1727

The Reports of Sir Edward Coke Kt., in English, Compleat in Thirteen Parts: The Third Part of the Reports of Sir Edward Coke Kt., Her Majesty's Attorney General

Sir Edward Coke

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 Ancient as Modern.

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:*

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for D. Browne, J. Walthoe, B. Lintot, R. Gosling, W. Pears, T. Ward, W. Innys, J. Osborn, J. Hooke, T. Woodward, F. Clay, T. Wooton, R. Williamſon, and A. Ward.

M.DCC.XXVII.

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 ſe legerint & conſtituer', qui reverendiſſimorum Judicium ſententias ac decreta mandarent literis, tum ut ſolverentur queſtiones dubiæ ex opinionum diſcre-

HOW profitable and neceſſary the Reports of the Judgment and Caſes in Law publiſh'd 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 Sci-*

ences there often fall out) Diverſity of Opinions, as alſo for the true and genuine Sence 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, 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 catæ & 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 Judicium 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,

triſſimi illius reverendiſſimique Judicis ac Juriſperiti *Jacobi Dyer* Militis Communis (ut loquimur) Banci, ſive actionium communium Curiæ capitalis non ita pridem Juſtitiarii: Adjicias denique & labores meos qualeſcunque atque quindecim invenies ſive libros ſive tractatus, totidemq; 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; limate tractare, quinimo impoſſibile ut quod non capit intellectus, lingua juſte referat; caveas imprimis moneo, ab Annalium noſtrorum ementita, Juriſprudentia, Legumq; 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 puniſh'd, 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 untill almoſt three hundred Years after,* viz. *in the firſt Year of* Edward *the Third.*

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, proceed 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 dificiles 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 Judg-

ment 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, Preſidents, 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 probabliter poſſint applicari; ita multiplex ratio, alia alium pro cujuſvis lectoris aut auditoris captu trahet & perſuadebit. Atq; iſtæ quidem judicium ſententiæ quia plurimum continent theſauri quaſi reconditi, tuto ac fideliter, in Archivo Regio

(idque

(idque merito ſuo maximo) aſſervantur: Ita tamen intereą 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 et quecunque choſe en la court le Roy de reaſon devoient demurr illeoques 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 ceque 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' illeoqes 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 ceque 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 Glanvile, Bracton, Britton, Fleta, Ingham, *and* Novæ Narrationes, *and thoſe alſo of later Times, as the old Tenures, old* Natura Brevium, Littleton,

Doctor *and* Student, Parkins, Fitzh. Nat. Br. & 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, *Kt. late Chief Juſtice of the Coure 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 nonnnihil Typographi vitio occurrit, ſiquidem ſtudioſus Lector poſt accuratam majorum librorum perlectionem, magna illa duo compendia, *Fitzherberti* Judicis alterum, alterum *Roberti Brooke* Militis in eadem queſtione 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

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 Treaſure of Knowldge) 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 Plea, 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-*

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.

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 queſtione diſputata libro Aſſiſarum 26. pla. 24. digna profecto cum in ſe, tum præſertim opera & attentionem 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. Edwardi 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 cauſſarum ac queſtionum 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 utcunq; 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 ap-

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 Kings 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 13th 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 retornable 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* ponere. *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 viceneto illo videre ten'tum illud, & nomina eorum imbreviar',* atq; hæc reſcripti formula habetur tum apud *Bractonum, 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-

cauſſæ: Ita enim reſcripti Aſſiſæ verba habent, *Etinterim fac' 12 liberos & legales homines, &c.* 3. Qd' per idem tempus extiterant reſcripta Aſſiſæ alique reſcripta Originalia in Curias Regias releganda ac remittenda. Quæ ſane (quandoquidem ſunt ut inquit *Fitzherbert* 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, petitia 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 uſque diem antiquar' poſſeſſion' nomen obtinent, quodque omnes colentes & occupantes eaſd' Edwardi Confeſſoris poſſeſſion' in Aſſiſis juratis ſeu recognitionibus poni non debent; qua quidem immunitate ac privi-

Law of England *had been 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 debent, *which Immunity and Privilege remains to the Tenants of thoſe Manors, to whoſe Hands ſoever the ſame become 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' Oſwaldeſhaw,

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 quærelam, 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 Soccage 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 Sanctæ Mariæ de Worceſter habet Hundredum vocatum Oſwaldeſhaw, 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 quærelam, nec in aliquo placito nec in aliqua qualibet cauſſa. Denique quod *Edgarus* Rex, diu ante divictam hanc gentem prædictas immunitates atq; poſſeſſiones Eccleſiæ

Græce ſcribere: Quin & interceſſiſſe item aſſidua commercia Maſſilienſibus ipſis cum Britannis, ibidem directe Strabo indicat: Olim enim ait ſolebant Stannum ἐκ τῶν Βρετανικῶν νησῶν εἰς τὴν Μασσαλίαν κομίζεσθαι e Britannicis inſulis in Maſſaliam aſportare: Unde Juvenalis illud ſat. 15. qui ſupra centum & 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 Σαμοθρᾴκῃ, Samo vixerunt. Denique cum exercuiſſe Græcos hic commercia, tum non incognitam modo, ſed familiarem fuiſſe veteribus Britannis eorum linguam probant ipſa hujus Inſulæ nomina. Nam *Bret* (un-

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* Grecians *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 Σαμοθρᾴκῃ, *in* Samos. *Laſtly, that as well the* Grecians *had Trafick here, as that their Language was not unknown to the antient* Britains, *the very Names given unto this our Country, do declare and prove. For* Bret *(from whence our Writers as from an old* Britiſh *Word derive the Appellation 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*

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 or 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 Languange or Tongue*

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 quod artes & ſcientiæ neceſſariæ ſint ad iſtarum legum cognitionem atque 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:

Cùm

Cum vero ut quis ætatem ſuam omnem in ſtudiis hiſce legum conterat, aliquid ſemper addendum reſtaret quod ad plenam earum intelligentiamfaceret, 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 *Anno* 36. *c.* 14. 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 Edw. 3. tam reſcripta omnia originalia ac Judicialia, quam univerſi legis libri *Glanvillæ*, *Bractonis*, &c. denique & ſtatuta quæ in hunc uſq; 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, 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 indited in the* Latin: *(as ſome alſo of the Statutes of* Richard the Second *be.) And divers alſo be enacted in* French; *for that they had divers Territories and Seigniores 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 have likewiſe publiſhed theſe*

in

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.* Edward 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 Conceipt, 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 *Language, and which are at this Day, (though in Proceſs of Time much altered) called the* Cuſtoms of Normandy: *So taught he* Engliſhmen *the* Norman *Terms of Hunting, Hawking, and in Effect of*

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 cæperunt 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 Normiam 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 conſuetudinum Normanniæ nomen, atq; 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.

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.

Verum conſule quæſo præfationem illam Gulielmi de Rouil de Alen-

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 Edw. 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 veredica & falſitas compoſita, quæ hominem ſuis erroribus allicit, & per linguæ ornamentum laqueos dulces aſpergit: Et doctrina in multis eſt quibus deeſt oratio. Corte quidem ſpecies & pulchritudo exterior politorum verborum ſententiarumque fucatarum, ita

quandoque

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 aprippitur, 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, conſiſo uti: atque de hiis hæc ſufficiant.

Fecit Benevole Lector, ſuperiorum elucubration' mearum ſingularis ſane approbatio, novis tuis inſuper aſſociata votis, ut pauca hæc reverendiſſimorum judicium 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 explicantes

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.

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

Vale.

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 cauſſas 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: Deniq; 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 knowen 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 wrought and ſentenced in the* Greek *Tongue, it is plain and evident by Proofs luculent and uncontrolable: 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 Common-wealth; for ſo he ſaith,* De omnibus controverſiis publicis privatiſque conſtituunt, &c. & ſi quod eſt admiſſum facinus, ſi cœdes 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 conditio 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. Atq; 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, & reipub. ac legum adminiſtratio, ita enim diſerte loquitur; de omnibus controverſiis publicis privatiſq; conſtituunt, &c. Et ſi qd' eſt admiſſum facinus, ſi cœdes 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 dixerint, & 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 Diſciplines 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 Britaniam 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 Trafick 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 Ἑλλήνιστι 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, ἐκ τῆς Βρεττανικῶν νήσων εἰς τὴν Μασσαλίαν κομίζουσι, *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, atq; 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 Maſilienſes colonia Græca (atq; 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 Ἑλλήνιστι γράφειν, hoc eſt contractuum formulas

Græce

that very Signification is Greek, *and* τὸ βρέτας *in* Aſchylus & Lycophron *ſignifies a Picture; now the other Part of the Word,* ταvία, *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* Cyrographor 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 then 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* Dunuallo M. *of ſome* Dovebant, *did write Two Books of the Laws of the* Britons, *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, ταvία græca vox eſt, idemque plane quod apud Latinos Regio ſonat: Mitto hic nomen alterum *Albion*, primo *Olbion* grece 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 ante 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 divictam 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 3d* 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, Polider Virgil, Harding, Caxton, Fabian, Baleus *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 imperto, & 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 ſhameleſly and falſly to be ſlan-*

unam coegit quam vocari voluit legem communem; hæc atq; conſimilia plura leges apud Gildam, Gervaſium, Tilburienſem, Galfridum, Monumathenſem, GuilielmumMamsburienſem, 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 perdomviſſet 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

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efficaciſſime videbantur adjecit; hæc habet Gervaſius Tilburtenſis 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 juſticiarus, ſingulari cum doctrina tum authoritate vir de hac ipſa reſcripſerit. 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 creditu 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, *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*

illorum juſtitia, ratione, vel affectione concitati 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 aboleverit: Henricus vero ſecundus Librum etiam de legibus & ſtatutis Angliæ compoſuit, quem in Tomos ſectum, alterum pro Republica leges, alterum ſtatuta regalia, ſecundum diviſionem illam incripſit, quorum ne fragmentum extat hodie reliquum. 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 quæremonias ut plurimum contineri, labore illo audiendi cauſſas defatigatus, ex conceſſione & edicto Regis, minores aliquot Curias ſubſtituit, quæ audiendis populi quærelis per

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Dapifero, Ranulp' de Glanvill' tunc Vicec' Ebor' Ranulp' filio Watler', Roger de Badnut, Warmo 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 Malebake, 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 & Heliam fili- um ejus, idq; de una caru- cata terræ in Fridaſtorpe, quod quidem breve Domi- Johannem in eodem comi- tatu ad faciendum præd' ſervitium præd' Heliæ filio ſuo, & hæredibus ſuis; hiis teſtibus Remigio Dapifero, Ranulpho de Glanvil' tunc Vicecomite Eborum, Ra- nulpho filio Waltero, Ro- gero de Badnut, Warmo de Rollesbey, 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- bake, 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 una carucata terræ cum pertinentiis in Fridaſtorpe quam clamat, & quam Walterus de Fri- daſtorpo, & 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 Ba- verlaco *brought a Writ of Right againſt* Walter *of* Fri-

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 miſteria 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 Normanorum ingreſſum Cirographa firma erant cum crucibus aureis, aliiſque ſignaculis, ſed Normannos cum cerea impreſſione uniuſcujuſque ſpeciale ſigillum ſub intitulatione trium vel quatuor Teſtium conficere Cirographia 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 plebio 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- " greſſ. 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

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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 putani 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' Reg' ſcil' quod præd' Walt. &*

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 Johannem 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. &

& 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' Penticoſt, pro omnibus ſervitiis quæ ad terram illam pertinent: Et præd' Walterus & Helias & hæred' ſui warrantizabunt præd' Joh' & hæredibus ſuis præfat' dimid' carucatam 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 retementos; 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 & herædib' ſuis 12 d. *ad termin' Penticoſt', pro omnib' ſervitiis quæ ad terram illam pertinent: Et præd' Walterus & Helias & hæred' ſui warrantizabunt præd' Joh' & hæred' ſui 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-

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 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, à 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 vicecometi dati, ut ſi Dom' ipſe officio in hac 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 ἐπ φωνηεντ *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 defeceruntut (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 expounded to be a Writ of Right by theſe Words* clamavit, &c. jus ſuum, *but directly after, 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*

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 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.

2dly, to reconcile 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 queſtionibus: 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

ob has cauſas elucubrationum mearum partes priores duas hancq; poſtremo ultimam in lucem edidi, quæ legum ſtudioſos (id quod ſperoq; ac cupio) ad illorum vetorum 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, nunquam prius fuerunt expoſita aut explicata; vel ad faniorem intellectum germani ſenſus, ac rationis judiciorum atque ſententiarum antehac relatarum; vel deniq; ad dubiar' queſtionum (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 Statute 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. *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 Edw. 6. *of Chauntries, the Archbiſhop 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 Juſtice diſtributed, is*, Jus ſuum cuique 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 *Doringtoni*, ex ſtatuto 31 *Hen.* 8. de diſſolutione Monaſteriorum: Item in 1 *Eliz.* de Canteriis (ut loquimur) cauſam Epiſcopi Cantuarienſis, præterea membrum unum magnorum illor' ac 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

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 cujuſcunque ſcientiæ humanowned *Colleges, or Houſes of Court, called, The* Inner Temple, *to which the firſt three Houſes of Chancery 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 Utterbarriſters, 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 diſtinguiſhed 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 humain 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*

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, quod 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 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 alienating or demiſing but only for the Life*

of Tenant in Tail, which in Proceſs of Time brought in ſuch Troubles and Inconveniencies, that after two hundred 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. cap. 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 *Hen.* 8. c. 10. de Revocando atq; reſtituendo antiquo Jure communi, ut ex ill' procœmio 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 queſtion' 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 *Utterbarreſters* 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* Oxford *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 Poſſeſſion of the Law, there are Mootemen (which are 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 choſen Readers in Inns of Chancery: Of Utterbarriſters, after they have been of that Degree twelve Years at leaſt, are choſen Benchers, or Antients; of which one that is of the Puiſne Sort, reads yearly in Summer Vacation, and is called a ſingle Reader; and one of the Antients that had formerly read, reads in* Lent *Vacation, and is*

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 Solicitor-General, his Attorney of the Court of Wards and Liveries, and Attorney of the Dutchy: And of theſe 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 one, two, or three as pleaſe him, to be his Serjeants, which are called the King's Serjeants: Of Serjeants, are 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, 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, Utterbarreſters, Mootemen, and inferiour Students, are four famous and re-*

Benchers dicimus co-optantur; ex hac claſſe ſingulis annis noviſſimus quiſq; 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 atq; elementa juris perdiſcant ædes Cancellariæ octo, vocatas *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.

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

The Marqueſs of WINCHESTER's *Caſe.*

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* Eſquire, and to one *Anne Milles*, the Mannor 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 Marqueſs of *Wincheſter* and divers others, did recover (in the Life of the ſaid *Anne*) the ſaid Mannor 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 afterwards, the 22d Day 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 Mannors, 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 Hereditaments, 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 Poſſeſſion the Day of his Treaſons committed, or at any Time after: And afterwards the ſaid *Lionel* died without Iſſue of his Body; and afterwards the ſaid *Anne* died; and thereupon the Queen brought a Writ of Error againſt the Marqueſs 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 Mannor of *Merleſton*, *cum pertin'* general, and not reſtrained to any Town. And the ſaid Marqueſs, in bar of the ſaid Writ of Error, pleaded, That after the Attainder of the ſaid *H. N.* the Father, the Queen 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 Mannor, *cum pertin'tiis*; and alſo all her Right, Eſtate, Title, Claim, Intereſt and Demand in the ſaid Mannor, To have and to hold to him and his Heirs. And upon this Plea *Popham* the Queen's Attorney did demur in Law. And this Caſe was argued by *Popham* the Queen's Attorney, and *Egerton* the Queen's Sollicitor, in Maintenance of the Writ of Error; and by *Plowden* and *Coke* for the Defendant And the Defendant's Council took five Exceptions to the Writ of Error.

1. That the Writ of Error was brought to reverſe a Judgment for all the Mannor, 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 Jointenant, 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 Council, 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.

(*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. 1 Sand. 285.

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

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 intended to continue, the Books in 7 *H.* 7. 3. (*a*) *Stradling*'s Caſe, *fol.* 199. (*b*) & 10 *H.* 7. 28. in *Hewbade*'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 Mannor of *Merleſton*, *cum pertinentiis*, and the Writ of Error was to remove a Recovery of the Mannor 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 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. & (*g*) 26 *Aſſ.* 31. in Caſe of Att'.

(*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 Mannors, *&c.* which the ſaid *Henry 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 Mannor, which ought to have been averred preciſely, as it is agreed in *Nichol*'s Caſe, in (*h*) *Plow. Com.*

(*h*) Plowd. 48. 5. b.

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 Mannor: 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 Hereditament 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 *Thomas Gawdie* Knight, 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. 291, 292. 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 Remed. 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*) 3 *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 of 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 Attain. 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 Hereditament. Alſo altho' an Uſe were an Hereditament (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 Attainder, but neither the Condition

(*a*) Hob. 242, 341.

(*b*) 2 Rol. Rep. 339, 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.

(*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, 501. 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 Attainder. *Note* a Diverſity between *Inheritance* and *Chattels*; for as it hath been ſaid, a right of Action concerning Inheritances, is not (*a*) forfeited by Attaind. but Obligations, Statutes, Recognizances, *&c.* and other ſuch Things in Action are forfeited to the K. by Attainder or Outlawry. And it was agreed by 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.

Hardr. 488, 490

(*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 Mannor, for altho' the Recovery were erroneous for want of an Original (for it was agreed it was not void, but voidable by Error) yet notwithſtanding, 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 Recoverer, 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 Council, 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 Poſſeſſion 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 Mann. to which, *&c.* becauſe before he hath recovered the Mann. he hath no Action to recover the Advowſ. So if a Man purchaſe an Advowſ. in Fee, and ſuffers an Uurp. and 6 Mon. to paſs, now he hath Right, but foraſmuch as he hath no Remedy for it, he ſhall ne'er 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 reſolved 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. 661. Co. Inſt. 349. a. b.

(*f*) 2 Rol. Rep. 417. Co. Lit. 307. a. 33. b.

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 K. by the general Words of the ſaid Act. It is adjudged in *Paſch.* 3 *E.* 3. 74. that whereas all the Poſſeſ. of the (*b*) Templers were by Act of Parl. *Anno* 17 *E.* 2. given and tranſ. to the Hoſpitlers, 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*) Frankalmoinge, becauſe that Tenure conſiſts only in Privity, and for that Cauſe without ſpecial Words, it ſhall not againſt the Rule and and Reaſon of the Com. Law, be created. The ſame Law of a Writ of Error. And altho' *Anne Milles* was jointly ſeized 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 Lieu, 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 Remaind. over: For this Cauſe it was reſolved, That for one Moiety the Recov. ſhall be a Bar to the Eſt. Tail, and to the Remaind. alſo, becauſe by the Recov. againſt *Lionel*, the Jointure was ſevered. And it was ſaid, That com. Recov'ries, as much as any benign Interpretat. of the Law will permit, ought to be maintain'd, becauſe they are the com. Aſſurances of the Land. But it was agreed, That for the other Moiety whereof *Anne Milles* was Ten. 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 Remaind. 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*.

The third Cauſe was, Becauſe *Henry* at the Time of his Attainder was not entituled 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 Com. 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

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

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

(*c*) 7 Co. 13. a. Moor, 312, 322.

(*d*) 1 Rol. Rep. 301. Bridgm. 71. Palm. 237, 345. Dyer, 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 Party to the Record, *Vide* 4 *Aſſ.* 7. 17 *Aſſ.* 24. 18 *E.* 3. 25. 20 *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. *c.* 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 diveſted, 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*) 0 *R.* 2. *cap.* 3. was made, by which it is provided, That if Tenant for Life, Tenant in Dower, Tenant by the Curteſie, 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, although 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. 8. Cr. Eliz. 289. Cr. Jac. 333. F. N. B. 99. c. 21. m. c. 22 E. 4. 31. a. 2 E. 4. 27. b. Palm. 253.

(*b*) Rol. 748.

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

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

Firſt, That although the Statute ſpeaks only of Reverſons, 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 Curteſie, 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 Point in Caſe of Receipt) their Meaning appears to

(c) Cr. Car. 535.

(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

(d) Poſt, fol. 61. a. 10 Co. 44. b.

give him in Reverſ. or Rem. expectant on ſuch 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 Recovery by Covin and

(e) 1 Co. 15. b. 2 Co. 74. a. 2 Leon. 60, 63, 66. 4 Leon. 124, 126, 128, 131. Co. Lit. 356. a. 362. a. Br. entre congeable 49. Br. forfeiture de terre 29. 1 Rolls. 853. 10 Co. 44. a. Moor, 271. 3 And. 227.

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 Mannor of *Merleſton*, and of all her Intereſt, Claim, and Demand in it, although it were made *de gratia ſpeciali, & ex certa ſcientia, & mero motu*; that the Writ of

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

(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

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

was ſaid, it was adjudged in (g) *Cromer*'s Caſe, 8 *Eliz.* That where by the Attainder of a Diſſeiſee, a Right of 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 grant. 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 Diſſolut. was diſſeiſed, and the K. after the Diſſolut. 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*, C. J. of the Com. Pleas, and Sir *Rog. Manwood*, C. Bar. of the Exeheq. and divers other Juſtices, and they were unanimouſly of their Opin. And afterwards, foraſmuch as it appeared to the Court, That the ſaid com. Recov. 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. 272.

Note Reader, for the ſaid Point of com. Recov. there was a Caſe in the Com. Pleas, *Trin.* 27 *Eliz. Rot.* 276. between *Owen* and *Morgan*, and the Caſe was ſuch; *George Owen* brought a *Scire facias* againſt *Edward Morgan*, to execute a Remainder of certain Land limited to him by Fine, and ſhewed, That *Rice Owen* was ſeized of the ſaid Land in Fee, and levied a Fine thereof to *Richard Owen* and *Thomas Moningtón*, 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 Conuſans) 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 Execut. The Defendant pleaded in Bar a com. Recov. had againſt the ſaid *Rice* as Tenant, with Voucher over of the common Vouchee, which Recov. was to the Uſe of the Defend. and his Heirs, and that *Rice* ſurvived *Lettice*: The Plaint. replied and ſaid, That the ſaid *Lettice* was alive at the Time of the ſaid Recov. upon which the Defend. did demur in Law. And it was adjudged for the Plaint. And in that Caſe two Points were reſolved.

Owen *and* Morgan's *Caſe*. Trin. 27. Reg. Eliz. (b) 2 Rol. 395. Moor 210. Poſtea 6. b. 1 And. 162. Gould. 26. 1 Jones 324. 10 Co. 46. a. Cr. Car. 321. 4 Leon. 26. 93. 222.

1. Altho' *Lettice* was not (c) Party, either to the Writ or to the Conuſans, 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.

(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 ſeized 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 Siderf. 83. Poſt. 6

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 Huſb. 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 Remaind. in Tail expectant upon an Eſtate for Life, in which Caſe a com. Recov. had againſt him ſhall not bind, becauſe he was not Tenant to the *Præcipe*, nor ſeized 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.* 4. 14. *b.* that againſt a com. Recov. againſt the Anceſtor in Tail, the Iſſue may ſay, That the Anceſtor was not Tenant *tempore brevis.*

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., ſeized 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. Recov. it ſhall not bind the Eſtate Tail *cauſa qua ſupra.* And altho' the Huſband, who ſuffered the com. Recov. 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.

* Co. Lit. 187.

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

(*c*) Br. Remitter 35.
(*d*) Br. Tail 36.

(*e*) 1 And. 44.

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 Quen's Ward, Plaintiff, and* Edward Cuppledike, *Defendant; And the Caſe was ſuch,* &c.

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

FRancis *Cuppledike* and *Elizabeth* his Wife, were ſeized of the Mannor 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*

Thomas Cuppledike, now Ward to the Queen in Tail, with a Remaind. over in Tail, the Reverſ. to *Francis* and his Heirs: *Francis* levied a Fine, *Oct. Mich.* 36 & 37 *Eliz.* to *Tho. Seaton*, *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, recov. againſt *Seaton* and *Becket* the ſaid Mann. who vouched *Francis* only, who (*a*) vouched over the com. Vouchee, and Judgment and Seiſin had accordingly, the ſaid *Eliz.* then being alive, which Recov. 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 Mann. to the ſaid *Edw. Cuppledike*, and died without Iſſue Male: And now the Queſt. was, Whether by this com. Recov. the Remaind. 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* Attorn. of the Court of Wards, it was reſolved, That this Recov. 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 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 Recov. in Value gave Recompence to the Tail which *Francis* had, and to the Remainders over: So it was held, If *A.* (*c*) be Ten. in Tail, the Remaind. to *B.* in Tail, the Remain. to *C.* in Tail, the Remaind. to *D.* in Fee, *A.* makes a Feoffm. in Fee, the Feoffee ſuffers a com. Recov. in which *B.* is vouched, and he vouches the com. Vouchee, in this Caſe *A.* is not bound, but *B.* and all the Remainders over are barred: For altho' by the Feoffm. 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 remit. before the Eſtate Tail in Poſſeſſion be recontinued; yet in Caſe of a com. Recov. which is the com. Aſſur. of the Land, he who comes in as Vouchee, 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 diveſted or diſcontinued.

(a) Co. Lit. 378. b.

(b) 6 Co. 32. a. 2 Rol. 395. Hob. 25, 26. 1 Co. 122. b.

(c) Hob. 338. Heſſ. 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 Ten. in Tail, and cannot be jointly ſeiz'd 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 Wife

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 his 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 Remaind. 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 that it was adjudged 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 Rol. 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. Dyer 252. pl. 97, 98. Poſtea 60. b.

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

Paſch.

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

HEYDON's *Caſe.*

(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. Co. Ent. 372. nu. 10. 1 Leon. 42. 333. 4 Leon. 117. Sav. 66. 9 Co. 105. a.

