The Third PART of the

REPORTS

OF

EDWARD COKE,

Her Majesty's ATTORNEY GENERAL,

OF

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

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

In Memoria æterna erit justus, & non timebit ab auditione mala.
PSALM. 105

Justitia omnium virtutum princeps est, tuta & fida comes humanæ vitæ; ea enim imperia, regna, populi, civitates reguntur, quæ si de medio tollatur, nec constare possit hominum societas. ISIDORUS.
Justitia in sese virtutes continet omnes.

In the SAVOY:

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TO THE

READER.

QUAM non utiles modo, ſed neceſſariæ plane fuerint judiciorum & cauſarum Relationes olim editæ, facile vel ex duobus hiſce argumentis, in aliorum magna copia, æquo Lectori conſtare poteſt: Primo quod Reges noſtri *Edwardus* videlicet *Ed.* 3. *Hen.* 4. *Hen.* 5. *Hen.* 6. *Ed.* 4. *Rich.* 3. & *Hen.* 7. prudentes quatuor & doctos legum Profeſſores ſelegerint & conſtituer', qui reverendiſſimorum Judicum ſententias ac decreta mandarent literis, tum ut ſolverentur quæſtiones dubiæ ex opinionum diſcre-

HOW profitable and neceſſary the Reports of the Judgments and Caſes in Law publiſhed in former Ages have been, may unto the learned Reader, by theſe two Conſiderations amongſt others evidently appear. Firſt, that the Kings of this Realm, that is to ſay, E. 3. H. 4. H. 5. H. 6. E. 4. R. 3. *and* H. 7. *did ſelect and appoint* * *four diſcreet and learned Profeſſors of Law to report the Judgments and Opinions of the Reverend Judges, as well for reſolving of ſuch Doubts and Queſtions wherein there was (as in all other Arts and*

* Theſe four Reporters I take to be thoſe who have ſince been nam'd *Readers*, and elected to that Office by the reſpective Inns of Court.

Sciences there often falls out, Diverſity of Opinions, as alſo for the true and genuine Senſe and Conſtruction of ſuch Statutes and Acts of Parliament, as were from Time to Time made and enacted. To the End that all the Judges and Juſtices in all the ſeveral Parts of the Realm, might, as it were, with one Mouth in all Mens Caſes pronounce one and the ſame Sentence; whoſe learned Works are extant, and digeſted into nine *ſeveral Volumes, wherein if you obſerve the Unity and Conſent of ſo many ſeveral Judges and Courts in ſo many Succeſſions of Ages, and the Coherence and Concordance of ſuch infinite, ſeveral, and divers Caſes, (one as it were with ſweet Conſent and Amity proving and approving another) it may be queſtioned whether the Matter be worthy of greater Admiration or Commendation: For as in Nature we ſee the infinite Diſtinction of Things proceed from ſome Unity, as many Flowers from one Root, many Rivers from one Fountain, many Arteries in the Body of Man from one Heart, many Veins from one Liver, and many Sinews from the Brain: So without Queſtion* Lex orta eſt cum mente divina,

Now Ten, by adding Maynard's Ed. 2.

pantia (id qd' in aliis fere artibus & ſcientiis uſu venit) ortæ; Tum ut de vero ac genuino ſenſu eorum ſtatutorum legumq; in comitiis fixarum conſtaret, quæ de tempore in tempus latæ & ſancitæ fuerant; Idque eo fine quo Judices ac Juſtitiæ Præſides univerſi, in ſingulis regni partibus, uno quaſi ore idem jus in omnibus omnium hominum cauſis dicerent. Horum igitur docta ſane opera, extant digeſta etiamdum in juſta novem volumina: in quibus ſiquidem conſpirantem unitatem & conſenſum tot tamq; adeo diverſorum Judicum ac Curiarum in tanta ſucceſſionum & ſeculorum varietate obſervaveris, una etiam & cohærentiam atq; concordantiam cauſarum pene infinitarum numero natura plane disjunctarum animadverteris, quo modo una aliam dulci quaſi harmonia & affinitate amplexetur, probet atq; approbet; Profecto in dubium vocari poterit, ſit ne res admiratione potius, an commendatione majori digna. Quod enim in Natura videmus infinitam rerum diſtinctionem ab unitate aliqua provenire, ut ab eadem radice multos

flores,

flores, ab eodem fonte plures rivulos, & in humano corpore ab eodem corde multas arterias, ex uno jecore multas venas, nervos omnes ab uno cerebro, ita proculdubio lex orta eſt ex mente divina, atq; unitas hæc conſenſus plane admirabilis in tanta rerum diverſitate, non niſi a Deo bonarum legum & conſtitutionum authore ac fonte dimanavit. Huic Argumento accedit & ſecundum illud ductum a multiplici & jucundo fructu quem ex iiſdem hiſce libris in æqua Juſtitiæ executione, & tranquilla ac pacifica regni hujus adminiſtratione jam inde percepimus.

and this admirable Unity and Conſent in ſuch Diverſity of Things, proceeds only from God the Fountain and Founder of all Good Laws and Conſtitutions. Secondly, in Conſideration of the ſweet and delectable Fruit that hath been reaped by thoſe Works for the due Adminiſtration of Juſtice, and the Government of the Realm in Peace and Tranquility.

Sunt præterea & Relationes aliæ majoribus ingeniis aptæ, paris ſane authoritatis, ſed perſpicuitatis forte minoris; quales ſunt cauſarum formulæ judiciorumq; in curiis regiis datorum monumenta, in quibus graves ſane ac difficiles quæſtiones, (diligenti prius adhibita deliberatione) maturo conſilio diſjudicantur & definiuntur: Ita tamen ut non exprimantur judiciorum ſententiarumq; cauſæ ac rationes, quandoquidem ſoleant prudentes & docti viri priuſquam judicant qui-

Beſides theſe there be Reports fit for ſtronger Capacities of equal Authority, but of leſs Perſpicuity than the other; and theſe be the judicial Records of the King's Courts, wherein Caſes of Importance and Difficulty are upon great Conſultation and Adviſement adjudged and determined, in which Records the Reaſons or Cauſes of the Judgment are not expreſſed; for wiſe and learned Men do before they judge, labour to reach to the Depth of all the Reaſons of the Caſe in Queſtion, but in their Judgments*

* Yet, ſee Placita Parliam. Temp. E. 1, 2, and 3 where the Reaſons, and Cauſes of the Judgment are frequently expreſs'd in the Record. A Method highly commendable.

ments expreſs not any: And in Troth if Judges ſhould ſet down the Reaſons and Cauſes of their Judgments within every Record, that immenſe Labour ſhould withdraw them from the neceſſary Services of the Common-wealth, and their Records ſhould grow to be like Elephantini libri *of infinite Length, and in mine Opinion loſe ſomewhat of their preſent Authority and Reverence; And this is alſo worthy for learned and grave Men to imitate. But mine Advice is, that whenſoever a Man is enforced to yield a Reaſon of his Opinion or Judgment, that then he ſet down all Authorities, Precedents, Reaſons, Arguments and Inferences whatſoever that may be probably applyed to the Caſe in Queſtion; for ſome will be perſwaded or drawn by one, and ſome by another, according as the Capacity or Underſtanding of the Hearer or Reader is. Theſe Records, for that they contain great and hidden Treaſure, are faithfully and ſafely kept (as they well deſerve) in the King's Treaſury. And yet not ſo kept but that any Subject may for his neceſſary Uſe and Benefit have Acceſs thereunto, which was the ancient Law*

dem rationum momenta ponderare, & in omnes rei controverſæ latebras ac receſſus inquirere, verum inter judicandum ſententiam nudam non cauſas dicere. Et certe ſiquidem ſententiarum ſuarum rationes ſingulis edictis Judices apponerent, & avocaret eos immenſus ille labor a neceſſariis Reipub' negotiis, fierentque adeo Elephantinorum librorum ſimiles eorum ſententiæ in infinitam molem excreſcentes, denique authoritatis atque reverentiæ priſtinæ (mea quidem opinione) nonnihil amitterent: Dignum atque hoc eſt qd' imitentur viri docti & graves; utcunque ſuaſerim, quod ſi quando contigerit ut opinionis judiciiq; ſui rationem quiſpiam cogatur reddere, omnes tum demum afferat & accumulet authoritates, omnia exempla, rationes item, argumenta & illationes quaſcunque quæ cauſæ controverſæ probabiliter poſſint applicari; ita multiplex ratio, alia alium pro cujuſvis lectoris aut auditoris captu trahet & perſuadebit. Atq; iſtæ quidem judicum ſententiæ, quia plurimum continent theſauri quaſi reconditi, tuto ac fideliter, in Archivo Regio

(idque

(idque merito ſuo maximo) aſſervantur: Ita tamen interea ut cuivis ſubdito liceat in uſum & commodum ſuum illas adire & conſulere, idque antiqua lege Angliæ cautum fuit, poſteaq; declaratum & ſancitum in magnis Comitiis Anno 46 Edw. 3. habitis, in hæc verba: *Item pria les Commons que come recorde & quecunque choſe en la court le Roy de reaſon devoient demurr illonques pur perpetual evidence, & eide de touts parties a icelly, & de touts ceux a queux en nul maner ills atteignent, quant meſtier lour fuit. Et ja de novell refuſent en la court n're dit Seign' de ſerche ou evidence en contr' le Roy ou diſadvantage de ly; que pleiſe ordeiner per eſtatute, que ſerche & exemplification ſoit faitz as toutz gentz, de queconque recorde que les touche en aſc' maner' auxibien de ce que chiet encountre le Roy come autres gentz. Le Roy le voet.*

Perutiles etiam ſunt & antiqui legum noſtrarum libri qui hodie extant, quales *Glanvillus*, *Bracton*, *Britton*, *Fleta*, *Ingham*, & *Novæ Narrationes*, necnon & recentiores alii, utpote *Vetus liber Tenorum*, *Natura Brevium*, *Littleton*, *Dia-*

of England, *and ſo is declared by an Act of Parliament in* 46 E. 3. *in theſe Words:* Item pria les Commons que come recorde & quecunque choſe en la court le Roy de reaſon devoient demurr illonques pur perpetual evidence, & eide de touts parties a icelly, & de touts ceux a queux en nul maner' ills atteignent, quant meſtier lour fuit. Et ja de novell refuſent en la court n're dit Seign. de ſerche ou evidence encountr' le Roy ou diſadvantage de ly; que pleiſe ordeiner per eſtatute, que ſerche & exemplification ſoit faitz as toutz gentz, de queconque recorde que les touche en aſc' maner' auxibien de ce que chiet encountre le Roy come autres gentz. Le Roy le voet.

Right profitable alſo are the antient Books of the Common Laws yet extant, as Glanvil, Bracton, Britton, Fleta, Ingham, *and* Novæ Narrationes, *and thoſe alſo of later Times, as the old Tenures, old* Natura Brevium, Littleton,

Doctor *and* Student, Perkins, Fitzh. Nat. Br. *and* Stamford; *of which the* Regiſter, Littleton, Fitzherbert, *and* Stamford *are moſt neceſſary and of greateſt Authority and Excellency; and yet the other alſo are not without their Fruit. In reading of the Caſes in the Books at large, which ſometimes are obſcure and miſprinted, if the Reader, after the diligent reading of the Caſe, ſhall obſerve how the Caſe is abridged in thoſe two great Abridgments of Juſtice* Fitzherbert, *and Sir* Robert Brooke, *it will both illuſtrate the Caſe and delight the Reader; and yet neither that of* Statham, *nor that of the Book of Aſſiſes is to be rejected: And for Pleading, the great Book of Entries is of ſingular Uſe and Utility. To the former Reports you may add the exquiſite and elaborate Commentaries at large of Maſter* Plowden, *a grave Man, and ſingularly well learned, and the ſummary and fruitful Obſervations of that famous and moſt Reverend Judge and Sage of the Law, Sir* James Dyer, *Knt. late Chief Juſtice of the Court of Common Pleas, and mine own ſimple Labours: Then have you* 15 *Books or Treatiſes, and as*

logus inter Doctorem & Studioſum, Perkins, Fitzh. Natura Brevium, & Stamford: in quibus utcunque *Regiſtrum, Littleton, Fitzh. & Stamford,* facile primas partes cum uſus, tum authoritatis & dignitatis vendicent, reliqui tamen omnes fructu ſuo nequaquam carent. Prolixiores vero cauſarum relationes quod attinet, in quibus obſcuritatis aliquid, erroris item nonnihil Typographi vitio occurrit, ſiquidem ſtudioſus Lector poſt accuratam majorum librorum perlectionem, magna illa duo compendia, *Fitzherberti* Judicis alterum, alterum *Roberti Brooke* Militis in eadem quæſtione conſuluerit, afferet profecto Methodus hæc multum & lucis cauſæ, & Lectori delectationis. Hiis accedant & *Stathami* atque *Aſſiſarum*, ut loquimur, duo alii non contemnendi libri. Denique ad agendas cauſas, *Intrationum* ille, ut dicimus, magnus liber, uſum habet atque utilitatem ſingularem; iſtis ſi lubet addas Magiſtri *Plowden* gravis ſane, doctiq; imprimis viri, enucleata prorſus & elaborata commentaria majora: Compendioſas inſuper atque utiles obſervationes illuſtriſſimi

triſſimi illius reverendiſſimique Judicis ac Juriſperiti *Jacobi Dyer* Militis Communis (ut loquimur) Banci, ſive actionum communium Curiæ Capitalis non ita pridem Juſtitiarii: Adjicias denique & labores meos qualeſcunque; atque quindecim invenies ſive libros ſive tractatus, totidemque etiam (præter compendia) Relationum juſta volumina de communi noſtro jure ſcripta; ut de Statutis interim ac decretis comitialibus, quorum magni aliqui habentur libri, penitus taceam. Et quia difficile eſt illius artis aut ſcientiæ quam non profiteris, membrum aliquod vere atq; limitate tractare, quinimo impoſſibile ut quod non capit intellectus, lingua juſte referat; caveas imprimis moneo, ab Annalium noſtrorum ementita Juriſprudentia, Legumque vel ficta vel erronea relatione, quæ incauto alias facile imponat. Exempli gratia, referunt Annales Gulielm', quem appellant Conqueſtorem, Vicecomitum munus in ſingulis Provinciis decreviſſe atq; ordinaſſe, itemq; & juſtitiæ Præſides, qui paci conſervandæ proſpicerent & delinquentes punirent, ſtatuiſſe, ubi no-

many Volumes of the Reports, beſides the Abridgments of the Common Laws; for I ſpeak not of the Statutes and Acts of Parliament, whereof there be divers great Volumes. And for that it is hard for a Man to report any Part or Branch of any Art or Science juſtly and truly, which he profeſſeth not, and impoſſible to make a juſt and true Relation of any thing that he underſtands not; I pray thee beware of Chronicle Law reported in our Annals, for that will undoubtedly lead thee to Error: For Example, they ſay that William the Conqueror *decreed that there ſhould be Sheriffs in every Shire, and Juſtices of Peace to keep the Countries in Quiet, and to ſee Offenders puniſhed; whereas the learned know that Sheriffs were great Officers and Miniſters of Juſtice, as now they are, long before the Conqueſt, and Juſtices of Peace had not their Being until almoſt three hundred Years after,* viz. *in the firſt Year of* Edward *the Third.* Note.

But

runt docti, & fuiſſe olim quales nunc ſunt, vel ante victoris illius temp' Vicecomites, primarios juſtitiæ miniſtros; neque extitiſſe etiam, niſi poſt trecentos fere exinde annos, munus illud Juſticiariorum (ut loquimur) videlicet anno primo Edwardi Tertii.

But the Module of a Preface will not ſuffer me to enter into that Matter, whereat my Mind began to kindle: I will only (to incite the ſtudious Reader to the diligent Obſervation of the Books, wherein be hidden infinite Treaſures of Knowledge) note unto thee, divers excellent Things worthy thy Obſervation out of the Book Caſe in 26 lib. Aſſiſ. pl. 24. *for a Precedent for thee to follow in many other Caſes: There it appeareth that in a Writ of Aſſiſe the Abbot of* B. *claimed to have Conuſans of Pleas, and Writs of Aſſiſe, and other Original Writs out of the King's Courts by Preſcription, Time out of Mind of Man, in the Times of Saint* Edmund, *and Saint* Edward the Confeſſor, *Kings of this Realm before the Conqueſt, and ſhewed divers Allowances thereof, and that King* Hen. 1. *confirmed their Uſages, and that they ſhould have Conu-*

Verum non me ſinet præfationis iſtæ modulus argumentum hoc ulterius proſequi, quo tamen cæpit mihi animus aliquantum incaleſcere: Ideoq; ut ſtudioſum potius Lectorem incitem ad eorum librorum diligentem obſervationem, in quibus infiniti plane ſcientiæ theſauri ſunt reconditi, adnotabo quædam e quæſtione diſputata libro Aſſiſarum 26. pla. 24. digna profecto cum in ſe, tum præſertim opera & attentione tua, utpote quæ in aliis multis cauſis pro exemplo tibi ad imitandum inſerviant. Ibi apparet quod in reſcripto Aſſiſæ, ut loquimur, Abbas de *B.* cognitionem atq; determinationem vendicavit actionum & reſcriptor' tam Aſſiſæ quam originalium aliorum e curiis Regis datorum, idq; ex uſu & præſcriptione ultra memor' hominum ducta, videlicet, a temporibus S. Edmundi, & S. Edw. Confeſſoris

Confeſſoris, quorum utriq; Reges Angliæ extiterunt priuſquam a Normanno Duce vinceretur. Ad hanc rem confirmandam variæ præterea allatæ ſunt allocutiones; atq; quod Henricus primus eorum conſuetudines confirmaſſet, & nominatim illam de cauſarum ac quæſtionum deciſione, adeo ut neutrius banci ſive Curiæ Judicibus liceret aut interponere illic authoritatem ſuam, aut jus dicere: Ex hoc reſcripto annos abhinc ſupra trecentos dato, facile liquet quod Abbates etiam ſuperiores, qui præceſſerant, reſcripta Aſſiſæ atq; originalia reſcripta alia e curiis Regiis petita habuerunt: Idque ab antiquis uſque temporibus ſub iiſdem illis Regibus, ultra hominum recordationem, ita ut nemo tum extaret qui ſecus aliquando factum ſciret, ſive ex memoria & cognitione propria, ſive ex reſcripto aut argumento quocunq; alio. Jam utcunque apud doctos conſtat originalia reſcripta ad Vicecomitem illius Provinciæ mitti ac dirigi in qua lis orta eſt; tamen non abs re erit, ad majorem dilucidationem diverſarum rerum obſervatione dignarum, formulam ipſam reſcripti Aſſiſæ hoc loco apponere.

ſance of Pleas, ſo that the Juſtices of the one Bench, or the other, ſhould not intermeddle; out of which Record (being now above Three Hundred Years paſt) it appeareth that the Predeceſſors of that Abbot had Time out of Mind of Man in thoſe King's Reigns, (that is whereof no Man then knew the contrary, either out of his own Memory, or by any Record or other Proof,) Writs of Aſſiſe, and other original Writs out of the King's Courts. Now albeit that the Learned do know that original Writs are directed to the Sheriff of the County where the Land doth lie, yet it is not Impertinent to ſet down the Form of the Writ of Aſſiſe for the better Manifeſtation of divers Things worthy of Obſervation. Rex vicecomiti Salutem: Queſtus eſt nobis A. quod B. injuſte & ſine judicio diſſeiſivit eum de libero tenemento ſuo in E. &c. & ideo tibi præcipimus quod ſi prædict' A. fecerit te ſecurum de clamore ſuo proſequendo, tunc facias tenementum illud reſeiſire de catallis quæ in ipſo capt' fuer', & ipſum tenementum cum catallis eſſe in pace uſque ad primam aſſiſ. cum Juſticiarii noſtri

noſtri in partes illas venerint, & interim fac' 12 liberos & legales homines de vicineto illo videre tenementum illud, & nomina eorum imbreviar', &c. *And this Form of Writ appeareth in* Bracton, lib. 4. cap. 16. *and in* Glanvile, *in his* 13*th Book, who wrote not long after the Conqueſt: Out of which I gather Four Things.* 1. *That Time out of Mind of Man before the Conqueſt there had been Sheriffs; for the Writ of Aſſiſe, and every other original Writ is directed to the Sheriff, and cannot be directed to any other, unleſs it be in ſpecial Caſes to the Coroner, who then ſtands in the Place of the Sheriff.* 2. *That likewiſe by all that Time there were Trials by the Oath of Twelve Men, for the Words of the Writ of Aſſiſe are,* & interim fac' 12 liberos & legales homines, *&c.* 3. *That by like Time there had been Writs of Aſſiſe and other original Writs returnable into the King's Courts, which (ſeeing they be, as Juſtice* Fitzherbert *ſaith in his Preface to his Book of* Natura Brevium, *the Rules and Principles of the Science of the Common Law) do manifeſtly prove that the Common Law of* England *had been* *Rex Vicecomiti ſalutem: Queſtus eſt nobis A. quod B. injuſte & ſine judicio diſſeiſivit eum de libero ten'to ſuo in E. &c. Et ideo tibi præcipimus quod ſi prædict' A. fecerit te ſecurum de clamore ſuo proſequendo, tunc facias ten'tum illud reſeiſire de catallis quæ in ipſo capt' fuer', & ipſum ten'tum cum catallis eſſe in pace uſque ad primam Aſſiſam, cum Juſticiarii noſtri in partes illas venerint, & interim fac' 12 liberos & legales homines de vicineto illo videre ten'tum illud, & nomina eorum imbreviar'.* Atque hæc reſcripti formula habetur tum apud *Bracton. lib. 4. c.* 16. tum apud *Glanvillum, lib.* 13. qui a devicta natione noſtra non ita multo poſt ſcripſit; hinc ergo quatuor colligo. 1. Quod nondum ſubjugata hac Inſula, ultra omnem hominum memoriam Vicecom' hic extiterant: Quandoquidem reſcript' Aſſiſæ, ut & alia ſingula reſcripta originalia Vicecomiti ſoli mittuntur, nec ad alium quenquam poſſunt dirigi, niſi forte ad Coronatorem, ut appellant, idq; in ſpeciali aliqua cauſa, quando is etiam Vicecomitis locum obtinet. 2. Quod toto illo tempore ex duodecim hominum juratorum fide definiebantur

cauſ-

cauſæ: Ita enim reſcripti Aſſiſæ verba habent, *Et interim fac' 12 liberos & legales homines, &c.* 3. Qd' per idem tempus extiterant reſcripta Aſſiſæ aliaque reſcripta Originalia in Curias Regias releganda ac remittenda. Quæ ſane (quandoquidem ſunt ut inquit *Fitzherb.* in præfation' ad Librum ſuum de Natura brevium, Juris noſt' communis regulæ & principia) evincunt manifeſto, & fuiſſe hoc antiquitus ante devictam Regionem iſtam, ultra omnem omnium hominum recordationem, jus commune Angliæ, neq; a victore Normanno alterationem aut immutationem paſſum eſſe. 4. Quod per totum illud tempus Curia fuerat, quam Cancellariam dicimus, utpote ex qua ſola, neq; alicunde alias, petita ſint originalia reſcripta univerſa. Quin & ex Libris noſtris liquido conſtat, q'd omnes fundi (quos maneria vocamus) qui erant Sancti Edwardi Confeſſoris, vel in hunc uſq; diem Antiquar' poſſeſſion' nomen obtinent, quodque omnes colentes & occupantes eaſd' Edw. Confeſſoris poſſeſſion' in Aſſiſis, juratis ſeu recognitionibus poni non debent; qua quidem immunitate ac privi-

Time out of Mind of Man before the Conqueſt, and was not altered or changed by the Conqueror. 4. *That by all that Time there had been a Court of Chancery; for all Originals do iſſue out of that Court, and none other: And in our Books it appeareth, that all thoſe Manors that were in the Hands of Saint* Edward *the Confeſſor, are to this Day called Antient Demeſne; and that all King* Edward *the Confeſſor's Tenants* in Aſſiſis, Juratis, ſeu recognitionibus poni non debent; *which Immunity and Privilege remains to the Tenants of thoſe Manors, to whoſe Hands ſoever the ſame be come to this Day; and this appeareth by the Book of* Domeſday *now remaining in the Exchequer, which was made in the Reign of Saint* Edward *the Confeſſor, as it appeareth in* Fitzh. Natura Brevium, fol. 16. *So as without Controverſy the Trial by Juries, who ever were returned by Sheriffs, was before the Conqueſt. In the Book of* Domeſday *you ſhall alſo read, that* Eccleſia Sanctæ Mariæ de Worceſter habet Hundred' vocat' Oſwaldeſlaw, in

in qua jacent 300 hidæ, de quibus Epiſcopus ipſius Eccleſiæ a conſtitutione antiquorum tempor' habet omnes Redditiones Socharum, & omnes conſuetudines inibi pertinentes ad dominicum victum, & Regis ſervicium & ſuum: Ita ut nullus Vicecomes ullam ibi habere poſſit querelam, nec in aliquo placito, nec in aliqua qualibet cauſa. *And it appeareth by the Charter it ſelf, that King* Edward, *long before the Conqueſt, granted to the Church of* Worceſter *the ſaid Franchiſes and Hereditaments, whereby it is evident that then there were Sheriffs; and that the Sheriffs had then a Court, and determined Cauſes, held Pleas by plaint as to this Day they do, and that there were* Redditiones Socharum, *which prove Socage Tenure, and* Regis ſervicium *Knight's Service; then called* Regis ſervicium, *becauſe it was done to or for the King, and the Realm: The ſame King granted the like Charter to the Monaſtery of St.* Andrew *in* Ely, viz. *Two Hundreds within the Iſle, and Five and a Half without, together with Views of Frank-Pledge, and by expreſs Words that no Sheriff* legio gaudent omnes etiamdum in quorum manus ii ipſi fundi hodie devenerunt. Atq; hoc apparet ex Libro qui inſcribitur *Domus Dei*, & in Scaccario aſſervatur: Qui ſane Liber (ut refert *Fitzherb. de Natura Brevium, f.* 16.) regnante St. Edwardo Confeſſore ſcriptus & conditus fuit. Quapropter extra controverſiam plane eſt, morem atque conſuetudinem experiundi lege per homines juratos, qui ſolum & ſemper a Vicecomite citabantur, gentis hujus ſubjugationem præceſſiſſe. Quin & in libro illo *Domus Dei* dicto ſcript' Leges, quod Eccleſia S. Mariæ de Worceſter habet Hundredum vocatum Oſwaldeſlaw, in qua jacent 300 hidæ, de quibus Epiſcopus ipſius Eccleſiæ a conſtitutione antiquorum temporum habet omnes redditiones Socharum, & omnes conſuetudines inibi pertinentes ad dominicum victum & Regis ſervicium & ſuum: Ita ut nullus Vicecomes ullam ibi habere poſſit querelam, nec in aliquo placito nec in aliqua qualibet cauſa. Denique quod *Edgarus* Rex, diu ante devictam hanc gentem, prædictas immunitates atq; poſſeſſiones Eccleſiæ

ſiæ Worceſtrenſi conceſſerit, vel ex illa ipſa ſive Charta, (ut loquimur) ſive donatione ſatis conſtat: Ideoq; & Vicecomites tum fuiſſe, eoſdemq; olim velut hodie, in curia ſua cauſas determinaſſe, extitiſſe item tunc temporis redditiones ſocarum, ſervicium ſocæ, hoc eſt aratri, ſervicium Regis (dictum *Knight's Service*) vel meridiana luce apparet clarius. Conſimilem prorſus donationem & Monaſterio Sanctæ *Etheldred* Elyenſis conceſſit idem Rex: Videl't duas Hundred', id eſt Centurias infra inſulam, & quinque ac dimidiam extra eandem, una cum cognitione franciplegiarum, ut dicimus, hoc eſt vadium liberorum: Denique diſertis verbis cavit ne quis inibi Vicecomes authoritatem ſuam ullo modo interponerit; atq; hæc ſatis profecto in re tam clara, fortaſſis etiam nimis multa. Si quam ergo Annalium ſcriptoribus fidem adhibere velitis, in illiſce rebus detur quæ pro juris communis honore atque antiquitate tradiderunt; quale imprimis memorant de *Bruto* gentis hujus (ut aiunt) primo Rege: Quod is ubi imperium ſuum confir-

ſhould intermeddle within the ſame; but thus much (if in a Caſe ſo evident it be not too much) ſhall ſuffice. But if you will give any Faith to them, let it be in thoſe Things they have publiſhed concerning the Antiquity and Honour of the Common Laws: Firſt they ſay that Brutus *the firſt King of this Land, as ſoon as he had ſettled himſelf in his Kingdom, for the ſafe and peaceable Government of his People, wrote a Book in the* Greek *Tongue, calling it the* Laws of the Brittons, *and he collected the ſame out of the Laws of the* Trojans: *This King, ſay they, died after the Creation of the World* 2860 *Years, and before the Incarnation of Chriſt* 1103 *Years,* Samuel *then being Judge of* Iſrael. *I will not examine theſe Things in* a Quo warranto, *the Ground thereof I think was beſt known to the Authors and Writers of them; but that the Laws of the antient* Brittains, *their Contracts and other Inſtruments, and the Records and judicial Proceedings of their Judges were wrote and ſentenced in the* Greek *Tongue, it is plain and evident by Proofs luculent and uncontroulable: For Proof whereof I ſhall be*

be inforced only to Point out the Heads of ſome few Reaſons, yet ſo as you may proſecute the ſame from the Fountains themſelves at your good Pleaſure, and greater Leiſure. And firſt take a juſt Teſtimony out of the Commentaries of Julius Cæſar, (*whoſe Relations are as true, as his Style and Phraſe is Perfect.*) *He in his 6th Book of the Wars of* France *ſaith, that in antient Time the Nobility of* France *were all of two Sorts,* Druides *or* Equites; *the one for Matters of Government at home, the other for Martial Employments abroad: To the* Druides *appertained the ordering as well of Matters Eccleſiaſtical, as the Adminiſtration of the Laws and Government of the Commonwealth; for ſo he ſaith,* De omnibus controverſiis publicis privatiſque conſtituunt, &c. & ſi quod eſt admiſſum facinus, ſi cædes facta, ſi de hæreditate, de finibus controverſia eſt, decernunt; præmia, pœnaſque conſtituunt. *Concerning the Myſteries of their Religion, they neither did, nor might commit them to Writing, but for the diſpatching and deciding of Cauſes, as well publick as private, ſaith he,* maſſet ad tutam & tranquillam populi ſui gubernationem, Græca lingua librum compoſuit, quem inſcripſit Leges *Britonum*, collectum e legib' *Trojanorum*. Atq; Rex iſte, inquiunt, mortuus eſt Ann. ab orbe condito 2860. & ante incarnationem Chriſti 1103. quo tempore Iſraelem Samuel judicabat. Non eſt inſtituti mei iſtarum rerum fidem atq; authoritatem excutere aut examinare; viderint hoc Authores atque ſcriptores ipſi: Illud tamen interea luculentis admodum & neceſſariis rationibus conſtat, ſolere apud veteres olim Britannos, leges, pacta, & quæcunq; contractuum inſtrumenta alia, actiones item cauſarum, ac ſententiarum formulas & monumenta, Græca lingua conſcribi & tranſigi univerſa. Quod dum probo, cogor profecto digitum quaſi ad capita & fontes rationum aliquot intendere, earumq; hinc inde juſtam proſecutionem, ſive ardenti tuo ſtudio, ſive majori forte otio relinquere. Atque primum habeas tibi e Julii Cæſaris Commentariis expreſſum teſtimonium: Cujus ſane authoris non minus veræ ſunt narrationes, quam

eſt

eſt perfecta ſtylus, phraſis elegans; is lib. 6. de Bello Gallico, Optimatum inquit apud Gallos duo olim genera, Druidum & Equitum: Quorum illi res domi adminiſtrabant, hii negotia militaria foras procurabant: Atq; Druidum ſane officium duplex, ſacrorum procuratio, & rei-pub. ac legum adminiſtratio, ita enim diſerte loquitur; de omnibus controverſiis publicis privatiſq; conſtituunt, &c. Et ſi qd' eſt admiſſum facinus, ſi cædes facta, ſi de hæreditate de finibus controverſia eſt, decernunt, præmia, pœnaſq; conſtituunt: Diſciplinam religioſam aut philoſophicam literis non mandant, nec fas putant; in reliquis vero rebus publicis privatiſq; rationibus Græcis literis utuntur inquit, ne diſciplina illa efferretur in vulgus. Jam hoc poſito, quod Druides Græca lingua jus ex more dixerunt, & negotia tam publica quam privata tranſegerint, facile ſequitur fuiſſe idem & in Britannia uſitatum: Quia omnis diſciplina & tota cohors Gallicorum Druidum, Druidum Britannicorum Colonia quædam fuit, vel ipſo ibidem teſte Cæſare, qui inquit: Diſci- Græcis literis utuntur *they uſed to do it in the* Greek *Tongue, to the End that their Diſcipline might not be made common among the Vulgar: Now then this being granted that the* Druides *did cuſtomarily ſentence Cauſes, and order Matters publick and private in the* Greek *Language, it will eaſily follow, that the very ſame was likewiſe uſed here in* Britain; *and the Conſequence is evident and neceſſary, for that the whole Society, and all the Diſcipline of the* Druides *in* France, *was nothing elſe but a very Colony taken out from our* Britiſh Druides, *as* Cæſar *himſelf in the ſame Place affirmeth, from whence they learned and received all their Diſcipline for managing of Cauſes whatſoever.* Diſciplina Druidum (*ſaith he*) in Britannia reperta, atque inde in Galliam tranſlata: Et nunc qui diligentius illam diſciplinam cognoſcere volunt, in Britanniam diſcendi cauſſa proficiſcuntur. *The very ſame witneſſeth* Pliny *alſo,* lib. 13. cap. 1. *towards the End. Nay their very Name and Appellation may ſerve for a Proof of the Uſe of the* Greek *Tongue, they being called* Druides *of* δρῦς *an Oak, becauſe, ſaith*

Pliny, *they frequent Woods where Oaks are, and in all their Sacrifices uſe the Leaves of thoſe Trees. Add ſecondly to this, the daily Commerce and Traffick betwixt thoſe* Britains *and* French *ſo much ſpoken of by* Cæſar, Strabo, *and* Pliny: *And therefore no doubt but they uſed one and the ſame Form of covenanting by Writing; which that it was in* Greek, Strabo *plainly affirmeth*, lib. 4. Geographiæ, *for that the* Maſſilienſes *a* Greek *Colony, and, as Hiſtories report, the chiefeſt Merchants then in the World next the* Phœnicians, *ſo ſpread abroad the deſire of Learning their Language, that even vulgarly inſtancing therein the* French *Nation, they did* τὰ συμβόλαια Ἑλλωτιστὶ γράφειν, *write, ſaith he, their Deeds and Obligations in* Greek; *and that there paſſed continual Traffick likewiſe betwixt theſe very* Maſſiliens *and the* Britains; Strabo *in the ſame Place directly affirmeth in that ſaith he they uſed to fetch Tin from the* Britiſh *Iſlands* to Maſſalia, ὅτι τὸ Βρεττανικῶν νήσων εἰς τὴν Μασσαλίαν κομίζεσθαι, *and for this it is that* Juvenal, *who wrote above* 1500 *Years paſt in his* 15*th Satyr ſaith*, Gallia cauſſidiplina Druidum in Britannia reperta, atque inde in Galliam tranſlata; & nunc qui diligentius illam diſciplinam cognoſcere volunt, in Britanniam dicendi cauſſa proficiſcuntur. Hoc ipſum etiam teſtatur Plinius, lib. 13. c. 1. ad finem: Quin & nomen ipſum Druidum pro ſermonis Græci uſu argumento nobis eſſe poteſt; quandoquidem a Græco δρῦς appellationem & nomen traxerint, ob hanc cauſam inquit Plinius quia per ſe roborum eligunt lucos, nec ulla ſacra ſine ea fronde conficiunt. Adjicias ſecundo loco aſſidua commercia Britannorum cum Gallis a Cæſare, Strabone, Plinio tantopere decantata: Ergo & iiſdem pactorum conventorumq; formulis fuiſſe uſus proculdubio eſt neceſſe, quod totum Græca lingua factitatum eſſe affirmat diſerte Strabo, lib. 4. Geographiæ, quia Maſſilienſes colonia Græca (atque, ut hiſtoriæ referunt, præcipui tum poſt Phœnices mercatores) ſtudium diſcendi Græca in tantum paſſim excitarunt, ut ſolerent etiam vulgo, (de Gallis ibi loquitur) τὰ συμβόλαια Ἑλλωτιστὶ γράφειν, hoc eſt contractuum formulas Græce

Græce ſcribere: Quin & interceſſiſſe item aſſidua commercia Maſſilienſibus ipſis cum Britannis, ibidem directe Strabo indicat: Olim enim ait ſolibant Stannum ἐκ τῶν Βρεττανικῶν νήσων εἰς τὴν Μασσαλίαν κομίζεσθαι e Britannicis inſulis in Maſſaliam aſportare: Unde Juvenalis illud Sat. 15. qui Mille ſupra & quingentos abhinc annos ſcripſit, reſpectu uſus Græcæ linguæ in Juriſprudentia, *Gallia cauſſidicos docuit facunda Britannos*: Non quod a Gallis Juriſperiti noſtri eloquentiam didicerint, id quod Cæſar Author certiſſimus negat, ſed quia leges noſtræ græce conſcribebantur, idcirco Gallia, quæ coloniam Græcam (ut ait Strabo) receperat, juris noſtri profeſſores dicitur docuiſſe. Porro diſciplinam religioſam quod attinet, refert idem Author, lib. 4. Coluiſſe Britannos *Cererem* & *Proſerpinam*, iiſque ſacra feciſſe eorum plane ritu, qui in Σαμοθρήκη, Samo vixerunt. Deniq; cum exercuiſſe Græcos hic commercia, tum non incognitam modo, ſed familiarem fuiſſe veteribus Britannis eorum linguam probant ipſa hujus Inſulæ nomina. Nam *Bret* (unde cos docuit facunda Britannos: *Not that the* Frenchmen *did teach the Lawyers of* England *to be Eloquent*, (*which* Cæſar *a moſt certain Author denieth*) *but that a Colony of* Græcians *reſiding in* France, *as* Strabo *ſaith*, Gallia *was ſaid to teach the Profeſſors of the Laws of* England, *being written in the* Greek *Tongue*, *Eloquence. Now for Matters of Religion*, Strabo *in his 4th Book obſerveth, that the* Britains *worſhipped* Ceres *and* Proſerpina, *and ſacrificed unto them according to the* Greek *Form of Superſtition as they did* ἐν τῇ Σαμοθρήκῃ, *in* Samos. *Laſtly, that as well the* Grecians *had Traffick here, as that their Language was not unknown to the antient* Britains, *the very Names given unto this our County, do declare and prove. For* Bret (*from whence our Writers as from an old* Britiſh *Word derive the Apellation of this Iſland and Inhabitants, becauſe the ancient* Britains *were wont to paint their Bodies, and in* Juvenal *are called* picti Britanni, *which was, ſaith* Cæſ. lib. 5. *to make them ſeem fearful in fight to their Enemies, the ſame Word in*

that very Signification is Greek, *and* τὸ βρέτας *in* Æſchylus & Lycophron *ſignifies a Picture; now the other Part of the Word,* ταυία, *it is in* Greek *as much as Land or Country: I omit the Name* Albion, *at the firſt* Olbion, *or the happy Iſland in* Greek, *together with a great Multitude of* Engliſh *Words, as* Cyrographer Prothono, Ideote, *&c. yet taſting of a* Greek *beginning: For that hereby as I think it is ſufficiently proved that the Laws of* England *are of much greater Antiquity than they are reported to be, and than any the Conſtitutions or Laws imperial of* Roman *Emperors. Now therefore to return to our* Chronologers, *they farther ſay, that* 441 *Years before the Incarnation of Chriſt,* Mulumucius *of ſome called* Dunvallo M. *of ſome* Dovebant, *did write Two Books of the Laws of the* Brittons, *the one called* Stat' Municipalia, *and the other* Leges Judiciariæ, *for ſo the ſame do ſignify in the* Britiſh *Tongue, wherein he wrote the ſame, which is as much as to ſay, the Statute Law, and the Common Law: And* 356 *Years before the Birth of Chriſt,* Mercia Proba, *Queen and Wife of King* Gwintelin,

de ſcriptores noſtri tanquam ab antiquo verbo Britannico, regionis iſtius atque incolarum appellationem deducunt, eo nimirum quod ſoliti ſint veteres olim Britanni, corpora pingere, unde *picti Britanni* apud Juvenalem, cujus ratio fuit inquit Cæſar, lib. 5. quo fierent in prælio aſpectu horribiliori) illud ipſum verbum in ipſiſſima eadem ſignificatione, purum putum Græcum eſt; & τὸ βρέτας apud Æſchylum ac Lycophronem, picturam ſignificat: Quod ad alterum vero vocabuli illius membrum, ταυία græca vox eſt, idemque plane quod apud Latinos Regio ſonat: Mitto hic nomen alterum *Albion*, primo *Olbion* græce beata inſula, una cum Britannicorum vocabulorum ingenti quaſi exercitu, quæ in hunc uſq; diem Græcam originem prorſus ſapiunt; quandoquidem vel ex hiiſce ſatis (ut opinor) liquet, antiquius multo fuiſſe jus noſtrum quam fertur, quamque ullæ ſint cujuſcunque tandem Romani Imperatoris leges aut conſtitutiones imperiales: Quare ut aliquando ad Chronicos noſtros redeam, inquiunt porro Mulumucium ab aliis Dunvallo

vallo M. dict', ab aliis Doveb' duos libros de Britonum legibus annos ante Chriſtum natum 441. conſcripſiſſe, alterum ſtatuta municipalia dictum, leges Judiciariæ alterum, ita enim Britannice ſonant verba antiqua, idemque valent quod jus noſtrum municipale, juſque commune. Porro annis ante Chriſtum 356. Mercia, proba Regina & uxor Regis Swinthelini, Britonum lingua de legibus Angliæ librum ſcripſit, quem eundem Marchenleg, nominavit. Ad hæc Alfredus ſive Alvredus Saxonum occidentalium Rex, annos poſt Chriſtum 872. de iiſdem legibus Angliæ librum compoſuit, quem inſcripſit Breviarium quoddam, qd' compoſuit ex diverſis legibus Trojanorum, Græcorum, Britannorum, Saxonum, & Dacorum. Anno vero a Chriſti incarnatione 635. Sigabert ſive Sigesbert Orientalium Anglorum Rex, librum ſcripſit de legibus Angliæ, quem vocavit Inſtituta legum: Edw. Rex ejus nominis ante devictam hanc gentem tertius, ex immenſa legum congerie, quas Britanni, Romani, Angli & Daci condiderunt, optima quæque ſelegit, ac in *wrote a Book of the Laws of* England *in the* Britiſh *Tongue, calling it* Merchenleg: *King* Alfred, *or* Alvred *King of the Weſt* Saxons, 872 *Years after Chriſt wrote a Book of the Laws of* England, *and called the ſame*, Breviarium quoddam, quod compoſuit ex diverſis legibus Trojanorum, Græcorum, Britannorum, Saxonum, & Dacorum: *In the Year after the Incarnation of Chriſt* 635. Sigabert, *or* Sigesbert orientalium Anglorum Rex, *wrote a Book of the Laws of* England, *calling it* legum Inſtituta: *King* Edward *of that Name before the Conqueſt the* 3. Ex immenſa leg' congerie, quas Britanni, Rom', Angli & Daci condiderunt, optima quæq; ſelegit, ac in unam coegit quam vocari voluit leg' communem; *theſe and much more to like purpoſe ſhall you read in* Gildas, Gervaſius Tilburienſ. Galfr. *of* Monmouth, Will' *of* Mamſbury, Hovend, Matthew *of* Weſtminſter, Polidore Virgil, Harding, Caxton, Fabian, Balæus *and others. So as it appeareth by them that before the Conqueſt there were, amongſt others, Seven Volumes or Books intituled* Leges Britannorum,

rum, Statuta Municipalia, Leges Judiciariæ, Merchenleg, Breviarium Legum, Legum Inſtituta, & Communis Lex. Cum inſignis ſubactor Angliæ Rex Will' ulteriores inſulæ fines ſuo ſubjugaſſet imperio, & rebellium mentes terribilium perdomuiſſet exemplis, ne libera de cætero daretur erroris facultas, decrevit ſubjectum ſibi populum Juri ſcripto legibuſque ſubjicere: Propoſitis igitur legibus Anglicanis ſecundum tripartitam eor' diſtinctionem, hoc eſt *Marchenleg*, *Daneleg*, & *Weſt-Saxonleg*, quaſdam, reprobavit, quaſdam autem approbans tranſmarinas Newſtriæ leges, quæ ad Regni pacem tuendam efficaciſſimæ videbantur adjecit; *this ſaith* Gervaſius Tilburienſis, *one that wrote in the Conqueror's Time, or ſhortly after him: Whereby, if the ſame were admitted, it appeareth that ſome of the* Engliſh *Laws he allowed, and ſuch of his own as he added were* efficaciſſimæ ad Regni pacem tuendam, *and therefore if ſuch Laws as he added of his own had continued, (as in Troth they did not) they were not ſo ſhamefully and falſly to be ſlan-*

unam coegit, quam vocari voluit legem communem; hæc atq; conſimilia plura leges apud Gildam, Gervaſium Tilburienſem, Galfridum Monumathenſem, Guilielmum Mamsburienſem, Hovendenum, Matthæum Weſtmonaſterienſem, Polidorum Virgilium, Hardingum, Caxtonum, Fabianum, Balæum, atque alios: Ex quibus apparet quod ante ſubjugatam Angliam, ſeptem profecto ſive libri ſive volumina extiterunt, inſcripta leges Britonum, ſtatuta Municipalia, leges judiciariæ, Marchenleg, Breviarium legum, legum Inſtituta, & communis Lex. Cum inſignis ſubactor Angliæ Rex Willielmus ulteriores inſulæ fines ſuo ſubjugaſſet imperio, & rebellium mentes terribilium perdomuiſſet exemplis, ne libera de cætero daretur erroris facultas, decrevit ſubjectum ſibi populum Juri ſcripto legibuſque ſubjicere, propoſitis igitur legibus Anglicanis ſecundum tripartitam eorum diſtinctionem, hoc eſt Marchenleg, Daneleg & Weſt-ſaxonleg, quaſdam reprobavit, quaſdam autem approbans tranſmarinas Neweſtriæ leges, quæ ad Regni pacem tuendam

effica-

efficaciſſime videbantur, adjecit; hæc habet Gervaſius Tilburienſis, qui aut victoris ipſius temporibus, aut non ita multo poſt ſcripſit: Ex quo conſtat (ſiquidem fidei quid hic Author habeat) & approbaſſe illum leges Angliæ nonnullas, & fuiſſe illas quas de ſuo addidit ad regni pacem tuendam efficaciſſimas; ideoque ſi perſtitiſſent, etiam atq; permanſiſſent leges illæ adjectitiæ (id quod neutiquam videmus factum) at contumelia illa tamen tam impudenti, tamque adeo falſa nequaquam dignæ fuiſſent, qua eas nonnulli malicioſe, ne dicam an ignoranter magis affecerunt. De quibus illum tantum dico;

Aut hæc in noſtros fabricata eſt machina muros;
Aut aliquis latet error, equo ne credite Teucri.

Interea tamen ut habeas lector in quo acquieſcas, audi quid *Joh. Forteſcue* miles, capitalis Angliæ juſticiarius, ſingulari cum doctrina tum authoritate vir de hac ipſa re ſcripſerit. Is libro primo c. 17. de legibus Angliæ agens; quæ ſi optimæ inquit non extitiſſent, aliqua regum *dered, as ſome maliciouſly and ignorantly have done; of whom I only ſay,*

Aut hæc in noſtros fabricata eſt machina muros;
Aut aliquis latet error, equo ne credite Teucri.

For thy Satisfaction herein, hear what Sir Jo. Forteſcue, *Kt. Chief Juſtice of* England, *a Man of excellent Learning and Authority, wrote of this Matter,* lib. 1. cap. 17. *ſpeaking of the Laws of* England; Quæ ſi optimæ non extitiſſent, aliqui regum illorum juſtitia, ratione, ſeu affectione concitati eas mutaſſent, aut omnino deleviſſent, & maxime Romani qui legibus ſuis quaſi totum orbis reliquum judicabant. *After the Conqueſt King* Henry *the Firſt, the Conqueror's Son, ſurnamed* Beauclarke, *a Man excellently Learned, becauſe he aboliſhed ſuch Cuſtoms of* Normandy *as his Father added to our Common Laws, is ſaid to have reſtored the antient Laws of* England: *King* Henry *the Second wrote a Book of the Common Laws and Statutes of* England, *divided into two Tomes, and according to the ſame Diviſion, intituled the one* pro Republica leges,

and the other Statuta Regalia, *whereof not any Fragment doth now remain* *. *And yet by the Way, I could but Smile when I read in ſome of them, that when Cardinal* Woolſey *at the laſt perceived untrue Surmiſes, and feigned Complaints for the moſt part of ſuch poor People as laded him with Petitions, he then waxed weary of hearing their Cauſes, and ordained by the King's Commiſſion divers Under-Courts to hear Complaints by Bill of poor People; the one was kept in the* Whitehall, *the other before the K.'s Almoner Dr.* Stokeſley, *a Man that had more Learning than Diſcretion to be a Judge; the Third was kept in the Lord Treaſurer's Chamber, beſide the Star-Chamber, and the Fourth at the Rolls at the Afternoon: Theſe Courts were greatly haunted for a Time, but at the laſt the People perceived that much Delay was uſed in theſe Courts, and few Matters ended, and when they were ended, they bound no Man by the Law, then every Man was weary of them, and reſorted to the Common Law; but* Tractent fabrilia fabri; *and yet it were to be wiſhed that they had kept themſelves within their*

* See the Laws of H. 2. in Wilkins's Saxon Laws, p. 318 to 338.

illorum juſtitia, ratione, vel affectione coneitati eas mutaſſent, aut omnino deleviſſent, & maxime Romani qui legibus ſuis quaſi totum orbis reliquum indicabant. Poſt ſubactionem noſtram Henricus ejus nominis primus, victoris filius cognomento Beauclarke, præſtanti vir doctrina, ob id antiquas leges Angliæ reſtituiſſe dicitur, quod conſuetudines Normannicas a patre ipſius ſuperinductas penitus abaleverit: Henricus vero ſecundus Librum etiam de legibus & ſtatutis Angliæ compoſuit, quem in duos Tomos ſectum, alterum pro Republica leges, alterum ſtatuta regalia, ſecundum diviſionem illam inſcripſit, quorum ne fragmentum extat hodie reliquum. (Q.) Nequeo tamen obiter abſtinere riſu interea, cum apud Annalium hoſce ſcriptores quoſdam lego, quod ubi Cardinalis Woolſeius perſenſiſſet in ſupplicationibus vulgi, quibus indies onerabatur, aut ſuſpiciones falſas, aut fictas queremonias ut plurimum contineri, labore illo audiendi cauſſas defatigatus, ex conceſſione & edicto Regis, minores aliquot Curias ſubſtituit, quæ audiendis populi querelis per

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libellos ſupplices inſervirent, harum unam conſtituit in ædibus dictis *Whitehall*, alteram coram Eleemoſynario regio Doctore *Stockeſley*, viro utcunque docto, certe ad officium & munus Judicis minus apto & diſcreto: Tertiam in cubiculo mag' Angliæ Theſaurarii juxta cameram ſtellatam: Et quartam apud Rotulorum cuſtodem poſt meridiem; atque ad has quidem curias frequens populus aliquandiu confluxit, verum earum tædio demum victi, ubi cauſſas plurimas de die in diem vidiſſent dilatas, paucas vero compoſitas, neq; quenquam deniq; teneri lege latæ illic ſententiæ utcunque ſtare, ad Jus commune omnes inde convolarunt: *Sed tractent fabrilia fabri.* Et optandum ſane eſſet ut intra metas ſuas ſe continuiſſent, quando eorum forte aliqui apud viros prudentes illorum tandem reportarunt præmium, quibus ne tum quidem creditur, etiam cum verum dicunt. Doctis vero & prudentibus hiſtoriographis conſilium illud do, ne immiſceant ſeſe temere alienis ſtudiis, neve in myſteria cujuſcunque tandem artis aut ſcientiæ, imprimis vero legum hujus Regni

proper Element, for Peradventure with wiſe Men, ſome of them have reaped the Reward of thoſe that are not believed, when they ſay the Truth. To the grave and learned Writers of Hiſtories, my Advice is, that they meddle not with any Point or Secret of any Art or Science, eſpecially with the Laws of this Realm, before they confer with ſome Learned in that Profeſſion.

And

And where it is reported, that it was not lawful for any common Perſon to uſe any Seal to any Deed, Charter, or other Inſtrument in the Reign of Hen. 2. *nor long after, and therefore* Richard Lacy *Chief Juſtice of* England, *in the Reign of* Hen. 2. *is ſaid to have reprehended a common Perſon, for that he uſed a Patent Seal, when as that pertained, as he ſaid, to the King and Nobility only; againſt which,* Ingulphus *Abbot of* Croyland, *who is ſaid to have come in with the Conqueror ſaith,* Ante Normannorum ingreſſum Cirographa firma erant cum crucibus aureis, aliiſque ſignaculis, ſed Normannos cum cerea impreſſione uniuſcujuſque ſpeciale ſigillum ſub intitulatione trium vel quatuor Teſtium conficere Cirographa inſtituere, *by which it appeareth, that in the Conqueror's Time, every Man might Seal with a private Seal: But letting theſe paſs, and to believe neither till both of them be agreed, in Troth it was ever unlawful for a Gentleman to* non conſulto prius docto aliquo ejus profeſſore, irruant aut invadant.

Atq; quod fertur non licuiſſe publicitus, regnante *Henrico ſecundo* & multo poſt, in pactis, donationibus aliiſve inſtrumentis plebeio homini ſigillo privato uti (quo nomine *Rich. Lacy* capitalis totius Angliæ juſtitiarius temporibus *Henrici ſecundi* hominem plebeium reprehenderit, qd' ſigillo patenti ut loquuntur uſus ſit, id quod Regis tantum ac procerum fuiſſe dicitur:) Contrarium plane habet *Ingulphus* Abbas de *Croyland*, qui cum gentis hujus victore una huc devenit, " atq; quod " ante Normannorum in- " greſ. Cirographa fir- " ma erant cum crucibus " aureis aliis ſignaculis, " ſed Norman' cum cerea " impreſſione uniuſcujuſ- " que ſpeciale ſigillum, " ſub intitulatione trium " vel quatuor teſtium con- " ficere Cirographa inſti- " tuere: Unde conſtat cu- " ivis e plebe licuiſſe tem- " poribus illius Victoris " privato ſigillo ſuo Ciro- " graphum ſignare. Verum ut rem hanc aliquando miſſam faciamus, atq; neutri parti tantiſper credamus, dum inter ſeſe mutuo convenerint, illud pro-

profecto certum eſt, nunquam licuiſſe ſive homini generoſo alterius inſignia aut ſigillum uſurpare, ſive cuicunq; alii cujuſvis ſignaculum affingere aut imitari; alias vero ſemper cuivis ſubdito licuit, ſigillum ſuum cuicunque tandem inſtrumento apponere; atq; hoc infinitis prope conſtat exemplis; ego tamen unico inſtar omnium contentus ero, quod a Magiſtro *Joſepho Hollandio* Interioris Templi ſocio accepi, Antiquario ſane perito & bonarum literarum amantiſſimo; Datum vero fuit *An.* 33 *H.* 2. & vel in hunc uſq; diem vetera duo pulcherrima ſigilla geſtat, alterum Gualteri de Fridaſtorpe, alterum Heliæ ipſius filii: Et quia multa notatu digna continet, opere pretium putavi in lectoris gratiam, de verbo ad verbum huc transferre. *Hæc eſt concordia facta in Comitatu Ebor' die Lunæ proxime poſt feſtum Sancti Hillarii Anno Regni Regis Henrici ſecundi* 33, *inter Walterum de Fridaſtorpe & Heliam filium ejus, & inter Johannem de Beverlaco, ſcil't, de una carucata terræ in Fridaſtorpe, quam præd' Joh. clamavit verſus eos in eod' com' ſicut jus & hæreditagium ſuum, per breve Dom'*

uſurp the Arms or Seals of another; and to forge or counterfeit the Seal of any other was unlawful for any: But otherwiſe it was never unlawful for any Subject to put his own Seal to any Inſtrument, as may appear by infinite Precedents, amongſt which for an Inſtance, I thought good here to remember one for all, which Maſter Joſeph Holland *of the* Inner Temple, *a good Antiquary, and a Lover of Learning delivered unto me, and beareth Date* Anno 33 H. 2. *and is ſealed at this preſent with 2 fair ancient Seals,* viz. *of* Walter *of* Fridaſtorpe, *and* Helias *his Son, and for that it containeth divers Matters worthy Obſervation; I thought good to exemplify it to the Reader* de verbo in verbum. Hæc eſt concordia facta in Comitatu Eborum die Lunæ proxime poſt feſtum Sancti Hillarii Anno Regni Regis Henrici ſecundi 33, inter Walterum de Fridaſtorpe & Heliam filium ejus, & inter Johan. de Beverlaco, ſcil. de una carucata terræ in Fridaſtorpe, quam præd' Joh. clamavit verſus eos in eodem comitatu ſicut jus & hæreditagium ſuum per breve Dom' Reg' ſcil. quod præd' Walt.

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& Helias filius ejus dederunt,& reddiderunt præd' Joh. pro clameo & recto ſuo quod in ipſa terra habuit, unam dimid' carucatam terræ in eadem villa, & unum toftum, ſcil' illam dimid' carucatam terræ quæ jacet inter terram Galfrid' Wanlin & inter præd' carucatam terræ quam clamavit, & illud toftum qd' jacet inter terram Adæ filiæ Norman' de Sezevall' & terram Hen' filii Thom' plenarie cum omnibus pertinentiis ſuis infra villam & extra ſine ullo retenemento ; hanc vero dimid' carucatam terræ & toftum plenarie cum omnibus pertinentiis ſuis tenebit præd' Joh' & hæred' ſui de præd' Helia & hæredib' ſuis, Reddendo inde annuatim præd' Heliæ & hæredib' ſuis 12 d. ad termin' Pentecoſt', pro omnibus ſervitiis quæ ad terram illam pertinent : Et præd' Walterus & Helias & hæred' ſui warrantizabunt præd' Joh' & hæredibus ſuis præfat' dimid' carucat. terræ & toftum, cum omnib' pertinen' contra omnes homines : Hanc vero concordiam ex utraq; parte affidaverunt firmiter & ſine dolo tenend', ſicut præſens Cirographum teſtatur; & ſæpe dictus Walterus atturnavit prædict'

Reg', ſcil' qd' præd' Walt' & Helias filius ejus dederunt, & reddiderunt præd' Jo' pro clameo & recto ſuo quod in ipſa terra habuit, unam dimid' carucat' terræ in eadem villa, & unum toftum, ſcil' illam dimid' carucatam terræ quæ jacet int' terr' Galfrid' Wanlin & int' præd' carucatam terræ quam clamavit, & illud toft' qd' jacet inter terr' Adæ filiæ Norm' de Sezevall' & terram Henr' filii Thom' plenarie cum omnibus pertinen' ſuis infra villa' & extra ſine ullo retenemento ; hanc vero dimid' carucatam terr' & toft' plenarie cum omnib' pertinen' ſuis tenebit præd' Joh' & hæred' ſui de præd' Helia & hæred' ſuis, Reddendo inde annuatim præd' Heliæ & hæredib' ſuis 12 d. *ad termin' Pentecoſt', pro omnib' ſervitiis quæ ad terram illam pertinent : Et præd' Walterus & Helias & hæred' ſui warrantizabunt præd' Joh' & hæred' ſuis præfat' dimid' carucatam terræ & toft', cum omnib' pertinen' contra omnes homines: Hanc vero concordiam ex utraque parte affidaverunt firmiter & ſine dolo tenend', ſicut præſens Cirographum teſtatur ; & ſæpe dictus Walterus atturnavit præd' Johan' in eodem com' ad faciend' præd' Heliæ filio ſuo, & hæred' ſuis ; hiis teſtibus Remigio Dapi-*

Dapifero, Ranulp' de Glanvill' tunc Vicec' Ebor', Ranulp' filio Walteri, Roger de Badnut, Warino de Rollesby, Alano de Sinderby, Radulp' filio Radul. Will' de Aton', Nich' de Warham, Rob' de Mara, Alano filio Heliæ, Roberto de Melſa, Thom' filio Jodlani, Walram' filio Will' Walter' de Bomadnum, Alano Malebanke, Adamo de Killum, Robert' de Malteby, Gilbert' de Torini, Will'mo Agullum, Gilbert' filio Ric' Will'mo de Backeſtorpe, Helia Latimer; " Quo quidem reſcripto " ſive brevi rex domino " mandavit, quod ſine di- " latione plenum rectum " teneat Joh' de Beverla- " co de una carucata terræ " cum pertinen' in Frida- " ſtorp quam clamavit, & " quam Wal' de Frida- " ſtorp, & Helias filius e- " jus ei deforc', & niſi fe- " cerit Vicecomes Ebor' " faciat, ne amplius inde " clamorem audiamus pro " defectu recti. Ad pleni- orem vero hujus rei intel- ligentiam, tenendum im- primis quod Joh' de Be- verlaco reſcript' ſeu breve addux' pro jure ſuo recupe- rando contra Walterum de Fridaſtorpe & Helia n filium ejus, idq; de una caru- cata terræ in Fridaſtorpe, quod quidem breve Domi- Johan' in eodem comitatu ad faciendum præd' ſervi- tium præd' Heliæ filio ſuo, & hæredibus ſuis; hiis te- ſtibus Remigio Dapifero, Ranulpho de Glanvil' tunc Vicecomite Eborum, Ra- nulpho filio Walteri, Ro- gero de Badnut, Warino de Rollesby, Alano de Sinderby, Radulpho filio Radul' Will' de Aton', Nich' de Warham, Robert' de Mara, Alano filio He- liæ, Roberto de Melſa, Thom' filio Jodlani, Wal- ram filio Will' Waltero de Bomadnum, Alano Male- banke, Adamo de Killum, Roberto de Malteby, Gil- berto de Torini, Will' A- gullum, Gilberto filio Ri- chardi, Will'mo de Backe- ſtorpe, Helia Latimer; *by which Writ the King commanded the Lord,* Quod ſine dilatione plenum re- ctum teneat Johan' de Be- verlaco de uno carucata terræ cum pertinentiis in Fridaſtorpe quam clamat, & quam Walterus de Fri- daſtorpe, & Helias filius ejus ei deforc', & niſi fe- cerit Vicecomes Eborum faciat, ne amplius inde clamorem audiamus pro defectu recti. *For thy bet- ter Underſtanding, hereby it appeareth that* J. de Be- verlaco *brought a Writ of Right againſt* Walter *of* Fri-

Fridaſtorpe, *and* Helias *his Son, of one plough Land in* Fridaſtorpe, *directed to the Lord of the Manor of whom the ſaid plough Land was holden, which Writ was after by a Precept made by the Sheriff called a* Tolt, *(becauſe it doth* tollere loquelam *from the Court Baron to the County Court) removed into the County Court, where before* Ranulph de Glanvilla *then Sheriff of* York, *this Concord was by Conſent of Parties made in the County Court, by Force of the Commiſſion given to the Sheriff in Default of the Lord, by the ſaid Writ,* (viz.) *That the Sheriff in his County Court ſhould ſee that the Demandant ſhould without delay have his full Right in the ſaid plough Land, upon which Writ ſo brought in that Court this Concord was made, and not only entred into the Rolls of the County Court, but by way of Inſtrument indented, mutually ſealed by either Party; ſo as by this Concord the perclose of the Writ,* Ne amplius inde clamorem audiamus pro defectu recti *was ſatisfied, and to the End that this Concord might be the more firmly kept, each Party bound himſelf to the other by an* Affidavit:

no illius fundi miſſum fuit, a quo carucata illa terræ tenebatur: Inde vero hoc ipſum breve ad Comitatus curiam vi præcepti per Vicecomitem facti (quod ideo apud nos vocatur *a Tolt* quia tollit atq; eximit cauſam e curia Baronis ad illam comitatus) removebatur, ubi coram Ranulpho de Glanvilla Ebor' tunc tempor' Vicecomite mutuo partium conſenſu facta eſt in curia comitatus concordia hæc, Idque vi præcepti per breve illud vicecomiti dat', ut ſi Dom' ipſe officio in hanc parte deeſſet, tum curaret vicecomes in Comitatus curia ut plenum jus ſuum in carucata illa terræ actor poſſit recuperare. Reſcripti igitur, ſeu brevis illius virtute, facta eſt illa Curia concordia hæc, & relata ac inſcripta non ſolum in rotulis curiæ Comitat', ſed in inſtrumento etiam qd' Indenturam vocant, utrinq; ex utraq; parte mutuo conſignato; atque ſic adimpletum fuit reſcripti illius ἐπιφώνημα *Ne amplius clamorem audiamus pro defectu recti.* Deniq; quo firmior ſtaret atq; inviolabilior hæc concordia, utraque pars ſe alteri per breve illud devinxit, quod fortaſſis hinc inde dictum eſt affidavit:

affidavit: Quod ſane ex antiquo hoc & docto inſtrumento neceſſario colligitur; nam per literas Dom' Reg' intelligitur reſcript' ſeu breve de re ſua recuperanda in hiis verbis clamavit, &c. jus ſuum, Verum infra diſerte ubi dicitur pro clameo & recto ſuo; ad hæc conſtat quod concordia hæc facta fuit in Comit' Ebor', & clamavit verſus eos in eod' comitatu, &c. per breve Domini Reg', hocq; totum factum fuit coram Ranulpho de Glanvilla tunc Vicecomite: Jam vero doctos quoſq; non latet, qd' breve de jure ſuo recuperando in Curiam comitatus mitti ac dirigi non poteſt, verum eo per præcept', vocatum *Tolt*, debet neceſſario removeri: illud bone Lector audacter tibi auſſim affirmare qd' concordiam hanc adeo præſtantem, adeo ſcriptam bene, nullus ſive Abbas, ſive Monachus, ſive clericus alius, qui Annales noſtros aut earum forte partem aliquam conſcripſit, intelligere potuiſſet. Verum redeamus aliquando ad antiquor' tempor' graves ſane & doctos Legum ſcriptores, qui defecerunt (ut conjicio) ad finem regni Hen' ſeptimi, inter quor' Relationes ac *All this is neceſſarily collected out of this ancient and learned Inſtrument; for* per breve Domini Regis *is intended a Writ of Right by theſe Words* clamavit, &c. jus ſuum; *and afterwards expreſsly, when it is ſaid* pro clameo & recto ſuo: *Alſo it appeareth that this Concord was made in* comit' Eborum, *and* clamavit verſus eos in eodem, comit', &c. per breve Domini Regis, *and all this was done* coram Ranulpho de Glanvilla tunc vicec': *And the Learned do know that a Writ of Right cannot be returnable in the County Court, but muſt of Neceſſity be removed thither by* Tolt. *Good Reader I dare confidently affirm unto thee, that never any Abbot, Monk, or Churchman, that wrote any of our Annals, could have underſtood this excellent and well indicted Concord. But to return again to theſe grave and learned Reporters of the Laws in former Times, who (as I take it) about the End* of the Reign of K.* H. 7. *ceaſed, between which and the Caſes reported in the Reign of* Hen. 8. *you may obſerve no ſmall Difference: So as about the End of the Reign of* Hen. 7. *it was thought*

* Rather the Beginning; the Policy of the Reign being, to leave as few Memorials of it to Poſterity as poſſible.

thought by the Sages of the Law, that at that Time the Reports of the Law were ſufficient; wherefore it may ſeem both unneceſſary and unprofitable to have any more Reports of the Law: But the ſame Cauſes that moved the former, do require alſo to have ſome more added unto them for two ſpecial Ends and Purpoſes. Firſt to explain and expound thoſe Statutes and Acts of Parliament which either have been enacted ſince thoſe Reports, or were not (no Occaſion falling out) in any former Reports expounded at all.

ſcripta, atque eorum qui temporibus Hen. 8. ſubſequuti ſunt, quantum interſit facile potes obſervare; unde fuit quod circa finem Hen. 7. conſultiſſimis juriſperitis perſuaſum erat, libror' tum atque relationum juris abunde ſatis extitiſſe: Quid ergo an ſupervacaneum prorſus & inutile putabimus plura etiam illis adjicere? Certe quæ res duæ imprimis ſuperiores illas relationes & libros cauſabant ac procurabant, illæ ambæ plures etiam hodie requirunt flagitantque. Primo ad ea ſtatuta atque decreta comitialia explicanda atque exponenda quæ inde a ſcriptis illis in hunc diem aut ſancita fuerunt, aut (nulla interveniente occaſione) non expoſita.

2. To reconcile the Doubts in former Reports, riſing either upon Diverſity of Opinions or Queſtions moved and left undecided, for that it cannot be, but in ſo many Books written in ſo many ſeveral Ages, there muſt be (as the like in all Sciences and Arts both divine and human it falleth out) ſome Diverſity of Opinions and many Doubts left unreſolved: For which only Purpoſes I have publiſhed the for-

2. Ad concilianda quædam dubia in iiſdem libris orta vel ex opinionum varietate, vel ex motis quidem nec ſolutis poſtea quæſtionibus: Fieri enim non poteſt quin in tot libris, tamq; adeo diverſis ſæculis ſcriptis (id quod in aliis ſcientiis & artibus univerſis tam divin' quam humanis uſu venit) opinionum varietas aliqua contingat, dubiiſq; plurimis non ſatisfiat. Quare

ob has cauſas elucubrationum mearum partes priores duas, hancq; poſtremo ultimam in lucem edidi, quæ legum ſtudioſos (id quod ſperoq; ac cupio) ad illorum veterum præſtantiſſimor' utiliſſimorumque librorum frequentem magis ac diligentem revolutionem excitare & movere poſſint. Atq; ſane Relationes iſtæ meæ (ſiquidem meas dicere liceat quæ aliorum ſunt conſcriptæ ſententiæ) Commentariorum naturam ſortiuntur,& faciunt vel ad fœliciorem apprehenſionem genuinæ ac veræ Interpretationis quorundam generalium ſtatutorum, quæ licet univerſum hoc regnum reſpiciunt, tamen quoad præcipuas quaſdam partes, nuncquam prius fuerunt expoſita aut explicata; vel ad ſaniorem intellectum germani ſenſus, ac rationis judiciorum atque ſententiarum antehac relatarum; vel deniq; ad dubiar' quæſtionum (quales multæ in illis non ſolutæ adhuc reperiuntur) plenam certamque determinationem. Hinc ergo prioribus duobus libris ad explicandum & exponendum Statutum illud in 23 *Hen.* 8. *c.* 10. actam dedi *Porteri* Cauſam: Pro tam

mer two, and this laſt Part of my Reports, which I truſt will be a Mean (for ſo I intended them) to cauſe the ſtudious to peruſe and peruſe again with greater Diligence, thoſe former excellent and moſt fruitful Reports: And in troth theſe of mine (if ſo I may call them, being the Judgments of others) are but in Nature of Commentaries, either for the better apprehending of the true Conſtruction of certain general Acts of Parliament concerning the whole Realm, in certain principal Points never expounded before; or for the better Underſtanding of the true Senſe and Reaſon of the Judgments and Reſolutions formerly reported; or for Reſolution of ſuch Doubts as therein remain undecided: For which Purpoſes, in my former Reports I have reported and publiſhed for the Explanation and Expoſition of the Statute of 23 H. 8. c. 10. Porter's *Caſe: Of the broad ſpreading Stat. of* 27 H. 8. c. 10. *of Uſes, the Caſes of* Chudleigh, Corbet, Shelley, Albany, *and the Lord* Cromwel's *Caſe: Of the Statute of* 34 H. 8. cap. 20. *of Recoveries,* Wiſeman's *Caſe; of the Statute of* 13 Eliz. cap. 7. *of Bankrupts,*

the Caſe of Bankrupts ; of the Statute of 34 H. 8. cap. 21. *of Confirmation of Letters Patents,* Dodington's *Caſe ; of the Statute of* 31 H. 8. *of Diſſolution of Monaſteries, and of the Statute of* 1 Ed. 6. *of Chauntries, the Archbiſh. of* Canterbury's *Caſe ; and of one Branch of the great and general Statutes of* 32 *and* 34 H. 8. *of Wills,* Bingham's *Caſe : I have reported the Lord* Buckhurſt's *Caſe, for the true Underſtanding and expounding of the ancient and former Book Caſes concerning Charters and Evidences, and to that End the Reſidue of the Caſes in thoſe two former Parts are publiſhed. And ſeeing the End of theſe Laws is to have Juſtice duly adminiſtred, and that Juſtice diſtributed is,* Jus ſuum cuiq; tribuere, *to give to every one his own : Let all the Profeſſors of the Law give to theſe Books that Juſtice which theſe Books have in them, That is, to give to every Book and Caſe, his own true Underſtanding: And not by wreſting or racking, or Inference of Wit to draw them (no not for approving a Truth) from their proper and natural Senſe ; for that were a Point of great Injuſtice. For Truth and Falſhood are ſo oppoſite, as*

late patenti ſtatuto illo in 27 *H.* 8. de uſibus retuli cauſas haſce *Chudleigh, Corbet, Shelley, Albany :* Illam item *Domini Cromwell,* de ſtatuto 34 *Hen.* 8. *c.* de Recuperationibus: Cauſam Wiſemanni, de ſtatuto in 13 *Eliz. c.* 7. de obſtrictis ære alieno qui fidem ac teſſeram ruperunt, eorum item cauſam in particulari, ex ſtatuto in 34 *Hen.* 8. *c.* 21. De confirmatione literarum patentium cauſam *Dodingtoni,* ex ſtatuto 31 *Hen.* 8. de diſſolutione Monaſteriorum : Item in 1 *Eliz.* de Canteriis (ut loquimur) cauſam Epiſcopi Cantuarienſis, præterea membrum unum magnorum illor' ad generalium ſtatutorum in 32 & 34 *H.* 8. de Teſtamentis, cauſam *Binghami :* Retuli etiam cauſam *Domini de Buckhurſt,* pro vero intellectu Chartarum & antiquarum relationum de conceſſionibus ſeu chartis & evidentiis ut loquimur, atq; huc fere ſpectant reliquæ cauſæ duobus illis ſuperioribus libris a me editæ. Cum igitur eo tendant leges iſtæ ut juſtitia adminiſtretur, ſitq; hoc juſtitiæ diſtributivæ ſuum cuique tribuere, illud demum tribuant Juriſperiti omnes

libris

libris hiſce, quod ipſis hii libri dederunt prius, hoc eſt ſingulis tam libris quam cauſis proprium ſuum ac genuinum intellectum, neque a germano ſuo ſenſu, vel ad veritatem aliquam confirmandum argutis illationibus inflectendo, extendendo, depravando torqueant, quod eſſet ſummæ prorſus injuſtitiæ.

Truth itſelf ought not to be proved by any Gloſs or Application, that the true Senſe will not bear.

Jam ex omnibus hiſce libris ac relationibus juris communis illud obſervavi, quòd utcunque aliquando ex ſtatutis comitialibus, quandoq; etiam ex acumine atq; inventione humana quædam juris hujus partes ſive immutatæ fuerint, ſive a curſu ſuo inverſæ atq; diſtractæ, tamen de curſu ac revolutione temporis idem ſemper jus, tanquam tutiſſimum fideliſſimumque Reip. firmamentum ac præſidium, magno ſane applauſu ad incommoda multa devitanda obtinuit & reſtitutum fuit. Exempli cauſa, dictavit communis juris prudentia ut hæreditatum jus omne per feudum ſimplex (ut loquimur) tranſiret, adeo ut tuto poſſent inter ſe homines alienare, allocare, & contrahere; verum Statutum *Weſtmon. 2. cap. 1.* aliud tulit jus limitatum,

Out of all theſe Books and Reports of the Common Law, I have obſerved, that albeit ſometime by Acts of Parliament, and ſometime by Invention and Wit of Man, ſome Points of the ancient Common Law have been alter'd or diverted from his due Courſe, yet in Revolution of Time, the ſame (as a moſt skilful and faithful Supporter of the Commonwealth) have been with great applauſe, for avoiding of many Inconveniencies, reſtored again: As for Example, the Wiſdom of the Common Law was, that all Eſtates of Inheritance ſhould be Fee-ſimple, ſo as one Man might ſafely alien, demiſe, and contract to and with another: But the Statute of Weſtm. 2. cap. 1. created an Eſtate-Tail, and made a Perpetuity by Act of Parliament, reſtraining Tenant in Tail from aliening or demiſing but only for the Life

Co. Lit. 282.

6 Co. 40. Præf. l. 4. & l. 9.

of Tenant in Tail, which in Proceſs of Time brought in ſuch Troubles and Inconveniences, that after two hundree Years, Neceſſity found out a Way by Law for a Tenant in Tail to alien. Alſo by the ancient Common Laws, Freeholds ſhould not paſs from one to another but by Matter of Record, or ſolemn Livery of Seiſin; but againſt this were uſes invented, and grew common and almoſt univerſal through the Realm, in Deſtruction of the ancient common Law in that Point: But in Time the manifold Inconveniencies hereof being by Experience found, the Statute of 27 Hen. 8. c. 10. *was made for reſtoring of the ancient Common Law again, as it expreſly appeareth by the Preamble of that Statute; and hereof an infinite more of Examples might be added, but hereof this ſhall ſuffice: And thus much of the Books and Treatiſes, and of the Reporters and Reports of the Laws of* England.

illud quaſiq; inciſum quod noſtri vocant *an Eſtate-Tail*, & decreto comitiorum perpetuitatem quandam ſtatuit, quæ tenentem *in Tail* ut loquuntur, hoc eſt illiuſmodi poſſeſſiones incolentem & occupantem reſtringeret, quo minus alienare quid aut allocare poſſit, niſi tantum pro tenentis ipſius vita naturali: Quod quidem ſtatutum tantas turbas totque incommoda de curſu temporis invexit, ut poſt 200 tandem annos, neceſſitas ipſa rationem ac viam per legem inire atque excogitare docuerit, qua liceret poſſeſſiones ſic tenenti abalienare; cavit præterea jus commune, ne tenementa libera ut dicimus de manu in manum irent, niſi vel tranſactionis illius extaret ſcripto monumentum, vel ſolenni more poſſeſſio atq; jus in re traderetur: Contra hoc adinventi ſunt uſus, ut appellant, qui in tantum creverunt ut obtinerent etiam ad antiqui juris in illa parte deſtructionem, non ſolum vulgo ſed fere per totum hoc regnum univerſum: Verum aliquando ubi experientia docuiſſet quam multifaria hinc incommoda pullularent: Latum eſt ſtatutum

illud

illud in 27 *H.* 8. *cap.* 10. de Revocando atque reſtituendo antiquo Jure communi, ut ex ill' proœmio diſerte patet, infinita plane ſunt in hoc genere exempla, verum nobis hæc ſufficient: Atq; de libris & tractatibus, deq; Relationibus ac ſcriptoribus Legum Angliæ hæc hactenus.

Sequitur nunc de gradibus qui illarum Legum ſtudioſis ſunt proprii; ſicut enim in utraque Academia Cantabrigienſi atq; Oxonienſi varii gradus ſunt, quales ſophiſtæ generales, Baccalaurei, Artium Magiſtri, Doctores, ex quibus viri ad eminentia loca & ſedem Judicii in Eccleſia Curiiſq; Eccleſiaſticis apti eliguntur: Ita ſunt & in Juriſprudentia noſtra primo quos vocamus *Mootemen* Inceptor', qui quæſtion' a Lectoribus propoſitas in ædibus Cancell', tam in terminis quam magnis vacationibus arguunt & diſputant: Ex hiis poſt ſtudium octo annorum aut circiter, eliguntur Juriſconſulti, nobis *Utterbarriſters* dicti; ex quibus conſtituuntur Lectores in Hoſpitiis Cancellariæ, qui poſt expletos duodecim ad minim' annos, a ſuſcepto illo gradu in ſenatorum ſive patrum ac ſeniorum claſſicorum numerum quos

Now for the Degrees of the Law, as there be in the Univerſities of Cambridge *and* Oxf. *diverſe Degrees, as general Sophiſters, Batchelors, Maſters, Doctors, of whom be choſen Men for eminent and judicial Places, both in the Church and Eccleſiaſtical Courts; ſo in the Profeſſion of the Law, there are Mootemen (which are* Mootmen. *thoſe that argue Readers Caſes in Houſes of Chancery, both in Terms and grand Vacations.) Of Mootemen after eight Years Study or thereabouts, are choſen Utterbarriſters; of theſe are* Utterbarriſters. *choſen Readers in Inns of Chancery: Of Utterbarriſters, after they have been of that Degree twelve Years at leaſt, are choſen Benchers, or* Benchers. *Antients; of which one, that is of the Puiſne Sort, reads yearly in Summer Vacation, and is called a ſingle Rea-* Readers. *der; and one of the Antients, that had formerly read, reads in* Lent *Vacat. and is*

Readers. *called a double Reader, and commonly it is between his firſt and ſecond Reading, about nine or ten Years. And out of theſe the King makes Choice of his Attorney, and* Attorney Gen. &c. *Solicitor General, his Attorney of the Court of Wards and Liveries, and Attorney of the Dutchy: And of theſe* Serjeants. See the Preface to 10 Co. *Readers, are Serjeants elected by the King, and are, by the King's Writ, called* Ad ſtatum & gradum ſervientis ad legem; *and out of theſe the King electeth* King's Serj. *one, two, or three as pleaſe him, to be his Serjeants, which are called the King's Serjeants: Of Serjeants are* Judges. *by the King alſo conſtituted the Honourable and Reverend Judges, and Sages of the Law. For the young Student, which moſt commonly cometh from one of the Univerſities, for his Entrance or Beginning were firſt inſtituted, and erected eight Houſes of Chancery,* Inns of Chancery. *to learn there the Elements of the Law, that is to ſay,* Clifford's-Inn, Lyon's-Inn, Clement's-Inn, Barnard's-Inn, Staple's-Inn, Furnival's-Inn, Davie's-Inn, *and* New-Inn; *and each of theſe Houſes conſiſt of forty or thereabouts: For the Readers, Utterbarriſters, Mootemen, and inferiour Students, are 4 famous* *Benchers* dicimus co-optantur; ex hac claſſe ſingulis annis noviſſimus quiſque recentiſſimuſq; in æſtiva vacatione prælegit, dictus Lector primo; in Quadrageſimali autem vacatione ſenior alius, qui Lector ſecundo nominatur: Inter primam vero atque ſecundam cujuſque prælectionem intercedunt fere anni novem aut decem; atque ex hiis quidem eligit Rex Procuratorem ſuum & Solicitatorem (ut loquimur) generalem Atturnatum in curia pupillorum & liberationum, & in curia Ducatus: Inſuper ex hiis per breve Regis vocantur alii ad ſtatum & gradum Servientium ad Legem, inter quos Rex qui ipſi ſibi inſerviant duos aut tres pro arbitrio elegit: Denique ex hiis, honoratos ac reverendos Judices atq; Præſides juris Rex conſtituit. Tyrones quod attinet qui huc fere ab Academiis accedunt, habent illi in quibus rudimenta atque elementa juris perdiſcant ædes Cancellariæ octo, vocata *Clifford's-Inn, Lyon's-Inn, Clement's-Inn, Bernard's-Inn, Staple's-Inn, Furnival's-Inn, Davie's-Inn, New-Inn*; harum ſingulæ quadraginta plus minus legum ſtudioſos continent.

nent. Pro Prælectoribus vero & Juriſconſultis, atq; inceptoribus aliiſq; inferioris ordinis ſtudioſis extant ampliſſima quatuor illuſtriſſimaq; Collegia, vocata *Inns of Court*, quæ ſunt Templum interius, ad qd' pertinent priores tres Cancellariæ ædes; Hoſpitium Graii, cui ſubſunt duæ proximæ ſequentes; Hoſpitium Lincolnienſe, cui duæ aliæ; denique Templum Medium, cui ædes poſtremæ inſerviunt. Conſtant autem ſingula hæc Collegia lectoribus ſupra viginti, Juriſconſultis pluſquam 60, Tyronibus circiter 160, aut 180, qui omnes inibi tempus ſuum in Juriſprudentiæ ſtudio aliiſque exercitiis dignis laude, & hominibus liberis ac generoſis impendunt. Judices & Servientes ad Legem quod attinet, qui fere numerum vicenum explent aut excedunt, in ædes duas quæ dicuntur Hoſpitia Servientium ad Legem, ſuntq; majoris eminentiæ & Dignitatis, equaliter diſtribuuntur: Atque univerſa hæc Hoſpitia, ut neque inter ſe longe ſunt diſſita, ita conjunctim omnia conficiunt ſane præ omnibus in toto terrarum orbe cujuſcunq; ſcientiæ humana *and renowned Colleges, or Houſes of Court, called* The Inner Temple, *to which the firſt three Houſes of Chanc. appertain*; Gray's-Inn, *to which the next two belong*; Lincoln's-Inn, *which enjoyeth the laſt two ſaving one; and the Middle Temple, which hath only the laſt: Each of the Houſes of Court conſiſt of Readers* * *above twenty; of Utterbariſters above thrice ſo many; of young Gentlemen about the Number of eight or nine-ſcore, who there ſpend their Time in Study of Law, and in commendable Exerciſes fit for Gentlemen: The Judges of the Law and Serjeants being commonly above the Number of* 20, *are equally diſtinguiſh'd into two higher and more eminent Houſes, called* Serjeants-Inn: *All theſe are not far diſtant one from another, and all together do make the moſt famous Univerſity for Profeſſion of Law only, or of any one human Science that is in the World, and advanceth itſelf above all others,* Quantum inter viburna cupreſſus. *In which Houſes of Court and Chancery, the Readings and other Exerciſes of the Laws therein continually uſed, are moſt*

Inns of Court.

