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The Reports of Sir Edward Coke

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

Sir Edward Coke

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The Fifth PART of the
R E P O R T S
O F
Sir Edward Coke Kt.

Her Majesty's ATTORNEY GENERAL.

O F

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

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Antient as Modern.

Quid enim laboro, nisi ut veritas in omni questione explicetur; verum dicentibus facile cedam. TUL. Tusc. quest. lib. 3.

In the *SAVOT*:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer* Esq;) for D. Browne, J. Walthoe, B. Lintot, K. Coling, W. Sears, T. Ward, W. Innys, J. Osborn, L. Woodward, F. Clay, L. Wotton, K. Williamson and A. Ward.

M. DCC. XXVII.

annos, paginas, & id genus alia figillatim adnotavi, ut quilibet pro arbitrio oculis intueatur & legat: Anglice & Latine edidi (qd' & nonnulli nostri juris scriptores fecerunt) eo consilio, ut concives charissimi in Reg' hujus legibus, ipsorum jure avito & hæreditario, necnon illustribus ejusd' juris indicis hac in parte non sint peregrini: Ad veritatem persuasus, quod nemo ex Anglorum gente modo sanus, & ingenue sincerus, qui persuasus antequam informatus fuerat, in veritate (quam ipse oculis intueatur suis) abnuet, ne ab errore dissuaderetur, quo obcæcatus sit abductus; Misere enim cum illo agitur, & misericordia dignus, qui fuit persuasus priusquam informatus, & nunc informari abnuet, quia persuaderi nolit,

Writers of the Law have done to the End that my dear Countrymen may be acquainted with the Laws of this Realm, their own Birth-right and Inheritance, and with such Evidences as of Right belong to the same; Assuring my self that no wise or true hearted Englishman, that hath been persuaded befoze he was instructed, will refuse to be instructed in the Truth, (which he may see with his own Eyes) least he should be dissuaded from Error, wherewith blindfold he hath been deceived: For miserable is his Case, and woorthy of Pity, that hath been persuaded befoze he was instructed, and now will refuse to be instructed, because he will not be persuaded.

Casuum istius Libri series; continen'
in qua Cur' act' & quando recordat'
fuer', & in quo folio hujus Libri in-
cipiunt.

Of the King's Ecclesiastical Law.

1. Caudrey's Case.

Folio 1

Cases of Leases.

2. Clayton's Case,	Mich. 27 & 28 Reg. El.	1
3. Elmer's Case,	Trin. 30 Eliz.	2
4. Jewel's Case,	Trin. 30 Eliz.	3
5. The Lord Mountjoy's Case,	Mich. 31 & 32 Eliz.	3
6. Justice Windham's Case,	Mich. 31 & 32 Eliz.	7
7. Brudnel's Case,	Trin. 34 Eliz.	9
8. Henstead's Case,	Mich. 36 & 37 Eliz.	10
9. Ive's Case,	Mich. 39 & 40 Eliz.	11
10. Saunder's Case,	Trin. 41 Eliz.	12
11. Roffe's Case,	Mich. 41 & 42 Eliz.	13
12. The Countess of Shrews- bury's Case,	Mich. 42 & 43 Eliz.	13
13. The Case of Ecclesiast. Persons,	Mich. 43 & 44 Eliz.	14

*Cases of Covenants, Agreements, &c. concerning
Leases, Assurances, &c.*

14. Spencer's Case,	Paschæ 25 Eliz.	16
15. Slingsby's Case,	Mich. 29 & 30 Eliz.	18
16. Rosewell's Case,	Paschæ 35 Eliz.	19
17. Higginbottom's Case,	Paschæ 35 Eliz.	19
18. Stille's Case,	Hill. 38 Eliz.	20
19. Sir An. Mayne's Case,	Paschæ 38 Eliz.	20
20. Laughter's Case,	Trin. 37 Eliz.	21
21. Halling's Case,	Trin. 38 Eliz.	22
22. Matthewson's Case,	Hill. 39 Eliz.	22
23. Lambe's Case,	Trin. 41 Eliz.	23

Casuum istius Libri series, &c. PART V.

24. Broughton's Case,	Mich. 42 & 43 Eliz.	24
25. Dean and Chapter of <i>Wind-</i> <i>for's</i> Case,	Mich. 43 & 44 Eliz.	24
26. Sir Tho. Palmer's Case,	Paschæ 43 Eliz.	24
27. The Coun'ls of Rutland's Case,	Trin. 2 Jac.	25

Cases of Executors.

28. Ruffel's Case,	Hill. 26 Eliz.	27
29. Middleton's Case, -	Pasch. 1 Regis Jac.	28
30. Harrison's Case,	Hill. 40 Eliz.	28
31. Piggot's Case,	Hill. 40 Eliz.	29
32. Prince's Case,	Mich. 41 & 42 Eliz.	29
33. Coulter's Case,	Mich. 40 & 41 Eliz.	30
34. Hargrave's Case,	Mich. 41 & 42 Eliz.	31
35. Pettifer's Case,	Hill. 45 Eliz.	32
36. Robinson's Case,	Pasch. 1 Regis Jac.	32
37. Reade's Case,	Trin. 2 Jac.	33

*Cases of Constructions of the Statutes of Feo-
fais, &c. Amendment of Fines, Records,
Common Recoveries, &c.*

38. Playter's Case,	Mich. 25 & 26 Eliz.	34
39. Walcot's Case,	Trin. 30 Eliz.	36
40. Baineham's Case,	Trin. 30 Eliz.	36
41. Gardiner's Case,	Pasch. 21 Eliz.	37
42. Bishop's Case,	Pasch. 34 Eliz.	37
43. Tey's Case,	Trin. 34 Eliz.	38
44. Dormer's Case,	Pasch. 35 Eliz.	40
45. Rowland's Case,	Mich. 35 & 36 Eliz.	41
46. The Countess of Rutland's Case,	Mich. 34 & 35 Eliz.	42
47. Codwel's Case,	Mich. 35 & 36 Eliz.	42
48. Nichol's Case,	Mich. 37 & 38 Eliz.	43
49. Bohun's Case,	Mich. 38 & 39 Eliz.	43
50. Freeman's Case,	Pasch. 41 Eliz.	45
51. Gage's Case,	Trin. 41 Eliz.	45
52. Cook's Case,	Trin. 41 Eliz.	46

Cases of Pardons.

53. Francklyn's Case,	Mich. 35 & 36 Eliz.	46
54. Gilbert Littleton's Case,	Hill. 39 Eliz.	47
55. Drywood's Case,	Pasch. 42 Eliz.	48
56. Vaughan's Case,	Mich. 39 & 40 Eliz.	49
57. Wyrral's		

T O T H E

R E A D E R.

VERE dicitur (candide Lec-
tor) quod Er-
ror (cui igno-
rantia gemella est indivi-
dua) in progressu adeo
infinite se multiplicat, tam
prodigiosas & novas Chi-
mæras procreat, tanta &
tam multiplici incertitu-
dine fluctuat, & ejusmodi
venenum ex virulento ig-
norantiæ halitu imbibit, ut
singulos quibus aliquid sui
venenati halitus infundit,
pestifera contagione infi-
ciat seu contaminet; Quo-
dque mirandum est, pri-
usquam ad terminum per-
veniat, ad miserum &
immaturum exitum (nisi
prævertatur) confusione

It is truly said (good Pref. to Parsons
Reader) that Error Answer.
(Ignorance being her
inseparable Twin)
doth in her Proceeding so
infinitely multiply her self,
produceth such monstrous
and strange Chimæra's,
floateth in such and so
many Incertainties, and
sucketh down such Poison
from the contagious Breath
of Ignorance, as all such into
whom she infuseth any of her
poisoned Breath, she dange-
rously infects or intoxicates;
And that which is wonder-
ful before she can come to
any End, she bringeth all
Things (if she be not pre-
vented) by Confusion to a
miserable and untimely

To the R E A D E R.

End; Naturalia & vera artificialia sunt finita, nullus terminus falso, error immensus. On the other Side, Truth cannot be supported or defended by any Thing but by Truth herself, and is of that Constitution and Constancy, as she cannot at any Time, or in any Part or Point be disagreeable to her self; she hateth all Bombasting and Sophistication, and bringeth with her Certainty, Unity, Simplicity, and Peace at the last; Putida falsamenta amant origanum, Veritas per se placet, honesta per se decent, falsa fucis, turpia phaleris indigent. Ignorance is so far from excusing or extenuating the Error of him that had Power to find out the Truth (which necessarily he ought to know) and wanted only Will to seek it, as she will be a just Cause of his great Punishment: Quod scire debes & non vis, non pro ignorantia sed pro contemptu haberi debet. Error and Falshood are of that Condition, as without any Resistance they will in Time of themselves fade and fall away: But such is the State of Truth, that though many do impugn her, yet will she of her self.

quadam abripit; Naturalia & vera artificialia sunt finita, nullus terminus falso, Error immensus. Contra vero Veritas sustentari & oppugnari nisi ipsa veritate minime potest, & ea est ejus natura & constantia, ut nullo tempore nulla parte sibi a se differentiat, mangonio & phaleris exornari odit, comitesque secum ducit Unitatem, Simplicitatem, & Pacem tandem: Putida falsamenta amant origanum, Veritas per se placet, honesta per se decent, falsa fucis, turpia phaleris indigent. Tantum abest, ut ignorantia excuset aut extenuet ejus errorem qui Veritatem invenire poterat (quam necessario agnoscere debeat,) & tantum investigare noluit, ut in causa sit cur gravius plectatur; Quod scire debes & non vis, non pro ignorantia sed pro contemptu haberi debet. Erroris & falsitatis ea est natura, ut nemine repugnante sensim per se dilabantur & evanescant: Ea autem veritatis natura, ut quamvis plurimi oppugnent, ipsa tamen demum vincat & ut Palma efflorescat;

To the R E A D E R.

refcat; Ad tempus forfitan vi quadam prematur, sed nullo tempore ulla ratione opprimatur. Nullus est hujus Reipublicæ Civis, qui illustribus documentis & perspicuis indiciis de suo patrimonio & jure avito & certissimo vere edoctus (quamvis aliquantisper ignorantia, falsa persuasione, aut inani timore deceptus fuerit, & possessione deturbatus) sed Juris prudentes ad eam recuperandam consulent: Antiquæ & præcellentes Angliæ Leges sunt avita jura & antiquissima optimaque hæreditas quæ cives hujus Regni habent; Per illas etenim non solum hæreditate & bonis in pace & tranquillitate, sed etiam vita & patria charissima secure gaudent. Cum autem male metuo ne ex charissimis concivibus permulti (& ex illis quamplurimi præstanti ingenio, singulari solertia, & eximiis animi dotibus) quia illustria quæ habent indicia minus intelligunt, jus etiam avitum in nonnullis maximi momenti rebus minus vere cognoscant; In primo limine hujus Quinti operis mei illos direxi &

ever prevail in the End, and flourish like the Palm-Tree; she may peradventure by Force for a Time be trodden down, but never by any Means whatsoever can she be trodden out. There is no Subject of this Realm, but being truly instructed by good and plain Evidence of his ancient and undoubted Patrimony and Birth-right, (tho' he hath for some Time by Ignorance, false Persuasion, or vain Fear, been deceived or dispossessed) but will consult with learned and faithful Counsellors for the Recovery of the same: The antient and excellent Laws of England are the Birth-right, and the most ancient and best Inheritance that the Subjects of this Realm have, for by them he enjoyeth not only his Inheritance and Goods in Peace and Quietness, but his Life and his most dear Country in Safety. And for that I fear that many of my dear Countrymen, (and most of them of great Capacity, and excellent Parts) for want of understanding of their own Evidence, do want the true Knowledge of their ancient Birth-right in some Points of greatest Importance; I have in the Beginning of this my fifth Work, directed them to those that will

De Jure Regis Of the King's Ecclesiastico. Ecclesiastical Law.

Casus CAUDREY.

CAUDREY'S Case.

TErmino Hillarii, anno 33 regni Elizabethæ Rotulo 340 *Robertus Caudrey* Clericus in jus vocavit *Georgium Atton* de actione transgressionis, quod Clausum suum ad Northluffenham in Comitatu Rutlandiæ perfregisset die septimo Augusti, anno regni prædictæ Reginæ tricesimo primo: Defendens respondit se minimè esse reum; juratores evocati & jurati, veredictum dederunt speciale, videlicet rem esse veram comperuerunt, de jure autem ad judicium curiæ referentes in hanc sententiam, comperuerunt querentem ante transgressionem fuisse rectorem rectoriæ de Southluffenham in Comitatu prædicto, & locum in quo damnum fuit illatum, esse partem ejusdem Rectoriæ comperuerunt item statutum factum anno ejusdem Reginæ primo, quo sancitum in hanc sententiam fuit. Quod ea Ecclesiastica jurisdictio, quæ aliqua potestate Spirituali, vel

IN the Term of St. Hillary, in the 33^d Year of the Reign of *Q. Elizabeth*, Rotulo 340, *Robert Caudrey* Clerk brought an Action of Trespals against *George Atton*, for breaking of his Close at Northluffenham in the County of Rutland, the 7th Day of August, in the 31st Year of the Reign of the said late Queen: The Defendant pleaded not guilty, and the Jury returned and sworn for Trial of this Issue, gave a special Verdict, that is, they found the Truth of the Case at large, referring the same for the Law to the Judgment of the Court, to this Effect: They found that the Blain-tiff before the Trespals supposed to be done, was Parson of the Rectory of Southluffenham, in the County aforesaid, whereof the Place wherein the Trespals is alleged was Parcel, and found the Statute made in the* first Year of the said late Queen's Reign by which in effect it is enacted, that such Jurisdiction Ecclesiastical, as by any Spiritual or Ecclesiastical

Poph. 59. 3 Inst.
198. Moor 228.

* 1 Eliz. c. 1.
16 & 17 Car.
c. 11 Cawly 1,
2, 3, &c. 4 Inst.
324, 325. Cr.
Jac. 37. Moor
755. Parson's
Answer 57.

tical Power hath heretofore been, or may lawfully be exercised for the Visitation of the Ecclesiastical Estate and Persons, and for Reformation, Order, and Correction of the same, and of all Manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts, and Enormities, within this Realm, should for ever be united and annexed to the Imperial Crown of this Realm. And that her Highness, her Heirs and Successors, should have full Power and Authority by Virtue of that Act by Letters Patents under the Great Seal of England, to assign, nominate and authorize such Persons, being natural born Subjects, as her Highn. her Heirs or Success. should think meet, to exercise and execute under her Highness, her Heirs and Successors, all and all Manner of Jurisdiction, Privileges and Preheminences in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction within this Realm of England and Ireland, and to visit, reform, correct, order, correct, and amend all such Errors, Heresies, Schisms, Abuses, Offences, Contempts, and Enormities whatsoever, which by any Manner Spiritual or Ecclesiastical Power, Authority or Jurisdiction can or may lawfully be reformed, ordered, redressed, corrected, restrained or amended to

Ecclesiastica jam ant' exercebat', vel legitimè exerceri poterat ad visitand' Ecclesiasticum statum & ordinem, item ad reformandum, in ordinem redigendum, & corrigendum homines Ecclesiasticos, omnimodos errores, hæreses, schismata, abusus, offensas & enormitates intra hoc regnum, imperiali hujus Regni diademati in perpetuum uniretur & adjungeretur. Et quod ejusdem Reginae celsitudo, hæredes & successores, virtute hujus statuti, plenam potestatem & auctoritatem haberent, per literas patentes sub magno Angliæ sigillo, assignandi, nominandi, & auctoritate muniendi ejusmodi personas, nativos hujus regni subditos, quos sua celsitudo, hæredes & Successores idoneos existimarent, ad exercendum & exequendum sub sua celsitudine, hæredibus & successoribus omnimodam jurisdictionem, privilegia, præheminentias, ullo modo spectantes ad jurisdictionem Spiritual' vel Ecclesiasticam infra hoc regnum Angliæ & Hiberniæ, & ad visitandum, reformandum, componendum, corrigend' & emendand' omnes ejusm' errores, hæreses, schismata abusus; offensas, contemptus, & enormitates quæcunq; quæ ulla potestate spiritali vel ecclesiastica potestate

PART V. Of the King's Ecclesiastical Law.

state, autoritate, aut jurisdictione legitime reformari, componi, corrigi, coerceri, vel emendari possint, ad omnipotentis Dei beneplacitum, virtutis incrementum, & pacis unitatisque hujus regni conservationem. Et quod etiam ejusmodi personæ ita nominatæ, assignatæ, & autoritate munitæ, virtute Stat. & ejusdem literarum Patent. plenam potestatem & autoritatem habere sub sua Celsitudine hæredibus & Successoribus ad omnia præmissa exercenda, utenda, & exequenda juxta tenor prædicti Literarum Patentium, ulla re, vel causa in contrarium non obstante. Postea autem præfata Reg. per literas Patentes sub magno Angl. sigillo datas nono die Decembris anno regni sui vicesimo sexto juxta tenor prædicti statuti Archiepiscopo Cantuariensi, Episcopo Londinensi, & quibuslibet aliis, vel eorum tribus aut pluribus autoritatem dedit inquirendi ad statut. anni primi regni sui de libro prec. publicar. cum hac etiam clausula in iisdem Literis Patentibus comprehensa, viz. Præterea, plenam potestatem & autoritatem damus & concedimus reformandi, ordinandi, corrigendi, emendandi in singulis hujus Regni locis, omnes errores, hæreses, schismata, abusus, contemptus, enormitates spirituales,

the Pleasure of Almighty God, the Increase of Virtue, and the Conservation of the Peace, and Unity of this Realm. And that such Persons so to be named, assigned, and authorized, should have full Power and Authority by Virtue of that Act, and of such Letters Patents, under her Highness, her Heirs and Successors, to exercise, use or execute all the Premises, according to the Tenor and Effect of the said Letters Patents, any Matter or Cause to the contrary notwithstanding. And afterwards the said Queen by her Letters Patents under the Great Seal of England, bearing Date the ninth Day of December, in the six and twentieth Year of her Reign, according to the Tenor of the said Act, did authorize the Archbishop of Canterbury, the Bishop of London, and divers others, or any three or more of them, to inquire amongst others, of the Statute of the first Year of her Reign, concerning the Book of Common Prayer, with this Clause also contained in the said Letters Patents, videlicet, Also we give and grant full Power and Authority to reform, redress, order, correct and amend in all Places of this Realm, all Errors, Heresies, Schisms, Abuses, Contempts, and Enormities, Spiritual or Ecclesiastical whatsoever, which by any

Spiritual or Ecclesiastical Power and Authority or Jurisdiction, can or may lawfully be reformed, ordered, redressed, corrected, restrained or amended by the Censures Ecclesiastical, Depriuation, or otherwise, &c. And upon Proof thereof had, and the Offences aforesaid, or any of them sufficiently proved against any Person or Persons, by Confession, lawful Witness, or by any due Manner, &c. That then you or three of you shall have full Power and Authority to order and award such Punishment to every such Offender by Fine, Imprisonment, Censure of the Church, or otherwise, or by all or any the said Ways, and to take such Order for the Redress of the same, as by your Wisdoms and Discretions shall be thought meet and convenient, as by the said Letters Patents more at large appeareth. And further they found the Statute of the first Year of the Reign of the said late Queen, by which it is enacted; That the Offender against that Act concerning the Uniformity of Common Prayer, and being thereof lawfully convicted, according to the Laws of the Realm, by the Verdict of twelve Men, or by his Confession, or by the notorious Evidence of the Fact, should forfeit for the first Offence the Value of his Spiritual Living for one whole Year, and should suffer six Months

ales vel Ecclesiasticas quacunque, quæ aliqua auctoritate, vel jurisdictione Spirituali vel Ecclesiastica, reformari, ordinari, corrigi, coerceri, vel emendari, legitime possint censuris Ecclesiasticis, deprivatione, vel alias, &c. Cumque hæc & offensæ prædictæ, aut earum aliqua contra ullam personam aut personas, confessione, legitimo testimonio, aut quavis debita forma sufficienter probentur, &c. Quod tunc vos vel tres ex vobis plenam potestatem & auctoritatem habebitis in ordinem redigendi, & pœnas infligendi singulis sic delinquentibus, multa, incarceratione, censura Ecclesiastica, vel aliâ, vel illis omnibus, & singulis, & ad eorum reformationem eam rationem ineundi, quæ vestra prudentia æquum & bonum videbitur, ut ex iisdem literis Patentibus plenius patet. Ad hæc comperuerunt Statuti anni primi regni ejusdem Reginæ, quo sancitum est, quod qui offenderit contra Statutum de precum publicarum uniformitate, & legitime juxta leges regni duodecim virorum veredicto convictus, vel sua ipsius confessione, vel perspicua facti evidentia, prima vice amitteret emolumenta beneficiorum Ecclesiasticorum quæ habuit, & sex totos menses incarcerationetur

tur. Si secunda vice deliquerit, postquam convictus fuerit, *ipso facto* omnibus Spiritualibus promotionibus deprivaretur. Tertia autem vice si deliquerit post duas convictiones, ut prædicitur, omnibus Ecclesiasticis promotionibus deprivatus ad vitam incarcerationetur. Et quod præfatus *Robertus Caudrey* ante tempus transgressionis præsuppositæ prædicta rectoria seu beneficio coram Commissariis prædictis privatus fuerit, tum quod contra precum publicarum librum concionatus sit, tum quod rem divinam juxta præscriptum ejusdem libri celebrare recusaverit, & in quibus sigillatim offensum erat: Quæ deprivationis sententia per Episcopum Londinensem, cum assensu A. B. C. D. collegatarum suorum lata. Jurati autem veredictum suum concluderunt: Quod si prædicta deprivatio non legitima esset, sed irrita, tunc defendentem transgressionis reum invenerunt. Sin autem deprivatio illa irrita non erat, tunc defendentem non reum invenerunt. Et hæc causa pro Tribunali per Advocatos utriusque partis, & de Tribunali per Judices sæpius tractata est, & post magnam & maturam deliberationem, & cum cæteris Judicibus consultationem, Termino Hillarii anno ejusdem

Imprisonment. For the second Offence to be committed after such Conviction, he should be deprived ipso facto, of all his Spiritual Livings. And for the third Offence to be committed after ii. Convictions as is aforesaid, he should be deprived of all his Ecclesiastical Livings, and be imprisoned during his Life. And that the said Robert Caudrey before the Time of the Trespas supposed, was deprived of his said Benefice before the said high Commissioners, as well for that he had preached against the said Book of Common Prayer, as also for that he refused to celebrate Divine Service according to the said Book, and shewed particularly wherein: Which said Sentence of Deprivation was given by the Bishop of (a) London, cum assensu A. B. C. D. &c. collegatarum suorum. And the Jury concluded their Verdict; That if the said Deprivation were not warranted by Law, but void, then they found the Defendant guilty of the Trespas: And if the Deprivation were not void in Law, Then they found the Defendant not guilty. And this Case was solemnly and oftentimes debated at Bar by the Counsel of either Party, and at the Bench by the Judges, and after great and long Deliberation and Consultation had with the Rest of the Judges, was in the Term of S. Hilary in the 37. Year of the

(a) Poph. 59.
post. 4.

The Objections
of the Coun-
sel of the Plain-
tiff.

7.

the said Queen adjudged. And it was argued by the Counsel of the Plaintiff, that the said Deprivation was void for 4 Causes. First, the said Book of Common Prayer being authorized and commanded to be observed by the said Act of the first Year of the Queen, upon the Forfeitures and Punishments therein comprised, the Offence of the Plaintiff is against that Act: for that Act only doth command the Observation of the said Book and inflicteth Punishments in several Degrees for departing or not observing of the same, and consequently if the Offence be against that Act, the Plaintiff ought to have been proceeded withal, and punished according to the same: And it was said, that the said Act was an Act of great Moderation and Equity, for the Offender for the first Offence, should not be ipso facto, deprived, but should only lose the Profits of his Ecclesiastical Livings for one Year, and suffer Imprisonment for six Months, to the End that such as were forward might have a Time to repent, and the well minded a Time to consent; and such Care had the Act of the Offenders in this Behalf, as if they committed one Offence, and then another, and after the second many more: yet should not the Offender be deprived for any of the later Offences, unless he had been first judicially convicted of Record

Reginæ 37 adjudicata fuit. Per Advocatos querentis argumentatum est, deprivationem quatuor de causis esse irritam. *Primum*, cum sancitum esset, & scitum, ut liber ille publicarum precum statuto illo anni primi Reginæ observaretur sub multâ & pœnis ibidem comprehensis, & querens peccavit contra illud statutum: Statutum etenim illud observationem tantummodo illius libri imperat, pœnamque infligit diversis gradibus pro eodem depravato vel non observato, & consequenter si violatum sit statutum, querens juxta statutum tractandus & plectendus erat: Dicitur insuper erat, statutum illud fuisse admodum moderatum & æquum, nam delinquens pro primo delicto non erat *ipso facto* deprivandus, sed tantum emolumenta Ecclesiasticorum suorum beneficiorum ad unum annum amitteret, & ad sex totos menses incarcerationis, ut pervicaces spatium resipiscendi, & moderatiore tempus ad consentiendum haberent; eamque delinquentium rationem statutum illud habuit, ut si quis primo, secundo, vel tertio deliquerit, non tamen deprivaretur, pro posterioribus delictis, priusquam judicialiter convictus fuisset ex recordo per duode-

duodecim virorum vereditum, vel sui ipsius confessione, vel perspicua facti evidētia: Itā ut secundum delictum pro quo deprivandus sit ex illo statuto, committendum est post ejusmodi judicialem & solemnem convictionem & pœnam juxta statutum: Si ejusmodi publica pœna & infliccio non intellectum daret, & cor ad resipiscendum non apperiret, tunc post ejusmodi convictionem pro secundo delicto incarcerandus, & post ejusmodi convictionem deprivandus. Quod si in hac causa *Caudrey* querens beneficio illo Ecclesiastico, sive rectoria de *Southbluffenham* pro primo delicto deprivatus erat, cum nunquam antea in questionem vocatus aut convictus fuisset pro ejusmodi delicto. Conclusum igitur erat pro hac prima parte, quod supremi illi commissarii formam & ordinem statuto prescriptum non observarunt: *Et non observata forma infertur adnullatio actus*, & ex consequentia deprivatio est irrita, ideoque sententia pro eo ferenda. Allegatum etiam erat per Querentis advocatos per anticipationem quod etiam si in eodem statuto erat *Proviso*, pro Archiepiscopis, Episcopis, eor' Cancellariis, Commissariis, Archidiaconis, & aliis Ordinari' peculiarem ju-

by Verdict of xii. Men, or by Confession, or notorious Evidence of the Fact: So as the second Offence for which he must be deprived by the said Act, must be done and committed after such a judicial and solemn Conviction and Punishment according to the said Act: And then if such an open Punishment and Infliccion should not give him Understanding, and open his Heart to repent: Then upon a like Conviction for a second Offence, to be committed after such a Conviction, Deprivation should follow. But in the Case now in Question, *Caudrey* the Plaintiff was deprived from his said Parsonage of *Southbluffen* for his said first Offence, being never convicted or convicted for any such Offence before. And therefore it was concluded for this first Point, That the said high Commissioners had not pursued the Form and Order prescribed by the said Act; Et non observata forma, infertur adnullatio Actus, and consequently the Deprivation of the Plaintiff is void, and therefore Judgment ought to be given for him. And it was said by the Plaintiff's Counsel, by Way of Anticipation, That albeit there was a *Proviso* in the same Act for Archbishops, Bishops, and their Chancellors, Commissaries, Archdeacons, and other Ordinaries, having peculiar Jurisdiction,

yet that did not give any Strength to the said Depu-
 tation for two Causes. First,
 that the Commissioners by
 Force of the said Act of 1 E-
 liz. and of said Letters Pa-
 tents, are not within the said
 Proviso but only Archbishops
 and Bishops, their Chancel-
 lors, Commissaries, &c. in re-
 spect of their ordinary Juris-
 diction. 2. Admitting it should
 extend to the said high Com-
 missioners, yet ought they to
 proceed according to the Form
 and Order of the said Act, for
 an Offence done against that
 Act. Secondly, it was objected
 by the Counsel of the Plain-
 tiff, that Caudrey the Plain-
 tiff was not deprived either by
 the Verdict of vii. Men, or by
 Confession, or by the noto-
 rious Evidence of the Fact,
 but by Default in respect he
 appeared not, being duly pre-
 cognized or warned, which
 Case, as it was objected, was
 (a) Casus omissus, & oblivioni
 datus, and not within the said
 Act. Thirdly, It was object-
 ed on the Behalf of the Plain-
 tiff; That the said Sentence
 given by the said high Com-
 missioners was utterly void,
 for that they or any three or
 more of them having Autho-
 rity by Force of the said Act,
 and of the said Letters Pa-
 tents under the Great Seal,
 ought to join in the Sen-
 tence, and that one alone
 with the (b) Consent of two or
 more of the other Commissio-
 ners cannot give a Sentence,
 for that every Commissio-

risdictionem exercentibus,
 nullam tamen vim præd-
 deprivationi dedit, idque
 duabus de causis: *Primum*,
 quod prædicti commissarii
 virtute statuti anni primi
 Elizabethæ, & prædictarum
 literarum Patentium in isto
 Proviso non comprehen-
 duntur, sed solummodo Ar-
 chiepiscopi, Episcopi, eor-
 um Cancellarii, & Com-
 missarii, &c. ratione jurif-
 dictionis eorum ordinariæ.
Secundo, si modo detur quod
 ad supremos Commissarios
 extenderit, illi tamen juxta
 formam & ordinem statuti
 pro delicto contra statutum
 procederent. *Secundo*, per
 advocatos querentis, quod
Caudrey non deprivatus e-
 rat vel duodecim virorum
 veredicto, vel confessione,
 vel perspicua facti eviden-
 tia. sed quod citatus, &
 admonitus non comparuerit,
 quod, ut illi objecerunt, *Ca-
 sus erat omissus, & obli-
 vioni datus*, & non statuto
 puniendus. *Tertio*, ex parte
 querentis objectum erat sen-
 tentiam à primis illis Com-
 missariis latam omnino esse
 irritam, quod illi vel tres,
 aut plures illorum autori-
 tatem habentes ex illo sta-
 tuto, & literis illis Paten-
 tibus sub magno sigillo,
 debent junctim sententiam
 ferre, & quod unus solus
 cum consensu duorum aut
 plurium Commissariorum
 sententiam ferre non pos-
 sit, quia singuli æqua-
 lem

2.

3.

(a) 5 Co. 2.
 P. 37. b.

(b) Poph. 59.
 Antea 3. 2.
 Poltea. 7. 2.

Schismatibus; Ordinibus conferendis, Clericorum admissionibus, & institutionibus, rerum divinarum celebratione, ritibus matrimonialibus, divortiiis, bastardiis generalibus, decimarum jure, & earundem Substractionibus, oblationibus, obventionibus, dilapidationibus, Ecclesiarum reparationibus, testamentorum probationibus, administrationibus, simoniis, incestibus, fornicationibus, adulteriis, castitatis oppugnationibus, petitionibus, procurationibus, appellationibus Ecclesiasticis, Pœnitentiæ commutatione, & aliis, (quorum cognitio ad communes leges Angliæ non spectat) a iudicibus Ecclesiasticis determinandæ & decidendæ sunt juxta hujus Regni regias leges Ecclesiasticas. Quemadmodum enim leges, quas Athenis Romani transfulerunt, cum ab ipsis comprobatæ & confirmatæ fuissent, eas nihilominus *Jus civile Romanorum* nominarunt, uti etiam Normanni plerasque ipsorum leges ex Anglia mutuo acceptas nomine legum vel consuetudin' Normanniæ insignierunt: Sic licet Angliæ Reges, Ecclesiasticas quas habent leges, ab aliis deduxerunt, ex illis tamen quotquot hic generali omnium & consensu approbatæ fuerunt, apposite & recte *Angliæ leges reg' Ecclesiasticæ* appellantur; qd'

Apostasy from Christianity, Heresies, Schisms, ordering Admissions, Institutions of Clerks, Celebration of divine Service, Rights of Patrimony, Divorces, general Bastardy, Subtraction and Right of Tithes, Oblations, Obventions; Dilapidations, Reparation of Churches, Probate of Testaments, Administrations and Accounts upon the same, Simony, Incests, Fornications, Adulteries, Solicitation of Chastity, Penitions, Procurations, Appeals in Ecclesiastical Causes, Commutation of Penance, and others (the Consuance whereof belong not to the Common Laws of England) the same are to be determined and decided by Ecclesiastical Judges, according to the King's Ecclesiastical Laws of this Realm: For as the Romans fetching divers Laws from (a) Athens, yet being approved and allowed by the State there, called them notwithstanding *Jus Civile Romanorum*: And as the (b) Normans borrowing all or most of their Laws from England, yet baptized them by the Name of the Laws or Customs of Normandy: So albeit the Kings of Engl. derived their Ecclesiastical Laws from others, yet so many as were proved, approved and allowed here, by land with a general Consent, are aptly and rightly called, 'The (c) K's Ecclesiastic' Laws of England, which who

Courts, See Circumspicte agatis, 13 E. 1. W. 2. 13 E. 1. c. 5. versus finem. Artic. cleri 9 E. 2. 15 E. 3. c. 6. 31 E. 3. c. 11. 2 H. 5. cap. 7. 1 H. 7. cap. 4. 23 H. 8. cap. 9. 24 H. 8. c. 12. 27 H. 8. c. 20. 32 H. 8. c. 7. 1 E. 6. cap. 2. 2 E. 6. cap. 13. 1 Mar. cap. 3. 1 Eliz. cap. 1. 5 Eliz. c. 23. 13 Eliz. c. 10. Lit. lib. 2. cap. Frankal. f. 30. F. N. B. f. 41. 42, 43, 44, 45, 46, 47. Reg. f. 33. 34, 44.

(a) Dav. 71. a.

(b) Præf. ad 3. Rep. circa finem.

(c) Co. Lit. 11. b. Dr. Confins's Apology 102.

soever shall deny, he denieth that the King hath full and plenary Power to deliver Justice in all Causes to all his Subjects, or to punish all Crimes and Offences within his Kingdom: For that as befoze it appeareth the Deciding of Matters so many, and of so great Importance, are not within the Consuance of the Common Laws, and consequently that the King is no complete Monarch, nor Head, of the whole and intire Body of the Realm. But (a) to confirm those that hold the Truth, to satisfy such as being not instructed, know not the ancient and modern Laws and Customs of England, every Man being persuaded as he is taught: These few demonstrative Proofs out of the Laws of England, instead of many in Order, & serie temporum, are here added.

(a) Parson's Answer to the 5th Rep. 93.

(b) This King reigned A. D. 755. Stamford lib. 3. c. 38. f. 111. Full. Ch. Hist. 101, 102. Parson's Answer 93, 94, 95. Dav. 73. a. Br. Coron. 129. Moor 120. Stanf. Coron. 111. b. Burn. Reform. Pars 1. lib. 3. f. 187. This Charter was pleaded 1 H. 7. 23, 25. Nota.

(b) Kenulphus Rex, &c. per Literas suas Patentes, consilio & consensu Episcoporum, & Senatorum gentis suæ, largitus fuit Monasterio de Abnidon in comitatu Berk. ac cuidam Ruchnio tunc Abbati Monasterii, &c. quandam ruris sui portionem, id est quindecim Mansias, in loco qui a Ruricolis tunc nuncupabatur Culnam cum omnibus utilitatibus ad eandem pertinentibus, tam in magnis quam in modicis rebus in æternam hæreditatem. Et quod prædictus Ruchnius, &c. ab omni episcopali Jure in sempiternum esset quietus ut inhabitatores ejus, nullius Episcopi

quicumque denegaverit, idem denegat Regem plenariam habere potestatem, justitiam in omnibus causis suis subditis administrandi, vel crimina & delicta infra hoc regnum puniendi: Quia, ut jam liquido constat, determinatio tot & tanti momenti causarum in cognitionem legum communium non cadit, & consequenter Rex non est absolutus Monarcha, nec caput totius integri corporis hujus regni. Sed ad eos confirmandos, qui veritatem agnoscunt, & ad satisfaciendum illis, qui nondum instructi antiquas & modernas Angliæ leges & consuetudines ignorant, cum singuli ita sint persuasi ut informati: Hæc paucula argumenta certissima & quasi Apodeictica, quæ instar multorum esse possint, suo ordine, & tempor' serie hic subjiciuntur.

Kenulphus Rex, &c. per Literas suas Patentes, consilio & consensu Episcoporum, & Senatorum gentis suæ, largitus fuit Monasterio de Abnidon in Comitatu Berk. ac cuidam Ruchnio tunc Abbati Monasterii, &c. Quandam ruris sui portionem, id est, quindecim Mansias in loco, qui a ruricolis tunc nuncupabatur culnam, cum omnibus utilitatibus ad eandem pertinentibus, tam in magnis quam in modicis rebus in æternam hæreditatem. Et quod prædictus Ruchnius, &c. ab omni episcopali jure in sempiternum esset quietus, ut inhabitatores

To the READER.

will not only faithfully counsel, and fully resolve therein, (such as cannot be daunted with any Fear, moved by any Affection, nor corrupted with any Reward,) but also establish and settle them in quiet and lawful Possession. Upon just Grounds to rectify an Error in a Man's own Mind is a Work of a clear Understanding, and of a reformed Will, and frequent with such as be good Men, and have sober and settled Wits. The End of such as write concerning any Matter, which by some for want of Instruction is called into Controversy, should be, with all the Candor and Charity that can be used, to persuade and resolve by demonstrative Proofs the diligent Reader in the Truth. But now a Day those that write of such Matters do for the most Part by their bitter and uncharitable Invectives, transported with Passion and Fury, either beget new Controversies, or do as much as in them lie to make the former immortal. Certain it is, that some Books of that Argument, that have had Truth for their Center, yet because they have wanted Temperance, Modesty and Ur-

quasi manu duxi, ad eos qui non tantum sano consilio aderunt, & cumulate satisfaciunt (nec enim vel timore frangi, vel affectione moveri, vel præmio corrumpi possunt) verum etiam in tranquilla & justa possessione stabiliunt & confirmabunt: Errorem ex animo solidis argumentis extorquere intellectus est acerrimi, animi integri, virisque probis, sobriis, & sanis non est insolens. Hoc iis propositum esset qui de re aliqua scribunt, quæ inter alios controvertitur quia non sunt informati, ut omni quo possunt candore & charitate studiosum Lectorem certis argumentis persuadeant & edoceant. Sed ut nunc sunt tempora, qui de ejusmodi rebus scribunt animi impetu abrepti, acerbis & contumeliosis convitiis aut novas controversias suscitant, aut quantum in illis est priores reddunt immortales: Certo certius est nonnullos ejus generis libros quibus veritas ipsa centrum fuerat, nihilominus quia in peripheria temperantia, molestia & urtantia non aderant,

PART V. *Casuum istius Libri series, &c.*

57. Wyrral's Case,	Hill. 41 Eliz.	49
58. Biggen's Case,	Trin. 41 Eliz.	50
59. Hall's Case,	Trin. 2 Reg. Jac.	51
60. Page's Case,	Mich. 29 & 30 Eliz.	52
61. Knight's Case,	Mich. 30 & 31 Eliz.	54
62. Specot's Case,	Hill. 32 Eliz.	57
63. Foster's Case,	Hill. 32 Eliz.	59
64. Gooch's Case,	Mich. 32 & 33 Eliz.	60
65. Sparry's Case,	Mich. 32 & 33 Eliz.	61

Cases of By-Laws and Ordinances, &c.

66. The Chamberlain of London's Case,	Mich. 32 & 33 Eliz.	62
67. Clarke's Case,	Trin. 38 Eliz.	64
68. Jeffrey's Case,	Mich. 31 & 32 El.	64, 66
69. The Lord Cheney's Case,	Mich. 33 & 34 Eliz.	68

Cases of Usury.

70. Burton's Case,	Mich. 33 & 34 Eliz.	69
71. Clayton's Case,	Pasch. 37 Eliz.	70
72. Hoe's Case,	Pasch. 34 Eliz.	70
73. St. John's Case,	Trin. 34 Eliz.	71
74. Williams's Case,	Mich. 34 & 35 Eliz.	72
75. The Case of the Orphans of London,	Pasch. 35 Eliz.	73
76. Wymark's Case,	Mich. 35 & 36 Eliz.	74
77. Clifton's Case,	Mich. 35 & 36 Eliz.	75
78. Pilkinton's Case,	Pasch. 43 Eliz.	76
79. The Earl of Pembroke's Case,	Mich. 35 & 36 Eliz.	76
80. Paget's Case,	Mich. 35 & 36 Eliz.	76
81. Booth's Case,	Trin. 36 Eliz.	77
82. Samon's Case,	Trin. 36 Eliz.	77
83. Gray's Case,	Hill. 37 Eliz.	78
84. Fitzherbert's Case,	Pasch. 37 Eliz.	79
85. Foord's Case,	Pasch. 37 Eliz.	81

Cases of Customs.

86. Snelling's Case,	Trin. 37 Eliz.	82
87. The Case of Market-overt,	Hill. 38 Eliz.	83
88. Periman's Case,	Trin. 41 Eliz.	84
89. Sir H. Knivet's Case,	Pasch. 38 Eliz.	85
90. Penryn's Case,	Trin. 38 Eliz.	85

Cases

Cases of Executions.

91. Blumfield's Case,	Mich. 38 & 39 Eliz.	86
92. Garnon's Case,	Hill. 40 Eliz.	88
93. Frott's Case,	Trin. 41 Eliz.	89
94. Hoe's Case,	Trin. 42 Eliz.	89
95. Semayn's Case,	Mich. 2 Reg. Jac.	91
96. Barwick's Case,	Trin. 39 Eliz.	93
97. Goodale's Case,	Mich. 39 & 40 Eliz.	95
98. The Countess of Northum- berland's Case,	Mich. 39 & 40 Eliz.	97
99. Bury's Case,	Mich. 40 & 41 Eliz.	98
100. Flower's Case,	Mich. 40 & 41 Eliz.	99
101. Rook's Case,	Hill. 40 Eliz.	99
102. Penruddock's Case,	Trin. 40 Eliz.	100
103. Windsor's Case,	Pasch. 41 Eliz.	102
104. Hungate's Case,	Trin. 43 Eliz.	103
105. Baker's Case,	Trin. 42 Eliz.	104
106. Boulston's Case,	Mich. 39 & 40 Eliz.	104
107. Alden's Case,	Hill. 43 Eliz.	105
108. Sir H. Constable's Case,	Pasch. 43 Eliz.	106
109. Foxley's Case,	Pasch. 43 Eliz.	109
110. Mallory's Case,	Pasch. 43 Eliz.	111
111. Wade's Case,	Trin. 43 Eliz.	114
112. Foliamb's Case,	Trin. 43 Eliz.	115
113. Oland's Case,	Hill. 44 Eliz.	116
114. Pynnel's Case,	Trin. 44 Eliz.	117
115. Edrich's Case,	Pasch. 1 Jacobi	118
116. Whelpdale's Case,	Trin. 2 Jac.	119
117. Long's Case,	Mich. 2 Jac.	120
118. Saffyn's Case,	Pasch. 3 Jac.	123
119. De Libellis famosis,	Pasch. 3 Jac.	125
120. Palmer's Case,	Pasch. 3 Jac.	126

F I N I S

To the READER.

rant, in veritatis præjudicium adversarios in erroribus obfirmasse suis; & conviciis amarulentis non solum exacerunt eos ut se ipsos defenderent, & defendendo similiter impingerent, verumetiam sæpenumero (inde ad scribendum adacti) errorem ipsum in multorum fraudem propugnarent, qui alias nemine contradicente in auras abiisset. Qui contra conscientiam veritatem cognitam oppugnat, id facit aut sui ipsius aut aliorum gratia; sui ipsius, eo quod animo sit male contento: Aliorum, quibus ob aliam rationem placere studet: Male ille contentus, quia quo ambitiosa & injusta cupiditas traxit non pervenerit, aut quia in luce Reipublicæ, ob pravitatem vel flagitia, pœnam merito subierit, aut gratia exciderit, ac igitur temporis adverso æstu oblectatur ut aliis placeret, eo quod ex eorum favore & benevolentia, ejus æstimatio & victus dependet. Non me latet, quod hoc tempore omnia Regna & Reipublicæ Legibus administrantur, quodque sua cuiusque nationis peculi-

banity for their Circumference, have to the great Prejudice of the Truth hardened the Adversaries in their Errors; and by their bitter Invectives, whetted them not only to defend themselves, and to offend in the like, but many Times (being thereby urged to write) to defend the Error it self to the Hurt of many, which otherwise might have vanished away without any Contradiction. He that against his Conscience doth impugn a known Truth, doth it either in respect of himself, or of others; of himself, in that he hath within him a discontented Heart; of others, whom for certain worldly Respects he seeketh to please: Discontented he is, either because he hath not attained to his ambitious and unjust Desires, or for that in the Eye of the State, he for his Vices or Wickedness, hath justly deserved Punishment and Disgrace, and therefore doth oppose himself against the Current of the present to please others, in Respect that his Credit or Maintenance dependeth upon their Favour or Benevolence. I know that at this Day all Kingdoms and States are governed by Laws, and that the particular and approved

To the READER.

approved Custom of every Nation is the most usual binding and assured Law; I deal only with the municipal Laws of England, which I profess, and whereof I have been a Student above these thirty-five Years: My only End and Desire is, that such as are desirous to see and know (as who will not desire to see and know his own?) may be instructed: Such as have been taught amiss (every Man believing as he hath been taught) may see and satisfy himself with the Truth, and such as know and hold the Truth (by having so ready and easy a Way to the Fountains themselves) may be comforted and confirmed.

aris & approbata consuetudo, usitatissimum est vinculum, & Lex firmissima; Mihi res est cum Municipalibus Angliæ Legibus quas profiteor, & quibus jam triginta quinque annos invigilavi: Hoc mihi solummodo propositum, & in votis est, ut qui expectant perspicere & cognoscere (Quis enim quæ sua sunt videre & recognoscere non expetit?) edoceantur, qui male fuerint edocti (Quisque enim credit ut est edoctus,) veritatem perspiciant & in ea acquiescant, qui autem veritatem perspiciunt & tuentur, (cum tam facilis via ad ipsos fontes pateat) cum solatio confirmentur.

Vale.

*Person's Answ.
fol. 19.*

Multa Ignoramus quæ non laterent, si Veterum lectio nobis esset familiaris. Macrobian. lib. 6. Satur.

De

PART V. Of the King's Ecclesiastical Law.

lem habent auctoritatem, & per easd' literas Patentes tres vel plures sententiam ferre debent cum aliorum consensu, & quod ejusmodi sententia lata per Commissarios ad audiendum, & determinandum, vel per alios Commissarios aut Judices legis communis omnino erit irrita. *Quarto*, & postremo objectum erat, quod prædicti Commissarii non erant juxta statutum illud nominati, & constituti: Jurisdiction enim, & potestas coronæ per illud statutum data est ejusmodi Commissariis qui sunt naturales & nati subditi, & ex speciali illo veredicto non constat, quod Commissarii illi fuerunt naturales & nati subditi; & quamvis Judices ut viri privati in particulari scientia illos naturales & natos subditos cognoscerent, cum tamen Judices ex recordo existerent judicialibus tantum oculis intueri, & nihil aliud cognoscere, quam quod in recordo illis apparet, nam ex illo non ex privata scientia sine recordo sententiam ferre debent, & ex illo record' judicium suum in record' inscribere. Et quandoquidem Regina prædict' (ut à Consiliariis querentis dictum erat) Ecclesiasticam jurisdictionem ex illo statuto parliamentario haberet & ex eod' potestas ipsi data esset

ner hath equal Authority, and by the said Letters Patents three or more must give the Sentence with Consent of others, and such a Judgment given by any Commissioners of Oyer or Terminer, or other Commissioners or Judges of the Common Law, were utterly void and of none Effect. Fourthly, and lastly it was objected, that the said Commissioners were not nominated and appointed according to the said Act, for the Jurisdiction and Power given by the said (a) Act to the Crown, is to name such Commissioners as be natural born Subjects, and it doth not appear by the said special Verdict that the said Commissioners were natural born Subjects: And albeit the Judges as private Men in their particular Knowledge did know them to be (b) natural born Subjects, yet they being Judges of Record ought only to see with judicial Eyes, and to take Knowledge of no more than doth appear to them within the Record, for upon that, and not upon private Knowledge out of Record, they only must give their Judgment, and upon that Record enter their Judgment also of Record. And seeing that the late Queen had, as it was said by the Plaintiff's Counsel, Ecclesiastical Jurisdiction by the said Act of Parliament, and by the same, Power was given unto her to name Ecclesiastical

4.

(a) 1 El. c. 1.

(b) Poph. 59, 60.

Eccl^esiastical

ecclesiastical Commissioners, the of necessity must make her Determination according to the said Act having no other Power, as was objected, but by the said Act: And seeing it was not specially found that they were natural born Subjects:

(a) 4 Co. 47. a.
Vaugh. 72.
12 Co. 52.
Hob. 295.
Palm. 15
3 Bufl. 110.
2 Inst. .o.

Et (a) de non apparentibus & non existentibus eadem est ratio: For this Cause also the said Sentence of Deprivation was void, as given by Commissioners not warranted by the said Act.

The Resolutions of the Court to the 1st and 2d.
(b) 2 Rol. 222.
1 Jones 393.

As to the first and second Objection, both being grounded upon the said (b) Act of Parliament, it was resolved by the whole Court, that notwithstanding these two Objections, the Sentence was not to be impeached for either of them, and that for three Causes. First, for that the said Act concerning the Uniformity of Common Prayer, being in the (c) Affirmative, doth not abrogate or take away the Jurisdiction Ecclesiastical, unless Words in the Negative had been added, as, and not otherwise, or in no other Manner or Form, or to the like Effect: And this appeareth by the general Rule of all our Books, as it appeareth in 46 Ed. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 Ed. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. Stradling's Case Pl. Com. 207. &c. ¶ 2. The Ecclesiastical Law and the

(c) 2 Rol. 222.
Poph. 60.
11 Co. 64. a.

Ecclesiasticos Commissionarios nominandi, illa necessario juxta illud statut', cum aliam potestatem, nisi inde, ut objectum erat, non haberet, eos nominaret: Cumq; non speciatim inventum fuerit eos nativos fuisse subditos: *Et de non apparentibus, & non existentibus eadem est ratio:* Hanc etiam ob causam deprivatio' sententia irrita erit, utiq; lata per Commissionarios non sufficient' autoritatis munitos ex eod' statuto.

Quod ad primam & secundam objectionem spectat, quorum utraque illi Parliamenti statuto iungitur, determinatum est de totius Curie sententia, quod objectionibus illis non obstantibus sententia lata in questionem non esset vocanda idque tribus de causis. Primum quod statutum illud de publicarum precum uniformitate, cum esset in parte affirmativa, jurisdictionem Ecclesiasticam non abrogat aut tollit, nisi verba in parte negativa adjuncta fuissent, utique, *& non alias, vel ullo alio modo vel forma,* aut ad eundem sensum: Hoc manifesto apparet, & clare constat ex generali omnium codicum nostrorum regula, ut etiam in 46 E. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 E. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. ¶ 2. Lex Ecclesiastica

fiastic' & temporal' suas seorsim procedendi formulas habent, & diversos respiciunt scopos; altera temporalis ad pœnam infligendam corpori, terris, & bonis; altera spiritalis pro salute animæ; altera ad externum hominem plectendum, altera ad internum reformandum: Et hoc perspicuum est in 12 H. 7. 22. & 10 E. 4. 10. &c. Hæ igitur distinctæ & separatæ jurisdictiones apte coherent, & in hoc coeunt, ut homo totus externe & interne reformetur. *Tertio*, Proviso in prædicto statuto hanc quæstionem omni quæstione liberat, nam ex eo provisum, decretum, & sancitum est autoritate præfata, quod omnes & singuli Archiepiscopi & Episcopi, & singuli eorum Cancellariorum, Commissariorum, Archidiaconorum, quibus aliqua est spiritalis jurisdictione vigore ejusdem statuti plenariam potestatem, & auctoritatem haberent, tam inquirendi in visitationibus, Sinodis, & alibi intra ipsorum jurisdictionem, quam alio quovis tempore & loco accipiendi information' omnium, & singularum rerum, quæ supra memorantur commissæ vel perpetratæ intra limites & jurisdictionis & auctoritatis eorum, easque puniendi admonitione, excommunicatione, sequestratione, vel deprivatione, aut

Temporal Law have severall Proceedings, and to severall Ends: The one being Temporal to inflict Punishment upon the Body, Lands or Goods: The other being Spiritual, pro salute Animæ, the one to punish the outward Man, the other to reform the inward: And this appeareth in 12 H. 7. 22. & 10 Ed. 4. 10. &c. When both these distinct and severall Jurisdictions consist and stand well together, and do join in this: To have the whole Man inwardly and outwardly reformed. ¶ 3. The Proviso in the said Act doth make this Question without Question, for by it is provided, ordained, and enacted by the Authority aforesaid, That all and singular Archbishops and Bishops, and every of their Chancellors, Commissaries, Archdeacons, and other Ordinaries, having any peculiar Ecclesiastical Jurisdiction, should have full Power and Authority by Virtue of that Act, as well to enquire in their Visitation, Synods, and elsewhere within their Jurisdiction, as at any other Time and Place to take Accusations and Informations of all and every the Things aboves mentioned, done, committed or perpetrated within the Limits of their Jurisdiction and Authority, and punish the same by Admonition, Excommunication, Sequestration, or Deprivation, and other Cen-

To the 3d.

Censures and Processes in like Form as heretofore had been used in like Cases by the Queen's Ecclesiastical Laws, as by the said Act appeareth. So as seeing, if that Act had never inflicted any Punishment for depraving or not observing the Book of Common Prayer, yet the same being allowed and commanded to be observed for Uniformity of Common Prayer, and the Unity and Peace of the Church; The Ecclesiastical Judge may deprive such Parson, Vicar, &c. as shall deprave or not observe the said Book, as well for the first Offence, as he might have done by the Censures of the Church, and the Ecclesiastical Laws, as if no Form of Punishment had been inflicted by that Act, And this doth evidently appear by the said Proviso: For thereby notwithstanding any Thing in that Act contained, they may punish such Offenders by Admonition, Excommunication, Sequestration, or Deprivation, and other Censures and Processes, in like Form as heretofore hath been used in like Cases by the Queen's Ecclesiastical Laws, and are not bound to pursue the Form prescribed by the said Act, which is to punish the Offender according to the temporal Law. And it was resolved, that if the Jurisdiction of the Archbishops and Bi-

aliis censuris, & procedendi formulis, perinde ac hactenus in usu fuisset in ejusmodi causis, regis legibus Ecclesiasticis, ut ex eod' statut' manifeste constat. Adeo ut si statutum illud nunquam ullam poenam pro depravando, vel non observando publicarum precum libro infixisset; at tamen cum liber ille approbatus, & ex mandato Regis observandus esset pro precum publicarum uniformitate, & unitate, ac pace Ecclesie conservanda; Judex Ecclesiasticus ejusmodi Rectorem, Vicarium, &c. deprivare potest, qui eundem librum depravabit, vel non observabit, tam pro primo delicto, ut per Ecclesie censuras, & leges Ecclesiasticas facere potuisset, quasi nulla poenae aut puniendi forma per statutum inflictæ fuisset, & hoc per præfatum Proviso dilucide manifestum est. Ex eo enim nihilo obstante in præd' statuto, delinquentes admonitione, excommunicatione, sequestratione, deprivatione, & aliis censuris, & procedendi formulis, perinde ac ante in usu fuerit in ejusm' causis, per Ecclesiasticas Regin' leges punire possunt, & non obstricti sunt ad formam prosequendam in eod' statuto præscript', quæ est delinquent' juxta legem temporal' punire. Determinat' etiam erat, quod si eodem

dem statuto prospectum fuisset jurisdictioni Archiepiscoporum, & Episcoporum & Cancellariorum, Commissariorum, Archidiaconorum, & aliorum Ordinariorum, quibus est peculiaris jurisdictio Ecclesiastica, à fortiori supremis Commissionariis autoritate munitis ex alio statuto in eodem Parlamento tacite provisum erat: *Quia cui licet quod majus est, non debet quod minus est non licere.* Ad objectionem vero tertiam per totam etiam Curiam determinatum erat, quod sententia ab Episcopo cum Collegarum assensu lata ejusmodi erat ut communis legis Judices approbare debeant juxta Ecclesiasticas leges latam fuisse: Cum etenim illis sit autoritas procedendi, & sententia ferendi in causis Ecclesiasticis, juxta leges Ecclesiasticas, & illi sententiam tulerint in causa Ecclesiastica, juxta eorum procedendi formulam vi & virtute ejusdem legis: Communis legis Judices ipsorum sententiae fidem adhibere & eandem approbare, juxta legem Ecclesiasticam latam fuisse debent. Et hæc est recepta opinio in libris nostris omnibus, ut liquet in 11 H. 7. 9. 34 H. 6, 14, &c. Et in causa *Bunting & Leppingwel* in 4 part' relation' mear'. Hæc est usitata sententiarum forma in Ecclesiasticis ipsorum curiis: Et in hoc ipso An. 23

shops and their Chancellors, Commissaries, Archdeacons, and other Ordinaries, having any peculiar Ecclesiastical Jurisdiction were provided for by the said Act, a fortiori the high Commissioners authorized by an other Act in the same Parliament were tacite provided for; Quia (a) cui licet quod majus est, non debet quod minus est non licere. As to the third Objection it was also resolved by the whole Court, that the Sentence given by the Bishop, by the Consent of his (b) Colleagues, was such as the Judges of the Common Law ought to allow to be given according to the Ecclesiastical Laws: For seeing their Authority is to proceed and give Sentence in Ecclesiastical Causes, according to the Ecclesiastical Law, and they have given a Sentence in a Cause Ecclesiastical upon their Proceedings, by Force of that Law; The Judges of the Common Law ought to give (c) Faith and Credit to their Sentence, and to allow it to be done according to the Ecclesiastical Law; For (d) cuilibet in sua arte perito est credendum. And this is the common received Opinion of all our Books, as appeareth 11 H. 7. 9. 34 H. 6. 14. &c. And in (e) *Bunting and Leppingwel's Case*, in the fourth Part of my Reports; And this is the usual Form of all the Sentences in their Ecclesiastical Courts: And this very Point, Tr. 23. Re-

(a) 4 Co. 23. a.
9 Co. 48. b.
Father Parson's 86.
To the 3.

(b) Poph. 59.
Antea 3. a. 4. b.

(c) 2 Rol. 7.
7 Co. 42. b.
4 Co. 29. a.
8 Co. 135. b.
2 Vent. 43.
Cawly 31.
(d) 4 Co. 29. a.
7 Co. 19. a.
Calvin's Case,
Co. Lit. 125. a.
2 Leon. 176.
Cawly 31.
(e) 4 Co. 29. a.

ginae Eliz. in this Court between (a) Cheyney and Frankwell, all the Matter being found, as this Case is by special Verdict, was adjudged. As to the fourth Objection, videlicet; That the said late Queen had only Power by Force of the said Act, to nominate Commissioners for Ecclesiastical Causes, and therefore the aforesaid Nominat' not pursuing the Authority given unto her by that Act should be void. Hereunto a threefold Answer was given and resolved by the whole Court. I. That they which were Commissioners, and had Places of Judicature over the King's Subjects, should be (b) intended to be Subjects born and not Aliens: But if in verity they were Aliens, yet in respect of the general Intendment to the contrary, it ought to be alledged and proved by the other Party; For (c) Stabitur praesumptioni donec probetur in contrarium. Secondly the Jurors have found that the Queen by her said Letters Patents, did authorize them secundum formam Statuti praedicti; And therefore it doth by necessary Consequence amount to as much as if they had found they had been Subjects born: For if they were not Subjects born, they could not be authorized secundum formam Statuti praedicti. Vide 11 H. 4. 4. 13 Elizab. Dyer fol. And the rather for that this is found by special Verdict. ¶ 3. It

Reginae Eliz. in hac cur' inter Cheney & Frankwell adjudicatum erat, cum res tota, ut in hac causa, speciali veredicti compert fuerit. Ad quart' vero objectionem, viz. Quod praed' Regina virtute praed' statuti solummodo potestatem habuit nominandi Commissarios ad causas ecclesiasticas & igitur praefata nominatio non subsequens auctoritat' illi datam isto statuto irrita esset. Huic tripliciter responsum est, & per totam Cur' determinat; Primo quod illi qui erant Commissarii, & locum judicandi int' Regis subditos tenerent, nativi esse subditi, & non exteri intelligi deberent: Sin aut' revera exteri essent, tamen eo quod generatim contraintellect' erat, ab alt' parte allegandum & proband' erat: Nam stabitur praesumptioni donec probetur in contrarium. Secundo, Juratores invener' Reginam auctoritat' per Literas Patentes dedisse secund' formam Statuti praedicti; & igitur ex consequentia necessaria tantum valet, ac si eos subditos nativos fuisse invenissent: Si enim Nativi subditi non erant, auctoritate non instructi fuissent secundum auctoritatem Statuti praedicti. Vide 11 H. 4. 4. & 13 Elizab. Dyer Fol. Et potius cum hoc speciali veredicto inventum fit. Tertio de-

To the 4.

(b) 1 Jenes 68.

(c) 2 Co. 48. a.
4 Co. 71. b.
6 Co. 73. b.
Co. Lit. 373. b.
2 Bullf. 314.
Hob. 297.

determinat' erat, quod statutum anni primi Reg' Elizabethæ de jurisdictione Ecclesiastica, non erat statutum quod novam legem introduxerit, sed antiquam declaraverit quod perspicere potest tam ex ipso titulo ejusd' statuti, viz. *Statutum restituendi ad coronam jurisdictionem antiquam super stat. Ecclesiastic' & Spiritualem*: Quam etiam ex ipsius statuti context' in diversis ejusdem partibus. Statutum enim illud non aliam jurisdictionem coronæ annectit quam quæ antea revera erat, aut esse debuit juxta antiquas hujus regni leges, particula regni jurisdictionis, & unita coronæ imperali, quæq; antea legitime exercebatur, & exerceri poterat intra regnum, cujus jurisdictionis, & formularum procedendi in ead' scopus erat, ut omnia in causis Ecclesiasticis fierent ad divini numinis gloriam, virtutis incrementum, & pacis atque unitatis hujus regni conservation', ut ex diversis partibus ejusdem statuti liquet: Igitur, ut ex illo statuto nulla prætenfa jurisdictionis intra hoc regnum exercita, quæ vel impia, aut prærogativæ vel antiq. legi coronæ hujus regni adversa & repugnans restituebatur, vel restitui poterat prædictæ coronæ, secund' antiquum ejusd' jus & legem: Ita si statuit' il-

was resolved; That the said Act of the first Year of the said late Queen concerning Ecclesiastical Jurisdiction, was not a Statute introductory of a new Law, but (a) Declaratory of the Old, which appeareth as well by the Title of the said Act, Videlicet. An Act restoring to the Crown the ancient Jurisdiction over the State Ecclesiastical and Spiritual, &c. As also by the Body of the Act in divers Parts thereof. For that Act doth not (b) annex any Jurisdiction to the Crown, but that which in Truth was, or of Right ought to be by the ancient Laws of the Realm Parcel of the King's Jurisdiction, and united to his Imperial Crown, and which lawfully had been, or might be exercised within the Realm: The End of which Jurisdiction, and of all the Proceeding thereupon was, that all Things might be done in Causes Ecclesiastical to the Pleasure of Almighty God, the Increase of Virtue, and the Conservation of the Peace and Unity of this Realm, as by divers Parts of the said Act appeareth: And therefore as by that Act no pretended Jurisdiction exercised within this Realm, being either ungodly or repugnant to the Prerogative or the ancient Law of the Crown of this Realm, was or could be restored to the same Crown, according to the ancient Right and Law of the same: So if that Act

(a) 4 Inst. 325.
Cawley 5, 6.
Cr. Jac. 37.
Moor 755.

(b) Cawley 3.

Act of the first Year of the late Queen had never been made, it was resolved by all the Judges, that the King or Queen of England for the Time being may (a) make such an Ecclesiastical Commission as is before mentioned, by the antient Prerogative and Law of England. And therefore by the antient Law of this Realm, this Kingdom of England is an absolute (b) Empire and Monarchy consisting of one Head, which is the King, and of a Body politick, compact and compounded of many, and almost infinite several, and yet well agreeing Members; All which the Law divideth into two several Parts, that is to say, The Clergy and the Laity, both of them, next and immediately under God, subject and obedient to the Head: Also the Kingly Head of this politick Body is instituted and furnished with (c) plenary and entire Power, Prerogative and Jurisdiction, to render Justice and Right to every Part and Member of this Body, of what Estate, Degree, or calling soever in all Causes Ecclesiastical or Temporal, otherwise he should not be a Head of the whole Body. And as in temporal Causes, the King by the Mouth of the Judges in his Courts of Justice doth judge and determine the same by the temporal Law of England: (d) So in Causes Ecclesiastical and Spiritual, as namely, Blasphemy,

lud anni primi prædictæ Reginae nunquam sancitum fuisset, determinat' & judicatum erat, quod Rex vel Regina Angliæ qui pro tempore fuerit, ejusmodi Ecclesiasticam Commissionem (cujusmodi antea memorata est) per antiquam prærogativam, & Angliæ legem instituire possit. Juxta igitur leges hujus regni antiquas, hoc Angliæ Regnum absolutum est Imperium & monarchia, ex uno capite, viz. Rege, & ex corpore politico compacto & composito ex membris distinctis quam plurimis, & fere infinitis, nihilominus inter se coherentibus, consistens. Quæ omnia lex bifariam in Clericos & Laicos dividit, qui utrique proxime & immediate sub Deo suo capiti subjiciuntur & obsequuntur. Regium etiam hujus politici corporis caputplenaria & integra potestate prærogativa, & jurisdictione ad suum cuique hujus corporis membro distribuend' cujuscunque loci ac ordinis, in omnibus causis Ecclesiasticis, vel secularibus instructum est, & armatum; alias totius corporis caput non esset. Et perinde ac in secularibus causis, Rex in foris judicialibus causas temporales judicat & determinat juxta leges Angliæ temporales: Ita in causis Ecclesiasticis & spiritualibus, scilicet blasphemia, Apostasia, Hæresibus, Schif-

(a) 4 Inst. 326.
Cr. Jac. 37.
Hertl. 19.

(b) Postea 28. b.

(c) Hob. 17.

(d) Co. Lit. 96.
a. b. 344. a.
What Causes
belong to the
Ecclesiastical.

PART V. Of the King's Ecclesiastical Law.

8

res ejus nullius Episcopi, aut suorum officialium jure inde deprimentur, sed in cunctis rerum eventibus & discussionibus causarum, Abbatis Monasterii prædicti decreto subji- ciantur. Ita quod, &c. Ut ex eadem Charta anno 1 Hen. 7. producta, & a Stanfor do allegata plene apparet: Quæ Charta concessa ante annos 850, confirmata fuit per Edwinum Britannicæ Anglorum Regem & Monarcham: Ex qua perspicuum est, Regem charta sua in Parlamento confecta, consilio & consensu Episcoporum & Senatorum gentis suæ, qui in Parlamento convenerant, prædicti Abbatem Episcopi jurisdictione liberaffe & exemptisse, &c. Et eadem charta Abbati intra ejus Monasterium, Ecclesiasticam jurisdictionem concessit: Quæ Ecclesiastica jurisdictio a corona derivata, usque ad dissolutionem ejusdem Monasterii tempore H. 8. permansit.

aut suorum officialium jure inde deprimentur, sed in cunctis rerum eventibus & discussionibus causarum, Abbatis Monasterii prædicti decreto subji- ciantur. Ita quod, &c. As by the said Charter pleaded in i Henrici 7. and vouched by Stanfor, at large appeareth: which Charter granted above 850 Years since, was after confirmed per Edwinum Britannicæ Anglorum Regem & Monarcham: By (a) which it appeareth that the King by his Charter made in Parliament (for it appeareth to be made by the Counsel and Consent of his Bishops and Senators of his Kingdom which were assembled in Parliament.) did discharge and exempt the said Abbot from the Jurisdiction of the Bishop, &c. And by the same Charter did grant to the said Abbot Ecclesiastical Jurisdiction within his said Abby, which Ecclesiastical Jurisdiction being derived from the Crown, continued until the Dissolution of the said Abby, in the Reign of King Henry the eighth.

Rex Edwin. regnavit anno Dom. 955. (a) Full. Ch. Hist. 102. Par- son's Answ. 94.

Regnante Anglor' Rege Edwardo Confessore.

In the Reign of King Edward the Confessor.

REX autem, qui Vicarius summi Regis est, ad hoc constitutus est, ut regnum & populum Domini & super omnia, sanctam Ecclesiam regat & defendat ab injuriis, maleficos autem destruat.

THE King, who is the Vicar of the highest King, is ordained to this End, that he should govern and rule the Kingdom and People of the (a) Land, and above all Things the holy Church, and that he defend the same from

S. K. Edw. Laws c. 19.

(a) Spelm. Conn. Tom. 1. pag. 614

from wrong Doers, and de-
stroy and root out Workers
of Mischief. And this shall
suffice for many before the
Conquest.

Et hoc pro multis ante
Conquestum sufficiat.

In the Reign of *Regnante Gu-*
K. William I. lielmo primo.

7 E. 3. Tit.
Quare Impedit
19.
(a) Dav. 73.a.

IT is agreed that no Man
can make any Appropri-
ation of any Church having
Cure of Souls, being a Thing
Ecclesiastical, and to be made
to some Person Ecclesiastical,
but he that hath Ecclesiastical
Jurisdiction: But (b) William
the first of himself without any
other, (as King of (c) Eng-
land) made Appropriation of
Churches with Cure, to Ec-
clesiastical Persons; wherefore
it followeth that he had Eccle-
siastical Jurisdiction.

(b) Seld. Not.
ad Eadmer. 165.

(c) Burner's Re-
form. Pars 1.
lib. 3. f. 187.

INter omnes convenit, qd'
nemo possit appropriare
ullam Ecclesiam, cui ani-
marum cura incumbit, cum
sit res Ecclesiastica, & Ec-
clesiasticæ personæ appro-
prianda, nisi ille qui jurif-
dictionem habet Ecclesia-
sticam: Sed Rex *Gulielmus*
primus ex se sine quovis al-
io, Ecclesias cum cura per-
sonis Ecclesiasticis ut Rex
Angliæ appropriavit, unde
ipsum Ecclesiast' jurisdic-
tionem habuisse consequitur.

In the Reign of *Regnante Hen-*
K. Henry I. rico primo.

The Charter
of H. 1. Foun-
der of the Ab-
bey of Reading.
in the 26th
Year of his
Reign, and in
the Year of
our Lord, 1125.

HENRY by the Grace of
God King of England,
Duke of Normans: To all
Archbishops, Bishops, Abbots,
Earls, Barons, and to all
Christians as well present as
to come, &c. We do ordain as
well in regard of Ecclesiasti-
cal as Royal Power, that
whenever the Abbot of Rea-
ding shall die, that all the
Possessions of the Monastery
wheresoever it is, do remain
intire and free with all the
Rights and Customs thereof,
in the Hands and Disposition

HENRIC' Dei gratia Rex
Angliæ, Dux Norman-
norum, Archiepiscopis, Epif-
copis, Abbatibus, Comitibus,
Baronibus suis, & omnibus
Christianis tam præsentibus
quam futuris salutem per-
petuam, &c. Statuimus au-
tem tam Ecclesiasticæ quam
regiæ prospectu potestatis,
ut decedente Abbate Ra-
dingensi, omnis possessio
monasterii ubicunq; fuerit,
remaneat integra & libera
cum omni jure & consue-
tudine sua, in manu & dis-
positione

positione Prioris & Monachorum capituli Radin-
genfis; hoc autem ideo
statuimus, statutumq; per-
petuo fervandum firmavi-
mus, quia Abbas Radin-
genfis non habet proprios
redditus sed communes cum
fratribus; qui autem Deo
annuente Canonica electio-
ne Abbas substitutus fue-
rit non cum suis secularibus
confangueinis feu quibulibet
aliis, eleemosinas mon-
asterii male utendo disper-
dat, sed pauperibus & pere-
grinis, & hospitibus suscipi-
endis curam gerat, terras
censuales non ad feudum
donet, nec faciat milites
nisi in sacra veste Christi,
in qua parvulos suscipere mo-
deste caveat, maturos autem
feu discretos, tam Clericos
quam Laicos suscipiat.

of the Prior and the Monks
of the Chapter of Reading:
We do therefore ordain and
establish this Ordinance to be
observed for ever, because the
Abbot of Reading hath no
Revenues proper and pecu-
liar to himself but common
with his Brethren: Whoso-
ever by God's Will shall be
appointed Abbot in this Place
by Canonical Election, may
not dispend the Alms of the
Abbey by ill Usage with his
secular Kintmen, or any o-
ther, but in entertaining the
poor Pilgrims and Strangers,
and that he have a Care not
to give out the Kent-lands in
Fee, neither that he make a-
ny Servitors or Soldiers, but
in the sacred Garment of
Christ, wherein let him be
advisedly provident he enter-
tain not young ones, but that
he entertain Men of ripe Age
or discreet, as well Clerks, as
Laymen.

Regnante Henrico Tertio.

In the Reign of King Henry III.

TEmpore H. 3. & proge-
nitorum ejus Regum
Angliæ, & jam inde, si quis
aliquem in jus vocaret co-
ram judice Ecclesiastico in-
tra regnum ulla de re, cu-
jus cognitionem legitimam
illa curia approbatione &
consuetudine non haberet,
Rex semper per breve sub
magno Sigillo procedere
prohibuit: Quod si sug-
gestio illa Regi facta, in

In all the Time of H. 3. and
his Progenitors Kings of
England, and ever since,
if any Man did sue before any
Judge Ecclesiastical within
the Realm for any Thing
whereof that Court by Allow-
ance and Custom had not law-
ful Conusance, the K. did ever
by his Writ under his Great
Seal prohibit them to proceed:
And if the Suggestion made
to the King, whereupon
the

2H.3. Tit. Pro-
hibit. 13. 4H. 3
ib. 15. 15 H. 3
Tit Prohib. 22.
Register fol.
F. N. B. Tit.
Prohibition 40.
41. &c.

The Prohibition was grounded, were after found untrue, then the King by his writ of Consultation under his great Seal, did allow and permit them to proceed. Also, in all the Reign of H. 3. and his Progenitors Kings of England, and ever since, if any Issue were joined upon the Loyalty of Marriage, general Bastardy, or such like, the King did ever write to the Bishop of that Diocese, as mediate Officer and Minister to his Court, to certify the Loyalty of Marriage, bastardy, or such like; all which do apparently prove, that those Ecclesiastical Courts were under the Kings Jurisdiction and Commandment and that one of the Courts were so necessarily incident to the other, as the one without the other could not deliver Justice to the Parties, as well in these particular Cases, as in a Number of Cases before specified, whereof the Kings Ecclesiastical Court hath Jurisdiction: Now to command, and to be obeyed, belong to sovereign and supreme Government.

By the ancient Canons and Decrees of the Church of Rome the Issue born before Solemnization of Marriage, is as lawful inheritable, (Marriage following) as the Issue born after Marriage; But this was never allowed, or appointed in England, and therefore was never of any Force here: And this appeareth by the Statute of

quam prohibitio innixa erat minime vera comperta esset, Rex per breve suum consultationis sub magno suo sigillo procedere permisit. Præterea tempore hujus H. 3. & progenitorum ejus Regum Angliæ, & jam inde, si de bigamia, generali bastardia, vel hujusmodi ad litis contestationem perventum esset, Rex semper Episcopo ejus Diocesis, ut mediato officario & ministro imperat, ut de bigamia, bastardia, & hujusmodi significaret: Quæ omnia plane comprobant Ecclesiastica illa fora Regis jurisdictioni & imperio subjici, & eadem fora ita necessario coincidere, ut alterum sine altero jus suum cuique tribuere non posset, tam in his causis particularibus, quam in pluribus aliis prius memoratis quarum regia fora Ecclesiastica habent jurisdictionem. Ad Reges autem & Monarchas solummodo spectat, ut ipsi imperent, & ipsis imperantibus alii obtemperent.

Juxta antiq' Romanæ Eccles. Canones & decreta, proles ante matrimon' celebratum nata, perinde legitima est & hæreditat' adeat, (matrimonio subsequente) quam quæ post matrimon' nata sit: Verum enimvero hoc in Angl' nunquam approbat' vel admissum, & igitur vim nullam hic habuit, qd'

ex statuto de Merton anno vicefimo H. 3. perfpicue hifce verbis eluceat.

Ad breve Regis de Baftardia, utrum aliquis natus ante matrimonium habere poterit hæreditatem, ficut ille qui natus eft poft matrimon', responderunt omnes Epifcopi quod nolunt nec poffunt ad iftud breve refpondere, quia hoc effer contra communem formam Ecclef. Et rogaverunt omnes Epifc' magnates, ut confentirent, quod nati ante matrimonium effer legitimi ficut illi qui nati funt poft matrimonium, quantum ad fucceffionem hæreditariam, quia Ecclefia tales habet pro legitimis. Et omnes Comites & Barones una voce responderunt; Nolumus leges Angliæ mutare quæ hucusque ufitatæ funt & approbatæ.

Merton, made in the 20th Year of King Henry III.

The Statute of Merton an. 20. H. 3.

So the King's Writ of Baftardy, whether one being bozn befoze Patrimony may inherit in like Manner, as he that is bozn after Patrimony, all the Bifhops answered that they would not, noz could not answer to it, becaufe it was direaly againft the common Order of the Church; and all the Bifhops infanced the Lords, that they would confent, that all fuch as were bozn befoze Patrimony fould be legitimate, as well as they that be bozn within Patrimony, as to the Succelfion of Inheritance, fozmuch as the Church accepteth fuch to be legitimate: And all the Earls and Barons with one Voice answered, We (a) will not change the Laws of England which hitherto have been used and approved.

(a) Moor 120. Præf. 4 Rep. Co. Lit. 245. a. 2 Inf. 96, 97.

Regnante Edwardo primo.

In the Reign of King Edward the First.

*E*Dwardo ejus nominis primo regnante, fubditus quidam excommunicat' bullam contra alterum hujus Regni fubditum intulit, & coram Domino Thefaurario Angliæ divulgavit, hoc læfæ Majeflatis crimen contra Regiam Coronam & dignitat' judicatum efl;

*I*n the Reign of King Edward the firft, a Subject brought in a Bull of Excommunication againft another Subject of this Realm, and published it to the Lord Treafurer of England, and this was by the antient common Law of England adjudged Treafon againft the King, his Crown and Dignity, for the which

Vide 30 E. 3. lib. Alf. pl. 19. Brooke Tit. Præmunire pl. 10. Note this was by the common Law of England before a-ny Stat. made.

which the Offender should have been drawn and hanged, but at the great Instance of the Chancellor and Treasurer, he was only abjured the Realm for ever.

19 E. 3. Tit.
Quare non admittit 7.

Vide 39 E. 3. 20.

The said King Edward I. presented his Clerk to a Benefice within the Province of York, who was refused by the Archbishop, for that the Pope by Way of Provision had conferred it on another; The King thereupon brought a Quare non admittit, the Archbishop pleaded that the Bishop of Rome had long Time before provided to the said Church, as one having supreme Authority in that Case, and that he durst not nor had Power to put him out, which was by the Pope's Bull in Possession: For which his high Contempt against the King, his Crown and Dignity, in refusing to execute his Sovereign's Commandment, fearing to do it against the Pope's Provision, by Judgment of the Common Law, the Lands of his whole Bishoprick were seized into the King's Hands and lost during his Life; which Judgment was before any Statute or Act of Parliament was made in that Case. And there it is said, that for the like Offence, the Archbishop of Canterbury had been in worse Case by the Judgment of the Sages of the Law, than to be

pro quo delinquens extremo supplicio afficiendus eratur, trahendus scilicet & suspendendus. Sed Cancellario & Thesaurario intercedentibus, Regnum solummodo in perpetuum abjuravit.

Idem Rex *Edward* Clericum suum ad beneficium in Provincia Eboracensi nominavit, qui ab Archiepiscopo rejectus, quoniam Papa per Provisionem idem beneficium alteri contulerat; Hinc Rex emisit breve *Quare non admittit*, allegavit Archiepiscopus, quod Pontifex Romanus jam antea eidem beneficio alterum providisset, utique qui supremam in illa causa auctoritatem haberet, & quod ipse minime ausus sit, nec potestatem habuerit ipsum amovendi, qui per Bullam papalem jam possederat. Pro hoc contemptu in Regem, coronam, & dignitatem, eo quod recusaverit supremi sui Domini mandatum exequi contra provisionem papalem, Commun' Legis judicio possessiones totius Episcopatus in Regis manus fuere reductæ, & ad ejus vitam amissæ: Quæ sententia lata fuit, priusquam aliquid Parliamenti statutum hac de re factum fuerit. Ibid' etiam memoratur, quod pro ejusmodi delicto asperius actum fuisset cum Archiepiscopo, Cantuar. Juris consultissimorum judicio, quam pro con-

contemptu puniri, nisi Rex in gratiam accepisset.

De Bigamis quos Dominus Papa in Concilio suo Lugduniensi omni privilegio Clericali privavit, per Constitutionem inde editam, & unde quidam prælati illos qui effecti fuerunt Bigami ante prædictam Constitutionem, (quando de feloniam reſtati fuerunt) tanquam Clericos exigerunt ſibi liberandos. Concordatum eſt & declaratum coram Rege & Concilio ſuo, quod Conſtitutio illa intelligenda ſit, quod ſive effecti fuerint Bigami ante prædictam Conſtitutionem, ſive poſt, de cætero non liberentur Prælati, immo fiat eis juſtitia ſicut de Laicis.

In Statuto Parlamenti Carleoli habito anno regni ejuſdem Regiſ *Edwardi primi* 25. declaratum eſt, quod Sacroſancta Eccleſia Anglica in ſtatu Præſulum intra regnum Angliæ, per Angliæ Regem & ejuſ progenitores ad populum in Lege Dei inſtituend', hoſpitalitatem colendam, eleemoſynam erogandam, & ad alia charitatis opera exercenda, &c. fundatâ fuiſſet; Eoſdemque Reges temporibus retroactis ſolere Præſulum & Clericorum, quos evexer', concilio & judicio uti ad Regni incolumitat'

puniſhed for a Contempt, if the King had not extended Grace and Favour to him.

Concerning *Men twice married* (called *Bigami*) whom the *Biſhop of Rome* by a *Conſtitution* made at the *Council of Lions* hath excluded from all *Privilege of Clergy*, whereupon certain *Brethren* (when ſuch *Perſons* have been attainted for *Felonies*) have prayed for to have them delivered as *Clerks* which were made *Bigami* beſore the ſame *Conſtitution*. It is agreed and declared beſore the King and his *Council*, that the ſame *Conſtitution* ſhall be underſtood in this wiſe, that whether they were *Bigami* beſore the ſame *Conſtitution* or after, they ſhall not from henceforth be delivered to the *Brethren*, but *Justice* ſhall be executed upon them as upon other *Lay People*.

In an Act made at a *Parliament* holden at *Carlisle* in the *xxv. Year* of the ſaid King *Edw. the Firſt*, It is declared, that the *holy Church of England* was founded in the *State of Bretry* within the *Realm of England*, by the King and his *Progenitors*, &c. for them to inform the *People* in the *Law of God*, and to keep *Hospitality*, give *Almes*, and do other *Works of Charity*, &c. And the ſaid Kings in *Times paſt* were wont to have their *Advice and Counsel* for the *Safeguard of the Realm* when they had need of ſuch *Bre-*

The Statute of Bigamis in An. 4 E. 1. Obſerve how the King by Advice of his Council (that is by Authority of Parliament) expounded how the ſaid Council ſhould be underſtood, and in what Senſe it ſhould be received and allowed here.

Statutum de Anno 25 E. 1. Carliffe. Vide 20 E. 3. Tit. Eſſoin 24.

Note, The first Attempt was to usurp upon such Ecclesiastical Things as pertained to the Clergy of England, who at that Time stood in great Awe of the Church of Rome.

Bishops and Clerks so advanced; The Bishop of Rome usurping the Seigniories of such Benefices, did give and grant the same Benefices to Aliens which did never dwell in England, and to Cardinals which might not dwell here, &c. in Adnullation of the State of the holy Church of England, Disherison of the King, Earls, Barons and other Nobles of the Realm, and in Defence and Destruction of the Laws and Rights of this Realm, and against the good Disposition and Will of the first Founders; It was enacted by the King, by Assent of all the Lords and Commonalty in full Parliament: That the said Oppressions, Grievances, and Damage in this Realm, from thenceforth should not be suffered, as more at large appeareth by that Act.

cum opus fuerit; quodque Pontifex Romanus sibi usurpans ejusmodi beneficiorum Ecclesiasticorum superioritatem, eadem beneficia exteris qui nunquam in regno Angliæ habitabant, & Cardinalibus qui hic habitare non poterant, &c. contulerit, ad statum Sacrosanctæ Ecclesiæ Anglicanæ subvertendum, ad Regem cum Comitibus, Baronibus, & Regni Proceribus hæreditate avita deprivandum, ad leges & consuetudines hujus Regni tollendas, & ad consilia voluntatesq; fundatorum infringenda: Unde sancitum erat per Regem cum assensu Procerum & Communitatis in pleno Parlamento, quod prædictæ oppressiones, gravamina, & detrimenta in hoc Regno jam inde amoverentur & tollerentur, ut plenius ex ipso statuto apparet.

Post. f. 18. a.

In the Reign of King
Edw. the Second.

Regnante Edwardo secundo.

Albeit by the Ordinance of Circumspecte agatis made in the viii. Year of *Edw.* 1. and by general Allowance and Usage, the Ecclesiastical Court held Plea of Tithes, Obventions, Oblations, Mortuaries, Redemptions of Penance, laying of violent Hands upon a Clerk, Defamations, &c. yet did not the Clergy think themselves assured nor quiet from Prohibit.

ET si ex Decreto Circumspecte agatis facto anno *Edw.* primi 13. recepta approbatione & consuetudine fore Ecclesiastica placita tenerint, & judicia exercuerint de Decimis, obventionibus, oblationibus, mortuariis, penitentiarum redemptionibus, violenta manus injectione in Clericos, defamationibus, &c. Clerici tamen se minime securos a Prohi-

Prohibitionibus per Subditos procuratis existimarunt donec Rex Edwardus secundus per Literas Patentes cum consensu Parliamenti ad Cleri petitionem, illis jurisdictionem in prædictis causis exercere concessisset. Rex in Parlamento anno regni sui nono, post particularia responsa ad petitiones eorum de rebus præfatis concedit, & Regium assensum hisce verbis præbuit.

Nos desiderantes statui Ecclesiæ Anglicanæ, & tranquillitati & quieti Prælatorum Cleri prædictorum, quatenus de jure poterimus providere, ad honorem Dei, & emendationem status dictæ Ecclesiæ & Prælatorum & Cleri prædicti, omnes & singulas responsiones, prædictas quæ patent in eodem Actu, ac omnia & singula in eisdem responsionibus contenta ratificantes & approbantes; ea pro nobis & hæredibus nostris concedimus & præcipimus imperpetuum inviolabiliter observari: Volentes & concedentes pro nobis & hæredibus nostris, Quod prædicti Prælati & Clerus, & eorum Successores, imperpetuum in præmissis Jurisdictionem Ecclesiasticam exerceant, juxta tenorem responsionis prædictæ.

purchased by Subjects, until that King Edw. the 2. by his Letters Patents under the Great Seal, in and by Consent of Parliament, upon the Petitions of the Clergy, had granted unto them to have Jurisdiction in those Cases. The King in a Parliament holden in the 9 Year of his Reign, after particular Answers made to their Petitions, concerning the Matters abovesaid, doth grant and give his Royal Assent in these Words.

We desiring as much as of Right we may, to provide for the State of the Church of England, and the Tranquility and Quiet of the Prelates of the said Clergy, to the Honour of God, and the Amendment of the State of the said Church, and of the Prelates and Clergy, ratifying and approving all and singular the said Answers which appear in the said Act, and all and singular Things in the said Answers contained; we do for us and our Heirs grant and command, that the same be inviolably kept for ever: Willing and granting for us and our Heirs; That the said Prelates and Clergy and their Successors for ever, do exercise Ecclesiastical Jurisdiction in the Premises according to the Tenor of the said Answer.

The Statute of 9 E. 2. Artic. Cleri. 16.

See the Ordinance of Circumspecte agitatis 13 E. 1. to this Effect.

By this Statute of 9 E. 2. and the Statutes of 15 E. 3. c. 6. 31 E. 3. c. 11. and by other Statutes heretofore mentioned, the Jurisdiction of the Ecclesiastical Courts is allowed and warranted by Consent of Parliament, in all Causes wherein they now have Jurisdiction, so as these Laws may be justly called, the King's Ecclesiastical Laws of England.

In the Reign of King *Regnante Edwardo tertio.*
Edw. the Third.

16 E. 3. Tit. Excom. 4.

(a) Co. Lit. 134. a. F. N. B. 64. f. Postea 16. a.

In the Reign of E. 3.

(b) Co. Lit. 134. a. 3 Co. 75. b.

AN EXCOMMUNICATION by the Archbishop, albeit it be disannulled by the Pope or his Legates, is to be (a) allowed, neither ought the Judges give any Allowance of any such Sentence of the Pope, or his Legate.

It is often resolved that all the (b) Bishopricks within England were founded by the King's Progenitors, and therefore the Abbotsions of them all belong to the King, and at the first they were Donative; And that if an Incumbent of any Church with cure die, if the Patron present not within 6 Months, the Bishop of that Diocese ought to collate, to the End the Cure may not be destitute of a Pastor: If he be negligent by the Space of 6 Months, the Metropolitan of that Diocese shall confer one to that Church: And if he also leave the Church destitute by the Space of 6 Months, then the Common Law giveth to the King as to the Supream within his own Kingdom, and not to the Bishop of Rome, Power to provide a competent Pastor for that Church.

The King may not only exempt any Ecclesiastical Person from the Jurisdia. of the Ordinary, but may grant unto him Episcopal Jurisdia. As thus it appeareth there the

EXCOMMUNICATIO facta per Archiepiscopum, licet annullata sit per Papam, aut ejus a latere Legatum, est approbanda, nec Judices ullo modo sententiam Papæ, aut ejus a latere Legati in Anglia approbare debent.

Sæpius determinatum est omnes Episcopatus Angliæ per Regis Progenitores fundatos fuisse, & igitur advocaciones eorum omnium ad Regem spectare; principio etiam donativos fuisse, & quod si Incumbens aliqujus Ecclesiæ cum Cura diem obierit, si Patronus intra sex menses non presentaverit, Episcopus Diocesios conferre debet, ne Ecclesia pastore sit destituta: Si autem ille sex menses neglexerit, Metropolitanus Provinciæ aliquem ad illam Ecclesiam presentabit: Si autem Archiepiscopus Ecclesiam sex Menses destitui sinat, lex regni Communis potestatem providendi idoneum pastorem eidem Ecclesiæ concedit Regi, tanquam supremo intra Regnum suum, & non Pontifici Romano.

Rex non solum Ecclesiasticam personam quamcunq; ab Ordinarii jurisdictione eximere, verum etiam jurisdictionem Episcopalem ipsi concedere potest; ut eo loci constat

17 E. 3. 23.

servatæ fuerint, Rex recte ad primam institutionem redire debet, ut plenius ex ipso statuto clarissime patet.

by the said Act moze at large appeareth.

Anno 27. ejusdem Regis gravissima querela ab hujus regni magnatibus, & communitate regi in parlamento exhibita fuit, qd' plurimi subditorum ex regno evocati essent ad respondendum de rebus quarum cognitio ad curiam Regis spectabat, & quod judicia data in eadem curia in aliis curiis impedita & infirmata essent, in Regis coronæq; sue & universi populi sui præjudicium & exhereditationem, atque etiam in communis legis ejusdem regni, quæ semper in usu fuerat, subversionem: Unde magna & matura deliberatione magnatum, & aliorum ex ejus prædicto consilio assensum & concordatum est per regem, magnates, & communitatem, quod omnes populi sub Regis fide, cujuscunque loci & conditionis qui aliquem extra regnum in jus vocarent de causa cujus cognitio ad curiam Regis spectaret, vel de rebus de quibus judicia in Regis curia data fuerint, aut qui jus suum persequerentur in ulla alia curia, ad infringenda infirmanda & rescindenda judicia in Regis curia data, pœnam *Præmunire* incurere deberent, ut ex eodem statuto videre est.

In the 27. Year of the Reign of the same K. it was grievously complained to the King in a Parliament then holden, by the great Men and Commons of the Realm, how that divers of the People were and had been drawn out of the Realm, to answer to Things whereof the Conscience pertained to the K.'s Court: And also that the Judgments given in the same Court, were impeached in other Courts, in Prejudice and Dishonour of the K. and his Crown and of all the People of his said Realm, and in the Undoing and Destruction of the Com. Law of the same Realm at all Times used: Wherefore, upon good Deliberation had with the great Men and others of his said Council, it was assented and accorded by the K. and the great Men and Commons aforesaid, that all the People of the K.'s Allegiance of what Condition that they be, which should draw any out of the Realm, in Plea whereof the Conscience pertained to the King's Court, or of Things whereof Judgments were given in the King's Court, or which did sue in any other Court to defeat or impeach the Judgments given in the K.'s Court should incur the Danger of *Præmunire*, as by the said Act appeareth.

Statutum de
27 Ed. 3.

To nourish Love, Peace, and Concord, between holy Church and the Realm, and to appeale and cease the great Hurt and perils, and insupportable Losses and Grievances that had been done and happened in Times past, and that should happen hereafter, if the Thing from thenceforth be suffered to pass, because of personal Citations and other that be passed befoze this Time, and commonly did pass from Day to Day out of the Court of Rome, by feigned and false Suggestions and Propositions, against all manner of Persons of the Realm, upon Causes whose Cognisance and Final discussing pertained unto the King and his royal Court: And also of Impetrations and Provisions of Benefices and Offices of holy Church, pertaining to the Gift, Presentation, Donation, and Disposition of the R. and that other lay Patrons of this Realm as of Churches, Chapels, and other Benefices appropriated to Cathedral Churches, Abbies, Priories, Chauntries, Hospitals, and other poor Houses, and of other Dignities, Offices, and Benefices occupied in Times past, and presented by divers and notable Persons of the said Realm: For which Causes, and dispensing whereof, the good ancient Laws, Usages, Customs, and Franchises of the said Realm, had been and were greatly appaired, blemished &

Ad mutuuum amorem, pacem & concordiam, intra sacrosanctam Ecclesiam, & regnum fovendam & confirmandam, nec non ad magna damna, detrimenta intolerabilia, & gravamina amovenda, sedanda, & tollenda, quæ superioribus temporibus illata fuerant & acciderant, & postea accidere possent (si res quæ cœpit pergere toleretur) ex citationibus personalibus, & aliis, quæ & superioribus temporibus provenerunt, & indies proveniunt ex curia romana per fictas & falsas suggestiones, contra quaslibet hujus regni personas, de causis quarum cognitio & finalis discussio, ad regem & regiam ipsius curiam attinet: Ac etiam ex beneficiorum, & ecclesiasticorum officiorum impetrationibus, & provisionibus, quæ ad præsentationem, donationem, & dispositionem Regis spectant, & ad alios in hoc regno patronos laicos, utique ecclesiarum, capellarum, & aliorum beneficiorum ecclesiis cathedralibus, abbatibus, prioratibus, Hospitalibus adnexorum, aliarumque dignitatum, officiorum, & beneficiorum quæ jam antea tenebantur, & ad quæ præsentationes factæ fuerint per quosdam eximios hujus regni viros: Quibus de causis, & eandem dispen-

ex recordo, & alias in Anglia tenent, juxta tamen Regis leges, & Regni consuetudines in iis procedunt.

Observes hic (candide lector) quandoquidem decisio & determinatio hæresium, schismatum, & errorum in religione, ordinationum, examinationum, admissionum, institutionum, & deprivationum hominum ecclesiasticorum (quæ ad Dei cultum, & veram religionem spectant) matrimoniorum, divortiorum, bastardiæ generalis (unde stirpium & hæreditatum validitas dependet) probationis testamentorum, literarum administrationum (sine quibus nullum debitum defunctis per legem communem recuperari possit) mortuariorum, pensionum, procurationum, reparationum Ecclesiarum, simoniæ, incestus, adulterii, fornicationis, incontinentiæ, & quorundam aliorum ad communem legem non spectant, quam necessarium fuerit ad justitiam exercendam & administrandam, quod Regiæ Majestatis Progenitores hujus regni Monarchæ, Ecclesiasticas sub ipsis Curias autoritate armaverint, determinandi causas illas Ecclesiasticas tanti momenti (a communis legis jurisdictione exemptas) per

and hold Courts of Record, and other Courts, and yet all their Proceedings be according to the Kings Laws and Customs of the Realm.

Observe (good Reader) seeing that the Determination of Heresies, Schisms, and Errors, in Religion, Ordining, Examinat. Admissi. Institut. and Deprivation of Men of the Church (which do concern God's true Religion and Service) of Right of Patrimony, Divorces, and general Bastardy, (whereupon depend the Strength of Mens Descents and Inheritances) of Probate of Testam. and Let. of Administration. (without which no Debt or Duty due to any dead Man can be recovered by the Com. Law) Mortuaries, Pension, Procurat. Reparation of Churches, Simony, Incest, Adultery, Fornication, and Incontinency, and some others, doth not belong to the Com. Law, how necessary it was for Administration of Justice, that his Majesty's Progenitors Kings of this Realm did by publick Authority authorise ecclesiastical Courts under them, to determine those great and important Causes Ecclesiastical, (exempted from the Jurisdiction of the Com. Law) by the King's Laws Ecclesiastical, which was done originally for two Causes. I. That Justice should be administered under the Kings of this Realm, within

within their own Kingdom, to all their Subjects, and in all Causes. 2. That the Kings of England should be furnished, upon all Occasions either foreign or domestical, with learned Professors as well of the Ecclesiastical, as Temporal Laws.

Thus hath it appeared as well by the ancient Common Laws of this Realm, by the Resolutions and Judgments of the Judges and Sages of the Laws of England, in all Succession of Ages, as by Authority of many Acts of Parliament, ancient, and of later Times, that the Kingdom of England is an absolute Monarchy, and that the King is the only supreme Governour, as well over ecclesiastical Persons, and in ecclesiastical Causes, as temporal within this Realm, to the due Observation of which Laws, both the King and the Subject are sworn. I have herein cited the very Words and Texts of the Laws, Resolutions, Judgments, and Acts of Parliament, all publick and in print, without any Inference, Argument, or Amplification; and have particularly quoted the Books, Pages, Leaves, Chapters, and such like certain References, as every Man may at his Pleasure see and read the Authorities herein cited. This Case is reported in the English and Latin Tongues (as some other

leges Regis ecclesiasticas, quod initio duabus de causis factum. Primo ut justitia sub regni hujus Regibus, omnibus suis subditis, & in omnibus causis administraretur. Secundo, ut Angli Reges peritos professores legum tam ecclesiasticarum, quam temporalium in promptu semper haberent, quacumque occasio tulerit, sive illa externa, sive domestica.

Jam pateat, & in promptu sit, tam ex antiquis communibus hujus regni legibus, Judicium & Jurisprudentissimorum in Anglia sententiis & judiciis, singulis seculis, quam ex auctoritate plurimorum statutorum parliamentariorum prae cis temporibus, & recenti memoria; quod Regnum Angliae sit Monarchia absoluta; quodque Rex solus & summus sit gubernator tam personarum ecclesiasticarum, & in causis ecclesiasticis, quam temporalium, & in temporalibus intra hoc regnum: Ad quas leges sancte & inviolate observandas, & Rex & subditi jurejurando obstricti tenentur. Legum autem, sententiarum, judiciorum, & statutorum parliamentariorum, quae singula publice typis impressa prostant, ipsissima verba & textus sine ulla illatione, argumentat, aut amplificatione allegavi; libros vero, annos

annos, paginas, & id genus alia figillatim adnotavi, ut quilibet pro arbitrio oculis intueatur & legat : Anglice & Latine edidi (qd' & nonnulli nostri juris scriptores fecerunt) eo consilio, ut concives charissimi in Reg' hujus legibus, ipsorum jure avito & hæreditario, necnon illustribus ejusd' juris iudiciis hac in parte non sint peregrini : Ad veritatem persuasus, quod nemo ex Anglorum gente modo sanus, & ingenuè sincerus, qui persuasus antequam informatus fuerat, in veritate (quam ipse oculis intueatur suis) abnuet, ne ab errore dissuaderetur, quo obcæcatus sit abductus ; Misere enim cum illo agitur, & misericordia dignus, qui fuit persuasus priusquam informatus, & nunc informari abnuet, quia persuaderi nolit.

Writers of the Law have done to the End that my dear Countrymen may be acquainted with the Laws of this Realm, their own Birth-right and Inheritance, and with such Evidences as of Right belong to the same ; Assuring my self that no wise or true hearted Englishman, that hath been persuaded befoze he was instructed, will refuse to be instructed in the Truth, (which he may see with his own Eyes) least he should be dissuaded from Error, wherewith blindfold he hath been deceived : For miserable is his Case, and worthy of Pity, that hath been persuaded befoze he was instructed, and now will refuse to be instructed, because he will not be persuaded.

constat Regem Archidiacono Richmondæ olim fecisse.

Singulæ ædes Religiosæ vel Ecclesiasticæ quarum Rex fundator extitit, ab ipso Rege omni jurisdictione ordinaria sunt exemptæ & per Ecclesiasticam Regis commissionem sunt solummodo visitandæ & corrigendæ.

Abbas Burgi Sancti Edmundi in Suffolcia diplomate regio ab omni Episcopali jurisdictione exemptus erat.

Qui fuerat præsentatus ad Ecclesiam per Dominum Regem, impeditus fuit per quendam qui impetraverat Bullas a Curia Romana, quapropter carceri perpetuo emancipatus fuit, &c.

Decimas ex locis extra aliquam parochiam Rex habebit, quoniam cum illi sit suprema jurisdictione Ecclesiastica, obligatus est sufficientem Pastorem providere, qui curam ejusmodi loci qui intra alicujus Parochiæ limites non comprehenditur habeat. Juxta etiam communes leges clarum est, quod nemo jus hæreditarium in decimis habeat, nisi sit Ecclesiasticus, aut Ecclesiasticam habeat jurisdictionem.

Rex ratione supremæ suæ Ecclesiasticæ Jurisdictionis præsentabit ad liberæ capellas suas (in defectu Decani &c.) per lapsum. Et Fitzherbertus dicit, quod in hac cau-

King had done of antient Time to the Archdeacon of (a) Richmond.

All (b) Religious or Ecclesiastical Houses, whereof the King was Founder, are by the King exempt from ordinary Jurisdiction, and only visitable, and corrigible by the King's Ecclesiastical Commission.

The Abbot of Bury in Suffolk was exempted from Episcopal Jurisdiction by the King's Charter.

The King presented to a Benefice, and his Presentee was disturbed by one that had obtained Bulls from Rome, for which Offence he was condemned to perpetual Imprisonment, &c.

Tithes (c) arising in Places out of any Parish the King shall have, for that he having the supreme Ecclesiastical Jurisdiction, is bound to provide a sufficient Pastor that shall have the Cure of Souls of that Place which is not within any Parish; And by the common Laws of England it is (d) evident, that no Man unless he be Ecclesiastical, or have Ecclesiastical Jurisdiction can have Inheritance of Tithes.

The King shall present to his free Cappelles (in Default of the Dean) by lapse in Respect of his supreme Ecclesiastical Jurisdiction. And Fitzh. saith, that the King in that Case doth pre-

(a) Co. Lit. 134. a.

20 E. 3. Excom. 9.

(b) Dav. 46. b. 16 E. 3. 11. Tit. Bre. 660. 21 E. 3. 60. 6 H. 7. 14. F. N. B.

20 E. 3. Tit. Excom. 6.

21 E. 3. 40.

22 E. 3. lib. i. Aff. pl. 75. (c) Seld. de cimis 365.

(d) Co. Lit. 139. a. 2 Co. 44. a. Cr. El. 512.

27 E. 3. f. 84. F. N. B. f. 34. f.

(a) Plowd. 498. b.

30 E. 3. lib. Aff. pl. 19.
12 H. 4. 16.
14. H. 4. 14.
8 H. 6. fol. 3.
35 H. 6. 42.
28 H. 6. 1.
7 E. 4. 14.
12 E. 4. 16.
F. N. B. f. 64. F.
Vid. 9 E. 4. f. 3.
Hereafter f. 11.
It ought to be determined in the Ecclesiastical Courts in England.

Post. f. 23. b. 26. a.

31 E. 3. Tit. Excom. 6.

present by Lapse as (a) *Ordinary*.

An Excommunication under the Pope's Bull, is of no Force to disable any Man within England: And the Judges said, that he that pleadeth such Bulls though they concern the Excommunication of a Subject, were in a hard Case, if the King would extend his Justice against him. If Excommunication being the extreme and final End of any Suit in the Court at Rome, be not to be allowed within England; It consequently followeth, that by the antient Common Laws of England, no Suit for any Cause though it be Spiritual, rising within this Realm, ought to be determined in the Court of Rome; Quia frustra expectatur eventus, cujus effectus nullus sequitur: And that the Bishops of England are the immediate Officers and Ministers to the King's Courts.

In an Attachment upon a Prohibition, the Defendant pleaded the Pope's Bull of Excommunication of the *Bl.* The Judges demanded of the Defendant, if he had not the Certificate of some Bishop within the Realm, testifying this Excommunication: To whom the Counsel of the Defendant answered, that he had not, neither was it as he supposed necessary: For that the Bulls of the Pope under Lead were notori-

sa Rex ut ordinarius per lapsum presentat.

Excommunicatio sub Bulla Papali, nullam habet vim reddendi aliquem incapacem intra Angliam; & Judices pronunciarunt, quod qui ejusmodi Bullas ad causam suam stabiliendam producit, quanquam erant ad subditum excommunicandum, male cum illo ageretur, si Rex summo jure ageret Si excommunicatio, quæ summa & suprema est censura & coertio in Curia Romana intra Angliam non sit approbanda, ex consequentia colligitur, quod per antiquas communes Angliæ leges, nulla controversia ulla de causa, licet illa spiritualis, intra regnum exorta, in Romana Curia dijudicari debeat; *Quia frustra expectatur eventus, cujus effectus nullus sequitur*: Quodque etiam Angliæ Episcopi sunt immediati officarii & ministri ad curias Regis.

In apprehensione ex prohibitione, defendens quidam Bullam Papalem excommunicationis contra *A-*ctorem sive Querentem produxit: Judices defendentem rogarunt, si certificationem ab aliquo intra Regnum Episcopo ad excommunicationem testificandam haberet: Defendentis advocati responderunt, quod non haberet, neque necessarium esse existimarunt ut haberet quia Bulla Papalis sub Sigillo

Sigillo plumbeo satis superque nota erat, & omnibus constaret. Verum adjudicatum erat Bullas Papales minime sufficientes esse, quia Curia Regia nullam habere debet rationem alicujus excommunication' extra Regnum factæ, & igitur ex Curia regula, Querens inde suo jure non erat exclusus.

Reges sacro oleo uncti, sunt spiritualis jurisdictionis capaces.