Firſt, They found that Parcel of the Lands in the Information were ancient Copyholds of the Mannor of *Otlery*, whereof the Warden and Canons regular of the late College of *Otlery* were ſeized in Right of the ſaid College; and that the Warden and Canons of the ſaid College, 22 *H.* 7. at a Court of the ſaid Mannor, 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 Mannor; 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 ſeized 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 Statut of (b) 31 *H.* 8. and the Branch of it, *ſcil.* by which it is enacted, *That if any Abbot*, &c. *or other Relig. & 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 Mannors, 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 Mannor, 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 seized 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 Siderf. 41. 2 Bulst. 187. Hob. 97. 1 Rol. Rep. 162, 166. Cro. Argument 40.

And 4. The true Reason and 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 subtil 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 Statute 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 Parliament 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 L. or of the Cuſtom of the Mannor, or in Prejudice of the Tenant, there the general Words of ſuch Act of Parliament, ſhall not extend to Copyholds: But when an Act of Parliament 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 Mannor, 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. §. 76. 9 Co. 105. a. Co. Lit. 60. a. b. 4 Co. 22. a.

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 Statute *de Donis Conditionalibus* was not to extend (in Prejud. of Lords) to ſuch baſe Eſtates, which as the Law was then taken, was but at the

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

(*e*) Lit. §. 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*) Recov. bar them; ſo as he who hath ſuch Eſtate can't (without the Aſſent of the L. 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 Statute, without ſpecial Cuſtom, doth not extend to Copyholds; but if the (*c*) Cuſtom of the Mannor 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 Mannor, 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. Cart. 238. Cro. Car. 45.

(*c*) 1 Rol. 838. Co. Lit. 60. b.

And to this Purpoſe is (*d*) *Littleton*, *Lib.* 1. *cap.* 8. for he ſaith, That if a Man ſeized of a Mannor, within which Mannor there hath been a Cuſtom which hath been uſed Time out of Memory, That certain Tenants within the ſame Mannor 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 Mannor; and a little after, That *Formedon* in Deſcender, lies of ſuch Tenements, which Writ as it was ſaid, was not at the Common Law.

(*d*) Lit. §. 77. Co. Lit. 60. b.

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 Mannor 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

(*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 Statute of *Weſtm.* 2. as appears in his own Book, *Lib.* 2. *cap.* 10. and 34 *H.* 6. 36. And where he ſaith, that *Formedon* in (*a*) Deſcender lies, he alſo ſaith that it lies at the Common Law. And it appears in our Books, That in ſpecial Caſes a *Formedon* in the Deſcender lay at the Common Law, before the Statute of *Weſt.* 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. §. 481. F. N. B. 217. D. Poph. 34.

(*b*) O. Benl. 165. 1 Rol. Rep. 4. Co. Lit. 60. b.

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 Mannors were 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.

To that it was anſwered by the Chief Baron, That where the Cuſtom of the Mannor 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 Mannor, 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. 573. 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 to 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. 202. 1 Leon. 333. 2 Rol. 700. 2 Co. 74. a. Cro. Jac. 413.

Trin. 26 Eliz.

Adjudg'd in the Exchequer.

DOWTIE's *Caſe.*

(a) 1 Leon. 21. 3 Leon. 187. Hob. 171. 9 Co. 95. b. 96. a. 7 Co. 29. 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 Viſc. *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, in Conſideration of Money, did bargain and ſell to the Lady *Johan Lea*, all his Tenements and Cottages ſituate in the Pariſh of St. *Andrews* in *Holborn*, in the Occupation and Tenure of *William Gardiner*, To have and to hold to ſaid Lady *Johan* for her Life, the Rem'der 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 *Thomas* 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 five Meſſuages

to

to *John Farneham* and his Heirs, with a Proviſo in the ſame Letters Patents, That if the ſaid Tenements, Rents, 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 remained 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. *Sepulchres*, 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 *Farneham*, then they found the Defendant not guilty; and if the Queen did not grant the ſaid five 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 reſolv'd.

(a) 1 Leon. 21. Hob. 171. Cro. Jac. 22. 473. 3 Keb. 413, 414. 2 Co. 23. a. b. 33 a. b. 4 Co. 35. a. b. 50. a. Plowd. 191. b.

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. *Andrews* in *Holborn* 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. *Andrews Holborn*) 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 Diſſeiſereſs; But the great Doubt of the Caſe was, When the Diſſeiſee is attainted of H. Treaſon, if the Land itſelf ſhould be preſently in the actual Poſſeſſion of the K. by Force of the Stat. of *(d)* 33 *H.* 8. *cap.* 20. or if the K. 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 King. 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. *cap.* 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

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

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

(d) 3 Inſt. 19.
(e) 1 Leon. 21. 3 Leon. 187. 4 Leon. 166. 172. 2 Rol. Rep. 318, 321, 324, 373, 421 503. 3 Inſt. 19. Godb. 301. 304, 302, 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.

the actual Poſſeſſion of the K. until Office; and with that agrees the Judgment in *Plowd. Comm.* 486. 15 *Eliz.* *(a)* *Dyer* 325. Sir *William 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 H. Treaſon and dies, there the Fee and Freehold, without any Office found, is caſt upon the K. 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 K. 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 King 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 King 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

(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. 1 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 295.

(d) 2 Rol. Rep. 325, 340, 375, 421. 1 Jones 71.

(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 Anderſ. 34. Palm. 439. Heri. 151, 157. Godb. 302, 305, 307, 308, 309, 311, 315, 321, 322, 323, 324. Co. Lit. 372. b. 392. b. Plowd. 552. b. Hob. 334, 339, 340, 341, 343, 344, 346, 347, 348. Dyer 332. pl. 27. 343. pl. 56. Co. Ent. 422. a.

(g) Hob. 341. 3 Inſt. 19.

or 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 Poſſeſſion without Office, *id eſt*, 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.

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 Marqueſs of *Wincheſter*'s Caſe in the King's Bench. And *Popham* the Attorney-General, *Coke*, and others, were of Council 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. Anrea 4. b. Hob. 243.

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

Mich. 26 & 27 Eliz.

In the Exchequer.

Sir WILLIAM HARBERT's *Case.*

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 Bailywick; 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 Retorn, 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 oncretur, & ei inde ſatisfaciat.* And thereupon the ſaid Sir *Will. Harbert* brought a Writ of Error, and aſſign'd three Errors: 1. In the *Scire facias*. 2. In the Retorn. The 3d in the Judgment. And this Term the Errors were mov'd by *Plowden* being of Council with Sir *William Harbert* before Sir *Thomas Bromley* L. Chancellor of *England*, and the Baron of *Burleigh* L. Treaſurer of *England*, and the two C. 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 faciendum* lies, and there the King 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 Accompt, for at the Common Law Process in Accompt was Distress infinite; and afterwards by the Statute of (n) 25 *E.* 3. *cap.* 17. the like Process was given in Debt as in Accompt, 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 Bulst. 63.
(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.
(f) 7 Co. 38. a. Co. Lit. 289. b.
(g) 7 Co. 37. b.
(h) 7 Co. 37. b.
(i) Plowd. 441. a. Cro. Jac. 450.
(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 Bulst. 63.
(n) 2 Rol. Rep. 295. 2 Bulstr. 63. 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 Accomptant, 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. Dier* (*c*) 224. and *Plow. Comm.* (*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.

(*a*) Cro. Jac. 450. Palm. 167. Plowd. 440. a.
(*b*) Co. Lit. 90. b. 106. a. 131. b. Godb 293. 2 Rol. Rep. 295. Lit. Rep. 100.
(*c*) 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. 295. 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.

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

(*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 Bulstr. 320. 3 Bulstr. 306, 318
F. N. B. 162. b. c.

Con-

Contribution againſt another Heir, for they are *in æquale 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 Ten'ts of the Land, who were Ten. to the Def. 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. 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 *Richard Walgrave*'s Caſe. So if a Man be bound in a Stat. or Recog. 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 afore-ſaid, 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 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

were

(*a*) 1 Rol. 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. Dec. 7. Br. Joinder in Action 119.

(*f*) 2 Co. 25. b. Br. Dower 18. Stath. 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. Br. Parol demur 16. Fitz. Age 73.

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 B. 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 querel 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 ſeiſed 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.*

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

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 Warranty, and both die, both their Heirs ought to be vouched, and they ſhall be equally charged: But, againſt this, two Objections were made:

(*b*) 2 Co. 25. b. Br. Dower 98. Strath. Dower 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 Warranty: For by the Stat. or Recogn. the Land is preſently bound in whoſe Hands ſoever it ſhall come, but ſo it is not in Caſe of a Warranty: To which it was anſwered and reſolv'd, 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 Brownl. 99. Br. Recover en value 63. Br. Voucher 165.
(*h*) 2 Rol. 87. 29 E. 3. 39. a. Fitzh. Erec. 256. 29 Aſſ. 37. Br. Charge 27. Br. Joint-tenants. 27. Br. Age 36. Br. Error 192. Br. Parol demur 16. Fitzh. 73. Fitzh. Execution 100.
(*i*) Co. Lit. 102. a. Lit. Sect.
(*k*) 2 Rol. 87. Carr. 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 reconcil'd, 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. 187. 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 restor'd 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 Council of Sir *Will. Harbert* moved three Errors in the Record.

(d) Dyer 333. pl. 23, 24. 2 Inst. 396. Mo. 524, 536. F. N. B. 103. b. Cro. Car. 445. 1 Rol. 311. 1 Jones 90. Bendl. 133. 2 Bulstr. 17. 3 Bulstr. 306. 23 E. 3. Execution 127.

The first was, That the Writ of *Scire facias* was *Scire facias hæred'*

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 ſeiſed of the Manor of *Dale* in Fee, and died ſeiſed, after whoſe Death the Manor of *D.* deſcended to *B.* as *conſanguineo & hæredi prædicti A.* (and ſhew how) and not *prædicti manerii.*

The ſecond Error was, admitting 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' & hered' predict' 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 Council, 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 Conuſee 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 Defend. died, the Pl. prayed a *Scire fac'* againſt *A.* who is Tenant of the Defend. Lands, and had it, who came and counter-pleaded the Exec. and they were at Iſſue, and

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 Bulſtr. 317, 318, 320. Palm. 419. 1 Jones 87, 88.

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

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 pleaded a
2 Co. 20. 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 reſolv'd by the Court, but afterwards, on a Petition made to the Queen, Sir *William* compounded with her. *Plowden* and *Coke* were of Council 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.

De

De Termino Sancti Hillarii, Anno regni dominæ Elizab. nunc Reginæ Angliæ viceſimo nono, Rotulo 790.

MEmorandum quod alias ſcilicet Termino Sancti Michael' ultimo præterito, coram domina Regina apud Weſtmonaſterium, ven' Richardus Hynde per Jacobum Tong attornatum ſuum; Et protulit hic in curia dictæ dominæ reginæ tunc ibidem quandam billam ſuam verſus Willihelmum Ambrye in cuſtod' Mareſchall', &c. de placito tranſgreſ. & ejectionis firmæ. Et ſunt pleg' de proſequend', ſcilicet Johannes Doo & Richard' Roo: Quæ quidem billa ſequitur in hæc verba. ſſ. Hertf. ſſ. Richardus Hynde queritur de Willihelmo Ambrye in cuſtod' Mareſc' Mareſchall' dominæ reginæ, coram ipſa regina exiſten', pro eo videlicet, quod cum quidam Thomas Brand & Conſtantia uxor ejus, & Willihelmus Davyes & Margareta uxor ejus, nono die Julii, anno regni dominæ Elizab' nunc Reginæ Angliæ viceſimo octavo, apud Aldenham in comitatu prædict', dimiſer', conceſſer', & ad firmam tradider' præfato Richardo Hynde inter alia, decem acr' terr' cum pertinentiis vocat' **the upper Part of a Cloſe named Reddings in Aldenham** prædict' in comitat' prædict': Habend' & tenend' prædict' decem acr' terr' cum pertinentiis præfato Richardo Hynde & aſſignatis ſuis, a feſto Sancti Johannis Bapt. tunc ultimo præterito, uſque finem & terminum ſeptem annorum extunc proxim' ſequen' & plenarie complend' & finiend'. Virtute cujus quidem dimiſſionis, idem Richard' Hynde in prædict' decem acr' terr' cum pertinentiis prædict' nono die Julii, anno viceſimo octavo ſupradicto intravit, & fuit inde poſſeſſionat', quouſque prædict' Willihelm' Ambrye, poſtea ſcilicet prædicto nono die Julii, anno viceſimo octavo ſupradicto, vi & armis, &c. in prædict' decem acr' terræ cum pertinentiis ſuper poſſeſſionem ipſius Richardi intravit. Hertf.

travit, & ipſum Richardum a firma ſua prædict' inde termino ſuo nondum finit' ejecit, expulit, & amovit, ipſumq; Richardum a poſſeſſione ſua inde extratenuit, & adhuc extratenet: Et alia enormia ei intulit, contra pacem dictæ dominæ reginæ, ad dampnum ipſius Ric' decem libr': Et inde producit ſectam, &c. Et modo ad hunc diem ſcilicet diem Lunæ proxim' poſt octab' Sancti Hillarii iſto eodem termino, uſq; quem diem prædictus Willihelmus, habuit licentiam ad billam prædict' interloquendi, & tunc ad reſpondendum, &c. coram domina regina apud Weſtmon', ven' tam prædictus Richardus per Attornatum ſuum prædict', quam prædict' Will' per Richardum Belfield attornatum ſuum: Et idem Will' defendit vim & injuriam quando, &c. Et dicit quod ipſe non eſt inde culpabil', & de hoc pon' ſe ſuper patriam: Et prædict' Richardus ſimiliter, &c. Ideo ven' inde Jur' coram domina regina apud Weſtm', die Mercurii proxim' poſt xv. Paſchæ: Et qui nec, &c. ad recogn', &c. Quia tam, &c. Idem dies dat' eſt partibus prædict' ibidem, &c. Poſtea continuat' inde proceſſu inter partes prædict' de placito prædict' per Jurat' poſit' inde inter eas in reſpect' coram domina reg' apud Weſtm', uſque diem Mercurii prox' poſt octab' Sancti Michaelis extunc proxim' ſequen': Niſi Juſtic' dominæ reginæ ad Aſſiſas in com' prædict' capiend' aſſign' prius die Veneris, duodecimo die Julii apud Hertford in com' prædicto, per formam ſtatuti, &c. ven' pro defectu Jur', &c. Ad quem quidem diem Mercurii proxim' poſt octab' S. Michael' coram dom' reg' apud Weſtm' ven' prædict' Richard' Hynde per attornatum ſuum prædict', & præfat' Juſtic' ad aſſiſas coram quib', &c. miſ. hic recordum ſuum coram eis habitum in hæc verba. ſſ. Poſtea die & loco infracontent, coram Thom' Gawdy Milit', uno Juſtic' dominæ reg' ad placita coram ipſa domina reg' tenend' aſſign', & Roberto Clarke uno Baron' dict' dom' reginæ Scaccar' ſui, Juſtic' ipſius dom' reginæ ad aſſiſas in com' Hertf. capiend' aſſign', per formam ſtatuti, &c. ven' tam infra nominat' Richard' Hynde, per Henr' Brantwayte attornat' ſuum, quam infraſcript' Will' Ambrye, per attorn' ſuum infracontent': Et Jur' jur' unde infra fit mentio exact', quidam eorum videlicet, Ric' Penyfather, Thomas Glaſcock, John' Harmer, & Stephanus Nebbes ven', & in jur' ill' jurat exiſtunt: Et quia reſid' Jur' jurat' illius non comparuer', Ideo alii de circumſtan' per vic' electi, ad requiſition' præfat' Ric' Hynde, ac per mandat' Juſtic' prædictorum de novo apponuntur, quorum nomina panello infraſcript' affilantur, ſecundum formam ſtatuti in hujuſmodi caſu nuper edit' & proviſ. Ac quidam Jur' ſic de novo appoſit, videlicet Edward' Vyall, Thomas Cooker, Thomas Throwe, Edward' Aſſer, Johannes Dermer, Will' Tyverton, Edwardus Jorden, & Rob' Carpenter ven', qui ad veritatem

de

de infracontent' ſimul cum Jur' præd' prius impanellat' & jurat', dicend', electi, triati, & jurati, dicunt ſuper ſacramentum ſuum, quod diu ante tranſgreſſion' & ejectionem firmæ interius fieri ſuppoſit', quidam Tho. Boraſton fuit ſeiſit' de & in infraſcript' x. acr' terr' cum pertin', vocat' **the upper Part of a Cloſe, called Redding** in Aldenham infraſcript' in dominico ſuo ut de feodo, & eaſdem decem acras terræ cum pertinentiis, tenuit de quodam Roberto Stepneigh armigero, ut de manerio ſuo de Aldenham in libero ſocagio: Et ulterius Jur' præd' dicunt ſuper ſacramentum ſuum, quod prædictus Thomas Boraſton habuit exitum de corpore ſuo legitme procreat', Humfridum Boraſton filium ſuum natu maximum, & Henricum Boraſton filium ſuum natu miminimum: Et quod prædictus Humfridus Boraſton habuit exitum de corpore ſuo legitime procreat' Conſtanciam Boraſton, modo uxorem infranominati Thomæ Brand, & infranominat' Margaretam uxor' infranominat' Willihelmi Davies. Et poſtea idem Humfridus obiit, prædict' Thom. Boraſton vivente, & quod prædict' Conſtancia & Margareta fuerunt & ſunt filiæ & cohæredes præfati Humfridi Boraſton: Et ulterius Jur' præd' dicunt ſuper ſacramentum ſuum quod prædict' Tho. Boraſton ſic de & in prædictis decem acris terræ cum pertin' ſeiſitus exiſtens ut præfertur, poſtea, ſcilicet duodecimo die menſis Auguſti, anno Domino Milleſimo quingenteſimo quinquageſimo nono, ann. regni dictæ dom. reginæ nunc primo, condidit teſtament. & ultimam voluntatem ſuam in ſcriptis in hiis Anglicanis verbis ſequen'. In Dei nomine Amen; **Item, 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 xlvi. s. viii. Pence, 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 8 Years, fell none of the Woods, Timber, nor Underwoods, in, nor upon the ſaid upper Part, but ſhall preſerve the Woods, Yawts 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 accomplith his full Age of Twenty one Years, and the mean Profits to be**

employed by my Executors towards the Performance of this my laſt Will and Teſtament: And when the ſaid Hugh cometh unto Twenty and one 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 Thomas Amerie do refuſe to bring in his Obligation, or to preſerve the Woods upon the ſaid upper Part, then my Executors to enjoy the Premiſſes during the ſaid Term of 8 Years, paying the ſaid Amerie his Annuity of xlvi. s. viii. d. during the ſaid Term of Eight Years; Prout per Teſtamentum & ultimam voluntatem præd, inter alia plenius liquet & apparet, Et ulter' Jur' præd' dicunt ſuper ſacramentum ſuum præd', quod prædict' Thomas Boraſton ſic de præd' decem acris ter' cum pertin' ſeiſitus exiſtens, poſtea ſcilicet quarto decimo die dicti menſis Auguſti, anno regni dict' d'næ reginæ nunc primo, apud Aldenham prædictam de tali ſtatu ſuo obiit ſeiſitus. Et ulterius Jur' prædicti dicunt ſuper ſacramentum ſuum, quod prædictus Hugo Boraſton in dicto Teſtamento & ultima voluntat' nominat' & mentionat', fuit filius præd' Henrici Boraſton, & quod idem Hugo Boraſton obiit, antequam quod ipſe pervenerit ad ætatem viginti uni' annorum, ſcilicet circa ætatem novem annorum. Et ulterius Jur' prædict' dicunt ſuper ſacramentum ſuum, quod intereſſe præmiſſorum prædict' in dict' Teſtament' & ultima voluntat' mentionat' & deviſat', tam præf. Thomæ Ameri & Amphili uxori ejus, quam executorib' ejuſdem Teſtamenti, ante diem exhibitionis billæ infraſpec' finivit & determinavit. Et ulterius Jur' præd' dicunt ſuper ſacramentum ſuum, quod Philippus Boraſton fuit & eſt frater & proxim' hæres præfati Hugonis Boraſton, prætextu quorum idem Philippus Boraſton, poſt prædict' intereſſe præmiſſor' præf. Tho' Amery & Amphilli uxori ejus, & execut' prædictis, per præd' teſtament' & ultimam voluntat' dat' & deviſat', finit' & determinat' fuit, in præd' decem acras ter' cum pertin', ut frater & proxim' hæres præd' Hugonis intravit, & inde fuit ſeiſit', prout lex poſtulat, & ſic inde ſeiſitus exiſtens, idem Phil' Boraſton, poſtea & antea tempus exhibitionis billæ præd', ſcilicit, viceſimo die Junii, anno regni dictæ dominæ Reginæ nunc viceſimo octavo, dimiſit, conceſſit, & ad firmam tradidit præf. Willihelmo Ambrey modo defenden', tenementa præd' cum pertin' in quibus, &c. Habend' & tenend' eidem Willi' Ambrey, & aſſign' ſuis per uno ann' integro extunc proxim' ſequent' plenar' complend' & finiend', & ſic de anno in ann' quamdiu ambab' partibus placeret, virtute cui' quidem dimiſſion', præd' Willihelm' Ambrey in præd' decem acras ter' cum pertin' intravit & fuit inde poſſeſſionat': Et ſic inde poſſeſſionat' exiſtens, præd' Thomas Brand & Conſtanc'

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uxor ejus, Willihelmus Davies & Margareta uxor ejus, ut in jure prædict' Conſtanciæ & Margaretæ, poſtea ſcilicet nono die Julii, ann' regni dictæ dominæ Reginæ nunc viceſimo octavo ſupradicto, in prædictas decem acras ter' cum pertin', in & ſuper poſſeſſionem præfat' Willihelm' Ambrey intraver' & inde fuerunt ſeiſiti, prout lex poſtulat; Et ſic inde ſeiſiti exiſten', apud Aldenham prædict' iidem Tho' Brand, & Conſtanc' uxor ejus, Willihelmus Davies & Margareta uxor ejus, poſtea ſcilicet dicto nono die Julii, anno viceſimo octavo ſupradict', per Indentur' ſuam geren' dat' eiſdem die & anno, dimiſerunt, conceſſerunt, & ad firmam tradiderunt prædictas decem acras ter' cum pertin' præfat' Richardo Hynde: Habend' & tenend' prædict' decem acras ter' cum pertin' præfat' Richardo Hynde & aſſignat' ſuis, a feſto Nativitatis ſancti Johannis Baptiſtæ tunc ultimum præterito, uſque finem & terminum ſeptem annor' extunc proxim' ſequent' & plenar' complend' & finiend', virtute cujus quidem dimiſſionis, idem Richardus Hynde in prædictas decem acr' ter' cum pertin', prædict' nono die Julii, anno regni dict' dominæ Reg. nunc viceſimo octavo ſuprædict' intravit, & fuit inde poſſeſſionat', quouſq; prædict' Willihelmus Ambrey, poſtea ſcilicet prædict' nono die Julii, anno viceſimo octavo ſupradicto, vi & armis, &c. in prædict' decem acras terræ cum pertin' ſuper poſſeſſion' præfat' Richardi Hynde, per præcept' & mandatum prædict' Philippi Boraſton reintravit, & ipſum Rich' Hynde a poſſeſſione ſua inde extratenuit, & adhuc extratenet: Sed utrum ſuper tota materia prædict' in forma prædict' comperta, reintracio præfat' Willihelmi Ambrey in prædict' decem acras terræ cum pertin', ſit, ſive in lege adjudicar' debeat, bona & licita reintracio, jurat' prædict' penitus ignorant, Et inde petunt adviſamentum Cur' dominæ Reginæ. Et ſi ſuper tota materia prædict' in forma prædict' comperta, videbitur cur' dominæ Reginæ, quod reintracio prædict' Willihelmi Ambrey in prædict' decem acr' ter' cum pertin', in & ſuper poſſeſſionem præfat' Richardi Hynde, non ſit nec in lege adjudicar' debeat bona & licita reintracio; Tunc Jur' præd' dic' ſuper ſacramentum ſuum, quod prædict' Willihelmus Ambrey eſt culpabil' de tranſg' & ejection' firmæ interius ſpec' modo & forma prout prædict' Rich' Hynde interius verſus eum queritur, Et tunc aſſid' dampnum ipſius Rich' Hynde, occaſione tranſgr' & ejectionis firm' illius, ultra miſ. & cuſtag' ſua, per ipſum circa ſect' ſuam in hac parte appoſit' ad octo ſolid', & promiſ. & cuſtag' illis ad tredecim ſolid' & quatuor denar'. Sed ſi ſuper tota materia præd' in forma præd' comperta videbitur cur' d'næ Reg' quod reintracio præf. Wil' Ambrey in præd' decem acr' ter' cum pertin', in & ſuper poſſeſſion' præf. Rich' Hynde, ſit ſive in lege adjudicari debeat, bona & licita reintracio, tunc Jur' præd' dicunt

ſuper ſacramentum ſuum, quod præd' Willih' Ambrey non eſt culp' de tranſgr' & ejectione firm' præd', prout ipſe interius pro ſe allegavit. Et quia cur' dom' regin' hic, de judic' ſuo de & ſuper præmiſſ. reddendo nondum adviſat', dies inde dat' eſt partibus præd' in ſtatu quo nunc coram d'na reg' apud Weſtm' uſque diem Jovis proxim' poſt octab' ſancti Hillar' de judic' ſuo inde audiendo, eo quod cur' dom' Reginæ hic inde nondum adviſat', &c. Ad quem diem cor' dom' Regin' apud Weſtm' ven' partes præd' per attorn' ſuos præd', Et quia cur' dom' Reg' hic de judicio ſuo, de & ſuper præmiſſ. reddend' nond' adviſat', dies ulteri' inde dat' eſt partib' præd', in ſtatuo quo nunc cor' dom' Reg' apud Weſt' uſque diem Mercur' proxim' poſt xv. Paſc. de judic' ſuo inde audiendo, &c. eo quod, &c. & ſic de termin' in terminum uſque loquela præd' ulter' adjornat' fuit per aliud breve dict' dom' reg' de communi adjornamento cor' dom' reg' uſque in craſt' Animar' apud Caſtr' Hertford' in com' Hertf. Ad quem diem coram dom' reg' apud Caſtr' Hertford' ven' partes præd' per attorn' ſuos præd', Et quia cur' dom' reg' hic de judic' ſuo de & ſuper præmiſſ. reddendo nond' adviſat', dies inde ulter' dat' eſt partib' præd' in ſtatu quo nunc coram domina reg' apud Caſtrum Hertf. uſque diem Martis, prox' poſt Octab' ſancti Hill' de judic' ſuo inde audiend', &c. eo quod, &c. Ante quem diem loquela præd' adjornat' fuit per breve dictæ dom' reg' de communi adjorn' coram eadem dom' reg' uſque in octab' ſancti Hillar' apud Weſtm'. Ad quem diem coram dom' reg' apud Weſt' ven' partes præd' per attorn' ſuos præd', Et quia cur' dom' reg' hic de judic' ſuo de & ſuper præmiſſ. reddendo nondum adviſatur, dies inde ulteri' dat' eſt partib' præd' in ſtatu quo nunc, cor' dom' reg' apud Weſt' uſque diem Mercurii prox' poſt xv. Paſch' de judic' ſuo inde audiend', &c. eo quod', &c. Ad quem diem cor' dom' reg' apud Weſt' ven' partes præd' per attorn' ſuos præd': Super quo viſ per cur' dom' reg' hic, diligenterque inſpectis præmiſſis, maturaque deliberatione inde habita, quia videtur cur' dom' reg' hic, quod intracio præd' Will. Ambrey ſuperius præſpecificat'. in præd' decem acr' terræ cum pertin', in & ſuper poſſeſſ. præf. Will' Hynde fuit bona & licita reintracio. Ideo conceſſ. eſt quod præd' Rich' Hynde nihil capiat per billam ſuam præd', ſed quod ipſe pro falſo clamore ſuo capiatur, &c. Et quod prædict' Will' Ambrey eat inde ſine die, &c.