* Or Benchers.

Serjeants Inn.

excellent and behooful for attaining to the knowledge of theſe Laws: And of theſe Things this Taſte ſhall ſuffice, for they would require, if they ſhould be treated of, a Treatiſe by itſelf. Of the Antiquity of theſe Houſes, and how they have been changed from one Place to another, I may ſay as one ſaid of ancient Cities: Perpaucæ antiquæ civitates authores ſuos norunt. *Now what Arts and Sciences are neceſſary for the Knowledge and Underſtanding of theſe Laws; I ſay, that ſeeing theſe Laws do limit, bound and determine of all other human Laws, Arts, and Sciences; I cannot exclude the Knowledge of any of them from the Profeſſor of theſe Laws, the Knowledge of any of them is neceſſary and profitable. But foraſmuch as if a Man ſhould ſpend his whole Life in the Study of theſe Laws, yet he might ſtill add ſomewhat to his Underſtanding of them: Therefore the Judges of the Law in Matters of Difficulty do uſe to confer with the learned in that Art or Science, whoſe Reſolution is requiſite to the true deciding of the Caſe in Queſtion. Concerning the Lang. or Tongue*

Arts and Sciences.

næ aliis illuſtriſſimam unius juriſprudentiæ Academiam, quæ ſeſe ſupra alias effert; *Quantum inter viburna cupreſſus.* Porro in Collegiis atq; ædibus hiſce ſingulis lectiones aliaque Juriſprudentiæ exercitia aſſidue habita, præſtantiſſima profecto ſunt, & ad legum ſcientiam conſequendam ſummopere conducibilia; Atque de hiſce rebus guſtum hunc dediſſe ſufficiat; quas ſi fuſius perſequerer, integrum per ſe tractatum requirerent: Antiquitatem vero ædium harum quod attinet, & quomodo de loco in locum tranſlatæ fuerint, idem dicam quod de antiquis civitatibus quidam: *Perpaucæ antiquæ civitates Authores ſuos norunt.* Jam ſi quæratur quæ artes & ſcientiæ neceſſariæ ſint ad iſtarum legum cognitionem atq; Intelligentiam, reſpondeo quod quandoquidem Juriſprudentia hæc definit ac ſtatuit de aliis non ſolum humanis legibus, verum artibus & ſcientiis univerſis, profecto earum cujuſlibet cognitionem a juris noſtri profeſſore non modo non excludo, ſed utilem prorſus atque neceſſariam judico;

Cum

Cum vero ut quis ætatem ſuam omnem in ſtudiis hiſce legum conterat, aliquid ſemper addendum reſtaret quod ad plenam earum intelligentiam faceret, idcirco Judices in difficilioribus cauſis eorum fere conſilium in illa arte aut ſcientia adhibent, quorum requiri judicium ad veram quæſtionis controverſæ deciſionem videatur. Quod ad linguam attinet in qua conſcriptæ ſunt leges noſtræ, Judiciorum imprimis ſententiarumque formulæ ac monumenta ſcripta & aſſervata ſunt Latine omnia, id quod cum ex ſtatuto apparet lato in comitiis *An.* 36 *E.*3. *c.*15. tum e ſcriptis *Glanvillæ*, *Bractonis*, *Fletæ*, e Novis item Narrationibus, Lib. Intrationum, & variis denique ſtatutis ipſis quæ ſermone Latino conſcripta atq; edita ſunt: Ante imperium illuſtriſſimi illius Regis Ed. I. tam reſcripta omnia originalia ac Judicialia, quam univerſi legis libri *Glanvillæ*, *Bractonis*, &c. denique & ſtatuta quæ in hunc uſque diem extant omnia, lingua Latina conſcripta atque edita fuerunt; Poſtea vero in ipſius atq; fi-

wherein theſe Laws are written, for all judicial Records are entred and enrolled in the Latin *Tongue: As it appeareth by an Act of Parliament* in anno 36 Ed. 3. c. 15. *and the Works of* Glanville, Bracton, *and* Fleta, Novæ Narrationes, *and the Book of* Entries, *and divers of our Statutes are ſet forth in the* Latin *Tongue. Before the Reign of that famous King* Edward I. *as well all Writs original and judicial, as all the Books of the Law, as* Glanville, Bracton, &c. *and all the Statutes yet extant, were publiſhed in the* Latin *Tongue*; *In the Reign of him and his Son many Statutes are indicted in the* Latin: (*as ſome alſo of the Statutes of* Rich. II. *be.*) *And divers alſo be enacted in* French; *for that they had divers Territories and Seigniories that ſpake* French *within their Dominion, and in Reſpect thereof the better Sort learned that Language. But foraſmuch as the former Reports of the Law, and the reſt of the Authors of the Law* (*the* Doctor *and* Student, *who wrote in the* Engliſh *Tongue excepted*) *are written in* French; I

Law Language. See the late Stat. 4 Geo. 2. cap. 26. and Bohun's Preface to the Engliſh Lawyer.

Q. The 1ſt Edition was in Latin.

have

have likewiſe publiſh'd theſe in the ſame Language: And the Reaſon that the former Reports were in the French *Tongue, was, for that they begun in the Reign of K.* Edw. 3. *who, as the World knows had lawful Right in the Kingdom of* France, *and had divers Provinces and Territories thereof in Poſſeſſion; it was not thought fit nor convenient, to publiſh either thoſe or any of the Statutes enacted in thoſe Days in the Vulgar Tongue, leſt the unlearned by bare reading without right underſtanding, might ſuck out Errors, and truſting to their own Conceit, might endamage themſelves, and ſometimes fall into Deſtruction. And it is verily thought that* William the Conqueror, *finding the Excellency and Equity of the Laws of* England, *did tranſport ſome of them into* Normandy, *and taught the former Laws, written, as they ſay, in* Greek, Latin, Britiſh *and* Saxon *Tongues (for the better Uſe of* Normans) *in the* Norman *Langu. and which are at this Day, (though in Proceſs of Time much altered) called the* Cuſtoms of Normandy: *So taught he* Engliſhmen *the* Nor-

Q. de hoc?

Præf. ad L. 6.

lii ejus regno multæ leges (ſicut & Rich. 2. ſtatuta nonnulla) Latine ſcriptæ ſunt, Gallice item variæ, eoque multas poſſeſſiones magnumq; adeo dominium infra regnum hoc ſub imperio ſuo tenuit, in quibus Gallice ſunt loquuti, quo reſpectu ſuperioris fere Ordinis viri eam linguam dicerunt: Quandoquidem tamen juris noſtri ſcriptores tam qui cauſas ac ſententias retuler', quam authores fere alii (excepto uno qui Doctoris ac Studioſi librum Anglice compoſuit) lingua Gallica ſcripſerunt, & Elucubrationes haſce meas eadem lingua edendas duxi: Jam quod Gallice habeantur relationes illæ veteres, in cauſa fuit cœperunt ſcribi ſub Imperio Edw. 3. qui ut omnes norunt, in regno Galliæ plenum jus habuit; variaſque ejuſdem Provincias ac territoria in ditione ac poſſeſſione ſua tenuit; neque ſane conducere aut convenire putabatur, ſive Relationes illas, ſive ſtatuta alia tum ſancita ſermone vernaculo edere, ne imperiti homines ex nuda lectione abſque vero intellectu errores inde ſugerent,

rent, ſuiſque adeo confiſi ingeniis, aut damnum aliquod, aut certam aliquando perniciem incurrerent: Creditur etiam (nec vana fides) Gulielmum gentis hujus ſubactorem, poſtquam legum Angliæ excellentiam atque æquitatem percepiſſet, earum nonnullas in Normanniam tranſtuliſſe, legeſque illas veteres (ſcriptas (ut aiunt) Græce, Latine, Britanice, & Saxonice) ad commodiorem uſum Normannorum, Normannice loqui docuiſſe. Quæ ſane licet longo temporis intervallo fuerint immutatæ, tamen vel in Hodiernum uſque diem conſuetudinem Normanniæ nomen atque appellationem retinent: Conſimili plane modo & Anglos noſtros, venationis, aucupii, & cæterorum fere ludorum atque exercitiorum omnium vocabula docuit, quæ vel hodie uſque manent: Et tamen nemo dubitat quin intra regnum hoc, ante victoris illius tempora, ludi illi animique relaxationes extiterint.

Verum conſule quæſo præfationem illam Gulielmi de Rouil de Alenman *Terms of Hunting, Hawking, and, in Effect, of all other Plays and Paſtimes, which continue to this Day; and yet no Man maketh Queſtion but theſe Recreations and Diſports were uſed within this Realm before the Conqueror's Time.*

But ſee the Preface of William de Rouell *of* Alenſon *to his Commentary written*

written in Latin, *upon the Book, called* Le graund Cuſtumier de Normandie, *entitled in* Latin, Deſcriptio Normanniæ: *where he ſheweth and proveth by other Authors, that moſt of the Cuſtoms of* Normandy *were derived out of the Laws of* England, *in or before the Time of the ſaid King* Edward the Confeſſor, *from whom* William *Duke of* Normandy *did derive the Title, by Colour whereof he firſt entred into the Crown of* England. *If the Language or Stile do not pleaſe thee, let the Excellency and the Importance of the Matter delight and ſatisfy thee, thereby thou ſhalt wholly addict thyſelf to the admirable Sweetneſs of Knowledge and Underſtanding*: In lectione non verba ſed veritas eſt amanda, ſæpe autem reperitur ſimplicitas veredica, & falſitas compoſita, quæ hominem ſuis erroribus allicit, & per linguæ ornamentum laqueos dulces aſpergit: Et doctrina in multis eſt, quibus deeſt Oratio. *Certainly the fair Outſides of enamel'd Words and Sentences, do ſometimes ſo bedazzle the Eye of the Reader's Mind with their glit-*

Iſidorus de ſummo bono. lib. 3. Valer. lib. 8.

ſon in commentarium ſuum Latine ſcriptum ad librum, Gallice *Le graund Coſtumier de Normandy*, latine deſcriptio Normanniæ appellatum: ubi ex aliis authoribus probat & demonſtrat conſuetudines illas Normannicas e legibus Angliæ fuiſſe petitas, ſive ante ſive non multo poſt Ed. Confeſſoris tempora, a quo Gulielmus Normanniæ dux jus ſuum & titulum duxit, cujus colore regnum hoc Angliæ primo invaſit. Siquidem igitur Relationum iſtarum phraſis aut ſtilus tibi minus arrideat, at rei ipſius ſubjectæ præſtantia atque utilitas & delectet & ſatisfaciat; unde fiet ut totum te admirabili plane dulcedini cognitionis atque ſcientiæ dedas & addices. In lectione non verba ſed veritas eſt amanda, ſæpe autem reperitur ſimplicitas veridica, & falſitas compoſita, quæ hominem ſuis erroribus allicit, & per linguæ ornamentum laqueos dulces aſpergit; Et doctrina in multis eſt, quibus deeſt oratio. Certe quidem ſpecies & pulchritudo exterior politorum verborum ſententiarumque fucatarum, ita

quan-

quandoque lectori aciem mentis ſplendore ſuo perſtringit, ut in rei ipſius viſcera quaſi ac medullam, penetrare atque introſpicere nequeat; qui enim ſtructorum verborum lepores & feſtivitates avide venantur, phraſiumq; tragicarum ac tument' luxuriante quaſi odore abripitur, ſæpenumero fit ut dum ad inanem oſtentationem verba conquirit, rem amittat: Et ſic *Projicit ampullas & ſeſquipedalia verba*; verum Juriſperiti noſtri gravitati imprimis convenit ſermone apto, noto, conciſo uti: atque de hiis hæc ſufficiant.

Fecit, Benevole Lector, ſuperiorum elucubration' mearum ſingularis ſane approbatio, novis tuis inſuper aſſociata votis, ut pauca hæc reverendiſſimorum judicum atque Præſidum juris præſtantiſſima ſane Judicia ac decreta prælo committam: Quæ quidem omnia tendunt vel ad veram quorundam generalium ſtatutorum expoſitionem, vel ad librorum noſtror'in quibus diſcrepantes opiniones occurrunt, ſenſum ac ſententiam genuinam explican-

tering Shew, as they cauſe them not to ſee or not to pierce into the Inſide of the Matter; and he that buſily hunteth after affected Words, and followeth the ſtrong Scent of great ſwelling Phraſes, is many Times (in winding of them in, to ſhew a little verbal Pride) at a dead Loſs of the Matter itſelf, and ſo Projicit ampullas & ſeſquipedalia verba: *To ſpeak effectually, plainly, and ſhortly, it becometh the Gravity of this Profeſſion: And of theſe Things this little Taſte ſhall ſuffice.*

Your extraordinary Allowance of my laſt Reports, being freſhly accompany'd with new Deſires, have overcome me to publiſh theſe few excellent Judgments and Reſolutions of the Reverend Judges and Sages of the Law, tending either to the true Expoſition of certain general Acts of Parliament, or to the true Underſtanding and Senſe of our Books, wherein there ſeemeth ſome Diverſity of Opinion; and albeit they be few in Number, yet many of them conſiſt of divers ſeveral Points, and comprehend in them many other Judgments and Reſolutions, which never

never before were reported. If by theſe Labours the Commonwealth ſhall receive any Good, and the Reader reap the Benefit that for his Reading and Study he deſerveth; I ſhall have all the Reward that for my Writings and Pains I deſire.

Vale.

dam. Et licet exiguus prorſus ſit relatarum hic a me cauſarum numerus, late tamen patent earum plurimæ, quæ & diverſis conſtant membris, & multas alias ſententias atque concluſiones nunquam antehac in lucem editas complectuntur: Ex quibus laboribus ſiquidem Reſpub. emolumentum, Lector ſtudiorum ſuorum condignum fructum perceperit, exiſtimabo me Elucubrationum mearum amplum ſane præmium conſequutum.

Vale.

The Marq. of Wincheſter's *Caſe.*

Trin. 25 Eliz. *Between the Queen and the Marquis of* Wincheſter, *which began* Mich. 21 & 22 Eliz.

THE Queen brought a Writ of (*a*) Error againſt the Marquis of *Wincheſter*, the Effect of the Writ was, That *John Horne*, and others, by their Deed bearing Date the 10th Day of *July*, *An.* 6. *H.* 8. gave to *Lionel Norreis* Eſq; and to one *Anne Milles*, the Manor of *Merleſton*, with the Appurtenances in *Merleſton* in the County of *Berks*, To have and to hold to the ſaid *Lionel* and *Anne*, and to the Heirs of the Body of the ſaid *Lionel*; and for Default of ſuch Iſſue, the Remainder to *Henry Norreis*, and to the Heirs Male of his Body: And that *Term. Paſch.* 19 *H.* 8. the Marquis of *Wincheſter* and divers others did recover (in the Life of the ſaid *Anne*) the ſaid Manor of *Merleſton*, in *Merleſton*, againſt the ſaid *Lionel*, in a Writ of Entry in the *Poſt*, in which the ſaid *Lionel* did vouch one *Thomas* (*b*) *Chappian*, then the common Vouchee, and Judgment was given and Execution had according to the uſual Form of common Recoveries: And afterwards the ſaid *Henry Norreis* having Iſſue *Henry*, now Lord *Norreis* of *Ricote* (who is now living) *Paſch.* 28 *H.* 8. was attainted of High Treaſon; and and afterwards, the 22d of *May* in the ſame Year, was executed. And afterwards, at a Parliament held the 18th Day of *June* in the ſame Year, it was enacted, That the ſaid *Henry Norreis* the Father, for divers Treaſons by him committed, ſhould forfeit to the ſaid King *Henry* VIII. his Heirs and Succeſſors, all ſuch Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders,

(*a*) 1 Leon. 270. Moor 95, 125, 323. Co. Ent. 240. nu. 5.

(*b*) Cro. El. 2.

Uſes, Poſſeſſions, Offices, Rights, Conditions, and all other his Hereditam. which he, or any other Perſon to his Uſe, then had or ought to have, of any Eſtate of Inheritance in Fee-ſimple, Fee-tail, in Uſe or in Poſſeſ. the Day of his Treaſons committed, or at any Time after: And afterw. the ſaid *Lionel* died without Iſſue of his Body; and afterwards the ſaid *Anne* died; and thereupon the Q. brought a Writ of Error againſt the Marq. of *Wincheſter*, the Heir of the Survivor of the Recoverors; and the Error which was aſſigned was, Becauſe the original Writ of Entry in the *Poſt* failed, and the Record, which was removed out of the Common Pleas, was of the Manor of *Merleſton*, *cum pertin'* in general, and not reſtrained to any Town. And the ſaid Marquis, in bar of the ſaid Writ of Error, pleaded, That after the Attainder of the ſaid *H. N.* the Father, the Q. that now is (if ſhe had any Right to any Writ of Error in the Caſe aforeſaid) by her Letters Patents, bearing Date in the 14th Year of her Reign, of her ſpecial Grace, certain Knowledge, and meer Motion, did give, grant, and reſtore, for her and her Succeſſors, to the ſaid *Henry* Lord *Norreis* the ſaid Manor, *cum pertinentiis*; and alſo all her Right, Eſtate, Title, Claim, Intereſt and Demand in the ſaid Manor, to have and to hold to him and his Heirs. And upon this Plea *Popham* the Q.'s Attorney did demur in Law. And this Caſe was argued by *Popham* the Queen's Attorney, and *Egerton* the Queen's Solicitor, in Maintenance of the Writ of Error; and by *Plowden* and *Coke* for the Defendant. And the Defendant's Counſel took five Exceptions to the Writ of Error.

1. That the Writ of Error was brought to reverſe a Judgment for all the Manor, where it ſhould be but of a Moiety, for it appears by the Writ, that the Recovery was void for a Moiety, becauſe *Anne Milles (a)* the other Joint-tenant was not named with *Lionel* in the Writ, by which one Moiety was forfeited to the Queen by his Attainder, which the Queen by her Letters Patents hath granted over to the ſaid Lord *Norreis*, and ſo foraſmuch as the (*b*) Regiſter hath one Form of Writ for the whole, and another Form for the Moiety, three Parts, &c. this Writ brought of the whole, where it ſhould be brought of the Moiety, ought to be abated. And principally, as it was ſaid, by one of the Defendant's Counſel, becauſe it comes of the Plaintiff's own ſhewing, and not by the ſhewing of the other Side, nor by the finding of a Jury, as in (*c*) 36 *H.* 6. 27. *b.* it is agreed, That in Maintenance if it appear by the (*d*) ſhewing of the Party himſelf, that the Maintenance be ſeveral, the Writ ſhall abate; otherwiſe, if it be found by Verdict. *Vid.* 10 *E.* 4. 8. 11 *H.* 7. 6. 11 *Aſſ.* 9. 19 *Aſſ.* 14. 22 *Aſſ.* 86.

The ſecond Exception was, Becauſe it was not ſhewed That *Henry Norreis*, to whom the Remainder was entailed, had the Remainder at the Time of the Recovery for the Gift in Tail was made in 6 *H.* 8. and the Recovery

(*a*) Cro. Jac. 333.

(*b*) 1 Roll. Rep. 306.

(*c*) 11 Co. 5. b. Fitz. Maint. 15. Br. Maint. 26. Br. Br. 245.

(*d*) Cro. El. 30, 325. Cro. Jac. 70, 104. Hob. 164, 199, 251, 279. Yelv. 71. Styl. 15. 1 Leon. 41. 3 Leon. 77. 11 Co. 45. a. 1 Roll. Rep 35, 77. Palm. 524 1 Brownl. 68. 2 Sand. 285.

was in 19 *H.* 8. and no Continuance of Eſtate, either of the Eſtate-Tail in Poſſeſſion, or of the Remainder, is alledged; and that the ſaid Eſtates ſhall not be intented to continue, the Books in 7 *H.* 7. 3. (*a*) *Stradling*'s Caſe. *Plowd. fol.* 199, (*b*) & 10 *H.* 7. 28. in *Henbade*'s Avowry, were cited.

(*a*) Plowd. 199. b.
(*b*) Br. Pleading 167.

The third Exception was, Becauſe the (*c*) Record of the Recovery was of the Manor of *Merleſton, cum pertinentiis*, and the Writ of Error was to remove a Recovery of the Manor of *Merleſton* in *Merleſton, cum pertinentiis*, and ſo the true Record was not removed by the ſaid Writ of Error, as in the like Caſe is agreed in (*d*) 9 *H.* 6. 1. *a. b.* where it is ſaid, That in all Caſes where a Man is to execute a Record, or to defeat a Record, there no Variance ought to be between the Writ and the Record, and with that agree the Books in 7 (*f*) *Aſſ.* 5. and (*g*) 26 *Aſſ.* 31. in Caſe of Attaint.

(*c*) 1 Roll. 752. 2 Sand. 291, 292.
(*d*) Fitz. Variance 6. Br. Variance 6. 2 Bulſtr. 169.
(*e*) 1 Roll. Rep. 16 2 Bulſtr. 169. 3 H. 6. 16. a. Br. Variance 3. Godb. 249.
(*f*) 2 Bulſtr. 169. Br. Variance 92.
(*g*) Br. Brief, 288.

The fourth Exception was, Becauſe the Act of 28 *H.* 8. upon which the Writ of Error was founded, gave to the King all the Manors, &c. which the ſaid *Hen. Norreis* then before attainted had the Day of his Treaſon committed, or at any Time after; and it is not ſhewed when the Treaſons were committed, nor that then he had any Thing in the Manor, which ought to have been averred preciſely, as it is agreed in *Nichol*'s Caſe, in (*h*) *Plow. Com.* 485. *b.*

(*h*) Plowd.

The laſt Exception was, Becauſe altho' all the Rights, &c. Hereditaments, &c. which the ſaid *Henry Norreis* had, &c. were given to the King, yet it doth not appear without Office, whether he had any Right to this Manor: And note, That altho' after the ſaid *Henry Norreis* was executed, ſo as by Reaſon of his Attainder he died without Heir, yet this Writ of Error cannot be in the King without Office, for by the Common Law ſuch Hereditam. as a Writ of Error ſhall not be forfeited, nor can eſcheat, and therefore this Caſe is out of the Reaſon of the Book in 19 *H.* 7. for there the Land eſcheated, and a Freehold cannot be in (*i*) ſuſpence. But the Court did not deliver any Opinion touching any of theſe Exceptions to the Writ of Error, but only that it was unanimouſly agreed, That by this Writ of Error the Record of the Recovery was removed into the King's Bench; for Judgment was given againſt the Queen upon the Subſtance of the Matter. And in this Caſe two Points were unanimouſly reſolved by Sir *Chriſtopher Wray*, Chief Juſtice, and Sir *Tho. Gawdy* Knt. and the whole Court of King's Bench.

(*i*) Poſtea, 10. b.

Firſt, That this Writ of (*k*) Error was not given to the King by any of the Words of the ſaid Act of 28 *H.* 8. for three Cauſes, Firſt, Becauſe in this Caſe, the Terre-Tenant is in by Title, and the Entry of the Perſon attaint is not congeable; and therefore this Right of Action, if he had any, was not given to the King by any of the ſaid Words. So if the ſaid *Henry Norreis* the Father had Right of *Formedon* in the *Deſcender*, after

(*k*) 2 Roll. Rep. 374. 7 Co. 13. a. 1 Leon. 271, 272. Moor 125, 323. Lit. Rep. 100. Cro. El. 389. Owen 21.

Diſcontinuance made by his Father; or if *Henry* the Father had been diſſeiſed, and the Diſſeiſor had died ſeiſed before the ſaid Act, ſuch (*a*) Right of Action was not given to the King by any of the ſaid Words; but if the Act had been made after the Diſſeiſin, and before the Deſcent, ſuch Right had been given to the King by the ſaid Act: For the Juſtices ſaid, That ſuch Right, for which the Party had no Remedy but by Action only to recover the Land, is a Thing which conſiſts only in (*b*) Privity, and which cannot eſcheat, nor be forfeited by the Common Law, (*c*) 5 *R.* 2. *Entre congeable* 38. 32 *H.* 6. 27. 2 *H.* 4. 8. 7 *H.* 4. 6. & 17. 7 *H.* 5. 9. 21 *E.* 3. 47. *a.* 27 *Aſſ.* 32. 49 *E.* 3. 13. 49 *Aſſ.* 4. *F. N. B.* 144. *Stamford* 188. So that by the (*d*) general Words of an Act of Attainder all (*e*) Rights, &c. and Hereditaments, &c. (altho' in Truth the Party attainted had a Right, which alſo is an Hereditament) ſhall not be given to the King; for it would be very vexatious and inconvenient, that Eſtates of Purchaſors and others, after many Deſcents and long Poſſeſſion, ſhould be impeached at the King's Suit, by ſuch general Words, againſt the Reaſon and Rule of the Common Law, where all the Words may by reaſonable Intendment be well ſatisfied, *ſcil.* ſuch Rights, &c. which may lawfully eſcheat, or be forfeited. And it was obſerved by the Juſtices, That by no Act of Attainder that ever hath been made, Actions were given, but (*f*) Rights of Entries, &c. Alſo the Statutes of 27 *H.* 8. & 31 *H.* 8. (*g*) of Monaſteries, and the Statute of 1 *E.* 6. of Chauntries, give to the King all Rights, Entries, &c. which give not Actions to the King. And therefore it was agreed by the Court, That a (*h*) Right of Action after Diſcontinuance, Deſcent, &c. where the Entry was not lawful, was not given to the King by the general Words of any of the ſaid Acts. And ſo, it was ſaid, have the ſaid Statutes always been expounded. The ſame Conſtruction hath been made upon the Statute of 33 *H.* 8. *cap.* 28. by which it is enacted, *That the King's Majeſty, his Heirs and Succeſſors, ſhall have as much Benefit and Advantage by ſuch Attainders of Treaſon, as well of Uſes, Rights, Entries, Conditions, as Poſſeſſions, Reverſions, Remainders, and all other Things, as if it had been done and declared by Parliament.* That a (*i*) Right which conſiſts only in Action, where the Entry is tolled, is not given to the King by that Act.

It was alſo agreed by them, That before this Act of (*k*) 33 *H.* 8. by the general Words of any Act of Attainder of all Hereditaments, a Condition was not given to the King; and therefore by the ſame Act, by expreſs Words, Conditions are given to the King, and yet without Queſtion a (*l*) Condition is an Hereditam. Alſo altho' an Uſe were an Hereditam. (for there ſhall be a (*m*) *poſſeſſio fratris* of it) yet by the general Words of all Hereditaments, an (*n*) Uſe was not given to the K. by any Act of Attaind. but neither the Condition

(*a*) Hob 242, 341.
(*b*) Co Lit 368 2 Rol Rep 329. 507.
(*c*) 1 Rol. 816. Palm. 353.
(*d*) 3 Keb. 244. Styl. 81.
(*e*) 2 Rol. Rep. 314. Poſtea 11 a. Hob. 242, 243 10 Co. 48. a. Cro. Car. 428, 429. Rep. Q. A. 84.
(*f*) Hob. 341.
(*g*) 31 H. 8. c. 13.
(*h*) Cro. Car. 428.
(*i*) 3 Inſt. 19 Palm. 356, 439 1 Jones 76 2 Rol. Rep 319, 324, 325, 420, 561. Hob. 241. 10 Co. 48. a.
(*k*) 1 Jones 77. Poſtea 11. a.
(*l*) Palm. 439 3 Inſt. 19.
(*m*) 1 Co. 121. b
(*n*) Palm. 439. 3 Inſt. 19.

dition, nor the Uſe, were Things forfeitable by the Com. Law; and therefore by the general Words of all Hereditaments, they were not given to the K. by any Act of Attaind. Hardr. 488, 490. Stamf. 188.

Note a Diverſity between *Inheritances* and *Chattels*; for as it hath been ſaid, a Right of Action concerning Inheritances is not (*a*) forfeited by Attaind. but Obligations, Statutes, Recogniſances, &c. and other ſuch Things in Action are forfeited to the K. by Attainder or Outlawry. And it was agreed by the whole Court, that if *Lionel* had made a Feoffment in Fee, without Warranty, that had been a Diſcontinuance for a Moiety, for by the Feoffment the Jointure was ſevered. And note, that in this Caſe at Bar, Conditions and Uſes are given by expreſs Words, for the Makers of the Act knew, that they would not be given by the general Word of Hereditaments. (*a*) Cro. Jac. 513. Hob. 214. 2 Rol. 807. Godb. 315, 316. Palm. 353, Stamf. Cor. 188. a.

The ſecond Reſolution was, That in this Caſe, *Henry Norreis* had not any Right in the Moiety of the ſaid Manor, for altho' the Recovery were erroneous for want of an Original (for it was agreed it was not void, but voidable by Error) yet notwithſtand. as long as the Recovery ſtood in its Force, he in Remainder had not any Right to the Remainder in reſpect of the intended Recompence, but till the Recovery be reverſed by Writ of Error, the Remainder is barred for one Moiety, and he in Remainder hath not any Right in it. And therefore, if Tenant (*b*) in Tail ſuffer a common Recovery erroneouſly, and afterwards diſſeiſes the Recoveror, and dies, his Iſſue ſhall not be remitted, for as long as the Recovery remains in its Force, the Eſtate-Tail is barred, *quod fuit conceſſum per totam Curiam*. And it was ſaid by one of the Defendant's Counſel, That neither (*c*) Action without Right, nor Right without Action, with a Deſcent, &c. ſhall make a Remitter; the firſt is apparent, and reſolved by the Court in the Caſe at Bar. As to the ſecond it was ſaid, That a Man ſhall never be (*d*) remitted, but where if the Right and Poſſeſſ. were in ſeveral Perſons, he who had the Right might have an Action to recover the Poſſeſſion. And that appears by (*e*) *Littleton* 147. for he ſaith, That one of the principal Cauſes for which the Eſtate in Tail ſhall be remitted is, becauſe there is no Perſon againſt whom he can bring his Writ of *Formedon*, &c. and for this Cauſe the Law adjudges him in his Remitter, in ſuch Plight as if he had lawfully recovered the ſame Land againſt another, 5 *H.* 7. 38. *a.* (*f*) A Man ſhall not be remitted to an Advowſon appendant (altho' he hath Right to it before he hath recontinued the Manor to which, &c. becauſe before he hath recovered the Manor he hath no Action to recover the Advowſ. So if a Man purchaſe an Advowſ. in Fee, and ſuffers an Uſurp. and 6 Months to paſs, now he hath Right, but forasm. as he hath no Remedy for it, he ſhall never be remit. to it, altho' the Advowſ. be caſt upon him, either by Deſcent, or any other Act in Law, & *ſic de ſimilibus*. And it was reſolv d by the Court, That inaſm. as in the princip. Caſe *Hen.* had no Right, (*b*) Co. Inſt. 349. b. 10 Co. 38. a. (*c*) Co. Lit. 349. b. (*d*) 6 Co. 58. b. Co. Lit. 349. a. b. (*e*) Co Lit. Sect. 661. Co. Inſt. 349. a. b. (*f*) 2 Rol. Rep. 417. Co Lit. 307. a. 333. b.

(a) 2 Roll Rep. 374. 1 Leon. 271, 272. Mo. 125, 323. Lit. Rep. 100. Cro. Eliz. 389. Owen 21. 7 Co. 13. a.

a fortiori this Writ of (a) Error being a bare Action, which conſiſts more in Privity than an Action which is accompanied with a Right, is not given to the King by the general Words of the ſaid Act. It is adjudged in *Paſch.* 3 *E.* 3. (47) 74. that whereas all the Poſſeſſions of the (b) Templers were by Act of Parliament, *Anno* 17 *E.* 2. given and tranſmitted to the Hoſpitallers, to hold them in the ſame Manner as the Templers held them, yet they had not by the ſaid general Words a Rectory which was appropriate to the Templers; for that was an Inheritance inſeparably in Privity annexed to them. So it is held in 35 *H.* 6. 56. that upon the ſaid Words of the ſaid Act, To hold them as the Templers held them, they ſhall not hold by (c) Frankalmoigne, becauſe that Tenure conſiſts only in Privity, and for that Cauſe without ſpecial Words, it ſhall not againſt the Rule and Reaſon of the Common Law be created. The ſame Law of a Writ of Error. And altho' *Anne Milles* was jointly ſeiſed with the ſaid *Lionel* for her Life, ſo that as well *Lionel* as the Vouchee might have abated the Writ, yet when the Vouchee, without Demand of any Lien, enters generally into the Warranty, and thereby admits the Writ good, and *Lionel* recovers in Value againſt the Vouchee, who enters according to the Eſtate of him who voucheth, with the Remainder over: For this Cauſe it was reſolved, That for one Moiety the Recovery ſhall be a Bar to the Eſtate-tail, and to the Remainder alſo, becauſe by the Recovery againſt *Lionel*, the Jointure was ſevered. And it was ſaid, That common Recoveries, as much as any benign Interpretation of the Law will permit, ought to be maintain'd, becauſe they are the common Aſſurances of the Land. But it was agreed, That for the other Moiety whereof *Anne Milles* was Tenant for Life, the Recovery was not any Bar either to the Eſtate-tail, which *Lionel* had expectant upon the Eſtate of *Anne Milles*, or to the Remainder of *Henry*, becauſe for this Moiety *Lionel* was not Tenant to the *Præcipe*; but the Recovery had its Operation againſt him by Eſtoppel and Concluſion, which ſhall not bind the Iſſue in Tail who claims *per formam doni*.

(b) Mo. 312, 322, 530, 531. Fitz. Grant 70.

(c) 7 Co. 13 a. Mo. 312, 322.

Co. Lit. 187.

Co. Lit. 186.

The third Cauſe was, Becauſe *Henry* at the Time of his Attainder was not intitled to have any Writ of Error. And as to that, it was agreed, That he, who has a Remainder expectant upon an Eſtate-tail, ſhall have a Writ of (d) Error upon a Judgment given againſt Tenant in Tail, altho' there were no ſuch Remainder at the Common Law; for when the Statute *de Donis conditionalibus* doth enable the Donor to limit a Remainder upon an Eſtate-tail, all Actions, which the Common Law gave to Privies in Eſtate, are by the ſame Act as Incidents *tacite* given alſo, according to the Rule of the Common Law; and therefore as thoſe in Reverſion or Remainder expectant upon an Eſtate

(d) 1 Roll. Rep 301. Bridgm. 71. Palm. 237, 345. Dy. 188. pl. 8.

Eſtate for Life, had a Writ of Error by the Common Law, upon a Judgment given againſt Tenant for Life, altho' they were not made Parties by Aid Prayer, Voucher, or Receipt: So, after the Statute *de Donis conditionalibus*, ſhall he have, who hath a Reverſion or Remainder expectant upon an Eſtate-tail. 2. It was agreed by them, That in none of the ſaid Caſes, he in Reverſion or Remainder, who was not Party to the firſt Record by Voucher, &c. ſhall have any Writ of (*a*) Error by the Common Law, 'till after the particular Eſtate determined, for then he in Reverſion or Remainder ought to have the Land in Poſſeſſion, and take the Profits; but if he in Reverſion or Remainder be made a (*b*) Party to the Record by Aid Prayer, Receipt, or Voucher, then he ſhall have a Writ of Error preſently, during the Life of the Tenant for Life, in reſpect that he was made Party to the Record. *Vide* 4 *Aſſ.* 7. 17 *Aſſ.* 24. 18 *E.* 3. 25. 20 (30) *E.* 3. *Error* 2. 32 *E.* 3. *Error* 73. 43 *Aſſ.* 41. 8 *H.* 4. 4. 21 *H.* 6. 29. 22 *E.* 4. 31. *F. N. B.* 21. *c.* 99. *e.* And by the ſaid Differences you may reconcile all the ſaid Books, and many other, betwixt which, to ſome who obſerve not the ſaid Diſtinctions, ſeems to be Contrariety; but when an erroneous Judgment was given againſt Tenant for Life, by that his Reverſion or Remainder was deveſted, ſo that he could not grant or transfer it by any Means to another. And it was doubted he could not puniſh any Waſte committed after the Recovery, and divers other Miſchiefs, and yet he had no Remedy to reverſe it during the Life of the Tenant for Life. 45 *E.* 3. 21. *b.* 8 *H.* 6. 13. *b.* *F. N. B.* 60. *b.* *for Waſte.* For Remedy of which Miſchiefs, the Statute of (*c*) 9 *R.* 2. *cap.* 3. was made, by which it is provided, That if Tenant for Life, Tenant in Dower, Tenant by the Curteſy, or Tenant in Tail after Poſſibility of Iſſue extinct, loſe in a *Præcipe*, &c. that he in Reverſion, his Heirs or Succeſſors, ſhall have an (*d*) Attaint or a Writ of Error, as well in the Life of ſuch Tenants, as after their Deaths, and that the Tenant for Life, if the Judgment be reverſed, ſhall be reſtored to his Poſſeſſion of the Tenements ſo loſt, with the Profits in the mean Time, &c. Provided always, That if the Party ſuing will alledge that the Tenant was of Covin and Aſſent with the Demandant, who recovered, that ſuch Tenements ſhould be loſt, that then, altho' ſuch Tenants be living, yet Reſtitution ſhall be made to the Party ſuing of the Poſſeſſion, with the mean Profits, &c. upon which Act two Points were reſolved by the Court.

(*a*) Dyer 188. pl. 1. Cr. El. 289. Cr. Jac. 333. F. N. B. 99. e. 21. m. c. 22 E. 4. 31. a. 2 E. 4. 27. b. Palm. 253.

(*b*) Roll. 748.

(*c*) 4 Inſt. 51. Dyer 2. pl. 5. 90. pl. 5. Bridgm. 71. Cr. Eliz. 289. F. N. B. 99. e. Owen 149. 2 Bulſt. 15. 10 Co. 44. b. Palm. 251, 253.

(*d*) F. N. B. 108. a. Poſt. fol. 61. a. Reg. 122.

Firſt, That although the Statute ſpeaks only of Reverſions, yet Remainders are alſo taken to be within the Purview thereof.

(a) 1 Leon. 272. 10 Co. 45. b.

Secondly, That a Reverſion or Remainder *(a)* expectant upon an Eſtate-tail is out of the Words, and alſo out of the Meaning of the ſaid Act. For in as much as the

(b) 1 Jones 423.

Makers of the Act, by *(b)* ſpecial Words, have provided Remedy for thoſe in Reverſion expectant upon Eſtates for Life, or in Dower, or by the Curteſy, or in Tail after Poſſibility of Iſſue extinct, by this preciſe Enumeration of thoſe four particular Eſtates for Life *(Vide* 33 *H.* 6. 22. the like

(c) Cr. Car. 535.

Point in Caſe of Receipt) their Meaning appears to *(c)* exclude Reverſions and Remainders expectant upon Eſtates-tail, and they had good Reaſon for it; for an Eſtate-tail is an Eſtate of Inheritance, and therefore it was not reaſonable to give him in Reverſion or Remainder expectant on ſuch

(d) Poſt. fol. 61. a. 10 Co. 44. b.

Eſtate, a *(d)* Writ of Error during the Continuance of ſuch Eſtate, which by Poſſibility may continue for ever. Note Reader, upon the Proviſo of the ſaid Act, That if Tenant for Life ſuffers a Recovery in a *Præcipe* by Covin and Aſſent, if he in Reverſion or Remainder reverſes the Recovery, he ſhall be reſtored to the Poſſeſſion and mean Profits: *Unde colligo*, that the Parliament did adjudge ſuch

(e) 1 Co. 15. b. 2 Co. 74. a. 2 Leon. 60, 63, 66. 4 Leon 124, 126, 128, 131. Co. Lit. 356. a. 262. a. Br. entre congeable 49. Br. forfeiture de terre 29. 1 Roll's 853. 10 Co. 44. a. Moor 271. 1 And. 227.

Recovery by Covin and Aſſent *(e)* a Forfeiture. For otherwiſe it would be hard to reſtore him not only to the Poſſeſſion, but alſo to the mean Profits; and with that agree the Books in 5 *Aſſ.* 3. 14 *E.* 3. *Receipt* 135. 22 *Aſſ.* 31. 9 *H.* 5. 14. Now foraſmuch as it appears in the Caſe at Bar, that *Lionel* ſurvived *Henry*, who was in Remainder, it was reſolved, That *Henry* had but a Poſſibility to have a Writ of Error, that is to ſay, If *Lionel* had died without Iſſue in the Life of the ſaid *Henry*, and becauſe *Lionel* ſurvived him, that Poſſibility was deſtroyed. Alſo no Word of the ſaid Act doth extend to give a Poſſibility to the King. Secondly, Admitting in this Caſe the Writ of Error had been given to the Queen, yet it was reſolved, That by the general Grant of the ſaid Manor of *Merleſton*, and of all her Intereſt, Claim, and Demand in it, altho' it were made *de gratia ſpeciali, & ex certa ſcientia, & mero*

(f) 7 Co. 13 a. Poſt. 11. a. 1 Jones 370. Godb. 378.

motu; that the Writ of *(f)* Error did not paſs, becauſe if the King could grant it, it muſt be by his Prerogative, for no common Perſon can do it; and therefore it ought to be granted by expreſs and preciſe Words. And it was

(g) 1 Leon. 271. Hob. 243 Cromer's Caſe. 8 Reg. Eliz.

ſaid, it was adjudged in *(g) Cromer*'s Caſe, 8 *Eliz.* That where by the Attainder of a Diſſeiſee, a Right to certain Land eſcheated, and was forfeited to the Queen, and after the Death of the Diſſeiſee, the Queen, by her Letters Patents *de gratia ſpeciali, ex certa ſcientia, & mero motu*, granted all the Lands, Tenements, Rights and Hereditaments which ſhe had by the Attainder of the Diſſeiſee, that in that Caſe ſuch a bare Right ſhould not paſs by the ſaid general Words of the King; but if it could be granted at all, it ought

to

to have been granted with a ſpecial Recital by expreſs and ſpecial Words; which Caſe was affirmed to be good Law by the whole Court. And therewith agrees 33 *H.* 8. *Br.* *(a)* *Choſe in Action* 14. If an Abbot before the Diſſolution was diſſeiſed, and the King after the Diſſolution granteth over the Land by general Words, this Right ſhall not paſs. And Sir *Chriſto. Wray* ſaid, That he had conferred with the L. *Anderſon*, Chief Juſtice of the Common Pleas, and Sir *Roger Manwood*, Chief Baron of the Exchequer, and divers other Juſtices, and they were unanimouſly of their Opinion. And afterwards, foraſmuch as it appeared to the Court, That the ſaid common Recovery was erroneous for want of an Original; for that Cauſe a ſpecial Judgment was entred, that is to ſay, becauſe upon the Matter, no Writ of Error in this Caſe was given to the Q. *Ideo Domina Regina nihil capiat per breve.*

(a) 1 Leon. 271.

Note Reader, for the ſaid Point of com. Recovery there was a Caſe in the Common Pleas, *Trin.* 27 *Eliz. Rot.* 276. between (*b*) *Owen* and *Morgan*, and the Caſe was ſuch; *George Owen* brought a *Scire facias* againſt *Edw. Morgan*, to execute a Remainder of certain Land limited to him by Fine, and ſhewed, That *Rice Owen* was ſeiſed of the ſaid Land in Fee, and levied a Fine thereof to *Rich. Owen* and *Tho. Monington*, and to the Heirs of *Richard*, who granted and rendred it to the ſaid *Rice* and *Letice* his Wife, (who was not Party to the Writ or Conuſance) and to the Heirs of the Body of the ſaid *Rice*; and *Letice* died, and afterward *Rice* died without Iſſue, wherefore he prayed to have Execution. The Defendant pleaded in Bar a common Recovery had againſt the ſaid *Rice* as Tenant, with Voucher over of the common Vouchee, which Recovery was to the Uſe of the Defendant and his Heirs, and that *Rice* ſurvived *Letice:* The Plaintiff replied and ſaid, That the ſaid *Letice* was alive at the Time of the ſaid Recovery, upon which the Defendant did demur in Law. And it was adjudged for the Plaintiff. And in that Caſe two Points were reſolved.

Owen and Morgan's Caſe. Trin. 27 Reg. Eliz.

(*b*) 2 Rol. 395. Moor 210. 1 oſtea 6 b. 1 And. 162. Gould. 26. 1 Jones 324. 10 Co. 46. a. Cr. Car. 321. 4 Leon 26, 93, 222.

1. Altho' *Letice* was not (*c*) Party, either to the Writ or to the Conuſance, and altho' it appeared in the ſame Record that ſhe was a Stranger, and not Party; yet the Grant and Rend. by Fine to her was not *(d)* void, but voidable by Error.

(*c*) Co. Lit. 353. a. 373.

(*d*) Kelw. 19. b.

2. That this Recov. againſt the Husband only, ſhould not bind the Remaind. for between Husb. and Wife there are no Moieties, and the Husb. hath not Power to ſever the Jointure, nor to diſpoſe of any Part of the Land; and he during the Wife's Life is not ſeiſed by Force of the Tail, and by no Act that he can do, can he execute it for any Part; ſo that the *Præcipe* being brought againſt him alone, the Recompence cannot for any Part enure to the Eſtate-tail, or to the Remainder, for to the whole Eſtate it cannot enure, becauſe the Wife had a joint Eſtate with him in Poſſeſſion at the Time

Cr. Car. 321. 1 Sidorf. 83. Polt. 6. Co. Lit. 26. Wing. Max. 767.

of

of the Recov. who was not Party to it, and for a Moiety it cannot be good, for there are no Moieties between Husb. and Wife, and the Eſtate of him in Remaind. doth depend upon the entire Eſtate made to the Husband and Wife, and not upon any Eſtate made to the Husb. alone, or which reſts in the Diſpoſal of the Husb. for any Part; and therefore the Recompence recovered only by the Husb. in this Caſe, cannot enure to him who hath the Remaind. which depends upon a joint and undivided Eſtate made to the Husb. and Wife, and the Jointenancy between the Husb. and Wife cannot be ſevered by the Judgment againſt the Husb. and altho' the Husb. hath the ſole Eſtate of Inheritance, yet becauſe by no Poſſibility it can be executed, nor the Jointure ſevered during the Wife's Life, for this Cauſe it is as much as if the Husb. had had a Remainder in Tail expectant upon an Eſtate for Life; in which Caſe a common Recovery had againſt him ſhall not bind, becauſe he was not Tenant to the *Præcipe*, nor ſeiſed by Force of the Tail, but the Recov. as to the Eſtate-tail of the Husb. took its Effect by Eſtoppel and (*a*) Concluſion: And therewith agrees (*b*) 12 *E.* 14. *b.* that againſt a common Recovery againſt the Anceſtor in Tail, the Iſſue may ſay, That the Anceſtor was not Tenant *tempore brevis.*

Co. Lit. 187.

(*a*) Poſtea 51. a.
(*b*) Fitz. fauxefier de Recovery 19. Br. Fauxefier de Recovery 30. Br. Brief 374. Moor 256, 634.

Alſo if Tenant in Tail do diſcontinue the Tail, and take back a new Eſtate-tail to himſelf, and afterwards a Writ of Right is brought againſt him, and he vouch the com. Vouchee, and Judgment be given accordingly; in this Caſe it is adjudged, *ſcil.* in (*c*) 12 *E.* 4. 19. (*d*) 14 *E.* 4. 1. *a.* that the Iſſue in Tail ſhall not be barred for the firſt Intail, becauſe his Father was not at the Time of the Recov. ſeiſed by Force of that Intail, in lieu whereof Recompence can enure: So (*e*) if Land be given to the Husb. and Wife, and the Heirs of their two Bodies begotten, and the Husb. alone ſuffers a com. Recovery, it ſhall not bind the Eſtate-tail *cauſa qua ſupra.* And altho' the Husband, who ſuffered the com. Recovery in the principal Caſe of *Morgan* and *Owen*, ſurvived the Wife, it is not material, for the Law will adjudge upon the Caſe, as it was at the Time of the Recovery.

(*c*) Br. Remitter 35.
(*d*) Br. Tail 36. Cr. El. 670, 828.
(*e*) 1 And. 44. 2 Roll. 395. 3 Lev. 108.

CUPPLEDIKE's *Caſe.*

Note Reader, for this Point of a common Recovery, there was another Caſe reſolved, Paſch. 44 Eliz. *in the Court of Wards, between* Thomas Cuppledike *the Queen's Ward, Plaintiff, and* Edward Cuppledike, *Defendant; And the Caſe was ſuch,* &c.

Cuppledike's Caſe, P. 44 Reg. Eliz. 2 Roll. 395. Co. Lit. 372. b.

Francis Cuppledike and *Elizabeth* his Wife were ſeiſed of the Manor of *Harrington* in the County of *Lincoln*, to them and to the Heirs Males of the Body of *Francis*, the Remainder to *Thomas Cuppledike*, Father of

Thomas Cuppledike, now Ward to the Queen, in Tail, with a Remainder over in Tail, the Reverſion to *Francis* and his Heirs: *Francis* levied a Fine, *Oct. Mich.* 36 & 37 *Eliz. to Tho. Seaton*, and *Rob. Becket*, and to the Heirs of *Thomas*, to the Uſe of them and their Heirs: *Hill.* 37 *Eliz. Curtiſe* and *Dudley*, by Writ of Entry in the Poſt, recovered againſt *Seaton* and *Becket* the ſaid Manor, who vouched *Francis* only, who (*a*) vouched over the common Vouchee, and Judgment and Seiſin had accordingly, the ſaid *Eliz.* then being alive, which Recovery was to the Uſe of *Francis* for Life, and after to the Uſe of *Eliz.* for Life, and after to the Uſe of *Francis* and his Heirs: *Francis* by his Will in Writing deviſed the ſaid Manor to the ſaid *Edward Cuppledike*, and died without Iſſue Male: And now the Queſtion was, whether by this common Recovery, the Remainder in Tail were barred or not, foraſmuch as the Wife, who had an Eſtate with *Francis*, was not vouched. And after Argument before the two Chief Juſtices, *Popham* and *Anderſon*, *Pepper* Surveyor, and *Hesket* Attorney of the Court of Wards, it was reſolved, That this Recovery ſhould bind the Remaind. for here was a lawful (*b*) Tenant to the *Præcipe*; and altho' *Francis* who had the Eſtate-Tail be only vouched; and not *Eliz.* who had a joint Eſtate with him, yet *Francis* coming in as Vouchee, he comes in in Privity of the Eſtate-Tail, and not of any other Eſtate, and the Recoveror in Value gave Recompence to the Tail which *Francis* had, and to the Remainders over: So it was held, If *A.* (*c*) Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, *A.* makes a Feoffment in Fee, the Feoffee ſuffers a common Recovery in which *B.* is vouched, and he vouches the common Vouchee, in this Caſe *A.* is not bound, but *B.* and all the Remainders over are barred: For altho' by the Feoffment of *A.* all the Remainders were diſcontinued, and the Eſtates which *B. C.* and *D.* had, became converted to meer Rights; and altho' the Remainders can never be remitted before the Eſtate-Tail in Poſſeſſion be recontinued; yet in Caſe of a com. Recovery, which is the com. Aſſurance of the Land, he who comes in as Vouch. ſhall be in Judgm. of Law in in Privity of the Eſtate which he had, altho' the precedent Eſtate, upon which the Eſtate of the Vouchee depends, be deveſted or diſcontinued.

(*a*) Co. Lit. 372. b.

See 1 Salk. 568, 569.

(*b*) 6 Co. 32. a. 2 Rol. 295.

Hob. 25, 26. 1 Co. 122. b.

(*c*) Hob. 338. Hetl. 156. 2 Rol. Rep. 506. Raym. 29.

So in the Caſe at Bar, altho' the Eſtate of the Wife be not recontinued, yet the Husb. as Vouchee, ſhall be in Judgm. of the Law in of his Eſtate-Tail; and the Caſe is the ſtronger, foraſmuch as the Eſtate of the Wife was put to a Right, ſo that now the Husb. comes in as ſole Tenant in Tail, and cannot be jointly ſeized with his Wife, foraſmuch as ſhe is not Vouchee, and cannot be in of another Eſtate, becauſe once he had an Eſtate-Tail, and now comes in as Vouchee: But if the Husb. and

1 Salk 568.

Wife had had a joint Eſtate to them, and to the Heirs of their Bodies, with the Remainders over, and the Husband only had been vouched, there it may be doubted if the Eſtate-Tail ſhall be barred, becauſe the Wife had a joint Eſtate of Inheritance with him; but here the Inheritance was only to the Husband. And the Caſe which *Plow.* puts *arguendo*, in *Manxel's* Caſe, *fol.* 8 *b.* That if a (*a*) Gift be made to *J.* and to the Heirs Males of the Body of his Wife begotten, and he hath Iſſue a Son, and afterwards the wife dies, and he diſcontinues, and takes an Eſtate to him and to the Heirs Females of the Body of his ſecond Wife, and afterwards diſcontinues again, and taketh an Eſtate back to him, and to the Heirs Females of his Body, and afterwards diſcontinues again, againſt which laſt Diſcontinuee a common Recovery is had, in which the Tenant in Tail is vouched, and vouches over the common Vouchee, and afterwards dies, and his three Iſſues bring ſeveral *Formedons* in the Deſcender, they ſhall be all barred by the ſaid Recovery; for in Judgment of Law, when he generally enters into Warranty, he comes in of all his ſeveral Eſtates, which ſhall be all barred in reſpect of one and the (*b*) ſame Recompence, was agreed to be good Law by the two Chief Juſtices; but the Opinion of *Plowden* in the other Point, If Tenant for Life be, the Remainder or Reverſion over in Tail, that if a common Recovery be had againſt him in Remainder or Reverſion, it ſhall bar the Eſtate-Tail, was (*c*) denied by them all; for there is no Tenant to the *Præcipe*, but only by Admittance and Concluſion, which ſhall not bind the Iſſue in Tail. And this Caſe at the Bar is not to be likened to the ſaid Caſe of (*d*) *Owen* and *Morgan*, for in this Caſe thoſe, againſt whom the *Præcipe* is brought, are lawful Tenants to the *Præcipe*; and when the Husband, who hath the Eſtate-Tail only is vouched, he comes in as ſole Tenant in Tail, and all the Eſtate is in him, and nothing then remains in the Wife but a Right, and when he who hath the Eſtate-Tail is vouched, he cannot be in of another Eſtate, being Vouchee, as it appears before. *Vide* 8 *Eliz. Dyer* 252. *b.* (*e*) *Kniveton's* Caſe, which in Effect was, That Tenant for Life, and he in Remainder in Tail ſuffered a common Recovery, in which they both vouched the common Vouchee, it ſhall not bind the Tail, for he in Remainder in Tail is not Tenant to the *Præcipe*, but the Tenant for Life, and in Truth the Land is recovered againſt the Tenant for Life only, and the Recompence cannot veſt in him in Remainder only, foraſmuch as the Land is in Truth recovered againſt the Tenant for Life, and he in Remainder was never ſeized by Force of the Tail. And according to this it was adjudged in the Common Pleas, between (*f*) *Leach* and *Cole*, in *Replevin*, *M.* 41 & 42 *Eliz. Rot.* 1703.

(*a*) Herl. 156. Hob. 338.

(*b*) Herl. 156. Hob. 338.

(*c*) Cro. El 21. 670.

(*d*) Antea 5. a. 2 Roll. 395. Moor 210. 1 Anderſ. 162. Goldsb. 26. 1 Jones 324. 10 Co. 46. a. Cro. Car. 321. 4 Leon 26, 93. 222.

(*e*) 10 Co. 46. a. 2 Rol 395. Dy. 252. pl. 97, 98. Poſtea 60. b.

(*f*) 2 Rol. 395. Cro. Eliz. 670.

HEYDON's

HEYDON's *Caſe.*

Paſch. 26 Eliz. *But the Plea began* Paſch. 20 Eliz. Rot. 140. *in the Exchequer.*

(a) IN an Information upon an Intruſion in the Exchequer, againſt *Heydon*, for intruding into certain Lands, &c. in the County of *Devon*: Upon the general Iſſue, the Jurors gave a ſpecial Verdict to this Effect:

(a) Moor 128. C. Ent. 372. nu. 10. 1 Leon. 4, 333. 4 Leon. 117. Sav. 66. 9 Co. 105. a. 2 Inſt. 505.

Firſt, They found that Parcel of the Lands in the Information was ancient Copyholds of the Manor of *Ottery*, whereof the Warden and Canons regular of the late College of *Ottery* were ſeized in the Right of the ſaid College; and that the Warden and Canons of the ſaid College, 22 *H.* 7. at a Court of the ſaid Manor, granted the ſame Parcel by Copy, to *Ware* the Father and *Ware* the Son, for their Lives, at the Will of the Lord, according to the Cuſtom of the ſaid Manor; and that the reſt of the Land in the Information was occupied by *S.* and *G.* at the Will of the Warden and Canons of the ſaid College for the Time being, in the Time of *H.* 8. And further, That the ſaid *S.* and *G.* ſo poſſeſſed, and the ſaid *Ware* and *Ware* ſo ſeiſed as aforeſaid, the ſaid Warden and Canons by their Deed indented, *dat.* 12 *Jan. Anno* 30 *H.* 8. did leaſe the ſame to *Heydon* the Defendant, for 80 Years, rendring certain Rents ſeverally for ſeveral Parcels; and found that the ſaid ſeveral Rents in *Heydon*'s Leaſe reſerved, were the ancient and accuſtomed Rents of the ſeveral Parcels of the Lands, and found, that after the ſaid Leaſe they did ſurrender their College, and all the Poſſeſſion thereof, to King *H.* 8. And further found the Stat. of (b) 31 *H.* 8. and the Branch of it, *ſcil.* by which it is enacted, *That if any Abbot, &c. or other Relig. and Eccleſ. Houſe or Place,*

(b) 31 H. 8. c. 13.

Place, within one Year next before the first Day of this present Parliament, hath made, or hereafter shall make any Lease or Grant for Life, or for Term of Years, of any Manors, Messuages, Lands, &c. and in the which any Estate or Interest for Life, Year or Years, at the Time of the making of such Grant or Lease, then had his Being or Continuance, or hereafter shall have his Being or Continuance, and not determined at the making of such Lease, &c. Or if the usual and old Rents and Farms accustomed to be yielden and reserved by the Space of twenty Years next before the first Day of this present Parliament, is not, or be not, or hereafter shall not be thereupon reserved or yielded, &c. that all and every such Lease, &c. shall be utterly void. And further found, that the particular Estates aforesaid were determined, and before the Intrusion *Heydon*'s Lease began; and that *Heydon* entred, &c. And the great Doubt which was often debated at the Bar and Bench on this Verdict, was, Whether the Copyhold Estate of *Ware* and *Ware* for their Lives, at the Will of the Lords, according to the Custom of the said Manor, should in Judgment of Law be called an Estate and Interest for Lives, within the said general Words and Meaning of the said Act. And after all the Barons openly argued in Court in the same Term, *scil. Pasch. 26 Eliz.* And it was unanimously resolved by Sir *Roger Manwood*, Chief Baron, and the other Barons of the Exchequer, That the said Lease made to *Heydon* of the said Parcels, whereof *Ware* and *Ware* were seised for Life by Copy of Court-Roll, was void; for it was agreed by them, That the said Copyhold Estate was an Estate for Life, within the Words and Meaning of the said Act. And it was resolved by them, That for the sure and true (*a*) Interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the Com. Law,) four Things are to be discerned and considered.

(*a*) Moor 128. Sav. 66. 6 Co. 37. b. Cro. Car. 45. 83.

(*b*) Poph. 74.

(*b*) 1. What was the Common Law before the making of the Act.

(*c*) 2 Rol. Rep. 99.

(*c*) 2. What was the Mischief and Defect for which the Common Law did not provide.

3. What Remedy the Parliament hath resolved and appointed to cure the Disease of the Commonwealth.

(*d*) Hard. 27. 2 Rol Rep. 314. Cro. Car. 83, 533. Co. Lit. 381. b. 1 Co. 123. a. 11 Co. 73 b. 2 Sidert. 41. 2 Bulst. 187. Hob. 97. 1 Rol. Rep. 162, 166. Cro. Argument 40.

And 4. The true Reason of the Remedy; and then the Office of all the Judges is always to make such (*d*) Construction as shall suppress the Mischief, and advance the Remedy, and to suppress subtile Inventions and Evasions for Continuance of the Mischief, and *pro privato commodo*, and to add Force and Life to the Cure and Remedy, according to the true Intent of the Makers of the Act, *pro bono publico*. And it was said, that in this Case the Common Law was, That Religious and Ecclesiastical Persons

ſons might have made Leaſes for as many Years as they pleaſed, the Miſchief was, that when they perceived their Houſes would be diſſolved, they made long and unreaſonable Leaſes: Now the Stat. of 31 *H.* 8. doth provide the Remedy, and principally for ſuch Religious and Eccleſiaſtical Houſes which ſhould be diſſolved after the Act (as the ſaid College in our Caſe was) that all Leaſes of any Land, whereof any Eſtate or Intereſt for Life or Years was then in Being, ſhould be void; and their Reaſon was, That it was not neceſſary for them to make a new Leaſe ſo long as a former had Continuance; and therefore the Intent of the Act was to avoid doubling of Eſtates, and to have but one ſingle Eſtate in Being at a Time: For doubling of Eſtates implies in it ſelf Deceit, and private Reſpect, to prevent the Intention of the Parliament. And if the Copyhold Eſtate for two Lives, and the Leaſe for 80 Years ſhall ſtand together, here will be doubling of Eſtates *ſimul & ſemel*, which will be againſt the true Meaning of Parliament.

Co. Lit. 44. a. 31 H. 8. c. 13. 3 Bulſt. 152. Moor 60. 1 Leon. 333.

And in this Caſe it was debated at large, in what Caſes the general Words of Acts of Parliam. ſhall extend to Copyhold or Cuſtomary Eſtates, and in what not; and therefore this Rule was taken and agreed by the whole Court, That when an Act of Parliament doth (*a*) alter the Service, Tenure, Intereſt of the Land, or other Thing in prejudice of the Lord, or of the Cuſtom of the Manor, or in Prejudice of the Tenant, there the general Words of ſuch Act of Parliam. ſhall not extend to Copyholds: But when an Act of Parliam. is generally made for the (*b*) good of the Weal publick, and no Prejudice can accrue by Reaſon of Alteration of any Intereſt, Service, Tenure, or Cuſtom of the Manor, there many Times Copyhold and cuſtomary Eſtates are within the general Purview of ſuch Acts. And upon theſe Grounds the Chief Baron put many Caſes, where he held, That the Statute of (*c*) *Weſt.* 2. *De donis conditionalibus* did not extend to Copyholds; for if the Statute alters the Eſtate of the Land, it will be alſo an Alteration of the Tenure, which would be prejudicial to the Lord; for of Neceſſity the Donee in Tail of Land ought to (*d*) hold of his Donor, and do him ſuch Services (without ſpecial Reſervation) as his Donor doth to his Lord.

(*a*) Cro. Car. 41, 43, 44. Moor 128. Godb. 369. O. Benl. 163. 3 Bulſt. 152. Hard. 433. Cawly 106

(*b*) Moor 128. Cro Car. 42, 43. O Benl. 163. 1 Rol. Rep. 48.

(*c*) Moor 188, 189. Sav. 67. Cro. Eliz. 391, 307, 149. 1 Leon. 175. Poph. 34, 128. 2 Sand. 422. Hard. 433. 1 Rol. 838. Lit. Sect. 76. 9 Co. 105. a. Co. Lit. 60. a. b. 4 Co 22. a.

(*d*) Cr. Car. 43, 44.

2. *Littleton* ſaith, *Lib.* 1. *cap.* 9. That although ſome Tenants by Copy of Court-Roll have an Eſtate of Inheritance, yet they have it but at the (*e*) Will of the Lord, according to the Courſe of the Common Law. For it is ſaid, That if the Lord put them out, they have no other Remedy but to ſue to their Lord by Petition, and ſo the Intent of the Stat. *de Donis Conditional.* was not to extend (in Prejud. of Lords) to ſuch baſe Eſtates, which as the Law was then taken, was but at the

(*e*) Lit. Sect. 77. 2 Co. 17. a. 6 Co 37. b. Co. Lit. 60. b. Cro. Car. 45 4 Co. 21. a. Hetl. 6. 9 Co. 105. a.

the Will of the Lord. And the Statute ſaith, *Quod voluntas donatoris in carta doni ſui manifeſte expreſſ. de cætero obſervetur*: So that, which ſhall be entailed, ought to be ſuch an Hereditament, which is given, or at leaſt might be given by Deed or Charter in Tail.

3. Foraſmuch as great Part of the Land within the Realm, is in Grant by Copy, it will be a Thing inconvenient, and occaſion great Suit and Contention, that Copyholds ſhould be (*a*) entailed, and yet neither Fine nor common (*b*) Recovery bar them; ſo as he who hath ſuch Eſtate can't (without the Aſſent of the Lord by committing a Forfeiture, and taking a new Eſtate) of himſelf diſpoſe of it, either for Payment of his Debts, or Advancement of his Wife, or his younger Children; wherefore he conceived that the Statute de *Donis Conditionalibus* did not extend to Copyholds, *quod fuit conceſſum per totam Curiam.* But it was ſaid that the Stat. without ſpecial Cuſtom, doth not extend to Copyholds; but if the (*c*) Cuſtom of the Manor doth warrant ſuch Eſtates, and a Remainder hath been limited over and enjoyed, or Plaints in the Nature of a *Formedon* in the Deſcender brought in the Court of the Manor, and Land ſo entailed by Copy recovered thereby, then the Cuſtom co-operating with the Statute makes it an Eſtate-Tail; ſo that neither the Statute without the Cuſtom, nor the Cuſtom without the Statute, can create an Eſtate-Tail,

(*a*) Moor 189. Sav. 67. Cro El. 149, 307, 391. 1 Leon. 175. Poph. 34. 128 2 Sand. 422. Hard. 433. a. 9 Co 105. a. 1 Rol. 838. Co Lit. 60. a. b. 1 Rol Rep. 48. 4 Co 22. a. Moor 188. (*b*) Cro Car. 43, 45. Godb. 368. O Benl. 165. Poph. 35. Cro. Eliz. 391. Carr. 238. Cro Car. 45. (*c*) 1 Rol 838. Co. Lit. 60. b.

(*d*) Lit. Sect. 77. Co. Lit. 60 b

And to this Purpoſe is (*d*) *Littleton*, *Lib.* 1. *cap.* 8. for he ſaith, That if a Man ſeiſed of a Manor, within which Manor there hath been a Cuſtom which hath been uſed Time out of Memory, that certain Tenants within the ſame Manor have uſed to have Lands and Tenements, to hold to them and their Heirs in Fee-ſimple, or Fee-tail, or for Term of Life, &c. at the Will of the Lord, according to the Cuſtom of the ſame Manor; and a little after, That *Formedon* in Deſcender lies of ſuch Tenements, which Writ, as it was ſaid, was not at the Common Law.

To which it was anſwered by the Chief Baron, That if the Statute (without Cuſtom) ſhall not extend to Copyholds, without Queſtion the Cuſtom of the Manor cannot make it extend to them: For before the Statute, all Eſtates of (*e*) Inheritance, as *Littleton* ſaith, *Lib.* 1. *cap.* 2. were Fee-ſimple, and after the Statute, no Cuſtom can begin, becauſe the Statute being made in 13 *E.* 1. is made within Time of Memory; *Ergo*, the Eſtate-Tail cannot be created by Cuſtom; and therefore *Littleton* is to be intended (inaſmuch as he grounds his Opinion upon the Cuſtom, That Copyholds may be granted in Fee-ſimple, or Fee-tail) of a Fee-ſimple conditional at the Common Law: For *Littleton* well knew, That no Cuſtom could

Rep. Q. A. 98 160. Skin. 269, 297. (*e*) Co. Lit. 19. a. Cro. Car. 45 Poph. 34. 1 Co. 103 b. 6 Co. 40. a. (*f*) Co. Lit. 45. 114. b. 115. a.

could commence after the Stat. of *Weſt.* 2. as appears in his own Book, *lib.* 2. *c.* 10. and 34 *H.* 6. 36. And where he ſaith, that *Formedon* in (*a*) Deſcender lies, he alſo ſaith that it lies at the Com. Law. And it appears in our Books, that in ſpecial Caſes a *Formedon* in the Deſcend. lay at the Com. Law, before the Stat. of *Weſtm.* 2. which ſee 4 *E.* 2. *Formedon* 50. (*b*) 10 *E.* 2. *Formedon* 55. 21 *E.* 3. 47. *Plowd. Com.* 246. *b.* &c.

(*a*) Co. Lit 60. b. 280. b 19. a. Lit. Sect. 481. F. N. B. 217. D. Poph. 34.
(*b*) O Benl. 165. 1 Rol. Rep. 4.

And where it was further objected, That the Statute of *Weſt.* 2. cannot without Cuſtom make an Eſtate-Tail of Copyholds, becauſe without Cuſtom, ſuch Eſtate cannot be granted by Copy, for it was ſaid, If Eſtates had been always granted to one and his Heirs by Copy, that a Grant to one and the Heirs of his Body, is another Eſtate not warranted by the Cuſtom: So that in ſuch Manors where ſuch Eſtates of Inheritance have been allowed by Cuſtom, the Statute doth extend to them, and makes them, which before were Fee conditional, now by the Statute Eſtates in Tail, and that the Statute cannot, as hath been agreed before, alter the Cuſtom, or create a new Eſtate, not warranted by the Cuſtom.

Co. Lit. 60. b.

To that it was anſwered by the Chief Baron, That where the Cuſtom of the Manor is to grant Lands by Copy *in feodo ſimplici* (as the uſual Pleading is) without Queſtion, by the ſame Cuſtom Lands may be (*c*) granted to one, and the Heirs of his Body, or upon any other Limitation or Condition; for theſe are Eſtates in Fee-ſimple, *& eo potius*, that they are not ſo large and ample as the general and abſolute Fee-ſimple is, and therefore the Generality of the Cuſtom doth include them, but not *e converſo*, *ad quod non fuit reſponſum*. But it was agreed by the whole Court, that another Act made at the ſame Parliament, *cap.* 18. which gave the *Elegit* (*d*) doth not extend to Copyholds, for that would be prejudicial to the Lord, and againſt the Cuſtom of the Manor, that a Stranger ſhould have Intereſt in the Land held of him by Copy, where by the Cuſtom it cannot be transferred to any without a Surrender made to him, and by the Lord allowed and admitted. But it was agreed by them, That other Statutes made at the ſame Parl. which are beneficial for the Copyholder, and not prejud. to the Lord, may be by a favourable Interp. extended to Copyholds, as *cap.* 3. which gives the Wife a *Cui* (*e*) *in vita*, and Receit, and *cap.* 4. which gives the particular Tenant a *Quod ei deforceat*; and therewith agrees 10 *E.* 4. 2. *b.*

(*c*) Godb. 20. Poph. 35. 1 Leon. 56. Cro. Eliz. 323, 373. 4 Leon. 64. 1 Rol. 511. 4 Co 23. a. Co. Lit. 52. b.
(*d*) 1 Rol. 888. Cro. Car. 44. Hard, 433. O. Benl. 163. Sav. 67.
(*e*) Cro. Car. 43. 2 Inſt. 343. Sav. 67. 4 Co. 23. a.

And in this Caſe it was alſo reſolved, That altho' it was not found (*g*) that the ſaid Rents were the uſual Rents, accuſtomed to be reſerved within twenty Years before the Parliament, yet inaſmuch as they have found, that the accuſtomable Rent was reſerved, and a Cuſtom goes at all Times before, for this Cauſe it ſhall be intended, that it was the accuſtomable Rent within the twenty Years, and ſo it ſhould be intended, if the contrary be not ſhewed of the other Side. And Judgment was entred for the Queen.

(*g*) 4 Co 65. b. Hob. 55. 262. 1 Leon 333. 2 Rol. 700. 9 Co 74 a. Cr. Jac. 413. Poſt. 42. b.

DOWTIE's *Caſe.*

Trin. 26 Eliz.

Adjudg'd in the Exchequer.

(a) 1 Leon. 21. 3 Leon. 187. Hob. 171. 9 Co. 95. b. 96. a. 7 Co. 20. a.

(a) IN an Information upon an Intruſion in the Exchequer againſt *John Dowtie*, who intruded into five Meſſuages or Cottages in the Pariſh of St. *Sepulchres* in *London*; upon Not guilty pleaded, the Jurors gave a ſpecial Verdict to this Effect; That *John* late Viſcount *Liſle* (who was afterwards Duke of *Northumberland*) was ſeiſed of the ſaid Meſſuages in Fee, and ſo ſeiſed, by his Deed indented and inrolled within ſix Months, &c. in Conſideration of Money, did bargain and ſell to the Lady *Johan Lea* all his Tenements and Cottages ſituate in the Pariſh of St. *Andrew* in *Holborn*, in the Occupation and Tenure of *William Gardiner*; To have and to hold to the ſaid Lady *Johan* for her Life, the Remainder to *Katharine* her Daughter, and to her Heirs: And further found, That by Force of the ſaid Bargain and Sale, the ſaid Lady *Johan* did enter into the ſaid five Meſſuages or Cottages, and was thereof ſeiſed, *prout lex poſtulat*, and took to Husband Sir *Thomas Challoner*: And afterwards the ſaid Sir *Tho.* and Dame *Johan* 18 *Aprilis* 5 *E.* 6. demiſed the ſaid five Meſſuages to one *Pahen* for 21 Years, by Force of which the ſaid *Pahen* entred, and took the Profits. And afterwards, *ſcil.* the firſt Year of Queen *Mary*, the ſaid Duke was attainted of High Treaſon, &c. And afterwards Queen *Mary* died; and afterwards, *ſcil.* 20 *Julii* 18 *Eliz.* the Queen, by her Letters Patents under the Great Seal, granted the ſaid 5 Meſſuages to *John Farneham* and his Heirs, with a Proviſo in the ſame Letters Patents, That if the ſaid Tenements, Rents, and

and Profits were (not) from the Queen that now is, or from her Sister Queen *Mary*, or her Brother *E.* 6. or Father *H.* 8. concealed, subtracted, or unjustly detained, and so remain'd till the first Inquisition or Certificate, that then the Letters Patents shall be void; and the Defendant claimed in under the said Letters Patents: And further found, that the said five Messuages or Cottages lay in the Parish of St. *Sepulch.* and that at the Time of the said Bargain and Sale they were in the Occupation of the said *William Gardiner*. And if upon the whole Matter the Queen granted by the said Letters Patents the Tenements aforesaid to the said *Farnèham*, then they found the Defendant not guilty; and if the Queen did not grant the said 5 Messuages or Cottages by the said Letters Patents, then they found the Defendant guilty. And upon many Arguments at the Bar and Bench, Judgment was given for the Queen by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer. And in this Case three Points were unanimously resolved.

First, That nothing passed by the said Bargain and Sale, for notwithstanding the later (*a*) Certainty, *scil.* in the Tenure of *William Gardiner*, was true; yet because the first Certainty, *scil.* in the Parish of St. *Andrew* in *Holbourn*, was false, for this Cause the Bargain and Sale was utterly void. But otherwise had it been, (*b*) if a true Certainty had been in the first place; as if he had bargained and sold, (the Tenements, &c. in the Tenure of *William Gardiner* in the Parish of St. *Andrew, Holbourn*) there it was agreed that the Tenements shall pass well enough, notwithstanding the Addition of the Falsity, for (*c*) *utile per inutile non vitiatur:* But in the Case at Bar, it was agreed, that the Bargain and Sale was void, and that the said Lady *Lea* was a Disseisoress: But the great Doubt of the Case was, when the Disseisee is attainted of High Treason, if the Land it self should be presently in the actual Possess. of the K. by Force of the Stat. of (*d*) 33 *H.* 8. *c.* 20. or if the King until seisure, &c. should have only a mere Right: And the Doubt arose upon the Purview and Words of the Act; for by the same Act, all Rights, &c. are given to the K. And further it is enacted, that the King shall be in actual Possession without any Office found thereof, &c. saving to all Strangers all such Rights, &c. Possession, &c. as if the Act had not been made: And it was declar'd, that there were three Causes for making the said Branch of the Act of (*e*) 33 *H.* 8. First, That by the Com. Law for Lands in Fee-simple, and by the Stat. of 26 *H.* 8. *c.* 13. for Lands in Tail, the actual Possession was not in the K. by Attaind. before Office, for the Words of the Act are, *That every Offender shall lose and forfeit to the King all such Lands*, &c. by which Words the Lands shall not be in the actual Possession of the K. until Office; and with that agrees

(*a*) 3 Leon. 21. Hob. 171. Cro. Jac 22, 473. 3 Keb. 413, 414. 2 Co. 23. a. b. 33. a. b. 4 Go. 35. a. b. 50. a. Plowd. 191. b.

(*b*) 1 Leon. 21. 3 Leon. 235. Hob. 171. Con. Moor 881. Cr. Eliz. 39, 299. Cart. 154.

(*c*) Co. Lit. 3. a. 227. a. 2 Syd. 63, 70. 2 Roll. Rep. 422. Cart. 154, 155. 2 Sand. 369. Hob. 171.

(*d*) 3 Inst. 19.

(*e*) 1 Leon. 21. 3 Leon. 187. 4 Leon. 169, 172. 2 Rol. Rep. 318, 321, 324, 375, 421, 503. 3 Inst. 19. Godb. 301, 304, 305, 312, 315 Stamf. Cor. 398. a. Stamf. Præ. 53. a. b. 1 Co. 42. a. 48. a. 3 Co 2. b. 5 Co. 52. b. 7 Co. 12. b. 15. b. 422 b. Kelw. 17. b. Co. Lit. 372. b. 392. b. Poph. 19. Dyer 45 pl. 56. 344 a. 1 Anders. 293. Palm. 439. 1 Jones 70, 71, 75, 76, 77, 80. Cro. Car. 428, 461. Moor 307, 311, 312, 320, 323, 327, 329. Hob. 231, 335, 341, 344, 345.

(*a*) Dyer 325. pl. 38. 1 Co. 42. a. 2 Rol. Rep. 497. Cro. Car. 173. 2 Ander. 34. (*b*) 2 Rol. Rep. 321. Cro. Car. 173. Godb 312. Br. N. C. 103. 4 Co. 58. a. 3 Jones 71. (*c*) 3 Leon. 187. 9 Co 95. b. 96. a. 9 H. 7 2. b. Br. Office Antea Eſcheater 34. Br Pre. 91. Br. Eſcheat 25, 33. Plowd. 229. b. Moor 293. Nichols's Caſe. See Caſes in Law, &c. 361. Et poſt. 61. b.

agrees the Judgment in *Plow. Comm.* 486. 15 *Eliz.* (*a*) *Dyer* 325. Sir *Will. Say*'s Caſe, 28 *H.* 8. *Br.* (*b*) *Office* 17. 4 *E.* 4. 22. 29 *H.* 8. *Br. Charter de Pardon* 52. But when Tenant in Fee-ſimple is attainted of High Treaſon, and dies, there the Fee and Freehold, without any Office found, is caſt upon the King for Neceſſity, that the Freehold ſhall not be in Suſpence, and therewith agrees (*c*) 9 *H.* 7. 1. And it was alſo agreed in the ſame Caſe, that altho' the Land, which ſuch Perſon ſo attainted had in Fee-ſimple, be not held of the K. but of a Subject, yet preſently, by the Death of the Perſon attainted, and without any Office, the Fee and Freehold ſhall be preſently veſted in the King, and ſhall not eſcheat to the Lord of whom the Land is held till Office found (as *obiter* it is ſaid in *Nichol*'s Caſe) for the Eſcheat of all Lands for H. Treaſon belongs to the K. only, and to no other, as well of Lands held of others as of himſelf, as it is declared and adjudged in Parliament *Anno* 25 *E.* 3. *cap.* 2. ſo that the Land can neither eſcheat to the Lord, for an Eſcheat in ſuch Caſe is not by the Law given to him, nor deſcend to the Heir, becauſe the Blood is corrupted; and in Abeyance it cannot be; *Ergo* it ſhall veſt in the King: But it was agreed, if Tenant in Tail be attainted of High Treaſon, and dies, the Land ſhall not veſt in the K. before Office, but it ſhall deſcend to the (*d*) Iſſue in Tail till Office found, for the Act of 26 *H.* 8. gives the Forfeiture of it: But neither the Act nor the Attainder makes any Corruption of Blood as to the Deſcent of Land in Tail: For *Popham*, Attorney General, ſaid, That ſo it was agreed in the Caſe of the L. (*e*) *Lumley*, that where there was Grandfather, Father, and Son, and the Grandfather was Tenant in Tail, and the Father was attainted of H. Treaſon, and died in the Life of the Grandfather, and afterwards the Grandfather died, that the Land ſhould deſcend to the Son notwithſtanding the Attainder of the Father; which Caſe was affirmed for good Law by the whole Court; for the Father had not the Land, neither in Poſſeſſion nor in Uſe, in which two Caſes the Act of 26 *H.* 8. gave the Forfeiture only, and his Attainder is not any Corruption of Blood for the Land in Tail: But now the Stat. of 33 *H.* 8. in all the ſaid Caſes doth tranſfer, and veſt the actual Poſſeſſion in the K. preſently, by the Attainder as well in the Life, as after the Death of the Perſon attainted, and as well of Lands in Tail as of Land in Fee-ſimple, which was one of the Cauſes of making the ſaid Act. Another Cauſe was, that the Act of (*f*) 26 *H.* 8. extended only to Lands, &c. which the Perſon attainted had in Poſſeſſion or in Uſe, and did not extend to (*g*) Rights, Conditions &c. And laſtly, the Act of 26 *H.* 8. extended only to Attainders of Treaſon by Confeſſion, Verdict or

(*d*) 2 Rol. Rep. 325, 340, 375, 421. 1 Jones 71. Lucas 361. (*e*) Godb. 305, 316. 2 Rol. Rep 321, 325, 418, 428, 496, 504, 508. 2 Anderſ. 34. 8 Co. 166. a. Hob. 343. Cr. El. 28. 1 Jones 81. 1 Syd. 199. (*f*) 26 H. 8. c. 13. 1 Leon. 21. Le S. Lumley's Caſe. 1 Rol Rep. 162. 2 Rol. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508. 1 Jones 70, 71, 75, 76, 77, 80. Cro. Car. 428. 1 Co. 22. a. 7 Co. 33. a. 34. b. 9 Co. 140. a. 12 Co. 6. 3 Inſt. 19. 4 Inſt. 42. 2 Ander. 34. Palm. 439. Herl. 151, 157. Godb. 300, 303, 307, 308, 309, 311, 315, 321, 322, 323, 324. 346, 347, 348.

Co. Lit. 372. b. 392. b. Plowd. 552. b. Hob 334, 339, 340, 341, 343, 344. Dyer 332. pl. 27. 343 pl. 56. Co. Ent. 422. a. (*g*) Hob. 341. 3 Inſt. 19.

Proceſs

Proceſs of Utlagary, and therefore Attainders by Parliament, or when the Party ſtood mute, (in which Caſe ſuch Judgment ſhall be given as if he had confeſs'd the Treaſon, or that he had been found guilty by Verdict, &c.) were out of that Act. But the Act of 33 *H.* 8. extends to all Manner of Attainders of Treaſon.

Secondly, It was reſolv'd, That altho' it be provided by the Statute of 33 *H.* 8. that the King ſhall be in actual Poſſeſſion without any Office (*a*) found thereof, &c. yet when the Diſſeiſee is attainted of High Treaſon, preſently by his Attainder, the King had only a Right, for the ſaid Words ſhall have ſuch Conſtruction, *ſcil.* That the King ſhall be in actual Poſſeſſ. without Office, *ideſt*, as if an Office had been found thereof. And at Common Law, if the Diſſeiſee had been attainted of Treaſon, and the Seiſin and Diſſeiſin had been found by Office, the Poſſeſſion ſhould not be in the King till a (*b*) *Scire facias* ſued, &c. or a Seiſure at the leaſt; becauſe, when a Stranger is ſeiſed at the Time of the Office found, the King ſhall not be in Poſſeſſion till Seiſure; and therewith agrees *Stamf. Prærog.* 54. (*c*) 17 *E.* 3. 10. 29 *Aſſ.* 30. 21 *E.* 4. 1. Alſo all Poſſeſſions, &c. are (*d*) ſaved by the ſaid Act, as if the ſaid Act had not been made; and therefore the Poſſeſſion of the Diſſeiſor is ſaved thereby in the ſame Manner as if a ſpecial Office had been found by the Common Law.

