1727

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

Sir Edward Coke

The Seventh PART of the

REPORTS

OF

Sir *Edward Coke* Kt.

Chief Juſtice of the COMMON PLEAS.

OF

Divers Reſolutions and Judgments given upon ſolemn Arguments, and with great Deliberation and Conference of the Reverend Judges and Sages of the Law, of Caſes in Law which were never reſolved or adjudged before: And the Reaſons and Cauſes of the ſaid Reſolutions and Judgments: Publiſh'd in the ſixth Year of the moſt High and moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the 42*d*. the Fountain of all PIETY and JUSTICE, and the LIFE of the LAW.

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

Frequentibus argumentis & collationibus latens veritas aperitur, cum ſub eiſdem verbis ſæpe lateat multiplex intellectus.

Veritas ſæpius agitata magis ſplendeſcit in lucem.

In the *SAVOY*:

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

M DCC XXVII.

Deo, Patriæ, Tibi.

SExtæ Commentariorum ſive Relationum mearum parti vix extremam manum addideram (Lector candide) cum, quæ ſingulos exercuit Angliæ Judices, oborta eſt controverſia, cujus certe ſimilis nunquam fuit ante hunc diem in aula Weſt. agitata: Unde etiam, dum eorum quæ audieram recens admodum memoria fuit, ea præcipue (prout mos eſt ſemperque apud me fuit) quæ ſummarie ex omnibus diſputationibus atque argumentis, plurimum ponderis ac momenti, ſive authoritates ſive rationes ad ſolvendam quæſtionem annotaſſem, in pro-

I *Had no ſooner (good Reader) made an End of the ſixth Part of my Commentaries or Reports, but the greateſt Caſe that ever was argued in the Hall of* Weſtminſter *began to come in Queſtion, and afterwards was argued by all the Judges of* England. *This great Caſe (for that Memory is* infida & labilis) *while the Matter was recent and freſh in Mind, and almoſt yet ſounding in the Ear, I ſet down in Writing, out of my ſhort Obſervations which I had taken of the Effect of every Argument, (as my Manner is,*

and ever hath been) a ſummary Memorial of the principal Authorities and Reaſons of the Reſolutions of that Caſe, for my own private Solace and Inſtruction. I never thought to have publiſhed the ſame, for that it was not like to give any Direction in like Caſes that might happen, (the chief ſt End of publiſhing Reports) it is of its own Nature ſo like the Phœnix, and ſo ſingular and rare in Accident, as the Union of two famous and ancient Kingdoms in Ligeance and Obedience under one great and mighty Monarch. Now when I had ended it for my private Uſe, I was by Commaudment to begin again (a Matter of no ſmall Labour and Difficulty) for the Publick. For certainly, that ſuccinct Method and Collection that will ſerve for the private Memorial or Repertory, eſpecially of him that knew and

prium ſolamen meum & juvamen (infida enim eſt labiliſque memoria) privatim literis mandavi. Nunquam autem iſta quoviſmodo in publicum proditura putavi, quia (quod primum arbitror & præcipuum quod ex Relationibus edendis percipi poteſt emolumentum) non veriſimile eſt hunc caſum de aliis in judicando cognitionem informaturum: Nam duo nobiliſſima ſimul & antiquiſſima regna, in unam conflari monarchiam, uno in utriſque florentiſſimo rege invictiſſimoque monarcha dominante, hoc uſu infrequens, imo ſicut ipſe Phœnix unicum & individuum eſt in ſpecie, cum quo comparari poteſt ſocium habens neminem. Tum demum cum tantum, quantum mei ſolius cauſa apud memet annotare volui, perfeciſſem, mandatum mihi fuit, ut de novo (quod non minimi ſudoris erat & difficultatis) in uſum etiam publicum, recolligerem: Nam certe ſuccincta iſta & compendio-

Non metuo pulicis ſtimulos fucique ſaſurros.

Nec pili quidem æſtimo invidum iſtum & maledicum, qui, quo fuſius venena ſua evomeret, libellum quendam, neſcio an rudem an inconcinnum magis ſub titulo & nomine *Pricket* in lucem protulit, dicatum Optimo meo Domino & Socero Comiti Exceſtr. & inſcriptum, *Memoriale ſive mandatum Juratorum in Aſſiſis apud civitatem Nordovicam, 4 die Auguſti*, 1606. quem ſane conteſtor non ſolum me omnino inſciente fuiſſe divulgatum, ſed (omiſſis etiam ipſis potiſſimis) ne unam quidem ſententiolam eo ſenſu & ſignificatione, prout dicta erat, fuiſſe enarratam. Jam vero ſi cataſtrophen expectes, ecce (dum perpetuum in me dedecus & infamiam inurere conatus eſt) quam falſum ejus eum habuit expectatio? Primo enim Lectores illi, juris peritos dico, qui inter legendum, non ſolum graves & turpes errores

And little do I eſteem an uncharitable and malicious Practice in publiſhing of an erroneous and ill-ſpelled Pamphlet, under the Name Pricket, *and dedicating it to my ſingular good Lord and Father-in-Law, the Earl of* Exeter, *as a Charge given at the Aſſizes holden at the City of* Norwich, 4 Auguſt, 1606. *which I proteſt was not only publiſhed without my Privity, but (beſides the Omiſſion of divers principal Matters) that there is no one Period therein expreſſed in that Sort and Senſe that I delivered it: Wherein it is worthy of Obſervation how their Expectation (of ſcandalizing me) was wholly deceived, for behold the Cataſtrophy. Such of the Readers as were learned in the Laws, finding not only groſs Errors and Abſurdities*

ſa annotandi methodus, quæ ſatis eſt in memoriam colligentis, qui omnia atque ſingula prout geſta fuerunt audierit & cognoverit, nequaquam ſane ſatis erit in eo ſcribendi genere, quod & in præſens & futurum ſeculum eſt duraturum, & quod Lectores etiam, qui per ſemetipſos nihil habent præter illud quod ex eo quod conſcriptum eſt addiſcant, eſt edocturum. Et ſicut unda gignit undam, ſic labor unus alium tanquam gemellum aliquem videtur eſſe conſecutum: Nam cum hic quem dixi caſus, novus eſſet & inauditus, animum idcirco induxi non inutilem fore, ſi, cum & temet (candide Lector) in quantum poſſum erudirem, aliis item in ambiguarum quarundam, de terris & tenementis ſuis (in quibus adhuc graves admodum & inter ſe pugnantes Juris peritorum opiniones extiterunt) quæſtionum ſolutione ſatisfacerem, alios nonnullos caſus uſu frequentiores, & dignitate inter cæte-

heard all, will nothing become a publick Report for the preſent and all Poſterity, or be ſufficient to inſtruct thoſe Readers, who of themſelves know nothing, but muſt be inſtructed by the Report only in the right Rule and Reaſon of the Caſe in Queſtion. And as unda gignit undam, *ſo commonly one labour cometh not alone: This brought on another with it; for ſeeing this Caſe was of ſo rare a Quality, I thought good as well for thine Inſtruction and Uſe (good Reader) as for the Repoſe and Quiet of many, in reſolving of Queſtions and Doubts (wherein there hath been great Diverſity of Opinions) concerning their Eſtates and Poſſeſſions, to publiſh ſome other that are common in Accident, weighty in Conſequent, and yet never reſolved or adjudged before: So as it is now verified in this, that which hath been ſaid of old,* Labor

labori laborem addit.

With this ſeventh Work or part of my Reports (whereunto Almighty God of his Goodneſs, hath in this ſhort Time, amongſt many other publick Imployments, enabled me) I have out of my Love unto all my dear Countrymen, of what Perſuaſion in Religion ſoever they be, thought good to give them all a Caveat or Forewarning in a Caſe of great Importance, that deeply and dangerouſly concerns them all in ſo high a Point, that in the firſt Degree it is a Præmunire, *and in the ſecond High Treaſon. And yet many Men, without all Fear (by Reaſon I think they know not the Law) run into the Danger thereof almoſt every Day. I muſt confeſs, that this*

ros nequaquam minores, nunquam antehac diluci-de ſatis judiciis explicatos, in medium proferrem: Ita ut jam ratum ſit quod jamdudum apud antiquos in proverbium abiit, *Labor labori laborem addit.*

Putavi ego, ex mea in Concives meos charitate, cujuſcunque demum conditionis religioniſve ſint, navandam eſſe operam, ut non ſolum hanc ſeptimam Relationum mearum partem (cui colligendæ ac in lucem edendæ Deus in hiſce temporum anguſtiis, dum in gravioribus Reipublicæ negotiis verſatus ſum, vires dedit) omnibus ob oculos ponerem, ſed ut eoſdem etiam adhortarer & præmonerem in quodam non mediocris momenti caſu, qui ſingulos ita neceſſario eoque modo ſpectat, ut, ſi quid in eo peccatum fuerit, in primo gradu ſit Pœna de *Præmunire*, in ſecundo læſæ Majeſtatis culpa, in quo tamen multi (dum Legem, ut mihi videtur, ignorant) temere & inconſulto pene quotidie delinquunt. Mihi certe confi-

fitendum,

tendum eſt, eo uſque nunc temporis redactum eſſe hoc ſeculum, ut quiſque pro ſe ſedulo in diſcribendis libellulis faciat, *viz. Quotidie plures, quotidie pejus ſcribunt.* Et certo certius eſt ſi quiſquam hominum libros iſtos (quos ego vidi) nuperrime conſcriptos a Roma vel a Romaniſtis ad nos uſque attulerit, aut eos legendo ſuffragiis patrocinatus fuerit, aut eos item aliis approbando (quod maxime apud authores in votis eſt) legendos dederit, in ſummas, & turbulentiſſimas periculorum tempeſtates incidat neceſſum eſt: Nam primo cum in hunc modum peccarit pœnas dabit per *Præmunire* (quæ ſic ſe habent, adjudicari non eſſe in Regis protectione; eorum terras & bona omnia in Regis poteſtatem redigi; & corpora carceri perpetuo damnari): & qui ſecundo deliquerit læſæ Majeſtatis grave ſupplicium incurret. Hi ſunt illi libri qui ſplendidos & imprimis religioſos præ ſe

is a writing or ſcribling World, Quotidie plures, quotidie pejus ſcribunt. *And ſure I am that no Man can either bring over thoſe Books of late written (which I have ſeen) from* Rome *or* Romaniſts, *or read them, and juſtify them, or deliver them over to any other with a Liking and Allowance of the ſame (as the Author's End and Deſire is they ſhould) but they run into deſperate Dangers and Downfalls; for the firſt Offence is a Premunire, which is to be adjudged to be out of the King's Protection, to looſe all their Lands and Goods, and to ſuffer perpetual Impriſonment; and they that offend the ſecond Time therein, incur the heavy Danger of High Treaſon. Theſe Books have glorious and goodly Titles, which promiſe Directions for the Conſcience, and Remedies for the Soul, but there is* mors in olla: *They*

are like to Apothecaries Boxes, quorum tituli pollicentur remedia, ſed pixides ipſæ venena continent, *whoſe Titles promiſe Remedies, but the Boxes themſelves contain Poiſon. This Forewarning I give out of Conſcience and Care of their Safety, that blindfold might fall into ſo great Danger by their Means whom they ſo much Reverence. I am not afraid of Gnats that can prick and cannot hurt, nor of Drones that keep a Buzzing, and would but cannot ſting.*

ferunt titulos; hi illi ſunt qui conſcientiis hominum infirmitate laborantibus opem ferre ſe profitentur; hi ſunt illi deniq; qui miſeras & miſerandas peccatrices animas in optatum tranquillitatis & ſalutis portum adducere in ſe ſuſcipiunt; at mors in olla; quemadmodum plerumq; in Pharmacopolarum vaſculis videre eſt, *quorum tituli pollicentur remedia, ſed pixides ipſæ venena continent.* Hiſce ego præmonitionibus uſus ſum e ſolicita eorum cura, qui præſtigias & impoſturas iſtas (quibus hi, quos tanto proſequuntur amore & reverentia, in ſummum capitis periculum eos de improviſo ducant) nondum cognorunt. Jam vero, neque culices, qui quaſi titillando pungunt paulo, non penetrant, neq; fucos iſtos qui ſuſurris tantis bombuliſq; quos edunt, maximis, aculeis autem, quibus carent ægrius, nuſquam loci belligerare ſolent, tantillum pertimeſco; imo inquam, ut eſt apud Poetam,

Non

ties in Law, but palpable Miſtakings in the very Words of Art, and the whole Context of that rude and ragged Stile, wholly diſſonant (the Subject being legal) from a Lawyer's Dialect, concluded, that inimicus & iniquus homo ſuperſeminavit zizania in medio tritici: *The other diſcreet and indifferent Readers, out of Senſe and Reaſon, found out the ſame Concluſion, both in Reſpect of the Vanity of the Phraſe, and for that, I publiſhing about the ſame Time one of my Commentaries, would, If I had intended the Publication of any ſuch Matter, have done it my ſelf, and not to have ſuffered any of my Works to paſs under the Name of* Pricket; *and ſo* una voce conclamaverunt omnes, *that it was a ſhameful and ſhameleſs Practice, and the Author thereof, to*

& devias opinionum abſurditates, ſed ipſas etiam voces artis turpiter in alienum ſenſum uſurpatas, & totum deniq; contextum longiſſime a Jurisconſultorum (de legibus enim agebatur) uſu & conſuetudine remotiſſimum eſſe, animadverterunt, continuo hoc in ore habuerunt, *Inimicus & iniquus homo ſuperſeminavit zizania in medio tritici.* Deinde alii quoque cordati & æqui Lectores, dum generis dicendi & phraſis levitatem ſerio perpenderunt, ſuapte ſponte in eandem inciderunt opinionem: nam, cum eodem fere tempore Commentarium quendam ipſe divulgarem, pro certo ſtatuerunt, ſi ea animus fuiſſet dimulgandi, me tetipſum voluiſſe, meo proprio nomine, nequaquam nomine *Pricket*, mea propria opera omnibus inſpicienda præbuiſſe: Idcirco quaſi una voce conclamaverunt omnes, illud ipſum opus tum natura ſua maxime nequam eſſe & puden-

pudendum, cum ab opifice ſcelerato & mendaci proficiſcatur:

be a wicked and malicious Falſary.

Circumvertit enim vis & injuria quemque,
Atque unde exorta eſt in eum plerunque revertit.

In hiſce ſicut in aliis meis Relationibus, hoc mihi præcipue curæ fuit, ut (quantum me penes erat) obſcuritatem, Ambiguitatem, Periclitationem, Novitatem & Prolixitatem averſarer. 1. Obſcuritatem, quæ ſane haud abſimilis tenebrarum eſt, in quibus miſere ſolis radiis viduos neceſſe eſt huc illuc, ultro citroque, uſque quaque deviare. 2. Ambiguitatem, in qua non ut ſupra lucis inopia laboramus, ſed variis meatuum anfractibus, & irremeabilibus dubitationum mæandris ita diſtracti ſumus, ut quid ſequendum, quid fugiendum ſit, prorſus ignoremus. 3. Periclitationem, ne quicquam omnino in medium proferrem, quod quæſtiones magis novas & controverſias ad turbandum, quam tranquillitatem &

In theſe and the Reſt of my Reports, I have (as much as I could) avoided Obſcurity, Ambiguity, Jeopardy, Novelty, and Prolixity: 1. Obſcurity, for that is like unto Darkneſs, wherein a Man, for want of Light, can hardly with all his Induſtry diſcern any Way. 2. Ambiguity, where there is Light enough, but there be ſo many winding and intricate Ways, as a Man for want of Direction, ſhall be much perplexed and intangled, to find out the right Way. 3. Jeopardy, either in publiſhing of any thing, that might rather ſtir up Suits and Controverſies in this troubleſome World, than eſtabliſh Quietneſs and Repoſe be-

tween Man and Man (for a Commentary ſhould not be like unto the winterly Sun, that raiſeth up greater and thicker Miſts and Foggs, than it is able to diſperſe) or in bringing the Reader, by any Means, into the leaſt Queſtion of Peril or Danger at all. 4. *Novelty, for I have ever holden all new or private Interpretations, or Opinions, which have no Ground or Warrant out of the Reaſon or Rule of our Books, or former Precedents, to be dangerous, and not worthy of any Obſervation: For* Periculoſum exiſtimo quod bonorum virorum non comprobatur exemplo. 5. *Prolixity, for a Report ought to be no longer than the Matter requireth, and as* Languor prolixus gravat medicum, ita relatio prolixa gravat lectorem.

concordiam ad ſtabiliendum hunc fluctuantem hominum ſtatum procreet, (non enim convenit, ut hujuſmodi Commentarii illud agant qd' plerumque ſolent hyberni ſoles, qui denſiores nebulas & fuliginoſiores concitant, quam quas eiſdem radiorum viribus diſpergere valent) aut quod Lectorem meum vel in primaria erroris & dubitationis limina quoquo modo ducat. 4. Novitatem, eo quod id maxime laborandum arbitror, ut novas quaſcunque interpretatiunculas & privatas opiniones, (quæ, ſi ad amuſſim noſtrorum librorum & antiquorum exempla applicentur, nequaquam quadrant) periculoſiſſimas, & ſtudiis noſtris indigniſſimas evitem: Nam *periculoſum exiſtimo quod bonorum virorum non comprobatur exemplo.* 5. Prolixitatem, cum in Relationibus hoc imprimis ſit optandum, ut ſint adeo compendiario breves prout neceſſitas reſque

que ipſa ferre poteſt; ſicut enim *languor prolixus gravat medicum, ita Relatio prolixa gravat lectorem.*

Quod caſus ille de *Poſtnatis* reliquis eſt prolixior, confitendum eſt, at vero tres, quæ fuſiorem me fecerunt in eo renuntiando, cauſæ graviores acceſſerunt. 1. Quod in Camera Scaccarii caſus erat diſcuſſus, ad quem quidem diſcutiendum omnes Angliæ Judices (quemadmodum leges & conſuetudines poſtulant) ſigillatim, aperte, & copioſe ſunt argumentati. 2. Quia non alius fuit uſpiam caſus in Camera Scaccarii quod quiſpiam nunc temporis virorum cogitatione poteſt aſſequi, quem tot inſimul Judices tamque elaborate, pertractarunt: non enim Dominus Cancellarius ſolum, ſed alii etiam quatuordecim Judices in eodem caſu vires ſuas & ingenia limate exercuerunt. 3. Quia tanta fuit varietas atque copia tam materiæ rationum & argumentorum

The Caſe of Poſtnati, *I confeſs, is longer than any of the Reſt, and that for three Cauſes: Firſt, for that it was an Exchequer-Chamber Caſe, for deciding whereof all the Judges of* England (*as the Law doth require*) *did argue openly, and at large. Secondly, for that never any Caſe within Man's Memory, was argued by ſo many Judges in the Exchequer-Chamber, as this was, there having argued the Lord Chancellor and fourteen Judges. Thirdly, for the Variety as well of the important Matter, as of the ſeveral Kinds of excellent Learning and Knowledge, delivered in the Arguments of this Caſe.*

Finally,

Finally, with theſe Wiſhes and Deſires I conclude, Firſt, that the ſtudious Reader might indeed receive as great Profit and Delight in Reading this Work, as I did (unleſs mine own Judgment deceive me) in compoſing and framing thereof: Secondly, that quoad ejus fieri poſſit, quamplurima legibus ipſis definiantur, quam pauciſſima vero Judicis arbitrio relinquantur.

ponderib' libratæ, quam formæ multis excellentium ingeniorum, mirabiliumque artium ornamentis decoratæ, ut breviter & ſuccincte magis referri non poſſe videbatur.

Nunc demum, hoc ulterius tantum votis amplector meis; Primum ut ſtudioſus Lector quantam ego quidem (ſi non meum me deluſerit judicum) in componendis & formandis, tantam ille itidem revera in legendis hiſce Relationibus utilitatem ſimul & voluptatem excerpat; Deinde ut *quoad ejus fieri poſſit, quamplurima legibus ipſis definiantur, quam pauciſſima vero Judicis arbitrio relinquantur.*

Caſuum

Caſuum iſtius libri ſeries.

Poſtnati.

Poſtnati.

Trin. 6 Jacobi Regis.

CALVIN's *Caſe.*

JAcobus Dei gratia Angl', Scot', Franc', & Hibern' Rex, fidei defenſor', &c. Vic' Midd' Salut'. Queſtus eſt nobis Robertus Calvin gener. quod Richardus Smith & Nicolaus Smith injuſte & ſine judicio diſſeiſ. eum de libero tenemento ſuo in Haggard, alias Haggerſton, alias Aggerſton, in paroch' Sancti Leonardi in Shoreditch infra triginta annos jam ultim' elapſos. Et ideo tibi præcipimus quod ſi prædict' Robert. fecerit te ſecurum de clameo ſuo proſ. tunc fac' tenementum ill' reſeiſ. de catallis quæ in ipſo capt. fuerint, & ipſum tenementum cum catallis eſſe in pace uſque diem Jovis proxim. poſt quindena Sancti Martini proxim. futur. Et interim fac' xii liber' & legal' homines de viſn. illo videre tenement' ill' & nomina eorum imbr. Et ſumm' eos per bonos ſumm' quod tunc ſint coram nobis ubicunque tunc fuerimus in Angl' parat' inde facere recognit'. Et pone per vad' & ſalvos pleg' prædictos Richardum & Nicolaum vel ballivos ſuos ſi ipſi invent' non fuerint, quod tunc ſint ibi aud' ill recognit'. Et habeas ibi ſumm' nomina pleg', & hoc breve. T. meipſo apud Weſtm. tertio die Novembris, anno regni noſtri Angl', Franc', & Hibern' quinto, & Scot' quadrageſimo primo. Elleſmere's Poſtnati 1, 2, &c.

Pro quadragint. ſolid' ſolut' in Hanaperio.

Kindeſley.

Aſſiſa ven' recogn' ſi Ric' Smith & Nic. Smith injuſte & ſine judicio diſſeiſ. Rob. Calvin gener' de libero tenem' ſuo Midd. ſſ.

in Haggard, alias Haggerſt' alias Aggerſt' in paroch' S. Leonardi in Shoreditch infra triginta ann' jam ultimos elapſos: Et unde id' Rob. qui infra ætat' vigint' & unius annor' exiſtit, per Johan' Parkinſon & Willihelm. Parkinſon Guardianos ſuos per cur' dom' regis hic ad hoc conjunctim & diviſim ſpecialiter admiſſ. queritur qd' diſſeiſ. eum de uno meſſ. cum pertin', &c. Et præd' Richardus & Nic. per Willihelm. Edw. attornat' ſuum ven', & dicunt quod præd' Robertus ad breve ſuum prad' reſponderi non debet, quia dicunt qd' præd' Robertus eſt alienigen. natus quinto die Novemb' anno regni domini regis nunc Angl', Franc', & Hibern' tertio, & Scot' triceſimo nono apud Edenborough infra regnum ſuum Scot' præd' ac infra ligeanc' dicti dom' Reg' dicti regni ſui Scot', ac extra ligeanc' dicti domini regis regni ſui Angl'. Quodque tempore nativitatis præd' Roberti Calvin ac diu antea & continue poſtea præd' regnum Scot' per jura, leges, & ſtatuta ejuſd' regni propria, & non per jura, leges, vel ſtatuta hujus regni Angl', regulat' & gubernat' fuit, & adhuc eſt. Et hoc parat' ſunt verificare, unde pet. judicium ſi præd' Robert' ad breve ſuum præd' reſponderi debeat, &c. Et præd' Robert. Calvin dicit, quod prædictum placitum per præd' Richardum & Nicolaum ſuperius placitat. minus ſufficiens in lege exiſtit ad ipſum Robertum a reſponſ. ad breve ſuum præd' habend' repellend' quodque ipſe idem Robertus ad placit' ill' modo & forma præd' placitat' neceſſe non habet nec per legem terr' tenetur reſpondere. Et hoc parat' eſt verificare, unde petit judicium: Et quod præd' Richardus & Nic. ad præd' breve ipſius Roberti reſpondeant. Et præd' Richardus & Nic. ex quo ipſi ſufficien' materiam in lege ad ipſum Rob' a reſponſ. ad breve præd' habend' repellend' ſuperius allegaver. quam ipſi parat' ſunt verificare; quam quidem materiam præd' Robertus non dedic', nec ad eam aliqualiter reſpondet, ſed verificat' ill' penitus admittere omnino recuſat, ut prius pet' judicium ſi præd' Robertus ad breve ſuum præd' reſponderi debeat, &c. Et quia cur' domini regis hic de judicio ſuo de & ſuper præmiſſ. reddendo nondum adviſatur, dies inde dat' eſt partibus præd' coram domino rege apud Weſtmonaſter. uſque diem Lunæ prox' poſt octab' Sancti Hillarii de judicio ſuo inde audiendo, eo quod cur' domini regis hic inde nondum, &c. Et aſſiſa prad' reman' capiend' coram eodem domino rege uſque eundem diem Lun' ibidem, &c. Et vicecom' diſtring' recogn' Aſſiſ. præd' Et interim fac. viſum, &c. Ad quem diem coram domino Rege apud Weſtmonaſterium ven' tam prædictus Robertus Calvin per Guardianos ſuos prædict quam præd' Richardus Smith & Nicolaus Smith per attornatum ſuum præd'. Et quia curia domini regis hic de judi-

cio

cio ſuo inde & ſuper præmiſſis reddendo nondum adviſatur, dies inde dat eſt partibus præd' coram domino rege apud Weſtm' uſque diem Lun' prox poſt craſtin' aſcenſionis domini de judicio ſuo inde audiend' eo qd' cur' domini regis hic inde nondum, &c. Et aſſiſa præd' reman' ulterius capiend' uſque eundem diem Lun' ibidem, &c. Et vicecom' ſicut alias diſtring' recogn' aſſiſ. præd' & interim fac. viſum, &c. Ad quem diem coram domino rege apud Weſtm' ven' tam præd' Rob. Calvin per Guardianos ſuos præd', quam præd' Richardus Smith & Nic. Smith per attornat' ſuum præd', &c. Et quia curia, &c.

The Queſtion of this Matter in Law was, whether *Robert Calvin* the Plaintiff (being born in *Scotland* ſince the Crown of *England* deſcended to his Majeſty) be an Alien born, and conſequently diſabled to bring any real or perſonal (*a*) Action for any Lands within the Realm of *Engl.* After this Caſe had been argued in the Court of the K's Bench, at the Bar, by the Counſel learned of either Party, the Judges of that Court upon Conference and Conſideration of the Weight and Importance thereof, adjourned the ſame (according to the ancient and ordinary Courſe and Order of the Law) into the (*b*) Exchequer-chamber, to be argued openly there; firſt by the Counſel learned of either Party, and then by all the Judges of *England*; where afterwards the Caſe was argued by *Bacon* Solicitor General, on the Part of the Plaintiff, and by *Laur. Hide* for the Defendant; and afterward by *Hobart* Attorney General for the Plaintiff, and by Serjeant *Hutton* for the Defendant; and in *Eaſter* Term laſt, the Caſe was argued by *Heron* puiſne Baron of the Exchequer, and *Foſter* puiſne Judge of the Court of Common Pleas; and on the ſecond Day appointed for this Caſe, by *Crook* puiſne Judge of the King's Bench, and *Altham* Baron of the Exchequer; the third Day by *Snigge* Baron of the Exchequer, and *Williams* one of the Judges of the King's Bench; the fourth Day by *Daniel* one of the Judges of the Court of Common Pleas, and by *Yelverton* one of the Judges of King's Bench: And in *Trinity* Term following, by *Warburton* one of the Judges of the Common Pleas, and *Fenner* one of the Judges of the King's Bench; and after by *Walmeſley* one of the Judges of the Common Pleas, and *Tanfield* Chief Baron; and at two ſeveral Days in the ſame Term, *Coke* Chief Juſtice of the Common Pleas, *Fleming* Chief Juſtice of the King's Bench, and Sir *Thomas Eggerton*, Lord *Elleſmere*, Lord Chancellor of *England*, argued the Caſe (the like Plea in Diſability

The Queſtion.

(*a*) 1 Bulſt. 134. Yelv. 198. Owen 45. Co. Lit. 129. b. 1 And. 25. Moor 431. 1 Keb. 266. Cr. El. 142, 683. Co. Car 9. 4 Inſt. 152.

How this Caſe hath proceeded.

(*b*) 2 Bulſt. 146.

of *Robert Calvin's* Perſon being pleaded *mutatis mutandis* in the Chancery in a Suit there for Evidence concerning Lands of Inheritance, and by the Lord Chancellor adjourned alſo into the Exchequer-chamber, to the End that one Rule might over-rule both the ſaid Caſes.) And firſt (for that I intend to make as ſummary a Report as I can) I will at the firſt ſet down ſuch Arguments and Objections as were made and drawn out of this ſhort Record againſt the Plaintiff, by thoſe that argued for the Defendants. It was obſerved, that in this Plea there were four Nouns, *quatuor nomina*, which were called *nomina operativa*, becauſe from them all the ſaid Arguments and Objections on the Part of the Defendants were drawn; that is to ſay, 1. *Ligeantia* (which is twice repeated in the Plea, for it is ſaid, *infra ligeantiam domini regis regni ſui Scot'*, & *extra ligeantiam domini regis regni ſui Angl'.*) 2. *Regnum* (which alſo appeareth to be twice mentioned, *viz. regnum Angl'*, and *regnum Scot'.*) 3. *Leges* (which are twice alledged, *viz. Leges Angl'*, and *Leges Scot'*, two ſeveral and diſtinct Laws.) 4. *Alienigena* (which is the Concluſion of all, *viz.* that *Robert Calvin* is *Alienigena.*) By the firſt it appeareth, that the Defendants do make two Ligeances, one of *England*, and another of *Scotland*, and from theſe ſeveral Ligeances two Arguments were framed, which briefly may be concluded thus. Whoſoever is born *infra ligeantiam*, within the Ligeance of King *James* of his Kingdom of *Scotland*, is *Alienigena*, an Alien born, as to the Kingdom of *England*: But *Robert Calvin* was born at *Edenburgh*, within the Ligeance of the King of his Kingdom of *Scotland*; therefore *Robert Calvin* is *Alienigena*, an Alien born, as to the Kingdom of *England*. 2. Whoſoever is born *extra ligeantiam*, out of the Ligeance of King *James* of his Kingdom of *England*, is an Alien as to the Kingdom of *England*; but the Plaintiff was born out of the Ligeance of the King of his Kingdom of *England*; therefore the Plaintiff is an Alien, *&c.* Both theſe Arguments are drawn from the very Words of the Plea, *viz. Quod præd' Robertus eſt alienigena, natus 5 Novemb. anno regni domini regis nunc Angl' &c. tertio apud Edenburgh infra regnum Scot', ac infra ligeantiam dicti domini regis dicti regni ſui Scot', ac extra ligeantiam dicti domini regis regni ſui Angl'.* From the ſeveral Kingdoms, *viz. regnum Angl'* and *regnum Scot'*, three Arguments were drawn. 1. *Quando* (a) *duo jura (imo duo regna) concurrunt in una perſona, æquum eſt ac ſi eſſent in diverſis*: But in the King's Perſon there concur two diſtinct and ſeveral Kingdoms; therefore it is all one as if they were in divers Perſons, and

The Arguments and Objections on the Part of the Defendant.

(a) Elleſmere's Poſtnati 88. Poſtea 14 b. 4 Co. 118. a. Cawly 209. Moor 793, 804.

and consequently the Plaintiff is as Alien, as all the *Antenati* are, for that they were born under the Ligeance of another King. 2. Whatsoever is due to the King's several politick Capacities of the several Kingdoms is several and divided; but Ligeance of each Nation is due to the King's several politick Capacities of the several Kingdoms; *Ergo*, The Ligeance of each Nation is several and divided, and consequently the Plaintiff is an Alien, for that they that are born under several Ligeances are Aliens one to another. 3. Where the King hath several Kingdoms by several Titles and Descents; there also are the Ligeances several; but the King hath these two Kingdoms by several Titles and Descents, therefore the Ligeances are several. These three Arguments are collected also from the Words of the Plea before remembered.

From the several and distinct Laws of either Kingdom, they did reason thus; 1. Every Subject that is born out of the Extent and Reach of the Laws of *England*, cannot by Judgment of those Laws be a natural Subject to the King, in Respect of his Kingdom of *England*; but the Plaintiff was born at *Edenburgh*, out of the Extent and Reach of the Laws of *England*; therefore the Plaintiff by the Judgment of the Laws of *England* cannot be a natural Subject to the King, as of his Kingdom of *England*. 2. That Subject, that is not at the Time and in the Place of his Birth inheritable to the Laws of *England*, cannot be inheritable or Partaker of the Benefits and Privileges given by the Laws of *England*; but the Plaintiff at the Time, and in the Place of his Birth was not inheritable to the Laws of *England*, (but only to the Laws of *Scotland*;) therefore he is not inheritable or to be Partaker of the Benefits or Privileges of the Laws of *England*. 3. Whatsoever appeareth to be out of the Jurisdiction of the Laws of *England*, cannot be tried by the same Laws; but the Plaintiff's Birth at *Edenburgh* is out of the Jurisdiction of the Laws of *England*; therefore the same cannot be tried by the Laws of *England*. Which three Arguments were drawn from these Words of the Plea, *viz. Quodque tempore nativitatis præd' Roberti Calvin, ac diu antea, & continue postea, præd regnum Scot' per jura, leges & statuta ejusdem regni propria, & non per jura, leges, seu statuta hujus regni Angl' regulat' & gubernat' fuit, & adhuc est.* From this Word *Alienigena* they argued thus: Every Subject that is *alien' gentis (i. e.) alien' ligeant', est alienigena*; but such a one is the Plaintiff; therefore, &c. And to these nine Arguments, all that was spoken learnedly and at large by those that argued against the Plaintiff may be reduced.

But it was resolved by the Lord Chancellor and twelve Judges, *viz.* the two Chief Justices, the Chief Baron, Justice *Fenner*, *Warberton*, *Yelverton*, *Daniel*, *Williams*, Baron *Snig*, Baron *Altham*, Justice *Crooke*, and Baron *Heron*, that the Plaintiff was no Alien, and consequently that he ought to be answered in this Assise by the Defendants.

How this Case was argued by the Ld. Chancellor and the Judges.