Cum Prior Regi debitor est, & Decimas ab alia persona spirituali accipere debet, in ejus est electione de subtractione Decimarum, vel in Curia Ecclesiastica, vel in Scaccario in jus vocare, cum & personæ & res itidem fuerunt Ecclesiasticæ: Quandoquidem enim res meditare ad Regem spectat, ille in Scaccario perinde ac in Curia Ecclesiastica in jus vocare potest, & ibi jus de Decimis decidatur. *Fitzherbertus* etiam in suo Nat. Bre. fol. 30. affirmat, quod ante statutum 18 Edwardi 3. cap. 7. jus de Decimis decidendum erat in Curia temporalibus pro arbitrio agentium; Et per illud statutum sancitum est, ut in Ecclesiastica Curia deciderentur, & temporalis Curia inde erat exclusa. Curia etiam quorundam Maneriorum Regis, & aliorum Magnatum, superioribus sæculis testamenta probarunt: & ex 11 H. 7.

ous enough: But it was adjudged that they were not sufficient, for that the Court ought not to have regard to any Excommunication (a) out of the Realm. And therefore by the Rule of the Court the Plaintiff was not thereby disabled.

(a) Antea 14. b. Co. Lit. 134. a. F. N. B. 64. f.

Reges (b) sacro oleo uncti, sunt spiritualis Jurisdictionis capaces.

(b) 2 Rol. Rep. 451. Dav. 4. 2.

33 E. 3. Tit. Aid Roy 103.

38 Ass. pl. 20.

Where a Prior is the Kings Debtor, and ought to have Wites of another Spiritual Person, he may choose either to sue for Subtraction of his Wites in the Ecclesiastical (c) Court, or in the Exchequer, and yet the Persons and Matter also was Ecclesiastical: For seeing the Matter by a Dean concerneth the King, he may sue for them in the Exchequer as well as in the Ecclesiastical Court, and there shall the Right of Wites be determined. And Fitzherbert in his Na. Bre. fol. 30. holdeth, that before the Statute of 18 Edw. 3. cap. 7. that Right of Wites were determinable at the Temporal Courts at the Election of the Party; And by that Statute assigned to be determined in the Ecclesiastical Court, and the Temporal Court excluded thereof: And the Courts of divers Barons of the Kings, and of other Lords in ancient Times had the (d) Probates of last Wills and Testaments, and it appeareth by 11

(c) Co. Lit.

149. a.

2 Co. 44. a.

(d) Perk. sect.

486. 9 Co. 37. b.

2 Rol. 217.

2 Inst. 231,

488. 11 H. 7.

12. b. Br.

Testament 27.

1 Sid. 46.

Vaug. 207.

Seld. Jurisd. de

Testamentis 9,

10.

H. 7.

See the Statute
of 15 E. 3. c. 6.
31 E. 3. c. 11.

H. 7. fol. 12. That Probate of Testaments did not appertain to the Ecclesiastical Court, but that of late Time they were determinable there: So as of such Causes, and in such Manner as the Kings of the Realm by general Consent and Allowance have assigned to their Ecclesiastical Courts, they have Jurisdiction by Force of such Allowance.

38 Lib. Ass.
Pl. 22.

The King did by his Charter translate Canons secular, into regular and religious Persons, which he did by his Ecclesiastical Jurisdiction, and could not do it unless he had Jurisdiction Ecclesiastical.

46 E. 3. Tit.
Præmun. 6.

The Abbot of Waltham died in the 45 Year of E. 3. and one Nicholas Morris was elected Abbot, who for that the Abbey was exempt from ordinary Jurisdiction, sent to Rome to be confirmed by the Pope: And because the Pope by his Constitutions had reserved all such Collations to himself, he did recite by his Bull, that he having no regard to the Election of the said Nicholas, gave to him the said Abbey, and the Spiritualities and Temporalities belonging to the same, of his Spiritual Grace, and at the Request (as he saied) of the King of England. This Bull was read and considered of in Council, that is, before all the Judges of England, and it was resolved by them

fol. 12. liquet, probationem testamentorum ad Curias Ecclesiasticas non spectasse, sed non ita pridem ibi fuisse decidendam; adeo ut in ejusmodi causis, & eodem modo, quo regni hujus Reges unanimi consensu & approbatione Ecclesiasticis Curis attribuerunt, virtute ejusdem approbationis jurisdictionem habeant.

Rex suo diplomate Canonicos seculares, in regulares & religiosas personas transtulit, quod ex jurisdictione sua Ecclesiastica fecit, & minime facere poterat, nisi jurisdictionem habuisset Ecclesiasticam.

Abbas Walthamiae diem obiit 45 E. 3. & quidam Nicholas Morris erat Abbas electus, qui quoniam Abbatia illa ordinaria jurisdictione exempta erat, Romam misit ut a Papa confirmaretur. Quoniam autem Papa ex suis constitutionibus omnes id genus collationes sibi reservasset, in Bulla sua recitavit, Quod ipse nulla habita ratione ad electionem præd' Nicholai, dedit ipsi præd' Abbatiam cum spiritualibus & temporalibus ad eandem spectantibus ex gratia sua spirituali, ad petitionem (uti finxit) Regis Angliæ. Hæc Bulla in Concilio, id est, coram universis Angliæ Judicibus lecta & perpensa erat, & ab

ab illis universis pronunciatum est, hanc Bullam esse contra leges Angliæ, & Abbatem pro impetratione ejusd' esse in Regis misericordia, unde omnes ejus possessiones in Regis manus sunt captæ, ut plenius in eadem causa apparet.

Cum Abbas Westmonasterii haberet priorem & conventum regularem in lege mortuum, Rex tamen suo diplomate corporationem illam divisit, & fecit priorem & conventum corpus distinctum & capax, qd' ex se in jus & vocare, & vocari poterat.

Parlamento anno Regis *Edwardi* tertii 25. habito, sancitum est totius Parliamenti consensu, qd' tam illi qui provisiones Romæ procurarent, quam qui eas exequerentur, non essent in Regis protectione, sed eo loco quo hostes Regis haberentur, & qui contra ejusmodi provisores offenderint, contra omnes excusarentur, & nunquam inde in crimen vocarentur, aut molestarentur. Ex qua lege, quilibet ejusmodi provisorem legitime tanquam professum Regis, & patriæ hostem tollere poterat, tanta & tam atrocitas hæc habebantur flagitia.

Postmodo eod' *Edwardi* tertii 25. an. in pleno Parlamento demonstratum erat

all, that this Bull was against the Laws of England, and that the Abbot for obtaining the same was fallen into the K.'s Mercy, whereupon all his Possessions were seized into the K.'s Hands, as moze at large by the said Case appeareth.

Where the Abbot of Westminster had a Priory and Covent who were regular and mozt in Law, yet the K. by his Charter did divide that Corporation, and made the Priory and Covent a distinct and capable Body, to sue and be sued by themselves.

At (a) a Parliament holden in the xv. Year of K. Edward the Third: It was enacted by consent of the whole Parliament, that as well they that obtained Provisions from Rome, as they that put them in Execution, (b) should be out of the K.'s Protection: And that a Man might do with them, as with the Enemies of the K. and he that offended against such Provisors in Body, Goods, or other Possessions, should be excused against all People, and should never be impeached or griev'd for the same. By which Law every Man might lawfully kill such an Offender, as a com. Enemy against the K. & his Country, so hainous were such Offences then holden.

Afterwards in the same xv. Year of K. Edward the Third, It was in open Parliament by

49 E. 3. lib. Aff. pl. 8.

Statute de 24 Ed. 3. de provisoribus. (a) 3 Co. 76. a. 1 Jon. 160.

Statute de 25 E. 3.

by the grievous Complaints of all the Commons of this Realm, shewed that the Grievances and Mischiefs aforesaid did daily abound, to the great Damage and Destruction of all this Realm, moze than ever were befoze, viz. That of late the Bp. of Rome, by Appointment of Clerks and otherwise, had reserved and did daily reserve to his Collation, generally and specially, as well Archbishops, Abbies and Priories, as all other Dignities, and other Benefices of Engl. which were of the Advowze of People of holy Church, and gave the same as well to Aliens as to Citizens, and taketh of all such Benefices the Firstfruits, and many other Profits, and a great Part of the Treasure of the Realm was carried away and dispended out of the Realm, by the Purchasors of such Graces; and also by such other Reservations, many Clerks advanced in the Realm by their true Patrons, which peaceably holden their Advancements by long Time, were suddenly put out. Whereupon the said Commons did pray their said Sovereign Lord the King, that thence the Right of the Crown of England and the Law of the said Realm was such, that upon the Mischiefs and Damages which happened to his realm, he ought and was bound of the Accord of his said people, theretoze to provide reme-

communitatis hujus regni gravissimis querelis, quod prædicta gravamina & detrimenta, ad hujus regni maximum damnum & subversionem indies magis magisque quam unquam antea ingravescerent, viz. Quod nuper pontifex romanus clericis procurantibus, & aliis, tam archiepiscopatus, abbatias, ac prioratus, quam reliquas omnes dignitates, & Angliæ beneficia, quæ ad jus clerici spectarent, sibi, & quotidie reservaret ad suam collationem generatim & speciatim, & ead' tam exteris, quam indigenis conferet, & ex ejusmodi beneficiis primitias & multa alia emolumenta sibi attraheret, unde per euentes ejusmodi gratias expectativas, magna vis opum ex hoc regno deportaretur, extraque regnum distraheretur, ac etiam hujusmodi occultis reservationibus quamplurimi clerici per indubitatos patronos promoti, qui pacifice diu sua beneficia tenuerant, ex improvise erant exturbati. Hinc prædicta communitas regem suppliciter rogavit, ut quandoquidem jus coronæ Angliæ, & lex Angliæ ejusmodi erat, ut ipse deberet & obligatus esset, ex consensu communitatis suæ, damnis & detrimentis quæ in regno acciderunt, prospicere legemq; ferre, ad dam-

Note.

na & detrimenta quæ inde profluxerunt evitanda, ut sibi placeret his malis remedium adhibere. Præfatus Rex Edwardus tertius prospiciens hæc damna & detrimenta, & ad statutum tempore avi sui *Edwardi primi*, & causas in eo comprehensas respiciens, quod statutum vim suam habet, & nunquam ulla in parte antiquatum erat aut abrogatum: Et quandoquidem ille, jurejurando obstrictus erat, ad idem ut regni legem observandum, etsi quadam incuria, & negligentia quidam contra ierant: Quærelas etiam communitatis suæ in diversis Parliamentis prius habitis perpendens, nihil magis in votis habuit, quam magnis illis damnis & detrimentis, quæ inde acciderant, & quotidie Ecclesiæ Anglicanæ accidunt, consulere & mederi, assensu procerum & communitatis regni, ad Dei honorem, Ecclesiæ Anglicanæ, & totius regni sui emolumentum, ordinavit & fanxit, quod libera electio archiepiscoporum, episcoporum, & reliquarum dignitatum, & beneficiorum electivorum in anglia jam inde permaneret eo modo, quo per Regis progenitores fuerit concessa, & aliorum antecessores fundata. Quod

by and Law, for the avoiding the Mischiefs and Damage which thereof came, that it might please him thereupon to ordain remedy. The said King E. III. seeing the mischiefs and damages befoze named, and having regard to the Statute made in the Time of his Grandfather K. Ed. I. and to the causes contain'd in the same, which Stat. holdeth always his force, and was never defeated nor adnulled in any point: and forasmuch as he was bound by his Oath to see the same to be kept as a law of this Realm, tho' that by suffe-
rance and negligence it had been sithence attempted to the contrary, also having regard to the grievous complaints made to him by his people in divers his Parliaments holden heretofore, willing to ordain remedy for the great damage and mischiefs which had happened, and daily did happen to the Church of England by the said cause, by the assent of all the great men, and the commonalty of the said realm, to the honour of God, and profit of the said Church of Engl. and of all his realm did order and establish, that the free election of Archbishops, Bishops, and all other dignities and benefices electory in England, should hold from thenceforth in the manner as they were granted by the King's progenitors.

Antea 13. b.

Nota.

Vide 10 E. 3.
fol. 1 & 2.

and founded by the Ancestors of other Lords: And that all Bishops, and other People of the holy Church, which had Advowsons of any Benefices of the K.'s Gift or of any of his Progenitors, or of other Lords and Donors, to do Divine Service and other Charges thereof ordained, should have their Collations and Presentments freely, in the Manner as they were inforced by their Donors. And in Case that Reservation, Collation or Interdiction be made by the Court of Rome, of any Archbishoprick, Bishoprick, Dignity, or other Benefice in Disturbance of the Election, Collations, or Presentments aforesaid: That at the Time of the Avoidance, that such Reservations, Collations, and Provisions ought to take Effect, the said K. Edw. III. and his Heirs should have and enjoy for the same Time Collations to the Archbishopricks and other Dignities elective, which be of his Advowry, such as his Progenitors had before that free Election was granted, since that the Elections were first granted by the K.'s Progenitors, upon a certain Form and Condition, as to demand Licence of the King to chuse, and after the Election to have his royal Assent, and not in other manner: Which Conditions not kept, the King ought by reason to resort to his first Nature, as

omnes prælati, & alii ordinis ecclesiastici, qui jus patronatus habuerunt in ullis beneficiis ex dono Regis, aut alicujus progenitorum ejus, vel aliorum magnatum ad rem divinam celebrandam, & alia quæ ad eandem pertinent, collationes atque nominationes liberè haberent, eo modo quo a donatoribus data, & donata fuerint: Quod si reservatio, collatio, vel provisio ullius archiepiscopatus, episcopatus, dignitatis, vel alterius cujuspiam beneficii per curiam romanam facta fuerit, ad disturbandum electiones, collationes, aut nominationes antedictas, quæ quandoquæ vacaverint, & ejusmodi reservationes, collationes, provisiones, effectum suum fortiri debuerint, præd' Rex Edw. 3. & hæredes haberent & fruerentur iisdem collationibus ad archiepiscopatus. & alias dignitates electivas, quæ sunt ex patronatus sui jure, cujusmodi jus progenitores ejus habuerant priusquam ejusmodi libera electio concessa fuisset: Quandoquidem electiones sub certa forma & conditione a Regis progenitoribus concessæ fuissent, viz. ut eligendi venia a rege peteretur, & post electionem regius assensus adhiberetur & non alio quovis modo: Quæ condition cum minime observare

penfationibus, cum bonæ & antiquæ leges, confuetudines, & libertates ejusdem regni fuiffent imminutæ infirmatæ, & confufæ, corona fupremi Domini Regis accifa, ejusque perfona infamia afperfa, thefaurus & opes regni deportatæ, incolæ & fubditi ad paupertatem redacti & divexati, beneficia fanctæ Ecclefiæ direpta & vafata, divinus cultus, hospitalitas, elemofynæ, & charitatis opera fublata, regni communitas, & laboribus confecta, & bonis exhausta.

Rex in Parlamento Westm' habito Octob' Hill' anno 38. regni, populi fui commodis, & tranquillitati confulens, quem placida pace & tranquillitate tueri in votis habuit, & rempublicam administrare fecundum regni leges, confuetudines & libertates, ut jurejurando cum inauguraretur obftrictus erat; progenitorum fuorum veftigiis infiftens, qui fuis temporib' falutares leges, ordinationes, & provisiones, contra prædicta gravamina & pericula tulerunt; quas leges, ordinationes, & provisiones fingulas, & alias fuo tempore, potiffimum anno regni fui 25 & 27. latas, Rex affenfu, expreffa fententia, & unanimi confenfu ducum, comitum, baronum, & communitatis hujus regni atque aliorum omnium ad quos hæc fpectarunt

confounded, the Crown of their Sovereign Lord the King, diminished, and his Person fallily defamed, his Treasury and Riches of the Realm carried away, the Inhabitants and Subjects of the Realm impoverished and troubled, the Benefices of holy Church wasted and destroyed, Divine Services, Hospitalities, Alms & Deeds, and Works of Charity withdrawn and set apart, the Commons and Subjects of the Realm in Body and Goods consumed.

The King at his Parliament holden at Westminster in the Utas of S. Hillary the xxxviii. Year of his Reign, having regard to the Quietness of his People, which he chiefly desired to sustain in Tranquillity and Peace, to govern according to the Laws, Usages, and Franchises of his Land, as he was bound by his Oath made at his Coronation, following the Ways of his Progenitors, which for their Time made certain good Ordinances and Prohibitions against the said Grievances and Perils: Which Ordinances and Prohibitions, and all the other made in his Time, and especially in the 25 and 27 Years of his Reign, the King by the Assent and Express Will and Concord of the Dukes, Earls, Barons, and the Commons of this Realm, and of all other whom these Things touched, by good and meet Deliberation and Advice, did approve, accept,

Stat. de 38^r. 3.
cap. 3.

and confirm, as by the said Act appeareth.

But those which should execute the said good Lawes against such capital Offenders, were cursed, reproved, and defamed, by such as maintained the usurped Jurisdiction of the Bishop of Rome, against which an especial Act of Parliament was made by the King and his whole Realme, prohibiting thereby such Defamations and Reproofs.

salutari & matura deliberatione & consultatione approbaverunt, acceptaverunt, & confirmaverunt, ut ex eodem statuto omnibus manifestum & testatum est. Veruntatem illi qui salutare illas leges contra tam nefarios delinquentes exercent, diris erant devoti, maledictis violati, & in calumniam rapti ab illis, qui usurpatam pontificis romani jurisdictionem propugnabant: Contra quos speciali statuto parlamentario, per regem & universum regnum facto, ejusmodi maledicta, calumniae, & defamationes prohibita fuerunt.

King Richard the
Second.

*Regnante Richardo
Secundo.*

12 R. 2. Tit.
Jurisdiction 13.

Against an Incumbent of a Church in England, another sueth a Prohibition in the Church of Rome, and there pursueth until he recovereth the Church against the Incumbent, and after brought an Action of account against him, as Receiver of divers Sums of Money (which in Troth were the Oblations and Offerings which the Incumbent had received :) And the whole Court was of Opinion against the Plaintiff, and thereupon he became *Consuit.*

Rectorem Ecclesiae in Anglia alter in jus vocavit per provisionem in curia romana, & ibidem sectam suam adeo persecutus est, quousque in curia romana sententia lata fuit contra rectorem: Et postea actionem suam de compoto contra eundem rectorem, quasi retentorem diversarum pecuniarum summarum producit: Quae pecuniae erant oblationes & obventiones per rectorem receptae, &c. In hoc casu tota curia sententiam contra querentem in actione de compoto proferbat, super quo querens ulterius non persecutus est, sed causa cecidit.

Par-

Parliamentaria auctoritate hoc anno declaratum erat, qd' Angliæ corona omnibus temporibus adeo libera fuit, ut nulli regno subdita sed immediate Deo, & non cuivis alteri subiecta fuerit, quodque eadem, quantum ad maiestatem eiusdem spectat, in nulla re Romano pontifici submitti debeat, nec leges aut statuta hujus Regni per ipsum antiquari, aut imminui, ad perpetuam Regis ejus coronam, & maiestatis ejus, & totius Regni subversionem. Ad hæc Regni communitas in eodem parlamento affirmanter asseveravit, quod quæ Romanus pontifex attentaverit, sunt manifesto contra Regis coronam, & maiestatis jura, temporibus omnium ejus progenitorum usitata & approbata: Quapropter & ipsi, & universa fidelis communitas eiusdem regni, a rege, ejus corona, & maiestate starent in causis præfatis, & aliis quibuscunque susceptis contra ipsum, ipsius coronam, & maiestatem, in singulis usque ad mortem. Regem præterea orabant, & iustitiæ nomine obsecrabant, ut seorsim examinaret singulos proceres in parlamento, tam spirituales, quam temporales, & omnes parlamenti ordines, quid in prænominatis sentirent, quæ tam aperte Regiæ coronæ adversabantur,

It is declar'd by that Parliament, that the Crown of England hath been so free at all Times, that it hath been in Subjection to no Realm, but immediately subject to God, and none other, and that the same ought not in any Thing touching the Regalty of the same Crown, be submitted to the Bp. of Rome, nor the Laws & Stat. of this Realm by him frustrated or defeated at his Will, to the perpetual Destruction of the R. his Sovereignty, Crown, and Regalty, and of all his Realm. And the Commons in that Parliament affirmed, that the Things attempted by the Bp. of Rome, be clearly against the King's Crown and his Regalty, used and approved in the Time of all his Progenitors: Wherefore they and all the leige Commons of the same Realm, would stand with the King, and his said Crown, and his Regalty, in the Cases aforesaid, and in all other Cases attempted against him, his Crown, and his Regalty, in all Points to live and to die. And moreover they did pray the King, and him required by Way of Justice, that he would examine all the Lords in the Parliament, as well Spiritual as Temporal severally, and all the States of the Parliament, how they thought of the Cases aforesaid, which were so openly against the King's Crown and

Statutum de
16 R. 2. cap. 5.

Nota.

in derogation of his Regalty, and how they would stand in the same Cases with the King, in upholding the Rights of the said Crown and Regalty: Whereupon the Lords temporal so demanded, did answer every one by himself: That the Cases aforesaid were clearly in derogation of the King's Crown and of his Regalty, as it was well known, and had been of long Time known; and that they would stand with the same Crown, and Regalty in those Cases especially, and in all other Cases which should be attempted against the said Crown and Regalty in all Points, with all their Power. And moreover it was demanded of the Lords Spiritual there being, and the Procurators of others being absent, their Advice and Will in all those Cases, which Lords, that is to say, the Archbishops, Bps. and other Prelates being in the Parliam. severally examined, making Protestations, that it was not their Mind to deny or affirm that the Bp. of Rome might not excommunicate Bps. nor that he might make translation of Prelates after the Law of holy Church, answered and said, that if any Executions or Processes made in the King's Court, as before were made by any, and Censures of Excommunications be made against any Bishop of Engl. or any other of the

& majestati Regiæ derogabant; Quomodo etiam in prædictis causis cum rege concurrerent in coronæ & majestatis jure sustentando, qua de re domini temporales interrogati singuli seorsim responderunt, qd' causæ præd' manifesto tenderent in Regiæ coronæ & ejusdem majestatis derogationem, ut explorate cognitum est, et jam diu cognitum erat: Quodque ipsi omnibus viribus firmiter starent ab eadem corona & majestate in causis potissimum prædictis, & omnibus aliis, quæcunq; contra eandem coronam & majestatem susciperentur. Domini spirituales ibidem præsentés, & procuratores aliorum qui aberant, interrogati erant, quid sentirent & fieri vellent in causis illis omnibus: Qui domini, viz. archiepiscopi, episcopi, & cæteri prælati in parlamento seorsim examinati, protestationibus prius factis, quod non erat ipsis in animo negare aut affirmare, pontificem Romanum non posse episcopos excommunicare, aut prælatos transferre juxta sanctæ Ecclesiæ leges, responderunt & dixerunt, quod si ullæ executiones vel processus in curia Regis, ut antea, ab ullo factæ fuerint, & excommunicationis censure contra ullum Angliæ episcopum, vel alium quemvis

ex fidelibus Regis subditis, quod ejusmodi mandata executi fuerint. Præterea si ullæ executiones ejusmodi translationum aliquorum prælatorum prædicti Regni, qui regi & regno suo in primis usui erant & necessarii, factæ fuissent; vel si prudentes ex ejus concilio evocati sint & longe a regno abducti sine assensu ejus, & contra quam voluerit, ita quod opes & thesaurus regni imminerentur, ea omnia esse contra Regem ejusque coronam, ut in prædicta petitione memorabatur: Similiter procuratores singuli per se de iisdem rebus examinati, idem in nomine dominorum suorum responderunt, perinde ac præfati episcopi pronunciaverant, & responderant; Quodq; etiam prædicti domini spirituales, & vellent & deberent stare a Rege in hisce causis, in corona ejus facta teçta conservanda, & omnibus aliis causis quæ ad coronam ejusque majestatem spectarunt, ut fide quam Regi debebant obligati fuerant. Unde Rex ex assensu præfato, & prædictæ communitatis petitione statuit, & sanxit, quod si quis in Romana curia vel alibi ejusmodi translationes, processus, excommunicationis sententias, bullas, instrumenta, aut alia quæcunque quæ ad Regem dominum

King's leige People, for that they had made execution of such Commandments: And that if any Executions of such translations be made of any Prelates of the same Realm, which Prelates were very profitable and necessary to the King, and to his said Realm; or that his sage Men of his Council and without his Assent, and against his Will be withdrawn and enjoyned out of the Realm, so that the Substance and Treasure of the Realm might be destroyed, that the same was against the K. and his Crown, as it was contained in the Petition before named: And likewise the same Procuratores every one by himself examined upon the said Matters, did answer and say in the same and for their Lords, as the said Bishops had said, and answered; And that the said Lords Spiritual would and ought to stand with the King in these Cases, lawfully in maintaining of his Crown, and in all other Cases touching his Crown and his Regalty, as they were bound by their Allegiance. Whereupon the King by the Assent aforesaid, and at the Prayer of his said Commons, did ordain and establish: That if any purchase or pursue, or cause to be purchased or pursued in the Court of Rome or elsewhere, any such Translations, Processes, and Sentences of Excommunication, Bullas, Instruments, or any

ny other Things which touch-
ed the King their Lord, against
him his Crown and his Regal-
ty, or his Kealm, as is afoze-
said: And they which bring
within the Kealm, or them
receibe, or make thereof Po-
sification, or any other Execu-
tion within the same Kealm,
or without; that they, their no-
tozious Procuratozs, Pain-
tainers, Fautozs, and Coun-
sellozs, should be put out of
the King's Protection, and
their Lands and Tenements,
Goods and Chattels forseit to
the King, and they be attach-
ed by their Bodies if they may
be found, and brought befoze
the King and his Council,
there to answer to the Cases
afozesaid; or that Process to
be made against them by præ-
munire facias, as it is ozdained
in other Statutes of Provi-
sozs, and others which do sue
in any other Court in deroga-
tion of the Regalty of the King,
as by the said Act also appear-
eth.

Co. Lit. 130. a.
F. N. B. 169. f.

In the Reign of King
Henry IV.

IT is resolved that the Pope's
Collector, tho' he have the
Pope's Bulls for that purpose,
hath no Jurisdiction within
this Kealm, and there the
Archbishops and Bishops, &c.
of this Kealm are called the
King's spiritual Judges.

By the ancient Laws Ec-
clesiastical of this Kealm, no

3 H. 4. fol. 9.

F. N. B. 269.
2 H. 4. c. 15.

suum spectarint, contra ip-
sum, ejus coronam & ma-
jestatem, vel ejus regnum,
ut prædict' est, procuraverit,
vel procurari fecerit: Et
qui ea in regnum intule-
rint, vel receperint, vel pub-
licaverint, vel quovis modo
in prædicto regno, vel ex-
tra executi fuerint; quod
ipsi, eorum notarii, procu-
ratores, adjutores, fautores,
consultores, Regis protec-
tione excluderentur, & eor-
um terra tenementa & bo-
na in Regis potestatem re-
digerentur, ipsiq; si inveni-
ri possint apprehenderentur,
& coram Rege & ejus con-
cilio sifterentur ad respon-
dendum de prædictis, vel
ut processus contra eos fie-
ret per *præmunire facias*,
ut sancitum est in aliis sta-
tutis de provisoribus & aliis
qui in alia curia ad Regiæ
dignitatis derogationem jus
suum persequuntur, ut ex
eodem statuto plenius pa-
tet.

Regnante Henrico
quarto.

DEterminatum est quod
collector papal', vigore
alicujus bullæ, nullum intra
hoc regnum habet authori-
tatem, & ibidem archiepif-
copi, episcopi, &c. intra hoc
regnum spirituales judices
Regis nuncupantur.

Per antiquas ecclesiasticas
hujus regni leges, nemo
hare-

hæreticæ pravitatis, quæ crimen est læsæ majestatis contra divinum numen, convinci poterat, nisi ab archiepiscopo & universo ejusdem provinciae clero, & inde abjuratus, postea de integro convictus & condemnatus a clero ejusdem provinciae in synodo generali, Sed statutum 2 H. 4. c. 15. auctoritatem episcopo diocesios hæreticos condemnandi tribuit: Quodq; ante statutum illud hæreticus seculari brachio ad concremandum committi non poterat, donec semel abjurasset, & in eandem vel aliam hæresin relapsus fuisset: Unde luce clarius est, quod Rex consensu parliamenti direxit formulas procedendi curiis ecclesiasticis in hæresios causis, & aliis magis spiritualibus.

Papa non potest mutare leges Angliæ.

Judices pronunciarunt, quod statuta quæ ad papales provisiones, ad beneficia ex ecclesiasticorum hominum patronatu coercendas facta fuerint, eo quod ecclesiastici in sua justa causa papalibus provisionibus contradicere non audent: A deo ut illa statuta tantum ad leges communes confirmandas fuerint sancita.

Excommunicatio per papam facta nullam vim in Anglia habet, & eadem signifi-

can could be convicted of Heresy, being High Treason against the Almighty, but by the Archbishop and all the Clergy of that Province, and after abjured thereupon, and after that newly convicted and condemned by the Clergy of that Province, in their general Council of Convocation: But the Stat. 2 H. 4. c. 15. doth give the Bp. in his Diocese Power to condemn an Heretick; And that before that Stat. he could not be committed to the secular Power to be burnt, until he had once abjured, and was again relapsed to that, or some other Heresy; whereby it appeareth that the K. by Consent of Parliament directed the Proceedings in the Ecclesiastical Court in Case of Heresy, and other Matter more spiritual.

The Pope cannot alter the Laws of England.

The Judges say, that the Statutes which restrain the Pope's Provisions to the Benefices of the Advowsons of Spiritual Men, were made, for that the Spirituality durst not in their just Cause say against the Pope's Provisions: So as those Statutes were made, but in Affirmance of the Common Laws.

Excommunication made by the Pope is of no Force in England, and the same being certified

3 Inst. 49.

This had Resemblance to an Attainder of Treason, wherein there must be first an Indictment by one Jury, and a Conviction by another.

11 H. 4. 37.

11 H. 4. f. 69.
76.

14 H. 4. f. 14.
Vide 30 E. 3.
lib. Ass. pl. 19.
before.
Vide 13 E.
Certificat. 6.

fied

Vide 20 H. 6. r.
35 H. 6. 42.
7 Ed. 2. 14.
F. N. F. 64. F.
Antea 15. b.
Post. 26. b. 27. E.

ried by the Pope into any Court in England ought not to be allowed, neither is any Certificate of any Excommunication available in Law, but that is made by some Bishop of England, for the Bishops are by the Common Laws, the immediate Officers and Ministers of Justice to the King's Courts in Causes Ecclesiastical.

14 H. 4. 14.

If any Bp. do excommunicate any Person for a Cause that belongeth not unto him, the King may write unto the Bishop, and command him to assyle and absolbe the Party.

Statute de 2 H.
4. cap. 3.

If any Person of Religion obtain of the Bishop of Rome to be exempt from Obedience regular or ordinary, he is in Case of Præmunire, which is an Offence as hath been said, contra Regem, coronam, & dignitatem suas.

Statute de 6 H.
4 cap. 1.

The Commons did grievously complain to the King, at the Parliament holden in the sixth Year of H. 4. of the horrible Mischiefs and damnable Customs which then were introduced of new in the Court of Rome, that no Person Abbot or other should have Provision of any Archbishop, or Bishop, which should be void, till he had compounded with the Pope's chamber, to pay great and excessive Sums of

cata per papam alicui curie in Anglia admitti & approbati non debet, neq; alicujus excommunicationis ejusmodi significatio in lege vim habet, sed quæ per aliquem Angliæ episcopum facta sit: Episcopi enim per leges communes sunt officarii immediati, & Justitiæ administri ad curias Regis in causis ecclesiasticis.

Si episcopus personam quamcunque excommunicaverit, pro causa ad eundem episcopum non spectante; Rex in eo casu scribat hujusmodi episcopo, ei præcipiens personam illam nodo excommunicationis sic innotatam absolvere.

Siqua religiosa persona a pontifice Romano impetaverit, ut ab obedientia regulari eximatur, incurret Præmunire, quod est crimen ut jam antea dictum contra Regem, ejus coronam, & dignitatem.

In Parlamento habito anno 6 Henrici quarti, communitas Regni querelam gravissimam regi exhibuit de flagitiis atrocibus, & damnanda consuetudine, tum temporis in Romanam curiam recens introductis, viz. Quod nulla persona, abbas, vel quispiam alius, provisionem alicujus archiepiscopatus, vel episcopatus vacantis haberet, priusquam cum papali

pali camera tranſegerit, ad magnam vim pecuniæ perſolvendam, tam pro primitiis ejuſdem archiepiſcopatus vel epiſcopatus, quam pro aliis minoribus penſitationibus in eadem curia: Et quod ea vis pecuniæ, vel major pars ejus præ manibus ſolveretur, quæ pecuniæ ſumma duplo vel triplo ad minimum major erat quam quæ ſuperioribus temporibus in eadem camera & alibi, ratione ejuſmodi provisionum ſolvi ſolebat, unde magna pars opum hujus regni ad prædictam curiam aſportata fuerat, & futuris temporibus aſportanda eſſet, ad archiepiſcopatus, vel epiſcopatus intra prædictum regnum, & alibi intra Regis dominia exhauriendos, ſi modo ſalutare remedium non adhiberetur. Rex ad honorem Dei omnipotentis, tam ad damna & detrimenta regni, quam ad pericula animarum ipſorum, qui ad archiepiſcopatus & epiſcopatus intra regnum Angl', & alibi intra Regis dominia extra prædictum regnum propulſanda, concilio & aſſenſu magnatum regni ſui in Parlamento ſtatuit & ſanxit, quod ipſi & ipſorum ſinguli, qui prædictæ cameræ vel alibi, pro ejuſmodi primitiis & ſervitiis majorem vim pecuniæ ſolverent quam retroactis tempo-

Money, as well for the firſt Fruits of the ſame Archbiſhoprick or Biſhoprick, as for the other leſſe Services in the ſame Court: And that the ſame Sums, or the greater Part thereof be paid before Hand, which Sums paſſed the Treble or the Double at the leaſt of that that was accuſtomed of old Time to be paid for the ſaid Chamber, and otherwiſe by the Occaſions of ſuch Proviſions, whereby a great Part of the Treafure of this Realm had been brought and carried to the ſaid Court, and alſo ſhould be in Time to come, to the great impoveriſhing of the Archbiſhops and Bps. within the ſame Realm, and elſewhere within the K.'s Dominions, if convenient Remedy were not for the ſame provided. The King to the Honour of God, as well to eſchew the Damage of this Realm, as the Perils of their Souls, which owen to be advanced to any Archbiſhopricks and Biſhopricks within the Realm of Engl. and elſewhere within the K.'s Dominions, out of the ſame Realm, by the Advice and Aſſent of the great Men of his Realm in the Parliament, did ordain and eſtabliſh, that they and every of them that ſhould pay to the ſaid Chamber or otherwiſe, for ſuch Fruits and Services greater Sums of Money than had been accuſtomed to be paid in old time paſt, they and every

every of them should incur the Forfeiture of as much as they may forfeit towards the King, as by the said Act appeareth.

Statute de 7 H.
4. cap. 6.

So Person religious or secular, of what Estate or Condition that he were, by colour of any Bulls, containing Privileges, to be discharged of Tithes pertaining to Parish Churches, Prebends, Hospitals, Vicarages, purchased before the first Year of King Richard the second, or after not executed, should put in execution any such Bulls so purchased, or any such Bulls to be purchased in Time to come, upon the Pain of a Præmunire, as by the said Act appeareth.

ribus solvi consuevit, ipsi & ipsorum singuli incurrerent tantam multam quantam erga Regem multari possent, ut ex eodem statuto liquido constat.

Nemo religiosus vel secularis cujuscunque loci vel conditionis, sub obtentu bullarum quarumcunque cum privilegiis, ut exonerarentur decimis ad Ecclesias parochiales, præbendas, hospitalia, vicariasque spectantibus, (quæ quidem bullæ impetratæ fuissent ante Regis *Richardi secundi* annum primum, vel postea, & non executioni mandatæ fuerant) exequeretur ulla ejusmodi bullas ita impetratas, aut in futurum impetrandas, sub pœna *Præmunire*, ut ex eodem statuto clare elucet.

In the Reign of King
Henry V.

*Regnante Henrico
quinto.*

Statute de 3 H.
5. cap. 4.

IN an Act of Parliament made in the third Year of King H. 5. It is declared, that whereas in the Time of King H. 4. Father to the said H. the 7. Year of his Reign, to eschew many Discords and Debates, and divers other Mischiefs which were likely to arise and happen because of many Provisions then made, or to be made by the Pope, and also of Licence thereupon granted by the said late King, amongst other Things; It was ordained and established,

IN statuto parliamento IN anno tertio Regis *Henrici quinti* facto declaratur, quod quandoquidem tempore Regis *Henr. 4.* patris ejusdem Regis, scilicet anno septimo regni ejusdem, ad evitanda multas contentiones, lites, & varia alia mala probabiliter tunc exoritura ex multis provisionibus per papam tunc concessis, & concedendis, & etiam ex licentia inde per eundem nuper Regem concessa, inter alia scitum & sancitum erat,

ciplinæ in questionem venit, quod declaratum, explicatum, & demonstratum erat, per eam præd' corporis politici partem, qui ecclesiastici vocantur, tunc vulgo vocitata *Ecclesia Anglicana*, quæ semper talis habita, & etiam agnita, ut scientia, integritate, & suo numero semper haberetur, & hodie habeatur ex se sufficiens & idonea sine exterorum adminiculo, ad declarandum & determinandum quæcunque in questionem venerint, & ad administrandum omnia munia, quæ ad spirituales ordinem spectant: Quæ ut quam commodissime & recte administrantur, & ipsi a corruptione & prava affectione deterreantur, Regis progenitores illustrissimi, & procerum hujus Regni antecessores, præd' ecclesiam Angl' cum honore, tum possessionibus satis superq; dotarunt: Leges etiam temporales ad terrarum & bonorum proprietatem decidendam & ad populum hujus Regni in unitate, pace, sine prædatione & expilatione conservandum administrabantur, & executioni mandabantur per diversos judices & ministros alterius partis præfati corporis politici, quæ temporalitas appellatur, & utriusque auctoritates & jurisdictiones in debita justiciæ administratione mutuo con-

That it was declared, interpreted and shewed by that Part of the said Body politicke, called the Spirituality, then being usually called the English Church, which always had been reputed and also found of that Sort, that both for Knowledge, Integrity, and sufficiency of Number, it had been always thought, and was also at that Hour sufficient and meet of it self, without the intermedling of any exterior Person or Persons, to declare and determine all such Doubts, and to administer all such Offices and Duties as to the Rooms spiritual did appertain: For the due Administration wherof, and to keep them from Corruption, and sinister Affection, the King's most noble Progenitors, and the Ancestors of the Nobles of this Realm, did sufficiently indow the said Church both with Honour and Possessions: And the Laws temporal for Trial of Propriety of Lands and Goods, and for the Conservation of the People of this Realm in Unity and Peace, without Ravine or Spoil, was and then was administered, adjudged, and executed by sundry Judges and Ministers of the other Part of the said Body politicke called the Temporality, and both their Authorities and Jurisdictions did conjoin together in the due Administration of Justice, the one to help the other: And
where

Whereas the King his most noble Progenitors and the Nobility and Commons of the said Realm, at divers and sundry Parliaments, as well in the Time of King Edw. 1. Edw. 3. Rich. 2. H. 4. and of other noble Kings of this Realm, made sundry Ordinances, Laws, Statutes and Provisions, for the entire and sure Conservation of the Prerogatives, Liberties and Preeminences of the said imperial Crown of this Realm, and of the Jurisdiction, Spiritual and Temporal of the same, to keep it from the Annoyance as well of the See of Rome, as from the Authority of other foreign Potentates, attempting the Diminution or Violation thereof, as often and from Time to Time as any such Annoyance or Attempt might be known or espied: And notwithstanding the said good Statutes and Ordinances made in the Time of the King's most noble Progenitors, in Preservation of the Authority and Prerogative of the said imperial Crown as aforesaid: Yet nevertheless since the Making of the said good Statutes and Ordinances, divers and sundry Inconveniencies and Dangers, not provided for plainly by the said former Acts, Statutes and Ordinances, have risen and sprung by Reason of Appeals sued out of this Realm

currerunt. Quandoquid etiam Regis progenitores serenissimi, regniq; proceres, & communitas, variis & diversis parliamentis, temporibus Regis E. 1. E. 3. R. 2. & H. 4. & aliorum serenissimorum hujus Regni regum, varias ordinationes, leges, statuta & provisiones sanxerint, ad solidam & salutarem prerogativarum, libertatum, preheminentiarum prefate coronae imperialis hujus Regni, & jurisdictionum spiritualium & temporalium ejusdem conservationem, ut defenderetur tam a detrimentis quae a sede Romana imminabant, quam ab autoritate aliorum principum exteriorum, qui eandem imminuere aut violare machinarentur, quoties singulis temporibus ejusmodi detrimenta aut machinationes prospicerentur aut detegerentur; quamvis autem statuta illa salutaria & ordinationes temporibus serenissimorum progenitorum Regis, ad auctoritatem & prerogativam prefate coronae imperialis firmandam facta fuerint, ut jam antea dictum: Nihilominus ex quo illa facta fuerint, quamplurima incommoda & pericula non plane provisiva in superioribus illis statutis & ordinationibus pullularint per appellationes ad sedem romanam in causis testamentariis,

erat, quod nulla ejusmodi licentia aut facultas, ita concessa ante prædicti statutum, aut postea concedenda, vim haberet ad conferendum aliquid beneficium plenum, quod suum habuit incumbentem die quo ejusmodi licentia aut facultas data fuerit; nihilominus diversæ personæ, quæ papales provisiones ad diversa beneficia in Anglia & alibi, & regiam licentiam eisdem provisiones exequendi habent, sub prætextu earundum provisionum, facultatum & acceptationum prædictorum beneficiorum nonnullos suis beneficiis dolo malo excluderunt quibus longo jam tempore gavisæ sint, & incubuerint ex collatione indubitatorum patronorum spiritualium ipsis cogitato & debite facta, ad eorundem incumbentium statum enervandum & disturbandum. Rex summo studio ejusmodi mala propulsandi statuit & sanxit; quod omnes incumbentes cujuslibet beneficii ecclesiastici, ex patronatu, collatione, vel præsentatione ecclesiasticorum patronorum, quiete & pacifice iisdem fruereantur sine ulla inquietatione, molestatione, aut vexatione, sub ejusmodi provisionum facultatum & acceptationum prætextu: Et quod omnes licentiæ, ac facultates ex ejusmodi provisionibus

that no such Licence or Pardon so granted before the same Ordinance, or afterwards to be granted, should be available to any Benefice full of any Incumbent, at the Day of the Date of such Licence or Pardon granted: Nevertheless divers Persons, having Provisions of the Pope of divers Benefices in Engl. and elsewhere, and Licences Royal to execute the same Provisions, have by Colour of the same Provisions, Licences and Acceptations of the said Benefices, subtilly excluded divers Persons of their Benefices, in which they had been Incumbents by a long Season of the Collation of the very Patrons spiritual, to them duly made to their Intent, to the utter Destruction and Enervation of the Estates of the same Incumbents. The King willing to void such Mischiefs, hath ordained and established, that all the Incumbents of every Benefice of Holy Church, of the Patronage, Collation, or Presentation of spiritual Patrons, might quietly and peaceably Enjoy their said Benefices, without being inquieted, molested, or any ways grieved, by any Colour of such Provisions, Licences and Acceptations: And that all the Licences and Pardons upon and by such Provisions made in any Manner, should be void, and of no Valour; and if any feel himself
d grieved,

grieved, molested or inquieted, in any wise from thenceforth by any, by Colour of such Provisions, Licences, Pardons, or Acceptations, that the same Molesters, Grievers, or Inquietors, and every of them, have and incur the Pains and Punishments contained in the Statutes of Provisors before that Time made, as by the said Act appeareth.

ullo modo factæ irritæ sint, & nullius momenti: Qd' si quis se ab aliquo divexatum, exagitatum, aut molestiis affectum ullo modo jam indolentiret, sub ejusmodi provisionum, licentiarum, facultatum, aut acceptationum prætextu, qui ita molestias facefferent, gravamina injicerent, aut quietem disturbarent, ipsorum singuli poenam & animadversionem quæ in statuto de provisoribus facto subeant, ut ex eodem statuto planissime liquet.

Statut. de 2 H. 5. cap. 7.
(a) Lollardy a Lolio. For as Cockle is the Destruction of the Corn, so is Heresy the Destruction of true Religion.

A Statute was made for Extirpation of Heresy, and Lollardy, whereby full Power and Authority was given to the Justices of Peace, and Justices of Assize to Inquire of those that hold Errors, Heresies, or Lollardy, and of their Maintainers, &c. And that the Sheriff or other Officers, &c. may arrest and apprehend them.

Statutum ad extirpandam hæresin, & hæreticam pravitatem factum erat, quo plenaria potestas & autoritas Eirenarchis, & assisarum justiciariis data, inquirendi de illis qui errores, hæresies, vel hæreticam pravitatem defendunt, & de eorum fautoribus, &c. Et qd' vicecomes, vel alius officarius, eos apprehendere possit.

Stat. de 2 H. 5. cap. 1.

(a) *Perperam sane, sed potius a Gualtero Lolhard Germanico quodam qui floruit circa annum Dom. 1315. Spelm. Gloss. Tit. Lollardia. 3 Inst. 43 Linwood 300.*

The King by Consent of Parliament, giveth Power to Ordinaries to enquire of the Foundation, Creation and Governace of Hospitals, or other than such as be of the King's Foundation, and thereupon to make Correction and Reformation according to the Ecclesiastical Law.

Infelix lolium, & steriles dominantur avena. Virgilius. Et caveant lolis oculis vitiantibus agri. Ovidius.

Rex assensu parliamentario dat ordinariis potestatem inquirendi de fundatione, erectione, administratione hospitalium, præterquam eorum quæ sunt ex Regis fundatione, & etiam corrigendi & reformandi juxta legem Ecclesiasticam.

Regnante Henrico In the Reign of King
Sexto *Henry VI.*

EXcommunicatio facta, & significata per papam nullam vim habet ad aliquem incapacem in Anglia reddendum: Et hoc per antiquas leges communes, priusquam statutum de jurisdictione externa factum erat.

Rex solummodo potest concedere & licentiam dare fundandi incorporationem spiritualem.

Tempore Regis *Hen. 6.* Pontifex Romanus literas scripsit ad derogationem Regis & maiestatis eius, & Ecclesiastici ne hincere quidem contra ausi sunt; verum *Humfridus Dux Gloucestriz*, (scilicet ne perirent) in ignem projecit.

Regnante Edwardo In the Reign of King
Quarto. *Edward IV.*

E*Dw' do quarto regnante,* Pontifex Romanus Priori Sancti Johannis Asylum infra prioratum suum concessit, hoc disceptatum erat, & Prior sibi vendicavit; verum iudices pronunciarunt Papam nullam habuisse potestatem concedendi aliqua asyli jura in hoc regno, & igitur legis sententia improbatum erat, & minime permiffum.

EXcommunication (a) made and certified by the Pope, is of no Force to disable any Man within England: And this is by the ancient Common Laws befoze any Statute was made concerning fozeign Jurisdiction.

8 H. 6. f. 37
(a) Ant. 15. b.
23. b.
Postea 27. a.

The (b) King only may grant or licence to found a Spiritual Incorporation.

9 H. 6. f. 16. b.
(b) 4 Co. 107. b.
Dy. 81. pl. 64.

In the Reign of *H. Henry the Sixth*, the Pope writ Letters in Derogation of the King, and his Regalty, and the Churchmen durst not speak against them; but *Humfrey Duke of Gloucester* for their safe keeping put them into the fire.

1 H. 7. 10.

In the Reign of *H. Edward the Fourth*, the Pope granted to the *Abbot of St. John's*, to have Sanctuary within his Priory, and this was pleaded and claimed by the *Abbot*; but it was resolved by the Judges, that the Pope had no Power to grant any Sanctuary within this Realm, and therefore by Judgment of the Law the same was disallowed.

1 H. 7. 20.

9 E. 4. 3. Vide
F. N. B. f. 44.
H. agreeing
herewith.

There it appeareth, that the Opinion of the King's Bench had been oftentimes, that if one spiritual Person sue another spiritual Man in the Court of Rome for a Matter spiritual, where he might have Remedy before his Ordinary, that is the Bishop of that Diocese within the Realm, Quia trahit ipsum in placitum extra regnum, incurreth the Danger of a Præmunire: An hainous Offence, being contra legiantie sue debitum, in contemptum Domini Regis, & contra Coronam & Dignitatem suas; by which it appeareth, how grievous an Offence it was against the King, his Crown and Dignity, if any Subject, although both the Persons and Cause were spiritual, did seek for Justice out of the Realm, as though either there wanted Jurisdiction or Justice was not executed in the Ecclesiastical Courts within the same, which (as it hath been said) was an high Offence, contra Regem, Coronam & Dignitatem suas.

Nota.

9 E. 4. 28.
Boon's Exam.
Leg. Angliæ
p. 15.
3 Inst. 114.
Hale's Pl. Cor.
240.

In the K.'s Courts of Record, where Felonies are determined, the Bp. or his Deputy ought to give his Attendance, so the End that if any that is indicted and arraigned for Felony, do demand the Benefit of his Clergy, that the Ordinary may inform the Court of his sufficiency or insufficiency, that is, whether he can read as a Clerk or not, whereof notwithstanding

Eo loci perspicuum est, quod tribunal regium sæpenumero in ea fuit opinione; qd' si aliquis ecclesiasticus alium ecclesiasticum in jus vocaverit in curia romana de re aliqua Ecclesiastica, cum coram ordinario, qui est Ep'us diocæfios intra regnum sibi remedium compararet, quia trahit ipsum in placitum extra regnum, poenam præmunire incurrit: delictum sane atrox contra legiantie sue debitum, in contempt' Dom' Regis, & contra Coronam & Dignitatem suam: Unde patet quantum erat delict' contra Regem, suam Coronam, & dignitatem, si quis subditus (quamvis & persona & causa esset ecclesiastica) jus suum extra regnum persequeretur, quasi vel jurisdictio deesset, vel justitia non coleteretur in curiis Ecclesiasticis intra regnum, quod ut jam diximus nefarium erat delict' contra Regem Coronam & Dignitatem suas.

In curiis Domini Regis (ad quarum cognitionem crimina felonie spectant.) Episcopus ejusve Deputatus interesse & attendere debet, eo nimirum proposito, quod si aliquis ibidem de feloniam indictatus & arreatus existens, clericale privilegium petierit, ordinarius superinde curiam illam de habilitate sive inhabilitate hujusmodi delinquentis

quentis poterit informare, scil't utrum legere valeat ut clericus five non; & tamen ordinarius in eo casu sententiam suam ut iudex ferre non potest, sed tantummodo officio ministri curiæ regalis fungitur; & iudicium utrum huiusmodi persona sit habilis aut inhabilis, ad iudices curiæ illius solummodo spectat: Ac quodcunq; illis ab ordinario informatum erit, ipsi iudices super debet' examinatione delinquentis, sententiam suam contra ordinarii relationem promulgare possint, quia iudices illi a Rege assignati sunt ejusd' causæ proprii & soli iudices.

Excommunicatio papalis nullius est momenti aut auctoritatis in regno Angliæ.

Tempore hujus Reg' Ed. quarti legatus papalis Calitium venit, animo in Angliam trajiciendi, verum Rex & qui ab ejus concilio, noluerunt permittere ut Angliam ingrederetur, priusquam jus jurandum præstitisset se nihil contra Reg' vel ejus Coronam machinatur; qd' etiam alteri Legato Papali ipso regnante fact': Et hoc ita relatum est, 1 H. 7. f. 10.

ing the Ordinary is not to judge, but is a (a) Minister to the King's Court; and the Judges of that Court, are to judge of the Sufficiency or Insufficiency of the Party; whatsoever the Ordinary do inform them, and upon due Examination of the Party, may give Judgment against the Ordinary's Information, for the King's Judges are Judges of the Cause.

(a) Stanf. Cor. 133. a.

The Pope's Excommunication is of no Force within the Realm of England. 12 E. 4. f. 16.

In the Reign of King Edward the Fourth, a Legate from the Pope came to Calais, to have come into England, but the King and his Council would not suffer him to come within England, until he had taken an Oath, that he should attempt nothing against the King or his Crown: And so the like was done in his Reign to another of the Pope's Legates: And this is so reported in 1 Hen. 7. fol. 10.

Regnante Richardo Tertio.

In the Reign of King Richard III.

JUDICES pronunciarunt, qd' iudicium vel excom-

It is resolv'd by the Judges, that a Judgment or Excom- 2 R. 3. f. 22. d 3 come

communication in the Court of Rome, should not bind or prejudice any Man within Engl. at the Common Law.

municatio in Curia Romana non obligaret vel præjudicaret cuiquam in lege communi in regno Angliæ.

In the Reign of King
Henry VII.

*Regnante Henrico
Septimo.*

1 H. 7. c. 10.

In the Reign of K. H. VII. the Pope had excommunicated all such Persons whatsoever, as had bought Allom of the Florentines; and it was resolved by all the Judges of England, that the Pope's Excommunication ought not to be obeyed, or to be put in Execution within the Realm of England.

Henrico septimo regnante, Pontifex Romanus sacris interdixit quotquot alumen a Florentinis emissent; ab omnibus tamen Angliæ iudicibus pronunciatum est, quod papalis interdictio non obediretur, aut executioni mandaretur in regno Angliæ.

Statut. de
1 H. 7. c. 4.

In a Parliament holden in the first Year of K. H. VII. for the more sure and like Reformation of Priests, Clerks, and religious Men, culpable, or by their Demerits openly noised of incontinent living in their Bodies, contrary to their Order; it was enacted, ordained and established, by the Advice and Assent of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same; that it be lawful to all Archbishops and Bishops, and other Ordinaries, having episcopal Jurisdiction, to punish and chastise Priests, Clerks, and religious Men, being within the Bounds of their Jurisdiction, as shall be committed aforesaid them by Examination, and

In Parlamento an' primo Regis Henrici septimi habito, ad majorem & efficaciorum reformationem sacerdotum, clericorum, & personarum religiosarum, qui ob incontinentiam vel in crimen vocati, vel vulgo male audierunt contra ipsorum professionem, statutum ordinatum & sancitum erat concilio & assensu dominorum spiritualium & temporalium, & communitatis eodem Parlamento, & ejusdem auctoritate, quod omnes Archiepiscopi & Episcopi, & alii Ordinarii, quibus est jurisdictionis episcopalis, possint ex jure punire & castigare sacerdotes, clericos & personas religiosas, intra jurisdictionis ipsorum limites, quotquot coram illis examina-

minatione, vel alia legitima probatione requisita per legem ecclesiasticam, convicti fuerint adulterii, fornicationis, incestus, vel alicujus incontinentiæ carnalis, eisdem incarcerando, & in carcere detinendo, quamdiu illis prudentia visum fuerit juxta delicti gravitatem: Quodq; nullus prædictorum Archiepiscoporum, Episcoporum, aut Ordinariorum in jus vocentur ulla actione de incarceratione injusta: Sed qd' in causis præd', virtute hujus statuti sint omnino inde exonerati.

Rex est persona mixta, quia cum ecclesiasticam tum temporalem jurisdictionem habeat.

Per leges Ecclesiasticas in hoc regno approbatas, unus sacerdos duo beneficia habere non potest, nec Bastardus sacris initiarii: Verum Rex ecclesiastica potestate & jurisdictione quam habeat, in utroque dispensare potest; quia mala sunt prohibita, & non mala per se.

lawful Proof requisite by the Law of the Church of Adultery, Fornication, Incest, or any other fleshly Incontinency, by committing them to Ward and Prison, there to abide for such Time as shall be thought to their Discretions convenient for the Quality and Quantity of their Trespass: And that none of the said Archbishops, Bishops, or Ordinaries aforesaid, be thereof chargeable, of, to or upon any Action of false or wrongfull Imprisonment, but that they be utterly thereof discharged in any of the Cases aforesaid, by Virtue of this Act.

Rex (a) est persona mixta, because he hath both Ecclesiastical, and Temporal Jurisdiction.

By the Ecclesiastical Law allowed within this Realm, a Priest cannot have two (b) Benefices, nor a (c) Bastard can be a Priest. But the R. may by his Ecclesiastical Power and Jurisdiction, dispence with both of these, because they be mala prohibita, and not mala per se.

10 H. 7. 18.
(a) 1 Rol. 657.
2 Co. 44. a.
13 Co. 17.
Davis 4. a.

11 H. 7. 12.

(b) Hob. 147.
(c) Hob. 147.

Regnante Henrico Octavo.

In the Reign of King Henry VIII.

Statuto Parliamenti habiti 24. Regis Hen. octavi facto per Regem, Episcopos 24. Abbates & Priores 29. (totidem enim tunc erant Domini Parlamentarii) per

By an Act of Parliament made the 24th Year of H. K. 8. that is to say by the R. viiij Bishops, viij Abbots and Priors, for so many were then Lords of Parliament,

Statute of 24 H. 8. c. 12. This Statute is declaratory of the ancient Laws of Eng. as manifestly appeareth by

that which hath been said. See Br. Abr. Tit. Presentment al Esglise pl. 12. The Pope was permitted to do certain Things within this Realm by Usurpation, and not of Right, until the Reign of H. 8.

(a) Ant. 8. b.

ment, by all the Lords Temporal and the Commons in that Parliament assembled, It is declared, That where by divers sundry old authentick Histories and Chronicles, it was manifestly declared and expressed, that this Realm of Engl. is an Empire, and so hath been accepted in the World, governed by one supreme Head and King having the Dignity and royal Estate of the (a) imperial Crown of the same, unto whom a Body politic compact of all Sorts and Degrees of People, divided in Terms and by Names of Spirituality and Temporality, been bound and ought to bear next to God, a natural and humble Obedience, he being also institute and furnished by the Goodness and Favourance of Almighty God, with plenary, whole, and entire Power, Preheminence, Authority, Prerogative and Jurisdiction, to render and yield Justice and final Determination to all manner of Folks, Residents or Subjects within this his Realm, in all Causes, Matters, Debates and Contentions, happening to occur, insurge or begin within the Limits thereof, without Restraint or Provocation to any foreign Princes or Potentates of the World: The Body Spiritual whereof having Power when any Cause of the Law divine happened to come in Question, or of spiritual Learning,

omnes Dominos temporales, & communitatem in eodem parlamento declaratum est, quod cum ex variis historiis ac chronicis antiquis & fide dignis clarissime constat, hoc Angliæ regnum imperium esse, & ita per universum orbem terrarum habitum fuisse, quod administratum ab uno supremo capite & rege, qui imperialis coronæ ejusdem dignitatem & regiam habet majestatem, cui corpus politicum, ex populo cujuscunque loci & ordinis compactum, nominibus ecclesiasticorum & laicorum distinctum, obstrictum est, ac naturalem submissamque obedientiam proxime a Deo præstare debet; cum ille etiam divini numinis benignitate & gratia, instructus & munitus sit potestate, præheminentia, autoritate, prærogativa plenaria integra & omnimoda, ad justitiam reddendam, & jus decidendum omnibus subditis & residentibus intra hoc suum regnum, in omnibus causis, litibus, & contentionibus exorientibus & pululantibus, intra ejusdem limites sine prohibitione aut provocatione ad quosvis externos orbis terrarum principes aut monarchas: Cum corpus item Ecclesiasticum potestatem habeat, quando ulla causa legis divinæ vel Ecclesiasticæ disciplinæ

tariis, matrimonialibus, divortiiis, jure decimarum, oblationibus & obventionibus, non solum ad perturbationem, vexationem, & impensas Regiæ celsitudinis & quam plurimorum ejus subditorum & residentium in hoc Regno; verum etiam ad magnam protractionem & impeditionem in causis illis vere & & brevi tempore decidendis: Quoniam qui ad Romanam curiam appellarunt, id plerumque fecerunt, ad justitiam protelandam, cumque tantum erat intervalum inter hoc regnum & Romam, ut necessariæ probationes ex certa causæ scientia tam perfecte haberi, aut testes tam recte examinari non possent, quam intra hoc regnum; usque adeo, ut qui illis appellationibus divexati fuerint nullam plerumque remedium suis malis invenerint. Unde Rex, regni proceres, & communitas perpendentes magnas enormitates, pericula, procraftinationes & detrimenta, quæ tam suæ celsitudini, quam suis proceribus, subditis, & intra regnum suum residentibus in prædictis causis testamentariis, matrimonialibus, divortiiis, decimis, oblationibus & obventionibus, indes exorientur, Regio suo assensu & dominorum spiritualium ac temporalium, nec non communitatis con-

to the Sea of Rome, in Causes testamentary, Causes of Patrimony and Divorces, Right of Tithes, Oblations and Obventions, not only to the great Inquietation, Agitation, Trouble, Costs and Charges, of the King's Highness and many of his Subjects and Reliants in this his Realm, but also to the great Delay and Let to the true and speedy determination of the said Causes: Forasmuch as the Parties appealing to the said Court of Rome, most com'ly did the same for delay of Justice: And forasmuch as the great Distance of Way was so far out of this Realm, so that the necessary Proofs nor the true knowled. of the Cause could neither be so well known, or the Witnesses there so well examin'd, as within this Realm: So that the Parties grieved by Means of the said Appeals, were most Times without Remedy. In Consideration thereof, the King his Nobles and Commons, considering the great Enormities, Damages, long Delays and Hurts that as well to his Highn. as to his noble Subjects, Commons, and Reliants of this his Realm, in the said Causes Testamentary, Causes of Patrimony and Divorces, Tithes, Oblations and Obventions, did daily ensue; did therefore by his Royal Assent, and by the Assent of the Lords Spiritual and Temporal, and the Commons in

in that Parliament assembled, and by Authority of the same, enact, establish, and ordain, that all Causes Testamentary, Causes of Patrimony and Divorces, Rights of Tithes, Oblations, and Obventions, the Knowledge whereof by the Goodness of Princes of this Realm, and by the Laws and Customs of the same, appertained to the Spiritual Jurisdiction of this Realm, then already commenced, moved, depending, being, happening, or hereafter coming in Contention, Debate, or Question within this Realm, or within any of the King's Dominions, or Marches of the same, or elsewhere, whether they concern the King his Heirs or Successors, or any other Subjects or Residents within this Realm, of what Degree soever they be, should be from thenceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the King's Jurisdiction and Authority and not elsewhere, in such Courts Spiritual and Temporal of the same, as the Natures, Conditions, and Qualities of the Cases and Matters aforesaid in Contention, or thereafter happening in Contention should require, without having any respect to any Custom, Use, or Sufferance, in Hindrance, Let, or Prejudice of the same, or to any other thing used or suffered to the contrary there-

sciverunt, sanxerunt, & statuerunt, quod omnes causæ testamentariæ, matrimoniales, divortia, jus decimarum, oblationum & obventionum, quorum cognitio ex beneficentia principum hujus regni, & ex ejusdem legibus & consuetudinibus ad spirituales hujus regni jurisdictionem spectarunt, tunc exortæ & dependentes, exorturæ in posterum, controversæ aut, controvertendæ in hoc regno, vel in ullis Regis Dominiis, aut eorundem limitibus vel alibi, si ve ad regem ipsum, ejus hæredes vel successores vel quemvis alium subditorum, aut intra hoc Regnum residentium, cujuscunque loci vel ordinis spectent, jam inde audiantur, examinentur, disceptentur, clare finaliter & definitive adjudicentur & determinantur, intra Regis jurisdictionem & autoritatem nec alibi, in ejusmodi curiis ecclesiasticis & temporalibus ejusdem, juxta causarum quæ sunt controversæ & controvertendæ naturam, conditiones & qualitates, nulla habita ratione cujuscunque consuetudinis aut tollerationis, vel rei in contrarium usitatæ, aut toleratæ in earundem obstaculum, impedimentum, aut præjudicium, quocunque alio modo quibuscunque personis quovis pacto,

This also is declaratory of the ancient Law, as it appeareth both by 9E.4.3; F. N. B. 44. and many other Cases and Statutes aforesaid.

pacto; quibuscunque exteris inhibitionibus, appellationibus, restrictionibus, iudiciis, vell ullis aliis processibus vel impedimentis cuiuscunque naturæ, nominis, qualitatis, fuerint, a sede Romana, aut quibuscunque curiis exteris aut orbis terrarum principibus, aut ex hoc regno aut Regis Dominiis, aut eorundem limitibus ad sedem Romanam, vel ad alias quascunque curias externas, aut principes, ad ejusdem obstaculum aut impedimentum ullo modo non obstantibus, ut ex eodem statuto clare elucet.

Ex statuto parliamentario anno 25 *Henrici octavi*, per Regem, dominos spirituales, temporales, ac communitatem in parlamento convenientes declaratum est, quod neque Rex, sui hæredes, successores hujus regni Reges, neque ulli subditi hujus regni, aut aliorum ejus dominiorum quorumcunque jam inde peterent a pontifice Romano, vel sede Romana, vel autoritate ejusdem, vel alicujus prælati hujus regni, vel ab aliqua persona sive personis, qui inde autoritatem habent, aut prætendunt, venias, dispensationes, compositiones, facultates, concessionis, rescRIPTA, delegationes, aut alia instrumenta aut scripta cuius-

of, by any other Manner, Person or Persons, in any Manner of wise: Any foreign Inhibitions, Appeals, Sentences, Summons, Citations, Suspensions, Interdictions, Excommunications, Restraints, Judgments, or any other Process or Impediment, of what Natures, Names, Qualities, or Conditions soever they be, from the See of Rome, or any other foreign Courts or Potentates of the World, or from and out of this Realm, or any other the King's Dominions or Parches of the same, to the See of Rome, or to any other foreign Courts or Potentates, to the Let or Impediment thereof in any wise notwithstanding, as by the said Act appeareth.

By an Act of Parliament in 25 H. 8. It is declared by the King, the Lords Spiritual and Temporal, and the Commons in that Parl. assembled; that neither the K. his Heirs, nor Successors King's of this Realm, nor any his Subjects of this Realm, nor of any other his Dominions, should from thenceforth sue to the said Bishop of Rome called the Pope, or to the See of Rome, or to any Person or Persons having or pretending any Authority by the same, for Licences, Dispensations, Impositions, Faculties, Grants, Rescripts, Delegacies, or any other Instruments, or Writings, of what kind, Name, Nature, or Quality soever they

Stat: 25 H. 8. c. 21. This was also declaratory of the antient Law, as by that which hath been said appeareth.

they be of, for any Cause or Matter, for the which any Licence, Dispensation, Composition, Faculty, Grant, Rescript, Delegacy, Instrument, or other Writing, theretofore had been used and accustomed to be had and obtained at the See of Rome, or by Authority thereof, or of any Prelate of this Realm: Nor for any Manner of other Licences, Dispensations, Compositions, Faculties, Grants, Rescripts, Delegacies, or any other Instruments or Writings, that in Causes of Necessity might lawfully be granted, without offending of the Holy Scripture and Laws of God, but that from thenceforth every such Licence, Dispensation, Composition, Faculty, Grant, Rescript, Delegacy, Instrument, and other Writing aforesaid named and mentioned, necessary for the King, his Heirs and Successors, and his and their People and Subjects, upon due Examination of the Causes and Qualities of the Persons procuring such Dispensations, Licences, Compositions, Faculties, Grants, Rescripts, Delegacies, Instruments, or other Writings, should be granted, had, and obtained from Time to Time within this his Realm, and other his Dominions, and not elsewhere, in Manner and Form following, and not otherwise, that is to say: The Archbishop of Canterbury, for the Time being, and

cunq̄ue generis, nominis, naturæ, aut qualitatis, ulla de causa vel re, pro quâ ulla venia, dispensatio, compositio, facultas, concessio, rescriptum, delegatio, instrumentum, aut aliud scriptum, quæ hactenus usitata fuerant, & a sede Romana impetrari consueverant: Neque pro quibuscunq̄ue aliis veniis, dispensationibus, compositionibus, facultatibus, concessionibus, Rescriptis, delegationibus vel aliis quibuscunq̄ue instrumentis aut scriptis, quæ necessitatis causa ex jure, sine sacrarum literarum aut legum divinarum præjudicio concedi poterant; sed quod jam inde quælibet ejusmodi venia, dispensatio, compositio, facultas, concessio, rescriptum, delegatio, instrumentum, aut alia scripta prænominata & memorata, Regi, suis hæredibus & successoribus, subditisque suis, examinatione debita causarum & qualitatum eorum, qui ejusmodi dispensationes, venias, compositiones, facultates, concessiones, rescripta, delegationes, instrumenta, vel alia scripta procurant, concederentur, haberentur, & impetrarentur deinceps intra hoc suum regnum, & alia sua dominia, & non alibi, juxta formam quæ hic subjicitur & non aliter, viz. Archiepiscopus Cantuariensis qui pro tempore fuerit, & ejus suc-

PART V. Of the King's Ecclesiastical Law.

successores deinceps potestatem & auctoritatem habeant, prout ipsis visum fuerit, dandi, concedendi, & disponendi, per instrumentum sub ejusdem archiepiscopali sigillo Regi, & ejus hæredibus & successoribus hujus regni Regibus, tam omnimodas ejusmodi licentias, venias, dispensationes, compositiones, facultates, concessiones, rescripta, delegationes, instrumenta, & quævis alia scripta de causis sacris scripturis, & divinis legibus non contradicentibus, quæ hactenus impetrari solita sunt per Regem & serenissimos progenitores, vel quemvis illorum subditum a sede Romana, vel a quacunque persona, auctoritate ejusdem, necnon quaslibet alias venias, dispensationes, facultates, compositiones, concessiones, rescripta, delegationes, instrumenta, & quævis alia scripta, quæ in ejusmodi causis & rebus singularis, ad Regis, suorum hæredum & successorum, honorem & securitatem, hujusque regni opulentiam & emolumentum sint consecrata & necessaria; ita tamen, quod præfatus archiepiscopus aut ejus successores, nullo modo ulla de causa aut re divini numinis legibus repugnante, aliquam dispensationem, veniam, rescriptum, aut quodvis aliud scriptum prius me-

his Successors, should have Power and Authority from Time to Time by their Discretions, to give, grant, and dispose by an Instrument under the Seal of the said Archbishop unto the King, and unto his Heirs and Successors Kings of this Realm, as well all Panner such Licences, Dispensations, Compositions, Faculties, Grants, Rescripts, Delegacies, Instruments, and all other Writings, for Causes not being contrary or repugnant to the Holy Scriptures and Laws of God, as theretofore had been used, and accustomed to be had and obtained by the King, or any his most noble Progenitors, or any of his, or their Subjects, at the Sea of Rome, or any Person or Persons by Authority of the same, and all other Licences, Dispensations, Faculties, Compositions, Grants, Rescripts, Delegacies, Instruments, and other Writings, in, for, and upon all such Causes and Matters as should be convenient and necessary to be had for the Honour and Surety of the King, his Heirs and Successors, and the Wealth and Profit of this his Realm, so that the said Archb. or any his Successors, in no manner wise should grant any Dispensation, Licence, Rescript, or any other Writing before rehearsed, for any Cause or Matter repugnant to the Law of Almighty God, as by the said Act also

ap

appeareth. If it be demanded what Canons, Constitutions, Ordinances, and Synodals provincial, are still in force within this Realm, I answer that it is resolved and enacted by Authority of Parliament, that such as have been allowed by (a) general Consent and Custom within the Realm, and are not contrariant or repugnant to the Laws, Statutes, and Customs of the Realm, nor to the Damage or Hurt of the King's Prerogative Royal, are still in force within this Realm, as the King's Ecclesiastical Laws of the same. Now, as Consent and Custom hath allow'd those Canons, so no Doubt by general Consent of the whole Realm, any of the same may be corrected, enlarged, explained, or abrogated. For Example, there is a Decree that all Clerks that have received any manner of Orders, greater or smaller, should be exempt, pro causis criminalibus before the temporal Judges. This Decree had never any force within England: First, for that it was never approved and allowed of by general Consent within the Realm: Secondly, it was against the Laws of the Realm, as it doth appear by infinite Precedents: Thirdly, it was against the Prerogative and Sovereignty of the King, that any Subject within this Realm

moratum concedet, ut ex eodem statuto clarissimè patet. Si quis quærat, qui canones, constitutiones, ordinationes, & synodi provinciales vires intra hoc regnum habeant, respondeo, parliamentaria autoritate judicatum & sancitum esse, quod quæ generali consensu & consuetud' intra hoc regnum approbantur, & regni legibus, statutis, & consuetudin' non adversantur, neq; regis prærogativæ fraudi sunt, vim suam & virtutem intra hoc regnum habent, ut ejusd' Regiæ leges ecclesiasticæ. Cum autem, ut consensus & consuetudo hos canones comprobaverint, ita proculdubio generali totius regni consensu quivis eorum canonum corrigi, adaugeri, explicari, aut abrogari possit. Verbi gratia, decretum extat, quod singuli clerici qui sacris ullo modo sunt initiati pro causis criminalibus coram judice temporalis exempti essent. Hoc decretum, nullas in Anglia vires habuit. Primum, quia nunquam generali consensu in hoc regno acceptum & approbatum erat. Secundo, quod regni legibus adversabatur, ut ex innumeris exemplis luce clarius est. Tertio, quod contra Regiam prærogativam & majestatem erat, quod aliquis subditus infra hoc

(a) Co. Lit.
344. a.

This appeareth by the Resolution of all the Judges in 7 H. 8. Lib. Kelw. fol. 18. And this was long before any Act of Parliament was made against foreign Jurisdiction by King H. 8.

hoc regnum legibus hujus should not be subject to the
regni non subjaceret. Laws of this Realm.

Regnante Eli- In the Reign of *zabetha.* *Q. Elizabeth.*

STatuto Parlamento præfato (ex quo causâ principalis tunc controversa partim dependet) sancito anno primo regni *Elizabethæ* declaratum est; quod cum regnante *Henrico* octavo variæ leges salutare, & statuta lata & sancita erant, tam ad extirpandam & penitus tollendam omnimodam usurpatam & exteram potestatem & auctoritatem ex hoc regno, & aliis ejus Dominiis & territoriis, quam ad restituendam & adunendam antiquam jurisdictionem, auctoritatem, superioritatem, & præheminentiam hujus regni coronæ imperiali, quæ de jure ad eandem spectant & pertinent; unde ab anno 25. ejusdem Regis *Henrici* octavi subditi hujus regni devotissimi, ordine & recte in officio continebantur, & quamplurimis magnis & intolerandis expensis & molestiis liberati fuerint quibus antea injuste oppressi & confictati fuerint, per potestatem & auctoritatem exteram eo usq; usurpatam; utque omnimoda usurpata & externa potestas, auctoritasque spiritualis & temporalis, in perpetuum exter-

BY the said Act of Parliament (whereupon the principal Case then in Question partly dependeth) made in the first Year of the Reign of the late Queen Elizabeth, it is declared; That where in the Time of the Reign of H. Henry the Eighth, divers good Laws and Statutes were made and established, as well for the utter Extinguishment and putting away, of all usurped foreign Powers and Authorities, of this Realm, and other her Dominions and Countries, as also for the Restoring and uniting to the imperial Crown of this Realm, the ancient Jurisdiction, Authorities, Superiorities, and Preheminences, to the same of Right belonging and appertaining; by Reason whereof her most humble Subjects, from the xvth Year of the said King Henry the Eighth, were continually kept in good Order, and were disburdened of divers great and intolerable Charges and Exactions, before that Time unlawfully taken, and exacted by such foreign Power and Authority, as before that was usurped; and to the Intent, that all usurped and foreign Power and Authority, Spiritual and Temporal, might
for

The Statute of
1. of Queen
Elizabeth.

for ever be clearly extinguish-
ed, and never be used or obey-
ed within this Realm, or any
other her Dominions or Coun-
tries; it was by the Authority
of that Parliament enacted,
That no foreign Prince, Ber-
son, Prelate, State or Potentate,
Spiritual or Temporal, should at any Time after the
last Day of that Session of
Parliament use, enjoy or ex-
ercise any manner of Power,
Jurisdiction, Superiority, Au-
thority, Preheminence, or
Privilege Spiritual or Eccle-
siastical within this Realm,
or within any other the Kings
Dominions or Countries, that
then were, or hereafter should
be, but from thenceforth the
same should be clearly abo-
lished out of this Realm, and
all other her Dominions for
ever; any Statute, Ordinance,
Customs, Constitutions, or
any other Matter or Cause
whatsoever to the Contrary
in any wise notwithstanding.
And it was then also established
and enacted by the Authority
of that Parliament, that such
Jurisdicions, Privileges, Superiorities,
and Preheminences, Spiritual
or Ecclesiastical, as by any
Spiritual or Ecclesiastical
Power or Authority, had
heretofore been, or might law-
fully be exercised or used for
the Visitation of the Eccle-
siastical State and Persons, and
for Reformation, Order, and
Correction of the same, & of all

minaretur, & nunquam in
hoc regno vel aliis ejus
Dominis aut territoriis sit
in usu, aut observetur;
authoritate ejusdem Par-
liamenti scitum & sancitum
erat: Quod nullus exterus
princeps, prælatus, status vel
Dynasta spiritualis aut tem-
poralis, a postremo die ses-
sionis hujus Parliamenti, ul-
la potestate & jurisdictione,
superioritate, autoritate,
præheminentia, aut privile-
gio spirituali aut Ecclesia-
stico intra hoc regnum, aut
alia Reginæ Dominia aut
territoria, unquam uteretur,
frueretur, aut eadem exer-
ceret; sed qd' deinceps ea-
dem in perpetuum ex hoc
regno, & aliis ejus Domini-
is in æternum extermina-
rentur, quocunque statuto,
ordinatione, consuetudine,
constitutione, aut re quavis
alia non obstante. Eadem
etiam autoritate Parli-
amentaria scitum & sancitum
erat, qd' ejusmodi jurisdic-
tiones, privilegia, superioritates,
præheminentiæ Spirituales
vel Ecclesiasticæ, quæ per
aliquam Spiritualem vel
Ecclesiasticam autoritatem
hactenus in usu essent, vel
de jure esse possent ad
visitationem Ecclesiastici
status Spiritualium, atque
ad ejusdem etiam status &
ejusmodi personarum, atque
etiam omnium error, Hæresium,
Schismatum.

tum, abusuum, offensarum, contemptuum, & enormitatum reformationem, correctionem & correctionem, imperiali hujus regni coronæ adunirentur & adnecterentur. Quodque Regina, hæredes & successores hujus Regni Reges & Reginae, virtute hujus statuti plenariam potestatem & auctoritatem haberent per literas patentes per magno Angliæ sigillo, assignandi, nominandi, & auctoritate instruendi, quando & quoribus & quamdiu Reginae, hæredibus suis vel hujus regni successoribus, visum fuit ejusmodi personam aut personas natas ad exercendum & exequendum sub præd' Regina, hæredibus suis vel successoribus, omnimodas jurisdictiones, privilegia & præheminentias quovis modo ad aliquam Spiritualem vel Ecclesiasticam jurisdictionem pertinentes intra hæc Angliæ & Hiberniæ Regna, aut quævis alia ipsius Dominia vel territoria: Atq; etiam ad visitand', reformandum, ordinandum, corrigendum, & emendandum omnes errores, hæreses, schismata, abusus, offensas, contemptus, & enormitates quascunq; quæ Spirituali vel Ecclesiastica aliqua potestate, auctoritate vel jurisdictione, reformari, ordinari, corrigi, coerceri, vel emendari legitime

Manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts, and Enormities, should for ever by Authority of that Parliament, be united and annexed to the imperial Crown of this Realm. And that the D. her Heirs and Successors, Kings and Queens of this Realm, should have full Power and Authority by Virtue of that Act, by Letters Patent under the Great Seal of Engl. to assign, name, and authorize, when and as often as the Queen, her Heirs or Successors should think meet and convenient, and for such and so long Time as should please the Queen her Heirs or Successors, such Person or Persons being natural born Subjects to the Queen her Heirs or Successors, as the said Queen her Heirs or Successors should think meet, to exercise, use, occupy, and execute, under the said Queen her Heirs and Successors, all manner of Jurisdictions, Privileges, and Preheminences, in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction within these Realms of Engl. and Ireland, or any other her Dominions or Countries, and to visit, reform, redress, order, correct, and amend, all such Errors, Heresies, Schisms, Abuses, Offences, Contempts and Enormities whatsoever, which by any manner Spiritual or Ecclesiastical

Ecclesiastical Power, Authority, or Jurisdiction, could or might lawfully be reformed, ordered, redressed, corrected, restrained or amended, to the Pleasure of Almighty God, the Increase of Virtue, and the Conservation of the Peace, and the Unity of this Realm: And that such Person or Persons so to be named, assigned, authorized, and appointed by the said D. her Heirs or Successors, after the said Letters Patent, to him or them made and delivered as is aforesaid, should have full Power and Authority by Virtue of that Act, and of the said Letters Patent under the said D. her Heirs or Successors, to exercise, use, and execute all the Premises according to the Tenor and Effect of the said Letters Patent, any Matter or Cause to the Contrary in any wise notwithstanding, as by the said Act also appeareth.

It was adjudged in the Court of Com. Pleas, by Sir James Dyer, Weston, and the whole Court, that a Dean or any other Ecclesiastical Person may resign, to the King (as a) divers did to King Edward VI.) so that he had the Authority of the Supreme Ordinary.

From the 1 until the 21 Year of the late D. Eliz. Reign no Person of what Persuasion of Christ. Religion soever, at any Time refused to come to the publick divine service, celebra-

possint ad divini numinis gloriam, virtutis incrementum, & pacis unitatisque in hoc regno conservationem. Porro quod ejusmodi persona vel personæ nominandæ, assignandæ, autoritate instruendæ & instituendæ per præfatam reginam, hæredes vel successores, postquam prædictæ literæ patentis ipsi fuerint confectæ, & ipsi vel ipsis in manus traditæ, ut jam dictum est, virtute ejusdem statuti & literarum patentium, plenariam potestatem & autoritatem haberent exercendi & exequendi omnia præmissa sub prædictæ Regina, hæredibus vel successoribus, juxta prædictarum literarum patentium tenorem & sententiam, quavis re aut causa in contrarium non obstante, ut eodem statuto est etiam perspicuum.

De communium placitorum tribunali per Dominum *Jacob. Dyer, Weston,* & universam curiam pronunciatum erat: Quod decanus vel quævis alia persona Ecclesiastica Regi possit resignare, (ut nonnulli Regi Edwardo sexto resignarunt) eo quod supremi Ordinarii potestatem habuerit.

Ab anno Regni Reginae Elizabethæ primo usque ad undecimum nemo quacunque fuerit de Christiana Religione persuasione, ad rem Divinam

12 Eliz. Reg. Dyer.

(a) 2 Bulstr. 4

hominum hoc venenum infundentes, quod per illam *Pii quinti* bullam Regina fuerat excommunicata, regno abdicata, subditiq; sui omni erga ipsam fide & obsequio exempti, omne saxum moverant, ut ipsos a fide qua Regiæ Majestati erant obstricti abstraherent, & Ecclesiæ Romanæ reconciliarent. Hinc anno regni sui 27. parliamentaria autoritate statuit, crimen esse læsæ Majestatis, si quis Jesuita vel Sacerdos Romanenses nativus hujus regni subditus sacris Romanis iniuriatus, aut in Jesuitarum societatem admittus jam inde a regni sui initio, Dominia sua adiret, eo concilio ut ipsos inde arceret, ne subditos perfidis illis & perniciosis persuasionibus & machinationibus, ut jam dictum est, contaminarent, quæ proculdubio læsæ Majestatis in summo gradu erant crimina per antiquas communes Angliæ leges: Nec quis sane Regum Angliæ animo erecto, ex quo hæc Monarchia primum firmata fuerit, eorum vitæ (potissimum si nativi subditi erant) pepercisset, qui subditis persuasisset illum de jure non fuisse Regem, molitusq; fuisset intra hoc regnum eos a fide & obsequio erga Regem suum abducere, qd' per antiquas

son of the said Bull of Pius 5. her Majesty was excommunicated, deprived of her Kingdom, and that her Subjects were discharged of all Obedience to her, and by all Means endeavoured to withhold them from their Duty and Allegiance to her Majesty and to reconcile them to the Church of Rome. In the 27. Year of her Reign, by Authority of Parliam. her Majesty made it Treason for any Jesuit or Romish Priest being her natural born subject, and made a Romish Priest or Jesuit sithence the Beginning of her Reign, to come into any of her Dominions, intending thereby to keep them out of the same, to the End that they should not infect any other Subjects with such treasonable and damnable Persuasions and Practises, as are aforesaid, which without Controversy were High Treason by the ancient Common Laws of England: Neither would ever magnanimous King of England, sithence the first Establishment of this Monarchy, have suffered any (especially being his own natural born Subjects) to live, that persuaded his Subjects that he was no lawful King, and practised with them (within the Heart of this Realm) to withhold them from their Allegiance, and Loyalty to their Sovereign, the same

The Statute de Anno 27 Eliz. Regina. 3 Inst. 101.

same being crimen læsæ Majestatis, by the ancient Laws of this Realm.

hujus regni leges crimen erat læsæ Majestatis.

By this and by all the Records of the Judgments it appeareth, that these Jesuits and Priests, are not condemned and executed for their Priesthood and Profession, but for their treasonable and damnable Persuasions and Practices against the Crowns and Dignities of Monarchs, and absolute Princes, who hold their Kingdoms and Dominions by lawful Succession, and by inherent Birth-right and Descent of Inheritance, (according to the fundamental Laws of this Realm) immediately of Almighty God, and are not Tenants of their Kingdoms (as they would have it) at the Will and Pleasure of any foreign Potentate whatsoever.

Now albeit the Proceedings and Process in the ecclesiastical Courts, be in the Name of the Bishops, &c. It followeth not therefore, that either the Court is not the King's, or the Law whereby they proceed is not the (a) King's Law; For taking one Example for many, every Heef or View of Frankpledge holden by a Subject, is kept in the (b) Lord's Name, and yet it is the King's Court, and all the Proceedings therein are directed by the King's Laws, and many Subjects in Engl. have

Hinc ex actis publicis, in quæ eorum accusationes relatae sunt, luce clarius est, quod Jesuitæ & Sacerdotes illi, non sunt condemnati & supplicio affecti, eo quod sint Sacerdotes, & contrariam religionem professi, sed quod proditorii & execrandis persuasionibus & machinationibus moliti sint contra Coronam & Majestatem Monarcharum, & Principum absolutissimorum, qui sua Regna & Dominia immediate a summo Deo legitima successione, & jure avito atq; hæreditario, juxta leges fundamentales tenent & non (ut ipsi somniant) ex alterius cujuscunq; Principis exteri nutu & arbitrio.

Quamvis autem procedendi formulæ & processus in Curias Ecclesiasticas sint sub Episcoporum, &c. nominibus; non igitur sequitur Curias illas non esse Regis vel legem juxta quam procedunt, non esse Regis legem. Sit hoc exemplum instar multorum; quilibet visus Franc' pleg' a subdito in nomine Domini sui tenetur, & tamen Regis est Curia, & omnes in ea processus ad Regis leges diriguntur, subditiq; quamplurimi Curias

(a) Cawley
142.

(b) Cawley
142.

nam in Anglicana Ecclesia publice celebratam, & in sacrosancto & certissimo Dei verbo fundatam, & publica autoritate intra hoc Regnum confirmatam accedere recusavit. Postquam autem Pii Quinti Bulla contra prædict' Regnam, anno Regni undecimo publicata fuerat, continens (inter aliâ quæ nimis longum est pro nostro instituto jam percurrere) hæc ipsissima verba: *Pius Episcopus, servus servorum Dei, &c. Missæ sacrificium, preces, jejunia, ciborum delictum, calibatam, illa Regina Elizabetha abolevit, eadem occupato Regno supremi Ecclesie Capituli locum in omni Anglia, ejusque præcipuam autoritatem atque jurisdictionem sibi usurpans, Regnum ipsum rursus in miserum exitium revocavit: "Ad quam velut ad asyllum omnium infestissimi perfugium invenerunt, &c. Declaramus præd' Elizabetham eiq; adherentes, in præd' Anathematis sententiam incurrisse: Quin etiam ipsam præcensu Regni præd' jure, necnon omni & quocunque Dominio, dignitate, privilegioque privatam: Præcipimus & interdicimus universis & singulis proceribus, subditis, & populis, & aliis præd', ne illi ejusve monitis, mandatis, & legibus audeant obedire; qui secus egerint eos simili Anathematis sententia*

fed in the Church of England, being evidently grounded upon the sacred and infallible Word of Almighty God, and established by publick Authority within this Realm: But after the Bull of Pius Quintus was published against her Majesty in the first Year of her Reign (containing amongst other Things too long to be repeated for this purpose) in these Words: *Pius Bishop, Servant of God's Servants, &c. She* (Queen *Elizabeth*) hath clean put away the Sacrifice of the Mass, Prayers, Fasting, Choice or Difference of Meats, and single Life: She possessing the Kingdom, and by usurping the Place of the supream Head of the Church in all England, and the chief Authority and Jurisdiction of the same, hath again brought the said Realm into miserable Destruction. Unto her all such as are the Worst of the People resort, and are by her received into safe Protection, &c. We make it known, that the said *Elizabeth* and as many as stand on her side in the Matter above named, have run into the Danger of our Curse: We make it also known, that we have deprived her from that Right she pretended to have in the Kingdom aforesaid, and also from all and every her Authority, Dignity and Privilege. We charge and forbid all and every the Nobles and Subjects, and People, and others aforesaid, that they be

Psalm 109. 28. Though they curse, yet blest thou (O Lord) and let them be confounded that rise up against me, but let thy Servant Rejoice. Which was the Prayer her Majesty made when this Bull was published against her.

De Jure Regis Ecclesiastico. PART V.

not so hardy as to obey her or her Admonitions, Commandments, or Laws, upon Pain of the like Accurse upon them. We Pronounce that all whosoever by any Occasion have taken their Oath unto her, are for ever discharged of such their Oath, and also from all Fealty and Service, which was done to her by Reason of her Government, &c. As by the said Bull more at large appeareth. After this Bull, all they that depended on the Pope obeyed the Bull, disobeyed their gracious and natural Sovereign, and upon this Occasion refused to come to the Church. The publishing of this Bull by a Subject against his Sovereign (as appeareth by that which hath been oftentimes said) was Treason in the highest Degree, by the ancient Com. Laws of Engl. For if it were Treason to publish a Bull of Excommunication within this Realm against a Subject thereof, as it was adjudged in the Reign of H. Ed. I. a fortiori it is Treason in the highest Degree to publish such a Bull against the Sovereign and Monarch her self. After this Bull many Bulls of Absolution and Reconciliation to the Church of Rome were published and dispersed amongst her Majesty's Subjects, to withdraw them from their natural Loyalty and Allegiance to their Sovereign, whereupon no small Inconveniences (as

*innodatus: Omnes qui illi quomodocumq; juraverunt a juramento hujusmodi, ac omni prorsus Dom' fidelitatis & obsequii debito perpetuo absolutos declaramus, ut ex ipsa Bulla plenius videre est. Hac Bulla publicata, omnes qui Pontifici Romano adhæserunt, Bullæ obtemperarunt, obedientiam erga principem benignissimam, & nativam Dominam, hac arrepta occasione abjecerunt, ad Ecclesiam Anglicanam accedere recusarunt. Publicatio hujus Bullæ per subditum contra suum principem, ut manifestum & testatum est ex illis, quæ subinde jam dicta fuerunt, crimen erat Majestatis læsæ & imminutæ juxta antiquas communes Angliæ leges: Etenim si læsæ Majestatis crimen erat, excommunicationis Bullam in hoc Regno contra subditum publicare, ut regnante *Edwardo Primo* adjudicatum fuerit; a fortiori Bullam contra Regem & ipsum Monarcham publicare, Majestatis læsæ in summo gradu crimen est. Post hanc Bullam publicatam, plurimæ absolutionis, & ad Romanam Ecclesiam reconciliationis, Bullæ publicatæ & dispersæ erant inter Majestatis suæ subditos, ad eos a fidelitatis & obsequii debito abstrahendos, unde cum magna mala & incommoda (ut*

con-

constat) promanarint: In Parlamento anno decimo tertio ejusdem Reginae habito, declaratum erat per universos Regni ordines: Quod plurimi seditiosi & scelerati machinantes & molientes, seditiose & scelerate non solum hoc Regnum & imperialem ejusdem Coronam (quæ revera ex se sunt liberrima) sub jugum extera, usurpatæ & injustæ jurisdictionis, præhementiæ, & auctoritatis a Romana sede sibi arrogatæ redigere: Verum etiam subditorum animos a suo Principe, & a debita observantia abalienare, seditioemq; turbulentam & rebellionem intra hoc Regnum concitare, nuper procurarunt & impetrarunt sibi a Romano Pontifice, & ejus sede, diversas Bullas, eo consilio ut eos absolverent & reconciliarent, quotquot parati essent debitam erga Principem obedientiam projicere, & semetipsos ementitæ, injustæ & usurpatæ illius auctoritatis jugo subicere. Sub obtentu etiam earundem Bullarum & rescriptorum illi clandestino & seditiosissime in illis Regni hujus partibus, ubi populus minus instructus, infirmissimus, simplicissimus, & imperitissimus erat, atque inde suum officium erga Deum & principem minus intellexit, subdolis nefariis & clan-

hereafter appeareth) followed: And therefore at a Parliament holden in the viii Year of her Majesty's Reign, it was declared by the whole Body of the Realm: That divers seditious and very ill disposed People, minding very seditiously and unnaturally, not only to bring this Realm, and the imperial Crown thereof (being in very Deed of it self most free) again into the Thraldom and Subjection of the forezign usurped and unlawful Jurisdiction, Preheminence, and Authority claimed by the said Sea of Rome, but also to estrange and alienate the Minds and Hearts of sundry the M.'s Subjects, from their dutiful Obedience, and to raise and stir Sedition and Rebellion within this Realm, did then lately procure and obtain to themselves, from the said Bishop of Rome, and his said Sea, divers Bulls and Writings, the Effect whereof had been, and then was, to absolve and reconcile all those that would be contented to forsake their due Obedience to the Queen, and to yield and subject themselves to the said fained unlawful and usurped Authority: And by Colour of the said Bulls and Writings, the said Persons very secretly and most seditiously in such Parts of this Realm, where the People for want of good Instruction were most weak, simple and ignorant, and thereby further

The Statute of
13 Eliz.

from the good Understanding of their Duties towards God and the Queen, did by their lewd and subtil Practices and Persuasions so far forth work, that sundry simple and ignorant Persons, had been contented to be reconciled to the said usurped Authority of the See of Rome, and to take Absolution at the Hands of the said naughty and subtil Practisers, whereby did grow great Disobedience and Boldness in many not only to withdraw and absent themselves from all Divine Service, then most godly set forth and used within this Realm; but also have thought themselves discharged of and from all Obedience, Duty and Allegiance to her Majesty, whereby most wicked and unnatural Rebellion did ensue, and to the further Danger of this Realm, was thereafter very like to be renewed, if the ungodly and wicked Attempts in that behalf were not by Severity of Laws in Time restrained and hindered: For Remedy and Redress whereof, and to prevent the great Mischiefs and Inconveniences that thereby might ensue; It was enacted by the Queen, with the Assent of the Lords Spiritual and Temporal, and the Commons in that Parliament assembled, and by the Authority of the same, That if any Person or Persons after the first Day

destinis machinationibus & persuasionibus eo usq; processerunt, ut nonnulli simplices & imperiti, prædictæ usurpatæ authoritati sedis Romanæ sese reconciliari, & a nefariis illis & subdolis machinatoribus absolvi voverint; unde magna inobedientia & audacia in multis adeo prorupit, ut non solum a Divino cultu religioso instituto, & in hoc Regno usitato abessent; verum etiam se omni obedientia, obsequio, & fide erga Principem solutos existimarent, & hinc seditio nefaria & rebellio concitata fuit, & ad majus hujus Regni discrimen postea (ut probabile est) concitanda esset, nisi nefarii illi conatus legum severitate opportune cohibiti fuissent: Quibus incommodis & malis inde emergentibus ut provideretur, & remedium adhiberetur, per Reginam cum assensu Dominorum Spiritualium & Temporalium, necnon Communitatis in Parlamento, & ejusdem authoritate sancitum est; quod si quis a primo die Julii proxime subsequente, in quocunque hujus Regni loco, & Reginæ Dominiis, uteretur aut exqueretur aliquam ejusmodi Bullam, rescriptum, vel instrumentum absolutionis vel reconciliationis, scripto vel

typis

Note the Fruits of the Bull.

1.

2.

3.

4.

The Parts of the Act.

1.

typis impressa, antea impetrata, & postea impetranda a Pontifice Romano, ejus successoribus, vel a quibuscunque aliis qui auctoritatem a Pontifice Romano ejus predecessoribus, vel successoribus, vel sede Romana, habent, vel sibi affumunt; Vel si quis a primo illo die Julii sub pretextu alicujus ejusmodi bullæ, rescripti, instrumenti, aut auctoritatis, aliquem absolvere, aut reconciliare susceperit; vel concedere aut promittere alicui in hoc regno, aut aliis Reginæ Dominiis, ullam ejusmodi absolutionem vel reconciliationem, loquendo, prædicando, docendo, scribendo, vel quovis facto aperto; Vel si quis in hoc regno, vel aliis Reginæ Dominiis a primo illo die Julii aliquam ejusmodi absolutionem vel reconciliationem sponte acceperit: Vel si quis impetraverit a postremo die parliamenti anno primo ejus regni habiti, vel a primo illo die Julii impetrabit a Pontifice Romano, vel ejus successoribus, aut sede Romana, aliquam bullam, scriptum, instrumentum scriptum, vel typis impressum, de re vel causa quacunq; vel aliquam ejusmodi bullam, rescriptum, vel instrumentum, ullo modo publicaverit, qd' omnia & singula ejusmodi

of July then next coming, should use or put in ure in any Place within this Realm, or in any the N.'s Dominions, any such Bull, Writing, or Instrument, written or printed of Absolution or Reconciliation, at any Time theretofore obtained and gotten, or at any Time thereafter to be obtained or gotten from the said Bp. of Rome, or any his Successors, or from any other Person or Persons, authorized or claiming Authority, by or from the said Bp. of Rome, his Predecessors or Successors, or See of Rome: Or if any Person or Persons, after the said first Day of July, should take upon him or them by Colour of any such Bull, Writing, Instrum. or Authoz. to absolve or reconcile any Person or Persons, or to grant or promise to any Person or Persons, within this Realm, or any other the N.'s Domin. any such Absolut. or Reconciliat. by any Speech, Preaching, Teaching, Writing, or any other open Deed; Or if any other Person or Persons within this Realm, or any the N.'s Dominions after the said first Day of July, should willingly receive and take any such Absolution or Reconciliation: Or else if any Person or Persons had obtained or gotten thence the last Day of the Parliament holden in the first Year of her Reign, or after the said first Day of July, should obtain

or

2.

3.

4.

5.

or get from the said Bp. of Rome, or any his Successors, or See of Rome, any Manner of Bull, Writing, or Instrument, written or printed, containing any Thing, Matter or Cause whatsoever. Or should publish, or by any Ways or Means put in ure any such Bull, Writing, or Instrument; That then all and every such Act or Acts, Offence and Offences, should be deemed and adjudged by the Authority of the said Act to be High Treason, and the Offender and Offenders therein, their Procurers, Abbets and Counsellors to the Fact and committing of the said Offence or Offences, should be deemed and adjudged High Traitors to the R. and the Realm, and being thereof lawfully indicted and attainted, according to the Course of the Laws of this Realm, should suffer Pains of Death; and also lose and forfeit all their Lands, Tenements, Hereditaments, Goods and Chattles, as in Cases of High Treason, by the Laws of this Realm ought to be lost and forfeited, as by the said Act appeareth.

And albeit many of her Subjects after the said Bull of Pius Quintus, adhering to the Pope did renounce their former Obedience to the R. in respect of that Bull, yet all this time no Law was either made or attempted against them for their Recusancy tho' it were grounded upon so disloyal a Cause.

facta & delicta, autoritate ejusdem statuti crimen læsæ Majestatis habeantur & adjudicentur. Quodque, qui in his deliquerint, & eorum procuratores, fautores, & consultores in his factis, & delictis, læsæ Majestatis rei contra Reginam & regnum habeantur & adjudicentur; atque, inde legitime accusati & condemnati, juxta legum hujus regni præscriptum, extremo supplicio afficiantur; terræ, tenementa, hæreditamenta, bona & facultates in fiscum redigantur, ut in causis læsæ Majestatis per leges hujus regni fieri solet, ut ex eodem statuto liquido apparet.

Quamvis autem ex hac *Pii Quinti* bulla, quamplurimi subditi Pontifici Romano adhærentes, pristinam obedientiam erga Reginam reliquerint, nulla tamen lex lata aut rogata fuit contra eos de recusatione, quamvis illa tam injustæ causæ inniteretur. Cum autem Statuto parli-

parlamentario declaratum esset, hoc brutum bullarum fulmen tot & tanta pericula Reipublicæ intulisse, in eorum loco Jesuitæ, & Sacrifici Romanenses huc sunt missi, qui latitantes in animos quamplurimorum imperitorum subditorum hujus regni immurmurarent, & infillarunt, quod Pontifex Romanus auctoritatem Reges & Principes excommunicandi & abdicandi habeat, quod ille Reginam excommunicasset, regno abdicasset, subditosque omnes fidelitatis & obsequii vinculo absolvisset; & proinde nec ipsi nec ejus mandatis aut legibus sub pena anathematis obtemperandum. Hoc per antiquas Angliæ leges crimen erat Majestatis læsæ in summo gradu: Et inde *Campianus, Sherwinus,* & plures alii Sacerdotes Romanenses apprehensi, & confessi, quod in Angliam venerint ad causam Catholicam Romanam firmandam cum opus esset, anno prædictæ Regiæ 21 per antiquas communes Angliæ leges fuerunt in questionem vocati, accusati, auditi, condemnati, & extremo supplicio affecti, ob crimen læsæ majestatis, contra fidem quam suo Principi debeant. Nec adhuc aliquod statutum parlamentarium contra Recusantes, Jesuitas, aut

Now that these speechless Bulls were declared by Act of Parliament to be so dangerous; then in place of them Jesuits and Romish Priests were sent over, who in secret Corners whispered and infused into the Hearts of many of the unlearned Subjects of this Realm, that the Pope had Power to excommunicate and depose Kings and Princes, that he had excommunicated the late D. deprived her of her Kingdom and discharged all her Subjects of their Oath, Duties and Allegiance to her; And therefore they ought not to obey her, or any of her Commandments or Laws, under pain of the Pope's Curse. This was High Treason by the ancient Laws of England; And therupon *Campion, Sherwin,* and many other Romish Priests being apprehended, and confessing that they came into England to make a Party for the Catholick Cause when need should require, were in the 21 Year of the said late D.'s Reign, by the ancient Common Laws of England, indicted, arraigned, tried, adjudged, and executed, for High Treason against their natural Allegiance which they ought their Leige Sovereign. But all this Time there was no Act of Parliament made either against Recusants, or Jesuits, or Priests, her Majesty still desiring and expecting their Conversion

Conversion, and that by Clemency and Mildness they might be reclaimed to their former Obedience and Conformity before the said Bull. After Priests and Jesuits were punished by Sentence of Law, according to their Demerits, then great Numbers of Slanderous and seditious Books (libri falsidici) against her Majesty and the State, were dispersed and scattered within this Realm, tending to the inciting and stirring of the Subjects to Insurrection and Rebellion.

Her Majesty in open Parliament, having with the Lords Spiritual, Temporal, and Commons, mature Consideration of so weighty and important Causes, in the 23 Year of her Reign made two several Laws: One against the Writers and Publishers of seditious Books, ordaining that Offence to be Felony: Another against Recusants, inflicting the Penalty of twenty Pounds the Month for their Recusancy: And yet upon their Submission according to the Act, to be thereof freely and absolutely discharged: (a mild and merciful Law, considering their former Conformity, and the Cause of their Revolt.) But after these Jesuits and Romish Priests coming daily into and swarming within the Realm, instilling still this Poison into the Subjects Hearts, that by Rea-

Sacerdotes sancitum erat, cum ferenissima Regina nihil magis in votis habuit, quam ut converterentur, & ad pristinam obedientiam quam ante illam Bullam emissam præstiterant, clementia & lenitate revocarentur. Postea autem in Sacerdotes illos & Jesuitas merito legis sententia animadversum erat; inde famosi & seditiosi libelli, (*libri falsidici*) contra Regiam Majestatem & Statum editi in hoc regno, & dispersi erant, ad tumultum conflandum, & seditionem concitandum.

Regina in pleno parlamento, matura deliberatione habita cum Dominis Spiritualibus & Temporalibus, de rebus tantis tantique momenti, anno 23 regni duo sanxit statuta: Alterum contra auctores & divulgatores seditiosorum librorum, feloniam poenam illis infligens: Alterum contra Recusantes viginti librarum multam in singulos menses pro recusatione imponens, nihilominus si se submiserint juxta statutum illud, inde esse absolutos & liberatos: (mitis sane & benigna lex, si ad pristinam conformitatem & defectiois eorum causam respiciamus.) Postea autem Jesuitæ & Sacerdotes Romanenses indies in hoc regnum influentes, & in animos homi-

The Statute of
Anno 23 Reg.
Eliz.

Cases of Leases.

Mich. 27 & 28 Eliz.

In the King's Bench.

CLAYTON'S Case.

IN an *Ejectione firmæ* between Clayton and Presenham, of Latch 61. Lands in Lichborow in the County of North. the Case was such; Indentures of Demise were ingrossed bearing Date 26 Maii, anno 25 Eliz. of Land in L. to have and to hold (for three Years from henceforth) and the said Indentures were delivered at four of the Clock in the Afternoon, the 20th Day of June, anno 25 *Supradicto*: And when this Lease by Computation should have its Beginning, whether from the Day of the Date, or from the Delivery was the Question. And in this Case three Points were resolved by Wray Chief Justice, Sir Thomas Gawdy, and the whole Court.

1. That (a) (*from henceforth*) should be accounted from the Day of the Delivery of the Indentures, and not by any Computation of Date; for, *from henceforth* is as much as to say, *from the making*, or *from the Time of the Delivery of the Indentures*, or (b) *a confectioe presentium*; for the Confection or making of the Lease does begin by the Delivery; and these Words (*from henceforth*) or any other Words of the Indenture, are not of any Effect or Force until Delivery, *quia traditio loqui facit chartam*.

2. That where the said Indenture was delivered at 4 of the Clock in the Afternoon of the said 20 of June, it was resolved, that this Lease should end the 19th Day of June in the 3d Year,

B

for

(a) Co. Lit. 46.
b. Cr. Jac. 258.
Wing. Max. 13.

(b) Co. Lit. 46.
b. 2 Rol. 520.
P. ff. 94 a.
C. Jac. 647.
P. low. 108. b.
Wing. Max. 1.
Perk. sect. 3.

(a) 1 Brownl.
125. Moor 879.
Cowls 198.
2 Rol. 521.
3 Inst. 53.
(b) Hob. 140.
Alley 77.
Cr. Jac. 135.
136, 258, 647.
Co. Lit. 46, b.
Post 94 a.
2 Rol. 520.
1 Rol. Rep. 387.
388. Owen 50
1 Bullfr. 177.
2 Bullfr. 83.
3 Bullfr. 203.
2 Cr. 264.
(c) Hob 139,
140. Moor 40,
41 42, 879.
Dall. in Kelw.
205. pl. 6.
Dall. in Ash.
pl. 6. 2 Inst.
674. Yelv. 100.
Larch 14, 60.
Dall 41, 42.
1 Rol. Rep. 387.
3 Bullfr. 203.
Dyer 218. pl. 6.
286. pl. 43.
Co. Lit. 46. b.
(d) Cr. Jac.
136. 1 Rol.
Rep. 387.
3 Bullfr. 204.
Salk. 413, 625.

for the Law in this Computation doth reject all (a) Fractions and Divisions of a Day for the Incertainty, which is always the Mother of Confusion.