(*a*) 1 Leon. 21. 4 Co. 58. a. 9 Co. 59. b 2 Rol. Rep. 420. Cro. Car. 429

(*b*) 9 Co. 95. b. 96 a. 1 Leon 21. 2 Rol. Rep. 497. Hob. 243, 244. (*c*) 9 Co. 96. a. (*d*) Godb. 324. Skinner 614.

Thirdly, It was reſolv'd, That the Queen having but a (*e*) Right, that it ſhould not paſs by the Grant of the ſaid five Meſſuages, as in the like Caſe it was adjudg'd in the Marquis of *Wincheſter*'s Caſe in the King's Bench. And *Popham* the Attorney General, *Coke* and others, were of Counſel with the Queen. And *Robert Atkinſon*, *Henry Beaumont*, and others, with the Defendant. And afterwards (*f*) a ſpecial Office was found, ſetting forth the Seiſin and Diſſeiſin aforeſaid; and thereupon a *Scire facias* was brought againſt him who was found Tenant; and thereupon Judgment was given, and the Tenements ſeiſed into the Queen's Hands: And afterwards the Queen, by new Letters Patents, granted the ſaid Tenements to one *Saxie* and his Heirs, who had purchaſed the Eſtate of the ſaid *Katharine*, and had newly built the ſaid Tenements, and was expelled by the ſaid *Dowtie*, by Colour of the ſaid Letters Patents made to *Farneham*. And after this Judgment and the ſaid Letters Patents, *Saxie* peaceably enjoy'd the Tenements.

(*e*) 1 Leon. 21. 2 Rol. Rep. 324, 339. Cro. Car. 428, 429. Antea 4. b. Hob. 243.

(*f*) 2 Rol. Rep. 497.

Sir WILL. HARBERT's *Caſe.*

Mich. 26 & 27 Eliz.

In the Exchequer.

Popham 154. Moor 169.

MAtthew Harbert, 4 *E.* 6. acknowledged a Recognizance of 3000 *l.* to the King in the Court of Augmentation; and after his Death a *Scire facias* iſſued 18 *Eliz.* out of the Court of Exchequer againſt the Executors *teſtamenti & ultimæ voluntatis præd' Matthæi & hæred' terrarum & tenementorum quæ ſua fuerunt, &c.* And upon that the Sheriff returned, that the ſaid *Matthew Harbert* had no Executors within his Bailiwick; and further *quod Scire fecit Will. Harbert militi, filio & hæredi dicti Matthæi Harbert per I. D. & D. R. quod ſit coram Baronibus, &c.* And at the Day of Return, the ſaid Sir *William Harbert* made Default, upon which the Barons gave Judgment, *Quod dicta domina Regina recuperet verſus dict' Will. Harbert dicta tria millia lib. & quod ipſe idem Willielmus de eiſdem* 3000 l. *erga dictam dominam reginam nunc oneretur, & ei inde ſatisfaciat.* And thereupon the ſaid Sir *William Harbert* brought a Writ of Error, and aſſign'd three Errors: 1. In the *Scire facias.* 2. In the Return. The 3d in the Judgment. And this Term the Errors were mov'd by *Plowden* being of Counſel with Sir *William Harbert* before Sir *Tho. Bromley* Lord Chancellor of *England*, and the Baron of *Burleigh* Lord Treaſurer of *England*, and the two Chief Juſtices, *Wray* and *Anderſon*, in the Exchequer Chamber. And in this Caſe divers Points were reſolved.

(*a*) Cro. Jac. 450. 2 Inſt. 394. 2 Bulſt. 63, 99. 2 Rol. Rep. 295. Co. Lit. 290. b. Cart. 20. 5 Co. 88. a. (*b*) 2 Inſt. 394. 2 Bulſtr. 63, 99.

Firſt, That, (*a*) at the Common Law, where a common Perſon ſues a Recognizance or a Judgment for Debt or Damages, he ſhall not have the Body of the Defendant, nor his Lands (unleſs in ſpecial Caſe) in Execution: But at the (*b*) Common Law he ſhall have Execution in ſuch Caſe only of his Goods and Chattels, and of Corn, and the like preſent Profit which ſhall grow upon the Land, to which Purpoſe the Com. Law gave him two ſeveral Writs:

1. A *(a) Levari facias*, by which Writ the Sheriff was commanded, *Quod de terris & catallis ipsius A. &c. Levari faciat, &c.* and another Writ called *Fieri facias*, which was only *de bonis & catallis*, both which Writs ought to be sued *(b)* within the Year after the Judgment, or the Recognizance acknowledged; and if he had not the one or the other within the Year, the Plaintiff or the Conusee was put *(c)* to his Action of Debt. And now by the Stat. of *West. 2. cap.* 45. a *(d) Scire facias* is given; and by the Stat. of *West. 2. cap. (e)* 18. *cum debitum fuerit recuperatum, &c.* the *Elegit* is given of the Moiety of the Land, which was the first Act which subjected Land to the Execution of a Judgment, or of a Recognizance, which is in the Nature of a Judgment; and therewith agreeth *F.N.B.* 265. *g.* And by the Stat. of *(f)* 13 *E.* 1. *de Mercatoribus. (g)* 27 *E.* 3. *cap.* 9. *&* *(h)* 23 *H.* 8. *cap.* 6. it is provided, That in case of a Stat. Merchant, or Stat. Staple all the Lands, which the Conusor had at the Day of the Conusance, shall be extended in whose Hands soever they after come, either by Feoffment or other Manner. But in Debt against the Heir upon an Obligation made by his Ancestor, the Pl. by the *(i)* Com. Law should have all the Land which descended to him in Execution against him; and yet he should not have Execution of any Part of the Land against the Father himself; but the Reason thereof was, because the Com. Law gave an Action of Debt against the Heir; and in such Case, if he should not have Execution of the Land against the Heir, he could have no Fruit of his Action; for the Goods and Chattels of the Debtor do belong to his Executors or Administrators; and so for Necessity in such Case only Land was liable to Execution of the Debt of a common Person at the Com. Law: Also the Body of the Defendant was not liable to Execution for Debt at the Com. Law; *vide* 13 *H.* 4. 1. But the Com. Law, which is the Preserver of the common Peace of the Land, did abhor all Force as a capital Enemy to it; and therefore, against those who committed any Force, the Com. Law did subject their Bodies to Imprisonment, which is the highest Execution, by which he loses his Liberty till he agree with the Party, and pay a Fine to the King; and therefore it is a Rule in Law, That in all Actions *Quare vi & armis*, *Capias* lies, and where *Capias* lies in Process, there, after Judgment, *(k) Capias ad Satisfaciendum* lies, and there the K. shall have *Capias pro fine*; with that agreeth 8 *H.* 6. 9. 35 *H.* 6. 6. 22 *E.* 4. 22. 40 *E.* 3. 25. 49 *E.* 3. 2. and many other Books. Then by the Statutes of *(l) Marlebridge*, *cap.* 23. and *(m) West.* 2. *cap.* 11. *Capias* was given in Account, for at the Common Law Process in Account was Distress infinite; and afterwards by the Statute of *(n)* 25 *E.* 3. *cap.* 17. the like Process was given in Debt as in Account; for before that Statute the Body of the Defendant was not liable to Execution

(a) F.N.B. 265, 266. Co. Lit. 291. a
2 Bulstr. 63. Rep. Q. A.
(b) Co. Lit. 291. a.
2 Bulstr. 63.
(c) 5 Co. 88. a. Cart. 124.
F. N. B. 265. g.
(d) Co. Lit. 291. a.
2 Bulstr. 63.
F. N. B. 265. g.
2 Inst. 469.
(e) 2 Roll. Rep. 295. 2 Inst 394, 395. 2 Bulst. 63.
F. N. B 265. g.
Cro. Jac. 450.
7 Co. 38. a.
Co. Lit. 289. b.
(f) 7 Co. 38. a.
(g) 7 Co. 37. b.
(h) 7 Co. 37. b.
(i) Plowd. 441. a.
Cro. Jac. 450.
Wing Max. 556.
6 Co. 47.
Dyer 81. contr.
(k) Co. Lit. 290. b.
(l) F. N. B. 117. h. 2 Bulst. 63. Co. Lit. 89. a.
2 Inst. 143.
(m) Co. Lit. 89. a.
2 Inst. 380.
2 Bulstr. 63.
(n) 2 Rol. Rep. 295. 2 Bulstr. 5 Co. 88. a.

for Debt, for the Reason and Cause aforesaid; but it was resolv'd, that *(a)* at the Com. Law, the Body, the Land, and the Goods of the Accountant, or the King's Debtor, were liable to the King's Execution, for *(b) Thesaurus Regis est pacis vinculum, & bellorum nervi.* And therefore the Law gave the King full Remedy for it; and therewith agrees 5 *Eliz. Dyer (c)* 224. and *Plow. Com. (d)* 321. Sir *Will. Cavendish*'s Case, who was Treasurer of the Chamber, 24 *E.* 3. *(e) Walter de Chirton*'s Case, and infinite Precedents in the Exchequer, to prove, that for the King's Debt, the Body and the Land of the Debtor shall be liable by the Common Law before the Statute of (*f*) 33 *H.* 8. *cap.* 39.

Secondly, *(g)* It was resolv'd, That in Case of a common Person, the Heir of the Conusor, or he, against whom the Judgment is given in Debt, shall be only charged, and shall not have Contribution against the Terre-tenant in some Cases, and in some Cases he shall have Contribution, and shall not be only charged. For if a Man be seised of three Acres of Land, and acknowledges a Recognizance or a Statute, &c. and enfeoffs *A.* of one Acre, *B.* of another, and the third descends to his Heir; in this Case, if Execution be sued *(h)* only against the Heir, he shall not have Contribution, for he comes to the Land without Consideration, and the Heir sits in the *(i)* Seat of his Ancestor. *Et hæres est alter ipse, & filius est pars patris,* and as it is said, *Mortuus est pater, & quasi non est mortuus, quia reliquit similem sibi*; and therefore the Heir shall not have Contribution against any Purchasor, altho' *in rei Veritate* the Purchasor came to the Land without any valuable Consideration, for the Consideration of the Purchase is not material in such Case. And so it was of late resolv'd in the Case of *Thomas (k) Gawdie* late Marshal of the King's Bench, that the Heir may be solely charged, and shall not have Contribution against Purchasors. For altho' in Case of Recognizance, Statute, or Judgment, the Heir is charged as Terre-tenant, and not as Heir, as appears by 27 *H.* 6. *Execution (l)* 135. *(m)* 15 *E.* 3. *(n) Age* 95. and the Reason is, because by Recognizance or Statute the Heir is not bound, but the Conusor *concedit quod dict' pecuniæ summa de terris, &c. levetur*; yet he shall not have Contribution against a Purchasor, against the Opinion of *Finchden* 48 *E.* 3. 5. *b.* But yet in some Cases the Heir shall have Contribution, and shall not be only charged; and therefore if a Man be seised of two Acres, one of the Nature of Borough *English*, and binds himself in a Stat. or Recognizance: Or if Judgm. in Debt be given against him, and he dies, having Issue two Daughters, who make Partition; in this Case, if one only be charged, she shall have Contribution; for as one Purchas. shall have Contrib. against another, and against the Heir of the Conusee also, so one Heir shall have

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(*a*) Cro. Jac. 430. Palm. 167. Plowd. 440. a.
(*b*) Co Lit 90 b 106. a. 131. b. Godb. 293. 2 Rol Rep 295 Lit. Rep. 100.
(*e*) Plowd. 321. a. Godb. 292, 297. 2 Rol. Rep. 300, 302. Hard 25, 26. 8 Co. 171. a 11 Co. 93. a.
(*d*) Plowd. 440. 7 Co. 21 b. 29. b.
(*e*) 2 Rol. Rep. 296, 297, 303, 304. 11 Co. 92. b. 12 Co 3. 2 Inst. 19. Lane 48, 108. Godb 293, 299. 1 Ventr. 132. Dyer 160. pl. 41, 225. pl. 32, 33, 295 pl. 10.
(*f*) 7 Co. 19. a. b. 21. a. b. Lane 51. Hard. 27, 304, 368, 442. 4 Inst. 118, 119. O. Ben. 65, 66, 67.
(*g*) Moor 169. Plowd. 72. b Cro. Car. 295. 2 Bulstr. 15.
(*h*) 2 Inst. 396.
(*i*) Hetl. 127.
(*k*) Moor 169.
(*l*) Cro. Car. 296.
(*m*) 3 Bulst. 317, 320, 321. Poph. 154. 1 Cro. 313
(*n*) 3 Bulst. 320. 3 Bulstr. 306, 318.
F. N. B. 162. b. c.

Contribution againſt another Heir, for they are *in æquali jure*, *Trin.* (*a*) 24 *E.* 3. 28. *a.* in a *Scire facias* to have Execution of Damages recovered in a Writ of Intruſion of a Ward, the Sheriff returned, that the Defendant, againſt whom the Judgment was given, is dead; whereupon a Writ iſſued to warn the Tenants of the Land, who were Tenants to the Defendant at the Time of the Judgment, who were returned warned; one of the Tenants ſaid, that his Couſin (who was another than him, againſt whom the Judgment was had) died ſeiſed, whoſe Heir he is, and is (*b*) within Age, and prayed his Age, and that the Parol might demur againſt all the other Terre-tenants till he was of Age. *Unde colligo*, That if there be Grandfather, Father, and two Daughters, and Judgment is given for Debt or Damages againſt the Grandfather, and he dies, and the Father dies, one of the Daughters within Age, and the other of full Age, Partition is made, the elder Siſter ſhall not be charged alone, but ſhall take Advantage of the Infancy of her Siſter, for both Heirs are in the ſame Degree. The ſame Law if a Man be bound in a (*c*) Recognizance, and hath Iſſue two Daughters, and dies, they make Partition; one alone ſhall not be charged, but ſhall have Contribution; and if one be within Age, the other ſhall take Benefit thereof; for, in ſuch Caſe, altho' ſhe be charged as Terre-tenant, yet ſhe ſhall have her Age. (*d*) See for this 11 *E.* 3. *Age* 4. 15 *E.* 3. *Age* 95. 29 *Aſſ.* 37. 29 *E.* 3. 50. 47 *Aſſ.* 4. in Sir *Rich. Walgrave*'s (*e*) Caſe. So if a Man be bound in a Stat. or Recognizance, and after his Death ſome of his Land deſcends to the Heir on the Part of the Father, and ſome to the Heir on the Part of the Mother; in this Caſe one alone ſhall not be charged; and if he be, he ſhall have Contribution againſt the other. So and with this agrees 11 *H.* 7. 22. *Br.* (*f*) *in Dower*, If the Tenant vouch the Heir in three ſeveral Wards, every one ſhall be equally charged, as it is agreed in 48 *E.* 3. 5. *a. b.* But it was reſolv'd in the Caſe at Bar, that altho' the Heir in this Caſe was charged as Terre-tenant, yet for the Cauſes aforeſaid, the Writ which iſſued againſt him only, and not againſt the other Tenants, was good enough by the Rule of the Court. Note, Reader, if two, four, (*g*) or more Men, be ſeverally ſeiſed of Land, and they all join in a Recognizance, in this Caſe the Conuſee cannot extend the Land of any of the Conuſors only, but all ought equally to be charged; for altho' the Land of the Conuſor himſelf may be only charged, when divers Men have purchaſed any of the Land ſubject to the Recognizance, becauſe the Purchaſor is in other Degree (*h*) than the Conuſor himſelf, yet one of the Conuſors ſhall not be only charged, for he ſtands in equal Degree with the other Conuſors, and that appears by 29 *Aſſ.* 37. and 29 *E.* 3. 50. Sir *John Langford*'s Caſe; where the Caſe was, That four

(*a*) 1 Roll. 147. Fitz. Age 102.

(*b*) Cro. Car. 295.

(*c*) Co. Lit. 290. *a.*

(*d*) 1 Rol. Rep. 140. Co. Lit. fo 290. *a.*

(*e*) 2 Co. 25. *b.* 5 Co. 100. *a.* Dy. 239. pl. 39. Mo. 74. 1 Ander. 10 Co. Lit. 376. *b.* Hob. 25. 11 H. 7. 12. *b.* 11 E. 3. Det. 7. Br. Joinder in Action 119.

(*f*) 2 Co. 25. *b.* Br. Dow. 18. Strath. Dow. 18. Poſtea 14. *a.* Fitz. Vouch. 76. Br. Voucher 38.

(*g*) 2 Inſt. 396. 2 Bulſtr. 15.

(*h*) 1 Roll. 147. Br. Age 36. Br. Confeſſion 28. Br. Charge 27. B. Parol demur 16. Fitz. Age 73.

were

were bound in a Recognizance of Debt acknowledged in the Court of *Cheſter* to Sir *John Langford*, and afterwards one of the Conuſors died, his Heir within Age; Sir *John Langford* brought a *Scire facias* againſt the three Survivors to have Execution, who pleaded, that the Heir of the Conuſor, who was dead, was within Age, and in as much as during his Minority he cannot be charged, and the Survivors only ought not to be charged, they demanded Judgment, *&c.* And becauſe Sir *Joh. Langford* did not deny it, it was awarded that the Parol ſhould demur; upon which Sir *John Langford* brought a Writ of Error in the K.'s Bench, which Judgm. was there affirmed. Out of which Judgment I obſerve, 1. That amongſt the Conuſors themſelves there ſhall be an (*a*) equal Charge, and the Land of any of them ſhall not be only extended. 2. That the Heir of any of them ſhall not have greater Privilege in Law than the Conuſor himſelf; for it appears by this Judgment, that he ſhall be equally charged with the Conuſors themſelves, which agrees well with the ſaid Reſolut. that he ſhall not have Contrib. againſt a Purchaſor. The 3d Thing that I obſerve is, That the Heir is not charged only as (*b*) Terre-tenant, but in ſome Reſpect as Heir, for otherwiſe he ſhould not have his Age, as it was adjudged in that Caſe. It is ruled in (*c*) 17 *E.* 3. 43. *a.* that the (*d*) Heir of the Conuſor ſhall have *Audita querela* before Execut. ſued, as well as the Conuſor himſelf, and ſhall (*e*) have a *Superſedeas*; but ſo ſhall not have a (*f*) ſtrange Purchaſor till he be ouſted by Execution, and therewith agrees (*g*) 17 *Aſſ.* 24. & 18 *E.* 3. 25. And with the ſaid Judgment in 29 *Aſſ.* agrees 19 *E.* 3. (*h*) *Execut.* 81. that if Judgment be given againſt two Diſſeiſors in Aſſiſe for the Land and Damages, and one Diſſeiſor dies, the Execution ſhall not be awarded againſt the ſurviving Diſſeiſor, who was Party to the Wrong; but as well the Heir as the Diſſeiſor ſhall be equally charged: Now for as much as no Land was ſubject to Execution for the Debt of a common Perſon at Com. Law, but only by the ſaid Stat. It is worthy Conſideration what ſhould be the Reaſon of the ſaid Differences concerning Contribution, and by what Law the Purchaſor ſhould have greater Privilege than the Conuſor himſelf, or his Heir, and that one Heir only ſhould not be charged, but all the Heirs together, *& ſic de cæteris.* As to that, it is to be known, that the Judges and Sages of the Law have always expounded general Stat. according to the Rule of the Com. Law, which is built on the Perfection of Reaſon, and not according to any private and ſudden Conceit or Opinion: And becauſe in as much as the ſaid Stat. have ſubjected the Land to Execution for his Debt, the Judges and Sages of the Law conſidered the Rule and Reaſon of the Law in Caſe of the Heir of an Obligor; in which Caſe the Land was ſubject to Execution for Debt by the Common Law. And it appears to them, that if a Man bound

(*a*) 5 Co. 100. a. 2 Co. 25. b.

(*b*) 1 Rol. 140.
(*c*) Audita Querela 8.
(*d*) 1 Roll. 306. 2 Rol. Rep. 54. 2 Bulſtr. 17.
(*e*) F. N. B. 240. a.
(*f*) 1 Rol. 305. Cro Jac. 507. 2 Rol. Rep. 54. 2 Bulſtr. 17.
(*g*) 2 Bulſtr. 14, 16.
(*h*) 2 Rol. 87. Antea 12. a.

bound himself and his (*a*) Heirs in an Obligation, and died seized of Land as well on the Part of the Mother as on the Part of the Father, in that Case the Law required Equality; and neither the Heir on the Part of the Father, nor the Heir on the Part of the Mother should be only charged; and therewith agrees 11 *H.* 7. 12. *b.*

So in the Case in 48 *E.* 3. when the Heir is (*b*) vouched in the Ward of three several Heirs, every one shall be equally charged *pro rata*. So if two Men (*c*) alien Lands with (*d*) Warranty, the Lands of one only shall not be rendred in Value; neither if one dies, shall the Land, of the Survivor be only rendred in Value, but the Charge shall be equal on them. For a joint (*e*) lien, which binds the Land, shall not survive, or lie only on the Survivor, as in Case of a Joint Warranty, where two for them and their Heirs warrant Lands to another and his Heirs, the Survivor shall not be only vouched: And the Sheriff cannot deliver the Land of the one or the other at his Pleasure; for in (*e*) Executions, which concern the Realty, and charge the Lands, the Sheriff cannot do Execution on the Land of one only. And so if two (*f*) are bound to warrantry, and both die, both their Heirs ought to be vouched, and they shall be equally charged: But, against this, two Objections were made:

(*a*) 3 Bulstr. 318. 2 Co. 25. b. Co. Lit. 376. b. 386. b. Dy. 239. pl. 39. Mo. 74. 1 Ander. 10. Hob. 25. 11 E 3. Det 7. Ant. 13. a. Br. Joinder en Action 119.

(*b*) 2 Co. 25. b. Br. Dower 98. Statb. Dow. 18. Fitzh. Vouch. 76. Br. Vouch. 38.

(*c*) Mo. 20. d. 17 E. 3. 41. b. 2 Rol. 87. Fitz. Voucher 90.

(*d*) Co. Lit. 386. b. 19 H. 6. 55. a. 12 H. 7. 3. a. 17 E. 3. 8. b. 2 Brownl. 99.

(*e*) Cro. Jac. 507.

(*f*) 8 Co. 52. a.

1. That because each of them warrants the whole, that both their Lands, or the Lands of the one or the other may be put in execution: And so it is *obiter* said in (*g*) 16 *H.* 7. 13. *a.* But to that it was answer'd and resolv'd, that altho' each be bound to warrant the whole, yet *non sequitur*, that the Recompence in Value shall be made by one of them only; for if the Heir be vouched in the Ward of several Persons, one alone shall not be charged, but all equally, as is held in 48 *E.* 3. and yet the Ancestor did warrant the whole. And where two or more are bound in a (*h*) Recogn. or Stat. now is each of them bound in the whole, yet the Land of one only shall not be extended. But it was also objected, that the Case of a Recogn. or Stat. was not like the Case of Warranry: For by the Stat. or Recogn. the Land is presently bound in whose Hand soever it shall come; but so it is not in Case of a Warranty: To which it was answered and resolved, That for as much as by the said Book of 16 *H.* 7. and all other Books, it appears, That the Survivor and the Heir ought to be vouched together, and so of the Heirs of both: And *Littleton*, Chapter *Homage Ancestrel* saith, that the Land which the (*i*) Vouchee had at the Time of the Voucher shall be liable to render in Value; from thence it follows that the Charge shall be equal; and that is a stronger Case than the Case of the Statute or Recognizance, for the Warranty extends to render in Value Lands of Inheritance; but if (*k*) Husb. and Wife and the Heirs of the Wife be bound to War-

(*g*) Co. Lit. 386. b. 2 Bronl. 99. Br. Recover en value 63. Br. Voucher 165.

(*h*) 2 Rol. 87. 29 E. 3. 39. a. Fitzh. Erec. 256 29 Ass. 27. Br. Charge 27. Br. Joint-tenants 27. Br. Age 36. Br. Error 191. Br. Parol demur 16. Fitz. 73. Fitz Execution 100.

(*i*) Co. Lit. 102. a. Lit Sect. 145.

(*k*) 2 Rol. 87. Cart. 242. 3 Keb. 187.

Warranty, and the Wife dies, the Lands of the Husband may be alone put in Execution, becauſe there are no *(a)* Moieties between Husband and Wife; and thus are divers Opinions in our Books, ſome whereof being ill-reported are well reconciled. 17 *E.* 3. 41. *b.* 29 *E.* 3. 46. *a.* 12 *H.* 7. 3. *b.* 16 *H.* 7. 13. *a.* 22 *E.* 3. 1. *a. b.* 17 *E.* 3. 8. 30 *E.* 3. 40. 19 *H.* 6. 55. *a.* But in a perſonal Lien it is otherwiſe.-----As if two be bound in an *(b)* Obligation, there the Charge ſhall ſurvive: So it appears by theſe Caſes, that when Land ſhall be charged by any Lien, the Charge ought to be equal, and one alone ſhall not bear all the Burthen; and the Law in this Point is grounded on great Equity: But in all the Caſes at the Common Law, if the Party who ſhould be charged had aliened the Land *bona fide* before any Action brought, the Land in the Hands of the Purchaſor was not ſubject to any Charge or Execution; and this was the Reaſon why the Judges and Sages of the Law in Conſtruction of the ſaid Statutes, altho' the Lands of Purchaſors, after the Judgment, Recognizance or Statute, were ſubject to Execution, yet gave greater Privilege to them, than to the Conuſor himſelf or to his Heir.

(a) 1 Co. 102. b. 2 Co. 68. a. 3 Co. 5. a. b. 25. a. 30. b. 8 Co. 71. b. 72. a. Lit. Sect. 291. Co. Lit. 117. b.

(b) 2 Brownl. 99. Co. Lit. 376. b. 386. b. 2 Rol. 87.

Alſo the Statute of *Weſt.* 2. *cap.* 18. provides, *Quod vicecomes liberet ei medietatem terræ ſuæ*, which ought to be intended of all his Land; ſo the Statute of 13 *E.* 1. enacts, That all the Lands of the Conuſor ſhall be delivered to Merchants, *&c.* and that is another Reaſon why the *(c)* Land of one Terre-tenant only ſhall not be charged with the whole Debt, for as much as by the Statute all the Land is liable. And the Reaſon why the Conuſor himſelf, at the Will of the Conuſee, may be only charged, is becauſe he himſelf is the Perſon who was the Debtor, and who was bound; and therefore he is ſubject to Execution, and it is but reaſonable that he may be only charged; the ſame Law of his Heir for the Reaſons before rehearſed.

(c) 1 Rol. 311.

Note, Reader, when it is ſaid before and often in our Books, That if one Purchaſor be *(d)* only extended for the whole Debt, that he ſhall have Contribution; it is not thereby intended that the others ſhall give or allow to him any Thing by way of Contribution; but it ought to be intended that the Party, who is only extended for the whole, may by *Audita querela* or *Scire fac'*, as the Caſe requires, defeat the Execution, and thereby he ſhall be reſtored to all the mean Profits, and compel the Conuſee to ſue Execution of the whole Land; ſo in this Manner every one ſhall be Contributory, *hoc eſt*, the Land of every Ter-tenant ſhall be equally extended: And afterwards the Counſel of Sir *Will. Harbert* moved three Errors in the Record.

(d) Dyer 333. pl. 23, 24. 2 Init. 396. Mo. 524, 536. F. N. B. 103. b. Cro. Car. 443. 1 Rol. 311. 1 Jones 90. O. Bendl. 133. 2 Bulſtr. 17. 3 Bulſtr. 306. 23 E. 3. Execution 127.

The

The firſt was, That the Writ of *Scire facias* was *Scire facias hæred' terrarum & tenementorum, &c.* which was improper and againſt Law; for one is always called Heir to his Anceſtor, and not Heir to the Land, for Anceſtor and Heir are *relativa*, and it cannot be ſaid that one is *filius*, or *conſanguineus & hæres manerii de Dale*; but that *A.* was ſeized of the Manor of *Dale* in Fee, and died ſeized, after whoſe Death the Manor of *Dale* deſcended to *B.* as *conſanguineo & hæredi prædicti A.* (and ſhew how) and not *prædicti manerii.*

The ſecond Error was, admiting the Writ good, then for as much as the Writ requires *quod Scire fac' hæred' terrarum & tenementorum, &c.* the Return of the Sheriff, *quod Scire fecit Willielmo Harbert Militi, fil' & hæred' prædict' Matthæi*, is not good, becauſe he doth not return him Heir of any Lands or Tenements, as the Writ requires; for his Warrant is not to ſummon the Heir of the ſaid *Matthew*, but the Heir of the Lands and Tenements of the ſaid *Matthew*, and every Return ought to anſwer the Point of the Writ.

The third Error, admitting the Writ and the Return good, was, That the Judgment itſelf was erroneous. For the Judgment is given generally againſt Sir *Will. Harbert*, *Quod dicta Domina Regina recuperet verſus præd' Will. Harbert dicta tria millia librarum; Et quod ipſe idem Willielmus de eiſdem tribus millibus librar' erga dictam dominam Reginam nunc oneretur, & ei inde ſatisfaciat.* And it was moved by the Defendant's Counſel, that the Judgment ought to have been ſpecial; for by this general Judgment his own Land will be liable, where by the Law, the Land only which came to him by his Father ſhould be liable; and, as hath been ſaid, he is charged as Terre-tenant, for the Coniuſee cannot have an Action of Debt on the Recognizance againſt the Heir, for the Recognizance is, *Quod tunc vult & concedit quod dicta pecuniæ ſumma de bonis & catallis, terris & tenementis, &c. levetur:* So that the Charge is impoſed on his Goods and Lands; ſo that Debt doth not lie on it againſt the Heir, no more than on a Recovery in Debt, for there a *Scire facias* lies againſt the Heir, but no Action of Debt: Then although the Heir makes a Default, yet the Judgment ought to have been ſpecial; and it was ſaid in this Caſe, if the Heir had appeared and pleaded a falſe Plea, yet the Judgment ought to have been ſpecial; for he is not charged merely as Heir, but rather as Terre-Tenant. And with that agrees 33 *E.* 3. *Execution* 162. in (*a*) Debt the Plaintiff recovered, and before Execution ſued, the Defendant died, the Plaintiff prayed a *Scire fac'* againſt *A.* who is Tenant of the Defendant's Lands, and had it, who

Plowd. 440. a. b. 21 E. 3. 9. b. 2 Rol. 70, 71. Cro. El. 692. Cro. Car. 296. Co. Lit. 102. a. b. Fitzh. 76. b. Moor 522. 5 Co. 60. Dyer 373. pl. 14. Poph. 153, 154. 3 Bulſt. 317, 318, 320. Palm. 419. 1 Jones 87, 88.

(*a*) 3 Bulſt. 318, 321, 322. Poph. 154. 1 Jones 88.

who came and counter-pleaded the Execution, and they were at Iſſue, and afterwards did not follow it; wherefore Execution was awarded againſt him, and the Plaintiff prayed Execution as well of his own Lands, which he had the Day he pleaded, as of the Debtor's Lands in his Hands, becauſe he
7 Co. 20. a. pleaded a falſe Plea. But by the Rule of the Court, he could have only the Lands of the Debtor. *Vide* 16 *E.* 3. 15. But theſe Points were not reſolved by the Court, but afterwards, on a Petition made to the Queen, Sir *William* compounded with her. *Plowden* and *Coke* were of Counſel with Sir *William Harbert*; And note well, the new Writ of Error, after the Entry of the firſt, was not brought, *quod coram vobis reſidet*, becauſe the record is not removed out of the Keeping of him who had the Cuſtody thereof before; but it remained in the ſame Cuſtody after the Writ of Error purchaſed, as it was before.

BOR-

BORASTON's *Caſe.*

Hillary 29 Eliz. *in* B. R. Rot. 790.

MEmorandum, That at another time, that is to ſay, in *Mich.* Term laſt paſt, before the Lady the Queen at *Weſtminſter*, came *Richard Hynde* by *James Tong* his Attorney, and brought here in the Court of the ſaid Lady the Queen then there, his Bill againſt *William Ambrye*, in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs and Ejectment of his Farm, and there are Pledges of Suit, that is to ſay *John Doe* and *Richard Roe*, which Bill followeth in theſe Words. *ſſ. Hartf. ſſ. Richard Hynde* complaineth of *William Ambrye* in the Cuſtody of the Marſhal of the Marſhalſey of the Lady the Queen, before the Lady the Queen her ſelf being, for that, that is to ſay, That whereas one *Thomas Brand* and *Conſtance* his Wife, and *William Davies* and *Margaret* his Wife, the 9th Day of *July* in the 28th Year of the Reign of the ſaid Lady *Elizabeth* now Queen of *England* at *Aldenham* in the County aforeſaid, demiſed, and granted, and to farm let to the aforeſaid *Richard Hynde*, among other Things, 10 Acres of Land, with the Appurtenances, called the Upper Part of a cloſe named *Reddings*, in *Aldenham* aforeſaid in the County aforeſaid; To have and to hold the aforeſaid 10 Acres, with the Appurtenances, to the aforeſaid *Richard Hynde* and his Aſſigns, from the Feaſt of St. *John* the Baptiſt then laſt paſt, until the End and Term of 7 Years from thence next enſuing, and fully to be compleat and ended: By Virtue of which Demiſe the ſaid *Richard Hynde* entred into the aforeſaid 10 Acres of Land, with the Appurtenances, the aforeſaid 9th Day of *July* in the 28th Year aforeſaid, and was thereof poſſeſs'd until the aforeſaid *William Ambrye* afterwards, to wit, the aforeſaid 9th Day of *July* in the 28th Year aforeſaid, with Force and Arms, &c. into the aforeſaid 10 Acres of Lands, with the Appurtenances, upon the Poſſeſſion of the ſaid *Richard* entred, and him the ſaid Hertf. ſſ.

Rich. from his Farm aforeſ. the Term thereof not yet ended, did eject, expel, and amove, and then the ſaid *Rich.* from his poſſeſſion thereof held out, and as yet holdeth out, and other harms to him did, againſt the Peace of the ſaid Q. to the Damage of the ſaid *Rich.* of 10 *l.* and thereof he bringeth Suit, &c. And now at this Day, that is to ſay, *Monday* after 8 Days of St. *Hillary* in this Term, until which Day the ſaid *Will.* had Licenſe to the Bill aforeſaid to imparl, and then to anſwer, &c. before the L. the Q. at *Weſtm.* come as well the aforeſ. *Rich.* by his Attorney aforeſ. as the ſaid *Will.* by *Rich. Belfield* his Attorney, and the ſame *Will.* doth defend the Force and Injury when, &c. And ſaith, that he is not Guilty thereof, and of that he puts himſelf upon the Country; and the ſaid *Rich.* likewiſe. Therefore let a Jury thereof come before the L. the Q. at *Weſt. Wedneſday* next after 15 Days of *Eaſter*, who neither, &c. to recogniſe, &c. becauſe as well, &c. the ſame Day is given to the Parties aforeſ. there, &c. Afterwards the Proceſs thereof was continued between the Parties aforeſ. of the Plea aforeſ. by a Jury put between them in reſpite before the ſaid Lady the Q. at *Weſtm.* until *Wedneſday* next after 8 Days of St. *Mich.* then next following: Unleſs the Juſtices of the ſaid L. the Q. to take Aſſiſes in the County aforeſ. aſſigned, ſhall firſt upon *Friday* the 12th Day of *July* at *Hartford* in the County aforeſ. by Form of the Stat. &c. come for Default of Jurors, &c. At which *Wedneſday* next after 8 Days of St. *Mich.* before the L. the Q. at *Weſtm.* came the aforeſ. *R. Hynde* by his Attorney aforeſ. &c. and the aforeſ. Juſtices of Aſſiſes, before whom, &c. ſent here their Record before them had, in theſe Words: *ſſ.* Afterwards, the Day and Place within contained, before *Thom. Gawdy* Knt. one of the Juſtices of the L. the Q. of Pleas, before the L. the Q. her ſelf to be holden, aſſigned, and *Rob. Clark*, one of the Barons of the ſaid Lady the Q. of her Excheq. Juſtices of the ſaid Lady the Q. to take Aſſiſes in the County of *Hertford* aſſigned by Form of the Stat. &c. came as well the within named *Rich. Hynde*, by *H. Branwayte* his Attorn. as the within written *Will. Ambrye* by his Attor. within mentioned, and the Jurors of the Jury whereof within mention is made, ſome of them, that is to ſay, *Rich. Penifather*, *Th. Glaſcock*, *Jo. Harmer*, and *Stephen Nebbes* came, and in the ſaid Jury are ſworn. And becauſe the reſt of the Jurors of the ſaid Jury did not appear, therefore others of the Standers-by, choſen by the Sheriff at the Requeſt of the ſaid *Rich. Hynde*, and by the Command of the Juſtices aforeſaid, are of new put, whoſe Names to the Panel within written are filed, according to the Form of the Statute in ſuch Caſe late made and provided; and ſome of the Jurors ſo a new put, that is to ſay, *Edward Vyall*, *Thom. Cooker*, *Thom. Throwe*, *Edw. Aſſer*, *John Dermer*, *Will. Truerton*, *Ed. Jordan*, and *Rob. Carpenter* came, who to ſay the Truth

of

of the Matters within contained, (together with the Jurors aforeſaid firſt impanelled, and ſworn,) choſen, tried and ſworn, ſay upon their Oath, that long before the Treſpaſs and Ejectment of Farm within ſuppoſed to be done, one *T. Boraſton* was ſeiſed of and in the within written 10 Acres of Lands with the Appurtenances, called the Upper Part of a Cloſe called *Reddings*, in *Aldenham* within written, in his Demeſne as of Fee, and the ſaid 10 Acres of Lands with the Appurtenances held of one *Robert Stepnigh* Eſq; as of his Manor of *Aldenham* in free Socage. And further the Jurors aforeſaid ſay upon their Oath, that the aforeſaid *Th. Boraſton* had Iſſue of his Body lawfully begotten *Humphrey Boraſton* his elder Son, and *Henry Boraſton* his younger Son: And the aforeſaid *Humphrey Boraſton* had Iſſue of his Body lawfully begotten *Conſtance Boraſton*, now the Wife of the within named *Thomas Brand*; and the within named *Margaret* Wife of the within named *William Davies*: And that afterwards *Humphrey Boraſton* died, living the ſaid *Thomas Boraſton*, and that the aforeſaid *Conſtance* and *Margaret* were and are Daughters and Co heirs of the aforeſaid *Humphrey Boraſton*. And farther the Jurors aforeſaid ſay upon their Oath, that the aforeſaid *Tho. Boraſton* ſo of and in the aforeſaid 10 Acres of Land with the Appurtenances being ſeiſed as aforeſaid, afterwards, that is to ſay, the 12th Day of the Month of *Auguſt* in the Year of our Lord 1559. in the firſt Year of the Reign of the ſaid Lady the now Queen, made his Teſtament and laſt Will in writing, in theſe *Engliſh* Words following. *In the Name of God Amen, &c. I give unto* Thomas Amerie *and* Amphillis *his Wife, all that my upper Part of my Cloſe called* Redding, *for the Term of eight Years next after my Deceaſe, in Recompence of one yearly Annuity of* 46 s. 8 d. *due unto the ſaid* Thomas Amerie, *upon one Obligation of certain Years yet during, and upon further Condition that the ſaid* Thomas Amerie *ſhall bring in the ſaid Obligation to my Executors, to be cancelled, and utterly diſcharged, upon this Conſideration, before ſuch Time as the ſaid* Thomas Amerie *ſhall make any Entry upon the Premiſſes, and that the ſaid* Thomas Amerie, *neither his Aſſigns, ſhall not, during the ſaid eight Years, ſell none of the Woods, Timber, nor Uderwoods, in, nor upon the ſaid Upper Part, but ſhall preſerve the Woods, Hawts and Springs, to the Behoof of the Heir in Remainder, and after the Term of the ſaid eight Years, the ſaid upper Part to remain to my Executors, until ſuch Time as* Hugh Boraſton *ſhall accompliſh his full Age of twenty-one Years, and the mean Profit to be employed by*

my Executors towards the Performance of this my laſt Will and Teſtam. And when the ſaid Hugh *cometh unto* 21 *Years of Age, then I will that he ſhall enjoy the ſaid upper Part to him and his Heirs for ever. Provided always, that if the ſaid* Tho. Amerie *do refuſe to bring in his Obligation, or to preſerve the Woods upon the ſaid upper Part, then my Execut. to enjoy the Premiſſes during the ſaid Term of* 8 *Years, paying the ſaid* Amerie *his Annuity of* 46 s. 8 d. *during the ſaid Term of* 8 *Years*; as by the Teſtament and laſt Will aforeſ. amongſt other things, it more fully appeareth: And farther the Jurors aforeſ. ſay upon their Oath aforeſ. That the aforeſ. *Tho. Boraſton* ſo of the aforeſaid 10 Acres of Land with the Appurt. being ſeiſed, afterward, that is to ſay, the 14th Day of the aforeſ. Month of *Auguſt* in the 1ſt Year of the Reign of the ſaid L. the now Q. at *Aldenham* aforeſ. of ſuch his Eſtate died ſeiſed; and farther the Jurors aforeſ. ſay upon their Oath, that the aforeſaid *Hugh Boraſton* in the ſaid Teſtam. and laſt Will named, was Son and Heir of the ſaid *Henry Boraſton*, and that the ſaid *Hugh Boraſton* died before he came to the Age of 21 Years, that is to ſay, about the Age of 9 Years. And farther the Jurors aforeſ. ſay upon their Oath aforeſ. that the Intereſt of the Premiſſes aforeſ. in the ſaid Teſtam. and laſt Will mention'd and deviſed, as well to the ſaid *Thomas Amery* and *Amphillis* his Wife, as to the Executors of the ſaid Teſtam. before the Day of the bringing of the Bill within written ended and determin'd. And further the Jurors aforeſ. ſay upon their Oath, that *Philip Boraſton* was and is Brother and next Heir of the ſaid *Hugh Boraſton*, by colour whereof the ſaid *Philip Boraſton*, after the aforeſ. Intereſt of the Premiſſes to the ſaid *Tho. Amery* and *Amphillis* his Wife, and the Executors aforeſ. by the aforeſ. Teſtam. and laſt Will given and deviſed, was ended and determined, into the aforeſ. 10 Acres of Land with the Appurt. as Brother and next Heir of the ſaid *Hugh*, entred, and was thereof ſeiſed as the Law requireth, and being ſo thereof ſeiſed, the ſaid *Philip Boraſton* afterwards and before the Time of the Exhibiting of the Bill aforeſ. that is to ſay, the 20th Day of *June* in the 28th Year of the Reign of the L. the now Q. demiſed, granted, and to Farm let to the aforeſaid *William Ambrye* now Defendant, the Tenements aforeſaid with the Appurtenances in which, *&c.* to have and to hold to the ſaid *Will. Ambrye* and his Aſſigns, for a whole Year from thence next following to be fully compleat and ended, and ſo from Year to Year as long as both Parties ſhould pleaſe; By Virtue of which Demiſe, the aforeſaid *Will. Ambrye* into the aforeſaid 10 Acres of Land with the Appurt. entred and was thereof poſſeſſed, and ſo thereof being poſſeſſed, the aforeſ. *Tho. Brand* and

Conſtance

Conſtance his Wife, *William Davis* and *Margaret* his Wife, as in the Right of the ſaid *Conſtance* and *Margaret*, afterwards, that is to ſay, the 9th Day of *July* in the 28th Year of the Reign of the Lady the now Queen aforeſaid, into the aforeſaid 10 Acres of Land with the Appurtenances in and upon the Poſſeſſion of the ſaid *William Ambrye* entred, and were thereof ſeiſed as the Law requireth; and ſo thereof being ſeiſed at *Aldenham* aforeſ. the ſaid *Thomas Brand* and *Conſtance* his Wife, *William Davies* and *Margaret* his Wife, afterwards, that is to ſay, the ſaid 9th Day of *July* in the 28th Year aforeſaid, by their Indenture bearing Date the ſame Day and Year, demiſed, granted, and to Farm let, the aforeſaid 10 Acres of Land with the Appurtenances to the aforeſaid *Richard Hynde*, to have and to hold the aforeſaid 10 Acres of Land with the Appurtenances unto the ſaid *Richard Hynde* and his Aſſigns, from the Feaſt of Saint *John* the Baptiſt then laſt paſt, until the End and Term of 7 Years from thence next enſuing, and fully to be compleat and ended; by Virtue of which Demiſe, the ſaid *Richard Hynde* into the aforeſaid 10 Acres of Lands with the Appurtenances, the aforeſaid 9th Day of *July* in the 28th Year of the Reign of the ſaid Lady the now Queen aforeſaid entred, and was thereof poſſeſſed until the aforeſaid *William Ambrye*, afterwards, that is to ſay, the aforeſaid 9th Day of *July* in the 28 Year aforeſaid, with Force and Arms, *&c.* into the aforeſaid 10 Acres of Land with the Appurtenances, upon the Poſſeſſion of the ſaid *Rich. Hynde*, thereof, by the Precept and Command of the aforeſaid *Philip Boraſton* re-entred, and him the ſaid *Richard Hynde* from his Poſſeſſion thereof held out, and yet doth hold out: But whether upon the whole Matter aforeſaid, in Form aforeſaid found, the re-entry of the aforeſaid *William Ambrye* into the aforeſaid 10 Acres of Land with the Appurtenances, be, or in Law ought to be adjudged, a good or lawful re-entry, the Jurors aforeſaid are utterly ignorant, and thereof pray the Advice of the Court of the Lady the Queen; And if upon the whole Matter aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Court of the ſaid Lady the Queen, that the Re entry of the aforeſaid *William Ambrye* into the aforeſaid 10 Acres of Land with the Appurtenances, in and upon the Poſſeſſion of the ſaid *Richard Hynde*, be not nor in Law ought to be adjudged a good and lawful Re-entry; then the Jurors aforeſaid ſay upon their Oath aforeſaid, that the aforeſaid *William Ambrye* is guilty of the Treſpaſs and Ejectment within ſpecified, in Manner and Form as the aforeſaid *Richard Hynde* within againſt him complaineth, and then they Aſſeſs the Damages of the ſaid *Richard Hynde*, by occaſion of the Treſpaſs and Ejectment out of his Farm, beſides his Charges and Coſts by him about his Suit in this behalf expended to 8 *s.* and for his Charges and Coſts to 30 *s.* and 4 *d.* But if upon the whole Matter aforeſaid, in Form aforeſ. found, it ſhall ſeem to the Court of the L. the Q. that the re-entry of the aforeſaid *William Ambrye* into the aforeſ. 10 Acres of Land with the Appurtenances in and upon the Poſſeſſion of the ſaid *Richard Hynde* be, or in Law ought to be adjudged a good and lawful Re-entry, then the Jurors aforeſ.

ſay upon their Oath, that the ſaid *Will. Ambrye* is not guilty of the Treſpaſs and Ejectment of the Farm aforeſaid, as he before for himſelf hath alledged: And becauſe the Court of the Lady the Q. here of giving their Judgment of and upon the Premiſſes is not yet adviſed, Day thereof is given to the Parties aforeſ. in the State that now it is, before the L. the Q. at *Weſtm.* until *Thurſday* next after 8 Days of Saint *Hillary* to hear their Judgment thereof, becauſe the Court of the L. the Q. here thereof not yet have adviſed, &c. At which Day before the Lady the Q. at *Weſtm.* come the Parties aforeſ. by their Attornies aforeſ. and becauſe the Court of the Lady the Q. here of giving their Judgm. of and upon the Premiſſes is not yet adviſed, further Day thereof is given to the Parties aforeſ. in the State it now is, before the Lady the Q. at *Weſtminſt.* until *Wedneſday* next after 15 Days of *Eaſter*, to hear their Judgm. thereof, &c. becauſe, &c. and ſo from Term to Term, until the Plaint aforeſaid was farther adjourned by another Writ of the ſaid L. the Q. of common Adjournment before the Q. until the morrow of *All Souls*, at the Caſtle of *Hartford* in the County of *Hartford*, at which Day before the L. the Q. at the Caſtle of *Hartford* came the Parties aforeſ. by their Attorn. aforeſ. And becauſe the Court of the L. the Q. here of giving their Judgment of and upon the Premiſſes is not yet adviſed, Day thereof is farther given to the Parties aforeſ. in State as it is now before the L. the Q. at the Caſtle of *Hartford*, until *Tueſday* next after 8 Days of Saint *Hillary* to hear their Judgment, &c. becauſe, &c. before which Day the Plaint aforeſ. was adjourned by a Writ of the L. the Q. by common Adjournment before the ſaid L. the Q. until 8 Days of Saint *Hillary* at *Weſtm.* At which Day before the L. the Q. at *Weſtm.* come the Parties aforeſ. by their Attornies aforeſ. and becauſe the Court of the L. the Q. here of giving their Judgment of and upon the Premiſſes is not yet adviſed, Day is further given to the Parties aforeſ. in State as now, before the Lady the Q. at *Weſtm.* until *Wedneſday* next after 15 Days of *Eaſter*, to hear their Judgm. thereof, &c. becauſe, &c. At which Day before the L. the Q. at *Weſtm.* come the Parties aforeſaid by their Attornies aforeſ. Upon which the Premiſſes being ſeen by the Court of the L. the Q. here, and diligently looked into, and mature Deliberation being thereof had, becauſe it ſeemeth to the Court of the ſaid L. the Q. here, that the entry of the aforeſ. *Will. Ambrye* above ſpecified into the aforeſ. 10 Acres of Land with the Appurt. in and upon the Poſſeſſion of the aforeſ. *Rich. Hynde*, was a good and lawful Re-entry; therefore it is granted that the aforeſaid *Rich. Hynde* take nothing by his Bill aforeſ. but that he for his falſe Clamour be taken, &c. and the aforeſaid *William Ambrye* go thereof without Day, &c.

BORASTON's *Caſe.*

Hill. 29 Eliz. in *B. R.* Rot. 790. *between* Hinde *and* Ambrye.

Of contingent Remainders, the Deviſor's Intent, &c.

BEtween *Richard Hinde*, Plaintiff and *William Ambrye*, Defendant, in an *Ejectione firmæ* in the King's Bench, of Lands in *Aldenham* in the County of *Hertford*, on a Leaſe made by *Thomas Brand* and *Conſtance* his Wife, and *William Davies* and *Margaret* his Wife, to the Plaintiff for ſeven Years. The Defendant pleaded, *Not guilty*, and the Jury gave a ſpecial Verdict to this Effect: *Tho. Boraſton* was ſeiſed in Fee of the Lands aforeſ. and held them in Socage, and had Iſſue *Humphrey Boraſton* his elder Son, *Henry Boraſton* his younger Son; and *Humphrey* had Iſſue the ſaid *Conſtance*, Wife of the ſaid *Brand*, and the ſaid *Margaret*, Wife of the ſaid *Davies*; and the ſaid *Henry Boraſton* had Iſſue *Hugh*. And afterwards the ſaid *Thomas Boraſton*, *Auguſt* 12. 1559. by his Will in Writing, deviſed the ſaid Lands in theſe Words, *viz.* Item, *I give to* Thomas Amery *and* Amphillis *his Wife, all that my upper Part of my Cloſe called* Reading, *for eight Years next after my Deceaſe. And that the ſaid* Thomas Amery, *nor his Aſſigns, ſhall, during the ſaid Term, fell none of the ſaid Wood or Timber in or upon the ſaid upper Part, but ſhall preſerve the Woods to the Uſe and Behalf of the Heir in Remainder: And after the Term of the ſaid* 8 *Years, the ſaid upper Part to remain to my Exec. until ſuch Time as* Hugh Boraſton *ſhall accompliſh his full Age of* 21 *Years, and the mean Profits*

2 Bulſtr. 123. 124. 2 Rol. Rep. 223, 427. Cro. Jac. 510. Swinb. 135. See Taylor and Wharton's Caſe. Carter's Rep. 182. See Lane's Rep. 56.

2 Bulſtr. 124. 25. Lit. Rep. 310.

Profits to be employed by my Executors towards the Performance of this my laſt Will and Teſtament: And when the ſaid Hugh *ſhall come to his Age of Twenty-one Years, then I will he ſhall enjoy the ſaid upper Part to him and to his Heirs for ever.*

And afterwards the ſaid *Tho. Boraſton*, 14 *Auguſti anno* 1 *Eliz.* died, and the ſaid *Hugh* died before his full Age of Twenty-one Years, about the Age of Nine Years. And that *Philip Boraſton* was Brother and Heir of *Hugh Boraſton*; and the ſaid *Philip*, after the End and Expiration of the ſaid Terms, that is to ſay, of *Thomas Amery* and *Amphillis* his Wife, and of the ſaid Executors, entred into the Lands, as Brother and Heir of the ſaid *Hugh Boraſton*, and demiſed the ſaid Lands to the ſaid *William Ambrye*, *&c.* by Force whereof he was poſſeſſed, upon whom the ſaid Leſſors of the Plaintiff, in Right of their ſaid Wives, entred in the ſaid Lands; And by Indenture, bearing Date the ſame Day and Year mentioned in the Declaration, demiſed to the Plaintiff, *prout* in the Declaration, by Force whereof he was poſſeſſed, 'till the Defendant, by the Commandment of the ſaid *Philip*, entered upon him, *&c.* And whether the ſaid Entry of the Defendant was lawful or not, was the Doubt which was referred to the Court. And this Caſe was argued by the Counſel of the Plaintiff. And it ſeemed to them, that no Remainder was veſted in the ſaid *Hugh Boraſton*, 'till he attained his Age of Twenty-one Years; and in the mean Time, that the Lands did deſcend to the Daughters of the elder Son, who are general Heirs to the Deviſor; and foraſmuch as *Hugh* did never accompliſh his ſaid Age, for this Cauſe the Land never veſted in him, but remained in the Heirs general; and in Proof that the Remainder did not veſt in *Hugh* before his ſaid Age, they ſaid, it appeared by the Words of the Will, that he ſhould not have it till his ſaid Age of Twenty-one Years. For the Words are, *And when the ſaid* Hugh *ſhall accompliſh his ſaid Age of Twenty-one Years, then I will he ſhall enjoy the ſaid upper Part to him and to his Heirs for ever:* So that it fully appears, that this Deviſe to *Hugh* doth depend on a Contingent, that is to ſay, on the Accompliſhment of *Hugh*'s full Age of Twenty-one Years, and that ought to precede before the Remainder can begin, and whether *Hugh* ſhall attain to his Age is ſo incertain, that no Man can know, but it depends ſolely on the Providence of God. And it was ſaid, If *Thomas Boraſton* in this Caſe had made a Leaſe till *Hugh* attain his full Age, *Hugh* then being of the Age of Nine Years, the Leſſee ſhould not have an abſolute Leaſe for Twelve Years: for if *Hugh* ſhould die before his full Age, the Leaſe would be ended, *Quod fuit conceſſum per totam curiam.*

Cro. Jac. 510.

It

It was alſo ſaid, That when a (*a*) particular Eſtate (which doth ſupport a Remainder) may determine before the Remainder can begin, there the Remainder ſhall not preſently veſt, but ſhall depend in (*b*) Contingency: As if one makes a Leaſe to *J. S.* for his Life, and after the Death of *J. D.* to remain to another in Fee, this Remainder doth depend in Contingency; for if *J. S.* dies before *J. D.* the particular Eſtate is determined before the Remainder can begin. So and on the ſame Reaſon it is adjudged, in *Colthurſt* and *Bejuſhing*'s Caſe, in *Plow. Com.* where the Caſe in Effect is, That a Leaſe is made to *A.* (*c*) for Life, the Remainder to *B.* for Life, and if *B.* dies before *A.* that it ſhall remain to *C.* for Life, this is a good Remainder on contingent, if *A.* ſurvives *B.* which Caſe is all one in Reaſon with the common Caſe which is often agreed in our Books. A Leaſe is made to one for Life, the Remainder to the right Heirs of *J. S.* this Remainder is good upon a (*d*) Contingent, that is to ſay, if the Leſſee for Life ſurvives *J. S.* otherwiſe not. So, and for the ſame Reaſon, if a Man having Iſſue a Son of the Age of Nine Years, makes a Leaſe until his Son ſhall attain to his full Age, and after he ſhall accompliſh his full Age, that it ſhall remain over to another in Fee, nothing veſts (without Queſtion preſently) in him in Remainder, which was granted by the whole Court. And it was ſaid by the Plaintiff's Counſel, That ſuch Remainder is utterly void, and yet may take Effect: For inaſmuch as the Remainder ought to paſs out of the Leſſor preſently, either to him in Remainder, or to be in Abeyance and Cuſtody of the Law, and a Freehold cannot in ſuch Caſe be in (*e*) Abeyance, for this Cauſe the Remainder is utterly void: As if a (*f*) Man makes a Leaſe to *A.* for Twenty-one Years, if *B.* ſhall live ſo long, and after the Death of *B.* that it ſhall remain over in Fee, this Remainder is void: So if a (*g*) Leaſe for Years be made, the Remainder to the right Heirs of *J. S.* this Remainder is void, *Quod fuit conceſſum per totam curiam.*

Alſo it was ſaid, That when a Remainder is limited to take Effect on the doing of an Act, which Act will be the Determination of the particular Eſtate, yet if the Act depends on a Caſualty and meer Incertainty, whether it will ever happen or not, there alſo the Remainder doth depend in Contingency, and ſhall not preſently veſt: As if (*h*) *A.* makes a Feoffment to the Uſe of *B.* till *C.* come from *Rome* to *England*, and after ſuch Return from *Rome* to *England*, to remain over in Fee, this Remainder doth depend in Contingency; for it is incertain whether *C.* will ever return into *England* or not, which was granted by

(*c*) 2 Rol. 419. Raym. 144.

(*b*) 10 Co. 85. a. b. 2 Rol. 419. Lit. Rep. 219.

Co. Lit. 378.

(*c*) Plow. 22. a. 24. b. Raym. 144. Lane 22.

(*d*) Raym 144. 2 Co. 51. b. Co. Lit. 343. a. 10 Co. 50. b.

(*e*) Co Lit. 342. b. 9 H. 7. 2. b. Br. extinguiſhment 53. Plow. 229. b. 280. a. 486. Lit. Sect. 647. Plow. 557. b. 558. a. Dy. 71. pl. 43, 190. pl. 18. pl. 20. Hob. 153, 281. 1 Co. 130. a. 135. b. 3 Co. 2. a. 10. b. Hob. 94, 171, 253, 335, 336, 338.

(*f*) Raym. 144.

(*g*) Hob. 153.

(*h*) Lit. Rep. 316.

the whole Court. And ſo it was concluded by the Plaintiff's Counſel, That for all theſe Cauſes Judgment ought to be given for the Plaintiff. Againſt which it was argued by the Defendant's Counſel, and they conceived, the Remainder veſted in *Hugh* preſently, by the Death of the Deviſor, and by his Death, without Iſſue, the Land did deſcend to *Philip* his Brother, who leaſed to the Defendant. For it was ſaid, That in this Caſe, altho' *Hugh* died before his full Age, yet the Intereſt and Term of the Executors did not ceaſe; and their Reaſon was, becauſe in Wills, the (*a*) Intent of the Deviſor is to be conſidered; and when he deviſeth his Lands to his Executors, 'till *Hugh* his Son ſhall come to his full Age for Payment of his Debts, and to perform his Will, it is to be intended he hath computed (*b*), That the Profits to be taken of his Lands by his Executors, during the Minority of his Son (which was for the Space of Twelve Years) would ſuffice to pay his Debts, and perform his Will, and that he did not intend it ſhould determine by the Death of his Son; for then the Means which he had preſcribed to ſatisfy his Debts, and perform his Will, would be defeated, and by Conſequence his Debts remain unſatisfied, and his Will unperformed; and therefore this Caſe of a Deviſe doth differ from a Leaſe or a Grant made in the like Manner. For the Deviſor is intended to be (*c*) *inops conſilii*, and therefore the Law will be his Counſel and, according to his Intent appearing in his Will, will ſupply the Defect of his Words: And therefore, where the Deviſor ſaith, (*d*) *Until ſuch Time as* Hugh Boraſton *ſhall accompliſh his full Age of Twenty-one Years*, the Law, which favours the Performance of Wills (according to the Intent of the Deviſor) in Conſtruction will make it, *Until ſuch Time as* Hugh Boraſton *ſhould have come to his full Age of Twenty-one Years*: For when the Deviſor by apt Words and Terms, might have by good Advice made his Will good and ſufficient in Law, according to his true Intent, there, although the Deviſor being hindred by Sickneſs, or for want of good Advice, makes his Will in a diſordered Manner, and in barbarous and unfit Words, the Law in ſuch Caſe will reduce his Words, which want Order, into good Order, and Sentence his unfit Words to Words ſufficient in Law, according to his Intent which appears by his own Words. As *Mich.* 32 & 33 *Eliz.* in the King's Bench, it was adjudged between (*e*) *Wellcoke* and *Hammond* in Treſpaſs, upon Not guilty pleaded, the Caſe upon ſpecial Verdict was ſuch: A Copyholder in Fee of Land diſcendible in Borough Engliſh, having three Sons and one Daughter, deviſed his Land to his eldeſt Son, (*f*) paying to his Daughter, and to each of his other Sons 40*s.* within two Years after his Death; the Deviſor made a Surrender according to the Cuſtom of the Manor, to the Uſe of his Will, and died, the eldeſt

(*a*) 2 Bulſt. 128. Poſtea 27. b. Co. Lit. 322. b. Firzgib. 10.

(*b*) 2 Bulſt. 125. Lane 58.

(*c*) Co Lit. 9. b. 8 Co. 95. a. 3 Bulſtr. 106. 1 Co. 85. b.

(*d*) Swinb. 135. 2 Bulſt. 125.

(*e*) Cro. Eliz. 204. 1 Co. 41. a. Cro. Jac. 57, 527, 592. 2 Bulſt. 273. Latch 9. Bridgm 138. 3 Mod. Rep. 86. Vaugh. 271. Cart. 93, 226. Swinb. 133, 114. 2 Leon. 114. 2 Rol Rep. 219. Bridgm. 138. Goldsb. 134. Cro. Car. 158.

(*f*) Swinb 113. Co. Lit. 9. b. 236. b. Bridg. 138. Goldsb. 134. Cro. Eliz. 205, 833, 378, 919. Cro. Car 158, 159. Cro. Jac. 416, 527, 591, 599, 600. Godb. 280. 2 Rol. Rep 80. Noy 51. Moor 544. 3 Keb. 96. 1 Mod. Rep. 263. Lit. Rep. 259. 2 Jones 107. Hob. 65. Dyer 371. pl. 5. B. N. C. 125. 29 H. 8. Br. Teſtam. 18. Cart. 226. 1 Vent. 227. 4 Ed. 6. Eſtate. Bl. 78. O. Benl. 24, 25.

eldeſt Son is admitted, and doth not pay the Money within two Years, the youngeſt Son, now Plaintiff, entred into the Land; and it was adjudged that his Entry was lawful: And in that Caſe two Points were reſolved.

1. Altho' the yearly Profits of the Lands for two Years exceed the Money to be paid to his Sons and Daughter, yet the eldeſt Son had a Fee-ſimple; for the Recompence and Conſideration, altho' it be not to the Value of the Land, in Caſe of a Will, doth make it in Conſtruction a Fee-ſimple: And in the Books of (a) 4 *E.* 6. *Eſtates Br.* 78. & 29 *H.* 8. *Teſtaments* 18. 22 *Eliz. Dyer* 371. (b) no mention is made of the Value of the Land, no more than in the Caſe of Bargain and Sale of Land in 4 *E.* 6. *Eſtates* 78. yet the Fee-ſimple of the Uſe ſhall paſs.

(a) Cro. Jac. 527, 416. Co. Lit. 9. b. 6 Co. 16. a. Swinb. 118. Cro. Eliz. 205. 29 H. 8. Br. Teſtament 18.

2. It was reſolved, Altho' in the Caſe of a Will, this Word (paying) makes a Condition; yet in that Caſe the Law would conſtrue this unapt Word (paying) to a Limitation, for if it ſhould be a Condition, then it would deſcend on the eldeſt Son, and then it would be at his Pleaſure whether his Brothers or Siſter ſhould be paid or not; and therefore it was adjudged, That in that Caſe the Law would conſtrue it for a (c) Limitation, of which the youngeſt Son in Borough Engliſh might take Advantage, and to amount to as much as if he had made the Deviſe of the Land to his eldeſt Son, till he ſhall make Default of Payment, &c. and ſo the Doubt in 14 *Eliz. Dyer* 317. (d) moved by *Manwood*, is well reſolved. Upon which it was concluded in the Caſe at Bar by the Defendant's Counſel, That the Executors had a good (e) Term for Twelve Years, which was not determined by the Death of *Hugh Boraſton*; which was granted by the whole Court. And the general Rule put by the Counſel of the other Side was well agreed, That the Remainder ought to commence in Poſſeſſion, when the (f) particular Eſtate ends, as well in Wills as in Grants, and there cannot be a mean Time between them; but that doth not concern the Caſe at Bar, for here inaſmuch as the Term did not end by the Death of *Hugh Boraſton*, the Remainder did begin in Poſſeſſion (g) at the End of the Term. And as to the Incertainty, it was ſaid, That the Caſe at Bar is no other in Effect, but that a Man deviſes his Lands to his Executors (for the Payment of his Debts) *until* (h) *his Son ſhall or ſhould have come to his full Age* (*of Twenty-one Years*) the Remainder to his Son in Fee; for altho' theſe are Adverbs of Time, *when*, &c. and *then*, &c. yet they do not amount to make any Thing to precede the ſettling of the Remainder, no more than in the common Caſe. (i) A Man leaſes Land for Life or Years, and after the Deceaſe of the Leſſee, or the Term ended, the Remainder to another, yet it ſhall remain preſently; for when theſe Adverbs refer to a Thing, which muſt of Neceſſity happen,

(c) Dyer 74. pl. 16. Plowd. 413. a. 10 Co. 41. a. Cart. 93, 171. Cro. Jac. 57. 2 Rol. Rep. 219. 425. Cro. Eliz. 205, 833, 920. Goldsb. 134. Noy 51. Owen 112. Plowd. Queries 108. 1 Leon. 283. 1 Rol. 411.

(d) Dyer 316. pl. 5. 2 Leon. 114. 1 Mod. Rep. 86.

(e) Cro. Jac. 510. Hard. 80.

(f) 1 Co. 66. b. 129. b. 130. a. 134. b. 135. b. 138. a. 2 Co. 51. a. Plowd 25. b. 29. a. b. 35. a. Raym. 54. 2 And. 37. Moor 104. Perk. 12. Raym. 413. Palm. 139. Poph. 82, 83, 84.

(g) 10 Co. 85 b.

(h) Sty. 204. Dall. 58. Moor 48.

(i) 10 Co. 85. b. Cro. Jac. 510. Palm. 141.

happen, there they make no Contingency, and it is certain that every Man muſt die, for *Statutum eſt hominibus ſemel mori*, and every Term will end; for *Tempus edax rerum*: And in the Caſe at Bar, certain it is, that *Hugh* would or might have accompliſhed his Age of Twenty-one Years, which are in this Caſe of a Will, all one in Conſtruction of Law. So that theſe Adverbs (*Then* and *When*) in our Caſe, are Demonſtrations of the Time, when the Remainder to *Hugh* ſhall take Effect in Poſſeſſion, as in the ſaid Caſes of a Leaſe for Life, and Leaſe for Years, and not when the Remainder ſhall veſt; *quod fuit conceſſum per totam Curiam.* And Judgment was given, That the Plaintiff ſhould take nothing by his Bill.

Hard. 80.

Egerton, the Queen's Solicitor, *Thomas Forſter*, and others, were of Counſel with the Plaintiff, and *Coke* and others with the Defendant; and note in the Declaration it doth not appear that the Husbands and Wives made the Leaſe to the Plaintiff by Deed; and no Exception was taken to it.

Doct. pla. 176. 2 Co. 61. b. Cro. Car. 527. Dyer 93.

WALKER's

WALKER's *Case.*

W. leaſes to H. for Years, H. aſſigns his Intereſt to J. S. Then W. brings Debt againſt H. and held Well.

Paſch. 29 Eliz. *Between* Walker *and* Harris *in the King's Bench.*

THE Caſe was in Effect; *Walker* leaſed certain Lands to *Harris* for Years, the Leſſee aſſigned all his Intereſt to another, *Walker* brought an Action of Debt againſt *Harris* for Rent behind, after the Aſſignment, and whether the Action were maintainable or not, was the Queſtion. And it was objected againſt the Action, that the Land was Debtor, and not the Perſon, but in Reſpect of the Land; and a Difference was taken between a perſonal and a real Contract, for if a Man lets a Stock of Cattle or other Goods for Years, rendring Rent at ſeveral Days, he ſhall not have an Action of Debt till all the Days be incurred. So if a Man makes an Obligation or other (*a*) Contract to pay ſeveral Sums at ſeveral Days, he ſhall not have an Action of Debt till all the Days are paſt. But in the Caſe of a Leaſe for Years, which is a real Contract, the Leſſor ſhall have an Action of Debt after every Day, as appears by 45 *E.* 3. 8. 2 *E.* 4. 11. which proves that the Leſſee is not charged in reſpect of any perſonal Contract, but in reſpect of the Realty. And therefore, when the Leſſee aſſigns over all his Intereſt, all the Realty, which always follows the Land, is gone. Alſo, if a Man ſells Goods for Money to be paid at ſeveral Days, in ſuch Caſe, although the Goods be taken by one who hath Right before the Day, yet the Seller ſhall have an Action of Debt in reſpect of the Contract: But if a Man makes a Leaſe for Years rendring Rent, if before the Day incurred the Lands be (*b*) evicted by Title Paramount, the Leſſor ſhall not have an Action of Debt in reſpect of the Contract, becauſe it is a real Contract, and follows the Eſtate of the Land, and the Rent iſſues out of the Land, and the Perſon is not the

Moor 351. Cro. El. 556. 713. 1 Syd. 266, 402. Poph. 120.

(*a*) Co. Lit. 47. b. 292. b. 1 Rol. Rep. 29, 30, 221, 601. 2 Rol. Rep. 47. F. N. B. 130. h. 267. b. 4 Co. 94. b. 5 Co. 81. b. 8 Co. 153. a. 10 Co. 128. b. Moor 13. 3 Leon 4. Blendl. in Kel. 208, 209. Bendl. in Aſſ. 10. O. Bendl. 3. pl. 8. N. Bendl. 57. pl. 93. Cro. El. 118, 776. 807. Cro. Jac. 504. Cro. Car. 241. 2 Leon. 107, 108. 4 Leon. 13. Owen 42. Yelv. 67. Br. Action ſur le Caſe in fine. 2 Inſt. 395. 2 Sand. 337.

(*b*) Cro. Jac. 310. 10 Co. 128. a. a. Dy. 56. pl. 15. B. N. C. 52. 2 Roll. 235.

See 1 Salk. 81, 82.

the Debtor but in reſpect of the Land; for if the Leſſee grants over all his Intereſt, the Leſſor may have an Action of Debt againſt the Aſſignee, with whom there was no Contract by Deed. But foraſmuch as the Rent iſſues out of Land, the Aſſignee who hath the Land, and is privy in Eſtate, is Debtor in reſpect to the Land: So if a (*a*) Man leaſes three Acres, rendring Rent, and the Leſſor ouſts the Leſſee of one Acre, he ſhall have an Action of Debt for no Part; (*b*) but if the Leſſor recovers Part in an Action of Waſte, or enters into Part for a Forfeiture, or by Surrender, or by ſpecial Condition for Entry into Part; or if Part of the Land be evicted by Title Paramount; in all theſe Caſes the Rent reſerved on the Leaſe for Years, which is a Rent-Service, ſhall be apportioned. *Ergo*, the Contract follows the Land, for otherwiſe the Leſſor might in all thoſe Caſes have an Action of Debt for the whole Rent in reſpect of the Contract, as he ſhall have on a Sale of Goods; for which Matter ſee (*c*) 20 *H.* 6. 23. *a.* (*d*) 9 *E.* 4. 1. *a.* 21 *E.* 4. 29. *a. b.* which Book is to be intended of a lawful Entry, as for a Forfeiture, or by Surrender, and not of a tortious Entry, 4 *H.* 7. 6. 7 *E.* 6. *Tit. Apportionment*, *Br.* 26. 25 *H.* 8. 36. 13 *H.* 8. 30 *H.* 8. *Apportionment*, *Br.* 7. 3 *H.* 7. 17. And ſo all the Books are well reconciled. So it appears, that altho' in every Leaſe for Years there is a Contract between the Leſſor and Leſſee, yet that Contract is annexed to an Eſtate, and follows the Land. So on the other Side, if the Leſſor grants over his Reverſ. now the Contr. runneth with the Eſtate, and therefore the Grantor ſhall not have any Action of Debt for Rent due after his Aſſignment, but the Grantee ſhall have it, for the Privity of the Contract follows the Eſtate of the Land, and is not annexed to the Perſon, but in reſpect of the Eſtate: As where there be divers (*e*) Parceners of an Advowſon, the eldeſt hath Prerogative to make the firſt Preſentment; but it is not in reſpect of her Perſon only, but as it is annexed to her Eſtate. For as (*f*) 5 *H.* 5. 10. *b.* it is agreed, her Husband, who is Tenant by the Courteſy, ſhall have it: So if one Coparcener hath a Rent granted her for (*g*) Owelty of Partition, ſhe may diſtrain for it of common Right, without any Words of Diſtreſs; and ſo ſhall her Grantee, for it was not annexed to her Perſon only, but to the Eſtate alſo, as it is held in 21 *H.* 6. 11. So the Grantee of a Reverſ. and the Lord by Eſcheat ſhall have an Action of Debt for the Rent, as it is held in (*h*) 5 *H.* 7. 18. *b.* for the Contr. is incident to the Eſtate: And it was (*i*) ſaid, That it was held by Sir *Ro. Catlin*, late Chief Juſtice, that the Leſſee ſhall not be charged for Rent due after the Aſſignment. But on great Deliberation and Conference with others, it was adjudged by *Wray*, L. C. J. Sir *Tho. Gawdie*, and the whole Court of K.'s B. That the (*k*) Action would lie (after ſuch Aſſignment).

(*a*) Co. Lit. 148. a. Dy. 5. pl. 6.

(*b*) Cro. Eliz. 793. Mo. 114. 1 Rol. 235. 2 Inſt. 504.

(*c*) Fitz. Det. 42. Br. Obligation 6. Br. Apportionment 1. Br. Condition 207.

(*d*) 9 Co. 135. Br. Apportionment 7. Br. Bar. 39. Co. Lit. 148. b.

(*e*) 2 Rol. 346. Dyer 55. pl. 5. Kel. 49. pl. 5.

(*f*) Br. Quare Imp. 62. Br. Brief al Eveſq; 29. Fitz. Preſentment al Eſgyleſe 2.

(*g*) Lit. Sect. 352. Co. Lit. 169. b.

(*h*) Fitz. Det. 101. Br. Det. 140.

(*i*) Ventr. 99.

(*k*) 1 Syd. 266. Moor 351. Poph. 120. 2 Sand 182. Cr. El. 715. Cro. Jac. 523.

*Co. Lit. 166. b 186. b. F. N. B. 33. m. 34. v. Cro. El 18, 19. 2 Inſt. 364, 365.

And firſt for the apprehending of the true Reaſon of this

Caſe, and of all the other Caſes, which have been urged on the other Side, (for the Law always, and in all Caſes, is conſonant to itſelf) It is to be known, that as to the Matter now in Queſt. there are three Manner of (*a*) Privities, *ſcil.* Privity in Reſpect of Eſtate only, Privity in Reſpect of Contr. only, and Privity in Reſpect of Eſtate and Contr. together: Privity of Eſtate only; as if the Leſſor grants over his (*b*) Reverſion (or if the Reverſion eſcheat) between the Grantee (or the Lord by Eſcheat) and the Leſſee is privy in Eſtate only, ſo between the Leſſor and the Aſſignee of the Leſſee, for no Contr. was made between them. Privity of Contract only is perſonal Privity, and extends only to the Perſon of the Leſſor and to the Perſon of the Leſſee, as in the Caſe at Bar, when (*c*) the Leſſee aſſigned over his Intereſt, notwithſtanding his Aſſignment the Privity of Contract remained between them, although the Privity of Eſtate be removed by the Act of the Leſſee himſelf; and the Reaſon thereof is,

(*a*) Lit. Sect. 454. Co. Lit. 271. a. 4 Co. 123. b. 124. a. 8 Co. 42. b. 1 Jones 32. Cro. Car. 184. 2 Inſt. 516.

(*b*) Cro. Car. 184.

(*c*) Cro. Car. 222.

Firſt, Becauſe the Leſſee himſelf ſhall not prevent by his own Act ſuch Remedy which the Leſſor hath againſt him by his own Contract, but when the Leſſor grants over his (*d*) Reverſion, there, againſt his own Grant, he cannot have Remedy, becauſe he hath granted the Reverſion to another, to which the Rent is incident.

(*d*) Lit. Sect. 229. Co. Lit. 152. a. Q. the late Stat.

Secondly, The Leſſee may grant the Term to a poor Man, who ſhall not be able to manure the Land, and who will, for Need or for Malice, ſuffer the Land to lie freſh, and then the Leſſor will be without Remedy either by Diſtreſs or by Action of Debt, which would be inconvenient, and in Effect concern every Man; (for, for the moſt part, every Man is a Leſſor or a Leſſee) and for theſe two Reaſons, all the Caſes of Entry by Wrong, Eviction, Suſpenſion and Apportionment of Rent are anſwered: For in ſuch Caſes either it is the Act of the Leſſor himſelf, or the Act of a Stranger; and in none of the ſaid Caſes the ſole Act of the Leſſee himſelf ſhall prevent the Leſſor of his Remedy, and introduce ſuch Inconveniencies, as hath been ſaid.

The third Privity is of Contract and Eſtate together, as between the Leſſor and the Leſſee himſelf; And *Wray*, Ch. Juſt. and Sir *Tho. Gawdy* ſaid, That as he who is a Baſtard born hath no Couſin, *ſo every Caſe imports Suſpicion of its Legitimation, unleſs it has another Caſe which ſhall be as a Couſin-German, to ſupport and prove it.* And therefore it was agreed by the whole Court, that if there be Lord and Tenant, and the Tenant makes a Feoffment in Fee, in this Caſe betwixt them for the (*e*) Arrearages due as well before the Feoffment as after, till Notice, &c. it is only Privity as to Avowry, and not any Privity in Eſtate or in Tenure, which Priv. ſhall not go with the Eſtate, and yet it is more in the Realty than the Caſe at Bar; *a fortiori* in the Caſe at Bar, when the Leſſee aſſigns his Int. yet Privity of Contr. between the Leſſor and Leſſee, as to the Action of (*f*) Debt remains.

Skin. 610.

(*e*) 2 Rol. Rep. 247. Cro. Jac. 334.

(*f*) Cro. Car. 222

(*a*) 2 Inſt. 500, 501. 4 H. 6. 20.

And at the Com. Law, before the Stat. of (*a*) *Quia emptores terrarum*, if the Tenant made a Feoffment in Fee to hold of the Chief Lord, the Feoffee could not by any Tender that he could make, compel the Lord to avow on him, but the Lord always might avow on the Feoffor, as appears in 33 *E.* 3. *Avowry* 255. For by his own Act he cannot change the Avowry of his Lord; which is a ſtronger Caſe than the Caſe at Bar: And in the ſame Caſe, if the Lord granted over his Seigniory, or if the Feoffor died, there the Privity, as to Avowry, is deſtroyed; for it is perſonal, and holds only between the Lord himſelf and the Feoffee himſelf: So, if after the Aſſignment of the Leaſe, the Leſſor grants over his Reverſion, the Grantee ſhall not have an Action of Debt againſt the Leſſee, for the Privity of Contract, as to the Action of (*b*) Debt, holds only betwixt the Leſſor himſelf and the Leſſee himſelf: So in ſuch Caſe, if the Leſſee dies, the Leſſor ſhall not have an Action of Debt againſt his (*c*) Executors; for the Privity conſiſts only between the Leſſor and the Leſſee. See for the Caſe of Avowry, *Litt. Chap. Releaſes* 106, (*d*) 107. 4 *E.* 3. 22. 2 *E.* 4. 6. 34 *H.* 6. 46. 37 *H.* 6. 33. 7 *E.* 4. 28. 24 *H.* 8. *Dy.* 4. (*e*) 29 *H.* 8. *tit. Avow. Br.* 111.

(*b*) 2 Sand. 181, 182.
(*c*) Yelv. 103. Styl. 52, 61, 118, 119. Cro. Jac. 549. 2 Rol. Rep. 131. Palm. 116, 117. All. 34.
(*d*) Co. Lit. 268. a. Lit. Sect. 454. Poſt. 35. a.
(*e*) Cr. El. 169.

So if Tenant in (*f*) Dower, or Ten. by the Curteſy, grants over their Eſtate, yet the Privity of Action remains between the (*g*) Heir and them, and he ſhall have an Action of Waſte againſt them for Waſte committed after the Aſſignment: But if the Heir grants over the Reverſion, then the Privity of the Action is deſtroyed, and the Grantee cannot have any Action of Waſte, but only againſt the Aſſignee; for between them is Privity in Eſtate, and between the Grantee and the Tenant in Dower, or Tenant by the Curteſy, is no privity at all. See *F. N. B.* 56. *f. Temp. E.* 1. *Waſte* 122. 18 *E.* 3. 3. 30 *E.* 3. 16. 36 or 38 *E.* 3. 23. 11 *H.* 4. 18. And it was agreed, that if the Leſſor enters for Condit. broken, or if the Leſſee ſurrenders to the Leſſor, now the Eſtate and Term is determined, and yet the Leſſor ſhall have an *Action of Debt* for the (*h*) Arrearages due before the Condition broken, or the Surrender made, as it appears by *F. N. B.* 120. 30 *E.* 3. 7. 6 *H.* 7. 3. *b. F. N. B.* 122. (againſt the Book of 32 *E.* 3. *Bar.* 262. which is not Law) and that in Reſpect of the Contract between the Leſſor and the Leſſee. Note, Reader, So great was the Authority and Conſequence of this Judgment, that after this Time, not only the Point adjudged hath been always affirmed, but alſo all the Differences in this Caſe taken by *Wray*, Ch. J. and the Court have been adjudged, as you may learn by the Caſes following *Hil.* 36. *Eliz.* in the K.'s B. *Rot.* 420. between (*i*) *Ungle* and *Glover* it was adjudg'd, That if the Leſſee for Ys. aſſigns over his Int. and the Leſſor by Deed indent.

(*f*) Co. Lit. 54. a. 316. a. 273. a. 9 Co. 142. a. 2 Rol. Abr. 828. 30 E. 3. 16. a. b. F. N. B. 55. e. 56. f. Cro. El. 358. Fitz. Waſte 122. 2 Inſt. 301. 11 H. 4. 19. a. Br. Waſte 66. Reg. 72. a.
(*g*) Co. Lit 54. a. 2 Inſt. 301. 2 Rol. Abr. 828. F. N. B. 56. f.
(*h*) Poſt. 65. a. 4 Co. 49. a. F. N. B. 120. h. 122. a. Br. Arrearages 11. Br. Entre cong. 90. Br. Rent 15. Kelw. 153. b. 112. b.
(*i*) Mo. 351. Cr. El. 328. 556, 633. Poph 55, 120 Goldb. 182. 1 Jones 44, 244. Ungle and Glover. Hut. 69. 1 Brownl. 56.

and enrolled according to the Stat. bargains and sells the Reverſ. to another, that the Bargainee ſhall not have an Action of Debt againſt the Leſſee, for there is no Privity betwixt them. But it was unanimouſly agreed by *Popham* Ch. Juſt. *Clench*, *Gawdy* and *Fenner* Juſtices, that after the Aſſignm. the Leſſor himſelf might have an Action of Debt againſt the Leſſee for Rent due after the Aſſignm. *Trin.* 37 *Eliz.* in the K.'s Bench, *Rot.* 1042. between (*a*) *Overton* and *Sydhall* two Points were reſolv'd by *Popham* C. J. and the wole Court.

1. That if the Executor of a Leſſee for Years aſſigns over his Intereſt, that an Action of Debt doth not lie againſt him for Rent due after the Aſſignment.