This Case was as elaborately, substantially, and judicially argued by the Lord Chancellor, and by my Brethren the Judges, as I ever read or heard of any; and so in mine Opinion the Weight and Consequence of the Cause, both in *præsenti & perpetuis futuris temporibus* justly deserved; for though it was one of the shortest and least that ever we argued in this Court, yet was it the longest and weightiest that ever was argued in any Court, the shortest in Syllables, and the longest in Substance; the least for the Value (and yet not tending to the Right of that least) but the weightiest for the Consequent, both for the present, and for all Posterity. And therefore it was said, that those that had written *de fossilibus* did observe, that Gold hidden in the Bowels of the Earth, was in Respect of the Mass of the whole Earth, *parvum in magno*; but of this short Plea it might be truly said (which is more strange) that here was *magnum in parvo*. And in the Arguments of those that argued for the Plaintiff I specially noted, That albeit they spake according to their own Heart, yet they spake not out of their own Head and Invention: Wherein they followed the Counsel given in God's Book, *Interroga pristinam generationem* (for out of the old Fields must come the new Corn) *& diligenter investiga patrum memoriam*, and diligently search out the Judgments of our Forefathers, and that for divers Reasons: First on our own Part, *Hesterni enim sumus & ignoramus, & vita nostra sicut umbra super terram*; for we are but of yesterday, (and therefore had need of the Wisdom of those that were before us) and had been ignorant (if we had not received Light and Knowledge from our Forefathers) and our Days upon the Earth are but as a Shadow, in Respect of the old ancient Days and Times past, wherein the Laws have been by the Wisdom of the most excellent Men, in many Successions of Ages, by long and continual Experience (the Trial of Right and Truth) fined and refined, which no one Man (being of so short a Time) albeit he had in his Head the Wisdom of all the Men in the World, in any one Age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiorem legibus*; no Man ought to take

Job. 8. 8.

Co Lit. 97. b.

take upon him to be wiſer than the Laws. Secondly, in Reſpect of our Forefathers: *Iſti* (ſaith the Text) *docebunt te, & loquentur tibi, & ex corde ſuo proferunt eloquia*, they ſhall teach thee, and tell thee, and utter the Words of their Heart, without all Equivocation or mental Reſervation, they (I ſay) that cannot be daunted with Fear of any Power above them, nor be dazzled with the Applauſe of the popular about them, nor fretted with any Diſcontentment (the Matter of Oppoſition and Contradiction) within them, but ſhall ſpeak the Words of their Heart, without all Affection or Infection whatſoever.

Alſo in their Arguments of this Cauſe concerning an Alien, they told no ſtrange Hiſtories, cited no foreign Laws, produced no alien Precedents, and that for two Cauſes; the one, for that the Laws of *England* are ſo copious in this Point, as, God willing, by the Report of this Caſe ſhall appear; the other, leſt their Arguments concerning an Alien born, ſhould become foreign, ſtrange, and an Alien to the State of the Queſtion, which being *quæſtio juris* concerning Freehold and Inheritance in *England*, is only to be decided by the Laws of this Realm. And albeit I concurred with thoſe that adjudged the Plaintiff to be no Alien, yet do I find a mere Stranger in this Caſe, ſuch a one as the Eye of the Law (our Books and Book-caſes) never ſaw (as the Ears of the Law (our Reporters never heard of, nor the Mouth of the Law (for *Judex eſt lex loquens*) the Judges our Forefathers of the Law never taſted: I ſay, ſuch a one, as the Stomach of the Law, our exquiſite and perfect Records of Plead. Entries and Judgm. (that make equal and true Diſtribution of all Caſes in Queſtion) never digeſted. In a Word, this little Plea is a great Stranger to the Laws of *England*, as ſhall manifeſtly appear by the Reſolution of this Caſe. And now that I have taken upon me to make a Report of their Arguments, I ought to do the ſame as truly, fully, and ſincerely as poſſibly I can; howbeit, ſeeing that almoſt every Judge had in the Courſe of his Argument a peculiar Method, and I muſt only hold my ſelf to one, I ſhall give no juſt Offence to any, if I challenge that which of Right is due to every Reporter, that is, to reduce the Sum and Effect of all to ſuch a Method, as upon Conſideration had of all the Arguments, the Reporter himſelf thinketh to be fitteſt and cleareſt for the right Underſtanding of the true Reaſons and Cauſes of the Judgment and Reſolution of the Caſe in Queſtion.

The Method that the Reporter doth uſe.

In this Caſe five Things did fall into Conſideration. 1. *Ligeantia*. 2. *Leges*. 3. *Regna*. 4. *Alienigena*. 5. What legal Inconveniences would enſue on either Side.

What Things did fall into Conſideration in this Caſe.

1. Concerning Ligeance: 1. It was resolved what Ligeance was: 2. How many Kinds of Ligeances there were: 3. Where Ligeance was due: 4. To whom it was due: And lastly, How it was due.

2. For the Laws: 1. That Ligeance or Obedience of the Subject to the Sovereign is due by the Law of Nature: 2. That this Law of Nature is Part of the Laws of *England*: 3. That the Law of Nature was before any judicial or municipal Law in the World: 4. That the Law of Nature is immutable, and cannot be changed.

3. As touching the Kingdoms: How far forth by the Act of Law the Union is already made, and wherein the Kingdoms do yet remain separate and divided.

4. Of *Alienigena*, an Alien born: 1. What an Alien born is in Law: 2. The Division and Diversity of Aliens: 3. Incidents to every Alien. 4. Authorities in Law. 5. Demonstrative Conclusions upon the Premisses, that the Plaintiff can be no Alien.

5. Upon due Consideration had of the Consequent of this Case: What Inconveniences legal should follow on either Party.

And these several Parts I will in this Report pursue in such Order as they have been propounded; and 1st *de Ligeantia*.

The 1st general Part, What Ligeance is.

1. (*a*) Ligeance is a true and faithful Obedience of the Subject due to his Sovereign. This Ligeance and Obedience is an Incident inseparable to every Subject; for as soon as he is born he oweth by Birth-right Ligeance and Obedience to his Sovereign. *Ligeantia est vinculum fidei*: and *Ligeantia est quasi legis essentia. Ligeantia est Ligamentum, quasi ligatio mentium; quia sicut ligamentum est connexio articulorum & juncturar', &c.* As the Ligatures or Strings do knit together the Joints of all the Parts of the Body, so doth Ligeance join together the Sovereign and all his Subjects, *quasi uno ligamine. Glanvil*, who wrote in the Reign of *H.* 2. *lib.* 9. *cap.* 4. speaking of the Connexion which ought to be between the Lord and Tenant that holdeth by Homage faith, That *mutua debet esse domini & fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam*, and the Lord (saith he) ought to defend his Tenant. But between the Sovereign and the Subject there is without Comparison a higher and greater Connexion; for as the Subject oweth to the K. his true and faithful Ligeance and Obedience, so the Sovereign is to govern and protect his Subjects,

(*a*) Bacon's Discourse of Laws and Governm. 2d Part fo. 46, 47, &c. Co. Lit. 129. a.

regere

regere & protegere ſubditos ſuos; ſo as between the Sovereign and Subject there is *duplex & reciprocum ligamen*; *quia ſicut ſubditus regi tenetur ad obedientiam, ita rex ſubdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in ſe duplex ligamen.* And therefore it is holden in 20*H.*7, 8.*a.* that there is a Liege or Ligeance between the King and the Subject. And *Forteſcue, cap.*13. *Rex* (a) *ad tutelam legis corporum & bonorum erectus eſt.* And in the Acts of Parliament of 10*R.* 2.*c.* 5. & 11 *R.* 2. *cap.* 1. 14 *H.* 8. *cap.* 2, &c. Subjects are called Liege People; and in the Acts of Parliament in 34*H.*8.*c.*1. & 35*H.* 8. *cap.* 3, &c. the King is called the Liege Lord of his Subjects. And with this agreeth *M. Skeene* in his Book *de expoſitione verborum*, (which Book was cited by one of the Judges which argued againſt the Plaintiff) Ligeance is the mutual Bond and Obligation between the King and his Subjects, whereby Subjects are called his Liege Subjects, becauſe they are bound to obey and ſerve him, and he is called their Liege Lord, becauſe he ſhould maintain and defend them. Whereby it appeareth, that in this Point the Law of *England* and of *Scotland* is all one. Therefore it is truly ſaid that *protectio trahit ſubjectionem, & ſubjectio protectionem.* And hereby it plainly appeareth, that Ligeance doth not begin by the Oath in the Leet; for many Men owe true Ligeance that never were ſworn in a Leet, and the Swearing in a Leet maketh no (b) Denization, as the Book is adjudged in 14 *H.* 4. *fol.* 19.*b.* This Word Ligeance is well expreſſed by divers ſeveral Names or *Synonyma* which we find in our Books. Sometime it is called the Obedience or Obeyſance of the Subject to the King, *obedientia regi*, 9*E.*4. 7.*b.* 9 *E.* 4. 6. (c) 2 *R.*3.2.*a.* in the Book of Entries, *Ejectione firm'* 7, 14 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 8, &c. Sometime he is called a natural Liege Man that is born under the Power of the King, *ſub poteſtate Regis*, 4 *H.* 3. (d) Tit. *Dower. Vide* the Statute of 11 *E.* 3. *c.* 2. Sometimes Ligeance is called Faith, *Fides, ad fidem regis*, &c. *Bracton*, who wrote in the Reign of *H.* 3. *lib.* 5. *tractat' de exception'* c. 24. fol. 427. *Eſt etiam alia exceptio quæ competit ex perſona quærentis, propter defectum nationis, ut ſi quis alienigena qui fuit ad fidem Regis Franc'*, &c. And *Fleta* (which Book was made in the Reign of *E.* 1.) agreeth therewith; for *l.*6.*c.*47. *de except' ex omiſſione participis*, it is ſaid, *vel dicere potuit, qd' nihil juris clamare poterit tanquam particeps eo qd' eſt ad fidem Regis* Franciæ, *quia alienigenæ repelli debent in Angl' ab agendo, donec fuerunt ad fidem Reg' Angl'. Vide* 25*E.*3. *de natis ultra mare*, Faith and Ligeance of the King of *England*; & *Litt. l.* 2. *c. Homage*, ſaving the Faith that I owe to our Sov. Ld. the K. and *Glanv. l.*9.*c.*1. *Salva fide debita dom' Regi & hæredibus ſuis.* Sometimes Ligeance is called

(a) Cro. Arg. 64.

(b) Br. Deniz. 11 Poſtea 15. b.

(c) Br. Deniz. 8.

(d) 4 Hen. 3. itz. Dow. 179. Elleſmere's Poſtnari 13, 14. Jenk. Cent. 3.

(e) Lit. Sect. 85. Co. Lit. 64. b.

called Ligealty, 22 *Aſſ. Pl.* 25. By all which it evidently appeareth, that they that are born under the Obedience, Power, Faith, Ligealty, or Ligeance of the King, are natural Subjects, and no Aliens. So, as ſeeing now it doth appear what Ligeance is, it followeth in Order, that we ſpeak of the ſeveral Kinds of Ligeance. But herein we need to be very wary, for this Caveat the Law giveth, *ubi lex non diſtinguit nec nos diſtinguere debemus.*; and certainly *lex non diſting'*, but where *omnia membra dividentia* are to be found out and proved by the Law itſelf.

How many Kinds of Ligeances there be.

2. There is found in the Law 4 Kinds of Ligeances; the firſt is, *ligeantia naturalis*, *abſoluta*, *pura*, & *indefinita*, and this originally is due by Nature and Birthright, and is called *alta Ligeantia*, and he that oweth this is called *ſubditus natus.* The ſecond is called *Ligeantia acquiſita*, not by Nature but by Acquiſition or Denization, being called a Denizen, or rather Donaizon, becauſe he is *ſubditus datus.* The

Co. Lit. 129. a.

third is *Ligeantia localis*, wrought by the Law, and that is when an Alien that is in Amity cometh into *England*, becauſe as long as he is within *Engl.* he is within the King's Protection; therefore ſo long as he is there, he oweth unto the King a local Obedience or Ligeance, for that the one (as it hath been ſaid) draweth the other. The fourth is a legal Obedience, or Ligeance which is called legal, becauſe the municipal Laws of this Realm have preſcribed the Order and Form of it; and this to be done upon Oath at the Torn or Leet. The firſt, that is, Ligeance natural, &c. appeareth by the ſaid Acts of Parliament, wherein the King is called natural Liege Lord, and his People natural Liege Subjects; this alſo doth appear in the Indictments of Treaſon which of all other Things are the moſt curiouſly and certainly indited and penned) for in the Indictment of the Lord *Dacre*, in 26 *H.* 8. it is ſaid, *præd' Dominus Dacre debitum fidei & ligeant' ſuæ qd' præfato domino regi naturaliter & de jure impendere debuit, minime curans, &c.* And *Reginald Pool* was indicted in 30 *H.* 8. for committing Treaſon *contra dom' regem ſupremum & naturalem dominum ſuum.* And to this End were cited the Indictment of *Edw.* Duke of *Somerſet* in 5 *E.* 6. and many others both of ancient and later Times. But in the Indictment of Treaſon of *John Dethick* in 2 & 3 *Phil. & Mar.* it is ſaid *qd' præd' Johannes machinans, &c. prædict' dominum Philippum & dominam Mariam ſupremos dominos ſuos*, and omitted (*naturales*) becauſe K. *Philip* was not his natural Liege Lord. And of this Point more ſhall be ſaid when we ſpeak of local Obedience. The 2d is *Ligeant' acquiſita*, or Denization; and this in the Books and Records of the Law appeareth to be threefold: 1. Abſolute, as the com. Denizations be, to them and their

Ligeantia naturalis. Co. Lit. 129. a.

Ligeantia acquiſita. Co. Lit. 129. a.

Heirs,

Heirs, without any Limitation or Reſtraint: 2. Limited, as when the King doth grant Letters of Denization to an Alien, and to the Heirs (*a*) Males of his Body, as it appeareth in 9*E.*4. *fol.*7. in *Baggot*'s Caſe; or to an Alien for Term of his Life, as was granted to *J. Reynel*, 11 *H.* 6. 3. It may be granted upon (*b*) Condition; for (*c*) *cujus eſt dare, ejus eſt diſponere*, whereof I have ſeen divers Precedents. And this Denization of an Alien may be effected three Manner of Ways; by Parliament, as it was in 3 *H.* 6. 55. in *Dower*: By Letters Patents, as the uſual Manner is; and by Conqueſt, as if the King and his Subjects ſhould conquer another Kingdom or Dominion, as well *Antenati* as *Poſtnati*, as well they which fought in the Field, as they which remained at Home, for Defence of their Country, or employed elſewhere, are all Denizens of the Kingdom or Dominion conquered. Of which Point more ſhall be ſaid hereafter.

(*a*) 9 E. 4. 8.

(*b*) Co. Lit. 129. a. 274. b.
(*c*) 2 Co. 7. b. 4 Inſt. 192. 2 Sideſ. 73. Hard. 412. Lit. Rep. 128.

3. Concerning the local Obedience it is obſervable, that as there is a local Protection on the King's Part, ſo there is a (*d*) local Ligeance of the Subjects Part. And this appeareth in 4 *Mar. Br.* 32. (*e*) & 3 & 4 *Phil. & Mar. Dyer* 144. *Sherley* a *French* Man, being in Amity with the King, came into *England*, and joined with divers Subjects of this Realm in Treaſon againſt the King and Queen, and the Indictment concluded (*f*) *contra ligeant' ſuæ debitum*; for he owed to the King a local Obedience, that is, ſo long as he was within the King's Protection; which local Obedience being but momentary and incertain, is ſtrong enough to make a natural Subject, for if he hath Iſſue here, that Iſſue is (*g*) a natural born Subject; *a fortiori* he that is born under the natural and abſolute Ligeance of the King (which as it hath been ſaid, is *alta Ligeantia*) as the Pl. in the Caſe in Queſtion was, ought to be a natural born Subject; for *localis ligeantia eſt ligeantia infima, & minima, & maxima incerta*. And it is to be obſerved, that it is *nec cælum, nec ſolum*, neither the Climate nor the Soil, but *ligeantia* and *obedientia* that make the Subject born; for if Enemies ſhould come into the Realm, and poſſeſs a Town or Fort, and have Iſſue there, that Iſſue is no Subject to the King of *England*, tho' he be born upon his Soil, and under his Meridian, for that he was not born under the Ligeance of a Subject, nor under the Protection of the King. And concerning this local Obedience, a Precedent was cited in *Hillar.* 36 *Eliz.* when *Stephano Ferrara de Gama*, and *Emanuel Lewes Tinco*, two *Portugals* born, coming into *England* under Queen *Elizabeth*'s ſafe Conduct, and living here under her Protection joined with Doctor *Lopez* in Treaſon within

Ligeantia localis.
(*d*) Co. Lit. 129. a.
(*e*) 8 N.C. 487.
(*f*) Hob. 271. Co. Lit. 129. a. Dyer 145 pl 62. Cawly 184. 3 Inſt. 11.
(*g*) Co. Lit. 8. a.

this

this Realm againſt her Majeſty; and in this Caſe 2 Points were reſolved by the Judges. Firſt, that their Indictment ought to begin, that they intended Treaſon *contra dominam reginam, &c.* omitting theſe Words *(naturalem domin' ſuam)* and ought to conclude *contra (a) ligeant' ſuæ debitum.* But if an *(b)* alien Enemy come to invade this Realm, and be taken in War, he cannot be indicted of Treaſon; for the Indictment cannot conclude *contra ligeant' ſuæ debitum*, for he never was in the Protection of the King, nor ever owed any Manner of Ligeance unto him, but Malice and Enmity, and therefore he ſhall be put to Death by martial Law. And ſo it was in *anno* 15 *H.* 7. in *Perkin Warbeck*'s Caſe, who being an Alien born in *Flanders*, feigned himſelf to be one of the Sons of *Edward* the fourth, and invaded this Realm with great Power, with an Intent to take upon him the Dignity Royal: But being taken in the War, it was reſolved by the Juſtices, that he could not be puniſhed by the Common Law, but before the Conſtable and Marſhal (who had ſpecial Commiſſion under the great Seal to hear and determine the ſame according to martial Law) he had Sentence to be drawn, hanged, and quartered, which was executed accordingly. And this appeareth in the Book of *Griſfeth* Attorney General, by an Extract out of the Book of *Hobart*, Attorney General to King *H.* 7.

(a) 3 Inſt. 11. Dy. 145. pl. 62. Cawly 185. Hob. 271. Co. Lit. 129. a. (b) 3 Inſt. 5. 11. (c) Bacon's Hiſt. H. 7. fo. 11.

Ligeantia legalis.

4. Now are we to ſpeak of legal Ligeance, which in our Books, *viz.* 7 *E.* 2. Tit. *Avowry* 211. 4 *E.* 3. *fol.* 42. 13 *E.* 3. Tit. *Avowry* 120, *&c.* is called Suit Royal, becauſe that the Ligeance of the Subject is only due unto the King. This Oath of Ligeance appeareth in *Britton*, who wrote in *anno* 5 *E.* 1. *cap.* 29. (and is yet commonly in Uſe to this Day in every Leet) and in our Books; the Effect whereof is: *You ſhall ſwear, that from this Day forward, you ſhall be true and faithful to our Sovereign Lord King* James, *and his Heirs, and Truth and Faith ſhall bear of Life and Member, and terrene Honour, and you ſhall neither know nor hear of any Ill or Damage intended unto him, that you ſhall not defend. So help you Almighty God.* The Subſtance and Effect hereof is (as hath been ſaid) due by the Law of Nature, *ex inſtitutione naturæ*, as hereafter ſhall appear: The Form and Addition of the Oath is, *ex proviſione hominis.* In this Oath of Ligeance five Things were obſerved. 1. That for the Time it is indefinite, and without Limit, *from this Day forward*; Secondly, Two excellent Qualities are required, that is to be *true and faithful*; 3. To whom, *to our Sovereign Lord the King and his Heirs:* (And albeit *Britton* doth ſay, to the King of *England*, that is ſpoken *propter excellentiam*, to deſign the Perſon, and not to

Co. Lit. 68. b.

Co. Lit. 68. b.

to confine the Ligeance; for a Subject doth not ſwear his Ligeance to the King, only as King of *England*, and not to him as King of *Scotland*, or of *Ireland*, &c. but generally to the King;) 4. In what Manner, *and Faith and Troth ſhall bear*, &c. *of Life and Member*, that is, until the Letting out of the laſt Drop of our deareſt Heart Blood. 5. Where and in what Places ought theſe Things to be done, in all Places whatſoever; for, *you ſhall neither know nor hear of any Ill or Damage*, &c. that you ſhall not defend, &c. ſo as natural Ligeance is not circumſcribed within any Place. It is holden 12 *H.* 7. 18. *b.* That he that is ſworn in the Leet, is ſworn to the King for his Ligeance, that is, to be true and faithful to the King; and if he be once ſworn for his Ligeance, he ſhall not be ſworn again during his Life. And all Letters Patents of Denization be, that the Patentee ſhall behave himſelf *tanquam verus & fidelis ligeus domini Regis*. And this Oath of Ligeance at the Tourn and Leet was firſt inſtituted by King *Arthur*; for ſo I read, *Inter leges Sancti Edwardi Regis ante conqueſtum* 3. *cap.* 35. *Et quod omnes principes & comites, proceres, milites, & liberi homines debent jurare, &c. in Folkemote, & ſimiliter omnes proceres regni, & milites & liberi homines univerſi totius regni Britann' facere debent in pleno Folkemote fidelitatem domino Regi, &c. Hanc legem invenit Arthurus qui quondam fuit inclytiſſimus Rex Britonum, &c. hujus legis authoritate expulit Arthurus Rex Saracenos & inimicos a regno, &c. & hujus legis authoritate Etheldredus Rex uno & eodem die per univerſum regnum Danos occidit. Vide Lambert inter Regis Edwardi, &c. fol.* 135 & 136. By this it appeareth, when and from whom this legal Ligeance had his firſt Inſtitution within this Realm. *Ligeantia* in the Caſe in Queſtion is meant and intended of the firſt Kind of Ligeance, that is, of Ligeance natural, abſolute, &c. due by Nature and Birthright. But if the Plaintiff's Father be made a Denizen, and purchaſe Lands in *England* to him and his Heirs, and die ſeiſed, this Land ſhall never deſcend to the Plaintiff, for that the King by his Letters Patents may make a Denizen, but cannot naturalize him to all Purpoſes, as an Act of Parliament may do; neither can Letters Patents make any inheritable in this Caſe, that by the Common Law cannot inherit. And herewith agreeth 36 *H.* 8. Tit. *Denizen Br.* 9.

Co. Lit. 68. b.

Co. Lit. 68. b. 172. b.

Co. Lit. 8. a.

Homage in our Books is twofold, that is to ſay, *Homagium Ligeum*, and that is as much as Ligeance, of which *Bracton* ſpeaketh, *l.* 2. *c.* 35. *f.* 79. *Soli Regi debet' ſine domin', ſeu ſervit'* and

Homage is twofold. Co. Lit. 65. b. Vaugh. 279.

Vaugh. 279. and there is *Homagium feodale*, which hath his Original by Tenure. In *Fit. Nat. Brev.* 269. there is a Writ for Reſpiting of this later Homage (which is due *ratione feodi ſive tenur'*:) *Sciatis quod reſpectuamus homagium nobis de terr' & tenementis quæ tenentur de nobis in capite debit'*. But *Homagium ligeum*, *i. Ligeantia*, is inherent and inſeparable, and cannot be reſpited.

Where natural Ligeance is due. 3. Now are we come to (and almoſt paſt) the Conſideration of this Circumſtance, where natural Ligeance ſhould be due: For by that which hath been ſaid it appeareth, that Ligeance, and Faith and Truth, which are her Members and Parts, are Qualities of the Mind and Soul of Man, and cannot be circumſcribed within the Predicament of *ubi*, for that were to confound Predicaments, and to go about to drive (an abſurd and impoſſible Thing) the Predicament of Quality into the Predicament of *ubi*. *Non reſpondetur ad hanc quæſtionem, ubi eſt?* to ſay, *Verus & fidelis ſubditus eſt; ſed ad hanc quæſtionem, qualis eſt? Recte & apte reſpondetur, verus & fidelis ligeus, &c. eſt.* But yet for the greater Illuſtration of the Matter, this Point was handled by it ſelf, and that Ligeance of the Subject was of as great an Extent and Latitude, as the Royal Power and Protection of the King, *& e converſo*. It appeareth by the Stat. of 11 *H.* 7. *cap.* 1. and 2 *E.* 6. *cap.* 2. that the Subjects of *England* are bound by their Ligeance to go with the King, *&c.* in his Wars, as well within the Realm, *&c.* as without. And therefore we daily ſee, that when either *Ireland*, or any other of his Majeſty's Dominions, be infeſted with Invaſion or Inſurrection, the King of *England* ſendeth his Subjects out of *England*, and his Subjects out of *Scotland* alſo into *Ireland*, for the Withſtanding or Suppreſſing of the ſame, to the End his Rebels may feel the Swords of either Nation. And ſo may his Subjects of *Gernſey*, *Jerſey*, *Iſle of Man*, *&c.* be commanded to make their Swords good againſt either Rebel or Enemy, as Occaſion ſhall be offered; whereas if natural Ligeance of the Subjects of *England* ſhould be local, that is, confined within the Realm of *England* or *Scotland*, *&c.* then were not they bound to go out of the Continent of the Realm of *England* or *Scotland*, *&c.* And the Opinion of *Thirninge* in 7 *H.* 4. Tit. *Protect'* 100. is thus to be underſtood, that an *Engliſh* Subject is not compellable to go out of the Realm without Wages, according to the Statutes of 1 *E.* 3. *c.* 7. 18 *E.* 3. *c.* 8. 18 *H.* 6. *c.* 19, *&c.* 7 *H.* 7. *c.* 1. 3 *H.* 8. *c.* 5, *&c.* In *ann.* 25 *E.* 1. *Bigot* Earl of *Norfolk* and *Suffolk*, and Earl Marſhal of *England*, and *Bohun* Earl of *Hereford* and high Conſtable of *England*, did exhibit a Petition to the King in *French* (which I have ſeen antiently recorded) on

2 Inſt. 47, 48, 528.

2 Inſt. 528.

the Behalf of the Commons of *England*, concerning how and in what Sort they were to be employed in his Majesty's Wars out of the Realm of *England*; and the Record saith, that, *post multas & varias altercationes*, it was resolved, they ought to go but in such Manner and Form as after was declared by the said Statutes, which seem to be but declarative of the Common Law. And this doth plentifully and manifestly appear in our Books, being truly and rightly understood. In 3 *H.* 6. Tit. *Protection* 2. one had the Benefit of a Protection, for that he was sent into the King's Wars *in comitiva* of the Protector; and it appeareth by the Record, and by the Chronicles also, that this Employm. was into *France*; the greatest Part thereof then being under the King's actual Obedience, so as the Subjects of *England* were employed into *France* for the Defence and Safety thereof: In which Case it was observed, that seeing the Protector, who was *Prorex*, went, the same was adjudged a Voyage Royal, 8 *H.* 6. *fol.* 16. *b.* the Lord *Talbot* went with a Company of *Englishmen* into *France*, then also being for the greatest Part under the actual Obedience of the King, who had the Benefit of their Protections allowed unto them. And here were observed the Words of the Writ in the Register, *fol.* 88. where it appeareth that Men were employed in the King's Wars out of the Realm *per præceptum nostrum*, and the usual Words of the Writ of Protection be in *obsequio nostro*. *32 *H.* 6. *fol.* 1. *a.* it appeareth, that *Englishmen* were pressed into *Guyan*, †44 *E.* 3. 12. *c.* into *Gascoyne* with the Duke of *Lancaster*, 17 *H.* 6. Tit. *Protection*, into ‖ *Gascoyn* with the Earl of *Huntington*, Steward of *Guyan*, 11 *H.* 4. 7. *a.* into (*a*) *Ireland*, and out of this Realm with the Duke of *Glouceſter* and the Lord *Knolles*: *Vide* (*b*) 19 *H.* 6. 35. *b.* And it appeareth in 19 *Ed.* 2. Tit. *Avowry* 224. 26 *Ass.* 66. 7 *H.* 4. 19, &c. that there was *forinsecum servitium*, foreign Service, which *Bracton*, *fol.* 36. calleth *regale servitium*; and in *Fitz. N. B.* 28. (*c*) that the King may send Men to serve him in his Wars beyond the Sea. But thus much (if it be not in so plain a Case too much) shall suffice for this Point for the King's Power, to command the Service of his Subjects in his Wars out of the Realm, whereupon it was concluded, that the Ligeance of a natural-born Subject was not local, and confined only to *England*. Now let us see what the Law saith in Time of Peace, concerning the King's Protection and Power of Command, as well without the Realm, as within, that his Subjects in all Places may be protected from Violence, and that Justice may equally be administered to all his Subjects.

2 Inst. 528.

Co. Lit. 130. b.

Co. Lit. 130. b.

Fitz. Protect. 5. Br. Protect. 48.

* Fitz. Protect. 13.
† Fitz. Protect. 35. Br. Protect. 24.
‖ Fitz. Protect. 56.
(*a*) Fitz. Protect. 24. Co. Lit. 130. b. Br. Protect. 34.
(*b*) Fitz. Protect. 8. Br. Protect. 49.
(*c*) F. N. B. 28.

In

In the Regiſter *fol.* 25. *b. Rex univerſis & ſingulis admirall', caſtellan', cuſtodibus caſtrorum, villar', & aliorum fortalitiorum præpoſitis, viccecom. majoribus, cuſtumariis, cuſtodil' portuum, & alior' locor' maritimor' ballivis, miniſtr', & aliis fidel' ſuis, tam in tranſmarinis qm' in ciſmarinis partib' ad quos, &c. ſalutem. Sciatis, qd' ſuſcepimus in protectionem & defenſion' noſtram, necnon ad ſalvam & ſecuram gardiam noſtram W. veniendo in regnum noſtrum Angl', & poteſtatem noſtram, tam per terram quam per mare cum uno valetto ſuo, ac res ac bona ſua quæcunque ad tractand' cum dilecto noſtro & fideli L. pro redemptione priſonarii ipſius L. infra regnum & poteſtatem noſtram præd' per ſex menſes morando & exinde ad propria redeundo. Et ideo, &c. quod ipſum W. cum valetto, rebus & bonis ſuis præd' veniendo in regn' & poteſtat' noſtram præd' tam per terr' quam per mare ibid' aut prædict' eſt ex cauſa antedicta morando, & exinde ad propria redeundo, manuteneatis, protegatis, & defendatis; non inferentes eis, &c. ſeu gravamen. Et ſi quid eis forisfactum, &c. reformari faciatis. In cujus, &c. per ſex menſes duratur. T. &c.* In which Writ 3 Things are to be obſerved. 1. That the K. hath *fidem & fideles in partib' tranſmarinis.* 2. That he hath *protection' in partib' tranſmarinis.* 3. That he hath *poteſtatem in partibus tranſmarinis.* In the Regiſter *fo.* 26, *Rex univerſis & ſingulis admirallis, caſtellanis, cuſtodibus caſtrorum, villarum, & aliorum fortaliciorum præpoſitis, vicecom' majoribus, cuſtumariis, cuſtodil' portuum, & alior' locor' maritimorum ballivis, miniſtris, & aliis fidelibus ſuis, tam in tranſmarinis quam in ciſmarinis partibus ad quos, &c. ſalutem. Sciatis quod ſuſcepimus in protectionem & defenſionem noſtram, necnon in ſalvum & ſecurum conductum noſtr' I. valettum P. & L. Burgenſium de Lyons obſidum noſtrorum, qui de licentia noſtra ad partes tranſmarinas profecturus eſt, pro finantia magiſtrorum ſuorum prædict' obtinenda vel deſerenda, eundo ad partes prædictas ibidem morando, & exinde in Angl' redeundo. Et ideo vobis mandamus, quod eidem I. eundo ad partes præd' ibidem morando, & exinde in Angl' redeundo, ut præd' eſt, in perſona, bonis, aut rebus ſuis, non inferatis, ſeu quantum in vobis eſt ab aliis inferri permittatis injuriam moleſtiam, &c. aut gravamen. Sed eum potius ſalvum & ſecurum conductum, cum per loca paſſus, ſeu diſtrictus veſtros tranſierit, & ſuper hoc requiſiti fueritis, ſuis ſumptibus habere faciatis. Et ſi quid eis forisfactum fuerit, &c. reformari faciatis. In cujus, &c. per tres ann' durat' T. &c.* And certainly this was, when *Lyons* in *France* (bordering upon *Burgundy*, an antient Friend to *Engl.*) was under the actual Obedience of K. *Hen.* 6. For the King commanded *fidelibus ſuis*, his faithful Magiſtrates there, that

that if any injury were there done, it ſhould be by them reformed and redreſſed, and that they ſhould protect the Party in his Perſon and Goods in Peace. In the Regiſter, fol. 26. two other Writs: *Rex omnibus ſeneſchallis, majoribus, juratis, paribus, præpoſitis, ballivis & fidelibus ſuis in ducatu Aquitaniæ ad quos*, &c. *ſalutem. Quia delicti nobis* T. & A. *cives civitat' Burdegal' coram nobis in Cancellar' noſt' Angl' & Aquitan' jura ſua proſequentes, & metuentes ex veriſimilibus conjecturis per quoſdam ſibi comminantes tam in corpore quam in rebus ſuis, ſibi poſſe grave damnum inferri, ſupplicaverunt nobis ſibi de protectione regia providere: nos volentes dictos* T. & A. *ab oppreſſionibus indebitis præſervare, ſuſcepimus ipſos* T. & A. *res ac juſtas poſſeſſiones & bona ſua quæcunque in protectionem & ſalvam gardiam noſtram ſpecialem. Et vobis & cuilibet veſtrum injungimus & mandamus, quod ipſos* T. & A. *familias, res ac bona ſua quæcunque a violentiis & gravaminibus indebitis defendatis, & ipſos in juſtis poſſeſſionibus ſuis manuteneatis. Et ſi quid in præjudicium hujus protectionis ſal' gard' noſtr' attentatum inveneritis, ad ſtatum debitum reducatis. Et ne quis ſe poſſit per ignorantiam excuſare præſentem protectionem & ſalvam gardiam noſtram faciatis in locis de quibus requiſiti fueritis infra diſtrict' veſtrum publice intimari, inhibentes omnibus & ſingulis ſub pœnis gravibus, ne dictis* A. & T. *ſeu famulis ſuis in perſonis ſeu rebus ſuis, injuriam, moleſtiam, damnum aliquod inferant ſeu gravamen: Et penocellas noſtras in locis & bonis ipſorum* T. & A. *in ſignum protectionis & ſal' gard' memorat', cum ſuper hoc requiſiti fueritis, apponatis. In cujus*, &c. *Dat' in Palatio noſtro Weſtm' ſub magni ſigilli teſtimonio, ſexto die Auguſt' anno* 44 *E.* 3. *Rex univerſis & ſingulis ſeneſchallis, conſtabular', caſtellanis præpoſit', miniſt', & omnib' ballivis & fidelibus ſuis in dominio noſtro Aquican' conſtitutis ad quos*, &c. *ſalut'. Volentes* G.&R. *uxor' ejus favore proſequi gratioſe, ipſos* G.&R. *homines & familias ſuas, ac juſtas poſſeſſiones, & bona ſua quæcunque, ſuſcepimus in protectionem & defenſionem noſtram, necnon in ſalvam gardiam noſtram ſpecialem. Et ideo vobis & cuilibet veſtrum injungimus & mandamus, quod ipſos* G.&R. *eorum homines, familias ſuas, ac juſtas poſſeſſiones & bona ſua quæcunq; manuteneatis, protegatis, & defendatis: non inferentes eis ſeu quantum in vobis eſt ab aliis inferri permittentes, injuriam, moleſtiam, damnum, violentiam, impedimentum aliquod ſeu gravamen. Et ſi quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis ſine dilatione corrigi, & ad ſtatum debitum reduci faciatis, prout ad vos & quemlibet veſtrum noveritis pertinere: penocellas ſuper domibus ſuis in ſignum præſentis ſalvæ gardiæ noſtræ (prout moris erit facientes. In cujus &c. per unum annum duratur'.* T. &c.

