generall for all his Majeſties ſubjects, againſt one Jolliffe, and Tucker, and againſt Sir Richard Bingley for two Ships, and their lading of divers kinds of the goods of the Subjects, of the King of Spaine generally, and not naming them *adduct. ad port. de Munſter* in the preface, of the libell generally againſt them all, and then proceeds and charged them ſeverally thus: That Jolliffe and Tucker Captaine, *Piratæ in alto mari more bellico dictas naves aggreſſi ſunt, & per vim & violentiam* tooke them, and that they were *adductæ in partes Hiberniæ*, and that they came to the hands of Sir Richard Bingley, and he converted them to his owne uſe (not ſaying where) and refuſeth to render them, being required &c. Hereupon Sir Richard Bingley prayed a prohibition, and two dayes were given to the Embaſſadors Councell. And now Mountague the Kings Serjeant, ſaid that he could not ſue for their goods at Common law, becauſe he were

Admiralty Court holds Plea of things at land.

not proprietary. Secondly, that Piracy did not change property, no more then left at hand. Thirdly, that the cauſe begun at the Sea, and therefore originally belonged to the Admiralty. But all this notwithſtanding, the Court with full and cleare conſent, awarded a prohibition for that part of the ſuit onely that concerned Sir Richard Bingley, allowing clearely, that they might proceed againſt Jolliffe, and Tucker for that part of the ſuit, that did diſtinctly concerne them, becauſe it was laid downe upon the high Sea. But becauſe Sir Richard Bingley, is not ſaid to have any hand in the firſt taking at Sea, but a part by himſelfe, becauſe the goods came to his hands, and were converted by him to his owne uſe, which is his particular Charge; that part of the ſuit belongs not to the Admiralls Court, becauſe it is not laid to be done at Sea. Nay more, it is laid in the libell, as it muſt needs be underſtood to be done in the part of Munſter, or at land in Ireland; for it is ſaid, that they were brought *ad partes Hiberniæ*, ſo it muſt be underſtood upon the continent, and then followes, that they came to Bingleys hands, which muſt be underſtood there, no other place being aſſigned.

Now the whole Court reſolved clearely, that the Admiralty of England, can hold no plea of any contract, but ſuch as riſeth at Sea: No, though it riſe upon any continent, Port, or Haven in the world, out of the Kings dominions; for their Jurisdiction, is limited by the ſtatute of the Seas onely, for the Admirall is for the Sea, and the Court for Maritime Cauſes. And therefore if any Stranger or other will ſeeke Juſtice at the hands of the King of England, for wrongs done him out of his dominions, he muſt ſeeke it in thoſe Courts, that have Jurisdiction over the Cauſe. Now if the cauſe riſe at land, or in a Port (for no port is part of the Sea, but of the continent) then he cannot ſue in the admiralty, but he muſt ſue in the Courts of Common law, which have unlimited power in cauſes tranſitory. And then muſt he ſo lay it, that it may give him Jurisdiction. And this ſuit againſt Bingley is no other then a mere action of Trover and Converſion, as Bawtry, and other of the Serjeants confeſſed.

1. Now to the objections. To the firſt.

The cauſe being at London, no man may by a new frame forme a ſuit, which hee cannot have at common law, drawing it *ad aliud exemplum*, but hee muſt ſubmit his formes to the law, and not *è contra*.

2. To the ſecond, the originall cauſe is not Piracie, for though he calls them Pirats, yet the charge is onely *per vim & violentiam*. And to the taking of the goods, the proceeding is civill, not Criminall. And if it were laid Piracy, All that ſhould come in traverſe upon the evidence, in the action of Trover: And if it were Piracie indeed, buying it in open market without fraud, would defend the buyer. And now the Queſtion is not, who hath right, but where the right ſhall be tryed?

3. To the third, Bingleyes charge ſtands by it ſelfe, as done at land, and

Juſtice

[Juſtice Warburton] ſaid, that the death of a man in great Ships, might be tryed either before Judges at land by the common law, or before the admirall, by the ſpeciall law in that behalfe. And this prohibition, was the rather allowed to Bingley; becauſe it was prayed before any proceedings in the admiralty, further then the libell which in it ſelfe warranted the prohibition.

101. *Watts Caſe.* Admiralty.

AND note that the ſame day Sir Iohn Watts and others, as Captaine Newport prayed a Prohibition, in the caſe of Monſieur Villiers, Governour of Deepe, for a ſpoyle done at *Cape de vert*, which they would have ſurmiſed, to have beene done at land at Guiney. But becauſe it did not appeare ſo in the libell; & becauſe they had ſuffered it to proceed to ſentence, it was denyed, and they left to their remedy, upon the Acts of their owne cauſe.

102. *Palmer* Verſus *Pope.* Admiralty. Co. B.

PAlmer libelled in the admiralty, for an agreement made at Sea, for well tranſporting of Sugars againſt Pope; and that the agreement was put in writing at Barbarie, and that the Sugars were ſpoyled at Sea, and thereupon a Prohibition was granted, but if the writing had not beene at land, under Seale, but under a ſimple remembrance of the Agreement, it had beene otherwiſe, 48. E. 3. 2. F. N. *Br.* 118. 9. 10. H. 7. Temps E. 1. Avowry 192. 8. E. 2. 45. E. 3. 7. R. 2. Statham 5. H. 6. 2. H. 4. 6. H. 6. And the ſtat. *primos pontes* is onely for death, and Mayheym, And Sir Iohn Watts had a Prohibition, againſt *Alanſo de Valaſco* Embaſſador of Spaine, for attaching of Tobacco at land here which one Couero ſubject to the King of Spaine brought hither, and which the Embaſſador libelled to belong to his Maſter as confiſcated, as all other his goods were, for the property of goods here at land, muſt be tryed by the Common law, how ever the property be guided. Prohibition to the admiralty.

Auxi, Jennings libelled in the Admiralty, againſt one Audley, upon a contract made, or laid to be made *apud Malega inter diſtrictum Maris vocat.* the ſtraights of Gibralter *infra Iurisdictionem maritimam*, And becauſe it appeared the Contract was made at the Iſland of Malega, Prohibition was granted, for it was not regarded, that he added *infra Iurisdictionem maritimam*, which appeared contrary.

103. *Newman* verſus *Moore.* Second deliverance.

THomas Newman brought a ſecond deliverance, againſt Nicholas Moore for taking his Beaſts at *Fraile in quodam loco vocat.* Brockley

Cloſe. The defendant avowes the taking, and ſhewes that Sir Pexall Brocas was ſeiſed of the place, *inter alia* in his demeſne as of Fee, and held the ſame of the late Queene in chiefe, and ſo ſeiſed, demiſed a rent of ten pound a yeare, out of the ſaid lands to the ſaid Nicholas Moore for terme of life with a clauſe of diſtreſſe, and likewiſe demiſed two parts of the land unto the now Pexall Brocas, and the heires of his body, and that he diſtrained the Beaſts of the plaintife in two parts of the ſaid cloſe. And for the rent behinde the plaintife confeſſeth the ſeiſin, tenure, and demiſe, and conveyed the third part to foure heires, whereof one Becket was one, and then conveyed the fourth part being the twelfth part of the whole to one Iobſon, who demiſed the twelfth part unto him, by force whereof he was of the twelfth part poſſeſſed, and ſo poſſeſſed put in his beaſts into the ſaid twelfth part, and the defendant took them.

Demiſe of rent of all the land holden in chiefe.

The avowant conveyes unto the ſaid Iobſon, as well the two parts demiſed as the ſaid twelfth part, and then ſhewes, that Jobſon did demiſe both the one and the other to the plaintife, by force whereof he was poſſeſſed of both, and ſo poſſeſſed put in his beaſts, *abſque hoc quod predictus Thomas Newman de pred.* 12 *parte tenementorum pred. poſuit Averia ſua pred. in pred. triginta Acris paſturæ cum pertinentiis, &c. in quibus, &c. ſicut idem Thomas ſuperius allegavit.* Hereupon the plaintife demurred in law, and for cauſe of demurrer, ſhewed that the avowant had both confeſſed, avowed, and traverſed the plaintifes plea, and alſo that he had traverſed that the plaintife had not alleaged *(cil.* the *tantum.* And it was without argument ruled, that the demiſe of a Rent, by the name out of all the lands, was as good as out of all the two parts only, by the meaning of the ſtatute againſt the opinion in Butlers caſe and *Bakers*, as it had beene formerly adjudged upon the ſame will betweene Euſtace Barton, plaintife, and the ſame Nicholas Moore avowant in the Common Pleas, Trin. 6. Jac. Reg. rot. 707. which is the caſe reported by my Lord Coke l.k.6.

Traverſe confeſſion and avoidance.

But for the terme of the traverſe it was argued to be naught, becauſe the avowant had confeſſed as much as the plaintife had pleaded, that is to ſay, the leaſe of the twelfth part, and then added the leaſe of the two parts, which ſtood well with the plaintifes plea, and did avoid it, and therefore he ſhould have reſted there; and then the traverſe ſhould have come on the other ſide to that leaſe of the two parts. For now it was ſaid, that the iſſue upon this traverſe might put the plaintife to a miſchief, for if he were poſſeſſed of more then of the third part diſcharged, then ſo much as he pleads it ſhould be found againſt him, and yet hee were not to be diſcharged, and yet the plea was holden good, and judgement given for the avowant. For it was ſhewed to the Court that in the former caſe betweene Barton and Moore, the pleading was altogether the ſame, with the ſame traverſe and demurrer, with the clauſe eſpecial-

Traverſe upon traverſes.

ly

ly aſſigned as it was here, and the point argued, and afterward by the order of the Court overruled and left, and commanded only to argue the matter in law, which was alſo adjudged for Moore the avowant, though in the report of the caſe there is no mention made of this point of the traverſe.

Now for the objection made againſt this traverſe, which makes a ſhew, I declared my opinion, that if it had beene found upon the traverſe, that the plaintife had beene poſſeſſed of more then the twelfth part of the land diſcharged, and of the full third part, or the like, and of no part of the reſt of the land charged, that it had beene found for the plaintife.

For upon the diſcloſing of the caſe it appeares plainly that the effect and end of the iſſue, whether he were poſſeſſed only of land diſcharged as diſcharged, and not of what part of theſe lands, for that is not the ſubſtance, though it be the letter of the iſſue.

It was alſo ſaid that every man ſhall be preſumed to know his owne caſe, and ſo it ſhall be accounted his folly if he have miſtaken his parts. And it was agreed by the whole Court, that the avowant might have reſted upon his plea, as a confeſſion and avoidant without the traverſe; and that the traverſe might better have come on the plaintifes ſide.

And therefore I am of opinion, that ſince the confeſſion and avoidance was of the ſame effect and conſequence with the traverſe, and ſo ſurpluſage, though it were no juſt cauſe of demurrer, yet the plaintife might have waved that traverſe, and maintained his poſſeſſion of the part diſcharged, *abſque hoc*, that he was poſſeſſed of the part charged, *modo & forma prout*, and ſo the iſſue would have riſen upon this traverſe materiall, not upon the others immateriall.

104. *Stoner* Verſus *Gibſon*. Obligation.

STONER Adminiſtrator plaintife, againſt Gibſon defendant, in an action of debt upon an Obligation; The defendant pleaded that the obligation was with condition for performance of covenants of a deed Poll, and pleaded that he had performed them all, not ſhewing what they were. Whereupon the plaintife demurred in law, and the plea upon the demurrer was adjourned from Octab. Mich. laſt, to this Octab. Hillar. at which day the defendant pleaded, that ſince the laſt continuance, *ſcil.* ſince Octab. Mich. laſt, from which day the ſaid plea was continued till octab. Hillar. the plaintifes adminiſtration was revoked and committed to the defendant. Term. Hil. 13. Jac. Reg.

And it was agreed upon the adjournments and continuances of demurrers, the plaintife may be nonſuit at the day in another terme, whereunto it was adjourned. And by the ſame reaſon he may plead a plea *puis darrain* continuance. And it was alſo agreed, that if he or the plaintife

Plea Puis darrain Continuance after demurrer or iſſue

tife ſhould here take iſſue, or demurre upon the plea, yet the Court muſt conſider alſo upon the firſt demurrer the plaintife could not have his action the Court would not give judgement for him, howſoever the latter iſſue or demurrer paſſe. But otherwiſe it were if the firſt had been an iſſue, for then nothing were confeſſed to his prejudice, for then that had beene utterly relinquiſhed by a ſecond iſſue or demurrer *Quære.*

105. *Chuddin* verſus *Wilkins.* Caſe.

V. Caſe. 92. Calling a man theefe after a pardon generall or ſpeciall.

CHuddington brought an action of the caſe againſt Wilkins, and declared that 1 Martii 10 Jac. the defendant had ſpoken to him theſe words, *viz.* He (meaning the plaintife) is a theefe, and why will you take his part? To which the defendant pleaded, that 1 Martii or Auguſti 36 Eliz. the plaintife did ſteale 6 Sheep of one I. S. by force whereof, &c. and ſo he juſtifieth them. The plaintife by proteſtation ſaith, that he ſtole not the Sheepe, and pleads the generall pardon 7 Iac. and averres that he is none of the perſons excepted. Whereupon the defendant demurred in law. And now this terme it was adjudged for the plaintife, for the whole Court were of opinion, that though he were a theefe once, yet when the pardon came, it tooke away not onely *pœnam*, but *reatum*, for fellony is *contra Coronam & dignitatem Regis*. Now when the King hath diſcharged it and pardoned him of it, he hath cleered the perſon of the crime and infamy; wherein no private perſon is intereſſed but the Common-wealth, whereof he is the head, and in whom all generall wrongs reſide, and to whom the reformation of all generall wrongs belongs. And therefore ſuits for defamation by private perſons in Spirituall Courts are pardonable by the King, even after ſentence, becauſe though they be ſued ſometime by the party grieved, yet it is not but in the nature of an Informer, and the ſentence is not to give him amends, but *pro ſalute animæ*, for examples ſake. And ſo are the ſuits in the Starre-chamber. And to ſhew the force of the Kings pardon, the Chiefe Juſtice then cited two bookes, 1 & 2 E. 3. Fitz. Corone 281. 154. wherein it is adjudged, that if an appeale of fellony, the defendant do offer triall by battell, the plaintife may counterplead it, by ſaying the defendant being apprehended, eſcaped or brake priſon, which preſumes a guiltineſſe. And yet thoſe bookes are ruled, that if the King pardon that breaking of priſon, the defendant ſhall be reſtored to the battaile, and the counterplea taken away. And yet the reaſon of the preſumption of the guiltineſſe is the ſame after the pardon as it was before. But the reaſon of the caſe is, that the Kings pardon doth not only cleare the offence it ſelfe, but all the dependancies, penalties, and diſabilities incident unto it, and that againſt the appellant. For though the appellant hath no intereſt in the originall fact, which the King would not diſcharge againſt him, yet in the breaking of the priſon he had

had none but oblique. And it was ſaid that he could no more call him theefe, in the preſent tence, then to ſay a man hath the Pox, or is a villaine after he is cured or manumiſed, but that he had beene a thiefe or villain he might ſay. And it was held no great difference, though this had beene a ſpeciall pardon and not knowne to the defendant, for he muſt take heed at his perill that he do no man wrong. And here is no neceſſity nor uſe of ſlanderous words to be allowed to ignorants. But it may well be, that if a man had committed fellony, and got a ſecret pardon, yet another man not knowing of the pardon may juſtifie the apprehending of him for the fellony, becauſe it is Advancement of Iuſtice; even as a common voice and fame is a ſufficient warrant to arreſt for fellony, though the ſame be not true: But ſo it not to call him thiefe, for that is neither neceſſary nor advanceth nor tends to Iuſtice.

Common fame a ſufficient warrant to arreſt for felony.

106. Sir *R. Grobham* Knight, againſt *Thornborough.*

SIr Richard Grobham brought an action of debt of 100 pounds againſt Thornborough and others, and declared upon a leaſe made at London of the Mannor of Leckford-Richards, in the County of Southhampton, and of a capitall meſuage in the ſame County of Southhampton, and foure cloſes of paſture to the ſame Meſſuage adjoyning, lying in Leckford in the ſame County of Southhampton, &c. rendring 120 pounds a yeere, with a *nomine penæ* of 8 ſhillings a day, for non payment, and then ſhewes that 60 pound was behinde for halfe the yeare, at ſuch a feaſt, and ſo remained behind by the ſpace of a hundred dayes, making forty pound, ſo together the 100 pound. The defendant confeſſed the demiſe, and pleaded an extent of the land by a ſtranger, upon a ſtatute acknowledged before the demiſe; but ſhewes that the liberate was executed after the rent due, whereupon the plaintiſe demurred, and judgement was given for him for the 60 pound rent, becauſe it was due before the liberate executed.

An action of debt brought upon a leaſe.

Debt intirely demanded made of ſeverall ſummes whereof one is void.

And though the leaſe were laid in the declaration, in as much as the capitall Meſſuage is laid in no Towne, but in the County at large, neither can be holpen, for the Towne ſet for the foure Cloſes, for the ſentence is perfected in the houſe and finiſhed before, yet that fault being but want of a vizt, is cured, becauſe the defendant hath confeſſed the leaſe.

But for the 40 pound paine, it was adjudged againſt the plaintife, becauſe he laid no actuall demand of his rent at the day, without which a paine is not forfeited. Though a demurrer confeſſe the fact was well pleaded, yet if the defendant here had demurred, he might have taken advantage of the ill laying, but here the defendant did both admit the leaſe by pleading the extent to defeat it, and yet now more did confeſſe it directly by a *bene & verum, &c.* And a leaſe ſo made is good.

Demande requiſite where there is a forfeiture of pain.

107 *Thomas Virely* againſt *Roger Gunſtone.*

Checq. Cham.

Perjur'd fellow

THomas Virely brought an action of the caſe againſt Roger Gunſtone Clerke in the Kings Bench, for calling him perjured fellow, and had judgement by *nihil dicit.* And thereupon had a writ of enquiry of damages to the Sheriffe of Norfolke, thus: *Preceptum eſt vic. quod per ſacramentum duodecim proborum & legalium hominum de Balliva ſua diligenter inquirat quæ damna, &c.* Whereupon the Sheriffe returned, *Quod mandavit Iohanni Geſtingham Ballivo libertatis Rad. Hare mil. Hundredi de Blackcloſe in execut. pred. brev. totaliter reſtat fienda, & quod alibi infra Com. pred. per ſe fieri non potuit. Qui quidem Ballivus ſic ſibi reſpondit.* And ſo ſets downe an Inquiſition before the Bailiffe, and 40 pound damages. Hereupon a writ of error was brought in the Exchequer Chamber, and agreed by the Judges, that the returne was inſufficient, for it was apparantly untrue and againſt law, becauſe the warrant was directed to the Sheriffe himſelfe to be executed in any part of his Shire, and no venue contained in this Inqueſt of office, as there is no other writ which intitles the Bailiffes of liberties. But yet the Court would not reverſe the judgement, becauſe there were diverſe of the like, both in the Kings Bench and Common Pleas, eſpecially in Suffolke and Norfolke in latter times.

Returne of a Sheriffe falſe in law.

Co. Ba.

108. *Slawneys* Caſe.

IN the Prerogative Court, Sir John Bennet the Judge according to the cuſtome, had taken bonds of one Slawney, upon granting of an adminiſtration upon the conditions uſuall there; whereof one is, that the adminiſtrator ſhall diſpoſe the ſurpluſage of the goods after the debts and legacies paid, according to the direction of the Court. Whereupon, the inteſtate having left a wife, to whom the adminiſtration was committed, the Judge did now finde a ſurpluſage in her hands, and did ſentence that ſhe ſhall give certaine portions to certaine of the kindred of her husband, being not his children, whereupon a prohibition was prayed in her behalfe. And the Court was of cleare opinion, that whereas the ſtat. of 21 H.8. appoints the adminiſtration to be granted, &c. And that the Ordinary ſhall take ſureties for the true adminiſtration of the goods of the dead. That the Ordinary may not impoſe any other or further condition upon the bond, and though the Ordinary will pretend that the true adminiſtration mentioned in the Statute is to be extended as well to the diſpoſition of the ſurpluſage, as to debts and legacies, yet that is not under their judgement, for they muſt take their bond according to the law; and then what is the meaning and expoſition of the ſtatute, and of the condition of the obligation, both are to

The power of the Ordinary and the ſurpluſage of the goods of the inteſtate.

be judged by the Court of Common Law. And I finde that if a man obſerve well the ſtatute of 21 H.8. cap.5. he ſhall perceive by preferring the wife and children to the ſaid adminiſtration, he did not imitate the minde of the inteſtate to preferre them that is like he would have preferred if he had made a will, which muſt be by giving the profit of the eſtate, and not only labour and dolour in ſuing, and being ſued, to bring in and defend the eſtate, and then to give this vaſt power to the Ordinary to give the ſurpluſage where he will. To which opinion the reſt of the Judges did incline.

But yet the cauſe with the conſent of Sir John Bennet himſelfe was referred to the order of Serjeant Harris and Hutton, who were of Counſell for the prohibition.

109. *Spendlow* againſt Sir *William Smith*.

Dilapidations.

SPendlow Parſon of Skiton in Norfolke, ſues Sir William Smith of Eſſex, executor of one Smith the laſt Parſon there, for dilapidations, in the *Arches*. And among other things, there was a queſtion about a leaſe for yeares, which was alleaged to be taken by Sir William Smith in his owne name, but covenouſly in truſt, and for the uſe of the ſaid Smith the Parſon, whereupon they would put Sir William Smith to his Oath, to anſwer concerning the Covin; whereupon the Court granted a prohibition *quoad*, examining of him upon his oath concerning the Covin, for though the originall cauſe belong to their cognizance, yet the Covin & fraud is criminall; & the avowing it *bona fide* is puniſhable, both in the Starrechamber, and by the penall law of fraudulent gifts, and therefore not to be extorted out of himſelfe by Oath. Alſo the expoſition of the ſtatute 13 Eliz. cap. 10. of Dilapidations, and what ſhall be Covin or not within the law, reſts not in them to judge, but in the Courts of Common law.

Court Eccleſiaſticall cannot examine a delinquent opon oath.

Court Eccleſiaſticall cannot interpret a ſtat.

110. *Edward Skeat* againſt *Oxenbridge*, and *Ethered* his Wife.

Waſt.

EDward Skeat brought an action of waſt, againſt Oxenbridge and Ethered his wife, and the writ was *De omnibus terris & Gardinis in L. de quibus Edwardus Skeat gen. jam defunctus ſeiſitus exiſtens poſt quartum diem Febr. An.* 27 *H.* 8 *inde feoffavit Edmundum Slifeild & al. ad uſum pred. Edwardi Skeat defuncti & pred. Etheldred pro termino vitarum eorum, & eorum alterius diutius viventis & poſt deceſſum pred. Edwardi Skeat defuncti, & Etheldred tunc ad uſum hæredum de corpore predicti Edwardi Skeat defuncti procreand. ſuper corpus pred. Etheldred.* After a verdict upon iſſue *nul* waſt found for the plaintife, exception was taken to the writ, becauſe he did not lay the feoffement to be made to the feoffees

offees and their heires, without which there could be no inheritance in *Ceſtuy que uſe*, and by circumſtance and conſequence no diſ-inheriſon, as the action of waſt imports, which was agreed to be true. Yet it was judged for the plaintiſe, becauſe the Clerks of the Chancery affirmed and ſhewed their books that they had uſed this forme alwayes in that caſe ſince the making of the ſtatute. *And* the declaration proceeded further in that caſe, and laid the ſeiſure in fee as it muſt.

Writs of waſt wanting ſubſtance allowed by reaſon of practiſe.

So note a new writ in forme allowed wanting ſubſtance, by the practiſe ſince it came in uſe, though it be late, for the plaintife in this caſe might have had his writ generall, and there had beene no queſtion of it, for the generall writ ſhould have maintained with a ſpeciall declaration, as it is common in many caſes. And the like preſident with the principall, was ſhewed by Brownlow 7 E. 6. Ter. Paſch. rot. 918. Gawen & Elizabeth ſa femme in waſt.

Brieſe generall and Count ſpeciall.

Vide for the like, a writ of *Cui in vita* 39 H. 6. 38 Fitz.N.B. 193. 11. 8 E. 3. 391.

In this caſe it was holden cleare, that Ethelred the wife had but an eſtate for life, and that the intaile and inheritance by the forme of limitation *ſuper*, reſted only in the husband Edward Skeat. It is all one, as if it had beene *hæredibus Edwardi Skeat de corpore ſuo ſuper corpus*, &c.

111. *Earle of Cumberland*, againſt *the Counteſſe Dowager.*

Eſtrepement of divers forms

ESTrepement judiciall was awarded out of the Court ~~of~~ to the Coroners of the County of Weſtmerland in the action of waſt, brought by the Earle of Cumberland againſt the Counteſſe Dowager, becauſe the Earle was Sheriffe of the ſame Shire, by which writ the Coroners were commanded to ſuffer no waſt to be done in the lands, &c.

Now this terme oath was made in Court, that the Ladies people had done waſt after the writ publiſhed and made knowne unto them, yet the Court would not commit them, becauſe it was not a writ directed immediately to the Lady and her ſervants, commanding them to doe no waſt as it might have beene, and then it had beene immediate contempt to the Court. *And* here the Coroner himſelfe is to provide againſt the waſt by taking *poſſe comitatus*, if there be no remedy or the like.

112. *Day* verſus *Savadge.* Treſpaſſe.

Cuſtome of London.

MAtthew Day brought an action of treſpaſſe againſt Ioh. Savadge for taking away a bag of Nutmegs. The defendant pleaded that the City of London is an ancient City, and ſo had beene time out of minde, and that the Major, Citizens, and Commonalty had beene by all that time a corporate body, and ſeiſed of a back or wharfe in London

don called Queene-Hithe, and by all that time had uſed to have and take for goods laid upon the ſame wharfe, to be conveyed from thence by water of perſons not lawfully thereof diſcharged, wharfage, that is to ſay, a halfe penny for every Porters burthen there layd to be ſo conveyed, and for default of payment, to diſtraine ſuch goods upon the ſaid wharfe, by a perſon, by the Major, to be appointed for the collection, and then ſhewes that two perſons unknowne brought two Porters burthens of the goods of the ſaid plaintife, being no perſon lawfully diſcharged, whereof the bag of Nutmegs in Queſtion was part, and laid them upon the ſaid wharfe to be conveyed by water. And that the defendant being appointed collector, &c. demands two halfe pence, and becauſe they were not paid, diſtrained, &c. as was lawfull for him to do: The plaintife by way of replication confeſſed all the barre in generall, and laid that within the ſaid City there was, and time out of mind had beene a cuſtome, that all the freemen of the ſaid City, had beene, and ought to be diſcharged of the ſaid payment of wharfage for their goods, and averred, that he was a freeman of the ſaid City. The ſaid defendant ſaid, that there was no ſuch cuſtome within the ſaid City, *Et hoc paratus eſt verificare ubi & quando, &c. prout Curia conſideravit*: and then addes a ſurmiſe thus: *ſuper quo pred. Iok. Savage dicit quod in civitate pred.* there is, and time out of minde hath been a cuſtome, that when any iſſue, &c. upon any cuſtome of the ſaid City is joyned, though the Major, Commonalty, and Citizens be parties to the action, the Major and Aldermen of the City have uſed to certifie the Iuſtices the truth of ſuch cuſtome; and that the ſaid cuſtome and all other cuſtomes of the ſaid City by authority of Parliament in the 7 yeare of Richard the ſecond was confirmed. And prayed the Kings writ to the Major and Aldermen of the City, to certifie, &c. And the ſaid plaintife ſaith, that the ſaid iſſue ought to be tried by Iury, and not by Certificate, and that ſuch cuſtome alleaged by the defendant, for the triall by certificate *ut ſupra*, is againſt the law and common reaſon, and prayeth judgement, and that the cauſe may be tryed by Jury, whereupon the defendant demurreth.

After ſome arguments at the Barre *pro & contra*, wherein nothing was queſtioned, but whether the cuſtome in the ſpeciall caſe were good, and the Major and Aldermen ſhould certifie a cuſtome which concerned the intereſt of the Corporation whereof they were a part.

The Court now being agreed determined to give judgement, and intreated me to pronounce it for them all, and ſo we gave judgement, that the cuſtome was not to be tryed by certificate, but by the Jury, whereof I gave them three reaſons.

The firſt, that it was not properly a cuſtome, but a kinde of preſcription, or in the nature of a preſcription, and then cleerly it was not within their cuſtome. 1

Secondly, that it was no ſuch cuſtome as was within the reaſon or meaning 2

meaning of that ſpeciall peculiar forme of tryall by certificat, that was granted or uſed in London.

3. Cuſtome againſt law to try and judge their owne cauſe.

Thirdly, it were againſt right and Juſtice, and againſt naturall equitie, to allow them their Certificate, wherein they are to try, and judge their owne Cauſe.

As to the firſt it is apparent, that as Savage pleads it for the Citie, it is a meere preſcription in the Corporation, and if hee had joyned unto it (as he ought to have done) the point of diſcharge of Citizens expreſſely, as he did generally, under the name of perſons diſcharged, it had beene a meere intrie preſcription throughout, and ſo pleaded.

Now though he ommitted that part, yet when it comes to be ſhewed on the other ſide, if it be true, it appeares to be a branch of the ſaid preſcription, and of the ſame nature, and no cuſtome.

And it is true that being pleaded apart by it ſelfe by the inhabitants, as to a diſcharge of Freemen, it muſt be pleaded by way of cuſtome, and not by way of preſcription, not becauſe of the nature of the thing, but becauſe the freemen cannot preſcribe in their perſons, and therefore are allowed to lay a Cuſtome for their diſcharge, ſo that naturally a preſcription or a thing preſcriptible is ſo to be laid, where by law it may be, and not by way of cuſtome, and where it cannot be by law, and therefore is pleaded by way of cuſtome, the nature of the thing is not changed, but remaines ſtill a preſcription of his kind, though it bee allowed to be pleaded, by way of cuſtome for neceſſities ſake. And this learning appeares well in Gatewoods caſe, Co. lib. 6. 39. B. where it appeares, that lying properly in preſcription, as common, did in that Caſe being an intereſt, which muſt, herein in ſome body, cannot be pleaded by way of cuſtome, where it cannot ſtand by way of preſcription, as there they could have made it for inhabitants, that are not permanent to preſcribe; but yet common for copyholders in the Lords ſoyle, is allowed to bee pleaded by cuſtome for neceſſities ſake, whereas in the faile of another, it muſt be laid by preſcription.

But a matter of diſcharge as the principall caſe is, and diſcharge of Tythes, as Gatewoods caſe ſayes, may be laid by way of Cuſtome, for that is not an intereſt, but an execution, not *Poſitive*, but *Privative* of the generall poſition. So it is indeed but an execution cut of the intereſt of truth, ſhould be ſo pleaded in the principall.

Cuſtomes in London.

To the ſecond point. This privilege of London is to be underſtood of ſuch cuſtomes, as are of the nature of locall lawes, peculiar lawes for that Citie, generall to all the Citties differing from the generall law of the kingdome, ſuch as Littleton calls uſages in many Boroughs; and ſamples them; ~~but~~ that the younger Sonne ſhall inherit, that the wife ſhall have the whole land in Dower, and that their houſes and lands are demiſable, ſuch are the cuſtomes in London, of forraine attachment, 7. E. 6. fo. 83. Dy. & 3. Eliz. Dyer 196. and the cuſtome 5. E. 4. fo. 30. that

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if a Debtor become fugitive, hee may bee arreſted before the day of payment. And Co. 5. lib. fo. 82. Snellings caſe, that if one Citizen be indebted to another in a ſingle contract, it ſhall be equall to an obligation. And 21. E. 4. 16. 74. 75. And 21. E. 3. 46. a good caſe to this very purpoſe, where in an Aſſize of freſh force, in the Countie of Oxford, it was pleaded that the Cuſtome of the Towne was, that if a man had poſſeſſion of lands by 40. weekes, he could not be put out by the Kings writ, whereupon the other would have taken no ſuch cuſtome. But it was reſolved, that this being the law of the Citie, was not to be tryed by Jury, but by the Judges, as a matter of law, and ſo indeed in the nature of a Demurrer.

And the reaſon hereof is, that the Judges of every place are ſuppoſed to have knowledge of the lawes of the place, whereby they doe Judge, and to have cuſtomaries among them. And therefore in ſuits in their owne Courts doe determine them, as the Judges doe in the Kings Courts, Judge the generall cuſtomes of the whole kingdome, being the Common law. And ſo in London by ſpeciall priviledge, they certifie alſo their cuſtomes of this nature into the Kings Bench, which other Townes doe not. But their cuſtomes even thoſe that are their locall lawes, are locall places, are tryable by Jury, if they come to iſſue in the Kings Courts. And agreeing with this was found, and ſhewed a preſident in the Common Pleas London, betweene Bilford plaintife, and Lowe defendant in an action, upon the caſe for certaine parcells of Plate. And the iſſue was, whether the cuſtome of London were, where there was a Common market in London, for all goods in all open Shops all dayes, except Sundayes, and holy dayes, from the Sun riſing to the Sun ſet; and concluded, *Et hoc parati ſunt verificare, ubi & quando ac prout Curia Conſideraverit.* And then the defendants made their ſurmiſe, for the tryall of their cuſtome by the mouth of their Recorder, and prayed a writ accordingly. And it was granted returnable in Trinity Terme, and continued *per non miſit brc. till Octabis Mich.* And then it is entered, that the Concluſion of the defendants Plea, ought to be *Et de hoc ponit ſe ſuper patriam*, whereupon the Plea was ſo made and iſſue taken, and upon *venire fac.* to the Sheriffe of London found for the plaintife, & had judgement, which is a ſtranger caſe, then this at the barre.

Cuſtome of London to certifie their Cuſtome by their Recorder.

And further in the principall Caſe, it cannot properly be ſaid to bee cuſtome of the whole City, nor of the Citizens perſonally, as all the cuſtomes in the nature of lawes are, and as the forme of ſurmiſe, for the tryall doth impart, for it concernes partly, and onely the body Corporate of the Citie, and the place Queene Hith, where the profit ariſeth, and where the diſtreſſe is to be taken for it.

As to the third point, the booke is full, that challenges are allowed, where the iſſue concernes a Citie, or Corporation, and they are to bee made the panel, or where any of their body be to goe on the Jury, or a-

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ny of kin unto them, though the body Corporate be not directly party to this ſuit, for which purpoſes, 15.E.3.18.28. aſſ. 18.21.E.4. 11. where a Deane and Chapter bringing an Aſſize a Juror was challenged, becauſe he was brother to one of the Prebendaries.

Now if ſuch challenges be allowed, where an attaint lyes for falſe verdict, much more here, where there is no wayes to reverſe a falſe certificate, as no judiciall Act, but miniſteriall. And therefore if the Certificate be falſe, the party ſhall have his remedie by action of the Caſe, and that not againſt the Recorder, but againſt the Mayor and Aldermen; for it is their Certificate by the Recorder, and ſo is the pleading and ſurmiſe, and the writ to Certifie is warrant to them, which takes away one defence made againſt their partiality to themſelves, that they did not certifie but their Recorder. As where a grant is of a Recogniſance of Pleas to be holden before the Steward of the Grantee, *licèt* the grantee *furit pars*, that there the Steward is Judge himſelfe, and not the grantee, as the Kings Judges are betweene him and the parties, & where the Recordee is but their mouth to ſpeake for them, as they command him.

By that, that hath beene ſaid it appeares, that though in pleading it were confeſſed, that the cuſtome of Certificate of the cuſtome of London is confirmed by Parliament, yet it made no change in this caſe, both becauſe it is none of the cuſtomes intended, & becauſe even an *Act* of Parliament, made againſt naturall equitie, as to make a man Judge in his owne caſe, is voyd in itſelfe, for *Iura naturæ ſunt imbecilla*, and they are *leges legum*.

Stat. cannot eſtabliſh Cuſtome againſt naturall equitie.

Caſes in the Exchequer Chamber, out of the Kings Bench this Terme.

Checq. Ch.

113. *Laſtlow againſt Tomlinſon.* Aſſumpſit.

LAſtlow brought an *Aſſumpſit* againſt Tomlinſon, declaring that Tomlinſon ſold him ſo many Oates, as according to the rate of 15. ſhillings nine pence for every Quarter, ſhall amount to 52. pound, to be delivered ſuch a time. And that the ſaid Oates, after ſuch a rate, came to 96. quarters and 6. Buſhells, which the defendant hath not delivered to his dammage. Which money the plaintife promiſed to pay ſuch a time; upon iſſue *Non Aſſumpſit*, it was found for the plaintife. And upon judgement a writ of Error, and Error aſſigned, that 96. quarters, and 6. buſhells of Oates, after the rate aforeſaid, came to 52. pound, and three Farthings, and ſo no breach, becauſe he was not bound to deliver ſo many. But the Judgement was affirmed, both becauſe it was certaine, whether it amounted to more, the account was ſo buſie, And alſo becauſe it was not poſſible in effect, to mince the meaſure ſo, ſo as it ſhall hit the juſt ſumme, as the odd houres are not accounted in the yeare.

Aſſumpſit.

The law regardeth not things too ſmall.

114. *Herrenden*

114. *Herrenden* against *Margaret Palmer.*

Aſſumpſit upon promiſe. Checq. Ch.

HErrenden brought an *Aſſumpſit* againſt Margaret Palmer, adminiſtratrix of her husband, and declared that her husband had bought of him, gold and Silver, and Pearle, and was indebted unto him for them two hundred pound, and ſhe after his death, had likewiſe bought of him Pearle, for 27. pound, and that upon Accompt, ſhe was found indebted, both thoſe ſummes unto him, and promiſed payment, Judgement for the plaintife, and aſſigned for Error, that the defendant was to bee charged in two manners, one in her owne right and the other *ad* adminiſtratrix, and therefore the Judgement was reverſed.

115. *Nichols* and *Raynbred.*

Aſſumpſit.

promiſe for promiſe.

NIchols brought an Aſſumpſit againſt Raynbred, declaring that in conſideration, Nichols promiſed to deliver the defendant to his owne uſe a Cowe, the defendant promiſed to deliver him 50. ſhillings, adjudged for the plaintife in both Courts, that the plaintife need not to averre the delivery, becauſe it is promiſe for promiſe, note here the promiſes muſt be at one inſtant, for elſe they will be both made *nuda pacta*.

116. *Brinſley* & *Partridge.*

Checq. cham. Aſſumpſit.

Declaration caſting *upon a totall.*

BRinſley brought an Action upon Aſſumpſit againſt Partridge, declaring that he accounted for divers ſummes of money, due to the plaintife by the ſaid defendant, & upon the ſame account, the defendant was found in arrerages to the plaintife 57. pound, and that the defendant in Conſideration thereof, did promiſe to pay to the plaintife that 57. pound, at a certaine day then to come, which he did not pay, to his dammage &c. The defendant pleaded *Non Aſſumpſit*, whereupon the plaintife had judgement. The defendant aſſigned for Error, that the conſideration was not ſufficient, becauſe the plaintife did not ſhew, whether the mony upon the ſaid account was due, as for moneyes received or lent, or for wares bought and ſold; notwithſtanding judgement was confirmed, becauſe by the accounts, the debt was confeſſed good.

117. *Rich* against *Shere.* Ejectione.

Checq. Cham.

RIch brought an *Ejectione Firmæ* againſt Shere, and declared that whereas Richard Harris and other, 9. *Octob.* 5. *Iac. Regis* at Saint Gunneyes, in the County aforeſaid, did demiſe grant and to Farme, let to the defendant one Meſſuage, 4 Gardens, 200. *Acres* of land 20.

Acres of Meadow, 80. Acres of paſture, 16. Acres of Wood, and 60. Acres of Heath and Furſe, with the Appurtenants, called eaſt Ditzart *aliàs* Dizard in the ſame County. To have and to hold, to the defendant, for five yeares, &c. The defendant pleades not guilty, whereupon the plaintife had judgement. The defendant aſſigned for Error, that the plaintife in his declaration, did not ſhew in what Towne, Pariſh, Hamlet, or place the ſaid Tenement, called the Eaſt Ditzart *alias* Dizard lay, but in the generall County aforeſaid. For that cauſe the Judgement was reverſed.

viſne. Want of it in the declaration hurts where the matter is confeſſed by the defendant.

Note, here is a tryall without a *Viſne*, if the tryall were from Saint Gunneys, and if it were from *de Corpore Com.* it was not good, for that is not allowed, where a neere place may be, but for Tythes, as knight or not, or the like, which are not large.

118. *Foxcroſt* verſus *Lacy*.

Caſe. Action for ſlander to many not named but ſignified. Checq. *Ch.*

FOxcroſt brought an action of the Caſe againſt Lacy and declared, that whereas Lacy, and foure others, concerning Conſpiracies, &c. and that communication, was moved betweene Iohn Walter, and Richard Guyn Eſquires, concerning the ſaid ſuit, that the defendant Lacy upon the ſaid communication in their preſence, ſpake theſe words: Theſe defendants, meaning the plaintife, and the other ſix are thoſe, that helped to murther Henry Farrer, meaning one Henry deceaſed, who was murthered by one Thomas Guldfeild, who was hanged for it, to the plaintifes dammage &c. The defendant denyeth the words, and found for the plaintife, and Judgement given, Error was aſſigned generally, that the judgement ſhould have beene contrary, but judgement was affirmed, for it was holden, that it was ſufficiently laid, to entitle every one of the defendants to a ſeverall Action, as if they had beene ſpecially named.

Checq. cham.

119. *Bayle* verſus *Gird*. Aſſumpſit.

Aſſumpſit for dying Clothes.

BAyle brought an Aſſumpſit againſt Gird, declaring that in Conſideration he ſhould dye divers Clothes, called Devonſhire Kerſies, into ſeverall colours, meaning ſo many ſeverall, as amounted in the whole, to be 60. That the defendant did promiſe to pay him a certaine ſumme, for the dying of every ſeverall Cloth, And averres, that hee did dye the ſaid Clothes amounting in all to 59. Whereas indeed they were 60. *Vt ſupra.* And that the money came to 19. pound, which hee hath not paid. Found and adjudged for the plaintife, and Error Aſſigned, and that it appeares hee ſhould have dyed 60. and dyed but 59. And ſo the ſame not due. The Jury did aſſeſſe dammages *occaſione detentionis debiti pred.*

Whereas

Whereas it ſhould have beene *occaſione non performationis Aſſumptionis &c.* But the judgement was affirmed, for that it was firſt averred he dyed all, which appeared before to be 60. So the other was but miſnaming, and as to the other, it was a debt, and a promiſe implyed upon it.

120. *Keere* verſus *Owen.* Error. Checq: ch.

KEere recovered 400 pound debt, againſt Edward Owen who dyed, and upon *Scire fac.* in the County of Surrey the Sheriffe returned *Rebecca terretenant omnium terrarum & tenementorum in balliva ſua quæ fuerunt pred. Edwardi &c.* And judgement given, that Keere ſhould have judgement and execution againſt *Rebecca*; the ſaid *Rebecca*, whereupon the ſaid Keere prayed, the *Elegit* thus entered in the Roll. *Elegit ſibi liberari medietatem omnium terrarum, & tenementorum in Com. Surrey tenend. &c. quouſq;*. And ſo this judgement was reverſed *quoad adjudicationem executionis*, upon the *Elegit*, and yet the writ of *Elegit* it ſelfe, and the returne of it, were well in that point. But where it was alſo Aſſigned for Error, that ſhe was returned *Terretenant omnium terrarum*, without aſſigning of what in certaine, that was not allowed for Error. Error. Elegit.

Caſes out of the Court of Wards this Terme.

121. *Spathurſts Caſe.* Mandamus.

AFter the death of Iohn Spathurſt, by *Mandamus* in Eſſex, it was found that he dyed ſeiſed of certaine lands, *Et quod tenentur de domino Rege de uno groſſo per vigeſimam partem unius feodi mil.* This was ruled by the chiefe Baron & my ſelfe, my Lord chiefe Juſtice being abſent, that it was a tenure by Knights ſervice in chiefe. All tenures in chiefe are in groſſe, and the words *ut de groſſo* are ſcarce of any ſence, but of no certaine ſenſe in law, and ſo ſtand as void. The Cheq. Ch. Error. *Vt de uno groſſo Elegit.*

122. *Thomas Puckerings Caſe.* Commiſſion.

IT was found by Office, taken at Barnet in the County of Hertford. 18. *Maii.* 31. *Eliz.* by Commiſſion, in the nature of a *Diem Clauſit Extremum*, That Sir Iohn Puckering Knight, late Lord Keeper of the great Seale of England, and the Lady Iane his wife, were joyntly ſeiſed to them, and the heires of him of the Mannor of Weſton, in the Countie of Hertford, and of the Mannor of Kingerby, in the County of Lincolne, by the originall purchaſe of the ſaid Lord keeper, and that they being ſo ſeiſed thereof, and that the ſaid Sir Iohn Puckering, being alſo ſeiſed in fee of the mannor of Weſton Argentine, in the County of Hert-

ford, and of the mannor of Kington, in the County of Warwick *ultimo April.* dyed ſo ſeiſed, and the Lady Puckerin him ſurvived, and that the Mannor of Weſton, was onely held of the late Queene in *Capite* by Knights Service. And that the reſt of the ſaid Mannor were held in ſoccage, and not of the Queene in *Capite* or Knights ſervice, and that Thomas Puckering was his ſonne and heire, of the Age of 4. yeares 3. Decem. before the death of his ſaid Father.

Ward made knight.

The Lady Puckering 17. *Maii.* 9. *Iac.* dyed, Thomas the heire 3. *Iunii* 10. *Iac.* was made Knight 3: *Dec. Iac.* he accompliſhed his full age, and tendered his livery, and within the time limited, he ſued forth a ſpeciall livery, under the great Seale of England, no Office being then or yet found of the death of the ſaid Lady, nor any charge they impoſed upon the heire of his ſaid lands.

Livery ſpeciall what it diſcharge th.

In the ſaid ſpeciall livery, there is contained a Releaſe, and pardon from his Majeſtie to the heire of all entries and intruſions, made by the heire into the Mannor and lands, whereof his Father dyed ſeiſed, and alſo a pardon, and Releaſe of accompts, and of all Actions, ſuits impeachments executions, and demands whatſoever, which his Majeſty, at the time of the ſuing forth of the ſaid livery by any meanes had or might have againſt the heire, not extending to diſcharge him, or his lands of any debt Account or demand, by reaſon of any Office or Receipt, of any of his Majeſties moneyes or Treaſure, or of the Converſion of the ſame, or of any debt then due, by Recognizance or Obligation. The auditors, ſince the ſpeciall livery aforeſaid ſued, have impoſed ſeverall charges upon the heire, one for meane rates due, and is ſuppoſed betweene the death of the ſaid Lady, and the full age of the heire; And the ſecond charge, not of a ſumme in particular, but to bring the heire *ad Computandum pro meliore valore*, as upon a Demurrer to this laſt Charge, for the incertaintie and inſufficiency thereof, and a plea to the former Charge appeareth, wherein theſe Queſtions are.

1 Whether the laſt charge be lawfully impoſed upon the heire or no, in regard the Charge is generall, *ad computandum pro meliore valore*. And it is not grounded upon the ſaid Office, nor warranted by any Preſident or by the courſe of the Court.

2 Whether the King be, or can be intituled to any meane rates, between the death of the ſaid Lady Puckering, and the Knight-hood of the ſaid Sir Thomas Puckering and his full age, no Office being found of the death, of the ſaid Lady Puckering, nor any charge impoſed, before the ſaid Knighthood, or the ſaid ſpeciall livery ſued.

Court of wards what warrant there for charge ſet.

Whereupon we reſolved, that the Auditor can ſet no charge, nor Award proces to anſwer any Charge but upon a Record, as an Office or the like.

But yet if an Office be found onely in one ſhire of all the lands, lying as well in other Shires as there, which in law is no office, but for the proper

per ſhire, yet this by the courſe of the Court, is allowed as an Office to all to ground a charge and proces upon ; and this is beneficiall to the Subject, who elſe by divers offices, would be put to an intollerable charge.

Againe, where in this charge, there was an Office, after the death of Sir Iohn Puckering, of the Mannor of Weſton, in the proper County of Hertford, whereby the eſtate thereof was found ; Out of which it did appeare, that no wardſhip of the land could accrew, during the life of the Lady, becauſe it was but a Remainder to the heire, ſo that no Office could be found of her death: yet becauſe the originall cauſe of the wardſhip is the Remainder deſcended, and the death of the Lady, is but a removall of the impediment of the wardſhip ; it is therefore allowed by the Courſe of the Court, and in eaſe of the Subject, that the Certificate of the Feodary, of the death of the Lady, made into the Court without office, ſhall be ſufficient to put in charge.

Office findeth deſcent of Rem. there needs no new office upon the death of the Tenant for life.

So here it was reſolved, that if the Feodaries Certificate, of the death of the Lady were in Court, before the ſpeciall livery granted, for the death of the ſaid Lady, till the Knighting of Sir Thomas Puckering, were not diſcharged by the courſe of the Court, becauſe they were by that Courſe of the Court adjudged in the King, veſted upon Certificat as well as if it had beene upon Office; but thoſe that were incurred, ſince his Knight-hood (being then made of full age in law). till his full Age indeed were perfectly diſcharged by the ſpeciall livery, or rather indeed by the Knighting of him, and tender of his livery, which he might tender as ſoone as he is knighted, being then made to all caſes of wardſhip of full Age, for the wardſhip of the body continues not, as if he were ſtill under Age, but the value of his Marriage he muſt anſwer, becauſe it was fully veſted in the King, by his nonage before.

123. *Pas.* 14. *Iac.* 1616.

Star-chamber.

The Lord *William Howard*, againſt *Chriſto. Bell. Tho. Salkeld, John Dacre*, and others.

IN the Starchamber, in a cauſe betweene the Lord William Howard plaintife, and Chriſtopher Bell, Thomas Salkeld, Iohn Dacre, and other defendants. It was holden by my Lord Coke, and my ſelfe, that the Tenants of the mannor of Gilſeland clayming tenant right, and being now impeached by the plaintife, being Lord of the Mannor, who ſuppoſeth their eſtates to be void in law, that they might all joyne together in quiet and peaceable manner, to defend the Cauſe, being common to them all ; and therefore though ſome particular perſons were ſued, yet they might defend the ſuit upon their common Charge. And the reaſon was, that ſince the title was one againſt all, it was in effect but one

defence, and one defendant, for the triall in one mans caſe tryed all. And therefore the Courts of Iuſtice doe every day deny them to be witneſſes one for another in ſuch generall caſes, as in caſes of common *Modus Decimandi*, and the like, wherein it is many times ordered for avoiding of unneceſſary multiplicity of ſuits; that a triall be had in one mans caſe for all. Now as they are acknowledged parties to their prejudice in defence, ſo it is in reaſon that they be in like manner allowed for their advantage. And ſo it was ſaid, that it had been ruled in that Court before in the caſe of the L. Grey of Groby. Yet the L. Chancellor ſeemd to be of a contary mind, and cited a preſident in 8 El. to that purpoſe But yet in this cauſe it was agreed, that they muſt not joyne themſelves together by Oath, which was in the caſe ſuſpected, but not ſufficiently proved. But Bell being a tenant was fined a 100 pounds for aſſembling the tenants to the number of 200 in an open field, where Leonard Dacres had beene in open rebellion, and fought a battell with the Q. forces, divers of the tenants being weaponed with ſwords and daggers, abiding 3 hours together, & yet nothing was provedd one there by any of the defendants, but conference concerning the defence of their title by promiſe and writing, and contribution of money to that purpoſe. And Hodſon another tenant was alſo puniſhed for being preſent at that aſſembly, and the event of ſuch aſſembly is in no mans power to moderate. And Salkeld and Dacre were fined a 100l a man, becauſe that being no tenants, nor any way intereſſed in the cauſe or title, and being men of ſtrength and countenance, they did thruſt themſelves by way of maintenance into it, warranting the title, ſtirring the people to perſiſt in it to give occaſion of ſuits, where perhaps elſe the cauſe had beene ended by way of agreement withall, as it hath done with many. But Salkeld and Dacre were not of the aſſembly, neither did it certainly appeare that they were acquainted with all. And Mich. 14. Jac. Barkſhire in a caſe betweene Edmund Dunch Eſquire plaintife, and Banneſter and others defendants, where the queſtion was betweene the plaintifes and the defendants, tenants of the Lord Norris of Dorcheſter Manner, for a common of in effect claimed, which he denied, though the action were betweene him and one of them only, upon a particular cuſtome layed for his tenement only for neceſſity of pleading. It was reſolved by the moſt part, that they might all maintaine with their purſe. But becauſe Baniſter had threatned ſome that they ſhould loſe their copyholds for not contributing to the Lord Norris, he was fined at forty pound, and the two reſt quitted, but the Lord Chancellor differed.

Aſſemblies unlawfull.

Maintenance of a common cauſe by common perſons.

124. *Gold* Verſus *Death.* Obligation.

Checq. Chamb.

HUgh Gold brought an action of debt upon an Obligation, againſt Henry Death, executor of John Death, & the condition was, that where Gold had taken Anthony Death as an Apprentice, that if he the ſaid Anthony ſhould waſt or conſume any of his goods, and that duly proved by the confeſſion of the ſaid Anthony, or otherwiſe, that then John Death and his executors within three moneths after ſuch due proofe and notice given unto him or them ſhould render him recompence and ſatisfaction. The defendant pleads, that there was no proofe made, &c. The plaintife replyes, there came to the hands of his apprentice in Flemiſh money to the value of 3000 pounds of his, whereof the apprentice imbeziled and waſted as much as came to 400 pound, and that he confeſſed it, and by a writing under his hand did acknowledge and confeſſe it. And that he gave notice of it to the ſaid Henry Death, and he did not make him recompence within three moneths, whereupon the defendant demurred. And now upon a writ of error in the Exchequer Chamber the judgement was agreed to be confirmed; for though the word [proofe] put generally, ſhall be underſtood by law ſuch a proofe as is legall, *ſcil.* proofe by Jury, yet when the party expreſſeth to meane and allow another forme of proofe, that ſhall prevaile againſt that that is but inſtruction of law. And here it is referred to the diſcretion of the party which ſhall be underſtood a confeſſion voluntary according to the common acceptation, and not a confeſſion in Court of Record. Alſo, though it be not ſaid to whom he made the confeſſion in the replication, yet by the greater opinion it was holden good enough, becauſe it anſwered the words of the condition. And yet it is not like *Halfepennies* caſe of agreement or diſagreement to an intereſt which was made to a party intereſſed.

Action of debt upon an obligation.

Paroll [proof] how to be taken.

Yet afterwards it was found and moved by Henneage Finch of Counſell with the plaintife, that the notice was laid to be given to Henry Death, which was the executor. And it did no where appeare that John Death the teſtator was dead at the time of the notice, which was a neceſſary part of the condition. And therefore the judgement was reverſed.

125. *Moore* Verſus *Huſſey, & al.* Raviſhment.

FRancis More plaintife, againſt James Huſſey Doctor of Law, and Katherine his wife, Robert Wakeman, and John Woodford, and Cutberd Clifford defendants, and counts that where Raph Herniold held of the late Queene in chiefe, and dyed in the thirtieth yeare of the Queene, leaving Iohn Herniold his ſonne and heire of two yeares of age, and

The raviſhment of a ward.

and that the Queene *Anno* 32 *Regni ſui* did grant the wardſhip to the plaintife.

The defendants *An.* 3. Iac. did raviſh and take away the ſaid ward to his damage of 2000 pounds. The defendants pleade not guilty, and are all found guilty ſaving Iames Huſſey, and Cutberd Clifford in 10 pound damages and 10 ſhillings coſts. And the Iury further finde, that the ward is married, and was at the time of the marriage 16 yeares old and more, and under 21, and that his marriage was worth eight hundred pounds.

Now this Terme (ſcil.) Paſch. 14. Iac. this caſe was argued by all the Iudges of the Common Pleas, after divers arguments at the barre, and the queſtions were made two.

Firſt, whether the wife of Doctor Huſſey being a woman covert and found guilty, and her husband not guilty, be within the ſtat. of Weſtm. 2 cap. 35 or not, and her husband to pay the value and damages for her.

Secondly, whether the verdict finding that the ward was married (without certainty by whom) be ſufficient to charge the defendants or any of them with the value of the mariage.

But (as I ſaid) the queſtion in groſſe is but one, whether the ſtatute ſhall be made in the whole eluſory or not. For to leave all women covert at large, who are both moſt cunning & vigilant, and have moſt opportunity to make theſe matches for their daughters or friends, and nextly, to put the gardiant after raviſhment to hunt out who married the ward, or elſe to faile of his value, is utterly to fruſtrate the law.

Now to the firſt point, the woman is plainly within the words, but where there are two exceptions to exempt her in meaning. Firſt, becauſe ſhe is a woman covert, the other becauſe the ſtatute inflicts abjuration or perpetuall impriſonment, in caſe the Raviſher cannot ſatisfie for the mariage. But here it is ſaid that the woman is under a neceſſary diſability in law to ſatisfie, and therefore as being out of the meaning ſhall not be puniſhed (for not ſatisfying) with impriſonment or abjuration.

Now to the firſt part it is certified, that a woman covert was at the common law ſubject to an action of treſpaſſe for taking away a ward, as ſhe was for any other action of treſpaſſe, and to be impriſoned for the Kings fine, and her husband anſwerable with her for the damage. And he that obſerves well this ſtatute ſhall eaſily perceive, that it hath two aſpects, one civill, another criminall. For it provides that the executor ſhall anſwer for the value, *ſed non quoad pœnam priſonæ, quia quis pro alieno facto non eſt puniendus*, which holds alſo for the husband and wife, that he ſhall anſwer the damages, not the puniſhment of immediate impriſonment, that is upon a writ of execution, for the damages and value, he ſhall as in the other treſpaſſes, for if they made the executor (which is but a civill repreſentation of the ſame perſon) anſwerable, much more the husband, which is one by law of nature.

Now

Now the action of the common law was in effect and ſubſtance the ſame that is now, only it hath received ſome additions, and ſome more diſtinct forme of proceeding then was before.

The writ of the common law was, *Quare filium & har. (cujus maritagium ad ipſum pertinebat*, and ſometime without this clauſe) *ceperunt abduxerunt & maritaverunt*, without ſaying within age; and judged good, for it is a guard naturall, not legall, 32 E.3. Fitz gard.32. & Fitz. N.br.91.& 1.43. & Regiſter 98.& 99. And the like for the Gardian at common law by the word of *rapuit & abduxit* it appeares, 29 E.3.37. & 29. aſſ. 35. *By* which bookes and 12 H. 4.16. it is agreed that both the father and the guardian ſhall recover in damage for the value of the mariage.

The offence heretofore and the fact is the ſame in the very word *rapuit* in the ſtat. that was at the common law, and the reſtitution the ſame in effect by diſtinct valuation of the marriage that was before given confuſedly in the damage.

The matter is farre from the ſame, that if a man recover in the treſpaſſe at the common law, it ſhall barre him in a writ of raviſhment, *& contra*, as in treſpaſſe of battery and appeale of *Mayhem*, and in common treſpaſſe upon the ſtatute of 5 *R.* 2, or 8 H. 6: or *malefactoribus in parvis.*

Againe, the writ upon this ſtatute hath not eſtranged the writ at common law, but participates. And therefore 17 E.3.73. and 22 Rich. 2. Fitz. damage ought to be given in a writ of raviſhment, becauſe the ſtatute gives none but only the body and value of mariage. It is anſwered and reſolved by the Court, that it was uſuall. And that the damage was by the common law, and the mariage by the ſtatute, and reaſon it was to joyne them ſo.

And it was further ſaid, that it was not the like reaſon betweene the Formedon in Deſcender, and Mordanceſter, becauſe both theſe are in the nature of treſpaſſe.

At the common law a man ought to recover for the mariage, though he were not married, for the loſſe and hazard apparent. Alſo where a man doth arreſt his debtor, and where he might have good baile, the Sheriffe lets him eſcape being non-ſolvent, and not to be had againe, the Iury are to give damage for the whole debt in effect; for though the debt remaine in law, yet it is loſt in effect, and the Guardian at the common law could not have a new treſpaſſe without a new taking, and he could not have a conditionall verdict after hapning, as that ſtatute hath provided. And therefore now the damages are diſtinguiſht *ut in ſectis laboribus dilationibus & expenſis*, as the Preſidents go, *ultra valorem*, which are confuſed to all before at common law.

The offence of raviſhment then being not ſufficiently provided for, and reſtrained by common law, as was perceived, ſtatutes were made

for other puniſhment of this plagiary offence or injury, being much greater then the wrong in other creatures, in as much as the body of man is more honourable and of greater price, and was in ancient times uſed by Lords, as now it is by the Kings Committees for advancement of their own children by way of mariage, or otherwiſe.

Thereupon by the ſtatute of Merton, c. 6. it was provided for Wards under 14. *contra pacem vi abductis vel detentis ſeu maritatis, quicunque laicus inde convictus fuerit qui puerum aliquem ſic detinuerit abduxerit vel maritaverit, reddat perdenti valorem Maritagii, & pro delicto corpus ejus capiatur & impriſonetur donec perdenti emendaverit delictum ſi puer maritatur.* Here it is, *ſi puerum maritaverit*, which expounds the other ſtatute. And then W. 1. cap. 22. confirmes this ſtatute in generall.

This ſtatute was not found full enough to give remedy, and therefore the ſtatute in queſtion was made, which might well be ſaid to be made by men unlearned, for indeed it was the intereſt and heat of Lords for the generall abuſe that begat it, for the act being in his nature a treſpaſſe and an act of force, yet it is not made *vi & armis*. And therefore 7 H. 4. 9. the Count *vi & armis* was rejected.

Nextly, the nature of treſpaſſe being to end in damage, this recovers the body it ſelfe, and yet not by demand, but by commandement to the Sheriffe to take and ſequeſter the body, and then by judgement giving it to the plaintife if it will be for him. Againe, where all treſpaſſes dye with the perſon, here the action is continued with the heire or executor, and though the heire dye in caſe of a Ward as well as raviſhment.

And therefore 24 E. 3. fo. 29. upon a reſummons in ſuch a caſe againſt the executor he pleaded pleniement adminiſter, whereupon iſſue, and yet the Ward judged to the plaintife, & 9 E. 3. 15. gard of body and land againſt three whereof one dyed during the Proclamation and reſummons againſt his heire, and though he were within age, yet judgement paſſed preſently againſt all, for it was doubted whether the heire ſhould anſwer damage.

11 H. 4. If the anceſtor have his Ward raviſht, and bring his action and dye, the heire ſhall have reſummons, but not the executor. But if the anceſtor brought not his action, the executor ſhall commence it, not the heire, for it is a Caſe out of the ſtatute. And in this caſe Hill ſayes that the makers of the law were not learned; which the *Reporter* reprooves.

This progreſſe of ſtatutes argues the care of diſtreſſe and providing certainly for remedy in caſe of death on either ſide to exempt any former offenders. And therefore it hath beene ſtill extended by equity. Therefore it is given to gardian in ſocage as the books 1 E. 3. 20. *tempore* E. 1. ff. gar. 133. Regiſter 163. by equity of the ſtatute of *Conſimili caſu*. And Fitz. Nat. br. 139. is *recto de cuſtodia* lay for them both at common law.

And

And that is yet ſtronger both 32. E. 3. fo. 31. Gard Fitz. N. Br. 142. Committee of an Orphan, by the Mayor and Aldermen of London, declaring upon the cuſtome ſhall have the writ and the Age, and nonage ſhall be limitted by them.

And 47. E. 3. F. Gard 30. the king ſhall maintaine that action. This new remedy was given in caſe of Raviſhment in *odium ſpoliatoris*.

Upon the treſpaſſe upon the ſtatute of *malefactoribus in parcis*, it is confeſſed the wife is puniſhable ſo in treſpaſſe upon the Statute of 2. R. 3. and 8. H. 8.

Of theſe, the reaſons are not becauſe the forme of the actions, and the Judgements and executions are the ſame, but becauſe the ground and the ſubſtance of the action is one, and aggravation of the offence and puniſhment is an argument, that they never meant to exempt any offendor, that was knowne in law before.

And in ſtronger Caſes, women Covert are involved amongſt others, where a new offence is created, that was not before. And therefore where the ſtatute of 34. E. 1. 6. is, that if in an Aſſize the Tenant plead joyntenancy with a Stranger, who being called in, maintaines it, and it to be found falſe, he ſhall be impriſoned a yeare, and not be delivered without a great Ranſome in 21. aſſizes p. 28. an Aſſize was brought againſt the husband, who pleaded joyntenancy with his wife by deed, and ſhee being called in, maintained it, which being found falſe, ſhe was adjudged to priſon according to that law. Yet 36. E. 3. Fitz. Na. br. Aſſ. 443. And Saunders in Ployden 364. & Hawes 4. H. 7. 11. agree upon the ſtatute of Weſtm. 2. cap. 21. That if an infant faile in an Aſſize of a Record by him pleaded, hee ſhall not be thereupon judged a diſſeiſor upon that law. And where the ſtatute of Mert. cap. 3. gives a writ of Rediſſeiſin, againſt one that being convicted of diſſeiſin, doth againe diſſeiſe the ſame perſon, that thereupon he ſhall be taken and impriſoned, till he be delivered by the King by ranſome or otherwiſe.

9. H. 4. 5. If a woman commit a diſſeiſin and be convicted, and then commits a Rediſſeiſin, and then marryes, ſhee ſhall bee charged in Rediſſeiſin and her husband named with her for conformity, but hee muſt not be charged as a principall Actor in the wrong done, no more then for a treſpaſſe done by his wife before he marryed her, yet he ſhall ſatisfie the dammages.

Now where it is in the ſecond place objected, that the womans diſability, to pay for the marriage, ſhall excuſe her of the impriſonment and exempt her out of the meaning of the law, under that rule, *Lex non cogit impoſſibilia, ſed impotentia excuſat legem.*

I anſwer. That firſt that point anſwers but one branch of the law, which is, *ſi hæredem non reſtituerit vel poſt amotionem maritaverit, abjuret regnum vel habeat perpetuam Priſonam.* But the clauſe before which is, *Si ille qui rapuit poſtmodum reſtituerit puerum maritatum, vel de maritagio*

ſatisfecerit, puniatur tamen de transgreſſione per Priſonam duorum Annorum. And then followes the other Clauſe; ſo the ſame perſons are underſtood in both caſes.

Now in the firſt Clauſe, the impriſonment ſtands abſolute, and hath no ſatisfaction required, to which a wife is unable, no more then the ſtatute of Merton, within which hee confeſſeth to be. And therefore ſhee may be contained in that, and then in the other alſo. And the text before cited I allow, but it hath no uſe for this caſe, for it is to be underſtood impotency to excuſe the law, where the impotencie is a neceſſarie or invincible diſability to performe the mandatorie part of the law, or to forbeare the Prohibitory.

Now this law and the ſcope of it, is abſolutely and directly to forbid the Raviſhment of a ward, and the reſtitution of the value, is but a proviſion by way of Condition, if the law be broken. But all lawes which be Artificiall Creatures do as well as naturall Creatures affect their own Conſervation; And therefore doe deſire and command, that they bee not violated, not that their wrong be redeemed, for as it is ſaid that *pœnitentia* is but *Tabula poſt naufragium*, ſo it may be ſaid of *Redemptio*. Now then who will ſay, that the woman is unable to obey the law, ſhee is unable to redeeme more then any other, and therefore ſhe ought tobe the more carefull, not to offend the Law, which is in her power; and the penning of the law, is as proper as it is poſſible, for it is not *de Maritagio non ſatisfecerit*, as the common forme of penning in ſuch caſes is, but *ſatisfacere non potuerit*, which is the caſe in queſtion. And therefore where perſons able have choyce, when they offend to pay or ſuffer, ſhee knowing ſhee hath no meanes to pay, did by offending voluntarily (as it were) yeeld her-ſelfe to abjuration or impriſonment.

It is true, all lawes admit certaine caſes of juſt excuſe, when they are offended in letter, and where the offendor is under neceſſitie, either of compulſion or inconvenience, or elſe where he is in ignorance invincible; or where the offence is by a meere misfortune, without will or purpoſe. Or where there is a meere impotencie, to doe that is required.

By compulſion. As in the caſe of Lucretia, with young Tarquine, of whom Saint Auſtine ſayes, *Duo fuerunt, & unus Commiſit Adulterium*, and thereupon he makes the *Dilemma: ſi caſta, quare trucidata; ſin minus, quare laudata?*

Neceſſitie of avoyding greater inconvenience, is where one kills a Theefe or a Burglar, in defence of his perſon or houſe, 22. aſſ. the binding and beating of a perſon Lunatique, removing of a perſon Leprous.

In ignorance, as in caſe of Jacob and Leah; ſuch is the excuſe of a deed, read amiſſe to him that cannot read, or reported to him that is blind.

Lunacie in him that kills a man.

Of impotencie, as in the caſe of Mephiboſheth, accuſed by Ziba his ſervant

ſervant to David, and by himſelfe excuſed by his impotency and foule Action, and an unjuſt judgement of David towards him, *Feſtinatio juſticiæ noverca Infortun. notor.*

In all which caſes, there is a juſt excuſe of the law, not performed by them, the diſtinction from the principall Caſe appeares cleare, but the principall falls upon the rule, *Qui non habet in ære, luat in corpore, ne quid peccetur impune.*

Upon the ſtatute of Weſtm. 1. cap. 11. whereby it is enacted, that if a man raviſh a woman, hee ſhall bee puniſhed with two yeares impriſonment, and fined at the Kings will. And if hee have not wherewith to be fined, to be puniſhed by longer impriſonment. Will any man doubt if a Monk, which hath no ſubſtance commit a Rape, but that hee ſhall nevertheleſſe, ſuffer impriſonment.

So upon the ſtat. of Weſtm. 1. cap. 20. *de Malefactoribus in parcis*, it is enacted, that if any be Attainted at the ſuit of the party, he ſhall bee fined, if he have wherewith; if not, he ſhall be impriſoned and find ſurety no more to offend.

The ſtat. *quinto Eliz.* If any perſon forge &c. Hee ſhall pay double Coſts & dammages to the party grieved, & ſuffer the Corporall puniſhments, ſhall none be puniſhed, except he can doe both. Indeed the husband ſhall not upon indictment of his wife, for that is meerely in a Criminall, and the husband not party to it, as he is to ſome actions.

5. E. 2. If any perſon be convicted of perjury he ſhall forfeit 40. pound, and if he have not goods and Chattells, or lands to the value, then to be impriſoned by a yeare. If the perjury had beene *Vice verſa*, the perſon ſhall be impriſoned, except he pay 40. pound, or ſuch as are able ſhall pay money, ſuch as are not able ſhall be impriſoned; could there have beene any doubt? and this is as much. It had beene Colour if it had beene thus: ſuch as will not pay for the fault, here it is in her power, as the ſtat. ſpeakes purpoſedly, not in her will.

16. aſſ. 6. The wife impriſoned by force, 9. H. 4. 6. And upon the ſtat. 1. Eliz. againſt hearing of Maſſes 2. Eliz. Dyer 203. the judgement and ſtatute is, that the Offender ſhall forfeit an hundred markes, and if he pay it not within ſix moneths, then to be impriſoned; It was never doubted, but to extend to women Covert; So it is in that Booke.

And 1. Eliz. cap. 2. every perſon fayling to goe to Church, was enacted to forfeit 12. pence a Sunday to be levied by the Church-wardens, for the reliefe of the poore, of the goods, lands, and Tenements of ſuch Offendors by diſtreſſe. This extended to women Covert.

Then 23. Eliz. the 20. pound a moneth was given for this, and if they were not able, or failed to pay, then to be impriſoned till they paid.

The woman Covert is within the ſtatute. Foſters caſe. Co. lib. 11. fo. 61.

And 7. E. 3. 11. I hold to be a caſe in the point; and brought a writ of Raviſhment againſt the Maſter of Burton Lazar and two confreres,

which were dead perſons in law. Theſe two confreres, were apparently to the Court as unable as a woman Covert, yet there was no challenge, they were not within the ſtatute, but exception was taken to the Clauſe of the writ, commanding the Sheriffe to have the body to render, to which or the plaintife, or defendant he did belong, whereas to the Confreres he could not belong; which was excuſed, that the forme of the writ, was determinate by the ſtatute, and added that in a ſort they might ſeeme a little intereſſed in the behalfe of the Hoſpitall. And if the plaintife were barred, the ward ſhould not be adjudged to the defendants. And if the Maſter had joyned his confreres with him, in an action of Raviſhment, it had abated, for they cannot demand without intereſt.

And 14. H. 6. 17. A writ of Raviſhment, is brought againſt a husband and wife and admitted, and other matter pleaded in barre.

And if in this caſe Doctor Huſſey, had beene found guilty with his wife, no doubt they ſhould both have beene condemned; And yet for her ſingle perſon, the cauſe had beene the ſame that now it is, that ſhee could not by her ſelfe ſatisfie, yet ſhe ſhould have beene impriſoned, except her husband had ſatisfied. Et Co. lib. 5. 14. Entries caſe of Annuity recovered againſt a perſon, by conſent and aide of Patron and Ordinary.

Statutes that are made in imitation, or ſupply of common law, ſhall be expounded according to the law, and ſuch a ſtatute is this. And if a woman ſole raviſh and then marry, the reaſon is all one, for there the fact is the wives, and muſt be ſo laid on her alone, and not upon her husband; And therefore in that caſe, if the husband pay not the value, ſhee muſt be impriſoned. But it ſeemeth that the value of the marriage being found, the husband muſt anſwer it, and ſo it is out of the caſe of the ſtatute, and not like the principall, for the husband ſatisfies, yet the words are *ſi ille qui rapuit de Maritagio ſatisfacere non potuerit.*

Now to the caſe 23. E. 3. F. *Corone* 276. that a Monke or a woman Covert being appealed maliciouſly and found not guilty, ſhall yet have no dammage nor inquiry againſt the Appellor. The words of the law Weſtm. 2. cap. 23. are, that the perſon appealed ſhall have dammages, now they can have none, there is no incapacitie indeed in the very point, yet a woman may take any thing to the benefit of her husband. The words are that the party appealed, ſhall have damages for his impriſonment and infamy, which reach both to a woman Covert, and for the like ſhe with her husband, and ſhe alone after his death ſhall have action, and the dammages recovered by and for her, and therefore that caſe may endure queſtion.

The woman may take any thing to the benefit of her husband.

And it is of no waight, that is ſaid, that where bookes of 8. E. 3. 52. and 22. R. 2. doe inquire of the ſufficiencie of the defendants, which cannot be in this caſe, becauſe the woman Covert appeares to the law inſufficient; For therefore that point of inquiry is ſaved, and the judge-

ment

ment peremptory upon the other. And ſo though the ſtat. of Weſtm. 2. cap. 13. give an Appellor damages, you muſt not inferre thereof, that an appeale cannot be had, but where the appellor may have damage for the contrary thereof 22 E. 3. Corone 276 *Quære* of the precedent judgement againſt husband and wife *quod capiantur*.

As to the ſecond great point whether the verdict be ſufficient or not, I make two queſtions of it. 2 great point.

Firſt, whether the raviſher ſhall be anſwerable for the value of the marriage, though he were not the author of the marriage, but ſome other without his act or conſent, or the Ward of his owne will marry himſelfe, for if the law be ſo, then is there no warrant in the verdict.

The ſecond, ſuppoſing that he be not anſwerable, except he were Author of it, whether the verdict as it is, ſhall be taken ſo by intendment. Verdict taken by intendment

To the firſt. At the common law, and before the ſtatute of Gloceſter, cap. 1. If a man were diſſeiſed by A, and B infeoffed C, or were diſſeiſed by him, A. had no remedy for damages againſt the Feoffee, or diſſeiſor of his diſſeiſor, but was to bring his aſſize againſt B which was the immediate diſſeiſor, and therein he was to recover the meane profits by way of damage, nor only for his owne time, but alſo for the profit received by the feoffee. To the firſt queſtion.

And likewiſe if a firſt diſſeiſee had reentred whereby he had loſt his aſſize, he might by an action of treſpaſſe *vi & armis* brought againſt his diſſeiſor, recover the meane profits for all the meane poſſeſſions, and neither at the common law nor now can he recover upon his reentry damages againſt the feoffee, leſſee, or ſecond diſſeiſor, by action of treſpaſſe *vi & armis*, as to them who did no immediate treſpaſſe, for that fits not this caſe.

And therein the common law doth no wrong to charge the firſt diſſeiſor for the profits not received by him, becauſe the firſt diſſeiſee had no remedy for them againſt the ſecond diſſeiſor, or was ſuppoſed to have received ſatisfaction at the hands of the feoffee or leſſee, and ſo paid but where he received.

But now the reaſon is cleere of either in the caſe in queſtion, for the raviſher of a Ward by his raviſhment gaines no intereſt in the body or cuſtody of the Ward, neither doth the true Guardian loſe his poſſeſsion by the raviſhment. And therefore if my tenant by Engliſh ſervice dye, his heire within age, I am preſently in the poſſeſsion of the body without ſeiſure; and in this caſe, if another take away the Ward from the raviſher, and marry him, the firſt raviſher can have no action againſt the ſecond, but the very gardian may have action againſt them both for ſeverall raviſhments, 8 E. 3. 52. where it is ſaid that one raviſhed, and a woman knowing of it did marry him, and they were all charged with the value; for of the perſon of a man there can be no poſſeſsion without

a right. And therefore Littleton in his chapter of confirmation ſayes, that if a man take my villaine in groſſe, and I confirme his eſtate in his villaine, the confirmation is void; but I may give him by words *Dedi & conceſſi* to him that took him away or to any other notwithſtanding ſuch wrongfull taking away of him; which will be cleane contrary to the taking away of my Beaſt or any other like thing.

And this by law of nature, by which all men are free, and cannot be brought under the dominion of any, but according to *jus gentium, viz.* in caſe of captivity, from which our villenage came. And the confeſsion in court of Record is not ſo much a creation as it is in ſuppoſall of law a *deliberation* declaration of rightfull villenage, before, as a confeſsion of other actions; though it is true that Littleton ſayes, that it ſhall not binde his iſſue borne before, becauſe the favour of liberty gives them leave to juſtifie. They were called *ſervi* not *a ſerviendo*, but *a ſervando*.

But all this notwithſtanding I am cleare of opinion, that if one raviſh my ward and take him out of my poſſeſsion by wrong, & after that another takes him from him, and marries him, or he marries himſelfe during his nonage; That in this caſe I ſhall or may by a writ of raviſhment of ward brought againſt my firſt raviſhor recover not only damages for the taking of him away, but alſo the value of the mariage. And this is to be maintained by reaſon and authority of bookes.

By reaſon: for he that obſerves well the nature of the caſe muſt confeſſe, that if the value be not given againſt the raviſher for the marriage hapning after (howſoever and by whomſoever) he ſhall make the law eluſory in point of marriage, for there is no creature ſo moveable, ſo eaſily and cloſely to be conveyed and kept as man, ſo as he may be toſſed from man to man to a hundred in a ſhort time, his marriage may be clandeſtine out of the Church, and yet ſuch and ſo many at it, and ſo covertly handled, that it ſhall not be poſsible to aſsigne the certaine perſon that was the author of the marriage, or elſe that offence may be aſsigned to him that is unable to anſwer the value. As in the caſe of a woman covert, if her husband were not anſwerable as before. And the raviſher hath no wrong if he be made to anſwer the value of the marriage, though he had it not, for the true gardian loſt it by his meanes. And I doe not regard what the wrong-doer gaines by his wrong, but what the owner loſeth by it, when the law runnes to repaire the wrong. For if the ſtatute of Weſtm. cap. 2. ſay well, *Caveat emptor qui ignorare non debuit quod jus alienum emit*, much better may it be ſaid, *Reſpondeat raptor qui ignorare non potuit quod populum alienum abduxit*. And this is the juſt uſe of law in *odium ſpoliatoris*. For preſidents, in books of Entrie, in bookes of Law, though ſometimes the Queſtion to the Jury in raviſhment of Ward be by whom he was married, which cannot be but well, as old book of Entries in raviſhment 11. 17. & 18. the book 33 E. 5. ff. Judgement 251. found marriage, but no value,

nor

nor by whom marryed, and ſo no judgement could be given for the value, but for the damages only; yet the more bookes and preſidents by much are married, or not, generally, without asking by whom. And the anſwer of the Jury in moſt caſes is, that they know not whether married or not yet, and therefore they make their verdict conditionally, if married, as much for the mariage beſides damages, if not married the body, and ſo much for damages only. And ſo the judgement is conditionall both for the body and the damages. And if the Sheriffe returne that he is married, then the plaintife ſhall have a *ſcire fac.* for the value of the marriage, 33 Hen.8. 6. & 45 E. 3. 16. & 9. H.6.61. Babington asketh the Jury whether the Ward were married generally, they anſwer, they know not whether married, or not, yet the verdict is made conditionall, ſo much for the value if he be maried, generally without ſaying by whom.

Note in this caſe where there is no marriage found, and yet the verdict gives the value if he be married, or ſhall be married before he can come to the body unmarried, it followes that this muſt extend to marriage by whomſoever. To the ſame effect is 21 E. 3. 44 & 19 E. 3. ff. judgement 123. & 19 E.3. Fitz. judgement 112. & 17. E.3.ff. judgement 16. 26 E.3.24. Coke lib.ent. pl.8.fo. *ultimo* in raviſhment.

All thoſe bookes and preſidents are of marriage found generally, not ſaying by whom,

If a Ward be married within age and a writ of right be brought, the defendant anſwers that he is come to age, hanging the writ that is to demand the body as his Ward. But if it were a writ of raviſhment of ward, it would be otherwiſe, 9 E.4.50. 37 H.6,7.& 24 E.2.49. And the old book of Entries warden raviſhment 18. enquires where the Ward were married, or come to full age, as inferring, that though he were not married, yet if during the raviſhment he were come to full age, the raviſher ſhould anſwer the value, becauſe the gardian could not now have his marriage.

Alſo Coke, lib, Intr. raviſhment ult. the raviſher was condemned in the value, when the Ward dyed unmarried and within age after the raviſhment, for the gardian loſt the marriage. But note the ſtat. of Weſtm. in that caſe may grow by force of the Stat.

Another point is, that if the Gardian gets the poſſeſſion of his Ward againe unmarried after the raviſhment, he may have damages for the taking, but he ſhall not have the value againſt him upon the raviſhment: The reaſon is plaine, and for that ſee 27 H.6. gard. fo.118. which is the old preſident booke of Entries, gard. tit. raviſhment pl. 12. and the old book of Entries, gard. in raviſhment 11. where the Jury finde *inter alia*, that the gardian could never have the poſſeſsion of the Ward after the raviſhment.

But touching the principall point how a raviſher ſhall be charged

with the value though another marry the Ward, the two great caſes relyed upon, and by me by way of diſtinction were 8 E. 3. 32. & 8 E. 4. 45. whereof the firſt is: one brought a writ of raviſhment againſt foure men and a woman, they all plead not guilty, and the Jury finde that the foure men raviſht the Ward and not the woman. But they finde withall, that the woman knowing of the raviſhment did marry him to her daughter, and the Court condemned them all in the value; whereof the conſequence muſt be, that though her marriage by her might be holden of it ſelfe a raviſhment, and ſo they are all guilty of ſeverall raviſhments, yet they could not have beene condemned in the value, being no parties to the marriage, but that they were made lyable becauſe the marriage was made whileſt the reſt ſtood deforceors and raviſhers.

And note that the ſtatute brands the raviſher with the title *cujus extitit malæ fidei poſſeſſor.*

But the other caſe 8 E. 3. 45. was, that one brought a writ of ward againſt Alice, and demands R. ſonne and heire of I. as his ward; Alice came in, and ſhe ſaid, that ſhe claimed nothing in the Ward but nurture, and now in the Court ſhe tendred him to the plaintife, who refuſed him becauſe he was married by her; ſhe anſwered he was not married by her, the other replyed, that he was married in her gard, after ſhe became deforceor, for which time ſhe was to anſwer. Unto which it was ſaid for her, that in as much as ſhe came lawfully to the poſſeſſion of the Ward, and did tender him the firſt day, ſhe could not be counted a deforceor, and ſo ſhe was not amerced. But there was judgement by agreement that ſhe ſhould leave the Ward and have 20 pound, for here ſhe was cleane contrary *bonæ fidei poſſeſſor*, and therefore was not to anſwer but for her owne act for her poſſeſſion, being from the beginning lawfull, and without wrong, cannot be wreſted to other mens wrongs.

Judgement pro quer. per Nichols, Winch, Warburton, and Hubbart.

And ſo in concluſion upon ſolemne and ſeverall arguments of all the foure Judges, judgement was given for the plaintife, with a full and uniforme conſent of the whole Court, Nichols, Winch, Warburton, and my ſelfe, which judgement was given and pronounced in the Court Paſch. 14. Reg. Iac. &c. and entered thus.

Ad quem diem hic venerunt tam pred. Franciſcus quàm pred. Iac. & Katherina, Robertus, Iohannes Worford & Cuthbertus per Attornatos ſuos pred. Franc. reum per & verſus pred. Iac. Katharinam, Robertum, Iohannem Woodford oſtigint. libris pro valore Maritagii pred. & damna ſua pred. ad decem libras & decem ſolidos per juratum pred. in forma pred. aſſeſſa, nec non quadraginta libr. & decem ſolid. eidem Franc. ad requiſitionem ſuam pro miſis & cuſtagiis ſuis adjudicat. Quæ quidem valor & damna in toto ſe attingunt ad oſtingent quinquaginta & unum libr. Et pred. Katherina Robertus & Iohannes Woodford capiuntur ad habendum priſonam duorum annorum juxta formam ſtatuti, &c. Et pred. Franc. in miſ. pro falſo clamore

more ſuo verſus pred. Iac. & Cuthbertum de tranſgr. & captione pred. unde pred. Iac. & Cuthbertus eant inde ſine die, &c. This judgement was reverſed in the Kings Bench onely, becauſe there were no *plegii de proſequendo* entred for the plaintife, for they took it not to be within the remedy of the ſtatute of Jeoffailes, becauſe they held it a penall law, and ſo excepted. But Haughton Juſtice, was of a contrary minde. The penalty muſt be in the certaine impriſonment for two yeares, for the raviſhment is but as treſpaſſe at the common law. This judgement reverſed in the Kings Bench.

126. *G. Digby* againſt *Martha Fitzharbert*.

GEorge Digby brings a *Quare Imped.* againſt Martha Fitzharbert, and ~~deliverts~~, that Thomas Fitzharbert Eſquire was ſeiſed of the Mannor of Marbury with the advouſon in fee, & preſented one Brown, &c. And then granted the next avoidance unto the plaintife, and now Browne is dead, &c. Martha ſayes, that Thomas Fitzharbert Knight, was long before, &c. ſeiſed of the Mannor in fee, and preſented one Murraine, and afterwards infeoffed one Richard Fitzharbert in fee ſimple, and conveyed the ſaid Mannor unto the ſaid Tho. Fitzharbert for the life of one Banford the remainder to Anthony Fitzharbert in fee, and then Murreine dyed, and Thomas Fitzharbert preſented Browne, and then granted the next avoidance unto the plaintife, and then Banford, and then Anthony Fitzharbert entred, and made his will, and gave the Mannor, &c. unto Martha for her life, and dyed, and ſhe preſented the Clerke, and traverſed without that that the ſaid Thomas Fitzharbert at the time of the grant made to the ſaid George Digby was ſeiſed of the Mannor in fee, &c. prout. &c. The plaintife replyes and maintaines his Declaration, and traverſeth without that that the ſaid Thomas Fitzharbert at the time of the grant made by him unto the plaintife, was ſeiſed of the ſaid Mannor for the terme of the life of Banford prout the defendant alleaged, and thereupon it is demurred in law. Quare imped. Declared upon ſeiſin and preſentment avoided, and the ſeiſin alſo traverſed.

The caſe in the argument I divided into foure queſtions.

The firſt queſtion, whether the defendants plea had been good without traverſe of the ſeiſin in fee. 1

Whether the defendant have no election either to traverſe or not, but to leave it as a confeſſion and avoidance, and then to traverſe had come aptly, as it is on the other ſide. 2

Whether the now defendant having taken a traverſe, hath not ſo locked up the plaintife as he hath no choice but to joyne upon that to avoid infinity. 3

Laſtly, whether if the plaintife hath power to reſort to traverſe the defendants inducements to his traverſe, yet he hath taken that traverſe right, or ought to have given it more ſcope by a *modo & forma*. 4

To the firſt point. To the firſt, 26 H.8 4. by the opinion of Fitzharbert, as that upon ſuch a count of ſeiſin in fee, &c. in a *Quare Imped.* againſt Prior the defendant pleaded a grant to the plaintife of a Prochein avoidance, the defendant needs not traverſe the ſeiſin in fee, becauſe it was a confeſſion and avoidance, *Quod nullus negavit*, which is leſſe then *conceſſum* only, *qui tacet conſentire videtur.*

It is true that Brook makes a *mirum* of it in the abridgement of it, & 284, it is to the ſame purpoſe thus.

In an aſſize if the defendant pleade that I. S. was ſeized in fee and infeoffed him upon whom hee entered, without a traverſe as being confeſſed and avoyded.

And therefore I incline to hold the opinion of Fitzharbert, 28. H. 4. for law, becauſe that a preſentment executed without more doth make a fee, and therefore the defendant ſhewes that the preſentment was ſuch as neither made nor proved fee, it is a confeſſion and avoidance ſufficient.

For a preſentment is indifferent and workes as the note is from whence it growes. As for example, here in the plaintife it is the fruit of an eſtate in fee, and ſo ſettles and proves a fee ſimple in the plaintife, or in Thomas Fitzharbert that granted the next avoidance to him; but as the defendant makes the caſe now, the ſame preſentment neither gave nor proved the fee ſimple in Thomas Fitzharbert, but was under his title for the life of Bunford, and after made for the right of the defendant, according to the eſtates xv li. H. 8.ff. Qua. Imp. 77. the plaintife in Quare Imped. declared that his anceſtors were ſeiſed in fee of the Mannor, to which, &c. and preſented V. which brought the Mannor to himſelfe. The defendant ſaid, that long after that he was ſeiſed of the advouſon in fee and preſented, and now preſented againe, and holden good clearely without traverſing the appendancy, for this latter preſentment hath confeſſed and avoided the appendency.

And now upon that I hold, that if the defendant had not joyned the traverſe to his plea, that his plea had been good, and the plaintife might properly have made the traverſe that he makes, for the traverſe had fallen properly to his turne upon affirmative plea of the defendant, his traverſe being prevented by the defendants traverſe.

2 Point. But now to the ſecond point. As I incline that the plea of the defendant might have ſtood without traverſe, ſo I am cleare of opinion that the traverſe ſo added by the defendant is better and more ſure then the other part of the plea without the traverſe would have beene. And note that in 26 H.8. doth not ſay in that caſe that he might not traverſe, but ne beſoigne he needeth not.

Now for this know that though it be true that a preſentation may make a fee without more, that you never have a declaration in a Quare Imped. that the plaintife did preſent the laſt Incumbent without more,

but

but you declare that the plaintife was ſeiſed in Fee and preſented, or elſe lay the fee ſimple in ſome other, and then bring downe the Advowſon to the plaintife, either in fee or ſome other eſtate, and ſo are both 26. H. 8. 40. & 15. H. 7. *Quare Imp.* 71. before recited. The reaſon thereof is. That a Preſentment in the plaintife is *militant* and indifferent, and may be in ſuch a title, as may prove that new avoydance is the defendants, and therefore you muſt lay the caſe ſo as by the title you make the preſentation paſt joyned to the title prove this preſentation is yours too. Why then obſerve, there is in this declaration two points materiall *ſcil.* a ſeiſin in fee and a Preſentation. To the preſentation the defendant hath given anſwer by confeſſion and avoidance, but to the ſeiſin in fee hath given no anſwer, but argumentally by two Affirmatives one againſt another, and therefore the traverſe to that is good, and without it, it is but *reſponſum dimidiatum*, and yet it is true that as well the Preſentation, as the ſeiſin in fee, is to be anſwered for the Cauſe aforeſaid.

The cauſe that moved mee a little to doubt was, that I. S. ſeiſed of an Advouſon and I. D. uſurps upon him, now he hath gained the fee, and when the advowſon next avoids againe, the preſentation is his. Now if I. D. declare in his *Quare Imped.* upon his ſeiſin in fee time of his former Avoidance which he uſurpes, that is falſe, and ſo the defendant, I. S. may by ſuch an indictment as is here, traverſe his ſeiſin in fee and trice him and yet he hath the right.

To this I anſwer, that to this ſpeciall caſe, he muſt declare according to his *Leaſe*, caſe, and to the truth, and not to the common forme, That is; hee ſhall declare that I. S. was ſeiſed in fee that the Church voided and he preſented, and now it is void againe. As Fitz. N. B. 33. if one recover an advowſon by a writ of right, he ſhall lay the laſt preſentation in the perſon againſt whom he recovered. So when a Patron ſues a *Quare Imped.* upon a preſentation diſallowed. Now the caſe put by my brother Walberton, out of 3. H. 4. and 14. H. 6. 16. they are avoyded, and then he cannot adde a traverſe, which makes a difference, for the confeſſion and avoydance, was but to part.

Now the caſes of late reſolutions are for mee, *Scilicet* 14. Eliz. Dyer 312. & 18 & 28. Eliz. 365. Leakes caſe, which is much ſtronger, then when a man having pleaded himſelfe ſeiſed, in fee of a cloſe adjoyning upon, the point of treſpaſſe for default of the other, was allowed to traverſe the ſeiſin in fee, and yet in any leſſe eſtate would have licenſed, to put his beaſts into the Cloſe adjoyning, but becauſe he tooke upon him to plead his owne eſtate, eſpecially, he gives Advantage to his adverſary, and the caſe we judged lately betweene Norman and More ſup. 131. which alſo had beene formerly adjudged in that very point, proves that Traverſe may well be allowed, when the plaintife was before confeſſed and avoyded, much more before the point traverſed, was no whit touched or confeſſed.

3. point. Now to the third point, I hold it cleare, for the rule muſt ſtand undoubted *Actio Incumbentis probabilior, & melior eſt Conditio poſſidentis*, for if you will recover any thing from mee, it is not enough for you to deſtroy my title, but you muſt prove yours better then mine.

Why then take the uſe of 27. H. 8. 2. which is, that if one plead a falſe Plea, and his adverſary traverſe that with an Inducement, which alſo is falſe, yet he ſhall have advantage of his traverſe. The caſe is there which is alſo in 15. H. 7. 2. in treſpaſſe, the defendant pleads, that the plaintiffe ſeiſed of I. S. and brings that terme to himſelfe by Aſſignement. The plaintiſe cannot traverſe the Aſſignement, and if he doe, and if it paſſe for him, he ſhall have judgement, and yet in this caſe, if the plaintiſe convey himſelfe to his owne Leaſe by ſurrender, now hee ſhall traverſe the maine Aſſignement, and have advantage of it, being the firſt falſity. Now ſhall the defendant in that caſe come againe, to have that traverſe the ſurrender? I hold clearely no, for that were infinite; and ſo I hold in the caſes cited before *ſcili.* 14. Eliz. & 21. Eliz. and ſay in this booke 131 that there could not be traverſe upon traverſe.

7. E. 4. 6. aſſ. The defendant pleaded, that I. S. enfeoffed himſelfe after recovery *abſq; hoc* that the defendant hath his eſtate, now the defendant cannot traverſe the feoffement to the plaintife.

Yet note in the Caſes 27. H. 8. 2. If the defendant had pleaded not guilty, the iſſue ſhould have beene found for him; Therefore let a man take heed in pleading, for if he have the generall iſſue, and plead falſely or unadviſedly, the other party ſhall have his fit replies or to the plaintife, and caſe as it appeares without reſpect to that that might have beene pleaded better.

And note that there are generall iſſues, that need no inducement as not guiltie; *Nihil debet ne diſturbapas*, which is the Ordinary Plea in theſe caſes. But if a man will leave the generall iſſues and controvert the title, he muſt enable himſelfe, by ſome title of his owne to doe it, but yet that is not the principall part of his Plea, but formall inducement only, & there is no ſenſe if you will quarrell my poſſeſſion & I void the title effectually (and that with a title of my owne) that you ſhall fly my title, or forſake your owne; for you muſt recover by your owne ſtrength, and not by my weakneſſe.

So I ſay regularly, that whenſoever a Traverſe is taken apart and materiall to the plaintifes title, the plaintife is bound to doe it, and cannot for the ſame thing leave it, and force the defendant, and force another Traverſe tenderd by him, and there is no caſe in the law againſt this rule as I ſay it.

The caſes 20. E. 4. 2. 12. E. 4. 6. 2. R. 3. 9. are agreed, and the law and reaſon cleare. So if a man bring an Action of treſpaſſe, for breaking his cloſe on a certaine day, if the defendant plead a Releaſe of Actions, hee ſhall traverſe all treſpaſſes after. If a feoffement, hee ſhall traverſe all treſ-

paſſes

paſſes before; If a licence for once, all before and after. Now hath the plaintife choice to leave to traverſe, and traverſe the point of Juſtification, *ſcil.* the Releaſe Feoffement or licenſe, and may alleage a treſpas before or after, and ſo joyne upon the treſpas offered. This is indeed a Traverſe after a Traverſe, but it is not a Traverſe upon a Traverſe, to the ſelfe ſame point, as I gave my rule, and as the caſe is here to one and the ſame preſentation. For now note, when a man brings an action of treſpaſſe, for breaking of his Cloſe one day, and he may maintaine this action by any one, or mo treſpaſſes before his Action brought, which is the cauſe, that though the defendants juſtified for all that day, yet hee muſt traverſe before or after, ſo now the treſpaſſe juſtified is one, and that traverſe is another. Now if the plaintife traverſe the point of juſtification, that is to one treſpaſſe, and is no treſpaſſe upon a traverſe. If he doe aſſigne treſpaſſe with the time of the traverſe, to joyne upon the Traverſe, tendered according to my rule, it varies not in that point, from the firſt traverſe, ſee how cleare this is.

The other caſe objected is long 5. E. 4. 10. as it is well Collected in the end of the caſe by Danby. A man brings an action of waſte, for felling of trees, and layes that the leſſee felled and ſold them, the defendant confeſſes that he felled them, but ſaith, that hee beſtowed them in repairing the houſe *abſque hoc* that hee ſold them. The plaintife may reply, that he imployed them to reparations; and this indeed is directly to the ſame thing, and traverſe upon traverſe. But this I affirme clearely by another Caution of my rule, that this firſt traverſe was not materiall, nor to a point materiall, for the plaintife might have declared of the felling onely, and the other point was meere ſurpluſage. And therefore though perhaps the plaintife was joyned upon it, & it had beene found for him, he ſhould have had judgement, yet clearely hee was not bound to the Plea, as not finall to the action, and therefore clearely in that caſe, the plaintife might have demurred upon the defendants Plea, as reſting upon a thing not materiall at all, in which reſpect it differs clearly from the principall caſe wee lately judged, betweene Sir Iohn Sherley and his wife defendants, againſt William Wood ſuper in this booke 119. When the tenant pleaded a jointure, made to the defendant, and acceptance of it after the husbands death, the defendant may plead a refuſall, after the death of the husband, without traverſing the acceptance, for it was not matteriall for the part of the refuſer.

Then there remaines no caſe objected to withſtand mee, but Sapcots caſe cited 2. R. 3. F. iſſue 128. and the ſame 22. *H.* 7. Co. Reports 97. which is indeed the very ſame with the principall in 2. R. 3: it is but Townſend for the ſecond traverſe, and Cottesmore againſt it.

In 22. H. 7. it is reported that after debate iſſue was taken upon the ſecond traverſe. This is all the authority which I note, For wee doubt not but iſſue may be taken upon it, but the queſtion is, whether it can be the

the parties ſtanding, and demurring upon it as it is here ; againſt this I ſuppoſe the Caſe judged Paſche 37. Eliz. rot. 2278. Woodroffe brought a *Quare Imped.* againſt John Cottord for his Vicaridge of Stepney in Midd. and ſaid that one Richard Leighton, Parſon there, whereunto the Vicaridge belonged, did leaſe the Parſonage, to Thomas Lord Cromwell, Gregory and Richard Cromwell for 80. yeares, and that Thomas and Gregorie dyed, and that Richard ſurvived, and gave the leaſe to his executor for 21. yeares, and the rem. to Francis Cromwell.

That the executor agreed unto the deviſe of Francis, and after ten yeares he entred, and brings downe that Intereſt in the plaintife, who preſented one Anthony Anderſon, and now upon this avoidance hee preſents againe the terme enduring.

The defendant Cottord ſaid, that the plaintife had the firſt and ſecond avoydance, and then granted his Terme to the defendants, and the Church became voyd againe, and ſo the defendant preſented, and preſented and traverſed abſque *hoc quod pred. Richardus ſupervixit Thomam & Gregorium Cromwell prout &c.*

The plaintife maintaineth his declaration in *omnibus abſque hoc quod pred. Gregorius* did grant to the plaintife the firſt avoidance, *prout*, and then demurred ; and after two or three termes adviſe, it was adjudged that the Replication was inſufficient in law, and ſo adjudged *nihil Capiat per billam* ; which in effect is all one with the principall caſe, for the preſentment for the plaintife was avoided as here, and yet they traverſe the generall title of the plaintife, and that was the roote of that preſentment, which the plaintife was not permitted to forſake, and to offer a ſecond traverſe to that that did avoid his preſentment, as the plaintife would here in the principall Caſe, ſo this is a full judgement on the very point.

4. Point. Now to the laſt point. If the plaintife be admitted to a ſecond traverſe, yet hee ſhould not have taken it ſo ſtrictly and preciſely to the eſtate for the life of Bunford, becauſe if the eſtate had beene for the life of any other, who had beene dead, or had beene any other wayes inſufficient, ſo that it would not contain the plaintifes tytle to his avoidance, it would have beene all one, and therefore the traverſe ſhould have beene abſque *hoc* that Thomas Fitzharbert was ſeized *tempore Conceſſionis modo & forma prout &c.* for that would have allowed the defendant to make proofe of any other ſeiſin, that might have diſabled the grant as well as the life of Bunford : like unto the caſe of *Conſimili Caſu*. Where the ~~Committees~~ Count is of an Alienation in fee, yet the defendant ſhall traverſe to the Alienation *modo & forma*, and then the demandant ſhall maintaine the iſſue by an alienation in Fee or in tayle, or for life, for they are all alike materiall. To this there can be no other anſwer given. but that the defendants plea upon that particular eſtate gives the plaintife his traverſe accordingly

accordingly ; which I retort upon the plaintife, that ſince he hath laid the diſſeiſin in fee, hee hath given the defendant juſt advantage to traverſe it. This was my opinion and argument upon this caſe and my brother [Winch] arguing before that the firſt traverſe was well taken, and the ſecond not well, ſo he and I agreed. But my brother [Nichols] & [Warburton] had argued to the contrary. And ſo it reſts.

127. *Lamphugh* Verſus *Brathwayt.*

Aſſumpſit.

ANthony Lamphugh brought an Aſſumpſit, againſt Thomas Brathwait, and declared, that whereas the defendant had felloniouſly ſlaine one Patrick Mahune, the defendant after the ſaid felony done inſtantly required the plaintife to labour, and doe his endeavour to obtaine his pardon from the King, whereupon the plaintife upon the ſame requeſt did by all the meanes he could, and many dayes labour, doe his endeavor to obtaine the Kings pardon for the ſaid Felony, vizt. in riding and journeying at his owne Charges from London to Roiſton, when the King was there, and to London back, and to and from New-market to obtaine pardon for the defendant for the ſaid felony. Afterwards *ſci. &c.* in conſideration of the premiſſes, the defendant did promiſe the ſaid plaintife to give him one 100. pound and that he had not &c. to his dammage 120. pound.

Aſſumpſit and of Conſiderations generally.

To this the defendant pleaded *Non Aſſumpſit*, and found for the plaintife one hundred pound. It was ſaid in arreſt of judgement, that the conſideration was paſſed.

But the chiefe objection was, that it doth not appeare, that hee did pay any thing towards the obtaining of the pardon, but riding up and downe, and nothing done when he came there. And of this opinion was my brother [Warburton] But my ſelfe and the other two Judges were of opinion for the plaintife, and ſo had judgement.

Firſt it was agreed, that a meere voluntary Curteſie, will not have a conſideration to uphold an Aſſumpſit. But if that curteſie were moved by a ſuit or requeſt of the party that gives the Aſſumpſit, it will, and for the promiſe though it followes, yet it is not naked, but couples himſelfe with the ſuits before, & the merits of the party which procured the ſuit, which is the difference Pas. 10. Eliz. Dyer. 355.

Then to the maine point it is cleare, that in this caſe upon the iſſue *Non Aſſumpſit* all theſe points were to be proved by the plaintife.

1. That the defendant had confeſſed the felony *prout &c.*
2. That the defendant requeſted the plaintifes endeavour *prout &c.*
3. That thereupon the defendant made his proofe *prout &c.*

For whereſoever I bind my promiſe upon a thing done at my requeſt, the execution of that Act, muſt purſue the requeſt, for it is like a caſe of Commiſſion for this purpoſe.

So then the iſſue found *ut ſupra* is a proofe that he did his endeavor according to the requeſt, or elſe the iſſue could not have beene found, for that is like a difference betweene a promiſe and a Conſideration executed and executorie, that in the executed you cannot traverſe that conſideration by it ſelfe, becauſe it is paſſed and incorporated, and Coupled with a Proviſo &c. if it were not indeed then acted, it were *nudum pactum*.

But if it bee executory, as in conſideration, that you ſhall ſerve mee a yeare, I will give you tenne pound, there you cannot bring your Action, till your ſervice performed. But if it were a promiſe on either ſide executory, it needs not aver performance, for it is the Counter-promiſe, and not the performance, that makes the conſideration, yet it is a promiſe before, though not binding, and in the Action, you ſhall lay the promiſe as it was, and make a ſpeciall averment, of the ſervice done after.

Now if the Service were not done, and the promiſe made *prout &c.* the defendant muſt not traverſe the promiſe, but he muſt traverſe the performance, becauſe they are diſtinct in fact, though they muſt concur to the bearing of the action.

Then note here, that it was neither required, nor promiſed to obtaine the pardon, but to doe his endeavor to obtaine it, the one was his end, and the other his office.

Now he hath laid expreſſely in generall, that he did endeavour to obtaine it, vizt. in *equitando &c.* Now then, there the ſubſtance of the plea is generall, for that anſwers directly the requeſt, the ſpecialtie aſſigned, is but to informe the Court; and therefore clearely, if upon the tryall he could have proved no riding, nor journeying; yet any other effectuall endeavour, according to the requeſt would have ſerved, and therefore if it had beene then, he ſhould endeavour in the Future, ſo then he might have laid his endeavour expreſſely, and had it done as he doth here, and if the defendant had not denyed the promiſe, but the endeavour, the endeavour in the generall, not the riding &c. in the ſpeciall; which proves clearely, that it is not the ſubſtance, and that the other the endeavour. This makes it cleare, that though particulars ought to be ſet forth to the Court, and thoſe ſufficient which were not done, which might be cauſe of Demurrer, yet being but matter of forme and the ſubſtance in the generall, which is here in the iſſue and verdict, it were cured by the verdict; But the ſpeciall is alſo well enough, for all is laid downe for the obtaining of that, which is within the requeſt; and therefore ſuppoſe he had ridden to that purpoſe, and Brathwayt had dyed, or himſelfe, before he could doe any thing elſe, that another obtained a pardon or the like, yet the promiſe had holden.

And obſerve that Caſe 22. E. 4. 40. Condition of an Obligation, to ſhew a ſufficient diſcharge of an Annuity, you muſt ſhew the certaintie of the diſcharge to the Court; The reaſon whereof given by Brian and Coke

Coke is, the Plea there contained two parts, one a tryall perhaps *fcil.* the writing of the diſcharge, the other by the Court *ſcil.* the ſufficiency and validity of it, which the Iury could not try, for they agree, that if the Condition had beene to build a houſe agreeable to the obligation, becauſe it was a caſe proper for the Country to try, it might have beene pleaded generally, and then it was a Demurrer, not an iſſue, as is here.

128. *Wilſon* againſt *the Biſhop of Carlile.*

Prohibition.

THomas Wilſon brought a Prohibition againſt Henry Biſhop of Carlile, and laid that there was within the pariſh of Grayſtock, this cuſtome of tithing of Wooll amongſt others, that if any inhabitant have 5. Fleeces of Wooll or above, that then ſuch Inhabitants after the ſhearing and binding up of the ſaid 5. Fleeces, *abſque fraude & dolo fideliter ſolvent Rectori poſt monitionem &c. apud oſtium domus manſionalis ejuſdem inhabitantis infra parochiam pred. Decimam partem abſque aliquibus viſu vel tactu novem partium ejuſdem lanæ per Rectorem &c. Habendum vel ſcrutandum in plenam &c.* And the Parſons &c. have ſo accepted; And then thus: that the Biſhop pretending himſelfe Parſon or commendatorie &c. the Biſhop pleads himſelfe the Parſon or Commendatorie of the Church by preſentation &c. from the Counteſſe of Arundell, and yet ſhewes that his facultie and confirmation was ſo long as he ſhould remaine Biſhop of Carlile, which may well ſtand together, that hee may be Parſon, yet qualified by his faculty to hold it but for a time, and then to his cuſtome demurred in law. And it was this terme adjudged with one conſent for the ſubſtance of the preſcription, is laid that the very truth is, it ought to be paid without fraud, which is not preſcriptible, for it is common right, then the ſole point preſcriptible is, that this is without view or touch of the 9. parts which is in effect repugnant to the other, for when you have laid truth in that former part, you lay the way to fraud in the latter, for it is againſt reaſon that any man judge or divide for himſelfe, and then take choice of his owne diviſion. Againſt the rule of partition Litt. for the truth of the tenth depends upon the proportion, it holds with the 9. parts; And therefore for the pariſhioners, which is in the nature of an adverſary to the Parſon in this caſe, to ſet out a part for the tenth, which he onely affirmes to be juſt, is to give him meerely power to tyth as he liſts, and the preſcription were as reaſonable as to ſay plainly, that they might ſet out what tyth they liſt.

Cuſtome of tything truly without view of the perſon.

4 E. 6. 6. The Guardian that tenders marriage, muſt preſent the Parſon to the ward. And it is a weake anſwer to ſay, that if it be not a juſt Tenth he may refuſe it, and ſue for his due. For firſt he hath no meanes to be aſſured whether it be true or not, for his ſuit may be cauſeleſſe; ſure he may be, it will be fruitleſſe; But the law was provided directly not to ingender, but to prevent ſuits, and therefore provides, that things bee

done by indifferent meanes and perſons, that there be no juſt ſuſpicion of indirect dealing.

If a man were Judge in his owne Caſe and judged amiſſe, a writ of Error would redreſſe it, ſo if a Biſhop diſturbe, or would not admit the Clerke, he might be compelled; yet the law provides better, that is, that you have the right, and therefore that your meanes be ſuch as is likely to produce it, you may challenge the Award or the polls, yea you ſhall remove the *venire fac.* to another Officer, as the Coroner, where the Sheriffe is ſuſpected in law by a proviſionall Challenge aforeſaid to avoid delay, which is a kind of injury.

Replevin.

129. *Browne* verſus *Goldſmith.*

Doubleneſſe in pleading.

THomas Browne plaintife, againſt Thomas Goldſmith defendant, in a Replevin for taking a Braſſe Kettle at Cobham in Surrey, 21. *Aprill.* 12. Jac. the defendant avoweth, as Bayliffe to the Deane and Canons of Windſor, that one Robert Pearſon held the place of Dean and Cannons, as of the mannor of Hampton Court in the Countie of Surrey and Middleſex, by rent and ſuit of Court, that Robert Pearſon being ſummoned, did not appeare at a Court, holden in the ſaid mannor, and for ſuit he did diſtraine and makes Conuſans, as in land holden of the Deane &c. the plaintife confeſſed the ſeiſin of the Deane and Canons and tenure, And further that the ſeventh day of *Aprill An.* 9. Eliz. the ſaid Deane and Cannons did leaſe by indenture the ſaid mannor, unto one George Phidelphea from the Annunciation, then paſt for terme of 51. yeares then next following, then he entered *ante pred. tempus quo*, and was and is yet thereof poſſeſſed, the reverſion to the ſaid Deane and Cannons expectant.

The Avowant confeſſeth the leaſe to Phidelphea, but ſaith that in the ſaid deed, all leets Courts and Lawdayes and Courts there to be held, and all manner of Fines, Herriots, Releifes, Eſcheats, Perquiſits, and profits of Courts were excepted and reſerved. And that Phidelphea being ſo poſſeſſed, did the 10. of Octob. 11. Iac. grant all his eſtate to one Butts, that Butts the 26. *decim.* Iac. by his deed ſhewed forth, did grant all Leets, Lawdayes, Courts &c. unto the Deane and Cannons. And that they afterwards held the courts of the default of ſuits *ut ſupra.* And that Goldſmith did diſtraine for the ſuit.

The plaintife demurs for doubleneſſe, and ſheweth for Cauſe, that the defendant ſaith, the Courts be excepted and alſo the Courts be ſurrendred.

In this caſe Judgement was given for the plaintife. Firſt, it was agreed by us all, that the exception in the originall leaſe of the Courts &c. was utterly voyd, becauſe the mannor by that name, it was granted might be recalled, and a mannor it could not be without a Court, one-

ly

ly in the Kings caſe it was otherwiſe. And by the ſame reaſon the ſurrender of the Courts was void, which were inſeparable from the Mannor, *ſcil.* the Court *Baron*. But then it was inſiſted upon that the Plea was void, and not pleadable by him being a meere ſtranger, for it was ſaid that this was a ſuit ſervice done from Parſons, the very Tenant, and for default of ſuit of Parſons, he did diſtraine. Now the plaintife conveyed himſelfe no intereſt to the tenancy, but only a meere ſtranger did intitle himſelfe to the ſervice which by the bookes he cannot doe, but pretend only hors ſon fee. To this it was anſwered and reſolved by the Court, that this exception was true at the Common law, when all avowries for ſervice were to be made upon the perſon of the tenant.

And it is true if the Lord will hold the courſe of the Common law in avowing ſo farre, his choice remaines unto him ſtill to avow at the Common law, but if he will leave that way and take the benefit of the ſtatute to avow as upon land lyable to his diſtreſſe, as here he hath done, and ſo handle it as a rent charge, then the ſtat. is indifferent to both, that the other may defend according to the ſame rules, for the ſame reaſon, for now the privity of the perſon tenant is removed on both ſides, and the charge of the land is only in queſtion.

Legem feras quam ipſe tuleris, yet it is true there is a literall proviſion for this in the law of 21 H. 8. but it is the more conſequence of reaſon changing, that changes the law.

Now whether the avowing was only upon the land, as in the caſe of cuſtomary profits, as a fine for alienation or of a rent charge, that the plaintife at the Common law in ſuch caſes might plead any diſcharge though he were a meere ſtranger, and had nothing in the land. See H. 4. 46 & 26. H. 8. 6. Halfepennies caſe judged.

130 *The King and the Lord Hunſdon* againſt *the Counteſſe Dowager of Arundell and the Lord W. Howard.* Chancery.

IN the Chancery there was a ſuit commenced by me as Attourney Generall on the behalfe of the Kings Majeſtie and the Lord Hunſdon as the Kings Farmer for the Mannor of Weſt Harſley and Caſtleby in the County of Yorke againſt the Counteſſe Dowager of Arundell, and the Lord William Howard and his Lady, which cauſe comming to hearing after I was Chiefe Juſtice of the Common Pleas, my Lord Chancellor called to his aſſiſtance in the hearing of it, the Lord Chiefe Juſtice Coke and my ſelfe, this cauſe hung long, and had many hearings and after long conſideration was this Terme with uniforme conſent of the Lord Chancellor, us the Judges and Maſter of the Rols decreed for the King, wherefore the decree with the reaſons thereof adviſedly and exactly penned and entered, as of this terme 14 Jac.

Of this Decree therefore at large I will ſay nothing but this, that the reaſon

reaſon of the ſuit in Chancery was not for want of good title at law, for if it were laid the Kings title to be meerely at law by the attainder of Francis Dacre, whoſe land the bill layd to be of an eſtate in taile, but the cauſe of ſuit was made, that the deeds whereby the ſtate was to come to Francis Dacres were but meere voluntary ſuſpicions to have beene ſuppreſſed and withholden by ſome under whom the defendant claymed, and therefore in the end the decree ran, that the King and his heires and his ſaid Farmer ſhould hold and enjoy the land till the defendant ſhould produce the deeds, and the Court thereupon take further conſideration and order.

Chancery believth meere titles in law where the deeds are not extant.

Two points. 1 Point.

But two points fell out in this caſe very worthy obſervation.

The firſt ſhortly thus, *Anno* 35 H. 8. there was great controverſie betweene William Lord Dacres and his children on the one part, and the heires generall of Sir James Strangwayes, for the lands of the ſaid Strangwayes. Whereupon Hil. 35. H 8. the King made an award betweene them, which becauſe it could not ſtate the lands accordingly, afterwards in March 35 H. 8. an act of Parliament was made for ratification of the Kings award, which was extant in the rols of Parliament, and now was certified under the great Seale of England.

The exception to diſanull this act of Parliament was thus. The Bill paſſed firſt in the upper houſe, by the conſent of the Lords, which was ſent downe into the lower houſe, and from thence was returned with this indorſement or ſuperſcription on the body of the Bill *A ceſte Bille les commens fuerunt aſſentz avec la proviſion annexe*: But there is no proviſion extant upon record. But that very Bill with that ſuperſcription or indorſement, and with the regall aſſent and without any proviſo indeed is filed with the reſt of the Bils with the Kings aſſent unto it, and labelled with the reſt, whereunto the great Seale is ſet, as the courſe is in private acts, which are not inrolled without ſpeciall ſuit, as generall acts are; for generall acts are inrolled by the Clerk of the Parliament, and delivered over into the Chancery; which inrollement in the Chancery makes them the originall record, as it was reſolved in John Stubs caſe, but in private acts the very body of the firſt bill filed and ſealed as aforeſaid, and remaining with the Clerke of the Parliament, is the originall record.

The principall caſe ſtanding thus, the defendants Counſell preſſed the Journall book for the Upper houſe, for there was no Journall book for the Lower houſe till the time of E. 6. Concerning this Bill it is thus in divers parts: *Quarto Martii prima vice lecta eſt billa* concerning the Kings award for controverſies betweene the Lord Dacres and the heires generall of Sir John Strangwayes, &c. *In quadam billa proceres aſſenſerunt. Item hodie eſt ad domum communem per regium Attornatum allata billa, &c.* And after 18 *Martii hodie allata eſt a domo communi Billa, &c. cum proviſione eidem annexa, quæ prima & ſecunda vice lecta eſt hodie & com-*

commiſſa eſt Regio Attornato Billa. And after 28 *Mar. miſſa eſt in domum communem per Attornatum Regium Billa, &c. & hodiè cum procerum conſenſu & aſſenſu cancellata eſt proviſio pro hæredibus maſculis Iac. Strangwayes mil. billæ cuidam cui titulus eſt, &c.* ſee theſe three acts, the ſending of it to the Lower houſe, the bringing it from thence, and the cancelling of the Proviſo, all on this one day 28 Mar. upon which they inferred that the Commons having aſſented with proviſion, had not aſſented to this act without proviſion, the ſame being cancelled by the Lords, of their own hands. And ſo it is not an act of both houſes, as it ought to be.