2. If the Leſſee for Years aſſigns over his Intereſt, and dies, the Executor ſhall not be charged for Rent due after his Death; for, by the Death of the Leſſee, the perſonal Privity of Contract, as to the Action of Debt in both Caſes, was determined. And *Mich.* 40 & 41 *Eliz.* between (*b*) *George Brome* Eſq; Pl. and *Hore* Def. the Caſe, in effect was ſuch: *A.* leaſed to *C.* 3 Acres of Land for Years rendring Rent, the ſaid *C.* aſſign'd all his Eſtate in one Acre to another, *A.* ſuffer'd a com. Recov'ry to the Uſe of *B.* in Fee, who brought an Action of Debt againſt the firſt Leſſee, and it was adjudg'd by *Popham*, C. J. and the whole Court, that the Action did lie; for in as much as the Leſſee had aſſign'd his Intereſt but in Part, and remain'd poſſeſs'd of the Reſidue, that not only the Leſſor, but alſo his Aſſignee, or he who claimeth under him ſhall have an Action of (*c*) Debt for the whole Rent againſt the Leſſee, for there was not Privity of Contract only, but alſo Privity in Eſtate and Contract together; and therefore the Action in this Caſe ſhall go with the Eſtate; as at Com. Law, if before the Stat. of (*d*) *Quia emptores terrarum* the Ten. had made a Feoffment in Fee of Part of the Tenancy, there was not any Apportionment, but the Lord, or his Grantee, ſhould avow on the Feoffor for as much as he remained Tenant in Reſpect of the Reſidue: But if he had made a Feoffment of the whole, then the Grantee of the Lord ſhould not avow on him, as it hath been ſaid before: See 22 *Aſſ.* 52. 24 *H.* 8. 4. *b.* 32 *H.* 8. *Br. Accept.* for this Matter. And *Popham* C.J. in this Caſe ſaid, That in Caſe when Rent reſerv'd on a Leaſe for Years ſhall be (*e*) apportioned, if in an Action of Debt the Leſſor demands more *quam oportet*; yet on *Nihil debet* the Leſſor ſhall recover as much as ſhall be apportion'd and aſſeſſed by the Jury, and ſhall be barred for the Reſidue. And *Paſch.* 41 *Eliz. Rot.* 2485. in the Com. Pleas, (*f*) *Samuel Marrow* brought an Action of Debt againſt *Fr. Turpin*, and *W. Turpin*, Adminiſt' of *Geo. Turpin*, and declar'd on a Demiſe made by the Pl. by Deed indent' of certain Land to the Inteſtate for Years rendring Rent, and for Rent behind after the Death of the Inteſtate, the Action was brought; The Defendants pleaded, That before the Rent behind, one

Poph. 137.

Dyer 4. b. Cro. El. 328.

Overton and Sydhal's Caſe. 1 Sand. 240. 2 Sand. 304.

(*a*) Poph. 120. Gould. 120. Moor 351. 1 Syd. 240, 266. Swinb 329. Co. Ent. 122. a. Cro. El. 555. Cro. Car. 188. 2 Sand. 304. 2 Ventr. 209. Latch 260, 261, 262. Sty. 407. Godb. 277. Palm. 117. 3 Bulſt. 311.

Brome and Horne's Caſe. (*b*) Cro. El. 633. Godb. 277.

(*c*) Cro. Car. 222.

(*d*) Dyer 4. pl 4. 3 Keb 583. 2 Inſt. 500, 501.

(*e*) 2 Inſt. 504. 1 Brownl. 186. 1 Rol. 237. 1 Syd. 6 Yelv. 114.

Marrow and Turpin's Caſe. (*f*) Moor 600. 2 Anderſ. 133. 2 Bulſtr. 152. Cro. El. 715. Latch 260, 261, 262. 2 Ventr. 209, 210.

(*a*) 2 Bulſtr. 151, 152. 2 Rol. Rep. 366.

of the Defendants had (*a*) aſſigned all his Intereſt to *Thomas Boorde*, of which Aſſignment the Plaintiff had Notice, and accepted the Rent by the Hands of the Aſſignee, due at a Day after the Aſſignment, and before the Day on which the Rent was due which is now demanded, upon which the Plaintiff did demur. And it was adjudg'd againſt the Plaintiff, becauſe the Privity of the Contract, as to the Action of Debt, was determined by the Death of the Leſſee; and therefore, after Aſſignment made by the (*b*) Adminiſtrator, Debt did not lie againſt the Adminiſtrator for Rent due after the Aſſignment, according to the Judgment given in (*c*) *Overton* and *Sydhall*'s Caſe before.

(*b*) 1 Jones 223. Cro. Car. 188.

(*c*) Antea 24. a.

Alſo it was ſaid, if the Leſſee aſſigns over his Term, the Leſſor may charge the Leſſee or his Aſſignee at his Election; and therefore if the Leſſor (*d*) accepts the Rent of the Aſſignee, he hath determined his Election, and ſhall not have an Action againſt the Leſſee afterwards for Rent due after the Aſſignment, no more than if the (*e*) Lord once accepts the Rent of the Feoffee, he ſhall not avow on the Feoffor: And by theſe Judgments and Reſolutions you will the better underſtand your Books; betwixt which *prima facie* ſeems to be ſome Diverſity of Opinions. *Vide* 44 *E.* 3. 5. & 44 *Aſſ.* 18. 9 *H.* 6. 52. by *Paſton*, which agree with the Judgment of Sir *Chriſtopher Wray*. See 8 *Eliz. Dyer* 247. and the *Quære* there made, is now well reſolv'd.

(*d*) 3 Bulſtr. 152, 153. Cro. Car. 334. 1 Sand. 240.

(*e*) Co. Lit. 269. b. Poſtea 65, b. 66. a. 6 Co. 58. a.

BUTLER *and* BAKER's *Caſe.*

* Rep. Q. A. 106, 121, 122, 160, &c. Fitzg. 231.

Mich. 33 & 34 Eliz.

In the King's Bench.

IN an Action of Treſpaſs brought by *John Butler* againſt *Thomas Baker* and *Thomas Delves* Defendants, for a Treſpaſs in Parcel of the Manor of *Thoby*, in the County of *Eſſex*, and Not guilty pleaded, the Jury gave a ſpecial Verdict to this Effect; *William Barners* ſeiſed of the Manor of *Hynton* in the County of *Glouceſter*, had Iſſue *William* his eldeſt Son, *Thomas* and *Leonard Barners*; and that *William* the Son, married *Elizabeth Eden*; and afterwards 2 & 3 *Phil. & Mar. William*, the Father, in Conſideration of the ſaid Marriage, and for a Jointure for the ſaid *Elizabeth*, did enfeoff of the ſaid Manor of *Hynton*, *Robert Rocheſter*, Knt. and others, to the Uſe of the ſaid *William* the Son, and *Elizabeth* his Wife, and the Heirs of their two Bodies begotten; and afterwards *William*, the Father, died, whereby the Reverſion of *Hynton* deſcended to *William* the Son; and that *William* the Son was alſo ſeiſed of the Manor of *Thoby*, (whereof the Place in which is Parcel) and of certain Lands in *Fobbing* in the County of *Eſſex* in Fee, and had Iſſue *Thomas* and *Griſild*, now the Wife of *Baker*, one of the Defendants; and afterwards *William* the Son, by his laſt Will in Writing deviſed, that *Elizabeth* his Wife ſhould have and hold during her Life the Manor of *Thoby*, in Conſideration of her Jointure and Dower in all his other Manors and Lands; provided always, that if the ſaid *Elizabeth* ſhould take herſelf to any former Jointure of any Lands of *William* the Son, that then the ſaid Will of the Manor of *Thoby*, as to the ſaid *Elizabeth*, ſhould be void: And after the Death of the ſaid *Elizabeth*, the ſaid Manor of *Thoby* ſhould remain to *Thomas* his Son, and to the Heirs Males of his Body; the Remainder to the Heirs Males of the Body of the ſaid *William* the Son; the Remainder to *Thomas* his Brother for Life; the Remainder to his eldeſt Son, in Tail, &c. the Remainder

Poph. 87. 1 Anderſ. 348. Moor 254. Goldsb. 84. 3 Leon. 271. 10 Co. 80. b. 84. a. b. Co. Lit. 111. b.

to *Leonard Barners*, and to the Heirs Males of his Body; the Remainder to *Richard Barners* in Tail; the Remainder to the Right Heirs of *William Barners* the Son. And that *William* the Son ſo as aforeſaid ſeiſed of all the Premiſſes, died thereof ſeiſed; and that the Manors of *Thoby* and *Hynton* were held of the Queen *in Capite* by Knights Service, and that after the Death of *William* the Son, his Wife by Word *in Pais* did wave her Eſtate in *Hynton*, and agreed to the Manor of *Thoby*, and entred into it; and that the Manor of *Hynton* and the Lands in *Fobbing* were an entire third Part of all the Lands and Tenements whereof *William* the Son died ſeiſed. And that *Thomas* the Son of *William* the Son, and *Thomas* the Son of the Father, were dead without Iſſue, by which *Leonard* entred into the Manor of *Thoby*, and took to Wife *Mary Gedges*, and died; *Anthony* his Son aſſigned the ſaid Manor of *Thoby* to the ſaid *Mary* for her Dower, now the Wife of *Butler* the Plaintiff. And that *Thomas Delves*, one of the Defendants, by the Command of *Baker*, the other of the Defendants, entred, *&c.* And if the Entry of the ſaid *Delves* were lawful, is the Doubt; and the Caſe in Effect is ſuch: *William* ſeiſed of *Thoby* and *Fobbing*, and *William* and *Elizabeth* his Wife ſeiſed of *Hynton*, to them and to the Heirs of their two Bodies begotten, by Eſtate made to them, during the Coverture, for the Jointure of the Wife; the Reverſion to *William* in Fee; *Thoby* amounting to the Value of two Parts, and *Fobbing* and *Hynton* to a full third Part. *Thoby* and *Hynton* are held *in Capite*; *William* by his Will deviſed in Writing *Thoby* to his Wife for her Life, on Condition that ſhe ſhould not take her former Jointure, with divers Remainders over, and died; the Wife *in Pais* refuſed her former Jointure in *Hynton*. If the Will be good for the whole of *Thoby*, or but for Part. And two Queſtions were moved in this Caſe: 1. If the Refuſal *in Pais* ſhould deveſt the Eſtate-Tail which was veſted in the Wife? 2. Admitting the Refuſal *in Pais* ſhould deveſt it, if the Refuſal ſhould have ſuch Relation that the Will ſhould be good for the whole Manor of *Thoby* by the Statutes of (*a*) 32 & 34 *H.* 8. or ſhould be void for Part? And this Caſe was argued in the King's Bench by *Egerton*, the Queen's Solicitor, and *Thomas Buckley*, for the Plaint. and by *Popham*, the Queen's Attor. and *Coke* for the Def. And afterwards *Mich.* 33 & 34 *Eliz.* the Caſe was argued by the Court. (*b*) and *Fenner* and *Clench* argued for the Plaint. and *Wray* C. J. and *Gawdy* for the Defend. And afterwards, the ſame Term, the Caſe was argued by the Counſel on both Sides in the Excheq. Chamb. before all the Juſtices of *Engl.* and *Wray* Ch. Juſt. told me, that *Anderſon* Ch. Juſt. of the Common Pleas, and *Manwood* Chief Baron did agree with him: And afterwards *Wray* Ch. Juſt. the laſt Day of *Eaſter* Term

(*a*) 32 H. 8 cap. 1. 34 H. 8. cap. 5. 12 Car. 2 cap. 24. Co. Lit. 76 a. b.

(*b*) Poph. 88. Moor 254.

Term 34 *Eliz.* died, who was a moſt Reverend Judge, of profound and judicial Knowledge, accompanied with a ready and ſingular Capacity, grave and ſenſible Elocution, and continual and admirable Patience; and Sir *Jo. Popham*, the Queen's late Attorney General, did ſucceed him. And afterwards, in *Michaelmas* Term 34 & 35 *Eliz.* Sir *Roger Manwood* Chief Baron died, who was alſo a Reverend Judge of great and excellent Knowledge in the Law, and accompanied with a ready Invention and good Elocution; and Sir *William Periam* Knt. late one of the Juſtices of the Common Pleas, ſucceeded him. And afterwards the Caſe was oftentimes argued, as well in the Exchequer-Chamber as at Serjeants Inn, before all the Juſtices of *England* and Barons of the Exchequer; and after many Conferences between themſelves, Judgment was order'd to be entred for the Defendant, which was done in the King's Bench accordingly; and in this Caſe divers Points were reſolved.

Firſt, That at the Common Law, if Lands be given to Husband and Wife in Tail, or in Fee, and the Husband dies, there the Wife cannot deveſt the Freehold out of her by any verbal Waver or Diſagreement *in Pais*. As if before any Entry made by her, ſhe ſaith that ſhe utterly waves and diſagrees to the ſaid Eſtate, and will never take or accept thereof; yet the Freehold remains in her, and ſhe may enter when ſhe pleaſes: So if before her Entry, ſhe reciting her Eſtate, had ſaid by Word *in Pais* that ſhe doth aſſent and agree to the ſaid Eſtate, or Words *tantamount*, yet ſhe might afterwards wave it in a Court of Record; for a verbal Aſſent and Agreement *in Pais*, as it was held by divers in ſuch Caſe, is not of any Effect in Law; for the Law doth more reſpect an Act without Words, than Words without an Act; and therefore if ſhe enters into the Land and takes the Profits, altho' ſhe ſaith nothing, it is a good Agreement in Law, for the Law doth reſpect Deeds; but Words without an Act are not in this Caſe regarded in Law, as it is adjudg'd in *M.* 34 *E.* 1 *Avowry* 232. That if a Man takes a Diſtreſs for one Thing, yet when he comes into a Court of Record, he may avow for what Thing he pleaſes; *a multo fortiori* when a Freehold is veſted in him it cannot be deveſted by bare Words *in Pais*; and therewith agrees 17 *E.* 3. 6. & 17 *Aſſ.* where the Husb. aliened his Land, and took back an Eſtate to him and his Wife in Tail, the Husb. died, the Lord of whom the Land was held, by Knights Service, ſuppoſing the Husb. died ſole ſeiſed, by Word aſſigned Dower to the Wife, which ſhe accepted; yet it was adjudg'd that this Refuſal of the Eſtate of Inheritance and Acceptance

Poph. 89. 17 Aſſ. pl. 3 4 Co. 5. b.

of her Dower *in Pais* ſhould not deveſt the Freehold out of her. Alſo in 13 *R.* 2. *Joint-tenancy*, the Caſe was, a Charter of Feoffment was made to four, and Seiſin was deliver'd to Three in the Name of all; and after the Seiſin was given, the Fourth came and ſaw the Deed, and ſaid by Word that he would have nothing in the Land nor agree to the Deed, but diſagree; and it was adjudg'd that this Diſagreement by Word *in Pais* ſhould not deveſt the Freehold out of him. And *Thorpe* in 35 *E.* 3. *tit. Diſclaimer* ſaith, that in ſuch Caſe the Tenancy doth remain *in toto* till Diſagreement in a Court of Record. Another Reaſon was alledged, That a Freehold ſhould not ſo eaſily be deveſted by bare Word *in Pais*, to the End that the Tenant to the *Præcipe* ſhould be the better known: But as an Act *in Pais* may amount to an Agreement, ſo an Act *in Pais* may amount to a Diſagreem. but that is always of one and the ſame Thing: As if Lord and Tenant be, and the Tenant by Deed doth enfeoff the Lord and a Stranger, and makes Livery to the Stranger in the Name of both; in this Caſe, if the Lord, by Word, diſagree to the Eſtate, it is nothing worth; and on the other Side, if he enters into the Land generally, and takes the Profits, this Act will amount to an Agreement to the Feoffment; but if he enters into the Land, and diſtrains for his Seigniory, this Act amounts to a Diſagreement to the Feoffment; and will deveſt the Freehold out of him; and therewith agrees 10 *E.* 4. 12. (*b*) by all the Juſtices: And yet in ſome Caſe a Claim by Word will direct an Entry to be an Agreement to one Eſtate, and a Diſagreement to another. As if Lands be given to Husband and Wife in Tail; and after the Stat. of (*c*) 32 *H.* 8. the (*d*) Husband aliens the Land to the Uſe of him and his Heirs, and afterwards deviſes it to his Wife for Life, and dies, the Wife enters, claiming by Word the Eſtate for Life; this is a good Diſagreement to the Eſtate of Inheritance, and a good Agreement to the Eſtate for Life; and therewith agrees 18 *Eliz. Dyer* 351. *b.* for there is not any Doubt of the Tenant to the *Præcipe*, and the Act and the Words work together. But if the Wife, before her Entry, agrees by Word to one Eſtate, and diſagrees to the other, it is nothing worth; But if *A.* makes an Obligation to *B.* and delivers it to *C.* to the Uſe of *B.* this is the Deed of *A.* preſently: But if *C.* offers it to *B.* there *B.* may refuſe it *in pais*, and thereby the Obligation will loſe its Force, (but perhaps in ſuch Caſe *A.* in an Action brought on this Obligation cannot plead *non eſt factum*, (*e*) becauſe it was once his Deed;) and therewith agrees *Hill.* 1 *Eliz. Rot.* 442. in *Tawe's* (*f*) Caſe, reported by Serjeant *Bendloes*, and by the Lord *Dyer*, *Hill.* 1. *Eliz.* 167. The ſame Law of a Gift of Goods and Chattels, if the Deed be deliver'd to the Uſe of the Donee, (*g*) the Goods and Chattels are in the Donee preſently

13 R 2 Joint-tenancy 9. Rep. Q. A. 39.

(*b*) 3 Leon. 372. Br. extinguiſhment 33.

(*c*) 32 H. 8. cap. 28

(*d*) Dyer 351. pl. 24. 8 Co. 72. b 1 Co. 87. b. Co. Lit. 357. a Hob. 71. Cro. Jac 490. 1 Brownl. 140. 1 Leon 84. Moor 493. 2 Roll's Rep. 36.

(*e*) 5 Co. 119. b. Cr. Eliz. 54, 627. 2 Leon 110, 111. Doct pl. 260, 261.

(*f*) N. Benl. 75. Co. Ent. 145. nu. 24.

(*g*) Dyer 49. a.

preſently, before Notice or Agreement; but the Donee may make Refuſal *in Pais*, and by that the Property and Intereſt will be deveſted, and ſuch Diſagreement need not to be in a Court of Record. Note, Reader, By this Reſolution you will not be drawn to Error by certain Opinions deliver'd by the Way, without Premeditation, in 7 *E.* 4. 7. *a. b.* & 19. *b.* 8 *E.* 4. 29. *a.* 8 *H.* 7. 13. (*a*) 39 *H.* 6. 44. *b.* and other Books *obiter*.

(*a*) Fitz. Releaſe 17, 54. Br. Releaſe 45. Br. Agreem. 3. Br. Faits 80.

Secondly, It was reſolv'd, that tho' the Eſtate is created by Limitation of Uſe, by Limitation made after the Stat. of 27 *H.* 8. which Statute hath transferred the Uſe into Poſſeſſion, for ſo is the uſual Pleading *de uſibus in poſſeſſionem transferendis*, and altho' an (*b*) Uſe might have been waved by Word *in Pais* before the ſaid Stat. yet now the Statute doth incorporate the Uſe and Poſſeſſion of the Land, and hath coupled them together with an indiſſoluble Conjunction, and therefore no more than an Eſtate created by Feoffment, Gift, or Grant can be waved *in Pais*, no more can ſuch Eſtate created by Limitation of Uſe; which Matter, on theſe Words of the ſaid Act, (*in ſuch Manner, Form, and Condition*) is well and at large explain'd and reſolv'd in (*c*) *Dillon* and *Frein*'s Caſe, and in (*d*) *Corbet*'s Caſe: And therefore it was reſolv'd in this Caſe at Bar, the Refuſal *in* (*e*) *Pais* to have the Manor of *Hynton*, and the Entry and Agreement to the Manor of *Tholby* was a good Agreement to one, and a Refuſal to the other, and thereby the Inheritance was deveſted, and that by Force of the Statute of 27 *H.* 8. *cap.* 10. *verſus finem*, concerning Jointures of Wives; by which it is provided, *That if any Wife ſhall have any Manors*, &c. *unto her given, or aſſured, after Marriage, for Term of her Life*, &c. *that then ſuch Wife over-living her Husband, ſhall and may at her Liberty, after the Death of her ſaid Husband, refuſe to have, and take the Lands*, &c. *and to have, demand, and take her Dower; any Thing in this Act to the contrary notwithſtanding*. By which Words, it was unanimouſly agreed by all the Juſtices and Barons of the Exchequer, that the Wife might refuſe (*f*) her Jointure *in Pais*, and be endow'd by Conſent *in Pais*, or by Writ of Dower. And therewith agrees (*g*) *Whorewood*'s Caſe, 38 *H.* 8. *Dyer* 61. *b.*

(*b*) 6 Co. 34. *a.* 2 Co. 53. *b.*

(*c*) 1 Co. 120, &c. Poph. 70. 1 And. 309. Jenk. Cent. 276.

(*d*) 1 Co. 83. *b.* 84, 85. Moor 601, 633. 2 And. 134.

(*e*) Poph. 88. Moor 254. Goldb. 84.

(*f*) 4 Co. 3. *a.* Plowd 396. *b.* Co. Lit. f. 36 *b.*

(*g*) Dyer 61. pl. 31. Poſtea 28. *a. b.*

The third Point, and the great Doubt of the Caſe was on a Branch of the Stat. of (*h*) 34 & 35 *H.* 8. of Wills, by which it is enacted, That the Act of 32 *H.* 8. of *Wills, Shall be extended, expounded*, and taken, as hereafter enſueth, that is to ſay, "That the King ſhall have and take for his full third "Part of all ſuch Manors, Lands, &c. whereunto he is or "ſhall be entitled by the ſaid former Act, and by this "preſent Act, ſuch Manors, Lands and Tenements, as ſhall

(*h*) Co. Lit. 76. *a. b.* 111. *b.* 6 Co. 75. *b.* 76. *a. b.* 1 Sidenf. 56.

" by any Means deſcend, or come by Deſcent, as well of " Eſtate of Inheritance in Fee-tail as Fee-ſimple, or in Fee- " tail only, *&c.* immediately after the Death of the ſame " Deviſor or Owner thereof. And that the Will, *&c.* ſhall " ſtand good and effectual in the Law, albeit the ſame Will, " *&c.* be had and made of all his Fee-ſimple Lands, *&c.* or " of the more Part thereof.' And if in this Caſe the Refuſal of *Hynton* hath ſuch Relation or Operation in Law, that now on the Matter, *Hynton* and *Fobbing* do deſcend immediately after the Death of the Deviſor? And it was ſtrongly objected, that now on the Matter *Hynton* and *Fobbing* do deſcend immediately after the Death of the Deviſor, within the Intention and Meaning of the ſaid Branch of the Act of 34 & 35 *H.* 8. and that for divers Reaſons and Cauſes.

(*a*) Poph. 89. 1 Anderſ. 350. 3 Leon. 204. 1 Co. 85. b. 3 Co. 20. b.

1. Becauſe this Caſe doth conſiſt on (*a*) Conſtruction of an Act of Parliament, and of a Will or Teſtament, both which are always conſtrued and expounded according to the Intent and Meaning of the Parties thereto, and not by any ſtrict or ſtrained Conſtruction.

2. This Refuſal ſhall have ſuch Relation and Operation in Law, that now on the Matter *Hynton* immediately deſcends, and now *ab initio* the Husband was ſole ſeiſed of the Manor of *Hynton*. And many Caſes were put on the general Ground of Relations. But I will report thoſe only, which I conceive to be moſt material. It was ſaid, that of a Joint Eſtate a Woman ſhall not be endow'd: But if (*b*) Lands be given to Husband and Wife, and the Heirs of the Husband, or the Heirs of their two Bodies, or to their Heirs, and afterwards the Husband dies; now if ſhe will wave and refuſe the Joint Eſtate, the Wife may bring her Writ of Dower, and thereby, in Judgment of Law, the Husband ſhall be ſaid ſole ſeiſed *ab initio*; for otherwiſe the Wife cannot be endowed, and yet in Truth the Husband and Wife were Joint-tenants during all the Coverture; but now the Refuſal ſhall have ſuch Relation, that in Judgment of Law the Husband was *ab initio* ſole ſeiſed: And therewith agrees the Book in (*c*) 11 *E.* 3. *tit. Dower* 63. where the Caſe was, Lord and Tenant of a Houſe held by Homage and 10*s.* Rent, the Tenant enfeoffed *W.* the Lord granted the Seigniory to Husband and Wife in Tail, *W.* attorned, the Husband died, the Seigniory ſurvived to the Wife, and ſhe brought a Writ of Dower, in Bar of which the Lord pleaded Acceptance of Homage, by which it was admitted, that the Writ of Dower did lie. In an Action of Waſte brought by *Rob.* (*d*) *Thetford* againſt *Andrew Thetford*, *Paſch.* 28 *Eliz. Rot.* 122. in the Com. Pleas, the Plaintiff counted that *J. A.* gave to *John Thetford* and *Thomaſin* his Wife, and to the Heirs of their Bodies, (whoſe Heir the Plaintiff is) and that *John* and *Thomaſin*, 3 & 4 *Phil.* & *M.* made a Demiſe to the Def-

(*b*) 1 Anderſ. 350.

(*c*) 3 Leon. 272. Poſtea 28. b. Perk. 29. b. ſect. 352.

(*d*) Co. Ent. 710. nu. 12. 1 Ander. 220, 350. Sav. 109. 2 Leon. 204. Lane 7.

for

for 21 Years, and that the Donees were dead, and that the Plaintiff was Heir in Tail, and that the Defendant had done Waſte: The Defendant pleaded *quod prædict' Johannes & Thomaſina non dimiſer', &c.* on which they were at Iſſue: The Jury found, that the ſaid *John* and *Thomaſin*, by their Deed indented, made the Leaſe to the Defend. for 21 Years, *ut ſupra*, and that *John* died, and after his Death *Thomaſin* entred and diſagreed to the ſaid Leaſe; and whether the Iſſue was found for the Plaintiff, for as much as it was found that both made the Leaſe, as the Plaintiff had counted, which was the Point of the Iſſue; or whether it was found for the Defendant by Matter *ex poſt facto*, that is to ſay, by the Diſagreement of the Wife, was the Queſtion.

And after great Conſideration, and many Arguments at the Bar and Bench, the Juſtices of the Common Pleas gave Judgment for the Defendant; for now by the Diſagreement of the Wife, in Judgment of Law it was the Leaſe of the Husband only; and yet in Truth, during the Life of the Husband, it was the Leaſe of both, as it appears by 7 *H.* 4. 13. *in Waſt.* 3 *H.* 6. 53. (*a*) *in Weſt.* 22 *H.* 6. 24. (*b*) But now by the Diſagreement ſubſequent, and by Relation and Operation of Law, it was *ab initio* the Leaſe of the Husband only; for if it *ab initio* had not been the Leaſe of the Huſband only, the Iſſue had been found for the Plaintiff: And the Caſe of *Whorewood* 38 *H.* 8. *Dy.* 61. *b.* was ſtrongly urged, where the Caſe was, That *W. Whorewood*, the King's late Attorney General, being ſeiſed of the Inheritance of Lands of the Value of 630 *l.* in which the Wife was a Joint Purchaſor with her Husband of 60 *l.* by his laſt Will in Writing declared, That his Wife ſhould have, during her Life, the third Part of all his Lands and Tenements, with the ſaid Lands which ſhe had in Jointure, the ſaid Part to be aſſigned by his Executors, and died; the Wife refuſed her Jointure, and demanded a third Part of the whole Land, that is to ſay, 120 *l.* as a Legacy, and 80 *l. per Ann.* as a third Part of the Reſidue, for her Dower: And it was ordered and decreed in the Court of Wards, that ſhe ſhould have her Legacy, *ſcil.* the third Part of the whole; by which it appears, that the Refuſal of the Wife ſhould have Relation *ab initio* to make the Husband ſole ſeiſed of the whole, or otherwiſe the ſaid Deviſe could not extend to that whereof ſhe was before jointly ſeiſed. And ſo in the Caſe at Bar, the Refuſal of the Wife hath ſuch Relation and Operation in Law, that now on the Matter the Husband was *ab initio* ſole ſeiſed of the Manor of *Hynton*, and by Conſequence the ſame doth deſcend after the Death of the Husband; and ſo the Deviſe of the whole Manor of *Tholby* good and effectual in Law; for now it is tantamount as if the Uſe had been limited only to *William*, and to his Heirs on the Body of *Elizabeth* begotten; and where the Statute of 34 *H.* 8. ſpeaks of

(*a*) Br. Leaſe 11. 3. Br. Baron and Feme 4, 48. Br. Agreem. 6. Fitz. Waſte 36. Br. Waſte 120.
(*b*) Antea 27 a. Dyer 61. pl. 31. Poſtea 28. b.

a Deſcent *immediately after the Deceaſe*, &c. that is true, for now upon the Matter the Manor of *Hynton* deſcended immediately; for now the Impediment, that is to ſay, the Eſtate of the Wife, is remov'd *ab initio*; and yet it was ſaid, that this Word (*immediately*) ſhould not have ſuch a ſtrict Conſtruction, that it ought to be made *in ipſo articulo temporis*, but would be ſatisfy'd if it be made in convenient Time: As in 18 *E.* 4. 22. a Man is bound to make an Obligation immediately, yet he ſhall have convenient Time to make it: But it was anſwer'd and *Reſolv'd*, That the ſaid Refuſal in the Caſe at Bar, ſhould not have ſuch Relation or Operation in Law, that the Deviſe ſhould be good for the whole Manor of *Thoby*, and that for two general Cauſes:

1. Upon the Reaſon of the Com. Law, and 2. upon the Statutes of 32 & 34 *H.* 8. As to the firſt it was reſolv'd, That Relation is a Fiction of Law, (not) to make a Nullity of a Thing *ab initio*, (to a certain Intent) which *in rei veritate* had Eſſence, and the rather for Neceſſity, *ut res magis valeat quam pereat*: And therefore in the ſaid Caſe of Dower in (*a*) 11 *E.* 3. to this Intent, that the Wife ſhould have Dower, which it is not poſſible for her to have, unleſs her Refuſal ſhould have Relation *ab initio*; for this Cauſe, and for Neceſſity, the Law will make a Nullity of it; but as to any other collateral Intent, the Law will not make any Nullity thereof; as if a Man makes a Gift in Tail to Husband and Wife, and afterward grants the Reverſion of the Lands and Tenements which the Husband and Wife hold in Tail, and afterwards the Husband dies, and the Wife to have her Dower, waves and diſagrees to the Eſtate-tail; now, as to her, there is a Nullity of the Eſtate *ab initio*; and to ſuch Intent the Law feigns that the Eſtate was made only to the Husband; but as to the Grant of the Reverſion, which is a collateral Act, the Refuſal ſhall not have any ſuch Relation, for ſhe may be endowed altho' that Act ſtand, and ſo no Neceſſity; and therefore, without Neceſſity, *ut res magis valeat*, the Law will not feign any Nullity; but in Deſtruction of a lawful Eſtate veſted, the Law will never make any Fiction. So in the Caſe at Bar, for the Manor of *Hynton* only, the Law will make ſuch a Fiction; but for the Manor of *Thoby*, which is a collateral Thing, no ſuch Fiction ſhall be made; for (*b*) *relatio eſt fictio juris, & eſt intenta ad unum*, and that was the firſt Reaſon. And as to (*c*) *Whorewood*'s Caſe, it was ſaid, that the Decree was made by Agreement, as it appears by the ſaid Caſe; and the Scope of the Caſe was, that ſhe would have the third Part as a Legacy, and her Dower alſo; and, by Agreement, ſhe took Compoſition for the whole: And it doth not appear by the ſaid Caſe, whether the Wife were Joint Purchaſor for Life, in Tail, or in Fee, nor whether any Part of the Land were held *in Capite*, or by Knights-Service,

Finch's Law. 65.

(*a*) Antea 27. b. 3 Leon. 272. 1 erk. 29. ſect. 352.

(*b*) Godb. 317.

(*c*) Antea 27. a. 28. a. Dyer 61. pl. 31.

The

The ſecond Reaſon was, that Relations in many Caſes ſhall help Acts in Law, as in the Caſe of *(a)* Dower, &c. but ſhall never help Acts of the Parties; that is to ſay, to make void Acts of the Parties good, by Relation, or Fiction of Law; and therefore if a Man enfeoffs an Infant, or a Feme covert, and afterwards gives or grants or deviſes the Land, or any other Thing out of the Land to another, and afterwards the Infant or the Husband diſagrees, that without Queſtion ſhall have Relation between the Parties *ab initio*, to this Intent, that the Infant or Husband ſhall not be charged in Damages, or receive any Prejudice; but as to the void Grant or Deviſe of the Party, it ſhall never make the void Grant, Gift, or Deviſe, good. Alſo if one demiſes Land to one by Deed for Life, the Remainder to the King in Fee, and the King grants the Remainder over in Fee, and afterwards the Deed is enrolled; in this Caſe the *(b)* Enrolment ſhall have Relation for Neceſſity, and *ut res magis valeat*, that the Remainder *quaſi ab initio* ſhall paſs by Fiction of Law; for otherwiſe it would never paſs; and therefore, to this Intent only, it ſhall have Relation: But to make the Patent (which was void at the Time of the Grant) good, it ſhall have no Relation. So if a Diſſeiſor makes a Feoffment in Fee by Deed to *A.* and *B.* and makes Livery to *A.* in the Name of both, and afterwards *A.* dies, in this Caſe *B.* to diſcharge himſelf of Damages, may refuſe it, as hath been ſaid, and it ſhall have Relation *ab initio* as to diſcharge him of Damages; but to make any Leaſe, Gift, or Grant, or Deviſe, or any other Act of the Party good, it ſhall not have Relation.

(a) Co. Lit. 150 a. 9 Co. 135. b. 5 E. 2. Avowry 206.

(b) Fitz. Feoffments and Faits 30. Plowd. 31. b. 1 H. 7. 31. a. Hob. 222. Moor 676. Godb. 218. 2 And. 161. Br. Prærogative 57. 2 Roll's 399, 400. Cr. Jac. 52, 53, 409. Skin. 74, 75.

And it was ſaid, That as Relations ſhall extend only to the ſame Thing, and to one and the ſame Intent, ſo they ſhall extend only between the ſame Parties, and ſhall never be ſtrain'd to the Prejudice of a *(c)* third Perſon who is not Party, or privy to the ſaid Act. And therefore if a Man makes a Feoffment of a Manor by Deed, or *(d)* without Deed, and long Time after the Livery the Tenants attorn to the Feoffee, in this Caſe the Attornment for Neceſſity, and *ut res magis valeat*, ſhall have Relation by Fiction of Law to paſs *ab initio*, for otherwiſe they can never paſs. And if they ſhould not paſs *(e) ab initio* by a Fiction of Law, they would not be Parcel of the Manor according to the Intent and Purpoſe of the Feoffment, if they ſhould paſs at ſeveral Times: But yet this Relation ſhall not *(f)* charge the Tenants for the Arrearages in the mean Time: So if Feoffee, upon Condition, grants a Rent-Charge out of the Land, and afterwards the Grantee brings a Writ of Annuity, now *ab initio* it was an Annuity between the Grantor and Grantee; but as to the Feoffor, who by the Grant was entitled to enter for the Condition broken, it ſhall not have

(c) Co. Lit. 150. a. Cr. Car. 423.

(d) 2 Roll's 11. 20 H. 6. 7. a.

(e) Co. Lit. 310. b.

(f) Co. Lit. 310. b.

have any Relation to his Prejudice. So it is adjudg'd in (*a*) 30 *E.* 3. 17. in a *Dum fuit infra ætatem* againſt *Richard Spellow*, the Tenant ſaid, that his Father was ſeiſed, and died ſeiſed, and pray'd his Age; the Demandant Counter-pleaded the Age, becauſe his Father and he himſelf were jointly enfeoffed, and to the Heirs of the Father: And it was adjudg'd, that he ſhould not have his Age; for altho' this Refuſal ſhould have Relation as to himſelf, yet, as to the Demandant, who is a Stranger, it ſhould not have Relation to delay his Action, when in Truth he had the Freehold by Purchaſe. Further, it was ſaid, That no Relation ſhall make that tortious which was lawful; for, as it hath been ſaid, Relations are Fictions in Law, which will never do Wrong: Upon all which Matter it was concluded, That this Refuſal ſhould have Relation only as to the Manor of *Hynton*, and not as to the Manor of *Tholby*, and to the Intent only that the Wife ſhould not be prejudic'd for any Thing concerning the Manor of *Hynton*; and this Relation doth not prejudice the Heir, who is a third Perſon, upon whom, by the Death of the Deviſor, Part of the Manor of *Tholby* did deſcend; and it will not deveſt that which the Law by Deſcent had lawfully veſted by the Death of the Deviſor in the Manor of *Tholby*: But as the Will took Effect at the Time of his Death, it ſhall remain; for (*b*) *omne Teſtamentum morte conſummatum eſt*; and the Refuſal of the Wife, as to the Manor of *Hynton*, cannot make the Deviſe as to the third Part of the Manor of *Tholby* good, which was void when the Deviſe took Effect, *ſcil.* at the Time of the Death of the Deviſor.

(*a*) Fitz. Age 58. 1 Roll's 143, 144, 145.

(*b*) Poſtea 34. a. 4 Co. 61. b. 6 Co. 76. a. Poſtea 32. a.

Note, Reader, Not only in this Caſe of Relation, which is a Fiction of Law, but alſo in all other Fictions of Law, they are to certain Reſpects and Purpoſes, and extend only to certain Perſons. As the Law ſuppoſes, that the Vouchee is Tenant of the Land, whereas in Truth he is not, but that is as to the Demandant himſelf, and to enable him to do all Things as to the Demandant, and which the Demandant may do to him; and therefore a Fine levied by the Vouchee to the Demandant, or a Fine or Releaſe from the Demandant to the (*c*) Vouchee, is good; but a Fine levied by the Vouchee to a Stranger, or a Releaſe made to him by a Stranger is void, and therewith agrees 7 *E.* 4. 13. *b.* So if the Tenant, hanging a *Præcipe* againſt him, makes a Feoffment as to the Demandant, the Law doth ſuppoſe him Tenant of the Land, and he ſhall plead all Pleas which the Tenant of the Land may plead; but *in rei veritate* the Feoffee is Tenant of the Land as to all Strangers: So if (*d*) Donee in Tail makes a Feoffment in Fee, *in rei veritate* the Donee hath *neque jus in re, neque jus ad rem*, and yet the Donor may extinguiſh or diminiſh his Rent by Releaſe or Confirmation made to him; as it is agreed 14 *H.* 4. 38. *a. b.* 1 *H.* 5. *Grants* 43. in

(*c*) Hob. 222. 1 Co. 87. b. 8 Co. 151. b. Lit. Sect. 491. 10 Co. 48. b. Co. Lit. 265. b. 9 H. 7. 26. a. 7 E. 4. 13. b. 2 Roll's Rep. 323.

(*d*) Co. Lit. 269. a. Hob. 337. 2 Roll's Rep. 322, 417, 429. Godb. 313, 314. 10 Co. 48. b. 1 Jones 73.

in all which Caſes, and other the like, the Law will never make any Fiction, but for Neceſſity, and in Avoidance of a Miſchief; for if the Vouchee ſhould not be Tenant as to the Demandant, or that the Tenant after the Feoffment ſhould not be, as to the Demandant, Tenant of the Land, the Demandant in the one Caſe and the other could never have the Effect of his Suit, but would be for ever delayed; And in the latter Caſe, notwithſtanding the Feoffment, the Donee ſhall remain Tenant as to him, and of Neceſſity he ſhall *(a)* avow for his Rent upon him, for he cannot avow upon the Diſcontinuee, for then upon his own ſhewing, the Reverſion, to which the Rent is incident, would be deveſted out of him by the Feoffment, and by Conſequence he cannot maintain his Avowry for the Rent; and therefore for Neceſſity he ſhall avow upon the Donee; and his Feoffment, which is his own Act, and by which wrong is done, ſhall not avail him to bar the Donor of his Rent, for a Man ſhall never take Benefit of his own Wrong, and that is (as to this Point) as it ſeems to me the better Opinion of the Books. As to the Statutes of 32 & 34 *H.* 8. it was reſolved, That after the Statute of 27 *H.* 8. and before the Statute of 32 *H.* 8. the Manor of *Thoby* was not deviſeable; and becauſe the ſaid *Will. Barners* the Deviſor had not followed the Power and Authority (which the Statute of 32 *H.* 8. and the Statute of 34 *H.* 8. which explains it) gave him, it was reſolved, That the Will was void for Part of the Manor of *Thoby*. And that was collected on four Parts of the ſaid Acts, the Effect of which I have abridged as follows.

(a) Hob. 337. Co. Lit. 269. a. Cro. Car. 428, 430. Plow. 561. a. 48 E. 3. 8. b.

Co. Lit. 76. a. b. 78. a.

The firſt Branch of the Act of 34 *H.* 8.

" 1. That all and every Perſon, having a ſole Eſtate in Fee-" ſimple of any Manors holden in chief, &c. ſhall have full " and free Liberty, Power and Authority, to give or diſpoſe, " by his laſt Will in Writing, as much as in him of Right, " as much of, &c. as ſhall amount to the full and clear yearly Value of two Parts in three Parts to be divided.

The firſt Branch of the Act 34 H. 8.

The ſecond Branch.

" 2. The ſame Diviſion to be ſet out by the Deviſor, " Owner, or in Default thereof, by Commiſſion to be granted out of the Court of Wards.

The ſecond Branch.

The third Branch.

" 3. And that the King ſhall take for his full third Part, " ſuch Manors, &c. of Eſtate of Inheritance, as well in Fee-" Tail as in Fee ſimple, as ſhall deſcend, or come by Deſcent, " &c. immediately after the Death of ſuch Deviſor.

The third Branch.

The fourth Branch.

" 4. And in Caſe the Manors, &c. which ſhall immediately after his Death deſcend, &c. ſhall not extend to the " Value of a full 3d Part, the K. may take, &c. to make up, &c.

The fourth Branch.

And on theſe four Parts it was concluded for divers notable Reaſons,

Reaſons, that the Deviſor had not Power to deviſe the whole Manor of *Thoby* by Force of the ſaid Statutes: And to this Purpoſe four Reaſons were collected on the ſaid firſt Branch.

1. Rep. Q. A. 105. 122, 123, &c.

Firſt, on this Word (*having*); and therefore if it be asked, *Quis poteſt legare?* The Makers of the Act anſwer, *Every Perſon having Manors, &c.* ſo that it is not ſaid *every Perſon* generally, but *every Perſon having*, &c. And this Word (*having*) imports two Things, *ſcil.* Ownerſhip, and Time of Ownerſhip, for he ought to have the Land at the Time of the making of his Will, and the Statute gives ſuch Perſon *having* &c. Authority to deviſe two Parts of his Lands which he hath, and more he cannot deviſe, for his Authority doth not extend to more: And in our Caſe the Deviſor had not the Manor of *Hinton*, for he and his Wife were Joint-tenants of it during the Coverture, between whom are no Moieties: ſo that he and his Wife had it, but he himſelf had it not; and he is not Owner thereof, nor is it to be accounted any of his Lands: And every Deviſor ought to be a *Perſon having, &c.* at the Time of the making his Will within the Purview of this Act. This appears 4 & 5 *Phil. & M. Dyer* 158. A Man (*a*) ſeiſed in Fee of Land of Socage Tenure aſſured it to his Wife in Jointure, *Anno* 32 *H.* 8. and eight Years after, in 2 *E.* 6. he purchaſed Lands in Fee, held *in Capite*, in Knight's Service, and of two Parts thereof made his Will, and died, his Heir within Age; and it was reſolved, That the Queen ſhould not have any Part of the Jointure of the Wife, and that by Force of theſe Words in the Act of Explanation of 34 *H.* 8. *and having no Lands holden by Knight's Service*, becauſe he was not *a Perſon having* any Lands held of the King by Knight's Service *in Capite*, at the Time of the Jointure made. It was reſolved on the ſame Reaſon, in the Court of Wards, and in *Trinit.* 29 *Eliz.* (*b*) *Carre*'s Caſe was reſolved by the Chief Juſtices *Wray* and *Anderſon*, on conference with divers other Juſtices, and the Caſe was ſuch: King *E.* 6. by his Letters Patents, granted the Manor of *Congresbury* to *G. Owen*, in Fee-Farm, to hold of the Manor of *Eaſt Greenwich* in Socage; and rendring the annual Rent of 95 *l. per Ann.* And afterwards Queen *Mary*, in the firſt Year of her Reign, granted divers Manors, which came to the Crown by the Attainder of *Margaret* Counteſs of *Salisbury*, and alſo 54 *l. per Ann.* Parcel of the ſaid Rent of 95 *l.* to *Francis* Earl of *Huntington*, and *Katharine* his Wife, and to the Heirs Males of the Body of the ſaid *Katharine*, the Rem'r to *Winifred Haſtings*, in Tail, to hold in Socage; the Reverſion of the Fee being in the Crown: And afterwards King *Philip* and Queen *Mary* reciting the ſaid Grant made by the ſame Queen, as to the ſaid Rent, granted the Reverſion of the ſaid Rent to the ſaid Earl of *Huntington* and *Katharine* his Wife, and to the Heirs

(*a*) 10 Co. 83. b. Dyer 158. pl. 33. 6 Co. 76. a. 2 Brownl. 105. Co. Lit. 78. a.

Carre's Caſe. (*b*) 3 Leon. 276. 2 Rol. Rep. 361. Godb. 309, 425. 416. 2 Brownl. 105.

Heirs of the ſaid *Katharine*, to hold in chief by the 20th Parts of a Knight's Fee; and afterwards *G. Owen* being ſeized of the Manor of *Congresbury*, purchaſed the ſaid Rent of 54 *l. per Ann.* by which it was extinct; and afterwards *G. Owen* died ſeized of the ſaid Manor, and it deſcended to *Richard* his Son in Fee, who by his Will in Writing deviſed it to divers Perſons for Payment of his Debts, and died, his Heir of full Age; and although the ſaid Rent was extinct between the Parties, yet it was ſaid that in Conſideration of Law, it was in being as to the King, for the Benefit of his Tenure: As in 26 *Aſſ.* there the King was ſeized of the Honour of (*a*) *Pikering*, and granted the Bailiwick thereof in Fee, rendring Rent, and afterwards granted the Honour over to another, and afterwards the Baily forfeited his Office of Bailiwick, whereof the Patentee took Advantage, whereby it was utterly void: But as to the King for the Preſervation of the Rent, it had Continuance: 11 *H.* 7. (*b*) a Meſnalty deſcends to the Tenant paravail; and although it be extinct, yet the Lord Paramount ſhall have the Ward. 31 *E.* 3. (*c*) *tit. Aſſets*, a Rent extinct ſhall be Aſſets, 10 *E.* 3. *Mortmain* 17. 38 *Aſſ.* 17. (*d*) *F. N. B.* 223. A Rent extinct by Releaſe to an Abbot, is Mortmain; yet it was reſolved, and ſo decreed, That the Deviſe was good for all the Land in Reſpect of this Word (*having*); for *Richard Owen* was not a Perſon *having the Rent* at the Time of the making of his Will, but he was a Perſon *having the Manor*, and therefore he might deviſe it; and foraſmuch as it was held in Socage, the Deviſe was good *in toto*; and that was the Reaſon of the Lord *Dyer* in *Bret's* Caſe, *Plow. Com.* (*e*) That the Deviſe there in the principal Caſe, was not good, becauſe the Deviſor had not the Land at the Time of the Deviſe, and grounded his Reaſon on this Word (*having*). And *Wray* Chief Juſtice, in his Argument (which was the laſt Argum. that ever he made) held that this Word (*having*) imports, That the Deviſor ought to have the Land, either at the Time of the making of his Will, or at the Publication thereof, which amounts in Law to a making.

And that the Statute of 34 *H.* 8. which is but an Act of (*f*) Explanation of the Act of 32 *H.* 8. ſhould not be conſtrued by any ſtrained Senſe againſt the Letter of the Act; for if any Expoſition ſhould be made againſt the direct Letter of the Expoſition made by Parliament, there would be no end of expounding; and therefore he ſaid he had not ſeen any Caſe adjudged, that the Act of 34 hath been interpreted againſt the (*g*) Letter by other Conſtruction than the makers of the Act have made; and therefore he ſaid, That if a Man (*h*) hath Lands held *in Capite* of the yearly Value of 20 *l.* and Land in Socage of the yearly Value of 10 *l.*

Co. Lit. 374.

(*a*) 26 Aſſ. 60. 6 Co. 79 a. Moor 161. Br. Incidents 11. Br. Patents 35.

(*b*) 11 H. 7. 12. a. 6 Co. 79 a. Br. Deſcent 67. Br. Gard. 123.

(*c*) 31 Ed 3. Aſſets 5. Co. Lit. 374. b.

(*d*) F. N. B 223. J. 7 Co. 38. a.

Vide infra.

(*e*) Plow. 344. b. Rep. Q. A. 122, 123, &c.

Rep. Q. A. 106.

(*f*) 8 Co. 163. b. Cr. Car. 34 b.

(*g*) Poſt. 34. b. 10 Co. 83. a.

(*h*) Dy. 366. pl. 38. 1 Keb. 97.

that he may deviſe all the Land held *in Capite*, for that is within the expreſs Words of the Act, and therefore he denied the Opinion of the Juſtices of the Common Pleas conceived *ex improviſo*, in 21 *Eliz.* (*a*) *Dyer* 366.

(*a*) Dyer 366. pl. 38. 1 Keb. 97.

Note Reader, The Reaſon of ſuch Opinion (as I conceive) was becauſe if the Deviſe ſhould be good for all the Land held *in Capite*, the King, as it ſeems *prima facie*, would in ſuch Caſe have neither Wardſhip, nor Primer Seiſin, becauſe the Heir had not any Land held *in Capite*, whereof he could ſue Livery, for only the Land in Socage deſcended to him. And therefore the Judges there ſaid, That if the Deviſe ſhould be good for all the Land held *in Capite*, the Statutes of 32 & 34 *H.* 8. would be fruſtrated and defrauded.

(*b*) 10 Co. 80. 83. a.

But as I conceive, the Opinion of (*b*) *Wray*, Chief Juſtice, is good Law; for although the Deviſe be good for all the Lands held *in Capite*, yet the Queen ſhall have Warſhip or Primer Seiſin, as the Caſe requires, by Force of the Savings of the ſaid Acts: For if in ſuch Caſes the Tenant by Act executed had conveyed all the Land held *in Capite*, to the Uſe of his Wife, or for the Preferment of any of his Children, or for Payment of his Debts, in this Caſe the Heir ſhall ſue Livery for one Acre of Land held *in Capite*, and yet none of the Land held *in Capite* deſcended to the Heir: And ſo it was reſolved and decreed in the Court of Wards, in (*c*) *Calthrop*'s Caſe, 20 *Eliz.*

(*c*) Swinb. 28

And he ſaid, That two Things are requiſite to the Perfection of a Will by which Land ſhall paſs; that is to ſay, (*d*) the Writing, and that is *initium*; and the Death of the Deviſor, and that is *finis vel conſummatio*; and he ſaid, That the *initium* ought to be *plenum & perfectum*, or otherwiſe it is worth nought: And therefore if one commands another to make his Will, and thereby to deviſe *W.* Acre to *J. S.* and his Heirs, and *B.* Acre to *J. N.* and his Heirs, and he writes the Deviſe to *J. S.* in the Life of the Deviſor, and before the other is written, the Deviſor dies, yet it is a good Will to *J. S.* But if he commands one to make his Will, and to deviſe *W.* Acre to *J. S.* and his Heirs, upon Condition, and he writes the Deviſe to *J. S.* and his Heirs, and before he writes the Condition, the Deviſor Dies; this Deviſe is void; for in the one Caſe the Deviſes are ſeveral and diſtinct, and in ſuch Caſe the Deviſe to *J. S.* is full and perfect; but in the latter Caſe the Deviſe is not full, but maimed and imperfect, for the whole Deviſe as to *J. S.* was not fully put in Writing, and ſo *initium* in ſuch Caſe *non fuit plen'*

(*d*) 4 Co. 4. a. 5 Co. 68. a. Plow. 343. b. Jenk. Cent. 115. Allen. 54.

Skin. 72.

So it was reſolved in the Caſe at Bar, That neither the Beginning nor the End of the Will was full or perfect; For at the Time of the Writing of it, and at the Time of the Death of the Deviſor, he had not Power in reſpect of the joint Eſtate in *Hynton* to diſpoſe of all the Manor of *Tholby*,

which amounted to the Value of two Parts of the whole, (*a*) *& omne Teſtamentum morte conſummatum eſt*, and because by the Death of the Deviſor *Hynton* ſurvived to the Wife, part of *Thoby* preſently by the Death of the Deviſor deſcended to the Heir; and as the Deviſe in this Caſe took Effect by the Death of the Deviſor, ſo it ſhall continue.

(*a*) Antea 29. b. Poſtea 34. a. 4 Co. 61. b. 6 Co. 76. a.

The ſecond Reaſon out of the firſt Branch was on the Word (*ſole*); for the Teſtator ought to have a ſole Eſtate, as well in the Land which he leaves to deſcend to the Heir, as in the Land which he deviſes: But in the Caſe at Bar, the Deviſor neither at the Time of the making of his Will, nor at the Time of his Death, had any ſole Eſtate in the Manor of *Hynton*, which he did intend ſhould deſcend to his Heir, but he had a joint Eſtate in Tail with his Wife, and the Wife had not any Power to diſagree during the Coverture; but her Time of Diſagreement came after the Death of her Husband, as it is held 19 *Eliz. Dyer* (*b*) 358. ſo that without Queſtion the Deviſor had not a ſole Eſtate in the Manor of *Hynton*, neither at the Time of making of his Will, nor at the Time of his Death; and therefore the Deviſor had Power by the Act, to deviſe but two Parts of the Reſidue, that is to ſay, whereof he was ſole ſeiſed, either at the Time of the making of his Will, or at leaſt of his Death. 2.

(*b*) Dyer 358. pl. 49. Co. Lit. 36. b. 1 Leon. 285.

The third Reaſon on the firſt Branch was upon theſe Words (*ſhall have full and free Liberty, Power and Authority, by Will, to deviſe or diſpoſe of two Parts of the ſaid Manors*); by which Words it appears, that the Intent of the Makers of the Act was, to give Liberty and Authority to the Party (who peradventure had not Time to make Diſpoſition by Act executed in his Life) to deviſe it by his Will: But without Queſtion, that which he (*c*) cannot diſpoſe of by any Act in his Life, ſhall not be taken for any of his Manors, *&c.* whereof he may deviſe two Parts by Authority given him by this Statute: But here in our Caſe, the Deviſor by Reaſon of his individed Eſtate with his Wife, cannot make any Diſpoſition of the Manor of *Hynton*, but only during the Coverture. 3.

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

The fourth Reaſon on the firſt Branch, on Conſideration of both Statutes, the Deviſor had Liberty to deviſe two Parts of the clear yearly Value, and the third Part of the clear yearly Value is ſaved to the K. *&c.* In which it was noted, that the Words as to two Parts, and as to the third Part, are all one as to the clear yearly Value; ſo that it appears fully by the Letter and Intention of the Act, that the King ſhould have equal and equal Benefit for his third Part, as the Deviſee ſhould have for his two Parts; yea, the Statute adds more ſpecial Words for the Value of the third Part, than for the two Parts; for he 4.

ſhall

ſhall have *the clear yearly Value* of the third Part, without any Diminution, *&c.* or Subſtraction of the third Part *of the full, &c. Profits thereof*, as the Words of 32 *H.* 8. are. But in our Caſe, the King will not have equal Benefit; yea, the King will be in a worſe Caſe, for the Deviſee will have his two Parts abſolutely, and the King will have but a Poſſibility for his third Part, and that will depend upon the Will of the Wife, whoſe will and Pleaſure is not reſtrain'd to any Time, ſo that againſt the expreſs Letter and Intent of the Acts, and againſt all Reaſon, the Deviſee will have two Parts preſently of the *clear yearly Value*, and the King will not have the Poſſeſſion of *Hynton*, but will have a Poſſibility to have it, if the Wife will diſagree, and that would be an injurious and unequal Conſtruction; for *Cato* ſaith, (*a*) *Ipſæ etenim Leges cupiunt ut jure regantur*; and this very Statute hath been ſo conſtrued, that Equity and Equality ſhall be obſerved, and inequality avoided, 35 *H.* 8. *tit. Teſtaments Br.* 19. If (*b*) a Man holds three Manors of three ſeveral Lords by Knight's Service, he cannot deviſe two Manors, leaving the third, for that would not be equal to the two other Lords, but two Parts of each Manor. And on theſe Words *(clear yearly Value)* it was ſaid, That That of Inheritances which are not of any annual Value, ſome are deviſable, and ſome are not deviſable within this Statute. And therefore, if the Queen grants to one and his Heirs (*c*) *bona & catalla felonum & fugitivorum*, or *utlagatorum, fines, amerciamenta, &c.* within ſuch a Town or Manor, in this Caſe he cannot deviſe them to another, nor leave them to deſcend for a third Part, becauſe they are not of any annual Value, and therefore the ſaid Statutes do not extend to them.

(*a*) 2 Co. 25. b. 5 Co. 100. a. 8 Co. 152. a. 9 Co. 123. b. Co. Lit 10. a. 143. a. 116. b. 174. b. 271. b.
(*b*) 9 Co 133. b. 2 Co. 25. b. 5 Co. 100. a. 2 Bulſt. 15. Br. N. C. 275.
(*c*) 10 Co. 81. a. Co. Lit. 111. a

But if a Man be ſeiſed of a Manor to which a Leet, or Waif and Stray, or any other Hereditament which is not of any annual Value, is appendant or appurtenant, there by the Deviſe of the Manor, with the Appurtenances, theſe ſhall paſs as Incidents to the Manor, for inaſmuch as the Statute enables him by expreſs Words to deviſe the Manor, by Conſequence it enables him to deviſe the Manor, with all Incidents and Appurtenances to it: And it was never the Intent or Meaning of the Parliament, that when the Deviſor had Power to deviſe the Principal, that he ſhould not have Power to deviſe that which was incident and appendant to it, or that the Manor, *&c.* ſhould be diſmembred, and Fractions made of Things which by lawful Preſcription have been united and annexed together. And it was ſaid, That all this was reſolved by *Anderſon* Chief Juſtice of the Common Pleas, and *Periam*, then one of the Juſtices of the ſame Court, on a Conference had with divers other Juſtices, *Paſch.* 25 *Eliz.* in *Baker*'s Caſe, concern-

ing divers Franchiſes and Liberties within the Manor of *Canford*, which Report was made to the Lords of the Council, in the ſaid Term, after Dinner, in the Star-Chamber. And with their Reſolution agrees the Opinion of (*a*) *Priſot* in 32 *H.* 8. 22. in the like Caſe: It is enacted by the Statute of (*b*) 1 *H.* 4. *cap.* 6. that thoſe who ask of the King Lands or Tenements, Offices, *&c.* make expreſs mention of the Value of them: But *Priſot* there held, That if the Office be of a certain Value, there he ought to make mention of the Value; but if it be of a caſual Thing, there he need not; As if the King grants me a Market, I need not to ſet the Value thereof, becauſe it is not yearly certain; ſo when the Law requires that the Value be mentioned, it is to be intended of a Thing which is of a certain yearly Value: But if a Man hath a Hundred, with the Goods of Felons, Outlaws, Fines, Amerciaments, return of Writs, and ſuch like caſual Hereditaments within the Hundred, and ſuch Hundred, with the ſaid caſual Hereditaments, have been accuſtomably let to Farm for a yearly Rent, then it may be deviſed within the Purview of the ſaid Acts, becauſe the Incertainty hath been reduced to an annual Value, according to the Purview of the ſaid Acts; on which Differences it was concluded, That the third Part of the clear yearly Value ought to be left to the Heir, and not any Thing which depends on an Incertainty. For if the Franchiſe to have the Goods and Chattels of Felons or Perſons outlawed, which were never demiſed for a certain Rent, are left to the Heir for his third Part, in that the Statute is not purſued, and yet it may be they may happen every Year; *a fortiori* in the Caſe at Bar; As to the Manor of *Hynton*, it depends on an Incertainty, for it may be the Wife will refuſe, and it may be ſhe will not refuſe, and no Time is limited when ſhe ſhall refuſe, and therefore the Statute is not purſued by Reaſon of the Incertainty.

(*a*) 32 H. 6. 22. a. 10 Co. 81. a.

(*b*) 10 Co. 81. a. Co. Lit. 133. a. Raſtal Patent 4.

5 Co. 6. a.

Alſo it was ſaid, That if a Man is ſeiſed of 3 Acres, each of the yearly Value of 12 *d.* and he deviſes a Rent of 3 *s.* out of all the three Acres, this Deviſe is void for the whole, and ſhall not be good for two Parts, becauſe he hath not purſued the Statute of 34 *H.* 8. by which it is enacted, *That he may deviſe any Rent, Common or other Profit, out of the ſame two Parts*, viz. *of his Mannors, Lands, Tenem. and Hereditam. or out of any Part thereof, as much thereof as ſhall amount to the full clear yearly Value of two Parts thereof.* So when he deviſes a Rent out of the whole, he doth not purſue the Power and Authority which the Stat. preſcribes, but in ſuch Caſe, if he deviſes a Rent of 3 *s.* which is to the Value of the whole, out of two Parts, it is good, for in this Branch the Value extends to the Land, and not to the Rent, for the Words are, *any Rent*, without any Reſtr. And it

Hob. 80. Co. Lit. 111. 8 Co. 85. a.

8 Co. 84. a 85. a.

was obſerved on the Stat. of 32 *H.* 8. That if a Man had deviſed all his Land, it had been good for a third Part, as it was adjudged in *(a) Unton* and *Hyde*'s Caſe, *Dyer* 150. becauſe the Land was ſeverable, and might be divided either by the Deviſor during his Life, or by Commiſſion after his Death. But a Rent deviſed out of Land, is an entire Thing, and Power to deviſe that, is given only by the Statute of 34 *H.* 8. for the Act of 32 *H.* 8. doth not extend to it; and therefore when the Statute enables him to deviſe a Rent out of two Parts, if he deviſes it out of the whole, he doth not purſue the Statute: And ſo it was concluded on the firſt Branch, That the Deviſor in the Caſe at Bar, at the Time of the making his Will, was not a Perſon *having*, and *having ſole Eſtate*, and who had Power and Authority to diſpoſe two Parts of the ſame Lands of *clear yearly Value*, and that the King, *&c.* ſhould have the third Part of *clear yearly Value*, without any Diminution, *&c.* but as to the Manor of *Hynton*, he was jointly ſeiſed with his Wife, as is beforeſaid.

(a) N Benl. 49 pl. 88. 8 Co. 85. a. Dyer 150 pl. 86. 1 Leon. 76. 3 Leon. 29. 1 And. 3. 4. Jenk. Cent. 215.

Their Reaſon on the ſecond Branch was, That the Deviſor, by any Thing in his Life, could not aſſign the Manor of *Hynton* for the third Part, nor could it after his Death, by Commiſſion, be aſſigned for the third Part; for during all the Coverture, the Wife was jointly ſeiſed with him, and after his Death it ſurvived to his Wife; and the Words of the Act are, *The ſame Diviſion to be ſet out by the Deviſor or Owner*, &c. *and in Default thereof by Commiſſion*; in which Branch this Word (*Owner*) is alſo to be obſerved, which is added, to ſhew that every Deviſor ought to be *Owner*, and he who ſhall make any Diviſion of the three Parts, *&c.* ought to be *Owner*, which he is not in our Caſe of the Manor of *Hyuton*, and therefore he cannot aſſign it to the King for his third Part.

Their Reaſon upon the third and fourth Branches, was on this Word *(immediately)* which for the enforcing of the Intent of the Makers of the Act, is twice inſerted. And by the Words of the third Branch it is enacted, That the third Part ought (in two ſeveral Clauſes) immediately to deſcend after the Death of the Deviſor or Owner; immediately is as much as to ſay, without any mean Time: But in our Caſe, the Manor of *Hynton* ſurvived to the Wife, and till Diſagreement, nothing thereof did deſcend, *&c.* *Ergo*, it did not deſcend immediately. And herein the Judgment of the Law on this Will, and of the Eſtate of theſe Manors and Lands after the Death of the Deviſor, and before the Diſagreement is to be conſidered; and without Queſtion in the mean Time, the Manor of *Hynton* ſurvived to the Wife, and therefore of Neceſſity in the mean Time, a Part of the Manor of *Tholby* ſhall deſcend, for if before this Diſagreem. an Office had been found of all this Matter, without Queſt. the Q. ſhould have had Part of the Manor of *Tholby*, *&c.* then

then foraſmuch as every Deviſe ought to take Effect by the Death of the Deviſor, as it is held in 9 *H.* 6. and many other Books, becauſe *(a) omne Teſtamentum morte conſummatum eſt*, for this Cauſe the Deviſe being void at the Time of the Death, for Part of *Thoby*, and lawfully veſted in the Heir by Deſcent, it cannot be made good and deveſted out of the Heir by the ſubſequent Diſagreement of the Wife: But this Word (*immediately*) makes it clear, for add it to the Words precedent, *viz.* that the King ſhall have a third Part of the *clear yearly Value*, immediately after the Death of the Deviſor or Owner, all theſe Words, and principally this Word (*immediately*) directly prove that the K. ought to have the third Part preſently by the Death, and ſhall not ſtay or expect on any Incertainty, as in our Caſe he ſhall do, if he ſhall expect it on the Refuſal of the Wife, for peradventure ſhe will not refuſe in a Year, peradventure two Years, &c. *Littleton* ſaith, if a Woman (*b*) Diſſeiſoreſs takes a Husband, and hath Iſſue and dies, and afterwards the Tenant by the Curteſy dies, this dying ſeiſed ſhall not toll an Entry, for the Iſſue came not to his Lands immediately after the Death of his Mother.

(*a*) Antea 29 b. 32. a. 4 Co. 61. b. 6 Co. 76. a.

(*b*) Co. Lit. 241. b. Co. Lit. Sect. 394. 37 H. 6. 1.

And it was agreed, That if a Man be ſeiſed of three Acres by Knight's Service *in Capite*, and makes a Leaſe of one Acre for Life, and afterwards deviſes the other two Acres, and dies, and afterwards Tenant for Life dies, yet the Deviſe is void for the third Part of the two Acres, becauſe the third Acre did not deſcend immediately after the Death of the Deviſor to the Heir, as the Stat. ſaith; that is to ſay, *by Deſcent, immediately after the Death of the Deviſor.* In 17 *El. Dyer*, the Earl of (*c*) *Arundel*'s Caſe, where a Gift in Tail was made on Condition, that if the Donee, or his Iſſues, *aliquam rem facerent, &c. quo minus prædict' maner' præfato Comiti & hæredibus ſuis, &c. immediate reverti deberet, &c.* In that Caſe they held clearly, That if the Donee do any Act by which, when he dies without Iſſue, the Donor ſhall be put to Suit, or to Entry, ſo that the Manor doth not immediately revert, *hoc eſt*, without any mean Time, &c. that the Donor may re-enter: And as to the Caſe in 18 *E.* 4. that was affirmed for good Law, when a (*d*) Man is to do an Act immediately after an Award, in that Caſe, inaſmuch as the Party is bound to do an Act of Neceſſity, he ought to have ſuch Time for the doing thereof, as the doing of the Act requires, and therefore there of Neceſſity, there ought to be a mean Time between the Award and the Performance of the Act; but here in the Caſe at Bar, immediately by the Death of the Deviſor, Land without any mean Time may deſcend, and that was the Intent of the Makers of the Act: For as the Deviſee ſhall have the two Parts (*e*) immediately, ſo the Heir ſhall have

(*c*) 10 Co. 37. a. 40. a. Dyer 342, 343. pl. 55, 56. 6 Co. 41. Jenk. Cent. 242.

(*d*) Antea 28. b. 18. E. 4. 22. b. Br. Arbitrement 51.

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

his third Part immediately, 8 *E.* 4. 71. and 21 *E.* 3. 27. it appears that he who is immediate Heir, excludes all mean Heirs; the ſame Law of an immediate Tenant.

(*a*) Antea 312. And againſt the Opinion of (*a*) *Wray*, Ch. Juſtice, it was afterwards objected in the Excheq. Chamber, that the Statute of 34 *H.* 8. hath been conſtrued by Equity, againſt the Letter of it. And to that Purpoſe a Caſe, *Trin.* 26 *Eliz.* in the Com. Pleas, *Rot.* 1916. between (*b*) *Ive* and *Stacie* was cited; the Effect of which Caſe was, That a Man ſeiſed of Lands, Part held *in Capite*, and Part in Socage, made a Feoffment of the Lands held *in Capite*, to the Uſe of himſelf and his Wife for Life, with divers Remaind. over, and afterw. (the ſaid Lands *in Capite*, being full two Parts) deviſed the Socage Land: It was adjudged that the Deviſe was void; and yet it was ſaid, it is againſt the Letter of the Act. To which it was anſwered and reſolved, That the Reaſon of the ſaid Caſe was, becauſe it appears by the Words of the ſaid Act, That the Stat. gives Authority to one to make Diſpoſition, either by Act executed, or by his Will, of two Parts, ſo that if he hath executed his Authority by Act executed of two Parts to the Uſe of his Wife, he hath no (*c*) Authority by the Stat. to make any Deviſe of the third Part, for by the Conveyance in his Life, he hath executed his Power and Authority which the Statute gave him, and therefore he cannot make any Deviſe of the Reſidue, which was applied to prove that he ought to purſue the Authority which the Statute gave him, *&c.*

(*b*) Co. Ent. 663. nu. 13 2 Brownl 104. 1 And 146 Mo. 148. 3 Leon. 105.

(*c*) Cr. El. 878. Cr Jac. 31. Mo 567. 6 Co. 18. a. Co. Litt. 111. b.

Another Caſe was cited out of a Reading, That the King granted certain Lands to one and his Heirs (*d*) during the Life of the Grantee by Knight's Service *in Capite*, and after his Death in Socage, in that Caſe he might deviſe all that Land; and yet it was ſaid, it was againſt the Letter of the ſaid Act, for at the Time of the making of his Will and Day of his Death, he held by Knight's Service, which Caſe was agreed to be good Law. For altho' the Stat. ſpeaks at the Beginning generally of Lands held by Knight's Service, yet there is a ſaving of Ward, *&c.* to the Lord; ſo that it appears fully by the Letter of the Act, that there ought to be ſuch a Tenure by Knight's Service, whereby the Lord ſhall have Ward, *&c.* or otherwiſe it is not any Tenure within the Act: But in the ſaid Caſe the Lord was not to have any Wardſhip, becauſe the Tenure determin'd by his Death, and the Reaſon of Wardſhip failed, *ſcil.* that an (*e*) Infant within Age cannot do Knight's Service, as *Littleton* ſaith, *fol.* 22. (*a*) So *e converſo*, if Land be given to hold in Socage during his Life, and after his Death by Knight's Service, there ſhall not be any Wardſhip, becauſe the Tenure by Knight's Service beginneth in the Son, and the Father during his Life held in Socage.

(*d*) 10 Co. 84. b.

(*e*) Lit. Sect. 103. Co. Lit. 74. b. 78. b. 6 Co. 73. b. 74. a. 2 Inſt. 12. Cr. Jac. 156, 389.

And another Caſe was cited out of a Reading alſo, *ſcil.*

A Man (*a*) ſeiſed of Lands held *in Capite*, and of other Lands held in Socage, deviſed the Land in Socage, and afterwards aliened the Land held *in Capite in bona fide*, this Deviſe is good for all the Land holden in Socage; which Caſe was alſo agreed for good Law for all the Land in Socage, when no Title of the Wardſhip, *&c.* doth accrue to the Lord in reſpect of other Land. And it was objected, That if the Stat. of 34*H.*8. ſhould not be taken by Equity, then the Stat. might be eaſily defrauded: For if a Man held one Acre of Land by Knight's Service *in Capite*, and 1000 Acres in Socage, and is diſſeiſed of the Acre held in chief, and then makes his Will of all the Land held in Socage, and dies, in that Caſe according to the Let. of the Act, the Deviſe will be good for all the Land in Socage: And thereupon they did infer on theſe Words, *Every Perſon having a ſole Eſtate in Fee ſimple, &c. holden by Knight's Service in chief*, and in that Caſe he had not any Land held in chief, either at the Time of the making of his Will, or at the Time of his Death but only a Right to the Land, and ſo out of the Letter of the Act, of which he could not make any Diſpoſition or Deviſe; and yet if that Caſe ſhould not be taken by Equity, the whole Act would be to little or no Purpoſe: to which it was anſwered, That the ſaid Caſe was within the Letter of the ſaid Act, for the (*b*) Diſſeiſee in the Judgm. of Law hath the Land to many Purpoſes.

(*a*) 10 Co 84. a. Co. Lit. 111. b.

(*b*) Fitz. Eſcheat 3 Br. Eſcheat 11, 16, 22. Gard. 36. Br. Traverſe 133. Br. Entre Congeable 129.

For firſt, he hath the Land to forfeit, and therefore if he be attainted of Treaſon or Felony, he ſhall forfeit the Land.

2. If he dies without Heir, the Land ſhall eſcheat to the Lord. 37 *H.*6. 1. *a.* 6 *H.* 7. 9. *a.* 32 *H.*6. 27. *a.* 2 *H.* 4. 13.

3. The Diſſeiſee ſhall compel the Lord to (*c*) avow on him as his very Tenant, *Lit. Releaſes* 106. *b.* And *Littleton* there ſaith, That the Diſſeiſee is Tenant in Law.

(*c*) Ante 23. b. Co. Lit. 268. c. Co. Lit. Sect. 454. 9 Co. 21. a.

4. If he dies, his Heir within Age, the Lord ſhall have the Wardſhip; and the Lord ſhall have a Writ of Right of Ward, and the Writ ſhall ſay, *Terram illam Tenuit*; and therewith agrees *F.N. B.* in Writ of Eſcheat (*d*) 144. and (*e*) *Lit. Chap. Releaſes*, 107. *a. b.* 36 *E.* 3. *Garde* 10. And ſo in Judgment in Law, the Diſſeiſee had the Land held *in Capite*, ſo that he cannot deviſe all his Socage Land. And as to the Caſe in 4 & 5 *Phil. & Mar. Dyer* 155. that if Lands in (*f*) *London*, or Lands which are deviſable by Cuſtom, are held *in Capite*, yet the whole may be deviſed. To that it was anſwered, That was not by Force of the Statute, but becauſe the Lands were deviſable by Cuſtom before the Statute, and the Statute is in the affirmative, and doth not (*g*) take away any Cuſtom: But it was agreed, That in the ſaid Caſe, the Saving in the Act gave in ſuch Caſe the third Part of the King for Wardſhip, *&c.* and yet the Heir ſhould be barred by the Cuſtom.

(*d*) F.N.B. 144. c.

(*e*) Lit. Sect. 458. Co. Lit. 270. a.

(*f*) 9 Co. 133. b. Dy. 155. pl. 21. Dall. in Kelw. 205. b. 206. a. Dall. in Aſh. pl. 9. Dall. 75. pl. 60. Styl 476. Mo. 70. Dall. 64. pl. 24. Co. Lit. 111. b. 1 And. 52, 53, 147. Benl. in Kelw. 214. Benl. in Aſh. 32. N. Benl. 317. pl. 300.

(*g*) Co. Lit. 111. b. 115. a. 2 Ro. 266. Mo. 70.

And after the Case had been argued Twenty-one Times severally, *scil. Pasch.* 37 *Eliz.* Judgment was given according to the said Resolutions, against the Plaintiff. You have (good Reader) many notable Rules and Cases of Relations put in this Case, whereby you will the better understand your Books which treat of Relations, to which I will add one Case now lately, *scil. Trin.* 37 *Eliz.* adjudged in the Common Pleas, in an *Ejectione firmæ*, between *(a) Jennings* and *Bragge*, where on a Special Verdict found, the Case was shortly thus: A Disseisee made an Indenture purporting a Lease for Years, and delivered it to a Stranger off of the Land, as an Escroll, and commanded him to enter on the Land, and to deliver it on the Land, as his Deed, to the Lessee, which he did accordingly; it was adjudged it was a good Lease. And in that Case,

(a) Cr. El. 446, 447. Co. Lit. 48. b. Lane 99. 3 Bulst. 215. Palm. 498, 499. Bridgm. 51. 1 Ro. 830.

1. This Difference was agreed, when the Person at the first Delivery hath not Power or Ability in Law to make the Lease and Contract, and before the second Delivery he attains to it, there the Lease or Contract is void: But when the Person at the first Delivery hath Power and Ability in Law to contract, but cannot perfect it till an Impediment be removed; there if the Impediment be removed before the second Delivery, the Contract is good. As if at the Time of the first Delivery the Lessor be an Infant, or Feme *(b)* Covert, and at the Time of his second Delivery he is of full Age, or sole, in both these Cases the Deed shall not bind; for at the Time of the first Delivery he was not a Person who had Ability in Law to make a Contract: But in the Case at Bar, the Lessor was able to make a Contract, as well in respect of his Person, as of his Right and Interest in the Land, but was hindred only by the Disseisin, which being removed before the second Delivery, the Lease is good.

(b) Cro Car. 165. Cr. Jac. 617. 2 Leon. 200. Yelv. 1. 1 Benl. 134, 135. Cr. Car. 388. 2 Sand. 313.

2. It was resolved, that to some Intent, the second Delivery hath *(c)* Relation to the first Delivery, and to some not, and yet in Truth, the second Delivery hath all its Force by the first Delivery; and the second is but an Execution and Consummation of the first: And therefore in Case of Necessity, *& ut res magis valeat quam pereat*, it shall have Relation by Fiction to be his Deed *ab initio*, by Force of the first Delivery; and therefore, if at the Time of the first Delivery, the Lessor be a Feme Sole, and before the second Delivery she takes Husband; or if before the second Delivery she dies, *(d)* in that Case, if the second Delivery should not have Relation to this Intent, to make it the Deed of the Lessor *ab initio*, but only from the second Delivery, the Deed in both Cases would be *(e)* void; and therefore in such Case for Necessity, and *ut res magis valeat*, to this Intent by Fiction of Law, it shall be a Deed *ab initio*, and yet in Truth it was not

(c) Dyer 57. pl. 23. Cr. El. 447.

(d) Styl. 423.

(e) Cr. El. 447.

not his Deed till the ſecond Delivery: But in the Caſe at Bar, if it ſhould have Relation by Fiction of Law *(a)* to the firſt Delivery, then that would avoid the Leaſe, for then it would be made by one who was out of Poſſeſſion, and as one ſaid, *(b) fictio legis inique operatur alicui damnum vel injuriam*; and therefore to this Intent it ſhall not have Relation but according to the Truth to be a Deed from the Time of the ſecond Delivery, *ut res magis valeat quam pereat*; and hereby it appears, that the Reaſon of the Law (that to ſome Intent the ſecond Delivery ſhall have Relation, and to other Intent no Relation) is all one, *ſcil.* for Neceſſity, and *ut res magis valeat quam pereat.*

(a) Cr. Jac. 451.

(b) Co. Lit. 150. a. 2 Rol. Rep. 502. Ant. fol. 29. b. 11 Co. 51. a. Godb. 317. Palm. 354. 13 Co. 21.

3. It was reſolved, That as to *(c)* collateral *Acts*, there ſhall be no Relation at all; for if the Obligee do releaſe before the ſecond Delivery, ſuch Releaſe is void, *vide* 18 *H.* 6. (9.) 91. & 27 *H.* 6. 7. *a.* Note Reader, That if in the Caſe of the Infant after the ſecond Delivery, full Age ſhould make the Deed good, then it would be in the Power of him to whom it was delivered, to make it bind or not at his Pleaſure: For if he would deliver it during the Minority, it would not bind; and if he ſhould deliver it after full Age, it ſhould bind; which would be inconvenient that he, who to this Purpoſe was but a Servant, ſhould have *(d) ligandi & non ligandi poteſtatem.*

(c) 2 Rol. 410. Perk. ſect. 127. Br. Relation. Br. non eſt Factum 5.

1 Salk. 301.

(d) Hard. 33.

And touching *(e)* Wills, whereof you have much good Matter in the ſaid Caſe of *Butler* and *Baker*, my Advice to all who have Lands, is, That you take Care by the Advice of learned Counſel, by Act executed, to make Aſſurances of your Lands according to your true Intent, in full Health and Memory; to which Aſſurances you may add ſuch Conditions or Proviſoes of Revocation as you pleaſe. For I find great Doubts and Controverſies daily ariſe on Deviſes made by laſt Wills; ſometimes in reſpect of Tenures of Lands, ſometimes by Pretences of Revocations, which may be made eaſily by Word; alſo in reſpect of obſcure and inſenſible Words, and repugnant Sentences, the Will being made in haſte: And ſome pretend that the Teſtator, in reſpect of extream Pain, was not *Compos mentis*, and divers other Scruples and Queſtions are moved upon Wills. But if you pleaſe to deviſe your Lands by Will,

(e) Co Lit. 111. b. 12 Car. 2. cap. 24. Swinb. 31.

Swinb. 31.

1. Make it by good Advice in your perfect Memory, and inform your Counſel truly of the Eſtates and Tenures of your Lands, and by God's Grace the Reſolution of the Judges in this Caſe will be a good Direction to learned Counſel to make your Will according to Law, and thereby prevent Queſtions and Controverſies.

Of Gifts of Goods. Poſt. 81. a. b.

2. It is good, if your Will concern Inheritance, to make it

indented, and to leave one Part with a Friend, leſt after your Death it be ſuppreſſed.

3. At the Time of the Publication of the Will, call credible Witneſſes to ſubſcribe their Names to it.

4. If it may be, let all the Will be written with one and the ſame Hand, and in one and the ſame Parchment or Paper, for fear of Alteration, Addition or Diminution.

5. Let the Hand and Seal of the Deviſor be ſet to it.

6. If it be in ſeveral Parts, let his Hand and Seal be put, and the Names of the Witneſſes ſubſcribed to each Part.

7. If there be any Interlining or Raſure in the Will, let a *Memorandum* be made of it *(and ſign'd by the Teſtator).*

Hob. 30. 8. If you make any Revocation of your Will, or of any Part of it, make it by Writing, by good Advice, for on a Revocation by Word, follow Controverſies, ſome of the Witneſſes affirming it to be in one Manner, ſome in another Manner.

[*See the Statutes of Frauds and Perjuries*, 29 Car. 2. c. 3. & 3 & 4 W. & M. c. 14, &c.]

RATCLIFF's *Caſe.*

Hill. 34 Eliz.

In the King's Bench

LUKE Norton brought an *Ejectione firmæ* againſt *William Rowland*, on a Demiſe made by *Edward Ratcliff*, 10 *December* 31 *Eliz.* of the Moiety of a Houſe, Four Hundred Acres of Land, Forty Acres of Meadow, One Hundred Acres of Paſture, and Forty Acres of Wood, in *Wye* and *Braborn* in the County of *Kent*, &c. And on ſpecial Pleading of the Act of 4 & 5 *Phil. & Mar. cap.* 8. &c. *(a)* the Iſſue was, Whether *Elizabeth Ratcliff*, Wife of *Ralph Ratcliff*, had the Cuſtody of *Martha*, Wife of the ſaid *Edward Ratcliff* the Leſſor, at the Time of the Contract and Marriage between the ſaid *Edward* and *Martha*; for if the ſaid *Elizabeth* then had the Cuſtody of the ſaid *Martha* within the ſaid Act, then by the Pretence of the Defendant, *Martha* by Force of the ſaid Act had loſt the Inheritance of the ſaid Lands, and then Judgment ought to be given againſt the Plaintiff. And on the ſaid Iſſue the Jurors gave a ſpecial Verdict to this Effect: *William Wilcocks*, Eſq; took to Wife *Eliz. Edolf*, Daughter and Heir apparent of *John Edolf*, and *Alice* his Wife, which *William Wilcocks* had Iſſue on the Body of the ſaid *Elizabeth*, *John*, *Elizabeth*, and the ſaid *Martha*: And afterwards, *ſcil. ultimo Martii* 16 *Eliz. Will. Wilcocks*, by his Will in Writing, deviſed and appointed the Order, Cuſtody, Education and Government of the ſaid *John* his Son, and of the ſaid *Eliz.* and *Martha* his Daughters, to the ſaid *John Edolf* and *Alice* his Wife, *durante vita eorundem Johannis & Aliciæ*, and died. After whoſe Death the ſaid *Elizabeth*, the Relict of the ſaid *William Wilcocks*, took to Husband the ſaid *Ralph Ratcliff*; and afterwards *John Edolf* died, and that the ſaid *Alice* was ſeiſed of the ſaid Tenements in Fee, and held them in Socage; and 20 *Eliz.* by

(a) Co. Lit. 88. b. Cr. Car. 465. 3 Inſt. 62. Vaugh. 181.

by her Will in Writing, deviſed the Tenements aforeſaid to the ſaid *John Wilcocks* in Tail, the Remainder to the ſaid *Elizabeth* and *Martha*, Daughters of the ſaid *Will. Wilcocks*, and to the Heirs of their two Bodies begotten, by equal Portions, equally to be divided; the Remainder to the ſaid *Eliz.* the Mother, Daughter and Heir apparent of the ſaid *Alice*, and to her Heirs. And afterwards, *Anno* 26 *Eliz.* the ſaid *Alice* died, and afterwards the ſaid *John Wilcocks*, 1 *Auguſt* 28 *Eliz.* died without Iſſue; and that the ſaid *Eliz.* Daughter of the ſaid *Will. Wilcocks*, 10 *July* 28 *Eliz.* took to Husband *Will. Androwes*, by Force whereof the ſaid *William* and *Elizabeth* his Wife, and the ſaid *Martha*, did enter into the Tenements aforeſaid, and were thereof ſeiſed accordingly; and afterwards the ſaid *Martha*, 8 *October*, 29 *Eliz.* then dwelling in the Houſe of the ſaid *Ralph Ratcliff*, at *Hitcham* in the County of *Hertford*, with the ſaid *Ralph*, and *Eliz.* his Wife, and then being above the Age of Fourteen Years, and within the Age of Sixteen Years, with the Conſent and Good-will of the ſaid *Ralph Ratcliff*, voluntarily and of her good Accord, between the 6th and 7th Hours of the ſame Day, before Noon, departed from the Houſe of the ſaid *Ralph Ratcliff*, for the Space of Eight Miles, to *Bramfield* in the ſaid County of *Hertford*, where at the Twelfth Hour of the ſame Day, ſhe was eſpouſed and married to the ſaid *Edw. Ratcliff*; and that the ſaid *Edw. Ratcliff* entred, and made the Leaſe to the Plaintiff, *prout*, &c. But whether upon the whole Matter, the ſaid *Elizabeth Ratcliff* had the Cuſtody and Governance of the ſaid *Martha* at the Time of the Contract and Marriage aforeſaid, or not, the Jurors pray the Advice of the Court. And it was unanimouſly agreed by Sir *Chriſtopher Wray*, Chief Juſtice, and the whole Court. That the ſaid *Eliz.* had the Cuſtody and Governance of the ſaid *Martha* at the Time of the ſaid Contract and Marriage, within the Intent and Meaning of the ſaid Act. And in this Caſe ſix Points were unanimouſly reſolved by the whole Court.