3. That in this Case the Day of the Delivery of the Lease should be taken *inclusive*, and the Day itself is Parcel of the Demise; so where the Demise is limited to begin from the Making; but if the Lease be to begin from the Day of the Making, (b) or from the Day of the Date, there the Day itself of the Date is excluded, and so the Doubt in 12 *Eliz. Dier* 286. well explained, and with this Resolution agrees 14 *Eliz. Dier* 307. And it was adjudged in the *Common Pleas, Trin* 21 *Eliz.* where the Words of the Stat. of 27 *H. 8. cap.* 16, of Inrolments are (*within six Months after the Date of the same Writings indented*) that if such Writings have a Date, the six Months should be accounted from the Date, and not from the Delivery; but if they have no Date, then the six Months should be accounted from the Delivery. *Vide Dier*, 5 *Eliz.* 218. An Indenture of Bargain and Sale bore Date the fourth Day of *October*, 4 & 5 *Phil. & Mar.* was (c) inrolled the 21st Day of *March* next following, which was the last Day of the six Months, accounting the Day of the Date *exclusive*. And it was adjudged on Demurrer in the *Common Pleas* (which Plea began 4 *Eliz. Rot.* 812.) that the Deed was well inrolled within the said Act; for the whole Day of the fourth of *October* should be accounted in Law the Date of the Indenture, *unde sequitur*, *That from the Date (d) and from the Day of the Date*, are all of one Sense, forasmuch as in Judgment of Law, the Date doth include the whole Day of the Date.

Trin. 30 Eliz. Reg.

In the King's Bench.

ELMER'S Case.

Between *Elmer* (a) Bishop of *London*, and *Gale* Defendant for the Scite of the Manor of *Drayton* in *Midd.* two Points were resolved.

1. That the Statute of (b) 1 *Eliz.* is a private Act, whereof the Court without pleading of it would not take Notice.

2. It was resolved, That where the said Scite Parcel of the Bishoprick was in Lease for Years, and *Grendal* the Bishop ousted the Lessee, and made a Lease (which was confirmed by the Dean and Chapter) for three Lives, rendering the ancient and accustomed Rent; that this Lease was voidable by the (c) Successor. 1. Because the Statute of 1 *Eliz.* was in the Disjunctive for 21 Years or three Lives, and therefore the Bishop could not make both: But if in the Case at Bar the said Lease should be good, then a Bishop might make a Lease for 21 Years, and presently after make a Lease for three Lives, which would be against the Words and Meaning of the Act. 2. The Rent reserved on the Lease is not payable within the Meaning of the said Act; for although *ex vi termini* it is payable, because after the Lease for Years determined, the Lessor might distrain for all the Arrearages of the Rent reserved on the Lease for Lives; yet it is not payable within the Meaning of the Act, for the Act was made to maintain Hospitality, and to avoid Dilapidations, and that cannot be but by a continual Revenue yearly payable by Compulsion of Law, and not in Expectancy, or *in futuro*. For (d) Possibilities neither maintain Hospitality nor repair Churches; and in this Case the Bishop would have but a Possibility; for the Lessees for Lives would have the Rent reserved on the Lease for Years, and if they

(a) 10 Co. 60. b.
Moor 253.
Hard. 89.
2 Brownl. 164.
Winch. 47.
(b) Raft. Leases
4. Cr. Jac. 112.
4 Co. 75. a.
Doct. plac. 337.
Moor 108, 253.
1 And. 65, 66,
193. 3 Leon.
50. Cr. El. 141.
2 Brown. 164.
Co. Lit. 45. a.
Palm. 467, 468.
Larch 241.
Cr. Car. 50.
10 Co. 60. a. b.
(c) 3 Co. 60. a.
Co. Lit. 45. 1.
Cr. El. 473, 474,
564. 10 Co. 59. 1.
3 Keb. 109.
1 Mod. Rep. 205.
Cart. 13, 16.
1 Vent. 247.
1 Rol. Rep. 152,
154, 156, 169.

(d) Bridg. 1: 2.

(a) 10 Co. 60. a. survive the Lease for Years, then the Bishop and his Successors would have remedy for the Rent and Arrearages reserved on the Lease for Lives, as it hath been said. And it was said, That where the Statute of (a) 32 H. 8. cap. 28. provides, *That the old Lease be surrendered within one Year, &c.* that a Surrender (b) conditional is not within the said Act: For the Intent of the Makers of the Act was to have a continual and absolute Surrender, and not such illusory Surrender, which might be avoided the next Day; for *factum non dicitur quod non perseverat*; and *Sensus verborum est anima legis*. But in the principal Case Judgment was given against the Bishop, for not pleading the said Statute of 1 Eliz.

Car. 22, 44, 435. 1 Rol. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch. 45. Bridg. 28. Moor 58, 75, 783. 1 Leon. 59, 149. 3 Leon. 132, 156. 1 Jones 60. 2 Illit. 342, 681. Godb. 102. pl. 119. 3 Keb. 381. Cr. El. 350, 602. (b) Moor 783. Hutt. 8, Lit. Rep. 131. Hob. 204. Co. Lit. 44. b.

Trin. 30 Eliz. Reg.

In the King's Bench.

JEWEL'S Case.

Between Paul and Maior the Case was; (a) Jewel Bishop of Salisbury 6 Eliz. by Deed indented made a Lease of a Fair, Parcel of the Possessions of his Bishoprick, with all Profits thereof in Sberburn in the County of Dorset for three Lives, rendering *the old and accustomed Rent*, which was confirmed by the Dean and Chapter; and afterwards the Bishop died, and if this Lease was good against the Successor, and not restrained and made void by the Statute of (b) 1 Eliz. not printed was the Question. And it was adjudged that the Successor should avoid the Lease; for a Fair is but a Franchise or Liberty, not manurable, out of which a (c) Rent cannot be reserved; and therefore for such Rent reserved the Lessor or his Successors have not any Remedy, either by Distress or Affize; and all Leases of such Inheritances, out of which the antient and accustomed Rent cannot be well and lawfully reserved, are voidable by the said Act. It was also resolved, that if the Lease had been made for 21 (d) Years, rendering *the antient and accustomed Rent*, the Successor should avoid it; for although the Rent reserved should be good by Way of (e) Contract between the Lessor and the Lessee, yet it is not incident to the Reversion, nor shall go with it; and therefore such Lease should be also voidable by the Successor by the said Statute. Vide 17 E. 3. 75. b. 9 Aff. p. 24. (f) 30 Aff. p. 5. 14 E. 3. Scire (g) facias 122. 10 H. 6. 2. 3 H. 6. 21, &c.

(a) 10 Co. 60 b.

(b) Lev's Rep. 77. 5 Co. 2. a. Rast. Leases 4. Cr. Jac. 112. 4 Co. 76. a. Doct. plac. 337. Moor 108, 253. 1 And. 65, 66. 193 3 Leon. 59. Cr. El. 141. Co. Lit. 45. a. 2 Brownl. 162. Palm. 105, 467, 468. Latch. 241. Cr. Car. 50. 10 Co. 60. a. b. (c) 7 Co. 23. b. Co. Lit. 44. b. 142. a. Post. 4. a. Cr. Jac. 111, 112. Moor 163, 168. 2 Rol. 446. 2 Sand. 304.

Cr. El. 690 2 Sand. 303. Vaugh. 203. Raym. 194. Moor 778. (e) 2 Sand. 303. (f) Postea 4. a. (d) Cr. Jac. 112. (g) Post. 4. a.

B 3

Mich.

Mich. 31 & 32 Eliz.

In the King's Bench.

The Lord MOUNTJOY'S Case.

Moor 197, 494.
Hardr. 89, 92,
397. 3 Keb. 192,
373, 378, 380,
583, 596, 597.
Lit. Rep. 305.

Richard Shephard was Plaintiff against Blackaller Defendant in an *Ejectione firmæ* of two Houses and 18 Acres of Land in *Hemston Arundel*, on a Demise made 10 Apr. 28 Eliz. for three Years; the Defendant pleaded not guilty, and the Jurors, as to the Moiety of one House and 18 Acres of Land, found the Defendant guilty, and as to the Residue they have a special Verdict to this Effect: They found that the Tenements in which, &c. were Parcel of the Manor of *Hemston Arundel*, and demised and demisable Time out of Mind, by Copy, &c. And that *Robert Lord Brook* was seised of the said Manor in Fee, and further found that by a special Act of Parliament made 4 Feb. 27 H. 8. the said Manor was intailed to *Anne* Wife of *Charles Lord Mountjoy*, and to *John Pawlet* and *Elizabeth* his Wife, and to the Heirs of their Bodies begotten with divers Remainers over; by which Act it was provided as follows, *scil.* That the Donees, nor any of them, *non facerent aliquid in nocumentum, vel exheredationem hæredum suorum vel eorum alicujus, vel alicujus eorum in remanere, sed tantum pro junctura uxoris pro termino vitæ, vel alicujus viri, &c. pro termino vitæ, vel pro termino vitæ alicujus aliæ personæ vel pro annis, vel ad voluntatem, secundum consuetudinem manerii; reddend' verum & antiquum reddit' prædictarum terrarum, & tenementorum sic demissorum, & quod* all other Acts should be void, as by the said Act appears: And further found, that the said Manor did consist of divers free Rents amounting to 7 *l.* and of 15 Copyhold Tenements which were held for Lives, the customary Rent of which was

3 l. and of the Demesnes which had usually been demised by Indenture for the several Rents and Farms of 7 l. &c. And that there was one Acre of Waste, Parcel of the said Manor, in which were divers Highways, and Common for the Ten'ts of the yearly Value of 12 d. And that on the Death of every Copyholder, the Lord by Custom ought to have an Heriot; and that there was a Court-Baron incident to the said Manor, and Perquisites of Court, and a Leet appertaining to the said Manor; and that the Free Rents, or Copyhold Rents, or Heriots, or Perquisites of Court, or Leet, never were demised before for Life, or Years, or otherwise; and that afterwards *Cha. L. Mountjoy* died, after whose Death the said *Anne* his Wife in 6 *Eliz.* did accept a Fine of a Stranger, *sur consensans de droit come ceo, &c.* of the Moiety of the said Manor with the Appurtenances, and of a great Number of Acres which did comprehend the Demesnes; by which Fine the said *Anne* did grant and render the Moiety of the said Manor, &c. with the Appurtenances for 300 Years rendering Rent amounting to the free Rents, the Copyhold Rents, the Farm-Rents, and 18 d. more, and 12 d. for the Acre of Waste, to be paid at two Feasts of the Year, where the old Rent was payable at four Feasts. And afterwards the said *Anne* died, and the now Plaintiff claimed under the said Lease for 300 Years: And the Defendant claimed by the Lord *Mountjoy* that now is, being Heir to the said Entail. And the Doubt of this Case was, if the said Lease for 300 Years, made in Manner and Form aforesaid, was to be avoided by the said Clause of Restraint of the said Act of 27 *H. 8.* or not, and it was argued on the Plaintiff's Side (in which as much was said as the Wit of Man could think or invent) that the Lease should be good, and not restrained by the said Act. And all that which was said may be briefly divided into five Parts.

1. Forasmuch as this Act restrains the Power which the Ten't in Tail had by the Laws of the Land, it should be taken strictly, as to the Restraint, and beneficially for the Tenant in Tail: And to that Purpose the Rule put by *Read* in 21 *H. 7.* 17. b. & 18 *E. 4.* 16. a. and divers other Books on that Ground were cited.

2. It was said, That although the Rents of Assize, Heriots, Leets, &c. were never demised before, it was not material; for the Rent reserved doth not (a) issue out of them, but only out of Things manurable, to which the Lessor may resort to distrain; as in 9 *Aff.* 24. A Lease of Land and of the Toll (b) of a Mill, rendering Rent, or in 30 *Aff.* 5. A Lease of Land and an (c) Hundred, or Advowson, rendering Rent, &c. all the Rent shall issue out of the Land, and not out of the Toll, Advowson, or Hundred. But the King may reserve a Rent out of a Fair, or other Thing not manurable, as is adjudged in 14 *L.* 3. (d) *Scire facias* 122. because he may (e) distrain for it in

(a) Antea 3. a.
7 Co. 23. b.
Palm. 105. Co.
Lit. 44. b. 142. a.
2 Rol. 446. Cr.
Jac. 111, 112.
Moor 163, 168.
2 Saund. 303,
304. Raym. 194.
Cr. El. 690.
Vaugh. 203.
(b) Br. Rents 11.
Br. Tenure 26.
(c) Antea 3. a.
(d) Antea 3. a.
(e) Plowd. 239.
a. 243. b. 343. a.
Br. Prerogative
68, 77. Fitz.
Grant 47. 44. E.
3. 45. a. Fitz.
Prerogative 7.
Br. Distress 6,
49. 13 E. 4. 6. a.
2 Init. 131.
4 Init. 119.
5 H. 7. 38. b.
5 Co. 56. a.

all the other Lands of the Grantee. *Vide* 10 H. 6. 2. And this Point was concluded with 12 *Aff. p.* 40. That if a Rent be granted out of a Manor, that the Demesnes only (a) and not the Services are charged.

3. Altho' the Acre of Waste was never demised before, and altho' the Moiety was now demised, where no Moiety was demised of the Demesnes before; and altho' the Rent was reserved at two Days of the Year, where before it was reserved at four Days of the Year, yet *verus & antiquus redditus* is reserved within the said Act: For every Rent hath Quantity and Quality, and *verus & antiquus redditus* is not to be intended of every Quality incident to it, but of the Quantity of the Rent, for that is the Effect and Substance of the Thing reserved; as if the ancient Reservation was of the Rent to be paid in Gold, (b) and the new Reservation was to be paid in Silver; or if a Quarter of Wheat was anciently reserved, and now (c) the Lease is made rendering eight Bushels of Wheat, all is one; for the Law doth not respect the Form of Words, or the Quality, but the Substance and Effect of the Matter: So if the old Rent was 10*l.* and the Lessor reserves (d) 20*l.* this is not *ex vi termini verus & antiquus redditus*, (e) but *parum differunt quæ re concordant*, & (f) *qui hæret in Litera, hæret in cortice*. And it is not necessary to have all the Qualities incident to an annual Rent; for if it were customary or copyhold Rent before, other Rent may now be reserved by Indenture: For by that he shall have *veram & antiquam summam redditus*, which he had before, and that is the Effect and Substance of the Matter, altho' it differs in Quality; so when the Rent is payable at 4 Days of the Year, (g) and now it is reserved at two Days only, it is not material. For the Words are, *reddendo verum & antiquum redditum*, and doth not say, *ad usalia festa, &c.* so if he reserves the true and ancient Rent it is sufficient. And it was said, if Ten't in Tail be of two Farms, (b) one, which hath been always let for 20*l.* Rent, and the other for 10*l.* Rent, and he makes a Lease of both for 21 Years, rendering 30*l.* Rent intirely out of both, it is good, and yet it is not the accustomed Rent which hath been paid, &c. for now it is one intire Rent, where it was several before, and now this intire Rent issues out of both, and each of them charged with the whole Rent, where each of them was severally charged before; but intire and several are but Qualities of the Rent; but in Substance the accustomed Rent is reserved, for they both amounted to 30*l.* and that is reserved. So if Tenant in Tail be seised of three Acres of Land, each of equal yearly Value, and all have been demised for 3*s. per annum*, in such Case he may lease one of them for 12*d. per annum*, or two of them for two Shillings *per annum*, and so (i) *pro rata*: And yet in these two Cases it is not the accustomed

(a) Br. Char. 19.
50. 14. H. 6. 24.
Fitz. Ch. 12.

Nov 110.

(b) Postea 5. b.

(c) Bridg. 20.
Poit a 5. b.

(d) Co. Lit. 44. b.

(e) 10 Co. 124. b.
2 Bull. 53, 85.

1 Leon. 160.

(f) 11 Co. 34. b.

Co. Lit. 54. b.

283. b. Wing.

Max. 19. Hawk.

Max. 425.

3 Bullfr. 65.

(g) 6 Co. 38. a.

Post. 4. Co. Lit.

44. b. Ley 72.

Cr. Jac. 76, 77.

2 Rol. Rep 407.

Cr. Car. 17.

Degge 111.

(b) Postea 5. b.

(i) Postea 5. b.
Co. Lit. 44. b.

customable Rent which hath been paid. So if two (a) Coparceners be seised of certain Land in Tail, which hath been let for 10*l.* Rent, one of them may let his Part or Moiety for 5*l.* In all which Cases the Rent reserved, altho' it differs in Form or Quality, yet in Substance it is *verus & antiquus redditus* within the said Act of 27 H. 8. It was further said, That if a Manor has been always let for 10*l.* Rent, and afterwards a Tenancy * escheats, yet it may be let for 10*l.* and yet it may beargued that this is not *verus & antiquus redditus*, for no Rent was ever reserved before out of Land escheated, and by Consequence the Rent reserved cannot be called *verus & antiquus redditus*: But that would be too nice and subtle an Interpretation; for by the same Reason, if a Copyhold of Inheritance is forfeited, it may be said, that because the Rent of the Copyhold was demised and not the Land, it should impeach the Lease, which would be too hard a Construction, tending to avoid many Leases of poor Men, which would be inconvenient: So in the Case at Bar, altho' the Acre of (b) Waste was never demised before, yet inasmuch as the Value thereof, and more is reserved, the Purview and Intent of the Act is well observed.

4. It was argued, and strongly urged, that if the said Render as to the said Acre of Waste, the Services, Heriots, Leets, &c. (which were never demised before the said Grant and Render) should be void by the said Act, that then it was consequently good for the Demesnes which had been demised; for then all the Rent reserved should issue out of the Demesnes.

5. If it should not be void as to such Things which were not demised before, yet after the Death of him who made the Grant and Render, there should be an Apportionment of the Rent for them; and then sofarasmuch as the whole Rent and more is reserved for the Demesnes, (altho' the Rents of the Freeholders and Copyholders and the Acre of Waste be deducted) *& verus & antiquus Redditus*, and more besides them should remain for the Demesnes, for this Cause it was urged, that the said Render should be good for the Demesnes; *& id(c) certum est, quod certi reddi potest*: And in this Case, after many Arguments, and great Deliberation and Consideration six Points were resolved.

1. That altho' it be provided by the said Act, that all Estates, &c. restrained by the said Act, &c. should be void, yet it is not by Construction of Law void as to the Tenant in Tail himself, (d) but should be avoided by the Issues in Tail; for the Intent of the Act was to provide, that the Donces or any of them, *non facerent aliquid ad nocumentum, vel exhereditationem hereda eorum*, and not to make void the Estate which the Donce himself made against himself; and all Acts of Parliament, as well private as general, shall be taken by

(a) Co.Lit. 44.
b. Post. 5. b.

* Post. 6. a.

(b) Postea 5. b.
Moor 199.

(c) Co.Lit. 45. a.
96. a. 142. a.
9 Co. 30. a. 47. a.
4 Co. 66. b.
Lane 51. Her-
leyo 8. Post. 6. a.
2 Brown. 336.
(d) 3 Co. 59. b.
60. a. Mo. 199.
10 Co. 59. a. b.
60. b. 61. b.
Co. Lit. 45. a.
Cr. El. 207.
1 And. 244.
Carter 13, 16.
1 Rol. Rep. 152,
159, 169.
1 Mod. Rep. 205.
1 Vent. 247.

a reasonable Construction to be collected out of the Words of the Acts themselves, according to the true Intent and Meaning of the Makers of the Act. *Vide (a)* 14 E. 4. 1. a. & (b) 43 Aff. p. 29.

2. It was resolved, That in respect of the said Acre of Waste, which was never (c) demised before, the Rent which is entirely reserved out of the Whole, cannot be called *verus & antiquus redditus*: For how can it be called *verus & antiquus redditus*, when it issues out of a Thing, which was never charged with any Rent, by any Reservation before?

3. By the Grant and Render of the Manor, he to whom the Render is made hath an Interest and a Term in the Lands held by Copy, and when any of the Copyholders die, or it be forfeited, he may enter and enjoy the Land himself if he will; and the Rent reserved doth issue out of the same Lands held by Copy, which Lands were never charged with any Farm-Rent before, but always have been demised by Copy according to the Custom of the Manor: And when the Demesnes of the said Manor have been only demised for Rent, in the Case at Bar, the whole Manor cannot be demised within the said Act; also the Estates which the Ten't in Tail shall make by the said Act of 27. are distinguished by the Act, *scil.* Estate for Life, for Years, and at Will, according to the Custom of the Manor; but by this Grant and Render all are put in Hotchpot and jumbled together, as Sir *Tho. Garway* said, whereas the Copyholds ought to have been granted by Copy, accord. to the Custom of the Manor, and not by Fine or Deed.

4. The Reservation of the Rent at (d) two Days where the Rent was reserved and payable at four Days before, makes the Grant and Render void, because it is *ad nocumentum* of the Heirs in Tail, which is restrained by the Act; for it is more beneficial for them to have it paid at four Feasts than at two. And all beneficial Qualities of the Rent ought to be reserved and observed.

5. As to the Cases which have been put, of the Reservation of Silver (e) in lieu of Gold, or of joining (f) two several Farms in one Demise, with Reservation of one and the same Rent, or to let Parcel of a Farm rendring Rent *pro rata*, all these were denied by the whole Court; but the Case of Reservation of eight Bushels of Wheat in (g) lieu of a Quarter is all one in Quality, Value, and Nature, and varies only in Words. But *Wray* Ch. Just. said, that he did agree to the Case of (h) two Coparceners, that one might let her Moieties, yielding the Moiety of the accustomed Rent; for in as much as they are in by Act of Law, and of God, it would be hard that the Frowardness of her Coparcener should prejudice her of the Benefit of a Fine which she might have by making of a Lease of her Moieties: And so a Difference between that Case and the Case of the Lease of Part with Reservation of Rent (i) *pro rata*, which is her own Act, and which Rent for Parcel is not the accustomed

(a) 4 Co. 76. b.
Br. Parliament
61.

(b) 4 Co. 76. b.
Br. Parliament
35.

(c) 3 Bulstr. 291.
Moor 198,
199, 494.
Cro. Car. 50.
Co. Lit. 44. b.

(d) Co. Lit.
44. b.
6 Co. 37. b.
38. a.

Antea 4. b.
Ley 72.
2 Rol. Rep. 407.
Cr. Jac. 76, 77.
Cr. Car. 17.
Degge 111.

(e) Antea 4. b.
(f) Cr. Car.
21, 22.
Antea 4. b.

(g) Bridg. 20.
Antea 4. b.

(h) Antea 5. a.
Co. Lit. 44. b.

(i) Co. Lit.
44. b.
Antea 4. b.

stomable Rent which hath been paid. So and for the same Cause, when two distinct Farms are joined (a) together, the whole Rent which is reserved out of both, is a new Rent, and not the accustomed Rent. And as to the Case of (b) Ejectment of a Tenancy it was agreed for good Law. For the Act of Law, or of God will not prejudice any one. But if the Lessor had purchased the Tenancy, it would be otherwise, for that which is purchased is not Parcel of the Manor, because he acquires it by his own Act.

6. It was resolved, That no Apportionment (if any should be) in this Case would make the Render good; for first, no Apportionment could be made in this Case, for as much as there be Copyholders for Mens Lives, which depend on the Providence of God, Heriots, Profits of Court, which are Accidents, and other Casualties, which could not be reduced to a (c) yearly Value, as it is said in *Butler's* and *Baker's* Case; for this Cause no Apportionment could be made, for Apportionment ought to be of a Certainty. And where it was said, *Quod id (d) cert' est, quod cert' reddi potest*; It was answered, *Quod *id incert' est, quod cert' reddi nullo modo potest.* 2 *Wray* Ch. Just. said, That altho' there should or might be an Apportionment after the Death of Tenant in Tail, that would not serve to make the Grant and Render good, for if *verus & antiquus reddit'* be not reserved Yearly, during the Term (as by Construction of Law is implied) the Power which the Tenant in Tail hath is not pursued. For it is not sufficient, *Quod verus & antiquus reddit'* be reserved to the Heirs in Tail, but it ought also to be reserved to the Tenant in Tail himself; and therefore if he reserves a less Rent to himself during his Life, and after his Death, the true and ancient Rent, the Lease is not good: And altho' the Stat. was made principally, as hath been said, for the Benefit of the Heirs in Tail, &c. yet the Reservat. ought in Construction in Law to be of the true and ancient Rent during the whole Term. And therefore if the true and ancient Rent be not reserved during the Life of the Tenant in Tail who made the Grant and Render, (as in Truth it was not in the Case at Bar) no Apportionment after his Death will make the Demise good. And for as much as the Land it self held by Copy was demised, it would appear on Apportionment (if any should be) that the ancient Rent would not remain for the Demesnes.

And in the Argument of this Case, the Difference of Penning of divers Stat. concerning Leases was observed. The Stat. of 32 (e) H. 8. c. 28. that appoints the Demise to begin from the Day of the Making, &c. not above the Number of 21 Years, or three Lives, and that there shall be reserved Yearly during the same Lease, &c. so much Yearly Rent, or Farm, or more, as hath been most accustomedly paid, &c. within 20 Years before such Lease made; so that a Lease

for

(a) 1 Co. 139. a.
Cr. Car. 21, 22.

(b) Antea 5. a.

(c) 3 Co. 32. b.
33. a.(d) Co. Lit. 45. b.
96. a. 142. a.9 Co. 30. a.
47. a.4 Co. 66. b.
Antea 5. a.Lane 51.
Herl. 98.2 Brownl. 336.
* 1 Co. 155. a.(e) 3 Co. 50. b.
5 Co. 2. b.6 Co. 37. a.
7 Co. 7. b.8 Co. 34. a.
72. a.9 Co. 140. b.
10 Co. 60. a.Co. Lit. 44. a.
333. a.Plow. 112. b.
Rast. Leases 2.Dyer 72. pl. 3.
162. pl. 48, 191.pl. 22, 246.
pl. 69, 271.pl. 28. 357.
pl. 43, 363.pl. 26.
Sav. 85. pl. 165.Cr. Jac. 173.
Cr. El. 350,602.
Cr. Car. 22,44, 435.
1 Rol. Rep.159, 163, 230.
2 Rol. Rep.169, 311, 332,
405, 410, 491,499.
Hob. 201.Larch. 45.
Bridg. 28.Moor 58,
759, 783.1 Leon. 59,
148.3 Leon. 132,
156.1 Jones 60.
2 Inst. 342,681.
Godb. 102.pl. 119.
3 Keb. 381.

for a lesser Term or a greater Rent is within the Letter of the said Statute: the Words of the Statute of 1 Eliz. of Leases made by Bishops are, *Other than for the Term of 21 Years, or three Lives, (without saying, or under) from such Time as any such Grant or Assurance shall begin, whereupon the old accustomed yearly Rent, or more (without Limitation of any Time) shall be reserved, &c.* And yet a Lease for lesser Time is good, and the Rent ought to be reserved during the whole Term. The Statute of (a) 13 Eliz. c. 10. *other than for the Term of 21 Years, or three Lives (without saying, or under) from the Time as any such Lease or Grant shall be made, whereupon the accustomed yearly Rent, or more, shall be reserved, &c.* And many other Matters were moved by the Counsel on both Sides at the Bar in this Case, which I purposely omit because the Court gave no Resolution of them.

And take great Care (good Reader) if you contract for any Lease, on any of the said, or any other Statutes, or with any Person who hath Power to make Leases, by any of the Provisoes newly invented and put into Indentures, you take good Advice of Counsel on the Sight and good Consideration of them in making of your Lease; and my hope is, that the Report of these Cases concerning Leases will bring to their Memory some Things tending to the repose and quiet of poor Farmers.

(a) Co. Lit.
44. b.
6 Co. 37. b.
38. a.

Mich. 31 & 32 Eliz.

In the King's Bench, in a Writ of Error.

Justice WINDHAM'S Case.

IN Trespas between *Francis Windham* one of the Justices of the *Common Pleas* Plaintiff, and *John Debney* and others Defendants, in the *Common Pleas* for Trespas done in a Meadow called *Sextens* Meadow in *Trowse* in the County of *Norfolk*, the Case was such; The Dean and Chapter of the holy and individed *Trinity* of *Norwich* were seised of the said Meadow called *Sextens* Meadow, and of another Meadow in the said Town called *Cheese* Meadow; and by Indenture under their common Seal, 37 *H.* 8. demised *Cheese* Meadow to *Howlins* for 40 Years: And afterwards 4 & 5 *Phil.* & *Mary*, by Indenture under their common Seal, demised *Sextens* Meadow to the said *Howlins* and *Debney* for 21 Years. And afterwards 12 *Eliz.* the said Dean and Chapter demised to *Nicholas Manne* both the Meadows with a several *Habendum*, *scil.* to have and to hold *Cheese* Meadow for 40 Years after the End of the first Lease thereof made; and to have and to hold *Sextens* Meadow for 40 Years after the first Lease thereof made, with several Reservations of Rents. The said *Manne* assigned his Interest to *John Hoe*, who 15 *Eliz.* surrendered and took a new Lease by Indenture of the said Dean and Chapter under their common Seal (in which the first Leases were recited) of both the Meadows, *Habendum sibi ab & post determinationem præd. separalium dimission', videlicet, præd. dimission. præd. Rob. Howlyns in forma præd. fact', & præd. dimission. præf. Rob. Howlyns & J. Debney, &c. in forma præd. fact', sive esset per surfs. reddit', determinat', &c. usq; ad fin' & terminum*

Moor 191.
Cr. El. 199.
2 Leon. 106.
Lit. Rep. 364.

min' 40 annor' ex tunc proxim. sequen', existen' verum numerum annor' mentionat. in dict. sursum reddit. Indentur. dict. Nicholao Manne made: Reddendo, &c. the antient Rent severally for the said Meadows; so that in Effect the Case is; A Man makes a Lease of *Sextens* Meadow to *A.* for ten Years, and of *Cheese* Meadow to *B.* for twenty Years; and afterwards by Indenture reciting the said two Leases, makes a Lease to another of both for forty Years, to begin after the End or Determination of the said several Leases made to *A.* and *B.* And afterwards the former Lease of *Sextens* Meadow ends, and the Lease of *Cheese* Meadow continues; and when the last Lease as to *Sextens* Meadow now in question should begin was the Question; for if it should not begin till the Lease of *Cheese* Meadow be ended, then the Pl. had entred before his Time, for the former Lease of *Cheese* Meadow hath yet Continuance. But if the said *Habendum* in the later Lease should be taken **respective* or *distributive*, (*a*) *Reddendo singula singulis*, so that when the Lease in *Sextens* Meadow determines, the new Term for 40 Years therein should begin, then Judgment ought to be given for the Pl. And after many Arguments at Bar and Bench in the *Common Pleas*, it was resolved and adjudged, That the *Habendum* in the later Lease should be taken *respective*, that is to say, the Lease of *Sextens* Meadow to *John Hoe* for 40 Years should begin (*b*) presently after the End of the first Lease thereof made. For every Deed shall be taken more (*c*) strong against the Grantor, and more beneficially for the Grantee, and it is more strong against the Lessor, and more beneficial for the Lessee to have the Lease of *Sextens* Meadow to begin presently after the Expiration of the first Lease made thereof, than to tarry till the Lease of *Cheese* Meadow be ended. As in (*d*) 9 *E. 4. 42. b.* & 19 *H. 6. 4. a.* If I release unto you all Actions which I have against you and another, in this Case notwithstanding the joint Words, all Actions which I have against you alone are released, for it shall be most beneficially for him to whom the Release is made, and most strongly against him who makes it; and the joint Words of the Parties shall be taken *respective* and severally.

1. Sometimes in respect of the several Interests of the Grantors; as if two (*e*) Tenants in common, or several Tenants join in a Grant of a Rent-Charge, yet in Law this Grant shall be several, although the Words are joint, as Sir *Robert Catlyn* Chief Justice held in *Browning's* Case in *Plow, Commentaries*.

2. Sometimes in respect of the (*f*) several Interests of the Grantees, &c. as 19 *H. 6. 63, 64. a* Warranty made to two of certain Lands shall enure as several Warranties in respect that they are severally seised, the one of

Part

*1 Mod. Rep. 33.
 (a) Moor 291.
 Cr. Jac. 259.
 9 Co. 27. b.
 10 Co. 85. b.
 2 Rol. Rep.
 411, 412.
 Cr. El. 471.
 Palm. 390.
 1 Sand. 184.
 (b) Jenk.
 Cent. 272.
 Cr. Jac. 35,
 259, 656.
 10 Co. 85. b.
 Yelv. 183.
 1 Bulstr. 42.
 1 Brownl. 147.
 3 Keb. 85.
 1 Sand. 184.
 Moor 191.
 2 Leon. 106.
 Cr. El. 199.
 3 Keb. 85.
 (c) Jenk.
 Cent. 272.
 Lit. Rep. 371.
 Co. Lit. 42. a.
 99. a. 183. a.
 127. a.
 6 Co. 36. a.
 Plowd. 103. b.
 287. b.
 Winch. 96.
 7 Co. 23. a.
 8 Co. 145. a.
 (d) Fitz. Release 14.
 4 Co. 50. a.
 Br. Release 29.
 (e) Plowd.
 140. b. 161. b.
 171. a. 289. a. b.
 Perk. sect.
 106, 107.
 Herly 9.
 Yelv. 189.
 Co. Lit. 197. a.
 267. b.
 (f) Postea
 19. a.

Part of the Lands, and the other of the Residue in Severalty, 6 E. 2. * *Covenant Br.* 49. A joint (a) Covenant taken several in respect of the several Interests of the Covenantees. *Vide* 16 Eliz. *Dier* 337, 338. between Sir *Anthony* (b) *Cook* and *Wotton*, a good Case.

3. Sometimes in respect that the Grant cannot take Effect, but at several Times, as 24 E. 3. 29. a. a Rem'r limited to the right Heirs of *F. S.* (c) and *F. N.* (*F. S.* and *F. N.* being alive) in which Case the Words are joint, and yet the Heirs shall take severally; for they shall not join in Action.

4. Sometimes in respect of the Incapacity and Impossibility of the Grantees to take jointly, as a Lease made to an Abbot and (d) secular Man, or a Gift to two Men, or to two Women, and to the Heirs of their two Bodies begotten, the Inheritance is (e) several, 7 H. 4. 17. *vide Chapman's Case, Pl. Com.*

5. Sometimes in respect of the Cause of the Grant, or *ratione subjectæ materiæ*, as 15 H. 7. 14. a. One (f) Coparcener grants a Rent to two other Coparceners for Owelty of Partition, altho' the Words are joint, yet the Cause of the Grant shall be respected, and the Rent shall be of the Quality of the Land, and therefore they shall have the Rent in Degree and Quality of Coparcenary, and not jointly. And *Kniwet Ch. Just. and Chancellor* said in 38 E. 3. 26. that if two Coparceners make a Feoffment in Fee, rendering Rent to them and their Heirs, the Heirs of both shall inherit, because their Right in the Land was several, (g) 22 E. 4. 25. b. & (h) 2 R. 3. 18. b. A joint Submission to Arbitrament taken severally in Respect of the several Causes, &c.

6. Sometimes *Ne res destruat, & ut evitetur absurd'*, as in 6 H. 7. 7. b. in (i) *Cessavit*, where the Tenure is alledged by Homage, Fealty, and Rent, and the Demandant counts, that in *faciendo servitia præd' cessavit*, shall be by Construction taken to such Services only, of which a Man may cease, (k) 17 E. 3. 1. b. & 2. a. The Prior of *Tikeford's Case* in a *Scire facias* against the Successor of the Prior on a Judgm. given in a Writ of Annuity for the Arrearages in the Time of the Predecessor, and of the Successor, and the Writ was that the Predecessor and Successor *nondum reddiderunt*: To which Exception was taken that the Predecessor was supposed not to Render that which the Successor ought, & *non allocatur*; for *reddendo singula singulis* by reasonable Construction, the Words may well stand together. *Vide* 21 E. 3. 48. a. in a *Per que servitia, F. N. B.* 14. in *Monstraverunt*: And the Reason of all these Cases is, either *quod* (l) *res non destruat*, or that the Grant shall be taken more strong against the Grantor, and shall take Effect as near as may be according to the Intent of the Parties. And such Construction concurs with two of the said Reasons in the principal Case. 1. It shall be taken more strongly against the Lessor. 2. This Construction

* *Postea* 19. a.
(a) *Postea* 19. a.
(b) 1 *Anders.*
53 54.
N. Benl. 228,
229.
Dyer 337, 338.
pl. 39.
Postea 19. a.
(c) *Co. Lit.*
188. a.
2 *Roll.* 87.
13 *Co.* 57.
Fitz. Joinder in
action 10.
30 *Ill. pl.* 47.
(d) *Park. sect.*
106. *Lit. sect.*
296, 297.
Co. Lit. 190. a.
(e) *Co. Lit.*
181. a. b. 184. a.
8 *Co.* 87. a.
7 *H.* 4. 16. b.
17. a. *Lit.*
sect. 283, 284.
1 *Co.* 84. b.
2 *Anders.*
12, 138. *Br.*
Jointenants 40.
(f) *H. b.* 172.
Br. Rent 8. *Br.*
Jointenants 20.
3 *Keib.* 215.
Co. Lit. 169. b.
Dy. 153. pl. 14.
29 *Aff. pl.* 23.
Fitz. Partic.
tion 12.
Plow. 134. b.
(g) *Br. Condi.*
tion 182.
Br. Arbitre-
ment 41.
8 *Co.* 98. a. b.
(h) *Bridg.* 91.
Plowd. 289. b.
Br. Arbitre-
ment 44.
(i) *Fitz. Cessa-*
vit 5.
Br. Cessavit 23.
Br. faux latin 76.
Doctrin. pla-
cit. 97, 289,
290.
(k) *Fitz. Brief*
663.
(l) 1 *Co.* 76. a.
2 *Co.* 72. b.
8 *Co.* 95. b.
3 *Keib.* 288.
2 *Jones.* 69.
5 *Co.* 55. b.
1 *Mod. Rep.* 109.

tion will concur with the Intent and Meaning of the Parties, for after the *Habendum* and the Number of the Years these Words are added, *existen' verum numerum annor' in dict' sursum reddit' Indent' mentionat'*, in which Indenture the *Habendum* was several, so that the Intent of the Parties was to have several Beginnings in this new Lease, &c. and the Lessor and Lessee never imagined but that the Leases should begin severally, and not that the Lessee should wait for *Sextens* Meadow, until the Lease of *Cheese* Meadow, which is another distinct Lease, and a distinct Thing, should end. And so it was adjudged, and the Plaintiff had Execution. Upon which Judgment a Writ of Error was brought; and after many Arguments it was resolved by Sir *Christoph. Wray*, Sir *Thomas Garway*, and the whole Court of *King's Bench*, That the Lease to *Hoe* should have several Beginnings. And so this Case was resolved by both Courts. And afterwards the same Term in a Case between *Pollard* and *Alcocke* in the Court of *Wards*, *Wray* Chief Justice clearly held: That if a Man be seised of three Acres of Land in Fee, and makes a Lease of one other to *A.* for Life, of another Acre to *B.* for Life, and of the other to *C.* in Tail, and afterwards by Deed (reciting the said Estates) covenants with his Brother, That after all the said Estates ended and determined, he and his Heirs would stand seised of the said three Acres to the Use of his Brother in Tail, &c. That in this Case presently by the Death of *B.* the Brother should have the Acre leased to *B.* and should not tarry till all the Estates, *scil.* the other Estate for Life, and the Estate-tail be ended: But *reddendo singula singulis*, by the Covenant the Estate in the several Acres vest presently in the Brother, and should take Effect in Possession, as the several Estates in Possession end or determine, which was granted by the whole Court. And in the Case of *Pollard, Wray* cited and relied on the said Case of Just. *Windham*. And afterwards the Plaintiffs in the Writ of Error perceiving the Opinion of the Court, did not proceed in their Writ of Error.

2 Leon. 106.
Cr. El. 199.
Jenk. Cent. 272.
Lit. Rep. 220.
2 Bulstr. 132.

Trin. 34 Eliz.

In the King's Bench

BRUDNEL'S Case.

Thomas Brudnel Administrator of *Anthony Rone*, brought an Action of Debt on Bond of 200*l.* against *Thomas Skidmore*, and had Judgment to recover in the *Common Pleas*, and died; *Robert Brudnel* and *John Brudnel* Executors of the said *Thomas Brudnel* sued a *Scire facias* on the said Judgment, and Process continued until the said *Thomas Skidmore* was outlawed; and now the said *Thomas Skidmore* brought a Writ of Error. And now, it appeared by the Record certified, that the said *Thomas Brudnel* was Administrator to the said *Anthony*, during the Minority of *Edward*, *Jeremy*, *Humphrey* and *Anne*, the Children of the said *Anthony*, and he averred in his Declaration, that the said *Edward*, *Humphrey* and *Anne* were alive; and within Age, and did not (a) aver that the said *Jeremy* was alive, or within Age; and the Plaintiff's Counsel assigned for Error, that when Administration is committed to one during the (b) Minority of four, if one of them dies, or comes of full Age, the whole Authority ceases, for a Difference was taken between a Limitation annexed to an Estate or Interest, and a collateral and bare Limitation not coupled or conjoined with an Estate or Interest, of which there can be no Survivor; as if a Man makes a Lease to two (c) during their Lives, there if one dies his Estate shall survive: But if a Lease be made to *A.* during the Life of *B.* and *C.* without saying, and during the Life of the (d) Survivor of them, there if one of them dies, the Estate (as it was said) was determined. But it was answered and resolved by Sir *John Poph.* Chief Justice, and the whole Court, that in the same Case put by the Plaintiff's Counsel, if one of the *Cestuy que vies* dies, the Estate is not determined, but *A.* should have the Land during the Life of the Survivor of them: And so was it resolved by all the Justices at *Mich. Term*

(a) Cr. Cal. 50.

(b) 1 Brown. 46.

47. 2 Brown 83.

1 Leon. 74.

(c) 1 Mod. Rep.

187.

(d) 2 Brown.

282. 11 Co. 3 b.

13 Co. 66.

- (a) Raym. 126. held at St. Albans 5 & 6 Eliz. for A. had an Estate of Freehold by Way of Limitation of an Estate during the Lives of two Men, and by Construction of Law during the Life of the Survivor of them: As if a Man makes a Lease of Land to two Men during their Lives, and they assign their Estate over, now the Assignee hath an Estate for the Life of the two Men, and if one dies, he shall have the Land during the Life of the Survivor of them. And two Differences were taken and agreed in this Case.
1. Between a Limitation, as the Case before, and a Condition: For if a Man leases Land for 100 Years if A. and B. shall so long live, in that Case if one of them dies, the Lease is (a) ended, for the Lease was conditional, and not determinable by Limitation of Estate; and the Life of a Man is collateral, as to the Lease which is but a Chattel.
- The second Difference was between a Limitation of an Estate of Freehold during Lives, which is the usual and ordinary Limitation of a Freehold and collateral Determinations, as during the Time that C. and D. shall be of the *Inner Temple*, or during the Time that C. and D. shall be dwelling in *Norfolk*, or shall be Justices of Peace, or the like; for in these Cases the Failure of the one shall determine the Estate: But the said Point moved for an Error in the Case at Bar was not expressly resolved, because another Error was moved for which without Question the Judgment was reversed, and that was, that when the Administrator had Judgment and died, his Executors could not sue Execution of the said Judgment; for none shall have Execution of that Judgment, but he who shall be subject to the Payment of the Debts of the first Intestate, and that the said Executors are not, *vide de 26 H. 8. 7.* And it is adjudged in 28 H. 8. reported by Serjeant *Bendloes*, That the Administrator of an Executor shall not have Execution of a Judgment given for the Executors. (b) And the Opinion of the Court was, that the said Outlawry on this Judgment was erroneous; and for this Cause it was reversed.
- (a) Raym. 126.
1 Rol. Rep. 197.
309, 310.
3 Bultr. 31, 131.
Moor 400, 376.
Cr. Car. 378.
Cr. El. 414. Co.
Lit. 219. b.
1 Rol. 832.
1 Co. 3. b.
1 And. 161, 162.
Owen 52.
Goldsb. 71, 72.
1 And. 151. pl.
199. 1 Mod.
Rep. 187. Cr.
Jac. 377, 378.
1 Leon. 74, 103.
1 Brownl. 30.
39, 180, 181.
1 Vent. 163.
Palm. 23.
2 Vent. 74, 108.
(b) 1 Co. 96. a.
1 Rol. 890, 907.
Went. 148, 149.
Yelv. 33, 83.
Moor 4, 139,
680. 1 Jones
214, 248, 385.
386. O. Benl. 2.
pl. 5. N. Benl.
18. pl. 24. Cr.
Jac. 4, 394, 459.
Cr. Car. 167,
227, 451, 459.
2 Sand. 149.
1 Sid. 29, 317.
March. 9.
1 And. 23, 24.
Finch 4. b. 5. a.
17 Car. 2. c. 8.
30 Car. 2. c. 6.
Swinb. 323. i
Cr. El. 435.
Dyer 47. pl. 12.
112. pl. 51.
2 Brownl. 144.
Noy 81, 82.
Latch 140.
Palm. 443.
1 Sid. 122.

Mich. 36 & 37 Eliz. Rot. 1634.

In the Common Pleas.

HENSTEAD'S Case.

THE Case was such; A Woman Tenant for Life of a House and certain Land in *Sboram* in *Kent* made a Lease at Will rendering Rent, and afterwards took Husband; and she and her Husband brought an Action of Debt for the Arrearages after the Marriage; and if the Lease at Will were determined by the Intermarriage or not was the Question. And it was agreed by the whole Court, That the Will was not determined (a) by the Intermarriage; for altho' the Woman had by marrying submitted her self to the Will of her Husband as her Head; yet forasmuch as it might be prejudicial to the Husband to have the Lease determined (for then he would lose the Rent to be paid at the next Day after the Marriage, and it cou'd not be in any Manner prejudicial to the Wife, if the Lease continue, but rather to her Benefit. And generally it might be great Prejudice to all Husbands who intermarry with Women who have Tenants at Will for the Losing of their Rents.) For these Causes it was resolved, that without express Matter done by the Husband after the Marriage to determine the Will, it is not determined. The same Law, if a Lease be made to a Woman (b) at Will, and she marries, the Will continues notwithstanding the Marriage.

So if a Lease at Will be made to (c) three rendering Rent, and one dies, it is no Determination of the Will, and although nothing can survive, yet because every Jointenant is possessed *per my & per tout*, they shall be charged with the whole Rent. And so the *Quære* in 10 *El. Dier* (d) 269. b. well resolved: But in the Case at Bar after the Marriage, the Woman her self could not countermand or determine the Lease at Will, no more than where (e) she and her Husband make a Lease at Will rendering Rent during the Co-

(a) Kelw. 162.
b. 163. a.
Heil. 72. 1 Rol.
861. Cr. Car.
304. Co. Lit.
55. b.

(b) Co. Lit. 55. b.
1 Rol. 861.
Cr. Car. 304.
(c) Dyer 269.
pl. 20.

(d) Dyer 269.
pl. 20.

(e) 1 Rol. 861.
Co. Lit. 55. b.

verture; or if a Lease be made to them at Will: For she hath submitted her self, and all her Will to her Husband; and so a Feme Covert may have a Tenant at Will; and be Tenant at Will, and yet she her self cannot countermand it, because she by her Intermarriage hath put her countermanding Power in this Case (which doth not concern Freehold or Inheritance) into her Husband's Mouth.

(a) 1 Rol. 861.
Co. Lit. 55. b.

Also if the Husband (a) and Wife lease Land at Will rendering Rent, and the Husband dies, it is no Countermand of the Will, but the Lease continues. So it was said, if

(b) 1 Rol. 861.
Co. Lit. 55. b.

two (b) Jointenants make a Lease at Will rendering Rent, and one dies, all survives to the other, and if the Lessee continues his Possession, the Survivor shall have an Action for the whole Rent for the Privity, and it shall not be a Countermand for one Moiety for the Mischief which might ensue to Lessors, and the rather because no Mischief or Prejudice can come to the Lessees in such Case.

Mich. 39 & 40 Eliz. which began Pasch. 38 Eliz. in the Common Pleas.

IVE'S Case.

IVE brought an Action of Wast against *Sammes*, and counted of a Lease made to the Defendant of the Manor of *Tottenbam* in the County of *Essex* for 30 Years: The Defendant pleaded, *non dimisit*; and by special Verdict it was found, That the Lessor made a Lease for 30 Years of the said Manor, except all Woods and Underwoods growing or being on the Manor; and afterwards made a second Lease to the same Lessee of all the Woods and Underwoods growing or being on the said Manor for the Term of 62 Years without Impeachment of Wast, and afterwards made a third Lease of the said Manor to the said Lessee for 30 Years, without Exception to begin at a Day to come, *scil.* from the Expiration of the said first Lease for 30 Years; and after the Term of 30 Years expired, the Lessee cut Trees; *Ive* in Reversion brought an Action of Wast, and it was adjudged for the Plaintiff. And in this Case three Points were resolved.

1. That by the (a) Exception of the Woods and Underwoods growing or being on the Manor, the Soil itself is excepted (b), 14 H. 8. 1. a. b. acc', and by Name of Wood may be demanded and recovered, and that these Words (growing or being) are Words of Abundance, for without them the Law will imply as much, & (c) *expressio eorum que tacite insunt nihil operatur*, for by the Lease of the Wood and Underwood on the Manor, is implied that they are growing, and therefore to demise all Woods on the Manor, and all Woods growing on the Manor is all one. And so it was also adjudged, *Trin. 7 Eliz.* in the *King's Bench*, as it was there said. *Vide* 46 E. 3. 22. b. 28 H. 8. *Dier* (d) 19. 33 H. 8. *Br.* (e) *Reservation* 39. 7 E. 6. *Dier* (f) 79, &c. and so a Question in our Books well resolved.

3 Bulst. 290. Co. Lit. 4. b. pl. 48. 11 Co. 47. b. Co. Lit. 4. b.

(e) 11 Co. 42. b. 3 Bulst. 290.

3 Bulst. 290. 11 Co. 47. b. Co. Lit. 4. b.

C 3

2 And. 51.
Lib. 11. f. 52. a.
Cr. El. 521, 522.
(a) 3 Bulst. 290.
Dall. 11. pl. 11.
Br. Except. 2.
Br. Tresp. 167.
Palm. 497.
(b) Dall. 11. pl. 11. 3 Bulst. 299.
2 Rol. 455.
11 Co. 49. b.
47. b. Cr. El. 522. 1 Rol. Rep. 95. 96. 98.
Co. Lit. 4. b.
44 E. 3. 34. b.
Cr. Jac 487.
488. 524. Perk. sect. 642. 643.
Poph. 146.
2 Brown. 231.
(c) 8 Co. 56. b. 145. a. 4 Co. 73. b. 1. Co. 60. a.
10 Co. 39. a.
2 Rol. Rep. 523.
Larch. 25.
Palm. 433, 437.
Co. Lit. 191. a. 205. a. Wing. Max. 235.
2 Inst. 365. 1 Lit. Rep. 111.
2 Sand. 351.
2 Bulst. 131. 1 Mod. Rep. 190.
Hard. 92. 1 Rol. Rep. 310.
Hob. 170.
(d) Dyer 19. pl. 110, 111.
1 Leon. 49.
(f) Dyer 7A

2. Not-

(a) Co. L't. 324. b.
 (b) Plow. 103. b. 104.
 (c) Co. Lit. 324. b. 325. a. Fitz-grant 15. Hurr. 89. Br. gram 60. Br. patent 29. Plowd. Comm. 152. b. 399. a. b. 2 Rol. 121. Plow. 103. b. 104. b. 11 Co. 47. b.
 (d) Co. Lit. 324. b. 325. a. 1 Rol. 233. 11 Co. 50. Hurr. 88, 89. Dyer 57. b.
 (e) Cr. El. 264, 522, 605, 873, 874. Co. Lit. 218 b. 338 a. 2 Rol. 496. 10 Co. 52, 53. a. 67. b. Poph 8, 9. 2 Leon. 188. 3 Leon. 247. 4 Leon. 30. Dal. 74. Mo. 196, 358, 636, 637. 2 And. 52, 192. Dyer 46. pl. 9. 57, 58. pl. 2, 3, 112. pl. 49, 140. pl. 43, 177. pl. 35. 200. pl. 62, 280. pl. 13, 349. pl. 15. Perk. sect. 617. 14 H. 8. 15. a. Br. Lease 14. 2 Rol. Rep. 171. 406. Lit. Rep. 269, 273, 282. Lane 7. 6 Co. 69. b. 37 H. 8. 18. a. Plow. 107. b. 194. b. Br. Surrender 14. 31 H. 7. 5. a. b.

2. Notwithstanding the said Exception, the Wood remains Parcel of the (a) Manor, and by Lease of the Manor shall pass, because the Freehold remains intire, and the Lessor remains Tenant to every *Præcipe*, and there needs no Exception. *Vide Plow. Comm. 103. b. (b) Fulmerston's Case*; otherwise of a Lease for Life with such Exception, *causa patet*. And therefore it was resolved, That by the Lease of the Manor, the Woods shall pass. *Vide (c) 38 H. 6. 35. b.* The King seized of a Manor to which an Advowson was appendant, leased the Manor, (without speaking of the Advowson appendant, whereby it did not pass) for Life; and afterwards granted the Reversion, *Habendum una cum Advocatione*, the Advowson shall not pass, for during the Life of the Lessee it was not appendant: Whereupon it is to be observed, That if a Man grants an Advowson appendant for Life, the Reversion is appendant to the Manor: But when a Man leases the Manor for (d) Life, except the Advowson, the Advowson in Possession cannot be appendant to the Reversion of the Manor expectant on the Estate for Life; otherwise on an Estate for Years.

3. That by the Acceptance of a future Lease, to begin divers Years after, the said Lease of the Wood for 62 Years was presently (e) surrendered, because the Lessee by Acceptance thereof had affirmed the Lessor to have Ability to make the new Lease, which he had not, if the first Lease shall stand: As if Lessee for 20 Years takes a Lease for three Years, to begin 10 Years after; it is a present Surrender of the whole Term, for it cannot be a Surrender of the last 10 Years, and remain for the first 10 Years, and so to make a Fraction of the Term: Nor can he who hath a Lease for 20 Years surrender the last 10 Years by any express Surrender saving to him the first 10 Years. *Vide 14 H. 8. 15. 2 Mar. 112. 4 Mar. 141. 3 Eliz. 200. 10 Eliz. 272. 11 Eliz. 280. 35 H. 8. 57. 21 H. 7. 6. 31 Aff. p. 26, 32 H. 8. 46. 37 H. 6 17. 14 H. 7. 37. 21 H. 7. 12, 40. 13 R. 2. Dower. 40 E. 3. 24, 43. 41 E. 3. 13. 44 E. 3. 25, 26. 45 E. 3. 13.*

35. 2 Co. 17. b. 7 Co. 18. a. Raym. 148. O. Benl. 57. Kelw. 70. b. Br. estoppel 210. 2 Sid. 138.

Trin. 41 Elizab. which began
Hill. 40 Eliz. Rot. 747.

In the Common Pleas.

SAUNDER'S Case.

Saunders brought an Action of Wast against *Marwood* ^{1 Brown. 241.}
Assignee of the Term in the Tenement for Wast done in ^{Cr. El. 683.}
digging of Sea-coals; the Defendant pleaded in Bar, that the
first Lessee who opened the Mine, granted to him all his
Interest in the Land *cum omnibus profic' (Except. & sem-*
per reservatis sibi & hered' suis tot' benefic' & profic' Miner'
Anglice the Coal-Mine in præd' parcell' terr' ac omnibus
arboribus maeremii;) and averred, that the said Mine at the
Time of the Assignment, and yet, is open. Whereupon the
Plaintiff demurred in Law. And on great Deliberation it
was adjudged for the Plaintiff, and in this Case three Points
were resolved.

1. If a Man hath Land in Part of which there is a Coal-
Mine open, and he leases the Land to one for Life, or for
Years, the Lessee may (a) dig in it: For inasmuch as the
Mine is open at the Time, &c. and he leases all the Land,
it shall be intended that his Intent is as general as his Lease
is; *scil.* that he shall take the Profit of all the Land, and by
Consequence of the Mine in it. *Vide (b)* 17 *E.* 3. 7. *a. b.* *John*
Hull's Case acc', and so the Doubt in *F. N. B.* 149. *C.* well
explained.

2. If the Mine were not (c) open, but included within the
Bowels of the Earth at the Time of the Lease made, in
such Case by Leasing of the Land, the Lessee cannot make
new Mines, for that shall be Wast. *F. N. B.* 59. & 22 *H.* 6.
18. *b. acc'*.

3. If a Man hath Mines hid within his Land, and leases
his Land, and (d) all Mines therein, there the Lessee may
dig for them, for (e) *quando aliquis aliquid concedit, conced'*
videtur & id sine quo res ipsa esse non potest, and therewith

C 4

agrees 258. 2 Sid. 39.

(a) Co. Lit. 54. b.
(b) Fitz. Wast
101.
(c) 1 Sider. 152.
2 Rol. 816.
Larch. 190.
Co. Lit. 54. b.
Hob. 234.
(d) N. B. 149. c.
Co. Lit. 54. b.
Larch 190.
Hob. 234.
2 Rol. 816.
2 Jones 72.
Hutr. 19.
2 Bullst. 252.
1 Vent. 45.
(e) Post. 47. a.
Hob. 234.
2 Bullst. 252.
12 Co. 13. 130.
Co. Lit. 56. a.
153. a. 2 Inst.
306. Moor 218.
Cawley 246.
Hawks Max.
agrees 258. 2 Sid. 39.

(a) 2 Bulst. 252.
12 E. 4. 8. a.
Br. Wait 126.
9 E. 4. 35. b.

agrees 9 E. 4. 8. where it is said, That if a Man leases his Land to another, and in the same there is a (a) Mine (which is to be intended of a hidden Mine) he cannot dig for it, but if he lease his Land and all Mines in it, then although the Mine be hidden, the Lessee may dig for them; and by Consequence the Digging of the Mine in the principal Case was Waste in the first Lessee.

4. It was resolved, That although the Mine was first opened by the first Lessee, yet if his Grantee dig in it, it is Waste in him.

(b) 1 Brownl.
241. Cr. El. 683.
Allein 81, 82.
13 Co. 60. Cr.
Jac. 296. Poph.
195. 2 Bulst. 6, 8.

5. It was resolved, that the Exception was (b) void, for first by the Exception of the Profits of the Mine, or of the Mine itself, the Land is not excepted; and then it follows, that he hath excepted that which he could not have or take: As if a Man assigns his Term, and excepts the Timber-trees on the Land, or the Gravel, or Clay within the Land, it is void, for he cannot except to himself a Thing which doth not belong to him by the Law. And although it was said, That forasmuch as the Lessee first opened the Mine, and thereby committed Waste, and so had *quodam modo* appropriated it to himself, and by his Wrong had subjected himself to lose the Place wasted, and treble Damages, it should be a Reason that he might keep it to himself, and so continue punishable for the Waste of which he was the first Author; but notwithstanding that, it was resolved as above; for his Wrong which he committeth cannot devert the Interest in the Mine, being in the Land demised to him out of the Lessor, and therefore he cannot except that to himself which belongs to another: And it was adjudged *Pasch.* 28 *Eliz.* in the *Common Pleas*, *Rot.* 820. between *Foster* and *Miles* Plaintiffs, (c) and *Spencer* and *Borde* Defendants, that where the Lessee for Years assigns over his Term except the Timber-trees, and afterwards the Trees were felled, that the Action of Waste was maintainable against the Assignee, for the (d) Exception was utterly void for the Causes aforesaid, *quod nota bene*. And in this Case it was said, if Lessee for Years devises his Term to another, and makes his Executors, and dies, the Executors do Waste, and afterwards assent to the Devise, in that Case although between the Executors and the Devisee it hath Relation, and the Devisee is in by the Devisor, yet an Action of (e) Waste shall be maintainable against the Executors in the *tenuit*. So if Grantee of a Term on Condition doth waste, and afterwards the Grantor enters for the Condition broken, the Action of Waste shall be maintainable against the Grantee in the *tenuit*, (f) 30 E. 3. 16. a. b. acc.

(c) Goldsb. 63.
3 Leon. 48, 49.
Cr. El. 17, 18,
683. 13 Co. 60,
61. Co. Ent.
695. pl. 3.
2 Bulst. 6.
(d) 1 Leon. 49.
Cr. El. 17, 18,
683. 2 Bulst. 6, 8
Poph. 194.

(e) 1 Rol. Rep.
248. 2 Inst. 302.
Swind. 324.
Bridgm. 54.

(f) Fitz. Waste
26.

Mich. 41 & 42 Eliz.

Rosse's Case.

Between *Peter Rosse* and *Aldwick* in an *Ejectione firme*, which began *Pasch. 37 Eliz. Rot. 499.* the Case was such; A Lease is made to *A.* and his Assigns, *Habendum* to him during his Life, and the Lives of *B.* and *C.* and if this Limitation during the Life of *B.* and *C.* were void or not was the Question. And it was adjudged, That the Limitation was good; for where it was objected, That when a Man hath two Estates in him, the greater shall drown the Lesse, and that an Estate for his own Life is higher than for the Life of another, and therefore an Estate for his own Life, and for the Lives of others cannot stand together, To that it was answered and resolved, That in the Case at Bar, the Lessee had but one Estate, which hath this Limitation, *scil.* during his Life, and the Lives of two others, and he hath but one Freehold, and therefore there cannot be any drowning of Estates in the Case, but he hath an Estate of Freehold to continue during these three Lives, and the Survivor of them.

Moor 398, 399,
Gold. 157, 158.
Cr.El. 491, 492.

1 Bulstr. 136.
Cr. Jac. 282.
Cr. El. 58, 182.
2 Bulstr. 135.
Moor 8.
Co. Lit. 41. b.
2 Leon 1.
2 Rol. 445,
446, 472.
Rol. Rep. 178.

Mich.

Mich. 42 & 43 Eliz.

In the King's Bench.

The Countess of Shrewsbury's Case.

Cr. El. 777,
784.

THE Countess of Shrewsbury brought an Action on the Case against Richard Crompton a Lawyer of the Temple, and declared, That she leased to him a House at Will, *Et quod ille tam negligenter Et improvide custodiivit ignem suum, quod domus illa combusta fuit*: To which the Defendant pleaded Not guilty, and was found guilty, &c. And it was adjudged that for this (a) permissive Waste no Action lay, against the Opinion of *Brook* in the Abridgment of the Case of 48 E. 3. 25. (b) Waste 52. And the Reason of the Judgment was, because at the Common Law no Remedy lay for Waste, either voluntary or permissive against Lessee for Life (c) or Years, because the Lessee had Interest in the Land by the Act of the Lessor, and it was his Folly to make such Lease, and not restrain him by Covenant, Condition, or otherwise, that he should not do Waste. So and for the same Reason, a Tenant at Will shall not be punished for permissive Waste. But the Opinion of *Littleton* is good Law, fol. 152. If Lessee at Will commits (d) voluntary Waste, *scil.* in Abatement of the Houses, or in Cutting of the Woods, there a general Action of Trespass lies against him. For as it is said in 2 & 3 *Phil. & Mar. Dyer* 122. b. when Tenant at Will takes upon him to do such Things which none can do but the Owner of the Land, these amount to the Determination of the Will, and of his Possession, and the Lessor shall have a general Action of Trespass without any Entry: And there 15 E. 4. 20. b. is cited, That if a (e) Bailee of Goods, as of a Horse, &c. kill them, the Bailor shall have a general Action of Trespass, for by the Killing the Privity was determined. But it was agreed that in some Cases, when there is a Confidence reposed in the Party, the Action upon the Case will lie for Negligence, although

(a) Co. Lit. 57. a.
 (b) Br. Waste 51.
 (c) Cr. El. 777. 2 Inlt. 299. Stat. Glouc. c. 5. Dr. & Stud. 60. a. 4 Co. 62. b. 6 Co. 43. a. Salk. 19. 6 A. c. 31. 10 A. c. 14.
 (d) Cr. El. 777, 784. Cr. Car. 187. Noy 51. Lit. sect. 71. Co. Lit. 57. a. 1 Rol. 860. 2 Rol. 555, 556. Raym. 148.
 (e) Co. Lit. 57. a. Cr. El. 784. 18 E. 4. 27. b. 11 Co. 82. a. Moor 248. 1 Leon. 37, 88. Goldsb. 66, 67. 72. Owen 52. Dyer 121. pl. 17. Moor 248.

although the Defendant comes to the Possession by the Act of the Pl. As (a) 12 E. 4. 13. a. b. where a Man delivers a Horse to another to keep safe, the Defendant *equum illum tam negligenter custodivit, quod ob defectum bonæ custodiæ interiit*; the Action on the Case lies for this Breach of the Trust. So 2 H. 7. 11. if my (b) Shepherd, whom I trust with my Sheep, and by his Negligence they be drowned, or otherwise perish, an Action upon the Case lies: But in the Case at Bar it was a Lease at Will made to the Defendant, and no Confidence reposed in him; wherefore it was awarded, that the Plaintiff take nothing by her Bill.

(a) Fitz. action sur le Case 19.
Br. action sur le Case 97.
(b) Cr. El. 777, 784.
Lit. sect. 71.
Owen 52.
Moor 248.
Dy. 121. pl. 17.
Goldsb. 72.
(c) Co. El. 777.

MICH. 43 & 44 ELIZ.

I N T H E

High Court of PARLIAMENT.

The Case of Ecclesiastical Persons.

AT a Parliament held in the same Term upon Consideration of a Bill for Confirmation of Conveyances made by the Subjects to the Queen, and of Letters Patents made by the Queen to Subjects. It was resolved by the Chief Justices, *Popham* and *Anderson*, and by divers other Justices assisstant to the Lords of Parliament in the Upper House, That Leases made to the Queen by Colleges, Deans and Chapters, Wardens of Hospitals, or any other having Spiritual or Ecclesiastical Livings, against the Provision of the Act of 13 Eliz. (a) cap. 10. are restrained by the same Act, as well as Leases made to common Persons.

1. Because the Ecclesiastical Persons are disabled by the Act to make any Lease, Gift, Grant, Feoffment, Conveyance, or Estate, but only in the same Form as the Statute prescribes;

Full. Ch. Hist. l. 10. p. 27.
(d) 10 Co. 60. b.
11 Co. 67. a.
70. a. 73. a.
75. b. 76. a.
1 Rol. Rep. 152, 155, 158, 160, 164, 166, 236.
Carter 13.
Hardres 302, 445.
1 Jones 21.
Jenk. Cent. 255, 256.
Antea 6. b.
Cr. Argument 60. Co. Lit. 43. a. 44. b.
301. a. 342. a.

The Case of Ecclesiastical Persons. PART V.

prescribes; and if they are disabled to make Estates, then the Queen cannot take any Estate of them, which is not warranted by the said Act. For altho' the Queen by the Common Law hath Ability to take it, yet for as much as the Parliament hath disabled them to make Estates, the Estates made to the Queen against the Act are void.

2. The Stat. of 1 *Eliz.* which restrains Bishops to make Estates, hath a special (a) Provision, that they may make Estates to the Queen; which proves, that if such Provision had not been made for the Queen, for as much as the Act doth disable Bishops to make Estates, the Queen could not take Estate from them against the Provision of the Act, but no such Provision is in the said Act of 13 *Eliz.*

3. In divers Cases the King is (b) bound by Act of Parliament, altho' he be not named in it, nor bound by express Words. And therefore all Stat. which are made to suppress Wrong, or to take away Fraud, or to prevent the Decay of Religion, shall bind the King altho' he be not named: For Religion, Justice, and Truth are the sure Supporters of the Crowns and Diadems of Kings. And therefore it is agreed in 35 *H. 6. 60.* that the (c) King shall be bound by the Stat. of *West. 2. (d) cap. 5.* which makes Provision against tortious Usurpations, altho' the K. be not named in the Act. So in the Lord *Barkley's* Case reported by Mr. *Plowden*, it is adjudged, That if a Gift in Tail be made to the King, he can't alien to defraud him in Reversion, or his Issue, but is (e) bound by the Stat. of *West. 2. De donis conditionalibus.* And the said Act of (f) 1 *Eliz.* proves, That Acts which restrain Ecclesiastical Persons from wasting their Possessions, which were given to maintain the Service of God, shall bind the King, if special Provision had not been made to the contrary by the same Act; *Et (g) summa ratio est quæ pro religione facit.* Sir *Tho. Egerton* Lord Keeper of the Great Seal, agreed in Opinion with the Justices aforesaid in the principal Case: Note Reader, the said Act of 13 *Eliz.* hath been construed (h) beneficially, to prevent all Inventions and Evasions against the true Intent of the Makers of the Act. And therefore it was held *Pasch. 14 Eliz.* in the *Common Pleas* in (i) *Eitruæ's* Case, That if a Writ of Annuity be brought against a Parson or a Vicar on a feigned Prescription, or by a Grant by him, the Patron and Ordinary, supposed to be made before the Statute; and he prays in Aid of the Patron and Ordinary, and loses by Action tried, and all this is feigned to make an Evasion out of this Act, that this Invention is taken within the Equity of it; for although the (k) Annuity charge the Parson or Vicar and not the Possessions, yet it is within the Mischief, *scil.* impoverishing of the Successor, Cause of Dilapidations, and Decay of Spiritual Livings, and Hospitals, which are the Mischiefs mentioned in the

Preamble

- (a) 11 Co. 71. b.
- (b) 2 Inst. 358, 681.
- Co. Lit. 43. b.
- 99. a. 120. a.
- 11 Co. 70. a. b.
- 72. a.
- 2 Sid. 69.
- 1 Rol. Rep. 152, 153, 165, 167.
- Cr. Car. 526.
- (c) 35 H. 6. 61. a.
- (d) Co. Lit. 344. b.
- 2 Inst. 553, 354, &c.
- (e) Plowd. 243. b. 244. a. b. 248. b. 251. b. 252. a.
- 1 Co. 44. b. 48. a.
- 7 Co. 21. a. 23. a.
- 11 Co. 72. a.
- 1 Rol. Rep. 153.
- (f) Raft. Leafes 4.
- (g) 1 Rol. Rep. 167.
- Hardr. 302.
- 10 Co. 55 a.
- Co. Lit. 341. a.
- 2 Bulstr. 53.
- Hob. 295.
- Hawk. Max.
- 2 Wing. Max. 3.
- (h) 11 Co. 76. a.
- Palm. 216.
- 1 Rol. Rep. 164.
- Co. Lit. 342. a.
- (i) Eitruæ's Case, Pasch. 14 Eliz. in *Com- muni Banco*.
- 10 Co. 60. b.
- 1 Rol. Rep. 160, 164.
- Hob. 97.
- 11 Co. 82. b.
- (k) Bridg. 30.
- Hob. 97.
- 10 Co. 61. a.
- 11 Co. 69. b.
- Cr. Car. 49.
- 1 Rol. Rep. 160.

Preamble. And note this Word (*suffered*) in the Act was well observed.

It was adjudged in the *Com. Pleas, Mich. 37 & 38 Eliz.* between the Dean and Chapter of *Hereford*, and the Bishop of *Hereford* (a) and *Ballard*, That the Grant of the next (b) Avoidance of a Benefice by the Dean and Chapter was within the Purview of this Act; so it was resolved there, If a Dean and Chapter grant a (c) Rent-Charge out of their Possessions, it is restrained by the Equity of the Act; and yet the Rent is not any Part of their Possess. within the Words of the Act. It hath been held, That where an Archdeacon made a Lease for three Lives according to this Act, and the Lessees made a Lease for 100 Years, and the Archdeacon, Bishop, and the Dean and Chapter confirmed it; yet it should not bind the Successor; for if such Confirmation should not be said a Conveyance within this Act, the Statute would be to little or no Purpose, and the good Intent and Purview of the Act would be defeated and defrauded.

And it was held *Trin. 30. Eliz.* in a Case depending by *English* Bill in the Exchequer-Chamber, between *Hodges* Pl. and (d) *Newcomen* Def. by Sir *Roger Manwood* Ch. Baron, and all the Barons of the Exchequer, That where the Parson of *Weston* in the County of *Gloucester* 9 *Eliz.* demised his Rectory to *Will. Hodges* then Patron of the same Rectory for 50 Years, who 14 *Eliz.* by his Deed assigned it over to Sir *John Trogmorton*, the Bishop confirmed this Lease 17 *Eliz.* in the Life of the Lessor, that the said Confirmations were good. And in that Case two Points were resolved.

1. That for as much as the said Lease was made before the Stat. of 13 *Eliz.* and so not restrained by the said Act, the (e) Confirmations made after the said Act to perfect the said Lease, were not within the Purview or Intention of the Act.

2. It was resolved, that the Grant made by the Patron of the said Lease, did (f) import in it self as well a Grant of the Term, as a Confirmation of the same Term: And so one Deed of one and the same Thing by one and the same Person, to one and the same Person, and at one and the same Time shall enure to two several Purposes, *scil.* to a Grant of the Interest as Lessee, and to a Confirmation of the same Interest as Patron. As if (g) Tenant for Life grants a Rent-Charge to him in the Rev'n in Fee, and he by Deed grants it over to another and his Heirs, that is a good Grant and Confirmation. also to make the Rent good for ever. So if a (h) Disfeisor makes a Lease for Life, the Remainder to the Disfeisee, and the Disfeisee grants the Remainder over, it is a good Grant and Confirmation also.

And in the principal Case the Lords of the Parliament, after the said Resolution, being informed, that divers Deans and Chapters, Colleges, &c. had made Leases to the Queen, intending that the Queen was not bound by the said Act of 13 *Eliz.* caused a Clause

(a) Cr. El. 440.
Bishop of Hereford. Cafe.
Mich. 37 & 38
Eliz. in Communi Banco.
(b) Cr. El. 207.
690.
3 Co. 59. b.
(c) Dyer 370.
pl. 62.

(d) Newcomen's Case,
Trin. 30 Eliz.
in the Excheq.
1 Rol. Rep.
171, 361.
2 Rol. Rep. 9.
Co. Lit. 301. b.
1 Rol. 481.
Cr. Car. 38.
3 Bulst. 238.
Bridg. 83.

(e) Cr. El. 18,
430.
Cr. Jac. 53.
Co. Lit. 301. b.
302. a.
(f) Co. Lit.
301. b.

(g) Co. Lit.
302

(h) Co. Lit.
302. a.

The Case of Ecclesiastical Persons. PART V.

to be added in the first Branch of the Act of Confirmation that it should not extend to make any Lease, Grant, &c. good to the Queen by any Ecclesiastical Person, &c. who had not Power by the Laws and Statutes of the Realm to make it, which is more than was in the Act of Confirmations in *anno* 18 *Eliz.* which was done to manifest the Matter to the Lay-people; for it was held by the said Justices, That the general Words of the said Act of 18 *Eliz.* hath not enabled such Ecclesiastical Persons to make Leases or Estates to the Queen, who by the said Act of 13 *Eliz.* were upon good and important Considerations disabled. *Vide* 17 *E.* 3. 40. & 21 *E.* 3. 46. The King being Head of the Commonwealth, cannot be an Instrument to defeat the Purview of an Act of Parliament made *pro bono publico.*

9 Co. 73. 2.

11 Co. 76. 2.

Covenants.

Covenants, Agreements, &c. concerning Leases, Assuran- ces, &c.

Pasch. 25 Eliz. in the King's Bench.

SPENCER'S Case.

S *Spencer* and his Wife brought an Action of Covenant against *Clark*, Assignee to *J.* Assignee to *S.* and the Case was such: *Spencer* and his Wife by Deed indentured demised a House and certain Land (in the Right of the Wife) to *S.* for Term of 21 Years, by which Indenture *S.* covenanted for him his Executors and Administrators with the Plaintiffs, that he, his Executors, Administrators, or Assigns, would build a Brick Wall upon Part of the Land demised, &c. *S.* assigned over his Term to *J.* and *J.* to the Defendant; and for not making of the Brick Wall the Plaintiffs brought the Action of Covenant against the Defendant as Assignee: And after many Arguments at the Bar, the Case was excellently argued and debated by the Justices at the Bench: And in this Case these Points were unanimously resolved by Sir *Cristopher Wray* Chief Justice, Sir *Thomas Garwy*, and the whole Court. And many Differences taken and agreed concerning express Covenants, and Covenants in Law, and which of them run with the Land, and which of them are collateral, and do not go with the Land, and where the Assignee shall be bound without naming of him, and where not; and where he shall not be bound although he be expressly named, and where not. 2 Bulstr. 281
282.
Morr 159.

1. When the Covenant extends to a Thing in *esse*, Parcel of the Demise, the Thing to be done by Force of the Covenant is *quodam-*

(a) Moor 27,
399.
Co. El. 457,
552, 553.
1 Rol. 521, 522.
Poſtea 24.
1 Sand. 239.
Cr. Jac. 125.
Cr. Car. 222,
523.
1 Jones 245.
1 Siderf. 157.
1 Anderf. 82.
1 Show. 284.
4 Mod. 80.
3 Lev. 326.
Salk. 185, 317.
(b) Cr. Fl. 457.
Cr. Car. 439.
Dy. 14. pl. 69.
1 Anderf. 82.
Moor 159.
(c) Cr. Car.
25, 188.
1 Jones 223.
1 Rol. Rep.
360.
Moor 159, 399.

(d) F. N. B.
135. d.
Co. Lit. 384. b.

(e) 2 Jones 152.
1 Leon. 43.
Swinb. 324.

(f) Cr. Car.
188.

quodammodo annexed and appurtenant to the Thing demised, and shall go with the Land, and shall bind the Assignee (a) altho' he be not bound by exprefs Words: But when the Covenant extends to a Thing which is not in Being at the Time of the Demise made, it cannot be appurtenant or annexed to the Thing which hath no Being: As if the Lessee covenants to repair the Houses demised to him during the Term, that is Parcel of the Contract, and extends to the Support of the Thing demised, and therefore is *quodammodo* annexed and appurtenant to Houses, and shall bind the Assignee altho' he be not bound expressly by the Covenant: But in the Case at Bar, the Covenant concerns a Thing which was not in *esse* at the Time of the Demise made, (b) but to be newly built after, and therefore shall bind the Covenantor, his Executors, or Administrators, and not the Assignee, for the Law will not annex the Covenant to a Thing which hath no Being.

2. It was resolved that in this Case, If the Lessee had covenanted for him and his (c) Assigns, that they would make a new Wall upon some Part of the Thing demised, that for as much as it is to be done upon the Land demised, that it should bind the Assignee; for altho' the Covenant doth extend to a Thing to be newly made, yet it is to be made upon the Thing demised, and the Assignee is to take the Benefit of it, and therefore shall bind the Assignee by exprefs Words. So on the other Side, If a Warranty be made to one, his Heirs and Assigns, by exprefs Words, the Assignee shall take Benefit of it, and shall have a (d) *Warrantia Chartæ*, F. N. B. 135. & 9 E. 2. *Garr' de Charters* 30. 36 E. 3. *Garr. 1. 4 H. 8. Dier 1.* But altho' the Covenant be for him and his Assigns, yet if the Thing to be done be merely collateral to the Land, and doth not touch or concern the Thing demised in any Sort, there the Assignee shall not be charged. As if the Lessee covenants for him and his Assigns to build a House upon the Land of the Lessor which is no Parcel of the Demise, or to pay any collateral Sum to the Lessor, or to a Stranger, it shall not bind the Assignee, because it is merely collateral, and in no Manner touches or concerns the Thing that was demised, or that is assigned over; and therefore in such Case, the Assignee of the Thing demised cannot be charged with it, no more than any other Stranger.

3. It was resolved, If a Man leases (e) Sheep or other Stock of Cattle, or any other personal Goods for any Time, and the Lessee covenants for him and his Assigns at the End of the Time to deliver the like Cattle or Goods as good as the Things letten were, or such Price for them; and the Lessee assigns the Sheep over, this Covenant shall not bind the Assignee, for it is but a personal Contract, and wants such (f) Privity as is between the Lessor and Lessee and his Assigns of

of the Land in Respect of the Reversion. But in the Case of a Lease of personal Goods there is not any Privity, nor any Rev'n (a) but merely a Thing in Action in the Personalty, which cannot bind any but the Covenantor, (b) his Executors, or Administrators, who represent him. The same Law, if a Man demises a House and Land for Years, with a Stock or Sum of Money rendering Rent, and the Lessee covenants for him, his Executors, Administrators, and Assigns, to deliver the Stock or Sum of Money at the End of the Term, yet the Assignee shall not be charged with this Covenant, for altho' the Rent reserved was increased in Respect of the Stock or Sum, yet the Rent did not issue out of the Stock or Sum (c), but out of the Land only; and therefore as to the Stock or Sum the Covenant is personal, and shall bind the Covenantor, his Executors and Administrators, and not his Assignee: And it is not certain that the Stock or Sum will come to the Assignees Hands, for it may be wasted, or otherwise consumed or destroyed by the Lessee, and therefore the Law can't determine at the Time of the Lease made, that such Covenant shall bind the Assignee.

4. It was resolved, that if a Man makes a Feoffment by this Word (d) *Dedi*, which implies a Warranty, the Assignee of the Feoffee shall not vouch: But if a Man makes a Lease for Years by this Word *Concessi*, (e) or *Demisi*, which implies a Covenant, if the Assignee of the Lessee be evicted, he shall have a Writ of Covenant; for the Lessee and his Assignee hath the yearly Profits of the Land which shall grow by his Labour and Industry for an annual Rent, and therefore it is reasonable when he hath applied his Labour, and employed his Cost upon the Land, and be evicted (whereby he loses all) that he shall take such Benefit of the Demise and Grant, as the first Lessee might, and the Lessor hath no other Prejudice than his especial Contract with the first Lessee hath bound him to,

5. Tenant by the Curtesy, or any other who comes in the *Post* shall not vouch (which is in lieu of an Action.) But if (f) a Ward be granted by Deed to a Woman who takes Husband, and the Woman dies, the Husb. shall vouch by Force of this Word *Grant*, altho' he comes to it by Act in Law; So if a Man demises or grants Land to a Woman for Years, and the Lessor covenants with the Lessee to repair the Houses during the Term, the Woman marries and dies, the Husband shall have an Action of Covenant as well on the Covenant in Law on these Words (demise or grant) as on the express Covenant, The same Law is of Ten't by Statute-Merchant or Statute-Staple, or *Elegit* of a Term, and he to whom a Lease for Years is sold by Force of any Execution, shall have an Action of Covenant in such Case as a Thing annexed to the Land, altho' they come to the Term by Act in Law; as if a Man grant to Lessee

(a) 1 Leon. 43.

(b) Swinb. 324.

(c) Kelw. 153. b.

1 And. 4.

Dyer 56. pl. 15.

16, 212. pl. 37.

38. 21 E. 4. 29. a.

3 Bull. 291.

9 E. 4. 1. b.

(d) 2 Inst. 275.

4 Co. 81. a.

1 Co. 2. b. Co.

Lit. 384. 2.

Yelv. 139. Perk.

sect. 124.

(e) 4 Co. 81. a.

Yelv. 139. Co.

Lit. 384. a.

Perk. Sect. 124.

Dall. 101. Cr.

Jac. 73. 2 Inst.

276. F. N. B.

134. h. Hob. 124.

1 Vent. 44.

1 Rol. 521.

(f) 2 Rol. 744.

* Post. 24. b.
F. N. B. 181. n.

for Years, that he shall have so many * Estovers as will serve to repair his House, or as he shall burn in his House, or the like, during the Term, it is as appurtenant to the Land, and shall go with it as a Thing appurtenant into whose Hands soever it shall come.

(a) Ant. 16. a. b.
Post. 24. b. Cr.
Jac. 240. 309.
439. Jones 223.
Cr. El. 373.
1 Sid. 157.

6. If Lessee for Years covenants to repair the Houses during the Term, (a) it shall bind all others as a Thing which is appurtenant, and goeth with the Land in whose Hands soever the Term shall come, as well those who come to it by Act in Law, as by the Act of the Party, for all is one having Regard to the Lessor. And if the Law should not be such, great Prejudice might accrue to him; and Reason requires, that they, who shall take Benefit of such Covenant when the Lessor makes it with the Lessee, should on the other Side be bound by the like Covenants when the Lessee makes it with the Lessor.

(b) 1 Rol. 521.
1 Rol. Rep 81,
82. 2 Bull. 281.
Owen 151, 152.

7. It was resolved, That the Assignee (b) of the Assignee should have an Action of Covenant. So of the Executors of the Assignee of the Assignee; so of the Assignees of the Executors or Administrators of every Assignee, for all are comprised within this Word (*Assignees*) for the same Right which was in the Testator, or Intestate, shall go to his Executors or Administrators: As if a Man makes a Warranty to one, his Heirs and Assigns, the Assignee (c) of the Assignee shall vouch, and so shall the Heirs of the Assignee: The same Law of the Assignee of the Heirs of the Feoffee, and of every Assignee. So every one of them shall have a Writ of *Warrantia Charta*. Vide 14 E. 3. Garr. 33. 38 E. 3. 21. 36 E. 3. Garr. 1. 13 E. 1. Garr. 93. 19 E. 2. Garr. 85, &c. For the same Right which was in the Ancestor, shall descend to the Heir in such Case without express Words of the Heirs of the Assignees.

(c) Cr. El. 534.
Co. Lit. 384. b.

Observe Reader your old Books, for they are the Fountains out of which these Resolutions issue, but perhaps by these Differences the Fountains themselves will be made more clear and profitable to those who will make Use of them. For Example (d) in 42 E. 3. 3. the Case is; Grandfather, Father, and two Sons, the Grandfather was seised of the Manor of D, whereof a Chappel was Parcel, a Prior with the Assent of his Covent by Deed covenanted for him and his Successors, with the Grandfather and his Heirs, that he and his Covent would sing all the Week in his Chappel, Parcel of the said Manor, for the Lords of the said Manor and his Servants, &c. The Grandfather did infeoff one of the Manor in Fee, who gave it the younger Son and his Wife in Tail; and it was adjudged, that the Tenants in Tail, as (e) Tertenants (for the elder Brother was Heir) should have an Action of Covenant against the Prior, for the Covent is to do a Thing which is annexed to the Chappel, which is within the Manor, and so annexed to the Manor, as it is there said. And *Finchden* related, That he had seen it

(d) Co. Lit. 384.
2. 1 Rol. 520.
521. Br. Co-
venant 5.
Statham Cove-
nant 3.

(e) Co. Lit.
385. a.

adjudged

adjudged, that two (a) Coparceners made Partition of Land, and one did covenant with the other to acquit him of Suit which was due, and that Coparcener to whom the Covenant was made did alien, and the Suit was arrear; and the Feoffee brought a Writ of Covenant against the Coparcener to acquit him of the Suit; and the Writ was maintainable, notwithstanding he was a Stranger to the Covenant, because the Acquittal fell upon the Land: But if such Covenant were made to say divine Service in the (b) Chappel of another, there the Assignee shall not have an Action of Covenant, for the Covenant in such Case cannot be annexed to the Chappel, because the Chappel doth not belong to the Covenantee, as it is adjudged in (c) 2 H. 4. 6. b. But there it is agreed, that if the Covenant had been with the Lord of the Manor of D. and his Heirs, Lords of the Manor of D. and Inhabitants therein, the Covenant shall be annexed to the Manor, and there the Tertenant shall have the Action of Covenant without Privy of Blood. Vide 29 E. 3. 48. & 30 E. 3. 14. *Simpkin* (d) *Simeon's* Case, where the Case was, That the Lady *Bardolf* by Deed granted a Ward to a Woman who married *Simpk. S.* against whom the Queen brought a Writ of Right of Ward, and they vouched the Lady *Bardolf*, and afterwards the Wife died, by which the Chattel (e) real survived to the Husband (and resolved that the Writ should not abate) the Vouchee appeared, and said, What have you to bind me to Warranty? The Husband shewed, how that the Lady granted to his Wife before Marriage the said Ward; the Vouchee demanded Judgment for two Causes.

1. Because no Word of Warranty was in the Deed; as to that it was adjudged, that this Word (f) (*Grant*) in this Case of Grant of a Ward (being a Chattel real) did import in it self a Warranty.

2. Because the Husband was not Assignee to the Wife, nor privy. As to that it was adjudged, That he should vouch, for this Warranty implied in this Word (*Grant*) is in Case of a Chattel real so annexed to the Land, that the Husband who comes to it by Act in Law, and not as Assignee, should take Benefit of it. But it was resolved by *Wray* Chief Justice, and the whole Court, that this Word (*Concessi* or *demisi*) in Case of (g) Freehold or Inheritance doth not import any Warranty. 11 H. 6. 41. *acc'*, vide 6 H. 4. 12 H. 4. 5. 1 H. 5. 2. 25 H. 8. *Covenant Br.* 32. 28 H. 8. *Dier* 28. 48 E. 3. 22. *F. N. B.* 145. C. 146. & 181. 9 *Eliz. Dier* 297. 26 H. 8. 3. 5 H. 7. 18. 32 H. 6. 32. 22 H. 6. 51. 18 H. 3. *Covenant* 30. *Old N. B. Covenant*, 46 H. 3. 4. 38 E. 3. 24. See the Statute of (b) 32 H. 8. *cap.* 24. which Act was resolved to extend to Covenants which touch or concern the Thing demised, and not to collateral Covenants,

(a) 1 Rol. 521.
Co. Lit. 384. b.
385. a. 42 E. 3.
3. b. Br. Cove-
nant 5. 1 Rol.
Rep. 81.

(b) 1 Rol. 521

(c) Co. Lit. 385.
a. Fitz. Co-
nant 13. Br.
Covenant 17.

(d) Co. Lit.
384. a. 2 Rol.
743, 744. 3 Bullf.
165. Hob. 47.
1 Rol. Rep. 81,
Cr. El. 436.

(e) 1 Rol. 345;
Co. Lit. 351. a.

(f) Co. Lit.
384. a.

(g) Co. Lit.
384. a. 2.
(b) 32 H. 8. c. 34.
Moor 159.
Cr. Jac. 523.
2 Bullf. 281.
282, 283. 1 Sand
238, 239. Cr.
Car. 25, 222.
1 Anderf. 82.
2 Jones 152.
Owen 152.
Stile 316, 317.
Co. Lit. 215. a.

*Mich. 29 & 30 Eliz. in a Writ
of Error in the Exchequer
Chamber.*

SLINGSBY'S CASE.

Slingsby and *Frances* his Wife brought an Action of Covenant in the *King's Bench* against *Roger Beckwith*, and declared on an Indenture tripartite between the Defendant *Roger Beckwith* of the first Part, *William Vavasor*, *Francis Slingsby*, and *Elizabeth* Sister of the said *Roger*, of the second Part, and *George Harvy*, and the said *Frances* (then his Wife) another of the Sisters of the said *Roger*, of the third Part. And declared, That the said *Roger Beckwith* the Defendant by the said Indenture (a) *convenisset, promisset, & concessisset ad & cum dictis Will. & Francisco, & ad & cum præd' Georgio & Francisca uxore ejus, & assignat' suis, & ad & cum quolibet, & qualibet eorum, quod præd' Rogerus ad sigillationem & deliberationem ejusdem indentur' fuit legitime & solus seistus de Rectoria de Aldingfleet in Com' Eborum*: And on this Covenant Issue was joined, and the *Venire facias* was *de vicinet' Castri Eborum*, and the Issue by *Nisi prius* was tried for the Plaintiff, and Damages assessed, upon which Judgment was given in the *King's Bench*. And now in a Writ of Error in * the *Exchequer-Chamber* before *Anderson* Chief Justice of the *Common Pleas*, *Manwood* Chief Baron of the *Exchequer*, *Windham*, *Periam*, and *Rhodes*, Justices of the *Common Pleas*, and *Gent* and *Clark* Barons of the *Exchequer*, and of the *Coif*, it was resolved that the said Judgment was † erroneous; for it appears by the Plaintiff's own Shewing in his Declaration, that the Plaintiffs only cannot maintain an Action of Covenant, but the other Covenantees ought to have (b) joined in the Action with them, notwithstanding these Words (*& ad & cum (c) quolibet & qualibet eorum*;) for as to these Words this Difference was agreed: When it appears by the Declaration, that every of the Covenantees hath, or is to have, several Interest or Estate, there, when the Covenant is made with the

Cove-

3 Leon. 160,
161. 2 Leon. 47.
Jenk. Cent. 262.

(*) 1 Bulst. 26.

* 27 Eliz. c. 8.

† 3 Leon. 161.
Jenk. Cent. 262.
1 Bulst. 26.

(b) 1 Bulst. 26.
1 Sand. 155.

(c) 3 Leon. 161.
2 Leon. 47.

Covenantees, & *cum quolibet eorum*, these Words *cum quolibet eorum*, makes the Covenant several in Respect of their several (a) Interests. As if a Man by Indenture demises to (a) Antea 7. b. (b) A. black Acre, to B. white Acre, to C. green Acre, and (b) Jenk. Cent. 262. Bridg. 63. covenants with them, and *quolibet eorum*, that he is lawful Owner of all the said Acres, &c. in that Case in Respect of the said several Interests by the said Words, & *cum quolibet eorum*, the Covenant is made several: But if he demises to them the Acres jointly, then these Words *cum quolibet eorum* are void, for a Man by his Covenant (unless in Respect of several Interests) cannot make it first joint, and then to make it several by the same or the like Words, *cum quolibet eorum*: For altho' sundry Persons may bind themselves, & *quemlibet eorum*, and so the Obligation shall be (c) joint (c) Postea 21. b. or several at the Election of the Obligee; yet a Man cannot (d) bind himself to three, and to each of them to make it (d) 2 Brownl. 208. Yely. 177. joint or several at the Election of several Persons for one and the same Cause; for the Court would be in Doubt for which of them to give Judgment, which the Law will not suffer, as it is held in 3 H. 6. 44. b. There it appears that one brought a Replevin against two Persons for an Ox, who made several (e) Avowries, each by himself in his own (e) Plowd. 10. b. Right; and there by Advice of all the Justices, both the Avowries abated for the Inconveniency, that if both the Issues should be found for the Avowants, the Court could not give Judgment to them severally for one and the same Thing. Also the Covenantor in the Case at Bar would be divers Times charged for one and the same Thing; and therefore the said Words & *cum quolibet eorum*, are in such Case but Words of Amplification and Abundance, and cannot sever the joint Cause of Action. And it was also resolved, That an * Interest could not be granted jointly and severally: As if a Man grants *proximam advocacionem*, (f) or (f) Jenk. Cent. 262, 263 makes a Lease for Years of Land to two jointly, and severally, these Words severally are void, and they are Jointenants; so if a Man makes a Feoffment in Fee by Deed to three, and warrants the Land to them, & *cuiilibet eorum*, this Warranty is joint and not several: But in such Case, if their Estates were several, their Warranty should be several accordingly: But a Power or Authority, as to make Livery, (g) or to sell, &c. may be joint and several, for these (g) Jenk. Cent. 263. they have not any Interest or Action, but are as Servants to others. Vide 16 Eliz. Dier 337, 338. acc. Sir (h) Anthony (h) Antea 8. a. Coke's Case, 6 E. 2. Covenant (i) Br. 49. 12 II. 4. 18. in 1 And. 53, 54. n. Benl. 228, 299. Dyer 337, 338 pl. 39. Detinue. And for this Error the Judgment was reversed. (i) 2 Leon. 47. Another Error was assigned concerning the *Vifue*; but as to Antea 8. a. that the Court did not deliver any Opinion.

Pasch. 35 Eliz.

ROSEWEL'S Case.

Cr. El. 297, 298
 (a) Cr. El. 9.
 465, 466. 1. Rol.
 466. Moor 143
 595, 596.
 (b) 6 H. 7. 4. a.
 Br. Condition
 113. Fitz. Bar.
 149. Cart. 205
 (c) Poitea 20. a.
 Br. Condition
 247. Cr. El. 298.
 (d) 26 H. 8. 1. b.
 Br. Condit: 1.

Between *Moor* and *Rosewel* it was adjudged, That if a Man bargains and sells Land in Fee, and covenants to make further Assurance to the Bargainee as his Counsel shall devise; in this Case the Bargainee (a) himself although he be learned in the Law cannot devise the Assurance, but some of his Counsel ought to devise it; and therewith agree the Books in (b) 6 H. 7. & (c) 11 H. 7. 21. a. for if the Party himself might devise it, then it would be no Plea to say, *quod consilium non dedit advisamentum. Vide (d) 26 H. 8.*

Pasch. 35 Eliz.

In the King's Bench.

HIGGINBOTTOM'S Case.

Cr. El. 298, 299
 Moor 595, 596.
 1. Rol. 424.
 Carter 205.

JOHN Stafford Esquire brought an Action on the Case, (which began in the *King's Bench, Hill. 34 Rot. 647. Glocestr'*) against *Ralph Higginbottom* Parson of *Littleton* upon *Severn*, because the Defendant upon good Consideration mentioned in the Declaration, did promise that he would make a good and lawful Estate and Assurance in Law of the Rectory of *Littleton* aforesaid to the Plaintiff discharged of all former Bargains, Sales, &c. made by the Defendant during the joint Lives of the Plaintiff and Defendant, as by Counsel learned of the Plaintiff on Request made, should be advised; And alledged that one *Maurice Tovy* was of the Plaintiff's learned Counsel, and gave his Advice to the Plaintiff, That the Defendant should make
 a Lease

a Lease by Indenture to the Plaintiff of the said Rectory with the Appurtenances, to have to him during their joint Lives, &c. and the Plaintiff gave Notice to the Defendant of the said Advice, and requested him to perform it, which the Defendant did deny to do, &c. The Defendant pleaded *Non Assumpsit*, and it was found for the Plaintiff. And it was moved in Arrest of Judgment, that this Advice of the Plaintiff's Counsel ought to be given immediately by the Counsellor himself to the Defendant, and not to the Plaintiff, and he to give Notice as above. And the Defendant's Counsel did rely strongly on the Book of 11 H. 7. 21. for there it is held by all the Justices, that the Counsel ought to be given to him who ought to make the Estate, and not to him with whom he is of Counsel: And they insisted much on the Words of the Book; but on Consideration of the Book, and on the Residue of the said Case, afterwards in the same Year *fol. 23. b.* it appears plainly; and so it was resolved, That the Intent of the Judges was not, that the Counsel could not be given or signified to the Party who should make the Estate, but only to the Covenantor, because it is Matter whereof by Intendment he who should make the Estate (without Notice given) could not have Knowledge. And it was resolved, That it would be more proper that the Counsellor should give his Counsel to him with whom he is of Counsel, and he to give Notice thereof to him who should make the Estate. And altho' he hath two or three of his Counsel, yet none of them may give Advice to him who is to make the Estate without his Request, for peradventure he would not use their Advice in such Case; and it is Reason that the Counsel be given to the Party with whom he is of Counsel, for peradventure he may dislike it, and will not have it notified. 2. It is less mischievous; for if the Party himself notify other Advice to him who should make the Estate than the Counsellor gave, if the Covenantor knows it, he may refuse; if he do not know it, and the Counsel notified is according to his Covenant or Agreement, if he perform it, he is excused; and if it be not according to his Covenant or Agreement, he may refuse it, and so no Mischief to the Party; but if the Counsellor should give Advice to him who should make the Estate, he may be ignorant, whether he be his Counsel or not. And afterwards Judgment was given for the Plaintiff for the Causes before alledged. *Vide* § E. 4. 1. § 2. 6 H. 7. 4. a. § 14 H. 8.

Anrea 12. b.
Br Condit. 247.
Cr. El. 298.

Cr. El. 298.

1 Rol. 424.

Perk. Sect. 777.

1 Rol. 424.

Cr. El. 298.

21. b.

Hill. 38 Eliz.

In the King's Bench.

STILE'S Case.

2 Rol. 22.
Cr. Fl. 472.
(a) 2 Brownl.
291. Co. Lit.
143. b. 229. a.
2 Inst. 672.
Cr. Jac. 429.
(b) Co Litt 35. b.
229. a. 2 Inst.
672. 2 Rol. 21.

BETWEEN *Frampton* and *Stile* in Debt upon an Obligation; the Defendant said, that it was on Condition to perform Covenants in an Indenture, *hic in Curia prolat'*, and in Truth the Deed was not indented, but wrote *hec indentura*: And it was adjudged, that it was (a) not an Indenture, although it was in two Parts; for the Words of a Deed cannot make it indented: But to the Making of an Indenture there ought to be a manual Act of Indenting of the (b) Parchment, or Paper; and because the Defendant did not shew any Indenture, the Plaintiff had Judgment.

Pasch. 38 Eliz.

Rot. 42. in Error, In the King's Bench.

Sir ANTHONY MAIN'S Case.

Co. Ent. 244.
p. 5. Jenk. Cent.
256. Mot. R 452,
453. Cr. El. 450,
479. 2 And 18.
Keph. 109, 110.

THE Case in Effect was, That Sir *Anthony Main* did lease certain Land to *Scot* for 21 Years by Indenture, and covenanted that at any Time during the Life of *Scot* upon Surrender of his Lease, Sir *Anthony*, &c. would make a new Lease during the Residue of the Years, and bound himself to perform the Covenants, &c. And now in Debt on the said Obligation by *Scot* against Sir *Anth.* he pleaded that *Scot* did not surrender, &c. To which *Scot* replied, and said, that
after

after the said Lease Sir *Anthony* had accepted a Fine *sur conusans de droit come ceo*, &c. and by the same Fine granted and rendred the Land to the Conusee for 80 Years: Upon which the Def. did demur in Law. And it was adjudged for the Pl. And in this Case three Points were resolved:

1. That *S. Ant. Main* had broke his Covenant without any (a) Surrender made, for by the said Fine levied by him for 80 Years, he had (b) disabled himself either to take a Surrender, or to make a new Lease; and the Law will not enforce any one to do a Thing which will be vain and fruitless (c) *Lex nemini cogit ad vana seu inutilia peragenda*: But it would be vain to compel him to make a Surrender to him who cannot take it; and altho' the Lessee in this Case by the Words of the Indenture ought to do the first Act, *scil.* to make the Surrender, yet when the Lessor hath disabled himself not only to take the Surrender, but also to make a new Lease according to the Covenant, for this Cause the Lessors Covenant is broke without any Surrender made. *Vide* 32 *E.* 3. (d) *Barre* 264. & 21 *E.* 4. (e) 55. a. If you are bound to enfeoff me of the Manor of *D.* before such a Feast, if you make a Feoffment of the said Manor to another before the said Feast, you have forfeited your Obligation, altho' you repurchase the Land again before the Feast, because you were once disabled to make the Feoffment. And therewith agreeth *Temp. E.* 1. *Covenant* 29. If a Man leases a Manor for Years, and the Lessee covenants to keep the Houses of the Manor, and as much as was in the Manor in as good Plight as he found them, during the Term, the Lessee committed Waste in the Houses, and in cutting of Oaks, the Lessor brought an Action of Covenant (f) before the End of the Term for the Oaks, because for them it was impossible that the Covenant should be performed: Otherwise is it of the Houses; and therewith agree *F. N. B.* 145. k. & 12 *E.* 3. *Covenant* 2.

2. It was resolved, If a Man seised of Lands in Fee, covenants to enfeoff *J. S.* of them upon request, and (g) afterwards he makes a Feoffment in Fee of the said Lands; now in this Case *J. S.* shall have an Action of Covenant without Request. And that in Effect is all one with the principal Case.

3. It was resolved that in the Case at Bar, If the said Term of 80 Years were but an Interest of a future Term, so that *Scot* notwithstanding that might make the Surrender, yet in such Case *Scot* should have an Action of Covenant without making any Surrender; for true it is that he may Surrender; but also true it is, that Sir *Anthony* after such Surrender cannot make the new Lease, which was the Effect that the Surrender should produce; and therefore in as much as the Lessor hath disabled himself to make a new Lease, which is the Effect and End of the Surrender, and that which he ought to do on his Part, the Lessee shall not be enforced to make the Surrender, which is the first Thing to be done on his Part,

for

(a) *Hardres* 337.
2 *Rol. Rep.*
347, 348, 408.
Hurt. 48.
Winch. 29.
Cr. El. 450, 479.
Jenk. Cent. 256.
Moor 453.
Poph. 109.
Raym. 26.
(b) 1 *Bullstr.* 117.
Perk. sect. 767,
801.
1 *ir. sect.* 355.
356, 357, 358.
1 *Co.* 25. b.
Co. Lit. 221.
a. b. 222. a.
2 *Co.* 59. b.
79. a.
13 *H.* 7. 23. b.
Br. Condition
26, 217.
44 *Aff.* 26.
20 *H.* 6. 34. b.
Cr. El. 450,
472. *Moor* 323,
452, 453, 626.
2 *Anderf.* 18.
Poph. 110, 198.
Hurt 48.
1 *Rol.* 447, 448.
3 *Co.* 29. a. b.
10 *Co.* 49. b.
1 *Rol. Rep.*
168.
Hardr. 387.
7 *H.* 4. 16. a.
8 *Co.* 83. a.
O *Beni.* 77.
(c) 2 *Rol.*
Rep. 408.
Hard. 387. b.
Co. 1. *ir.* 127. b.
197. b.
Postea 89. a.
(d) *Cr. El.* 479.
(e) 8 *Co.* 83. a.
(f) 7 *Co.* 15. a.
F. N. B. 145. K.
Moor 313, 323.
2 *Rol. R.* p.
332. 347.
Godb. 335.
(g) 1 *Bullstr.*
117.

for by the Surrender he would lose his old Term without Possibility of having the New according to the Lessor's Covenant. And therewith agreeth 14 H. 4. 19. a. *J. (a)* Parson of the Church of *G.* was bound in an Obligat. of 100*l.* to the Prior of *E.* the Condition was, That if the Parson resign his Church within certain Time to the Prior for a certain Pension as they could agree, that then the Obligation should be void; and afterwards and within the Time, the Prior and Parson agreed of a Pension of 5*l.* yet the Parson did refuse to resign. And the Opinion of the whole Court was, That although they had agreed of the Pension, yet the Parson is not bound to resign until he be sure of the Pension, and that he cannot be without Deed. And therefore in such Case the Parson is not obliged to resign until the Prior hath tendered him a Deed of the said Pension, by which he might be sure of it.

(a) 2 Rol.
Rep. 408.
Perk. sect. 774.
14 H. 4.
18. b.
Fitz. Bar. 190.
Br. Condition
42.

Trinit. 37 Eliz.

In the King's Bench.

LAUGHTER'S Case.

Thomas Eaton Esquire, and *Roger Monox* Gent. brought an Action of Debt on a Bond of 400*l.* bearing Date 26 Sept. 26 Eliz. against *Thomas Laughter*. The Defendant demanded Oyer of the Bond and Condition; and it appeared by the Bond, that *Richard Ramsford* was also bound in the said Bond with the Defendant jointly and severally: And the Condition was in Effect, "That if the within bounden *Rich^d Ramsford* after lawful Marriage had betwixt him and *Jane Gilman* Wife of *Henry Gilman* deceased, and together with the said *Jane*, do and shall lawfully sell and alien in Fee-simple, or Fee-tail, all the great Messuage with the little Tenement thereunto adjoining, of the said *Jane*, situate in *London*, now in the Occupation of *William Fitzw.* Esquire, If then the said *Richard Ramsford* do or shall either in this Life-time purchase to the said *Jane*, and her Heirs, and Assigns,

" Lands,

Cr. El. 398,
399.
Poph. 98.
Moor 357.
2 Jones 96.
2 Rol. Rep.
216.