Hill'

Hill. 29 Eliz. Rot. 790. *in the King's Bench, between* Hinde *and* Ambrey.

BORASTON's *Case.*

BEtween *Richard Hinde*, Plaintiff, and *William Ambrey*, 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: *Thomas Boraſton* was ſeized in Fee of the Lands aforeſaid, and held them in Socage, and had Iſſue *Humphrey Boraſton* his elder Son, *Henry Boraſton* his younger Son; and *Humph.* 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 *Tho. Boraſton*, *Auguſt* 12. 1559, by his Will in Writing, deviſed the ſaid Lands in theſe Words, *viz.* Item, *I give to* Thomas Ambrey *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 Ambrey, *nor his Aſſigns, ſhall, during the ſaid Term, ſell 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 Eight Years, the ſaid upper Part to remain to my Executors, until ſuch Time as* H. Boraſton *ſhall accompliſh his full Age of* 21 *Years, and the mean*

2 Bulſtr. 123, 124. 2 Rol. Rep. 223. 427. Cro. Jac. 510. Swinb. 235.

2 Bulſtr. 124, 125. 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 *Thomas 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 Ambrey* 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 Ambrey*, *&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 were lawful or not, was the Doubt which was referred to the Court. And this Case was argued by the Council 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 atttain 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 Council, 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.*

(a) 2 Rol. 419. Raym. 144.
(b) 10 Co. 85. a. b. 2 Rol. 419. Lit. Rep. 219.
(c) Plow. 232. 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 55. Plow. 229. b. 280. a. 486. Lit. §. 647. Plow. 557. b. 558. a. Dyer 71. pl. 43. 190. pl. 18. pl. 20. Hob. 153. 281. 1 Co. 130. a. 135. b. 3 Co. 2. a. 10. b. Hob. 74. 171, 253. 335. 336, 338.
(f) Raym. 144.
(g) Hob. 153.

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

(h) Lit. Rep. 316.

the whole Court. And so it was concluded by the Plaintiff's Council, That for all these Causes Judgment ought to be given for the Plaintiff. Against which it was argued by the Defendant's Council, 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 released to the Defendant. For it was said, That in this Case, although *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 satisfie 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, deviseth 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 Mannor, to the Use of his Will, and died, the

(*a*) 2 Bulstr. 128. Postea 27. b. Co. Lit. 322. b.

(*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. 123.

(*e*) Cro. Eliz. 204. 1 Co. 41. a. Cro. Jac. 57. 527. 592. 2 Bulst. 273. Larch. 9. Bridg. 138. 1 Mod. Rep. 86. Vaugh. 271. Cart. 93. 226. Swinb. 113, 114. 2 Leon. 114. 2 Rol. Rep. 219. Bridg. 138. Goldib. 134. Cro. Car. 158.

(*f*) Swinb. 113. Co. Lit. 9. b. 236. b. Bridg. 138. Goldib. 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 644. 3 Keb. 96. 1 Mod. Rep. 263. Lit. Rep. 259. 2 Jones 107. Hob. 65. Dyer 371. pl. 5. P. N. C. 125. 29 H. 8. Br. Testam. 18. Cart. 226. 1 Vent. 227. 4 Ed. 5. Estate Br. 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. Although 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, although 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.

(*b*) Dyer 371. pl. 5. Cro. Jac. 527. Co. Lit. 9. b.

2. It was reſolved, Although 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 Council, 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 Council 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 Age of Twenty one Years*, the Remainder to his Son in Fee; for altho' theſe are Adv. of Time, *when*, *&c.* and *then*, *&c.* yet they do not amount to make any thing 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. 1 all. 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.

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

Egerton, the Queen's Sollicitor, *Thomas Forſter*, and others, were of Council 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.

Paſch.

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

WALKER's *Caſe.*

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 Reality. And therefore, when the Leſſee aſſigns over all his Intereſt, all the Reality 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 Land 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. 715. 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. Bendl. in Kel. 208, 209. Bendl. in Aſh. 10. 0 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 ſim. 2 Inſt. 395. 2 Sand. 337. (*b*) Cro. Jac. 510. 10 Co. 128. a. Dy. 56. pl. 15. B. N. C. 52. 2 Roll. 235.

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 of 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 thoſe 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. Apporcionment, Br.* 26. 25 *H.* 8. 36. 13 *H.* 8. 30 *H.* 8. *Apporcionment, 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 Contr. 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*) 15 *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. And firſt for the apprehending of the true Reaſ. of this Caſe, and of all the other Caſes

(*a*) Co. Lit. 148. a. Dyer 5. pl. 6.
(*b*) Cro. Eliz. 793. Moor 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. Apportionm. 7. Br. Bar. 39. Co. Lit. 148. b.
(*e*) 2 Roll. 346. Dyer 55. pl. 5. Kel. 49. pl. 5.
(*f*) Br. Quare Imp. 62. Br. Brief al Eveſq; 29. Fitz. Preſentment al Egliſe 2. Co. Lit. 166. b. 186. b. F. N. B. 33. m. 34. v. Cro. El. 18, 19. 2 Inſt. 364, 365.
(*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. Cro. El. 715. Cro. Jac. 523.

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 Question, there are three Manner of *(a)* Privities, *scil.* Privity in Respect of Estate only, Privity in Respect of Contract only, and Privity in Respect of Estate and Contract 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 Contract 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 Privy 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.

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 answer'd: 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 bring in such Inconvenience 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 Reality than the Case at Bar, *a fortiori* in the Case at Bar, when the Lessee assigns his Int. yet Privity of Contract betw. the Lessor and Lessee, as to the Action of *(f)* Debt remains.

(e) 2 Rol. Rep. 247. Cr. 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 deſtroy'd; 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. Avowry Br.* 111. So if Tenant in (f) Dower, or Ten. by the Courteſy, 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 deſtroy'd, 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 Courteſy, is no Privity at all. See *F. N. B.* 56. *f. Temp. E.* 1. *Waſte* 122. 18 *E.* 3. 3. 30 *E.* 3. 16. 38 *E.* 2. 23. 11 *H.* 4. 18. And it was agreed, that if the Leſſor enters for Condition 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 follow. *Hil.* 36 *Elix.* 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.

(b) 2 Sand. 181, 182.
(c) Yelv. 103. Styl. 52, 61, 118, 119. Cro. Jac. 549. 2 Rol. Rep. 231. Palm. 116. 117. All. 34.
(d) Co. Lit. 268. a. Lit. Sect. 454. Poſtea 35. a.
(e) Cro. El. 169.
(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) Poſtea 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) Moor 351. Cro. El. 328. 556. 633. Poph. 55, 120. Goldſb. 182 1 Jones 44, 244. Ungle and Glover. Hut. 69. 1 Brownl. 56.

and

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* C. Juſtice, *Clench*, *Gawdy* and *Fenner* Juſtices, that after the Aſſignm't the Leſſor himſelf might have an Action of Debt againſt the Leſſee for Rent due after the Aſſignm't, *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 whole Court.

Poph. 137. Dyer 4. b. Cro. El. 328. Overton & Sydhal's Caſe. (*a*) Poph. 120. Gould 120. Moor 351. 1 Syd. 240, 266. Swinb. 329.

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.

Co. Ent. 122. a. Cro. El. 555. Cro. Car. 188.

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 the 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. Rec'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 remained 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 Tenant 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 *George 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

(*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 & 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* ſeem 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) 2 Bulſtr. 152, 153. Cro. Car. 334. 1 Sand. 240.

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

Mich.

Mich. 33 & 34 Eliz.

In the King's Bench.

BUTLER *and* BAKER's *Case.*

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, marry'd *Eliz. 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 Stat's of (*a*) 32 & 34 *H.* 8. or ſhould be void for Part? And this Caſe was argu'd in the K's B. by *Egerton*, the Q's Sollicit. and *Thomas Buckley* for the Pl. and by *Popham*, the Q's Attor. and *Coke* for the Def. And afterwards *Mich.* 33 & 34 *Eliz.* the Caſe was argu'd by the Court, (*b*) and *Fenner* and *Clench* argu'd for the Pl. and *Wray* C. J. and *Gawdy* for the Def. And afterwards, the ſame Term, the Caſe was argu'd 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 *John 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*, Knight, late one of the Juſtices of the Common Pleas, ſucceeded him. And afterwards the Caſe was oftentimes argu'd, 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 K'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 as much, 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, although 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 Word *in Pais*, and therewith agrees 17 *E.* 3. 6. & 17 *Aſſ.* where the Huſband aliened his Land, and took back an Eſtate to him and his Wife in Tail, the Huſband 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 all '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't, but that is always of one 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 Serj. *Bendloes*, and by the L. *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.

(*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 403. 2 Rolls 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. (*u*) 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 Stat. 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 Stat. 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 *Thoby* was a good Agreement to one, and a Refuſal to the other, and thereby the Inheritance was deveſted, and that by Force of the Stat. 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. Gold. 84.

(*f*) 4 Co. 3. a. Plowd. 390. b. Co. Lit. 1. 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 Siderf. 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. 1 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-

(*b*) 1 Anderſ. 350

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

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

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

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

Dower did lie. In an Action of Waſte brought by *Rob.* (*d*) *Thetford* againſt *Andrew Thetford*, *Paſch.* 28 *Eliz. Rot.* 122. in the Common 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 *Thomaſine*, 3 *&* 4 *Phil. & Mary*, made a Demiſe to the Def.

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 *Thomaſine*, by their Deed indented, made the Leaſe to the Defend. for 21 Years *ut ſupra*, and that *John* died, and after his Death *Thomaſine* 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 Waſt.* 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. *Dyer* 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 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 *Thoby* 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. 9. Br. Agreements 8. Fitz. Waſte 106. Br. Waſte 120. Antea 29. a. Dyer 61. pl. 21. Poſtea 2b. 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 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 anſwered 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, 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. The

(*a*) Antea 27. b. 3 Leon. 272. Perk. 29. §. 352.

(*b*) Godb. 317.

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

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. 3 E. 2. Avowry 206.

(*b*) Fitz. Feoffments & Faits 30. Plowd. 31. b. 1 H. 7. 31. a. Hob. 222. Moor 676. Godb. 218. 2 And. 161. Br. Prærogative 57. 2 Rolls 399, 400. Cr. Jac. 52, 53, 409.

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 Rolls 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 *Thoby*, 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 *Thoby* 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 *Thoby*: 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 *Thoby* good, which was void when the Deviſe took Effect, *ſcil.* at the Time of the Death of the Deviſor.

(a) Fitz. Age 58. 1 Rolls 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 levy'd by the Vouchee to the Demandant, or a Fine or Releaſe from the Demandant to the (c) Vouchee, is good; but a Fine levy'd 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.

(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. 2. 7 E. 4. 13. b. 2 Rolls Rep. 323.

(d) Co. Lit. 269. a Hob. 337. 2 Rolls 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 Mannor of *Thoby* was not deviſeable; and becauſe the ſaid *William 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 Mannor 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 Mannors 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 year-" ly 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 2. Branch.

The Third Branch.

" 3. And that the King ſhall take for his full third Part, " ſuch Mannors, *&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 3. Branch.

The fourth Branch.

" 4. And in Caſe the Mannors, *&c.* which ſhall imme-" diately 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 4. Branch.

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

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

1. Firſt, on this Word (*having*) and therefore if it be aſked, *Quis poteſt legare?* The Makers of the Act anſwer, *Every Perſon having Mannors, &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 Mannor 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.

(*a*) 10 Co. 83. b. Dyer 158. pl. 33. 6 Co. 76. a. 2 Brownl. 105. Co. Lit. 78. a. This appears 4 & 5 *Phil. & M. Dyer* 158. a Man (*a*) ſeized in Fee of Land of Socage Tenure, aſſured it to his Wife in Joint. in *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 Mannor of *Congreſbury* to *G. Owen*, in fee Farm, to hold of the Mannor 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 Mannors 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 *Huntingdon*, and *Katharine* his Wife, and to the Heirs Males of the Body of the ſaid *Katharine*, the Remainder 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

Carres Caſe. (*b*) 3 Leon. 276. 2 Rol. Rep. 361. Godb. 309. 425. 416. 2 Brownl. 105.

Heirs

Heirs of the ſaid *Katharine*, to hold in chief by the 20th Part of a Knight's Fee; and afterwards G. *Owen* being ſeized of the Mannor 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 Mannor, 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*) *Pickering*, 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 Mannor*, and therefore he might deviſe it; and foraſmuch as it was held in Socage, the Deviſe was good in all; and that was the Reaſon of the Lord *Dyer* in *Bret*'s Caſe, *Plow. Com.* 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.*

(*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. I. 7 Co. 38. a.

(*e*) Plow. 344. b.

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

(*g*) Poſtea 34. b. 10 Co. 83. a.

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

that

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. Keb. 47.

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. 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 Wardſhip 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*) *Calthorp*'s Caſe, 20 *Eliz.*

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

(*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 *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 plenum.*

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

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 Mannor of *Thoby*, which

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 Man. 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 Huſb. as it is held 19 *Eliz. Dyer* (*b*) 358. ſo that without Queſtion the Deviſor had not a ſole Eſtate in the Mannor 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 ſeized, either at the Time of the making of his Will, or at leaſt of his Death.

(*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 Mannors*) 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 Mannors, *&c.* whereof he may deviſe two Parts by Auth. 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 Mannor of *Hynton*, but only during the Coverture.

(*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 to as 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

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 reſtrained 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 Equality and Equality ſhall be obſerved, and inequality avoided, 35 *H.* 8. *tit. Teſtaments Br.* 19. If *(b)* a Man holds three Mannors of three ſeveral Lords by Knight's Service, he cannot deviſe two Mannors, leaving the third, for that would not be equal to the two other Lords, but two Parts of each Mannor. And on theſe Words *(clear yearly Value)* it was ſaid, That of Inheritances which are not of any annual Value, ſome are deviſable, and ſome are not deviſeable 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 Mannor, 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. b.

But if a Man be ſeized of Mannor to which a Leet, or Waife and Stray, or any other Hereditament which is not of any annual Value, is appendant or appurtenant, there by the Deviſe of the Mannor, with the Appurtenances, theſe ſhall paſs as Incidents to the Mannor, for inaſmuch as the Statute enables him by expreſs Words to deviſe the Mannor, by Conſequence it enables him to deviſe the Mannor, 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, but the Mannor, *&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-

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ing divers Franchiſes and Liberties within the Mannor 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. As 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 Mannor 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 ſeiſed of three Acres, each of the yearly Value of 12 *d.* and he deviſes a Rent of 3 *s.* out of all 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, Tenements and Hereditaments, 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 Statute 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.

was obſerved on the Statute 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 Author. to diſpoſe two Parts of the ſame Lands of *clear yearly Value*, and that the K. *&c.* ſhould have the third Part of *clear yearly Value*, without any Diminution, *&c.* but as to the Mannor of *Hynton*, he was jointly ſeized 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 Mannor 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 ſeized 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 Mannor of *Hynton*, 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 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 Mannor 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 Mannors and Lands after the Death of the Deviſor, and before the Diſagreement is to be conſidered; and without Queſtion in the mean Time, the Mannor of *Hynton* ſurvived to the Wife, and therefore of Neceſſity in the mean Time, a Part of the Mannor of *Tholy* ſhall deſcend, for if before this Diſagreement, an Office had been found of all this Matter, without Queſt. the Q. ſhould have had Part of the Man. of *Tholy*, *&c.*

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 King 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*) Disseiseress takes a Husband, and hath Issue and dies, and afterwards the Tenant by the Curtesie dies, this dying seized shall not toll 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 seized 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 Statute saith; that is to say, *by Descent, immediately after the Death of the Devisor.* In 17 *Eliz.* *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' manerr' præfato Comiti & hæredibus suis, &c. immediate reverti debeat, &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 Mannor 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 his

(*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. & 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 31. a. And against the Opin. of (*a*) *Wray*, Chief Justice, it was afterwards objected in the Exchequer 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 seized 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 Statute 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. Lit. 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 Statute speaks at the Beginning generally of Lands held by K'ts 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 K'ts 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 determined by his Death, and the Reason of Wardship failed, *scil.* that an (*e*) Infant within Age, cannot do Kt'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 Kt'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, 385.

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

A Man (*a*) ſeized 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 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 L. in reſpect of other Land. And it was objected, That if the Statute of 34 *H.* 8. ſhould not be taken by Equity, then the Statute might be eaſily defrauded: For if a Man held one Acre of Land by Kt'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 Kt's Serv. 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 Judgment 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. Trav. ſe 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*) Antea 23. b. Co. Lit. 268. a. 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. & (*e*) *Lit. Chap. Releaſes*, 107, *a. b.* 36 *E.* 3. *Garde.* 10. And ſo in Judgment of 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 deviſeable 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 (*f*) 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 to 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. Beni. 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 Com-

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

mon 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 Eſcroul, 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,

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

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

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 thoſe 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.

2. It was reſolved, that to ſome Intent, the ſecond Deli-

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

very 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) Styl. 423.

(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

(e) Cr. El. 447.

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

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. 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. 412. Perk. S. 127. Br. Relation. Br. non eſt Factum 5.

(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 Council, 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 Council 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 Council to make your Will according to Law, and thereby prevent Queſtions and Controverſies.

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.

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.

Hill.

Hill. 34 Eliz.

In the King's Bench.

RATCLIFF's *Caſe.*

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* Eſquire took to Wife *Elizabeth 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. William 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 *Elizabeth* 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 ſeized of the ſaid Tenements in Fee, and held them in Soc. and 26 *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 *William Wilcocks*, and to the Heirs of their two Bodies begotten, by equal Portions, equally to be divided, the Remainder to the ſaid *Elizabeth*, 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 *Elizabeth*, Daughter of the ſaid *William Wilcocks*, 10 *July* 28 *Eliz.* took to Huſband *William Androwes*, by Force whereof the ſaid *William* and *Elizabeth* his Wife, and the ſaid *Martha*, did enter into the Tenements aforeſaid, and were therefore ſeized 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 Ac-
3 Inſt. 62. cord, between the 2d Hour of the ſame Day, before Noon, departed from the Houſe of the ſaid *Ralph Ratcliffe*, 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 *Edward Ratcliff*; and that the ſaid *Edward 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*, C. J. 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.

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 Kt's 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 Guard. 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 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 Juſtice *Fitzherbert* 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 peradventure 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 Wardſhip 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;

(a) 1 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. 8. 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. a. Moor 738. 2 And. 207.

(k) Co. Lit. 84. b.

for

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, 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 apparent is raviſhed by him, as appears by (e) *Littleton*, and 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.

(c) 32 E. 3. gard. 32. Antea 38. a. (d) Co. Lit. 84. b. (e) Lit. Sect. 114. Br. gard. 55. Br. Raviſhment de gard. 23. Co. Lit. 84. b. F. N. B. 143. c.

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, which

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 underſtod 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*.

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 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 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.

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) makes 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.

(*b*) Lit. Rep. 47. Moor 594. 558, 667. Goldſb. 182. 88. 183. Cr. El. 729. 1 Brownl. 82. Yelv. 23, 24. Owen 127. 1 Leon 113. Stiles 434. 3 Leon. 19. 1 Bulſt. 113. Cr. Eliz. 443, 444. 695, 696. 2 Roll. 89. O. Benl. 19. Dyer 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.

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 *Martha*, 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 Statute 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 Daughter ſhall

(*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 congeable 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. 50. 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. 93. Swinb. 398. Cawly 224, 225. B. N. C. 415. Poſtea 40. a.

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 conclued, That in the ſame 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 ſupreme Cauſe, and nothing can be more high and ſupreme than the Principals (*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, aud 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*) *Diſcendit 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 Principal 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. Dr. & 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 Fath.; 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 Principal 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 contr. is one of the Cauſes of the Certainty of the Rules of the Common Law in Caſe of Deſcents and Inheritance, being *pondroſum 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 dies ſeized 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 Common Law is notable, and may be collected by the ſaid ancient Authors of the Law, that every one who is Heir to anoth. *aut eſt hæres jure* (*b*) *proprietatis* as the eldeſt Son, who alone ſhall inherit before all his Brothers,

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

Brothers, *aut juræ* (*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 hath 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 *Britton* 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 (*e*) Mother as on the Part of the Father; and the Reaſon thereof was, that the Son begotten after the Judgment 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: *Aut jure ſive ratione doni*, and in that the Com. 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* faith, (*a*) *Quod poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*: In which Rule every Word is to be obſerv'd,

(*a*) Lit. 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 Hereditam's in Poſſeſſi. he who claims ſuch Heredita-

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

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

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, Unkle, and Son, Co. Lit. 11. b. and the Son purchaſes Land and dies without Iſſue, and the Land deſcends to the Unkle, if the Unkle 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 Unkle enter, *&c.* then the Father ſhall have the Land as Heir to the Unkle; 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 Co. Lit. 15. b. 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 Co. Lit. 12. a. Purchaſor; 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 Co. Lit. 15. b. 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 Cro. Car. 601. 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)* Co. Lit. 15. b. which is but *pedis poſitio*, extends only to Things of which a Man by his Entry or other Act may get the actual Poſſeſſion.

2. *Littleton* ſaith, *Poſſeſſio fratris de feodo ſimplici*, and theſe Words, *feodum ſimplex*, exclude Eſtate 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 an 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 *Martha*, 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 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.

Mich.

Mich. 34 & 35 Eliz.

In the King's Bench.

BOYTON's *Caſe.*

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*, Knight, and *William Dixe*, Eſq; by *Fordey* 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 emanen', & Vic' prædict' Suff. nuper direct', &c.* the ſaid *Thomas Boyton* was taken and arreſted in Execution, 'till the ſaid *Roger* and *William Dixe*, the ſaid *Thomas 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 *William 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 *William Dixe*, Bayliffs Moor 299.

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 Bayliffs miſtook the Day of the Return; and that the ſaid Bayliffs, in the Interim, before the Return of the Writ, at the Requeſt of the Plaintiff, carry'd 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 Bayliffs 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 Bayliffs 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 given 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 Bayliffs could not have the Cuſtody of him there as Bayliffs 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 Bayliffs 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 Goal is, or the Office of the Sheriff or Bayliffs extends, and where the Sheriff or Bayliff 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 Bayliff of a Liberty aſſent that one who is in (*a*) Execution and under his Cuſtody go out of the Goal 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 Bayliff ought to keep him *in* (*c*) *ſalva & arcta cuſtodia*. And the Statute of *Weſt.* 2. *cap.* 11. ſaith, *Quod carceri manucipentur 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 Rolls 806. Hob. 202. Dalt. Sher. 140. Cr. Car. 14.

(*b*) 1 Rolls 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. 26. 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 Rolls 807. 3 Inſt. 35.

(*d*) 1 Bulſt. 145. 146. Dalt. Sher. 140. 1 Rolls 807. 2 Inſt. 381.

(*e*) 1 Rolls 807. Dyer 249. pl. 84.

(*f*) 1 Rolls 807. Dyer 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 Goal 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 Bayliffs. 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 th'one County into th'other, to carry them both together to the K'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 Req. 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, Bayliffs of Liberties, and Goalers, 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, Bayliffs 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 Def. 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 Rolls 808.

(*d*) Moor 57. Cr. Eliz. 44, 102, 429, 555. Moor 610 Cr. Car. 240 Poſt 452. b. Style 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 Goaler 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 Bayliffs 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 52. a. Poph. 41. Moor 660. Cr. Eliz. 318, 439. Goldib. 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*, 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.