By all which it is manifeſt, that the Protection and Government of the King is general over all his Dominions and Kingdoms, as well in Time of Peace by Juſtice, as in Time of War by the Sword, and that all be at his Command, and under his Obedience. Now ſeeing Power and Protection draweth Ligeance, it followeth, that ſeeing the King's Power, Command and Protection extendeth out of *England*, that Ligeance cannot be local, or confined within the Bounds thereof. He that is abjured the Realm, *Qui abjurat regnum amittit regnum, ſed non regem, amittit patriam, ſed non patrem patriæ:* for notwithſtanding the Abjuration, he oweth the King his Ligeance, and he remaineth within the King's Protection; for the King may Pardon and Reſtore him to his Country again. So ſeeing that Ligeance is a Quality of the Mind, and not confined within any Place; it followeth, that the Plea that doth confine the Ligeance of the Plaintiff to the Kingdom of *Scotland*, *Infra ligeantiam regis regni ſui* Scotiæ, *& extra ligeantiam regis regni ſui* Angliæ, whereby the Defendants do make one local Ligeance for the natural Subjects of *England*, and another local Ligeance for the natural Subjects of *Scotland*, is utterly unſufficient, and againſt the Nature and Quality of natural Ligeance, as often it hath been ſaid.

Cawly 139.

And *Coke*, Chief Juſtice of the Court of Common Pleas, cited a ruled Caſe out of *Hingham*'s Reports, *Tempore E.* 1. which in his Argument he ſhewed in Court written in Parchment, in an ancient Hand of that Time. *Conſtance de* N. brought a Writ of Ayel againſt *Roger de Cobledike*, and others, named in the Writ, and counted that from the Seiſin of *Roger* her Grandfather it deſcended to *Gilbert* his Son, and from *Gilbert* to *Conſtance*, as Daughter and Heir. Sutton *dit, Sir, el ne doit eſte reſponde, pur ceo que el eſt Francois & nient de la ligeance ne a la foy Dengliterre, & demand judgement ſi el doit action aver:* that is, ſhe is not to be anſwered, for that ſhe is a *French* Woman, and not of the Ligeance, nor of the Faith of *England*, and demand Judgment, if ſhe this Action ought to have. *Bereford* (then Chief Juſtice of the Court of Common Pleas) by the Rule of the Court diſalloweth the Plea, for that it was too ſhort, in that it referred Ligeance and Faith to *England*, and not to the King: And thereupon *Sutton* ſaith as followeth; *Sir, nous voilomus averre que el ne eſt my de la ligeance Dengliterre, ne a la foy le Roy, & demand judgement, & ſi vous agardes que el doit eſte reſponde, nous dirromus aſſers:* that is, Sir, we will aver, that ſhe is not of the Ligeance of *England*, nor of the Faith of the King, and demand Judgment, &c.

Cobledike's Caſe temp. E. 1. reported by Hingham.

Elleſmere's Poſtnati 91, 92.

Which

Which later Words of the Plea (*nor of the Faith of the King*) referred Faith to the King indefinitly and generally, and reſtrained not the ſame to *England*, and thereupon the Plea was allowed for good, according to the Rule of the Court: For the Book ſaith, that afterward the Plaintiff deſired leave to depart from her Writ. The Rule of that Caſe of *Cobledike*, did (as *Coke* Chief Juſtice ſaid) over-rule this Caſe of *Calvin*, in the very Point now in Queſtion; for that the Plea in this Caſe doth not refer Faith or Ligeance to the King indefinitely and generally, but limiteth and reſtraineth Faith and Ligeance to the Kingdom: *Extra ligeantiam regis regni ſui* Angliæ, out of the Ligeance of the King of his Kingdom of *England*: which afterwards the Lord Chancellor and the Chief Juſtice of the King's Bench, having Copies of the ſaid ancient Report, affirmed in their Arguments. So as this Point was thus concluded, *Quod ligeantia naturalis nullis clauſtris coercetur, nullis metis refrænatur, nullis finibus premitur.*

4 & 5. By that which hath been ſaid it appeareth, That this Ligeance is due only to the King; ſo as therein the Queſtion is not now, *cui, ſed quomodo debetur*. It is true, that the King hath two Capacities in him: one a natural Body, being deſcended of the Blood Royal of the Realm; and this Body is of the Creation of Almighty God, and is ſubject to Death, Infirmity, and ſuch like; the other is a Politick Body or Capacity, ſo called, becauſe it is framed by the Policy of Man (and in 21 *E.* 4. 39. b. is called a myſtical Body;) and in this Capacity the King is eſteemed to be immortal, inviſible, not ſubject to Death, Infirmity, Infancy, (*a*) Nonage, &c. *Pl. Com. in the caſe of the Lord Barkley* 238. & *in the caſe of the Dutchy* 213. 6 *E.* 3. 291. & 26 *Aſſ. pl.* 54. Now ſeeing the King hath but one Perſon, and ſeveral Capacities, and one Politick Capacity for the Realm of *England*, and another for the Realm of *Scotland*, it is neceſſary to be conſidered, to which Capacity Ligeance is due. And it was reſolved, that it was due to the natural Perſon of the King (which is ever accompanied with the Politick Capacity, and the Politick Capacity as it were appropriated to the natural Capacity) and it is not due to the Politick Capacity only, that is, to his Crown or Kingdom diſtinct from his natural Capacity, and that for divers Perſons. Firſt, every Subject (as it hath been affirmed by thoſe that argued againſt the Plaintiff) is preſumed by Law to be ſworn to the King, which is to his natural Perſon, and likewiſe the King is ſworn to his Subjects (as it appeareth in *Bracton lib.* 3. *de actionibus, cap.* 9. *fol.* 107.) which Oath he taketh in his natural

To whom and how Ligeance is due.

(*a*) Poſtea 12. a. Co. Lit. 43. a. 5. Co. 27. a. Plowd. 213. a. 221. a. 364. b. 26 Aſſ. 54. Fitz. Enfant 15. Br. Age 34.

Perſon: for the Politick Capacity is inviſible and immortal; nay, the Politick Body hath no Soul, for it is framed by the Policy of Man. 2. In all Indictments of Treaſon, when any do intend or compaſs *mortem & deſtructionem Domini Regis* (which muſt needs be underſtood of his natural Body, for his Politick Body is Immortal, and not ſubject to Death) the Indictment concludeth, *contra* (*a*) *ligeantiæ ſuæ debitum*; *ergo*, the Ligeance is due to the natural Body. *Vid. Fit. Juſtice of Peace* 53. & *Pl. Com.* 384. *in the Earl of Leiceſter's Caſe.* 3. It is true, that the King *in genere* dieth not, but, no Queſtion, *in individuo* he dieth: as for Example, *H.* 8. *E.* 6. *&c.* and Queen *Elizabeth* died, otherwiſe you ſhould have many Kings at once. *In* 2 & 3 *Ph. & Mar. Dyer* 128. one (*b*) *Conſtable* diſperſed divers Bills in the Streets in the Night, in which was written, that K. *E.* 6. was alive and in *France*, *&c.* and in *Coleman* Street in *London*, he pointed to a young Man, and ſaid that he was King *Edward* the Sixth. And this being ſpoken *de individuo* (and accompanied with other Circumſtances) was reſolved to be High Treaſon; for the which *Conſtable* was attainted and executed. 4. A (*c*) Body Politick (being inviſible) can as a Body Politick neither make or take Homage: *Vide* 33 *H.* 8. *Tit. Fealty*, *Brook* 15. 5. *In fide*, in Faith or Ligeance nothing ought to be feigned, but ought to be *ex fide non ficta*. 6. The King holdeth the Kingdom of *England* by Birth-Right Inherent, by deſcent from the Blood Royal, whereupon Succeſſion doth attend; and therefore it is uſually ſaid, to the King, his Heirs and Succeſſors, wherein Heirs is firſt named, and Succeſſors is attendant upon Heirs. And yet in our ancient Books Succeſſion and Succeſſor are taken for Hereditance and Heirs. *Bract. l.* 2. *de acquirendo rerum Dominio*, *c.* 29. *Et ſciend' eſt, quod hæreditas eſt ſucceſſio in univerſum jus quod defunctus anteceſſor habuit, ex cauſa quacunque acquiſitionis vel ſucceſſionis, & alibi affinitatis jure nulla ſucceſſio permittitur.* But the Title is by Deſcent; by Queen *Elizabeth*'s Death the Crown and Kingdom of *England* deſcended to his Majeſty, and he was fully and abſolutely thereby King, without any eſſential Ceremony or Act to be done *ex poſt facto*: for Coronation is but a Royal Ornament and Solemnization of the Royal Deſcent, but no Part of the Title. In the firſt Year of his Majeſty's Reign, before his Majeſty's Coronation, *Watſon* (*d*) and *Clerke*, Seminary Prieſts, and others, were of Opinion, that his Majeſty was no complete and abſolute King before his Coronation, but that Coronation did add a Confirmation and Perfection to the Deſcent; and therefore (obſerve their damnable and damned Conſequent) that they by Strength

(*a*) Antea 6. a. b. 3 Inſt. 11. Hob. 271. Dy. 143. pl. 62. Cawly 185. Co. Lit. 129 a.

(*b*) This Caſe is not in the Book at large, but is in the Abrigdment of Dy. fo. 32. Stow's Abridg. p. 1062, 1064. Speed's Chron. p. 1127. col. 2. num. 100.

(*c*) 10 Co. 37. b. Co. Lit. 66. b. 4 Co. 11. a.

(*d*) 3 Inſt. 7.

Strength and Power might before his Coronation take him and his Royal Iſſue into their Poſſeſſion, keep him Priſoner in the *Tower*, remove ſuch Counſellors and great Officers as pleaſed them, and conſtitute others in their Places, &c. And that theſe and others of like Nature could not be Treaſon againſt his Majeſty, before he were a crowned King. But it was clearly reſolved by all the Judges of *England*, that preſently by the Deſcent his Majeſty was completely and abſolutely King, without any eſſential Ceremony or Act to be done *ex poſt facto*, and that (*a*) Coronation was but a Royal Ornament, and outward Solemnization of the Deſcent. And this appeareth evidently by infinite Precedents and Book-Caſes, as (taking one Example in a Caſe ſo clear for all) King *Henry* VI. was not crowned until the eighth Year of his Reign, and yet divers Men before his Coronation were attainted of Treaſon, of Felony, &c. and he was as abſolute and compleat a King, both for Matters of Judicature, as for Grants, &c. before his Coronation, as he was after, as it appeareth in the Reports of the 1, 2, 3, 4, 5, 6, and ſeven Years of the ſame King. And the like might be produced for many other Kings of this Realm, which for Brevity in a Caſe ſo clear I omit. By which it manifeſtly appeareth, that by the Laws of *England* there can be no *interregnum* within the ſame. If the King be ſeiſed of Land by a defeaſible Title, and dieth ſeiſed, this Deſcent ſhall Toll the Entry of him that Right hath, as it appeareth by 9 (*b*) *E.* 4. 51. But if the next King had it by Succeſſion, that ſhould take away no Entry, as it appeareth by *Littleton fol.* 97. If a Diſſeiſor of an Infant convey the Land to the King, who dieth ſeiſed, this Deſcent taketh away the Entry of the Infant, as it is ſaid in 34 *H.* 6. *fol.* 34. (*c*) 45 *lib. Aſſ. pl.* 6. *Plow. Com.* 234. where the Caſe was, the King *H.* 3. gave a Manor to his Brother the Earl of *Cornwal* in Tail (at what Time the ſame was a Fee-ſimple conditional) King *H.* 3. died, the Earl before the Statute of *Donis conditional* (having no Iſſue) by Deed exchanged the Manor with warranty for other Lands in Fee, and dyed without Iſſue, and the Warranty and Aſſets deſcended upon his Nephew King *Edward* I. and it was adjudged, that this Warranty and Aſſets, which deſcended upon the natural Perſon of the King, barred him of the Poſſibility of Reverter. In the Reign of *Ed.* 2. the *Spencers*, the Father and the Son, to cover the Treaſon hatched in their Hearts, invented this damnable and damned Opinion, That Homage and Oath of Ligeance was more by Reaſon of the King's Crown (that is, of his Politick Capacity) than by reaſon of the Perſon of the

(*a*) 3 Inſt. 7.

(*b*) 4 Co. 58. b.

(*c*) 10 Co. 96 b. Co. Lit. 19. b. 370. b. Plowd. 234. a. 553. b. Fitz. Garranty 68. Br. Aſſets per diſcent 31. Br. Tail 34. Br. Prærog 52. Br. ſerch pur le Roy 5. Br. Garranty 52. 9. Co. 132. b.

King, upon which Opinion they inferred execrable and deteſtable Conſequences: 1. If the King do not demean himſelf by reaſon in the Right of his Crown, his Lieges be bound by Oath to remove the King, 2. Seeing that the King could not be reformed by Suit of Law, that ought to be done by the Sword; 3. That his Lieges be bound to govern in Aid of him, and in Default of him. All which were condemned by two Parliaments, one in the Reign of *Ed.* 2. called *Exilium Hugonis le Spencer*, and the other in *Ann.* 1 *Ed.* 3. *c.* 1.

Pryn's Sovereign Power of Parliament. 2 Part. pa. 43. Cro. Arg. 64.

Bracton lib. 2. *de acquirendo rerum Dominio, c.* 24. *f.* 55, ſaith thus, *Eſt enim corona Reg' facere juſtitiam & judic', & tenere pacem, & ſine quibus corona conſiſtere non poteſt nec tenere; hujuſmodi autem jura ſive juriſdictiones ad perſonas vel tenementa transferri non poterunt, nec a privata perſona poſſideri, nec uſus nec executio juris, niſi hoc datum fuit ei deſuper, ſicut juriſdictio delegata delegari non poterit quin ordinaria remaneat cum ipſo Rege. Et lib.* 3. *de actionibus, cap.* 9, *fol.* 107. *Separare autem debet Rex, cum ſit Dei vicarius in terra, jus ab injuria, æquum ab iniquo, ut omnes ſibi ſubjecti honeſte vivant, & quod nullus alium lædat, & quod unicuique quod ſuum fuerit recta contributione reddatur.* In reſpect whereof one ſaith, That *Corona eſt quaſi cor ornans, cujus ornamenta ſunt miſericordia & juſticia.* And therefore a King's Crown is an Hieroglyphick of the Laws, where Juſtice, *&c.* is adminiſtred; for ſo ſaith *P. Val. l.* 41. *pag.* 400. *Coronam dicimus legis judicium eſſe, propterea quod certis eſt vinculis complicata, quibus vita noſtra veluti religata coercetur.* Therefore if you take that which is ſignified by the Crown, that is, to do Juſtice and Judgment, to maintain the Peace of the Land, *&c.* to ſeparate right from wrong, and the Good from the Ill; that is to be underſtood of that Capacity of the King, that *in rei veritate* hath Capacity, and is adorned and indued with Indowments as well of the Soul, as of the Body, and thereby able to do Juſtice and Judgment according to Right and Equity, and to maintain the Peace, *&c.* and to find out and diſcern the Truth, and not of the inviſible and immortal Capacity that hath no ſuch Indowments; for of it ſelf it hath neither Soul nor Body. And where divers Books and Acts of Parliament ſpeak of the Ligeance of *England*, as 31 *E.* 3. *tit. Coſinage* 5. 42 *Ed.* 3. 2. 13 *E.* 3. *tit. Brief* 677. 25 *Ed.* 3. *Stat. de natis ultra mare.* All theſe and other ſpeaking briefly in a vulgar Manner (for (*a*) *loquendum ut vulgus*) and not pleading (for *ſentiendum ut docti*) are to be underſtood of the Ligeance due by the People of *England* to the King; for no Man will affirm, that *England* itſelf, taking it for the Continent thereof, doth owe

(*a*) 3 Keb. 20. Cart. 120 2 Rol. Rep. 239. Her. 101. 4 Co. 46. b.

any

any Ligeance or Faith, or that any Faith or Ligeance ſhould be due to it: But it manifeſtly appeareth, that the Ligeance or Faith of the Subject is *proprium quarto modo* to the King, *omni, ſoli, & ſemper*. And oftentimes in the Reports of our Book-Caſes, and in Acts of Parliament alſo, the Crown or Kingdom is taken for the King himſelf, as in *Fitzh. Natur. Brev. fol.* 5. Tenure *in capite* is a Tenure of the Crown, and is a Seigniory in groſs, that is of the Perſon of the King: and ſo is 30 *H.* 8. *Dyer fol.* 44, 45. a Tenure in chief, as of the Crown, is meerly a Tenure of the Perſon of the King, and therewith agreeth 28 *H.* 8. *tit. Tenure, Br.* 65. The Statute of 4 *H.* 5. *cap. ultimo* gave Priors aliens, which were conventual to the King and his Heirs, by which Gift ſaith 34 *H.* 6. 34. the ſame were annexed to the Crown. And in the ſaid Act of 25 *Ed.* 3. whereas it is ſaid in the Beginning, within the Ligeance of *England*, it is twice afterward ſaid in the ſame Act within the Ligeance of the King, and yet all one Ligeance due to the King. So in 42 *Ed.* 3. *fol.* 2. where it is firſt ſaid, the Ligeance of *England*, it is afterwards in the ſame Caſe called, the Ligeance of the King; wherein though they uſed ſeveral Manner and Phraſes of Speech, yet they intended one and the ſame Ligeance. So in our uſual Commiſſion of Aſſiſe, of Gaol-delivery, of *Oyer* and *Terminer*, of the Peace, *&c.* Power is given to execute Juſtice, *Secundum legem & conſuetudinem regni noſtri* Angliæ; and yet *Littleton lib.* 2. in his Chapter of Villenage *fol.* 43. in diſabling of a Man that is attainted in a Premunire ſaith, That the ſame is the King's Law; and ſo doth the Regiſter in the Writ of *ad jura regia* Stile the ſame.

The Reaſons and Cauſes wherefore by the Policy of the Law the King is a Body Politick, are three, *viz.* 1. *cauſa majeſtatis*, 2. *cauſa neceſſitatis*, and 3. *cauſa utilitatis*. Firſt, *cauſa majeſtatis*, the King cannot give or take but by Matter of Record for the Dignity of his Perſon. Secondly, *cauſa neceſſitatis*, as to avoid the (*a*) Attainder of him that hath Right to the Crown, as it appeareth in 1 *H.* 7. 4. leſt in the *interim* there ſhould be an (*b*) *interregnum*, which the Law will not ſuffer. Alſo by force of this Politick Capacity, though the (*c*) King be within Age, yet may he make Leaſes and other Grants, and the ſame ſhall bind him; otherwiſe his Revenue ſhould decay, and the King ſhould not be able to reward Service, *&c.* Laſtly, *cauſa utilitatis*, as when Lands and Poſſeſſions deſcend from his collateral Anceſtors, being Subjects as from the Earl of

The Reaſons wherefore the King by Judgment of Law hath a Politick Capacity.
(*a*) Co. Lit. 16. a. Bacon's H. 7. fo. 8, 9. Fitz. Parl. 2. Br. Parl 37. 105. Plowd. 238. b.
(*b*) 1 W. & M. cap. 4. ſect. 10. Co. Lit. 43. a.
(*c*) 5 Co. 27. a. 1 Roll. 728. Plowd. 213. a. 221. a. 364. b. 26 Aſſ. 54. Fitz. Enfant 15 Br. Age 14.

of *March*, &c. to the King, now is the King ſeiſed of the ſame *in jure coronæ*, in his Politick Capacity; for which Cauſe the ſame ſhall go with the Crown; and therefore, albeit Queen *Elizabeth* was of the half Blood to Queen *Mary*, yet ſhe in her Body Politick enjoyed all thoſe Fee-ſimple Lands, as by the Law ſhe ought, and no collateral Couſin of the whole Blood to Queen *Mary* ought to have the ſame. And theſe are the Cauſes wherefore by the Policy of the Law the King is made a Body Politick: So as for theſe ſpecial Purpoſes the Law makes him a Body politick, Immortal, and Inviſible, whereunto our Ligeance cannot appertain. But to conclude this Point, our Ligeance is to our natural Liege Soveraign, deſcended of the Blood Royal of the King's of this Realm. And thus much of the firſt general Part *de Ligeantia*.

Co. Lit. 15. b.

De Legibus
The ſecond general Part.

Now followeth the ſecond Part, *de Legibus*, wherein theſe Parts were conſidered: Firſt, That the Ligeance or Faith of the Subject is due unto the King by the Law of Nature: Secondly, That the Law of Nature is Part of the Law of *England*: Thirdly, That the Law of Nature was before any Judicial or Municipal Law: Fourthly, That the Law of Nature is immutable.

The Law of Nature.
Wing's Max. 1.

The Law of Nature is that which God at the Time of Creation of the Nature of Man infuſed into his Heart, for his Preſervation and Direction; and this is *Lex æterna*, the Moral Law, called alſo the Law of Nature. And by this Law, written with the Finger of God in the Heart of Man, were the People of God a long Time governed, before the Law was written by *Moſes*, who was the firſt Reporter or Writer of Law in the World. The Apoſtle in the ſecond Chapter to the *Romans* ſaith, *Cum enim gentes quæ legem non habent naturaliter ea quæ legis ſunt faciunt*. And this is within that Command of the Moral Law, *Honora patrem*, which doubtleſs doth extend to him that is *pater patriæ*. And the Apoſtle ſaith, *Omnis anima poteſtatibus ſublimioribus ſubdita ſit*. And theſe be the Words of the great Divine, *Hoc Deus in ſacris Scripturis jubet, hoc lex Naturæ dictat, ut quilibet ſubditus obediat ſuperiori*. And *Ariſtotle*, Natures Secretary *Lib.* 5. *Æthic.* ſaith, That *jus naturale eſt, quod apud omnes homines eandem habet potentiam*. And herewith doth agree *Bracton lib.* 1. *cap.* 5. and *Forteſcue cap.* 8, 12, 13, & 16. *Doctor & Student cap.* 2, & 4. And the Reaſon hereof is, for that God and Nature is one

Co. Lit. 11. b.

to

to all, and therefore the Law of God and Nature is one to all. By this Law of Nature is the Faith, Ligeance, and Obedience of the Subject due to his Sovereign or Superior. And *Ariſtotle* 1 *Politicorum* proveth, that to command and to obey is of Nature, and that Magiſtracy is of Nature: For whatſoever is neceſſary and profitable for the Preſervation of the Society of Man is due by the Law of Nature: But Magiſtracy and Government are neceſſary and profitable for the Preſervation of the Society of Man; therefore Magiſtracy and Government are of Nature. And herewith accordeth *Tully lib.* 3 *de legibus*, *Sine imperio nec domus ulla, nec civitas, nec gens, nec hominum univerſum genus ſtare, nec ipſe denique mundus poteſt.* This Law of Nature, which indeed is the eternal Law of the Creator, infuſed into the Heart of the Creature at the Time of his Creation, was two thouſand Years before any Laws written, and before any Judicial or Municipal Laws. And certain it is, That before Judicial or Municipal Laws were made, Kings did decide Cauſes according to natural Equity, and were not tied to any Rule or Formality of Law, but did *dare jura*. And this appeareth by *Forteſcue cap.* 12 & 13. and by *Virgil* that Philoſophical Poet, 7 *Ænead.* Poſtea 25. a.

Hoc Priami geſtamen erat, cum jura vocatis
More daret populis.

And 5 *Ænead.*

———*Gaudet regno Trojanus Aceſtes,*
Indicitque forum & patribus dat jura vocatis.

And *Pomponius lib.* 2. *cap. de origine juris*, affirmeth, that in *Tarquinius ſuperbus*'s Time there was no Civil Law written, and that *Papirius* reduced certain Obſervations into Writing, which was called *Jus Civile Papirianum*. Now the Reaſon wherefore Laws were made and publiſhed, appeareth in *Forteſcue cap.* 13. and in *Tully lib.* 2. *officiorum*: *At cum jus æquabile ab uno viro homines non conſequerentur, inventi ſunt leges.* Now it appeareth by demonſtrative Reaſon, that Ligeance, Faith, and Obedience of the Subject to the Sovereign, was before any Municipal or Judicial Laws. 1. For that Government and Subjection were long before any Municipal or Judic. Laws. 2. For that it had been in vain to have preſcribed Laws to any, but to ſuch as ought Obedience, Faith, and Ligeance before, in Reſpect whereof they were bound to obey and obſerve them: *Fruſtra enim feruntur*

feruntur leges niſi ſubditis & obedientibus. Seeing then that Faith, Obedience, and Ligeance, are due by the Law of Nature, it followeth that the ſame cannot be changed or taken away; for albeit Judicial or Municipal Laws have inflicted and impoſed in ſeveral Places, or at ſeveral Times, divers and ſeveral Puniſhments and Penalties, for Breach or not Obſervance of the Law of Nature, (for that Law only conſiſted in Commanding or Prohibiting, without any certain Puniſhment or Penalty) yet the very Law of Nature it ſelf, never was nor could be (*a*) altered or changed. And therefore it is certainly true, that (*b*) *Jura naturalia ſunt immutabilia.* And herewith agreeth *Bracton*, *lib.* 1. *cap.* 5. and *Doctor and Student cap.* 5 & 6. And this appeareth plainly and plentifully in our Books.

(*a*) Dr. & Stud. 4. a.
(*b*) Cart. 130.

If a Man hath a Ward by Reaſon of a Seigniory, and is outlawed, he forfeiteth the Wardſhip to the King: But if a Man hath the Wardſhip of his own Son or Daughter, which is his Heir apparent, and is outlawed, he doth not (*c*) forfeit this Wardſhip; for Nature hath annexed it to the Perſon of the Father, as it appeareth in 33 *H.* 6. 55. *b. Et bonus Rex nihil a bono patre differt, & patria dicitur a patre, quia habet communem patrem, qui eſt pater patriæ.* In the ſame Manner, *maris & fœminæ conjunctio eſt de jure natur'*, as *Bracton* in the ſame Book and Chapter, and St. *Germin* in his Book of the *Doctor and Student*, *cap.* 5. do hold. Now if he that is attainted of Treaſon or Felony, be ſlain by one that hath no Authority, or executed by him that hath Authority, but purſueth not his Warrant, in this Caſe his eldeſt Son can have no Appeal, for he muſt bring his Appeal as Heir, which being *ex proviſione hominis*, he loſeth it by the Attaind. of his Father; but his (*d*) Wife (if any he have) ſhall have an Appeal, becauſe ſhe is to have her Appeal as Wife, which ſhe remaineth notwithſtanding the Attainder, becauſe *mariz & fœmin' conjunctio* is *de jure naturæ*, and therefore (it being to be intended of true and right Matrimony) is indiſſoluble; and this is proved by the Book in 33 *H.* 6. 57. So if there be Mother and Daughter, and the Daughter is attainted of Felony, now cannot ſhe be Heir to her Mother for the Cauſe aforeſaid; yet after her Attainder if ſhe kill her Mother, this is Paricide and Petit-treaſon; for yet ſhe remaineth her Daughter, for that is of Nature, and herewith agreeth 21 *E.* 3. 17. *b.* If a Man be attainted of Felony or Treaſon, he hath loſt the King's legal Protection, for he is thereby utterly diſabled to ſue any Action real or perſonal (which is a greater Diſability than an Alien in League hath) and yet ſuch a Perſon ſo attainted hath not loſt that

(*c*) 3 Co. 39. a. 7 Co. 12. b. Co. Lit. 84. b. Br. Gard 6. Br. Forfeit. 70. Plowd. 294. a. Engleſield's Caſe. 2 Inſt. 234

(*d*) Stamf. Cor. 59 c. 35 H. 6. 58. a. Br. Appeal 5, 131. Fitz. Cor. 21. 2 Inſt. 215.

Protection which by the Law of Nature is given to the K. for that is *indelebilis & immutabilis*, and therefore the K. may protect and pardon him, and if any Man kill him without Warrant, he ſhall be puniſhed by the Law as a Manſlayer, and thereunto accordeth 4 *Ed.* 4. and 35 *H.* 6. 57. 2 *Aſſ. pl.* 3. By the Statute of 25 *Ed.* 3. *cap.* 22. a Man attainted in a *Præmunire*, is by expreſs Words out of the King's Protection generally; and yet this extendeth only to legal Protection, as it appeareth by *Littleton, fol.* 43. for the Parliament could not take away that Protection which the Law of Nature giveth unto him; and therefore notwithſtanding that Statute, the King may protect and pardon him. And though by that Statute it was further enacted, That it ſhould be done with him as with an Enemy, by which Words any Man might have ſlain ſuch a Perſon (as it is holden in 24 *H.* 8. Tit. *Coron. Br.* 197.) until the Stat. made *anno* 5 *Eliz. cap.* 1. yet the King might protect and pardon him. A Man outlawed is out of the Benefit of the Municipal Law; for ſo ſaith *Fitz. N. B.* 161. *a. Utlagatus eſt quaſi extra legem poſitus*: And *Bract. l.* 3. *tract.* 2. *c.* 11. ſaith, that *caput gerit lupinum*; yet is he not out either of his natural Ligeance, or of the King's natural Protection; for neither of them is ty'd to Municipal Laws, but is due by the Law of Nature, which (as hath been ſaid) was long before any Judicial or Municipal Laws. And therefore if a Man were outlawed for Felony, yet was he within the K's natural Protection, for no Man but the Sheriff could execute him, as it is adjudged in 2 *lib. Aſſ. pl.* 3. Every Subject is by his natural Ligeance bound to obey and ſerve his Sovereign, *&c.* It is enacted by the Parliament of 23 *H.* 6. that no Man ſhould ſerve the King as Sheriff of any County, above one Year, and that, notwithſtanding any Clauſe of *non obſtante* to the contrary, that is to ſay, notwithſtanding that the King ſhould expreſly diſpenſe with the ſaid Statute: Howbeit it is agreed in 2 *H.* 7. that againſt the expreſs Purview of that Act, the King may by a ſpecial *Non obſtante* diſpenſe with that Act, for that the Act could not bar the King of the Service of his Subject, which the Law of Nature did give unto him. By theſe and many other Caſes that might be cited out of our Books, it appeareth, how plentiful the Authorities of our Laws be in this Matter. Wherefore to conclude this Point (and to exclude all that hath been or could be objected againſt it) if the Obedience and Ligeance of the Subject to his Sovereign, be due by the Law of Nature, if that Law be Parcel of the Laws as well of *England*, as of all other Nations, and is immutable, and that *Poſtnati* and we of *England* are united by Birthright,

Cawly 47. 3 Inſt. 126.

Co. Lit. 130. a.

B. N. C. 53. Co. Lit. 130. a. 2 Bulſtr. 299. Cawly 46, 47.

Co. Lit. 128. b.

Br. Corone 67.

23 H. 6. c. 8.

Plowd. 502. b. 2 H. 7. 6. b. Br. Patents 109. 12 Co. 18.

in

in Obedience and Ligeance (which is the true Cauſe of natural Subjection) by the Law of Nature; it followeth, that *Calvin* the Plaintiff being born under one Ligeance to one King, cannot be an Alien born; and there is great Reaſon, that the Law of Nature ſhould direct this Caſe, wherein 5 natural Operations are remarkable: Firſt, The King hath the Crown of *England* by Birthright, being naturally procreated of the Blood Royal of this Realm: Secondly, *Calvin* the Plaintiff naturalized by Procreation and Birthright, ſince the Deſcent of the Crown of *England:* Thirdly, Ligeance and Obedience of the Subject to the Sovereign, due by the Law of Nature: Fourthly, Protection and Government due by the Law of Nature: Fifthly, this Caſe, in the Opinion of divers, was more doubtful in the Beginning, but the further it proceeded, the clearer and ſtronger it grew; and therefore the Doubt grew from ſome violent Paſſion, and not from any Reaſon grounded upon the Law of Nature, *quia quanto magis violentus motus (qui fit contra naturam) appropinquat ad ſuum finem, tanto debiliores & tardiores ſunt ejus motus; ſed naturalis motus, quanto magis appropinquat ad ſuum finem, tanto fortiores & velociores ſunt ejus motus.* Hereby it appeareth how weak the Objection grounded upon the Rule of (a) *Quando duo jura concurrunt in una perſona, &c.* is: For that Rule holdeth not in perſonal Things, that is, when two Perſons are neceſſarily and inevitably required by Law (as in the Caſe of an Alien born there is; and therefore no Man will ſay, that now the King of *England* can make War or League with the King of *Scotland, & ſic de cæteris:* And ſo in Caſe of an Alien born, you muſt of Neceſſity have 2 ſeveral Ligeances to two ſeveral Perſons. And to conclude this Point concerning Laws, *Non adverſat' diverſitas regnor' ſed regnant', non patriarum, ſed patrum patriar' non coronarum, ſed coronatorum, non legum municipalium, ſed regum majeſtatum.* And therefore thus were directly and clearly anſwered as well the Objections drawn from the Severalty of the Kingdoms, ſeeing there is but one Head of both, and the *Poſtnati* and us joined in Ligeance to that one Head, which is *copula & tanquam oculus* of this Caſe; as alſo the Diſtinction of the Laws, ſeeing that Ligeance of the Subjects of both Kingdoms, is due to their Sovereign by one Law, and that is the Law of Nature.