“ Lands, Tenements, and Hereditaments, of as good Right,
 “ and of as good Value, as the Money by him received or
 “ had by or upon his Sale or Alienation of the Premises
 “ shall amount unto: Or else do or shall leave unto her
 “ the said *Jane* as Executrix, or by Legacy, or other good
 “ Assurance or Conveyance, as much Money as shall be by
 “ him received upon such, &c. that then, &c. And plead-
 ed that the said *Richard Ramsford* married the said *Jane*
 1 Decemb. 27. and that the said *Jane* died 8 August 31.
 and the said *Richard Ramsford* survived her; The Plaintiff
 shewed by Way of Replication, that the said *Ramsford* and
Jane Pasch. 30 Eliz. for 320*l.* levied a Fine of the Premises
 to *John Thompson* and *William Kerwen*, and to the
 Heirs of *John Thompson*; and that the said *Ramsford* did
 not purchase Lands, Tenements, or Hereditaments, of the
 Value of 320*l.* to the said *Jane* and her Heirs, *neque reli-*
quit præd. *Jane post decessum ipsius Rich. ut executrici,*
 &c. And on this Plea the Defendant's Counsel did demur
 in Law. And on great Deliberation Judgment was given
 by *Popham* Chief Justice and the whole Court against the
 Plaintiff: And the Reason and Cause of the Judgment was,
 That where a Condition of a Bond consists on two Parts in
 the (a) Disjunctive, and both are possible at the Time of
 the Bond made, and afterwards one of them becomes im-
 possible by the Act of God, the Obligor is not bound to
 perform the other Part: For the Condition is made for the
 Benefit of the Obligor, and shall be taken beneficially for
 him, and he hath Election to perform the one or the other
 for the Saving of the Penalty of his Bond: And when one
 Part is become impossible by the Act of God, it is as benefi-
 cial for him as if that Part of the Disjunctive which is become
 impossible had been only the Condition of the Bond: And so
 when one became (b) impossible by the Act of God, which by
 no Industry he could perform, his Bond is saved, although
 he doth not perform the other, *quia (c) impotentia excusat*
legem. And in this Case at Bar, for as much as *Jane* died
 before the said *Ramsford*, so that he could not leave to the
 said *Jane*, either as Executrix, or by Legacy, or other As-
 surance, so much Money as should be received by him, &c.
 and so this Part of the Disjunctive became impossible by the
 Act of God. *Vide (d)* 30 H. 6. Barre 60. (e) 15 H. 7. 4.
 9 Eliz. *Dier (f)* 162. between *Arundel* and *Combe* And the
 Case in (g) 21 E. 3. 29. b. is not like this Case. For there
 at the Time of the Bond made, and at the Time when the
 Condition was to be performed, one Part of the Disjunctive
 was not possible to be performed, for there the Heir of his
 Body was not *in rerum natura*.

4 Co. 11. a. 6 Co. 21. b. 68. a. 8 Co 172. b. 9 Co. 73. a. 10 Co. 139. b.
 (d) 31 H. 6. Fitz. Bar. 60. (e) 15 H. 7. 13. a. (f) *Dyer* 262. pl. 30.
 Cr. El. 398. Moor 432. Palm. 549. (g) *Postea* 112. a. 1 Rol. 450.
 Br. Condition 47. Bridg. 40.

(a) 1 Rol 447,
 450.
 4 Co. 52. b.
 1 Mod. Rep.
 264, 265.
 Cr. El. 396,
 397, 539.
 10 Co. 127.
 Poph. 98.
 O Beul. 8.
 Pl. 31.
 Goldsb. 142.
 Moor 395, 396.
 Co. Lit. 225. a.
 Lutw. 693.
 2 Mod. 200.
 (b) 1 Jones
 171, 172, 179,
 139, 180, 181,
 Palm. 514, 515,
 549, 552, 553,
 554, 555, 556,
 557, 558.
Dyer 231. pl. 4.
 Co. Lit. 206. a. b.
 Cr. El. 864.
 Yelv. 138, 139.
 1 Brownl. 104,
 105.
 1 Rol. 419, 420.
 (c) Co. Lit. 29. a.
 1 Co. 58. a.
 Hadres 387.
 Co. Lit. 206. a.
 Plowd. 289. a.

Trin. 38 Eliz. Rot. 1734.

In the Common Pleas.

HALLING'S *Case.*

Owen. 157.
Cr. El. 517.
Poph. 199.
Allein 25.
Godb. 445.
1 Anderl. 300.
2 Rol. Rep.
466.
Cart. 205.
Kelw. 53. a.
Moor 22, 454,
457, 458.
Co. Ent. 132.
pl. 15.

Between *Halling* and *Conward* in Debt on Bond for Performance of Covenants, it was adjudged, That where the Covenant was, That he should make an Estate in Fee before such Feast at the Costs of the Covenantee, that the Covenantor ought to do the first Act, *scil.* notify to the Covenantee what Manner of Estate he would have, so that the Covenantee might know what Sum of Mony to tender: And it was said, 'twas all one when the Covenant was general, and when it was particular: As to make a Feoffment, the Covenantor ought to do the first Act, *scil.* shew what Manner of Feoffment he would make, either by Deed-Poll, or by Indenture, &c. So in the principal Case, if nothing be done before the Day, the Covenant is broke, because the Covenantor ought to have done the first Act, and so the Default is in him.

Hill. 39 Eliz.

In the Common Pleas.

MATHEWSON'S *Case.*

Cr. El. 408,
470, 471.
2 Rol. 30, 149.

Between *Mathewson* and others Pl. and *Lydiate* Def. the Case was such; A Charter-party indented between the Master and the Owner of a Ship of the one Part, and *George Lydiate* and six other Merchants of the other Part. By which the Master and Owner covenant with the Merchants to ship certain Merchandize

Merchandizes at such a Port beyond Sea, and to transport them to the City of London, for which each of the Merchants covenants *separatim* with the Master and Owner, that one Merchant shall pay 3 l. another 3 l. &c. *Et sic de ceteris*. And the Words of the Covenant are, *conveniunt separatim*, &c. and in the End is this Clause, *Et ad (a) performance omnium & singulorum conventionum ex parte præd' Mercatorum perimplend'*, quilibet Mercatorum præd' *separatim obligat seipsum præfat' Magistro & proprietariis*, in double the Freight. And now on one of the several Covenants an Action of Debt was brought against *Lydiate* one of the Merchants on the said Indenture. To which the Defendant (*b*) pleaded, That the Seal of another of the Merchants fixed to the said Indenture was broke from the Deed; upon which the Plaintiff did demur in Law. And in this Case it was resolved:

1. That although the Merchants join in Covenant, *scil. conveniunt (c) separatim*, yet this Word, *separatim*, makes it several Covenants, and not a joint Covenant. Also the said later Clause, *ad performance omnium & singulorum*, &c. is in Law several, by Reason of this Word *separatim*; and this Word shall be referred to the several Covenants before.
 - (a) 2 Rol. 149.
 - (c) 2 Rol. 149.
 - Cr. El. 546.
 - (d) 11 Co. 28. b.
 - 1 Rol. Rep. 49.
 - Cr. El. 576.
 - 2 Rol. 30.
2. It was resolved, That although the Covenants on the Part of the Master and Owner were joint, yet the Covenants on the Part of the Merchants stood several; and for this Cause if (*d*) the Seal of one of the Merchants be broke from the Deed, it should not avoid the Deed, but only against him: But if any of the (*e*) Seals of the Master or Owners had been broke from the Deed all their Covenants had been defeated. And if the Deed had been rased in the Date after the Delivery, it had gone to the whole. But when the Covenants are several, they are as several Deeds wrote in one and the same Piece (*f*) of Parchment. And Judgment was given accordingly. *Vide (g) 3 H. 7. 14 H. 8. 25. 30 E. 3. 31. 32 in Aff. 47 E. 3. 3. in Debt per Finchden, 29 H. 8. 36.*
 - Doct. placit.
 - 260, 262, 263.
 - (e) 2 Rol. 30.
 - Doct. placit.
 - 260, 262, 263.
 - Cr. El. 546.
 - Poph. 161.
 - March 125.
 - 2 Show. 28.
 - 2 Lev. 220.
 - (f) Cr. El. 546.
 - (g) 11 Co. 28. b.
 - Cr. El. 408.
 - 3 H. 7. 5. a.
 - 2 Rol. 30.
 - Br. obligation
 - 43.
 - Fitz. Bar. 46.

Trin. 41 Eliz. Rot. 3252.

In the Common Pleas.

LAMB'S Case.

Co. Ent. 129. **I**N Debt on a Bond by *Lamb* Executor of *D.* against
 pl. 13. *Brownwent*, with Condition, " That if the Defendant
 Cr. El. 716, 864. " shall in the Term of *S. Michael* next, in the Prerogative
 Moor 645. " Court of the Archbishop of *Canterbury* give unto the said
 (a) 1 Mod. Rep. " *D.* his Executors or Assigns, such sufficient Release and
 104, 265. " Discharge, &c. as by the Judge of the said Court shall be
 3 Bulstr. 30. " thought meet, that then, &c. The Defendant shewed,
 1 Rol. 452. that Doctor *Lewyn* was Judge of the Court, & quod idem
 6 Co. 31. a. " *Judex nec devisavit, nec appunctavit aliquam relaxatio-*
 1 Rol. Rep. 196. *nem, seu exonerationem, &c. secundum formam, &c.* upon
 Co. Lit. 209. a. which the Plaintiff did demur in Law. And it was adjudg-
 2 Mod. 200. ed for the Plaintiff; For in as much as the Judge was (a) a
 Lutw. 694. Stranger to the Condition, and the Condition is for the Be-
 (b) 2 Jones 96. nefit of the Obligor, and the Performance thereof shall save
 Cart. 205. his Bond, he hath taken upon him to perform it at his Pe-
 1 Vent. 255. ril; and therefore he ought not only to have done the (b)
 1 Rol. 458. first Act, but ought also to have procured the Judge to have
 (c) Br. cove- devised and directed it. Otherwise it is, if the Obligee
 nant 3. himself or his Council should devise. *Vide* (c) 35 H. 6. 16. b.
 Co. Lit. 209. a. adjudged accordingly, (d) 36 H. 6. 8. b. 32 E. 3. Barre 264. b.
 33 H. 6. 16. b. 2 E. 4. 2. 8 E. 4. 2. 15 E. 4. 5. b. 22 E. 4. 43. b. 9 H. 7.
 17. a. 17. &c. vide 7 (e) E. 4. 13. b. it was said, If a Man be bound
 Fitz. Bar. 62. to make to a Man a sure, sufficient, and lawful Estate in
 Br. condi- certain Lands by the Advice of *J. D.* if he make an Estate
 tion 13. to him according to the Devise of *J. D.* be it sufficient or
 2 Co. 3. b. not, lawful or not lawful, yet his Bond is saved,
 1 Rol. Rep. 196.
 3 Bulstr. 29, 30.
 (d) 2 Co. 3. b.
 (e) Perk. sect.
 775.
 Fitz. Det. 81.

Mich.

Mich. 42 & 43 Eliz.

In the King's Bench.

BROUGHTON'S Case.

IN Debt in the *Common Pleas* by *Broughton* against *Pretty* on a Bond, the Condition was; That where the Plaintiff was bound in a Bond of 200 *l.* for the Defendant, for the Payment of 100 *l.* to *A. B.* " If therefore the Defendant " should save and keep harmless the Plaintiff for all Suits, " Quarrels, and Demands touching and concerning the said " Bond of 200 *l.* That then this Obligation to be void, At the Day of Payment of the 100 *l.* the Plaintiff came to the Place where the 100 *l.* ought to be paid, and perceiving no Person there present to pay the 100 *l.* for the Defendant, he to save the Penalty of his Bond paid the 100 *l.* to *A. B.* and now brought this Action on his Counter-Bond; and on *Non fuit damnificatus* pleaded, the Plaintiff replied, and shewed all the said special Matter; and thereupon the Defendant demurr'd; And it was adjudged that the Plaintiff should recover, for the Payment of the 100 *l.* is (a) a Damage and Harm, and if he had not paid it, a greater Harm would have followed: And it is not necessary that the Plaintiff be arrested, or sued, &c. Also it was said, That this Plea, *Non fuit (b) damnificatus* implied that the Defendant had saved him harmless, as by Release, Payment, or otherwise. *Vide* 18 *E. 4. 27. b.* by *Brian* and *Littleton*, Terror of Suit, so that he dare not go about his Business, is a Damnification, although he be not arrested by Force of Process.

(a) 1 Vent. 36, 261.
1 Jones 329, 330.
2 Bulstr. 94.
Cr. El. 53, 264, 369.
1 Rol. 432.
Owen 19.
Cr. Car. 349, 350. Cr. Jac. 288, 340.
Dyer 187. pl. 4.
Yelv. 207.
3 Bulstr. 234.
(b) Doctrin placit. 270.
(c) Cr. Jac. 340.
1 Rol. 432.
2 Bulstr. 94, 105.
3 Bulstr. 234.
18 E. 4. 27. b.
28. a. Br. condition 165.

Mich. 43 & 44 Eliz.

In the King's Bench.

The Dean and Chapter of WINDSOR'S Case.

IN the *King's Bench*, between the Dean and Chapter of *Windsor* and *Hyde*, the Case was such; A Man demised a House by Indenture for Years; the Lessee for him and his Executors covenanted and granted with the Lessor to repair the House at all Times necessary, The Lessee assigned it over to *Hyde*, who suffered it to decay; the Lessor brought an Action

Cr. El. 457, 552, 553.
1 Rol. 521.
Moor 399, 400.

(a) Moor 27,
399.
Cr. El. 457,
552, 553.
1 Rol. 521, 522.
1 Sand. 239.
Cr. Jac. 125.
1 Sid. 147.
Cr. Car. 222,
523.
1 Jones 245.
1 Anderf. 82.
Antea 16. a. b.
17. b.
(b) Postea 100. a.
1 Co. 99. a.
7 Co. 38. b.
Co. Lit. 231. a.
(d) Dyer 27. pl.

tion of Covenant against the Assignee. And it was adjudged by *Popham* Chief Justice, and the whole Court, that the Action of Covenant did lie, although the Lessee had not covenanted for him and his Assigns; and (a) such Covenant which extends to the Support of the Thing demised is *quodammodo* appurtenant to it, and goes with it. And in Respect the Lessee hath taken upon him to bear the Charges of the Reparations, the Yearly Rent was the less, which goes to the Benefit of the Assignee, & (b) *qui sentit commodum sentire debet & onus*. If a Man grants to one (c) Estates to repair his House, it is appurtenant to his House. *F. N. B.* 181. 28 *H.* 8, (d) 28. If the Lessee covenants to discharge the Lessor *de omnibus oneribus ordinariis & extraordinariis*, and to repair the Houses, an Action lies against the Assignee.

2 Inst. 489. Carter 142. 3 Keb. 592. (c) Ant. 17. b, *F. N. B.* 181. N, 172, 173, &c.

Pasch. 43 Eliz.

In the King's Bench.

Sir THOMAS PALMER'S Case.

Co. Ent. 36.
pl. 29. Cr.
El. 819, 820.
2 Rol. 699.
Noy 32.
Moor 692, 691.

IN an Action on the Case between *Basset* and *Maynard*, on the general Issue the Jurors gave a special Verdict to this Effect; Sir *Thomas Palmer* was seized in Fee of a great Wood, and bargained and sold to one *Cornford* and his Assigns 600 Cords of Wood to be taken by the Assignment of Sir *Thomas*; *Cornford* assigned his Interest to the Plaintiff, and afterwards the said Sir *Thomas* sold to the Defendant such Quantity of Wood as would make 4000 Cords, to be taken within the said great Wood, at the Election of the Vendee. And afterwards Sir *Thomas* assigned to the Plaintiff 600 Cords of Wood to be taken by him, who felled them; and the Defendant took and converted them, &c. And Judgment was given for the Plaintiff. And in this Case two Points were resolved:

(a) Goldsb. 184.
1 Rol. Rep. 99.
2 Rol. 47.
(b) Winch 29.
Cr. El. 820.
1 Rol. 725.
1 Jones 276.
Cr. Jac. 481.

1. That *Cornford* had an Interest which he might (a) assign over, and not a Thing in Action, or a Possibility; For it was resolved, That if Sir *Tho.* did not assign them to *Cornford* on Request, *Cornford* might take them without (b) Assignm. for the Grantor cannot by his own Act, or Default, either sub-

vert,

vert, or derogate from his Grant; then it follows that he had an Interest which he might assign over. *Vide* 44 *E.* 3. 43. *b.* where the (a) Prior of *Letton* seized of a Wood called *Hosley*, by Deed by Assent of his Covent sold the said Wood to one *Barth. Wilby* to be felled and carried away within two Years next following (except 40 of the best Oaks to be taken at the Election of the Prior) the Vendee for Shortness of Time upon the End of the Covenant requested the Prior to come and chuse his Oaks, and he would not come, wherefore the Vendee suffered 40 of the best Oaks to stand, and the others he felled. And there Issue was taken on the Request: Which Case is not well abridg'd by *Brook*, Tit. *Reservation* 3. for there he has omitted the Request; But *Fitz.* Tit. *Barre* 204. hath truly abridged it. Take heed, Reader, of all (b) Abridgments, for the chief Use of them is as of Tables to find the Book at large. But I exhort every good Student to read and rely only on the Books at large, as in another Place I have advised. And with this Resolution agreeth the Book in 8 *E.* 3. 5. & 54. *b.* where the Case was; *J.* had a House and a Carve of Land, and he had reasonable (c) Estovers in the Wood of another by View and Delivery of the Bailly, &c. If he takes Estovers without View or Livery, he is a Trespasser, although he takes less than he ought to have by his Delivery: But if *J.* demands his Estovers, and the Owner of the Wood or his Bailly will not deliver them to him, *J.* may have an Assise. *Vide* 5 *E.* 3. 64. *b.* & 55. *a.*

2. It was resolved, That admitting the Assignment to the Plaintiff to be void, yet after that the Trees are felled, the Defendant (d) could not take them: As if I grant 1000 Cords of Wood to one to be taken at the Election of the Grantee; the Grantor or Stranger fells some Trees, the Grantee cannot take them, but ought to supply his Grant out of the (e) Residue.

(a) Cr. El. 820.
Hob. 174.
44 E. 3. 43. b.
Fitz. Bar. 204.
Br. Reservat. 3.
Br. Relat. 4.

(b) 10 Co. 41. 2
117. b. Præf.
4 Rep.

(c) 2 Inst. 411.

(d) 3 Keb. 493,
Cr. El. 820.
Palm. 212
1 Brownl. 220.
Yelv. 188.
(e) 1 Vent. 271.
1 Bullst. 94.

Trin. 2 Jac.

In the King's Bench.

The Countess of Rutland's Case.

Moor 723, 724,
725. Cr. Jac. 29. *I*sabel Countess of Rutland brought an Action of Trespass
against Roger Earl of Rutland for breaking her House
and Close, called *Eykering* House, and *Lady* Park, at *Eyker-*
ing in the County of *Nottingham*: The Defendant pleaded
Not Guilty; and now this Term on Evidence to a substan-
tial Jury at the *King's Bench* Bar, the Case on the Evi-
dence was such; *Edward* Earl of *Rutland* was seised in
Fee of the Manor of *Eykering*, whereof the House and
Close in which, &c. were Parcel, and by Indenture bear-
ing Date 10 *March*, 21 *Eliz.* for the Augmentation of the
Jointure of the said Countess, then his Wife, covenanted
with Sir *Gilbert Gerrard*, Knight, and *Tho. Holcroft*, Esq;
his Brother, that he before the End of *Trinity* Term then
next following, would assure by Fine, or other Conveyance
the said Manor to the said Sir *Gilbert* and *Thomas* in Fee,
which Fine or other Conveyance of the said Manor of *Ey-*
kering should be to the Use of the said Earl and the said
Isabel his Wife, and the Heirs of the said Earl, which In-
denture the said Earl acknowledged before a Master of the
Chancery, the 28th Day of the same Month, and the same
Day it was inrolled; and the next Day, *scil.* the 29th Day
of *March* by another Indenture between the said Earl of the
one Part, and the Lord *Burghley*, Sir *Gilbert Gerrard* and o-
thers, of the other Part, for the Advancement of those who
should succeed him in the Earldom; and for the Advance-
ment of the Heirs Males of the Body of *Thomas* Earl of
Rutland his Grandfather, covenanted with the Lord *Burgh-*
ley, Sir *Gilbert Gerrard* and others to convey the said Ma-
nor of *Eyker*' amongst others to the said *Ld. Burgh.* Sir *Gilb.*
Gerrard and others, or to some or one of them before the Feast
of the Annunciation of our Lady next following, which Assurance
should be to the Use of the said Earl *Edw.* and to the Heirs
Males

Note, Sir *Gilb.*
was Party to
both the Inden-
tures.

Males of his Body, and for Default of such Issue to the Use of the Heirs Males of the Body of the said *Thomas* Earl of *Rutland* with divers Rem's over. And afterwards the said *Edward* Earl of *Rutland*, by the said later Indenture, covenanted and granted with the Parties thereto, That if the said Earl *Edw.* should not convey sufficiently the said Manor amongst others as is aforesaid, before the said Feast of the Annunciation of our Lady, that then the said Earl *Edw.* and his Heirs would stand seised of the said Manor of *E.* to the said Uses contained in the second Indenture. No Fine or other Assurance was levied or made by the said Earl *Edw.* before the End of *Trin.* Term: And afterwards, *scil.* 17 *Sept.* next following, the said Earl acknowledged a Note of a Fine of the Manor of *E.* only to Sir *Gilbert Gerrard* and *Thomas Holcroft*, and to the Heirs of Sir *Gilbert*; and the 18th Day of the same Month acknowledged another Note of a Fine of the said Manor of *E.* amongst many other Manors mentioned in the last Indenture to the Lord *Burghley*, Sir *Gilb. Gerrard* and others, Parties to the last Indenture, and to the Heirs of the *Ld. Burghley*; and both were entered in *Octab. Michaelis* then next following. And it was proved by divers Witnesses, That the said Earl *Edw.* as well before the Indentures as after the Fine levied, told them, That the said Countess should have the Manor of *E.* for her Jointure.

And in this Case four Points were resolved by Sir *John Popham* Chief Justice, and the whole Court.

1. Altho' the Indentures being made for declaring of the Uses of a subsequent Fine, Recovery, or other Assurance, to certain Persons, and within a certain Time, and to certain Uses, are but directory, and do not bind the Estate or Interest of the Land; yet if the Fine, Recovery, or other Assurance be pursued according to the Indentures, there could not be any bare (a) Averment against the Indentures taken in such Case, that after the making of the Indentures, and before the Assurance by mutual Agreement of the Parties it was concluded and agreed that the Assurance should be to other Uses: But if other Agreement or Limitation of Uses be made by Writing, or by other Matter as high or higher, then the last Agreement shall stand; for every Contract or Agreement ought to be dissolved by Matter of as high a Nature as the first Deed, (b) *Nil tam conveniens est naturali equitati, unumquodque dissolvi eo ligamine, quo ligatum est.* Also it would be inconvenient, that Matters in Writing made by Advice and on Considerat. and which finally import the certain Truth of the Agreement of the Parties should be controlled by Averment of the Parties to be proved by the incertain

(a) 2 Co. 76. a.
9 Co. 10. b.
3 Bullst. 251, 257.
Palm. 507.
Cr. Jac. 29.
2 Anderf. 46, 47.
2 Rol. Rep. 39.
Winch. 119.

(b) Braçt. lib. 2.
f. 28. 1 Brown.
191. 2 Co. 53. a.
4 Co. 57. b.
6 Co. 43. b.
2 Inf. 359, 573.
Davis 33. b.

Covenants, Agreements, &c. PART V.

Testimony of slippery Memory. And it would be dangerous to Purchasers and Farmers, and all others in such Cases, if such nude Averments against Matter in Writing should be admitted.

Cr. Jac. 29.
Post. 68. b.
1 Co. 176. a.
2 Co. 76. a.
7 Co. 39. a. b.
2 And. 46, 47.

2. It was resolved, That if the Form of the Indentures be not pursued, as for the Quantity of the Land, or the Time within which, &c. in these Cases, and other like, where the Indentures be not pursued, Averment without Writing might be taken, That the Fine, Recovery, or other Assurance was to another Use or Intent than is contained in the Indenture: For inasmuch as the Indentures are not pursued, it is reasonable that the Parties should be admitted to shew the Cause and Reason why they were not pursued by Reason of the new Argument subsequent, which in such Case might be as well by Word as by Writing.

Cr. Jac. 512.

3. It was resolved, That although the Indentures are not pursuant in Circumstance of Time, Quantity, Person, and the like, yet if no other new Agreement can be proved, the Assurance should be in Judgment of Law to the Use contained in the Indentures.

4. That in the principal Case the Fines could not be directed by both the Indentures, that is to say, by the first Indenture to the Use of the Earl *Edward* and *Isabel* his Wife for their Lives; and by the second Indenture to the Earl and the Heirs Males of his Body with the Remainders over, limited by the second Indenture, and so the Fines to work on both the Indentures (although peradventure such was the Intent of the Parties) and that for three Reasons:

Widgm. 115;

1. The Directions and Declarations of the first Indentures were controlled and frustrated by the second Indentures, and therefore the Fines could not be directed by both.

2. The Indentures import several distinct and divers Contracts and Estates, that is to say, one to the Earl and *Isabel* his Wife, and to the Heirs of the Earl, the other to the Earl only, and to his Heirs Males of his Body, with divers Remainders over; so that the Fines ought for the Manor of *Eyker* to be directed, either wholly by the first, or wholly by the second, without any Fraction or Division of Estates.

3. It would be against the Words and Intent of both the Indentures, to make a Hotchpotch and Commixture of both, which by their Creation were several and distinct in Time, in Persons and Estates.

Cases

Cases of Executors.

Hill. 26 Eliz.

In the King's Bench.

RUSSEL'S Case.

Edward Russel as Executor of *William Russel* brought an Action on the Case against *Thomas Prat* and *Margery* his Wife; and declared, that *William Russel* was possessed of a Chest with divers Jewels, Goods, and Sums of Money (and declared what in certain) in it, and that the said *William* lost them, and that they came to the Hands of *Margery dum sola fuit*, that is to say, 6 Jan. 1 Eliz. And afterwards the Testator died, & quod præd' *Margeria dum sola fuit*, did convert the Goods to her own Use, &c. The Defendants pleaded in Bar a Release of the Plaintiff made to them, &c. To which the Plaintiff said, That at the Time of the Release made, he was within the Age of 21 Years, &c. on which the Defendants did demur in Law. And the great Question (which was often argued at the Bar and Bench) was, Whether the Release of an Infant Executor having proved the Will should bar him or not. And it was argued that the said Release should bar him for divers Reasons.

1. Because the Executor represents the Person of the Testator, and all that which he doth is in the Right (and as in the Person) of the Testator, and not in his own Right; and therefore his Infancy is not to be respected.

2. The Law which enables him to take on him the Charge of the Will, and to prove it, and to bring Actions, and to do Things which belong to the Office of an Executor, the same Law enables him to make Releases and Acquittances without any Regard to his Nonage. As the (a) King shall not avoid Leases or Grants in Respect of the Infancy of his natural Capacity; nor the Mayor, Bailiff, or the Head of any

1 And. 177. 17^a
1 Leon. 193.
Moor 146.
Poph. 190, 191.
1 Jones 174.

(a) 1 Rol. 72. 2. a.
26 Ass. 54. Co.
Lit. 43. 2.
Fitz. infant. 15.
Br. Age 34.
7 Co. 12. 2.
Caloin's Case.
Plowd. 213. 2.
221. 2.
364. b.

other Corporation shall not avoid any of their Deeds or Grants, for the Infancy of their natural Capacity, because they do them in another Right and Capacity.

3. It would be inconvenient that an Infant Executor shall compel the Debtors of his Testator to pay the Debts to him, and that he shall not have Power to acquit or discharge them.

4. They cited divers Books in the Point, 16 H. (a) 6. Release 45. the Opinion of the whole Court, that a Release made by an (b) Infant within Age, as an Executor, is good, and he cannot avoid it. And the same Law is of a Release made by a Feme-covert Executrix; and so the Release of the Husband is nought worth, as there it is said, 18 H. 6. 4. of a Feme-covert, and 18 E. 4. 10. of a Feme-covert, 21 E. 4. 13. & 24. of an Infant and Feme-covert, and 16 H. 7. 6. But on great Deliberation, and on Conference had with *Anderson* Chief Justice of the *Common Pleas*, *Manwood* and others, Justices, it was resolved by Sir *Christopher Wray* Chief Justice, Sir *Thomas Garvey*, and the whole Court of *King's Bench*, that the (b) Release was no Bar, and principally for 3 Reasons.

1. Because if it should be a Bar it would be a *Devastavit*, and charge the Infant of his own proper Goods.

2. It would do a Wrong, which an Infant by his Release can never do.

3. In making of this Release he doth not pursue his Office, nor perform the Duty of an Ex'or: And therefore it was well agreed, That all things which he doth (c) according to the Office and Duty of an Ex'or should bind him: But Things which he doth against the Office of an Ex'or should not bind him, forasmuch as he is within Age. The Office of an Ex'or (as appears in 20 H. 7. 5. a.) is to do his Office (d) truly, diligently and lawfully, and all these he breaks when he wastes the Goods of the Dead: But it was resolved, that on Payment or Satisfaction to an Infant Executor, he might acquit and discharge the Debtor for as much as he receives:

But it was resolved, That a Monk Ex'or might release without Satisfaction, for his Profession would be no Impediment to the Release, 21 E. 4. 13. b. And as to the said Book of (e) 16 H. 6. in the said Case of the Infant, it was to be intended when the Infant receives full Satisfaction; for the Book saith, The Deed of an Infant as Ex'or; and he doth not as Ex'or when he releases, and receives nothing. But the Opinion there as to the Feme

(f) Covert Ex'trix, was utterly denied, for altho' she be Ex'ix, yet she can do nothing to the Prejudice of her Husband: But without Question in such Case the Release of the Husband is good. And so the Doubts in the Books of 13 E. 1. Ex'ors 119. 5 E. 3. 45. *Barbor's Case*, 18 H. 6. 4. & 18 E. 4. 10. 21 E. 4. 13. & 24. 2 H. 7. 15. 6 H. 7. 6. 7 H. 7. 13 & 14. are well explain'd. And afterwards on a Writ of Enquiry of Damages returned after the Stat. of (g) 27 El. cap. 8. Judgment was given for the Plaintiff:

And

(a) Cr. Car. 490.

(b) Moor 146.

(b) Moor 146.

Cr. El. 43, 671.

1 And. 177. pl.

138, 164, Swinb.

288. Co. Lit.

172. a. 4 Leon.

102.

1 Jones 420.

1 Rol. 750. Cr.

Car. 490, 491.

1 Rol. Rep. 366.

1 Brownl. 120.

Cr. El. 43, 671.

Godb. 29.

(c) Cr. El. 254.

Cr. Jac. 441.

Co. Lit. 172. a.

1 And. 117, 177.

178. 1 Rol. Rep.

566. 1 Brownl.

120.

(d) 8 Co. 133. 2.

20 H. 7. 5. a.

(e) 16 H. 6. Re-

lease 45. Cr.

Car. 490.

(f) 1 And. 117.

Kelw. 122. a. b.

Cr. Car. 519.

7 Sid. 188.

(g) 11 Leon. 193.

194. Moor 146.

And on the said Act a Writ of Error was brought in the Exchequer-Chamber, where it was unanimously agreed That the said Release was no Bar. And so this Point was resolved by all the Judges of *England*: But divers other Errors were assigned and moved as well in the Declaration, as that the Plea was discontinued; and afterwards the Parties agreed, and for Error in the Proceeding the Judgment was reversed. And note, good Reader, by these Resolutions you will better understand the said Books before cited, & *alios ejusdem farinae*. And Sir *Thomas Garwy* said in this Case, that an Executor might well (a) release any Action before Probate, for altho' he could not have an (b) Action, yet the Interest of the Action is in him (c) 21 *E. 4. 24. a. acc.*

Raym. 481. 1 Rol. 917. A. 2. Co. Lit. 292 b. Hurr. 31. 10 Co. 52. a. Peik. Sect. 482. (c) Dy. 135. pl. 13. (d) Br. Execut. 117. infr. in Middleton's 2 Show. 25. Salk. 322. (a) Plow. 278. b. 281. a. infra in Middleton's Case. 9 Co. 39. a. Raym. 481. 1 Rol. 917. A. 1. Co. Lit. 292. b. Hur. 31. 10 Co. 52. a. (b) Plow. 278. b. 280. b. 281. a. 7 H. 4. 18. infra in Middleton's Case. Fitz. Executors 107. Br. Execut. 49. 9 Co. 39. a. Wentworth 51. Case. 3 Lev. 59.

Pasch. I Jac.

In the Common Pleas.

MIDDLETON'S Case.

IT was adjudged in the *Common Pleas* between *Middleton* and *Rimor*, That an Ex'or before Probate might (a) release an Action, although before Probate he could not (b) have an Action, for the (c) Right of the Action is in him; but if *A.* releases and afterwards takes (d) Administration, it should not bar him, for the Right of the Action was not in him at the Time of the Release. *Vide* (e) 18 *H. 6. 43. b. Greisbrook's Case*, *Plow. Com. 277, 278.* (f) 21 *E. 4. 24. a.* Two Executors prove the Will, the third refuses, yet he may release. (g) *Lit. 177.* If a Man be bound to pay a Sum at a Day to come, a Release of all Actions before the Day bars it, yet before the Day he cannot have an Action of Debt, and so the Opinion of Sir *Thomas Garwy* in the Case before was now adjudged.

Raym. 481. 1 Rol. 917. a. 2. Co. Lit. 292. b. Went. 51. Perk. sect. 482. pl. 13. (d) Moor 119, 126. Swinb. 281. (e) 18 H. 6. 23. b. (f) Br. supra in Ruffel's Case. (g) Lit. sect. 512. f. 118. b. Co. Lit. 292. a. b. (a) Plow. 278. b. 281. a. supra in Ruffel's Case. 9 Co. 39. a. Raym. 481. 1 Rol. 917. a. 1. Co. Lit. 292. b. Hur. 31. 10 Co. 52. a. (b) Plow. 278. b. 280. b. 281. a. 7 H. 4. 18. a. supra in Ruffel's Case. Fitz. Executors 107. Br. Executors 49. 9 Co. 39. a. 10 Co. 52. a. (c) Dyer 135. Executors 117

Hill. 40 Eliz. Rot. 119.

In the Common Pleas.

HARRISON'S Case.

Co. Ent. 146.
pl. 25. Jenk.
Cent. 274.
Bridgm. 80.

(a) 1 Rol. 925.
Bridgm. 80, 122
2 Leon. 212.
1 Rol. Rep. 405.
Moor 752.
Jenk. Cent. 274.
Cr. Jac. 9, 35,
102, 182.
1 Bullf. 101.
Cr. Car. 363.
Cr. El. 467.
Stiles 55.
9 Co. 108. b.
Swinb. 370.
Owen 72.

(b) 4 Co. 59. b.
60. a. Cr. E.
575, 714, 735,
822. 2 And. 160.
1 Brownl. 101.
1 Rol. 926.
Yelv. 29, 133.
6 Co. 45. b.
Swinb. 369, 270.

36 H. G. G. a.

Robert Green brought an Action of Debt on a Bond of 40l. against *William Harrison* Administrator of the Goods and Chattels of *Thomas Sidney*: The Defendant pleaded, that the Intestare was bound in a Bond in the Nature of a Statute-Staple, beyond which he had no Goods, &c. The Plaintiff replied, that there were Indentures of De-feasance made to perform Covenants in certain Indentures, which were all performed hitherto; upon which the Defen-dant demurred. And it was adjudg'd that the Plaintiff should recover; for a Debt due by Bond shall be paid be-fore a Statute made to perform Covenants, when none of them then were, nor perhaps ever would be broken, but are Things in Contingency, and *in futuro*; and therefore such Possibility which peradventure may never happen, shall not bar present and due Debts by Bond or other Spe-cialties. And if such Statutes to perform Covenants should bar others of their due Debts, little or no Debts would be paid. *Et nota bene*, that it was adjudged in the *King's Bench* by *Popham* Chief Justice, and the whole Court, *Hill. 42 Eliz.* that if a Man recover Debt by Judgment in the King's Court, this Judgment shall be paid before Bonds in the Nature of a (b) Statute Staple or Merchant; for Judg-ment given in the King's Court is higher than such Statutes which are private Records, and portable by the Conufee in his Pocket. But Judgments given in the King's Court on ordinary and judicial Proceedings, which remain in the Cu-stody of a sworn Officer, are Records which are preferred in Law before such Statutes. And the Law presumes, *quod judicium redditur in invitum*; and such Judgments shall be paid before Recognizances acknowledged by the Assent of the Parties in any of the King's Courts, which may be acknowledged in a private Manner; and it is not material whether the Judgm. or Recognizance, or Stat. be first; but be the Judgment first

or last, it ought to be first satisfied. And so it was held by the whole Court of *Common Pleas*, between (a) *Pemberton* and *Barram*, *Pasch.* 32 *Eliz.* *Rot.* 235. which see before in the End of the *Sadlers Case*, in the fourth Part of my Reports.

Hill. 40 Eliz.

In the Common Pleas.

Piggot's Case.

Piggot Administrator of *Longfield* *durante minore etate* of *A. Longfield* brought an Action of Debt in the *Common Pleas* on a Bond against *Gascoigne* and *Furthee*; And (a) averred that *A. Longfield* was within the Age of 21 Years; To which the Defendants pleaded an insufficient Bar; on which the Plaintiff demurr'd. And for as much as the Bar was insufficient, now the Question was, whether the Declaration were good or not. And the Doubt was, When Administration is granted *durante minore etate*, how long it should endure, *scil.* to the Age of 21 Years, or to what Age it should continue. And thereupon the Court confer'd with sundry Doctors of the Civil Law openly in Court. And it was held by them, That Administration *durante minore etate* should cease at the Age of (b) 17 Years; and if such Administration be committed, the Executor being of the Age of 17 Years it is void: And for this Cause it was adjudged by the Court, that the Declaration was insufficient; for perhaps the Executor was of the Age of 17, or 18, &c. and within the Age of 21 Years as the Pl. hath averred; and yet the Plaintiff's Administration was determined; for which Cause it was awarded, that the Plaintiff should take nothing by his Bill.

Cr. El. 602.

(a) 1 Rol. Rep.

400, 401.

Vaugh. 93.

Cr. Jac. 590.

Cr. Car. 240.]

Hob. 251.

Yelv. 128.

Doctrin. placit.

2 Sid. 60.

(b) Postea 29. b.

Cr. El. 602.

1 Brownl. 46,

101.

2 Brownl. 247,

248.

6 Co. 67. b.

Cr. Car. 516.

1 Rol. 526,

910.

Moor 462.

Vaugh. 93.

Cr. Jac. 590.

287. Hob. 251.

Yelv. 130. 2 Sand. 213. 2 Jones 48. 1 Mod. Rep. 299. Swinb. 43, 286, 2 Rol. Rep. 209. Doctrin. placit. 86.

Mich.

Mich. 41 & 42 Eliz.

In the Common Pleas.

PRINCE'S Case.

IN Trespafs *quare clausum fregit*, between *John Prince* Plaintiff, and *William Simpson* Defendant, the Case was such; One *Jackson* being possessed of a Term for Years, had Issue *James* and *Jane*, and made his Will, and made *Jane* his Daughter (then of the Age of 12 Years) his Executrix; and then devised the said Term to *James*, then also within Age, and died. Administration *durante minore etate* of *Jane* was committed to her Mother who took Husband; *James* died, the Husband took Administration of his Goods, and sold the said Term, *Jane* took Husband; and the Question was, whether the said Sale was good or not. And in this Case three Points were resolved by the Justices of the Common Pleas.

1. That such an Administrator *durante minore etate*, could not (a) sell any of the Goods of the deceased, unless it be of Necessity, for Payment of Debts, or (c) *bona peritura*, for he hath his Office of Administration *pro bono* & *commodo* of the Infant, and not for his Prejudice. Also he can't (d) assent to any Legacy, unless there be Assets to pay Debts, &c. and generally he can't do any Thing to the Prejudice of (e) the Infant; for the Words of the Letters of Administration are, *Administrationem omnium & singulorum bonorum ad opus*, (f) *commodum*, & *utilitatem executoris durante sua minore etate*, & *non aliter, nec alio modo committimus*, &c.

2. Such Administration doth cease at the Infant's Age of (g) 17, as it was adjudged between *Piggot* and *Gascoign*, Hill. 40 Eliz. in the Common Pleas: And there it was also held, That an Infant Executor before 17 cannot assent to a Legacy, &c. And when *Jane* within 17 took Husband, if it had appeared that the Husband had been of full Age, then the Administration should cease, for she hath taken a Husband, who might administer as Executor; but it did not appear in the Case whether the Husband was of full Age or within Age. And in this Case it was said, That Judgment was given in the King's Bench *Pasche 22* Eliz.

2 Anderf. 132.
Cr. El. 718, 719.
3 Leon. 278.
(a) 1 Anderf.
132. Cr. Jac.
718, 719.
6 Co. 67. b.
Swinb. 288.
(b) Raym. 484.
Swinb. 288.
(c) 1 Anderf.
132. Cr. Jac.
718, 719.
Swinb. 288.
(d) March 138.
Cr. El. 719.
Swinb. 288.
(e) 8 Co. 135. b.
(f) 6 Co. 67. b.
(g) Antea 29. a.
1 Brownl. 46,
101. 2 Brownl.
247, 248.
Cr. El. 602.
6 Co. 67. b.
1 Rol. 526, 910.
Moor 462.
Vaugh. 93.
Cr. Jac. 590.
Yelv. 128, 130.
2 Jones 48.
1 Mod. Rep. 299.
Swinb. 43,
286, 287.
Hob. 251.
1 Rol. Rep.
400, 401.
2 Rol. Rep.
209. Cr. Car.
240, 516.
2 Sand. 213.
Doct. placit. 85.

Eliz. between *Vere* and *(a) Jefferies*, that where one hath Goods only in an inferior Dioceſe, yet the Metropolitan of the ſame Province pretending that he had *bona notabilia* in divers Dioceſes, committed Adminiſtration, this Adminiſtration is not void, but voidable by Sentence, becauſe the Metropolitan hath Jurisdiction over all the Dioceſes in his Province, and therefore it cannot be void, but voidable by Sentence; but if an *(b) Ordinary* of a Dioceſe commits Adminiſtration of Goods, when the Party hath *bona notabilia* in ſundry Dioceſes, ſuch Adminiſtration is meerly void, as well as to Goods within his own Dioceſe as elſewhere, becauſe he can by no Means have Jurisdiction of the Cauſe: And true it is that ſuch Judgment was given.

Vere's Caſe,
Pafchæ 21 Eliz. in Bank le Roy.
(a) 8 Co. 135. a.
 2 Jones 78.
Davis 44. a.
 47. a.
 3 Bullſtr. 176.
 4 Leon. 212.
 1 Rol. Rep. 423.
 Cr. El. 457.
Moor 145, 692.
Swinb. 357.
 2 Leon. 155.
Hob. 185.
Plowd. 281. a.
 Cr. El. 457.

(b) *Plow.* 281. a. 2 *Leon.* 155.

Mich. 40 & 41 Eliz.

In the King's Bench.

COULTER'S Caſe.

Robert Coulter brought an Action of Debt on a Bond of 40*l.* againſt *William Ireland Executorem Teſtamenti & ultim' voluntatis Rich. Hunt*; The Defendant pleaded, that he had fully adminiſtered, and ſo nothing was in his Hands; on which they were at Iſſue, and the Jury gave a ſpecial Verdict; That the ſaid *Richard Hunt* was bound to the Defendant and his Son in a Bond in the Nature of a Statute Staple of 500*l.* and that the Defendant was Executor of his own Wrong, and had 140*l.* of the Goods of the deceaſed in his Hands, and retain'd the ſaid Goods in his Hands to ſatisfy himſelf Part of the ſaid Debt of 500*l.* And whether the ſaid Retainer by an Executor of his own Wrong was lawful or not, was the Queſtion. And it was objected, that the Defendant in ſuch Caſe might retain for divers Reaſons.

Moor 527.
 Cr. El. 630,
 631.
 1 Rol. 922.

1. Plaintiff hath by his Declaration affirmed him *fore Executorem*

cutorem Testamenti & ultim' voluntatis Rich. Hunt, and the Jury cannot find against that which both the Parties have (a) agreed in Pleading, as it is agreed in 28 *Aff. p.* (b) 38. in *Affise*, (c) 9 *H. 6.* 37. *a. b. in Debt*, 1 *Eliz. Dy.* 167. 9 *H. 7.* 3. *a. b. in Rescous*, &c. and therefore the finding that he is Executor of his own Wrong is abundant and Surplusage.

2. Altho' an Executor of his own Wrong cannot retain against a rightful Executor, or against an Administrator, yet he may retain against the Pl. who is a Creditor as the Def. is *& eo potius* because he hath affirmed him Executor in his Declaration, as is aforesaid; *& ideo* against him he shall have all the Privileges of an Executor, and so *respective* he shall have against the one, and not against the other.

3. In divers Cases one who is in of his own Wrong shall recoupe and retain, *&c.* 3 *H. 6. Damages* 18. he who hath a Rent of 10*l.* issuing out of certain Land, disseises the Tenant of the Land, in an Affise brought by the Disseisee, the Disseisor (d) shall recoupe the Rent in the Damages, so that where the mean Profits of the Land in such Case were of the Value of 13*l.* the Disseisee shall recover but 3*l.* 43 *E. 3. Damages* 37. The Disseisor shall recoupe all in Damages which he hath expended in amending of the Houses, 14 *E. 3. Damages* 92. 24 *E. 3.* 50. *& 14 Aff. pl.* 124. *acc.* 8 *Aff. p.* 37. Rent-Service incurred during the Disseisin shall be recoup'd, 9 *E. 3.* 8. 4 *H. 7.* 11. 14. *b. acc.* and in 40 *Aff. p.* 56. the Wife shall retain the 3d Part of the Profits against the King in Respect of her Right of Dower which she hath to the same

Lands. So he who is (e) Guard. in Socage of his own Wrong shall have reasonable Allowances. But it was resolved by the whole Court, That an Executor of his own Wrong should not (f) retain, for from thence would ensue great Inconvenience and Confusion; for every Creditor (and chiefly when the Goods of the deceased are not sufficient to satisfy all the Creditors) would contend to make himself Executor of his own Wrong, to the Intent to satisfy himself by Retainer, by which others would be barred. And it is not reasonable that one should take Advantage of his own Wrong; and if the Law should give him such Power, the Law would be the Cause and Occasion of Wrong, and of the wrongful Taking of the Goods of the deceased. And the Law of God saith, *Non facias malum ut in te fiat bonum, & melius est omnia mala pati, quam mala consentire.* And it is clear, that all lawful Acts, (g) which an Executor of his own Wrong, or a (b) Disseisor, or Abator, *&c.* doth, is good. And therefore if a Disseisor or Abator endows a Woman who hath Title of (i) Dower it is good, and shall bind the Disseisee: But if a Woman who hath Title of Dower disseises the Tenant of the Land, she cannot endow her self by Retainer. Also if a Woman who hath Title of Dower occupies the Land as Guardian in Socage by her own Right, and not as rightful Guardian,

(a) Raymond
47. 2 Co. 4. b.
2 Rol. 691.
Dyer 32. pl. 8.
9 Co. 60. b.
(b) 28 *Aff. pl.* 34.
Br. Confession
27. Fitz.
Affise 272.
(c) Br. Confession
38.
Br. verdict. 3.
Br. non est
factum 4.

(d) Cr. El. 631.
Dyer 2. pl. 7.

(e) Cr. El. 631.

(f) 1 Rol. 927.
Cr. El. 631.
Moor 527.
2 Brown. 103,
104. 1 Mod.
Rep. 208.
1 Sid. 76.
Yelv. 137. 138
Clayton Rep.
116. pl. 203.
Swimb. 237, 381
2 Vent. 180.
Godb. 217.
Stil. 337, 358.
Chan. Rep. 33.
(g) Plow. 282. b.
(b) Dy. 2. pl. 7.
(i) Co. Lit.
35. a. 357. b.
2 Co. 67. a.
12 *Aff.* 20.
Br. Dower 59.
Br. Affise 181.
Br. Damage 56.
4 Co. 58. a.

She shall not endow her self *de la plus beale*, for that is in a Judgment given in the King's Court. Also if a Woman who hath rightful Title of Dower be party or privy or consenting to a Wrong, the (a) Assignment of Dower to her is void; as if she procures one to disseise the Tenant of the Land, to the Intent to be endowed by him. And the naming the Defendant *Executor's Testamenti & ultimæ voluntatis*, &c. doth not prove him lawful Executor, for so every Executor of his own Wrong is named, and there is no other (b) Form of Writ or Count. And as to the Case of Recouper in Damages in the Case of Rent Service, Charge, or Seck, It was resolved, that the Reason of the Recouper in such Case is, because otherwise when the Disseisee re-enters, the Arrearages of the Rent Service, Charge, or Seck, wou'd be revived, and therefore to avoid Circuity of Action, and (c) *circuitus est evitandus*, & (d) *boni Judicis est lites dirimere, ne lis ex lite oriatur*, the Arrearages during the Disseisin shall be recoup'd in Damages: But if the Disseisor ought to have Common in the Land, the Value of the Common shall not be recoup'd, for by the Regress of the Disseisee, he should not have any Arrearages or Recompence for it, as appears in (e) 27 H. 6. 10. And with this Resolution concerning Recouper in Case of Common agreeth the Book in 33 H. 6. (f) 32. a. in *Riche's Case*. And so the Doubt in 16 H. 7. 11. a. is well explained. And it appears that the Case of Recouper doth stand on another Reason than the Case at Bar.

(f) Br. Trespass 30. Fitz. Bar. 63.

(a) 2 Co. 67. a.
3 Co. 78. a.
6 Co. 58. a.
8 Co. 132. b.
15 E. 4. 4. b.
Br. Dower 15.
59. Br. Assise 181.
Co. Lit. 35. a.
357. b.
1 Rol. 549.
2 Rol. Rep. 17.
Plow. 51. a.
54. b.
Poph. 64, 100.
Br. Damages 96.
(b) 1 Brownl.
102. Yelv. 137.
1 Mod. Rep.
208.
(c) Co. Lit.
348. a.
(d) Postea 37. a.
4 Co. 15. b.
(e) Fitz. com-
mon. 6.
Carr. 76, 77.
Br. Grant 2.
Br. Common 4.
Br. Pernor de
Profitis 2.
Br. Titles 2.

Mich. 41 & 42 Eliz.

In the King's Bench.

HARGRAVE'S Case.

Body made a Lease for Years rendring Rent, the Lessee died intestate; *Hargrave* took Letters of Administration, and for Rent arrear in his Time after the Death of the Intestate, *Body* brought an Action of Debt in the *debet & detinet*, &c. And after Verdict the Def. Counsel moved in (a) Arrest of Judgm. that the Writ ought to be brought in the *detinet tantum*, because the Def. took the Profits in another Right, and

Moor 566.
Cr. El. 711,
712.
1 Rol. 603.
(a) 5 Geo. c. 13.

(a) Br. det. 238. and they shall be Affets in Law. And the Book in (d)
 Cr. El. 326, 10 H. 7. 5. b. was strongly urged, for there it is expressly
 712. held, that in the Case at Bar the Writ shall be in the *Deti-*
 1 Bultf. 23. *net* for the Arrearages incurred in the Time of the Executor
 2 Rol. Rep. of the Lessee: Yet on good Consideration and Conference
 132- had with other Justices, it was adjudged, that the Writ
 2 Brownl. 206. should be in the *debet* * & *detinet* in the Case at Bar; for
 Palm. 117. when an Executor or Administrator takes the Profits, nothing
 * Cr. El. 711, 712. Moor 566. shall be (b) Affets but the Profits above the Rent; as if the
 1 Rol. 603, Land be worth 10*l.* per annum, and 5*l.* is reserved, in that
 927. Cr. Car. Case nothing shall be Affets but the 5*l.* above the Rent;
 225, 226. and therefore the Writ shall be for the Rent in the *debet* &
 Cr. Jac. 238, *detinet*. Vide *Dyer* 7 E. (c) 6. 81. acc. But note, that in
 411, 545, 546, all Actions brought by Executors, (as Executors) the Writ
 549, 685. accrues in their own Time. As (e) 18 H.8. 3. if the Executors
 1 Bultf. 22, 23. of the Lessor bring an Action of Debt against the Lessee for
 Palm. 116, 117. Arrearages incurred in their Time, the Writ shall be in the
 2 Rol. Rep. *Detinet* only, 20 H. 6. 4. b. In Debt upon Arrearages of
 131, 132, 133. Account, of Assignment of the Auditors, by themselves,
 Noy 137. the Writ shall be in the (f) *Detinet* only; for in all Cases
 1 Brownl. 56. when Executors are bound to name themselves Executors in
 2 Brownl. 202, any Action brought by them, the Writ shall be in the *Deti-*
 203, 204, 205, *net* only, because the Thing or Damages recovered shall be
 206, 207. Affets. And it was adjudged *Pasch.* 36 *Eliz.* in the Exche-
 Allein 34, 42, 43. quer in the Case of one (g) *Hitchcock*, that for an † Escape
 Scile 61, 80, 81. out of Execution in the Time of the (b) Executor, on a Re-
 Hurr. 79. covery had by the Executor himself, he shall not have an
 Poph. 121. Action in the *debet* & *detinet*, but in the (i) *detinet* only a-
 1 Mod. Rep. 185. gainst the Sheriff, *causa qua supra*. Vide 11 H. 6. 7, 8, 36.
 1 Keble 189, *Harlewin's Case*.
 493.
 Lit. Rep. 342. Poph. 121. Salk. 297, 317. (c) 1 Bultf. 22. Cr. El. 712. *Dyer* 81. pl. 67.
 8 Co. 159. a. Brownl. 203, 206. Moor 566. Cr. El. 840. F. N. B. 119. m. 1 Rol. 603.
 Postea 35. b. Noy 32. Cr. Jac. 225, 238, 545, 546. Br. Executors 15. (e) 2 Jones 170 (f) 2 Rol.
 2 Jones 169, Rep. 132. Cr. Jac. 545. 2 Jones 169, 170. 2 Brownl. 203. Cr. Car. 326. Br. det. 9. Fitz.
 170. Brief 84. 1 Rol. 602. (g) Poph. 190. 2 Rol. Rep. 132. Lane 80. Cr. Eliz. 326, 327. Hob.
 1 Sid. 266, 342, 379. Cr. Jac. 546. † Hob. 38. (h) F. N. B. 121. a. (i) Hob. 272. Jenk.
 Hob. 282. Cr. Jac. 546. † Hob. 38. (b) F. N. B. 121. a. (i) Hob. 272. Jenk.
 1 Vent. 271, 272. Cent. 300.
 (b) Moor 566.
 Cr. El. 712. Poph. 121. Salk. 297, 317. (c) 1 Bultf. 22. Cr. El. 712. *Dyer* 81. pl. 67.
 Stile 81. (d) 2 Brownl. 203, 206. Moor 566. Cr. El. 840. F. N. B. 119. m. 1 Rol. 603.
 Noy 32. Cr. Jac. 225, 238, 545, 546. Br. Executors 15. (e) 2 Jones 170 (f) 2 Rol.
 Rep. 132. Cr. Jac. 545. 2 Jones 169, 170. 2 Brownl. 203. Cr. Car. 326. Br. det. 9. Fitz.
 Brief 84. 1 Rol. 602. (g) Poph. 190. 2 Rol. Rep. 132. Lane 80. Cr. Eliz. 326, 327. Hob.
 264. Hurr. 79. Cr. Jac. 546. † Hob. 38. (h) F. N. B. 121. a. (i) Hob. 272. Jenk.
 Cent. 300.

*Hill. 45 Eliz.**In the King's Bench.*PETTIFER'S *Case.*

IN a Writ of Error between *Robinson, &c.* and *Pettifer*, the Case was such; In Debt Judgment was given in the *Common Pleas* against two Executors to recover the Debt *de bonis testatoris*; upon which a *Fieri facias* was awarded to the Sheriff to levy the Debt *de bonis testatoris, &c.* whereupon the Sheriff returned, *Nulla bona, &c.* And upon this Return an Entry was made in the Roll, because *testatum est* that the Executors had sold divers Goods of the Testator, and converted the Money to their own Use, a Writ was awarded to the Sheriff, to enquire by the Oath of good Men of his Bailiwick what Goods (which were the Testator's the Day of his Death) were wasted by the Executors; by Force of which Writ the Sheriff took an Inquisition, by which it was found that divers Goods of the Testator to the Value of the said Debt recovered were wasted by the Executors: And this was returned into Court. Upon which the Plaintiff sued a *Scire facias* against the Defendants to shew Cause wherefore Execut. should not be awarded of their own proper Goods. And upon two *Nibils* the Court awarded Execution: And thereupon the Executors brought a Writ of Error *in redditione executionis*. And although it was said that the said Course was usual in the *Common Pleas*, and more favourable than the ancient Course was, for by this the *Devastavit* shall not be returned by the Sheriff only, but now shall be inquired by Enquest returned, and upon that a *Scire facias* ought to be awarded.

Co. Ent. 268.
pl. 15.
1 Jones 417,
418.
Lit. Rep. 47.
2 Sid. 102.

Cr. Car. 564.
2 Inst. 472.
1 Jones 417.
18.

But it was adjudged that the said Proceeding was erroneous: For when Judgment is given against Executors, and on the *Fi. fa.* the Sheriff returns *Nulla bona, &c.* the Plaintiff may have a special Writ of *Fi. fa. scil.* that the Sheriff levy the Debt of the Goods of the Dead, *& si sibi constare poterit*, that the Executors have wasted the Goods, then *de bonis propriis*: And that is agreeable to Law and Reason;

Cr. Car. 520.
526, 527, 564,
603.

Lib. Intr. 11.
11 H. 6. 16, 36.
Kelw. 22. b.
Noy 124.
Owen 132, 133.
Cr. El. 860.

Cr. Car. 528.
Dyer 168.
pl. 17.

Cr. Car. 527.
Cr. Car. 520.
1 Rol. 776.

son; To Law as appears in 12 E. 3. *Executors* 73. & 85. 9 H. 6. 9. b. & 57. b. To Reason, because in such Case, if the Sheriff makes a false Return the Party may have his Remedy by Action on the Case, which is a good Means to force the Sheriff to make true and just Returns in such Cases. But by the said new Course if the Sheriff takes an Inquest and returns it, although it be false, yet the Party hath no Remedy against the Sheriff, nor against any other: And although a *Scire facias* in the Case at Bar was awarded against the Executors, yet on two *Nibils* returned they shall be condemned, and charged of their own Goods, and yet perhaps had no Notice thereof, the Action sometimes being brought in a foreign County, and sometimes in the County where they dwell, and yet the Executors have not Knowledge thereof, which will be mischievous; and for these Causes the Execution was reversed, but the Judgment stood.

Pasch. I Jacobi,

I N T H E

C O M M O N P L E A S.

ROBINSON'S Case.

Cr. Jac. 15.
Dyer 202.
pl. 69.

Robinson and others, Executors of *J. Robinson*, brought an Action of Debt on a Bond against *Robinson*; The Def. pleaded that before the Purchase of this Writ, one of the Plaintiffs as Administrator of *J. R.* brought an Action of Debt on the same Bond in this same Court against the Defendant, who then pleaded, That *J. R.* made Executors who administered; and traversed that he died Intestate: Then

Then the Plaintiff replied, That Administration was committed to him *pendente lite* between the Executors of the said Will; on which the Defendant demurr'd; and it was adjudged against the Pl. And this Plea was pleaded by Way of Estoppel, and Judgment demanded, if he as Executor should have an Action of Debt against the Defendant on the same Bond: The Plaintiffs replied, and shewed the Repeal of the Letters of Administration, and that the Plaintiffs are Executors; on which the Defendant did demur, he pretending, that forasmuch as one of the Plaintiffs was barred in the former Action, that they should be barred for ever. And the Cause was well debated at the Bar and Bench; and at last Judgment was given for the Plaintiff. For it was unanimously agreed, That by the former Judgment the Plaintiff was barred as to the Action of the Writ, *scil.* to have any Action as Administrator: But although he then in Truth was Executor, yet the Mistaking of his Action is no Bar nor Estoppel to bring his true Action; as if an Heir bring a *Formedon* in the Discender, and be barred therein, yet he may have a *Formedon* in the Remainder, or Reverter. See 3 *E.* 3. 21. 4 *E.* 3. *Estoppel* 133. 19 *E.* 3. *Estoppel* 227. 18 *E.* 3. 31. 40 *E.* 3. 21. 2 *R.* 2. *Estoppel* 210. 6 *H.* 4. 4. 11 *H.* 4. 30. 2 *R.* 3. 14. 21 *H.* 7. 24. 7 *E.* 6. *Estoppel* 162.

Cr. Jac. 15. 394.
6 *Co.* 7. b. 8. a.

6 *Co.* 7. b.
Doct. pl. 65. 66.
Dy. 371. pl. 6.
1 *Mod.* 207.

Trin. 2 Jac.

In the Common Pleas.

READ'S Case.

Co. Ent. 144.
Pl. 27.

READ brought an Action of Debt against *Carter Ex'or of Yong*, which Plea began in the *Common Pleas, Hill. 44 Eliz. Rot. 401*, the Jurors found, that the said *Yong* made his Testament and last Will, and made one *A.* his Executor; and the Day of his Death was possessed of Goods above the Value of the Debt in Demand, and died; and before the Will was proved the Defendant took the Testator's Goods into his Possession, and intermeddled with them; and afterwards, and before the Writ purchased, the Will was proved; and if on this Matter the Defendant should be charged as Executor of his own Wrong, was the Question. And on great Deliberation Judgment was given for the Plaintiff. And in this Case these Points were resolved.

(a) 2 Leon.
223. 224.
1 Rol. 918.
Noy 65. Swinb.
289. 380. Mo. 14.
N. Bendl. 72.
1 And. 11.
Dyer 166. b.
Antea 30. b.

1. When a Man dies intestate, and a Stranger takes the Intestate's Goods and uses them, or sells them, in that Case it makes him (a) Executor of his own Wrong. For although the Pleading in such Case be, That he was never Executor, nor ever administered as Executor, and therefore it was objected, that he ought to pay Debt or Legacy, or do something as Executor: Yet it was resolved, and well agreed, that when no one takes upon him to be Executor, nor any hath taken Letters of Administration, there the Using of the Goods of the Deceased by any one, or the Taking of them into his Possession, which is the Office of an Executor or Administrator, is a good Administration to charge them as Executors of their Wrong; for those to whom the Deceased was indebted in such Case have not any other against whom they can have an Action for Recovery of their Debts.

(b) Swinb.
289. 380.

2. When an (b) Ex'or is made, and he proves the Will, or takes upon him the Charge of the Will, and administers, in that Case if a Stran

PART V. *Cases of Executors.*

a Stranger takes any of the Goods, and claiming them for his proper Goods, uses and disposes of them as his own Goods, that doth not make him in Construction of Law an Executor of his Wrong (a), because there is another Executor of Right whom he may charge, and these Goods which are in such Case taken out of his Possession after that he hath administered, are Assets in his Hands: But (b) altho' there be an Executor who administers, yet if the Stranger takes the Goods, and claiming to be Executor, pays Debts, (c) and receives Debts, or pays Legacies, and intermeddles as Executor, there for such express Administration as Executor, he may be (d) charged as Executor of his own Wrong, although there be another Executor of Right; and therewith agreeth 9 E. 4. 13.

3. In the Case at Bar, when the Defendant takes the Goods before the rightful Executor hath taken upon him, or proved the Will, in this Case he may be charged as Executor of his own Wrong, for the rightful Executor shall not be charged but with the Goods which come to his Hands after he takes upon him the Charge of the Will. Note, Reader, these Resolutions, and the Reason of them, and by them you will better understand your Books, which otherwise seem *prima facie* to disagree. 41 E. 3. 13. b. 50 E. 3. 9. 6 H. 4. 3. a. 11 H. 4. 83. b. 84. a. 13 H. 4. 4. b. 8 H. 6. 35. b. 19 H. 6. 14. b. 21 H. 6. (f) 26 E. 27. 32 H. 6. 7. a. 33 H. 6. 21. 21 E. 4. 5. a. 20 H. 7. 5. a. 26 H. 8. 7. b. 8. a. 1 Eliz. Dier (g) 166. 9 Eliz. (h) Dier 255. And so the *Quere* in 1 Maria (i) Dier 105. well resolved.

(x) Swinb. 289, 380.
 (b) Swinb. 289.
 (c) N. Benl. 72.
 Moor 14.
 1 And 11.
 Dyer 166. b.
 (d) Latch. 160, 267, 268. Noy 65, 86. 6 Co. 19. a. 1 Sid. 57.
 1 Keb. 114.
 pl. 16. Cro. Car. 88, 89. Hob. 49, 266. Cr. El. 460, 565. 1 Rol. 919.
 (e) Swinb. 289, 380, 381.
 1 Rol. 919.
 (f) 21 H. 6. 27. b. 28. a.
 (g) Dyer 166. pl. 10, 11, 12.
 1 Anderf. 11.
 N. Benl. 72.
 2 Brownl. 183, 184. Moor 14.
 (h) 8 Co. 135. b.
 9 Co. 39. a.
 1 Rol. 918.
 Swinb. 351, 352.
 Dyer 355, 356.
 pl. 8. 1 Keb. 854.
 Wentw. 250.
 2 Inst. 398.
 (i) 1 Rol. 918. 1 & 2 Ph. & M. Dyer 105. pl. 17.

Construction of the Statutes of Jeofails,
 &c. Amendment of Records, Fines,
 Common Recoveries, &c.

Mich. 25 & 26 Eliz.

In the King's Bench.

PLAYER'S Case.

Player brought an Action of Trespafs against Warne, *Quare clausum suum fregit, & (a) pisces (b) suos cepit, &c.* (without shewing the Number or Nature of the Fish;) the Defendant pleaded Not guilty, and was found Guilty to the Damage, &c. And now this Term in Arrest of Judgment it was shewed, That the Declaration (which by the Law ought to be certain, because it is in a Manner the Foundation of the Suit) was in the Case at Bar altogether uncertain for two Causes.

(a) Palm. 101.
 Cr. Jac 665.
 (b) 1 Vent. 122,
 123.

(c) 1 Vent. 105,
 106, 272.
 1 Rol. Rep. 25.
 Hard. 132.
 Palm. 101.
 Cr. Car. 18.
 Cr. El. 837.
 2 Rol. Rep. 442.
 (d) Cr. Car. 18.
 Plow. 128. b.
 Cr. El. 866.
 2 Rol. Rep. 269,
 270. 1 Rol. Rep.
 25. Cr. Jac. 435.
 Hardr. 132.
 Godb. 370.
 3 Vent. 272.

1. It doth not appear by the Declaration of what (c) Nature the Fish were, Pikes, Tenches, Breems, Carps, Roches, &c.

2. The certain (d) Number of them doth not appear, but generally *pisces suos cepit*; To which it was answered by the Plaintiff's Counsel:

1. That it was good by the common Law, for the Verdict hath found the Defendant guilty to Damages, and therefore it is not now material of what Nature, or of what Number the Fish were, but taking of Fish to Damages in which Case the Verdict hath made the Declaration (if it wants Form) good.

2. They conceived that the Declaration in an Action of Trespafs without expressing the Number or Nature of the Fish was good enough, forasmuch as the Fish themselves are not to be recovered but Damages for them: As in 20 H. 6. 19. in a Writ of (e) Deceit for purchasing and casting a Protection, and doth not shew in certain of what Nature the first Writ was (as in *Formedon*, Affise, or other Writ) which was delay'd by the Protection, and yet the Writ was adjudg'd good; And in Trespafs on the Case the Writ was, that

(e) Doct. p. 87,
 20 H. 6. 18. a.
 Fitz. disceit 13.

that the Pl. did retain the Def. *pro quadam pecuniæ summâ solvendâ, &c.* without shewing the Quantity of the Sum, and yet held good in 11 H. 6. 55. b.

3. If the Law doth require more (a) Certainty as to the Fish, then it shall be intended that the Judges before whom this Issue was tried, did direct the Jury to find the Def. guilty only for the Close for which the Declaration was good, and not for the Fish for which the Declaration was insufficient.

4. Admitting the Declarat. was insuffic. in the Form thereof by the com. Law, and that it was not made good by the Verdict, yet they conceived that it was remedied by the Stat. of 18 Eliz. cap. 14. (for the Stat of 32 H. 8 cap. 30. doth not extend to Counts) By which Act of 18 El. after Verdicts it is provided, "That all Defaults in Form in any Writ Original or Judicial, Count, Declarat', Plaintiff, Bill, or Demand, are remedied, and Judgm. for them shall not be stayed. And it was said, that the Omission of the Number and Nature is but of the Form and not of the Substance of the Action, but the Substance is for the Taking of the Fish; But it was resolved by Sir Chr. Wray Ch. Just. Sir T. Garway and the whole Court against the Plaintiff.

And to the 1st and 2d Objections it was answered and resolved, That the Declarat. was insufficient, and was not made good by the Verdict, for the Declarat. ought to reduce the Generality of the Writ to Particularity, and to declare that which is briefly touched in the Writ in Certainty, to which the Def. may have certain Answer, and on which a certain Judgm. may be given, *Quia (b) oportet quod certa res deducatur in judic'.* And true it is, if this Action had been brought by Original the Writ should be general; but the Declarat. ought to have comprehended the Fish in (c) certain; and therewith agree all the Precedents, and 4 H. 6. 11. b. where the Writ was *Quare piscem (d) cepit*, and declared of so many Pikes in certain; and altho' the Writ was *piscem* in the singul. Number, yet it was well, for *pisc' est nomen collectivum*, in which the plural Numb. is comprehended. *Vide* 21 H. 6. 39. a. b. acc. that (e) the Certainty of the Fish shall be alledged in the Declarat'; and great Inconven. would thereof follow, for unless the Issue hath Certainty with which the Jury may be charged, on such a general Incertainty they cannot be charged in Attain, if they give a false Verdict.

As to the 3d Objection it was answered and resolved, That when the Jurors have found the Defendant guilty (f) generally of the Trespas in the Declaration, &c. that without Question doth extend to both the Trespassee, and no such Intendment should be taken as was objected: But if the Pl. Counsel had done wisely, they would have caused the Damages to have been (g) severed, that is to say, so much for the Fish, and so much for breaking the Close, and then the Pl.

(a) Post. 121 a.
8 Co. 57. a.
Salk. 129, 364.
5 Geo. cap. 13.

(b) Co. Lit. 96. a.
303. a. Postea
38. a. 61. a.
March. 98.
Hard 132.

(c) Post. 120.
121. Hard. 132.
Co. Lit. 303. a.
Plow. Com.
121, 122. Cr.
Car. 18. 572.

2 Rol. Rep. 96.
Godb. 370. Cr.
El. 837. Larch.
195. Cr. Jac. 435,
665, Palm. 101.

447. 1 Vent. 53.
105, 106, 272,
329. 2 Jones
109. Doct. pl.
87. Kelw. 153.

pl. 2. Noy 91.
O. Bendl. 174.
(d) Br. general
brief 9. Doct.
placit. 34, 384.
Fitz. brief 27.

Br. brief 209.
Br. faux lating 1.
(e) Fitz. brief 92.
Br. faux lating 3.

(f) 2 Sand. 170.
171. Lane 98.
(g) Moor 708.

Construction of the Stat. of Feofails, &c. PART V.

(a) 18 El. c. 14.
 (b) Palm. 123,
 124. Cr. Car.
 147, 148.
 Postea 36. a.
 1 Leon. 300.
 (c) 1 Jones 199.
 (d) Hutt. 57, 79.
 Anrea 31. a. b.
 Cr. Jac. 238,
 411, 545, 546,
 549, 685. 8 Co.
 159. a. Cr. El.
 350, 711, 712.
 1 Rol. 603, 927.
 Moor 566.
 1 Bullf. 22, 23.
 Cr. Car. 225,
 226. Palm. 116,
 117. Noy 137.
 2 Rol. Rep. 131,
 132, 133. Still:
 61, 80, 81.
 Poph. 121.
 1 Brownl. 155.
 2 Brownl. 202,
 203, 204, 205,
 206, 207.
 1 Mod. Rep. 185.
 Allein 34, 42, 43.
 Lit. Rep. 342.
 1 Keb. 189, 493.
 1 Sid. 266, 342,
 379. 2 Jones 169,
 170. Hob. 282.
 1 Vent. 271, 272.

should recover Damages for breaking the Close, with his Costs.

As to the last Objection, it was agreed by the whole Court, that the Omitting of the Nature and Number of the Fish, was a Matter of Substance, and not of Form to be remedied by the said Statute of (a) 18 *Eliz.* for Want of Form within the said Act is such Matter of Course, that the (b) Clerk might have supplied and amended without any Information of the Party, for the Party ought to inform the Truth of the Matter, and the Clerk ought to draw it in Form: But in the Case at Bar the Clerk without Information of the Party could not know the Nature or Number of the Fish, and therefore it is not Want of Form within the Purview of the said Act. But *Wray* Chief Justice said, That every (c) Misprision of a Clerk in a Thing which he might have supplied and amended without Information of the Party is not remedied by the said Act: As if a Writ be brought against Executors in the (d) *Debet* and *Detinet*, this is the Fault of the Clerk, but because it is in Matter of Substance, that is to say, in the Point of the Action, and not Want of Form as the Statute speaks, it is not remedied by the said Act. So there is a Difference between Matter of Course and Matter of Substance, which the Clerk might have amended.

Trin. 30 Eliz.

In the King's Bench:

WALCOT'S Case.

Lloyd brought an Action of Debt in the Common Pleas against *Walcot* and the Lady *Arnold* his Wife on an Obligation made by the Wife before Marriage; the Defendant pleaded to Issue, and found against him, on which Judgment was given: The Defendant brought a Writ of Error, and divers Errors were assigned, which were all over-ruled by the Court; then one of the Defendant's Counsel moved; that the Writ was brought against them in the *Detinet tanquam*, where it ought to have been in the *debet & detinet*, for the Wife who is Party to the Action made the Bond herself, and the (a) Intermarriage is a Gift in Law to the Husband of all the personal Goods, and Disposition of all Chattels real, and all those he hath to his own Use, and not to another Use as Executors have. But as against the Heir of the Obligor an Action lies in the (b) *debet & detinet*, because he hath Assets from the same Ancestor in Fee-simple in his own Right, so hath the Husband the Goods and Chattels of his Wife to his own Use, and therefore the Writ shall be brought against them in the *debet (c) & detinet, quod fuit concessum per totam Curiam*: Then it was moved, That it was Want of Form, and therefore should be amended by the Statute of 18 *Eliz. cap. 14.* because it was but (as it was said) the Misprision of the (d) Clerk, which he himself ought to have amended and supplied: But it was resolved by the whole Court, That it was Matter of (e) Substance, and the very Point of the Action, and the said Act remedied only Want of Form; which Resolution agrees with the Opinion of *Wray* Chief Justice in the Case before.

3 Leon. 206.

(*) Co. Lit. 351. a.

(b) Cr. El. 350;
712. 1 Jones 199.
Plow. Com.
441. a. 10 H. 7.
8. b. 1 Sid. 342.
(c) 3 Leon. 206.

(d) Antea 35. b.
Palm. 123, 124.

(e) 1 Bull. 152.
Or Jac 546.
Antea 35. a.

F 4

Trin.

Trin 30 Eliz.

In the Exchequer.

BAYNHAM'S Case.

(a) Stile 8.
 Cr. Car. 17, 162.
 Cr. Jac. 631.
 Stat. 21 Jac. c. 13.
 2 Rol. Rep. 258.
 1 Sid. 19.
 Cr. El. 664.
 (b) 8 Co. 162. b.
 11 Co. 6. b.
 1 Anderf. 26.
 27. pl. 60.
 O. Benl. 12.
 N. Benlow 37.
 Benl. in Kelw.
 207 b. Benl.
 in Ash. pl. 5.
 Hob. 281.
 21 Jac. c. 13.
 (c) Godb. 429.
 2 Rol. Rep. 363.
 Cr. El. 574.
 586, 894.
 8 Co. 162. b.
 163. a. Hur. 26.
 Co. Lit. 125. b.
 Cr. Jac. 21.
 Yelv. 15. 1 Rol.
 Rep. 28. 3 Bullf.
 175. Moor 356.
 Dyer 367. pl. 40.
 2 Rol. 668, 669.
 Brownl. 134.
 (a) Co. Lit.
 125. a. 126. a.
 Cr. El. 664.
 2 Rol. Rep. 363.
 Hob. 5. Jenk.
 Cent 3. o.
 Post. 40. b.
 O. Bendl. 83.
 Godb. 429.
 (e) Co. Lit. 37. a.
 126. a. 180. a.
 Poitea 40. b.
 2 Rol. Rep. 363.
 7 Bullf. 216.
 (f) Cr. El. 194.
 536, 587.
 Poitea 37. a.

Between Baynham and Brook in an *Ejectione firme* on a Demise of the Rectory of A. in A. B. & C. the Defendant pleaded Not guilty, and the Venue came only out of A. and the Jurors found the Defendant Guilty, and Judgment was given thereon: And in a Writ of Error this Judgment was reversed, for the Venue ought to be out of the three Towns; and this Trial was resolved to be insufficient, and insufficient Trials are not remedied by any Statute, for the Statute of 32 H. 8. cap. 30. doth not extend to a Verdict given between the Demandant * and the (b) Vouchee, nor to any Fault in the original Writ, or in the Return thereof, or to the Want of an Original, or in the Count, or to any Insufficiency in Trial, Verdict, or Judgment, &c. And the Statute of 18 Eliz. cap. 14. helps many of the said Defects, but doth not remedy any insufficient Trial, but that remains as it was in the Common Law. And Wray Chief Justice said, that it was of late adjudged in the King's Bench between Goodwyn and Franklyn, that where a *Venire facias* was awarded (c) to the Coroners where it ought to have been awarded to the Sheriff; and so the Jurors returned by one who had not Authority, that it was in the Nature of an insufficient Trial; and therefore on Consideration of the said Statutes, and of the Opinion in 21 & 22 Eliz. Dier 367, it was resolved that it was not remedied by any of the Statutes; but for this Cause a new *Venire facias* was awarded: *Et verum dixit*, for I was of Counsel with Franklyn in the same Case: But the principal Case in the Lord Dier was held good Law, because there the *Venire Facias* was awarded *ex (d) assensu partium*, & *omnis (e) assensus tollit errorem*. And in this Case Wray Chief Justice said, that it had been adjudged in this Court in Gardiner's Case, that if on the *Venire facias* but *f*: 23 be returned, and 12 appear and give a Verdict, that is remedied by the said Acts of 32 H. 8. & 18 Eliz.

Pasch. * 31 Eliz. Rot. 301.*In the King's Bench.*

GARDINER'S Case.

Between *Tirrel* and *Gardiner* on Issue joined, 23 (a) Jurors were only returned, whereof 12 did appear and give Verdict; and that was moved in Arrest of Judgment: And on great Deliberation it was resolved, That it was remedied by the Statute of 18 *Eliz. cap. 14.* and thereupon Judgment was given accordingly; which was the Case which *Wray* Chief Justice cited in the Case next before.

* The Original is 31 Eliz. but Q. if it should not be 21.

Latch 54. Savil 124. 1 Sid. 66.

(a) O Benl. 95.
Cr. El. 194,
586, 587.
2 Brownl. 274.
Cr. Car. 223,
224, 278, 279.
Antea 36. a.
1 Jones 245,
302, 357.
1 Rol. 800.
Cr. Jac. 647.
2 Show. 309.

Pasch. 34 Eliz.*In the King's Bench*

BISHOP'S Case.

Mattbew Bishop brought an Action on the Case against *Michael Harecourt* in the Common Pleas by original Writ, setting forth that the Defendant in Consideration that the Plaintiff had given and delivered to the Defendant a Horse; and that the Plaintiff promised the Defendant that he on 90*l.* to him by the Defendant to be paid, would deliver to the said *Michael* an Indenture, *inter William Ward ex una parte, & Agnetem Frauekencr ex altera parte fact.*, &c. and a Bond by which *Tho. Ward* and *Christopher Bishop* were bound to the said *Agnes*, &c. in 500*l.* assumed, and to the said Plaintiff did promise to pay him 90*l.* *Termino Trinit.* next following: And the Plaintiff declared, and the Writ and Declaration agreed in all but only in this, That where by the Writ the said Bond of 500*l.* was alledged to be made by *Tho. Ward* and *Christ. Bishop*, &c. in the Declaration he was named *George Bishop*, &c. And the Defendant pleaded *Non assumpsit*, and found against him, and Judgment given

1 Leon. 210,
211.
1 Anderf. 240.
Cr. El. 210.

3 Bulstr. 224,
228. 1 Rol.
Rep. 432.
2 Rol. Rep. 252.
Cr. Jac. 629,
630.
O Benl. 51.
Palm. 193.

(a) 1 Jones 9,
140.
Larch. 152.
Noy 83, 84.
1 Rol. 764, 765.
Stil. 175, 176.
1 Rol. Rep. 432.
2 Bulstr. 71.
Cr. Jac. 6, 141.
Cr. El. 84, 155,
281, 282, 836,
837.
1 Leon. 22,
23, 176.
2 Leon. 3.
1 Sid. 139.
Hard. 112.
Palm. 285.
(b) 2 Bulstr. 71.
1 Leon. 22.
2 Leon. 3.
Palmer 285.
1 Jones 140.
(c) Fitz. Er-
ror 44.
Br. Error 166.
(d) 22 E. 4.
45. b. 46. a. b.
(e) Fitz. Er-
ror 29.
Br. Error 12.
(f) 8 Co. 163. a.
4 Bulstr. 224.
2 Rol. Rep. 252.
Cr. Jac. 629,
630.
O. Benl. 51.
1 Rol. Rep. 432.
Palm. 193.
Winch. 69.
(g) 1 Jones 304.
Cr. El. 722.
Cr. Jac. 185,
654. Doctrin.
placit. 385.
Yelv. 109.
3 Bulstr. 224.
1 Sid. 84.
(h) 3 Bulstr. 224.
Doct. placit.
385.
Cr. Car. 272,
282.
Cr. Jac. 185,
654, 655.
Cr. El. 722.
1 Sid. 84.
1 Jones 304.
5 Co. 4.
Caudries Case.
Vide 5 Geo.
cap. 13.

given accordingly. And the Defendant brought a Writ of Error, and assigned divers frivolous Errors to which the Court gave no Regard. And then another Error not assigned was moved, *scil.* the said Variance between the original Writ and the Declaration. For the Declaration in the Common Pleas always recites the Writ, by which it appeared that the Writ was *Christopher Bishop*, (who was one of the Obligors in the said Bond) and the Declaration was *George Bishop*. And on that after *in nullo erratum* pleaded, the Plaintiff by *Certiorari* out of the King's Bench removed the original Writ, by which the Variance appeared to the Court. And it was moved, That it should be helped by the Statute of 18 *Eliz. cap. 14.* by which it is enacted, That after Verdict no Judgment shall be reversed for Want of Form, &c. or for any Want of any Writ original or judicial, or Default in Process: And here wants an original Writ in our Case, for the Action on the Case consists on two Parts, *scil.* on Consideration and Promise. And as to the Consideration, the Writ and Declaration vary, and so no original Writ to warrant this Declaration; and if that should not be within the Letter of the Act, yet it would be within the Meaning and Intent of it, because it was in equal Mischief. Also it was moved, That after in (a) *Nullo est erratum* pleaded, no Writ of Diminution, or *Certiorari* should be awarded, as it is agreed in (b) 7 *E. 4.* (c) 25. b. (d) 22. *E. 4.* (e) 28 *H. 6.* 10. b. but if any should be awarded by the Discretion of the Court, it should be only to assure them of the Truth for the amending the Record in Things amendable, and to save the former Judgment, according to the Truth of the Case, but never to reverse the Judgment, as it would be in our Case.

But as to the first it was answered and resolved by the whole Court, That this (f) Variance between the original Writ and the Declaration was not remedied by the Statute of 18 *Eliz.* nor any other Statute; and a Difference was taken by the Court when there was an (g) original Writ, which in Matter of Substance varieth from the Declaration, that was not remedied by the said Act, *Quia Casus omissus & oblivioni datus, dispositioni juris communis relinquitur*; but when there is (h) no original Writ, that was expressly remedied by the Act.

As to the second Point they all agreed, That when the original Writ is removed (be it before *in nullo est erratum* pleaded, or after,) and a material Variance appears to the Court between the Writ and the Declaration, the Judgment shall be reversed: And so it hath been done before this Time, as *Wray* Chief Justice said.

*Trin. 34 Eliz.**In the King's Bench.*

TEY'S Case.

Thomas Tey and Eleanor his Wife levied a Fine to Robert Drury and Tho. Cannock, and to the Heirs of Robert Drury, of the Manors of *Layrdelabay*, *Layer Bretton*, and of divers other Manors, and of a great Number of Acres of Land, Meadow, Pasture, &c. in *Layerdelabay*, *Layer Bretton*, *Magna Bretton*, *Magna Birch*, and many other Towns in the County of *Essex*. And in the said Fine divers Grants and Renders were made: And in the third Render the Manors of *Layrdelabay*, *Layer Bretton*, and divers other Manors, & tenementa prædict in *Layerdelabay*, *Layer Bretton*, *Neverds* and *Magna Birch*, were granted and rendred to the said Thomas and Eleanor, and to the Heirs of the said Thomas. And by the fourth Render 115 Acres of Land in *Layer Bretton* and *Magna Birch*, were granted and rendred to Eleanor in Tail, the Remainder to the Right Heirs of Sir Tho. Tey: And after the Death of Thomas Tey, William Tey his Brother and Heir brought a Writ of Error, and assigned Error in the Grant and Render made by Drury and Cannock; and that was for the Repugnancy between the third and (a) fourth Render, for by the third Render all the Tenements in *Layer Bretton* and *Magna Birch* were rendred to Thomas and Eleanor, and to the Heirs of Thomas; and by the fourth Render, certain of the said Tenements are granted and rendred to the said Eleanor in Tail, the Remainder to the right Heirs of Sir Thomas Tey; so one and the same Thing is granted and rendred to several Persons and of several Estates, and so repugnant, and erroneous: For it was said, That a Fine is like a Judgment, for a *Sci. fa.* lies to execute it, as of a Judgm. and oportet (as *Braeton* saith) *Quod (b) certa res deducatur in iudicium*: As in Case where there are two Demandants, and the Court

(a) Jenk. Cent. 256.

(b) Antea 35. a. Co. lit. 96. a.

203. a. Hardr. 132. Postea 61. a. March 98. should

should adjudge one and the same Thing to each Demandant severally, it would be Error as well for the Repugnancy, as for the (a) Doubtfulness to which of them the Court should make Execution. As in the Case of 3 H. 6. 44. b. where two Avowants are, and one avows for Rent-Service, and the other for Rent-Charge, both the Avowries (b) shall abate; for the Court will be in doubt to which of them Return shall be awarded; so here in the Case at Bar, because the same Thing is granted and rendred in the third Render to one, and in the fourth to another, because both cannot have one and the same Thing, for the Contrariety and Incertainty to whom the Court shall make Execution, it is erroneous. And it was further objected, that a Fine ought to be more certain than a Judgment, or any other Record, for a Fine can't be receiv'd being levied to two (c) and to their Heirs, as it is held in 2 H. 5. 7. a. b. & 24 E. (d) 3. 36. and a Man cannot acknowledge the Right to two, as it is held in 27 E. 3. 79. Neither can a Fine be levied on (e) Condition, as it is held in 22 H. 6. But after many Arguments at Bar and Bench, First, it was resolved by them, That the (f) fourth Render, as to that which was contained in the third Render should be of the same Condit. and Quality in Construct. as a Charter, or other Conveyance between Party and Party, and need not have such precise Form as a Writ or a Judgm. But a Conufance of a Fine and a Grant and Render should have the like Construct. as another (g) Conveyance between Party and Party, for it hath the Words of Grant and Render, because it is a Conveyance of Record. And although a Fine may be refused in the Cases which have been put, yet if such Fines be received they would be good enough in all the said Cases, for *fieri non debuit, sed factum valuit*; and therefore if a Fine be accepted to two and their Heirs, or if the Conufance of Right be to two, or if a Fine be on Condition, in all these Cases and other like, the Fine (h) shall stand, and shall not be reversed by Writ of Error. 2. In the Argument of this Case, all the Parts of a Fine *sur conufans de droit come ceo*, &c. were recited and perused. And it was resolved by the whole Court that there are five (i) Parts of every Fine, that is to say, an original Writ, for without (k) an original Writ a Fine cannot be levied, as appears by the Stat. *De (l) modo levandi Fines*, that the Order of Law will not suffer that a final Accord be levied in the

(a) Antea 19. a.
Hob. 128.
1 Rol. 353.
Moor 864, 865.
(b) Antea 19. a.
Plowd. 10. b.
Manxel's Cafe.
21 R. 2. Fitz.
Avowry 262.
Br. Avowry 6.
in Fine.
Moor 865.

(c) Fitz. Fines
15, 77.
7 H. 4. 7. b.
24 E. 3. 36. b.
37. a.
Br. Fines 10,
31.
33 H. 6. 52. b.
2 Co. 72. b.
1 Leon. 62.
3 Co. 84. a.
(d) 24 E. 3.
36. b. 37. a.
Fitz. Fines 77.
(e) 2 Rol. 18.
44 E. 3. 22. a.
Fitz. Fines 15,
36.
27 H. 8. 24. a.
Br. Fines 5,
10.
Br. Done 3.
33 H. 6. 52. b.
Perk. sect. 629.
Plowd. 34. b.
(f) Jenk.
Cent. 256.
(g) Jenk.
Cent. 256.
Postea 45. b.
6 Co. 66. b.
(h) 27 H. 8.
24. a. Br. Fin. 5.
(i) Raym. 71.
Co. Lit. 121. a.
2 Inst. 511.
(k) 2 Inst. 513,
514. 1 H. 7.
9. a. Br. Fines
B. N. C. 461.
(l) 2 Inst. 510,
511, &c.

Levies, &c. 85, 97. in Fine. Fitz. Fines 27. 21 E. 4. 4. b. Plowd. 394.
Fitz. Assise 13. Br. Assise 396. Fitz. Error 28. Br. Judgment 114, 130.

King's Court without an original Writ; and so it is held 37
(a) *Aff.* 17. And on every Writ, by which Land is demand-
ed, or by which Land is to be charged or bound, or which
in any Sort doth concern Land, &c. (b) a Fine may be levied.
See for that 5 *E.* 2. *Statham Fines*, & 18 *E.* 4. 22 *a. b.* 19
E. 4. 2. 21 *E.* 4. 4. *b.* 32 *E.* 3. *Scire facias* 100. in '*Præ-*
cipe, in Warrantia Chartæ, in a Writ of Mesn, in *Quid ju-*
ris clamat, Per quæ servitia, in Ration' dimiss. & similia.

2. There ought to be a Licence or (c) Leave to agree, for
which Licence there is a (d) Fine due to the King, which
is an ancient Revenue of the Crown, and that is e called the
King's Silver; and that fully appears by the said Stat. *De*
modo levandi fines. And the Entry of the King's Silver in such
Case at the Bar was such, *Robertus Drury armig' dat domi-*
næ Reginæ septem libr' pro Licentia concordandi cum Tho-
ma Tey armiger' & Elianora uxore ejus, de placito conven-
tionis, de maneriis de, &c. & habet Chirographum per pa-
ceper' admissum, coram Jacobo Dier. Et nota bene, The Use
is that he in whom the Fee (f) reposes, pays the King's Silver,
and not the other Conusee who hath but for Life, and all
the Precedents agree therewith. And note the King's Sil-
ver is entred on the Writ of (g) Covenant, and ought to ex-
press, 1. The Sum given for the Licence to agree. 2. The
Party who pays it, that is to say, he in whom the Fee re-
poses. 3. The Plea and between whom, &c. And 4. The
Land for which the Fine is paid; and all this was well ob-
served in the Case at Bar.

3. The Concord, and that begins thus, *Et est concordia ta-*
lis, scil. quod præd' Tho. & Eleanora recognoverunt maner',
&c. *esse jus, &c. It notand' est,* that this is the Foundation
and Substance of the Fine. For if thereon the (b) King's Sil-
ver be entred, altho' the Conusor dies afterwards, the Fine is
good, as it was adjudged in *Carrel's Case* 5 *Eliz. Dy.* 220. *b.*
And the Note and the Foot of the Fine are but Abstracts out
of it, but the Concord is the Ground and Substance of the Fine.

4. The Note of the Fine, and that is but an Abstract out
of the Original and the Concord, and begins in this Manner,
scil. inter Robert' Drury & Tho. Cannock querent', & Tho. T.
& E. uxor' ejus desorcean' de maner', &c. unde placit' con-
ventionis summonit' fuit inter eos, scil. quod præd' Tho. Tey
& Elianora recognover' maner', &c. esse jus, &c. But it was
observed, that in old Books the Note of the Fine is taken for
the Concord, as in 12 *H.* 4. 16. *a.* that the (i) Note of a Fine
is pleadable before the Fine engrossed, and (k) 22 *H.* 6. 51. *acc.*
But that is intended of the Concord it self; and all the Plead-
ings in *Quid juris clamat*, &c. that the Lessee had Fee the Day
of the Note levied, are to be intended of the Concord it self.

5. The Foot of the Fine, and that begins so, that
is to say, *Hæc est finalis concordia facta in Curia*
Domini

(a) Br. Judg-
ment 114.
Br. N. C. 461.
Br. Error 129.
Br. Fines, Le-
vies, &c. 82.
(b) 2 Inst. 513.

(c) 2 Inst. 511,
512.
(d) 1 Leon.
249, 250.
2 Leon. 56,
379, 233, 234.
(e) Postea 43. b.

(f) 2 Inst. 512.

(g) Postea 43. b.
44. a.
Dyer 320. pl. 19.

(h) Co. Ent.
231. a.
Hob. 330.
2 Inst. 511,
512.
4 Leon. 96.
2 Sid. 56.
Dyer 39. b. 220.
pl. 15. 254. a.
Hutt. 135.

(i) Doctrin.
placit. 307.
Br. Fines Le-
vies, &c. 41.
(k) 22 H. 6.
13. a.
Doct. pl. 307.

Construction of the Stat. of Feofails, &c. PART V.

Domini Regis, apud West. a die Pasche in quindecim dies, anno, &c. coram Jacobo Dyer, &c. So that the Foot of the Fine includes the whole, and hath the Day, Year, Place, and before what Justices the Concord was made. And a Fine is said to be * engrossed when the Chirographer makes the Indentures of the Fine, and delivers them to the Party to whom the Conufance was made. And it is to be known, that if a Fine is levied of a Reversion, the Conufee presently (a) after the Conufance, which is the Concord, ought to sue a (b) *Quid juris clamat* against the Lessee; for if the Conufee stay till the Fine be ingrossed he shall never have a *Quid juris clamat*, for presently by the Record and Conufance the Reversion passes. *Vide F. N. B. i47. & 22 H. 6. 57. acc.* And at the Common Law immediately after the Fine ingrossed, it was sent into the (c) Treasury, as appears in 17 E. 3. 29. a. But now by the Statute of 5 H. 4. cap. 14. it is enacted, That all the Parts of the Fine shall be (d) enrolled with the chief Clark of the Bench (who is the *Custos Brevium*) before the Chirographer hath them out of Court. And note before this Statute the *Custos Brevium* had not any Record of the Fine but the Chirographer, and nothing remains with the Chief Justice of the Common Pleas but the Licence to accord. And note it is provided by the same Statute, that the original Writ shall be of Record. And the Use is to direct a Writ of Error to the Ch. Just. of the Bench, another to the *Custos Brevium*, to certify *transcript' pedis finis*, and another to the Chirographer to certify *transcriptum notæ finis*. And note that Words are added in the Writ to the *Custos brevium, cum † omnibus eundem finem tangen'*, by Force of which Writ he certifies the original Writ. 3. It was resolved that the Conufor should not assign Error in the Grant and Render, by which he himself took an Estate, no more than the Conufee shall do in the Conufance, for that is to defeat the Estate which by the Fine is given to him; nor shall the Recoveror bring a Writ of Error to defeat the Record in which he himself doth recover; for the Judgment in the Writ of Error is to be restored to all that which he lost by the Fine or Judgment, and not to avoid and lose that which he hath gained by the Fine or Judgment, 7 E. 3. 25. b. A Man shall not reverse a Judgment for Error, if he cannot shew that the Error is to his (e) Disadvantage, 8 H. 5. l. F. N. B. 21. acc. and afterwards the Fine was affirmed.

* F. N. B. 147. a.

(a) F. N. B. 147. a.
3 Co. 86. a.
6 Co. 68. a.
Br. Quid juris clamat 14.
Br. Attornment 25.
22 H. 6. 13. b.
Plowd. 431. b.
(b) F. N. B. 147. a.
(c) Fitz. Scire facias 8.
(d) Lane 62.

† Dy. 89. pl. 2.

(e) 3 Co. 59. a.
7 Co. 4. b.
1 Rol. 757,
759, 760, 784.
Palm. 39. 11
2. b. F. N. B.
Dy. 315. pl. 99.

Co. 56. a. Jenk. Cent. 256, 257, 286. Fitz. Error 92. Br. Error 37. 8 H. 5. 21. f. 7 H. 4. 16. a. 11 H. 4. 88. b. 89. a. 2 Sand. 46. Cr. Eliz. 84, 107.

Pasch.

Pasch. 35 Eliz.
In the King's Bench.

DORMER'S *Cafe.*

*W*illiam Dormer Esquire, Son and Heir of *Jeffrey Dormer* brought a Writ of Error on a Judgment given in a Writ of Entry in the Post, on which a common Recovery was had in the Common Pleas, between *John Crooker* and *George York* Demandants, and the said *Jeffrey* Tenant of the Manor of *Farninghoe cum pertinentiis*, & *sex mesuagiis, sex cotagiis, duodecim gardinis*, 400 Acres of Land, 60 Acres of Meadow, 400 Acres of Pasture, 2 Acres of Wood, 60 Acres of Moor and Heath, and 40 s. Rent in *Farninghoe*, and of one Yearly Rent or Pension of 4 Marks, *excut' de Ecclesia sive rectoria de Farninghoe in Com' Northampton*; and that the Tenant vouched *H.* the common Vouchee, and Judgment was given, *Idco consideratum est quod prædict' Georgius & Johannes recuperent seisinam suam versus præfat' Galfridum de manerio, tenement', & reddit' præd' cum pertinent', ac de * advocations Ecclesie præd': Et quod idem Galfridus habeat de terra præd' Henrici the Vouchee, ad valentiam, &c.* In this Record divers Errors were assigned.

Common Recovery.
Poph. 22, 23, 24.
2 Inst. 519.

* 2 Vent. 32.
Poph. 22, 23.
1 Mod. Rep. 250.
2 Rol. Rep. 67.
2 Co. 74. a.
Jenk. Cent. 257.
Cr. Cr. 270.
Postea 40. b.
Raym. 71.
1 Rol. Rep. 303.
(a) Poph. 23.

(b) Poph. 23.

† F.N.B. 152. h.
Co. Lit. 145. a.
(c) 2 Co. 37. a.
Postea 41. a.
(d) 2 Co. 37. a.

1. Because the Writ of Entry was *de uno annuali redditu sive pensione quatuor marcarum excut' de Ecclesia sive rectoria*; It was said that this was erroneous for two Causes: 1. Because a Pension is properly a Sum demandable in the (a) Ecclesiastical Court, and a Rent is a Thing demandable by our Law. 2. The Demand of Rent, or Pension in the (b) Disjunctive is utterly uncertain, and every *Præcipe* ought to be of a Thing certain, for although the Grant be in the Disjunctive, the *Præcipe* in a Writ of Annuity shall be of a Thing certain. *Vide 11 E. 3. (c) Annuity 27. 5 E. 4. 6.* And see in my Reports Sir Rowland (d) *Heyward's Case*: But otherwise it is in *Affise*. *Vide 3 E. 3. Affise 175. 11 Aff. 8. & 29 Aff. 7. 11 E. 3. Variance 69. Alternativa petitio non est audienda.*

Anoth. Err. was assign'd, That a Writ of Entry in the Post lies not

- (a) 2 Inst. 353.
- 354, 355, &c.
- (b) Jenk. Cent.
- 257. Poph. 23.
- Poltea. 46. a.
- 1 Co. 15. b.
- Cr. Car. 270.
- (c) Poph. 23.
- 1 Co. 15. b.
- 10 Co. 44. a.
- 2 Lon. 60, 61,
- 62, 67.
- 4 Leon. 123,
- 124, 125, &c.
- 333.
- 1 Anderf. 227.
- Co. Lit. 356. a.
- 362. a.
- Moor 271.
- Vaugh. 51.
- 2 Brownl. 170.
- 1 Rol. Rep. 304.
- 2 Co. 74. a.
- 3 Co. 4. b.
- (d) Co. Lit.
- 37. a. 180. a.
- 126. a.
- 5 Co. 36. b.
- 2 Rol. Rep. 363.
- 1 Bulst. 216.
- (e) Godb. 429,
- 430.
- 39 E. 3. 2. b.
- (f) Godb. 429.
- 1 Rol. Rep. 28.
- Raym. 372.
- * Doct. pl. 176.
- (g) Godb. 429.
- † 52 H. 3. Star.
- de Marl. c. 12.
- 2 Inst. 123, 124.
- ¶ 2 E. 3. c. 8.
- †† 20 E. 3. c. 1.
- (h) F. N. B.
- 240. d.
- (i) Palm. 411.
- Godb. 429.
- 1 Rol. 459.
- (k) 1 Mod.
- Rep. 250.
- 2 Vent. 32.
- Poph. 22, 23.
- 2 Rol Rep. 67.
- Jenk. Cent. 257.
- 2 Co. 74. a.
- Cr. Car. 270.
- Raym. 71.
- 1 Rol. Rep. 303.
- (l) Jenk. Cent.
- 257. Poph. 23.
- (m) Br. Jointenants 6.
- (n) 1 Co. 14. b.
- 15. a. b.
- 2 Leon. 60.
- 4 Leon. 123.
- Moor 271.

not of an Advowson, as appears by the Statute of *West. 2.* (a) *cap. 5.* 4 *E.* 3. 162. 14 *H.* 4. 33. a. no more than of Common of Pasture, 4 *E.* 3. 146. 27 *H.* 8. 12. a. But the Judgment was affirmed by the whole Court. And in this Case four Points were resolved.

1. That a common Recovery is not to be compared to a Judgment or Proceeding in any other real Action for three Causes. 1. Because it is now by Usage and Custom become a common Assurance and Conveyance of Lands, &c. for it may be averred to an Use; and if Tenant for Life suffers a common Recovery, it is a (c) Forfeiture. 2. That it is had by mutual Consent of the Parties, & (d) *consensus tollit errorem*, 39 *E.* 3. 1. the Demandant and Tenant consent that two (e) of the four in the Writ of Right shall be Esquires, where by the Law they ought to be Knights, and well, because by consent, 44 *E.* 3. 6. b. Trial of (f) Villenage alter'd from the natural Trial by Consent, 7 *H.* 6. 7. b. Pleading of a Feoffment in * Fee on Condition without Deed and Re-entry is good, if the other Party consents the Condition, 34 *E.* 3. *Office de Court* 12. If 12 be sworn and one depart; g another of the Panel by consent may be sworn, and with the 11 give Verdict, 11 *H.* 6. 13. The Court in a *Quare Impedit* by Consent may give longer Day than is limited by the Stat. of *Marlebridge*, 11 *H.* 4. The Stat. of 2 *E.* 3. & 20 *E.* 3. provide, That neither for the Great Seal (h) nor Petit Seal, Justice shall not be delayed; yet when the Matter doth concern the King only, if he command it, it may be stayed, *F. N. B.* 21. b. 27 *H.* 8. A Tenure may be created at this Day by Consent of all, notwithstanding the Stat. of *Quia emptores terrarum*, 6 *E.* 6. *Dy.* 78. By special Consent of the Parties, a (i) Re-entry may be for Default of Payment of Rent without Demand of it. And divers other Cases were put where Consent of the Parties shall alter the Form and Course of the Law. 3. Otherwise no Assurance could be of an (k) Advowson, (l) Commons in Grofs, &c. to bar Rem's or Rev's expectant on Estates-tail: The same Law of Common of Pasture, Franchises, Liberties and Privileges, as to have Felons Goods, &c. Waifs, Strays, &c. *Et sepe numero necessitas vincit communem legem*, & *quod necessarium est licitum est*. As if two Jointenants (m) be of Land to them and to the Heirs of one of them, they shall not join in a Writ of Right. But two Jointenants to them and to the Heirs of one of them of an Advowson shall join in a Writ of Right of Advowson. And the Reason of the Difference is, because in the first Case they have several Ways and Remedies, as it is agreed in 46 *E.* 3. 21. b. But in the other Case if the Tenant for Life should not join with him who hath the Fee, neither the one nor the other would have any Remedy; and therefore in such Case, *necessitas vincit legem*. Vide 21 *E.* 3. 27. & *nota Dictum de Stone there*. Vide Sir William Pelham's (n) Case in the first Reports.

PART V. *Amendment of Records, Fines, &c.*

41

2. As to the Demand of the (a) Rent, or Pension of four Marks issuing out of the Rectory, it was resolved, That the Writ was good enough, for here is not any (b) Incertainty, for one of two several Things is not demanded, but one Thing only is demanded, for the Demand is of a Rent or Pension of four Marks, so that there is not but one four Marks. And in this Case *redditus* and *pensio*, as this Case is, are *synonyma*. For these later Words (*exeunt' de rectoria*) prove it to be a Rent, for if it was but an Annuity, then it would not be issuing out of the Rectory, but the Parson in such Case should be charged in Respect of the Rectory. And in 11 E. 3. (c) *Annuity* 27, there one granted by Deed *quandam annuam pensionem unius robe precii unius marce, vel unam marcem.* 22 E. 3. 4. *Lacy's Case*, there an Abbot granted *quandam annuam pensionem &c.* and *F. N. B.* 231. *H.* the Writ *de annuali pensione*: By which it appears, that *pensio & annuitas*, or *annualis redditus* are all one, and principally in the Case at Bar, when it is alledged to be issuing out of the Rectory. And if a Writ be brought *de redditu, sive annuitate, exeunt'* out of the Manor of *D.* it is good enough for the Causes aforesaid

3. It was also resolved, that common Recoveries are so usual, and their Form and Order of proceeding so notorious by Appearances the first Day, and *gratis, &c.* that the Law takes Knowledge of them; and therefore the Judges *ex Officio*, without Allegation of the Party, shall take Notice that they are Recoveries had by Consent of the Parties for Assurance of Lands as in *Wimbisbe* and *Talboys Case*, *Plow. Com.* 56. Recovery in *Formedon* appeared to the Judges to be by Consent of Parties, because the Tenant was not es-foined, nor demanded the View, &c. but appeared the first Day and confessed the Action. *Vide Plow. Comm.* 515. in *Stowel's Case*, that the (d) common Usage in these Cases of Recoveries is to be allowed, and that in them the Intent of the Parties is to be observed.

(a) Poph. 23.

(b) Palm. 265.

(c) Antea 40. a.

2 Co. 37. a.

Co Lit. 145. a.

(d) 2 Co. 74. a.

G

Mich.

Mich. 35 & 36 Eliz.

In the King's Bench.

ROWLAND'S Case.