Termino Sancti Hillarii, Anno Triceſimo ſexto Elizabethæ Reginæ, Rotulo 440.

WIllihelmus Spencer nuper de Swindon in Comitatu Wilts. ff. prædict' Yeoman, & Thomas Spencer nuper de Swindon in Comitatu prædicto Yeoman, attach' fuerunt ad reſpondendum Jacobo Lynch, de placito quare vi & armis unum meſuagium, unum horreum, unum gardinum, octoginta acras terre, octoginta acr' prati, & octoginta acras paſturæ cum pertinentiis in Swindon, quæ Georgius Brown Miles præfat' Jacobo dimiſit ad terminum qui nondum præteriit, intraverunt, & ipſum a firma ſua prædicta ejecerunt: Et alia enormia ei intulerunt, ad grave dampnum ipſius Jacobi, & contra pacem dominæ Reginæ nunc, &c. Et unde idem Jacobus per Thomas Cowper Attornatum ſuum queritur: Quod cum prædictus Georgius Brown viceſimo ſecundo die Octobris, anno regni dominæ Reginæ nunc triceſimo quinto, apud Swindon prædict' dimiſiſſet eidem Jacobo tenementa prædict' cum pertinentiis: Habendum & tenendum eadem tenementa cum pertinentiis eidem Jacobo & aſſignatis ſuis, a feſto Sancti Michaelis Archangeli tunc ultimo præterito, uſque finem & terminum quatuor annorum extunc proxime ſequentium & plenarie complendorum; virtue cujus dimiſſionis idem Jacobus in tenementa prædicta cum pertinentiis intravit, & fuit inde poſſeſſionatus, & ſic inde poſſeſſionatus exiſtens, prædicti Willihelmus & Thomas poſtea, ſcilicet prædicto

dicto viceſimo ſecundo die Octobris, anno triceſimo quinto ſupradicto, vi & armis, &c. tenementa prædicta cum pertinentiis, quæ prædictus Georgius Brown eidem Jacobo in forma prædicta dimiſit ad terminum prædictum qui nondum præteriit intraverunt: Et ipſum Jacobum a firma ſua prædicta ejecerunt, Et alia enormia, &c. Ad grave dampnum, &c. Et contra pacem, &c. unde dicit quod deterioratus eſt, & dampnum habet ad valentiam viginti librarum: Et inde producit ſectam, &c. Et prædicti Willihelmus & Thomas per Johannem Puxton Attornatum ſuum, venerunt & defend' vim & injuriam quando, &c. Et dicunt quod ipſi in nullo ſunt culpabiles de tranſgreſſione & ejectione prædict', prout prædictus Jacobus ſuperius verſus eos queritur: Et de hoc ponunt ſe ſuper patriam: Et prædictus Jacobus ſimiliter. Ideo præceptum eſt Vicecomiti, quod venire faciat hic in Octabis Purificationis beatæ Mariæ duodecim probos & legales homines, &c. Per quos rei veritas, &c. Et qui nec, &c. Ad recogn', &c. Quia tam, &c. Poſtea continuatur proceſſus inter partes prædictas de prædicto placito per Jurat' poſit' inde inter eas, in reſpectum hic uſque ad hunc diem, ſcilicet in octabis Sancti Michaelis, anno regni dominæ reginæ nunc triceſimo ſeptimo, niſi Juſticiarii dominæ Reginæ ad Aſſiſas in Comitatu prædicto capiend' aſſign' pro formam ſtatuti, &c. die Jovis decimo ſeptimo die Julii proxim' præterit', apud novum Sarum in comitat' prædicto prius veniſſent: Et modo hic ad hunc diem vener' tam prædict' Jacobus Lynch, quam prædict' Willihelmus Spencer & Thomas Spencer per Attornat' ſuos prædictos, Et præfat' Juſtic' ad aſſiſas coram quibus, &c. miſ. hic recordum ſuum in hæc verba: Poſtea die & loco infracontent' coram Thoma Walmeſley uno Juſtic' dominæ Reginæ de Banco, & Edwardo Fenner uno Juſtic' dictæ dominæ Reginæ, ad placita coram ipſa Regina tenend' aſſign', Juſtic' ipſius dominæ Reginæ ad aſſiſas in comitatu Wilteſ. capiend', aſſign' per formam ſtatuti, &c. ven' tam infranominat' Jacob' Lynch, quam infraſcript' Willihelmus Spencer, & Thomas Spencer per Attornatos ſuos infracontent', Et Jurat' juratæ unde infra fit mentio exact', quidam eorum, videlicet Willihelm' Garret de Shaw gener', Willihelmus Bury de Crickland, Thom' Buchell de Netherhaven gener', Willihelmus Morſe de Haydon, Johannes Noyſe de Graſton, Richard Legge de Netherhaven, Thom' Smith de Kynnet, Tho' Sloper de Mounton, & Willihelm' Gouldeſborough de eadem vener', & in Jurat' illam jurat' exiſtunt, Et quia reſid' Jur' jurat' illius non comparuerunt, ideo alii de circumſtantib' per Vicecomitem comitatus prædicti ad hoc electi, ad requiſitionem prædicti Jacobi, ac per mandat'

mandat' Juſticiar' prædictorum de novo apponuntur, quorum nomina panello infraſcript' affilantur, ſecundum formam ſtatuti in hujuſmodi caſu nuper edit' & proviſ. Ac jurator' ſic de novo appoſit', videlicet Thomas Stringer, Willihelmus Bundy, & Willihelmus Haſcall, exact' ſimiliter ven' qui ad veritatem de infracontent' ſimul cum aliis jurat' prædict' prius impanellat' & jurat, dicend', electi, triati, & jurati, dicunt ſuper ſacramentum ſuum, quod prædictus Willihelm' Spencer non eſt culpabilis de tranſgreſ. & ejectione infraſcript', prout idem Willihelmus interius allegavit: Et ulterius iidem Jurat' quoad totas tranſgreſſion' & ejectionem infraſcript' præter tranſgreſ. & ejectionem in meſuagio infracontent', & viginti & ſex acris terr' de tenementis infraſpec' per prædict' Thomam Spencer interius fieri ſuppoſit' dic' ſuper ſacramentum ſuum, quod idem Thomas non eſt inde culpabilis, prout idem Thom' ſimiliter inde interius allegavit; Et quoad tranſgreſ. & ejectionem infraſpec' in prædict' meſuagio ac vigint' & ſex acris terræ interius fieri ſuppoſit', iidem Jurat' dicunt ſuper ſacramentum ſuum, quod diu ante infraſcriptum tempus quo ſupponitur tranſgreſ. & ejectionem prædictas fieri, quidam Richardus Bridges miles fuit ſeiſitus tam de prædicto meſuagio & viginti & ſex acr' terræ cum pertinentiis, quam de aliis tenementis infraſcript' reſid' cum pertinentiis in dominic' ſuo ut de feodo, Et ſic inde ſeiſitus exiſten', idem Richardus diu ante prædict' tempus quo, &c. per quoddam ſcriptum ſuum feoffamenti indentat', in conſideratione cujuſdam Junctūræ cujuſdam Johannæ adtunc uxoris ſive filiæ Willihelmi Spencer militis defuncti, extunc impoſterum habendum & fiend', dedit & conceſſit, & eod' ſcripto ſuo indentato confirmavit Johan' Winchcombe ſen' de Newbery in comit' Berk' & Johan' Knight de Newbery prædict', prædictum meſuagium & vigint' & ſex acras terræ in quibus, &c. inter alia: Habend' & tenend' eadem meſuagia & vigint' & ſex acr' terr' in quibus, &c. inter alia præfat' Johan' Winchcombe & Johan' Knight hæred' & aſſignat' ſuis imperpetuum, Sub hac tamen conditione ſequenti: videlicet, quod prædict' Johannes Winchcombe & Johannes Knight infra unum menſem proxime ſequent' poſt dat' ejuſdem ſcripti, per eorum ſufficiens ſcriptum in lege, prout per erudit' conſilium in lege præfat' Richard' Bridges adviſaret', Traderent, concederent, & deliberarent prædict' meſuagium, & vigint' & ſex acras terr', in quibus, &c. inter alia eidem Richard' & dict' Johannæ uxori ſuæ: Habend' & tenend' dictum meſuagium, & vigint' & ſex acras terr', in quibus, &c. inter alia eidem Rich' & dict' Joh' uxori ſuæ, & hæred' de corporibus ejuſdem Richardi & dict' Johann' uxoris ejus, inter eundem Richardum & dictam Johannem legitime procreat',

creat', Et pro defectu talis exitus remanere inde rectis hæred' præfat' Richardi imperpetuum, de capitalibus dominis feodi illius per ſervitia inde debita, & de jure conſuet', prout per prædict' ſcriptum feoffamenti indentat', ſigill' præd' Richardi Bridges ſignat', ac geren' dat' viceſimo tertio die Januarii, Anno Regni domini Henr' nuper regis Angl' octavi triceſimo ſecundo, jur' prædict' in evidentiis oſtenſum pleni' apparet: quodq; virtute ejuſdem feoffamenti prædict' Johan' Winchcombe & Johannes Knight, fuerunt ſeiſit' de prædict' meſuag' ac vigint' & ſex acr' terræ in quibus, &c. inter alia in dominico ſuo ut de feodo ſub conditione præd': Et ulteri' jurat' prædict' dicunt ſuper ſacramentum ſuum quod præd' Joh' Winchcombe, & Johan' Knight ſic inde ſeiſit' exiſten', diu ante prædictum tempus quo, &c. Et infra prædict' unum menſem prox' ſequent' poſt dat' præd' ſcripti feoffamenti indentat', apud Walcot præd' in performationem conditionis præd', & ad requiſitionem præd' Rich' Bridges, per quoddam ſcript' ſuum indentat' feoffamenti liberaverunt, feoffaverunt, tradiderunt, & eodem ſcript' ſuo indentat' confirmaverunt præfat' Rich' Bridges, & Joh' uxori ejus, præd' meſuag' & vigint' & ſex acras terr' in quib', &c. int' alia, Habend' & tenend' præd' meſuag', & viginti & ſex acr' terr' in quibus, &c. inter alia, præf. Rich' Bridges & Joh' uxori ejus, & hæred' de corporibus eorundem Rich' & Joh', inter eos ligitime procreat', & pro defectu talis exitus remanere inde rectis hæred' præd' Rich' Bridges imperpetuum, de capitalib' dominis feodi illius per ſervitia inde debit' & de jure conſuet' prout per idem ſcript' feoffamenti indentat', ſigillo præd' J. Winchcombe & Joh' Knight ſigillat', ac geren' dat' ſexto die Feb', anno regni præd' nuper Reg' Henr' octavi triceſimo ſecundo ſupradict', ac jurat' præd' in evidentiis oſtenſ. pleni' apparet: Quodq; virtute feoffamenti illius præd' Ric' Bridges & Joh' fuerunt ſeiſit' de præd' meſuag' & vigint' & ſex acr' terr', in quibus, &c. inter alia, in dominico ſuo ut de feodo talliato, viz. eiſdem Ric' & Joh' & hæred' de corporibus ſuis inter eos ligitime procreat', remanere inde rectis hæred' ejuſdem Rich' ut ſupra dictum eſt; Idemq; Ric' & dicta Johan' ſic inde ſeiſit' exiſten', habuer' exit' de corporibus ſuis inter eos legitime procreat', quendam Anthon' Bridges filium ſuum adhuc ſuperſtitem, & in plena vita exiſten', viz. apud Weſt-Shefford in com' Berk' quodq; poſtea, & ante præd' tempus quo, &c. præd' Ric' Bridges & Joh' de præd' meſuag', & vigint' & ſex acr' terr' in quibus, &c. inter alia, in forma præd' ſeiſit' exiſten', idem Rich' ante prædict' temp' quo, &c. apud Lugerſhal in dicto Com' Wilteſ. de tali ſtatu ſuo obiit inde ſeiſit': Et præd' Joh' ipſum Ric' ſupervixit, & ſe tenuit intus in præd' meſ. & vigint' & ſex acr' terr' in quibus, &c. int' alia, ac fuit inde ſola ſeiſit' in d'nico ſuo ut de

feodo

feodo talliato in forma præd', remanere inde ultra ut ſupradict' eſt. Et ulterius Jurat' præd' dicunt ſuper ſacramentum ſuum, quod eadem Johan' ſic inde ſeiſit' exiſten', præd' Anth' Bridges quarto die Decemb', anno regni dictæ dominæ Reginæ nunc triceſimo ſecundo apud Walcot præd', per quandam Indenturam fact' inter prædictum Anthonium Bridges, filium prædictorum Richardi Bridges & Johannæ, & Barbar' tunc uxor' ipſi' Anthonii, ac quendam Edwardum Langford generoſum, per nomina Anthonii Bridges de Weſt Shefford, alias Shefford magna in com' Berk' ar', & Barbar' uxor' ej', & Edward' Langford de Lincolns Inne gener' ex una parte & quendam Georgium Brown Militem, per nomen Georgii Brown Arm', ſecundi filii prænobilis Anthonii Vicecomitis prænobilis ordinis Garterii Militis ex altera parte, cujus altera pars ſigillis eorundem Anthonii Bridges, Barbar', & Edward' Langford ſignat', geren' dat' eiſdem die & anno, Jur' prædict' in evidentiis oſtenſ. fuit, convent', conceſſ. condeſcenſ. concluſ. & plenarie agreat' fuit, per & inter eaſdem partes ad eandem indenturam modo & forma ſequen', videl' quod prædictus Anthonius Bridges, filius prædictorum Rich' Bridges & Joh', & Edwardus Langford, convenerunt, & conceſſerunt pro ſeipſis hæred', & aſſignat' ſuis, ad & cum præd' Georgio Brown, hæred' & aſſignatis ſuis per eandem Indenturam, quod ipſi iidem Anthonius Bridges filius prædictorum Richardi Bridges & Johannæ, & Barbara, una cum præd' Edwardo Langford, ante terminum Paſchæ tunc proxim' ſequen', levarent & cognoſcerent coram Juſticiar' dictæ dominæ Reginæ de banco apud Weſtmonaſter', quendam finem, vel diverſos fines cum proclamationibus, ſecundum curſum finium in eadem cur' uſitat' præf. Georgio Brown, de toto illo manerio de Knitbury, cum omnibus & ſingulis juribus, membris, & pertin' in prædict' com' Berk. Ac de omnib' meſuag', ter' & tenement', reddit', ſervitiis, advocationibus, patronat', libertatib', privilegiis, proficuis, & hæreditament' cum omnibus & ſingulis eorum pertinen' eidem manerio ſpectant', ſive pertinent': Ac de prædictis tenementis integris interius ſpecificat', per nomen terrarum, tenementorum, ac hæreditamentorum cum pertin', vocat' ſive cognit' per nomen de Walcot, jacen' in Swindon infraſcript', unde prædict' meſuag', & vigint' & ſex acr' terr' tunc fuerunt, & adhuc ſunt parcel': Ac de omnib' meſuag', cottagiis, terris, tenementis, reddit', ſervitiis, & hæreditamentis quibuſcunq; ad eadem ſpectan', occupan', reputat', dimiſ. ſive accept' tanquam pars ſive parcell' eorundem, per nomina quadragint' meſuagior', vigint' toftor', unius columbarii, triginta gardinor', vigint' pomarior', mille acrar' terr', treſcentar' acrar' prati, mille acrarum paſturæ, centum acrarum boſci, quingentarum

acrarum

acrarum jampnorum & bruere, & quadraginta ſolidat' liber' reddit', cum pertinentiis in Knitbury, Holt, Hungerford, Walcot, & Swindon in prædict' com' Berk' & Wilteſ. vel per quemcunque alium numerum acrarum, aut ſola vel una cum aliquibus aliis maneriis, terris, ten'tis, & hæreditamentis: quodq; prædict' finis, vel prædicti fines concernen' præmiſſa in eadem Indentura præmencionata, & executio finis vel finium ill' foret & forent, ad uſum prædicti Georgii Brown, hæred' & aſſignatorum ſuorum imperpetuum, & ad nullum alium uſum, intentionem, ſive propoſitum: Et iidem Jurat' ulteri' dicunt', quod in performatione & accomplement' convenſionis & agreamenti in dict' Indentura, inter prædict' Anth' Bridges, filii prædictorum Rich' & Joh', Barbara', & Edw' Langford, & prædict' Georgium Brown forma prædicta fact' mentionat', poſtea & ante prædictum terminum Paſchæ, ſcilicet termino Sancti Hill', anno regni dictæ dominæ Reginæ nunc triceſimo ſecundo ſupradict', quidam finis levavit in curia dict' dominæ Reginæ apud Weſtm' in prædict' com' Middl', coram *Edmundo Anderſon, Franciſco Wyndham, Willihelmo Periam, & Thoma Walmſley* tunc Juſtic' ejuſdem d'næ Reg' & aliis dictæ d'næ Regin' fidelib' tunc ibi præſent', inter prædict' Georgium Brown quærent', & prædictos Anth' Bridges, filium prædictorum Rich' & Joh', & Barbaram uxor' ejus, & Edwardum Langford generoſ. deforc' de te'ntis integris illis in eadem Indentur' ſpecificat', unde prædict' meſuag' & vigint' & ſex acr' terr' ſunt, & tempore levationis finis illius fuerunt parcell' inter alia, per nomina maneriorum de Knitbury, & Fally, alias Fally magna cum pertinen', Ac ſexagint' meſuag' vigint' toftorum trium columbar', quadragint' gardinorum, quinquaginta pomariorum, quatuor mille acrar' terr', treſcentar' acrarum prati, quatuor millium acrarum paſtur', treſcentar' acrar' boſci, mille acrar' jampnorum & bruere, & ſex librar' treſdecem ſolidat' & quatuor denar' reddit', cum pertinen' in Knitbury, Holt, Fally, alias Fally magna, Hungerford, & Weſt Shefford, alias Shefford magna: Necnon Rectoriæ de Fally magna cum pertinen', ac liberæ warren', & libertat' parci in Weſt Shefford alias Shefford magna, Ac etiam de libera piſcaria magna de Kennet in com' Berk' ac manerii de Buddeſden cum pertinen' ac vigint' meſuag', decem toftorum, duodecim gardinorum, octo pomariorum, mille acrar' ter', centum acrar' prati, mille acrar' paſturæ, ducentarum acrar' boſci quingent' acrar' jampnorum & bruere, & quadragint' ſolidat' reddit' cum pertin' in Buddeſden, Lugerſhal, Walcot in Swindon in com' Wilteſ. unde pl'itum conventionis ſumm' fuit inter eos in eadem cur', ſcilicet quod præd' Anthonius, Barbara, & Edwardus recogn' prædicta maneria, ten'ta, reddit', rectoriam, warren', libertat',

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& piſcariam cum pertinent' in eodem fine content', eſſe jus ipſius Georgii, ut illa quæ idem Georgius habuit de dono ejuſdem Anthonii, Et ill' remiſerunt & quiet' clam', de ipſis Anthonio, Barbara, & Edwardo, & hæred' ſuis præd' Georgio & hæredibus ſuis imperpetuum. Et præterea iidem Anthonius & Barbara conceſſerunt, pro ſe & hæredibus ipſius Anthonii, quod ipſi Warrant' præd' Georgio & hæred' ſuis prædict' maneria, tenementa, reddit', rectoriam, warren' & libertates, & piſcariam cum pertin' in eodem fine content', contra prædict' Edward' & hæredes ſuos imperpetuum: Et pro illa recogn', remiſſione, quiet' clam', warrant', fine & concordia, idem Georgius conceſſit prædicto Edwardo quandam annualem redditum centum libr', exeunt' de & in prædictis maneriis, tenementis, reddit', rectoria, warent' libertat', & piſcar' cum pertin', in eodem fine content', Et ill' ei reddidit in eadem cur': Habend' & percipiend' prædictum annual' redd' centum librarum eidem Edwardo, tota vita prædict' Johann' per nomen d'næ Johannæ Bridges, matris prædicti Anthonii, Ad feſta Annunciationis beatæ Mariæ virginis, Nativitatis S. Johan' Baptiſtæ, ſancti Michaelis archangeli, & Natal' d'ni, per æquales porciones annuatim ſolvend' tota vita ipſius Johannæ, prima ſolutione inde incipiend' ad illud feſtum feſtorum prædict', quod proxim' poſt deceſſum ipſius Anthonii fore contigerit. Et ſi contigerit prædictum annualem redditum centum librar', aut aliquam inde parcel' aretro fore in parte vel in toto, poſt aliquod feſtum feſtorum prædictorum, quo (ut præfertur) ſolvi deberet, non ſolut' per ſpacium trigint' dierum, Quod tunc & toties prædictus Georgius & hæredes ſui forisfacerent prædicto Edwardo quatuor libras & quindecim ſolidos nomine pœnæ, quoties prædict' annual' reddi' centum librarum, aut aliqua inde parcell', ſic aretro fore contigerit, Et qd' tunc & toties bene liceret eidem Edwardo, tota vita ipſius Johannæ in prædicta maneria, tenementa, reddit', rectoriam, warrenam, libertatem, & piſcariam cum pertinentiis in dicto fine content', & quamlibet inde parcel' intrare & diſtringere, diſtrictioneſque ſic ibidem capt' & habit', licite, abducere, aſportare, & effugare, ac penes ſe retinere, quouſque tam de prædicto annuali reddit' centum librarum, cum arrearagiis eiſdem ſi quæ fuiſſent, quam de prædictis quatuor libris, & quindecim ſolidis, nomine pœnæ, ut præfertur forisfaciend' plenarie fuiſſet ſatisfactum, & perſolutum. Conceſſit etiam prædictus Georgius prædictis Anthonio & Barbaræ prædicta maneria de Buddeſden, & Fally, alias Fally magna cum pertin', ac vigint' meſuag', decem toſta, decem gardina, ſex pomaria; mil' acr' ter', cent' acr' prati, mille acr' paſtur', cent' acr' boſci, quingent' a-

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cras jampnorum & bruere, & quadragint' ſolidat' reddit' cum pertinentiis in Buddeſden, Luggerſhal, Fally, alias Fally magna, & Weſt Shefford, ac Rectoriam de Fally magna cum pertinentiis, ac liberam warrenn' & libertatem parci in Weſt Shefford, alias Shefford magna prædict', parcell' maneriorum, tenementorum, & reddit' prædictorum cum pertin' in dicto fine conten': Et ill' eis reddiderunt in eadem cur': Habend' & tenend' eiſdem Anthonio & Barbaræ, de capitalib' d'nis feodi illius, per ſervitia quæ ad illa maneria, tenementa, reddit', rectoriam, warrennam, & libertatem parci pertinent, tota vita ipſorum Anthonii & Barbaræ, & eorum alterius diutius vivent', abſq; impetitione alicujus vaſti, tota vita ipſius Anthonii; Et poſt deceſſum ipſorum Anthonii & Barbaræ, eadem maneria, tenementa, redditus, rectoria, warren', & libertates parci cum pertinen', integre reverterent ad prædictum Georgium & hæredes ſuos: Tenend' de capitalib' d'nis feodi illius, per ſervitia quæ ad illa maneria, tenementa, reddit', rectoriam, warren', & libertat' parci pertinent imperpetuum. Et iidem Jur' ulterius dicunt ſuper ſacrum ſuum prædict', quod prædict' Johanna de eiſdem meſuag' & vigint' & ſex acr' ter', inter alia cum pertin' in forma prædict' ſeiſit' exiſten', eadem Johanna poſtea & ante infraſcript' tempus quo, &c. ſeptimo die Octob. anno regni dictæ d'næ Reginæ nunc triceſimo ſecundo, apud Swindon præd', per quandam Indentur' ſuam dimiſſionis inter ipſam Johann', per nomen Joh' Harecort de Ludgerſhal in com' Wilteſ. viduæ, alias dict' d'næ Joh' Bridges de Ludgerſhall in Com' Wilteſ. viduæ ex una parte, & quoſdam Edmund' Bridges armig', Willi' Bridges, & Antho' Bridges, filios ejuſdem Edmundi & aſſign' ſuos ex alia parte factam, cujus quidem Indentur' dat' eſt viceſimo primo die Auguſti, ann' regni dict' d'næ Regin' nunc triceſimo ſecundo ſupradict', tam pro & in conſideratione ſurſum redditionis unius Indentur' ſive dimiſſionis ante tunc conceſſ. de omnibus & ſingulis præmiſſis in eadem Indentur' prædict' Johann' tunc poſtea dimiſſ. & dimittend', decem & novem annorum, & ulteri' tunc ventur' & minime expirat', quam præd' Edmund' ante tempus illud habuiſſet & gaviſus fuiſſet: Quam quidem priorem Indentur', ſive dimiſſionem, ad vel ante ſigillationem & deliberationem dict' Indentur', modo in evidentiis oſtenſ. prædictus Edward' Bridges ſurſum reddidit & deliberavit in manus & poſſeſſ. dictæ Johannæ quam pro diverſis aliis bonis cauſis & conſiderationibus eandem Johannam maxime ſpecialiter movent', dimiſſit, conceſſit, & ad firmam tradidit præf. Edward' Bridges, Willi' Bridges, & Antho' Bridges, filiis ipſi' Edmund', prædict' meſuag' & vigint' & ſex acr' ter' cum pertin' inter alia: Habend' & tenend'

eadem

eadem meſuag. & viginti & ſex acras terræ inter alia præf. Edmund', Willihelmo, & Anthonio Bridges, prædictis duobus filiis ipſius Edmundi Bridges, pro termino vitæ eor' natural', & pro termino vitæ cujuſlibet eor' diutius viven', & quemlibet eor' ſucceſſive gaudend'; reddend' & ſolvend' proinde annuatim duran' term' illo præf. Joh. ſub & per nomen Joh' Harecourt hæred' & aſſignat. ſuis, 4. li. & 2. d. bonæ & legalis monetæ Angliæ ad duos uſual' feſta ſive terminos anni, viz. ad feſtum Annunciat' beatæ Mariæ virginis 40 s. & 1 d. Et ad feſtum Sancti Michaelis conſimilem ſummam 40. s. & 1. d. reſid' prædictarum 4. li. & 2. d. prout per eandem Indenturam dimiſſionis eiſdem Jur' in evidentiis oſtenſ. plenius liquet; virtute cujus dimiſſionis prædicti Edmund' Bridges, Willihelmus Bridges, & Anthonius Bridges, filius ejuſdem Edmundi fuerunt ſeiſit. de præd' meſuag. & viginti & ſex acris terræ infraſcript', prout lex poſtulat: Et ulterius iidem Jur' dicunt ſuper ſacramentum ſuum quod præd' meſuag. viginti & ſex acræ terræ infraſpec', ac cætera tenementa in dicta Indentura dimiſſionis per ipſam Johannam ſub & per nomen Joh' Harecourt præf. Edmund', Willihelmo & Antonio, filiis ejuſdem Edmundi, in forma prædict' dimiſſ. non fuerunt uſualiter dimiſſ. per majorem partem vigint. annorum proxime ante dimiſſion' ill' ſic ut præfertur fact. pro tali parvo reddit', Anglice **ſo little Rent**, qual' per Indenturam prædictam inde modo in evidentii oſtenſ. in forma prædicta reſervat fuit: Et iidem Jurat. dicunt ulterius ſuper ſacramentum ſuum, quod prædicta Johanna poſtea & ante præd' tempus quo, &c. ſcilicet viceſimo nono die Septembris, Anno regni dictæ dominæ Reginæ nunc triceſimo quinto, apud Ludgarſhal prædictam obiit, poſt cujus mortem prædictus Georgius Browne in tenementa infraſcript. integr' cum pertin' in quibus, &c. ſuper poſſeſſionem præd' Edmudi Bridges, Willihelmi, & Anthonii Bridges, filiorum ipſi' Edmundi inde intravit, & fuit inde ſeiſitus prout lex poſtulat; Et ſic inde ſeiſit' exiſten', poſtea & ante prædict' tempus quo, &c. ſcilicet infraſcript' viceſimo ſecundo die Octobris, anno triceſimo quinto infraſcript', dimiſit præfat' Jacobo eadem tenementa integra infraſpec. cum pertin' in quibus, &c. habend' & tenend' eidem Jacobo & aſſignatis ſuis ab infraſcript. feſt. S. Mich. Archangeli, uſque finem & terminum infracontent' 4. annor' extunc proxim' ſequen' & plenar' complend'; virtute cujus dimiſſionis præd' Jacobus in eadem ten'ta integra infraſpec. cum pertinentiis intravit, & fuit inde poſſeſſionatus prout lex poſtulat, ſuper cujus quidem Jacobi poſſeſſion' præd'