(a) Elleſmere's Poſtnat. c. 88. 4 Co. 118. a. Cawly 209. Antea 2. b. Moor 793, 804.

The 3d general Part concerning both Kingdoms.

For the Third, it is firſt to be underſtood, that as the Law hath wrought four Unions, ſo the Law doth ſtill make four Separations. The 1ſt Union is of both Kingdoms under one natural Liege Sover. K. and ſo acknowledg. by the Act of Parli-

Parliament of Recognition. The 2d is an Union of Ligeance and Obedience of the Subjects of both Kingdoms, due by the Law of Nature to their Sovereign: And this Union doth ſuffice to rule and over-rule the Caſe in Queſtion; and this in Subſtance is but a Uniting of the Hearts of the Subjects of both Kingdoms one to another, under one Head and Sovereign. The 3d Union is an Union of Protection of both Kingdoms, equally belonging to the Subjects of either of them: And therefore the two firſt Arguments or Objections drawn from two ſuppoſed ſeveral Ligeances were fallacious, for they did *diſjungere conjungenda.* The fourth Union and Conjunction is of the three Lions of *Engl.* and that one of *Scotland*, united and quartered in one Eſcutcheon.

Concerning the Separations yet remaining: 1ſt, *England* and *Scotland* remain ſeveral and diſtinct Kingdoms. 2. They are governed by ſeveral judicial or municipal Laws: 3. They have ſeveral diſtinct and ſeparate Parliaments: 4. Each Kingdom hath ſeveral Nobilities; for albeit a *Poſtnatus* in *Scotland*, or any of his Poſterity, be the Heir of a Nobleman of *Scotland*, and by his Birth is legitimated in *England*, yet he is none of the (*a*) Peers or Nobility of *England*; for his natural Ligeance and Obedience, due by the Law of Nature, maketh him a Subject and no Alien within *England*: But that Subjection maketh him not noble within *England*, for that Nobility had his Original by the K's Creation, and not of Nature. And this is manifeſted by expreſs Authorities, grounded upon excellent Reaſons in our Books. If a Baron, Viſcount, Earl, Marqueſs, or Duke of *England*, bring any Action real or perſonal, and the Defendant pleadeth in Abatement of the Writ, that he is no Baron, Viſcount, Earl, &c. and thereupon the Demandant or Plaintiff taketh Iſſue; this Iſſue ſhall not be try'd by Jury, but by the (*b*) Record of Parliament, whether he or his Anceſtor, whoſe Heir he is, were called to ſerve there as a Peer, and one of the Nobility of the Realm. And ſo are our Books adjudged in 22 *Aſſ.* 24. 48 *Edw.* 3. 30. 35 *H.* 6, 40. 20 *Eliz. Dyer* 360. *Vide in the 6th Part of my Reports, in the Counteſs of* Rutland's *Caſe.* So as the Man, that is not *de jure* a Peer, or one of the Nobility, to ſerve in the upper Houſe of the Parliament of *England*, is not in the legal Proceedings of Law accounted noble within *England.* And therefore if a Countee of *France* or *Spain*, or any other foreign Kingdom, ſhould come into *England*, he ſhould not here ſue, or be ſued by the Name of Countee, &c. for that he is none of the Nobles that are Members of the upper

(*a*) Dyer 360. pl. 6. 9 Co. 117. a. b. 2 Inſt. 48.

(*b*) Co. Lit. 16. b. 6 Co. 53. a. 9 Co. 31. a. 49. a. 12 Co. 70, 94, 95. 2 Inſt. 50. 2 Rol. 575. Moor 767

upper Houſe of the Parliament of *England*; and herewith agree the Book-caſes of (*a*) 20 *Ed.*4.6.*a.b.* and 11 *Ed.* 3. Tit. *Bre.* 473. Like Law it is, and for the ſame Reaſon, of an Earl or Baron of *Ireland*, he is not any Peer, or of the Nobility of this Realm: And herewith agreeth the Book in 8 *R.* 2. Tit. (*b*) *Proceſs pl. ultim.* where in an Action of Debt Proceſs of Outlawry was awarded againſt the Earl of *Ormond* in *Ireland*; which ought not to have been, if he had been noble here. *Vide Dyer* (*c*) 20 *Eliz.* 360.

(*a*) 9 Co. 117. b. Br. noſme de dignity 49.

(*b*) 9 Co. 117. b. Fitz. Proc. 224.

(*c*) Dy. 360. pl. 6. Co. Lit. 261. b.

But yet there is a Diverſity in our Books worthy of Obſervation, for the higheſt and loweſt Dignities are univerſal, for if a King of a foreign Nation come into *England*, by the Leave of the King of this Realm (as it ought to be) in this Caſe he ſhall ſue and be ſued by the Name of a King; and herewith agreeth 11 *E.* 3. Tit. *Br.* (*d*) 473. where the Caſe was, that *Alice* which was the Wife of *R. de O.* brought a Writ of Dower againſt *John* Earl of *Richmond*, and the Writ was *Præcip. Johann' Comiti Richmondiæ cuſtodi terr' & hæredis* of *William* the Son of *R. de O.* the Tenant pleaded That he is Duke of *Britain*, not named Duke, Judgment of the Writ? But it is ruled, that the Writ was good, for that the Dukedom of *Britain* was not within the Realm of *England*. But there it is ſaid, that if a Man bring a Writ againſt *Edward* (*e*) *Baliol*, and name him not K. of *Scotland*, the Writ ſhall abate for the Cauſe aforeſaid. And hereof there is a notable Precedent in *Fleta lib.* 2. *cap.*3. §. 9. where treating of the Juriſdiction of the King's Court of *Marſhalſea* it is ſaid, *Et hæc omnia ex officio ſuo licite facere poterit, (ſ. Seneſchal' aul' hoſpitii Regis) non obſtante alicujus libertate, etiam in alieno regno dum tamen reus in hoſpitio Regis poterit inveniri ſecundum quod contigit Pariſ. anno* 14 *Ed.* 1. *de Engelramo de Nogent capto in hoſpitio Regis Angl' (ipſo Rege tunc apud Pariſiam exiſtente) cum diſcis argenti furatis recenter ſuper facto, Rege Franc' tunc præſente, & unde licet curia Regis Franc' de præd' latrone per caſtellanum Pariſ. petita fuerit, habitis hinc & inde tractatibus in conſilio Regis Franc', tandem conſideratum fuit; quod Rex Angl' illa regia prærogativa, & hoſpitii ſui privilegio uteretur, & gauderet, qui, coram Roberto Fitz-John milite tunc hoſpitii Regis Angl' Seneſchallo de latrocinio convictus, per conſiderationem ejus Cur' fuit (f) ſuſpenſus in patibulo Sancti Germani de Pratis.* Which proveth, that though the King be in a foreign Kingdom, yet he is judged in Law a K. there. The other Part of the ſaid Diverſity, is proved by the Book-caſe in 20 (*g*) *E.*4, *fol. 6.a.b.* where in a Writ of Debt brought by Sir *J. Douglas* Knight, againſt *Elizabeth Molford*, the Defend. demanded Judgment of the Writ, for that the

(*d*) Moor 803. 9 Co. 117. b. Poſtea 16. a.

(*e*) Moor 803.

(*f*) Moor 798, 799.

(*g*) 9 Co. 117. b. Br. noſme de dignity 49.

the Plaintiff was an Earl of *Scotland*, but not of *England*; and that our Sovereign Lord the King had granted unto him ſafe Conduct, not named by his Name of Dignity, Judgment of the Writ, &c. And there Juſtice *Litt.* giveth the Rule; the Plaintiff (ſaith he) is an Earl in *Scotland*, but not in *England*; and if our Sovereign Lord the King grant to a Duke of *France* a ſafe Conduct to merchandize, and enter into his Realm, if the Duke cometh and bringeth Merchandize into this Land, and is to ſue an Action here, he ought not to name himſelf Duke, for he is not a Duke in this Land, but only in *France*. And theſe be the very Words of that Book-caſe; out of which I collect 3 Things. Firſt, that the Plaintiff was named by the Name of a Knight, whereſoever he received that Degree of Dignity. *Vide* (*a*) 7 *H.* 6. 14 *b. accord.* 2. That an Earl of another Kingdom or Nation is no Earl (to be ſo named in legal Proceedings) within this Realm: And herewith agreeth the Book of (*b*) 11 *Ed.* 3. the Earl of *Richmond*'s Caſe before recited. 3. That albeit the King by his Letters Patents of ſafe Conduct do name him Duke, yet that Appellation maketh him no Duke, to ſue or to be ſued by that Name within *England*: So as the Law in theſe Points (apparent in our Books being obſerved, and rightly underſtood it appeareth how cauſeleſs their Fear was, that the Adjudging of the Plaintiff to be no Alien, ſhould make a Confuſion of the Nobilities of either Kingdom.

(*a*) Br. brief 159. Fitz. brief 35. (*b*) 11 E. 3. Fitz. brief. 473. Antea 15. b. Moor 803. 9 Co. 117. b.

Now are we in Order come to the fourth Noun (which is the 4th general Part) *Alienigena*; wherein 6 Things did fall into Conſideration. 1. Who was *Alienigena*, an Alien born by the Laws of *England*. 2. How many Kinds of Aliens born there were. 3. What Incidents belonged to an Alien born. 4. The Reaſon why an Alien is not capable of Inheritance or Freehold within *England*. 5. Examples, Reſolutions, and Judgments, reported in our Books in all Succeſſions of Ages, proving the Plaintiff to be no Alien. 6. Demonſtrative Concluſions upon the Premiſſes, approving the ſame.

The 4th general Part, De Alienigena.

1. An Alien is a Subject that is born out of the Ligeance of the King, and under the Ligeance of another, and can have no real or perſonal Action for or concerning Land; but in every ſuch Action the Tenant or Defendant may plead, that he was born in ſuch a Country which is not within the Ligeance of the King, and demand Judgm. if he ſhall be anſwered. And this is in Effect the Deſcription which *Lit.* himſelf maketh, *lib.* 2. *cap.* 14. *Villen. fol.* 43. *Alienigena eſt aliena gentis ſeu alien' ligeant', qui etiam dici-*

Who is an Alien.

Co. Lit. 128. b. 129. a. 4 Inſt. 152.

tur

tur peregrinus, alienus, exoticus, extraneus, &c. Extraneus eſt ſubditus, qui extra terram, i. poteſtatem Regis natus eſt. And the uſual and right Pleading of an Alien born, doth lively and truly deſcribe and expreſs what he is. And therein two Things are to be obſerved; 1. That the moſt uſual and beſt Pleading in this Caſe, is, both excluſive and incluſive, *viz. extra ligeantiam domini Regis, &c. & infra ligeantiam alterius Regis*, as it appeareth in (*a*) 9 *Ed.* 4. 7. *b. Book of Entries fol.* 244, *&c.* which cannot poſſibly be pleaded in this Caſe, for two Cauſes; Firſt, for that one K. is Sovereign of both Kingdoms; 2. one Ligeance is due by both to one Sovereign, and in Caſe of an Alien there muſt of Neceſſity be ſeveral Kings and ſeveral Ligeances. Secondly, no Pleading was ever *extra regnum*, or *extra legem*, which are circumſcribed to Place, but *extra ligeantiam*, which (as it hath been ſaid) is not local or tied to any Place.

(*a*) Antea 5. 1a.

It appeareth by *Bracton lib.* 3. *tract.* 2. *c.* 15. *fol.* 134. that (*b*) *Canutus* the *Daniſh* King, having ſettled himſelf in this Kingdom in Peace, kept notwithſtanding (for the better Continuance thereof) great Armies within this Realm. The Peers and Nobles of *England* diſtaſting this Government, by Arms and Armies, (*Odimus accipitrem quia ſemper vivit in armis*, wiſely and politickly perſuaded the King, that they would provide for the Safety of him and his People, and yet his Armies carrying with them many Inconveniences, ſhould be withdrawn; and therefore offered, that they would conſent to a Law, that whoſoever ſhould kill an Alien, and be apprehended, and could not acquit himſelf, he ſhould be ſubject to Juſtice: But if the Manſlayer fled, and could not be taken, then the Town where the Man was ſlain ſhould forfeit 66 Marks unto the King; and if the Town were not able to pay it, then the Hundred ſhould forfeit and pay the ſame unto the King's Treaſure; whereunto the King aſſented. This Law was penned, *Quicunque occiderit Francigenam, &c.* not excluding other Aliens, but putting *Francigena* a *Frenchman* for Example, that others muſt be like unto him, in owing ſeveral Ligeance to a ſeveral Sovereign, that is, to be *extra ligeantiam regis Angl'*, and *infra ligeantiam alterius regis.* And it appears before out of *Bracton* and *Fleta*, that both of them uſe the ſame Example (in deſcribing of an Alien *ad fidem regis Franc'*. And it was holden, that except it could be proved, that the Party ſlain was an *Engliſhman*, that he ſhould be taken for an Alien; and this was called Engleſhere, *Engleſheria*, that is, a Proof that the Party ſlain was an *Engliſhman.* (Hereupon *Canutus*

(*b*) Stanf. Cor. 17. f.

Full. Ch Hiſt. l. 1. 12.

Canutus preſently withdrew his Armies, and within a while after loſt his Crown, and the ſame was reſtored to his right Owner.) The ſaid Law of Engliſhery continued until 14 *Ed.* 3. *cap.* 4. and then the ſame was by Act of Parliament ouſted and aboliſhed. So amongſt the Laws of *William* the Firſt, (publiſhed by Maſter *Lambert*, *fol.* 125. *Omnis Francigena*) there put for Example as before is ſaid, to expreſs what manner of Perſon *alienigena* ſhould be) *qui tempore* Edvardi *propinqui noſtri fuit particeps legum & conſuetudinum Anglorum* (that is, made Denizen) *quod dicunt ad ſcot & lot perſolvat ſecundum legem Anglorum.*

How many kind of Aliens there be.

Every Man is either *Alienigena*, an Alien born, or *ſubditus*, a Subject born. Every Alien is either a Friend that is in League, &c. or an Enemy that is in open War, &c. Every Alien Enemy is either *pro tempore*, temporary for a Time, or *perpetuus*, perpetual, or *ſpecialiter permiſſus*, permitted eſpecially. Every Subject is either *natus*, born, or *datus*, given or made: And of theſe briefly in their Order. And Alien Friend, as at this Time, a *German*, a *Frenchman*, a *Spaniard*, &c. (all the Kings and Princes in Chriſtendom being now in League with our Soveraign, but a *Scot* being a Subject, cannot be ſaid to be a Friend, nor *Scotland* to be *ſolum amici*) may by the Common Law have, acquire, and get within this Realm, by Gift, Trade, or other lawful Means, any Treaſure, or (*a*) Goods perſonal whatſoever, as well as an *Engliſhman*, and may maintain any (*b*) Action for the ſame: But (*c*) Lands within this Realm, or Houſes (but for their neceſſary Habitation only) Alien Friends cannot acquire, or get, nor maintain any Action real or perſonal, for any Land or Houſe, unleſs the Houſe be for their neceſſary Habitation. For if they ſhould be diſabled to acquire and maintain theſe Things, it were in Effect to deny unto them Trade and Traffick, which is the Life of every Iſland. But if this Alien become an Enemy (as all Alien Friends may) then is he utterly diſabled to maintain any Action, or get any Thing within this Realm. And this is to be underſtood of a temporary Alien, that being an Enemy, may be a Friend, or being a Friend, may be an Enemy. But a perpetual Enemy (though there be no Wars by Fire and Sword between them,) cannot maintain any Action, or get any Thing within this Realm. All Infidels are in Law *perpetui* (*d*) *inimici*, perpetual Enemies (for the Law preſumes not that they will be converted, that being *remota potentia*, a Remote Poſſibility) for between them, as with the Devils, whoſe Subjects they be, and the Chriſtian, there is perpetual

(*a*) Co. Lit. 2 b.

(*b*) 1 Bulſt. 134. Yel. 198. Owen 45 Co. Lit. 129. b. 1 And. 25. Moor 431. 1 Keb. 266. Cr. El. 142. 683. Cr. Car. 9. 4 Inſt. 152. Dy 2. pl. 8. O. Benl. 10. B. N. C. 375. Br. Non-ability 62.

(*c*) Soph. 36. Co Lit. 2. b. Dy. 2. pl. 8.

(*d*) Wing Max. 10.

(a) 4 Inſt. 155. Hoſtility, and can be no *(a)* Peace; for as the Apoſtle ſaith, 2 *Cor.* 6. 15. *Quæ autem conventio Chriſti ad Belial, aut quæ pars fideli cum infideli*, and the Law ſaith, *Judæo Chriſtianum nullum ſerviat mancipium, nefas enim eſt quem Chriſtus redemit blaſphemum Chriſti in ſervitutis vinculis detinere. Regiſter* 282. *Infideles ſunt Chriſti & Chriſtianorum inimici.* And herewith agreeth the Book in 12 *H.* 8. *fol.* 4. where it is holden that a Pagan cannot have or maintain any Action at all.

By what Laws Kingdoms gotten by Conqueſt, &c. ſhall be governed. 1 av. 30. b. 3 Keb. 402.

And upon this Ground there is a Diverſity between a Conqueſt of a Kingdom of a Chriſtian King, and the Conqueſt of a Kingdom of an Infidel; for if a King come to a Chriſtian Kingdom by Conqueſt, ſeeing that he hath *vitæ & necis poteſtatem*, he may at his Pleaſure alter and change the Laws of that Kingdom, but until he doth make an Alteration of thoſe Laws, the ancient Laws of that Kingdom remain. But if a Chriſtian King ſhould conquer a Kingdom of an Infidel, and bring them under his Subjection, there *ipſo facto* the Laws of the Infidel are abrogated, for that they be not only againſt Chriſtianity, but againſt the Law of God and of Nature, contained in the Decalogue, and in that Caſe, until certain Laws be eſtabliſhed amongſt them, the King by himſelf, and ſuch Judges as he ſhall appoint, ſhall judge them and their Cauſes according to natural Equity, in ſuch ſort as Kings in ancient Time did with their Kingdoms, before any certain Municipal Laws were given, as before hath been ſaid. But if a King hath a Kingdom by Title of Deſcent, there ſeeing by the Laws of that Kingdom he doth inherit the Kingdom, he cannot change thoſe Laws of himſelf, without conſent of Parliament. Alſo if a King hath a Chriſtian Kingdom by Conqueſt, as King *Henry* the Second had *Ireland*, after King *John* had given unto them, being under his Obedience and Subjection, the Laws of *England* for the Government of that Country, no ſucceeding King could alter the ſame without Parliament. And in that Caſe while the Realm of *England*, and that of *Ireland* were governed by ſeveral Laws, any that was born in *Ireland* was no Alien to the Realm of *England*. In which Precedent of *Ireland* three Things are to be obſerved: 1. That then there had been two Deſcents, one from *Henry* the Second to King *Richard* the Firſt, and from *Richard* to King *John*, before the Alteration of the Laws. 2. That albeit *Ireland* was a diſtinct Dominion, yet the Title thereof being by Conqueſt, the ſame by Judgment of Law might by expreſs Words be bound by Act of the Parliament of *Engl.* 3. That albeit no Reſer-

Ireland.

vation were in King *John*'s Charter, yet by Judgment of Law a Writ of *Error* did lie in the King's Bench in *England* of an erroneous Judgment in the King's Bench of *Ireland*. Furthermore, in the Case of a Conquest of a Christian Kingdom, as well those that served in Wars at the Conquest, as those that remained at home for the Safety and Peace of their Country, and other the King's Subjects, as well *Antenati* as *Postnati*, are capable of Lands in the Kingdom or Country conquered, and may maintain any real Action, and have the like Privileges and Benefits there, as they may have in *England*. Kelw. 202. pl. 19. 4 Inst. 71. F. N. B. 22. Vaugh. 290, 291.

The third kind of Enemy is, *inimicus permissus*, an Enemy that cometh into the Realm by the King's safe Conduct, of which you may read in the *Register fol.* 25. *Book of Entries Ejectione firmæ* 7, 32 *H.* 6. 23, *b.* &c. Now what a Subject born is, appeareth at large by that which hath been said *de ligeantia*; and so likewise *de subdito dato*, of a *donaison*; for that is the right Name, so called, because his Legitimation is given unto him; for if you derive Denizen from *deins nee*, one born within the Obedience or Ligeance of the King, then such a one should be all one with a natural born Subject. And it appeareth before out of the Laws of King *W.* 1. of what Antiquity the making of Denizens by the King of *England* hath been. Co. Lit. 129. a.

3. There be regularly (unless it be in special Cases) three Incidents to a Subject born. 1. That the Parents be under the actual Obedience of the King. 2. That the place of his Birth be within the King's Dominion. And 3. the Time of his Birth is chiefly to be considered; for he cannot be a Subject born of one Kingdom that was born under the Ligeance of a King of another Kingdom, albeit afterwards one Kingdom descend to the King of the other. For the first, it is termed actual Obedience, because though the King of *England* hath absolute Right to other Kingdoms or Dominions, as *France*, *Aquitain*, *Normandy*, &c. yet seeing the King is not in actual Possession thereof, none born there since the Crown of *England* was out of actual Possession thereof, are Subjects to the King of *England*. 2. The Place is observable, but so as many Times Ligeance or Obedience, without any Place within the King's Dominions may make a Subject born, but any Place within the King's Dominions without Obedience can never produce a natural Subject. And therefore if any of the Kings Ambassadors in Foreign Nations, have Children there of their Wives, being *English* Women, by the Com. Laws of *England* they are natural born Subjects, and yet they are born out of the King's Dominions. But if Enemies should come into any of the King's Dominions, and surprise any Castle or Fort, and Of the Incidents to an Alien. Lit Rep. 27. Co. Car. 601, 602. March. 91. Jenk. Cent. 3.

poſſeſs the ſame by Hoſtility, and have Iſſue there, that Iſſue is no Subject to the King, though he be born within his Dominions, for that he was not born under the K's Ligeance or Obedience. But the Time of his (*a*) Birth is of the Eſſence of a Subject born; for he cannot be a Subject to the King of *England*, unleſs at the Time of his (*a*) Birth he was under the Ligeance and Obedience of the King. And that is the Reaſon that *Antenanti* in *Scotland* (for that at the Time of their Birth they were under the Ligeance and Obedience of another King) are Aliens born, in reſpect of the Time of their Birth.

(*a*) 2 Vent. 6. Vaugh. 286.

Wherefore an Alien born is not capable of Lands.

4. It followeth next in courſe to ſet down the Reaſons, wherefore an Alien born is not capable of Inheritance within *England*, and that he is not for three Reaſons. 1. The Secrets of the Realm might thereby be diſcovered. 2. The Revenues of the Realm (the Sinews of War, and Ornament of Peace) ſhould be taken and enjoyed by Strangers born. 3. It ſhould tend to the Deſtruction of the Realm. Which three Reaſons do appear in the Statutes of 2 *H.* 5. *cap.* and 4 *H. cap.* 5. *ultimo.* But it may be demanded, Wherein doth that Deſtruction conſiſt? Whereunto it is anſwered: Firſt, it tends to Deſtruction *tempore belli*; for then Strangers might fortify themſelves in the Heart of the Realm, and be ready to ſet Fire on the Commonwealth, as was excellently ſhadowed by the Trojan Horſe in *Virgil's* ſecond Book of his *Æneads*, where a very few Men in the Heart of the City, did more Miſchief in few Hours, than ten thouſand Men without the Walls in ten Years. Secondly, *tempore pacis*, for ſo might many Aliens born get a great Part of the Inheritance and Freehold of the Realm, whereof there ſhould follow a Failure of Juſtice (the Supporter of the Commonwealth) for that Aliens born cannot be returned of Juries (*b*) for the Trial of Iſſues between the King and the Subject, or between Subject and Subject. And for this purpoſe, and many other, ſee a Charter (worthy of Obſervation) of King *Ed.* 3. written to Pope *Clement*, *Datum apud* Weſtm. 26 *die Sept. ann. regni noſtri* Franciæ 4. *regni vero* Angliæ 17.

(*b*) 10 Co. 104 a. Co. Lit. 156. b. Poph. 36.

Examples and Authorities in Law.

5. Now are we come to the Examples, Reſolutions, and Judgments of former Times; wherein two Things are to be obſerved: Firſt, How many Caſes in our Books do over-rule this Caſe in Queſtion (for *ubi* (*c*) *eadem ratio ibi idem jus, & de ſimilibus. idem eſt judicium.* 2. That for want of an expreſs Text of Law *in terminis terminantibus* and of Examples and Precedents in like Caſes (as was objected by ſome) we are driven to determine the Queſtion by natural Reaſon: For it was ſaid, *Si ceſſet lex ſcripta id cuſtodiri oportet*

(*c*) Co. Lit. 10 a. 191. a. 232. a.

oportet quod moribus & consuetudine inductum est, & si qua in re hoc defecerit, recurrendum est ad rationem. But that receiveth a threefold Answer: First, That there is no such Rule in the Common or Civil Law, but the true Rule of the Civil Law is, *Lex scripta si cesset, id custodiri oportet quod moribus & consuetudine inductum est, & si qua in re hoc defecerit, tunc id quod proximum & consequens ei est, & si id non appareat, tunc jus quo urbs Romana utitur, servari oportet.* Secondly, If the said imaginative Rule be rightly and legally understood, it may stand for Truth: For if you intend *ratio* for the legal and profound Reason of such as by diligent Study and long Experience and Observation are so learned in the Laws of this Realm, as out of the Reason of the same they can Rule the Case in Question, in that Sense the said Rule is true: But if it be intended of the Reason of the wisest Man that professeth not the Laws of *England*, then (I say) the Rule is absurd and dangerous; for (*a*) *cuilibet in sua arte perito est credendum, & quod quisque* (*b*) *norit in hoc se exerceat. Et omnes prudentes illa admittere solent quæ probantur iis qui in sua arte bene versati sunt, Arist.* 1. *Topicorum, cap.* 6. Thirdly, There be Multitudes of Examples, Precedents, Judgments, and Resolutions in the Laws of *England*, the true and unstrained Reason whereof doth decide this Question; for Example: The Dukedom of *Acquitain*, whereof *Gascoin* was Parcel, and the Earldom of *Poytiers*, came to King *Henry* the Second by the Marriage of *Eleanor*, Daughter and Heir of *Wm.* Duke of *Acquitain*, and Earl of *Poytiers*, which descended to *Rich.* 1. *Hen.* 3. *Ed.* 1. *Ed.* 2. *Ed.* 3. *&c.* In 27. *lib.* (*c*) *Ass. pl.* 48. in one Case there appear two Judgments and one Resolution to be given by the Judges of both Benches in this Case following. The Possessions of the Prior of *Chelsey* in Time of War were seised into the King's Hands, for that the Prior was an Alien born: The Prior by Petition of Right sued to the King, and the Effect of his Petition was, That before he came Prior of *Chelsey*, he was Prior of *Andover*, and whilst he was Prior there, his Possessions of that Priory were likewise seised for the same Cause, supposing that he was an Alien born; whereupon he sued a former Petition, and alledged that he was born in *Gascoin* within the Ligeance of the King: Which Point being put in Issue, and found by Jury to be true, it was adjudged that he should have Restitution of his Possessions generally without mentioning of Advowsons. After which Restitution, one of the

(*a*) 4 Co. 79. a. 5 Co. 7. a. Caudry's Case. Cawly 31. Co. Lit. 125. a.

(*b*) 11 Co. 10. b. 12 Co. 65. 13 Co. 12. Co. Lit. 125. a. 8 Co. 130. a Gascoin. Vasconia. Gasconia

(*c*) Moor 796, 801. Post. 20. b.

ſaid Advowſons became void, the Prior preſented, againſt whom the King brought a *Qua. Imp.* wherein the King was barred, and all this was contained in the later Petition. And the Book ſaith, that the Earl of *Arundel*, and Sir *Guy* of *B.* came into the Court of Common Pleas, and demanded the Opinion of the Judges of that Court concerning the ſaid Caſe, who reſolved, that upon the Matter aforeſaid the King had no Right to ſeize. In which Caſe, amongſt many notable Points, this one appeareth to be adjudged and reſolved, that a Man born in *Gaſcoin* under the King's Ligeance, was no Alien born, as to Lands and Poſſeſſions within the Realm of *England*, and yet *England* and *Gaſcoin* were ſeveral and diſtinct Countries. 2. Inherited by ſeveral and diſtinct Titles. 3. Governed by ſeveral and diſtinct Municipal Laws, as it appeareth amongſt the Records in the *Tower*, *Rot. Vaſc.* 10 *Ed.* 1. *Num.* 7, 4. Out of the Extent of the Great Seal of *England*, and the Juriſdiction of the Chancery of *England*. 5. The like Objection might be made for default of Trial, as hath been made againſt the Plaintiff. And where it was ſaid that *Gaſcoin* was no Kingdom, and therefore it was not to be matched to the Caſe in Hand, it was anſwered, that this difference was without a Diverſity as to the Caſe in Queſtion; for if the Plea in the Caſe at the Bar be good, then without Queſtion the Prior had been an Alien; for it might have been ſaid (as it is in the Caſe at the Bar) that he was born *extra ligeantiam Regis Regni ſui Angliæ, & infra ligeantiam Dominii ſui Vaſconiæ*, and that they were ſeveral Dominions, and governed by ſeveral Laws: But then ſuch a Conceit was not hatched, that a King having ſeveral Dominions ſhould have ſeveral Ligeances of his Subjects. Secondly, it was anſwered, That *Gaſcoin* was ſometime a Kingdom, and likewiſe *Millain*, *Burgundy*, *Bavier*, *Britain*, and others were, and now are become Dukedoms. *Caſtile*, *Arragon*, *Portugal*, *Barcelona*, &c. were ſometime Earldoms, afterwards Dukedoms, and now Kingdoms. *Bohemia* and *Polonia* were ſometimes Dukedoms, and now Kingdoms, and (omitting many other, and coming nearer home) *Ireland* was before 32 *H.* 8. a Lordſhip, and now is a Kingdom, and yet the King of *England* was as abſolute a Prince and Soveraign when he was Lord of *Ireland*, as now, when he is ſtiled King of the ſame. 10 *Ed.* 3. 41. an exchange was made between an *Engliſhman* and a *Gaſcoin*, of Lands in *England* and in *Gaſcoin*; *ergo* the *Gaſcoin* was no Alien, for then had he not been capable of Lands in *England*, 1 *H.* 4. 1. the King brought a Writ of right of Ward againſt one *Sybil*, whoſe Husband was exiled into *Gaſcoin*; *Ergo*

Vaſconia appellata fuit tempore Caroli magni regnum de Vaſconia. Mo. 800. Vaugh 300.

Co. Lit. 7. b.

Ergo Gaſcoin is no Parcel or Member of *England*, for *exilium eſt patriæ privatio, natalis ſoli mutatio, legum nativarum amiſſio*, 4 *E.*4. 10.*b.* the King directed his Writ out of the Chancery under the Great Seal of *England*, to the Mayor of (*a*) *Burdeaux* (a City in *Gaſcoin*) then being under the King's Obedience, to certify, whether one that was outlawed here in *England*, was at that Time in the King's Service under him *in obſequio Regis*: whereby it appeareth, that the King's Writ did run into *Gaſcoin*, for it is the Trial that the Common Law hath appointed in that Caſe. But as to other Caſes, it is to be underſtood, that there be a kind of Writs, *viz. Brevia mandatoria & remedialia*, & *brevia mandatoria & non remedialia: brevia mandatoria & remedialia*, as Writs of Right, of *Formedon*, &c. of Debt, Treſpaſs, &c. and ſhortly, all Writs real and perſonal, whereby the Party wronged is to recover ſomewhat, and to be remedied for that Wrong that was offered unto him, are returnable or determinable in ſome Court of Juſtice within *England*, and to be ſerved and executed by the Sheriffs, or other Miniſters of Juſtice within *England*, and theſe cannot by any Means extend into any other Kingdom, Country or Nation, though that it be under the K's actual Ligeance and Obedience. But the other kind of Writs that are Mandatory, and not Remedial, are not tied to any Place, but do follow Subjection and Ligeance, in what Country or Nation ſoever the Subject is, as the King's Writ to command any of his Subjects reſiding in any Foreign Country to return into any of the King's own Dominions, *Sub fide & ligeantia quibus nobis tenemini*. And ſo are the aforeſaid mandatory Writs cited out of the *Regiſter* of Protection for Safety of Body and Goods, and requiring, that if any Injury be offered, that the ſame be redreſſed according to the Laws and Cuſtoms of that Place. *Vide le Reg. fo. 26. Stamford Prærog. cap.* 12. *fol.* 39. ſaith, That Men born in *Gaſcoin* are inheritable to Lands in *England*. This doth alſo appear by divers Acts of Parliament: for by the whole Parliament, 39 *E.* 3. *cap.* 16. it is agreed, that the *Gaſcoins* are of the Ligeance and Subjection of the King. *Vide* 42 *Ed.* 3. *cap.* 2. & 28 *H.* 6. *cap.* 5. &c.

(*a*) Vaugh. 290. 9 Co. 31. b. 2 Roll. 583. Co. Lit. 74. a. Br. Trial 126.

Vaugh. 401. 2 Inſt. 486. Moor 804.

3 Inſt. 179.

Antea fol. 8 b.

Guyen was another Part of *Aquitain*, and came by the ſame Title: And thoſe of *Guyen* were by Act of Parliament in 13 *H.* 4. not imprinted, *ex Rott. Parliament. eodem anno*, adjudged and declared to be no Aliens, but able to Poſſeſs and Purchaſe, &c. Lands within this Realm. And ſo doth *Stamford* take the Law. *Prærog. c.* 12. *f.* 39.

Guyan. Guienna. 13 H. 4. nu. 22. Corton's Abr. 480.

And thus much of the Dukedom of *Aquitain*, which (together with the Earldom of *Poytiers*) came to King *Henry* the Second (as hath been ſaid) by Marriage, and continued in the actual Poſſeſſion of the Kings of *England* by ten Deſcents, *viz.* from the firſt Year of King *Henry* the Second, unto the two and thirtieth Year of King *Henry* the Sixth, which was upon the very Point of three hundred Years, within which Dutchy there were (as ſome write) 4 Archbiſh. 24 Biſhop. 15 Earldoms, 202 Baronies, and above a thouſand Captainſhips and Bailiwicks: And in all this long Time neither Book-Caſe nor Record can be found wherein any Plea was offered to diſable any of them that were born there, by Foreign Birth, but the contrary hereof directly appeareth by the ſaid Book-Caſe of (*a*) 27 *lib. Aſſ.* 48.