But this was cleerely reſolved by us all, that this exception was of no value, and conſidered firſt by the act of it ſelfe without the journall, next by the journall.

The act it ſelfe hath no mention of the Proviſo, but in the Indorſement as before, wherein what the Proviſo was (if any were) appeares not. Why then if there were indeed no Proviſo, the aſſent of the lower houſe is abſolute and perfect; for the referring of it ſelfe to that that was not, hurts not; and the comming of it doth not prove neceſſarily that there was ſuch a Proviſo, no more, but rather leſſe then in the Earle of Leiceſters caſe, Plow. 390. the mention and recitall of his attainder did convince the truth of it. If there were a Proviſo, yet it might be ſundry wayes ſalvable though it be not extant, for firſt if it were loſt by the fault or negligence of the Keeper or Clerke of the Parliament, that muſt not avoid the whole act. But ſuppoſe that the Proviſo was cancelled by the Lords only, yet it might be ſuch a peece by it ſelfe as this Act that remaines might be perfect and compleat without it, and that three wayes ſeverally, becauſe it might be as a part of it ſelfe as a ſeverall effect from the reſt of the act, though all were in one Chapter or continent of the Act; and it is reſolved in Dove and Manninghams caſe 65. upon the ſtat. 23 H. 6. of Sheriffes, it might be a Proviſo meerely idle and illuſory, for as it favour'd flattering Plo. 564. in the caſe of Hutton upon the ſtatute of Wils, and the Duke of Norfolkes attainder, the matter pretended by this Proviſo might be ſo ſufficiently provided for by the act it ſelfe before, as this was meere ſurpluſage, and then the omiſsion of it could not prejudice. And to that opinion inclines 39 *H.* 6. 17. And that may ſeeme to be truth of this, for the Proviſo ſeemes to have beene only to preſerve the right of the heires males of Strangwayes, whereas there was a generall ſaving in the act as it came from the Lords, which ſerved them aſwell as others, and that perhaps might have beene informed to the Lower houſe by the Kings Attourney the 26 of March, when he carried it to them, as is ſaid; which might be the reaſon of the cancelling of it.

Queſtion whether a matter be an act of Parliament or no.

So this is the ſtate of this Act, as it appeares any waye s in the Record; out of which nothing can be inferred to annihilate the Act. And it doth not ſay, that the Lords did cancell the Proviſo, but that it was cancelled.

led the 28 day it was in the Commons houſe, and brought *ut ſuper*, ſo it might be cancelled there, and the Lords after conſent to it. And all true and proper. And note that there is a Iournall of that time of the houſe of Commons, and the Lords over not in the Journall of the Acts of the Commons. Then take the Iournall, it hath no mention of the effect of the Proviſo, but in one place, and that only by way of a ſum, and not of a full and formall ſentence. For if the Proviſo were indeed in no other forme then is mentioned, *proviſo pro heredibus maſculis, &c.* it were ſenſeleſſe and void, and no way divine, what was it to the avoiding of an Act otherwiſe perfect. But now ſuppoſe that the Iournall were every way full and perfect, yet it hath no power to ſatisfie, deſtroy or weaken an act, which being a high record muſt be tryed only by it ſelfe *Teſte meipſo*. Now Iournals are no records, but remembrances of formes of proceedings to the Record, they are not of neceſſity, neither have they alwayes beene: They are like the Dockquets of the Prothonotaries or the particular of the Kings Patents Co. lib. 2. 34 & 16. Eliz. 331. of the particular. The laſt intended Parliament 10 Jac. if you be judged by the Iournall, it was a large and well occupied Parliament, yet becauſe no act paſſed, no record is of it, it was reſolved by all the Judges to be no Parliament. The Iournall is of good uſe for the obſervation of the generality and materiality of proceedings and deliberations as to the three readings of any bill by intercourſe betweene the two houſes, or the like, and when the Act is paſſed, the Iournall is expired. And in this Iournall there appeares but one reading of the Bill in the Upper houſe where it paſſed, which is unlikely. But if the record of the act it ſelfe carry his deadly wound in it ſelfe, then it is true that neither the parchment, no nor the great Seale, either to the originall act or to the exemplification of it will not ſerve as in the 4 H. 7. 18. where the Act was by the King with the conſent of the Lords (omitting the Commons) and was judged therefore void. And he that obſerves the caſe 33 *H.* 7. 17. which was the only caſe relyed upon by the defendants Councell, ſhall finde it ſo; and upon this rule the doubt to be conceived, *ſcil.* upon the Parliament roll it ſelf, not upon a Iournall.

For the caſe was, that Sir Iohn Pilkinton being charged with an eſcape, an act of Parliament paſſed, that he ſhould be proclaimed, and if he appeared not at the day, he ſhould be attainted for the fact, and pay a fine to the party grieved. Now being taken and brought into the Kings Bench, he alleaged that the act whereof a tranſcript was ſent by Mittimus out of the Chancery into the Kings Bench was not a ſufficient act of Parliament in law, ſo the act began with the Commons and there paſſed, and was indorſed (*ſoiet Rolle ſequens*)) but where that bill was, that Sir Iohn Pilkinton ſhould anſwer before Pentecoſt next, the Lords indorſed the bill thus.

The Lords granted an aſſent and that he ſhould anſwer before Pentecoſt

tecoſt 1452, which was the Pentecoſt twelve moneth. For the Pentecoſt next inſuing, taking this Bill to paſſe as of the firſt day of the Parliament did incurre ſitting the Parliament, for the Parliament begun before Pentecoſt 1451, and the Lords gave Pentecoſt 1452, deferring the Bill which ſhould have returned to the Commons to allow or not. Now Preskot and Markham asked if the Bill came into the houſe after the Pentecoſt that incurred during the Parliament, as concerning that the Pentecoſt next inſuing mentioned in the *Bill* of Commons ſhould not have beene in law, that Pentecoſt, but the ſame the Lords made a yeare after and ſo needed no returne by the Commons for a meet conſent, but if *è converſo*, then otherwiſe. But that by latter judgement is cleere, that all Bils take effect and worke more from the beginning of the Parliament Seſſion except it be otherwiſe ordained by the Act it ſelfe. But in this caſe it is plaine that the difference appeared in the body of the *Roll*, which appeares not ſo much as in the Iournall in this our caſe. And yet Forteſcue the Juſtice of the Kings Bench after at Done reſolved in that caſe 35 H. 6. 12. that it was an act of Parliament, and that they would be well adviſed before they annulled an Act of Parliament, peradventure it were beſt to referre it to the next Parliament. The other great point reſolved in this caſe preſent, was, that whereas this title betweene the King in the right of Francis Dacres ſtood partly upon the ſaid Act of Parliament, and partly upon a feoffement made by William Lord Dacres, An. 4 & 5. Ph. & Mar. and a reinfeoffement back againe, whereby the ſtate came to Francis Dacres which feoffement the defendant laid was not lawfully executed; and that point had been examined before the Councell at Yorke, in the 8 yeare of the late Queen Eliz. the defendant required the uſe of the ſaid depoſitions, which the Kings Councell denyed, and ſaid they ought not to be granted unto them, and ſo the whole Court reſolved for divers reaſons contained particularly, and at large in the decree.

The other great poiat.

Becauſe the ſuit was by Engliſh bill in the very nature of a replication to trie the title of freehold of a whole *Barony* in effect, without any mixture of equity at all, becauſe it was betweene Strangers to the remainder of Francis Dacres, by which the King claimes, for there was three ſonnes of William Dacres ſtated, before it could come to Francis. 1 Depoſitions taken there without bill and anſwer.

Becauſe the point put in iſſue was an eſtate ſupported by Thomas Dacre the eldeſt ſonne of William Lord Dacre then dead in the time of H. 6. whereby he pretended the feoffement was not denied but admitted, and yet the baile was not a whit examined nor proved, but all is to deſtroy the feoffement, ſo that it was ſaid, that thoſe depoſitions ſmell upon practiſe, and upon motion ought to be ſuppreſſed, and therefore ought not to be allowed, becauſe the Originals of the Depoſitions at Yorke were all gone, and no exemplifications of them but in the hands of the defendants, ſo that the King muſt fight with weapons aſſigned by 2

parties adverſary. And this very point had beene by the late Queenes command, very carefully examined in Chancery 22 Eliz. only upon petition, without bill and anſwer betweene Francis Dacres the petitioner, and the Earle of Arundell and his Counteſſe, and the Lord William Howard and his Lady defendants, as they are now, wherein all the Interrogatories therein were appointed to be peruſed by the Chiefe Iuſtice and the examinations made not by the examiner, but by certaine Doctors of Law. At which time divers of theſe witneſſes that had beene examined 22 Eliz. were examined.

Theſe depoſitions were little queſtioned by the defendants Counſell, but were cleerely allowed and read by the Court, though they were without Bill and anſwer, for though they were *without Bill and anſwer* by ſpeciall direction againſt that courſe, for expedition, they were with ſuch carefull proceeding and reverend perſons as before they were by conſent of parties, and the then defendants which were examined were many witneſſes then. But out of this curioſity it was forced that the depoſitions taken no man knowes how, were then either not knowne or not regarded, nor ought not now to be allowed.

Depoſitions taken in the Court of the Councell at York in caſe of freehold, refuſed in Chancery.

But the great and maine reaſon that they were not allowed to be read here was, becauſe the Court where they were taken was not holden competent in a caſe of this nature. And for depoſitions to be read in Court we all held it dangerous to give a preſident in this Court with ſuch aſsiſtance. And though it did not appeare whether their inſtructions did barre it, yet the reformations of late prove, that it was neither fit, nor allowable.

And though it were ſaid that thoſe depoſitions were allowed and given in evidence by the Lord Coke the Attourney Generall in 36 Eliz. upon an Office of Carlile taken before my Lord Chancellor, then Maſter of the Rols, upon the attainder of Francis Dacres; which was alſo confirmed by my Lord Coke; yet that moved us little, both becauſe the difference is much betweene an Inqueſt of Office which admits a traverſe, and this hearing which is finall. And alſo becauſe it is now contradicted and put to the judgement of the Court, which muſt give anſwer judicially, which before paſſed in ſilence.

Treſpaſſe.

131. *Tasker* verſus *Salter*.

TAsker brought an Action of treſpaſſe of battery againſt Salter, the defendant made juſtification by conveying himſelfe an eſtate by Copy, in a peece of ground, parcell of the mannor of an houſe, wherein Maſter Deane was ſeiſed, and the plaintife came upon it, and he laid his hands molliter &c.

The plaintife replyed and conveyed himſelfe alſo an eſtate by Copie of another peece, or parcell of the ſame mannor, and then laid that the ſaid

ſaid Maſter Deane &c. then Lord of the ſaid mannor, had had for them and their Tenants of this peece of ground, a way over the defendants peece &c. And thereupon iſſue taken and found for the plaintife.

And the better opinion of the Court was then, that this was not holpen by the ſtatute, becauſe indeed this was no iſſue at all, nor thing poſſible nor iſſuable, and therefore the verdict muſt alſo be utterly void, for a verdict cannot make good, that the Court ſees cannot be in law, ſo, ſelfe is impoſſible and that is the office of the Court to judge. But payment pleaded to a ſingle Obligation, though it be not a ſufficient barre, yet it may be in fact and in law. Verdict found according to the iſſue, where the iſſue it void.

And though it were ſaid, that the ſubſtance of the iſſue was no way. And if it had beene laid in the iſſue by way of cuſtome, the ſame evidence would have maintained it. So it was not, but an Error in forme.

To which I anſwered, that ſince it was put in iſſue as before, ſo as it cannot ſtand in law, their verdict is not to be taken againſt them, to make them ſubject to an attaint.

If in another ſenſe it be falſe, And I ſay that they had found a ſpeciall verdict that the cuſtome had beene ſo neere the way as it ſhould have beene pleaded. *Et ſi &c.* The Court would not have given judgement, as if the iſſue had beene found for the plaintife, for the ſpeciall matter of the Cuſtome, did not beare the iſſue, as it is taken upon a preſcription void in law. And ſo upon the matter, it is a verdict without an iſſue.

132. *Stukeley* verſus *Vnderhill.* Replevin.

RIchard Stukely plaintife, and Thomas Underhill defendant *en Replevin le* defendant, *avow pur dammage feſant, le plaintife pleade que il fuit ſeiſi in fee de un meſſ. & terre &, d'vn Acre d'vn autre meſſ. & terre &c.* That they two, and all thoſe whoſe eſtate &c. had common of feeding &c. in the place, and then conveyes to himſelfe, the other houſe and lands for yeares, and then juſtifies the puting in of Beaſts, *le* defendant, traverſe the preſcription and found for the plaintife. And though this preſcription thus confuted for ſeverall was Groſly faulty, yet the verdict did Salve it by the ſtat. This was this Trinity Terme. Preſcription for Common of feeding.

133. *Kent & Hall.* Obligation.

BEtweene Kent and Hall *Mich.* 42. & 43. Eliz. rot. 908. in debt upon an obligation to pay ten pound ten ſhillings, the defendant pleads payment of ten pound *ſecundum formam conditionis, ſurque iſſue*, and verdict for the plaintife, and yet repleader was awarded. ſee a like in *Quare Imped.* betweene Danby and the Archbiſhop of Yorke Hil. 7. Iac. *Regis rot.* 901. *and* 902.

Juſtice Warburton reported a caſe of one Armeſeyes, when Dower

was brought againſt the Feoffee of the husband, who pleaded Detinue of Charters; which is no Plea but for the heire, whereupon iſſue was taken, and the verdict for the defendant, and Error brought upon it, but he could not tell what became of it.

Amendment by putting the Sheriffes Sirname to a returne.

After verdict it was moved, that the *Hab. Corpus* was returned *Barth. mil. vic. & Michel* which was the Sheriffes Sirname omitted. And it was amended by rule.

Chancery.

134. *Don Diego Servienti de Aenna the Spaniſh Embaſſador* againſt Sir *Rich. Bingley.*

Procurator attorney or Embaſſador is not for private Cauſes.

Don Diego ſervienti de Aenna the Spaniſh Embaſſador, exhibited his Bill in Chancery againſt Sir Richard Bingley, upon the caſe *ſupra* in 109. as Procurator generall for all the King of Spaines ſubjects of his matter generally, without naming any perſons certaine, and laid the ſpoile at Sea there &c.

The defendant demurred upon the Bill, and it was referred to my brother Nichols and my ſelfe, *ſcil.* the demurrer by my Lord Chancellor, wee heard Serjeant Mountague for the Embaſſador, and Serjeant Crew and Hutton for the defendant, and wee were of opinion, that the Embaſſador was not to be Anſwered to his Bill, for to omit that a Procurator ought to ſue in the name of his Principall, no man can make a Procurator for me but my ſelfe; therefore the King cannot make a Procurator for all, or any of his Subjects, without their allowance; that is for the part of the plaintife. Againe, on the part of the defendant, the Embaſſador neither by releaſe nor ſentence, can diſcharge him againſt the principall, for whom he is no Procurator. Againe, the office of an Embaſſador, doth not include a Procuration private, but publique for the King, nor for any ſeverall ſubject, otherwiſe then as it concernes the King, and his publique Miniſters to protect, and procure their protection in forraine Kingdomes, in the nature of an office, and negotiation of State; and therefore they may and ought to mediate, proſecute, and defend for them at the Councell Table, which is as it were a Court of State. But when they come to ſettled Courts, which do and muſt obſerve eſſentiall formes of proceedings, *ſcil. proceſſus legitimos*, then they muſt be ruled by them, and not to confound all Rules; except ſome Preſidents could be found in Chancery.

But wee made no report, becauſe we adviſed another Courſe, whereunto both parties conſented. And wee the Judges of the Common-Pleas, where this cauſe depended by Prohibition appointed a Commiſſion by conſent in Chancery to examine witneſſes, and then wee to determine the Cauſe, as Judges of our owne Court Arbitrally, not by warrant of any order of Chancery.

And ſo a large Bill being founded, onely by our order and conſent of parties

parties, we made a finall order, whereof the maine was this, that 200. pound was to be paid to the Embaſſador, he having ſecurity of a much greater ſumme, becauſe the Embaſſador had made a high eſtimate ; and indeed the goods not allowing juſt defalcations of eſpoiles, ſalvage and other things was 2600 pound, or 2700. pound to ſecure the defendant againſt all Proprietaries, and other claimes.

135. *Bradſhaw & Salmon.* Covenant. Starchamber.

IN the Star chamber betweene Bradſhaw, and Salmon in an action of Covenant, the ſame Salmon had upon a tryall, delivered Breviats to the Jury, by meanes whereof 200. markes, dammages were given againſt Bradſhaw. Now the plaintife, when it appeared, that there was no Cauſe of dammage in effect, but onely ſomewhat muſt be given, becauſe the iſſue, by not pleading the truth in forme was paſſed againſt him, and though the plaintife in this caſe, had an ordinary remedy in law, to Attaint the exceſſive dammages, yet for the difficulty in the proceeding in Attaint, the Court gave him 160. pound dammages. Here note that the Jury were not defendants, which yet they might have beene here in reſpect of the Brieſes received. But I hold that a Bill againſt them onely for giving of exceſſive dammages could not lye.

Bill cannot lye againſt a Iury for giving exeeſſive dammages.

136. *In a ſuit in the Star-chamber, witneſſes were examined to prove, what was depoſed concerning a will in the Eccleſiaſtical Court; But becauſe the Depoſitions, are not allowed in Star-chamber taken in other Courts; theſe were rejected as a Craſte deviſe to induce Depoſitions againſt the rule.*

Anonymus. Starchamber admits no forraine depoſitions directly nor in directly

137. *Marſhall* verſus *Steward.* Caſe.

MArſhall brought an action of the caſe againſt Steward for ſaying: The devill appeares to thee every night, in the likeneſſe of a black man, riding upon a black Horſe, and thou conferreſt with him. And whatſoever thou doſt aske, hee gives it thee, and that is the reaſon thou haſt ſo much money. And after ſome debate, Judgement was given for the plaintife, he recited the ſtatute of Conjuration ; which needed not.

Thou conferreſt with the Devill.

vide p. 72.

138. *Hoskins Caſe.*

Conſultation cannot be but where the libell warranted good.

HOskins ſued in the Eccleſiaſticall Court, for all the Tythes of the ground of one Eve, who pray'd Prohibition upon ſurmiſe, that the Queene was ſeiſed of two parts of the Tythes, and had granted them to one Weſton, and ſo conveyed them to another, to whom hee had paid theſe two parts. Now the Parſon by Harvy Serjeant, pray'd conſultation for the third part, but it was denyed him, becauſe his conſultation cannot be granted but upon the libell. Therefore hee muſt libell for the third part of new.

Habeas Corpus Cap. utlegat.

139. Sir *Thomas Sherleyes Caſe.*

SIr Thomas Sherley being under protection, was brought by *Habeas Corpus* to the Common pleas bar by one, who deſired to have him charged in execution, by reaſon of a *Cap. utlegatum* after judgement for his debt. But it was anſwered by my ſelfe, and the Court agreed it, that becauſe the *Capias utlegatum* was at the Kings ſuit, and for the Subject, but in the ſecond degree, the King might diſcharge his owne ſuit. if any Act had beene done by the king to fruſtrate the outlawry, this were ſo; but a Protection will hardly doe, eſpecially not being delivered or made knowne to the Coroners. Now then the party is not in execution for the party, though he make his Election after, ſpecially, as the caſe was being after the yeare.

Protection of the Kings debtor doth increaſe other executions upon the body except the Cap. utlegat.

But it was ſaid, that though the Kings debtor were in execution, by his body or his lands for the King, yet the Subject might alſo lay or take him in execution by his body. For the ſtatute 25. E. 3. cap. 13. (where it ſayes the ſubjects execution ſhall ceaſe, till the King be ſatisfied) is underſtood of executions, whereby the King may be prejudiced &c. lands or goods. But the body is all to all.

Star-chamber.

140. *Glanvile & Allens Caſe.*

Bill anſwered and Interr. refuſed cannot be taken pro Confeſſo.

IN the great Cauſe of Glanvile and Allen defendants, in the Star-chamber, at the ſuit of the Kings Attorney for offering Indictments in the Kings Bench upon proceedings in Chancery after judgement and ſome indirect dealings in that Caſe, they anſwered, but refuſed to Anſwer *interr*: And upon motion it was reſolved by the Court, that the Bill could not in this caſe pro Confeſſo, becauſe it anſwered and denyed the anſwer. And therefore it was ordered that they ſhould be put in Irons, and ſo more and more clogged till they anſwered. Yet I then doubted, for I conceive that the anſwering upon Interr. was the more perfect anſwer, that being his owne, the other being as it were his Counſells.

cels. So I conceive the anſwer not finiſhed till the Inter. were alſo anſwered by reaſon of the courſe of that Court.

141. *Flowers* Caſe.

Starchamber.

ONe Blanch Flower bought a tytle thus: that if he could recover it he ſhould pay 200 pounds, otherwiſe nothing. And now he was ſued in the Starre-chamber for the buying and maintenance of ſuits. After the buying was laid upon the ſtatute of 32. H. 8. and out of time, ſcil. out of the yeare. So for that part he could not be queſtioned.

Maintenance of a title brought, but nothing to be paid without he recovered.

The maintenance the defendants Counſell ſaid it was lawfull, becauſe it had taken ſtate of the land, ſo he maintained his owne cauſe, yet he was ſentenced for that point. For it was ſaid, that till he had recovered it was not in effect, and told him, becauſe he was to pay nothing, if hee recovered not. And it was not meant unto him to be given him freely. So all the while he maintained the title at the perill of the owner. Beſides this being a meere deviſe, and fraud, and practiſed by a Sollicitor to transferre to himſelfe another mans title to fall upon a caſuall match was to be met withall in time.

Quære, If this will lye upon the Satutes at Common law Courts.

142. *Wickſtead* verſus *Bradſhawe*.

Habeas Corp.

WIckſtead recovered againſt Bradſhawe 60 pounds debt and 46 ſhillings 8 pence damages, and now this Terme Bradſhawe was brought to the Barre by a *Habeas Corpus* procured by the bayle, with purpoſe to ſave themſelves. And ſo both the plaintife prayed that he might be committed in execution, and alſo the Baile that he might be received in their diſcharge. But it appeared to the Court that Bradſhaw had already brought a writ of error which was allowed by me, and the returne of it was not yet come; ſo that the Court was not now diſabled either to avoid execution or to put him in execution. And this alſo was the cauſe that the bayle could not be diſcharged, for the end of the baile is not only to bring the body, but that he come ſubject to Court according to the meaning of the baile, which cannot be in this caſe becauſe of the writ of error, for the entry in diſcharge of the baile muſt be, that the defendant *reddidit ſe* to the Court to be in execution if the plaintife will, which cannot be ſo here. And *Quære* whether this hath not ſo diſabled this defendant by his owne act, that the bayle is forfeited (note the bayle have not diſabled themſelves) though afterwards he proceeded not in his writ of error. And ſo exception may be taken here.

Mich. 14. Jac. Bayle cannot render the body of the defendant in the Common Pleas after writ of error brought by him.

But note that afterwards this Terme *Bradſhawe* the defendant was brought againe to the *Barre* by another *Habeas Corpus*, and the plaintife prayed him in execution, which was granted becauſe the day of the returne of the writ of error was paſſed, and he had cauſed the record to be removed, and therefore this Court remediable to award execution.

143. *Walker*

Obligation.

143. *Walker* verſus *Bigot.*

WIlliam Walker brought an action of debt againſt Thomas Bigot, and declared that the defendant ſtood bound to him in *ſeptingent. & quinquagint libris*, whereupon he produced his writing, upon oyer, whereof the words were *ſeptuagint & quinquagint. libris.* Whereupon the defendant pleaded the variance, and thereupon a demurrer & adjudged for the plaintife that it was no cauſe to abate the writ. And the defendant put to further anſwer, who pleaded *non eſt factum.* And the Iury found that the aforeſaid writing obligatory *de ſumma ſeptuagint. & quinquagintarum librarum pred. quod predictus Willielmus Walker per bre. ſuum de elegit prefat. Thom. Bigot. infraſcript. ſeptingent. & quinquagintas libras* was ſealed, and delivered by Bigott to Walker as his deed; *ſed utrum ſuper tota materia, &c.* And thereupon the Court adjudged the plaintife ſhould recover 750 pounds demanded, and damages and coſts. Note there was nothing either pleaded by the party or found by the Jury, that it was meant for 700, pound, upon this judgement a writ of error was brought, but it appeares not what was done upon it.

Septuagint. for ſeptingent.

144. *Blackford* verſus *Alkin.* Treſpaſſe.

THomas Blackford brought an action of treſpaſſe againſt John Alkin for taking his horſe. The defendant pleaded that one John Hat was ſeiſed in fee, and ſo ſeiſed, granted a rent of 4 pound *per annum* to John Alkin with clauſe of diſtreſſe, and conveys the rent to the defendant, and for 40 ſhillings he diſtrained.

The plaintife replyed that long before the grant ſuppoſed William Hat was ſeiſed and had iſſue Iohn Hat the elder, and Iohn Hat the younger, but he deviſed his land to his ſaid two ſonnes in taile and dyed. And that A gave licenſe to the plaintife to put in his horſe, *abſque hoc quod pred. Iohannes Hat pater fuit ſeiſitus in Dominico ſuo ut de feodo, prout.* ſee *que* iſſue, and found for the plaintife. And it was ſaid in arreſt of judgement that there was no iſſue, for it was not pleaded that Iohn *Hat pater* was ſeiſed in fee as the traverſe was. But yet judgement was given for the plaintife, for though *pater* be added, yet *pred. Iohannes Hat prout* the defendant had alleaged, binds it to that perſon that the defendant had pleaded, and that *pater* is but Iohn, and can doe no hurt, eſpecially ſince it may ſtand true that he was *pater*, as if it had beene traverſed *abſq; hoc quod pred. Iohannes Hat generoſus* of, &c. otherwiſe if it had beene *abſque hoc quod pred. Willielmus Iohannes Hat generoſus*, which could not be taken for the ſame perſon, yet perhaps that might have beene amended, though hardly.

Iſſue inſufficient or none in law.

145. *Box* verſus *Barnaby.* Caſe.

BOx an Attourney, brought an action of the caſe againſt *Barnaby* for theſe words. Thou art a common maintainer of ſuits and a Champertor, and *I* will have thee throwne over the *Bar* the next Terme. And after a verdict for the plaintife, it was moved in arreſt of judgement, the Court gave judgement for the plaintife, only upon the word Champerter, for there is maintenance lawfull and unlawfull, and where the word is indifferent, it ſhall be taken in *meliorem partem*; now an *Attourney* may and ought to maintaine his Clients cauſe. And yet to an action of maintenance he cannot plead not guilty, but muſt juſtifie. And an Attourney may well be ſaid a common maintainer, becauſe he is common to as many as will retaine him. And the words of throwing over the Barre, are utterly of an uncertaine ſenſe, but yet it is a ſlander to an Attourney, and that in his vocation of Attourney to be a Champertor, for that is not only beyond but againſt his office. And therefore 20 or 21 Eliz. Champerty 3. That Pleaders and Attourneys take no pleas to Champerty. And I hold that if an Attourney follow a cauſe to be paid in groſſe, when it is recovered that is Champerty. Attorney Champertor.

But when it was objected that this word (Champerter) was a word of Art not to be underſtood by the vulgar, and ſo no damageable ſlander, no more then words in Latine or Welſh, except you ſay that the Hearers underſtood it was reſolved that this being Engliſh, and of a certaine and ſingle ſence, the Court cannot doubt but it was underſtood.

146. *Napper* verſus *Iaſper & George.*

IN an action of treſpaſſe brought by William Napper againſt George Jaſper and Robert George, iſſue was taken, that one Richard Iohn Prebendary of the Prebend of Preſton in the Church of Sarum, and all his Predeceſſors Prebendaries, &c. had uſed time out of minde to keepe a Shepheard of certaine ſheepe of theirs, following the ſame ſheep for the better keeping of them, feeding together in a certaine paſture, from the ſheepe of Thomas Earle of Suffolke in the ſame place, and the iſſue was found accordingly. And it was moved that this was a voide verdict, for the preſcription was ſenſeleſſe and could not ſtand, that the ſheepe could be kept time out of minde from the ſheepe of the Earle of Suffolke, but one mans life. But yet judgement was given according to the verdict for the plaintife, for the ſubſtance of the iſſue was the keeping the ſheepe of the Prebendary feeding together, and the other part was but the conſequent of it, that thereby they were kept from the ſheep of the Earle. Iſſue ſeeming to be ſenſeleſſe.

Q. Imped.

147. *Brickhead* Verſus Biſhop of *Yorke & Coke.*

v. caſe.

IN a *Quare Impedit*, betweene Brickhead plaintife, and the Archbiſhop of Yorke and Coke defendant for the Vicaridge of Leeds. After demurrer joyned, and one or two arguments at the Barre, it was found in the writ inſtead of *vicarium viccarium*. And ſo it was prayed to be amended, whereupon the Curſitor was called into the Court. And becauſe it appeared to the Court by his book, that his inſtructions were *Viccarium*, and he depoſed that the tithing was delivered unto him accordingly, he was ordered to mend the writ in open Court, and ſo did.

Amending of an originall by the tything.

148. *Shelton* Verſus *Montague.*

Prohibition.

WIlliam Shelton Eſquire brought a Prohibition againſt Richard Montague, and declared that where he holds and occupies by 10 yeares laſt paſt, a field and occupied 100 acres of land, and 10 acres of wood, lying within the bounds of Stamfords river in Eſſex within a Parke there called *Hugar*, part being part of the ſaid Parke which extends it ſelfe as well into the Pariſh of Hugar as Stamford Rivers. *And* whereas the ſaid William and all the occupiers of that Parke that lyes in Stamford rivers, &c. time out of minde, have payed and uſed to pay to the Parſon of Stamford rivers aforeſaid, &c. yearely, &c. 4 pound in full ſatisfaction and diſcharge of all the tithes of the ſaid grounds, which 4 pound the Parſons had and ſo accepted, whereupon iſſue was taken and found for the plaintife. And now Montague moved in arreſt of judgement for two cauſes: firſt, becauſe it was not layd that it was *Parcus antiquus* to beare preſcription as the caſe of Hebrues Parke 6. E. 6. 5. which was anſwered, that there the preſcription was made for the Keeper which requires a Parke and liberty, that here the Parke was laid but as land generally. The ſecond exception was, that the preſcription was laid in Occupiers, and not in Owners by way of cuſtome in the place, which was reſolved and anſwered by the Court, that this was no matter of intereſt and inheritance, but in point of diſcharge, and therefore the Preſidents were common in this kinde, and ſo an eaſement. And I ſaid that a preſcription in this caſe did not ſo properly lye on the part of the pariſhioners, for no man can preſcribe to his owne charge only as to pay 4 pound *per annum*, but it took effect rather on the part of the Parſon that received it, but the preſcription indeed amounts to this, that the Occupiers or pariſhioners have beene time out of minde diſcharged of all tithes for the payment of 4 pound *per annum*, for every *Modus Decimandi* is a diſcharge of naturall tithe, and ſo workes by way of diſcharge, as it is reſolved in the perſon of Pickerings caſe, Dyer.

Preſcription for a *Modus Decimandi* which is in Occupiers.

149 *Dominus*

149. *Dominus Rex* againſt *Iohn* Biſhop of Rocheſter, and *Iackſon* his Clerke. Q. Imped.

A *Quare Imped.* was brought by the King againſt John Biſhop of Rocheſter, and Edm. Jackſon his Clerke, and declared that Queen Eliz. was ſeiſed of the advouſon of the Church of Milton by Graveſend in groſſe, and preſented one Soane, who at his Preſentation was, &c. and now the Church is void by the death of Soane, and it appertaines to the King to preſent. The Biſhop and his Clerke plead that before the Queen, &c. Iohn Biſhop of Rocheſter was ſeiſed of the ſaid advouſon, & collated one Edmund Iackſon, and then was removed to Norwich, and then in the vacation Iackſon died, and the Queene preſented Soane; now Soane being dead it belongs to the Biſhop, who collated the ſaid Edmond Iackſon, who is Parſon imperſonate, &c. *abſque hoc* that the Queene was ſeiſed of the advouſon, &c. prout. and the Iury found for the Queene by two turnes contiguous. And the Biſhop for the third turne. And that the Queenes firſt turne was ſatisfied by the preſentment of Soane, and that this is the ſecond for the King, and concluded *ſuper totam materiam.* And the Court doth judge that the Queene was ſeiſed of the advouſon aforeſaid, *ut de uno groſſo per ſe ut de feodo in jure.* Then the Iury found ſo, and though the verdict did not finde the iſſue for the King, for the iſſue was to be underſtood of the whole advouſon, yet becauſe it did cleerely appeare to the Court by the verdict, and that not out of the iſſue, that this preſentment did of right belong to the King, the Court did award a writ to the Biſhop for the King, and to remove the Clerke of the Biſhop, and to this alſo the Biſhop aſſented, which was entred in the record of the judgement. *Advouſon ut de uno groſſo.*

150 *Parry* Verſus *Dale.* Obligation. Checq.

THomas Parry brought an action of debt againſt William Dale for 500 pound upon an obligation dated the 16 of September, *An.* 41. Eliz. Dale the defendant demands Oyer of the Obligation, and it was read in theſe words. *Nos univerſi per preſentes nos Nichardum Oldſworth & Willielmum Dales cives & Groceros London, teneri & firmiter obligari Tho. Parry generoſo in quinquegentis libris legalis monete Anglie ſolvend.* and the defendant after Oyer of the condition pleaded an inſufficient barre, whereupon Parry demurred, and yet judgement was given againſt him, the whole Court conceiving that the bond was naught, becauſe *quinquegintis* was no latine word at all. But the cauſes comming by writ of error before the judgement in the Exchequer Chamber 11 Jac. after many debates and preſidents ſeene and peruſed Ter. Paſch. 14. Jac. the cauſe was ruled by mediation of the Judges, and 300 pound given Obligation falſe latiue or no latine in the ſummes.

by order to Parry, and ſo generall releaſes from each to other. For my ſelfe and moſt of the Iudges was of opinion, that the bond was good for 500 l, but the Chief *Baron* ſtuck being one of them that gave judgement in the Kings *Bench*.

151. *Wood* Verſus *Buden*. Treſpaſſe.

'WOOd brought an action of treſpaſſe againſt *Buden* and declared the new aſſignements in a cloſe of paſture in Tallard Royall; the defendant pleaded that William Earle of Salisbury was ſeiſed in fee as of right in one ancient chaſe repleniſhed with Deere called Cranborne, and ſo preſcribed in liberty of Chaſe, and that the ſame Chaſe did extend it ſelfe aſwell in and through the ſaid 8 acres of paſture, as in and through the ſaid Towne of Tollard Royall, and juſtifies the treſpaſſe for uſe of the Chaſe. The plaintife maintained his declaration, and traverſeth that the Chaſe doth not extend it ſelfe as well to the 8 acres as to the Towne. And this iſſue was now tried at the Barre and found for the plaintife. And now it was ſaid in arreſt of judgement by Finch Serjeant, that this iſſue and verdict were faulty, becauſe if the chaſe did extend to the 8 acres only, it was enough for the defendant, & therefore the finding of the Iury that it did not extend it ſelfe as well to the towne as to the 8 acres did not conclude againſt the defendants right in the 8 acres, which was only the queſtion. But it was anſwered by the Court that there was no fault in the iſſue, much leſſe in the verdict which was according to the iſſue, but the fault was in the defendants plea more then it needed, ſcil. to the whole Towne, which being to his owne diſadvantage, and to the diſadvantage of the plaintife there was no reaſon for him to demurre upon it, but rather to omit it as he did, and ſo to put it to the iſſue. And ſo judgement was given for the plaintife.

Verdict upon iſſue larger then was lawfull.

152. *Smales* Verſus *Dale*. Ejectione.

IOhn Smales brought an *Ejectione firme* againſt William Dale upon the demiſe of Iohn Berryman, and upon not guilty the Iury found that one William Watſon was ſeiſed of the land in queſtion and had iſſue Allen Watſon and Anne Watſon by one wife, and William Watſon by another, and deviſed this land being holden in Knights ſervice by the late Queene, unto his wife during her widowhood, the rem. to William the younger, and dyed, and that his wife entred into all the lands, but dyed without iſſue, and then the wife married and William Watſon the younger ſonne entred and infeoffed the defendants, upon whom the plaintifes leſſor being ſonne and heire of *Anne* the ſiſter of Allen entred, and made the leaſe to the plaintife, who being actually ejected, brought this

this *Ejectione Firmæ* of the whole land. And it was adjudged for the plaintife, as to the third part onely which deſcended to Allen notwithſtanding the deviſe, ſo it was reſolved, that the wifes Actuall Entrie did worke to an actuall Entrie, alſo to Allen the heire of his third part, whereof hee was tenant in Common with other. For it was ſaid that the entry of one tenant in Common might be in three manners, either in the name of her ſelfe, or her fellow which were moſt cleare, or generally as this caſe is, which ſhall be alwayes taken according as to the right as being under conſtruction of law, and therefore ever conſtrued lawfull; or laſtly Entrie claiming all expreſſely which yet cannot diſpoſſeſſe her fellow, for her poſſeſſion is over all lawfull, as well before ſuch claime as after, ſo that there is no poſſeſſion altered, by ſuch clayme, and then a ſole clayme, without more cannot change the poſſeſſion, and without a change of poſſeſſion it remaines as before. And therefore a Copartner or joyntenant, or tenant in Common can never be diſſeiſed by his fellow, but by Actuall Ouſter, and therefore in ſuch a Caſe if a tenant in Common, bring an action of treſpas againſt a Stranger alone, his action ſhall be abated, by pleading him tenant in Common with other, howſoever his Entrie were made, which proves that the Entry of one ſerves for all, for elſe they could not joyne in an action of treſpaſſe.

Entry by one tenant in Common ſerveth another.

153. *Lord Darcy in the North* againſt *Gervaſe Markham.*

Star-chamber.

THe Lord Dircie in the North ſued Gervaſe Markham Eſquire in the Star-chamber, and the caſe fell out to be thus, that they had hunted together, and the defendant, and a Servant of the plaintifes, one Beckwith fell together by the Eares in the Field, and Beckwith threw him downe and was upon him Cuffing of him, and the Lord Darcy tooke him off and reproved his ſervant, and yet Markham Chid him, charging him with maintaining his man. And the Lord Darcy replyed, that he had uſed him kindly, for if he had not reſcued him from his man, he had beaten him to raggs. Whereupon Markham wrote 5. or 6. letters to the Lord Darcy, and ſubſcribed them with his name, but ſent them not, but diſperſed them enſealed in the Fields, whereof the effect was, that where as the Lord Darcy had ſaid, that but for his man Beckwith had beate him to raggs, he lyed, and as often as hee ſhould ſpeake it he lyed, and that he would maintaine with his life, and then ſaid that hee had diſperſed thoſe letters, that he might find, or ſome body elſe might bring them to him, and concluded, that if he were deſirous to ſpeake with him, that he ſhould ſend his boy, and he ſhould be well uſed. The Cauſe was effectually handled at the Common law nor enforced by the Kings Proclamation nor by likelyhood could have it ſo ſoone after the Proclamation,

Starchamber puniſheth provocation to a Challenge.

clamation, but the plaintifes Counſell by direction of the Court, left the Proclamation, and yet Markham was cenſured and fined in 500. pound, the reaſon of the ſentence was, that this was a compounded miſdemeanor, for this matter thus diſperſed, was in nature of a libell ſlanderous and defamatory to my Lord Darcy, and the other point was that though there were no direct Challenge to my Lord Darcy to fight, yet there was plaine provocation to it, and as it were to call and challenge my Lord Darcie to challenge him. And though the Caſe was ſomething aggravated, that it was to a Peere of the Realme, yet the cenſuring of the Fact, roſe out of the nature of it, and out of the Circumſtances of the perſon. And I in my ſentence ſaid, that the law did not allow to ſtrike any man in private revenge of ill words. And the reaſon of the wiſedome of the law in that caſe was, becauſe there was no proportion betweene words and blowes, but he that is ſtrucken may ſtrike againe; And it is true, that there is a judiciall combat allowed before the Conſtable, If a man be called Traytor, and in this caſe for matter of ſatisfaction in point of Honour, as it is called, that was left to the Lord Marſhall, as a diſtinct Court and conſideration from this. And in this caſe in my ſentence, I ſaid that thoſe inſolent perſons take upon them to frame a law and Common-wealth to themſelves, as if they had power to caſt off the Yoake of obedience to peace and Juſtice. And therefore they enact among themſelves as an undoubted poſition, that a man wronged may with his ſword in his hand, require ſatisfaction of any man, being no privy Counſellor, and with a mild word, to qualifie the deteſtation of this kind of murther, they have made it a familiar phraſe, that he was killed fairely, and he was killed in equall fight; which arrogancy and Rebellion, muſt be ſubdued by this Court, cenſuring the beſt. And by Judges and Jurors, who muſt not give any way to the impious diſtinction of faire and foule killing, but muſt execute the law, with ſeverity againſt all murders, for the law knowes no diſtinction.

And this I avowed publiquely, for I tooke it to be the onely remedy againſt this damnable preſumption.

This ſentence of mine, it pleaſed the King much to approve, and it pleaſed him to ſay that I hit his owne mind in it. This was the laſt day of December 1616. when it pleaſed him to conferre with his poore ſervant of divers things.

Hil. 10. Jac. Rot. 1783. 1. Jac. rot. 1373. meanſworne theefe.

155. *Small* verſus *Bell*. Caſe.

SMall brought an Action againſt Bell and his wife, becauſe the wife called him a meane ſworne theefe, & the defendant pleaded not guilty and found for the plaintife. And here he could have no judgement becauſe the defendant ſhould have pleaded, that the wife onely was not guilty, ſo there was no iſſue in effect joyned.

Anonymus

154 *Anonymus. Action for Welſh words.*

IN the Exchequer an action of the caſe, was brought by againſt for calling him Idoner in the Welſh tongue, and did not aver what the word did import, and yet Judgement was given for the plaintife, and the Court tooke information by Welſhmen, what the word meant in Engliſh.

And the like Judgement in the Common pleas, and upon the like forme of declaration, were found in ſearch in the Common Pleas, betweene William Verch Howell, againſt Evan George, for a ſlander in Welſhwords, Tr. 43. Eliz 3024. and another Paſche 44. Eliz. rot. 8034. And at this time Serjeant Iohn Moore informed the Court, that Judgement had beene given in the Kings Bench 6. Jac. in the Caſe of one Tuch upon theſe words. Thou art a healer of felons, without any averment how the words were taken, becauſe the Court was informed, and tooke knowledge, that in ſome Counties, it was taken for a ſmotherer of felons.

155. *Chancellor &c. of Cambridge* Verſus *Walgrave.* Q. Imped.

SIr Edward Walgrave Knight, Henry Yaxley Eſquire, and William Moore, and others were ſued in a *Quare Imped.* by the Chancellor, Maſter and Schollers of Cambridge, and they claimed the preſentation of the Church of Colvey by the ſtat. of 3. Jac. becauſe that Yaxley being Patron of the Church, at the time of the avoydance, by the death of Iohn Eaſt Incumbent, was then alſo a Popiſh Recuſant Convict. To this all the defendants pleaded, but the materiall Plea was Walgraves, which was thus (the others reſting from the ſame title) Hee did confeſſe that Yaxley was ſeiſed of the Mannor of Eaſt Hall *ad quod &c.* in his Demeaſne as of fee, and that he was a Popiſh Recuſant, and hee ſaid that for the *non* payment of 20. pound the Moneth, a commiſſion was ſent forth, and Inquiſition taken, and it was found before the Commiſſioners that the ſame Yaxley was ſeiſed in the time of his conviction of the ſaid mannor, *ad quod &c.* and that thereupon, the ſaid Commiſſioners, by vertue of their Commiſſion, did ſeiſe two parts of the ſaid Mannor in the Kings hands, and that the King did by his letters Patents, under the Seale of the Exchequer, demiſe unto the ſaid Walgrave, the ſaid two parts of the Mannor with appurtenances, and all profits, commodities, and hereditaments to the ſame belonging for 21. yeares, *ſi tam diu &c.* And then ſhewes that the Church became void (as before) Yaxley ſtill remaining a Popiſh Recuſant Convict, by reaſon whereof hee preſented Moore his Clerke, one of the defendants, *abſque hoc quod pred.* Henr. Yaxley was Patron of the ſame Church, at the time of the avoydance

The Patron of an Advouſon a Popiſh Recuſant.

avoydance, as the plaintifes have declared, upon which Plea the Court conceived plainly, that the title to this avoydance, did appeare to bee in the King, for that the ſtatute gives two parts of the Recuſants poſſeſſions, ſo that though there be no mention made in the Inquiſition, and ſeiſure of the Advowſon eſpecially, yet two parts of the Advowſon, will follow two parts of the Mannor, and then the King will preſent alone. And the next point is, that there are no words in the Kings grant to Walgrave, to Carry the Advouſon from the King, yet becauſe this ſerved onely to prove the Kings title againſt the defendant onely, the Court would not award a writ to the Biſhop, for the King being one party to the Action, except his title were cleare, and without doubt againſt all the parties to the action, according to the Bookes. Whereupon (as the Record is entered) the plaintifes were demanded by the Court, if they had any thing to ſay, why a writ to the Biſhop, ſhould not be judged to be directed for the King by his title, appearing on the defendants Plea, who did confeſſe that ſuch a writ ought to be adjudged, and that they had no title to the preſentation, notwithſtanding, their title by their declaration by them made, which now they doe wholy diſclaime. Whereupon judgement was given for the King, that he ſhould have a writ to the Biſhop, that notwithſtanding the declaration of the defendants, Moore ſhould remaine the Incumbent as *idonea perſona ad preſentationem Dom. Regis.*

156. *Scaife* Verſus *Nelſon.* Caſe.

Amendment of a Iudgement by the booke of Iudgements.

SCaife brought an Action of the Caſe, againſt Nelſon and his wife, for ſlanderous words ſpoken by the wife. And had judgement *& pred. la femme in m^cia. &c.* where both ought to be Amerſed, and upon a writ of Error, the Record was certified into the Kings Bench, and yet by order of the Court, here it was amended, becauſe upon view of the booke of Judgement of Goldsborough the Prothonotary, it appeared they were well entered and directed.

Obligation.

157. Sir *Henry Warner* Verſus *Wainsford.*

Demurrer. Iſſue generall or ſpeciall matter amounting to it.

SIr Henry Warner brought an action of debt, againſt Wainsford Adminiſtrator of Kirby, who pleaded that the inteſtate was indebted unto him, in divers obligations, and recites to the ſumme of 80. pound, and that goods of that value, and not above came to his hands, which he detaines for his debt, and that he hath nothing *ultra.* The plaintife demurred in law, becauſe it amounted to the generall iſſue of *plene Adminiſtravit.* But the better opinion of the Court was, that this was no Cauſe of Demurrer, for the Plea is ſufficient, and beſides it is ſome matter in law, which hath beene allowed alwayes to be pleaded eſpecially, and

and not left to a Jury, and the reaſon of preſſing a generall iſſue, is not for inſufficiencie of Plea, but not to make long Records, where there is no Cauſe, which is matter of diſcretion, and therefore is to be moved by the Court, and not to be demurred upon.

158. *Pie* verſus *Coke.* *Information.*

PIe the informer exhibited an information, againſt Peter Coke Clerk, for taking of Farmes. And now it was moved by Serjeant Hutton, that an information was exhibited by another Informer, for the ſame offence, and both executed upon one day, ſo there was no probability to attach the right of Action in the one more then in the other, and therefore the Court adviſed them to plead the truth of his Cauſe, for it was ſufficient to bar them both in as much as there being no precedency of ſuit to attach it in either, the Court could find Judgment for neither.

Informations ſeverall at one day for one offence.

Oglethorp and *Maud.* Aſſize.

IN Aſſize betweene Oglethorp and Maud, that the writ was *ad ſatisfaciendum Recognitionem illum*, which ſhould have beene *illam*, and it was moved to have beene amended, and Harriſon the Curſitor was called into the Court, who made there Oath, that a Note by him produced (which was right) was the originall note, whereby the writ was made, yet becauſe in Penningtons Caſe of Aſſize 11. H. 7. the like fault in the writ, would not be amended, the Court would be adviſed.

Amendment (*illum*) for (*illam.*

160. *Perkin* verſus *Perkin.* *Ejectione.*

PErkin brought an *Ejectione firmæ* againſt Perkin the defendant, pleaded a ſpeciall barre, which being inſufficient, the plaintife replyes and conveyes his land to his leſſor by bargaine & ſale acknowledged before Tempeſt Iuſtice of Peace of the weſt riding, *Cartwright*, Clerke of the peace there, and enrolled within ſix moneths. And the Plea was holden inſufficient, becauſe it did not appeare, that the land in queſtion, which was conveyed, did lye within the Weſt riding, but generally in Yorkeſhire. But now it was cleare, that the words of the Statute be before the Juſtices of peace of the Countie, yet it will ſerve before a Juſtice of the Peace, of the Weſt Riding, if the ſame lye there, *Quere* of a Corporation &c. Within the Countie. So in this caſe though the barre averre not, yet becauſe the plaintife made not title in his replication, he could have no Judgement.

Inrollment muſt be before the Juſtice of *P.* of the Riding where the land lieth.

161. *Withes & Caſon.* Treſpaſſe.

Reverſion granted inſerting the leaſe.

WIthes brought an action of Treſpaſſe, againſt Caſon for taking of his Beaſts at Reaton, in a place called Brough Cloſe. The defendant avowed for himſelfe and his wife, and made cognizance for Elizabeth Caſon, and pleaded that Philip Fairefax was ſeiſed of it in fee and 2. of *Octo. quinto Iac.* did demiſe it unto Raph Lawſon *Habend.* from the Feaſt of the Anuntiation next after for 21. yeares rendering 20. pound. *per Annum*, at the Feaſt of S. Michaell and our Lady day, and that Philip Fairefax 8. Jac. by his deed, reciting the leaſe *ut ſupra*, did bargaine and ſell the ſaid reverſion unto his wife and Eliz. Caſon *habend.* for their lives if the ſaid terme of 21. yeares ſhould ſo long endure and for 25. pound, rent behind at *Mich.* in the 10. yeare of the king he did avow and make Cognizance as before. The plaintife pleaded in barre that Philip Fairefax did not grant the ſaid reverſion *modo & forma*, the Jury found all the matter, juſt as it was laid by the defendant, ſaving that they found that the leaſe that was made unto Lawſon, was made *habend. à Feſto Purific.* And that Fairefax and his bargaine, and ſale of the reverſion and Rent *prout &c.* And the Court *una voce* gave Judgement for the Avowant, and held it to be a good grant of the Reverſion and rent which was the point in iſſue.

162. *Marſhall* Verſus *Steward.* *Caſe.*

V. Caſe. 159

Conferreſt with the devill

MArſhall brought an action of the Caſe againſt Steward reciting the ſtat. of 1. Jac. of invocation of foule ſpirits; which is needleſſe, for ſpeaking theſe words unto him; The devill appeares unto thee every night, in the likeneſſe of a black man, riding upon a black horſe, and thou conferreſt with him, and whatſoever thou doſt aske him he did give it thee, and that is the reaſon thou haſt ſo much mony. And after a verdict finding the words the Court gave Judgement for the plaintife.

163. *Wilton & Hardingham.* *Treſpaſſe.*

The Cauſe muſt appeare within the Iuriſdiction.

WIlton brought an action of treſpaſſe againſt Hardingham, the defendant juſtified, that the plaintife was a Common Baker, dwelling in Timſteed in the Countie of Norfolke, and that it was preſented in a Leet in Timſteed that he had ſold bread againſt the Aſſize *in locis vicinis*, whereupon he was amerced, and by Amerciament afferred to 10. ſhillings, and that by a Precept of the Court, he did diſtraine the plaintife, and the Court gave Judgement for the plaintife, becauſe in doth not appeare, that the offence was committed within the Juriſdiction of the Leet, which ſhall not be preſumed with us, except it bee ſpecially

ſpecially pleaded. *But* perhaps the preſentment in the Leet ſhall bee good enough with ſpeciall mention in the preſentment that it was done in the Jurisdiction, if the truth were not ſo full and perfect thereof let them beware. And I noted that the Plea was abſurd, for it was ſaid that he was amerced without ſaying (what) and that the Amerciament was affirmed to 10. ſhillings, for which he diſtrained. Now the Jury muſt aver a certaine ſumme which may be mitigated and aſſured by others, and therefore theſe offers cannot be confounded.

164. *Cowley & Vxor*, againſt *Poulton & Vxor.*

COwley and his wife brought an action upon the caſe, againſt Poulton and his wife, for ſlanderous words ſpoken by one of the women to another woman. And after a verdict the Court was informed that one of the women was dead, whereupon judgement was ſtayed.

Mort ou partie betweene verdicts and judgements.

165. Sir *George Griſleys* Caſe.

SIr George Griſley now Baronet was bound in a ſtat, Marchant of a 1000 pounds before the Major of Coventry and one Drury, and now upon a Certificat made by the Major into the Chancery, took out a *Capias* againſt Griſley Eſquire, as he was named in the ſtatute returned the laſt Terme. Whereupon writs of extent were made into the Counties of Derby and Stafford which were executed and returned. And now Mountague prayed that all might be amended. But it was denyed by the Court. And hee was willed to ſue a new writ out of the Chancery upon the firſt Certificat *ſc. Capias Corpus Georgii Griſley, mil. & Baronet. qui per nomen G. G. recognovit, &c.* for this was matter that muſt come of the information of the party.

Baronet muſt be ſued by the title.

166. *Wilſons* Caſe.

ONe exhibited a Bill *de placito debiti verſus* Wilſon an Attorney of this Court. And after a verdict it was moved in arreſt of judgement that the originall bill was not filed with the Cuſtos, as it ought to be. But it appeared to the Court, that the tenor of the bill was entred of record in *hæc verba*. And it ſeemed to the Court that this was remedied by the ſtatute of Ieoffailes as being in the nature of a writ originall after judgement. But yet becauſe it was ſaid it had been otherwiſe ruled in the caſe of Matthew Rood an Attorney, the Court would adviſe.

Note that it hath beene ſince judged in the Common Pleas cured by verdict, and ſo alſo out of the Exchequer chamber upon error out of the Kings Bench for want of bill there, yet the words of the ſtatute [want of originall writ.]

Amendment.

Bill not filed helped by verdict.

vide 138.

167. *Saint-Iohn* againſt *Diggs*. Obligation.

Recitall bindeth.

SAint-John brought an action of debt againſt Digs upon an Obligation, and the condition was, that the defendant ſhould pay to the plaintife 10 pound which is for the rent of certaine lands, the defendant alleaged that the plaintife had entred upon the land, and ſo ſuſpended the rent, whereupon the plaintife demurred in law, and it was adjudged for him, for this being but a recitall that it was for rent, it is not materiall. It ſeemes the ſame, though he had applyed it by pleading the leaſe.

168. *Wilby* and *Windſey*. Habeas Corpus.

Amendment of *Album breve*.

BEtweene Wilby and Winſey the *Habeas Corpus* was returned *album breve*, and thereupon a new *ven. fac.* awarded.

169. *Oates* and *Frith*. Treſpaſſe.

Rent reſerved to a ſonne and heire apparant but not by name of heire upon a leaſe made by the father.

BEtweene Oates and Frith the caſe was, that the father being ſeiſed in fee, he and his ſonne and heire apparent by indenture leaſed land unto the defendant for yeares to begin after the death of the father rendring rent unto the ſonne; the father dyed, the leſſee entred, the rent was behinde and the ſonne diſtrained, and the leſſee brought an action of treſpaſſe and had judgement; for the reſervation of the rent was held utterly void, for that the ſonne did prove heire it bettered not the caſe by event, for by reſervation muſt be to the heire or heires of the leſſor by that name, for that is the only word of privity in law requiſite in reverſion of rents and conditions, for the heire is in repreſentation in point of taking by inheritance *eadem perſona cum anteceſſore*. And though in ſuch a caſe the rent could never be demanded by the father, yet the heire ſhall take from the father as inherent and riſing from the root of the reverſion which was his fathers, and which he takes by deſcent from his father, and ſo the rent it ſelfe which was in the father, though not to demand, becauſe it was not yet due, but yet it was ſo his that he might releaſe and diſcharge it by the word rent, though not by the word action. And ſo note the difference in this caſe where rent is reſerved upon a leaſe to the anceſtors, and to the heire firſt, and where the anceſtor grants an annuity or makes a warranty or a like charge againſt his heires firſt omitting himſelfe, all ſuch grants are utterly void, for no man chargeth his heire but as a part of himſelfe. And ſuch charges ſtand naked and have nothing that was firſt in the father, and comes from him to them whereunto they may cleave as a rent to a reverſion in the former caſes.

Rent in the father to releaſe, but not to demand.

170. *Robins*

170. *Robins* againſt *Barnes.*

Quod permittat.

Robins brought a *Quod permittat* againſt *Barnes proſternere quandam domum, &c.* and counts that hee was ſeiſed of an ancient houſe, and yard; and whereas in the Eaſt part of the ſaid houſe there is, and time out of minde hath been, a window of ſuch length and breadth upon his owne freehold, ſo neere the Eaſt part of the ſaid houſe, that it overhangs the ſame, and ſtoppeth the lights, &c. The Defendant pleads that one *Richard Allen* was ſeiſed of the ſaid houſe and yard, and was alſo ſeiſed of another houſe, ſtanding in the ſame place, where the houſe of the Defendant now ſtandeth, which did overhang the houſe of the now Plaintiffe, *modo & formâ*, as the ſaid now houſe of the Defendant doth. And he ſaith he pulled downe that houſe, becauſe it was ruinous, and built his houſe in the place of it. The Plaintiffe maintaines his Count, and traverſeth that the old houſe *ſuperpendebat, &c.* And the Jury found for the Plaintiffe: And now it was ſaid in Arreſt of judgement, that this was an upright iſſue; for there ought no more of the new to be proſtrated, than did indeed overhang more than the former houſe did, which was granted by the Court, though one of the houſes had been built overhanging the other wrongfully before they came both into one hand; yet after when they came both into the hand of *Allen*, that wrong now was purged: ſo that if now the houſes came into ſeveral hands, yet neither party could complain of a wrong before: ſo that in this caſe it was plaine, that the Plaintiffe could have no courſe of Action, but for the encreaſe of the overhanging; yet becauſe he had not expreſſed & diſtinctly limited that in his Plea, but took iſſue generally as before, which was found againſt him, if the Jury had found, that the former houſe had overhanged ſo much, but not the laſt. The Court muſt now give judgement according to the complaint as true; becauſe they can take no other knowledge; yet out of their diſcretion they gave the Plaintiffe judgment for the whole, and execution for damages and coſts preſently; but ſtayed execution, as to the abating of the houſe till it might be viewed what was overhanging *de novo*; becauſe the Court was informed, that in truth it was but a ſmall matter. If I have an ancient houſe, and lights, and I purchaſe the next houſe or ground, where yet no annoyance is done to my former houſe; now it is cleare, that my priviledge, againſt that I have purchaſed, ceaſeth; for I may uſe mine owne as I will. Now then I ſuppoſe I would leaſe my former houſe, I may build upon my latter, or if I leaſe my latter, he may build againſt me as it may ſeeme.

Nuſans by one houſe hanging over another, and they both came into one hand, and are divided again, and the like.

But note there is a great difference betweene Intereſts and profits, as Rents Commons, &c. and made eaſements, ſuch as are lights, ayregates, *ſtillicidia*, and the like; for while they are in one hand, they

may be ſtopped, and foredone; becauſe a man cannot be ſaid to wrong himſelfe, yet if they bee divided, things of that nature ſtill in being equally *rebus ſic ſtantibus* in the ſame uſe & occupation, are neceſſary for the ſeverall houſes to which they belong; but clearly, if every ſuch thing bee foredone or altered, while they are in one hand, and ſo the houſes being againe divided, they cannot be reſtored againe by law, but muſt be taken as they were at the time of their conveyance.

Obligation.

171. *Grantham* againſt *Hawley.*

Ter. S. Hill. 14. Iac. Reg.

Robert Grantham brought an Action of debt upon an Obligation of 40. pound againſt *Richard Hawley*; the Condition whereof was, that if a certaine crop of Corne, growing upon a certaine peece of ground, late in the occupation of *Richard Sankee* did of right belong to the Plaintiffe: Then the Defendant ſhould pay him for it 20. pound. Now the caſe upon the pleading and demurring fell out thus: That one *Sutton* was ſeiſed of the land, and 30. *Eliz.* in April, made a Leaſe of it to *Richard Sankee* for 21. yeares by Indenture, and did thereby covenant and grant to and with the ſaid *Sankee*, his Executors, and Aſſignes, That it ſhall, and may be lawfull for him to take, and carry away, to his owne uſe, ſuch Corne as ſhall be growing upon the ground at the end of the Terme. Then *Sutton* conveyed the reverſion to the Plaintiffe; and *John Sankee*, Executor to *Richard*, having ſowed the Corn, and that being growing upon the ground at the end of the Term, ſold it to the Defendant. And it was argued by *Hutton* for the Plaintiffe, that it was meerely contingent, whether there ſhould bee Corne growing upon the ground at the end of the Terme. Alſo, the Leaſſor never had properly right in the Corne; and therefore could not give nor grant it, but it founded properly in covenant; for the right of the Corne ſtanding in the end of the Terme being certaine, accrewes with the land to the Leſſor; And it was ſaid to be adjudged. And it was agreed by the Court, That if *A.* ſeiſed of land. ſowe it with Corn, and then convey it away to *B.* for life remaining to *C.* And *B.* dy before the Corne reapt, now *C.* ſhall have it, and not the Executors of *B.* Note the reaſon of induſtry and charge in *B.* failes, though his eſtate was uncertaine; yet judgement in this caſe was given for the Defendant againſt the Plaintiffe, that is, that the property and very right of the corn when it happened, was paſt away; for it was both a covenant, and a grant. And therefore if it had beene of naturall fruits, as of graſſe, or hay, which renew yearly with the land; the like grant would have carried them in property after the Terme. Now though Corne bee *fructus induſtrialis*, ſo that he that ſowes it may ſeeme to have a kinde of property *ipſo facto* in it divided from the land; and therefore the Executor ſhall have it, and not the Heires. Therefore in this caſe all

Leaſe for certaine terme, with grant, that the Leſſee ſhall have the Corne.

all the colour that the Plaintiffe hath to it, is by the Land which he claims by the Leſſor which gave the Corn. And though the Leſſor had it not actually in him, nor certain, yet he had it potentially; for the Land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may ariſe upon it after, and the property ſhall paſſe as ſoon as the fruits are extant, as 21. *H.* 6. A Parſon may grant all the Tyth-wooll that he ſhall have in ſuch a year; yet perhaps he ſhall have none; but a man cannot grant all the wooll that ſhall grow upon all the Sheep that he ſhall buy hereafter; for there he hath it neither actually, nor potentially. And though the words are here not by words of gift of the Corn, but that it ſhall be lawfull for him to take it for his own uſe; it is as good to transfer the propertie, for the intent and common uſe of ſuch words; as a Leaſe without impeachment of waſt, for the like reaſon, and not *ex vi termini*, gives the trees.

Grant or gift of that I have not actually, but potentially.

Debt.

172. *Noon* againſt *Andrews.*

MOon brought an Action of Debt againſt *Andrews* as an Adminiſtrator, and he pleades that another had gotten a judgement againſt him for an hundred pound, and that he had fully Adminiſtred, and that he had no goods in his hands *tempore brevis originalis, nec tempore judicii prædicti, nec unquàm poſtea præterquam bona & Catalla non attingentia* to an hundred ſhillings; whereupon the Plaintiffe demurred in Law generally. My Brother *Winch* and I were of clear opinion, that the Plaintiffe ought to be heard; for though by the right form of pleading he ſhould in ſuch caſe ſet down in certain to what valew the goods were, yet that is but form; for if he had ſaid he had goods to the valew of 100. ſhillings, and the Plaintiffe had proved that he had 100. pound, yet he had gained nothing. So the ſubſtance appears in this Plea, that he had not above to ſatisfie that judgement. And the Stat. of 27. is a favorable Law and full of equitie, which Judges ought to reach, and not to ſhrinke; and for the repugnancie that may ſeem to be in that he pleads firſt *plèniement adminiſtravit*, yet afterwards confeſſeth ſomewhat unadminiſtred. All the Preſidents are ſo, and the *præterquam* corrects all, and the *unquàm poſtea* refers not only to the next antecedent *tempore judicii*, but alſo to the time of the originall before. But *Warburton* did a little doubt of the firſt point.

Adminiſtrator pleads *plene Adminiſt. &c.*

Dower.

173. *Allen* againſt *Walter.*

ALlen and his Wife brought a Writ of Dower againſt *Walter* of Lands *in Munden magna, et Munden parva*: And *Broyborne* the Sheriff returns pledges and ſummons, and then added that *poſt Summon. prædictam in forma prædicta factam*, he did at *Munden magna*, where part

Summons at the Church door where part of the land lyeth.

part of the Tenements lie at the moſt uſuall door, &c. cauſe to be proclaimed all that was contained in the Writ, although the words of the Statute of 31. *Eliza.* be ſomewhat doubtfull (Pariſhes or Chappels where Lands lye) yet the opinion of the Court was, that the Proclamation in one Town was ſufficient. Firſt in imitation of the Common-Law, where ſummons upon the Land in one Town is ſufficient.

Nextly, the words of the Statute are for avoyding of ſecret ſummons, and to give convenient notice to the partie, for that is the word, both which are ſatisfied in this Proclamation.

Laſtly, other expoſition would be full of miſchief, for the Land may lye in 20. ſeverall and ſo the notice muſt be to every Town upon a Sunday, and every one 14. dayes before the return of the Writ; and though there were no actual ſummons returned, but only the names of the ſummoners, that was not regarded. For that is all the form at the Common-Law, and there is no alteration made by the Statute in the point of ſummons; but where he did return that he had proclaimed the contents of the Writ, that was inſufficient; for he muſt proclaim that he hath made ſummons of the Land.

174. *Howell* againſt *Sandback*.

Avowry good in part faulty of his own ſhewing.

Demand requiſite where there is forfeiture of a pain.

BEtween *Howell*, and *Sandback* the Defendant, made avowry and conveyed himſelf to 50. pound Rent due ſuch a day, and for *non* payment thereof 80. pound *nomine pœnæ*; but layd no actuall demand of the Rent, and concluded: and for the ſame 80. pound he did diſtrain, and ſo avows. And it was reſolved by the Court, that this Attournement was inſufficient for the pain, which could not be forfeited without actuall demand of the Rent; and yet the Return was adjudged unto him, becauſe he had juſt cauſe to diſtrain for the Rent, and they appeared to the Court to be ſeverall.

Debt.

175. *Wike* againſt *Wright*.

Vide 173.

Bill not filed, order for a new Bill.

WVike brought a Bill of Debt againſt *Wright* an Attourney of the Court; and after iſſue found for the Plaintiffe, it was alledged that there was no Bill to be found filed with the *Cuſtos brevium*, as it ought to be. And it was firſt queſtioned to be within equitie of the Law of 18. *Eliza.* for want of originall Writ; for the Bill is originall in this caſe: But upon that there was no reſolution; for it was pleaded by oath that there was a Bill, and that the Defendant had accepted it, and ſubſcribed it, and it was entred in *hæc verba* upon the Roll. And ſo the Court ordered that a new Bill ſhould be filed.

176. *Weaver*

Treſpaſſe.

176. *Weaver* againſt *Ward.*

Weaver brought an action of treſpaſſe of Aſſault and Batterie againſt *Ward.* The Defendant pleaded that he was amongſt others, by the commandement of the Lords of the Councell a trayned Souldier in *London*, of the Band of one *Andrews*, Captain; and ſo was the Plaintiffe, and that they were skirmiſhing with their Muskets charged with powder for their exerciſe, *in re militari* againſt another Captain, and his Band; and as they were ſo skirmiſhing, the Defendant *caſualiter & per infortunium & contra voluntatem ſuam*, in diſcharging of his Peece, did hurt and wound the Plaintiffe, which is the ſame *abſq; hoc*, that he was guilty *aliter ſive alio modo*. And upon Demurrer for the Paintiffe, judgement was given for him; for though it were agreed that if men Tilt, or Turney in the preſence of the King; or if two Maſters of Defence playing their prizes kill one another, yet this ſhall be no fellony; or if a Lunatique kill a man, or the like, becauſe felony muſt be done *animo felonico*: yet in treſpaſſe which intends only to give Dammages according to the hurt or loſſe, it is not ſo; and therefore if a Lunatique hurt a man, he ſhall be anſwerable in treſpaſſe: and therefore no man ſhall be excuſed for a treſpaſſe, and this is in the nature of an excuſe, and not of a juſtification, *prout ei bene licuit*; except it may be judged utterly without his fault.

One Trayne Souldier hurteth another by miſchance.

As if a man by force take my hand and ſtrike you, and if here the Defendant had ſaid that the Plaintiffe ran croſſe his Peece when it was diſcharging, or had ſet forth the caſe with the circumſtance, ſo as it had appeared to the Court that it had been inevitable, and that the Defendant had committed no negligence to give occaſion to the hurt.

Debt.

177. *Coventry* againſt *Woodhall.*

Coventry brought an Action of Debt againſt *Woodhall* for twenty pound. The condition was, that whereas one *Ruthborne* had bound himſelf Apprentice to the Defendant for eight years, the Defendant did covenant with the Plaintiffe that he would retain, teach, keep, and employ the ſaid Apprentice in his own houſe and ſervice, in the Art of Chyrurgery during the terme, and bound himſelf in twenty pound for performance of thoſe covenants. And then it was ſhewed that within the terme, the Defendant ſent the ſaid Apprentice in a voyage to *Bantam* in the *Eaſt Indies*, which he pleaded to be in the company of other expert Chyrurgions, the better to learn the Art; whereupon the Plaintiffe demurred, and judgement was given to him; for it was expreſſely againſt the covenant; for though the covenant were not made to be reſtrained to the houſe in meaning; but that he might ſend his ſervant, or

Apprentice cannot be ſent out of the Realm but in ſpeciall caſes.

Apprentice into other places about his cures, yet he muſt be ſtill as one of his Houſhold comming and going, and in his ſervice, and not put over to any other; for as I ſayd the matter of putting an Apprentice is a matter of great truſt for his dyet, for his health, for his ſafety; and therfore I will by choice commit him to one, and not to another. And generally no man can force his Apprentice to go out of the Kingdome, except it be ſo expreſſely agreed; or that the nature of his Apprentiſhip doth import it, as if he be bound Apprentice to a Merchant-adventurer, or a Saylor, or the like.

Information.

178. *Pie* againſt *Thrill.*

Pie informed againſt *Thrill* upon the Statute of Recuſancie, who pleaded that he was indited in *Middleſex* for the ſame offence, and the Plaintiffe ſaid *nul tiel Record*, and day was given to the Defendant to bring in the Record; whereupon he took a *Certiorari Juſtitiarius pacis* out of this Court, and at the day brought *tenorem Recordi* certified by Sir *Thomas Lake Cuſtos Rotulorum.* And it was holden cleer that the Defendant did not need to take his *Certiorari* out of the Chancerie, and ſo to bring it hither by *Mittimus.* But this Court might ſend his *Certiorari* immediately to an inferior Court, and ſo are the books 4. *H.* 6. 13. & 19. *H.* 6. 19. But if it were to certifie the Record it ſelf, as upon a Writ of Error, or a *Certiorari* out of the Kings Bench to a Iuſtice of Peace, which removes the very Record it ſelf to hold plea upon, there it were otherwiſe; but here the Certificate was diſallowed, becauſe it ought to have been made in the name of the Iuſtice of Peace, before whom it was taken, according to the direction of the Writ; though the *Cuſtos Rotulorum* keep the Records, and that the Chief Iuſtice of the Common-Pleas alone certifies all Records upon Writs of Error; for the Writs are directed only to him. But it appears after that the Plea was of a communication before the Iuſtice of Goal-delivery, and ſo the *Certiorari* and all was voyd: and yet becauſe it was the award of the Court, it was not made as a failer of the Record in the Defendant, though he had it not at the day; but a *Certiorari* was awarded *de novo* to the Iuſtice of the Goal-delivery.

Certiorari in Courts inferior.

Cuſtos Rotulorum cannot certifie Record before a Iuſtice o Peace.

Treſpaſſe.

179. *Denny* againſt *Leman.*

Denny againſt *Lemman.* The caſe was thus; That the Coppyholder brought an action of Treſpaſſe againſt the Lord, for an houſe and an Acre of Land. The Defendant pleaded, that he had admitted the Coppyholder, and had aſſeſſed a Fine of twenty Nobles upon it, and had appointed him to pay it to his Bailiffe, at an houſe being within the Manor, three moneths after, and alledged that he had not payd it accordingly; whereupon

whereupon the Plaintiffe demurred, and the opinion of the Court was, that the Lord was not bound to averr, or ſhew that the Fine aſſeſſed was reaſonable, but it muſt come on the Coppyholders ſide, to ſhew the circumſtances of the Caſe, to make it appear to the Court to be unreaſonable, and ſo to put it upon the judgement of the Court. For the Fine in Law is arbitrarie, and is due to the Lord of common right: and it is only in point of excuſe to the Tenant if it be unreaſonable, which the Court cannot judge, but upon the fact agreed. And the Coppyholder if he be a Defendant, may plead not guilty; and then it ſhall come in evidence whether the Fine were unreaſonable or no. But yet the opinion of the Court was againſt the Lord in this caſe, becauſe he had not layd a demand of his Fine, at the time it grew due, or ſometime after, of the perſon of the Tenant, as the Lord muſt do in caſe of forfeiture of Coppyhold, both for Rent, and Fine.

In a Coppyhold the unreaſonablenes of the Fine muſt come on the part of the Tenant.

Deviſe.

180. *Griffith Floods Caſe.*

"IN the Court of Wards was this caſe: One *Griffith Flood* a Doctor "of Law being ſeiſed of lands in the county of *Cardigan* 1571. de- "viſed the ſame, after certain lives, to the Principall, Fellowes, and Schol- "lars of Ieſus Colledge in *Oxford*, and their ſucceſſors to finde a Schol- "lar of his blood from time to time, and died. The lives ended, the heire of *Griffith Flood*, being the Kings ward, entered. And upon a caſe made hereof in the Court of Wards, and by order of the ſaid Court brought unto the Chiefe Baron and my ſelfe to be reſolved; we agreed that the deviſe was voyd in law; becauſe the ſtatute of Wils did not allow deviſes to Corporations in Mortmaigne; but yet we held it clearely with the releiſe of the Statute of Charitable uſes of 43 *Eliz.* under the words limited and appointed. And ſo it was declared that the Colledge ſhould enjoy it againſt the Ward and his heires.

Deviſe.

181. *Colliſons Caſe.*

Chaunc. Stat. 43. *Eliz.* of charitable uſes.

Colliſon 15. *H.* 8. deviſed an houſe in Eltham in Kent to *Lettice* his wife for life, and after her death made *Iohn Bricket* and others, Feoffees (as he called them) in the ſaid houſe, to keep it in reparations, and to beſtow the reſt of the profits upon the reparation of certaine highwayes there. *Colliſon* and his wife are dead; and the houſe is deſcended to one *Oliver Robert* an infant. This Caſe being in the Chancery between the pariſhioners and *Robert*, was referred by the Court to me and *Tanfield*: and we reſolved clearly that it was within the releiſe of the ſtatute of 43 *Eliz.* for though the Deviſe were uttterly voyd, yet it was within the words limited and appointed to charitable uſes: otherwiſe, if he were an infant,

infant, lunatique, or the like, that gave it, or that one appointed that, that were not his owne to charitable uſes.

Inquiſition.

182. *Dimmocks Caſe.*

Theſe Caſes came out of the Court of Wards.

Bargaine and ſale enrolled after the death of the bargainee maketh a kinde of deſcent.

IT was found by Inquiſition, after the death of Sir *Henry Dimmock* *in Com. Warwick*, 2 *Decemb.* 13. *Jac.* That one *Bull* and *Wilcocks* did by Indenture, dated 3 *July* 13. *Jac.* bargaine and ſell the Mannour of *Pipe* to the ſaid Sir *Henry* and his heires for money, and that hee dyed 14. *Octob.* 13. *Jac.* and after his death, and not before, that is to ſay 23. *ejuſd. Oct.* the deed was inrolled. And that *Anne Dimmock* was his cozen, and heire, and of full age; and that the Mannor was holden in chiefe. And it was reſolved by *Mountague*, *Tanfield*, and my ſelf, that *Anne Dimmock* was to ſue livery; for wee agreed, that this differed from all the caſes that are put in *Shellyes* caſe of Recovery, *Fine executorii*, Covenant to raiſe uſes, as in *Woods* caſe there, and the like where the eſtate veſts in the Heir, that never was in the Anceſter, for this upon the Inrolment ſettles in Law, as between the Bargainer and Bargainee, *ab initio*, upon the Statute of 26. *H.* 8. which doth joyn all States to the uſes *ipſo facto*: only the Stat. of Inrolment ſayes, that in that caſe it ſhall not veſt, except the Deed be Inrolled. So that if it be inrolled, it doth veſt, not by the Stat. of inrollments, but by the Stat. of uſes preſently. Yet it was agreed that the Bargainee cannot bargain and ſell unto another, before his own Deeds be inrolled.; as was judged in *Bellinghams* caſe.

Lunatique.

183. *Bourchiers Caſe.*

Lunatique ſueth not livery, no meane rates runne againſt him.

SIr *Ralph Bourchier* being ſeized of divers Mannors in the County of *Yorke*, holden in Ch. and dyed ſeized Anno 40. *Eliz.* and the ſame deſcended to *William Bourchier*. Preſently after his death, it was found by Office before Commiſſioners in the County of *Middleſex*, that the ſaid *William* was a Lunatique, and ſo had been long before the death of his Father, and that he was ſeized of the ſame Manors; and the Queen granted the cuſtodie of him and his Lands to Sir *Francis Barrington*. After which 42. *Eliz.* there was an Office found in the County of *York*, of the ſeiſin of Sir *Ralph* his death, and his Heir *ut ſup.* and that he was of full age; and we reſolved the King was not to have any mean Rates in this caſe for default of Livery ſued or tendered; becauſe no Laches could be imputed unto the Heir being Lunatique before, and ever ſince the death of his Anceſtors, and the Laches of his friends ſhall not hurt him. Otherwiſe it were, if at any time he had been *ſanæ memoriæ* ſince the death of his Anceſter. And there was ſhewed unto us the like

Decree

Decree made *Mich.* 10. *Iac.* in the caſe of one *Vaughan*, which Maſter Attourney of the Wards ſaid was made as a Decree of Equitie, but was reſolved alſo, it was a good Decree *of equitie* in Law, upon the reaſon aforeſaid; not becauſe the King had ſeized, and committed by force of the Lunacie, for that would have changed with the Kings better eſtate, for it is better for the King to hold by default of Liverie, then for Lunacie.

184. *Edward Earl of Bedford, againſt William Biſhop of Exeter, and Henry Wilſon Clerk of the Church of Buckland.*

Quare Impedit Cannot bee brought hanging another againſt the ſame Defendant, and for the ſame avoydance.

EDward Earl of *Bedford* brought a *Quare Impedit* againſt *William* Biſhop of *Exeter*, and *Henry Wilſon* Clerk of the Church of *Buckland*, and conveyed unto himſelf the Advouſon in tayl; and then he ſhewed that he granted the next avoydance unto one *Walton*, and others; and that the Church voyded by the death of *Wheeler*; and that the Grantees preſented *John Hopkins*, who was admitted, &c. and died, and ſo it pertains to him to Preſent, and the Defendants diſturbed him. To this the Defendant pleaded, that before this purchaſe, that is to ſay in *May* 10. *Iac.* the Plaintiffe did purchaſe a *Quare Impedit* againſt this Biſhop Defendant of the ſame Church; whereunto the Biſhop appeared, and the Plaintiffe declared againſt him, and conveyed unto himſelf the Advouſon in tayl, and that the Church became voyd by the death of *Wheeler*, and that he preſented *John Hopkins*, who was admitted, &c. and dyed, and ſo it pertains to him to Preſent; whereunto the Biſhop Defendant imparled, and averrs that it is the ſame Earl, the ſame *Hopkins*, the ſame avoydance, and the ſame diſturbance, whereupon both actions are brought. And that the firſt action depends, yet not diſcontinued, diſcuſſed, nor determined; and demands judgement of this later Writ purchaſed. Whereupon the Plaintiffe now declares, having the firſt Writ. The Plaintiffe replies, that after the purchaſing of the laſt originall Writ, that is to ſay, the ſixth day of *December*, anno 12. *Iaco.* the ſame Church being ſtill void, and he ſtill ſeized af the Advouſon in tayl (as aforeſaid) preſented one *Henry Curtis* his Clerk to the Biſhop, praying him, &c. who refuſed him, which is the diſturbance, whereupon he now declares; and traverſes without that, that it was the ſame diſturbance, whereupon both actions were brought, and upon this the Defendants demurred in Law: and in the end of *Eaſter* Tearm 15. *Iaco.* after ſome argument at Bar before we had all agreed, and I pronounced the judgement, that this Writ ought, and of right ſhould abate; for though there muſt be a diſturbance naturally to maintain the action, yet the principall effect of the Suite is, to gain and recover the preſentation. And therefore for the ſame thing you ſhall not have two ſuits at once. And here was a diſturbance layd in the

former ſuit, and the avoydance the ſame; ſo that the new diſturbance betters not the caſe for the Plaintiffe. Beſides the nature of a *Quare Impedit* is too finall upon Nonſuit, or diſturbance, or diſcontinuance; but this way were to defeat, that for the Plaintiffe, not leaving his former ſuite, may bring a new one. And by the ſame reaſon, twenty which were an intolerable vexation without rule of Law; and the adding of a new Defendant to the former, amends not the caſe; for ſtill there are two depending againſt no man. Otherwiſe if the *Quare Impedit* were againſt tenne, he might have a new *Quare Impedit*, and ſo *ad infinitum*; but he may have as many as he will againſt ſeverall perſons.

Starchamber 185. Sir *Stephen Procter* againſt *Darnbrook*, and others.

IN the Starchamber in a ſuit between Sir *Stephen Procter* Plaintiffe, *Barnbrook*, *Armitage*, and many others Defendants, Defendants for divers, but ſpecially for one horrible Riot committed by them all, in *Beverly Moors* about Lead-works, and felling of Woods about them; becauſe it appeared upon the hearing of the Cauſe in part, that it was depoſed by divers, that one *Wetherall* which was grievouſly hurt in the Riot, did dye within three moneths after: And being before an able man ſayd, he would charge one of the Rioters with his death. By order of Court we the two chief Juſtices, together with the reſt of the Judges conſidered, whether it were fit to proceed here; and reſolved that the caſe appearing thus, it exceeded the capacity of the Court, and was of dangerous conſequence, though it were layd but a Riot in the Bill, ſince it fell out to be likely to be murder in them all, by theſe proofs, the rather becauſe the proofs were read by the Plaintiffe himſelf, and his Interrogatories tended to that purpoſe, and he himſelf had proſecuted it, as a murder long ſince, and therefore we thought fit that he ſhould be ordered to prefer his Bill of murder, and bring his witneſſes together at the next Aſſizes, and there his Bill and Evidence to be given in open Court before the Juſtices of Aſſize to the great Inqueſt; and then if the Bill were found to proceed for Felony, if not, to returne hither again upon the Riot, and to be ſo heard.

Murder upon a Ryot.

Ejection. 186. *Anthony Moreton* againſt *Thomas Orde*, and others.

ANthony *Moreton* brought an *Ejection firme* againſt *Thomas Orde*, and others, for Land in *Morton* in the County of *Durham*, as debtor to the King, *Quo minus, &c.* And the Defendant pleaded not guilty, *et de eo ponit ſe, &c. Et prad. Anthonius ſimiliter ſic fiet inde Jur. Et quia exit prad. ſuperius junct. per homines de vicineto de Morton in Com. Dunelm. prad. ubi Breve Domini Regis non currit, & non alibi triari debent.*

Quo minus.

beat, eo quoad triandum exitum illum Recordum loquelæ prad. mandetur Epiſc. Dunelm; et ipſe ulterius mandat Iuſtic. infra libertatem illam idem Recordum, ita quod illud habeant ad prox. curiam apud Dunelm. prad. prox. tenendum, poſtquam idem Recordum ſibi deliberatum fuerit ad verificationem prad. exit. ibm. faciendum, & Dies dat. eſt tam quærenti quam defenderti tunc ibm. &c. Et cum verificatio exitus ibm. fact. fuerit, quod tunc prad. Epiſcopus Recordum loquelæ, prad. cum toto eo quod in prad. curia prox. fact. fuerit Baronibus hic mittat ad certum diem quem iidem Juſticiarii partibus prad. in eâdem Curiâ his præfigent. And then followes the Biſhops Certificate thus. *Ego Gulielmus Epiſcopus Dunelm. Baronibus, de Scac. certifico quod ſecundum tenorem Brevis Domini Regis de Mittimus mihi direct. & hinc Recordo annex. ad curiam Domini Regis tent. apud Dunelm. Die lunæ 26. Iulii Anno Regni Regis Iac. 11. coram me præfat. Epiſcopo, & Iac. Altham, & Ed. Bromley, &c. Juſticiariis Dom. Regis in Com. Dunelm. & Sadberg. exiſten. prox. cur. &c. Poſtquam idem Recordum mihi deliberatum fuit, mandavi idem Recordum eiſdem Juſticiariis Dom. Regis ad verificationem exit. &c.* And then ſhewes that the ſame day he parties came, and the Plaintiffe prayed *ſibi fieri, quod lex ſua daret, &c.* And commandement was given to the Sheriffe, *quod venire fac. ad horam primam poſt meridiem eiuſdem Diei duodecim, &c.* And that then the parties came, and the Sheriffe returned his Writ ſerved with a pannell, but the Jurie came not, and ſo it was continued with a *habeas corpora* from day to day, till the 8. of *Auguſt* anno 12. *Iaco.* and then the Jurie paſſed and found the Defendants guilty, and aſſeſſed dammages, and coſts, and the Juſtices prefixed a day to the partie in *Octab. Mich. tunc prox. futur. coram Baronibus, &c. Ad quem diem ego præfatus Epiſc. Recordum prad. cum toto eo quod inde in dicta cur. apud Duelm. fact. fuit Baronibus, &c. juxta tenorem brevis, &c. mitto.* Whereupon judgement was given for the Plaintiffe, and a Writ of Error brought and now Error aſſigned; That it was confeſſed that the Cauſe could not be tryed but at *Durham*, as it is uſed in caſes of challenge by the Plaintiffe to the Sheriffe, to remove it to the Coroner. But it was anſwered, that it was matter of meer ſurmiſe, and therefore required the confeſſion of the Defendant. But this was a matter apparent to the Court, and therefore the Court *Ex officio* did award a writ *ut ſupra.* But the chief Error whereupon it was inſiſted, was; That the *Mittimus* was to the Biſhop, *et ipſe ulterius mandat Juſticiariis.* Now it appears by his Certificate, that he was one of the Juſtices himſelf, ſo that he could not ſend the Record to himſelf; and indeed this Certificate varied from former Preſidents, which did never mention that the Biſhop was a Juſtice himſelf.

County Palatine of Durham tryall there out of the Exchequer, and Certificate from thence.

Authority and intereſt in one Act.

Now this appears to be the practiſe ever ſince the Stat. of 27. *H.* 8. which took from the Biſhop, and gave to the King the making of Juſtices there. But yet notwithſtanding the form of the *Mittimus* is contiBb 2 nued

nued to the Biſhop, that he ſhould ſend to the Iuſtices as before; only they are now called the Kings Iuſtices, which they were not before. And it ſeems that the *Mittimus* might well enough, upon the Stat. 27. *H.*8. have been directed to the Juſtices themſelves immediate; and yet this way alſo may be good, becauſe the Statute directed no alteration in that point, and the Preſidents have continued; ſo now it appears alſo, that the Biſhop is the firſt man in Commiſſion with the Judges, ever ſince the Statute for honors ſake, ſo that the ſubſtance of the certificate hath ever been in effect, as now this is; ſaving that the Biſhop hath not named himſelf a Iuſtice expreſſely, as in this he doth. Hereupon *Mountague* chief Iuſtice, and my ſelf, after hearing of ſome arguments reſolved, that the certificate was well enough, and that the words *mandavi Recordum Iuſticiariis* was not more in effect, but *habui Recordum coram Iuſticiariis*, which was true. And he brought the Record into the Court holden before himſelf, and other Iuſtices. And though the proceedings were not all *ad prox. cur.*: but upon many adjournments, it is well enough; but the Record muſt be delivered into the Court next after it is received, and to proceed as it may; for all cannot be finiſhed at the firſt Court, and ſo we reported to the Lord Keeper, and Lord Treaſurer in the Exchequer, and ſo judgement was given.

187. *Norris* againſt *Gantris*.

Norris brought a Writ upon the Statute of Huy and Cry againſt the Hundred of *Gantry*, and the Robery was layd as it was judged 9. *October* 13. *Jaco.* And the Teſte of the Writ was 9. *October* 14. *Jaco.* And after a Verdict for the Plaintiffe, it was moved by *Harvy*, that the Writ was not brought within the year after the Robery committed, which are the very words of the Stat. 27. *Eliza.* And it was agreed, that in the caſe of Protection, the year ſhall be counted from the day of the Date. And ſo in a Deed inrolled, the day of the Date ſhall not be counted any part of the ſix moneths. And Iuſtice *Warburton* held it alſo in this caſe. But Iuſtice *Winch* and I, were of the contrary opinion, in caſes that depended not upon writing, dated upon time to be reckoned from Acts done, as in this caſe from the Robery committed, which muſt be confeſſed, was done upon the ninth of *October*, 13. *Jaco.* and there cannot be two ninth dayes of *October* in one year; and he might have brought his action the ſame firſt day, without doubt. And though it is true, that a Deed may be inrolled the very day of the Date, yet this is by reaſon of the intent of the Law, and not by the letter. If a Leaſe be made from the making of the Leaſe, it takes effect preſently the ſame day, whether it be made, or no: ſo if the Bargain and Sale be not dated, the ſix moneths muſt be reckoned from the delivery. And though the partie Robbed, deſerving of relief and pitie; yet againſt the Hundred,

In accompt of a yeare upon the Statute of Huy and cry, the day of Robbery s excluded.

Hundred, it is a very pœnall Law, and ſo the Plaintiffe could not have his Judgement.

188. *Thornton* againſt *Iobſon.*

Caſe.

Thornton brought an Action of the Caſe againſt *Jobſon*, and layd that he was a Carrier, and a man of honeſt fame; and the ſayd Defendant had ſayd of him, that he was a common Barreter. Now we were of opinion, that if theſe words were ſpoken of a Juſtice of Peace, or publique Officer, or of an Attourney, or the like, that they would bear an Action.

Action for common Barreter.

Benloes dd. l'opinion del Court in ceſt cas Roy ſoy donne Manor, a que Advouſon eſt appendant, eſtrange preſent, et ſon Clerke euis per 6. mois nient conuſant al Councell del Roy, et puis le Roy per ſes lettres Patents grant le Manour ouel'advouſon a eſtrange l'incumbent de tiel grant poit preſent eſt le Queſtion, et fuit tenus per Curiam que il poit car l'advouſon fuit al dit temps appendant et le inheritance de ceo paſſe al grante. Car cheſcun common perſon fuit ſeiſe d'un mannor a que l'advouſon eſt appendant et eſtrange preſent, et ſi le Clerke eſt eins per 6. mois ore l'advouſon eſt appendant tanque l'auter ad recon. per breve de droit l'advouſon mais neſt iſſint in le cas del Roy, car home ne poit mitter le Roy hors de poſſeſſion per preſentment ou uſurpation mais le patentee n'avera, Quare Imped. del primeir diſturbance car ceo remaine a le Roy pur ceo que le Roy nad donne ceo eſteant en Accon. ſi non que il fait aſcun mention de ceo eo ſon grant. Et fuit agree que le patentee avera le prochein Avoydance et un Quare Imped. ferra ſoit title per le darraine preſentment de Roy ſans faire mention de preſentment del eſtrange.

Vſurpation upon the King, yet he may grant the Advouſon.

189. *Commendam Caſe.*

Quare Imped.

Iohn Colt and *Glover*, againſt the Biſhop of *Coventry* and *Lichfield.*

Iohon Colt of *Wilmer*, and *Glover*, bringa *Quare Impedit*, againſt *Richard* Biſhop of *Coventry* and *Lichfield*, of a Preſentation of the Church of *Clifton Camvil*; and declared that one *Gombride* Eſquier, was ſeized of the Mannor of *Clifton Camvill* and *Hampton*, with the appurtenances; to which th'Advouſon did belong, and died ſeized, and it deſcended unto *Elizabeth* and *Iſabel* his Daughters and Heirs, and bringeth the Mannor and Advouſon to *Herſey* and *Moyle*, by whom the next avoydance, 4. *E.* 6. was granted to 3. And then that whole avoydance came to one of thoſe three, *ſcil.* to *Ieffrey Walkenden*; And then the Church avoyded by the death of *Humphrey Standley* Incumbent. And ſo *Ieffery Walkenden* was admitted, inſtituted, and inducted, and then bringeth down the whole Mannor and Advouſon to

Walter Weringham. &c. And *Weringham* entered into the whole Manor, *cum pertinentiis ad quod, & c.* and now was ſeized in tayle, and ſo ſeized *poſtea ſcil.* 11. *Iac.* made a grant of the next avoydance unto *Colt* and *Glover* the Plaintiffes, and then the Church avoyded by the death of *William Walkenden* the Incumbent; and ſo it belongeth to the Plaintiffes to preſent, and averrs the life of *Walter Weringham* the Grantor.

The Defendant by proteſtation denied all the conveyance of the Advouſon, and the firſt grant of the avoydance by *Herſey* and *Moyle*, and the avoydance by the death of *Stanley* the Incumbent, and the preſentation of *William Walkenden*, and that he was admitted, inſtituted, and inducted accordingly. And then he pleaded to the Stat. of 21. *H.* 8. of pluralities; and that *Clifton Camvill* was a Benifice of *Yelveſton* in the County of *Northampton*, and was therein admitted, inſtituted, and inducted. And ſo *Clifton Camvill* became voyd, and remained 18. moneths, and ſo it accrewed to the Queen by laps to preſent, and then the Queen died, and ſo it doth belong to the King to preſent, and then pleadeth the Statute of 25. *H.* 8. of diſpenſation to the Archbiſhop of *Canterburie*, and in the Vacation to the Guardian of the Spiritualties; and then pleadeth that in *November* 1603, the Dean and Chapter of *Canterbury* being voyd after the examinations, and the ſaid Biſhop then of *Rocheſter*, and now elect of *Coventry* and *Lichfield*, accepting the Letters Patents of diſpenſation, the petition of the Defendant then being Biſhop of *Rocheſter*, and elect Biſhop of *Coventry* was inſufficient; and that he held the *Rectorie* of *South-fleet* in *Kent* in *Commemdam* with his Biſhoprick of *Rocheſter*. And therefore to provide for a Biſhops ſtate, and that it ſhould not be vilified, did grant, *inter alia, ut Rectoriam de South-fleet, nec non unum aliud, vel plura, Curata, vel non Curata, Beneficia Eccleſiæ infra Regnum Angliæ, cujuſdam nominis, qualitatis, aut dignitatis in Commendam itidem obtinere, acceptare, et recipere; ac propriâ ſuâ Authoritati capere, et apprehendere; ac realem, actualem, & Corporalem poſſeſſionem ejuſdem, abſq; Inſtitutione, Collatione, Inductione, vel aliâ quacunq; Iuris Solennitate, intrare, ac omnes Decimas, ac proficua, quàm diu viverit, & dicto Epiſcopatui Coventry & Lichfield præeſſet, in Commendam tenere, poſſidere, & habere, & in ſuos proprios uſus, & utilitatem convertere; ac de eiſdem omnibus, & ſingulis integrè, ac pro ſuo Arbitrio, liberè & libitò diſponere poſſit, in tam amplis modo & formâ, & effectu, acſi Epiſcopatum non fuiſſet aſſequutus, acſi eundem titulum Canonicum legitimâ diſpenſatione poſſideret, ac in eiſdem debitam & perſonariam Reſidentiam faceret; Ac ſicut veri Rectores & Incumbentes convertere poſſint licet, non fecerint Reſidentiam.* And then *fol.* 66. grants him like power, *pro arbitrio ſuo*, to reſign and change, and others in their places *propriâ ſuâ Authoritate capere, & apprehendere, ut ſupra.* And then diſpenſeth with *non Reſidence*, that he ſhould not by any means be compelled unto it,

it, *quantùm in ipſis & jure regni poterant; tamen decretis, conſtitutionibus locorum, libris Statutorum, ſive Ordinationibus Eccleſiæ generalibus, vel ſpecialibus, etiamſi juramentum Religionis, vel quovis alio modo confirmatis, vel corroboratis, in contrarium non obſtantibus.* Provided that all his Benefices ſhould not exceed 200. Marks in the Kings books. And provided, *quòd beneficia prædicta obtenta, vel obtinenda debitis non fraudentur obſequiis.* And then he pleadeth the Kings confirmation *ordinarii* 8. *Jac. & literas ſuas ſigillatas juxta prædictos Articulos &c.* That he ſhould enjoy all things contained in the diſpenſation, *ſecundùm vim, &c. earundem.* And the Inrollment of the Diſpenſation was not repugnant to the law of God. And that like diſpenſations were uſed to be had at *Rome*, before the making of the Act by Biſhops, ſubject to King *H.*8. And that the ſaid diſpenſation was not againſt the Statute of 21. *H.*8. of *Non-reſidencie.* And then he ſhewes that he was made Biſhop of *Coventry* and *Lichfield* 6. *September* 8. *Jac. concurrentibus his, &c.* And then that the King *ratione prærogativæ ſuæ Regiæ, per lapſum temporis ſibi de volutum*, by his Letters Patents under the great Seal of *England*, dated 27. *Martii* 10. *Iacobi ad prædictam Eccleſiam de Clifton Camvil per lapſum temporis vacantem, & ad ſuam preſentationem ſpectantem preſentavit eundem Epiſcopum, eandemq; Eccleſiam ei commendavit; Ita quod eidem Epiſcopo benè liceret dictam Eccleſiam in Commendam obtinere, & propriâ ſuâ Authoritate capere, & apprehendere; ac corporalem poſſeſſionem ejuſdem abſq; Inſtitutione, Collatione, Inductione, vel aliâ quacunq; Juris ſolennitate intrare; ac Decimas, & Proficua ejuſdem quamdiu viverit in dicto Epiſcopatu capere, poſſidere, & convertere, juxta & ſecundum vim, formam, effectum, & tenorem dictarum literarum diſpenſationis licentiam conceſſit. Ad quam rem ad debitum Finem producendum, Dominus Rex literas Patentes Regiam ſuam ſupremam Authoritatem, tàm in ſpiritualibus, quàm in temporalibus, prærogativam ſuam Regiam adhibuit. Virtute quidem quarum literarum diſpenſationis, & ſeparalium literarum Patentium Domini Regis, idem Epiſcopus, 28. Marcii Anno Decimo ſupra dictam Eccleſiam de Clifton, &c. in Commendam acceptavit, & intravit; atq; eam ſemper poſtea hucuſq; in Commendam habuit, & habet, abſq; hoc quod prædicta Eccleſia de Clifton, &c. vacavit per mortem prædicti* Guliel. Walkenden *prout, &c. unde petit judicium, &c.*

Then the Averments in the ſecond, that he remaines Biſhop of *Coventry* and *Lichfield*; That he had no other Benefice with Cure at the time of the Diſpenſation, but *Southfleet*. That *Clifton* is a Benefice with Cure, and that the Church is not defrauded of her dues, ſpeaking nothing of *Southfleet*, to which the Proviſion alſo of the Cure did extend.

That he never had more Benefices than two. with Cure, ſince his diſpenſation; That all the yearly value of all his Benefices *quæ jam retinet* (Note, he ſayes not, or ever had: ſo the condition might be broke before) exceeds not 200. Marks. The

The Plaintiffe *proteſtando*, that *Walkenden* did not accept *Yelvertoſt*. Alſo that ſuch Diſpenſations were not had at *Rome* for Biſhops. King *Henry* the Eights Subjects, before that Act: Prayes *Oyer* of the Diſpenſation, Confirmation, and Preſentation ſo called.

And then Demurres *prout modo & formâ*.

There was never Judgement in Law paſſed upon this kinde of *Commendam*, though it hath heretofore received ſome onſet; and therefore it ſtood with the gravity of the Court of Common-Pleas to adjourn it to the Exchequer, as to the generall counſell of Law, to receive there a definitive ſentence. Ten Judges have already delivered their opinions what judgement they would adviſe to be given in the Common-Pleas upon this caſe. Of which ten, two, that is to ſay Barons have holden in the *Commendam* to be good in Law, and that the Commendatories Plea is good. And of the ſame opinion was *Montague* the Chief-Juſtice, that the *Commendam* was good, notwithſtanding the exception; And that therefore judgement ought to be given for him, that is for the Defendant. Two others, that is Juſtice *Doderidge*, and *Winch* were of opinion that judgement ought to be given, neither for the Plaintiffe, nor for the Defendant, but for the King; and they conceive that the *Commendam* is voyd in Law. The other five had alſo commended the *Commendam*; but they have concluded that judgement ought to be given for the Plaintiffe.

Now to the Caſe, which I divide into four main points; whereof three are between the Plaintiffe and Defendant. And the fourth is between the King, and both parties, Plaintiffe and Defendant.

The firſt main queſtion.

The firſt queſtion is, whether the *Commendam* be good in Law upon the Statute of 25. *H.* 8. *cap.* 21. by which Statute it muſt ſtand or fall, being grounded upon it, and made in this form; that is to ſay, either by the Archbiſhop of *Canterbury*, or in Vacation by Dean and Chapter as this is, with the Kings ordinary confirmation approved by that Act. And I hold that this *Commendam* thus confirmed, is voyd in Law.

The ſecond main point.

The ſecond is, whether the ſeveral and diſtinct Acts of the King by his ſecond Letters Patents (there called his Preſentation) being more than is required by the ſayd Act of 25. *H.* 8. upon conſideration of all the parts of it, do amount to an immediate *Commendam* made by the King himſelf; or do ſo depend upon the former *Commendam* of the Deane and Chapter; as if that fall, this muſt fall too. And in this I hold it is no primarie or ſubſtantiall grant; but is in it ſelf and the Kings intention dependant upon the other, that it muſt ſtand or fall with it.

The third main point.

The third queſtion is, whether this *Cammendatory* be ſuch a poſſeſſion of the Benefice, as may by the Statute of 25. *E.* 3. *cap.* 7. Or by the Common-Law, interplead with the Patron Plaintiffe in the *Quare Impedit*. To this I hold him not inabled.

The

The fourth main queſtion is, whether upon this whole Record judgement ought to be given, neither for the Plaintiffe, nor Defendant, which hath confeſſed the lapſe of the Church, and the title of the King, as the Defendants Plea imports. And in this I hold, that upon the whole matter there is no warrant in Law to give judgement, or award a writ to the Biſhop for the King, in this Caſe. The fourth main queſtion

There is a fift point in this Caſe meets with a mans imagination; that is, how it ſtands with the Kings lapſe, ſtill being true, as is pleaded; that is, whether it remain ſtill ſo to the King, as he may preſent anew: as it is ſaid, That he hath preſented over all the now Biſhop of *Coventry* and *Lichfield*, who is inſtituted and inducted upon it. And whether the ſame Biſhop ſhall not retain the Benefice, notwithſtanding judgement ſhould be given for the Plaintiffe, and a writ awarded to the Biſhop for him.

But this queſtion ſtands no way in judgement now, and what is worſe, I may come in judgement for my ſelf, and brethren hereafter; and therefore I will not prejudice any thing, but reſerve my opinion to the due time, and ſo proceed to the Caſe upon this Record.

Before I enter into the main of the Caſe, *muniam viam meam*, I will fence out the way, *neque ſtiones alienæ*, leſt ſtrange queſtions break into my Arguments. Therfore I ſtate the queſtion ſingle, that we may reaſon *ad idem* certainly, for *multiplex diſtinctio parit confuſionem*, and Rogations, Queſtions, and Poſitions *debent eſſe ſimplices*. Therefore I will exclude variety either in matter, or nomination.

And firſt I declare that the Kings immediate perſonall ordinary inherent power, which he executes, or may execute *Authoritate ſuprema Eccleſiæ*, as King and Governour of the Church of England, which is one of thoſe flowers, *quæ faciunt Coronam*, which makes his Royal Crown a Diadem in force and vertue, is not (as I ſhall hereafter ſhew) the queſtion in this Caſe. But the queſtion is only of the power given to the Archbiſhop, or Dean and Chapter by the Statute, and by the true meaning of it, concerning faculties and diſpenſations, which I call *Authoritatem ordinariam limitatam & deligatam.* 1

Secondly, we have nothing to do with a *Commendam retinere*, which indeed is no *Commendam*, though it be ſo commonly called; but is a faeultie of Retention and Continuation of a Benefice in the ſame perſon wherein it was, notwithſtanding ſomething interviewing, as a Biſhoprick, or the like; which without ſuch a facultie could avoyd it. So a *Commendam* it is not, for my own Benefice cannot be commended unto me; Therefore no argument taken from allowance of the *Commendam* ſo called of that kinde, *ſci.* to retain, can warrant this we have in hand. 2

A third obſervation which amounteth to an excluſion alſo is, that the *Commendam* which we have in hand, is not *Commanda perpetua* (which 3

can be no leſſe than for the life of the Commendatory abſolute) which this is not; but ſo long as he ſhall live and remain alſo Biſhop of *Coventrie* and *Lichfield*.

So then our ſingle queſtion ſingled, or ſtated, is, whether a *Commenda* of the Tenour and forme that this is, having the clauſes that this hath, and wanting ſome others which this wants, as they appear in the Record. And ſo I ſhall obſerve and enforce, after diſtinctly in my Argument, that Grants made by an Archbiſhop of *Canterbury*, or Dean and Chapter, with the Kings ordinarie Confirmation, according to the Statute to a Biſhop, to take Benefices *de novo*, to the valew of two hundered Marks in the Tax of the Exchequer, with Cure, or without, or to hold them and their fruits for the time limited, more than for ſix moneths, or leſſe than for life, be warranted by Stat. of 25. *H.* 8. and the true meaning of it.

Commendams are of three degrees, one *ſemeſtris*, another perpetuall, *vel ad vitam*. A third, *intermedia haud diuturna, ſed limitata*, which is called ſometime *temporaria*, or *temporalis*, or *ad certum temporis ſpatium limitata*, as ſhall appear in the Canons after.

The *Commenda ſemeſtris* grew out of a materiall equitie, that in the time of the Patrons reſpite given to him to preſent, the Church could not be without a Provinciall-Paſtor, with a Law of neceſsitie agreeable to the law of nature. And this might with the ſame reaſon be continued with the Revennues, ſo long as the Patrons reſpit laſted, as to ſix Moneths after notice, in this caſe or the like. But after the lapſe juſtly cured the *Commendam* is to ceaſe; for the Ordinary may Collate; for *natura appetit perfectum Bonum; et neceſſarium extra terminum neceſſitatis non eſt Bonum.* 18. *Ed.* 3. 21. *&* 1. *Hen.* 7, 21. the Biſhop may ſequeſter if the King preſent not: and 12. *He.* 8. 8. by *Pollard* the Biſhop muſt ſee the Cure ſerved, if the Parſon fayle, at his own coſts. And *Lindwood de jure-jurand. cap. Presbit. verbum oblationis.* If a Biſhop celebrate Divine Service in any Pariſh of his Dioceſſe, he may require the Offering of that day. And upon the ſame reaſon, if the Executors, being called by the Ordinary, will not prove the Will, the Ordinary may commit the Adminiſtration till he do it 4. *H.* 7. 17. 10. *H.* 7. 18. and 7. *E.* 4. 12. Letter as *Colligend.*

Now out of the Canon Law of Decretals, concerning *Commendams* of all ſorts, *Concilium Calcedonenſe ſub Leone*, Anno 51. cap. 10. *Statuit Clericum in duarum Civitatum Eccleſiis, eodem tempore conſcribi non oportere. Cauſa* 8 1. *queſtio* 1. *in principio cap. Cleric.*

Synodus 7. *cap.* 15. Anno 783. *ſub Andriano in Concilio Nicene, ſecundum eandem queſtionem,* 1. *in principio cap. Clericum prohibet in duabus Eccleſiis aliquem Commorari, negotiationis enim eſt, & turpis lucri, & ab Eccleſiaſticâ conſuetudine penitus alienum. Audivimus enim ex ipſâ Dominicâ voce, quòd nemo poteſt duobus Dominis ſervire, & hoc quidem*

in

in unâ Civitate. Caterùm in villis quæ foris ſunt, propter inopiam hominum indulgeatur: Leo quartus Anno 487. *cauſa* 21. *queſtio* 1. *cap. Qui plures ſcribit, Qui plures Eccleſias retinet, unam quidem per titulum, aliam vero ſub commendatione tenere debet, Et per gloſſam; de Commenda non eſt Prælatus; ſed potius Procurator; & qui Commendavit revocare poteſt quando vult.*

Note, that this makes *Titulum, & Commendam, membra dividentia,* and was but an evaſion out of that good Law; except it be taken of the Semeſtris.

Gregorius 9. *Anno* 1227. *Nullus poterit plures Eccleſias parochiales obtinere, niſi una pendeat ex altera; vel unam intitulatam, alteram verò commendatam habuerit. Dud.* 54 *de Eccleſ. Ag. membra dividentia.*

Gregorus 10. *in Concilio Lugdunenſi generali Anno* 1273. (marke how late it continues) *Nemo deinceps parochialem Eccleſiam alicui, niſi in ætate legitima Sacerdos conſtituatur, Commendare præſumat; nec talis etiam niſi unam, et hoc evidente neceſsitate, vel utilitate ipſius Eccleſiæ ſuadente. Hujuſmodi autem Commenda, ut permittitur, ritè facta declaravimus ultra ſemeſtris temporis ſpacium non durare: ſtatuentes, quicquid ſecus cum Eccleſiis parochialibus actum fuerit eſſe irritum, ipſo Iure Lap. Nem.* 15. *de electione, in ſexto.* Note that this is the laſt, either generall Councell, or Popes Decree or Decretall; which gives to *Commendams.*

In the gloſſe upon this it is ſayd, That the conſent of the Patron, *& omnium qui ladi poſſunt,* muſt be had, and that he is not Prelate, but Procurator Advou. *& habet titulum Canonicum.* It doth not make *fructus ſub,* but *ad providendum ſibi & Miniſtris, & quod ſupereſt in utilitatem Eccleſiæ non obligat. Dum Papam cum ſeipſo obligare non poſſit; Ideo Papa poteſt in perpetuum commendare,* I finde not this part to be the Popes power.

Clement 5. *Extravag. Com. lib.* 3. *tit. de Prebendis & dignitatibus lib.* 2. *ex certâ ſcientiâ ex nunc revocamus Conceſſiones, & permiſſiones per nos factas, per quas Epiſcopatus, Eccleſias, & Monaſteria, ſub Commenda vel Cuſtodia, Sentuariæ vel guardiæ aut adminiſtrationis titulo, vel nomine duximus perpetuò, ad vitam, ſeu ad certum temporis ſpacium committend. Proſpeximus enim demum indebitè conſtitutionis, equitudinis, & a negotiorum diſcuſſione ſemot.* 1. *Quod Eccleſiarum earundem cura negligitur.* 2. *Bona & jura diſſipantur.* 3. *Subjectis perſonis, & populis ſpiritualiter, & temporaliter injuriatur, cedere ad perfectionem.*

Conſtitutio Othoboni, Anno 1248. *De Commendis Eccleſiarum. Sanè inter adinventiones eorum, quifraudes contra ſuas animas moliuntur, hanc maximè comperimus Divini & humani Juris præſidia confundentem, quod cum una Eccleſia unius debeat eſſe Rectoris, ſicut ratio dictat, & multiplicis Iuris Statuta declarant: Quidam tamen rationis expertes, vel Iuris regulas contemnentes, dum ad plurium Eccleſiarum occupationem velamen aliud non habentes, quoq; modo ditari feſtinent, vacantes ſibi Eccleſias commendari procurant, amplectentes Iuris verba, non ſenſum, quod ali-*

quando permittit unam haberi Eccleſiam intitulatam, & alteram commendatam: Et cum juxta ſanum intellectum propter neceſſitatem, vel utilitatem vacantis Eccleſiæ, jus commendationis, non tam præceptoriè quam permiſsivè fuerit introductum, univerſas Eccleſiarum commendationes hactenùs quibuſcunq; factas (niſi ex evidenti utilitate unius tantum Eccleſiæ commendatio facta ſit) penitùs revocamus.

Johannes de Anthona upon this Canon *dicit, Quod commendare, idem eſt quod deponere, ſeu cuſtodiæ committere. Et dicunt omnes, quòd non eſt Prælatus, ſed Procurator. Habet tamen legitimam adminiſtrationem ad Colligend. & providend. Miniſtris; ea verò quæ ſuperſunt ad utilitatem Eccleſiæ convertend. Et conſenſus patroni requiritur ſecundum omnes, quod ſatis obſervant Prælati; quod alias, quam præſentales per patronos non faciunt Commendas.*

Et Conſtitutio Guillelmi Lyndwood de Prebendis limit. Commendam ad Conſtitutionem Gregorianam Lugdunenſem, ſupra. Which was the moſt exact.

Gregorius ſecundus Epiſt. 13. ad Anglum Epiſcopum ſcribit, qui antea fundorum erat Epiſcopus, quod cum ea Civitas cum hoſtibus eſſet vaſtata, Torronius eum conſtituit ſacerdotem, ſic tamen ut fundendis Eccleſiis ſibi Iura poteſtatemve nullo modo ſubtraheret, cauſâ 21. Queſtio 4. cap. ult. & penult. Gregorius Luſitaniæ Eccleſiæ captivat ipſum Iohannem Cardinalem, in Sillut. Eccleſia, conſtituit Sacerdotem, cum Paſtor Curam gubernat, ita tamen ut ſi Luſitar' abhoſtibus liberari contigerit, ad eam reverteret. Unde Gloſſa facit queſtionem, ſi inſtitutio poſsit eſſe ſub conditionem, & diſputatur variè ſic tamen ut Papa hoc concedere putat: Cauſa 7. Queſt. 1.

Rebuffus de Commendis dicit, quòd Papa in Commendis opponens hanc Clauſaulam, quod licet de fructibus diſponere, ut tamen Patronus lucretur fructus, nec tenetur rationem reddere quemadmodum, ſi haberet Titulum. Et quamvis Commenda non poteſt permutari cum titulo, tamen in Francia obſervamus contrarium, quia reputamus Commendam verum titulum, & ſic permutari poſsit.

Commenda ad vitam alicujus facta, ſive ad Eccleſiæ, ſive perſonæ utilitatem, non poteſt ſine cauſa revocari, ſicut nec collatio facto in titulum.

Et Rebuffus de prox. Beneficiorum fol. 135. Per mortem Commendatorii perpetuò Beneficium vacat non ut panus, & hæc eſt praxis in Francia, Commenda perpetua perputari poteſt cum titulo, quod ſæpe vidi in Francia, & confert, locat, & omnia facit ſicut habens titulum; & Commenda perpetua non poteſt revocari.

Et Homes in Regula de triennali poſſeſſore dicit de titulo, quod perpetua Commenda eſt ampliſſima diſpoſitio: Et eſt verus & legitimus titulus, cujus ſigna ſunt perpetuitas & fructuum diſpoſitio; quæ duo concurrunt in perpetua Commenda. Et poteſt locare omnia bona Eccleſiæ, & talis Commenda poteſt permutari, &c. Et eſt inſtar Collationis, & Reſervatio Papæ vacat

per

per Commendam perpetuam ſicut per Collationem; ſecus per temporalem.

So much of *Commendams* out of the Canon Law. Yet before I proceed to the Argument of this particular caſe, I will ſay ſomething of the power of diſpenſing in generall.

And firſt I ſhould clear, That though this Statute ſayes that all the Diſpenſations &c. ſhould be granted in manner and form following, and not otherwiſe; ~~and~~ that yet the King is not thereby reſtrained, but his power remains full and perfect as before, and he may ſtill grant them as King; for all Acts of Juſtice and Grace flow from him, as 4. *Eliz. Dyer* 211. The Commiſsion of tryall of Piracie upon the Statute of 28. *H.* 8. *cap.* 13. is good, though the Chancellor do not nominate the Commiſsioners, as that Statute appoints; and yet it is a new Law, and *Mich.* 5. and 6. *Eliz. Dyer* 225. The Queen made Sheriffes without the Judges, notwithſtanding the Statute of 9. *Eliz.* 2. And *Mich.* 13. and 14. *Eliz. rot* 303. The Office of Alnage by the Queen, without the Bill of the Treaſurer, it is good with a *Non obſtante* againſt the Stat. of 31. *H* 6. *cap.* 6. for this Stat. and the like were made to put things in ordinary form, and to eaſe the Soveraign of labour, but not to deprive him of power.

Next, it is certaine and cleare, that whatſoever the Pope did in this Kingdome, even then when he was in the greateſt higth and ſtrength, when indeed he was *Damon meridianus*, was of no better force in right and juſtice, then at firſt when he was but ſimple Biſhop of *Rome*; for whatſoever he did, was *coram non judice*, and ſo *jus non habenti tutè non paretur*. And this is clearly declared by the Statute of 28. *H.* 8. *cap.* 16. *ſect. prima &c.*

But where it hath been inferred, that whatſoever the Pope did *de facto*, or uſed to do, the ſame ſhould be by this Act of *H.* 8. allowed by the Archbiſhop, and no reſtraint to be underſtood upon this Statute, to ſuch Acts as the Pope did lawfully; for, that, they ſay, were to fruſtrate the whole Act, becauſe he did nothing lawfully. This muſt receive a more perfect expoſition; for we muſt not leave it upon the will and lawleſſe power of ſo vaſt a conſtruction. *Quo jure, Qua injuria?* Neither were the Popes Acts of all ſorts equally allowed, or diſallowed; as appears clearly by this Act *Sect.* 1. it ſelf, which contains both the claim, and uſe it ſelf, under theſe words; That he claimed all power to diſpenſe with all humane Lawes of all Realms, in al cauſes which he called ſpirituall. And the ſame Statute ſayes there, and *Sect.* 2. That it hath been ſo uſed and practiſed by many years, by the ſufferance of the King and his Progenitors. The truth whereof appears by the Statute of 25. *E.* 3. and 30. *E* 1. recited in it, and this Statute 25. *H.* 8. *Sect.* 5. where it gives ſtrength to the Act of the Archbiſhop bindes upon this; That they ſhould be of the ſame force that they ſhould have been, if they had been obtained with all things requiſite of the See of *Rome*. And

Sect. 20. saving the Popes Dispensation then in force, gives them no other force than they had before the Act; which should make the whole Law elusorie, if nothing were lawfull according to the supposition and intention of that Law.