IN an *Ejectione firmæ* between *John Rowland*, alias *Steyner*, Plaintiff, and *William James*, and *William Sherive*, Defendants of Lands in *W.* in the County of *Worcester*, on Not guilty pleaded the Jury found for the Plaintiff: And now it was moved in Arrest of Judgment, that on the *Venire facias* no Return was indorsed, nor any (a) Name of any Sheriff appeared on the Back of the Writ, *nec quod executio brevis præd' patet in quodam pannello*, &c. but a Panel of the Jury with their Manucaptors was annexed and sewed to the said Writ; and also a *Tales* was awarded, and a Panel of the *Tales* annexed, but no Return of them, nor Name of Sheriff to it, but the *Postea* made Mention that they were returned by the Sheriff *per mandatum Justici'*. But it was moved that that would not serve, for the Sheriff ought to return the Jurors, and the *Tales* also; and where there is no Return, it is not remedied by the Statute of 18 *Eliz. cap. 14.* nor by any other Statute, but insufficient Returns, or which want Form, &c. And therefore a notable Precedent was cited, and Judgment given in the Common Pleas, *Trinit.* last past, between *Harbert Barney* and others Plaintiffs, and (b) *Walkley* Defendant, *Trin. 35 Eliz. Rot. 1251*, which follows in these Words, *Postea continuato processu inter partes præd' de placito prædict' per Jur' posit' inde inter eos in respect' hic usque hunc diem, &c. Et modo ad hunc diem venerunt tam prædict' H. B. &c. quam præd' J. W. per attorn' suos præd': Et super hoc idem Johannes W. cur' hic dat' intelligi, quod quoddam breve de Venire facias hic duodecim, &c. inter partes præd' de placito præd', a die Sanctæ Trin. in tres septiman' ultimo præterit', retornat' fuit album, & absque aliquo indorsamento sive scriptura super dorsum ejusdem brevis in ligulis Civitatis Glouc' annex', arvat' inter brevia de tres septiman' Sanctæ Trin' remanen' afflat', nullamque faciend' mentionem super breve illud de aliquo Viccomite, qui retorn' brevis illius*

WARRANT

(a) Cr. El. 310.
2 Rol Rep. 210.
3 Bulst. 220.
Cr. Jac. 188,
443, 528. 8Co.
162. b. 163. a.
Cr. Car. 189.
Cr. El. 466, 509,
704. Noy 115.
Moor 65, 868.
Yelv. 110.
Palm. 152.
21 Jac. c. 13.
1 Rol. 204. Hob.

Harbert Barney's Case,
Trin 35 Eliz in
Comm' Ban o.
(b) Cr. El. 310.
1 Rol. 204.

warrantizaret, nec quod executio patet in dict' panell' eidem brevi annex', petendo quod breve illud una cum panell' de nominibus Fur' & process. inde retornat' adhibentur, & pro nullo habeantur. Super quo brevi præd' ac dorso ejusdem brevis, una cum panell' annex', per Justic' hic vis. & inspect' dict' allegatio dicti Joha' Walkeley comperta est vera. Ideo considerat' est, quod præd' breve de Venire faci', ac panell' eidem brevi annexat' necnon totus processus superinde retornat', adhibentur, & pro nullo habeantur. Et super hoc præd' H. B. &c. petunt breve Domina Reg' Venire facias de novo hic duodecim, &c. ad triandum exitum præd' superius junctum, & eis conceditur: Ideo preceptum est Vicecomiti, quod venire faciat de novo hic in crastino Sanct' Trinit' duodecim, &c. per quos, &c. And note, that the said Exception was taken after Verdict, as in our Case at Bar. And see the like Precedent, Mich. 32 H. 8. Rot. 112. in the Com. Pleas: But there Curia advisare vult. And it was moved in the Common Pleas, 35 Eliz. in the said Case of H. B. that the said Writ on Examination might be endorsed and amended, *sed non allocatur*; & *judicium ut supra*. And so it was prayed in 32 H. 8. but there Curia advisare vult.

Mich. 34 & 35 Eliz.

In the King's Bench.

The Countess of Rutland's Case.

IN Debt on a Bond of 500*l.* brought by the Countess of Rutland: The Defendant pleaded to Issue, and it was found for the Plaintiff. And now in Arrest of Judgment it was shewed, that one Robert Moore was returned on the *Venire facias*, and so named in the Distress; but in the Panel before the Justices of *Nisi prius*; by Misprision he was named (a) Robert Mawre, and so on the *Postea*; upon which it was said, that a Stranger who was not returned was sworn and gave Verdict; for which Cause Judgment should not be given: But it was resolved by the whole Court, that if it could appear by Examination that his

(a) 1 Rol. 197.
8 Co. 162. b.
Moor 762.
1 Rol. Rep. 200.
2 Rol. Rep. 168.
4831

Construction of the Stat. of Feofails, &c. PART V.

right Name is *Robert Moore*, so that he is well named in the Panel on the (a) *Venire facias*, and also that he is the same Man who was returned, and was sworn, there the *Postea* should be amended. And to this Purpose, *vide* 9 E. 4. 14. by *Darby*, & 19 H. 6. 39. Tit. *Amendment Br.* 37. 27 H. 6. 5. by which Books it appears, That if one be well returned in the Panel of *Venire facias*, and misnamed in the *Distringas*, or *Habeas Corpor'*, That it was not amendable; but the Process against the Jurors was discontinued: But at this Day after Verdict Judgm. shall not be therefore stayed, for all Discontinuances are remedied by the Statute of 32 H. 8. and 18 Eliz. But at this Day, if a Juror be misnamed in the Panel of *Venire facias*, although he be well named in all the subsequent Process, it cannot be amended. And so it was adjudged *M. 35 & 36 Eliz.* in the King's Bench in *Codwel's Case*; and afterwards the Sheriff was examined, and on Examination it appeared that the true Name of the Juror was *Robert Moore*, and that the said *Robert Moore* who was returned appeared and gave his Verdict; and thereupon for the Reason aforesaid, the Record of the *Postea* was amended by the Opinion of the whole Court, *viz.* *Popham* Chief Justice, *Clench*, *Gawdy*, and *Fenner*.

(a) 8 Co. 162. b.
Mo. 762. 1 Rol.
Rep. 200. 2 Rol.
Rep. 168, 483.
Poltea 43. a. . .
1 Rol. 197.

Cr. El. 57, 222.
32 H. 8. cap. 30.
18 El. c. 14.
21 Jac. cap. 13.
Cr. Jac. 457.
458. Cr. Car.
278. 1 Rol. 404.

Mich. 35 & 36 Eliz.

In the King's Bench.

CODWEL'S Case.

1 Rol. 197, 198.
Cr. El. 319.
Goldsb. 184.
185. Moor 762.
Cr. Jac. 457, 458.
Cr. Car. 203.
Palm. 103, 104.

IN an Appeal of Mayhem between *John Codwell* Plaintiff, and *Thomas Parker* Defendant, the Parties came to Issue, and the Jury found for the Plaintiff; and now it was moved in Arrest of Judgment, that there was Variance between the Panel of the *Venire facias* and the *Distringas* and *Postea* in the Name of one of the Jury, who appeared and gave Verdict; for in the Panel of the *Venire facias* he was named *Palus Cheal*, and in the *Distring* and *Postea*

PART V. *Amendment of Records, Fines, &c.*

43

Post. he was named *Paulus Cheale*; and because the Name of the Juror was (a) misnamed in the *Venire facias*, and especially in his (b) Christian Name, therefore the Judgment was arrested; but if he had been well named in the Panel of *Venire facias*, and misnamed on the *Distringas* or in the *Postea*, there on Examination it should be amended.

374, 375. Hurr. 81. 3 Bullf. 179, 180. Hob. 328. 1 Leon. 278. Owen 61, 62. 182. (b) Cr. El. 256. 1 Rol. 197. 198. 1 Jones 448, 449. Cr. Car. 32, 203. 563. Cr. El. 57, 222, 258, 866. Cr. Jac. 28, 116, 353, 354, 396, 457, 458, 653, 654. 1 Rol. Rep. 1 Sid. 66. 1 Keb.

Mich. 37 & 38 Eliz.

In the King's Bench.

NICHOLS'S Case.

Chamberlain brought Debt against *Nichols* on a single Bill; the Defendant pleaded Payment without Acquittance, on which they were at Issue, and found for the Plaintiff; and although Payment without Acquittance is no Plea, and Issue is joined on a Thing not material; for if the Defendant hath paid the Sum without Acquittance, yet the single Bill remains in Force: But forasmuch as there was an Issue joined on an Affirmative and a Negative, which Issue is found for the Plaintiff, it was expressly helped by the Statutes of 32 H. 8. & 18 Eliz. and on that the Plaintiff had Judgment; on which Judgment a Writ of Error was brought on the new Statute, and there on good Consideration the Judgment was affirmed. *Quod nota.*

3 Bullfr. 301, 302. O. Benl. 127. Hard. 2, 3, 40. Lane 81. Stile 198. Jenk. Cent. 257. Cr. El. 157, 455. 697, 716, 884., 1 Brownl. 225, 229, 232. Moor 12, 692. Dy. 6. pl. 3. 1 Rol. 243. pl. 4. Cr. Car. 27, 78. Cr. Jac. 86, 377. 435, 447. Noy 85, 86. Latch. 158. 1 Jones 142, 141. Hob. 68, 69, 113. 1 Keb. 5. pl. 13. Winch. 76. Hurr. 54. (a) 27 El. c. 8.

Mich. 38 & 39 Eliz.

BOHUN'S Case.

Amendment of
Fines.

(a) Antea 39.a.

IN 32 H. 8. Grey and Elizabeth his Wife being seised in the Right of the said Elizabeth, of the Manor of *Empoles* in *Westhall* in *Suffolk*, in the same Year levied a Fine thereof to *Nicholas Bohun* Esq; and his Heirs, by the Name of the Manor of *Empoles*, and of a great Number of Acres of Land, Meadow, &c. according to the common Form of Fines; and the Manor and Tenements were valued at 20 Marks *per annum*, so that the Fine in the Hamper was 26 s. 8 d. which was endorsed on the Writ of Covenant; and always the Fine *pro licentia concordandi* (which is (a) call'd the King's Silver, or the Post-Fine) is the Fine in the Hamper, and half the said Fine more. As in this Case the Fine in the Hamper was 26 s. 8 d. and the half is 13 s. 4 d. in all amounting to 40 s. and yet the Clerk made the Entry of the King's Silver in this Form, *Nicolaus Bohun armiger dat Domi Reginae 40 s. pro licentia concordandi, &c. in placito conventionis* of so many Acres of Land, Meadow, &c. leaving out the Manor, and following the other Words. And for this Misprision *Aldam* who was Cousin and Heir of the said Woman, brought a Writ of Error in the King's Bench, and the Transcript of the Fine certified. And Error assigned (amongst others) in the said Point, because the King's Silver was not paid as well for the Manor as for the Tenements. And after that, the Judges of the Common Pleas were moved to amend this Fine in open Court; and because it appeared to them on Examination and Sight of all the Parts of the Fine, that it was only the Misprision of the Clerk who entered the King's Silver, and that the said Sum of 40 s. was in Truth the Fine as well for the Manor as for the Residue. And always the Value entered on the Back of the Writ of Covenant is the Warrant for the Entry of the King's Silver; and altho' the Transcript of the Fine was removed by Writ of Error; yet forasmuch as the

Body

Body of the Record did remain with them, they unanimously agreed, That the said Entry should be amended, and made in a Writ of Covenant of the Manor aforesaid, and of all the Acres, &c. as it ought to be. And afterwards on Diminution alledged in the Omission of the said Manor, in the Entry of the K's Silver, a Writ was directed to this Purpose to the Ld. *Ander-son*, who one Day this Term moved all the Justices of Serjeants Inn in *Fleetstreet* to know their Opinions concerning the said Amendm. in this Case, pending the said Writ of Error. An it was resolved by *Poph.* Ch. Just. of *Engl. Periam* Ch. Baron, *Clark, Walmsley, Fenner, Owen* and *Erwyns*, that the said Entry of the King's Silver should be amended, and that pending the Writ of Error. Also where the Writ of Covenant should be *Teste meipso*, the Writ was, *Dede meipso*, which was insensible and vitious; and that was also amended by all their Opinions.

Postea 39. a.
2 Sid. 93.
Poph. 102.

Note Reader, these Precedents and Resolutions of the Justices following in the like Cases were shewed to the said Justices before they resolved of the principal Case.

In *Essex, Dowling's Case, &c.* Fine levied *Hill. 6. E. 6.* certified in a Writ of Error, *Mich. 24 & 25 Eliz.* and certificate by Writ of *Certiorari Pasch. 26 El. & Trin. 26 El. ex assensu omnium Justiciar' de Reg' Banco, & Com' Banco, & Baron' de Scaccario*, pending the Writ of Error, Proclamations endorsed *sup' pedem finis* were amended according to the Proclamations on the Note of the Fine remaining with the *Chirographer, ut patet per record'*. The Just. of the K's Bench were then *Wray, T. Gawdy, Ayloffé* and *Clench*; and the Just. of the Com. Pleas then were *Andersf. Mead, Windham*, and *Periam*, and the Barons of the Exchequer were *Maurwood* and *Shute*.

Dowl. Case.
Tr. 26. El. by
all the Justices
and Barons.
Godb. 103.

2. In *Kent, Kettle's Case.* The Return of the Writ of Covenant was, *Ost' Purif. 31 H. 8.* and in Truth was ingrossed *Trin. sequen'* but was entered thus, *sc. & post concess. & recordat' in crast' Sanct' Trin', ann. 30 H. 8.* where it should be *32 H. 8.* and thereupon a Writ of Error was brought; and pending the Writ of Error, the Justices of the King's Bench, by the Resolution of *Wray, Gawdy, Clench* and *Shute* (*sedente Curia*) the Record was amended in these Words, *Et postea concess. crastin' Trin' 32.* And on that *Regula intratur in Reg' Banco Term. Mich. 27 & 28 Eliz.* And it appears by the said Rule, that the Justices of the Com. Pleas, that is to say, *Anderson, Periam, Windham* and *Rhodes* assented to it; and *Rhodes* said, that there was a good Precedent in *30 H. 8. ubi pes finis* was amended by the Note and the Proclamations, &c.

Kettle's Case.
Mich. 27. & 28
El. by all the
Justices.

3. *Morgan's Case* in the County of *Oxford, Certificat' notæ Judicis, sc. Concordia partium fuit in his verbis, In Præcipe*

Morgan's Case,
Hill. 38. El. per
Cur. de Com.
Banco.

*de duabus partibus Rector, & de duabus part' tenem, & per vitium Clerici scriptor' in concordia, desforcian' recognovit partem ultim' quam, &c. & pes finis, & nota cum Chirographar' recte ingrossant', viz. recognovit partes quas, ut illas quas, &c. Et penden' super hoc breve de errore, Hill. 38. Eliz. emendatur certificatio Judicis per notam & pedem finis, per Curiam, before Judgment given in the King's Bench; and thereupon the Plaintiff in the Writ of Error moved the Court of Common Pleas, that forasmuch as the Writ of Error was depending, that the Fine might be *in statu quo prius* before the Amendment, as it was certified before the Writ of Error certified. And the Justices of the Common Pleas, *scil. Anderson, Walmesley, Beaumont and Owen* denied the Motion, and awarded that the Amendment should stand, although it was after the Writ of Error brought.*

Down's Case,
Mich. 38 & 39
Eliz. per Cur'
de Com'Banco.

4. In *Suffolk, Down's Case, Mich. 38 & 39.* by the Motion of *Williams* Serjeant at Law *proclam' pedis finis* were amended *per proclam' nota, in his verbis, super pedem finis proclam'* was indorsed to be made 30 Julii, which was after *Trin.* Term ended; & *super notam finis fuit 30 Junii*, and well and duly done, & *emendatur per Curiam* after Writ of Error brought; and that assigned for Error. And so in the principal Case the Roll of the Entry of the King's Silver was amended (a Writ of Error depending and that assigned for Error) according to the Writ of Covenant, the Note, the Foot, and the Certificate of the Judge in these Words (*de manerio de Empoles cum pertinentiis ac*) which by the Negligence of the Clerk in the Entry of the Kings Silver were omitted in the Roll and are fully extant in the Writ of Covenant, Note, Foot and Certificate of the Judge: And because it appeared that the whole Sum was paid to the Queen as well for the Manor as for the Residue, and so no Prejudice to the Queen, it was amended, *ut supra.*

Payn's Case,
Mich. 33. & 34
Eliz. per Cur.
de Com'Banco.

5. *Mich. 33 & 34 Eliz.* between *Pain* and *Covert*; the Records (before Amendment) were in *Com' Sussex*, and amended, and made *Kanc'* as the Truth was; & *duo alii fines, M. 33. & 34 Eliz.* were amended, and *pro civitate Eborum, made Eborum.*

Wealch's Case.

6. *Suffex, Wealch's Case, Cognitio Judicis,* the Town in which, &c. was to be *Saleburst*, as the Truth was, and the Writ of Covenant, Note and Foot were *Caleburst, & emendatur,* and made *Saleburst per Curiam. Et notandum est, Quod tales emendationes per mandatum Curie, intrantur in dorso Recordi per Regulam Curie.*

Pasch. 41 Eliz.

IN THE

KING'S BENCH.

FREEMAN'S Case.

ERror by *Smith* against *Freeman* in a Recovery in Waste: The Writ was in Recital of the Statute of (a) *Gloucester*, *Quod nullus faciat vastum, venditionem & (b) destructionem, &c.* where it should be *destructionem*. And in that Error was assign'd, and it was prayed that this original Writ might be amended, being but the Misprision of the Clerk, who hath mistaken a Word in the Statute of *Gloucester*, on which the Writ was grounded. And the Misprision was only in a Letter, that is to say, *destructionem* for (c) *destructionem*. And the whole Court on good Debate and Consideration at two several Times resolved: 1. That it was Matter of Substance; for *districtio* is a Latin Word, and alters the Sense of the Statute. 2. That it could not be (d) amended by any Statute, for Matter of Substance in an original Writ is not remedied by any Statute, but Matter of Form only.

Note well Reader, on Consideration of the Statutes of (e) 14 E. 3. cap. 6. Stat' 1. 9 H. 5. cap. 4. 4 H. 6. cap. 3. 8 H. 6. cap. 12. 32 H. 8. cap. 30. & 18 Eliz. cap. 14. If a Writ original at this Day wants Form, or contains false Latin, or varies from the Register in Matter of Form after Verdict, no Judgment shall be stayed or reversed. But if it wants Substance as in the Case at Bar, although it be by Misprision of the Clerk, it is not remedied by

Cr. El. 462.
8 Co. 163. a.Construction
de Statutes.(a) 6 E. 1.
Stat. de Glou-
cest. cap. 5.2 Inst. 299,
300, &c.(b) F. N. B.
55. c.

(c) 2 Bulst. 51.

Cr. El. 462.

Hutr. 56, 57.

(d) 2 Bulst. 51.

Cr. El. 462,

644.

(e) 8 Co. 157. a.
158. a.

5 Geo. cap. 13.

Construction of Stat. of Jeoffails, &c. PART V.

by any Statute. *Vide* 3 E. 6. 86. 10 E. 3. 482, 553. 41 E. 3. 14. 45 E. 3. 6. 4 H. 6. 16. 7 H. 6. 40. 21 H. 6. 8. 40 *Aff.* 26. 11 H. 6. 34. 27. H. 6. 6. 27 H. 6. *Amendment* 34. 28 H. 6. 8. 2 H. 7. 11. 9 H. 7. 16. 9 H. 7. 19. 34 H. 6. 26. 35 H. 6. 10. 30 H. 6. 4. 8 E. 4. 4. 10 E. 4. 12. 11 E. 4. 14. 22 E. 4. 21, 47. 13 H. 7. 21. 14 H. 7. 13. *Vide Mich.* 3 E. 6. *Bendloes*, the Justices of the Common Pleas in a Writ of Partition, added the Word *ostensurus*, (*a*) which was omitted: And in a Writ of Aiel they amended this Word (*b*) *Ave*, and made it *Avie*.

(*a*) 8 Co. 160. a.
1 Ander. 24.
Moor 5.
Dall. 5. pl. 9.
N. Benl. 33.
pl. 53. O. Benl.
O. Benl. 3. pl. 9.

3. pl. 9. (*b*) 8 Co. 159. b. Moor 5. 1 Anderf. 24. N. Benl. 33. pl. 53.

Trin. 41 Eliz.

In the King's Bench.

GAGE'S Case.

Jenk. Cent. 258.
Co. Ent. 250.
pl. 9. Noy 171.
Moor 571.
Cro. El. 740.
Salk 52, 53.

IN a Writ of Error by *Gage* against *Tawyer* to reverse a Fine levied 4 *Eliz.* and assigned for Error that the Writ of Covenant bore *Teste* 24 *Aprilis*, returnable 15 *Pasch.* (which in Truth was the 15 Day of *April*) and so the Return before the *Teste*. And it was resolved by the whole Court that it should be amended; for a Fine and common Recovery are but common (*a*) Assurances, had by the mutual Consent of the Parties, and therefore such Misprisions might be amended. But in other Actions no Amendment should be in such Case: And it was said, That in 18 *Eliz.* between (*b*) *Norri*: and *Braybrook* a Writ of Error was brought to reverse a Recovery in 19 *H.* 8. and the *Teste* was a Day after the Return; and because it appeared, that it was the Misprision of the Clerk, in Case of common Recovery, it was amended. *Vide* 11 *H.* 6. 2. *b.*

(*a*) *Anrea* 40. b.
Jenk. Cent. 257.
Cr. Car. 270.
Poph. 23.
Poitca 46. a.
1 Co. 15. b.
(*b*) *Raym.* 71.

Trin.

*Trin. 41 Eliz.**In the Common Pleas.*

COOK'S CASE.

CHallenor brought a *Formedon* against Cook of the Manor of (a) *Isfield* in the County of *Suffex*. The Tenant pleaded in Bar a common Recovery against the Donee in Tail of the said Manor; The Plaintiff pleaded, *Nul tiel Record*, upon which they were at Issue; And the Record was *Isfield* either by the Negligence of the Clerk, or by Corruption by drawing a Stroke, and making an *f. sc. Isfield* for *Isfield*. And the Court was moved to amend it; and it was resolved, That if it could (b) appear to them, that it was the Misprision of the Clerk, or corrupted after, that it should be amended. And to induce the Court to it, the Tenant shewed, that the Recoveror enfeoffed him who was Tenant in Tail by Deed, which recited the Recovery by the Name of *Isfield*, and he enfeoffed him by the same Name, and divers Conveyances immediately after the Recovery, and all by the true Name of *Isfield*. And the Court agreed that it should be amended; and the rather that it was in a common Recovery which is suffered by Assent of the Parties for (c) Assurance of Land. And thereupon it was amended, and Judgment given against the Demandant.

(a) 2 Brownl. 236.
1 Bullst. 7.
Noy 1.

(b) 2 Brownl. 236.
1 Bullst. 7.

(c) Antea 40. b.
45. b. Jenk.
Cent. 257.
Poph. 23.
Cr. Car. 270.
1 Co 15. b.
Noy 1.

Cases of Pardons.

Mich. 35 & 36 Eliz.

In the Star-Chamber.

FRANKLIN'S Case.

1 Ander. 131,
132.
3 Inf. 234.

A Question was referred to the Consideration of *Coke* the Queen's Solicitor General, out of the Court of Star-Chamber, between *Downing* Pl. and *Franklin, Eden* and others Defendants, on the general Pardon, 19 Feb 35 *Eliz.* and the Case was, That *Downing's* Bill was exhibited into the said Court five Years before the last Parliament, for Riots, Routs, &c. and what Thing was pardoned by the said general Pardon was the Question: And it depended on two Branches of the said Act, *scil.* "And also except all Penalties, Forfeitures now due, accrued or grown, or which shall or may be due, accrue or grow to the Queen's Majesty by Reason of any Offence, Misdemeanor, or Contempt, and whereof and for the which any Action, Bill, Complaint or Information at any Time within eight Years next before the last Day of this present Session of Parliament, hath been or shall be exhibited, commenced, or sued, and shall be there the last Day of this Session of Parliament depending or remaining to be prosecuted." And next following there is another Exception, *scil.* "And also excepted out of this general and free Pardon, all Offences, Contempts, Disorders, Covins, Frauds, Deceits, and Misdemeanors, &c. whereof or for the which any Suit by Bill, Complaint, &c. within four Years next before the last Day of this Session of Parliament, is or shall be commenced, or exhibited: And on Consideration

tion of these two Branches, the Solicitor General certified, That the Fine due to the Queen was excepted, and the Plaintiff or the Queen's Attorney might proceed for the Fine which is excepted, and that the Queen should have it, for without Prosecution the Queen could not have the Fine, nor the Party his Costs. *Et (a) quando Lex aliquid alicui concedit, concedere videt' & id, sine quo res ipsa esse non potest.* But he certified, that the Imprisonment, and all the corporal Punishment in the said Case were pardoned. For in the first of the said two Exceptions the Offence it self is not excepted, but the Forfeiture, Penalty and Profit due to the Queen. And therefore the Imprisonment or any other corporal Punishment is not excepted, for that is not included within these Words, *Forfeiture, Penalty, or Profit.* But if the Bill had been exhibited within the four Years, then the Offence it self being excepted, by Consequence all Incidents (*b*) or Appendants thereon, as well corporal, as pecuniary, are excepted. And therefore in such Case nothing is pardoned: Which Certificate oftentimes since hath been confirmed by the Opinion of *the Court of Star-Chamber.*

Hardres 370. Postea 51. a. b. Jenk. Cent. 258. Moor 394, 599. Yelv. 126. Flo. 401. a. Cr. El. 72.

(a) 5 Co. 12. a. 115. b. 12 Co. 13, 130. Co. Lit. 56. a. 153. a. 2 Inst. 306. Cawly 246. Moor 218.

(b) 6 Co. 13. b. Latch. 81. Palm. 412. Hob. 81, 82. 2 Inst. 236. Cr. Jac. 207. 1 Brownl. 211.

Hill. 39 Eliz.

In the Star-Chamber.

GILBERT LITTLETON'S *Case.*

Between *Gilbert Littleton Esq; Pl.* and the Lord *Dudley* and others Def. in the Star-Chamber, the Case was such; At the last Parliament which began 19 Feb. 35 Eliz. in the general Pardon is such Exception: "And also excepted out of this general Pardon all Offences, &c. whereof, or for the which any Suit by Bill, &c. at any Time within four Years

3 Inst. 234. Hard. 370.

" Years next before the last Day of this present Parliament
 " is, or shall be commenced or exhibited in the Court of
 " Star-Chamber, and now is, or the last Day of this Session
 " of Parliament shall be there depending. And the Bill
 was exhibited by *Gilbert Littleton, Term' Hillar'* before the
 Parliament, and Procefs awarded returnable *Term' Pasch'*
 next following, which was after the Parliament; And whe-
 ther this Suit should be said depending before the Return
 of the Procefs was the Question. And first, it was objected,
 that the Words of the Exception are, *Suit by Bill depend-*
ing, and it cannot be said Suit till the Procefs be returned.
 2. It was observed, That in the next preceding Exception
 concerning Suits commenced within eight Years, there the
 Conclusion is, *Depending, or remaining to be prosecuted,*
 which Words, *or remaining to be prosecuted,* as it was said,
 extend to Bills not depending; *scil.* when the Procefs is not
 returned, but no such Words are in this Exception. And to
 prove that the Bill was not depending before the Procefs re-
 turned, the Defendants Counsel resembled it to Writs at the
 Common Law, where divers Books were cited, to prove that
 original Writs are not in Law depending (a) before their Re-
 turns, 2 i *E. 4. 55. a.* a Writ it brought as soon as it is seal-
 ed, but it is not depending until it be returned, (b) 18 *H. 8.*
5. a. acc. But it was answered and resolved; That there was
 a great Difference between an original Writ purchased out
 of the Chancery, and returnable in the Common Pleas, or
 King's Bench for there inasmuch as the Original comes
 out of another Court, the Common Pleas or King's
 Bench, hath not any Record before the Return there
 of: But in the Case at Bar, the Bill is exhibited in the Star-
 Chamber, and Procefs issues out of the same Court, and is
 returnable in the same Court; and therefore the Suit by Bill
 shall be said depending before the Return, or serving of the
Subpena. And it was said, that Suit by Bill depending, and
 Bill depending are all one; for the Bill is, *Origo rei & ca-*
pit sectæ, & res denominatur a principaliori parte: And
 the Attorney General said, That where an original Writ is
 purchased out of the Chancery returnable in the Common
 Pleas, or King's Bench, in such Case after the Writ shall
 be returned, the Writ shall be said pending from the Day
 of the (c) *Teste* of it. And if the Tenant alien before the
 Return, and after the *Teste* it shall be said an Alienation
 pending the Writ; or if the Def. purchases another Writ before
 the Return of the first Writ, it shall be said purchased pend-
 ing the first Writ. And it is said in 9 *H. 6. 54.* that where a Writ
 of Covenant (d) is purchased to levy a Fine, and before the
 Return, *Dedimus potestat' recites, cum breve nostr' de con-*
ventionione pendeat; and yet the Writ of Covenant then is not
 returned;

(a) 2 Inst. 329.
 Cr. El. 261.
 Hob. 224.
 Hurr. 4.
 10 E. 4. 19. a.
 2 Sid. 94.
 Postea 48. b.
 7 Co. 30. a.
 3 Keb. 172.
 9 H. 6. 51. b.
 54. b.
 (b) Cr. El. 677.
 Br. Eitrep-
 nent 1.

Nota

(c) 2 Sid. 94.
 9 H. 6. 54. b.

(d) Cr. El. 677
 Cr. Jac. 11.

returned; and so is the common Experience at this Day. *Vide 2 E. 4. 11. b.* If (a) a *Quare Impedit* be delivered to the Sheriff in the Court of Common Pleas to be executed, it is pending to this Purpose, that the Plaintiff may have a Prohibition for Suit for the same Cause in the Spiritual Court: And a Man may purchase his original Writ, and at the same Time a Writ (b) of Estreperment. Also the Words of the Exception were observed, "sc. Whereof any Suit by Bill is, or shall be commenced, &c. and shall be depending the last Day of this Parliament. In which this Word (is) is to be intended, depending 19 Feb. which was the first Day of the Parliament; but (shall be commenced) ought to be of Necessity after the said 19 Day of Feb. which is always out of Term. And because it appears that the Makers of the Act intended that the putting in of the Bill only into the Star-Chamber after the 19 Day of Feb. and before the said last Day, should be said depending; and so it appears that the said Words in the preceding Branch, *scil. Depending or remaining to be prosecuted*, are all one in Effect; wherefore it was concluded, That in the Case at Bar, the Bill should within the true Intendment of the said Exception be said (c) depending. And so it was resolved by the Justices on a Conference had between them. And thereupon Sentence in the Star-Chamber did (d) proceed against the Defendant in the said Bill.

(a) Br. Prohibition 10.
Hurt. 4.
F. N. B. 43. g.¹
Fitz. Prohibition. 7.

(b) 19 H. 8. 5. a.
18 H. 8. 5. a.
Br. Estreperment 1.
F. N. B. 61 d. c.
2 Inst. 328, 329.

(c) Postea 48. b.
(d) 2 Rol.
Rep. 485.

Pasch. 42 Eliz.

In the Star-Chamber.

DRYWOOD'S Case.

Drywood was Plaintiff against Appleton and others Defendants in the Star-Chamber for Riots, and Routs, and other Misdemeanors; which Bill was brought before the last general Pardon in 39 Eliz. and before the said Pardon the Plaintiff died. And afterwards the Queen's Attorney informed for the same Offences against the Defendants, and prosecuted

3 Inst. 234.

Hard. 368.

prosecuted on the first Suit: And now a great Question was moved, whether the said Offences were pardoned or not by the said general Pardon. And it is to be known, that the said Bill was brought four Years and more before the last Day of the said Parliament, and within the eight Years. And the Doubt was conceived on these Words of the Exception of the said Pardon, *scil.* " And now is, or the last " Day of this Session of Parliament shall be there depending, or remaining to be prosecuted: And it was said, That although this Suit was not depending, because the Pl. who prosecuted for the Queen (for every Suit in the Star-Chamber is for the (a) Queen, and she may pardon it) was * dead; yet it was said that these Words (*or remaining to be prosecuted*) ought to have Construction in Cases where no Suit is depending, and yet may be prosecuted, and that is when the Plaintiff dies, or will not prosecute, then the Queen's Attorney may prosecute for the Queen. But it was resolved by the two Chief Justices and the Chief Baron, that the said Offences were pardon'd, for these Words, *Or remaining to be prosecuted*, ought to be construed, *to be prosecuted by the Party*; And the said Words, *remaining to be prosecuted* are added, to remove a Scruple which some conceived, That a Bill should not be said depending till the Process be returned, although in Judgment of Law, the Bill in such Case is said (b) to be depending.

(a) Postea 50.b.

51. a.

2 Bulst. 182.

2 Inst. 238.

* Hard. 398.

(b) Antea 48.a.

Mich. 39 & 40 Eliz.

In the King's Bench.

VAUGHAN'S Case.

IN a Writ of Error between *Hall* and *Vaughan* in a Writ of Entry in the *Quibus* brought in *Wales*: The Def. pleaded *Non disseisvit*, and pending this Plea the general Pardon in 35 *Eliz.* was made, by which all Fines, Amercements, Contempts, &c. were pardoned, &c. and after divers Continuances the Issue was found for the Demandant, and Judgment given, *sed non in misericordia, quia (a) pardonatur*. And the principal Error which was assigned was, because the Defendant ought to have been amerced, because the general Pardon did not discharge the Amercement; for it was said, that the Wrong, or the Disseisin was not the Cause of the Amercement, but the Delay of the Plaintiff; for if the Defendants come (b) the first Day and render to the Demandants, they shall not be amerced, as 14 *E.* 3. *Amerciament* 16. 22 *E.* 3. 1 & 2. 8 *R.* 2. Tit. *Amerciament* 28, and divers other Books are agreed. And a Case was cited in the Common Pleas, *M.* 15 & 16 *Eliz.* where a *Præcipe* was brought against an (c) Infant, and pending the Plea he came of full Age, it was adjudged he should be amerced for the Delay, as it was urged after his full Age. So in the Case at Bar, forasmuch as there was a Delay as well after as before the Pardon, and the Amercement was wholly for the Delay, for this Cause the Pardon did not discharge it: But the Court resolved, the Judgment should be affirmed: And in this Case these Points were resolved.

1. That the original Cause of the Amercement in the Case at Bar was the Wrong and Contempt of the Tenant that he did not render the Land to the Demandant, as he was commanded by the K's Writ; and altho' the Amercement cannot be imposed, nor the Queen intitled to it before the Judgment (because by the Judgment the Wrong is discerned) and al-

H

thought

Jenk. Cent. 258.
Moor 374.

(a) Lane 71.

(b) 8 Co. 61. b.
Cr. El. 65.
2 Sand 227: Cr.
Lit. 126. b.
Cr. Car. 364.
Plowd. 42. b.
1 Rol. 212.
(c) 1 Rol. 215.
Co. Lit. 126. b.
127. a. Mo 394.The Resolution
of the Court.

(a) 1 Brownl. 211. Yelv. 126. although the Pardon comes before the Judgment, yet the (a) original Cause of the Amercement being pardoned, the Amercement it self by Consequence is pardoned, as in Cole's Case in *Plow. Com.* 401. a. And in *Quatermoigne's* Case in 37 (b) *H.* 8. 21. where it is agreed, that a general Pardon ought to be taken (c) most beneficial for the Subject, and most strong against the King.

2. It was resolved, That all Statutes of Jeofails extend to (d) *Wales*, for the Statute of 27 (e) *H.* 8. hath made it Parcel of *England*; and afterwards the Judgment was affirmed. Note, he who commits a Wrong, and at the (f) first confesses it, and obeys the King's Command by his Writ shall not be amerced; for *prudenter facit, qui præcepto legis obtemperat*: But every one who commits a Wrong, and being commanded by the King's Writ, *quod iuste & sine dilatione reddat, &c.* and he unjustly maintains the Wrong on Record in the King's Court, and with great Delay compels the Demandant to recover it by Course of Law, *peccatum peccato addit, qui culpæ quam fecit parrocinia defensionis adiungit*, and therefore he shall be amerced.

(a) 1 Brownl. 211. Yelv. 126. Anrea 47. a. 6 Co. 13. b. Latch. 81. Palmer 412. 3 Inst. 236. Hob. 81, 82. Hardr. 370. Co. Lit. 126. b. Moor 394, 599. Cr. Jac. 107. Cr. El. 72. Jenk. Centr. 258 (b) Cr. El. 72. 37 H. 6. 21. (c) Latch. 22. 82, 141. Godb. 288. 6 Co. 79. b. Postea 50. a. Kelw. 198. a. (d) 2 Bullt. 54. 3 Keb. 405. (e) 27 H. 8. c. 26. 2 Bullstr. 54. 2 Sand. 40. Plowd. 126. b. Vangh. 396. (f) Co. Lit. 126. b. 8 Co. 61. b. 2 Sand. 227. Cr. El. 65. 1 Rol. 212. Cro. Car. 564. Plowd. 42. b.

Hill. 41 Eliz.

In the Exchequer.

WYRRAL'S Case.

3 Inst. 234.

Hill. 40 Eliz. Rot. 188. the Case was such; *Thomas Wyr-ral* and *Jasper Bosvile* were bound to *Henry Thwaites* in a Recognisance in the Nature of a Statute-Staple 15 Feb. 55 Eliz. of 500 l. And afterwards the said *Thwaites* was outlawed in the County of *York*, 8 Octob. 38 Eliz. and afterwards the general Pardon at the last Parliament 39 Eliz. was made. And whether this Debt was pardoned or not was the Question now in this Term in the Exchequer. And it consisted on two Exceptions in the said Pardon, *scil.* "And" also except out of this Pardon all Debts which were or "be due to our Sovereign Lady the Queen, &c. or to "any

“ any to her Use, by any Condemnation, Recogni-
 “ fance, Obligation, or otherwise, &c. And also except our
 “ of this Pardon, all Goods, Chattels, Debts, Actions and
 “ Suits already forfeited, &c. by Reason of any Outlawry,
 “ and whereof her Majesty by her Highness’s Letters Pa-
 “ tents hath before the last Day of this present Session made
 “ any Grant, Covenant, or Promise to any Person or Per-
 “ sons.” And it was resolved, that by the last Exception it
 is proved, that the Intention of the Queen was not to in-
 clude (a) Debts which accrued to her by Outlawry within
 the first Exception; for there is a special Saving, and in a
 special Manner for them by the last Exception. Also the
 general Pardon is to be taken most (b) beneficially for the
 Subject, and most strong against the Queen.

(a) Lit. Rep. 87.
 Swinh. 303.
 (b) Antea 49. b.
 Kelw. 198. a. b.
 6 Co. 79. b.
 Latch. 22, 82.
 141. Godd. 288.

Trin. 41 Eliz.

In the King’s Bench.

BIGGIN’S Case.

IN Appeal between *Shugborough* and *Biggins* the Defen-
 dant was found guilty of Manlaughter; and the Question
 was, if the Queen might pardon the Burning of the Hand.
 And it was objected, That the Appeal is the Suit of the
 Party; and now by the Statute of 4 H. 7. cap. 13. the
 Burning of the Hand is Parcel of the Punishment. As if it
 was enacted, That he who is attainted in an Appeal of May-
 hem, shall have Judgment of Death; in that Case if one was
 attainted in an Appeal of Mayhem, the Queen could not
 pardon the Execution of Death, because it is the Punishment
 of the Offence at the Suit of the Party. But on Conference
 had with divers other Justices it was resolved; That the
 Queen might (a) pardon the Burning of the Hand in an Ap-
 peal, and that for two Reasons.

1. It appears by the said Statute of (b) 4 H. 7. that at
 the Common Law a Man who had once had the Bene-
 fit of his (c) Clergy should have it again, and so *in infinitum*

Moor 571. Cr.
 El. 632, 682.
 3 Inst. 114.

(a) Dyer 261.
 pl. 26. Raym.
 370. Hob. 294.
 Moor. 571.
 3 Inst. 237.
 Cr. El. 465,
 632, 682.
 (b) 4 H. 7. c. 13.
 Raym. 370.
 Stanf. Cor. 124.
 c. Hob. 294.
 (c) Stanf. Co-
 ron. 124. c.

which was remedied by the said Act; so that the Burning of the Hand was to no other Purpose but to (a) signify to the Judge whether he had had his Clergy before or not.

(a) Raym. 370.
Hob. 294.
(b) Raym. 370.
Hob. 294.

2. The Burning of the Hand is not any (b) Parcel of the Judgment, for then the Queen could not pardon it, because the Plaintiff hath Interest in the Judgment, and for this Cause the Case of Mayhem which was put on the other Side was well agreed. And so the Doubt in *Ellen Lamb's* Case, 3 *Eliz. Dier* 201 (c) & 202. and in *Musgrave's* Case in 9 *Eliz. Dier* (d) 261. well explained. But there it is said, that the Queen cannot pardon the Imprisonment, for that is Parcel of the Execution of the Plaintiff in the Appeal. And *Taverner's* Case, 15 *Eliz. Dier* (e) 323. was agreed by all, That the Queen may pardon the corporal Punishment in Case of (f) Forgery, because all Suits in the Star-chamber are but Informations for (g) the Queen, although the Suit be exhibited by the Party; and the Queen may pardon any Offence for which any Subject complains there. But if *Taverner* had been attainted at the Common Law in an

(c) Dyer 201,
202 pl. 67, 68.
Cr. El. 682.
3 Inst. 237.
(d) Cr. El. 467.
Dy. 261. pl. 26.
(e) 2 Inst. 200.

(f) Moor 571.
Cr. El. 682.
(g) Antea 43.b
Postea 51. a.
2 Inst. 238.

(b) Moor 571.

Action of (b) Forgery of false Deeds, there the Queen could not have pardoned it. 2. It was objected, That altho' the Queen may pardon the Burning of the Hand, yet the Defendant might be imprisoned at the Suit of the Party; for before the Statute of (i) 18 *Eliz. cap.* 7, the King might in Case of Indictment of Manslaughter pardon the Imprisonment, as appears in (k) 15 *H. 7. 9. a.* but not in Appeal. And by the Statute of 18 *Eliz.* they cannot deliver the Prisoner (l) before he be burnt in the Hand. But it was resolved, that forasmuch as it was enacted by the said Statute of 18 *Eliz.* that after Clergy allowed, and Burning in the Hand, the Prisoner should be presently at large, and delivered out of Prison, which Act was resolved to extend as well to the Case of Appeal as to the Case of Indictment; and the Queen now hath pardoned the Burning of the Hand, for this Cause the Burning of the Hand being discharged, the Party also shall be discharged of his Imprisonment by good Construction of the same Act, otherwise the Party would be lawfully discharged of his Punishment, and yet remain perpetually in Prison, which never was the Intent of the Makers of the Act. And thereupon *Biggins* was discharged.

(i) Raym. 370.
Cr. fac. 430, 431
6 Co. 68. b.
2 Rol. 222.
Hob. 294.
5 Co. 110. a. b.
(k) Fitz. Imprisonment 28.
Br. coron. 53.
Br. Charter de Pardon 21.

Trin. 2 Jac.

In the Common Pleas.

HALL'S Case.

Alice Cooke libelled in the Spiritual Court against *Rowland Hall* for Defamation, for calling her Whore, and had Sentence, and Costs were taxed. *Et decretum fuit quod prædictus Rowlandus Hall foret movendus, & citandus, ad solvend' expens. citra tale festum.* From which Sentence the Defendant appealed, and before the said Feast *Hall* obtained the King's Pardon, and thereupon got a Prohibition out of the Common Pleas. And in this Case four Points were resolved.

1. In all Cases depending between Party and Party in the Spiritual Court, where the Suit is only (a) *pro salute anime, vel reformatione morum*, as for Defamation, or laying violent Hands on a Clerk or the like, there the (b) K's Pardon is a Bar of the Suit, for the Suit is not to recover any Damages, or any other Thing, but only to inflict Punishment on the Offender *pro salute anime*; which Punishment the King may pardon as well before as after the Suit begun, for in Truth such Suits are only for the (c) King, although they be prosecuted by the Party, and like Suits in the (d) Star-chamber preferred by one Subject against another, the King may pardon them; for although a Subject prosecutes them, yet the Suits are for the King, and to punish the Defendants for their Offences and Misdemeanors by Imprisonment and Fine, &c. to the King. But if one libels for Tithes or a Contract of Matrimony, or for a Legacy, or the like, where the Plaintiff hath an Interest and Property in the Thing in Demand, and Sentence shall be given for him for the Thing which he libels for, there the King cannot pardon it, neither before or after the Suit begun.

(a) 4 Co. 20. a.
Ludh. 81.

Day 75. a.

Hob. 82.

(b) Dav. 75. a.
Hob. 82.

(c) 2 Bullst. 182.
Cr. Jac. 335.

(d) Antea 43. b.

59. b. 2 Int. 238.

2 Bullst. 182.

Cr. Jac. 335.

3 Mod. 56.

2 Show. 420.

(a) Cr. El. 684.
Hob. 82.
Dav. 73. a.

2. It was resolved that all Proceedings in the Ecclesiastical Court *ex officio* are for the (a) King. For which Cause, whatsoever the Suit is, there the King may pardon it, for they are only to correct and punish the Party for the Offence or Crime, which the King may pardon, and not for the particular Interest of the Party.

(b) 3 Inst. 238.
Cr. Car. 9, 47,
199. Cr. Jac. 159.
335. Noy 91.

3. It was resolved, that in the principal Case, although the Suit be for the King, and which the King may pardon, yet when Sentence is (b) given, and Cofts taxed for the Plaintiff, now the Plaintiff hath a particular Interest in them by the Sentence, which the King cannot pardon, although a Day be given for the Payment of them, *ut supra*.

(c) 2 Bulst. 182.
Cr. Car. 68.
Cr. Jac. 335.

The same Law of Suits aforesaid in the Star-chamber after Sentence given, and Cofts taxed for the Party, the Pardon shall not discharge them. But if the (c) Pardon had been obtain'd before the Sentence, there the Pardon had discharged the Whole, for then the Court could not have proceeded to any Sentence of the Principal, and by Consequence not of the Cofts, which are but accessary.

(d) 6 Co. 18. b.
Palm. 412.
3 Bulst. 73.
1 Rol Rep. 226.
2 Jones 67.
3 Keb. 282.
Cr. El. 460.
(e) Cr. El. 460.
(f) Dyer 105.
pl. 17.

4. Although the Defendant hath (d) appealed, by which the Sentence to divers Purposes (by the Opinion of the Doctors of the Spiritual Law) is suspended, as appears in (e) 27 H. 6. Gard 118. 2 R. 2. *Quare Impedit* 143. 1 H. 7. 12. 2 Mar. (f) 105. yet by the first Sentence the Party (notwithstanding the Appeal) had an Interest in the Cofts, which could not be discharged by the King's Pardon. And therefore as to this Purpose the first Sentence is not suspended by the Appeal. And afterwards a Consultation was granted for the Cofts.

Mich. 29 & 30 Eliz.

In the Exchequer.

PAGE'S Case.

IN an Information against *Page* and his Wife for Intrusion in certain Houses in *Lynn-Regis* in the County of *Norfolk*, on Demurrer, the Case was such; *Indy* seized of the said Houses in Fee, held in Socage, by his Will in Writing devised them to his Wife, (now the Wife of *Page*, who was an Alien born) and before the Death of *Indy*, the Queen by her Letters Patents under the great Seal made the said Woman a Denizen, and afterwards *Indy* died; and the said Letters Patents under the great Seal were corrupted and rased in the *Teste*, so that now as they were rased and corrupted they bore *Teste* after the Death of *Indy*, and upon that *Page* and his Wife got an Exemplification of the Inrolment of the Letters Patents in the Chancery under the great Seal, which was with the true *Teste* according to the Truth. And afterwards an Office was found before certain Commissioners, by Force of a Commission directed to them under the Exchequer-Seal, by which it was found that the said Woman was an Alien born, &c. And in this Case these 9 Points were resolved by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer.

1. That the Office was insufficient and void for divers Causes. 1. Because an Office found by Force of a Commission under the Exchequer-Seal is not sufficient to intitle the Queen to the Lands of an Alien born: For there are two Manner of (a) Offices; one that vests the Estate and Possession of the Land, &c. in the Queen, where she had but a Right or Title before, and that is called an Office of Intitling: As in Case of a Purchase by an Alien, or the King's Villain, or by any Body Corporate or Politick in Mortmain, or by a Person attainted of Felony, & sic *de similibus*: And such Office which concerns Fee or (b) Freehold ought to be by Force of a Commission

(a) Hob. 231.

Cr. Car. 173.

1 Jones 217.

Godb. 312.

325. 2 Rol. Rep.

322, 342.

Lane 43.

1 Bulltr. 34.

10 Co. 115. a.

(b) Hob. 231.

Cr. Car. 173.

Postea 56. b.

(a) Godb. 312.
Moor 293.

(b) 1 Co. 42. a.

(c) 1 Rol. Rep.
395. Cr. Car.
461. Doct. pla-
cit, 79.

(d) Moor 325.
Co. Lit. 2. b.
Hob. 231.
7 Anderf. 53.

(e) 1 Jones 78,
79, Moor 325.

(f) Dyer 283.
pl. 31. 1 Leon.
47. Goldsb. 29.
102. 2 Sid. 148.
Moor 390.

(g) Hardr. 118.
Co. Lit. 225. b.

(h) 2 Inst. 282.

tion under the great Seal of *Engl.* There is another Office, and that is called an Office of (a) Instruction, and that is when the Estate of the Land, &c. is lawfully in the K. before, but the Particularity of the Land, &c. doth not appear of Record, so that it may be put in Charge. As if one be (b) attainted of high Treason, all his Lands, &c. are presently by the Stat. of 33 H. 8. c. 20. in the King: Or if the K's Ten't commits Felony and is attainted, and dies, in these and the like Cases the Estate of the Land without any Office is in the King: But it doth not appear to the Court of Excheq. of what Lands the Person attainted was seised, at the Time of his Attainder or after, and if that be found by Office by Force of a Commission under the Excheq. Seal, it is a sufficient Record to instruct the King of the Certainty of the Land, &c. by which it may be put in Charge.

2. It was resolved, That the (c) Office was insufficient, because it doth not appear what Authority the Commissioners had, but generally, *Inquisitio capta, &c. coram, &c. virtute ejusdem Commissionis eis direct*, and for divers other gross Imperfections the Office was adjudged insufficient.

3. It was resolved, That in the Case of an Alien, (d) Person attainted, so long as he lives, the K's Villain, Alienation in Mortmain, Condition broke, Alienation *contra form' collarionis*, and the like, the Inheritance or Freehold of the Land is not vested in the K. till (e) Office found under the great Seal, for that is an Office of Intitling. *Vide* 35 E. 3. *Villennage* 22. 8 E. 4. 4. 9 H. 7. 2. *Mortmain*, 2 H. 7. 8. *Condition* 29 H. 8. *Charter de Pardon B.* 59. The K's Ten't attainted of Felony, 7 E. 4. 29. & 11 H. 4. 26. If an Alien and a Subject born purchase Lands to them and to their Heirs, they are Jointenants, and shall join in an Assise, and the Survivor shall hold Place till Office found, *Plow. Com. Nichols's Case*, fol. 477. & 11 Eliz. *Dier* 283. *Alien born. Vide Stauf. Prærogat. Regis*, cap. 18. fol. 53.

4. The great Question of the Case was, Whether the Def. should plead the said (g) Exemplificat. of the Inrolment of the said Letters Pat. of Denization, by Force of the Stat. of 3 E. 6. c. 4. or 13 *El. cap. 6.* And it was objected, that neither an Exemplification, nor a *Constat* of any Letters Patents were pleadable at the Com. Law, for as it appears by the Preambles of both Statutes, that this Case of Denization was out of the Words of both Stat. for the Words of the Purview of the Stat. of 3 E. (b) 6. are, "All and every Person or Persons, Bodies Politick or Corporate, which lawfully shall or may claim by Force of any Patent made since 4 Feb. 27. H. 8. &c. and all other that now have, or hereafter shall have any good or lawful Estate, Right, Title, Rent, Profit, &c. of, in, to, or out of any Lands, Tenements, Hereditaments, or Offices under any such Patentee or Patentees, &c. shall and may, &c. make and convey to themselves Title, &c. unto the

" said

“ said Honours, Lands, Tenements, Offices, and other the
 “ Premises, &c. by, from or under the said Patentees or any
 “ of them, &c. by shewing forth of any Exemplificat. or Con-
 “ stat of the Roll, &c. And in the Case at Bar, the Woman doth
 not claim any *Estate, Right, Title, &c.* of or in any Lands,
 Tenements, &c. by Force of any Letters Patents, but only to
 be made Denizen, which extendeth only to Ability and Ca-
 pacity of her Person, and not to any Lands, Tenements, nor
 unto any Thing issuing out of them. And it was objected,
 That this Case was out of the Statute of 13 *Eliz. cap. 6.* for
 the Letter of that is, “ that all and every Patentee and
 “ Patentees, their Heirs, Successors, Executors and Assigns,
 “ and all and every other Person and Persons, having by or
 “ from them or any of them, or under their Title, any E-
 “ state, or Interest, of, in, or to any Lands, Tenements He-
 “ reditaments, or other Thing whatsoever to such Patentee
 “ or Patentees heretofore granted, &c. By which it appears
 for the Reason aforesaid, that he who claims to be made a
 Denizen is out of these Words; also the Stat. doth intend such
 Hereditament, or Thing only as may be assigned or transfer-
 red over, which appears by the said Words. “ And all and
 “ every Person and Persons having by or from them, &c. a-
 “ ny Estate, &c. of, in, or to any Lands, &c. to such Patentee,
 “ &c. granted. But when the Queen by her Letters Patents
 makes one a Denizen, it is individual and incident inseparable
 to the Person of him who is made Denizen which cannot be
 transferr'd over, and therefore this Case is out of the said Act:
 But it was thereunto answered and resolved by the Court.

2 Inst. 282.

1. That it was true, that neither an Exemplification, nor a
 Constat was pleadeable, and to be shewed to the Court at
 the Common Law, because they were but the Tenor of the
 Inrolment, and the Tenor of a Record is not pleadeable by
 the Law. And with this the Preamble of both the said
 Statutes agrees, and the Statute of 6 *R. 2. cap. 4.*

Co. Lit. 225. b.
Hardr. 118.
Palm. 62.

2. It was resolved, That the said Act of 13 *Eliz.* did ex-
 tend to the said Letters Patents of Denization; for it was a
 great Question conceived on the said Act of '13 *E. 6.* Whe-
 ther the Patentee himself might plead the Exemplification
 or Constat of the Inrolment of his own Letters Patents by
 Reason of the said Words in the Body of the Act, “ Shall
 “ and may, &c. make and convey to themselves Title, &c.
 “ unto the said Honours, Lands, Tenements, &c. by, from
 “ or under the said Patentees, &c. So that by the Words
 of the Act, the Patentees themselves were left to the Com-
 mon Law. *Vide* 1 *Eliz. Dyer* 167. *Sir Tho. Wrotbe's Case*;
 for the Remedy whereof, the said Act of 13 *Eliz.* was made,
 which is more liberal and beneficial than the said Act of
 3 *E. 6.* for that by express Words extends to all Patents
 whatsoever, without any Restraint: For it was resolved that

Doct. pla 213.
2 Bulltr. 34.

Dy. 167. pl. 13.

Co. Lit. 225. b.

these

these Words, " All and every Patentee and Patentees, their Heirs, Successors, Executors and Assigns, is a distinct Clause of it self, and extends to all Letters Patents whatsoever, either concerning Lands, &c. or Persons, &c. or any Thing, or Matter whatsoever. For in the next Clause the Words are, " any Lands, Tenements, or Hereditaments, or any Thing whatsoever. And afterwards towards the End, " as shall " and may serve to and for such Title, Claim or Matter; and therefore this Act doth extend to Letters Patents of Creation of (a) Dukes, Marquesses, Earls, Viscounts, Barons. Also to Pardons of Treasons, Felonies, &c. Outlawries, Infranchisements of Villains, and all other Letters Patents which at the Time of the Exemplification or Constat are in Force, not lawfully surrendered, or cancelled, concerning any Inheritance, Freehold or Chattels, or any other Thing, or Matter real, personal, or mixt whatsoever. *Vide* the Opinion of *Mervin* in (b) 32 H. 8. Tit. *Patents Br.* that a Constat was pleadable at the Com. Law, but not an *Inspeximus*. And the Opinion of (c) *Fischer*, 12 H. 7. 12. b. & *vide Lib. Intrationum*, Aid granted on pleading of a Constat. But by this Resolution you will better understand the Law in these Cases.

Note Reader, forasmuch as the said Acts of 3 E. 6. & 13 Eliz. extend to make an Exemplification or Constat of the Inrolment of Letters Patents pleadable, it is requisite to shew you the Difference between an Exemplification and a Constat, and the Signification also of those Words by which Letters Patents are commonly called (d) *Inspeximus*, *Innotescimus*, *Vidimus*: And it is to be known, that an Exemplification, and an *Inspeximus*, as an *Innotescimus* and *Vidimus* are all one: An *Inspeximus* or Exemplification begins in this Form; *Eliz. Dei gratia, &c. omnibus, &c. inspeximus* (e) *irrotulament' quarund' literar' paten', &c.* and recites them *de Verbo in Verb'*, and concludes in such Form, *Nos autem tenorem literarum paten' præd', &c. ad requisitionem A. B. duximus exemplificand' per præsentis. In cuius rei testimonium, &c.* And it is called *Inspeximus*, because it begins after the King's Stile, with this Word, *Inspeximus*; And it is called Exemplification *a re ipsa*, because the Record is thereby exemplified, as appears by the End of it, *duximus exemplificand' per præsentis*. And a Constat after the King's Stile begins; *Constat nobis per Inspection' Rot' Cancell' nostræ quod Dom' Henric' nuper Rex Angliæ octav' pater noster præcharissimus, literas suas Patentes fieri fecit in hæc verba: Henric' Dei gratia, &c. and recites all the Letters Patents de verbo in verbum, and concludes, Nos autem pro eo quod literæ Patentes prædict' sunt casualiter amissæ, sicut A. B. nobis in Cancellar' nostra personaliter constit' sacramentum præstitit corporale, & quod ipse literas præd', si eas imposter' reperir' contigerit, nobis in Cancell' nostr' præd' restituerit cancelland'*

(a) Doct. pla.
213.

(b) Palm. 87.
Br. Patents 97.
Br. N C. 192.
(c) Palm. 62.
Br. Patent 58.

(d) Co. Lit.
225. b.

(e) 8 Co. 8. 2.

cancelland' tenorem irrotulament' præd' ad requisitionem J. S. duximus exemplific' per præsentés. In cuius, &c. And it is called a *Constat*, because after the King's Stile it begins with this Word, *Constat*. And it is to be observed, That by none of them any Thing is exemplified, but the Tenor of the Record. Also by that it appears, that a Man cannot have a *Constat* without an *Affidavit*, as by the Form of the *Constat* appears. But an *Inspeximus* may be obtained without *Affidavit*. An *Innotescimus* or *Vidimus* are all one, and are always of a Charter of Feoffment, or some other Instrument which is not of Record; and the *Innotescimus* begins in this Form; *Regina, &c. omnibus, &c. Inspeximus quoddam script' fact' per A. B. Radulpho D. sigill' ipsius A. sigill' (ut dic') in hæc verba: Sciant præsentés, &c.* and recites the Instrument *de verbo in verbum. Et hoc omnibus quorum interest aut interesse poterit in præmissis Innotescimus per præsentés. In cuius rei, &c.* And it is called *Innotescimus*, because of this Word *Innotescimus* in the End of it. And sometimes it begins, *Vidimus quoddam scriptum, &c.* and then it is called a *Vidimus*; For the Antiquity of an *Inspeximus* or Exemplification in the Form that now is used, I have read in the Chronicles of the Monastery of S. Martin of Battaile, that King Henry the first invented the said Form; for these are the Words of the Chronicle, *Contigit unam ex chartis Will' fundatoris de Bello vetustate dissolvi, unde Odo Abbas a Rege Hen. petiit, ut sigillo suo remunerata renovet'. Rex assentit. Ac ubi in chartis antiquis posterior solet mention' facer' prioris in huiusmodi verbis: Sicut charta talis Regis vel hominis testatur. Rex Henr', ne clausula illa rescriberet', sed aliam antea inusitat', ipse dictavit hoc modo: Quoniam inspeximus chartam Will', &c. (recitans totam priorem cartam.) Et inclytus Rex reddidit hanc rationem facti sui. Si enim (inquit) clausula, quæ suppressa est, minime inserta fuisset charta posterior sine prio' modicum conferret, nunc vero, nulla de præcedente facta mentione, hæc charta sola sufficit, etiamsi omnes alii deperiissent, quoniam ego ipse, quæ in persona vidi, testifico.*

3 Inf. 173.
Co. Lit. 225. b.

Mich.

Mich. 30 & 31 Eliz.

In the Common Pleas.

KNIGHT'S Case.

1 Anderf. 173,
174, 175, &c.
3 Leon. 124,
125, 126, &c.
Moor 199, 200,
201, &c.
Cr. El. 855.
Goldsb. 15, 16,
17, 18, 19, 20,
21, &c.

IN an Action of Trespass between *Knigh*t and *Breech*, the Case was; The Prior of S. *John's* of *Jerusalem*, anno 29 *H. 8.* made a Lease by Deed indented with the Assent of his Covent under their common Seal, of divers Houses in *Clerkenwell* in the County of *Midd.* for Years yet enduring, yielding the yearly Rent of 5 *l.* 10 *s.* 11 *d.* at four Feasts in the Years, usual in the City of *London*, scil. for one House 3 *l.* 11 *d.* for another 20 *s.* and for the other Houses several Rents Residue of the said Rent of 5 *l.* 10 *s.* 11 *d.* with Condition that if the said Rent of 5 *l.* 10 *s.* 11 *d.* be behind in Part or in all, at any of the said Feasts, that then the said Prior and his Successors should re-enter. And afterwards the said Priory and all the Possessions thereof came to King *H. 8.* by Surrender of the said Prior and Covent, and by the Statute of 31 *H. 8.* which King in the 36 Year of his Reign by his Letters Patents under his great Seal granted one of the Houses (for which 20 *s.* of the Rent was by the said Lease reserved) to the Lessee and another in Fee, and afterwards the Lessee died; and afterwards it was found by Inquisition, in the County of *Middlesex*, anno 26 *Eliz.* by Force of a Commission under the Exchequer Seal, that 37 *s.* 5 *d.* Parcel of the said Rent of 5 *l.* 10 *s.* 11 *d.* reserved by the said Demise for the Residue was behind at the Feast of S. *Michael* then for a Quarter of a Year then last past: And that the said Feast of S. *Michael* was one of the usual Feasts of Payment in *London*; and that afterwards the Queen, before the Commission returned, and before any Entry or Seizure by her, by her Letters Patents under the Great Seal, granted the Residue
of

of the Houses to one in Fee, who made the Lease to the Plaintiff *Knight*, on whom *Breech* the Defendant the Assignee of the Executor of the first Lessee entered, against whom *Knight* the Plaintiff brought an Action of Trespass. And this notable Case was often argued at the Bar in the Common Pleas, and afterwards openly by the Justices at two several Days; and because the Court was divided in Opinion, this Case was argued in the Exchequer-Chamber before all the Justices of *England*. And after Argument at Bar, and divers Conferences had amongst the Justices at Serjeants Inn it was adjudged for the Plaintiff: And in this Case these Points were resolved.

1. That it was one intire Lease, and consisted on six Unities: 1. The Demise is made by one Word of Demise. 2. To one Lessee. 3. To have one Beginning. 4. One Term of Years. 5. One Determination of it. 6. One Reservation of Rent in Gross at the first; and the (*videlicet*) afterwards doth not make a Severance of it as this Case is, but is rather a several Declaration of the several Values of each Parcel, by which it appears how and for what Rates the (*a*) whole Rent of 5*l.* 10*s.* 11*d.* is reserved. But it was resolved, that on one Lease several yearly Rents by apt Words might be reserved, for the Reservation of the Rent is not of the Substance of the Lease, for a Lease may consist without any Reservation, either for Part, or for the whole. And therefore if a Man makes a Lease to *B.* of the Manors of *Dale*, *Sale* and *Down*, to have and to hold to him the said Manors for 21 Years, rendring Yearly out of the Manor of *Dale* 10*l.* in that Case the Manor of *Dale* is only charged with the said Rent, and the Manors of *Sale* and *Down* are not charged with it; And in that Case the Rent is incident to the Reversion of the Manor of *Dale* only; and if in that Case the Lessor grants over the Reversion of the Manors of *Sale* and *Down*, yet the whole Rent of 10*l.* doth remain with the Lessor, and the Lessor or his Lessee cannot distrain for this Rent in the Manors of *Sale* and *Down*: And in the same Case the Lessor might have reserved a Rent of 10*l.* out of the Manor of *Dale* during 5 Years, and 10*l.* out of the Manor of *Sale* during 10 Years and 16*l.* out of the Manor of *Down* to commence 10 Years after, and one on a Condition precedent, another on a Condition subsequent, and the third absolutely, and to be paid at several Days and Places; in which Cases without Question the Rents are several; and for the Rent of the one, the Lessor cannot distrain in any of the other: And a Surrender of one Manor will not extinguish the Rents for the others. And therewith agree 14 *Eliz. Dy. in Winter's (b) Case* 308 *£* 309. by three Justices, 17 *E. 3. 75. b. 17 Aff. p. 10. & 9 E. 3. 12.* And such Construct. agrees also with the true Intent of the Partics, which is always to be observed, when it may by

reasonable

(a) 3 Bulstr.
256.
Hob. 172.
Ley 77.
2 Kol. 448.
Polst. 55. b.

(b) Moor 98,
205.
1 Anderf. 174.
Cr. El. 341.
3 Leon. 124.
Goldsb. 16, 19.
Hob. 172.
2 Rol. 448.
Cr. Car. 154.
2 Bulstr. 281,
282. Dy. 308,
309. pl. 75.

reasonable Construction consist with the Rule and Reason of the Law. *Vide* 29 *E.* 3. 39. 29 *Aff.* p. 52. 18 *Eliz.* Dy. 350. 5 *Aff.* p. 6. 7 *Aff.* p. 1. 15 *Aff.* p. 11. But in the Case at Bar it was resolved, that the Rent was (a) entire, because first the Lessor reserves the yearly Rent (in the singular Number) of 5*l.* 10*s.* 11*d.*: And afterwards when the Lessor comes to his Condition for Payment of the said Rent, the Condition is also in the singular Number, *scil.* if the said Rent of 5*l.* 10*s.* 11*d.* be behind in Part or in all, so that it agrees with the Words of the Indenture (which import the Intent of the Parties) that in this Case it should be one entire Rent; and if it should be several Rents, then a Question might be made of the Validity of the Condition which extends to the said Rent, &c. in the singular Number, *Sed* (b) *benignæ faciendæ sunt interpretationes chartarum propter simplicitatem laicorum, ut res* (c) *magis valeat quam pereat.* And by this Construction all the Parts of the said Indenture well agree with themselves, and with the Law also. And the Difference between this Case and the said Case of (d) *Winter* is, because there, the Reservations are several, and here (on Consideration of the whole Indenture) intire, *quod nota bene.*

2. It was resolved, That admitting they had been several Rents, yet forasmuch as the Condition was intire, giving one intire Entry into the whole for Default of Payment of any Part, by the Severance of any Part of the Reversion (if it was in the Case of a common Person) (e) the whole Condition would be destroyed. And therewith agrees the Judgment in the said Case of *Winter*, 14 *Eliz.* *Dyer* 308, 309.

3. The great Doubt was, Whether this being in the King's Case, if the Condition by the Severance of Part of the Reversion be destroyed or should be apportioned. And, 1, it was objected, That the Lease in the Case at Bar was made by common Persons, and the Reversion thereof was vested in the King by their Surrender, and by the Act of 31 *H.* 8. in which Case the King cannot take it in other Manner than the Subject had it before. For the Parliament which gave it the King, shall bind the King as well as the Subject, and his Prerogative shall not be extended to do (f) Wrong or Injury to any Subject, as it is held in 13 *E.* 4. 8. a. 19 *H.* 6. *Br. Quinzim.* 5 *E.* 3. 6. 17 *E.* 3. 40. *Stamford* 543. *Plow. Com. Nichols* Case 246. 2. It was objected, That if the Condition in this Case should be divided, the Law and Nature of the Thing would be altered by the King's Grant, and that the King cannot do, for he cannot alter nor change the Law, or Custom of the Land by his Patent. *Vide* 11 *H.* 4. (g) 73. 37 *H.* 8. *Patents Br.* 100. &c. 3. If the Condition should be divided, he would make two Condit. of one, and the Lessee would be subject to two, and for the Non-payment of the Rent to one, the other might enter, and many Absurdities would follow thereupon; all which will be avoided, if according to the

(a) 3 *Bullstr.* 256.
Hob. 172.
Ley 77.
2 *Rol.* 448.
Moor 52, 98.

(b) *Co. Lit.*
36. a. 183. b.
301. b.
2 *Bullstr.* 282.
(c) 1 *Co.* 76. a.
2 *Co.* 72. b.
5 *Co.* 8. a.
8 *Co.* 95. b.
3 *Keble* 288.
1 *Med. Rep.*
109.
2 *Jones* 69.
(d) *Antea* 55. a.
Dyer 308, 309.
Moor 98.

(e) 1 *Rol.* 472.
Co. Lit. 215. a.
4 *Co.* 120. a.
Styl. 316, 317.

(f) 1 *Co.* 44. b.
52. b.
11 *Co.* 72. a.
2 *Inst.* 681.
Co. Lit. 19. b.
13 *E.* 4. 8. a.
Plowd. 246. b.
487. b.
Cr. Argument
60. 1 *Rol.*
Rep. 167.
Noy 182.
Moor 416.
Godb. 317.
7 *Co.* 12. b.
Dav. 75. a. b.
(g) 11 *H.* 4.
37. b.

the Rule of Law the Condition shall not be divided. But on great Deliberation, and the Justices of the Common Pleas having divers Conferences with *Wray* Chief Justice of *England*, *Manwood* Chief Baron of the Exchequer, and all the other Justices, at last, on mature Consideration it was resolved, that the (a) Patentee of Parcel, should not take Advantage of the Condition; but as to that Part of the Land demised, it was altogether discharged of the Condition. But it was also resolved, That as to the Residue the Condition (b) remain'd with the Reversion which the King hath, and so no Prejudice to any Party, nor Wrong done to any by the King's Prerogative, nor the King by his Grant doth not alter the Law. For the Law makes a Difference between the King's Grants, who always is presumed to intend *ardua regni pro bono publico omnium*, &c. and the Grants of Subjects who may follow their private Business, for the Grants of Subjects are always taken most strong against them, but the Grants of the King are taken and interpreted by a favourable and beneficial Interpretation, so that no Prejudice shall accrue to him by Construction or Implication on his Grant more than he truly intended by it. And therefore if the King grants Land to *J. S.* and his Heirs, and in truth *J. S.* is the King's Villain, it shall not (c) enfranchise the Villain by Implication. The same Law of an (d) Alien born, 17 *E.* 3. 39. (e) the Advowson of a Prebend held of the King was aliened to an Abbot and his Successors; and the King granted to the Abbot and his Successors, That the Abbot and his Successors should hold the Prebend to his own Use, yet he shall seize the Advowson for the Alienation in Mortmain, and shall destroy the Appropriation, for he shall not be ousted of his Right to the Advowson by Implication. And in 2 *R.* 3. 4. 21 *E.* 4. 46. & 34 *H.* 6. If two (f) are indebted to the King, and the King releases to one it shall not discharge the other. And in 6 *H.* 7. 15. 11 *H.* 7. 10. if the King releases all (g) Demands, a Right of Inheritance shall not be released. 21 *H.* 7. 7. The King grants Lands in Fee on Condition that he shall not (b) alien, it is good; but in all these Cases it is otherwise in the Case of a common Person. And in many Cases the King who claims by a Subject shall be in a better Case in Respect of the Dignity and Prerogative incident by the Law to the Royal Person of the King, than the Subject himself by whom he claims. As if the King has a Rent-Seck by Attainder of Treason, or by Grant, (i) he shall distrain for it not only in the Land charged, but in all his other Lands, and yet the Subject by whom he claims should not distrain for it. If a Subject has a (k) Recognisance or Bond, and afterwards is outlawed, or attainted, the King shall seize all the Land of the Conusor, or Obligor, whereas he himself could have but a Moiety: So in the Case at Bar, the King shall take Advantage of the Condit. without (m) Demand,

(a) 2 Bulstr. 281.
 Scile 316.
 Co. Lit. 215. a.
 1 Rol. 472.
 (b) 1 Rol. 472.
 Co. Lit. 215. a.
 (c) Plowd. 502.
 Goldsb. 20.
 2 Sid. 81.
 (d) 3 Leon. 243.
 Plowd. 502. b.
 (e) 7 Co. 14. b.
 (f) 3 Leon. 243.
 2 Sid. 82.
 1 H. 7. 13. a.
 Br. Charter de
 Pardon 36.
 2 Inst. 239.
 (g) Co. Lit.
 291. b.
 (h) Lit. fest.
 360, 361.
 Co. Lit. 223. a.
 3 Leon. 126,
 127. Moor 204.
 Golds. 19, 22.
 4 Co. 3. b.
 6 Co. 41. b.
 Hob. 170.
 Br. Condition
 82, 135.
 Dr. & Student.
 39. a. 123. a.
 21 H. 6. 33. b.
 3 H. 7. 10. b.
 13 H. 7. 23. a.
 21 H. 7. 8. a.
 Br. Prerog. 102.
 21 E. 4. 47. a.
 Plowd. 77. a.
 (i) 5 H. 7. 38. b.
 3 Leon. 125.
 13 E. 4. 6. a.
 2 Inst. 131.
 4 Inst. 119.
 Antea 4. a.
 Plowd. 239. a.
 243. b. 343. a.
 Br. Prerogative
 68, 77. Fitz.
 Grant 47.
 44 E. 3. 45. a.
 Fitz. Prerog. 7.
 Br. Distress 6,
 49. Goldsb. 17.
 (k) 3 Leon. 125.
 Goldsb. 17.
 Plowd. 243. a.
 (l) 4 Co. 73. a.
 Moor 210, 296.
 2 H. 7. 8. b.
 Plowd. 243. a.
 Fitz. Prerog. 10.
 Br. Prerog. 10.
 Br. Condit. 125.
 Br. Entry con-
 geable 88.
 (m) Cr. Jac. 513.

and

and yet the Prior himself under whom the King claims could not re-enter for Default of Payment of the Rent without a Demand made. And if the King purchase a Seigniority of which Land was held by Posteriority, the King shall be in a better Condition than the Subject from whom he claims, and shall have the Priority. And so likewise shall his Grantee have in such Case, as it is held in 24 E. 3. 65. *Garde* 27, 47.

F. N. B. 142. f.

Hard. 15.
Lanc 41, 42.

4. It was resolved, That although there was 37 s. 5 d. which was found to be behind at *Michaelmas*, which was more than was due at any one Quarter of the Year, yet it is sufficient for the King when the Office hath Matter and Substance, for the sole and substantial Point which proves the Breach of the Condition, is the Non-payment of the Rent, or any Part of it, and it is not material how much Rent was behind, for if any Part was behind it is sufficient; and the Party who traverses, ought not to traverse that the said Sum of 37 s. 5 d. was behind, but that the said Sum of 37 s. 5 d. or any Part of it was behind; and every Office being the Finding of Lay People which hath Matter and Substance, shall serve the King, although the Manner of it be not so formal as it might be. And therefore if it be found, that the Rent for one whole Quarter was behind, and in Truth but Part of it was behind, it shall suffice for the King. Also that the Jurors in *Midd.* might find which were the usual Feasts in *London* being another County.

i Anderf. 177.

5. It was resolved, That although without Office the Lease was not void, because a Clause of Re-entry is only reserved, as appears before, and no Limitation, that for Non-payment the Lease should be void, and although the Office was not returned before the Date of the Patent; yet forasmuch as the Office was found before the Grant, and afterwards it was returned of Record, the Grant was good, and that in this Case of Re-entry, by the Office without Seisure, the Lease was void.

Cr. Car. 100,
173. Mo. 296.

6. It was resolved, Although the Commission was under the Exchequer-Seal, yet forasmuch as thereby a Chattel, *scil.* a Lease for Years shall be void, the Inquisition found by Force thereof was good enough, although the Commission was not under the Great Seal.

Cr. El. 855.
Cr. Car. 173.
10 Co. 115. a.
Antea 52. a.

And so note a Difference between this Case and *Page's* Case before. And afterwards the Plaintiff according to these Resolutions had Judgment to recover.

Hill. 32 Eliz.

In the King's Bench in a Writ of Error.

SPECOT'S CASE.

HUMPHREY Specot Esq; and Elizabeth his Wife, Pasch. 28 Eliz. brought a *Quare Impedit* against the Bishop of Exeter, and declared, that *John Arscot* was seised of the Manor of *Tedcote* in the County of *Devon*, to which the Advowson of the Church of *Tedcote* was appendant in Fee, and held it in Socage; and so seised, 1 Jan. 4 & 5 Ph. & M. by his Will in Writing devised the said Manor with the Appurtenances, to which, &c. to the said *Elizabeth* for Term of her Life, and died, by which the said *Elizabeth* entered into the said Manor, and was thereof seised for Term of her Life, and took to Husband the said *Humphrey*, and they presented to the said Church, then being void, *David Walter* who was admitted, instituted and inducted in Time of (a) Peace, &c. And afterwards the Church became void by the Death of the said *David Walter*, and yet is void; and so it doth appertain to the Plaintiff to present, and that the Bishop did disturb him, &c. The Bishop pleaded, that the said Church *fuit infra diocesis suam, quodque ipse nihil habet, nec habere clamat in Ecclesia illa, &c. nisi admission', institution' & induction' personarum, &c.* And that the said Church *est beneficium cum cura animarum, &c.* And that the said *David Walter* 24 Nov' 27. died, & *quod Ecclesia prædicta vacavit, ipse Episcopo ad tunc ejusdem Ecclesiæ Ordinario existit'. Et ulterius idem Episcopus dicit, quod prædict' Humfrid' infra sex menses, proxim' post mortem prædict' David, apud civit' Exoniæ, in Con' ejusdem Civit' presentavit eidem Episcopo tunc Ordinar' Ecclesiæ præd' quendam Johannem Holmes ut clericum suum, ad Ecclesiam prædictam sic vacantem, eundem Episcopum requirent', quod ipse eundem Johannem Holmes admittere, ipsumque in ead' Ecclesia instituere, induci facere diguaret: Super quo idem Episc', ut Ecclesiæ præd' Ordinarius, apud, &c. præd' Johan' Holmes sic presentat' de habilitat' & idoneitate sua in hac parte, secund' Leges Ecclesiastic' examinav', ut de Jure debuit: Et sup' hujusm' examinationem*

3 Leon. 198,
199. &c.
Goldsb. 35, 36,
&c. 52. 1 And.
189. 190. Jenk.
Cent. 258, 259.

(a) Doct pl. 291.

nem suam, idem Episc' adtunc & ibid' invenit presat' Johann' Holmes fore schismaticum inveteratum, ac eundem Johann' Holmes ea occasione per legem sacrosanct' Eccles. fore personam inhabil', & minime idoneam, ad acceptand' aliquod beneficium cum cura animarum, per quod idem Episcopus ut Eccles. illius Ordinarius adtunc & ibidem recessavit admittere presd' Johann' Holmes ad Ecclesiam predictam; and pleaded that he of the Cause of Refusal aforesaid, gave Notice to the said *Humph. &c.* upon which the Pl. did demur in Law: And it was adjudged in the Com. Pleas, That the Bishop's Plea was insufficient, because he shewed generally that he was (a) *schismaticus inveterat'*. And on this Judgm. a Writ of Error was brought in the King's Bench by the said Bishop, and two Errors were assigned in the Record.

1. Because no Presentment was alledged in the Devisor, but only in the Devisees for Life; but *non allocatur*, for the (b) Presentment of the Lessee is a sufficient Title for himself without Question, (c) 8 H. 5. 10.

2. Error was assigned, That the Court erred in Law in giving Judgm. against the Bishop for the Insufficiency of his Plea, where his Plea was sufficient. And it was objected by the Bishop's Counsel, that the Bish. need not shew any particular Schism, for if he shews it, the Court cannot either decide or examine it, because it is a spiritual Thing which lies not in their Conulance, as it is held 27 H. 8. 14. a. b. That for calling a Man (d) Heretick no Action on the Case lies in our Law, for those of the Com. Law cannot determine what is Heresy; and in 15 H. 7. 7, 8. a. it is agreed by all the Justices, that the Bish. in Examination is Judge, and not a Minister, and therefore the Law gives Faith and Credit to his Judgm. And it was said, That it is a good Cause to remove a (e) Coroner from his Office generally, because he is *minus idoneus ad officium illud exequend'*, as appears by the Register and F.N.B. 163. But it was answered and resolved, That the Plea of the Bish. was insufficient. First, it is declared by the Stat.

De (f) Articulis Cleri cap. 13. That *De idoneitate person' presentat' ad beneficium Ecclesiast' pertinet examinatio ad iudicem Ecclesiasticum, &c. ut propter defect' scient' & aliarum causarum rationabilium*: So that it appears there ought to be reasonable Cause, & *causa vaga & incerta non est rationalis*, for it is commonly said, *Quod dolosus versatur in universalibus*: And by the Reason which hath been made, that the general Allegation of the Pl. should be good in the Case at Bar, it is good, because the Bishop in Examination is Judge; by the same Reason it may be maintained that he may refuse any Clerk, because *non est idoneus* generally, or because he is (g) *criminosus* generally: But although he is Judge in Examination, yet forasmuch as the Proceedings of the Bishop are not of (b) Record, the Cause of the Refusal

is

(a) Doct. pl. 60.
1 Rol. Rep. 136.

237, 238.

2 Bullstr. 139,

329. 3 Leon.

200. 1 And. 190.

Cr. El. 242.

Hob. 290.

(b) Doct. pl. 301.

Postea 97. b.

6 Co. 57. b.

2 Rol. 378, 379,

Cr. El. 518.

Moor. 456.

2 And. 49, 50.

F. N. B. 33 h.

1 Leon. 230.

(c) 8 H. 5. 4. b.

Fitz. quare impedit 201.

(d) 2 Inst. 631.

4 Co. 17. a. 20. a.

Hob. 296.

Br. Action sur

le Cafe 2.

(e) 8 Co. 41. b.

F. N. B. 163. n.

Postea 58. b.

(f) Goldsb. 36.

Dyer 293. pl. 3.

2 Inst. 631. d. e.

articulis cleri

cap. 13.

2 Co. 34 a.

3 Co. 81. a.

2 Bullstr. 226.

1 Rol. Rep. 157.

Moor. 121.

(g) 2 Sid. 97.

1 Rol. Rep. 192,

237.

(b) Doct. pl. 351.

is (a) traversable, and if it be traversed, and the Party refused be alive, it shall be tried by the Metropolitan, and if he be dead, it shall be tried by the (b) Country. And if such a general Allegation of Bishops should be admitted (to which the Patron shall not have Answer, because the Bishop in his Examination is Judge, the Cause being spiritual, as it hath been objected) Patrons would suffer great Prejudice in these Times in their Presentations: In 38 E. 3. 2. (c) the Bishop Plaintiff shewed for Cause of Refusal that the Presentee had acknowledged himself to be perjured, &c. and so *criminosus*, by which it appears, that the Alledging that he is *criminosus* generally is not good, for no certain Issue can be taken thereupon. *Et dubitatur* there, Whether there the Bishop ought not to say *in facto* that he is perjured, and not that he had confessed himself perjured. In 5 R. 2. Trial 54. it was agreed for good Law, That if a Miscreant or Schismatick be presented, admitted and inducted, it is a good Cause of Deprivation. So if he be irreligious he may be refused, as it is said in 5 H. 7. 6. But when he is charged with the one, or refused for the other, it ought to be alledged in particular, so that the Party may answer to it. And it was observed, that it appears in our Books, that the Cause of Refusal ought to be certain, as in 5 H. 7. 19. & 11 H. 7. 7. & 37. That the Presentee is a Bastard (d), Villain, within Age, or illiterate, &c. And 15 H. 7. that the Patron had been *excommunicatus* by 40 Days, and therefore his Presentee is not to be admitted; or that the Presentee had committed Manslaughter, as it is held in 38 E. 3. 2. or that the Presentee is outlawed, for then he is not *idonea persona*, or one who is *mere laicus*, Mich. 12 & 13 Eliz. (f) Dier 293. Vide 8 & 9 Eliz. (g) Dier 254. The Bishop of *Norwich* refused one because he was a Haunter of Taverns, and a Player at unlawful Games, *ob quod & diversa alia crimina* he was *criminosus*, & *non idoneus*, And it was adjudged, that the particular Causes were not sufficient, for they were not *mala in se*, but (h) *mala prohibita*. And *quod ob diversa alia crimina*, he was *criminosus*, & *non idoneus*, was too general and uncertain. As 40 E. 3. 6. in Tender of a Marriage and Refusal, the Heir ought to alledge a certain Cause of the Refusal, whereof Issue may be taken.

And it was resolved, That all such as are (i) sufficient Causes to deprive an Incumbent, are sufficient to refuse a Presentee. And altho' it doth not appertain to the King's Court to determine Schisms or (k) Heresies, yet the original Cause of the Suit being Matter whereof the King's Court hath Conscience, the Cause of the Schism or Heresy, for which the Presentee is refused, ought to be alledged in certain, to the Intent that the King's Court may consult with Divines to know

(a) Doct. pl. 351.

(b) 2 Inf. 632.

(c) 3 Leon. 199.
Goldsb. 35, 36.
Fitz. Quare
Impedit 124.
Dyer 293. pl. 3.
2 Rol. 356.

(d) 2 Rol. 356.

(e) 2 Rol. 355.

(f) Dyer 293.
Pl. 3.

(g) 1 Hob. 296.

Goldsb. 35.

G. db. 36.

2 Rol. 355.

Dyer 254. pl. 2.

(h) 2 Bulstr. 139.

Hob. 296. 1 Rol.

355. 2 Rol. 355.

1 Leon. 106.

2 Leon. 35.

(i) 2 Rol. 355.

(k) Wing.

Mar. 8. 27 H. 8.

14. a. b.

(a) Antea 57. b.
84. Co. 41. b.
F. N. B. 163. N.

(b) Stanf. Cor.
88. 2.

whether it be Schism or not; and if the Party be dead, thereupon to direct the Jury that try it. And as to the Case of the (a) Coroner which hath been put, it was answered, That it was not to be compared to the Case of a Presentee, for such general Allegat. is not sufficient as it is confessed by both Sides, either to refuse a Presentee, or to deprive an Incumb. because he is *persona minus idoneus* generally. And the Coroner at the com. Law hath but the Keeping of the Rolls of the Pleas of the Crown, but the Incumb. hath the Care and Keeping of Souls, and therefore the Law requires more Circumspection and Certainty in the one Case than in the other. 2. The King may remove a Coroner by Writ directed to him for a Cause which shall not be traversed as appears in *F. N. B.* 163. and so not like.

Then anoth. Error not assign'd was moved, *sc.* That for the Insufficiency of the Bish. Plea, the Court gave Judgm. for the Pl. *Ideo considerat' est quod præd' H. & E. recuperent vers' prædict' Episcopum presentation' suam ad Ecclesiam prædictam, & habeant breve Joh. Archiepiscopo Cantuar' rotius Angliæ primat', loci illius Metropolitanano, eo quod præd' Episc' est pars, &c. Et idem Episc' in misericordia.* And afterwards a Writ to inquire of the Value of the Church was awarded, and the Value and other Points of the Writs found and returned; and upon that Judgm. was entered again, *sc.* That the Pl. shall have a Writ to the Archbish. *ut supra.* *Et quod recuperent versus præd' Episc' damna, &c. Et præd' Episc' in M'ra:* So that the Bishop was (c) twice amerced, and every Amercement of a Bishop is 5 *l.* and in this Case he ought not by the Law to be twice amerced; and therefore this Difference was taken, if a Man brings Trespas against two, and one is found guilty to Damages by himself, and the oth. is found guilty to Damages by himself, in that Case each Def. shall be severally amerced; and the Pl. shall be also severally amerced against each of them, as appears in 47 *E.* 3. 20. But in an Action against (c) one and the same Def. or Ten't, and the Def. or Ten't pleads one Plea to Part, and another Plea to the Residue, or confesses Part, and pleads to Issue for the other Part, and the several Issues be found against him, yet the Def. or Ten't shall not be twice amerced. And therewith agrees 9 *E.* 3. 6. by *Herle*, & 22 *H.* 6. wherefore it was concluded, That forasmuch as the Bishop being one and the same Person was twice amerced, in this Case it was Error.

Against which it was answered by one of Counsel with the Def. That the later was only a Recital of the former, and so to give a full Judgm. of all with the Damages, and not a new Judgm. for he cannot have two Writs to the Metropolitan, no more than he can be (f) twice amerced. But if it was *gratia argumenti*, admitted, that the later Judgment was erroneous, yet the (g) first Judgment is good and perfect in it self, and shall not be impeached for any Error in the second

(c) 1 Rol. 218.
(d) 1 Rol. 216.
218.

(e) 1 Rol. 218.
8 Co. 61. 2.

(f) Jenk. Cent.
259. 1 Rol. 218.
(g) 1 Rol. 776.

second Judgment; for the first Judgment was the Judgment which was in the *Quare Impedit* at the common Law, for before the Stat of *West. 2. cap. 5.* the Plaintiff in a *Quare Impedit* did not recover Damages (a) And the Plaintiff after the said Statute may take the Judgment (b) at the Common Law, and relinquish the Benefit of the Statute if he will, *Quod concessum fuit per totam curiam*, for which Cause the Defendant's Counsel prayed that the Judgm. might be affirmed, and so it was.

(a) 6 Co. 51. 2.
Co. Lit. 17. b.
344. b. 2 Inst.
362. 3 Inst. 156,
Cr. El. 162.
(b) Jenk. Cent.
259.

Note Reader, the Matter in Law was resolved and adjudged by both Courts.

Hill. 32 Eliz.

In the King's Bench

FOSTER'S Case.

JOHNSON Foster and Ursula his Wife brought a Writ of false Imprisonment against Robert Smith, and on the Pleading and special Verdict, the Case was such; *scil.* That the Town of *Brancafter* is in the Hundred of *Smithden* in the County of *Norfolk*; and that the Defendant was *præd' tempore quo*, &c. one of the Constables of *Brancafter*. And that *Nathaniel Bacon* Esquire, then one of the Justices of Peace within the said County, made a Warrant sealed with his Seal directed amongst others to the Constables of *Brancafter*, reciting that *John Lane* of *Brancafter* was in Fear of his Life, Maim and Burning of his Houses by *Ursula* the Plaintiff, &c. *Verbis*, &c. *præcipimus quod præd' Ursulam coram aliquo Justiciarior' nostrorum ad pacem in Com' prædict' assign venire faciat*, seu aliquis vestrum venire faciat sufficient' manucapt', quod ipsa prædict' Ursula præsat' *Johann' Lane* damnum & malum aliquod, &c. non faciat, nec fieri procurabit. Et si hoc facere recusaverit, tunc ipsam sic recusantem proxim' prison' nostræ in Com' præd' duci facias, &c. *ibidem* moratur' quosque gratis hoc facer' voluer', &c. By Force of which Warrant the Def. did arrest the said *Urs.* and that afterwards the Pl. and one *John Hammond*

offered them to go to *Thomas Farnor* Esquire, one of the Justices of Peace of the same County to be bound to the Queen according to the Purport of the said Warrant; and that the said *Robert Smith* did refuse to go to the said *Thomas Farnor*, on which the Plaintiffs went with the said *John Hammond* to the said *Thomas Farnor*, and there acknowledged a Recognisance to the Queen to appear at the next Sessions to be held within the Hundred of *Smithden* (which was not according to the Warrant) and that the Defendant *prædict tempore quo, &c.* by Force of the said Warrant carried the said *Ursula* before the said *Nathaniel*, before whom she refused to find Sureties; wherefore the Defendant carried the said *Ursula* to Gaol by Force of the said Warrant. And in this Case two Points were resolved by *Wray* Chief Justice and the whole Court.

1. That on the said general Warrant, *scil. coram aliquo Justiciar', &c.* it is at the Election of the Constable, who is an Officer and Minister of Justice, to carry the Party arrested to what Justice he will, for it is more reasonable to give Election to the Officer, who in Presumption of Law is a Person indifferent, and sworn to do and execute his Office duly, than to give the Election to the Delinquent himself, who by Presumption of Law will seek Excuses, and perhaps will carry the Constable being for the most Part a poor Man, to the farthest Part of the County, by Reason whereof such Constable would be more negligent and remiss of such Warrants for Fear of Travel, and Loss of their Time. Which Judgment is against the Opinion of *Fineux* 21 H. 7. 20. *obiter*, whereof the Reporter makes a *Quære*. But it agrees with the Opinion of the Lord *Brook* in Abridging the Case of 21 H. 7. Tit. *Faux Imprisonment* 11. Note Reader, the Law adjudged in the Point, which never (as I know) was adjudged before.

2. It was resolved, That after the Officer in the Case above, had brought the Party before the Justice, and before him she refused to find Sureties, if the Officer without a new Warrant or Commandment might carry the Party to Prison, and that by the Words of the said Warrant, *Et si hoc facere recusaverint, &c.* And *Wray* Chief Justice said, That a Justice of Peace might in such Case make a Warrant to bring the Party before himself, and it would be good and sufficient in Law: For, for the most Part, he who makes the Warrant, has best Knowledge of the Matter, and therefore most fit to do Justice in the Case.

Lamb. Eir 94.

Br. Peaces, &c.
9. 21 H. 7. 20. b.
21. a. Br. faux
Imprisonment
11.

Mich.

Mich. 32 & 33 Eliz.

In the King's Bench.

GOOCH'S CASE.

BETWEEN Rous Plaintiff and Gooch Defendant, as Heir to his Father in Debt, on a Bond made by the Father, in which he bound himself and his Heirs; the Defendant pleaded *Ricus per Descent*; and the Plaintiff maintained Assets at *L.* in the County of *Suff.* And at *Nisi prius* before *Wray* Chief Justice of *England*, one of the Counsel with the Plaintiff gave in Evidence that his Father was seised of Lands in *L.* aforesaid in Fee, and died thereof seised; and that they descended to the Defendant, by which, &c. All which was agreed by the other Side: But the Defendant's Counsel gave in Evidence, That long Time before this Action brought, the Defendant had enfeoffed one *W. G.* in Fee of the same Lands, which was also confessed; but the Plaintiff's Counsel alledged and proved, that this Feoffment was made by Fraud and Covin to defraud the Plaintiff of his Action; and therefore void by the Stat. of (*a* 13 *Eliz. cap. 5.* as to the Plaintiff. But it was strongly urged and insisted on, That it ought to have been pleaded, and could not on this Issue (of *Ricus per Descent* the Day of the Writ purchased be given in Evidence: But on the Importunity of the Plaintiff's Counsel, *Wray* Chief Justice directed the Jurors to find the special Matter; and so they did. And now this Term on Argument at Bar and Bench, two Points were resolved by *Wray* Chief Justice, and the whole Court.

1. That the Matter aforesaid might well be given (*b*) in Evidence for two Reasons; 1. Because the said Statute provides generally, That the Estate as to the Creditor shall be void, and Acts of Parliament made in Prevention or Suppression of Fraud ought to have a favourable Interpretation. 2. If this Matter ought to be pleaded, it would be mischievous to Creditors, and much to the Maintenance and Increase

(*a*) 1 Brownl.
111. 3 Co. 80. b.
6 Co. 18. b.
10 Co. 56. b.
Co. Ent. 162. a. d.
Hob 166.
3 Inst. 152.
2 Leon. 8, 9,
47, 223, 308,
309. 3 Leon. 57.
Larch. 222.
2 Rol. Rep 493.
Palm. 415. Cro.
El. 645, 233,
234, 810. Dyer
295. pl. 17.
351. pl. 23.
2 Bulltr. 226.
Lane 47, 103.
Co. Lit. 3. b.
76. a. 290. a.
Rattul fraudulent
Deeds 17.
Raff. Ent. 207. b.
Cr. Jac. 270, 271.
Moor 638.
Yelv. 196, 197
(*b*) Hob. 72.
Doct. pla. 200.
2 Rol. 684.
6 Co. 72. b.
2 Inst. 445.

of a Fraud and Covin; for Fraud and Covin (because they are odious) are so privately and secretly hatch'd in a hollow Tree, *in arbore cava & opaca*, and so artificially covered and concealed that the Party grieved has no Means to find or know it; then to drive the Plaintiff, who is altogether a Stranger to it, to plead the Feoffment (whereof he hath no Knowledge) and that it was made by Fraud, &c. would be mischievous and against Law and Reason. And Judgment was given for the Plaintiff. And in this Case *Wray* Ch. Justice said, if *A.* seized of Land in Fee make a fraudulent Conveyance to the Intent to deceive and defraud Purchasers against the Statute of *a 27 Eliz.*) and continues in Possession, and is reputed as Owner, *B.* enters into Discourse with *A.* for the Purchase of it, and by Accident *B.* has Notice and Knowledge of this fraudulent Conveyance, and notwithstanding concludes with *A.* and takes his Assurance of him; in this Case *B.* shall avoid the said fraudulent Conveyance by the said Act, notwithstanding his Notice; for the Act has by express Words made the fraudulent Conveyance void as to a Purchaser; and forasmuch as it is within the express Purview of the Act, it ought to be so taken and expounded in Suppression of Fraud. And according to the Opinion of the Lord *Wray*, it was unanimously agreed and resolved by the whole Court of Common Pleas, *Pasch. 3 Jacobi* in Evidence to a Jury in an *Ejectione firme*, on a Lease made by *Standen* to *House* Plaintiff, against *Bullock* Defendant, That where one *Bullock* had made a fraudulent Estate of his Land within the said Act of *27 El.* to *A. B.* and *C.* and afterwards notwithstanding offered to sell the said Land to *Standen*, and before Assurance thereof made by *Bullock*, *Standen* had Notice of the said fraudulent Conveyance, and notwithstanding proceeded, and took his Assurance of *Bullock*, that *Standen* should avoid (by the said Act) the said fraudulent Conveyance; for the Notice of the Purchaser cannot make that good which an Act of Parliament made void as to him. And true it is, *Quod non decipitur qui scit se decipi.* But in that Case the Purchaser is not deceived; for the fraudulent Conveyance whereof he has Notice, is void as to him by the said Act, and therefore shall not hurt him, nor is he, as to that, in any Manner deceived.

(a) 27 El. c. 4.

(b) Co. Lit. 3 b. 76. a. 290. 2. b.

Standen's Case, Pasch. 3 Jac. in Comm' Banco.

(c) 3 Co. 82. b. Moor 605, 615. Bridgm. 23. Palm. 217. Lanc. 22. 2 Jones 95.

Mich. 32 & 33 Eliz.

In the Exchequer.

SPARRY'S Case.

Israel Owen brought an Action on the Case against *James Sperry*, of Trover of a certain Quantity of Cotton Yarn, and selling it to Persons unknown, and Conversion to his own Use: The Defendant pleaded, That the Plaintiff had another Action on the Case depending in the King's Bench for the same Trover and Conversion of the same Goods; and this Suit is prosecuted pending the other: And demanded Judgment of the Bill: And thereupon the Plaintiff did demur in Law. And it was resolved by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer, that the Bill should (a) abate for two Reasons.

1. Because by the Rule of Law a Man shall not be (b) twice vexed for one and the same Cause, *Nemo (c) debet bis vexari, si constet Curie quod sit pro una & eadem causa.* But the old Difference in our Books is between Writs which comprehend Certainty as in Debt, Detinue, &c. And Writs which comprehend no Certainty, as Affise, Trespafs, &c. For it is true that in Writs (be they real, personal, or mixt) which are certain, it is a good Plea to say, That the Writ is brought pending another, but in Writs real or personal, where no Certainty is contained, there it is no Plea. As in Affise the Writ is general *de libero tenemento*, and a Writ of Trespafs is, *Quare bona & catalla cepit, &c.* generally without any Certainty, either of the Thing, or of the Time, &c. or of any convenient Certainty which may be put in Issue; for the Law requires, *Quod (d) certa res deducatur in exitum, & non potest constare Curie, quod sit pro una & eadem causa.* But in Affise, Trespafs, &c. after Pleint or Declaration made, which Pleint or Declaration reduces the Generality of the Writ to a Certainty, then the Writ purchased after such Pleint or Declaration shall abate, as appears in 14

(a) Doct. pla.
67, 68.
Moor 539.
(b) Moor 418.
(c) 4 Co. 43. a.
8 Co. 118. b.
11 Co. 59. b.
2 Vent. 170.
Cr. Jac. 481.
Cawly 78.
Noy 82.
1 Rol. Rep. 95.
Bridg. 122.
Wing. Max.
695.

(d) Antea 35. a.
38. a.
Co. Lit. 95. a.
303. a.
Herd. 132.
March 98.

Moor 883.

E. 3. Brief 270. adjudged in the Point, where in Affise of *Novel disseisin* the Ten't pleaded, That the Pl. had another Writ of Affise depending of the same Tenements between the same Parties; and so this Writ purchased pending the other, Judgment of the Writ: And because Plaintiff was not made in the first Writ, so that *non potest constare Curiae*, of what Tenements he made his Plaintiff, the Writ was awarded good, and he pleaded to issue. And therewith agree 14 *Aff. p. 7. 29 (a)*

(a) Br. Brief 300.
Br. Affise 299.

(b) Br. Brief 259. Fitz. Brief 142

(c) Doct. pla. 68.
Br. Brief 321.

Aff. p. 40. Vide 18 E. 3. Brief 318. A Writ of Rescous brought pending another shall abate, if it be of Record that the Pl. hath declared in the first Writ, or otherwise not, and (b) 39 *H. 6. 12. acc'* by *Priest* in Affise after Plaintiff; and in Trespafs after Declaration the Plea is good. But in the Case at Bar, the first Action on the Case on Trover and Conversion, be it by Writ or Bill, is here as certain as an Action of Trespafs is after Declaration. But the Reason in (c) 5 *H.*

(d) Fitz. Brief 87.

7. 15. *a. b.* (which as it seems the Reporter mistook) was utterly denied by the Court, where it is said, That because divers Trespasses may be done in one and the same Day, therefore it is no Plea (as it is there said) in Trespafs, that another Action is depending, &c. for the same Trespafs: For by the same Reason after the Pl. has recovered in Trespafs, and brings his Action for the same Trespafs again, the Def. cannot aver that it is all for one and the same Trespafs. But the Book in (d) 20 *H. 6. 44. b. 45. a.* was affirmed to be good Law; where in Forgery of false Deeds, the Def. demanded Judgm. of the Writ, because the Pl. had the like Writ of Forgery of the same Deeds, to which he had appeared, and this Writ purchased pending the other. For the Writ of Forgery of false Deeds is general. *Quare diversa falsa facta fabricavit, vel quoddam falsum factum fabricavit:* And the Def. had not pleaded that the Pl. had declar'd in the first Action whereby the Certainty might appear, therefore *Newton* compared it to a Writ of Trespafs and awarded the Def. to answer. *Vide*

(e) Br. Trespafs 171.
14 *H. 7. 12. b.*
13. a.

(f) Fitz. Trespafs 59.
Br. Trespafs 152.
Br. Brief 188.

(e) 14 *H. 7. 12. b.* & 22 (f) *H. 6. 15. b.* that in an Action of Trespafs for a Horse, which by the Declarat. is reduced to a Certainty, it is a good Plea to the Writ, that there is a Replevin depending of the same Taking, where an Averment is allowed, that all is for one and the same Taking, and yet there may be several Takings in the same Day, which is against the Reason of 5 *H. 7.* and agrees with this Resolut. And therewith agrees also the Book in 22 *H. 6. 52. a.* where the Case of Trespafs is adjudg'd; for there in Trespafs the Def. said that the Pl. had another Writ depending against the Def. for the same Trespafs, on which he had declar'd, Judgm. of that Writ brought pending the other, and *Newton* and the whole Court awarded that the Writ should abate. Note, there it is Part of the Plea to the Writ, that the Pl. had declar'd, by which he had made the Thing certain; and that is the Differ. between this Case and the Cases in (g) 20 *H. 6. 44. & 5 (b) H. 7. 15. a. b.* for the

(g) 20 *H. 6. 44. b.*
45. a. Fitz. Brief 87.
(b) Doct. pla. 68.
Br. Brief 321.

(b) 14 *H. 7. 12. b.* & 22 (f) *H. 6. 15. b.* that in an Action of Trespafs for a Horse, which by the Declarat. is reduced to a Certainty, it is a good Plea to the Writ, that there is a Replevin depending of the same Taking, where an Averment is allowed, that all is for one and the same Taking, and yet there may be several Takings in the same Day, which is against the Reason of 5 *H. 7.* and agrees with this Resolut. And therewith agrees also the Book in 22 *H. 6. 52. a.* where the Case of Trespafs is adjudg'd; for there in Trespafs the Def. said that the Pl. had another Writ depending against the Def. for the same Trespafs, on which he had declar'd, Judgm. of that Writ brought pending the other, and *Newton* and the whole Court awarded that the Writ should abate. Note, there it is Part of the Plea to the Writ, that the Pl. had declar'd, by which he had made the Thing certain; and that is the Differ. between this Case and the Cases in (g) 20 *H. 6. 44. & 5 (b) H. 7. 15. a. b.* for the

principal Case in 5 (a) H. 7. was affirmed to be good Law, for there it was not Part of the Plea that the Pl. had declared. And the Case at Bar was stronger, for it shall not be intended that there were divers Sales and Conversions in one and the same Day. Also it was resolved, that although the first Action was in another Court, *scil.* in the King's Bench, or *vice versa*, that the Plea is good. *Vide* 43 (b) E. 3. 27. a. acc. and that the Book in 34 E. 3. Brief 789. is good Law; for it doth not appear by the Plea, that the Plaintiff or Defendant was privileged in the Exchequer, and then by the Statute of *Articuli super Chartas*, cap. 4. it is enacted, that no common Plea shall be held in the Exchequer: But in 43 E. (c) 3. 27. a. it appears that the Def. was privileged in the Exchequer, and therefore the Plea to the Writ there was good. But if a Man brings an Action of Debt by Bill in *London* or *Norwich*, or in any other inferior Court, and afterwards brings an Action of Debt in the Common Pleas, this Suit in the higher Court, which is brought pending the Suit by Bill in an inferior Court, shall not abate, as appears in 7 (d) H. 4. 8. a. & 3 (e) H. 6. 15. a. b. *Vide* 43 E. 3. 22, 27. & (f) 7 H. 4. 44. a. b. *Brimingham's Case*. But it is said 9 E. 4. 53. a. that all the King's Courts at *Westminster*, have been Time out of Mind, &c. and so a Man cannot tell which of them is the most ancient Court.

And afterwards it was adjudged that the Plea was good, and the Pl. took nothing by his Bill. And so note Reader, all the Books which *prima facie* seem to disagree, are on full and solid Reason unanimously agreed and reconciled.

(a) 5 H. 7.
15. a. b.
Doct. pla. 68.
Br. Brief 321.
Antea 61. b.

(b) Fitz. Bar.
197.
Br. Debr. 35.
Br. Brief 66.

(c) Supra.

(d) Fitz. Brief
225.
Br. Brief 108.
Br. Eftoppel 54.
(e) Br. Eftoppel
1.
Br. Brief 8.

Fitz. Eftoppel
15.
(f) Fitz. Action
sur le Cafe
26. Br. Action
sur le Cafe 37.

Cases of By-Laws and Ordinances.

Mich. 32 & 33 Eliz.

In the King's Bench.

The Chamberlain of London's Case.