(*a*) Dev. 19. a. Moor 796, 801.

Normandy, Normannia Normandia.

The Kings of *England* had ſometime *Normandy* under actual Ligeance and Obedience. The Queſtion is then, whether Men born in *Normandy*, after one King had them both, were inheritable to Lands in *England*; and it is Evident by our Books that they were: For ſo it appeareth by the declaratory Act of 17 *E.* 2. *de Prærog. Reg. c.* 12. that they were inheritable to, and capable of Lands in *England*: For the Purview of that Statute is, *Quod Rex habebit eſcaetas de terris Normannorum, &c. Ergo Normans* might have Lands in *England*: *& hoc ſimiliter intelligendum eſt, ſi aliqua hæreditas deſcendat alicui nato in partibus tranſmarinis, &c.* Whereby it appeareth, that they were capable of Lands within *England* by Deſcent. And that this Act of 17 *E.* 2. was but a Declaration of the Common Law, it appeareth both by *Bracton* who (as it hath been ſaid) wrote in the Reign of *Henry* the Third, *lib.* 3. *tract.* 2. *c.* 1. *f.* 116. and by *Britton* who wrote in 5 *E.* 1. *c.* 18. that all ſuch Lands as any *Norman* had either by Deſcent or Purchaſe, eſcheated to the King for their Treaſon, in revolting from their natural Liege Lord and Soveraign. And therefore *Stamford Prærog. cap.* 12. *fol.* 39. expounding the ſaid Statute of 17 *E.* 2. *cap.* 12. concludeth, that by that Chapter it ſhould appear (as if he had ſaid, it is apparent without Queſtion) that all Men born in *Normandy*, *Gaſcoin*, *Guyen*, *Anjou*, and *Britain*, (whilſt they were under actual Obedience) were inheritable within this Realm as well as *Engliſhmen*. And the Reaſon thereof was, for that they were under one Ligeance due to one Soveraign. And ſo much (omitting many other Authorities) for *Normandy*: ſaving I cannot let paſs the Iſles of *Jerſey* and *Gerſey*, Parts and Parcels of the Dukedom of *Normandy*, yet remaining under the actual Ligeance and Obedience of the King, I think no Man will doubt, but thoſe that are

Stamf. prærog. 38, 39, &c.

Kel. 202. pl. 19. 4 Inſt. 286. Co. Lit. 11. b. Seld. mare claus. lib. 2. cap. 19. Jerſey and Gerſey.

born in *Jernſey* and *Gerſey* (though thoſe Iſles are no Parcel of the Realm of *England*, but ſeveral Dominions enjoyed by ſeveral Titles, governed by ſeveral Laws) are inheritable and capable of any Lands within the Realm of *England*, 1 *E.* 3. *fol.* 7. Commiſſion to determine the Title of Lands within the ſaid Iſles, according to the Laws of the Iſles; and *Mich.* 41 *E.* 3. in the Treaſury, *Quia negotium præd' nec aliqua alia negotia de inſula præd' emergentia non debent terminari niſi ſecundum legem inſulæ præd'*, &c. And the *Regiſter fol*, 22. *Rex fidelibus ſuis de Jernſey & Gerſey.* K. *William* the Firſt brought this Dukedom of *Normandy* with him, which by five Deſcents continued under the actual Obedience of the Kings of *England*, and in or about the 6th Year of King *John*, the Crown of *England* loſt the actual Poſſeſſion thereof, until King *Henry* the 5th recovered it again, and left it to King *Henry* the 6th, who loſt it in the 28th of his Reign; wherein were (as ſome write) one Archbiſhoprick and ſix Biſhopricks, and an hundred ſtrong Towns and Fortreſſes, beſides thoſe that were waſted in War. *Maud* the Empreſs, the only Daughter and Heir to *Henry* the Firſt, took to her ſecond Husband *Jeffrey Plantaginet*, Earl of *Anjou*, *Tourain*, and *Mayne*, who had Iſſue King *H.* 2. to whom the ſaid Earldom by juſt Title deſcended, who, and the Kings that ſucceeded him, ſtiled themſelves by the Name of *Comes Andegav'*, &c. until K. *E.* 3. became King of all *France*; and ſuch as were born within that Earldom, ſo long as it was under the actual Obedience of the King of *England*, were no Aliens, but natural born Subjects, and never any Offer made, that we can find, to diſable them for foreign Birth. But leave we *Normandy* and *Anjou*, and ſpeak we of the little, but yet ancient and abſolute Kingdom of the Iſle of *Man*, as it appeareth by divers ancient and authentick Records; as taking one for many. *Artold* King of *Man* ſued to King *H.* 3. to come into *England* to confer with him, and to perform certain Things which were due to King *H.* 3. thereupon King *H.* 3. 21 *Decemb. ann. regn. ſui* 34. at *Wincheſter* by his Letters Patents gave Licence to *Artold* King of *Man* as followeth; *Rex omnibus ſalutem. Sciatis, quod licentiam dedimus*, &c. *Artoldo Regi de Man veniendo ad nos in Angl' ad loquend' nobiſc'*, & *ad faciend' nobis quod facere debet*; & *ideo vobis mandamus quod ei Regi in veniendo ad nos in Angl'*, *vel ibi morando*, *vel inde redeundo nullum faciat' aut fieri permittatis damnum*, *injur'*, *moleſtiam*, *aut gravamen*, *vel etiam hominib' ſuis quos ſecum ducet & ſi aliquid eis forisfact' fuerit*, *id eis ſine dilat' faciat' emendari. In cujus*, &c. *duratur' uſque ad feſt' S. Mich.* Wherein

Co. Lit. 11. b.

4 Inſt. 286.

Co. Lit. 7. a.

Man, Mannia. 4 Inſt. 283, 284. Co. Lit. 11. b. Kelw. 202. pl. 19 2 And. 155, 156.

two

two Things are to be obſerved; 1. That ſeeing that *Artold* King of *Man* ſued for a Licence in this Caſe to the King, it proveth him an abſolute King, for that a Monarch or an abſolute Prince cannot come into *England* without Licence of the King, but any Subject being in League, may come into this Realm without Licence; 2. That the King in his Licence doth ſtile him by the Name of a King. It was reſolved in 11 *H.* 8. that where an Office was found after the Deceaſe of *Thomas* Earl of *Darby*, and that he died ſeiſed, *&c.* of the Iſle of *Man*, that the ſaid Office was utterly void, for that the Iſle of *Man*, *Normandy*, *Gaſcoin*, *&c.* were out of the Power of the *Chancery*, and governed by ſeveral Laws; and yet none will doubt, but thoſe that are born within that Iſle, are capable and inheritable of Lands within the Realm of *England*. *Wales* was ſometime a Kingdom, as it appeareth by 19 *H.* 6. *fol.* 6. and by the Act of Parliament of 2 *H.* 5. *c.* 6. but whilſt it was a Kingdom, the ſame was holden, and within the Fee, of the King of *England*; and this appeareth by our Books, *Fleta*, *lib.* 1. *cap.* 16. 1 *E.* 3. 14. 8 *E.* 3. 59. 13 *E.* 3. Tit. *Juriſdict'* 10 *H.* 4. 6. *Plow. Com.* 368. And in this Reſpect, in divers ancient Charters, Kings of old Time ſtiled themſelves in ſeveral Manners, as King *Edgar*, *Britanniæ* Βασιλευς, *Ethelredus*, *totius Albion' Dei providentia Imperator*, *Edredus magn' Britann' Monarcha*, which among many other of like Nature I have ſeen. But by the Statute of 12 *E.* 1. *Wales* was united and incorporated into *England*, and made Parcel of *England* in Poſſeſſion; and therefore it is ruled in 7 *H.* 4. *f.* 13. *a.* that no Protection doth lie *quia moratur in Wallia*, becauſe *Wales* is within the Realm of *England*. And where it is recited in the Act of 27 *H.* 8. that *Wales* was ever Parcel of the Realm of *England*, it is true in this Senſe, *viz.* that before 12 *E.* 1. it was Parcel in Tenure, and ſince it is Parcel of the Body of the Realm. And whoſoever is born within the Fee of the King of *England*, though it be in another Kingdom, is a natural-born Subject, and capable and inheritable of Lands in *England*, as it appeareth in *Plow. Com.* 126. And therefore thoſe that were born in *Wales* before 12 *E.* 1. whilſt it was only holden of *England*, were capable and inheritable of Lands in *England*.

Wales, Cambria, Wallia. 3 Keb. 402. 4 Inſt. 239, 240, &c. Plow. 126. b 129. b. Vaugh. 281.

Co Lit 130. b. Fitz. Protect. 23. Br. Protect. 33. 3 Keb. 405. Vaugh. 414.

France, Gallia, Francia.

Now come we to *France* and the Members thereof, as *Callice*, *Guynes*, *Tournay*, *&c.* which deſcended to King *Ed.* the Third as Son and Heir to *Iſabel*, Daughter and Heir to *Philip le Beau*, K. of *France*. Certain it is, whilſt King

King *Henry* the Sixth had both *England*, and the Heart and greateſt Part of *France* under his actual Ligeance and Obedience (for he was crown'd King of *France* in *Paris*) that they that were then born in thoſe Parts of *France*, that were under actual Ligeance and Obedience, were no Aliens, but capable of, and inheritable to Lands in *England*. And that it is proved by the Writs in the Regiſter, *fol.* 26. cited before. But in the Inrolment of Letters Patents of Denization in the Exchequer *int' originalia ann.* 11 *H.* 6. with the Lord Treaſurer's Remembrancer, was ſtrongly urged and objected; for (it was ſaid) thereby it appeareth, that King *H.*6. in *anno* 11 of his Reign, did make Denizen one *Reynel* born in *France*; whereunto it was anſwered, that it is proved by the ſaid Letters Patents, that he was born in *France*, before King *Henry* the Sixth had the actual Poſſeſſion of the Crown of *France*, ſo as he was *Antenatus*; and this appeareth by the ſaid Letters Patents, whereby the King granteth, that *Magiſter Johannes Reynel ſerviens noſter, &c. infra regnum noſtrum Franc' oriundus pro termino vitæ ſuæ ſit ligeus noſter, & eodem modo teneatur ſicut verus & fidelis noſter infra regnum Angl' oriundus, ac quod ipſe terras infra regnum noſtrum Angl' ſeu alia dominia noſtra perquirere poſſit & valeat.* Now if that *Reynel* had been born ſince *Henry* the Sixth had the quiet Poſſeſſion of *France* (the King being crowned King of *France* about one Year before) of Neceſſity he muſt be an Infant of very tender Age, and then the King would never have called him his Servant, nor made the Patent (as thereby may be colelcted) for his Service, nor have called him by the Name of *Magiſter Johannes Reynel:* But without Queſtion he was *Antenatus*, born before the King had the actual and real Poſſeſſion of that Crown.

Callice is a Part of the Kingdom of *France*, and never was Parcel of the Kingdom of *England*, and the Kings of *England* enjoyed *Callice* in and from the Reign of K. *Edw.* the Third, until the Loſs thereof in Queen *Mary*'s Time, by the ſame Title that they had to *France*. And it is evident by our Books, that thoſe that were born in *Callice*, were capable and inheritable to Lands in *England*, 42 *E.* 3. *c.* 10. *Vide* 21 *H.*7. 33. *b.* 19 *H.* 6. 2 *E* 4. 1. *a.b.* 39 *H.* 6. 39. *a.* 21 *E.* 4. 18. *a.* 28 *H.* 6. 3. *b.* By all which it is manifeſt, that *Callice* being Parcel of *France* was under the actual Obedience and Commandment of the King, and by Conſequent thoſe that were born there, were natural-born Subjects, and no Aliens. *Callice* from the Reign of King *Ed.* 3. until the fifth Year of Queen *Mary*, remained under the actual Obedience of the King of *Engl.*

Callice. Calecia, Calerum. Kelw. 202. pl. 19. 2 And. 116 Br. Trial 58, 133 Br. Error 101. Br. Cinque Ports 10 Vaugh. 401. 4 Inſt. 282.

Guines

Fitz. Protect. 13 Guynes. Tournay. Dyer 224. pl. 29. Vaugh. 282.

Guines alſo, another Part of *France*, was under the like Obedience to King *Henry* the Sixth, as appeareth by 31 *H.* 6. *fol.* 4. And *Tournay* was under the Obedience of *Henry* the Eighth, as it appeareth by 5 *El. Dier fol.* 224. for there it is reſolved, that a Baſtard born at *Tournay*, whilſt it was under the Obedience of *Henry* the Eighth, was a natural Subject, as an Iſſue born within this Realm by Aliens. If then thoſe that were born at *Tournay*, *Callice*, &c. whilſt they were under the Obedience of the King, were natural Subjects, and no Aliens, it followeth, that when the Kingdom of *France* (whereof thoſe were Parcels) was under the King's Obedience, that thoſe that were then born there, were natural Subjects, and no Aliens.

Ireland, Hibernia. 12 Co. 108, 109, &c. 4 Inſt. 349, 350, &c. Dav. 60. Præf. 4. Rep. 32, 33.

Next followeth *Ireland*, which originally came to the Kings of *England* by Conqueſt, but who was the firſt Conqueror thereof, hath been a Queſtion. I have ſeen a Charter made by King *Edgar* in theſe Words: *Ego Edgarus Anglorum Βασιλευς, omniumque inſularum Oceani, quæ Britanniam circumjacent, Imperator & Dominus, gratias ago ipſi Deo omnipotenti Regi meo, qui meum Imperium ſic ampliavit & exaltavit ſuper Regnum patrum meorum, &c. mihi conceſſit propitia divinitas, cum Anglorum Imperio omnia Regna inſularum Oceani, &c. cum ſuis ferociſſimis Regibus uſque Norvegiam, maximamque partem Hibern', cum ſua nobiliſſima civitate de Dublina, Anglorum Regno ſubjugare, quapropter & ego Chriſti gloriam & laudem in Regno meo exaltare, & ejus ſervitium amplificare devotus diſpoſui, &c.*

Co. Lit. 7. a.

Yet for that it was wholly conquered in the Reign of *Henry* the Second, the Honour of the Conqueſt of *Ireland* is attributed to him, and his Stile was, *Rex Angl' Dominus Hibern', Dux Normann', Dux Aquitan', & Comes Andegav'*, King of *England*, Lord of *Ireland*, Duke of *Normandy*, Duke of *Aquitain*, and Earl of *Anjou*. That *Ireland* is a Dominion ſeparate and divided from *England*, it is evident by our Books, 20 *H.* 6. 8. Sir *John Pilkington's* Caſe. 32 *H.* 6. 25. 20 *Eliz. Dier* 360. *Plow. Com.* 360. And 2 *R.* 3. 12. *a. Hibernia habet Parliamentum, & faciunt leges, & noſtra ſtatuta non ligant eos, quia non mittunt milites ad Parliamentum* (which is to be underſtood, unleſs they be eſpecially named) *ſed perſon' eorum ſunt ſubjecti Regis, ſicut Inhabitantes in Caleſia, Gaſconia & Guyan.* Wherein it is to be obſerved, that the *Iriſhman* (as to his Subjection) is compared to Men born in *Calice*, *Gaſcoin*, and *Guyan*. Concerning their Laws, *Ex rotulis Patentium de anno* 11 *Regis H.* 3. there is a Charter which that King made, beginning in theſe Words: *Rex*, &c. *Baronibus, militibus, & omnibus libere tenentibus. L. ſalutem, ſatis ut credimus*

12 Co. 111. 4 Inſt. 351. 1 And. 263. 2 And. 116. Dav. 37. a. Jenk. Cent. 164 Br. Parliam. 98

Co. Lit. 141. a.

veſtra

veſtra audivit diſcretio, quod quando bonæ memor' (a) Johannes quondam Rex Angl' pater noſter venit in Hiberniam ipſe duxit ſecum viros diſcretos & legis peritos, quorum communi conſilio & ad inſtantiam, Hibernenſium ſtatuit & præcepit leges Anglicanas in Hibern' ita quod leges eaſdem in Scripturas redactas reliquit ſub ſigillo ſuo ad ſcaccarium Dublin.' So as now the Laws of *England* became the proper Laws of *Ireland*; and therefore, becauſe they have Parliaments holden there, whereat they have made divers particular Laws concerning that Dominion, as it appeareth in 20 *H.* 6. 8. & 20 *El.* (*b*) *Dyer* 360. and for that they retain unto this Day divers of their ancient Cuſtoms, the Book in 20 *H.* 6. 8. holdeth, that *Ireland* is governed by Laws and Cuſtoms, ſeparate and diverſe from the Laws of *Engl.* A Voyage Royal may be made into *Ireland*. *Vide* (*c*) 11 *H.* 4. 7. *a.* & 7 (*d*) *E.* 4. 27. *a.* which proveth it a diſtinct Dominion. And in *Anno* 33 *Reg. El.* it was reſolved by all the Judges of *England* in the Caſe of (*e*) *Orurke* an *Iriſhman*, who had committed High Treaſon in *Ireland*, that he by the Statute of 33 *H.* 8. *c.* 23. might be indicted, arraigned, and tried for the ſame in *England*, according to the Purview of that Statute; the Words of which Statute be, *That all Treaſons, &c. committed by any* (*f*) *Perſon out of the Realm of* England *ſhall be from henceforth enquired of, &c.* and they all reſolved (as afterward they did alſo in Sir *John Perrot's* Caſe) that *Ireland* was out of the Realm of *Engl.* and that Treaſons committed there, were to be tried within *England* by that Statute. In the Statute of 4 *H.* 7. *cap.* 24. of (*g*) *Fines*, Proviſion is made for them that be out of this Land, and it is holden in *Plow. Com.* in *Stowel's* Caſe, 375, that he that is in *Ireland* is out of this Land, and conſequently within that Proviſo. Might not then the like Plea be deviſed as well againſt any Perſon born in *Ireland*, as (this is againſt *Calvin* that is a *Poſtnatus*) in *Scotland*? For the *Iriſhman* is born *extra ligeantiam regis regni ſui Angl'*, *&c.* which be *verba operativa* in the Plea: But all Men know, that they are natural-born Subjects, and capable of and inheritable to Lands in *England*. Laſtly, to conclude this Part with (*h*) *Scotland* itſelf; in ancient Time Part of (*i*) *Scotland* (beſides *Berwick*) was within the Power and Ligeance of the King of *England* as appeareth by our Books (*k*) 42. *E.* 3. 2. *b.* the Lord *Beaumont's* Caſe, 11 *E.* 3. *c.* 2, *&c.* and by Precedents hereafter mentioned; and that Part (though it were under the King of *England's* Ligeance and Obedience) yet was it governed by the Laws of *Scotland*. *Ex rotulis Scotiæ*, *Anno* 11 *Ed.* 3. amongſt the Records in the Tower of *London*. *Rex*, *&c. Conſtituimus Rich. Talebot Juſticiarium noſtrum villæ Berwici*

(*a*) Co. Lit. 141. b. 2 Vent. 4.

(*b*) 9 Co. 117. b. Cart. 186.

(*c*) Fitz. Protect. 24. Br. Protect. 34.
(*d*) Fitz. Protect. 16. Br. Protect. 72. 3 Inſt. 11, 18, 24. Co. Lit. 261. b. 1 And. 262, 263 2 Vent 4. Cart. 190. Cawly 93.
(*f*) 35 H. 8. c. 2.
(*g*) Cawly 93. Co. Lit. 261. b. 3 Inſt. 11.

(*h*) 3 Inſt. 18. Plowd. 368. b. Scotland. Scotia.

(*i*) Heylin's Coſmog. lib. 4. p. 305, 306.
(*k*) Fitz. Brief 551.

Berwici super Twedam, ac omnium aliarum terrarum nostrarum in partibus Scot', ad faciend' omnia & singula quæ ad officium Justiciarii pertinent, secundum legem & consuetudinem regni Scot'. And after *anno 26 E. 3. ex eodem rot. Rex Henrico de Perney & Ricardo de Nevil, &c. volumus & vobis & alteri vestrum tenore præsentium committimus & mandamus, quod homines nostri de Scot' ad pacem & obedientiam nostrum existentes, legibus, libertatibus, & liberis consuetudinibus, quibus ipsi & antecessores sui tempore celebris memor' Alexandri quondam Regis Scot' rationabiliter usi fuerunt, uti & gaudere deberent, prout in quibusdam indenturis, &c. plenius dicitur contineri.* And there is a Writ in the *Register* 295. *a. Dedimus potestatem recipiendi ad fidem & pacem nostram homines de Galloway.* Now the Case in (*a*) 42 *Ed* 3. 2.*b.* (which was within sixteen Years of the said Grant, concerning the Laws in 26 *E.* 3.) ruleth it, That so many as were born in that Part of *Scotland*, that was under the Ligeance of the King, were no Aliens, but inheritable to Lands in *England*; yet was that Part of *Scotland* in another Kingdom governed by several Laws, *&c.* And if they were natural Subjects in that Case, when the King of *England* had but Part of *Scotland*, what Reason should there be, why those that are born there, when the King hath all *Scotland*, should not be natural Subjects, and no Aliens? So likewise (*b*) *Berwick* is no Part of *England*, nor governed by the Laws of *Engl.* and yet they that have been born there, since they were under the Obedience of one King, are natural-born Subjects, and no Aliens, as it appeareth in 15 *R.* 2. *cap.* 7, *&c. Vide* (*c*) 19 *H.* 6. 35.*b.* & 39 *H.*6. 39.*a.* And yet in all these Cases and Examples, if this new devised Plea had been suffic. they should have been all Aliens against so many Judgments, Resolutions, Authorities, and judicial Precedents in all Successions of Ages. There were sometimes in *England*, whilst the Heptarchy lasted, seven several crowned Kings of 7 several and distinct Kingdoms, but in the End the *West Saxons* got the Monarchy, and all the other Kings melted (as it were) their Crowns to make one imperial Diadem, for the King of the *West Saxons* over all. Now when the Whole was under the actual and real Ligeance and Obedience of one King, were any that were born in any of those several and distinct Kingdoms, Aliens one to another? Certainly they being born under the Obedience of one King and Sovereign, were all natural-born Subjects, and capable of and inheritable unto any Lands in any of the said Kingdoms.

(*a*) Fitz. Brief 551. Ant. 23.a.

Berwick.

(*b*) 1 Sid. 381, 382.

(*c*) Fitz. Protect. 8 Br. Protect. 49.

In

In the holy Hiſtory reported by St. *Luke*, *ex dictamine Spiritus Sancti*, *cap.* 21 & 22 *Act. Apoſtolorum*, it is certain, that St. *Paul* was a *Jew*, born in *Tarſus*, a famous City of *Cilicia*; for it appeareth in the ſaid 21ſt Chapter, Ver. 39, by his own Words, *Ego homo ſum quidem Judæus a Tarſo Ciliciæ non ignot' civitatis municeps.* And in the 22d Chapter, Verſe 3. *Ego ſum Vir Judæus natus Tarſo Ciliciæ*, &c. and then made that excellent Sermon there recorded, which when the *Jews* heard, the Text ſaith, Verſe 22, *Levaverunt vocem ſuam dicentes, tolle de terra hujuſmodi, non enim fas eſt eum vivere; vociferantibus autem eis & projicientibus veſtimenta ſua, & pulverem jactantibus in aerem, Claudius Lyſias* the popular Tribune, to pleaſe this turbulent and prophane Multitude (though it were utterly againſt Juſtice and common Reaſon) the Text ſaith, *Juſſit Tribunus induci eum in caſtra*, 2. *flagellis cædi*, and 3. *torqueri eum* (*quid ita?*) *ut ſciret propter quam cauſam ſic acclamarent*; and when they had bound *Paul* with Cords, ready to execute the Tribune's unjuſt Commandment, the bleſſed Apoſtle (to avoid unlawful and ſharp Puniſhment) took hold of the Law of a Heathen Emperor, and ſaid to the Centurion ſtanding by him, *Si hominem Romanum & indemnatum licet vobis flagellare?* Which when the Centurion heard, he went to the Tribune and ſaid,, *Quid acturus es? Hic enim homo civis Romanus eſt.* Then came the Tribune to *Paul*, and ſaid unto him; *Dic mihi ſi tu Romanus es? At ille dixit, etiam.* And the Tribune anſwered, *Ego multa ſumma civitatem hanc conſequutus ſum.* But *Paul* not meaning to conceal the Dignity of his Birthright ſaid, *Ego autem & natus ſum:* As if he ſhould have ſaid to the Tribune, you have your Freedom by Purchaſe of Money, and I (by a more noble Means) by Birthright and Inheritance. *Protinus ergo* (ſaith the Text) *deceſſerunt ab illo qui illum torturi erant, Tribunus quoque timuit poſtquam reſcivit, quia civis Romanus eſſet, & quia alligaſſet eum.* So as hereby it is manifeſt that *Paul* was a *Jew*, born at *Tarſus* in *Cilicia*, in *Aſia Minor*, and yet being born under the Obedience of the *Roman* Emperor, he was by Birth a Citizen of *Rome* in *Italy* in *Europe*, that is, capable of and inheritable to all Privileges and Immunities of that City. But ſuch a Plea as is now imagined againſt *Calvin* might have made St. *Paul* an Alien to *Rome*. For if the Emperor of *Rome* had ſeveral Ligeances for every ſeveral Kingdom and Country under his Obedience, then might it have been ſaid againſt St. *Paul*, that he was *extra*

lige-

ligeantiam Imperatoris regni ſui Italiæ, & infrà ligeantiam Imperatoris regni ſui Ciliciæ, &c. But as St. *Paul* was *Judæus patria & Romanus privilegio, Judæus natione & Romanus jure nationum*; ſo may *Calvin* ſay, that he is *Scotus patria, & Anglus privilegio, Scotus natione & Anglus jure nationum.*

Samaria in *Syria* was the chief City of the ten Tribes; but it being uſurped by the King of *Syria*, and the *Jews* taken Priſoners, and carried away in Captivity, was after inhabited by the *Panyms*. Now albeit *Samaria* of Right belonged to *Jury*, yet becauſe the People of *Samaria* were not under actual Obedience, by the Judgment of the chief Juſtice of the whole World they were adjudged *Alienigenæ*, Aliens: For in the Evangeliſt St. *Luke*, *c.* 17. when Chriſt had cleanſed the ten Lepers, *Unus autem ex illis* (ſaith the Text) *ut vidit quia mandatus eſſet, regreſſus eſt, cum magna voce magnificans Deum & cecidit in faciem ante pedes ejus gratias agens, & hic erat Samaritanus. Et Jeſus reſpondens dixit, nonne decem mundati ſunt, & novem ubi ſunt? Non eſt inventus qui rediret & daret gloriam Deo niſi hic Alienigena.* So as by his Judgment this *Samaritan* was *Alienigena*, a Stranger born, becauſe he had the Place, but wanted Obedience. *Et ſi deſit obedientia non adjuvat locus.* And this agreeth with the Divine, who ſaith, *Si locus ſalvare potuiſſet, Satan de cœlo pro ſua inobedientia non cecidiſſet. Adam in Paradiſo non cecidiſſet*, Lot *in monte non cecidiſſet, ſed potius in Sodom.*

6. Now reſteth the ſixth Part of this Diviſion, that is to ſay, ſix demonſtrative Illations or Concluſions, drawn plainly and expreſly from the Premiſes.

1. Every one that is an Alien by Birth, may be, or might have been an Enemy by Accident; but *Calvin* could never at any Time be an Enemy by any Accident; *Ergo*, he cannot be an Alien by Birth. *Vide* 33 *H.* 6. *f.* 1. *a.b.* the Difference between an Alien Enemy, and a Subject Traitor. *Hoſtes ſunt qui nobis, vel quibus nos bellum decernimus, cæteri proditores, prædones, &c.* The *major* is apparent, and is proved by that which hath been ſaid *Et vide Magna Charta, cap.* 30. 19 *E.* 4. 6. 9 *E.* 3. *c.* 1. 27 *E.* 3. *c.* 2. 4 *H.* 5. *c.* 7. 14 *E.* 3. *ſtat.* 2. *c.* 2, *&c.*

2. Whoſoever are born under one natural Ligeance and Obedience due by the Law of Nature to one Sovereign, are natural-born Subjects: But *Calvin* was born under one natural Ligeance and Obedience, due by the Law of Nature to one Sovereign; *Ergo* he is a natural-born Subject.

3. Who-

3. Whoſoever is born within the King's Power or Protection, is no Alien: But *Calvin* was born under the King's Power and Protection; *Ergo* he is no Alien.

4. Every Stranger born muſt at his Birth be either *amicus*, or *inimicus*: But *Calvin* at his Birth could neither be *amicus* nor *inimicus*; *Ergo* he is no Stranger born. *Inimicus* he cannot be, becauſe he is *ſubditus*; for that Cauſe alſo he cannot be *amicus*; neither now can *Scotia* be ſaid to be *ſolum amici*, as hath been ſaid.

5. Whatſoever is due by the Law or Conſtitution of Man, may be altered: But natural Ligeance or Obedience of the Subject to the Soveraign cannot be altered; *Ergo* natural Ligeance or Obedience to the Soveraign is not due by the Law or Conſtitution of Man. Again, whatſoever is due by the Law of Nature, cannot be altered: But Ligeance and Obedience of the Subject to the Soveraign is due by the Law of Nature; *Ergo* it cannot be altered. It hath been proved before, that Ligeance or Obedience of the Inferior to the Superior, of the Subject to the Soveraign, was due by the Law of Nature many thouſand Years before any Law of Man was made: Which Ligeance or Obedience (being the only Mark to diſtinguiſh a Subject from an Alien) could not be altered; therefore it remaineth ſtill due by the Law of Nature. For *Leges naturæ perfectiſſimæ ſunt & immutabiles, humani vero juris conditio ſemper in infinitum decurrit, & nihil eſt in eo quod perpetuo ſtare poſſit. Leges humanæ naſcuntur, vivunt, & moriuntur.* Sawyer's Argument in Quo Warranto 25. Antea 13. a.

Laſtly, whoſoever at his Birth cannot be an Alien to the King of *England*, cannot be an Alien to any of his Subjects of *England*: But the Plaintiff at his Birth could be no Alien to the King of *England*; *Ergo* the Plaintiff cannot be an Alien to any of the Subjects of *England*. The *Major* and *Minor* both be *propoſitiones perſpicuæ veræ*. For as to the *Major* it is to be obſerved, that whoſoever is an Alien born, is ſo accounted in Law in reſpect of the King: And that appeareth firſt by the Pleading ſo often before remembred, that he muſt be *extra ligeantiam Regis*, without any mention making of the Subject. 2. When an Alien born purchaſeth any Lands, the King only ſhall have them, though they be holden of a Subject, in which Caſe the Subject loſeth his Seigniory. And as it is ſaid in our Books, an Alien may purchaſe *ad proficuum Regis*; but the Act of Law giveth the Alien nothing: And therefore if a Woman Alien marrieth a Subject, ſhe ſhall not be endowed, neither ſhall an Alien be Tenant by the Curteſy. *Vide* 3 *H.* 6. 55. *a.* 4 *H.* 3. 179. 3. The Subject ſhall plead, that the Defendant is an Co. Lit. 2. b. Br. Denizen 1. Fitz. Dower 179.

Alien born for the Benefit of the King, that he upon Office found may ſeize, and 2. that the Tenant may yield to the King the Land, and not to the Alien, becauſe the King hath beſt Right thereunto. 4. Leagues between our Soveraign and others are the only Means to make Aliens Friends, *& fœdera percutere*, to make Leagues, only and wholly pertaineth to the King. 5. Wars do make Aliens Enemies, and *bellum indicere* belongeth only and wholly to the King, and not to the Subject, as appeareth in 19 *Ed.* 4. *fol.* 6. *b.* 6. The King only without the Subject may make not only Letters of ſafe Conduct, but Letters Patents of Denization, to whom, and how many he will, and enable them at his Pleaſure to ſue any of his Subjects in any Action whatſoever, real or perſonal, which the King could not do without the Subject, if the Subject had any Intereſt given unto him by the Law in any Thing concerning an Alien born. Nay, the Law is more preciſe herein than in a Number of other Caſes, of higher Nature: For the King cannot grant to any other to make of Strangers born Denizens, it is by the Law it ſelf ſo inſeparably and individually annexed to his Royal Perſon (as the Book is in 20 *H.* 7. *fol.* 8.) For the Law eſteemeth it a Point of high Prerogative, *Jus Majeſtatis, & inter inſignia ſummæ poteſtatis*, to make Aliens born Subjects of the Realm, and capable of the Lands and Inheritances of *Engl.* in ſuch ſort as any natural-born Subject is. And therefore by the Statute of 27 *H.* 8. *c.* 24. many of the moſt ancient Prerogatives and royal Flowers of the Crown, as Authority to pardon Treaſon, Murther, Manſlaughter, and Felony, Power to make Juſtices in Eyre, Juſtices of Aſſiſe, Juſtices of Peace and Gaol-Delivery, and ſuch like, having been ſevered and divided from the Crown, were again reunited to the ſame: But Authority to make Letters of Denization, was never mentioned therein to be reſumed, for that never any claimed the ſame by any pretext whatſoever, being a Matter of ſo high a Point of Prerogative. So as the Pleading againſt an Alien, the Purchaſe by any Alien, Leagues and Wars between Aliens, Denizations, and ſafe Conducts of Aliens, have Aſpect only and wholly unto the King. It followeth therefore, that no Man can be Alien to the Subject that is not Alien to the King. *Non poteſt eſſe alienigena corpori, qui non eſt capiti, non gregi qui non eſt Regi.*

Br. Patents 111.