So this Antimonie is to be reconciled *fœdere distinctionis*, thus: There is *veritas vera, pura & realis*, which is the primitive and very truth which answers the meer Right: And there is *veritas verisimilis, putativa, practica, suppositiva, ex concessis*; As for example, If the suppositious Child be once acknowledged for the Child by him whom it concerns, the consequences which shall follow of it are as certain *ex hypothesi, ex concessis*, as if he were the true Child indeed. And therfore *petitio principii*, if it be begotten, is *Elenchorum fortissimus*; So was it in these times, when by the sufferance and ignorance of times, the Pope had gained the opinion of supream head of the Church. And so *Hauke* 11. *H.* 4. 34. sayes, *Papa omnia potest*; *& Hillar* there acknowledgeth him *Haut & grand Soveraign* from whom all Ecclesiasticall persons have their power, and *Thirming* calls him Apostle. It falls by consequence upon a false ground, that his Ecclesiasticall Acts must be allowed lawfull. And upon the clearing of the Kings Supremacie, when the clouds of ignorance were dispersed, the consequence of his authoritie was as clearly declared 25. *H.* 8. cap. 21. *sect.* 2. And yet alwaies the Crown kept a possession of his reall power of dispensation in *spiritualibus* 13. *H.* 4. 6. to retain Benefice with Bishoprick, and 11. *H.* 7. 12. double Benefices; and so it came to this, that *Communis Error fuit quasi jus*; so then it arose from the error of sufferance of State, and of Courts of Justice both, for *res judicata pro veritate habetur*, though it be not so indeed. And therefore but in one case let me shew you the Act of the Court of Justice, concurring to allow an Act concerning the spiritualty done by the Pope, which is the 41. *E.* 3. 5. where the King brought a *Quare Impedit* against the Bishop of *Sarum*, and layd for his title, that the said Bishop being Prebendarie, therof before he was Bishop, the Bishoprick avoyded, and so the Temporalities being in the Kings hands, the Defendant being Prebendarie, was made Bishop, and so the Prebend avoyded, and belonged to the King to Present. The Defendant pleaded in Bar, that the Pope having reserved this Bishoprick to his Collation, gave it to the Defendant; whereupon the King reciting the Popes gift dd. him his Temporalties, after which he was consecrated, which Consecration made the avoydance of his Prebend; At which time the Temporalties were out of the Kings hand, and in his hand; whereupon it was adjudged, that the gift of the Prebend did belong to the Bishop, and not to the King.

Whereof note, That though the King might have given this Bishoprick by force of the Stat. 25. *E.* 3. by reason of the Popes sayd usurpation upon the Dean and Chapters Election, and also in default of Election,

ction, and by condition; whereby they held the right of Election by the gift of the Crown, as the ſame Stat. 25. *E.* 3. alſo ſayes; yet that being not done, which was the temporall part; you ſee that he was both by allowance of the King, and judgement of the Court holden a Biſhop elect, *de facto*, by the Popes authority only, or elſe the livery of the Temporalties to him had been utterly voyd.

Yet even in thoſe times the King was not excluded, but ſtill acknowledged to have power of diſpenſation and other Eccleſiaſticall Acts; And therefore at the firſt did give Biſhoppricks and Abbeys, and after granted the Election to the Deane and Chapters and Covents, 6. *E.* 3. 11. 14. *H.* 4. 6. and might grant diſpenſation to a Biſhop Elect, to retaine a Benefice, 1. *H.* 4. 6. and to take two Benefices, and to a Baſtard to be Prieſt, 11. *H.* 7. 12 So now we muſt agree that the Archbiſhop cannot doe all things that the Pope did *de facto*, for he made Proviſions upon all Churchmens Benefices, as appeares by the ſtatute of 25. *E.* 3. but thoſe the Lawes, and Courts did ſtill pronounce to bee unjuſt and injurious. But the ſtatute is to be underſtood of thoſe things that the Pope was by the erronious opinion of that time ſuppoſed to doe lawfully in meer Spiritualls. And indeed a man may well ſay, *non conceſſit* of that which a man hath no power to grant, aſwell as if he made no grant. Now then the Archbiſhop is reſtrained to thoſe Acts onely that the Pope did *quaſi Iure*, that is *inſpiritualibus* onely

Foure Caſes wherein the Archbiſhop is reſtrained from Diſpenſation.

But now I proceed to affirme, that the Archbiſhop is reſtrained by the ſtatute it ſelfe in foure mayne heads and Caſes which were accounted ſpirituall, and put in diſpenſation every day by the Pope.

And the firſt is in *ſect* 3 & 12 That nothing be repugnant to the Law of Almighty God, neither for King, nor for ſubject. So no advantage for prohibited marriages, as *Tanfield* Lord chiefe Baron thought. 1

Secondly, that nothing be againſt the Stat. of 21. *H.* 8. againſt pluralitie of Benefices. 2

That nothing be done againſt the Kings Prerogative Lawes and Statutes of the Realm in generall; which is not in the Statute *totidem verbis* as the two other caſes were, but inferred plainly upon the diſpoſition of thoſe Lawes, and upon this Law it ſelfe. For this Stat. *ſect.* 21. baniſheth all Licenſes made at, &c. contrary to the Proviſions of the Lawes and Statutes of the Realm, having in the *ſect.* 20. next before eſtabliſhed Licenſes and Diſpenſations from *Rome* then in being, generally; which ſhewes and makes the plain diſtinction: That the King never before, nor ever after this Statute, meant to allow Diſpenſations againſt the Common-Lawes, howſoever the Pope had practiſed ſuch ſometimes. For the Diſpenſations of thoſe times, I obſerve the Stat. 25. *H.* 8. *cap.* 14. *ſect.* 1. which enveighs againſt the proceedings in caſe of Hereſie, by the Popes Canons, which are repugnant and contrary to 3

the

the Prerogative Royall, and Lawes and Statutes of this Realm. And the Statute 25. *H.* 8. *cap.* 19. *ſect.* 3. which baniſheth all Canons prejudiciall in that kinde.

4 Fourthly, he is reſtrained *ſect.* 3. in Pleas to caſes, and matters that ſhall be convenient and neceſſarie upon examination of the cauſes and qualities of the perſons; and *ſect.* 12. ſpeaketh of a remedie, where the Archbiſhop ſhall refuſe to grant Diſpenſations. By the authoritie of that Act, it is limited to ſuch perſons as ought of a good, juſt, and reaſonable cauſe to have the ſame; wherein you ſhall ſee that I mean not any thing ſhall be examined that is committed in their examinations by that Law; As I ſhall hereafter ſhew when I ſhall have occaſion to ſpeak of that purpoſe. So I hold, that an Archbiſhop cannot licenſe a marriage within the degrees prohibited, as being againſt the Law of God. And yet the Pope did, and doth it at this day elſewhere. I hold likewiſe, that he cannot diſpenſe in ſome caſes mixt againſt the Law of God, and the Lawes of this Realm alſo; as to diſpenſe with an Alien that neither ſpeaks nor underſtands Engliſh, to have a Benefice there, which yet was practiſed with the Pope, as appears by the Statute of *Carliſle* 30. *E.* 3. recited in the Statute of Proviſoes 25. *E.* 3. which declaims againſt the Pope for giving ſpirituall promotions to his Cardinalls, Italians, or the like; which neither did dwell, nor might dwell here: whereas it is of the ſame eſſence of a Paſtor to be *educatus*, to teach the people in their own language, *Co.* 1. 14. and ought alſo to be *Hoſpitalis*, and ſo the ſaid Statute of *Carlile* ſaith, That the Prelacie and Churchmen of *England* were founded, to inform the people in the Law of God, and to keep Hoſpitalitie, and do Alms, and other works of Charity in the places where the Churches are founded.

I hold likewiſe, that the Archbiſhop could not by the meaning of this Law, appropriate a Benefice with Cure to a Nunnerie, between 25. *H.* 8. and the diſſolutions of Monaſteries, though the Popes made many *de facto*; for a woman cannot be a Paſtor by the Law of God, 1 *Tim.* 2. 11, 12. And *Dyer* in *Grimdons* caſe ſayes well, that it was a thing abominable. I ſay more, that it was againſt the Law of the Realm; for *Beneficium non datur niſi propter officium*, and it is no reply that the Cure may be ſerved by the Curate for them: For the queſtion is not, how they can make a Curate, but how themſelves are capable: and therefore in 5. *E.* 3. 4. *Crook* Patents 108. 9. *E.* 4. 6. & 4. & 5. *Ph.* & *Mar. Dyer* 150. If an Office of learning be given to a man utterly inſufficient, it is utterly voyd; and though it be to him and his aſſigns, or to be executed by his ſufficient Deputie, it mends not the caſe; but it muſt radically veſt in the firſt Grantee, before it can go in title of Procuration, or Deputation to any other.

Now it is well ſayd in *Grimdons* Caſe, that proper and operative words

words that do appropriate, is to make the Patron and his ſucceſſours perpetuall perſons, which ſhould here be the Prioreſſe, and her ſucceſſours, which fayles as I have ſaid; for *jura naturæ ſunt immutablia.* But ſuch, and all other Appropriations howſoever defective, were given to the King by the true meaning of the Lawes of Monaſteries, which meant to give all, aswell in reputation, as in truth; yet I agree with the book 12. and 13. *Eliz. Dyer* 129. That if a meer Layman, yea, or a man utterly illiterate be Preſented, inſtituted, and inducted, that this is not a meer Nullitie; but he is a Parſon *de facto*, for he hath all the Ceremonies to make him a Parſon, and his inſufficiencie muſt receive examination; but the incapacitie of a Woman appears in it ſelf. And though the Lay, or illiterate man be a Parſon *de facto*; yet no Diſpenſation can make him a lawfull Parſon: even as a man may get Land by *diſſeiſin de facto*, but no licenſe can make it lawfull.

But all theſe enormities in the time of the Popes tranſcendent and unqueſtioned power ſtood firm; for what ordinary or Eccleſiaſticall Judge durſt queſtion his Act? he could not erre; and if any durſt, the Pope had power to diſ-au horiſe his proceedings three wayes, that is indeed by all; *Anticipando*, by taking the cauſe to his own cogniſance by prevention. *Concurrendo*, by joyning ſome other with him that might over-rule him. And *amovendo*, by taking the cauſe out of his hands, and ſo to make himſelf both partie, and Judge.

Having thus cleared my way, and made ſome generall obſervations upon the Statute, and alſo diſtinguiſhed the kinds of *Commenda*; I will now examine this *Commendam* we have now in hand, not by the lawes of *Italy*, or *France*, but by the Lawes of *England*, either Common, or Canon-Law, by which it muſt be judged.

And firſt becauſe the Lawes of the Realm admit nothing againſt the Law of God, I quit this *Commenda*, that I do not condemne it for any contrariety to the Law of God; for though it be *de jure Divino*, That Chriſtian people be provided of Chriſtian offices and duties; as for Teaching, Adminiſtration of the Sacraments and the like, and of Paſtors for that purpoſe; and therefore to debar them wholly of it, were expreſſely againſt the Law of God: Yet the diſtinction of Pariſhes, and the form of furniſhing every Pariſh Church with his proper Curate, Rector, or Paſtor, by way of Preſentation, inſtitution, &c. is diverſly in divers Churches, and the State or Title which he hath, or ought to have in his Church or Benefice, is not a poſitive Law of God in point of circumſtance. And we know well that the Primitive Church in her greateſt puritie, were but voluntary Congregations of Beleevers, ſubmitting themſelves to the Apoſtles, and after to other Paſtors, to whom they did miniſter of their Temporals, as God did move them. So as *Eccleſiaſticus cap.* 17. 17. ſayes, God appointed a Ruler over every people, when he divided Nations over the whole Earth.

This *Commendam* not againſt the Law of God.

And therefore if a people will well refuſe all government, it were againſt the Law of God; and if a Popular State will receive a Monarch, it ſtands well with the Law of God.

But now to come to the main; I hold this *Commendam* to be voyd in Law, becauſe it is Contrariant, Repugnant, and Derogatorie to the Lawes of the Realm, and the Analogie of them, for ſeven faults, or Reaſons.

This *Commendam* voyd, for ſeven faults.

1 Fault.

The firſt is, that power is given by this *Commenda* to the Biſhop Defendant, *propriâ Authoritate*, to take Benefices with Cure, or without; and to enter and take poſſeſſion of them, and to convert the profits of them to their own uſe without Inſtitution, Collation, Induction, or any other ſolemnitie in Law whatſoever, no reſtraint or proviſion being made; that the Benefices that he ſhall ſo take, ſhall be voyd, when he ſhall take, enter, and poſſeſſe them, as it ought to be.

2 Fault.

Secondly, it is not provided in the *Commendam*, that the allowance and conſent of the Patron be had and gotten, before he executed the *Commendam*, as it ought to be.

3 Fault.

Thirdly, the *Commenda temporariè*, more than for ſix moneths, and leſſe, than for life, cannot ſtand with the Rules of the Common-Lawes of the Realm.

4 Fault.

Fourthly, He that hath a Benefice in his gift by lapſe, is leſſe able to make ſuch a *Commendam* of it, then he that hath the Advouſon in his proper intereſt.

5 Fault.

Fiftly, I make a Corollarie or Appendix, riſing out of all theſe exceptions, which I may call *Argumentum ab Authoritate negativa*; that there was never *Commendam* of this form or nature, *in capere temporariè*, heard of in any book in Law, or Record, before the Statute of 25. *H.* 8. or ever any ſuch received any allowance by any judgement, or judiciall opinion; but hath rather, when they have come in queſtion, been diſallowed and condemned.

6 Fault.

Sixthly, this *Commendam* is voyd by the Statute of 21. *H.* 8. of Pluralities, becauſe it contains not it ſelf within the number of Benefices allowed by that Law.

7 Fault.

If there were no Statute nor Law at all againſt Pluralities, yet the *Commendam* giving power to take Benefices of any ſort or number, ſo the valew exceed not 200. Marks, is not warranted by the Statute of 25. *H.* 8. as being neither neceſſarie nor convenient, but clean contrary; and yet I will leave them the latitude of their diſcretion allowed them by the Statute.

To the firſt Fault.

To the firſt, a Patron cannot Preſent to a Church full, neither can a *Commendam* be made to a Church certain that is then full; for there is no difference betwixt a *Commendam*, and a Preſentment, but that the one Preſents the Parſon to the Church, the other commits the Church to the Parſon, both being incompetible when the Church hath her proper Rector,

De futuro quum vacuit.

Rector, or husband alreadie; and therefore cannot be married, or be ſpoken to by any other. And the Canons when they ſpeak of *Commendams*, rely upon *Eccleſias vacantes*, and *neceſſitas & utilitas Eccleſiæ vacantis*, as before.

Suppoſe the *Commendam* had ſaid that he might take and enter, *Eccleſias vacantes, vel non vacantes:* this is in effect the ſame. For it is generally, *Beneficia cujuſcunq; nominis, qualitatis, &c.* So that if he enter a full Church, one cannot ſay that he hath exceeded his licenſe, but the licenſe it ſelf hath exceeded.

And note alſo, that the *Commendams* were not in ancient times made in terms generall, as this is to any Churches uncertain, but to ſome certain Churches then voyd; as appears both by the Texts of the Canons, and the practiſe of the two famous Preſidents before remembred, *Fundenſis*, and *Liſſitance*.

This abſurditie can receive but two anſwers.

Firſt, that the *Commendam* is to receive, *civilem intellectum*, of Churches voyd only, though it be generall.

The other, that this Church of *Clifton* was voyd, when it was taken; and ſo no intruſion.

To the firſt I reply, That the Papacy was a clear and plenary tyranny, eſpecially towards Churchmen, and in Church cauſes. Now a full tyrannie hath two parts, the one *ſine jure uſurpare*, and the Statute of 28. *H.* 8. *cap.* 10. proves; for the Statute calls it an uſurped tyranny, and the exerciſe of it a Robberie, and a ſpoyling of the King, and his people. And this Statute 25. *H.* 8. *ſect.* 14. calls it ruine and ſpoyl of the Realm; ſo you ſee both parts have tyranny in it.

Now it is plain, that he had no more right upon the Advouſons of Church-men, then of Lay-men; and therefore they had the ſame remedie againſt his proviſions by a *Quare Impedit*, in the Kings Courts that Lay-men had, if they durſt have uſed; as appears by the 11. *H.* 4. 46. and the Statute of 25. *E.* 3. of proviſors; but becauſe they were in his danger in meer ſpiritualls, ſubject to deprivation, diſpoſition, &c. and the like; and to receive promotions by him, he wrought his will upon them, *obliquè in temporalibus*, which was the cauſe that the ſaid Statute 25. *Edw.* 3. gave their Preſentations to the King, when the Pope uſurped upon them, as to a Fortification againſt invaſion.

And that the Pope did uſe to provide to Benefices full See, to expreſſe Statute 7. *H.* 4. *cap.* 8. & 3. *H.* 5. *cap.* 4. Raſtall proviſions 20. & 22. And that a civill underſtanding will not help; ſee *Grimdons* caſe judged in the point; That if an Appropriation be made of a Church then full, it is utterly voyd; except it be made by expreſſe words, *de futuro quando vacaverit*, which is the clauſe wanting here.

So *Paſche*, 9. *Eliz.* *Dyer* 25[c]. 9. *Edw.* 4. 6. 7. *H.* 7. 16. the office of a Steward of Courts being full, cannot for any other, but by the

King. And that not by preſent words, *de futuro quando vacaverit.*

Now to the ſecond anſwer, that this Church of *Clifton* was voyd, both when the *Commendam* was granted and executed; I reply, that this anſwer had been good of that Church certain, as the Kings Preſentation is in the caſe. But the *Commendam* is of any Churches generally, ſo it gives power to execute upon any voyd, or not voyd, which is againſt the nature of a *Commendam*; ſo the fault I finde, is not in the execution of the *Commendam*, but the conſtitution of it; which being not warranted by the lawes of a *Commendam*, makes it no *Commendam* at all, and then it can bear no execution at all; for *jura naturæ ſunt immutabilia*, which extends to partieular natures and forms of every thing, *quæ dant eſſe*; for if you change the eſſentiall form, it may be ſome other thing, but it is not now the ſame that it was. *Omnis forma per quam quæq; res in propriâ ſpecie conſtituitur perfectio quædam eſt, Perfectum cui nihil deeſt, ſecundum ſuæ perfectionis, vel naturæ modum.*

Now to ſhew that a good execution will not profit where the conſtitution is defective. See *Mildmayes* caſe in *Coke, lib.* 175. *Sharington* reſerved a power to himſelf to limit uſes to any bodie; This limitation in generall being utterly voyd, he could not limit any uſe to his Daughter. See 33. *Eliz. Coke lib.* 1. 154. The Lord *Paget* in conſideration of payment of debts, covenanted to ſtand ſeized to the uſe of *Charles Paget* for years; though he make his Executor after, yet the limitation is voyd.

Vernons Caſe, *Coke lib.* 4. 2. If *A.* make a Feofment to the uſe of a ſtranger, the remainder to his wife for her Joynture; though the ſtranger dye before the Husband, yet this will not be made a Joynture.

So *Jrr.* 12. *Jaco. rot.* 3264. Common-Pleas Caſe of *Otes* and *Frith*. # A man ſeized of Land in Fee; He, and his Son and Heir joyned in a Leaſe to begin after his death, yeelding a Rent to his ſaid Son; he died; his Son proved an Heir, and yet the reſervation was adjudged voyd.

Now to the ſecond part of the *Commendam*. That there is no Proviſion that the Patrons conſent be had; which is ſo neceſſarie, as that upon the Councell of *Lyons*, and upon other Lawes Provinciall, *ſecundum omnes patroni Conſenſus, & omnium qui læsi poſſunt, requiritur*. As if the Patronage be divided, as *A.* to name to *B.* and *B.* to Preſent ever as the books are, *lib.* 5. 1. 14. *lib.* 4. 11. and other common books. And again, *Quod ſatis obſervant Prælati, qui niſi præſentati per patronos, non faciunt Commendas*. And 11. *H.* 4. 40. *Hauke*, and *Her.* The Pope may grant that a man may have divers Biſhopricks with conſent of the Patron. So that it ſeems in the caſe of a *Commendam*, the Parſon was firſt Preſented by the Patron to the Biſhops; which was indeed the naturall courſe, the Patron being the firſt actor, and the *Commendam* working but the effect of the Advouſon, Admiſſion, Inſtitution, and Induction.

a Fault.

Now

Now the inſtrument of *Commendam* doth expreſſely exclude the power in theſe words, *Authoritate ſuâ propriâ capere, & apprehendere abſq; inſtitutione, Collatione, Inductione, vel alia quacunq; juris ſolennitate, &c.* which (*alia*) muſt refer to the Preſentation to exclude that, becauſe the ſpirituall ſolemnities were named, and excluded before eſpecially. *Solenne eſt quod ſolet fieri Angl.*

Now if the *Commenda* had been, that he might take the Benefices without the Patrons conſent, it had been voyd; this is the ſame in effect in cloſer words.

Yet know the degreee of the Popes practice in *Commendams*, by *Rebuffus de praxi, &c.*

The Pope provided upon the Churches abſolutely upon the Churches of the Lay-Patrons; his proviſion was not good, but either with an expreſſe clauſe, *Dummodo Conſenſus Patronorum, Laicorum, adhibeatur*; or with an expreſſe, *non obſtante*, the Patrons conſent were not had.

So by their own rules, the inſtrument of *Commendam* it ſelf muſt provide for the conſent, or diſcharge it, for the Pope ſaw that the Patron was to be one. So this form is worſe than his.

But if a *Commendam* were made to the Patron himſelf, it were good in this form, as an Appropriation which is alwaies to the Patron.

Now that the Patrons right was never ſubject to the Churchmen, nor Officers Eccleſiaſticall; and that it is the more worthie and firſt Act and part of the promotion to the Benefice is apparant in all diſpoſitions and tranſpoſitions of Benefices, as in the ordinary Preſentation in the Propriation, in the caſe of Church, 50. *Edw.* 3. 27. 4. *Hen.* 6. 15. In deriving of a Viccaridge, 17. *Edw* 3. 5. 15. *Edw.* 2. *Fitz. Quare Impedit*, 165. In tranſlating of a Parochiall Church, to a Collegiate 15. *Eliz.* 3. 26. in permutation, and change of Benefices, 45. *Edw.* 3. *F.* Exchange 10. For the Patron muſt preſent of *New-Croſſe*, and did ſo there. But it is true, that it ſhall depend upon the execution and enjoying of the Exchange, as that caſe is in both points; and the Reſignation and proteſtation of both the Incumbents Regiſter 306. 6. In which caſe, if the reaſon of his change fail; either Incumbent ſhall return to his old Benefice, *in priſtino Statu*, upon this former Preſentation.

The Patronage is both granted, and pleaded by the name of *libera diſpoſitio Eccleſiæ*; 14. *Edw.* 4. 2. & 7. *Edw.* 3. 4. by the name of the Church it ſelf. And the *Quare Impedit eſt, quod permittat preſentare ad Eccleſiam, &c. quæ vacat & ad ſuam ſpectat donationem.* And truly, for the Acts of the Ordinarie, are in execution of it; as the admittance of a Coppy-holder upon ſurrender.

The Patrons Preſentment takes place againſt the Ordinarie, after lapſe incurred, 12. *Ed.* 4. 3. 43, *Edw.* 3. 15. 11. *Hen.* 4, 80, and againſt the Kings lapſe likewiſe.

Tri. 17. Eliz. Dyer 241. Caſe *Watſon*, a *Quare impedit*, againſt the Archbiſhop and his Incumbent upon default; the Plaintiffe made Title, and had a Writ to the Sheriffe, where it was found, that the Church remained void two yeares, ſo the Lapſe devolved to the Crowne, and now is full of the Collation of the Archbiſhop, and the Plaintiffe had Judgement of the dammage; but before halfe a year, becauſe he ſhould remove the Clerk, and a Writ to the Biſhop; note, for it is not fully within the rule, *nullum tempus occurrit Regi*; for the Patrons Title continues till the Lapſe executed; for the Kings time is not veſted in him peremptory, as in other Titles.

No Act of the Ordinary can diſappropriate, the Patron which preſented it did diſappropriate, 38. *H.* 6. 20. 11. *H.* 6. *Fitzh. Na. br.* 3, 35. And I am of opinion, that if the Preſentee and his Clerk be refuſed for juſt cauſe and notice given, that lapſe ſhall incurre; for the appropriation gives him a choice to hold, or not. As appeares by a forme of an Appropriation in *Grimdons* Caſe, which by his preſentment he hath now renounced; ſince the Patrons right and part to the filling of the Church, and making an incumbent, is *prior tempore, & potior jure*, ſince both in time and dignity it is firſt. Shall the Ordinaries Act be good to perfect and finiſh the Act, which the Patron ought to begin to him; to give the Incumbent leave, to leave open the door, and come in by the window.

Now what an anſwer hath been made to this? Nothing, but that the King, who proved Patron, did conſent before the Commendatory entred, which is not *ad idem* (as we have ſaid before) when we ſpake of the Conſtitution, to anſwer with the Execution. And the Popes practiſe was in this exact, as you ſee in *Rebuffus* before, though he took upon him more in the Patronage, than belonged to him.

Suppoſe that the Archbiſhop ſhould commend to a certaine Church void, *licet patronus non conſenſerit*; and ſo in this generall, this inſtrument of *Commendam* were void, though the Patron would after conſent.

3. Fault. The third part of the *Commendam* is, that it is temporary, which brings ſo many inconveniences and abſurdities in law, as cannot be born; for the Church is neither altogether void, as it remaines in the caſe of *Commendam Semeſtris*, which is but a ſequeſtration of fruits and cures, till the Patron preſent; neither is the Church abſolutely full; for then it ſhould be, as it appeares by the pleading, *plena & conſulta*, that is, *plena poſſeſſore, & conſulta de rectore:* Now *plena eſt, cui nihil addi poteſt ſecundum modum ſuæ capacitatis*: Now that clearly is not ſo in this caſe; for he hath not the benefit entirely, neither in Paſtorall cure; for there is no more than a proviſion put upon him (not to ſerve the cure himſelfe, as the Law ſpeaks to the true perſon, *accipe, accipe curam tuam*) but that the Church be not defrauded. Neither hath he the Benefice wholly in him, as a Rector, ſo as he may be ſaid to be ſeized in Fee, or to be ſaid a Succeſ-

ſor

for or Predeceſſor, to the perſons that were before, or that ſhall follow. And a Benefice is ſo entire and indiviſible, that it cannot be preſented or commended by the parties as the Cure, nor the Glebe to one, nor the Tithes to another, or the like: And by the ſame reaſon the ſtate and perpetuity of an Incumbent cannotbe divided or diminiſhed,as that he may take it and hold it for three or four years, or as this is, ſo long as he ſhall remaine Biſhop. Again, this were to keep a freedome in a perpetuall Abeyance,which the Law doth permit out of neceſſity, as upon death of a Biſhop, or Parſon, or the like, but never allowes it to the Act of the party; and therefore if a man make a Leaſe for yeares, the Rem. to the right heires of *H. H.* being alive, the Rem. is utterly void. This Commendatory cannot have a *Juris utrum*, which is *Juris ſit libera Eleemoſina pertinens Eccleſiæ ſuæ*; for the Church is not his, he cannot take to him and his Succeſſors; he cannot ſue, or be ſued in Writ of Annuity, or the like. It ought to be *vinculum colligatum*, between the Rector and Rectory. Now that is, as if a man ſhould take a wife, with proviſion to keep her,till he can get a richer: ſee the Gloſſe upon the Preſident before cited, of *Eccleſia ſillatina*, which holds, that the Pope can make an Inſtitution to a Benefice for a time only. Out of which obſerve the fallibility of forrein Authours,and forrein practiſe; for by the Lawes of *England*, the Acts of Preſentation, Inſtitution, and Induction, are all authorities given by Law, and muſt be executed by form preſcribed by Law, and cannot be; for *Actus legitimi non recipiunt modum*; for the Law gives the Church, not the Patron and Ordinary, who are ceremonious Miniſters, and are but appointed their manner and forme, which they may neither exceed nor abridge. So a man may aſſigne Rent for Dower, out of the land Dowable, without Deed; and it muſt be for no leſſe eſtate than for life, 7. *H.* 6. 34. 33. *H.* 6. 2. yet there is intereſt and authority joyned. Nay, a Joynture, which is but an imitation of a Dower, or a Baſtard Dowry, cannot be made for the life of another, *Coke lib.* 4. 3. *Moile* 39. *H.* 6. 40. holds a Protection to be void, if it be for leſſe than a whole yeare, *M.* 6. *E.* 6. *Dyer* 36. in caſe of *Quarentine*, the wife muſt not depart from the houſe upon the husbands death, and return when ſhe will for the reſt of her dayes. If the King grant the Office of *Cuſtos Rotulorum*, or chiefe Juſtice to two, it is void 18. *E.* 4. 7. I cannot grant the Office of my gift of chiefe Juſtice, for leſſe time than for life, if the King grant the cuſtody of the land of a Lunatique, *abſq; compoto*, it is void, 28. *H.* 8. *Dyer* 26.

But a *Commenda* may be admitted; for it amounts to a Collation or proviſion, and hath full words that he may take and receive any Benefice, void of the gift or preſentation of the Patron, and enter it without induction, &c. and take the profit as Rector or in *Commendam* for tearm of life.

And now it is true, that it is in a ſort repugnant, that a man ſhould have

have a perpetuity irrecoverable in a thing that he takes only to keep; for ſo was the originall of a *Commendam*. But here where the words are ample, to make a full Incumbent, the word *in Commendam* ſhuffled in, may be counted void; as in *Grindons* Caſe it is reſolved, the perfect'ſt word to make an Appropriation, is to make him Parſon; ſo yet as a Periphraſis equivalent, like unto this, will ſerve.

Now what hath been the maine anſwer unto this; That the nature of a *Commendam* is determinable, and not perpetuall.

To which I make a double reply.

Firſt, That a *Commendam* may be *perpetua*, and that is the beſt and perfecteſt kinde, as appears by Canons and Doctors. But ſuppoſe that were ſo, I ſay the Popes chaire is no Court of Parliament, to make Laws for Inheritances or Free-holds in *England*; neither is it in any mans power to create new natures in Law, according to the new inventions, except they may ſtand with *Jus commune*, which is *natura univerſa* to this purpoſe. Therefore in the like Caſe, in the matter of manners, *Tully* gives good advice, *Propter naturam univerſam nihil contendamus, eâ tamen conſervatâ propria ſequamur*: was it not ſo in our Caſe of Perpetuities, every man made new Lawes for his proper matrimony, and they ſtood long in vulgar opinion, and without the aſſiſtance of learned men; but now *exploſa eſt ſententia*, being contrary to the Laws; for *politiæ legibus, non leges politiis adaptandæ*.

4. Fault. The fourth fault of this *Commendam*, that it is grounded upon a Lapſe, which is not an intereſt naturally, as is the Parſonage, but is a meer truſt in Law.

If the ſixth moneth be incurred, yet the Patrons Clerk ſhall be received, if he be preſented before the Church be filled with the Lapſe, 13.*E.*4.3. *Brook Plenarty*, 15.43.*E.*3.11. 11 *H.*4.80.

A Lapſe cannot be granted over as Grantee of the next Lapſe, before it fals, nor after. If the Lapſe incur, and then the Ordinary die, the King ſhall preſent, and not the Executors of the Ordinary: For it is rather an addition than an intereſt, *Fitz. Nat. Br.* 34. & 25. *E.*3.45. *Dyer* 87. is doubtfull, whether to the King, or to the Metropolitan. And I hold it clear, that if the Patron preſent, and his Clerk be inſtituted, and remaine without Induction eighteen moneths, the King ſhall not preſent upon him by Lapſe, as he may do by a direct patronage accruing to him by guard of temporalties, or of his Tenants, hereafter Inſtitution before Induction, *Fitz. N.B.* 34.36. for the King cannot have a Lapſe, but where the Ordinary might have had it before.

But a lapſe (as I have ſaid) is an Act or Office of truſt repoſed by Law in the Ordinarie, and Metropolitan; and laſtly, in the King, who is *centrum & ſtabilimentum juſtitiæ*; the end of which truſt is to provide the Church of a Rector, in default of the Patron; and yet as for him, and to his behalf. And therefore as he cannot transfer this truſt

truſt to another; ſo cannot he divert the thing wherewith he is truſted to any other purpoſe: and therefore though the King or Biſhop may ſuffer the Church to ſtand voyd (which is *culpa*) yet they cannot binde themſelves, that they will not fill the Church; for that were *injuria & malum in ſe*, and therefore ſhall be judged in Law, a deceit of the King; for *eadem præſumitur mens Regis, quæ eſt Juris, & quæ eſſe debet, præfert in dubiis.*

Now the Ordinarie, or he that is preſent at the lapſe, is as it were *Negotiorum geſtor*, or a kinde of Attourney made by Law, to do that for the Patron, which it is ſuppoſed he would do for himſelf, if there were not ſome let; And therefore the collation by lapſe is in right of the Patron, and for his turn, 24. *Eliz.* 3. 16. And he ſhall lay it as his poſſeſſion, for an aſſize of darranie preſentment, 5. *H.* 7. 34. 13. *Jac.* The like if it were for Proviſion of the Pope *Fitzh.* Aſsize darraign preſentment, 3. And upon 7. *Edw.* 3. 60. If my Attourney to proſecute buſineſſe, ſhould conſent or agree to ſuch *Commenda*, as this, it would be voyd, as out of his Warrant; Theſe kindes of Ann. or others are never extended beyond Ordinaries.

Bayliffs may receive Rents of old Tenants, they cannot except neer upon the change of old = tenants; they cannot enter for *non* payment of Rent, much more for procurations made by Law; the reaſon is, they are but a provinciall Miniſterie, for eaſe of neceſsitie, and certain benefit of the Lord.

The eſtates of Ideots and Lunatiques are by Law intruſted to the King; If therefore, the King ſhould grant to one that intrudeth upon the poſſeſsions of an Ideot or Lunatique, or take their perſons unlawfully, that he would not meddle with them, but ſuffer them to do their pleaſure, theſe grants were voyd. For theſe are Acts of Juſtice, and offices of a King, which he cannot put off, *Ceſſa Regnari, ſi vis non Judicare.* And in theſe things the King is never ſuppoſed by Law ill affected, but abuſed and deceived; for, *eadem præſumitur mens Regis, quæ eſt juris*: So the 7. *H.* 4. 42. & 21. *E* 3. 47. the Earl of *Kents* caſe, The Kings Guardian, his granting of Land in Fee is voyd. So we judged lately; If a Sheriff make an under-Sheriff, and take Bond of him, that he ſhould not ſerve Executions without his conſent, the Bond would be voyd; ſo it is reſolved *Co. lib.* 7. 36. that the King cannot grant a pœnall-Law: So here, if the King having a lapſe, ſhould grant to an Intruder, that he would not Preſent to the Church, yea, perhaps, if one ſhould uſurpe upon the Kings lapſe, and the King grant to the uſurper that he would not remove his Clerk; for this were a breach of that truſt which the Law repoſeth in him, aswell for the behoof of the true Patron, as for the good of the Church; for by this means the Patron ſhould loſe his Patronage.

The firſt exception, or rather Argument, out of all the former excep- 5 Farr.

tions is the Appendix, or Corollary after them all; I draw *à praxi beneficiorum in Anglia*, as *Rebuffus* writes, *de praxi beneficiorum* in practice; for by the Law and practice of this Realm, we muſt judge here; not by the practice of forreign Nations, much leſſe by the practice of *Rome*, the Popes temporall Principalitie or demeaſne of the Church, which they call *patriæ obedientiam*; but we may well call it *patriæ jugum aſſueti, & ſervituti circumdat.* And beſides we know not the conſtitution of their Patronages and Church-livings in forreign Kingdomes. But this I ſay, that no man ſhall ſhew any Law, or Statute, Authenticall reſolution, or judiciall opinion, nor hiſtory, nor Councell, that did ever allow in this Realm, *Commendam in Capere, & apprehendere*, and to hold *propriâ Authoritate*, for a time leſſe than for life, either from the Pope, or any other; but ſuch opinions as have been againſt it, neither ſhall any man ſhew me the word *Commenda*, either in book-Law, or Statute-Law of *England*, before 25. *H.* 8. only 11. *H.* 4. 76. *Thermin*, and *Hawkeford* agree, that the Pope may grant to a Biſhop to take Benefices *de Novo*. And likewiſe *Horton*, and *Hawkeford* there, that one may be made Biſhop of divers Sees by the Pope, if the Patron abſent; which I grant, underſtanding Benefices totally, with conſent of Patron, and free from the exceptions that I have, and ſhall take againſt it.

In the caſe of the new Book of Entries, *fol.* 521. 43. *Eliz. Rot.* 2028. by the Queen, againſt the Biſhop of *Coventry*, and *Crompton*, *Warberton*, and *Kingſmell*, Judges, argued openly, and at large againſt the the *Commendam* for the Queen; and *Anderſon* alſo declared his opinion, *Walmſley* declared his opinion to the contrary, without Argument. Whereupon, the Queens Attourney entered a *Nolle proſequi*. Now it is to be obſerved, that all the inventions of the Pope concerning the diſpoſition of Benefices, Biſhopricks, and other Church-livings in *England*, were ſtill to make perfect, not mutilate Incumbents. As Appropriations, Collations, Proviſions, *Commenda retinere*, as it is ſaid, and Reſervations, which was not of it ſelf a beſtowing of a Benefice; but was a declaration what dignities or Benefices he did reſerve to be diſpoſed by himſelf, or any other: Whereupon afterwards was to follow another Act of Proviſion, or Collation to give it execution. And this he would make ſometimes by particular Benefices, ſometimes by whole Provinces, and Kingdomes, as appears before in the extravagants of *Clement* the 5. And the Stat. 25. *E.* 3. of Proviſoes. Now that Proviſion did make a perfect Incumbent perpetuall, as well as the ordinary form of Inſtitution. See *Fitz. Na. br.* 37. *C.* 18. *Ed* 3. 23. 41. *Ed.* 3. *&* 5. *&* *Stat* 13. *R.* 2. Raſtall Proviſions made againſt Proviſions to come; yet enacted that ſuch as were in poſſeſſion already by Proviſions, ſhould enjoy them during their lives. The firſt mention that is made of the word *Commenda* in books of Law is 7. *H.* 8. where the Archbiſho is ſaid to be *Commendatorie of Albanie*, which might alſo be in the *Retinere*, or elſe by an abſolute taking.

taking. The next is the Statute of 28. *H.*8. *cap.* 16. where the Statute making mention of divers kinds of Buls and Hereſies of the Popes, nameth *(inter alia) Commendams* and Tryalties; and enacts that the party ſhall enjoy the benefit of ſuch of them only, as might be granted by the Archbiſhop, by the Statute 25. *H.*8. and this is ſtill under the queſtion, and argues, that all was not permitted to the Archbiſhop, that the Pope tooke upon him, which was plainly true upon Tryalties, by the Statute of 21. *H.*8 But the *Commendam* in the *retinere*, may be made temporary for years, or any time whereof the difference is manifeſt, if either nature or reaſon be obſerved.

The difference between *Retinere* and *Capere*, is no leſſe than between holding and retaining that which is already mine own, which is free from all exceptions before taken to the other kinde, and the taking of that which is another mans; and therefore take the Caſe, that I am already Beneficed by Preſentation and ordinary forme, and would take alſo a Biſhopprick, and of his owne nature would avoid the Benefice, whereof I obtained a diſpenſation, whereby to hold this Benefice for three yeares, though I take the Biſhopprick; which when I take, I remaine ſtill the Parſon of the ſame Benefice, in no leſſe eſtate the I did before and where there is no injury done neither to Church nor Patron; for though it be *damnum*, yet it is *abſque injuria*. Now when three years are paſt, the Benefice voids, as it ſhould have done at the firſt, if there had been no diſpenſation; like unto Fee-ſimple warranted for life, though the warrant be temporary, yet the thing warranted, and to be recovered, in value is perpetuall for it is a warrant of Fee, though not a warranty in Fee. So the *Commendam retinere*, is a perpetuity, though it ſelf be not perpetuall. And of the allowance of this in Books, ſee the famous Caſe of *An.* 11. *H.* 4. 76. upon the Common Law and Statute proviſions both *Fitz. Na.br.* 36. *H. Puckhurſt* Caſe, *M.* 6. & 7. *Eliz. Dy.* And *Hollands* caſe, *Co.lib.fo.*75. Now the Statute ſeemes to give power over all Diſpenſations granted at *Rome*, wonted and unwonted, and all diſpenſations generally; yet it muſt have confirmations, ſuch as were allowable and allowed by the Lawes and practiſe of this Realm, or elſe it ſhould make our yoke heavier than before. And the Statute meant not to create new powers unlimited, but to tranſlate from the Pope to the Archbiſhop, with reſtrictions, as was obſerved before. Now though the Pope did ſometimes attempt to grant diſpenſations againſt the Lawes of the Realme, and perhaps added fulminations; yet they are but *bruta fulmina, mina inermes*, and *Idola conceſſor.* For they are no grants indeed that have no forme, and therefore againſt the Kings grant you may plead *non conceſsit*, if they were not his, *Co.lib.* 6. 15. And therefore the Defendant he hath averred, that the like *Commendams* were granted to the Biſhops of this Realme, before the Statute which the Plaintiffe hath by proteſtation denied. But the averment is vaine, if the

Fault

Law judge the contrary, as is his averment alſo. That this *Commendam* is not againſt the Statute 21. *H.* 8 of pluralities, touching which and the proviſion of this Statute 25. *H.* 8. *cap.* 21. to preſerve it, I will explain my ſelfe the more largely, becauſe we are now upon a point that may utterly defeat that Statute, which was a moſt religious and politick Church Law, and I may ſay a Redintegration of thoſe holy ancient Canons, and a reſtauration of the Church, ruined by the Popes *Tot-quots*, diſpenſations and tolerations; for though this be in the Caſe of Biſhop *Smith*, and cannot be but rare; yet like diſpenſations may be granted to any common Church, to take in *Commendam* ten Benefices to hold for years, or ſo long as perfect Incumbent. For obſerve, the ſcope of this Law was to appropiate every Flock his proper Paſtor, both in body and mind; in body, that he ſhould be the husband of one wife; *una Eccleſia, unus Rector*; In minde, that having but one Benefice, ſaving ſome ſpeciall favour and Conſiderations, he ſhould not farm graſſe, or mingle himſelfe with ſecular affairs, that might withdraw his mind. The policy in this Law I obſerve, that the time of this Parliament inclining againſt the Pope, (for 31. *H.* 8. was that Parliament) yet they did not ſtraightway take away from the Pope power of diſpenſing by plurality, which was one of the greateſt enormities of his power, and was *ſpecialis introitus* of his coffers: but they provided that this diſpenſation ſhould not be ſufficient onely for it ſelfe; but muſt alſo ſecond a qualification, which ſhould come from Lords and great men, whereby the King did draw them to his part from the Pope, by dividing his power in this among them. Now touching this Statute, I agree clearly, that Biſhopricks are not in the Law under the word (Benefices,) ſo that if a Parſon take a Biſhoprick, it avoids not the Benefice by force of this Law, but by the ancient Common Law, as it is holden, 11. *H.* 4. 60. but I hold it is as clear, that if a Biſhop have, or take two Benefices, Parſonages, or Viccarages, with Cure either by Retainer, or otherwiſe *de novo*, he is directly as to thoſe Benefices within the law; for he is to all purpoſes to thoſe not a Biſhop (whether it be in his own Dioceſſe or not) but a Parſon or Viccar; and by that name muſt ſue, and be ſued, and preſcribe and claime; for the words are plain. If any Parſon have Benefice with Cure, and take another Cure, &c. whoſoever will hold two Benefices, muſt have both ſuch a qualification, and ſuch a diſpenſation as the Law 21. *H.* 8. requires. And thereupon I am of opinion clear, that if a man be qualified Chaplain to any ſubject, and then be made a Biſhop, his qualification is void; but if he have lawfully two Benefices *de novo*, after by force of that qualification to retain beſides his former diſpenſation, to take two Benefices, hold them with his Biſhoprick. And if a man, being the Kings Chaplain, take a Biſhoprick, I hold he ceaſeth to be the Kings Chaplain; and Biſhops are not in that reſpect Chaplains to the King, within the meaning of this Law. So the cauſe of the Statute that gives the King power to give as many Benefices as he would of his own gift to his Chaplain, will not ſerve them.

Now

Now where it was objected, that this *Commendatorie* is not within the Statute of 21. *H.* 8. for two reaſons. Firſt, becauſe being but temporarie, he neither is, nor can be inducted, which the Law requires. The ſecond, that *Clifton* was the later Benefice received; and therefore it ſhould be *Southfleet*, and not *Clifton* that ſhould avoyd.

I anſwer to the firſt; That it is the office of Judges to advance Laws made for Religion, according to their end, though the words be ſhort, and unperfect, *Magdalen* Colledge Caſe. Otherwiſe if a man take twenty Benefices, and enter and take the profits of them all, but take no formall inſtrument of induction, he ſhall out of the Law, *durus eſt hic ſermo*; and ſo that Statute *ſect.* 4. it hath only theſe words really intituled or poſſeſſed, and hath not the words of induction. And *ſect.* 15. it is provided, that a Benefice Appropriate ſhall not be taken a Benefice with Cure within the Law, elſe it had been; yet it hath formall induction, but gives poſſeſsion without induction, and ſo doth this.

But another cleer anſwer is, that the main ſcope of the Law is to avoyd and diſable all Licenſes, Diſpenſations, Vnions, Tolerations, and other faculties whatſoever from *Rome*, or elſe where; wherby any ſhould be enabled to take, receive, or have any more number of Benefices, or in any other form than is preſcribed in that caſe. Now as it is judged in *Digbies* Caſe, a Benefice is taken, received, and had by inſtitution only; and therefore a qualification, or diſpenſation following comes too late.

Why, then obſerve the conſequence; If a man having one Benefice with Cure by inſtitution, only without diſpenſation; the Common-Law makes avoydance Actuall, if the Patron will. Now if this Diſpenſation to take Benefices without number be utterly voyd by the Law, then are theſe Benefices taken without Diſpenſation to be voyd, eſpecially being by a Biſhop. And I hold, if a man take a Trialtie which is not allowed him, he cannot by that take two Benefices, becauſe his Diſpenſation is voyd: And alſo I am of opinion, that if a man have a Benefice and Cure, worth above eight pound, he cannot with qualification, or diſpenſation procure another with Cure, to be united after, though they make but one Benefice; for the clauſe of union is provided for, by expreſſe name. But of unions, before I am of another minde, and tolerations alſo excluded, which is a proper word for this caſe of *Commendam temporarie*; for it is not allowed, but tolerated, *non præcepto, ſed permiſſione*, as the Canon ſpeaks. Having ſpoke ſo much of the Statute of 21. *H.* 8. now obſerve how jealous the Statute 25, *H.* 8. is, That nothing be done by it, to the prejudice of the other; and therfore the *proviſo* for the preſervation of it, is inculcate with a triplication; and as *Solomon* ſaith, *vinculum triplex non facilè rumpitur.* This Statute ſhall not extend to appeal, or derogate, &c. nor give licenſe to take, receive, or have any more number of Benefices, &c. That the Act of 21. *H.* 8. ſhall ſtand good to all intents, according to the true meaning, &c. Now

this *Commendam* croſſeth all theſe points; and namely, gives power to take, and receive (which are the very words of the Statute) without reſpect of time, more, or leſſe, one, or more Benefices with Cure, and the ſame to enter and take, and have the profits, &c.

This alſo gives anſwer to the ſecond objection, that *Clifton* could not avoyd; for I hold (as I have ſaid) that a Biſhop by Diſpenſation, may retain as many Benefices as he had lawfully before, but can take none of new, if he had his number before; for the words are aſwell againſt the having of Benefices, as taking. And if he had none before, then he can take but one *de novo*, except by qualification he can be a Chaplain, and alſo by a double Diſpenſation have licenſe to take two Benefices, and hold them with a Biſhoprick.

2 Fault. The laſt and ſeventh fault that I aſsign in this *Commendam*, is; That though there be a latitude of diſcretion left to the Archbiſhop, yet he is circumſcribed with theſe cautions, *ſect.* 3. that the Diſpenſations be neceſſarie and convenient in the caſe of the King himſelf; and the ſame ſection hath theſe words, which in caſes of neceſſitie may lawfully be granted: and *ſect.* 12. ſpeaketh of the refuſall of the Archbiſhop to grant Diſpenſions. It is added, that of a good, juſt and reaſonable cauſe he ought to have the ſame; for it is no diſcretion, *ratione inſanire.*

The Stat. *ſect.* 3. gives the Archbiſhop examination of the cauſes and qualities of the Parſons, procuring Diſpenſations; and therefore, if he affirm the cauſe juſt, as the exilitie of a Biſhoprick, or the quality of the Parſon worthy againſt theſe two, ſhal be no exception or averment by Court, or partie; yet this point is very imperfect in the Plea; for the Diſpenſation ought not to affirm it as certain as they ſpeak it, the Biſhoprick was inſufficient, but that the Biſhops Petition did ſo informe.

But now the Diſpenſation may be ſo groſly and palpably unneceſſary and inconvenient, as no liberty of diſcretion can defend it. Suppoſe it were a meer *Tot-quot*, and yet that was common with the Pope: but this Statute hath not given it to the Archbiſhop, and yet it is not otherwiſe reſtrained, but by theſe words, and the Statute 21. *H.* 8. And this *Commendam* is almoſt *Infinitum, & Iure reprobatur*, It is Infinite in nature, in dignityes and Benefices, in place where, in time when, in orders how they ſhalbe given and holden, in number, for they may have twenty or thirty ſmall, and ten very good; ſuppoſe there were not many very worſe in the time of Popery. This is like the fraud that is called apparent, where the Father infcoffes the Son and Heir, 33. *H.* 6. 14. the Lord may enter upon the Heir, and ſo upon the Feofee without proof convenient, *eſt quiddam perfectum in rebus licitis.* So Saint *Paul* 1 *Cor* 10. 23. *All things are lawfull, but all things are not expedient.* And this formerly ſpoken by *Tully*, *eſt aliquod quod non oportet etiamſi licet; Quicquid vero non licet, certè non oportet.* See *Maldmaies* Caſe *Co. lib.* 1. 177.

A Leaſe

A Leaſe for 1000. was diſallowed, though a power were reſerved to admit any eſtate for years, for any reaſonable conſideration, as to him ſhould be thought good, yet the land was his own before, 4. *Ed.* 3. *F. Waſt.* 11. A Leaſe of an Houſe and Land, *Et quod poſſit commodum ſuum, inde facere meliori modo, quo ſibi viderit expedire, ſine contradictione aliquâ*, yet he may not pull down the Houſe; for there is nothing more contrary to libertie, than licentiouſnes, nor to diſcretion, then fooliſhnes. *In maximâ potentiâ, ~~maxima~~ licentia.*

And now for the other words of the Statute; that is to ſay, *neceſſarie, lex neceſſitatis, & lex temporis, ſcilicet inſtantis.* And before it is well ſaid, *neceſſitas legum vincula ridet.* But this is, when you may perceive the caſe brought to extream neceſsitie; for when the Act is done, the Law permits you not to kill him that aſſails you, when you draw neer your laſt refuge, becauſe you foreſee, you ſhall be driven to it, but you muſt forbear till neceſsitie be at his full period; for till then it may be otherwiſe prevented, or remedied. So I am of opinion, that if a *Commendam* were granted to a Biſhop of a poor ſchollerſhip of a Church certain, now full, to take effect when it ſhould fall voyd, that it were not warranted by this Statute; for it muſt be certainly neceſſarie and convenient. And here before the Church voyd, he may have a better Biſhoprick, or that Biſhoprick may be bettered.

Now the ſecond great point, whether the Patent of the King called his Preſentation; ſhall be judged to have the force of a compleat *Commendam* in it ſelfe, or ſhall only ſerve to give his conſent as Patron to the Diſpenſation, before made by force of the Statute, as was pretended that this was the queſtion, The ſecond great point.

It is firſt to be confeſſed, that the King hath power to do both; and therefore had the election to do the one, or the other, or both at his pleaſure.

Now in caſe of elections, where an indifferent Act may be taken divers wayes; let us in a word ſee how they ſhall work either by Act of the partie, or diſcretion of the Law.

And firſt, if your Act may work two wayes, both ariſing out of your intereſt, Election is given to the patient to uſe it either way, as Sir *Rowland Heywards* Caſe, *Co. lib.* 2. 5. He was feiſed of the Mannour of *Ditton*, whereof the Demeaſnes were part in his poſſeſsion, and part in Leaſe, and did demiſe, bargain, and ſell the ſame to *Warren*, and others for 17. years after his death; and it was reſolved by the Judges in the Court of *Wards*, that the Leſſees might uſe this, either as a common Leaſe, or bargain and Sale, but not both wayes to one entire Act, and one entire thing.

On the other ſide, if the Act will work two wayes, the one by an Intereſt, the other by an Authoritie, or power: And the Act be indifferent, the Law will attribute to it the Intereſt, and not the Authoritie; for

for you muſt take it, that *fictio cedit veritati.* And therefore ſo it was ruled in Sir *Edward Cleares* Caſe, Anno 41. & 42. *Eliz. Co. lib.* 10. 17. If a man be ſeized of three Acres of land holden in Cheif, and makes a Feoffment of all to the uſe of ſuch Eſtate as he ſhall give, or diſpoſe by his will; and after by his will gives and Demiſes all his lands to *H.* and his Heirs, that this ſhall carry but two parts of the land. And upon the ſame reaſon is the Caſe 21. *H.* 7. of the Feoffment made joyntly by the Feoffees, and a *ceſt. que* uſe.

And laſtly, where Intereſt and Authoritie meet, if the partie declare clearly that his will is, that his Act ſhall take effect by his Authoritie, or power, there it ſhall prevail againſt the Intereſt; for *modus & conventio vincunt legem*; and therefore in the ſame caſe of *Cleares* it is agreed; That if the Deviſor had rejected his power, and had relied upon that, all would have paſſed upon an expreſſe Declaration; yet if his Act do import a neceſſitie to work by his power, or elſe to be wholly voyd, the benignitie of the Law will give way to effect the meaning of the Partie; and therefore in that caſe it was reſolved, That whereas *Heyward* was ſeized for example of three Acres of land, every one of equall valew, and conveyed two of them to his wife, for her Joynture; and afterwards made a Feoffment of the third, to the uſe of ſuch perſon, &c. as before; and then deviſed that three pence Acre *ut ſupra*; that Deviſe was good by force of the Authoritie; for elſe the whole Deviſe had been utterly voyd, having before given the other two parts to his Wife.

Now then for the *minor* propoſition, how this caſe fits the former Rules and diſtinctions. It is to be obſerved, that the Kings Patronage, and his aſſenting to the *Commendam* in that reſpect, is proceeding from Intereſt: But the Kings aſſenting to a *Commendam* made by an Archbiſhop according to the Law, is but a meer Authoritie limited by that Law, and ſo far it was performed in the firſt confirmation by him made. And the making of a compleat *Commendam* by the King, hath an operation out of Intereſt (if he be Patron) and though he be not a Patron, it is not a rude Authoritie derived from another, but inherent in his own perſon, amongſt other powers and authorities annexed, and incident to the Crown, to which the Patron muſt conſent.

Now let us ſee what may be taken to be the Kings minde in this his Patent.

Firſt, if the King had begun with a direct recitall of the former *Commendam*, and then made his Preſentation, and Commendation of the Church to the Biſhop, as here he doth; *Ita ut liceret, &c. ſecundum vim, &c. prædictarum literarum diſpenſationis*, the Patent it ſelf is, *cujuſdam facultatis.* No man would have doubted, but that according to his plain declaration, and according to *Cleares* Caſe, it would have wrought no more, but the Aſſent and Act of the Patron, to eſtabliſh the former *Commendam.*

Now

Now this in effect ſounds as much; for it concludes upon the former, which ſuppoſeth a kind of recitall of that former *Commendam*, in the Kings thought, in the former part, though it be not expreſſed: and the *ſecundum vim &c.* is full, whereſoever it is placed.

Now, either there was a former diſpenſation, or none. If there were one, the King means to eſtabliſh that; if there were none, or a voyd one as void Cuſtomes. 5. *E.* 4. 40. which is as none, the King is deceived, 5. *Ed.* 4. 40. and ſo the Act voyd.

Now I aske, if the Biſhop had taken his 200. Marks a year before, whether by this Patent of the King he might have taken this over and above?

Clearly no; for he muſt take it *ſecundum vim, &c.* And the Biſhop in pleading hath acknowledged that; for he avers, that all his Livings are under that value.

Alſo he pleads that the King by force of his lapſe, did make this Patent, &c. *ſc. ratione prærogativæ ſuæ Regiæ, per lapſum temporis, ſibi devolut. per Literas ſuas Patentes, &c.*

Now this generall power to make *Commenda's* is in all caſes alike; but his Intereſt to eſtabliſh a *Commendam* of the Archbiſhop, is only by force of his Patronage, which he hath by the lapſe in this Caſe, and upon that he hath relied.

Laſtly, obſerve the ſenſe, and it is cleer, that the King had no purpoſe, neither hath the Patent the Tenour of any immediate *Commenda*; for it doth conſiſt but upon three main clauſes, whereof there is but one that is *Clauſula conſtitutiva*, and the other two are *Clauſulæ conſecutivæ*, or *conſequentes*.

The firſt is, that the King doth Preſent him, and commend him, and grant the Church to him; this doth Conſtitute, Preſent, and Commend the Church to him Actually, and that was proper and neceſſarie for the King to do, as Patron, to give force and effect to the firſt *Commenda*, and the words were apt enough to enforce his Aſſent effectuall: and ſo it is in the Caſe of *Heale*, againſt the Biſhop of *Exeter*, 43. *Eliz. No. Entr.* 473.

The ſecond clauſe which muſt make the *Commenda* immediate, or none, is not a ſubſtantive, or conſtitutive clauſe of it ſelf in this form; *Et inſuper conſeſsit, Dominus eidem Epiſcopo, quod ei benè liceret*, which yet would have been much checkt by the clauſe of that ſentence, *ſecundum vim, &c.* But it is clean contrary thus; *Eccleſiam Commendavit, & Conceſsit ita, ut eidem Epiſcopo benè liceret, &c. ſecundum vim, &c.* which amounts but to this; That the King Commended the Church unto him, being his by lapſe, to the end to enable him to have it in *Commendam* by force, and according to his former Diſpenſation: there can be nothing more cleer.

The laſt Clauſe *ad quam rem, &c. ad debitum effectum perducendum*, had no colour at all to make an abſolute *Commendam*; for it doth not pretend to make any new thing, but to bring that to effect, which was before ſpoken of, ſee the Caſe, *H.* 3. *Phil. & Mar. Dyer.* 141. *H.* 8. Appointed by his Will, that the Lady *Mary* ſhould have land to hold ſo long as ſhee ſhould keep her ſelfe ſole; *E.* 6. granted them unto her for terme of her life, *ſecundum tenorem Teſtamenti*, *H.* 8. She granted a Rent out of them; and then *E.* 6. dyed: a Quere is made, What is become of the Rent which depends upon the validitie of her Eſtate, and that upon deceit to the King or not; but clearly, if there had been no Will, the Eſtate had been voyd; for the King was deceived; ſo here if the firſt *Commendam* be voyd.

So the Caſe of the Abbeſſe of *Syon*, 38. *H.* 6. 33. The King ſeiſed of a Manor, with the Advowſon appendant granted the Mannor for life; and then granted the Advowſon of the Mannor, *habendum unà cum advocatione*. And then by Parliament the King reciting both the grants, confirmed them by Parliament, yet the Advowſon paſſed not.

The third great point.

As to the third great point, whether this *Commendatorie*, might be admitted to plead a *Quare Impedit* at the Common Law, or by the meaning of the Statute of 25. *E* 3. *cap.* 7 *pro Clero Stat.* 3. Whereof read the words of the Preamble and body (where the Ordinary gives a Benefice by lapſe) ſo that is the caſe of a perfect Incumbent, which he calls a Poſſeſſor, and then enacts that the Ordinary or Poſſeſſor in all Caſes like, ſhall be received to Counter-plead the Title, and to defend his right, although they clayme, nothing in the Patronage.

Firſt note, that the miſchiefe of the *Commendatorie*, for not being admitted to plead, ought to move no man; for the very true Incumbent was in that miſchiefe till this Law; ſo that if the Statute did not relieve this kinde of limited *Commendatorie* (whereof, as I have ſhewed you, no Law or practice ever took knowledge before, nor after that Statute) that he hath no Cauſe to complaine.

Note, that if a *Commendatorie* were not in Law a poſſeſſor of a Benefice, that is, an Incumbent at the Common Law, then is hee not relieved by the Statute; for it makes no new Poſſeſſors; but gives the old leave to plead; if he were a perfect Parſon, he were within the pluralities at the Common-Law and Statute 21. *H.* 8.

Now let it not ſeeme unreaſonable, that hee ought to hold his poſſeſſion, and yet may be ſo diſabled to plead in ſome ſort, that being ſued, he cannot defend himſelfe; for if every man might in every Caſe alike, plead what hee would, and in what ſort hee would, *pingui Minervâ*, it might be better called talking at the leaſt, then pleading. And *Lit. cap. confir.* 123. it ſhould ſeem had little underſtanding to admoniſh his ſonne, that it is one of the moſt honourable laudable, and profitable things in our Law, to have the knowledge of well pleading in

Actions

Actions reall and perſonall, and therefore Counſelled, *ſe demitter ſon courage & coeur de ceo apprehend'*. And there is (as *Bracton* ſayes) a great Reſemblance betweene *militaris & civilis*; And therefore as in a Battell, you will not put every kinde of weapon into every mans hand; nor appoint all men confuſedly to all ſervices; but ſort men according to their ſeverall faculties, and appoint to every man his own ſtation, in which hee muſt ſtand, and not leap into another mans place (though of hope of ſucceſſe, though if hee doe with ſucceſſe, yet hee deſerves death by the Martiall diſcipline, whereof the *Romans* were the greateſt Maſters and Teachers;) much more exactly does the Law aſſigne to every perſon in this Civill warre, his proper action and ſervice, according to the propertie of his Caſe and faculties. And therefore at the Common-Law, the Incumbent or any other that claimed nothing in the Patronage, could not counter-plead the Title of the Plantiffe, in a *Quare Impedit*; becauſe that was for Title to the Patronage, wherewith he had not to doe. And it was againſt reaſon, that any man ſhould contend for that he neither had nor claymed: And therefore to put you but one Caſe before the Statute, and one Caſe after to prove this 18. *E.* 3. 23. The King brought a *Quare Impedit*, againſt the Prior of *Dureſme*, and his Incumbent, and claymed by a grant of the next Avoydance from the Pryor to him, which was no Plea without ſhewing it; And the Incumbent demanded judgment, becauſe the King ſhewed no deed of the grant, which exception was allowed. Then hee pleaded that the Pryor made no ſuch grant, which the Pryor whom it concerned, had confeſſed; and both were adjudged againſt him, becauſe he claymed nothing in the Patronage; ſo as it lay not in his mouth to plead, ſo the king had judgement, and yet the miſchiefe of the Incumbent was objected. 18. *E.* 3. 23. before the Stat.

Since the Statute 31. *E.* 3. *Fitz.* Incumbent 6. The King brought a *Quare Impedit* againſt the Archbiſhop of *Canterbury*, and his Vicar, and made Title by Avoydance, while the Temporalites were in his hands. The Archbiſhop confeſſed it, and the Vicar denyed it, which plea hee was admitted unto, by the Statute, if hee were Incumbent; whereupon, for the King it was ſaid, that the Vicar had reſigned, hanging the Writ. And though it were excepted, that the King ſhould not bee received to ſay ſo; yet it was judged for the King, becauſe hee could not bee received by Common-Law, as aforeſaid, nor by the Statute, becauſe hee was no longer poſſeſſor. But 13. *H.* 4. 7. It was reſolved, that without making Title to the Patronage, a man may ſhew as *Amicus Curiæ*, falſe Latin, or other matter appearing within the Writ; for indeed, that is no pleading, but remembring the Court of that which they ſhould acknowledge of Office: And one plea which in effect is the generall iſſue of *a Quare Impedit*, *Ne diſturba pas*, every Defendent may plead

without more, becauſe it doth but defend the wrong wherewith he ſtands charged, and leaves the Plaintiffes Title not controverted, but in effect confeſſed; who may therefore upon that Plea, preſently pray a Writ to the Biſhop, or (at his choyce) maintaine the diſturbance for dammage. Of this forme of pleading in Law, there is no reaſon common to other Actions, wherein Title is contained to the land in queſtion, eſpecially, which the Tenant ſhould never bee received to Counter-plead, but hee muſt convey himſelfe, by his Plea, a Title to the land, and ſo avoyd the Plaintiffes Title alleaged by traverſing, or confeſſing and avoyding. But in the *Quare Impedit*, there is a further reaſon; for both the Plantiffe and Defendent, are Actors one againſt another; and therefore the Defendant ſhall have a Writ to the Biſhop, as well as the Plantiffe, which he cannot have without a Title appearing to the Court. And therefore, if the Defendant never appear, yet the Plantiffe muſt make a Title for formes ſake, and ſo muſt the Defendant, if the Plantiffe be non-ſuite. And upon the ſame reaſon it is; That if an Aſſize be brought againſt the Diſſeiſor and Tenant, and the Diſſeiſor can make no uſe of the releaſe of Actions reall made by the Plantiffe to him, becauſe he hath nothing to do with the realtie, and yet it is an entire Action, mixt of the realtie and perſonaltie, and hath ſeverall reſpects to ſeverall perſons, whereas if the ſame perſon were both Diſſeiſor and Tenant, it were good if the Plaintiffe demurred upon it, and confeſſed not.

So if a Voucher, enter into warrantie, the very Tenant can no longer plead; but the Tenant by fiction of Law muſt plead.

Now the Statute ſayes, he muſt be the poſſeſſor that muſt plead. Now it is well ſaid, *Aliud eſt poſsidere, aliud eſſe in poſſeſsione.* And it is confeſſed unto me, that the *Commendatorius ſemeſtris* is not within the law; and yet he is in a ſort in poſſeſſion; for by a Canonicall Title, or allowance, or Commiſſion, he doth gather the fruits, and ſerve, or cauſe the Cure to be ſerved, and takes and diſtributes the fruits accordingly, and is no Intruder.

But becauſe the Satute hath alwayes been expounded of a naturall and compleat Incumbent, both to the Spirituall Cure (which is attained by Admiſsion and Inſtitution only) and to the Temporaltie alſo, by induction, as the Books, & pleadings are clear, & therefore can no *Commendatorie* for ſix Months, nor for leſſe time, then for perpetuitie, whereby hee may be made a perfect Incumbent, Rector of the Church, and ſeiſed in fee to him & his ſucceſſors, can be within the words, or meaning of this law; for there is difference between the *Commendatorie ſemeſtris*, or for yeers, or limited Eſtate, but that this latter *Commenda.*, hath a clauſe to make the fruits his own, but not to make him Rector of the Church, which is the eſſence of an Incumbent; as is well agreed in *Grimdens* Caſe, and as upon my Argument before hath fully appeared.

Now

Now to the fourth point, whether the Demurrer of the Plaintiffe, doth work a Confeſſion of the Plea of the Defendant; That the Church of *Clifton* did not avoid by the death of *Wakenden* but by taking of *Yelverton*, and ſo the Lapſe accrued to the King, (though no party to the ſuit) may take advantage according to the rule of books. It is ſo clear contrary, as it troubles me to make or offer proofe of it; for there is no diſpute of things manifeſtly true or falſe; for argumentation commonly is *à notioribus*. The fourth great point.

Now if the thing it ſelfe be *notiſsimum*, we muſt make no new Comparatives upon Superlatives, *Multum valet ad ſeipſam perſuadendam ipſa evidentia veritatis; nec uſquam ſic invenio quid dicam, quod ubi res de qua dicitur manifeſtior eſt, quam omne quod dicitur. Auguſt.*

I do firſt agree, that a *Quare Impedit*, between two ſtrangers, if in the debate of the Cauſe, either by pleading or Confeſſion of the parties, it appeare to the Court, that neither of them hath right, but that preſentation belongs to the King, the Court may, nay they muſt award a Writ for the King to the Biſhop; and that without prayer on the part of the King; for the Court and Judges are of the Kings Councell: But this muſt be where the Kings Title appeares ſo cleare *in allegatis & probatis* to the Court, as it is certain and infallible both againſt Plaintiffe & Defendant, 16 *H.* 7. 12. *Fineux dit que in ceo cas doit eſſe adjudge pur le Roy &* 12. *H.* 7. 12. *Mordant dit que eſt common caſe: &* 11. *H.* 4. 11. *adjudge per Hawk & Hill ſi cleare title appiert al Roy, come per les parties in le pleadant Fitz. Na. br.* 38. *I.* And therefore I will cite you a Caſe lately adjudged in the Common Pleas.

M. 4. *Jac. Regis, rot.* 648. A *Quare Impedit* was brought by the Chancellour, Maſters and Schollers of *Cambridge*, againſt Sir *Edward Walgrave*, and others, of the Church of *Colney* in *Norfolk*, and declared that *Henry Yaxly* Eſquire was ſeiſed on the Mannor of *Eaſthall ad quod, &c* and was a Popiſh Recuſant convict, and the Church voided, &c. *Walgrave* confeſſed the Title of *Yaxley*, but ſaid that he paid not the twenty pounds a month, whereupon a part of the Monnor *ad qd. &c.* was by Commiſſion ſeiſed into the Kings hands, and that he granted the ſame two parts, with the Appurtenances, to him for one and twenty years, *ſi tam diu, &c.* Now though by the Defendants plea, the Kings Title did appear againſt him, yet the Plaintiffe was demanded by the Court what he could ſay, &c. who confeſſed the Kings Title according to the Bar, and diſclaimed in their Title; and ſo a Writ was awarded to the Biſhop for the King. Now in this caſe there is no other confeſsion againſt the Plea of the Title ſet forth for the King, then ſuch as may be enforced out of the Demurrer of the Plaintiffe, upon the Defendants plea. *Vide in hoc lib. No. Caſe.*

Now there is a great difference betweene a direct Confeſsion of the party by a *bene & verè*, and a *nient dedire*, or a Demurrer, that is, between a direct Confeſsion of the party againſt himſelfe, and

and an admittance by implication, or a verdict finding it, or the like, as in 2. *H.* 7. 16. If a man bring an Action of Treſpaſſe againſt *quod ipſe ſimul cum* B. & C. did the treſpaſſe, and doth not ſue them all, his Writ ſhall abate; and if he bring his Action againſt *A.* and he plead the treſpaſſe done to him and *B.* and that the Plaintiffe releaſed to *B.* and the Plaintiffe traverſe the releaſe, yet his Action ſhall not abate, *fol.* 9. *H.* 7. 3. If a man avow for two rents, and one of them ſhewing appears not to be due, the whole Avowry is vitious; otherwiſe, if it were ſo found by verdict.

Againe, here the point (whereof advantage would be taken as confeſſed) is by way of Proteſtation denied, that is, that *Walkenden* the Incumbent did not accept *Yelvertoft*, nor was inducted in the ſame, and then there was no avoidance of *Clifton*, being the former Benefice; and ſo conſequently in Lapſe. And if it were no avoidance by that Law, it could not fall into the Lapſe by the ſimple plurality, without notice to the Patron, which is no where alleaged.

Laſtly, becauſe the Law requires in every Plea two things, the one, that it be in matter ſufficient; the other that it be deduced and expreſſed according to the forms of Law, if either the one or the other of theſe be wanting, it is cauſe of Demurrer.

And all the policie and order inſtructeth a man, firſt to skirmiſh and practiſe ſome ſlight defeats before he joyn Battell; ſo we begin firſt with Pleas to the juriſdiction of the Court, then to the perſon, then to the Writ, then to the Action of the Writ, and then to the Action it ſelf. And upon all Demurrers the arguments begin ever with the points of forme before they ſpeak to the matter of Law. And ſo the Earl of *Leiceſter*, Caſe *Plo. Com.* 4. or in the Kings-Bench, where the judgement was drawn up by the Clerk, *quod placitum prædicti Heydon modo & forma prædictis placitatum minus ſufficiens, in lege exiſtit, &c.* which was ſayd to be the form in that Court; yet becauſe the Counſell ſaid, they Demurred as well for matter as forme, at their requeſt the Court ordered, that the entry ſhould have the clauſe, *materiaque in eodem contenta minus ſufficiens, &c.* as it is uſed in the Common Pleas.

2. And obſerve, that the Demurrer in this caſe is, *Quod placitum prædicti Epiſcopi modo & formâ, prædict. placitatum & materia in eodem contenta minus ſufficiens, &c. ab actione ſua præcindend. quod ipſi ad placitum illud modo & formâ prædict. placitatum neceſſe non habent, nec per legem tenentur reſpondere, & hoc, &c.* which fals full to this, That whatſoever the plea is, they are not bound to anſwer it in forme, as it is pleaded; and therefore it were madneſſe for them, by anſwering it, to allow it good, and make themſelves anſwerable unto it.

After all the Iudges had argued, wee aſſembled in *Serjeants Inne*, the rather becauſe the King deſired there might be a conference, where it was found and agreed (as I obſerved in the beginning) that ſeven of us had delivered

delivered our judgement, that judgement was to be given for the Plaintiffe.

So it was agreed by us all, that the judgement ſhould be given for the Plaintiffe, *Quod habeat brev. Epiſcop.* Nevertheleſſe becauſe *Crooke* (who was one of the ſeven for the Plaintiffe) had adviſed in the end of his argument, that knowledge ſhould be taken of the truth (being as it is diſcloſed, or in ſome ſort either admitted or not denied) before execution ſhould be awarded; we alſo thought it juſt, both for the matter and the forme of unity. That all parties ſhould be called, and the ſtate of the preſent avoidance and plenarty underſtood.

Wherupon judgement was this *Michaelmas* Terme entered, *pro querente quod habeat breve Epiſcopo*; and order given, that no Writ ſhould go forth, neither to the Biſhop nor to the Sheriffe, to enquire of the points of the Writ, till the Court gave further order.

190 *Benedict Winchcombe* againſt the Biſhop of *Winchester* and one *Richard Pulleſton*.

Quare Impedit.

Benedict Winchcombe brought a *Quare Impedit* againſt the Biſhop of *Wincheſter*, and *Richard Pulleſton*; And the Caſe was this, That one *William Walter* being ſeiſed of the Church of *Seck-ford*, and *Watton* being Incumbent of it, and a man grievouſly pained with the Strangurie, and like every day to die; *Say* bargained with *Walter* for 90. li. that he ſhould preſent, or cauſe him to be preſented, whenſoever the other dyed; And for the better and ſure effecting whereof, it was agreed betweene them, that *Walter* ſhould grant the next Avoidance unto one *Ebden* a ſpeciall Friend of *Sayes* upon Confidence, &c. Which was done accordingly. Then *Watton* the Incumbent dyed, and *Ebden* in execution of the Symonicall agreement aforeſaid, preſented *Say*, who was admitted, &c. and then *Walter* granted the Mannour and the *Advouſon* to *Winchcombe* the plantiffe for yeeres. *Say* dyed, the King preſents *Pulleſton* who is admitted, &c. And *Winchcombe* brings the *Quare impedit* againſt the Biſhop of *Wincheſter*, and him who pleaded all the matter of Simony aforeſaid, as Parſon imperſonee; whereupon iſſue was taken and and found for him. The queſtion made by the plantiffe in arreſt of Judgement was, whether the King or *Winchcombe* have right to that Preſentation, which depends wholy upon this, whether the Kings turn growing by reaſon of the Simmony be forfeted by the preſentation which depends wholy upon this, whether the Kings turne growing by reaſon of the Simony be forfetted by the preſentation, &c. And death of *Say* that came in by Simmony.

Statute 31. *Eliz.* Simmony expounded.

How the Kings title begins and continues by it.

This caſe after divers Arguments at the barre, *pro & contra* was argued by us, at the Kings Bench openly and at large; And we all foure agreed

agreed, that Judgement was to be given for the Defendant that is to ſay, for the Kings title by the Symony. And *Hutton*, now this *Trinity Terme*, being come newly to the Bench, having beene before for the Plantiffe was now of opinion with us, and ſo argued. And my own Argument I ſet downe, which was thus:

It is againſt nature that any thing ſhould be both voyd, and not voyd at once, but to ſeverall reſpects it may be, as at ſeverall times. If I bargaine and ſell to A. and before inrollment, doe bargaine and ſell the ſame to B. which is inrolled, now this eſtate is good. But if that to A. bee after inrolled in due time, the other is *ipſo facto*, voyd.

A thing may be voyd to one purpoſe, and not to another; ~~and~~ as if one be ſeiſed of a Rent and be bound in a Statute, and the rent be releaſed to the Tenant of the land, it is utterly of it ſelfe extinct and voyd, but yet as to the Cognizee, &c. And for his execution it is in being, *Coke lib.* 7. 38. *Lillingtons* caſe.

A thing may be voyd, or not voyd, at the Election of him whom it concernes, as in *Hollands* caſe *Anno.* 9 & 10. *E.* 3. If a man having one Benefice take another without Diſpenſation though he be not inducted ſo, within the Statute of 21. *H.* 1. yet the Patron of the firſt Church make take it as voyd and preſent preſently, or may leave it as full till ſentence of Deprivation,

Voyd and not voyd one ſelfe ſame Act.

A thing may be voyd, and yet not to be avoyded in every manner; wherein I will not uſe the example of Outlawries made voyd upon the Statute of 8. *H.* 6. Which is well expounded, voyd by writ of Errour; for ſuch caſes are not voyd indeed but voydable onely; and there is a great difference between a Writ abated, as by the death of the parties, and onely abatable by plea to the writ. But a Sheriffs Bond againſt a Statute of 23. *H.* 6. is utterly voyd; and yet you cannot plead *non eſt factum* to it, but you muſt plead the ſpeciall Caſe, and conclude Judgement *ſi* action, or ſue not your deed, *Dive & Manningham & 36. H.* 6. 1. ſoe a Feoffement fraudulent ſhall be avoyded by not guilty, not by iſſue *ne infeoffa pas*: but then by pleading the fraud Caſe *Humberſton & Howgall Tr.* 21. *Jac.* my own Reports, *Gooches* caſe, *Co. lib.* 560. in *Burrells* Caſe *Co. lib.* 6. But the Commoneſt caſes are that the ſame may bee voyd as to one perſon, and not voyd as to another, and that Common runs upon this diſtinction, though it bee made voyd againſt the party himſelfe that made it, as are the Caſes of fraudulent Conveyances and Alyenations of women tenants in Dower, or Ioyntreſſes upon the Statute 11. *H.* 7. and this is the leaſt that can bee made of this Caſe. But this preſentation, &c, made upon Symony is utterly voyd againſt the King, and the Church in no ſort filled by it. Which being ſo, it is repugnant in it ſelfe, that is to ſay, that it ſhall be both voyd and not voyd againſt the King at once. Now it is confeſſed

that

that it is utterly voyd againſt the King during the life of *Say*, ſo that the King might preſent as to a voyd Church; which being granted it is abſurd to ſay, that his death ſhould alter the Caſe; for the King cannot be diſpoſſeſſed or barred, but by an Act, and the death is a privation but no Act: Therefore now obſerve the Errour, that growes by not well obſerving the reaſons of Caſes, which are their Cauſes; for *Tum demum ſcimus, cum per Cauſas ſcimus*, as *Baskerviles* Caſe is cited, That if the King have a lapſe, or (as Iuſtice *Browne* ſayes in the Lord *Barkleys* caſe *Plow* 249. againſt *Weſton* there, 242. who delivers his opinion without either authoritie, or reaſon) Grant of the next Avoydance, and an uſurpation be made upon him, and the Clerk die, now the King hath loſt his turn. Theſe Caſes I grant, for it is apparent, that the Preſentation made, the uſurpation is voyd, and filled the Church, which the King cannot undoe, but by *Quare Impedit*, after Induction, that the death of the Incumbent did not fill the Church; but it hath ſo ſatisfied the Kings turn, as he cannot take another, becauſe ſo much is had in the Kings default, as his turn amounts unto; and the owner of the Advowſon muſt be no longer kept out, neither by Law in caſe of lapſe, nor by grant.

Now this Caſe is clean contrarie; for here all the Acts that ſhould fill the Church, are made utterly void, and the pretended Incumbent diſabled to be Incumbent, even from the firſt Simonicall procurement, which was before the Preſentation, ſo as there was never in Law Preſentation, &c. no more than a Parſon dead to this purpoſe in Law: nay more, he is diſabled for ever to take that Benefice of any other Preſentation; and therefore this Simonicall Preſentation cannot fill the Church againſt the King, as the uſurpation doth in the other Caſes; and the death cannot conſummate that was never begun; and therfore the Statute ſhould have been vainly and ignorantly penned, if it ſhould have ſaid that the Church ſhould have been voyd, as if he had been naturally dead; for in this it is, as if he had never been, as in the ſaid caſe of *Grimdons* Caſe; and therefore the Law proceeds to give it upon this branch to the King for that time and turn only, which is for that avoydance only; which is not yet filled nor ſatisfied by this Idol, or ſhadow of Preſentation.

Note the Pleading here *fol.* 18. is, that *Ebden* preſented *Say*, and that he was admitted, &c. *Quorum pratextu, & vigore ſtatuti*, the Preſentation, &c. was a voyd kinde of repugnancie; but ſee *Grimdons* Caſe Pleaded, *Plow* 495. that the Church being full of Dean and Chapter, *Edw.* 6. Preſented *Chamblaine* who was, &c. which Preſentation, &c. were utterly voyd, and no Caſe is like this: here the Parſon is incapable of the Church, there the Church was not capable of the Parſon; and though the Preſentation and all the Acts be made voyd, yet it was neceſſarie to expreſſe them; for without a Preſentation Actuall, or Simonicall, the King could not have the turn. And if the Statute had only

made voyd the Preſentation, and not given it expreſly to the King, it would have fallen to the Patron again, as it doth upon the Caſe of Inſtitution by Symonie, and ſo the Statute ſhould have rewarded him for his Symonie.

Beſides note, that in the other Caſes of lapſe and grant before mentioned, both by uſurpation and death, the King had a turne precedent, upon which, an uſurpation was, and might be made by preſentation and he ſo diſpoſſeſſed; But here it cleane contrary; for the pretended preſentation gives the King his Title, and therefore cannot alſo diſpoſſeſſe him of that Title that it giues him.

For if a Patron would contract with one for Symonie, and then will preſent another without Symonie; the King gaines nothing; ſo there muſt be an Actuall, though not an effectuall preſentation. But if once the Patron have preſented by Symonie, the King is ſtraight-wayes intereſſed (though no admiſſion follow) by the expreſſe words of the Statute: And the obſervation of the three ſeverall clauſes, makes the difference of the conſequence evident.

For, the firſt finding the Patron guiltie makes his Act voyd, and gives his turne to the King *ab initio*. But the ſecond clauſe, finding the Patron innocent, and the Symonie to begin in the Inſtitution and the Juduction after, makes the Church voyd only from the Induction, and ſo allowes this to bee a Plenartie, and gives the next turne to the next Patron; ſo upon the laſt branch of the Statute, if a Clerk that gets orders by Symonie, obtaines a Benefice lawfully within ſeven yeeres it is made voyd: but how? From the Induction, as if hee were dead, and the Patron to preſent. If either of theſe had beene *Ebdens* caſe, *Winchcombe* ſhould have preſented now: So that if a man have a grant of the next Avoydance, and preſent one without Symonie that were inſtituted and inducted, or got orders by Symonie; yet his grant were Inſtituted, but in the other Caſe by Preſentation by Symonie it is truly executed, when the King preſents, though it were attempted before.

And the ſecrecie of Symonie conſidered, to take this expoſition, were to fruſtrate the Law; for if Symonie bee concealed till death all were ſafe, which the Statute well perceiving gives no lapſe without notice againſt the common Patron upon the ſecond and laſt branch, and by the ſame reaſon, can impute no Laches to the King, for which it ſhould deprive him of his Preſentation. But I grant if the Clerk ſhould reſign or the like, and a new Clerk were preſented and dyed, that now the Kings turn were loſt, as in the other ordinarie Caſe, and upon the ſame reaſon.

And this is ſpoken, as if this were only voyd againſt the King; But I hold it utterly voyd to ſtrangers that may take lawfull advantage of it; and therefore note the nature of the Caſe, that it is *contractus ex*

turpi.

turpi cauſa & contra bonos mores, and ſo it is againſt Law, and voyd by the Statute, even between the parties; Yea, and ſtrangers ſhall take the Advantage of it, and therefore if ſuch an *Obligor* make his Executor and dye, and the Executor pay an Vſurious Bond, other Creditors may ſue it, and make a *Devaſtavit* of it.

So I hold in this Caſe, that if a man be bound to a ſtranger to preſent *H.* to a Benefice, and he preſents him upon a Symonicall promiſe with another ſtranger, yet the Bond is forfeited. If the King ſhould pardon the Symony, yet I hold clearly, that the Church abroad ſhould ſtill remain void to this preſentation; even as the Kings releaſe of Vſury will never make the other Bond other then void. A Bond for performance of Covenants, whereof if one be broken, though that be releaſed, yet the Bond is ſtill under forfeiture. I hold alſo clearly, that if this Parſon ſue for Tithes in the Eccleſiaſticall Court, or for treble dammage, at the Common Law, that the Pariſhioners may plead him no Parſon, becauſe of the Symony; or otherwiſe, if the King ſhould preſent, and his Clerk received, he might not pay both, and to whom he ſhall pay it at his perill, upon the Symonie or not; And if the Ordinary refuſe his Plea, he may have a Prohibition; for it is made voyd by a Statute Law, by which the Spirituall Courts are bound: And it is much ſtronger, than the Caſe upon the Stat. 13. *Eliz.* Whereupon it is reſolved *Dy.* the laſt Caſe; that if a man having one Benefice, accept another, and be inſtituted and inducted into the ſecond; and then read not his Articles; that yet the firſt Benefice voyds, not by Ceſſion, becauſe the ſecond is not taken. And ſo in the Caſe of *Norris* and *Eaton*, it was adjudged voyd even to the Pariſhioner.

But now I ſaid, that it was voyd to all men, *quorum intereſt*; to the King and his Incumbent, and all that claime under him, and the Pariſhioners to the Ordinarie, and to the like, for all things that may concerne that point, and the parties intereſſed in that.

But clearely it is not voyd to an Vſurper, for a man without right cannot preſent unto it, as to a Church voyd, nor the Ordinarie, ſo diſcharge himſelfe, if he receive the Clerk of an Vſurper; for he is none of them, *Quorum intereſt.*

Alſo, if one having a *prochein* avoidance preſent by Symonie, and his Clerk be received, he ſhall never preſent againe, as taking this to be voyd, and ſo his turne to remaine. For as to him it is fallen, he ſhall not diſable his own Act, nor can have reaſon by the Kings Title to doe it.

And though *Winchcombe* were no way privie to the Symonie, that doth him no good, as to this cauſe; for the Patronage cannot come to him, till *Ebdens* turne be ſatisfied; which remaines ſtill voyd to their purpoſe, notwithſtanding his Symonicall preſentation, till the King preſented *Pulleſton*. See the reſidue of the Caſe *infra*, 270. Sir *Thomas*

" *mas Stukeley* brought an Action of Treſpaſſe againſt *Robert Butler*, for " felling of certaine Oakes and Aſhes, &c. At old Cleave, whereunto " the Defendant pleads not guilty, and upon a ſpeciall verdict, the " Caſe was thus.

" The Earle of *Eſſex* 36. *Eliz.* was ſeiſed of the Mannor of Cleave, " whereof a Meſſuage called Stout, and 100 Acres uſually occupied " with it, and 700 more, and certaine Woods called Blagrave, Puck- " hall, Erridge-Boore, and Readwood, all lying in Cleave were par- " cell; and the ſame yeere did demiſe unto *Robert Butler*, and *Iulian* " his wife, and *Robert* their Son, now Defendant, the ſaid houſe and " all the Lands, and Blagrave, and Pitchell wood, for their lives (ex- " cepting all Timber Trees.) And the ſame yeer by Indenture, did bar- " gaine and ſell to *Edward George*, *Omnia illa, boſcos, ſubboſcos, maeremia,* " *Int' tunc ſtant', creſcen', & exiſten' in & ſuper toto illo Manerio ſuo de* " *Cleave, in dicto Com' Somerſet*, viz. *in & ſuper Copicia ſua, ſive boſco* " *vocat le Erridge Wood, cont' 24. Acres. Et in & ſuper toto illo boſco-* " *vocat' Boorewood cont' 10 Acr'. Ac in & ſuper toto illo boſco vocat'* " *Blagrave Wood cont' 7 Acr'. Et etiam in & ſuper toto illo boſco ſuo vocat'* " *Pitchell Wood cont' 7 Acr', unà cum omnibus aliis boſcis, & ſubboſcis;* " *maeremio, & Arboribus ſtant' & exiſten' ſupra prad' Manerium* " *de Cleave, quæ convenienter parcari poterint & ſumi ſine præjudicio &* " *damno eidem Statui, Anglicè, the State and maintenance dicti Manerii:* " And a Covenant on the part of the Earle, that the ſaid *George*, and " his Aſſignes during five yeeres, may fell and carry the Woods with- " out interruption of the Earle, or any others; and to make ſawing " Pits, and to ſquare, and cut the Timber-Trees upon the ground du- " ring the ſaid Terme, and a Covenant on the part of the Leſſee, that " hee ſhall fill up the Pits, and make all things faire, and amend the " fences that ſhould bee broken during the ſaid terme of five yeares. " Then *George*, *Anno* 38. Did bargaine and ſell to *Robert Butler*, the " Father all the Woods in Blagrave and Pitchell-wood, and in the ſeven " hundred Acres; ſo the Woods in the hundred Acres, growing with- " in the Groves and Wood, and in the other three Woods, remaine ſtill " with Proviſo; who after *Anno* 40 *Eliz.* did bargaine and ſell unto the " Earle of *Eſſex*, all the Woods by him ſold unto *George*, except thoſe " that he had ſold as aforeſaid to *Butler* the Father, who by his Will " did give unto *Butler* his ſonne the Defendant his Woods. And the " Earle 3° *Jac.* did bargaine and ſell by deed, inrolled unto Sir *Thomas* " *Stukeley*, the reverſion of the ſaid lands, and alſo his Woods, 242 l' to " which *Butler* the Father attourned; and then hee and *Robert Butler* " the ſonne, and *Lewis* the other Defendent, as his ſervant, by conſent of " *Trevilian* and others the Executors of his Father, felled certaine of " the Trees in the Declaration, which was Timber at the time of the " grant in Blagrave Wood, and Pitchell Wood, and other of the Trees

in

in the ſeven hundred Acres; and the Jury aſſeſſed dammage ſeverally for the trees, ſeverally felled in either Wood, and for thoſe in the 700. Acres, which was well and adviſedly done.

Vpon this whole cauſe I am of opinion, that the Defendant had good Title to all trees felled in either wood; and for as well thoſe in the 700. Acres, as in the two Groves, and that therefore the Plaintiffe is to be wholly barred.

I make two queſtions; The firſt, Whether the *Viz.* hath power to reſtrain the generall grant to all the woods upon the whole Mannor, to the woods onely growing upon the five Groves; or that the ſame generall clauſe being certain and expreſſed, ſhall make void the *Viz.* The firſt point or Queſtion.

The ſecond queſtion is, Whether the Covenant on the part of my Lord of *Eſſex* and *George*, to take the trees, &c. within the five years next after the grant, ſhall ſo check and controll the Grant, that he may not take the trees after the five yeares: And I am of opinion clearly, that it doth not controll the Grant, but that as the trees are abſolutely given, ſo the Bargainees and their Aſſignes may take them when they will. The ſecond Queſtion.

Thirdly, I will give my opinion concerning that part of the Clauſe that runneth under the *unà cum omnibus aliis, &c.* upon which I hold, that that part of the Clauſe giveth nothing, becauſe it is void for uncertainty, and yet it hurteth not the former Clauſe, becauſe it is diſtinct, and ſtandeth of it ſelfe divided in his power and operation from the other.

As to the firſt poynt, whether the *Viz.* doth reſtrain the generall grant of all the woods, upon all the Mannor, or of the woods upon the Copice only. The firſt point or Queſtion.

I am of opinion, that thereby it doth not; and therefore I will conſider, firſt in generall, how the premiſſes of a grant may be checked, reſtrained, corrected and explained. The force and uſe of a *viz.*

It may be corrected or reſtrained by a divided clauſe, or by a connexion of one clauſe.

By a divided clauſe, either in the thing given by an exception, or in the ſtate given by an *Habendum:* But both muſt be where the premiſſes of the Grant are not ſpecifyed and expreſſed, but generall and implyed as to the purpoſe reſtrained

And therefore though the Law ſay, that when a man grants land, he grants the underwoods incluſively, and ſo when he grants the houſe, he grants all the ſeverall rooms in the houſe, *M.* 33. & 34. *Eliz.* in the Kings Bench between *Keniſham* and *Redding*, the caſe was that the Queene leaſed the Parſonage of *Greenwich*, with all the lands and underwnods thereunto belonging, *(exceptis omnibus groſſis Arboribus, boſcis, & Maeremiis)* The opinion of of the Court was, that the exception as to the underwoods is void. So is the caſe 9. *Eliz.* 265. of a Leaſe of an houſe and ſhops (excepting the ſhops) which proves that the rule, *expreſſio eorum quæ tacitè inſunt nihil operatur*, is to be underſtood having reſpect to it

ſelfe onely, and not having relation to their clauſes.

So a Leaſe may be reſtrained by condition, not to alien 21. *H.* 6. 3. but now if the Leaſe be to him and his Aſsignes, as an office of truſt to one, and his Aſsignes give power to grant it over.

A Condition annexed to an eſtate given, is a divided Clauſe from the Grant, and therefore cannot fruſtrate the Grant precedent, neither in any thing expreſſed, nor in any thing implied, which is of his nature incident and inſeparable from the thing granted. And therefore Sir *Anthony Mildmayes* Caſe, *Co. lib.* 6. 4. A gift in tail upon condition not to ſuffer a common Recovery, it leaves you the land and the eſtate, but it takes away a liberty which is inſeparable from the ſtate, as to a fee, not to alien. And a grant of an houſe upon condition not to meddle with the ſhops, is void; for this doth not as an exception reſerve the ſhops to the Leſſor, and from the Leſſee; but leaves them in the Leſſee, and then forbids the uſe of that which it hath made his; which is repugnant. So upon *Whiſtlers* Caſe, *Co. lib.* 1. 63. though it be well ſaid, that when the King grants a Mannor, *cum pertinentiis*, it no way paſſeth the Advowſon then, if it were excepted; yet the words *adeò plenè, &c.* will carry it in the one Caſe, though not in the other, when it is excepted. So *e converſo*, the Mannor *adeò plenè*, will admit an exception of the Advowſon, not if it were expreſly granted.

Vpon the ſame reaſon it is, that if you Demiſe a Mannor, you may by an exception pare away as much of the Demeſnes or Services, or both, as you will, but you muſt leave it ſtill a Mannor, having ſome Demeſnes, ſome Services, and a Court. I mean, where that that I have is ſuch a true Mannor, that hath both Demeſnes and Services; for though a Mannor may ſtand and paſſe by that name, that is but titular, yet your Grant ſhall be taken, as the thing in your Grant.

Againe, by an exception, you ſhall not make the whole Grant fruſtrate, though the Grant be in generall words. Therefore if you have but one cloſe in *D.* and you Demiſe all your land in *D.* excepting that one Cloſe, the exception is void.

18. *Eliz. lib.* 62. 88. & 100. in the Kings Bench, *Darrell* brought an ejectment againſt *Collins* of *Lamberhurſt*, in the County of *Kent*. The Jury found that the Maſters and Sbhollers of *Linſford*, were ſeiſed of the land in queſtion, being part of the Mannor of *Hothley* in *Lamberhurſt*, and that they did Demiſe all their lands in *Lamberhurſt*, excepting the Mannor of *Hothley*, under which the Plaintiffe claimed; and they found that *Lamberhurſt*, did extend unto *Kent* and *Suſſex*, and that the Maſter, &c. had no land in *Lamberhurſt*, but the Mannor of *Hothley*: and it was adjudged that the Leaſe did carry the Mannor of *Hothley*, and that the exception was void. And alſo that the Jury being alſo of *Kent*, ſought to finde that they had not lands in *Suſſex*, as well as in *Kent*, becauſe the iſſue, guilty or not guilty, depended upon it; otherwiſe

wiſe where a locall thing in another County, is ſpecially put in iſſue.

Like Law is of the uſe of an *Habendum*, that if by your premiſſes you have given no certain nor expreſſe State, then that otherwiſe the Law would give; you may alter and abridge, nay you may utterly fruſtrate it, by the *Habendum*. And therefore in the Caſe of *Hodge*, and *Croſſe M.* 33. & 34. *Eliz.* in the Kings-Bench one *Warren* made a Feoffment of Lands in *London Habendum* to his Feoffeee, and his Heirs after the death of the Feoffor; and upon Argument the Feoffment was ruled to be voyd;

And yet in the Caſe of *Underwood*, and *Underhay*, *Hil.* 34. *Eliz.* in the Kings-Bench, the Caſe was; That one having Leaſed his Land to three for their lives, granted the Reverſion *Habendum* to the Grantee for his life; and then theſe words, which ſaid Eſtate for life to begin after the death of the three firſt Leſſees. And that was adjudged a good Eſtate in Reverſion for life; neither can you by an *Habendum* fruſtrate a Grant that was compleat before, as the Caſe is 7. *Edw.* 6. where a Leſſee for years granted all his eſtate *Habendum* after his death.

So much of divided Clauſes.

But now of one clauſe carried on with a Connexion, ſo as they make it but one entire ſentence, till the whole be finiſhed, the Law is otherwiſe; for one part of the ſentence may not only abridge and correct, but utterly fruſtrate and make voyd the whole grant. And therefore if a Leſſee for years grant his Terme after his death, the Grant is voyd.

So in *Doughtons* Caſe, *Co. lib.* 3. 9. the Caſe was, That the Duke of *Northumberland* was ſeiſed of divers Houſes and Cottages in the Pariſh of Saint *Sepulchres London*, and bargained and ſold all his Tenements in the Pariſh of Saint *Andrews Holborn*, in the Tenure of one *William Gardiner*, unto one *Lea*; and the Grant was judged voyd, though thoſe Houſes were in the Tenure of *Gardiner*, which was the point judged; But where it is added in that Caſe, that the Court was of opinion, that if he had begun with the Tenure of *Gardiner*, which was true, and ended with the Pariſh miſtaken, that the Grant had been good by the rule, *utile per inutile non vitiatur*.

I hold it plain contrary; for the ſeverall circumſtances and deſcriptions circumſcribe and aſcertain the grant. And it is a good Rule, *Inutile eſt in ſua ſcientia perfecta de aliqua parte judicare*; and therefore the Judgement in *Daringtons* Caſe *Co. lib.* 2. 22. is full in the poynt *H.* 8. was ſeiſed of the Hoſpitall of *Welles*, whereof certain houſes in *Lindace* out of the Circuit of *Welles*, which were in in the tenure of *John Browne*, were part, and he granted unto *Ailworth* all his Lands, in the Tenure of *John Brown* ſcituate in *Wells* to the ſaid Hoſpitall belonging. And it was adjudged, that though the firſt part of the deſcription as it was pleaded in the Patent, in the Tenure of *Brown* were true; yet the latter part (being falſe) marred all, even as if it were the grant of a com-

mon

mon perſon. And indeed in one ſentence it is vain to imagine one part before another; for though words can neither be ſpoken nor written at once, yet the minde of the Author comprehends them at once, which gives, *vitam & modum*, to the ſentence. But in Grants of particulars ſufficiently once aſcertained, miſtaking will not fruſtrate, though it be falſ. As *Paſ.* 33. *Eli. rot.* 376. One made a Feoffment by Attourney of his Meſſuage in *D.* which was *R. Cottons* caſe; yet it paſſed; for elſe all was to be fruſtrate; but a thing certain may be diminiſhed, though not wholy made voyd, in *Reynolds, Co. lib.*

Rainsford poſſeſſed of a Term in *Ornel Grange*, whereof part, that is to ſay, *Hobsfield* came to one *Streckton* in poſſeſſion for part of the Term, and to one *Beer*, for the reſt of the Term in Reverſion; and a Rent-charge was granted out of the Grange, *nuper in Tenura Rainsford, & modo in Tenurâ & occupatione Hobsfield*; but it changed the reſt, and ſo there was no repugnancie.

Now I come to the uſe of a (*viz.*) or (*ſc.*) or in Engliſh (that is to ſay) and the nature and force of it. It is neither a direct ſeverall clauſe, nor a direct entire clauſe, but it is *intermedia*.

Firſt it is clear, that it is not a ſubſtantive of it ſelf, and therefore you cannot begin a ſentence with it, nor make a ſentence of it by it ſelf; but it is (as I may ſay) *clauſula ancillaris*, a kinde of Hand-maid to another clauſe, to deliver her minde, not her own. And therefore it is a kinde of Interpreter, her naturall and proper uſe is to particularize that, that is before generall, or diſtribute that, that is in groſſe, or to explain that, that is doubtfull or obſcure.

Firſt, it muſt be contrary to the premiſſes, as 20. *H.* 6. Treſpaſſe with a *Continuando*, till the day of the writ purchaſed *ſc.* ſuch a day, as is not in the ſame, is utterly voyd.

Next, it muſt neither encreaſe, nor diminiſh; for it is not the nature of it, to give of it ſelf: As if I have in *D.* black-Acre, white-Acre, and green-Acre; and I grant unto you all my Lands in *D.* that is to ſay; black-Acre, white-Acre, and green-Acre ſhall paſſe too; but if I adde under the *viz.* land lying out of the Town of *D.* it ſhall not paſſe. And therefore ſee 29. *Aſſize* 23. upon a partition between two Partners in *Chancerie*; one of them for a ſurpluſage granted unto the other, to a Rent of five pound a year; that is to ſay, to the one fifty ſhillings, and to the other aſmuch; yet it was judged an entire Rent. And 29. *Edw.* 3. 9. It is holden, that if I grant a Rent of 20. s. out of two Mannors, *ſc.* 10. s. out of one, and aſmuch out of another, it is but one Rent. So are *Knights* Caſe, *Co. lib.* 3. 25. and *Winters* Caſe, 14. *Eliz. Dyer* 308. upon the difference where the Rents are reſerved ſeverally at the firſt, and where they are at the firſt entire and broken by a *viz.*

So 18. *Eliz. Dyer* 350. an obligation of two hundred Pound, to two *ſolvend'* to the one a hundred, as much to the other. The Book-

leaves

leaves a *Quære*; but where it is clear, a *Void.* So *Hil. & Granges* Caſe. A Leaſe made in *April* for example, rendring a yearly Rent (that is to ſay) at our *Lady-day*, and *Michaelmaſſe*, the yearly payment cannot be diminiſhed. *Osborns* Caſe *Co. lib.* 10. 13. *an Anglicè*, which is but a *viz.* or that is to ſay, ſhall never exceed the Latine.

But now I grant on the other ſide, that a *viz.* may work a reſtriction where the former words were not expreſſed, and ſpeciall, but ſo indifferent, as they may receive ſuch a conſtruction without apparent injurie; though theſe former words by conſtruction of Law would have had a larger ſenſe, if the *viz.* had not been; and therefore ſee 17. *Eliz.* 3. 9. *Mortimers* Caſe: One granted twenty pound Rent; note a Rent which muſt be, as I have ſaid underſtood, one Rent of ten pound in his Mannor of *D.* to receive by the hands of one Tenant to another, till he made up twenty pound, ſaving his Signiorie. And the opinion of the Court was, that this was but a Grant of the ſeverall Rents of thoſe Tenants, as Rent *ſeck* by this *viz* which had been otherwiſe; if it had left at the premiſſes without the *viz.* for then it would have been a new entire Rent of ten pound out of the whole Demeaſnes of the Mannor. But I am of clear opinion, that if the particular Rents in the firſt Caſe had made but five pounds, that then the premiſſes would have taken place, and the *viz.* had been voyd. Like unto the Caſe 15. *Aſſ.* 11. & 15. *Ed.* 3. in charge 9. *A.* grants twenty ſhillings Rent in his Mannor *viz.* by the hands of one, ſo much, and of another ſo much; and the Tenants aſſigned are but Tenants at will, the whole Mannor is charged with the Rent; *viz.* being of no effect, is void in law for it ſelf being of no effect, cannot fruſtrate the premiſſes, which are of ſufficiencie of themſelves 1. *Ed.* 3. 59. One gave land to *A.* and *B. Habendum* to *A.* for life, and after his deceaſe to *B.* It was holden good. See *Littleton* 66. If a man give land to two *Habendum*, to them *ſc.* the one moity to the one, and the other moity to the other, it is good. For note, that the ſubſtance of the premiſſes is not altered; for both of them ſhal have the ſame in uſe, in common as they ſhould have had it by the premiſſes joyntly, which is but a point of qualitie, or accident altered. But if it were thirty Acres to two, *ſc.* twenty to one, and ten to another, it were voyd. So upon the Caſes 21. *H.* 8. 7. & 13. *H.* 7. 24. I held, If I granted Land to one and his Heirs, *viz.* the Heirs of his bodie; it is an eſtate tayle. So 13. *Eliz. Dyer* 299. If in a *Quare Impedit*, one is pleaded ſeiſed of the Manor, to which the Advowſons append, *viz.* to Preſent in the third turn, it is good: but if one ſeiſed of the whole Advowſon ſhould grant the whole, *viz.* to Preſent every third turn, *viz.* were voyd. So upon the Caſe 9. *Eliz. Dyer* 261. If a man have Lands in a Hamlet, and other Lands in another part of the Town; if he grant his Lands in that Town *ſc.* in the Hamlet, I hold that no more will paſſe, and the *viz.* is voyd, & 6. *Edw.* 6. *Dyer* 77. The King granted *ſcitum Abbathiæ nec non omnia ter' prat' paſtur' &*

ſubſcript' dict' Monaſterio pertinen', viz. Such a Cloſe, and ſuch a Cloſe; and the opinion is, that the *viz.* ſhall only ſerve to explaine the word *ſubſcript'*, and that all other the Lands belonging to the Monaſterie, ſhall paſſe by the expreſſe words.

The ſecond great point.

Now to the ſecond great point, which is, whether the Covenant on the part of the Grantor, for the five yeers doe diſable the Grantee, or thoſe that claime under him, to take the Trees, after the five yeeres expired.

I will ſay little, for I have declared my ſelfe in the beginning, to hold it not queſtionable, and doe yet.

For firſt, it is cleare, by the grant of the Trees by a Tenant in fee-ſimple, they are abſolutely paſſed away from the Grantor, and his Heires, and veſted in the Grantee, and goe to the Executors or Adminiſtrators, being in underſtanding of Law, divided as Chatels from the Freehold: And the Grantee hath power incident and implyed to the Grant to ſell them, when hee will, without any other ſpeciall licence, which can never bee reſtrained by power given by the Grantor in the affirmative, which the Grantee had before.

And therefore 8. Aſſ. 10. One granted a rent of ten pounds a yeer to the husband and the wife for their lives; and if the wife ſervive, that then ſhee ſhall have three pounds a yeer for her life, and judged ſhe ſhould hold her ten pound a yeere: Otherwiſe, if it had been ſaid that ſhee ſhould have three pound a yeere and no more. And ſo *Trin.* 28. *H.* 8. *Dyer* 19 The Leſſor Covenanted that the Leſſee might take thorne by Aſsigment of the Bayliffe, yet he may take without; otherwiſe, if it were in the negative.

Statutes that were taken by extent, ſhall not by an affirmative alter the former power, 33. *H.* 8. *Dy.* 50. The Stat. 27. *H.* 8. 17. *Eliz. Dyer* 341. hereafter.

Now the Grant implying an abſolute libertie to the Grantee to take, if the Covenant were on the part of the Leſſee, not to take after the five yeers, it would not extinguiſh his propertie, nor conſequently his power to take them after the five yeers; and therefore if hee took them, he might plead not guiltie in Treſpaſſe, but ſhould be anſwerable to an Action of Covenant for it; for things that have their proper effects and conſiderations, and ſeverall reſpects of Actions, are not to bee counfounded. And therefore 3. *Eliz. Dyer* 199. If the Leſſor Covenant to repaire the houſe at his proper Coſts; or againe, if the Leſſee Covenant to repaire at his Coſts in Timber work, and the like, yet in both Caſes, if hee felled Timber to repaire, there is no charge in the remedy by Action of waſt, but by Action of Covenant.

The Statute of 27. *H.* 8. of Court of Augmentation, all Grants of Lands within their ſurvey, ſhall be ſealed with that Seale 23. *H.* 8. *Dyer* 50. For

50. For want of a Negative, much more it had been (may be ſealed) as here, 17. *Eliz. Dyer* 341. the Title of Monaſteries were given to the King; Proviſo, to avoyd fraudulent Leaſes within the yeer of diſſolution; and another Proviſo in the affirmative, that Leaſes with the ancient Rent ſhall be good: Yet judged that a Leaſe within forty dayes without ancient Rent was good, for they had lawfull power before, and there is no negative.

Laſtly, this Covenant on the part of the Grantor, is of neceſſary uſe, though it work nothing in the reſtraint of time for felling; for it gives power to dig, and make Saw-Pits upon the ground, and to ſquare the Timber there, which the Grantee could not doe by the ſimple Grant of the Timber, without ſuch ſpeciall Warrant. Alſo it containes a generall warrantie, that the Grantee may take and fell Timber, without the let or Interuption of any perſons whatſoever.

Now to the third and laſt point; If the clauſe had been, that the Earle had granted all his Woods and under-woods growing upon all his Mannor of *Cleave*, which could conveniently have been ſpared without prejudice to the Eſtate of his Mannor, I ſhould be of minde that his Grant is voyd. The clauſe *unà cum omnibus aliis.*

And yet it is true, that many things that are uncertaine of themſelves, being reduced to certaintie, by ſuch meanes, as either the Law appoints, or the partie himſelfe aſſignes, may take effect; and therefore the Caſes put are cleare, that the Fine of a Coppy-hold being uncertaine, ſhall be made certaine and reſonable by the Jury and the Court, upon the circumſtances of the Caſe.

But note, that all theſe and the like are Proviſions in Law, for Acts in Law.

Alſo I grant, that if the ſaid Earle had covenanted or granted, that *George* might have taken ſuch Trees, as might conveniently have been ſpared without prejudice, &c. That this being but a Covenant or grant Executorie, hee might have taken Trees by force of it, and have juſtified himſelfe upon the Jurie for it. So of convenient time to remove upon the death of a Tenant for life, 41. *E.* 3. *barr.* 205. In treſpaſſe for entring his Corne; The Defendant pleaded that hee had Common, and the other left his Corne there, after the other man had carried, and it was ready to bee carried, &c. Of evill will, &c. The Plantiffe, that it was not dry, &c. But our Caſe is not of that nature; but it is a Grant or bargaine, which muſt take effect, and change the propertie of the thing granted, either preſently, and at once, or *in futuro*, depending upon ſomewhat that ſhall reduce it to his full effect; which when it is done ſhall make the grant good *ab initio.*

And if I make a Leaſe to *A.* for ſo many yeeres, as *I.* ſhall name, or Grant ſuch Liberties, as another Town hath, both theſe at the time of the Grant appeare in Caſe to bee made certaine, and tie Common

Caſes of Grants, that take the perfections or Elections given by the partie or by the Law to certaine perſons.

The ſame Books or reaſons that prove that when the election creates the Intereſt nothing paſſes till election, the ſame prove, where an election can be, no Intereſt can ariſe.

Bullocks Caſe, 10. *Eliz. Dyer* 281. Feoffement of an houſe and 17. Acres, parcell of a Waſt, the Feoffee, not his Heires muſt take his election, or elſe the Grant is voyd, and 2. *H.*7. So *Haywards* Caſe *Co lib.*2. 36. If I give thee one of my houſes, nothing paſſes till the Donee chooſe, therefore he muſt do it, his Executors cannot, 44. *E.* 343. Is a good Caſe: A Prior ſold his Woods excepting forty of the beſt Oakes at his choyce, to be taken within two yeers; then the Pryor brought an action of treſpaſſe againſt the Vendee for felling them; hee pleadeth that the Plantiffe delayd his choyce, till the two yeers were almoſt expired, that he could forbeare the felling no longer, but his two yeers would expire, and therefore required him to make his choyce; but hee refuſed, whereupon he choſe forty of the beſt himſelfe, and left them ſtanding, and took the reſt.

So note that the Vendee in this Caſe had no propertie, till election or default made by the Vendor, which was ſupplyed by the Vendee; and yet the Vendee, could not have made the choyce in default of the Vendor till the time incurred ſo neere, that he muſt needs; And that muſt be put upon judgement of the Jurie or Court, upon ſpeciall Declaration of the time, and number of Trees, and the like. But here it cannot change propertie preſently; to any Trees certaine beauſe it is uncertaine, which Trees may bee ſpared and indifferent, whether theſe or thoſe. And there is no perſon to whom it is given to determine, which may be ſpared, which not: But if the Grant had been of ſuch Trees as *H.* ſhould judge might be ſpared, it might have ſtood with his determination. *Primo Mar' Dy.* 90. A ſale of Woods, which may be reaſonably ſpared 7. *E* 6. terme that ſhall be to come after his death, uncertaine apparant time of the Grant, not referred to certainty, 22. *H.* 8. a Grant to two, *& hared'* voyd.

But the Defendant pleadeth not guilty, which he cannot maintaine, unleſſe the Trees were actually his, before he felled them; for if it had but been a liberty, he might have pleaded it, and not pleaded not guiltie.

Alſo hee muſt have averred that they might have been ſpared, which is not pleaded, nor found by the Jurie. And ſo the Defendant pleaded, *Primo Mar' Dyer* 90. Adde to this the point, *infra* 8. That yet this hurts not the firſt Grantee.

Now though I am of opinion as before, that this laſt clauſe is voyd for incertaintie; yet I hold clearly that it reacheth not to the firſt clauſe of Grant, upon which I have argued and concluded for the Defendant.

Defendant. But look back only to the firſt clauſe beginning at *unà cum omnibus aliis boſcis, &c.* which though it be fruſtrate, yet the firſt clauſe ſtands perfect of it ſelf; for it is true, that if a grant be carried in generall, which of it ſelf is not certain, if that by the other parts of the ſame entire ſentence in point of deſcription, or other declaration cannot be true; as in *Doughton*, and *Darringtons* Caſe before, or cannot be effectuall, as in this concluſion, and as in *Finches* Caſe, *Co. lib. 6. 29.* marke the ſentence. yet that hurts not yᵉ grᵃⁿᵗ.

The Rent of twenty pound a year was granted by the Lady *Finch* to her ſonne, in theſe words, out of the Manor of *Haſtwell, Outerplea, Potbury*, and *Seaton*, and her lands lying in the Pariſhes of *Eaſtwell, Weſtwell, Chaklock*, or elſe-where in the County of *Kent*, to the ſaid Manors, or any of them belonging cleerly; this charged no other lands in thoſe tearms, but ſuch as belong to the Manors; for it is plainly one entire compacted ſentence, ſo woven and interlaced together, as there is neither diviſion in words, nor ſenſe, and this is a joyning of the ſentence to good uſe, and not to avoyd all.

Note, theſe Caſes are of one entire and compacted ſentence, and therfore one part overthrowes or reſtrains another: But our Caſe hath two clauſes that are cleerly diſtinct.

Firſt grant of all thoſe his Woods ſtanding upon this whole Manor, which anſwers the Pronoune *illa*, being reſolved thus; all thoſe Woods which ſtand to that clauſe, I joyn them *viz.* as an hundred, as I ſayd, though it be voyd,

Then comes the ſecond clauſe, *unà cum omnibus aliis boſcis*, which in Law though it be governed by the firſt word of grant, yet that word of grant is reſpectively, as ſeverall grants of ſeverall things. And it is all one, as if he had ſaid, he granted all the Woods growing upon his whole Manor; and he alſo granted all other his Woods that might conveniently be ſpared, &c. And in that Caſe of *Finch* it is granted, that if I grant a Rent in this form iſſuing out of my Manor of *D.* and out of my Lands and Tenements in *D.* and *S.* and out of my Lands elſe-where, to the ſaid Manor belonging; that this middle clauſe ſtands ſo in force divided, that it ſhall charge my Lands in thoſe Towns, though they be no part of the Manor; and yet that clauſe is incloſed with the Manor, both before and after; much more here, where the firſt generall clauſe ſtands clearly by it ſelf, and the ſecond clauſe under the *unà cum omnibus aliis* is a new addition, and of other things than were before granted, and hath his own concluſion, with *convenienter, &c.* attending upon it.

Libell. Eccl.

192 *Edward Topſall* and others, againſt *Ferrers*,

Cuſtome of the Pariſh, that a Paſſenger dying there, ſhould pay Fees there, though buried elſewhere.

Edward Topſall Clerk, Parſon of Saint *Butolphs* without *Alderſgate*, and the Churchwardens of the ſame, libelled in the *Court-Chriſtian*, againſt Sir *John Ferrers* Knight; and alleaged that there was a cuſtome within the Citie of *London*, and eſpecially within that Pariſh; that if any perſon dye within that Pariſh, being man or woman, and be carried out of the ſame Pariſh, and buried elſe-where, that then ought to be paid to the Parſon of the Pariſh, if he be buried elſe-where, in the Chancell ſo much, and to the Church-wardens ſo much, being the ſums that they alleaged, were by cuſtome payable unto them, for ſuch as were buried in their own Chancell; and then alleaging that the wife of Sir *John Ferrers* died within the Pariſh, and was carried away and buried in the Chancell of another Church, and ſo demand of him the ſaid ſumme. Whereupon, for Sir *John Ferrers* a Prohibition was prayed by Serjeant *Harris*, and upon debate it was granted; for this cuſtome is againſt reaſon, that he that is no Pariſhioner, but may paſſe through the Pariſh, or lie in an Inne for a night, ſhould be forced to be buried there, or to pay as if he were; and ſo upon the matter to pay twice for his buriall.

Treſpaſſe.

193 *Plant* againſt *Thorley*.

"*Plant* brought a Treſpaſſe againſt *Thorley*, for taking and carrying "away a hundred load of Turfe at *Leake*; The Defendant pleads, "*quod locus in quo* (whereas there was no place aſſigned) was two Acres, "called black-Acre in *Leake*, which was his Freehold, and that he dig- "ged the Turfe there, and tooke them away *pro-ut, &c.* The Plaintiffe "ſaies, that *locus in quo*, was a peece which contained twenty Acres in "*Leake aliquam, &c.* and the Defendant *quoad aliquam tranſgr' in pred'* "20. *Acris*, not guiltie: whereupon iſſue was taken and found for the "Plaintiffe: And it was moved in Arreſt of Judgement, that this was as no iſſue; for there was no twenty Acres, nor place certain in the declaration; yet the Court gave judgement for the Plaintiffe. For though it were not in the Declaration, yet it was no plain departure from the Declaration; for both parties were agreed, that the Treſpaſſe was done at *Leake*; ſo that the aſsigning of more particular place in *Leake* ſtands well with the Declaration, and both doe reduce it to more certaintie, and is a ſupply of that, that might have been well layd in the Declaration. And ſo it is not a Verdict of the matter, and ſo no iſſue, but is a Verdict holpen by the Statute of Jeoffailes.

Stat. of Jeoffailes, verdict help thereby.

194 *Shaw* againſt *Tayler.* *Herriot.*

THe Defendant made Avowry for Herriot-ſervice; The Plaintiffe pleaded in Barr that the Tenant at the time of his death, *nulla habuit animalia*; and the Defendant demurred: And it was adjudged for the Plaintiffe, becauſe the Avowrie was inſufficient; for that it did not ſet down in certain, what the Herriot ſhould be, Beaſt, or other thing. *Quære*, if it were expreſſed in the beſt Beaſt, either in caſe of Tenure, or Cuſtome, if the Tenant had none without fraud.