3 Inſt. 62.

Co. Lit. 88. b. Lit. Sect. 103.

1. That there were two Manner of Cuſtodies or Guardianſhips, one by the Common Law, the other by the Statute; and alſo that at the Common Law there are four Manner of Guardians, *ſcil.* Guardian in Knights-Service, Guardian in Socage, Guardian in Nature, and Guardian in Nurture. The firſt two and the laſt are fully deſcribed in our Books: But as to Guardian in Nature, great Controverſy was betwixt thoſe who have argued in this Caſe at Bar, and all roſe through the ill Underſtanding of our Books on both Sides. For ſome held that the Father only ſhould have the Cuſtody of his Son and Heir apparent within Age, and not the Mother, nor the Grandfather, nor any other Anceſtor, ſhould have any Cuſtody of his Heir apparent: Alſo that the Father ſhould not have the Wardſhip of his Daughter and Heir apparent;

for according to them, it ought to be ſuch an Heir as ought to continue Heir and ſole Heir apparent, and that a (*a*) Daughter is not, for a Son may be born, and then the Daughter is not Heir, or another Daughter may be born, and then ſhe is not ſole Heir. As if Lands in Borough Engliſh be held by Knight's Service, the Father ſhall not have the Cuſtody of his younger Son, becauſe he may have a younger Son, no more than the (*b*) younger Son can endow his Wife of Land in Borough Engliſh, *ex aſſenſu patris*, for he ought in ſuch Caſe to be Heir apparent, who in Judgment of Law ſhall continue Heir apparent, and not Heir apparent who by Accident is Heir, and by (*c*) Accident may not be Heir; And in Reſpect the ſole Cauſe which gives the Wardſhip in the one Caſe, and enables the Heirs to make the Endowment in the other Caſe, is, becauſe he is Heir apparent, the ſame ſhall be intended in Law (which abhors Incertainty) of a certain and perdurable Heir apparent: And they relied principally on the Words of *Littleton* (*d*) in his Chapter of Knight's Service, who ſpeaks only of Father and Son in ſuch Caſe, and not of Daughter, or any other Heir: And on the other Side, it was affirmed, That the Father ſhould have the Wardſhip not only of his Son and his (*e*) Daughter alſo, as it is agreed 8 *E.* 2. *Treſpaſs* 235. 31 *E.* 1. *Garde* 154. & *F. N. B.* 143. *o.* But alſo every Anceſtor, Male, or Female, ſhould have the Wardſhip of his Heir apparent, Male or Female; and all this, it was ſaid, appears not only by the Regiſter of Writs, on which (*f*) Foundation (as Juſt. *Fitzher.* in his Preface to his Book called *Natura Brevium* ſaith) the whole Law depends, but alſo in our Books, by the Judgments and Opinions of the Sages and Judges of the Law, 32 *E.* 3. *tit.* (*g*) *Garde* 32. *in Treſpaſs, Quare J.* (*h*) *conſanguineum & hæredem* (the Plaintiff) *cujus maritagium ad ipſum pertinet, tali loco rapuit & abduxit contra pacem.* 31 *E.* 3. *Barre* 257. And (*i*) 31 *E.* 3. *Brief* 327. The Mother, although ſhe had no Land, brought a Writ of Raviſhment of Ward of *J.* her eldeſt Son and Heir raviſhed, againſt the Grandfather of *J.* who had Land which might deſcend to *J.* And it was ſaid, That where it was objected, that the Father ſhould not have the Wardſhip of his Daughter and Heir apparent, becauſe peradventute ſhe might not continue Heir, or at leaſt ſole Heir: The ſame Reaſon may be objected againſt the Wardſhip of his eldeſt Son, for peradventure he will not remain Heir apparent, for if the Father be (*k*) attainted of Felony or Treaſon, in ſuch Caſe his Son is not his Heir apparent, and then the Lord of whom the Land is held ſhall have the Warſhip of the Son in the ſaid Caſe that *Littleton* puts: For then the Son is not Heir apparent to the Father, and therefore the Father ſhall not have the Wardſh. of him, and by Conſequence the L. ſhall have it; for

(*a*) Moor 738. 2 And. 207. 6 Co. 22. a.

(*b*) 6 Co. 22. a. Co. Lit. 35. b.

(*c*) Cr. Car. 412.

(*d*) Co. Lit. ſect. 114.

(*e*) Co. Lit. 84. a. 6 Co. 22. a. b.

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

(*g*) Moor 739.

(*h*) Co. Lit. 84. a.

(*i*) F. N. B. 143. g. Moor 738. 2 And. 207.

(*k*) Co. Lit. 84. b.

for it appears by *Littleton*, and all the Books, That he ought to be his Heir apparent: And the Court reſolved, That both Sides had erred by miſtaking the true Senſe of the Books; for it is true, that every Anceſtor, Male or Female, ſhall (a) Co. Lit. 84. a. b. have Treſpaſs, or a Writ of (a) Raviſhment of Ward, againſt any Stranger, who of his own Wrong raviſhes the Heir apparent of any Perſon, be the Heir Male or Female, and the Writ ſhall ſay, *Cujus maritagium ad ipſum pertinet*, and the Law in that hath great Reaſon; for whereas in Truth (b) Co. Lit. 84. b. the whole Eſtate of the Anceſtor, and the (b) eſtabliſhing of his Inheritance, principally conſiſts in providing of a ſuitable Marriage for his Heir apparent, the Law therefore gives him a Remedy againſt him who wrongfully deprives him by their tortious Raviſhment of the Means to accompliſh it: And therefore it is not material of what Age the Heir apparent in ſuch Caſe is, as appears by the ſaid Book, (c) 32 E. 3. Gard 32. Antea 38. a. in (c) 32 *E.* 3. but ſuch Action lieth not againſt the (d) Guardian in Chivalry by any Anceſtor, but only for the Father, and for him the Action lieth againſt the Lord of whom Land is held by Knight's Service, where his Son and Heir (a) Co. Lit. 84. b. apparent is raviſhed by him, as appears by (e) *Littleton*, and (e) Lit. Sect 114. Br. Gard. 55. Br. Raviſhment de gard. 23. Co. Lit. 84. b. F. N. B. 144. o. 18 *E.* 3. 25. 30 *E.* 3. 17. 29 *E.* 3. 7 & 19. And the Book in 9 *E.* 4. 53. *a.* That a Wom. ſhall not have a Raviſhment of Ward of her Daughter and Heir apparent taken and raviſhed, is to be intended againſt the Guardian in Chivalry, and on this Difference the ſaid Books are well reconciled: But as to the Caſe of the Daughter and Heir apparent, the Court gave no Reſolution: So in this Caſe, the Court reſolved that the Mother could not be Guardian in Socage, if the Land had deſcended to the Daughter, nor for Nurture, becauſe the Daughter was above the Age of fourteen Years; but the Common Law gave her Remedy againſt, every Stranger who took and raviſhed her of his own Wrong, as is aforeſaid.

2. It was reſolved, That in this Caſe the Mother had the 4 & 5 P. & M. cap. 8. Cuſtody of the ſaid *Martha* within the Proviſion of the ſaid Act; for now the ſaid Act hath ordained two Sorts of new Cuſtodies, *ſcil.* by Reaſon of Nature, and by Aſſignation: By Reaſon of Nature the Father, and after the Death of the Father the Mother, having the Governance of ſuch Daughter by Aſſignation made by the Father, either by his Will, or by any Act in his Life: And to this Purpoſe three Branches of the ſaid Act were conſidered: The firſt Branch doth prohibit the taking of any Damſel under the Age of Sixteen Years out of the Poſſeſſion, Cuſtody and Governance, and againſt the Will of the Father, or of ſuch Perſon to whom her Fath. by his Will, or by any Act in his Life, ſhall deviſe, aſſign, or give the Order, Cuſtody, Educat. or Governance of her

her; which firſt Branch contains only a Prohibition; but it is thereby proved, that the Father may appoint the Cuſtody of any of his Daughters under the Age of Sixteen Years, by his Will, or by any Act in his Life, to this Purpoſe only, that he who takes ſuch Damſel out of ſuch Cuſtody, ſhall incur the Penalty of this Act. The ſecond Branch doth inflict a Puniſhment by Fine and Impriſonment, on him who takes ſuch Damſel unmarried out of the Poſſeſſion, and againſt the Will of the Father and Mother, or of ſuch Perſon who then ſhall have by any lawful Means, the Order, Cuſtody, &c. of ſuch Damſel. And it was agreed, That theſe Words (Father and Mother) ſhould be underſtood Father or Mother, after the Death of the Father, which is well expounded by the ſubſequent Clauſe. The third Branch, on which this Caſe depended, impoſes the Puniſhment and Forfeiture, as well on him who takes ſuch Damſel and deflours her, either againſt the Will, or without the Knowledge of the Father, if he be alive, or of the Mother having the Cuſtody of ſuch Damſel, contracts Matrimony with her; as on the Damſel if ſhe exceeds the Age of Twelve Years, if ſhe aſſents to ſuch Contract, by Forfeiture of her Land during her Life: Note; this latter Branch extends only to the Cuſtody of the Father and Mother having the Cuſtody of her, that is to ſay, If the Father had not diſpoſed the Cuſtody of her to others; and it extends to him who takes any Damſel, altho' ſhe were not Heir, or Heir apparent, and altho' ſhe departs with her own Aſſent after the Age of 12 Years, for which the Common Law gave no Remedy: And it is to be obſerved, That the Clauſe, which gives Forfeiture to ſuch Damſel which conſents, refers only to the third Branch, and not to the firſt or ſecond; ſo that foraſmuch as the Father in this Caſe on the Matter had not diſpoſed of the Cuſtody of the Daughter, the Daughter was in the Cuſtody and Governance of the Mother within the Proviſion of this Act; and alſo ſhe was, at the Time of the ſaid taking, Heir apparent to the ſaid *Elizabeth*.

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3. It was reſolved, That the Aſſent of *Ralph Ratcliff* the Husband was not material, for the Statute hath annexed the Cuſtody to the Perſon of the Mother *Jure naturæ*, which is inſeparable, and cannot by the Marriage be transferred to the Husband, but remains after the Marriage only in the Mother; for as it is agreed in 33 *H.* 6. 55. *b.* the Father who hath the Wardſhip of his Son and Heir apparent *Jure naturæ*, cannot forfeit it by Outlawry, neither ſhall his Executors or Adminiſtrators have ſuch Wardſhip: And it was ſaid, if there be Lord and Feme Tenant by Knight's Service, and the Tenant makes a Leaſe for Life, and afterwards the Lord and Tenant intermarry and have Iſſue between them

Co. Lit. 84. b. Br. Gard. 6. Br. Forfeiture 70. 7 Co. 12. b. 13. b. Calvin's Caſe. 2 Inſt. 234.

them a Son, and the Wife dies, and afterwards the Father dies, the ſon within Age, that his Executors ſhould not have the Wardſhip by Reaſon of the Seigniory, for the Father has the Wardſhip of the eldeſt Son *Jure naturæ*, which is inſeparable, and cannot be waved, and he cannot have the Wardſhip of his Son by the Death of his Wife, by Reaſon of his Seigniory, for that was inſeparably veſted in him as Father preſently, by the Birth of his Son *Jure naturæ*: And *Littleton* (*a*) ſaith, That the Father during his Life ſhall have the Marriage of his Son and Heir apparent, and not the Lord.

(*a*) Lit. Sect. 114. Co. Lit. 84. a.

4. It was reſolved, That altho' the Iſſue was, Whether the ſaid *Elizabeth* had the Cuſtody of the ſaid *Martha* at the Time of the Contract; and it appears by the Verdict, that ſhe did depart out of the Houſe of the ſaid *Elizabeth* 6 Hours before the Contract; yet in Judgment of Law, the ſaid *Elizabeth* had the Cuſtody of her at the Time of the Contract, for as hath been ſaid, this Cuſtody is inſeparably annexed to the Perſon of the Mother.

(*b*) Lit. Rep. 47. Moor 594, 538, 667. Goldsb. 182, 88, 183. Cr. El. 729. 1 Brownl. 82. Yelv. 23, 24. Owen 127. 1 Leon. 113. Style 434. 3 Leon 19. 1 Bulſt. 113. Cr. Eliz. 443, 444, 695, 696. 2 Roll. 89. O. Benl. 19. Dy. 25. pl. 158. Cr. Car. 75. N. Benl. 36. pl. 63. Dall. 9. 39, 44, 45, 90. Cr. Eliz. 330. 2 Siderf. 78, 53. Swinb. 282. Hetl. 64.

5. It was reſolved, That in this Caſe *Martha* and *Elizabeth* were Tenants in common in Tail, the Reverſion to *Elizabeth* the Mother and her Heirs: for theſe Words in a Will, (*b*) (equally to be divided) make a Tenancy in common, accord. to the Intent of the Deviſor, altho' they never make any Partition *in facto*, for his Intent appears, that it ſhall be divided, and by Conſequence, that there ſhall be no Survivor, and ſo hath it divers Times been adjudged before this Time.

(*c*) 1 Co. 95. a. 3 Co 61. b. 5 Ed. 4. 6. a. Plowd. 43. a. 56. b. Br. Done 28. 9 H. 7. 25. b. Br. Entrie con geable 94. 1 Co. 98. b. 137. b. (*d*) 6 R. 2. cap. 6. 1 Co. 95. a. Plowd. 42. b. 45. b. 2 Inſt. 434. Long. 5 to Ed. 4. 58. a. 1 H. 6. 1. a Fitz. Corone 1. Br. Rape 4. Br. Appeal 48. Br. Parliam. 89 Stamf. Cor. 82. (*e*) Co. Lit. 10. b Raym. 23. Swinb. 398. Cawly 224, 225. B. N. C. 415. Poſt. 404. a.

6. It was reſolved, That on this Verdict it appears, That *Edward Ratcliff* and *Martha* his Wife had a good Title to the Land againſt *Androwes* and *Elizabeth* his Wife; and that one Daugh. as this Caſe is, ſhould not take Benefit of the Forfeiture of the other. For the Stat. gives the Forfeiture *to the next of Kin, to whom the Inheritance ſhould deſcend, or come after her Deceaſe, &c. during the Life of ſuch Perſon that ſo ſhall contract Matrimony.* So that firſt, he ought to be of Blood, and, 2d. he ought to be next of Blood to whom the Inheritance ſhould deſcend or come, *&c.* And altho' *Eliz.* the Daugh. be of Blood, yet in this Caſe by the Death of *Mar.* the Land, if ſhe hath Iſſue, ſhall deſcend to her Iſſue, and if ſhe hath no Iſſue, it ſhall revert to *Eliz.* the Mother, (*c*) 5 *E.* 4. 5. *Aſſiſe* 27. in the like Caſe on the Stat. of (*d*) 6 *R.* 2. agrees with this Reſolution. Then it was moved, If the Mother in this Caſe ſhould enter for the Forfeiture; and it was objected, That ſhe could not enter, for ſhe is not of the Blood of the Daughter, for the Daughter derives her Blood from her Mother, and not the Mother from her. And therewith agrees (*e*) 5 *E.* 6. *Adminiſtration Br.* 47. where it is held, That the Father or Mother are not next of Blood, to whom Adminiſtration of the Goods of their Son or Daugh.

ſhall be granted; and there it is ſaid, *Quod pueri ſunt de ſanguine parentum, ſed pater & mater non ſunt de ſanguine puerorum*, and that is the Reaſon that no Land can (*a*) deſcend from the Son to the Father or Mother, but ſhall rather eſcheat to the Lord, becauſe the Father or Mother is not of the Blood of their Son. Againſt which it was argued, That the Mother ſhould take Advant. of this Forfeiture. And the ſaid Book of (*b*) 5 *E.* 6. was utterly denied to be Law, and that it had oftentimes been reſolved againſt it, *ſcil.* That Adminiſtration may be granted of the Goods of the Son or Daughter, to the Father or Mother, as to the next of Blood, and that is well proved by *Littleton* in his firſt Chapter of his Book, where it appears, that if there be Father, Uncle and Son, and the Son dies, that the Uncle ſhall be Heir to the Son, and not the Father, and yet the (*c*) Father is more near of Blood, which are *Littleton's* Words, which, as was ſaid, decide the Point now in Queſtion. And on the Words of *Littleton* it was concluded, That in the ſaid Caſe of Father, Uncle and Son, if a Leaſe be made to the Son, the Remainder to the next of his Blood, that the Father in Caſe of Purchaſe, ſhall have the (*d*) Remaind. for by the Judgment of *Littleton* he is the next of Blood. And although in every Art and Science there are *principia & poſtulata*, of which it is ſaid, *Altiora ne quæſiveris, & principia probant, & non probantur*, becauſe every Proof ought to be by a more high and ſupream Cauſe, and nothing can be more high and ſupream than the Principles (*e*) themſelves, and therefore ought to be approved, becauſe they cannot be proved. And *Littleton* ſaith, that it is a Maxim in Law, That an Inheritance may lineally deſcend, and not aſcend; and that appears by *Glanvile*, who wrote in the Time of *H.* 2. *lib.* 7. *cap.* 1. *fol.* 44. *b.* (*f*) *Quælibet hæreditas, naturaliter quidem ad hæredes hæreditabiliter deſcendit, nunquam autem naturaliter aſcendit:* And by *Bracton* alſo, who wrote in the Time of *Hen.* 3. *lib.* 2. *cap.* 29. (*g*) *Deſcendit itaque jus quaſi ponderoſum, quod cadens deorſum recta linea vel tranſverſali, & nunquam reaſcendit ea via, qua deſcendit poſt mortem anteceſſorum.* And therewith agrees *Britton*, who wrote in the Time of *E.* 1. *cap.* 119. *de Succeſſione.* Yet becauſe the Common Law doth differ in this Point from the Civil Law, theſe Reaſons of this Principle of the Common Law were alledged, *ſcil.* That in this Point, as almoſt in all others, the Common Law was grounded on the Law of God, which was ſaid, was *cauſa cauſarum*, as appears in the 27th Chap. of (*h*) *Numbers*, where the Caſe which was in Judgment before *Moſes* was, That *Salphaad* had Iſſue five Daughters, and having divers Brothers, died, to whom his Inheritance ſhould deſcend was the Queſt. the Daughters claiming

(*a*) Lit. Sect. 3. Co. Lit. 10. b. D. & Stud. 13. a.

(*b*) Br. Adminiſtration 47. Antea 39. b.

(*c*) Lit. Sect. 3. Co. Lit. 10. b.

(*d*) Co. Lit. 10. b.

(*e*) F.N.B. præf. 1 Inſt. 11. a.

(*f*) Co. Lit. 11. a.

(*g*) Co. Lit. 11. a.

(*h*) Co. Lit. 11. a. Noy 161.

claiming it *jure propinquitatis*, as their Birthright, and next Heirs to their Father; the Brothers claiming it as Heirs Male *jure honoris*, to celebrate and continue the Name of their Anceſtors: And this Caſe ſeemed of great Difficulty to *Moſes*, and therefore, for the deciding of that Queſtion, *Moſes* conſulted with God; for the Text ſaith, *Retulitque Moſes cauſam earum ad judicium Domini, qui dixit ad eum, juſtam rem poſtulant filiæ Salphaad. Da eis poſſeſſionem inter cognatos patris ſui, & ei in hæreditatem ſuccedant: Ad filios autem Iſrael loqueris hæc: Homo cum mortuus fuerit abſque filio, ad filiam ejus tranſibit hæreditas, ſi filiam non habuerit, habebit ſucceſſores fratres ſuos, quod ſi fratres non fuerint, dabitis hæreditat' fratribus patris ejus; ſin autem nec patruos habuerit, dabitur hæreditas his qui ei proximi ſunt, eritque hoc filiis Iſrael ſanctum lege perpetua, ſicut præcepit Dominus Moſi.* By which general Law (which extends not only to the ſaid particular Caſe, but to all other Inheritances, to all Perſons, and at all Times) it appears that the Father himſelf, and all lineal Aſcenſion, is excluded.

Another Reaſon of the ſaid Principle was alledged, for avoiding of Confuſion in Caſe of Deſcents, if not only lineal and collateral Deſcent ſhould be allowed, but lineal Aſcenſion alſo, which is one of the Cauſes of ſuch Diverſity of Opinions in Caſes of Deſcents in the Civil Law; and the contrary is one of the Cauſes of the Certainty of the Rules of the Common Law in Caſe of Deſcents and Inheritance, being *ponderoſum quoddam*, as *Bracton* ſaid, *jure naturæ deſcendit*, and not *aſcendit*, for *omne grave fertur deorſum.* And it was ſaid at the Bar, If in this Caſe he in the Reverſion had been Brother of the half Blood to the Daughter that conſented, *&c.* he might enter as *proximus de ſanguine*, and yet he could not inherit Lands in Fee-ſimple, as Heir to his Siſter in ſuch Caſe, in which Point alſo the Common Law doth differ from the Civil Law; for by the Common Law of *England*, if a common Perſon hath (*a*) Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and died ſeiſed of Lands in Fee-ſimple, and the elder Son enters into the Land, and dies without Iſſue, the Siſter of the whole Blood ſhall inherit to him, and not the Brother of the half Blood. And that was the ancient Common Law of this Land, and always continued, as appears by *Glanvil*, *lib.* 7. *cap.* 1. *Bracton*, *lib.* 2. *cap.* 30. and by *Britton*, *cap.* 119.

(*a*) Lit. Sect. 8. Co. Lit. 14. b.

And the Reaſon of the Com. Law is notable, and may be collected by the ſaid ancient Authors of the Law, that every one who is Heir to another, *aut eſt hæres jure* (*b*) *proprietatis*, as the eldeſt Son, who alone ſhall inherit before all his

(*b*) Co. Lit. 10. b.

Brothers, *aut jure* (*a*) *repræſentationis*, as where the eldeſt Son dies in the Life of his Father, his Iſſue ſhall inherit before the younger Son; for altho' the youngeſt Son is *magis propinquus*, yet *Jure repræſentationis* the Iſſue of the eldeſt Son ſhall inherit, for he repreſents the Perſon of his Father, and, as *Bracton* ſaith, *Jus proprietatis*, which his Father had by Birth-right, deſcends to him, *aut jure propinquitatis*, (*b*) as *propinquus excludit remotum*, & *remotus remotiorem*; *aut jure ſanguinis*, and by Force thereof, in the ſaid Caſe, the Daughter ſhall inherit before the Son, and that for divers Cauſes; in as much as the Blood which is betwixt every Heir and his Anceſtor makes him Heir, for without Blood none can inherit: And therefore it is great Reaſon, that he who hath full and whole Blood, ſhould inherit before another who had but a Part of the Blood of his Anceſtor, for *ordine naturæ totum præfertur unicuique parti*. And therefore *Bracton* ſaith, *Quod propter jus ſanguinis* (*c*) *duplicatum, tam ex parte patris, quam ex parte matris, dicitur hæres propinquior ſoror, quam frater de alia uxore*. And *Briton* ſaith, That the Right of Blood in this Caſe cauſes the Female to forecloſe the Male.

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

(*b*) Co. Lit 10 b.

(*c*) Co. Lit. 14. a.

2. As none can be begotten but of a Father and Mother, and ought to have in him two Bloods, that is to ſay, the Blood of his Father and the Blood of his Mother; theſe Bloods commixt in him by lawful Marriage conſtitute and make him (*d*) Heir; ſo that none can be Heir to any, unleſs he hath in him both the Bloods of him to whom he will make himſelf Heir, and therefore the Heir of the half Blood cannot inherit, becauſe he wants one of the Bloods which ſhould make him heritable, as *Ariſtotle lib. Topicorum*; *Parte quacunque integrante ſublata, tollitur totum, quod verum eſt ſi accipias partem integrantem pro parte neceſſaria*: As in this Caſe, the Blood of the Father and of the Mother are but one inheritable Blood, and both are neceſſary to the Procreation of an Heir, and therefore *deficiente uno, non poteſt eſſe hæres*. And on this Reaſon it ſeems to *Britton, cap.* 5. if a Man be attainted of Felony by Judgment, that the Heirs begotten after the Attainder are excluded of all Manner of Succeſſion of Heritage, as well on the Part of the Mother, as on the Part of the Father; and the Reaſon thereof was, that the Son begotten after the Judgm. had not two heritable Bloods in him; for, at the Time of the Begetting of him, the Blood of the Father was corrupted; for *ex leproſo parente leproſus generatur filius*; and when the Father is attainted of Felony, the Blood, in Reſpect of which

(*d*) Co. Lit. 14. a.

(*e*) Co. Lit 12. a. 1 Sid. 200. Jenk. Cent. 3.

he ſhould be heritable, being corrupted, the Son, as ſeem'd to him, had but half Blood; that is to ſay, the Blood of the Mother in him uncorrupted; and therefore he held, that ſuch Son ſhould not inherit to his Mother. And with him agrees *Bracton*, *lib.* 3. *cap.* 13. *Non valebit felonis generatio, nec ad hæreditatem paternam, vel maternam; ſi autem ante feloniam generationem fecerit, talis generatio ſuccedit in hæreditatem patris, vel matris, a quo non fuerit felonia perpetrata*; becauſe at the Time of his Birth he had two lawful Bloods commixt in him, which cannot be corrupted by the ſubſequent Attainder, but only as to him who offended.

The third Reaſon was for avoiding of Confuſion; for if as well the half Blood as the whole Blood ſhould be equally heritable, then in many Caſes Confuſion and Incertainty will enſue who ſhould be the next Heir; and if a Man would advance any that is of half Blood to him, he might eaſily convey ſome of his Inheritance to him at his Pleaſure: And therefore it was concluded, that the Common Law, which prefers the whole Blood before the half Blood, was grounded on greater Reaſon than the Civil Law in this Point: (yet in ſome Caſes the half Blood may inherit by our Law, *i. e.*) *Aut jure ſive ratione doni*, and in that the Common Law doth admit the half Blood to inherit. As if a Man makes a Gift to one and his Heirs of his Body, and he hath Iſſue a Son and a Daughter by one *Venter*, and a Son by another *Venter*, and the Father dies, and the elder Son enters and dies, the younger Son ſhall inherit *per formam doni*, for he claims as Heir of the Body of the Donee, and not generally as Heir to his Brother; and this is the Reaſon that *Littleton* ſaith, (*a*) *Quod poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*: In which Rule every Word is to be obſerv'd.

(*a*) 1 it. Sect. 8. Co. Lit. 15. a. b.

1. That the Brother ought to be in actual Poſſeſſion of the Fee and Freehold, either by his own Act, (*b*) or by the actual Poſſeſſion of another; but if neither by his own Act, nor by the Poſſeſſion of another, he gains more than deſcends to him, the Brother of the half Blood ſhall inherit; and therefore if Land, Rent, (*c*) Advowſon, &c. deſcends to the elder Brother, and he dies before any Entry by him made into the Land, or receive the Rent, or preſent to the Church, the younger Brother ſhall inherit: And the Reaſon thereof is, that of all Hereditaments in Poſſeſſ. he who claims

(*b*) Co. Lit. 15. a. b. Kelw. 110. a.

(*c*) Co. Lit. 15 b. 1 Ro. 628.

ſuch

ſuch Hereditaments as Heir, ought to make himſelf Heir to him who was laſt actually ſeiſed, as it is held 11 *H.* 4. 11. 10 *Aſſ.* 27. 34 *Aſſ.* 10. 19 *E.* 2. *Quare imp.* 177. 45 *E.* 3. 13. and *Littleton, cap.* 1. For if there be Father, Uncle, and Son, and the Son purchaſes Land, and dies without Iſſue, and the Land deſcends to the Uncle, if the Uncle dies before Entry, the Land ſhall not deſcend to the Father, for then he ought to make himſelf Heir to him who was laſt actually ſeiſed, and that was the Son; and therefore *Littleton* ſaith in ſuch Caſe, if the Uncle enter, *&c.* then the Father ſhall have the Land as Heir to the Uncle; and in this Caſe the Father was laſt actually ſeiſed, and the Siſter cannot claim the Land as Heir to the Father, for the younger Son is Heir to him: But if the elder Son enters, and by his own Act hath gained the Actual Poſſeſſion, or if the Lands were leaſed for Years, or in the Hands of a Guardian, and the Leſſee or Guardian poſſeſs the Land, there the Poſſeſſion of the Leſſee or Guardian doth veſt the actual Fee and Freehold in the elder Brother; and in ſuch Caſe the Siſter ſhall inherit as Heir to her Brother, who was laſt actually ſeiſed: But of a Reverſion, or a Remainder expectant on an Eſtate for Life or in Tail, there he who claims the Reverſion as Heir, ought to make himſelf Heir to him who made the Gift, or Leaſe, if the Reverſion or Remainder deſcend from him: Or if a Man purchaſe ſuch Reverſion or Remainder, he who claims as Heir ought to make himſelf Heir to the firſt Purchaſer; and all this appears, 24 *E.* 3. 24. 37 *Aſſ.* 4. 40 *E.* 3. 9. 42 *E.* 3. 10. 45 *E.* 3. *Releaſes* 28. 49 *E.* 3. 12. 7 *H.* 5. 3 & 4. 8 *Aſſ.* 6. 35 *Aſſ.* 2. 5 *E.* 4. 7. 3 *H.* 7. 5. 40 *Aſſ.* 6. 21 *H.* 7. 33. And by theſe Rules (good Reader) you will well underſtand your Books, and the true Reaſon of them; and by that which hath been ſaid it appears, That if the King, by his Letters Patents, create one a Baron, and gives the Dignity to him and his Heirs, and he hath Iſſue a Son and a Daughter by one *Venter*, and a Son by another, and dies, and afterwards the elder Son dies without Iſſue, in this Caſe the Dignity ſhall deſcend to the younger; for it cannot be ſaid that the elder Son was in Poſſeſſion of the Dignity, no more than of his Blood, for the Dignity is inherent to his Blood; and neither by his own Act, nor by the Act of any other doth he gain more actual Poſſeſſion (if it may be ſo termed) than by the Law deſcended to him; and then the younger Brother ſhall make himſelf Heir to his Father, and not to his Brother; ſo that this Word *(poſſeſſio)* which is but *pedis poſitio*, extends only to Things of which a Man by his Entry or other Act may get the actual Poſſeſſion.

Co. Lit. 11. b.

Q. Carth. 128.

Co. Lit. 15. b.

Co. Lit. 12. a.

Co. Lit 15. b.

Cro. Car. 601.

Co. Lit. 15. b.

2. *Littleton* ſaith, *Poſſeſſio fratris de feodo ſimplici*, and theſe Words, *feodum ſimplex*, exclude Eſtates-Tail.

Co. Lit. 15. b

3. *Facit ſororem hæredem*, by which is implied, that in this Caſe, *ſoror eſt hæres factus*, and that the Law without other Act doth not make the Siſter Heir; but the younger Brother is after the Death of the elder Brother *hæres natus* to his Father. But the Act by which the elder Brother gains actual Poſſeſſion *facit ſororem hæredem*; ſo that when the elder Son hath not actual Poſſeſſion, or if it be ſuch an Inheritance of which an actual Poſſeſſion can't be gain'd *per pedis poſitionem*, or by ſome other Act, it ſhall by Law deſcend to the Brother of the half Blood: And ſo it was concluded by the Plaintiff's Counſel, That the Father, or Mother, or Brother of the half Blood, might be next of Blood within the Purview of the ſaid Act; and that in this Caſe it appears by the Verdict, that the Mother, and not the other Siſter, ought to take Advantage of this Forfeiture: But the Court reſolv'd, that the ſaid Points on the Statute who ſhould be next of Blood to enter for the Forfeiture, could not come in Judgment in this Caſe, becauſe the Iſſue was join'd upon a collateral *Point*, *ſcil.* Whether *Elizabeth* the Mother had the Cuſtody of the ſaid *Mart.* at the Time of the ſaid Contract; and therefore all the other Matter concerning the Forfeiture, and who ſhould take Benefit thereof, was out of the Iſſue; and the finding of the Jury (as to that) was without Warrant, and not material: And
Q. 2 Salk. 663. for this Cauſe, altho' in Truth the Plaintiff, as it here appears, had good Right againſt the Defendant, yet for as much as the Iſſue was found againſt him, Judgment was given that the Plaintiff *Nihil capiat per billam.*

Coke and others were of Counſel with the Plaintiff, and *Godfrey* and others with the Defendant.

[*Where a Verdict, finding more than is in Iſſue, ſhall be good for what was in Iſſue, and the Surplus rejected, ſee* 3 Co. 9. 4 Co. 43, 46. 5 Co. 2. Part 30. 6 Co. 47. 9 Co. 12. 34. 11 Co. 11, 13, 20.]

BOYTON's *Caſe.*

Mich. 34 & 35 Eliz.

In the King's Bench.

THomas *Boyton* Clerk, Parſon of *Heſſet* in *Suffolk*, brought an *Audita querela* againſt *William Andrews* and *Lewis Sympſon*, ſetting forth how the Defendants in the King's Bench had recover'd againſt the Plaintiff 50 *l.* Debt and Damages, and that after the Judgment, *ſcil.* 2 *Julii*, 31 *Eliz.* at *Bury St. Edmunds* in the County of *Suffolk*, within the Liberty and Franchiſe of Sir *Roger Townſhend* Knt. and *William Dixe* Eſq; by *Purdey* and *Dey*, *Virtute cujuſdam warranti nuper antea eiſdem prædictis Rogero & Will' fact', virtute cujuſdam Warranti eiſdem Roger' & Will' per Philippum Tilney Armig' tunc Vicecom' prædict' Com' Suff. ſub ſigill. officii ſui confect', de & ſuper quoddam breve de Capias ad ſatisfaciendum præfat' Willielmo Andrews & Lodovico Sympſon de debit' & damnis præd', ad proſecutionem ipſius Will' Andrews & Lodovic' a præd' curia noſtra coram nobis emanan', & Vic' prædict' Suff. nuper direct', &c.* the ſaid *Thomas Boyton* was taken and arreſted in Execut. 'till the ſaid *Roger* and *Will. Dixe*, the ſaid *Tho. Boyton* at *Lambeth* in the County of *Surrey*, the ſaid Debt and Damages not ſatisfied, *extra priſonam prædict' evadere & ad largum quo voluit ire permiſerunt.* The Defendants pleaded, That the ſaid *Roger* and *Will. Dixe non permiſerunt eundem Tho. Boyton extra priſonam præd' evadere, & ad largum ire quo voluit, modo & forma prout, &c.* And thereupon the Jury gave a ſpecial Verdict to this Effect; That the Plaintiff was in Execution *prout, &c.* and that the ſaid *Roger* and *Will. Dixe*, Bailiffs Moor 259.

of the ſaid Franchiſe *adduxerunt* him to *Weſtminſter* within the County of *Middleſex*, *die Lunæ ante retorn' brevis de Capias ad ſatisfaciend'*, (the Day of the Return being *die Lunæ poſt craſtin' animarum)* ſo that the Bailiffs miſtook the Day of the Return; and that the ſaid Bailiffs, in the Interim, before the Return of the Writ, at the Requeſt of the Plaintiff, carried him to *Lambeth* within the County of *Surry*; which Town of *Lambeth* is next adjoining to *Weſtminſter*, but out of the Way, and not in the Way from the County of *Suffolk* to *Weſtminſter*. And that at the Return of the ſaid Writ the Bailiffs did deliver the ſaid *Boyton* to the Priſon of the King's Bench by Virtue of the ſaid Writ; and that the Plaintiff, from the Time of the Arreſt, until the Return of the ſaid Writ and Delivery of him to the Priſon aforeſaid, did remain and continue with the Bailiffs by Virtue or Colour of their Warrant. And whether on the whole Matter the Plaintiff were at large and out of Priſon, was the Queſtion: And Judgment was againſt the Plaintiff; and in this Caſe theſe Points were unanimouſly reſolv'd by the Court.

Firſt, it was objected, That the Command of the Writ of *Capias ad faciendum* was to have the Body of the Plaintiff at the Court of King's Bench, which then was at *Weſtminſter*; and for as much as they carried the Priſoner beyond *Weſtminſter*, that is to ſay, to *Lambeth* in another County, which was not warranted by the Writ, it muſt of Neceſſity be an Eſcape: For the Writ gave them Authority to bring him to *Weſtminſter*, for there was the King's Bench; and therefore when they carry him farther, to *Lambeth* in another County, it is without Warrant, and by Conſequence an Eſcape; for the Bailiffs could not have the Cuſtody of him there as Bailiffs of the Franchiſe, for that was out of the Franchiſe; and by Force of the Writ they could not have the Cuſtody of him, becauſe they have not purſued the Writ; and if the Bailiffs ſhould be ſuffered to carry him to *Lambeth*, by the ſame Reaſon they may carry him to *York*, or to any other remote Part of the Realm, at their Pleaſure.

Secondly, it was ſaid, That in as much as the Writ, which is their Warrant, was to have his Body at the Court of King's Bench ſuch a Day, they ought to bring the Body the uſual way to *Weſtminſter*, where the King's Bench then was, for ſo much is implied by the Writ; and therefore the carrying of his Body to *Lambeth* in another County, was without Warrant, and by Conſequence an Eſcape, and the Plaintiff thereby out of their Cuſtody.

To which it was anſwer'd, and reſolv'd by the Court, That, firſt, there was a Difference between the Cuſtody of one in Execution within the Franchiſe or County where the common Gaol is, or the Office of the Sheriff or Bailiffs extends, and where the Sheriff or Bailiff hath the Cuſtody

of

of one in Execution out of their Franchiſe or County, as in the Caſe at Bar by Force of a Writ: For if the Sheriff or Bailiff of a Liberty aſſent that one who is in (*a*) Execution and under his Cuſtody go out of the Gaol for a Time, and then to return, altho' he return at the Time, yet it is an Eſcape. So if the Sheriff, *&c.* ſuffer him to go by Bail or (*b*) Baſton, for the Sheriff or Bailiff ought to keep him *in (c) ſalva & arcta cuſtodia.* And the Stat. of *Weſt.* 2. *cap.* 11. ſaith, *Quod carceri mancipentur in (d) ferris*, ſo as the Sheriff may keep them who are in Execution in Fetters and Irons, to the End they may the ſooner ſatisfy their Creditors. And with that agrees a Reſolution, *Trin.* 24 *H.* 8. by the Advice of *Fitz-James* and *(e) Norwich*, C. Juſtices, and *Fitzherbert* and *Spilman* Juſtices, that by the Law, thoſe who are in Execution ſhall not go at their Liberty within the Priſon, nor out of the Priſon with the Keeper, but ſhall be kept in ſtrict Ward, *vide Dyer (f)* 249. *b*, and the Statutes of 2 *R.* 2. *cap.* 12. & *Weſtm.* 2. *cap.* 11. But it was adjudg'd, where the Sheriff hath one in Execution for Debt, and a *(g) Habeas Corpus* iſſues out of the King's Bench to have the Body of him who is in Execution in the ſame Court at a certain Day, by Force of which Writ, the Sheriff, before the Return of the Writ, brings his Body to an Inn in *Smithfield* towards *Weſtminſter*, and the Priſoner of his own Head goes without any Keeper to *Southwark*, in the County of *Surrey*, and the next Morning comes again to the Sheriff to *Smithfield*, and at the Return of the *Habeas Corpus* the Sheriff delivers his Body in Court; this was no Eſcape.

(*a*) 1 Roll's 806. Hob. 202. Dalt. Sher. 140. Cr. Car. 14.

(*b*) 1 Roll's 806. Plowd. 36. b. 37. a. b. Hob. 202. Co. Lit. 206. a. Dalt. Sher. 140. Cr. Eliz. 5 Benl. in Kelw. 214. N. Benl. pl. 267. Benl. in Aſh. 29.

(*c*) Hard. 30. 2 Inſt. 381. 8 Co. 100. a. b. Dalt. Sher. 140. Cr. Car. 466. Co. Lit. 260. a. 1 Roll's 807. 3 Inſt. 35.

(*d*) 1 Bulſt. 145, 146. Dalt. Sher. 140. 1 Roll's 807. 2 Inſt. 381.

(*e*) 1 Roll's 807. Dy. 249. pl. 84.

(*f*) 1 Roll's 807. Dy. 249. pl. 84. Poſtea 78. b.

(*g*) Dalt. Sher. 141. Moor 257.

And ſo it was adjudg'd in this Court 31 *Eliz.* in *Charnock*'s Caſe, who was Sheriff of *Bedford*, for the Effect of the Command of the Writ was perform'd, *ſcil.* to have his Body in the K.'s Bench ſuch a Day; and this ſtands with great Reaſon, for the Sheriff, *&c.* may more ſtrongly guard his Gaol, than every Inn or other Place thro' which he travels; *a fortiori* in the Caſe at Bar, for he was always under the Cuſtody of the Bailiffs. And the Writ doth not command the Sheriff to bring him the direct or uſual Way to *Weſtm. &c.* but only to have his Body in the K.'s Bench, *&c.* ſuch a Day. And therefore if one be Sheriff of two Counties, and hath arreſted and taken ſeveral Perſons in Execution in the ſeveral Counties by Force of ſeveral *Capias ad Satisf.* directed to him; he may in that Caſe bring one Priſoner out of the one County into the other, to carry them both together to the King's Court at *Weſtm.* without any Eſcape; and what Way or Place the Sheriff thinks moſt ſure for him, he may take.

And ſome conceived that the Caſe at Bar was ſtronger, becauſe the Priſoner went to *Lambeth* at his own Requeſt; and therefore he ſhall not diſcharge himſelf by *Audita Querela* in this Caſe. And for as much as Eſcapes are ſo (*h*) penal to Sheriffs, Bailiffs of Liberties, and Gaolers, the Judges

(*h*) Dalt. Sher. 143.

of the Law have always made as kind and favourable Conſtructions as the Law would ſuffer, in Favour of Sheriffs, Bailiffs of Liberties, and Keepers of Priſons, who are Officers and Miniſters of Juſtice. And to the Intent that every one ſhould bear his own (*a*) Burthen, the Judges would never adjudge one to make an Eſcape by any ſtrict Conſtruction.

(*a*) Hard. 31.

And therefore if one in Execution eſcapes out of Priſon, and flies into another County, it may be argu'd that this ſhall be an Eſcape, altho' he be re-taken on freſh Suit, becauſe the Sheriff cannot have the Cuſtody of him in (*b*) another County, in Regard he is not Sheriff there, neither doth his Authority extend thither. But the Judges, nevertheleſs, will adjudge it no Eſcape, becauſe the Sheriff did all he could, and by his (*c*) freſh Suit hath re-taken him before any Action brought. So in the Caſe at Bar, when the Priſoner is once out of the proper County, altho' he goes into another County which is not in the way to *Weſtm.* where the K.'s Bench ſits; this, by a favourable Conſtruction in Law, is not an Eſcape, if at the Day of the Return he have the Body of the Defendant in Court. And if the Sheriff, *&c.* ſhould be compelled to bring his Priſoners to the K.'s Court as *in recta linea*, it would be too full of Hazard and very dangerous for Sheriffs, *&c.*

(*b*) Plowd. 37. a.

(*c*) Poſt. fol. 52. b. 1 Roll's 808.

(*d*) Moor 57. Cr. Eliz. 44, 102, 439, 555. Moor 660. Cr. Car. 240. Poſtea 52. b. Styles 117. Ridgway's Caſe.

Secondly, it was reſolv'd, That if one in Execution eſcape of his own Wrong, and be re-taken, he ſhould never have an *Audita (d) Querela* to diſcharge himſelf of the Impriſonment, becauſe he ſhall not take Advantage of his own Wrong; and in ſuch Caſe it is lawful for the Gaoler to retake him, as it more fully appears in the following Caſe: And where it was objected, That the Writ was not good, becauſe it doth not appear that the Warrant made by the Bailiffs was in Writing; for the Words of the Writ are, *Virtute cujuſdam warranti*, and doth not ſay in Writing, as hath been ſaid. But that Exception was diſallow'd by the Court; for the Sentence is, (*f*) *Virtute cujuſdam warranti per præfat' R. & W. fact' & direct, &c.* by which Words (*fact' & direct'*) is implied that it was in Writing.

(*e*) Poſtea 53. a. Poph. 41. Moor 669. Cr. Eliz. 318, 439. Goldsb. 180.

(*f*) 2 Jones 197.

Another Exception to the Writ was taken, That it doth not appear thereby when the Judgment was given, nor when the *Capias ad ſatisfaciendum* iſſued, nor when it was return'd, ſo that it might appear that the Defendant was arreſted by Force of it after the *Teſte* of the Writ, and before the Return of it; but that Exception was alſo diſallowed by the Court; for as much as it (*g*) appears by the Writ, That the ſaid *Thomas Boyton* the Plaintiff, *virtute brevis præd' captus & arreſtatus fuit in executione*, by theſe Words it is implied, that it was lawfully and duly done. And it was agreed, that Writs are more compendious than Counts, and Counts than other Pleadings, for Writs comprehend the Effect and Subſtance without Circumſtance of Time or Place, and other Circumſtances. *Et ideo dicuntur brevia, propter eorum brevitatem.*

(*g*) Yelv. 201.

Sir

Sir GEORGE BROWN's *Caſe.*

Hill. Term, 39 Eliz. *in B. R. Rot.* 440.

William Spencer, late of *Swindon* in the County aforeſaid, Yeoman, and *Thomas Spencer*, late of *Swindon* in the County aforeſaid, Yeomen, were attached to anſwer to *James Lynch* of a Plea; wherefore with Force and Arms one Meſſuage, one Barn, one Garden, eighty Acres of Land, eighty Acres of Meadow, and eighty Acres of Paſture, with the Appurtenances, in *Swindon*, which *George Brown*, Knt. to the aforeſaid *James* demiſed for a Term which is not yet ended, they entred, and him from his Farm aforeſaid did eject, and other Harms did unto him, to the grievous Damage of the ſaid *James*, and againſt the Peace of the Lady the now Queen, &c. and whereupon the ſaid *James*, by *Thomas Cowper* his Attorney, complaineth, That whereas the aforeſaid *George Brown* the 22d Day of *October* in the 35th Year of the Reign of the now Queen, at *Swindon* aforeſaid, had demiſed to the ſaid *James* the Tenements aforeſaid, with the Appurtenances, to have and to hold the ſame Tenements, with the Appurtenances, to the ſaid *James* and his Aſſigns, from the Feaſt of St. *Michael* the Archangel then laſt paſt, until the End and Term of four Years from thence next enſuing, and fully to be compleated: By Virtue of which Demiſe, the ſaid *James* into the Tenements aforeſ. with the Appurtenan. entred, and was thereof poſſeſſed; and ſo thereof being poſſeſſed, the aforeſ. *Will.* and *Tho.* afterwards, that is to ſay, Wilts, ff.

the

the 22d Day of *October* aforeſaid in the 35th Year aforeſaid, with Force and Arms, &c. the Tenements aforeſaid, with the Appurtenances, which the ſaid *George Brown* to the ſaid *James* in Form aforeſaid demiſed for the Term aforeſaid, which is not yet ended, entred, and him the ſaid *James* from his Farm aforeſaid held out, and other Harms, &c. to the grievous Damage, &c. and againſt the Peace, &c. whereupon he ſaith that he is the worſe, and hath Damage to the Value of 20 *l.* and thereof bringeth Suit, &c. And the aforeſaid *William* and *Thomas* by *John Paxton*, their Attorney come, and defend the Force and Injury, when, &c. and ſay that they in nothing are guilty of the Treſpaſs and Ejectment aforeſaid, as the aforeſaid *James* above againſt them complaineth: And of this put themſelves upon the Country; and the aforeſaid *James* likewiſe, &c. Therefore it is commanded to the Sheriff, that he have here in eight Days of the Purification of the bleſſed *Mary* 12 good and lawful Men, &c. by whom the Truth, &c. and who neither, &c. to recogniſe, &c. becauſe as well, &c. Afterward the Proceſs between the Parties aforeſ. was continued of the Plea aforeſ. by Jurors between them put in reſpite here until this Day, that is to ſay, in eight Days of St. *Mich.* in the 37th Year of the Reign of the L. the now Q. unleſs the Juſtic. of the L. the Q. for Aſſiſes in the County aforeſ. to be taken aſſigned, by the Form of the Stat. upon *Thurſd.* the 17th Day of *July* laſt paſt, at *New Sarum* in County aforeſ. firſt came. And now here at this Day come as well the aforeſ. *James Linche*, as the aforeſ. *Will. Spencer* and *Tho. Spencer* by their Attorney aforeſ. and the aforeſaid Juſtices of Aſſiſe before whom, &c. ſent here their Record in theſe Words; Afterw. the Day and Place within contained before *Tho. Walmeſley*, one of the Juſtices of the Lady the Q. of the Bench, and *Ed. Fenner* one of the Juſtices of the ſaid Lady the Q. of Pleas before the Q. her ſelf to be holden aſſigned, Juſtices of the Aſſiſe of the Lady the Q. in the County of *Wilts*, to be taken, aſſigned by the Form of the Statute, came as well the within named *James Lynche* as the ſaid within written *Will. Spencer*, and *Tho. Spencer* by their Attornies within mentioned; and the Jurors of the Jury whereof within mention is made being called, ſome of them, that is to ſay, *William Garret* of *Shaw* Gent. *William Bury* of *Crickland*, *Thomas Buckley* of *Nether-Haven* Gent. *William Morſe* of *Haydon*, *John Noyſe* of *Graſton*, *Richard Legge* of *Nether-Haven*, *Thomas Smith* of *Kennet*, *Thomas Sloper* of *Mounton*, and *Will. Gouldesborough* of the ſame came, and are ſworn of the ſame Jury, and becauſe that the reſt of the Jurors of the Jury did not appear, therefore others of the Standers-by, choſen by the Sheriff of the County aforeſ. at the requeſt of the ſaid *James*,

James, and by the Command of the Juſtices aforeſ. were new put, whoſe Names to the Panel within written are filed, according to the Stat. in ſuch Caſe lately made and provided: And the Jurors ſo of new put, that is to ſay, *Thomas Sringer*, *Will. Bundy*, and *Will. Haſcall*, being likewiſe called came, who to the Truth of the Matter within contained, together with the other Jurors aforeſaid firſt impanelled, being choſen, tried and ſworn, ſay upon their Oath, That the aforeſ. *Will. Spencer* is not guilty of the Treſpaſs and Ejectm. within written, as the ſaid *Will.* hath within alledged; and further the ſaid Jurors, as to all the Treſpaſs and Ejectm. aforeſ. within written, beſides the Treſpaſs and Ejectm. in the Meſſuage within contained, and 26 Acres of the Tenements within written by the aforeſaid *Thomas Spencer* within ſuppoſed to be done, they ſay upon their Oath, That the ſaid *Tho.* is not thereof guilty, as the ſaid *Tho.* likewiſe thereof within alledgeth; and as to the Treſpaſs and Ejectment within written, into the aforeſaid Meſſuage and 26 Acres of Land within ſuppoſed to be done, the ſame Jurors ſay upon their Oath, That long before the within written Time, in which it is ſuppoſed the Treſpaſs and Ejectment aforeſaid to be done, one *Rich. Bridges*, Knt. was ſeized as well of the aforeſaid Meſſuage and 26 Acres of Land with the Appurtenances, as of the other Tenements within written, reſidue, with the Appurtenances, in his Demeſn as of Fee; and ſo thereof being ſeized the ſaid *Rich.* long before the Time aforeſaid, in which, &c. by his certain writing of Feoffment indented, in Conſideration of a certain Jointure of *one* Johanna *his Wife*, *Daughter* of *Will. Spencer*, Knt. deceaſed, from thence after to be had and ended, gave and granted, and in his ſaid writing Indented confirmed to *John Winchcombe* the Elder, of *Newbery*, in the County of *Berks*, and *John Knight* of *Newbery* aforeſaid, the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other things, to have and to hold the ſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other Things, to the ſaid *John Winchcombe* and *John Knight*, their Heirs and Aſſigns for ever, under this Condition following, that is to ſay, That the ſaid *John Winchcombe* and *John Knight*, within one Month next enſuing after the Date of the ſaid Writing, by their ſufficient Writing in Law, as by the learned Counſel in the Law of the ſaid *Richard Bridges* it ſhould be adviſed, ſhould give, grant, and deliver the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other Things, to the ſaid *Richard* and the ſaid *Johanna* his Wife; to have and to hold the ſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other Things, to the ſaid *Richard* and the ſaid *Johanna*, and to the Heirs of the Bodies of the ſaid *Richard* and the ſaid *Johanna* his Wife, betwixt the ſaid *Richard* and the ſaid *Johanna* lawfully begotten; and for

Default

Default of ſuch Iſſue, the Remainder thereof to the Right Heirs of the aforeſaid *Richard* for ever, of the chief Lords of the Fee by the Services thereof due and of Right accuſtomed, as by the ſaid Writing of Feoffment indented, ſealed with the Seal of the ſaid *Richard Bridges*, and bearing Date the 23d Day of *January* in the 32d Year of the Reign of the Lord *Henry* the 8th, late King of *England*, to the Jurors aforeſaid, in Evidence ſhewed, more fully appeared; and that by Virtue of the ſaid Feoffment, the aforeſaid *John Winchcombe* and *John Knight* were ſeiſed of the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other, in their Demeſn as of Fee, upon the condition aforeſaid: And farther the Jurors aforeſaid ſay upon their Oath, That the ſaid *John Winchcombe* and *John Knight* being ſo thereof ſeized, long before the aforeſaid Time, in which, &c. and within the ſaid one Month next enſuing, after the Date of the ſaid Writing of Feoffment indented at *Walcot* aforeſaid, in Performance of the Condition aforeſaid, and at the Requeſt of ſaid *Richard Bridges*, by their certain Writing indented of Feoffment, conveyed, enfeoffed and delivered, and by the ſaid their Writing indented, they did confirm to the aforeſaid *Richard Bridges* and *Johanna* his Wife the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other Things; to have and to hold the aforeſ. Meſſuages, and 26 Acres of Lands, in which, &c. amongſt other to the aforeſ. *R. Bridges* and *Johan.* his Wife, and the Heirs of the Bodies of them the ſaid *Richard* and *Johanna* betwixt them lawfully begotten; and for Default of ſuch Iſſue, the Remainder thereof to the right Heirs of the ſaid *Richard Bridges* for ever, of the chief Lords of the Fee by the Services thereof due, and of right accuſtomed, as by the ſaid Writing of Feoffment indented, with the Seals of the ſaid *John Winchcombe* and *John Knight* ſealed, and bearing Date the 6th Day of *February* in the 32d Year of the Reign of the aforeſaid late King *Henry* the 8th aforeſaid, and to the Jurors aforeſaid in evidence ſhewed, it more fully appeareth: And that by Virtue of the ſaid Feoffment, the aforeſaid *Richard Bridges* and *Johanna* were ſeized of the aforeſaid Meſſuage of 26 Acres of Land, in which, &c. amongſt other Things, in their Demeſn as of Fee-tail, that is to ſay, to the ſaid *Richard* and *Johanna*, and the Heirs of their Bodies between them lawfully begotten; the Remainder thereof to the right Heirs of the ſaid *Richard* as above is ſaid: And the ſaid *Richard* and the ſaid *Johanna* ſo thereof being ſeized had Iſſue of their Bodies between them lawfully begotten, one *Anthony Bridges* their Son yet living and in full Life being, that is to ſay, at *Weſt-Shefford* in the County of *Berks*; and that afterwards, and before the Time, in which, &c. the aforeſaid *Richard Bridges* and *Johanna* of the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other, in Form aforeſaid being ſeized, the ſaid *Richard* before the aforeſaid Time in which, &c. at *Ludgarſhall* in the ſaid County of *Wilts*, of ſuch his Eſtate died thereof ſeized: And the aforeſaid *Johanna* him over-lived, and held herſelf in the aforeſaid Meſſuage and 26 Acres of Land, in which, &c. amongſt other, and was thereof ſole ſeized in her Demeſn as of Fee-

Fee-tail in Form aforeſ. the Remainder thereof over, as before is ſaid: And farther the Jurors aforeſ. ſay upon their Oath, That the ſaid *Johanna* being thereof ſo ſeized, the aforeſ. *Anthony Bridges* the 4th Day of *December* in the 32d Year of the Reign of the ſaid Lady the now Q. at *Walcot* aforeſ. by his Indenture made between the aforeſ. *Anthony Bridges*, Son of the aforeſ. *Richard* and *Johanna*, and *Barbara* then Wife of the ſaid *Anthony*, and one *Edward Langford*, Gent. by the Name of *Anthony Bridges* of *Weſt-Shefford*, otherwiſe great *Shefford*, in the County of *Berks*, Eſq; and *Barbara* his Wife, and *Edward Langford* of *Lincolns-Inn*, Gent. of the one Part, and one *George Brown*, Knt. by the name of *George Brown*, Eſq; ſecond Son of the Right Hon. *Anthony* Viſcount *Brown*, Knt. of the moſt noble Order of the Garter, of the other Part; which other Part with the Seals of the ſaid *Anthony Bridges*, *Barbara*, and *Edward Langford* ſealed, bearing Date the ſame Day and Year, to the Jurors aforeſ. in Evidence ſhewed, it was covenanted, granted, condeſcended unto, concluded and fully agreed by and between the ſaid Parties to the ſaid Indenture, in Manner and Form following; that is to ſay, that the ſaid *Anthony Bridges*, Son of the ſaid *Richard Bridges* and *Johanna*, and *Edward Langford*, covenanted and granted for them, their Heirs and Aſſigns, to and with the aforeſaid *George Brown*, his Heirs and aſſigns, by the ſame Indenture, that they the ſaid *Anthony Bridges*, Son of the aforeſaid *Richard Bridges* and *Johanna* and *Barbara*, together with the aforeſaid *Edward Langford* before *Eaſter* Term then next following, would levy, and acknowledge before the Juſtices of the ſaid Lady the Q. of the Bench at *Weſtm.* one Fine or diverſe Fines with Proclamations, according to the Courſe of Fines in the ſaid Court uſed, to the aforeſ *George Brown*, of all that Manor of *Kintbury*, with all an ſingular the Rights, Members and Appurt. in the aforeſ. County of *Berks*; and of all the Meſſuages, Lands and Tenem. Rents, Services, Advowſons, Patronages, Liberties, Privileges, Profits and Hereditaments, with all and ſingular their Appurt. to the ſaid Manor belonging or appertaining, and alſo of the aforeſ. whole Tenem. within ſpecified, by the Name of Lands, Tenem. and Hereditaments with the Appurt. called or known by the Name of *Walcot*, lying in *Swindon* within written, whereof the aforeſ. Meſſuage and 26 Acres of Lands then were and yet are parcel: As alſo of all Meſſuages, Cottages, Lands, Tenem. Rents, Services and Hereditaments whatſoever to the ſame belonging, occupied, reputed, demiſed or taken as Part or Parcel thereof, by the name of 40 Meſſuages, 20 Tofts, 1 Dove-houſe, 30 Gardens, 20 Orchards, 1000 Acres of Land, 300 Acres of Meadow, 1000 Acres of Paſture, 1000 Acres of Wood, 500 Acres

Acres of Furz and Heath, and 40 *s.* of free Rent, with the Apputenances in *Kintbury*, *Holt*, *Hungerford*, *Walcot*, and *Swindon*, in the Counties of *Berks* and *Wilts*, or by whatſoever Number of Acres, either ſole or together with any other Manors, Lands, Tenements and Hereditaments, and that the aforeſ. Fine, or the aforeſ. Fines, concerning the Premiſſes in the ſaid Indenture before mentioned, and the Execution of the Fine or Fines ſhould be, and be to Uſe of the ſaid *George Brown* and his Heirs and Aſſigns for ever, and to no other Uſe, Intent or Purpoſe: And the ſaid Jurors farther ſay, That in Performance and Accompliſhment of a Covenant and Agreement in the ſaid Indenture, between the ſaid *Anthony Bridges* the Son of the ſaid *Richard* and *Johanna*, *Barbara* and *Edward Langford*, and the ſaid *George Brown* in Form aforeſ. mentioned, afterwards, and before the aforeſaid *Eaſter* Term, that is to ſay, in the Term of St. *Hillary* in the 32d Year of the Reign of the ſaid L. the now Q. aforeſ. a certain Fine was levied in the Court of the ſaid Lady the Q. at *Weſtm.* in the County of *Middleſex*, before *Edmund Anderſon*, *Francis Windham*, *William Periam*, and *Thomas Walmeſly*, then Juſtices of the ſaid Lady the Q. and other the Lady the Q.'s faithful People then there preſent, between the aforeſ. *George Brown* Plaintiff, and the aforeſaid *Anthony Bridges* Son of the ſaid *Richard* and *Johanna*, and *Barbara* his Wife, and *Edward Langford*, Gent. Deforceants, of the whole Tenements in the ſaid Indenture ſpecified, whereof the ſaid Meſſuage and 26 Acres of Land are, and at the Time of the levying of the ſaid Fine were Parcel amongſt other, by the Names of the Manors of *Kintbury* and *Fally*, otherwiſe *Great Fally*, with the Appurtenances, and 60 Meſſuages, 20 Tofts, 3 Dove-houſes, 40 Gardens, 50 Orchards, 4000 Acres of Lands, 300 Acres of Meadow, 4000 Acres of Paſture, 300 Acres of Wood, 1000 Acres of Furz and Heath, and 6 *l.* 13 *s.* and 4 *d.* of Rent, with the Appurtenances, in *Kintbury*, *Holt*, *Fally*, otherwiſe *Great Fally*, *Hungerford* and *Weſt-Shefford*, otherwiſe *Great Shefford*: as alſo of the Rectory of *Great Fally* with the Apputenances, and Free Warren and Liberty of a Park in *Weſt-Shefford*, otherwiſe *Great Shefford*; and alſo the Free Fiſhings in *Kennet* in the County of *Berks*, and of the Manor of *Baddeſden*, with the Apurtenances, and 20 Meſſuages, 10 Tofts, 12 Gardens, 8 Orchards, 1000 Acres of Land, 100 Acres of Meadow, 1000 Acres of Paſture, 200 Acres of Wood, 500 Acres of Furz and Heath, and 40 *s.* Rent with the Appurtenances in *Baddeſden*, *Ludgerſhall*, *Walcot*, and *Swindon* in the County of *Wilts*; whereupon a Plea of Covenant was ſummoned between them in the ſaid Court, that is to ſay, That the ſaid *Anthony*, *Barbara* and *Edward*, acknowledge the ſaid Manors, Tenem. Hereditam. Rents, Rectory, Warren, Liberty

and

and Fiſhing, with the Appurtenances, in the ſaid Fine contained, to be the Right of the ſaid *George*, as thoſe which the ſaid *George* had of the Gift of the ſaid *Anthony*, and the ſame remiſed and quit-claimed from the ſaid *Anthony*, *Barbara*, and *Edward*, and their Heirs, to the aforeſaid *George* and his Heirs for ever. And beſides the ſaid *Anthony* and *Barbara* granted for them and the Heirs of the ſaid *Anthony*, that they warrant to the aforeſ. *George*, his Heirs and Aſſigns, the aforeſaid Manors, Tenements, Rents, Rectory, Warren, and Liberties, and Fiſhing, with the Appurtenances in the ſame Fine contained, againſt the ſaid *Edward* and his Heirs for ever; and for this Recognition, Releaſe, Quit-Claim, Warranty, Fine and Concord, the ſaid *George* granted to the aforeſ. *Edward* a certain yearly Rent of 100 Pounds, to be going out of and in the aforeſ. Manors, Tenements, Rents, Rectory, Warren, Liberties and Fiſhing, with the Appurtenances in the ſame contained; and the ſame to him did render in the ſame Court, to have, and to hold, and perceive the ſaid yearly Rent of 100 *l.* to the ſaid *Edward*, the whole Life of the ſaid *Johanna*, by the Name of the Lady *Johanna Bridges*, Mother of the ſaid *Anthony*, at the Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin, the Nativity of St. *John* the *Baptiſt*, St. *Michael* the *Archangel*, and the Birth of the Lord, by equal Portions yearly to be paid the whole Life of the ſaid *Johanna*; the firſt Payment whereof to begin at the firſt of the Feaſts aforeſ. which next after the Deceaſe of the ſaid *Anthony* ſhould happen to be: And if it ſhould happen the ſaid yearly Rent of 100 *l.* or any Part thereof to be behind in Part or in all after any of the aforeſ. Feaſts, in which (as before is ſaid) it ought to be paid, not paid by the Space of 30 Days; that then and ſo often the ſaid *George* and his Heirs ſhould forfeit to the ſaid *Edward* 4 *l.* 15 *s.* *Nomine Pœnæ*, as often as the ſaid yearly Rent of 100 *l.* or any Parcel thereof ſo to be behind ſhould happen, and that then and ſo often it ſhould be well lawful to the ſaid *Edward*, all the Life-time of the ſaid *Johanna*, into the aforeſ. Manors, Tenements, Rents, Rectory, Warren, Liberty, and Fiſhing, with the Appurtenances in the ſaid Fine contained, and every Part and Parcel thereof, to enter and diſtrein, and the Diſtreſſes ſo there taken and had, lawfully to lead, carry away, and drive, and the ſame to keep, until as well of the aforeſ. yearly Rent of 100 *l.* with the Arrearages thereof, if any ſhould be, as of the aforeſ. 4 *l.* 15 *s.* *Nomine Pœnæ*, as before is ſaid, he ſhould be fully ſatisfied and paid. Alſo the aforeſ. *George* granted to the aforeſ. *Anth.* and *Barbara* the aforeſ. Manors of *Baddeſden* and *Fally*, otherwiſe *Great Fally*, with the Appurt. and 20 Meſſuages, 10 Tofts, 10 Gardens, 6 Orchards, 1000 Acres of Land, 100 Acres of Meadow, 1000 Acres of Paſture, 100 Acres of Wood, 500 Acres

of

of Furz and Heath, and 50 *s.* Rent, with the Appurtenances in *Baddeſden*, *Ludgerſhall*, *Fally*, otherwiſe great *Fally*, and *Weſt Shefford*, and the Rectory of great *Fally*, with the Appurtenances, and free Warren, and Liberty of a Park in *Weſt Shefford*, otherwiſe *Great Shefford* aforeſaid, Parcel of the Manors, Tenements and Rents aforeſaid, with the Appurtenances in the ſaid Fine contained; and then did render in the ſame Court; to have and to hold to the ſaid *Anthony* and *Barbara*, of the chief Lords of the Fee, by the Services, which to thoſe Manors, Tenements, Rents, Rectories, Warren, and Liberty of Park do belong, the whole Life of the ſaid *Anthony* and *Barbara*, and to the longeſt liver of them, without Impeachment of any Waſte, the whole Life of the ſaid *Anthony*: And after the Deceaſe of the ſaid *Anthony* and *Barbara*, the ſame Manors, Tenements, Rents, Rectories, Warren, and Liberties of Park, with the Appurtenances, wholly to return to the ſaid *George* and his Heirs; to be holden of the Lords of the Fee, by the Services which to thoſe Manors, Tenem. Rents, Rectory, Warren and Liberties of Park belonging, for ever: And the aforeſ. Jurors further ſay upon their Oath aforeſaid, that the ſaid *Johanna* in the ſaid Meſſuage and 26 Acres of Land, amongſt other, with the Appurt. in Form aforeſaid being ſeiſed, the ſaid *Johanna* afterwards, and before the within written time in which, &c. the 7th Day of *Octob.* in the 32d Year of the Reign of the ſaid Lady the now Queen, at *Swindon* aforeſaid, by her certain Indenture of Demiſe, between the ſame *Johanna*, by the Name of *Jane Harcourt* of *Ludgerſhall* in the County of *Wilts*, Widow, otherwiſe named the Lady *Johanna Bridges* of *Ludgerſhall* in the County of *Wilts*, Widow, of the one Party, and *Edward Bridges* Eſq; *Will. Bridges*, and *Anthony Bridges*, Sons of the ſaid *Edmond*, and their Aſſignees, of the other Party made; which Indent. is dated the 21ſt Day of *Aug.* in the 32d Year of the Reign of the ſaid Lady the now Q. aforeſ. as well for and in conſideration of the Surrender of one Indenture of Demiſe before then granted, of all and ſingular the Premiſſes in the ſaid Indenture, to the aforeſaid *Johanna* then after demiſed, or to be demiſed of 19 Years and more then to come and not expired, which the aforeſaid *Edmund* before that time had and injoyed, as of a former Indenture of Demiſe, at or before the Sealing and Delivery of the ſaid Indenture now in Evidence ſhewed, the aforeſaid *Edw. Bridges* had ſurrendred and delivered into the Hands and Poſſeſſion of the ſaid *Johanna*, as for divers other good Cauſes and Conſiderations the ſame *Johanna* ſpecially moving, demiſed, granted and to Farm let to the ſaid *Edw. Bridges*, *Will. Bridges*, and *Anthony Bridges*, Sons of the ſaid *Edmund*, the aforeſaid Meſſuage and 26 Acres of Land with the Appurten. amongſt other things;

to have and to hold the aforeſaid Meſſuage, and 26 Acres of Land amongſt other to the aforeſaid *Edmund*, *William*, and *Anthony Bridges*, the aforeſ. two Sons of the ſaid *Edmund Bridges*, for the Term of their natural Lives, and for the Term of the Life of the longeſt Liver of them, and every of them ſucceſſively to be enjoyed, yielding and paying therefore yearly, during the ſaid Term, to the aforeſ. *Johanna*, under and by the Name of *Jane Harcourt*, her Heirs and Aſſigns, 4 *l.* and 2 *d.* of good and lawful Money of *England*, at two uſual Feaſts or Terms of the Year, that is to ſay, at the Feaſt of the Annunciation of the bleſſed *Mary* the Virgin, 40 *s.* and 1 *d.* and at the Feaſt of St. *Michael* the Archangel the like Sum of 40 *s.* and 1 *d.* reſidue of the aforeſaid 4 *l.* and 2 *d.* as by the ſaid Indenture of Demiſe to the ſaid Jurors in Evidence ſhewed more fully appear'd, by Virtue of which Demiſe the ſaid *Edmund Bridges*, *William Bridges*, and *Anthony Bridges*, Sons of the ſaid *Edmund*, were ſeiſed of the aforeſaid Meſſuage and 26 Acres of Land within written, as the Law requireth: And farther the ſaid Jurors ſay upon their Oath, that the aforeſaid Meſſuage, and 26 Acres within written, and the reſt of the Tenements in the ſaid Indenture of Demiſe, by the ſaid *Johanna* under and by the Name of *Jane Harcourt*, to the ſaid *Edmund*, *William* and *Anthony*, Sons of the ſaid *Edmund*, in Form aforeſaid demiſed, were not uſually demiſed for the greater Part of 20 Years next before the ſame Demiſe (as before is ſaid) made for ſo little Rent, as by the aforeſaid Indenture thereof now in evidence ſhewed, in Form aforeſaid was reſerved: And the aforeſaid Jurors farther ſay upon their Oath, that the aforeſaid *Johanna* afterwards, and before the Time in which, *&c.* that is to ſay, the 29th Day of *September* in the 35th Year of the Reign of the ſaid Lady the now Q. at *Ludgerſhal* aforeſaid died: After whoſe death the ſaid *George Brown* into the Tenements within written, with the Appurtenances in which, *&c.* upon the Poſſeſſion of the ſaid *Edmund Bridges*, *William* and *Anthony Bridges*, Sons of the ſaid *Edmund*, thereof entered, and was thereof ſeiſed as the Law requireth: and ſo being thereof ſeiſed, afterwards and before the aforeſaid Time in which, *&c.* that is to ſay, the within written 22d Day of *October* in the 35th Year aforeſaid, demiſed to the ſaid *James* the ſaid whole Tenements within written, with the Appurtenances in which, *&c.* to have and to hold to the ſaid *James* and his Aſſignes, from the within written Feaſt of St. *Mich.* the Archangel, until the End and Term within mentioned of 4 Years from thence next enſuing and fully to be compleated; by Virtue of which Demiſe the ſaid *James* into the ſaid Tenements within written with the Appurt. entred, and was thereof poſſeſſed as the Law requireth; upon whoſe Poſſeſſ. of the ſaid *James*

the aforeſaid *Thomas Spencer* as Servant of the ſaid *Edm. Bridges*, and by his Commandment, the within written Time in which, &c. into the ſaid Meſſuage and 26 Acres of Land entred, and the ſaid *James* from his Farm aforeſaid thereof did eject: But whether upon the whole Matter aforeſaid by the aforeſaid Jurors in Form aforeſaid found, the entry of the ſaid *Tho. Spencer* into the aforeſaid Meſſuage and 26 Acres of Land, with the Appurtenances upon the Poſſeſſion of the ſaid *James* thereof, be a good and lawful Entry in Law or not, the ſaid Jurors are altogether ignorant, and pray thereof the Advice and Diſcretion of the Juſtices here, &c. And if upon the whole Matter aforeſaid it ſhall ſeem to the Juſtices and Court here, that the aforeſaid Entry of the aforeſaid *Tho. Spencer* upon the Poſſeſſion of the ſaid *James Linche* be not a good and lawful Entry in Law, then the ſaid Jurors ſay upon their Oath, that the ſaid *Tho. Spencer* is guilty of the Treſpaſs and Ejectment aforeſaid, in the aforeſaid Meſſuage and 26 Acres of Land, as the aforeſaid *James* againſt him within complaineth, and then they aſſeſs the Damages of the ſaid *James*, by the Occaſion of the ſaid Treſpaſs and Ejectment, above his Charges and Coſts by him about his Suit in this Behalf expended to 4 *d.* and for his Charges and Coſts to 12 *d.* And if upon the whole Matter aforeſaid, it ſhall ſeem to the Juſtices and Court here, that the aforeſaid Entry of the ſaid *Tho. Spencer* upon the Poſſeſſion of the ſaid *James* be a good and lawful Entry in Law, then the ſaid Jurors ſay upon their Oath, that the ſaid *Tho. Spencer* is not guilty of the Treſpaſs and Ejectment aforeſ in the ſaid Meſſuage, &c. within alledged: And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give their Judgment thereof, Day is given to the Parties aforeſaid here, until in 8 Days of St. *Hill.* to hear their Judgment thereof, becauſe that the ſaid Juſtices here thereof are not yet, &c. At which Day come as well the aforeſaid *James* as the aforeſaid *Will.* and *Tho.* by their Attornies aforeſaid: And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day farther is given to the Parties aforeſaid here, until from *Eaſter* in 15 Days to hear their Judgment thereof, becauſe the ſaid Juſtices here not thereof yet, &c. At which Day here come as well the ſaid *James* by *George Duncombe* his Attorney, as the ſaid *Will.* and *Tho.* by their Attornies aforeſaid: And becauſe the Juſtices here will farther adviſe of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties aforeſaid here, until the Morrow of *Holy Trinity* to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof not yet, &c. At which

which Day here come as well the aforeſaid *James* by the aforeſaid *George Duncombe* his Attorney, as the ſaid *Will.* and *Tho.* by their Attorney aforeſaid: And becauſe the Juſtices here will further adviſe of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties here, until in eight Days of St. *Michael*, to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof not yet, *&c.* At which Day here come as well the ſaid *James Linch*, by the aforeſ. *George Duncombe* his Attorn. as the aforeſ. *Will. Spencer* and *Tho. Spencer* by their Attorney: And upon this the Verdict and Premiſſes aforeſ. being ſeen, and by the Juſtices here fully underſtood, it ſeemeth to the Juſtices here, that the aforeſaid entry of the aforeſaid *Tho. Spencer* into the aforeſaid Meſſuage and 26 Acres of Land, upon the Poſſeſſion of the ſaid *James Linch*, is not a good and lawful entry in Law; Therefore it is granted, that the aforeſaid *James Linch* recover againſt the aforeſaid *Thomas Spencer* his Term aforeſaid yet to come, of and in the aforeſaid Meſſuage, and 26 Acres of Land with the Appurtenances, and his Damages aforeſaid, to 16 *d.* by the Jurors aforeſaid in Form aforeſaid aſſeſſed, as alſo 26 *l.* 9 *s.* to the ſaid *James* at his Requeſt, for his Charges and Coſts aforeſaid by the Court here of increaſe adjudged; which Damages in the whole do amount to 26 *l.* 10 *s.* 4 *d.* and the aforeſaid *Thomas* be taken, *&c.* And alſo the ſaid *James* in mercy for his falſe clamour againſt the aforeſaid *Will. Spencer*, of the whole Treſpaſs and Ejectment aforeſaid, and againſt the aforeſaid *Tho. Spencer* of the Reſidue of the Treſpaſs and Ejectment aforeſaid, thereof the ſaid *Will.* and *Tho.* and the Jurors aforeſaid above be acquitted; therefore the ſaid *Will.* and *Tho.* go thereof without Day, *&c.* And hereupon the ſaid *James* prayeth the Writ of the Lady the Queen, to the Sheriff of the County aforeſaid to be directed, to give him Poſſeſſion of his Term yet to come of and in the aforeſaid Meſſuage and 26 Acres of Land with the Appurtenances, and it is granted unto him returnable here from the Day of St. *Martin* in 15 Days, *&c.* Afterwards, that is to ſay, the 26th Day of *Novemb.* in the 40th Year of the Reign of the ſaid Lady the now Queen, come here into Court the aforeſaid *James*, by the aforeſaid *George* his Attorney, and by a ſpecial Warrant to him in that behalf made, confeſſed himſelf to be ſatisfied of the Damages aforeſaid; therefore the aforeſaid *Thomas* of the ſaid Damages be acquitted, *&c.*

See the Caſe of Symonds and Cudmore in Skinner, &c. and in Carth. 258, &c. and Poſt. 77, & 84.

Sir GEORGE BROWN's *Caſe.*

Hill. 36 Eliz. *in B. R. Rot.* 445.

IN an *Ejectione firmæ* by (*a*) *Thomas Lynch*, on a Demiſe made by Sir *George Brown*, againſt *William Spencer*, on Not guilty pleaded, the Jurors gave a ſpecial Verdict to this Effect: Sir *Richard Bridges*, ſeiſed of certain Lands in Fee, did thereof enfeoff *Winſcombe* and others, on Condition that they ſhould give back the ſame to him and his Wife, and to the Heirs of their two Bodies begotten; the Remainder to the right Heirs of Sir *Richard*; which was done accordingly; Sir *Richard* had Iſſue on the Body of his Wife *Anthony Bridges*, and died. *Anthony Bridges*, in the (*b*) Life of his Mother, levied a Fine (which in Truth was with (*c*) Proclamations, altho' the Proclamations were not found) to Sir *George Brown* in Fee; the Wife, living the ſaid *Anthony*, made a Leaſe of the ſaid Land for three Lives (which Leaſe was not warranted by the Statute of 32 *H.* 8. *cap.* 28.) whereupon Sir *George Brown* entred, and made the Leaſe to the Plaintiff: And whether the Entry of Sir *George Brown* were lawful or not, was the Queſtion; and after many Arguments at the Bar and Bench, Judgment was given for the Plaintiff; And in this Caſe three Points were reſolved.

(*a*) Cr. Eliz. 513. 9 Co. 140. b. 1 Roll's 878. Hob. 258. Moor 455. 2 And. 44 Cro. Car. 478, 479, 525. Winch 43, 44

(*b*) 9 Co. 141. b. 142. a.

(*c*) Co. Lit. 326 b. 305. b. Hob. 262. Cr. Jac. 689, 474, 475, 175. Cr. El. 514. 2 And. 44, 45. Hard. 91. Winch 43. Lane 101. Bridg. 28. 3 Keb. 133, 333.

1. That the Leaſe made by the Wife for three Lives, altho' the Leaſe were without Warranty, was within the Statute of 11 *H.* 7. *cap.* 20. the Letter of which Act is, *If any Woman*, &c. *have or ſhall hereafter, being ſole or with any other after taken Husband, diſcontinued or diſcontinue, aliened, releaſed or confirmed, alien, releaſe or confirm with Warranty*, &c. For theſe Words, *with Warranty*, (*d*) refer to Releaſes and Confirmations, which make no Diſcontinuance without Warranty; for the Intent of the Act was to prohibit not only every Bar, but every Manner

(*d*) Cr. Eliz. 514. Bridg. 29.

Manner of Diſcontinuance alſo, which puts the Heir to his real Action, by which ſometimes the Heir was diſinherited, and always greatly delay'd; and for as much as a Releaſe or Confirmation makes no Diſcontinuance without Warranty, for this Cauſe the Warranty ſhall be referred to them, to make them equivalent to ſuch Eſtate which paſſeth by Livery, which of it ſelf, without Warranty, is a Diſcontinuance. Note; the Title of the Act is, *Diſcontinuance of Right or Eſtate*; and afterwards in the Act it is ſaid, *Lands, Tenements or Hereditaments being diſcontinued, aliened or ſuffered to be recovered.* And afterwards, *as if no ſuch Diſcontinuance, Warranty nor Recovery had been had*; by which it appears that Diſcontinuance ſtood in equal Degree with Warranty or Recovery. *Vide Dyer, Paſch.* 4. *Mar.* 148. *Beamont* and *Viller's* Caſe, and *Plow.* 50. *b.* Co. Lit. 365. b.

2. It was reſolved, if *Anthony* had granted over his Remainder in Fee only, he might have entred for this Forfeiture by the expreſs Purview of the Act, the Effect of which is; "That it ſhall be lawful for every Perſon and Perſons, to "whom the Intereſt, Title or Inheritance, after the Deceaſe "of the ſaid Wom. of the ſaid Manor, *&c.* being diſcon-"tinued, aliened or ſuffered to be recovered in the Form "aforeſaid, ſhould appertain, to enter into all and every the "Premiſſes, and peaceably to poſſeſs and enjoy the ſame in "ſuch Manner and Form, as he or they ſhould have done, "if no ſuch Diſcontinuance, Warranty nor Recovery had "been had nor made": And if no Diſcontinuance had been made, the Land ſhould deſcend to the Iſſue. And therefore by the expreſs Letter of the Act, he ſhould enter on the Diſcontinuee, and not the Grantee of the Remainder. Plow. 45. a. b.