T. Spencer ut ſerviens præd' Edmundi Bridges, & per ejus præceptum infraſcript', tempore quo, &c. in præd' meſuag. & viginti & ſex acras terræ intravit, & præd' Jacobum a firma ſua præd' inde ejecit; Sed utrum ſuper tota materia prædict' per ipſos Jurat' in forma prædict' compert' intracio præd' Tho. Spencer, in prædict' meſuag. & viginti & ſex acras terræ cum pertinentiis ſuper poſſeſſionem præd' Jacobi inde ſit bona & legalis intracio in lege necne, iidem Jurat. penitus ignorant, Et petunt inde adviſamentum & diſcretionem Juſticiar' hic, &c. Et ſi ſuper tota præd' materia videbitur Juſticiar' & Curiæ hic, quod præd' intracio præd' Tho. Spencer in præd' meſuag. & viginti & ſex acras terræ, ſuper poſſeſſionem præd' Jacobi Lynch, non ſit bona & legalis intracio in lege, tunc iidem Jurat' dicunt ſuper ſacramentum ſuum quod præd' Thomas Spencer eſt culpabilis de tranſgreſſione & ejectione præd' in præd' meſuag. ac viginti & ſex acris terræ, prout prædict' Jacobus interius verſus eum queritur; Et tunc aſſid' dampna ipſius Jacobi occaſione tranſgreſſionis & ejectionis illarum, ultra miſ. & cuſtag. ſua per ipſum circa ſectam ſuam in hac parte appoſit. ad quatuor denarios: Et pro miſ. & cuſtag. ill' ad duodecem denarios. Et ſi ſuper tota materia præd' videbitur Juſticiar' & Curiæ hic, quod prædicta intracio prædicti Thomæ Spencer in prædictum meſuagium & viginti & ſex acras tertæ, ſuper poſſeſſionem prædicti Jacobi ſit bona & legalis intracio in lege, tunc iidem Jurat. dicunt ſuper ſacramentum ſuum, quod prædictus Thomas Spencer non eſt culpabilis de tranſgreſſione & ejectione prædict' in eiſdem meſuagiis ac viginti & ſex acris terræ cum pertinentiis, prout prædictus Jacobus interius allegavit. Et quia Juſticiar' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam judic' inde reddant, dies dat. eſt partib' præd' hic uſque in Octob. S. Hillarii de audiendo inde judicio ſuo, eo quod iidem Juſtic' hic inde nond', &c. Ad quem diem hic venit tam præd' Jacobus, quam præd' Willihelmus & Thomas per attornatos ſuos prædict', Et quia Juſticiar' hic ſe ulterius adviſare volunt de & ſuper præmiſſis priuſquam judicium inde reddant, dies ulterius datus eſt partibus prædictis hic uſque a die Paſchæ in quindecem dies de audiendo inde judicio ſuo, eo quod iidem Juſticiarii hic inde nondum, &c. Ad quem diem hic venerunt tam præd' Jacobus per Georg. Duncombe attorn' ſuum, quam præd' Will. & Thom' pro attorn' ſuum præd': Et quia Juſticiar' hic ſe ulterius adviſare volunt de & ſuper præmiſſis priuſquam judicium inde reddant, dies ulterius datus eſt partibus præd' hic uſque in craſtino S. Trin. de audien' inde judic' ſuo, eo quod

iidem

iidem Juſt. hic inde nond', &c. Ad quem diem hic ven' tam præd' Jacobus per præd' Georgium Duncombe attornatum ſuum, quam præd' Willihelm' & Thomas per attornatum ſuum præd'. Et quia Juſtic. hic ſe ulteri' adviſare volunt de & ſuper præmiſſis priuſquam judic' inde reddant, dies ulteri' dat' eſt partib' præd' hic uſq' in Octob. S. Mich. de audiendo inde judicio ſuo, eo quod iid' Juſtic' hic inde nond', &c. Ad quem diem hic ven' tam præd' Jac' Lynch per præd' Georg. Duncombe attorn' ſuum, quam præd' Will' Spencer & Thom' Spencer per attorn' ſuum præd'. Et ſuper hoc viſo veredict' præd', & per Juſtic' hic pleni' intellecto, videtur eiſd' Juſt' hic quod præd' intracio præd' Tho' Spencer, in præd' meſuag' & viginti & ſex acr' ter', de ten'tis præd' reſid', ſuper poſſeſſion' præd' Ja' Lynch, non eſt bona & legalis intracio in lege; Ideo conceſſ. eſt quod præd' Jac' Lynch recuperet verſus præf. Tho' Spencer termin' ſuum præd' adhuc ventur', de & in præd' meſuagio & viginti & ſex acr' ter' cum pertin', & dampna ſua præd' ad xvi. d. per Jur' præd' in forma præd' aſſeſſa, necnon xxvi. li. & ix. s. eid' Jacobo ad requiſition' ſuam pro miſ. & cuſtag' ſuis præd', per cur' hic de increment' adjudicat'. Quæ quid' dampna in toto ſe attingunt ad xxvi. li. & x. s. & iiii. d. Et præd' Tho' inde capiatur, &c. Ac etiam præd' Jac. in miſericordia pro falſo clamore ſuo verſ. præfat' Will' Spencer de tota tranſgr' & ejectione præd', ac verſus Præf. Tho' Spencer de reſid' tranſgreſſ. & ejectionis illarum unde iid' Will' & Tho' per Jur' præd' ſuperi' acquietat' exiſtunt: Ideo præd' Will' & Tho. eant inde ſine die, &c. Et ſuper hoc præd' Jac' petit breve d'næ Reg' vic' com' præd' dirigend', de habere faciend' ei poſſeſ. ſuam termini ſui præd' adhuc ventur', de & in præd' meſuagio & vigint' & ſex acr' ter' cum pertin': Et ei conceditur, retornabil' hic a die S. Martini in quindecem dies, &c. Poſtea ſcz. xxvi. die Novem' ann' regni d'næ Reg' nunc xl. ven' hic in cur' præd' Jac' per præd' Georgium Nicols attorn' ſuum: Et per ſpeciale war' ei in hac parte conſtitut' cogn' quod ſatisfactum eſt ei de dampnis præd': Ideo præd' Tho' de dampnis ill' ſit quiet', &c.

Hill. 36 Eliz. *Rot.* 445.

Sir GEORGE BROWN's *Case.*

IN an *Ejectione firmæ* by *Thomas* (*a*) *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* ſeized 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 Rolls 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. 365. 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. 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 Barr, 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 delayed; and foraſmuch 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 & Viller's* Caſe, & *Plow. Com.* 50. *b.* Co. Lit. 365. b.

2. It was reſolved, if *Anthony* had granted over his Remaind. 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 Mannor, *&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. 878. 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 Matter, the Caſe is no other, but that a Woman Tenant in Tail with-
(c) 11 H. 7. cap. 20. 10 Co. 37. a. Winch. 43. 1 Leon. 261. 2 Leon. 168. 3 Leon. 78. Cr. El. 2. 34. 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. 234. Co. Lit. 326. b. 365. b. Hob. 166. 341. Bridg. 136. in 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, although 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.

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
(d) 2 Leon. 168. Godb. 6. 3 Leon. 78. 2 And. 150. Moor 250. 2 Rol. Rep. 491. 3 Keb. 436. Cr. Jac. 689. 2 And. 57. Cr. El. 514. Jenk. Cent. 278. Cr. Car. 234. 1 Jones 60. 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 decreed 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* 3 & 4 *Phil. & Mar.* *(e)* 148. *Penicock's* Caſe.
(e) Dyer 148. pl. 79. Co. Lit. 252. a. 1 Rol. 852.

Paſch.

Paſch. 36 Eliz.

In the King's-Bench.

RIGEWAY's *Caſe.*

IN Debt by *William Grils*, againſt *Thomas Rigeway*, late Sheriff of *Dev.* for 306 *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 afterw. 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 20 *April.* 33 *Eliz.* and ſo continued in his Cuſtody till the eighth 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

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

Means the Priſoner might be out of Sight; and altho' the Priſoner flyeth into other Counties where the Sher. hath no Power, and where it may be objected, the Sher. cannot have the Cuſtody of him, yet foraſmuch as the Eſcape was of his (*a*) own Wrong, (whereof he ſhall not take Advantage) the Sher. might on freſh Suit take him in any other County, and he ſhould be ſaid in Execut. But if the Plaint. bring an Action againſt the Sher. for an Eſcape (*b*) before that the Sher. can retake him; or if the Sher. doth not make freſh Suit, yet in both theſe Caſes the Sher. 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 Def. be taken on a *Capias ad ſatisfaciendum*, and eſcapes, yet if the Writ be never returned and filed, the Plaint. may have a new *Capias ad ſatisfaciendum* againſt him, and take him again, and he ſhall not take Advant. of his own Wrong, but if the Plaint. will, he may charge the Sher. for 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 Sher. 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.

2. It was reſolved, That the Bar was (*e*) inſufficient, for the Plaint. hath declared of an Eſcape in *London*, and the Defend. 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 Plaint. hath Cauſe of Action, wherefore the Plaint. perceiving the Opin. of the Court, did diſcontinue his Suit: But it was agreed that if the Plaint. had demurred upon the Bar, he ſhould have had Judgment.

3. It was reſolved, That after Demurrer there ſhould be no Replead. for the Parties have by their mut. Aſ. put themſ. upon the Judgm. of the Court, and theref. without their Aſ. they could not replead. And ſo was it adj. in Debt betw. (*g*) *Kendal* and (*h*) *Heyer* in the K's B. *M.* 25 & 26 *El.* by *Wray* C. J. Sir *Tho. Gawdy*, and the whole C. of the K's B. And in the ſame C. in Debt betw' *Gallis* and *Burbry*, *Mic.* 29 & 30 *El.* againſt the Op. of 9 *H.* 6. 35. in an Avowry, which Record had been ſeen, and did not warrant the Report of the Book. *Ter.*

(*a*) Cr. El. 555. Godb. 126. Cr. Car. 240, 255. 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. Sty. 117. Cr. El. 102. Antea 44. b. 1 Rol. 307. 1 Lev. 211. 1 Show. 197. Lutw. 1260. 1 Mod. 194. Comb. 396.
(*e*) Pop. 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. Sty. 354. Palm. 287. Lit. R. 172.
(*g*) Cr. El. 318. Cr. Jac. 127. Moor 461. Pop. 42. 1 Ro. R. 271. 2 Bulſt. 37. 9 H. 6. 35. b. Fitz. Replead. 8. Br. Replead. 39. Moor 867. Doctr. pla. 321. 1 And. 168. 1 Ro. Rep. 363. Lit. R. 252.
(*h*) 8 Co. 120. b. Cr. El. 62, 8 Co. 120. b. 1 Leon.

Termino Sancti Michaelis, *Anno Regni Dominæ* Elizabethæ *nunc Reginæ* 37 & 38. Rotulo 82.

BROWKER,

ROBertus Chamberlaine Armiger, per Appolinem Paine Attornatum ſuum, petit verſus Cuſtod' ſive Rector' & Scholar' Collegii beatæ Mariæ omnium Sanctorum Lincoln', in univerſit' Oxon', maneria de Petteſho, & Eckney cum pertinentiis, except' cent' & vigint' acris paſturæ in Petteſho prædict', & trigint' acris paſturæ in Eckney prædict', quæ Alveredus Cornburgh armiger', Richardus Danvers armiger', Nicholaus Stathum, & Willihelm' Collow, dederunt Richardo Chamberlaine armigero, & Sibillæ Fowler, & hæred' maſculis de corpore ipſius Richardi Chamberlaine exeunt': Et quæ poſt mortem prædict' Richardi Chamberlaine, & Sibillæ, & Edwardi filii & hæred' ejudem Richardi Chamberlaine, & Leonardi filii & hæred' ejuſdem Edwardi, & Franciſci filii & hæred' ejuſdem Leonardi, præfato Roberto filio & hæredi prædicti Franciſci, deſcendere debet per formam donationis prædict', &c. unde dic' quod prædict' Alveredus Cornburgh, Richard' Danvers, Nicholaus & Willihemus dederunt maneria prædicta cum pertinentiis præfato Richardo Chamberlain & Sibillæ, & hæred' maſculis de corpore ipſi' Richardi Chamberlaine exeunt' in forma prædicta, &c. Per quod donum iidem Richardus & Sibilla fuerunt ſeiſiti de eiſdem maneriis cum pertinentiis, videlicet idem Richar' in dominico ut de feodo & jure, Et eadem Sibilla in dominico ſuo ut de libero tenemento per formam, &c. tempore pacis tempore domini Edward' nuper Regis Angliæ quarti, poſt conqueſtum, capiend' inde expleſ. ad valentiam, &c. Et de ipſo Richardo, deſcend' jus per formam, &c. cuidam Edwardo, ut filio & hæred', &c. Et de ipſo Edward', deſcend' jus

per

per formam, &c. cuidam Leonardo, ut filio & hæred', &c. Et de ipſo Leonardo, deſcend' jus per formam, &c. cuidam Franciſco, ut filio & hæred', &c. Et de ipſo Franciſco filio Leonardi, deſcend' jus per formam, &c. iſto Roberto qui nunc petit, ut filio & hæred', &c. Et quæ poſt mortem, &c. Et inde produc' ſectam, &c. Et prædicti Cuſtos ſive Rector' & Scholar', per Willihelm' Paine Attornatum ſuum, ven' & defend' jus ſuum quando, &c. Et dic' quod prædictus Robertus Chamberlaine actionem ſuam prædictam verſus eos habere non debet: quia proteſtando quod prædicti Alveredus Cornburgh, Richardus Danvers, Nicholaus Stathum, & Willihelmus Collow non dederunt maneria prædicta cum pertinentiis præfat. Richardo Chamberlaine & Sibillæ Fowler modo & forma prout in narratione prædicta allegatur; Pro placito dic' quòd diu poſt tempus quo donum prædict' ſuperius fieri ſupponitur, quidam Richardus Lyſter gener', Martinus Linſey, Johannes Cottesford, Johannes Clayton, Willihelmus Hogeſon, & Robertus Taylor, Clerici, fuerunt ſeiſiti de maneriis prædictis cum pertinentiis in dominico ſuo ut de feodo, Et ſic inde ſeiſit' exiſten' prædicta Sibilla Abavia dicti Roberti Chamberlaine, cujus hæres idem Robertus eſt, quinto die Maii, anno regni domini Henrici nuper Regis Angliæ octavi undecimo, apud Petteſho prædictam, per quoddam ſcriptum ſuum relaxationis, quod idem Cuſtos ſive Rector' & Scholar' ſigillo prædictæ Sibillæ ſignat' hic in Curia proferunt, cujus dat' eſt eiſdem die & anno, remiſit, relaxavit, ac omnino pro ſe & hæredibus ſuis imperpetuum quiet' clam', præfat. Richardo Lyſter, Martino Linſey, Johanni Cottesford, Johanni Clayton, Willihelmo Hogeſon, & Roberto Taylor, adtunc de maneriis prædictis cum pertinentiis in forma prædicta ſeiſit' exiſten', in eorum plena & pacifica poſſeſſione adtunc exiſten', hæredibus & aſſignat' ſuis imperpetuum, totum jus ſuum, clameum, titulum, ſtatum, uſum, intereſſe, & demand' quæ unquam habuiſſet, tunc habuit, ſeu quoviſmodo in futurum habere potuiſſet, de & in maneriis prædictis cum pertinentiis. Et ulterius eadem Sibilla per prædictum ſcriptum ſuum conceſſit pro ſe & hæredibus ſuis, quod ipſa eadem Sibilla & hæredes ſui maneria prædicta cum pertinentiis præfato Richard' Lyſter, Martino Linſey, Johanni Cottesford, Johanni Clayton, Willihelmo Hogeſon, & Roberto Taylor, hæredibus & aſſignatis ſuis, contra tunc Abbatem Weſtmonaſter' & ſucceſſores ſuos warrantiz', & imperpet' defender', prout per idem ſcript' relaxat' plenius apparet, Et hoc idem Cuſtos ſive Rector' & Scholar' parati ſunt verificare, unde pet' judic' ſi præd' Robertus Chamberlaine contra prædictum ſcript' relaxationis dictam

warrant'

warrant' ejuſdem Sibillæ anteceſſoris ſui cujus hæres idem Robert' eſt in ſe continen', actionem ſuam prædictam verſus eos habere debeat, &c. Et prædictus Robertus Chamberlaine dicit, quod ipſe per aliqua præallegat' ab actione ſua prædicta habend' præclud' non debet, quia dicit quod diu ante donum prædictum factum, & antequam prædicti Alveredus, Richardus Danvers, Nicholaus Stathum, & Willihelmus Collow, aliquid habuerunt in maneriis prædictis cum pertinentiis, prædictus Richardus Chamberlaine fuit ſeiſit' de eiſdem maneriis cum pertinentiis in dominico ſuo ut de feodo: ipſoque Richardo ſic inde ſeiſit' exiſten', ante donum prædictum fact', ſcilicet duodecimo die Junii, anno regni domin' Edwardi nuper regis Angliæ quarti poſt conqueſtum undecimo, prædicti Richardus Danvers, Alveredus Corneburg, Nicholaus Stathum, & Willihelmus Collow, extra curiam Cancellar' ipſius nuper Regis Edwardi quarti apud Weſtmonaſter' in comitatu Middleſex' tunc exiſten', impetraverunt & proſecut' fuer' quoddam breve ejuſdem nuper Regis Edwardi quarti de recto, verſus præfat' Richardum Chamberlaine adtunc tenen' liberi tenementi maner' prædictorum cum pertinentiis inter alia exiſten', tunc Vicecom' prædict' comitat' Buck. direct', per quod quidem breve idem nuper Rex eidem tunc Vicec' Buck. præcepit, quod præciperet eidem Richardo Chamberlaine, per nomen Richardi Chamberlaine armiger', quod juſte & ſine dilatione redderet præfat. Richardo Danvers, Alveredo, Nicholao, & Willihelmo, per nomina Rich' Danvers, Alveredi Corneburgh armiger', Nicholai Stathum, & Willihelmi Collow, maneria prædicta cum pertinentiis, inter alia, per nomina maneriorum de Petteſho & Eckney cum pertinentiis, ac ſex meſuagior', ducentar' acrarum terræ, vigint' acrarum prati, ducentar' acrarum paſturæ, & centum ſolid' reddit' cum pertinentiis in Petteſho, Eckney, & Emberton, quæ clam' eſſe jus & Hæreditatem ſuam: Et unde querebantur quod prædictus Richardus Chamberlaine eis injuſte deforc': Et niſi fac': Et prædicti Richard' Danvers, Alveredus, Nicholaus, & Willihelmus Collow, facerent ipſum tunc Vic' ſecur' de clam' ſuo proſequend', tunc ſummon' per bonos ſummon' prædict' Richard' Chamberlaine, quod eſſet coram tunc Juſticiar' dicti nuper Regis Edwardi quarti, hic ſcilicet apud Weſtmonaſter' prædict', a die Sancti Johannis Baptiſtæ in quindecem dies tunc proxime ſequen', oſtenſ. quare non faceret, Et quod haberet tunc hic ſummon', & breve illud, Quia Thomas Rokes armiger capitalis domin' feodi illius, remiſit inde cur' ſuam dicto nuper regi Edwardo quarto: Ad quam quidem

dem quindena Sancti Johannis Baptiſtæ, coram Tho' Brian Milite & ſociis ſuis, tunc Juſticiar' dicti nuper Regis Edwardi quarti de banco hic, ſcilicet apud Weſtmonaſter' prædictam, ven' tam prædicti Richardus Danvers, Alveredus, Nicholaus Stathum, & Willihelmus Collow, per Thomam Gurney tunc Attornatum ſuum, quam prædictus Richardus Chamberlaine per Johannem Wideſtale tunc Attornatum ſuum, Et tunc Vic' prædict' comitat' Buck. videlicet Reginaldus Grey armiger, adtunc ibi retornavit breve prædict' ſibi in forma prædict' direct' in omnibus ſervit' & execut', mand' quod prædicti Richardus Danvers, Alveredus, Nicholaus & Willihelmus Collow inven' eidem tunc Vic' pleg' de proſequend' breve ſuum prædictum, ſcilicet Richardum Doo, & Johannem Roo: Et quod idem Richardus Chamberlaine ſummon' fuit per Jacobum Tye, & Johannem Baker, bonos ſummon', &c. Et ſuper hoc prædict' Richardus Danvers, Alveredus, Nicholaus Stathum, & Willihelmus Collow, per dictum Thomam Gurney Attornat' ſuum, in eadem Cur' prædict' nuper Regis Edwardi quarti de Banco hic ſcilicet apud Weſtmonaſter' prædict' ad prædict' quindenam Sancti Johannis Baptiſtæ narrand' verſus præfat' Richardum Chamberlaine de & ſuper brevi ſuo prædicto per eundem Thomam Gurney Attornat' ſuum petierunt verſ. præfat. Richardum Chamberlaine, maner', tenementa, & reddit' prædicta cum pertinentiis, in dicto brevi de Rect' ſpec' ut jus & hæreditatem ſuam, per breve prædictum dicti nuper Regis Edwardi quarti, quia prædictus Thom' Rokes capitalis d'nus feodi illius remiſ. inde Cur' ſuam eidem nuper Regi; Et unde tunc dixerunt quod ipſimet fuerunt ſeiſiti de maneriis tenementis, & reddit' prædict' cum pertinentiis in dicto brevi de Recto ſpec' in dominico ſuo ut de feodo, & jure, tempore pacis, tempore dicti nuper Regis Edwardi quarti, capiend' inde explec' ad valenc', &c. Et quod tale fuit jus ſuum, adtunc offerebant, &c. Et prædictus Richardus Chamberlaine per prædict' Johannem Wideſtale Attornat' ſuum tunc ibidem ven' & defend' jus prædictorum Richardi Danvers, Alveredi, Nicholai, & Willihelmi quando, &c. Et ſeiſinam eorum, de quorum ſeiſina, &c. ut de feodo & jure, & totum, &c. Et maxime de maneris, tenementis, & reddit' præd' cum pertinentiis in dicto brevi de Recto ſpec'; Et tunc vocabit inde ad warrantizand' Robertum King, qui tunc præſens fuit in eadem Cur' in propria perſona ſua, Et gratis maner', tenemen', & reddit' præd' cum pertin' in dic' brevi de Recto ſpec' eis tunc warrantizabat, &c. ſuper quo præd' Richardus Danvers, Alveredus, Nicholaus, & Willihel' adtunc