The Authorities of Law cited in this Caſe for Maintenance of the Judgment, 4 *H.* 3. *tit. Dower. Bracton, lib.* 5. *fol.* 427. *Fleta, lib.* 6. *cap.* 47. *In temps E.* 1. *Hingham's Report.* 17 *Edw.* 2. *cap.* 12. 11 *Edw.* 3. *cap.*

cap. 2. 14 *Ed.* 3. *Statut. de Francia.* 42 *Ed.* 3. *fol.* 2. 42 *Ed.* 3. *cap.* 10. 22 *Lib. Aſſ.* 25. 13 *Rich.* 2. *cap.* 2. 15 *Rich. cap.* 7. 11 *Hen.* 4. *fol.* 26. 14 *Hen.* 4. *fol.* 19. 13 *H.* 4. *Statutum de Guyan.* 29 *Hen.* 6. *tit. Eſtoppel* 48. 28 *H.* 6. *cap.* 5. 32 *Hen.* 6. *fol.* 23. 32 *Hen.* 6. *f.* 26. *Littl. temps Ed.* 4 *lib.* 2. *cap. Villenage.* 15 *Ed.* 4 *fol.* 15. 19 *Ed.* 4. 6. 22 *Ed.* 4. *cap.* 8. 2 *Rich.* 3. 2. & 12. 6 *Hen.* 8. *fol.* 2. *Dyer.* 14 *H.* 8. *cap.* 2. No manner of Stranger born out of the King's Obeyſance, 22 *H.* 8. *c.* 8. Every Perſon born out of the Realm of *England*, out of the King's Obeyſance, 32 *H.* 8. *c.* 16. 25 *H.* 8. *c.* 15, *&c.* 4 *Ed.* 6. *Plowd. Comment. fol.* 2. *Fogaſſa*'s Caſe. 2 & 3 *Ph.* & *Mar. Dyer* 145. *Shirley*'s Caſe. 5 *El. Dyer* 224. 13 *El. c.* 7. *de Bankrupts.* All Commiſſions ancient and late, for the finding of Offices, to intitle the King to the Lands of Aliens born: Alſo all Letters Patents of Denization of ancient and later Times do prove, That he is no Alien that is born under the King's Obedience.

The 5. general part concerning Inconvenience.

Now we are come to conſider of legal Inconveniences: And firſt of ſuch as have been objected againſt the Plaintiff, and ſecondly of ſuch as ſhould follow, if it had been adjudged againſt the Plaintiff.

Of ſuch Inconveniences as were objected againſt the Plaintiff, there remain only four to be anſwered; for all the reſt are clearly and fully ſatisfied before: 1. That if *Poſtnati* ſhould be inheritable to our Laws and Inheritances, it were reaſon they ſhould be bound by our Laws; but *Poſtnati* are not bound by our Statute or Common Laws; for they having (as it was objected) never ſo much Freehold or Inheritance, cannot be returned of Juries, nor ſubject to Scot or Lot, nor chargeable to Subſidies or Quinzimes, nor bound by any Act of Parliament made in *Engl.* 2. Whether one be born within the Kingdom of *Scotland*, or no, is not triable in *England*, for that it is a Thing done out of this Realm, and no Jury can be returned for the Trial of any ſuch Iſſue: And what Inconvenience ſhould thereof follow, if ſuch Pleas that wanted Trial ſhould be allowed (for then all Aliens might imagine the like Plea) they that objected it, left it to the Conſideration of others. 3. It was objected, that this Innovation was ſo dangerous, that the certain Event thereof no Man could foreſee, and therefore, ſome thought it fit, that Things ſhould ſtand and continue as they had been in former Time, for fear of the worſt. 4. If *Poſtnati* were by Law legitimated in *England*, it was objected what Inconvenience and Confuſion ſhould

follow, if (for the Puniſhment of us all) the King's Royal Iſſue ſhould fail, *&c.* whereby thoſe Kingdoms might again be divided. All the other Arguments and Objections that have been made, have been all anſwered before, and need not to be repeated again.

1. To the firſt it was reſolved, That the Cauſe of this doubt was the Miſtaking of the Law: For if a *Poſtnatus* do purchaſe any Lands in *England*, he ſhall be ſubject in reſpect thereof, not only to the Laws of this Realm, but alſo to all Services and Contributions, and to the Payment of Subſidies, Taxes, and Publick Charges, as any Denizen or *Engliſhman* ſhall be; nay, if he dwell in *England*, the King may command him by a Writ of *Ne exeat Regnum*, that he depart not out of *England*. But if a *Poſtnatus* dwell in *Scotland*, and have Lands in *England*, he ſhall be chargeable for the ſame to all Intents and Purpoſes, as if an *Engliſhman* were Owner thereof, and dwelt in *Scotland*, *Ireland*, in the Iſles of *Man*, *Jerneſey*, or *Guernſey*, or elſewhere. The ſame Law is of an *Iriſhman* that dwells in *Ireland*, and hath Land in *England*. But if *Poſtnati*, or *Iriſhmen*, Men of the Iſles of *Man*, *Jerneſey*, *Guernſey*, *&c.* have Lands within *England*, and dwell here, they ſhall be ſubject to all Services and Publick Charges within this Realm, as any *Engliſhman* ſhall be. So as to Services and Charges, the *Poſtnati* and *Engliſhmen* born are all in one Predicament.

2. Concerning the Trial, a threefold Anſwer was thereunto made and reſolved: 1. That the like Objection might be made againſt *Iriſhmen*, *Gaſcoins*, *Normans*, Men of the Iſles of *Man*, *Jerneſey*, and *Gerſey*, of *Berwick*, *&c.* all which appear by the Rule of our Books to be natural-born Subjects; and yet no Jury can come out of any of thoſe Countries and Places, for Trial of their Births there. 2. If the Demandant or Plaintiff in any Action concerning Lands be born in *Ireland*, *Jerneſey*, *Gerſey*, *&c.* out of the Realm of *England*, if the Tenant or Defendant plead, that he was born out of the Ligeance of the King, *&c.* the Defendant or Plaintiff may reply, that he was born under the Ligeance of the King at ſuch Place within *England*; and upon the Evidence the Place ſhall not be material, but only the Iſſue ſhall be, whether the Demandant or Plaintiff were born under the Ligeance of the King in any of his Kingdoms or Dominions whatſoever: And in that Caſe the Jury (if they will) may find the ſpecial Matter, *viz.* the Place where he was born, and leave it to the Judgment of the Court: and that Jurors may take Knowledge of Things done out

Co. Lit. 261. a. b
6 Co. 47. a.

out of the Realm in this and like Cases, *Vide* 7 *H.* 7. 8. *l.* 20 *Ed.* 3. *Averment* 34. 5 *Ric.* 2. *tit. Trial* 54. 15 *Ed.* 4. 15. 32 *H.* 6. 25. *Fitz. Nat. Br.* 196. *Vide Dowdale's* Case, in the *sixth Part of my Reports, fol.* 47. and there divers others Judgments be vouched. 3 *Brown* in *anno* 32 *H.* 6. reporteth a Judgment then lately given, that where the Defendant pleaded, that the Plaintiff was a *Scot*, born at St. *Johns* Town in *Scotland*, out of the Ligeance of the King; whereupon they were at Iſſue, and that Iſſue was tried where the Writ was brought, and that appeareth alſo by 27 *Aſſ. pl.* 24. that the Jury did find the Prior to be born in *Gaſcoin:* for ſo much is neceſſarily proved by the Words *trove fuit.*) And 20 *Ed.* 3. *tit. Averment* 34. *in juris utrum*, the Death of one of the Vouchees was alledged at ſuch a Caſtle in *Britain*, and this was inquired of by the Jury: And it is holden in 5 *Ric.* 2. *tit. Trial* 54. That if a Man be adhering to the Enemies of the King in *France*, his Land is forfeitable, and his Adherency ſhall be tried where the Land is, as oftentimes hath been done, as there it is ſaid by *Belknap:* And *Fitz. Nat. Br.* 196. *in a Mortdanc'*, if the Anceſtor died *in itinere peregrinationis ſuæ verſ. terram ſanctam*, the Jury ſhall inquire of it. But in the Caſe at Bar, ſeeing the Defendant hath pleaded the Truth of the Caſe, and the Plaintiff hath not denied it, but demurred upon the ſame, and thereby confeſſed all Matters of Fact, the Court now ought to judge upon the ſpecial Matter, even as if a Jury upon an Iſſue joined in *England*, as is aforeſaid, had found the ſpecial Matter, and left it to the Court.

3. To the Third it was anſwered and reſolved, That this Judgment was rather a Renovation of the Judgments and Cenſures of the Reverend Judges and Sages of the Law in ſo many Ages paſt, than any Innovation, as appeareth by the Books and Book-caſes before cited: neither have Judges Power to judge according to that which they think to be fit, but that which out of the Laws they know to be right and conſonant to Law. *Judex bonus nihil ex arbitrio ſuo faciat, nec propoſito domeſticæ voluntatis, ſed juxta leges & jura pronuntiet.* And as for *timores*, Fears grounded upon no juſt Cauſe, *Qui non cadunt in conſtantem virum, vani timores æſtimandi ſunt.*

4. And as to the Fourth, it is leſs than a Dream of a Shadow, or a Shadow of a Dream: for as it hath been often ſaid, natural Legitimation reſpecteth actual Obedience to the Soveraign at the Time of the Birth: for as the *Antenati* remain Aliens as to the Crown of *Engl.* becauſe they were born when there were ſeveral Kings of the ſeveral Kingdoms, and the 2 Ventris 6.

uniting of the Kingdoms by deſcent ſubſequent, cannot make him a Subject to that Crown to which he was an Alien at the Time of his Birth: So albeit the Kingdoms (which Almighty God of his infinite Goodneſs and Mercy divert) ſhould by deſcent be divided, and governed by ſeveral Kings; yet was it reſolved, That all thoſe that were born under one natural Obedience, while the Realms were united under one Soveraign, ſhould remain natural-born Subjects, and no Aliens; for that Naturalization due and veſted by Birth-right, cannot by any Separation of the Crowns afterward be taken away: nor he that was by Judgment of Law a natural Subject at the Time of his Birth, become an Alien by ſuch a Matter *ex poſt facto*. And in that Caſe, upon ſuch an Accident, our *Poſtnatus* may be *ad fidem utriuſque Regis*, as *Bracton* ſaith in the afore-remembred Place, *fol.* 427. *Sicut Anglicus non auditur in placitando aliquem de terris & tenement' in Francia, ita nec debet Francigena & alienigena qui fuerit ad fid' Reg' Fran' audiri placitando in Angl': ſed tamen ſunt aliqui Francigenæ in Franc' qui ſunt ad fidem utriuſq; & ſemper fuerunt ante Normanniam deperditam & poſt, & qui placitant hic & ibi, ea ratione qua ſunt ad fidem utriuſque, ſicut fuit Willielmus comes mareſchallus & manens in Anglia, & M. de Gynes manens in Francia, & alii plures.* Concerning the Reaſon drawn from the (*a*) Etymologies, it made againſt them, for that by their own Derivation, *alienæ gentis*, and *alienæ ligeantiæ* is all one: But Arguments drawn from Etymologies, are too weak and too light for Judges to build their Judgments upon: for *Sæpenumero ubi proprietas* (*b*) *verborum attenditur, ſenſus veritatis amittitur*: and yet when they agree with the Judgment of Law, Judges may uſe them for Ornaments. But on the other ſide, ſome Inconveniences ſhould follow, if the Plea againſt the Plaintiff ſhould be allowed: for firſt it maketh Ligeance local; *videlicet, Ligeantia Regis Regni ſui Scotiæ*, and *Ligeantia Regis Regni ſui Angliæ*: whereupon ſhould follow, Firſt, That Faith or Ligeance, which is univerſal, ſhould be confined within local Limits and Bounds: Secondly, That the Subjects ſhould not be bound to ſerve the King in Peace or in War out of thoſe Limits; Thirdly, It ſhould Illegitimate many, and ſome of noble Blood, which were born in *Gaſcoign, Guyan, Normandy, Callice, Tournay, France*, and divers other of his Majeſty's Dominions, whilſt the ſame were in actual Obedience

(*a*) Co. Lit. 63. b

(*b*) 9 Co. 130 b.

Obedience, and in *Berwick*, *Ireland*, *Jernsey* and *Gersey*, if this Plea should have been admitted for good. And thirdly, this strange and new devised Plea inclineth too much to countenance that dangerous and desperate Error of the *Spencers*, touched before, to receive any Allowance within *Westminster-Hall*.

In the proceeding of this Case, these Things were observed, and so did the Chief Justice of the Common Pleas publickly deliver in the End of his Argument in the Exchequer-Chamber. First, that no Commandment or Message by Word or Writing was sent or delivered from any whatsoever to any of the Judges, to cause them to incline to any Opinion in this Case; which I remember, for that it is honourable for the State, and consonant to the Laws and Statutes of this Realm. Secondly, There was observed, what a Concurrence of Judgments, Resolutions, and Rules there be in our Books in all Ages concerning this Case, as if they had been prepared for the deciding of the Question of this Point: and that (which never fell out in any doubtful Case) no one Opinion in all our Books is against this Judgment. Thirdly, That the five Judges of the King's Bench, who adjourned this Case into the Exchequer-Chamber, rather adjourned it for weight than difficulty, for all they in their Arguments *una voce* concurred with the Judgment. Fourthly, That never any Case was adjudged in the Exchequer-Chamber with greater Concordance and less Variety of Opinions, the Lord Chancellor and twelve of the Judges concurring in one Opinion. Fifthly, That there was not in any Remembrance so honourable, great, and intelligent an auditory at the Hearing of the Arguments of any Exchequer-Chamber Case, as was at this Case now adjudged. Sixthly it appeareth, That *Jurisprudentia legis communis Angliæ est scientia socialis & copiosa*: sociable, in that it agreeth with the Principles and Rules of other excellent Sciences, Divine and Humane: copious, for that *quamvis ad* * *ea quæ frequentius accidunt jura adaptantur*, yet in a Case so rare, and of such a Quality, that Loss is the assured End of the Practice of it (for no Alien can purchase Lands, but he loseth them, and *ipso facto* the King is intitled thereunto, in respect whereof a Man would think few Men would attempt it) there should be such a Multitude and *Farrago* of Authorities in all Successions of Ages, in our Books and Book-Cases, for the deciding of a Point of so rare an Accident. *Et sic determinata & terminata est ista quæstio.*

* 5 Co. 127. b. Co. Lit. 218. a. 2 Inst. 137. Cart. 13. 6 Co. 87. a.

Super quo viſis & per cur' Domini Regis hic plenius intellect' omnibus & ſingulis præmiſſis, diligenterque inſpect' & examinat', maturaque deliberatione inde habit', pro eo quod videtur cur' Domini Regis nunc hic quod placitum prædictum per prædictos Richardum Smith & Nic. Smith ſuperius placit' minus ſufficiens in lege exiſt. ad prædict' Robertum Calvin a reſponſ. ad breve ſuum prædictum habend', repellend'. Ideo conſiderat' eſt per cur' Domini Regis nunc hic, quod prædict' Richardus Smith & Nicholaus Smith ad breve ipſius Roberti ulterius reſpond'.

Mich.

Mich. 26 & 27 Eliz.

BULWER'S *Case.*

Bulwer of *Dalling* in *Norfolk* brought an Action on his Case againſt *George Smith*, and declared that one *Henry Heydon* Eſq; did recover 20 *l. &c.* in the Common Pleas againſt the Plaintiff, and after Judgment, and before Execution, the ſaid *Henry Heydon* died, and afterwards the ſaid Defendant knowing thereof, at *W.* in the County of *Norfolk* to outlaw the Plaintiff upon the ſaid Judgm. in the Name of *Henry Heydon malitioſe & deceptive machinatus eſt*, in Performance of which the Defendant, *Trin.* 23 *El.* at *Weſtminſter* in *Midd.* took forth a Writ of *Capias ad Satisfaciend'* in the Name of the ſaid *Henry* upon the ſaid Judgment directed to the Sheriffs of *London*, who by the Procurement of the Defendant returned *Non eſt inventus*; whereupon the Defendant purchaſed a Writ of Exigent in the Name of the ſaid *Henry*, which Writ the ſaid Sheriffs by the Procurement of the ſaid Defendant returned, that at ſeveral Huſtings the ſaid now Plaintiff had been demanded, *Et ad Huſtingum de communibus placitis tent' in Guildhalda civitat' præd' die Lun' prox' poſt feſtum Apoſtol' Simonis & Jud'*, *anno ſupradict' præd'* the now Plaintiff *quint' exactus fuit, &c. & ideo ipſe* the Plaintiff *utlagatus fuit:* And afterwards *Paſch.* 24. *El.* the Defendant purchaſed out of the ſaid Common Pleas a Writ of *Capias utlagatum*, in the Name of the ſaid *Henry*, directed to the Sheriff of *Norf.* to arreſt his Body, *&c.* which Writ did mention that the ſaid now Plaintiff was outlawed *die Lun' prox' ante feſtum Apoſtolorum Simonis & Jud'*, *&c.* And the ſaid Writ the Defendant at *W.* aforeſaid in the ſaid County of *Norfolk*, did deliver to one *Robert Godfrey* then Deputy to the Sheriff of the ſaid County, to the Intent that he ſhould execute the ſaid Writ, the which *Robert* by Force of the ſaid Writ took, and arreſted the ſaid now Plaintiff, and did impriſon him by the Space of two Months, until the now Plaintiff purchaſed his Charter of Pardon, by Reaſon of which Outlawry he forfeited all his Goods and Chattels: And upon this Declaration the Defendant did demur in Law; and the principal Cauſe of the Demurrer was, becauſe this Action by the Pretence of the Defendant, ought

4 Leon. 52, 53. Noy 22.

Cr. Jac. 667. Cr. El. 629.

ought to have been brought in *Mid.* where the Wrong began, for there (as it was ſaid) the Def. took out as well the *Cap' ad Satisfac'* as the *Exigent* and the *Cap' Utlagat'* alſo. And altho' the *Cap' Utlagat'* was executed in *Norf.* yet the Action ought to be brought where the Wrong began; as in the Caſe of *Conſpiracy* in 42 *E.* 3. 14. *a.* and divers other Caſes were put; alſo, by the Outlawry which was in *Lond.* all his Goods and Chat. were forfeit. where it is more Reaſon to bring the Act'n than in *Norf.* But it was anſwer. and reſolved, That the (*a*) Act'n was well brought in *N.* for it is a Maxim in Law, *Qd' ibi ſemper debet fieri triatio, ubi jurator' meliorem poſſunt habere notitiam.* And in *N.* was the viſible Wrong, for there the Pl. was impriſoned for the Space of 2 Months, and therefore it is great Reaſon that the Pl. may have his Action there, and it doth not appear by the Record what Goods or Chatt. the Pl. had at the Time of the Outlawry, but for the Aggravating of the Damages, the Pl. may give in Evidence what Goods and Chat. he hath forfeited by the Outlawry. And this Act'n doth conſiſt upon 2 princip. Parts, the one, Matter of Record, and the other Matter in Fact; and none of the Matters of Record, but is mixed with Matter of Fact; and no Matter of Fact, but it is mix'd with Matter of Record: For the Writs and the Outlawry are Matters of Record, but mixed with Matters in Fact, *ſc.* taking forth, and Proſecut. of them by the Def. in the Name of *H. Heydon*, which are Matters in Fact; alſo the Impriſonm. is a Matter in Fact, but it is mixed with the Writ of *Cap' utlagat'*, which is of Record, *ſc.* if the Pl. was arreſted by Virtue thereof. And Matters in Fact are triable only by the Country, and not Matters of Rec. and when one Matter in one County is depend. upon the Matt. in the other County, there the Pl. may (*b*) chuſe in which County he will bring his Act'n, (unleſs the Def. upon the general Iſſue pleaded, ſhould be prejudic. in his Trial, as he would not be in this caſe,) as if 2 (*c*) conſpire to indict a Man in one County, and they by their malicious Proſecut. make the Execut. of their Conſpiracy in anoth. County, and there cauſe the Party to be indicted, the Pl. may have his Act'n of Conſpiracy in which County he will, for they put their Conſpir. in one County in Execut. in the oth. and the Matter of Record of the Indictm. is mixed with Matter of Fact. But if they conſpire in one County, by Force of which Conſpir' without any other Act by them, he is indicted in another County, there the Writ ought to be brought in the County where the Conſpir. was. for the Def. have done nothing in the County where the Indictm. was, nor were Parties nor Privies to the finding of the Indictm. but only by the Conſpir. in the other County. And that appears in 14 *E.* 4. 3. *b.* and ſo the Books in (*d*) 42 *E.* 3. 14. *a.* 20 (*e*) *H* 6. 10. *a. b. F.N.B.* (*f*) 116. *b.* and oth. Books are well reconciled. If a (*g*) Manaſſe be made in *Eſſ.* by which my Ten'ts depart in *Lond.* I ſhall have my Action in *Eſſ.* and not in

(*a*) Cr. El. 574, 844. Dyer 38. pl. 51. Cr Car. 20, 21. Dyer 40. pl. 66.

(*b*) 1 Sid. 218, 219, 401. 1 Mod. Rep. 198, 199. Winch 100. Latch 262. 1 Brownl. 12. 69. Cr. Jac. 533. Noy 22. Hob. 196, 209. Dyer 38. pl. 54. Cr. El. 574, 844. Plow. 530.

(*c*) 4 Leon. 53. 2 Rol Rep. 259. Stanf. cor. 166. d

(*d*) Fitz. Conſpiracy 10. Br. Conſpir. 6.

(*e*) Br. Lieu 3.

(*f*) F. N. B. 116. m.

(*g*) Br. Lieu 91. Br. Waſt 9.

in *Lond.* for in ſuch caſe I have done nothing in *Lond.* 9 *H.* 6. 42. *b.* In all caſes where the Act'n is founded upon 2 (*a*) things done in ſeveral Counties, and both are material or traverſable, and the one without the oth. doth not maintain the Act'n, there the Pl. may chuſe to bring his Act'n in which of the Count. he will, as it is if a Servant be (*b*) retained in one County and departs in another, and therewith agree 41 *E.* 3. 1. *b.* 34 *H.* 6. 18. *a* 38 *H.* 6. 15. *b.* 14 *E.* 4. 6. 20 *H.* 6. 11. 29 *H.* 8 *Dyer* 38. 20 *E.* 3. 25, *&c.* So if a man be arreſted in Execut. in one County, and he (*c*) eſcapes into anoth. County, the Pl. may chuſe to bring his Act'n in which of the Counties he will, and therewith agree 15 *E.* 4. 3. *a. b.* 30 *H.* 6. 6. *a. b.* 11 *El. Dyer* 278. So in a writ of (*d*) Annuity founded on a preſcript. againſt a man of religion, or body corporate, where the Church or Houſe is in one County, and the Seiſin is alledged in anoth. County, the Pl. may chuſe in which County he will bring his Act'n. 48 *E.* 3. 26. *a. b.* 4 *H.* 4. 1. 4 *H.* 6. 5. *b.* 10 *H.* 6. 19. *a. b.* 39 *H.* 6. 15. *b.* 2 *E.* 4. 28. *b.* 4 *E.* 4. 26. *a* *&c.* *F. N. B.* 152. *e.* Otherwiſe if the Annuity be granted in one County to be paid in anoth. the Act'n lies where the grant was, and ſo is * 8 *H.* 6. 23. *b.* So if a man cites one in one County to appear before (*e*) the Admiral in another County, for a thing done in the body of the County, by force of which the party appears, he may have his Act'n in the one County or the oth. at his pleaſure, 5 *Ma. Dyer* 159. *b.* 42 *E.* 3. 14. *a.* 44 *E.* 3. 31. *b.* 32. *a.* 46 *E.* 3. 8. *b.* 3 *H.* 4. 3. *a.* 38 *H.* 6. 14 *b.* 14 *E.* 4. 3. *a. b.* The ſame Law of the Spiritual Court. So if the Def. caſts a Protection in one County, and remains in anoth. County, he may bring his Action in which of the Count. he pleaſes. 20 *H.* 6. 10. *a. b.* So if a man ſtrikes a Perſon in one County (*f*), and he dies in anoth. County, the appeal of murder may be brought in the one or the oth. County, and yet the Def. did nothing in the County where the party died, but the (*g*) Death which enſued on the ſtroke makes the Felony. 18 *E.* 3. 32. 9 *H.* 6. 63. 45 *Aſſ. pl.* 9. 43 *Ed.* 3. 3 (*h*) *H.* 7. 12. *a.* 4 *H.* 7. 18. 6 *H.* 7. 10. 11 *H.* 4. 93, If a man commits (*i*) a robbery in one county, and carries the goods into divers Counties, the Party robbed may have an appeal of felony in which of the Count. he will, but not an (*k*) appeal of robbery, but only in the County where the robbery was done. for it is felony in all the Counties where the Goods are carry'd (for felony doth not deveſt property) but it is not robbery (which ought to be done to the perſon of a man) but only in the County where the robbery was done. 4 *H.* 7. 5. *b.* 29 *H.* 8. 39. 40. *Dyer*, 11 *H.* 4. 93. 3 *E.* 3. Tit. *Aſſ.* 446. In debt if a man declares on a leaſe (*l*) for years in one county of land in anoth. county, he ought to bring his Act'n where the leaſe was made, and not where the Land lies; for the Action is grounded upon the Contract made by the Leaſe. 38 *H.* 6. 15. *acc. per Cur.* 8 *H.* 6. 23. *acc. vide* 4 *H.* 6. 18. 14 *E.* 4. 3. 29 *H.* 8. 40 *Dy.* So the Law well explained in a Caſe in which are Va-

(*a*) Dyer 39. pl. 57. 1 Vent. 364.

(*b*) Fitz. labor. 22. Statham laborers 5. Br. lieu 11. Dyer 38. pl. 53. 40. pl. 70 4 Leon. 53. 14 E. 4. 3. b. Br. lieu 72.

(*c*) 4 Leon. 53. Cr. El. 271, 625. 2 Rol. 602.

Dy. 278. pl. 5. 38. pl. 53. Br. lieu 33, 43, 72, 82.

(*d*) Plow. 530. 12 E. 4. 3. a.

* Br. lieu 27.

(*e*) Hob. 196.

(*f*) Dyer 40. pl. 71.

(*g*) 4 Co. 42. b.

(*h*) Br. appeal 83 Br. viſn 78.

(*i*) Dyer 39. pl. 56. 40. pl. 66. Kelw. 160. b.

(*k*) Dyer 39. pl. 56. Stanf. 63. g. Winch 65. Latch 197, 271.

(*l*) Cr. Car. 184. Dyer 40. pl. 70. Cr. Jac. 142. Cr. El. 116, 259, 565. 12 E. 4. 3. a. Br. lieu 43.

rieties of Opin. in our Books. But if a leaſe be made in one Count. and the land lies in anoth. the Act'n of *(a)* Waſt ſhall be brought where the land lies, and not where the leaſe was made, altho' the term be paſſed for the land and damages, or damages only for the waſt which is local, ſhall be recovered. 14*E.*4.3.*a.*

(a) Dy. 40. pl. 79

acc. If a man promiſes to *(b)* cure one in one county, and miſdoth in anoth. County, the Pl. hath his election to bring his Act'n in which of the Count. he will, and therewith agrees 11 *R.*2. *Action ſur le Caſe* 37. If a man doth not repair a wall in *Eſſex* which he ought to repair, whereby my land in *Midd.* is drowned, I may bring my Action in *Eſſ.* for there is the Def. fault, as it is adjudged in 7*H.*4.8. or I may bring it in *Midd.* for there I have the damage, as it is proved by 11*R.*2. *Action ſur le caſe* 36. So if one forge a *(c)* deed in one county, and proclaims it in anoth. the Pl. may chuſe in which County he will bring his Act'n. 29*H.*8.38. 22*H.*6.5.*a.b.* But when the Def. upon pleading not guilty ſhall be prejudiced in his trial there the Pl. hath not election to bring his Act'n in which county he will

(b) Dyer 38. pl. 53, 54.

(c) Dy. 38. pl 54. 39. pl 57.

(d) 29*H.*8. *Dyer* 38. where *Gawyn* ſued an appeal of robbery in the county of *Wilts* where the robbery was done, againſt *Huſſey* and *Gibbs* as acceſſaries, and declared that the principals named in the writ, and who were attainted, did the robbery in the County of *Wilts*, and that the Def. felonioufly at *Lond.* before the robbery done, did abet them to do it, and it was adjudged, that altho' the Pl. can have but *(e)* one appeal againſt the principals and acceſſories, and againſt the principal of neceſſity it ought to be brought in the county of *Wilts*, yet becauſe thoſe of the county of *Wilts* upon not guilty pleaded, and *Lond.* cannot join, and thoſe in *Wilts* cannot inquire of a thing in *Lond.* altho' it be tranſitory (for in caſe of felony which concerns the life of a man every act ſhall be tried in the proper county where the act was in truth done) the appeal againſt the ſaid acceſſories did abate. 43*E.*3.17, 18, 19. And it is to be obſerv. that in all real Act'ns, if any iſſue riſes on the land, or in any Act'n in which the Poſſeſſ. of the land or *(f)* local thing, or which riſes on the land by reaſon thereof, is to be recovered, all theſe ſhall be brought in the County where the land lies; as in a writ of right of Ward of land, or Writ of Intruſion of Ward, theſe ſhall be brought in the County where the land lies; altho' the refuſal were, or the Seigniory be in anoth. county. 29*E.*3.3. 38*H.*6.14.*b.* 22*R.*2.*bre.* 937.*acc.* So in a writ of right of ward for the body only, it ſhall be brought in the county where the land is, for that is in the Right and favours of the land. 21*E.*3.42. 30*E.*3.25. 9*E.*3.12, 13. 10*E.*3.7.*acc.* and the reaſon of 40*E.*3.6. agrees with it, although the Judgment there is mentioned to be given contrary. But a Writ of Raviſhment of Ward ſhall be brought where the Raviſhment was, and not where the Land is, or where the Body is carried; for ſit

(e) 4 Co. 47. b. Jenk. Cent. 29.

(f) Dyer 38. pl. 52. Hob. 37. Winch 69. 1 Latch 197. Cr. Car. 143, 184

is

is founded on the raviſhm. 38 *H.6.* 14.*b.* 22*R.*2. *Brev.*937. & 12*E.Dy.*289. And a writ forfeiture of marriage ſhall be brought where the land is, for the writ doth ſuppoſe an intruſion into the land; and therewith agrees the ſaid Book in 22*R.*2.&38 *H.*6.15.*a.* And a writ *de valore* (*a*) *maritagii* ſhall be brought where the land is; for the Ld. need not make any (*b*) tender, but if he makes a tender and the other refuſes, and he alledges it in the county, then the writ *de valore maritagii* lies in the county where the refuſal was, 22*R.*2.*Brev.*937. 38*H.*6. 15.*a.* Writs of *Qu. Imp.* and *Qu. Incumbravit* (*c*) ſhall be always brought where the Church is; for by the one the Pl. ſhall recover his preſentment, and by the oth. the Bp's Clerk ſhall be removed, and the Pl's Clerk admitted, 38*H.*6.14&15. *accord. Vide* 4*Ed.*3.9. Otherwiſe it is in the K's caſe. But a *Qu.* (*d*) *non admiſit* ſhall be brought in the county where the refuſal was, and not in the county where the church is, becauſe damages are only to be recovered, and the refuſal is the beginning of the wrong, and the ground of the Action; and ſo is the Book adjudged in 38 *H.*6.14,& 15. *F.N.B.*47.*f.* And a *Qu. Imp.* of a Prebend ſhall be brought in the county where the Cathedral Church is, and not in the county where the body of the Prebend is; for the Pl's Clerk is to be induct. and inſtalled in the Cathedral Church, and therewith agrees 21*E.* 3.5. &2*El. Dy.*194. (*e*) but 43*E.*3.34. &15*Ed.*3.*Br.*325. ſeem contrary. 24*E.*3.37. And ſo the Law is well explain. in a caſe in which there were different opinions in our Books. And if a Man at the Com. Law had a Rent iſſuing out of two counties, he could not have had an (*f*) Aſſiſe in one County, becauſe every part of the land in the two counties is charged with the rent, and all ſhould be put in view, as it is agreed in 18*E.* 2. *Aſſ.*380. 18*E.*3.32. 10*E.*3.21. 10*Aſſ.p.*4. &18*Aſſ.p.*1. But if a man makes a leaſe *pur auter vie* of land in two counties, rendering rent, and the rent is behind, and *ceſt' que vie* dies, the leſſor ſhall have an action of debt in which of the count. he will, for now it is changed into debt; and in that caſe no land ſhall be put in view, but the perſon of the debtor ſhall be only charged by the com. Law. So if a rent be iſſuing out of the land of *B.* in two count. and the rent is behind, and he who hath the rent dies, his Ex'ors may have an Action of debt againſt *B.* in which of the count. they will, on the Stat. of 32 *H. .c.*37. for altho' he ought to bring his Action in one of the counties, yet at the com. Law the perſon of the Def. is chargeable in the Action of debt, and not the land. And before the Stat. of (*g*)6*R.*2.*c.*2. a Writ of debt and accompt againſt a Receiver, and ſuch Actions might be brought in ſuch County where the Party might be beſt brought in to anſw. and the Pl. might have declared on a contract or receipt, &c. in any oth. County, *quia debitum & contractus, &c. ſunt* (*h*) *nullius loci.* See for that 2*Ed.* 3.44. 6 *Ed.* 3.266. & 275. 8*E.*3.380.

(*a*) Br. lieu 43.

(*b*) 5Co.127.a.b

(*c*) F.N.B.48.c

(*d*) Dy. F.N.B. 47.f.40.pl.69.

(*e*) Dyer 194. pl. 33.

(*f*) Co. Lit. 147. a. Poſt.3.b.24.a.b

(*g*) 2 Inſt. 231.

(*h*) 2 Inſt. 231.