3. It was reſolved, That in this Caſe Sir *George Brown* (*a*) ſhould enter on the Diſcontinuee, for if no Diſcontinuance had been made, he ſhould enjoy the Land againſt the ſaid *Anthony*, and all the Heirs of his Body; for when the (*b*) Iſſue in Tail levies a Fine with Proclamations, in the Life of the Tenant in Tail, to another; and afterwards Tenant in Tail dies, this Fine ſhall bar the Tail. For the Words of the Statute of (*c*) 32 *H.* 8. *cap.* 36. are, *in any wiſe intailed to the Perſon or Perſons ſo levying the ſame Fine, or to any of the Anceſtor or Anceſtors of the ſame Perſon or Perſons.* But it was objected, that the Fine in the Life of the Wife doth operate in Part by (*d*) Concluſion; for after that the Wife doth remain Tenant in Tail, and in Part, by Conveyance of an Eſtate as to the Remainder in Fee; and he, who hath nothing but by Concluſion or Eſtoppel, ſhall not take Benefit of this Act, becauſe the Words are, *To whom the Intereſt, Title, or Inheritance, after the Deceaſe of the ſaid Woman ſhould appertain:* And in this Caſe, as to the Eſtate-Tail, the Wife being alive, the Conuſee had nothing but by Concluſion, and Right or Title of Entry

(*a*) Moor 455. Cr. El. 514. 2 And. 45. Cr. Jac 175. Hob. 258. 1 Rol. 87. Poſtea 61. a.
(*b*) Moor 252. Poſtea 61. a. b. 1 Jones 33, 60, 461. Cr. Jac. 478, 525, 689. 9 Co 140. b. 141. a. Godb. 316 Hut 84.
(*c*) 1 Co. 96. b. Co. Lit. 262. a. Poſtea 87. a. 10 Co. 50 a.
(*d*) Lit Rep. 283. 2 Bulſt. 43. Cr. Jac. 175. Antea 5. b.

in this Caſe could not be given to a Stranger. But it was re-
(*a*) 2 Bulſt. 45. ſolved, That Sir *George Brown* ſhould in this Caſe take (*a*) Advantage thereof; for he, who hath the immediate Title, Intereſt or Inheritance at the Time of the Forfeiture, ſhall enter by Force of this Statute: And now by the Fine with
(*b*) 2 Bulſt. 45. 1 Jones 33. Cr. Jac. 175. Proclamations, the Eſtate-tail was barred and (*b*) extinct, and againſt that *Anthony*, nor any Iſſue heritable by Force of the Eſtate-tail, can enter; and by Conſequence he, who hath the Remainder in Fee, ſhall enter, for he is the Perſon *to whom the Intereſt, Title and Inheritance, after the Deceaſe of the ſaid Woman, do appertain.* And now, on the
(*c*) 11 H. 7. cap. 20. 10 Co. 37. a. Winch 43. 1 Leon. 261. 2 Leon. 168. 3 Leon. 78. Cr. El. 2. 24, 513, 514. Godb. 6. Moor 93, 250, 455. 4 Co. 3. b. 5 Co. 80. a. 2 And. 31, 44, 57. 1 Rol. 878. Cr. Jac. 174, 474, 624. Cr. Car. 244. 1 Jones 13, 254. Co. Lit. 326. b. 365. b. Hob. 166, 341. Bridgm. 136. Matter, the Caſe is no other, but that a Woman Tenant in Tail within the Statute of (*c*) 11 *H.* 7. the Reverſion or Remainder in Fee, the Woman makes a Diſcontinuance, he in the Reverſion or Remainder ſhall enter for this Forfeiture; for he is the Perſon *to whom the Intereſt, Title and Inheritance, after the Deceaſe of the ſaid Woman, do appertain.* The ſame Law in the Caſe at Bar, altho' the Fine were without Proclamations; yet after the Death of the Woman, *Anthony* himſelf, againſt his Fine, cannot enter; but the Entry of the Conuſee is lawful, and therefore he ſhall take the Benefit of this Act, by the expreſs Words thereof.

(*d*) 2 Leon. 168. Godb. 6. 3 Leon. 78. 2 And. 150. Moor 250. 2 Rol. Rep. 491. 3 Keb. 496. Cr. Jac. 689. 2 And. 57. Cr. El. 514. Jenk. Cent. 276. Cr. Car. 234. 1 Jones 60. And it was ſaid by *Anderſon*, Chief Juſtice of the Common Pleas, That where it was invented to make Evaſion out of this Act, that ſuch Woman Tenant in Tail ſhould accept a Fine *Sur conuſans de droit come ceo, &c.* and thereby grant and render the Land for (*d*) 1000 Years, pretending that that was not within the Words of the Act, *ſcil.* which prohibits Diſcontinuance, Alienation, Releaſe, *&c.* That that was an Alienation within the Intent of this Act, or otherwiſe the Statute would ſerve for little or nothing. And ſo was it, on Conference with other Judges, reſolved by *Wray* Chief Juſtice, and himſelf in the Court of Wards, and declared accordingly. And ſo it was held in the Common Pleas 18 *Eliz.* by Sir *James Dyer*, *Manwood* and *Mounſon* Juſtices, as I my ſelf heard. *Vide Dyer Trin.* 3 & 4 *Phil. & Mar.* (*e*) 148. *Penicock*'s Caſe.

(*e*) Dyer 148. pl. 79. Co. Lit. 252. a. 1 Rol. 852. [*See the Caſe of* Symonds *and* Cudmore *in* Carthew, Skinner, *&c. alſo* Fermor's *Caſe, and the Caſe of* Fines poſt.]

RIGEWAY's *Caſe.*

Paſch. 36 Eliz.

In the King's Bench.

IN Debt by *William Grils*, againſt *Thomas Rigeway*, late Sheriff of *Dev.* for 309 *l.* 6 *s.* 8 *d.* which he had recovered in the ſame Court, in Treſpaſs, for taking of his Goods, againſt *Thomas Chawner*, alias *Chaundeler*, and that the Body of *Chawner* was taken in Execution 20 *April* 33 *Eliz.* by the Defendant, then Sheriff at *Stoke Cannon* in the ſaid County; and afterwards the Defendant, 10 *Decem.* 34 *Eliz.* then Sheriff of the ſame County, ſuffered him to eſcape in *(a) Parochia S. Mariæ de Arcubus in Warda de Cheape, London, & ad largum quo voluit ire permiſit, &c.* The Defendant pleaded and confeſſed, That *Chawner* was taken in Execution the ſaid 20th of *April* 33 *Eliz.* and ſo continued in his Cuſtody till the 8th Day of *December* following; at which Day, at *Stoke Cannon* aforeſaid, he broke the Priſon, *& a cuſtodia ipſius Th. Rigeway contra voluntatem ipſius Th. evaſit, ſuper quo præd' Thomas adtunc & ibidem recenter inſecutus eſt præd' Johannem, & in recenti inſecutione ipſius Johannis in forma præd', præd' Thomas Rigeway* 11 *Die Decemb. tunc proxime ſequent' apud (b) Stoke Cannon præd', ratione & virtute executionis præd' & prioris captionis & executionis prædict', cepit & arreſtavit præd' Johannem, &c.* The Plaintiff by way of *(c)* Replication, by Proteſtation that the Defendant did not make freſh Suit, for Plea ſaid, *Quod poſt evaſionem præd' & antequam præd' Johannes Chawner recaptus fuit, idem Johannes per totum unum diem & unam noctem*, viz. *apud London in parochia & Warda præd' fuit extra viſum ipſius Thomæ, &c.* And thereupon the Defendant did demur in Law.

Moor 660. Cr. El. 318, 439. Poph. 41. Gould. 180.

(a) Doct. pl. 55.

(b) Doct. pl. 55.

(c) Poph. 41.

1. In this Caſe it was unanimouſly agreed by the whole Court, That although the Priſoner who eſcaped be out of Sight, yet if freſh Suit be made, and he be retaken *in recenti inſecutione*, he ſhould be in Execution; for otherwiſe, at the Turn of a Corner, or by Entry into a Houſe, or by ſuch Means,

Cr. El. 439. Moor 660. 1 Rol. 901. Kelw. 2. b. 1 Jones 145. Latch 200. Pop. 41. 3 Co. 44.

Means the Priſoner might be out of Sight; and altho' the Priſoner flieth into other Counties where the Sheriff hath no Power, and where it may be objected, the Sheriff cannot have the Cuſtody of him; yet foraſmuch as the Eſcape was of his (*a*) own Wrong, (whereof he ſhall not take Advantage) the Sheriff might on freſh Suit take him in any other County, and he ſhould be ſaid in Execution. But if the Plaintiff bring an Action againſt the Sheriff for an Eſcape (*b*) before that the Sheriff can retake him; or if the Sheriff doth not make freſh Suit; yet in both theſe Caſes the Sheriff may retake (*c*) him, and keep his Body under his Cuſtody, till he hath agreed with him, or may have an Action on the Caſe for his tortious Eſcape. And altho' the Defendant be taken on a *Capias ad ſatisfaciendum*, and eſcapes, yet if the Writ be never returned and filed, the Plaintiff may have a new *Capias ad ſatisfaciendum* againſt him, and take him again, and he ſhall not take Advantage of his own Wrong; but if the Plaintiff will, he may charge the Sheriff for the Eſcape, if he hath not retaken him on freſh Suit before the Action brought: And when the Priſoner eſcapes of his own Wrong, and is retaken, he ſhall never have an (*d*) *Audita Querela* againſt the Sheriff. But otherwiſe it is, when he eſcapes with the Conſent of the Gaoler, for then he cannot retake him; and in ſuch Caſe for his Diſcharge he ſhall have an *Audita Querela*. And on theſe Differences are all the Books, *ſcil.* 8 *E.* 2. *Corone* 40. 6 *E.* 2. *Eſcape Br.* 49. 41 *Aſſ.* 15. 45 *E.* 3. 9. 2 *E.* 4. 6. 10 *E.* 4. 10. 11 *E.* 4. 4. 13 *E.* 4. 8. 21 *E.* 4. 67. 6 *H.* 7. 11. 10 *H.* 7. 25. 28. 13 *H.* 7. 2. 14 *H.* 7. 1. 16 *H.* 7. 2. 12 *H.* 8. 90. *Br. Eſcape* 45. *Plow. Com.* 36. *Plat*'s Caſe. *F. N. B.* 130. *b.* 10 *Eliz. Dyer* 275.

(*a*) Cr. El. 555. Godb. 126. Cr. Car. 240, 235. 1 Ro. 901. Hob. 60. Cr. El. 53, 439. Kelw. 3. a. Antea 44. b.
(*b*) 1 Jones 145. Cr. Jac. 657, 658. Cr. El. 439.
(*c*) Cr. El. 53, 124, 264. Godb. 126. Hard. 31. F. N. B. 130. b.
(*d*) Cr. El. 44, 439, 555. Moor 660. Cr. Car. 240. Style 117. Cr. El. 102. Antea 44. b. 1 Rol. 307. 1 Lev. 211. 1 Show. 177. Lutw. 1266. 1 Mod. 194. Comb. 396.
(*e*) Poph. 42. Doct. pla. 55.
(*f*) 1 Sand. 285. 8 Co. 120. b. 133. b. 163. a. Hob. 199. Cr. Car. 5. Cr. Jac. 133, 221, 312. 2 Bulſt. 94. Style 354. Palm. 287. Lit. R. 172.
(*g*) Cr. El. 318. Cr. Jac. 127. Moor 461. Poph. 42. 1 Ro. R. 271. 2 Bulſt. 37. 9 H. 6. 35 b. Fitz. Repleader 8. Br. Repleader 39. Moor 867. Doct. pl. 311. 1 And. 168. 1 Ro. Rep. 363. Lit. R. 252.
(*h*) 8 Co. 120. b. Cr. El. 62. 8 Co. 120. b. 1 Leon. 342. 35 H. 6. 19. a. con, ſee 1 Leo. 79.

2. It was reſolved, That the Bar was (*e*) inſufficient, for the Plaintiff hath declared of an Eſcape in *London*, and the Defendant juſtifieth the retaking of him at *Stoke Cannon*, and ſo the Eſcape at *London* is not anſwered; but foraſmuch as the Plaintiff not denying the freſh Suit, but by Proteſtation hath only relied upon that Matter, that the Priſoner was out of his Sight, the Court will not intend other Matter to maintain his Action, than he himſelf hath ſhewed; and now on (*f*) the whole Record it doth not appear to the Court, that the Plaintiff hath Cauſe of Action, wherefore the Plaintiff perceiving the Opinion of the Court, did diſcontinue his Suit: But it was agreed, that if the Plaintiff had demurred upon the Bar, he ſhould have had Judgment.

3. It was reſolved, That after Demurrer there ſhould be no Repleading; for the Parties have by their mutual Aſſent put themſelves upon the Judgment of the Court, and therefore without their Aſſent they could not replead. And ſo was it adjudged in Debt between (*g*) *Kendal* and (*h*) *Heyer* in the King's Bench, *Mich.* 25 & 26 *El.* by *Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court of the King's Bench. And in the ſame Court in Debt between *Gallis* and *Burbry*, *Mich.* 29 & 30 *El.* againſt the Opinion of 9 *H.* 6. 35. in an Avowry, which Record had been ſeen, and did not warrant the Report of the Book.

LINCOLN COLLEGE's *Caſe.*

Michaelmas Term, 37 & 38 Eliz. *in C. B. Rot.* 82.

Robert Chamberlain Eſq; by *Apollo Plaine* his Attorney, demandeth againſt the Warden or Rector and Scholars of the Bleſſed *Mary* and *All Saints Lincoln* in the Univerſity of *Oxford* the Manors of *Petteſho* and *Eckney*, with the Appurtenances, except 120 Acres of Paſture in *Petteſho* aforeſaid, and 30 Acres of Paſture in *Eckney* aforeſaid, which *Alvered Cornburgh*, Eſq; *Richard Danvers*, Eſq; *Nicholas Stathum* and *William Callow* gave to *Richard Chamberlain*, Eſq; and *Sibil Fowler*, and the Heirs Males of the Body of the ſaid *Richard Chamberlain* begotten; and which after the Death of the ſaid *Richard* and *Sibil*, and of *Edward* Son and Heir of the ſaid *Edward Chamberlain*, and of *Leonard* Son and Heir of the laſt ſaid *Edward*, and of *Francis* Son and Heir of the ſaid *Leonard*, to the aforeſaid *Robert* Son and Heir of the ſaid *Francis*, ought to deſcend by the Form of the Gift aforeſaid, &c. Whereupon he ſaith, That the aforeſaid *Alvered Cornburgh*, *Richard Danvers*, *Nicholas* and *William* gave the Manors aforeſaid, with the Appurtenances, to the aforeſaid *Richard Chamberlain* and *Sibil*, and to the Heirs Males of the Body of the ſaid *Richard Chamberlain* begotten, in the Form aforeſaid, &c. By which Gift the ſaid *Richard* and *Sibil* were ſeiſed of the ſaid Manors, with the Appurtenances, that is to ſay, the ſaid *Richard* in his Demeſne as of Fee and Right, and the ſaid *Sibil* in her Demeſne as of Freehold, by the Form, &c. In the Time of Peace in the Time of the Lord *Edward* late King of *England* (the 4th of that Name after the Conqueſt) taking thereof the Profits to the yearly Value, &c. And from him the ſaid *Rich.* the Right deſcended by the Form, &c. to one *Edw.* as Son and Heir, &c. And from him the ſaid *Edw.* the Right deſcended by

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by the Form, &c. to one *Leonard*, as Son and Heir, &c. And from him the ſaid *Leonard* the Right deſcended by the Form, &c. to one *Francis*, as Son and Heir, &c. And from the ſaid *Francis*, Son of the ſaid *Leonard*, the Right deſcended by the Form, &c. to this *Robert*, who now demandeth as Son and Heir, &c. And which after the Death, &c. And thereof bringeth Suit, &c. And the aforeſaid Warden, or Rector, and Scholars, by *William Plaine* their Attorney come and defend their Right when, &c. and ſay, that the aforeſaid *Robert Chamberlain*, his Action aforeſaid againſt them ought not to have; by Proteſtation taking it, that the aforeſaid *Alvered Cornburgh*, *Richard Danvers*, *Nicholas Stathum*, and *William Callow*, did not give the Manors aforeſaid, with the Appurtenances, to the aforeſaid *Richard Chamberlain*, and *Sibil Fowler*, in Manner and Form as in the Declaration aforeſaid is alledged; for Plea they ſay, That long after the Time in which the Gift aforeſaid is ſuppoſed to be made, *Richard Lyſter*, Gent. *Martin Linſey*, *John Cottesford*, *John Clayton*, *William Hogeſon*, and *Robert Taylor*, Clerks, were ſeiſed of the Manors aforeſaid, with the Appurtenances, in their Demeſne as of Fee; and ſo being thereof ſeiſed, the aforeſaid *Sibill*, Great Grandmother of the ſaid *Robert Chamberlain*, whoſe Heir the ſame *Robert* is, the 5th Day of *May* in the 11th Year of the Reign of the Lord *Henry* late King of *Engl.* the 8th, at *Petteſho* aforeſaid, by her certain Writing of Releaſe, which the ſaid Warden, or Rector, and Scholars, with the Seal of the aforeſaid *Sibil* ſealed, here bring into Court, whoſe Date is the ſame Day and Year, remiſed, releaſed, and altogether for her and her Heirs for ever quit-claimed to the aforeſaid *Richard Lyſter*, *Martin Linſey*, *John Cottesford*, *John Clayton*, *William Hogeſon*, and *Robert Taylor*, then of the Manors aforeſaid, with the Appurtenances, in Form aforeſaid being ſeiſed, in their full and peaceable Poſſeſſion then being, their Heirs and Aſſigns for ever, all her Right, Claim, Title, Eſtate, Uſe, Intereſt, and Demand, which ever ſhe had, now hath, or at any Time after might have, of and in the Manors aforeſaid, with the Appurtenances: And further, the ſaid *Sibill*, by her aforeſaid Writing, granted for her and her Heirs, that ſhe the ſaid *Sibil*, and her Heirs, the Manors aforeſaid, with the Appurtenances, to the ſaid *Richard Lyſter*, *Martin Linſey*, *John Cottesford*, *John Clayton*, *William Hogeſon*, and *Robert Taylor*, their Heirs and Aſſigns, againſt the then Abbot of *Weſtminſter*; and his Succeſſors would warrant, and for ever defend, as by the ſaid Writing of Releaſe more fully appeareth: And this the ſaid Warden, or Rector, and Scholars are ready to aver: Whereupon they demand Judgment, if the aforeſaid *Robert Chamberlain*, againſt the aforeſaid Writing of Releaſe, the ſaid

Ex Parte cleri hæc.

Warranty

Warranty of the ſaid *Sibil* his Anceſtor, whoſe Heir the ſaid *Robert* is, in it contained, his Action aforeſaid againſt them ought to have, &c. And the aforeſaid *Rob. Chamberlain* ſaith, that he for any Thing before alledged, to have his Action aforeſaid ought not to be barred, becauſe he ſaith, That long before the aforeſaid Gift made, and before the aforeſaid *Alvered*, *Richard Danvers*, *Nicholas Stathum*, and *William Callow*, had any Thing in the Manors aforeſaid, with the Appurtenances, the aforeſaid *Richard Chamberlain*, was ſeized of the aforeſaid Manors with the Appurtenances, in his Demeſn as of Fee, and the ſaid *Richard* ſo thereof being ſeized before the Gift aforeſaid, that is to ſay the 12th Day of *June* in the 11th Year of the Lord *Edward*, late King of *England*, the 4th after the Conqueſt, the aforeſaid *Richard Danvers*, *Alvered Cornburgh*, *Nicholas Stathum*, and *William Callow*, out of the Court of the *Chancery* of the ſaid late King *Edward* the 4th, at *Weſtminſter* in the County of *Middleſex* then being, brought and proſecuted a certain Writ of the ſaid late King *Edward* the 4th of Right, againſt the ſaid *Richard Chamberlain*, then being Tenant of the Freehold, of the Manors aforeſaid with the Appurtenances, amongſt other Things, to the then Sheriff of the County of *Buckingham* directed: By which Writ, the ſaid late King then and there commanded the ſaid Sheriff, that he ſhould command the ſaid *Richard Chamberlain*, by the Name of *Richard Chamberlain*, Eſq; that juſtly, and without Delay, he render to the ſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *Will.* by the Names of *Richard Danvers*, *Alvered Corneburgh*, Eſq; *Nicholas Stathum*, and *William Callow*, the Manors aforeſaid with the Appurtenances, (amongſt other) by the Names of the Manors of *Petteſho* and *Eckney*, with the Appurtenances, and 6 Meſſuages, 200 Acres of Land, 20 Acres of Meadow, 200 Acres of Paſture, and 100 *s.* Rent, with the Appurtenances in *Petteſho*, *Eckney* and *Emberton*, which he claimed to be his Right and Inheritance: And whereupon they complained that the ſaid *Richard Chamberlain* them unjuſtly deforced, and unleſs he do, and if the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas* and *William Callow*, ſhould ſecure him the ſaid Sheriff to proſecute their Claim, that then he ſummon by good Summoners the aforeſaid *Richard Chamberlain*, that he be before the then Juſtices of the ſaid late King *Edward* the 4th here, that is to ſay, at *Weſtminſter* aforeſaid, from the 15th Day of St. *John* the *Baptiſt* then next following, to ſhew wherefore he ſhould not do, and that he have then here the Summoners and that Writ; becauſe *Thomas Rokes*, Eſq; Chief Lord of the ſame Fee, remiſed thereof his Court to the ſaid late King *Edward* the 4th. At which 15 Days of *John* the

the *Baptiſt*, before *Thomas Brian*, Knt. and his Companions, then Juſtices of the ſaid late King *Edward* the 4th of the Bench here, that is to ſay at *Weſtmineſtr* aforeſaid, came as well the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas Stathum*, and *Wiliam Callow*, by *Thomas Gurney* their Attorney, as the aforeſaid *Richard Chamberlain*, by *John Wideſtale* then his Attorney, and then the Sheriff of the aforeſaid County of *Buckingham*, that is to ſay, *Reginald Gray*, Eſq; then there returned the Writ aforeſaid, to him in Form aforeſaid directed, in all Things ſerved and executed, and ſent, *(i. e.* Returned*)* that the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William Callow*, found to the ſaid then Sheriff Sureties to proſecute his Writ aforeſaid, that is to ſay, *Richard Doe* and *John Roe*; and that the ſaid *Richard Chamberlain* was ſummoned by *James Tye* and *John Baker*, good Summoners, *&c.* And hereupon the ſaid *Richard Danvers*, *Alvered*, *Nicholas Stathum*, and *William Callow*, by the ſaid *Thomas Gurney* their Attorney, in the ſaid Court of the aforeſaid late King *Edward* the 4th of the Bench here, that is to ſay, at *Weſtminſter* aforeſaid at the 15 Days aforeſaid of St. *John Baptiſt*, declared againſt the ſaid *Richard Chamberlain*, of and upon their Writ aforeſaid, and upon their Writ aforeſaid, by the ſame *Thomas Gurney*, demanded againſt the aforeſaid *Richard Chamberlain*, the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, in the ſaid Writ of Right ſpecified, as their Right and Inheritance, by the aforeſaid Writ of the ſaid late *King Edward* the 4th; becauſe the aforeſaid *Thomas Rokes*, Chief Lord of the ſame Fee, releaſed thereof his Court to the ſaid late King: And whereupon then they ſaid, that they themſelves were ſeized of the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, in the ſaid Writ of Right ſpecified, in their Demeſn as of Fee and Right, in the Time of Peace, in the Time of the ſaid late King *Edward* the 4th, taking the Profits thereof to the Value, *&c.* and that ſuch is their Right then, they did offer, *&c.* And the aforeſ. *Rich. Chamberlain*, by the aforeſaid *John Wideſtale* his Attorney, came and defended the Right of the ſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William*, when, *&c.* And their Seiſin, of which Seiſin, *&c.* as of Fee and Right, *&c.* And all, *&c.* And chiefly of the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, in the ſaid Writ of Right ſpecified, and then vouched thereof to warranty *Robert King*, who was preſent in the ſame Court in his proper Perſon, and willingly, the Manors, and Tenements, and Rents aforeſaid, with the Appurtenances, in the ſaid Writ of Right ſpecified, to them then did warrant, *&c.* Whereupon the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas*, and

William

William then demanded againſt the aforeſaid *Robert*, Tenant by his Warranty, the Manors, Tenements, and Hereditaments aforeſaid, in the ſaid Writ of Right ſpecified, in Form aforeſaid, &c. And whereupon then they ſaid, that they themſelves were ſeized of the Manors, Tenements, and Rents aforeſaid, with the Appurtenances in their Demeſn as of Fee and Right, in the Time of Peace, in the Time of the ſaid late King *Edw.* the 4th, taking thereof the profits to the Value, &c. And that ſuch was his Right, he then offered, &c. And the aforeſaid *Robert*, Tenant by his Warranty aforeſaid, defended the Right of the ſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William*, when, &c. and their Seiſin, of which Seiſin, &c. as of Fee and Right; and all, &c. and chiefly of the Manors, Tenements, and Rents aforeſaid with the Appurtenances, in the ſaid Writ of Right ſpecified; and then put himſelf on the grand Aſſize of the ſaid late King *Edward* the 4th, and then demanded Recognition to be made, whether he more Right then had to hold the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, to him and his Heirs, as Tenant thereof by his Warranty as he then held, or the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William*, to have the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, in the Writ of Right ſpecified, as they above them demanded, &c. And the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William*, then returned back in the ſame Court, the very ſame Term of *Holy Trinity* in the 11th Year of the Reign of the ſaid late King *Edward*, the 4th after the Conqueſt, by their then Attorney aforeſ. and the aforeſaid *Robert*, being then ſolemnly called, did not come back, but departed in deſpite of the Court, and made Default; wherefore it was then granted by the ſame Court, that the aforeſaid *Richard Danvers*, *Alvered*, *Nicholas*, and *William*, ſhould recover their Seiſin, againſt the aforeſaid *Richard Chamberlain*, of the Manors, Tenements, and Rents aforeſaid, with the Appurtenances, in the ſaid Writ of Right ſpecified; to hold to them and their Heirs quietly from the aforeſaid *Richard Chamberlain* and his Heirs; And that the aforeſaid *Richard Chamberlain*, then ſhould have of the Lands of the ſaid *Robert* to the Value, &c. And that the ſaid *Robert* ſhould then be in Mercy, &c. as by the Record and Proceſs thereof here in Court remaining, it manifeſtly appeareth. Which Recovery in Form aforeſaid had, was had to the Uſe and Intent, that the aforeſaid *Alvered*, *Richard Danvers*, *Nicholas Stathum*, and *William Callow*, ſhould give the Manors aforeſaid, with the Appurtenances, to the aforeſaid *Richard Chamberlain*, and *Sibil*, and the Heirs Males of the Body of the ſaid *Richard Chamberlain* iſſuing: By Colour of which Recovery,

covery, the aforeſaid *Alvered*, *Richard Danvers*, *Nicholas*, and *William Callow*, into the Manors and Tenements aforeſaid with the Appurtenances entred, and were thereof ſeized in their Demeſn as of Fee, to the Uſe and Intent aforeſaid: And ſo thereof to the Uſe and Intent aforeſaid being ſeized, the ſaid *Alvered*, *Richard Danvers*, *William Stathum*, and *William Callow*, give the aforeſaid Manors with the Appurtenances, to the aforeſaid *Richard Chamberlain* and *Sibil* by the Names of *Richard Chamberlain*, Eſq; and *Sibil Fowler*, and the Heirs Male of the Body of the ſaid *Richard Chamberlain* iſſuing, as the ſaid *Robert Chamberlain* by his Writ and Declaration aforeſaid above ſuppoſeth: By which Gift the aforeſaid *Richard Chamberlain* and *Sibil* were ſeized of the Manors aforeſaid, with the Appurtenances, that is to ſay, the ſaid *Richard Chamberlain*, in his Demeſn as of Fee-tail, that is to ſay, to him and the Heirs Males of his Body iſſuing, and the aforeſaid *Sibil*, in her Demeſn as of Freehold, for the Term of her Life, by the Form of the Gift aforeſaid: And afterwards the ſaid *Richard Chamberlain*, at *Petteſho* aforeſaid, took to Wife the aforeſaid *Sibil*, Great-Grandmother of the aforeſaid *Robert Chamberlain*, and had Iſſue Male of his Body iſſuing, the aforeſaid *Edward Chamberlain*, and afterwards the ſaid *Richard Chamberlain* at *Petteſho* aforeſaid died, and the aforeſaid *Sibil* him over-lived, and held herſelf in the Manors aforeſaid, with the Appurtenances, and was thereof ſole ſeized in her Demeſn as of Freehold, for the Term of her Life by Right of Survivor, *&c.* by the Form of the Gift aforeſaid; and afterwards the ſaid *Sibil* by her aforeſaid Writing of Releaſe remiſed, and releaſed to the aforeſaid *Richard Lyſter*, *Martin Linſey*, *John Cottesford*, *John Clayton*, and *William Hogeſon*, and *Robert Taylor*, all her Right, Claim, Title, Eſtate, Uſe, Intereſt, and Demand, at and in the Manors aforeſaid, with the Appurtenances, in Manner and Form, as in the aforeſaid Bar above is ſpecified; and that afterwards the ſaid *Sibil* at *Petteſho* aforeſaid died: And from the aforeſaid *Richard* the Right deſcended by the Form, *&c.* to the aforeſaid *Edward*, as Son and Heir, *&c.* And from the ſaid *Ed.* the Right deſcended by the Form, *&c.* to the aforeſaid *Leonard*, as Son and Heir, *&c.* And from the aforeſaid *Leonard* the Right deſcended by the Form, *&c.* to the aforeſaid *Francis*, as Son and Heir, *&c.* And from the ſaid *Francis* the Right deſcended by the Form, *&c.* to the ſaid *Robert*, who now demandeth as Son and Heir, *&c.* as he by his Writ and Declaration aforeſ. ſuppoſeth: And this he is ready to aver: Wherefore, foraſmuch as by Force of a certain Act of Parliam. made in the Parliam. of the late K. *Henry* the 7th, at *Weſtm.* aforeſ.

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in the County of *Middleſex* aforeſ. holden in the 11th Year of his Reign, the aforeſ. Warranty of the aforeſaid *Sibil*, in Form aforeſ. made is altogether void, he demandeth Judgm. and his Seiſin of the Manors aforeſ. with the Appurtenances, to be to him adjudged: And the aforeſaid Warden, or Rector, and Scholars ſay, that by the aforeſ. Act made in the aforeſ. Parliament of the late K. *Henry* the 7th, at *Weſtm.* aforeſ. holden in the 11th Year of his Reign abo ſ. it is provided, That the Act aforeſ. ſhould not extend to any ſuch Recovery or Diſcontinuance in which the Heirs next inheritable to ſuch Woman, or where he or they who next after the Death of the ſaid Woman, had or ſhould have the Eſtate of Inheritance in the ſaid Manors, Lands and Tenements, ſhould be aſſenting or agreeing to the aforeſ. Recoveries, where the ſame Aſſent or Agreem. are of Record or inrolled, as by the ſaid Act amongſt other things it appeareth: And the ſaid Warden, or Rector, and Scholars further ſay, That before the making of the ſaid Writing of Releaſe of the aforeſaid *Sibil*, and after the Death of the aforeſaid *Richard Chamberlain*, *Nicholas Evan* Clerk, and *Thomas Hartop* Clerk, the 2d Day of *June* in the 4th Year of the Reign of the ſaid late King *Henry* 8th, after the Conqueſt, out of the Court of the *Chancery* of the ſaid late King then being at *Weſtminſter* aforeſaid, ſued forth an Original Writ of the ſaid late King of Entry upon Diſſeiſin in the *Poſt*, againſt the aforeſaid *Edward Chamberlain*, of the Manors aforeſ. with the Appurtenances, to the then Sheriffs of the County of *Buckingham* directed, the ſaid *Edward* then being Tenant of the Freehold of the ſaid Manors with the Appurtenances; by which Writ the ſaid late K. commanded the ſaid Sheriff, that the ſaid Sheriff ſhould command the ſaid *Edward Chamberlain*, by the Name of *Edward Chamberlain* Eſq; that juſtly and without Delay he render to the aforeſaid *Nicholas Evan* and *Thomas Hartop* Clerks the Manors aforeſ. with the Appurtenances amongſt other, by the Names of the Manors of *Petteſho* and *Eckney* with the Appurtenances, and of 6 Meſſuages, 200 Acres of Land, 20 Acres of Meadow, 200 Acres of Paſture, and 100 Shillings of Rent, with the Appurtenances in *Petteſho*, *Eckney* and *Emberton*, which the ſaid *Nicholas* and *Thomas* then claimed to be their Right and Inheritance, and into which the ſaid *Edward Chamberlain* had no entry; but after the Diſſeiſin which *Hugh Hunt* thereof unjuſtly, and without Judgment did to the aforeſaid *Nicholas Evan* and *Thomas Hartop*, after the firſt Paſſage of the Lord King *Henry*, Son of King *John*, into *Gaſcoign*, as they ſaid, and whereupon they complained, That the ſaid *Edward Chamberlain* did them diſſeiſe; and if the aforeſaid *Nicholas*,

and *Thomas Hartop* ſecure him the ſaid Sheriff to proſecute their Claim; then he ſummon by good Summoners the aforeſaid *Edward Chamberlain*, that he ſhould be before the Juſtices of the ſaid late K. *Henry* the 8th here, that is to ſay, at *Weſtminſter* aforeſaid, in the Morrow of St. *John* the Baptiſt then next following, to ſhew why he did not do it; and that he have then here the Summons and that Writ. At which Morrow of St. *John* the Baptiſt, before *Robert Read* Knt. and his Companions, then Juſtices of the ſaid late K. *Henry* the 8th of the Bench here, that is to ſay, at *Weſtminſter* aforeſaid, came as well the aforeſaid *Nicholas Evan* and *Thomas Hartop*, by *John Cowper* then their Attorney, as the aforeſ. *Edw. Chamberlain*, by *Thomas Palmer* then his Attorney. And the Sheriff, that is to ſay, *Ralph Verney* Eſq; then return'd here the Writ aforeſaid, in all things ſerved and executed, that is to ſay, that the aforeſ. *Nicholas* and *Thomas* found to the then Sheriff ſureties to proſecute his Suit aforeſaid, that is to ſay, *John Doe* and *Richard Roe*; and that the aforeſ. *Edward Chamberlain* was ſummoned by *John Den* and *Richard Fen*: And upon this the ſaid *Nicholas Evan* and *Thomas Hartop*, by declaring againſt the ſaid *Edw. Chamberlain*, upon the Writ aforeſaid, demanded againſt the ſaid *Edward Chamberlain* the Manors, Tenements and Rents aforeſaid with the Appurtenances, as their Right and Inheritance, and in which the ſaid *Edward Chamberlain* had not Entry, but after the firſt Paſſage of the Lord King *Henry*, Son of King *John*, into *Gaſcoign*, &c. And whereupon then they ſaid that they themſelves were ſeiſed of the Manors, Tenements and Rents aforeſaid, in their Demeſne as of Fee and Right, in the Time of Peace, in the Time of the ſaid late K. *Henry* the 8th, taking thereof the Profits to the Value, &c. and into which, &c. And thereof then they brought Suit, &c. And the aforeſaid *Ed. Chamberlain*, by the aforeſaid *Tho. Palmer* his Attorn. then defended his Right, when, &c. and then vouched thereof to Warranty *Thomas Fiſh*, who was then preſent in Court in his proper Perſon, and willingly the Manors, Tenements and Rents aforeſaid to him did warrant; and thereupon, the ſaid *Nicholas Evan* and *Thomas Hartop* demanded againſt him the ſaid *Thomas Fiſh*, then Tenant by his Warranty, the Manors, Tenements and Rents aforeſaid, with the Appurtenances in Form aforeſaid, &c. And whereupon they then ſaid, that they were ſeiſed of the Manors, Tenements and Rents aforeſaid, with the Appurtenances amongſt other things in their Demeſne as of Fee and Right, in the Time of Peace, in the Time of the aforeſ. late K. *H.* the 8th, taking the Profits thereof to the

Value, &c. And the aforeſaid *Thomas Fiſh*, Tenant by his Warranty aforeſaid, then defended his Right, when, &c. and then prayed Licence thereof to imparl, and had it, &c. And afterwards, the very ſame Term, the aforeſaid *Nicholas Evan* and *Thomas Hartop* returned back here into the Court aforeſaid of the ſaid late K. *Henry* the 8th, by their Attorney aforeſaid; and the aforeſaid *Thomas Fiſh*, Tenant by his Warranty aforeſaid, did not come back, but in deſpite of the Court departed and made Default; therefore then it was granted by the aforeſaid Court here, that the aforeſaid *Nicholas Evan* and *Thomas Hartop* ſhould recover their Seiſin againſt the ſaid *Edward Chamberlain*, of the Manors, Tenements and Rents aforeſ. with the Appurtenances, and that the ſaid *Edward* ſhould have of the Lands of the aforeſaid *Thomas Fiſh*, to the Value of, &c. and that the ſaid *Thomas Fiſh* ſhould be in mercy, &c. as by the Record and Proceſs thereof here in Court remaining more fully appeareth. Which Recovery, in Form aforeſaid had, was had to the Uſe and to the Intent, that the aforeſaid *Nicholas Evan* and *Thomas Hartop*, of the Manors aforeſaid with the Appurtenances, ſhould enfeoff the aforeſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, to have and to hold to them, and their Heirs for ever: By Colour of which Recovery, the aforeſaid *Nicholas Evan* and *Thomas Hartop* into the Manors aforeſaid with their Appurtenances entred, and were thereof ſeiſed in their Demeſne as of Fee; and ſo being thereof ſeiſed the ſaid *Nicholas* and *Thomas Hartop* of the ſaid Manors with the Appurtenances did infeoff the aforeſaid *Richard Lyſter*, *Martin Linſey*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, to have and to hold to them and their Heirs for ever: By Virtue of which Feoffment the ſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor* were ſeiſed of the Manors with the Appurtenances, in their Demeſn as of Fee; and ſo thereof being ſeiſed, the aforeſaid *Sibil*, in the Life of the ſaid *Edward*, for the better Security of the ſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, the Manors aforeſaid with the Appurtenances, according to Agreement between the ſame *Edward* and *Sibil*, firſt before the aforeſaid Recovery had, by her Writing aforeſaid of Releaſe Remiſed, and Releaſed to the aforeſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *R. Taylor*, and all her Right, Claim, Title, Eſtate, Uſe, Intereſt, and demand of and in the Manors aforeſaid, with the Appurtenances in Manner and Form as they have above al-

ledged; And this they are ready to aver: Whereupon they demand Judgment; and that the ſaid *Robert Chamberlain*, from having his Action aforeſaid againſt them be barred. And the aforeſaid *Robert Chamberlain*, by Proteſtation taking it, that the recovery aforeſaid was not had to the Uſe and intent, that the aforeſaid *Nicholas Evan* and *Thomas Hartop* ſhould infeoff the ſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Rob. Taylor* of the Manors aforeſaid with the Appurtenances; by Proteſtation alſo, that the aforeſaid *Nicholas Evan* and *Thomas Hartop* did not infeoff the aforeſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, of the Manor aforeſaid with the Appurtenances; by Proteſtation alſo, that the aforeſaid *Sibil*, for the better Security of the aforeſaid *Richard Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, in the Manors aforeſaid with the Appurtenances, according to Agreement between them the ſaid *Edward* and *Sibil*, firſt before the aforeſaid Recovery above ſuppoſed to be had, by her Writing of Releaſe aforeſaid, did not remiſe and releaſe to the aforeſaid *Rich. Lyſter*, *Martin*, *John Cottesford*, *John Clayton*, *William Hogeſon* and *Robert Taylor*, as the aforeſaid Warden or Rector and Scholars above in their Rejoinder have alledged; By Proteſtation alſo, That the aforeſaid *Edw. Chamberlain*, at the Day of the bringing of the Original Writ of the ſaid *Nicholas Evan* and *Thomas Hartop*, out of the Court of Chancery of the aforeſaid late K. *Henry* the 8th, that is to ſay, the 2d Day of *June* in the 4th Year of the Reign of the ſame late K. or ever after was Tenant of the Freehold of the Manors aforeſaid with the Appurtenances: For Plea, the ſaid *Robert Chamberlain* ſaith, that the aforeſaid Plea of the aforeſaid Warden, or Rector, and Scholars, above by rejoinder pretended, is not ſufficient in Law to bar him the ſaid *Robert* from having his Action aforeſaid againſt the aforeſaid Warden, or Rector and Scholars, as well for that, that the Rejoinder is a Departure from the aforeſaid Bar of them the Warden, or Rector and Scholars, as for want of ſufficient Matter in the ſaid Rejoinder contained; and this he is ready to aver: Wherefore, for want of a ſufficient Rejoinder of the ſaid Warden, or Rector and Scholars, in this Part, the ſaid *Robert Chamberlain*, as at firſt, demandeth Judgment and Seiſin of the Manors aforeſaid with the Appurtenances to him to be adjudged, *&c.* And the Warden, or Rector and Scholars, in as much as they ſufficient Matter in Law to bar the aforeſaid *Robert* from having his Action aforeſaid againſt them the Warden, or Rector and Scholars, above by rejoining have alledged, which they are ready to aver, which Matter

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the aforeſaid *Robert* doth not deny, nor to the ſame any ways anſwereth, but to admit of the ſame Averment doth altogether refuſe, as at firſt demand Judgment; and that the aforeſaid *Robert Chamberlain* to have his Action aforeſaid be barred. And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day is given to the Parties aforeſaid here, until in 8 Days of St. *Hillary*, to hear their Judgment, becauſe that the ſaid Juſtices here thereof not yet, *&c.* At which Day come as well the aforeſaid *Robert*, as the aforeſaid Warden, or Rector and Scholars, by their Attornies aforeſaid: And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day further is given to the Parties aforeſaid here until from the Day of *Eaſter* in 15 Days, to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof not yet, *&c.* At which Day here come as well the aforeſaid *Robert*, as the ſaid Warden, or Rector and Scholars, by their Attornies aforeſ. And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties aforeſaid here, until in the Morrow of the *Holy Trinity*, to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof not yet, *&c.* At which Day here come as well the aforeſaid *Robert*, as the aforeſaid Warden, or Rector and Scholars by their Attornies aforeſaid: And becauſe the Juſtices here will further adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, further Day is given to the Parties aforeſaid here, until in 8 Days of St. *Michael*, to hear their Judgment thereof, becauſe the ſame Juſtices here thereof not yet, *&c.* At which Day here come as well the aforeſaid *Robert*, as the aforeſaid Warden, or Rector and Scholars, by their Attornies aforeſaid; and upon this, the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeemeth to the ſame Juſtices here, that the Plea of the aforeſaid Warden, or Rector and Scholars, above by Rejoinder pleaded, is ſufficient in Law to bar the ſaid *Robert* to have his Action aforeſaid, againſt the aforeſaid Warden or Rector and Scholars: Therefore it is granted, that the aforeſaid *Robert* take nothing by his Writ aforeſaid, and that he be in Mercy for his falſe Clamour; and that the aforeſaid Warden, or Rector and Scholars go thereof without Day, *&c.*

Judgment, Nota bene.

LINCOLN COLLEGE's *Caſe.*

Mich. 37 & 38 Eliz.

In the Common Pleas. Rot. 82.

2 And. 31. Moor 255.

IN a *Formedon* in Deſcender by *Rob. Chamberlain*, Couſin and Heir Male of the Body of *Rich. Chamberlain*, againſt the Rector and Scholars of *Lincoln* College in the Univerſity of *Oxford* for the Manors of *Petſore* and *Ekeney* in the County of *Buckingham*: On the Pleading the Caſe was ſuch: *Rich. Chamberlain* did enfeoff *Corneborough* and others of the ſaid Manors, to the Intent that they ſhould give back the ſame to the ſaid *Richard Chamberlain* and *Sibil Fowler* whom he intended to marry, and to the Heirs Male of the Body of *Richard*, which was done accordingly. *Richard* and *Sibil* intermarry'd and had Iſſue *Edward*; *Rich.* died, *Edward* in the Life of *Sibil adtunc tenens liberi tenementi, &c.* (which was intended by Diſſeiſin) *an.* 4 *H.* 8. ſuffer'd a common Recovery with ſingle Voucher by Agreement amongſt other things, to the Intent that the Recoverors ſhould enfeoff *Liſter* and others to divers Uſes; and that *Sibil* (for better Aſſurance) ſhould releaſe to them with Warranty; which Feoffment and Releaſe with Warranty were made accordingly *an.* 11 *H.* 8. And afterwards *Sibil* died, *Edward* then being alive; and whether this collateral Warranty ſhould bar the Demandant or not, or ſhould be void by the Stat. of 11 *H.* 7. *cap.* 20. was the Queſtion; for in as much as the common Recovery was had againſt *Edward* in the Life of Tenant for Life, it cannot be intended, that *Sibil* had ſurrender'd her Eſtate, or that *Edward* had entred for a Forfeiture, and thereby ſeiſed by Force of the Tail, unleſs it had been alledged in Pleading: But for as much as it was generally alledged that then he was Tenant of the Freehold, it ſhall be intended more ſtrong againſt him who

Co. Lit. 326. b. 365. b.

Co. Lit. 72. a. 303. b.

who (*a*) pleads it, that is to ſay, that it was by Diſſeiſin, or by Feoffm. of a Diſſeiſor, ſo that he was in of another Eſtate, and then the Recovery with (*b*) ſingle Voucher will not bind it: And therefore the ſole Queſtion was, on the collateral Warranty. And it was ſtrongly objected, That this Warranty ſhould be void, not only within the Expreſs Letter, but alſo within the Meaning of the Act.

(*a*) Co. Lit. 303. b. Cr. Car. 50. 1 Co. 46. a.
(*b*) 2 Roll's 394, 395. Yelv. 51.

For firſt, There is no Doubt but the Heir Male of the Body of *Edward* is a Perſon to whom the Inheritance, after the Death of *Sibil*, ſhall appertain: And the Words of the Act are, That ſuch Perſon ſhall enter, and peaceably poſſeſs the Land as he ought if no ſuch Warranty had been made. And the Meaning of the Act was not to ſave the Eſtate-Tail for him only who is Heir apparent at the Time of the Forfeiture, but to preſerve it for the Benefit of all the Iſſues inheritable by Force of the Tail. As if *A.* makes a Feoffment in Fee to the Uſe of himſelf and his Wife, and to the Heirs of the Body of *A.* *A.* hath Iſſue *B.* and dies, the Wife is diſſeiſed, the Heir in Tail by Deed releaſes to the Diſſeiſor, and afterwards the Wife releaſes alſo with Warranty and dies, *B.* hath Iſſue *C.* and dies; altho' *B.* hath by his Releaſe diſabled himſelf to take Advantage of the Forfeiture during his Life, yet it ſhall not prejudice his Iſſue; for he is the Perſon to whom the Inheritance of the Eſtate Tail doth appertain, and now by the Statute he ſhall enter as if no Warranty had been made.

2. It is to be obſerv'd, That by the Statute, not only Entry is given to him to whom the Intereſt, Title, or Inheritance ſhall appertain, as if no Warranty had been made; but by the Branch next before, it is provided, That every (*c*) Diſcontinuance, Alienation, Releaſe, or Confirmation with Warranty, and Recovery made or ſuffered by ſuch Woman ſhall be utterly void and of none Effect: And if the Warranty in this Caſe, by the expreſs Letter of the Act, be utterly void and of none Effect, it is void as to all, and by Conſequence againſt every Iſſue in Tail, and it is void alſo as to *Edward* himſelf, but in Reſpect of the ſaid Recovery he hath barred himſelf that he cannot enter into the Land; and the Opinion of *Doctor* and *Student* was ſtrongly urg'd, That if a (*d*) Woman, Tenant in Tail, ſuffers a common Recovery, and the Iſſue in Tail releaſes to the Recoveror, yet his Iſſue may enter; which proves, that altho' he, who hath the immediate Right to the Eſtate-Tail, will, by his own Act, exclude himſelf from the Benefit that the Statute would have given him; yet his Iſſue ſhall not be prejudic'd by it.

(*c*) Co. Lit. 366. b. 325. b. Antea 50. b.
(*d*) Poſtea 61. a. Dr. & Stud. Lib. 1. cap. 31. Q. Lucas 124.

And it was further objected, That if any (*e*) Error had been in the Recovery that *Edw.* ſuffered, and he had brought a Writ of Error, the collateral Warranty of the Woman would not be a Bar to him, for the Stat. by expreſs Words hath

(*e*) Poſtea 61. a.

made the Warranty utterly void, and of no Effect; *a fortiori* the Warranty ſhall not bind the Demandant, who claims as Couſin and Heir Male of his Body *per formam doni*. To which it was anſwer'd and reſolv'd, as to the firſt Branch, That the Office of a good Expoſitor of an Act of Parliament is to make Conſtruction (*a*) on all the Parts together, and not of one Part only by itſelf; *Nemo enim aliquam partem recte intelligere poſſit, antequam totum iterum atque iterum perlegerit:* And altho' the firſt Branch makes the Diſcontinuance, Alienation, Warranty, and Recovery, utterly void, and of no Effect; yet the Clauſe following being connected to it with this Conjunction, *And that it ſhall be lawful*, expounds the Generality of the Words of the precedent Branch; and therefore the (*b*) Senſe of both together is, that they ſhall be utterly void and of no Effect by the Entry of him to whom the Intereſt, Title, or Inheritance, after the Woman, doth appertain; but the Diſcontinuance, Alienation, Warranty, or Recovery, are not void betwen the Parties, but ſtand in Force between themſelves, and againſt all others, but only againſt ſuch to whom the Intereſt, Title, or Inheritance, after the Death of ſuch Woman doth appertain, and they only can make it void and of no Effect by their Entry: And ſo before this Time have other Statutes been expounded by the ancient Judges and Sages of the Law. As the Statute of (*c*) 8 *H. 6. cap.* 10. by which it is provided, that all Outlawries ſhall be held for null and void, and that the Party, &c. be not damaged nor put to Loſs of his Goods and Chattels, &c. unleſs a *Capias* be awarded againſt the Party in the County, in which by the Indictment or Appeal he is expreſſed to be dwelling; yet it ought to be avoided by the Means which the Law hath appointed, and that is by Writ of Error.

In the ſame Manner in the Caſe at Bar, Eſtates of Freehold or Inheritance cannot be defeated without an Entry, and therefore by Entry they ought to be made void. So the Statute of (*d*) 23 *H. 6. cap.* 10. makes an Obligation, taken in other Manner than the Statute preſcribes, void; yet it is held in (*e*) 7 *E. 4. 5. b.* that the Party cannot plead, (*f*) *non eſt factum*, but it is voidable by Plea, with ſuch apt Concluſion as the Law doth appoint. So on the Stat. of (*g*) 1 *Eliz.* which provides, That all Grants, Leaſes, &c. made by Biſhops in other Manner than is mention'd in the Act ſhall be utterly void, and of no Effect to all Intents and Purpoſes: Notwithſtanding theſe preciſe Words, it was adjudg'd in the Common Pleas, *M.* 32 & 33 *Eliz.* in a *Quare Impedit* between (*h*) *Sale* and the Biſhop of *Coventry* and *Litchfield*, That a Grant of the next Avoidance of an Advowſon,

(*a*) 2 Co. 55. a. Godb. 324. Co. Lit. 381. a. 5 Co. 99. a.
(*b*) 5 Co. 5. a.
(*c*) March 84. 3 Inſt. 31. 4 Inſt. 51. Kelw. 21. b.
(*d*) 10 Co. 99. b. Hard. 121. Cr. Car. 287, 309, 361, 448. Hob. 13. Cr. El. 66, 76, 178, 190, 199, 200, 271, 800. Dyer 25. pl. 157, 118. pl. 1. 119. pl. 1, 2, 3, 4, 324. pl. 32, 33, 364. pl. 29. Styl. 234. 2 Bulſt. 13, 213 37 H. 6. 1. a. Fitz. Obligat. 4. Br. Obligat. 37. Plowd. 62. b. 63. a. 65. a. Raſtal Sher. 25. 1 Leon. 132. 2 Leon. 78, 107, 118. 3 Leon. 228. 1 Roll's Rep. 40, 169. 2 Roll's Rep. 201. Sav. 81. Latch 23, 54, 55, 143. O. Benl. 110. 1 Jones 65. Hut. 70. 3 Inſt. 194. 1 Roll's 537. Moor 247. Owen 90. Godb. 136. Goldsb. 54, 66 1 Keb. 391. Noy 33, 76, 172, 173. 3 Keb. 191. 1 An. 267. 2 And. 122. 1 Sand. 161, 162. Herly 25, 175. F. N. B. 251. b. 9 Co. 119. b. Hetl. 23.
(*e*) Br. non eſt factum 14. 10 Co. 100. b. Plowd. 66. b. 68. a. Fitzher. 80 5 Co. 119. b. Dyer 120. pl. 8.
(*f*) Hob. 72, 166. 5 Co. 119. Doct. pl. 262. Br. non eſt factum 14.
(*g*) Co. Lit. 45. a. Winch 47. Moor 107, 108, 109. Degg. 109, 110, 111. Cr. El. 141. 1 Leon. 59. 5 Co. 2. a. 1 And. 65, 193. Moor 253. Bridg. 29, 30.
(*h*) 10 Co. 59 a. Cr. El. 141, 207. 2 Roll's 350. Sav. 94, 95. Owen 99. 1 And. 241, 242, 243, 244.

which is not warranted by the ſaid Act, is not void as to the Grantor himſelf, but as to the Succeſſor; for ſo was the Intent of the Act, to provide for the Succeſſor and not for the Party himſelf. So and on the ſame Reaſon was it reſolv'd in the Com. Pleas, *per totam curiam*, *Paſch.* 39 *Eliz.* between *Hunt* and (*a*) *Singleton* for a Houſe in *Foſter-lane* in *London*, whereof the Inheritance was in the Dean and Chapter of *Paul's*, That if the Dean and Chapter make a Leaſe not warranted by the Statutes of 13 & 14 *Eliz.* in which Caſe it is provided by the ſaid Acts, that ſuch Leaſe ſhall be abſolutely void, and of no Effect to all Intents and Purpoſes; in this Caſe of a Corporation aggregate of many Perſons, which never dies, it was greatly doubted, if the Leaſe ſhould not be utterly void preſently according to the expreſs Letter of the Act; but it was at laſt reſolv'd, Foraſmuch as the Act was made for the Benefit of the Succeſſors, that the Leaſe ſhould not be void 'till after the Death of the Dean, who was Party to the Leaſe: And altho' the Succeſſor of the Dean is not Succeſſor to the whole Corporation who made the Leaſe, but only the principal Member of it; yet becauſe the whole Corporation never (*b*) dies, ſuch Leaſe, by Conſtruction, ſhall be void after the Death of the Dean, who is the principal Member of the Corporation, and his Succeſſor, with the Chapter, ſhall avoid it. So in the principal Caſe, altho' it be provided by the Statute of 11 *H.* 7. That the Diſcontinuance, Alienation, Warranty, and Recovery, ſhall be void; yet they are not void preſently, but are to be made void by ſuch Perſons to whom after the Death of the Woman the Intereſt, Title or Inheritance appertains. And with this Reſolution agrees 27 *H.* 8. 23. *b.* on this very Statute of 11 *H.* 7.

(*a*) Co. Lit. 45. a. Cr. El. 473, 474, 564. 10 Co. 59. a. 3 Keb. 109. 1 Mod. Rep. 205. Carr. 13, 16. 1 Vent. 247. 1 Roll's Rep. 152, 154, 159, 169.

(*b*) Treby Argument in Quo Warranto 4. Co. Lit. 9. b. 94. b. 1 Roll's 833. 2 Bulſtr. 233. 21 Ed. 4. 13. a. 11 H. 7. cap. 20. Lucas 124.

2. It was anſwer'd and reſolv'd, That this Caſe was out of the (*c*) Intention of the ſaid Act for ſeveral Reaſons: (*c*) Cr. Jac. 475.

Firſt, Becauſe the Intent of the Act was to reſtrain Women from making a Diſcontinuance, Warranty, and Recovery, in Bar, or Prejudice of the Heir in Tail, or of them in Remainder, &c. But when the Heir in Tail, in the Caſe at Bar, doth convey and aſſure the Land to others, and the Releaſe or Confirmation of the Woman with Warranty, is but to perfect and corroborate the Eſtate which the Heir in Tail hath made, ſuch Warranty is not reſtrained by this Act; for it ſhall be intended for the Benefit of the Heir, and not to his Prejudice: And this was the Reaſon that a common Recovery, in Reſpect of the intended Recompence, was not reſtrained by the Statute of *Weſt.* 2. And therefore when the Iſſue in Tail, in the Caſe at Bar, hath ſuffer'd a common Recovery, and the Warranty of the Woman extends only to ſtrengthen it, this Warranty is not reſtrained by the ſaid Act of (*d*) 11 *H.* 7.

(*d*) 11 H. 7. 20. Cro. Jac. 474. 475.

The ſecond Reaſon was, That the Wife, with the Heir in Tail, might have join'd in a Fine, and ſo barred the Eſtate-tail; or if the Wife had *(a)* ſurrender'd to the Heir in Tail, he might have ſuffer'd a Recovery, and by that the Eſtate-tail would be docked, and ſo they both had Power to bar the Eſtate-tail, and the Remainder or Reverſion expectant thereupon: Then it was not the Intention of the Act to reſtrain the Warranty the Wife made to him who had the Land by Conveyance of the Heir in Tail. And on the ſame Reaſon it was adjudg'd *M.* 38 & 39 *Eliz.* in the King's Bench, between *Jennings* and *Wiſeman*; and *Hill.* 39. in the Common Pleas, but the Plea began *Trin.* 38 *Eliz. Rot.* 2302. between *(b) Wiſeman* and *Crow*, and the Caſe in both Courts was the ſame, *ſcil. Thomas Wiſeman* had Iſſue *William*, his elder Son by one *venter*, and *Thomas* and a Daughter by another *venter*, and ſeiſed of Land in *Eſſex* held in Socage, deviſed to *Dorothy* his Wife for Life, the Remainder to *T.* in Tail, and died; whereby the Wife was Tenant for Life, the Remainder to *T.* in Tail, and the Reverſion of the Fee deſcended to *William*; *Dorothy*, after the Statute of 14 *Eliz.* ſuffer'd a common Recovery, in which *Thomas* was vouched, who vouched over the common Vouchee, which Recovery was to the Uſe of *Thomas* and his Heirs; the Daughter married *Jennings*, *Thomas* died without Iſſue: Now between *Jenings* and *Crow* his Fermor, and *Wiſeman*, Son and Heir of *William*, was the Queſtion for the ſaid Land: *Wiſeman* objected, That the ſaid common Recovery was void by the expreſs Letter of the Statute of 14 *(c) Eliz. cap.* 8. "Where divers Perſons being "ſeiſed, &c. of any Lands, &c. only for Life or Lives, or "of Eſtates determinable upon Life or Lives, have ſuffer'd "other Perſons by Agreement or Covin to recover the "ſame Lands againſt the ſame particular Tenants, &c. or "as Vouchees, to the great Prejudice of thoſe to whom "the Reverſion or Remainder hath appertained, or ought "to appertain: Be it enacted, That every ſuch Recovery, "as of ſuch Perſon in Reverſion or Remainder thereof, &c. "be clearly and utterly void and of none Effect: Provided "that every ſuch Recovery had by the Aſſent of any "Perſon in Reverſion or Remainder, ſo the ſame Aſſent "appear of Record in any Court, &c. ſhall ſtand in Force "againſt ſuch Perſon ſo aſſenting.' And the ſaid Recovery was had againſt *Dorothy*, being Tenant for Life; and the ſaid *William Wiſeman*, who had the Reverſion in Fee, never aſſented to the ſaid Recovery according to the ſaid Proviſo: And therefore the ſaid Recovery ſhould not bind him by the expreſs Letter of the Act: But it was adjudged in both Courts, that the Reverſion in Fee was barred by the ſaid Recovery. And the ſaid Act of 14 *(d) Eliz.* did not extend to it; And the principal Reaſon was, becauſe it

(a) Co. Lit. 362. a. Poſtea 61. a.

(b) 10 Co. 39. b. 43. b. Co. Lit. 362. a. Cr. El. 562, 570. Co. Ent. 667. nu. 16. Moor 690. 1 And. 275. Winch 43. 1 And. 276.

(c) Co. Lit. 356. a. b. 1 Co. 15. a. 10 Co. 37. a. 43. b. Cr. El. 562, 570. Co. Ent. 655. Moor 690. 1 And. 275. Winch 43. Co. Lit. 262. a. 362. a. 2 Leon. 62.

(d) Co. Lit. 356. a. 362. a. 1 Co. 15. a. b.

was

was not the Intent of the Act to extend to ſuch Recovery in which he in Remainder in Tail was vouched, becauſe Tenant in Tail hath an Eſtate of Inheritance which may continue (*a*) for ever; and he hath Power by a common Recovery to dock all Remainders and Reverſions expectant on his Eſtate; and if *Dorothy* had (*b*) ſurrender'd to him, then without Queſtion the Recovery ſhall bar the Reverſion in Fee: So *Dorothy* and *Thomas* had Power to bar the Reverſion in Fee, and neither the Stat. of *Weſt.* 2. *cap.* 3. (*c*) which gives Receipt, extends to him in Reverſion or Remainder expectant on an Eſtate-tail, 33 *H.* 6. 22. 41 *E.* 3. 12. nor the Stat. of (*d*) 9 *R.* 2. *cap.* 3. which gives the Writ of Error to him in Reverſion; nor doth the Stat. of (*e*) 32 *H.* 8. *cap.* 31. made againſt common Recoveries had againſt Tenants for Life, extend to Remainders or Reverſions expectant on an Eſtate-tail. So in the Caſe at Bar, foraſmuch as he who had the Eſtate-tail hath ſuffer'd a common Recovery, and the Wife hath releaſed to the Recoverors with Warranty, the Act of 11 *H.* 7. *cap.* 20. doth not extend to it, becauſe the Heir in Tail hath Power of himſelf to bar the Tail, and the Warranty of the Wife is but to perfect his Conveyance.

(*a*) 3 Co. 4. b.
(*b*) 1 Co. 63. a. 6 Co. 42. a. 10 Co. 37. b. 39 a. 46. a. Cr. El. 718. 1 Roll's 418. 2 Roll's 396. 2 Brownl. 67.
(*c*) Co. Lit. 362. a. Ant. 60. b.
(*d*) Plowd. 57. b. 10 Co. 44. b. Reg. 122. a. Vet. N. B. 112. a. b. F. N. B. 108. a. 3 Co 4. a. b. 2 Bulſt. 15. Palm. 251, 253. Dyer 1. pl. 5. 90. pl. 5. Cr. El. 289. 4 Inſt. 51. 9 R. 2. cap. 3.
(*e*) 10 Co. 44. b. Cr. El. 562. Co. Lit. 362. a. 1 And. 38. 2 Leon. 61, 62. 4 Leon. 126, 127, 128, 129. Raſtal Recov. 3.

Thirdly, it was reſolv'd, That in the Caſe at Bar when the ſaid *Edward*, by the common Recovery had againſt him by his own Agreement, had diſabled himſelf to take Benefit of the Forfeiture given by the Statute, after the Death of *Edward*, his Iſſue ſhould not take Benefit thereof, becauſe his Father was in Being at the Time of the Forfeiture, and could not enter; and a Perſon who is not *in rerum natura*, or who hath not the immediate Intereſt, Title, or Inheritance, at the Time of the Forfeiture, ſhall never take Benefit of this Act, when another was in Being at the Time of the Forfeiture, and could not enter, and yet had Power to bar by Fine or Recovery him who would claim the Benefit of the Act? And this was in Effect adjudg'd in (*f*) Sir *Geo. Brown*'s Caſe, where the Iſſue in Tail, in the Life of his Mother, having the Reverſion in Fee, levied a Fine without Proclamations. And if Error was in the ſaid Recovery, the Warranty of the Wife would bar *Edward* of his Writ of Error, becauſe by his own Act he hath barred himſelf from the Remedy of Entry, which the Act preſcribes. And the Caſe of *Doctor* and (*g*) *Student* was affirmed to be good Law; for there preſently, by the Recovery, the Iſſue had Title of Entry on the Recoveror; and therefore by his Releaſe by Deed he could not bar his Iſſue; but in the Caſe at Bar, the Iſſue in Tail firſt ſuffer'd the Recovery, and ſo diſabled himſelf before the Warranty made; as alſo it was done in Sir *George Brown*'s Caſe, by the Fine levied in the Life of the Mother; and therefore in thoſe Caſes Title of Entry was never given to the Iſſue in Tail, as it was in the Caſe of *Doctor* and

(*f*) Antea 50. b. Cr. El. 513. Moor 455. 2 And. 44. 1 Rol. 878. Jenk. Cent. 275.
(*g*) Antea 59. a. Dr. Stud. Lib. 1. cap. 31.

and *Student*; and ſo manifeſt Diverſity: But if *Sibil* had releaſed after the Death of *Edward*, then the Iſſue of *Edw.* might have avoided the Warranty by Force of this Act.

Note, Reader, I conceive, that if a Man makes a Feoffment in Fee, to the Uſe of him and his Wife in Tail, and to the Uſe of the Husband in Fee, and hath Iſſue a Daughter, and dies, his Wife with Child with a Son, whereby the Reverſion in Fee deſcends to the Daughter; the Wife, before the Birth of the Son, levies a Fine, or ſuffers a common Recovery; in this Caſe, altho' the Daughter doth or doth not enter, or altho' the (*a*) Daughter had joined in the Fine, or was vouched in the Recovery, or by any other Act had diſabled herſelf from taking Benefit of this Act, yet the Son, after born, ſhould take Benefit of this Act; and that well agrees with this Reſolution. For by no Act that the Daughter could do, could ſhe bar the Son of the Eſtate-tail, as *Edward* might in the Caſe at Bar; and therefore it ſtands with Reaſon and Equity, that no Act which ſhe could do ſhould be prejudicial to the Son, who was *in utero matris*. And this Caſe is not to be compared to the Caſe in (*b*) 5 *E.* 4. 6. *a.* For by the Stat. of (*c*) 6 *R.* 2. *cap.* 6. it is provided, *Quod proximus de ſanguine eorundem rapientium & raptorum, cui hæreditas deſcendere, remanere, vel accidere deberet poſt mortem rapientis vel rapti, habeat titulum immediate ſtatim ſcilicet poſt raptum intrandi ſuper rapientem vel raptum, &c. & tenere de ſtatu hæreditario*; in that Caſe, if the Daughter enters, ſhe ſhall keep it for ever againſt the Son after born: But altho' the Daughter enters by Force of the Statute of 11 *H.* 7. yet the Son born after ſhall enter upon her; and the Cauſe and Reaſon of this Difference is, that the Daughter, by the Statute of 6 *R.* 2. hath the Land merely as a Perquiſite in Fee-ſimple: And by the expreſs Words of the Act, ſhe ſhall enter and keep the Land, for the Statute ſaith, *intrabit, &c. & tenebit de jure hæreditario.* And it is like the Caſe of 9 (*d*) *H.* 7. 25. *b.* if a Remainder be limited to the right Heirs of *J. S.* and he dies, having a Daughter, the (*e*) Daughter ſhall have it as a Purchaſor, and ſhall keep the Land againſt the Son born after. But when the Daughter enters by Force of the Act of 11 *H.* 7. ſhe is in of an Eſtate-tail *per formam doni*, and ſo in Nature of a Deſcent, and not merely as a Purchaſor; and that by the expreſs Words of the Stat. of 11 *H.* 7. which are, That the Perſon to whom the Lands appertain, after the Deceaſe of ſuch Woman, ſhall enter into the Tenements, and poſſeſs and enjoy them according to ſuch Title and Intereſt as they ſhall have, if ſuch Woman had been dead, and no Diſcontinuance, Warranty, or Recovery had; ſo that the Daughter in this Caſe doth not claim the Land merely as a Perquiſite, as ſhe doth upon the Statute of 6 *R.* 2. but by Force of this

(*a*) Hob. 333.

(*b*) 1 Co. 95. a. 3 Co. 39. b. Fitz. Affize 27. Plowd. 43. a. 56. a. b. Br. Done 28. 1 Co. 98. b. 137. b.

(*c*) 1 Co. 95. a. Br. Entry congeable 94. Plow. 42. b. 45. b. 2 Inſt. 434. Long. 50. Ed. 4. 58. a. 1 H. 6. 1. a. Br. Rape 4. Br. Appeal 48. Br. Parliament 89. Stam. Corone 82. Hob. 74.

(*d*) 1 Co. 95. a. 99. a. Moor 140. 8 Co. 76 a. Hob. 3. Cr. Car. 87.

(*e*) 1 Co. 137. b.

Act

Act of 11 *H.* 7. ſhe claims according to her Title, as if the Woman had been dead, and no Act done againſt the Stat. and that is *per formam doni*, and *per formam doni* the Son after born is to be preferred before the Daughter: And therefore this Caſe is to be compared to (*a*) *Shelley*'s Caſe; in which Caſe, although the Uſe veſted firſt in *Richard* the younger Son, yet the Son of the elder Son, after born, ſhall enter on him, becauſe *Richard* in that Caſe was in the Nature of a Deſcent, and not merely as a Purchaſor. And if the Makers of the Act of 11 *H.* 7. had been aſked if in ſuch Caſe the Wife might prejudice the Son, wherewith ſhe is big, of the Benefit which they by the ſaid Act had provided, they would have anſwered, *abſit quod licitum fuerit matri nocere filio qui in utero ſuo eſt.* And with this *Montague* Chief Juſtice of the Common Pleas, *Plow. Comm.* 56. well agrees. And the Opinion of the Court of Wards, 20 *Eliz. Dy.* 362. *a.* (*b*) is not repugnant to it; for there the Opinion is, That if the Iſſue in Tail, within Age, enters by Force of this Act on a Fine levied by his Mother, and her ſecond Husband, he ſhall not be in Ward, which may well be, for in ſuch Caſe he hath the Land but during the Coverture, and therefore is in Manner a Purchaſor; Alſo, altho' he ſhould have the Land in Nature of a Deſcent, yet it doth not follow that he ſhall be in Ward; for in the Caſe of Wardſhip, there ought to be Death, either natural or civil; it is neceſſary alſo, that the Anceſtor die in the Lord's Homage: And by this Difference you will better underſtood your Books in 9 *H.* 6. 25. 9 *H.* 7. 25. & *Doctor* and *Student*.

(*a*) 1 Co. 106. b. 155. b. Mo. 140, 141, 482. 1 Jones 59. Jenk. Cent. 249. 1 Co. 94. b. 2 Leon. 27.

(*b* Dyer 362. pl. 16. Co. Lit. 326. b. 365. b.

4. It was reſolv'd *per totam curiam*, That if Tenant in Tail being in of another Eſtate ſuffers a common Recovery, and a collateral Anceſtor of the Tenant in Tail releaſes with Warranty to the Recoveror, and afterwards the Recoveror makes a Feoffment to Uſes, which are executed by the Statute of 27 *H.* 8. and afterwards the collateral Anceſtor dies, in that Caſe, altho' the Eſtate of the Land be transferred in the *Poſt* before the Deſcent of the Warranty, yet the Warranty ſhould bind, and the Terre-tenants might take Advantage thereof by Way of Rebutter: So if he to whom the Warranty is made ſuffers a common Recovery, and afterwards the Anceſtor dies, the Recoveror might rebut by this Warranty; and yet it is adjudged in (*d*) 22 *Aſſ.* 57. that if Tenant in Dower doth enfeoff a Villain with Warranty, and the Lord of the Villain enters into the Land before the Deſcent of the Warranty, and afterwards the Wife dies, this Warranty ſhould not bind the right Heir: So it is agreed by the Juſtices in (*e*) 29 *Aſſ.* 34. if a collateral Warranty be made to a Baſtard and his Heirs, and living the Anceſtor, the Baſtard dies without Iſſue, and the Lord by Eſcheat enters, and afterward the Anceſtor dies,

(*c*) Cr. Car. 370. 2 Rol. 776, 777. Co. Lit. 385. a. 1 Jones 200.

(*d*) Dr. & Stud. 129. b. 10 Co. 48. a. Br. Choſe in Action 8. Br. Garranty 45. Cr. Car. 370. 1 Co. 136. a. Br. Villenage 37. Hob. 27. Vaugh. 391, 392, 393. Co. Lit. 117. a. 2 Rol. 733. Br. Voucher 132.

(*e*) Cr Car. 370. Vaugh. 392. 1 Co. 136. a. Hob. 27.

Co. Lit. 385. a. dies, this Warranty ſhall not bind. And although as well in the Caſe at Bar, as in thoſe two Caſes, before the Warranty deſcends, the Eſtate of the Land is transferred in the *Poſt*, yet there is a great Difference between thoſe two Caſes, and the Caſe at Bar; for he who hath the Land by the Limitation of an Uſe, or by a common Recovery, comes to the Land by the Limitation and Act of the Party; and therefore he who hath a Reverſion by (*a*) the Limitation of an Uſe, or by common Recovery, although he be in the *Poſt* in both Caſes; yet he ſhall take Benefit of a Condition as an Aſſignee within the Statute of 32 *H.* 8. *cap.* 34. But when the (*b*) Lord of a Villein enters, he comes to the Land in Reſpect of a Title Paramount, that is to ſay, in Reſpect of Villeinage, and the Lord by Eſcheat in Reſpect of the Seigniory which was a Title Paramount, and both thoſe are in meerly in the (*c*) *Poſt*, and not by any Limitation or Act of the Party, and ſo a manifeſt Difference. And although ſome preſume to ſay that thoſe Books are erroneous, and againſt Law, and their Reaſons are *ſcil.* becauſe it was held in the Time of *E.* 3. *ſcil.* in (*d*) 8 *E.* 3. 10. *a.* That the Tenant ſhall not take Advantage of a Warranty by Way of rebutter, without ſhewing how the Warranty extends to him; which is as much as to ſay, to make him Aſſignee to the Land; ſo that one who comes in in the *Poſt*, ſhall not Rebut. And in (*e*) 10 *E.* 3. 42. 10 *Aſſ.* 5. in an Aſſize the Tenant pleaded a Warranty made to one *W.* &c. and concluded on the Warranty as Aſſignee to *W.* and demanded Judgment, &c. and was charged by the Party, and by the Court, to ſhew how he was Aſſignee, and ſo he did: And in (*f*) 22 *Aſſ.* 88. in the ſame Year, when one of the ſaid Caſes was adjudged, it was held that one ſhould not take Advantage of a Warranty made to another and his Aſſigns by Way of Rebutter, although he be an Aſſignee without Deed, and that in Caſe of Rebutter, as well as in Caſe of Voucher he ought to ſhew as well the Deed which comprehends the Warranty, as the Deed which proves the Aſſignment: And theſe Errors were the Cauſe, as they ſaid, that it was then held, that neither the Lord of the Villein, nor the Lord by Eſcheat ſhould take Advantage of a Warranty by Way of Rebutter: But I conceive, the true Reaſon of the ſaid Books is utterly miſtaken. For true it is, that ſome Judges in thoſe Times thought, that none ſhould take Advantage by Rebutter of a Warranty made to one, his Heirs and Aſſignees, but he who was Heir or Aſſignee: And that the Terre-tenant ought in Caſe of Voucher and Rebutter, to ſhew Deeds of the mean Aſſignments; which Opinion hath great Semblance of Reaſon, becauſe the Warranty extends only to the Feoffee, his Heirs and Aſſigns. And a Thing, which of its own Nature cannot be created without Deed, cannot be aſſigned without Deed:

(*a*) Co. Lit. 315. b. 1 Mod. Rep. 192. Mo. 98.

(*b*) Co. Lit. 215. b.

(*c*) 2. Rol. 776. Cr. Car. 370.

(*d*) Vaugh. 386.

(*e*) Vaugh. 386, 387.

(*f*) Vaugh. 386.

Deed: But I well agree that ſuch Opinions were againſt the true Senſe and Judgment of the Law in both Points: For (*a*) he, who hath the Poſſeſſion of the Land, ſhall Rebut the Demandant himſelf, without ſhewing how he came to the Poſſeſſion of it; for it is ſufficient for him to defend his Poſſeſſion, and to bar the Demandant; and the Demand. againſt the Warranty cannot recover the Land: And ſo was it held 35 *Aſſ.* 9. that Tenant by the Curteſy might Rebut. And in (*b*) 45 *E.* 3. 18. it is adjudged, That the Donee in Tail, altho' he be in of another Eſtate, might Rebut the Demand. And in (*c*) 38 *E.* 3. 26. it is adjudged, That the Aſſignee might Rebut by Force of a Warranty, made to one and his Heirs: And (*d*) 7 *E.* 3. 34. & 46 *E.* 3. 4. Feoffee of the Donee in Tail might (*e*) Rebut: I likewiſe well agree, That if *A.* enfeoffs *B.* his Heirs and Aſſigns with Warranty, and *B.* enfeoffs *C.* without Deed, *C.* ſhall (*f*) vouch *A.* as Aſſignee, for the Warranty extends to *B.* and his Aſſigns of the Land, and *C.* is his Aſſignee thereof, and the Aſſignment is not made of the Warranty, for then it ought to be by Deed, but the Warranty cannot be aſſigned, but extends to the Aſſignees of the Land; and if the Feoffment to *C.* was by Deed, it is only of the Land, and not of the Warranty; and *C.* ſhall vouch *A.* as Aſſignee of the Land, becauſe the War. by expreſs Words extends to him, that is to ſay, to *B.* and his Aſſignees of the Land; and if the Feoffee without Deed ſhall not vouch as Aſſignee, truly the Feoffee by Deed ſhall not vouch, for one of them is as well Aſſignee of the Land as the other, and none of them hath or can have Aſſignment of the Warranty.

(*a*) Vaugh. 384, 385. Cr. Car. 371.

(*b*) Co. Lit. 385. Vaugh. 387, 389, 398.

(*c*) 38 E. 3. 21. Vaugh. 384, 388. Co. Lit. 385. a.

(*d*) Vaugh. 388, 389.

(*e*) Co. Lit. 385. a. 10 Co. 76. a. 1 Bulſt. 166. Br. Formedon 57. Plowd. 436. b. Fitz. Garranty 18. Statham Garranty 4.

(*f*) Co. Lit. 385. b. 1. Co. 1. b.

And ſo it was reſolved, *Paſch.* 30 *Eliz.* in the K.'s B. between (*g*) *Auder* and *Noke*, on a Writ of Error on a Judgment given in a Writ of Covenant in *C. B.* by *Popham* C. J. *Gawdy*, and the whole Court, on Conference had with divers other Juſtices; That if a Man makes a Leaſe for Years, and covenants with him and his (*h*) Aſſigees, his Aſſignee by Parol ſhall have an Action of Covenant: So Feoffee by Parol ſhall (*i*) vouch as Aſſignee; and therefore the Books which ſpeak of ſhewing the Deed comprehending the Warranty, and of the Deed of Aſſignment, are to be intended of Things which lie in (*k*) Grant, which cannot be aſſigned without (*l*) Deed. And ſo may all the Books be well reconciled. 8 *Aſſ.* 33. 9 *Aſſ.* 11. 10 *Aſſ.* 5. 10 *E.* 3. 42. 11 *E.* 3. *Br. Monſtrans de faits* 164. 13 *E.* 3. *Voucher* 17. 14 *E.* 3. *Garr.* 33. 12 *E.* 3. *Condition* 11. 17 *E.* 3. 68. 22 *Aſſ.* 88. 40 *E.* 3. 22, 23. 40 *Aſſ.* 30. 42 *E.* 3. 19. 3 *H.* 7. 13 & 14. *b.* 3 *H.* 6. 21. *Statham Aſſignee* 1.

(*g*) Cr. El. 373. 436. Mo. 419.

(*h*) 4 Co. 80. b. 5 Co. 17, 18.

(*i*) 2 Rol. 754.

(*k*) Co. Lit. 172. a. 9. b.

(*l*) Cr. El. 373.

But Note Reader, That theſe were not the Reaſons of the ſaid Books in 22 *Aſſ.* 37. and 29 *Aſſ.* 34. which have been alledged, for it appears by both the Books, That if the Warranty had bound, and had been a Bar in Right in the one Caſe, *viz.* of the Villein, *hoc eſt*,

if the Warranty had deſcended before the Lord of the Villein had entred; and in the other Caſe, if the Anceſtor had died before the Tenant (ſo that the Warranty had deſcended before the Eſcheat) the Lord by Eſcheat in the one Caſe, and the Lord of the Villein in the other Caſe, ſhould take Advantage of the Warranty by Way of Rebutter; and that appears by the Rule of both Books. And therefore thoſe, who condemned the ſaid Books, were not well appriſed of the true Reaſon of them. And I dare not take upon me, or preſume to oppoſe the Authority of the ſaid Books. For Maſter *Littleton* ſeems to agree with the Reaſon of them in his Chapter of *Diſcontinuance* 143. for he ſaith, *Nota*, If there be Lord and Tenant, and the Tenant gives the Tenements to another in Tail, the Remainder to another in Fee; and afterwards the Donee makes a Leaſe for Life, and grants the Reverſion to another in Fee, and the Tenant for Life attorns, and afterwards the Grantee dies without Heir, whereby the Reverſion eſcheats to the Lord; in this Caſe, if the Tenant for Term of Life dies, and the Lord by Eſcheat enters in the Life of the Tenant in Tail, it is no Diſcontinuance, becauſe the Lord is in by Way of Eſcheat, and not by the Tenant in Tail (and therefore the Entry of the Iſſue in Tail, in ſuch Caſe was lawful, becauſe the Lord by Eſcheat cannot take Advantage of any Warranty which Tenant in Tail, as was intended, had made.) But *Littleton* ſaith, *ſecus eſſet*, if the Reverſion had been executed in the Grantee, in the Life of Tenant in Tail, for he was in by the Tenant in Tail.

Co. Lit. 340. b. Sect. 642. Co. Lit. 144. a.

PENNANT's *Case.*

3 Salk. 3.

Trin. 38 Eliz. *In the King's Bench, between* Thomas Harvy *and* Walter Oſwald.

IN an *Ejectione firmæ*, between *Harvy* Plaintiff, and *Oſwald* Defendant, on a Demiſe made 37 *Eliz.* by *John Pennant* to the Plaintiff, of certain Land in *Ardeley* in the County of *Eſſex*, for three Years, from the Feaſt of *All Saints*, *Ann.* 37. The Defendant pleaded, That the ſaid *John Pennant* was ſeized of the ſaid Land in Fee, and *Anno* 35. demiſed it to the Defendant for 10 Years, yielding the yearly Rent of 33 *l.* 10 *s.* at the Feaſt of St. *Michael*, and the Annunciation of our Lady; and that he was poſſeſſed till *Pennant* ouſted him, and demiſed to the Plaintiff, and he re-entred, *&c.* The Plaintiff replied, and confeſſed the ſaid Leaſe, but further ſaid, That the ſaid Leaſe was on Condition, That if the Defendant, his Executors or Adminiſtrators, at any Time without the Aſſent of the ſaid *John Pennant*, his Heirs or Aſſigns, grant, alien, or aſſign the ſaid Land, or any Part thereof, that then it ſhould be lawful for the ſaid *Pennant* and his Heirs to re-enter: And that the Defendant, *Anno* 35. granted to one *Taylor* Parcel of the ſaid Land for ſix Years, without the Aſſent of *Pennant*, for which he re-entred, and made the Leaſe to the Plaintiff, *prout*, *&c.*

Moor 426, 456. Cro. Eliz. 553, 572. 2 Anderſ. 90.

The Defendant by Way of Rejoinder, ſaid, That before the Re-entry *Pennant* accepted the Rent due at the Feaſt of the Annunciation of our Lady, after the Aſſignment by the Hands of the Defend. *Walter Oſwald.* To which the Plaintiff by Way of Sur-rejoinder ſaid, That *Pennant* before the Receipt of the Rent had no Notice of the ſaid Demiſe to *Taylor*, on which Plea the Defendant did demur in Law: And *Trin* 39 *Eliz.* it was adjudged for the Plaintiff. And in this Caſe theſe Points were reſolved:

3 Salk. 3, 4. Skin. 31.

1. That the Condit. being (*a*) collateral, the Breach of it might be ſo ſecretly contrived, as to be impoſſible for the Leſſor

(*a*) Cro. El 528. 553, 572. Moor 426, 456. 8 Co. 92. a.

Lessor to come to the Knowledge of it, and therefore (*a*) Notice in this Case is material and (*b*) issuable, for otherwise the Lessee would take Advantage of his own Fraud, for he might make the Grant or Demise so secretly, and so near the Day on which the Rent is to be paid, as to be impossible for the Lessor to have Notice of it: But if a Man makes a Lease for Years rendring Rent, on Condition that if the (*c*) Rent be behind, that it shall be lawful for him to re-enter; in that Case, if the Lessor demands the Rent, and it is not paid, and afterwards he accepts the Rent (before the Re-entry made) at a Day after, he hath (*d*) dispensed with the Condition, for there the Condition being annexed to the Rent, and he having made a Demand for the Rent, he well knew that the Condition was broke: But altho' in such a Case, he (*e*) accepts the Rent (due at the Day for which the Demand was made) yet he may enter, for as well before as after his Re-entry, he may have an Action of Debt for the Rent, on the Contract between the Lessor and Lessee, and that was the first Difference between a Collateral Condition and a Condition annexed to Rent. *Vide (f)* 45 *Ass.* 5.

(*a*) Palm 433. 8 Co. 92. a. Cr. El. 572. Hardres 48.
(*b*) Doct. pla. 189.
(*c*) Cr. El. 3. 528, 529, 553. Moor 426. 1 Leon. 262. Godb. 47. Co. Lit. 211. a. b.
(*d*) Cr. El. 572. Cr. Car. 512. Co. Lit. 211. b
(*e*) 1 Leon. 262. Cr. El. 3.
(*f*) Moor 426.

The second Difference was, That in Case of a Condition annexed to Rent, if the Lessor (*g*) distrains for the same Rents for which the Demand was made, he hath thereby also affirmed the Lease, for his Distress for the Rent hath affirmed the Lease to have Continuance after the Rent received; for after the Lease determined he cannot distrain for the Rent. 14 *Ass.* 11. *Accord.*

(*g*) 1 Rolls 475. 14 E. 3. Entre congeable 41. Co. Lit. 211. b. Cr. El. 3. Plowd. 113. b. 136. b.

The third was, That as well in Case of a Condition annexed to Rent, as in Case of a Condition annexed to any collateral Act, if the Conclusion of the Condition be, that then the Lease for Years shall be void, there no Acceptance of Rent (due at any Day after the Breach of the Condition) will make the void Lease good. And so a Difference between a Lease which is (*ipso facto*) void without any Re-entry, and a Lease which is voidable by Re-entry; for a Lease which is *ipso facto* void by the Breach of the Condition, cannot be made good by any Acceptance afterwards. *Plow. Com.* in *Browning* and *Beston*'s Case 133.