3 Leon. 264,
265.
1 Rol. 365.

THE Chamberlain of *London* brought an Action of Debt in *London* in the *Guild-Hall* there against divers Persons, &c. And it was grounded on an Act of Common Council, or Ordinance made by the Mayor, Aldermen and Commonalty of the City at their common Assembly (which they make by Custom, and which amongst others is confirmed by divers Acts of Parliament) by which it was ordained, That if any Citizen, Freeman or Stranger within the said City put any Broad-cloth to sale within the City of *London* before it be brought to *Blackwell-Hall* to be viewed and searched, so that it may appear to be saleable, and that Hallage be paid for it, *scil.* 1 *d.* for every Cloth, that he shall forfeit for every Cloth 6 *s.* 8 *d.* And further it was ordained, For such Forfeiture the Chamberlain of the City of *London* for the Time being should have an Action of Debt, &c. And because the Defendants had broke the said Ordinance, for the Penalty inflicted by the said Ordinance, the Chamberlain of *London* brought an Action of Debt in *London*, and it was removed by *Corpus cum Cause* into the King's Bench. And it was moved that those of *London* could not make Laws and Ordinances to bind the King's Subjects, and principally Strangers, for then they wou'd have as high Authority as an Act of Parliament: And 2. The said Ordinance (as it was urged) was against the Law, and the Freedom and Liberty of the Subject, to compel him to bring his Cloths to any one Place. 3. The Imposit. of 1 *d.* for Hallage was a Charge to the Subject, and by the same Reason that they may impose 1 *d.* they may impose 2 *d.* and so *in infinitum*.

And one of the Inner Temple of Counsel with the City moved to have a *Procedendo*. It appears by many Precedents, That it hath been used within the City of *London* Time out Mind, for those of *London* to make Ordinances and Constitutions for the good Order and Government of the Citizens, &c. consonant to Law and Reason, which they call Acts of Common Council. Also all their Customs are confirmed by divers Acts of Parliaments, and all such Ordinances, Constitutions or By-Laws are allowed by the Law, which are made for the true and due Execution of the Laws or Statutes of the Realm, or for the well Government and Order of the Body incorporate. And all others which are contrary or repugnant to the Laws or Statutes of the Realm are void and of no Effect: And as to such Ordinances and By-Laws, these Differences were observed; Inhabitants of a Town without any Custom may make Ordinances or By-Laws for the Reparation of the (a) Church, or a Highway, or of any such Thing which is for the general Good of the Publick; and in such Case the greater Part shall bind the whole without any Custom. *Vide* 44 *E.* 3. 19. But if it be for their own private Profit, as for the well ordering of their (b) Common of Pasture, or the like, there without a Custom they cannot make By-Laws: And if there be a Custom, then the greater Part shall not bind the less, if it be not warranted by the Custom. For as Custom creates them, so they ought to be warranted by the Custom. *Vide* 8 *E.* 2. *Affise* (c) 413. Also Corporations (d) cannot make Ordinances or Constitutions without a Custom, or the King's Charter, unless for Things which concern the publick Good, as Reparations of the Church or common Highways, or the like. *Vide* 44 *E.* 3. 19 8 *E.* 2. *Affise* 413. 21 *E.* 4. 54. 11 *H.* 7. 13. 21 *H.* 7. 20. & 40. 15 *Eliz.* *Dyer* 322.

And as to the Case at Bar many Statutes were made for the true Making of woollen Cloth, which is the principal Commodity of this Realm; and to the Intent that the said Statutes might be the better executed without any Deceit, the said Act of Common Council was made, that they shall be brought to *Blackwell-Hall*, as to a Place publick, and known, to the Intent they might be searched and viewed, if they were made according to the said Stat. So the said Ordinance being made for the better Observat. and Execut. of the said Laws, to prevent all Frauds and Falsities, was good (e) and allowable by the Law. Also the Assessing of the said (f) 1 *d.* for Hallage was good, because it was *pro bono publico*, and it was competent and reasonable, having regard to the Benefit

(a) *Postea* 67. b.
Hob. 212.
1 *Mod. Rep.*
194.

(b) *Cr. Car.*
498.
1 *Anderf.* 234.
1 *Leon.* 190.
Hob. 212.
Goldsb. 79.
Carter 178.
(c) 2 *Brownl.*
179.
3 *Leon.* 265.
Hob. 212.
(d) 1 *Rol.* 513.
Hob. 211.

(e) 1 *Rol.* 365.
3 *Leon.* 204.
265.
Hob. 212. *Mo.*
580. 2 *Jones* 145.
8 *Co.* 127. 3.
Blidg. 140. 141.
Pollexfen's *Arg.*
Cro. Arg. 22.

Pollexfen's Argument in Quo Warranto 81. *Hardr.* 56, 210. *Lane* 24. 1 *Rol. Reps.* 115. (f) 8 *Co.* 127. b. 2 *Brownl.* 287, 288. *Hardr.* 56, 210. Argument in Quo Warranto 81. *Trebie's* Argument in Quo Warranto 33. 1 *Rol.* 365.

which

Cases of By-laws and Ordinances. PART V.

(a) 11 Co.
54. 2.

which the Subject enjoyed by Reason of the said (a) Ordinances; and such Assesment being for the Maintenance of the public Good, and not *pro privato lucro*, were maintainable by the Law; and it was not to be called a Burthen or Charge to the Subject when he reaps a Benefit by it. But it is like Pontage, Murage, Toll, and the like, as appears in 13 H. 4. 14. b. in which Cases the Sum for Reparations of Bridges, Walls, &c. ought to be so reasonable, that the Subject shall have more Benefit thereby than Charge.

(b) 3 Leon. 265.
(c) 1 Rol. 366.

Also the Penalty inflicted on the Offender, be he Citizen or Stranger, was lawful, the Offence being committed within the City, and the Sum being competent and proportionable to the Offence, and without a Penalty the Ordinance would be in vain; for (b) *Oderunt peccare mali formidine pene*. And the Appointment of their (c) Chamberlain, being their public Officer of Debt to bring the Action of Debt was good, and allowable by Law; and the Ordinance being according to Law, may be put in Execution without any other Allowance, (d) notwithstanding the Statute of 19 H. 7. cap. 7.

(d) 1 Rol. 363.

And after great Deliberation *Wray* Chief Justice, by the Advice of the other Justices, granted a *Procedendo*. Vide 2 (e) E. 3. 7. *John de Brittain's Case*. The King may grant by his Charter, that all Manner of Ships coming to such a Haven laden with Merchandizes, shall be unladen at a certain Place, and not elsewhere, to the Intent he may be better answered his Customs and other Duties.

(e) Hard. 55.
2 Brownl. 179,
278.
1 Rol. Rep. 5.
Palm. 3.

*Trin. 38 Eliz.**In the Common Pleas.*CLARK'S *Case.*

IN an Action of false Imprisonment brought by *Clark* against *Gape*; the Defendant justified the Imprisonment, because King *E. 6.* incorporated the Town of *St. Albans* by the Name of Mayor, &c. and granted to them to make Ordinances: And shewed, that the Queen appointed the Term to be kept there, and that they with the Assent of the Plaintiff and other Burgeffes, did assess a Sum on every Inhabitant for the Charges in erecting the Courts there; and ordained, That if any should refuse to pay, &c. that he should be imprisoned, &c. and because the Plaintiff being a Burgeffs, &c. refused to pay, &c. he as Mayor justified; And it was adjudged no Plea, for this Ordinance is against the Statute of *Magna Charta, cap. 29. Nullus liber homo imprisonetur*; which Act hath been confirmed and established above 30 Times, and the Plaintiff's Assent cannot alter the Law in such Case: But it was resolved, that they might have inflicted a reasonable Penalty but not Imprisonment, which Penalty they might limit to be levied by Distress, or for which an Action of Debt lay, and the Plaintiff had Judgment.

1 Rol. 363;
366, 367, 599.
1 Jones 162.
8 Co 127. b.
2 Bultr. 328.
Stile 85.
Moor 411, 412;
580.
2 Inst. 54, 702.
Cr. Argument
22.
Bridg. 141, 142.
2 Brownl. 288.
Hob. 61.

*De termino Sancti Michaelis,
Anno regni Dominae Eliz.
Reginae Angliae 31 & 32 Ro-
tulo 447.*

JEFFREY'S Case.

Memorandum, quod die Lunæ proxim' post mensem sancti Michaelis isto eodem termino, coram Domina Regina apud Westmonaster', ven' Willihelmus Jeffrey generosus in propria persona sua, & dat cur' dict' Dominae Regine nunc hic intelligi, quod cum secundum legem terræ & consuetudinem hujus Regni Angl', a tempore cujus contraria memoria hominum non existit, infra idem Regnum habit', & usitat', inhabitant' & resident' infra aliquam parochiam infra regnum præd', infra quam quidem parochiam aliqua eccles' parochial' extitit, eccles' ill' sumptib' suis propriis quoties necesse fuerit repar', & a toto tempore supradict' reparare consuever' & debuer', & quod quaelibet alia persona seu persona inhabitans, seu inhabitant' extra paroch' illam in aliqua alia paroch', de factione hujusmod' reparation' a toto tempore supradict' exonerat' & acquietat' fuer', cumque etiam per legem terræ & consuetudinem præd' non licitum sit, alicui personæ sive aliquibus personis, imponere aliquam compositionem sive taxationem super aliquam personam non inhabitantem in aliqua paroch', ubi hujusmodi Ecclesia reparand' sit, in respect' seu ration' aliquor' terr' sive tenementor', quæ eadem persona tenet vel occupat in ead' parochia ubi hujusmodi ecclesia reparanda sit, ut supradict' est pro reparatione alicujus talis ecclesiæ sic irreparat' sine assensu suo, cumque etiam triatio & determinatio causæ præd' sit materia terminabilis ad communem legem, & non per jura seu censuras Ecclesiastic' quovismodo triari, terminari, & discuti debeat, nec a tempore cujus contrarii memoria hominum non existit consuevit: Quid' tamen Abrah' Kenshley & T. Foster Gardian' sive economi paroch' de Halesham in com' Suffex' asserint præmissor'

non ignari falso & subdole præd' præd' Will' Jeffrey fore inhabitantem infra paroch' de Haylesham prædict' (ubi revera prædict' Willihelmus Jeffrey est, & semper fuit inhabitans infra paroch' de Chiddingley in comitatu Suffex, & nunquam fuit inhabitans infra parochiam de Haylesham prædict') ac eandem Ecclesiam de Haylesham præd' per renen' & proprietarios terrar' & tenmentor' infra eand paroch' reparari oportere & debere, machinan' dictam Dominam Regin' nunc & coronam suam regiam exhæreditare, cognitionemque placit' quæ ad dict' Domin' Regin' nunc & coron' suam regiam, & non ad Cur' Christianitat' in hac parte pertinet, ad aliud examen in Cur' Christianitatis, traher' ipsum Willihelmum Jeffrey in Cur' Christianitatis præd' coram Johanne Drury legum Doctore, in & per totum Archim' Lewen reverend' in Christo patris Dom Thomæ provident' divin' Cicestren' Episcop' officiali principali rite deputat' ad promotionem prædictorum Abrahami & Thomæ Foster in hac parte, de & pro quadam taxatione super ipsum Willihelmum Jeffrey ad & circa reparationes Ecclesie de Haylesham prædictam imposit' citari fecer': Ac eundem Willihelmum in cur' Christianitat' præd' coram præfato Judice spiritali, comparere, eundemque Willihelmum sic comparentem ad respondend' quibusdam articulis de & pro taxatione prædict' videlicet de eo quod idem Will' Jeffrey scivit, credidit, vel audivit qd' infra Archim' Lewen in com' prædict' fuit quadam Ecclesia communit' vocat' *The Parish Church of Haylesham*: Et qd' eadem Eccles. parochial' in quamplur' partibus ejusd' Ecclesie tam in tegumento quam in cooperimento ejusdem quam aliis indiguit & indigebat: Ita ut nisi repararet', ruinam pati verend' fuisset, quodq; tam de jure communi quam de antiqua laudabili & præscripta consuetudine, necnon a tempore & per temp' cujus contratii memoria hominum non existit inviolabilit' & inconcussa usitat' & observat' fuit infra paroch' de Haylesham prædict' quod omnes & singuli parochian' reparation' Eccles. alicujus irreparat' intendunt' juxta ratam & qualitatem possession' in eadem paroch' habent' vel occupant', cuilib' infra dict' paroch' possessiones habend' & obtinend' collection' sive taxation' imponere potuissent & debuissent. Ac etiam qd' dict' Eccles. matura deliberat' præhabuit non minor' summ' sexagint' decem lib' legal' monet' Angl' sufficient' reparari potuit, necnon qd' Guardiani Eccles. paroch. de Haylesham prædict' pro tempore existen' anno Domini millesimo quingentesimo octogesimo nono & duobus annis tunc proxim' præteritis, de & in consensu omnium parochianor' de Haylesham prædict', seu majoris & melioris partis eorund' quandam contribution' juxta quantitatem & qualitatem possession' prædict' & reddit' infra dict' paroch' existent' in præd' Ecclesie reparation', possession'

Cases of By-laws and Ordinances. PART V.

præd', seu reddit' in ead' paroch' omnib' & singul' habend' & obtinend', imponend' & de eisd' taxand' decrevisset, diemq; & locum pro hujusmodi contribur' & taxatione faciend' statuisset; quodq; eod' die, quo dict' contributio imponenda foret præceden' omnib' parochianis præd', necnon forensibus, terras præd' possession', seu reddit' in paroch' de Haylesham præd' habend' & obtinend', in dict' parochia de Haylesham præd' necnon in foro publico ibid' adfuisset concursus populi quibus die & loco contributio præd' & taxatio faciend' & imponend' esset. Ac quod die & loco statut' pro impositione præd' taxationis, sive contributionis, ill' Gardiani, necnon parochiani dict' parochiæ ad hujusmodi contribution', sive taxation' faciend' processer'. Ac summ' quatuor denar' de qualib' acr. voc' *Parishland*: necnon summam duorum denar' legalis monet' Angl' de qual. acr. terr. voc' *Upland*, infra dict' paroch' de Haylesham præd' existen', in reparation' dict' Eccles. per habentes & occupatores dictar' acr. dict' Gardianis solvend' imposuer'. Necnon qd' idem Willielm' trigint' acr. Marisci voc. *Parishground*, & centum acr. terr' voc' *Upland*, infra paroch' præd' tenuit, occupavit, seu reddit' pro eisd' ad tunc recepit. Ad qd' summæ ab occupatoribus & habentibus possession' præd', sive reddit' infra dictam paroch' de Haylesham præd' juxta collection', sive taxation' præd' levand' & colligend' non ultra summam quinquagint' libr' legalis monet' Angl' extendebant, sub nomine & colore officii sui (ut præfertur) de & in præmissis respondere minus juste astrinxit. Ac licet idem Willielm' Jeffrey materiam præd' superius content' in Cur' Christianitat' præd' coram præfat' judice spiritual' in exoneration' suam in præmissis sæpius pl'itaverit, allegaverit, & illa inevitabili veritate & testimon' probare obtulerit, quodq; ipse per legem terræ in form' præd' citari non debuisset, pro solutione præd' summæ super ipsum Willielm' Jeffrey, pro reparationib' Eccles. de Haylesham præd', ut præfertur taxat', ac qd' taxatio præd' pro reparationib' Eccles. in casu præd' existit materia terminabil' ad communem legem & non in Cur' Christianitat': dict' tamen judex spiritualis pl'itum, & allegac' illam admittere penitus recusavit, ac præd' Abraham' & Thom' Foster ipsum Willielm' Jeffrey in Cur' Christianitat' præd' in præmissis condemnari, ac ad solvend' præd' separales denar' summas super ipsum Willielm' Jeffrey pro reparatione Ecclesiæ præd' superius in hac parte spec' imposuit & taxat' quas ipse per legem terr' (ut præfertur) solvere occasione præd' non debeat, seu tenetur facere per definitivam dict' Cur' Christianitat' sententiam totis suis virib' conantur & indies machinant', in dict' Dom' Reg' nunc contemptum, & ipse W. Jeffrey damnus, præjudic', depauperation', & gravamen manifest', & contra legem terræ præd': Et hoc idem W. Jeffrey parat' est verificare, unde idem Will' Jeffrey auxilium &

& munificenc' cur' dictæ Dom. Reg. nunc hic humillime implorando pet' remedium, & b're Dom' Reginae de prohibitione præfat' judici spirituali in forma præd', ad prohibend' ipsum ne ipse pl'itum præd', præmiss' quovismodo tangen', coram eo ulterius teneat. Et ei conceditur, &c. Et super hoc ven' Johannes Porter de Chiddingly in com' Suffex armiger, & Thomas Aynscombe de Buxted in com' præd' gen', in propriis personis suis, & manuceper' pro præfat' Will. Jeffrey, qd' si conting' præd' Abr' Kenshley & Tho' Foster ad cur' Dom' Reg' hic imposte' accedere ad b're Dom' Reg. de consultatione impetrand', seu aliter. Justic' ibid' de & sup' præmiss' prosequend', qd' tunc idem Will' dict' materiam sive suggestionem prosequatur cum effectu, quousq; placit' inde aliquo legitimo modo terminent', videlicet, uterq; manucapt' præd' sub pœna decem libr', quam quidem summam decem libr', præd' manucapt' cogn' & uterque eorum per se cogn', de terræ & catall' suis & eorum cujuslibet fieri, & ad opus dict' Dom' Reginae levari, si conting' dict' Will. præmiss' non prosequi in form' prædict' cum effectu, &c.

Mich. 31 & 32 Eliz.

In the King's Bench.

JEFFREY'S Case.

Cr. El. 659.
Hob. 212.
1 Mod. Rep. 261.
Hadr. 372.

William Jeffrey Gent. brought a Prohibition against *Abraham Keusley* and *Thomas Foster*, and declared, that by the Law of this Realm, the Parishioners of every Parish where they are dwelling ought to repair their own Church, and not the Parishioners of any other Parish, &c. The said *Thomas* and *Abraham* being Churchwardens of the Parish of *Haylesham* in the County of *Sussex*, had sued the Plaintiff in the Spiritual Court before Doctor *Drewry* in the Diocese of *Chichester* for certain Monies imposed on the said *William Jeffrey* without his Assent for 30 Acres of Marsh, and 100 Acres of Land which the said *William Jeffrey* had, and occupied in the said Parish of *Haylesham*, for the Reparation of the Church of *Haylesham*, and had constrained him to answer to certain Articles, *scil.* that the said Church was in Decay, and that it could not be repaired for less than 70*l.* And that the said Churchwardens of the said Church for the Time being, *anno Dom.* 1589, and two Years before, with the Assent of the greater Part of the Parishioners of the said Parish, *juxta quantitatem & qualitatem possessionis & redditus infra dictam parochiam existentis*, determined and agreed to make a Taxation for the Repair of the said Church; and that Notice of such Meeting was given in the said Church, and also proclaimed in the Market; and that at the Day so appointed, the Churchwardens and the greater Part of the Parishioners of *Haylesham* who were there met together, made a Tax, *scil.* of every Acre of Marsh-Land 4*d.* and of every Acre of arable Land 2*d.* to be paid by the Occupiers of them in *Haylesham* aforesaid; and that the said *William Jeffrey* the said 30 Acres of Marsh, and 100 Acres of Land occupied, or received Rent for them; and that all the said Tax of the said Town did not exceed the Sum of 50*l.* And further declared, that the said *Will. Jeffrey* was at the Time of the said Tax, and long Time before, and yet is an Inhabitant of the Parish of *Chiddingly* within the said County of *Sussex*, and never did inhabit within the Parish

of

of *Haylesbam*, and that he had pleaded the said Matter in the Spiritual Court, and the Judge refused to allow it. And on this Declaration, *Coke* of Counsel with the Defendant did demur in Law. And after many Arguments at the Bar and Bench it was adjudged, That a Consultation should be granted. And in this Case these Points were resolved.

1. That the Spiritual Court (a) has Conusance *de reparatione corporis sive navis Ecclesie*; and that appears by *Britton* who wrote in 5 E. 1. lib. 1. cap. 4. fol. 11. and in the Stat. *de circumspicte agatis, &c.* but *in rebus manifestis errat qui auctoritates legum allegat, quia perspicue vera non sunt probanda*, because he who endeavours to prove them obscures them. And it was objected, That the Reason why every Parishioner is charged to the Reparations of the Church, and to provide convenient Ornaments in it for the greater Convenience and Honour of Divine Service, is first for the spiritual Comfort which he has in Hearing the Word of God there for his Instruction in the true Way to Heaven in Celebration of the Sacraments, and in presenting to God their Prayers, not only privately, but with the great Congregation to be thankful to God for all his Benefits, and to desire of him all Things necessary, &c. in Respect of which inestimable Benefits, he is chargeable to repair his own proper Church in which he receives them. But shall not be bound to the Reparation of any other Church in another Parish in which he doth not inhabit. And the Description of this Word (*Parochia*) was observed, *Parochia est locus in quo degit populus alicujus Ecclesie.*

2. It was objected, That it would be hard to charge the said *Jeffreys* to such Tax, because he was dwelling in another Town, and never consorted with them of *Haylesbam* at any of their Assemblies or Assessments for such Purposes.

3. It was objected, That the Libel in the Spiritual Court against the said *William Jeffrey* was in the Disjunctive, that the said *William Jeffrey* occupied the said Lands, or received Rent for them, on which Libel if *Kensbley* and *Fester* should have a Consultation, although *Jeffrey* doth not occupy the Lands himself, but a Farmer in *Haylesbam* who pays to him Rent, that yet *Jeffrey* might be charged, which would be against Law and Reason, and against the common Experience of all *England*. It was answered and resolved first, That although the House wherein *Jeffrey* dwelt be in another Parish, yet forasmuch as he had Lands in the Parish of *Haylesbam* in his proper Possession and Manurance, he is in Law *Parochianus de Haylesbam*. For the Place where he lies, sleeps, or eats, doth not make him Parishioner only; but also forasmuch as he manures Lands in *Haylesbam*, and by that is resident upon it, that makes

The Resolution of the Court.

2 Rol. 289.
 Cr. El. 659.
 343. 2 Rol. Rep.
 262. 2 Inst. 653.
 702. Winch. 53.
 2 Brownl. 10.
 1 Bullstr. 20.
 2 Saund. 423.
 Salk. 164.
 Comb. 113.

Cases of By-laws and Ordinances. PART V.

him a Parishioner of *Haylesbam* also as to this Purpose.

2. If in this Case *Jeffrey* should not be charged to the Reparation of the Church of *Haylesbam*, for those Lands which he himself occupies there, no Person would be charged for them, upon which great Inconven. would ensue; for one who inhabits in the next Town, may occupy the greatest Part of the Lands in another Town; and so Churches in these Days will come to Ruin: But it was resolved, when there is a (a) Farmer of the same Lands, the Lessor who receives Rent for them shall not be charged for them in Respect of his Rent, because there is an Inhabitant and Parishioner who may be charged; and the Receipt of the Rent doth not make the Lessor a Parishioner.

(a) 2 Rol. 289.
Cr. El. 659.
2 Ro. Rep. 270.

3. In this Case the Charge is on the Person, and not on the Land, but is on the Person in Respect of the Land, for the more Equality and Indifferency. *Vide Regist. 44. b. inter consultations. Consultatio ad procedenda contra parochianos super emendationem corporis sive navis Eccles. &c. ubi prohibitio de laico feodo prius porrecta fuit*, which is to be intended when the Tax was of the Person in Respect of his Lay-Fee.

4. Altho' he dwells in another Town, yet forasmuch as in Judgm. of Law he is an Inhabitant and Parishioner of *Haylesbam*, he may come, if he will, to the Assemblies of the Parishioners of *Haylesbam*, when they meet together for such Purposes: And Sir *Christ. Wray* Ch. Justice said, That forasmuch as the Consuance of the Reparations of Churches doth not belong to the Spiritual Court, it was necessary to hear the Opinion of those who profess the Ecclesiastic Law as to this Point; and so it was done. And thereupon divers of them under their Hands in Writing did certify their Opinions, That *Jeffrey* by their Law was a Parishioner of *Haylesbam* as to this Purpose, and chargeable to the Reparations of the (b) Church of *Haylesbam*: And that the Churchwardens and greater Part of the Parishioners (on such general Warning) met together, might make such a Tax by their Law, and that it don't charge the Land but the Parson in Respect of the Land for Equality and Indifferency.

(b) 1 Mod. Rep.
194. Hob. 212.
Antea 63. a.

5. As to the Objection, that the Libel was in the Disjunctive, &c. It was answered and resolved, That altho' the (c) Libel be so, yet the Defendants should have a special Consultation only in Respect of such Lands which the said *W. Jeffrey* at the Time of the said Tax had in his own Hands, and so much the rather because the said *Jeffrey* has confessed in his Declarat. on the said Prohibit. that he himself at the Time

(c) Hob. 115,
392.

of the said Tax, &c. had the said Lands in his own Occupation. And a special Consultation was awarded: And this was the first leading Case that ever was adjudged and reported in our Year-books as to this Matter.

And afterwards *Pasch.* 41 *Eliz.* between *Paget* and *Baump* in the King's Bench in the Time of *Popham* Ch. Justice, the Point came again in Question on a like Tax, a Prohibition being obtained after many Arguments and great Deliberation, at length on View of the Record of this Case at Bar, which was adjudged in the Point, it was resolved again by *Popham* Chief Justice and the whole Court, that a Consultation should be granted according to this Judgment; and now it is generally allowed and received for Law.

This is a good Case to many Purposes, and therefore observe well the Consequences of it. Nota.

Mich. 33 & 34 *Eliz.*

In the Court of Wards.

The Lord CHEYNEY's Case.

SIR *Thomas Cheyney* Knight Lord Warden of the Cinque Ports, 1 *Eliz.* made his Will in Writing, and thereby devised to *Henry* his Son divers Manors, and to the Heirs of his Body, the Remainder to *Thomas Cheyney* of *Woodley*, and to the Heirs Males of his Body, on Condition *that he or they, or any of them shall not alien, discontinue, &c.* And it was a Question in the Court of Wards, between Sir *Thomas Perot* Heir general to the Lord Warden, and divers of the Purchasers of Sir *Tho. Cheyney*, if the said Sir *Tho.* should be received to prove by Witnesses that it was the Intent and Meaning of the Devisor to include his Son and Heir within

M. or 727, 728.

W. in G. Max. 15.

K. 4

these

The Lord CHEYNEY'S Case. PART V.

these Words of the Condition (*he or they*) and not only to restrain *Thomas Cheyney* of *Woodley* and his Heirs Males of his Body: But *Wray* and *Anderſon* Ch. Juſtices on Conference had with the other Juſtices reſolved, That he ſhould not be received (*a*) to ſuch Averment out of the Will, for the Will concerning Lands, &c. ought to be in Writing, and the Conſtructions of Wills ought to be collected from the (*b*) Words of the Will in Writing, and not by any Averment out of it; for it would be full of great Inconvenience, that none ſhould know by the written Words of a Will, what Conſtruction to make, or Advice to give, but it ſhould be controlled by collateral Averments out of the Will: But if a Man has (*c*) two Sons both baptized by the Name of *John*, and conceiving that the Elder (who had been long abſent) is dead, deviſes his Land by his Will in Writing to his Son *John* generally, and in Truth the Elder is living, in this Caſe the Younger Son may in Pleading or in Evidence alledge the Deviſe to him, and if it be denied, he may produce Witneſſes to prove his Father's Intent, that he thought the other to be dead; or that he at the Time of the Will made, named his Son *John* the Younger, and the Writer left out the Addition of the Younger: For in 47 E. 3. 16. *b.* the Caſe was; *Robert Peynel* had Iſſue two Sons baptized by the Name of *William*, and (*d*) levied a Fine to Sir *John Fanningbridges* and others *come ceo*, &c. who granted and rendered to *Robert* and *William* his Son generally; and after the Death of *Robert*, *William* the younger Son brought a *Scire facias* againſt the Heir of *William* the Elder; and the Younger by the Rule of the Court averr'd that the Fine was levied to make him Heir ready, and upon that Iſſue was taken. And no Inconvenience can riſe if an Averment in ſuch Caſe be taken in Caſe of a Deviſe, by Will, for he who ſees ſuch Will, whereby Land is deviſed to his Son *John*, cannot be deceived by any ſecret inviſible Averment; for when he ſees the Deviſe to his Son *John*, he ought at his Peril to inquire which *John* the Teſtator intended, which may eaſily be known by him who wrote the Will, and others who were privy to his Intent; and if no direct Proof can be made of his Intent, then the Deviſe is void for the Incertainty, as the Renter alſo would be in the ſaid Caſe of the Fine, as to *William*, for the Law will not make the one or the other by Conſtruction inheritable, for neither the elder Son ſhall have it by Courſe of Law, becauſe the Elder need not have an Addition; nor ſhall the Younger have it by Conſtrict. by Reaſon the Father need not have limited the Land to the Elder, becauſe the Land after the Death of the Father would deſcend to the Elder. But he ſhall have it whom the Father intended to advance with it, and for Want of Proof of ſuch Intent, the Will or the Renter for the Incertainty (as hath been ſaid) is void; and ſo the Doubt in 11 H. 6. 13. well explained.

Cafes

(a) 1 Rol. 422.
Wing. Max. 15.

(b) 4 Co. 4. a.
Larch. 42.

Jenk. Cent. 115.
Cr. El. 498.

Moor 222.
2 Bulfr. 177,

178. Bridg. 135.
Godb 432. Lit.

Rep. 185.
Hurr. Arg. 49,

50. Srile 293,
294. Wing.

Max. 22.
Raym 410, 411.

2 Leon. 70.
2 Brownl. 132,

191.
Salk. 235.

(c) 1 Brown. 132.
Srile 293.

Moor 105.
2 Leon. 217.

Swind. 108.
Hob. 32.

(d) 3 Co. 155. a.
Br. Nefm. 63.

Cr. Eliz. 531.
Br. Fine 28.

Fitz. Feoffm. 56
Kelw. 49. a.

(e) 1 Bu. fr. 62.
Swind. 108.

Cases of Usury.

Mich. 33 & 34 Eliz.

In the King's Bench.

BURTON'S Case.

IN a Replevin brought by *Humphrey Burton* against *H. H.* he avowed, because *Tho. Woodhouse* Esq; was seised of the Place where, &c. containing 10 Acres in *Hicklyn* in the County of *Norfolk*, *inter alia*; and so seised 17 *Julii* anno 21 *Eliz.* by his Deed granted to *A. G.* Esq; a Yearly Rent of 20*l.* issuing out of the Place where, &c. *inter alia*, to perceive to him and his Heirs at the Feasts of the Nativity of Christ and *St. John Baptist* Yearly to be paid; The first Payment to begin at the Feast of the Nativity of Christ, which shall be in *Anno Domini* 1580. And afterwards *A.* by Deed acknowledged before Justices of Peace, and Clerk of the Peace of the said County, and enrolled according to the Statute, did bargain and sell the said Rent to the Defendant and his Heirs, who for the Rent behind did avow: The Plaintiff in Bar of the said Avowry, pleaded the Statute of Usury, and alledged, that the said 17 *Julii*, anno 21, *inter eosdem Thomam Woodhouse, & A. G. taliter concordatum fuit per viam corruptæ barganiæ*, scil. quod prædictus *A. mutuo daret præfat' Thomæ Woodhouse centum libras, & quod idem Thomas concederet* to the said *Anthony* and his Heirs the Rent of 20*l.* under Condition, That if the said *Thomas* should pay to the said *A.* 100*l.* 17 *Julii*, 1580. that then the said Rent should cease; on which corrupt Agreement *Thomas* there then received the said 100*l.* and there then granted the said Rent accord-

37 H. 1. c. 9
13 El. c. 8.
Co. Lit. 3. b.

ingly

ingly under such Condition as is aforesaid, according to the said Agreement; *Qui quidem annuus redditus pro præd^o 100l. in forma præd^o solubil^{is} excedit secundum rat^{em} 10l. pro 100l. pro uno anno, contra formam Statuti, &c.* and conveyed a Lease of the Land to the Plaintiff for 21 Years. And note the Distress was taken 27 *Decemb. anno* 33. for 20l. behind at *Midsummer* then past; upon which the Avowant did demur in Law; and Judgment was given for the Avowant. For altho' it was objected, That the Plaintiff in his Bar to the Avowry hath alledged, that the said Grant was on a corrupt Contract against the Statute, and the Avowant hath demurred thereupon, by which he hath confessed all Matters in Fact, yet because on the Matter disclosed in the Bar, it appears to the Court, that it was not a corrupt Contract against the said Statute, and so his Allegation of it repugnant to the Matter shewed by himself in his Bar to the Avowry; and a Demurrer is not a Confession of all Matters in Fact, but of all such Matters in Fact which are well and sufficiently pleaded; for this Cause Judgment was given for the Avowant.

1 Brownl. 124.
Co Lit. 72. a.
Hob. 56, 164,
199.
Cr. Arg. 10.
Hurr. Arg. 57.
3 Co. 52. b.
Doff. pla. 116.

And the Cause that it was not against the Statute of Usury was, That nothing was to be paid by *Thomas Woodhouse* the Grantor within a Year and a Quarter after the Grant made; for within the 17 of *July* 1579. and *Christmas* 1580. no Rent is appointed to be paid. And if the Grantor had paid the 100l. the 17th of *July* 1580. the Rent should cease without any Thing paying for the said 100l. So that the Court said, It was a plain Bargain, and Purchase conditional of such Rent, and no Usury. It was in the Election of the Grantor to have paid the said 100l. and to have frustrated the Rent, so that the Grantee (as the Nature of Usury is) was not assured of any Recompence for the Forbearance of his 100l. for a Year, and the said Rent of 20l. *per Annum* is but a Penalty to the Grantor, and Assurance to the Grantee for the Payment of the said 100l. But it was resolved by the whole Court, That if it had been agreed between the Grantor and the Grantee, that notwithstanding such Power of Redemption, that the 100l. should not be paid at the Day, and that the Clause of Redemption was inserted to make an Evasion out of the Statute, then it had been an usurious Bargain and Contract within the said Statute. For if in Truth the Contract be usurious against the Statute, no Colours or Shews of Words will serve, but the Party may shew it, and shall not be concluded or estopped by any Deed, or any other Matter whatsoever; for the Statute gives Averment in such Case.

1 Bulst. 36, 37.
Cr. Jac. 253,
509.
Cr. El. 27, 28.
1 Jones 410.
Hard. 418.
1 Sid. 28, 182.
Co. Lit. 3. b.
Postea 70. b.

2 And. 15, 16.
Postea 70. a.

And *Popham* Ch. Just. said, If *A.* comes to *B.* to borrow 100l. *B.* lends it him, if he will give him for the Loan of it for

for a Year 20*l.* if the Son of *A.* be then alive, this is Usury within the Statute; for if it should be out of the Statute for the Incertainty of the Life, the Statute would be of little Effect: And by the same Reason that he may add one Life, he may add many; and so like a Mathematical Line, which is *divisibilis in semper divisibilia.*

Noy 151.
Hard. 418.
Cr. Jac. 209.
253, 508, 509.
Cr. El. 643.

Pasch. 37 Eliz. Rot. 1915.

IN THE

COMMON PLEAS.

CLAYTON'S Case.

Between *Reighnolds* Pl. and *Clayton* Defend. in an Action of Debt on a Bond of 60*l.* the Case was, *Clayton* requested *Reighnolds* to lend him 30*l.* and on Communication betwixt them, *Reighnolds* doth lend *Clayton* 30*l.* 6 Decemb. 34. Eliz. until the second Day of *June* next following, to pay him for the Principal and Loan of it 33*l.* at the said second Day of *June*, if the Son of the Obligee be then alive, and if he die before the said Day, that then he shall pay him but 27*l.* which was 3*l.* less than the Principal. And it was resolved by the whole Court, That it was an usurious Contract within the Statute, according to the Opinion of *Popham* Ch. Justice before, and for the Reasons there given by him, *Usura dicitur ab usu, & ere, quasi usuera, i. e. usus eris: Et Usura est commodum certum, quod propter usum*

Co. Ent. 168.
pl. 42.
2 And. 15, 16.
Moor 397.

1 Bulstr. 36, 37.
Palm. 547.
Moor 397,
2 And. 15, 16.
Cr. Jac. 209,
252, 253, 508,
509.
Co. Lit. 3. b.
Antea 69. b.
1 Sid. 28, 182.
3 Inf. 151.

usum rei mutuata recipitur. And this Description agrees with this Judgment: For if on the first Contract he who lends reserves no certain Sum for the Loan; but *secundario speret de aliqua retributione ad voluntatem ejus qui mutuatus est, hoc non est vitiosum.* Vide *Ganvile lib. 7. cap. 16, & lib. 10. cap. 1.* what was the old Law of this Land concerning Usury. *Vide etiam Leges Sancti Edwardi, &c.*

Pasch. 34 Eliz.

In the King's Bench, Rot. 275. in Debt.

H O E ' s C a s e .

(a) Cr. El.
579, 580.
Goldsb. 166,
167, &c.
Moor 469.
(b) 2 Bullst.
231, 286.
Poph. 136.
Goldsb. 168.
Moor 469.
Winch. 56.
Cr. El. 580.
Cr. Jac. 171,
401, 451, 623.
10 Co. 48. a.
51 a.
Hutr. 12, 17.
2 Sid. 141.
Co. Lit. 265. b.

I N an Action of Debt brought by (a) *Hoe* in the King's Bench, *Phelix Marshal* was bail for the Defendant; and afterwards before any Judgment, the Plaintiff released to *Phelix* all Actions, Duties, and Demands; and afterwards Judgment was given against the Defendant, and on Default of the Def. a *Scire facias* issued against *Phelix Marshal*, who pleaded the said general Release; upon which the Plaintiff demurr'd. And it was adjudged that this (b) Release should not bar the Plaintiff; for the Words of the Bail are conditionally, that is to say, *Si contingeret predicti defendantem debitum & damnum ill' præsat' quer' minime solvere, aut se prisonæ Mareschall' ea occasione non reddere, &c.* so that there can be by the said Bail no certain Duty till Judgment be given, for before that none can know to what Sum the Debt and Damages will amount: so he who is bail for the Def. is not bound in any certain Sum at first: But his Recognizance being general, shall be reduced to a Certainty by the Judgment, and not before; And therefore there is a (c) Difference between a certain Duty on Condition subsequent, for that may be released before the Day

(c) 1 Rol. Rep.
256, 311, 386.
1 Co. 111. b.
Co. Lit. 274. b.

of a Performance of the Condition, and a Duty uncertain at first, and on Condition precedent to be made certain after; that in the mean Time is but a meer Possibility, and therefore cannot be released, for this Recognisance doth not create a Duty presently, but shall produce a Duty after on a *Contingat*.

Note, That it was adjudged, *Trin. 4 Eliz. Rot. 1207.* in the Common Pleas, That by a Release of all Actions, Suits, and Quarrels, a (a) Covenant before the Breach of it is not released, because there is not any Cause of Action, nor any certain Duty before the Breach of it, but the Breach of it ought to precede the Action, and the Cause of the Duty, and for this Cause such Release was no Bar. *Vide Dyer 5 Eliz. (b) 217. acc.* And *vide Littleton* in his Chapter of (c) Warranty 170. That by a Release of all Demands a Warranty (which is a Covenant real) as is there said, is extinct, yet it is executory and incertain; But there the Feoffee to whom the Warranty is made may presently have a *Warrantia Chartæ*, and bind the Land *pro loco & tempore*. But see 35 H. 8. *Dyer 57.* that by a Release of (d) Covenants, the Covenant is discharged before the Breach of it, which is proved by *Littleton* also, *fol. 170. &c. 16 E. 3. Barr. 245.* A Woman had Title of Dower, and releases to him in the Reversion, and afterwards Tenant for Life surrendered to him, and it seemed a good Bar; and yet the Woman had no Cause of Action against him in the Reversion at the Time of the Release made. But the Reason is because the Woman had Right to the Land, and he in the Reversion had an Estate on which a Release might enure, and by Recovery of her Dower his Estate would be charged, 21 H. 7. the last Case. A Release in Time of (f) Vacation to the Patron, discharges an Annuity with which the Parson is charged in Respect of the Parsonage. *Vide 40 E. 3. 22. 18 E. 3. Avowry 77. 13. R. 2. Avowry 89. 14 H. 4. 4. Recordare longe.*

(a) 1 Co. 112. b. 8 Co. 153. b. 10 Co. 51. b. Co. Lit. 291. b. 292. b. Cr. Jac. 170. Moor 34. 2 Bullf. 231. Yelv. 156. Hurt. 17. And. 8. Goldsb. 166, 167. (b) 8 Co. 151. b. 153. b. 4 & 5 Eliz. Dy. 217. pl. 2. N. Bendl. 126. pl. 190. 1 And. 8. Co. Ent. 115. pl. 5. Goldsb. 160, 167. Hurt. 12. Cr. Jac. 487. Yelv. 156. (c) 1 Co. 112. b. 8 Co. 154. a. Lit. sect. 748. Lit. 171. a. Co. Lit. 392. b. Cr. Jac. 170. (d) Poph. 136. Hurt. 17. 1 Co. 112. b. 10 Co. 51. b. 154. a. Co. Lit. and Chapter 11-57.

Palm. 218. Yelv. 156. 2 Rol. 404. (e) 1 Co. 112. b. 8 Co. 151. a. b. 265. a. Doctrin. placit. 149. (f) 21 H. 7. 41. a. Br. Release 33. Br. Dean 1 Co. 112. b. Poltea 81. b. 2 Rol. 340. Co. Lit. 266. a. Fitz. Release 57.

Trin.

Trin. 34 Eliz.

In the King's Bench.

SEINT JOHN'S Case.]

Cf. El. 821,
822.

Gardener had a Judgment in the King's Bench against one *Seint John* of the County of *Bedford*, and had a *Capias ad satisfaciend'* against him, and got a Warrant from the Sheriff to a special Baily to arrest him, who came near the said *Seint John's* House to arrest him, and because he feared Resistance he brought with him a Dagge. And *Seint John* being then a Justice of Peace of the said County of *Bedford*, having Notice of it, sent one of his Servants for him, who finding him armed with a Dagge, arrested him, and brought him before the said *Seint John* being the next Justice of Peace; who on Examination of the Matter committed him to the next Gaol, there to remain till he had paid 10*l.* one Moiety to the Queen, and the other Moiety to the Informer, according to the Statute of 33 *H. 8. cap. 6.* which prohibits *the Shooting in, or carrying, &c. of any Hand-gun.* And it was objected, that a Dagge was not within this Word *Hand-gun*; for it was said, That Daggess were not in Use at the Time of the Making of the said Act, but invented after; and although they are used with the Hand, yet it is not known by the Name of *Hand-gun*, no more than *Hagbut*, or *Demybake*, which were also used with the Hand, but notwithstanding are known by particular Names, and are not comprehended within this Word *Hand-gun*: For they are both particularly named with the *Hand-gun* in the Stat. So a Dagge is distinguished by special Name from a *Hand-gun*. Wherefore for both these Reasons, 1. That it was not in Use at the Time of the Making of the Act; 2. That it was known by a special Name, It was objected, that this Carrying of the said Dagge was not within the said Act. But it was resolved by the whole Court, that it was within the said Stat.

and comprehended within this Word (*Hand-gun*) for altho' no Gun was known by the Name of a *Dagge* at the Time of the Making of the said Act, and altho' in common Speech a *Dagge* is known by a special Name, yet forasmuch as he who made the *Dagge*, had his Invention from the *Hand-gun*, and it is not of any new Kind in Substance, but has only a little Alteration in Form and Quality, for this Cause it is comprehended within this Word (*Hand-gun*;) for if a little Alteration or Addition should defeat the Penalty of the Act, the Statute would be of small Effect. And it has been explained by sundry Proclamations, That Pistols, *Dagges*, &c. were within the said Act: And it was said, That where the said Act doth prohibit *Cross-bows*, thereby *Stone-bows* are also prohibited, *causa qua supra*. And the Preamble of the said Act speaks of a little *Handgun*. But it was resolved for another Cause, That the Carrying of this *Dagge* was not prohibited by the said Act, for the Sheriff, or any of his Ministers, for the better Execution of Justice, may carry with them *Hand-guns*, or other Weapons invasive or defensive, and the same is not restrained by the general Prohibition of the said Act. *Vide 3. H. 7. 1. a.*

Cr. El. 822.
Hard. 484.3 Inst. 160.
Cr. El. 822.

Cr. El. 822.

Mich:

Mich. 34 & 35 Eliz.

In the King's Bench.

WILLIAMS'S Case.

Salop.

Cr. El. 664.
1 Rol. 110.

T Thomas Williams Esquire brought an Action on the Case in the King's Bench against *Henry Jones* Clark, and declared where the said *Henry* being Vicar of *Alderbury* in *Comitat' prædict'*, ought and is bound by himself or by another Chaplain to celebrate Divine Service at *Wollaston* in his Chapel of *St. John* within the Scite and Precinct of his Manor of *Wollaston* aforesaid, and within the Parish of *Alderbury* aforesaid, there of antient Time built, every Sunday *per annum*, and every Feast-Day *per annum*, before Noon of the same Days, and to administer the Sacraments to the said *Thomas*, *hominibus*, *tenentibus* & *servientibus suis infra præinctum ejusdem manerii inhabitant' & commoran'*. *Idemq;* Hen' Vicarius & omnes prædecess. sui Vicarii Ecclesiæ paroch' de *Alderbury præd'*, a tempore cujus contrarii memoria homin' non existit, per seipsum vel hujusmodi Capellanum ad celebrand' divina servitia in forma prædicta in Capella præd', ac sacrament' & sacramentalia præfat' *Thom' Williams* & antecessor' suis, ac omnibus illis quorum statum *idem Thomas* modo habet, ac hominibus servientibus, & tenentibus suis *infra dictum scitum manerii præd'* commorantibus, per totum annum ministrand' vel administratur' annuatim exhibere & sustentare consueverunt. Prædictus tamen *Henricus Jones* nunc Vicarius Ecclesiæ parochialis de *Alderbury præd'*, per seipsum vel hujusmodi Capellan' divinum servitium in Capella præd' in forma præd', ac ad Sacramenta & sacramentalia eidem *Thom'* ac hominibus, servient' & tenent' suis *ibidem* in forma præd' ministrand', licet sepius requisit', per magnum tempus, videlicet, a festo Pentecost' ultim' præterit' ante exhibition' hujusmodi billæ, usque exhibition' hujusmodi billæ, exhibere & sustentare recusavit, unde dicit quod deterioratus est, &c. And the

Defendant

Def. pleaded, Not guilty; and was found Guilty: And after divers Motions in Arrest of Judgment, and the Matter well debated at the Bench; at last it was resolved by *Popham* Chief Justice, and the whole Court, that in this Case an Action on the Case (a) did not lie, but the Remedy which the Plaintiff has is to sue in the Spiritual Court: But if the Chapel had been (b) private only for himself and his Servants and Family within the said Manor, there a private Action on the Case on the Prescription would be maintainable by the Lord of the Manor, &c. for in such Case he himself only (and none of his Family) should have the Action; and altho' the divine Service be spiritual, yet forasmuch as it doth by Prescription belong to a private Person, and to be celebrated for his Ease within his Manor, which shall be intended to begin at first by Grant, therefore for the not Doing of this spiritual Service an Action on the Case lies, and Damages shall be recovered for them; and therewith agrees 22 H. 5. 46. in the Prior of (c) *Woolburn's* Case. But when the Chappel is not (d) private to him and his Family, but publick and common to all his Tenants of the same Manor, which may be many and of great Number; there no Action on the Case lies for the Lord, for then every of his Tenants might also have his Action on the Case as well as the Lord himself, and so infinite Actions for one Default, *Et (e) boni Judicis est, lites dirimere, & (f) expedit reipublicæ ut sit finis litium propter communem omnium utilitatem*; and yet they shall not be without Remedy in such Case, for (as it hath been said) they may and ought to sue for such Default in the (g) spiritual Court, and there it shall be redressed, and herewith agrees *Lit. lib. 2. cap. Frankalmoigne* 30 b. *Vide* † 27 H. 8. 27. a. A Man shall not have an Action on the Case for a Nufance done (b) in the Highway, for it is a common Nufance, and then it is not reasonable that a particular Person should have the Action; for by the same Reason that one Person might have an Action for it, by the same Reason every one might have an Action, and then he would be punished 100 Times for one and the same Cause. But if any (i) particular Person afterwards by the Nufance done has more particular Damage than any other, there for that particular Injury, he shall have a particular Action on the Case: And for common Nufances, which are equal to all the King's Liege-people, the common Law has appointed other Courts for the Correction and Reforming of them, *scil.* Tourns, Leets, &c. (k) 5 E. 4. 2. b. *acc. Vide* 2 E. 4. 9. a.

(a) 3 Keb. 428.
9 Co. 112. b.
Cr. El. 664.
1 Rol. 110.
1 Sid. 34.
(b) 1 Rol. 110.
Lit. Rep. 95.
(c) 22 H. 6. 46. b.
47. a. Fitz. Action sur le Case 12. Br. Action sur le Case 61. Br. Jurisdiction 43.
(d) 1 Rol. 110.
Lit. Rep. 95.
* 2 Sid. 174.
(e) 4 Co. 15. b.
5 Co. 31. a.
(f) 8 Co. 37. b.
(g) 1 Rol. 110.
9 Co. 79. b.
Co. Lit. 103. a.
2 Inst. 411.
11 Co. 69. a.
3 Bull. 98.
Hard. 128.
Godb. 242.
(h) Lit. Sect. 136. Co. Lit. 96. a. Br. Action sur le Case 6. † 2 Rol. Rep. 26. Br. Action sur le Case 6 Br. Chimin 1. Br. Nufance 1.
9 Co. 112. b.
(i) Co. Lit. 56. b.
1 Rol. 88. Cr. El. 664. 2 Jones 157. Moor 180.
9 Co. 113. a.
1 Show. 243, 255.
3 Mod. 289.
Salk. 12.
Comb. 180.
(j) Co. Lit. 56. a.
Cr. El. 664.
Cr. Jac. 446. 478
491. Noy 120.
Moor 180.
9 Co. 113. a.
Postea 104. b.
2 Rol. Rep. 26.
Br. Action 6.
(k) Cr. Car. 185.
Br. Action sur le Case 93.
Br. Nufance 29.
9 Co. 112. b.

Pasch. 35 Eliz.

In the King's Bench.

The Case of the Orphans of London.

2 Rol. 313.
2 Inf. 660.
March 107.
4 Inf. 249.

NOTE it was resolved by the whole Court, That if any Orphan of *London*, who is by the Custom of *London* under the Government of the Mayor and Aldermen of the said City, sues in the Ecclesiastical Court, or in the Court of Requests, &c. for any Goods, Monies, or Chattels due to them either by the Custom of *London*, or by any Devise or Legacy in the Will of their Ancestor, or to have an Account, that a Prohibition will lie, because the Government of the Orphans of the City of *London* doth appertain to the Mayor and Aldermen of *London*, and they have Jurisdiction of them. And *Popham* Chief Justice said, That if the Lord of a Manor has Probate of Wills within his Manor, if any such Will be to be proved in the Ecclesiastical Court, a Prohibition lies, because the Jurisdiction belongs to another, otherwise the Party may have double Trouble. And I have seen two Precedents of Prohibitions granted on the said Custom of the Orphans of *London*.

2 Rol. 313.
5 Co. 16 a.
Caudry's Case.

Mich.

Mich. 35 & 36 Eliz.

In the King's Bench.

WYMARK'S Case.

ABEL Dun brought an *Ejectione firmæ* against William Co. Ent. 190.
Law, and declared of a Lease made by Richard Sle- pl. 4. 1 Rol. 751.
 ford, 9 Nov. 34 El. of a House, &c. in Northluffenham in
 the County of Rutland, for three Years: The Defendant
 pleaded, That *ante præd' tempus quo*, &c. the said Ri-
 chard Sleford was seised in Fee of the Tenements afore-
 said; and 9 Maii 32 El. by his Deed indented and inrolled
 within 6 Months according to the Statute, *Quod quidem*
scriptum indentat' hic in (a) cur' profert, &c. bargained (a) Lane 32:
 and sold the said Tenements to Edward Wymark Gent. in
 Fee, by which and by Force of the Statute he was seised,
 till by the said Sleford disseised, who made the Lease in
 the Declaration mentioned, on whom the Defendant by the
 Commandment of Edward Wymark entered, &c. To which
 the Plaintiff replied and confessed the Bargain and Sale by
 the said Deed inrolled to the said Wymark, *Modo & forma*
prout, &c. *Et idem Abel ulterius dicit, quod in eodem*
scripto indentato, provis. existit modo & forma sequentibus
videlicet, quod si præd' Edwardus Wymark, &c. do not pay
 300 l. 2 Nov. 1592, to Sleford, that then the said Bargain
 and Sale shall be void; and shewed the Breach of the
 Condition and Re-entry, and the Lease made to the Plain-
 tiff, and the Ejectment *prout* in the Declaration, without
 that, that the said Sleford disseised the said Edward Wymark,
 &c. on which the Defendant did demur in Law. And
 shewed this Cause according to the Statute (b) because the (b) 10 Co. 94. a. b.
 Plaintiff in his Replication did not shew forth the Deed Co. Lit. 72. a.
 indented, which comprehended the Condition. And after 27 El. cap. 5.
 good Debate and Consideration of the Matter in Law, it
 was adjudged for the Plaintiff. And in this Case two Points
 were resolved by Popham Chief Justice, and the whole
 Court.

1. When any Deed is shewed in Court, the Deed by Judgment of Law doth remain in Court (a) all the Term in which it is shewed; but at the End of the Term, if the Deed be not denied, then the Law doth adjudge it to be in the Custody of the Party to whom it belongs; for the whole Term in Law is but one (b) Day, and therefore it shall be intended to remain in Court all the Term in which it is shewed, but when the Term (c) is closed and ended, then there is no Officer in such Case to whom the Custody of it by the Law belongs, and therefore the Party who shewed it shall have the Keeping of it: For a Man's Evidences are as the Sinews of his Land. And where it appears by 38 H. 6. 2. a. b. that because the Deed in another Term is in the Custody of the Party, and not in Court, the Defendant shall not have (d) Oyer of it; and therewith agree 4 H. 7. 18. & 21 H. 7. 30. b. Also *vide Lit. fol. 88. b.* if the Tenant in Assise pleads a Feoffment by Deed-Poll of the Plaintiff, and shews it in Court, in this Case (*Litt. (e)* saith) that forasmuch as the Deed is in Court, the Feoffee may shew to the Court, how that in the Deed there are several Conditions, &c. but that is to be intended, that he shall take Advantage of the Condition in the Deed, in the same Term that it was pleaded and shewed forth. And therewith agrees 24 E. 3. 73. b. that when a Deed is in Court one may take Advantage of it without having it in Hand, 38 E. 3. 8. a. & 40 *Aff. pl. 34. acc.* and in 45 E. 3. Tit. *Feoffm. & (f) Faits.* In Assise against fundry Tenants, some pleaded as to one Parcel the Deed of the Ancestor of the Pl. to them with Warranty shewed forth in Court; and some other of the Ten'ts as to other Parcels pleaded in Bar by the same Deed without having it in Hand; and it was challenged, because the Deed ought to be shewed the Court against one, the other could not have Advantage of the same Deed without shewing it, & *non allocatur.* Note when the Deed is by one shewed to the Court, it is not respective as to him, but all others shall take Advantage thereof, 21 E. 4. 49. a. in the Abbot of *Waltham's* Case. If (g) Letters Patents be inrolled in any Court of Record, one may plead them in the same Court without shewing them, notwithstanding that they were not pleaded before: And Difference was taken between Letters Patents or other Matters of Record, which of their own Nature are of Record, and Matter in Fact; for although a Deed be inrolled in Court, (b) one cannot plead it in the same Court without shewing it. *Vide* 19 H. 6. 6. b. 19 E. 4. 9. b. 22 H. 8. *Record Br. 65.* But if a Deed be pleaded and shewed in Court, (i) and denied, then it shall remain in Court for ever, for if it shall be found not his Deed, it shall be (k) damned. 41 *Aff. 29. 12 (l) H. 4. 8. a. b. 7 H. 4 (m) 39. b. 11 H. 4. (n) 73. b. 45 E. 3. 11. a.* And if a Deed be denied in one Court, by which

(a) Co. Lit. 231. b. 8 Co. 156. b. 157. a. Poltea 76. b.
 (b) 4 Co. 71. a. Godb. 433.
 (c) Co. Lit. 231. b. 1 Co. 1. b. 9 Co. 17. b. 11 Co. 50. b.

(d) D. & pl. 271 Goldsb. 150. Br. Laches 17. Br. Oyer de records, &c. 16. Br. Contin. 74. Fitz. monitans de faits, &c. 98.
 (f) Fitz. Feoffments & faits 55.
 (g) Br. monit. de faits, &c. 124 Br. Plead. 110. in fine. Paim. 87.
 (h) Br. monit. de faits 123.
 (i) Co. Lit. 231. b. Salk. 215.
 (k) 6 Co. 45. b.
 (l) Fitz. monit. de faits 129. Br. monit. de faits 38. Br. faits 20.
 (m) 6 Co. 45. b. Br. faits 16.
 (n) 6 Co. 45. b. Br. faits 19. Br. Obligat. 22. (o) 6 Co. 45. b.

which it remains there, this Deed may be (a) pleaded in another Court without shewing it, 12 (b) *H. 4. 8. a. b. & 43 E. 3. 27. a. acc.* for (c) *lex non cogit ad impossibilia*. Note a good Case in 42 *E. 3. 18. a.* where the Case was, That a (d) Feme-sole made a Lease for Life, the Lessee committed Waste, the Husband released and delivered the Deed to a 3d Person to be delivered to the Def. on certain Conditions performed; the Defendant performed the Conditions, the Husband got the Release, and detain'd it from the Lessee, and he and his Wife brought an Action of Waste; the Lessee on this special Matter shall plead it without shewing of it forth. *Vide* 10 *E. 3. 40. a.* If Husband and Wife be impleaded in a real Action, where the Default of the Wife is the Default of both, if the Demandant takes the Wife of the Tenant from him, it shall not turn the Ten't to a Default. So in Dower, Detinue of Charters, &c. by the Demandant is a good Plea. 20 *H. 7. 5.* Tenant by Statute-Merchant, or Staple, &c. shall not shew the Deed, for he comes to the Possession of the Land by Process of (e) Law, against the Will of him who has the Deed, and has no Means to come to it; otherwise of a Lease for Life or Years, &c. Because he comes in by the Lessor, and might have taken a Covenant, or other Security for his peaceable Enjoying of the Land let to him. And in Case when the Deed is denied, (f) the Law which has appointed the Deed to remain in Court, has also appointed an Officer to have the Custody of it, and that is the *Custos* (g) *Brevium*, as appears in *F. N. B. 243. L.*

2. It was resolved, That the Course of the King's Bench is, that although the Plaintiff after the Bar pleaded has Day to reply two or three Terms after, no Mention shall be made in the Roll of any Imparance or Continuance, but when he replies, the Entry shall be *ut supra; Et præd' Abel dicit quod ipse per aliqua per ipsum Williel' superius placit' ab actione sua præcludi non debet, &c.* But otherwise it is of a Bar there, for that contains the Imparance or Continuance, and is in such Form, *Et modo ad hunc diem, scilicet diem Veneris, &c. isto eodem termino, usque quem diem præd' Willielmus habuit licentiam interloquend'*; but no such Entry is made on any Replication, Rejoinder, &c. by which it shall be intended, when they are generally entered on Record, that they were made in the same Term, in which the Bar was pleaded; and by Consequence the Pl. in the Case at Bar, may take Advantage of the Condition comprised in the Deed shewed forth by the Defendant.

(a) Co. Lit. 231. b.
 (b) Fitz. monst. de faits 129.
 Br. monit. de faits 38.
 Br. faits 29.
 (c) Co. Lit. 92. a. 231. b. Hard. 337.
 (d) Statham Wast 5. Fitz. Brief 554.
 Fitz. monst. de faits 139.

(e) 10 Co. 94. b.
 Cr. Car. 209.
 442. Cr. Jac.
 209, 317. Co. Lit. 225. b.

(f) Co. Lit. 231. b.
 (g) F. N. B. 243. L. Co. Lit. 231. b.

Mich. 35 & 36 Eliz.

In the Common Pleas.

CLIFTON'S Case.

Dy. 23, 211.
6 Co. 37. Fitz.
Waff. 62, 117,
146. Fitz. Judg-
ment 85, 134,
255. Fitz. Da-
mage 7, 22, 42,
52, 92, 113, 114.
1 Inst. 53, 54,
200, 247, 355.
F. N. B. 59.
2 Inst. 299.
Reg. 23. Raft.
Entr. 689.

IN a Writ of Waff between *Tho. Southcote*, Esq; Pl. and *John Clifton* Defendant, the Form of the Writ was such; *Si Thom' Southcote Arm' fecerit, &c. summon' Johannem Clifton quod sit, &c. quare cum, &c. idem Johannes de terris, domibus, boscis & gardinis in Otterie, quæ tenuit ad vitam Margaretæ nuper uxor' suæ, in jure ipsius Margaret' de præfat' Tho. ex dimissione quam idem Thomas inde fecit præfat' Margaret', & cuidam Petro Carew Militi quond' viro suo, ad vitam eorundem Petri & Margaret', fecit waffum, venditionem & destructionem, ad exhereditationem ipsius Thom', & contra formam provision' prædict', ut diciatur, &c. & habeas, &c. Teste 8 Februar' anno 35.*

And it was resolved by the whole Court in the Common Pleas, that the said Writ doth not lie; for the Recital of the Writ is, *Quare cum de communi consilio Regni nostri Angl' provisum sit, quod non liceat alicui waffum, venditionem, seu destructionem facere de terris, &c. sibi demissis ad terminum vite vel annorum &c.* And in this Case the Husband had not any Estate for Life in this Land, but the Wife had the Estate for Life, and the Husband had it only in her Right, and so he is not within the said Act; and therefore if a Woman Tenant for Life takes Husband who commits Waff, and the Wife dies, the Husband shall not be punished for this Waff.

(*) 1 Rol. 351.
2 Rol. 827, 833,
834. Cr. El. 357.
2 Inst. 301.
Co. Lit. 54. a.
Co. Ent. 703.
Pl. 9. 707. b.

Note, Reader, this Judgment given on Consideration of the Stat. of *Gloucester cap. 5.* and of the Opinions *obiter* in 10 H. 6. 11. & 12. by *Strange* and *Cotesmore*, 46 E. 3. 25; 46 E. 3. Waste in *Statbarn*.

Pasch.

Pasch. 43 Eliz.

In the King's Bench.

PILKINGTON'S Case.

Between *Pilkington* (a) Plaintiff, and *Hastings* and others Defendants in Replevin, it was resolved by the whole Court, That when a Distress is taken for Damage-feasant, that the Party may tender Amends till the Cattle are (b) impounded, but after they are in the Custody of the Law, then the Tender comes too late. *Vide* 13 (c) *H.* 4. 17. & 27 *E.* 3. 88. And so it was adjudged *Trin.* 33 *Eliz.* between *Nevil* and *Segrave*.

2. It was resolved, That Tender of Amends to the Bailiff (c) is not good, for he cannot deliver the Distress once taken, no more than he can change the Avowry of his Master, or demand Rent on a Condition of Re-entry.

(a) Co. Ent.
602. pl. 17.
Cr. El. 813.
(b) Cr. El. 332,
813. 8 Co. 147.
b. Hect. 16.
1 Brownl. 173;
2 Inst. 107.
Lit. Rep. 34.
(c) Cr. El. 813;
(d) Cr. El. 332,
813. 1 Rol.
Rep. 258.
(e) Cr. El. 813
Cr. Jac. 377.
1 Rol. Rep. 258.
2 Rol. Rep. 172.
Hob. 154.
2 Brownl. 173.

Mich. 35 & 36 Eliz.

In the King's Bench.

The Earl of PEMBROOK'S Case.

IN an Action on the Case brought by the Earl of *Pembrook* against Sir *Henry Barkley*, for interrupting him of certain Walks in the Forest of *Selwood*; the Def. pleaded a Grant of them by the said Earl to the *Ld. Maur. Berkley* in Tail by Deed shewn forth. It was held by *Popham* Ch.

Cr. El. 384, 486;
560. 2 And. 20.
Goldsb. 130.
Poph. 116.
Hardr. 49.
Moor 706.

Antea 74. b.
Doct. pl. 118.

Justice, and the whole Court, That in the same Term the Plaintiff may pray that the Deed be entered *in hæc verba*, and afterwards he may demur, or take Issue at his Pleasure, but in another Term the Deed shall not at his Prayer be entered *in hæc verba*, although he would demur on it, for then the Deed is out of Court: And afterwards the Deed on the Prayer in the same Term was entered *in hæc verba*, the Earl pleaded, that *ulterius per scriptum prædictum provisum fuit*, (without shewing forth any Part) because the Deed was entered *in hæc verba, quod nota*, good Policy. And the Earl shewed the Condition and the Breach of it: *Nota bene.*

Mich. 35 & 36 Eliz.

In the Common Pleas.

PAGE T'S Case.

(a) 2 Co. 92. b.
Cr. Jac. 688.
10 Co. 44. b.
11 Co. 81. b.
Allein 82.
1 Jones 51.
F.N.B. 58. c. 59.
h. 50 E. 3. 4. a.
1 Rol. 377.
2 Rol. 119, 829
2 Inst. 301.
Lit. Rep. 256.
Winch. 79.
Moor 18. Co.
Lit. 54. a. 299. b.
Vide Herli-
ynden's Case
in the 4th Part
of my Reports
acc' Lewis
Bowl's Case,
11 Co. 81. b.
(b) 4 Co. 62. 63.
(c) 4 Co. 62. b.
11 Co. 42. b. 81. b
Cr. Car. 242,
243, 274. 2 Rol.
119. Offenst.
Palm. 327.
Moor 19.
1 Rol. Rep. 181.
10 H. 7. 2. b.

BETWEEN *William Paget* Esq; Plaintiff, and *Edward Cary* and *Elizabeth* his Wife Defendants in Wast, in the Common Pleas, it was resolved, that if there be (a) Tenant for Life, the Remainder for Life, the Remainder in Fee, if Tenant for Life doth Wast in Trees, and afterwards he in the Remainder for Life dies, the Action of Wast is maintainable for Wast done in the Life of him in the Remainder for Life, for it was to the Disinheritance of him in the Remainder in Fee; and now the Impediment, which was the mean Estate for Life is taken away. *Et remoto impedimento emergit actio.* And as it was there said, so it was adjudged in 9 *Eliz.* The same Law, if he in the Remainder for Life after the Wast surrender his Estate to him in the Remainder or Reversion in Fee. And where it was objected, That at the Time of the Wast, it could not be to the Damage of him in the Remainder in Fee, in Respect of the mean Estate for Life: To that it was answered and resolved, when the Tree is severed, the (c) Property thereof belongs to him in the Remainder in Fee; and so where it is said in some Books that he in the Remainder

or Reversion in Fee shall not have an (a) Action of Wast, it is to be intended during the Continuance of the mean Remainder; And where in other Books it is said, That in such Case the Action of Wast well lies, it is to be intended after the Death of him in the Remainder for Life. *Quia cum aliquid impeditur propter unum, eo remoto, tollitur impedimentum*: And so all your Books are well reconciled. *Vide* 11 E. 3. *Receit* 118. 4 E. 3. 18. *b. Cotte's Case*, 33 E. 3. *Wast* (b) 33 E. 3. Fitz. *Wast* 144. (b) 114. 5 E. 3. 3. 10 E. 4. 9. *a. F. N. B.* (c) 58, 59. and the Writ in the *Register*, 74. *b.* and the *Nota* there, *fol.* 75. (c) F. N. B. 58. c. 59. b.

Trin. 36 Eliz. Rot. 1546.

In the Common Pleas.

BOOTH'S Case.

GGeorge Booth brought an Action of Wast against *Skewington*, and declared that Sir *William Booth* demised for Years to *Enfor*, who assigned it to *Skewington*. The Defendant pleaded an Assignment to *Elizabeth Cave*, before which Assignment no Wast done; The Plaintiff in his Reply shewed the Statute of 11 H. 6. *cap.* 5. and that the Grant to *Elizabeth Cave* was to the Intent, that he might not know against whom to bring his Action of Wast; and averred that he took the Profits; The Defendant rejoined, that *Elizabeth Cave* granted her Estate to *A.* who demised to the Defendant at Will, without that, that he granted to the Intent, &c. on which the Plaintiff demurr'd in Law. And in this Case three Points were resolved.

1. That altho' the Words of the said Act are, That where Ten't for Life or Years have leased or granted their Estate, to the Intent that those in Rev'n, *scil.* their Lessors, their Heirs or Assignees may not know their Names; and afterwards the first Ten'ts continually occupy those Lands, &c. and commit Wast, &c. it is ordained and established, that he in the Reversion

Co. Ent. 697.
pl. 5.
2. *Anderf.* 23,
24, 8cc.
Co. Lit. 54, a.
2. *Inst.* 302.

F. N. B. 59, a.
Dyer 8.

(a) 2 Rol. Rep. 246. F. N. B. 59. c.
 Co. Lit. 54. a.
 2 Inst. 302.
 Lit. Rep. 106.
 (b) Co. Lit. 54. a.
 2 Rol. Rep. 246.
 (c) Doctrin. placit. 354.
 Cawly 35.
 (d) Doctrin. placit. 346, 350.
 Br. Parner de Profits 18.
 Br. Traverse per, &c. 180.
 Br. Peremptory 40.
 Fitz. Maintenance de Brief 38.
 (e) Fitz. Maintenance de Brief 33.

version in such Case shall maintain a Writ of Wast against the said Tenants for Life or Years. And there is Proviso for the first Tenants. Yet it was resolved, that every Assignee of the first Lessee mediate or immediate is within the said Act: For the Statute was made to suppress Fraud and Deceit, and therefore shall be taken beneficially.

2. It was resolved, that he in (b) Remainder is within the said Act, as well as he in Reversion, for in equal Mischief, yet the Preamble and the Body of the Act speak only of him in Reversion.

3. It was resolved, that (c) the Intent aforesaid was not traversable in this Case but the Pernancy of the Profits, for that was a Thing notorious, whereof the Country might have Knowledge, and in the Pernancy of the Profits, the Intent is implied. *Vide 4 H. 7. 9. a. in Formedon*, the Tenant pleaded Nontenure, the Demandant said, that he made a Feoffment to Persons unknown to defraud him of his Tenancy, and took the Profits: The Pernancy of the Profits, (d) and not the Feoffment is traversable. *4 E. 4. 29. a. Q. if it should not be 4 E. 4. 22. a.*

Trin. 36 Eliz. Rot. 877.

In the King's Bench.

S A M O N ' s C a s e .

1 Rol. 243.
 Co. Ent. 3. pl. 4.
 Cr. El. 432.
 Moor 359.
 Lit. Rep. 30.

S A M O N brought an Action on the Case on *Assumpsit*, and declared, that whereas Controversies were between the Plaintiff and Defendant concerning divers Lands in *D.* The Defendant in Consideration of 6 *l.* assumed and promised to pay 200 *l.* to the Plaintiff, if the Defendant did not perform the Award of *J. S. &c.* which *J. S.* made an Award, That the Def. should enter into a Bond to the Pl. that the Pl. and *Elizabeth* his Wife should enjoy the said Land, &c. which he had not done; on which the Def. demurr'd. And it was adjudg'd against the Pl. and the Reason and Cause of the Judgment was, because the Award was void for the Incertainty;

certainty; (*a*) for it doth not appear of what Sum the Bond should be, for the Arbitrators are Judges of the Case; and their Judgment and Award ought to be certain, so that thereby the Controversy be decided; and that it should not for the Incertainty be a Cause of new Controversy. And the Arbitrators cannot (*b*) assign their Power over, but they themselves ought to determine it, and therefore neither the Plaintiff nor the Defendant can assess the Sum. But it was agreed that if *I.* covenants with *B.* to enter into a Bond to him for the enjoying of such Land, and does not express what Sum, he shall be bound in such Sum, as amounts to the (*c*) Value of the Land, as it is agreed in 10 *E.* 3. 18. If a Man grants an Annuity to one of 10 Marks till he be promoted to a convenient Benefice, the Law will expound it to be of the Value of the (*d*) Annuity or more; but the Reason of that is, because it is the Act of the Covenantor himself which cannot be void, but it is otherwise in the Case at Bar. Also the Award Was void as to the Wife, for she was (*a*) a Stranger to the Submission.

(*a*) Cr. Eliz? 432. Moor 359. Hardr. 45, 46. Stile 56. 1 Rol. 263. Jenk. Cent. 340. March Arbitrament 163, 164. 192. 2 Rol. Rep. 214. Palm. 84, 146. Yelv. 98. Cr. Jac. 314, 315.
 (*b*) Cr. El. 432.
 (*c*) Cr. El. 432.

(*d*) Cr. El. 432.

El. 4, 432. Moor 3, 359. Cr. Car. 226. 1 Rol. Rep. 270. Kelw. 43. a. 2 Sand. 293, 337. Hutt. 9. Hardr. 46. Yelv. 98. Herley 5. Styl. 39. 10 Co. 131. b.

(*e*) 1 Rol. 243, 247, 259. Cr. 3 Leonard 62, Godb. 12, 13.

Hill. 37 Eliz Rot. 601.

In the King's Bench.

GRAY'S Case.

Co. Ent. 573.
 pl. 4.
 Cr. El. 405,
 546.
 Cr. Car. 533.
 Carr. 88.
 1 Rol. Rep.
 121, 123.
 Lit. Rep. 295.
 1 Sand. 320.

Cr. El. 405,
 563.
 Doct. pla. 103.
 Hob. 42.

Cr. El. 405.
 Hob. 42.
 Doct. pla. 103.
 Godb. 238.
 Winch. 22.

IN *Replevin* between *Gray* and *Fletcher*, in Bar of the Avowry for Damage-feasance, the Plaintiff by Custom entitled himself to have Common of Pasture in the Place where, &c. to his Copyhold, which Custom was traversed. And it was found that he ought to have the same Common, but that every Copyholder had used to pay Time out of Mind, &c. *Pro eadem communia unam gallinam, & quinque ova annuatim.* And it was adjudged, that on this Verdict the Plaintiff should have Judgment; for the Plaintiff need not shew more then makes for him, and that is of his Part. And the Doubt was, what Remedy the Terre-tenant should have for the Hens and Eggs; for if the Terre-tenant has no Remedy for them, then the Commoner should have his Common *sub modo*, *scil.* paying so much, &c. and then it would be against the Pl. But if the Terre-tenant has a good Remedy for the Hens and Eggs, then as the Verdict is found, it is not *modus communie*, *scil.* a Manner of Commoning, nor Parcel of the Issue as to the Common, but a collateral Recompence to be paid for the Common, whereof every one has equal Remedy. And *Popham* Chief Justice said, that it was adjudged in a *Devonshire* Case, That where a Man prescribed to have Pot-water out of the River, &c. and the Jury found that he ought to have it paying 6 *d.* Yearly. And it was adjudged that he had failed of his Prescription, for he had prescribed absolutely, and the Jury had found it conditionally, or *sub modo*. And there if he did not pay the Money he ought not to take the Water, and the Terre-tenant in such Case might disturb him, which is all the Remedy that the Terre-tenant had. But in the Case at Bar, the Terre-tenant may distrain
 the

the Cattle of the Commoner on his own Land for the Hens and Eggs; and therewith agrees 26 *H.* 8. 5. But in the *Case* at Bar, if the Jury had found, that the Plaintiff should have Common paying so many Hens and Eggs, the Issue had been found against him, because it is Parcel of the Custom: But in the *Case* at Bar, the Custom as to the Commoning is perfect without the said Payment, and the Payment doth not limit or qualify the Custom, but it is a Recompence for the Common, for which Recompence the Terre-tenant has Remedy. But if the Terre-tenant had no Remedy for the Recompence, as in the *Case* put by the Chief Justice, but only to make the said Disturbance, as is aforesaid, then the said Manner of Payment (although it be found as it is in the *Case* at Bar) is Parcel of the Custom. Note a good Difference. And the like Judgment was given in the Common Pleas, *Pasch.* 37 *Eliz.* *Rot.* 723. between *Lovelace* and *Reighnold's*, *quod vide* there. *Vide* 10 *E.* 4. 17. *F. N. B.* 107. a. 15 *E.* 3. *Assise* III,

Cr. El. 546,

Cr. El. 546,

563.
2 *And.* 67, 68.*Pasch.*

Pasch. 37 Eliz.

In the King's Bench.

FITZHERBERT'S Case.

Co. Lit. 366. b.
567. a.
Cr. Car. 483,
484.
1 Jones 397,
398, &c.
3 Co. 78. a.
Moor 469.

Cr. Car. 483,
484.
3 Co. 78. a.
Co. Lit. 367. a.
1 Jones 397,
398.

THE Case in Effect was; Tenant for Life, the Remainder to his Son and Heir apparent in Tail by Covin and Agreement between him and *A.* and *B.* to the Intent to bar his Son of his Remainder by a collateral Warranty made a Lease for Years to *A.* who made a Feoffment to *B.* in Fee, to whom the Father released with Warranty, and all this by Covin and Consent between the Parties, to the Intent aforesaid; and afterwards the Father died, and the Warranty descended on the Son being then of full Age. And it was resolved by *Popham* Chief Justice and the whole Court, that this Warranty should not bar the Son; for the Feoffment of the Lessee for Years is a Disseisin, and the Father himself is *particeps criminis*, and agreeth to it, and then although the Release with Warranty is made after the Disseisin, yet for as much as the Disseisin was to that Intent and Purpose, the Law will adjudge on the whole Act; as it is agreed in 19 *H. 8. 12. b.* If a Man disseises another to the Intent to make a Feoffm. with Warranty, although he makes the Feoffm. 20 Years after the Disseisin, yet the Law will adjudge on the whole Act, and the Disseisin and the Warranty shall be coupled together, according to the Intent of the Parties; and therefore in such Case the Law will adjudge the Warranty to commence by Disseisin, although they be made at several Times. As if a Man makes a Lease of Lands in two several Counties reserving one intire Rent, although the Livery be made at several Times, first in one County, and then in the other, yet the Rent is issuing out of the Lands in both Counties; so if a Man makes a Charter of Feoffment with Warranty, and delivers the Deed, and afterwards makes Livery of the Land *secundum formam chartæ*, now the Law will judge on the whole Act, and although the Deed was delivered at one Time, and the Livery of the Land at another Time; and although a Warranty ought to

to enure on an Estate, yet on the whole Matter the Warranty is good.

2. It was resolved, that although the Disseisin was to the Father himself who made the Release; yet forasmuch as the Father agreed and consented to the Disseisin, and he who made the Warranty procured the Disseisin, it should not (a) hinder, but that the Warranty doth commence by Disseisin, for *consentientes & agentes pari pœna plectentur. Vide Litt. 151.* in his Chapter of *Remitter*. If the Husband discontinues (b) the Wife's Right, all is one as to a Remitter, if they procure or assent to a Disseisin, and afterwards take a Feoffment of the Disseisor, as if they themselves had disseised the Discontinuee; and so are the Books in (c) 44 E. 3. 46. a. 18 H. 8. 13. 11 E. 4. 2. &c.

3. Altho' the Disseisin was not made immediately to the Son who is to be bound by the Warranty; yet forasmuch as this Disseisin was a Wrong to him, and did devert his Remainder out of him, it should not hinder, but that the Warranty commences by Disseisin. And so is the Book in 31 E. 3. *Warranty* (d) 28. where one Brother made a Gift in Tail to another, the Uncle disseised the Donee, and made a Feoffm. with Warranty; the Uncle died, and the Warranty descended on the Donor, and afterwards the Donee died without Issue; the Donor brought *Formedon* in the Reverter, and the Feoffee pleaded the Feoffm. with Warranty, the Demandant avoided it, because it began by Disseisin, and yet the Disseisin was to the Donee and (e) not to the Donor, but by the Disseisin a Wrong was done to him, and his Reversion by it was deverted. In this Case *Popham* Ch. Just. said, That this very Point was in Question between *Pawlet* and *Putenham*, and *Pawlet* who was in the Remainder enjoyed the Land. And by great Advice it was resolved, that he was not barr'd by the Warranty: But it was not adjudged. *Vide* Reader the Books 14 E. 3. *Warranty* 5. *Temp. E. 1. Warranty* 86. 27 E. 3. 89. 12 *Aff. p.* 9. 4 *Ma. Dyer* 148, &c. and the Stat. of *Glocest. c. 3.* and the Stat. of 11 H. 7. c. 20. (f) That the Release with Warranty of Ten't by the Curtesy, Ten't in Dower, or Ten't for Life to the Disseisor was a collateral Warranty by the Com. Law, and should bind the Heir: But that is to be intended when there was not any Covin or Collusion to make Disseisins. But after Disseisins made without Covin there such Release in Case of Ten't by the Curtesy, or Husband seised in Right of his Wife before the Statute of *Glocest. c. 3.* or of Tenant in Dower, or in Jointure, before the Statute of 11 H. 7. (g) was a Bar, as a Release by another Tenant for Life is at this Day. But a Release at this Day by Tenant for Life made to a Disseisor, or any other without Covin; and yet to the Intent to bar him in the Reversion, shall bar him; for Intent without Covin and

(a) Co. Lit. 466. b.

(b) Co. Lit. 357. a. Lit. sect. 678.

3 Co. 78. a. Lit. 152. b.

(c) Perik. sect:

394. 395. Plowd. 51. a:

3 Co. 78. a. Br. Faux fier

de Recovery 6. Br. Collusion

10. Br. Dower 15. Fitz. Dower 42.

(d) Co. Lit. 366. b.

3 Co. 78. a.

(e) Co. Lit. 366. b. 367. a:

Br. Judgm. 157, 248. 11 Inst. 326. b. 381.

(f) Co. Lit. 365. b.

(g) Co. Lit. 326. b. 365. b.

FITZHERBERT'S *Case*. PART V.

Co. Lit. 366. a.
1 Co. 66. b.

Disseisin shall not avoid the Warranty. As if the Father in the Case at Bar had made a Feoffment in Fee with Warranty, and died, this Warranty should bind the Son, altho' it was made of Purpose to bar him, for there was not any Disseisin; and therefore such Warranty cannot be avoided by Averment of Covin, because there was not any Disseisin in the Case, for a Warranty commencing by Wrong shall not be avoided, but a Warranty which commences by Disseisin. And altho' it is said in our Books (and it is true) That Warranties are much favoured in Law, because they extend to establish him who is Terre-tenant in Possession; yet when they are mixt with Covin, which is so odious, and so much abhorred in Law, the Warranty loses not only its Favour, but its Force also: For Covin is like Poison, which will infect all the good Things wherewith it is mixt.

Note Reader, a good Resolution, for if such covenous Invention should be allowed in Law, every Father, or other Ancestor, who on Consideration of Marriage, or other good Consideration has assured and established his Lands after his Death to his Heir apparent, might by such covenous and sinister Device dishinherit his Heir apparent, which would be full of great Inconvenience.

Pasch.

Pasch. 37 Eliz.

In the Common Pleas:

FOORD'S CASE.

Between *Bettisford* and (a) *Foord* in Replevin, the Case was such; The *Prebendary of Kingston* in the County of *Dorset* in the Cathedral Church of *Salisbury* in the Time of King *H. 8.* made a Lease of the said *Prebend* for 70 Years. The *Bishop*, Patron of the said *Prebendary*, and the *Dean* and *Chapter*, by their several Instruments under their common Seal (reciting the said Lease) confirm'd *dimissionem prædictam in forma prædictæ factæ pro termino 51 Years tantum, & non ultra.* And afterwards the said *Prebendary* made another Lease to begin after the Determination of the first Lease, &c. And whether the first Lease should continue after the 51 Years, viz. Whether the Confirmation should extend to the whole Term; or for the 51 Years only was the Question. And it was adjudged, that the said Confirmation (as this Case is) should extend to the (b) whole Term; for when the *Bishop* and the *Dean* and the *Chapter* (reciting the said Demise for 70 Years) had confirmed *dimissionem prædictæ in forma prædæ*, these Words (*pro termino 51 Years*) & *non ultra*, come too late; and the Lease being for 70 Years; it is repugnant to confirm *dimissionem prædictæ* for 51 Years, for it is as much as if they had confirmed the Lease and Term of 70 Years for 51 Years. But if the *Bishop* and the *Dean* and *Chapter* had recited the Lease, and had confirmed the (c) Land to the Lessee for 51 Years; that had been good enough, for then there would not be any such Repugnancy in the Confirmation.

Et nota, A Difference (d) between a bare Assent, without any Right or Interest, and an Assent coupled with a Right or Interest; for the Ten't who is to perfect a Grant by his Attornment; cannot assent for a Time, nor (e) on

M

Condition;

(a) 1 And. 47.
Cr. El. 447, 472.
Dy. 338, 339.
pl. 43. N. Bendl.
238. Latch. 251
Lane 64.
Lit. Rep. 366.

(b) Co. Lit. 1.
297. a. 1 And.
47. Cr. El. 447,
472. Lit. Rep.
82. Dy. 32. pl. 4.
Winch. 95, 96.

(c) 1 And. 47.
Cr. El. 447, 472.
Lit. Rep. 82.
(d) Cr. El. 447.
Co. Lit. 297. a.
1 Anderf. 47.

(e) Co. Lit. 297.
274. b. 300. b.
2 Co. 68. a.
9 Co. 85. b.
1 Rol. 412. M. 1.

(a) Ant. 71. a.
 B. Release 33.
 Br. Dean and
 Chapter 11.
 1 Co. 112. b.
 2 Rol. 340.
 Co. Lit. 266. a.
 Fitz. Release 17.
 (b) 1 Co. 147. b.
 Co. Lit. 297. a.
 341. b. F. N. B.
 152. j.
 (c) 1 Rol. 412.
 (d) Co. Lit. 297. a.
 (e) 3 Co. 22. a.
 4 Co. 91. b.
 8 Co. 153. a.
 10 Co. 128. b.
 1 Brownl. 62.
 63. F. N. B. 130,
 131. h. 131. a.
 2 Leon. 107,
 108, 131.
 3 Leon. 4.
 4 Leon. 13.
 Ow. 42. Benl.
 in Ass. pl. 10.
 O. Benl. 3. pl. 8.
 N. B. n. l. 57. .
 pl. 93. Benl. in
 Kelw. 208, 209.
 Yelv. 67. C.
 El. 118, 119, 776,
 807. Moor 13.
 1 Rol. 29. 601.
 1 Ro. Rep. 221.
 2 Rol. Rep. 47.
 Br. Action sur
 le Case 108. in
 fine. Cr. Car.
 241. Cr. Jac. 505.
 Co. Lit. 47. b.
 297. a. 252. b.
 2 Sand. 337.
 (f) Cr. El. 118,
 119, 472. Lit.
 Sect. 521. Co.
 Lit. 47. b. 297. a.
 3 Co. 22. a.
 8 Co. 153. a.
 10 Co. 128. b.
 2 Brown. 62. 63.
 2 Leon. 108.
 Owen 42.
 1 Rol. Rep. 221.
 (g) Co. Lit.
 297. a.

Condition, nor for Part of the Thing granted, but it shall absolutely enure to all, because he has but a bare Assent, which cannot be qualified, or apportioned: But the Bishop who is Patron, and the Dean and Chapter have an Interest in the Prebend, and every Part of it, for the Patron has *fus conferendi*, and a Release to the Patron of an Annuity in the Time of (a) Vacat. is good, as it is held in 21 H. 7. 41. a. 8 E. 3. 28. *Persey's Case*. 33 E. 3. *Aid le Roy* 103. 8 H. 6. 24. acc. Also it is held in 31 E. 3. *Graunts* 90. 16 E. 3. *Annuity* 23. 8 R. 2. *Annuity* 33. That the Patron and Ordin. may (b) charge the Glebe in Time of Vacat. therefore they have an Interest; and *Fitz. N. B.* 49. saith, that the Right is in the Patron and Ordin. *Vide Lit. lib. 3. cap. Discontinuance* 144, 145. So if the Lease be made of 20 Acres, they may make a Confirmat. as to Part of the Land, as for one or more Acres: So they may confirm Part or all on (c) Condition; by which it appears that they have not a bare Assent, as in Case of Attornment, but an Assent clothed with an Interest.

Anoth. Difference was taken between a Lease for Years, and a Lease for Life, a Gift in Tail, or a Feoffm. in Fee; For if a Prebendary makes a Lease for Years, a Confirmat. may be made of the Land, as has been said before, for (d) less Years, for the Years are several, altho' the Lease or Term be one.

If I sell you any Thing for 100 l. to be paid 20 l. per ann. in 5 Years, I shall not have an Action of Debt (e) till all the Years be incurred, because all is but one Contract: But if a Man makes a Lease of Lands for 5 Years, rendering every Year 20 l. there in the Case of a Lease of Land for Years, the Years are several, and he shall have an Action of Debt for every Year, as it is adjudged in 45 E. 3. 8. But if a Prebendary makes a Lease for Life, or a Gift in Tail, or a Feoffm. in Fee, and a Confirmat. is made of the Land to the Lessee, Donee or Feoffee for one Hour, it is good for ever, for an Estate of Freehold or Inheritance is intire: And therefore if he who has a Freehold or Inheritance be disseised, and confirms the Land to the Disseisor for an Hour, it is good for ever.

So if a Disseisor makes a Lease for Life, or a Gift in Tail, and the Disseisee confirms the Land to the Lessee or Donee for an Hour, it shall confirm his whole Estate, but it shall not (f) enure to the Remainder or Reversion, because he confirms the Land to the Lessee or Donee only, and the Estate for Life or in Tail, and the Remainder or Reversion are several distinct Estates: But if the (g) Disseisor makes a Lease for Years of 20 Acres, the Disseisee may confirm the Whole, or any Part of the Land to the Lessee, to have and to hold to him for all, or any of the Years, upon or without a Con-

a Condition ; for although the Term or Demise be one, and therefore if the Term or Demise be confirmed for an (a) ^(a) Co. Lit. 297. a. Hour, it is good for ever, as it is resolved in the Case at Bar ; yet the Years and Acres are several, and therefore the Confirmation may extend to Part of them : *Pari ratione*, if my Tenant (b) for Life makes a Lease for Years, I may confirm the Land to him for less Years : So if Tenant in Tail makes a Lease for 40 Years, and diés, the Issue in Tail may confirm the Term or Part, &c. for less Years. The same Law of a Woman after Coverture. *Vide Lit. lib. 3. cap. Confirmations 119, 120, &c.* ^(b) Co. Lit. 297. a.

Cases of Customs.

Trin. 37 Eliz.

In the Common Pleas.

SNELLING'S Case.

(a) Noy 53.
Cr. El. 409, 410.
Hob. 86.
Swinb. 328, 329.

Between (a) *Snelling* and *Norton* the Case was such; Debt was brought by *Snelling* against *Norton* Administrator of *N:* on a Bond; the Defendant shewed the Custom of *London*; That if a Contract be made by a Citizen in *London* to pay Money to another Citizen, and he who ought to pay dies intestate, that the Administrator shall be bound to pay it as well as if it was by Bond. And shewed further, that the Intestate was a Citizen of *London*, and was indebted on Contract to such a Citizen, who after the Death of the Intestate had recovered against him, on which the Pl. demurr'd in Law; and Judgment was given against the Pl. And in this Case three Points were resolved.

(b) 8 Co. 126. a.
Cr. Car. 347.
Hard. 303.
(c) Hob. 86.
Cr. El. 410.
1 Rol. Rep. 105.
1 Rol. 551, 555,
556, 557.
(d) Cr. El. 410.
1 Rol. 551.
Dy. 247. pl. 73.
(e) 2 Inst. 398.
Selden. Juris-
dict. de Testa-
ment. 24. Co.
Lit. 133. b.
9 Co. 38. b.
(f) Carr. 118.
Cr. El. 409.

1. That the said Custom (c) was good against the Opinion in *Dier* 8 *Eliz.* 247 (d), for although none was chargeable at the common Law by the Name of Administrator, because before the Statute of (e) 31 *E.* 3. no Action lay against an Administrator by such Name, and the Custom cannot begin after 31 *E.* 3. which is within Time of Memory; yet forasmuch as they were chargeable at the Com. Law, as Executors for their Administration, so that the (f) Name of the Charge is only changed, and yet in Substance is all one, for every Executor is an Administrator of Goods; and the Pleading is *ne unques executor ne unques admini-*

administravit as Executor; and an Administrator has the Office or Quality of an Executor, therefore the Custom alledged in such general Manner was resolved to be good.

2. It was resolved, if the Ordinary took the Goods into his Possession, he was chargeable by the Common Law. And the Statute of *Westm. 2. cap. 19. Cum post mortem alicujus*, was made in Affirmance of the Common Law. *Vi- de 17 E. 2. Brief 822. 24 E. 3. 55. 11 E. 3. Executors 77. 18 H. 8. 23. 9 E. 4. 33. 11 H. 7. 12. F. N. B. 120. D.*

Dyer 247. pl. 73.
2 Inst. 397.
Plow. 277. a. b.
9 Co. 39. b.

3. It was resolved, although the Plaintiff was a Stranger and no Citizen, yet this Custom was good to bind him. *Vi- de 1 E. 4. 6. a.*

Dyer 196 pl. 42.
1 Rol. 556.

Hill. 38 Eliz.

The Case of Market-overt.

AT the Sessions of *Newgate* now last past, it was resolved by *Popham* Chief Justice of *England*, *Anderson* Chief Justice of the Common Pleas, *Sir Thomas Egerton* Master of the Rolls, the Attorney General, and the Court, That if Plate be stolen and sold openly in a Scrivener's Shop on the Market-Day, (as every Day is a (a) Market-Day in *London* except (b) Sunday) that this Sale should not change the Property, but the Party should have Restitution; for a (c) Scrivener's Shop is not a Market-overt for Plate; for none would search there for such a Thing, & sic de similibus, &c. But if the Sale had been openly in a (d) Goldsmith's Shop in *London*, so that any one that stood or passed by the Shop might see it, there it would change the Property. But if the Sale be in the Shop of a Goldsmith, either behind a Hanging, or behind a Cupboard upon which his Plate stands, so that one that stood or passed by the Shop could not see it, it would not change the Property: So if the Sale be not in the Shop, but in the Warehouse, or other (e) Place of the House, it would not change the (f) Property, for that is not in Market-overt, and none would search there for his Goods. So every Shop in *London* is a Market-overt for such Things only which by the Trade of the Owner are put there to Sale; and when I was Recorder of *London*, I certified the Custom of *London* accordingly. Note Reader, the Reason of this Case extends to all Markets-overt in *England*.

(a) 1 And. 344.
345. 2 And. 115.
Moor 625, 360.
Pop. 84. Cr. El.
454. 3 Co. 78. b.
8 Co. 127. a.
9 Co. 66. b.
2 Brownl. 288.
Dy. 122. pl. 16.
35 H. 6. 29. b.
2 Inst. 713.
1 Jac. cap. 21.
(b) Hale's Pl.
Cro. 45. Palm.
485. 2 Brownl.
288. 8 Co. 127. a.
9 Co. 66. b.
Cr. Jac. 69, 280,
426. Jenk. Centr.
291. 1 Jones
156, 157. Caw-
ly 78. Dy. 168.
pl. 17. Pop. 84.
Moor 624.
1 Anderf. 344.
(c) Cr. Jac. 69.
Poph. 84.
1 And. 344.
Moor 360, 625.
625. Cr. El. 454.

Cr. El. 454. (d) Moor. 360. Poph. 84. (e) 1 And. 345. Moor 360,
625. Cr. El. 454. Poph. 84. Godb. 131. Palm. 485, 486. 1 Jones. 164. (f) 1 Jac.
cap. 21.

Trin.

Trin. 41 Eliz.

In the Common Pleas.

PERRYMAN'S Case.

IN Replevin between *Bowyer* and *Perryman*, the Defendant did avow for Damage-feasance in his Freehold; and Issue taken on the Freehold, and a special Verdict was found to this Effect; *R. R.* seised of the Land in Fee did enfeoff divers Persons by Deed in Fee, and died without Heir, and found a Custom in this Manner, *Infra maner' de Porchester, a tempore cujus contrarii, &c. habebatur consuetudo, Quod si aliquis tenens aliquorum terrarum sive tenementor' de manerio prædict' ten' alienaverit sive concesserit hujusmodi terr' sive terram per script' sive feoffament' inde concessit, vel per testamenti suum hujusmodi terr' sive tenementa dederit sive legaverit, quod tunc hujusmodi alienatio, concessio, don', seu legatio fact', vel ad proxim' Cur' ejusdem manerii fuerunt presentat' & presentari consueverunt, vel ad aliquam Cur' ejusdem maner' infra annum post hujusmodi alienationem, concessionem, sive feoffament', donum, sive legationem fact', vel ad proxim' Cur' ejusd' manerii post annum illud tenend': Et si aliqua talis alienatio, concessio, &c. in forma præd' non presentat' fuerit, tunc hujusmodi alienatio, concessio, &c. sic minime presentat' per consuetudinem manerii illius vacua fuerit:* And found that the said Land was held of the said Manor; and that the said Feoffment was not presented according to the Custom. And whether this was a reasonable or lawful Custom or not was the Question; and it was adjudged, that it was a (a) reasonable Custom: But against this Custom it was objected:

1. That if this Custom should be allowed, what Remedy (b) if the Tenants will not present it? Or if the Steward will reject the Presentment? As to that it was answered by the Court, That the like Objection might be made on a Bargain and Sale by Deed, what Remedy if the Clerk will not enrol it? And in Case of Copyhold, what Remedy if the Copyholders will not present a Surrender made out of Court? *Et caveat (c) emptor*, and he at his Peril is to perfect all that is requisite to his Assurance. And it is not like the Case in 2 H. 4. 24. b. where a Custom was pleaded, that none should use (d) his Common in such a Place till the Lord

2 And. 1 25, 126
Cr. El. 668, 669

(a) Lit. Rep. 233
2 And. 125.
Lane 32. Bridg.
82, 83. Hct. 127.
Bridg. 51.
3 Bullf. 215.
(b) 2 Bullf. 337.

(c) 1 Rol. Rep.
125, 195.
4 Co. 26. a.
(d) Fitz. Custom 10.
Br. Custom 12

entered with his Cattle; and *per totam Curiam* that cannot be a Custom, for if the Lord will not enter, it is not Reason that the Commoner should lose his Common.

2. It was objected, that once it was a Feoffment, then to say that the Custom of the Manor should devert an Estate of Freehold and Inheritance vested by solemn Livery would be against Law. To which it was answered and resolved, That the Reason of the common Law, that Land should pass by solemn (a) Livery, was to give Notice to the Country who were Owners of the Land, to the Intent that none might be deceived in Taking of Leases and Estates, and every one have Notice who should be Tenant to the *Præcipe*; and Lords would have better Knowledge of their Tenants to have Wards, Escheats, &c. And therefore a Custom which fortifies the Reason of the common Law with greater Solemnity and Notice, is good, as in this Case, to have the Feoffment openly presented in open Court, to the Intent that the Lord and all his Tenants might take Notice; and therefore if it be not presented according to Custom, then the Livery is become void, because it wants Presentment, which is Part of the Essence of the Livery; and it was said, that there is not *plenum & perfectum feoffamentum* in this Case, till Presentment made in Court according to the Custom; but *opus (b) inchoatum & non perfectum*; and yet if the Feoffor or Feoffee (c) dies, and afterwards it is presented according to the Custom, it is good. As if a Man delivers a Writing (d) as an Escrow, to be his Deed on certain Conditions to be performed, and afterwards the Obligor or Obligee dies, and afterwards the Condition is performed, the Deed is good, for there was *raditio inchoata* in the Life of the Parties, *sed postea consummata existens*: by the Performance of the Condition takes its Effect by Force of the first Delivery, without any new Delivery: So in the Case at Bar, when the Feoffment is presented according to the Custom, then it takes its Effect by Force of the Livery before: And it was said, there was a Custom in *Kent*, That if the free Tenants of a Castle did not pay their Rents, that they should lose their Land held of it. And that the Custom of *Lidsford* Castle in the County of *Devon* is, That a Freeholder of Inheritance cannot pass his Freehold, unless by Surrender into the Hands of the Lord, &c. And the Custom of *London* is, That a Devise of Land by Will in Writing being inrolled is good, for it has greater Solemnity added to the Will than in other Boroughs where Lands are devisable: And so Judgment was given in the principal Case, that the Custom was good and lawful. And this Plea began *Hill. 40 Eliz. Rot. 159.* in the Common Pleas.

(a) Flow. 302. b

(b) Bridg. 82. 83.
 (c) Hale 12.
 Bridgm. 51.
 (d) 9 Co. 137. a.
 Co. Lit. 36. a.
 Cr. El. 520. 835.
 836. 884. 2 Rol.
 26 27. Moor
 642. 699. 697.
 Nov. 6. 30. Cr.
 Jac. 85. 66.
 Stile 251.
 Hob. 246.

Pasch

Pasch. 38 Eliz.

I N T H E

K I N G ' S B E N C H.

Sir HENRY KNIVET'S Case.

BETWEEN *Sir Henry Knivet* Plaintiff, and *Pool* and others Defendants, on a special Verdict the Case was such; Tenant for Life, the Remainder in Fee to the Plaintiff, Tenant for Life leased for Years, the Lessee for Years is ousted, and the Tenant for Life disseised; the Disseisor made a Lease for Years, and his Lessee sowed the Land; and Tenant for Life died. *Sir Henry Knivet* who had the Remainder in Fee entered; the Defendants took the Emblements, and for them *Sir Henry Knivet* brought an Action of Trespass; and on Not guilty pleaded, the Jury found the special Matter aforesaid. And it was adjudged, that the Plaintiff being he in the Remainder, had no Right to the Emblements. It was also resolved, That the Defendants claiming by the Lessee of the Disseisor had not the mere Right to them, but in Respect of his Possession should bar the Plaintiff; but the mere Right was in the Lessee of the Tenant for Life, and he might have an Action of Trespass, and should recover all the mean Profits against the Lessee of the Disseisor; therefore he in the Reversion should not have Remedy for them also, nor recover Damages for them, for then the Lessee of the Disseisor would be twice charged: But as to the Entry into the Land to take the Emblements, it was good Matter of Justification; but forasmuch as they had pleaded Not guilty, the Plaintiff had Judgment for the Entry, and was barred for Residue.

Goldsb. 143.
144.
Cr. El. 463,
464.
2 Inst. 81.

Hob. 132.
Co. Lit. 55. b.

Co. Lit. 282. b.
Doct. pla. 203.

And note Reader in the principal Case, The Lessee

of the Tenant for Life had Right to the Land, and by Consequence to the Emblements, as Things annexed to the Land, and the Death of the Lessee for Life determined his Interest to the Land; but his Right to the Emblements remained, and that was the principal Reason of the Judgment.

Co. Lit. 55. a. b.

Trin. 38 Eliz.

In the King's Bench.

PENRYN'S Case.

Moor 403.
Jenk. Cent.
141, 142, 259.
2 Rol. Rep. 29.

IN a Writ of Error between *William ap Richard*, and *William Penryn* on a Judgment given in *Wales* in the County of *Montgomery*, before *Sir Richard Shuteleworth* Justice there, in a *Quod ei desorceat* in the Nature of a Writ of Right, (as the Use and Precedents are there) the Error was assigned in the Matter in Law, which was such; *William ap Richard* brought a *Quod ei desorceat* in the Nature of a Writ of Right of certain Lands in the County of *Montgomery* against *Penryn*, who appeared and joined the Issue on the mere Right, and thereupon a Jury by *Venire fac.* was returned, whereof 12 were sworn and charged; and before Verdict the Demandant was Nonsuit, on which final Judgment was given; *scil. Quod tenens teneat terram illam sibi & hered', in pace versus petentem & hered' suos imperpetuum.*

Cr. El. 503.
Co. Lit. 295. b.
Lit. sect. 51.

And afterwards the same Demandant brought another *Quod ei desorceat*, in the Nature of a Writ of Right against the same Tenant of the same Land, who pleaded the final Judgment in Bar: On which the Demandant did demur, And Judgment was given against him; and on this later Judgment the Demandant brought a Writ of Error. And after many Arguments and long Deliberation the Judgment was affirmed. And in this Case three Points were resolved.

Co. Lit. 295. b.
Cr. El. 503.

1. That altho' by the Stat. of *Rutland*, made 12 E. 1. it is provided, that Trial in *Wales* in a Writ of Right shall be by common Jurors, and by 12, yet Judgment final shall be there given, as it was before the Stat. altho' the Manner
and

and Dignity of the Trial was altered; for the Statute has altered the Trial, but the Judgment which belongs to such Action remains as it was before. Jenk. Cent. 259.

2. If Judgment final be given in a Writ of Right where it ought not to be, yet it shall bind till it be reversed.

3. It was resolved, That if Tenant after the Mife joined make Default, Judgment final on this Default shall not be given (as *Fitzherbert* in his *N. B.* 6. holds) but a *petit Cape* shall issue; for Peradventure he may save his Default. See *Temps E. 1. Droit 41. 13 E. 1. Droit 51. 7 E. 3. 67. 8. E. 3. 8. 11 E. 3. Statham, Droit. 27 E. 3. 85. 33 E. 3. Judgment 252. 44 E. 3. 13 H. 4. Judgment 245. 3 H. 6. 55. 10 H. 6. 2. 9 E. 4. 16. 12 H. 7. 26 H. 8. 8. 35 H. 8. Dy. 56. 1 Mar. Dyer 98, 103.* where Judgment final in a Writ of Right shall be given. Co. Lit. 295. b.
Cr. Jac. 293.
2 Sand. 46.
Yelverton 211.
1 Buist. 159,
160, 161
F. N. B. 5. n.
11. a,

Cases of Executions.

Mich. 38 & 39 Eliz.

Rot. 259. in the King's Bench.

BLUMFIELD'S Case.

IN an *Audita querela* between *Blumfield* and (a) *Ufzewick* the Case was; Two Men were bound jointly and severally in Bond, one was sued, condemned, and taken in Execution; and afterwards the other was sued, condemned, and taken in Execution, and afterwards the first escaped, and thereupon the other brought *Audita (b) querela*: And although the Plaintiff might have an Action on the Escape against the Sheriff, yet until he be satisfied in Deed, the other cannot have *Audita querela*; and Peradventure the Sheriff is worth nothing; and if the Defendants had been sued by one Writ by several *Præcipes*, although the Entry shall be, *quod unica fiat executio*, that is to be intended of an Execution with Satisfaction, for he shall have both their Bodies in Execution, (c) 4 H. 7. 8. & 29 H. 8. *Execution Br. acc.* 132. And so is the Book in 4 E. 4. 38. & 5 E. 4. 4. to be intended. *Hill. 35 El.* it was adjudged in the Com. Pleas between *Linacre* and (d) *Rhodes*, That notwithstanding the Conusor on a Stat. Staple be taken and escapes, yet his Goods and Lands on the same Statute may be extended, for the Escape and the Action which the Plaintiff has against the Sheriff for the Escape, is no Satisfaction of the Debt. So if the Conusor be taken and dies in Execution, the Conusor shall have Execution of his Goods and Lands. And it was adjudged *Pascb. 24 Eliz.* in the Com. Pleas between *Jones* and (e) *Williams*, That where two Men were condemned in Debt, and one was taken and died in Execution, yet the taking

of

(a) Moor 459.
Cr. El. 478,
479, 555, 574.
3 Keb. 306.
(b) 1 Rol. 308.
Cr. Jac. 338,
339, 532, 694.
2 Bulst. 97,
98, 99, 100.
1 Rol. Rep. 8, 9.
Godb. 257, 258.
1 Rol. Ab. 896.
Cro. Car. 75.
Cr. Execut. 145.
2 Show. 394.
(c) God. 208.
Cr. Jac. 338.
2 Bulst. 98.
Hob. 59.
(d) 1 And. 266.
1 Leon. 230.
2 Leon. 96.
1 Rol. Rep. 204.