Mich. 14. Iac. Herriot ſervice. *Nulla habuit animalia.*

Now, no ſuch thing in *rerum natura*, no Guard, if their be no Heir, or he of full age.

195 *Hawles* and *Bayfield.* *Prohibition.*

IT was reported in the Common-Pleas this Tearm, *Trin.* 15. *Iac.* That in the Kings-Bench in the Tearm and Roll aforeſaid, between *Hawles* and *Bayfield*, a Prohibition was awarded upon this ſurmiſe, that between the Lord *Shandois* then ſeiſed of the Mannor of *Blunſden* in *Wiltſhire*, and the Defendant then Parſon of *Blunſden*; there was a concord and agreement, that the Lord *Shandois* and his Farmers of his ſaid Mannor, ſhould pay unto the ſaid Parſon, ſo long as he ſhould remain Parſon, ſuch a ſumme of money in full ſatisfaction of all Tythes; and that in conſideration thereof, they ſhould hold the ſaid Mannor diſcharged, &c and upon Demurrer it was adjudged for the Defendant, and a conſultation awarded.

Trin. 15. Iac. Agreement that ſhould pay money not Tythes.

196 *Steward* againſt *Biſhop.* *Caſe.*

Ames Steward brought an Action of the Caſe againſt *Biſhop*, for ſaying of him *Innuendo*, *&c.* is in *Warwick* Goal, for ſtealing of a Mare, and other Beaſts; and after a Verdict for the Plaintiffe, upon divers motions in Arreſt of Judgement, the whole Court gave opinion *ſeriatim*, that the words would not bear Action; for they do not affirm directly, that he did ſteal the Beaſts, as if he had ſaid that he ſtole them, and was in Goal for it; but they do only make report of his impriſonment, and the ſuppoſed reaſon of it; and it may very well be, that the Warrant or *Mittimus* was for ſtealing expreſſely, as is the common form of making of the Kalender of the Priſoners for the Juſtices of Aſsize, and the like.

Action for words, hee is in Gaol for ſtealing.

197 *Gage's* Caſe.

Attourney as Executor Plaintiffe or Defendant ſued not by Bill.

Gage an Attourney of this Court, ſued as Adminiſtrator by Writ of priviledge, and it was moved by *Chibborn*; That they ought to ſue by originall; *Quod fuit conceſſum*, and therefore they took out his originall, *Paſche* 15. *Jac.* And the Defendant appeared, and the like opinion was given this Trinitie-Term *è converſo*, for *Dury* who was ſued as Executor to his brethren by Bill, being an Attourney.

Waſte.

198 *Bell* againſt *Hartley* and his Wife.

Receipt denied to the Wife, and the day and bank.

Richard Bell brought an Action of Waſte againſt *Hartley* and his Wife; and after iſſue joyned at the *Niſi prius*, the parties appeared, and verdict was given for the Plaintiffe, and now at the day in Banke, *Henden* Serjeant moved that the Wife might be received, but 'twas denyed as a ſtrange Motion.

Replevin.

199 *Swinnerton* againſt *Miller.*

Coppi-holder maketh Leaſe by licence, he may grant the reverſion.

IN a Replevin between *Swinnerton* Plaintiffe, and *Meller* Defendant, upon occaſion of motion in arreſt of Judgement, it was reſolved by the Court, That whereas one *Robert Winniffe* was ſeiſed of a Copi-hold of the Mannor of *Iſlington*, and by licenſe of the Lord dimiſed the ſame by Indenture to the Plaintiffe for twenty yeers, rendring twenty five pounds *per Annum*; The ſaid *Robert Winniffe* ſurrendred the reverſion of the moity of the ſame Coppi-hold to the uſe of *Nicholas Winniffe*, to which hee was admitted, and then he ſurrendred the other moitie to one *Mary* the Wife of *John Miller*, who was admitted, and the Defendant as Bayliffe to the ſaid *Mary* and her husband for halfe the Rent as belonging to the reverſion of the halfe made Coniſance. It was reſolved by the Court that the ſurrender by the name of reverſion was good ~~this~~ in the caſe, though the Leaſe were not made by ſurrender, which had been directly derived; and that not according to Cuſtome out of the cuſtomary eſtate, but by Indenture; for ſtill it is the Leaſe of the Coppi-holder, and not of the Lord, and yet perhaps if the Coppi-holder ſhould forfeit his eſtate, the Leaſe would ſtand againſt the Lord in this kinde of demiſing by licence. Alſo it was holden cleare, that the Rent was to bee divided by halfes according to the halfes of the reverſion.

Reverſion of a Coppi-hold granted, needeth no Attournement.

Laſtly, the Court was of opinion, that they need no Attournement upon the ſurrender made of the moity of the reverſion of *Robert Winniffe* unto *Nicholas*, becauſe it paſſeth not by way of Grant or reverſion or Attournement; but there muſt bee an admittance of the Lord

Lord; and when that admittance is given, the eſtate is ſetled, and there is no meanes in Law to compell the Leſſee to Attourn. And the Admittance is a kinde of Act in Law, and puts the State into the partie in a ſort in the poſt. But I am of opinion of the reaſon of *Millers* Caſe, *Co. lib.* 6. For that there ſhall be no Entrie for condition broken in ſuch a Caſe without Attournment. But indeed, it is not within the Stat. of Conditions.

200 *Pickners Caſe.*

IN the Caſe of one *Pickner*, It was reſolved by the Court upon the Stat. of 28. *H.* 8. That if a Biſhoprick within the Province of *Canterbury* bee voyd, and ſo the Juriſdiction devolved to the Metropolitan, That hee muſt hold his Court within the inferiour Dioceſſe, for ſuch Caſes, as were by that Law to be holden before the inferiour Ordinarie. And I moving that as my opinion, it was ſaid of the Prothonotaries, that it had been ſo formerly reſolved.

Stat. 23. H. 8. *cap.* 9. Metropolitan in Vacation of a Biſhoprick, muſt ſit in the Dioceſſe.

201. *Andrewes* againſt *De-la-hay.*

Obligation.

SIr *William Andrewes* brought a Bill of Debt, of ten pounds againſt *De-la-hay* as Attourney, and counted as upon three ſeverall Bonds of five Marks a peece; and upon the *Oyer* of the ſeverall Conditions, it appeared that one of the ſummes in the condition, was payable after the Bill exhibited, and iſſue was joyned upon conditions performed, and verdict given for the Plaintiffe, and entire dammage and coſts aſſeſſed; and *per Cur'* hee cannot have judgement in forme as it was found; Nevertheleſſe upon Releaſe of dammage and coſts, judgement was given for the two firſt Bonds only; for though the Bill was in an entire ſumme, yet by the Court, it appeareth that they were ſeverall demands; for the whole ſuite is not ſatisfied, by the Plaintiffe himſelfe, for it is as ſeverall demands and ſuits: *Tamen Quere*, if it had been by Originall.

Dammages given where there is no cauſe for part.

202 *Bird* againſt *Culmer.*

Debt.

Bird brought an Action of Debt againſt *Culmer* an Executor, upon *plenè adminiſtravit*, the Plaintiffe replyed that hee had Aſſets; and the Defendant, *rehictâ verificatione cognovit Actionem, nec quin ipſe detinet*; the Defendant, &c. And the Judgement was given *pro Quere Teſtatoris*, which was entred *Hill.* 12. *Rot.* 2033. And it was moved by *Richardſon*, that the Confeſſion ſhould alſo continue, that hee had

Confeſsion of Action by Executor, how it worketh for the acknowledgement of of Aſſets.

goods ſufficient,&c. And prayed that might be added to the Entrie, but the Court refuſed to do ſo; for indeed the confeſſion naturally can extend no further, then to the Count which is of the debt, and not of the Aſſets. Yet if the Defendant will confeſſe more hee may, and there are Entries both wayes. Note that in this Caſe hee pleaded *plenè adminiſtravit, &c.* And the other replyed aſſets,&c. Then he confeſſed, which may bee taken diſavowing his Plea of *plenè adminiſtravit.*

Obligation.

203 Earle of *Corks* Caſe.

Condition to make compoſition for Land.

EArle of *Corke* in debt upon an Obligation, with condition that if the Defendant ſhould make compoſition with the Earle for lands, &c. Then hee ſhould pay the Plaintiffe thirty pounds: The Defendant pleads that hee made no compoſition: The Plaintiffe replies, that the ſaid Earle did grant unto the Defendant, a rent charge of five Markes in fee, in ſatisfaction of his Title,&c. Which the Defendant did not accept in ſatisfaction,&c. There muſt be added for forme, and ſo hee made compoſition.

Information.

204 *Flood* againſt *Kinght.*

Vſing a Trade not having been an Apprentice.

RObert *Flood*, informed againſt *Richard Knight*, for uſing a Trade not being Apprentice.

Debt.

205 *Lovedens* Caſe.

Baron and Feme muſt appeare together in debt.

AN Action of Debt was brought againſt *Loveden* and his wife, for the Recuſancie of his wife; and the husband would have appeared by *Superſedeas* alone; but the Court was reſolved, that either both muſt appeare, or both be out-lawd.

206 *Coachman* againſt *Halley.*

Eſcape in debt upon it, the Defendant may plead *Nul tiel Record.*

DEbt by *Coachman* againſt *Halley*, Bayliffe of *Aſhford*, for an eſcape, &c. And committed upon a Recoverie, in the Court of *Aſhford.* The Defendant pleaded *Nul tiel Record*; and now in the Records certified, there were divers differences in the continuances, and in the Proceſſe; and yet becauſe the *Plaint Count* and Judgement certified, agreed with the Declaration, Judgement was given for the Plaintiffe.

207 *Copley*

207 *Copley* againſt *Collins.* *Prohibition.*

IN prohibition it was reſolved, That ſix Months for proofe of the ſurmiſe, ſhall not bee counted by twenty eight dayes to the Month, but according the Kalendar.

Count in a ſurmiſe by the Kalendar.

208 *Swaine* againſt *Holman.*

Waſt.

ACtion of waſt between *Swaine* and *Holman* of Lands in *Com. Dorſet.* The parties were at iſſue upon a ſurrender made in *Middleſex.* The queſtion was how the Writ of Seiſin ſhall be awarded, which muſt bee *per viſum Juratorum.*

Seiſin in Writ of Waſt, how it ſhall bee, where the tryall is in forrain County.

209 *Anonymus.* *Caſe.*

ACtion upon the Caſe for calling one Baſtard, the Defendant juſtifies that he was a Baſtard, and it was awarded that this ſhould bee tryed *per pais*, and not by the Ordinary.

Baſtardy ſhall be tryed by Iury in Action upon the Caſe.

210 *Points* againſt *Gibſon.* *Partition.*

IN a Writ of Partition upon the Statute, by *Points* againſt *Gibſon*, being within Age, the Defendant was demanded his Age.

Age is not grantable in partition.

211 *Wheatley* againſt *Stone.* *Treſpaſſe.*

WHeatley brought an Action of Treſpaſſe againſt *Stone*, in the Kings Bench, and declared that hee levied a plaint of Debt in the Counter of *London* againſt one *Watkins*, and upon Proces hee was arreſted by one *Weſt* a Serjeant, and that *Stone, Vi & Armis*, did reſcue him, &c. Whereby hee loſt his Debt upon iſſue not guiltie, and verdict for the Paintiffe, Judgement was given *quòd defendens capiatur*; whereupon errour was brought in the Exchequer Chamber, and the Judgement was affirmed; for though the value of the Action properly is upon the Caſe, as touching the Plaintiffes loſſe or dammage of Debt, yet being done with force, and that force being done, though not to the Plaintiffe himſelfe, but to the Serjeant, who was Miniſter as well to him, as to the Court; he makes his Action *vi & Armis*: And

the like Preſident was ſhewed out of the ſame Court, *M.*44.*Et* 45. *Eliz. Rot.* 169. between *Margaret Aſtell*, and *Hugh Ridge*; and another of the ſame *M.* 43. 44. *Eliz. Rot.* 467. between *Andrew Pawling*, and *Robert Marriot*, and on the other ſide *Paſche* 14. *Jac. Rot.* 364. *London*: *Robert Spear* brought an Action upon the Caſe, upon the like arreſt and reſcue, *vi & Armis* expreſly, and the Judgement was given in *Mich.* And it being alſo brought before us by Errour, this terme wee affirmed the Judgement; and the like had been, *Hil. 6. Jac.* 722. in the Kings Bench, and affirmed upon a Writ of Errour; for it was reſolved that the Caſe, though the reſcue were laid *vi & Armis*, would beare either Treſpaſſe, *vi & Armis*, or Treſpaſſe upon the Caſe. But the Plaintiffe muſt beware that hee follow his originall, if it bee by Writ; for if that be *vi & Armis*, or upon the Caſe, the Judgement muſt be ſutable.

Action of Treſpaſſe *vi & Armis*, or upon the Caſe indifferent.

And ſo muſt it be in a Bill in the Kings Bench. But if the Bill bee Treſpaſſe generall, neither ſaying *vi & Armis*, nor upon the Caſe ſpecially, he may uſe it to either.

Caſe.

212 *Slowley* againſt *Eveley*.

Slowley brought an action of the Caſe againſt *Eveley* in the Kings Bench, for beating and impriſoning of him, and had Iudgement; and upon a Writ of Errour aſſigned, took this difference; that where a man hath a perſonall Action againſt two Defendants, if they plead ſeverally, and hee be *Non-ſuite* againſt the one, before hee hath judgement againſt the other, that he ſhall be barred againſt both; for it works in the nature of a Releaſe of the whole. But where there is but one Defendant and hee pleads to one part in iſſue, and to the other demurres, the Plaintiffe may not bee *Non-ſuite* for one point, and proceed to another.

Non-ſuite in part.

Caſe.

213 *Sydenham* againſt *Man*.

Sir *Iohn Sydenham* brought an Action of the Caſe, againſt *Timothy Man* Clerk in the Kings Bench for theſe words, (If Sir *Iohn Sydenham* might have his will, hee would kill all the true Subjects in *England*, and the King too) and hee is a maintainer of Papiſtrie, and of rebellious perſons. The Defendant pleaded other words *abſque hoc, &c.* And the Iurie found that hee ſpoke theſe words, *viz.* I think in my conſcience, that if Sir *Iohn Sydenham* might have his will, he would kill all the Subjects in *England*, and the King too, and hee is a maintainer of Papiſtrie and rebellious perſons; and

Action for Wards not altogether the ſame.

if

if upon the matter hee be guiltie, in ſpeaking the words, *in forma qua*, in the Declaration then, &c. and if not, &c. a Iudgement was given for the Plaintiffe, and now upon a Writ of Errour in the Exchequer Chamber, the Court inclined againſt the Defendant; for the matter is in effect the ſame, and the forme muſt be underſtood, the Eſſentiall forme, not according to every word: Yet *Paſche* 16. Wee inclined that either of theſe words would beare Action, but the words were found not ſo abſolute as the Declaration, neither moved credit in the eare, ſo fully, which is the force of a ſlander; and then they are not the ſame words in force and effect; as if the words were laid, I know him to bee a Thiefe, and it were found, I think him to bee a Thiefe.

214 *Howard* againſt *Bartlet*.

VIſcount *Howard* was ſeiſed of the Mannor of *Stockwood* in *Dorſet-ſhire*, whereof the Cuſtome was, that the Coppy-holders for lives, their Widowes ſhould enjoy during their Widow-hood, their Cuſtomary lands, whereof their husbands died, ſeiſed. The Viſcount, *Anno* 5. *Eliz.* granted a Cuſtomarie Tenement of that Mannor unto *John Bartlet* for life by Coppy, and 19. *Eliz.* conveyeth the whole Mannor to *Winterhay*, who the ſame yeer conveyeth the Inheritance, and Freehold of *Bartlets* Tenement for money, payd by *Bartlet* to *Whitby* and others, and their Heires, and Aſſignes during the life of *John Bartlet*; the remainder to *Ellen* then wife of *Bartlet*, the Remainder to *John Bartlet* himſelfe in Fee.

The ſame *John Bartlet*, 28. *Eliz.* did grant the ſame remainder in Fee to *William* his ſonne and heire; to whom *Whitby* and the reſt releaſed. Then *William Bartly* having iſſue *William* (who is now a Ward) died; and the 11. *Eliz.* *Ellen* the wife of *John Bartlet* died; and *John Bartlet* married againe one *Frances*, and died ſeiſed of his Cuſtomarie lands, 14. *Iac.* and then *Frances* his wife entered.

Upon this Caſe it was reſolved by us, three Aſſiſtants, that *Frances* was to enjoy her widowes eſtate, in this Land. For firſt, it was clear, that the Cuſtomary eſtate of *John Bartlet* remained as it was during his life, not extinct, nor altered by the purchaſe of the Fee-ſimple, which during his life was in others, not in him; whereof it followes by conſequence, that all Cuſtomary Tenements, to which a Cuſtomary eſtate remaines, whereof there is once as an Excreſcence, which by the Cuſtome and Law growes of it ſelfe out of that eſtate, even as deſcent ſhould have done; if *Bartlet* had been a Coppy-holder in Fee, and the Free-hold granted to another in Fee. But if ſo much as an admittance only were requiſite before her husband

The widow ſtandeth as long in poſſeſſion as her husbands eſtate.

band could veſt in her, it were dangerous, as if it were a Dower which could not be had but by ſuite; for that were loſt, becauſe the Cuſtomary Court, that ſhould relieve her is gone as to her, for her eſtate is utterly eſtranged from the Mannor: But now this eſtate is as it were a part or ſuite of the others, and is caſt upon her, and veſted by Law. And *Paſche*, 16 *Iac.* Upon a tryall in *ejectione firmæ*, between Leſſee to the Widow of one *Walter Rennigton* claiming a Widowes eſtate in land in *Southrage* in *Gloceſterſhire*, againſt——— For Sir *Edward Withipole* : It fell out indeed, that ſhee was married to *Rennigton*, and they inhabited together; but ſhee being Neece to his former wife, he was queſtioned, as for an inceſtuous marriage, and put to Pennance by the high Commiſſion Court, and bound from her company, and then died : and then the woman came into the Court to pray her widowes eſtate, and was denied. And wee reſolved, that her Widowes eſtate was not due to her, though ſhee were not divorced a *vinculo*, though there were cauſe.

Nextly, we held that the Action was maintainable, againſt the Lord within the admittance, for the reaſon in the former Caſe. And *Warburton* and *Hutton*, did alſo rely upon the refuſall to admit, in which Caſe they thought their Law ſhould ſupply the admittance.

Raviſhment.

215. *Bruton* againſt *Norris*, and others.

Star-Chamber.

John Bruton exhibited a Bill in the Starre-chamber againſt *Edward Norris*, and others, and complained, that he having one only daughter of the age of twelve yeares, or thereabouts, and having in lands and goods to the value of five thouſand pounds; the Defendant *Norris* did cauſe his daughter to bee allured to his houſe in *Southwark*, downe the Thames to ſee a ſhip, and having her ſo abroad, afterwards by force and threats carried her into *Suffolk*, and there married her.

Upon the Stat. 3. *H.* 7 *cap.* 2. of taking away an Heire.

Now the truth was, that this *Bruton* had alſo a ſonne, though it were not ſo laid in the Bill, ſo that this daughter was neither heire apparent to her father, nor had lands or goods : whereupon queſtion ariſing whether this caſe were within the Statute of 3. *H.* 7. *cap.* 2. and ſo felony and not examinable in this Court : It was ordered, that the chiefe Juſtice and I ſhould conſult with all the Judges, which we did : and upon examination of the Statute and view of Preſidents of former Indictments in the King Bench, wee reſolved that this caſe was not within the Starute; for though the words of the Purview ſeeme generall to all women, taken unlawfully againſt their wills, and that this Maid, though ſhee were firſt trained out with her conſent, yet was afterwards by force taken away, which was a forcible taking then begun, becauſe ſhee was before in her owne power:

power: It was conſidered that the preamble of the Statute could not bee thought to bee idle, but meant to reſtraine the Purview to the particular caſes of the preamble in the ſame of women, and their eſtates and conditions; and alſo the motives and ends of their taking it, is that they ſhould bee made widowes, or wives; that they had ſubſtance in goods or lands, or ſhould bee heires apparent; that the motive ſhould bee lucre, and the end to marry or deflower; and the Purview following, that what perſon or perſons ſhould take a woman ſo againſt her will unlawfully, &c. It was conceived that this word (ſo) did implicitly binde up the preamble in the Purview; for elſe the word (ſo) were idle, and might bee ſpared, if it did not include the motive and end of the action, which is a part of every action, as being the cauſes of it, which in caſe, are lucre and luxurioufneſſe. And that was alſo conceived to bee the meaning of the law, as being like to bee the common caſe; for men will not commonly ſteale women that are nothing worth. Yet it was objected, that by this conſtruction the taking of a Maid inheritable to twenty Acres of land ſhall bee felony, and the taking of a daughter of the geateſt Peere of the land ſhall bee no felony. And alſo that there could bee no lucre in ſtealing of her that was a mans wife, neither could the raviſher marry her. Alſo the Proviſo in the end, That the act ſhall not extend to any perſon taking away any woman, claiming her as his Ward only, or Bondwoman, which he was to reſpect only, taking without the word (ſo.) There were alſo ſome Indictments found in the Kings Bench; *Norff. Pas.* 90. *H.* 7. againſt one *Higford* and another *Norff. Pas.* 6. *H.* 8. againſt one *Moore*, and another *Kanc. Hill.* 3. & 4. *Phi. & Mar.* againſt *Polley* that ſpake neither of lands nor goods, nor heire; but on the other ſide aſwell thoſe Indictments as all other that were found, did recite the preamble of the Statute, and the reſt, being ſeven or eight, did all lay the women to bee heires, or poſſeſſed of lands or goods. And one Indictment which was *Norff.* 31. *H.* 8. againſt one *Large*, for the taking of *Agnes Hopſon* was put *ſine die* for inſufficiency, and one fault was entered, becauſe there was no mention to what intention hee took her, whether it was to marry her, or to deflower her.

And another *Ebor. Hill.* 3. & 4. *Phi. & Mary* againſt one *Thompſon*, for taking one *Margaret*; and *Margerie Burton* was alſo put *ſine die* for inſufficiency, and one fault was entred, becauſe it was not ſaid that he did marry, or deflower them, or either of them *prout per tenorem Stat. prædict. fore deberet.* Alſo *Hill.* 16. *Eliz.* my Lord *Anderſon* in his booke of Reports hath it thus: It was agreed by the Iuſtices, that if a woman be taken againſt her will, and menaced to contract her ſelfe in marriage, but yet

is

is not married indeed, that is no felony; but if ſhee were married, or defiled, it were felony; for though the body of the Law ſay that ſuch a taking ſhall bee felony, yet it ſhall bee ayded by the preamble, which makes the marriage or defiling materiall: And one other judgement, *Inſulâ Elienſi in Com. Canterbr. Paſ.* 35. *Eliz.* diſcharged by pardon in Parliament *William Harriſon*, for taking *Anne Lewis* the wife of *Thomas Lewis* at *Ely*, ſhee being ſeiſed of lands in *Ely* of twenty pounds *per Annum*, and that one *David Eyre* knowing her to bee ſo unlawfully, and ſo felonioufly taken away, and by the procurement of the ſaid *Harriſon* at *Ely* aforeſaid, took the wife.

Now ſince the marriage or deflowring is made a neceſſary part of the jugdement, it followes, that the purview of ſo taking is expounded and reſtrained by the preamble, and motive of lucre is more incorporate into the Act of taking, as being a precedent and a ſufficient cauſe of it, than the marrying and deflowering, which is an accident following after the Act, and perhaps was not purpoſed when hee took her away.

Quære, whether the taking of the lands, and the marrying or deflowering were in ſeverall Counties; for it is felony compoſed of all thoſe three things, as a murder is of the ſtroke and death.

Information.

216. *Daviſon* againſt *Barker. Term. S. Mich.* 15. *Iac. Reg.*

Edmond Daviſon qui tam, &c. ſued an Information in the common Pleas againſt *William Barker*, for exerciſing occupations againſt *Deces Bers*, by eleven moneths in the City of *Norwich*, and upon iſſue not guilty, found for the Plaintiffe, *Richardſon* excepted in arreſt that it ſhould have been in the occupation of a common Baker; but that was not regarded. Another exception was taken, that by the Statute of 5. *Eliz.* the forfeiture ariſing upon offences committed within Cities and Townes corporate, whereof the conſequence was urged by mee, That if the cauſe were ſo to bee underſtood, then this Information could not ſtand, which was for the King and the Informer. And this doubt depends upon two branches of the Statute, after all the forfeitures given in theſe words: That the one halfe of all forfeitures and penalties mentioned in the Statute, other than are expreſly otherwiſe appointed ſhall bee to the Queene, the other halfe to the Informer.

Stat. 5. *Eliz.* whether it give the penalty to Cities and corporate Townes.

The other clauſe is neerer the end in theſe words, That all manner of Amerciaments, Fines, Iſſues, and Forfeitures which ſhall ariſe by reaſon of any offences, or defaults mentioned in this Act, or

any

any branch thereof within any City ſhall bee levied to the uſe and maintenance of the ſame City, in ſuch ſort, as any other Amerciaments, Fines, iſſues, or forfeitures have been taken by reaſon of any grant made by the Crowne to the ſame City, any clauſe in this Act to the contrary notwithſtanding. Hereupon I was of opinion, that the word (forfeiture) in the later clauſe was not to bee underſtood of any penalties of the Law, for two reaſons.

Firſt, becauſe it was penned beginning with Amerciaments, &c. which imports the forfeitures of the like, or of the leſſe nature: Againe, that appoints them to bee levied in ſuch ſort, as other Amerciaments, &c. granted to ſuch Cities, are to bee levied, which are of Record, and due as ſoone as they are impoſed, and want nothing but the levying. Now Fines, and Amerciaments are often granted to Cities; and yet they could not extend to the like growing upon ſuits, upon offences made by new Statutes. Note, theſe are not due till there bee a converſion; for the queſtion is of the ſuit, not of the levying.

But no City hath, or can have Grant by Charter of any penall Law: And where it was urged, that the former clauſe did expect from the Queene, The penalties otherwiſe appointed muſt needs bee underſtood of theſe: There is in the Statute 5. forfeiture given againſt him that departs without licence out of a work undertaken to him from whom he departs.

And another exception in this caſe was, that the Information ought to have been in the Quarter-ſeſſions, Aſſize, or Leete upon this Law by the expreſſe proviſion of the Statute of the 31. *Eliz.* which I hold to bee plainly ſo; for that Statute hath one generall clauſe; That upon penall Lawes the offence ſhall bee laid to bee done in the County where in truth it was. A ſecond clauſe there is, excepting ſome offences, out of that generall which may ſtill bee laid in forraigne Counties. Then followes the third clauſe, which provides expreſly that for the Statute of unlawfull games, Boyes and Apprentices ſhall bee ſued and proſecuted in Seſſions or Aſſizes, &c. in an Aſſize, &c. or in the Leete, &c. Note the reaſon and intent of the Law to eaſe the Subject diverſly, and moſt in theſe petty offences: Note the difference of words, in the firſt clauſe, the offences ſhall bee laid; in the third clauſe ſhall bee ſued, and proſecuted, &c. and not in any wiſe out of the ſaid County; but it may bee a queſtion which of thoſe petty offences being committed in *Midd.* may not bee ſued in the Courts of *Weſtminſter* ſitting in *Midd.*

Debt.

Revell againſt *Gray.*

Debt counting upon parcels.

Revell brought an Action of Debt againſt *Gray*, and his wife, for three pounds and eighteen ſhillings, and counted for thirty nine ſhillings, upon a contract of the wives, *Dum ſola fuit*; and the other thirty nine ſhillings, upon an *ni ſimul computaverunt*, with *Gray* the husband, only and after iſſue *nihil debet*, found for the Plaintiffe, judgment was ſtayed.

Aſſiſe d. pr.

218 *william* S. *Andrews* againſt the Biſhop of *York*, *Mary* Counteſſe of *Shrewsbury*, and one *Hacks*.

Aſſize of *Darr.* preſentment a *Quare Impedit.*

William S. *Andrewes* brought a Writ of Aſſize of *Darrein* preſentment, againſt the Biſhop of *York*; *Mary* Counteſſe of *Shrewsbury*, and one *Hack* the Biſhop made default: And the Counteſſe, and *Hack*, pleaded in Abatement, that the Plaintiffe before this Writ purchaſed, brought a *Quare Impedit* againſt the ſame Defendant, and ſhewes all certaine, which remaines undetermined; and averres, that they are both of the ſame Avoydance: And upon Demurrer the Writ was abated by Judgement.

Iudgment.

Caſe.

219 *Male* againſt *Ret.*

Action for words of Petylarceny.

Male brought an Action of the Caſe againſt *Ret*, for ſaying hee had ſtolne his Corne out of his Barne. After a verdict it was ſaid, it might bee, the Corne was not worth a penny; yet judgement was given for the Plaintiffe; for it is felony, though it bee not capitall.

Caſe.

220 *Chamberleyns* Caſe.

Amendment of the Record by the book of Office.

Chamberleyn brought an Action of the Caſe upon the Statute of *Huy* and *Cry*, and after iſſue joyned and entred where the Record was made, that the Robbery was done 30. *Oct.* It was ordered by the Court to bee amended, and made 30. *Septem.* upon the Oath of *Truſter* the Attourney, for the Plaintiffe, that it was ſo in the book of the Office, and ſhewed it.

221 *Iones* againſt *Iones*. *Prohibition.*

MOtion was made by—— for a Prohibition between *Iones* and *Iones*, upon the Stat. of 23. *H.* 8. for being cited out of the Dioceſſe: And the Caſe was; The chancellour of the inferiour Ordinarie, did make requeſt to Doctor *Donne* Deane of the Arches, to take the Cauſe of his hearing; and the reaſon given by the Chancellour was, that the Cauſe (being indeed a cauſe of *Modus Decimandi*) was ſo difficult, that the Plaintiffe could have no ſufficient Councell, there for that cauſe. Citation out of the Dioceſſe, where the inferiour Ordinary may remit to the Metropolitan. Stat. 23. *H.* 8. *cap.* 9.

Now the Queſtion was, whether the tranſmitting of this cauſe was warranted by the exception in that Statute: which exception is of two ſorts; the one for ſpeciall caſes, there particularly expreſſed, (whereof this is one;) the other a generall clauſe thus: That in caſe, that any Biſhop or any other inferiour Judge, having under him juriſdiction in his own right and Tytle, or by Commiſſion, make requeſt or inſtance to the Archbiſhop, or other ſuperiour Judge, to take, treat, examine, or determine the matter before him, or his Subſtitute; And that to bee done in Caſes truly, where the Law Civill or Canon, doth affirme execution of ſuch requeſt, or inſtance, or juriſdiction to bee lawfull or tolerable, upon paine to forfeit, &c. double dammages and coſts to the partie for his vexation; and alſo ten pounds; one halfe to the King, the other halfe to him, that will ſue for the ſame.

Wee ſent for *Civilians*, and there came for the Defendant Doctor *Talbot*; and Doctor *Talbot* ſaid, That by the Canon-Law in the beginning, there was but one Biſhop, who had ſole juriſdiction, and was the immediate Ordinarie throughout: Afterwards, there were Suffragan Biſhops made under him, which brought in a reſtraint of the Archbiſhops in their Dioceſſe; but in ſpeciall Caſes which agrees with our Law, that an Adminiſtraon granted by the Archbiſhop, is but voydable.

Then hee ſaid, that the juriſdiction of the Archbiſhop is opened (for that is their phraſe) ſometimes by himſelfe, *volente Ordinario*, as in the Caſe of his Viſitation. And by the partie in default of Iuſtice in the Ordinary, as by Appeale, or *Nullities*. Again, it is opened by Ordinary himſelfe, without the partie or Archbiſhop; as where the Ordinary ſends the cauſe to the Archbiſhop: *Panormitan. Archiepiſcopus eſt Ordinarius totius Provintiæ; non tamen habet exercitium niſi in Caſibus*; and ſets downe many Caſes: And amongſt the reſt, *Quando fertur ad eum queſtio, vel tota Cauſa.* And *Hoſtienſis, cap. Paſtoralis de Officio Ordinarii. Certum eſt quod Metro-* *Panormitan.* *Hoſtienſis.*

politanus, ſive Epiſcopus Decimas Ordinariorum totius Provinciæ non poterit exercere, Iuriſdictionem ſuam in ſuorum Suffraganeorum ſubditos, niſi in Caſibus ſequentibus, and reckons 21 Caſes.

1 *Vbi ab Eccleſia ſua Metropolitanus diſcrepat in Divinis.*

2 *Vbi ſubditus conqueritur de Epiſcopo.*

3 *Si appellatur ad Epiſcopum.*

4 *Quando inter Epiſcopum & alios criminalis Quæſtio agitatur.*

5 *Ratione delicti Commiſſarii in ſua Dioceſi.*

6 *Quando præcepit ſubdito Epiſcopus quem reperit juſtè excommunicatum.*

7 *Quod eidem Epiſcopo ſatisfaciat, & ſubditus non ſatisfacit ratione rei ſit. in ſua Dioceſi.*

8 *Si quando ad eum refertur Quæſtio per conſultationem.*

9 *In his quæ tangunt communiter totam provinciam.*

10 *Quando congregatur concilium Provinciæ alibi.*

11 *In Ariis notariis ſibi, vel ſuis arrogatis.*

12 *Quando Epiſcopus negligens eſt in Iuſtitia facienda.*

13 *Quando Canonici in contemptu Epiſcopi abſtinent à Divinis.*

14 *Quando notoria eſt ſententia Epiſcopi.*

15 *Non retinere ratione Viſitationis annualis.*

16 *Poteſt per totam provinciam indulgentiam facere.*

17 *Si non ſuperfuit convinci idoneè vacante ſede, cuſtod. bona Epiſcopal. mente.*

18 *Ratione Privilegii ſibi conceſſi.*

19 *Ratione conſuetudinis.*

20 *Si inter Epiſcopum & Capitulum ſuum fiat mutatio.*

21 *Quando Epiſcopus, vel quia recuſatur, tanquam ſuſpect', vel aliâ Cauſâ mutet' ciopartes, & refert totam Cauſam*; whereof the cauſe is *Quando eadem refertur, Quæſtio ad conſultand. ad ſpeculand. titulo de rationibus peragere, quando generaliter inde poteſt facere lationem, quandocunque ſibi videtur expediens,* ſc. *ante litem., in medio litis, vel quandocunque.*

Baldenſis. And *Baldenſis* being a *Civilian*, writing after *Hoſtienſius*, referres himſelfe to him; *& dicit quod Archiepiſcopus eſt Iudex Provinciæ; tamen Iuriſdictio ſua eſt ſignata, & non aperitur niſi ex cauſa.*

Talbot ſaid reſolutely, that though the Canon-Law reſtraine the Archbiſhop to call cauſe from the Ordinarie *nolente*, but in 21. caſes; yet the Law is left in the abſolute power of the Ordinary, to ſend the cauſe to the Archbiſhop, abſolutely at his will, without aſſigning any ſpeciall reaſon; and therein *Hoſtienſis & Dominicus de competenc.* and other Authors doe agree. And Doctor *Duck* comming to us another day with *Talbot*, being againſt him, did confeſſe

confeſſe the Ordinarie might conſult with the Archbiſhop at his pleaſure, without limitation. And they agree that the Caſes allowed by the Canon-Law to the Archbiſhop, to call cauſes from the Ordinarie *nolente* to his own hearing, were more than this Statute did allow. And touching the double meaning of the Statute, Doctor *Baldus* cited *Baldus Cauſâ 3. Qu. Sextâ, cap. penal. Synod. reman. Neminem oportet extre de Provincia ad Provinciam, vel de Comitatu ad Comitatum, niſi ad relationem Iudicis, ita Actor rei forum ſequatur.* Baldus.

Now to expound the Statute thus, That the Ordinary may at his will and pleaſure, ſend his ſubject from one end of his Kingdome to another without cauſe, is both againſt the letter of the Statute, and excluds it utterly.

Firſt, the purpoſe of the Law, was to provide for the juriſdiction of the Ordinary; which appeares in that there is Action given to the Subject, and penaltie to the King for his vexation. But now to the Ordinary againe; the Archbiſhop by Statute is reſtrained to Caſes of neceſſitie, much fewer than hee had in his power before, *volente Ordinario*; which ſhewes that they regarded the ſubject more then their juriſdiction.

And this very cauſe of referring ſeverally, it checks it with this [that to bee done in Caſes only, &c.] Which were a vaine correction of it, leſt it as generally as before, that it were lawfull or tolerable in all Caſes without cauſe.

And no doubt the Statute was not made without advice and hearing of the Canoniſts, and therefore cannot bee ſuppoſed to bee ſo ignorantly penned; and therefore this Caſe concerning ſo much the ſubject deſerves much conſideration.

In this Caſe in queſtion, it is doubted whether the forme of the Statute bee well obſerved, the referring being from a Cancellour to a Delegate, and not from a Biſhop.

Quære, if an Archbiſhop calls a cauſe unto him, that is none of the Caſes within his power, whether the inferiour Ordinarie may have remedy againſt him, or can recall it by the Common-Law, or whether the Defendant may plead it to the juriſdiction.

If a Peculiar be a Subordinate to the Biſhop, then he cannot referre a cauſe to the Archbiſhop, but to the immediate Ordinary, as an Archdeacon or Commiſſary muſt doe; otherwiſe it is, if the Peculiar have any immediate reſpect to the Archbiſhop.

But if the peculiar bee free by a generall exemption, from all ordinary Juriſdiction (which was common in the caſe of Monaſteries, both by the grants of Kings and Popes) then the cauſe

muſt bee remitted to the King, as Appeales muſt alſo bee in ſuch caſes; and ſo it is provided by the Statute 25. *H.*8. *cap.* 21.

Note, that a Prohibition lies upon this Statute; becauſe it hath words prohibitory, as well as penalty annexed, for breaking the Prohibition. Otherwiſe it had been, if the opening had been thus only: If any man cite another out of his Dioceſſe he ſhall forfeit ten pounds.

Tro. and Converſion.

222. *Agar* againſt *Liſle.*

Agar brought an Action of *Tro.* and *Converſion* againſt *Liſle* of a Cow, and laid it *apud Caſtrum Ebor.* The Defendant pleads, that the Biſhop of *Durham* hath a yearly Faire, *primo Junii*, at *Darveton in Com. Durham*, and hath Toll there, and tels for what; and for non-paiment he uſed to diſtrain, &c. and ſhews that the Plaintiffe had bought Sheep of one, and Cowes of another, and that this whole Toll came to ſo much; and that the Defendant, as ſervant &c. had demanded it, and upon a refuſall, took the Cow and detained her for the Toll; which is the ſame Converſion *abſque hoc*, that hee was guilty *apud Caſtrum Ebor.* or elſewhere, within the County of *York*, or at any time before the ſaid firſt day of Iune, &c.

Whereupon the Plaintiffe demurred in Law, and ſhewed for cauſe, that there was no Converſion confeſſed; and therefore no anſwer to the Action; but hee ſhould have pleaded not guilty. And being now moved this Terme *Mich.* 15. *Harris* ſaid that it was the common experience, that the Detainer of goods from an owner after requeſt is allowed for a ſufficient evidence to maintaine a Converſion: whereunto I anſwered, that though legally it were not a Converſion; yet in that caſe it was reaſonable to allow it for an evidence to prove a Converſion; becauſe if you have goods of mine lawfully by finding or Bailment; yet if I require them of you, you can no longer lawfully hold them; and therefore when you ſtill detaine them from mee, it argues, that you claime them as your owne, and ſo uſe them.

Diſtreſſe makes no Converſion; but unreaſonable deteinor doth.

But in this caſe it is otherwiſe; for here hee hath not a lawfull cauſe to detaine it, againſt demand, as a diſtreſſe till the Toll paid; and yet hee denies not the Plaintiffe properly, nor doth any thing againſt it; and ſo it was adjudged for the Plaintiffe in this caſe.

223 *Freeſtone* againſt *Bowyer.* *Battery.*

Freeſtone and his Wife brought an Action of Battery, and wounding of the Wife *in Com. Salop.* againſt *Bowyer*, who pleaded a Juſtification, by warrant of the Sheriffe of *Worc. & molliter impoſuit manus, &c. abſque hoc quod eſt culpabilis in Com. Salop.* but anſwered nothing to the wounding: And verdict was given for the Defendant, and judgement; becauſe it was but a diſcontinuance upon the point of wounding, which is holden after verdict.

Iuſtification in Action of Battery.

Iudgement.

224 *Rives* againſt *Moxham.* *Caſe.*

Rives bought an Action of the Caſe againſt *Moxham*, that where the Plaintiffe lent unto the Defendant a Mare to plough his ground, by two dayes: the Defendant to *Chapman* promiſed, that hee would deliver her ſafe at the end of the ſaid two dayes; and hee did, during thoſe two dayes, exceſſively labour her, that ſhee dyed of diſeaſes, *abſque hoc*, that hee did ſo exceſſively labour her, that ſhee dyed thereof. And it was found for the Plaintiffe; and judgement was ſtayed upon the motion of *Francis Moore*; becauſe there was no place aſſigned in the Declaration where the labouring was, which is put in iſſue; and therefore ought to bee laid where it was: but if the Promiſe had been laid in one place, and the labouring in another, the Plaintiffe might have taken his choyce, to have brought his Action in either: but the *venue* and triall ſhould have been according to the event of the iſſue *non aſſumpſit*, or *non laboravit*. But note, that after in *Hil.* Terme 15. *Jac.* Judgement was given for the Plaintiffe; for the iſſue was taken from the place of the Action, which ſhall bee taken right where the contrary appeares not; otherwiſe, if the labouring had been laid in another place.

Action ſhall be laid, where the cauſe of Action appeareth to riſe.

225 *Collins* againſt *Throughgood.* *Covenant.*

Collins againſt *Throughgood* Executor; an Action of Covenant was brought againſt the Executor, and the breach was aſſigned for default of reparation committed in the time of the Executor

Iudgement againſt an Executor in Covenant broken by himſelfe ſhall be *de bonis Teſtatoris.*

ecutor, and dammages wee afſeiſed. And it was moved by *Towſe*, whether the judgement ſhould be *de bonis Teſtatoris*, or *propriis*. And upon view of Preſidents, it was judged *de bonis Teſtatoris*: For note that it is the Teſtators Covenant, which binds the Executor as repreſenting him, and therefore he muſt be ſued by that name.

Deceit.

226 Action of Deceit by *A.B.*

Ancient demeaſne tryed by the Book of Doomeſday.

ACtion of deceit brought by *A.B.* for levying of a Fine of Lands in ancient Demeaſne; and the iſſue was, whether the Mannor of little *Bowden* in *Northampton* be ancient demeaſne, or not. Whereupon Doomſday Book was brought into the Court and there ſhewed; whereby it appeares that the Mannor of *Bowden, in Commitatu Leiceſt'* was ancient demeaſne, but no ſuch in *Com° Northampton*, and ſo the Plaintiffe was barred.

Prohibition.

227 *Anonymus.*

In a Legacie the Court of Audience, refuſe ſingle witneſſe.

Court Eccleſiaſticall ſhall have tryall of *Ideocy* upon ſuite of legacy.

Hibborne moved for a Prohibition, and the Caſe was; One was ſued for a Legacie in the Court of Audience, and the Libeller pleaded a releaſe, and proved it by one witneſſe. The Plaintiffe denyed not the Releaſe, but replyed that the Inteſtate that made it was a convict, and the Prohibition was denyed; For it was pertinent to the cauſe and their juriſdiction: But if they will diſallow the proofe, becauſe it is but one witneſſe, which hee made a cauſe at the firſt, a Prohibition will lie; for it is not ſufferable by our Law to diſallow of proofe againſt a Legacie which is allowable by Law, againſt a Statute recognizance, or judgement; for that would make a Demonſtrive. But if they will except to the credit of witneſſes or the like, they may according to there Law.

Statute 2. *E.* 6.

228 *Harris* againſt *Cotton.*

Whether of Glebe Land the Corne be reapt by the Executor.

IN Action of Debt upon the Statute of 2. *E.* 6. for not ſetting out of Tithes, *Towes* moved the Court, that the Corne was grown upon the Glebe land of the Vicars, which was diſcharged of Tithes being in his own uſe; but if it were let out, did pay Tythes. Now the Vicar did ſow the Land himſelfe being in his own hands, and dyed before it was ſevered, and his Executors did cut and carry the Corne away, and he that had the Parſonage impropriate brought his Action, whereupon he prayed the opinion of the Court, whether he did plead *Nihil debet*. But the Court would give no opinion, becauſe it hanged before them in the ſuit.

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229. *Iohn Harbin & Vxor* Verſus *Greene.* Caſe.

HArbin and his wife brought an action upon the caſe, againſt Maurice Greene, reciting that the Biſhop of Sarum was ſeiſed in fee in right of his Biſhoprick of Sarum of and in foure mills in the City, and that there is a cuſtome there, that all the inhabitants reſident within the City in any ancient houſe holden of the Biſhop, &c. *à tempore, &c.* all their graine whatſoever by ſuch inhabitants in their ſaid meſſuage ſpent or ſold at the ſaid Mils and not elſewhere, without licenſe, &c. have uſed to grinde and pay for the grinding, and in conſideration thereof the ſaid Biſhops, &c. *à tempore, &c.* have uſed to keepe ſervants, &c. to grinde, and loaders to carry, &c. and ſo conveyes the Mils to them by demiſe, made *Anno* Iac. And that the defendant dwelling in an ancient houſe, &c. Dec. 12. Jac. *& diverſis diebus & vicibus inter eundem diem & quartum diem Aprilis Anno* 20. *Iac. tamſua grana in Meſuagio pred. expendit quam venditioni expoſita ad alia molend. & non ad præd. molendinum, &c. molabat ad dampnum, &c.* And upon iſſue not guilty, &c. it was found for the plaintife, and judgement was notwithſtanding given againſt the plaintife, *quod nihil capiat*, for two cauſes: firſt, that the cuſtome it ſelfe was unreaſonable, for the reaſon and uſe of ſuch a cuſtome is, that the corne that a man doth grinde, he ſhould grinde there, and not elſewhere, and therefore both ſides are bound by the cuſtome, the one to bring his corne to grinde there and not elſewhere; the other to maintaine his Mils and all proviſion of grinding, and mutuall actions will lye on both ſides if there be a default. And it was holden that this cuſtome would aſwell hold for corne as well as growing within the Towne, ſo it were ſpent within their houſes being ground, both for the conſideration aforeſaid, and the rather becauſe the houſes were holden of the Biſhop, though in a *ſecta Molendini* by tenants it would not be ſo. But the fault here is that by this cuſtome if a man buy corne, he cannot ſell it againe in corne in his houſe, for he muſt firſt grinde it in thoſe Mils. And he hath aſsigned this breach as well in corne ſold as ſpent. And I am of opinion, that if he had aſsigned it only in corne ſpent, yet it would not have ſerved, becauſe the cuſtome it ſelfe being intire, is totally void, though ſome part of it alone might be good in Law.

Cuſtome of ſuit to a Mill unreaſonable.

Another fault was, that he aſsigned the breach *Anno* 12. *& diverſis vicibus* betweene that, and *Anno* 2 which was long before the plaintife had intereſt, and the damages were given intire, upon the not guilty to the whole, which damage ſhall be underſtood to be given not according to the law, but according to the allegation of the plaintife who layeth his damage for all. And the verdict of laymen who finde him guilty *de præmiſſis* to the damage of, &c. And it makes no difference that the

ſpeciall breach is right, *An.* 12. and the reſt commeth by *diverſis diebus*, like a treſpaſſe with a *continuando* for which damage is alſo given.

Note there was no mention that the action was brought by the husband and wife, both being only to recover damage, and not for the Terme.

230. *Gogle* Verſus *Banningham*. Treſpaſſe.

GOgle brought an action of treſpaſſe, *Quare clauſum fregit, &c.* againſt Banningham. The defendant pleaded that he was ſeiſed of an houſe in Coleby in the ſame County, and preſcribeth to have a way from the ſaid Meſſuage over the ground in queſtion to a common way bending to the City of Norwich, and iſſue taken upon the preſcription, and the *Venue* was taken from Banningham & Colby, and found for the plaintife, and judgement was moved to be ſtayed upon the motion of Richardſon, becauſe there was no place aſsigned where that way (leading to Norwich) lay, which is now made part of the preſcription and iſſue, and therefore muſt have his view and triall, though the materiall part of it was only whether it layd over this ground or no, where he might have left, and then the triall if it had beene againſt that preſcription it had beene well. But in Hil. Terme the plaintife had judgement, for though a way muſt be pleaded *à quo termino ad quem*, becauſe you muſt not goe over my grounds but to the right place, yet becauſe here the viſne is from all the places named in the record, the triall ſhall not be avoided by a meere imagination that the highway lay in another towne, for it may lye in the ſame, and no triall hath beene voided, but where the other viſne hath appeared in the record.

Preſcription for a way.

Judgement.

231. *Leets & Edwards.*

Whether the Common be extinct, &c.

BEtweene Leets and Edwards, the caſe was, that a Copyholder of inheritance which hath common appendant in another Mannor, purchaſeth the freehold inheritance of the copihold whether the Common be thereby extinct.

Debt.

232. *Dorrel* Verſus *Andrewes.*

Entry & expulſion, &c.

ACtion of debt was brought by M. Dorrell againſt Andrewes a Knight, upon a leaſe made by her to him in truſt for Truſſell for 75 pounds a Quarters rent, & declared of a demiſe *de toto illo Meſſuagio capitali maner. & domo manſionali cognit. per nomen de Cauſton infra parochiam de Dunchurch ac omnia horrea ter. tenementa, &c. ſcituat. in Cauſton.* The defendant pleads an entry and expulſion out of the Garden houſe, and Well houſe, parcell of the tenements, &c. whereupon iſſue and the

Venue

Venue was *de Calliſton infra parochiam de Dunchurch*, and the plaintife had judgement not withſtanding exception taken to the view. Judgement.

Goſſe Verſus *Browne.* Obligation.

GOſſe *verſus* Browne upon an Obligation dated 23 Feb. *An. primo*, to performe an award of all cauſes untill the day of the date of the bond. The defendant pleaded *Nullum arbitrium.* The plaintife replyeth that 18 Mar. An. 20. they made an award *de ſuper premiſſis*, that Browne ſhould pay the plaintife 20 pound at Mid. following in full ſatisfaction of all matters betweene them, and that they then ſhould make the one to the other generall releaſes of all matters betweene them, and aſsigned the breach for the non payment of the 20 pound. The defendant demurred in law, becauſe the award did ſeeme to exceed the ſubmiſſion being for diſcharge and ſatisfaction of all matters to the day of the award, which was more then was ſubmitted, for it may be that the arbitrators might meane ſome part of the 20 pound in diſcharge of the cauſes that might ariſe betweene the 23 of February and the 18 day of March, which were not within their power, and ſo for the releaſe: yet judgement was given for the plaintife, which muſt be either becauſe *de & ſuper premiſſis* may import a reſtraint to the things ſubmitted, or elſe that no new cauſes ſhall be ſuppoſed except they were alleaged, as in pleading of awards of cauſes they doe not averre that theſe were all, or elſe that the award of cauſes ſubmitted being joyned to the premiſſes, & that therefore a releaſe ſo made, ſhould have beene a good performance of the award.

Arbitrement ſeeming larger then the ſubmiſſion.

Judgement.

234. *Barnes* Verſus *Greenly.* Anonymus.

A caſe much alike debt of Barnes againſt Greenly upon an obligation dated 4 Sept. to performe the award of all cauſes till the day of the date, the plaintife pleads the award *de premiſſis*, viz. of all cauſes till the third day of September, and aſsignes a breach, the defendant maintained the barre *quod prius nullum fecit arbitrium*, and verdict for the plaintife and judgement. And here the award was a day ſhort of the ſubmiſſion, and upon this a writ of error was brought, and the record removed, but what iſſue it took I know not.

Award. Arbitrement ſeeming larger, or not ſo large as ſubmiſſion.

Judgement.

235. *Anonymus.*

ACtion of treſpaſſe, *Quare vi & armis bona & catalla, viz. palos ralos.* And after verdict it was moved, that *Ralos* was no Latine word, and yet judgement given for the plaintife. Judgement.

236. Gibs Verſus Ienkins. Caſe.

Action for welſh words.

GIbs brought an action upon the caſe againſt Jenkins for ſpeaking of welſh words in the preſence of divers underſtanding the language, and did ſet downe the words in welſh. upon iſſue not guilty after verdict witneſſes were ſworne for the ſignification of the words, and ſome affirmed that the words were commonly taken, and ſo underſtood for ſtealing, which others denied; but both agreed that the true and proper ſignification of the words was bearing away, whereupon judgement was given againſt the plaintife.

Judgement.

237. Tooker Verſus Loane. Prohibition.

GIles Tucker a Reader of Lyncolns Inne and Charles his Brother, adminiſtrators of Maude Tooker their mother, by Serjeant Harris, moved for a prohibition againſt Loane, and the cauſe was, that Maude had iſſue the plaintife, and John and Thomas nine children, and Thomas three, and were dead, the children being infants. The adminiſtrators upon their accompts before Sir John Bennet by his mediation, and not judicially, were content to make a diſtribution of the eſtate of the teſtators *per capita non precipites* or *è converſo*, Loane being Curator *ad lites*: for the infants appealed to the Delegates, and a prohibition was granted becauſe the Ordinary hath no power to make diſtribution of the ſurpluſage, nor to take bond for it by the true meaning eſpecially of the ſtat. 21 H. 8. which intends a benefit to the adminiſtrator, and not an unprofitable burthen, and therefore gives a preferment to the wife and not of kin, &c.

Stat. 21. H. 8. the Ordinary cannot make diſtribution of the ſurpluſage.

238. Scarlet againſt Stiles. Caſe.

Action for accuſation before a Juſtice.

SCarlet brought an action of the caſe againſt Stiles, for theſe words, thou didſt ſteale a ſack. The defendant pleaded, that there was a ſack of a mans unknowne ſtolne, and that the common fame was, that the plaintife had ſtolne it, whereupon the defendant did informe Thomas Kempe a Iuſtice of Peace that he had ſtolne it, and in complaining and informing the ſaid Juſtice thereof, he did there in the preſence of Kemp and of the plaintife ſay unto the defendant and of him, Thou didſt ſteale &c. *quæ eſt eadem, &c.* whereupon the plaintife demurred in law.

239. Berries Caſe.

Conſultation cannot be where the libell warranted good.

BErry ſued for tythes of hay *in ſpecie*, and in a prohibition iſſue was taken, whether the inhabitants had uſed to pay tythes of hey of all ancient Meadowes within the Towne, a certaine rate tythe. The Jury finde

finde there was ſuch a cuſtome for all the ancient Meadowes, ſaving for certaine called Burton Meadowes, for which tythes had beene paid in kinde, and that the party ſued the plaintife in the Spirituall Court, and had hey upon five acres of the *Burton* meadow. Now the queſtion was how Berry the Parſon ſhould have his conſultation, for if the Jury had found againſt the cuſtome generally (as they might well have done) he ſhould have his conſultation for all : but now that the Jury hath found the truth diſtributively, that the plaintife had cauſe to ſue in the Spirituall court for one part, but not for the other, we ſhall never give them a conſultation to proceed in all, no not in the part, where the ſuit appeares to be originally ill founded;& a prohibition leaves more power in this Court then other actions whatſoever, in as much as it locks up that Court which cannot require to be opened but with a key of right and juſtice, as in the caſe of Pell and Sanderſon, Dyer. A man ſues for tithes in kinde, the defendant ſues a prohibition upon ſurmiſe of a meere barren land, paying no tithes, whereupon iſſue, and it was found it was but barren, and yet paid ſmall tythes. So it was found againſt the plaintife : and yet conſultation was denied, becauſe he ſhould not have ſued for tithes in kinde, which if they ſhould grant a conſultation ſhould be allowed but for that ſmall tythe. But in this caſe *Berry* muſt have conſultation of the *Burton* lands only, for the libell for tythes, in kinde, for the two acres is ſeverall for all or any part, and therefore here for as much as was *Burton* and not of the cuſtome it was well libelled, as if it had beene for that alone.

140. *Thompſon* verſus *Comfort.*

Conſultation in part, and thereupon coſts.

INter Thompſon & Comfort Clerke, the caſe was, that Comfort ſued for tythes of honey and divers other things, the plaintife obtained a prohibition for all the tythes libelled ſaving the honey. The Parſon had ſentence for all the tythes before the prohibition delivered, and after the prohibition delivered, the Judge proceeded to the execution of the ſentence for the honey and the taxation of coſts. If the coſts were taxed before the publication delivered (which muſt be then underſtood as large as the ſentence which is for all) then muſt they not proceed to the exacting of all the coſts ; but if they did tax the coſts after for the ſuit of the honey only, though they ſet as much as they meant to give for all, they are out of the danger of the prohibition, for where the coſts belong to them, the proportion of the coſts is of their juriſdiction, and not of ours. Now after the prohibition which was in the exception of the taxed coſts, and *expenſis litis* generally, without the *quoad, &c.* Yet I think it is well enough, eſpecially when his intent appeares to proceed upon the principall, only the honey x cepted.

141 *Bitcot*

Caſe.

241. Bitcot & Ward.

Ripæ Rivi.

INter Bitcot & Ward, the caſe was, that one having an ancient Watercourſe and River to his Mill and the ancient banks of the river being become falſe and hollow, by direction of certaine Juſtices, a damme was made a Rood from the river bank in another mans ground, and ſo the river was holden in. Now another, not the owner of the ground cut up the ſame, whereupon an action of the caſe was brought and laid for cutting and ſubverting *ripam cujuſdam rivi* which commeth to triall before mee. After Evidence I cauſed it to be ſtayed, leaſt it ſhould paſſe againſt the plaintife. And now the Court held the declaration inſufficient, and I gave direction, that he ſhould take a new writ according to his Caſe *de quadam ripa Anglicè* a Damme *includente Rivum predictum*. It was before laid to be the banke, time out of mind.

Hobard.

Q. Imped.

242. Winchcomb & Pulleſton.

IN the Caſe of *Quare Imped.* between Winchcombe and Pulleſton *ſupra page* (~~264~~ 231) after it was reſolved upon publique Argument that Judgement ſhould be given for the King, it was prayed that a Writ might be directed to the Biſhop for the King, againſt which it was objected, that it was repugnant to the Record, in that Pulleſton the defendant pleaded himſelfe Parſon imperſonee, and againe in the end of the Plea ſayes expreſſely, that they preſented him, and that he was admitted, inſtituted, and inducted before the writ brought, ſo by the Record it appeared, that the King hath the effect of that, for which the writ is required, yet becauſe it was affirmed by the Counſell of Pulleſton himſelfe, that the Church was not full, but that the Plea in that part was untrue, the Court entered into conſideration, was juſt and fit to be done in this Caſe and the like.

Firſt, it was reſolved that if there were not an helpe, there would follow an inevitable miſchiefe to the King, and to his Preſentee, if a *Quare Imped.* were brought againſt him before Induction, for whereas if the *Quare Imped.* were brought againſt the Clerke, or the Incumbent of a Common perſon, he may abate the writ, becauſe you name not his Patron with him, who may defend his title, though he be not inducted, ſo as he may plead himſelfe; this is not ſo in the Caſe of the King, for hee cannot be made a defendant, but the action muſt be brought againſt the Clerke alone, who cannot plead except he be inducted, and ſo the action muſt go againſt him, or elſe if hee plead himſelfe inducted to inable himſelfe to his defence, the ſame being untrue, though he win the Cauſe, yet neither he nor the king, ſhall have benefit of the ſuit, by writ to the Biſhop. Therefore it was conſidered, that though it was confeſſed of Record

Record by Pulleſton, that the Church was full of the Kings Preſentation, that this was not binding to the king, that was no party to the confeſſion. Now therefore ſuppoſe the cauſe to be that the *Quare Imped.* were brought of the Common perſon, Patron or his Clerke, and that the Patron ſets forth his title to the advouſon, and confeſſeth no plenarty of the Preſentation, and the Clerke of the other ſide would plead as here Pulleſton doth, and that he was inducted &c. which was falſe, yet no doubt the Patron ſhould have a writ to the Biſhop, for the falſe plea of another ſhall not conclude him, the rather becauſe the Patron could not contradict his to the defendants plea in that point, much leſſe ſhall the defendants plea here conclude the king, that is no party at all to this ſuit in point of prejudice, and yet by a ſpeciall Prerogative, the King is to take benefit of this title found effectually, as if he were party.

Now it was obſerved, as theſe were miſcheivous to the king to be denyed, if the Church were void, ſo on the contrary, if it be full as it was pleaded, it can be no miſchiefe to Pulleſton, for either the king will not take the writ, or if he did take it, the Biſhop may returne the Cauſe of *non execution* as if hee ſhould admit another Clerke, it would be utterly void.

And it was further obſerved, that the Awarding of a writ to the Biſhop was an incident, and part of the forme of Judgement in a *Quare Imped. &c.* dammages for the diſturbance, and the writ to the Biſhop for giving the preſentation. And therefore that forme of Judgement, may be where the Court ſees there can be no fruit of it, ſo 11. R. 2. Demur. 144. In *Quare Imped.* the defendant pleaded them, the plaintife had title to the Church hanging the writ, whereupon the plaintife demurred, which confeſſed as much, yet Judgement was given of the writ to the *Biſhop*, & F.N. br. n. 35. agrees that a preſentment hanging the writ, ſhall not abate & 7. H. 4. 34. & 36. A *Quare Imped.* was brought againſt two, whereof one pleaded an inſufficient Plea, whereupon Judgement is for a writ to the *Biſhop*, and the other pleaded, that the Church was full of the preſentment of the plaintife, the day of the writ purchaſed, And William Hall there ſayes, that if it bee found ſo, ye the plaintife ſhall have Judgement of the writ to the *Biſhop*. But 12. H. 4. 11. & 13. H. 4. 7. if a Patron have his Clerk in, he cannot afterward bring his *Quare Imped.* for his writ is falſe and abatable, for it was *quod permittat preſentare ad Eccleſiam quæ vacat* & 14. *Eliz.* 3. *Fitz. Quare Imped.* 52. The King brought a *Quare Imped.* againſt a Prior alyen, and made a title to the King by Act of Parliament. The Prior pleaded that the Church was full before the kings title, whereupon Shard awarded a writ to the *Biſhop*, for the Prior, though he had pleaded the Church; But indeed hee did not plead, whether it was his owne preſentment or others, and it was ſo in the Record it ſelfe, for I cauſed it to be ſearched, ſo in the end Warburton, Winch, and I agreed, that a writ ſhould bee

Quers Imped. Bre. Epiſcop. where the Church ſeemeth full by Record.

Awarded

Awarded to the Biſhop, for the King either *ex officio Curiæ*, as being a part of the Kings Judgement, and no way miſchievous, or elſe (as Warburton defined) upon a ſurmiſe of the King. So in the end the judgement was drawne up and peruſed by me and entered in *hæc verba*, thus.

Octabis Mich. Ad quem diem hîc venit pred. Ric. Pulleſton per Attornatum ſuum pred. & ſuper hoc videlicet omnibus & ſingulis premiſſis pred. & per inſtantiam hîc plenè intellectis eiſdem Iuſticiariis hîc evidenter conſtat & apparet per veredictum pred. in forma pred. quod jus ratione ſummariam agreamenti pred. inter pred. Willelmum Walker & pred. Wm. Say fact. per Im'o, pred. ſuperius compet. vigore ſtat. pred. inde edit. & proviſis ad Dominum Regem nunc ſpectan. pertinen. & per pred. quo pred. Ric. Pulleſton per Cur. hîc allocat. ſi quod &c. per ſe habent vel dicere ſciant quare bre. dicti Domini Regis pro eodem Domino Rege de & ſuper premiſſis pred. Epo. adjudicari & demandari non debeat, dicit quod ipſe non dedicit, ſed benè cognoſcit & fatetur quod bre. illud pred. dom. Regis Epo. in forma eidem impetrationis brevis originalis pred. ſeu unquam poſtea in rei veritate non ſt. perſona Eccleſiæ, pred. imperſonata in eadem ex præſentatione do. Regis nunc non obſtante placito pred. per ipſum ſuperius in contrarium inde placitato. Ideo conceſſit & quod dict. dom. Rex nunc habeat bre. Epo. Winton quod non obſtante reclamatione pd. Benedic. & Rici. Doue perſona ad eccleſiam pred. ad preſentationem dicti Dom. Regis nunc te admittat &c. conceſſit: eſt etiam quod predictus Benedictus nihil capiat per bre. ſuum pred. ſed ſit in mi'a proinde ſine die.

243. *Tuſton* verſus *Nevill.* *Starchamber.*

SIr Humfrey Tufton exhibited a Bill into the Starchamber, againſt Chriſtopher Nevill, ſonne of the Lord Aburgavenny, for a Riot, and laid by way of Inducement, that Nevill had ſollicited his wife to inchaſtity before and ſince his marriage with her, and that this being made knowne unto him by his wife, hee cauſed her to write letters to the defendant, giving him hope of her inclination, and appointing him a time by night and place, at which the defendant comming with a man diſguiſed like a woman being there expecting as much, the defendant and others in his company made a Riot upon him, and his company.

To this the defendant, as to the Ryot anſwered. But as to the ſolicitation of the Ladies Chaſtitie demurred; whereupon motion being made in Court, though there were ſome of another mind, yet it was reſolved and ruled that the defendants Demurrer was good; and though it was aggravated, that this Inducement ſerved very much to aggravate the defendants ryot and to juſtifie the plaintifes traine, yet the point of it ſelfe was naturally *alien fieri* for the ſpirituall Courts, whoſe proceeding in this caſe was not to be uſurped nor prevented. Beſides, the fault of ſollicitation is of ſo uncertaine acceptation, as is not fit to bee here examined.

Star-chamber holds no plea of ſollicitation of Chaſtitie.

And

And laſtly to examine ſuch a fault by the Oath of the delinquent, which is being a delict that we cannot cenſure, it was proved ſcandalous in the event, if the defendant ſhould upon his Oath which were in him excuſable, if the Court conſtraine his anſwer to criminate the Lady were it true or falſe, for that would never be ſatisfied, being a point ſo ſecret as ſolicitation onely.

But this *Bill* were allowed though it were a meere croſſe *Bill* before exhibited by Nevill againſt Tufton for the ſame Ryot.

244. *Kings Attorney* verſus *Rocheſter.*

Starchamber. A proces *ad audiendum Iudicium* in Starchamber how ſerved.

IN the ſuit in the Starchamber by the Kings Attorney againſt Worcheſter, it was agreed that a proces *ad audiendum Iudicium* in that Court, is not holden ſerved ſufficiently by leaving it at the houſe, though the wife and ſervants know it, but muſt either be delivered to his perſon, or elſe hee being at home, or otherwiſe proved by Affidavit to have knowledge of it. But if proces be left at one Terme for a hearing, to bee one terme after, ſo there be a convenient diſtance of time, it is ſaid by the Clerkes, to be ſufficient upon preſumption of notice, and for the miſchiefe in the contrary; & ſo in this caſe, was proces Awarded.

245. *Hall* verſus *Winckfeild.* Debt.

Debt, or *ſcire fac.* the place where that ſhall be brought upon a Recognizance taken in London, by a Judge of the Common Pleas.

HAll brought an action of debt againſt Winckfeild, and declared upon Recognizance in Serjeants Inne, in Fleetſtreet London, whereupon the defendant demurred, and the queſtion was, whether the Action ought to be brought in Mid. where the Recognizance is recorded or in London, becauſe the Entry of the Record is, that the Recognizance was acknowledged before mee, at Serjeants Inne in Fleetſtreet London ſuch a day, which was one of the Terme *ut ſupra.*

Whereupon it was agreed, Firſt, that the ſeverall Judges might take the Recognizance out of terme as in any part of England, as it was reſolved *quarto Martii* upon view of Preſidents, Brooks Recognizance 40.

Nextly, it was agreed, that though it were not a perfect Record, till it were entered upon the Roll, yet when it was entered, it was a Recogni. from the firſt acknowledgement, and binds perſon and lands, as a Record from that time. For it is the acknowledgement before a Judge that gives it force of a Record, though the Inrollment be neceſſary for the teſtification, and perpetuating of it againſt the Bookes, and I agree that a man receiving dammage, or debt in the Common Pleas upon treſpaſſe, or Obligation laid in any other County, If the plaintife will bring an Action of debt, hee muſt lay it in the County of Mid. and not in the Countie, where the firſt Action aroſe; and the reaſon is apparent, for he muſt count upon Record, by which it appeares to the Court that

the Cauſe of this action ariſeth in Mid. where the Judgement was given, and the Record is for that treſpaſſe that was done, and that Obligation that was made in another Countie, is not now in the Cauſe of this action, but the Judgement, which hath made *warrantionem contractus*, which begins there, And regularly it is true, that every Action muſt be brought in that Countie, where by the Record it appeares the Cauſe of Action began, which ſometimes may admit an Election, as where the admirall Court ſits in Mid. and ſummons a party in Eſſex, the Action upon the ſtatute may be in either of both Counties. And if a man recover a debt in the Court of Norwich, and will bring his action of debt upon that Record in the Common Pleas, he muſt lay his Action in Norwich. But now obſerve the caſe, the Inrollment of the Record doth expreſſe that the Recognizance was taken before me at the place aforeſaid which (as is ſaid) was a Record *ipſo facto* then and there, and the inrollment of it is a Complement, and conſummation of the Acknowledgement and Record, and makes nothing, as in the other caſe. But becauſe both concurre to the making it a perfect Record, it may bee that the Action may be brought in either Countie.

But I am of cleare opinion, that it may be in London, as the firſt and more worthy part of the Act, and therefore 5. *Martii*. Brooke line 85. where it is reſolved by all the Prothonotaries, that a *ſcire fac.* upon ſuch a Recognizance, ſhall bee directed to the Sheriffe of London, and not of Mid. And Sagar cyted a Preſident that upon a judgement given in the Common Pleas at Hertford Terme, and the Record brought hither, after that, the *ſcire fac.* went to the Sheriffe of Hertford, and not to the Sheriffe of Middleſex, wherefore the reaſon muſt bee becauſe in the Record it ſelfe it appeared, that the Judgement was given at Hertford, and the like caſe is, in this caſe. But if the Entrie of the Record were generall, that the Recognizance was taken before mee, it ſhould be underſtood in Court, and then the Actions were to bee brought in Mid. ſee 16. Eliz. 4. 18. 13. E. 3. 22. H. 6. 38. B. lien 60. 36. & 29. & Br. bre. 191.

246. *Blunts Caſe of Common Recovery.*

Common Recovery againſt the infant.

M*Emorand.* that it pleaſed his Majeſtie by his letters, under his privie Signet and ſigne manuall bearing date 26. *Novem.* in the 15. yeare of his highneſſe raigne, to ſignifie unto me, and my fellow Juſtices of the Common pleas, that he had beene humbly petitioned by Mountjoy Blount being under the age of 21. yeares, as well by himſelfe as his friends and kindred and Feoffees into whoſe cuſtodie the late deceaſed Earle of Devonſhire, did commit his eſtate in truſt, that he would declare unto us his liking, that hee might be admitted to ſuffer a Common recovery of the Mannor of Wanſted for the payment of debts, and further

ther advancement of his owne meanes, to the uſe of the Earle of Buckingham, which his Majeſty by his ſaid letter, did accordingly.

Now though wee did never hold ſuch recovery, very unlawfull nor void in law, yet we have refuſed many motions in that kind, as holding it very inconvenient, but conveniency is diſcerned by circumſtance. And therefore I acquainted my brethren. We determined, that I ſhould ſend for the young gent. my ſelfe and examine him ſole and ſecret, of the reaſons of this recovery, and of his owne free will; which I did, and he being 18. yeares of age or thereabouts, ſatisfied me of his owne good liking, and that he did conceive it to be neceſſary for his eſtate, yet not therewith contented. I cauſed the Earle of Southampton the Lord Davers, and Maſter Wakeman, the perſons to whom the world knew hee and his eſtate were committed in truſt, and that they had worthily performed. And calling them in open Court, and queſtioning with them, they conſented to us all, that it was neceſſary for the yong gentleman, and for his good to their knowledge to part with this thing, and that therefore they had made meanes to his Majeſtie, for his letters in that behalfe, whereupon the Recovery was paſt, openly at the bar the laſt day of this *Mich.* Terme againſt Maſter Blount in perſon and the Earle of Southampton, the Lord Davers, and Maſter Wakeman were admitted his Guardians.

Brownloe and Waller Prothonotaries gave a note of the like recoveries againſt infants. M. 23. H. 8. Rot. 441. P. 38. H. 8. rot. 128. T. 28. Eliz. Rot. 17. M. 26. & 27. Eliz. rot. 45. & 72. P. 42. & rot. 1. & 63. 44. 45. 69. 70. 89. 91. 94. P. 32. Eliz. rot. 6. T. 38. Eliz. rot. 41, 44. 40. Eliz. rot. 62. 104. & 112. M. 40. & 41. Eliz. rot. 13. M. 34. & 35. Eliz. rot. 166. M. 39. & 40. Eliz. rot. 82. & 173. M. 41. & 42. Eliz. rot. 24. & 106. & 72. Tr. 42. Eliz. rot. 20. M. 42. & 43. Eliz. rot. 173.

247. *Brickhead* verſus *Archbiſhop of Yorke.*

Qu. Impedit.

RObert Brickhead brought a *Quare Imped.* againſt Toby Archbiſhop of Yorke, Alexander Cooke, Clerke of the Vicaridge of Lees; And ſhewes that divers perſons were ſeized of the Advouſon of the Vicaridge in Fee, and preſented Robert Cooke, and then brings downe the Advouſon to the plaintife, and then ſhewes that by the death of Robert Cooke the Vicaridge voyded, and it apertained to him to preſent, but the defendant diſturbed him dammage 400. pound, the Archbiſhop pleaded, that the Vicaridge or Advouſon thereof, but admiſſion &c. as Ordinary thereof, but further he ſaid *Quod bene & verum eſt* and confeſſeth all the truth, as the plaintife hath laid it, and the Church voyded by the death of Robert Cooke, and that it belonged to the party, to preſent as he ſuppoſed. But he ſaith further, that the ſaid Robert Cook dyed, 1. *Jan. An.* 12. *Iac. ac pro eo quod eadem vicaria Eccleſia pred. vacaverat*

5. Caſe.

Quare Impedit and no diſturbance before the Action.

Action brought before Cauſe of Action given.

per tempus ſemeſtre poſt mortem pred. Roberti Cooke nulla idonea & perfecta perſona ad eandem Vicariam per prefatum Rob. Brickhead infra tempus jam prefatum preſentata. Ideo Archiepus. adtunc Ordinarius &c. poſt tempus ſemeſtre illud elapſum ſcilicet 23. Dec. Anno 13. Iac. jure ſuo ordinari contulit pred. Vicariam prefato Alexandro Cooke & eum inſtitui & induci fecit, prout eis bene licuit. Et hoc &c. unde petit judicium ſi &c. abſque ſpeciali impedimento in perſona ſua in hac parte aſſignato actionem &c. habere debeat verſus eum, and Alexander Cooke the other defendant pleads by confeſſion of the plaintifes title, and the Collation &c. by laps altogether, as the Archbiſhop made *per Iudicium &c.* The plaintife replies to the Archbiſhop, and confeſſeth that the Church voyded 1. Jan. 12. Jac. by the death of Robert Cooke, and that the Church remaining voyd hee did after the firſt of January and before the 23. *Dec. an.* 13. Jac. and within the 6. Moneths that is to ſay 29. *Mai.* 1615. by his writing ſealed with his ſeale dated the 27. of the ſame May preſent unto the ſaid Archbiſhop S. V. &c. one Richard Middleton his Clerk praying him to the ſaid Vicaridge, which he refuſed to doe, and afterwards, vizt. the thirtieth day of the ſame May, did Collate it unto Alexander Coke, *& hoc &c. unde petit judicium & dampna ſua occaſione impedimenti pred. Archiepi. nec non bre. eidem Archiepi. ſibi adjudicari,* and makes the ſame replication to the plea of Alexander Cooke the Clerke, and they both demur ſeverally, upon the ſeverall replications, and ſhew for cauſe that they doe containe double matter and are uncertaine.

As to the cauſe of Demurrer expreſſed, namely the doublenes of the Plea, after divers Arguments on both ſides, the Court was of opinion that the Plea was not double; the doubleneſſe or treblenes is not ſuppoſed in that the plaintife Aſſigned his preſentation, and a refuſall of his Clerke, and a Collation by the Biſhop of his owne Clerke. But it was holden of the Clerke, that the onely materiall Part of the plaintifes replication was, that he had preſented a Clerke; for the ſubſtance of the defendants plea was, that the plaintife had not preſented any Clerke unto him within the 8. Moneths, and that therefore the Addition to a Plea was neceſſary, yet not iſſuable, he had afterwards collated.

Now to this the Replication ſayes, that he did preſent within the 8. Moneths, ſo there is a perfect negative and affirmative which makes the iſſue; but yet the plaintife muſt adde a refuſall to make good the diſturbance laid, and then the plea is compleat, like unto the Caſe of an action of debt upon an obligation, to performe an Award, & the defendant pleads no Award made; the plaintife ſhewes the Award which makes the iſſue, yet he muſt ad a breach, which though it be not iſſuable, yet it is ſo materiall a forme, that the plaintife hath no cauſe of action without it. And therefore if it be omitted, & the defendant demur generally, I am of opinion clearely, that hee may take the benefit of it.

Note

Note the words of the ſtat. of demurrers, the right (viz. of actions) muſt appeare to the Court of ſubſtance to the action, otherwiſe in caſe of meere forme. Now the addition of collation in this caſe is but a matter of aggravation and ſurpluſage; thus farre it went before it was diſcovered, that the preſentation and refuſall was laid 29 Maii. And the writ bearing teſte 9 Maii, ſo as howſoever there was a generall diſturbance layd in the declaration, yet the true diſturbance *layd in the declaration*, whereby the plaintife intended to mainetaine his action was done after the action was brought. Whereupon I was and am of cleere opinion that judgement muſt needs be given againſt the plaintife; for right and wrong are the mother of all actions; and therefore no action can be brought without laying a wrong done before the action, neither can there any full and perfect recovery be had regularly without convicting the defendant of wrong, *I* ſay, a full recovery, and regularly, becauſe in ſome ſpeciall cauſes, a man may obtaine the end of his ſuit in ſome ſort without convicting of the defendant of wrong, but that muſt be in a ſpeciall and regular forme, but never without a wrong ſuppoſed, as for example in this very caſe.

The plaintife layes downe his tytle to the advouſon, and the avoidance, and the diſturbance. If in this caſe the Biſhop ſay he claimes nothing but as Ordinary, and demands judgement without ſpeciall diſturbance, &c. Now the plaintife hath an election either to take his writ to the Biſhop, or to retaine and proſecute his action to a finall judgement if he pray his writ to the Biſhop, for it doth not appeare to the Court, that he was a diſturber; neither ſhall the Biſhop be amerced, but the plaintife, *pro falſo clamore*.

This forme is proper to this action and ſome few others (whereof I ſhall ſpeake) and the forme and nature of this action doth well beare this proceeding, for, the writ being *per quod permittat ipſum preſentare &c. Et unde eum impedit & defendit* comes in, and ſaith, in effect I ſuffer, and do not hinder you to preſent.

The cauſe is at an end if the plaintife will, and he may pray and take the effect of his ſuit with his preſentation and no damage, becauſe the defendant is not convicted for any wrong.

But now if the plaintife will not accept that reddition, but chooſe rather to make a full and finall recovery, then doth he (as in all other caſes of election) forſake and loſe the benefit of the former, and ſtands to the hazard of the latter, to have either a totall recovery, or a totall barre.

So that if he do aſſigne a ſpeciall diſturbance, and it be tried againſt him, he is to be barred. Like unto this if a man bring an action of debt upon an obligation of 20 pound for the payment of 10 pound at a day paſt offering it in Court, the plaintife may accept it, and there is an end, but if he will proceed to a full recovery of the forfeiture, and deny the

tender

tender, and that be found againſt him, all is loſt. So in dower if the tenant plead that the demandant detaines evidences, the demandant delivering in the evidence may have judgement maintenant. But if ſhe will deny the detainer of the evidence, and that be found againſt her, ſhee ſhall loſe her dower.

So in the caſe of Dower brought againſt a Guardian in Chivalry who pleads the detainer of the heire his ward. So in the caſe of an action of debt brought againſt an executor, who pleads *Rien entre Majus*, and indeed hath then nothing, yet the plaintife may have judgement for his debt preſently to be had by *ſci. fac.* if his goods ſhall come to his hands.

See Hapleys caſe, Co.lib.8.134. but if he will proceed to prove aſſets preſently, and that be found againſt him, he ſhall be barred for ever, and yet there was a due debt, and in effect confeſſed.

So in a writ of meane, if the defendant plead not diſtrained in his default, the plaintife may have judgement for his acquitall preſently: but if he will proceed to prove that he was diſtrained in his default, and fail, he ſhall be barred.

Now then cleerely to make a finall recovery in a Q. *Imped.* you muſt prove unto the Court or at the leaſt have a ſufficient allegation of an unjuſt cauſe of action, which is a diſturbance by the defendants, or one of them before the action brought, whereas in this caſe it appeares, that the diſturbance whereupon you would maintain your action, was made after the writ brought; and that which makes it the worſe againſt you is, that this appeares of your owne ſhewing, whereof it is regularly true, ſo that if the plaintife will himſelfe diſcover to the Court any thing whereby it may appeare that he had no cauſe of action when he commenced a debt or diſtrained for a rent before the day of payment of his owne, ſhewing it is againſt him.

Nay more, if of his own ſhewing though he had cauſe of action, yet it was in another manner as it will be againſt. And therefore if I commit a treſpaſſe which in its nature is joynt and ſeverall, yet if the plaintife will bring his action againſt one only, & declare that he with other three did the treſpaſſ, his action ſhal abate; but if he had brought his action againſt one alone, and the defendant had pleaded that he with others did the treſpaſſe, and the plaintife hath releaſed to the other and deny the releaſe, whereby he doth in a manner confeſſe that the other were joynt treſpaſſers, yet this action ſhall not abate. But you ſay that the plaintife hath laid a diſturbance well in this Court, which is ſuppoſed true, and done before the action brought, and that the defendant hath pleaded an inſufficient barre to it, for he hath neither denied nor confeſſed and avoided the diſturbance laid, for, the collation after the writ is no anſwer. And therefore ſaith judgement ought to be given againſt the defendant, which is true if the plaintife had reſted upon the barre and demurred upon it.

That

That if upon the whole record it appeare that the plaintife had no cauſe of action, and eſpecially of his own ſhewing, that the Court ſhall never give judgement for him, howſoever the defendant had miſdemeaned himſelfe in his pleading, for *melior eſt conditio poſſidentis*, and the defendant is not hurt if the aſſailant miſſe him, for, *vana eſt ſine viribus ira*. Ridgwayes Caſe, Co.lib.3.52. & Burtons Caſe, Coke lib. 5.69. A brings an action of debt upon an Obligation againſt Biſhop, who pleads that it was upon condition that he ſhould performe the award of two, and that they two and others made no award. This is naught. But if the plaintife do alleage an award by two or three, and alleage not alſo a breach whereby it may appeare to the Court that he had no cauſe of action, he ſhall never have judgement. And yet it was not the chiefe matter of his plea, nor iſſuable, and the declaration was full and perfect, and that was but the beginning of the plea, and the Court muſt judge of the whole, whereof the declaration is but a kinde of ſurmize. But when the defendant hath pleaded in barre, ſo that both parties are heard in part, then the replication and other pleading brings the whole cauſe to maturity, and then the Court ſees the truth of the whole cauſe, and not before.

Now to queſtion that which hath beene ſtirred and is of good uſe for learning, though it concludes not to the judgement of the cauſe, I will ſpeake a word.

Suppoſe the cauſe to be that I have right to preſent to an advouſon, but I preſent not, nor am any way diſturbed, but the Church remaines void and open to me, but before the ſix moneths incurred before collation made by the Ordinary I bring a *Quare Imped.* againſt him, whether now the Ordinary be barred of preſenting by laps, hanging the writ.

I am of opinion cleerely, that he is not debarred. And firſt it is a caſe full of miſchiefe that the Ordinary bearing himſelfe never ſo juſtly and ſincerely, ſhould againſt law and reaſon be ſubject to cauſeleſſe actions and charges & defrauds of his due laps, & the Church kept void *Eccleſia viduata* by the fraud of the Patron by a fraudulent action as long as he liſt. For, if he brought no action, the laps ſhall run, and now by bringing of a feined action he ſhall ſtop the laps and the Ordinary, that by conſequence it will not come to the Ordinary nor to the King. But now examine the reaſon of the authority, can there be any thing more unreaſonable then that a man ſhould make benefit of an unjuſt ſuit as the plaintife ſhould; or be puniſhed doing nothing amiſſe, or againſt his office as the defendant ſhould, but you will ſay to me it is an effect of law, *&, exactio Iuris non habet injuriam.* For when the Biſhop comes in, he is charged by the declaration with the diſturbance, which if hee doe not avoid, he ſhall be taken a diſturber, and then indeed he cannot collate, or his collatee ſhall be removed. Therefore, if when he doth appeare he doth but caſt an Eſſoyne, though it doe make him no diſturber

ber to maintaine the writ, yet it faſtneth upon him the charge of the diſturbance layd in the declaration, ſo that he ſhall not be received after to plead *ne diſturba pas*, or the ordinary plea which amounts to as much; for that plea pretending innocency muſt (as all other the like pleas) be offered the firſt day upon the appearance, for delay makes him nocent, and ſo is *appoſitum in objecto*. Then againe if the Ordinary plead his owne acquitall amounting to a *Ne diſturba pas*, the plaintife may pray a writ to the Biſhop, and ſo remove the Clerke, becauſe he comes in hanging the writ, and thus is a Dilemma made by law, and not by fraud of the party. And the rule in the Reg. fo. 31. is ſo.

But if the Dioceſan be named the defendant in the *Quare Imped.* he ſhall never preſent by laps.

To this I do anſwer, that if the Biſhop do not plead according to his innocency, that the proceedings ſhall be againſt him, and the conſequence of it is againſt a diſturber, but if he did not diſturbe, which is true, it ſhall be taken according to the caſe that he did not diſturbe before the action brought neither unlawfully, nor by unlawfull action collation, but it can never be underſtood to deny or remove any actuall collation ſince, for if he ſhould plead that it were vaine and to no purpoſe, (as it hath beene ſaid.)

Now then if he did not diſturbe before the writ purchaſed, &c. therefore he hath not diſpoiled himſelfe of his right of collation in his time, and then collates by laps lawfully when his time comes when the Patron hath wilfully and without his fault forfeited his time, and then pleads that he claimes nothing, but as ordinary without mentioning his collation hanging the writ, becauſe it is impertinent (as it hath beene ſaid) neither indeed do I ſee how he can be received to pleade it, no not by the way of ſaving it by proteſtation as upon attornement to have priviledge of waſte. But certainly it is neceſſary, though upon ſuch plea the plaintife may have a writ to the Biſhop, he may perhaps be compellable to admit the Clerke of the plaintife in obedience to the writ, but yet it ſhall not worke a removall of the *B*iſhops Clerke, but he ſhall retaine the *B*enefice as having the better right. Like unto the caſe and reaſon where A brings a *Quare Imped.* againſt *B* hanging the ſuit, a ſtranger preſents and his Clerke is inſtituted, &c. And then A hath judgement againſt *B*. and a writ to the Biſhop *non obſtante reclamatione* B, the Biſhop ſhall receive the Clerke of A, without the diſputing of the right of A and C, but if C have better right to the patronage his Clerk ſhall retaine the *B*enefice, and ſo a controverſie.

But now I put another caſe. If my Church become void, and I preſent to the Biſhop, and ſo alſo doth another that hath no right, in which caſe the Biſhop though he may receive at his perill, yet doth as he may lawfully do, refuſeth to receive either till the right be inquired, without doing himſelfe any act of diſturbance, in this caſe if the true Patron do bring

bring his *Quare Imped.* againſt the diſturber only, then the *Biſhop* may collate by laps without queſtion. But in that caſe if the true Patron name the Ordinary, *viz.* together with the diſturber, and then the *Biſhop* comes in and pleads that he claimes nothing but as Ordinary, &c. and the plaintife hath an award of a writ to the Biſhop with a *ceſſet executio, &c.* and then receives againſt the diſturber, and the Biſhop in the meane time collates by laps, in that caſe perhaps the *Biſhops* Clerke may remove, for it differs much from the former caſe; for, there was a true, and not a feined diſturbance, whereunto the Ordinary gave way ſo farre, that the plaintife could not get his Clerke received, but was driven to his *Quare Imped:* for if he had proceeded to his *Iure patronatus* without *Quare Imped.* and the time had incurred, the Biſhop might have preſented to laps remedileſſe, and therefore he did his indeavour to preſent and was interrupted by a ſtranger, and the Ordinary alſo refuſed his Clerke, for which he had rather have an excuſe then a juſtification, and now both being made defendants, and the plaintifes tytle is approved againſt them both, as if it had been ſo from the beginning, it ſhould be hard that the Biſhop ſhould make any advantage of his refuſall, which now appeares to have beene againſt right, and the parties to the ſuit.

248. *Lacyes* Caſe.

Star-chamber.

IN the caſe of one Lacy a will was ſentenced in the Starre-chamber, and now he againſt whom the ſentence paſſed, exhibited a new bill of perjury againſt the witneſſes, ſuppoſing that their teſtimonies were falſe and corrupt, whereupon the ſentence paſſed, and the defendant thereupon demurred in law, and this demurrer was referred to Mountague Chiefe Juſtice, who reported that the defendant ought to anſwer.

Sentence given grounded upon the witneſſes, which are after ſued there for perjurie.

249. *Iarvous* againſt *North.*

These two are but one entire caſe.

Information.

A *Nno quinto Iac.* betweene Jarvous and North an Information charging the witneſſes in a former ſentence to be ſuborned and perjured was allowed. Note that this was a legall and judiciall proceeding which allowes, the ſentence to be juſt according to the proofes, which if it ſhould not be allowed perjury ſhould receive warrant in a Court of Juſtice, and by the ſentence of it whoſe office is to puniſh it, but yet if the perſon ſentenced will ſpeak voluntarily to the ſame effect that the ſentence was juſt, but it was grounded upon falſe teſtimony, the Court doth puniſh it commonly, for, this is a cunning ſcandalizing of the ſentence, and hath neither purpoſe nor protection of a legall proceeding.

250. *Baldwin* Verſus *Temple*. Debt.

Habeas Corpus muſt be incontinently performed.

BAldwin brought an action of debt againſt Sir Thomas Temple late Sheriffe of Buckingham for an eſcape of one Cookman his priſoner in execution and upon iſſue *nihil debet*, the evidence before me at Guildhall London was this, that one Shotlebury Goaler to Sir Thomas Temple, having the ſaid priſoner in execution in his Goale at Ailsbury, ſuffered him to walke abroad in the ſaid Towne, yet for the moſt part with a keeper, whereupon I directed the Jury, & ſo they found againſt the defendant as an eſcape, for though the Sheriffe may remove his Goale from one place to another within it, and not ſuffer them to go at large out of the priſon, though himſelfe be attending on him without an *Habeas corpus* from ſome Court of Juſtice. And let Keepers of priſons beware when they receive an *Habeas corpus* from the Chancery or any other Court bearing teſte in the end of the Terme to have the body of one in execution in the Court to the next Terme, that they doe not by colour of ſuch writ ſuffer the party to go at large all the meane time (as it is ſometimes practiſed) for, the writ warrants no more but that he be brought out of priſon for that purpoſe, and only for ſo much time as in Judgement of law ſhall be convenient and neceſſary for the execution of the writ and no more, which in *privilegiis odioſis* muſt ever be ſtrict.

251. *Sheriffe of Eſſex his Caſe*. Debt.

Execution diſcharged by the Goalers voluntarily ſuffering a priſoner to eſcape.

'BEfore me at Guildhall upon an action of debt againſt the Sheriffe 'of Eſſex upon an eſcape it fell out thus upon evidence, that the pri- 'ſoner having beene in execution, was wilfully let to go out of priſon 'by the Goaler, and then came into the Goale againe, and then ſo re- 'mained in the Goale till the time of another Sheriffe and ſo eſcaped, 'wherupon this action was now brought. And I directed that this Sheriffe was not anſwerable to this action, for when the priſoner was let to go abroad voluntarily by the Goaler, the execution was utterly diſcharged, ſo as he could not be taken lawfully nor indeed in execution by law though the party ſhould yeeld himſelfe unto it, or the creditor ſo allow him. And therefore the next Sheriffe cannot be anſwerable with him, or chargeable for him as in execution, neither can two Sheriffes be anſwerable *ſimul & ſemel* for two eſcapes out of one execution at the ſame time.

252. *Anonymus.*

AND another triall fell out thus. That upon a *Capias ad ſatisfac.* one was taken in execution by the Underſheriffe who took money of him for the execution, and let him go, and this he concealed from the plaintifes, and then the Sheriffe dyeth, a new Sheriffe being made, the ſame that was Underſheriffe before became Underſheriffe to him alſo, and procureth the plaintife to take out a new *Capias ad ſatisfac.* againſt the party, upon which he was arreſted againe, and eſcaped.

The Underſheriffe for money let one go taken in execution.

253. *Mannering & Vxor* verſus *Dennis.*

Chancery.

SIr Arthur Mannering and his Wife, one of the daughters and coheirs of Thom. Dennis of Devonſhire, exhibited a bill in Chancery againſt Gabriel Dennis, and the effect of the bill was this; that Sir Robert Dennis father of Sir Thomas in the tenth yeere of the Queene, had conveyed his whole inheritance to the ſaid Sir Thomas for terme of his life, ſo as for default of iſſue male of him and another brother of his, the land was limited to the father of Gabriel, and the heires males of his body lawfully begotten, and added a proviſo, giving him power to make a revocation by his writing under his hand and ſeale in the preſence of two credible witneſſes in ordinary forme, and alleaged that he had made ſuch a revocation, and the writing was extant, and therefore prayed proces, The defendant denyed revocation, and ſo that was the meere iſſue whether there were a revocation or not, which Gabriel Dennis laboured by all meanes to bring a triall at the Common law; but it was holden by injunction till by an accident he got a ſlip by the death of the party out of the injunction, & had a trial by *Ejectione firmæ* againſt Sir Henry Rawle that had married the other daughter and heire, and had a verdict againſt him upon that very point and judgement and execution of the Mannor of , yet the Lord Chancellor renewed his injunction for all the reſt, and paſſed to examination of witneſſes, and ſo the cauſe was heard before him and me and Baron Altham, whom hee called to his aſſiſtance, but he never came to conſult with us what to doe upon the hearing, but dyed. And then Sir Francis Bacon being made Lord Keeper, hee called me to his aſſiſtance againe Baron Altham being dead, and then the queſtion was made by a former order of his, whether the cauſe were a cauſe examinable in Chancery. And it was reſolved by him, the Maſter of the Rols, and my ſelfe, that this cauſe was not fit for that Court, but for the Common Law, except all cauſes that were triable naturally by the Common law, and by Jury ſhould be made examinable and determinable in Chancery *per teſtes*, which were to confound juriſdiction, and to make the Common law

Cauſes improper for the Court of Chancery.

Chancery releeveth not not againſt ſtat. law.

and all the courſe of it needleſſe, and a handmaid to the Chancery, to take ſuch Cauſes, as it pleaſeth them to leave, and ſo this caſe after ſo long and tedious ſuit in Chancery was diſmiſt.

Chancery.

254. *Cavendiſh* verſus *Worſley*.

SIr Charles Cavendiſh exhibited a Bill in Chancery againſt Worſley and dyed, and his two ſonnes, Sir William Cavendiſh, and another did likewiſe exhibit a Bill of Revivor againſt him, and the Cauſe ~~to~~ this that the Grandfather of Worſley, being tenant for terme of life, the Rem. to the Father in taile, the Grandfather levied a fine of the land 6. yeares paſt to & the Father alſo conveyed the land by bargaine and ſale, and ſo it came by meane conveyances to Sir Thomas Cavendiſh, and in this caſe alſo the Lord Keeper called me to his aſſiſtance, and wee reſolved, that Cavendiſh could have no reliefe in this cauſe in this Court, becauſe by ſtatute tenant in tayle is diſabled to barre or bind his iſſues, but by ſuch meanes as the law and ſtatute have allowed.

Chancery releeveth not againſt ſtatute law.

255. *Swaine* verſus *Holman & vx.*

Conſideration in the kings Court of a former leaſe to a woman Covert for her ſelfe ſurrendred. v. Caſe.

RIchard Swayne Eſquire brought an action of Waſte againſt Thomas Holman, and Eliz. his wife of certaine Mills in Sturminſter, and declared of a leaſe thereof, made by Queene Elizabeth, unto the ſaid Elizabeth the defendant, when ſhe was ſole in the 8. yeare of her raigne, and ſhewes that the King granted the reverſion unto him, & then ſhewes the waſte. The defendants plead, that they being ſeiſed in the right of Elizabeth of the ſaid Eſtates, they did in the 40. yeare of the Queene at *Weſtm. ſur. tam totum jus, ſtatum, titul. & interreſſe ipſius Eliz. quam lit. Patentes &c. & ſuperinde* the Queene afterwards *eodem an.* 40. reciting the demiſe and ſurr. (as aforeſaid) in conſideration of the ſame ſurr. did demiſe the ſame Mills unto the ſaid Elizabeth Holman, and two of her Sonnes, the plaintife maintaines his declaration, and traverſed *abſque hoc* that the defendant did ſurrender *tam totum ſtatum jus & intereſſe ipſius Eliz. prout, &c.*

Surrender in law by a new leaſe made to the husband & wife by the king, where the wife had eſtate for life before.

Whereupon iſſue was taken and tryed before me in Middleſex, and the Jury found that the defendant being ſeized in the right of Elizabeth the wife, for Terme of her life by the firſt letters Patents, the ſaid mentioned Mills to the ſaid Elizabeth, and to her ſaid Sonnes, Humfrey, and Roger Holman one after another for life, and then ſigned the ſaid letters Patents, with recitall of the former eſtate of Elizabeth, and that ſhe had ſurr. *totum jus* (as before in conſideration of the ſaid ſurrender did demiſe the ſame of new to her, and to her ſaid two ſonnes one after another

another *prout*, and they find that to the ſaid two demiſe was made and had with the Aſſent of the ſaid Holman her husband, and that he payed the fine of 20. Nobles, mentioned in the ſaid letters Patents, and that both the defendants did agree, and claime the later demiſe *& ſi &c.* Whereupon after ſome argument, Judgement was given for the plaintife, whereof the Serjeants principally made this reaſon, that the husband could not be ſaid to ſurrender to the Queene but by record, whereof his aſſent was not of record, but was a thing *dehors* as it was found by the Jury. Juſtice Hutton, held that as it was put in iſſue, it muſt bee underſtood as an actuall ſurr. whereas this was but a ſurrender in law at the moſt. Judgement.

But that that moved [mee] principally was, that the iſſue did import, and ſo the Queene in her recitall and conſideration doth expreſſe and conceive, that the whole eſtate of Elizabeth, was ſurrendred and extinct, ſo as it ſhould be in her abſolute power, to make a new demiſe perfect and permanent; whereas here if the ſecond leaſe had been made to the husband and wife both, as it was but to her alone, yet upon his death, ſhe might have claimed againe by her old terme. *Hobard.*

And therefore if the King would make the like recitall, and conſideration of a ſurrender of *totum ſtatum*, and the ſaid ſurrender indeed was upon condition revocable, the new eſtate would be voyd, as in deceipt of the King, like the caſe upon the ſtatute of 32. H. 8. of Leaſes, a ſurr. conditionall will not be within the law, to make good a new leaſe. And ſo Barwicks caſe, where a pretended void leaſe was ſurrendred to the Queene, and ſhe in conſideration of the ſurrender of the letters Patents, and of the ſtate that he held by them, made a new Leaſe, and it was adjudged void, not becauſe it was untrue in word, but becauſe it was untrue in effect, the Queene meaning to take in ſuch an eſtate as was in ſhew.

But I am of opinion, that if the king make a new leaſe to his preſent leſſee, in conſideration of the ſame ſurrender of the former, that this will be clearely good, by the ſurrender in law. And if a man will deny the ſurr. hee may demurre in this upon it, becauſe it appeares to the Court, that the acceptance of the new leaſe, is a ſurrender of the old. And if an eſtate be made to a wife *de Novo*, it is not neceſſary to averre his aſſent, for it reſts till the diſcent, but in this caſe no aſſent is neceſſary, becauſe the wife had an eſtate before, which cannot be diveſted, but by his aſſent of the later eſtate.

256. *Pie* verſus *Lovell.*

Hil. Decimo quinto Iac. Information for Recuſancie in the Common Pleas.

Pie the informer had a verdict for the King and himſelfe, againſt Sir Francis Lovell, by information in the Common Pleas for two hundred pound for eleven Months abſence from Church. Now in arreſt of Judgement Athow moved that the information lay not in the common

pleas, but was by the expreſſe letter in the ſtat. 28. Eliz. reſtrained to the Kings Bench, onely with an expreſſe negative, and not elſewhere.

This exception tooke life from a conceipt of Sir Edward Cokes in Foſters caſe lib. 8. fo. 11. where after ſomething reſolved, hee ſayes that it was well obſerved, but doth not ſay by whom (but I take it by himſelfe) that the ſtat. 28. had reſtrained the informer, onely to the Kings Bench, and ſo he doth both exclude the Common pleas, and Exchequer. Hereupon the Court tooke time, and ſpake publiquely in it, Hutton, Warburton and my ſelfe (Winch being then ſick) and wee all agreed clearely, that the Information did well lye in the Common pleas, and that the contrary opinion was an Error, ſpringing out of the Common miſtaking of a law by cleaving too much to the word, and not obſerving the intent and meaning of the law. For firſt it is cleare, that the ſtatute 23. Eliz. gives the remedy upon recuſancy, one for the Queene alone by Judgement (and that Coke confeſſeth in the ſame caſe) whole, and that appeares by the clauſe, and that admits ſubmiſſion before judgement, or upon Argument before Juſtices of Oyer, and Terminer of Aſſize, and Gaole delivery, and before Juſtices of peace; the other by action of debt, plaint, Bill or information in any Court of Record for the Queene the informer and the poore, ſo here it is cleare, that the informer is enabled in theſe Courts by the ſtat. now the ſtat. of 28. Eliz. was made onely for the benefit of the Queene in her proper ſuits by Judgement, and that Coke himſelfe in Foſters caſe fo. 60. confeſſeth was reſolved, and therefore the word (Indictment) is found almoſt in every Clauſe of that ſtat. and that ſtatute was made onely for the Queene, and for her indictments. Obſerve all the Clauſes. Firſt fraudulent conveyances are made void, as againſt the Queene; ſecondly, that all convictions ſhall bee certified into the Exchequer, to make proces for the Queene. Thirdly, there followes the clauſe, that every conviction hereafter ſhall be in the kings Bench, or the Aſſize of Gaole-delivery & not elſewhere. The meaning of which Clauſe is; That the Indictment for the Queene her ſelfe ſhall be there, and not before the Juſtices of peace, as by 23 Eliz. it muſt be; which was the reaſon of the negative (not elſewhere) And note that this clauſe did not give unto the Queene any new forme of conviction by action of debt, or information for her ſelfe alone, for afterwards the ſtat. 35. Eliz. was made for that purpoſe. Then the fourth clauſe is, that every recuſant before convicted generally, ſhall without any other Indictment, which ſhewes plainly, that all reſpected Indictments, and convictions thereupon, and ſo 5. 6. & 7. clauſe, and laſtly the third clauſe which gives the new forme of conviction, by indictment and Proclamation. Neither is it probable, that the lawes that were ſharpened, and added from time ſhould purpoſe to ſhorten, and diminiſh the meanes of puniſhing the Recuſant; And the practice hath beene alwayes againſt it. And Coke himſelfe in that caſe confeſſeth fol. that the

the informer may ſue in the kings Bench ſtill, and that by force of the ſtat. 23. as he might before. Now it is cleare, that if a man at the making of 28. had beene convicted for Recuſancie, by that law to pay the 20. ſhillings a moneth from the conviction, and if a man bee now convicted in the kings Bench by indictment, or otherwiſe, hee cannot bee proclaimed, nor otherwiſe his penalty run on, for it is not within the 8. Clauſe of that law of conviction by the Proclamation.

257. *Waterer* Verſus *Freeman.* Caſe.

WAterer brought an action of the Caſe againſt Freeman, and declared, that the defendant had ſued out at Weſtm. a *Fieri fac.* upon a Judgement, given againſt him for the defendant, for a treſpaſſe in Oxfordſhire, who by vertue thereof, tooke goods of the plaintife, to the value of the dammage and ſo made his returne, and that the goods remained in his hands *pro defectu emptoris*, and that the defendant well knowing this (to the intent to vex and double charge him) afterwards did ſue out another *Fieri fac.* to the ſame Sheriffe, and delivered it to be executed, who did thereupon levy the money of other goods of the plaintife and paid it over to the defendant, whereby the now plaintife was double charged, whereupon the defendant pleaded not guilty, and it was found againſt him.

Action upon the caſe for double execution ſued.

2. *Fieri fac.* executed upon one judgement.

V. Caſe. *ptea. fol.*

Now Harris moved in arreſt of Judgement that the action would not lye, being for a legall ſuit, by the party intereſſed himſelfe, though the cauſe of Action were falſe, and ſo knowne to the party himſelfe, and cited to his purpoſe 2. R. 3. 9.-5. E. 4. 126. & 2. E. 4. 22. Chibborns Caſe Co. that it is Actionable if I pretend a title to another mans land, though it be not for my ſelfe, if I know not it certainly to bee falſe, alſo he cited M. 43. & 44. Eliz. Bray *verſus* Partridge in B. *le Roy* Action upon the caſe, for ſuing in the ſpirituall Court for Tythes, againſt compoſition made by himſelfe. And a like in 4. Jac. by the Lady Waterhouſe, againſt Moodie for a ſuit in the ſpirituall Court, for tithes of trees not Tythable. But note that Gerrards Caſe is not a ſuit in Court, but of idle ſpeech, and the other two Caſes are of ſuits *Coram non Iudice*, and ſo no legall nor juſt ſuits in effect So 8. E. 4. the like in forme, and Buckley, and Woolis caſe, if one by Bill in the Starchamber, will charge another with Piracie, or felony, and both plaintife and defendant are puniſhed by ordinance of law by Amerciament, as well for falſe defence, as falſe complaint. And by like reaſon, he that ſhould defend a ſuit unjuſtly againſt his knowledge, ſhould be ſubject to an Action of the Caſe.

Hugh

258. *Speake* verſus *Richards.* Debt.

Debt againſt a Sheriffe for money taken in execution, and not anſwered.

HUgh Speake brought an action of debt of 523 pounds, 17 ſhillings againſt Edward Richards, late high Sheriffe of the County of South-hampton, and declared that one Paramour and others were bound by recognizance in Chancery in 200 pounds to the plaintife, and after that proces of judgement 10 *Iulii* 14. *Iac.* the plaintife ſued a *levari fac.* to the defendant returneable 15 Mich. which was delivered 1. Aug. whereupon the defendant leavied the ſame ſumme, *Quos paratos habeo*, and yet did not deliver it in Court, *per quod, &c.* The defendant *quoad* 308 pleaded *nihil debet*, whereupon the plaintife took iſſue, and as to the reſt he pleads, that after the iſſuing of the writ, and before the returne, ſcil. 31. Aug. he did pay unto the plaintife the ſame ſumme, whereupon the plaintife by his Acquitance the ſame day reciting that he had received it, did acquit him of it, whereupon the plaintife demurred in law.

The firſt queſtion in this caſe was, whether the action of debt would lye, becauſe there was no contract betweene the plaintife and defendant. But it was reſolved by the Court that it would lye; for though there were no actuall contract, yet there was a kinde of contract in law, ſo it is *ex quaſi contractu*. And therefore upon damages recovered in an action of treſpaſſe the plaintife ſhall have an action of debt; and by the ſame reaſon when the money is levied by the Sheriffe ſo as the action ceaſeth againſt the defendant, the ſame is *ipſo facto* by law transferred to the Sheriffe having both the judgement to make it a debt, as before, and the levy to make him like unto the caſe of 1 H. 7. of a Tally delivered to the cuſtomer, as ſoone as money comes into his hands he is made a debtor. Debt lyes by corporations for penalties forfeited upon their lawes, ſo for amerciaments in Court *Barons*, ſo 11 H. 7. 14. for 3 pound forfeiture, upon a cuſtome for pound breach, & 34 H. 6. 36. & 9. E. 4. 50. It is holden that upon ſuch levies by the Sheriffe appearing upon record the Court may award a Diſtringas, or the party may have a *fieri fac.* or Elegit againſt the Sheriffe to levie ſo much of his owne, ſee Mich. 8. H. 8. Reports Crooke 187. Tha. and in the Exchequer makes the Sheriffe debtor to the King, and the debtor himſelfe debtor to the Sheriffe. And though an action of account will lye properly in this caſe, yet the ſame caſe will many times beare both actions, though the money *per auter mains* or the like. But then the action of account is neceſſary, when the firſt receipt *ab initio* was directed to Marchandizing which makes uncertainty for the meane remainder till account finiſhed, or where a man is charged as Bayliffe of a Mannor, or the like, whereupon the certainty of his receipt appeares not till account, yet even in the like caſe of Marchandizing an action of debt will lye for the ſum received

received before the merchandize for ſo much as he hath not imployed; and therefore if I deliver an 100 pound to one to buy cattell, and if he beſtow 50 pound of it in cattell, and I bring an action of debt for all, I ſhall be barred in that action for the money beſtowed and charges, &c. but for the reſt I ſhall recover.

Another point was urged for the plaintife that the defendants plea to the 308, *nihil debet* was naught, becauſe it was directly contrary to his returne of record; bnt that was anſwered that ſince they have not replyed upon the eſtopple, but taken iſſue, that would give him no advantage.

A third point was urged for the plaintife, that ſince the defendant by his returne made 15 Mich. had charged himſelfe with the whole money *paratos* then to be delivered to the plaintife, he cannot now ſay that it was paid and acquitted before.

Releaſe to the Sheriffe by the plaintife after the debt levied is good.

Alſo before the returne of the writ, he was not debtor to the plaintife; and therefore a releaſe to him was void, ſo upon indictment by conſpiracy releaſe before acquitall will be void. But this the Court adjudged for the plaintife, for as ſoone as the money was received by the Sheriffe he was preſently debtor to the plaintife, and reſeiſable, and ſince he hath by his demurrer confeſſed his acquitance, the Court can never give judgement for him upon pretence of his eſtoppell.

But now I move a queſtion, if a Sheriffe have a *fieri facias* or *capias ad ſatisfaciendum* pay the plaintife his money of his owne, whether he may now levie the mony of the plaintife after.

259. *Crawley* Verſus *Kingswell.* Replevin.

Rent ſervice tendered at the day of payment, upon the land, yet the Lord may diſtraine without a perſonall demand

CRawley brought a Replevin againſt Kingſwell for taking his Cow at Liſſ. *in quodam loco, &c.* the defendant avowed becauſe that place (*inter alia*) was holden of him as of his Mannor of Liſſ. by 20 ſhillings rent at Mich. and our Lady day *An.* 14. he diſtrained; the plaintife making himſelfe tenant to the land, pleads that the ſame Lady day he was before ſun-ſet, and ſo continued, &c. upon part of the land ſo holden and offered to pay the rent to the defendant, but neither he nor any body for him was there to receive it, and that it was never after demanded of him. The defendant replies, that after the ſame feaſt and before the diſtreſſe he did demand the rent of a part of the land ſo holden, and that becauſe it was not paid, he diſtrained.

Whereupon the plaintife demurred in law and Iudgement was given for ~~a want~~ warrant. For it is cleere firſt that the rent remaines due ſtill, and the rent is duty Perſonall, as in an Homage which muſt be demanded of the perſon. Alſo, this tender is not materiall in this caſe, becauſe the demand muſt proceed, and the iſſue muſt be taken upon that; for, if there be no demand there can be no damage required.

Now the diſtreſſe is both a demand and a diſtreſſe, and if the Tenant be there and offer the rent, hee may not diſtraine, and therefore, the rent being due, and the land anſwerable, hee may demand it when he will at the land. But where a penalty or reentry is joyned to the thing there you cannot take advantage of the paine or forfeiture, without a demand at the very time prefixt. And the miſchiefe were great, for by this conceipt if the Lord did not demand his rent at the very day, hee would never diſtraine after, without an Actuall demand of the perſon of his tenant. But if the tenant tender his rent at the day, or after to the perſon of the Lord, and he refuſe it, I am of opinion, that hee ſhall not after diſtraine without a demand of the perſon of his Tenant, but the caſe of a rent ſeck manners caſe Coke lib. 7. 29. for there if the rent bee not demanded at the day it muſt after be demanded of the perſon, for there is no remedy for that rent, but an Aſſize. Now a diſtreſſer, a man cannot be, nor dammages laid upon him without a wilfull fault.

Replevin.

260. *Browne* Verſus *Dunnery.*

Rent granted with a diſtreſſe *ſi legitime petatur* requires an actuall demand.

BRowne plaintiſe againſt Dunnery, for taking his Cowes, firſt *Sept.* 14. *Iac.* at old Sudbury, the defendant makes cognizance as Bayliffe to Margaret Waller, and ſhewes that one Warner was ſeized of the land, and granted a rent of 6. pound, for the life of Margaret payable at *Michaelmas* & our Lady day, or within ten dayes after any of the feaſts *exiſten legitimè petit*, that then he ſhould forfeit 10. pound, by way of paine. *Et quod tunc & toties*, it ſhould bee lawfull for Waller and his wife, to diſtraine and detaine untill the ſaid rent be ſatisfied. And then ſayes for 34. pound, for 9. yeares in the life of Robert Waller, ended at the feaſt of Saint Michael an. 13. were unpaid, and that therefore hee diſtrained for them, being ſo behind. The plaintiſe denyed the ſeiſin of Warner, which was found for the defendant.

Now in arreſt of judgement it was excepted, that the rent incurred in the life of Waller, and did not belong to her, as Adminiſtratrix, but as in her owne right.

To which it was anſwered, that ſhee might waive the grant to her ſelfe. But that anſwer would not ſerve, but then ſhe muſt have pleaded ſo as to bring her ſelfe within the ſtat. of 32. H. 8. to diſtraine for arrerages after the eſtate ended. But I gave another anſwer, that ſince it appeares, ſhe might diſtraine in her owne right, and not as Adminiſtratrix, the cognizance muſt ſtand as well as her Bayliffe, and the reſt ſurpluſage and voyd.

Another exception was that the nine yeares rent, could not be due at *Michaelmas*, becauſe of the 10. dayes after given. But that was anſwered, that it is averred, that the whole rent was behind at the ſame time of the diſtreſſe which was long after.

But

But the great exception was that it was not averred, that the rent was demanded before the diſtreſſe (as they ſay it ought to bee by the expreſſe Clauſe) Whereupon theſe things muſt be agreed clearely, that the clauſe of diſtreſſe is no otherwiſe to be extended, then as the grant gives it, and therefore if the Clauſe were of the rent behind, being demanded at another place beſides the land, or of his perſon, then he may diſtraine clearly, then he could not diſtraine without a demand made firſt, for there the demand is other then the law requires. But where the Clauſe is no more, but if the rent be behind being lawfully demanded, then he may diſtraine, it is no more then the law ſpeakes, and therefore the diſtreſſe implies a demand, and a diſtreſſe one before another, by operation of law ſatisfies it. And ſo here it was adjudged for the defendant, for if he would have diſtrained for the paine, hee muſt have made his demand actually of the rent at the end of 10. dayes, for then that grew due. And I am of opinion, that he muſt have made another demand of the paine it ſelfe, which muſt bee after that is growne due, which is not till the 10. dayes be incurred, ſo that it is not till the eleventh day, in the end of which day I hold he muſt demand it, for the whole day is given to the payer without fraction, and though the Clauſe of diſtreſſe be not ſeverall one for the rent, another for the paine, but as it were joynt for both, ſo it is literally taken, there could be no diſtreſſe for the rent except there were alſo a paine forfeited and diſtreſſe for both, yet the law will divide them, and diſtinguiſh according to their natures.

Demand of paine, when it ſhall be.

261. *Madox* Verſus *Young*. Debt.

MAdox brought an Action of Debt againſt Young late Sheriffe of Barkſhire upon a Judgement of 60. pound recovered againſt one Goughe, whereupon hee was taken in execution by *Capias utlagatum*, within the yeare and eſcaped. The defendant pleaded *nul tiel* Record of the Recovery, the plaintife demurred conceiving, that hee ſhould have pleaded *nihil debet*. But Judgement was given for the defendant.

Eſcape out of execution for debt upon it the defendant may plead *nul tiel Record*.

262. *Parkhurſt* Verſus *Powell*. Caſe.

PArkhurſt brought an action of the caſe againſt Powell late Sheriffe of Denbighſhire, and declared that where he had recovered againſt one Richard Owen in the Common Pleas 40. pound debt, &c. and Owen was outlawed. That the plaintife delivered a *Cap. utlagatum* againſt him to the defendant then Sheriffe, and that he having him in his preſence would not arreſt him, being required and returned, and returned the writ *non eſt inventus*. Upon iſſue not guiltie, it was found againſt the defendant. And it was moved in arreſt, that this Action ſhould have beene laid in Middleſex, becauſe the fault which was the

The plaintife hath election of divers places to lay his action.

not arreſting him was in Denbighſhire, yet judgement was given for the plaintife for the falſe returne which is in Middleſex Court was alſo a wrong; ſo the plaintife hath his Choyce.

263. *Michael* verſus *Mortimer*. Replevin.

Preſcription miſlaid.

MIchael brought a Replevin againſt Mortimer, and iſſue was taken whether one John Michael and all thoſe whoſe eſtate, &c. had uſed to have common for all their beaſts levant and couchant upon a meſſuage and 200 acres of land 50 of meadow, and 50 of paſture in foure townes, the Jury findes, that the ſaid Michael was ſeiſed of the ſame houſe and meadow, and paſture in the ſame foure townes, but that he had his Common as belonging only to the meſſuage and 20 acres of land, 20 of meadow, and 20 of paſture in two of the townes, and not in the reſt, whereof judgement was given againſt the plaintife as failing in his preſcription.

264. *Parry* Verſus *Pary*. Information.

Triall of record muſt be by record.

PArry informed againſt Pary for non reſidence, the defendant pleads another information in the Exchequer exhibited there 28 Aprill, *Anno* 14. for the ſame abſence, upon iſſue recorded, it appeared that the Information in the Exchequer was exhibited 29 *Aprilis* in the ſame yeare, and was for the matter right. Whereupon judgement was given for the defendant.

M. 14. Jac.

265. *Welby* Verſus *Cunning*. Scire fac.

The rendering of baile muſt be of record, and how it muſt be done.