petierunt

petierunt verſus prædictum Robertum tenen' per warrant' ſuam maneria, tenementa, & reddit' præd' cum pertinentiis in dicto brevi de Recto ſpec' in forma præd', &c. Et unde tunc dixerunt quod ipſimet fuerunt ſeiſiti de maner' tenementis, & reddit' præd' cum pertinentiis, in dominico ſuo ut de feodo & jure tempore pacis, tempore dicti nuper Regis Edwardi quarti, capiend' inde expleſ. ad valentiam, &c. Et quod tale fuit jus ſuum, tunc offerebat, &c. Et præd' Robertus tenen' per warrant' ſuam defendebat jus prædictorum Richardi Danvers, Alveredi, Nicholai, & Willihelmi quando, &c. Et ſeiſinam eorum, de quorum ſeiſina, &c. ut de feodo & jure, & totum, &c. Et maxime de maneriis, tenementis, & reddit' prædictis cum pertinentiis in dicto brevi de Recto ſpecificat', & tunc ponebat ſe in magnam aſſiſam ejuſdem nuper Regis Edwardi quarti, Et tunc petebat recogn' fieri, utrum ipſe majus jus tunc habuit, tenend' maneria, tenementa, & reddit' prædicta cum pertinentiis ſibi & hæredibus ſuis ut tenens inde per warrant' ſuam, ut illa tunc tenuit, an prædicti Richardus Danvers, Alveredus, Nicholaus, & Willihelmus, habend' maneria, tenementa, & reddit' prædict' cum pertinentiis in dicto brevi de Recto ſpec' ut illa ſuperius tunc petiebant, &c. Et prædicti Richard' Danvers, Alveredus, Nicholaus, & Willihelmus tunc reven' in eadem Cur' illo eodem Termino ſanctæ Trinitatis, anno regni ejuſdem nuper Regis Edwardi quarti poſt conqueſtum undecimo, per tunc Attornatum ſuum prædictum, Et prædict' Robertus tunc ſolempniter exact' non reveniebat, ſed in contempt' Cur' receſſit, & defaltam faciebat, per quod tunc conſ. fuit per eandem Curiam, quod prædict' Richard' Danvers, Alveredus, Nicholaus, & Willihelmus recuperent ſeiſinam ſuam verſus prædictum Ric' Chamberlaine de maneriis, tenementis, & reddit' prædictis cum pertinentiis in dicto brevi de Recto ſpecificat', tenend' ſibi & hæred' ſuis quiete de prædicto Richardo Chamberlaine & hæredibus ſuis, Et etiam de prædicto Roberto & hæredibus ſuis imperpetuum. Et quod prædictus Richardus Chamberlaine tunc haberet de terra prædicti Roberti, ad valentiam, &c. Et quod idem Robertus tunc eſſet inde in miſericordia, &c. prout per recordum & proceſſum inde in Cur' hic reſiden', liquet manifeſte: Quæ quidem recuperatio in forma prædicta habit', fuit habita ad uſum & intentionem, quod prædicti Alveredus, Richardus Danvers, Nicholaus Stathum, & Willihelmus Collow, darent maneria prædicta cum pertinentiis præfato Richardo Chamberlaine, & Sibillæ, & hæredibus maſculis de corpore ipſius Richardi Chamberlaine exeunt', cujus quidem

dem recuperationis prætextu, prædicti Alveredus, Richardus Danvers, Nicholaus, & Willihelmus Collow, in maneria prædict' cum pertinentiis intraverunt, & fuerunt inde ſeiſiti in dominico ſuo ut de feodo, ad uſum & intentionem prædict', & ſic inde ad uſum & intentionem prædict' ſeiſit' exiſten', iidem Alveredus, Richardus Danvers, Nicholaus Stathum, & Willihelmus Collow, dederunt prædicta maneria cum pertinentiis præfato Richardo Chamberlaine & Sibillæ, per nomina Richardi Chamberlaine armiger', & Sibillæ Fowler, & hæredibus maſculis de corpore ipſius Richardi Chamberlaine exeunt', prout idem Robertus Chamberlaine per breve & narrationem ſua prædict' ſuperius ſuppon', per quod donum prædicti Richardus Chamberlaine & Sibilla fuerunt ſeiſiti de maner' prædictis cum pertinentiis, videlicet idem Richardus Chamberlaine in dominico ſuo ut de feodo talliat', videlicet ſibi & hæredibus maſculis de corpore ſuo exeuntibus, Et prædicta Sibilla in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ, per formam donationis prædict': Et poſtea prædictus Richardus Chamberlaine apud Petteſho prædict' duxit in uxorem præfat' Sibillam Abaviam prædicti Roberti Chamberlaine: Et habuit Exitum maſculum de corpore ſuo exeun' præfat' Edwardum Chamberlaine; Et poſtea prædictus Richardus Chamberlaine apud Petteſho prædictam obiit, & prædicta Sibilla ipſum ſupervixit, & ſe tenuit intus in maneriis prædictis cum pertinentiis, Et fuit inde ſola ſeiſita in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ, per jus accreſcendi, &c. per formam donationis prædict'. Et poſtea eadem Sibilla per prædictum ſcriptum ſuum relaxationis remiſit & relaxavit præfato Richardo Lyſter, Martino Linſey, Johanni Cottesford, Johanni Clayton, Willihelmo Hogeſon, & Roberto Taylor, totum jus ſuum, clameum, titulum, ſtatum, uſum, intereſſe, & demand' ſua, de & in maneriis prædict' cum pertinentiis, modo & forma prout in prædicta barra ſuperius ſpecificatur: Poſteaque prædict' Sibilla apud Petteſho prædictam obiit: Et de præfato Richardo deſcend' jus per formam, &c. præfato Edwardo ut filio & hæred', &c. Et de ipſo Edwardo deſcend' jus per formam, &c. præfat' Leonardo ut filio & hæred', &c. Et de ipſo Leonardo deſcend' jus per formam, &c. præfato Franciſco ut filio & hæred', &c. Et de ipſo Franciſco deſcend' jus per formam, &c. eidem Roberto qui nunc pet', ut filio & hæred', &c. prout ipſe per breve & narrationem ſua prædict' ſuperius ſuppon', Et hoc paratus eſt verificare, unde ex quo vigore cujuſdam act' in Parliament' domini H. nuper Regis Angliæ ſeptim', apud W. præd' in

comitatu

comitatu Middleſex' anno regni ſui undecimo, tent', edit' prædicta warrant' prædictæ Sibillæ in forma prædicta facta, penitus vacua & nullius effectus in lege exiſtit', pet' judicium & ſeiſinam ſuam de Maneriis prædictis cum pertinentiis ſibi adjudicari, &c. Et prædicti Cuſtos ſive Rector' & Scholar' dic', quod per prædictum Actum in prædicto parliamento prædicti nuper Regis Henrici ſeptimi apud Weſtmonaſterium prædictam, anno regni ſui undecimo ſupradict' tent', edit', proviſ. ſit, quod Actus prædictus non extenderit alicui tali recuperationi ſive diſcontinuationi habend' cum hæred' proxime inheritabil' tali fœminæ, ſeu ipſe vel ipſi qui proxim' poſt mortem ejuſdem fœminæ, haberet ſive haberent ſtatum hæreditatis in iiſdem maneriis, terris, & tenementis, foret ſeu forent aſſentien' ſive agrean' prædictis recuperationibus ubi eadem aſſenſus & agreamentum ſint de Recordo, ſive irrotulat', prout per eundem Actum inter alia plenius apparet. Et iidem Cuſtos ſive Rector' & Scholar' ulterius dicunt, quod ante confectionem prædicti ſcripti relaxationis prædictæ Sibillæ, ac poſt mortem prædicti Richardi Chamberlaine, quidam Nicholaus Evan, clericus, & Thomas Harrop, clericus, ſecundo die Junii, anno regni dicti nuper Regis Henrici octavi poſt conqueſtum quarto, extra curiam Cancellar' ipſius nuper Regis apud Weſtmonaſter' prædictam tunc exiſten', proſecut' fuer' quoddam breve originale ejuſdem nuper Regis de Ingreſſu ſuper diſſeiſinam in le Poſt, verſus præfat' Edwardum Chamberlaine de maneriis prædictis cum pertinentiis inter alia tunc Vicecom' prædict' Comitat' Bucking' directum, eodem Edwardo adtunc exiſten' tenent' liberi tenementi eorundem maneriorum cum pertinentiis, per quod breve idem nuper Rex eidem tunc Vicecomes præcepit, quod idem Vicecom' præciperet præfat' Edwardo Chamberlaine, per nomen Edwardi Chamberlaine Armigeri, quod juſte & ſine dilatione redderet præfato Nicholao Evan, & Thomæ Harrop, cleric', maneria prædicta cum pertinentiis, inter alia per nomina maneriorum de Petteſho & Eckney cum pertinen', ac ſex meſſuagiorum, ducentarum acrarum terræ, vigint' acrarum prati, ducentarum acrarum paſturæ, & centum ſolid' reddit' cum pertinentiis in Petteſho, Eckney, & Emberton, quæ iidem Nicholaus & Thomas tunc clam' eſſe jus & hæreditatem ſuam, Et in quæ idem Edwardus Chamberlaine non habet ingreſſum, niſi poſt diſſeiſinam quam Hugo Hunt inde injuſte & ſine judicio fecit præfat' Nicholao Evan, & Thomæ Harrop, poſt primam transfretationem domini Henrici Regis filii Regis Johannis in Vaſcon' ut dixerunt, Et unde querebantur quod prædictus Edwardus Chamberlaine eis deforc'. Et niſi fecerit, Et prædictus Nicholaus & Thomas

Thomas Harrop feciſſent ipſum tunc Vic' ſecur' de clam' ſuo proſequend', tunc ſumm' per bonos ſummonit' præfat' Edwardum Chamberlaine quod eſſet coram præfat' Juſticiar' dicti nuper Regis Henr' octavi hic, ſcilicet apud Weſtmonaſterium prædictam, in Craſtino ſancti Johannis Baptiſtæ tunc proxime ſequen' oſtenſ. quare non feciſſet, Et quod haberet tunc hic ſumm', & breve illud. Ad quem quidem Craſtinum ſancti Johannis Baptiſtæ coram Roberto Reade Milite & ſociis ſuis, tunc Juſticiar' dict' nuper Regis Henrici octavi de banco hic, ſcilicet apud Weſtmonaſter' prædictam, ven' tam prædicti Nicholaus Evan & Thomas Harrop, per Johannem Cowper tunc attornatum ſuum, quam prædictus Edwardus Chamberlaine per Thomam Palmer tunc Attornatum ſuum, Et Vic' videlicet Radulphus Verney, Armiger, adtunc hic retornavit breve prædictum in omnibus ſervit' & execut', videlicet quod prædicti Nicholaus & Thomas inven' eidem tunc Vic' pledg' de prof. breve ſuum prædict', ſcilicet Johannem Doo, & Richardum Roo. Et quod prædictus Edwardus Chamberlaine, ſumm' fuit per Johannem Den, & Richardum Fen. Et ſuper hoc iidem Nicholaus Evan & Thomas Harrop narrando verſus præfatum Edwardum Chamberlaine, ſuper brevi prædicto, petierunt verſus prædict' Edwardum Chamberlaine maner', tenementa, & reddit' prædict' cum pertinentiis, ut jus & hæreditatem ſuam, Et in quæ idem Edward' Chamberlaine non habuit ingreſſum niſi poſt diſſeiſinam, quam Hugo Hunt inde injuſte & ſine judicio fecit præfat' Nicholao & Thom' Harrop, poſt primam transfretationem domini Henrici Regis filii Regis Johannis in Vaſcon', &c. Et unde tunc dixerunt quod ipſimet fuerunt ſeiſiti de maneriis, tenementis, & reddit' prædict' cum pertinentiis in dominico ſuo ut de feodo & jure, tempore pacis tempore dicti nuper Regis Henrici octavi, capiend' inde expleſ. ad valentiam, &c. Et in quæ, &c. Et inde tunc produxerunt ſectam, &c. Et prædictus Edwardus Chamberlaine per prædict' Thomam Palmer Attornatum ſuum tunc defendebat' jus ſuum quando, &c. Et tunc vocabat inde ad warr' Thomam Fiſhe, qui adtunc præſens fuit in eadem Cur' in propria perſona ſua, Et gratis maneria, tenementa, & reddit' prædict' cum pertinentiis ei warr', &c. Et ſuper hoc prædicti Nicholaus Evan, & Thom' Harrop petierunt verſus ipſum Thomam Fiſhe tunc tenen' per warr' ſuam, maneria tenementa, & reddit' prædict' cum pertinentiis in forma prædicta, &c. Et unde tunc dixerunt quod ipſimet fuerunt ſeiſiti de maneriis, tenementis, & reddit' prædictis cum pertinentiis, inter alia in dominico ſuo ut de feodo & jure, tempore pacis tempore prædicti nuper Regis Henr' octavi, capiend' inde expleſ. ad valentiam &c.

&c. Et in quæ, &c. Et inde tunc produxerunt ſectam, &c. Et prædictus Thomas Fiſh tenens per warrant' ſuam prædictam, adtunc defend' jus ſuum quando, &c. Et adtunc petiit licentiam inde interloquendi; Et habuit, &c. Et poſtea illo eodem termino prædicti Nicholaus & Thomas Harrop revener' ibidem in eadem curia prædict' nuper Regis Henrici octavi, per Attornatum ſuum prædictum; Et prædictus Thomas Fiſh tenens per warrant' ſuam prædictam, licet tunc ſolempniter exact' non revenit, ſed in contemptum curiæ illius receſſit & defalt' fec': Ideo adtunc conc' fuit per eandem curiam hic, quod prædicti Nicholaus Evan & Thomas Harrop recuperarent ſeiſinam ſuam verſus prefat' Edward' Chamberlain, de maneriis, tenementis, & reddit' præd' cum pertinentiis, Et quod idem Edwardus haberet de terra prædict', Thomæ Fiſh ad valentiam, &c. Et quod idem Tho' Fiſh eſſet inde in miſericordia, &c. prout per recordum & proceſſum inde in curia hic reſiden' plenius liquet: Quæ quidem recuperatio in forma prædicta habita, fuit habit' ad uſum & intentionem quod prædicti Nichol' Evan, & Thomas Harrop de maneriis prædictis cum pertinentiis feoffarent prædictos Richard' Lyſter, Martinum, Johannem Cottesford, Johannem Clayton, Willihelmum Hogeſon, & Robertum Taylor, Habend' & tenendum ſibi & hæredibus ſuis imperpetum, cujus quidem recuperationis prætextu, prædicti Nichol' Evan, & Tho' Harrop in maneria prædicta cum pertinentiis intraverunt, & fuerunt inde ſeiſit' in dominico ſuo ut de feodo, & ſic inde ſeiſiti exiſten', iidem Nich', & Thomas Harrop de eiſdem maneriis cum pertinentiis feoffaverunt prædictos Richardum Lyſter, Martinum, Johannem Cottesford, Johannem Clayton, Willihel' Hogeſon, & Robertum Taylor, haben' & tenend' ſibi & hæredibus ſuis imperpetuum: Virtute cujus feoffamenti iidem Richardus Lyſter, Martinus, Johannes Cottesford, Johannes Clayton, Willihelmus Hogeſon, & Robertus Taylor, fuerunt ſeiſiti de eiſdem maneriis cum pertinentiis in dominico ſuo ut de feodo, & ſic inde ſeiſiti exiſten' prædict' Sibilla in vita prædicti Edwardi, pro meliore ſecuritate prædictorum Rich' Lyſter, Martini, Johannis Cottesford, Johannis Clayton, Willihelmi Hogeſon, & Roberti Taylor in prædictis maneriis cum pertinentiis ſecundum agreamentum inter eoſdem Edwardum & Sibil' prius ante prædictam recuperationem habit' per præd' ſcriptum ſuum relaxationis, remiſit & relaxavit præfat' Richardo Lyſter, Martino, Johanni Cottesford, Johanni Clayton, Willihelmo Hogeſon, & Roberto Taylor, totum jus ſuum, clameum, titulum, ſtatum, uſum, intereſſe, & demand' ſua, de & in maneriis prædict' cum pertinentiis modo & forma prout ipſi ſuperius allega-

verunt, Et hoc parati ſunt verificare, unde pet' Judicium, Et quod prædictus Robertus Chamberlain ab actione ſua prædicta verſus eos habend' præcludatur, &c. Et prædictus Robertus Chamberlain proteſtando quod recuperatio prædicta non fuit habita ad uſum & intentionem quod prædicti Nicholaus Evan & Thomas Harrop, feoffarent prædictos Richardum Lyſter, Martinum, Johannem Cottesford, Johannem Clayton, Willihelmum Hogeſon, & Robertum Taylor, de maneriis prædictis cum pertinentiis, proteſtando etiam quod prædicti Nicholaus Evan & Thomas Harrop non feoffaverunt præfat' Richard' Lyſter, Martinum, Johannem Cottesford, Johannem Clayton, Willihelmum Hogeſon, & Robertum Taylor de maneriis prædictis cum pertinentiis, proteſtando etiam quod prædict' Sibilla pro meliore ſecuritate prædictorum Richard' Lyſter, Martini, Johannis Cottesford, Johannis Clayton, Willihel' Hogeſon & Roberti Taylor in maneriis prædictis cum pertinentiis ſecundum agreamentum inter eoſdem Edwardum & Sibillam prius ante prædictam recuperationem habit' ſuperius fieri ſupponit', per præd' ſcriptum relaxationis non remiſit & relaxavit præfat' Richard' Lyſter, Martino, Johanni Cottesford, Johanni Clayton, Willihelm' Hogeſon, & Roberto Taylor, prout prædicti Cuſtos ſive Rector & Scholares ſuperius rejungend' allegaverunt, proteſtando etiam quod prædictus Edwardus Chamberlain die impetrationis brevis originalis ipſorum Nicholai Evan, & Thomæ Harrop extra cur' Cancellar' prædict' nuper Regis Henrici octavi, ſcil' ſecundo die Junii anno regni ejuſdem nuper regis quarto, ſeu unquam poſtea non fuit tenens liberi tenementi maneriorum prædictorum cum pertinen', pro placito idem Robertus Chamberlain dic', quod prædictum placitum prædictorum Cuſtod' ſive Rector' & Scholar' ſuperius rejungend' placitat', minus ſufficiens in lege exiſtit, ad ipſum Robert' ab actione ſua prædict' verſ. præfat' Cuſtod' ſive Rectorem & Scholares habend' præcludend', tam pro eo quod prædicta rejunctio eſt deceſſus, Anglice, a Departure a prædicta barra ipſorum Cuſtod' ſive Rectoris & ſcholar', quam pro defectu ſufficientis materiæ in eadem rejunctione content', Et hoc paratus eſt verificare, unde pro defectu ſufficientis rejunctionis ipſorum Cuſtod' ſive Rectoris & Scholar' in hac parte, idem Robertus Chamberlain ut prius petit judicium & ſeiſinam maneriorum prædictorum cum pertinentiis ſibi adjudicari, &c. Et prædict' Cuſtos ſive Rector & Scholares ex quo ipſi ſufficient' mater' in lege ad prædictum Robertum ab actione ſua prædicta verſus ipſos Cuſtod' ſive rectorem & ſcholar' habend' præcludend' ſuperius rejungend' allegaver', quam ipſi parati ſunt verificare, quam

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quidem materiam præd' Robert' non dedic', nec ad eam aliqualiter reſpondet, ſed verification' illam admittere omnino recuſavit, ut prius per' Judic': Et quod præd' Rob' Chamberlain ab actione ſua præd' habend' præcludatur, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſ. priuſquam judic' ſuum inde reddant, dies dat' eſt partibus præd' hic uſque in octab. ſancti Hil' de audiend' inde judic' ſuo, eo quod iidem Juſtic' hic inde nondum, &c. Ad quem diem hic venit tam præd' Rob' quam præd' Cuſtos ſive Rector & Scholar' per Attor' ſuos præd', Et quia Juſticiarii hic ſe ulter' adviſare volunt de & ſuper præmiſſ. priuſquam judic' ſuum inde reddant, dies ult' dat' eſt partib' præd' hic uſq; a die Paſchæ in xv. dies de audiendo inde judicio ſuo, eo quod iidem Juſtic' hic inde nond', &c. Ad quem diem hic ven' tam præd' Rob' quam prædicti Cuſtos ſive Rector & Scholar' per attor' ſuos præd': Et quia Juſtic' hic ulter' ſe adviſare volunt de & ſuper præmiſſ. priuſquam judic' inde reddant, dies ulter' dat' eſt partib' præd' hic uſq; in cr'o ſanctæ Trin' de audiendo inde judic' ſuo, eo quod iidem Juſtic' hic inde nond', &c. Ad quem diem hic ven' tam præd' Rob' quam præd' Cuſtos ſive Rector & Scholar' per attorn' ſuos præd', Et quia Juſtic' hic ulter' ſe adviſare volunt de & ſuper præmiſſ. priuſquam judicium ſuum inde reddant, dies ulter' dat' eſt partib' præd' hic uſq; in Octabis ſancti Mich' de audiendo inde judicio ſuo, eo quod iidem Juſtic' hic inde nond', &c. Ad quem diem hic ven' tam præd' Ro' quam præd' Cuſtos ſive Rector & Scholar' per attor' ſuos præd': Et ſuper hoc viſis præmiſſ. Et per Juſtic' his plenius intel', videtur eiſdem Juſtic' hic, quod præd' placitum præd' Cuſtod' ſive Rector' & Scholar' ſuperius rejungen' pl'itat', ſufficiens in lege exiſtit ad præd' Rob' ab actione ſua præd' verſus præf. Cuſtod' ſive Rector' & Scholar' habend' præcludend'. Ideo conſ. eſt quod præd' Rob' nihil capiat per breve ſuum præd', Sed ſit in mi'a pro falſo clam' ſuo: Et quod prædict' Cuſtos ſive Rector' & Scholar' eant inde ſine die, &c.

Mich. 37 & 38 Eliz

In the Common Pleas. Rot. 82.

LINCOLN COLLEGE *Caſe.*

1 And. 31. Moor 255.

IN a *Formedon* in Deſcender by *Robert Chamberlain*, Couſin and Heir-Male of the Body of *Richard Chamberlain*, againſt the Rector and Scholars of *Lincoln* College in the Univerſity of *Oxford* for the Manors of *Petſore* and *Ekency* in the County of *Buckingham*: On the Pleading the Caſe was ſuch: *Richard 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 *Sibill Fowler* whom he intended to marry, and to the Heirs Male of the Body of *Richard*, which was done accordingly. *Richard* and *Sibill* intermarry'd and had Iſſue *Edward*; *Richard* died, *Edward* in the Life of *Sibill adhunc tenens liberi tenementi, &c.* which was intended by Diſſeiſin, *ann.* 4 *H.* 8. ſuffer'd a common Recovery with ſingle Voucher by Agreement amongſt all, to the Intent that the Recoverors ſhould enfeoff *Liſter* and others to divers Uſes; and that *Sibill* (for better Aſſurance) ſhould releaſe to them with Warranty; which Feoffment and Releaſe with Warranty, were made accordingly *anno* 11 *H.* 8.* And afterwards *Sibill* died, *Edward* then being alive; and whether this collateral Warranty ſhould bar the Demandant or not, or ſhould be void by the Statute 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 *Sibill* 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. 36. b.

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

who (*a*) pleads it, that is to ſay, that it was by Diſſeiſin, or by Feoffment 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 Rolls 394, 395. Yelv. 52.

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 *Sibill*, 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 urged, That if a (*d*) Woman, Tenant in Tail, ſuffers a common Recovery, and the Iſſue in Tail releaſes to the Recover, 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.

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 connexed 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 between 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 Statute 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, which

(*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. 13, 23, 34, 324. pl. 32, 33. 364. pl. 29. Styl. 234. 2 Bulſt. 13. 213. 37 H. 6. 1. a. Fitz. Obligation 4. Br. Obligat. 37 Plowd. 62. b. 63. a. 65. a. Raſtal Sheriff. 25. 1 Leon 132. 2 Leon. 78, 107, 118. 3 Leon. 228. 1 Rolls Rep. 40, 169. 2 Rolls Rep. 201. Sav. 81 Larch. 23, 54, 555, 143. O. Benl. 110 1 Jones 65. Hut. 70. 3 Inſt. 194. 1 Rolls 537. Moor 247. Owen 90. Godb. 136. Goldſb. 54, 66. 1 Keb. 391. Noy. 33, 76, 172, 173. 2 Keb. 191. 1 An. 267. 2 And. 122. 1 Sand. 161, 162 Hetly 25, 175. F. N. B. 251. b. 9 Co. 119. b. Heil. 23.

(*e*) Br. non eſt factum 14. 10 Co. 100. b. Plowd. 66. b. 68. a. Fitz. det 80. 5 Co. 119. b. Dyer 129. 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 Rolls 350. Sav. 94. 95. Owen 99. 1 And. 243, 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 Common 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. 2. Cr. El. 473, 474, 564. 10 Co. 59. 3 Keb. 109. 1 Mod. Rep. 205 Cart. 13, 16. 1 Ventr. 247. 1 Rolls Rep. 152. 154, 159, 169.

(b) Treby Argument in quo War. 4. Co. Lit. 9. b. 94. b. 1 Rolls 833. 2 Bulſtr. 233. 21 Ed. 4. 13. a. 11 H. 7. cap. 20.

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 was it 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 it 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 marry'd *Jennings*, *Thomas* died without Iſſue, now between *Jennings* 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 Agree- "ment 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*) *El.* did not extend to it: And the princ. 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. Enr. 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. Enr. 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.* 2. 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. 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 Rolls 418. 2 Rolls 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 Bulstr. 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. Rast. Recoveries 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*) S. *George 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 of Entry, which the Act prescribes. And the Case of *Doctor* and *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*

(*f*) Antea 50. b. Cr. El. 513. Moor 455. 2 And. 44. 1 Rol. 878. Jenk. Cent. 275.

(*g*) Antea 50. a. Dr. Stud. Lib. 1. cap. 31.

and

and *Student*; and ſo manifeſt Diverſity: But if *Sibill* 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 Act

(*a*) Hob. 333.