(e) Cr. El. 851.
Cr. El. 851.
1 Rol. 903.
1 Rol. Rep. 9.
Hob. 59.

of the other was lawful. And then it was resolv'd by the whole Court, that if the Def. in Debt (a) dies in Execut. the Pl. may have a new Execution by *Elegit*, or *Fieri facias* for divers Reasons.

1. Because the Pl. shall not be prejudiced nor the Def. benefitted by the Act and Wrong of the Def. in Non-payment of his Debt, when no Default is in the Pl. he having pursued the due and ordinary Course of Law.

2. The Execut. of the Body is no (b) Satisfaction (as appears in 4 *H. 7. 8.* & 33 *H. 6. (c)* 47. *Hillary's Case* adjudged) but a Gage for the Debt; as where a Man has return irreplevifable awarded, as it is said in 33 *H. 6. 46.* and therefore after his Death he shall resort to a new Execut. And the Words of the *Capias ad satisfac'* are, *Cap. I. de S. Ita qd' hab' corp' ejus cor' Justic' nostr'*, &c. *ad satisfac' G. de K. de debito & damn'*, &c. So that his Body is taken to the Intent that he shall satisfy, and when the Def. pays the Mony, he shall be discharg. out of Prison.

3. The Death of the Def. is the Act of God, which shall not turn to the Prejudice of the Pl. as it is said in * *Trewm-yard's Case* 33 *H. 8. Dy. 60.* the Pl. shall not be prejudic'd of his Execut. by Act of Law, which doth not Wrong to any one.

4. It would be mischievous to the Pl. to lose his Debt without any Default in him; and no Mischief if a new Execution should be done, for nothing would be liable to his new Execution, but the Lands and Goods of the Def. which in Law and all Equity ought to be subject to the Payment of his Debts. And is not like when the Pl. has Execut. of the Lands of the Def. and afterwards the Lands are evicted, there before the Stat. of 32 *H. (d)* 8. he should not have any new Execut. for the Execut. of the Lands was valuable and accounted in Law for a Satisfaction, and for avoiding of Infiniteness there should be but one valuable Execut. or Execut. with Satisfact. at the Com. Law; but Execut. of the Body is no valuable Execut. and therefore the Pl. after his Death shall have a new Execut. till he has had a valuable Execut. (e) which is the End and Fruit of his Suit: *Et finis rei attend' est, & fines mandator' Dom' Reg' per rescripti sua (sc. brev') diligenti sunt observandi.*

So note Reader; good Differences between Execut. not valuable; (as of the Body of the Def.) and Execut. valuable, as of Lands, &c. And therefore if a Villain be delivered to one in Execut. on a Recovery in Value, and afterwards the Villain dies without Issue; yet the Demandant shall never have a new Execut. for his first Execut. was valuable; and by the Law a Man shall never have but one valuable Execut. Note also a Difference between an Execut. final; as where the Sheriff levies the Money of the Def. Goods; or extends his Lands and delivers them to the Pl. for that the Party accepts in Satisfaction, and that is the End of the Suit, and all that the King's Writ commands to be done; and between Execut. with a (f) *quousq; &c.* tending to an End, and which is not final, as

(a) Lit. Rep. 325, 326.
1 Rol. 903.
Cr. Jac. 136.
143.
Moor 857, 858.
Cr. El. 850,
851.
Hob. 59, 60, 61.
21 Jac. c. 24.
Hert. 159.
(b) Cr. Jac. 338.
(c) 2 Bullt. 97, 99.
Hob. 59.
1 Rol. Rep. 9.

* Godb. 273.

(d) 32 H. 8.
c. 5.
Cr. Jac. 694.
Co. Lit. 289. b.
4 Co. 66. a.

(e) Godb. 294.

2 Show. 394.

(f) 2 Bullt. 98.
in

in the Case of a *Cap' ad satisfaciend'*, &c. it is not final, but his Body is to be taken to the Intent and Purpose that he shall satisfy the Party, and his Imprisonment is not absolute, but *quousque* the Def. shall satisfy the Party: But Execution final is when the Party is satisfied; and because he dies before Satisfaction it consists with Law and Equity, that the Plaintiff should resort to a new Execution. *Vide Regist. & F. N. B.* 246. If a Man has recovered Damages in Trespass before Justices of *Oyer and Terminer*, and has the Body of the Party in Execution *quosque satisfecerit* the Plaintiff, and he who is in Execution dies, he who recovered shall sue a *Certiorari* to the Justices to remove the Record into the King's Bench, that the Justices there may do on that Record as the Law requires in such Case; and that is to award a new Execution, 47 *E.* 3. Tit. *Execution* 41. If in Trespass the Pl. recovers, and the Def. is taken for the King's Fine, if he pray that the Def. may remain in Prison till he be satisfied, he shall not have an *Elegit*, because he has taken Execution of his Body and has it; but if the Party dies in Prison, so that he has not Execution with Satisfaction, wherein is no Default of him, he shall have an *Elegit* afterwards, because he cannot have Satisfaction according to the first Election; and these are the Words of the Book. And therewith agrees *Fitz. N. B.* 246. *b.* And if the Conusor of a Statute-Merchant or Staple, &c. be taken and dies in Execution, yet the Conusee shall have Execution without Doubt of his Goods and Lands, as it was resolved in (a) *Linacre's Case*. And so you will better understand your Books in 22 *Ass.* 43. 33 *H.* 6. 46, 47. 4 *E.* 4. 38. 5 *E.* 4. 4. *Br. Execution* 79. 41 *E.* 3. 13. *in Accompt*, &c.

(a) 1 And. 266.
Hob. 60.
1 Leon. 230.
2 Leon. 96.
1 Rol. Rep. 204.
Antea 86. b.

*Hill. 40 Eliz. Rot. 114.*GARNON'S *Case.*

Between *Layton* Plaintiff, and *Garnon* Sheriff of the County of, &c. Defendant, the Case was such; *Layton* recovered against *Wallxen* in the Common Pleas in an Action of Debt, and sued forth a *Capias ad satisfaciendum*, and *ex post Ca.* and outlawed the Defendant; the Defendant brought a Writ of Error, and the Judgment was affirmed: And thereupon within the Year a *Capias utlagatum* was awarded, and the Defendant was taken, and the Sheriff suffered him to escape before the Return of the Writ; and on this Escape the Plaintiff brought this Action. And in this Case three Points were resolved.

Moor 566, 567.
Cr. El. 706, 707.
1 Rol. 810, 895.
1 Leon 263.
Cr. Jac. 361.

1. If one at the Common Law had Judgment in an Action of Debt, and after the Judgment outlawed the Defendant, the Plaintiff was at the End of his Suit as to any Process to be sued by himself, for he could not have a *Scire fac'*, nor any other Process on the Judgment, but was put to his (a) new Original, as it is agreed in 13 *H. 4. 1. a.* 21 *E. 3. 55.* 20. *E. 3. Nonability 8. acc.* And although before the Statute of 25 *E. 3. Capias* did not lie in Debt, nor was the (b) Body of the Defendant before that Statute subject to Execution for Debt, as appears before in Sir *Will. Harbert's Case*: Yet if the Defendant be taken by *Capias utlagatum* at the King's Suit no Laches being in the Plaintiff in continuing of his Process, he should be in (c) Execution for the Plaintiff if he would: For inasmuch as the King by the original Suit of the Party is intitled to have all his Goods and Chattels, and the Profits of his Lands by the Outlawry, and his Body also in Prison, it is reasonable that if the Defendant in such Case be taken at the King's Suit, that as the King shall have Benefit by the Suit of the Party, so the Party shall have some Benefit by the Suit of the King.

(a) Co. Lit 291. a.
2 Bulst. 63.
Cart. 124.
Cr. El. 706, 124.
Cr. El. 706.
3 Co. 12. a.
(b) 1 Brown 118.
2 Bulst. 63.
(c) Yelv. 19, 20.
Bridg. 7.
1 Rol. 810, 895.
Cr. El. 706.
Moor 567, 598.
Hob. 57.

2. It was resolved, That if Judgm. be given in the Com. Pleas, and removed by a Writ of Error, and Judgm. affirmed within the Year, and (d) they award a *Capias*, or a *Fi. fa.* the Plaintiff

(d) Godb. 372;
373.
Cr. El. 416.
2 Inst. 471.
Cart. 189.

Plaintiff is not put to a *Scire facias*, altho' it be in another Court, against the Opinion of 14 H. 7. 15; 19. Vide 21 Aff. p. 14. F. N. B. 267.

3. It was resolved, That in the Case at Bar, when he was taken by *Capias utlagatum* which issued out of the King's Bench, he should be in (a) Execution for the Plaintiff presently after his Arrest if he would, although his Body be never brought into Court, and altho' the Court do not commit him in Execution for the Party. Vide 7 H. 6; 6: *Nota bene*, in all Cases when the Plaintiff may have a *Capias ad satisfaciendum*; and the Party Defendant is taken by *Capias (b) pro fine*, there the Defendant is in Execution presently, if the Plaintiff will; without any Prayer of the Party: Also in all Cases when the Plaintiff may have Execution presently by *Fieri facias*, although he cannot have a *Capias*, nor does a *Capias* lie in such Action; as in Affise with Force and Rendisseisin, &c. and the Party is taken by *Capias pro fine*; and is committed at the King's Suit, there the Plaintiff may pray that he may remain in Execution for his Damages, but without Prayer he shall not be in Execution, altho' he may have Execution by *Fieri facias*; And when the Pl. has Judgment and (c) surceases his Time, so that he cannot have present Execution neither by *Capias* nor by *Fieri facias*, &c. but is put to a *Scire fac*; there if the Defendant be taken by *Capias (d) pro fine*, the Plaintiff may pray that he may remain in Execut. for him; but that shall not be (e) without Prayer of the Party: See for Proof of these Differences 11 H. 7. 15. 13 H. 7. 21. 7 H. 6: 6. a. 36 H. 6. 23. F. N. B. 121. P. 6 E. 4: 4. a. 2 R. 3. Execution 16. 7 H. 4. 4. b. &c. Observe good Reader this Case well, and all these Books, for these Points touching Execution (which is the Life of the Law) are necessary to be known:

(a) 1 Sid. 380.
Cr. El. 652,
706, 850.
Yelv. 19, 20.
1 Rol. 810, 895.
Bridg. 7.
Moor 567.
Hob. 57, 115.
Postea 89. a.
(b) Moor 567.
Bridg. 7.

(c) Bridg. 7.

(d) Moor 567.
Cr. El. 467.
1 Leon. 263.
Bridg. 7.
Hob. 57.
(e) Salk. 319.
5. Mod. 200.
Comb. 373.

Trin. 41 Eliz.

In the Common Pleas.

FROST'S Case.

FROST recovered Debt and Damages against *B.* in the Common Pleas, 29 *Eliz.* and on an *ex post Capias* the Defendant was outlawed, and after the Year the Plaintiff procured a *Capias utlagatum* against him, and delivered it to the Sheriffs of *London*. And that one *Laborn* one of the Serjeants of the Sheriffs of *London* had arrested the said *B.* in *Fleetstreet* at the Suit of one *A. ad respondend'*, &c. before the Sheriffs, *Laborn* kept *B.* in his House, and then *Frost* came to *Laborn* with the Sheriffs Warrant to arrest him on the *Capias utlagat'* which he absolutely refused. And afterwards the Sheriffs suffer'd the said *B.* to go at large; and on this Matter *Frost* brought an Action on the Case against the Sheriffs, and supposed that the Sheriffs arrested the said *B.* by Force of the said *Capias utlagat'*, and that the Sheriffs suffered him to go at large: The Defendants pleaded, *Non permisserunt cum ire ad largum*; and the Jury found all the special Matter. And Judgment was given for the Plaintiff.

1 Leon, 263;
Bridg. 7.

For 1. They resolved, That when a Man is in the Custody of the Sheriff by Process of Law, and afterwards another Writ is delivered to him to arrest the Body of him who is in his Custody, presently he is in his (a) Custody by Force of the second Writ by Judgment of Law, although he do not actually arrest him; for to what Purpose should he arrest him who is and was before in his Custody? *Et (b) lex non præcipit inutilia, quia inutilis labor stultus*: And the Words of the *Capias ad satisfaciendum* are not only, *quod capiat, &c.* but *quod salvo custodiat, &c.* *Ita quod habeat corpus, &c.* So that although he cannot take him (whom he has) in his Custody, yet he may safely keep him; and therefore agrees 7 *H.* 4. 30 *b.*

(a) Cr. Jac. 436;
Antea 88 *b.*
Comb. 435.

(b) 2 Rol. Rep.
408. Ant. 21. a.
Hardr. 387.
Co. Lit. 127. *b.*
197. *b.*

2. The Verdict well warrants the Declaration, for in Judgment of Law it is equipollent, and amounts to as much as if the Sheriffs had arrested the said *B.*

(a) Cr. Fl. 467.
Antea 88.
5 M. d. 100.
Salk. 519.
Comb. 373.
(b) Dy. 172.
Pl. 11.

3. That although the *Capias utlagat* was sued after the Year, so that the Defendant could not be in (a) Execution without Prayer of the Party, &c. yet the Plaintiff is prejudiced by his Escape, for he ought not to be discharged of the Imprisonment till he find Sureties to satisfy him by the Statute of 5 (b) E. 3. cap. 12.

Trin. 42 Eliz.

In the Exchequer.

Hoe's Case.

Moor 468.
Cart. 19.

BETWEEN *Clement Hoe* Executor of *John Hoe* Plaintiff, and *Boulton* Defendant, the Case was such; *John Hoe* the Testator had Judgment to recover in the King's Bench against *Boulton* 75 l. 3 s. 4 d. *John Hoe* assigned it by Deed inrolled to the Queen in Satisfaction of a Debt due to the Queen by him as Collector of Fifteens, with Proviso, that if the Lord Treasurer and Barons of the Exchequer, or any two of them, because the Debt could not be levied in convenient Time, or for any other reasonable Cause disallow'd of the said Assignment, and revoked it by Writing under their Hands, then the Assignment should be void. And afterwards *Boulton* brought a Writ of Error according to the new Statute, and there Judgment was affirmed, and 5 l. Costs on the Affirmance of the Judgment: And afterwards (on Process which is called a Writ of Prerogative out of the Exchequer on the said Assignment) the Lands of *Boulton* were extended, and his Goods which were of Value above the said Debt

27 El. cap. 2.

Debt assigned were seized by the Sheriff by Force of the said Writ, but the Writ was not returned. And afterwards *Periam*, *Exens*, and *Southerton*, 3 of the Barons, revoked the Assignm. after the Testator's Death, because the Testator had satisfied the Debt which was due to the Queen by him as Collector. And now the Pl. as Ex'or of *J. Hoe* sued a *Scire facias* to have Execut. of the said 75 l. 3 s. 4 d. & 5 l. Costs: And the said Matter being disclosed by special Pleading, a Demur. in Law was joined. And in this Case three Points were resolved.

1. That the Execut. for the Queen was good without Question, as to the Goods, altho' the Writ was not returned. And so it is in Case of a com. Person, if the Sheriff by Force of a Writ of *Fieri facias* levies the Debt, and delivers it to the Party, the Execut. is good without a Return of the Writ, as it is adjudged 20 *H. 6. 24. a.* & 21 *H. 6. 5. a.* And so was it adjudged in the Com. Pleas, *Pasch. 23 El.* between *Rook* and *Willimore*; and *Trim, 23 El.* between *Mount* and *Andrews*; and therewith agrees 44 *E. 3. 18.* So if a Man be taken on a *Capias ad (a) satisfaciendum*, the Execution is well done, although the Writ be never returned: And the Difference is apparant between *Capias* in Process, and *Capias ad satisfaciendum*, for if the *Capias (b)* in Process be not returned, the Arrest is tortious, for there the End of the Arrest is to the Intent the Party should appear and answer the Pl. but in all Writs of Executions when the Sheriff alone does it, as *Capias ad satisfaciendum*, *Habere facias seisinam*, or *possessionem*, *Fieri fac. Libera'*, &c. If the Execution be duly done it is good, although the Writ be not returned, for there the Plaintiff has the Effect of the Suit, and no other Thing is to be done on his Part after: But in Case of (c) *Elegit*, because there the Extent is to be made by Inquest, and not by the Sheriff only, it ought to be returned, otherwise it is nought worth. So by these Resolutions in the Case at Bar, and by the said Judgments here cited, you will learn the Law, and better understand your Books in 19 *E. 3. Scire facias, 11 H. 4. 73. b.* and (d) *Fulwood's* Case in the fourth Part of my Reports.

Note Reader, that the said Judgments given in the Case of the *Fieri facias*, where Execution was done, and no Writ returned, were given on great Reason.

1. Because the Levying of the Debt was lawful, and well done, and the Party Def. cannot resist the Sheriff to levy the Money.

2. The Effect of the Authority which the Sheriff had by Force of the *Fieri facias* was executed.

3. The great Prejudice that the Def. (whose Goods and Chattels are sold by the Writ and Process of Law, for the Satisfaction of his Debt) would have, if the Sheriffs not returning of the Writ should cause a new Execut. to be sued forth against him, and leave the Def. to his Action against the Sheriff.

(a) Cr. El. 17.
Lane 52. 21 H.
7. 23. a.
16 H. 7. 14. a. b.
20 H. 7. 13.
Cro. Car. 447.
Mo. 57.
Owen 48. 4 Co.
67. a.
(b) 2 Rol. 563.
Lane 52.
21 H. 7. 23. a.
4 Co. 67. a.

(c) 4 Co. 67. a

(d) 4 Co. 67. a

Cro. El. 206.
209.
Cro. Car. 323.
539.
Hob. 206.
Sav. 123.
Cro. El. 390.
Salk. 323.
2 Show. 166.

4. If the Sale of the Goods by Force of the Writ, should by the Non-return of the Writ be wrongful, then the Sheriff would never find Buyers of the Goods of any Def. by Force of any Writ of Execut. which would be inconvenient, and a great Delay of Execut. which are the Fruit and the Life of every Suit; and where the Words of the Writ of *Fieri fac'* are, *Ita qd' habeas denar'*, &c. they are but Words of Command to the Sheriff to make Return, which if he do not he shall be amerced, but yet the Execut. shall stand in Force.

Cro. Car. 539.
2 Show. 79, 281.

2. It was resolved, That after Execut. had by the Queen, the Revocat. came too late, for then the Queen had had the Effect and End of the said Assignment, and that which was executory when it was assigned, is now executed by lawful Process of Law, and therefore cannot be revoked; for when

(a) Dy. 49. pl. 12.

one has a Power of (a) Revocat. yet if he suffers any Thing to be lawfully executed by Force of it, as to that he cannot make any Revocat.: As if a Man makes a Letter of Attorney to make Livery, before Execut. he may revoke it, but after Execut. lawfully had, it is executed, and cannot be revoked. *Vide 7 b. H. 6. 41.* in Detinue, where the Case was; In Detinue of a Statute-Merchant the Def. prayed Garnishment, the Pl. recovered against the Garnishee by erroneous Judgment, by Force whereof the Defendant delivered the Statute to the Pl. who had Execution; and afterwards the Garnishee reversed the Judgment in a Writ of Error, by which he had restored all that he lost, by that the Execut. shall not be avoided: But I conceive in such Case he shall be helped by *Audita Querela*. *Vide 7 E. 4. 2.* If one, to whom another is indebted, be outlawed, and he who is indebted pays the Money to the Queen, and afterwards the Outlawry is reversed, now the Creditor shall recover his Debt against him. So if the Goods of a Man (c) outlawed be sold by the Sheriff on the Writ of *Capias utlagatum*, &c. and afterwards the Outlawry is reversed by Writ of Error, the Defend. shall have Restitution of his Goods; but if the Sheriff by Force of a *Fieri facias* (d) sell Goods, and afterwards the Judgment is reversed by Writ of Error, the Defendant shall not have Restitution of his Goods, but the Value of them for which they were sold; and there are 2 Reasons of this Difference. 1. If the Sale of the Sheriff by Force of a *Fieri fac'* should be avoided by subsequent Reversal of the Judgment, there would be no Buyer, and by Consequence no Execution done. 2. In the Case of a *Fieri facias*, the Sheriff is compellable to make and levy the Debt of the Goods, &c. of the Def. and therefore it is great Reason that it should stand: But in the Case of *Capias utlagatum*, the Sheriff or Escheator is not compellable to sell them, but may keep them for the King's Use, and therewith agrees 20 *Eliz. Dyer* (e) 363. and *vide 3 E. 3. 51.* Recompence in Value

(b) 7 H. 6. 42 a. b.
8 Co. 142. b.
143. b. Br. Error 66. 1 Rol. 777, 778, 308.

(c) 8 Co. 143. a.
Cr. El. 270, 278.
Moor 270.
1 Rol. 778.
Dyer 223. pl. 26.
(d) 8 Co. 96. b.
143. a. 1 Rol. 778. Dy. 363. pl. 24. Mo. 573. Jenk. Cent. 264. 2 Leon. 92. 3 Leon. 89, 90. Godb. 27, 28. Yelv. 180. Goldsb. 103, 104. Cr. Eliz. 278. Cr. Jac. 246.

(e) Dyer 363.
Bl. 24.

on a Voucher once lawfully executed, shall not be defeated although the Title of the Demandant to the Land which he recover'd, be afterwards disaffirmed and evicted.

3. It was resolved, That the Revocation by three, if no Execution had been had, had been sufficient; for if three (a) revoke, two do it; but if the Words of the Clause of Revocation had been by them jointly or severally, then the 3 of them could not have done it, for that had been neither jointly nor severally. And therewith agrees 36 H. 8. *Dier* 61, 62. § 27 H. 8. And so note a good (b) Difference.

(a) Cr. Jac. 254.
1 Rol. 328.
(b) Co. Lit.
181. b. 1 Rol.
329. Yelv. 25,
26. Noy 47.
Hurr. 127.
1 Rol. Rep. 199.
2 Inst. 38.
27 H. 8. 6. b.
1. Co 92. a.
Dy. 62 pl. 34.
2 Rol. Rep. 107.
3 Bulltr. 210.

Mich. 2 Jac.

In the King's Bench.

SEMAYNE'S Case.

IN an Action on the Case by *Peter Semayne* Plaintiff, and *Richard Gresham* Defendant, the Case was such; the Plaintiff and one *George Berisford* were Jointenants of an House in *Black Fryers* in *London* for Years, *George Berisford* acknowledged a Recognizance in the Nature of a Statute-Staple to the Plaintiff, and being possessed of divers Goods in the said House, died, by which the Defendant was possessed of the House by Survivorship, in which the Goods continued and remained; the Plaintiff sued Process of Extent on the Statute to the Sheriffs of *London*; the Sheriffs returned the Conusor dead, on which the Plaintiff had another Writ to extend all the Lands which he had at the Time of the Statute acknowledged, or any Time after, and all his Goods which he had at the Day of his Death; which Writ the Plaintiff delivered to the Sheriffs of *London*, and told them that divers Goods which were in the said *George Berisford's* at the Time of his Death were in the said House: And thereupon the Sheriffs by Virtue of the said Writ, charged a Jury to make Inquiry according to the said Writ, and the Sheriffs and Jury *acceserunt ad Domum predictam ostio Domus predictæ aperto existen' & bonis predictis in predicta Domo tunc existen'*, and they offered to enter the said House, to extend the

Co. Ent. 12.
pl. 11. Mo 668.
Yelv. 28, 29.
Cr. El. 608, 609.
2 Rol. Rep. 294.

the Goods according to the said Writ; and the Def. *præmis-
sorum non ignarus*, intending to disturb the Execution, *estio
præd' domus tunc aperto existen', claudebat contra Vicecom'
& Furator' præd'* whereby they could not come, and extend
the said Goods, nor the Sheriff seize them, by which he lost
the Benefit and Profit of his Writ, &c. And in this Case
these Points were resolved.

(e) 3 Inft. 162.
Cr. El. 753.
2 Co. 32. a.
7 Co. 6. a.
8 Co. 176. a.
11 Co. 82. a.
1 Bulstr. 146.
Stanf. Cor. 14. b.

(b) Co. Lit. 391.
Hale's Pl.
Cor. 32. Stanf.
Cor. 15. c. 16. d.
(c) 3 Inft. 56.
Stanf. Cor. 14. a.
Cor. 192. 3 E. 3.
Cor. 205, 330.
Br. Cor. 100.
1 Rol. Rep. 182.
22 H. 8. c. 5.
(d) 11 Co. 82. b.
Br. Riots, &c. 1.
21 H. 7. 39. a.
Fitz. Tresp. 246.
2 Inft. 161, 162.
(e) 11 Co. 82. b.
1 Rol. Rep. 182.

(f) O. Benl. 112.
1 Bulstr. 146.
Cr. El. 908, 909.
Moor 668, 668.
Yelv. 28, 29.
Cr. Car. 537.
538. 3 Inft. 161.
Dy. 36. pl. 40.
12 Co. 131.
4 Inft. 177.
Goldsb. 70.
1 Jones 213, 234.
4 Leon. 41.
13 E. 4. 9. a.

(g) Yelv. 29.
Politea 92. b.
Cr. El. 909.
Moor 668.
(h) 4 Inft. 177.

1. That the House of every one is to him as his (a) Cattle and Fortrefs, as well for his Defence against Injury and Violence, as for his Repose; and altho' the Life of Man is a Thing precious and favoured in Law; so that altho' a Man kills another in his Defence, or kills one *per infortun'*, without any Intent, yet it is Felony, and in such Case he shall forfeit his Goods and Chatt', for the great Regard which the Law has to a Man's Life; but if Thieves come to a Man's (b) House to rob him, or murder, and the Owner or his Servants kill any of the Thieves in Defence of himself and his House, it is no Felony, and he shall lose nothing, and therewith agree 3 E. 3. *Coron.* 303. & 305. & 26 *Aff. pl.* 23. So it is held in 21 H. 7. 39. every one may assemble his Friends and Neighb. (d) to defend his House against Violence: But he cannot assemble them to go with him to the Market (e), or elsewhere for his Safeguard against Violence: And the Reason of all this is, because *domus sua cuique est tutissimum refugium*.

2. It was resolved, When any House is recovered by any real Action, or by *Eject' firmæ*, the Sheriff may break the House and deliver the Seisin or Possession to the Demandant or Pl. for the Words of the Writ are, *Habere facias seisinam, or possessionem, &c.* and after Judgment it is not the House in Right and Judgment of Law of the Tenant or Defendant.

3. In all Cases when the King (f) is Party, the Sheriff (if the Doors be not open) may break the Party's House, either to arrest him, or to do other Execut. of the K's Process, if otherwise he cannot enter. But before he breaks it, he ought to signify the Cause of his Coming, and to make Request to open the Doors; and that appears well by the Stat. of *Westm.* 1. *cap.* 17. (which is but an Affirmance of the Com. Law) as hereafter appears, for the Law without a Default in the Owner abhors the Destruct. or Breaking of any House which is for the Habitat, and Safety of Man) by which great Damage and Inconvenience might ensue to the Party, when no Default is in him; for perhaps he did not know of the Process, of which if he had Notice, it is to be presumed that he would obey it, and that appears by the Book in 18 E. 2. (g) *Execut.* 252. where it is said, That the K's Officer who comes to do Execut. &c. may open the Doors which are shut; and break them, if he cannot have the Keys; which proves, that he ought first to demand them 7 E. 3. (b) 16. *J.* beats *R.* so as he is in Danger of Death, *J.* flies, and thereupon Hue and Cry is made, *J.* retreats into the House of *T.* they who pursue him, if the House be kept and defended with Force (which proves that first Request ought

to be made) may lawfully break the House of T. for it is at the K's Suit. 27 *Aff. p.* 66. the K's Bailiff may distrain for Issues (a) in a Sanctuary. 27 *Aff. p.* 35. by Force of a *Capias* on an Indictm. of Trespas the Sheriff may (b) break his House to arrest him; but in such Case, if he breaks the House when he may enter without Breaking it, (that is, on Request made, or if he may open the Door without Breaking) he is a Trespaffor. 41 *Aff. p.* 15. on Issue joined on a Traverſe of an Office in Chancery, *Venire fac.* was awarded returnable in the King's Bench, without mentioning *non omittas propter aliquam libertat'*, yet forasmuch as the K. is Party, the Writ of it self is *non omittas propter aliquam libertat'*, 9 *E.* 4. 9. that for Felony (d) or Suspicion of Felony, the K's Officer may break the House to apprehend the Felon, and that for 2 Reasons; 1. For the Commonwealth, for it is for the Commonwealth to apprehend Felons. 2. In every Felony the King has Interest, and where the King has Interest, the Writ is, *non omittas propter aliquam libertatem*; and so the Liberty or Privilege of an House doth not hold against the King.

4. In all Cases when the Door is (e) open the Sheriff may enter the House, and do Execut. at the Suit of any Subject, either of the Body, or of the Goods; and so may the Lord in such Case enter the House (f) and distrain for his Rent or Service, 38 *H. 6.* 26. a. 8 *E. 2.* *Distr.* 21. § 33 *E. 3.* *Avowry* 256. the Ld. may distrain in the House, altho' Lands are also held in which he may distrain. *Vide* 29 (g) *Aff.* 49. But the great Question in this Case was, if by Force of a *Capias* or *Fieri fac'* at the Suit of the Party the Sheriff after Request made to open the Door, and Denial made, might break the Def's House to do Execut. if the Door be not opened. And it was objected, That the Sheriff might well do it for divers Causes: 1. Because it is by Process of Law; and it was said, That it would be granted on the other Side, that a House is not a Liberty, for if a *Fieri fac'* or a *Capias* be awarded to the Sheriff at the Suit of a common Person, and he makes a Mandate to the Bailly of a Liberty who has Return of Writs, who *nullum dedit respons.* in that Case another Writ shall issue with *non omittas propter aliquam libertat'*, yet (it will be said on the other Side) that he shall not break the Def's House, as he shall do of another Liberty; for whereas in the County of *Suffolk* there are 2 Liberties, one of *S. Edmund Bury*, and the other of *S. Etheldred of Ely*, suppose a *Cap'* comes at the Suit of *A.* to the Sheriff of *Suff.* to arrest the Body of *B.* the Sheriff makes a Mandate to the Bailiff of the Liberty of *S. Etheldred*, who makes no Answer, in that Case the Pl. shall have a Writ of *Non omittas*, and by Force thereof he may arrest the Def. within the Liberty of *Bury*, altho' no Default was in him: 2. Admitting it be a Liberty, the Defendant himself shall never take Advantage of a Liberty: As

(a) Br. Distress 35. Br. Trespas 151.

(b) Fitz. Trespas 232. Br. Trespas 248.

(c) Br. Prerogative le Roy 109. Br. Franchise 18.

Br. Process 102. Fitz. Prerogative 21.

(d) 13 *E.* 4. 9. 2.

Fitz. Bar. 110.

4 Inst. 177.

1 Bullstr. 146.

2 Bullstr. 61.

(e) 1 Brown 50. Cr. Jac. 486.

(f) Br. Trespas 226.

Br. Issue 26.

(g) Br. Distress

for 52. Fitz.

Affis: 286.

If the Bailiff of a Liberty be Def. in any Action, and Process of *Cap'* or *Fieri fac'* comes to the Sheriff against him, the Sheriff shall execute the Process against him, for a Liberty is always for the Benefit of a Stranger to the Action. 3. For Necessity the Sheriff shall break the Def.'s House after such Denial as is aforesaid, for at the Com. Law a Man should not have any Execut. for Debt, but only of the Def.'s Goods. Suppose then the Def. would keep all his Goods in his House, and so the Def. himself by his own Act would prevent not only the Pl. of his just and true Debt, but there would also be a great Imputation to the Law, that there should be so great a Defect in it, that in such Case the Pl. by such Shift without any Default in him should be barred of his Execut. And the Book in 18 E. 2. (a) *Execut.* 252. was cited to prove it, where it is said; that it is not lawful for any one to disturb the K's Officer, who comes to execute the K's Process; for if a Man might stand out in such Manner, a Man would never have Execut. but there it appears (as has been said) that there ought to be Request made before the Sheriff breaks the House. 4. It was said, that the Sheriff was an Officer of great Authority, in whom the Law reposed great Trust and Confidence, and are of Sufficiency to answer all Wrongs which should be done; and they had *custodiam Comitatus*, and therefore it should not be presumed that they would abuse the House of any one by Colour of doing their Office in Execut. of the K's Writs against the Duty of their Office, and their Oath also: But it was resolved, That it is not lawful for the Sheriff (on Request made and Denial) at the Suit of a (b) com. Person, to break the Def.'s House, *sc.* to execute any Process at the Suit of any Subj. for thence would follow great Inconven. that Men as well in the Night (c) as in the Day should have their Houses (which are their Castles) broke, by Colour whereof great Damage and Mischief might ensue; for by Colour thereof, on any feigned Suit, the House of any Man at any Time might be broke when the Def. might be arrested elsewhere, and so Men would not be in Safety or Quiet in their own Houses? And altho' the Sheriff be an Officer of great Authority and Trust, yet it appears by Experience, that the K's Writs are served by Bailiffs, Persons of little or no Value: And it is not to be presumed, that all the Substance a Man has in his House, nor that a Man would lose his Liberty which is so inestimable, if he has sufficient to satisfy his Debt. And all the said Books which prove, that when the Process concerns the King, that the Sheriff may break the House, imply that at the Suit of the Parry, the House may not be broken, otherwise the Addition (at the Suit of the K.) would be frivolous. And with this Resolution agrees the Book in (d) 13 E. 4. 9. and the express Difference there taken between the Case of Felony, which (as has been said) concerns the Commonwealth, and the Suit

(a) Yelv. 29.
Antea 91. b.
Moor 668.
Cr. El. 409.
O. Beal. 121.

The Resolution of the Court.
(b) 1 Jones 429.
430. 1. Brownl.
50. 1 Bulltr. 146.
Cr. Jac. 556.
O. Beal. 121.
4 Inst. 177.
Palm. 53. Dyer
36. pl. 41.
Moor 668.
Cr. Car. 537.
538. Cr. El. 908.
909. Yelv. 29.
Hob. 62, 263,
264. 4 Leon. 41.
11 Co. 82.
March. 3, 4.
18 E. 4. 4. a.
Br. Execut. 100.
Br. Trespass
300.
(c) 9 Co. 66. a.
Cr. Jac. 280, 486.
Jenk. Cent. 291.
Hale's Pl. Cor.
25. Owen 63.
(d) 13 E. 4. 9. a.
Antea 92. a.
Fitz. Bar 110.
4 Inst. 177.

of any Subject, which is for the particular Interest of the Party, as there it is said in (a) 18 E. 4. 4. a. by *Littleton* and all his Companions it is resolved, That the Sheriff cannot break the Defendant's House by Force of a *Fieri facias*, but he is a Trespassor by the Breaking, and yet the Execution which he then doth in the House is good. And it was said, that the said Book of (b) 18 E. 2. was but a short Note, and not any Case judicially adjudg'd, and it doth not appear at whose Suit the Case is intended, but it is an Observation or Collection (as it seems) of the Reporter. And if it be intended of a *Quo (c) minus*, or other Action in which the King is Party, or is to have Benefit, the Book is good Law.

5. It was resolved, That the House of any one is not a Castle or Privilege but for himself, and shall not extend to protect any (d) Person who flies to his House, or the Goods of any other which are brought and conveyed into his House, to prevent a lawful Execution, and to escape the ordinary Process of Law; for the Privilege of his House extends only to him and his Family, and to his own proper Goods, or to those which are lawfully and without Fraud and Covin there; and therefore in such Cases after Denial on Request made, the Sheriff may break the House; and that is proved by the Statute of *West. 1. c. (e) 17.* by which it is declared, That the Sheriff may break an House or Castle to make Replevin, when the Goods of another which he has distrained are by him conveyed to his House or Castle, to prevent the Owner to have a Replevin of his Goods; which Act is but an Affirmance of the Common Law in such Points. But it appears there, that before the Sheriff in such Case breaks the House, he ought to demand the Goods to be delivered to him; for the Words of the Statute are, After that the Cattle shall be solemnly demanded by the Sheriffs, &c.

6. It was resolved, admitting that the Sheriff after Denial made might have broke the House, as the Plaintiffs Counsel pretend he might, then it follows that he has not done his (f) Duty, for it doth not appear, that he made any Request to open the Door of the House. Also the Defendant as this Case is, has done that which he might well do by the Law, *scil.* to shut the Door of his own House.

Lastly, the general Allegation, (g) *premissorum non ignorans* was not sufficient in this Case, where the Notice of the Premises is so material; but in this Cause it ought to have been certainly, and directly alledged, for without Notice of the Process of Law, and of the Coming of the Sheriffs Jury to execute it, the shutting of the Door of his own House was lawful. And Judgment was given against the Plaintiff.

(a) Cr. Eliz. 909. Yelv. 29. Br. Execution 100. Br. Trespass 390.

(b) 18 E. 2. Execution 252. Yelv. 29. Moor 668. Cr. El. 909. Antea 91. b. 92. b. O Benl. 121. (c) Plowd. 208. a. 2 Show. 87.

(d) Cr. Car. 544.

(e) 2 Inst. 192, 193, 194.

(f) Stile 447.

(g) Harp. 2. 1 Mod. Rep. 286.

Trin. 39 Eliz.

In the Exchequer.

BARWICK'S Case.

1 Co. 43. b.
Moor 393, 394.
16 Co. 63. a.
2 Rol. Rep. 273.
3 Keb. 414.
Stile 189.
Hardr. 499.
Lane 11.

IN an Information of Intrusion into a House and certain Lands in *Sutton* in *Galtres* in the County of *York*, against *Peter Barwick* and others, the Case was such: *E. 6.* by his Letters Patents 19 *Maii*, anno 4. demised the Manor of *Sutton*, whereof, &c. to *Thomas Tirril* for 21 Years: And afterwards Queen *Elizabeth* having the Reversion, by her Letters Patents 11 *Maii*, in the 10th Year of her Reign reciting the said Lease, demised the said Manor to *Humphrey Barwick* for 21 Years in Reversion: *Humphrey Barwick* 2 *Augusti*, 10 *Eliz.* by Indenture granted to one *Story* a House and Croft Parcel of the said Manor, from the Feast of *S. Michael* 1597, for 21 Years, and 20 *Maii*, 16 *Eliz.* demised to *John Ragget* another Parcel of the said Manor for 21 Years, from the said Feast of *S. Michael*; and another Demise of another Parcel to *William Simpson* for the like Term. And afterwards Queen *Eliz.* 21. *Nov. anno* 23. by her Letters Patents (reciting (a) the said Lease to *Humphrey Barwick*) *pro* & *in consideratione rursus* (b) *redditionis totius status, tituli, termin' annor' & interesse, de & in premiss. per pread' literas paten' eidem* *Humfrido* demised and granted the said Manor to the said *Humphrey* for 21 Years, whereas in Truth the said *Humphrey* had not surrendered all the said Term granted to him, for he had made divers Assignments and Demises, as is aforesaid. And afterwards Queen *Eliz.* 28 *Julii, anno* 26. in Consideration of the Surrender of the said Letters Patents *de anno* 23 *Eliz.* and of all the Estate, Term and Interest by them demised and granted, demised and granted the said Manor to the said *Humphrey*, *Habend' a* (c) *die consecution' earund' literar' patent'*, for the Lives of 3 others and the Surviv. of them: And under this later Demise the Defendant claimed.

(a) Cr. Car.
198.
(b) Godb. 442.

(c) Alc. in 77.

claimed. And whether this later Lease was good or not, was the Question. And after many Arguments at Bar and Bench Judgment was given by Sir *William Periam* Chief Baron, and the whole Court of Exchequer for the Queen. And in this Case two Points were resolved :

1. Inasmuch as the valuable and material Considerat. of the said Letters Patents for three Lives being false, and thereby the Queen deceived, by Consequence the said Lease for three Lives was void; for the Consideration was, That the said former Lease should be surrendered, and in Truth the former Lease was void, so the Cause and Motive Cause of making the Lease was false; and therefore the said later Lease made on such Consideration was void also. And the former Lease *de anno 23.* was void, because it was made in Consideration of the Surrender of all the Estate, Term, and Interest demised by the Letters Patents *de anno 10 Eliz.* whereas in Truth all the Estate was not surrendered: For he had made divers Demises and Grants of certain Parcels of the said Manor before, and that might be very mischievous to the Queen, for her Lessee might demise all the Land to him demised saving a small Parcel, and for a small Term in Reversion, and after surrender to the Queen, and take a new Lease with Reservation of Rent, and Condition of Re-entry; and in that Case neither the new Rent, nor the Condition would extend to the Estates and Interests derived out of the first Lease. And it is a Maxim, That if the Consideration which is for the Benefit of the Queen, be it executed, or executory, or be it on Record or not on Record, be not true or not duly performed, or if Prejudice may accrue to the Queen by Reason of non-performance of it, the Letters Patents are void. And in the Case at Bar it was for the Advantage and Benefit of the Queen, that the whole former Term *de anno 10 Eliz.* should be surrendered accord. to the express Consideration, to the Intent that the Rent, and Condition reserved on the new Lease *de anno 23.* should extend to all the Land demised according to the Purport and true Intention of the said Letters Patents. Also when the Queen made the Lease for three Lives in Consideration of the Surrender of the said Lease *de anno 23.* which Lease was void, thence it follows that the Demise made in Consideration of that Surrender was void also, because the Queen was deceived in the Consideration of her Demise; for the Surrender of the former Term was a principal Motive to induce the Queen to make a new Lease, and perhaps to mitigate her Fine; which Consideration being valuable and material, ought to be truly and duly performed.

2. It was resolved, That when the Queen 28 *Julii, an. 26.* demised the said Manor to *Humph. Barwick, Habend' sibi a die consecration' earund' litterar' patentium,* that the said 28 Day of *July* it self is without Quest. excluded and that the Demise

cannot

2 Rol. Rep. 273.
Davis 40. a.
1 Co. 43. b.
Lane 3, 13, 76,
109, 112.
Hard. 499.
Hob. 204, 230.
Moor 393.
Hurr. 7.

2 Rol. Rep. 273.

Dy. 352. pl. 26.

Anrea 1. a. b.
Co. Lit. 46. b.

(a) Stile 189.
Cr. Car. 94.
Moor 759.

cannot begin, nor the Lessee enter, before 29 of July, for this (a) [a] or [ab] est dictio significativa primi termini, a quo, sicut dictio (usque) termini, ad quem; & [a] vel [ab] accipitur exclusive.

(b) Moor 393,
394, 423, 424,
881.
Cr. El. 29, 254,
255, 450, 585.
2 Anderf. 29.
Cr. Car. 547,
548.
Cr. Jac. 376,
563.
1 Jones 437.
Godb. 265, 451.
1 Rol. Rep. 109,
110, 138, 253,
254, 256, 261.
4 Leon. 8.
Co. Lit. 48. b.
11 Co. 77. a.
78. a.
2 Rol. 10, 66.
Br. Patent. 29.
2 Bullstr. 272,
273, 274, 275,
303.
Hob. 171.
Palm. 29, 30.
Bridg. 108, 109.
2 B.ownl. 299,
300.
Heil. 23.
2 Co 55. a.
(c) Cr. Jac.
153, 563
Cr. Car. 94,
588.
* Perk. sect.
704.
(d) Palm. 30.
(e) Co. Lit.
49. b.

3. It was resolved, That an Estate of Freehold could not by the Common Law begin (b) *in futuro*, but ought to take Effect presently in Possession, Reversion, or Remainder. And the Difference is between a Lease for Life, and a Lease for Years: For a Lease for Years may begin *in futuro*, but not a Lease for Life. As if a Man makes a Lease for Years to begin at *Michaelmas* next ensuing, it is good; but if a Man makes a Lease for Life to begin at *Michaelmas* it is void; And the Reasons and Causes of this Difference are; 1. Because a Lease for Years may be made without Livery of Seisin, but so cannot an Estate of Freehold without Livery, either in Fact or in Law: And therefore when a Man makes a Lease for Life to begin at a future Day, he cannot make present Livery to a future Estate; and therefore in such Case nothing passes: And it was said, that Letters Patents under the Great Seal amount to a Livery in Law; and therefore by Letters Patents a Lease cannot be made for Life to begin at a Day to come. 2. If any Freehold should pass presently by the Letters Patents from a Day to come, then the Queen in the mean Time would have a particular * Interest and Term without any (d) Donor or Lessor, which would be against the Rules of the Law. But no such Consequent will follow in the Case of a Lease for Years; and therefore it was resolved in the Case at Bar that the Lease for three Lives was void, because it was to begin the next Day after the *Teste* of the Letters Patents: And if the Lease should be good, the Queen would have an Interest for the 28 Day; and altho' the Lease was to begin the next Day after the *Teste* of it, it is all one in Law as if it had been to begin 20 or 40 Days, or Years to come, for the Distance of the Time doth not make an Alteration of the Law in such Case: And in this Case it was agreed, That if a Man makes a Lease for Years to *A.* and *B.* the (e) Remainder to *C.* for Life, in that Case the Lessor ought to make Livery to *A.* and *B.* before their Entry, and by the Livery to *A.* and *B.* *C.* shall take a present Estate for Life by Way of Remainder, by Force of the Livery made to the Lessees for Years. And therewith agrees *Lit. lib. 1. fol. 12. b.* And in such Case a Difference was taken by some, between two joint (f) Attornies, who have express Authority to take Livery and Seisin by Deed, and two joint Lessees in the Case aforesaid who have Power to receive Livery for the Benefit of another by Warrant in Law; for Livery made to one Attorn. in the Name of both is not good, for he doth not pursue his express Warrant, for he himself only has not a Warrant, for they both make but one Attorney: But in the Case of two joint Lessees

(f) Co. Lit.
49. b.
Palm. 23.

Leffees, the Livery made to one in the Name of both is good, for they two have an Interest in the Land before their Entry, and the Livery to one in the Name of both, makes an actual Possession in both, which is sufficient to support the Remainder to C. And in the one Case the Livery is made to the Leffees who have Interest, and in the other to him who made the Warrant of Attorney by his Attornies, who have but a bare Authority. And although Livery cannot be made to one in the Name of him and of another who is absent, whereby any Estate of Freehold shall pass to him who is absent without Deed, because his Estate is only to begin by the Livery: Yet when a Lease is made to two for Years without Deed, the Remainder for Life, the Leffees presently have Interest in the Lands before any Livery made; and therefore Livery made to one who has an Interest in the Name of him and the other, is sufficient to that Purpose.

Co. Lit. 49. b.

Co. Lit. 49. b.

Note (good Reader) I have reported this Case, to the Intent that the Imperfections in the Letters Patents made to *Barwick*, by which he lost his Lease, should be avoided in Leases, (and principally to poor Men) to be made in Times to come.

Mich.

Mich. 39 & 40 Eliz.

In the King's Bench.

GOODALL'S Case.

Jenk. Cent.
261.
1 Rol. 408, 421.
Goldsb. 176,
177.
Godb. 299, 449.
Cr. El. 383, 384.
Lit. Rep. 105,
175.
Moor 708, 709.
Poph. 99, 100.

Between *Cutbert Goodall* Plaintiff, and *John Wyatt* Defendant, in an *Ejectione firmæ* of Lands in *Ailesbury* in the County of *Buck.* (which began *Hill 37. Rot. 805.*) The Defendant pleaded Not Guilty: And the Jurors gave a special Verdict to this Effect; Sir *John Packington* was seised of the Tenements aforesaid in Fee, and by his Deed indentured, 1 *Julii*, 35 *Eliz.* did thereof enfeof *Robert Woodcliff* and his Heirs, *Proviso semper quod si presat' Johannes infra unum annum post decessum ipsius Roberti solvat, seu solvi faciat hered', executor', sive administrator' ipsius Roberti summ' centum marcarum legalis moner' Angl', quod tunc & deinceps presens charta indentata & seifina inde habita, vacua sit, & nullius vigoris,* *Robert Woodcliff* did thereof enfeof *Edward Woodcliff*, whose Estate by divers mean Conveyances *Thomas Goodall* the Lessor of the Plaintiff had: And afterwards 7 *Jan.* 35 *Eliz.* the said *Robert Woodcliff* died, after whose Death *Drue Woodcliff* being his Son and Heir, and *Anne* his Wife took Letters of Administration of his Goods; by which *Drue* and *Anne* made a Letter of Attorney to *Tho. Goodall* to demand and receive the said 100 Marks on the said Proviso or Condition, of which the said *Thomas Goodall* gave Notice to the said Sir *John Packington*; and afterwards, and within the said Year, it was agreed between the said Sir *John* and the said *Drue*, that the said Sir *John* should pay to the said *Drue* but 32 *l.* of the said 100 Marks, and no more, and yet in Appearance for the better Performance of the Condition, that the whole Sum of 100 Marks should be paid, and that the Residue above 32 *l.* should be repaid to Sir *John*; upon which Sir *John* paid within the said Year 100 Marks to the said *Drue*, and presently all was repaid to the said Sir *John* but the said 32 *l.* according

according to their preceding Agreement aforesaid: And afterwards the said Sir *John* did re-enter into the said Tenements, pretending that he had performed the Condition, upon whom the said *Tho. Goodall* enter'd and made the Lease to the Plaintiff, who entred and was possessed, until the said *John Wyat* ousted him, (without conveying any Interest or Authority to the said *Wyat* under Sir *John Packington*) but the Jury concluded, *Et si super totam materiam, &c. præd' solutio præd' centum marcarum per præd' Johannem Packington Milit' præfat' Drugoni fact', sit bona & legalis solutio in lege earundem centum marcarum, secundum formam provisionis præd', Juratores prædicti ignorant: Et si, &c.* So that the Doubt which the Jury conceived, was only on the said Payment; and whether the said Payment, as is aforesaid, was sufficient in Law to give Title of Entry by Force of the said Condition to the said Sir *John Packington* on the said *Thomas Goodall*: And it was objected on the Defendant's Part, That although before the Payment it was agreed between the said Sir *John Packington* and the said *Drue Woodcliff*, that the said *Drue* should have but 32*l.* of the said 100 Marks, yet Sir *John* paid the whole, and *Drue* received the whole, and the Property of all the Monies was in *Drue*; and if *Drue* would not have repaid him the Residue above 32*l.* Sir *John* had not any Remedy, but an Action on the Case (if any Action on the Matter would lic.) And therefore they concluded that it was a good Payment to satisfy the said Condition.

But to that it was answered and resolved by *Popham* Chief Justice and the whole Court, that it was not any (a) Performance of the Condition, and their Reason was, because an Estate of Inheritance was by the Payment of the said Money to the Heir to be devested out of *Tho. Goodall* the Assignee of the Land; and therefore the Condition ought to be performed in Truth by a true and effectual Payment, and not by a Shadow or Colour of Payment: And in the Case at Bar the precedent Agreement guided the subsequent Payment, and their Intent was that, but the said 32*l.* should be enjoyed and kept, although more was in Appearance paid; But the Estates of (b) third Persons shall not be devested by colourable or covenous Payments, but by true and effectual Payments, as is aforesaid. *Vide* 19 *H. 6.* 54. 20 *E. 3.* (c) *Accompt* 79. & 18 *E. 4.* 18. where it appears, That Conditions ought to be performed truly and effectually, *Quia factum non dicitur, quod non perseverat.*

(a) Co. Lit. 209. b.

2 Rol. Rep.

303, 403.

Godb. 299.

Moor 709.

Jenk. Cent. 261.

Lane 48. Cr.

El. 383, 384.

Cr. Jac. 451.

Lit. Rep. 129.

130.

(b) Jenk. Cent.

261.

Poph. 100.

8 Co. 133 a.

2 Rol. Rep. 303.

Lane 48

Co. Lit. 209. b.

(c) Co. Lit. 129.

GOODALL'S Case. PART V.

(a) Co. Lit.
209. b. 210. a.
Jenk. Cent. 261.
1 Rol. 421.
Goldsb. 177,
178.
Poph. 100.
Hard. 11.

2. It was resolved, That if all the Money had been paid to the Heir (a) *bona fide* (altho *Robert Woodcliff* his Father hath convey'd over his whole Estate in the Land) it had been sufficient. For the Heir is a Person expressly named in the Condition to whom the Payment shall be made, and the Feoffor is a Stranger to the Conveyance that the Feoffee and his Assigns made, and the Feoffor shall not take Notice at his Peril of the Validity of them, nor of the Conditions or Limitations annexed to them.

(b) Jenk. Cent.
261.
1 Rol. 421.
Cr. El. 384.

3. It was resolved, That as this Condit. is in the Case at Bar, the Feoffor could not have paid it to *Goodall* (b) the Assignee of the Land, for Heirs, Executors, or Administrators were expressed in the Condition, and the Assignee not, as in the Case of *Litt. Lib. 3. cap. Condition 78*. If the Condition was, That if the Feoffor shall pay to the Feoffee, or to his Heirs, such a Sum on such a Day, there after the Death of the Feoffee, if he dies before the Day limited, the Payment ought to be made to the (c) Heir at the Day set, where this Word (ought) which imports Necessity in Law, was observed; And therefore in such Case the Money shall not be paid to the Executors. And so the Doubt in 12 E. 3. *Condition 9.* and (d) *Dyer 2 Eliz. 181.* well resolved: But (e) the Assignee of the Land, altho' he be not named in the Condition amongst the Persons who shall pay the Money, yet he may well pay the Money for the Saving of his Tenure, as

(c) Lit. sect.
339.
Co. Lit. 210. a.

(d) *Dyer* 181.
pl. 50.
Owen 10.
(e) *Hardr.* 425.
Co. Lit. 207. b.

(f) Lit. sect.
336.
* Co. Lit.
207. b.

Litt. (f) saith, *eodem Lib. fol. 77*. So note the Difference, that the Money shall not be paid to the Assignee of the Land without naming him in the Condition, for there the Payment goes to the Defeasance of the Inheritance, but the Money shall be *paid by the Assignee in Salvation of his Inheritance.

(g) *Mo.* 243, 705.
Co. Lit. 210. a.
Hard. 95.
Palm. 482.

Mich. 23 & 24 Eliz. in the Court of Wards, the Case was such, *Edw. (g) Randal* seised in Fee of certain Lands within the County of *Surry* by Deed indented and inrolled according to the Statute, did covenant with *John Brown*, that if the said *Brown* did pay to the said *Randal*, his Heirs or Assigns 400 l. the fourth Day of *March* then next following, at a certain Place, that then the said *Edward* and his Heirs would stand seised of the said Lands to the Use of *Brown* and his Heirs; and before the said Day *Edw. Randal* died, and having Issue a Son, made his Will in Writing, and made *Alice* his Wife, *Ralph Hare*, and *Hugh Hare* his Executors, and devised the said Land to his Wife during the Minority of his Son, and died, his Issue within Age, and in Ward to the Queen; and before the Day, the Wife renounced, and took Letters of Administration. And now the Question was, to who the Money should be paid. And in that Case three Points were resolved by the Chief Justices *Wray* and *Dyer*, and the whole Court of Wards, that is to say, That in the said Case these Words (Assigns) shall be on-

ly intended of the Assignees of the Estate of *Edw. Randal*, for he has an Estate in him assignable, and the Law will never seek out (a) an Assignee in Law, when there may be an Assignee in Fact: But if *Edward Randal* had made a Feoffm. in Fee, on Condition that the Feoffee should pay the Money to the Feoffor, his Heirs or Assigns, &c. there because he departs with his whole Estate in Fee, and has but a bare Condition which he cannot assign over, the Law, which will never reject any Word, if by any reasonable Construction it may take Effect, will make Construction what Person will be most proper as his Assignee in Law to receive the said Money; and those the Law adjudges to be his (b) Executors, because they represent the Person of the Testator for all Goods and Chattels, and in such Case the Feoffor cannot have any Assignee in Fact. And so a good Difference; and therewith agrees 27 (c) *H. 8, 2. a. 2.* It was resolved in the said Case of *Randal*, that the Wife having by the Devise but a particular Interest in the Land, was not Assignee of the Land within the said Proviso: So if the said *Edward* had made an Estate for Life or Years, &c. for none shall be Assignee in this Case: But when the Covenantor departs with his whole Estate, as if he makes a Feoffment in Fee, a Gift in Tail, or a Lease for Life with the Rem'r over in Fee, in such Case the Lessee for Life, or Donee in Tail is the Assignee: But so long as the Covenantor has the Reversion remaining in him, the Payment ought to be made to him. So it was said, that if *Edw. Randal* had made an Assignment of his whole Estate in Part, as long as any Part remained with *Edw. Randal*, the Tender ought to be made to him or his Heirs. 3. It was resolved in the said Case of *Randal*, That the Tender ought to be made to the (d) Heir, and not to the Executors, because the Heir was expressly named, which excluded Executors and Administrators. *Et (c) expressum facit cessare tacitum.*

4. It was resolved, That although in the Case at Bar no Title was found for the Defendant, but he is as a meer Stranger, yet the Court in a special (f) Verdict, will never doubt but of that only whereof the Jurors have conceived a Doubt: And therefore forasmuch as they rely and conclude on the Payment, whether it be a good Performance of the Condition or not, the Court ought not to give Judgment till they have resolved that which the Jurors have referred to their Consideration, and all other Matters shall be intended and supplied, but only that which the Jurors have referred to the Consideration of the Court. And so it was adjudged *M. 30 & 31 in B. R. between (g) Scovel and Cabel:* And afterwards Judgment was given for *Cuthbert Goodall* the

(a) Co. Lit.
210. a.

(b) Co. Lit.
209. a. b.

(c) Br. Condition
5. Br. Ex-
position 4. Br.
Deputy 1.

(d) Lit. fest.
339. Co. Lit.
210. a.

(e) Godb. 449.
Co. Lit. 210. a.
183. b. Larch.
265. Cart. 35.
Palm. 497.

(f) Jenk. Cent.
262. Hob. 55.
262. Cr. Jac.
64, 437, 442.
Cr. Car. 22, 392.
458. 2. Rol. 698.
702. Cr. El. 231.
239.
Salk. 249.

(g) Moor 268.

The Countess of Northumberland's Case. PART V.
 the Plaintiff: On which Judgment the Defendant brought
 a Writ of Error in the Exchequer-Chamber: And all the
 Court of Argument and Debate of the Case there again
 did concur in Opinion with the Justices of the King's Bench
 and affirmed the Judgment. And so this Case was resolved
 by all the Judges of *England*.

2 El. cap. 8.

Mich. 39 & 40 Eliz.

In the Common Pleas.

The Countess of Northumberland's Case.

(a) 2 And. 48,
 49, 50, &c.
 Moor 455, 456.
 Cr. El. 518.

Fitzon and the Countess of Northumberland (a) his Wife,
 Sir Thomas Cecil Knight, and Dorothy his Wife, Wil-
 liam Cornwallis Esquire, and Lucy his Wife, and the Lady
 Danvers, Daughters and Heirs of the Lord Latimer, brought
 a *Quare Impedit* against Hall and others, who pleaded a
 Release of William Cornwallis pending the Writ; Judg-
 ment of the Writ; and thereupon the Plaintiffs demurr'd.
 And it was adjudged that it went in Bar (b) but against Wil-
 liam Cornwallis and his Wife, and the Writ stood for the
 others: *Vide* 45 E. 3. 10. a. in the Case of (c) Ward. *Et nota*,
 That in all Cases of a Thing intire, and in the Realty,
 as Presentation to a Church, Wardship of the Body, &c. the
 Release of one shall enure to the Benefit of the others. Then
 it was moved, That the Declaration was insufficient for the
 Plaintiffs in their Declaration intitle themselves, that the
 said Lord Latimer was seised of the Advowson in Fee, and
 granted the next Avoidance to Dean Carew, and afterwards
 the Church being void, Dean Carew presented, and so con-
 vey the Descent to them without alledging any Present-
 ment in the Lord Latimer or any other but only in
 the Grantee of the next Avoidance; and whether this
 Presentment was good Title for the Grantor, and his
 Heirs or not, was the Question, And it was adjudged that
 it was a (d) sufficient Title, for he doth it in the Right and
 Title

(b) Doct. pl. 64.
 2 Rol. 411.
 Moor 456.
 Cr. El. 65, 518.
 2 Co. 68. a.
 (c) Moor. 456.
 Cr. El. 65.
 Firz. Gard. 100.
 Br. Gard. 13.
 Br. Summons &
 Severance 5.

(d) Cr. El. 518.
 Antea 57. b.
 2 Rol. 377, 378.
 6 Co. 57. b.
 Moor 456.
 2 And. 49, 50.

Title of the Grantor, and therefore it shall serve for him to make a Title in a *Quare Impedit*. The same Law of Lessee for Years, Lessee for Life, Tenant in Dower, Tenant by the Curtesy, Guardian, Tenant by Statute Merchant, Staple, &c. and this agrees with divers Opinions in 7 *E.* 4. 20. 22 *E.* 4. 9. *b.* 16 *H.* 7. 18. *a.* 9 *H.* 7. 23. *Br. Quare Impedit* 122. 23 *Eliz. Dyer* 300. And true it is that it is a common Learning in our Books, that where Tenant for Years, or for Life, brings a *Quare Impedit*, he ought to alledge Seisin in him who has Fee, & *hoc regulariter verum est*. And yet Presentations by themselves suffice, as appears 8 *H.* 5. 10. And this Resolution doth not oppose that Rule; for the Presentation of the Grantee of the next Avoidance being made in the Title and Right of the Grantor shall serve as well for him, as his own Presentment, and is tantamount. As if Grantee for Years of a Seignior, or Guardian, get Seisin of the Services, it shall be a good Seisin for him in Reversion, and therewith agrees *F. N. B.* 179. *f.* 45 *E.* 3. 26. 11 *E.* 3. *Affise* 86. Also it is held in our Books, That if Presentment be alledged in the Lessor or Donor, and also in the Lessee and Donee it is not double, for the Presentment of the Lessor or Donor is only traversable. And see for both these Points 18 *E.* 3. 15. 24 *E.* 3. 37. 40 *E.* 3. 10. 42 *E.* 3. 4. 33 *H.* 6. 32, 33, 34. 7 *E.* 4. 20. 9 *H.* 7. 23. 1 & 2 *Phil. & Ma. Dyer* 106. Note a Case adjudged in which was Diversity of Opinions in our Books, in which the Law is now well resolved.

Antea 57. *b.*
97. *b.* 6 *Co.* 57. *b.*

1 *Roll. Rep.* 235.
3 *Bulstr.* 89.
Cr. El. 518
Doct. pl. 146.

Mich. 40 & 41 Eliz.

In the Common Pleas.

BURY'S Case.

Jenk. Cent. 268,
 269. Moor 225,
 226, 227, 228.
 Noy 72. 2 Leon.
 169, 170, 171,
 172, &c. Dyer
 179, pl. 40,
 And. 185, 186.

BETWEEN *Webber* and *Bury* in an *Ejectione firme*, a special Verdict was given on a Divorce between *Bury* and his Wife, *causa frigiditatis*, and that the Wife for three Years after the Marriage *remansit virgo intacta propter perpetuam impotentiam generationis in viro, & quod vir fuit inaptus ad generandum*. And in this special Verdict all the Examinations of the Witnesses on which the Judge in the Spiritual Court was moved to give his Sentence, and which were disposed in the same Case by which the perpetual Infirmitie and Disability of *Bury ad generandum* was manifest (which were not entered in a former Verdict, on which Judgment was given) by which it was pretended, that by Reason of his perpetual Impotency, the Issue which he had by the second Wife was illegitimate; and that was the Doubt in this Cause which the Jury conceived: And it was adjudged, that the Issue by the second Wife was legitimate; for it is clear that by the Divorce *causa frigiditatis* the Marriage was dissolved *a vinculo matrimonii*, and by Consequence each of them might marry again. Then admitting the second Marriage was voidable, yet it remains a Marriage until it be dissolved; and by Consequence the Issue which is had during the Coverture, if no Divorce be in the Life of the Parties, is lawful. See 36 *Aff.* 10. 39 *E.* 3. 32. 28 *H.* 8. *Bastardy* 44. *Bracton, lib.* 2. fol. 92. 12 *H.* 7. 22. 22 *E.* 4. *Consultation* 5. *Et semper presumit pro legitimatione puerorum, & filiatio non potest probari*, and a Man may be *habilis & inhabilis diversis temporibus*, And therefore (notwithstanding the Depositions by which a natural and perpetual Inability before the first Sentence was disposed) Judgment was given that the Issue was lawful according to the first Judgment given. And on this Judgment a Writ of Error was brought, and after many Arguments and great Deliberation, the said Judgment was affirmed by *Popham* Chief Justice and the whole Court, for the Reasons and Causes aforesaid.

Jenk. Cent.
 268, 269.

Moor 222.

Bullt. 42.
 Co. 44. b.

Mich.

Mich. 40 & 41 Eliz.

In the King's Bench.

FLOWER'S Case.

Lancelot Flower was indicted on the Statute of 5 Eliz. for Perjury in giving false Evidence to the Grand Inquest at the Sessions held at *Wisbich, &c.* on an Indictment of Riot, and the Indictment was removed into the King's Bench and the said Flower was by Judgment of the Court discharged of the Indictment; for the Statute of 5 Eliz. cap. 14. has two Branches: The first is against Procurers of Perjury, and that in Matter depending in Suit by Bill, Writ, Action, or Information; so that a Procurement of Perjury on an Indictment is out of that Branch. The second Branch (on which the said Flower was indicted) is enacted against them who commit Perjury by his or their Deposition in any of the Courts above mentioned, or being examined in perpetuam rei memoriam: And altho' this Clause be general and not restrained by any Words to such particular Suits, viz. by Bill, Writ, Action, or Information; as the first was, yet in good Construction this Branch shall have Reference to the first, and shall be expounded by it, and so one Part of the Act shall (a) expound the other. For otherwise the Party who commits the Perjury on an Indictment will be punished by this Branch; and he who suborns and procures him to commit the Perjury will pass with Impunity, which will be against Reason, and the Meaning of the Makers of the Act. For some say, *Quod plus peccat auctor quam actor.* And so it was adjudged in Monday's Case in the K's Bench, Mich. 36 & 37 Eliz. And the like Judgm. was given Trin. 39 Eliz. in the King's Bench in Case of Perjury supposed to be committed on an Indictment of Felony.

3 Inst. 164.
5 El. cap. 9.
2 Rol. Rep. 177.
3 Leon. 201.
Goldsb. 51.

3 Inst. 164.
Cr. Jac. 120, 211.

(a) Co. Lit.
381. a. 2 Co.
55. a. 3 Co. 59. B.
8 Co. 117. a.
Godb. 324, 428.
2 Rol. Rep. 358.

Hill. 40 Eliz.

In the Common Pleas.

ROOKE'S Case.

IN Replevin in the Common Pleas by *Rooke* against *Withers*; the Defendant justified the Taking by Authority of a Commission of Sewers directed to *B. S.* and others, to survey all Walls (*prout* in the Commission) in the River of *Tbames* in the Counties of *Kent* and *Essex*, because one *Carter, &c.* was assessed to every Acre for Repairing of a Bank, &c. for the Non-payment of which he took the Distress; to which the Plaintiff replied, Of his Wrong, without such Cause. And the Jurors found the Commiff. and the Stat. of 6 *H. 6. c. 5. & 23 (a) H. 8. c. 5.* And that the Commission. did impanel a Jury to inquire of Defaults, who presented that seven Acres of Meadow in which the Distress was taken was next adjoining to the River; and that the Bank of the River was adjoining to the said seven Acres, for which they taxed *Carter* to pay 8 s. for every Acre: And the Jury further found, that the Occupiers of the said seven Acres (*b*) had used always to repair the said Bank, sometimes voluntarily, and sometimes by Presentment. And further that divers other Persons had Lands to the Quantity of 800 Acres within the same Level, and subject to Drowning, if the said Bank be not repaired: And whether this Assessment of the Owner of the Land next adjoining only, without any Assessment of the others, who had Lands subject to the like Danger of Drowning, was lawful or not, was the Question. And in this Case three Points were resolved:

1. That the Finding of the Repairing, &c. by the Occupiers of the said seven Acres was not material, because the (*c*) Occupiers might be Tenants at Will, or other particular Tenants, who can't by their Act bind him who has the Inheritance.

2. That the Commissioners ought to tax (*e*) all who are in Danger of being damaged by the not Repairing equally, and not him who has the Land next adjoining to the River only; for the Statute of 6 *H. 6. cap. 5.* in which
the

4 Inft. 275.
Hardr. 478.
Paim. 331.

(a) 10 Co. 138. a.
139 a. 140. a.
13 Co. 36. Cr.
Jac. 336. a. Bullt.
197. Callis
Sect. f. 1.

(b) 2 Rol. Rep.
289.

(c) 2 Rol. Rep.
289.

(d) 10 Co. 139. a.
1 Rol. Rep. 32.
2 Bullt. 199.
Cr. Jac. 336.

the Commission of Sewers is formed and specified, has precise Words in the same Commission, That no Person of any Estate or Condition shall be spared. *Ita quod aliquibus tenentibus terrarum sive tenementorum, &c. diviti vel pauperi, vel alteri cuiuscunque conditionis, status, vel dignitatis fuerit, qui defensionem, commodum, & saluationem per præd Wallias, fossatas, gutteras, pontes, calceta, & gurgites, &c. habent vel habere poterint nullatenus parcatur in hac parte.* And if the Law should be otherwise, Inconvenience might follow, for perhaps the Rage and Force of the Water might be so great, that the Value of the Land adjoining will not serve to make the Banks, &c. and therefore the Statutes will have all who are in Danger, and who are to receive Benefit by the Making of the Banks to be contributory; for (b) *Qui sentit commodum sentire debet & onus*: And the said Statutes require Equality, which well agrees with the Rule of Equity: *Vide* the Case of Bankrupts in the second Part of my Reports. *Et vide* 35 H. 8. Br. Tit. *Testam.* (c) 19. 4 E. 3. * *Affise* 178. † 11 H. 7. 12. b. §. 29 E. 3. 39. and Sir William (d) *Herbert's Case* in the third Part of my Reports; Cases of Equality grounded on Reason and Equity, *Ipsæ* (e) *etenim leges cupiunt ut iure regantur*; and notwithstanding the Words of the Commission give Authority to the Commissioners to do according to their Discretions, yet their Proceedings ought to be limited and bound with the Rule of Reason and Law. For (e) Discretion is a Science or Understanding to discern between Falsity and Truth, between Wrong and Right, between Shadows and Substance, between Equity and colourable Glosses and Pretences, and not to do according to their Wills and private Affections; for as one saith, *Talis discretio discretionem confundit*. And *Walmesley* Just. held, and it was not denied by any, That if the Owner of the Land was bound by (f) Prescription to repair the River-Bank, that yet on such Commission awarded, the Commissioners ought not to charge him only with the Whole, but ought to tax all who had Land in Danger: And to this Purpose the Statutes were made; for otherwise it might be that all the Land would be drowned before that one Person only could repair the Bank, and that appears by the Words of the Statutes; wherefore Judgment was given for the Plaintiff.

Cr. Jac. 336.
10 Co. 139. a.
1 Rol. Rep. 32.
2 Bullst. 199.

(b) 1 Co. 59. a.
5 Co. 24. b.
7 Co. 38. b.
Co. Lit. 231. a.
2 Inst. 485.
Cart. 142.
3 Keb. 592.
(c) 2 Co. 23. b.
Br. N. C. 275.
2 Bullst. 15.
* 2 Co. 25. b.
† 2 Co. 25. b.
3 Co. 13. a. 14. a.
Co. Lit. 376. b.
386. b. Hob. 25.
3 Bullst. 318.
Cr. Jac. 218.
¶ 2 Co. 25. b.
(d) 3 Co. 13. 14.
(e) 10 Co. 138. a.
140. a. 4. Inst. 41.
2 Bullst. 197.
198. Callis
Sect. 112. Hob.
158. Hardr.
146. Cr. Jac.
336. 3 Bullst. 128.
(f) 2 Co. 25. b.
8 Co. 152. a.
9 Co. 123. b.
Co. Lit. 10. a.
43. a. 166. b.
274. b. 171. b.
(f) 10 Co.
140. a. Callis
Lect. 144.
(g) 10 Co. 140. b.

Trin. 40 Eliz.

In the Common Pleas.

PENRUDDOCK'S Case.

Hill. 37 Eliz.
Rot. 387. in the
King's Bench
on a Writ of
Error. Jenk.
Cent. 260.
3 Inst. 201, 202,
203, &c. Cr. El.
234. 9 Co. 53. b.

IN a *quod permittat* between Henry Clark Plaintiff, and Edward Penruddock and Mary his Wife Defendants, which was adjudged in the Common Pleas, and removed by a Writ of Error into the King's Bench, Hill. 37 El. Rot. 387. the Case was such; John Cock 2 Oct. anno 1 Mar. built on his own Freehold an House in St. John's Street in the County of Midd' so near the Curtilage of the House of Thomas Chicheley, that *domus illa superpendet, Anglice*, doth hang over *magnam partem, videlicet 3 pedes Curtilagii præd', &c.* And afterwards John Cock conveyed the House which he had so built to Penruddock and his Wife; and Thomas Chicheley to whom the Nuisance was done, conveyed his House to the said Clark the now Plaintiff. And the Plaintiff in his *Quod permittat* (which he brought) *prostertere domum prædict'*, declared that the same House *superpendet tres pedes curtilagii prædict'*, *sic quod aquæ pluviales de eadem domo descendentes, solum ejusdem curtilagii conterunt, ac magnopere, ac indies magis magisque consumunt & devastant, ac ea ratione curtilag' præd' quolibet pluviali tempore humectat' & inundat' exist'*, quod prædict' Henric' inhabit' in eodem messuagio, nullum profic' & easamenti' de eodem curtilagio percipere possit, ad nocumentum liberi tenit' prædicti in eisdem. And the first Question was, if the Writ of *Quod permittat* lies in this Case for the Feoffee or not: And it was objected, that when a Wrong and Injury is done by levying of a Nuisance for which an Action lies, that if he who has the Freehold to which the Nuisance is done conveys it over, now this Wrong is remediless; as if the Lord increaches Rent of his Ten't, the Tenant cannot avoid this Wrong in an (a) *Avowry*, but in an *Assise*, (b) or a *Cessavit*, or a *Ne* (c) *injuste vexes*, he may. But if the Ten't to whom the Wrong is done enfeoffs another, his Feoffee shall never avoid this

(a) 4 Co. 11. b.
9 Co. 34. a.
Doct. pl. 318.
2 Inst. 21.
(b) 4 Co. 11. b.
9 Co. 34. a.
Doct. pl. 318.
2 Inst. 21.
(c) F.N.B. 11. c.

this Wrong; for he shall take the Land in the same Plight as it was given him, and that appears by 33 *E. 3. Avowry* 255. & 18 *E. 2. Avow.* 217. & 4 *E. 2. Avow.* 201. Also if a Man be seised of Land to which Common is appendant, and he is disseised of the Common, upon which he brings an Assise, and afterwards enfeoffs another of the said Land, the Common is extinct for ever; and therewith agrees 4 *E. 3.* wherefore they conceived that the Feoffee should not have the said *Quod permittat* to avoid the Wrong and Nuisance made in the Time of his Feoffor. But it was answered and resolved, That the dropping of the Water in the Time of the Feoffee is a new Wrong, so that the Permission of the Wrong by the Feoffor, or his Feoffee, to continue to the Prejudice of another should be punished by the Feoffee of the House to which, &c. And if it be not reformed after Request made, the *Quod permittat* lies against the (a) Feoffee, and he shall recover Damages, if he do not reform it, but without Request made, it doth not lie against the Feoffee, but against him who did the Wrong it lies without any Request made, for the Law doth not require any (b) Request to be made to him who doth the Wrong himself: And so this Case is not like any of the Cases which have been put on the other Side. *Vide* 4 *Aff. 3. (c)*; 4 *E. 3. 36. a. b.* 5 *E. 3. 43.* where it appears that the Feoffee shall have a *Quod permittat* of a Nuisance levied in the Time of the Feoffor: And with this Judgm. agrees a Judgm. given by Sir *Christ. Wray* Ch. Just. and the whole Court of *King's Bench, Mich. 24 & 25 Eliz.* where the Case was; *John (d) Rolf* the Father was seised of a House in *Hemclumstead* in Fee; and *Ric. Rolf* the Father was also seised of a Piece of Land on the South and East Parts adjacent to the said House, and *Ric. Rolf* built a House on his Piece of Land aforesaid, so near the House of the said *John Rolf*, that the Eaves of the said House did hang over Part of the House of the said *John Rolf*, so that the Rain which descended from the said House of the said *Ric. Rolf* fell on Part of the House of the said *J. Rolf*, and afterwards *J. Rolf* died, and his House descended to his Son, and afterw. the said *Rich.* died, and his Land descended to his Son, who on Request made by the said *John* the Son, did not reform the said Wrong, but suffered the Eaves of his House to hang over the House of *John Rolf* the Son for a certain Time; the Wall of the House of the said *J. Rolf* the Son became rotten, &c. upon which Matter *John* the Son brought an Action against *Rich.* the Son, upon which *Rich.* the Son did demur in Law; and it was adjudged that the Action was (e) maintainable, because the Def. on Request made, did not reform the Nuisance which his Fath. made, but suffered it to continue to the Prejudice and Damage of the Pl. Son and Heir to him to whom the Wrong was done. *Vide* 2 *H. 4. 13. 3 E. 3. Voucher* 272. 20 *Aff. p. 18. 19 Aff. p. 6.* and with this Judgment in the principal Case agrees the Register 199. b. & *F. N. B. 124. H.* And the Stat. of *West. 2. cap. (f)* 24. by which it is enacted, *Quod si transferat domus,*

(a) Jenk. Cent. 260.
Raym. 424, 469.
2 Bullit. 16.
2 Inst. 405.
3 Inst. 204.
Cr. Jac. 231,
373.
Cr. El. 191.
Moor 353.
F. N. B. 124. h.
(b) Cr. El. 269.
(c) 2 Bullit. 16.
9 Co. 54. a.
(d) Rolf's Case,
24 & 25 Eliz.
Cr. Eliz. 402.
Moor 353.

(e) Moor 118,
353.
Cr. El. 191, 402.
Cr. Jac. 231.

(f) 9 Co. 55. a
2 Inst. 405, &c.
C. l. i. 54. b.

PENRUDDOCK'S Case. PART V.

murus, &c. in aliam personam, breve non denegat, sed de cætero, cum in uno casu concedit breve, in consimili casu simili remedio indigente, sicut prius, fiat breve. Et si hujusmodi levata ad nocumentum transferant in aliam personam, de cætero fiat breve. By which it appears, That the Writ in our Case well lies, and so it was adjudged in the *Common Pleas*, that the *Quod permittat* in the Case at Bar did well lie. *Vide* 14 *Eliz. Dyer* (a) 319. *Madam Brown's Case.* And *Hill. 35 Eliz. Rot.* 493. between (b) *Beswick* and *Cumden* in the *King's Bench*: On which Judgment in the Case at Bar *Penruddock* and his Wife brought a Writ of Error in the *King's Bench*, where *Popham* Chief Justice, and all the Justices of the *King's Bench* did concur in Opinion with the Justices of the *Common Pleas*, as to the Point there adjudged: And it was moved in the *King's Bench*, If the Feoffee might abate the Nuisance as the Feoffor himself, and as well in the Hands of the Feoffee who did not the Nuisance, as in the Hands of the Tort-Fesor himself; and if the Feoffee of the House to which the Nuisance was made might do it, (if he might do it) before he had some special Prejudice, as in the dropping of the Water, or if he ought to stay till he had special Prejudice. And *Popham* Ch. Just. held that in both Cases, the Feoffee might (c) abate the Nuisance, and that before any Prejudice, for it is reasonable that he should prevent his Prejudice, and not stay till it be done, which was granted by the whole Court. And afterwards the Judgment was affirmed: And so this Case was adjudged by all the Judges of *England*.

- (a) Cr. El. 251, 402.
- 2 Leon. 103.
- Dyer 319, 320.
- pl. 17.
- Yelv. 144.
- Noy 112.
- (b) Moor 353, 449, 450.
- Cr. El. 402, 403.
- Noy 68.
- (c) 9 Co. 55. a.
- Cr. El. 26).
- 1 Rol. Rep. 394.
- 3 Bullst. 197.
- 1 Jones 222.
- 2 Rol. 144, 145, 565.
- Cr. Jac. 555.
- 9 E. 4. 35. b.
- Cr. Car. 185.
- Jenk. Cent. 260.

Pasch. 41 Eliz. Rot. 513.

WINDSOR'S Case.

IN a *Quare Impedit* by *A. Windsor* against the Archbishop of *Canterbury*, *Fletcher*, &c. for the Church of *Buscot* in the County of *Berks*: The Plaintiff declared that he had a Manor to which the Advowson of two Parts of the Church was appendant, and that the Defendant had a Manor to which the Advowson of the third Part was appendant; and on the Declaration, and the Bar, the Case was such: The Plaintiff had the Advowson of two Parts, and the Defendant of the third; the Plaintiff presented once, and the Incumbent died, and afterwards he presented in the Time of *E. 6. Parry* who was admitted, instituted, and inducted; And afterwards in the Time of Queen *Mary* he was deprived, because he *fuit conjugatus, and a Favourer of the Religion tempore Ed. 6.* and the Church being void by his Deprivation, the Defendant presented his Clerk, who was admitted, instituted, and inducted, *& remansit in Ecclesia usque 1 Eliz.* and then deprived by *Jewel* and others of the High Commissioners, and the first Sentence declared and adjudged to be void, and *Parry* the first Incumbent restored to the said Church: And afterwards the Defendant's Clerk so deprived died, and then *Parry* died, and the Defendant presented as in his Turn, forasmuch as his Incumbent was deprived, and *Parry* the Incumbent of the Plaintiff restored, by whose Death the Church now becomes void; upon which the Pl. did demur in Law: And it was adjudged against the Pl. And in this Case it was agreed, If two have Title to present by Turns; and one presents, who is admitted, instituted, &c. and afterwards is deprived for Crime or Heresy, or any other Cause, yet he shall not present again, but it shall serve for his (a) Turn; So if he presents a meer Lay-man, who was admitted, instituted &c. altho' it be declared by Sentence that he was incapable, and therefore void *ab initio*; yet because the Church was full till the Sentence declaratory came, therefore, altho' this Deprivation relates to some Purpose, yet it shall serve for his Turn, because it was but voidable, as in the Case of *Litt.* If the (c) Lord marries his Ward within Age of Consent, and afterwards he disagrees to it, now it is no Marriage *ab initio*, yet

Co. Ent. 485.
pl. 6.
Moor 558, 559.
2 Rol 347.
Cr. Cl. 686.
687.
10 Co. 136. b.
2 Rol. Rep. 131.
Lit. Rep. 304.

(a) 2 Rol. 347.
Cr. El. 687.

811.
Hob. 167.
(b) 2 Rol. 347.
Hob. 148, 149.

(c) Co Lit. 79. b.
Lit. sect. 105.

he.

(a) Co. Lit. 79. b.
Co. Lit. sect. 105.

Vide 23 Eliz. Dyer pl. ult.

(b) 2 Rol. Rep. 3.
2 Rol. 347.
6 Co. 29. a.
2 Jones 19.
Cr. El. 680.
1 And. 62, 63.
Yelv. 7.
Cawley 22.
(c) Dyer 377.
pl. 31.
2 Anderf. 183.
Hob. 168.
Cr. El. 680.

(c) 2 Rol. 347.
Cr. El. 687.
(d) Doctrin.
pl. 95, 385.
10 Co. 135, 136.
Co. Lit. 17. b.
18. a.
(e) Dyer 78.
pl. 34.
4 Co. 75. a. b.
10 Co. 136. b.
(f) F. N. B.
33. a.

he shall not (a) marry him afterwards. So 27 H. 6. *Guard.* 118. If the Guardian marries his Ward, and afterwards they are divorced *causa præcontractus*, yet he shall not have the Marriage of him again. But when the Admission and Institution are meerly void, then without Doubt it shall not serve for a Turn, as if his Presentee had been admitted, instituted, and inducted, but he had not subscribed to the (b) Articles, &c. according to the Statute of 13 Eliz. whereby in such Case the Admission and Institution and Induction are void; 23 Eliz. (c) *Dyer pl. ult.* But in the principal Case, although the Defendant's Clerk was Parson for the Time to all Purposes, and during the first Deprivation *Parry* was not Incumbent; yet when the second Sentence came, then *Parry* was Incumbent again by Force of his former Presentation, Institution and Induction, and needed no new Institution, &c. And by Force of the second Sentence the Presentee of the Defendant was removed, and *Parry* restored; Then when *Parry* died, who was the last Presentee of the Plaintiff, the Defendant shall present as in his Turn, for the Presentation which he made now on the Matter, during the Life of *Parry*, being the second Presentee of the Plaintiff, cannot be in his Turn, when *Parry* died Incumbent by Force of the Plaintiff's Presentation: But if *Parry* had died (c) before the second Sentence, or had not reversed the former Sentence, then the Defendant had had his Turn: And note, that the Writ was *ad (d) Ecclesiam*, and the Declaration was *de advocacione duarum partium*, and well. *Vide Dyer 6 E. 6. (e) 78. b. F. N. B. 39. b. Vide Trin. 14 Eliz. Rot. 1060. in the Common Pleas, and Hill. 38 Eliz. Sir Thomas Stambop's Case in the Common Pleas:* And I conceive that the Writ ought to be (f) general, as *F. N. B.* and divers other Books are; but the Declaration ought to be according to his Title.

Trin. 43 Eliz. Rot. 1084.

I N T H E

COMMON PLEAS.

HUNGATE'S Case.

Hungate (*a*) brought an Action of Debt on a Bond against Mese and Smith, the Condition of which was to perform the Arbitrement of two, between the Plaintiff of the one Part, and the Defendants of the other Part; *ita quod arbitrium præd' fiat & deliberetur utrique partium prædictorum* before such a Day: And the Defendants pleaded that before the Day the Arbitrement was made, but was delivered to the Plaintiff, and Mese one of the Defendants, and not to the said Smith; upon which the Plaintiff demurr'd. And Judgment was given against the Plaintiff. And it was resolved, that sometimes this Word (*uterque*) is *discretive* and several, and sometimes *collective*, and conjoined: As if two or three be bound in a Bond, (*b*) *& utrumque eorum*, this Word *utrumque* makes the Bond several, as it is held in 28 (*c*) *H. 8. Dy. 19.b.* But in the Case at Bar it shall be taken *collective*. And the Rule to know in what Sense it shall be taken, and when it shall be taken either (*d*) severally or * jointly is to consider the subject Matter, and to make Construction according to Congruity of Reason, and *ut evitetur absurdum*, as in the Case of (*e*) 32 *H. 6. 7.* the Condition of a Bond was, *si uterque eorum, scil.* the Obligor and Obligee, *steterit arbitrio Robert' Bozom, &c.* and it was adjudged that each of them was bound *pro parte sua*, and not one for the other; for that would be absurd and unreasonable. And in the Case at Bar, forasmuch as each of the Parties is subject to Penalty and Danger, it is Reason that the Arbitrem. should be delivered

(*a*) Moor 642.
Cr. El. 885.
2 Rol. Rep. 87.
Bridg. 63, 64.
March Arbitre-
ment 182, 183.

(*b*) 2 Rol. 148.
2 Bulltr. 70.
Cr. Jac. 322.
10 H. 7. 16.
Dy. 310. pl. 80.

(*c*) Dyer 19.
pl. 114.
2 Bulltr. 70.
(*d*) Cr. El. 797.
* Moor 260.

(*e*) Bridg. 63, 64.
39 H. 6. 11, 2.
10. b.

to

HUNGATE'S *Case.* PART V.

to each of the Parties, to the Intent that they might perform it, and avoid the Danger of Breaking of it. 2. It was resolved, that if two be of one Part, and two of the other Part, and the Words are (as above) *ita qd' deliberet' utriq; partium*, that the Delivery of the Arbitrement to one of the one Part, and to another of the other Part is not sufficient; for Party is to be intended of the whole Party, and one is as well within the Penalty and Danger as the other. And forasmuch as the Arbitrement was not delivered to the said *Smith*, Judgment was given against the Plaintiff.

Trin.

Trin. 42 Eliz.

In the King's Bench.

BAKER'S Case.

UPON Evidence in an *Eject. firmæ*, between (a) Middleton and Baker, it was resolved by the whole Court, That if the Plaintiff in Evidence (b) shews any Matter in Writing, or of Record, or any Sentence in the Ecclesiastical Court, upon which a Question in Law arises, and the Defendant offers to demur in Law upon it, the Plaintiff cannot refuse to join in Demurrer, (c) but he ought to join in the Demurrer, or wave his Evidence. So if the Plaintiff produces (d) Witnesses to prove any Matter in Fact, upon which a Question in Law arises if the Defendant admits their Testimony to be true, there also the Defendant may demur in Law upon it, but then he ought to admit the Evidence given by the Plaintiff to be true; and the Reason thereof is, That Matter in Law shall not be put to Lay-men. So may the Plaintiff demur upon the Defendant's Evidence, *mutatis mutandis*: But if Evidence be given for the (e) King in an Information, or any other Suit, and the Defendant offers to demur upon it, the King's Counsel shall not be compelled to join in Demurrer, but in such Case the (f) Court ought to direct the Jury to find the special Matter, and upon that they shall adjudge the Law, as it appears 34 H. 8. (g) *Dyer* 53. but that is by (b) the King's Prerogative, who also may wave (i) a Demurrer, and take Issue at his Pleasure. *Nora bene*,

(a) Cr. El. 751, 752.
(b) Co. Lit. 72. a.
Doct. pl. 118.

(c) Co. Lit. 72. a.
2 Mol. Rep. 119.
Doct. pl. 118.
(d) Doct. pl. 118.

(e) Cr. El. 752.
Co. Lit. 72. a.
Doct. pl. 119.
(f) Cr. El. 752.
Doct. pl. 119.
Co. Lit. 72. a.
(g) Cr. El. 752.
Co. Lit. 72. a.
Dyer 53. pl. 8.
(b) 1 Mod. Rep. 280.
(i) *Hard.* 83.
Plowd. 87. a.
236. a.

Mich.

Mich. 39 & 40 Eliz.

In the Common Pleas.

BOULSTON'S Case.

BETWEEN *Boulston* and *Hardy* it was adjudged in the *Com. Pleas*, That if a Man makes (a) Cony-boroughs in his own Land, which increase in so great Number that they destroy his Neighbours Land next adjoining, that his Neighbour cannot have an Action on the Case against him who makes the said Cony-boroughs; for so soon as the Conies come in his Neighbour's Land he may (b) kill them, for they are *feræ naturæ*, and he who makes the Cony-boroughs has no Property (c) in them, and he shall not be punished for the Damage which the Conies do wherein he has no Property, and which the other may lawfully kill. And it was resolved in this Case, That none may new erect a (d) Dove-cote but the Lord of a Manor, and if any do it, he may be punished in the Leet, but no Action on the Case lies by any particular Man, for the (e) Infiniteness of Actions that may be brought: And of such Opinion, as to the new Erection of a Dove-cote was Sir *Roger Manwood* Chief Baron, and the Barons of the Exchequer in the Exchequer-Chamber.

(a) Cr. El. 547, 548. Moor 420, 421, 453.
 1 Rol. 90, 405.
 1 Jones 356.
 Yelv. 104.
 2 Leon. 201.
 4 Leon. 7.
 Godb. 122, 123.
 Owen 114.
 2 Bulst. 115, 116.
 (b) 1 Rol. 90.
 4 Leon. 7.
 Cr. El. 548.
 Cr. Car. 388.
 (c) 4 Inst. 305.
 (d) Moor 238, 421, 453.
 Cr. El. 548.
 2 Rol. 138, 139, 265.
 Cr. Jac. 382, 491. Godb. 259.
 1 Rol. Rep. 136.
 200, 201.
 2 Rol. Rep. 3, 4, 5, 30, 31, 32. Poph. 141. (e) Cr. Car. 388. Antea 73. a.

Hill 43 Eliz. Rot. 1807.

In the Common Pleas.

ALDEN'S Case.

IN *Ejectione firmæ* by *Smith* against *Alden*; (a), the Defendant pleaded that the Tenements in which *Ec.* were Parcel of the Manor of *Odibam* in the County of *Southampton*, *Ec. quod quidam manerium est de antiquo dominico, Ec.* and demanded Judgm. if this Court would take Conufance; upon which the Pl. did demur in Law: And it was objected that this Action was but in the Nature of Trespafs, and that in old Time, in it the Term was not recovered, but only against him in the Reversion; and in *b*) Trespafs for Breaking of a Clofe and Felling of Trees, ancient Demefne is no Plea, as it is adjudged in *46 E. 3. 1. b.* Also Lands in ancient Demefne shall be *c*) extended by *Elegit*, becaufe the Freehold doth remain as it was before, and yet the Interest of the Land is charged by this Execution, *7 H. 7. 1.* But it was answered and resolved that the Plea was good.

1. Because the common Intendment is, that the Title and Right of the Land will come in Debate, as in a Replevin, in a Writ (*e*) of Mesne, in a Writ of (*f*) Ward, in Accompt (*g*) against Guardian in Socage, ancient Demefne is a good Plea, for the Appearance and common Intendment that the Realty will come in Debate, *21 E. 3. 10 40 E. 3. 4. 46 E. 3. 1.* So in Accompt against a Bailly, for it is brought for the Issues and Profits of the Land, which is ancient Demefne, which ought to be determined in the Court of ancient Demefne. *Vide 21 E. 4. Ancient Demefne 6.*

2. In this Action of *Ejectione firmæ*, the Plaintiff shall recover the Possession of the Land, and shall have Execution also *per habere facias possessionem*, and not like an Execution by *Elegit*; for there no Judg-

4 Inft. 270. (f) Hob. 47. 1 Rol. 322. 55 E. 3. 1. b. 2. a. Br. ancient
(g) Hob. 47. 2 Brownl. 131. 1 Rol. 322. 46 E. 3. 2. a. 4 Inft. 270.

ment is given to recover the Possession of the Land in a Court of Record, but only Execution done by the Sheriff in the Country: But in an Assise brought by Tenant by *Elegit* (a) ancient Demefne is a good Plea, as it is held 22 *Ag.* 45. And there some say, That Land in ancient Demefne is not subject to *Elegit*, but the Contrary is at this Day held for Law for the Reason aforefaid. And where any Interest in the Land fhall be bound, or the Realty come in Debate, it will be reasonable that thofe in ancient Demefne, who beft know to try and determine it, fhould have the Conufance of it. And if this Action proceeds in this Court, the Sheriff cannot return any Perfons within ancient Demefne; and if he thereby the true Inftitution of the Law will be defeated, *fcil.* That the Interest of every Land fhall be tried *per probos & legales homines de vicinet*, &c. who beft know the Truth of the Matter. And forasmuch as at this Day all Titles of Lands are for the greateft Part tried in Actions of Ejectments, if in them ancient Demefne fhould not be a good Plea, the ancient Privileges (which the Law for the Repofe and Quiet of thofe of ancient Demefne allowed to them, to the Intent that they fhould apply themfelves to Tillage and Husbandry, and therefore are fo greatly regarded and favoured in our Books) would be utterly taken away and defeated. *Vide* 44 *E.* 3. 22.

(a) Hob. 47, 48.
Antea 109. a.
Dy. 373. pl. 13.
Doct. pl. 51.
2 Inf. 397.
4 Inf. 270.
Palm. §41.
Br. ancient Demefne 33.
3 Rol. 888.

Cr. El. 104.

Pasch.

Pasch. 43 Eliz.

In the King's Bench.

Sir HENRY CONSTABLE'S Case.

SIR *Henry Constable* brought an Action of Trespafs against *Gamble*, and declared, That King *Philip* and Queen *Mary* were seised of the Manor and Fee of *Holderness* in the County of *York* in their Demefne as of Fee, as in Right of the Crown of *England*; and by their Letters Patents granted the said Manor and Fee with Wreck of the Sea within the said Manor and Fee, to *Henry* Earl of *Westmorland* in Fee, who conveyed them to Sir *John Constable* Father of the Plaintiff, whose Heir he is, in Fee: And further declared, that certain Goods, *scil.* twelve Shirts and five Cloaks were Wreck and cast on the Land within the Manor of *Barneston*, which is within the said Fee of *Holderness*, and that the Defendant took the said Goods, &c. The Defendant pleaded to Issue, and thereupon a special Verdict was found to this Effect; *scil.* That the Conveyance to the Pl. of the Manor and Fee aforesaid was true as he had declared; and that the said Manor of *Barneston* was within the said Fee: And further, that Parcel of the said Goods were Wreck, and cast *super arenas aqua salsa minime coopertas Manerii de Barneston infra fluxum & refluxum maris in Manerio de Barneston*, and for other Parcel of the Goods, that they were floating *super aquas maris resuantes ex arenis ejusd' Manerii de Barnest. infra fluxum & refluxum maris, &c.* And that the Defendant took all the said Goods and seised them to the Use of the Lord Admiral, &c. And assessed Damages entirely for all: And *si super totam materiam, &c.* And this Case was often well argued at Bar and Bench, and at last Judgment was given against the Plaintiff. And in this Case five Points were resolved.

1. That nothing shall be said *Wreccum (a) maris*, but such Goods only which are cast or left on the Land by the Sea; for *Wreccum maris significat illa bona, quæ naufragio ad terram appellantur*: (b) *Floresam* is when

Wrecc' maris. }
(a) 2 Inst. 167.
Floresam. Jers.

(b) Dalt. Sher.
90.

Sir HENRY CONSTABLE'S Case. PART V.

when a Ship is sunk, or otherwise perish'd, and the Goods float on the Sea; *Fetsam* is when the Ship is in Danger of being sunk, and to lighten the Ship the Goods are cast into the Sea, and afterwards notwithstanding the Ship perish. *Ligan* (vel *potius Ligan*) is when the Goods which are so cast into the Sea, and afterwards the Ship perishes, and such Goods cast are so heavy that they sink to the Bottom, and the Marin. to the Intent to have them again, tie to them a Buoy, or Cork, or such other Thing that will not sink, so that they may find them again, & dicitur *Ligan a ligando*; and none of these Goods which are called *Fetsam*, *Flotsam* or *Ligan*, are called Wreck so long as they remain in or upon the Sea; but if any of them by the Sea be put upon the Land, then they shall be said Wreck. So *Flots. Fetsam*, or *Ligan*, being cast on the Land pass by the Grant of Wreck: And where it is provided by the Stat. of 15 R. 2. c. 3. that the Court of Admiralty shall not have Cognizance or Jurisdiction of Wreck of the Sea, yet it shall have Conusance and Jurisdiction of *Flots. Fets.* and *Ligan*; for Wreck of Sea is, when the Goods are by the Sea cast on the Land, and so *infra Comitatus*, whereof the Com. Law takes Conusance, but the other 3 are all on the Sea, and therefore of them the Admiral has Jurisdiction. *Bracton, lib 3. cap. 3. fol. 120. Item magis proprie dici poterit wreccum, si navis frangatur, & ex qua nullus vivus evaserit, & maxime si domini rerum submersus fuerit, & quicquid inde ad terram* (note these Words) *venit, erit Domini Regis.* And that also appears by the Book of Entries, fol. 611, 612. *Trespas in Wreck.* Always when Wreck is claimed by Prescript. (as by Law it may be) the Pleading is, *bona wreccata super mare, & ad terram projecta.* And another Prescript. is there, *habere omnimod' wreccum maris infra praeinctum Manerii, sive Domini prae'd' projecta, & flotsam maris infra eund' praeinct' devenient'*; by which the Difference between Wreck and *Flots.* appears. *Vide 9 E. 4. 22.* Wreck is when it is cast on the Land. 11 H. 4. 16. 5 E. 3. 3. & 29. 21 H. 6. *Prescript. 14 E. 2. in Trespas 236. 5 H. 7. 36. 39 H. 6. 37. & 9 H. 7. 20. acc. Vide Registr. int' brevia de transgress. 102. b. the Writ saith, Ostensurus quare cum idem Tho. Dominus Manerii de Estombavent existat & ibidem habere debeat, ipseq; & antecessores sui Domini Manerii prae'd' a tempore quo, &c. non existat memoria, hucusque habere consueverunt wrecc' maris infra praeinct' Maner' prae'd', prae'd' Jocus & Robert. bona & catalla ad valenc' cent' solid' apud S. infra praeinct' ejusd' Manerii ad terram projecta & quae ad ipsum Tho. tanquam wreccum pertinere deberent, vi & armis ceperunt & asportaverunt.* Also the Stat. of 15 R. 2. c. 3. proves it also, where it is enacted and declared, That Wreck of the Sea shall be tried and determined by the Laws of the Land, which cannot be extended to *Flots. Fets.* or *Ligan*, for they are in or upon the Sea, and therefore cannot be tried and determined by the Com. Law, for Trial fails, but are to be determined, before the Admiral.

Dalt. Sher. 90.
Spelm. Gloss.
verbo Flotsam.

Dalt. Sher. 90.
1 Sid. 178.
Palm. 96.

4 Inst. 154.
F.N.B. 112. C.
Doct. & Stud.
156, 157.

Raft. Ent. 684.

F.N.B. 91 d.

2. In this Case it was resolved by the whole Court, that the Soil on which the Sea flows and ebbs; *sc.* between the high Water Mark and low Water Mark may be Parcel of the Manor (a) of a Subject, 16 *El. Dier* 326. *b. acc.* And so it was adjudg. in (b) *Lacy's Case*, *Trin.* 25 *El.* in this Court. And yet it was resolved, That when the Sea flows, and has *plenitudo maris*, the Admiral shall have Jurisdiction of every Thing done on the Water, between the high Water Mark and low Water Mark; by the ordin. and natural Course of the Sea: And so it was adjudged in the said Case of *Lacy*, that the Felony committed on the Sea *ad plenitud' maris*, between the high Water Mark and the low Water Mark, by the ordin. and natural Course of the Sea, the Adm. should have Jurisdiction of; and yet when the Sea ebbs, the Land may belong to a Subject, and every Thing done on the Land when the Sea is ebbed shall be tried at the Com. Law, for it is then Parcel of the County, and *infra corp' Comitatus*, and therewith agrees 8 *E.* 4. 19. *a.* So note, that below the low Water Mark the Admiral has the sole and absolute Jurisdiction and between the high Water Mark and low Water Mark; the Com. Law and the Admiral have *divisum Imperium*, interchangeably as is aforesaid, *sc.* one *sup. aquam*, and the other *sup. terram*. And Sir *J. Popham* Ch. Justice said, That on a Trial at *Nisi prius* between the City of *Bristol* and the *Ld. Berkeley*; it was held by the Justices of Assise, That where the *Ld. Berkeley* had a Manor adjoining to the *Severn*, and prescribed to have Wreck within his Manor, and certain Goods floated between the high Water Mark, and low Water Mark; and the City of *Bristol* had *Flots* there; that the said Goods were not Wreck as long as they were floating upon the Water between the high Water Mark and low Water Mark. See the Book in (c) 5 *E.* 3. 3. *a.* in a Replevin brought by *Will. de Newport of London* against Sir *Hen. Nevil*, and declared that the Def. took 3 Latts of Herrings, and a Ship; the Def. pleaded that he was *Ld.* of the Manor of *Walring*, and prescribed to have Wreck within his Manor *a tempore cuius*, &c. and that the Herrings and Ship were Wreck within his Manor: To which the Pl. said, that they were our Goods in the Keep. of our Mariners which arrived by the Sea, and we say that he took 'em out of their Custody: Judgment if he can claim as Wreck? To which the Def. said, we took 'em as Wreck, out of all Custody on which Book I observe 3 Things; 1. That Wreck may be claimed by Prescript. 2. That forasmuch as a Ship cannot be Wreck, *sc.* cast on the Land, but between the high Water and low Water Mark, thence it follows, that that was Parcel of the Manor: 3. If the Ship perishes, yet if any of the Servants escape, the Law saith, that they have the Custody of the Goods; and they are not Wreck, 39 *E.* 3. 5. *a. b.* One (d) prescribed to have royal Fish, as Porps, &c. found within his Manor, which seems to be between the high Water and low Water Mark.

3. It was resolved, That the *K.* should have *Flots* of *Fishes* & *Ligam.* when the Ship perishes, or when the Owners of the Goods

Terra inter fluxum & refluxum maris
(a) 2 *Roll.* 170.
(b) 3 *Inst.* 48.
113. 2 *Co.* 93. *ad*
13 *Co.* 53.
1 *Leon.* 270.
Moor 121, 122.
1 *Roll. Rep.* 139.
1 *Bulfr.* 203.
Dalt. *Just.* 340.
2 *Brownl.* 34.

(c) *Fin. Replev.*
41. 2 *Inst.* 167.

(d) 3 *Bulfr.* 8.
Co. *Lit.* 117.

Sir HENRY CONSTABLE'S Case. PART V.

are not known, for in 46. E. 3. 15. it appears, that Goods cast into the Sea for Fear of Tempest are not forfeited. *Vide F.N.B. 112. c. 5 E. 3. 35**. 9 E. 4. 22. that the Ship ought to perish, which is called Shipwreck: And that is also proved by the said Act of *West. 1. c. 4. (a)* where it is said, if a Man, Dog, or Cat escape alive, (which is to be intended when the Ship perishes) and therewith agrees *Braet. lib. 2. c. 18. fol. 41. Item sine tradit' res habita pro derelict', ubi Dom' statim desinit esse Dom', si autem causa navis alleviandæ, non sic, quia non ea voluntate eiecit quis, ut desinat esse Dom', &c.* And a Man may have *Flots.* and *Jets.* by the K's Grant, and may have *Flots.* within the high Water and low Water Mark by Prescription, as appears before. And those of the West Country prescribe to have Wreck in the Sea so far as they may see an *Humber* Barrel.

4. It was resolved, that the Stat of *West. 1. c. 4.* by which it is enacted, that of Wreck of the Sea it is agreed, that where a Man, a Dog, or a Cat, escape alive out of the Ship, that such Ship, nor Barge, nor any Thing within them shall be adjudged Wreck, but the Goods shall be saved and kept by View of the Sheriff, Coroner, or King's Bailiff, &c. so that if any sue for those Goods, and after can prove that they were his, or perished in his Keeping within a Year and a Day, they shall be restored to him without Delay, &c. was but a Declarat. of the Com. Law; and therefore all that which is provided as to Wreck, extends also to *Flots. Jetsam* and *Lagan*. *Braet.* who wrote in the Time of *H. 3.* before the Making of the said Act, speaking of Wreck before saith, *Et qd' hujusm' dici debet verum est, nisi sit, qd' verus Dom' aliunde veniens & certa judicia & signa donaverit res esse suas, ut si canis vivus inveniat, & constare poterit, qd' talis sit Dom' illius canis pr' & sumptive, ex hoc illum esse Dom' illius canis & illarum rerum; eod' modo si certa signa imposita fuerint mercibus:* By which it appears, that the Stat. of *West. 1.* which was made 3 E. 1. was but a declaration of the (b) Com. Law, against the Opin. in *Dr. and Stud. lib. 2. f. 118.* and if the Owner dies, his Ex'ors or Administrat. may make their Proofs. And in many Cases concerning Time, the Com. Law gives a Year and a Day for a convenient Time; as in the Case of a Stray, if the Own. Proclamat. being made) don't claim it within a Year and a Day, it is forfeited. So a Year and a Day is given in Case of Appeal, and in Case of Descent after Entry or Claim; of Nonclaim on a Fine, or Writ of Right at the Com. Law; of a Villain dwelling in (c) ancient Demesne; of the Death of a Man who has a Blow or Wound; of Profections, Effoins of the K's Service, and in many other Cases: And the Year and Day in Case of Wreck, shall be (d) accounted from the Taking or Seizure of them as Wreck; for altho' the Property is in Law vested in the Ld. before Seizure, yet until the Ld. seizes, and takes it into his actual Possess. it is not notor. who claims the Wreck, nor to whom the Own. shall repair to make his Claim, and to shew to him his Proofs. And if the Wreck

* The Orig. is 23. but Q. if it should not be 3. (a) 2 Inst. 166, 167. Dalr. Sher 89. Vaugh. 168

(b) 2 Inst. 166, 168. Dalr. Sher. 91. Di. & Stud. lib. 2. cap. 51.