WElby brought a *ſcire fac.* upon a recognizance of baile of 660 pounds for one Davenant and ſhewes that he had judgement Mich. 14. Jac. againſt Davenant, and that he did neither render his body nor ſatisfie his debt. The defendant pleaded that after the judgement, *ſcil.* 23. *Ian.* *Anno* 4. Davenant came into Court and rendred his body to the priſon of the Fleet in execution in diſcharge of his baile, and that the plaintife did refuſe to take him in execution, and the plaintife denied the yeelding of his body and ſo all iſſue. But it was reſolved, that this was ill pleaded, for the pleading of his body being in act in Court, and in diſcharge of his baile which is of it ſelfe of record, and therefore ought to be concluded *prout patet per record*, and then the other plea ſhould have beene *nul tiel record*. But indeed in this caſe there was no record entered of it, and yet it was proved by the Attorney Cotwick, and another in open Court that Davenant came in for that and other cauſes, and was committed to the Fleet, and after ſet at large. And in this caſe divers preſidents were ſhewed of the manner of the entry upon

on the yeelding of the body upon the baile, *vid.* 12. Eliz. Rot. 328. P. 29. Eliz. & Tr. 20 Eliz. Rot. 125. betweene Young and Thompſon in *exoneratione manucaptorũ & poſtea*, becauſe he was not prayed in execution by the party he was diſcharged. Et P. 6. Jac. R. 105. ſuch a yeelding of the body was entered in *exonerationẽ manucaptorũ*. So the true form is, that entry be made of record of the yielding in diſcharge of the baile. But then if the plaintife or the Attorney be preſent he muſt make his election to take him in executiõ or to refuſe him, wherof entry alſo is to be made. But if he be abſent, the party preſently muſt not be diſcharged, becauſe the time of bringing him is uncertain, for they receive him, if he be brought in at any time before the *ſcire fac*: againſt the Bayle, or upon the returne of it, and therefore he muſt be committed, that the party may have time for his election. But then when hee is committed, the uſe is by rule of Court to call the plaintife, or his Attorney to take or leave him, and ſo to enter his Acceptance, or refuſall of Record. And this is a judiciall way, for if the plaintife, and the Attorney bee both dead or in ſuch like caſe there muſt bee a meanes by record to inforce and anſwer, which I ſuppoſe muſt be by *ſcire fac.* to the plaintife or his executors, to anſwer whether hee will have him in execution or not. And I am of opinion that though a man refuſed thus to take the defendant in execution upon his yeelding, and that entered upon Record, yet hee may after take him by *Capias ad ſatisfaciendum*, for it is but a forbearing, for the time to receive him upon his owne offer, for it is not a renouncing or a releaſing of his owne Act of execution, when he ſhall ſee cauſe ; But the principall Cauſe I ended betweene the parties arbitrating, and gave unto Welby, but 20. pound from Cunning the bayle, and left him nevertheleſſe to his remedy againſt Davenant the principall, for his whole Judgement being 208. pound.

266. *Norris* verſus *Staps*.

Corporations have power to make lawes & the validitie of them.

NOrris and Truſſell, and the Fellowſhip of the weavers of Newbery brought an Action of debt of five pound againſt Staps, and declared that Queene Elizabeth incorporated them *an.* 44. by that name, and gave them power to make lawes *non rationi inconſonans*, and not contrary to the lawes and ſtatutes of the Realme, with a Proviſo to the ſame effect; and that the Queene by the ſame letters Patents did ordaine for her, her heires and ſucceſſors, that none ſhould exerciſe the trade of weaving within the ſaid Towne, except he were firſt admitted thereunto, by the Guardian and ſociety of Weavers. And then ſhewes the Act of 19. H. 7. and then the two Guardians, and the greater part of the fellowſhip of weavers did make an ordinance ; that no perſon ſhould uſe the ſaid Art of weaving within the ſaid Towne, except he had beene an Apprentice to the ſaid Art within the ſaid Towne, and had uſed by the

ſpace of five yeares before the Ordinance, or were admitted by the Guardian and fellowſhip, upon the paine of 20. ſhillings the Moneth. And then ſhewes the Allowance of the ſaid ordinance according to the law of 19. H. 7. and that one of the Gardians gave notice of it to the defendant, and then ſhewes that the defendant had uſed the Art &c. here by the ſpace of five Moneths after, whereas he had not beene an apprentice there, nor uſed the ſame Art, the five yeares before the ordinance, nor admitted &c. againſt the ſame ordinance, and to the Queenes letters Patents *nihil debet*, and it was found the plaintifes, and yet Judgement was given againſt them *quod nihil capiant per bre.* The reaſon of the Judgement, was by meanes of groſſe faults in the declaration.

Firſt, that it did not appeare that the Corporation did conſiſt of two Gardians, for there was no more declared, but that they were incorporated by the name of Gardians &c. which may be more then two, and they had omitted the clauſe whereby the number was appointed. I am of opinion that they needed not to ſhew how they were incorporated, for the name argues a Corporation, as the like of Cities, and the plea *nihil debet* (or the like) requires proofe of it.

But the worſt fault is in the law it ſelfe, for it excludes all Apprentices, brought up in the Towne it ſelfe, after the ordinance made, which is abſurd. Now I am of opinion, that though power to make lawes, is given by ſpeciall Clauſe in all Corporations, yet it is needleſſe; That I hold is included by law, in the very Act of incorporating, as is alſo the power to ſue, to purchaſe and the like; For, as reaſon is given to the naturall body to governe it, ſo the body Corporate muſt have lawes politique to governe it but thoſe lawes muſt ever be ſubject to the lawes of the Realme as ſubordinate to it. And therefore though there bee no Proviſo for that purpoſe, the law ſupplies it. And if the king in his letters Patents of incorporation doe make ordinances himſelfe, as here it was (as aforeſaid) yet they are alſo ſubject to the ſame Rule of law.

But the Queſtion which was chiefely intended is indeed great, whether a new Corporation, having no preſcription to appropriate and exclude others, can make a law to exclude all perſons, to uſe an Art or trade in their Towne, whereunto they were not Apprentices in the ſaid towne, though they ſerved their Apprentice-hoods to wit elſewhere.

Wherein the Queſtion is betweene the particular privileges of townes and the generall liberties of the people, which is fit to receive a determination, For it runs through the Realme.

Obſerve theſe degrees in the conſideration in this caſe.

Firſt the common law did not forbid any man to exerciſe any trade, were hee trained or not trained, or to exerciſe more trades then one. But if any man profeſſing a publique trade, would performe it falſely, or inſufficiently, he were anſwerable.

Secondly, that the law as it now ſtands, forbids no man to uſe any trade

trade privately as to be a Tayler in my houſe, or the like, for it is not a Trade, but a Service, it is at mine owne peril, be it ill or well done.

Thirdly, that the law (as it now ſtands) forbids no man to exerciſe a Trade publiquely, that hath been Apprentice whereſoever. See the caſe of the Taylor of Ipſwich Co. lib. 11. 53. The ſimple incorporating of a Towne doth not draw by conſequence a peculiar trading to that Towne with an excluſion of Forrainers; ſo that it muſt be by the ſpeciall law or ordinance that muſt worke this effect.

Now of the things conſiderable in this and the like caſes, what ſocieties, Companies or Colledges of men may make by lawes; wherein not onely corporations made by Patents, or preſcription, but all the Pariſhioners, or Townſmen of one Pariſh or Towne, may make ſome; For they are by Common law, as it were incorporate for ſome neceſſaries both Common and peculiar to that diſtinct body, as for repairing their Church, or the like. Alſo the tenants of one Mannor may for their Common or the like make by lawes. But whether if there be a Lords Court whereunto it belongs, that may be done but in Court, and by conſent of all the Tenants, and with conſent of the Lord and by preſcription, and what paines may bee ſet and by whom to be levied, and to what uſe, is conſiderable.

Againe, whether ſuch a law may bind Strangers to the law doing againſt it within the precinct.

Againe, what notice is requiſite, either to free, or ſtrangers; And for theſe ſeverall points, ſee theſe books 44. E. 3. 19. 8. E. 2. F. aſſize 413. 12. E. 4. 54. 11. H. 7. 13. & 12. H. 7. 40. & 12. H. 7. 20.

Jefferies caſe Co. lib. 5. fo. 66. the Taylors of Ipſwich caſe called the caſe of Monopolies. Co. lib. 11. fo. 84. & in that caſe Davenants caſe, and the Chamberlaine of Londons caſe. Co. lib. 5. fo. 26.

267. *Don Alphonſo* Verſus *Cornero.*

DOn de Walaſco Embaſſador, for the king of Spaine libelled in the Admiraltie Court, againſt one Cornero (naming no defendant) That one Cornero being a ſubject to the king of Spaine, had committed divers Crimes againſt the king, for which all his goods were Confiſcated, and that hee was come into England, and had brought with him 300. waight of Tobacco, to the value of 800. pound. Admiralty.

The Judges ſaid that they would not *lex prayment* Attachment, of the goods at the hands of leaving a ſpace for names, and a ter attached them in the hands of Sir Iohn Watts, who had bought the Tobacco of Cornero for 800. pound.

The Judges ſhall, that they would not let the Embaſſador from proſecuting his Maſters ſubject. But for the goods of any ſubject of a forraigne Prince, which he brings into the kingdome, though they were confiſcate

confiſcate before the property of them be altered, ſhall not here be queſtioned but at the common law. And though Wats be yet a party grieved by that undue ſuit, prohibition was granted Ter. Hil. 9. Jac. upon the like libell by *Don Pedro de Eſtumenga* Embaſſadour for Spaine.

Admiralty.

268. *Palmer* verſus *Pope*.

TErm. Mich. 9. Jac. Palmer. libelled againſt Pope for that it was agreed upon them *ſuper altum mare*, that Pope ſhould carry certaine ſugars, and the agreement was after put in writing in the Port of Gado in the coaſt of Barbary; and ſhewed that Pope ſuffered the ſugars to be ſpoyled *ſuper altum mare* with ſalt water.

V. Caſe.

Houghton Serjeant ſuggeſted that the Charter party was made in the Port of Gado, upon the Continent of Barbary, whereupon the Court reſolved that a prohibition lay, becauſe the originall contract though it were made at ſea, yet was changed when it was put in writing ſealed, which being at land changed the juriſdiction as to that point, but if it had beene a writing only without ſeale, it had made no change, now then if the contract were at land, though the breach be at ſea which are two ſeverall acts, yet becauſe theſe two muſt concurre to make the cauſe of the ſuit which is entire, the party ſhall be forced to ſue in the Kings Court, becauſe that the Common Law muſt prevaile againſt other Courts and Lawes; and theſe caſes were cited for the Kings Court, that it might ſeeme for the Admirall 48. E. 3. 2. 10 H. 7. Fitz. N. 89.

And it is a generall rule for Merchants, Embaſſadours, and the like, who make bils, accounts, and other things in forraine parts. And for the juriſdiction of the Admiralty, ſee *tempore* E. 1. Fitz. Avoury 192. 8 E. 2. Stamford 45 E. 3. 7 R. 2. title treſpaſſe Statham 5 H. 6. 2 H. 4. 6 H. 6. and where the ſtat. ſaith *ad prius points* that is to be underſtood of death or maime (as the ſtatute ſaith) not for a condition.

269. *Audley* verſus *Iennings*.

Admiralty.

THe ſame Terme Audly had an Action *verſus* Jennings, who had in his libell laid his contract *apud Malega infra diſtrictum Maris vocat.* the ſtraights of Gibralter *infra juriſdictionē maritimam*, becauſe it appeared that the contract was made in the Iſland of Malega, and then the adding *infra juriſdictionem maritimam* is vaine.

Note that every libell doth and muſt lay the cauſe of ſuit *ſuper altum mare*, which argues that it is a neceſſary point; for, the Jury there groweth not from the cauſe as of tythes and teſtaments in the Spirituall Court, but from the place. And therefore I am of opinion that if a contract

contract bē made in truth at Sea,& a ſuit ariſeth upon that in the Admirals Court, & there the contract is laid generally without laying *ſuper altum mare*, the prohibition will lye; for, the libell muſt warrant the ſuit in it ſelfe, though you may on the contrary part, ſurmize that the contract was made at land againſt the libell that layes it on the ſea. And I hold it not ſufficient for the libell to lay it *infra Iur. mar.* generally, but it muſt be laid as it may appeare to the Kings Court to be ſo indeed.

270. *Abignye* Verſus *Clifton.* Chancery.

IN the caſe betweene the Lord Abignie plaintife, and the Lord Clifton defendant in Chancery, concerning a promiſe ſuppoſed by the plaintife to be made to him of aſſurance of lands upon the marriage of his Lady being daughter and heire apparent to the Lord Clifton, and his Lady. The King by his letters under his ſignet manull certified to the Lord Chancellor, and alſo to this Court the manner of the promiſe as it was made to his Majeſtie: in regard whereof his Majeſtie gave to the Lord Abigney 18000 pounds in liew of 1000 *per annum* in land which he had promiſed, which certificate was allowed upon the hearing for a proofe without exception for ſo much. Roy his Certificat.

271. *Counteſſe of Exeter* Verſus *Lady Roſſe.* *& è contra.*

IN the cauſe betweene the Counteſſe of Exeter and the Lady *Roſſe*, there was ſuit made to have the cau e heard at Councell Table. But the Chiefe Juſtice and I being called to queſtion before the King, delivered our opinion, that ſince it was a cauſe in thi nature fit for the Starrechamber being a Court of Iuſtice; and that Sir Thomas Lake on the behalfe of the Lady Roſſe deſired that courſe that was not agreeable to law, to examine it at the Councell Table where it could not be determined, and where yet thoſe voluntary examinators might inſtruct and prejudicate the witneſſes and proofes after to be taken legally, and cleerely, it would make the witneſſes on either part know, and the conſequence of that would be parties in their croſſe ſuit. Yet we agreed, becauſe the King and the party were ſo content, that if it were his Majeſties pleaſure to appoint his learned Counſell to examine ſecretly what his Highneſſe ſhould think fit, and make it knowne only to himſelfe to uſe as his wiſdome ſhall finde cauſe for ſome ſpeciall purpoſe, it might well be done, eſpecially the parties being of honour, and it being a caſe of a moſt ſcandalous nature. It was therefore agreed that every of the parties ſhould be ruled by the Kings rule who ſhould be made. And to all this it was conſented Sr. Ed. Coke being preſent. Scandall.

272. *Lord Chancellors* Caſe.

Lord Chancellors preſentation to a benefice above value.

THe late Lord Chancellor preſented to the Benefice of Stabridge *A. B.* the value of which came to the King by a laps, being the inheritance of the Earle of Caſtlehaven, and the Clerke was inſtituted and inducted; whereupon C. D. obtained a new preſentation of the King, who required the opinion of the Chiefe Juſtice, Chiefe *Baron*, and my ſelfe upon it. And we certified that the firſt Clerk being inducted could not be removed by law, for the preſentation is under the great Seale and by the King in law being in his name, and there was no difference in the forme when it is for the King or for the Chancellor, ſaving that for the moſt part the one is *mandantis*, and the other is *rogantis*. The confuſion of which words is of no moment. *But* if the preſentation it ſelfe under the great Seale had recited that the *Benefice* had beene under the value of 20 pound, in which the Chancellor was (as it was ſaid) abuſed by a falſe note brought unto him from the office of firſt fruits, it had beene void, for the deceipt appeared upon record. And therefore it were not amiſſe, that that clauſe were inſerted in the Chancellors particular, or if the Clerke had not beene inducted, the King might have revoked it, 38 E. 3. the like caſe.

273. *Hare* and *Leiſure*.

Office of the Clerke of the Court of Wards granted but to one with a *Non obſtante*.

IOhn Hare and Nicholas Hare his ſonne having a joynt Patent of Clerks of the Court of Wards with an expreſſe proviſion that if one of them ſhould dye, that the other ſhould enjoy the others place *non obſtante* the ſtatute, John Hare being now dead, Sir Stephen Leiſure moved the King, that he might be joyned by patent to Nicholas the ſurvivor, upon opinion that by the word of the ſtat. 32 H. 8. *viz.* that there ſhould be two Clerks to be named by his Highneſſe to be Clerks of the ſaid Court, which was referred by his Majeſtie to Viſcount Wallingford, my ſelfe, and Sir Thomas Lea Attorney of the Court, and we certified the King having heard the Councell and ſeen the former grants, and ſince the erection of the ſaid Court, that the King could not make ſuch a new grant as was deſired by law, for ſince the gift of the Office was meerly in the King, & that only meerly miniſteriall, the King was not bound to the number but might w^th a *non obſt.* diſpence w^th it. as he might give alnage without the nomination of the Treaſurers name, Sheriff. without Judges Commiſſioners for the Admirall Court without Chancellor. *But* the Auditors place being judiciall and appointed to be two, cannot be leſſe, becauſe the ſubject hath intereſt in the prejudicature which he committed neither to more nor leſſe then the law of their patent of the Clerkes have alwayes been to one alone at the firſt, others as this and ſo enjoyed.

274. *Earle*

274. *Earle of Somerſets Caſe.*

THe Earle of Somerſet had obtained a grant of the licence of wines, and tooke it in the name of Sir John Daccombe, in truſt for him. Whereupon the King willed the Chiefe Juſtice and me to call the Judges, and to give opinion, whether it were forfeited by his Attainder of Felony, which we did, and it was reſolved *una voce*, that it was forfeited to the Crowne, and often reſolved ſo in the Exchequer, in Caſes of Chattells reall and perſonall.

Grant of licence of wines forfeited by felony. *Hobard.*

275. *Priſes of Wine.* The 24. of *Dec.* 16. *Jac.*

THe Lord Chancellor, Lord Privie Seale, and the Chiefe Juſtice and my ſelfe, met at Yorke houſe, to ſet prizes of Wine, to be ſold both in groſſe and retaile, either by Merchants or Vintners.

Wines the ſtat. for ſetting of prizes of wine.

For our power of ſetting prizes in groſſe, there was no doubt, for by the ſtat. 28. H. 8. were Authoriſed, and it is in force. But by the retaile, it was queſtioned; for there was no ſtatute made for that purpoſe 34. H. 8. which was *temporarie* and diſcontinued, but there was alſo a ſtatute made, 37. H. 8. but making alſo an expreſſe Act of it ſelfe for the ſetting of prizes, as well for retaile as in groſſe by the ſaid Officers, which at that time was not made temporary, as 34. H. 8. but by conſequence was at the firſt perpetuall, yet in the end of that Act, it is ſaid in Raſtalls Abridgement that by the Stat. 5. E. 6. it was continued together with 34. H. 8. till the end of the next Parliament, and then diſcontinued: Now it is true that 5. E. 6. hath ſuch a continuance which as to 34. H. 8. is effectuall, but as to the 37. H. 8. which was before perpetuall, it is idle. Neither can an Affirmative of an eſtatute perpetuall worke an Abrogation of the ſtate, but then the penalty mentioned in the ſtat. 37. H. 1. is referred to that of 28. H. 8. which was 40. ſhillings, upon the prizes of wine ſold at the price limited. For that ſtatute meddles not with the ſales in groſſe, ſo the ſtat. 37. H. 8. hath no certaine penalty for the diſordered ſale by retaile, but that ſtands upon a ſimple contempt.

Starchamber.

276. *Hicks Caſe* P. 16. *Iac.*

ISEnt a letter cloſed and ſealed to Sir Baptiſt Hicks, which was ſo delivered to his hands containing many deſpightfull ſcandalous words delivered *ironicè*, as ſaying, you will not play the nor the Hypocrite, and in that ſort taunting of him for an Almes Houſe and certaine good workes that he had done, all which he charged him to doe for vaine glory. Whereupon Sir Baptiſt Hicks ſued him in the Starchamber. And upon hearing it was reſolved, that though it were not proved that the defendant had any way publiſhed it, yet the Court would hold Plea of it, and ſo did, and fined the defendant and ſentenced him to weare papers, and to make his ſubmiſſion to Sir Baptiſt Hicks in Cheapſide; yet an action of the caſe will not lye in that caſe for want of ~~Prohibi~~ *Publica-* tion, but the King and the Commonwealth are intereſſed in it, becauſe

Libell *ironicè* by Contraries.

it is a Provocation to challenge, and to make a breach of the peace.

277. *Cocks* Verſus *Darſon.*

Actions touching a Lunatiques lands ſhall be in his owne name.

COcks brought an action of treſpas of Trover and Converſion of beanes againſt Darſon and comming to tryall at the Aſſizes upon not guilty, becauſe it was a ſmall cauſe, the Judge tooke not the Jury, but directed to move the Court, and the cauſe was that the lands whereupon the Beanes grew, where a Lunatiques and a Copihold, and the Lord had granted unto one, the Cuſtody of the land by whoſe leave and aſſent the plaintife did ſow the land. And the Court was of opinion that the Action was to be brought in the name of the Lunatique: for there was an intereſt gained in his land by this Commitment, and I doe not agree that the Lord hath power over the Lunatique bound with a Cuſtom, for the imitation of the Kings power over Freeholders makes not, for though I take the ſtatute to be an affirmance of the common law in the caſe of the King, yet the collaterall incidence of eſtates as Dower of Tenants by the Curteſie, wardſhips, and the like, are not without ſpeciall Cuſtome.

278. *Bedwell* Verſus *Catton.* Caſe.

Aſſumpſit in conſideration of ceaſing a ſuit not averring that there was cauſe of ſuit.

BEdwell an Attorney, brought an Action of the Caſe, againſt Catton executor of Read, and counted, that whereas he had in Michaelmas Terme 14. Jac. proſecuted an Attachment of priviledge againſt Read Retornable in Hill. Terme, the teſtator knowing of it, in Conſideration that at his requeſt, the plaintife would forbeare to proſecute the ſaid writ any further againſt the ſaid Teſtator, did promiſe to pay him fifty pound, and then averred, &c. And after a verdict it was excepted in arreſt of Judgement.

1. First, that it was not alleged, that the plaintife had any juſt Cauſe of Action.

2. Secondly, that this kind of Action could not be againſt an executor, becauſe it is not in the nature of a debt.

Judgement. The Court nevertheleſſe gave Judgement; For ſuits are not cauſeleſſe, and the promiſe argues Cauſe in that hee deſired to ſtay. *Quære* if the defendant averred that there was no cauſe of ſuit.

3. Thirdly, though this did not require a diſcharge of the Action, yet it requires a loſſe of the writ, and a delay of the ſuit, which was both a benefit to the one, and a loſſe to the other.

4. Fourthly, it was agreed, that if the Teſtator promiſe to build, or to doe ſome ſuch Collaterall Act that an Aſſumpſit upon that will not lye againſt the Executor. But the Court held an Action of debt would lye againſt the Teſtator for his 50. £ being a ſumme of money due upon a Contract in which he received *quid pro quo* for the forbearing of a ſuit, which is as beneficiall in ſaving, as ſome other things would have beene in gaining, accor. 17. E. 4. If a man promiſe a Chirurgion money to cure a poore man, he ſhall have an Action of debt for it.

279. *Smith*

279. *Smith* & Vxor, Verſ. *Stafford.*

Aſſumpſit by a man to a womã to leave her *an.* 100 l. if he marry her, and they marry.

ANdrew *Smith* & his wife were Plaintifs againſt *Richard Stafford*, and declared that upon ſpeech of marriage had between *Anne* and the Teſtator: he promiſed that if ſhe would marry him and hee died before her, he would leave her worth an 100 l. upon *Non aſſumpſit*, a Verdict for the plaintiſe, and it was moved in arreſt of Iudgement that the promiſe was releaſed by the marriage in law. Againſt which it was objected, that this Action could not riſe during the coverture, for it was not to be performed till after the death of him which made the promiſe, which is true, but yet it is a promiſe preſently, and before the Act came to be performed, ſo the laying and binding of the promiſe is already in force, and therefore without doubt, the woman had releaſed it before marriage by the word promiſe, not by the word action, and what might bee releaſed actually the marriage releaſed. So *Hil.* 5. *Iac. Rot.* 132. in the Kings Bench, *Belcher* and his wife brought an Action of the Caſe againſt *Hudſon*, upon a promiſe made unto the wife, that if ſhee would marry one at his requeſt, he would give her after *Maſtons* death 40 s. the defendant pleaded that *Maſton* after marriage did releaſe unto him all and all manner of actions, as well reall as perſonall, and mixt plainte, debts, contentions, claimes, challenges, controverſies, variances and demands, *&c.* And yet Iudgement was given for the plaintiſe. For never an one of theſe would reach it; the Caſe was compounded, ſo no Iudgement was entered. And I was of opinion that by the marriage the promiſe was diſcharged (the husband being the perſon lyable) though it were true that the action was not accrued in his time, and though by this no meanes muſt bee *ab initio*, as a like bond ſhould be immutable, which moved the other Iudges to be of another mind, but the Rules of Law muſt not be guided by the improvidence of others.

Baron & feme their intermarriage extinguiſheth perſonall ſuits.

280. *Crokey*, Verſ. *Woodward.*

Covenant.

CRokey brought an action of covenant againſt *Woodward*, and declared that the defendant by his deed ſhewed in Court did covenant with him, that he would ſatisfie him all ſuch ſommes as *Ioſias* his ſon the plaintiſe, and apprentice ſhould imbeazel from him within three Months after Requeſt, and then layes the imbezeling and requeſt, *&c.* The defendant prayes oyer of the deed, which was entred in *hæc verba*, and there the covenant was to ſatisfie within three months after requeſt and due proofe made of ſuch imbezelling, wherupon the defendant tooke iſſue, that *Ioſias* the Apprentice did not imbezill

befill, and it was found for the plaintif, to the damage of
And now it was moved in Arreſt of Iudgement by *Chibborne*, becauſe it appeares by the entry of the deed, that the plaintife ought not to have brought his action till the three months were incurred, as well after proofe as after requeſt; whereas the plaintife had averred no proofe in the Declaration: and this exception was allowed as effectuall as if the defendant had demurred; for the whole Cauſe appeares to the Court by the whole Record whereof the deed entered is part, as fully as if it had been in the Plea.

Proofe how to bee underſtood in Law.

But the great queſtion was, How a matter of proofe ſhould be underſtood in Law, whether a proofe in Court judiciall, or proofe out of the Court, how it ſhould be made? And firſt, it was agreed by the Court, that the word proofe generally laid, ſhall bee underſtood judiciall, by Iury confeſſion or demurrer in Court; It was alſo agreed, that if the forme of proofe ſhould prevaile, as in Golds Caſe, *ſupra* 152, or if it were upon proofe made by certificat, as is uſed for Travellers; or by witneſſes, before two Aldermen, or the like; which appearing, cannot be judiciall: which proofe ſhall bee ſet down in the Plea, with all the circumſtance, and then it ſhall be put in diſcretion of the Court, to judge whether that proofe were competent according to the meaning of this writing. And ſo no new proofe ſhall be made in the preſent action, being brought in before he ought to have remedy he can have no Iudgement; and in the *Warrantia Charte* he may. But in the principall caſe, becauſe the word proofe is left at large, and may be made as Courts Iudiciall, in an Action brought upon this Covenant made by another; it may very wel be taken of a proofe by tryall in Court, and ſo is every way againſt the plaintife, that hath brought his Action of his owne ſhewing before hee had cauſe, and ſo is judged againſt the plaintife in this Caſe.

Note that in a *Warrantia Chartæ*, or a Writ of Meane may bee brought before the party take loſſe; yet hee hath Cauſe of that Action which is that having a Warrant of Acquitall ſues, *Quæ licuit*, to eſtabliſh the ſame by Iudgement, to bind the land of the Warrantor *& pro loco & tempore*; which kind of Action permiſſionall, and preſently remediall, but after by *ſcire fac.* but the Action of the principall Caſe being remediall and like unto the Caſe of a proofe, or a Caſe of a ſurmiſe *per Teſtes*, the Court judgeth whether it be ſufficient or not.

Obligation.

281 *Warley*, Verſ. *Beckwith.*

Arbitrement leaving matter in ſuſpence.

DEbt upon an Obligation of 40 l. by *Warley*, againſt *Beckwith*; the condition was to ſtand to the Award of *Gibſon* and *Beckwith*, and

and the Award to be made *ante Feſtum Sancti Andreæ* the Apoſtle. The Defendant ſaith that they made no Award, the Plaintiffe ſaith that the Arbitrators aforeſaid, receiving divers ſommes of money, alleaged by the Plaintiffe, to be due unto him by the Defendant, *&c.* On the 8 day of *November* did order, that the Defendant *(inter alia)* ſhould pay 9 l. to the Plaintiffe. And further, that if the aforeſaid Defendant, at or before the Feaſt of S. *Andrew* the Apoſtle then next following, ſhould before the ſaid Auditors or either of them, diſprove the payment of any of the ſeverall ſommes aforeſaid or any part thereof; then ſo much ſhould be deducted out of the payment of the ſeverall ſomes aforeſaid and upon iſſue, that they made no Award after verdict for the Plaintiffe; it was moved that the Award was not ſufficient, *& Curia adviſare vult*, whether this reſervation bee voyd ſhall fruſtrate all reaching to the Award ſhall ſtand, and the reſervation be voyd.

282. *Howard* Verſ. *Salkeld.* *Deceit.*

MY Lord *Howard* having a Iudgement in a Caſe againſt *Thomas Salkeld* Eſquire, the tenant before Execution brought a Writ of Deceipt, and though both theſe tended to avoyd the Iudgement, yet becauſe they were upon ſeverall reaſons and reſpects, they were both allowed. Writ of Deceit and writ of error both upon a Iudgement *in ceſſavit.*

283. *Kid* Verſ. *Chineley.*

DEt againſt Executors who Pleaded three Iudgements of 100 l. a peece, and that he had paid 40 l. in full ſatisfaction of two of the Iudgements, and that he hath not nor had, *&c. præterquam*, &c. the ſaid 40 l. and 20 l. more, which is ſufficient to pay the other, wherupon the Plaintiffe demurred and had Iudgement for the Defendant, for it is pleinement adminiſter ſpeciall. Executor pleinement *adm. ſpecial.* *Iudgement.*

284. *Bawtrey* Verſ. *Iſted.* *Debt.*

BAwtrey Verſ. *Iſted* *Debt* upon the *Stat.* of 2. *E.* 6, for not ſetting out Tythes, the Defendant pleaded *Nihil debet*, and adjudged a good iſſue. *Stat.* 2. *E.* 6. for not ſetting out tithes.

285. *Cheſter*, & vxor Verſ. S. *George*.

Heire of Adminiſtrator ſhall not bee ſued where there is poſſeſſion,

Judgement:

Cheſter & his wife brought an Action againſt S. *George*: the defendant pleaded that another S. *Geor.* was ſeiſed and dyed ſeiſed, *&c.* and came to him as heire; The Plaintiffe replies that before, *&c.* one *Burges* was ſeiſed and made a leaſe to one Marſhall, who dyed Inteſtate and the Adminiſtration committed to the wife of the Plaintiffe, and traverſed the dying ſeiſed, and found for the Plaintiffe. In Arreſt it was moved, that the Plaintiffe ſhould have ſhewed the Letters of Adminiſtration; but the Court gave Iudgement for the Plaintiffe, becauſe his poſſeſſion, which is affirmed by the Verdict, was his Title, and Adminiſtration was but an inducement to the Traverſe.

286. *Denry* againſt *Fitch*.

Caſe.

Actiõ for words, I arreſt thee of felony.

Coſts againſt the Plaintiff upon his *Nonſuite*, where there was no cauſe of ſuite

Denry brought an Action of the Caſe againſt *Fitch*, for theſe words, I arreſt you for felony, and at the Tryall the Plaintiffe was non ſuite. And now it was ſaid by his Councell that the Defendant was to have no Coſts, becauſe the words were not Actionable, and ſo Iudgement was to be given againſt the Plaintiffe for that and not for the *Nonſuite*. And it was ſaid that it had been ſo ruled in the Kings Bench: But I was of a contrary opinion, for the words of the Law are plaine and generall, that the Defendant ſhall have Coſts upon the *Nonſuite*, and the vexation is the more groſſe, if there were no Action, for elſe a man might ſue with more ſafety, where he had left cauſe; And ſo Coſts were adjudged.

Aſſumpſit.

Conſideration to maintaine an *Aſſumpſit*, for forbearance of a ſuite, not laying how long.

287. *Sybill Yardley*, Verſ. Sir *Arthur Ingram*.

Sybill Yardley brought an *Aſſumpſit* againſt Sir *Arthur Ingram*, and declared that Sir *Edward Giles* was indebted unto her 160 l. and that ſhee told the defendant that ſhee would arreſt him for it: whereupon the Defendant, upon conſideration that ſhee would forbeare, did promiſe to pay ſo much, as ſhe ſhould prove due unto her by the ſaid *Edward*: And that thereupon ſhe did forbeare untill this time, and though 160 l. were due, and ſhe can well prove it, yet the Defendant hath not; hereupon *Non-Aſſumpſit*, it was found for the Plaintiffe, and after the Arreſt it was moved, that the conſideration was not ſufficient, becauſe there was no time of forbearance proved, for ſo it might bee a minute, but ended the Cauſe by compoſition.

288. Prohibition.

A Record of a Prohibition was ſhewed by *John Moore* Sergeant, *Paſche* 14. *Iac. rot.* 1918. between *Guffly* Plaintiffe, and *Pindar*, Parſon of *Mottesfluit*, in the County of *Southampton*, for Tythes of Willowes upon ſurmiſe that they are of uſe, as Timber in that Countrey: If Willowes grow in ſight of an houſe, it is waſt to fell them, yet if they be felled, I hold they ſhall pay Tythes. Note the reaſon, *

Diſmes for the Tithe of Willowes, and averring that they were of uſe for Timber there:

289. *Blands Caſe.*

Caſe.

George Bland brought an Action of the Caſe, againſt *A.B* for ſaying that he was indicted for felony at a Seſſions, holden at And did not averre that he was not indicted, and after a Verdict for the Plaintiffe, Iudgement was ſtayed, becauſe there was no Averrement *ut ſupra*: It was alſo queſtioned for the very words, becauſe an Indictment is but a ſurmiſe.

Action of words, thou waſt indicted of felony, not averring that he was not indicted.

290. *Crittall* Verſ. *Horner.*

Caſe.

Crittall brought an Action of the Caſe againſt *Horner*, for ſaying that he had caught the French Pox, and had carried them home to his wife, and had Iudgement: The ſlander is not the wicked meanes of getting them, but of the odiouſneſſe of infection.

291. *Laſhbrooke*, Verſ. *Liveſey.*

Battery.

Laſhbrooke an Attorney, brought an Action of Battery, *&c.* againſt *Liveſey*, in the County of *Wigorn*: The Defendant pleaded not guilty, which was entered. And now the Defendant would confeſſe the Action, which the Plaintiffe was not willing to accept, becauſe the Defendant had ſome power with the Sheriffe, before whom the inquiry of damage ſhould be. Whereupon, all the Prothonotaries ſaid, that they had never ſeene a Confeſſion refuſed, if it were offered before the *niſi prius* ſealed. And yet the Court did in their diſcretion refuſe it; as well becauſe the wounding was grievous, as to avoid errour.

Confeſſion of Action refuſed after iſſue joyned.

Starchamber.

292. *Wrenhams* Caſe.

YElverton Attorney generall, informed in the Starchamber, *Ore tenus*, againſt *Iohn Wrenham* for a complaint by him exhibited againſt Sir *Francis Bacon*, Lord Chancellor to the King, in a book conteyning

Starchamber for ſlanderous petition, againſt the L. Chancel.

teining a ſcandalous cenſure of a Decree, made by the ſaid L. Chancellor againſt him, for one Sir *Edward Fiſher*. In the Sentencing of which cauſe it was reſolved by the whole Court, that it was lawfull for any ſubject to petition to the King for redreſſe in an humble and modeſt manner, where he finds himſelfe grieved by a Sentence or Iudgement, for acceſſe to the Soveraigne muſt not bee ſhut up from the ſubject; but on the other ſide, it is not permitted under colour of a Petition and refuge to the King, to raile upon the Iudge or his Sentence, to make himſelfe Iudge in his own Cauſe, by prejudging it before the rehearſing. For which his ſuite to the King ſhould be, which *Wrenham*, in caſe he did inveigh through his whole book, with the moſt deſperate boldneſſe and deſpightfull, and violent words that was poſſible. It was alſo reſolved that the Iuſtice of the Decree was not to be queſtioned in this caſe, for that was not the point examinable, though it did appeare that he did my Lord Chancellor much and great wrong.

It is lawfull to complaine to the King of Injuſtice.

Tr.16. Iac.

293. *Anne Needler*, Verſ. Biſhop of *Wincheſter*.

Quare Imped.

"*Anne Needler* brought a *Quare Imped.* againſt the Biſhop of "Wincheſter, and *George Needham* Clerke of the Vicaridge of "*Horley* in the County of *Suſſex*, and declareth that one *Robert Bri-* "*ſtow* was ſeiſed of the Parſonage of *Horley*, whereunto the Advow- "ſon of the Vicaridge belongeth, and that the Vicaridge is avoyded "by the death of one *Lucas*; and that it was then in the hands of "Queen *Elizabeth*, by the Wardſhip of *Robert Briſtow*, the ſon of the "firſt *Briſtow*, who preſented *William Browne*, and ſo conveys the "Parſonage *ad quam, &c.* by divers meane conveyances to one *James* "*Cromer* in fee, and that he the firſt of *Ianuary* 1601. Did grant un- "to *Francis Foxton*, the next avoydance of the Vicaridge; who "granted the ſame unto *Henry Needler*, and the Plaintiffe then his "wife: and that *Henry Needler* dyed, and that ſurvived unto her, "and then the Church became voyd, by the death of *William Browne* "incumbent, and ſo it belonged unto her to preſent: This being the "next avoydance after the grant of *Foxton*. *Needham* Pleads in bar "as Parſon imperſoned of the Vicaridge, and ſays, that King *Henry* "the 8. was ſeiſed of the ſaid Parſonage of *Horley*, *Ad quam, &c.* And "that hee dyed ſeiſed of it and ſo makes the diſcent to King "*Edward* the 6, and Queen *Mary*, and laſtly to Queen *Elizabeth*; by "force whereof ſhe was ſeiſed in fee, and ſo ſeiſed, ſhe preſented one "*Lucas*, and then the ſaid *William Browne*, and now upon the death "of *Browne*, the King preſented him the Defendant: At whoſe preſentatione hwas inſtituted and inducted, and traverſeth without that, that *Robert Briſtow* the father, was ſeiſed of the ſaid Rectory, *ad*

quem,

quem, &c. as the Plaintiffe hath alledged; whereupon iſſue is taken, and the Iury find a ſpeciall Verdict, thus.

That one *Robert Southwell*, and *Margaret* his wife, were ſeiſed to them and the heires of *Robert*, of the Rectory of *Forſham*, in the County of *Suſsex*, and the 10, day of *May* 31. *Hen.* 8. by their deed of that date did give the ſame Rectory, &c. to King *Henry* the 8. and his ſucceſſors. And that King *Henry* the 8, being ſeiſed of this Rectory of *Horſey*, *ad quam*, &c. by his Letters Patents bearing date 21, *Iulii*, 31 *Elizabeth*; *In conſideratione pred' Rectoriæ de Forſham, &c. per pred' Robertum Southwell, & Margaretam eidem nuper Regi haeredibus & ſucceſſoribus ſuis, dat. & conceſs. de gra. &c. dedit & conceſſit pred' Roberto Southwell & Margaretæ*, the ſaid Rectory of *Horſley*, and the Advowſon of the Vicaridge, *inter alia quæ nuper Monaſterio de Horſley in eodem Com. de Suſſex modo diſſoluto ſpectabant, & pertinebant, Habend'*. to *Southwell* and his wife and the heires of *Southwell*. And that afterward, that is to ſay, 26 day *Iulii an.* 31 *Eliz.* and not before, the ſaid Southwell and his wife came into the Chancery, and did acknowledge their ſaid deed; which deed was afterwards duly inrolled. And then they find a conveiance of the Parſonage of *Horſley*, *ad quam*, &c. to the ſaid *Robert Briſtow* and his heires, and ſo conclude the Verdict: That if the Court ſhall judge that *Robert Briſtow* the father were ſeiſed in fee, *Et ſi contra*, then *è contra*.

And I am of opinion that *Briſtow* was ſeiſed in fee, and conſequently that Iudgement ought to be given for the Plaintiffe.

The points are two.

The firſt, whether the conſideration in the Kings grant were true, and good in Law or not.

The ſecond, whether the Kings grant were good, be it that the ſecond conſideration were true or falſe, good or not good.

The firſt, whether the conſideration were good, is.

The husband had been ſeiſed alone, and the Kings grant had beene made in conſideration of the Grantee alone, and ſo no other fault but that his gift had been then inrolled, and I thinke it had beene good even by the Common Law.

The next whether the joyning of the wifes grant to the husband, in the point of the conſideration had made the conſideration falſe. And I thinke it hath, and that neither to bee cured by the Common Law, nor by any Statute, that is, the conſideration cannot be made a good and true conſideration.

So the ſecond point, I hold the Kings Grant ſufficient; notwithſtanding that the conſideration be falſe and voyd, and that only by the helpe of the Statute of 31. *Hen.* 8, and this I hold to be cleare and out of doubt.

As to the firſt point, the Caſe is, That *Southwell* and his wife, being

ſeiſed

ſeiſed of the Parſonage of *Horſham* to them, and the heires of *Southwell* did grant the ſame to King *Hen.* the 8, and the heires by their deed, 10 *Maii, an.* 31: Did grant this Parſonage of *Horſley* (whereunto the Advowſon of the Vicaridge belonged) to them and the heires of *Southwell*, in conſideration of the Parſonage of *Horſham*, &c. given and granted by them to him, not ſaying by deed, nor by what meanes.

Then after 26. *Iulii, an.* 31, the deed was acknowledged by *Southwell* and his wife, and inrolled *ſecundum formam Stat.*

Vpon this Caſe I am of opinion, that though the deed to the King were not acknowledged, nor inrolled at the grant made by the King, yet the relation of the inrollement and the operation of the Law ſhall make the conſideration true in effect and ſufficient, as touching the husbands eſtate, and the King not deceived; which is the true reaſon that makes a Patent voyd, when the King is deceived in the reall conſideration that moveth and cauſeth this Grant; For then the King makes a grant by the word *ex mero motu*, and yet expreſſeth a reall conſideration moving his Grant, which is falſe: Now ſince theſe are contrary and cannot ſtand together, the Law ſhall judge upon the expreſſe conſideration, and ſhall not regard the clauſe of forme *ex mero motu*, which is *Clauſula Clericorum*, but ſhall reject that, as the Court doth the opinion of the Iury, when they finde the fact and conclude upon it contrary to Law, as in *Aymy Townſends* caſe, *& 9. H. 6. iſſint nient non faits.*

Conſiderations in the Kings Grant at large.

Now for the conſiderations, they may be falſe, and yet not defeat the Grant; as conſideration of money paid, or conſideration of ſervice, 37. *H.* 8. *B.* patents and S. Saviours caſe, 67. *b.*

The reaſon is not, becauſe the King is not deceived verbally, but becauſe the Law doth not eſteeme ſuch a deceipt, ſo waighty or materiall, as to deſtroy the grant; much leſſe here where the King is not deceived at all in effect: For the King hath the Parſonage of *Horſham*, &c. and that by the grant of *Southwell*, which was made before the Kings Grant, and muſt be ſo pleaded, as made, 10. *Maii.*

Inrollement of a deed to the King, how it relateth.

And though it be true, that it was not complete, nor perfected for want of inrollement, at the time of the Kings Grant, yet when the inrollement came upon it, it takes his effect, neither from the inrollement nor by it, but from and by the firſt Act: And therefore between the parties it ſhall bind to all purpoſes *ab initio*, though this be in a collaterall reſpect.

And therefore, I am of opinion, that if I give my land to the King by deed, and after change the land, and then I levy a Fyne to the King of the ſame land, and then the deed be inrolled, that the King ſhall hold the land diſcharged. And *Hinds* Caſe is not like, for there the latter conveyance prevailes, becauſe it extinguiſheth the uſe, without

but which the bargaine and ſale works not ſo, 1. *Hen.* 7. 31. a Feoffement is made to one for life, the rem. to the King, the rem. ſhall take effect, though the inrollement follow long after. So in *Hall* and *Winckefeilds* caſe, a Recogniſance acknowledged before me, in the vacation at Sergeants Inne, being inrolled the Terme after was ruled, to bind from the acknowledgement.

So *P.* 15. *Jac. Bull* ſold to *Dimmock* the Mannour of Pipe, *Dimmock* dyed, then the deed was inrolled, yet it was reſolved that the heire ſhould be in ward.

So upon the Caſe of 38. *E.* 3. 11. of a Feoffement within the view and entry after; and *Bullocks* caſe, 17. *Eliz.* of a Feoffement of lands uncertaine with election. For theſe are not, nor cannot properly be called fictions of Law, nor any reall Act, compounded of ſome ſimples, which make not a complete or intire Act, till they come together, and then they make one perfect Act working by their nature *ab initio*, even as others do that are in their nature ſingle: But thoſe things are properly fictions in Law, that have no reall eſſence in their own body, but are ſo acknowledged and accepted in Law, for ſome ſpeciall purpoſe, as *Littleton tit.* releaſes. He that hath alyened hanging the Writ, may as long as that Writ hangs, expect a releaſe of the Demandant, ſo may a vouchee, after he hath entered into the warranty: For, though they be but tenants, yet the Laws and the parties have allowed them tenants *inter ſe*, for that ſuite. So 38. *E.* 3. 29. an infant *in ventre ſa mere* may be vouched.

But if the husbands grant could not be made true by Common-Law the Stat. of 38. *H.* 8. of Monaſteries could not help, becauſe that Grant by the husband, was made as in the caſe appeares after the Parliament began 28. *Aprilis H.* 8. and the Statute only extended to Grants made and paſſed ſince 4. *Feb.* 27. *Eliz.* which muſt bee underſtood, and before this Parliament 31. *H.* 8. for it is true that all Acts of Parliament have their effects from the beginning of the Parliament as it is reſolved 38. *H.* 8. *B.* plaint 86. and in *Partridge* and *Cokes* caſe, *Plow.* 79. except the Act it ſelfe appoint another terme, from which it is to take his effect.

But the Stat. 34. *H.* 8. will help it, for that extends to all grants made to the King, from 27. *H.* 8. till that Parliament and 7. yeares, and helps (amongſt other things) want of inrollement.

Againſt which it was objected wittily by my brother *Finch* (whereunto my brother *Hutton* alſo inclined) that the deed was inrolled long before the Statute, and ſo holds its perfection by the Common Law, and therefore neither needed nor could have any aid by this Law, as a deed not inrolled.

And to this, I anſwer, that there was a time when it was not inrolled, and this Statute makes the deed good and effectuall, according

to the meaning from the beginning, when it was not inrolled, and is all one for this cafe, as if a Statut were made in general, that all grants by the King ſhall be good without inrollement, and then a Grant is made that is good, *ipſo facto*, good to the Statute to all purpoſes, though inrollement follow, with which it would have beene good without the Statute.

And though this Grant were good by the inrollement before the Statute; Yet it was not ſo to make the conſideration true at the time of the Kings Grant, for want of inrollement then; but, that is the worke of this Statute to make it good ſo, and to that purpoſe.

But now for the womans Act, I am of opinion that the conſideration cannot be good and true, neither by any rule of Common Law, nor by any Stat.

For firſt where it was objected that ſince the wife had but an eſtate for life in the thing granted to the King, if either the husband ſurvived, or the wife diſagreed to the eſtate, the King was to enjoy the land abſolutely, by warrant of the husband alone, without the wife, as well as if ſhe had enjoyed the Fyne, and it doth not appeare that ſhe ever did or could impeach the Kings eſtate.

To this I anſwer, that the conſideration muſt be taken as it is, which is not in conſideration that the King ſhould enjoy the land, but in conſideration that the husband and wife had granted it to the King, which in this caſe is not true; For the wifes grant is utterly voyd, but if it had been a grant, though defeaſible, it might incline to allow it good.

As if the King in conſideration of land conveyed by *I. S.* to the L. Treaſurer, for the Kings uſe, ſhould grant land to *I. S.* which were gotten by diſſeiſin, and the diſſeiſee ſhould enter upon the Lord Treſorer, Yet the Kings grant ſhall ſtand good. For the conſideration was untrue, and you muſt not ſtraine it beyond the word, by any imaginary intent; For elſe if the land were by a writ of right, the reaſon were all one, and a conſideration doth not intend a generall warranty.

And therefore in the caſe of *Alton woods* where the conſideration was the ſurrender of Letters Patents by the husband of an eſtate of Freehold, it was reſolved to be good, though it might and did appeare that the wifes eſtate could not be ſurrendred, which might bee thought the Kings intent mentall, but it is not the expreſſe legall intent; It was the Kings finall intent to have the land by ſurrender, but he required only a meanes which he had, and that was inutile.

The King in his Patent deceived in his fynall intent.

Again, when it was ſenſibly objected, that the King was not deceived in the matter of Fact, but in the effect of Law, *& ignorantia Iuris non excuſat.* And then the caſe ſhould be no other than as if the King had ſaid, *Southwell* and his wife have made me a grant, which

The King deceived in judging the Law.

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is indeed voyd in Law, as to the wife; yet in conſideration that they have granted mee land, I grant unto them the Parſonage of *Harly*, &c.

To this I anſwer two wayes.

First, that for ought appeares to the Court, the King is deceived in this Fact: For his grant is in *Conſideratione pred' Rectoriæ de Horſham*, &c. *per pred' Southwell* and his wife, *eidem nuper Regi dat. & conceſs.* So it refers to a grant in generall, which might be by fyne and not by deed, to all purpoſes, much leſſe by this deed. First anſwer.

My ſecond anſwer is, That though the King be deceived but in land, yet that will not preſerve the grant; For it is not only the fraud of the party that fruſtrates the grant, as a puniſhment of his deceit: But if it appeare in the body of the Patent, that the King erres in his Iudgement to his prejudice, that will make the grant voyd. Second anſwer.

Therefore 18. *H.* 8 *Brooke* Patents 104. If the King gives lands to one and his heires males, it is judged in the Exchequer Chamber to be utterly voyd, yet it is but error in Law, (a fee ſimple) and *Altonwoods* caſe *lib.* 1. 15. the King being tenant in taile, the reverſion to himſelfe in fee, gave the land to *Walſh* in taile. This was adjudged voyd, not becauſe the eſtate was miſtaken, as in the other caſe 18. *H.* 8 but becauſe the King did erre in the forme and manner of the eſtate, intending that entire, which could not be ſo. And *Gowdly* is there of opinion, that though the King had recited his divided eſtates, yet it could not have bettered his grant. Vnto which opinion the two Chiefe Iuſtices did alſo agree; and yet then he had taken notice of the fact, and had miſcommented the Law, that his grant might nevertheleſſe work intirely.

And the Lord *Chandos* caſe, *Co. lib.* 6. 55. is not contrary. The caſe is, that K. *H.* 7. gave the Mannour of *Blundell* to *Giles Chandos* in taile, and then the King reciting that he had ſurrendred his ſaid Patent, by force whereof the King was ſeiſed in his demeaſne as of fee, gave the ſaid Manor to him and his wife; and it was holden that this grant was good in Law, to paſſe the reverſion in fee only wherof two maine reaſons were given. First, that leſſe paſſed than the K. meant, that is, the reverſion in fee inſtead of the whole eſtate in Fee. 2. That it was not made part of his conſideration of the grant, and therefore if the grant had been in conſideration that by the ſurrender of his Patent, the King had been ſeiſed in Fee, in poſſeſſion, he had granted it again, *&c.* It would have been voyd, and then it had been like the principall caſe here.

And the ſame reaſon that ſupplies the Kings ignorance of matters in fact, will alſo excuſe his want of knowledge even of the Law and ſubtilties of it. For, hee ſtudies a greater Art, *ſc. Arcanum regni*, the Art of Regiment, which is *Ars Artium*, and containes all Arts, as

the Common-wealth includes all private ſocieties.

Tu regere Imperio populos Romane memento,
Hæ tibi erunt Artes, pacique imponere morem.

As touching the meaning of the Statute to this purpoſe: The purpoſes of theſe Statutes were to eſtabliſh conveyances to and from the King, according to the naturall equity *ſecundum æquum & bonum*, which is *Lex legum*, without reſpect to all legall ceremonies. But it was never meant to inable thoſe perſons nor their grants, who by naturall defects or diſablements, were either by the Law of Nature or the Law of the Land diſabled to grant.

And therefore if an Idiot, or Lunatique, or an Infant under ſeven yeares of age had made a grant to the King, this Statute never made them good, for *jura naturæ ſunt immutabilia*. And yet it is true, that if any of theſe had levyed a Fyne to the King, this had bond even without the help of the Statute. And *Mary Portingtons* caſe, *Co. lib.* 10. 42. it binds them alſo for the uſes therupon declared by their deed, as being a part of the operation of the Fyne.

Laws of Nature are immutable.

But note the reaſon which is not becauſe the Law binds ſuch perſons, for therein *Jura naturæ ſunt immutabilia* ſtill, but cleane contrary, becauſe the Law finds them perſons not ſo diſabled, nor admits the averrement of ſuch diſablement, becauſe it is certified by invincible and indiſputable credit of the Iudges, that they were perfect and able perſons. And ſo here is a Law of Policy that doth not cancell the Law of Nature, and doth only bound it in point of forme and circumſtance, it being better to admit a miſchiefe in particular, even againſt the Law of Nature, than an inconvenience in generall; And though it be true that the age of 21, is not ſet for grant by the Law of Nature, yet becauſe that it is by the Law of the Land, ſet as the terme and period that the Law of Nature judgeth of diſability of Minors, to give or grant all Statuts of this Land, ſhall bee judged equally in the favour of Minors even to that age; in imitation of the Common-Law, except in ſpeciall caſes, *ſecundum quid*, as an Infant to contract for meere neceſſities, and the Age of 14, for the heire in ſoccage, and the age of 12 and 14, for marriage of male and female, and the like.

So then it is apparent, that it is no Argument, that becauſe theſe might by their grants to the King, have bound themſelves ſome way, that is to ſay, by Fyne, therefore by what way ſoever it was done, this Statute ſhould make it good. Even ſo I ſay of a woman Covert, the Law of Nature hath put her under the obedience of her huſband, and hath ſubmitted her will to his, which the Law follows, *Cui ipſa in vita ſua contradicere non poteſt*; and therefore will not bind her by her acts joyning with her husband, becauſe they are judged his acts and not hers, ſo, ſhe wants free will, as the other Iudgement.

7. E.

7.E.4.14 the wife being *ceſtuy que uſe*, ſhee and her husband ſold the land, ſhe received the money, and they both required the Feoffee, to make eſtate to the vendee; and yet ſhe after her husbands death was releeved againſt the Feoffee, and might alſo againſt the vendee, if ſhe were privy to the uſe.

Yet note that this was in a Court of equity which judgeth *ſecundum æquum & bonum*, Note a conflict of two Laws of Nature and Equity as it were, but the one is predominant. And yet the Law of the Land for neceſſities ſake, of Commerce and the like, by a Law of Policy, makes bold with the Law of Nature in a ſpeciall kind; and therefore allows a Fyne levied by the husband and the wife, becauſe ſhe is examined of her free-will judicially by an authenticall perſon, truſted by the Law and by the Kings Writ, and ſo taken in a ſort a ſole woman, as alſo when ſhe comes in by receipt. But this being but a fiction of Law muſt not be extended beyond that, that the Law hath granted as a priviledge.

Nay more if a woman covert ~~by~~ *ſeem* a Fyne alone, as if ſhe were ſole, this ſhall bind her for the reaſon before given, that ſhe ſhall not be received to ſay covert, though her husband ſhall and may enter and reſtore the land to himſelfe and his wife both.

But no man will ſay, That if a woman covert would without her husband make a writing of her Land to the King, and acknowledge and inrolle it, that this would be made good by either of theſe Laws, becauſe it would be good by her Fyne, if her husband impugne her not, even ſo the reaſon holds not in the other caſe.

By the cuſtome of ſome Cities and places, an Infant of 15 yeares (for in pleading an age certainty muſt be ſet down, and not left upon telling 12 d, or meaſuring a yard of cloth, as ſome books are, that the Court may judge it an age of diſcretion; for Cuſtome muſt not deprive the Law of Nature) may make a Feoffement of his land lying there.

But if ſuch an Infant would make a grant to the King by deed inrolled, this Statute would not make it good: So if a man and his wife paſſe the wives land in *London*, and ſhe be examined (Note, for elſe the cuſtome were voyd in Law) it binds her by the cuſtome of *London*. But they would grant their land to the King by deed inrolled in the Chancery, this Statute would not make it good.

For, where an Act is made good by cuſtome, if that be not purſued it is all one, if there were no Cuſtome.

To conclude, as this Statut doth not confirme a grant of that, that is not in the Grantors to give, ſo theſe weake perſons are owners of the lands to hold and retaine to themſelves, but are eſteemed in Law not owners to give them away. And therefore it was a needleſſe explanation of the Statute of wils, that Idiots and the like ſhould not be enabled to deviſe.

But if a grant by tenant in tayle to the King, the reaſon is otherwiſe, for there is no inſufficiency in reſpect of naturall defect, but a reſtraint by a Statute, where the Common-Law did inable.

The objection that was inferred out of the ſaving of the Statute, where wives were excepted, that therefore they were not meant to be bound, moves mee nothing: For beſides it is a weake implicite and indirect inference to let in ſo great an Abſurdity and incongruity of two; that exception doth not reach unto the wives that are praties, that is, to ſuch as joyne in the grant of their own eſtates, but to the wives of the parties to the grants, that is, having nothing, but as wives, title of Dower, which being a ſmall thing and caſuall, they were content to free the Kings eſtate, if the words are (other than the parties their heires) and wives. So they put the wife in ranke with the heire.

Now then if this conſideration be faulty, as concerning the wife, it will bee cleare, that the Kings grant will be wholy voyd: For, though the conſideration conſiſts of divers things: Yet it is one entire conſideration, the King conceiving that he had the whole eſtate both of the wife and husband, wherein he is deceived, and taking that for his recompence, is not ſatisfied with the whole, like unto an Exchange.

If a Leaſe or Obligation were read to an unlearned man, as under a condition precedent thus: If *I.S.* and his wife convey unto you their eſtate, then you Leaſe unto them this land, or are bound, and indeed the Leaſe or Bound is onely if the husband alone do it: This Leaſe or Bond will be voyd.

Now the ſecond or great point is thus, Admitting that the grant to the King were either touching the wife utterly inſufficient or the grant by the husband not ſo complete at the time of the Grant made by the King, as it could verifie and make good the conſideration, and that conſequently the King was prejudiced and really deceived, and ſo his grant were clearely voyd by the rule of the Common-Law, whether it be not made good by force of theſe Statutes, or one of them; and by which, though the conſideration were totally and really falſe, as this is not.

And I hold that this Grant is made good by the Statute of 34. But I hold it clearely good by the Statute of 31, and not by 34: becauſe it cures but certaine ſpeciall faults, and miſ-recitall, non-recitall, miſ-naming, and the like, whereof a faulty or falſe conſideration is none.

Now touching the Statute of 31. I muſt remove certaine objections, without which I cannot bring this caſe within the reliefe of this Statute.

Firſt, it hath beene objected, That this Statute is not a generall Law

Law in this part: For though it be confeſſed that the purview of this Law that makes grants to the King good, becauſe it is for the benefit of the King in generall, as in the Lord *Barkeleys* caſe, and the Princes caſe, becauſe the Prince *cenſetur una perſona cum Rege*: Yet the Purview, that makes the Grants by the King good, being to his diſadvantage; ſhall not have the honour of generall notice, which is given to the Laws that advance the Kings good, for the general intereſt that all the people have in him and in his rights.

Another objection was, That the Statute did only extend to Monaſtery lands, and this Parſonage and Advowſon of *Horley* was neither pleaded nor founded to be ſuch.

As to the firſt, I grant that one chapter of an Act of Parliament may be both generall and particular, becauſe one chapter may contain divers Acts and Laws, which may be as ſeverall and ſundry in their natures, as if they were in ſeverall chapters. As it is reſolved in *Dive* and *Manninghams* caſe, upon the Statute of 23. *Henry* 6. And therefore you may plead *inter alia inactitatum fuit*, which you cannot plead in caſe of recovery, becauſe it is an entire body of Record, ariſing upon an Originall, and ending with one Iudgement, which neither is nor can be divided.

And the caſe of the Chanc. and Scholars of *Oxford*, is good to this point. For, though the Statute of 3. *Iac.* be generall againſt Recuſants, and namely in that point, which diſables them to preſent; yet that clauſe that gives their preſentations to the Vniverſities reſpectively is ſpeciall, and muſt be pleaded or found, or elſe the Court is not to take knowledge of it: And it is true that this part of the Statut that gives the Monaſteries to the King, is one Law. And that other part that makes good grants, to and from the King, is meerely another State (as it were) and the two ſavings for the Duke of
and the Lord *Cobham*, in this Act, 31. *Henry* the 8. are particular.

But I hold both theſe Purviews of Grants to be generall, inaſmuch as they both concerne the King in giving and taking, which are relatives, and the Honour and Iuſtice of the King, in performing really the intents of his Grant, doth much concerne him and his people, as doth his profit in rceiving and enjoying Grants from him. And this diſtinction as it is without Warrant, ſo it is too mechanicall and ſavours more of a Merchant than a King.

As to the caſe that hath been cited 2, & 3. *Ph. & M. Dyer*, 129. between *Ibgrave* and *Heydon*, where in Aſſize, iſſue was taken whether lands were contained in a Letters Paten. or not, which by the Common-Law were not contained, but by the Statute 34. *H.* 8. were conteined. The Iuſtice of Aſſize would not ſuffer that Statute, being not pleaded, to be given in evidence to the Iury, whereupon they found

found that the Law was not contained. Hereupon an attaint was brought, and the Court would not ſuffer that Statute to be given in evidence to the pety Iury.

Vpon this caſe I hold that the Iuſtices of the Aſſize did erre in denying the Statute to be given in evidence: For, though it bee true that the Court neither need nor can take knowledge of any particular Statute except they be pleaded: For, the *Allegata* to the Court muſt alſo be *Recordata*, yet a Iury may and muſt take knowledge of any particular Record, either Patent, Stat. or Iudgment, if it be given in evidence to them, for that is their *Allegata* verbally alleged and produced, if it make to the iſſue. But it ſeems they are miſled by errour of the old books that held a Iury could not find matter of Record: Even as the like error was the antient, that a ſpeciall verdict could not bee found, but upon a generall iſſue, and if this were a ſpeciall Statute, then the Iudges did juſtly refuſe the evidence of it to the grand Iury as of any other Evidence of Fact or Record not given to the pety Iury.

Allegata & probata, to the Iudge or Iury differ.

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But if it were a generall Law, yet the Iudges did diſcreetly and cautelouſly to barre it to be given in evidence to the Grand Iury, becauſe it was not juſt to attaint the Pety Iury by that, that by the diſcretion of the Court was concealed from them: But legally it wil be hard to quit a Iury that binds againſt the Law either Common-Law or ſeverall Stat. Law, whereof all men were to take knowledge, and whereupon Verdict is to be given, whether any evidence be given to them or not. As if a Feoffement or demiſe were made to one *imperpetuum*, and the Iury ſhould fynd croſſe either an eſtate for life or in fee ſimple againſt the Law, they ſhould bee ſubject to an Attainct, though no man informed them what the Law was in that caſe.

As to the ſecond objection that this part of the Statute concernes only Grants, made by the King touching Monaſteries lands, and therefore remedies not this caſe.

Firſt, that the Statute extends to all lands granted by the King: Nextly, that this doth ſufficiently appeare to the Court to be Monaſtery land.

For the firſt, though the proviſion be in the great Statute of Monaſteries, (for ſo it is) which gives colour to the objection, yet the clauſe to the King is clearely of grants of all kinds of lands to him, and obtained of divers and ſundry perſons: And therefore the clauſe ought in reaſon to be as large.

And that other clauſe for the grant of the ſubject is alſo clearely generall and hath no diſtrictive concluſion to Monaſteries, as hath 1. *E.6.cap.*44. of Chanteries, which is expreſly of grants, to and from the King, of thoſe kind of poſſeſſions only, and therefore obſerve all this part of the Statute 31. *H.*8. as to this purpoſe.

The

The Grants to be perfected are ſaid to be under the great Seale, Duchy ſeale, and ſeale of the Court of Augmentations, which laſt ſeale was by the Statute the proper ſeale of theſe lands.

It names Honours, Caſtles, *&c.* which were poſſeſſions not of Monaſteries. And it hath generall words of hereditaments of what kind, nature, or quality ſoever.

My ſecond anſwer is, that though the Iury find not as part of their Verdict the land to belong to Monaſteries, yet they find the Kings Patent, which ſays, that it was part of the poſſeſſion of the Monaſtery of *Chertſey*, and that is ſufficient, as in *Harvis* caſe, *Co. lib.* 11. 25. And if it were not ſo, it muſt come on the other ſide, as there of the wife or kinſman, ſo called in the Covenant, to raiſe uſes (after the objections removed) is this.

Now the laſt and greateſt Queſtion, whether a Grant made by the King by Letters Pat. of lands upon a conſideration real, which is paſſed before the Pat. which is falſe be made good by the Law of 31. *H.* 8.

And I am of opinion that it is, and for this purpoſe this Statute is to be conſidered in it ſelfe, and by conference with other Statutes of the ſame kind, tending to the confirmation of Patents.

1 Firſt, the generall purpoſe of this Statute, was to eſtabliſh Monaſteries in the King, by Act of Parliament, howſoever they came to him by other meanes; as by diſſolving, ſuppreſſing, renouncing, relinquiſhing, forfeiture or ſurrender, or by any other meanes to me, *&c.* or other unperfect or unqueſtionable meanes.

2 Nextly, the ſame did eſtabliſh them in the Crown, and gives actuall poſſeſſion accompanied with all liberties, priviledges, diſcharges of Tythes, and the like exemptions, immunities and other endowments whatſoever, even ſuch as were ſo peculiar and perſonall, as would elſe have periſhed with their body, to which they were firſt appropriate, as appropriations or benefices, and the like.

This care was to make the lands of Monaſteries to be the more deſired of the ſubject, which was the Kings purpoſe to invite all men to take of them, and lay a baite of riches and commodiouſneſſe upon them; but this only to bring them well to the Crown.

3 Now the next care was to bring them from the Crowne to the ſubject, with as much ſecurity as was poſſible, and that proviſion is couched in this clauſe, and is performed in large and ample words, ſavouring of a great deale of bounty and Royall meaning to the ſubject, wherein there is one particular of favour to the ſubject beyond that, that is granted to the King in the ſame Cauſe; which is this.

4 The Statute makes good the Grants to the King, only paſſed before the Parliament, and ſince the fourth of *February*, in the 27 yeare of the King.

But on the other ſide the Kings Grants to the ſubject are made good, not only thoſe that were paſſed within the ſame time, but alſo thoſe that ſhould bee made within three yeares next after: which makes an Argument of great force, upon all parts of theſe Purviews, that the Parliament intended no leſſe, but rather more extention of favour upon the words and clauſes to the benefit of the ſubject, than of the King.

Nextly, this is a Law of equality between the King and the ſubject, and therefore it is to be ſuppoſed to be carried as in an even ballance of Accompt where the words are equall, and therefore as on the Kings part it is provided, that the King ſhall enjoy the lands by him obtained, notwithſtanding miſrecitall, or miſnaming, or non recitall, or non naming, *&c.* and concludes [or any other matter or cauſe whatſoever in any wiſe notwithſtanding] ſo for the behalfe of the ſubject the clauſe is penned with as generall words and clauſes, and rather to more advantage to the ſubject.

For whereas on the Kings part the recitall is only of things obtained by the King either for money paid, or for land, or other recompence given in ſatisfaction, *&c.*

On the part of the ſubject it is recited gifts of his Majeſties moſt abundant grace, and goodneſſe, as otherwiſe upon divers and ſundry conſiderations, ſo free gifts are as well ſtrengthened as ſales.

And again, whereon the Kings part the particular faults are contained in the very body of the Purview for the King to bee cured though it hath been alſo a generall concluſion, as I have ſaid.

On the part of the ſubject there are no ſpeciall faults mentioned in the Purview, for the cure, neither doth the recitall rely only upon particular defects in the Kings Grants, but ſaith [for the avoyding of the Kings Letters Patents and the contents of the ſame, many queſtions might be moved or invented as well for miſ-recitall, non recitall, lack of inquiſitions, whereby the Kings title ought to have beene found] and then hath this generall clauſe [as for divers & ſundry other ſuggeſtions and ſurmiſes, *&c.*] albeit the words in effect contained in the ſaid Letters Patents, be according to the true intent and meaning of his moſt Royall Majeſty.

This is the Purview grounded upon a mere generall clauſe, that the Letters Patents of any generall honors, *&c.* muſt be alſo underſtood and the grants therein contained ſhall ſtand and bee good, effectuall, and availeable in Law to all effects, purpoſes, conſtructions, and intents againſt his Majeſty, his heires and ſucceſſors, without any other lycence, diſpenſation, or toleration of the King, *&c.* or of any other perſons, *&c.* for any thing contained or to be contained in them. Any clauſe (note, ſuch clauſe) conſideration or thing materiall to the contrary in any wiſe notwithſtanding.

And

And then hath a ſaving of the rights of all perſons, other than the King, his heires and ſucceſſors, the Governors, Donors, Founders, and Patrons, their heires and ſucceſſors; ſo here you have all the ſubſtance of this Statute, which is indeed in this part an erection of the Law of naturall equity concerning Grants, whereof the power and Act of transferring things from one to another, is *Iuris Naturalis*. But the formes and manners to be obſerved in the transferring of them, are *Iuris Poſitivi & Civilis*, that is, Kingdomes and Commonwealths have by Law written or un-written, entertained ſeverall formes, which are there made part of the ſubſtance of the Grant, though ſtill having reſpect of naturall equity, they are not materiall but formall; the very matter and ſubſtance of every Grant, being nothing elſe but a Declaration of the owners will, to transferre that, that is his to another. So the ſupplying of the defects of theſe formes, was the end and purpoſe of this Stat.

Of this kind are all thoſe which I will recite, which I call prerogative formes, which are only regarded in the Kings Grants for defence againſt abuſe and deceipt, which in the like caſe of a ſubject, are not neceſſary.

Of this ſort are non-recitall and miſ-recitall of Leaſes, which in the Kings caſe is made a fault, becauſe the Law requires not onely that the King be not miſ-informed of the eſtate that he Grants: And this may be remedied by a *Non-obſtante*, the non-recitall or miſ-recitall, as it is well reſolved in *Boſomes* Caſe, *Co.lib.*4.35. And common experience teacheth. For indeed it is a legall Prerogatives formalitie.

There are other Prerogative formes (for they take no effect between ſubjects that are of more importance, and therefore may bee ſaid in ſome ſort materiall, though in reſpect of the Grant they are not of the eſſence of it, as untrue ſuggeſtions and untrue conſiderations paſt.

As if the King do grant the Manor of *S.* reciting it to bee of the value of 20 l. or to have come to him by attainder or to be concealed where it is of the value of 40 l. or come to him by purchaſe, that is voyd by the Law of this Realme, and is not holpen by a *Non-obſtante* ſo the caſe of falſe conſideration by the Common-Law, would have made a Grant voyd againſt the King: But neither of theſe faults would make the Grant of a ſubject voyd, as will a Deceit in reading or writing to an ignorant man amiſſe: For that pretends expreſly his will, not to concurre with the Act, which the Law of Nature requires.

So theſe being formes of Prerogatives, I hold them clearly ſupplyed by the meaning of the Statute, the rather becauſe they are within the very words of the Law.

For firſt, (as I have ſaid) the Law doth eſtabliſh free gifts without conſideration, ſo that conſideration was not in any reſpect requiſite in the Stat.

Nextly, it mentioneth Grants made for divers and ſundry conſiderations, and eſtabliſheth them all, notwithſtanding any clauſe, conſideration, or thing materiall in any wiſe.

So here you have the fault that may bee in a conſideration in the Kings Grant, remembred and cured: And in Grants of Abbey lands, the conſideration was moſt ordinarily part of that land.

Now the conſideration that is remedied muſt firſt be taken a conſideration expreſſed, not omitted out of the Patent; For if the King will make a ſimple grant without any conſideration, that is clearely good, *Altonwoods* Caſe; A conſideration ſhall not bee extended beyond the Letter.

Nextly, the conſiderations that are uſually in the Kings Grants, are many of them not materiall, whether they be true or falſe, if they be paſt, as for ſervice done, or money paid, (as before is ſaid.) Theſe therefore cannot be the conſiderations meant: For it had beene in vaine to make a Statute to amend that, that was not faulty before.

It muſt therefore be underſtood of materiall and important conſiderations, ſuch as is this, eſpecially ſince the word (materiall) follows in general, which argues all things in the clauſe to be taken in the like nature.

Nextly, the conſiderations materiall muſt be falſe, for if they bee true and juſt, they need no Statute to make the Grant good. So thus it appeares, that the conſideration meant in this Statute muſt bee materiall and expreſſed in the Patent; and not in deceit of the King.

The ſame I hold in the Caſe of falſe ſuggeſtions materiall, that they are all ſo cured upon the ſame reaſon, under the words [any cauſe or thing materiall to the contrary in any wiſe notwithſtanding] the rather alſo becauſe the very word (Suggeſtion) is uſed in the Statute.

What faults a *Non-obſtante* in the Kings Patents will not carry.

And theſe are faults that a *Non-obſtante*, a falſe conſideration or a falſe ſuggeſtion could not have holpen, and therefore required the ſtrength of a Statute, and the benefit was of ſmall moment and not worth a Statute, that a *Non-obſtante* (which is denied to no man and is in the power of the Attorney generall) could helpe.

Now this Statute hath expreſly remedied ſome faults that a *Non-obſtante* could not have holpen, as namely lacke of an Office or Inquiſition, wherby the Kings title ſhould be found, which is a marvellous ſtrong caſe. For there are two kinds of offices, the one of intitling, which this Stat. ſpeakes of, whereby the Kings title is found, and before which though the King have a title, yet the land is ſtill the ſubjects.

As

As now, where the Kings tenant is attainted of Felony, or of Treaſon, at the making of this Statute of 31, for it was 33. *H.* 8. that gave the King actuall poſſeſſion upon attainder of Treaſon; ſo here for the benefit of the Grantee by this Stat. that is made the Kings to grant that was not his for himſelfe to retaine. Like unto the proviſion of 1. *R.* 3. of Feoffements by *ceſtuy que uſe*, and to give that which indeed himſelfe had not; The other Office is but to ſurvey and know what the King already hath.

And to conclude, Note that the Stat. meant to bind the K. abſolutely, for it makes the Grants good againſt his heires and ſucceſſors, and in the ſaving, excludes them as fully as it doth the Abbots, and Priors, and the Founders, Patrons, *&c.* which the Stat. did utterly exclude out of all hope.

Yet are there caſes that may be ſeen within the words of this Law, that are not within the remedy: And therefore though I have delivered my opinion, that conſiderations materiall that are paſt, ſhall not violate a grant if they be paſt: Yet if a conſideration be preſcribed in the future, and be not performed, it will avoyd the Grant, this Stat. notwithſtanding.

As if the King ſhould grant the Manor of *D.* to *I. S.* in conſideration that he ſhould within one yeare convey unto the King the Manour of *Sale*; Nay more, if it be in conſideration that he ſhould ſerve the King in any Office, as that hee ſhould pay unto him an 100 l. though theſe conſiderations in times paſt had done no hurt, (as is ſaid) yet in the future they are made materiall, and are out of the meaning of this Stat. which only makes good the Grant, according to the words contained in it.

For this, *Worths* Caſe, *Plow.* 21. *E.* 4. 48. agrees, that if it bee a conſideration of ſervice paſt, it is good, and needs no Averrement, *eo quod eſt libera capella*, but if it be *eo quod relaxavit*, it is otherwiſe, for that is for his advantage.

And ſo *tempore*, *H.* 8. *Nowels* Caſe, 368. the King gives land *pro ejectione Collegii*, *&* 38. *H.* 6. 34. Grant by the King *ad effectum*, makes a condition in the future, and that ſtands with the Grant, and allows it good and perfect at the firſt, but after forfeit by the condition, and therefore out of the reaſon and meaning of this Stat.

On the other ſide the words of the clauſe of Grants to the King, not meaning of the Honors, *&c.* is reckoned among the faults that ſhould be cured. And yet I hold that cleare not remedied generally: For that were not only againſt naturall equity, but againſt ſenſe to make that paſſe that was never mentioned, and to ſuppoſe a meaning without words, or perhaps againſt words, were an unſufferable miſchiefe: And the makers of the Stat. find themſelves intangled with this miſchiefe, and therefore in a kind of implyed contradiction con-

cluded expreſly againſt it: For, they ſay that the Grant ſhall bee good, notwithſtanding, not naming of any of the Honours, *&c.* Compriſed and mentioned in the Grant. So it muſt bee mentioned and therefore cannot be un-named. Alſo the words are for things contained; ſo the not naming cannot ſtand.

Now to underſtand it not named, that is not particulariſed, is vaine: For if the King grant all the lands, and tenements in *D.* it is good without quantity or quality, 30. *H.* 8. *B. Pat.* 95. ſo it is indeed an overflow of words, not poſſible or fruitleſſe.

Againe, I am of opinion, That a Grant of the Manour of *D.* or by him *habend. cum Dale*, is voyd for *S.* ſo a Grant to one *in perpetuum* gives not fee by this Statute: For, though there be a naming in the latter caſe and words in the forme, yet neither are perfect and certaine, and proper to make a Grant; For ſale is not grantable. And ſo it is a not naming in effect, and ſo the Statute ſaith, Albeit the words, *&c.* ſo it requires ſenſible and effectuall words and ſentences. And touching the other caſe, the favour of the deviſe is peculiar to that kind of conveyance.

Now the conference of the latter Statutes of Confirmations, Patents, and Grants, to and from the King, will make the bounty and liberality of this Statute to the ſubject more evident and perſpicuous; For this Statute being found too large againſt the King, the Statute after made to that purpoſe, for confirmations meant in diminutions and abatement of the benefit of the ſubject.

And therefore 34. *Henry* the 8. though it have a generall clauſe of all cauſes, and matters for the King; Yet for the ſubject, it concludes onely upon the ſpeciall faults particularly ſet down.

The Statute 1. *Edw.* 6. of Chanteries, the other Statute 1. *Edw.* the 6. of Confirmations, though it bee not in one point ſtrange, for it cures onely grants made by the King, and not to the King, but for the ſpeciall faults the Statute 4. & 5. *P.* & *M.* 18. & 32. *Elizabeth*, have a generall concluſion for the Crowne, but for the ſubject they extend onely to particular faults. But 18. *E.* 4. expreſly that they ſhall be taken with a beneficiall conſtruction. And theſe three later Statutes do extend their benefit and favour to grants made not only to the King himſelfe (as the reſt did) but alſo to grants made unto others to the Kings uſe.

294. *Heard* Verſ. *Baskervile.*

Replevin.

William Heard brought a Replevin againſt *Richard Baskervile.* The Defendant, as *Bayliffe* to *John Dinham* Eſquire, *cognovit captionem*, for he ſaith that long before, *&c.* one Thorne was ſeiſed of the place, *&c.* in Fee. And 12. *E.* 2. granted a rent of 2 s. with a clauſe of diſtreſſe unto one *Millington.* And that he dyed ſeiſed, after whoſe death the rent deſcended to another *Millington*, as his coſen and heire, without ſhewing how his coſin, and then ſhews that the ſame later *Millington* 7. *Hen.* 8. did grant unto one *Dinham* and his heires the ſaid rent in Exchange; which was executed on both ſides. And then conveyes the rent down by diſcent unto *Dinham*, in whoſe right, *&c.* upon Conuſans the Plaintiffe demurred generally.

And the only queſtion whereupon the Court ſtood was, whether the not ſetting down of the manner of coſenage, were matter of ſubſtance, or only of forme, ſuch as by the Statute of *Demurrers*, 27. *Eliz.* ought to be particularly ſet downe, or elſe no advantage to bee taken of it.

This caſe as being of great conſequence in the rule was argued by the Iudges publiquely, and adjudged for the Defendant, *Warburton* only diſſenting.

In this caſe all the parts of the Statute were conſidered, The title is for the furtherance of Iuſtice finall, and definitive, with ending of controverſie, by deciding it, according to the very right. For every ſeverall Action of ſuite hath a kind of Iuſtice, which may bee called interlocutory, in which a man may faile, though his right bee good and for want of forme before the Statute, which bred much charge and multiplicity of ſuits, and was alſo a hinderance of that definitive Iuſtice, which this Statute intends to further.

Now the moderation of this Statute is, that it doth not utterly reject forme: For, that were a diſhonour to the Law, and to make it in effect no Act: but requires only that it bee diſcovered and not uſed as a ſecret ſnare to intrap. And that diſcovery muſt not be confuſed and obſcure, but ſpeciall, therefore it is not ſufficient to ſay, that the Demurrer is for forme, but it muſt expreſſe what is the point, and ſpecialty of forme, that he requires. And ſo is the word and meaning of the Stat.

Now then the maine queſtion is, what is matter and what is forme within the meaning of the Law. The Stat. beſt expreſſed it ſelfe in this; For it divideth it ſelfe into two maine members, which are *membra dividentia.*

Demurrer generall what ſhall be forme what ſubſtance.

Firſt,

Firſt, what is imperfection of forme.

Second, the matter in Law or very right, *Scil.* the true, mere, or very right; to which muſt be added that which the Statute addes, that the right according to which judgement is to be given, muſt appeare to the Court within the body of the Record.

So now whatſoever it is without which the right doth ſufficiently appeare to the Court, it is forme within this Law: And ſo *è converſo* whatſoever is wanting or imperfect, by reaſon whereof the right appeares not, is not remedied as forme within this Law.

And therefore if an Executor or Adminiſtrator, bring an Action of Debt, and do not produce his probate or Adminiſtration, it is not holpen.

So if a man plead a conveyance of a rent or the like, that cannot paſſe without deed without producing the deed in Plea, it is not holpen: For it is not enough for the party, to ſay that is Executor, that the Rent was granted to him; but the Court muſt ſee and adjudge of it, or els the right appeares not, & the adverſe party may cauſe the deed to be inrolled, which makes it a part of the Plea, whereupon the Court ſhal judge whether it maintaine the Plea or not.

So if the meanes be wanting whereby the right ſhould bee made appeare, it is uncurable: as if a man bring an Action of debt upon an Obligation and produce it, but lay it made beyond Sea or in one Plea a demurrer ſerves. And for the ſame reaſon two affirmants without a traverſe is not holpen, becauſe it admits no tryall without which the Court cannot ſee the right.

If a man bring an Action upon an Obligation to performe an Award, the Defendant pleads no Award made, the Plaintiffe replies and ſhewes the Award, now here is a full iſſue, a Negative and an Affirmative; yet if the Plaintiffe doth not alſo aſſigne a breach, the Defendant may demurre generally, yet the breach was not traverſable, but the plea is between the parties that had an iſſue before. And this is but an *excreſcence* or *ſurpluſage*. But yet becauſe it doth not appeare to the Court that he had right or cauſe of Action without it, it is matter and not forme to ſet it forth for information of the Court. And this is a caſe of ſome ſingularity upon this Stat.

But now to the caſe in queſtion, the diſcent to *Millington* as coſin and heire is the ſubſtance and body of the Plea. And the reſt which is required under the vizt. is but a ſpecification and replication of the ſame thing by the manner how it is, which it not the point iſſuable, but the generall diſcent, as it is called in the caſe of challenge for coſinage, 14. *Eli Dyer*, 319. 4. *E.* 4. 3. & *Co. lib.* 8. 7. and note that this is a matter of Fact to be tryed by Iury, whether it were pleaded generally or ſpecially: So it is not like the caſes of not ſhewing deeds or the like, whereof we ſpake before, whereupon the Court is to judge.

Note

Note, *Wimbiſh* and *Talboys* Caſe, *Plo. Wimbiſh* and his wife plead, that ſhe was the perſon to whom the intereſt of the land did belong, after *Eliz. Talboys*; and the opinion of the Court was equal, whether that were reall or not: Yet that was at the Common-Law before this Statute, but indeed the plea followed the words. For the Stat. 11. *H.* 7. which were in the generall, whereupon they relyed that maintained the Plea, are leſſe certaine than this, for ſhe might be next either by diſcent or by purchaſe, or by reverſion or rem.

Now where it was objected by *Warburton*, that if the Pedegree had been ſet down, the Plaintiffe might have pleaded a Releaſe of any of theſe Anceſtors or pleaded Baſtardy in any of them: It was anſwered that the traverſe of the diſcent of the rent to *Millington* muſt have been the iſſue in both caſes, and muſt have ſerved, and ſo will, though the pedegree be not ſet down.

Note, that as a demurrer at Common-Law did confeſſe all matters formerly pleaded, ſo now by the Statute a generall demurrer doth confeſſe all matters pleaded, though informally according to the formes meant by the Law. For ſuch formes are now not materiall not being expreſſed in the demurrer.

295 Lord *Darcy* Verſ. *Askwith*. *Waſt.*

John Lord *Darcy* brought an Action of Waſt againſt *John Askwith*, and *Robert Marſhall*, upon a Leaſe made by one *Edward Corth* to one *Arthur Denly*, 34. *H.* 8. and had generall words, *Boſcis, boſcorum venditionibus, magno maeremio, magnis Arboribus, minor. carbonum*, &c. *in tam amplis modo &* &c. *prout* the *Leſſor habuit vel jure habere potuit*, for the terme of 180 yeares, and conveyed the reverſion to the Plaintiffe, and the Leaſe to the Defendant, and then aſſigned Waſt in felling Oakes. The Defendants plead that they felled thoſe trees for the making of pinchions, croſſe rols, roll ſcoops, and other utenſiles in and about certaine Cole Mines parcell of the demiſe, and without which they could not dig, and get the Coales out of the pit, and did beſtow the ſame Trees accordingly, whereupon the Plaintiffe demurred in Law.

Generall words will not give leave to fell Tymber.

And firſt, there was no queſtion made, that the Leſſees might fell Tymber, by force of the generall words, becauſe thoſe words are concluded under a Terme, which argues that it gives not the Trees as is reſolved 2, *Eliz. Dyer*, 194. And 13. *Eliz. Dyer*, 374, but the only queſtion was, whether by implication of Law, by Leaſing the Coale-Mynes the Leſſor gave power for the uſe of the Coale-Mynes. For the grounds were agreed *tempore E.* 1. *F.* Grants 41. that the Grant of a thing did carry all things included, without which the thing granted cannot bee had. But this caſe was adjudged by the

Court *una voce*, againſt the Defendant, for that ground is to bee underſtood of things incident and directly neceſſary. Thus, if I give you the fiſh in my waters, you may fiſh with Nets, but you may not cut the Banks to lay the Water dry. If I grant or reſerve woods, it implyes a liberty to take and carry them away. So the Law that allowes a Fyne leavyed by an Infant, allowes him likewiſe to declare the uſe; but in the principall caſe it was firſt agreed, that this ſhall be taken for a Myne opened ſince the Leaſe, becauſe that is ſtrongeſt againſt the Defendant that pleads. Now then if Mynes had not beene granted by ſpeciall name, it had been Waſt to open a Myne of new. For, it is generally true, that the Leſſee hath no power to change the nature of the thing demiſed, he cannot turne Meadow into Arable, nor ſtub a wood to make it paſture, 2. *H.* 8. 6. nor dry up an antient Poole or Piſcary, 5. *R.* 2. Waſt 97. nor ſuffer ground to be ſurrounded, nor decay the Pale of a Parke: For then it ceaſeth to be a Parke, nor he may not deſtroy nor drive away the ſtock or breed of any thing, becauſe it diſherits and takes away the property of ſucceſſion a villany, Fiſh, Deere, young ſpring woods, and the like; but hee may better a thing in the ſame kind, as by digging a Meadow, to make a Drayne or Sewer to carry away water.

A Leſſee may build a new houſe where none was before, but that muſt bee every way at his owne charge: For hee muſt neither take Tymber or other things waſtable, neither to build nor repaire it, though it be never ſo needfull. And yet if he keep not in repaire, an Action of Waſt lyes, though the Writ be in *Domibus dimiſſis*, 42. *E.* 3 22. 17. *E.* 2. 17. *E.* 3. *Fitz.* Waſt 118. And in the 11. *H.* 32. But if the Leſſor build a houſe after the Leaſe, the Leſſee is not bound to keep it in repaire, 29. *E.* 3.

Now upon the like reaſon, though it were no Waſt to open a Myne in this caſe, as it would have been if the demiſe had not been of Mynes by ſpeciall name; yet it is like a houſe new built for maintenance, whereof the Leſſee can fell no Tymber, and ſo much worſe, as a new houſe betters and increaſeth the inheritance, whereas the making and digging of Mynes decayes, and perhaps deſtroyes the Inheritance of the Myne. And therefore it is againſt reaſon to make one Waſt to maintaine another. And ſo the difference is apparent between this caſe and the liberties inclusive of Houſe-boot, Fire-boot, Hedge-boot, and the like, which all tend to the preſervation of the thing demiſed, and Plough-boot depends upon the favour of Tillage. This was the Iudgement of reaſon of this caſe, which I did deliver at the requeſt of the reſt of the Iudges for us all.

And I am of the ſame opinion, though the myne had been open at the time of the Leaſe, and though both Leſſor and Leſſee had uſed to take Tymber for thoſe purpoſes; For the Leſſor might uſe his owne

as

as pleaſed him, and the wrong of one Leſſee cannot warrant anothers wrong.

296. *Vicars* and *Langham.* *Error.*

A Writ of Error was brought in the Exchequer Chamber, upon a Iudgement given in the Exchequer between *Vicars* and *Langham*, and the error aſſigned was, that the Sheriffe of *London* have returned a Iury, and they being called and not appearing, the Plaintif prayed a Tales; And after the Iury made full by Tales, then the Plaintiffe challenged the whole pannell by exception to the Sheriffe, whereupon the Iury was quaſhed, and a new Iury impannelled by the Coroners; by which the cauſe was tryed.

Challenge may bee taken to the Pannell made by the Sheriffe, after a Tales prayed unto him.

Now the exception was, That the Plaintiffe having prayed a Tales to the Sheriffe and obtained it, was eſcaped to challenge the pannell for exception to the Sheriffe.

Eſtoppell binds not where it is inforced by neceſſity.

But it was reſolved, That there could be no exception, neither to the Pannell, nor to the Poll, till firſt there were a full Iury, ſo that the Iury not appearing full, there was a neceſſity to have a Tales, or elſe the challenge could not have beene taken: And ſo the cauſe would have remained *pro defectu Juratorum*, that the Plaintiffe had not paid it, for the Defendant would not, and ſo the Iudgement was affirmed.

And note that in this caſe there were none ſworne before the challenge, but only impannelled. But if the principall pannell did once appeare full, then the challenge muſt be taken to the pannell before any be ſworne, or elſe it comes too late.

Note, that where the Plaintiffe ſues his *Ven. fac.* to the Sheriffe he is not eſtopped thereby, to challenge the pannell for kind or otherwiſe that was before the *Ven. fac.* And though a Iury may bee challenged for a Cauſe happened ſince he was ſworne, yet the pannell cannot be ſo; for no ill affection of the Sheriffe ariſing ſince the Iury ſworn, can make the Iury ſuſpected that was impannelled before.

Common appurtenants ſhall be apportioned upon diviſion of land.

It was adjudged that whereas one had a common appurtenant to 10 Acres of land for all his beaſts, levant and couchant upon the ſame, and ſold part of it, That the Common ſhould be apportioned and every one ſhould have Common for his beaſts, levant and couchant upon his part: For, there are things entire in ſeverall degrees, ſome that cannot be divided by any of the parties, as warranty conditionall, and ſuch others, which yet by Act in Law are divided. But the caſe of Common is not ſo ſtrict and entire, and the miſchiefe and generality of the caſe requires an extention for the Common good.

Starchamber.

297. Counteſſe of *Shrewsburies* Caſe.

Star-chamber puniſheth refuſall to anſwer to the Councell in queſtiõ of State.

IN the *Starchamber* the Counteſſe of *Shrewsbury*, Dowager of Earle *Gilbert* was fyned 10000 l. and committed to the Tower for that, being called to the Councell Table, and interrogated what ſhe knew, or had heard, or thought of a ſuppoſed child that it was rumored the Lady *Arbella* ſhould have had, ſhee refuſed obſtinatly to make any anſwer, for it was judged that this was a queſtion of State; for there is not one thing that doth more concerne the peace of a Kingdome than the certainty of a Royall Lyne, inſomuch as ſuſpitious perſons have raiſed as great commotions and troubles in States, as the diſcords of two heires and diſcents. As in the caſe of *Perkin Warbeck*, here at home; and counterfait *Sebaſtian* of *Portugall*, and many others. And ſo this was an examination proper for the Councell Table, and of their Iuriſdiction and Cogniſance, and therefore to deny to ſatisfie the King and State in a point wherein they are ſo neerely intereſſed, is to deny a part of Allegeance, which requires all duties that tend to the good and preſervation of the State, and that no leſſe for the preſent than the future time. This Lady was the more preſſed to anſwer this matter, becauſe being more familiar and inward with the Lady *Arbella*, than any other, ſhe muſt needs have ſatisfied the rumor, for all men of underſtanding thought it to be untrue.

298. *Traskes* Caſe.

Star-chamber puniſheth factions & conventicles though they bee upon greunds of Hereſie & Schiſme.

IN the Star-chamber likewiſe one *John Traske*, a Miniſter that held opinion that the Iewiſh Sabbath ought to bee obſerved, and not ours, and that we ought to abſtaine from all manner of Swines fleſh; being examined upon theſe things, he confeſſed that he had divulged theſe opinions, and had laboured to bring as many to his opinion as he could. And had alſo written a letter to the King, wherein he did ſeeme to tax his Majeſty with Hypocriſie, and did expreſly inveigh againſt the Biſhops high Commiſſioners, as bloudy and cruel in their proceedings againſt him and a Papall Clergy.

Now he being called *Oretenus*, was Sentenced to Fyne and Impriſonment, not for holding his groſſe and ſuperſtitious opinions, (for theſe were examinable in the Eccleſiaſticall Courts, and not here) but for making of Conventicles and Factions by that meanes, which may tend and lead to ſedition and commotion, and for open ſcandalizing the King, the Biſhops and the Clergy.

299 Counteſſe of *Exeter*, Verſ. Lady *Roſſe*. *Star-chamber.*

5. Caſe.
What examinations bind in the Star-chamber.

IN the Star-chamber in the great Cauſe betweene the Counteſſe of *Exeter*, the Lady *Roſſe*, and one *Sarah Swarton* her Maid; had charged the Counteſſe of *Exeter*, that ſhe had delivered unto the ſaid Lady *Roſſe* at *Wimbleton* at the Earles houſe in a certaine Chamber, there a paper written and ſigned by her ſelfe, (as ſhe ſaid) containing a confeſſion of certaine foule faults, and a ſubmiſſion thereunto: which was ſhewed unto the King. His Majeſty commanded Sergeant *Crew*, and Sergeant *Moore* of Counſell of either ſide, to go to *Wimbleton*, and there in the ſame chamber, to examine the Lady *Roſſe*, and *Swarton*, upon all ſuch things as upon their view of the place, they might judge likely to diſcover the truth or falſety of the ſame matter; which they did accordingly without Oath. Now the ſame perſons being afterwards examined in Court as Defendants, upon all things that the Plaintiffe liſted, they did further examine them upon Interrogatories, whether that Declaration which they had made at *Wimbleton* before the two Sergeants were true or not, but they did not ſhew them that Declaration, now whereupon they anſwered that they were true.

Now upon motion in open Court, it was reſolved that theſe examinations were not well taken, for no man is bound by an examination in Court, till firſt he have adviſedly read, peruſed, and corrected it, as he ſees cauſe, and then finally concluded it. Therefore this being firſt taken without Oath, there was no reaſon to bind them to it by a new Oath by memory without review, and therefore by order it was ſuppreſſed. Nevertheleſſe becauſe it was like that the ſaid examination might ſerve the better to diſcover truth; it was ordered that the ſame their declaration ſhould be ſhewed them, and they re-examined upon them. And ſo they were.

300. *Philip* L. *Stanhop* Plaintiffe, the *Biſhop* of *Lincoln*, *Miles Williams*, and *Iames* Defendant *in* *Quare Imped.* *Quare Imped.*

THe Plaintiffe declares that the Prior of *Shelford*, was ſeiſed of the moity of two parts of the Church of *Rippingale*, and S. *John Denham* of the other moity to preſent by turnes.

Vſurpation upon a leaſe how it works upon the reverſion being heire or purchaſor.

That the Church being full of one Brerely, The Prior with conſent, *&c.* Did grant the next avoydance unto *Bryan Higden*. Then he ſhews the diſſolution of the Priory, being under 200 l. *per annum*, by the Stat. of 23. *H.* 8. whereby the Priory is given to *H.* 8. and all Advouſons, Rights, Entries and Conditions belonging to the Prio-

There are no perſons relieved but thoſe that are heires, or in degree of heires, that is, in and by Inheritance and diſcent of the Advouſon wronged; wherein the words of the Law are full, for it is not penned in the word of Inheritance: as thus, whoſoever uſurps upon an Advouſon of Inheritance of an Infant, or a man of full age, in the time of a Guardian or Tenant for life, or the like: *Non fuit ita prejudicialis*, is equivocall. For, the word *hæreditas*, is indifferent, and hath relation as well *ad infra*, as *ad ſupra*, as well to the time deſcending, as the time aſcending. And therefore an Eſtate of Fee ſimple, that I have purchaſed, is not improperly called my Inheritance, becauſe it may deſcend and be Inherited from me as well as that which I Inherit from another, and deſcends to me as *Littleton*, hath it, and for this reaſon *fo.* 3.

And ſo the writ is of the wives purchaſe in her *cui in vita quod clamat eſſe jus & hæreditatem ſuam*; but the Statute is penned in the word *hæres* or *hæredes*, which is ſingle and not to be ſtrained, but to that hee hath heire. And therefore in the preamble it puts two caſes.

Firſt, *hæredes infra ætatem exiſtentes per fraudem & negligentiam Cuſtodis.*

The ſecond, *hæredes etiam, ſive Majores, ſive Minores per negligentiam vel fraudem* of Tenant, by Curteſie, Dower, Life, Yeares, or Tayle were many time diſ-inherited, or at leaſt put to their Writ of Right, and in caſe were altogether diſherited.

Then follows the Purview, which two branches anſwer the two branches of the Preamble, *Statutum eſt quod hujuſm. preſentationes non ſint hujuſm. rectis hæredibus* (ſupply *infra ætatem & in cuſtodia exiſtentibus.*) *Aut illis* (ſupply *hæredibus ſive majoribus ſive minoribus, ad quos poſt mortem Aliquorum* (ſupply *vel terminum annorum*, &c. *hujuſm. advocationes reverti debent. ita prejudiciales quotieſcunque aliquis jus non habens tempore hujuſm. cuſtodiarum preſentaverit*, (there is your firſt branch carried through.)

Then follows the ſecond branch carried through, *vel tempore* of the Tenant in Dower, Courteſie, Life, Yeares, or Tayle, *in proxim. vacationem, poſt quam hæres ad ætatem pervenerit.*

There is the firſt clauſe anſwered again, *vel advocatio poſt mortem tenentiam in forma prad' ad hæred' plenæ ætatis revertitur, habeat ſcil. id' hæres, eandem Actionem & recuperationem per breve poſſeſſionarium qualem haberet ultimus hujuſm. hæredis.*

So you have been throughout all places and caſes of the Preamble, and in the Purview laid forth together. And the ſtrength of the *Proviſo* is, *habeat eandem Actionem*, &c. *qualem haberet ultimus anteceſſor hujuſmodi hæred'.*

Theſe are the *verba remedialia vel operativa*, the reſt make the caſes; theſe

theſe give the remedy, and are bounded within theſe words [*heires*] whoſe anteceſſors had right to the Advouſon.

It is never theleſſe true, that there is another particular Purview made for the Relief of women covert by the word *hereditas*, and not heires, thus, *Hoc idem obſervetur in preſentationibus factis ad Eccleſias de hæreditate Uxoris tempore, quo fuerunt ſub poteſtate Virorum ſuorum, quibus per iſtud Statutum ſubveniatur per remedium ſupradictum.*

And becauſe the word (*hæreditas*) is indifferent, and the former Purview is made the Rule and Preſident of this (for there is no expreſſe forme ſpecially given them) but hoc idem obſervetur, *&c. Et per remedium ſupradictum*, and there is no cauſe to reſpect the wife purchaſer, therefore this clauſe is to be underſtood of wives that are heires as well as the other.

And if it be objected that the Stat. ſpeakes of ſome that were utterly diſherited by ſuch uſurpations, which cannot be but in caſe of a purchaſor, for otherwiſe a Writ of Right will lye.

I anſwer, that if a man before this Statute had purchaſed an Advouſon, and before preſentation had made a Leaſe and a uſurpation had been upon the Leaſe, the heire had been without remedy, but now by this Statute he may have a *Quare Imped.* at the next Avoydance after the Leaſe, and may lay the laſt preſentation in his fathers Grantor. According to the words of the Stat. *Actionem qualem anteceſſor*, &c. For by the Stat. the uſurpations upon the Leaſe are to be paſſed and counted as none to this purpoſe.

And though I hold the Stat. to the Letter in this caſe of heire, becauſe the Statute is ſo conſtant in it, and the received expoſition hath beene ſo, yet I allow divers equities where the reaſon is the ſame with the word.

And therefore, for equities I allow, that ſucceſſors are relieved by the Statute as well as heires, but with this diſtinction, ſucceſſors of ſingle Corporations, as Biſhop, Deane, Prior or the like, and ſo is *Brooke* his Preſentement 46. and *Boſwels* caſe, 34. *H* 6 27.

But of complete and compounded Corporations, I hold it contrary, for the ſame body continues that committed the Saches, which is the reaſon of the difference taken in *Croſſe* and *Howels* caſe.

In caſe of Non-claime upon fines againſt an heire within age, I hold relievable as well that that is not in ward, as that which is in ward, and though the uſurpation be upon himſelfe, the Advouſon being in his own hands and not in Leaſe.

Again, if an Infant heire ſuffer uſurpation, and then another avoydance, and then another avoydance fall in his Nonage: I hold that he may have his *Quare Imped* for that ſecond, though the words bee *poſtquam hæres ad ætatem pervenerit.* For, that clauſe was put to anſwer the particular caſe of the heire in ward, put in the preamble

where the Guardian had ſuffered uſurpation. In which caſe the Stat. ſaines the ward could have no title till his full age. I hold it cleare that if a Gardian ſuffer uſurpation, and then will ſurrender to his ward, that the ward ſhall not be relieved at any other Turne during his nonage, becauſe he ſhall be counted in by the Gardian to this purpoſe. But if a Gardian in ſoccage or his ward, after 14 yeares of age, ſuffer a uſurpation, he ſhall be within the reliefe at any other turne before 21.

And therefore, I deny the opinion of *Thorpe*, 16.*E*.3. *Fitzh. Quare Imped.* and *Brooke* 262. For it was the meaning of this Law, to ſuccour the weakneſſe of an heire within age, when he maketh a fault, but not to inforce him to ſuffer wrong.

It is true that in ſuch caſe he cannot have a *Dum fuit infra atatem*, for the incongruity of the writ, yet in that caſe he may enter. But in the *Quare Imped.* there will be no incongruity. Again, I am of opinion that if an uſurper be had upon one vizt. ſo neare that at the next turne after his birth, hee ſhall be relieved contrary to the iſſue taken, 11.*E*.3. *Fitzh. Quare Imped.* 158. For ſuppoſe the heire then *in eſſe*, being a daughter were relievable in reſpect of her Nonage, were it reaſonable that the ſame after borne (to whom the wrong is done) ſhould leeſe that reliefe. Beſides this, the ſpeciall Purview of that Stat. for Prelats to be relieved againſt uſurpation in the vacation of their Prelacies is altogether of the ſame nature and reaſon.

Again, a grant of the next Avoydance is within the equity though he be not a Leſſee for yeares, 34 *H*.8. 27. A rem. is within the Stat. as a Reverſion.

A purchaſor may be within the Law, as if one make a Leaſe for yeares, and the reverſion deſcends to the heire who grants it away to *I.S.* and then the Leſſee ſuffers a uſurpation and the Leaſe ends: *I.S.* at the next turne ſhall have a *Quare Imped.* for he is in *loco hæredis*, who was relievable, if he had kept the reverſion.

An iſſue in Tayle is within the remedy of this Stat. upon an uſurpation upon tenant in tayle, yet there is no word for him but for the reverſion, 43.*E*.3.20.43.*H*.6.27.46.*aſſ*.4.

Now to the ſecond point of the firſt great point, *ſcil.* in what great caſes the reliefe lyes, for the heire or ſucceſſor.

I hold it firſt cleare, that if a man have an Advouſon by deſcent, and being of full age, makes a Leaſe of it, upon whom an uſurpation is made, and then the Leaſe ends; the heire at the next Avoydance ſhall not have a *quare Imped.* for by making a Leaſe by himſelfe, hee is party to the negligence and wrong: And the word (*heires*) throughout the Law imports, that hee ſhould bee the heire of the reverſion wronged by the Gardian and other tenants, which hee could not helpe.

And

And the laſt clauſe is more plaine, which gives ſuch action as the anceſtors ſhould have before the demiſe, ſo the demiſe muſt not bee made by him that is relieved, but by his Anceſtors. Yet 33. *H.* 6. 12. & 34. *H.* 6. 27. admit the contrary in pleading, but *Fitzh. Natura br.* 31. *G.* agrees with my opinion. And though the new entries, *quare Imped.* 27. *Eliz.* the Queen made a title to the Church of *Aſhton*, and declared of a uſurpation upon the Priory of *C.* which was ſurrendred to K. *H.* 8. and now the Church voyded again, the Defendant pleads a good part of the Advouſon and traverſed the uſurpation, and ſo I left though I accompt no authority. For the Defendant, having a cleare title by the Grant to avoyd the pretended uſurpation had no reaſon to admit it an uſurpation, as he might have done if he had demurred. But no man will hold that if a Biſhop in poſſeſſion of his Advouſon, ſuffer an uſurpation, his ſucceſſor ſhall have a *quare Imped.* at the next avoydance: And therefore 7. *E.* 3. *Fitz. quare Imped.* 21 A Prior Defendant avoyded a preſentment, becauſe it was made in time of Vacation; but the other replyed that it was in the time of his Predeceſſor, when the Church was full, which was holden ſufficient to put the Prior ſucceſſor, from his poſſeſſory action or defence to a writ of right. And the reaſon is plaine, That when a Prior or a private perſon ſuffers an uſurpation, he himſelfe is put to a writ of right, and then the ſucceſſion or deſcent cannot change it to a *quare Imped.* for the uſurpation had wrought his full effect, as at the Common-Law out of the reliefe of the Stat. ſo as the caſe would never fall within the remedy of the Stat. after.

And in the great caſe 35. *H.* 6. 62. *Danby* and *Preſcot* agree, that if one uſurpe upon an Infant, that is an heire, and the Infant come to age within 6 Months, and remove not the incumbent by ſuite, he is out of the Stat.

Now to the third point of the firſt great point, how the Stat. works the remedy, it is not by making the uſurpation voyd, and ſo leaving the poſſeſſion with the right; but by giving a poſſeſſory action to recover the Advouſon, which at the Common-Law was not recoverable but by writ of right. And therefore the *verba remedialia & operativa, habent eandem Actionem & recuperationem, per bre. poſſeſſionis*, &c. *non eandem poſſeſſionem qualem*, &c. And it is cleare, that if a uſurpation be upon a leſſee, though the reverſion be in an heire, yet the leſſee himſelfe is without remedy for ever. 3. Point of the firſt great point.

Now the uſurpation cannot give a Fee in the Advouſon during the Terme, but it muſt be the whole Fee, which cannot returne to the heire upon the expiration of the terme, without an Act amounting to an eviction: And therefore 16. *E.* 3. *F. Na. br.* and *Boſwels* Caſe do all agree: That the Infant in ſuch caſe cannot grant an Advouſon, becauſe he hath but a right, and in this point the Statute hath made no

change, but hath left the poſſeſſion with the uſurper, and hath given the uſurper a readier action, and 6 months more than he had. And therefore, I am of opinion that if a man uſurp upon me, and his Clerk be inveſted, he hath gained the Advouſon, though the Clerke dye within 6 months, but if he dye ſo, I may have a *quare Imped.* or preſent the next turn, becauſe the plenirty doth not bar my action, till the 6 months incurred by reaſon of the Stat.

But if a man uſurp upon the King, the Kings preſentation is not taken away by induction, the King may have a *quare Imped.* as long as the uſurper or incumbent lives, but he cannot remove him without ſuite, but at the next avoydance the King may preſent again: For, though he may be diſpoſſeſſed of his preſent preſentation, hee cannot be ſo of his Advouſon, and therefore he may ſtill grant it; notwithſtanding the uſurpation, as was judged in a writ of errour, upon a judgement given to the contrary, between the King and *Campion*, for the Vicaridge of *Newton Valence*.

But a Collation being right or wrong, gives no Patronage, as is *Greens* Caſe, and *Boſwell*, *N.* 1. 29. 50.

Now though the Stat. doth not give the poſſeſſory Action, yet I hold clearely, that by the intent of the Stat. and by conſequent it gives liberty to preſent alſo upon an avoydance: For the tenor of the *quare Imped.* which is given *quod permittat ipſum preſentare*, ſo the meaning of this Law was to give poſſeſſary action or preſentment in nature of a Reentry, like the two Statutes of 32. *H.* 8 giving the wife an Entry upon the husbands diſcontinuance, and the Defendants iſſue or entry, the diſſeiſors heire.

Now as the rightfull Patron may preſent, ſo I hold clearely that the ordinary muſt in this caſe, as in all others beare himſelfe, that is to do nothing but as ordinary.

If the Church be litigious between the uſurper and the other to avoyd his *Iure patronatus*, but if he will chuſe the Clerk of either at his perill, hee muſt at his perill receive him that hath right by this Statute.

And it is no defence to ſay, that the uſurper preſented laſt, for this is no proofe or colour, that he hath right now: And the ordinary, that is to bee indifferent, and for whoſe ſafety the Law hath provided the *iure patronatus*, muſt not prejudge right, but at his perill.

Out of this diſcourſe the concluſion is, That if the uſurpation upon *Higden*, the grantee were in the time of the ſame Abbot, that made the Grant; that then aswell the Abbot as his Succeſſor muſt have beene put to their writ of right, notwithſtanding this Stat. and by conſequence the Stat. of Monaſteries could not have brought a right to the King nor from the King, to *Stanhope*.

And in this point is found uncertainty by the Iury, for the Grant

of

of *Heydon* was 21. *H.*8. and the uſurpation 25 *H.*8. and from the beginning to the ending, there is but one Prior named *Henry*, and ever after it is followed throughout the whole caſe, *pred'* Prior *eidem* Prior, ſo that the preſumption is rather againſt the Plaintiffe.

It is true, that if a man plead a Grant of a next avoydance from a Prior, he muſt averre his life, or elſe he muſt be taken dead, not out of any appearing in the Plea, but out of a rule in Law, that every mans Plea ſhall be taken moſt ſtrongly againſt himſelfe, becauſe every man is ſuppoſed to be partiall to himſelfe, and to make the beſt of his owne caſe. But in a Verdict it is not ſo, for that is and ought to be indifferent to both parties.

But now to the ſecond great point, take the caſe at the beſt, that the uſurpation upon *Higden* had beene in the time of a Prior ſucceſſor, ſo that hee might have a *quare Imped.* at the next avoydance, whether the K. ſhall have this *quare Imped.* by the Stat. which gives *Advocationes, jura, ingreſſus, conditiones*, &c. 2. great Point.

If a diſſeiſee dye without heire, or be attainted of felony, the Lords of whom the land is holden ſhall have his right of Entry by Eſcheat, and ſo ſhall the King in a caſe of Treaſon at the Common-Law; not ſo, if the diſſeiſor had dyed ſeiſed, as is agreed in the caſe of the Marqueſſe of *Winchester*, *Co. lib.* 3. *fol.* 2. becauſe attainders by Parliament are but limitations of attainders at the Common-Law and ſhall be of no other force, except the words be ſo expreſſe as can admit no doubt; as where it gives uſes and conditions. But the word *(rights)* is ſatisfied in the rights of Entry, ſo the word forfeiture gives but the title and inveſts no poſſeſſion. Actions, Rights and Entries, what are given to the K. by the Stat. of diſſolution of Monaſteries or for Treaſons, or to the L. by Eſcheat.

The King could have no action againſt the heire of a diſſeiſor: firſt, becauſe he had a lawfull tenement by title: ſecondly, becauſe he could not recover but by action, which could not be forfeited to the Lord; and therefore though he might enter upon the diſſeiſor, yet he could not have an aſſize upon the diſſeiſin done to his tenant, becauſe hee could not ſay, that he diſſeiſed him *in libero tenemento*.

Now the ſcrupule of our caſe conſiſteth in this, that it participates of both theſe caſes, and which ſhall be predominant, is the Queſtion.

For at the Common-Law there had been no queſtion of remedy, but a writ of right, which the K. could not have had by the Stat. of Monaſteries, and the Stat. of *Weſtm.* hath changed the action into a *quare Imped.* but hath not otherwiſe changed the nature or force of uſurpations. And therefore I am of opinion irreleviable by a *quare Imped.* upon this Statute dye without heire, the Lord by Eſcheat, ſhall not preſent, nor have a *quare Impedit*. The like I hold upon the ſecond Statute, 32. *H.*8. where the wife hath entry upon the diſcontinuance of her husband, or the diſſeiſed upon the heire of the diſ-

deſſeiſor. For, though entry be given in theſe caſes, yet they are in the title as they were before. And the Common-Law will not extend it ſelfe to irregular entries, that are given by ſpeciall Stat. differing from the reaſons of the Common-Law.

Now I hold nevertheleſſe that the Stat. of Monaſteries ſhall give his preſentation to the King, by the name of *Jura & Ingreſſus*, the Kings preſentation being for this caſe a kind of entry or claime, and ſo may have a *Quare Imped.* For the writ is proper enough for him, *quod permittat ipſum preſentare* for the preſent diſturbance done to himſelf. Not like the caſe of an Aſſize of wrong done before, and the ſame I hold upon the ſame two Stat.

Then if a woman have cauſe of entry upon the diſcontinuance of her husband or a deſſeiſed upon the heire of the deſſeiſor & then be attainted of Treaſon, that the K. upon the Stat. 33. *H.* 8. of Treaſon may upon Office ſeiſe thoſe lands by force of the words of that Law that gives the K. all right of entry. Of which ſort this is, and which hath been the miſchiefe that the Marqueſſe of *Wincheſters* caſe ſpake of privily of Action, and endleſſe vexation upon obſcure titles. Though it be true, that if a wife will take an Action, it muſt be a *Cui in vita* at the leaſt, and the deſſeiſee an *Entre ſur diſſeiſin*, which the King cannot have.

3. great Point. Now to the third and laſt great point, I am of opinion, that though this right of Advouſon and the preſentation to it, and Action of *Quare Imped.* for it to be given to the King; yet it is not well conveyed from the King to *Stanhop*. The reaſon is, that the Vſurper hath gained the Advouſon in poſſeſſion, and hath left in the Prior, and ſo in the King nothing but a right, though hee bee within the reliefe of the Stat. of *Weſtminſter*, which right cannot be conveyed away by a Subject, and therefore muſt paſſe by Prerogative, whereof the rule is, That nothing of Prerogative can paſſe without expreſſe and determinate words; As is reſolved in the caſe of Mynes. *Flo.* And therefore it will not paſſe by the word Advouſon, for it is no Advouſon *de facto*, nor by the word (*hæreditament*) being a word doubtfull and ambiguous, which ſhall never be taken againſt the King, in a ſtrange ſenſe, nor by the generall word of rights, without a ſpeciall mention and recitall of the particular right, which is meant to be granted, as was reſolved in *Bromers* Caſe, 8. *Eliz.* cited in *Doughties* Caſe, *Co. lib.* 3. *fol.* 11. and there affirmed for Law by the whole Court. In which caſe of *Doughties*, it is alſo judged, that the Statute of Treaſons, which puts the King in actuall poſſeſſion, doth remove the poſſeſſion of the deſſeiſor, but leaves the right in the King till leiſure.

Now this Grant of the King hath no ſpeciall Grant of this right, not ſo much as the word (*Jura*) in the nature of naked rights; For it is but in two places. The one is *Maner. de Shelford cum ſuis juribus*, which is of another nature. The other is of *Jura, Juriſdictiones, poſſeſſiones*,

ſeſſiones,&c. which are alſo of another kind. Now this Stat. of Monaſteries gives to the King amongſt other things, Rights, Entries, and Conditions; and then enacts that the Kings Patentees ſhall have any manner of Lands, Entries, and Conditions, contained and ſpecified in their Letters Patents, according to their tenor, and purport and actions for any thing therein contained; And that the King ſhall have the ſame in actual and reall poſſeſſion, ſo that he may grant them without Office, and it hath a ſaving of the poſſeſſions and rights of ſtrangers.

For, it is plaine according to the Rule of *Doughties* Caſe, upon the Stat. of Treaſon, which is of the ſame words and effect, and where the Parſon or Abbot, attainted of Treaſon was out of poſſeſſion, and had but an *Entrie*, that there the King was not to have actual poſſeſſion of the Land it ſelfe, and then it had beene in vaine to have given him Rights and Entries, and more vaine to ſave the poſſeſſion of Strangers.

Now if the King have nothing but a naked right, without poſſeſſion of the Advouſon, it is plaine that the Grant extends not to it, as hath been ſaid, neither can it be ſaid to be contained, much leſſe ſpecified in the Letters Patents; which words require ſuch a ſpecification, as the ſame requires the Kings Grant, and therefore if the King ſhould have granted Abbey-lands, with all Mynes found or to bee found within the ſame, this would not by the helpe of the Statute paſſe Mynes Royall; For the tenor and purpoſe of the Patent would not import it, no though the Abbot had had them, and the Grant had beene of all Mynes, in as ample manner as the Abbot had them.

Laſtly, the iſſue is joyned that the King granted the Advouſon, which is not true. For though it be true, that if the King had granted the right of Entry and Action, that the grantee might have had it, yet ſtill the grant muſt be pleaded, as it is in Law a grant of the right and not of the thing it ſelfe.

My three brethren had argued all before, and had concluded for the Plaintiffe, but they held (though not alike) that reverſions, as well of full age as within age, and as well of their own leaſe as of the leaſe of their Anceſtors or Predeceſſors, whoſe heires they were within the remedy of the Law, and that the Law preſcribed the poſſeſſion for the reverſion, though not for the Leſſee, and ſo made a kind of baſe fee by wrong during the leaſe in the uſurper, which was *Huttons* opinion. Things heard and not warranted in my Iudgement.

And ſo Iudgement was given for the Plaintiffe.

False Imprif.

301. *Peter* Verſ. *Stafford.*

Cuſtome. Court of Record.

George Peter Attorney, brought an Action of falſe Impriſonment againſt Sir *John Stafford* and others, for Impriſoning him at *Briſtow*. The Defendants plead that time out of mind, there hath been a Court of Record holden at *Briſtow* every Monday before the Major, *&c.* according to the cuſtome and liberties of the ſaid City, and that according to the ſaid Cuſtome, Sir *John Stafford* levied Plaint there againſt the Plaintiffe, whereupon the other Defendants, being Sergeants, were commanded to arreſt him, which they did. The Plaintiffe tooke iſſue that Sir *John Stafford* did levy no ſuch plaint *prout*, and it was found for the Plaintiffe. And it was ſaid in Arreſt of Iudgement, that it ought to have been tryed by the Record. But the Court reſolved that it was well tryed, for the matter of Record was mixt with matter of fact, that is, whether the Court were kept, and the Plaint levied, according to the cuſtome and the liberties of the City, which is a matter of fact tryable per *pais*: Alſo the levying of a plaint is like the ſuing out of an Originall, which is not of Record till it be returned in Court.