10*E*.3.7. 19*E*.3.*Juriſd*.29. 29*E*.3.26. 33*E*.3.Tit.*Juriſd*.57. 40 *E*.3.7. 3*H*.6.30. 15*E*.4.19. 21*E*.4.88.As in 22*H*.6.9.*b*. & 10.*a*.*b*. where the K. granted the office of Surveyor of pack. of all manner of clothes within *Lond*. and the libert. thereof, which are in two counties and the aſſiſe was brought in *Midd*. and there *Newton* and *Paſton* ſaid, That there is a great difference betw. an aſſiſe of rent and that aſſiſe; for where a rent-charge is iſſuing out of lands in divers Count. every parcel is chargeable with the whole, and all the Ter-tenants ought to be named; but here the perſon is charged and not the land, and yet the office for which the aſſiſe was brought did extend in 2 Count. And if a Fine or Feoffm. be made of lands in 2 Count. with Warranty, the *Warrant' chartæ* may be brought in any of the Count. 29*E*.3.3.*a*.*b*. It is purviewed by the Stat. of 7*R*.2.*c*.10. That an aſſiſe of *Nov. diſſeiſ*. ſhall for the future be granted and made of a rent behind, due for Tenements in divers Count. to be held *in confin' comitat'* and thereupon the aſſiſe ſhall be taken and tried by the people of the ſame Count. in the ſame manner and form as it is done of a Common of paſture in one County append. to Tenements in another County: For at the Com. Law if a man had had Com. in land in one County append. or appurtenant to land in anoth. County, he ſhould have 2 ſeveral Writs to the Sheriffs of the ſeveral Count. Or if the land to which, &c. lay in one County, and the land in which lay in ſeveral Count. there he ſhould have a Writ of aſſiſe to the Sher. of the County where the land to which, &c. lay, and ſeveral Writs to the Sher. of the Count. where the land in which &c. lay; and all that appears in the *Regiſt*. and *F.N.B*.180.*a*. And the ſame Law is when a nuſance is done in one County, and the land to which, &c. is in anoth. County, as it appears alſo in the *Regiſt*. and *F.N.B*. 183.*k*. So that if a Man hath a Rent in 3 or 4 Counties, it ſeemeth that he who is diſſeiſed may have ſeveral aſſiſes to be brought *in confin' comitatuum*; for the Letter of the Stat. of 7*R*.2. is general of rent due for Tenements in ſeveral Counties. And altho' it hath a reference to the caſe of Com. of Paſture, &c. yet foraſmuch as in the caſe of Com. of Paſture, if the land in which, &c. lay in ſeveral Counties, and the land to which, &c. lay in another County, there ſhould be as many Writs as there are ſeveral Counties; thence it follows, that ſuch remedy he ſhall have who hath a rent iſſuing out of lands in many Count. Alſo the Caſe of Com. is put *exempli gratia & ſimilitudinarie*, & *null' ſimile quatuor pedib' currit*; and it is not neceſſ. that a Simile ſhould agree in all Points. And the Stat. of 7*R*.2. was made to ſatisfy a doubt which was conceived before; for thereby it is enacted, That Writs in ſuch Caſe ſhall be made in the Chancery without any manner of contradiction, as well of Diſſeiſins before made, as after to be made. And the Doubt was on the Statute of *Magna Charta*, *cap*. 2. *Recognitiones de nova diſſeiſina*, & *de*

Fitz. aſſiſe 10. Br. aſſiſe 76.

Co. Lit. 154.a. 4 Co. 4. b.

Co. Lit. 154.a.

& de morte anteceſſor' non capiantur niſi in ſuis comitat'. And ſome held that the ſame was not obſerv. when the Juſt. of aſſiſe did ſit *in conſin' comitat'*, and namely when there are 2 o Count. meſne between the 2 Counties, as it is in the Book in 5 *E.* 4. 2. *b.* But that doubt alſo might be conceiv. on the ſaid aſſiſe of *Nov. diſſeiſin* of Com. when the land in which, *&c.* is in one County, and the land to which, *&c.* in another County (which caſe without Queſt. is not reſtrained by the ſaid Stat. For aſſiſe of *Nov. diſſeiſin* of Com. of paſture lay at the com. Law, as by the Stat. of *Weſtm.* 2. *c.* 29 appears) 10 *E.* 3. 21. & 10 *Aſſ. p.* 4. And if need were the Stat. of *Weſt.* 2. *c.* 28. doth extend to the ſaid caſe of rent, by which it is provided, *Q̄d' quotieſcunq; de cæteroevener' in cancellar', qd' in uno caſu reperit' breve, & in conſimili caſu, cadente ſub eod' jure, & ſimili indigente remedio, non reperit', concordent clerici in cancellar' in brevi faciendo, &c. vel ad proxim' Parliament' de conſenſu Juriſperitor' fiat breve.* And the Stat. concludes with the effect of a maxim of the com. Law, *Q̄d' cur' dom' regis non debet deficere conquerentib' injuſtit' perquirenda.* 38 *E.* 3. 33. *a.* where the caſe was, that the K. brought a writ of right of the 4th part of the tithes and offerings of the Church of S. *Dunſt.* in the Weſt, in *Fleetſt.* in the ſuburbs of *Lond.* againſt the Prior of S. *John's* of *Jeruſalem* in *Engl.* there *Candiſh* took Except. to the writ, becauſe altho' this writ was given by the Stat. of *Weſt.* 2. *c.* 5. toward the end, and *Artic. cler. c.* 2. which Stat. gave, that he ſhall have a writ *Ad petendum advocation' decimar' petitar', &c.* And this writ is brought of the 4th part of tithes and offerings, which is not warranted by the Stat. Judgm. of the writ, foraſm. as the Stat. do not give any writ of the 4th part of tithes. *Thorpe* the Ch. Juſt. who gave the rule ſaid, altho' the Stat. do not limit by expreſs words, but of tithes, yet thoſe in the Chanc. may make a writ *in conſim' caſu*, and the writ is good enough; wherefore anſwer. And in 18 *E.* 2. *br.* 827. a writ of Entry was brought in the County of *Suff.* the Ten't pleaded a releaſe of the Anceſt. of the Pl. with Warranty, which was denied, and found for the Pl. in *Lond.* by a Jury of *Fridayſtreet*, *&c.* for which the Demand. did recover; and the Ten't brought an Attaint, and there Except. was taken, becauſe in the writ is not compriſed to attach the Party, Judgm. *&c.* And for the Pl. it was ſaid, that the writ was granted to the Sher. of *Lond.* to ſummon the 24, and attach the 12, and another writ to the Sher. of *Suff.* to attach the Party where the land was, and both the writs were read in Court. To which it was ſaid, that there was no ſpecial Law, that did maintain that writ which is out of the com. courſe. *Beresford* the Ch. Juſt. who gave the rule, ſaid, in a new Caſe, a new Remedy, *&c.* wherefore anſwer. And therefore if there be Ld. and Tenant, and the Tenancy doth extend into 2 Counties, in this Caſe if the Rents and Services be behind, the Lord may have ſeveral Writs of Cuſtoms and Services, for every County one Writ, and ſhall have them

Co. Lit. 154. a. Fitz. aſſiſe 26.

9 Co. 88. b. Poſtea 4. b.

F.N.B. 30. e.

F.N.B. 107. p.

them returnable at one Day in the Common Pleas, and then to count upon them as his Caſe is, *quia aliter curia* (*a*) *regis deficeret conquerentibus in juſtitia perquirenda*, and therewith agree *Fitz. Nat. Brev.* 151. *b.* & 30 *Ed.* 1. *Droit pl. ultimo.* And that is a good Example, *pro quolibet conſimili caſu, &c. ſimili indigente remedio. Vide* 12 *Ed.* 1. Tit. *Attaint* 71. a very good Caſe; and the Reaſon and Rule of the Book in 21 *Ed.* 3. 18. is to be obſerved, where the Caſe was, That a Fine was levied of a Manor in one County, and the Tenancy lay in another County, now where the *per quæ ſervitia* ſhould be brought was the Queſtion; and it was adjudged, that it was well brought in the County where the Manor was. And there *Stone* gave the Rule of the Court in theſe Words: He can have no other Writ, for his Writ muſt be according to the Fine, and brought in the County where the Note is levied. *Vide* 11 *Rich.* 2. Tit. *Action ſur le Caſe* 36. 7 *H.* 4. 8. *Vide* 26 *Hen.* 6. Tit. *Covenant* 9. 41 *Aſſ. pl.* 12. 9 *Hen.* 5. 6. 22 *Hen.* 6. 5. And in the principal Caſe where it was objected, that the ſaid *Capias utlagatum* was erroneous; for it was *proximum ante feſtum, &c.* where it ſhould be, *poſt feſtum, &c.* The Court took no Regard to it; for the Error in the Writ which the Defend. himſelf hath wrongfully brought, ſhall not (*b*) advantage himſelf; but in Regard he was impriſoned and troubled thereby, that gave the Plaintiff Cauſe of Action. Alſo the Court did not regard the Clauſe that the Defendant at *W.* in the County of *Norf. &c. malitioſe & deceptive machinatus fuit, &c.* for that is ſo ſecret and ſo uncertain, that it cannot be tried.

(*a*) 9 Co. 88. b. Antea 4. a.

(*b*) 4 Leon. 54. 5 Co. 39. a. b. 8 Co. 59 a. F.N.B. 21. f. Palm. 39, 40. 2 Sand. 46. 1 Rol. 757, 759, 760. Fitz. Error 92.

Hill.

Hill. 27 Eliz.

In the Exchequer.

Sir MILES CORBET'S *Case.*

BEtween Sir *Edw. Clere* and *Miles Corbet* then Esq; now a Knight, it was resolved in a Case concerning the Parsonage of *Marham* in the County of *Norf.* That where in the County of *Norf.* there is a special Manner of Common called *Shack*, which is to be taken in arable land, after Harvest until the Land be sowed again, &c. and it began in ancient Time in this Manner; The Fields of arable Land in this Country consist of the Lands of many and divers several Persons lying intermixt in many and several small Parcels, so that it is not possible that any of them without Trespass to the others, can feed their Cattle in their own Land, and therefore every one doth put in their Cattle to feed *promiscue* in the open Field. These Words, *To go Shack*, is as much as to say to go at Liberty, or to go at large: In which the Policy of old Times is to be observed, That the Severance of Fields in such small Parcels to so many several Persons, was to avoid Inclosure, and to maintain Tillage. But it is to be observed, That the said Common called *Shack*, which in the Beginning was but in the Nature of a Feeding because of Neighbourhood for avoiding of Suit, within some Places of that Country, is by Custom altered into the Nature of a Common appendant or appurtenant, and in some Places it retains its original Nature; and the Rule to know it is the Custom and Usage of every several Town or Place, for * *consuetudo loci est observanda.* And therefore if in the Town of *D.* (*exempli gratia*) one who hath purchased diversParcels together, in which theInhabitants have used to have *Shack*, and long Time since has inclosed it; and notwithstanding always after Harvest the Inhabitants have had *Shack* there by passing into it by Bars or Gates with their Cattle, there it shall be taken as Common appendant or appurtenant, and the Owner cannot exclude them of Common there, notwithstanding he will not common with them, but hold his own Lands so inclosed in Severalty: and that is proved by the Usage, for notwithstanding the ancient Inclosure, the Inhabitants have had Common there. But if in the Town of *S.* the Custom and Usage hath been, That every Owner in the same Town hath inclosed

* 4 Co. 28. b. 6 Co. 67. a. 10 Co. 140. a.

their own Lands from Time to Time, and ſo hath held it in Severalty, there this Uſage proves, That it was but in the Nature of *Shack* originally, for the Cauſe of Neighbourhood, and ſo it continues, and therefore there he may incloſe and hold in Severalty, and exclude himſelf to have *Shack* with the others. And although in the ſaid Caſe of the Town of *D.* the Uſage hath been, That notwithſtanding the Incloſure by divers Inhabitants of late Times, the other Inhabitants have had *Shack* there; yet if a Man hath an ancient Cloſe of ancient Time taken out of the Field, and he and all thoſe whoſe Eſtate he hath, have held it always in Severalty, he may well keep it incloſed: For as to ſuch Parcel ſo antiently incloſed, the *Shack* there doth retain its ancient and original Nature. And he who claims *Shack* there cannot preſcribe to have Common in it. *Nota*, a good Reſolution, which ſtands with Reaſon, and no Inconvenience, Innovation, or Cauſe of Suits or Trouble can thereupon ariſe, but Quiet and Repoſe will be thereby in many Caſes eſtabliſhed, which I thought fit to be reported, becauſe it is a general Caſe in the ſaid Country And at firſt the Court was altogether ignorant of the Nature of this Common called *Shack*. It was alſo reſolved at the ſame Time, That if the Commons of the Town of *A.* and of the Town of *B.* are adjoining, and that one ought to have Common with the other by Reaſon of Neighbourhood, and in the Town of *A.* there are fifty Acres of Common, and in the Town of *B.* there are an hundred Acres of Common; in that Caſe the Inhabitants of the Town of *A.* cannot put more Cattle into their Common of fifty Acres than it will feed, without any Reſpect to the Common within the Town of *B. nec e converſo*; for the original Cauſe of this Common for Cauſe of Neighbourhood, was not for Profit, but for Preventing of Suits in a Champain Country; for the reciprocal Eſcapes of the one Town in the other: And therefore if the Common of the Town of *A.* will feed fifty Beaſts, and of the Town of *B.* an hundred Beaſts, it is no Prejudice to the one or the other, if the Cattle of one Town eſcape and feed in the Common of the other Town reciprocally; for if all the Cattle feed *promiſcue* together through the whole, it will be no Prejudice to one or the other.

4 Co. 38. b.
1 Co. Lit. 122. a.

Caſes

Caſes upon the Stat. of 13 Edw. 1. *of* Wincheſter.

THE Purview of the ſaid Act is, *That from henceforth every County be ſo well kept, That immediately after Robberies and Felonies committed, freſh Suit be made from Town to Town, and from County to County, &c.* And after the Felony or Robbery is committed, the County ſhall have no longer Space than 40 Days, within which 40 (*a*) Days it ſhall behove them to agree for the Robbery or Treſpaſs, or elſe that they anſwer for the Bodies of the Offenders, *&c.* Upon which Words divers Reſolutions have been made.

Weſtm. 1. c. 9. 2 Inſt. 172. 3 Inſt. 117, 118.

(*a*) 2 Inſt. 477 1 Sid. 11.

Trin. 27 Eliz.

TRinit. 27 *El.* it was held by the whole Court of Common Pleas, in a Caſe which happened in *Harleſton* in the County of *Suffolk*, That if a Man be robbed in his (*b*) Houſe, be it in the Day or in the Night, the Hundred in which the Houſe is ſhall not be charged with it: For altho' the Words of the ſaid Act are general, without ſpeaking of any Place in ſpecial, yet ſuch Robbery is not within the ſaid Act, for three Reaſons: 1. Becauſe every Man's Houſe is his (*c*) Caſtle, and he ought to keep and defend it at his (*d*) Peril; and if any one be robbed in his Houſe, it ſhall be eſteemed his Default and Negligence. 2. It is not lawful for any other to enter into the Houſe of another for the Safeguard of it. 3. Such Robbery for which the Hundred ſhall anſwer by Force of the ſaid Act, ought to be committed openly, ſo that the Country may take Notice of it themſelves; for it was adjudged in *Aſhpole*'s Caſe next following, that it is not neceſſary to have Hue and Cry, or Notice given to the Country, neither by the Words of the ſaid Act of 13 *Ed.* 1. nor by the Meaning thereof; for it may be that the Party robbed was bound, or maihemed, *&c.* ſo that he cannot make Hue and Cry, or give Notice to the Country, but when a Robbery is ſecretly done in a Houſe they cannot take Notice of it.

Sendil's Caſe.

(*b*) Cro El. 753. 3 Leon. 262. 2 Inſt. 569. Moor 620.

(*c*) Cro. El. 753. 2 Co. 32. a. 5 Co. 91. b. 8 Co. 126. a. 11 Co. 82. a. 1 Bulſtr. 146.

(*d*) 3 Leon. 262. Cro. El. 753.

Trin. 28 El. *in the Com. Pleas, Rot.* 725.

BEtween *Aſhpole* and the Inhabitants of *Evenger*, it was reſolved by the whole Court, That although the Statute is general, and doth not make Mention of any Time, That the Robbery ought to be committed in

Aſhpole's Caſe. 1 Leon. 57. 4 Leon. 218. 1 And. 158, 159. Goldsb 55, 56, 60, 61.

(*a*) 2 Inſt. 569. Moor 620. 1 Leon. 57. 4 Leon. 59. 191, 218, 219. Sav. 83. Goldsb. 70. 1 And. 159. Cr. El. 270. Cr. Jac. 106. (*b*) 4 Leon. 219. Sramf. Cor. 33. b.

the Day-time, and out of the (*a*) Night; and there the Caſe was, that a Robbery was committed in *January* preſently after Sun-ſet, during Day-light; and it was adjudged that the Hundred ſhould anſwer, becauſe it was convenient Time for Men to travel, or be about their Buſineſs or Work; and therewith agreeth the Book in 3 *Ed.* 3. *Coron.* (*b*) 293. That if one kills another at the Hour of Evening, and eſcapes, by the Common Law the Town ſhall be amerced; for it is in Law accounted Part of the Day, and not of the Night.

Trin. 29 Eliz. *in C. B. Rot.* 1027.

Milborn's Caſe. (*a*) Goldsb. 70. 4 Leon. 59, 60, 191 Savil 83.

(*b*) 2 Inſt. 569. Moor 620. 1 And. 159. Cr. El. 270. Cr. Jac. 106.

BEtween (*a*) *Milborn* and the Inhabitants of the Hundred of *Dunmow* in *Eſſex* it was adjudged, That for a Robbery committed in the Morning, *ante lucem*, the Hundred ſhall not be charged, becauſe the Robbery was committed in the (*b*) Night; and although no Time be ſpecified in the Statute, yet by good Expoſition it doth not extend to a Robbery committed in the Night; for no Laches or Negligence can be imputed to the Hundred for Default of well guarding the Country in the Night; alſo in the Night they cannot make Purſuit after the Offenders or enquire for them, and then to charge them when they are deprived of their convenient Means would be very hard. And as it hath elſewhere been often ſaid, it is a good Expoſition of a Statute to expound it according to the Reaſon of the Com. Law. And at the Com. Law, if a Man be killed in a Town by Day, that is, ſo long as there is full Day-light, and he who killed him eſcaped, the Town where this Felony was committed ſhould be amerced for it; and ſo it is held in 21 *E.* 3. *coron.* 238. *Cum quis felonice occiſus fuit per diem, niſi felo captus fuit, tota villa illa oneretur.* And therewith agreeth alſo the ſaid Book in 3 *Ed.* 3. But if ſuch Murder or Manſlaughter be committed in the Night, the Town ſhould not be amerced by the Common Law, becauſe, (as it hath been ſaid) no Laches or Negligence can be imputed to the Inhabitants of the Town; and God hath appointed the Day for Men to labour, travel, and do their Buſineſs, and the Night to take their Repoſe and Reſt, and therefore the Prophet

Pſalm. 104.

ſaith, *Poſuiſti tenebras, & facta eſt nox, in qua pertranſeunt beſtiæ ſylvæ, &c. ſol oritur, & congregati ſunt, exit homo ad opus & operationem, & redit veſpere:* So ſavage Beaſts paſs and repaſs in the Night, and then men are at reſt, and in the Day Men apply themſelves to their Labours and Affairs, and then the Beaſts retire to their Dens. And the Poet ſaith, *Ut jugulent homines ſurgunt de nocte latrones.*

And

And the Common Law is, Men cannot (*a*) diſtrain for Rent or Service in the Night, as it is adjudged in 12 *E.* 3. *Diſtreſs* 17. & 11 *H.* 7. 5. *a. acc.* But for Damage-feazance, a Man may diſtrain in the Night for the Neceſſity of the Caſe, for otherwiſe perhaps he ſhall not diſtrain at all, for before Day they may be taken or ſtray out of his Land, and therewith agreeth 10 *E.* 3. 21. And further it is provided by the ſaid Stat. of *Wincheſter*, That in Cities or great Towns which are incloſed, the Gates ought to be ſhut from Sun-ſet till Sun-riſing; after which Statute, if in ſuch City or Town incloſed any Murder or Manſlaughter be committed in the Day or in the Night, and the Offender eſcapes, ſuch City or Town ſhall be amerced. For now the Act hath changed the Reaſon of the Law, and therefore the Law it ſelf is changed; for *ratio legis eſt anima legis, & mutata legis ratione, mutatur & lex.* For at the Common Law, if a Man was killed in the Night, as it hath been ſaid, there was not any Fault in the City or Town; but now if they do not keep their Gates ſhut according to the Statute, by which the Offender eſcapes, then there is Fault and Negligence in them; and therewith agreeth the Book in 3 *E.* 3. *Coron.* 299. where the Caſe is, it was preſented, that one killed another in the Night; and it was asked, Where the Felon was? And they ſaid, that he is fled; and becauſe it was in the Night, they ought not to be charged. *Lowther* Juſtice who gave the Rule, ſaid, That the Town ſhould be ſhut, by the Statute, from ſuch an Hour; and becauſe the Townſmen of the Town took him not, all the Town was amerced: Alſo it was held on the ſaid Act of 13 *E.* 1. That if divers commit a Robbery, thoſe of the Hundred ought to apprehend all the Felons; for altho' they apprehend ſome of them, that ſhall not be ſufficient to excuſe them. For the Words of the Act of 13 *E.* 1. are, That they anſwer for the Bodies of the Offenders; which in Conſtruction was taken, all the Offenders. But now by the Statute of 27 *El. cap.* 13. a new Law is made, amongſt others, in theſe Points following, *viz.* 1. That none ſhall have an Action on the ſaid Stat. unleſs the Party robbed doth, ſo ſoon as he can, give Notice of the ſaid Felony to ſome of the Inhabitants of ſome Town, Village, or Hamlet next the Place where the Robbery was committed. 2. If they in their Purſuit do apprehend any of the Offenders, the ſame ſhall excuſe them, altho' they do not apprehend them all. See the Act of 27 *El. cap.* 13. which hath added to the ſaid Statute of *Wincheſter* and altered the ſame in divers Points.

(*a*) Co. Lit. 142. a. Dr. & Stud. fo. 75. a. 4 Leon. 218. Goldsb. 66. 9 Co. 66. a. 1 Rol. 672. Fitz. Avowry 137.

Styles 14.

Co. Car. 252.

Cro. Car. 299.

1 Sid. 11.

2 Inſt. 172, 173. 1 Sid. 11.

Mich. 28 & 29 Eliz.

The Earl of Bedford's *Caſe.*

IN the Court of Wards, the Caſe was, That *Francis* Earl of *Bedford* being ſeiſed of certain Houſes in the *Strand* in the County of *Midd.* in Tail, *ſcil.* to him and the Heirs of his Body, and ſeiſed of other Lands in Fee held *in Capite*, by Deed indented, made Leaſes of the ſaid Houſes, whereof he was ſeiſed in Tail, for 21 Years, rendering Rent (which Leaſes were not warranted by the Statute of 32 *H.* 8. but were voidable by the Iſſues in Tail) and died; the Reverſion deſcended to the Heirs general of the Earl, that is to ſay, to two Daughters and Heirs of *Henry* Lord *Ruſſel*, eldeſt Son of the ſaid Earl, (which *Henry* died in the Life of his Father) and it appeared that the ſaid Leaſes were to have Continuance after the ſaid Daughters ſhould be out of Ward: And by Office after the Death of the ſaid Earl it was found, that he died ſeiſed of the ſaid Eſtate-tail of the ſaid Houſes, and that they deſcended to the ſaid Heirs general, by Force whereof the ſaid Houſes were ſeiſed into the Queen's Hands. And in this Caſe two Points were reſolved: 1. That the (*a*) King in Privity and Right of the Heirs in Tail, ſhould avoid the ſaid Leaſes during the Time that they ſhould be in Ward; as if a Biſhop makes a Leaſe for Years not warranted by the Statute, ſo that the Leaſe is voidable by the Succeſſor, and dies, the King ſhall avoid the Leaſe (*b*) during the Vacation of the Biſhoprick, in Privity and Right of the Biſhoprick, for the King in none of the ſaid Caſes is as a Stranger. And the ſame Law is when a Subject is Guardian in Knight's Service he in the Right of the Heir, within Age, and in his Ward, ſhall avoid voidable Leaſes as to his own Intereſt, but it ſhall not prejudice the Heir of his Election at full Age; for *cuſtos ſtatum hæredis in cuſtodia ſua exiſtent' meliorem, non deteriorem facere poteſt.* So if the Heir within Age before the Entry of the Guardian, or the Anceſtor being within Age, makes a Leaſe for Years rendering Rent, the (*c*) Guardian may enter in the Right of the Heir, and ſhall avoid the Leaſe. But the Ld. by (*d*) Eſcheat ſhall not avoid voidable Eſtates made by his Ten't who was an Infant; for regularly, none ſhall avoid voidable Eſtates for Infancy, but the

(*a*) Palm. 437.

(*b*) Lit. Rep. 306.

(*c*) 3 Bulſtr. 273. Co. Lit. 215. b. 1 Rol. Rep. 402. 442.

(*d*) 4 Co. 124. a. 8 Co. 44. a. Palm. 234, 254. 1 Rol. Rep. 401, 442. Br. entry cong. 129. 3 Bulſt. 272. 2 Inſt. 483. 5 E. 3. 13. a.

the infant himself or his heirs, but the Guard. shall avoid the said voidable leases in the right of the infant himself, and so a difference; and the (a)K. in the case of a Bish. shall avoid the lease in the right of the bishoprick, which continues altho' the Bish. be dead. And that was one of the points adjudged in the Exchcq. in the great case between *Austine* and Sir *J. Baker*, 2 *Mar.* which I have seen, and which shall be related more at large in the Reso. of the 2d point of this case. *Vid.* 16 *El. Dyer* 337. *b.* Patentee of Queen *El.* of lands given to a parson and his successors to superstitious uses, shall avoid after his death a lease for life (which is voidable by the successor) made by the parson, by the intent of the Act of 1 *E.* 6. of Chantries. *Vide* 7 *El. Dy.* 239. *Hoskins*'s case. 2. It was resolved, that altho' the K. in the right of the Heir had avoided it for his Time, yet it doth not avoid the leases so absolutely, that the heirs in tail after the K's interest determined, cannot make them good by the acceptance of the rent. For the K's Act cannot determine the power and election of the Issues in tail, or of the successor of the Bish. in the case before put, to make the leases good by acceptance of the rent. And when voidable leases being void for a Time shall be always avoided, and when not, this difference was taken and resolved by the Court; *sc.* When the interest of him who makes the avoidance is but for part of the Term, so that it appears that a residue remains; and when he who makes the avoidance avoids the whole interest, so that it appears that no residue can remain; and therefore in the case at bar it appears, that after the K's interest determined, there remains a residue of the term. But if the patron of the church of *D.* doth grant the next avoidance to anoth. and afterwards and before the Stat. of 13 *El.* the parson, patron, and Ordin. make a lease for years, rendering rent, and the parson dies, the grantee presents, who is admitted, instituted, and inducted, and dies, this lease was avoided in the whole absolutely, and therefore such lease cannot stand against the 2d successor, 2 *E.* 3. 8. If an advowson of a Church by licence be granted to a Prior and his successors, and afterwards the same Church is appropriated to him and his successors, so as they be perpetual parsons imparsonees, in that case if the wife of the grantor be endowed of the Advows. and presents a clerk, who is admitted, instituted, and inducted, the appropriation is defeated for ever, for the whole estate of the parson imparsonee is avoided, and so it was adjudged as Sir *Jeff. Scroope* reports in 2 *E.* 3. 8. and in such sense is the book to be understood. For altho' the wife was endowed of the Advows. yet if she had died before any was admitted and instituted to the same Church at her Presentat. the Church had remained appropriated, and so the *Quære* in 6 *E.* 6. 72. *Dyer*, is well resolved. So if a Feme covert (as a Feme-sole) levies a fine by her self of land, whereof she is seised in fee to another and his heirs; in that

(a) Lit. Rep. 306

(b) Palm. 437. 1 Co. 51 a Hob. 123, 243. Dyer 337. p. 38. 3 Leon. 158. N. Benl. 225. pl. 258. O. Benl. 29 Palm. 437.

1 Jones 454. Co. Lit. 46. a. Hob. 7. Cro. Car. 582. 1 Rol. 480. Moor 481.

Co. Lit. 46. b.

Co. Lit. 46. b

Hob. 225. 10 Co. 43. a. Co. Lit. 46. a. 2 Rol. 20.

Caſe if the Husband doth not enter, that Fine ſhall bind the Wife and her Heirs for ever; and in the ſame Caſe if the Husb. enters and dies, the Conuſee ſhall not have the land; for by the Entry of the Husb. the whole Eſtate of the Conuſee was defeated, and the old Eſtate of the Wife reveſted in her, and the Husband ſeiſed of the whole Eſtate as in the right of his Wife, and therewith agree 17*E.*3,52.*b.* 17*Aſſ.pl.*17. 7*H.*4. 23. 2*R.*3.20. 9*H.*6.33. But when only Part of the Eſtate or Term is defeated, there it is otherwiſe, as in the ſaid Caſe between *Auſtine* and Sir *J. Baker* was adjudged, which Caſe, as I my ſelf have ſeen, in effect was, Sir *T. Wyatt* was Tenant in Tail of the Manor of *Eaſt-ſorleigh* in the County of *Kent*, *viz.* to him and to the Heirs Males of his Body of the Gift of *H.*8. to hold of him *in capite*, the Rev'n to the K. his Heirs and Succeſſors. Sir *T. Wyatt* by Indenture demiſed the ſaid Manor to *Auſtine* for 26 Years, rendering 13*l.* Rent to the ſaid Sir *Tho.* and his Heirs, and afterwards Sir *Tho.* died, and all this was found by Office, and that Sir *T. Wyatt* was his Son and Heir Male of full Age, by which the K. had primer Seiſin of the Land it ſelf, and for his Intereſt did avoid the leaſe, and afterwards Sir *Tho.* the Son ſued livery, and accepted of the rent of *Auſtine*, and afterward committed High Treaſon, for which he was attainted. In that caſe it was adjudged, that foraſmuch as the King had avoided the Leaſe, but as to his primer Seiſin, that after livery made it is in the Election and Power of the Iſſue in Tail, by Acceptance of the Rent to affirm the Leaſe; becauſe the Leaſe was avoided by the King, but for Part of the Term. So if Tenant in Tail takes a Wife, and makes a Leaſe for 30, or 40, *&c.* Years, rendering Rent, which is avoidable by the Iſſue in Tail, and dies, and afterwards the Wife recovers her Dower, in that caſe the Wife ſhall avoid the Leaſe, and yet, if ſhe dies within the Term, the Iſſue in Tail at his Election may either affirm or diſaffirm the Leaſe. And it was ſaid, if Tenant in Tail makes a Leaſe for 30 or 40 Years, rendering Rent, which is avoidable by the Iſſue in Tail, and afterwards Tenant in Tail dies without Iſſue, his Wife with Child with a Son, by which the Donor enters, and as to him avoids the Leaſe, and afterwards the Son is born, the Leſſee re-enters, the Son at his full Age may by Acceptance of the Rent affirm the Leaſe; for the Leaſe was never avoided abſolutely, nor *ſimpliciter*, but *ſecundum quid*, and upon the Matter *ex poſt facto* was defeated but for a Time. And altho' *filius in utero matris, eſt pars viſcerum matris, (vide* 3 *Aſſ.pl.* 2. 22 *Aſſ.pl.* 94. 22 *Edwardi tertii, Corone* 180. *Stamford* 21.) yet the Law in many Caſes hath Conſideration of him in Reſpect of the apparent Expectat. of his Birth

2 Rol. 20. 10 Co. 43. a. Co Lit. 46. a. 3 Jones 457.

Co. Lit. 46. a. Plowd 560.b. Bridgm. 27.

Co. Lit. 46. a.

Godb. 325.

1 Leon. 74. Cart. 87.

Birth. See the Opinion of *Saunders* and *Browne* in *Stowel's* Caſe, *Plow. Com.* for avoiding of a Fine. *Vide temp. E.* 1. *Gard.* 153. & 31 *E.* 1. *bre.* 873. for the Wardſhip of him. *Vide* 38 *E.* 3. 7. & 41 *E.* 3. & 11 *E.* 3. *Voucher*, that he ſhall be (*a*) vouched in his Mother's Womb. 11 *H.* 6. 13. a Deviſe of (*b*) Land (deviſable by Cuſtom) to one in his Mother's Womb. 41 *E.* 3. Deteinment of (*c*) Charters for the Heir in his Mother's Womb. 3 *El. Dy.* 186. An Adulterer doth counſel the Woman to kill the Child when he is born, who doth accordingly; the Adulterer is acceſſary, yet at the Time of the Counſel the Child was in his Mother's Womb. But it was ſaid, if (*d*) Tenant in Tail makes a Leaſe for 30 or 40 Years, rendering Rent, and afterwards takes a Wife, and dies without Iſſue, his Wife with Child with a Son, and afterwards the Wife recovers Dower of the ſame Land, ſhe before the Son's Birth ſhall not avoid the Leaſe, for her Eſtate is *quodammodo* a Continuance of Part of the Eſtate-tail, and the ſame is proved by 10 *E.* 3. 26. 34 *Aſſ. pl.* 15. & 23 *E.* 3. *Dower* 150. that ſhe ſhall be (*c*) attendant for a third Part of the Services that Tenant in Tail did, which ſhe ſhould not be, if to all Intents the Eſtate-tail were utterly extinct, and Tenant in Dower is in in the *Per* by her Husband, and in of his Eſtate. *Vide Litt.* 93. *b. in Deſcents*, 38 *Aſſ.* 26. 7 *H.* 5. 3. 8 *E.* 2. *Entre* 75, *&c. Vide* 33 *H.* 8. *Dyer* 51. *b.* (*f*) Tenant in Tail before the Statute of 27 *H.* 8. of Uſes, made a Feoffment in Fee to the Uſe of him and his Heirs; and alſo before the ſaid Act, he and his Feoffees made a Leaſe for Years, rendering Rent, and died after the Statute, the Land deſcended to his Iſſue, who before Entry upon the Termor levied a Fine to another, and by the better Opinion of the Juſtices of both the Benches, except *Saunders*, the Alienee ſhall not avoid it; for altho the Son was remitted, yet the Leaſe was not merely void, without actual Entry by the Iſſue. *Vide Plow. Com.* 437.

(*a*) 8 E. 2. Voucher 237. 1 Rol. Rep. 254. 31 E. 1. br. 873. Cart. 87. 10 Co. 32. b. Co. Lit. 390 a. 9 H. 6. 24. a. 11 E. 3. Vouch. 13. 2 Rol. 746. Hob. 222, 338.

(*b*) Dyer 303. pl. 51. 1 Sid. 153. Moor 637. Cart. 87. Raym. 83, 84.

(*c*) 1 Rol. Rep. 254.

(*d*) Co. Lit. 46. a. Bridg. 28.

(*e*) Co. Lit. 241. a.

(*f*) Dyer 51. pl. 17. 1 Rol. Rep. 216, 403. 3 Leon. 154. Bridgm. 27, 103 Co. Lit. 349. a. Moor 15. 2 Bulſtr. 44, 45.

Trin.

Trin. 33 Eliz.

In the Common Pleas.

UGHTRED's *Caſe.*

Jenk. Cent. 260. Hard. 9, 79. 2 Brownl. 98. Doct. pl. 91. 1 Bulſtr. 168. Palm. 397.