(c) Co. Lit. 254.

(d) 2 Inst. 168. Dalr. Sher. 91. Vaugh. 168.

Wreck belongs to the K. the Party may have a Commif. (a) to hear and determ. the Truth of it, and that by the Verd. of 12 hon. Men, for no (b) Proof is allow. by Law, but the Verd. of 12 Men: And if it belongs to other than the K. then if the Own. cannot satisfy him who claims them as Wreck by his Mark or Cocket, or by the Book of Cust. or by Testimony of honest Men, then the Own. may have such Commif. or may bring his Aēt. at the Com. Law, and prove it by the Verd. of a Jury; and if the Commif. be awarded, or the Aēt. be brought within the Year and Day, altho' the Verd. be given for him afterwards, it is suffic. *vid. Regist. and F.N.B.* 12. For the Commif. *vide Stat. West. i. c. 4. 4 E. 1. de Offic. Coronat.* 15 R. 2. c. 3. 27 E. 3. c. 13. *Britton c. 17. 33 Stamford. Prærog. Regis. Et nota,* that the Aēt. (c) *de Prærog. Regis* made in 17 E. 2. c. 11. enacts, *Qd' Rex hab. Wrccc. maris per tot. regn. &c.* is but that Stat. being made within Time of Memory, a Man may prescribe to have Wreck, as appears in 11 H. 4. 16. *Stamf.* 38. *F.N.B.* 91. d. 5 H. 7. 36. 5 E. 3. 3. & 59. 9 E. 4. 12, &c.

5. It was resolv. in the Case at Bar, that Part of the Goods passed by the Name of Wreck, and Part of the Goods were *Flots* and did not pass by the Grant of Wreck, and Damages were intirely assessed for all. And in Tresp. the Pl. shall recover Damages only for the Value of the Goods, wherefore Judgment. was given against the Pl. And the Book 21 H. 7. 34. b. was cited, where the Case is, that in Tresp. the Def. justified as to one Thing, and pleaded not guilty to another, and they were at Issue, and the Jury inquired of one Thing only, and taxed the Damages for both intirely. *Fineux* held the Verd. good for the Thing found, and of that he should have a Writ of Inquiry of Damages, *Qd' fuit negatu' per tot. Cur. Dy.* 22 El. 269. in *Ejceēt.* (d) *custod.* agrees with this Judgment. And it was adjudged *M. 14 & 15 El.* in this Court in Trespais by *Pooley (c)* against *Osburn* for Breaking his Clofe and beating his Servant, and doth not say, *per qd' servit. amisit*, the Def. pleaded not guilty, and the Jurors found him guilty and assessed Damages intirely; and because the Pl. had not Cause of Aēt. for Beating of his Servant, because he had not averred that he lost his Service, for that Cause the Pl. took noth. by his Bill. And *Carl.* then Ch. Just. caused the Reason and Cause of the Judgment. to be noted in the Margent of the Record: 9 H. 7. 3. in *Rescous acc.* And it was adjudged accordingly *M. 30 & 31 El.* between *More* and (f) *Bedell*, in an Aēt. on the Case on *Assumpsit*, which began in the K's Bench, *M. 28 & 29 El. Rot.* 476. where the Defendant promised to do divers Things, and the Plaintiff alledged two Breaches, whereof one was insufficient, the Defendant pleaded *Non assumpsit*, the Jury gave Damages generally. It was resolv. 1. That it should be intended that they gave Damages for both: 2. That forasmuch as the Plaintiff had no (g) Cause of Damages for the one, for that Cause the Judgment given for the Plaintiff

(a) Dal. Sher. 91.
(b) 4 Co. 74. b.
9 Co. 20. a.
11 Co. 39. a.
Hob. 93. 217.
1 Rol. Rep. 222.
261. 2 Rol. Rep.
40. 2 Rol. 595.
1 Sid. 313.
3 Bullstr. 55.
Cr. Jac. 188. 232.
381. 488.
2 Brownl. 57.
Cr. El. 723.
Mo. 113. pl. 53.
180. 181. pl. 322.
845. pl. 1140.
485. pl. 1250.
Perk. Sect. 791.
3 Inst. 98.
Br. condit. 131.
(c) Dal. Sher. 92.
Stamf. prerog.
37. b. 38. a.
2 Bullstr. 36.
Spelm. Gloss.
verb. Wreccutum

(d) 10 Co. 138. 23.
11 Co. 45. b. 56.
a. 1 Rol. 784.
Dy. 369. 370.
pl. 58. Hardr.
166. Stile 399.
2 Bullstr. 28.
1 Leon. 92.
pl. 118.
(e) 10 Co. 130. b.
2 Bullstr. 102.
2 Rol. Rep. 52.
Hard. 166.
(f) 10 Co. 131. 12.
1 Rol. 242. 243.
244. 245. 24.
Goldsb. 91.
1 Leon. 170.
1 Rol. Rep. 270.
437. 2 Rol. Rep.
2. 192. Jenks.
Cent 264.
Winch 33.
3 Bullstr. 238.
Hard. 399.
Pal. m. 107.
Bridg. 58. 59.
(g) Cr. Jac. 115.
Cr. Car. 327.
10 Co. 132. a.

Sir HENRY CONSTABLE'S Case. PART V.

in the King's Bench was reversed by a Writ of Error in the Exchequer Chamber.

Dalt. Sher. 91.
Estray, Animalia vaga-
ria,
five vacantia.

(b) Dr. & S. ud.
156. b. 2. Venr.
188. 3 Inst. 137.

(c) Vent. 188.

(d) Dalt. Sher.
91.

(e) Dalt. Sher.
91, 92, 79.

(f) Dalt. Sher.
91, 92.

Note Reader, at first (a) the Common Law gave as well Wreck, *Jetsam, Flotsam, and Lagan* upon the Sea, as Estray, (which *Bracton* calls *animalia vagantia*, or as others call them *animalia vacantia, quia Domino vacari debent*;) Treasure-trove, and the like to the King, because by the Rule of the Common Law, when no Man can (b) claim Property in any Goods, the King shall have them by his Prerogative. And therefore *Bracton lib. 3. cap. 3. saith, Sunt alia quedam que in nullius bonis esse dicunt, sicut wreccum maris, grossus piscis, sicut sturgio, & balena, & alie res que Dominum non habent, sicut animalia vagantia, que sunt Domini Regis propter privilegium.* So that it appears by *Bracton* that the King shall have Wreck, as he shall have great Fish, &c. because they are (c) *nullius in bonis*, or as he shall have *animalia vagantia, sive vacantia, scil. Estrays*, because none claims the Property. And note, that Wreck is Estray on the Sea coming to Land (d), as Estray of Beasts is on the Land coming within any privileged Place; and the Law gives in both Cases a Year and a Day to claim them. And *Bracton in eod' lib. 3. cap. 33. fol. 135. saith, Navis, nec batellus, nec alia catalla de his qui submersi sunt mari, nec in salsa nec in dulci aqua, wreccum erit, cum sit qui catalla illa advocet, & hoc docere poterit*; and so he properly before resembled it to an Estray: And if the Goods of an Infant (e), Feme-covert Executrix, Man in Prison, or beyond Sea, Estray and are proclaimed according to the Law, if none claim them within the Year and the Day, they shall be all bound. The same Law of Wreck of Sea, for the Law is (f) strict and binding in both Cases; but it appears by the Opinion of *Bracton* and *Britton* also, that *Flois, Jetsam, and Lagan*, so long as they are in or upon the Sea, do not belong to the K. *sed occupanti concedunt, quia non est aliquis qui inde privileg' habere possit, Rex non magis quam privata persona propter incert' rei eventum (& paulo ante reddit inde ration') eo qd' constare non possit ad quam regionem essent applicanda.* And *Britton lib. 1. c. 17.* Treasure hid in the Ground, we will that it be ours, and if it be found in the Sea, be it to the Finder. But as it appears before by the Resolut. of the whole Court. the K. shall have *Flois, Jetsam, and Lagan*, as is aforesaid, by his Prerogative, altho' they be in or upon the Sea; for the Sea is of the K's Allegiance, and Parcel of his Crown of *Engl.* as it is held *6R. 2. Procest. 46. & Britton c. 33.* well agrees with the Opinion of *Bract. sc. that Wreck is of a Thing in nullius bonis*; for there he saith, it is also purchased by Franchise granted, by Name of a Thing found in no Man's Goods, as a Wreck of Sea, and Cattle estraying, Conies, Hares, Patridg. and other savage Beasts, by Franchise to have Wreck found in his Soil, and Waif and Stray found in his Fee, Warrens, and his Demesne Lands. Pasche

Pasch. 43 Eliz.

In the King's Bench.

FOXLEY'S CASE.

Foxley brought an Action of Trover and Conversion of 20 Sheep; the Def. pleaded, that the Queen was seized of the Manor of *Newport-panel* in the County of *N.* and that certain Persons unknown stole the said Sheep from the Pl. and brought them within the said Manor, and there left, and waived them; wherefore the Def. as the Queen's Bailiff of the said Manor, seized them to the Queen's Use, as Goods waived there, which is the same Trover and Conversion, and demanded Judgment, *si Regina inconsulta?* upon which the Pl. demur'd. And he was ousted of the (a) Aid by Judgment, for it doth not appear by the Def. bar that these Goods were forfeited to the King; for it was resolved, if a Man steals my Goods, and brings them into a Manor, and there leaves them in his House, or in the House of any other, or in the Custody of any other, or hides them in the Ground, or other secret Place, and afterwards flies, these Goods are not forfeited, nor shall be said Waif in Law, for (b) Waif is where the Felon in pursuit waives the Goods, or when the Felon for fear of being apprehended, thinking that Pursuit was made, having them with him in his Possession flies, and waives the Goods, in these Cases they shall be said waived in Law: But if he has not the Goods with him when he flies being pursued, or for fear of being apprehended, they are not waived nor forfeited, but the Owner may take them when he will without any fresh Suit. But if the Thief in his Flight waives them, there the Goods are forfeited by the Com. Law, if the Felon on fresh Suit was not attainted at the Suit of the Owner of the Goods. And the Reason (c) that Waif is given to the King, and that the Party shall lose his Property in such Case is, for Default in the Owner that he doth not make fresh Suit to apprehend the Felon; for (d) *interest Reipublicæ ne maleficia remaneant impunita, & impunitas semper ad deteriora invitatur*, and therefore the Law has imposed this Penalty on the Owner, that if the Thief by his Industry and fresh Suit be not attainted at his Suit, (*scil.* in Appeal of the same Felony)

Moor 572.
Cr.El. 693, 694.

(a) 1 Rol. 150.
Cr.El. 693, 694.
Moor 572.
2 Inst. 269.

(b) Dalt.
Sher. 78.
Moor 572.
Yelv. 5.
Bona waivitura
sive direliſta.

(c) Cr. El. 694.

(d) Godb. 240.

Felony) he shall for his Default lose all his Goods which the Thief at the Time of his Flight waived. But if the Thief has them not with him when he flies, having perhaps hid them (as it is said) there no Default can be in the Party; and therefore they shall not be forfeited, for if he makes fresh Suit after Notice of the Felony, it is sufficient.

Bona fugitivo-
rum.

So note Reader, *bona waviata seu derelicta*, are Goods which are stolen and waived by the Thief in the Flight. *Bona fugitivorum* are the proper Goods of him who flies for Felony. But it is to be observed, that if a Man flies for Felony, his proper Goods are not forfeited until it be found by Indictment before the Coroner, in Case of Death, or otherwise lawfully found of Record, on Acquittal, that he fled for the Felony: For if the Goods of any should be forfeit. only by the Flight, without more, then a Man might have such Goods so forfeited by Prescription, in the same Manner as he may have Goods waived, estray, or Treasure found, &c. But so far as *bona fugitivorum* are not forfeited, until the flying be lawfully found of Record, and because Things forfeited by Matter of Record cannot be claimed by Prescription, which is but Matter in Fact, for this Cause they cannot be claimed by Prescript. (a) 46 E. 3. 16. b. & 9 H. 7. 20. a. acc'. But waif, estray, Treasure found, wreck of the Sea, &c. which may be gained by Usage without Matter of Record, there a Man may prescribe to have them, 21 H. 6. Prescription, 1 H. 7. 23. b. 9 H. 7. 20. a. 46 E. 3. 16. b. 22 E. 3. Coron. 241. Also he shall not (b) forfeit the Goods which he had at the Time of the Flight (as he should do if they were absolutely forfeited by the flying) but those which he has at the Time of the Indict. or Acquittal. Vide 3 E. 3. Cor. 344. & 8 E. 2. Cor. 296. 5 H. 4. Forfeit. 52. 33 E. 3. Forfeit. 30. 42 Aff. 5. Vide Stamford's Pl. of the Cro. 15. 184. c. 192. And the flying of a Felon, either ought to be found by Verdict on his Acquittal (for altho' he be found Not Guilty, yet he shall forfeit his Goods by the flying, *Quia (c) fatet facin', qui iudiciu' fugit*, and the Law will not admit any Proof against this Presumpt.) or on Indict. found *super vis. corpor'* before the Coron. if it be in Case of the Death of a Man, Vide 22 Aff. 76. 13 H. 4. 13. 3. E. 3. Forf. 35. and it appears there, that altho' the Jury that tried him find him Not Guilty, and further that he did not fly, yet the Goods are forfeited by Force of the finding of the flying before the Coron. But on no other Indict. the flying shall be found, unless it be in special Cases. As if a Felon be arrested of Felony, and as he is carrying to Gaol, in flying, those who pursue him cannot apprehend him without killing him, wherefore they kill him, if all this Matter and the Flying be presented before the Coroner, or any other who has Authority to enquire of Felonies, the Party so killed shall forfeit all his Goods and Chattels, and therewith agrees 3 E. 3. Coron. 287. 312. & 328. And there it appears, that in such Case it is not Felony in them that pursued him. 3 E. 3. Forfeit. 25. If a true Man kills a Thief who would (d) rob him, if the Thief does not retreat, he shall forfeit nothing. And the Reason

(a) Dalt. Sher. 79.
9 Co. 24. b.
2 Inst. 281.
3 Inst. 55, 227, 133.
Co. Lit. 114. a.
Stan. Prerog. 28. a. 50. a.
46 E. 3. 16. b.
1 H. 7. 23. b.
9 H. 7. 11. b.
20. a.
27 H. 7. 33. b.
2 Rol. 270.
Br. Corone 129.
Fitz. prescript. 27.
8 H. 4. 2. a.
Br. Estray. 13.
Cr. El. 560.
Moor 707.
Kelw. 150. b.
(b) Co. Lit. 391. a.
(c) 41 Co. 60. b.

(d) 3 Inst. 56.

of the Book in 45 E. 3. *Coron.* 100. that if a Man steals divers Goods, and the Owner in his Appeal (a) omits some Part, the King shall have all that which is omitted, is because by this Omission the Thief may escape, and because the Owner cannot have them, the King shall have them: And as in these Cases the Law punishes the Owner for his Negligence or Connivance, so the Com. Law abhors Malice in seeking the Blood of any without just Cause. And therefore if A. has the Goods of B. by Bailment or Trover, and B. brings an Appeal of Robbery against A. for taking them feloniously, and it is found that they were the Plaintiff's Goods, and that the Defendant came to them lawfully; in this Case the Plaintiff shall forfeit the Goods to the King for his (b) false and malicious Appeal, as it is adjudged in 3 E. 3. *Coron.* 367. Also *bona & catalla felonum* in some Cases shall be (c) forfeited by Conviction, and sometimes without Conviction. But always when any Forfeiture is of any Felons Goods it ought to appear of Record, and that is the Reason that such Goods cannot be claimed by (d) Prescription, as appears by the said Books. At Com. Law the Goods of a Clerk convicted, by Verdict or Confession were forfeited to the King, not only all which he had at the Time of the Conviction, but all the Goods which he should acquire afterwards until he had made his Purgation, or obtain'd his Pardon; for at the Com. Law every Clerk convicted, who had the Benefit of his Clergy either could make his Purgation, or could not make it; if he could make his Purgation, then the Entry was, *Quod talis commissus est ordinario*, and if he could not make his Purgation, then the Entry was, *quod talis commissus fuit ordinari absq; purgat' facienda*. And in Case when he could not make his Purgation, or in Case when he could make Purgation, till Purgation made, he remained a Person disabled to take Goods to his own Use: And therefore Question has been made on the Stat. of (e) 18 *Eliz. cap.* 7. by which it is enacted, That after Clergy allowed, and burning in the Hand, the Prisoner shall be presently enlarged and delivered out of Prison: If one after the Stat. is convicted of Felony, and has his Clergy, and is burnt in the Hand, and afterwards acquires Goods, if he shall forfeit his Goods which he acquires after till he obtains his Pardon; For now he cannot make Purgation, and Peradventure the Cause or Offence was such, that he could not make Purgation. And *Pasch.* 41 *Eliz.* in *B. R.* this Doubt was resolved; for in Action on the Case on Trover, brought of certain Goods by (f) *Hesdon*, as Administrator of *Riddleston* against *Masterston*; The Defendant pleaded that before the Trover the Intestate was convicted of Felony, and burnt in the Hand: and afterwards acquired the said Goods, on which the Plaintiff demurr'd in Law; And it was adjudged for the Plaintiff, for inasmuch as the Statute has taken away the ordinary Means and Power from him who might make Purgation,

Bona confiscata. feu forisfacta.
(a) 3 *Inft.* 227
Dalt. Sher. 80

(b) *Dalt. Sheri*
81.
3 *Inft.* 227.

Bona felonum.

(c) *Co. Lit.*
114. a. 391. a.
(d) 9 *Co.* 24. b.
2 *Inft.* 281.
Co. Lit. 114. a.
Dalt. Sher. 79.
Stanf. Prærog.
28. a. 50. a.
46 *E.* 3. 16. b.
1 *H.* 7. 23. b.
2 *Rol.* 270.
Br. Coron. 129.
9 *H.* 7. 11. b.
20. a. 27 *H.* 7.
33. b.
Fitz. Prescription 27.
B. Estry 13.
8 *H.* 4. 2. a.
3 *Inft.* 55, 133,
227.
Cr. El. 560.
Moor 707.
Kelw. 150. b.
(e) 5 *Co.* 50. b.
Raym. 170.
6 *Co.* 68. b.
Cr. Jac. 430, 431.
2 *Rol.* 222.
Hob. 291, 294.
Hale's Pl. Cor.

(f) *Hob.* 292.
6 *Co.* 68. a. b.
Raym. 370, 380.
3 *Inft.* 114, 242.

which

which was the ordinary Means to make himself capable of Goods to his own Use: And as to him who could not make his Purgation, forasmuch as by the said Act it is enacted, That he shall be presently enlarged and delivered, which is in Lieu of a Pardon by good Construction, the same Act of 18 Eliz. has made him as capable in both Cases to purchase Goods to all Purposes, as if he had made his Purgation in the one Case, or obtained his Pardon in the other. But it is to be known, that altho' the Felon had made his Purgation at Common Law, that was only to (a) enable him to purchase Goods and Chattels; for notwithstanding the Purgation he forfeited his Goods which he had before his Purgation, and the Profits of his Land also till Purgat. made, against the Book in 3 E. 3. *Corone* 365. *Vide* 8 E. 2. *Forfeiture* 34. But now presently by his Delivery on the said Act of 18 Eliz. he is discharged against the King of the Profits which shall come after: And if the King pardons the Burning of the Hand, it is within the said Act, altho' the Words are after Clergy allowed, and Burning of the Hand, for the Pardon has discharged the Punishment. And there it was resolved, That if a Man obtains a Pardon before Conviction, he shall not forfeit his Goods, nor the Profits of his Lands.

(a) Hale's Pl. Cor. 241.

(b) Laughton's Case, Hill. 37 Eliz. in B.R. Swinb. 72. 3 Inft. 55.

(b) *Laughton's Case*, Hill. 37 Eliz. in the *King's Bench* it was resolved by *Popham* Chief Justice, and the whole Court of *King's Bench*, That if a Man be *felo de se*, his Goods are not (c) forfeited till it is presented or found of Record, and that is the Reason that such Goods cannot be claimed by Prescription. Then it was moved if one be *felo de se*, and cast into the Sea, (d) or conveyed or buried in so secret a Manner that the Coroner cannot have the View of the Body, and by Consequence he cannot enquire of it: It was resolved, that the Justices of Peace, Justices of Oyer and Terminer, and all others who have Power and Authority to enquire of Felonies, may take a Presentment of it, for it is Felony, and that shall serve to entitle the King to his Goods and Chattels. And (e) *Deodanda* are Goods which occasion the Death of a Man by Misadventure, and are not forfeited till the Matter is found of Record, and therefore they cannot be claimed by Prescription. And the Jury who find or present the Death by such Misadventure, ought (f) to find and value the *Deodand* also: *Omnia quæ movent ad mortem sunt Deodanda*. *Vide* 3 E. 3. *Corone* 326, 341, 342. 8 E. 2. *Corone* 401. *Vide* 12 R. 2. *Forfeit.* 20: There are also *bona & cattalla in exigendo positorum*; and these are when any one is appealed or indicted of Felony, and he withdraws and absents himself for so long Time that an (g) *Exigent* is awarded against him, by this Retreat (which is a flying in Law) he shall forfeit all his Goods and Chattels which he had at the Time of the *Exigent* awarded, altho' he renders himself on the *Exigent*,

Bona felon' de se.

(c) Stanf. Prærog. 46. a. 3 Inft. 54, 55. Poph. 209. 1 Rol. Rep. 217. (d) 2 Rol. 96.

(e) Deodanda.

Stanf. Cor. 20, 21. Dalt. Sher. 81. 3 Inft. 57.

(f) Dalt. Sher. 81.

Bona in exigendo positorum.

(g) Dalt. Sher. 82. Stanf. Prærog. 47. a. 3 Inft. 232.

and

and is afterwards found Not Guilty; and that appears by 22 *Aff.* where the Case was, That a Man indicted of the Death of a Man did render himself, on the Exigent, and was presently arraigned, and found Not Guilty, and because he came by *Exigent*, by which it was sufficiently proved that he withdrew himself, his Chattels were forfeited, and the Jury who acquitted him valued the Goods. And in 41 *Aff. pl.* 13. at the Time of the *Exigent* awarded against divers in an Appeal of Death, a Writ was awarded to the Sheriff to enquire of their Goods and Chattels, and to seize them: But peradventure at the Time of the *Exigent* awarded the Def. was in Prison, or beyond Sea, what Remedy has the Party to have his Goods again? For as *Knivet* in 43 *E. 3.* 17. saith, the Party shall not have (a) Restitution of his Goods (altho' the Writ of *Exigent erronee emanavit*) so long as the Award of the *Exigent* (which is there called a Judgment) stands in Force not defeated. And in the same Book it is said, That if a Man has a Charter of Pardon, of eider Date (b) than the *Exigent*, his Goods are saved, for the Cause of Salvation appears of Record: But it doth not appear by the Book what Remedy the Party has, if the Cause of saving them be by Matter in Fact, as by Imprisonment, or that the Party was beyond the Sea, &c. And *Mich.* 33 & 34 *Eliz.* in the *King's Bench* in (c) *Marshe's Case* it was resolved, That in such Case the Party or his Executors or Administrators should have a Writ of Error to reverse the said Award of the *Exigent*: And a Precedent in 18 (d) *H. 7.* in this Court in the Case of one *Eaton*, against whom on an Indictment of Death, an *Exigent* was awarded in the County of *Lincoln*, and the said *Eaton* died, and was never convicted or attainted, and his Executors brought a Writ of Error to reverse the said Award of the *Exigent*; For inasmuch as the King is intituled by Matter of Record, of Necessity it ought to be avoided by a Matter of as high a Nature. And forasmuch as the Words of a general Writ of Error are (*si(e) judicium inde redditum sit*) which is not in such Case, he shall have a special Writ reciting the whole special Matter, as by the Precedent appears. *Vide* 30 *H. 6. Forfeiture* 31. 19 *E. 3. Forfeiture* 19. 8 *E. 3.* 11. 29 *E. 3.* 29 & 30. 37 *H. 8. Estry*, *Br.* 9. *Stamford's Pleas of the Crown* 186. And so it was resolved, that in the Case at Bar there was no Cause of Aid, and therefore by the Rule of the Court he was ousted of the Aid.

2. It was agreed, That the Demurrer was not peremptory, but to answer over. See now the Statute of 21 (f) *H. 8. cap.* 11. concerning Goods waived, and for the Restitution of them.

(a) 3 *Inft.* 232;
242.

(b) *Dalt. Sher.*
87.

(c) 1 *Leon.* 325;
326.

Owen 147, 148.
Cr. El. 2 25,
273, 274.

1 *Rol.* 912.
Godb. 377, 380.

(d) *Eaton's*
Case, 18 *H. 7.*
in *B. R.*
2 *Sid.* 93.

11 *Co.* 41. a.
Cr. Jac. 357.
1 *Rol. Rep.* 85.

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

Ye'v. 112.

(f) 3 *Inft.* 242;

Pasch. 43 Eliz.

In the King's Bench.

MALLORY'S Case.

Cr. El. 805,
806, 832, 833.

IN Replevin between *Mallory* Pl. and *Payn* Def. the Case was such; The Abbot and Covent of *Sawtry* by Deed indented, demised the Place, where, &c. to *Anthony Mallory* for 120 Years, rendring Yearly during the said Term to the Abbot and Covent, or their Successors, the Rent of eight Marks, to be paid at the Feast of St. *Michael* and the Annunciation of our Lady by equal Portions, on Condition that if the Rent be behind, and a Distress taken by the Lessor, &c. and not redeemed within six Weeks, that it should be lawful to the Lessor, &c. to re-enter. The Abbot and Covent surrender their Monastery and all their Possessions to King *H. 8.* The Term by divers mean Assignments was assigned to *Mallory* the Pl. and the Reversion by divers mean Conveyances to one *S.* who levied a Fine thereof to *Dr. Bellay*, who before any Attornment granted the Reversion by his Deed to *Thomas Bellay* his Son and his Heirs, to whom the Tenant attorned: And for Rent arrear, and Distress taken according to the Condition, &c. *Payn* by the Commandment of *Thomas Bellay* the Son, re-entred and distrained the Plaintiff's Cattle Damage-feasant: And the Question was, whether the Entry of *Thomas Bellay* the Son be lawful or not. And after divers Arguments at Bar and Bench, it was resolved by the whole Court that the Entry was lawful. And in this Case four Points were resolved:

1. That the said (a) Reservat. in the Disjunct. was good, for in the first Part of the Reservat. the Words are, rendring Yearly during the Term; and the subsequent Words ought to have such Interpretat. that they do not confound them which precede, but that all together may stand and satisfy the Intent and Meaning of the Parties. And such Construct. the Judges made, in *Hill* and *Graunge's* Case, *Plow. Comm.* 164 where

(a) Cr. Eliz.
832.

1 Vent. 148.

Hard. 91, 94.

2 Sand. 369.

1 Bullst. 175.

Ley 79.

3 Bullst. 328.

Palm. 482.

1 Jones 309.

Godb. 363,

449, 450.

Latch 99.

where a Lease was made in *January* for Years, rendring Yearly during the Term to the Lessor Rent, payable at the Feasts of *S. Michael* and the (a) *Annunciation*, which last Words shall be so marshalled and transposed, that the first Words, *scil.* rendring Yearly, shall not lose any of their Force: And therefore the Law shall make Construction, that the Rent shall be paid at the Feasts of the *Annunciation* and *S. Mich.* And it was agreed, that rendring Rent Yearly during the Term to one and his Successors, and rendring Rent during the Term to him or his Successors are all one; for if the Rent be reserved to him and his Successors, altho' the Words are joint and in the Copulative, yet in Construction of Law the Lessor shall have it during his Life; and his Successor after his Decease. So when Rent is reserved Yearly during the Term to (b) one or his Successors, these Words (to him or his Successors) are Words of Explanation, *scil.* to direct the Lessee to whom he shall pay the Rent during the Term, *viz.* to the Lessor during his Life, and after his Death to his Successors, for without these Words *scil.* to the Lessor or his Successors, the Reservation had been good by Force of these Words (rendring Yearly during the Term) as it is agreed in 10 *E.* 4. 14. & 27 (c) *H.* 8. 19. But if a Feoffment be made to *A.* to have and to hold to him, (d) or to his Heirs, there he has but an Estate for Life, for there want precedent Words to direct the Words in the Disjunctive: And these Words (his Heirs) are of the Essence of the Estate, and without them no Estate of Inheritance shall pass. So and for the same Reason if a Reservation on a Feoffment is not good but during the Life of the Feoffor. And so note the Difference. *Vide Chapman's Case, Plow. Comm.* 284. where a Copulative shall be taken for a Disjunctive; but here the Disjunctive doth amount in Construction to a Copulative. See the Case in (e) 21 *E.* 3. 29. *b.* where one was bound that when the Obligor should come to his Aunt, he would enfeoff the Obligee, or the Heirs of his Body of certain Lands; and the Obligee when the Obligor came to his Aunt requested him to enfeoff him, which the Obligor refused to do: And it was adjudged that he had forfeited his Obligation; for although the Condition was in the Disjunctive, and that the Condition is always for the Benefit of the Obligor, yet forasmuch as the Feoffment was to be made when he came to his Aunt, and when he came to her the Obligee was alive, and therefore it was not possible then to enfeoff his Heir, for this Cause he ought to perform such Part of the Disjunctive, that then was possible to be performed. Note Reader, a good Case to prove the principal Case; for inasmuch as the

(a) Cr. Eliz.
832.
Hob. 172.
Co. Lit. 217. b.
2 Rol. Rep. 213.
Plowd. 171. a.
2 Sand. 368.
10 Co. 106. b.

(b) Cr. Eliz.
832.
Hardr. 91, 94.
Ley 79.
1 Ventr. 148.
2 Sand. 369.
Palm. 482.
1 Bulstr. 175.
3 Bulst. 328.
Godb. 363, 449,
450.
1 Jones 309.
(c) 27 H. 8.
18. b.
(d) Co. Lit.
8. b. 214. a.

(e) Plow. 239. a.
1 Rol. 450.
Antea 22. a.
Br. Condition
47.
Bridg. 40.

Rent

Rent was to be paid Yearly during the Term at such Feasts in certain to the Lessor, or his Successors, the Lessee at the same Feasts ought to pay the Rent to that Person which then might receive it, and that is the Lessor himself, and the Lessor cannot choose to pay it at the same Feasts to him or his Successors as long as the Lessor lives, for it is not possible that he who is not then *in rer' natura* should receive it.

2. It was resolved, That altho' the Words of the Stat. of 32 H. 8. c. 34. are general (" As all other Persons being Grantees or Assignees to or by any other Person or Persons, &c. shall and may have like Advantage, as the Lessors or Grantors themselves, &c. ought, should, or might have had or enjoyed at any Time or Times, &c. Yet the Grantee or Assignee by Fine shall not take Advantage of a Condition without (a) Attornment. For when a Stat. speaks of an Assignee, &c. it is to be intended of such compleat Assignee, who has all the Ceremonies and Incidents requisite by the Law to such Assignee, and not to take away any Ceremony or (b) Circumstance, which the Law requires, nor to do any Thing contrary to the Com. Law; as it is agreed in 28 H. 8. 28. That where the Stat. of 27 H. 8. cap. 10. of Uses, enacts that the actual Possession shall be adjudged according to the Use, yet it ought to have the Circumstance which is requisite by the Com. Law, *scil.* actual Entry in Fact. So it is agreed in (c) 4 E. 4. 31. a. b. it was ordained by the Stat. of (d) 1 E. 4. that all Inquisitions taken before the Sheriff in his Turn, or County, should be delivered to the Just. of Peace at the next Sessions; to whom they should make Process on them, as on Inquisitions taken before themselves: A Presentment was made in the Turn on the Stat. of Liveries, which was delivered according to the Stat. to the Just. of Peace at the next Sessions who proceeded thereon; and it was held that it was against Law, for the Stat. of 1 E. 4. is intended of lawful and sufficient Presentments in Law, and not of Presentments which the Sheriff cannot take by the Com. Law. So it is held in 22 E. 3. *Corone* 276. that the Stat. of West. 2. cap. 12. shall not make a Monk who was appealed and acquitted capable of Damages, for he was disabled by the Com. Law. And it was said, that on the same Reason it was adjudged in *Duke's Case*, That the Conusee of a Fine before Attornment should not take (e) Benefit of a Condition by the said Statute of 32 H. 8.

3. It was resolved, That although Doctor *Bellay* himself could not have taken Advantage of the Condition because he had not Attornment; yet forasmuch as by the Fine the Reversion and the Rent was vested in him, which he has granted to his Son, to whom the Tenant has attorned, for this Cause he shall take (f) Advantage of the Condition, which his Father could not, because he wanted Attornment, which his Son has. And the Words of 32 H. 8. " That

(a) Co. Lit. 215. a. 309. b. Hob. 178.

(b) Dyer 28. pl. 182.

(c) 9 Co. 26. b. (d) 2 Inst. 190, 191. 9 Co. 26. b. Stant Cor. 85. b. 86. a. b.

(e) Co. Lit. 215. a. 309. b. Hob. 178.

(f) Cr. El. 832.

" That the Grantees or Assignees shall and may have and enjoy like Advantage, &c. as the said Lessors or Grantors themselves, &c. if the Rev'n had not come to the Hands of our Sovereign Lord, &c. are well satisfied; for here in this Case is a complete Grantee and Assignee; and therefore he shall take the same Benefit as the Abbot himself, who made the Lease, might. Also it was resolved, that these Words (as the said Lessors or Grantors, &c.) should not be intended of the immediate Grantor of the Reversion, but of any Grantor before, who might have taken Benefit of the Condit.

4. This Difference was taken and agreed for Law, that is to say, between an express Attornment of the Party, and an Act which amounts in Law to an Attornment: For if a Lease for Life, or for Years be made rendering Rent, &c. and afterwards the Rev'n is granted, &c. to B. by Fine, and before Attornment B. disseises or ousts the Lessee, and enfeoffs C. the Lessee re-enters, it shall not amount to an Attornment in Law to make Privy to C. that he may distrain for the Rent, for he shall not be in a better Case than his Feoffor was, as it was adjudged in the Com. Pleas, *M. 36 E 37 El. Rot. 420.* in (a) *Owsey's Case*. But otherwise it is if the Lessee had expressly attorned to the Feoffee. So *Popham* Chief Justice said it was adjudged in (b) *Knottisford's Case*, with whom he was of Counsel 30 Years past; That where the Conusee by Fine of a Rev'n before Attornment, bargained and sold the Rev'n to another by Deed indented and inrolled according to the Statute, That the Bargainee should not distrain for the Rent reserved on the Lease; for he should not be in a better Condition than he who made the Grant to him, for (c) *nemo potest plus juris in alium transferre, quam ipse habet*; but if the Conusee had had an express Attornment, then the Bargainee should distrain without any Attornment. But if the Conusee of a Rev'n by Fine dies without Heir before Attornment, by which the Estate which he has escheats to the Lord, the Lord in that Case should distrain without Attornment, as *Litt. 131, 132. E 39 H. 6. 32. E 38. Prist* holds, yet the Conusee himself could not; and the Reason is, because the Lord by Escheat has lost his Seignior, and he doth not claim as Heir or Assignee to the the Conusee, but by Virtue of his Seignior paramount.

Note Reader, otherwise it is, as it hath been said, if the Conusee before Attornment bargains and sells the Reversion by Deed indented and inrolled; for the Statute of 27 H. 8. executes the Possession in the same Quality, Manner, Form, and Condition as he had the Use; and when the Conusee before Attornment bargains and sells the Reversion, the Use which is derived out of his Estate,

Q

which

(a) *Owsey's Case* Mich. 36 &c; 37 El. 6 Co. 68. b. Cr. El. 264, 354. Owen 23. 2 Anderf. 15. (b) Cr. El. 832. 6 Co. 68. b.

(c) 4 Co. 24. b. 6 Co. 57. b. 68. b. 8 Co. 63. b. Co. Lit. 309. b.

Lit. lib. 3. tit. Attornment.

1 Anderf. 15. Cro. El. 285, 673. 3 Leon. 103, 104. 4 Leon. 34, 50. Vaugh. 36, &c. 49, 50.

which wanted Attornment, ought to be of the same Nature and Quality as that was out of which it was derived: But if the Bargainee in such Case had obtained an express Attornment, it is sufficient: And so observe these good Differences. And in this Case it was said by *Popham* Ch. Just. and not denied by any, That if the Lessor in the Absence of the Lessee enters as it is aforesaid, and makes a Feoffment in Fee, and the Lessee re-enters, altho' it amounts to an Attornment in Law, yet without Notice given of this Feoffment to the Lessee, the Feoffee shall not make a Demand of the Rent reserved on the Lease for Entry for Condition broken: For true it is that the Feoffee may distrain or have an Action of Debt for the Rent, or have an Action of Wast in such Case, for in his Avowry or Declaration he ought to alledge the Feoffment whereof the Lessee had Notice: But if he may demand the Rent on the Condition without Notice, it is not possible that the Lessee should know to whom he should pay his Rent to save his Term, nor have Notice of the Feoffment in such Case before he has forfeited his Term: So if the Lessor bargains and sells the Reversion by Deed indented and inrolled, the Bargainee (although there needs no Attornment) shall never take Benefit of a Condition on a Demand of Rent, without giving Notice to the Lessee of the Bargain and Sale; for although the Bargain and Sale by Deed indented and inrolled be of Record; yet forasmuch as it may be inrolled in so many Courts in so secret a Manner, the Law will not compel all the Farmers in *England*, who have conditional Leases to make every six Months such infinite Search to save their Terms; but the Law for the Salvation of the Interest and Term of the Lessee, will compel the Bargainee, who is to take Benefit of the Condition to give Notice thereof to the Lessee who is altogether a Stranger to it.

Note Reader, The Lessee, as *Littleton* saith, shall not be by the Law misconfant of Feoffments made on the same Lands, that is to be intended as to Distress, Action of Debt, and Action of Wast, in which Cases the Law will compel the Feoffee in his Avowry and Declaration to give Notice as has been said. But *Littleton* is not to be intended, as to Demand of Rent to have Advantage of a Condition without Notice thereof given, as is aforesaid. And *Littleton* therein, that in such Case the Feoffee after Regress made by the Lessee shall have an Action of Wast: But neither *Littleton*, nor any of the Books in 18 E. 3. 47. *Robert Bowser's* Case, 46 E. 3. 30. *Pomeray's* Case, 34 H. 6. 6. 5 H. 5. 12. nor any other Book speak of Demand and Entry upon the Condition broken.

8 Co. 92. a.
Cr. Jac. 146, 193,
476. 2 Rol. Rep.
143. Bridg. 130.
1 Mod. Rep. 87.
4 Co. 70. b.
2 Co. 68. b.
Cart. 93. 172.
Co. Lit. 215. b.
Hob. 178.
Litch. 15.
Cr. Car. 392.
Godb. 162.
Pam. 207, 210,
434. Poph. 165.

Lit. lib. 3. cap.
Attornment
fol. 130. Lit.
Sect. 576. Co.
Lit. 318. b.

Trin. 43 Eliz. Rot. 406.

In the Common Pleas.

WADE'S Case.

IN Replevin between *Foxcroft* Plaintiff, and *Wade* Defendant, the Case was; *Foxcroft* Copyholder in Fee surrendered to the Use of *William Wade* the Defendant's Father and his Heirs, on Condition that if the Plaintiff should pay to the said *William Wade* 250 l. *legalis monetæ Angliæ* the 24th Day of Nov. &c. *ad dom' suam mansional'*, &c. that then the Surrender should be void. And a Tender and Refusal was alledged, and Issue was taken on the Tender to the said *William Wade*: And the Jurors gave a special Verdict, *scil.* That *Foxcroft* the 24th Day of *Novemb. inter horas 7 & 8 ante meridiem ejusdem diei deliberavit cuidam M. Filio suo, & cuidam A. S. 250 l. in monet' (Anglice Money) sc. quinque solid' de Hispanico argento (Anglice in Spanish Silver) & duo duplices auri selopi (Anglice two double Pistolets) & resid' præd' summæ 250 l. fuit in bona legal' monet' Angl', ac etiam deliberavit præfat. M. & A. 34 s. legalis monetæ Angliæ*; and that the Plaintiff required them and each of them to tender and pay the said 250 l. according to the Form and Effect of the Condition. And it was further found, that they *inter horas 9 & 12 ante meridiem ejusdem diei super quandam mensam ibidem obtulerunt 250 l.* And that *Will. Wade* there then counted 244 l. but in Respect of the said 5 s. in *Spanish Money*, and the said two Pistolets, he refused to receive the Money; upon which *M.* and *A.* offered the said 34 s. in Silver to the said *W. Wade*, requiring him to take Silver in Lieu of the Pistolets and *Spanish Money* which also he refused; and afterwards *circa horam duodecimam*, they tendered to the said *William Wade* the Residue in Silver, *French Crowns* and *Angels*, current Money of *England*, which he in like Manner refused to accept: And afterwards *ante occasum solis ad ostium domus*, they offered to him to pay the 250 l. all

Co. Ent. 657.
pl. 10.

in Silver being in Bags, but did not shew any Part of it, and he said, that *recip' vellet, sed non recepit*. And at Sun set, the said *A*. entered into the House, and *sup. quand' mensam deposuit præd' 250 l.* being in Bags, *sed ill' extra baggas præd' non ostendit, quodq; præd' W. Wade differebat recipere præd' 250 l. usq; post occasum solis, & adtunc requisitus ad recipiend' recusavit, allegando*, that the Sun was set, *& ea de causa recipere noluit*: And if on the whole Matter there was any good Tender or not was the Question. And in this Case 4 Points were resolved:

1. Although the last Time of Payment of the Money by Force of the Condition (*a*) is a convenient Time, in which the Money may be counted before Sun set, yet if the Tender be made to him who ought to receive it at the Place specified in the Condition, at any Time of the Day, and he refuse it, the Condition is for ever saved, and the Mortgagor or Obligor, &c. needs not to make a Tender of it again before the last Instant, for by the express Words of the Condit. the Money is to be paid on the Day indefinitely, and a conven' Time before the last Instant is the extreme Time appointed by the Law, to the Intent that the one should not prevent the other, the one being sometimes there, and the other not, and the other being sometimes there, and not the other; and therefore the Law appoints the extreme Time of the Day, to the Intent that both Parties may certainly meet together; for the Law which always requires Convenience, and is grounded on the Experience of the Sages, will not compel any of the Parties to make an Attorney, or to repose Confidence or Trust in any other to pay it for him when he will do it himself, (for *non temere credere est nervus sapientiæ*.) But if both the Parties meet together any Time of the same Day, and the Obligor or Mortgagor, &c. makes a †Tender in the Place, &c. to the Mortgagee, &c. and he refuses it, the Penalty is for ever saved, and he need not make a new Tender by a convenient Time before the last Instant. And so on these Reasons you will better understand your Books 19 *H. 6. 76.* 20 *H. 6. 32.* 22 *H. 6. 46.* 7 *H. 7. 7.* 6 *H. 7. 2.* 32 *H. 8. Br. Condition* 192 *Plov. Com. Kidwelly's Case* 70. and *Hill and Grange's Case* 173. 4 *E. 6. Br. Tender* 41. 19 *Eliz. Dier* * 354.

2. Where the Condition was, that he should pay to him 250 *l. legalis monet' Angliæ*; it was resolved that the said Spanish Silver so tendered was lawful (*b*) Money of England, for it was made current by Proclamation in the Time of the Reigns of Philip and Mary: Also that French Crowns were current and lawful Money of England by Proclamation also. And the King (*c*) by his absolute Prerogative may make any foreign Coin lawful Money of England at his Pleasure, by his Proclamation, *quod nota*.

3. That

1 Point.

(a) Co. Lit.

202.a.7 Co.28 b.

Cr. El. 14.

Moor 122.

10 Co. 129.

† Co. Lit. 202.a.

* Co. Lit. 211.a.

3 Keb 19.

1 Rol. 449.

2 Bulltr. 145.

13 Co. 2.

2 Keb. 816.

8 Co. 92. Cr. El.

298, 299. Dyer

354. pl. 32.

3 Bulltr. 326.

1 Mod. Rep. 88.

Carter 93.

2 Point.

(b) Co. Lit. 207.

a. b. 208. a.

Dyer 82. b.

(c) Co. Lit. 207.a.

10av. 19. b.

3. That if a Man tenders more than he ought to pay, it is good, for (a) *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him (b) *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. Et in majore summa continetur minor.*

(a) 4 Co. 46. a.
Co Lit. 52. b.
285 a. 2 Co. 68. a.
6 Co. 43. b.
3 Inst. 109.
1 Bullstr. 105.
2 Bullstr. 48.
(b) 8 Co. 35. a.
(c) Co. Lit. 208. a
Noy 74.

4. That where the Plaintiff did tender all the 250 l. in (c) Bags without shewing it, or counting it; it was resolved that the Tender was good, if the Truth was that there were 250 l. in the Bags: And so it has been adjudged in the K's Bench in *Winter's Case*; for when the Condition is, that he shall pay 250 l. the Mortgagor doth all that is requisite by the Law for him to do, if he provides the Money, and offers it to the Mortgagee in Bags, which is the usual Manner to carry Money. And then it is the Part of the Mortgagee to count it if he will, or if he will credit the Mortgagor he may accept of it without telling it; then if the Telling it belongs to the Mortgagee, by Consequence he ought to put it out of the Bags, which is incident to it, for without so doing he cannot tell it: And if the Mortgagor puts the Money out of the Bags, yet it is at the Peril of the Mortgagee to look upon it, for perhaps they may be Counterfeits, and yet have a great Shew of good and lawful Money, and also it is at his Peril to count it: And if a Man be bound to pay 40000 l. at such a Day, if he tenders it in Bags it is sufficient, for it cannot be counted in one Day. And so hereby you will understand the better Opinion in 22 E. (d) 4. 21. And it was said that it was adjudged between *Vane* and *Studley*, that where the Lessor demanded Rent of his Lessee according to the Condition of Re-entry, and the Lessee paid the Rent to the Lessor, and he received it, and put it in his Purse, and afterwards in Looking it over again at the same Time, he found amongst the Money that he had received some counterfeit Pieces and thereupon he refused to carry away the Money, but re-entered for the Condition broken, And it was adjudged that the Entry was not lawful; for when the Lessor had accepted the Money, it was at his Peril, and after that Allowance he shall not take Exception to any Part of it.

(d) 22 E. 4. 21. c.

Trin. 43 Eliz.

In the Common Pleas.

FOLIAMB'S Case.

IN an Action of Wast by *Foliamb* against Sir *Will. Bowes* and his Wife, the Plaintiff had an Estreptment directed to the Sheriff. And in this Case two Points were resolved:

(a) Cr. El. 393,
774. Mo. 622.
2 Inst. 304, 329.
12 R. 2. Estrepre-
ment 6.

1. That a Writ of Estreptment lies in an Action of Wast (a); as well at any Time before Judgment; as after Judgment and before Execution: For without Question he cannot recover Damages for more than he has contained in his Count, and he cannot assign any Wast made after the Writ purchased, for the Words of the Writ are *fecit vastum* in the preterperfect Tense; and therefore he cannot assign Wast made after the Writ.

2. Where the Words of the Writ are, *Tibi precipimus, quod ad messuagium præd' personaliter acceden', totaliter ordinari facias, quod vastum seu estrepamentum de eodem messuagio, contra formam Statuti præd' non fiat, pendente placito prædict' indiscusso*: It was resolved, that the Sheriff by Force of this Writ might resist (b) them who would do Wast. And if he otherwise could not, he might imprison them, and make a Warrant to others to do it; and if it be necessary, he might take the *Posse Comitatus* to help him. *Quia quando aliquid mandatur, mandatur & omne per quod per-venitur ad illud*. And so a Doubt in divers Books, scil. 4 E.

(b) 2 Inst. 299, 3
329. 3 Bull. 200.
Hob. 85.

3, 32. 21 E. 3. 3. 22 E. 3. 2. 6 H. 4. 1. b. 33 (c) H. 6. 6. a. (d) 14 H. 7. 10. a. 14 (d) H. 7. 7, 8. F. N. B. 66. Y. & 61. C. K. L. well re- solved.

(c) Fitz. E-
streptment 5.
Br. Estreptem. 6.
(d) 14 H. 7. 10. a.
Br. Estreptem. 9.

Hill. 44 Eliz.

In the King's Bench.

OLAND'S Case.

IN Trespafs by *Oland* against *Burwick* which began in the King's Bench, *Hill. 37 Eliz. Rot. 924.* on a special Verdict, the Case was such; A Woman Copyholder of certain Land, *durante Viduitate sua*, according to the Custom of the Manor sowed the Land, and before Severance of the Emblements, took Husband. And whether the Husband or the Lord of the Manor should have the Emblements was the Question. And it was adjudged that the (a) Lord should have the Emblements; for although at the Time of the Sowing, the Estate of the Wife was incertain, and although her Estate determin'd by Limitation and not by Condition, either in Fact (as in Case of Re-entry) or in Law (as Forfeiture) yet because it determined by the Act of the Lessee her self, therefore the Lord shall have the Emblements, and not the Husband: So if a Woman seised of Land *durante Viduitate sua*, makes a Lease for Years, and the Lessee sows the Land, and afterwards the Woman who made the Lease takes Husband, the (b) Lessee shall not have the Emblements; for although his Estate is determined by the Act of a Stranger, yet he shall not be (as to the first Lessor) in a better Condition than his Lessor was. It is commonly held in our Books, That if a Man leases Land at Will, and afterwards the Lessee sows the Land, and afterwards the (c) Will is determined, that the Lessee shall have the Emblements; but it was agreed that if the Lessee (d) himself determines the Will before the Severance of the Corn, he shall not have the Emblements, because he has determined his Interest by his own Act.

Goldsb. 189, 190.
Moor 394, 395.
Cr. El. 460, 461.

(a) 1 Rol. 726.
Co. Lit. 55. b.
2 Bulfr. 213.
2 Inst. 81.

(b) Goldsb. 189.
1 Rol. 727.
Cr. El. 460, 461.

(c) Cr. El. 461.
(d) Goldsb. 190.
1 Rol. 726.
Cr. El. 461.
Co. Lit. 55. b.

- (a) 3 Keb, 166,
207. Goldsb.
190. 1 Rol. 861.
2 Rol, 807.
- (b) 1 Rol. 861.
2 Rol, 807.
- (c) Golsb. 190.
Moor 395.
1 Rol. 726.
Cr. El. 461.
- (d) 1 Rol. 726.
Cr. El. 461.
- If a Man makes a Lease at Will, and the Lessor is (a) outlawed, by which the Will is determined, the King shall have the Profits; yet the Lessee at Will shall have the Corn which was sowed: But if the Lessee at Will be (b) outlawed, by which the Will is determined, yet the King shall have the Emblements. *Vide 9 H. 6. 20, 21.* But it was held, If a Lease be made to Husband and Wife during the Coverture, and the Husband sows the Land, and afterwards they are (c) divorced *causa precontractus*, the Husband shall have the Emblements, and not the Lessor; for although the Suit is the Act of the Party, yet the Sentence which dissolves the Marriage is the Judgment of the Law, & *judicium redditur in invitum*; and therefore the Husband in such Case shall have the Emblements; but if a Lease be made to one until he doth (d) Waite, and he sows the Land, and afterwards doth Waite, he shall not have the Emblements, *causa qua supra.*

Trin. 44 Eliz. Rot. 501.

In the Common Pleas.

PINNEL'S Case.

Pinnel brought an Action of Debt on a Bond against Cole Moor 677, 678; of 16*l.* for Payment of 8*l.* 10*s.* the 11*th* Day of Nov. 1600. The Defendant pleaded, that he at the Instance of the Plaintiff, before the said Day, *scil.* 1 Octob. Anno 44. *apud W. solvit querenti 5 l. 2 s. 2 d. quas quidem 5 l. 2 s. 2 d.* the Plaintiff (a) accepted in full Satisfaction of the 8*l.* 10*s.* (a) Doct. pl. 267. And it was resolved by the whole Court, That Payment of a lesser Sum on the Day in Satisfact. of a greater, cannot be any Satisfaction for the whole, because it appears to the Judges that by no Possibility, (b) a lesser Sum can be a Satisfaction (b) Perk. sect. 749. to the Plaintiff for a greater Sum: But the Gift of a Horse, Co. Lit. 212. b. (c) Hawk, or Robe, &c. in Satisfaction is good. For it shall (c) 9 Co. 79. a. be intended that a Horse, Hawk, or Robe, &c. might be Perk. sect. 749. more beneficial to the Plaintiff than the Money in Respect Co. Lit. 212. b. of some Circumstance, or otherwise the Plaintiff would not Yelv. 11. have accepted of it in Satisfaction. But when the whole 1 Bulstr. 66. Sum is due, by no Intendment the Acceptance of (d) Parcel Cr. El. 46, 193. can be Satisfaction to the Plaintiff: But in the Case at Bar Cr. Jac. 254. it was resolved, that the Payment and Acceptance of Parcel (d) Co. Lit. 212. b. before the (e) Day in Satisfaction of the whole, would be a Yelv. 11. good Satisfaction in Regard of Circumstance of Time; for Perk. sect. 749. Peradventure Parcel of it before the Day, would be more Dall. 49. pl. 13. beneficial to him than the whole at the Day, and the Moor 48. Value of the Satisfaction is not material: So if I am bound Lutw. 466. in 20*l.* to pay you 10*l.* at *Westminster*, (f) and you Re- (e) Moor 677. quest me to pay you 5*l.* at the Day at *York*, and you will ac- Co. Lit. 212. b. cept it in full Satisfact. of the whole 10*l.* it is a good Satisfact. Cr. El. 304.

for the whole: For the Expences to pay it at *York*, is sufficient Satisfaction: But in this Case the Plaintiff had Judgment for the insufficient Pleading; for he did not plead that he had payed the 5*l.* 2*s.* 2*d.* in full (a) Satisfaction (as by the Law he ought) but pleaded the Payment of Part generally; and that the Pl. (b) accepted it in full Satisfaction. And always the Manner of the Tender and of the Payment, shall be directed (c) by him who made the Tender or Payment, and not by him who accepts it. And for this Cause Judgment was given for the Plaintiff.

(a) 9 Co. 80. b.
Doct. pl. 19.
Winch. 76.
Stile 263.
(b) Doct. pl. 267.
Cr. El. 193.
Stile 263.
(c) Cr. El. 68.
2 Brownl. 107.
108.
Stile 239.
(d) 9 Co. 79. b.
Dall. 49. pl. 13.

See Reader (d) 26 H. 6. Barre 37. in Debt on a Bond of 10*l.* the Defendant pleaded, that one *F.* was bound by the said Deed with him, and each in the whole, and that the Plaintiff had made an Acquittance to *F.* bearing Date before the Obligat. and delivered after, by which Acquittance he did acknowledge himself to be paid 20*s.* in full Satisfaction of the 10*l.* And it was adjudged a good Bar; for if a Man acknowledges himself to be satisfied by (e) Deed, it is a good Bar, without any Thing received. *Vide* 12 R. 2. Barre 243. 26 H. 6. Barre 37. & 10 H. 7, &c.

(e) Doct. pl. 267.
Co. Lit. 212. b.
Dall. 49. pl. 13.
Moor 47, 48.

Pasch. I Jacobi,

In the Common Pleas.

EDRICH'S Case.

Between *Edrich* and *Smith* in Replevin, a Case was ad-
 judged on the last Clause of the Statute of 32 H. 8. c. 37.
 and the Case was such; *A.* seised in Fee of Land held in So-
 cage, by his Will in Writing devised a Rent with Clause of
 Distress to *B.* for the Life of *C.* and died. The Heir leaf-
 ed the Land charged for Life to *D.* the Remainder to *E.* in
 Fee, the Rent is behind for divers Years in the Life of *D.* *D.*
 died, and afterwards *C.* died, *B.* distrained him in the Re-
 mainder for all the Arrearages incurred in the Life of *D.*
 And whether he should be charged in this Case for all the
 Arrearages by the said Act was the Question. The Branch
 of which Act as to this Purpose consists on two Parts; By
 the first, Action of Debt is given to the Tenant *per auter
 vie*, after the Death of *Cestuy que vie*, against the Tenant
 in Demesne, (who ought to have paid it when it was first
 due) his Executors or Administrators. The second is, "And
 " also shall distrain for the same Arrearages upon such Lands
 " and Tenements out of which the said Rents or Fee-Farms
 " were issuing, in such like Manner and Form as he might
 " or ought to have done, if *Cestuy que vie* had been alive.
 And it was objected, that by a former Part of the Act,
 which gave Distress to Executors of Tenant for Life, there
 the Distress is given against him in whose Time the Ar-
 rearages incurred due, and all others claiming the Land on-
 ly *by or from the said Tenant, by Purchase, Gift, or De-
 scent*, in the same Manner as the Tenant for Life might
 have done; so that by this Branch, he in the Reversion or
 Rem'r shall not be charged for the Arrearages incurred in the
 Life of Ten't for Life, for he in the Rev'n or Rem'r doth
 not claim *by or from him*: And in this same Case at Bar the
 Action of Debt by the first Part of the said Branch is given on-
 ly

10 Co. 68. a.
 Lit. Rep. 93.
 Co. Lit. 162. b.

1 Leon. 322.

4 Co. 50.

ly against the Tenant who ought to have paid it, his Executors or Administrators, and not against him in Remainder, &c. And in that it was said, the Statute has great Reason, for otherwise he in Reversion or Remainder would not only be charged by the Statute for the Arrearages (if any should be) which incur in their own Time, but also for the Arrearages incurred in the Life of the Tenant for Life, where in the one Case or the other he in Reversion or Remainder was not charged by the Common Law, and the Tenant for Life may leave all the Rent for his Time unpaid, and by that Means charge him in Reversion or Remainder for all; and the Grantee in this Case may have his Remedy against the Executors of the Tenant for Life: But it was resolved and adjudged, That he in Remainder in this Case, by the last Part of the said Branch should be charged. And the Judges said they ought not to make any Construction against the express Letter of the Statute; for nothing can so express the Meaning of the Makers of the Act, as their own direct Words, for *Index animi sermo*. And it would be dangerous to give Scope to make a Construct. in any Case against the express Words, when the Meaning of the Makers doth not appear to the contrary, and when no Inconvenience will thereupon follow, and therefore in such Cases, *A verbis legis non est recedendum*. And the several Inditing and Penning of the former Part concerning Distress given to Executors, and of this Branch, doth argue that the Makers did intend a Difference of the Purviews and Remedies, or otherwise they would have followed the same Words. And in the principal Case all the Land was charged with the Rent, and the Heir held all his Estate charged with it; and when he made the Lease for Life, the Remainder in Fee, he in Remainder was chargeable, and in this Case might have been distrained by the Common Law for the Arrearages, but by the Act of God by the Death of *C. D.* was prevented, which Prevention, the said last Part of the said Branch has supplied and remedied in this Case, giving the Grantee Power to distrain, as if *Cestuy que vie* had been alive. And according to this Resolution Judgment was entred,

Co. Lit. 162. b.
1 Vent. 92.
2 Sand. 176.
Hard. 342.
Palm. 433.
Owen 117, 118.
10 Co. 86. a.
Wing. Max.
24, 25.
2 Rol. Rep.
246, 278.
March. 37.

Trin. 2 Jacobi,
In the King's Bench.

WHELPDALE'S *Case.*

IN Debt by *Whelpdale* against *Whelpdale*, which began *M. 45 Eliz. Rot. 1303.* The Plaintiff declared on a Bill obligatory made by the Defendant to the Plaintiff; The Defendant pleaded, *Non est factum*; and the Jury found that the Bill was a joint Bill made by the Defendant and another to the Plaintiff; And if on the Matter the Bill mentioned in the Declaration be the Deed of the Defendant, the Jurors prayed the Advice of the Court. And it was adjudged that the Plaintiff should recover. And in this Case four Points were resolved:

1. When two Men are jointly bound in a Bond, although neither of them is bound by himself, yet neither of them can say; That the Bond is (*a*) not his Deed, for he has sealed and delivered it, and each of them is bound in the whole. And therefore if they are both sued and one appears, and the other makes Default, and by Process of Law is (*b*) outlawed, he who appears shall be charged with the whole, as appears in 40 *E. 3. 36.* 41 *E. 3. 3.* But in the Case at Bar, he might have pleaded in (*c*) Abatement of the Writ, but cannot plead, *non est factum.*

2. It was resolved, that in all Cases when the Deed is voidable, and so remains at the Time of the Pleading (as if (*d*) an Infant seals and delivers a Deed, a Man of full Age by (*e*) Durefs in these and the like the Obligee cannot plead *non est factum*, for it is his Deed at the Time of the Action brought, and ought to be avoided by special Pleading, with Conclusion of Judgment, *si Actio*, 1 *H. 7. 15. a. b.*

3. When a Bond or other Writing is by an Act of Parliament enacted to be void, the Party who is bound cannot plead *non est factum*, but in Construction of Law the Deed is to be avoided by the Party who is bound by it, by Pleading the special Matter, taking Advantage of the Act of Parliament; For although the Act makes the Bond or other Writing void, yet thereto the Law doth *tacitly* require Order and Manner, which the Obligor ought to follow: As if a Bond be made to a Sheriff against the Statute

(#) 2 *Roll. 709.*
Co. Lit. 283. a.
Cr. Jac. 152.
Dyer 310. pl. 8.
Doct. pl. 260.
Sav. 92.
1 Sid. 420.
(b) 1 Jones 442.
(c) 1 Sand. 291.
Doct. pl. 260.
1 Sid. 420.
Co. Lit. 283. a.
23 H. 6. 3. a.
Cro. El. 494.
544.
1 Ven. 34.
Lutw. 695, 696.
(d) Plowd. 66. b.
35 H. 6. 18. a.
Moor 43.
2 Inst. 483.
Doct. pl. 259.
14 H. 8. 28. a.
1 H. 7. 15. b.
(e) 14 H. 8.
28. a.
1 H. 7. 15. b.
2 Inst. 483.
(f) Doct. in.
pl. 259, 260,
262.
Hob. 72.
of 14 H. 8.

(a) Hob. 72.
166. 3 Co. 59. b.
Br. non est fact.
14. 7 E. 4. 5. b.
Stile 234.
Plowd. 66. b.
Doct. pl. 263.
1 Ven. 85.
2 Sand. 155.
(b) 3 Co. 59. b.
Br. non est fact.
14. 10' o. 100. b.
Fitz. De. 80.
Plow. 66 b.
68. a. b. Dyer
120. pl. 2.
(c) 11 Co 27. a.
Sav. 71. Dall. 33.
pl. 21. 105. pl. 50.
Doct. pl. 259.
260. Cr. El. 120.
62. 7. 800. Ow. 8.
2 Bullst. 247.
Dyer 112. pl. 5.
12 Co. 16.
Moor 30.
(d) Doct. pl. 262.
1 Rol. Rep. 40.
2 Bullst. 247.
Dy. 59. pl. 12, 13.
(e) Co. Lit. 53. a.
283. Doct. pl.
199. Dy. 276.
pl. 51. 2 Rol. 682.
(f) Dyer 112.
pl. 50. Doct.
pl. 260.
(g) 3 Co. 26. b.
Doct. pl. 260,
261. Cr. El. 54.
1 And. 4. Dy.
167. pl. 14, 15,
&c. 2 Leon.
100, 111.
N. Benl. 75.
pl. 117.
(h) Dyer 167.
pl. 14, 15, &c.

of 23 (a) H. 6. cap. 10. or to one against the Stat. of 13 El. cap. 8. of Usury, in these and other like Cases the Obligor ought to plead the special Matter, with Conclusion of Judgment, if Action; and not to plead *non est Factum*, and therewith agrees 7 (b) E. 4. 5. b. 7 E. 6. Br. non est Fact. 14. against the Opinion of Mountague, Plow. Comm. in *Dive & Manningham's Case*. In all Cases when the Bond was (c) once his Deed, and afterwards before the Action brought becomes no Deed, either by Rasure, or Addition, or other Alteration of the Deed, or Breaking off the Seal; in this Case, although it was once a Deed, yet the Defendant may safely plead *non est Factum*, for without Question at the Time of the Plea, which is in the present Time, it was not his Deed, 36 H. 8. Dier 59. In an Action of Debt on a Bond against *Harwood*, the Defendant pleaded, *non est Factum*, and before the Day of Appearance of the Inquest (d), Rats did eat the Label by which the Seal was fixed, by the Negligence of the Clark in whose Custody it was, the Justices charged the Jury, that if they should find that it was the Deed of the Defendant at the Time of the Plea pleaded, that they should give a special Verdict, and so they did: But if one commits Waste, and before any Action brought, the Lessee repairs, and afterwards the Lessee brings an Action of (e) Waste, there the Action is not maintainable, because the Jurors ought to view the Waste: But the Defendant in the same Case ought to plead the special Matter, and cannot plead that he did no Waste, for the Entry is in the preterperfect Tense, *scil. quod non fecit vastum*, and therewith agrees 10 Eliz. Dier 276. and so a good Diversity; and the *Quære 2 Mar. Dier (f) 112.* well resolved.

And if a Bond be delivered to another, to the (g) Use of the Obligee, and it is tendered to him, and he refuses it, now the Delivery has lost its Force, and the Obligee can never after agree to it; and therefore the Obligee may say it is not his Deed, against the Opinion in 1 Eliz. 167. So if a Bond be made to a Feme-covert, and the Husband disagrees to it, the Obligor may plead *non est factum*, for by the Refusal, the Bond lost its Force, and became no Deed. And so the disagreeing Opinions in 14 H. 8. 28. a. *Dive* and *Manningham's Case* 66. 1 H. 7. 15. a. b. 1 Eliz. Dier (b) 167. a. and other Books well reconciled.

Mich. 2 Jacobi.

In the King's Bench.

LONG'S Case.

Inquisitio indentata capta apud Cossam in Com. præd', Wilts. 5. die Octobr', anno Regni Dominæ Eliz. Dei gratia Angliæ, Franciæ, & Hiberniæ Regiæ, fidei defensor', &c. Indictment. tricesimo sexto, coram Willielmo Snelling coronat. Dominæ Regiæ infra libertat. dict. Domin. Regin. villæ suæ de Cossam præd', super visum corporis H. Long armig. ibid. existen. mortui per Sacrament. 12. Furat. exist. præsentat' 3; quod quidam Henricus Danvers nuper de C. in Com. E. miles, C. D. nuper de C. præd', in dicto Com. E. miles, G. L. nuper de Colkidge in Com. W. Yeoman, & R. P. nuper de L. in dict. Com. W. Yeoman, &c. timorem Dei præ oculis suis non habentes, sed instigatione diabolica seducti, quarto die Octobr', anno Regni dict. Domin. Regin. nunc tricesimo sexto supradict', inter horas undecimam & duodecimam ejusdem diei, apud Cossam præd', in dict. Com. Wilts, vi & armis, viz. gladiis, pugionibus, armacudiis & torment', in dict. Henricum Long, in pace Dei & dict. Domin. Regin. adtunc eodem 4. die Octobr', anno tricesimo sexto supradict', apud Cossam præd. existen', insult. fecerunt, & prædictus H. D. quoddam tormentum (vocat. a Dagge) ad valentiam 6s. 8d. cum pulvere & pellet. plumbeo, Anglice dict', charged with Powder and a Bullet of Lead, quod idem H. D. tunc, viz. dict. quarto die Octob', anno tricesimo sexto suprad', apud Cossam præd', in manu sua dextra habuit & tenuit, in & super ipsum H. Long adtunc eod' quarto die Octob. anno trices. sexto suprad', apud Cossam præd', in dict. Com. Wilts, felon. voluntar', & ex malicia sua præcogitata exoneravit, Anglice 1 Bulstr. 207. did discharge, dans eid. H. Long adtunc apud Cossam præd', cum pellet. plumbeo præd', sic extra torment. præd', per ipsu' emisso, unum vulnus mortale, in & super anterior' pari' corporis ipsius H. Long, subter sinistr' mamill' ipsius H. Long, totalit' penetrans in & per corp' dict' H. Long: De quo quia vulnere

vulnere mortali, idem H. L. ad tunc eod' quarto die Octob. anno 36. suprad', apud Cossam præd. instanter obiit. Et quod præd. C. D. miles, G. L. &c. dict. quarto die Octob. anno 36. supradict', ac inter horas præd. ejusdem quarti diei, apud Cossam præd', in dict. Com. Wilts. felonice, & ex malitiis suis præcogitat. fuerunt presentes, abbettantes, procurantes, confortantes, & manutinentes dict. H. D. ad feloniam & murdrum præd', modo & form. præd. felonice faciend. & perpetrand', contra pacem dict. Domin. Regin. nunc. coron. & dignitat. suas. Et sic Furator. præd', dicunt super sacrament. suum præd', quod præd. H. D. C. D. G. L. &c. dict. H. L. eodem 4. die Octob. anno 36. suprad', apud Cossam præd. in dict. Com. Wilts. felonice, voluntarie, & malitiis suis præcogitat. felonice interfecerunt & murdraverunt, contra pacem dict. Domin. Regin', coron. & dignitat. suas: Et ulterius Furatores præd. dicunt super sacrament. suum præd', quod immediate post felon. & murdrum præd. in forma præd. commiss. iidem H. D. C. D. G. L. &c. fuger', & se retraxer. pro feloniam & murdro præd'. Ac quod ipsi, aut eorum aliquis, tempore felonie & murdr. præd. in forma præd. commiss. nulla habuerunt bona aut catalla, terr', aut tenementa, ad notitiam fur' præd'. In cujus rei testimonium tam Furator. præd', quam præd. coronator', die & anno prius suprad', alternatim huic inquisitioni sigilla sua apposuer', & quilibet eorum apposuit.

Upon which Indictm. the said *H. D.* was outlawed, and brought a Writ of Error, and divers Errors were assigned in
 1 Exception. the Indictm. 1. because in the beginning of the Indictm. it is alledged, that the Indictm. was taken before *W. S. Coron. Domin. Regin. infra libertat. dict. Domin. Regin. villæ suæ de Cossam præd', super visum corporis*; and it is not alledged to what Places the said Liberty doth extend, nor what Part, or nothing of the Town of *Cossam* be within the Liberty; and so it doth not appear that the Coroner had Jurisdiction in the Place where the Inquisition was taken, nor where the Murder was committed, nor where the dead Body lay, for all is alledged by the Indictm. to be at *Cossam*; and Indictm. of Felony which are as Counts (b) and Declarations for the King against the Parties for their Lives, ought to have Certainty expressed in the Record of the Indictm. and shall not be supplied or maintained by Intendm. or Argum. For if the Counts between Party and Party for Land or Chattels ought to have two Things, *scil.* Truth and Certainty, as it is held in *Plow. Conam. 84. a. & 202. b. 5 E. 4. 21.* in Debt, 3 *H. 6. 1.* in *Forcible Entry.* 38 *H. 6. 35.* 9 *H. 6. 18.* because the Counts are the Foundations of the Suits, to which the Party shall answer, and on which the Judges shall adjudge, *a fortiori* Indictm. principally those which concern the Life of a Man, and which are the King's Counts, to which the Party

(a) Poph. 208.
Kelw. 89. pl.9.

(b) Cr. Jac. 588.
5 Co. 34. b. 35. a.
Br. Count. 54.
58, 63.
3 H. 7. 12. a.
Plowd. 84. a.
193. a. 202. b.
3 E. 4. 21. a. b.
38 H. 6. 1. a.
2 Co. 57. a.
2 Bulstr. 77, 78.
Co. Lit. 303. a.
2 Sid. 175.
4 Co. 44. b.

Party shall answer, and on which the Court shall adjudge for his Life, ought to have full and precise Certainty, and shall not be taken by Argument, as appears 2 E. 3. 31. 18 Aff. p. 15. 29 Aff. 45. 2 E. 3. 28. per Scrope, 27 Aff. 73. 38 Aff. 11, 12. 47 E. 3. 17, 7 H. 6. 42. 8 E. 4. 3. 3 H. 7. 5. And because it is not expressed in the Indictm. that *Coffam* was within the Liberty of *Coffam*, for this Cause the Indictm. was uncertain and insufficient. To which it was answered and resolved by the Court, that the Indictm. notwithstanding this Exception was sufficient; for true it is that the Rule of Law is, that Indictm. ought to be certain: But there are 3 Manner of Certainities; 1. To a common Intent; 2. To a certain Intent in general; 3. To a certain Intent in every Particular: The first Intent is suffic. in (a) Bars which are to defend the Party and excuse himself: The second is required in Indictments (b), Counts, Replications, &c. because they are to accuse or charge the Party; the third is rejected in Law, for (c) *nimia subtilitas in jure reprobat*; & *talis certitudo certitudinem confundit*: And in this Case at Bar there is a suffic. certain Intendment in general, that *Coffam* is within the Liberty of *Coff*; but peradventure the Liberty may reach beyond the Town, but that the Town it self should be presumed to be out of the Liberty of the Town is a strained and captious Intendment which the Law will not allow: And so Sir J. Pop. Ch. Just. said it was resolved in the same Point in the Case of *Lewes* in the County of *Sussex*; and there the Indictment was, *Inquisitio capta apud Lewes coram Coronatore rapæ sue de Lewes*, and adjudged good in Law.

The second Objection was, That whereas the Indictment was, *Quod prædictus H. D. quoddam tormentum, vocatum a Daggè, ad valentiam 6 s. 8 d. cum pulvere, & pelletto omerat, &c. in & super ipsum Henr. Long adtunc, &c. felonice, voluntarie, & ex malitia sua præcogit. exoneravit, dans eidem Henr. Long adtunc, &c. cum pellet plumbeo; &c. unum vulnus mortale super anteriorem partem corporis ipsius H. L. subter mamillam*: It was objected, that this Word (*Mamillam*) is a Word insensible, being no Latin Word, for the Latin Word was (as it was said) *Mammilla*, with a double [m:] And it was said, that false Latin shall abate Writs, and quash Indictments, because he who prosecutes may purchase a new Writ, and frame a new Indictment. (d) But otherwise it is of Grants and Deeds, for the Party cannot have new when he will. And *Hill. 28 Eliz. Vaux's* Case was cited, where the Count in Appeal was held insufficient by Reason of the Word *burgaliter*, (f) where it should be *burglariter*; to which it was answered and resolved by the Court: 1. That false Latin shall not quash an Indictment, nor abate any Count, for although an original Writ shall abate for false Latin, as it is held (g) 9 H. 7. 16. b. 2 H. 4. 8. a. 44 E. 3. 18.

The 1st Objection answered

- (a) Doct. pl. 58. 195. Plow. 261 a. b. 56. a. 8 Co. 57. a. 2 Bullt. 77. Co. Lit. 303. a. (b) Cr. Jac. 588. 4 Co. 44. b. 5 Co. 34. b. 35. a. 8 Co. 57. a. Plowd. 84. a. 193. a. 202. b. Br. count. 54. 58. 63. 3 H. 7. 12. a. 3 E. 4. 21. a. b. 38 H. 6. 1. a. 2 Bullt. 77. 78. Co. Lit. 303. a. 2 Sid. 175. (c) Wing. Max. 26. 4 Co. 5. b. 41. b. 3 Bullt. 65. 2 Objection. (d) Cr. El. 137. 231. 10 Co. 126. a. Yelv. 25. (f) 4 Co. 39. b. 11 Co. 32. a. Cr. El. 220. Doct. pl. 84. Hale's Pl. Cor. 84. 207. (g) 8 Co. 159. b. Br. faux lat. 78. 2 Venr. 173. Br. amendm. 64. Br. obligat. 71. 2 Sand. 39. The 2d Objection answered.

10 E. 3. 1. § 553. Yet judicial Writs or a Fine shall not be impeached for false *Latin*, as it is held 9 E. 3. 467. The same Law of an Indictment; as if in an Indictment it be *præfato Regine* where it should be *præfatæ Regine*, or *præfate Regi* for *præfato Regi*, or the like, forasmuch as the Word is *Latin* and significant; and altho' it be not true *Latin*, the Indictm. for such Incongruity shall not be quashed

10 Co. 133. a. But if the Word be not *Latin*, nor allowed by the Law, as *vocabul' artis* (for every Art and Science has *propr' vocabula artis*) but is insensible, there if it be in a Point material, it makes the Indictm. insuffic. as *burglaria*, *burglariter*, *murdrum*, *felonice*, and the like are *vocabula artis*, known to the Law, and therefore if such Words, or the like, are mistaken in an Indictment, so that in a material Place a Word insensible, which is not *Latin*, nor any Word known in Law, it makes the Indictment vicious and insufficient, as *murdrum* for *murdrum* or *burgariter* for *burglariter*, *feloniter* for *felonice*. But in the Case at Bar it was resolved, that *mamilla* with a single [m] is as good *Latin* as *mammilla* with a double [m], as *defamo* and *diffamo*, *definitio* and *diffinitio*. Also *Popb.* Chief Justice, *Gawdy*, *Yelwert.* and *Williams* held, that these Words *super mamillam* were abundant, and more than were necessary, and therefore if *mamilla* was insensible, and no *Latin*, yet it doth not make the Indictment vicious: For it was held by them. that *super anteriorem partem corporis* was certain enough and sufficient; for *corpus* in an Indictment (which is found by Lay-people) is to be intended of the Trunk of the Body, between the Neck and the Thighs, which is the usual and vulgar Meaning of the Body: So it was resolved, *Qd' super caput*, or *super faciem*, or *in dexteriori parte corporis*, or *in sinistra parte corporis*, or *super sinister' manum*, or *super dextram manum*, or *dextrum* or *sinistrum brachium*, &c. or *in pectore*, or *ventre*, are certain enough and sufficient. But *super brachium*, or *super manum*, or *super latus*, &c. without saying *dextr'* or *sinistr'* is not sufficient, because in such Cases the Part of a Man in which the Wound is, is not certain.

The 3d Object. Another Exception was taken, because in the said Indictment it was said, *dans eodem* *Henr. Long*, &c. *unum vulnus mortale*, &c. where it ought to be *unam plagam*, which is the Word used in all Indictments, and that *vulnus* should not be used in Indictments no more than *ictus*, which also signifieth a Stroke: But this Exception was disallowed *per totam Curiam*, for *plaga* and *vulnus* are *synonyma*, & *idem significant*, although *plaga* is the more usual Word in Indictments. Further Exception was taken, because the Length or * Depth of the Wound was not shewed, which ought to be in every Indictment of Death, for this

The 3d Object. answered.

* 4 Co. 42. a.

Godb 65. 66.

Stanf. Cor. 79. a.

2 Inst. 3 18.

The 4th Object.

this Cause the Indictment was insufficient. But this Exception was disallowed *per totam Curiam*, for the Length and * Depth of the Wound ought to be alledged, to the Intent that it may appear to the Court that the Wound was mortal, so that it may appear to be the Occasion of the Death, But in this Case the Wound was through the whole Body, *scil. totaliter penetrans, & per totum corpus*, so that it was apparent to be mortal; and in some Cases the Dimensions cannot be alledged, *scil.* when a Member, as the Knee, or the Hand, or the Foot, or the Head, &c. are cut off, there any of the said Dimensions cannot be shewed. So in the Case at Bar. *Vide Trin. 28 Eliz. Heydon's Case* agrees with the Resolution in this Point. Another Exception was taken, because the Indictment was, *dans eadem Henrico Long, &c. cum pelletto plumbeo præd', &c. vulnus mortale, &c. totaliter penetrans in & per corpus præd' Henr' Long*: And because *penetrans* ought of Necessity to agree with *vulnus*, and not with *pelletto*, not only because *vulnus* is the last Antecedent, but because otherwise will follow Incongruity: For *penetrans* agrees well with *vulnus*, and not with *pelletto*, for that is the Ablative Case, and so cannot be *penetrans*, for then it should be *penetrante*: And it was said, that the Wound did not penetrate or pierce the Body, but the Pellet pierced the Body, and made the Wound; but it was not allowed, for the Sense is significant enough to say that the Wound pierced the Body; for if the Depth of the Wound should be asked, it might well be answer. that it pierced the Body. And *penetro derivat' a penitus & intro*. And so the Words are significant enough, without any Absurdity or Incongruity, to say *dans, &c. vulnus mortale totaliter penetrans, in & per corpus, & eo magis*, being the Words of Lay-people. For the Pellet gave the Wound, which Wound did pierce through the whole Body. But the great Objection, and most difficult against the Indictment was, because the Indictment wanted *percussit*; for the Effect of it, as to this Purpose is, *Præd' H. D. quoddam tormentum, &c. cum pulvere & pelletto plumbeo onerat', &c. in & super ipsum Henr' Long exoneravit, dans eadem Henrico Long advunc & ibidem cum pellet' plumbeo præd' extra torment præd' per ipsum dimisso unum vulnus mortale, &c.* And it was said, that although *percussit* is wanting, yet here is *tantamount*, and it is a Rule of Law and Reason, *Non refert quid ex equi pollutib' fiat*. And when it appears that *H. D. torment' cum pulv' & pelletto, &c. in ips. H.L. exonerav. dans*

The 4th Object. answered.
*4 Co. 42. a.
Godb. 65, 66.
Stanf. Cor. 79. a.
2 Jac. 312.

4 Co. 42. a.

The 5th Object.

The 5th Object. answered.

The 6th Object.

Cr. Jac. 635.

eidem Henr' Long, &c. *cum pellet' plumbeo præd'. &c. unum vulnus mortale, &c.* by that it appears to the Court, that *H. D.* was the Occasion of the Wound, and on the Matter gave (in this Manner) the Wound. And it was said, that *percussit* is not properly said, but when one with his Hand, or with some Weapon which he holds in his Hand, wounds another, and not when he gives a Wound by a Means, as out of a Gun with a Bullet, or out of a Bow with an Arrow. This Word *Percutio* is derived and compounded as it was said from *per* and *quatio*: But it was resolved by the whole Court, that for this Cause the Indictment was insufficient. And this Part of the Indictment concerning the said Objection was divided into 2 Parts: 1. The Clause before *dans eidem, &c.* and the Clause containing *dans eidem, &c.* And it was resolved that the first Clause was not sufficient of it self, for although *H. D.* discharged the Dagge upon him, yet it may be he was not struck by it; then the second Clause, *scil. dans eidem, &c.* cannot make it good, for the Clause of *dans, &c.* depends on the said first Clause, and describes only the Wound, to manifest it to be mortal; which ought to appear by the first Sentence to be given, because *in hoc casu participium determinat verbum*: But here it doth not appear by the first Clause that there was a Stroke given; and then *dans, &c.* cannot supply it; for that is a Participle depending upon the Verb precedent, and the Verb precedent is *exoneravit*, and *exoneravit* may be without Stroke: As if one be indicted that he did assault another with an Ax in his Right Hand, giving him a mortal Wound, it is insufficient, because this Participle (giving) has no Verb before with which it can participate: And it was said, that if the second Clause had been in the Case at Bar, *Et dedit atunc Et ibidem unum vulnus mortale*, it had been insufficient; for *dedit* doth not imply a violent and voluntary Stroke, as *percussit*, and if *dedit* would have been sufficient, yet *dans* by the whole Court for the Cause aforesaid was insufficient. And it was resolved the Indictment might say *percussit*, as well of a Wound given out of a Gun, or Bow, as with the Hand. And a Precedent in 10 E. 4. in the King's Bench was shewed, where the Wound was out of a Gun, and the Indictment had the Word *percussit*, 1 *M. Dier* 99. That an Indictment that such a Person *ex malitia sua præcogitata felonice murdravit, &c.* is not good without saying *percussit*, because an Indictment of Murder and Manslaughter ought to have expressly a Stroke to be supposed. And true it is, that in all Indictments of Murder, or

Manslaughter

Palm. 282.
Cr. Jac. 635.

Cr. Jac. 635.
Palm. 282.
Dyer 99. Pl. 63.
1 Bullstr. 144.

Manlaughter a Stroke ought to be alledged, unless in Case of Poisoning. And for this last Error the Outlawry was reversed, and the said *H. D.* discharged and there are many Precedents of Indictments of Death, where the Wound was given with a Bullet out of a Gun, or by an Arrow out of a Bow, and all those (which I saw) had this Word *percussit*. 4 Co. 44. a. b. j

Pasch. 3 Jac.

In the Common Pleas.

SAFFYN'S Case.

Cr. Jac. 60, 61.
Lit. Rep. 18.
Cart. 196.

IN Replevin between *Saffyn* Plaintiff, and *Adams* Defendant, which began *Trin. 44. Eliz. Rot. 1242.* on a special Verdict found, the Case was such; A Man made a Lease for Years of certain Land to begin after the End or Determination of a Term for Years then in Being; the first Years determined, the second Lessee did not enter, but he in the Reversion entered and made a Feoffment, and levied a Fine of the Land with Proclamations, according to the Statute of 4 *H. 7. cap. 24.* And five Years past after the Proclamations without Entry or Claim made by the second Lessee: And whether the Lessee for Years was barred or not by the said Fine with Proclamations, and the said Act of 4 *H. 7.* was the Question; and it was objected that the Lessee for Years should not be barred for two Causes:

(a) 9Co. 103. a.

1. Although the (a) Word (*Interest*) is in the said Act, yet it is to be intended of such Interest that the Owner thereof, may thereof levy a Fine; but he who has a Lease or Interest for Years cannot levy a Fine, but every one shall say against it, *quod partes finis nihil habuerunt*, because a Lease for Years is but a Chattel, and a Fine is in the Realty, and the Law requires that one of the Parties have a Freehold. And that this Word (*Interest*) in the Act shall be intended of an Interest of Freehold whereof a Fine may be levied. And it was said that *Mich. 21. Eliz.* in the King's Bench, it was adjudged in (b) *Saunders's Case*, That a Lease for Years was not an Interest within the said Statute of 4 *H. 7.*

(b) Goldsb. 171,
172. Cr. Jac. 60,
61. Cart. 82.
1 Leon. 99.
2 Leon. 157.
Raym. 149.
Postea 124. b.

2. It was objected, That although Lessee for Years, when he is ousted and ejected shall be within the said Act; yet in this Case the Lessee shall not be bound, for no Fine levied with Proclamations shall bind any, but those who are put out of Possession, and have but a Right, for

for if their Estate or Interest be not devested out of them, but remain in them as it was *ab initio*, they need not make an Entry or Claim to that which never was devested; and therefore it is agreed in *Plow. Com.* 373. in *Strowel's Case*, That a Fine levied of Land with Proclamations, and five Years past without (*a*, Claim made by him who has Common of Pasture, Rent, or the like, shall not bind them, for their Estate is not devested out of them, but always remains in them. So it was said in the Case at Bar, until the second Lessee enters he has but *Interesse termini*, as he had before the first Lease determined, which (as it was said) continues in him notwithstanding the Feoffment or Fine. As if a Man makes a Lease for Years to begin at a Day to come, and before the Day the Lessor is disseised, yet the Lessee may grant over his Interest, for such *Interesse termini* cannot by Disseisin or Feoffment be devested, and put to a Right, more than a Rent or Common or the like; and this was briefly the Effect of what was said on this Side. But it was resolved, That the *b* Fine and Proclamations, and the Nonclaim of the Lessee had barred him of his Term by the Act of 4 H. 7. And as to the first Objection it was answered and resolved, that notwithstanding a Lessee for Years has not such Estate that he can levy a Fine yet *non sequitur*, that his Term and Interest shall not be bound and barred by the said Statute, and that for 2 Reasons: 1. It is within the Letter of the Act, for the Words of the Act are general (*the said Fine with Proclamation shall be a final End, and conclude as well Privies as Strangers to the same*) which Words are general, and extend to all: And the Words of the Saving are (*such Right, Claim, and Interest, &c*) and he who has a Term for Years has an Interest, and therefore agrees *c Cathyn* in *Plow. Com.* 373. 2. It is within the Mischief; for it appears by the Preamble, (*That Fines ought to be of the greatest Strength to avoid Strifes and Debates, and to be (d) the final End and Conclusion, &c.*) And great Mischief, Trouble and Vexation will ensue, if Leases for Years which now are made for a great Number of Years, sometimes absolute, sometimes determinable on Lives, shall not be within the said Act; and therefore it was resolved, That the Interests of Tenant by Statute Merchant, *e* Statute Staple, Elegit, Guardian by Knight's Service, Executors who have Lands till Debts and Legacies are paid, and every other such Interest are within the said Act of 4 H. 7. for all these have Interest in the Land, and he who has a bare Right or Title to any Inheritance or Freehold, cannot levy a Fine to any Stranger, but it shall be said, *qd' partes finis nihil habuer'*; and yet he shall be bound by a Fine levied by the Ter-tenant: So although Lessee for Years cannot levy a Fine to any Stranger

(a) Cr. Jac. 60.
Raym. 149.

(b) 1 Sid. 459.
Cr. Jac. 60, 61.
Cart. 82.
1 Vent. 56.
2 Inst. 517.
9 Co. 105. a.
2 Rol. Rep. 402.
405. 3 Keb. 288.
Plowd. 374. a.
Noy 23. Hardr.
202. 413.
Co. Lit. 262. a.

7 Co. 32.

(c) Plow. 374. a

(d) 9 Co. 105.

(e) 2 Inst. 517
Plowd. 374. a.
Mod Rep. 217.

but it shall be said, *quod partes finis nihil habuerunt, yet non sequitur* but that he shall be bound by the Fine with Proclamations levied by the Tenant of the Land.

As to the second Objection it was answered, and resolved by the Court, that in the Case at Bar by the said Feoffment, the second Lessee had but a Right, for when his future Interest had Commencement, then he had such present Estate in the Land which might be devised, and which he might revert by his Entry. As if a Man makes a Lease for Years, in this Case before the Lessee enters he has an Estate for Years in the Land which he may (a) grant. And the Words of *Littleton* were well observed, *lib. 1. c. 7. fol. 13. b.* If a Man makes a Lease for Years, and before the Lessee enters the Lessor dies, yet the Lessee may (b) enter, because the Lessee by Force of the Lease has a present Right to have the Tenements according to the Form of the Lease. And *Lit. lib. 3. cap. 8. fol. 107.* If a Man leases his Land for Years, if the Lessor releases to the Lessee all his Right before the Lessee has entered into the Land, such (c) Release is void, because the Lessee had not Possession in the Land at the Time of the Release made, but only a Right to have the same Land by Force of the same Lease: And *eadem lib. fol. 127.* if a Man leases Tenements for Years, by Force of which the Lessee is seised, that is, possessed, and afterwards the Lessor by his Deed grants the Reversion to another for Life, &c. it is necessary in such Case that the Tenant for Term of Years (d) attorn: By which it appears, that before the Lessee enters, he has not actual Possession, nor (as it seems) the Lessor has not such a Reversion that he can grant it over by the Name of the (e) Reversion, but yet such Lessee has more than he who has a future Interest, for he may presently enter and take the Profits, so that his Interest accompanied with present Entry and Ability to take the Profits which he may transfer to another, may be devised out of him, and put to a meer Right not grantable: And so the Difference appears between the Case at Bar, and (f) *Saunders's Case* which was adjudged in 21 *Eliz.* for there at the Time of the Fine levied the Lessee had not Power to enter or take the Profit, but only a future Interest, which (if it could be devised) he had not any Means possible to revert in him again.

(a) Cr. Jac. 60.
Cr. El. 15, 127.

(b) Lit. Sect. 66.
Co. Lit. 51. b.

(c) Lit. Sect.
459. Herl. 81.
Co. Lit. 46. b.
276. a. Lit. 108. b.
Perk. Sect. 603.

(d) Co. Lit. 315.
b. Lit. Sect. 567.
Lit. 128. b.

(e) Cr. Car. 110.
400 Cr. Jac. 604.
Godb. 451.
10 Co. 107. b.

(f) Goldsb. 171.
172. Cr. Jac. 60.
61. Carr. 82.
2 Leon. 157.
1 Leon. 99.

Pasch. 3 Jacobi.

De Libellis famosis.

IN the Case of *L. P.* in the *Star-Chamber* this Term, against whom the Attorney General proceeded *ore tenus* on his own Confession, for composing and publishing an infamous Libel in Verse, by which *John* Archbishop of *Canterbury* (who was a Prelate of singular Piety, Gravity, and Learning, now dead) by Descriptions and Circumlocutions, and not in express Terms; and *Richard* Bishop of *Canterbury* who now is, were traduced and scandalized: In which these Points were resolved;

3 Inst. 174.
9 Co. 53. b.
Moor 813, 627.
March. fur
Slander 131,
132.

1. Every Libel which is called *famosus Libellus, seu infamatoria scriptura*,) is made either against a private Man, or against a Magistrate or publick Person. If it be against a private Man it deserves a severe Punishment, for although the Libel be made against one, yet it incites all those of the same Family, Kindred, or Society to revenge, and so tends *per consequens* to Quarrels, and Breach of the Peace, and may be the Cause of Shedding of Blood, and of great Inconvenience: If it be against a Magistrate, or other publick Person it is a greater Offence; for it concerns not only the Breach of the Peace, but also the Scandal of Government; for what greater Scandal of Government can there be than to have corrupt or wicked Magistrates to be appointed and constituted by the King to govern his Subjects under him? And greater Imputation to the State cannot be, than to suffer such corrupt Men to sit in the sacred Seat of Justice, or to have any meddling in or concerning the Administration of Justice.

2. Although the private Man or Magistrate be dead at the Time of the Making of the Libel, yet it is punishable, for in the one Case it stirs up others of the same Family, Blood, or Society to revenge, and to break the Peace, and in the other the Libeller traduces and slanders the State and Government, which dies not.

3 Inst. 174;

3. A Libeller (who is called *famosus defamator*) shall be punished either by Indictment at the Common Law, or by Bill, if he deny it, or *ore tenus* on his Confession,

sion, in the *Star-Chamber*, and according to the Quality of the Offence he may be punished by Fine or Imprisonment, and if the Case be exorbitant, by Pillory and Loss of his Ears.

Hob. 253.

4. It is not material whether the Libel be true, or whether the Party against whom it is made, be of a good or ill Fame; for in a settled State of Government the Party grieved ought to complain for every Injury done him in an ordinary Course of Law, and not by any Means to revenge himself, either by the odious Course of Libelling, or otherwise: He who kills a Man with his Sword in Fight is a great Offender, but he is a greater Offender who poisons another, for in the one Case he who is openly assaulted, may defend himself, and knows his Adversary, and may endeavour to prevent it: But poisoning may be done so secretly that none can defend himself against it, for which Cause the Offence is the more dangerous, because the Offender cannot easily be known; and of such Nature is libelling, it is secret, and robs a Man of his good Name, which ought to be more precious to him than his Life, *Et difficillimum est invenire Authorem infamatoriae scripturae*, and therefore when the Offender is known, he ought to be severely punished. Every infamous Libel, *aut est in scriptis, aut sine scriptis*; A scandalous Libel *in scriptis* is, when an Epigram, Rhime, or other Writing is composed or published to the Scandal or Contumely of another, by which his Fame or Dignity may be prejudiced. And such Libel may be published, 1. *Verbis aut cantilenis*: As where it is maliciously repeated or sung in the Presence of others. 2. *Traditione*, when the Libel, or any Copy of it is delivered over to scandalize the Party; *Famosus Libellus sine scriptis* may be. 1. *Picturis*, as to paint the Party in any shameful and ignominious Manner. 2. *Signis*, as to fix a Gallows, or other reproachful and ignominious Signs at the Party's Door or elsewhere. And it was resolved *Mich. 43 Et 44 Eliz.* in the *Star-Chamber* in *Halliwood's Case*, That if one finds a Libel (and would keep himself out of Danger) if it be composed against a private Man, the Finder either may burn it, or presently deliver it to a Magistrate: But if it concern a Magistrate, or other publick Person, the Finder ought presently to deliver it to a Magistrate, to the Intent that by Examination and Industry, the Author may be found out and punished. And Libelling and Calumny is an Offence against the Law of God. For *Leviticus 17. Non facias calumniam proximo. Exod. 22. ver. 28. Principi populi tui non maledices. Ecclesiastes 10. In cogitatione tua*

3 Inft. 174.
9 Co. 59. b.

Hob. 253.
9 Co. 59. b.

tua ne detrahas Regi, nec in secreto cubiculi tui diviti male dices, quia volucres cæli portabunt vocem tuam, & qui habet pennas annuntiabit sententiam. Psal. 68. 13. *Adversus me loquebantur qui sedebant in porta, & in me psallebant qui bibebant vinum.* Job 30. ver. 7 & 8. *Filii stultorum & ignobilium, & in terra penitus non parentes, nunc in eorum canticum versus sum, & factus sum eis in proverbium.* And it was observed, that *Job* who was the Mirrour of Patience, as appears by his Words, became *quodammodo* impatient when Libels were made of him; and therefore it appears of what Force they are to provoke Impatience and Contention. And there are certain Marks by which a Libeller may be known: *Quia tria sequuntur defamatorem famosum*: 1. *Pravitate incrementum*, Increase of Lewdness; 2. *Burse decrementum*, Decrease of Money, and Beggary; 3. *Conscientiæ detrimentum*, Shipwrack of Conscience.

Pasch. 3 Jacobi,

In the King's Bench.

PALMER'S Case.

(a) Cr. Jac. 66.
Yelv. 59.
6 Co. 70. b.

Between (a) *Palmer* and *Wilder* for a Ward in the County of *Oxf.* the only Question in the Case was; If the Guardian in Chivalry, shall have the single Value of the Heir without any Tender: And it was objected, that the Guardian should not have it without a Tender for four Reasons.

(b) 2 Inst. 92,
93, &c.
Cr. El. 469.

1. *Litt. lib. 2. cap. 4. fol. 21.* and all the Books agree, that Knights Service draws to it Ward, Marriage, and Relief; and the Stat. of *Merton*, (b) *cap. 7.* saith, *Quod maritadium ejus qui infra etatem est de mero jure pertinet ad Dominum feodi*, so that the Marriage of the Heir within Age doth belong by the Law in such Case to the Lord; Then if the Heir will perform that which the Law requires, *scil.* to be married by his Guardian, there is no Reason that he should render any Value for it; for *Littleton* doth not say, that Knights Service draws to it the Value of the Marriage, but the Marriage it self; and the Statute of *Merton* doth not say, *Quod valor maritagii ejus de mero jure pertinet ad Dominum feodi, sed maritadium ejus de mero jure pertinet, &c.* Suppose then that *A.* covenants with *B.* that *B.* shall have the Marriage of *A.* and that he will be married to her whom *B.* will nominate to him; In this Case if *A.* be ready to be married according to his Covenant, and *B.* will not nominate any, he shall never render any Value for it: So in the Case at Bar, sofar as the Law gives the Lord the Marriage, if the Heir be ready to perform it, he is excused, and shall not be charged with any Value. So if the Tenant be ready to do Homage, or any other corporal Service, which by his Tenure he ought to do, the Lord cannot refuse or waive it, and take amends for it.

2. In this Case of Marriage which the Law gives, the Lord is to have the Benefit, and he ought to do the first Act, for the Heir cannot perform the Duty which the Law in such Case requires, without the first Act done by the Lord, *scil.* Tender of a Woman that the Heir shall marry; and in all Cases when the Default is in him who ought to do the first Act, the other Party is excused. As if a Man be bound to levy a (*a*) Fine to the Obligee before such a Day; in this Case sofarasmuch as by the Law the Obligee ought to do the first Act, *scil.* to sue forth a Writ of Covenant before the Day, if no Writ of Covenant be sued, the Obligor is excused, as it is held 4 *E. 3.* 39. *b.* 18 *E. 3.* 27. *b.* & 11 *H. 4.* 18. *a.* Vide 21 *E. 4.* 2. 2 *E. 4.* 3, 4. 20 *Eliz.* 361. *Dyer*, *Windsor's Case*, and 22 *Eliz. Dyer* 371, & *c.*

(*a*) 1 *Roll.* 458.
Hurt. 48.
Winch. 29.
& *E. 4.* 2. *b.* 21. *b.*

3. The Words of the Writ *de valore maritaggi* are, *Quare cum (b) maritagium præd' B. ad ipsum A. pertineat, eo quod præd' B. terram suam de eo tenuit per servitium militare, & idem A. præd' B. dum fuit infra Statem in custodia sua, competens maritagium absque disparagatione, &c. sæpius obulerit idem B. maritagium illud renuens, de eodem maritaggio præfat' A. cum ad plenam etatem pervenerit satisfacere recusavit, & adhuc recusat minus iuste, &c. ad dampnum, &c.* By which Writ, and also by the Writ of Intrusion of Ward it appears, that the Lord shall not have the Value without Tender of Marriage, and Default in the Heir; and if the Tender in such Case should not be requisite, great and tedious Surplusage would be contained in the Writ, which of its Nature, and according to its Name, ought to be brief and substantial; *Dicitur enim breve, quia rem breviter enarrat.*

(*b*) *Dyer* 361.
pl. 9.
F. N. B. 141. *d.*

4. Upon the Reasons aforesaid are divers express Authorities in the Point, 21 *E. 4.* 43. *a.* *per totam Curiam*, that it ought to be tender'd, *F. N. B.* 141. (*c*) 40 *E. 3.* 6. *b.* If sue taken on the Tender, 11 *H. 4.* 82. Tender alledged, (*d*) 43 *E. 3.* 20. and the Statute of *Merton*, *cap. 7.* *Si quis heres, &c. pro Domino suo noluerit maritare, non compellatur hoc facere, sed cum ad etatem pervenerit det Domino suo & satisfaciat ei, &c.* all which prove that there ought to be a Tender. As to the first and second Objections, it was resolved (*e*) *per totam Curiam*, That at the Common Law it was at the Lord's Election to have the Marriage of the Heir, or to suffer the Heir to marry whom he pleased, and to have Recompence, *scil.* the Value of it, and that at the Common Law lay not only the Writ *De valore maritaggi*, but also the Writ *Quare se intrusit maritaggio non satisfacto*, and therewith agrees (*f*) 31 *Aff. p.* 26. And at the Common Law if the Heir within Age had been ravished and married, the Guardian should recover in an Action of Trespas the Value of the Marriage in Damages, and therewith agrees 29 *F. 3.* 37. & 29 *Aff.* which is a notable

(*c*) *Fitz.* Action sur le Stat. 9.
Br. Forfeiture de Marriage 3.
(*d*) *Fitz.* Action sur le Stat. 11.
Br. Forfeiture de Marriage 5.

Le Resolution del Court.
(*e*) 6 *Co.* 70. *b.*
Cr. Jac. 66, 151.

(*f*) Br. Forfeiture de Marriage 7.
Br. Tender 44.

notable Proof, that the Value of the Marriage belongs to the Lord without Tender; (a) for if the Value should not be due without Tender, then if the Ravisher of a Ward married him, the Lord should not receive the Value, or if the Heir married himself before the Lord could make a Tender, or if he went beyond (b) Sea, or to Places unknown, the Act and Wrong of the Heir if a Tender were necessary might prevent the Guardian of the Benefit of the Marriage, which *de (c) mero jure* belongs to him, which would be inconvenient. As to the third Exception it was answered, That many Times Writs are framed according to that which most usually happens. And where the Rule is, *ad (d) ea quæ frequentius accidunt jura adaptantur*; it may be well said, *ad ea quæ frequentius accidunt rescripta sive brevvia adaptantur*; And a special Case shall have the usual Writ and a special Count: As to the Authorities, *scil.* of 40 E. 3. 6. b. there it appears that the Issue was taken on the Tender, which many Times is done by good Advice, *scil.* first to try the Matter in Fact, if the Plaintiff's Counsel will admit it, and then to take Advantage of the Matter in Law, which joining of Issue by the Plaintiff's Counsel, is not any Authority to Prove that a Tender is requisite. And as to the Book of (f) 21 E. 4. 43. a. which is but an Opinion *obiter* without Argument or Deliberation, in the debating of another Case, is to be understood of the Forfeiture of Marriage; And in the other Books, Tender is only alledged, and no Authority that is requisite: But the Book of (g) 31 Aff. p. 26. is adjudged, That for the single Value a Tender is not requisite; and therewith agrees 2 H. 7. 9. a. *Et hoc communi juris peritorum calculo comprobatur*: And so the Doubt in 9 Eliz. Dyer 255. (b) well resolved.

(a) Cr. El. 335.

468, 469.

Yelv. 59.

Moor 22, 65, 593.

Co. Lit. 82. a.

6 Co. 70. b. 71. a.

2 Inst. 93.

Cr. Jac. 66.

Cr. Car. 103, 503.

(b) Yelv. 59.

6 Co. 71. b.

Cr. Jac. 151.

(c) Cr. Jac. 66, 151.

Yelv. 59.

6 Co. 71. b.

Cr. El. 468.

(d) 6 Co. 77. a.

7 Co. 28. a.

Calvin's Case.

Co. Lit. 238. a.

2 Inst. 137.

Cart 13.

(e) Antea 127. a.

Fitz. Action

sur le Statute 9.

Br. Forfeiture

de Mariage 3.

(f) Ant. 127. a.

(g) Antea 127. a.

Br. Forfeiture

de Mariage 7.

Br. Tender 44.

(h) Dyer 255.

pl. 6.

Doct. pl. 94.

In

In Annis, in quibus Casus isti adjudicati erant, hi fuerunt Justiciarii.

Justic' de Banco Regis.

Chrift. Wray Miles, qui obiit anno 34 Eliz. Et post eum,
Johannes Popham Miles.
Johannes Southcote. Franciscus Gawdy Miles.
Thomas Gawdy Miles. Edwardus Fenner Miles.
Willielmus Ayloff. Christoph. Yelverton Miles.
Robertus Shute. David Williams Miles.
Johannes Clench.

Justic' de Communi Banco.

Jacobus Dyer Miles, qui obiit post Hill' 24 Eliz.
Et Pasch. 24. Edmundus Anderson Miles.
Ann' 19 Eliz. Rog. Manwood, qui recessit in Scacc' Hill. 24 Eliz.
Robertus Munson, cessit Pasch. 22.
Hill' 20 Eliz. Thomas Meade, obiit Pasch. 27 Eliz.
Trin' 21 Eliz. Franciscus Windham, obiit post Trin. 34 Eliz.
Hill' 23 Eliz. Will' Periam, Hill' 35. recessit in Scaccario.
M 27. & 28. El. Franciscus Rode, obiit an' 31 Eliz.
Pasch. 31 Eliz. Thomas Walmesley Miles.
Hill' 35 Eliz. Franciscus Beamont, obiit ante Pasch. 40 Eliz.
Hill' 36 Eliz. Thomas Owen, obiit ante Hill' 41 Eliz.
Trin' 40 Eliz. Johannes Glanvil, obiit post Trin' 42 Eliz.
Hill' 41 Eliz. Georgius Kingesmill Miles.
Mich. 43. Eliz. Petrus Warberton Miles.
Hill' 1 Ja. Reg. Willielmus Daniel Miles.

Baron' in Scaccario.

Joh. Jeffrey Miles. Edw. Flowerdew. Joh. Savill Miles.
T. Fleming Miles. Rob. Clark Miles. Georg. Snig Miles.
Robertus Shute. Thomas Gent. Johan' Sotherton.
Johannes Clench. Matthæus Evans.

Servientes ad Legem.

Rob. Gardiner Miles. Joh. Crook Miles. Jacobus Altham.
Tho. Harris Miles. Johannes Sherley. H. Hubberd Mil'.
Rich. Lewkenor Miles. Tho. Coventry. August' Nichols.
Johannes Hele Miles. Edw. Houghton. Robert' Barker.
Edw. Herne Miles. Laur. Tanfield Mil'. Rich. Hutron.
Edm. Pelham Miles. Tho. Foster. Miles. Jacob. Lea Miles.
Edw. Philips Miles. Thomas Harris. Joh. Dodderidge.