(*b*) 1 Co. 95. a. 3 Co. 39. b. Fitz. Aſſ. 26. Plowd. 43. a. 56. a. b. Br. donc 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 of 11 *H.* 7. ſhe claims according to her Title, as if the Woman had been dead, and no Act done againſt the Statute, 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, altho' 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 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 *Mountague* Chief Juſtice of the Common Pleas, *Plow. Comm.* 56. well agrees. And the Opinion of the Court of Wards 20 *Eliz. Dyer* 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 well may 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 Lords Homage: And by this Difference you will better underſtand 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.* 37. 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

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

(*d*) Dr. & Stud. 139. 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 Rolls 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 Villain enters, he comes to the Land in reſpect of a Title paramount, that is to ſay, in reſpect of Villainage, 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 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 Villain, 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

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

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

(*c*) 2 Rolls 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 Aſſignes with Warranty, and *B.* enfeoffs *C.* without Deed, *C.* ſhall (f) vouch *A.* as Aſſignee, for the Warranty extends to *B.* and his Aſſignes 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 Aſſignes 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 Aſſignes 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, 391.

(c) 38 E. 3. 21. Vaugh. 384, 388.

(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.* 39 *Eliz.* in the K's B. between (g) *Aude* 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) Aſſignes, 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 of 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. Moor 419.

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

(i) 2 Rolls 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 Villain, *hoc eſt*,

if the Warranty had deſcended before the Lord of the Villain 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 Villain 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.

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

PENNANT's *Caſe.*

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 *S. 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 Defendant *Walter Oſwald:* To which the Paintiff 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:

1. That the Condit. being (*a*) collateral, the Breach of it might be ſo ſecretly contrived, as to be impoſſible for the Leſſor 92. a. (*a*) Cro. El. 528. 553. 572. Moor 426. 456. 8 Co

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*) Paim. 434. 8 Co. 92. a. Cr. El. 572. Hardreſs 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 Rent 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. 133. 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-ent y, and a Leaſe which is voiable 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.

(*h*) Cr. Car. 512. Cr. El. 107. 221. 1 Rolls 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 Forty Years and dies, the Iſſue in Tail accepts the Rent in the Life of the Wife, and afterwards 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 23. 9. 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 voidable, 11 *E.* 3. *Abbot* 9. 8 *H.* 5. 19. 37 *H.* 6. 3. *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. Plow. 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 Rolls. 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 Rolls. 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 Rolls. 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 Rolls 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 Aſſize, 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*) Aſſize 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 *Curteis*, for Land in *Eſſex*, the like Judgment was given by *Anderſon*, (Chief Juſtice there) *Wamſley* Juſtice, and the whole Court, That 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. Ent. 215. n. 13. 1 Brownl. 78. Noy. 7. 2 Anderſ. 42, 90. Cro. El. 528. 1 Rolls 427.

the Leſſee aſſigned his Term, that although 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. 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. 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 therewith agrees 11 *H.* 4. 24. & 1 *H.* 5. 7. *b.* But note, It appears by the ſaid Record of 10 *Elix.* 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 or 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 Tenant recovers againſt him in Aſſize, and the Rent which incurred during the Diſſeiſin, is recoup'd in Damages, yet the Lord or Leſſor, ſhall recov. in the Aſſize the Arrearages before the Diſſeſin; and the Bar of the latter Years, is no Bar of the Arraerages 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 Tennat, 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 Rolls 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 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 Bloffom or 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 Rolls 514, 515. Co. Lit. 83. a.

(f) Dall. 17. pl. 6. Co. Lit. 83. a. b. 1 Rolls 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 *E.* 3. 63. but now it is remedied by the Statutes 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. That

1 Rolls 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 Feoffment was by Colluſion, againſt the Statute 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 explain'd.

De

De Termino Sancti Hillarii, Anno Regni Dominæ Elizabethæ *nunc Reginæ* Ang' 34. Rotulo 169.

MEmorandum quod alias ſcilicet termino ſancti Mich' ultimo præterito, coram domina Regina apud Weſt', ven' Titus Weſtby per Thomam Cocke attorn' ſuum, Et protulit hic in cur' dict' d'næ Reginæ tunc ibidem quandam billam ſuam verſus Tho' Skinner & Joh' Catcher nuper Vic' Lon', in cuſtod' Mar', &c. de pl'ito debiti. Et ſunt pleg' de proſequend', ſcil't, Joh' Doo & Rich' Roo: Quæ quidem bill' ſequitur in hæc verb. ſſ. Lond' ſſ. Titus Weſtby quær' de Tho' Skinner & Johanne Catcher nuper vic' London, in cuſtod' Mar' Mareſc' dominæ Reginæ coram ipſa regina exiſten' de pl'ito quod reddant ei quadringentas & quadraginta libras legalis monet' Angl', quas ei debent & injuſte detinent, pro eo viz. quod cum quidam Tho' Smyth gen', Edw' Winter gen', Anthon' Buſtard gen', per nomina Tho' Smyth de Camden in com' Glouc' gen', Edwardi Winter de Worthington in com' Leiceſtr' gen', & Anth' Buſtard de Adderbury in com' Oxon' gen', viceſimo die Jan' anno reg' dom' reg' nunc viceſimo nono, apud Weſtmonaſter' in com' Mid'. coram Chriſtofero Wray milite, tunc capitali Juſtic' dictæ dominæ reginæ ad placita coram ipſa Regina tenend' aſſign', per quoddam ſcriptum ſuum obligatorium ſigillis ſuis ſigillat', conceſſiſſent ſe teneri & recogn' ſe debere præfato Tito, per nomen Titi Weſtby civis & mercatoris Sciſſoris London' in quadringentis & quadraginta libris, ſolvend' eidem Tito aut ſuo certo attorn' ſcript' illud oſtendend' hæredibus vel executoribus ſuis, in feſto Annunciat' beatæ Mariæ virginis tunc London, ſſ.

proxim' ſequent'. Et ſi defec' in ſolutione debiti prædicti, tunc præd' Tho' Smyth, Edwardus Winter, & Anthonius Buſtard, voluerunt & conceſſerunt, quod tunc curreret ſuper eoſdem Thomam, Edward' & Anthonium, & eorum quemlibet hæredes & executores ſuos, pœna in ſtatuto ſtapulæ de debitis pro merchandizis in eodem emptis recuperand' ordinat' & proviſ. Cumq; etiam prædict' Tho', Ed' & Antho' prædict' quadringent' & quadragint' libr' per ipſos in forma prædict' recogn' in feſto prædict', præfato Tito non ſolviſſent, nec eorum aliquis ſolviſſet, per quod poſtea, ſcilicet undecimo die Aprilis, anno regni dictæ dominæ regin' nunc triceſimo, quidam Johannes Chomley armiger adtunc cleric' dictæ dominæ reginæ nunc, recogn' pro debit' recuperand' ſecundum formam ſtatuti in hujuſmodi caſu proviſ. deputat' per ſcriptum ſuum ſigillo ſuo ſigillat', recognitionem prædictam in Cancellar' dominæ reginæ nunc apud Weſtmon' prædictam tunc exiſten', ad requiſitionem ipſius Titi certificavit, ac idem Titus ſuperinde poſtea, ſcil' triceſimo primo die Auguſti, anno regni dictæ dominæ reginæ nunc triceſimo ſupradict', proſequut' fuit extra prædictam cur' Cancellar' apud Weſtmonaſt' prædictam tunc exiſten' quoddam breve ejuſdem dominæ reginæ tunc vic' London directum, per quod breve recitans quia prædict' Thom' Smyth, Edwardus Winter, & Anthonius Buſtard, viceſimo die Januarii anno reg' dictæ dominæ reginæ nunc viceſimo nono, coram Chriſtophero Wray milite capitali Juſtic' dictæ dominæ reginæ ad placita coram ipſa regina tenend' aſſign', recognover' ſe debere præfato Tito quadringentas & quadraginta libras quas eidem Tito ſolviſſe debuiſſent in feſto Annuntiationis beatæ Mariæ Virgin' tunc proxim' futur', & eaſdem die emanationis brevis illius non ſolviſſent, nec eorum aliquis adtunc ſolviſſet ut dicebatur, eadem domina reg' per breve illud tunc Vic' London præcepit, quod corpora prædict' Thomæ Smyth, Edwardi Winter, & Anthonii Buſtard ſi laici eſſent, capi & in priſona dictæ dominæ reginæ nunc, donec eidem Tito Weſtby de debito prædicto plene ſatisfeciſſent ſalvo cuſtodiri, & omnia ter' & catal' ipſorum Thomæ, Edwardi, & Anthonii in balliva ipſorum Vic', per ſacramentum proborum & legalium hominum de eadem balliva ſua, per quos rei veritas melius ſciri poſſit, juxt' verum valorem eorundem deligenter extend' & appreciari, & in manum dict' dominæ regin' ſciſire fac', ut ea præfato Tito quouſq; ſibi de debito prædicto plene ſatisfact' foret liberari fac', juxta formam ſtatuti apud Weſtmonaſterium pro hujuſmodi debit' recuperand' inde edit' & proviſ. Et qualiter iidem Vic' præc' illud forent execut' ſcire fac' eidem dominæ regin' in Cancell' ſuam in quindena ſancti Martini tunc proxim' futur'

ubicunq;

ubicunq; tunc foret per literas ſuas ſigillat'. Et quod haberent ibi breve illud, quod quidem breve idem Titus Weſtby poſtea, & ante eandem quindenam Sancti Martini, ſcilicet octavo die Septembris, an' regni dict' dominæ Reg' nunc triceſimo ſupradicto, apud London, viz. in parochia de le Chriſtchurch in Warda de Faringdon infra, deliberavit præfatis Thomæ Skinner & Johan' Catcher, adtunc Vic' London' exiſten' in forma juris exequend'. Et idem Titus ulterius dic' quod prædict' Anthonius Buſtard eodem tempore deliberationis ejuſdem brevis præfat' Thomæ Skinner & Johanni Catcher, ut prædicitur, fact' laicus fuit, & adhuc laicus exiſtit, & quod virtute brevis illius, poſt & ante retorn' inde, ſcilicet eodem octavo die Septembris, anno regni dictæ dominæ Reginæ nunc triceſimo ſupradicto præfati Thomas Skinner & Johannes Catcher tunc exiſten' Vic' London' præfat. Anthon' Buſtard apud London' in parochia & warda prædict', virtute brevis prædicti ceperunt & arreſtaver', & eundem Anthonium in executione pro prædictis quadringent' & quadraginta libr' adtunc ibidem habuerunt, ſecundum exigentiam brevis prædicti, ipſoq; Anthonio ſub cuſtod' ipſorum Thomæ Skinner & Johannis Catcher vic' in executione in forma prædicta exiſten', iidem Thomas Skinner & Joh' Catcher Vic' prædictum Anthonium Buſtard, poſtea ſcilicet viceſimo die octobris an' triceſimo ſupradicto, apud London' in parochia & warda prædictis, a cuſtod' ipſorum Thomæ Skinner & Johannis Catcher vic' ad largum quo voluit ire permiſerunt, prædict' Tito de præd' quadringent' & quadraginț' libris minime ſatisfact' per quod actio accrevit eidem Tito ad exigend', & habend' de præfat' Thomæ Skinner & Johan' Catcher prædict' quadringent' & quadraginta libras pro debito prædicto, per præfat' Anthonium in forma prædicta recognit' prædicti tamen Thom' Skinner & Johannes Catcher, licet ſepius requiſit', &c. prædictas quadringent' & quadraginta libr' eidem Tito nondum reddiderunt, ſed illi ci hucuſq; reddere contradixerunt, & adhuc contrad', unde idem Titus dic' quod ipſe deterioratus eſt, & dampnum habet ad valenc' quadraginț' libr', Et inde produc' ſectam, &c. Et modo ad hunc diem, ſcilicet diem Lunæ proxim' poſt octab' Sancti Hillarii iſto eodem Termino, uſq; quem diem prædicti Thomas Skinner & Johannes Catcher, habuer' licenc' ad billam prædictam interloquend', & tunc ad reſpondend', &c. coram domina Regina apud Weſtmonaſterium, ven' tam prædictus Titus Weſtby per Attornatum ſuum prædictum, quam prædicti Thom' Skinner & Johannes Catcher, per Chriſtopherum Ruſt Attornatum ſuum; Et iidem Thomas Skinner & Johannes Catcher defenderunt vim & injuriam quando, &c. Et dicunt quod ipſi non debent præfat'

ſat' Tito prædict' quadringent' & quadraginta libr', nec aliquem inde denar', modo & forma, prout prædict' Titus ſuperius verſus eos narr'. Et de hoc ponunt ſe ſuper patriam: Et prædictus Titus ſimiliter, &c. Ideo ven' inde jur' coram domina regin' apud Weſtmon' die Sabbati proxim' poſt xv. Paſchæ; Et qui nec, &c. Ad recogn', &c. Quia tam, &c. Idem dies datus eſt partibus prædict' ibidem, &c. Poſtea continuat' inde proceſſu inter partes prædict' de placito præd' per Jurat' poſit' inde inter eas in reſpect' coram domina reg' apud Weſtm', uſque diem Lunæ proxim' poſt tres ſeptimanas Sanctæ Trinitatis extunc proxim' ſequen', Niſi dilectus & fidelis d'næ reg' *Johannes Popham* Miles capital' Juſtic' dominæ reginæ ad placita, in cur' ipſius d'næ reg' coram ipſa regina tenend' aſſign', prius die Sabati proxim' poſt xv. Sanctæ Trinitatis apud Guildhald' London', per formam ſtatuti, &c. ven' pro defectu Jur', &c. Ad quem diem Lunæ proxim' poſt tres ſeptimanas Sanctæ Trinitatis coram d'na reg' apud Weſtmon' ven' partes prædictæ per Attornatos ſuos prædict', Et præfat' capitalis Juſtic' coram quo, &c. miſ' hic Recordum ſuum coram eo habitum in hæc verba: ſcilicet, Poſtea die & loco infracontent', coram *Johanne Popham* milite capitali Juſtic' infraſcript', aſſociat' ſibi Joh' Povey per formam ſtatuti, &c. ven' tam infranominat' Titus Weſtby, quam infraſcript' Thomas Skinner & Johannes Catcher per Attornat' ſuos infracontent'; Et jur' jurat' unde infra fit mentio exact' quidam eorum ven', & quidam eorum non ven', prout patet in panello; Et quidam eorundem Jur' modo comparuer', videlicet, Joh' Slye, Thomas Worlhip, Arthurus Parkings, Willihelm' Tegoe, & Joh' Wiggenton ven' & in juratam prædict' jurat' exiſtunt. Et quia reſid' Jur' ejuſdem jurat' non comparuer', Ideo alii de circumſtan' per Vic' London infraſcript' ad hoc electi, ad requiſitionem prædict' Titi Weſtby, ac per mandat' capitalis Juſtic' prædict' de novo apponuntur, quorum nomina panell' infraſcript' affilantur, ſecundum formam ſtatuti in hujuſmodi caſu nuper edit' & proviſ. Qui quidem Jur' ſic de novo appoſit' modo comparen', videlicet, Joh' Patſon, Georgius Clarke, Alexan. Sharpe, Edwardus Flory, Thomas Chapman, Emanuel Trumbel, & Henr' Field ven', Qui ad veritatem de infracontent' ſimul cum aliis jurat' prædict' prius impanellat' & jurat' dicend', elect', triat' & jurat', dicunt ſuper ſacramentum ſuum quod infraſcript' Thomas Smith, Edwardus Winter, & Anthonius Buſtard, infraſcript' viceſimo die Januarii anno viceſimo nono infraſcript' apud Weſtmonaſter' in Com' Middleſex infraſcript', coram infranominat', *Chriſt' Wray* mil', tunc capit' Juſtic' d'næ reg' infraſcr', ad pla'ta coram ipſa regina tenend' aſſign', per ſcriptum ſuum obligator' infraſpecificat', ſigillis

ſigillis ſuis ſigillat', conceſſiſſent ſe teneri, & recogn' ſe debere præfat' Tito, infraſcr' quadringent' & quadragint' libr', ſolvend' eidem Tito aut ſuo certo Attorn' ſcript' illud oſtend', hæred' vel executorib' ſuis, in infraſcript' feſto Annunciationis beatæ Mariæ virgin' nunc proxime ſequen'; Et ſi defecerint in ſolutione debiti prædict', tunc præd' Thomas Smith, Edward' Winter, & Anthonius Buſtard voluer', & conceſſer', quod tunc curreret ſuper eoſdem Thomam, Edwardum, & Anthonium, & eorem quemlibet', hæred' & executor' ſuos, pœna in ſtatut' de debit' pro merchandiſis in eodem empt' recuperand' ordinat' & proviſ. modo & forma prout præd' Titus interius ſimiliter verſus eos narravit; quodque idem ſtatutum per ipſos Thomam Smith, Edwardum Winter, & Anthonium Buſtard, idem Tito ſic in forma prædicta recogn', Poſtea ſcilicet infraſcript' undecimo die Aprilis, anno regni dict' domin' regin' nunc triceſimo infraſcript', per infranominat' Johan' Chomeley armigerum, adtunc Clericum dictæ dominæ reginæ nunc recogn' pro debit' recuperand' ſecundum formam ſtatuti in hujuſmodi caſu proviſ. deputat', per ſcriptum ſuum infraſpec', ſigillo ſuo ſigillat' in cancellar' dictæ dominæ reginæ infraſcript' certificat' fuit, modo & forma prout prædictus Titus interius ſimiliter verſus coſdem Thom' Skinner & Joh' Catcher narravit; quodque ſuperinde prædict' Titus, poſtea ſcil' infraſcript' triceſimo primo die Auguſti, anno triceſimo infraſcript' proſecut' fuit extra prædictam cur' cancellar', infraſcript' breve prædict' interius ſpecificat' dictæ dominæ reginæ tunc vicecom' London directum, per quod quidem breve eadem domina regina nunc tunc Vic' London' præcepit, quod corpora infranominat' Thom' Smith, Edward' Winter, & Anthon' Buſtard ſi laici eſſent capi & in priſona dictæ dom' reginæ, donec eidem Tito Weſtby de debito prædicto plene ſatisfeciſſent ſalvo cuſtod', & omnia terras & catall' ipſorum Thomæ, Edwardi, & Anthonii, in balliva ipſorum Vicecom' per ſacramentum proborum & legalium hominum de eadem balliva ſua, per quos rei veritas melius ſcire poſſit, juxta verum valorem eorundem diligenter extendi & appreciari, & in manus dictæ dominæ Reginæ ſeiſiri fac', ut ea præfat' Tito, quouſque ſibi de debito prædicto plene ſatisfact' foret liberari fac' juxta formam ſtatut' apud Weſtmonaſter' pro hujuſmodi debit' recuperand', inde edit' & proviſ. Et qualiter iidem Vicecom' præcept' illud forent execut' ſciri fac' eidem dominæ reginæ in cancellar' ſuam, in quinden' Sancti Martini tunc proxim' futur' ubicunque tunc foret per literas ſuas ſigillat', Et quod haberent ibi breve illud; Quod quidem breve iidem Jur' dicunt ſuper ſacrament' ſuum præ-

prædictum, quod prædictus Titus Weſtby, poſtea ſcilicet infraſcript' octavo die Septembris, anno triceſimo ſupradicto apud London prædict', videlicet in infraſcript' parochia de le Chriſtchurch in Warda de Faringdon infra, deliberavit præfat' Thom' Skinner & Joh' Catcher adtunc Vic' London' exiſten' in forma juris exequend', modo & forma prout prædictus Titus interius ſimiliter verſus eos narravit. Et ulterius jur' prædicti dic' ſuper ſacramentum ſuum prædictum, quod prædict' Anthonius Buſtard adtunc, ſcilicet prædicto octavo die Septembris, anno triceſimo ſupradicto, fuit in gaola dict' dominæ reginæ nunc de Newgate, ſub cuſtod' dictorum Thomæ Skinner & Joh' Catcher tunc Vic' London' prædict' in executione ad ſectam cujuſdam Roberti Dighton pro debito ducent' quadragint' librarum, ipſoque Anthonio Buſtard ſic ibidem in executione exiſten', prædict' Thomas Skinner & Joh' Catcher adtunc Vic' London' exiſten' infraſcr' octavo die Septembris, anno triceſimo ſupradicto, virtute brevis prædicti apud London' prædict' ceperunt & arreſtaverunt intranominat' Anthonium Buſtard, modo & form' prout idem Titus interius ſimiliter verſus eoſdem Thomam Skinner & Joh' Catcher narravit, quodque idem Anthon' Buſtard ſic capt' & arreſtat' ſub cuſtod' ill' Tho' Skinner & Johannis Catcher adtunc Vicecom' London' prædict' in forma prædict' exiſten', iidem tunc Vicecom' London' eundem Anthonium Buſtard in executione pro prædict' quadringent' & quadragint' libr' adtunc & ibidem habuerunt, ſecundum exigenc' dicti brevis. Et inſuper Jur' prædict' dicunt ſuper ſacramentum ſuum prædict', quod prædict' Anthonius Buſtard ſic' in cuſtod' ipſorum Thom' Skinner & Johannis Catcher in executione pro præd' quadringent' & quadragint' libr', pro prædict' alio debito ducent' & quadragint' librarum debit' præfat' Roberto Dighton in forma prædict' exiſten', iidem Thom' Skinner & Johann' Catcher, poſtea ſcilicet infraſcript' viceſimo die Octobr' anno triceſimo ſupradicto, in eorum exitu ab officio ſuo prædict' ipſum Anthonium Buſtard per Indentur' deliberaver' quibuſdam Hugoni Offeley, & Ric' Saltonſtall, in executione pro prædicto debito prædict' Rob' Dighton abſque alia mentione prædict' executionis præd' quadringent' & quadragint' libr' fact' præfat' Hugoni Offeley & Richardo Saltonſtall, aut eorum alicui dat' ſive notificat' Et ulterius iidem Jur' dict' ſuper ſacramentum ſuum prædict', quod adtunc ſcilicet prædicto viceſimo die Octobr', anno triceſimo ſupradict', iidem Thomas Skinner & Johannes Catcher ab officio ſuo prædict' exonerati fuer'. Et ulterius Jur' prædict' dicunt ſuper ſacramentum ſuum præd' quod poſtquam præd' Thom' Skinner & Johannes Catcher ab officio

officio ſuo prædict' in forma prædict' exonerat' fuer', quod prædict' Anthonius Buſtard abſque ſolutione aliquorum præd' debit' in cuſtod' prædict' Hugonis Offeley & Richard' Saltonſtall in forma præd' exiſten' pro prædict' ducent' & quadragint' libr', iidem Hugo Offeley & Richard' Saltonſtall ipſum Anthon' Buſtard nullam habentes, nec eorum alter unquam habens aliquam noticiam eis vel eorum alter' dat', de præd' executione prædictarum quadringent' & quadragint' librarum, apud London' prædictam extra priſonam prædict' ad largum quo voluit ire permiſer'. Sed utrum ſuper tota materia prædict' in forma præd' compert', prædict' Thom' Skinner & Joh' Catcher onerari debent pro prædicto debito quadringent' & quadragint' libr' in lege necne, Jur' prædicti penitus ignorant: Et petunt adviſamentum cur' dictæ dominæ reginæ coram ipſa regina exiſten'. Et ſi videbitur eidem cur' quod præd' Thom' Skinner & Johannes Catcher onerari debent pro prædictis quadringent' & quadragint' libr' in lege ſuper tota materia ſuperius comperta, iidem Jur' dic' ſuper ſacramentum ſuum prædictum, quod prædicti Thomas Skinner & Johannes Catcher debent præfat' Tito Weſtby, prædictas quadringent' & quadragint' libras, modo & forma prout idem Titus interius verſos eos narravit; Et aſſid' dampnum ipſius Titi Weſtby occaſione detenc' debit' illius ultra miſ. & cuſtag' ſua per ipſum circa ſectam ſuam in hac parte appoſit' ad viginti libr'. Et pro miſ. & cuſtag' ill' ad quinquaginta tres ſolid', & quatuor denar'. Et ſi videbitur cur' prædict', quod prædict' Thom' Skinner & Johannes Catcher onerari non debent pro prædict' quadringent' & quadraginta libr' in Lege ſuper tota materia ſuperius comperta, tunc iidem Jur' dic' ſuper ſacramentum ſuum prædict' quod prædict' Thom' Skinner & Johann' Catcher non debent præfat' Tito Weſtby prædictas quadringent' & quadragint' libr', modo & forma prout iidem Thomas Skinner & Joh' Catcher interius placitand' allegaverunt, Et quia cur' dominæ reginæ nunc hic de judicio ſuo de & ſuper præmiſſis reddendo nondum adviſatur, dies inde dat' eſt partibus præd' coram domin' regin' apud Weſtmonaſter' uſque diem Martis proxim' poſt Octabas Sancti Michael' de judicio ſuo inde audiendo, &c. eo quod curia dominæ reginæ hic inde nondum, &c. Ante quem diem loquela prædict' adjornat' fuit per breve dominæ reginæ de communi adjornamento, coram domina regina apud Weſtmonaſter' uſque a die Sancti Michaelis in unum menſem: Ad quem diem loquela præd' ulterius adjornat' fuit per aliud breve dictæ d'næ Reg' de communi adjornamento coram domina regina uſque in Craſtino Animarum extunc proxim' ſequen', apud Caſtrum Hertf. in Comit' Hertf. Ad quem diem coram domina regina apud Caſtrum Hertf. ven' partes præd' per attorn' ſuos præd', Et quia Cur' d'næ Reg' hic de judicio ſuo de & ſuper præmiſ. redd' nond' adviſatur, dies inde dat' eſt partib' præd' cor' d'na reg' apud