And ſo the Plaintiffe had Iudgement in this caſe.

Debt.

302. *Eſſington* Verſ. *Bourcher.*

Debt againſt divers Defendãts one alone wageth Law.

Eſſington againſt *Bourcher* Knight, *Turner* and others, brought an Accũlation of Debt of 1500 l. upon *a ſimul computaverunt*, and an *arere* of 1800 l. whereof all the reſt paid. *Bourcher* was out-lawed, *Turner* and the reſt appeared by one *ſuperſedeas*; *Turner* alone tendered his Law, that he with the reſt did not owe *&c.* And the others not out-Lawed did plead to the contrary. And it was objected againſt *Turner*, that he was not to bee admitted to his Law alone becauſe they were all charged as one defendant, being for a joynt debt, and ſo they muſt anſwer together. But it was anſwered, that this was unreaſonable, for ſo by joyning with me as joint defendants, I muſt be ſubject to his Plea, though he would confeſſe the Action. Now though the Defendants ſhall not ſever in Delatories, yet in Bars they may.

And after divers motions, there were Preſidents produced, one in *Tr.* 12. *Iac. rot.* 2226. where one of the Defendants alone waged his Law, that he and the reſt did not owe, and the reſt *nihil dicunt, & parcatur judicium*, till the Law made or failed.

And after, the Law being made, Iudgement againſt the Plaintiffe. And ſo in this caſe *Turner* was received to his Law, and the Plaintife Non-ſuite.

303.

303. *Pie* Verſ. *Weſtly*. *Information.*

Pie did informe againſt *Weſtly* Inne-holder, for uttering of fleſh, 30 dayes forbidden, *Unde petit adviſamentum Cur. & quod foriſfaciat* 5l. for every offence, *unde ipſe petit medietatem* upon not guilty, it was found againſt the Defendant, and now it was ſaid in arreſt of Iudgement, that there was a Statute *ſcil.* that gives 5 l. for an offence, but then it divides it one third part to the King, another to the Informer, and the third to the poore: *Et Curia adviſare.* But I am of opinion that the Information is inſufficient, for an Information hath not only ſomewhat in it of an Indictment to lay down the offence, but hath alſo the nature of an Action, for the Party to demand his due as in another Action, which is his Office to demand certaine, and not the Courts to aſſigne; therefore if he make no demand, or demand that appeares not to be due, his Information is inſufficient.

Informatiõ muſt conclude with the demand of the Informer.

304. *Bickford* Verſ. *Bickford*.

Bickford an Adminiſtrator brought an action of Debt againſt *Bickford*, and after iſſue found for the Plaintiffe, it was ſpoke by *Chibborne* in arreſt, that the action was brought the 2 of *Aprill* 16. *Jac.* and the Adminiſtration was laid in the Declaration granted the 11. of *May* after. So the Iudgement was ſtayed.

305. *Maſon* Verſ. *Grafton*. *Caſe.*

Maſon brought an Action of the caſe againſt *Grafton*, for goods inbeſelled out of his Inne, and found for the Plaintiffe. In arreſt it was excepted that he had not alleged it to bee in *Cõmuni Hoſpitio*. *Quære* if both in the writ and declaration; Yet becauſe the Declaration laid that he was *Hoſpes in hoſpitio*, of the Defandant, the Plaintiffe had Iudgement, For it ſhall be intended that it is *Domus non Hoſpitium*, if it be not common.

Action againſt an Hoſteler not laying *Commune Hoſpitium*.

306 *Harris* Verſ. *Ap Iohn*. *Treſpaſſe.*

Treſpas by *Harris* againſt *Ap-Iohn*, after Verdict it was found that the *Ven. fac.* and *Habeas corpus*, was *de placito debiti*. And the Court amended it.

Amendment *de placito deb.* for Treſpas.

307. *Hackford* Verſ. *Parker.*

Obligation.

Delivered as a Scroale.

Debt per Hackford *Verſ.* Parker, *ſur Obligation:* The Defendant pleaded that he delivered the writings to the Plaintiffe himſelf, as a ſcroale upon condition, *&c. Et iſſue nient ſon fait*, and demurred Iudgement againſt the Defendants, without Arguments.

308 *Anonymus.*

ACtion upon the Statute of *Huy & Cry per* Conſtable, *viri homines inhabitantes in dimidio Hundredi de Waltham Apres Verdict fuit acccept*, and Preſident there ſhewed of a like Action, *Viri inhabitantes in Hundredo de W. communiter vocat.* halfe hundred of W. And yet the Court gave Iudgement in this caſe for the Plaintiffe. For the Court may well intend it indeed to be a whole hundred, and ſo but cald halfe, and it was indeed an Hundred Court by it ſelfe, and otherwiſe it ſhould have been ſo pleaded or given in evidence.

Covenant.

309. *Norton* Executor of *Iames Hobart* againſt one *Molineux* and *Ford.*

Adminiſtrator during the minority of the Executor of an Executor, how he ſhall be named.

NOrton Executor of *Iames Hobert*, brought a writ of Covenant againſt *Molineux* and *Ford*, Adminiſtrator of the goods of *Thomas Carrell*, during the minority of *Mary Molineux*, Executrix of the ſaid *Thomas Carrell*, late Executor of *Thomas Carrell*, for payment of an Annuity, Iſſue *non eſt factum*, found for the Plaintiffe. It was pleaded in arreſt by *Towes*, that the Defendant ſhould have been named adminiſtrator of the goods of *Edward*, not adminiſtred by *Thomas*. But the Court being informed by the Prothonotaries, that this was the antient forme; Iudgement was ſaid for the Plaintiffe, if the children had been Defendants, they ſhould have been named but executors of the executor, for the reſt follows but the committing of adminiſtration is of goods, but the preſidents rule in the Tilling.

Debt.

310. *Leeſe* Verſ. *Arrowſmith.*

Amendment of the imparlance Rol, by the writ Original.

LEeſe brought an action of debt againſt *Arrowſmith*, for 300 l. and the imparlance roll, *&c.* the Count was upon the ſale of divers parcels to ſeverall ſomes, all making up 294 l. But after the count upon the Plaint. rol was right, and upon *nihil debet*, it was found for the Plaint. although the imparlance roll could not be amended by the after roll, yet becauſe *Bayle* the Plaintifs Attorney affirmed that his Inſtructions to the Clerke were right, it was amended by the Court.

311.

311. *Smith* Verſ. *Dinnell.*

Smith and other Church-wardens in *Ridgewell* in *Eſſex*, preſented to the Arch-Deacon, that one *Parnell* was a rayler and a ſower of diſcord between Neighbours, whereupon the Arch-Deacon enjoyned him purgation; and the Court awarded him prohibition, for the Cauſe belongs to the Leete and not to them, except it were in the Church and the like.

Court Eccleſiaſticall medleth not with rayling

312. *Wats* againſt *Conisby.*

Court Eccleſiaſt.

Elizabeth Wats wife of *Edward Wats* libelled in the Spirituall Court againſt *Iane Coninsby*, for a Legacy of 100 l. The Defendãt pleads the releas of *Wats* the husband after marriage, and there were no witneſſes to the releaſe but both dead, and therefore not allowed, whereupon Prohibition was granted concerning this averrement, that the witneſſes were dead, and that they offered to prove by witneſſes that it was the hand of witneſſes dead, and that *Wats* the husband confeſſed that he ſubſcribed to the releaſe.

Court Eccleſiaſticall refuſeth cõpetent proofe in prohibition.

313. *Luch's* Caſe.

Orphans.

John Luch was brought to the bar by *habeas corpus cum cauſa* directed to the Major, Alderman and Sheriſs of *London*, who verified the cauſe as followeth. That there hath been a Court of *Orphans* time out of mind in *London*, and that the cuſtome hath beene, that if any Freeman or Freewoman dyed, leaving Orphans within age unmarried, that they have had the cuſtody of their bodies and goods, and that the Executors & Adminiſtrators have uſed and ought to exhibit true inventories before them, and if any debt appeares to become bound to the Chamberlaine, to the uſe of the Orphans in a reaſonable ſome to make a true accompt upon Oath of them after they be received, and if they refuſe, to commit them till they be bound, and then ſhewed that one *Iane Cuttler* widdow, being a Freewoman Fiſhmonger, dyed leaving divers Orphans, and that this man was Admi. and had exhibited an Inventory of 1000 l. debt unreceived, and was required to give bond of 2000 l. *ut ſup.* who refuſed *per quod*, &c. And it was alleged for the priſoner, that he was already bound in the prerogative Court to make accompt and ſo hee ſhould be twice bound. Alſo he was informed that there was no ſuch cuſtome for widdows of Freemen. But the ~~truth~~ Court anſwered that they could not examine the truth of the Cuſtome, but the validity of it, and they held it reaſonable enough, if it were true. And if the Eccleſiaſticall Court would

Cuſtome for Executors to give bond in Court of *Orphans*, as well as in the Eccleſiaſticall Court.

Prohibition to Court Eccleſiaſticall, if they intrude into Court of *Orphãs*

would impugne a lawfull cuſtome this, Court might grant a Prohibition.

Prohibition.

314. *Scot* Verſ. *Wall.*

Prohibition where the Parſon demands tithe according to a cuſtome.

INter Scot and *Wall*, The Plaintiffe had a prohibition containing, that where he had 20 Acres of Wheat, and had ſet out the 10 part of it, that the Defendant pretending that there was a cuſtome of Tything that the Owner ſhould have 54 ſheaves and the Parſon 5, and ſo ſued for that, where there was no ſuch cuſtome: For the Court ſaid, that the *Modus Decimandi* muſt be ſued forth in the Eccleſiaſticall Court, as well as the very Tythe, and if it be allowed betweene the parties they ſhall proceed there; but if the cuſtome be denyed it muſt be tryed at the Common-Law, and if it bee found for cuſtome, then a conſultation muſt go, otherwiſe the prohibition ſtandeth.

315. *Auſtin* Verſ. *Kirby.*

Super ſacram. omitted.

AUſtin againſt *Kirby*, Falſe Iudgement upon a Iudgement in the County Court in treſpaſſe, if the Iury ſay that the Defendant *eſt culp.* leaving out *ſuper ſacramentum ſuum*, and reverſed.

Debt.

316. *Spray* Verſ. *Sherrot.*

New Writ againſt the heire or executors, as by journeyes amounteth upon reverſall of outlawry.

SPray againſt *Sherrot*, Debt againſt an heire who pleaded *viſus per diſcent juxt.* &c. The Plaintiffe pleaded, That heretofore hee ſued another writ of debt againſt the ſame heire, upon the ſame bond in this Court, and the Defendant was out-lawed, which Outlary for the inſufficiency of the Proclamation was reverſed, and hee freſhly brought this writ, and avers that the Defendant had aſſets the day of the firſt writ purchaſed; whereupon the Defendant demurred. The like hath been pleaded againſt the Executor, but no judgement hath been given in this Court in theſe caſes.

Annuity.

317. *Smith* Verſ. *Boucher.*

Annuity out of cleare gaines diſchargeth the perſon abſolutly.

SMith brought a writ of annuity againſt *Boucher* and others, the Annuity was 40 l. *per annum, ſolvend extra clara lucra, de les Allom* Works. The Defendant pleaded that there were no cleare gaines, and upon the Demurrer the Plaintiffe had Iudgement without Argument. For the Grant chargeth the perſon, and the reſt is idle.

Margaret Parkins Caſe.

318.

318. *Farmer* Verſ. *Shereman.*

Prohibition.

INter Farmer & Shereman in prohibition the caſe fell out, that ~~an~~ one Abbot having a Priviledge to bee diſcharged of Tythes *quamdiu manibus propriis*, in the time of *E.*4. made a gift in taile, and 31. *H.* 8. the Abbey was diſſolved. The queſtion, Whether the Donee or the iſſue ſhould be diſcharged. It ſeemeth cleare he ſhall not bee diſcharged, for the Stat. diſchargeth none, but as the Abbot was diſcharged in times paſt of the diſſolution, ſo they muſt claime the eſtate and diſcharge under the Abbot, ſince the Stat. ſo by the common Recovery, the reverſion had been barred before or after the Stat. but if the Land had returned to the Abbot or King, before or after the Stat. the caſe had been otherwiſe.

Diſmes demanded of Abbey-lands, entailed before the Statute 31. *Hen.* 8.

Prohibition.

319. *Napper* Verſ. *Steward.*

NApper and *Steward* a Parſon, had a Prohibition againſt the Pariſhioners, that libelled in the Spirituall Court to make proofe by witneſſes there of divers manner of Tything, *in perpetuam rei memoriam*, A ſtrange attempt.

Proh. to Eccleſi. Court admitting a cuſtome of Tithing in *perpetuam rei memoriam.*

5. Caſe.

320. *Barrets* Caſe.

A Charter was brought by *Barret*, and counted upon a Feoffement made by *Dedi & conceſſi ad Devham in Norff.* whereas the Land was laid to bee in another Towne, upon demurrer, this groſſe fault appeared and was denied to be amended. It was pleaded without a Sergeants hand.

No amendment of a feoffement of land falſe-laied.

Ejectione, &c.

321. *Bird* Verſ. *Snell.*

Bird brought againſt *Snell* a Writ containing both an *Ejectione firme*, and a treſpaſſe of Aſſault and Battery, and upon not guilty, pleaded Verdict was given for the Plaintiffe, both for the Ejectment and Battery and entire dammages. And the Court adviſed of the Iudgement, becauſe it was without Preſident, but the dammages for the Battery could not be releaſed, becauſe they were entire without Ejectment. Note it ſeemeth holpen by verdict.

Ejectione firme, and treſpaſſe of Battery both in one writ.

Obligation.

322. *Thorp* Verſ. *Taylor.*

THorpe brought an Action of Debt againſt *Taylour*, and counted upon an Obligation made *ultimo die Auguſti*, *anno* 4. *Rs*, upon

Count upon the date & making of the deed.

Oger of the bond 19. *die Aug. anno* 4. the Defendant pleaded *non est factum*. The Iury found it his deed, and the Plaintiffe had judgement; For the Count was not of the date, but of the making, and the Iury have found the deed.

Caſe.

323. *Bradſhawe* Verſ. *Walker.*

Action for words, Filching Fellow.

Bradſhaw brought an Action upon the caſe againſt *Walker* for theſe words; Thou art a filching fellow and didſt filch from *William Parſon* 100 l. after Verdict for the Plaintiffe *Cur. adviſare*, for the words are of uncertaine ſenſe, and ſo Iudgement was pronounced *una voce*, 17. *Iac. nihil capiat.*

Ejectione, &c.

324. *Marſh* Verſ. *Sparrey.*

Marſh brought an ejectment againſt *Sparrey*, of the demiſe of Sir *George Wrotteſly*, and the Plaintiffe had Verdict and Iudgement. Now it was moved by *Hitcham* that the writ was *Deviſit*, where it ought to have beene *Dimiſit*, and it was amended *per Curiam.*

Deviſit for *Dimiſit.*

Quare Imped.

325. *Cuppledick*, Verſ. Sir *Philip Terwhito.*

Cuppledick brought a *Quare Imped.* againſt S. *Philip Terwhit & alios qu. permittant ipſum preſentare ad Eccleſiam de Vlcibii, &c.* the Defendant pleaded *quod nulla talis habetur Eccleſia vocat. Vlcibii in Com. pred'*, whereupon iſſue and after verdict *pro Def.* it was moved by *Harris* for the Plaint. that the *ven. fac.* was miſtaken: For it was *de vicineto de Vlcibi*, where it ſhould have been *de corpore Com.* as where the iſſue is upon no ſuch Town: But the Court gave Iudgement *qd. caſſetur breve*, for though it be denied that there is any ſuch Church; yet the Town is not denied, and the Count of *Eccleſia de Vlcibi* is an allegation that there is a Town called *Vlcibi*, whereof whether there be a Church the *viſne* ariſeth properly from the Town, and though I obſerve the iſſue did not meet in words: For the writ is *Eccleſia de Vlcibi*, and the Plea *Eccleſia vocat. Vlcibi*, yet the effect is the ſame. And note that though another of the Defendants, *Scil.* Clerke, had pleaded likewiſe to the writ, no ſuch Biſhop of *Lincolne* as was named, whereupon there was another demurrer, yet the whole writ was abated againſt them all, upon the verdict, and no opinion given upon the other demurrer.

Verdict.

Nulla talis habetur Eccleſia.

326. *Pie* Verſ. *Deane*.

Information.

Pie informed againſt *Deane* for turning one houſe into many dwellings, upon the Stat. 35. *Eliz.* the Defendant pleaded not guilty, and verdict for the Plaintiffe. And Sergeant *Harris* in arreſt ſaid, that this Stat. was expired; For it was enacted to endure for 7 years and afterwards to the end of the Seſſion of Parliament then next enſuing, ſo it determined at the end of the Parliament 43. *Eliz.* Alſo the penalty of that Act is given one halfe to the Church-wardens of the Pariſh, where the offence is for the reliefe of the poore, to be levyed by diſtreſſe, and the other halfe to the Informer, *& Cur. adviſare.*

Stat. 35. Eliz. againſt Inmates whether in force or no.

327. *Briers* Verſ. *Goddard*.

INter Briers & Goddard adm. durante minore ætate of the daughter executrix, made divers obligations unto the creditors of the Inteſtate and after tooke husband. And the Court was of opinion that ſo much of the goods of the Inteſtate as amounted unto the value of the debts, and undertaken by the wife, the husband might retaine as his owne.

Adm. during the minority of an Executor gives bond and marrieth.

Quære how the caſe ſhall be if the wife dye, for then the husband is no longer chargeable by her bond. Alſo the Court was of opinion that this kind of adminiſtration during the minority of an executrix was not within the Stat. of 21 *H.* 8. to be granted of neceſſity to the Widdow of the Teſtator, becauſe there is an Executor all the while, otherwiſe perhaps it were if the Executor were made from time to time.

328. *Hide* Verſ. *Ellis*.

Prohibition.

PRohibition for the Plaintiffe againſt *Ellis*, Farmour of the Rectory of *Swinfeild* in *Com. Berk.* and preſcribed that the Tenants and Occupiers of the Meadow, had uſed to cut the graſſe and to ſtrew it abroad called Tedding, and then to put it into wyreves and then to put it into graſſe-cocks in equall parts without fraud, and then to ſet out every tenth cock great and ſmall to the Parſon in full ſatisfaction, as well of the firſt as of the laſt making, upon traverſe of the cuſtome, it was found for the Plaintiffe. And exception was taken that the cuſtome was voyd, becauſe it conveyed no more, than every owner ought to do, and ſo no recompence for the ſecond moity: But the Court gave Iudgement for the Plaintiffe. For the Tithe naturally is but the increaſe or the revenew of any ground, not of any labor or induſtry, where it may be divided; as in graſſe it may, though not in Corne: And in divers places they fell not the tenth Acre of wood

Prohibition for the 2 having paid Tythe for the firſt.

wood ſtanding, and ſo of graſſe: And ſo here the Iury having found this forme of Tything to bee the cuſtome here, it is well. And the like Iudgement was given upon the like cuſtome in the Kings Bench, *P.2.Iac.rot.* 192. or 292. between *Hall* and *Simmonds*.

Battery.

329. *Philips* Verſ. *Wood.*

Verdict no originall or not purſu'd.

PHilips brought a treſpaſſe of aſſault and Battery againſt *Wood* and *Wood* who pleaded not guilty, and it was found for the Plaintiffe. And after verdict it was moved in Arreſt of Iudgement, that the writ was againſt theſe two Defendants and another, and therefore the Count ought to be in the ſimul, which it was not. *Et Curia adviſare.* But *Tr.*17. Iudgement was given, but it was taken as no originall, and ſo ayded by the Stat.

Debt.

330. *Fetherſtone Haugh* Verſ. *Topſall.*

No amendment of the imparlance Roll, by the originall Writ.

FEtherſtone Haugh againſt *Topſall*, action of Debt againſt the executor. The writ was purchaſed in the County Court of the City of *Yorke*, and the declaration upon the imparlance, Roll was entred, *M.*13. *Iac.rot.*3404. And in the margent *Civit. Eborum*, but the Declaration was that the Teſtator *apud Villam Novi Caſtri ſuper Tinam conc. ſe teneri*, &c whereupon the Defendant imparled *uſque Hillar.* and the Plaintiffe counted again, right *conc: teneri apud Civitatem Eborum*, and upon iſſue *plene adminiſtravit*, Verdict for the Plaintiffe, and Iudgement, and after the Record removed by Error in the Kings Bench. It was moved in the Common Pleas, that the imparlance Roll might be amended and made agreeable to the Originall, but it was denyed by the Court.

331. *Carter* Verſ. *Haſelrig.*

Adm. of an executor within yeares need not aver his Minor.

CArter againſt *Haſelrig*, *Adm. durante minore ætate*, of an Executor, and did not averre that the Executor was ſtill within the age of 12 yeares. Opinion, That he need not, otherwiſe it were if the Plaintiffe ſued Adm.

Information.

332. *Grimſtone* Verſ. *Molineux.*

Penall-Laws ſuable in their proper ſhires, whether Recuſancy be one of them.

INformation by *Grimſtone* againſt *Molineux* Knight and his wife, for the Recuſancy of the wife, upon the Stat. of 23. *Eliz.* the Defendant prayed Iudgement of the Information, and pleaded a Stat. of 31. *Eliz.* That for that offence amongſt others, the action ſhould bee brought in the County where the offence was committed, and avers that

that the wife was inhabiting in *London* at the time, *&c. abſq; hoc*, &c. in *London*, whereupon a demurrer.

Note this offence is not in committing, but in omitting, and not in fezans.

333. *Armeſted's* Caſe. *Starchamber.*

SIr *Henry Yelverton* Attorney Generall, informed in the Star-chamber *ore tenus* againſt *William Armeſted* and others, for building without brick, againſt the Proclamation, though upon old foundations. And they were all fined to one yeares value of their houſes, ſaving one that was fined more, becauſe he had built two tenements upon the foundation of one, for that did work as ill an effect to one of them as if he had built that upon a new Foundation. Breach of Proclamatiõ againſt building puniſhed in Star-chamber.

And it was ſaid that Proclamations were ſo far juſt, as they were made *pro bono publico*. For, publique is againſt the increaſe of buildings in *London*, and about it, whereby if they cannot be fed, cleanſed or governed, the City is diſpeopled, and tymber conſumed, the City leſſe ſtrong and beautifull, and more ſubject to fire. And in this the King builds upon old Foundations, for he found the Proclamations and proceedings upon them in Queene *Eliz.* time. The offendors were alſo enjoyned to reforme their buildings according to the Proclamation.

334. *Lake* Verſ. *Hatton.* *Star-chamber.*

MAſter Secretary *Lake* exhibited a Bill againſt one *Luke Hatton*, containing that the ſaid *Luke Hatton* had delivered to my Lady *Roſſe*, his daughter a writing importing a Conference had between the Counteſſe of *Ecxeter* and him, wherein ſhee ſhould determine to give a dram to the Lady *Roſſe* to make away the Secretary her Father, and to charge him with a plot againſt the King, in the time of the late Queene; and that this Writing comming to the Secretaries hand, he required *Luke Hatton* to confeſſe the delivery of it. He the ſaid *Hatton* did deny the delivery of it, and had publiſhed and given out; That he the ſaid Secretary himſelfe, or the Lady *Roſſe*, or ſome other, by their procurement had deviſed and contrived it themſelves. To this (being the only Defendant) he anſwered and denied the writing, deviſing or delivering it; And denyed alſo, that he had at any time been with the Lady *Roſſe*, whereupon many witneſſes on both ſides were examined, and now the cauſe among the reſt, being ready for hearing: It was excepted by *Walter* the Princes Attorney, that the Bill ought to be caſt out of the Court, and his principall reaſons were two.

1 Firſt, that the Writing being a Libell, being againſt the Coun-

Libell no man ſhould complain of it in the Star-chamber, but the party grieved.

teſſe of *Exeter*, and ſo being a wrong unſeparable to her, no other perſon could complaine of it, having no intereſt in it: For perhaps the party libelled againſt, had rather it ſhould dye. And cited a caſe of one *Lambe* a *Civilian* in *Northamptonſh.* whoſe bill upon the like cauſe was caſt out of the Court for that part of the Libell that concerned others.

2 The other exception was that the charge was in the diſ-junctive, and ſo uncertaine.

Now to the point of incertainty of the charge, it was agreed by us all; That that point of the charge was well, for it was no other than a report of the words ſpoken by him, which they muſt deliver truly as he ſpake them. And withall, if a man ſhould ſpeake them, or ſay of three or foure Lords, that they or one of them had committed Treaſon, this were a ſcandall, whereof they or one of them might complaine. But if a man did complaine that two perſons or one of them had forged a deed, this charge is naught, becauſe it is his owne declaration, which muſt be certaine.

But to the firſt exception relied upon *Lambes* Caſe, he added further of his own with a great deale of violence; Another reaſon, That the Counteſſe of *Exeters* honor and diſhonour, was handled and traverſed between two ſtrangers, whereunto ſhe was made no party, which might be turned to a practiſe, that a man might pretend that a baſe perſon had ſcandalized a third perſon of quality, and ſo by that meane defame him. But he might have made the Counteſſe a Defendant with *Hatton*, or elſe have joyned her againſt *Hatton*.

To which exception it was anſwered by me and the Chief-Iuſtice, that *Lambes* caſe was no whit like this: For in that caſe *Lambe* had nothing to do with that Libell, more than any other of the people, whereas in this the Secretary was named for a plot againſt the King, and more the Libell is found in his hands, and he charged to bee the contriver of it, ſo that he is ingaged not ſo much to purſue the Libeller, as to quit himſelfe of the Libell, which will cleave to his fingers, if he find not another Author. And to ſay that he ought to have made the Counteſſe Defendant, is againſt reaſon, becauſe the Bill layes nothing againſt the Counteſſe, and againſt Iuſtice to force him to accuſe her of thoſe foule faults contained in the Writing, whereof perhaps he holds her innocent, and therefore hath no word in his Bill to charge her: And to make his intention more cleare, hee had moved before the King, that the Counteſſe would have joyned with him in this ſuite againſt *Luke Hatton*, and it was refuſed.

Libell puniſhed though the contents be true.

And when Sir *Edward Coke* had ſaid, that if it had been true, that the Counteſſe of *Exeter* had a purpoſe to poyſon, *&c.* *Hatton* might have juſtified the Writing, I denyed it; for a Libell, though the contents bee true, is not to be juſtified: But to diſcover it legally

to

to ſome Magiſtrate or other that may have cogniſance of the cauſe is the right way, but it may be juſtified in an Action upon the caſe.

335. *Breadman & Coale.* C. Wards.

Out of the Court of Wards came theſe Caſes this Terme.

Breadman was bound in a Stat. of 2000 l. to one *Coale*, who dying inteſtate, the Adminiſtration was committed to his wife who married one *Fawne*, which *Fawne* became bound with others to the King in 6000 l. and then he and his wife did by deed inrolled in the Court of Wards aſſigne this Stat. unto the King for payment of the ſaid debt of 6000 l. to the King, which was payable at certaine days after the aſſignement, and we reſolved that this aſſignment was good, notwithſtanding the Stat. of 7. *Jac.* which makes aſſignments of debts voyd, other than ſuch as did grow due originally to the creditor, *bona fide*, for the purpoſe of that Law was, that no debtor of the K. ſhall procure another mans debt to be aſſigned, which was a common practiſe; but this is *Fawns* own debt, though not to his own uſe, which he may himſelfe releaſe and diſcharge, and by the ſame reaſon aſſigne. Aſſignement of a debt to the K. good.

336. *Waddingtons* Caſe. C. Wards.

THe words of the Writ of *Diem clauſit extremum*, to the Eſcheator are *Quod per Sacramentum proborum hominum diligenter inquiras & inquiſitionem indè diſtinctè & aperiè factam nobis in Cancellaria noſtra, ſub ſigillo tuo & ſigillis eorum per quos facta fuerit ſine dilatione mittas.* In the concluſion of the Office it is thus. *In cujus rei teſtimonium ſigilla ſua alternatim appoſuerunt.*

It is excepted, that *alternatim* did import interchangeably, and that ſo it ſhould not be underſtood at all, both Eſcheators and Iurors ſhould ſeale to one. Paroll alternation.

But we reſolved it may well enough, becauſe it is ſaid *tam Eſcaetor quam Iur.* And it may well be true, that all did ſeale, and then the adding of the word *alternatim*, which muſt not be ſo notoriouſly conſtrued, but may be taken to both parts of the Inquiſition ſhall not hurt.

337. *Lake* Verſ. *Hatton.* Starchamber. 5. Caſe.

SIr *Thomas Lake* a principall Secretary, brought a Bill in Starchamber againſt *Luke Hatton* ſervant to the E of *Exeter*, ſuppoſing that he delivered to his daughter the La. *Roſſe*, a writing purporting

ting that the Counteſſe of *Exceter* had a purpoſe to poyſon both the Lady *Raſſe* and the plaintiffe, and ſome other ſcandals of the Counteſſe, and now denyed it and ſaid, that they had forged it. After which cauſe publiſhed and ready for hearing it, was moved by Sergeant *Crew*, Sir *Iohn Walter*, and others, that this Bill ought to be rejected, becauſe this being in effect a Libell againſt the Counteſſe, no other could complaine of it, except perhaps the Kings Attorney, according to the like rule given in this Court, in the caſe of Doctor *Lambe*.

This was long and vehemently debated, and at laſt avowed by the Court. And Sir *Edward Coke* leading, was of opinion, that there was no more of the Bill to be heard, but the proofe that *Hatton* had charged the Plaintiffe with the Libell, as being that whereby hee was grieved. But I ſhewed that in this caſe Sir *Thomas Lake* did not complaine of the Libell, as on the behalfe of the Counteſſe for the wrong done to her, but to charge *Hatton* with the delivery of it, to diſcharge himſelfe, who was otherwiſe anſwerable for it, as being found in his hand.

And after by the vote of the Lords, the Bill was reteined and firſt heard according to the priority of exhibiting of it.

Alſo in theſe caſes which were 3, where witneſſes were examined on part of the Bill upon Letters and exhibits, which they ſuffered not to remaine in the Office, but took them again into their keeping, all thoſe depoſitions were refuſed, for where they are depoſed, they are in Court part of the depoſition, and therefore ought to remaine in Court as their Acts, whereas being kept in the private hands of parties they may be altered and corrupted after examination, and ſo not ſufficient to ground a ſentence upon.

338. *Meltons* Caſe.

"*George Melton* and *Alice* his wife were ſeiſed of the land in "queſtion in fee, for the right of *Alice*, and leavied a fine with "Proclamations the 43. of *Eliz.* of it to the uſe of them two, and the "heires of their two bodies begotten, the rem. to *Suſan Andrews*, the "leſſor for life, the rem. to *Francis Duncombe* in taile, the rem. in "fee to the ſaid *Alice*; and the Iury found the ſeiſin accordingly by "the Stat. of uſes, and that the tenements were in the actuall poſſeſ- "ſion of *George* and *Alice*, and that *Melton* alone, *Menſe Michael* 44. "*Eliz.* levieth another fine with Proclamations of the ſame lands, to "the uſe of the ſaid *Melton* and his wife, in ſpeciall tayle as before, "the rem. to *Geor. Melton* and *Evan Melton* in fee; and then the Iury "found, that they were ſeiſed by force of this fine and the Act of uſes "*prout lex*, &c.

"And then they find that the ſame *George Melton* and his wife, died

"14.

"14. *Novem.* 44. *Eliz.* without iſſue, and that *George* and *John Dun-*
"*combe* is their heire, and that *George Melton* continued his poſſeſ-
"ſion and was ſeiſed *prout lex*, &c. And that he ſo ſeiſed 1. *Febr.* 45.
"*Eliz.* did for money bargaine and ſell the Tenements unto *Curtis*
"and *Stephenſon*, and their heires, and ſet down the Indenture in *hæc*
"*verba*, wherein it is appointed that there ſhall be a recovery againſt
"them, and that it ſhall be to the uſe of *Melton* and his heires, but
"no Inrollement found, neither is it concluded that *Curtis* and *Ste-*
"*phenſon* were ſeiſed by force, of the bargaine and ſale, not ſo much
"as *prout lex*, &c. But then they proceed and find that one *John Colte*
"and *Holland*, 23. *January* 45. *Eliz.* did proſecute a Writ of Entry in
"the poſt, againſt *Curtis* and *Stephenſon*, being then tenants of the
"Freehold of the ſame land, *retor. cr. pur.* And then ſets forth the
"whole common recovery, wherein *George Melton* was called to
"warranty with the execution. And that the ſame recovery was to
"the uſe of *George Melton* and his heires, and then they found that
"*George* and *Evan Melton* and *John Colt* made a leaſe for 21. yeares
"unto one Speed, which leaſe came unto *Wingfeild* the Defendant, and
"then *Geo. Melton* dyed. And then *Suſan Andrewes* entered upon
"*Wingfield* and made a leaſe unto the plaintiffe, *Francis Duncombe*, up-
"on whom *Wingfeild* enters. And whether the Reentry of *Wingfeild*
"be good or no is the queſtion, *ſcil.* the *utrum*, &c.

I divide the caſe into 4 points whether the wife be remitted upon the ſecond fine to her firſt entaile or not: And I thinke ſhe is and her husband too, as at the Common-Law, upon the taking the ſecond eſtate in tayle, as the caſe is found joyned to this, as a part of the ſame.

1 Point whether that a remitter extends to *Suſan Andrews*, and the other old rem. and I think it did as long as the Rem. ſtood.

2 Whether the Remitter failed and when, and I thinke it failed, and vaniſheth ſo ſoon as the wife dyed, and the old remainders were turned into rights.

3 That though the Remitter ceaſed upon the death of the wife, yet after the death of *Melton* the husband, *Suſan Andrews* had lawfull entry by the Stat. 32. *H.* 8. and by her entry did both regaine her owne eſtate and the remitters, and ſo ſhe had power to make the Leaſe to the Plaintiffe.

4 That there is no recovery at all found in the caſe in reſpect of the repugnancy of the Verdict.

1. Point. Remitter to the ſpec. in taile to the wife where the husband hath barred the Inheritance by his fine and to the rem. upon it.

And to the firſt point, I make it no queſtion but that the husband and the wife being tenants in ſpeciall tayle, without rem. over, the husband diſcontinue by fine or feoffement, and then take an eſtate back again to himſelfe and to his wife in ſpeciall tayle. That by this (as it was at the Common-Law) the wife was *ipſo facto* remitted, and by neceſſary conſequence the husband alſo, though it were true

that the husband was ſo far bound by his own act, that he would not in his own perſon claime it ſo, wherein *Littleton* being plaine, and the Law cleare, I ſo leave it without regard of the book 21. *Eliz.* 3. that makes difference where the wife or husband ſurvives, for that remitter is executed at the firſt. And the caſe is the ſtronger, yet in conſideration of the remitter, according to the judgement of *John Sayes*, caſe 41. *E.* 3. 17. where the feoffement was made to a husband and wife in ſpeciall taile, the rem. to *A.* Then the husband made a feoffement and tooke an eſtate to him and his wife the remitter to *B.* the huſband dyed, the wife agreed to the ſecond eſtate (as in reſpect of her ſelfe ſhe might) but being made during coverture: yet it was judged that for the benefit of *A.* in rem. ſhee could, much more here the beſt eſtate ſhall be judged in the wife even for her ſelfe, ſince ſhe lived not to croſſe the judgement of Law, and by her own Act. And likewiſe for the benefit of the rem. as I alſo held in the caſe of Sir *John Sherley*, but *Hawtries* caſe *M.* 2. & 3. *Eliz. Dyer*, 192. 135. a husband and wife ſeiſed in tayle remitter in fee to the husband, hee made a feoffement to the uſe of himſelfe and his wife for life rem. to her younger ſon and dyed, the wife might chuſe the latter (though ſhe did chuſe the firſt) for then the rem. could not be rem.

Remitter to the husband againſt his own fine, to the benefit of the wife.

But now it is objected that the caſe differs from that it was at the Common-Law for two ſpeciall reaſons.

The firſt, that the ſecond eſtate to the wife in this caſe in queſtion grew by a uſe declared to the husband and wife, in tayle upon a fine by the husband only, which eſtate comming in place of the uſe, muſt by force of the Statute of uſes, be ſuch in quantity and quality, as the uſe was, which was out of a new eſtate and not out of the old, whereunto the remitter ſhould be.

The ſecond objection is that the firſt eſtate being to the husband and wife in ſpeciall tayle, ſo that iſſue inheritable muſt clayme as heires to the husband as well as to the wife, his fine hath utterly barred all thoſe iſſues and himſelfe, and hath extinct the intayle, and ſo conſequently that eſtate cannot be remitted.

As to the firſt objection, I confeſſe that it is cleare that if an Infant or a woman, having right of lands diſcontinued, wherein entry was not lawfull, if the ſame Infant or woman covert come to that land by way of an uſe raiſed out of that eſtate, the firſt taker of that eſtate ſhall not be remitted, for the violence of the letter of the Stat. 27. *H.* 8. And the firſt taker in this caſe, is to be underſtood of the firſt taker of every ſeverall eſtate, as well in remainder as in poſſeſſion.

And therefore, 34 *Hen.* the 8. *Dyer* 54, in two caſes, one Maſter *Townſends* caſe, tenant in tayle made a Feoffement in fee to the uſe of his wife for life, the rem. to his next heire of that intaile, he ſhall not be remitted, no not if hee had the uſe by diſcent, as *Simons* caſe, and

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Marm. caſe, 6. & 6. if he were the firſt to whom the poſſeſſion was firſt transferred by the Stat. for then ſtill he fals within the Letter of the Law, that he muſt be in poſſeſſion of the eſtate, as he was of the uſe, and yet he hath both the free hold and the right and that without his fault, and have no Action, which are *Littletons* grounds and reaſons of Remitters.

Note, an Act of Parliament hath every mans conſent as well to come as preſent, and ſo he is here an Author of his own hurt, and alſo he muſt hold it as the Act gives it, having power to bind every mans right, either finally or *ſub modo*, as it is for the firſt Taker. And therfore are ſuffrages for ſtrangers rights in Acts of Parliaments.

See *M.* 15. & 16. *Eliz. Dyer*, 329. & 251. *Dyer*, which is a ſtranger caſe, *Ceſtuy que uſe tayle*, remitter to a ſtranger in tayle, remitter to himſelfe in Fee made a Feoffement before the Statute 27. *H.* 8. to the uſe of himſelfe for life, the rem. to his eldeſt ſon heire of his firſt entaile and his wife for life and dyed, his ſon was in by the Statute of the new eſtate. Reſolved by foure Iudges in the Chancery, that the old Feoffee could not enter to revive to the ſon the firſt uſe in tayle; whereof one reaſon was given that the ſame could not enter againſt his owne Act, and againſt the Statute, nor have any other eſtate, no though it were by the Act of another, *ſcil.* the feoffees, and after the Stat. had had his working, yet the next heire of the entayle ſhould be remitted.

But the firſt taker of a Remitter may bee remedied by accident, that is if a Remitter happen to another before the Land come to him. As if *A.* bee tenant in tayle and *A.* make a Feoffement to the uſe of himſelfe in tayle the remitter to *B.* in tayle again. And then the Statute execute the uſe. Now both *A.* and *B.* have their eſtates de *Novo*. And if *A.* dye, now his iſſue ſhall bee remitted, and ſo by conſequence ſhall *B.* in Remitter bee remitted though he were a firſt Taker.

Note that in *A.* Maſter *Townſends* Caſe, it was objected there was a ſaving of rights in the Statute of uſes, and by conſequence of Remitter whereunto in the Argument there was no Anſwer made by the adverſe counſell. But *Plowden* the Reporter notes, that the ſaving is only of former rights after the Statute, but the ſaving indeed preſerves rights, but to be recovered or rem. as may ſtand with the Stat. not againſt it. But I anſwer to this that the Stat. of 32. *H.* 8. hath changed the reaſon of this Caſe, that hath given the wife entry againſt her husbands Fyne, that now by the uſe raiſed unto her out of ſuch eſtate, he is not in of eſtate diſcontinued, but of an eſtate whereof after the death of her husband ſhe might have reentered.

Now as upon reentry in ſuch caſe where the entry is lawfull ſhe is remit-

remitted, ſo whereas an eſtate is conveyed unto her, and is in her thoughby the Stat. her entry be lawful, ſhe ſhal be judged in of her beſt eſtate, her Rem. being her *intratio legitima*, though not *actualis*, and ſo is *Humbryes* caſe *M.* 2. & 3 *Eliz. Dyer*, 162.

But when it is again re-objected, that yet at leaſt till there be an actuall entry the eſtate ſhall bee judged in her as the uſe was, which was out of the new eſtate, according to the opinion of the Councell that argued againſt the Rem. in *A. M. Tounſends* caſe of a Feoffement made by a Diſſeiſor to the uſe of the Diſſeiſee, that the Diſſeiſee ſhould not be remitted till an actuall entry.

To which I anſwer, that I know the Law not to be ſo. To which purpoſe *Littl.* 157. If a man have right of entry and take eſtate being of full age, *&c.* he is preſently without entry rem. though he tock the eſtate by contrary conveyance, but he ſayes that if he take but a Leaſe for terme of years, that doth not remit him but upon his actuall entry.

And yet, I Anſwer further as cleare, That the Iury find firſt this ſecond fine to the iſſue of the husband and wife in ſpeciall tayle. And that by force thereof and of the Stat. of uſes they were ſeiſed accordingly. But then they proceeded further, and ſay; that they were both in actuall poſſeſſion of the Land. Now the actuall poſſeſſion which imports entry to the husband, muſt be according to the eſtate, which is entire and indiviſable with his wife, which is the reaſon alſo of the entry remitter to the husband aſwell as to the wife at the Common-Law. So then it appeares plainly by the Verdict that there was actuall entry by, and for the wife, which makes an end of that objection.

As to the 2 objection it is alſo true, that by the fine of the husband alone, the entayle of the iſſue is finally and totally barred: And ſo are the caſes 18. *Eliz. Dyer* 351. *E.* 2. 269. and *Beam.* caſe. And ſo alſo and upon the ſame reaſon is 16. *Eliz. Dyer*, 332. Attainder of Treaſon of the father forfeits the Lands againſt the iſſues, which are grounded upon the force of the Letter and meaning of the Stat. 4. *H.* 7 & 32. *H.* 8. and the Stat. of Treaſons, 26. *H.* 8.

But yet I Anſwer, that the entayle, which is barred to the iſſues, yet remaines, notwithſtanding this fine to the wife in right, as to her ſelfe, and to all eſtates and remainders depending upon it, and to all the conſequences of benefit to her ſelfe and to others by her as long as ſhe lives as amply and beneficially, as if the fine had not been levied.

And therefore, firſt take *Beaumonds* caſe, *Co lib.* 8. 40. which was that *Iohn Beaumond* and his wife, being ſeiſed in ſpeciall tayle, rem. to *Iohn Beaumond* in fee, he alone levied a fine to *E.* in Fee, which eſtate came to the Earle of *Huntington* in fee. *Beaumond* having iſſue dyed, his wife entered, the Earle of *Huntington* confirmed the eſtate of the wife *habendum* to her and to the heires of the body of her and her

her husband: And it was ruled that the confirmation wrought nothing, becauſe ſhe had as great an eſtate before. And alſo the iſſues could not be made inheritable, which were before barred by their fathers fine, and the eſtate taile was againſt them lawfully given to another. And it was further reſolved by way of admittance, that if the rem. in fee had not been to *Beaumond* himſelfe, but to a ſtranger, the entry of the wife had reſtored that rem. and had left nothing in the cogniſee, but mere poſſibility, ſo ſhee hath the taile not only to herſelfe but to the benefit of other eſtates growing out of one roote with her. And yet during the life of *Beaumont* the entaile had been barred and all had been in the cogniſee, and the wife had had nothing but a poſſibility *via verſa*.

Now it is plaine and muſt be confeſſed, that the rem. in this caſe is to all purpoſes as effectuall, not only to the wife, but to the rem. and eſtates depending, as was the entry in *Bea.* For remitter is an entry in the Law, changing the eſtate as an entry, if it could be had ſhould.

Now becauſe the Stat. of 4 *H.* 7. and eſpecially 32. *H.* 8. hath made a more abſolute ſubjection of entailes to fines with Proclamation than the Common-Law did ſince the Stat. of *Donis conditionalibus*, and that theſe Stat. and the expoſit. upon them together with the other Stat. of 11. *H.* 7. of diſcontinuance of jointures in tailes have produced many intricacies, perplexities and appearing contrarieties, let us in ſome meaſure cleare, that we may ſee a way through it upon all occaſions. 32. H. 8.

It hath been a rule that hath deſtroyed perpetuities that an eſtate cannot be made to ceaſe for a time, and then to riſe againe or to ceaſe, as to one perſon, and have being to another, or to deprive a tenant in taile by condition of limitation of power of alienation, by fine or cómon recovery; Yet in theſe points theſe Stat. have induced all theſe ſingularities into entailes. And therefore at this day,

1 Firſt, an eſtate may ceaſe for a time, and yet riſe again, and may ceaſe as to one perſon, and be in force *& eſſe* to another.

2 Secondly, an eſtate in taile may be in it ſelfe perfect, and may be aliened, and yet cannot diſcend though there be iſſues of the intaile.

3 Thirdly, an intaile may diſcend and cannot be aliened.

4 Laſtly, an entaile may be full, and yet can neither diſcend nor be aliened.

Alſo as to the firſt, *Beau.* caſe is ſo that the husbands fine alone binds the entaile, ſo as during his life all is given away, and there is nothing left but a mere poſſibility. That if the wife ſurvive, ſhe ſhall be again upon her reentry tenant in taile as before, ſo it is ceaſed for that time and the iſſue barred, but as to the wife if ſhe ſurvive the whole taile revives and is reſtored to her. To the firſt.

For the 2 ſee *Archers* caſe judged 20. *Eliz.* in the Common-Pleas, that if the Grand father be tenant in tayle, and the Father deſſeiſe him To the ſecond;

and levy a fine, and then the grandfather dye and alſo the father, the ſons iſſue in tayle ſhall be barred. And the ſame I hold if the father had levied his fine without diſſeiſing his Grand-father, for though the ſon ſhould claime as heire in tayle to the grandfather as laſt ſeiſed by the entaile, yet he muſt claime as heire in bloud by the father, and ſo fals plainly within the words as an heire to the perſon that levied the fine and clayming only by an entaile made to an anceſtor of him that levied the fine.

And I hold that if tenant in taile have iſſue three ſons and the ſecond levy a fine with Proclamation in the life of his father who dyes, this ſhall not bar the elder brother. And if the elder dye without iſſue after the death of the father, ſo as the elder had the whole tayle, yet if the ſecond or his iſſue ſurvive and then dye, it ſhall bar the younger (for he is plainly within the words) as well as the ſecond that levied the fine. The words of the Stat. of 38. *Hen.* 8. are that a fine levied of lands any way entailed to the conuſee or any his anceſtors ſhall be a bar againſt the perſon and his heires, claiming only by force of ſuch entaile any doubt. &c. ſo the fine doth bar heires of the entaile in any caſes, where the conuſee cannot give the land becauſe he hath it not.

And therefore I match it upon the caſe of *Weſtm.* 2. *de Donis.* They to whom the land was given ſhall have no power to Alyen, but that it ſhall remaine to the iſſue. Now ſee *Little.* caſe *fol.* 160. 38 *E.* 3. 9. *E* 3. 16. &c. That if tenant in taile have iſſue 3 ſons and diſcontinue, and the midle ſon releaſe and bind him and his heires to warranty, and the midle ſon dyes and then the father dyes; This warranty is collaterall to the elder, and lineall to the younger, becauſe by poſſibility he might have claimed from him of that intaile, and ſo within the intent not the Letter of that Law as here it is.

So this land now cannot deſcend unto the heires in *Archers* caſe, (to returne to that caſe) becauſe the diſcent is ſtopt and ſtrangled; Yet I hold it cleare, that the grandfather after the fine levied may himſelfe alyen: For, as it were againſt reaſon for the St hath no letter to bar his anceſtors, but his heires only that levied the fine, ſo no ſaving is needful.

And therefore in *Archers* caſe, if after the fine levied by the father, the grand-father had made a feoffement to a ſtranger, yea or but ~~to~~ a bargaine and ſale in fee, and had dyed, this bargaine ſhould have both holden the land againſt the iſſue in taile: For they are barred, and their iſſue extinct by the fine, and ſo the Stat. of *Weſt.* 2. ſet looſe not to the reverſion, and againſt the fathers conuſee; For the fine in this caſe doth but extinguiſh the taile, but cannot give it by his conveyance that had not ſo much as right or a poſſibility, though there were a poſſibility, ſo the Stat. leaves the forme and effect of the fine, as to all purpoſes and perſons, but the iſſues in taile to the ordinary rules of Law, whereof one is, That a conveyance to one by him that hath but

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a naked right or poſſibility works by the extinguiſhing of it in the poſſeſſion, S. *Moyle Finches* caſe, *Co. lib. 6.* 70. So if the fathers conuſee will claime the other ſhall ſay *partes finis nihil habuer.* &c. if the iſſue in the tayle will claime he ſhall not plead the fine with a *Qui ſtat.* though it be a fault, which he cannot deny, but muſt anſwer the *finis nihil*, &c. is no plea for any iſſue in taile, for he is privy.

As to the 3. caſe of 11. *H.* 7. makes it as is Sir *Geo. Browns* caſe, *Co.* To the third. *lib.* 3. *fol.* 50. *Bridges* and his wife tenants in ſpec. taile of the proviſion of the husband with 11. *H.* 7. rem. to *Bridges* in fee had iſſue *Anthony Bridges*, and dyed, *Anthony* levies a fine to *Browne*, and then the mother made a diſcontinuance, *Browne* may enter, not by poſſibility of the eſtate ariſing out of the entaile, he could not have any Intereſt in that, becauſe the whole entaile was actually without change in the mother but by the fee ſimple. And ſo alſo in *Wimbiſh* and *Talboys* caſe, ſo then the taile cannot be aliened by the mother, by reaſon of the reſtraint of 11. *H.* 7. Neither can deſcend by reaſon of the fine by the iſſue in taile for her life.

As to the 4 and laſt, one may be ſeiſed of a perfect eſtate in tayle, To the fourth: and yet the ſame can neither be aliened nor diſcend, as in the caſe at the bar, and in *Beaumonds* caſe.

It cannot diſcend to the iſſues from the mother, though the whole eſtate tayle be in her, becauſe they were barred by the fathers fine before; It cannot be aliened by the wife, becauſe alſo it was aliened before by the husband in a ſort obliquely.

For though it be true, that when the husband hath levied a fine and dye, and his wife enter, the eſtate is wholly in her, ſo that the alienee hath no part of that eſtate in him, nor any eſtate derived out of it, but it is wholly evicted. So that if there be no iſſue of the entaile, the husband conuſee hath loſt the eſtate for ever; yet if there be iſſue in tayle at the death of the wife, the eſtate of the conuſee ſhall riſe again ſo ſoon as ſhe dyes, by force of the husbands fine, and that *ipſo facto* without entry, as upon a diſſeiſor of the wives eſtate, like unto *Chudleighs* caſe, of contingent uſes ariſing and falling where there is no diſturbance to the poſſeſſion.

So when the wife enters upon the conuſee, that which was in him as a bare fee ſimple, ſo long as the intaile laſted, is now in the wife a perfect entaile again, but to endure only during the life of the wife, and then to return again to the conuſee, ſo long as there ſhall be iſſues. So then the caſe is that the intaile remaines in the wife rem. but neither to be alyened nor diſcend, which are incidents inſeparable, but by Act of Parliament; So *Deane* and *Chapters* caſe have a fee ſimple to receive and go in ſucceſſion, but not to alyen. But now to all other purpoſes the entaile abides and is in the wife in the ſame eſtate, as it was before.

For firſt, though the iſſue be diſ-inherited, ſo as it is all one to the tayle as if there were no iſſue, yet ſhe is no tenant *puis poſſibility* or in that degree, as it is reſolved in *Beaumonds* caſe.

Alſo, ſhe may make Leaſes for 3 lives, under the old rents, *&c.* according to the Stat. and it ſhall neither be forfeiture nor diſcontinuance, as it is alſo reſolved there.

I hold it alſo cleare that in this caſe of rem. and in the caſe of entry of the wife, as in *Beau.* caſe, ſhe ſhall not only be tenant in tayle (as I have ſaid) but her entry and remitter ſhall alſo rem. all rem. and reverſions that were depending upon her eſtate, that are not otherwiſe bound, which is alſo reſolved in the argument of *Beaum.* caſe.

Therefore put the caſe that land be ſpecially entayled to *A.* and his wife, the rem. to *B.* in tayle the rem. to *C.* in fee and dyes leaving iſſue, and the wife enters, ſhe is in of her eſtate in tayle and her entry alſo rem: *B.* and *C.* to their ſeverall rem^s and hath put *D.* out of his whole eſtate. And therefore I am of cleare opinion, that the wife in that caſe may ſuffer a common recovery againſt her ſelfe as tenant in tayle, and vouch the common vouchee, and that ſhall bar the old rem. of *B.* and *C.* for ſhe cannot be ſaid to be *ejus d'autre* eſtate at all, much leſſe to them.

And yet it is a rare caſe, that a common recovery had againſt the tenant in tayle ſhall bar the rem. and not barre the entayle, for here the entayle (that is, the iſſues of the entayle) were barred before by the fine, but yet it may be truly ſaid that the entayle is barred againſt the recovery, becauſe the wife was ſeiſed of the whole entayle, which was ſo barred, and the rem. are then depending immediately upon it.

But what ſhall be the effect of that recovery after the death of the wife, againſt *D.* to whom the husband alone levied the fine, I will ſpeake hereafter.

If the wife after ſuch common recovery paſſed againſt her, dye, leaving iſſue by her husband, now *D.* is to have the land (as hath beene ſaid) neither can the recovery had againſt her hurt him, for as to him ſhe was *ejus d'autre eſtate*, and therfore the value cannot come to him. And if ſhe had come in as vouchee, yet it could not have hurt *D.* for his eſtate and hers never ſtood together, and had dependance the one upon the other. And he had his eſtate divided from hers and by contrary meanes, though both out of the root of the entayle.

2. Point. The next queſtion is, taking the caſe that the husband and wife were remitted to the firſt eſtate in tayle, and that by conſequence *Suſan Andrews* and the reſt in rem. were alſo rem. (as I have holden) as when the wife dyes leaving her husband, and was bound by his own fine, what now is become of the rem.

And upon that I am of opinion, that now theſe rem. to *Suſan Andrews* and *Duncomb*, that were by the remitter of the wife made actuall

actuall rem. were by her death diſledged and turned into rights, as they were by the fine, and ſhould ſtill have been if the wife had not been rem. or returned in the like caſe, whereof the reaſon is plaine.

For the husband by his fine gave and had power to give the whole eſtate in tayle, as to himſelfe, and the iſſues in tayle; but he had no power to prejudice the wife, ſo ſhe is only ſaved and the eſtate for her ſake, and ſo much as concernes her and others, that ſhould not claime under her husband, or the iſſues of the land had come to them, of which ſort theſe rem. are ſo, that now when ſhe is removed by death, or otherwiſe, that eſtate that was preſerved for her only ceaſeth, and the land returnes to the former current, and ſtate that was raiſed by the fine to be aliened, and ſo by conſequent the rem. which were rem. only out of neceſſity, becauſe their fundamental eſtate was rem. muſt faile together with it, for the old remainder cannot depend and bee joyned to the new eſtate, which was and is a fee ſimple. A rem. cannot be but where the freehold in poſſeſſion and the right meete, and therefore *Little. fol.* 153. puts it, that if the husband diſcontinue the wives land, and take an eſtate to himſelfe for life, the rem. to his wife, ſhe is not remitted till her rem. fall. By the ſame reaſon in this caſe, the rem. holds no longer, when the poſſeſſion and right parts.

And now I ſay, the ſaid husb. ſurviving the wife, the eſtate is *ipſo facto* adjudged in him according to the eſtate of the new fine, & not according to the former entaile, which he had given away & barred by his fine: And now it is all one, as if the wife in this caſe had never been rem. or had never entred after the husbands fine, in which caſe the remain. could never have been rem. or as if the land had beene given (with like rem. to the husb') alone in ſpec. taile; and ſo the rem. that were before during the rem. *in eſſe*, and now turned into rights of rem. only. But if on the other ſide the husband in this caſe had dyed firſt, and without iſſue, then had the rem. continued remitted becauſe there ſhould have been no interpoſition of new eſtate between the wife and the rem. as in this caſe in queſtion there is.

Out of this diſcourſe appeares the difference between this caſe ſince the Stat. & *Lit.* caſes which is the like, before the Sta. *Lit. fol.* 151, ſaith, that if land be given to the husb' and wife in ſpec' taile, and the husb' alien it by fine, and take an eſtate again to him and his wife, and that is a rem. to them both, becauſe they are one perſon, and the eſtate is deviſible. Now ſee how far this very caſe is the ſame in Law ſince the Stat. (as aforeſaid) and where it differs and upon what reaſon.

I agree, that in the caſe in queſt. the eſtate reſumed to the husbād & wife did rem. thē both as at the Com. Law, for the wife & her eſtate (as to her) is the ſame that was at the Com. Law, no way further prejudiced by her husbands fine, & therfore ſince ſhe is rem. her husband muſt alſo be rem. to her and for her, upon *Litt.* reaſon.

But whereas in *Little*.caſe the rem.was totall to the whole entaile, as well for the iſſues as for the parties themſelves, and ſo did wholly aboliſh the whole new eſtate, as torcious and wrongfull: Now the husbands fine and new eſtate upon it is not utterly aboliſhed, but interrupted only by the wife and for her, and is rightfull and not tortious againſt himſelfe, and his iſſues as being warranted by a Statute Lawe.

Note that the husbands fine at the Common-Law did bind himſelfe as ſtrongly during his own life as his fine, with Proclamation now, and yet he was remitted againſt it,by reaſon of his wives rem.which was to the whole eſtate in tayle to all purpoſes, and ſo hee is now remittable for his wife, and with her againſt his fine with Proclamation, ſo far as her rem.extends ſince the Stat. and no further.

And therefore I am of opinion that if upon ſuch a gift, a condition were annexed, that one husband ſhould not levy a fine without Proclamation, to bar his iſſues that this condition were voyd, and yet the like condition hath been good at the Common-Law.

3.Point. The next point is, ſince the remitter ceaſeth by the death of his wife, and the remainders to *Suſan Andrews* and the reſt are turned into rights, how now they may relieve themſelves after the death of *Melton* the husband without iſſue, as it fals out in this caſe.

And to this point I have declared my opinion before,that after the death of the wife the remit.ceaſed, and the lands returned again into the eſtate paſſed by the ſecond fine, which continued during the life of the husband,and was to continue as long as there was iſſue,if there had been any, for till then they in rem. had no title to demand the land,but now when *Melton* the husband dyed without iſſue, *Andrews* did enter upon *Wingfeild* the Defendant,claiming under the husband, and made the Leaſe to *Duncombe* the Plaintiffe, which I hold to bee lawfull. And I hold this entry of *Suſan Andrews* to be lawfull, and that without queſtion,for the words of the Law of 32.*H*.8.are cleare and certaine, that no fine by the husband only of any land, being the inheritance of Freehold of the wife, ſhall in any wiſe make a diſcontinuance or be prejudiciall to the wife or her heires,or to ſuch as ſhall have right, as by the death of ſuch wife or wives, but that the ſame wife and her heires and ſuch other, to whom ſuch right ſhall appertaine after the deceaſe ſhall.& may lawfully enter into the ſame,ſo the words are cleare, not only to relieve the wife and her heires, but alſo other ſtrangers that have right to the land by or after her death. And for that purpoſe the Stat. puts two caſes, one where the wife had an eſtate of Inheritance either fee ſimple, or fee taile: the other where ſhe hath but a freehold, meaning an eſtate for life in the Land alyenated.

Now in both caſes it gives reliefe by entry to the heires of the wife, which

which cannot be but in the caſe of Inheritance. And therefore in the caſe of freehold ſtrangers in rem. or reverſion muſt needs be relieved by the other words, and by the ſame reaſon ſome eſtates in tayle.

And as no man will doubt but if the wife enter firſt, it ſhall benefit thoſe in remainders alſo, though the Statute ſhould be changed to be made only for the good of the wives directly, ſo clearely here the words give entry, that is the firſt entry as well to others as to wives and their heires; yet I am of opinion that if the wife being ſeiſed in fee after ſuch alienation of the husband, ſhould dye without iſſue or heire and the land by eſcheat ſhould not be within the remedy of this Statute, as I held lately in the caſe of the Lord *Stanhops*, *Quare Imped.*

Now laſtly touching the common recovery mentioned in this verdict, I hold it to be inſufficiently found, as there is no recovery at all. And therefore obſerve that after the ſecond fine by *Melton* the husband alone, *Menſe Mich.* 44. *Eliz.* it is found that he and his wife were ſeiſed in ſpeciall tayle with the new rem. over and in actuall poſſeſſion, and that 14. *Novem.* 44. *Eliz.* the wife dyed, and that *Melton* the husband continues this poſſeſſion, and was ſeiſed *prout*, &c. And being ſo ſeiſed 1 *Feb.* 45. *Eliz.* by Indenture for money did bargaine and ſell the land unto *Curtis* and *Stephenſon* and their heires, and there ſet down the Indenture *in hæc verba*: To have and to hold to them and their heires, with a covenant in the deed, that a recovery ſhould be had againſt them to the uſe of *George Melton* and his heires, but makes no concluſion. That *Curtis* and *Stephenſon* ſo were ſeiſed by force of that, not ſo much as *prout lex*. But then they find that one *Colt* and *Holland* 23. *Ian.* 45. *Eliz.* did ſue a writ of entry, *&c.* againſt *Cur.* and *Steph.* then tenants of the Freehold of the premiſſes *ret. Oct. Pur.* and thereupon a recovery paſt with the voucher to *Geor. Melton*, and that the Sher. returned execution & that by force thereof, *Colt* and *Holland* were ſeiſed *prout lex poſtulat*. So that firſt it was found that *Melton* was ſeiſed in poſſeſſion in taile generall, and ſo continue till 1 *Feb.* 45. *Eliz.* and then granted, bargained and ſold the land, which by the word of Grant will not paſſe without livery, as the word Feoffement would, and of the bargaine and ſale, there is no Inrollement found, neither doth the Iury find that they were ſeiſed by force of this conveyance. 4. Point.

Curtis cannot be taken to be tenant to the recovery, for either it muſt be by the ſpeciall mentioned, or by the implication *tunc tenet*, but by the ſpeciall conveiance it cannot be, becauſe the Inrollement is not found; like unto Sir *George Brownes* caſe, where it was found that *Anthony Bridges* levied a fine which was taken to be without proclamations, though it were otherwiſe in the common intent and practiſe, for otherwiſe the Iury muſt find in this caſe, that *Melton* did bargaine

bargaine and ſell, but, that the deed was not Inrolled, and ſo in the other caſe that the fine was without proclamations, which were againſt ſenſe, to inforce a Iury to find a negative for that is not preſumed except it be found.

Alſo note, no touch in the Verdict that *Curtis* was ſeiſed by force of the bargaine and ſale, no not ſo much as *prout Lex*, &c.

Now for the *tunc teneat* (beſides that the Court ſhall not intend when they found a ſpeciall meanes of tenancy that he was tenant by another meane, eſpecially by a diſſeiſin) as this verdict is found it cannot be, or at leaſt it cannot be effectuall.

The Writ of entry was brought 23. *Ian.* 45. *Eli.* againſt *Curtis, tunc tenent. ret. cra. pur.* which was 3. *Feb.*

Now it is true that if he were tenant either at the time of the writ purchaſed, or at the returne when the recovery paſſed, it had beene ſufficient, but by the writ it is plaine he could not be tenant, neither at the day of the writ purchaſed, for *Melton* continued his poſſeſſion till 1 *Feb.* and if *Curtis* ſhould be taken to have diſſeiſed *Melton*, yet ſince *Melton* is found ſeiſed 1 *Febr.* there muſt be a reentrie, and ſo the tenancy lawfully diſſolved before the recovery paſſed.

Now where it is found that *Curtis* and *Stephenſon* were tenants of the Freehold, at the time of the Writ of entry purchaſed, it appeares to the Court falſe, for that was before the bargaine and ſale, till which time *Melton* is found to be ſeiſed, and no other conveyance found unto them, but the ſaid bargaine and ſale.

I grant that a verdict may be taken by a reaſonable intendment, as in *Fulfords* caſe, though the words be unperfect. But that muſt be where that intendment ſtands upright and nothing in the verdict to impugne it, as there is in this caſe expreſly; For, there is plaine falſity and repugnancy in this verdict, one part ſaying that *Melton* continued tenant, till 1 *Febru.* or elſe by confeſſing or avoyding that he was tenant, the other part ſaying that *Curtis* was tenant 23. *Ian.* by diſſeiſin, and that *Melton* reentred and was ſeiſed 1 *Feb.* For the recovery was not finiſhed till *Cra. pur.* which is 3. *Feb.*

Alſo I agree that where a ſpeciall verdict concludes their doubt upon ſome ſpeciall point, that the Court ſhall doubt of no more, but allow all other points, though there be ſome defect as in *Goodales* caſe *Co. lib.* 5. *fol.* 96. where the Iury made this doubt, whether the payment of one hundred pounds, with agreement to have ſome part of it againe, were ſufficient upon a condition to defeat the eſtate of a ſtranger.

The Court regarded not that there was no title found for the party that made the entrie, whereupon the Action was brought.

But here the Iury doth conclude upon the generall, whether the Defendants entry were lawfull or no, which is all one as if they had

had referred to the Court their *utrum*, whether the Defendant were guilty or not.

And it is a dangerous thing to conſtrue a writ larger, or otherwiſe than upon a ſure ground, for it ſubjects them to an attaint, as in this caſe to make a fine as it were a perfect recovery and a perfect tenant, which without queſtion they meant not generally and at large, but only by this bargaine and ſale and by no other meanes.

So upon the whole matter, I was of opinion that Iudgement was to be given for the Plaintiffe, and ſo were the reſt of the Iudges that had ſpoken before me; And ſo the Iudgement was given.

But they having argued before me, did take the recovery to be wel enough upon the word *tunc teneant*, not well obſerving all the parts, as I noted before.

And then they held that yet the recovery was voyd, becauſe *Melton* was by the remitter (after the death of the ſaid wife without iſſue) tenant in tayle *puis poſſibility*, and ſo within the Stat. of 44. *Eliz.* of feigned recoveries againſt tenants for like vouchees.

But taking the caſe as I have argued it, and as I hold the Law cleere, *Melton* was never leſſe than tenant in tayle: firſt, by the fine of his wife and himſelfe, and by his owne fine to the uſe of himſelfe and his wife again in the ſpeciall tayle the rem. to himſelfe in generall tayle, which remitted him and his wife to the old tayle, ſpeciall with the old rem. depending upon it as long as the wife lived: But when the wife dyed, then the old tayle and rem. vaniſhed, and the husband *Melton* became tenant in tayle generall by his latter rem. raiſed by his own fine and ſo being ever tenant in tayle, can by no meanes be drawn within the Stat. of 32. *H.* 8. & 14. *Eliz.* and then if the recovery were good, he comes in a vouchee of all his title in tayle, and binds all remitters upon any of the eſtates, which he had at any time.

But of this point I ſpake not publiquely, becauſe I held it no recovery as it was found: But Iuſtice *Hutton* obſerving my courſe, did aske me in private what I thought of the caſe, admitting the recovery to be good. To whom I replied and made anſwer as before, that then I held againſt the Plaintiffe.

339. *Waterhouſe & Vxor* Verſ. *Saltmarſh.*

Riot by breaking an houſe upon private proces.

"SIr *Edward Waterhouſe* and his wife, were Plaintifs againſt *Saltmarſh*, under Sheriffe of *Yorkeſhire*, and divers his Bailiffes, againſt *John Keelin*. The caſe is thus, The plaintiffe and *Keeling* were bound with *David Waterhouſe* as his ſureties, to one *Coale*, in 400 l. for the payment of 200 l. whereupon Iudgement was given againſt *Keeling* but at the ſuite of *Keeling*, execution was forborne by *Cole*, to ſee if any contribution could be gotten of the Plaintif, for *David*

"*Walterhouſe* was Bancrupt, and at the laſt nothing comming, *Cole* "tooke of *Keeling* 217 l. in ſatisfaction of his debt, yet delivered his "bond into the hand of *Keeling*, allowing him to ſue againſt the "Plaintiffe. Againſt whom *Keeling* ſent to *Saltmarſh* an Attach- "ment, and withall a *Cap. utlegat.* againſt the Plaintiffe before Iudg- "ment at the ſuite of one *Baſill* a ſtranger, without his privity or the "allowance of the Court, or the Kings Attorny, to the end that if the "Plaintiffe kept his houſe, they might break the houſe, and ſo ſerve "both it and the attachment: The Sheriffe thereupon entered the "houſe in the morning, the utter doore being open, but being within "the houſe with 6 Bayliffs, 5 of them being Gaole birds, ſhut the "doores and drew their ſwords, and preſently he, with 2 of them "with their ſwords drawn ran up to the chamber, where the Plain- "tiffe and his wife were in bed and the doore lockt, and knocking a "little, without telling what they were, or wherefore they came, "brake open the doore and tooke him, and tooke bond for his appa- "rance upon the *Latitat*. and 40 s. for ſuing out a ſuperſed. upon the "outlawry, and ſo diſcharged him, and afterwards the Plaintiſe paid "or gave aſſurance to *Keeling* for 90 l. and had his bonds both to *Cole* "and the Sheriffe delivered up unto him: Vpon all this the Sheriffe was fined 200 l. for the unneceſſary out-rage and terror of his Arreſt, and for not ſignifying that hee was Sheriffe, that the doore might have been open without violence, and eſpecially for diſcharge of the Plaintiffe upon the *Capias utlegat.* and *Keeling*, though it were not holden nor judged to be a Starchamber caſe, that he did ſue his fellow ſurety for contribution, in the name and by the conſent of the credi- tor, though he himſelfe had ſatisfied in a ſort the debt, becauſe it was a juſt ground of equity, that the ſureties ſhould be equally charged. And it is ſo commonly uſed in the like caſes, yet he was fined 50 l. for uſing the Kings Proces and Prerogative, without Warrant of Court, or party intereſſed, hee himſelfe having no intereſt in it, but by that indirect meanes defrauding the Plaintiffe of his liberty of defence of houſe, againſt his private debt.

eſcape.

340. *Caſely* Verſ. *Weſton.*

EZechiel *Weſton* late Sheriffe of *Radnorſhire*, was fined at the ſuite of *Caſely*, for that having a *cap. utlegat.* delivered unto him, againſt one *Bradſhaw*, being in view when he was attending upon the Iudges of Aſſize, from the Church to the Hall, he did not endeavour preſent- ly to take him, whereby he then eſcaped. But it did alſo appeare hav- ing meanes afterwards to take him, he did not, but tooke his word to ſave him harmeleſſe.

341.

341. *Lancaſtell* Verſ. *Sidney.*

Stephen Lancaſtell Executor of *Rich. Lancaſtell* recovered in the K. Bench, againſt S. *Ralph Sidney* one 100 l. debt, who being taken in execution eſcaped, and *Stephan Lancaſtell* brought an Acti. of debt againſt S. *Ge. Reinolds* the Marſhal in the *debet*, & *detinet* and had Iudgment, whereupon a writ of error brought, and *Geo. Crook* inſiſted upon *Hiſcoks* caſe cited in *Hargraves* Caſe, *Co. lib.* 5. 13. Iudgment was given in the K. Bench and new errors were aſſigned, that there were neither Baile nor Bil filed there. We agreed that the error muſt be aſſigned, that there was neither baile nor the party in the cuſtody of the Marſhal, for if he be, I may declare it againſt him, for that is natural, all declarations being in cuſtod. &c. and the Baile is but a fiction of the Marſhals cuſtody, and ſo bound to the Courts, for otherwiſe it were againſt the Record to aver that he were not in cuſtody being ſo layd and anſwered to.

Error for want of Bayle in the K. Bench, how it ſhall be aſſigned for error.

342. *Willis* Verſ. *Woodhouſe.*

William Willis brought an Action upon the caſe upon a trover and converſion of goods, againſt *William Woodhouſe* in the K. Bench, the Def. pleaded not guilty, and the Plaintif had a verdict and Iudgement. The Def. brought an error and aſſigned two errors: The one that there was no Bil filed, the other that there was no Baile. And upon a certiorari in that caſe awarded and returned, it was certified that there was neither Bill nor Baile filed, and the Iudgement, notwithſtanding the ſaid error was affirmed in *Camera S. Tr. anno.* 17. *Dom. Regis vizt.* 5. *die Iulii in eod' ter. in Banco Reg. qu. vide tr.* 16. *Rs. rot.* 745. *in Banco Regis ubi tam prim' judiciũ quam ſecund' intratur.*

Trover Caſe.

Want of { Bill. Bayle.

The want of the Bill being the origin. was taken to be within the meaning and intent of the Stat. of 18. *Eliz.* 14. and remedied by the equity of that Stat.

The want of the Baile was not materiall, becauſe it might be that the Defendant was in *cuſtodia mar.* at the time of the Plaint. Bill exhibited, according as the ſaid Bill ſuppoſeth.

Prohibition.

343. *Edwards* Verſ. *Graves.*

Tr. 17. *Jac.*

Philip Edwards Exec. of *Phil. Edwards*, had a prohibition againſt *Graves*, and the caſe was that one *Agnes Salter* deviſed that the Teſtator and 3 others ſhould ſell certaine lands, and ſhould diſpoſe the money to the Def. and three others equally, the land was ſold accordingly, and the now Def. ſued this executor in Court Chriſtian, for the 4 part of the money. The Court held that neither the land nor mony

It is no Legacy where land is appointed to be ſold by executors, & the mony to bee diſpoſed to certaine uſes.

Court Eccleſia. cannot hold plea in equity, but merely of cauſes according to their Law.

money was teſtamentary as this caſe is, for it was not aſſets to debts, and a ſome ariſing of land and appointed to ſpeciall uſes in way of equity, and not of a legacy, and therefore is not to be ſued for there, but in Court of equity; neither can that Court hold plea for a Legacy in equity, but where it is a Legacy in Law indeed, for they muſt hold plea by their Law as other Courts of Law do.

344. *Twiſſe* Verſ. *Cotton*.

Dower againſt a tenant for life, a fine of the reverſion, how it works upon it.

DOwer. The caſe was that a Tenant for life, and the reverſion in fee of land, whereof the Demandant had title of Dower againſt the Tenant for life hanging the writ, he in the reverſion levied a fine with Proclamation of the reverſion, the Tenant for life dyed, the yeares expired, and now the Demandant brings a new writ of Dower againſt the Tenant in poſſeſſion.

Replevin.

345. *Reynolds* Verſ. *Okeley*.

Diſtreſſe of beaſts eſcaped for rent.

THe Def. avowed for rent reſerved upon a Leaſe for life, the Plain. pleaded in bar and conveyed himſelfe title to 10 Acres adjoyning and put in his Beaſts, and they eſcaped into the place, *&c.* and he freſhly followed to drive them out, but before he could recover them the Defendant diſtrained them. The caſe had been ſomewhat better, if the Tenant ought to maintaine the fence.

Replevin.

346. Sir *Chriſtopher Heydon & Goodhall.*

Sueties in a Replevin.

IN a *Replevin*, *Goodhall* avowed for rent reſerved upon a Leaſe for life and had Iudgment to have retor. irrepleg. and dammages and coſts adjudged. The Plaint. brought a writ of error, and had a *Superſedeas*, and it was moved for *Goodhall*, that *Heydon* might find ſureties according to the Stat. of 30. of the King. But the Court reſolved by the meaning of the Stat. he was not to find ſureties. But if the Avowant had brought an action of debt for the rent, and had judgement, it had been within the Law for the words.

Obligation.

347. *Chandler* Verſ. *Thompſon*.

Execut. for time how. hee ſhall plead when his time is expired.

Chandler againſt *Thompſon* executor of *Marlet* debt, upon an Obligation of the Teſtators. The Def. pleads that the teſtator made him executor till one *John Marlet* ſhould come to 21 yeares of Age, and in the meane-time to keep all his goods for him, and then to deliver them unto him. And the ſaid *John Marlet* then to be executor, and ſhews that before the writ, *I. M.* was 21 yeares of age, and then hee

he delivered him the goods which he accepted, *abſq; hoc, &c. qd. ipſe die impetrationis, &c. fuit executor, &c.* It was debated by the Court, if the firſt executor ſold or waſted the goods, how the creditor ſhould releive himſelfe for thoſe goods, the new executor taking upon him the executorſhip; For the goods never came to the hands of the new executor, though perhaps he may have an action againſt the former executor, for ſo much as he did not lawfully adminiſter, for againſt the vendees he can have no remedy, for the old executor may remaine an executor ſtill for that purpoſe, the other being none in effect for theſe goods, as in the caſe of a Sheriffe that doth not deliver his priſoner he hath in execution to the next Sheriffe.

Executor for a time waſteth his goods, how the creditor ſhallbe relieved after his time expired

348. *Fawkner* Verſ. *Andrews.*

Prohibition.

IN Prohibition the parties be at iſſue upon a cuſtome *de non Decimando* of wood, *infra Villam de Suſſex.* It was moved by *Finch*, whence the *ven. fac.* ſhould be, and the Court directed that the beſt were *de corpore com.* for wood, is no *viſne*, whereof the Court can take knowledge unto this caſe, for the Def. aſſented theſe kind of aſſents would be entered upon record.

Diſmes charged of the tith of wood in the wild of *Suſſex.*

349. *Plat* and *Holford.*

Breve de Recto.

IN a writ of right between *Plat* Demand. and *Holford* Tenant, The tenant pleaded that he was within age, and in by diſcent, and prayed the Court that hee might demurre till his full age, whereunto the Demandant replied that he was ſeiſed till the tenant diſſeiſed him, and traverſed the diſcent, and day was given to the intent to advile what he would do.

Writ of right ayde prayed by tenants in a writ of right, the Demand. replyeth that hee was in by diſſeiſin.

350. *Waterer* and *Freeman.*

5. Caſe.

THe Caſe of *Waterer* and *Freeman ſup. pag.* ~~922.~~ 287. was this Terme Iudged for the Plaint. and the reſt of the Iuſtices deſired me to deliver the Iudgement and reaſon, wherein I firſt obſerved that the money was not twice levied, nor the Plaintiffe twice charged with the damages, as the Declaration did pretend and ran; for the firſt was, *pro defectu emptoris damna parata habere non poſſum*, but yet it appeares by the declaration that hee was twice vexed and diſturbed, and that wilfully by the Def. who had firſt one execution inchoate, which hee ought to have followed full well knowing it, and not to have taken another, for elſe he might take in execution and take away his milch kine or cattle, or his plough beaſts, but now the Iury muſt give dammages according to the leſſe.

2 *Fieri fac.* upon one Iudgment.

But if the Def. in this caſe haa been ignorant and had not knowne of the cattle firſt taken, he had not been lyable nor ſubject to the other Action.

But now to the maine point, we hold & are of opinion, that if a man bring an action upon a falſe ſurmiſe in a proper Court, he cannot bring an action againſt him and charge him with it as a fault directly, and *ex diametro*, as if the ſuite it ſelfe were a wrongfull Act, for *executio Iuris non habet injuriam*. And as all by nature is good, ſo S. *Paul* ſaith the Law is good if a man uſe it lawfully, ſo the abuſe of Law is the fault therof, 11. *El.* A man brought a writ of forgery, &c. the def. though by the Iury he was found guilty, could not have a */candalum magnatum*, and lay the charge contained in the action to be the ſcandal, ſo 43. *Eliz.* 3.33. The Plaint. brough an action of falſe impriſonment, the Defend. pleaded that he cauſed him to be impriſoned upon the Sta. The Plaint. replyed that there was a day given him upon defeaſance to pay the money, and that he paid the money before the day limited, & yet notwithſtanding the Court tooke it into their conſideration, and ruled it againſt the ſaid Plaint. becauſe it was apparently evident and plaine that he was impriſoned by the due courſe of Law.

And ſo we rule it every day, that if a man be impriſoned upon a formall ſuite, though there was no juſt cauſe of ſuite, yet if he give a bond for his releaſe, he ſhall not avoyd it by a *dureſſe*, for it is in *carcere legitimo*, that is by Law, though the party did untruly procure it.

But now on the contrary part, if you charge me with a crime in a Court that is no way capable of the Cauſe, I ſhall have action for it and lay that very complaint to the ſtander, as it is reſolved, *vid. l.* 1.14. In the caſe of *Buckley* againſt *Wood* for charge of a piracy or felony, in the Starchamber, for it is */candal' temerarium*, as if it were ſpoken elſewhere, being no Court to that purpoſe. So I hold if a man ſue in the Spirituall Court for a mere temporall cauſe 8. *E.* 4.

Now to the principall caſe, if a man ſue me in a proper Court, yet if his ſuite be utterly without ground of truth, & that certainly known to himſelfe, I may have an action of the caſe againſt him for the undue vexation and damage, that hee putteth mee unto by his ill practiſe, though the ſuite it ſelfe be legall, and I cannot complaine of it, as it is in ſuite. As in the caſe before, and therefore the 16 of *E.* 3. *Fitz.* 35. Deceipt 35. a conuſee of a Stat. ſued execution againſt him and his Aſſignes, in the nature of *audita querela*. So note the diſtinction upon this caſe and 43. *E.* 3. before; likewiſe I hold that I may have an action upon the caſe, againſt him that ſues me againſt his releaſe, or after the money duly paid; yea though it be upon a ſingle obligation. So where one doth bargain and ſell his land at the Com. Law and refuſe to make aſſurance accordingly, and after conveyeth the land to another, who hath knowledge of the firſt bargaine, the firſt bargaine may have an action

action upon the caſe or deceipt as well as *ſupra*, whereupon *Fairefax* 21.34*E*.3.ſaith wel, that if men wil be good pleaders, there ſhould not be cauſe of ſo many ſuits in Chancery. But now two cautions are to be obſerved to maintaine actions in theſe Caſes.

The firſt, that the new action muſt not be brought before the firſt be determined, becauſe til then it cannot appeare that the firſt was unjuſt, which is the reaſon given by the Iudges 1. *R*. 3. and that is the reaſon that a writ of conſpiracy lyes not till the Plaint. be lawfully acquited. The other rule is, that there muſt be a thing not only done amiſſe, but alſo a damage already fallen upon the party, or elſe inevitable. And therefore 19.*H*.6.44. If a man forge a bond in my name, I can have no action upon the caſe, but yet if I am ſued for the wrong and damage, I may avoyd it by plea, but if it were a recogniſance or fine, I ſhall have a deceit preſently before executiõ. For *quæ vel continet. vel certe fiunt ineſſe videntur*, 43.*E*.3.20. Deceipt againſt one that procured a forme done by colluſion.

351. *Fleetwood* Verſ. *Curley*.

Miles Fleetwood brought an action upon the caſe, againſt *Francis Curley* Eſq. and declared, That whereas the King by his Letters Patents *an*. 7. did make him generall receiver of the Court of Wards during his life, which Office he hath juſtly executed ever ſince; that the Def. the 16. of R. *Iac*. having ſpeech with one *Whorewood* of the Plaint. did ſpeake of the Plaint. theſe words, M. deceiver (meaning the Plaint.) hath deceived and cozened the K. and dealt falſly with him, and I have him in queſtion for it, and I doubt not but to prove it ere it be long, upon iſſue not guilty it was found for the Plaint. before me at Guildhall, in arreſt of Iudgement it was ſaid, that it doth not appeare by the words ſpoken, that they were ſpoken of this Plaint. For M. Deceiver had no property to that purpoſe, and then the *innuendo* will not make it certaine, when it appeared to the Court, that the words will beare no certainty.

Action for words M. Deceiver hath deceived and cozened the King.

Secondly, it may be objected that he did not ſay that the Plain. did deceive the K. in his Office, yet the Court after divers arguments gave Iudgement for the Plaint. And as to the firſt exception it was agreed that if a man ſhould ſay, looking upon 3 perſons, one of theſe murdered a man, no *innuendo* will helpe this incertainty, no more in the perſon than in the matter of ſcandall. *Paſch*. 17. *Iac*. *N*. *B*. *fol*. 8.

Harmeby brought an action againſt *Ducking*, for ſaying that he had forged a writing *Innuendo* all the circumſtances, and though he had a verdict, yet could have no Iudgement. But here it is ſaid, at the time of the words the Defen. had ſpeech of the Plaint. and expreſly that he ſpake theſe words of the Plaint. And then the word deceiver, though

it

it doth not import receiver, yet the alluſion and ironicall reſemblance of the word doth very well beare the application of the *Innuendo*, and if ſuch a ſlight evaſion ſhould be admitted, it would be a common practiſe with crafty wits, to ſlander ſafely. And if he had ſaid, M. receiver, there had been no doubt.

And to the ſecond point, it was likewiſe agreed that words of an ambiguous ſenſe ſhall receive the beſt ſenſe, as *(pox)* not the French pox, and 12. *Iac. l. Rel. fol.* 8. *Miles* brought an action againſt *Iacob*, for ſaying he had poyſoned one *Smith*, and had Iudgment in the K.B. but we reverſed it, becauſe it might be againſt his will: It was alſo agreed that if the Plain. ſhould have added an *innuendo*, that the deceipt was in his office, it would have been nothing available. But the Court reſolved that upon the whole caſe here the words muſt be underſtood of themſelves by conſtruction of law of his office, for always words ambiguous muſt be of an indifferent ſenſe that ſhall be indifferently take. But when there is a pregnant violence, certaine it may lead the Court and hearers to take it one way, that it ſhall be taken, and not another imagined, wherof there is no apparence. So here when you ſay the K. receiver, that he deceived the K. it muſt be underſtood in that wherin it appeareth that he may deceive him, & not to take it at large when no other meaning appeares; and therefore not like the caſe of *Pox*, or poyſoning before mẽtioned, otherwiſe if he had ſaid, that he had been a common deceiver, without applying to the K. certainly whoſe Officer he is, *Mic.* 11. *Iac. l. Rub.* 12. *Yardly* being an Attor. brought an action againſt *Ellis* and declared whereas he was reteined by one *Bancroft* againſt the Def. he ſaid of him to *Ban.* your Attorney is a bribing knave, and hath taken 20 l. of you to cozen me, and had Iudgm. For it ſhall be of him as an Attor. And *Mich.* 14 *Iac. l. Rub* 194. *Box* an Attorney brought an action againſt *Barnaby* for calling him *Champter*, and had Iudg. And its not materiall that its not alleged in this caſe, and the others that the hearers did know him to be the K. Receiver, and the others to be the Attor. and yet it were not ſo and the ſlander and dam. conſiſt in the apprehenſion of the hearers, and therfore ſlandering words in Welſh beare no action, except you affirme that they were ſpoken in the hearing of thẽ that underſtood the Welſh tongue: But when ſlanderous words are ſpoken, wch are a wrong, the wrongers are anſwerable, for all evil evẽts & dãgers. Now the hearers may come to the knowl. or others to whõ they ſhal report the words may know that they are perſons of that condit. that make the words actionable, which in the caſe of Welſh words cannot be ſo underſtood in any reaſonable poſſibility.

Covenant.

352 *Crane* Verſ. *Taylor.*

Iohn Crane brought an action of covenant againſt *Iam. Taylor* D. of Div. and one of the Prebendaries of *Ely*, and the caſe was, that D. *Tinda-*

Tyndall Deane of *Lincoln*, and this Def. and all other the Prebendaries there, by their ſever. names had covenanted joyntly and ſeverally, to make a Leaſe of an Inne called the *Bell*, within *Newgate* unto *Crane*, which Leaſe and Conv. was by demurrer in Law argued to be voyd, upon the Stat. 18. *Eli.* but the caſe was judged for the Plaint. that the Cove. was good in Law, becauſe it was not within the Stat. 18. *Eliz.* being concerning a houſe in *London*, for though the Stat. 13. *Eliz. c.* 10 be generall againſt all Leaſes and Grants, other than for 21 yeares, & 3. lives of all the poſſeſſions of Deanes and Chapters, &c. yet there is a Stat. of 14. *Eli.* mentioning the ſame may be granted, deviſed and aſſured, as they might lawfully have been before, and as if that Stat. had not been made, ſo that Stat. ſets all looſe touching ſuch houſes in Cities as are againſt the Stat. of 13. *Eli.* and therefore that Stat. of the 14. *Eli. c.* 11. makes a new Law of it ſelfe, for that then no Leaſe ſhall be made of them in reverſion, which was not reſtrained by the 13. *Eliz.* as appeares by the Stat. of 18. *Eli.* which provides for that miſchiefe, as not provided for before. Alſo the Stat. 14. *Eli. cap.* 11. alienations of ſuch houſes except there be full recompẽce given to the Church at the ſame time, ſo as with ſuch recompence they may alyen in fee, which was not permitted by 13. Then comes the Stat. of 18 *Eliz.* which recites that ſince the making of the 13. divers Leaſes long before the expiration of the former againſt the meaning of the St. 13. and enacted that all Leaſes made of lands, whereof any former Leaſe was then in being, and not to be ended within the 3 yeares ſhould be voyd, and that all bonds and Cov. for making Lea. againſt the intent of 18. or 13. *El.* ſhould be void, ſo this Stat. toucheth not the Sta. of 14 *Eli.* which permitted not leaſes in rever. at all nor was named, mẽtioned or expreſſed in this Stat.

St 18 *El.* Church Leaſes and Covenants for thẽ extend not to houſes in Cities &c.

353. *Wilden* Verſ. *Wilkinſon.*

Obligation.

John Wilden brought an action of debt againſt *John Wilkinſon* upon an Oblig. of 100l. the cond was to ſave the party harmleſſe from all actions and dam. that might ariſe upon the releaſe of the def. out of execution being then in executiõ at the Plain. ſuite from all perſons that might trouble him concerning the ſaid releaſe.

Condition of an Obligation extends to a matter *debors.*

The Defendant pleads that the Plaintiffe levied a plaint in the Court of *York*, againſt one *Nuttall* and alſo againſt the Bayle, and this Defendant was therupon taken in execution and the Plaintiffe releaſed him, which is the ſame releaſe in the condtion and ſo concludes that he did ſave him harmeles, &c. The Plaint. replies, and confeſſeth the Plaint, Baile, and Iudgment *ut ſupra*, but ſaith further before the Def. was taken in exec. *Hart* the other Baile gave him ſecurity for his mony and in conſid. thereof, the Plain. promiſed *Hart* that he might take out and lay the execu. upon the Def. and that he could not releaſe him,

without the conſent of *Hart*, wherupon *H.* procured him to be taken in exec. and then moved the diſcharge, who acquainted him with his promiſe to *Hart ut ſupra*, and thereupon the Def. made him this bond with condition *prout* and ſhewed that therupon he diſcharged him.

And *H.* brought his action for breach of his promiſe in the K. Bench and recov. 150 l. dam. *& ſic damnificatus*, wherupon the Def. demurred in Law, and Iudgment was given for the Plain. againſt the opinion of *Hutton*, who thought the condition was to be underſtood only by the words of dam. directly growing by the releaſe, and not by any collaterall Act *dehors*, as is this promiſe. But the reaſon that moved the Iudg. was, that this cond. did carry a forcible & apparent intent of ſaving harmeles of ſome danger that might ariſe, not upon the releaſe alone, but upon ſome externall and collaterall thing beſides the releaſe, and yet by the meanes and occaſion of the releaſe: For the words are, to ſave harmles *& c.* from all perſons that might trouble him concern' the ſaid releaſe: Now, no other perſon could moleſt or trouble him for the releaſe of his own debt only wherein no man could have to do but by meanes *dehors*; and where it is ſaid the replication was but matter of equity, it is not ſo, but it was a neceſſary part in Law to make it apparent to the Court, that this breach was within the condi', which was likewiſe gener' and to be then as *Hut'* tooke it, and as the bar is, & the declaring of this promiſe to the def. wherupon he gave the bód, doth alſo ſomewhat help the caſe, though I am of opini. it would have ſerved without it, for he takes upon him at his perill to defend him againſt all the dam. concerning the new releaſe. Now *Harts* action was exactly bent againſt the promiſe, for otherwiſe there could have been no lawfull damnification.

Star-chamber.

354. *Courteens* Caſe.

IN the Starcham. *Yelverton* Attor. gener' exhibited a bill in the Star-chamber, againſt *William Curteen*, *&* 7, or 8 ſcore *Duchmen*, for tranſporting of ſundry great ſoms of money, ſince the beginning of the K. raigne, and laid his bill, that they had joinly and ſever. brought and tranſported great ſoms; that is to ſay *Wil. Curt.* ſo much certaine, & ſo every one after another his portion certaine. Vpon this bill every one of the Def. demurred in Law, becauſe the offence was made by L. penal, and therefore ought to be ſued within the time prefixed for penal Laws Again, the Stat. gives for his offence forfeiture of body and goods, and ſo makes it capitall. This demurrer was referred to the Chiefe Iuſtice and to me, and we over-ruled it.

Tranſportation of money is an offence againſt the Com Law.

In the firſt bill was laid out no offence againſt the Stat. but againſt the State, Policy and ſafety of the Kingdome, and ſo puniſhable and not permitted by the Common Law.

To the ſecond we reſolved clearely that no Statute could be extended

ded to the like by doubtfull and ambiguous words, and therefore the forfeiture of the body ſhall be underſtood the loſſe of liberty and uſe of his body by impriſonment, *Quere* if forfeit l ſe..

Statutes that give forfeiture of body extend not to life.

This caſe the Attor. brought to hearing againſt divers, and ſerved ſome of them with *proces ad audiendum Judicium*, and ſome not.

Now though the common rule of Starcham is, that if one Defen. be ſerved to heare Iudg. that it ſerves for all. Yet in this caſe it was reſolved upon debate, that it could not be ſo. For preſidents of Courts as well as Laws are built upon reaſon and Iuſtice, *& tant' habent de lege quant' habent de Juſti.* Now in this caſe though there is but one writing or bill againſt all the Def. becauſe they are ſo many ſever' parties and offences, for though he did lay the offence, firſt joyntly and ſever' yet it is corrected and explained by a ſeveral applicat' of a diſtinct petition to every perſon, & ſo the word joynt is fruſtrate, and ſo there is no reaſon that the ſerving of one Defen. ſhould make another anſwer, that hath nothing to do with him or his cauſe, for it is not the parchment, but the matter that makes one or ſundry bils.

Many ſeverall bil's though but in one writing.

In this ſuit moſt of the Def. had pleaded in bar not guilty, and afterward in their rejoynder had pleaded the pardon by Parliam. 7. *Iac.* which did extend to buying of mony, but not to tranſporting, and thereupon a queſtion aroſe whether ſo many of the defendants as were neither naturalized nor indenized, were capable of the pardon.

Pardon general pleaded in Rejoynder after not guilty.

Secondly, whether it were receivable not being pleaded in the bar.

To the firſt it was urged that the gener. pardon in the preamble and in all parts uſeth the words of loving and obedient ſubj. whereupon the Ch. Iuſt. did in a manner expreſly hold them out of reliefe. But I did avoyd that queſtion, as being not neceſſary, for we all agreed that it did no good in the rejoynder for theſe reaſons.

Pardon general whether it extends to alyens.

1 Not guilty is a proper and perfect generall iſſue, and needs no rejoynder.

2 Secondly, rejoynder muſt not nearely depart from the bar, as this doth and more, for it implyeth a contradiction, the one innocent, the other pardoned as nocent.

3 Thirdly, upon anſwer, which is upon oath, the Def. is examined upon *Inter.* and both make but one anſwer: But upon rejoynder which is without Oath he is not examined, and yet he pleads matter of fact that he is one of the parties excepted, and ſo againſt the courſe of the Court he pleads without Oath or matter to bar the ſuite.

But to the other point I hold againſt the Attorn. generall, that the *Duch.* living here within the K. protection, being of a friend Country to be alſo truly under his ſubject. and therefore capable of his title of loving and obedient ſubj. but they are not capable of this diſ-junctive title of naturall ſub. which is uſually in Stat. ſet in oppoſit. againſt Denizens and Stran. and ſuch as are Forrei. and Stran. And therefore if

ſuch a ſtran. in amity cõmit Treaſon here, the Indict. ſhal conclude *con. debitam allegiantiam*, and ſhall call the King *Dominum ſuum*, but not *naturalem Dominum*.

And beſides the gener' pardon hath reſpect to the gener' contribut' for the Subſidy, wherein though the ſtrang' be no grantors, yet they pay more then we, and in a ſort they may bee called grant. for living here they do tacitly ſubmit themſelves to our Laws and formes of law making, and ſo their grant and conſent is involved, in the conſent of Parlia. And though they be not admit. to the choyce of Knights and Burg. that moved not, for no more are the *Eng.* themſelves that are not Freehol. And I think no Iudge will doubt but that ſuch a ſtran. ſhall have the benefit of ſuch a pardon amongſt com. penall Lawes, and of other com. offences. But if the ſtran. were not in the Kingd. at the time of the pardon made, then he was not within the benefit, for he is not otherwiſe a ſubject but by his reſidence here.

Starchamber.

355. *Hollis* Caſe.

THe Attor. generall did informe againſt Sir *Hollis* L. *Houghton* for that upon a petit. exhibited againſt him to the K. by Sir *Ed. Coke*; for ſtirring up one to ſcandalize and ſue him in the Starchã. the K. referred the examinat. of it to 4 of the Lords of the Coun. who having cald and examined him, did thereupon enjoyne him upon his Allegeance that he ſhould diſcloſe nothing that had paſſed in his examin. & that yet he had in contempt of that com. diſcloſed ſome of it to ſuch & ſuch, & named to whom, to inſtruct & ſtir thẽ to ſuppreſſe the truth.

To this the L. *Houg.* demur. in Law and aſſigned for cauſe that this cõmand. was not binding, becauſe it was not as from the body of the Councell, but from particular Commit' for one ſpec. purpoſe. But the demur. was over-ruled, firſt matterially in that prepar' of witneſſes, to ſuppr. the truth is a full charge of it ſelfe, fit for the Starch. and to be anſwered. And it is further accompted preſumpti. to weaken the acti. of a ſelect numb' of Councel', choſen and appointed by the K. himſelf, and therefore Serg' *Aſhley* and *Hughs* of Grays-Inne, that were of his Coun. were ordered at the Coun. Table to make a ſubmiſ. wch they did.

Councell Privy their authority.

Touching the injoyning ſecrecy upon Allegi. in this caſe I deliv. my opinion publikly in my ſentence that the Obli. of Alleg. was not to be applied, nor laid upon private cauſes, for no man could make a caſe of Alleg. other then ſuch as the Law makes & as conc' the Faith & Loyalty of a ſubj. that he makes to his Soveraigne in point of State.*

Paine of allegiance not to bee impoſed but in caſe of allegiãce.

Starchamber.

356. *Meyres* Caſe.

THe Attorney general did informe againſt *John Mayres* in the behalfe of the L. *Digby* ſuppoſing that he had forged a Leaſe of divers

vers lands parcell of the poſſeſſions of *Sherborne*, being now his in the name of S. *Walter Rawleigh* when he had it.

Bill of forgery in the Starchāber, failes by adding ſomewhat that is not in the writing.

The caſe now comming to hearing and being heard, it now fell out and happened that the informat' ſaid that the leaſe was of divers by name, whereof one peece of ground called *Long Meare* was one. Now the Leaſe pretended and ſuppoſed to be forged, being produced, the ground called *Long Mare* was not contained in it neither by name nor by generall words, but all the reſt of the lands were in it.

Now the Def. pleaded to the Forgery not guilty, and ſo the Court adjudged that as the bill was laid he was not guilty, for it is not the ſame Leaſe, and it was unneceſſary curioſity ſpecially that marred the caſe, for being of a ſtrangers act, if it had been at the Common Law, he might have made his information. That the Forgery had been of ſome one parcell whereof he had been moſt certain, for ſome place or parcel certain, for there muſt be (*inter alia*) as hath been formerly adjudged and ruled in *Patrick* and *Cokes* caſe to the like effect.

357. *Lancaſtell* Verſ. *Sidney*. *M. 17. Jac.*

STephen *Lancaſtell* executor of *Richard Lancaſtell* his father did recover by a Iudgement in the K. Bench, againſt Sir *Ralph Sidney*; a debt of 100 l. upon an Obligation made by the ſaid Sir *Ralph Sidney* and 4 l. for coſts, Sir *Ralph Sidney* afterwards was committed to Sir *Geo. Reinolds*, being then Marſhall of the Marſhalſey, in the execution of the ſaid debt and coſts, who ſuffered the ſaid Sir *Ralph Sidney* to eſcape, the Plaintiffe being not ſatisfied of the ſaid debt and coſts, upon which eſcape the ſaid *Stephen* as executor of the ſaid *Richard*, brought an action of debt of 100 l. againſt the ſaid Marſhal and declared in the *debet* and *detinet* and upon *non permiſit ire ad largium*, by the ſaid Marſhall, *Stephen Lancaſtell* the Plaintiffe had a verdict and Iudgement againſt the ſaid Marſhall for 104 l. debt, and 11 l. 10 s. coſts.

* Caſe. fol. 371. /

The Marſhall upon the writ of error aſſigneth the error.

That the ſaid action brought againſt him by the ſaid executor ought to have been in the *debet* only, and not in the *debet* and *detinet*.

That the executor in his declaration againſt the Marſhall hath not ſhewed the Will of the Teſtator his father, but concludeth his declaration with *Et inde producit ſect'*, and doth not ſay *Et profert hic in Cur. Literas teſtamentarias pred' Rich. Lancaſtell*, the Iudgment is reverſed in the Exchequer Chamber.

The Demandant brings a Formedon in the reverter of lands in Inhuſt and Salehurſt, and declares that *Robert* Earle of *Eſſex*, and *Francis* his wife 33. *Eliz.* levied a fine thereof to *Gerrard* and *Mils*, which fine was to the uſe of *Eliz. Sidney* in taile, the reverſion to the Lady *Francis* the Demandant and her heires, and *Eliz.* is dead without iſ-

Formedon.

ſues, and that the right of the tenement is reverted to the Lady *Francis, per formam doni:* The tenant vouches *Richard Gilc* and *Henrick Parry*. The vouchees confeſt the ſaid fine and uſe *ut ſup.* But they further ſay that *Eliz.* married *Roger* E. of *Rutland.* That the E. of *Eſſex* dyed, and the Demandant intermarried; and that they for the conſideration of money did levy a fine of the ſaid land (*inter alia*) unto *Roger* E. of *Rutland,* who was ſeiſed of the tenements to him and his heires. And then they adde that the ſaid *Roger* and *Eliz.* his wife, 7. *Iac.* levied another fine of the tenements in *Gaſton* and *Screvin*; which fine was to the uſe of the ſaid *Eliz.* and her heires, and then ſhew that the E. *Rog.* dyed and *Eliz.* dyed without iſſue, and that the tenements diſcended from her to the tenant Viſcount *Liſle* as her Vncle and heire, ſo that laſt fine was pleaded to bring the title of the reverſion to the tenant. But all the caſe and the Queſtion of it ariſeth from the 33. *Eliz.* & 3 *Iac.* fearing that upon the fine 7 *Iac.* the ſuppoſed extinguiſhing of the eſtate for the life of *Roger* Earle of *Rut.* depends.

The Defendants reply as to one of the three parts of the ſaid tenement, that the ſaid fine levied by the Demandant to the ſaid *Rog.* E. of *Rutl.* was to the uſe of the ſaid *Rog.* and his heires, during the life of the ſaid Lady *Francis* the demandant, and as to the other two parts of the ſaid tenements, the ſaid fine was to the uſe of the ſaid Lady *Francis* and her heires.

The vouchees rejoyne to the third part, *&c.* That the Leaſe was to the E. and his heires and traverſe the limitation of it during his life. And to the 2. parts reſidue they ſay, that the uſe was to the E. and to his heires, and traverſe the uſe to the L. *Francis* and her heires.

The Iury find as to the iſſue for the third part the ſeiſin of *Rog.* and *Eliz* in taile, the reverſion to the ſaid *Francis* in fee, and that the Demandant had no other eſtate to thoſe lands in *Inhurſt* and *Salehurſt* (ſo no Dower there) and then the Fine and Indenture 17. *Ian.* 3. *Iac.* between the Demandant and the Earle *Rog.* for money conteyning a demiſe, and grant of their eſtate of the 3 part of the ſaid lands (*inter alia*) to Earle *Roger* and his heire during the life of the La. *Francis* Demandant. And the covenant to make and do ſuch further and reaſonable acts and things as ſhall be reaſonably deviſed for the better aſſurance, ſurety and ſure making of their eſtate, of and in the ſaid premiſſes to the ſaid E. of *Rutl.* his heires and aſſignes as aforeſaid *fo.* 65, 66, 67. and the fine 3. *Iac.* upon it. And the Iury likewiſe finds as to the iſſue of the other two parts the intaile reverſion and no other title of the Demandant and the Indent. of bargaine and ſale of the third part and the covenant of further aſſurance *ut ſupra,* and that there was no other Agreement to lead the uſe of the fine, but the ſaid Indenture.

In the Iudgement of this caſe, I have conſidered theſe points.

What quantity of land contained in the fine, 3 *Iac.* doth paſſe unto the

the E. of *Rutl.* unto his own uſe and of what eſtate, and I am of opinion that there paſſeth but a third part during the life of the ſaid L. *Francis*, notwithſtanding the generall covenant of the deed.

This being admitted ſince the demandants have paſſed a third part during her life away, ſhee cannot demand the third part, nor by conſequence the whole as ſhe hath done, except by ſome meanes the eſtate bee given in uſe, and the third be determined and extinct, but that the tenant in this action ought to hold the third part againſt the Demandant during the La. life, and that ſhe cannot maintaine her Formedon againſt her own conveyance.

Out of this it will follow, that ſhe muſt bee barred of that third part of her own ſhewing, for ſhe hath expreſly confeſſed by her replication her alienation of the 3 part during her life by the fine 3. *Jac.*

But then the queſtion is whether ſhe ſhall be barred of that 3 part and have Iudgment for the other 2 parts or whether her whole writ, ſhall abate, inaſmuch as ſhee hath by her own confeſſion falſified her own writ, and demanded the whole as ſhe hath made it. And I hold that the Court ought to have abated the writ for that cauſe, the Def. haying grounded their Formedon only upon the fine, 33. *Elizabeth* whereby the land was given to the L. *Eliz.* in taile the reverſion left to the La. *Francis.* And that the L. *Eliz.* is dead without iſſue, and ſo ought to revert *per form' donationis*, whereas now upon the whole caſe it appeareth of the demandants ſhewing to the Court, that ſince that gift in taile made, the reverſion was conveyed away by the demandants by the fine, 3. *Jac.* though returned unto her by way of uſe, and ſo alteration made of the reverſion ſince the gift in taile.

What will be the effect of this appearing to the Court of her own ſhewing and confeſſion, and whether that were cauſe to abate the writ? What the Stat. 18. *Eliz.* of *Ieofailes* will worke in this caſe upon both faults: And I hold that in this caſe it cures both their cauſes of abatement. So I will conclude for a third part the Demandant is to be barred, and to recover the other two parts, for ſo much as it is in queſtion upon the ſpeciall verdict, which is *Inhurſt & Salehurſt.*

To the firſt point.

The truth of the caſe is, that of ſome part of the land in the deed mentioned, the L. *Fran.* was tenant in Dower actuall of the endowment of S. *P. Sidney*; But of the lands of *Inhurſt* and *Salehurſt*, which is the land in queſtion upon the ſpec' verdict ſhe had neither Dower actuall nor any other title, but her reverſion in fee, as it is found in the ſpeciall verdict.

Clauſes in company in a deed how they ſhall be expounded.

Whereupon firſt I hold, That foraſmuch as ſhe had in Dower that very third part paſt by the deed and fine demiſed to the E. of *Rut.* and his heires, during her life and no other part: But where ſhee had no Dower as in *Inhurſt* and *Salehurſt*, the 3 part of the reverſion in fee did

did paſſe for her life undivided, and ſo the Sentence which is but one in words, hath divers operations according to the nature of the thing wherein it works. For though the deed and the grant contained in it be induced with a recitall that the La. *Francis* did hold a third part of the Manours and lands in the deed mentioned whereof *Inhurſt* and *Salehurſt* are parts, as of Dower, *&c.* yet then it proceeds that in conſideration of mony, theſe, *&c.* demiſed and granted, *&c.* to the Earle of *Rutland* in theſe words all the ſaid eſtate of them, the ſaid E. of *Clanrickard* and La. *Francis* of and in all the 3 part of the Manor of *Roberſbridge*, &c. and all that their eſtate of and in the 3 part of all the lands thereunto belonging in *Inhurſt* and *Salehurſt*. So that the words of the grant are not bound to the words of the Dower recited, as if they had ſaid all their Dower or Eſtate in Dower, or all her 3 part, which ſhe holds in Dower, but looſly and at large all their eſtate in the 3 part of the manor, Towns, &c. So the words being general muſt not be fruſtrate in any part as they ſhould be, if they were reſtrained only to Dower. So there is no cauſe to urge the neceſſity that the generall covenant ſhould create any uſe of it ſelfe, becauſe elſe there were no uſe of theſe lands whereof there was no Dower, for therein you had my opinion cleare contrary. But now I hold that no more ſhall paſſe by the deed and fine but a 3 part of all in uſe to *Rutland*, though the conuſees were ſeiſed of the reverſion of the whole: And yet I grant that if a man ſeiſed of land in fee, will covenant with *I. S.* for money to do all Acts that he ſhall require for aſſurance of the land to him and his heires, and then levy a fine to him that this covenant and fine will give him the whole land: And a declaration of the uſes either in expreſſe words or in the Law is ſufficient, and this covenant is no leſſe than a declaration, and it ſtands in its full ſtrength without any other thing to qualifie it. So of this thē would be no more queſtiō.

But now conſider the caſe which a fine and a like covenant alſo in words, and yet ſhall paſſe unto the third part whereof the reaſon is the wiſedome and the benignity of the Law, that being to judge of an Act, Deed, or Bargaine conſiſting of divers parts containing the will and intent of the parties, all leading to one end, doth judge of the whole and finds every part his office, to make up that intent, and doth not breake his work in peeces.

Now here the deed containes the bargaine, which is a graut for money of all eſtates of the Earle of *Clanrickard*, and the Lady *Francis* of the third part of all ſeverall things to the Earle of *Rutland*, by ſeverall diſtinct clauſes: Then follows the *habendum* to limit the Eſtate to the Earle of *Rutland*, which was not before, though it might have been in theſe words. To have and to hold their eſtate of and in their third part, *&c.* to the Earle of *Rutland*, and his heires and aſſignes during the life of the Lady *Francis*.

So

So two parts of the premiſſes, concerning the grant it ſelfe and all things granted, and the Habendum containing the eſtate, have done their office cleerly and without Ambiguitie, and have given only their third part, and of a limited eſtate expreſſed. Then follow two ordinary Covenants attending upon this Conveyance, and for perfecting of this Conveyance by further Aſſurance, the other for well enjoying that that is conveyed.

Now who ſees not, that the Office of theſe when they follow in expreſſe grant, is not to give any thing, but to aſſiſt, further, and ſupport, being as a wall and as a muniment about it. And therefore cannot be underſtood to exceed that whereunto they are ſaid to be but handmaids, according to the Rule of the great Maſter.

And becauſe it may appeare how abſurd it will be, to take the Covenants as if they ſtood alone without reſpect to the whole context and intent of the deed. Therefore the firſt of the two Covenants is, that the Earle of *Rutland* his Heires and Aſſignes, ſhall at all and every time and times enjoy the third part, diſcharged and ſaved harmleſſe of all titles of the ſaid Earle, or Lady *Frances*.

This Covenant, though it be reſtrained to the third part, yet it is not reſtrained to the heires (as aforeſaid) but at large, for all heires of the Earle of *Rutland*, and at all times, that is, for ever; yet no man would judge this Covenant for an heire of the Earle, after the death of the Lady *Frances*, for it is againſt ſenſe and nature, that I ſhould covenant that thoſe heires ſhould enjoy the eſtate, that by the limitation were plainly excluded. Yet if this Covenant ſtood alone clearely, it would reach to all heires, and for ever, according to the words. So you ſee, that Clauſes in Company have other Conſtructions, then when they are alone.

Now this other Covenant for Aſſurance, is clearely reſtrained likewiſe to the limits of the bargaine, by all the parts and words of it, as well for the third part, as for the limited heires, for theſe apparent reaſons.

1 Firſt, it is joyned to the former Covenant of enjoying, under the ſame line, and the Covenant is depending upon it, which was expreſly only of the third part.

2 Then it is for other and further Acts.

3 Then, that thoſe Acts muſt be reaſonable, and reaſonably deviſed, therefore not differing from the bargaine.

4 Then, that it will be for the better Aſſurance, ſurety, and ſure making, which are all governing by the word (better) and muſt be for the better of that that was before.

Laſtly, of the eſtate, not, of all their eſtate (as the Councell have reported it) to the Earle of *Rutland* his heires and Aſſignes, as aforeſaid.

Now theſe object and preſſe this onely word [their eſtate] and paſſe by all the reſt that ſerve for the declaration and reſtriction. Note it is not [all their eſtate] caſe *Stuckley & Butler. Hil.* 12. *Iac. rot.* 827. The Earle of *Suſſex* Lord of the Manour of *Cleave* ſold to *George* all his Woods, Timber and Trees growing *ſuper totum illud Manerum de Cleave, viz.* upon three Coppics named, we all agreed, that if the word *totum* had not beene there, *viz.* had reſtrained.

Now I ſay, that conſidering all the former parts of the deed, being expreſly for the heires, and an explanation of this very covenant by the former obſervations, their eſtate in this caſe ſhall be underſtood not the eſtate at large, but their eſtate granted; and ſo much the rather, becauſe of the cloſe of the words as aforeſaid, which (as is confeſſed by the otherwiſe ſide) limits the generality of the heires, by the intent of the reſt of the deed, for ſtanding indifferently in the end of the covenant doth likewiſe extend it ſelfe to the thing and eſtate, given by the like intent and upon the ſame reaſon, the rather, becauſe there is no violent words [of all their eſtate] ſo it ſhall be of the ſame ſenſe, as if he had ſaid (their eſtate to him and his heires, according to the true intent and meaning of theſe preſents) or, (their eſtate in all the lands aforeſaid) to the heires aforeſaid. But there might have been more doubt, if the words (as aforeſaid) had been placed thus. That he ſhould make further aſſurance to him, and his heires aforeſaid, of their eſtate, *&c.* And yet I would not have doubted much even of that, as I obſerved upon the former covenant of enjoying, that ſpeak of heires at large without reſtriction as aforeſaid, for covenants, conditions, reſervations, warranties, do all wait and joyne to the grant.

And the word premiſes as aforeſaid, how they ſhall bee expounded in a deed.

And this is the very reaſon of the Iudgement in the Lord *Ruſſels* caſe, *Co.* 11. 51. where a Farme was demiſed, excepting one cloſe by name, and the Leſſee covenanted to repaire the fences of the premiſſes and it was adjudged, 10. *Eliz.* That upon the demiſe of lands named for Abuttals, the word (*præmiſſa*) in the like covenants, ſhall not reach to the Abuttals; yet the word *præmiſſa* in his full and large ſenſe as prementionation or prenomination, as *Montague* in *Davis* caſe. *Plow.* But a wiſe man in his expoſition muſt remember the rule *oculus ad mentem*, hee muſt keepe his eye upon the mark, which is, that the covenant which is but a ſhadow, muſt bee guided by the bodie, which is the eſtate. And therefore in the ſame caſe of *Liford* is cited a caſe, judged betweene the Earle of *Pembroke* and *Simonds*, which was, that the Earle of *Pembroke* granted to ſir *Henry Bartlet* the cuſtodie of *Stafford* walke, and *Brookham* walke, in the Forreſt of *Froome Sellywood* for his life, and then by another deed confirmed his eſtate in *Brookham* walke, and by the ſame deed granted *Stafford* in the Forreſt of *Froome Sellywood*, to him, and to his heires males of his body, and then added a Proviſo

or

or condition, that if he cut any trees in the premiſſes, that then his eſtate ſhould ceaſe, and then *Bartlet* cuts trees in *Brookham* walke. And it was reſolved that the word (premiſſes) ſhould extend unto that, becauſe the deed had operation to it by way of confirmation, but it ſhould not extend to the other parts of the forreſt of *Froome Sellywood* though it were named, becauſe that deed wrought not upon them; which caſe is full to the purpoſe, a condition being a thing attending and applying it ſelfe to the eſtate as a covenant doth. And upon the ſame reaſon in *Lifords* caſe, *Co. lib.* 10 106. where one made a leaſe of a Celler for a yeare, and if in the end of the yeare the parties ſhould agree that the demiſe ſhould continue; then to have and to hold the ſame for 3. years *reddendo inde annuatim durante dicto termino* 40 s. And it was adjudged, that the reſervation did extend to the firſt year, though he held no longer, for the reſervation is attendant upon the leaſe, and the word *dicto Termino* is indifferent to both terms. So here is an extention for warrantie, the caſe 6. *Eliz.* 2. title of *Vouchers*, 258. *A.* gives land to *H.* and his heires, *et ego et hæredes mei warrantizabimus*, not ſaying what, to whom, nor of what eſtate, yet all ſupplyed out of the grant. For, the law imitates nature, that gives proportion to every member anſwerable to the body, that nothing be monſtrous or deformed: ſo then we proceed upon this ground, That a third part and no more is granted away, during the demandants life; wherof it follows, that for the ſame third part, the defendant muſt be barred for want of right appearing to the court, though the iſſue for that third part be found for the demandant againſt the tenant. That the uſe of the third part was to the Earle of *Rutland* and his heires, during the life of the Lady *Frances* only.

This generall poſition is not much denyed by the demandants counſell, but they avoid it thus.

They ſay that after 7. *Jacob.* the Lady *Eliz.* being tenant in taile in poſſeſſion, and the Earle of *Rutland* her husband being tenant for life in reverſion, joyned in the fine to *Gotton* and *Scriven* in fee, that this did works a diſcontinuance by the fine of tenant in taile, and ſo the eſtate for life did drowne and extinguiſh it.

So that when the intaile determined, the defendants reverſion was to come in being, the eſtate for life being before extinct in the eſtate given by that fine 7. *Iac.* by which this Formedon in Reverter is to be defeated, if the eſtate for life be extinct, I meane ſo, that it ſhall run into the benefit of the counſee to whom it is given, but to the old remainder or reverſion, it muſt be either by ſurrender, or forfeiture, or confirmation. By ſurrender it cannot be. Note that this could not worke by way of ſurrender, as in *Bredons* caſe it might, becauſe it is a remainder following, and yet there it is not taken as a ſurrender, for then it it had been againſt the judgement.

To this I Anſwer.

Firſt, that the eſtate for life is not by that fine 7. *Jacob.* drowned and extinct, but that the eſtate in tayle and for life are both conveyed lawfully as eſtates in being to theſe Counſees, ſo firſt the eſtate for life is not forfeited by this fine.

Secondly, it is not involved in the eſtate given by the Tenant in taile, but it is given diſtinctly as an eſtate by it ſelf in judgement and by the force of law.