(*b*) Cr. Car. 512. Cr. El. 167, 221. 1 Roll's 475. 1 And. 304, 305, 306. Godb. 47. Co. Lit. 215. a.

The fourth was, As the Affirmation of a voidable Lease by Parol for Money (or other Consideration) will not avail the Lessee; so the Acceptance of a Rent (which is not in *esse*, nor due to him who accepts it) will not bind him: As if Land be given to Husband and Wife, and to the Heirs of the Body of the Husband, the Husband makes a Lease for 40 Years and dies, the Issue in Tail accepts the Rent in the Life of the Wife, and afterw. the Wife dies; yet the Issue shall avoid the Lease; for at the Time of the Accept. no Rent was in *esse*, or due to him. *Vide* 32 *H.* 8. *Br.* (*i*) *Acceptance.*

(*i*) 32 H. 8. Br. Acceptance 13.

The Fifth was (*k*) between a Lease for Life and a Lease for Years, for in the Case of a Lease for Life, if the Conclus. of a Condit. annex. to the Rent (or other col. Act) be, that then

(*k*) 8 Co. 95. b. Co. Lit. 214. b. Plowd. 135. b. Dyer 239 pl. 42.

the Leaſe ſhall be void, there (becauſe an Eſtate of Freehold being created by Livery, cannot be determined before (*a*) Entry) in ſuch Caſe Acceptance of Rent due at a Day after, ſhall bar the Leſſor of his Re-entry, for this voidable Leaſe may well be affirmed by Acceptance of Rent: And therefore, if a Man makes a Leaſe for Years, on Condition that if the Leſſee do not go to *Rome*, or any other collateral Condition, with Concluſion that the Leaſe ſhall be void, in that Caſe, if the Leſſor grants over the Reverſion, and afterwards the Condition is broke, the Grantee (*b*) ſhall take Benefit thereof; for the Leaſe is void, and not voidable by Re-entry; and therefore the Grantee who is a Stranger, may take Benefit thereof; but if the Leaſe be made for Life (*c*) with ſuch Condition, there the Grantee ſhall never take Benefit of it, for the Eſtate for Life doth not determine before Entry, and Entry or Re-entry in no Caſe (by the Common Law) can be given to a Stranger, 11 *H.* 7. 17. *a. Br. Cond.* 245. 10 *E.* 3. 52. *per Stone*, 21 *H.* 7. 12. *a.* So if a (*d*) Parſon, Vicar, or Prebend, makes a Leaſe for Years, rendring Rent, and dies, the Succeſſor accepts the Rent, it is nothing worth, for the Leaſe was void by his Death, (*e*) otherwiſe is it of a Leaſe for Life: But if a (*f*) Biſhop, Abbot, Prior, or ſuch like, makes a Leaſe for Years and dies, if the Succeſſor accepts the Rent, he ſhall never avoid the Leaſe, for the Leaſe was only voidable, 11 *E.* 3. *Abbot* 9. 8 *H.* 5. 19. 37 *H.* 6. *b.* 24 *H.* 8. *Br. Leaſes* 19. *F. N. B.* 50. *C.*

(*a*) 1 Roll. 408. Br. N. C. 265. Moor 292. 21 H. 7. 12. a. Mo. 345 346. 1 Low. 413. a. 135. b. 142. b. Br. Condition 245. 2 Co. 53. b. 3 Co. 59. b. Co. Lit. 218. a. (*b*) Co. Lit 215. a. Cr. El. 649, 650. 1 Leon. 61. 1 Roll's 473. n. 6. 8 Co. 95. b. 10 Co. 48. b. Co. Lit. 214. b. Lit. Sect. 347. (*c*) 8 Co. 95. b. 10 Co. 48. b. Co. Lit. 215. a. Perk. Sect. 831. F. N. B. 201. C. Dyer 127, pl. 56. Lit. Sect. 347. Plowd. 34. a. (*d*) Cro. El 18. 1 Roll's 831. Co. Lit. 45. b. Dyer 239. b. pl. 41, 42. 8 H. 5. 10. b. B. N. C. 381. (*e*) Co. Lit. 45. b. 1 Roll's 821. (*f*) Co. Lit. 44. b. B. N. C. 380. 2 E. 6. Br. Acceptance 20. Cr. Jac. 173. Dyer 46 pl. 9. Cro. Car. 96. 1 Roll's 476. 2 Roll Rep. 161.

But note, Reader, I conceive, that in the Caſe of a Leaſe for Life, if the Leſſor accepts the ſame Rent which was demanded, he hath affirmed the Leaſe, for he cannot receive it as due on any Contract, as in the Caſe of a Leaſe for Years, but he ought to receive it as his Rent, and then he doth affirm the Leaſe to continue; for when he accepted the Rent, he could not have an Action of Debt for it, but his Remedy then was by Aſſiſe, if he had Seiſin, or by Diſtreſs. And therefore I conceive in ſuch Caſe, the Acceptance of the Rent ſhall bar him of his Re-entry: And it appears by *Littleton*, *cap. Conditions*, *fol.* 79. *a.* That in ſuch Caſe, if the Leſſor brings an (*g*) Aſſiſe for the Rent, he relinquiſhes, and waves the Benefit of his Re-entry, although it be for the Rent due at the ſame Day; but if he (*h*) re-enters firſt, then he may have an Action of Debt for the Rent behind, 17 *E.* 3. 73. 18 *E.* 3. 10. 30 *E.* 3. 7. 38 *E.* 3. 10. And afterwards, *Mich.* 39 & 40 *Eliz.* in the Common Pleas, which Plea began *Hill.* 38 *Eliz. Rot.* 1302. in Treſpaſs between (*i*) *March* and *Curtis*, for Land in *Eſſex*, the like Judgment was given by *Anderſon*, (Chief Juſtice there) *Walmſley* Juſtice, and the whole Court, Where a Leaſe for Years was made, rendring Rent, and with Condition that if the Leſſee ſhould aſſign his Term, that the Leſſor might re-enter, and

(*g*) Co. Lit. 211. b. Co. Lit. Sect. 341. (*h*) F. N. B. 120. H. 3 Co. 23. b. Kelw. 112. b. Br. Arrearages, 11. (*i*) Moor 425. Co. Int. 215. n. 13. 1 Brownl. 78. Noy 7. Anderſ 42, 90. Cro. El. 528. 1 Roll's 427.

the Leſſee aſſigned his Term, that altho' the Leſſor had accepted the Rent by the Hands of the Leſſee, yet foraſmuch as the Leſſor had not Notice of the Aſſignm. the Acceptance of the Rent did not (*a*) conclude him of his Entry: So this Point hath been adjudg'd by both Courts. See for the ſaid Differences (which lie obſcurely in our Books) 45 *Aſſ.* 5. the Caſe of Waſte, 22 *H.* 6. 57. 6 *H.* 7. 3. *b.* *F.N.B.* 120, 122. *Plow. Com. Browning* and *Beſton's* Caſe 133, 545. 14 *Aſſ.* 11. 40 *E.* 3. *Entry Congeable* 41. 11 *H.* 7. 17. 10 *E.* 3. 52. 21 *H.* 7. 12. 21 *H.* 6. 24. 39 *H.* 6. 27. 26 *H.* 8.

(*a*) Moor 426.

And in theſe two Caſes many good Caſes and Diff. were taken, when Acceptance of Rent (or other Thing) ſhall bar him who accepts it of the Arrearages of the Rent, of Reentry, of Action, or of Execution, and the Reaſon of the old Books briefly reported, and in an obſcure Manner, well expl. If he who hath a Rent-Service or a Rent-Charge, accept the Rent due at the laſt Day, and thereof makes an Acquittance, all the (*b*) Arrearages due before are thereby diſcharged: And ſo was it adjudg'd between *Hopkins* and *Morton* in the Com. Pleas, *Hill. Rot.* 950. *Vide* 10 *Eliz. Dyer* 271. but there the Caſe is left at large; and therew. agrees 11 *H.* 4. 24. and 1 *H.* 5. 7. *b.* But note, it appears by the ſaid Record of 10 *El.* that the Bar to the Avowry ought to be in ſuch Caſe, with Concluſ. of Judgm. if againſt this Deed of Acquittance he ought to make Avowry; ſo that it appears that the Acquittance is the Cauſe of the Bar of Eſtoppel in ſuch Caſe. For it appears by 8 *Aſſ. pl. ult.* 9 *E.* 3. 9. 29 *E.* 3. 34. that if a Man makes a Leaſe for Life rendring Rent, or if there be Lord and Tenant by Fealty and Rent, and the Rent is behind for two Years; and afterwards the Leſſor or the Lord diſſeiſes the Terre-tenant, and afterwards the Ten't recovers againſt him in Aſſiſe, and the Rent, which incurred during the Diſſeiſin, is recoup'd in Damages, yet the Lord or Leſſor ſhall recover in the Aſſiſe the Arrearages before the Diſſeiſin; and the Bar of the latter Years, is no Bar of the Arrearages before. *Vide* 39 *H.* 6. *Bar.* 79. where the principal Caſe of Annuity may be good Law, either becauſe there the Defendant pleaded the Acquittance for the laſt Day, and demanded Judgment of Action, where he ought to have relied upon the Acquittance. Or becauſe in the Caſe of Annuity he is not bound to pay the Annuity without Acquittance: But in the Caſe of Rent-Service, or Rent-Charge, he who receives it is not compellable to make an Acquittance, but the making thereof is his voluntary Act, to which the Law doth not compel him.

(*b*) 1 Syd. 44. Co. Lit. 373. a. 1 Keb. 95. pl. 84. 113. pl. 15. Raym. 21. 11 H. 4. 55. Moor 426. 87, 88. 1 Anderſ. 14. pl 30. 2 Anderſ. 91. 178. N. Bendl. 188. pl. 228. Co. Ent. 589. pl. 8 39 H. 6. Bar. 79. 1 H. 5. 7. b. Dy. 271. pl. 26.

If there be (*c*) Lord and Tenant, and the Rent is behind, and the Tenant makes a Feoffment in Fee, if the Lord accepts the Rent or Service of the Feoffee, he ſhall loſe the Arrearages in the Time of the Feoffor, although

(*c*) Co. Lit. 269. b.

though he makes no Acquittance; for after such Acceptance he shall not avow on the Feoffor at all, nor on the Feoffee, but for the Services which incurred in his Time, as appears in 4 *E.* 3. 22. 7 *E.* 3. 8. 7 *E.* 4. 27. 29 *H.* 8. *Br. Avowry* 111. But in such Case, if the Feoffor dies, altho' the Lord (*a*) accepts the Rent or Service by the Hand of the Feoffee, he shall not lose the Arrearages, for now the Lord cannot avow on other, but only on the Feoffee; and that, to which the Law compels a Man, shall not prejudice him.

(*a*) 1 Roll's 317. Co. Lit. 269. b.

So and for the same Reason, if there be (*b*) Lord, Mesn, and Tenant, and the Rent due by the Mesn is behind, and afterwards the Tenant doth forejudge the Mesn, and the Lord receives the Services of the Mesn, which now issue immediately out of the Tenancy, yet he shall not be barred of the Arrearages which issued out of the Mesnalty: So if the Rent be behind, and the Tenant dies, the Acceptance of the Services by the Hands of the (*c*) Heir shall not bar him of the Arrearages; for in these Cases, altho' the Person be altered, yet the Lord doth accept the Rent and Services of him who only ought to do them; and all this appears in 4 *E.* 3. 22. 7 *E.* 3. 4. 7 *E.* 4. 27. 29 *H.* 8. *Avowry Br.* 111. But Acceptance of Rent or Services by the Hands of the Feoffee shall not bar the Lord of the (*d*) Relief before due; for Relief is no (*e*) Service, but a Fruit and Approvement of Services; for if it were Part of the Services, then an Action of (*f*) Debt would not lie for it so long as the Rent continues, but it is as a Blossom of Fruit fallen from the Tree; and for Relief, it is not necessary to avow on any Person certain: And the Book in 4 *E.* 3. 22. is to be intended, that the Father made a Feoffment in Fee by (*g*) Collusion and died: And there it is held, that if the Lord had accepted the Services by the Hands of the Feoffee in the Life of the Father, he should lose his Relief.

(*b*) Co. Lit. 265. b.

(*c*) Co. Lit. 269. b.

(*d*) 2 And. 178. Cro. Eliz. 885. Moor 643.

(*e*) 2 Roll's 514, 515. Co. Lit. 83. a.

(*f*) Dall. 17 pl. 6. Co. Lit. 83. a. b. 1 Roll's 596, 665.

(*g*) Co. Lit. 84. a.

But note, Reader, Relief was not taken within the Equity of the Statute of *Marlebridge*, as it is adjudg'd in 17 [27] *E.* 3. 63. but now it is remedied by the Stat. of 32 & 34 *H.* 8. of Wills. But in the Case before, the Lord (before Acceptance of the Rent or Service by the Hands of the Feoffee) might have (*h*) avowed on the Feoffee for all the Arrearages incurred, as well in the Time of the Feoffor, as in the Time of the Feoffee, as it is adjudg'd in 7 *H.* 4. 14. 19 *E.* 2. *Avow.* 222. And by what hath been said it appears, that the Acceptance of Homage or any other Service of the Heir, shall not bar the Lord of Relief, *vid. temp. E.* 1. *Relief* 13. 15 *E.* 3. *ib.* 5. 16 *E.* 3. *ib.* 10. 3 *E.* 2. *Avow.* 190.

(*h*) 21 H. 8. cap. 19. Co. Lit. 269. b.

And it was further said, That if there be Lord and Tenant by Knights Service, and the Tenant enfeoffs his Son and Heir apparent within Age by Collus. if the Lord accepts the Services by the Hands of the Feoffee, he shall lose the (*i*) Wardship: But against that it was objected,

(*i*) F. N. B. 142. E. 1 Co. 122. a. 2 Co. 94. a.

1 Roll's 317. 1. That the Feoffee might compel the Lord to avow on him, by giving Notice and tendring the Arrearages, and that which the Law compels one to do, ſhall not prejudice or eſtop him.

2. That Acceptance doth not conclude before Title accrued, and no Title of Wardſhip in this Caſe was accrued to the Lord at the Time of the Acceptance, but it accrued after the Death of the Feoffor.

As to the firſt, it was anſwer'd, That the Feoffee by no Tender that he could make, could compel the Lord to avow on him; for the Lord might ſhew, that the Feoffm. was by Colluſion, againſt the Stat. of *Marlebridge*, *cap.* 6. and therefore he might maintain his Avowry on the Feoffor; for the Law will not compel him to avow on the Feoffee to his Prejudice.

As to the Second, it was anſwer'd, That the Statute of *Marlebridge* hath made ſuch Feoffment, made by Colluſion, as void and of no Effect as to the Lord: And therefore, if the Lord will affirm the Feoffment, and wave the Benefit of the Act, by accepting the Feoffee for his Tenant, he ſhall purge the Colluſion, and loſe the Wardſhip. And the Reaſon of *Priſot*, 33 *H.* 6. 16. that ſuch Acceptance ſhould not conclude the Lord was, becauſe the Feoffee in ſuch Caſe might compel the Lord to avow on him, but that is not Law; and againſt the Opinion of *Priſot*, ſee 31 *E.* 3. *Garde* 154. 33 *E.* 3. *Garde* 33. *F. N. B.* 142. And now the Doubt in 36 *E.* 3. *Garde* 11. is well explained.

WESTBY's *Caſe.*

Hillary *Term*, 34 Eliz. *in B. R. Rot.* 169.

London. ff. Declaration in Debt on an Eſcape.

MEmorandum, That at another Time, that is to ſay, in the Term of St. *Michael* laſt paſt, before the Lady the Q. at *Weſtm.* came *Titus Weſtby*, by *Tho. Cook* his Atterney, and brought here into the Court of the ſaid Lady the Q. then here, his Bill againſt *Tho. Skinner* and *John Catcher*, late Sheriffs of *London*, in Cuſtody of the Marſhal, &c. of a Plea of Debt, and are Pledges of Suit *John Doe* and *Rich. Roe*, which ſaid Bill follows in theſe Words; *ff. London, ff. Titus Weſtby* complains of *Thomas Skinner* and *John Catcher*, late Sheriffs of *London*, in Cuſtody of the Marſhal of the Marſhalſea, before the Queen herſelf, of a Plea, that they render to him 40 *l.* of lawful Money of *England*, which they owe to him and do unjuſtly detain. For that, to wit, That whereas *Tho. Smith*, Gent. *Edw. Winter*, Gent. and *Anthony Buſtard*, Gent. by the Names of *Tho. Smith* of *Camden* in the County of *Glouceſter*, Gent. *Edw. Winter* of *Worthington* in the County of *Leiceſter*, Gent. and *Anthony Buſtard* of *Alderbury* in the County of *Oxford*, Gent. the 20th Day of *January* in the 29th Year of the Reign of the Lady the now Queen at *Weſtminſter*, in the County of *Middleſex*, before Sir *Chriſtopher Wray*, Knt. then Chief Juſtice of the ſaid Lady the Queen of Pleas, before the ſaid Queen holden aſſign'd, by their certain Writing obligatory, ſealed with their Seals, had granted themſelves to be bounded, and did acknowledge themſelves to owe to the aforeſaid *Titus*, by the Name of *Titus Weſtby*, Citizen and Merchant Taylor of *London*, in the Sum of 440 Pounds, to be paid to the ſaid *Titus*, or to his certain Attorney, on ſhewing the ſaid Writing) his Heirs, or Executors, in the Feaſt of the Annunciat. of the bleſſed *Mary* the Virgin

then next following; and if they ſhould make default in the payment of the debt aforeſ. then the ſaid *Tho. Smith*, *Edw. Winter*, and *Anthony Buſtard*, they willed and granted, that then there ſhould run upon the ſaid *Tho. Edw.* and *Anthony*, and every of them, their heirs and executors, the penalty in the Statute ſtaple of debts for merchandizes in the ſame bought to be recovered, ordained and provided; and whereas alſo the ſaid *Tho. Edw.* and *Anthony*, the ſaid 440 *l.* by them, in the form aforeſ. acknowledged in the feaſt aforeſ. to the aforeſ. *Titus* had not paid, nor any of them had paid; by which afterwards, that is to ſay, the 11th day of *April* in the 30th year of the reign of the ſaid Lady the now Queen, one *John Chomley*, Eſq; the Clerk of the ſaid Lady the now Q. the recognizance for debts, to be recovered according to the form of the Stat. in the like caſe provided, deputed by his writing, ſealed with his ſeal, the recognizance aforeſ. in the Chancery of the ſaid L. the now Q. at *Weſtm.* aforeſ. then being, at the requeſt of the ſaid *Titus*, did certify; and the ſaid *Titus* thereupon afterwards, that is to ſay, the 31ſt Day of *Auguſt* in the 30th year of the reign of the ſaid Lady the now Q. aforeſ. ſued forth out of the ſaid Court of Chancery at *Weſtm.* aforeſ. then being, a certain writ of the ſaid Lady the Q. to the then Sheriffs of *London* directed; by which writ reciting, becauſe the aforeſ. *Tho. Smith*, *Edw. Winter*, and *Anthony Buſtard*, the 20th day of *Jan.* in the 29th year of the reign of the ſaid Lady the now Q. before *Chriſtopher Wray*, Knt. Chief Juſtice of the ſaid Lady the Q. of Pleas before the ſaid Q. to be holden aſſigned, did acknowledge themſelves, to owe to the aboveſaid *Titus* 440 *l.* which to the ſame *Titus* they ought to have paid in the feaſt of the Annunciation of the bleſſed *Mary* the Virgin then next following, and the ſame day of iſſuing out of this writ had not paid, nor any of them then had paid, as was ſaid; the ſaid L. the Q. by the ſaid writ, the then Sheriffs of *London* commanded, that the bodies of the ſaid *Tho. Smith*, *Edw. Winter*, and *Anthony Buſtard*, if they were Laymen, to take, and in the priſon of the ſaid Lady the now Queen, until the ſaid *Tho. Weſtby* be fully ſatisfied of the debt aforeſ. ſafely to be kept; and all the lands and chattels of the ſaid *Thomas*, *Edward*, and *Anthony*, in the Bailiwick of the ſaid Sheriffs, by the Oaths of honeſt and lawful Men of their Bailiwick, they ſhould diligently extend and apprize, and ſeiſe into the hands of the ſaid Lady the Queen, that the ſame to the beforeſaid *Titus*, until to him of his debt aforeſaid he ſhould be fully ſatisfied, they ſhould make delivery, according to the form of the Statute at *Weſtm.* for the like debts to be recovered the 20f made and provided; and how the Sheriffs aforeſaid ſhould execute the ſame they ſhould make known to the ſaid Lady the Queen in her Chancery in 15 days of St. *Martin* then next coming

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whereſoever it ſhould then be by their Letters ſealed; and that they ſhould have there the ſaid Writ; which ſaid Writ the ſaid *Titus Weſtby* afterwards, and before the ſaid 15th Day of St. *Martin*, that is to ſay, the 8th Day of *Septemb.* in the 30th Year of the Reign of the ſaid Lady the now Queen aforeſaid at *London*, that is to ſay, in the Pariſh of *Chriſt-Church*, in the Ward of *Farrington* within delivered, to the ſaid *Thomas Skinner* and *John Catcher*, then being Sheriffs of *London* in Form of Law to be executed: And the ſaid *Titus* further ſaith, that the ſaid *Anthony Buſtard*, at the ſame Time of the Delivery of the ſaid Writ to the ſaid *Tho. Skinner* and *John Catcher*, as before is ſaid, made, was a Layman, and yet is a Layman; and that by Virtue of the ſaid Writ after and before the Return thereof, that is to ſay, the ſaid 8th Day of *September* in the 30th Year of the Reign of the ſaid Lady the now Queen aforeſaid, the aforeſaid *Thomas Skinner* and *John Catcher* then being Sheriffs of *London*, the aforeſaid *Anthony Buſtard* at *London*, in the Pariſh and Ward aforeſaid, by Virtue of the Writ aforeſaid, took and arreſted, and the ſaid *Anthony* in Execution for the ſaid aforeſaid 440 *l.* then and there had accordi..g to the Exigency of the ſaid Writ; and the ſaid *Anthony*, under the Cuſtody of the ſaid *Tho. Skinner* and *John Catcher* Sheriffs, in Execution in the Form aforeſaid being, the ſaid *Tho. Skinner* and *John Catcher* Sheriffs, him the ſaid *Anthony Buſtard* afterwards, that is to ſay, the 20th Day of *Octob.* in the 30th Year aforeſaid at *London*, in the Pariſh and Ward aforeſaid, from the Cuſtody of the ſaid *Thomas Skinner* and *John Catcher* Sheriffs, to go at large, where he would, did ſuffer, the ſaid *Titus* the aforeſaid 440 *l.* not being ſatisfied; by which an Action accrued to the ſaid *Titus*, to require and have of the ſaid *Thomas Skinner* and *John Catcher* the aforeſaid 440 *l.* for his Debt aforeſaid, by the ſaid *Anthony* in Form aforeſaid acknowledged; yet the ſaid *Thomas Skinner* and *John Catcher*, altho' often requeſted, *&c.* the aforeſaid 440 *l.* to the ſaid *Titus* have not yet rendred, but have hitherto denied to render the ſame unto him, and do yet deny ſo to do; whereupon the ſaid *Titus* ſaith, that he is the worſe, and hath Damage to the Value of 440 *l.* and thereof he bringeth his Suit, *&c.* And now at this Day, that is to ſay, *Monday* next after 8 Days of St. *Hillary* in the ſelf ſame Term, until which Day the ſaid *Thomas Skinner* and *John Catcher* had licenſe to imparl to the ſaid Bill, and then to anſwer, *&c.* before the Lady the Q. at *Weſtm.* come as well the ſaid *Titus Weſtby*, by his Attorney aforeſaid, as the ſaid *Tho. Skinner* and *John Catcher*, by *Chriſto. Ruſt* their Attorney; and the ſaid *Tho. Skinner* and *John Catcher* defend the Force and Injury when, *&c.* and ſay, that they do not owe

to the aforeſ. *Titus* the aforeſ. 440 *l.* or any Penny thereof, in Manner and Form as the ſaid *Titus* above againſt them hath declared; and of this they put themſelves upon the Country; and the ſaid *Titus* likewiſe, *&c.* Therefore let a Jury come before the Lady the Queen at *Weſtminſter* upon *Saturday* next after 15 Days of *Eaſter*; and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame Day is given to the Parties aforeſ. here, *&c.* Afterwards the Proceeding thereof was continued between the Parties aforeſ. of the Plea aforeſ. by Jurors put thereof between them in Reſpite, before the Lady the Queen at *Weſtm.* until *Monday* next after three Weeks of *Holy Trinity* then next following; unleſs the beloved and faithful of the ſaid Lady the Queen *John Popham*, Knt. Chief Juſtice of the ſaid Lady the Queen of Pleas, in the Court of the ſaid Lady the Queen to be holden, aſſigned, firſt, upon *Saturday* next after 15 Days of *Holy Trinity*, at *Guild-hall London*, by Form of the Stat. *&c.* ſhould come for Default of Jurors, *&c.* At which *Monday* next after three Weeks of *Holy Trinity*, before the Lady the Queen at *Weſtm.* come the Parties aforeſ. by their Attornies aforeſaid; and the beforeſaid Chief Juſtice before whom, *&c.* ſent here his Record before him had, in theſe Words, that is to ſay, Afterwards the Day and Place within contained, before *John Popham*, Knt. Chief Juſtice, within written, aſſociating to him *Tho. Povey*, by the Form of the Statute, *&c.* came as well the within named *Titus Weſtby*, as the within written *Tho. Skinner* and *John Catcher*, by their Attornies within contained; and the Jurors ſworn, whereof within mention is made, ſome of them came, and ſome of them did not come, as it appeareth in the Panel; and ſome of the ſaid Jurors now appeared, that is to ſay, *John Sly*, *Tho. Worſhip*, *Arthur Parkins*, *Will. Tegoe*, and *John Wiggenton* appeared, and were ſworn in the Jury aforeſ. and becauſe the reſt of the Jurors of the ſaid Jury did not appear; therefore others of the Standers-by, choſen by the Sheriffs of *Lond.* at the Requeſt of the ſaid *Titus Weſtby*, and by the Command of the Chief Juſtice aforeſ. were anew put, whoſe Names are filed to the Panel within written, according to the Form of the Stat. in that caſe made and provided; which Jurors ſo anew put appeared, that is to ſay, *John Paiſon*, *Geo. Clarke*, *Alex. Sharpe*, *Edw. Flory*, *Tho. Chapman*, *Emanuel Trumbel*, and *Henry Field* appeared, who being ſworn to the Truth of the Matters within contained, with the other Jurors choſen, tried and ſworn, ſay upon their Oath, That the within written *Thomas Smith*, *Edward Winter*, and *Anthony Buſtard*, the within written 21ſt Day of *January* in the 29th Year within written, at *Weſtm.* in the County of *Middleſex* within written, before the within named *Chriſtopher Wray*, Knt. then Ch. Juſtice of the Lady the Queen of Pleas before the Queen holden, aſſigned, by their Writing Obligatory within written,

ſealed with their ſeals, granted themſelves to be bounden, and acknowledged that they did owe to the aforeſ. *Titus* the within written 440 *l.* to be paid to the ſame *Titus*, or his certain Attorn. (on ſhewing that writing) their heirs or executors, on the within written feaſt of the Annunciation of the bleſſed *Mary* the Virgin then next following; and if they ſhould make default in payment of the ſaid debt, that then the ſaid *Tho. Smith*, *Edw. Winter*, and *Anthony Buſtard*, willed and granted that then ſhould run upon them the ſaid *Tho. Edw.* and *Anthony*, and every of them, their heirs and executors, the penalty in the Stat. of debts for merchandizes in the ſame bought to be recovered, ordained, and provided, in manner and form as the ſaid *Titus* likewiſe within againſt them declared; and that the ſaid Stat. which the ſaid *Tho.* ſueth, *Edw. Winter*, and *Anthony Buſtard* in form aforeſ. acknowledged, afterwards, that is to ſay, the within written 11th day of *April* in the 30th year of the reign of the ſaid Lady the now Q. within written, by the within named *John Chomley*, Eſq; then Clerk of the ſaid Lady the now Q. of recognizances of debts to be recovered, according to the form of the Stat. in the like caſe provided, deputed, by his writing within written, ſealed with his ſeal, into the Chancery of the ſaid Lady the Q. within written, it was certified in manner and form, as the ſaid *Titus* within likewiſe againſt the ſaid *Thomas Skinner* and *John Catcher* hath alledged: And that thereupon the ſaid *Titus* afterwards, that is to ſay, the within written 31ſt day of *Auguſt* in the 30th year within written, ſued forth out of the ſaid Court of Chancery within written, the writ aforeſ. within ſpecified, of the ſaid Lady the now Q. to the Sheriffs of *London* directed; by which writ the ſaid Lady the now Q. then commanded the Sheriffs of *Lond.* that the bodies of the within named *Tho. Smith*, *Edward Winter*, and *Anthony Buſtard*, if they were Laymen, to be taken, and in the Priſon of the ſaid Lady the Q. until the ſaid *Tit. Weſtby* of the debt aforeſ. was fully ſatisfied, they ſhould cauſe ſafely to be kept; and all the lands and chattels of the ſaid *Tho. Edw.* and *Anthony*, in the Bailiwick of the ſaid Sheriffs, by the oath of honeſt and lawful men of the ſaid Bailiwick, by whom the truth of the matter may beſt be known, according to the true value thereof, they diligently cauſe to be extended and apprized, and into the hands of the ſaid L. the Q. they cauſe to be ſeiſed, that the ſame to the aforeſ. *Titus*, until he ſhould be fully ſatisfied of the debt aforeſ. they might be delivered according to the form of the Stat. at *Weſtm.* for the like debts to be recovered, thereof made and provided; and how the ſaid Sheriffs have executed the ſaid command, that they make known to the ſaid Lady the Q. in the Chancery, within 15 days of St. *Martin* then next, whereſoever it ſhould then be, by their letters ſealed, and that they ſhould have then there that Writ. Which ſaid writ, the

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ſaid Jurors ſay upon their Oath aforeſaid, That the ſaid *Titus Weſtby* afterwards, that is to ſay, the within written 8th Day of *Septemb.* in the 30th Year aforeſaid, at *London* aforeſ. that is to ſay, in the within written Pariſh of *Chriſt-Church* in the Ward of *Farrington* within, delivered to the ſaid *Tho. Skinner* and *John Catcher*, then being Sheriffs of *London*, in Form of Law, to be executed in Manner and Form as the aforeſ. *Titus* within likewiſe againſt them declared: And further the Jurors aforeſ. ſay upon their Oath aforeſaid, that the ſaid *Anthony Buſtard* then, that is to ſay, the aforeſaid 8th Day of *Septemb.* in the 30th Year aforeſ. was in the Gaol of the ſaid Lady the Q. that now is of *Newgate*, under the Cuſtody of the ſaid *Tho. Skinner* and *J. Catcher*, then Sheriffs of *London* aforeſ. in Execution at the Suit of one *Rob. Dighton*, for the Debt of 240 *l.* and the ſaid *Anthony Buſtard* ſo there in Execution being, the ſaid *Thomas Skinner* and *John Catcher*, then being Sheriffs of *London* within written, the 8th Day of *Septemb.* in the 30th Year aforeſaid, by Virtue of the Writ aforeſaid, at *London* aforeſaid, took and arreſted the within named *Anthony Buſtard*, in Manner and Form as the ſaid *Titus* within likewiſe againſt the ſaid *Thomas Skinner* and *John Catcher* declared; and that the ſaid *Anthony Buſtard* ſo taken and arreſted, under the Cuſtody of the ſaid *Thomas Skinner* and *John Catcher*, then Sheriffs of *London* aforeſaid, in Form aforeſaid being, the ſaid then Sheriffs of *London*, the ſaid *Anthony Buſtard*, in Execution for the aforeſaid 440 *l.* then and there had, according to the Command of the ſaid Writ: And moreover, the Jurors aforeſaid ſay upon their Oath aforeſaid, that the ſaid *Anthony Buſtard*, ſo in Cuſtody of the ſaid *Thomas Skinner* and *John Catcher*, for the aforeſaid 440 *l.* for the aforeſaid other Debt of 240 *l.* to the ſaid *Robert Dighton*, in Form aforeſaid being, the ſaid *Thomas Skinner* and *John Catcher* afterwards, that is to ſay, the within written 20th Day of *October* in the 30th Year aforeſaid, in the going out of their Office aforeſaid, the ſaid *Anthony Buſtard*, by Indenture delivered to *Hugh Offeley* and *Richard Saltonſtall*, in Execution for the aforeſaid Debt of the ſaid *Robert Dighton*, without any other Mention of the ſaid Execution of 440 *l.* made to the aforeſaid *Hugh Offeley* and *Richard Saltonſtall*, or to any of them given or notified. And further, the ſaid Jurors ſay upon their Oath aforeſ. that then, that is to ſay, the 20th Day of *October* in the 30th Year aforeſaid, the ſaid *Thomas Skinner* and *John Catcher* from their Office aforeſaid were diſcharged. And further, the ſaid Jurors ſay upon their Oath aforeſaid, that after that the ſaid *Thomas Skinner* and *John Catcher*,

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from their Office aforeſaid, in Form aforeſaid, were diſcharged, that the ſaid *Anth. Buſtard*, without Payment of any of the aforeſaid Debts, in the Cuſtody of the aforeſ. *Hugh Offeley*, and *Rich. Saltonſtall*, in Form aforeſaid being for the ſaid 240 *l.* the ſaid *Hugh Offeley* and *Rich. Saltonſtall*, the ſaid *Anth. Buſtard*, having none, nor any of them ever having any Notice to them, or either of them given of the ſaid Execution of the aforeſaid 440 *l.* at *London* aforeſaid, out of the Priſon aforeſaid, ſuffered to go at large where he would: But whether upon the whole Matter aforeſaid, in Form aforeſaid found, the ſaid *Thomas Skinner* and *John Catcher* ought to be charged for the aforeſaid Debt of 440 *l.* in Law, or not, the Jurors aforeſaid are altogether ignorant. And they pray the Advice of the Court of the ſaid Lady the Q. *before the Q. herſelf being.* And if it ſhall ſeem to the ſaid Court, That the ſaid *Tho. Skinner* and *John Catcher*, ought to be charged for the ſaid 440 *l.* in Law, upon the whole Matter above found, the ſaid Jurors ſay upon their Oath aforeſaid, that the ſaid *Tho. Skinner* and *John Catcher* do owe to the ſaid *Titus Weſtby* the ſaid 440 *l.* in Manner and Form as the ſaid *Titus* within againſt them declared: And they do alſo aſſeſs the Damages of the ſaid *Titus Weſtby* by Occaſion of detaining of the ſaid Debt, beſides his Charges and Coſts by him about his Suit in this Part expended, to 20 *l.* and for his Charges and Coſts to 53 *s.* and 4 *d.* And if it ſhall ſeem to the Court aforeſaid, that the ſaid *Thomas Skinner* and *John Catcher* do not owe to the ſaid *Titus Weſtby* the ſaid 440 *l.* in Manner and Form, as the ſaid *Thomas Skinner* and *John Catcher* within by pleading have alledged, Then, *&c.* And becauſe the Court of the Lady the Queen that now is, here of their Judgment of and upon the Premiſſes to be given, are not yet adviſed; Day is given to the Parties aforeſaid, before the Lady the Q. at *Weſtm.* until *Tueſday* next after 8 Days of St. *Michael*, to hear their Judgment thereof, *&c.* becauſe the Court of the Lady the Q. here thereof not yet, *&c.* Before which Day, the Plaint aforeſaid was adjourned, by the Writ of the Lady the Q. of Common Adjournment, before the Q. at *Weſt.* until from the Day of St. *Mich.* in a Month; at which Day the Plaint aforeſaid was further adjourned by another Writ of the ſaid Lady the Q. of Common Adjournment, before the Q. until the Morrow of *All Souls* then next following, at the Caſtle of *Hartford* in the County of *Hartford.* At which Day, before the Lady the Queen at the Caſtle of *Hertford*, came the Parties aforeſaid, by their Attornies aforeſaid: And becauſe the Court of the L. the Q. here, of giving their Judgm. of and upon the Premiſſes is not yet adviſed, further Day is given to the Parties aforeſaid, before the Lady the Queen at the

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Caſtle of *Hertford* aforeſ. until *Tueſday* next after 8 Days of St. *Hill.* to hear their Judgment thereof, becauſe the Court of the L. the Q. here thereof not yet, &c. And ſo from Term to Term until *Thurſday* next after 8 Days of St. *Hill.* to hear their Judgment, &c. becauſe the Court of the Lady the Q. here, &c. At which Day, before the Q. at *Weſtm.* came the the Parties aforeſ. by their Attorn. aforeſ. upon which here all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Q. looked into and underſtood, and mature Deliberation thereof had, becauſe that it ſeems to the Court of the ſaid Lady the now Q. here, that the ſaid *Tho. Skinner* and *John Catcher* ought to be charged for the ſaid 440 *l.* It is granted, That the ſaid *Titus Weſtby* ſhall recover againſt the aforeſ. *Tho. Skinner* and *John Catcher* his Debt aforeſ. and his Damages aforeſ. by the Jurors aforeſ. in Form aforeſ. aſſeſſed, as alſo 10 *l.* 13 *s.* and 4 *d.* for his Charges and Coſts aforeſ. to the ſaid *Titus*, by the Court of the ſaid Lady the Q. here, with his Aſſent of Increaſe, adjudged, which Damages in the whole do amount to 33 *l.* 6. and 8 *l.* and the ſaid *Tho. Skinner* and *John Catcher*, in Mercy, &c. Afterwards, that is to ſay, upon *Monday* the 10th Day of *Febr.* in the 37th Year of the Reign of the ſaid L. the now Q. the Tranſcript of the Record, and Proceedings between the Parties aforeſ. with all Things touching the ſame, by a certain Writ of the L. the Q. of correcting Errors, by the ſaid *Tho. Skinner* and *John Catcher*, in the Premiſſes, was brought to the Juſtices of the Lady the Q. of the Common Pleas, and the Barons of the *Exchequer*, of the L. the Q. in the chamber of the *Exchequer* aforeſ. according to the Form of a Stat. made in the Parliam. of the ſaid L. the Q. held at *Weſtm.* the 23d Day of *Nov.* in the 37th Year of her Reign, in the ſame Court of the ſaid L. the Q. here before the Q. herſelf were ſent, the aforeſ. *Tho. Skinner* and *John Catcher*, into the Court of the *Exchequer* aforeſ. divers Matters for Errors, in the Record and Proceedings aforeſ. for the revoking and annulling of the Judgment aforeſaid aſſigned: To which the ſaid *Titus*, in the ſaid Court appearing pleaded, that neither in the Record, nor in the Proceedings aforeſ. for the revoking and annulling of the Judgment aforeſ. in any Thing was there Error: After which, that is to ſay, on *Monday* the 20th Day of *Oct.* in the 37th Year of the Reign of the ſaid now Q. the Prem. ſeen, and by the Court of the ſaid L. the Q. there dilligently examined and fully underſtood, as well the Record and Proceedings aforeſ. and the Judgment upon the ſame given, as the Cauſe aforeſ. for Error by the ſaid *Thomas* and *John* above aſſigned and alledged, it ſeemed to the Court there, that the Record aforeſaid was in nothing vitious or defective, and that in the Record aforeſaid, is Error

in nothing; therefore then and there in the ſame Court it was granted, that the Judgment aforeſaid ſhould be affirmed in all Things, and ſtand in all its Force and Effect, the ſaid Cauſes for Error here aſſigned in any Thing notwithſtanding: And farther it was granted that the ſaid *Titus* ſhould recover againſt the ſaid *Thomas* and *John* 80 *s.* to the ſaid *Titus*, by his Aſſent, by the ſaid Court of the Lady the Q. there adjudged, according to the Form of the Stat. lately made and provided for his Coſts and Charges, which he hath had by the Reaſon of the Delay of the Execution of the Judgment aforeſaid, by Colour of proſecuting the ſaid Writ of Error, *&c.* And thereupon the Record aforeſaid, as alſo the Proceedings thereon before the Juſtices of the Com. Pleas and the Barons of the *Exchequer* aforeſaid, in the Premiſſes, had before the Queen, whereſoever, *&c.* were by the Juſtices and Barons aforeſaid ſent back, according to the Form of the Stat. aforeſaid, *&c.* And in the ſame Court of the ſaid Lady, now here before the Queen, they remain, *&c.*

WESTBY's

WESTBY's *Caſe*.

Michaelmas 39 and 40 Eliz.

Adjudged in the King's Bench, but the Plea began Hill. 34 Eliz. Rot. 169.

Cro. El. 685. 1 Roll. 85 Moor 688.

John Weſtby brought an Action of Debt againſt *Skinner* and *Catcher*, late Sheriffs of *London*, for an Eſcape; and the Caſe was, One *Buſtard* was ſeverally in Execution under the Cuſtody of the Defendants, then Sheriffs of *Lond.* as well at the Suit of one *Dighton*, as at the Plaintiff's Suit, and the Defendants, at the End of their Year, deliver'd over the Body of *Buſtard*, amongſt others, to the new Sheriffs by Indenture, in which Indenture the Execution at the Suit of *Dighton* was mentioned, but the Execution at the Suit of the Plaintiff was omitted: And afterwards *Buſtard* (always being in the Gaol) in the Time of the new Sheriffs, eſcaped. And if the Defendants ſhould be charged with this Eſcape was the Queſtion. And it was ſtrongly objected on the Defendants Part, that they could not be charged. For they had delivered the Body of the Defendant then being in the Gaol to the new Sheriffs, and therefore the Eſcape did begin in their Time, for which they ought to be charged, and not the old Sheriffs; and for as much as the new Sheriffs had the Party in their Cuſtodies, they ought at their Peril to take Notice of all Executions (being Matters of Record) againſt him, and ought to keep him till all are ſatisfied. But it was adjudged that the Defendants being the old Sheriffs ſhould be charged; and in this Caſe four Points were reſolv'd unanimouſly *per totam curiam*.

1 Sid. 335. 2 Leon. 54.

1. That when the Body of *Buſtard* was delivered to the new Sheriffs as in Execution at the Suit of *Dighton* only, he was thereby out of Cuſtody of the old Sheriffs; and he could not be in the Cuſtody of the new Sheriffs for the Plaintiff's Execution, becauſe he was not delivered to them, nor they charged with him for the Plaintiff's Execution;

Cro. Jac. 588.

and altho' he was within the Walls of the Priſon, yet it was an Eſcape in Law as to the Plaintiff: For the Plaintiff, in whom was no Default, ought not to be without Remedy in this Caſe; but becauſe the Default was in the Defendants, in as much as they omitted the Plaintiff's Execution in *(a)* their Indenture, for this Cauſe it is Reaſon that they ſhould be charged: And as to that which was aſked, When the Eſcape began in this Caſe? It was anſwered and reſolved, That *eo inſtante*, that the old Sheriffs delivered their Priſoners to the new Sheriffs, they Ceaſe to have the Cuſtody of any of them; and *eo inſtante* doth the Eſcape begin as to the Plaintiff. So, Reader, you may obſerve, that the Law doth adjudge one, who remains in Priſon, to eſcape. See *Plow. Comm.* 37. *Plat's* Caſe, the Opinion of *(b) Chomley* Chief Baron.

(a) Cr. Jac. 588. 2 Rol. Rep. 146.

(b) Plowd. 37. a. 2 Ventris 19.

2. It was reſolv'd, That the old Sheriffs ought to give Notice to the new Sheriffs of all the Executions which are againſt any who are in their Cuſtody; altho' the Executions be of Record, yet the new Sheriffs ſhould not take Notice of them at their Peril, but ſhould be charged only with ſuch whereof the old Sheriffs gave them Notice: For it was obſerved, that in the general Caſe of Sheriffs of *England*, when the King makes a *(c)* new Patent to another to be Sheriff, altho' the old Sheriff had his Office but *durante bene placito*, yet it appears by the Regiſter, that preſently after the Patent a Writ *de Comitatu Commiſſ.* which is commonly called a Writ of Diſcharge, iſſueth: The Effect of which Writ is, *Rex omnibus ad quos, &c. ſalutem: Sciatis quod commiſimus dilecto nobis S.* (who is now Sheriff) *Com' noſtr' N. cum pertinentiis cuſtodiend', quamdiu nobis placuerit, &c. In cujus rei, &c.* And then is another Writ directed to the old Sheriff, and the Effect thereof is, *Et mandatum eſt N. nuper Vic' Com' prædict' quod eidem S. Com. prædict' cum pertinen', una cum rotulis, brevibus, memorandis, & omnibus aliis officium illud tangent' quæ in cuſtodia ſua exiſtunt, per indent' inde modo debit' conficiend' liberet cuſtodiend' in forma prædict', Teſte, &c.* And all this appears in the *Regiſter (d)* 295. *a.* & *b.* by which appears the great Care the Law hath of Executions, which are the Fruit of every Suit. But it was reſolv'd, that till the Priſoners are *(e)* delivered to the new Sheriffs, they remain in the Cuſtody of the old Sheriffs, notwithſtanding the new Letters Patents, the Writ of Diſcharge, and the Writ of Delivery. And although it was ſaid by ſome in the Caſe at Bar, That if the old Sheriffs had given Notice to the new Sheriffs by *(f)* Parol of the Plaintiff's Execution, it had been ſufficient; yet it appears by the *(g) Regiſter*, that the new Sheriff may compel the old Sheriff to make the Delivery by Indenture. Note; in *London*, the Mayor and Com-

(c) Cr. El. 12.

(d) Cr. El 366. 9 Co. 98. a.

(e) Cr. Jac. 588. 1 Bulſtr. 70, 75.

(f) Moor 689.

(g) Cr. El. 366.

Commonalty have the Office of Sheriffs of *London* and *Middleſex* by Charter, and two Sheriffs are yearly choſen: So that it was agreed, that after their Election, and before the Delivery over of the Priſoners to the new Sheriffs, they remain in Cuſtody of the old Sheriffs.

3. It was reſolv'd, That if the Sheriff hath in his Cuſtody divers Perſons in Execution, and dies, and afterwards a new Sheriff is made, he muſt take Notice at his (*a*) Peril of all the Executions which are againſt any Perſon which he finds in the Gaol; and that for Neceſſity; for there is no Perſon to make Delivery of them to him, or to give him Notice: And there is no Miſchief to the Sheriff if he keep them well, until he have perfect Notice of all the Executions; but if he might with Impunity ſuffer thoſe who are in Execution to eſcape, great Inconvenience would from thence enſue.

(*a*) Cro.E.365, 366. Poph. 85. Winch 108.

4. It was reſolv'd, If the Sheriff (*b*) dies, and before another is made, one who is in Execution breaks the Priſon and goes at Liberty, it is no Eſcape; for when the Sheriff dies, all the Priſoners are in the (*c*) Cuſtody of the Law till a new Sheriff be made; and therefore, altho' they were in the *interim* out of the Walls of the Priſon, yet the Law hath the Cuſtody of them, and keeps them in Execution without any (*d*) freſh Suit, in what Place ſoever they are, and they may be taken in Execution at any Time after. For no Eſcape can be in Prejudice of the Plaintiff, but when ſome Perſon may be charged for it, and the Law deceives no Man.

(*b*) 1 Mod.Rep 14.Hardreſs 35.

(*c*) Hardreſs 35

(*d*) Antea 52.b.

The

The Caſe of the Dean and Chapter of NORWICH.

Mich. 40 & 41 Eliz. *in Chancery.*

KING *H.* 8. by his Letters Patents bearing Date 2 *Maii*, *Anno Regni ſui* 30. *Authoritate ſua regia, ac authoritate ſua in terra ſupremi capitis Eccleſiæ Anglicanæ, qua tunc fungebatur, de gratia ſua ſpeciali, &c. Cœnobium de Priore & Conventu Eccleſiæ Cathedralis ſanctæ Trin. Norwici in Decanum & Capitulum Eccleſiæ Cathedralis Sanctæ Trin. Norwici tranſpoſuit & mutavit.* And by the ſaid Letters Patents the King diſcharged the Prior and Convent by their ſpecial and particular Names, *tam de habitu ſuo, quam de regula*, (the ſaid Priory being of the Order of St. *Bennet:*) *ipſoſque Decanum, Præbendarios, & Canonicos in Eccleſia prædict' realiter poſuit & conſtituit, & conceſſit eiſdem Decano, Præbendariis & Canonicis; Quod ipſi & ſucceſſores ſui ſub nomine, & per nomen Decani & Capituli Eccleſiæ Cathedralis Sanctæ Trin' Norwici, ſint de cætero imperpetuum unum corpus corporat' in re & nomine; Ac eoſdem Decanum & capitul' perpetuis temporibus duratur' corporavit, &c. Et ulterius conceſſit quod idem Decanus & Capitulum, & ſucceſſores ſui omnia & ſingula dominia, maneria, terras, & hæreditament' quæcunque, &c. quæ ad prædictum nuper Priorem in jure Eccleſiæ Cathedralis prædict' ſpectabant & pertinebant, habere, tenere, gaudere, & poſſidere ſibi & ſucceſſoribus ſuis imperpetuum, &c. poſſint & valeant, &c.* And further granted, that they ſhould be the Chapter of the Biſhop of *Norwich*,

2 And. 126, 165.
4 Inſt. 257.
1 Jones 166, 167.
1 Co. 126. a.
Palm. 491.
Treby's Argument in quo Warranto 8.
Winch 38.
Ley 74.

wich, and his Succeſſors. And on the Sight of the Foundation, and divers other ancient Inſtruments of the ſaid Priory, it was a great Queſtion who was Founder, *ſcil.* the King or *Herbert*, formerly Biſhop of *Norwich*. But it was admitted without any Prejudice to any Party, that *Herbert* was Founder; and afterwards the ſaid Dean and Chapter by their Deed enrolled ſurrender'd to King *Ed.* 6. in the ſecond Year of his Reign their Church and all their Poſſeſſions: And afterwards the King in the ſame Year incorporated them again, *per nomen Decani & Capituli Eccleſiæ Cathedralis Sanctæ & individuæ Trinitat' Norwici, ex fundatione Regis Edw.* 6. And afterwards the King in the ſame Year regranted their Church and all their Poſſeſſions (except certain Manors, &c.) to them by the Name of Dean and Chap. *Eccleſiæ Cathedralis Sanctæ & individuæ Trinitatis Norwici*, (omitting theſe Words, *ex fundatione Regis Edw.* 6.) and to their Succeſſors. And one *William Downing* and other needy and indigent Perſons, who endeavour'd to repair their poor declining Eſtates by the Diſſolution of the ſaid Cathedral Church, and of all the Poſſeſſions of the ſaid Dean and Chapter, did pretend, That the ſaid Cathedral Church and all the ſaid Poſſeſſions were concealed from the Queen: And that they were (in the Queen's great Deceit under general and obſcure Words) paſſed by Letters Patents of Concealment. And they did pretend that theſe Poſſeſſions were concealed for two Cauſes:

See Arthur Legat's Caſe 10 Co. 109, &c.

Firſt, That the ſaid Tranſlation was void, and then the old Corporation of Prior and Covent remained till the Death of all the Monks (which happen'd *cor' anno* 18 *El.*) And that by the Death of all the Monks, the ſaid Poſſeſſions came to the Q. by the Stat. of 31 *H.* 8. of Monaſteries.

Secondly, Admitting that the Tranſlation was good, yet, by the ſaid Surrender made to King *Edw.* 6. the King was ſeiſed of all their Poſſeſſions, and the Re-grant aforeſaid was void; for the ſaid Miſnomer of the Corporation of the Dean and Chapter, *ſcil.* by Reaſon of the omitting the ſaid Words (*Ex fundatione Regis Edw.* 6.) And this great Caſe concerning a Cathedral Church and all the Poſſeſſions thereof, and concerning the Intereſt mediately and immediately of a great Number of the Farmers and Leſſees, was by the Command of the Q. (who was very greatly offended that ſhe was ſo deceived, and eſpecially concerning a Cathedral Church which was of the Erection of her moſt happy Father) ſhe herſelf alſo much favouring the ſaid Cathedral Church, referred it to Sir *Tho. Egerton*, Keep. of the Great Seal, *Popham* and *Anderſon* Ch. Juſtices, and *Periam* Chief Baron. And now *Mich.* 40 & 41 *El.* at the L. Keeper of the G. Seal's Houſe, called *York-houſe*, before them this Caſe was argued

2 And. 120, 121, 165, 166, 167. 1 Jones 166 167, 170. Palm 492, 494, 495, 503. Cr. Car. 170. Poſtea 75 a 76. a. Hob. 124.

argued by the Counsel of the said Concealers: And the Effect of their Objections and Arguments here follow.

First, They did admit that the said Priory was of the Foundation of *Herbert* formerly Bp. of *Norwich*; and then they said, That for as much as the Founder was not Party to the said Translation, the said Translation was void. And to prove that the Founder of a Priory hath such Interest that he ought to join, divers Books were cited; that is to say, 39 *H.* 6. 14. 50 *Ed.* 3. 27. *a.* 11 *Ed.* 3. *Qu. Impedit* 157. 22 *H.* 6. 25. *b.* 9 *H.* 6. 33. 24 *Ed.* 3. 77. *b.* 30 *Ed.* 3. 21. *b.* 6 *E.* 3. 34. A *Quare Impedit* brought by the Founder of a Priory. But as to this Point, it was answered by *Coke* Attorney Gen. That first, if the K. was Founder, as he affirmed on the Sight of the Foundation and other Records he was, notwithstanding the Admittance in (*a*) 3 *H.* 7. then the Case is without Question. But admitting the Bishop were Founder, yet the Translation was good; for it appears by the old Books, that the *Pope might have discharg'd a Monk, or other dead Person in Law of his Profession, as appears in (*b*) 3 *H.* 6. 23. by *Martin*, 26 *H.* 6. (*c*) *Nonability*; (*d*) 14 *H.* 8. 16. *b.* &c. And by Consequence by the Stat. of 25 *H.* 8. *cap.* 21. King *H.* 8. might do it; and accordingly he hath discharged the said Prior and Monks of their Order and Profession, and translated them into Dean and Chapter by the said Letters Patents, and so none of the said Books, which were cited by the adverse Party, can be applied to this Case. Also there is not any Prejudice to the Founder, for he remains Founder notwithstanding this Translation; and nothing is altered but only the Order and Profession; and where the Prior and Covent was, the Chapter of the Bishop, now the Dean and Chapter supply it; and this Priory was eligible and not presentable, as it was agreed on both Sides: And that this Translation was good, the Case of 11 *Eliz. Dyer* 280. (*e*) *Corbet*'s Case proves it; where the Case was of the Translat. of this same Deanery; and by the Judgment of the Parliament in 33 *H.* 8. *cap.* 29. it appears, that such (*f*) Translations made by King *H.* 8. from Prior and Covent into Dean and Chapter were good. Further it appears, (*g*) 17 *E.* 3. 40. & 10 *E.* 3. 1. *a.* that all Chapters were Monks, and notwithstanding the (*h*) Translat. of them into Prebendaries or Canons, and Change of their Habit, the Advowson did remain as it was before; and for such Translations, see 36 (39) *H.* 6. 13. 38 *Ass.* 22. 49 *Ass.* 8. 49 *E.* 3. 14. 20 *E.* 3. *Nonability* 9. 22 *R.* 2. *Breve* 936. 14 *H.* 4. 10. 7 *E.* 4. 32. But admitting this Translat. were imperfect or void for this or any other Cause, yet it is made good by the Stat. of (*i*) 35 *El. c.* 3. in which the Preamble which declares the Mischiefs, and the Parts of the Purview and Body of the Act are to be considered. It appears by the Preamble, that divers Doubts and Ambiguities had been moved concerning two Things:

(*a*) 3 H. 7. 6 b. Br. Return de Brief 116.

* 1 Jones 160.

(*b*) 3 H. 6. 24. a. per Martin.

(*c*) 26 H. 6. Nonability 13.

(*d*) 14 H. 8. 17 a.

(*e*) Palm. 493, 495. Dyer 280. pl. 11, 12.

(*f*) 4 Co. 87. b. 1 Sand. 344. 6 Co. 66. a. Moor 581.

(*g*) 17 E. 3. 40. b. per Pa.n.

(*h*) Co. Lit. 102. b.

(*i*) 11 Co. 11. a. 2 And. 121.

1. Touching Surrenders, Grants and Conveyances made to King *Hen.* 8. by Abbots, Priors and other Religious and Eccleſiaſtical Perſons, after the 4th Day of *Feb.* 27 *H.* 8.

2. Touching the Validity of Erections of ſuch Deans and Chapters, and Colleges, which were erected, ordain'd, made or founded, by *H.*8. after the ſaid 4th Day of *Feb.* to explain and remove which Doubts, two Remedies were provided by the ſaid Act. Firſt, To ſettle and eſtabliſh all the Poſſeſſions of ſuch religious Perſons in the King. Secondly, To perfect and eſtabliſh the Deans and Chapters and Colleges, erected, founded, incorporated or endowed by K. *H.* 8. as is aforeſaid. And this Caſe is within the latter Clauſe; For firſt, when the King created them into Dean and Chapter, *viz.* from Regular to Secular, here is a Dean and Chapter newly erected and created by the King: Alſo it is within this Word *incorporate*; for without Queſtion, the King by his ſaid Letters Patent hath incorporated them *per nomen Decani & Capituli, &c.* And in two Places of the ſaid Foundation the
Co Lit. 250. King uſes the Word of the ſaid Act, *viz.* (*Corporamus*); and it is to be well obſerv'd, how beneficially and learnedly the Statute of 35 *Eliz.* is indited, for the Remedy of the ſaid Doubts and Ambiguities. For the Act doth not make all Erections, Foundations, *&c.* made by King *H.* 8. *&c.* good,
4 Co. 31. a. *&c.* for then it might have been objected, that there was not any Erection, Foundation, *&c.* in Law, *Et quod contra legem factum eſt, pro infecto habetur*: And yet ſuch Objection (if the Act had been ſo penned) had been material: But in our Caſe to take away all Objections, the Words of the Act are, "All Letters Patents made, *&c.* for the Erection, Foun-
" dation, Incorporation or Endowment of any Dean and
" Chapter, or College, were and ſhall be reputed, taken
" and adjudg'd to have been good, perfect and effectual in
" Law, for all Things therein contained, according to the
" true Intent and Meaning of the ſame: Any Thing, Mat-
" ter or Cauſe to the contrary thereof in any wiſe notwith-
" ſtanding.

And without Queſt. the ſaid Lett. Pat. of 30 *H.* 8. were made *for the Erect. and Incorporat. of the Dean and Chapt.* And the ſaid Letters Pat. are by the Act adjudged to be good *for all Things therein contained*; and in them is contained not only their Incorporation into a Dean and Chapter, but alſo a Grant to them and their Succeſſors, that they ſhall enjoy and have all Lordſhips, Manors, Lands, *&c.* as appears by the Charter before: So that the Incorporation, and all that is contained in the ſaid Lett. Pat. is adjudg'd good: And it is alſo adjudg'd by Parliam. that they ſhall enjoy all the

Lord-

Lordſhip, Manors, Lands, &c. which were Parcel of the Poſſeſſions of the Priory aforeſaid; and there is no Saving but only for Rights, &c. before the 4th Day of *Feb. an.* 27 *H.* 8. So it is manifeſt that this Act of 35 *Eliz.* being an Act of Explanation (which always is bene cially to be interpreted) adjudges the Corporation good, and eſtabliſhes their Poſſeſſions in them againſt all Titles which might accrue to the King or any other after the 4th Day of *Feb. an.* 27 *H.* 8. And therefore all thoſe, who pretend any Title by any Letters Patents of Concealment, are for ever barred of all Pretences and Claims which they can make to any of theſe Poſſeſſions.

Secondly, it was objected, That altho' the Tranſlation was good, yet the ſaid Dean and Chap. had not any Eſtate or Right in the ſaid Poſſeſſions; for by their Surrender to K. *Ed.* 6. of their ſaid Church, and all their Manors, Lands, and Poſſeſſions, the King was ſeiſed of them in Fee; then the King new incorporated them, *Per nomen Decani & Capituli Eccleſiæ Cathedralis Sanctæ & individuæ Trinitat' Norwicenſ. ex fundatione Regis Ed.* 6. And afterwards the ſaid King re-granted their Poſſeſſions to them by the Name of Dean and Chap. *Sanctæ & individuæ Trinit' Norwici*, omitting theſe Words, *(a) ex fundatione Regis Edw.* 6. which Grant was void, as it was objected, by Reaſon of Miſnoſmer of the Corporation, in as much as the Name of the Founder being material, Part of the Name of the Corporation was omitted.

(a) Hob. 124. Cr. Car. 170. Antea 73. b. 2 And. 120, 121, 165, 166, 167. 1 Jones 166, 167. 170. Palm. 92, 494, 495, 503. Poſtea 76. a.

To which it was anſwer'd by the Attorney General, That the ſaid Dean and Chapter had good Eſtate and Right in the ſaid Poſſeſſion for divers Cauſes.

1. Altho' they had (*b*) ſurrendred their Church and Poſſeſſions, yet their Corporation continued, and they remained the Chapter of the Biſhop; For altho' there cannot be a Warden of a Chapel, if the Chapel and all the Poſſeſſions be aliened as ſeems by (*d*) 15 *Aſſ.* 8. becauſe he cannot be Warden of nothing, yet that is not like, nor can be applied to the Caſe now in Queſtion. And for the better apprehending thereof, it was ſaid, That inaſmuch as it was impoſſible that the Church of God ſhould continue without Sects and Hereſies, it was in Chriſtian Policy thought and re-thought neceſſary, that every Biſhop ſhould be (*e*) aſſiſted with a Council, *ſcil.* with a Chapter, and that for two Reaſons:

(*b*) Davis 1. b. 1 Jones 168. 2 Roll's Rep. 453. Palm. 492. Treby's Argument in Quo Warranto 10. Pollexfen's Argument in Quo Warranto 99. Poſtea 76. b.

(*c*) Palm. 493.

(*d*) Palm. 493. 494, 495, 500, 501, 502. 2 Rol. Rep. 453. Davis 1. b. 10 Co. 29. a.

(*c*) Co. Lit. 94. a. 2 Roll's Rep. 453.

1. To conſult with them in Matters of Difficulty, and to aſſiſt him in deciding of Controverſies concerning Religion, to which Purpoſe every Biſhop *habet Cathedram.*

2. To conſent to every Grant, &c. which the Biſhop ſhould make to bind his Succeſſor. For it was not reaſonable to impoſe ſo great a Charge, or to repoſe ſuch Confidence in any ſingle Perſon, or to give Power to one Perſon,

only to prejudice his Succeſſor. And therefore it appears in 25 *Aſſ.* 8. 17 *E.* 3. 40. 10 *E.* 3. 10. 50 *E.* 3. 16. that at the first all the Poſſeſſions were to the (*a*) Biſhop, afterwards a certain Portion was aſſigned to the Chapter; *Ergo*, the Chapter was before they had any Poſſeſſions. And of common Right the Biſhop is (*b*) Patron of all the Prebendaries, becauſe their Poſſeſſions are deriv'd from him; *Et Prœbenda dicitur a prœbendo, quia prœberet auxilium Epiſcopo*; ſo that altho' the Dean and Chapter depart with their Poſſeſſions, yet, for Neceſſity, the Corporation doth remain as well to aſſiſt the Biſhop in his Office, as to give their Aſſent to the Eſtates, &c. which he ſhall make, &c. of his Temporalties; and ſo long as the Biſhoprick remains, they being his Chapter and Council, they may well remain, altho' they have not any Poſſeſſions, and ſhall be now as they were at the firſt, without any Poſſeſſions; and eſpecially when the Biſhoprick may conſiſt wholly of Spirituality, as *Stouf* ſaith in 10 *E.* 3. 1. *b.* in the Caſe of the Biſhop of *Norwich*, and 25 *Aſſ.* 8. by *Fiſher*. And in 17 *E.* 3. 59. the Prior and Friers Carmelites had not any Place nor Poſſeſſions: And *Br. tit.* (*c*) *Corporation* 78. *ann.* 32 *H.* 8. *Fitz.* held, that if an Abbot or Prior and Convent ſold all their Poſſeſſions, yet the Corporation remain'd, which, without Queſtion, is good Law, if they were the Chapter to a Biſhop. And in 15 *Aſſ.* 8. it is held, That if the Body of a Prebend be a Manor, and no more, and the Manor be recovered from him by Title paramount, yet his Corporation doth remain; for he hath *Stallum in* (*d*) *choro*, & *vocem in Capitulo*, and he is a Prebendary, altho' he have not Poſſeſſions; which is all one with our Caſe, for all the Chapter are Prebendaries.

(*a*) 10 Co. 28. b. Palm. 495. Cr. El. 79.

(*b*) Dy. 61 pl. 30. Cr. El. 79.

(*c*) Palm. 501, 502, 493, 494. Dav. 1. b. B. N. C. 170.

(*d*) 1 Jones 168. Palm. 494, 501, 502. 2 Roll's Rep. 453.

Alſo the Attorney ſaid, that it appeared in this very Caſe; that after the Dean and Chapter had granted and ſurrendred their Church and Poſſeſſions to King *E.* 6. the King by his Letters Patents incorporated them *per nomen Decani & Capituli Eccleſiæ Cathedralis Sanctæ & individuæ Trinitatis Norwicenſ. ex fundatione Regis E.* 6. And three Days after, the King by other Letters Patents granted their Church and Poſſeſſions as is aforeſaid; by which and many other like Foundations it appears, That there may be a Dean and Chapter without a Church or any Poſſeſſions; and if the Law ſhould not be ſo, many great Inconveniencies would enſue. And in 10 *Eliz. Dyer* (*e*) 273. altho' the Dean and Chapter of *Wells*, by expreſs Words, granted and ſurrendred *Diaconatum de Wells*, &c. yet it was not thought ſure till the Grant and Surrender was eſtabliſh'd and confirmed by Act of Parliament.

(*e*) Dyer 273. pl. 35, 36, &c. 2 Keb. 167. 2 Roll's Rep. 103. Dav. 46. b. 3. a. Styl. 181. Treby's Argument in Quo Warranto 10.

And altho' all Biſhopricks were of the (*f*) Foundation of the Kings of *England*, and therefore in ancient Time they were donative, and given by the Kings, as appears in 17 *E.* 3.

(*f*) 5 Co. 14. b. Caudry's Caſe. Co. Lit. 134. a. Dav. 81. a.

40. and by the Stat. of 25 *E.* 3. (*a*) *de Proviſoribus*, yet afterwards (as it appears by the ſaid Book and the ſaid (*b*) Act) the Biſhopricks became, by the Grants of the Kings, (*c*) eligible by their Chapters: And therefore, if by the Surrender of the Dean and Chapter, their Corporation ſhould be diſſolv'd, it would introduce three Inconveniencies; 1. To the Biſhop concerning his Aſſiſtance in his Epiſcopal Function: 2. To the Biſhop and others, touching the Confirmation of his Grants: 3. To all the Church in general; for how ſhall the Biſhop be choſen in ſuch Caſe? And therefore, to ſhun ſuch and many other Inconveniencies, it was concluded that the Corporation made by King *H.* 8. did remain, and ſo the Grant made to them by ſuch Name was good. *Vide* (*c*) *F. N. B.* 195. that the Biſhop and Chapter are but one Body, altho' their Poſſeſſions be ſeveral. But to make this Caſe clear, the Attorney moved, that admitting the Corporation newly made by King *E.* 6. was good, and that their old Corporation was ſurrendred, and that the ſaid Words which were omitted, *ſcil.* (*d*) *ex fundatione Regis E.* 6. were material, and not Words of Ornament only; yet, the King's Grant to them, was good; notwithſtanding this Miſnoſmer, by the Stat. of 1 *E.* 6. *cap.* 8. of Confirmations; which Stat. recites, That where King *E.* 6. had made divers Grants, *as well to Bodies Politick and Corporate, as to divers and ſundry of his loving and obedient Subjects*, &c. *in avoiding of which ſundry and many Ambiguities*, &c. *have or might be moved*, &c. *for Lack of true naming of the ſame Bodies, Politick or Corporate*; it is enacted, That all ſuch Grants made, or during his Life to be made, ſhall be good, notwithſtanding any of the Cauſes above-mention'd: *So that the Lack of the true naming of the ſame Corporation*, viz. to which the King had made, or after ſhould make any Grant, is remedied by the expreſs Words of the ſaid Act.

(*a*) 1 Jones 160. 5 Co. 17. a. Caudrey's Caſe.
(*b*) 25 H. 8. c. 22. Co. Lit. 134. a.
(*c*) Fitz. N. B. 194, 195. L.
(*d*) Antea 73. b. 75. a. Hob 124. Cr. Car. 170. 1 Jon. 166, 167. 170. Palm. 492, 494, 495, 503. 2 And. 120, 121, 165, 166, 167.

And after theſe Arguments, on Conference between the Lord Keeper of the Great Seal, and the ſaid Juſtices, and after great Conſideration had by them of the ſaid Points, it was unanimouſly agreed and reſolv'd by them, That if any Imperfection were in the ſaid Tranſlation, that the ſaid Act of 35 *Eliz.* had made it without Queſtion good. And ſo was it reſolv'd, as to this Point, in this very Caſe of the Dean and Chapter of *Norwich*, *Mich.* 35 & 36 *Eliz.* at St. *Albans*, by all the Judges of *England*.

2 And. 121.

2. If the Corporation of the Dean and Chapter made by K. *H.* 8. were gone by the ſaid Surrender made to K. *Ed.* 6. And if the Miſnoſmer were material, and not an additional Ornament; yet it was unanimouſly reſolv'd and agreed, That the ſaid Act of Confirmation of 1 *E.* 6. had made it good, notwithſtanding the ſaid Miſnoſmer; and on theſe two Points they reſolv'd without any Queſtion.

3. It was held by the Lord Keeper of the Great Seal and the Juſtices, That the old Corporation of Dean and Chapter did remain, notwithſtanding the ſaid Surrender (*a*) of their Church and of all their Poſſeſſions.

(*a*) Pollexfen's Argument in Quo Warranto 99. Dav. 1. b. Antea 75. a. 2 Roll. Rep. 453. Palm. 492. Treby's Argument in Quo Warranto 10.

Note, Reader, The great Aſſurance and Eſtabliſhment which is made by the good and ſtrong Act of Parliament of the ſaid moſt Illuſtrious and moſt Noble Queen *Elizabeth*, in the ſaid 35th Year of her Reign, not only of all Foundations of Cathedral Churches and Colleges in any Manner founded or tranſlated, or mention'd to be founded or tranſlated by King *H.* 8. but alſo to all Subjects who have any Eſtate or Intereſt in any of the Poſſeſſions of any Abbot, Prior, or any other ſuch religious Perſons, notwithſtanding they made not any Surrender to King *H.* 8. or that their Surrender was inſufficient; or that the Record thereof be now imbeziled or loſt; and notwithſtanding divers other ſuch like Defects; all which are remedied by the ſaid moſt excellent Act of Parliament, the fatal Plea to all Concealments as to theſe Poſſeſſions. And altho' theſe Reſolutions properly concern the Meridian of the Cathedral Church of *Norwich*; yet they will very well ſerve as well for many other Cathedral Churches, as for divers Colleges in the Univerſities of *Cambridge* and *Oxford*.

FERMOR's

FERMOR's *Caſe*.

Hill. 44 Eliz.

In the Chancery.

IN a Caſe depending in Chancery, between *Richard Fermor*, Eſq; Plaintiff, and *Thomas Smith* Defendant, on the Hearing the Cauſe before Sir *Thomas Egerton*, Knt. Lord Keeper of the Great Seal, the Caſe was ſuch: *Richard Fermor* the Plaintiff being ſeiſed of the Manor of *Somerton* in Fee, by Indenture 6 *Junii* 20 *Eliz.* demiſed a Meſſuage, Parcel of the ſame Manor, to *Thomas Smith*, the Defendant, for 21 Years, rendring the yearly Rent of 3 *l.* during the Term, by Force of which the Defendant entred and was thereof poſſeſſed: He was alſo poſſeſſed of divers other Parcels of the ſaid Manor at the Will of the Plaintiff, rendring 20 *s. per Ann.* and held divers other Parcels of the ſaid Manor by Copy of Court-Roll according to the Cuſtom of the ſaid Manor, rendring 40 *s.* Rent *per Ann.* all which lay in *Somerton:* And the ſaid *Thomas Smith* was ſeiſed in his Demeſne as of Fee of divers Lands in the ſame Town which were his proper Inheritance. And afterwards by his Deed 15 *Octob.* 25 *Eliz.* demiſed the ſaid Houſe and all the ſaid Land which he held for Years, at Will, and by Copy to one *Chappel* for his Life, *Paſch.* 35 *Eliz. Smith* levied a Fine with Proclamations of as many Meſſuages and Lands, as comprehended as well all the Lands which he held for Years, at Will, and by Copy, as his own Inheritance, by Covin and Practice, to bar the Plaintiff of his Inheritance; the Proclamations and five Years paſſed, *Smith* at all Times, before and after the Fine, continu'd in Poſſeſſion, and paid the ſaid ſeveral Rents to the Plaintiff. *Chappel* died, the 21 Years expired, and

Carth. 101, 415.
2 Anderſ. 176.
Jenk. Cent. 253.
Cary's Rep. 20.
Lit. 127.
1 Jones 35.
2 Bulſt. 139.
Winch 116, 117, 118.
2 Bulſt. 318.
9 Co. 105. b.
Raym. 149.
1 Jones 317.

Covin.

and now *Smith* claimed the Inheritance of the Land which he held by Leaſe, at Will, and by Copy, and would have barred the Plaintiff by Force of the ſaid Fine with the Proclamations, and five Years paſt. And the Lord Keeper of the Great Seal thinking and conſidering of the great Miſchiefs which might enſue by ſuch Practices, and on the other Side conſidering that Fines with Proclamations are the general Aſſurances of the Realm, referred this Caſe (being a Thing of great Importance and Conſequence) to the Conſideration of the two Chief Juſtices *Popham* and *Anderſon*; and after Conference between them, they thought it neceſſary that all the Juſtices of *England* and Barons of the Exchequer ſhould be aſſembled for the Reſolution of this Great Caſe. And accordingly in this ſame Term, all the Judges of *England* and the Barons of the Exchequer met at *Serjeants Inn* in *Fleetſtreet*, at two ſeveral Days, where the Caſe was debated among them. And at length it was reſolv'd, by the two Chief Juſtices, *Popham* and *Anderſon*, and by *Gawdy* and *Walmeſley*, and all the other Juſtices of *England* and Barons of the Exchequer, (except two) that the Plaintiff was not (*a*) barred by the ſaid Fine with Proclamations, and that for four Reaſons:

(*a*) 2 And. 176. Jenk. Cent. 253. 1 Jones 35: Winch 116. 9 Co. 105. b. 1 Jones 317.

1. The Makers of the Act of (*b*) 4 *H.* 7. *cap.* 24. did never intend that ſuch Fine levied by Fraud and Practice of Leſſee for Years, Tenant at Will, or Tenant by Copy of Court-Roll, who pretend no Title to the Inheritance, but intend the Diſinheriſon of their Leſſors or Lords, ſhould bar them of their Inheritance, and that appears by the Preamble of the Act of 4 *H.* 7. where it is ſaid, *That Fines ought to be of greateſt Strength to avoid Strifes and Debates*, &c. But when Leſſee for Years, or at Will, or Tenant by Copy of Court-Roll, makes a Feoffment by Aſſent and Covin, that a Fine ſhall be levied, this is not to avoid Strife and Debate, but by Aſſent and Covin to begin Strife and Debate where none was; and therefore the Act doth not extend to eſtabliſh ſuch Eſtate made and created by ſuch Fraud and Practice.

(*b*) 3 Co. 86. b. 87. a. b. 88. a. b. 89. a. 90. a. b. 91. a. 1 And. 170. 2 And. 176. Co. Lit. 262. a. 9 Co. 105. b: 13 Co. 20. Sav. 85, 88, 106, 107.

Carth. 415.

2. It was never the Intent of the Makers of the Act, that thoſe, who could not levy a Fine, ſhould by making of an Eſtate by Wrong and Fraud be enabled by Force of the ſaid Act of 14 *H.* 7. to bar thoſe who had Right by levying of a Fine: For if they themſelves without ſuch fraudulent Eſtate could not levy a Fine to bar them who had the Freehold and Inheritance, certainly the Makers of the Act did not intend that by making of an Eſtate by Fraud and Practice they ſhould have Power to bar them; and ſuch fraudulent Eſtate is as no Eſtate in the Judgment of the Law.

3. As it is ſaid in *Delamer*'s Caſe, *Plowd. Com.* 352. *b.* if any Doubt be conceived on the Words or Meaning of an

an Act of Parliament, it is good to (*a*) conſtrue it according to the Reaſon of the Common Law; but the Common Law doth ſo abhor (*b*) Fraud and Covin, that all Acts as well judicial as others, and which of themſelves are juſt and lawful, yet being mixt with Fraud and Deceit, are in Judgment of Law wrongful and unlawful: *Quod alias bonum & juſtum eſt, ſi per vim vel fraudem petatur, malum & injuſtum efficitur:* And therefore if a Woman hath Title of Dower, which is one of the Things favoured in Law, and by (*c*) Covin between her and another, cauſes a Stranger to diſſeiſe the Tenant of the Land, to the Intent that ſhe may bring a Writ of Dower againſt him, which is done accordingly, and the Woman recovers againſt him on a juſt and good Title, yet the whole is void, and of no Force to bind the Terre-tenant; *a fortiori* in the principal Caſe when the Leſſee for Years makes a Feoffment by Covin, which amounts to a Wrong and Diſſeiſin, a Fine levied by him who is (*d*) *particeps criminis*, and who had not, nor pretended to have any Right to the Land, ſhall not be a Bar to the Leſſor. And that Recoveries in Dower, or any other real Action, upon a good Title againſt the Tenant who comes to the Land by Wrong and Covin, are void and of no Force, appears by 41 *Aſſ.* 28. 44 *E.* 3. 46. *a.* 25 *Aſſ.* 1. 22 *Aſſ.* 92. 11 *E.* 4. 2. *a.* 15 *E.* 4. 4. *b.* 7 *H.* 7. 11. *b.* 18 *H.* 8. 5. *a.* 12 *Eliz. Dyer* (*f*) 295. For altho' his Right be lawful, and he hath purſued his Recovery by Judgment in the King's Court, yet his Covin makes all that unlawful and wrongful, and yet Recoveries, and eſpecially on a good Title, are much favoured in Law: Alſo the Right and Inheritance of Feme Coverts and Infants, are much favoured in Law; and yet if a Feme Covert, or an Infant be of (*g*) Covin and Conſent, that the Diſcontinuee ſhall be diſſeiſed, and that the Diſſeiſor ſhall enfeoff them; and all this is done accordingly, they are not remitted, as appears by *Littleton*, Chap. *Remitter* 151 & 19 *H.* 8. 12. *b.* And there it is held by ſix Juſtices, that in ſuch Caſe, if the (*h*) Diſſeiſor enters by Covin to the Intent to enfeoff the Infant, altho' the Infant be not of Covin, *&c.* yet he ſhall not be remitted, becauſe he who is in by him who makes the Covin ſhall be in the ſame Plight as he who did the covenous Act. And it is agreed in 19 *H.* 8. 12. *b.* that if a Man makes a Diſſeiſin to the (*i*) Intent to make a Feoffment with Warranty, altho' he makes the Feoffment 20 Months after, yet it is a Warranty which commences by Diſſeiſin.

So if one (*k*) makes a Gift in Tail to another, and the Unkle of the Donor diſſeiſſes the Donee, and makes a Feoffment with Warranty, the Uncle dies, and the Warranty deſcends on the Donor, and afterwards the Donee dies without Iſſue, the Donor brings a *Formedon* in the Reverter, and the Tenant pleads the Feoffm. with War'ty, the Demandant ſhall avoid

(*a*) Poſtea fo. 85. b.

(*b*) Poſtea fo. 82. a.

(*c*) Co.Lit. 35. a. 5 Co. 30. b. 11 E. 4. 2. a. 1 Sid. 21. 6 Co. 58. a. 8 Co. 132. b. 15 E. 44. b. Co. Lit. 357. b. Br. Dower 15. 44 E. 3. 46. a. Br. Colluſion 20. Lane 44. Fitz. Dower 42. 1 Rol. 549. 44 Aſſ. 29. 2 Rol. Rep. 17. 7 H. 2. 11. b. Perk. Sect. 396. Plowd. 51. a. 18 H. 8. 5. a. Plowd. 54. b. Poph. 64. 100.

(*d*) 5 Co. 79. b. Co. Lit. 366. b. 14 H. 8. 8. a.

(*f*) Poſtea 78. b. 82. a. Dy. 295. pl. 8, 9, 10, &c. Lane 44.

(*g*) Co.L. 357. a. 18 E. 4. 2. b. Lit. Sect. 678. Lit. 152. b. 5 Co. 80. b.

(*h*) Plow. 48. b. Br. Remitter 1. Lane 44.

(*i*) 5 Co. 79. b. Cr. Car. 483, 484. 1 Jones 397, 398.

(*k*) Co. Lit. 366. b. 5 Co. 80. a. 31 E. 3. Garranty 28.

avoid it, becauſe it began by Diſſeiſin, and yet the Diſſeiſin was not immediately done to the Donor, but to the Donee; but by it his Reverſion was deveſted; and yet Warranties are much favoured in Law. And it appears in 8 *Eliz.* 249. *Dyer*, that a *Vacat* was made of a (*a*) Recovery in the Common Pleas had by Covin. The Law hath ordained, That he, who will be aſſured of his Goods, ſhall buy them in open Market, and that Sale will bind all Strangers, as well as the Seller, and yet it is agreed in 33 *H.* 6. 5. *a. b.* That a Sale in (*b*) Market overt ſhall not bind him who hath a Right to the Goods, if the Sale be by Fraud, or the Vendee hath Notice that the Property of the Goods was another's. So the Law hath ordained the Court of Com. Pleas as a Market Overt for aſſurances of Land by Fine, ſo that he who will be aſſured of his Land not only againſt the Seller, but all Strangers, it is good for him to paſs it in this Market overt by Fine; for as it is ſaid, (*c*) *finis finem litibus imponit*: And yet Covin and Deceit in the Caſe at Bar will void it. In 4 *E.* 2. *Cui in vita* 22. it is held, That a Reſignation made by an Abbot by Covin ſhould not abate the Writ. 34 *E.* 1. *Warranty* 88. & 19 *E.* 2. *Aſſets* 3. & 31 *E* 1. *Voucher* 301. a covenous Conveyance that (*d*) Aſſets ſhould not deſcend, is nothing worth. And it appears in (*e*) 17 *E.* 3. 59. & 21 *E.* 3. 3. 46. that an Eſtate made to the K. and by his Let. Patent granted over, and all this by Covin between him who granted to the King and the Patentee, to make an Evaſ. out of the Stat. of Mortm. ſhall not bind, but ſhall be repealed. And 17 *Eliz. Dy.* 339. (*f*) a Preſentat. obtained by Colluſ. is void. And 17 *Eliz. Dy.* 339. Letters of (*g*) Adminiſtration obtained by Colluſ. are void, and ſhall not repeal a former Adminiſtration: See 13 *Eliz. Dyer* (*h*) 295. many Caſes there put concerning Covin.

(*a*) Dyer 249. pl. 841. 1 Roll's 807. 2 Inſt. 215.

(*b*) Plow. 46. a 55. a. Poſt fo. 33. a. Br. Trial paſs 26. Br. Colluſion 2. Br. Property 6. Fitz. Replicat. 15. 2 Inſt. 713. 14 H. 8. 8. b.

(*c*) Co. Lit. 120. b. 262. a. 3 Bulſt. 144. Hardreſs 121.

(*d*) 1 Rol. Rep. 169. Dy. 295. pl. 16.

(*e*) Lane 47.

(*f*) Dy. 339. pl. 47. 6 Co. 29. b. 1 Anderſ. 38. 2 Rol. 183, 188. 190 354. 1 Rol. Rep. 236, 467. Lane 104.

(*g*) 1 Siderfin 21. 6 Co 19. a. 8 Co. 135. b. 143. b. Cr. El. 460. 2 Keb. 12.

(*h*) Antea 78. a.

And thereupon it was concluded, That if a Recovery in Dower, or other real Action, if a Remitter, to a Feme Covert, or an Infant, if a Warranty, if a Sale in Market overt, if the King's Let. Patents, if a Preſentat. Adminiſtrat. *&c. ſcil.* Acts Temporal and Eccleſiaſtical, ſhall be avoided by Covin; by the ſame Reaſon a Fine in the principal Caſe levied by Fraud and Covin, as is aforeſaid, ſhall not bind; for * *fraus & dolus nemini patrocinari debent.*

* Palm. 158.