caſtrum Hertf. præd' uſque diem Martis proxime poſt octab' Sancti Hillarii de judicio ſuo inde audiendo, eo quod cur' dominæ reginæ nunc hic inde nondum, &c. *Et ſic de Termino in Terminum* uſque diem Jovis proximè poſt octab' Sancti Hillarii de judicio ſuo inde audiendo, &c. eo quod cur' dominæ reginæ hic, &c. Ad quem diem coram dom' regin' apud Weſtmonaſterium, vener' partes præd' per attorn' ſuos prædict'. Super quo viſ. & per cur' dominæ reginæ hic plenius intellectis omnibus & ſingulis præmiſſis diligenterque inſpectis, maturaque deliberatione inde habita, pro eo quod videtur cur' dominæ reginæ nunc hic, quod præd' Thomas Skinner & Johannes Catcher onerari debent pro præd' quadringent' & quadragint' libris, Conc' eſt quod præd' Titus Weſtby recuperet verſus præfat' Thomam Skinner, & Joh' Catcher debitum ſuum præd', ac dampnum prædict' per Jur' præd' in forma prædict' aſſeſſa: Necnon decem libras treſdecem ſolid' & quatuor denar' pro miſis & cuſtag' ſuis præd', eidem Tito per cur' dictæ dominæ reginæ hic ex aſſenſu ſuo de incremento adjudicat. Quæ quidem dampna in toto ſe attingunt ad trigint' tres libr' ſex ſolid' & octo denar'. Et præd' Thomas Skinner & Johannes Catcher in miſericordia, &c. Poſtea ſcilicet die Lunæ decimo die Febr' anno regni dictæ dominæ reginæ nunc 37. tranſcriptum recordi & proceſſus inter partes præd' cum omnibus ea tangen', prætexu cujuſdam brevis dominæ reginæ de errore corrigendo, per præfat' Thomam Skinner & Johannem Catcher in præmiſſis proſecut' Juſtic' dict' dominæ reginæ de communi Banco, & Baronibus de Scaccario dominæ reginæ in cameram Scaccar' præd', juxta formam ſtatuti in Parliamento dictæ dominæ reginæ apud Weſtmonaſter' 23. die Novembr', anno regni ſui 27. tent' & edit' in præd' cur' dictæ dominæ reginæ hic, coram ipſa regina tranſmiſſ. fuer', præd' Thom' & Johan' in eadem camera Scaccarii præd', diverſas materias pro erroribus in recordo & proceſſu prædict', pro revocatione & adnullatione Judicii præd' aſſign': Ad quas prædict' Titus in eadem cur' comparen' placitavit, quod nec in recordo & proceſſ. prædict' pro revocac' & adnullac' Judicii prædicti in ullo fuit erratum: Poſtmodumque ſcilicet die Lunæ viceſimo die Octobr', anno regni dictæ dominæ reg' nunc triceſimo ſeptimo ſupradicto viſis præmiſſis, & per cur' dictæ dominæ reginæ ibidem diligenter examinat' & plenius intellictis, tam Record' & proceſſu prædictis, ac judicio prædicto ſuper eiſdem reddit' quam cauſa præd' pro errore per prædictos Thomam & Johannem ſuperius aſſignat' & allegat', videbatur cur' ibidem quod recordum præd' in nullo vitioſum aut defectum exiſtit. Et quod in recordo præd' in nullo eſt erratum: Ideo adtunc & ibidem in eadem cur' conc' fuit,

fuit, quod judicium præd' in omnibus affirmaretur, & in omni ſuo robore ſtaret & effectu, præd' cauſis pro errore ib'm aſſignat' in aliquo non obſtante. Et ulterius conc' fuit quod præd' Titus recuperaret verſus præfat' Thomam & Johannem octoginț' ſolid' eidem Tito ex aſſenſu ſuo per cur' dominæ reginæ ibidem adjudicat', juxta formam ſtatuti inde nuper edit' & proviſ. pro miſ. & cuſtag' ſuis quæ habuit occaſione dilationis executionis Judicii prædict', prætextu proſecutionis prædicti brevis de errore, &c. Ac ſuperinde recordum prædictum, necnon proceſſus ſuperinde coram Juſticiar' de communi Banco & Baron' Scaccar' prædict' in præmiſſis habit', coram domina regina ubicunque, &c. per Juſticiar' & Baro-nes prædictos remittebantur, ſecundum formam ſtatuti præd', &c. Et in eadem cur' dictæ dominæ nunc hic coram ipſa regina reſident, &c.

Mich.

Mich. 39 & 40 Eliz.

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

WESTBY's *Caſe.*

Cro. Eliz. 685. Poph. 85. Moor 488.

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 *London*, 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 deliver'd 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 adjudg'd 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 deliver'd 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 deliver'd to them, nor they charged with him for the Plaintiff's Execution; and

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 anſwer'd and reſolv'd, That *eo inſtante*, that the old Sheriffs deliver 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 Roll. Rep. 146.

(*b*) Plowd. 37. a. 2 Ventris 38.

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 obſerv'd, 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 call'd a Writ of Diſcharge, iſſueth: The Effect of which Writ is, *Rex omnibus ad quos, &c. ſalutem, Sciatis quod commiſſimus dilecto nobis S.* (who is the new 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*) deliver'd 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 altho' 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 Plaintiffs 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 theſe who are in Execution to eſcape, great Inconvenience would from thence enſue.

(*a*) Cro. El. 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.

Mich.

Mich. 40 & 41 Eliz.

The Case of the Dean and Chapter of NORWICH.

KING *H.* 8. by his Letters Patents bearing Date 2 *Maii*, *Anno Regni sui* 30. *Authoritate sua regiâ, 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 regulâ*, (the said Priory being of the Order of St. *Bennet :*) *ipsosque Decanum, Prebendarios, & Canonicos in Ecclesiâ prædict' realiter posuit & constituit, & concessit eisdem Decano, Prebendariis & 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 & valebant, &c.* And further granted, that they should be the Chapter of the Bishop of *Norwich*,

2 And. 120. 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 *E.* 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 Chapter *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:

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 *Eliz.*) And that by the Death of all the Monks, the ſaid Poſſeſſions came to the Queen 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 Queen (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 to Sir *Tho. Egerton*, Keeper of the Great Seal, *Popham* and *Anderſon* Chief Juſtices, and *Periam* C. Baron. And now *Mich.* 40 & 41 *Eliz.* 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 Council 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 Bishop 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 *E.* 3. *Quare 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* Att. General, That first, if the King 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 discharged 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 Statute 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 Translation 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*) Translation 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 *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 admitt. this Transl. were imperfect or void for this or any other Cause, yet it is made good by the Statute of (*i*) 35 *Eliz. cap.* 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 Parn.

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

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

1. Touching Surrenders, Grants and Conveyances made to King *H.* 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, ordained, 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 Pat. 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 Stat. 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 K. *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 Queſtion, the ſaid Lett. Pat. of 30 *H.* 8. were made *for the Erection and Incorporation of the Dean and Chapt.* And the ſaid Lett. 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 Parliament, that they ſhall enjoy all the Lord-

Lordſhips, 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. anno* 27 *H.* 8. So it is manifeſt that this Act of 35 *Eliz.* being an Act of Explanation (which always is beneficially 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. anno* 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 Chapt. 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 Chapt. *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 Chapt. had good Eſtate and Right in the ſaid Poſſeſſions 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 Rolls Rep. 453. Palm. 492. Fre-by'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.

(*e*) Co. Lit. 94. a. 2 Rolls 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 Prœbendæ 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 of all 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 Covent, 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*) Dyer 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 Rolls 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 K. *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 Inconveniences would enſue. And in 10 *Eliz. Dyer* (*e*) 273. altho' the Dean and Chapt. 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 Rolls Rep. 103. Dav. 46. b. 3. a. Styl. 181. Treby's Argument in quo Warranto 10. (*f*) 5 Co. 14. b. Caudry's Caſe. Co. Lit. 134 a. Dav. 81. a.

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.

40.

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 K. *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 K. *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 K. *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 Meaning 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 Jones 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.

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

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.

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 K. *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 K. *H.* 8. or that their Surrender was inſufficient; or that the Record thereof be now embeziled 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*.

Hill.

Hill. 44 Eliz.

In the Chancery.

FERMOR's *Caſe.*

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 Demean as of Fee of divers Lands in the ſame Town which were his proper Inheritance. And afterwards by his Deed 15 *Oct.* 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

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

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 Excheq. 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 Excheq. 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*, *Walmſley*, 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.

(*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. 261. a. 9 Co. 105. b. 13 Co. 20. Sav. 85, 88, 106, 107.

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 Diſ-enheriſon 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.

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 4 *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. Comm.* 352. *b.* if any Doubt be conceived on the Words or Meaning of

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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 favour'd 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 favour'd in Law: Alſo the Right and Inheritance of Feme Coverts and Infants, are much favour'd 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 War'ty which commences by Diſſeiſin.

So if one (*k*) makes a Gift in Tail to another, and the Unkle of the Donor diſſeiſes the Donee, and makes a Feoffment with Warranty, the Unkle 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. §. 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. Dyer 295. pl. 8, 9. 10. &c. Lane 44.
(*g*) Co. Lit. 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 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 Common Pleas as 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 ſhall 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 King, and Letters Patent granted over, and all this by Covin by 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. Dyer* 339. (*f*) a Preſentat. obtained by Colluſ. is void. And 17 *Eliz. Dyer* 339. Letters of (*g*) Adminiſtration obtained by Colluſ. are void, and ſhall not repeal a former Adminiſtration: See 13 *El. Dyer* (*h*) 295. many Caſes there put concerning Covin.

(*a*) Dyer 249. pl. 841. 1 Rolls 807. 2 Inſt. 215.

(*b*) Plowd. 46. a. 55. a. Poſtea fo. 83. a. Br. Treſpaſs 26. Br. Colluſion 4. 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 Rolls 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. Cro. 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. *Robert Launе* Plaint. and *William 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. Cro. El. 220. 254. Cro. 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 five 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 is 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 Strifes 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. Poſtea 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 contrived his Fraud and Deceit in ſo ſecret a Manner, that he had deprived the Leſſor of the Remedy which the Statute 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 Leſſees 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 Poſſeſſion of the Leſſee is not any mean for the Leſſor to take any Notice of this Wrong, for he comes to the Poſſeſſion 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 Obligation 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.

for 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,

——Fugiere pudor, rectumque fideſque
In quorum ſubiere locum, fraudeſque dolique
Inſidiæque, & vis, & amor ſceleratus habendi.)

if Fines levied by ſuch Covin and Practice ſhould bind. And ſuch Objection might be made, (*a*) if a Fine be levied to ſecret Uſes to deceive a Purchaſor, an Averment of Fraud may be taken againſt it by the Statute of 27 *Eliz. cap.* 4. So if a Fine levied on an uſurius 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.

Mich.

Paſchæ 24 Eliz.

In the Star-Camber.

TWYNE's *Caſe.*

Moor 638. Lane 44, 45, 47. Co. Lit. 3. b. 76. a.

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 Statute 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, divers Perſons by the Command of the ſaid *Twyne*, did with Force reſiſt the 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 reſolved:

(*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. Larch. 222. 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. Hobi 72. 166. Moor 638. Doct. plat 200. Yelv. 196, 197. 1 Brownl. 111, Co. Ent. 162. a.

1. That this Gift had the Signs and Marks of Fraud.

2. Becauſe

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. 1 Roll. Rep. 157. Moor, 321.

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.

3. It was made in ſecret, *Et dona cland' ſunt 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 clauſula inconſuet' ſemper inducunt ſuſpicionem.*

Secondly, It was reſolved, That notwithſtanding here was a true Debt due to *Twyne*, and good Conſideration 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 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 Conſiderat. *ſcil.* Conſiderat. of Nature or Blood, and a Valuab. 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.

Cr. Jac. 197. Palm. 14.

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 Conſideration, or on a Conſiderat. 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 Feoffment 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 Conſideration of Nature, relieve his Father, or Couſ. 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 Conſiderat. is a good Conſiderat. 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 Conſiderat. 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 Conſiderat. is not within the Proviſo, but it ought to be on a good Conſideration, and *bona fide*.

To one who marvelled what ſhould be the Reaſon that Acts and Statutes are continually made at every Parliament, 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 Exchequer Chamber, *Mich.* 35 & 36 *Eliz.* 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 *Eliz. 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 Feoffments, 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, 45. 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. 2. b. 76. a. 290. a. b. 3 Inſt. 152. 5 Co. 60. a. b. 6 Co. 18. b. 10 Co. 56. b. Co. Enr. 462. 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. Ra'l. 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 Dam. and Penalt.) 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 attaint. or outlaw. these Goods are (*a*) forfeit. notwithstanding this Gift: The same Law of Recus. 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.

Standen and Bullock's Case. (*d*) Moor 605, 615. Bridgm. 23. 5 Co. 60. b. Palm. 217. Lane 22. 2 Jones 95.

Mich. 42 & 43 *Eliz.* in the Com. Pleas, on Evidence to a Jury, between *Standen* (*d*) and *Bullock*, these Points were resolved by the whole Court on the Stat. of 27 *Eliz. 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 resolved, and so directed a Jury on Evidence before them: That where a Man had conveyed his Land to the Use of himself for Life, and afterwards to the Use of divers others of his Blood, with a future Power of Revocation, as after such 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 altho' 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 Revocation, 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 *it præsenti*, or *in futuro*, should not stand against a Purchasor *bona fide* for a valuable Considerat. 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, an evil Invention, would be defeated.

(*e*) 1 Sid. 133.

And on the same Reason it was adjudged, 38 *Eliz.* in the Com. Pleas, between *Lee* and his Wife, Executrix of one *Smith* Plaint. and *Mary* (*f*) *Colshil*, Executrix of *Tho. Colshil*, Defen. in Debt on an Obligat. 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 An.*

Colshil's Case. (*f*) 2 And. 55. 107. Godb. 213. Cro. El. 529. Moor 857. Leo. 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 Execut. ſhould repay him 300 *l.* And divers Covenants were in the ſaid Indent. concerning the ſaid Office, and the enjoying of it: And *Colſhil* was bound to the ſaid *Smith* in the ſaid Obligat. to perform the Covenants; and the Breach was alledg'd in the non Payment of the ſaid 300 *l.* foraſmuch as *Smith* ſurvived *Colſhil*: And altho' the ſaid Coven. to repay the 300 *l.* was lawful, yet foraſmuch as the reſt of the Cov'. were againſt the Stat. of (*a*) 5 *E.* 6. *c.* 16. and if the Addit. of a lawful Cov. ſhould make the Obligat. of Force as to that, (*b*) the Stat. would ſerve for little or no Purpoſe; for this Cauſe it was adjudged, that the Obligation was utterly void.

2. It was reſolved, That if a Man hath Power of Revocat. 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 valuab. Conſiderat. the Bargainee ſhall enjoy the Land, for as to him, the Fine, Feoffment, or other Convey. by which the Condition was extinct, was void by the ſaid Act; and ſo the firſt Clauſe, by which all fraudulent and covenous Convey. are made void as to Purchaſors, extends to the laſt Clauſe of the Act, *ſcil.* when he who makes the Barg. and Sale had Power of Revocat. And it was ſaid, that the Stat. of 27 *El.* hath made voluntary Eſtates made with Power of Revocat. as to Purchaſ. in equal Degree with Convey. made by Fraud and Covin to defraud Purchaſ.

Between (*d*) *Upton* and *Baſſet* in Treſpaſs, *Trin.* 37 *El.* in the Com. 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 Com. Law an Eſtate made by Fraud ſhould be avoided only by him who had a former Right, Title, Int. 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 Com. Law.

2. It was reſolv. That no Purch. ſhould avoid a preced. Conv. made by Fraud and Covin, but he who is a (*f*) Purchaſ. for Mon. or other valuab. Conſiderat. for altho' in the Preamb. it is ſaid (*for Mon. or other good Conſiderat.*) and likewiſe in the Body of the Act (*for Mon. or other good Conſiderat.*) yet theſe Words (*good Conſiderat.*) are to be intend. only of valuab. Conſiderat. and that appears by the Clauſe which concerns thoſe who had Pow. of Revoc. for there it is ſaid, *for Mon. or other good Conſiderat. paid, or giv.* 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 Mon. paid, or other good Conſid. giv.* which Words exclude

(*a*) Styles 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. 180.

(*b*) 2 And. 56, 57, 108. 1 Mod. Rep. 35, 36. Hob. 14. 11 Co. 27. b. 2 Rolls. 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.

(*c*) 1 Co. 112. b. 174. a. Co. Lit. 237. a. Hob. 337, 338. Moor 605. 2 Rol. Rep. 337, 496. Winch. 56.

(*d*) Co. Ent. 676. b. nu. 19. Cro. El. 444, 445. Lane 45. Upton and Baſſet's Caſe.

(*e*) Antea 78. b. Plowd. 46. b. 55. a. Fitz. Replic. 15. Br. Treſpaſs, 26. Br. Colluſion 4. Br. 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 Conſideration which may be giv. and theref. he who makes a Purch. of Land for a valuable Conſiderat. 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.

And ſo it was reſolv'd, *Paſch.* 32 *El.* in a Caſe referr'd out of the Chancery to the Conſiderat. of *Windham* and *Periam*, Juſt. between *Joh. Nedham* Plaint. and *Beaumont*, Serj. at Law, Def. where the Caſe was, *Hen. Babington* ſeiſed in Fee of the Man. of *Lit-Church* in the Count. of *Derby*, by Indent. 10 *Feb.* 8 *El.* covenant. with the Lord *Darcy*, for the Advancement of ſuch Heirs Males, as well thoſe he had begot as thoſe he ſhould afterw. beget on the Body of *Mary* then his Wife (Siſter to the ſaid L. *Darcy*) before the F. of S. *John Bapt.* then next follow. to levy a Fine of the ſaid Man. 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 Remaind. 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 Man. for a great Numb. of Years, to *Rob. Heys*; and afterw. levied the Fine accordingly: And on Confer. had with the other Juſtices, it was reſolved, That altho' the Iſſue was a Purchaſor, yet he was not a Purchaſor in vulgar and com. 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 C. 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 Confid. that he ſhould take the Profits for his Maintenance, and that he ſhould not have Power to waſte and conſume the ſame; and afterw. 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 Barg. altho' it was for Mon. was holden to be (*c*) out of this Stat. for this Act is made againſt all Fraud and Deceit, and doth not help any Purchaſ. who doth not come to the Land for a good Conſiderat. lawful. 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.

2 And. 233. Nedham and Beaumont's Caſe

(*a*) 2 Roll. Rep. 305, 306.

(*b*) Cro. El. 445.

(*c*) Cro. El. 445.

And by the Judgm. of the whole Court *Twyne* was convict. of Fraud, and he and all the others of a Riot.

The

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.

The Caſe of FINES.

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.

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, Tythes, 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*) Bridgm. 97. (*b*) Leon. 111. 3 Leon. 212. Bridgm. 96.

(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) Advowsf. &c. and he by Deed makes a Grant of the Advowsf. 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 litterally, *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 Reversf. 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 Reversf. of the Tail is not in the Ten. in Tail, becaufe 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, becaufe no Reversion is in him, but the Reversf. 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.

(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 Judgm. reported in one Book, be not by any literal Interp. expounded against any Resolut. or Judg. 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 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 Tenant 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 Ten. 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 Ten. in Tail, then the Issue in Tail, aft. the Death, of the Fath. could not have a *Formedon* against such Grantee; for altho'

(h) 10 Co. 96. a. 98. a. Plowd. 557. b.

(i) 10 Co. 96. a. 1 Sand. 261. Fitz. Dower 98. Cart. 210.

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 Ten. 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 indefeaſable 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 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. *Diſcontinuance* 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* 35. 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.

(*a*) 36 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.

(*c*) Lit. Sect. 601. a. Co. Lit. 328. a. b. Poſtea 85. b.

Co. Tit. 332. b.

Note Reader, if you be deſirous to know the Reaſon, why on the

the Words of the Act of *West.* 2. *cap.* 1. *de Donis condicionalibus*, 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.)* such sundry Constructions have been made: As if Tenant in Tail makes a (*a*) Feoffment in Fee, it is a Discontinuance, and avoidable by Action only: If Tenant in Tail of a Rent, or other (*b*) 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*) 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 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 the (*e*) Common 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 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, 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: But if a (*h*) Bishop, *&c.* or Husband grants a Rent in Fee out of the Wives 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

(*a*) Co. Lit. 327. b.

(*b*) Hob. 45. Co. Lit. 332. a. Lit. Sect. 618.

(*c*) Antea 85. a. Lit. Sect. 601. Co. Lit. 328. a. b.

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

(*e*) Antea 78. a.

(*f*) Co. Lit. 327. b.

(*g*) Co. Lit. 327. b.

(*h*) Co. Lit. 327. b.

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 *William Read* in Fee. *Richard Read* levied a Fine of his Remainder to Juſtice *Windham*, and his Heirs, and before the engroſſing thereof (as *oportet*) Juſtice *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 Rolls 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 parlicular Tenant should never be compelled to attorn to an unlawful, torcious, 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.
Cr. El. 693.

Popham 66.
Dall. 51. Dall. in Kelw. 205. b.
Dall. in Ash. pl. 8. Moor 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 although the Fine without the Proclamations, nor 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, "adjudg'd 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 reſolv'd by *Popham* and *Anderſon* Chief 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 Statute 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 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 Proclamations,

(*a*) 1 Co. 96. b. 2 Roll. Rep. 342.

(*b*) 19 H. 6. b. Br. Fine levy, &c. 1. Br. Tail 2. Dyer 3. pl. 3. Moor 251. 9 Co. 105. a.

(*c*) 19 H. 6. b.

(a) Moor 301. (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 immediately after the ſame Fine levied, ingroſſed, and Proclamation 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 anſwer'd, 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

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 Statute 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 Proclamation 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. 80. 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 Demeſn 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 350. 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 & adnihillabant, & hac 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. *Replic'* 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

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.

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 Grandf. whose Heir he is, he should to such Averment be receiv'd: The Demandant said that the Stat. *ff. De donis conditionalibus*, voided the Fine levied by the Ancestor in Tail; and yet by Judgm. of the Court he was ousted of the said Averm. for there it is said that the Stat. voided the Fine as to bar the Heir in Tail of Action, nevertheless the Fine remained 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. & *(c)* 33 *H.* 6. 18. *a. b.* by *Yelverton* and others.

(a) Cr. Car. 524, 525. 1 Jones 458. 9 Co. 141. a. Moor 251.

(b) 1 Leon. 83.

(c) Fitz. Estoppel 53. Br. Fines 9. Postea 89. b.

As to the 3d Object. 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.* 3. 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 ad 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

(d) 46 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. 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 Statute *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 Remaind. to the said *Eliz.* in Fee; *Palmer* and *Mary* his Wife levied a Fine *sur conusans 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*) Plowd. 437. b
Conisby's Case, M. 3 & 4. Reg. Eliz.
(*f*) Benl. in Kel. 210. pl. 15. Benl. in Asb. 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 Common Pleas, that the Statutes of 4 *H.* 7. & 32 *H.* 8. extended to Fines levied by Concluſion, and ſhould bind the (*b*) Eſtate Tail, altho' *partes finis nihil habuerunt*; As if Tenant 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 Statute 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*) Averment. And afterwards, *ſcil. M.* 29 & 30 *Eliz.* Judgment 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 *ann.* 20 *Eliz.* in the Caſe of one (*e*) *Archer*, in the Common 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 Grandmother living) to the Eſtate Tail. Yet the Judges did expound

(*a*) Plowd. 435. a. b. Car. Jac. 699, 700.

(*b*) Cr. Eliz. 610. 1 Jones 33.

(*c*) Plowd. 434. b.

(*d*) 1 Jones 35. Archer's Caſe 20

(*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 Explanation) 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 Statute saith, *intailed to the Person so levying or to any of his Ancestors* in the (*a*) Disjunctive, it was held that the Fine with Proclamations 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 *Archer*, 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 *Trinity* Term, 23 *Eliz.* 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 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 Proclamations past, the Right which descended is barred by Force of the (*f*) Fine.

(*f*) Cr. El. 585.

2. That although 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 Rec'ry of his Right,

than the Issue should be barred in the Case in Quest. after the Proclamat. pass'd, notwithstand. 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 Common 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 avoids 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 after the Proclamations 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 adjudg'd; 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 resolv'd.

(*a*) 1 Anderf. 47. 172. 2 And. 177. Benl. in Ash. 17. N. Benl. 122. p. 156. O. Benl. 30. Cr. Eliz. 589. Bend. in Kelw. 210. b. Owen 75. Moor 115. 1 Brownl. 139.

(*b*) Moor 115.

(*c*) Poph. 61. 2 Anderf. 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 contra dicente*; *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

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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 reſolv'd 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*) Antea 88.b. Sav. 88.

Caſuum

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11	Sir George Brown's Caſe	*Hill. 36 Eliz. in Com. Banco*	50
12	Rigeway's Caſe	*Paſchæ 36 Eliz. in Banco Reg.*	52
13	Lincoln College Caſe	*Mich. 37 & 38 El. in Com. Banco*	58
14	Pennant's Caſe	*Trinit. 38 Eliz. in Banco Reg.*	64
15	Weſtby's Caſe	*Mich. 39 & 40 Eliz. in Ban. Reg.*	71
16	Caſe of the Dean and Chapter of Norwich	*Mich. 40 & 41 Eliz. Reg.*	73
17	Fermor's Caſe	*Hill. 40 Eliz. in Cancell.*	77
18	Twine's Caſe	*Paſchæ 44 Eliz. in Cam. ſtell.*	80
19	The Caſe of Fines	*Paſchæ 44 Eliz. Reginæ*	84

F I N I S.