And here firſt I doe exceedingly commend the Iudges that are curious and almoſt ſubtile *Aſtuti*, which are the words uſed in the *Proverbs* of *Salomon* in a good ſenſe, when it is to a good end, to invent reaſons and meanes to make Acts, according to the firſt intent of the parties, and to avoid wrong, which by rigid rules might be wrought out of the Act. And that is well performed in *Bredons* caſe, *Co. lib.* 1 *fol.* 76. where a Tenant for life, and he in Remainder in taile joyne in a fine (*come ceo*) The Tenant in taile dies without iſſue, the Counſee ſhall hold the land, during the life of the Tenant for term of life. Note in *Bredons* caſe a ſtrange effect, for the Counſee that had a Fee made of both the eſtates, as ſoone as tenant in taile dyed without iſſue, had but an eſtate for life, for there was no more diſcontinuance nor change of the reverſion, but lawfull giving of their eſtates and no more, ſee in *Engliſh* caſe there.

There is no forfeiture in this caſe, becauſe the tenant for life gives not the fee alone, but gives only ſo much of the fee as hee hath and joynes with another in giving a fee during the eſtate, without wrong to any, and therein differs from *M.* 16. & 17. *Eliz. Dy.* 339. of tenant for life, remainder for life joyning in a feoffement in fee, and from 41. *Eliz.* 3. 21. of tenant for life, making feoffement in fee to him in the remainder in taile and his wife. And if we need (as in *Bredons* caſe) to avoid diſcontinuance, it was deviſed that the remainder in taile ſhould be taken to paſſe firſt, ſo here to avoide forfeiture, the remainder in taile may be ſaid to paſſe firſt or laſt.

It is alſo no diſtinct Clauſe, becauſe either of them gives their eſtate lawfully, and there is no neceſſity to receive a wrong to the reverſion, ſince a fee may be determinable by operation of law, as in *Bredons* caſe, though it ſhould by the fine have beene a perfect fee, if there had beene ſuch an one to be given. And *Coke* in that caſe collects, that by reaſon of that cloſe of tenant for life, and he in remainder in taile, make a Feoffement for deed, that this ſhall be no diſcontinuance, nor ſhall deveſt the reverſion or remainder depending, becauſe it ſhall amount but to a grant of both their eſtates, and ſo it ſhall be a fee determinable upon both their eſtates, and no abſolute fee from the one nor the other, whatſoever the word imports, the one conſtruction working by right, the other by wrong, which the law will not admit

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if the other will by any meanes ſtand. So ſince theſe eſtates might have beene ſeverall without forfeiture, the law ſhall marſhall them joyning accordingly. So that this way, though the Tenant in taile ſhould make a diſcontinuance, and ſo work a wrong, yet the grant of a tenant for life in remainder might be lawfull.

Note my opinion upon *Engliſhes* caſe hereafter. Theſe things ſtanding thus, it muſt follow, that the eſtate for life doth not paſſe drowned in the taile, as giving place to it. But it is true, that both the eſtates that were in them ſeverall, did paſſe from bthoas diſtinct Authors of the new eſtate according to their meaſures.

But now in the Counſee they are but one intire ſtate made of two, and therefore removed the Confuſion, as Chymiſts doe, by extracting and ſegregating the ſimples of a compound. As ſuppoſe this conveyance were upon condition, the entrie ſhall reſt in their eſtates as they were before, ſo in *Engliſhes* caſe, in *Bredons* caſe, the Counſee tooke two eſtates, and from two givers; tenant for life and an infant in remainder by fine. The Counſee now had but one eſtate, yet upon reverſall of the fine, the law reſtoreth no more to the Infant, but the remainder becauſe he gave no more, yet the eſtate for life, was as in this caſe given confounded in the fee, and no forfeiture made in *Engliſhes* caſe. So in this caſe I hold it cleere: That if an Infant tenant in taile in poſſeſſion, and he in remainder for life had joyned in a fine, and the infant had reverſed his fine, yet the remainder for life ſhould have veſted with his Counſee.

Then againe, admit it ſhould be taken as a deſcent of the Tenant in taile, and a confirmation (which is leaſt) of the tenant in life for reverſion, who had that eſtate by the grant of the Donee himſelfe, what colour is there then, that the Donor ſhould recover the land, as long as that eſtate is out, that himſelfe gave no more, than if the tenant in reverſion had not joyned but kept his right, or releaſed it to be diſcontinued. And therefore put the caſe, that *A.* Donee intail remainder to *B.* for life, reverſion to *C.* in fee, *A.* diſcontinue at the Common law, this is a preſent wrong to the iſſue in taile, and to *B.* and *C.* but ſuch as none can remedie but in their ſeverall times: ſo that if the iſſue of *A.* ſue not, *B.* cannot, if *B.* ſue not, *C.* cannot, by the ſame reaſon if *B.* will not releaſe to the diſcontinuee, or confirme his eſtate, it is all one to *C.* for his eſtate or right is not thereby anticipated, for there was nothing taken from him but his reverſion, which is as he can require.

But if in *Bredons* caſe, the tenant for life had ſurrendred his eſtate to the tenant in taile in the firſt Remainder, who had levied the fine and died without iſſue, he in the ſecond remainder might have preſently had his Formedon, though the tenant for life were alive, for the eſtate for life was ſo drowned, as there was no more

but the eſtate in taile with the other remainder following. So the difference is, where the tenant for life in *Bredons* caſe ſurrenders, or in the caſe releaſes to the tenant in taile before the alienation, ſo that he hath all and gives all, one giver and one eſtate only. And where there is a joyning in the conveyance, or a releaſing or confirmation to the Counſee, in which caſe it is cleare, that hee gave but his owne ſingle eſtate, and the other remaines to be given by the proper owner.

But that that troubles the Iudgement in this caſe, I ſuppoſe to be the booke of 9. *Hen.* 7. 25. and the opinion *Co. lib.* 6. 70. ſo in this caſe, That if a Donee in taile be diſſeiſed, and the Donor diſſeiſe that diſſeiſor, and make a feoffement over, and then the Donee reenter upon the feoffee, he ſhall have but his firſt eſtate taile, and the reverſion ſhall be returned to the firſt diſſeiſor, and ſhall not remain with the feoffee of the Donor, whereof the reaſon is, That where the ſtronger diſſeiſeth the Donee, he gained by wrong both the tail and the reverſion, and then had in him no entire eſtate in fee: Now when the Donor diſſeiſeth him, he gaines the eſtate which the diſſeiſor had, which was intire, and ſo his diſſeiſor cannot divide the eſtates as they were, for his whole is by the wrong to the firſt diſſeiſor, none having right of entail but the Donee, then when he makes his feoffement over, that gives no eſtate but that wrongfull one. But it gives away his right alſo, not by granting but by drowning and dying in the land. So then, when the Donee reenters, hee can have no more than his owne, and muſt by his entrie reſtore the reverſion, becauſe the eſtate he had was no other than that wrongfully gotten by the Donor from the firſt diſſeiſor and given to him, wherein there was in effect the taile of the Donee and the reverſion of the diſſeiſor, and now when the Donee enters he cannot reſtore the reverſion to the feoffee in reſpect of the right, becauſe it is utterly annihilated by the feoffement which cannot give but doth extinguiſh it. And now you muſt ſee no other right but that which growes out of the diſſeiſors, whereof the firſt is both the beſt in eſtate and right, and therefore if the firſt diſſeiſor had entered upon the feoffee of the Donors diſſeiſor, and then the Donee had entred upon him, no doubt the reverſion had beene left in the firſt diſſeiſor, and then the feoffee had no way by his buried right, to recover it now or after the death of the Donee without iſſue, ſo here difference appeares, that in this caſe the firſt diſſeiſor hath right to the whole eſtate, wherein the right is buried, and ſo redounds to his whole benefit; In the principall not ſo, for firſt they had right only to the reverſion in fee after both the eſtates ended, whereof the one helpes the other.

So note that the right doth exſtinguiſh whether it be in feoffement, releaſe or confirmation, to the benefit of the eſtates then laſt

in

in being as of the firſt diſſeiſor. Much more here, if the diſcontinuee be now in *eſſe*, not to the benefit of the ancient right, for one right cannot extinguiſh another.

That though the demandant is to be barred of the third part only, yet it is cauſe to abate the Writ, being a wilfull deſerting or departure from his Writ and demand.

Now then admitting that for the third part, the demandants are to be barred upon their confeſſion, according to my opinion which muſt be peremptory and finall for ſo much, though their right had beene a good action for the whole, if they had tarried their time till after her death, I hold that the demandant can recover nothing in this ſuit, but the whole Writ is to be abated, for the Writ is ſatiſfied of their owne ſhewing, and that in a ſubſtantiall part, and not in point of forme, For it appeares, that they have no right of Action at all for this third part. As if a man ſhould demand a debt of twenty pound, and confeſſe that he hath no right to ten pound of it, or demand an hundred Acres, and confeſſe that he hath no right to fifty of them, no doubt the Court *Ex officio*, or the partie either by plea in abatement, or as *Amicus Curiæ* at leaſt might take knowledge and abate the Writ.

But if they went unto iſſue and a verdict given, where the Statute gives reliefe, it doth aſwell when it appeares of the parties ſhewing or otherwiſe, 14. *Eliz.* 3. *H. br.* 272. Formedon in deſcender the gift was traverſed to all, after, the demandant ſaid they were agreed. The tenant to the taile confeſt the gift for part, and the demandant confeſſed no gift, for the reſt the court held that by this the writ ſhould abate, wherefore judgement was firſt given againſt the tenant for the third part, and againſt the demandant for the reſt.

Et 9. *H.* 6. 454. one brought a detinue for two writings for one made no title, *Babington* was of opinion, that though this be a barre for that, yet it may be pleaded in abatement for all, as being more to his advantage. But if it were only ſome writings, then it muſt be in barre or the worthier. But then if it were found in barre by verdict, it were otherwiſe. So then likewiſe when a formedon is brought in land and Advouſon, which is alſo one generall point of *Godfreyes* caſe, *Co. lib.* 11. 45. the Alteration made of the reverſion ſince the gift in taile by the fine, 3. *Iac.* is true, only the gift of the third part of the Earle of *Rutland* during the life of the Lady *Frances*, whereof we have ſpoken.

The other the conveyance of the reverſion in fee ſimple aſwell as of the third part, after the Earle of *Rutlands* eſtate ended as to the uſe of the Lady *Frances* and her heires as before.

To the ſecond I doe agree, that if there bee an alteration whereby it is made another Reverſion, then it was before, that

that it muſt be mentioned in the Writ, ſo in *Wiſemans* caſe, where the reverſion that is in fee is turned into an eſtate in taile, though in the ſame perſon.

And *Fitzh. Nat. Br.* 219. *Regiſter* 242. where an eſtate for terme of life was interpoſed though ended, yet there is a Writ mentioning that eſtate determined.

But here the eſtate for the two parts, is the very ſame in Law in the Donor, that it was at the firſt, though it be in her now by a ſecond meanes, that is, by a ſecond fine to the old uſe. Wherein obſerve *Buckinghams* caſe 28. *Hen.* 8. which was, that *Buckingham* being receiving uſe before the Statute of Land, holden in Knights ſervice, *Iay* and others being his Feoffees, did infeoffe *Ienor* and others to take to the uſe of *Buckingham* and his heires: *Buckingham* dyed, and this was adjudged to be a reverſion by the old Statute. And in this caſe, *Willoughby* cites a judgement of the old Roſcis, which came to this: That a man being (as *Baldwin* puts it) receiving uſe of two Acres, one by priority and the other by poſteriority, made a Feoffement together of both, yet the priority remained.

Now, though when the Lady *Frances* with the Earle of *Eſſex* levied the fine, ſhe had no uſe, yet ſhe raiſed both the eſtate in taile, and her own reverſion by uſes. And though lands and uſes cannot now ſtand divided as they did before the Statute, yet the owner of the lands hath power to give the uſe as he did before, and the Statute couples the lands unto it, as it did when it found lands in uſe at the making of the Statute. And as upon the fine of 33. there was a uſe which was judged in reverſion, and then the land followed in the ſame degree, ſo the ſecond fine by the help of the Common law receives the ſame uſe, being of the ſame reverſion, and the Statute makes it in the ſame degree, and the rather, becauſe there is no expreſſe uſe in either but the uſe made by law.

But that was a fault, take the uſe of the Regiſter, *& Na. Br.* conſidering there the fee of the reverſion was never ſtirred. Here it is, ſo that you muſt pleade upon the Statute you are ſeiſed not by force of the firſt Conveyance. And ſo it may ſerve if you had granted upon Condition, Rents or Remitters.

It may be objected that the Tenant or Vouchee in this caſe, could not plead this matter in abatement for two cauſes. Firſt, becauſe they had pleaded no plea in abatement of the Writ before, which was judged good againſt them, and the Court awarded, that they ſhould anſwer to the anſwer of that Writ.

Secondly, becauſe they pleaded in barre, and therefore could not reſort back to a plea in abatement, and both are true.

But I anſwer, that there is no plea in abatement whereof the party needs ſpeake of Pleas in abatement, riſing *de hoc* in the

the Record, and whereof the Court can take no knowledge.

But in this Caſe, where the Cauſe appeares to the Court either of the parties own ſhewing, as here by variance from the Regiſter in the very caſe appearing, or by falſe Latine, or the like, in ſuch the Court may and ought, *Ex officio* to abate the Writ at any time. And if the Tenant or Vouchee ſhall informe the Court of it, hee is in that but *Amicus Curiæ*, and this Information is not formall in pleading, nor in Court, but verbal, and may be done any where and by any body.

358. Duke of *York* Uerſ. Earle of *Warwick*. Formedon.

THe Duke of *Yorke* brought a Formedon againſt the Earl of *Warwick*. At the Summons returned, the Tenants were demanded and eſſoyned, and the Eſſoyner pleaded in the abatement, that the Writ was *Dux Hiberniæ*, where it ought to be *Dominus*. And it was ſaid *per Cur.* that the Eſſoignee can pleade nothing, but he may only demand the Demandant to make him Nonſuite, therefore hee ſhewed this as *Amicus Curiæ*. For it was agreed that the Court *Ex Officio* ought to abate, when the fault is apparent. *Dux* for *Dominus.*

And therefore I condemne the Caſe 40. *Eliz.* 345. when a Formedon in deſcender was brought of 20. Acres, which with other 20. Acres *H.* gave *B.* and the Demandant held him *in ſimul cum D.* After view the Plaintiffe pleaded this abatement, and it was denyed him as an exception not riſing from view, which was not true as of the plea, but it was the office of the Court, *Fi.N.Br.* 26. It muſt be of part and not divided, and before partition the *Inſimul*, ſo then it rejoyned a fault, wherof (when it appears to the court of the plaintiffe ſhewing) advantage might be taken to abate the writ in ſuch maner as aforeſaid.

Now the queſtion is whether the advantage being permitted after, it might have been taken, and the parties deſcending to an iſſue, and verdict found by 12. men, whether the fault in the Writ be remedied by the Statute of Jeoffailes, 8. *E.* And (I) hold plainly it is, And becauſe this Statute and the like, are of ſoveraign uſe to cure theſe petty maladies that ariſe of thoſe curious forms of law, I will inlarge my ſelf upon it, and I profeſſe that I will inlarge the intent upon theſe Statutes ſo favourably as I remove no ſubſtantiall point or land-marke betweene right and wrong, And therefore I do not very well like the opinion of *M.* 1. & 2. *Ph. & M.* cited in ſir *John Heydons Co. l.* 11. 6. That a verdict between a Demandant and a Vouchee, ſhall be out of the remedie of the Statute 32, *H.* 8. the words being (when the iſſue, is tried for the partie plaintiff) ſurely it is a partie both the ſuit & iſſue and the common law which is the mother and patron of reaſon to ſtat. allows him a part to take a relief from the Demand. aswel as the very

Hobard. A fault in a Writ remedied by ſtatute of Ieofailes of 8. *Eliz.*

Tenant but he is no partie to the Originall writ. It is true that originally he is not but by ſubſtitution of the party allowed by law and hee may plead in Abatement though hee may alſo extort the warrantie of this tenant having not taken pleas in Abatement, ſo in Delatories, the party muſt take rather, than put the third perſon to his warrantie, which was intended alwayes, *ult. refugium.* But who requires this ſtrictneſſe; it is not ſaid partie to the originall, beſides the number of that is for the plantife and the defendant or demandant generally, not ſaying againſt the party tenant or defendant. And then, why may not by good reaſon, the two clauſes for the Tenant or defendant be enlarged, to anſwer the reciprocall intent of the one number, rather than to reſtraine the former by the latter, eſpecially ſince it is clearely true, the iſſue found for the vouchee, is found in effect for the tenant and the demandant thereby debarred againſt him.

But the other clauſe found for the demandant clearely, is within the words and meaning, for it is for the demandant, and he hath judgment upon it againſt the tenant, over againſt the vouchee.

And it is one caſe that the verdict here found is for the defendant for two parts indeed, and for the other part of *A.* ſo arguing this point as I do, though for the third part in it ſelfe it be a barre, yet it makes but forme for the abating of the whole writ for the reſt.

359. *Wells* Verſ. *Woodhouſe.*

Trover.

Eliz. 18.

VV*Ells* brought a Trov. in Kings Bench againſt *Woodhouſe*, after verdict error was aſſigned for want of Bil againſt or for felony is without the remedy of 18. *Eliz.* and ſo in the Exchequer chamber as before in the caſe of *Wells* for want of Bills in the Kings Bench for the evill miſchiefe and reaſon though the words of the law be writ not of the originall only, but of the originall writ. But this caſe of ours is ſubject to that doubt, though the iſſues were betweene the demandant and vouchees. For it is not within 32. *H.* 8. but with 18. *Eliz.* being a fault ſuppoſed in the Writ, and that ſtatute being in ſeverall words, if any verdict ſhall be given in any action *&c.* without mention betweene parties as 32. did. So the only queſtion is, whether the fault in the writ (ſuppoſing it a fault) be within the remedy of 18 *Eliz.* whereof the words are, If any verdict of twelve men or more ſhall be given in any action, ſuit, bill, plaint, or demand in any court of Record, the judgement ſhall not be ſtaied or reverſed by reaſon of any default, or lack of forme touching falſe Latine, or variance from the Regiſter, or other defaults in forme in any writ originall or judiciall, whereupon firſt it is to be obſerved, that the faults remedied by the law muſt be faults in forme, as forme ſtands in oppoſi-

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tion againſt the matter in law and very right, which words are expreſſed in the ſtatute 27 *Eliz.* of Demurrers, which are of the ſame nature, and are tacitly excluded out of this. And therefore the point of variance from the Regiſter, muſt bee in matter of Law very right, you muſt not varie from the kinde of Writ that is proper to your right, but if you keepe not the kinde *in ſpecie*, you varie in forme.

Therefore if you take a formedon in deſcender, where your right is by remainder or reverter, or *è converſo*, it is not holpen. Nay if you take reverter for remainder, though both ariſe from an intaile made and ended, and thereupon the land falling either to the donee or his aſſignee, I hold it uncurable, yet there may ſerve one another, As 18. *E.* 3. 28. *Plow.* 170. *redibunt* to a ſtranger. For, theſe kinde of variances are not variances from the Regiſter, but variances from your caſe and title, for the nature and recovery is like as in a remitter to reſtore you to land according to your title.

So if a debt be brought againſt an Executor in debt of *Detinet*, the verdict helpes not, for it differs in nature and judgement, the one charging the proper goods of the defendant the other not.

And yet in a ſtronger caſe *Lancaſtel* recovered againſt *Sidney*, who being in execution in the Kings Bench, eſcaped, and then this executor brought a new action of debt in the Kings Bench, in the *debet* and *detinet* againſt ſir *George Reynolds* the Marſhall, and had judgment after verdict, which was reverſed before us in the Exchequer chamber, and yet the words of the judgement being of the part of the plaintife all one, but the effect divers, for the *debet* and *detinet* is for his owne uſe, and the *detinet* only for the teſtators.

But there are formes curable, as in a formedon in deſcender the demandant in his writ muſt make mention of every heire, to whom any right is deſcended for diſcontinuance, though they were never ſeiſed. *Duchmers* caſe, *Co. lib.* 8. *fo.* 88. or elſe it may be pleaded in abatement and ſo is *Fitz. Nat. Br.* 20. *Dyer &* 18. *E.* 2. *Formedon* 59. for conveying the life of the Donor in Formedon in the Regiſter, yet I hold both theſe omiſſions cured by verdict, provided that they make themſelves to the laſt, and that was ſeiſed by the force of the taile, or to the firſt Donee, for that is naturall, See *Fitzh. Nat. Br.* 218. *D. &* 219. If the Donor grant his reverſion in fee, the grantee ſhall not have a Formedon in reverter, it ſhall bee in remainder; yet I hold that verdict will helpe, though it be made a reverter upon the entaile; becauſe it is true that he hath reverſion in taile, and hath rent incident unto it. *Scholehurſts* Caſe Aſſ. The Writ was abated, but if it were the day after verdict it would bee good. And though in *Bracebridge* his Caſe, 14. *Eliz. Plow.* 424. he were of opinion, that where an *Ejectione Firmæ* was brought of land upon a ſpeciall verdict, the Court judged one halfe againſt him, *Plow.* was of

opinion that the writ ought to have abated, and all common experience is againſt it after verdict. And I hold for a Rule, that where the ſtatute 18. doth cure a fault in forme after verdict, that effect is well where the fault appeares in forme, bythe confeſſion of the partie or otherwiſe, for the Statute is ſeverall without difference. So I hold it at moſt to bee a fault in forme varying from the Regiſter, when the Writ demands the whole, and the Right it but an undivided part.

Caſe.

360. *Adams* Uerſ. *Flemming*.

Hee hath forſworne himſelf before the Councel of the Marches of Wales.

Adams brought an Action of the Caſe againſt *Flemming* for ſpeaking of theſe words, *viz.* he hath forſworne himſelfe before the Councell of the Marches of *Wales*, in the ſuit I had againſt him there for perjury, and after a verdict for the Plaintiffe upon not guilty pleaded, it was moved in arreſt of judgemeut by Maſter Serjeant *Chibborne*, for the inſufficiency of the words, becauſe this Court cannot take notice of the Councell, *&c.* and yet judgement was given for the Plaintiffe, for 10. pound dammages and coſts.

Judgement.

Audita Quer.

361. *Hanner* Uerſ. *Maſe*.

Hanner brought an *Audita Querela* againſt *Maſe*, upon a judgement for debt and coſts, and ſhewes that hee had a releaſe after judgement. The Defendant pleaded after the judgement, and after the releaſe ſuppoſed to be made, he ſued forth a *Scir. fac.* upon the ſame judgement, and upon the Writ he had judgement to have execution by default. And it was moved by Serjeant *Harris*, and a Caſe was cited by him 12. *H.* 8. in Iuſtice *Cokes* Reports, fol. 11. That if the Defendant after judgment, have a releaſe made unto him by the Plaintiffe, and after the Plaintiffe ſues a *Scir. fac.* upon the ſame judgement, and the Defendant garniſhed makes default, and execution is awarded, he ſhall never have an *Audita Querela*. Otherwiſe it is, if a *Nihil* be returned on the *Scir. fac.*

In what caſe an *Audita Querela* ſhall not bee had.

Obligation.

362. *Caſtilion* Uerſ. Executor. of *Smith*.

Caſtilion brought an Action of Debt againſt the Executor of *Smith*, upon an Obligation made by the Teſtator, with Condition for performance of Covenants in an Indenture, in which there is a breach aſſigned for ploughing of Marſh lands, by the Executor himſelfe after the death of the Teſtator. And it was moved by Serjeant *Hen-*

vide Plow. fol. 264

Judgement *De bonis Teſtatoris.*

Henden, to have execution of the Executors owne goods, for that the breach of the Bond was by the Executor himſelfe. And the Court was againſt him, and judgement was entered *De bonis Teſtatoris*.

363. *Edwards* Uerſ. *Engleton*.

Treſpaſſe.

Canis Venaticus

Iudgement.

Edwards brought an Action of Treſpaſſe againſt *Engleton*, for that with force and Armes, hee tooke and led away *Quendam canem venaticum prec. &c.* And after verdict for the Plaintiffe, judgement was given for the Plaintiffe by the Court.

364. *Hunt* Uerſ. *Lawring*.

Battery.

Teſt of the Originall.

Iudgement.

Hvnt brought an Action of Aſſault and Battery againſt *Lawring* for beating of his ſervant, by reaſon whereof hee loſt ſervice for a long time, and declares that the Battery was done on the 19. of *Ianuary* in the 16. year of his Majeſties Reign that now is, and that he loſt his ſervice for a long time, *viz.* for the ſpace of 6. Moneths then next following, and after a Verdict for the Plaintiffe, and entry of the dammage aſſeſſed it was moved by Serjeant *Aſhley*, that the originall did beare teſt before the end of 6. Moneths. And yet they gave judgement for the Plaintiffe.

365. *Greene* Uerſ. *Harrington*.

Treſpaſſe.

Aſſumpſit upon promiſe.

Peter Greene brought an Action of Treſpaſſe upon the Caſe, againſt *Thomas Harrington*, That whereas the Defendant 26. of *October* in the 16. yeare of his Majeſties Reigne, was indebted unto the Plantiffe 10. pound for Rent in arere, and unpaid unto the Plantiffe for one yeare, ended at the Feaſt of Saint *Michael* Th'archangell, then laſt paſt, for certaine lands in *H.* demiſed unto the foreſaid Defendant by the ſaid Complainant, The ſaid Defendant in conſideration did aſſume to pay the ſaid 10. pound, whenſoever hee ſhould bee thereunto required, *&c.* The Defendant pleads that he made no ſuch promiſe. And after a Verdict, it was moved in arreſt of judgement, that this was no ſufficient conſideration, but that hee had good remedie by action of debt, for his Rent, and he could not have two remedies. But the Court will be well adviſed.

Treſpaſſe.

366. *Steward* & Vxor Verſ. *Sudbury*.

Simon Steward Eſquire, and *Dorothie* his wife, brought an Action of Treſ. againſt *Humphery Sudbury*, for that by force and armes he brake the cloſe of the ſaid *Dorothy*, when ſhee was ſole, and cut and carried away Thornes and under-woods of the ſaid *Dorothy*, *&c.* and declares upon the cutting of two Acres of under-Wood and Thornes, after not guilty, the Plantifes were non-ſuited at the Aſſizes, and the Plantifs moved that the Declaration was not ſufficient, becauſe Acres of under-Wood &c. was not good, and ſo prayed the Defendant might not have coſts. But the Court gave judgement againſt them for the Defendant that he ſhould recover coſts.

Declaration excepted againſt.

Iudgement.

2 Deliverance.

367. *Galliard* Verſ. *Miller*.

Ven. fac. where to the Manor where to the Towne.

IN a ſecond deliverance, for taking away his Horſe at *Wikefitz-pain*, *in quodam loco vocato* Ore places. The Defendant ſayes that the place where it was, contained 20. Acres parcell of 100. Acres, *&c.* which 100. time out of mind were parcell of the Manor of *Wikefitz-paine* in the Countie aforeſaid, of which Manor *Henry* Earl of *Northhampton* was ſeiſed in fee, and acknowledgeth the taking as Bayliffe of the ſaid Earle. The Plantiffe traverſeth *abſque hoc quod locus in quo &c. fuit parcella Manerii de Wikefitz-paine*, the *ven. fac.* was awarded *de vicineto de Wickfitz-pain*, *&c.* And after tryall and verdict here at the Barre, judgement was for the Defendant, becauſe the *ven. fac.* ought to have beene *de vicineto de Manerio &c.* and not to the Viſne of the Towne, whereunto the Court agreed.

Q. Impedit.

368. *Manuors* Verſ. Biſhop of *Lincolne* & *Naylor*.

Queſtion whether a good title in a Quare Impedit.

" IN a *quare Impedit* brought by *Mannors* againſt the Biſhop of " *Lincolne* and *Naylor*. The Plaintiffe declared that one *Ter-* " *whit* was ſeized of the Manor, *ad quod &c.* in fee *&c.* and de- " miſed the ſame to the Plaintiffe for yeares, and that the Church be- " came void, and that *Terwhit* the Leſſor preſented by uſurpation one " that was admitted and inſtituted, and that after the ſaid Manor be- " ing poſſeſſed of the ſaid *Mannor ad quod &c.* the Church be- " came void by reaſon whereof it appertained to him to preſent *&c.* " whether this were a good title in a *Quare Imped.* is the Queſtion " in Demurrer.

Balder

369. *Balder* Verſ. *Blackborne.*

Debt.

Case of Debt.

" B *Alder* brought an Action of debt againſt *Blackborne* for 12. " pound, and declared upon a demiſe made by the Plantiffe " to the Defendant of one Meſſuage, *&c.* the 14. *&c. an.* 5. *haben-* " *dum uſque Feſtum ſancti Michael.* next following, and ſo from " year to year during 24. yeares Rent *per annum. &c.*

" Vpon *Nil debet per patriam* pleaded, the Iury found a ſpeciall " verdict, ~~ane~~ *Iune* one *Iohn Wels* was ſeiſed of the ſaid Meſſuage, *&c.* in " fee, and held the ſame in ſocage, and by his laſt will in writing, de- " miſed the ſame land *&c.* to *Anne* his daughter, and to her heires " for ever at the full age of ~~21~~ 18 yeares, and further demiſed, that my " Wife and Executor ſhould have the education of my daughter with " her portion of money and profits of my land to her owne uſe, with- " out account, untill my daughters age aforeſaid, provided that the " ſaid Executrix ſhall pay the quit rent and fines *&c.* and keepe and " bring up my daughter to Schoole, *&c.* and made *Alice* his Execu- " trix, and dyed. *Alice* proved the Will, and took upon her the execu- " tion thereof, and marrieth with one *Pichard Porie*, who aſſigned " over his intereſt to the Plaintiffe, who demiſed it unto the Defen- " dant *prout* in the declaration. And that the ſaid *Anne* is living " and under the age of 18. yeares *viz.* of the age of 14. yeares and " that the ſaid Executrix hath performed the will of the Teſtator.

Iudgement.

And without much difficultie and doubt, the Court upon view and reading the verdict, gaue Iudgement for the Plaintiffe. For it is a plaine terme given to the wife for her owne uſe, which accrues to the husband, and keeping ſuch peculiar private it may bee performed effectually by another.

370. *Roberts* Verſ. *Young.*

Replevin.

" R *Oberts* againſt *Young* in a Replevin, for taking away of his " Cattell at Allerns in a place called the Lords Mead. The " Defendant doth acknowledge the taking away as Bailiffe to Sir " *Iohn Davis* Knight the Kings Serjeant at law, in a place contain- " ing foure Acres, as in his Free hold dammage feſant. In bar of his " Cogniſance, the Plantiffe pleads that *Henry* Earle of *Huntingdon* " was ſeiſed of the Manor of *Allerns*, whereof one Meſſuage *&c.* is " parcell and demiſable by Copie, and that within the ſaid Manor " there is this cuſtome, that every cuſtomarie Tenant, of the ſaid Meſ- " ſuage have uſed to have Common of paſture *&c.* in the ſaid place,

called

" called Lords Meadow, and ſo derives his title by grant of Copie.
" The iſſue is upon this Traverſe, *abſque hoc quod infra Manerium*
" *talis habetur conſuetudo quod quilibet tenens cuſtomarius, &c.*
" have uſed to have Common, *&c. prout. &c.* and after Verdict for
" the Plaintiffe, it was moved by Serjeant *Harris* that here was no
" cuſtome. For it doth appeare by the pleading upon the place *in quo*
Cuſtome of a Manor cannot extend out of a Manor. " *&c. eſt infra Manerium*, becauſe the cuſtome of the Manor can-
" not extend out of the Manor, but he ought to preſcribe in the Lord
" of the Manor, *&c.* And the Court will be adviſed.

Note, that dividing the Common from the Manor, cannot be the Common alſo, there is nothing more common, than for the Lords to preſcribe for the Tenants by copie in another mans land, whereas if it be his owne, it ſhall ever be laid by cuſtome.

Cur. Eccl.

371. *Nappers* Caſe.

V. Caſe.

NApper libelled in the Spirituall Court againſt divers pariſhioners in *Tintonholt*, in the Countie of *Somerſet*, for Tythes in kinde. The Defendants pleaded in the Spirituall Court, a cuſtome that they there have uſed, to pay a tenth part of their Rent, reſerved out of their Leaſes *&c.* And the Iudge of the Spirituall Court proceeds to examine witneſſes to prove this Cuſtome. The ſaid *Napper*, for that a cuſtome is determinable at the Common Law, and not before a ſpirituall, moved for a prohibition to the Spirituall Court, that they ſhould not proceed to try the Cuſtome before them, and the Court gave a day till the next Terme to ſhew cauſe *&c.* and in the meane time to ſtay the proceedings to examine the ſaid cuſtome.

Prohibition.

372. *Farmers* Caſe.

INter *Farmer &* A Prohibition out of this Court into the Spirituall Court upon diſcharge of the payment of tythes in the hands of the Abbot, upon the Statute of 31. *H.* 8. and upon iſſue joyned the Cauſe was tryed at the Barre, by a Iury of the Countie of *Northampton*, and after full evidence given, the Plaintiffe was Nonſuited by a Writ of Conſultation awarded, and after conſultation, the Plaintiffe in this court pleaded the ſame plea, in diſcharge of paiment of tithes, in the court Chriſtian, which was alledged in the prohibition, which the Spirituall Iudge accepted, and proceeded to try the ſame there, and the court was moved on the part of the ſaid *Farmer* the Parſon, to have a Prohibition to the ſaid Spirituall Iudge, that hee ſhould not admit of this Plea, which was once urged in this Court

Stat. 31. *H.* 8. of diſcharge of paiment of tithe.

Court, and which merely appertained to the Iudge of the Common Pleas, and the conſultation upon it is finall in this very ſort, and upon that Libell.

373. *Whittingham* & Sara Ux. Uerſ. Earle of *Derby*.

" VIncent *Merrington* in *Anno* 35. *Eliz.* recovered in this *Scir. fac.*
" Court; againſt the ſaid Earle, as well 300. pound Debt,
" as 3. pound coſts and charges, and made *Ioane Dorrington* his Ex-
" ecutrix, who dyed before execution. The ſaid *Sarah* tooke admi-
" niſtration of the goods of the ſaid *Vincent* by the ſaid *Ioane* unad-
" miniſtred, and tooke to husband *Whittingham* the now Plantiffe,
" both which brought a *Scir. fac.* upon the ſaid judgement, and had
" divers *Scir. fac.* againſt the Tenants upon a returne in *London* in-
" to divers Counties by one Teſtat. *viz.* in the Counties of *Lanca-*
" *ſter, Cheſter,* and *Northampton, R. Cro. Amiarum. An,* 16. *Iac.*
" *Regis.* upon the ſame Writ in the Countie of *Lancaſter* a *Scir. fac.*
" is returned againſt 20. terre Tenants, *Et quod non plures,* who made
" default, and Iudgement was given againſt them.

" Vpon the ſame Writ in the Countie of *Cheſter,* it was retur-
" ned *quod Scir. fac.* to 30. ter-tenants, *Et quod non plur.* 10. of theſe
" 30. made default, and Iudgement is paſſed againſt them, and an
" *Elegit* awarded againſt them, the other 20. appeared and pleaded
" ſeverally, and upon ſeverall Replications and Demurrers, are joy-
" ned, entred, and continued, *uſque oct. Michael. hoc Termino,* up-
" on the third *Scir. fac.* the Sheriffe of the Countie of *Northampton*
" returned a *Scir. fac.* to the Earle of *Bridgwater*, and his Counteſſe
" ten. who appeared and pleaded, and had day to amend their Plea,
" till the Terme.

Before which time, and before execution done upon the Writ of *Elegit*, the ſaid *Whittingham* the husband dyed.

It was moved by M. Serjeant *Henden*.

Firſt, whether by the death of the husband, all the whole Writs of *Scir. fac.* ſhall not abate, as well againſt the Tenants, againſt whom the Iudgement is entered, as againſt them, that have entred, as againſt them that have pleaded.

The other Queſtion is, whether (admitting that all the Writs ſhall abate againſt al.) the Plaintiffe ſhall have execution againſt any *Cu. vis. vult.* of theſe tenants before Iudgement bee given, for, or againſt the other. And upon theſe points the Court will be well adviſed.

Bankrupt.

374. *Rugles* Caſe.

Stat 13. *Eliz.* c. (7) & 1 *Jac.* c. () of Bankrupts.

IN a Caſe of *Rugles* of *Suffolke*, a Bankrupt deceaſed, referred by the Court upon a tryall to Sir *Robert Crone*, upon view of the Statute indt. of Bankrupts, of 13. *Eliz.* & 1. *Iac.* it was reſolved by the Court, that if certaine creditors ſue a Commiſſion, and others within foure Moneths after or more, being creditors, come before diſtribution, and will joyne in the charge of the Commiſſion, and all that belongs to it, and tender their parts, that they ſhall not be refuſed, but have their equall part as Creditors. But if any diſtribution be made of any eſtate, no Creditors are to be admitted after that, that came not in before.

Hilar. 17: *Iac.* Prohibition.

375. *Searle* Verſ. *Williams.*

SAmuel *Searle* Parſon of *Heydon German*, brings a Prohibition againſt *John Williams*, and declares, reciting the Statute of *Eliz.* of Clergie, where he was Parſon, &c. and was indicted 13. *Iac.* at Lent Aſſiſſes, before me and my brother *Haughton* for Manſlaughter, after the death of one *Simonds*, and convicted for the ſame. And the next Aſſizes in Sommer he was allowed his Clergie, but not burnt in the hand becauſe of his Orders, but by judgement of the Court was inlarged, and delivered out of priſon, by which judgement he was purged and acquitted of the Felony, but the Defendant pretending him to ſtand ſtill convicted of the Felony, and thereby deprived of his ſaid Benefice, and the Church to be voide (which was not ſo) and that Doctor *Donne* the patron had preſented him to the ſame, drew him to a plea, before the Councell of *London*, from whom he appealed to the Iudges of audience *Delegate*, where it hangs undiſcuſſed, whereupon he had his prohibition, and yet the Defendant preſented after in the Court Chriſtian, whereupon the Defendant demurres in Law, and judgement was given upon Argument by all the Iudges, for the Plaintiffe, that he ought not to be queſtioned now in the Spirituall Court for his Man-ſlaughter, as the caſe ſtands, whereof the reaſon and much of the Clergie will appeare here.

Clergie for Man-ſlaughter.

Iudgement.

The benefit of the Clergie is a refuge provided by common Law in favour of learning, to ſave the life of an offender literate, in certaine caſes, though I will not deny, that it tooke his originall by action of the common Law, or in favour of the Church, and was overruled, not by any fixed common Law, but ordered and qualified by Kings court according to conſcience.

At

At the common Law at the firſt, the benefit of the Clergie was not allowed but to Clearks in order, ſecular and religious, as appeareth by the Statute 25. *E.* 3. *cap.* 4. and 4. *H.* 4. *cap.* 2. neither did the Common Law require more, 20. *E.* 2. *Coke* 233. Clergie refuſed, hee had not cenſure nor habit, and therefore judged to penance. And then if the Ordinary had challenged him, hee ſhould have loſt his Temporaltie, and his Franchiſe of Clergie. Yet the Common Law extends it to all the Kings Subjects that could read, as appeares 4. *H.* 7. *cap.* 13. in favour of learning in generall, and in reverence of mankinde, and mans blood (which in perſons of uſe was not to bee ſhed ſlightly) As they did extend it beyond the Common Law, ſo did they ſtraiten it, and deny it in Caſes, and Perſons, and times, where the Common Law did grant it as now till Conviction paſt.

The time of claiming Clergie, muſt not be till after indictment, and upon argument to have a Iudge allow and deliver the offender, as *Weſtm* 1. *cap.* 2. ſpeaks, and of it *Bracton* writ. But yet ever for the credit of the ſolemne Inqueſt of Indictors, the words are, hee was not to bee delivered without due purgation. Both which points appeares by the Statute of *Weſtm.* 1. 3. 9. *Cap.* 2. yet ſo the practice 8. *E.* 2. *Cap.* 4. 17. that if a Clerke were indicted, and purged by the Ordinarie, yet they take an Inqueſt of Office, and if that found them guilty, hee was delivered to the Ordinarie, but to forfeit his goods, an invention in Law to get the goods; but as yet the Common Law allowed, not the Clerke to bee delivered to the Ordinary, after hee was convicted by a Iury of life and death, but that objected allowance by the Statute, 25. *E.* 3. *cap.* 4. is clear, which provideth, that though he be convicted for Felony, yea Treaſons, which touch not the King himſelfe nor his royall iſſue, he ſhall be delivered to the Ordinarie.

But yet purgation in this Caſe, after tryall, was not allowed by the Statute, but an Ordinance promiſed by the Archbiſhop (and yet is in retribution for that Act) for their ſafe keeping and puniſhment which was alſo againe ratified by another Statute 4. *H.* 4. *cap.* 9. that purgation in ſuch Caſes ſhould not be allowed, ſo it ſeemed, that they made their Ordinance to that purpoſe as was provided before, *id eſt*, that they ſhould not be admitted to their purgation, but kept in priſon and puniſhed.

So now you ſee, that Cleargie might bee prayed either before or after Eviction at the firſt; But now of later times, the Common Law runnes another courſe, to deny Clergie, untill the offender were convicted, which it ſeemeth hath two reſpects, the one, to retaine their juriſdiction over the Clergie, which the Clergie offered to diſanull by challenging the priſoner at firſt, as was ſaid. The other to bring the

forfeiture of goods to the King, by the meanes of the Common Law, that the offence ſhould not paſſe utterly unpuniſhed by us, and yet to ſave the life of the offender. For there are two benefits of Clergie, the one, the ſaving of the offenders life, which is a favour meerely of the Common Law, for, that alloweth him for a Clerke or not, and ſo delivereth him from the ſeverity of the Law. The other is the way of purgation, which is not ordinary at the Common Law, but is a practice amongſt themſelves, rather overſeene and winked at, than approved at the Common Law, after eviction. *Stanf.* 137. If purgation faile, yet hee was not rendered to the Law, but repreived and kept in Priſon till a pardon. Now as the Statute of *Weſtm.* before mentioned, that giveth a way to the purgation after indictment, only ſaith, that if they abuſe that liberty, the King will proceed in an other remedie therein, I aske how that proviſion ſhall be, And I Anſwer, that it was to be done by the ordinary way of Iuſtice, and Rule of Court, that ſince they could not have the priſoner but by favour of the King and his Lawes, nor could admit his purgation to our prejudice, in derogation of the proceedings of the Kings Courts, but as the King by his Statutes and Lawes did permit the ſame, it was agreeable to Iuſtice, that the Kings Court ſhould deliver him, *abſque purgatione*, after conviction, becauſe by the true meaning of the law he ought not to purge in that Caſe.

And the Court may deliver a Priſoner, that is an infamous Thiefe, *Abſque Purgatione*, through an order by the Rule 10. *E.* 3. 5. *Coronæ* 247. of *Spiganel.*

But it is true, that if the Court did deliver them after conviction, without that clauſe they would not, and did not purge them ordinary after conviction.

Then ſpake I the rather, becauſe it is ſaid in Bookes, that a Clerke attainted, cannot purge, and ſo in other Caſes, the Record in the Kings Court is *traditur ordinario abſque purgatione*, for that is all the Record the Ordinary hath to reſtraine the purgation: For, hee hath no Record of Attainder, neither is hee to take knowledge of the Law of the Land, that one Attainted is not to Purge; and there where the clauſe is not, he will Purge, attainted or not.

And ſo on the other ſide, if the Offender were delivered after conviction, and before the Attainder *abſque purgatione*, (as in foule and apparent faults they were and might bee, by the deſcretion of the Court) the purgation was thereby reſtrained.

Three things are to be obſerved, in the giving and taking the Clergie at the Common Law. Firſt, the Court is not to tender it *ex officio*. But That the Clerke that is the offender is to pray it, being *in favore*, and a remitting of the rigour of the Law, yet 22. *E.* 3. *fo. Coronæ* 254. ſayes, that if the Iudge know him to be a Clerke, they will give Iudgment

ment, though he pray it not, that is granted, as though it need ſpeciall pardon not pleaded.

Secondly, that if the offender pray it, it is not in the choice of the Iudge to deny or grant, but it muſt bee allowed him, where by the Law it is allowable.

Thirdly, though many of the Statutes as *W.* 1. and *Articuli Cleri cap.* 16. 25. *E.* 3. *cap.* 4 ſpeak of the Ordinaries demanding of the Clerk and his priviledge himſelf, and ſo is the Statute 18. *E.* 3. *cap.* 3. *Raſtal* 5. and the Ordinary could not defeat him of it, neither by directly refuſing him, or indirectly, and by practice, by anſwering the Court, that hee reades not as a Clerke, when hee did indeed in judgement of the Court. And therefore the Booke 21. *E.* 4. that ſayes, that at Newgate one was ſo refuſed, was but the opinion of one Iudge, and reported of heareſay, *ut audivi.* But the Booke 9. *E.* 4. 28. is reſolved better, that if the Ordinary refuſe him where he is capable, yet hee ſhall not dye. And *E Converſo*, if the Ordinary requires, and ſayes hee reades where hee is not capable, hee ſhall dye.

So the priviledge may bee granted whether the Ordinary will or no, and by conſequence without him, ſo that if he will be wilfully abſent, the Court may both fine him, and proceed without him, for this is an Act done in the preſence of the Iudge, like the caſes of Inſpection by the Iudge himſelfe, which are abſolute and doe overrule any falſe Certificate, which is of things done out of Court, 22. *E.* 4. *fo. Corona.* Reſolution of all the Iudges. That if an Ordinary refuſe a Clerke, yet they ſhall remand him of the Court, and ſo *E Converſo, fo. N. Br. ob. & 4. E. Dyer*, 215. *& Reg.* 69. If the Ordinary be abſent, the Court may give the priſoner the Booke and enter his reading, and remand him to the Goale, and then the Ordinary ſhall have the Kings Writ to the Iuſtices, commanding them to command the Goaler to deliver the priſoner to the Ordinary, which is without any reading in the preſence of the Ordinary, 26. *Aſſ.* 19. *Coronæ* 201. If the Ordinary chooſe one that is no Clerke, he ſhall loſe his temporalties, and yet alſo, he ſhall loſe the Clerke to induce the forfeiture of the temporalties of the Ordinary.

So regularly the Ordinary even at the Common Law, had no power over a Clergie man in a crime or offence touching the Crowne, but where that power was given him by the Common Law.

And therefore when the Kings Court did deliver the offender to the Ordinary, it did imply a power or permiſſion of the Law that hee might deale with him, to convince or diſcharge him, according to the forme of their Lawes. But now that this Statute doth forbid the delivery of him to the Ordinary, it detaines all the power to it ſelf, and decayes the Ordinaries.

And therefore I am of cleere opinion, that if the Ordinarie at the Common Law would have convicted a Churchman to deprive or degrade him for Felony, before the tryall at the Common Law, that the Prohibition would have laine, for holding a Plea of a cauſe touching the Crowne, and the prejudicing the Kings Court, *in eodem*. Much rather than in the Marqueſſe of *Wincheſter*, *Co. lib.* 6. 23 where prohibition was granted, to ſtop the probate of a will for goods, becauſe the ſame Will alſo did give lands: For, though the Will bee made *uno flatu*, and interlaced within one contient or writing, yet in effect they are two Wils, and of divers natures, effects, and counſauce; whereas in the other caſe, the crime is all temporall *idem in individuo*, the counſauce is only diverſe: That which with us is capitall, with them is deprivation, or degrading, or the like.

And againe, if after tryall of a Clerk found guilty of Felony, they will proceed to prove or diſprove any thing againſt the verdict and tryall, a Prohibition, would likewiſe lie, except only in this one caſe of Purgation after conviction, performed according to day and forme, as the Statute *W.* 1. ſpeakes, which the common Law did tolerate. As if a Clerk were found not guilty of Felony, and ſo diſcharged, if they would after convent him againe, and bring new proofe, that hee were guilty, to deprive him, they were to be prohibited: or if upon a Clerke delivered, *abſque purgatione*, to the Ordinarie, they would admit him to his Purgation a Prohibition would lye, yea, and a Premunire too, rather than by a Plea of traverſe holden by them, which is not ſo highly a Plea of the Crowne, as criminall Cauſes are, as among criminall Cauſes, there are degrees as Treaſons, and ever ſome againſt the Kings owne Perſon and Majeſtie, as the Statute of 25. *Edw.* 3. *cap.* 4. before ſpeakes. Alſo if they would proceed betweene Conviction and Clergie, Prohibition would lie for prevention, becauſe the Cauſe is not finiſhed in the Kings Court, otherwiſe it would be where Clergie is not allowed.

But if they would not controvert nor examine the Acts of the Kings Courts, but build their ſentences upon them, they were not to be prohibited. As if they ſhould deprive a man by ſentence, becauſe he was convicted or attainted of Felony, Murder, or Man-ſlaughter, at the common Law.

But if they tooke him of the Kings Court as a Clerk, and he were in caſe that he might Purge, as being only convict, and the Purgation not reſtrained by the Kings Courts, they could not deny him the way of Purgation, for in that Caſe, there was a Writ to command it, upon which he was purged, they could no further queſtion him, becauſe by their Law he was now cleared.

Now if that the Iurie found him guilty, then they might proceed againſt him as guilty by their Law, and not protected by ours, for though

though he had power and poſſibility of Purgation, yet that did conclude againſt purgation Actuall. And it is not againſt the booke 38. *E.* 3. 1 for it brings the judgement of the crime there accidentally to the *Q. Imp.* where the Biſhop refuſeth a Clerke for a temporall crime. But a ſentence of deprivation in the Eccleſiaſticall Court, for a Temporall crime keepes the whole cauſe in the Spirituall Court, and ſo determines of the capitall crime not capitally, whereby they judge both of the nature of the crime, and the validity of the proofes, neither of which belong unto them. So that caſe ſtands with my rules.

Now the law ſtanding thus, that the Clerk aſwell out of Orders as in Orders, praying his Booke after conviction (as the law now is uſed) had two benefits, the one to avoid judgement and to ſave his life, the other to make a kind of formall purgation to the crime. The firſt of theſe was a juſt and direct favour granted unto him of the common Law of the Land. The other was a cuſtome entertained, by colour of the common Law among Eccleſiaſticall perſons in their court, which the Statute or common Law, did rather winck at, then reprove.

Now comes the Statute 18. *Eliz. cap.* 7. The title whereof for this part is an order for delivery of Clerks convict without purgation, and then recites that for avoiding of ſundry perjuries and other abuſes in and about Clerkes convict, Be enacted *&c.* that the Iuſtice before whom ſuch allowance is had, ſhall and may for the further correction of ſuch, detaine and keepe ſuch perſons in Priſon, for ſuch convenient time, as they ſhall thinke fit, ſo as the time exceeds not a yeares impriſonment. Provided that all ſuch Clerkes ſhall bee put to anſwer all ſuch felonies as remaine unqueſtioned, that he ſhall never be queſtioned for the ſame againe.

So by the Statute two things are wrought. Firſt life, is preſerved, 432
which is the proper act of the Common Law.

The other, Purgation, which was the proper act of the Civil Law, is utterly aboliſhed, whereas the Statute ſayes truly, that ſundry perjuries and other abuſes were avoided.

The Perjuries indeed were ſundrie One in the Witneſſes, and compurgators, and another in the Iurie, compounded of Clerks and Laymen. And of the third, the Iudge himſelfe was not clear, all turning the ſolemn tryall by Oath, into a ceremonious informalitie.

The ſundry abuſes the Statute ſpeaks of, were firſt, the diſhonour and derogation of the Law of the Land, of the Kings Court, yea, and State and Government it ſelf, all which were deluded by this maſk; all which nouriſhed that error and ſchiſme of State. That Clerks were not ſubject unto the Kings Courts and Laws, and that by a counterfeit verdict, *De crudelitate*, they did fruſtrate both the verdict of the Iury and Indictors, *De crudelitate*, and the Iury and tryers, *De ſcientiâ & meré veritate.*

So

So the Statute 10. doth meerly aboliſh the purgation, which being now after eviction, could not be freed from theſe perjuries and abuſes meant by the Law, and the meanes whereby the Statute doth aboliſh it, is by denying of the delivery of the Clerk convict to the Ordinary, for by that, the purgation muſt needs ceaſe, which never was nor could be but before theſe Iudges, and in their Courts.

But now this Statute taking away Purgation, never meant to abuſe or abridge the benefit of the Clergie, but to give it by the proper means and by the proper place, and by a more ready and direct meanes without circuit and delay.

And therefore it is firſt ſaid, that they ſhall be admitted to the benefit and priviledge of Clergie, that is the generall purview of the Law. And the manner now follows, Negative, how it ſhall not bee, Affirmative, how it ſhall be. That is, he ſhall not be delivered to the Ordinary, an unfit Iudge to make his purgation, an undue and unſufferable meanes how to make it, but ſhall be forthwith enlarged and delivered out of the Priſon by the Iuſtices, that granted the Clergie the proper Iudges in Court.

Now ſince this Statute hath taken away all power from the Ordinarie in Caſe of Clerk convict, and hath reſumed all to himſelfe, to whom it did originally belong, this Court ſhall now finally determine the cauſe, and ſhall leave nothing to be done in it, in any other Court. And therefore it ſaith, if he ſhall have the benefit of Clergie, his life ſhall be ſaved, and he ſhall be enlarged and delivered out of Priſon, that is, freed *a pœnâ*, and by conſequent *a culpâ*, and then proceeds, that becauſe ſome offences be ſo, that may deſerve further puniſhment, it gives a latitude of power to the Iudges, to continue by their diſcretion the offender in Priſon for his farther correction, ſo that it bee not above one yeare.

And ſo it appeares plainly, that the Statute hath preſcribed both a free diſcharge for the offender regularly, and the height of correction for the higheſt offence, men capable of Clergie can be ſubject unto.

Now then the laſt Queſtion is, In what manner the Statute workes this diſcharge and freeing of a Clerke, *a pœna & culpa*, whether by ſupply of purgation as it was by the Civill Law, or by a ſtatute pardon.

I ſay, not by a ſupply of purgation, for divers reaſons: Firſt, all Clerkes judged by the Ordinarie, were not receivable nor capable of purgation, as thoſe that were delivered *abſque purgatione* as by the diſcretion of the Court, enormous offenders, Clerkes attainted and the reſt were, though they were capable of purgation, they were not to be purged, for the Iurie had power over them.

This were more to diſcredit the Acts of the Law than before; for then Iury went againſt Iury *pro & contra*, and with them there being

being ſome Clergie men ſaid, That this were to falſifie our jury without any equivalent oppoſer and in their owne Court, and by the ſame Law which is *oppoſitum in objecto.*

Where they complaine of abuſes in purgation of Clerks which were aboliſhed, this were no leſſe abuſe than the former though without perjury. 4.

There was never purgation in this Caſe without the Law. 5.

Therefore the Statute never warrants to doe that the Law never did, nor allowed of; therefore I hold it workes by way of pardon, which affirmes and doth not diſaffirme the verdict.

If you ſay there is no word in the Statute of pardon, I ſay, that there is much leſſe either word or meaning of Purgation, yet *Heſeen* 4. *Eliz.* cyted in *Foxleyes* Caſe, *Co. lib.* 6. allowes the Statute to worke both in Nature, and in Lieu of a Purgation; and alſo of a pardon by good conſtructions of this Law.

Now (as I have ſaid) there was no reaſon to intend the Statute of purgation; For, if it amount to a pardon, that alone is ſo ſufficient, that there is no need of a purgation or the effect of it.

Neither is it the work of Common Law to purge the offence that the Law hath found and eſtabliſhed, and ſo deſtroy their owne worke; but a pardon is naturall being in the Common Law, and affirmes the verdict and diſaffirmes it not as the purgation doth. So that to take it for both is to imply contradictories.

Now the expoſition of the Statute belongs to the Kings Courts of Law, as it is ſaid in *Burtons* Caſe, *Co. lib.* 6. 13. A Parſon was deprived for Adultery, afterwards a generall pardon came, which pardoned the Adultery. It was judged, *ipſo facto*, that the Parſon was reſtored in his Eccleſiaſticall right, becauſe the judgment of this pardon and the force of it belongs to the Temporall Court and not to theirs.

Now the words of the Act doe apparently prove, that the meaning of the Statute was to ſee the Clarke Convict and burned in the hand, and ſo freed from all further puniſhment, and therefore motions that he ſhall have the priviledge of the Clergie, which imports that hee ſhall have as much benefit as by his Clergie he ſhould have had with ſaving life and alſo freeing from the Cryme of *in pluribus de novo.*

But next he ſhall not have it by the meanes of the ordinary and by the way that had been accuſtomed, but only from the Iudges; and that by way of preſent diſcharge ſhall preſently be inlarged and delivered by the Iuſtice.

And becauſe the partie ſhall be abſolutely freed and diſcharged, the Statute takes from the Iudges all power of further puniſhment, but by the mild words of correction gives them power to detaine

them in Priſon one yeare and no more. And the Statute provides that the Clerke ſhall Anſwer all other Felonies, as fearing the generall, and free diſcharge ſhould bee taken to all Felonies: But to this they meant not that hee may bee any wayes put to further Anſwer.

Now this ordinary working of the effect of a pardon muſt needs bee underſtood a pardon, though the words be not verbally like the Caſe *de donis conditionalibus* which do make an eſtate in tayle by direct words; but whereas the eſtate that is now judged intayle was a Fee ſimple and alyenable, *poſt publicam prolem, &c.* it ordaines that the Donee ſhall have no power to alien, but it ſhall come to the iſſue or returne to the Donor if the iſſue faile. So this is a periphraſis in effect as *R. Coronæ* 204. *Stat.* 6. *R.* 2. If the Wife be raviſhed, the Husband ſhall have the ſuite, to have the offenders convict of life, and Member; this makes Felony, 5. *E.* 4. cutting of tongues incurres paine of Felony. This makes it Felony, *Charta de Forreſta*, no man ſhall loſe life or member for killing of the Kings Deere, it is by that made no Felony: For *ceſſante cauſa ceſſat effectus*; ſo there are ſome effects ſo incident that if they are not found, you muſt judge that there is no cauſe which muſt produce ſuch an effect. For though heate makes no fire, yet you may affirme that there is no fire where there is no heate.

And take the Law to have none other effect but to ſet him at large; And to have him ſtill as a Felon Convict, then would hee not acquire goods as by the judgment he may.

And therefore I hold that if a man ſhould call him Felon, or Thiefe, he may have his Action, as upon any other pardon, as wee reſolved of the Caſe of *Caddington verſ. Wilkes Trin.* 13. *Iac. rot.* 933.

Now it is plaine, That this man can bee no more impeached or convicted at the Common Law, for his Cryme being a temporall Cryme; and therefore much leſſe in a ſpirituall Court which can hold no Plea of a temporall Cryme though he were in his full force at the Common Law. And that was the reaſon of the Preſident, *M.* 27. *Eliz. rot.* 2574. in the Caſe of *Nichols* Vicar of Saint *Maryes*, in Cornwall, who was convicted of Felony, before *Manwood*, and *Anderſon*, and burnt in the hand, and was afterward impeached by one *William Cuſſe* in the ſpirituall Court. For many affirmed that the Vicaridge was voyd by reaſon of the conviction, and that he would have preſented thereunto by the Queene, and ſo prohibited the ſuite, which is the very Caſe. That after the diſcharging of the Clerke Convict by the Statute, he could not be queſtioned for it in the Eccleſiaſticall Court as for an offence to make the Church voyd by depravation.

Now

Now where the Statute ſaith after burning in the hand he ſhall be diſcharged, and here is no burning in the hand, that makes nothing to the Statute 4. *H.*7. and 13. that gave burning in the hand, except Clerkes in Orders 1. *h.* 8. the Clergie are reſtored to their former Priviledge, which yet was not obſerved in the Caſe of *Nichols* aforeſaid. But though it were in a Caſe where the hand ought to be burnt, yet it is not ſo eſſentiall but a man may have the benefit of the Statute though he be not burnt. And the King may pardon the burning even in an Appeale as no part of the judgement, inſomuch as it is not in the nature of a puniſhment, but rather a marke to notifie that he may have his Clergie but once.

So where the Statute ſaid after burning, it imports where burning ought to be, otherwiſe the Statute ſhould do no good to Clerks, for whom it was moſt intended.

376. *Slade* verſ. *Deake*. Prohibition.

Roger Slade brings a Prohibition againſt *John Deake* Eſquior; Farmer of the Rectory of *Axminſter*, and declares that whereas *Richard Gill*, late *Abbot* of the Monaſtery of *Newham*, in the Countie of *Devon*, was ſeized of a Meſſuage and diverſe Lands Meadow and Paſture, parcell of the poſſeſſions of that Monaſtery, ~~to~~ the time of diſſolution in Fee. And whereas alſo the ſame *Abbot* by himſelfe, and his Farmers at the time of the ſame diſſolution did hold and enjoy the ſame acquitted of all manner of Tythes and ſo ſeized ſurrendred the ſame 30. *H.* 8. and then recytes the Clauſe of diſcharge of Tythes in the Statute, 31. *H.* 8. and then brings down the Land by deſcent to Queene *Elizabeth*, and from her to the Duke of *Norfolke*, and from him to the Lord *William Howard*: And that hee by Indenture inrolled in the Chancery, within ſixe Moneths, did bargaine and ſell the ſame unto the Lord *Peter* and his ſonne 3. *Iac.* and they demiſed it unto *Slade* the plaintiffe, and then *Deake* the defendant, did ſue him in the Conſiſtory Court of the Biſhop of *Exeter* for Tythe of Wheat and other graine againſt the forme of the Statute.

Whereupon the defendant demurres in Law generally, and prayes a conſultation upon this caſe.

After ſolemne Argument judgement was given for the defendant, and a conſultation awarded, *Warberton* diſſenting. Iudgment.

In the Argument of the Caſe I made two great points.

1. Firſt whether the declaration were good or no, and I held it not good.

The ſecond, whether the fault of declaration were in the ſubſtance and ſo that advantage might bee taken of it upon ~~a~~ generall demurrer;

murrer; And I held the fault ſubſtantiall, I firſt profeſſed if my judgment ſhould take Counſell of my Intereſt or affection, I ſhould be of another minde, but I was bound within former Rules of Juſtice, Preſidents, Religion and Prudence. Juſtice *ſuum cuiq; tribuere*, Tithes to whom Tithes belong. Preſident *ſtate ſuper ſemitas antiquas.* Religion *Merito Simonia habetur ratioque pro religione facit.* Prudence *Quod dubitas in* feneris *non libent. De non apparentibus & non exiſtentibus eadem eſt ratio.*

Now to the firſt Point.

Litleton ſayes, that pleading is the moſt honourable and commendable and profitable part of Law, and by good deſert is it ſo. For caſes ariſe by chance and are many times intricate, confuſed and obſcure, and are caſt into forme, and made evident, cleare and eaſie; both to judge, and jurie (which are the Arbitrators of all cauſes) by good and faire pleading. So that it is the principall Act of Law, ſo pleading is not talking; and therefore it is required that it be true, that is the goodneſſe and vertue of pleading: and that it be certaine and ſingle, and that is the beautie and grace of pleading.

The Law loves ſingle pleading, abhorrs double.

Therefore the Law refuſeth double pleading and negative pregnant though they be true, becauſe they do inveigle and not ſettle the judgement upon one point.

Therefore firſt generall pleading is diſalowable though it bee in matters of fact, as a Covenant to make by the adviſe of *H.* he muſt ſhew what deviſe he gave.

Condition that an obligation enjoyne an office to grant by Letters Patents, hee muſt not pleade in *hæc verba*, but he muſt ſhew the effect of his Letters Patents and his enjoying accordingly.

But becauſe it hath beene ſaid this is a ſpirituall Act (which yet I grant not to be ſo,) he that pleads diſpoſition of an Abbot, he ſhall plead before what Ordinary.

So debt upon leaſe of a Vicaridge, the defendant pleading by a ſequeſtration muſt ſhew by what ordinary, for what cauſes, as for Non-Reſidence or the like legall proofe of ſequeſtration.

So union of Chappell muſt be ſhewed; by whom? *Scil.* The Pope or Biſhop generally, *Concurrentibus ijs, &c.*

In pleading a divorce, you muſt ſhew before whom it was, and ſet forth the cauſe of divorce, but all the proceeding you ſhall not need; as you ſhould of a Recovery at the common Law, 21. *H.* 4. And therfore in *Specots* caſe the Biſhop cannot plead for cauſe of the refuſall, *Schiſmaticus inveteratus*, nor upon the Statute 4. *H.* 4. that a man was defamed of Hereſie. But they muſt ſpecifie the ſchiſme or hereſie though they bee matters of meere ſpirituall Cognizance.

For

For this is regular for difference betweene the Kings Courts and the Courts Eccleſiaſticall, that things ſpirituall cannot originally and primitively fall into the Kings Court.

As for calling of a man Hereticke hee ſhall not have an action of the caſe, yet if a civill action bee well commenced, as in the caſes cyted in a *Quare impedit*, or an action of falſe impriſonment if any thing fall incidently, that is ſpirituall, the Kings Court ſhall continue upon that, either by jury or demurrer, except in caſe where the Law hath provided by Eccleſiaſticks; as by the iſſue upon Baſtardy being accepted *literatur*, and the like: In theſe caſes the Biſhops are not Judges, but Miniſters of the Kings Courts, as other kinde of Tryors are: Whereupon the Court proceeds to judgment, according to their Certificate and tryalls. But on the contrary, if the caſe begin well in the ſpirituall Court, as being ſpirituall, and a point fall accidentally, that is of temporall cognizance, it is cleane contrary, for the tryall is called from them as is in daily experience in preſcriptions and limits of Pariſhes in ſuites of Tythes.

Now if it bee a point of diſcharge, that is to bee pleaded as this caſe, it muſt ever bee pleaded ſpecially, and ſhewed to the Court how the diſcharge is, as it is no diſcharge if it be not ſufficient, and the ſufficiency is matter of Law, and therefore muſt bee ſeene and judged by the Court. As is 22. *E.* 4. *fol.* 40. And *Manſell & Co. lib.* 2. *fol.* 3.

Now touching diſcharging of tithes themſelves, and the pleading of them at the common Law. It is to be obſerved, that they are things of common right, and doe of right belong unto the Church. And therefore though it bee true, that before the Councell of *Lateran*, there were no pariſhes nor Pariſh Prieſts that could clayme them, but a man might give them to what ſpirituall perſon he would, yet to the Church he muſt give them. Yet, ſince Pariſhes were erected, they are due to the Parſon, and Vicar of the Pariſh, and therefore when you have a prohibition of diſcharge of Tythes, you muſt conſider it is a Plea in barre againſt Common right to a demand of Tythes which is a Common right, though they be in ſeverall Courts, as by a Releaſe either by deed or Law.

Now then if you will diſcharge a juſt demand, you muſt ſatisfie the Court of your diſcharge, conſider then the diſcharge of Tythes, the perſons capable of them, and the meanes how.

The perſons capable are ſpirituall or temporall.

Temporall I ſay when they are temporall, when the diſcharge didfirſt reſt in them, for otherwiſe if the temporall man exceeds a ſpirituall body in a diſcharge, as upon the Statute 31. *H.* 8. it is to be reckoned in a ſpirituall perſon or body, but not in a temporall.

The ſpirituall perſons had foure ordinary wayes of diſcharge, that

Diſcharge of Tythes.

that is, Firſt Bull of the Pope; Secondly, compoſition, Thirdly, preſcription, and theſe were abſolute.

Fourthly order, and that was limited ſo long as land remained in the Manure of Religious perſons themſelves; and theſe were the Seſtertians, and the Templars, and Hoſpitalers, and the Ieruſalemitans: But unitie of poſſeſſion of the Parſonage appropriate, and the land tythable was no diſcharge, nor ſo holden at the Common Law; But how that came into uſe and upon what reaſons and upon what cautions and how deduced in pleading, I ſhall ſpeak afterward when I come to the Statute of 31. *H.* 8.

Now cleerly at the Common Law, the ſpirituall perſon could not claim his diſcharge of Bull, compoſition and order; and he muſt plead it with this ground and reaſon, ſpecially, & his diſcharge by preſcription was allowed him without other reaſon, becauſe he was a perſon capable of ſuch diſcharge. And ſo the original was probable and therefore the preſcription was allowed him as in other caſes memorable whereof the originall cannot be found, but is ever preſumed juſt.

Now temporall perſons, not to ſpeake of the King which was a ſpeciall Cauſe 22. Statute had two wayes to obtain Tythes, or to diſcharge Tythes, the firſt was by grant of the Parſon, Patron, and Ordinary, and the other was by a preſcription; but that was ever, not *præſcriptio ſimplex*, but *compoſitio*, not a preſcription ſingle but compounded, differing from the caſe of ſpeciall perſons. And ſo is *Piggots* and *Hearnes* caſe.

And ſo were the Common caſes where men have the diſcharge of Tythes in kind by paying compoſition for them in mony or Land or penſion, held or enjoyed by Parſons and Vicars in lieu of them.

But now note a ſtrange *Anomall* of Tythes in his caſe differing from all other caſes in Law.

For where preſcription and antiquitie of time forfeiteth all other tythes and ſuppoſeth the beſt beginning that Law can give to them: In this caſe it workes cleane contrary. For whereas a grant of a Parſon, Patron, or Ordinary is good of it ſelfe without any recompence or conſideration, when it runnes out to preſcription it dyes and periſhes; Whereof no other reaſon is given but that our Bookes ſay that a man may preſcribe in *Modus decimandi*, and this is in *Amorem Eccleſiæ*, leaſt Lay-men ſhould ſpoyle the Church.

But I will make another reaſon not diſſonant from Law.

Therefore preſcriptions of Law be ſo violent, as though they be falſe, a man ſhould not be received to aver againſt them, as in a preſcript. The tenant pleads himſelfe villaine to *H.* and that hee hath nothing but in the Villenage, the demandant had no reply though it were falſe, but his writ muſt needs abate till the Statute, 37. *E.* 3. Admit the Counter Plea, ſo in the Replevin if in Avowrie

rie the tenant diſclaime, hee ſhall have judgment, though it be falſe, for the Law beleeves, that theſe parties will not doe themſelves wrong in ſo high a degree.

The like reaſon moves in this caſe. The Law preſumes violently that a Lay-man cannot be abſolutely diſcharged of Tythes: And therefore will not allow a preſcription of ſuch diſcharge, holding it more reaſonable that ſome one man ſuffer a miſchiefe to loſe ſuch a priviledge, being ſo improbable and of dangerous conſequence, than for his particular to admit a ſpoyle of the Church and decay of Religion, according to the Rule *omne Magnum aliquid habet ex iniquo quod publica utilitate compenſatur.*

So though you ſhall be allowed your diſcharge by grant when it appeares, yet when it appeares not, *ſtabit præſumptio donec probetur in contrarium.*

Now the Common Law as touching diſcharge of Tythes and the formes of pleading of it ſtanding thus: The next queſtion is what change the Stat. of 31. *H.*8. of Monaſteries hath made in that behalfe.

And I am of opinion that it hath made two mayne changes.

The firſt, That it hath by force of the clauſe of diſcharge that where the Statute, that is by Bull, compoſition and Order conveyed them over to the King and lay perſons, which elſe would have vaniſhed and diſſolved with the ſpirituall bodies themſelves whereunto they were annexed.

The next is, That it hath created and made one new diſcharge which was not before at the Common Law, that is, the unitie of the poſſeſſion of the Parſonage and the Land Tythable in one hand.

And this was long controverted and now is a received opinion of the Kings Court to be *de lege*, a diſcharge within the meaning of the Law, as the Divines ſay that Articles are made *de fide* by the determination of the Church.

But in this caſe of vnitie, foure things are to be obſerved.

Firſt, That it is no diſcharge of Tythe (but as it is well obſerved) a diſcharge of the payment of Tythe, and therefore if it be pleaded by way of diſcharge generall, and the Iury ſaid nothing, but a perpetuall unitie, it is found againſt the pleader, and ſo much is agreed in *Priddle* and *Nappers* caſe.

It is no diſcharge except it be by preſcription, if it be perpetuall, yet if it be alleadged that the *Abbot* or his Farmer pay Tythes, that doth deſtroy the preſcription, becauſe that proves that there was no reall diſcharge, but a *non* payment of unitie only.

Yet an unitie by preſcription is good *prima facie*, but not of it ſelfe, but in contemplation of a perfect diſcharge, that ſhall be ſuppoſed though it cannot be found for the infiniteneſſe and impoſſibility of ſearch of things beyond memory.

Laſtly,

4. Laſtly, though unitie perpetuall bee allowed, yet it is not well pleaded except it had that *ratione inde* they held diſcharge of payment of Tythes time out of minde, for though the unitie ſhall bee traverſed, and not that concluſion or conſequent, yet that concluſion fixeth it to the ſtate and Anſwers, the reall and perfect diſcharge that is preſumed under the unitie, to which the unitie it ſelfe is but augmentive, but yet I am of opinion it is but a fault in forme, which will be cured by a verdict or generall demurrer.

This diſcharge by unitie being the only diſcharge that is created and made anew by this Statute, all other diſcharges are not otherwiſe preſerved, but by theſe words, [That the King, his heres and ſucceſſors, and ſuch perſons their Heires and Aſſignes, which ſhall have and hold them according to their eſtates, and titles diſcharged, and acquitted of payment of tythes as freely and in as large and ample manner as the ſaid *Abbot* had or held the ſame at the time of the diſſolution of the ſame.]

So firſt it is plaine that clauſe gives neither new diſcharges nor inlarges the old, but continues and bounds them within the limits of thoſe that were enjoyed by the *Abbot* both by word and meaning according to the caſe *tot temnenta*, &c. For, though unitie (as hath bin ſaid) be now uſed for a diſcharge, yet it is not ſo for it ſelfe but for a more perfect, which is preſumed though it appeares not.

Now this being the ſubſtance and body of this clauſe in word and meaning. It is ſtrange it ſhould bee moved, that out of the clauſe ſhould be drawne a conceipt of a libertie given to the poſſeſſors of *Abbey* lands to plead their diſcharges in other form, and with more generalitie and favour, than the *Abbots* themſelves had in thoſe caſes. Againſt which the reaſons are many.

1. Firſt, the word is expreſſely touching the having and holding of them, no touch nor a glance of the pleading of them, which is meerly *heterogenium*.

2. Secondly, If theſe words ſhould be extended to pleading it would turne expreſſely againſt them, for then it muſt bee underſtood, that they ſhall have the benefit of pleading, in as large and ample manner which theſe *Abbots* had. Which implyes a negative. That it ſhall in no other or larger manner, for the Rule is, that affirmatives in the Statute that introduce new lawes, do imply a negative to all that is not in the Purview.

And therfore in *Amy Townſends* caſe *Plow.* 111. it is ad judged and hath bin ſince, where one comes to a poſſeſſion by a uſe out of a Stat. diſcontinued, ſo that the entry was not lawfull to the ſuch a poſſeſſion works no remitter, becauſe the Stat. appoints the poſſeſſion in the ſaid manner and forme, which imports a negative, and no other are in uſe.

So

So the Statute ( ) *H.* 2. appoints, that the Demandant may vouch *ac ſi eſſet tenens*, if in the firſt Action he could not vouch, as if it were a *Scir. fac.* then cannot hee vouch in the Law, *ei deforceat*, being demandant.

Thirdly, if you ſhall admit this expoſition, this clauſe muſt admit that alſo upon the body of the Law, upon the like words, which are thus. The King ſhall have and hold, to him and his heires and ſucceſſors, all Monaſteries, and all their Lands, Tenements, and Rents, *&c.* in as large and ample manner as the Abbots had the ſame, at the time of the diſſolution, *&c.* without ſhewing any other title. And ſo, the Statute, and this kinde of pleading, hath the ſame pretence of loſſe of Writings, of Grants, of Rents, Reverſions, and the like, and infiniteneſſe of ſearch, and more than the Caſe of *Bulls*, and the like.

This forme of pleading that lyes ſo obvious in words of the Statute, and was ſo eaſie and pleaſing to them that ſought diſcharge, was never to this day amongſt ſo many buſie wits offered, in any Authenticall pleading, much leſſe received the leaſt allowance, by the opinion of any learned or grave man, but the contrary, by ſpecification of the diſcharges, except in a Caſe of preſumption; And yet in the caſe of unity, though it be by preſcription, it is alſo ſpecified.

So no man can but ſee what abſurdities would come, by admitting a change of regular formes of pleading to vulgar Pleas, then uſed in ſuch Acts of Parliament, to expreſſe the meaning, which are every day by the Iudges extended, reſtrained and changed, according to a better Rule of reaſon and Iuſtice, than the words beare. And if the words rule not in ſubſtance, much leſſe in the formes of Pleading, which is the Act of Law, as hath beene ſaid: And this preſident of regularity of pleading, is as ill in conſequence, as the principall: So the Stat. of 4. *H.* 4. of Hereſies before mentioned, was not pleading as the Statute meant in generall, but the Hereſie eſpecially aſſigned. Now take the Statute 34. *H.* 8. *cap.* 20. hat provides, that if the Tenant in taile of the gift and proviſion of the King, ſuffer a common recoverie, the Reverſion or Remainder then being in the King, that ſuch a recoverie ſhall not binde the heires in taile, but that they may enter after the death of the Tenant in taile; the heire may pleade, that will any man ſay, that his Anceſtors were Tenants in taile of the Kings Proviſion and Reverſion or Remainder in the Crowne, when hee ſuffereth Recoverie, ſo in the caſe of 11. *Hen.* 7. *cap.* 20. if any woman being Tenant of the gift of any the Anceſtors of the husband diſcontinued, they ſhall bee voide, and that it ſhall bee lawfull to the perſon to whom the intereſt after the death of the woman ſhall appertaine to enter: will any man ſay that it were well pleaded in theſe words, without ſhewing how the State grew, or

how the diſcontinuance were made, and yet he that was to take the benefit, may bee a ſtranger to the conveyance, as upon a Covenant to raiſe uſe. So upon the Statute 32. *H.* 8. of Conditions, there are no miſchiefes to the diſcharges that were before time of memory of all ſorts: For, they muſt be maintained and pleaded by preſcription, even unitie it ſelfe may bee ſo. Neither is there any miſchiefe in effect to theſe diſcharges, which were concealed ſince memorie, if this bee true, and the originall unknown, for they may bee both oppoſed and pleaded by preſcription: For they had their effect of diſcharge, and the preſcription cannot bee impeached, but by ſhewing a late originall of diſcharge, which if the adverſarie can ſhew, the partie himſelf may much better: So then, there remains no prejudice but in one caſe, where can be no reaſonable preſcription of a lawfull diſcharge, which is where there cannot poſſibly be a diſcharge by preſcription, that where either the Abbey was founded, or Lands purchaſed to the Abbey ſince the memory, in which caſe to preſume a diſcharge even to the laſt times, where there is no appearance of it, is as much as to ſay, all Abbeys have diſcharge of all their Lands, and may be extended even to Orders, that had diſcharge thereby for their own Manurance, for they might alſo obtaine by Bull or otherwiſe, generall and abſolute diſcharges, and this may be concluded, that if this form of pleading be ever received, you ſhall have all others left, and this only uſed, which is one of the weightieſt reaſons that makes mee abhorre it, conſidering the buſie wits that have uſed all meanes to win diſcharges and formes of pleading to that purpoſe, and yet never take boldneſſe to offer this, and what needs all this labour, but unity by preſcription, if they might have pleaded diſcharges at the time of the diſſolution. For, it is eaſie to prove a non-payment, by reaſon of an unity for any time, and a non-paiment is the evidence for the proofe of a diſcharge ſufficient, which may be prooved, when the perpetuall unity cannot be diſcharged in Abbots, muſt now be proved *à poſteriori*, for no man living can now ſpeake of the time of Abbots, as to the caſe of *Wimbiſh* and *Talboyes*, it is no authority, for the Iudges are divided two to two. Secondly, both points pleaded their *virt covin* and decept were matters of fact.

And as to the caſe of *ſtrata Marcella*; that is no authority at all for me to judge, ſpeakes to that point, and the judgement paſſeth againſt him and pleaded ſo. But that indeed was upon another reaſon and point. And as to *Cokes* opinion in that Caſe of the Archbiſhop of *Canterbury*, *lib.* 2. 48. I anſwer, Firſt, that the opinion makes not at all to the judgement of the Caſe, to ſay, that by the Statute 3 r. ſuch a diſcharge may be pleaded.

Nextly, it is no part of the reſolution of the Court, but an addition of his owne, and that ſuddainly interpoſed.

Third-

Thirdly, it is ſo imperfectly ſet downe, that the Prior *&c.* ſo it may be the prior and his predeceſſors.

And that ſuch an Obligation is commonly uſed in a Prohibition, which argues plainly, that either he miſtooke the practice, or the book miſtooke him, which I rather believe, which is made the ground of his opinion: For, there is no authenticall Preſident, much leſſe judgment or grave opinion to that purpoſe.

And againe that Caſe in *Winchester*, in the ſame booke *fo.* 44. being both 38. *Edwar. Pridleyes* Caſe, comming after 10. *Iac.* in his 11. Booke *fo.* 44. he makes theſe queſtions, that if any Abbey have beene time out of mind, and an appropriation ſince, yet hee may preſcribe in a generall diſcharge; for, that may be though a unity came after. But ſaith he, if the Abbey it ſelf were founded ſince memorie, then he cannot preſcribe at all in the generall diſcharge, and ſo leaves it as a caſe deſperate, where the Abbey was founded ſince memory, which yet he might eaſily have relieved, if he might plead a diſcharge from the time of the diſſolution, without ſhewing how, which is either a retraction or an explanation of his former Report.

Now to that which was well moved and objected to my brother *Hutton*, that the Plaintiffe hath not well conveied himſelfe to the Land charged with Tythes, I hold that the Defendant notwithſtanding cannot upon the whole matter have a conſultation, if the diſcharge had beene well pleaded: For the title of the Land is not in queſtion, but whether the Land bee diſcharged or no, which any man that is anſwerable for the Tythe, may plead, whether he have good title to the Land or no, and ſince the perſon in this Caſe hath ſued him for Title, hee hath inabled him to make his defence, either by Plea, or diſcharge in the Eccleſiaſticall Court, where hee needs no Tythe, or by Prohibition to the ſame effect in the Kings Court, which is in lieu of it, ſuppoſeth that hee offered his Plea there.

And as this is regularly true, that if the Prohibition bee faultie, yet the Defendant ſhall never have a Conſultation, if it appeare to the Court that the ſuit in the Eccleſiaſticall Court was not well founded, as it was there, he though hee muſt have a ſuit in anothers name.

Therefore *M.* 1. and 2. *E. Dyer* 107. one ſued for tythe corne of 60. Acres of ground, the Defendant in his prohibition laid that all was barren ground, and paid no tythes, whereupon iſſue was taken, and the Iury found that thirty acres was ſo, and that the other thirty acres were barren, but yet had paid Tythe Woole and Lambe. The whole Court of Benchers awarded on that part, but yet upon better adviſement, they reſolved the contrary, for he had no right to purſue his ſuit for Common, and by the ſame reaſon if the Land

be diſcharged hee ought not to ſue for tythes of it with any man whether he hath title to the Land or no.

I hold the Declaration groſſely faulty in another point, that hee hath laid no eſtate of the diſcharge of Tythes, for hee hath not ſaid, that *Gill* the Abbot was ſeiſed of the Land in his demeaſue, as of fee diſcharged of Tithes, but hath made it two ſentences, that hee was ſeiſed of the Land in fee, at the time of the diſſolution diſcharged of Tythes, which may be true, if it were but for that year by grant of Parſon, Patron and Ordinary.

The ſecond great queſtion is, whether the Defendant in this Caſe ought to have demurred eſpecially, for the Plaintiffe hath laid, that the Land was diſcharged, which the Defendant by his demurrer may have ſeemed to confeſſe.

But I am of opinion, that the generall demurrer notwithſtanding, the Defendant may ſtill take advantage of the default.

The words of the Statute are, That the Iudges ſhall proceed and give Iudgement, according as the very right of the cauſe and matter in Law ſhall appeare unto them: So right is no right, if it appeare not to the Court, as we ruled in the Caſe of *Heard* and *Baſterveile*, that not ſhewing of a Deed, or not producing the Letters teſtamentary, or of adminiſtration, or not laying a place of viſue, is not remedied by a Generall Demurrer.

Quare Impel. 377. *Gawdy* Verſ. Biſhop of *Cant.* & alios.

SIr *Henry Gawdy* Knight, brought a *Quare Imped.* againſt the Archbiſhop of *Canterbury*, Sir *William Bird* Knight, and *Humphry Rone* Clerke, and declared that *Richard Southwell* was ſeiſed of the Manour of *Papentio* alias *Walſoken Popentio*, to which the Advouſon of the Church did appertaine in fee, and preſented *William Maiſters* his Clerke, who was inſtituted and inducted, and ſo ſeiſed 15. *Ian.* 24. *Eliz.* for money, did bargaine and ſell the Manor *ad quod &c.* to *Barow* in fee, and *Barow* being ſeiſed, the Church became void by the death of the ſaid *Maiſters*, 2. *Feb.* 1581. and remained void by 18. Moneths, whereupon Queene *Eliz.* in default of Patron, Ordinary, and Metropolitan, did preſent by Lapſe *Francis Saels*, who was thereupon admitted, inſtituted, and inducted, and afterward *Barow* did for money, bargaine and ſell the Manor *ad quod &c.* to *Richard Catlyn* and *Dyones* his wife, and the heires of *Catlyn*, who thereof inſeoffed ſir *Richard Gawdy* the Plaintiffe 12. *October* 33. *Eliz.* and he ſo ſeiſed, the Church became void by the death of *Sael*, and ſo remains void, and ſo it belongs to the Plaintiffe to preſent *&c.* the Archbiſhop claimes nothing but as Ordinary, *ſede vacante* of the Biſhop

Biſhop of *Norwich*, and demands iudgement, if without ſpeciall diſturbance, *&c.* Sir *William Bird* pleads *ne diſturba pes.* *Humphry Rone* pleades, that he is Parſon imperſonee of the preſentation of the King, and ſaith, that long before *Southwell* had any thing in the Manor *ad quod*, Queen *Eliz.* was ſeiſed in fee, as in groſſe, of the Advowſon of the ſaid Church in right of her Crown of *England*: She ſo ſeiſedr preſented the ſaid *Francis Sael* to the Church then void, who was thereupon admitted, inſtituted, and inducted, and the Queene dyed ſeiſed of the Advowſon, which deſcended to the King, who being ſeiſed thereof, the Church became void by the death of the ſaid *Sael*, and thereupon the King 4. *Decem. An.* 16. preſented the Defendant, who thereupon was admitted, inſtituted, and inducted, and yet is Incumbent there, *abſque hoc quod advocatio Eccleſiæ prædict. ad prædict. Manerium vocat. Popenham alias Walſeken Popenham pertinet*, as the Plaintiffe declared, and thereupon had iſſue.

The Iurie finds that *Southwell* was ſeiſed of the Manor with the Advowſon appendant and preſented the ſaid *William Maiſters*, who was thereupon admitted, inſtituted, and inducted, and that *Southwel* bargained and ſold the Manor to *Thomas Barow*, 2. *Feb.* 1588. whereupon Q. *Eliz.* to the Church then void, 15. *Feb. eodem An.* preſented *Francis Southwell* by theſe words, *per mortem naturalem ultimi Incumbentis ibidem vacavit & ad noſtram præſentationem prærogativam coic. ueu. ſpectan.* whereupon the ſaid preſentation is of the ſame, *Febr.* was admitted, inſtituted, and inducted by Letters of inſtitution running by *Div. Regina vera & indubitata ut ducitur patro na ad*, then conveyed down the Manor *ad quod &c.* to the Plaintiffe, and that *Saewell* dyed, and the King preſented *Rone* the Defendant in theſe words, *ad noſtram præſentationem ſive ex pleno jure, ſive per lapſum temporis, ſive alio quocunque modo quietam & ſuper totam materiam*, referre to the Court whether the Advowſon be appendant or not *prout &c.* And it was adjudged by the Court, that the Advowſon remained appendant, notwithſtanding the Queenes preſentation of *Sawell*. For it appeared, that there was no colour of title to the Queene, to preſent no lapſe for the preſentation, inſtitution, *&c.* were all in the ſame moneth, wherein the avoidance was. And if there had beene lapſe, it had not ſerved the Advowſon, and uſurpation of the Queene. It was not, becauſe the Preſentation ſuppoſed a right where none was, and ſo was void; for, the Queene meant to doe no wrong, and therefore the caſe is ſtronger than *Greenes* caſe, where the Preſentation is by lapſe, and the Title is by other right: And therefore the chiefe Iuſtice ſaith, That this Preſentation of *Rones*, was upon the ſame reaſon void, and therefore an uſurpation by the King muſt not import any right, but preſent to the Church being void, generallie, and require

Admiſſion &c. Now then the Preſentation of *Sawel* being void, it was but a collation to the Biſhop which makes no dependancie nor ſo much as plenartie, but the Church remains voide, as *Greenes* Caſe ſaith, which is to bee well underſtood, that it makes no binding plenartie againſt the true Patron, but that hee may not only bring his *Quare Imped.* when hee will, but alſo preſent upon him ſeven yeares after, And if the Biſhop receive his Clerke, the other is *ipſo facto*, yet to all other hee is a full Incumbent, and not in the nature of a Curate only.

Quare Impel.

378. *Holland* Verſ. *Shelley* & alios.

SIr *Thomas Holland* brought a *Quare Imped.* againſt Sir *John Shelly*, the Biſhop of *Wincheſter* now Biſhop of *Norwich* and *Laurence Gibſon* Clerke of the Benefice of *Clapham*, and declares, that King *Edward* the fourth, the ſeventh of *December. Anno Regni ſui.* ( ) did grant unto *John Mowbrey* Duke of *Norffolke* by his Letters Patents, in theſe words, *Quod ipſe, Hæredes & Aſſignati ſui habebunt omnia & omnimoda bona & Catalla quorumcunque felonum de ſe, aut pro quacunque felonia in aliquibus ſive quibuſcunque Curiis aut quacunque Curia dicti Domini Regis, hæredum ſive ſucceſſorum ſuorum, aut aliorum qualitercunque convicti & convine. damnati & damnand. fugit. & quorumcunque utlegat. & utlegand. waviat. & waviand. & omnium & ſingulorum pro felonia in exigend. qualitercunq; poſit. & ponend. ac omnia bona & catalla quæcunq; eidem nuper Regi, Hæred. & Succ. ſuis, quocunq; modo ut prædicitur forisfac. & forisfaciend. inter rapam ipſius Ducis nuper de Bramber in prædict. com. Suſſex et pracin. ejuſdem Rapæ qua invent. et inveniend. exiſtunt et ex tunc fore contingend.* And then conveyes theſe liberties to himſelfe for yeares, and the Advowſon to ſir *John Shelly* the next Avoydance, who was outlawed for debt, and the Church became void, and ſo that belonged to him to preſent, and averred, that the Church lay within the Rape of *Bramber*, upon which Declaration ſir *John Shelley* confeſſed the Action, and the Biſhop demurred in Law, his Councell conceiving that the grant and liberties did extend onely to the goods and Chattels of perſons, outlawed only for Felony, becauſe the Clauſe concerning the Outlawrie, was in the middeſt between two Clauſes of forfeiture for Felony, and urged the Caſe of 8. *Hen.* 4. 2. and 11. *Hen.* 6. for grants of goods of Felony, Statute, *Quod ſi pro aliqua tranſgreſſione & alio delicto pro quo catalla perdere debent, &c.*

But the Court reſolved, that the Clauſe did extend to Outlawes for Debts, and Treſpaſſe for Ourlawrie: For, Felonies were

were contained under the words *fugitivi, et in exigend. poſit.*

So the middle Clauſe, *utlag.* which ſtands perfect of it ſelfe and without depending upon the other, though it bee amongſt them, muſt either be conſtrued of Outlawries in Actions, or elſe muſt be ſurpluſage, and of no uſe.

Alſo being a grant of a lower nature, it is fitly placed, but the Caſes put by the Councell of the Defendants, are nothing like, for the very Grant is of Goods and Chattels of Felons, which the Clauſe following it under the *ita quod*, cannot inlarge, and withall, *Tranſgreſsio eſt nomen aequipſat.* and being joyned with *Delictum*, ſhall not bee taken for a common treſpaſſe, but for an offence.

Secondly, it was reſolved, the Deed of grant of the next Avoydance to *Shelly*, was not to be ſhewed by the Plaintiffe, being in the plaintiffe, and not to pray to the grant in any wiſe.

Thirdly, it was reſolved, that the Advowſon had ſuch a locality in the Rape, where the Church was, that it accrued to the Plaintiffe, whereſoever the Deed of grant was, or the Grantee himſelfe at the time of the Outlawrie.

In this Caſe *Gibſon* Parſon of the preſentation of Sir *Iohn Shelley*, pleaded another Plea, which was inſufficient and judged againſt him. So that the Plantiffe had a Writ to the Biſhop againſt them all.

379. John *Biſhop of* London *againſt the Chapter of the Collegiate Church of the bleſſed Virgin* Mary *of* Southwell. *Quare Imped.* 448.

Iohn Biſhop of *London* brought a *Quare Imped.* againſt the Chapter of the Collegiate Church of the Vicaridge of *Southwell*, and declared that one *Iones* was ſeiſed of the Prebend of *Normanton*, in the ſame Church, to which the Advowſon of the ſaid Vicaridge, did, and doth belong in Fee, and preſented, *&c.* And then brings downe the Prebend unto *Robert Abbot* Clerke, and then ſhewes, that *Abbot* did demiſe the Prebend *ad quam*, to him for yeares yet enduring, and that the Church became void, and the Chapter of *Southwell* diſturbed him.

By what words in a Leaſe, an Advowſon will not paſſe.

The Chapter pleaded that *Robert Abbot* did not demiſe the Prebend unto the Plaintiffe *pro ut, &c.*

The Iurie finde, that *Abbot* made him two Leaſes of one date, of divers ſeverall parcels of the ſaid Prebend, with theſe generall words in the concluſion of all the leaſes, *cum omnibus commoditatibus emolumentis*-

mentis proficuis & advantagiis cum pertinentiis eidem Prebend. ſpectant. ſeu aliquo modo pertinen. And then coucludes, That if the Advowſon of the Vicaridge paſſed by his leaſe, that then the Abbot demiſed the Prebend *&c.* and if not, then *e contra*, which was a concluſion ſomewhat imperfect, and ſerved well enough. The court adjudged, the Advowſon did not paſſe by the Leaſe aforeſaid, and the ſaid words. The words are foure; commodities, emoluments, profits, and advantages, to the Prebend belonging; all foure words are of one ſenſe and nature, implying things gainfull, which is contrary to the nature of an Advowſon regularly, yet an Advowſon may bee yeilded in value upon a voucher, and may bee Aſſets in the hand of an executor. But words in grants ſhall bee conſtrued to a reaſonable and eaſie enſe, not ſtrained to things unlikely and uſuall, and therefore 14. *Hen.* 8. 1. If a man grants all his Woods or Trees, Apple Trees will not paſſe. And 23. Aſſ. 9. common in groſſe will not paſſe by the words Terres Tenements *paſt. & paſtur.* yet it is a feeding or paſturage, and 44. *E.* 4. an Appropriation, nor the Advowſon of it, will not paſſe by the name of an Advowſon, yet an Advowſon will bee contained under the name of a Tenement. And therefore 33. *E.* 3. the King gave licence to purchaſe Lands and Tenements in *Mortmaine* to the value of an hundred pound, allowed for Advowſons, and the Eſſonie is *de placito terræ.* And 5. *Eliz. Dyer* 222. Advowſon paſſed by way of hereditament, lying where the church lyes, but the words here, commodities *&c.* it is to bee underſtood of thoſe, whoſe nature is gainefull and commodious, and therefore 39. *Hen.* 6. the King granted that the Monkes ſhould have all their poſſeſſions of the Abbey in the vacation for their ſuſtentation, but it was ruled, that they ſhould not have the advowſons becauſe no ſuſtentation can or may ariſe from them.

Mic. 18. *Jac.* *Obligat.*

380. *Lamb* Verſ. *Thompſon.*

Edmond Lamb brough an action of Debt againſt *Richard Thompſon*, upon an obligation of 14. pound, the condition was, that if the ſaid *Rich. Thompſon* ſhould not at any time or times, after the making of the ſaid Obligation by any way or meanes, be aiding or aſſiſting unto *Thomas Elmy*, or any other perſon for the ſaid *Thomas Elmy*, in any action or actions, ſuits or executions, troubles, hinderances, or moleſtations, to be randenced or proſecuted againſt the ſaid *Edmond Lamb* his wife children and aſſignes, that then this Obligation to be void.

The Plaintiffe by replication aſſignes for breach, that he brought an action of treſpaſſe before that obligation againſt the ſaid *Elmy* and the De-

Defendant *Thompſon*, and that he had judgement upon it, for eight pound dammages againſt the Defendant *Elmy*, and eight pound coſts againſt them both, and that thereupon after the making of the Obligation, *Elmy* and the Defendant brought a Writ of errour, and hindered him of the execution of that judgement, whereupon the Defendant demurred, and it was judged for him that it was no breach, for though the Defendant might binde himſelfe not to bring ~~of the~~ errour expreſly, yet upon ſuch generall words as theſe are, whereupon the Law may make conſtruction, it ſhall never inforce it ſo, for the apparent ſenſe of the Condition is, That he ſhould not maintaine *Elmy* in any his proper ſuites againſt the Plaintiffe, which is juſt and reaſonable, but he hath no reaſon, that he ſhould be barred to defend himſelfe by joyning with *Elmy*, againſt the unjuſt proceedings of the Plaintiffe againſt him; And therefore if the Plaintiffe after verdict againſt *Elmy* and the Defendant, ſhould have releaſed, and yet taken out judgement and execution, the Defendant might have joyned with *Elmy* in *Audita Querela*, for it is his owne defence againſt an unjuſt ſuit, ſo in this Writ of Errour.

381. *Poland* Verſ. *Maſon*.

Caſe.

Parolls.

I charge him with Felonie.

Vide infra, caſe 382. ~~et~~ Cafe 394.

Poland brought an Action of the Caſe againſt *Maſon*, for ſaying I charge him (meaning the Plaintiffe) with Felony, for taking money out of the pocket of *Henry Scacy*, upon not guilty, the verdict was given for the Plaintiffe, yet the judgement was given againſt him. The reaſon was double; he doth not affirme that he is a Felon, but he doth only ſay, that he doth charge him with Felony, which he may doe in ſome caſe, though hee did not the fact, as if a Felony were done, and the common fame were that he did it, any one that ſuſpects him may charge him with it: The other reaſon was, becauſe thoſe words ſingle doe but ſuppoſe it a Felony, whereby hee would warrant the words laid downe, which for ought appeareth to the Court might bee but a treſpaſſe, and though hee chargeth it to bee a Felony, yet in Ambiguities the Court ſhall follow the mildeſt ſenſe, as in the Caſe, hee is a Thiefe, for hee hath ſtolne my Trees: yet here is a ſtealth both in the words, and in the reaſon of the words.

382. *Powel* Verſ. *Wind*.

Hamerly hath ſo und forgerie againſt him &c.

Powell an Attorney brought an Action upon the caſe againſt *Wind* for theſe words, I have matter enough againſt him for M. *Hamer-*

ley hath found forgery againſt him, and can prove it againſt him. But there was no certainty whereof the forgerie was.

Replevin.

383. *Steard* Verſ. *Heartley*.

Cro. 391: Vid. infra. Ve. fac. whence

STeard brought a Replevin againſt *Hartley* for taking a diſtreſſe at *Baildon*, in a place there called *Steed houſe*. The Defendant made coniſance as Bailiffe unto *William Hankſworth*, becauſe that houſe was holden of him as of his Manour of *Baildon*, and the Plaintiffe ſaid it was out of his Fee. Whereupon the *Ven. Fac. de vicineto de Baildon*, and after verdict for the Plaintiffe, *Hareus* moved in arreſt of judgement, that the *Ven. fac.* ſhould have beene as well from the Manour, as the Towne, but the Court gave judgement for the Plaintiffe, becauſe it doth not appeare that the Manour was larger than the Towne, and ſince it paſſed, the Court ſhall not defeat it upon a poſſibilitie it may be or not be, as like the Caſe of the Towne and Pariſh, but if the Viſne were to come from two Townes by the Records, and were taken but from one, the Caſe were cleane contrary.

Caſe.

384. *Clearke* Verſ. *Wood*.

Vid. infra. Caſe 392.

Viſne whence.

CLearke brought an Action of the Caſe againſt *Wood*, and layed that hee was ſeiſed of a Meſſuage in *Hairfield*, to which hee had Common appendant, and ſeven Acres in Fee aforeſaid, and that hee had alſo a way from his Meſſuage to his ſeven Acres in fee aforeſaid, and by, and over it to *Buningford*, and that the Defendant had plowed up the ſeven Acres, whereby he loſt both the uſe of his Common and way; upon the iſſue not guilty, the *Ven. fac.* was from *Hairefield* only, and after verdict for the Plaintiffe, it was moved that it ſhould have beene from *Buntingford* alſo: But the Court gave judgement for the Plaintiffe, for though it is true, that if the iſſue had beene upon the preſcription, it muſt have beene from both, yet the iſſue not guiltie, reſpects chiefly the griefe, which is the plowing up of the way in Fee, which is a Treſpaſſe upon the Caſe there, though the way have beene laid only to and from the Houſe, and that peece of Common both in Fi.

385. *William Wright* againſt *Gilbert Gerrard* and *Richard Hilderſham.*

Prohibition.

THe Plaintiffe declares in Prohibition, that *Richard Stowden* the laſt Prior of the Monaſtery of *Hatfield*, and his Predeceſſors were time out of mind ſeiſed as well of the Rectorie of *Hatfield*, as of a certaine Farme there called *Downehall* farme, in his Demeaſue as of Fee, and by reaſon thereof did enjoy the ſaid Lands diſcharged of Tythes, and then recites the Statute of 27. *Hen.* 8. for diſſolution of Abbeyes and that the ſaid Priorie was under two hundred pound *per Annum*, and that by vertue of the Statute King *Hen.* 8. was ſeiſed *ſimul & ſemel* of the ſaid Parſonage and Lands diſcharged of Tythes, and that the Abbeſſe of *Barking* was ſeiſed of the Manour of *Littington*, and ſhee ſo ſeiſed 3. *November* 29. *H.* 8. conveyed the Manor of *Littington* to *H.* 8. and the King conveyed the ſaid Lands called *Downehall* Farm, and the ſaid Rectorie of the Abbeſſe of *Barking*; by vertue of which conveyance ſhe was thereof ſeiſed, and then ſpeakes not of the diſcharge of Tythes, and 14. *November*, 31. *Hen.* 8. ſhee ſurrendered them againe together with the whole Monaſterie to *Hen.* 8. and then recited the only clauſe of the Statute of 31. *Hen.* 8. for enjoying of Abbey Lands diſcharged of Tythes; And ſhee being ſo ſeiſed, granted the ſame to *William Barnes* and others, and brings downe the title of the Land to one *Glaſcocke*, and the Plaintiffe by Leaſe, and then recites the Statute of 32. *Hen.* 8. and 2. *H.* 6. that none ſhould bee compelled to pay Tythes for Lands diſcharged of Tythes, and that though the ſaid Farme and Lands were diſcharged of Tythes *&c.* yet the Defendant ſued *Glaſcocke* and him for their Tythes, *&c.* And that *Glaſcocke* dyed, hanging the ſuit there, and that hee pleaded *ut ſupra* there, and yet they refuſed *&c.*

Stat. 27. *H.* 8. for diſſolution of Monaſteries.

Whereupon the Defendant by proteſtation denying the unity by Preſcription in the Prior of *Hatfield*, demurres upon the declaration, and prayes conſultation.

The Plaintiffe demurred and prayes that no conſultation be granted. It ſeems his prayer ſhould be, that the Prohibition ſhould ſtand. But either is well enough.

The Prior of *Hatfield* and his Predeceſſors time out of minde, were ſeiſed of the Parſonage of *Hatfield*, and a Farme in the ſaid Pariſh, called *Downehall* Farme, together.

The Priorie being under 200. pound *per annum*, was given to the King by the Stat. of 27. *H.* 8. the King gives the Manour and Farm to the Abbeſſe of *Barking*, the Abbeſſe ſurrenders all to the King,

Queſtion of the Caſe.

The queſtion is, whether the King and thoſe that hold under him ſhall hold this Farme diſcharged of Tythes, by force of the perpetuall unity.

Iudgement. And it was adjudged againſt the Plaintiffe, and a Conſultation granted, by the uniforme conſent of all the Iudges.

This Caſe doth conſiſt of great points, as they ariſe in order of time.

1. Great point. The firſt great Point is, whether as this Caſe is, and as it is pleaded, this Land ought to bee diſcharged of Tythes, though it had come to the King onely by the Statute of 31. *Hen.* 8. That is to ſay, that it had never come to the Prioreſſe of *Barking*, by reaſon whereof and of her ſurrender it was veſted in the King by the Statute of 31. *H.* 8.

And I am of opinion, that in that Caſe they had not beene diſcharged.

2. Great point. The ſecond great Point is, whether upon the whole matter, and the Conſideration of a double meanes whereby it came to the King, *viz.* by 27. *H.* 8. and by 31. *H.* 8. and upon conſideration of both theſe Statutes, this Land ought to be diſcharged.

Now the firſt great point I doe ſubdivide into foure petty points, which do all conclude to the judgement of the firſt great point.

Firſt, Whether the appropriation in this Caſe came to the King, and remained in him a parſonage appropriated by force of the Statute of 27. *H.* 8. only as well as the like appropriations did by the other Statute of 31 *H.* 8.

1. Petty point. And I am of opinion, it came to the King appropriated, and ſo remained to him, by force of that Statute onely: For, if that were not ſo, the appropriation had beeue diſſolved *ipſo facto*, by the diſſolution of that Abbey, and ſo had not come to the King nor the Abbeſſe of *Barking* from the King, nor from her againe to the King.

2. Petty point. The ſecond Point, whether unity of parſonage appropriate, and Land, having beene in a ſmall Abbey time out of mind (as in this caſe it was) and ſo comming to the King by the Statute of 27. *H.* 8. only, doth work a diſcharge of paiment of tythes.

And I am of opinion that it will not. Wherein I will ſpeake of diſcharges of Tythes in generall, within that Law of 27. *Henr.* 8. which ſtand cleare with that Law, and which not.

3. Petty point. The third point; whether the clauſe of diſcharge of payment of Tythes, contained in the Statute ( ) *H.* 8. extended to the ſmall Abbeyes and their Lands, which came to the King by the Statute of 27. *H.* 8. only or not.

And I am of opinion that it cannot be extended to them.

The

The fourth point, as this caſe is pleaded, that is to ſay, repeating only the clauſe of the Statute 21. *H.* 8. that gives the diſcharge of payment of Tythes, without mentioning either preamble, or other clauſes that referre or reſtraine that Statute, to thoſe Abbeys that come to the King after the fourth of *February*, 27. *Hen.* 8. which excludes this Abbey. So that now this Clauſe may ſeeme as generall to the Court in meaning, as it is in letter, ſo that it may comprehend as well thoſe Abbeyes that came by the Statute of *Hen.* 8. and ſo before the fourth of *February*, *&c.* as well as after; whether now the Court ſhall judge upon that Clauſe of the Statute of 31. *Hen.* 8. onely without taking knowledge of the other part of the other Statute, part of the ſaid Statute, which gives the Clauſe another conſtruction, than by it ſelfe above it ſhould have. 4. Petty point. 452

And I am of opinion, that the Court ſhall take notice of the whole Statute (though part be omitted materiall) and judge accordingly. And that therefore if it had not come by *Barking*, and ſo within the Statute of 31. *Hen.* 8. the Court could not relieve by this Clauſe, as generall to all Abbeys, by the advantage of the generality of the Clauſe, as it is diliuered in pleading, ſo this point is handled, as though it had not appeared to come to the King by *Barking*, *Sciliset* by 31. *Hen.* 8. becauſe as the Clauſe is generally, it ſeemes to benefit both alike, as well thoſe as come by the 27 as 31. *Hen.* 8. though in truth and upon Conſideration of the whole Statute of 31. *H.* 8. it doth not ſo.

Now to the firſt point, or queſtion of the firſt great point.

It is true, that Appropriations are not regularly granted over, neither can they endure longer than the bodies, whereunto they were firſt appropriate: Whereof the reaſons are, Becauſe it carries not onely the Glebe, and Tythe, (which they might grant away) but it doth alſo give them the Spirituall Function, and doth make them Parſons of the Church, and doth ſupply Inſtitution and Induction, which being the higheſt part of truſt, cannot bee eſtranged, and therefore the Inſtrument of Appropriation runnes in theſe words, That they and their ſucceſſors (not their aſſignes) ſhall bee Parſons, or by Perpluraſis, hold the Church in *propria perſona*. Now yet by Parliament Appropriation may bee tranſlated. But the queſtion is, whether the Act of 27. gave them unto the King in Statute of appropriations, againſt which it is objected, that the Statute hath not the word of appropriation; which in a thing of ſo ſingular a nature, and ſo fixt to one certaine body, in point of care and function, ſhall not bee taken within the meaning of the Law, without ſome perfect and proper word to carrie it. To the firſt great point, the firſt petty queſtion thereof.

Secondly, it is objected in opinion of the Biſhop of *Canterburies* Caſe, *Co. lib. 2. fo. 47.* that all Impropriations had beene diſolved upon 31. *H.* 8. if the Clauſe of diſcharge of that Statute, had not beene. To this, anſwer hath beene endeavored, that the Statute gives to the King their Tythes and their Lands, which carries their Glebes, which is the whole Parſonage ſay they; But I follow not this Anſwer. For theſe words may bee well taken for Common Lands, and Tythes, for portions of Tythes divided from the paſtorall Church, made preſentative, and yet by the ſame Statute, both Glebes and Tythes ſhould be taken from the Church, and given to the King. For this is as much as was ſaid of *Iulian* the Apoſtata, that he did *occidere, non Presbyteros, ſed Presbyterium.*

But I hold, that Appropriations are well given to the King; and that by a word proper enough. For, the Statute gives (*Inter alia*) enough; the Churches, Chappels, Advowſons, and Parſonages, of ſuch Monaſteries which muſt bee underſtood their Churches, as they were in them either appropriate where they were ſo, as their Advowſons where they were not otherwiſe, it were a meere Tautologiſme, *Fitzh. N. Br. 3. 32. 2. 9. Eccleſia & Rectoria* are Synonimies, and the words of appropriating, are they that may hold *Eccleſiam & Rectoriam in proprios uſus*, as *Grendons* Caſe is. Againe, this Statute gives all thoſe Monaſteries whereof the poſſeſſion did not exceed two hundred pounds *per Annum*, ſo that whatſoever made to that Yearely Revenue was meant to bee given to the King. And it was notorious, that a great part of their Yearely Profits, did conſiſt in Appropriations, for it was eaſie for them to get Advowſons, and as eaſie to get them appropriate.

Alſo it was the cleare purpoſe of the Statute to give the King all thoſe Abbeyes, and therefore the ſaving doth exclude the Founders, Patrons, Donors, *&c.* But if the appropriations ſhould bee diſſolved, the giver ſhould bee reſtored to his patronage, and *Pridles* Caſe, *Co. Lib. 2. 23.* ſayes, that appropriations in reputation paſt by the Statute 30. *H.* 8.

Alſo note, that the Statute 31. *Hen.* 8. recites the ſurrender before made of divers Abbeyes, *& inter alia*, of all their Churches, Chappels, advowſons, patronages, and names, not appropriations there, but in the view gives appropriations by name, *in Magnam Cautelam*, as being granted before in one meaning, though it is there, that ſuch Grants or ſurrenders without the Statute, could not have carried appropriations. Therefore by the word, Churches, the appropriations were conceived to bee granted, and ſo ſetled by the Statute: and therefore the pleading is, *Virtute ſurſum redditionis prad, ac vigore Stat. &c.* For the Statute gives not intent, but

but doth inveſt onely, ſaving this ſpeciall Caſe, which I note, becauſe it is a ſingular Caſe.

And upon this I obſerve further, that all the Appropriations of Abbeyes that were ſurrendred betweene twentie ſeven, and thirtie one *Hen.* 8. were *Ipſo facto* diſſolved, with the diſſolution of the Corporation, and were preſentable and might have new Incumbents. But as ſoone as the Statute of 31. *H.* 8. came, the appropriations were reſtored, and given to the King, and the Incumbents outed.

And touching the opinion before mentioned, I wonder from whence it ſprang; For ſure the body of the Statute of 31. *H.* 8. gives appropriations by name, what needs the other Clauſe for that purpoſe, and if a Clauſe can doe it, why ſhould not the maine body? So that conceipt is void.

Now to the ſecond point, or queſtion, of the firſt great point. The ſtatute hath no Clauſe to the diſcharge of payment of Tythes, as that of thirtie one of *Hen.* 8. hath, neither hath it any thing to give colour to it, other than the Clauſe, that the King ſhall have the Land, &c in as large and ample manner, as the Abbots held the ſame. 2 ? prby point /

Now there are five wayes and meanes whereby Abbey Lands are holden diſcharged of Tythes, that is to ſay, Compoſition, Bull or Common Order, Preſcription of diſcharge, and unity of poſſeſſion of Parſonages, and Land time out of minde, together without paiment of Tythes. Of theſe the foure firſt diſcharges, the Abbots themſelves had, or might have them, but the firſt was no diſcharge in the Lands of the Abbeſſe, but it made a diſcharge of payment of Tythes to the King, and other that clayme under him by a favourable conſtruction of that clauſe of 31. *Hen.* 8. for ſo much as extends for, which opinion was long controverted, being confeſſed of all hands, that it was no full and perfect diſcharge in Law, for then it followes, that they receive no good by this unity, unleſſe they bee within the Reliefe of that clauſe, whereof wee ſhall ſpeake hereafter.

Now of the other foure. The firſt three, which are Compoſition, Bull, Canon, Order were granted and affixed unto the bodie of the Monaſteries, and were granted unto them as perſonall priviledges, in reſpect of their ſpirituall abilities or Functions, and their Capacity of Tythes, and diſcharge of Tythes for this cauſe, and therefore they had all vaniſhed and expired with the diſſolution of the body, if they had not beene preſerved by the King and his Patentees by that Clauſe, But diſcharge of Tythes of Lands of Monaſteries by preſcription is of another nature, for they have beene always (as preſcription preſumes) in ſpirituall hands; the Law judgeth that

that it was never charged with Tythes as the pleadings are *immunes a ſolutione decimarum n gative non privative, ſcilicet*, uncharged not diſcharged, as if they had beene as one chargeable: The reaſon whereof was, that being ſpirituall perſons, they were able to miniſter to themſelves ſpirituall rights, and therefore performing *Officium*; they might retaine *Beneficium*: And this (no diſcharge ſtanding upon preſcription) was to inherit Lands, not as a thing given, but as *non ens*, Lands that never yeelded Tythe, and Land of the Monaſteries ſo free of Tythes, the King by the Statute of 27. *Hen.* 8. and his Patentees were to hold free not by reaſon of any priviledge, which aid need to bee preſerved by any Statute, but ever by the grant of the Land by any kinde of Conveyance.

And therefore though I ſaid, that diſcharge of Bull or Compoſition was to dye with the corporation, but yet if it were once runne out time out of minde, it was then to be pleaded and uſed as a Non diſcharge, by preſcription of the Temporall Law, and if it were impugned, it was to bee drawne by Prohibition to a tryall at the Common Law, and this without the helpe of any Statute. And therefore in the Biſhop of *Wincheſters* Caſe, it was reſolved that the Biſhop holding Lands of his Biſhopricke, diſcharged of Tythes by preſcription, the Farmer being a layman, ſhall have a Prohibition for his diſcharge; and ſo ſhall the Biſhop have himſelfe, though hee bee a ſpirituall perſon. And yet Biſhopricks and their Lands are no point of diſcharge in the Common Law, out of all the Statutes: So then, the Concluſion is, that of five wayes of diſcharge of Tythes, three, that is to ſay, Order, Compoſition, Bull or Canon, are preſerved or kept alive by the Clauſe of diſcharge, in the Statute of 31. *Hen.* 8. and a fourth, which is Vnity, is created by that Branch; and the fifth which is Preſcription, ſtands by the Common Law, and hath no need nor uſe of any Statute,

The third petty Queſtion of the firſt great point.

Now to the third queſtion, of the great Point, the Lands of the ſmall Abbeys comming to the King by the Statute, made at the Parliament, holden 4. *February*, 27. *Hen.* 8. cannot bee added to the Clauſe of diſcharge of Tythes, in the Statute of 31. *H.* 8. For firſt of all, the ſmall Abbies ſhall bee ſaid to come to the King the firſt day of the Parliament, *ſcilicet* 4. *Feb.* according to the rule of 33. *Hen.* 8. becauſe Acts take effect the firſt day of the Parliament.

Then take the whole Statute of 31. *Hen.* 8. and you ſhall finde that the Monaſteries therein mentioned, are divided, both in the preamble, purviews, and other branches, into thoſe that ſhould come to the King after the Statute of 31. *Hen.* 8.

And ſo hee proceeds in the Clauſe, that puts them in the Survey of the Court of Augmentations, and then the Clauſes alwayes

uſe

uſe the ſaid Lady *Abbeſſe* which reſtraine them; And even in this clauſe of diſcharge there is in the body many Monaſteries indefinite yet the Preamble of that clauſe recites, that where diverſe of the *Abbeys* enjoy their lands diſcharged of Tithes: But if therefore the King ſhall hold diſcharged of Tythes as the ſaid late *Abbots, &c.* did, ſo the Preamble and the ſaid *Abbots* in the concluſion reduceth it to this, that the land of any Monaſteries ſhall bee holden diſcharged as the ſaid *Abbots* (*ſcilicet* mentioned in this Law) hold them; And this caſe is in effect judged in the Biſhop of *Canterburies* caſe, where it is adjudged, that Lands of Chantery comming to the Crowne by the Statute of 1. *E.* 6. are not within the reliefe of this clauſe, for three reaſons.

Firſt, that a branch of the Statute, ſhall not be taken larger than the body.

Secondly, that the Chanteries being in the King by an Act of Parliament ſhall not be judged in him by an other.

Thirdly, that the forme of pleading was never ſo, the King was ſeized by force of both Acts, All which fits this caſe. And yet more (as hath beene ſaid) the lands twentie ſeven, are by expreſſe tearmes excluded, out of the Statute of 31. which is not ſo in *Canterburies* caſe, and ſo 10. *Eliz. rot.* 342. for the point of Leaſes.

Fourth petty queſtion of the firſt great point

Now to the fourth queſtion of the firſt great point; If there had beene a particular Statute, whereof the Court could take no other knowledge, but as it was pleaded, this clauſe muſt have beene taken generally for all Monaſtery Lands, becauſe there was nothing in the plea, that reſtraines the generalitie of the word, and the defendant might at his choyce either pleade, that there was no ſuch Act of Parliament, or elſe might ſhew the farther addition and that in another tearme, as if he ſhould plead a demiſe in deed which is ſo in words, but then goeth on, and addes that if he dye without iſſue, it ſhall remaine, after, the Adverſary may either traverſe or deny generally, or ſhew the generall Law, the Court may take knowledge of the whole. But then though it be miſrecyted the Court ſhall take no knowledge of it, as it is recyted in *Partridge*, and *Crokers* caſe *Plow.* 84. and in *Cromwels* caſe, and in the caſe *Cooke, lib.* 4. *fol.*13. But note in the firſt of thoſe caſes, the Statute, was pleaded and made a Parliament, when there was no ſuch Parliament; and in the other the ſubſtance of the Parliament was miſ-recited. So both appeare to the Court halfe. But in this caſe there is nothing pleaded to the Court halfe, but onely there is an omiſſion of ſome part of the Statute, that may give an other ſenſe to this clauſe.