Note, Reader, in 33 & 34 *Eliz.* in the K.'s B. betw. *Rob. Laune* Plaint. and *Will. Toker* Defend. *in Ejectione firmæ*, of Lands in *Ilfordcoom* in the County of *Devon*, it was adjud. that where (*i*) Tenant for Life levied a Fine with Proclamat. and 5 Years paſs in his Life, that the Leſſor ſhould have 5 Years to make his Claim after the Death of the Leſſee; for altho this Statute of 4. *H.* 7. hath a ſaving for the Leſſor in ſuch Caſe, yet the ſaving is of ſuch Right (*as firſt ſhall grow, remain*, &c.) and the Right firſt accrued to the Leſſor

(*i*) 1 Jones 35. Cr. El. 220, 254. Cr. Car. 157. 1 Jones 211. Moor 71. 1 Leon. 40. Plowd. 373. b.

Leſſor after the Fine and the Forfeiture; but notwithſtanding that, in as much as by the Covin of the Leſſee, he in Reverſion or Remainder might be barred of his Reverſion or Remainder (for they do not expect to enter till after the Death of the Leſſee) and eſpecially when the Leſſee hath Lands of his own Inheritance in the ſame Town, (as in the Caſe at Bar he had) there the Leſſor ſhall have 5 Years after the Death of the Leſſee.

So it was agreed in the ſame Caſe, if * Tenant for Life makes a Feoffment in Fee to one who hath Lands in the ſame Town, and the Feoffee levies a Fine with Proclamations, it ſhall not bind the Leſſor, but he ſhall have 5 Years after the Death of the Leſſee, for the Leſſor cannot know of what Land the Fine is levied, for he is not Party to the Indent. or Agreement between the Conuſor and Conuſee: So in the ſaid Caſe, the Judges make Conſtruction (*a*) againſt the Letter of the Statute in Salvation of the State and Inheritance of him in the Reverſion. And ſo it hath been adjudged before in (*b*) *Some*'s Caſe in the Com. Pleas, in Sir *James Dyer*'s Time, as *Plowden* told me. Alſo it was ſaid That if Leſſee for Years makes a Feoffment in Fee by Practice and Covin, that the Feoffee ſhould levy a Fine with Proclamations to another (the Feoffee having other Lands in the ſame Town) and all this done accordingly; and yet the Leſſee doth continually pay the Rent to the Leſſor, it ſhall not bind the Leſſor for the Reaſons aforeſaid.

* 1 Brownl. 230. 2 Rol. Rep. 17.

(*a*) 2 And. 176.

(*b*) 1 Leon. 214. Cro. El. 254.

Laſtly, The Judges in this Reſolution did greatly reſpect the general Miſchief which would enſue if ſuch Fines levied by Practice and Covin of thoſe who had the particular Intereſts, ſhould bar thoſe who had the Inheritance, and eſpecially in the Caſe at Bar, when after the Fine levied, the Conuſor continually payed the Rent to the Leſſor, which made the Fraud and Practice apparent, and therefore the Leſſor was ſecure, and had no Cauſe of any Fear or Doubt of ſuch Fraud. But it was reſolved, That if *A.* purchaſes Land of *B.* by Feoffment, or Bargain and Sale, and enrols it, and afterwards perceiving that *B.* had but a defeaſible Title, and that *C.* had Right to it, *B.* levies a Fine with Proclamations, to a Stranger, or takes a Fine from another with Proclamations, to the Intent to bar the Right of *C.* this Fine ſo levied by Conſent ſhould bind, for nothing was done in this Caſe which was not lawful; and the Intent of the Makers of the Act of 4 *H.* 7. was to avoid Striſes and Debates, and by expreſs Purview ſhould bind all Strangers who do not purſue their Right by Action, or Entry within five Years. So if one pretending Title to Land enters, and diſſeiſes another, and afterwards with Intent to bind the (*c*) Diſſeiſee, levies a Fine with Proclamations, this Fine ſhall bind the Diſſeiſee by the expreſs Purview of the Act, if he neither enters nor purſues

(*c*) Jenk. Cent. 254. Poſt. 87. b. 1 Brownl. 230. Cro. El. 896.

purſues his Action within five Years; and this cannot be called levying by Covin, becauſe the levying of the Fine is lawful, and the Diſſeiſee may re-enter, or bring his Action within the five Years.

The fourth Reaſon was, Becauſe the Leſſee had contriv'd his Fraud and Deceit in ſo ſecret a Manner, that he had deprived the Leſſor of the Remedy which the Stat. gave him, that is to ſay, to make his Entry, or bring his Action within the five Years: For how could he make his Entry or bring his Action, when he knew not of the Feoffment which did the Wrong? And as to the Fine, inaſmuch as the Leſſee had Lands in Fee-ſimple, in the ſame Town, every one will preſume that the Fine would be levied of that whereof it might be lawfully levied. And although it contained more Acres than his own Land, that is uſual almoſt in all Fines, and peradventure the Leſſor did not know the juſt Quantity of the Leſſee's proper Land, for that doth not appertain to him; and therefore it would be unreaſonable to give him Benefit in this Caſe of the Non-claim of the Leſſor, when the Wrong and Cov. of the Leſſee is the Cauſe of his Non-claim, and a Man ſhall not take Advantage of his own Wrong or Covin. The Poſſeſſ. of the Leſſee is not any mean for the Leſſor to take any Notice of this Wrong, for he comes to the Poſſeſſ. of the Land by Grant or Demiſe lawfully; and after the Feoffment he continues in the Poſſeſſion as Leſſee, for he pays his Rent as a Leſſee ought, yea, the Poſſeſſion of the Leſſee, and the Payment of the Rent, was the Cauſe that the Leſſor neither knew nor ſuſpected the Fraud.

Alſo it was ſaid, That the Fraud and Covin in this Caſe made it the more odious, becauſe between the Leſſor and Leſſee, and the Lord and his Copyholder, there is a Truſt and Confidence, and therefore a Leſſee for Years, and a Copyholder ſhall do Fealty, which is a great Obligat. of Truſt and Confidence, and Fraud and Deceit by him who is truſted, is moſt odious in Law. And if the Makers of this Act had been aſked, If their Intent was, that ſuch a Fine ſo levied by ſuch Practice and Covin, ſhould bind the Leſſors, they would have anſwered, God forbid that they ſhould intend to patronize any ſuch Iniquity practiſed and compaſſed by thoſe in whom there was Truſt and Confidence repoſed. But when a Diſſeiſor (altho' he gains the Poſſeſſion by Wrong) levies a Fine with Proclamation, yet it ſhall bind as is aforeſaid, for a Diſſeiſor *venit tanquam in arena*, and it is not poſſible but that the Diſſeiſee to whom the Wrong is done, and who hath loſt his Poſſeſſion, ſhould be Conuſant of it; and therefore it will be his own Folly if he makes not his Claim, and not accompany'd with Fraud and Practice by one who came to the Poſſeſſion lawfully, by Grant or Demiſe, and who had a Truſt repoſed in him by his Leſſor or Grantor, which Fraud and Practice is ſo ſecretly (*a*) contrived, that the Leſſor

(*a*) 2 Rol. Rep. 17.

ſor by common Preſumption could not have Notice to make his Claim, becauſe his Leſſee continued in Poſſeſſion, and payed his Rent, as a Leſſee ought. And as to that which was objected, That it would be miſchievous to avoid Fines on ſuch bare Averments: It was anſwered, That it would be a greater Miſchief, and principally in theſe Days (in which as the Poet ſaith,

——— Fugere pudor, rectumque, fideſque,
In quorum ſubiere locum fraudeſque, dolique,
Inſidiæque, & vis, & amor ſceleratus habendi.)

if Fines levied by ſuch Covin and Practice ſhould bind; ſuch Objection may well be made; (*a*) ſo if a Fine be levied to ſecret Uſes to deceive a Purchaſor, an Averment of Fraud may be taken againſt it by the Stat. of 27 *Eliz. cap.* 4. So if a Fine be levied on an uſurious Contract, it may be avoided by (*b*) Averment by the Statute of 13 *Eliz. cap.* 8. And Sir *Tho. Egerton* Lord Keeper of the Great Seal, commended this Reſolution of the Juſtices, and agreed in Opinion with them.

(*a*) Plowd. 49. b. 7 Co. 39. b.

(*b*) Jenk. Cent. 254. 9 Co. 26. b.

[*Note alſo, No* Fine *can avoid an antecedent Charge, but the Eſtate will be bound notwithſtanding ſuch* Fine, &c.]

TWYNE's *Case.*

Mich. 44 Eliz.

In the Star-Chamber.

Moor 638. Lane 44, 45, 47. Co. Lit. 3. b. 76. a. 290. a. 3 Keb. 259. See the Stat. 27. Eliz. cap. 4. poſt. 2. b.

IN an Information by *Coke* the Queen's Attorney General, againſt *Twyne* of *Hampſhire*, in the Star-Chamber, for making and publiſhing of a fraudulent Gift of Goods: The Caſe on the Stat. of 13 *Eliz. cap.* 5. was ſuch; *Pierce* was indebted to *Twyne* in 400 *l.* and was indebted alſo to *C.* in 200 *l.* *C.* brought an Action of Debt againſt *Pierce*, and pending the Writ, *Pierce* being poſſeſſed of Goods and Chattels of the Value of 300 *l.* in Secret made a general Deed of Gift of all his Goods and Chattels real and perſonal whatſoever to *Twyne*, in Satisfaction of his Debt; and notwithſtanding that *Pierce* continued in Poſſeſſion of the ſaid Goods, and ſome of them he ſold; and he ſhore the Sheep, and marked them with his own Mark: And afterwards *C.* had Judgment againſt *Pierce*, and had a *Fieri Facias* directed to the Sheriff of *Southampton*, who by Force of the ſaid Writ came to make Execution of the ſaid Goods; But divers Perſons, by the Command of the ſaid *Twyne*, did with Force reſiſt the ſaid Sheriff, claiming them to be the Goods of the ſaid *Twyne* by Force of the ſaid Gift; and openly declared by the Commandment of *Twyne*, That it was a good Gift, and made on a good and lawful Conſideration. And whether this Gift on the whole Matter, was fraudulent and of no Effect by the ſaid Act of (*a*) 13 *Eliz.* or not, was the Queſtion. And it was reſolved by Sir *Thomas Egerton* Lord Keeper of the Great Seal, and by the Chief Juſtices *Popham* and *Anderſon*, and the whole Court of Star-Chamber, That this Gift was fraudulent, within the Statute of 13 *Eliz.* And in this Caſe divers Points were reſolv'd:

(*a*) 5 Co. 60. a. b. 6 Co. 18. b. 10 Co. 56. b. 3 Inſt. 152. Co. Lit. 3. b. 76. a. 290. a. b. 13 El. c. 5. 2 Leon. 8, 9. 47, 223, 308, 309. 3 Leon 57. Latch 222.

1. That this Gift had the Signs and Marks of Fraud.

2 Rol. Rep. 493. Palm. 415. Cr El. 233, 234, 645, 810. Cro. Jac. 270, 271. Dy. 295. pl. 17. 351. pl 23. 2 Bulſt. 226. Raſtal. Entries 207. b. Lane 47. 103. Hob. 72. 166. Moor 638. Doct. pla. 200. Yelv. 196, 197. 1 Brownl. 111. Co. Ent. 162. a.

1. Becauſe the Gift is general, without Exception of his (*a*) Apparel, or any Thing of neceſſity; for it is commonly ſaid, *quod* (*b*) *doloſus verſatur in generalibus.* (*a*) Godb. 398. (*b*) 2 Bulſtr. 226. 2 Co. 34. a.

2. The Donor continued in Poſſeſſion, and uſed them as his own; and by reaſon thereof he traded and trafficked with others, and defrauded and deceived them. 1 Rol Rep. 157. Moor 321.

3. It was made in ſecret, *Et dona clandſunt ſemp' ſuſpicioſa.*

4. It was made pending the Writ.

5. Here was a Truſt between the Parties, for the Donor poſſeſſed all, and uſed them as his proper Goods, and Fraud is always apparelled and clad with a Truſt, and a Truſt is the Cover of Fraud.

6. The Deed contains, That the Gift was made honeſtly, truly, and *bona fide*; *Et clauſulæ inconſuet' ſemper inducunt ſuſpicionem.*

Secondly, It was reſolved, That notwithſtanding here was a true Debt due to *Twyne*, and good Conſiderat. of the Gift, yet it was not within the Proviſo of the ſaid Act of 13 *Eliz.* by which it is provided, That the ſaid Act ſhall not extend to any Eſtate or Intereſt in Lands, &c. Goods or Chattels made on a good Conſideration, and *bona fide*; for altho' it is on a true and good Conſideration, yet it is not *bona fide*, for no Gift ſhall be deem'd to be *bona fide* within the ſaid Proviſo which is accompany'd with any Truſt: As if a Man be indebted to five ſeveral Perſons, in the ſeveral Sums of 20 *l.* and hath Goods of the Value of 20 *l.* and makes a Gift of all his Goods to one of them in Satisfaction of his Debt, but there is a truſt between them, that the Donee ſhall deal (*c*) favourably with him in regard of his poor Eſtate, either to permit the Donor, or ſome other for him, or for his Benefit, to uſe or have Poſſeſſion of them, and is contented that he ſhall pay him his Debt when he is able; this ſhall not be called *bona fide* within the ſaid Proviſo; for the Proviſo ſaith on a good Conſideration, and *bona fide*; ſo a good Conſideration doth not ſuffice, if it be not alſo *bona fide*: And therefore, Reader, when any Gift ſhall be to you in Satisfaction of a Debt, by one who is indebted to others alſo; 1. Let it be made in a publick Manner, and before the Neighbours, and not in Private, for Secrecy is a Mark of Fraud. 2. Let the Goods and Chattels be appraiſed by good People to the very Value, and take a Gift in Particular in Satisfaction of your Debt. 3. Preſently after the Gift, take the Poſſeſſion of them, for continuance of the Poſſeſſion in the Donor, is a Sign of Truſt. And know, Reader, that the ſaid Words of the Proviſo, on a good Conſideration, and *bona fide*, do not extend to every Gift made *bona fide*; and therefore there are two Manners of Gifts on a good Conſideration, *ſcil.* Conſiderat. of Nature of Blood, and a valuable Conſiderat. As to the firſt in the Caſe before put, if he who is indebted to five ſeveral Perſons, to each Party in 20 *l.* in Conſiderat. of natural Affection, gives (*c*) Goldsb. 161. Vide ante 36 a. b. Cr. Jac. 127. Palm. 214.

all his Goods to his Son, or Couſin, in that Caſe, foraſmuch as others ſhou'd loſe their Debts, *&c.* which are Things of Value, the Intent of the Act was, that the Conſid. in ſuch Caſe ſhould be valuable; for Equity requires, that ſuch Gift, which defeats others, ſhould be made on as high and good Conſiderat. as the Things which are thereby defeated are; and it is to be preſumed, that the Father, if he had not been indebted to others, would not have diſpoſſeſſed himſelf of all his Goods, and ſubjected himſelf to his Cradle; and therefore it ſhall be intended, that it was made to defeat his Creditors: And if Conſideration of Nature or Blood ſhould be a good Conſiderat. within this Proviſo, the Stat. would ſerve for little or nothing, and no Creditor would be ſure of his Debt. And as to Gifts made *bona fide*, it is to be known, that every Gift made *bona fide*, either is on a Truſt between the Parties, or without any Truſt; every Gift made on a Truſt is out of this Proviſo; for that which is betwixt the Donor and Donee, called (*a*) a Truſt *per nomen ſpecioſum*, is in Truth, as to all the Creditors, a Fraud, for they are thereby defeated and defrauded of their true and due Debts. And every Truſt is either expreſſed, or implied: An expreſs Truſt is, when in the Gift, or upon the Gift, the Truſt by Word or Writing is expreſſed: A Truſt implied is, when a Man makes a Gift without any Conſiderat. or on a Conſideration of Nature, or Blood only: And therefore, if a Man before the Stat. of 27 *H.* 8. had bargained his Land for a valuable Conſiderat. to one and his Heirs, by which he was ſeiſed to the Uſe of the Bargainee; and afterwards the Bargainor, without a Conſiderat. infeoffed others, who had no Notice of the ſaid Bargain; in this Caſe the Law implies a Truſt and Confidence, and they ſhall be ſeiſed to the Uſe of the Bargainee: So in the ſame Caſe, if the Feoffees, in Conſideration of Nature, or Blood, had, without a valuable Conſiderat. enfeoffed their Sons, or any of their Blood who had no Notice of the firſt Bargain, yet that ſhall not toll the Uſe raiſed on a valuable Conſideration; for a Feoffm. made only on Conſiderat. of Nature or Blood, ſhall not toll an Uſe raiſed on a valuable Conſiderat. but ſhall toll an Uſe raiſed on Conſiderat. of Nature, for both conſiderat. are *in æquali jure*, and of one and the ſame Nature.

(*a*) 6 Co. 72. b.

2 Roll. 779.

2 Roll. 779.

And when a Man, being greatly indebted to ſundry Perſons, makes a Gift to his Son, or any of his Blood, without Conſideration, but only of Nature, the Law intends a Truſt betwixt them, *ſcil.* that the Donee would, in Conſideration of ſuch Gift being voluntarily and freely made to him, and alſo in Conſiderat. of Nature, relieve his Father, or Couſin and not ſee him want who had made ſuch Gift to him, *Vide* 33 *H.* 6. 33. by *Priſot*, if the Father enfeoffs his Son and Heir apparent within Age *bona fide*, yet the Lord ſhall have the Wardſhip of him: So note, valuable Conſideration is a good Conſideration within this Proviſo; and a Gift made *bona fide*, is a Gift made without any Truſt either expreſſed or implied:

33 H. 6. 16.
7 Co 39. b.

By which it appears, that as a Gift made on a good Conſideration, if it be not alſo *bona fide*, is not within the Proviſo; ſo a Gift made *bona fide*, if it be not on a good Conſideration is not within the Proviſo; but it ought to be on a good Conſideration, and alſo *bona fide*.

To one who marvelled what ſhould be the Reaſon that Acts and Stat. are continually made at every Parliam. without Intermiſſion, and without End; a wiſe Man made a good and ſhort Anſwer, both which are well compoſed in Verſe.

Quæritur, ut creſcunt tot magna volumina Legis?
In promptu cauſa eſt; creſcit in orbe dolus.

And becauſe Fraud and Deceit abound in theſe Days more than in former Times, it was reſolved in this Caſe by the whole Court, that all Statutes made againſt Fraud ſhould be liberally and beneficially expounded to ſuppreſs the Fraud. Note, Reader, according to their Opinions, divers Reſolutions have been made.

Between *Pauncefoot* and *Blunt*, in the Exchеq. Chamber, *Mich.* 35 & 36 *El.* the Caſe was: *Pauncefoot* being indicted for Recuſancy, for not coming to Divine Service, and having an Intent to flee beyond Sea, and to defeat the Queen of all that might accrue to her for his Recuſancy or Flight, made a Gift of all his Leaſes and Goods of great Value, coloured with feigned Conſiderat. and afterwards he fled beyond Sea, and afterwards was Outlaw'd on the ſame Indictment: And whether this Gift ſhould be void to defeat the Queen of her Forfeiture, either by the Com. Law, or by any Stat. was the Queſtion: And ſome conceived, that the Com. Law, which (*a*) abhors all Fraud, would make void this Gift as to the Queen, *vide Mich.* 12 & 13 *El. Dyer* (*b*) 295. 4 & 5 *P. & M.* 160. And the Stat. of (*c*) 50 *E.* 3. *cap.* 6. was conſider'd; but that extends only in Relief of Creditors, and extends only to ſuch Debtors as flee to Sanctuaries, or other privileg'd Places: But ſome conceived, that the Stat. of (*d*) 3 *H.* 7. *cap.* 4. extends to this Caſe. For altho' the Preamble ſpeaks only of Creditors; yet it is provided by the Body of the Act generally, that all Gifts of Goods and Chattels made, or to be made on Truſt to the Uſe of the Donor, ſhall be void and of no Effect, but that is to be intended as to all Strangers who are to have Prejudice by ſuch Gift, but between the Parties themſelves it ſtands good: But it was reſolved by all the Barons, that the Stat. 13 *Eliz. c.* 5. (*e*) extends to it, for thereby it is enacted and declared, that all Feoffm. Gifts, Grants, &c. *to delay, hinder or defraud Creditors, and others, of their juſt and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs*, ſhall be void, &c. So that this Act doth not extend only to Creditors, but to all others who had Cauſe of Action, or Suit, or any Penalty, or Forfeiture, &c.

Lane 44, 47. Pauncefoot's Caſe.

(*a*) Antea 78. a.
(*b*) Antea 78. a. b. Dyer 295. pl. 8, 9, 10, &c. Lane 44.
(*c*) Co. Lit. 76. a.
(*d*) Cro. El. 291, 292. Lane 45.
(*e*) Co. Lit. 3. b. 76. a. 290. a. b. 3 Inſt 152. 5 Co. 60. a. b. 6 Co. 18. b. 10 Co. 56. b. Co. Ent. 162. a. 1 Leon. 47, 308, 309. 2 Leon. 8, 9, 223. 3 Leon. 57. Latch 222. 2 Roll. Rep. 493. Palm. 415. Cr. El. 233, 234, 645, 810. Cr. Jac. 270. 2 Bulſt. 226. Hob. 72, 166. Yelv. 196, 197. 1 Brownl. 11. Dyer 295. pl. 17, 351. pl. 23. Raſtal's Fraudulent Deeds. 1 Raſt. Ent. 207. b. Lane 47, 103. Moor 638. Doct. pl. 200.

And it was reſolved, that this Word (Forfeiture) ſhould not be intended only of a Forfeiture of an Obligation, Recogniſance, or ſuch like (as it was objected by ſome, that it ſhould, in reſpect that it comes after Damage and Penalty) but alſo to every thing which ſhall by Law be forfeit. to the King or Subj. And theref. if a Man, to prevent a Forf. for Felony, or by Outlaw. makes a Gift of all his Goods, and afterwards is attainted or outlaw'd, theſe Goods are (*a*) forfeit. notwithſtanding this Gift: The ſame Law of Recuſants, and ſo the Stat. expounded beneficially to ſuppreſs Fraud. Note well this Word (*b*) (declare) in the Act of 13 *Eliz.* by which the Parliament expounded, that this was the (*c*) Com. Law before. And according to this Reſolution it was decreed, *Hill.* 36 *Eliz.* in the Exchequer Chamber.

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

(*b*) Co. Lit. 76. a. 290. b.
(*c*) Hard. 397.

Mich. 24 & 43 *Eliz.* in the Com. Pleas, on Evidence to a Jury, between *Standen* (*d*) and *Bullock*, theſe Points were reſolv'd by the whole Court on the Stat. of 27 *El. c.* 4. *Walmſley* J. ſaid, That Sir *Chriſt. Wray*, late C.J. of *Eng.* reported to him, that he, and all his Comp. of the K.'s B. were reſolv'd, and ſo directed a Jury on Evidence before them; that where a Man had convey'd his Land to the Uſe of himſelf for Life, and afterw. to the Uſe of divers others of his Blood, with a future Power of Revocation, as after ſucl. Feaſt, or after the Death of ſuch one; and afterwards, and before the Power of Revocation began, he, for valuable Conſiderat. bargained and ſold the Land to another and his Heirs; this Bargain and Sale is within the (*e*) Remedy of the ſaid Stat. For although the Stat. ſaith, *The ſaid firſt Conveyance not by him revoked, according to the Power by him reſerved*, which ſeems by the literal Senſe to be intended of a preſent Power of Revocat. for no Revocation can be made by Force of a future Power 'till it comes in *eſſe*: Yet it was held that the Intent of the Act was, that ſuch voluntary Convey. which was originally ſubject to a Power of Revocat. be it *in præſenti*, or *in futuro*, ſhould not ſtand againſt a Purchaſor *bona fide* for a valuable Conſideration; and if other Conſtruction ſhould be made, the ſaid Act would ſerve for little or no Purpoſe, and it would be no difficult Matter to evade it: So if *A.* had reſerved to himſelf a Power of Revocat. with the aſſent of *B.* and afterwards *A.* bargained and ſold the Land to another, this Bargain and Sale is good, and within the Remedy of the ſaid Act; for otherwiſe the good Proviſion of the Act, by a ſmall Addition, and evil Invention, would be defeated.

Standen and Bullock's Caſe (*d*) Moor 605, 615. Bridgm. 23 5 Co. 60. b. Palm 217. Lane 22. 2 Jones 95.

(*e*) 1 Sid. 133.

And on the ſame Reaſon it was adjudg'd, 38 *Eliz.* in the Common Pleas, between *Lee* and his Wife, Executrix of one *Smith* Plaint. and *Mary* (*f*) *Colſhil*, Executrix of *Tho. Colſhil*, Defend. in Debt on an Obligation of 1000 Marks, *Rot.* 1707. the Caſe was, *Colſhil* the Teſtator had the Office of the Queen's Cuſtomer, by Letters Patents, to him and his Deputies; and by Indenture between him and *Smith*, the Teſtator of the Plaint. and for 600 *l.* paid, and 100 *l. per Ann.*

Colſhil's Caſe. (*f*) 2 And. 55, 107, Godb. 213 Cro. El. 529. Moor 857 Ley 2, 75, 79.

to be paid during the Life of *Colſhil*, made a Deputation of the ſaid Office to *Smith*; and *Colſhil* covenanted with *Smith*, that if *Colſhil* ſhould die before him, that then his Executors ſhould repay him 300 *l.* And divers Covenants were in the ſaid Indenture concerning the ſaid Office, and the enjoying of it: And *Colſhil* was bound to the ſaid *Smith* in the ſaid Obligation to perform the Covenants; and the Breach was alledged in the Non-payment of the ſaid 300 *l.* foraſmuch as *Smith* ſurvived *Colſhil*: And although the ſaid Covenant to repay the 300 *l.* was lawful, yet foraſmuch as the reſt of the Covenants were againſt the Statute of (*a*) 5 *E.* 6. *cap.* 16. and if the Addition of a lawful Covenant ſhould make the Obligation of Force as to that, (*b*) the Statute would ſerve for little or no Purpoſe; for this Cauſe it was adjudged, that the Obligation was utterly void.

(*a*) Style 29. Cro. El. 529. Cro. Jac. 269. Hob. 75. Co. Lit. 234. a. 12 Co. 78. 3 Inſt. 148, 154. 3 Keb. 26, 659, 660, 717, 718. 1 Brownl. 70, 71. 2 And. 55, 107. 3 Bulſt. 91. 3 Leon. 33. 1 Rol. Rep. 157, 236. Goldsb. 189.

2. It was reſolved, That if a Man hath Power of Revocation and afterwards, to the Intent to defraud a Purchaſor, he levies a (*c*) Fine, or makes a Feoffment, or other Conveyance to a Stranger, by which he extinguiſhes his Power, and afterwards bargains and ſells the Land to another for a valuable Conſideration, the Bargainee ſhall enjoy the Land, for as to him, the Fine, Feoffment, or other Conveyances by which the Condition was extinct, was void by the ſaid Act; and ſo the firſt Clauſe, by which all fraudulent and covenous Conveyances are made void as to Purchaſers, extends to the laſt Clauſe of the Act, *ſcil.* when he who makes the Bargain and Sale had Power of Revocation. And it was ſaid, that the Statute of 27 *El.* hath made voluntary Eſtates made with Power of Revocation as to Purchaſ. in equal Degree with Conveyances made by Fraud and Covin to defraud Purchaſers.

(*b*) 2 And. 56, 57, 108. 1 Mod. Rep. 35, 36. Hob. 14. 11 Co. 27. b. 2 Roll's 28. Co. Lit. 234. a. 2 Jones 90, 91. Cro. El. 529, 530. Cro. Car 338. Godb. 212, 213. 1 Brownl. 64. Plowd. 68. b. Moor 856, 857. Ley 75, 79.

Between (*d*) *Upton* and *Baſſet* in Treſpaſs, *Trin.* 37. *El.* in the Common Pleas, it was adjudg'd, That if a Man makes a Leaſe for Years, by Fraud and Covin, and afterwards make other Leaſe *bona fide*, but without Fine or Rent reſerved, that the ſecond Leſſee ſhould not avoid the firſt Leaſe.

For firſt it was agreed, That by the Common Law an Eſtate made by Fraud ſhould be avoided only by him who had a former Right, Title, Intereſt, Debt or Demand, as 33 *H.* 6. a Sale in open (*e*) Market by Covin ſhall not Bar a Right which is more ancient; nor a covenous Gift ſhall not defeat Execution in reſpect of a former Debt, as it is agreed in 22 *Aſſ.* 72. but he who hath Right, Title, Intereſt, Debt or Demand, more puiſne ſhall not avoid a Gift or Eſtate precedent by Fraud by the Common Law.

(*c*) 1 Co. 112. b. 174. a. Co. Lit. 237. a. Hob. 337, 338. Moor 605. 2 Rol Rep. 337, 496. Winch 65.

(*d*) Co. Ent. 676. b. nu. 19. Cro. El. 444, 445. Lane 45. Upton and Baſſet's Caſe.

2. It was reſolv'd, That no Purch. ſhould avoid a preced. Cov. made by Fraud and Covin, but he who is a (*f*) Purchaſer for Money or other valuable Conſiderat. for altho' in the Preamb. it is ſaid (*for Money or other good Conſiderat.*) and likewiſe in the Body of the Act (*for Money or other good Conſiderat.*) yet theſe Words (*good Conſiderat.*) are to be intended only of valuable Conſiderat. and that appears by the Clauſe which concerns thoſe who had Power of Revoc. for there it is ſaid, *for Money or other good Conſiderat. paid, or given*, and this Word (*paid*) is to be refer'd to (*Money*) and (*given*) is to be refer'd to (*good Conſiderat*) ſo the Senſe is *for Money paid, or other good Conſid. given*, which Words exclude

(*e*) Antea 78. b. Plow. 46. b. 55. a. Fitz. Replic. 15. Br. Treſpaſs 26. Br. Colluſion 4. B. Property 6. 2 Inſt. 713. 14 H. 8. 8. b. 33 H. 6. 5. a. b.

(*f*) Cro. El. 445.

all Consideration of Nature or Blood, or the like, and are to be intended only of valuable Considerations which may be given; and therefore he who makes a Purchase of Land for a valuable Consideration, is only a Purchasor within this Statute. And this latter Clause doth well expound these Words (*other good Consideration*) mentioned before in the Preamble and Body of the Act.

2 And. 233. Nedham and Beaumont's Case.

And so it was resolv'd, *Pasch.* 32 *El.* in a Case referr'd out of the Chancery to the Consideration of *Windham* and *Periam*, Justices; between *John Nedham* Plaintiff, and *Beaumont*, Serjeant at Law, Defendant; where the Case was, *Hen. Babington* seised in Fee of the Manor of *Lit-Church* in the County of *Derby*, by Indent. 10 *Feb.* 8 *El.* covenanted with the Lord *Darcy*, for the Advancement of such Heirs Males, as well those he had begot, as those he should afterwards beget on the Body of *Mary* then his Wife (Sister to the said L. *Darcy*) before the Feast of S. *John Bapt.* then next following, to levy a Fine of the said Manor to the Use of the said *Hen.* for his Life, and afterwards to the Use of the eldest Issue Male of the Bodies of the said *Hen.* and *Mary* begot. in Tail, &c. and so to three Issues of their Bodies, &c. with the Remainder to his right Heirs. And afterw. 8 *Maii An.* 8 *El. Hen. Babington*, by Fraud and Covin, to defeat the said Covenant, made a Lease of the said Manor for a great Number of Years, to *Rob. Heys*; and afterwards levied the Fine accordingly: And on Conference had with the other Justices, it was resolved, That altho' the Issue was a Purchasor, yet he was not a Purchasor in vulgar and common Intendment: Also Considerat. of Blood, natural Affection is a good Considerat. but not such a good Considerat. which is intended by the Stat. of 27 *El.* for (*a*) a valuable Considerat. is only a good Considerat. within that Act: In this Case *Anderson* C. J. of the Com. Pleas, said, That a Man who was of small Understanding, and not able to (*b*) govern the Lands which descended to him, and being given to riot and disorder, by mediation of his Friends, openly conveyed his Lands to them, on Trust and Confidence that he should take the Profits for his Maintenance, and that he should not have Power to waste and consume the same; and afterwards, he being seduc'd by deceitful and covenous Persons, for a small Sum of Money bargained and sold his Land, being of a great Value: This Bargain, altho' it was for Money, was holden to be (*c*) out of this Stat. for this Act is made against all Fraud and Deceit, and doth not help any Purchasor, who doth not come to the Land for a good Considerat. lawfully and without Fraud or Deceit; and such Conveyance made on Trust is void as to him who Purchases the Land for a valuable Consideration *bona fide*, without Deceit or Cunning.

(*a*) 2 Roll. Rep. 305, 306.

(*b*) Cro. El. 445.

(*c*) Cro. El. 445.

And by the Judgment of the whole Court *Twyne* was convicted of Fraud, and he and all the others of a Riot.

The

The Caſe of FINES.

See Fermor's Caſe ante 77. and Sir Geo. Brown's 50, 51.

The Reſolution of the Juſtices, after hearing many Arguments of Counſel learned on both Sides, and divers Conferences amongſt themſelves upon the Statute of Fines. Paſch. 44 Eliz.

A Tenant for Life of certain Land, the Remainder to *B.* in Tail, the Reverſion to *B.* and his Heirs expectant; *B.* levies a Fine to *C.* and *D.* and to the Heirs of *C.* to the Uſe of them and their Heirs, and hath Iſſue, and dies before all the Proclamations are paſt, the Iſſue in Tail then being beyond the Seas; the Proclamations are made, and afterwards the Iſſue in Tail returns, and immediately makes Claim on the Land to the Remainder in Tail; and if, in this Caſe, the Eſtate-tail were barred, or not, was the Queſtion; and in this Caſe four Points were reſolved. Moor 628. Jenk. Cent. 274. 2 And. 177. Rep. Q. A. 20. Carth. 260.

1. That the Eſtate which paſſes by the Fine, as to the Eſtate-tail, was not determined by the Death of *B.* for it was ſaid, If one be Tenant in Tail of a (*a*) Rent, (*b*) Advowſon, Tithes, Common, or other ſuch Things which lie in Grant, and by Deed grants them in Fee, and dies, the Grant is not abſolutely determined by his Death, but it is at the Election of the Iſſue in Tail to make it voidable, or void at his Pleaſure. For if he brings a *Formedon* for the Rent, *&c.* he makes the Grant voidable; but if he diſtrains for the Rent, or claims it on the Land, he thereby determines his Election to make it void; *& ſic de cæteris.* But until he makes his Election, the Grant is not determined, for then it would prevent his Election; and true it is, as (*a*) Bridg. 97. (*b*) Leon. 111. 3 Leon. 212. Bridgm. 56

(a) Lit. Sect. 598, 600, 606, 607, 608, 618.

Littleton (a) ſaith, That of ſuch Things which paſs from Tenant in Tail by way of Grant, or by Confirmation, or by Releaſe, nothing can paſs to make an Eſtate to him to whom ſuch Grant, Confirmat. or Releaſe is made, but that which the Tenant in Tail may lawfully make, and that is but for the Term of his Life. And if Tenant in Tail be of an (b) Advowſ. &c. and he by Deed makes a Grant of the Advowſ. to another in Fee, it is no Diſcontinuance; for in ſuch Caſes the Grantees have but an Eſtate for the Life of Ten. in Tail, and that (as it was ſaid) is as much as to ſay, the Grant is no Diſcontinuance, but is determinable by the Iſſue, after the Death of the Ten. in Tail, at his Election, either by Claim or by Action. And *Littleton* is not to be underſtood literally, *viz.* that the Grantee, in ſuch Caſe, hath only an Eſtate for the (c) Life of Ten. in Tail, for then the Ten. in Tail in ſuch Caſe would have the Reverſion in Tail, and ſhould have an Action of Waſte, or enter for the Forfeiture on Alienation made by ſuch Grantee: Or if Ten. in Tail of a Reverſ. expectant on an Eſtate for Years, or Life, grants it in Fee, and the Leſſee Attorns, and afterw. the particular Eſtate determines, and the Grantee commits Waſte, or makes a Feoffment, &c. that the Ten. in Tail in ſuch Caſe ſhall puniſh the (d) Waſte, or enter for the Forfeiture; for *Littleton* himſelf, 145. is againſt that, for he ſaith, If (e) Ten. in Tail grants all his Eſtate over to another, in this Caſe the Grantee hath an Eſtate but for the Life of Ten. in Tail, and the Reverſ. of the Tail is not in the Ten. in Tail, becauſe he hath granted all his Eſtate and his Right, &c. And if the Grantee commits Waſte, the Ten. in Tail ſhall never have an Action of (f) Waſte, becauſe no Reverſion is in him, but the Reverſ. and Inheritance of the Tail, during the Life of the Ten. in Tail, is in (g) abeyance.

(b) Lit. Sect. 617. Co. Lit. 332. a.

(c) Plowd. Com. 556. a. Hob. 338.

(d) Plowd. 556. a. Co. Lit. 331. a. 345. b.

(e) Lit. 146. a. b. Lit. Sect. 650. Cro. Car. 429. Carth. 260.

(f) 10 Co. 98. a.

(g) 2 Co. 52. a. Hob. 338, 339. Lit. Sect. 649. Lit. 146. a.

Note, Reader, The Office of an Interpreter is to make ſuch Conſtruction, not only that one and the ſame Author be not againſt himſelf, but alſo that the Reſolutions or Judgments reported in one Book, be not by any literal Interpretation expounded againſt any Reſolut. or Judgm. reported in any other, but that all (*ſi fieri poſſit*) may ſtand together. So here the Intent of *Littleton* was not that the Grantee had but an Eſtate for Life, and that his Eſtate ſhould be abſolutely determined by the Death of the Ten. in Tail, but that it was not a Diſcontinuance, nor had the Grantee any durable or fix'd Eſtate but for the Life of the Ten. in Tail, but that the Iſſue after his Death might at his Pleaſure determine it: And if the Grantee in ſuch Caſe ſhall have but an Eſtate for Life of Tenant in Tail, then the Wife of ſuch Grantee ſhall not be (h) endowed, againſt which it is adjudg'd in (i) 24 *E.* 3. 28. *b.* Alſo if the Eſtate of the Grantee ſhould be abſolutely in Judgment of Law determined by the Death of Tenant in Tail, then the Iſſue in Tail, after the Death of the Father, could not have a *Formedon* againſt ſuch Grantee; for

(h) 10 Co. 96. a. 98. a. Plowd. 557. b.

(i) 10 Co. 96. a. 1 Sand. 261. Firz. Dower 98. Cart. 210.

altho'

altho' the Demandant and the Tenant would admit the Eſtate which paſſed by the Grant to continue, yet the Court, who ought to judge according to Law, and is not concluded by the Admittance of the Parties, of any Thing which judicially appears to the contrary, ought *ex officio* in ſuch Caſe to abate the Writ. But it is agreed in 13 *H.* 7. 10. *pl.* 8. by all the Juſtices, If Tenant in Tail of a (*a*) Rent grants it with Warranty, it is no Diſcontinuance, altho' Aſſets deſcend, but he may diſtrain; but if he brings a (*b*) *Formedon* in the Deſcender, he ſhall be barred, 33 *E.* 3. *Formedon* 47. *acc.* By which it appears, that in ſuch Caſe the Grant of Tenant in Tail is determinable by his Death, by claim on the Land, or by Action: So when Tenant in Tail grants a Rent, Reverſion, Common, &c. in Fee, he hath an indefeaſible Eſtate during the Life of Tenant in Tail (and that *Littleton* intends) and after the Death of Tenant in Tail, it is defeaſible at his Election; for if he comes on the Land and diſtrains, or by claim on the Land determines his Election, then on the Matter it is void by the Death of Tenant in Tail; for otherwiſe the Warranty in ſuch Caſe would make a Diſcontinuance: As if Tenant in Tail be (*c*) diſſeiſed, and releaſes to the Diſſeiſor with Warranty, and dies, it is a Diſcontinuance, becauſe the Eſtate, on which the Warranty enures, continues after the Death of Tenant in Tail: But when Tenant in Tail of a Rent, Reverſion, &c. grants it in Fee with Warranty, and dies, now if the Iſſue in Tail determines his Election to have it void, it is abſolutely determined by his Death, and by conſequence the Warranty alſo: But if the Iſſue brings a *Formedon* and determines his Election to make the Eſtate to have Continuance, and not to be determined by the Death of the Tenant in Tail, then the Eſtate doth continue, and by conſequence the Warranty doth remain, and if Aſſets deſcend, the Iſſue ſhall be barred; *vide* 19 *E.* 3. *Brief* 468. 24 *E.* 3. 28. 36 *Aſſ.* 8. 22 *R.* 2. *Diſcontintance* 50. 8 *H.* 4. 9. 33 *E.* 3. *Formedon* 47. 48 *E.* 3. 23. 32 *E.* 3. *Diſcontinuance* 2. 23 *Aſſ.* 8. 16 *H.* 7. 4. *a.* 21 *H.* 7. 40. *a.* 38 *H.* 8. *Br. Diſcontinuance* 55. for this Matter: And there is no Difference between a Grant of Tenant in Tail of a Rent, Advowſon, Common, Tithes, &c. in Poſſeſſion, and a Grant of Tenant in Tail of a Reverſion or Remainder expectant on an Eſtate for Life: For altho' in the firſt Caſe, the Iſſue may have his *Formedon* preſently by the Death of the Tenant in Tail, and in the other Caſe not till after the Death of the Tenant for Life; yet it is all one; for by the Death of the Tenant in Tail the Grant is not determined till Election made by the Iſſue in Tail; for after the Death of Tenant for Life he may bring a *Formedon* if he will.

Note, Reader, if you be deſirous to know the Reaſon, why on the

(*a*) 26 Aſſ. 8. Kelw. 79. Co. Lit. 332. b. 4 H. 7. 17. b. 21 H. 7. 40. a. 3 H. 7. 12. b. 13. a. 9 E. 4. 18. b. 22 E. 4. 4. b.

(*b*) 16 H. 7. 4. a. 21 H. 7. 40. a. Carth. 260.

(*c*) Lit. Sect. 601. a. Co. Lit. 328. a. b. Poſtea 85. b.

Co. Lit. 322. b.

* Lucas 360. the Words of the Act of *Weſt. 2. cap. 1. de Donis* * *conditionalibus*, that is to ſay, *(Non habeant illi, quibus tenementum ſic fuerit datum ſub conditione, poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum, quibus tenementum ſic fuerit datum, remaneat poſt illorum obitum, vel ad Donatorem, &c. revertatur.)* Theſe ſundry Conſtructions have been made: *viz.* If Tenant in Tail makes a (*a*) Co. Lit. 327. b. (*a*) Feoffment in Fee, it is a Diſcontinuance, and avoidable by Action only: If Tenant in Tail of a Rent, or other (*b*) Hob. 45. Co. Lit. 332. a. Lit. Sect. 618. Thing which lies in Grant, grants it in Fee, it is no Diſcontinuance, but is voidable by Claim or by Action: If Tenant in Tail of Land grants a Rent out of it, the Rent is abſolutely determined by his Death: If Tenant in Tail be (*c*) Antea 85. a. Lit. Sect. 601. Co. Lit. 328. a. b. (*c*) diſſeiſed, and Releaſes to his Diſſeiſor, it is no Diſcontinuance, but the Eſtate is avoidable by Entry or Action of the Iſſue of the Tenant in Tail: But if the Releaſe be with Warranty it is a Diſcontinuance, if the Iſſue in Tail be Heir to the Warranty: But if Tenant in Tail makes a Leaſe for the Term of his own Life, or for Years, and releaſes to the (*d*) Co. Lit. 333. b. Leſſee and his Heirs, it is no *(d)* Diſcontinuance, altho' it be with Warranty: So if Tenant in Tail makes a Leaſe for Life, and afterwards grants the Reverſion in Fee, it is no Diſcontinuance of the Fee, unleſs it be executed in the Life of the Grantor. And all theſe (and many other) different Conſtructions have been made on the Words aforeſaid, *ſcil. Non habeant illi, quibus tenementum ſic fuerit datum ſub conditione, poteſtatem alienandi, &c.* this is the Reaſon which is worthy of Obſervation; for the Judges have conſtrued the ſaid Words according to the Rule and Reaſon of (*e*) Antea 78. a. the (*e*) Com. Law (which always is *optimus interpretandi modus:)* For at the Common Law, if a Biſhop, Abbot, *&c.* or Husband ſeiſed in the Right of his Wife, make a Feoffment in Fee, it is by the Common Law a Diſcontinuance, and doth put the Succeſſor, or the Wife, to her Action, for the Favour which the Law gives to an Eſtate which paſſes by Livery and Seiſin, becauſe it is publick and notorious, and in ancient Times was the common and uſual Aſſurance of (*f*) Co. Lit. 327. b. the Land; but if a *(f)* Biſhop, *&c.* or Husband ſeiſed of a Rent, or any Thing which lay in Grant, by Deed grants it in Fee, it is no Diſcontinuance, and yet it is not abſolutely determined by the Death of the Biſhop, *&c.* or Husband, (*g*) Co. Lit. 327. b. for the Succeſſor, or the Wife, hath *(g)* Election to determine it and make it void, or by bringing of his Writ to make it voidable, or by claim on the Land to make it void: (*h*) Co. Lit. 327. b. But if a *(h)* Biſhop, *&c.* or Husband grants a Rent in Fee out of the Wife's Land, or Biſhoprick, it is abſolutely void by the Death of the Biſhop, *&c.* or of the Husband: Alſo if a Biſhop, or the Husband and Wife be diſſeiſed, and the Biſhop, or Husband, releaſes to the Diſſeiſor, it is no Diſcontinuance; if the Biſhop, or Husband makes a Leaſe for Years, and releaſes to the Leſſee, and his Heirs, it is not abſolutely

determined by the Death of the Biſhop, or Husband; but it is void or voidable at the Election of the Succeſſor, or of the Wife. But if a Biſhop, or the Husband, makes a Leaſe for Life, and afterwards grants the Reverſion in Fee, and the Leſſee for Life dies in the Life of the Biſhop or of the Huſband, it is a Diſcontinuance; otherwiſe if the Leſſee ſurvives the Biſhop, or the Husband; *Vir bonus eſt quis? Qui conſulta patrum, qui leges, juraque ſervat.*

And it was held by *Popham*, C. J. and divers other of the Juſtices, that the Stat. of 32 *H.* 8. *cap.* 36. hath (*a*) enforced the Caſe; that the Eſtate which paſſes by the Fine ſhall not be determined by the Death of the Tenant in Tail, for inaſmuch as the Stat. hath provided, that Fines levied of any Land, Tenement, or Hereditament entailed, &c. in Poſſeſſion, Reverſion or Remainder, immediately after the Fine engroſſed, and Proclamations paſt, ſhall be a Bar, &c. if the Fine with Proclamation cannot bar the Eſtate-Tail, unleſs the Eſtate given by the Fine continues, the ſame Statute which provides, that the Fine with Proclamations ſhall be a Bar, provides alſo for all Things which are neceſſary and incident to the Perfection and Conſummation thereof: And therefore in 28 *El.* in a *Quid juris clamat* brought by *Francis* (*b*) *Windham*, then one of the Juſtices of the Common Pleas, againſt the Lady *Greſham*, in the Common Pleas; the Caſe was thus in Effect; That the Lady *Greſham* was Tenant for Life of the Manor of *Weſt Bradenham* in *Norfolk*, the Remainder to *Richard Read* in Tail, the Reverſion to *Will. Read* in Fee. *Rich. Read* levied a Fine of his Remainder to Juſt. *Windham*, and his Heirs, and before the engroſſing thereof (as *oportet*) Juſt. *Windham* brought a *Quid juris clamat* againſt the Lady *Greſham*, who pleaded, That *Richard Read* the Conuſor, at the Time of the Fine levied, had but an Eſtate in Tail in Remainder; and ſhewed how; and demanded Judgment if ſhe ſhould be compelled to attorn; upon which the Plaintiff demurred. And although before the Statutes of Fines of (*c*) 4 *H.* 7. & 32 *H.* 8. it was a (*d*) good Plea, as appears 37 *H.* 6. 33 *b.* 2 *E.* 2. *Age* 77. 2 *E.* 3. 23. & 22 *E.* 3. 18. yet it was adjudged, that now after the ſaid Statutes which make the Fine (after the engroſſing and Proclamations paſt) a Bar of the Eſtate-Tail; although the *Quid juris clamat* ought to be brought (*e*) before the Engroſſing, and by Conſequence, before the Eſtate-Tail be barred; and that *non conſtat* at the Time of the *Quid juris clamat* brought, that it ſhall be a Fine at the Common Law, or a Fine levied with Proclamations: Yet it was adjudged that ſhe ſhould (*f*) attorn.

See, Reader, 17 *E.* 3. 7. *pl.* 20. If an Alienation be made in (*g*) Mortmain; and 31 *E.* 3. *Ancient Demeſn* 16. If a Fine be levied of a Reverſion of Land in (*h*) Ancient Demeſn; 36 *H.* 6. 24. *pl.* 19.

(*a*) Co. Lit. 318. a.

Juſtice Windham's Caſe, 28 Reg. Eliz. (*b*) Gould 4. Popham 63. 2 Anderſ. 112. Co. Lit. 318. a. 356. a.

(*c*) 4 H. 7. c. 24. 32 H. 8. c. 36. (*d*) 1 Rol. 297. Raymond 347.

(*e*) 5 Co. 39. a. b. Plowd. 431. b. 6 Co. 68. a.

(*f*) Co. Lit. 318. a.

(*g*) Co. Lit. 318. a. 1 Rol. 297. (*h*) Co. Lit. 318. a.

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

pl. 19. If an (*a*) Infant levies a Fine, 45 *E.* 3. 6. if a Fine be levied of a Reverſion of Land held *in* (*b*) *Capite* without Licence; or, as in our Caſe, if Tenant in Tail of a Reverſion or Remainder, levies a Fine thereof, in all theſe Caſes, and other like, the Tenant was not compellable to attorn, becauſe the Eſtate which paſſed by the Fine was not lawful, but either prohibited by the Common Law, or by ſome Statute, and for the greater Part was voidable: But now the Statutes have made a Fine levied by Tenant in Tail to be lawful, and after the Engroſſing thereof, and Proclamations paſt, hath made the Eſtate, which paſſes by the Fine, unavoidable: And in the ſaid Caſe two Points were reſolved for good Law.

1. That every Fine levied ſhould be intended to be levied with Proclamations according to the ſaid Statutes, for it is moſt beneficial for the Conuſee; and all Fines being the general Aſſurance of the Land, are levied accordingly.

2. That the Statutes which make the Fine, after the Engroſſing thereof, and Proclamations paſt, a Bar to the Eſtate Tail, gives all Things incident thereto; and in as much as the Conuſee cannot have a *Quid juris clamat* after the Engroſſing, from thence it follows, that he ſhall have it before: And now the Statutes have altered the Reaſon of the Common Law, and given greater Force and Strength to a Fine than it had before. For the Reaſon of the Common Law was, That the particular Tenant ſhould never be compelled to attorn to an unlawful, tortious, or voidable Grant; which Judgment, in the Caſe of Juſtice *Windham*, was affirmed for good Law by all the Judges in this Caſe. So it was reſolved by all the Judges of *England*, and Barons of the Exchequer, for the one Cauſe or for the other, that the Eſtate which paſſed by the Fine, as to the Eſtate-Tail, was not abſolutely determined by the Death of the Tenant in Tail.

Co. Lit. 356. a. C. El. 603.

Popham 66. Dall. 51. Dall. in Kelw. 205. b. Dall. in Aſh. pl. 8. Mo. 629. Dy. 254. pl. 104. Poſtea 91. a.

2. It was reſolved by all the Juſtices and Barons of the Exchequer *nullo contradicente*, that although by the Death of Tenant in Tail, a Right of Eſtate-Tail did deſcend to the Iſſue, in as much as he died before all the Proclamations were paſt; yet when the Proclamations paſs without any Claim made by the Iſſue in Tail on the Land, this Right which deſcended to him is barred by the Statutes of 4 *H.* 7. & 32 *H.* 8. For altho' the Fine without the Proclamations, not the Proclamations without the Fine cannot Bar an Eſtate Tail; and altho' after the Fine levied, and before all the Proclamations be paſt, a Right is deſcended to the Iſſue in Tail *per formam doni*, which is paramount the Fine, and there is no Fine with Proclamations levied after the Death of Tenant in Tail,

Tail, to bar this Right ſo deſcended to the Iſſue in Tail; yet foraſmuch as it is provided by the Statute of 32 *H.* 8. "That all Fines levied with Proclamations of any Lands, "Tenements, or Hereditaments intailed to the Perſon ſo "levying the ſame, or to any of his Anceſtors in Poſſeſſion, "Reverſion, Remainder, or in Uſe, ſhall be immediately "after the Fine levied, ingroſſed, and Proclamations made, "adjudged a ſufficient Bar againſt the ſaid Perſons and their "Heirs, claiming the ſame only by Force of any ſuch En-"tail:" And the Iſſue in Tail, in this Caſe, claims as Heir by Force of the ſaid Eſtate-Tail; therefore by the expreſs Letter of the ſaid Act he is barred: With this agrees the Judgment in *Smith* and *Stapleton*'s Caſe, *Plow. Com.* 430.

3. It was reſolved by *Popham* and *Anderſon* Ch. Juſtices, and all the other Juſtices and Barons of the Exchequer but three, that in this Caſe the Iſſue in Tail being Heir and Privy, could not by any Claim that he could make ſave the Right of the (*a*) Eſtate-Tail which deſcended to him; but that after the Proclamations are paſt, the Eſtate-Tail ſhould be barred by the Statutes of 4 *H.* 7. & 32 *H.* 8. notwithſtanding any Claim that could be made by him; For it is enacted by the Statutes of 4 *H.* 7. *That every Fine after the engroſſing of it, and Proclamations had and made, ſhall be a final End, and conclude as well Privies as Strangers:* And if no Saving or Exception had been after in the Act, the Right of all, as well Strangers as Privies, had been bound and barred by this Act. And therewith agrees the Opinion of five Juſtices, (*b*) 19 *H.* 8. 2. *ſcil. Fitz-James, Brudnel, Fitzherbert, Brook,* and *Moor.* Then if all the Exceptions and Savings in the Act do extend to Strangers to the Fine, and not to Parties or Privies, from thence it will follow, that the Heir, or other Privy, cannot by any Claim avoid the Fine of his Anceſtor. The firſt Exception as to Feme Coverts, *&c.* doth not extend to this Caſe: The ſecond Saving by expreſs Words extends only to Strangers: The third Saving extends alſo to Strangers who are not Parties or Privies to the Fine; for the Words are, *And alſo ſaving to all other Perſons all ſuch Action, Right,* &c. *as firſt ſhall grow, remain, deſcend, or come after the ſaid Fine ingroſſed,* &c. *by Force of any Gift in Tail,* &c. ſo that it appears by theſe Words, *(ſaving to all other Perſons,* &c.) that he, who ſhall take Benefit of this Saving, ought to be *another Perſon,* and not Party or Privy to the Fine: And therewith agrees the Opinion of the ſaid five Juſtices in (*c*) 19 *H.* 8. But if Tenant in Tail makes a Feoffment, and the Feoffee levies a Fine with

(*a*) 1 Co. 96. b. 2 Rol. Rep. 342.

(*b*) 19 H. 6. b. Br. Fine levy, &c. 1. Br. Tail 2. Dyer 3. pl. 3. Mo. 251. 9. Co. 105. a.

(*c*) 19 H. 6. b. Moor 301.

(*a*) Pro-

(*a*) Moor 431. (*a*) Proclamations, the Iſſue in Tail after the Death of his Father, as it is there held, ſhall have five Years within this third Saving, for he is the firſt to whom the Right doth accrue and deſcend after the Fine levied. But if Tenant in Tail be (*b*) diſſeiſed, and the Diſſeiſor levies a Fine with Proclamations, and five Years paſs, and afterwards Tenant in Tail dies, there the Iſſue in Tail is barred, as it is there alſo held: For there after the Fine levied, the Tenant in Tail himſelf had Right, ſo that the Iſſue in Tail was not the firſt to whom the Right did accrue and deſcend after the Fine levied, but after the Feoffment in Fee he himſelf had not any Right: And with this Diverſity agrees the Opinion in *Stowel's* Caſe in *Plowden's Commentaries*; but in none of thoſe Caſes the Iſſue was Privy, but a Stranger to him who levied the Fine. Alſo the Stat. of 32 *H.* 8. which is but an Explanation and Interpretation of the Act of 4 *H.* 7. (as appears by the Preamble thereof) expounds the ſaid Act in ſuch Manner, that is to ſay, "That all Fines levied with "Proclamations according to the Stat. of 4 *H.* 7. of any "Lands, *&c.* in any wiſe entailed to the Perſon ſo levying "the ſame Fine, or to any of his Anceſtors, ſhall be imme- "diately after the ſame Fine levied, ingroſſed, and Procla- "mation made, adjudged a ſufficient Bar, *&c.* And in all this Act there is no Saving for the Iſſue in Tail. *Ergo*, after the Proclamations paſt, by the expreſs Proviſion of this Stat. the Iſſue in Tail is barred, and no Power is left him to make Claim, for the Intent of the Act was (as appears by the Preamble) to bar him by the Fine; and therefore it was never intended to ſave his Right: But againſt this it was objected, that altho' the Letter of the ſaid Acts, and chiefly of the Act of 32 *H.* 8. were againſt the Iſſue in Tail in this Caſe, yet he might make his Claim by the Equity and Intent and Meaning of the ſaid Acts; for otherwiſe to what Purpoſe ſhould the Proclamations be made, unleſs thoſe who had lawful Action, Entry, or Claim, might purſue it; for Proclamations are made to this End and Purpoſe, and the making of them with ſuch Solemnity as they are made would be utterly vain, if the Iſſue in Tail after the Death of his Father might not purſue his Action, Entry, or Claim before all the Proclamations incur; For the Act of 32 *H.* 8. doth not bar any Stranger, but him who levies the Fine, and the Iſſue of his Body. And therefore if the Iſſue after the Death of his Father cannot purſue his Action, Entry, or Claim, before the Proclamations incur, the Proclamations on ſuch fine will be utterly idle and vain.

(*b*) Godb. 302. Cr. El. 896. Jenk. Cent. 254. 1 Brownl. 230.

To which it was anſwered, That the Act of 32 *H.* 8. being an Act which explains and expounds the Act of 4 *H.* 7. as to the Fine by the Tenant in Tail, ſhould not be taken by any

ſtrained Conſtruction againſt the Letter, for then it would be requiſite to have another new Act to make an Explanation and Expoſition on the Explanation and Expoſition which was made by the former Act, and ſo *in infinitum*.

2. It appears by the Stat. of 4 *H.* 7. the laſt Clauſe, that every Perſon hath Liberty to purſue a Fine according to the ſaid Act, *ſcil.* with Proclamations in four ſeveral Terms after the Fine engroſſed, or without Proclamations, for ſo was the Uſe *(a)* before the ſaid Act; and therefore the Act of *(b)* 32 *H.* 8. which explains the ſaid Act of 4 *H.* 7. of Neceſſity doth preſcribe that Proclamations ſhall be made according to the Act of 4 *H.* 7. to diſtinguiſh it from a Fine at the Common Law, which was not a Bar to the Eſtate in Tail, and not to enable the Iſſue to make a Claim. For, as it hath been ſaid, it would be againſt the Intention of the Act expreſſed in the Preamble, and againſt the expreſs Purview of the Body of the Act; ſo that it was material that the Fine ſhould be levied with Proclamations, otherwiſe it would not be levied according to the Statute of 4 *H.* 7. which was interpreted and expounded by the ſaid Act of 32 *H.* 8.

(a) Co. Lit. 262. a. Poſt. fo. 90. b.
(b) 10 Co. 50. a. 1 Leon. 224. 2 Leon. 62, 224. 3 Leon. 10. Moor 115, 146. 1 And. 46. Sav. 85, 88. Co. Lit. 262. a. 372. a. 1 Bulſt. 33. Goldsb. 11. 3 Co. 51. a. Hob. 258. 7 Co. 32. a. b. 9 Co. 140. b. 11 Co. 75. a.

3. It would be greatly inconvenient, that when Tenant in Tail levies a Fine of a Reverſion or Remainder, *&c.* expectant on an Eſtate for Life, or on a Bargain and Sale on a valuable Conſideration, or for the Advancement of his Children, or for the Payment of his Debts, *&c.* and dies before Proclamations paſs'd, that all this ſhould be avoided by the Claim of the Heir in Tail, when the Conuſee could not have better Aſſurance, either by common Recovery (in as much as he was not Tenant to the *Præcipe*) or otherwiſe.

4. It is prov'd by divers Judgments and Reſolutions given before this Time, that the Iſſue in Tail in ſuch Caſe ſhall not make Claim to ſave the Eſtate-tail, but that after Proclamations had, it ſhall be barred, *Paſch.* 28 *Eliz. Rot.* 13. *Edward* Lord (c) *Zouch* brought a *Formedon* in the *Deſcender* of the Moiety of a Manor, *&c.* againſt *Bampfield*, who pleaded in Bar, that *John*, Great Grandfather of the Demandant, levied a Fine *ſur conuſans de droit come ceo, &c.* with Proclamations of the ſaid Moiety, *Paſch.* 30 *H.* 8. which was by the ſame Fine granted and rendred to the ſaid *John* and his Heirs, whoſe Eſtate the Tenant had; the Demandant replied, and ſaid, That at the Time of the Fine levied, and at all Times after (and ſhew'd how) the ſaid *Rich. Bampfield* now Tenant, was ſeiſed of the Land in Demand in his Demeſne as of Fee: And on ſolemn Argument it was agreed by *Anderſon*, *Periam*, *Windham* and *Rhodes* Juſtices, That the Demandant being Heir in Tail againſt ſuch Fine levied by his Anceſtor, whoſe Heir he is, was eſtopped to aver his Seiſin and Continuance thereof in a Stranger at the Time of the ſaid Fine levied; nor to aver, *Quod partes finis nihil habuer'*: And in the ſame Caſe the Juſtices did conſider,

(c) Moor 250. 1 And. 165. 1 Leon. 75. 1 Jones 33, 35. Goldsb. 107. Winch 43. Hob. 333. Sav. 84. 2 Leon. 36. 3 Leon. 211. Lane 103. Noy 59. Cr. El. 610.

If before the Statutes of 4 *H.* 7. & 32 *H.* 8. ſuch Averments were allowable in Law. And it ſeems by the better Opinion of the Books, that before the Stat. of 4 *H.* 7. & 32 *H.* 8. that the Iſſue in Tail was not admitted to ſuch Averments againſt a Fine levied by his Anceſtor. And this appears by the Stat. of (*a*) 27 *E.* 1. *cap.* 1. *de Finibus levatis*, which recites, *Quod per aliquod tempus præteritum, &c. partes finium, & earum partium hæredes, (contra leges & conſuetudines Regni noſtri antiquius uſitat') ſuper hujuſmodi finibus adnullandis & evacuandis, admittebantur proponere quod ante finem levatum & tempore levationis ejuſdem, & poſtea petentes ſeu querentes, aut eorum anteceſſores de tenementis in finibus content', aut de aliqua parte earundem ſemper fuer' ſeiſiti, & ſic fines hujuſmodi rite levatos per Jurat' patriæ falſe, ſubordinate, & malicioſe procurat' multotiens evacuabant & adnihilabant, & hæc minus juſte: Statuimus quod dictæ exceptiones, ſeu reſponſiones, vel inquiſitiones patriæ ſuper hujuſmodi exceptionibus ſeu reſponſionibus, nullo modo contra hujuſmodi recognitiones & fines de cætero admittantur.* But againſt this, three Exceptions were made.

(*a*) 2 Inſt. 521, 522, &c.

1. That it is provided by the Stat. *de Donis Conditionalibus, quod* (as to the Iſſue in Tail) *finis ipſo jure ſit nullus.*

2. That the ſaid Act of 27 *E.* 1. doth not extend to Heirs in Tail, but only to Heirs in Fee-ſimple, as *dicitur arguendo* in 8 *H.* 4. 7. for the Iſſues in Tail are not bound by Fines, or any other Record which enures by way of Eſtoppel or Concluſion.

3. The ſaid Act of 27 *E.* 1. ſpeaks *de finibus rite levatis*, and a Fine is not ſaid *rite levatus*, when there wants Seiſin in the one Part or the other, ſo that *partes finis nihil habuerunt*; and ſo hath the ſaid Act by the Judges in ancient Times been interpreted, as appears by the Book in 46 *E.* 3. 14. (*b*) *pl.* 20. where in a (*c*) *Formedon* in the *Deſcender* the Tenant pleaded a Fine with Warranty in Bar, the Demandant replied, *quod partes finis nihil habuerunt.* And (*d*) 13 *Aſſ.* 8. it is ſaid, that it hath been adjudged a good Plea for the Iſſue in Tail againſt a Fine on Grant and Render of his Father, to alledge the Continuance in his Father, and that he died ſeiſed, and that he entred as Son and Heir. And *Br. tit. Fines* 109. a (*e*) Fine levied with Proclamation by Tenant in Tail may be avoided by the Iſſue, *ſi partes finis nihil habuerunt*, for the Statute is intended *de finibus rite levatis*; and therefore the Iſſue in Tail may plead *quod partes finis nihil habuerunt*, for then it is but a Fine by Concluſion between the Parties: And in (*f*) 13 *E.* 3. *Replicat.* 62. and 17 *E.* 3. 53. ſome held that a Fine is not *rite levatus*, when *partes finis nihil habuerunt*, for Seiſin in one of the Parties is of the Eſſence of a Fine rightfully levied.

(*b*) 2 Inſt. 517. 1 Jones 458.
(*c*) 1 Leon. 78. Poſtea 89. a.
(*d*) Br. Fines levies 74. Poſtea 89. b.
(*e*) Sav. 88. Poſtea 91. b.
(*f*) Poſtea 89. b.

As to the firſt Objection, it was anſwer'd, That the Stat. *de Donis Conditionalibus* was made 13 *E.* 1. and the Stat. *de Finibus* was made 27 *E.* 1. in which the Iſſue in Tail is not excepted. *Ergo*, he ſhall be bound by the latter Act, and therewith agrees a good Opinion in 8 *H.* 4. 3, 8.

As to (*a*) the 2d Object. altho' the Iſſue in Tail was not barred by any Fine by his Anceſtor before the Stat. of 4 *H.* 7. yet, as it hath been ſaid, he was ouſted to aver in ſuch Caſe, *quod partes finis nihil habuerunt*, and being Privy and Heir to him who levied the Fine, was by the Stat. of 27 *E.* 1. eſtopped and concluded to annihilate the Fine of his Anceſtor by ſuch Plea; and altho' it is provided by the Stat. *de Donis Conditionalibus*, *Quod finis ipſo jure ſit nullus*, that is to ſay, to bar the Right of the Iſſue in Tail, yet it is an Eſtoppel to him to ſay, *Quod partes finis nihil habuerunt.* And therefore the Caſe is remarkable in 33 *E.* 3. *Eſtop.* 280. (*b*) where the Caſe in Effect was; Grandfather, Father and Son, the Son brought a Formedon of a Gift (in Tail) made to the Grandfather, the Tenant vouched to Warranty one *T.* as Couſin and Heir of *E.* within Age, and prayed that the Parol might demur; the Demandant ſaid, that the Vouchee nor any of his Anceſtors, *&c.* were ſeiſed after the Seiſin of his Grandfather, of which Seiſin, *&c.* The Tenant ſaid, that the Grandfather of the Demandant levied a Fine of the ſaid Tenements in Demand to *E.* and demanded Judgm. if againſt the Fine levied by his Grandfather whoſe Heir he is, he ſhould to ſuch Averment be receiv'd: The Demandant ſaid that the Stat. *ſſ. De donis conditionalibus*, voided the Fine levied by the Anceſtor in Tail; and yet by Judgment of the Court he was ouſted of the ſaid Averm. for there it is ſaid that tho' the Stat. voided the Fine as to bar the Heir in Tail of Action; nevertheleſs the Fine remain'd in Force to reſtrain the Heir in tail from averring a thing contrary to the Fine, as well as the Heir in Fee-ſimple; and therewith agrees 22 *E.* 3. 17. and (*c*) 33 *H.* 6. 18. *a. b.* by *Yelverton* and others.

As to the third Objection, a Fine may be ſaid *rite levatus*, altho' *partes finis nihil habuer'*, for *rite levat'* is as much as to ſay within the Intention of the ſaid Act, as duly levied, that is to ſay, in due Form of Law: For the ſame Act doth ouſt the Parties of ſuch Averment, and therefore *rite levatus* ought to be ſo expounded; and a Fine may be ſaid levied in due Form of Law, altho' it be a Fine merely by Concluſion: And as to the ſaid Caſe in (*d*) 46 *E.* 5. it ought to be intended of a Fine levied by a collateral Anceſtor, from whom the Demandant did not claim the Land, and then the Averment is good, for *hæres dicitur ab hæreditate*, *vide* 19 *H.* 8. 6. *b.* by *Inglefield* and others; and 38 *E.* 3. 10. 36 *H.* 6. *View* 30. And in the ſaid Act it is ſaid *earum partium hæredes*, which is to be intended

(*a*) Cr Car 524, 525. 1 Jones 458. 9 Co 141. a. Moor 251.

(*b*) 1 Leon. 83.

Q. reſtrain'd.

(*c*) Fitz. Eſtoppel 53. Br. Fines 9. Poſtea 89. b.

(*d*) 45 Ed. 3. 14. b. Antea 88. b. 1 Leon. 78.

of ſuch an Heir as claims the Inheritance from the Anceſtor who levied the Fine: As if in a *Formedon* of a Gift made to the Demandant's Father, the Tenant pleads the Fine of the Demandant's Grandfather with Warranty, &c. the Demandant may plead, *Quod partes finis nihil habuerunt*, but that ſuch a one was ſeiſed and gave to his Father in Tail: So in an Aſſiſe, if the Fine of the Demandant's Father be pleaded whoſe Heir he is, it is a good Plea to ſay, *Quod partes finis nihil habuerunt*, but that he himſelf was ſeiſed at the Time, &c. and therewith agrees (*a*) 33 *H.* 6. 18. (*b*) 13 *Aſſ.* 8. (*c*) 13 *E.* 3. *Replic.* 62. 22 *E.* 3. 17. (*d*) 17 *E.* 3. 53. And as to the ſaid Book in 13 *Aſſ.* 8. it was affirmed for good Law; for there is a Difference when Tenant in Tail levies a Fine *ſur conuſans de droit come ceo*, &c. and when he accepts ſuch a Fine, and makes a Grant and Render, for againſt a Fine levied by Tenant in Tail *ſur conuſans de droit come ceo*, &c. his Heir cannot aver Continuance, &c. in his Anceſtor, for that would be contrary to the Fine, which is reſtrained by the Stat. *de Finibus*, as *Fairfax*, *Littleton*, and *Brian* held in 12 *E.* 4. 15. *a.* 8 *H.* 4. 8, & 9. And ſo *Shard* ſaid in the ſame Book of 13 *Aſſ.* 8. But when Tenant in Tail accepts a Fine, and (*e*) grants and renders the Land by the ſame Fine, (which is but Executory) there, if no Execution be ſued in the Life of the Tenant in Tail, his Iſſue may aver Continuance of Poſſeſſion, &c. in his Father, for that well ſtands with the Fine, for the Acceptance of the Fine *ſur conuſans de droit come ceo*, &c. which preſuppoſeth a Gift precedent, doth not alter the Eſtate, and the Grant and Render, until it be executed, doth not deveſt any Eſtate out of the Tenant in Tail, and by Conſequence, he continues Tenant in Tail; and therewith agree 41 *E.* 3. 14. 42 *E.* 3. 9. 8 *Aſſ.* 33. 11 *H.* 4. 85. *a.* And ſo and according to this Difference was it adjudged *M.* 3 & 4 *Eliz.* in the Com. Pleas, *Rot.* 1483. *Conisby*'s Caſe, where the principal Caſe was ſuch; (*f*) *Palmer* and *Mary* his Wife ſeiſed for the Life of the Wife as in her Right, the Remainder to *Elizabeth Conisby* in Tail, the Remainder to the ſaid *Elizabeth* in Fee; *Palmer* and *Mary* his Wife levied a Fine *ſur conuſans de droit come ceo*, &c. to the ſaid *Elizabeth* with Proclamations, who granted and rendred a Rent of 27 *l.* 10 *s.* to the Conuſors, for the Term of their Lives, with Clauſe of Diſtreſs; and afterwards *Elizabeth* died, and the Land deſcended to *Henry Conisby*, her Son and Heir in Tail, who leaſed the Land to one *Parker* for Years; and afterwards *Mary* died; *Palmer* diſtrained for the Rent, and he brought a Replevin: And in that Caſe two Points were reſolv'd and adjudg'd.

(*a*) Antea 89 a
(*b*) Antea 88. b.
(*c*) Antea 88. b
(*d*) Antea 88. b. 17 Ed. 3. 53.
(*e*) Flowd. 437. b.
Conisby's Caſe M. 3 & 4. Reg. Eliz.
(*f*) Benl in Kel. 210. pl 15. Benl. in Aſh. 15. Dyer 213. pl. 41. 1 And. 6. pl. 11.

1. That againſt ſuch Fine accepted by Tenant in Tail, the Iſſue might aver Continuance of Seiſin by Force of the Tail

Tail, and the Issue in Tail is not estopped by the Admittance and Acceptance of his Ancestor.

2. That the Grant and Render of the Rent was not within the Statute of 4 *H.* 7. or 32 *H.* 8. because the Fine was not levied of the Land (*a*) itself, which was entailed but of a Rent newly created out of the Land: But in the said Case of the Lord *Zouch*, it was resolv'd by all the Judges of the Com. Pleas, that the Statutes of 4 *H.* 7. and 32 *H.* 8. extended to Fines levied by Conclusion, and should bind the (*b*) Estate-Tail, altho' *partes finis nihil habuerunt*; As if Ten. in Tail makes a Feoffment in Fee, or be (*c*) disseised, and afterwards levies a Fine with Proclamations to a Stranger, it shall bind the Estate-Tail, and the Issues in Tail are barred for ever. And it is to be observ'd, that the Stat. of 32 *H.* 8. saith, *All Fines levied of any Lands, Tenements, or Hereditaments, in any wise entailed to the Person so levying the same, or to any of his Ancestors*, &c. and the Land is entailed to the Person who levied the Fine, altho' he was not seised thereof at the Time. And in the Statute of 4 *H.* 7. (which is expounded by the Act of 32 *H.* 8.) is a *Saving to every Person or Persons not Party or Privy to the said Fine, their Exception, quod partes finis nihil habuerunt*; and the Issue in Tail is Privy, for he claims as Heir and by Descent; *Ergo*, he should not have such (*d*) Averm. And afterwards, *scil. M.* 29 & 30 *El.* Judgm. was given accordingly, *scil.* that the Demandant should be barred; which Case I have reported more at large, because it is remarkable, and the first Judgment which was given in the said Point on the said Statutes. And it was said, that the said Judgment did rule the Point now in Debate, for thereby it appears, If Tenant in Tail be disseised, and levies a Fine and dies before all the Proclamations are past, altho' the Issue enters into the Land, yet after the Proclamations are made he shall be barred, for he cannot say, *quod partes finis nihil habuerunt*: And it was said, if in Case when Tenant in Tail hath nothing at the Time of the Fine levied, that the Issue shall be barred by the said Statutes; *a fortiori*, when Tenant in Tail at the Time of the Fine levied is seised of an Estate-Tail (be it in Possession, Reversion or Remainder) which may in Truth (and not by Conclusion only) pass by the said Fine, the Issue shall be barred by the said Statutes.

Also *in an.* 20 *El.* in the Case of one (*e*) *Archer*, in the Com. Pleas, it was resolv'd by Sir *James Dyer*, *Manwood*, *Mounson* and *Mead*, that where Lands were given to the Grandfather and his Wife in special Tail, the Grandfather died, the Father disseised the Grandmother, and levied a Fine with Proclamations; the Grandmother died, the Father died, that the Son (*f*) was barred; and yet the Father at the Time of the Fine levied had but a Possibility (the Grandmoth. living) to the Estate-Tail. Yet the Judges did expound

(*a*) Flowd. 435. a. b. Car. Jac. 699, 700. 2 Lev. 36.

(*b*) Cr Eliz. 610. 1 Jones 33.

(*c*) Plowd. 434. b.

(*d*) 1 Jones 35. Archer's Case 20.

Note.

(*e*) 9 Co. 141. a. Hob. 258, 333. 1 Jones 33, 37. 39, 40, 81. Cr. Car. 435. 2 Ro. Rep. 374. Winch 110.

(*f*) 10 Co. 50 a. Cr. Car. 435. Cr. Jac 591. 9 Co. 141. a. Cr El. 122, 610. Hob. 258, 333. Dyer 3 pl. 3. Moor 252.

the Stat. of 32 *H.* 8. (being an Act of Explanat.) according to the Letter, *ſcil.* that foraſmuch as the Land was entailed to his Anceſtor, altho' his Anceſtor was alive; ſo that no Eſtate or Right was deſcended to him which he could paſs or extinguiſh; yet becauſe the Stat. ſaith, *intailed to the Perſon ſo levying or to any of his Anceſtors* in the (*a*) Disjunctive, it was held that the Fine with Proclamat. did bar the Right, which after the Fine ſhould deſcend to him, not only as to himſelf, but as to all the Heirs in Tail; *pari ratione* it was ſaid that in the Caſe in Queſtion, foraſmuch as it is provided, That after the Proclamations paſs'd, the Eſtate-Tail ſhall be barred without any Saving for the Iſſue; the Iſſue ſhould be barred notwithſtanding any Claim by him, according to the Letter and Purview of the ſaid Act. And on theſe two Caſes of the Lord *Zouch* and *Arbcer*, it follows, That if the (*b*) Grandfather be Tenant in Tail, and the Father in his Life having nothing in the Land, levies a Fine with Proclamations, and afterwards the Grandfather dies, and afterwards the Father dies; That this Fine ſhall bind the Son, which, as was ſaid, was a ſtronger Caſe than the Caſe now in Queſtion.

(*a*) Antea, fol. 51. a.

(*b*) Mo. 146, 147. Antea 51. a. 61. a. 1 Jones 34. Hob. 258, 353. Cr. Car. 435.

In *Mich.* 23 & 24 *Eliz.* in the Com. Pleas, the Caſe was ſuch; Sir *George Blunt* was Tenant in Tail of divers Manors in the Counties of *Salop* and *Stafford*, and had Iſſue a Daughter, who was married to one *Purſlowe*: And afterwards in *Eaſter* and *Trin.* Term, 23 *El.* Sir *George* levied a Fine of the ſaid Manors to one *Lacon* of *Worceſterſhire*, and died in *Auguſt* following. *Purſlowe* and his Wife brought a *Formedon*, and pending the Plea Proclamations paſſed; it was agreed by the whole Court, that the Tenant (*c*) ſhould plead the Fine and (*d*) Proclamations which paſſed pending the Writ, and bar the Demandant; and yet in the ſaid Caſe a Right of Intail deſcended to the Wife of *Purſlowe*, and preſently they ſued their *Formedon in le Deſcender*, which was all they could do; for the Fine is the Conveyance which paſſes the Eſtate, and the Proclamations are but a ſhort Repetition of the Fine, and are by the Stat. of 32 *H.* 8. only added (as hath been ſaid) to declare that it is a Fine levied according to the Stat. of 4 *H.* 7. which bars the Eſtate-Tail, and not a Fine at the (*e*) Com. Law: *Ex hoc* four Things are to be obſerv'd:

Purſlow's Caſe, Mich. 23 & 24 Reg. Eliz.

(*c*) 1 Jones 145.

(*d*) Cr. El. 362.

(*e*) Antea 88. a. Co. Lit. 262. a.

1. That tho' after the Fine levied, a Right of Intail deſcended to the Wife of *Purſlowe*, yet after the Proclamat. paſt, the Right which deſcended is barred by Force of the (*f*) Fine.

(*f*) Cr. El. 589.

2. That altho' a *Formedon* be brought and purſued, yet when after the Proclamations paſs, the Fine is a Bar; and what Reaſon ſhould there be that the Iſſue ſhould be more barred of his Right which deſcends to him, and of his rightful Action, which he hath purſued for the Recovery of his Right,

Right, than the Iſſue ſhould be barred in the Caſe in Queſtion, after the Proclamations paſs'd, notwithſtanding his Entry or Claim *in pais*.

3. That when Tenant in Tail levies a Fine and dies before Proclamations, the Iſſue in Tail is not within any of the *Savings* of 4 *H.* 7. for if he ſhould be, then the bringing of his *Formedon* before all are paſſed, and the purſuing of it would avoid the Bar which the Statute would make after the Proclamations paſt.

4. That in ſuch Caſe the Proclamations ſerve to no Purpoſe, but only to diſtinguiſh that it is a Fine levied according to the Statute of 4 *H.* 7. For altho' the Iſſue, having Notice by the Proclamations, brings his *Formedon* accordingly, yet it ſhall not avail him.

Trin. 4. *Eliz.* a Caſe was in the Com. Pleas, (as *Benlow* Serj. at Law reports) to this Effect; (*a*) Tenant in Tail diſcontinues in Fee, and diſſeiſes the Diſcontinuee, and levies a Fine *ſur conuſans de droit come ceo*, with Proclamations to a Stranger, and takes an Eſtate by Render in the ſame Fine; and the Diſcontinuee, before all the Proclamations paſt, enters, and claims the Land, and voids the Eſtate which paſſed by the Fine, and afterwards Proclamations paſſed, Tenant in Tail continues his Poſſeſſion and dies ſeiſed within the Year after the Entry and Claim; the Queſtion was, if the Heir in Tail be (*b*) remitted, or if the Entry of the Diſcontinuee were lawful? And the unanimous Opinion of the Juſtices was, That the Heir in Tail was not remitted, but that he was barred by the Stat. of 32 *H.* 8. altho' the Eſtate which paſſed by the Fine was utterly avoided before the Proclamations paſſed. By which it appears, that altho' the Eſtate which Paſſes by the Fine be utterly defeated before the Procl. yet when afterward the Proclam. paſs, the Eſtate-Tail ſhall be barred. And ſo the Doubt which was conceived in the K.'s Bench, *M.* 38 & 39 *Eliz.* in an *Ejectione firmæ*, between (*c*) *Harvy* Pl. and *Facy* Def. on a Demiſe made by *Robert Bret*, Eſq; of Land in *Northpedderton*, where the ſame Point was in Queſtion, and not adjudged; (for the ſaid *Robert Bret* and *Arthur Acclam*, Eſq; who was the Def. Leſſor did agree, and *Bret*, who claimed by the Fine, had good Part of the Inheritance) was well reſolved.

(*a*) 1 And. 43. 172. 2 And. 177. Benl. in Aſh. 17. N. Benl. 122. p. 156. O. Benl. 30. Cr. El. 589. Benl. in Kelw. 210. b. Ow. 75. Moor 115. 1 Brownl. 139.

(*b*) Moor 115.

(*c*) Poph. 61. 2 Anderſ. 109.

5. It was reſolv'd That altho' the Iſſue in Tail be beyond the Sea, yet foraſmuch as he is Privy, and out of all the Savings of the Stat. of 4 *H.* 7. he is bound, altho' he be beyond the Sea, in the ſame Manner as if the Iſſue in Tail was within Age, or under Coverture, or *Non compos mentis*, or in Priſon; and this was agreed by all the Juſtices *nullo contradicente*. *Ex hoc ſequitur*, that the Entry or Claim of the Iſſue in Tail, before all the Proclamations are paſt, is not material; for if the Entry or Claim of the Iſſue

in Tail would be of any Force, then it would be hard to bind them for Want of Claim, who have not Power or Intelligence to make an Entry or Claim, and their Non-claim was not prejudicial to them by the Rule and Reaſon of the Common Law. And if the Infancy, Coverture, *Non ſanæ memoriæ*, or Impriſonment of the Heir in Tail, in ſuch Caſe ſhould give him Power to avoid the Fine, in that Caſe no Man would be aſſured of Lands conveyed to him by Fine.

Note, Reader, There was never any Judgment or Reſolution of any Court againſt the third Point reſolved in this Caſe, but the Opinion of Counſellors *arguendo* in *Smith* and *Stapleton*'s Caſe, *Plow. Comm.* 430. And the Opinion of *Brook*, *tit. Aſſurance* 6. and *Fines* 109. (*a*) But thoſe Opinions are not only contrary to the ſaid Judgments and Reſolutions of the Courts aforeſaid, but would introduce great Inconvenience in weakening of the general Aſſurance of Lands: And obſerve well all theſe Points now reſolv'd, and the ſaid former Judgments and Reſolutions cited in this Caſe; for as I conceive they are grounded on profound and pregnant Reaſon, tending to the Repoſe and Quiet of infinite Inheritances.

(*a*) Ant. 88. b. Sav. 88.

The

The Order of the Caſes in this third Book: Shewing in what Court they were tranſacted, when Recorded, and in what *Folio* of this Book they reſpectively begin.

F I N I S.