Now then this being a generall Law, there was no need to plead it, nor any part of it, no more than when you plead a feoffment to

uſes to ſay that *virtute cujus & vigore Statuti, de uſibus, &c.* though the uſe of pleading bee ſo, for when you have laid downe the caſe, the Court in the generall Statute, makes application of the Law without your helpe. So then, ſince he hath in this caſe recited ſome part of the Law which he needed not have done, and that truly, you ſhall not require at his hands to repeat either the whole Law, preamble and all, or elſe at his perill to call out all parts, that are materiall to give inſtruction to that part that he pleads; for that is the office of the Court, and not of the party.

The ſecond great point.

Now the ſecond great point of the caſe, the Judges muſt bee very conſiderate, not to extend the charge of Tythes, by way of dutie, beyond the bounds whereof it hath gotten poſſeſſion; for diverſe reaſons.

Firſt, that it is no friend to Religion, for, it takes away the nouriſhment and reward of learning, and induſtry of Church men.

Secondly, It is againſt common right, and the common Law of *ENGLAND*, for according to them it is no diſcharge.

Thirdly, It is no incroachment, when as even beyond the uſurped Authority of the Sea of *Rome*, by which it is no diſcharge, it was ſuch a Beares Whelpe, as it was an Age before it would bee brought in any ſhape, and yet when all was done, it was caſt into a form of pleading which departs from the Rules of all Art of reaſoning; For, it is pleaded thus for example. The *Prior* of *Hatfield*, &c. time out of minde, was ſeized of the parſonage and land, *ſimul et ſemel et ratione inde*, held the ſame diſcharged, &c. And you may not deny the Argument, which muſt be; That unitie of preſcription diſchargeth though it be confeſſed to be halfe. And if you ſuppoſe the Major and turne it into a *Syllogiſme*, you are not allowed to deny it as to demurre in Law upon it, yet whereſoever ſuch a unitie is with a cleare Non-payment of Tythes, time out of mind, as a body ſpirituall capable of a Non charge, it muſt have beene laid as an abſolute diſcharge upon better reaſon directly, than to lay it upon an unitie; For, the preſcription of a perfect diſcharge, in that caſe was not doubtfull, for in *Pridles* caſe, *Co. lib. 11. fol.* 14. it is truly ſaid; That unitie of a perfect diſcharge by preſcription may ſtand together.

456. Now then it is agreed, that where the unitie is ſuch as is allowed for diſcharge, it is not ſo allowed for it ſelfe, and of its owne ſtrength, but in contemplation of a true diſcharge, which in ſuch confuſions of poſſeſſions and priviledges of all natures may well bee conceived, though it cannot bee ſhewed. Now that preſcription failes in this caſe. For, there was foure wayes uſed for diſcharge of *Abbey* Lands of Tythes: That is to ſay, Order, Compoſition, Bull, or Canon, and preſcription; All theſe may bee preſumed to maintaine

taine the diſcharge by unitie where the ſame body of the *Abbey* continued ſeiſed, both of the Patronage, and the Land, from beyond memory, till the Statute of 31. *H.* 8. For, then that Statute, and the clauſe of diſcharge thereof, did intrench upon it with full advantage, which is a neutralitie, therefore, thoſe preſumptions fayle with the Priory of *Hatfield*, as hath beene ſaid, that is Order, compoſition, Bull, or Canon.

But if it be ſaid that if the *Abbey* of *Hatfield* were diſcharged by preſcription that remaines. I Anſwer, that if it be ſo taken, it makes expreſſely againſt the Plaintiffe, for the diſcharge is ſufficient for it ſelfe, according to the courſe of common Law and both need no helpe of the Statute, as hath beene ſaid, and therefore cannot be admitted, in underſtanding to maintaine an unitie, which hath no force, but by the Statute of 31. For, Fiction is never admitted where truth may worke, as where CESTAY and uſe, and his Feoffee joyned in his Feoffement, it ſhall be the Feoffment of the Feoffee. So where in *Vrneycleys* caſe it hath beene ſaid, that an effectuall unitie muſt have foure qualities, that is to ſay, it muſt bee *perpetua, equalis, legitima, et libera*; You muſt adde unto it a fift, that it muſt continue in the ſame body: For elſe the preſumption, and true diſcharge loſeth his force. And I am of opinion, that if in this caſe the Plaintiffe, ſhould lay the diſcharge by preſcription that the Defendant might avoyd it by ſhewing that the *Abbey* was diſcharged by Order, Compoſition, or Bull, within time of memory or at the leaſt a great evidence for him.

368. *Ribbet* verſ. *Lee*.

THomas *Ribbet* brought an *Ejectione firmæ* againſt *George Lee* for certaine lands in *Huntington*, of the demiſe of *Thomas Lee*, upon iſſue not guiltie, the Jury found that *George Lee*, Father of the leſſor and of the defendant, did by Indenture covenant to ſtand ſeiſed of the Lands in queſtion, to the uſe of himſelfe for life, and after his deceaſe to the uſe of *George Lee* his ſonne and heire; which is now the defendant, and the heyres of his body, the remainder to his owne right heires. Provided nevertheleſſe, that if *George* the Father, ſhould at any time during his life be minded upon any occaſion to change the uſes, that then it ſhould be lawfull for him being in perfect health and memory by writing under his hand and ſeale, and by him delivered in the preſence of three credible witneſſes to declare that his will and pleaſure is, that the ſaid uſes or any of them ſhould be altered or made voyd, and the ſaid *George* the Father

and all others ſhall ſtand ſeized to ſuch uſes as by ſuch writing ſhall be limited. And then they ſaid that *George* the Father made his laſt will in writing under his hand and ſeale, and thereby did deviſe the ſaid tenements to *Thomas Lee* the leſſor, and the heyres of his body, and for want of iſſue, to his ſonne *George* in tayle, the Remainder to his daughter in Fee, and that the ſame laſt will, was ſealed and delivered in the preſence of foure, (naming them) being credible witneſſes, and then *George Lee* the Father dyed, and *Thomas Lee* the younger ſonne entred, and made the Leaſe, upon whom the defendant *George Lee* entred and ejected him, *&c.* And hereupon judgment was given for the plaintiffe, &c. by *Hobart* chiefe Juſtice, *Warburton*, *Winch*, and *Hutton*, only differing. The ſole maine queſtion, whether a Revocation actuall, or in an Act implying ſo much may be made by will by force of writing and meaning of the proviſo.

Iudgment.

The ſole maine queſtion.

And it was agreed firſt, that though the verdict did not find that *George* the Father was not in perfect health and memory, yet that was well enough for it, ſhall bee preſumed, except the contrary bee proved. And ſo for the preſence of ſufficient, and credible perſons. Otherwiſe it were in the preſence of good ſufficient ſubſidy Men.

Whether an actuall revocation may bee made by the aforeſaid proviſo.

Next it was agreed, that all Formes and circumſtances preſcribed muſt be obſerved as here it muſt be by writing, ſigned, ſealed and delivered in the preſence of witneſſes *ut ſupra*, which though they be not all requiſite in a will, yet as it is a Revocation within the proviſo, it muſt have beene in *Scroops* caſe.

Now though this bee true it is to be underſtood of formes and circumſtances that are expreſſed and not imagined.

Now then here the Will is in writing under hand and Seale, and delivered in the preſence, &c. ſo all the expreſſed circumſtances are obſerved.

Againſt which it was ſaid by my brother *Hutton*, that it is to bee underſtood of a Deed, according to the vulgar ſpeeches, and the reaſon, becauſe in ſuch clauſes the laſt Will is eſpecially mentioned.

And laſtly, that the clauſe thereof is, That from thenceforth, that is to ſay, from the ſealing and delivering, the old uſes ſhall bee voyd; which cannot be in caſe of a Will, which is ever revocable, and takes no effect till after death, nor in this caſe, which was ſo far agreed.

But it was anſwered by the Court, and ſo reſolved, that though Revocation muſt obſerve the circumſtances, that the owner impoſeth upon himſelfe, as hath beene ſaid, yet no more ſhall be impoſed upon him, but his power ſhall be taken favourably, as agreeable to nature, that every man have free power over his owne, which is the reaſon

that

that the latter Act cannot ſtand with the former uſes is conſtrued a Revocation, though according to the expreſſe word and vulgar ſenſe it is none, *Scroopes* and *Fitz Williams* caſe. Alſo where condition expreſſeth or diſtinct in part diſtinguiſhes wholly as being odious in law. The caſe of the Revocation is cleane contrary; for if the power extended to 100. Acres, and I make Feoffment of 10. I may nevertheleſſe revoke for the reſt. So the power of Revocation is to be taken liberally, and the execution of it favourably. Now then for the clauſes, [Then and thenceforth] they are ſurpluſage and of no force. For the power of Revocation is perfect, and compleat before they come to theſe words [and if it bee his pleaſure to revoke them by his writing, hee may, and declare them voyd,] and then words needleſſe ſhall not impeach a clauſe certaine and perfect without them. And yet further being truly conſidered, there is no repugnancy in them; For my meaning is, that he ſhall have power to declare them voyd according to his pleaſure, that is, according to the nature of his declaration in Law, which in caſe of a Will is from his death, or according as he ſhall expreſſely appoint the time. And therefore if in this caſe *George Lee* the Father had made a ſimple writing of declaration, and not in the manner of a deed, to any certain perſon, that his uſes ſhall bee voyde, and had, ſigned, ſealed, and delivered it in the preſence of three credible witneſſes, and had either in the body of the deed, or verballie declared that it ſhould take effect upon an hundred pounds paid, or at his death, and not before: That this Revocation ſhould be good, and yet ſhall not take effect from the making, but from the time appointed, within theſe words; [Then and from thenceforth,] whereof it follows that the former eſtates being revoked, the will is good for the whole, working as a will, which maintaines the judgment. But if the Land had beene holden by Knights ſervice, and the deviſe to a ſtranger, it could have carryed but two parts as a Will, and by force of the Deed of Covenants, it could carry nothing to a ſtranger, and if the Land had beene ſo holden and deviſed to the ſonne as it is here, it can carry but two parts as a Will, and I doubt it could not have carryed all as a declaration of new uſes upon the power of the Covenanter, ſince this deviſe (if it ſhould work ſo) cannot take effect during the life of the deviſor, and Covenanter, it amounts to no more, than if a man ſhould Covenant that after his death his Heire ſhould ſtand ſeized to the uſe of his younger ſon; which I hold to be voyd.

Ejection.

387. *Long.* verſ. *Hobart.*

THomas *Windſmore* Leſſee of *Edward Long* plaintiffe, and *Nicholas Hobart* defendant in *Ejectione firmæ* for land in *Polſholt*, in *Com. Wilts*, iſſue not guiltie, it was found by a ſpeciall verdict

that *William* Lord *Sturton* was ſeiſed in fee, and that 24. *Maii*, 28. *Hen.* 8. *Per quoddam ſcriptum ſuum indentatum, ſigillo ſuo ſigillatum, dimiſit cuidam* Thomæ Hobart *tenementa præd. habend. eidem* Thomæ *& præfato* Nicolao Hobart, *ac quibuſdam* Iohanni Hobart *&* Henrico Hobart *filiis prædict.* Thomæ, *pro termino vitæ eorum et alterius eorum ſucceſsivè, diutius viventium. William* Lord *Sturton* granted the Reverſion to *Thomas Long* and his heires, who deviſed the reverſion to *Edward Long* the Leſſor in taile, and dyed. *Thomas Hobart* and *Henry Hobart* dyed, and *Nicholas* and *Iohn* ſurvived, and the Leſſor entered, and made the Leaſe to the Plaintiffe, and the Defendant entered.

Iudgement. And in this Caſe, Iudgement was given for the Plaintiffe after long debate, and upon great conſideration, whereof the reaſons were, firſt, that none could take by the Deed immediately, but *Thomas Hobart* becauſe he was only party to the Deed, and the reſt not named, but by the *habend.* then they cannot take but by the way of Rem. which cannot be joynt, becauſe of the words *ſucceſsive, &c.* And in ſucceſſion they cannot take, for they are uncertaine who ſhall begin and who ſhall follow, which in the caſe, 20. *E. Dyer* is aſcertained by the Clauſe, *Succeſsivè ſicut nominatur in Chartâ.*

Errour.

388. *Greenewood* Verſ. *Taylor.*

NOw this Terme, by a Writ of Errour out of the Kings Bench, came this Cauſe before us, *Robert Greenewood* brought an *Ejectione Firmæ* againſt *Iohn Taylor*, for Lands in Box in the ſaid County, and upon iſſue not guilty, a ſpeciall verdict was found, *Que* Anthonie Long *&* Alice *ſa femme fuere ſeiſi in fee in droit* Alice *del dits tenements in que pres & ſic ſeiſit.* 20. *Aug. a.* 2. *E.* 6. *un Indenture fuit fait enter le dit* Anthony Long, Alice *ſa femme del un part & un* Iohn Fiſher *del auter part per que les dits* Anthony Long *&* Alice *ſa femme demiſe & leaſe la Farme par Indenture al dit* Iohn Fiſher *&* Annæ *ſa feme &* Iohannæ *lour file les dits tenements in le Count mentioned. Habend. les dits tenements al* Iohn Fiſher *&* Anne *ſa feme &* Iohannæ *lour file* & eorum diutius viven. ſucceſſive a feſto S. Michaelis Archangeli, *donque proschein enſuant le date del dit Indenture uſque le fine & terme de lour vies natural rendant* proinde annuatim durant. vitis ſuis & prædict. *le yearly rent de* 13. s. 4. d. *oveſque un harriot de lour beſt animal* poſt eorum deceſſum ſive exitum Anglice *going out* cujuſlibet eorum: *ore Covenant de part de* Iohn Fiſher *& ſa feme &* Iohanne *lour file de payer touts* free Rents *& autres* Charges *&* Duties *eſſuant hors de ceſte terræ durant lour vies ut prefartur apres le feaſt, de S.* Michaell *avant dit, & dit* Anthony Long

ong & Alice *ſa femme* delivered ſeiſin in perſon *al dit* Iohanne
nne *ſa femme &* Iohanne *lour file ſo lonque le tenor del dit Inden-*
ure Anthonie Long, *moruſt & apres* Alice *ſa dit femme* receive *le*
ent del dit Iohn Fiſher, *& puis ceo les dits* Iohn Fiſher & Anne
u femme moruſt & Iohanne *lour file entered & apres que ce dit*
lice *puis ſa Acceptance del dit rent enfeoffa* Henry Long in Fee
uth que le Defendant claime. *Et la dit* Iohanne *la file que eſt unc.*
vie priſt. a Baron un Anthony Tyler *& ils leſſant al dit* Robert
Greenewood *prout* in the *count del* Ejectione Firmæ *par que le*
it Robert Greenwood *fuit poſſeſſe tanque fuit Eject par. le dit* Iohn
Tyler *ſur que fait adjudge in bank le Roy pur le dit* Robert Greene-
vood *le Plaint. in le* Ejectione Firmæ *& ſur ceo de Defend.* Iohn
Tyler *port bre. de error.* 452

En bank le Roy ſur grand debate de le cauſe fuerunt ceux points reſolves, come fuit report a nous.

Que le livery & ſeiſin fait per Anthony Long *& ſa femme in perſon puis le Feaſt de S.* Michael ſecundum formam Chartæ *fait bon Auterment uſt eſte ſi le livery de ſeiſin uſt eē fait per Attorney ſolonque le Caſe de* Butler & Harvey 2. Reports fo. 55. *on devant le Feaſt.*

Attorney or the partie makes livery differing from the deed.

Que Anne *la femme de* Iohn Fiſher & Iohanna *lour file ne puiſ-* 2
ſoint prender joynt eſtate ove Iohn Fiſher *per le dit Indenture de Leaſe, eo que le dit* Anne *&* Iohanne *ne fuer. parties al dit Indenture ſolonque le caſe de* Coniſmore & Hobart *donque cited.*

Et que Iohan Fiſher *ne prendea aſcun grender eſtate que pur ſa* 3
vie demeſne, & ment pur les vies de lay M. Anne *ſa femme &* Iohanne *tour file, eo que ils deux fuer. intend de prender eſtate al eux meſnes & pur ceo lour noſmes on vies ne ferr. limitation on increaſe del eſtate del* Iohn Fiſher *contra al intention del fait.*

Et tamen *que le fait in les premiſes & in le* habend. *ne ſerra Au-* 4
terment void quoad *le dit en Remainder perforce del parol (ſucceſsive) limit al eux in le* habend. dea. *le eſtate pur lour 3. vies en cea mention. Iſſuit que le ſucceſsive lara & diſtinguiſh lour ſeverall eſtates & ſucceſsive ſolonque le Caſe* 20. Eliz. fo. 361.

Et en ceo de vavier del le ſucceſsive in Coniſmore, Hobbards Caſe *eo que la lendenture fuit fait inter* William Lord Sturton *de l'un part &* Tho. Hobart *del auter part, & pur ceo le dit* William Lord Sturton *leſſa al dit* Tho. Hobbard *habend. al dit* Tho. Hobbard, & Nicholas & Iohan & Henry Hobbard, pro termino vitæ eorum & alterius eorum ſucceſſive diutius viventis.

Pur que la le ſucceſsive apres les joynt vies limit ne extend. a lour perſons, mes le limitation de ſucceſſive diutius viven. *apres joynt eſtates pur vies limit &* ore Mre. *que le eſtate continue ſi longe come aſcun de eux vive & men. pur demand les eſtates mes in le principal cas icy*

li-

limitation eſt habend. al eux 3. noſmant eux & eorum diutius viven. ſucceſſive, *devant le limitation de aſcun eſtate iſſuit eſt placed pur divider l'eſtate.*

Ideo in le Caſe de Coniſmore *ceo ne fait lour eſtates ſeverall* quia *neſt limit al ceo mes autrement ſerra en ceſt Caſe en variance potius que ceo ſerra al eux un void limitation ſolonque l'opinion de* Iuſtice *Sands* in *Coltherſt* Caſe, *Com.* fo. 9. *ſur le livre de* 17. E. 3. fo. 29. & 18. E. 3. fo. 29. & 39. Aſſ. plac. 20. *on le heyre priſt per voy de Rem.* quia impoſſibile *ſur le fait de prender eſtate in poſſeſſion.*

But in debate of this Caſe upon the Writ of Errour, we were all of opinion, That there was no materiall difference betweene ~~Coniſmores~~ Caſe and this, ſo that the Iudgement could not ſtand both together. And therefore we adviſed the Defendant to compound with the Plaintiffe, in the Writ of Errour.

Windſmores Reuolt fol 447.

Quare Imped.

389. Sir *William Elvis* Knight, againſt the Archbiſhop of *Yorke*, *Martin Taylor* and *Thomas Biſhop*, Clerkes.

IN a *Quare Imped.* to preſent to the Church of *Badworth*, and declares, that Sir *Gervas Elvis* Knight, was ſeiſed of the Manour of *Salvie*, to which the ſaid Advowſon is appendant in Fee, and held the ſame of the King, and ſo ſeiſed one *George Turpin* his Clerke, who was admitted and inſtituted, *&c.* And the ſaid Sir *Gervas* ſo ſeiſed was attainted of Felony and ſo executed. By force whereof the King was ſeiſed of the ſaid Manour *&c.* in Fee, in right of his Crowne, and ſo ſeiſed did grant the Manour and Advowſon thereunto belonging to the Plaintiffe and his heires, *adeo plene et integre*, &c. by vertue whereof hee entered, and was ſeiſed thereof in Fee, and ſo being ſeiſed, the Church became voide by the death of *Turpin*, whereby it belonged to the Plaintiffe to preſent, and the Defendant did diſturbe him to the ſumm or dammage of five hundred pound Action, non confeſſeth the ſeiſin of Sir *Gervas Elvis*, and the preſentation of *Turpin*, and the Attainder and Execution as the Plaintiffe hath ſet forth in his Declaration, But further ſaith, that by vertue of the ſaid Attainder, the King was ſeiſed of the Manour *ad quod*, &c. in Fee, in right of his Crowne, and ſo ſeiſed, the Church became void by the death of *Turpin*, whereby the King (the Church being void) did preſent to the ſaid Archbiſhop the ſaid *Thomas Biſhop*, whom he cauſed to be admitted, inſtituted, and inducted, as it was lawfull for him to doe; without that, that the King did grant to the ſaid *William Elvis* the Advowſon, *prout*, &c. Whereupon the Plaintiffe demurrs in Law generally. That he is Parſon imperſonee of the

the Church aforeſaid, by the preſentation of the King, and ſayes, the Action was, becauſe hee ſayes that *Gervas Elvis* was ſeiſed of the ſaid Advowſon as of the Advowſon in groſſe, and confeſſeth the Attainder, and that after the death of *Turpin*, the King did preſent the ſaid *Biſhop*, who was admitted, inſtituted, and inducted, and was Parſon imperſonee at the time of the purchaſing of the Writ, *&c.* without that that the Advowſon aforeſaid did belong, or doth belong to the ſaid Manour of *S. prout*, &c.

Whereunto the Plaintiffe replyes that *Biſhop* is not Parſon imperſonee of the preſentation of the King *prout*, &c. *Ideo quod inquiratur*, and whereupon *Biſhop* demurres in Law, that one *Iohn Sidenham* Gentleman, was ſeiſed of the ſaid Manour *ad quod*, &c. in Fee, and ſo ſeiſed in the 16. yeare of Q. *Eliz.* by Indenture, *&c.* did grant to *Richard Ridley* and *Eleanor* his wife, the ſaid Advowſon for the firſt Avoydance. The Church became void by the death of one *Lilly*, which was the firſt Avoidance.

Negatiua Danans.

To which Church, the ſaid *Sidenham* ſeiſed of the ſaid Manour, and having no right to preſent, did preſent one *Richard Clifton* his Clerke, and the ſaid *Clifton* being Rector of the ſaid Church, the ſaid Church became voide, by the deprivation of the ſaid *Clifton*, which avoydance was the ſecond Avoydance.

And the ſaid Sir *Gervas Elvis* father of the Plaintiffe, being ſeiſed of the Manour in Fee, and having no right to preſent to the ſaid Church, being voide, did preſent to the ſaid Church being voide the ſaid *Gregory Turpin*, *Qui*, &c. And that the ſaid *Turpin* being Rector of the ſaid Church, and that the ſaid *Ridley* and his wife being poſſeſſed of the ſaid Advowſon, the ſaid *Ridley* dyeth, and *Eleanor* ſurvives, and was ſolely poſſeſſed of the Advowſon, and firſt makes *Martin Taylor* her Executor and dyeth, whereby he was poſſeſſed, and ſo the Church became void by the death of *Turpin*, which was the third avoidance, and whereby the Defendant *Taylor* did preſent the ſaid *Biſhop* his Clerke, as it was lawfull for him to doe; *Et hoc in dict. ſi Actio*, &c. upon which the Plaintiffe demurres in law generally.

The firſt point is, whether this Plea of *Biſhops*, to counterplead the title of the Plaintiffe to the patronage, be good or no. The firſt point

And I hold it is not good: Wherein let us conſider how it ſtood at the Common Law, and what alteration is made, as to this Caſe by the Statute.

And firſt, to the Common Law it was plaine, That neither Ordinary as Ordinary, neither before Collation nor after, nor Incumbent, neither of his Collation, nor of the preſentation of any other, could pleade by the title of the patronage, and therefore could not diſpute that, with which they had nothing to doe, which is the

reaſon that his collation by Lapſe (or before the Lapſe) incurred, though it be a wrong, doth not diſplace the Patronage but ſhall bee ſaid to bee done in the right of the very Patron, being nothing but inſtitution and induction which are his office as Ordinary aſwell upon preſentation, as without, though hee doth them out of ſeaſon.

And though this ſeemed, and was indeed extremitie miſchievous, yet the Law would not let in a thing abſurd and againſt the Law of Nature, and Reaſon, as to admit two to diſpute the Intereſt of a third.

This miſchiefe notwithſtanding, had a kinde of Remedy in ſome Caſes; For, if the *Quare Impedit* were brought againſt *Biſhop*, and the Incumbent, or the Incumbent alone leaving out the Patron, the Incumbent might pleade in abatement, that hee was Parſon imperſonee, of the preſentation of ſuch an one, who was alive and not named. So that though hee could not plead himſelfe to the Patronage, yet hee needed not to Anſwer without the Patron, which could pleade to the right of his patronage, and ſo defend his Clerke.

But yet there were two Caſes of miſchiefe ſtill. The firſt, when the Patron was joyned, if hee could collate or pleade a falſe and faint Plea, and give way to the plaintiffe, the Incumbent was without remedie, whereof the Common Law tooke little regard, both for the reaſon before ſpoken of, and becauſe comming in by him, hee was ſubject to his plea as Leſſee, for yeares could not ſatisfie at the Common Law.

And ſecondly, though it were regularly true that the patron was to be named, ſo that there was a meanes to defend the Title, yet when the incumbent came in by the King or Pope, they could not bee named, and yet though the miſchiefe to the Incumbent was inevitable, yet the common Law would not breake her rules to receive the Incumbent to plead the Title of the patronage no not in that Caſe.

This being ſo in the Caſe of the Incumbent, who had the whole intereſt of the Church veſted in him, and that by the preſentation of his patron, by whoſe title hee was to ſtand or fall, that hee could not pleade the patrons title. Much leſſe was the Ordinary to doe it, for three reaſons.

1 He had nothing to doe with the patronage, neither in intereſt nor dependancy as the Incumbent hath.

2 He hath no medling with the Church or the fruits of it, as the Incumbent hath. And if the Ordinary having collated by lapſe could not plead the title of the patronage to maintaine it (as by the Statute appeares) much leſſe could hee doe it before the Lapſe incurred.

3 The Law hath provided for him (if hee will containe himſelfe with-

within the bounds of an Ordinary) ſufficient meanes to ſave himſelf from making himſelfe a diſturber, and hath pleas to repreſſe and traverſe the ſame, which the Incumbent hath not. For, if the Incumbent hath accepted the Benefice of his preſentation, and hath no right or will not defend it, hee muſt needs bee a diſturber, and yet was not allowed to pleade by Title at the Common Law. And therefore the Ordinary cannot pleade in abatement, that the patron is not named as the Incumbent may for his Office and Acts are not joyned, nor depend upon the Patrons, as the Incumbents doe.

Now I hold it not impertinent in this place, and upon this occaſion, to ſhew, how the Common Law hath provided for the ſafety of the Ordinary againſt diſturbance, if hee will not exceed his Office, nor maintaine parts, but carrie himſelfe indifferently amongſt them that pretend to the Patronage of the Church, as he ought to doe, being in a ſort a judge amongſt them.

Firſt, where it hath beene ſaid, That hee ought to receive the Clerke of him that comes firſt: I hold the Law contrary, for hee may take competent time to perſons interreſſed, to take knowledge of the avoydance even in Caſe of death, and where notice is to bee taken, not given, and to preſent their Clerkes to it.

But perhaps if hee doe not receive the Clerke of him that comes firſt, he may quit himſelfe of diſturbance, becauſe hee doth nothing but as Ordinarie in Law, but let him looke to his conſcience, if it be not done *bona fide*.

But if two or more preſent, ſo that the title is become litigious, then cannot hee ſafely receive the Clerke of his owne head, except the Title bee certaine, but ſay his Title was aſcertained by *Jure Patronatus*, and that the Inqueſt finde for one partie, yet he may ſtill receive a contrary Clerke if hee will, for who can let him, but that muſt bee at his owne perill, which is well to bee underſtood at double perill, That is, firſt that the Title bee the better.

Secondly, that the Patron whoſe Clerke hee hath received, will pleade and defend that Title, for otherwiſe he cannot doe it, as hath beene ſaid.

But though after Inqueſt, in *Jure Patronatus*, the Ordinarie may accept the contrary Clerke, yet it is againſt Iuſtice and the intent of the Law; For, ſince it is a proviſion meerely for the good and ſafety of the Ordinary, and hee pretends doubt, and therefore puts the Patron to this Inquirie to his Charge, and delay, to ſatisfie and ſecure him, hee ought to judge and receive the Clerke according to that Verdict, and that is the true meaneing of *Greenes* Caſe that hath beene cited, and of the Bookes that ſay, that the Ordinary is to judge of the better Title,

that is, not to prejudge of his owne head, but *ſecundum allegata et probata*, upon verdict of the right given, and found according to the forme of Law, to give inſtitution which is his judgement, and the induction his execution.

And though it be true, it is but an inqueſt of Office, and therefore bindes not, I confeſſe it bindes not the Patron in his *Quare Impedit*, but it is finall, even to the true Patron, that hee cannot impute diſturbance to the Ordinary, following the verdict, and therefore it ought to bind him to follow it. For to thoſe purpoſes it is a full verdict, never to bee tryed againe, as it is a flight to a Coroners inqueſt to the forfeiture of goods. And therefore I am of opinion, that if the Patron bring his *Quare Impedit*, in that Caſe againſt the uſurper, and his Incumbent, not naming the Biſhop, and proves his title, that hee afterwards have an Action upon the Caſe againſt the Ordinary, for that wilfull wrong, delay, and trouble, that hee hath put him to, and he ſhall recover coſts and dammages, not in reſpect of the value of the Church (for there is no dammage for that, by the Common Law) but by *Weſtm. 2.* for the other reſpects I ſpeak of. But if hee name the Ordinary in the *Quare Impedit*, hee can have no Action of the Caſe; neither ſhall hee have ſuch Action upon the Caſe, before he hath tryed his Title in a proper Action, and againſt the proper Parties.

But yet in another point I am of opinion, that though but one preſent, if the Biſhop make doubt of his title, as in many Caſes hee may juſtly, being a ſtranger to it, hee may require ſatisfaction by *Iure Patronatus* for *à notatione nominis*, it doth not imply divers parties, as a *Iuris utrum* doth, but like a *quo Iure*. And therefore take the Caſe to bee, that a Parſon is deprived by the Ordinary, or reades not his Articles. In which caſes the Church is void, and yet notice muſt bee given to the very Patron for that time, or elſe the lapſe incurres not (which is inconvenient for the Church, and a prejudice to the Ordinarie) how ſhall hee now aſſure himſelfe of a ſufficient notice? For, if hee gave notice to him that is not Patron, for this very turne, his notice is vaine, and the Patron perhaps knowes not of the deprivation, or if he knowes it, needs he preſent without notice given him?

I hold in this Caſe his way is to award a *Iure Patronatus*, with ſolemne promonitions *Quorum Intereſt*, And the inquirie being made who is Patron, and give him notice, and if hee preſents not within ſixe Monethes, then the Ordinary may Collate, that ſhall not binde the very Patron, yet it ſhall excuſe from diſturbance upon the ſpeciall matter ſhewed, and if the other ſuppoſed Patron preſent, *Quare* if the true Patron bee bound ſince there was no notice given him. And I am of opinion, that though without notice, the

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Patron is not bound by the Lapſe, yet that is nothing to preſerve the uſurpation of another pretended patron, who is not ſubject to give notice.

Thus farre of the matter and forme of pleading for the Ordinary and Incumbent at the Common Law.

Now wee will ſee how it ſtands at this day, and what change is made by the Statute 25. *E.* 3. *Cap.* 7. *pro Clero, Stat.* 3. and what is the true meaning and uſe of that Law, which is thus: when an Archbiſhop or other Ordinary hath given a Benefice devolute unto him by lapſe of time, and after the King preſenteth and taketh his ſuite againſt the Patron, which percaſe ſhall ſuffer, that the King ſhall recover without action tryed, in deceipt of the Ordinary or the poſſeſſor of the ſaid Benefice, that in ſuch Caſes, and in all other Caſes like, where the Kings title is not tryed, The Archbiſhop, or Biſhop, Ordinary, or poſſeſſor, ſhall be received to counterpleade the title taken for the King, and to have his anſwer, and there to defend his right upon the matter, although that they claime nothing in the patronage, in the Caſe aforeſaid. What change is made by the Statute. 25. *E.* 3 chap. 7. concer- the pleading of Ordinaries.

The particular cauſe of this Law, is for the reliefe onely of the Ordinary that hath collated by Lapſe, and of the Clerke that is ſo collated, that they may both pleade to the truth againſt the King, which when you conſider, it is a neceſſary Law, and againſt the King more than againſt Common patrons. For, the King not being bound by lapſe of time, if the Common patron ſuffered a lapſe, and the Biſhop collated lawfully, yet if the King pretending himſelfe Patron, a *Quare Impedit* againſt the Ordinary and Incumbent, there was no meanes for them to ſave themſelves, ſince they could not deny the Kings Title, and maintaine the Patrons, in whoſe default the Lapſe tooke place, but the Statute gives remedies likewiſe, and the Caſes of like nature, are rather remedied by Letter than equitie.

And therefore firſt in the Caſe of Lapſe, a common perſon might by practice, have turned out a lawfull Collatee, in one onely Caſe, as this, and that was, A Common perſon no true Patron preſents within ſixe Moneths, and the true patron himſelfe preſents not in time.

Whereupon the Ordinary collates by Lapſe, againſt whom the pretender brings *Quare Impedit* becauſe his Clerk was refuſed, wherein he muſt needs prevaile if his title be good, And it muſt bee taken for good, becauſe neither Ordinary nor Incumbent could deny it, for, *De non apparentibus et de non exiſtentibus eadem eſt ratio.*

This is one of the like Caſes meant in the Statute. For, in all other Caſes the Lapſe is an equall title againſt all common perſons.

But the commoneſt Caſe, and that which extends fartheſt, is the

Purview of every Incumbent, that is called a poſſeſſor, aſwell by preſentment as by collation, is all one by the words of the Law, to Counterplead the Kings Title, and to ſhew and defend his own right upon the matter though hee claime nothing in the patronage in the Caſe aforeſaid.

Note all the words, for they have all their weight. For, firſt, the Incumbent muſt bee poſſeſſor, for that if hee have his preſentation, admiſſion, and inſtitution upon lawfull Title; yet remaines as he was before, under the miſchiefe of the common Law, becauſe he is not a poſſeſſor according to the letter of the Law till induction.

Againe I ſay, that though he be a poſſeſſor, hee muſt by the letter and meaning of this Law as well ſhew and defend his own right, as counterplead his Adverſaries.

And therefore clearely hee cannot make himſelfe Parſon imperſonee of the Preſentation of *H.* and defend himſelfe by the title of *I. D.* under whom hee claimes not, though that were ſufficient to deſtroy the Plaintiffes title, but muſt alſo make a title to himſelfe by the word and meaning of this Law, which I ſpeake not to binde the Incumbent by the Patrons plea, whereof I will ſpeake hereafter, when I come to the Incumbents plea.

But touching the Ordinaries Plea upon this Statute, I hold plainly that he can no otherwiſe plead, than hee could at the Common Law, but onely where hee hath Collated actually by Lapſe. For, though the Incumbent of preſentation bee alſo admitted to pleade by the meaning of this Law under the word, Like Caſe, becauſe the Caſe is like indeed, yet the Ordinaries Caſe before actuall collation, is no wayes like this, for hee hath gotten no intereſt for himſelfe, nor his Clerke in the Church. And therefore, if the Incumbent inſtituted onely at the preſentation of an other, bee not within the reliefe, much leſſe ſhall the Ordinary, that hath no intereſt but an Office onely, that ought to bee indifferent to all Patrons and maintaine noe ſide. And yet more, if the Incumbent which is inducted, being Defendant, in *Quare Impedit*, which may pleade by the Statute doe reſigne hanging the Writ, hee hath loſt his priviledge of pleading to the Title by this Statute, for as it was granted him to defend his poſſeſſion, ſo when his poſſeſſion is gone, there is no cauſe for him to uſe it: which reaſon ſerves ſtrongly againſt the Ordinary, where there is poſſeſſion under him, for yet that incumbent that hath reſigned, may ſtill pleade at the Common Law. And Note that Caſe of the Parſon reſigning, hanging the Writ, which the Plaintiffe may pleade againſt him to defeate him of his Plea, that hee might once have had hanging the Writ, whereas in *Præcipe quod reddat*, if the Tenant plead a releaſe, the Demandant cannot ſay that hee had not aliened hanging the Writ, but is eſtopped.

ped. The difference is, becauſe, that in that Caſe of the *Precipe*, the Demandant by his Writ admits him Tenant, but in the *Quare Impedit*, hee is not named an Incumbent, but a diſturber onely. Neither is the ſuite for the Incumbency onely directly, but for the Patronage or Preſentation. And therefore in the Writ, if the Demandant recover againſt his Patron hee ſhall bee removed.

I have beene the larger in this diſcourſe, becauſe I ſee the inheritances of Advowſons ſo incumbred by wilfull uſurpations, and diſturbances of pretended Patrons, Ordinaries, and Clerkes, and the multiplicity and perplexity of ſeverall Pleas of the Defendant, bee they never ſo many, whereof if any one paſſe againſt him hee is barred; and the incertainty and variety of the learning upon it, that it is almoſt impoſſible if a true Patron bee put to his Action, but he will be tyred.

Therefore firſt, I adviſe a Plaintiffe in *quare Impedit*, to name no more Defendants than needs muſt, and ſo if the Church bee once full of preſentations, ſo that there is no danger of the Lapſe, it is in vaine to name the Ordinary, and ſo to arme him with a Plea, who can now doe no more hurt or good, but only to bee anſwerable to the Dammages, which the Patron and Incumbent (which two muſt needs be named) will be ſufficient to anſwer.

But if the Church bee not full, but ſtand onely upon diſturbance, then you muſt name the Ordinarie, or elſe hee will collate (hanging the ſuite) by Lapſe, whereas if you name him hee muſt either diſclaime, and then you may have judgement againſt him, or elſe he muſt plead, and not allow himſelfe a diſturber and then hee can have no lapſe. But if he diſclaime, and the Plaintiffe will not take his judgement but maintaine him a diſturber and that bee found againſt the plaintiffe, I hold (as I have heretofore holden) that the Biſhops collatee hanging the ſuite ſhall not bee removed, for he can have no judgement nor Writ *non obſtante reclamatione Epiſcopi*, becauſe as againſt him he is barred.

Nextly in this Caſe I adviſe him to name no more diſturbers, than are likely to have reaſonable titles: For, every diſturber will make a ſeverall Title, and traverſe or confeſſe and avoid the plaintiffes title, whether hee himſelfe have good title or not; ſo it were better not to name them: For, they can but preſent and get their Clerks in hanging the ſuit, which will bee removed in the Writ to the Biſhop, if their title bee not good; but ſuch as have reaſonable titles are fit to be named, that the titles may bee diſcuſſed directly at the miſe of the parties, and left to an after game, the title to be tryed betweene the Incumbent that comes in hanging the Writ, and the Clerke that is admitted upon the Writ to the Biſhop. For I hold

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it cleare, that the Biſhop cannot refuſe to admit the Clerke of the partie, that recovers and returnes a Plenartie upon anothers preſentation and right, For that is the way to confound all: For, if that returne be falſe, it cannot bee traverſed, for there is neither partie nor day in Court to counterplead. And if you ſay, the Writ is only *non obſtante reclamatione* of the partie, and this is a ſtranger, I anſwer, that it is cleare, that the Clerke that came in, hanging the ſuite by the preſentation of them that have no right, ſhall be removed. And ſhall the Ordinary that is not received to plead to the Title of the Parſonage, hanging the ſuite wherein he is made a Defendant, make himſelfe Iudge of Titles after judgement (whereunto he is a ſtranger) to make it fruitleſſe?

469 If you ſay, that hee that hath recovered may remove the Clerk by *Scir. Fac.* I anſwer, that, that prevents not the abuſe of an Ordinary, if the returne bee falſe, which it may bee, becauſe either there is no plenartie, or not upon better title as he returnes, whereunto there is no anſwer.

And againe, it is unjuſt to put one to a double ſuite, where the ſatisfying of the Writ, is but *Executio juris, quod non habet injuriam*, to give him poſſeſſion according to his right. But if his adverſaries right bee the better, it hurts him not, but enables this Clerk to try his right, which without this admittance, hee could not. And in the caſe of Coppiholders, admittance workes.

2. Point. Now I will ſpeake next of the Plea of *Biſhop* the Clerke, and make that the ſecond point, becauſe it hath much affinity with the firſt point, that hath beene handled, and the reaſons of it.

Concerning the pleadings of Incumbents Wherein firſt I agree, that the plea of the Incumbent is good. For he hath pleaded himſelfe Parſon imperſonee: and ſo made himſelfe poſſeſſor according to the Statute, and hath alſo laid of whoſe preſent action as he muſt, that it may appeare to the court that hee defends his owne title and his patrons, whereupon his owne depends, according to the Statute. Now though he bee not in truth, in of the preſentation of the King, as he pretends, but of the preſentation of *Taylor* (who hath alſo pleaded ſo) yet it doth not appeare, which of thoſe pleas is true, nor the plea of the one doth eſtop the other, ſo that both are to be admitted.

That, touching the replication of the plaintiffe, I hold informall, for two reaſons.

Firſt, where he ſayes, hee is not Parſon imperſonee of the preſentation of the King, he ſhould have induced it will alledging of whoſe preſentation hee was in, with an *abſq; hoc*, or els it may bee that hee is not parſon at all, and then he ſhould have pleaded ſo, and not to a Negative pregnant, as this is, as againſt a Fine, *partes finis nihil*, &c. but ſuch another.

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Secondly, his concluſion would have beene judged, if he ſhall be receiued to his Plea.

Now where it was ſaid that the Replication ſhould have beene, that hee was not Parſon imperſonee generally, or *modo & forma*; becauſe he is a poſſeſſor within the Law, of whoſe preſentation ſoeuer: I hold the Replication as it is, very good.

Firſt, if a man make his title more ſpeciall than he needs, in many caſes his Adverſarie ſhall take advantage of it; For the Law ſhall conceiue that he is beſt appriſed of his owne title.

But in this caſe the Parſon cannot plead that he is Parſon generally, but he muſt ſhew neceſſarily of whoſe preſentation as all the Bookes and Preſidents are. And yet that is not forme, but therefore materiall becauſe by the Statute he muſt not only be a poſſeſſor, but he (muſt as hath beene ſaid) as well ſhew and defend his owne title and his Patrons, whereupon his owne depends, as counterplead his adverſaries.

Now then he muſt as well make it appeare to the Court that the title he defends is his Patrons, as that he is poſſeſſor; for he cannot ſay that hee is Parſon of the preſentation of *Tayler*, and make a title to the King as Patron, ſo it is materiall to ſet forth to the Court of whoſe preſentation hee is in, and by conſequence it is traverſable.

In a *Quare Imped.* you lay the preſentation of the laſt Incumbent and you name him, yet it is all one to the matter whether it were he or another, ſo it were the ſame Patron that preſented, yet ſhall traverſe the preſentation of the ſame man.

Now to the Plea of *Tayler*, which I will make the third point, wherein the caſe is thus. A man had three avoydances of an Advowſon appendant by him that was ſeiſed in Fee of the Manour, and Advowſon. The Church avoyds, and the Granter uſurpes, and then it avoyds the ſecond time, and then an other uſurpes that was likewiſe ſeiſed of the Manour, and forfeits it to the King, who makes a grant of the Manour, and Advowſon *in his verbis*, &c. to the plaintiffe. *De uberiori gratia dedit & concil. eidem Will. Elvis Mil. Manerium præd. cum pertinentijs cum advocatione Eccleſiæ præd. eidem Maner. ſpecta. et pertinen. per nomina Manerij de Sauli alias Samby, in Comitatu Norff. Ac advocationem Eccleſiæ, de Babworth eidem Maner. ſpectan. & pertinen. adeò plenè integrè et in tam amplis modo et forma prout pardict Gervaſius ea habuit tenuit et gaviſus fuit in tam amplis modo et forma prout Manerium illud cum pertin. ad quod*, &c. *cum prædict. advocatione Eccleſiæ, prædict. ad manus ipſius domini Regis nunc devenerunt, ſeu devenire debuerunt ratione attinctura prædict. Gervaſij aut in manibus ipſius Domini Regis tempore confectionis earundem literarum patentium exiſtebant*, &c.

3. point

And then the Church avoyds the third time and the Executor of the Grantee of the three Avoydances preſents, and his Clerke is received, whereupon the plaintiffe brings a *Quare Impedit.*

471. This point yeelded two queſtions.

1. Firſt, whether notwithſtanding the Vſurpation the grantee may nevertheleſſe preſent again upon every avoydance, as if there had bin no uſurpation.

2. The ſecond, whether the Kings grant (as it is) doth paſſe the Advowſon for the laſt turne, for elſe if that avoydance were gained from the grantee, and ſo come to the King by the forfeiture and not granted again by the King, then judgement ought to bee given for the King. But my opinion is for the plaintiffe in both.

To the firſt. As to the firſt of theſe, it muſt be confeſſed that an uſurpation at the common Law, did *ipſo facto*, gaine the poſſeſſion, not only of thoſe preſent avoydances, but of the whole ſtate of the Advowſon againſt all the world; which is the reaſon that the laſt preſentation is alwayes to be anſwered in a *Quare imped.* and the Law is the ſame ſtill in all caſes where the Statute of *Weſtm.* the ~~two~~ 2, hath not made alteration. And in this caſe if the Vſurpation had been made by any other, but by him that was ſeiſed of the immediate reverſion in Fee, no man could have doubted, but that it had gained the poſſeſſion of the whole Advowſon which could not have bin recontinued but by a writ of right which the grantee, of the three avoydances could not have for the feebleneſſe of his eſtate, nor the Revercover in Fee-ſimple could not have had it during thoſe three Avoydances, but after he might have his writ of Right or *quare Imped.* if he were within any of the caſes of *W.* 2. which in this caſe is not becauſe the reverſion is removed and is not now in that Parſon that was ſeized of it in the time of the uſurpation and ſo being but a right could not bee granted.

All that is objected is this, that when he in the Reverſion uſurps upon the leſſee for yeares he cannot gaine the whole intereſt of the Advowſon by wrong, and the new inheritance by wrong, he cannot gaine out of a leaſe for yeares only. So for an impoſſibilitie in Law it ſhould worke but to gaine that one avoydance, and leave the eſtate as it was before in the Leſſee, even as it was in the caſe of the King when an uſurpation is made upon him, which is the only caſe in Law of that nature.

This is a conceipt, and it is but a conceipt. For poſſeſſory things an expulſion may bee made as well as a diſſeſin. And therefore if a man make a leaſe for yeares of Land, and a ſtranger put out the Leſſee, hee doth alſo diſſeiſe him in the reverſion. But if the leſſor put him out, there is no diſſeiſin committed, and yet the Leſſee hath loſt his eſtate and hath but a right to it, and that, whether he will or no;

For

For though it be true, that when two are in poſſeſſion, the poſſeſſion is judged in him that hath right, for, he only poſſeſſeth, though the other be in poſſeſſion too, and take away the Trees, Corne, or the like; yet, when the true owner is clearely put out and removed, then he hath no longer eſtate or poſſeſſion, but a right only, and hath no election to be in poſſeſſion, or not in poſſeſſion as that caſe ſtands, and therefore cleerely he cannot now grant his Terme. And if the leſſor bring an action of debt for his Rent due at *Michaelmaſſe*, the Leſſee ſhall plead that he did enter upon him, and put him out, and he continued his poſſeſſion at that terme; For, he cannot have Rent out of that Land that hee himſelfe poſſeſſeth. And if the leſſor after ſuch expulſion dyeth, the Land ſhall deſcend in poſſeſſion to the Heire and the Executor ſhall not claime that that was a leaſe, for a wrong never beares a *G.* eſtate. But it is true that there are certaine caſes, wherein a poſſeſſion cannot be gained.

1. Firſt, for priviledge of perſons; For, the King cannot be diſſeiſed, but all Intruders, and Treſpaſſers to him, and if he will he may charge them by Actions of account, as Bayliffes, yet hee may, if he will bring a writ of Right of Advowſon.

2. Another caſe is, in reſpect of the Advowſon of the thing whereupon the wrong is committed. For, if a man receive any Rent claiming it as his own when it is not, and ſo feed upon my Common without Right, hee hath neither diſſeiſed me of the one nor of the other; but I ſhould bring an Aſſize, and ſo admit my ſelfe diſſeiſed, and he make title, and ſo we are both agreed; but the poſſeſſion is removed, then it is ſo by fiction of Law and conſent of parties that was not ſo in nature.

A man cannot by wrongfull ſeiſin of a villaine in groſſe have either eſtate in his blood or poſſeſſion of his perſon, otherwiſe than of a freeman by falſe impriſonment.

But an Advowſon is one of the things whereupon uſurpation workes more violently than upon any other poſſeſſion corporall; And therefore, where upon diſſ. of Lands, you have poſſeſſory actions, for remedy in the caſe of Advowſons, if the uſurpations bee compleate, (with a plenarty of ſixe moneths) you are driven to your writ of right.

Obj. And where it is objected, That the caſe is as good, as if the grant of the three avoydances had beene to three ſeverall perſons, in which caſe it is conceived that the uſurpation upon one had bound the reſt.

Anſwer 1. It is thus anſwered, That the caſe is not altogether like, becauſe that when all the avoydances are granted to one, he may by his laches prejudice him rather than another.

Anſwer 2. But another and more pregnant anſwer is, that which hath been

given, that one Vſurpation put all out of poſſeſſion.

So the concluſion is, That *Elvis* by his uſurpation having got all that was granted out and having one Reverſion in Fee ſimple in himſelfe, and forfeiting it to the King, the whole Advowſon is in the King in Fee-ſimple.

The ſecond queſtion of the third great point.

Now followes the ſecond queſtion of the third great point, whether this, being the third avoydance paſſe to the plaintiffe, by the Kings grant.

Wherein firſt it muſt bee confeſſed, that though the whole advowſon, were at the firſt Appendant, yet the three avoydances were by the grant made in groſſe.

Nextly, If this third avoydance were in the King in groſſe, I am of opinion that it doth not paſſe from the King for two great reaſons.

Firſt, that the Kings grant is expreſſely of the Advowſon as appendant, and therefore if it be in groſſe, the King is deceived; For in the caſe of Appendance it paſſed. But as a part in effect of the Manour, as largely as *Elvis* had it, it would paſſe without ſpeciall naming. But if it bee in groſſe it is as ſeverall grants in ſeverall things, which differs both in letter and in effect, and in meaning.

Secondly, (which makes it more cleare) if the King had his avoydance in groſſe, *and amounts to no more*, and the Reverſion in Fee Appendant, without touching the groſſe, and amounts to no more than a grant of ſo much of the Advowſon as is appendant, like to the grant of the Manour, of *D.* in *D.* But now, I hold that the King had not two eſtates in this Advouſon, but one conjoyned, and conſolidate of the right full reverſion, in which the poſſeſſary eſtate is drowned and extinct. The rather becauſe there is neither right left, nor meanes of recovery in the grantee, ſo that it is in effect as if the grantee had ſurrendered or granted the avoydance unto the Revercover. And therefore take the caſe of 9. *H.* 7. That he in reverſion diſſeiſes his Tenant for life and dyes ſeiſed, this is a deſcent to take away the entry of a ſtranger; becauſe as to him it is but the eſtate for life ſtill, and but a fiction, and not a true deſcendable eſtate. For a grant to *H.* and his Heires during the life of *I. D.* is no fee but a *fec. occupant*, as is reſolved in *Chadleighs* caſe, but a diſſ. of an eſtate for life by a neceſſitie in Law makes a *quaſi* fee, becauſe wrong is unlimited, and ravens all that can be gotten, and is not governed by termes of eſtates, becauſe it is not contained within Rules. So likewiſe if the leſſor ejects his Leſſee and dye, the poſſeſſion deſcends to the Heire as of one joynt eſtate, and yet the right remaines ſtill to the Leſſee. And in both theſe caſes if the leſſor grant the reverſion, the grant is voyd, for, there is no Reverſion. And yet it was ſtronger if the Leſſee for yeares or Leſſee for life after ſuch diſſ.

and

and expulſion by reverſion, ſhould releaſe unto him. And the principall is in effect as good where the right of the Grantee is now in Law as hath beene ſaid.

And now that two Fee-ſimples that may ſtand in two perſons diſtinct, when they meet in one perſon cannot doe ſo, but the greater and abſolute Fee doth ſwallow up the baſe and limited fee. So it is adjudged in *Hurſts* caſe, *Hillar.* 40. *Eliz.* in the common Pleas cyted in the caſe of *Alton* Woods, *Co. lib. fol.* 49. which was, that *Charles* Duke of *Suff.* was ſeized of the Advowſon of *Welborne* in the Countie of *Lincolne* in tayle the reverſion to the King in Fee: And the *Duke* by deed in rolled granted the Advowſon in Fee to the King, and then the Statute, 34. *Eliz. cap.* 21. of confirmation in Patents was made, and then the King granted the Advowſon in Fee to another, and it was adjudged a grant; For, the King had not two diſtinct titles, but one only made of two conjoyand conſolidate together; And Fee in *Auſtens* caſe, 1. *et* 2. *Ph. & Ma.* cyted before in *Walſinghams* caſe, *fol.* 560. which was thus. Sir *Thomas Wyat* being Tenant in Tayle, the reverſion in the Crown made a Leaſe to *Auſtin*, rendring a Rent and dyed. Sir *Thomas Wyat* the ſonne accepted the Rent and dyed, and was attainted of Treaſon and put to death, leaving *Arthur Wyat* his ſonne. And it was adjudged that *Auſtins* Leaſe was voyd. For though it were made good by acceptance of the Rent, yet by the attainder the eſtate tayle was barred, and extinct. As if *Wyat* the perſon attainted had dyed without iſſue, and ſo the Land came to the King in point of Reverter, and then the ſaving of Leaſes would not preſerve a Leaſe that was in Law ended, and determined. Which had beene otherwiſe if a reverſion in Fee had beene in an other, and not in the Crowne; I hold the Law the ſame, if a Tenant in tayle and the reverſion in himſelfe be attainted of Treaſon.

In the argument of this caſe the Judges ſpake publikely, and at large. The whole Court agreed *Una voce* upon the firſt and ſecond great point. 474.

Hobart Chiefe Juſtice, *Warburton* and *Winch*, did alſo agree *ut ſupra*. But in that only *Hutton* differed; and ſo judgement was given for the plaintife.

390. Dame *Sara Darcy*, *Clement Cooke* Eſquier, Plaintiffes *ver. Robert. Leigh & alios* defendants. Star-Chamber.

THe caſe was that Sir *Robert Langley* Knight, being ſeized of diverſe Lands in *Lancaſhire* had iſſue divers daughters whereof one was called *Katharine*, and hee ſo ſeized, conveyed certaine Lands to the uſe of the *Katharine* in tayle, the Rem. to his owne heyres, and

dyed, *Katharine* was married to one *Leigh*, and in Lent 13. *Eliz.* *Leigh* and his Wife ſuffered a common recovery of theſe Lands in *Lancaſhire*, to the uſe of *Leigh*, and his Wife, and the Heyres of *Leigh*, and to that recovery, *Leigh* and his Wife appeared by Attorny, and after dyed without iſſue, but had iſſue by her Husband, ſo that he was every way to bee Tenant by the curteſie, and then he dyed 29. *Eliz.* having before conveighed the Land to this defendant *Leigh*, being (as it is ſaid) the baſtard ſonne againſt whom the heyres at the common Law brought a writ of Error, Aſſigning for error that *Katharine* was within age, at the time of the recovery, whereupon iſſue being taken, it was found for the plaintiffe in the Writ of error. *Anno* 43. *Eliz.* the defendant being preſent, which failed by diſcontinuance.

And in another like tryall in another Writ of error, thirteenth yeare of the King which paſſed likewiſe againſt the defendants by default, and that alſo failed by the death of ſome of the parties. And now ſeventeene *Iac.* Vpon a third Writ brought by theſe plaintiffes, being heyres to *Langley* againſt the defendant; a Iury being charged againe upon the ſaid iſſue of Nonage, and the Evidence given at large on both ſides, the plaintiffes became nonſuited and brought a new Writ of error and alſo exhibited a new Bill into the Starre-Chamber againſt one *Chatterton*, *Whitehead*, *Teatloe*, and *Booth*, charging them with perjury in their depoſitions in the ſaid tryall as witneſſes for *Leigh*, and againſt *Leigh* for ſubornation of the perjury.

Perjury againſt *Whitehead* was aſſigned that he depoſed directly that *Katherine* was of full age at the time of recovery. Againſt *Chatterton* that he depoſed himſelfe to be 70. yeares of age. And againſt *Tetlow*, and *Booth* becauſe they affirmed his age ſo. And againſt *Booth* an other point, that he depoſed at his tryall, that he had not beene formerly depoſed in the caſe.

This caſe was heard three dayes namely upon the merits, that is, whether theſe deponents or any of them were perjured or no. For it was agreed by the Court the Bill being layd ſo, though there had beene proofe of undue preparation of the witneſſes (which is puniſhable though their teſtimony were true) yet it could not bee brought to ſentence upon this Bill.

Touching the perjury was produced for the parties of the plaintiffes the Office after the death of Sir *Robert Langley* which was found 20. *Ianuary* 4. *Eliz.* whereby it was found (the Jury being Eſquiers, and Gentlemen of good qualitie) that *Katharine* at the time of the taking of that Inquiſition was of the age of eight yeares and a halfe, and two Moneths and ſeven dayes, and no more in theſe tearmes. So then ſhee muſt bee borne the thir-

teenth

teenth of *May*, ſeven *E.* 6. who dyed in *June* after, and then ſhe could not be 19. at the time of the Recovery.

There were alſo other proofes of depoſitions, *pro et cont.* for the plaintiffes and defendant. 475.

Whereupon the cauſe being brought to ſentence, it was holden unfit for the Court, and therefore left abſolutely to the tryall at the Common Law, without deſcending at all into the merits of the cauſe, to avoyd prejudicating the tryall, and without ſo much as reſerving the perjury to the Court, if the tryall at Law ſhould paſſe for the nonage.

The Reaſons whereof were as follow.

IT was ſaid there were cauſes that originally and in their owne nature are criminall, and proper for this Court, as Ryots forgeries imbracing of juries preparing of witneſſes and the like, which are all faults puniſhable here, be the Title good or bad. Theſe are fit for the Court whenſoever they come in; But there are cauſes alſo examinable in this Court which depend upon a queſtion originally, and directly civill, and ſo are faults, and not faults as that civill queſtion or title is in truth, on the one part, or the other.

As for example in this caſe, The perjury of *Whitehead* meerely depends upon the title, and that depends upon the Age of *Katharine*, ſo that proper primitively and directly, the queſtion is meerely civill and determinable at the Common Law, and the charge of perjury is as if it were taken for granted, that *Katharine* were within age, which is *Quæſtio alterius fori*, and ſtill *ſub judice*, under tryall in his proper Court, ſo that this is a way by policy, by an oblike meanes to heare and determine titles in this Court, and by a kind of prevention to take the office of the Common Law and Court civill out of their hands; For if *Whitehead* in this caſe ſhall bee cenſured for perjury, ſhall not this ſentence in effect, perjure as many as ſhould afterwards depoſe the full age of *Katharine*, and ſo choake both title and tryall at Law. Which may beget an inſufferable inconvenience; For ſo, upon the firſt tryall in every title, the partie againſt whom it ſhall paſſe, may draw all the witneſſes in queſtion in this Court for perjury. And ſo all the witneſſes ſtanding upright he may convince the truth of perjury.

Star-Chamber meddles not with title determinable at common Law.

And this caſe was yet made more unfit for this Court by the circumſtances.

Firſt, that the queſtion was of ſo old date, of almoſt 50. yeares, though it were true that it could not be queſtioned during the life of *Leigh*, the Husband of *Katharine*.

Second-

Secondly, at the poſſeſſion of the Land, he had gone all the while according to the recovery.

Thirdly, that the tryall of Nonſuits, had beene *pro & contra*, and the depoſition of Witneſſes both wayes, and the queſtion depending upon compariſon of ages, and other circumſtances and indifferencies of much ſubtilty and incertainty, which were proved, and diſproved by perſons, ſome as young or younger, few or none as old, or elder than *Katharine* of whoſe age they ſpake. Whereas *Hobart* chiefe Juſtice of the Common Pleas obſerved the wiſdome of the Common Law did allow none to be a Jury man in an *ætate probanda*, that was not 42. yeares, for he tryed things 21. yeares paſt, and is not a Juror till he be 21. yeares.

Iury man in an *ætate probanda*, muſt bee 42. yeares old.

Laſtly, there was a writ of error then depending, wherein the title was to be tryed in his proper Court and courſe which it was no reaſon to prejudice by the ſentence of this Court, the rather becauſe it appeared to the Court to be a queſtion fit to bee ſifted by hearing and viewing of the witneſſes, and weighing their credit and certaintie of their teſtimony, and confronting them as there ſhould be cauſe, and applying apt and ſodaine queſtions by an intelligent Judge, for which they could not be prepared. All which advantages are wanting in depoſitions in paper.

And this Court hath two liberties which they uſe to very good purpoſes.

The firſt, where juries muſt of neceſſitie give a verdict, they may leave their ſentence with a *non liquet*.

The other, they may ſend the cauſe to another Court, to which it more properly belongs, and either abſolutely diſmiſſe it hence (as here they did) or reſerve the cryme after the civill part is ended.

Replevin.

391. *Steed* verſ. *Hartley*.

Steed brought a Replevin *verſ. Hartley* for taking his Cattle at *Ballenden*, at the place called the *Steeds* houſe. The defendant makes conizance as Bayliffe of *Walter Haukeſworth, in loco, &c.* And ſayes that the ſaid houſe is holden of the ſaid *Walther* as of his manour of *Ballenden* by rent, *&c.* And that for the rent hee did diſtreyne. The plaintiffe doth plead in barre, that the place is out of the Fee, of the ſaid *WALTHER*, whereupon iſſue was taken and found for the defendant. And *Harris* moved in Arreſt of judgment, that the *Ven. facias* was *de vicineto de B.* onely where it ſhould have been alſo *de vicineto Manerij de B.* But, the Court gave judgement for the plaintiffe. For in an indifferent caſe the Court ſhall never preſume, That the Manour is larger than the Towne to defeate a verdict.

Caſe *Vid ſupra* 383.

392. *Clerke* verſ. *Wood.*

Caſe.

CLerke an Action of the caſe againſt *Wood* and declared that he was ſeiſed of a Meſſuage in *Harfield*, and preſcribes to have Common and Paſture in ſeven Acres of Land there, and likewiſe to have a way from the ſaid Meſſuage, over the ſaid 7. Acres to *Bullingford* and that the defendant had plowed up the ſaid 7. Acres whereby hee loſt both his Common and his way. The defendant pleades not guiltie, and verdict found for the plaintiffe. And *Iones* moved that the viſue was from *T.* only where it ought to have beene alſo from *B.* becauſe hee could not bee guiltie except there were ſuch a way. And if the iſſue had beene upon the preſcription for the way the viſue muſt have beene from both. But yet the Court gave judgment becauſe the point in iſſue appearing and direct is upon the diſturbance, which was onely in *Harfield* where the ſeven Acres lye.

vid. ſupra 477. fol. 42

393. *Reynolds* verſ. *Buckle.*

INter *Reynolds & Buck*, the plaintiffe declares upon a demiſe for Rent.

The defendant pleaded that before the Rent due the plaintiffe did enter upon him, and did not ſay, that hee did expell him or hold him, and ſo iſſue was taken *non introivit* and found for the defendant and judgment was given for him; For the Plea in barre was ſufficient yet the verdict was full to the iſſue.

394. *Poland* verſ. *Maſon.*

Caſe.

POland brought an action of the Caſe againſt *Maſon* for theſe words, I charge him for Felony, for taking out of the pocket of *Henry Stacy*: after verdict for the plaintiffe for the inſufficiencie of the words, *querens nihil cap. per billam.*

vide 7 Caſe 1 Swan

395. *Powell* verſ. *Winde.*

Caſe.

POwell an Attorny brought an action of the Caſe, for theſe words. I have matter enough againſt him for Maſter *Hartley* hath found forgery, and can prove it againſt him, upon iſſue not guiltie, and found for the plaintiffe he could have no judgment.

Information. 396. *John Nevill* verſ. *Yarwood.*

478. *John Nevill* exhibited an information againſt *Yarwood*, for uſing the trade of a Baker againſt the Statute of 5. The defendant by *Henden* Serjeant, pleaded that this uſage of the trade, was in ſuch a Countie, and that by the Statute 31. *Eliz.* it ought to bee ſued, and tryed in the County at the Quarter-Seſſion or Aſſize, and not in any wiſe out of the Countie. And the opinion of the Court was ſo.

Q. *Imped.* 397. *Sherley* verſ. *Underhill.*

George Sherley Baronet brought a *Quare Imped.* againſt *Underhill* to preſent to the Church of neither *Stington* in *Com. War.* the tryall was had by *Niſi prius* for the plaintiffe, and judgement given by the Juſtices of Aſſize in theſe words. *Ideo conceſſum eſt quod præd. Georgius recuperet verſ. præfat. def. præſentationem ſuam ad Eccleſiam præd.* The defendant brought a Writ of Error reciting, *quia in Recordo*, &c. *inter Georgium Sherley mil. & Baronet, et præd. Underhill* Error, &c. Whereupon the Records were ſent into the Kings Bench, and a Nulliter entered upon the Roll here, and error aſſigned in the Kings Bench. And *Harris* and *Henden* moved that the Record was not removed becauſe the writ of error was not Knight as well as Baronet, ſo not the ſame perſon which the Court did then agree.

The word (Knight) omitted.

Then they moved that the Record of the judgment, might bee amended according to the writ, *quod recuperet præſentationem et vicariam Eccleſiæ*, &c. which was alſo granted and amended, accordingly. Though it was objected, that the judgment was not given by this Court, but by the Juſtices of Aſſize.

Vpon this caſe was ſhewed two Preſidents, one *M.* 33. *et.* 34. *Eliz. in B. le Roy.* betweene *Thomas Wyld* plaintiffe, and *John Wheeler* defendant, and the judgment was *quod recuperet verſ. præfat. Thomam Wheeler*, and it was amended in the Exchequer ch. after a writ of Error. And the like *Hillar.* 42. *Eliz.* betweene *Stephany* and *John Morgan Wolfe*, and the judgment was *recuperet* verſ. *Margan*, and it was amended in another Terme.

398.

398. *Scot* verſ. *Lawes.*

Debt.

Scot brought an Action of debt againſt *Lawes* Clerke upon the Statute of 21. *H.* 8. the Writ was *præcipe Willielmo* Lawes *quod reddat nobis et Iohanni Scot qui tam pro nobis, quam pro ſeipſo ſequitur* 100.l. *quas nobis et præfato Iohanni debet*, &c. and declares for taking to farme 60. Acres of Land, and holding the ſame ſixe moneths *per quod Actio*, &c. for 60.l. and further for taking to farm other lands and holding the ſame 5. Monthes *per quod Actio*, &c. for 50.l. The defendant pleads *quod ipſe non debet præfato Iohanni qui tam*, &c. *prad.* 100.l. *nec aliquem inde denarium in forma quam*, &c. 479.

Whereupon iſſue, and the Jury found that the defendant did owe 30.l. and for the reſt, *quod non debet*. *Henden* in arreſt of judgment tooke exceptions.

Firſt, for that the verdict expreſſes not for which Farme, nor for which of the moneths the mony was due. 1.

This exception was not regarded, becauſe that the demand and iſſue was not for 100.l. in generall, though it had been more formall to have diſtinguiſhed better.

The ſecond exception was, that the defendant hath not Anſwered the writ and declaration; For the Plea ought to have bin as the demand is, *Quod ipſe non debet dicto Domino Regi, et præfato Iohanni qui tam*, &c. which the Court regarded the rather becauſe the Statute of Jeo failes excepts penall Statutes. 2. Penall Statutes excepted of the Statute of Ieo-failes.

399. *Hughs* Caſe.

Prohibition.

Sir *Thomas Hughs* of *Grayes* Inne prayed a prohibition by *Henden* Serjeant, becauſe he being of the counſell with the defendant, in an Action upon the caſe.

For ſaying the plaintiffe had murthered three Children; whereunto the defendant pleaded not guilty. And at the tryall *Hughs* to extenuate the dammages of his Clyent, did urge and preſſe the Fact, to make the matter more probable ſo farre as might tend to the defamation of the plaintiffe. And becauſe it was in his profeſſion and pertinent to the good and ſafety of his Clyent, though it were not directly to the iſſue, a prohibition was granted.

400. *Badhams Caſe.*

Ejectione. *Ejectionæ firmæ* by *Badham* of the demiſe of *Benjamin Crockley*, for land in *Gloc.* The defendant pleads not guiltie and proces continued againſt the Jury, till a writ of *diſtringas ca. octo talibus* was awarded *return. octabis Hillar.* 17. *Iac.* At which day *Richard Triplets* of *Derſley*, was returned one of the *tales*, and the Jury made default, whereupon *a diſtringas cum ſex talibus*, was awarded *retur: menſis Paſchæ.* 18. *Iac.* And at the returne *Richard Triplets* was named as well in the writ of *diſtringas* as the Pannell *Tales*, and
480. by that name was ſworne with 11. more, and verdict given for the Plaintiffe. And at laſt the under Sheriffe of *Glouc.* that made the Returne but was gone out of his Office (a new Sheriffe being choſen) towards the end of *Michael.* Terme depoſed in Court, that he knew not the man, neither was he one of the 12. that gave the verdict, but yet affirmed, that there is a *Richard Trippets* of *Dirſley*, in his Free-holders book but no *Triplets*. And two other ſtrangers depoſed that they knew *Richard Tiplets* of *Dirſly*, and that there was no *Trippets* there, and that *Trippet* was the man ſworne of the Jury which they knew, becauſe they ſaw him ſworne being about the Court by accident, and ſome writing was alſo ſhewed proving his name *Tripets*; whereupon by Order of Court, the Writ and Pannell was made, *Triplets*, and judgment given for the Plaintiffe, for dammages only, for the terme was ended. And the entrie in the rule in the bill of pleas of M. *Brownloe*, by *Othagaire*, the ſecondary, 16. *Novem.* 18.

The Writ and Pannell amended.

401. *Clanrickard* verſ. *Liſle.*

Supra Caſe 50. *Formedon in Reverter.* *INter comitem Clanrickard*, and *Frances* his Wife demandant and *Robert* Viſcount *Liſle* in the formedon before entered, judgement was pronounced 16. *Novem.* 18. and a writ of error, was brought by the Earle of *Leiceſter*, tenant bearing *teſte* 17. *Novem.* and then allowed and in *Majorem cautelam* a *ſuperſedeas* made againſt executions and yet the demandant obtained a writ of ſeiſin bearing *teſte nono die Octobris* before by warrant of the judgment which was afterwards entred, but as of *Octab. Mich.* being the laſt continuance, which being opened to the Judges, and they well knowing that judgement was not pronounced till 16. of *Nov.* ſo that the tenant could not have writs of error, before, neither ought the demandant, to have a writ of ſeiſin before; For by this tricke any writ of error, might be defeated as to ſaving poſſeſſion. And therefore a new *ſuperſedas* was awarded againſt that writ of execution *quia erronice*, &c.

402.

402. *Barker* verſ. *Cocker.*

Cur. Spir.

PEter *Barker* Vicar of *Stowell* plaintiffe did libell in the ſpirituall Court againſt *Robert Cocker*, and layd that there was a cuſtome that all Lambes ingendred falne and bred upon any one *Tenem.* or living in the ſame Pariſh, although they belonged to ſeverall owners they have beene caſt and reckoned together, as if they were but one mans, and the tenth or tythe Lambe of them ſo counted together have been payd for tythe.

Lambes of ſeverall owners reckoned together an unreaſonable cuſtome.

Whereupon *Henden* prayed a prohibition becauſe all cuſtomes againſt common right are tryable at the common Law. Which was granted. And the Court was further of opinion that the pretended Cuſtome was unreaſonable and againſt Law; For by this meanes it might fall out that ſome one might have but one Lambe and that might be taken for tythe, and he that had more ſhould pay nothing at all.

403. *Erfields Caſe.*

Fyne.

SIr *Thomas Erfield* conveyed to his eldeſt ſonne (whom he did in effect diſinherit) the Manour of in the Countie of for terme of his life the remainder to a younger ſonne of his by a ſecond Wife in fee. Both brethren did bargaine and ſell their ſeverall eſtates to Sir *Edward Sackvile* and the younger brother was to have for his remainder 1500. l. whereof he received 300. l. in hand and for the reſt he had taken aſſurance, and then he and his eldeſt brother acknowledged a note of the Fyne of the Land before me, and then the elder brother dyed. Whereupon diverſe motions were made for the proceeding and ſtaying of the Fyne, *pro & contra.* And I was of cleare opinion that the Counſee might proceed with his Fyne as againſt the younger brother, and his Writ of covenant accordingly. For the death of the other is no impediment, for the coniſance of every one is as ſeverall againſt himſelfe, and ſhall worke for ſo much as he can paſſe. But Sir *Edward Sackvile* was contented that the younger brother ſhould have the Lands paying certaine of the elder brothers, and upon other agreement, ſo the fyne was ſtayed by conſent.

Motions for proceeding & ſtaying of a Fyne.

Fyne.

404. *Farmers Caſe.*

ONe *Farmer* and his Wife, acknowledged a note of a fine the twentie ſixe of *March* 1621. before Comm. by *dedimus poteſtatem*, and the Wife dyed the twentie ſeventh day of the ſame Moneth. The twenty eighth day compoſition was made in the Alienation office upon a Writ of Covenant, made in *Hillarie* terme, before, and the Kings ſilver was entered in the office of the Kings ſilver, as of the ſame *Hillar.* tearme, and ſo the fine was paſſed, and ingroſſed, and now in *Eaſter* Terme, the heire of the Wife moved againſt this fine.

The heyre of the Wife moves againſt the Fine.

And upon debate the Court reſolved that the Fine muſt ſtand. A partie of both Counties of *Bedford* and *Norff.* came to the barre this terme, and firſt was ſworne one of the one County, and another of the other Countie, and ſo in order, till one of the County of *Bedford* was challenged, and then the Court proceeded to the next of that County, untill one were ſworne, and ſo of the other County, untill ſixe of each County were ſworne; For, if there ſhould be ſixe of one Countie firſt, and ſixe of the other afterwards, it were diſorderly and Erroneous.

Second deliverance. 18. *Jac.*

405. *Wilſon* verſ. *Stubs.*

482. MArmaduke *Wilſon*, brought a writ of ſecond delivery againſt *Ralph Stubs*, and after verdict had here at the barre *an.* 18. *Jac.* had judgment to recover coſts and damages amounting in the whole to 16.l. and had a *Capias utlagat* directed to the Sheriffe of Yorke to take the ſaid *Stubs* in execution for the ſaid dammages, and after the ſame terme of Saint *Michael*, one *Ralph Stubs* the younger brought a writ of *Idemptitate nominis*, unto the Juſtices of this Court, and had a *ſuperſed.* to the Sheriffe to forbeare any execution againſt the ſaid *Ralph* the younger. And the Court was after moved to maintaine the writ of *Idemptitate nominis.* And diverſe preſidents ſhewed in like writs, brought in caſe of Outlawrie where one was taken upon a *Cap. utlagat* for an other of the ſame name, *vide Paſchæ. 36. H. 6. Rot.* 411. *per Iohan. Skyers, de* Northbury *in* Com. Somerſet Junior, *ad ſecta. Ro. et ſa femme et tiel briefe de Idemptiate Nominis*, directed to the Judges; and Suerties put in by the ſaid *Skiers, quoniam cap. corpus pro corpore.* And iſſue taken by the Attorney Generall, *quod le defend. eſt ead. perſona* and judgment thereupon, *in hæc verba Ideo conc. eſt quod præd. Iohannes Skiers de Northbury junior, de utlag. prædict. ſit quiet.* &c. *et ea occaſione non moleſtetur in aliquo nec gravetur, proviſo ſemper quod ad cap. præd.*

Caſe de Idemptitate nominis.

pred. IS. de N. Senior tanquam utlagat. procedat cum effectu, &c. The like preſident in *Mich.* 20. *H.* 7. *Rot.* 37. upon a *Cap. utlegat. G. Tho. Fulſer ador. Abrey, et apres iſſue* taken then by *Henry Hobart* then the Kings Attorney Generall, *quod eſt eadem perſona*, and verdict (as before) againſt the King, and the like Iudgment in *Mich.* 3. *H.* 4. *rot.* 214. and a writ awarded to the Sheriffe of *London*, to enquire *ſi eadem perſona*, which did returne that he is not the ſame perſon, and judgment as in the firſt.

And notwithſtanding theſe Preſidents, the Court was of opinion that the writ in the principall caſe, and the *ſuperſed.* thereupon was not warranted, but that the defendant, *Stubs* the younger might have his Action of falſe impriſonment; For, that the defendant, being named *Ralph Stubs* without addition, ſhall never be accounted the younger but alwayes the elder of the two of that name. Nevertheleſſe for avoyding duplicitie of ſuits, it was ordered the defendant *Wilſon* ſhould appeare to the *ſcir. fac.* Vpon the *Idemptitate nominis*, and plead and goe to tryall, and if upon tryall he was found to be the ſame, then the money remaining with the Sheriffe to be delivered to *Wilſon*, *vel contra ſi*, &c.

The Court did take a great difference betweene the caſes of the Outlawrie, and the principall caſe being onely at the plaintiffs ſuite. And not at the Kings as in every Outlawry the King is intereſſed, and of which principall caſe no preſident was or could bee ſhewed in Long 50. *Eliz. fol.* 84.

406. *Clearke* verſ *Gilbert.* *Caſe.*

EDward *Clearke* brought an Action upon the caſe againſt *Gilbert* for ſpeaking of theſe words; Thou art a thiefe, and haſt ſtolne twentie loade of my furze, and upon not guiltie, a verdict was found for the plaintiffe: Now it was moved by Serjeant *Hitcham*, that theſe words bare no Action, becauſe the furze might bee ſtanding and felled and carryed away by the plaintiffe, and ſo no felony. Haſt ſtolne 20 load of my Furz.

And although the counſell for the plaintiffe urged, that it ſhall be underſtood rather of furze felled and ſtanding, and alſo the words are ſo coupled, that the latter are not made a reaſon of the former, but either of them a diſtinct ſentence ſtanding of it ſelfe; And ſo the word Thiefe is ſufficient alone. And to that purpoſe cyted (as he ſaid) diverſe caſes all in *B. R.* one betweene *Minors* and *Lightford* 4. *Iac.* and another betweene *Heire*, and *Ounſted* 7. *Iac.* and another betweene *Turner*, and *Champion* 13. *Iac. Iac.* but he replyed chiefely upon a Record which was ſhewed 2. *Iac.* in the Kings Bench between *Kelham* and *Mandi*, where the words were; Thou art a Thiefe and haſt ſtolne my Corne, and judgement was given

given for the Plaintiffe. All which hereafter notwithſtanding diverſe motions and debates we gave judgement againſt the plaintiffe. For as to the firſt point it hath beene often ruled; That it is all one in Common ſence and acceptance, whether it be (And) thou haſt ſtollen, or (For) thou haſt ſtolne. And in the caſe of *Kelham* the Court deemed the Law not to bee ſo, except there be ſome further words of explanation, as Corne in my Barne, or the like. For otherwiſe in words meerely indifferent, the more eaſie ſenſe, and furtheſt from the moſt haynous charge ſhall be taken. And therefore wee have given judgment before *ſuper* 428. betweene *Cooke* and *Gilbert*, againſt the plaintiffe, upon debate where the words were; Thou art a thiefe, and haſt ſtolne a Tree.

Debt.

407. *Hanſon & Norcliffe.*

484. HAnſon plaintiffe, and *Norcliffe* defendant, in an Action of debt the plaintiffe declares upon a Leaſe for yeares made by him to the defendant, reſerving Rent, and for the Rent behind the Action is brought, the defendant pleades that the leaſe in the Count mentioned, was made by Indenture, reſerving the Rent *prout* and with condition, that if the Rent bee behind, then the Leaſe to be voyd, and doth alleadge a default of payment of the Rent, and ſo the Leaſe determined.

Demand. The plaintiffe demurreth in Law, and it was reſolved by the Court that this Leaſe is not voyd without a demand, which therefore the # defendant ſhould have made actually; And for want of, this Plea was nought; And ſo it is at the Election of the leſſor, and his heire to continue or avoyd the Leaſe in ſuch caſe.

Debt.

408. *Amphurſt & Palmer.*

THe ſame caſe was betweene *Amphurſt* and *Palmer*, in like ſort reſolved. So the Rent is due without demand, but the forfeiture of the eſtate, neither by Entry, nor by avoydance, upon condition is given either for leſſor, or for leſſee, without due demand made, which may be expreſſely layd in pleading.

Demand.

Error.

409. *Bigods Caſe.*

23. *Jac. rot. 96* DIe *Mercurij poſt feſtum ſanctæ Margaretæ* 17. *E.* 2. Iohn *de malo lacu* gave to *Peter de malo lacu*, and the heyres of his body the Caſtle and Manour of *Mulgrave*, by many meane deſcents the

the Land came to Sir *Ralph Bigod Ianuary* 11. 6. *Hen.* 8. *Ralph Bigod* made a feoffement to *William Ewer* and others, to the uſe of his laſt will and dyed, and the right of the Land together with the entaile and the uſe alſo, after the will performed, deſcended to Sir *Fsancis Bigod.*

December. 10. twenty one *Hen.* 8. Sir *Francis Bigod* made a feoffment to *Iohn* and others, to the uſe of himſelfe and *Katharine* his wife, and the heires of their bodyes, and they had iſſue *Ralph Bigod* and *Dorothie.*

Then the Statute of 26. *H.* 8. *cap.* 13. of forfeiture for Treaſon, is made, and 16. *Maii* 29. *H.* 8. Sir *Francis Bigod* was attainted of Treaſon, committed 7. *Ianuary*, 28. *Hen.* 8. and was executed, and *Katharine* ſurvived, 31. *H.* 8. the ſpeciall act of Attainder of S. *Francis Bigod* and his forfeiture amongſt other things is made.

4. *Nov.* () 7. 6. S. *Ralph Bigod* ſon of *Francis* and *Katharine*, was reſtored in blood by Parliament and died without iſſue, *Dorothy* married *Roger Ratcliffe*, and they had iſſue *Francis Ratcliffe.*

1. *Octob.* 8. *Eliz. Katharine* dyed, and *Francis Ratcliffe* entered 11. *Aug.* 33. *Eliz.* the Office found for the Queen.

1. *February*, 34. *Eliz. Francis Ratcliffe* dyed, having iſſue *Roger Ratcliffe.*

28. *Apr.* 34. *Eliz.* the Queen by her letters Patents of the ſame date, granted the ſame, *&c.* to *Edmund* Lord *Sheffeild* and his heires males of his body, begotten at the rent, 90.l. 18.s. 3.d.

Roger Ratcliffe upon this whole caſe, ſued his *Mran. de droit*, in the Exchequer, and had judgement for him. Whereupon a Writ of Error was brought. And the Queſtion is, whether this judgement ought to be affirmed or reverſed. The Queſtion.

The Queſtions are two.

First, Whether *Francis Bigod* who had eſtate in ſpeciall taile in poſſeſſion, had alſo any right in the old intaile left in him at that time of his attainder. Or whether it were in him but in Abeyance in reſpect of feoffement made by him, 21. *H.* 8. And whether that right did accrue unto the King, by the attainder of *Francis Bigod*, and the generall Statute, of 26. *H.* 8. *c.* 13. or by the particular Act of 31. *H.* 8. The 1. Queſt.

And I am of opinion. That there was a right of the old intaile remaining in him, and that the King ought to have it, together with the eſtate taile in poſſeſſion, freed and diſcharged thereof as long as the eſtate intaile indures.

In the handling of this point, I ſhall occaſionally ſpeake of Entries that are given, and alſo of rights of Actions reall, given or not given to the King upon attainder of treaſon, by force of the Statute, or of the generall Statute of 33. *Hen.* 8. *Cap.* 1. For this Statute is ſo neere of Kinne to that conſtruction of the word (rights) that

we muſt foreſee that wee doe not in the judgement of this caſe prejudice the Statute *Ex aliquo*.

The 2. queſtion. The ſecond Queſtion is, whether there be a Remitter in the Caſe after the Attainder of Treaſon, and if there bee ſuch a Remitter begun, how, and in whom (whereof nothing hath beene diſtinctly ſaid yet) And I am of opinion, that there ought to be no Remitter in this Caſe to the old intayle. And thereto I adde further, That if there be any Remitter, it is but for a time, and by the Office following, it is remitted and ended.

I muſt profeſſe that whenſoever I have thought of the Caſe, and adviſed upon it with my ſelfe, I have met with two ſtrong affections, Zeale, and Indignation. Zeale in behalfe of the King, to perſwade the ancient rights of the Crowne, againſt the Invaſion of Rebels and Traitors. Indignation when I find *Francis Bigod*, that ſometimes brought a puiſſant Army into the field to depoſe the King, failing in that enterpriſe, now to riſe in queſtion againſt him, That whom he could not by the ſword deſtroy hee might ſupplant by the Law: For though *Ratcliffe* bare the name of this Caſe, yet I ſee nothing but the Land of *Francis Bigot*, his State, his Right, his deſcent that maintaines it and defends it. Therefore let it not ſeeme ſtrange that I am warme in this Caſe, For, Zeale and Indignation are fervent paſſions.

And I do profeſſe to give Prerogatives to the Rights of the Crown in my care and vigilancy, And it is *Nobile Officium Iudicis & debitum Divinum*, by Oath of Office to watch for him, who works for us, *ne quid detrimenti capiat Reſpublica*, And if charitie begin in it ſelfe, ſo ought Iuſtice to doe, That the King who granteth juſtice to all, ſhould not be wanting to himſelfe.

Becauſe I deſire to be plaine and cleare in my Arguments, I will make the Queſtions as ſingle as is poſſible: For, *multiplex indiſtinctum paret confuſionem; & quæſtiones quo ſimpliciores eo lucidiores.*

Therefore I will make the firſt point a ſingle Queſtion (the worſe for my part) For this Tenant in Taile, or Land in poſſeſſion, makes a Feoffement in Fee. The Queſtion is,

1. Point. Whether any right in taile remaine in him ſtill againſt his Feoffment, and to what ends and uſes, and what he may either doe or ſuffer by force of that right?

In this Queſtion you ſee I doe ſhun to take exception at the validity of the Feoffment, made by *Francis Bigod*, a ceſtay and uſe in taile, by that Statute of 1. *R.* 3. and not the Tenant in taile in poſſeſſion.

Yet notwithſtanding, taking the cauſe at the worſt, I am of opinion, that this Feoffement gives away all the eſtate of the Tenant in tail-feoffer, and as concerning himſelf or any benefit he may receive.

But

But as concerning this iſſue inheritable to that in taile, and to him in the reverſion, and for their good, there remaines ſtill in him a right of that intaile by force of that Statute, againſt his alienation.

Therefore note firſt, that it is confeſſed on both ſides, that there is a right remaining for their uſe and good, and whether it bee for the Feoffer himſelfe, ſleeping till there bee an heire to claime, or in no perſon but in the preſervation of the Law, which ſome terme an *Abeyance*, or *in Nubibus* is the Queſtion. By which it appeares, that the extended exact enumeration of Rights, as *Jus habendi retinendi percipiendi poſsidendi recuperandi & fruendi*, inferre that there was no right, becauſe it was none of thoſe rights, and makes but muſter and noiſe, for there is a right, and that *in recuperandi*, when the time commeth. But where it is in the meane time till the perſon inheritable appeare, which may put his right in execution and practice, which the Feoffor cannot doe againſt his owne Feoffement, is the onely Queſtion; And upon this pretended exact diviſion of rights, they have left out one whole member of Rights, For, where Rights are in a Dicatory *Quarite*, *jura & creata*, or *lucrandi acquirendi*, or *jura alienandi*, they have left out that latter branch, and onely particularized the *Iura lucrandi*, or *Iura alienandi*, ſo all the wayes and powers and rights, whereby a man hath right and power to depart with that he hath, or not to get or keepe, are omitted: Such as are the rights to give, to releaſe, or *extinguendi* to extinguiſh, *jus renunciandi*, to renounce or diſclaime. Of which kind, this very right that the tenant in taile hath after feoffement, which hath not diſcontinued, finally to barre the whole entaile in one. For this right that is left after his Fine or Feoffement, he may extinguiſh, and by that right the taile may be recovered again, or by the roote of the intaile, which yet is left alive ſtill.

Now ſee the reaſon of this; and let the Statute of *Weſtm.* and the pleading and practice upon that Statute, which are the expoſitions of Law, judge.

The Statute of *Weſtm.* recites the formes of Fee ſimple conditionall, which now are intailes, and then ſheweth two miſchiefs: That in all thoſe Caſes, the Feoffes after iſſue, had power to alien and diſinherit their iſſue, and alſo the Donors were heretofore barred of their reverſion, both being againſt the mindes of the givers, and forme of the gift, and holden hard, *Durum videbatur & iniquum*, and the remedy provided is only in theſe words.

It is ordained, that the will of the giver, according to the Forme in the deed of gift expreſſed, ſhall be from henceforth obſerved. So that they to whom the Land was given under ſuch conditions ſhall have no power to alien it, but that it ſhall remaine, to the iſſue after their death, and ſhall revert to the giver for want of iſſue.

And if the Fyne be levied of ſuch Lands, *Finis ipſo jure ſit nullus*, he ſhall have no full and abſolute power to alien or levie a fine. But though neither fine nor feoffement bee void, yet they ſhall be voidable, not as before, when they bound abſolutely both Heires and Donors.

So it appeares, That whereas before this Statute, the Feoffee had abſolute power to alien after iſſue, and finally and totally and in a ſort rightfully, being in a ſort not poſitively againſt any rules of poſſitive Law, to barre to all purpoſes aſwell againſt the iſſue and the giver, as againſt himſelfe. Now, that very power of alienation remaining againſt himſelfe, is reſtrained and weakned, to do that that finally ſhall bar his iſſue or the giver expreſly, and him in the reverſion by equity, though hee may ſtill diſturbe and diſcontinne it againſt them by expoſitions, which the Statute hath received, which as *Littleton, Chap. 7. Diſcont.* reaſoning out of the Writ, which ſaith, a *Tort luy de force*, is a wrong and wrongfull Act, So that whatſoever concerneth to the recoverie of the iſſue or the giver that he had before to barre it.

So upon this Statute, I reaſon thus. A Tenant in Taile hath the whole eſtate in Taile, and all the right of it in himſelfe, and mayfinally and totally barre it, againſt his iſſue, as againſt himſelfe by a common recoverie, notwithſtanding this Statute, but by a Feoffement or fine he could not, by reaſon of this Statute.

And therefore, that theſe and more rights, *ſummum* or *merum jus* intaile (which though it bee diſcontinued, is not barred by the feoffement) remained where it was not aliened, (s) not *alienum*, for it is not in his power, but that kinde of conveyance, and a *non poſſe ad non eſſe ſequitur argumentum neceſſarium negativè*, though not *affirmativè*, that which cannot bee done, is not done, ſo that the argument ſtands thus. What the Tenant in taile had, and hath not parted withall, remaineth in him, *Qui non habet poteſtatem alienandi, habet neceſſitatem retinendi*, you ſay hee hath parted with all, I prove he hath, becauſe the Statute hath taken from him the power to doe it againe by fine or feoffement, only *Finis ipſo jure ſit nullus*, which before he could have done.

Now the practice of law hath beene anſwerable to this, both towards the Donor, and towards the iſſue only in his deſcender. The Donor hath two things wherein hee may bee benefited or prejudiced, one in his rents reſerved upon his giftes, the other in his reverter, the iſſue only in his deſcender. Now for the Donor, when the Donor hath made a feoffement and hath excluded himſelfe from all rights concerning himſelfe, yet the Donor ſhall by force of this Statute, which he could not at the Common Law action upon himſelfe as the Tenant of the Land, 48. *E.* 3.

And

And if the Donor will releaſe all his right in the Land to the Donee, that hath diſcontinued his releaſe, though it will extinguiſh no rights to the Land, yet it will extinguiſh the rents, which proves, that the Donee cannot by his feoffement deveſt himſelfe of his whole rights, but that by the Statute of *Weſtm.* his alienation is diſabled as to that, as touching the Donor, which is by the equitie and meaning of the Statute, in the point of avowry of rent. But whenſoever the tenant in taile ſuffers a recoveric, or levies a fine, at this day, the recovery together with the right of the intaile will ceaſe.

And the anſwer as to that is imperfect, to reſemble it to the Caſe of a tenant in fee ſimple, that doth alien, and yet the Lord onely ſtill avow upon him. For the Caſes have no reſemblance, For as *Littleton* well diſtinguiſheth, That Tenant in fee ſimple when hee hath departed with his whole eſtate, is no longer tenant to the Lord in right, neither can hee compell the Lord to avow upon him for the arrerages. And if the Lord releaſe unto him all his right in the Land, the releaſe is void to diſcharge rents and ſervices, in all which it differs materially from the other Caſe, and it is no other than a caution and proviſion of Law, that as the Tenant is to be made acquainted when the Lord aliens the Seigniorie, ſo the Lord is to bee made acquainted when the Tenant aliens his tenancy, and all arrerages paid, that he may have no after reckonings with his new and old tenant, when the Land that ſhould yeeld is gone. And when notice is given, and the Arrerages paid, the Avowry vaniſheth.

Now for the heire in taile, claiming from his Anceſtors after his feoffement, by deſcent from him thereby allowing a right to remaine in him againſt his feoffement, the Caſe is the more obſcure, becauſe during the life of the Feoffer, there can be no motion of that right, neither by the feoffer, who hath barred himſelfe, nor his iſſue, becauſe the right is not yet deſcended, yet let me put a Caſe upon the Statute of 11. *H.* 7. upon the opinion of *Mountague* Chiefe Iuſtice, that if a Wife Tenant in taile Ioyntreſſe make a feoffement, the perſon to whom the Land ſhall belong after her death, ſhall enter and hold it according to his right. Now till ſuch entry the diſcontinuance remaineth, and the Avowrie ſhall bee unto her. But when the iſſue enters he is in as heire in taile, *& quaſi*, by deſcent even in the life of the Tenant in taile that was in the mother, by force of the Act of Parliament, And therefore the Avowrie ſhall bee upon him.

But now generally, when the Tenant in taile hath made a feoffement, and dyes, his heire ſhall bring a formedon in deſcender, and ſhall ſay in his Count deſcenders from that Anceſtor to him, as his heire, *per formam doni.* And the Anſwer to the Objection is alſo imperfect, to ſay that *Deſcendit Ius*, is but as much as *devenit*

jus, for that is to confound propriety of phraſe, and diſtinction of caſes, which in the Writs and counts eſpecially is moſt apt and curious, for, to ſay *Devenit jus*, is a word common in caſes of Deſcender or Reverter or Remainder, and may ſerve Common people in ordinarie ſpeech, as in this very Statute is ſaid, that the ſtate ſhall remain to the iſſue after the death of the Anceſtors, or revert to the Donor.

And when you ſpeake of Writs, *devenit jus* will ſerve noe Writ in Count of Formedon one or other. And any other form improper will abate the Writ. It is true that regularly a Feoffement barres the Formedon of all preſent rights, yea of all after rights and poſſibilities ariſing to the ſame parties by Cauſes before the Feoffement, and that, without reſpect to the loſſe of ſtrangers, *Vide Abaine* and *Kayes* Caſe.

And therefore in *Archers* Caſe, *Co. lib.* 1. *fo.* 66. Land was demiſed to the Father for life, the Remainder to his firſt heire male. The Tenant for life made a Feoffement in Fee and dyed, the next heire was barred of his for ever. For by the Feoffment, the eſtate for terme of life was ſo bound, that the Remainder could never ariſe during that eſtate, and ſo muſt faile.

And 9. *H.* 7. A man ſeiſed of Land in the right of his Wife, makes a feoffment in fee, and then the eſtate is made back to the wife, ſhe is thereby remitted, and then he ſhall never bee Tenant by courteſie. And therefore it is well reſolved, that if tenant in Taile diſcontinue, and the diſcontinuee levie a Fine with Proclamation, hee that did diſcontinue is not bound to claime, but after his death his iſſue muſt. For the diſcontinuer hath no right: Firſt, for himſelfe, for ſo hee muſt claime and hee cannot bee blamed, or ſuffer for defau t of clayme, when it was not in his power to make a claime. And therefore all Caſes that are put to prove the force of a feoffement, regularly conclude nothing againſt this opinion, That the Tenant in taile by his Feoffement, cannot put away his whole right of intail, becauſe that the Statute of *Weſtm.* forbids it, which overrules all private Acts and rules of Law.

But this Caſe is irregular, becauſe it ſtandeth by Act of Parliament, which is able to make the ſame Act good to one purpoſe or perſon, and voide or voidable to another, as the Statute of Biſhops, Deanes, Chapters, and the like, which binde the predeceſſors, are void and voidable againſt the ſucceſſors, who ſhall nevertheleſſe when they enter, be in by way of ſucceſſion. And that there is ſtill remaining in the Tenant in taile, againſt his Feoffement appeares, in that he hath ſtill power to binde it more finally and totally by Fine or Recoverie if he purſue them rightly, and therefore note *Cuppledikes* Caſe, *Co. lib.* 3. *fo.* 6. If Tenant in taile with divers Remainders over make a Feoffement and the Feoffer vouch not the Feoffee Tenant in taile

taile in poſſeſſion: but the firſt in remainder, by this Statute the Feoffers are not barred but ſtand to be remitted and recovered. And *Manſels* Caſe is there cited, and allowed to be a barre to three ſeverall intailes by one Recoverie, with a double Voucher.

And this is the *Ius extinguendi* which I ſpake of before, which he could not extinguiſh nor diſcharge, if it were not in him and his power ſtill.

And therefore in no Cauſe to frame Abeyances needleſſe and in vaine, which the Law loves not nor admits, But in Caſes of neceſſitie, as in vacation of Biſhops, Parſons, and the like, or Remainders to right heires upon Freeholds. Abeyances are not allowed, but where the originall creation of eſtates requires them, or where the conſequence of eſtates and Caſes doe in congruitie require them.

As for the firſt.

In Caſe of ſingle Corporations, Biſhops, Deanes, and Parſons, and the like, which muſt dye and leave a *Vacuum* of Freehold or a Remainder to the heires of *H.* yet living, with proviſion of the preſent Freehold.

Or ſecondly in Caſes of congruity, if a man have given warranty and dye without heires, his heires may bee vouched *in ultero Matris.* But if there be no heires in Caſe he ſhall bee vouched, 38. *E.* 3. 29. And a vouchee may take and pleade a releaſe, *quaſi tenens*, *Littleton cap. Releaſ.* or may levie a fine to the Demandant of the Land in queſtion. But for ſtates that are of their owne nature in their originall perfect and intire (as this is) the Law permits not vaine affected Abeyances, or fictions by the voluntarie act of the partie, and therefore to no good, as this which ſhould bee to preſerve a right to ſerve the heire, and to defraud the King and Lords of their Eſcheats, and them that have right to demand, of their Actions.

Littleton was confounded in himſelfe that made an Abeyance of a grant of *Totum ſtatum ſuum*, and yet made it but an eſtate for life, which is condemned in *Walſinghams* Caſe by the Iudges. And again, although fictions may take place among common perſons, yet the King is not to be anſwered, bound, or defeated by fictions, and therefore the King will not be bound to his reverſion or remainder by recompence fained upon a common recoverie, 6. *E.* 3. 5. warrantie Collaterall binds not the King without ſome actuall Aſſets. Not by Eſtoppels of his own recitals, *ex certa ſcientia*, caſe *Alton woods*, *C. l.* 1 *f.* 45.

And I hold plainly that the Land in poſſeſſion given is diſtinctly and literally given to the King, ſo the right is as directly and plainly given by way of diſcharging the Lands, as to the Kings eſtate of that ancient right, whereof it was meant to be freed: And ſo the ſtate given to the King eſtabliſhed by it. For now when the Law ſaith that

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the King ſhall have the Lands, ſaving the right of all perſons, other than the offenders and their heires, and ſuch as claime to their uſe. It is plaine that the eye of the Law makers, was not only upon the Land in poſſeſſion, but alſo the rights to the ſame: The one, *viz.* in poſſeſion, in point of giving, the other in point of ſaving.

The Land in poſſeſſion given, could bee but in one, that is, in the Offenders, and ſo it was given. But rights to the ſame Lands might be in ſundry perſons, in the Offender, or in his heires, or in Strangers.

Now the Law ſaith, the King ſhall have the land always, ſaving the rights of ſtrangers. But without ſaving the right of the offender or his heires, or any claiming to their uſe; which is as much as to ſay, the King ſhall have the Land, without ſaving or excluding *&c.* or freed or diſcharged of the rights of offenders, or their heires, or againſt the offender or his heires in fee, or fee tayle, ſo if it had beene ſaving to all ſtrangers all their rights *&c.* the (other then) which breakes the ſentence had beene utterly omitted, the ſtrangers had been provided for, and the purviewes excluded, if the words had beene all in the purview that are divided in purview and ſaving, it had beene full, as to ſay, the offender ſhall forfeit his Land, againſt him and his heires, omitting the ſaving to ſtrangers. And *Copia verborum ſunt judice indigna.* And therefore where it was ſaid, that the word of diſcharging the right of the heire in taile, was a new invention, and that there was no word of barring or diſcharging the rights of the offender and his heires in the Statute, as there is in the Statute of Fines, it is plainly miſtaken, for it is plainly the ſame (joyning with the purview and ſaving with the excluſion of rights of heires together) with the word of diſcharging as hath beene ſaid, except wee thinke that the ſame thing cannot bee ſpoken but in the ſelfe ſame words, ſo that the Stat. of 31. *H.* 8. gives rights in the purview actually, as well as Land again diſcharges it ſelfe, by excluding it out of the ſaving.

For example. Tenant in Taile diſcontinues and diſſeiſes his Diſcontinuee, and is attainted of Treaſon, hee forfeits his Land gained be diſſeiſin, and his right of intaile he cannot uſe againſt the King by force of theſe Statutes. And this ſtands with the rule and reaſon of the Marques Caſe, For, *Contrariorum contraria eſt ratio.* The Traitors right to the land of a Stranger ſhall not bee given to the King, For the quiet of the ſtranger being poſſeſſor thereof, it ſhall bee given to the King being poſſeſſor, for the quiet of his poſſeſſion. And the word of Heriditament in the Statute of twentie ſixe *Hen.* eighth, and the word of right it ſelfe, in the Statute of thirtie one and thirty three of *Hen.* eight, are both ſufficient and fit to carrie ſuch rights in ſuch Caſes. And no man will diſpute but that the words are ſufficient to carry naked rights to the Land of Strangers.

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And therefore it is not for want of words that they paſſe not becauſe it was adjudged that it was not meant. And ſo it was ſaid in *Doughties* caſe, and ſo have antiquity, for the good of the Subject againſt the King expreſſely againſt letter.

Therefore thinke it not ſtrange that nothing be left for the King where letter and meaning and equitie are for him. And can any man conceive that the Parliament that gave the Land, to the King, ſhould leave a right to the Traytor to the ſame Land to defeate him of it againe, ſince the Statute gives the Land and the right, and the ſaving excludes the right againe.

And this manner of forfeiting all manner of Rights of perſons attainted of Treaſon, and their heires for the benefit of the Kings forfeiture is of ſo great importance, that if it be not taken at large as I take it, it is an of all the Statute, even that of 33. *H.* 8. *cap.* 30. For, that hath the word, rights, and ſo hath 33. *H.* 8.

And it is agreed on both ſides, that the word, (rights) in both Statutes doth not include the right of Action to the Land of ſtrangers, by an equitie againſt the Letter. But you ſhall agree alſo that it ſhall not extend to old and ſtale rights, that perſons attainted may have to the Kings Land, how ever the King hath the Land in the right which the perſon attainted hath buried in his own Land which he doth forfeit upon theſe Statutes.

You open a wide doore to every one that purpoſeth treaſon to make proviſion before hand; that though you get ſome ſtate in his Land, yet hee will have ſome ſecret right to fetch it away from againe. So that where the Statute of Entailes may bee truly ſaid to bee a reall and perpetuall ſanctuarie for Traytors and Treaſon it ſelfe, which ſanctuaries could not bee but for the perſons of Traytors only. So this Statute that doth ſubject ſtates in tayle to forfeiture of Treaſon may be ſaid to kill Treaſon it ſelfe, *occidere ipſam proditionem.* As the Tiran was ſaid to kill *preſbyterium* when hee tooke away their livings. And conſequently this miſinterpretation ſhall in effect build the Tower of confuſion, for who ſeeth not how many deſperate perſons (all Traytors are) who feare not to hazard themſelves for the compaſſing of their wicked ends, ſo they preſerve their poſterity, and eſtates, to preſerve them in glory that ought for ever to be infamous? and therefore the queſtion is *proaris & focis* in treaſonable deſignes.

In good faith *nimium altercando veritas amittitur*; And I find that when it admits diſputation it lets indoubting, that the cleareneſſe of the cauſe needed not; For what is all this where the Statute ſaith, That the perſon attainted ſhall forfeit his Land entayled to the King and his heyres from and againſt the Offenders, and their

heyres ſhall not retaine it; And ſo the right expreſſely contradicted, as to conſtrue *volumus, id eſt nolumus.*

And now to give Anſwer by the way, to a point ſtirred, with much aſſurance, and the adverſe partie which was this *Katharine*, the Wife of *Bigod* during her time was ſeiſed of an eſtate ſubject to a Formedon of the next heyre upon the ancient entayle, whereupon hee might have recovered, and then hee might have beene ſeiſed of the old entayle, which was paramount to the Kings title, and hee ſhould in effect have evicted the Kings eſtate as well as hers, and then its ſaid, that the cauſe is all one of Remitter or Recovery.

To this I anſwer, that if I may make my caſe, I will make my law for my caſe, and ſo this caſe is made at pleaſure, as the partie would have it; For, there is no ſuch caſe, but if there were ſuch an one it is true that the woman ſhall have much adoe to defend her ſelfe; For, ſhe could not claim any defence by the Kings title under whom ſhe claimes not, and alſo till the office were found the right were in the heyre who muſt implead his mother and after her death both poſſeſſion and right were according to the caſe of the Marques in the heyre, and ſo was found, and alſo in the Remitter, *de facto* was in force. But now and ever ſince the Office the caſe commeth right betweene the KING and the iſſue which is juſt that either party may plead and defend his cauſe himſelfe.

The Objection alſo doth receive diverſe conſiderations and Anſwers; For firſt, ſince the ancient title of the iſſue is extinct by the ſtatute together with the Husbands eſtate tayle, both is barred by the attainder againſt him, and his iſſue, and the Wives eſtate as a ſtranger by ſurviver, not clayming under her Husband, nor under that eſtate is ſaved, in point of the contingencie of the ſurviver, and not elſe, whereof this iſſue can take no advantage, for hee is no ſtranger within the ſaving.

Alſo, this appeares, to the Court, the whole caſe being found, or pleaded, ſpecially by the motion, that though the Woman be ſufficient tenant to the *præcipe*, yet the ſame is no ſufficient demandant, for hee muſt demand the old intayle, which he cannot have, becauſe it was extinct by the Statute, and a new, or leſſe eſtate hee cannot clayme, for that is not his true eſtate, as in *Dalimores* caſe of Fees to uſes, 15. *et* 16. *Eliz.* *Dyer*, 329. So the Wives new eſtate is ſafe becauſe the old eſtate and title is gone, and the King cannot clayme by the old againſt her, becauſe it is not given him by the Statute, ſo the prejudice of him being a ſtranger (as hath beene ſaid,) but by way of extinguiſhment in his poſſeſſion, for the eſtabliſhing ſo much of the new eſtate as he takes by the forfeiture and the Statute. And becauſe the Kings title, and the Wives are from one

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roote, the Wives eſtate ſhall not bee impeached, leſt the KING thereby ſhould bee hurt. Againe, if it bee ſaid, That though the right ſhould be ſaid to bee extinct by the Statute, yet that ſhould be only to the King, becauſe the Land is onely given to him diſcharged of the title, and ſo there were no defence for the woman in the Formedon.

I Anſwer, That as to this Imagination of a Formedon, between the ſonne and the Wife, and a recovery upon that, and ſo to ſee how that ſhould worke upon the Kings title to prevent, is upon the death of the woman, who could not defend her ſelfe by the Kings title, though it be good.

I anſwer, and ſay firſt that there is no ſuch point in the caſe, but the Wives eſtate continues ſtill after her death, and it is a point of the latter eſtate and tayle, which is forfeited. And whereby the King claymes, and ſo it ſupports the Kings eſtate.

Touching the point of Remitter, it muſt ſave two things, that is an eſtate in poſſeſſion, deſcended from *KATHARINE* to her ſon of her eſtate tayle, and to that muſt be joyned a right of her antient entayle.

Now touching the forfeiture of Lands in tayle before the Statute of 33. *H.* 8. *ſcilicet*, upon the Statute of 26. *H.* 8. or 31. *H.* 8. I am of opinion in generall, that the Land of Tenant in tayle ought to come to the King in an attainder of Treaſon, upon the death of the perſon attainted without Office, ſo that the heyre unto it ſhall not inherit, notwithſtanding the opinion of *Doughties* caſe, that the Land in tayle ſhall not deſcend notwithſtanding the attainder till the Statute of 33. *H.* 8. becauſe the bloud is not corrupted by the attainder. For I hold that opinion that is called a Reſolution, to be but a matter of diſcourſe, and no point of judgment nor pertinent to the judgment of that caſe, and to be erroneous. For it is plaine, that tenant in tayle with reverſion in the Crowne being attainted, his bloud is corrupted, and his eſtate ceaſeth upon his death, and the Land reverteth to the King in poſſeſſion. And that is the judgement in *Auſtens* caſe 1. *et.* 2. *Ph. & M. Plowden, Walſingham* 560. which went ſo far, as to avoyd a Leaſe made by Tenant in tayle, though he left iſſue, which I muſt confeſſe was an hard ſtraine, and ſo was Sir *Nicholas Carews* caſe ruled, 16. *Eliz. Dyer* 332. where *Wray, Dyer*, and SANDERS gave opinion in ſuch a caſe, that the eſtate tayle is extinct and the heyre diſabled; For, hee is an iſſue and no heyre.

Therefore this poſition is not true generally, That attainders of Treaſon, doe not corrupt intayles, but that they ſhall deſcend till office found.

But now it is true, That where tenant in tayle hath reverſion

to a Subject is attainted of Treaſon, there is no corruption of bloud, for then there muſt bee a ſeiſure of the eſtate tayle, which would worke expreſſely contrary to the Statute which gives the Office to the King, whereas by the ſeiſure it ſhould accrue to him in the reverſion.

So there is a corruption, or no corruption, for ſeverall reaſons, in ſeverall caſes, in the ſelfe ſame words of forfeiture; For, there is no word in the Statute of 26. *H.* 8. for the corruption of bloud in either caſe. If you aske mee by what rule the Judges guided themſelves in the diverſe expoſitions of the ſame word and ſentence.

I anſwer, it was by that libertie and authority the Judges have over Lawes, and eſpecially over Statute Lawes according to reaſon and beſt conveyance to mald them to the truth, and beſt uſe, and ſo to give the King his entayle where himſelfe is in reverſion, to his beſt advantage by way of extinguiſhing and ſeiſure, where he is not in reverſion to give him that by *G.* eſtate, and both by the ſame word of forfeiture, whereof I makes this conſequent. That as thoſe Iudges doe expound the Law to the beſt, for the King in that caſe without any helpe of words: So we may with more Reaſon Judge that this Law of 26. *H.* 8. that makes entayles forfeitable for Treaſons as Fee-ſimples, that in both caſes upon the death of the offender their heyres ſhould be diſinherited and the King ſhould have the Land immediately, though in both caſes of Fee-ſimple and tayle the offender himſelfe ſhould receive it during his life, becauſe Free-holds are not removed without ſome Ceremony of Law, as Office, Entrie, execution upon judgment, or the like.

And obſerve that about this time the eſtates taile were by the Statute of 33. *H.* 8. made plainely lyable to the Fynes of Tenants as Fee-ſimples, and ſo by the Statute of 26. *H.* 8. the Tenants in tayle are made alſo forfeitable of their whole eſtate, by Treaſon as Tenant in Fee. And for more clearenesſe of meaning, they only ſave the right of ſtrangers and exclude the heyres, as privies, even as the Statutes of Fynes doe; ſo as by the true meaning of 26. *H.* 8. neither land nor right in this caſe ſhall accrue to the heire, but both to the King And by conſequence there ſhould be no remitter to the heyre, in whom the old poſſeſſion and new right muſt meet to make a new Remitter.

And I reaſon thus upon the Statute of 26. *H* 8. that gives the Forfeiture of tayles; That if the Statute of *Weſtm.* after the purview, that tenant of Fee-ſimple conditional ſhould have no power to Alien, and ſhould have joyned a proviſo; That if they did commit Treaſon, they ſhould have forfeited as they ſhould have done before that Statute. Notwithſtanding I hold then, that as to the forfeiture of Treaſon, it ſhould have remained ſubject to all purpoſes as before

before this Statute, as well to forfeiture of eſtate as to corruption of bloud.

Now as the clauſe had not ſuffered the caſe to come within the Stat. of *Weſtm.* ſo this Stat. of 26. *H.* 8. takes it out of the Law againe, by the contrary meanes of that whereby it was brought in, that is, that whereby the Law did reſtraine him under the word of reſtraint of alienation to barre his iſſue, and yet doth not give him power to corrupt the bloud, not for any care of him, or of his bloud, but becauſe that had wrought expreſſely againſt the end of the Law as is ſaid before.

Alſo the reaſons uſed in *Doughties* caſe is of no leſſe value; for it is not the corruption of bloud, that doth bring the Land to the King, for then reſtitution of bloud would reſtore the Land to the perſon attainted and his heyres, which it doth not though it bee by Parliament as it appeares in all the Acts for the reſtitution of bloud onely, and in the very caſe for the reſtitution of bloud of *Ralph Bigod* by Parliament.

Alſo the Land is forfeited by Attainder *ipſo facto*, ſo that the Lord may enter by force of the forfeiture which gives the title againſt him for the whole eſtate, ſo that the heire is involved in him and the deſcent intercepted and prevented by the Stat. given away by the forfeiture, and by the corruption of bloud.

But now to the point, which I make now the third point in this caſe. Admit that an office were ſo requiſite in this caſe, that both Land and right ſhould deſcend to the heyre for want of it, as is the opinion of *Doughties* caſe, and ſo work a Remitter in him for the time, yet I am of opinon clearely, that this Remitter is but temporary, till office found, and when office is found, both ſtate, poſſeſſion, and right was inveſted in the Crowne by force of the Statute of 26. *H.* 8. and of the attainder according to the State and right, that the perſon Attainted had in it at the time of his Attainder. And this is juſt both for the King, and Subject, that ſince the Kings title was juſt and true, and by the Offices to have beene promoted and found in due time, if it had beene cleare for him againſt the heires, as is confeſt. There is no reaſon that the negligence of the Officers, and perhaps their compact and combination with the adverſe party ſhould defeate the King, *vigilantibus & non dormientibus jura ſubveniunt*, is a Rule for the Subject. 3. Point

But *nullum tempus occurrit Regi*, is the Kings plea, except it bee in ſome trifles as uſurpation, or death upon his lapſe or the like. And put the caſe that the Statute of 26. *H.* 8. had ſaid, that if a tenant in tayle of Lands bee attainted of Treaſon, then upon office found the King ſhall have the Land. Could any man have doubted that though the Attainder had not given the Land preſently, but that it

muſt have deſcended to the heyre, yet upon Office found the King ſhould have taken the Land from him? and this cauſe in queſtion, is in effect the ſame and the very point in the caſe, 30. *E.* 4. of the Earle of *Northamptons* caſe cyted in *Nichols* caſe of 489. is this, A man diſſeiſes the Kings tenant, and the diſſeiſor is attainted of Felony, and before Office the diſſeiſee entreth upon the Land (as hee may) now cleerely the diſſeiſor is remitted. Then the office is found for the King. It is agreed in the bookes, and now on both ſides that the *Remitter* is defeated,& the Land & poſſeſſion given to the *King*, as it was in the perſon attainted,& the right remaines to the diſſeiſee to be peruſed & recovered againſt the King, & ſo every man hath his due & nowrong done neither to the King,nor to the Subject; For,the Kings title was to the Land,by the Attainder,not by the office,which did but find the title, and give it,and that was his due,and the diſſeiſes due was the Right that remained to him notwithſtanding the diſſeiſin, and the attainted, and the Office. And it is againſt reaſon, that ſince the Office was deviſed by Law for an Authenticall meanes to bring the King to Land by ſolemne matter of Record ſutable to his Regalitie, and for the ſafety of the ſubject, that he ſhould not enter and ſeiſe the Lands of the Subject upon ſurmiſes without matter of Record, that this ſhould be ſo bound to times, that if he keepe not his times, he ſhould loſe his land for ever. And the caſe of 3. *E.* 3. is much ſtronger than this caſe in queſtion, for there the diſſeiſor might forfeit the Land (for it was his) but the right was not his but the diſſeiſees,whereas in the principall caſe, *Francis Bigod* hath both poſſeſſion and right as hath bin proved, and ſo forfeited to the King.

And this caſe was heretofore brought to conſultation of all the Judges, 34. *Eliz.* Sir *Edward Coke* made the entrie in writing, which is extant but without the parties names; the Copie whereof hath been ſeene by us all; wherein the caſe being put (as hath bin ſaid) without names,the Queſtion was made,whether Queen *Elizabeth*, or the heyre ſhould have the Land. And three great objections were made againſt the Queene, which were.

Firſt, that the old right could not bee forfeited to the Queene by the Stat. of 26. *H.* 8. as was reſolved in the Marques caſe.

Secondly, That the perſon Attainted had not that right by reaſon of Feoffment and therefore could not be forfeited.

Thirdly, that the heyre was remitted by deſcent of the Land and the ancient right meeting together in him,and the Book of *Plowden Nichols* caſe,489. cyted that if the Diſcontinuee convey to the King and he grant it to the Diſcontinuer for life, the remainder to the iſſue in tayle, that when it commeth to him he ſhall be remitted; And the Kings eſtate avoyded. But the Judges *una voce* reſolved becauſe there was an actuall eſtate plainely forfeited by the Stat. of 26. *H.* 8

Nextl

Nextly, that the rights of him and his heyres had bin bound by that Law if there had bin no ſaving, and there was no ſaving for them becauſe they were excluded expreſly, and therefore are bound by the body of the Act. So there is a diverſitie betweene a naked right of Action alone, and when an eſtate of Inheritance is coupled with ſuch a right, which by the forfeiture of the eſtate in poſſeſſion is barred by the ſaid Act and excluſion of the ſaving.

And laſtly, when this appeares by Office, then the iſſue in tayle is barred, notwithſtanding the Remitter, and therefore it differs from the caſe out of *Plowden* Remitter; For there the ancient right of entayle is not barred.

Vpon this caſe the Biſhop of *Lincolne*, Lord Keeper, and the Lord *Lea* Lord Treaſurer, having heard all the Arguments, gave judgment for the King, and the Lord *Sheffeild*, that the former judgment given in the Exchequer ſhould be reverſed.

FINIS.