HEnry Ughtred Eſq; brought a Writ of Annuity againſt *William* Marqueſs of *Wincheſter*, Son and Heir of *John* Marqueſs of *Wincheſter*, and declared that the ſaid *John* Marqueſs of *Winton*, 20 *Dec.* 17 *El. tam pro bona & favorabili affectione & benevolentia quas geſſit erga eundem Henricum, quam pro confidentia & fidelitate repoſit. in eodem Henrico*, by his Writing did conſtitute and authoriſe the ſaid *Henry* to be Captain of the Fort or Bulwark, and Caſtle of *Netley*, alias *Letley*, in the County of *Southampton*, To have and exerciſe the ſaid Office of Captain, *&c.* during the Life of the ſaid *Henry*, and gave him Authority during his Life to nominate and appoint from Time to Time a Maſter Gunner, one Porter, and ſix Soldiers, *&c.* And further by the ſaid Writing the ſaid *John* Marqueſs did grant, *pro conſideratione prædicta, & pro meliore manutentione ipſius Henrici & magiſtri tormentor. & ſex militum in defenſione & tuitione caſtri prædicti*, for him and his Heirs, to the ſaid *Henry* during his Life, an Annuity of 32 *l.* at the Feaſts of St. *Michael*, and the *Annunciation* of our Lady by equal Portions, by Force of which he was ſeiſed of the ſaid Office, and of the ſaid Annuity for his Life; and afterwards 10 *Nov.* 18 *El.* the ſaid *John* Marqueſs died; and the Defendant his Son and Heir for 11 Years before the Writ brought did with-hold the Annuity, which in all amounted to 368 *l. &c.* on which Declaration the Defendant did demur in Law; and according to the Statute did ſhew di-

27 El cap 5.

vers Cauſes: 1. Becauſe it doth not appear by the Declaration, That the ſaid *John* Lord Marqueſs had Power or Intereſt to grant the ſaid Office; and alſo becauſe the Plaintiff hath not averred, that he hath exerciſed the ſaid Office, nor that he did appoint a Maſter Gunner, Porter, or the Soldiers, and divers other Cauſes were ſhewed; but notwithſtanding theſe, Judgment was given by the Juſtices of the Common Pleas for the Pl. whereupon the Marqueſs brought

a Writ

a writ of Error, and divers Errors were aſſigned, but all were over-ruled by the Court but one. And that was, that the Pl. in the writ of annuity had not averr'd in his Declarat. that he had exerciſed the ſaid office, &c. But after many Arguments and Conſiderat. of all the books, in which (as it ſeems *prima facie* there is a diverſity of Opinions, It was reſolved, that the Declarat. was good without ſuch (*a*) averment; and their reaſon was, that in all caſes where an intereſt or eſtate doth commence upon a Condit. precedent, be the Condit. or Act to be performed by the Pl. or Def. or by any other; and be the Condit. in the (*b*) affirmative or negative, there the Pl. ought to ſhew it in his Declarat. and to aver the performance thereof; for there the intereſt or eſtate doth begin in him by the performance of the Condition, and is not in him till the Condit. be performed. But otherwiſe it is when the intereſt and eſtate paſſeth preſently and veſts in the grantee, and is to be defeated by matter *ex poſt facto*, or Condit. ſubſequent, be the Condit. or Act to be performed by the Pl. or Def. or by any other, and be the Condit. in the affirmative or negative, there the Pl. may declare generally, without ſhewing the performance thereof, and it ſhall be pleaded by him who will take advantage (*c*) of the Condition or matter *ex poſt facto*, for every one ought to alledge that which (*d*) makes for him, and which is for his avail, and none ſhall be forced to alledge that which is againſt himſelf. And it may well be, that the Condit. ſubſequent or matter *ex poſt facto*, ſtands upon many Parts; (as in the caſe at bar it happens) to rehearſe all which would be tedious, when Iſſue ſhall be taken but upon one of them, and the Def. may plead any one of them which he pleaſeth in bar of the Action, and ſo the pleading will be more ſhort and compendious, which is the moſt commendable, if it be ſufficient. Here in the caſe at bar the Condit. was to be performed by the Pl. himſelf, and therefore the caſe is the ſtronger, but becauſe the Pl. by the ſaid grant was preſently ſeiſed of the ſaid office and annuity for the term of his life, which ought to be defeated by the not uſing the ſaid office or other ſubſequent matter; the ſubſeq. matter makes againſt him, and therefore ſhall be pleaded by the Def. and therewith agreeth 15 *H.*7. (*e*) 1. *a. b.* In a writ of annuity againſt the ſucceſſor of a Prior on a grant made by his predeceſſor until he was advanced to a benefice of holy Church, and the Pl. declar'd generally, without ſaying that he is not yet advanced; and for that cauſe exception was taken to it, and notwithſtanding the Declarat. was adjudged good, becauſe the Condition went in Defeaſance of the Annuity, which ought to be ſhewed on the Defendant's Part. Alſo this is an Annuity, which beginneth before the Condition ſhall be performed, which Performance ſhall come on the Part of the Grantor, and not like where the Condition was (*f*), That if the Grantee doth ſuch a Thing, that then he ſhall have ſuch an Annuity; now, if he will demand

(*a*) Hard. 9. 79. Hob. 41. Jenk. Cent. 260. Doct. pl. 91.

(*b*) Doct. pl. 91.

(*c*) Doct. pl. 91.
(*d*) 5 Co. 78. b. Plowd. 16. b.

(*e*) Cro. Arg. 108. Hard. 9, 10. 2 Brownl. 98. Doct. pl. 91. Br. count 43. Plowd. 25. b. 32. b. 272. b. 273. a. Palm. 192

(*f*) Doct. pl. 91.

it, he ought to alledge *in facto*, that the Condit. is perform'd, for by the perform. thereof the annuity doth begin. And ſo is the differ. by all the Juſt. and theſe are the words of the book. So it is ſaid in *Colthirſt*'s caſe, *Pl.Com.* 25.*b*. If I grant to one that when he ſhall be promoted to a benefice, that he ſhall have an annuity; if he demands the annuity, he ought firſt to ſhew that he is promoted to a benefice. But if an annuity be granted to one until he be promoted to a benefice, there he ſhall have a writ of annuity, and ſhall not ſhew that he is not yet promoted to a benefice, becauſe the annuity doth precede, and the promotion is ſubſequent, and goes in defeaſance of the annuity; and therefore it ought to be ſhewed on the contrary part. But when (*a*) a man is only intitled to an Action, and the Act'n lies not, if the Condit. or Conſiderat. be not perform'd, there the Pl. in his Declarat. ought to ſhew the performance, for it amounts to a Condit. precedent, becauſe the Act'n ariſes on the Condit. or Conſiderat. performed, as the book in (*b*) 3*H.*6.33.*b*. Suppoſe I retain (*c*) a man to go with me to *Rome* for 40 *s*. here by the going the cauſe of the duty firſt ariſes, in which caſe if he brings an Act'n of debt for it, in his Declarat. he ought to declare, that he was there, otherwiſe the Declarat. ſhall abate. So it is if I (*d*) retain one to ſerve me for 40 *s*. by the year; for here by the Conſiderat. performed the duty ariſes, ſo that it is in the nature of an Act precedent, and ſo was the Opin. of the whole Court in the ſaid book. But the caſe in (*e*) 48*E.*3.3. & 4. was affirmed for good Law where it appears, that Indent. were made betw. Sir *R. Pool* Kt. of the one part, and Sir *R. Tolcelſer* of the other part, by which Sir *Ralph* did covenant with Sir *Rich.* to ſerve him with 3 Eſquires of Arms in the Wars of *France*, and Sir *Rich.* did covenant therefore to pay him 42 Marks: In that caſe each party had equal remedy, one for the ſervice, and the other for the money, and therefore in debt for the 42 Marks he may chuſe either to declare in general, or ſpecially at his pleaſure, by the rule of the Court. Alſo when an Intereſt doth paſs preſently, and is to be defeated by matter *ex poſt facto*, yet if it appears to the Court by matter in Law, that the Act'n ſhall not be maintainable without ſhewing the performance of the Condit. or Conſiderat. there the Pl. ought to aver it for the maintainance of his Act'n, as in 39*H.*6.21,22. the Caſe was, *R.* Abbot of *Cheſter* granted to *John Brewin* Eſq; by his Deed (without the Conſent of the Covent) a yearly Rent of 40 *s*. out of his Monaſtery, *pro conſil' ſuo eid' R. Abbati* & (*f*) *conventui ejuſdem loci impenſo*, & *imposterum impendendo*; the ſaid *R.* Abbot died, and *John Brewin* brought a Writ of Annuity againſt the Succeſſor, and averr'd, that he had given to the ſaid *R. nuper Abbati* & *conventui conſil' ſuum apud* W. *in negot' domus præd' agendis, ad proficuum ejuſd' domus*: And *Priſot* and the whole Court

(*a*) Doct. pl. 91. Lutw. 250, 251.

(*b*) Br. count 7. Palm. 397. 1 Bulſtr. 168. Poph. 161. Doct. pl. 91.

(*c*) Doct. pl. 91. Popham 161. Jenk. Cent. 260.

(*d*) Hob. 41, 105

(*e*) Doct. pl. 92. 1 Bulſtr. 168. Popham 161. Palm 397, 398. 1 Rol. 414, 415. 1 Saud. 320.

(*f*) Doct. pl. 92.

Court held that the Action was not maintainable againſt the Succeſſor without ſuch (*a*) Averment. For the Act'n is not maintainable againſt the Succeſſor for any Contract or Grant made by the Abbot only without the Covent, unleſs the Effect or Conſideration thereof comes to the Profit of the Houſe. And that ſuch general Averment was good, for it would be too long to ſhew all the Cauſes ſpecially, and therefore againſt the Succeſſor he ought to take ſuch Averment. But in an Action againſt the Abbot himſelf, who made the Grant, it is not neceſſary to take ſuch Averment, as it is agreed there by the whole Court. And ſo by theſe Differences: 1. Between an Intereſt, or Eſtate veſted, and which is to be deveſted by Condition or Matter ſubſequent, and a Condition or Matter, which precedes the Eſtate or Intereſt. 2. Between a Thing in Action which in Judgm. of Law is to commence on a Condition or Conſideration precedent, and Intereſts or Eſtates which begin preſently. 3. When equal Remedy is given to both by reciprocal Covenants. 4. When by Matter apparent the Plaintiff's Action ſhall not be maintained without Averment, altho' it be in the Caſe of an Eſtate or Intereſt veſted, you will the better underſtand your books, which ſeem *prima facie* to diſagree, (*c*) 21 *E.*4.49 *b.* 22 (*d*) *E.*4.43.*a.* 9*E.*4.20.*b.* 37*H.*6.8.*b.* 36*H.*6. 2.*b.* *Dyer* 10*El.*270. in Avowry, and 15*El.* *Dyer* 329. in Debt. And note, the ſaid *Ughtred* had Judgment in the Common Pleas, *Quod prædictus Henricus recuperet verſus præfatum nunc Marchionem, annuum redditum prædictum & arreragia ejuſdem, tamdiu ante diem impetrationis brevis original' ipſius Henrici, quam poſtea incurſa, & damna ſua occaſione ſubtractionis annui redditus prædict' ad decem libras, eidem Henrico ex aſſenſu ſuo per Curiam hic adjudicat'. Quæ quidem arreragia & damna in toto ſe attingunt ad* 402 *libr. Et prædictus nunc Marchio in miſericordia.*

(*a*) Jenk. Cent. 260, 261. Doct. pl. 92.

(*b*) Cr. El. 546. Doct. pl. 92.

(*c*) Br. counter. Br. annuity 38. Doct. pl. 90.

(*d*) Hard. 10. Doct. pl. 90, 91.

Mich.

Mich. 33 & 34 Eliz.

In the Exchequer.

ENGLEFIELD'S *Caſe.*

1 And. 293, 294. Poph. 18, 19. Moor 303, 304, 305. 4 Leon. 135, 136, 137. 169, 170, 171, 2 Rol. Rep. 142. 323, 324, 420. Lane 44. 3 Keb. 316. 3 Inſt. 19, 180. Palm. 437, 438, 439.

BEtween the Queen and *Margaret Englefield*, *Fran. Englefield*, and others, in an information upon intruſion in the Exchequer, which began *Trin.* 32 *El.* the caſe in effect was ſuch, Sir *Fr. Englefield* ſeiſed of the Manor of *Englefield* in the County of *Berks* in Fee, by Indent. dated 2 *Jan.* 18 *El.* between him and the ſaid *Fran.* his nephew, covenanted for the advancem. of his blood, &c. to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of his ſaid nephew, and the heirs males of his body, and afterwards to the uſe of the right heirs of the nephew. And it was further contained in the ſame Indenture, that becauſe his nephew was an infant, ſo that his proof was not then ſeen, and becauſe the uncle did not think convenient to ſettle the ſaid inheritance in the nephew abſolutely, ſo long as the uncle ſhould live, without a bridle to reſtrain him, if after he ſhould be prodigal, or ſhould be given to intolerable vices; for this cauſe it was provided, That if the uncle by himſelf, or by any other during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uſes, that then all the uſes ſhould be void. *Hill.* 2. 6 *El.* Sir *Fran.* was indicted in the K's Bench by a Jury of *Midd.* for Treaſon committed at *Nemures* in *Hanonia in partibus tranſmarinis*, 20 *Octob.* 18 *El.* upon which Indictment he was outlawed, and afterwards 8 *Aug.* 28 *El.* the Queen by patent under the great ſeal did leaſe the land to *Foſter* and *Fitton*, two of the Def. for 40 years, and alſo demiſed to them for 40 years, *omnes & ſingulos boſcos, ſubboſcos, arbores, & terras boſcales:* And afterwards at the Parliament 29 *Oct.* 28 *El.* the attainder was confirmed. And further it was enacted, that he ſhould be attainted of High Treaſon, and ſhould forfeit to the Queen all his Manors, Lands, Tenements, &c. the Day of the Treaſon committed, or at any Time after, and that the ſame ſhould be in the actual Poſſeſſion of the Queen without Office. But further it was provided, by the ſaid Act, That nothing therein ſhould extend to make void any Leaſe of Land, or Gift of Goods made by the Queen under the Great Seal, or Exchequer-Seal, after the Treaſon committed, &c. And at the ſame Parliament another Act was made, by which it was enacted, *That every perſon and perſons which hath, or claimeth to have any eſtate or intereſt, of, in, or out of any land of any of the perſons attainted ſince* 18 Eliz. *not inrolled*

2 Rol. Rep. 391. 1 Vent. 129. Latch 28. Palm. 438. 1 Jones 136.

29 El. cap. 3.

inrolled of Record, not certify'd into the Exchequer, made since 1 El. *by any of the persons attainted since* 18 El. *of Treason, for conspiring of the Queen's death* (as the said Treason of Sir *Fr. Englefield* was) *within* 2 *years after the last day of this session of Parliament, shall openly shew, and bring forth, into the Queen's Majesty's Court of Exchequer, the same, his, or their grant, conveyance and assurance, and there in the Term-time, in open Court, the same shall offer and exhibit, or upon his, or their Oath, affirming that they have not the same, nor can come by it, or that it was never put in writing, then the effect thereof to be entered and inrolled of Record. Or else every such conveyance and assurance should be void and of none Effect to all intents and purposes: Saving to every person and persons (other than parties and privies to such conveyance, and such as shall not exhibit the said conveyance according to the true meaning of this Act) all such right*, &c. And afterwards 17 *Mar.* 31 *El.* the Queen by her letters patents under the great seal, reciting the uses and the proviso of tendering of a ring, and that the benefit and advantage of the said Condit. is given to her by the Stat. of this realm, did depute, authorise, and in her place and person put, *R. Broughton* and *H. Bouchier*, jointly and severally to deliver or offer the ring of gold to *Englefield* the nephew, to the intent to make void the uses in the indentures; and that they should certify into the Exchequer, what they should do in the premisses. *Broughton* and *Bouch.* 8 *Mar.* 31 *El.* offer the ring (and read to him the patent) to the said *Fran.* the nephew, which he refused: All which fact, with the patent they certified into the Exchequer 19 *Mar.* 31 *El.* and the life of Sir *Fran.* was averr'd, &c. And the Def. were charged for intrusion 20 *Mar.* 31 *El.* and with the cutting of certain Trees of Elm and Ash, and certain Under-woods. And in this case, after many arguments at bar, and upon open argument at bench these points were resolved: 1. The Queen was Ten't *pur auter vie*, and made a lease for 40 years, altho' the Queen (having only an estate *pur auter vie*) could not absolutely contract for a lease for 40 years, yet without any recital or mention of the estate for life, the lease is good; for the lease for years is in judgment of law less than the lease *pur auter vie*, and the Queen doth not any wrong or prejudice to any by the demise, and is not deceived in her grant; for in Judgment of the Law it is a Lease for 40 Years, if *cestui que vie* shall so long live, but if the Queen had granted a greater Estate than she lawfully might, as an Estate in Tail, or in Fee, there because she could not lawfully do it, she was deceived, and by consequence her grant void. See now the case of *Alton* Woods, in the 1st part of my Reports. And it was said, that if the Queen grants *totum statum suum* (having a Term, or Estate for Life, Extent, or other particular Estate) it is good enough; for the Queen

Moor 321.

1 Co. 50. b. &c.

Queen doth not grant more than ſhe may do by the law, nor doth any (*a*) wrong, or make Alterat. of any eſtate by her grant. And it was objected, that this Condit. ſhould not be given to the Queen by the Stat. of 32 *H.*8. *c.*20. for 3 Reaſons: 1. This Condit. is annexed to Sir *Francis* with ſuch inſeparable privity, that it cannot be given to anoth. for in this caſe the ſubſtance of the Condit. is the intent and mind of Sir *Fran.* but becauſe his intent and mind cannot appear without an overt act. for this cauſe the ring ſhall be tendered as a Declarat. of his intent, which was inward and ſecret to himſelf, ſo that the tender of the ring is only the outward ceremony, but the ſubſtance of the Condit. is the mind and will of Sir *Fran.* which cannot be transferr'd to anoth. Alſo in this caſe nature is made judge, for the uncle is to judge of the quality and diſpoſition of the nephew, and whether he gives his uncle cauſe to revoke and diſannul his eſtate; and therefore as natural love and affect. cannot be transferred to anoth. ſo this conveyance, of which natural love and affect. is the cauſe of the creation of it, and the judge of the Determinat. of it, cannot be revoked or determined by any other; and all this agrees with the reaſon of the com. Law; for the (*b*) wardſhip of the eldeſt Son, which the law of nature gives the Father, is inſeparable, and cannot be forfeited or transferred to another, as it is agreed in 33 *H.*6. And Homage Anceſtrel is inſeparable, becauſe it is annexed to the blood of the Ld. and the Tenant. 2. By the general words of the Act of 33 *H.* 8. Conditions ſeparable, and which may be performed by others, and not inſeparable, are given to the K. as appears by divers caſes founded on general Acts of Parliam. here put, and after agreed. 3. It was objected, that this being a collateral Condit. altho' the Condit. be given to the K. *ſc.* the benefit of it, if it be performed, yet the performance of it is not given to the K. by the ſaid Act. And therefore Sir *Francis* ought to tender the ring, and not the Queen. And therefore ſuppoſe that the Condit. had been, if the Ch. Juſt. of *England* for the Time being, ſhall tender a ring after the attainder of Sir *Francis*, the Queen cannot tender it; and the reaſon of the Books in 12 *H.* 4. 2. & 9 *H.* 7. 17 & 20. 4 *H.*8. *Dyer* 1. *&c.* was urged, where collateral (*c*) Conditions cannot be altered, and other things taken in Satisfaction of them between the ſame Parties, *a fortiori* here, for here the perſon who by expreſs words ought to perform the Condit. ſhall be changed. As to the 1ſt and 2d Objections, *Manwood* Chief Baron, and the whole Court held, That the whole Force and Effect of the Condition in the Caſe at Bar did conſiſt on the Tender of the Ring; and the other Matter of the Reaſon and Cauſe, which moved and induced him to leave the ſaid Power and bridle in himſelf, was not any Parcel of the Proviſo, but a (*d*) flouriſh (as he termed it) and Preamble, and nothing is Parcel of the Condition but that which comes after the

(*a*) 5 Co. 55. b. 1 Co. 44. b. 52. b. Dav. 75. a. b. 11 Co. 72. a. 2 Inſt. 681. Co. Lit. 19. b. 13 E. 4. 8. a. Plow. 246. b. 487. b. Cr. Argument 60. 1 Rol. Rep. 167. Noy 182. Moor 416. Godb. 317.

(*b*) Vaugh. 180. 33 H. 6. 55. b. 7 Co. 13. b. Calvin's Caſe. 3 Co. 39. a. Plow. 294 a. 2 Inſt. 234. Br. gard. 6. Br. forfeit. 70. Co. Lit. 84 b.

(*c*) 9 Co. 78. a. 79. a. 1 Rol. 455, 456. 2 Brownl. 131. 1 Rol. Rep 296, 297. Cr. El. 46, 193, 304, 458. 3 Bulſt. 148. 149. Co. Lit. 212. b. Perk. 145. b. 146 a. Hob. 178. Palm. 550.

(*d*) Latch 71. Palm. 435.

proviſo, and that is the tender of the Ring. And as to that, the ſaid difference was taken and agreed by the whole Court, *ſcil.* Between conditions which are perſonal and individual, and cannot be performed by any other; and conditions which are not ſo inſeparably annexed to the Perſon but that they may be performed by any other; as it was reſolved in the Caſe of *Tho.* D. of (*a*) *Norfolk*, who in *Anno* 11 *El.* conveyed his lands to the uſe of himſelf for life, and afterwards to the uſe of *Philip* E. of *Arundel* his eldeſt Son in tail, with divers remainders over, with proviſo, that if he ſhould be minded to alter and revoke the ſaid uſes, and ſhould ſignify his mind in writing under his proper hand and ſeal, and ſubſcribed by three credible witneſſes, that then, *&c.* And afterwards the ſaid Duke was attainted of High Treaſon, that this proviſo or condition was not given to the Queen by the ſaid Act of 33 *H.* 8. becauſe the performance of it was (*b*) perſonal and inſeparably annexed to his Perſon, that is to ſay, to ſignify his mind by writing unto his own proper Hand, which none could do but the Duke himſelf: upon which point all the Poſſeſſions of the Dukedom ſo conveyed *ut ſupra* were ſaved, and not forfeited by the Attainder. 53 *H.* 6. 56. The Templers held divers of their Poſſeſſions in (*c*) *Frankalmoign* (which Tenure as *Littleton* ſaith, is annexed in privity to the Blood of the Donor) and afterwards they were diſſolved, and by Parliament, *anno* 17 *Ed.* 2. their Poſſeſſions were given to the Hoſpitalers, to hold them in the ſame manner as the Templers held, yet they by thoſe general Words ſhould not hold in *Frankalmoign*, becauſe the Privity of the Tenure on the Part of the Tenant doth not continue, and this privity being perſonal and inſeparable, by the general Words of the Act was not transferred to the Hoſpitalers. The ſame Law of an Impropriation of a Church, which alſo is an incident inſeparable to the religi. houſe to which the Chu. is impropriate. And therefore it is adjudged in *P.* 3 *Ed.* 3. (*d*) that the Hoſpitalers by the ſaid Act of 17 *Ed.* 2. ſhould not have the Impropriation, for it was inſeparably annexed to the Corporation of Templers, which thing conſiſting in inſeparable Privity by general words of an Act of Parl. ſhould not be tranſferr'd to others. So was it adjudged *Trin.* 25. *El.* in the Marq. of *Wincheſter*'s Caſe, (which ſee in the 3d part of my Reports,) That by the general words of all Hereditaments, *&c.* a Writ of (*e*) Error which a Perſon attainted had was not given to the King; for a Writ of Error is a Writ which lieth in Privity. And the Ch. Baron ſaid, That he never ſaw in any Act of Attainder (*f*) Actions which belonged to the Perſon attainted given to the King. In the time of *H.* 8. *Br. Corodie* 3. it is held, That a (*g*) Founderſhip, which alſo is a Thing annexed inſeparably to the Blood of the Founder, ſhould not be forfeited by Attainder, *vide L.* 5. *Ed.* 4. But in the Caſe at Bar, the Condition, *ſcil.* the Tender of the

(*a*) Latch. 107. 1 Mod. Rep. 17, 38. 4 Co. Hob. 342. 1 Vent. 12. 2 Roll's Rep. 391, 394. Latch. 27, 29, 69, 70, 71, 103. Palm. 435. O. Benl. 139. 1 Jones 77, 235, 239. Styles 196.

(*b*) Palm. 119.

(*c*) Latch. 69, 71. Lit. Sect. 141. Co. Lit. 99 a. 3 Co. 3. b. Moor 312, 322. 35 H. 6. 56. b. 57. a. Moor 163.

(*d*) 3 E. 3. 11. b. pl. 1. 3 Co. 3 b. Moor 530. 531. Fitz. Grants 70. Plo Leon. 17

(*e*) 4 Leon. 17. 173, 174. Moor 323. Latch. 30. 69. O. Benl. 139. 2 Roll's Rep. 319, 324, 374. 1 Leon. Rep. 371, 372. Moor 125. Lit. Rep. 109. Cro. El. 389. Owen 21. 3 Co. 2. a. 3. b. 1 Jones 77.

(*f*) Hob. 341. 2 Roll's Rep. p. 325. 420, 501.

(*g*) Co. Lit. 99. a. b. Moor 322. 4 Leon. 138. 11 Co. 17. a.

Ring is not annexed to the Perſon of Sir *Francis*, but any other may do it as well as himſelf. The ſame Law of Paym. of Money, delivery of Gold Spurs, or other like. As to the third Objection it was reſolved. That when the Statute gives the Condition to the Queen, that the Performance thereof (which is not perſonal, and inſeparable) is alſo given to the Queen, as incident to it: For the Performance is the Subſtance and the Effect of the Condition; and the Statute puts the King in the Place of the Perſon attainted, to do that for the Performance of the Condition, which is feaſible, and which is not inſeparably annexed to the Perſon of him who is attainted. 4. It was objected, That altho' the Condition ſhould be given to the Queen, and the Performance of it alſo, yet the Leaſe ſhould not be void, for the Eſtate for Life of Sir *Francis* was not ſubject to the Condition. For an (*a*) uſe at the Com. Law was a Truſt and Confidence repoſed in one Perſon, that another Perſon ſhould have the Profits, ſo that there ought to be a Separation of the Poſſeſſion and of the uſe, either by Covenant, or Feoffment, Fine, or other Conveyance, by which there is a Tranſmutation of the Poſſeſſion: But in our Caſe he himſelf ſtood ſeiſed to the uſe of himſelf for Life, which could not be as an uſe, for he himſelf is Ter-tenant and there is not any Separation of the Poſſeſſi. and it is not any Truſt or Confidence, and he could not have a *Subpœna* againſt himſelf before the Statute; and the Stat. of* 27 *H.* 8. doth execute the Poſſeſſion to him only who hath an uſe, and who hath not a Poſſeſ. before; but Sir *Francis* in our caſe had the Poſſeſ. before, and therefore the Stat. cannot give Poſſeſſi. to him, but his Eſtate for Life was Parcel of his old Eſtate. And note, The Stat. of 27 *H.* 8. ſaith, To the uſe of (*b*) another Perſon, &c. ſo that another Perſon ought to have the uſe, than he who hath the Poſſeſſion. And *vide* 30 *H.* 8. *Feoffments al uſes Br.* 47. *Ceſtuy que uſe* in Tail before the Stat was enfeoffed by the Feoffees; and afterwards the Stat. of 27 *H.* 8. was made, the Stat. ſhall not give him a Poſſeſ. in Tail according to the uſe, becauſe he had the Poſſeſ. before, becauſe there was not any Separation of the Uſe and Poſſeſ. at the time of the making of the Stat. And then if the Eſtate for Life be Parcel of his old Eſtate, it is not ſubject to the ſaid Proviſo or Condit. and by Conſeq. by the Perform. of the Condit. the Eſtate for Life is not defeated, and then the Leaſe for 40 Years, which is derived out of it, remains good. But it was reſolv'd by the Court, That Sir *Francis* had the Eſtate for Life by the Limitation of the uſe, and the Operation of the Stat. of 27 *H.* 8. And they much relied upon the Reaſon and Rule of *Bainton's* Caſe in *Plow. Com.* That a Man for the Advan. (*c*) of his Heirs Males, may Covenant to ſtand ſeiſed to the uſe of himſelf and the Heirs of his Body, in that caſe there is no Separation of the Poſſeſſ. and Uſe, and yet the

(*a*) Co. Lit. 272. b. 1 Co. 121. a. 1 Mod. Rep. 39. 1 Ande. 318. Plow. 352. b. Poph. 71.

* 27 H. 8. cap. 10.

(*b*) 13 Co. 56.

(*c*) 2 Rol. 785. Plow. 309. b.

the Statute doth create an Eſtate in Tail in Poſſeſſion in him, in which Caſe the whole Eſtate-Tail is in himſelf: but that is for the Benefit of the Heir Male, altho' he is *in futuro*, and not *in præſenti*, for none can know who ſhall be his Heir Male, for (*a*) *Solus Deus facit hæredes, non homo.* But in this caſe it is for the Benefit of the Neph. *in præſenti* to have the uſes raiſed according to the ſaid Indentures. 5. It was objected, that altho' the eſtate for life be defeated by the condit. yet the Q. ſhould not avoid her own leaſe; For when the Q. hath an Eſtate for the Life of another, and alſo a Condition in her by the Statute of 33 *H.* 8. and ſhe makes a Leaſe for Years, altho' the Queen doth perform the Condition, ſhe ſhall not avoid the Leaſe. As if in ſuch Caſe a common Perſon had had the Eſtate for Life, and the Queen the Condition, and the common Perſon had made a Leaſe of the Land, and the Queen had confirm'd it, and afterwards the Condition is performed, yet the (*b*) Leaſe is good. And if the Mortgagee makes a Leaſe for Years, and the Mortgagor confirms it, and afterwards the Condition is performed, the Leaſe ſhall not be avoided. And *Arden's* Caſe was cited. Tenant in (*c*) Tail makes a Leaſe for Life, now he hath gained a new Fee by wrong, and afterwards he grants a Rent-charge, or makes a Leaſe for Years, and afterwards Tenant for Life dies, he ſhall not avoid his Charge or Leaſe, altho' he be in of another Eſtate, becauſe he had a defeaſible Poſſeſſion, and ancient Right, the which if they be in ſeveral Hands, ſhould be good; as the Leaſe of one, and the Confirmation of the other, and being in one Hand ſhall be as much in Judgment of Law. Note the Leaſe is the ſtronger Caſe than the Charge, 11 *H.* 7. 21. *a. Edrich* Ten't in Tail made a Feoffm. to his uſe upon Condition, and afterwards upon his Recognizance the Land is extended by the Statute of 1 *R.* (*d*) 3. and afterwards he performed the Condition, yet the Intereſt of the Conuſee ſhall not be avoided, and yet the Eſtate is changed *cauſa qua ſupra*. And all that was affirmed by the Court. But as to that it was reſolved, That the demiſe of the Queen ſhould not enure (to her ſpecial Prejudice) to (*e*) two Intents, *ſcil.* to a demiſe of the Land, and alſo to a Suſpenſion of her Condition, by which ſhe might defeat the Eſtate for Life, and the other Eſtates as it ſhould in the Caſe of a common Perſon, or to a Demiſe in reſpect of her preſent Eſtate for the Life of another, and alſo to a Confirmation in reſpect of her Condition; by which otherwiſe ſhe might defeat the whole, as it ſhould be alſo in the Caſe of a common Perſon. For the Grant of the Queen ſhall be taken according to her expreſs Intention comprehended in her Grant, and ſhall not extend to any other Thing by Conſtruction

(*a*) Rolls 785. Co. Lit. 7. b. 2 56. 4.

Co. Lit. 301. a

(*b*) Moor 325. 2 Rol. Rep. 320, 340. Godb. 311, 314, 323.

(*c*) Moor 325. Poph. 50. 1 Co. 147 b. Co. Lit 343. a. Br. Condition 249. 2 Rol. Rep. 320.

(*d*) 1 R. 3. cap. 1. 1 Co. 147. a.

(*e*) Lane 121.

Poph. 150. b.

ction or Implication which doth not appear by her grant that her intent did extend to. And therefore in such Cases the Queen ought to be truly informed, and she ought to make a special and particular Grant, which by express Words may enure to all such several Intents as are desired; as 17 *E.* 3. 39. An Advowson held of the King is aliened to an Abbot, now the King hath Title to the Advowson for the Mortmain, and afterwards the King by his Letters Patents grants to the Abbot that he may hold the Advowson to his own Use, yet he shall not lose the Advantage of the Mortmain, for when the King hath two Rights in him, he cannot exclude himself of both without special Words, *vide* 9 *H.* 7. 14. *Plow. Com.* 397, *&c.* And if in this Case the Demise of the Queen should amount to a Confirmation by force of her Condition, or if the Demise should amount to a Suspension of the Condition, then upon that it would follow, that she during the Term could not perform the Condition, which would be very prejudicial to the Q. 6. And as to the said Tender by force of the said Letters Patents, and the Certificate thereof into the Exchequer, it was objected, That the same would not be sufficient, but the Tender ought to be found by Office, for altho' the Letters Patents are of Record, yet the Tender it self is Matter in Fact, which ought to be found by Office; For the Certificate of the Bishop by force of the King's Writ, or of the Marshal of the King's Host, as in 2 *Ed.* 4. 1. which and such like are not traversable, but are trials in law, and shall bind the parties. But in our Case, if this Certificate, which is not made upon any ordinary Course of proceeding, should be good in Law, it would be a great Prejudice to the Party; for no Certificate which is allowed and warranted by the Common Law, is traversable; and then the Matter might be false, and the Party disinherited, and yet he should not have any Remedy, which would be very inconvenient. But it was resolved by the whole Court, That the Tender and Certificate in this Case was good enough, and that the Party grieved, if it be false, might traverse the same, and should not be concluded by it, for it was not in the Nature of a Trial, but of a Record to inform and satisfy the Queen of her Title. Also they resolved, That presently by the Tender of the Ring according to the said Proviso, or Condition, the Uses were determined, and void in Law, and by Consequence the Land vested in the Queen by force of the Attainder, and of the Act of 33 *H.* 8. 7. It was objected, That the said Conveyance was void by the Act of 28 *Eliz.* and then was Sir *Francis* at the Time of his Treason committed, and Attainder thereupon, seised of the said Lands in Fee, which were for-

5 Co. 56. a.

Doct. pl. 352, 370.

Latch. 71. Moor 335. Doct. pl. 352, 370.

33 H. 8. c. 20.

forfeited to the Queen, and veſted in her by the ſaid Act of 33 *H.* 8. and by conſequence, the ſaid Leaſe made by the Queen (being at the Time of the making thereof ſeiſed in Fee) is good. And to prove that the Conveyance was void by the Statute before the ſaid Tender of the Ring, ſo that the Eſtate was not defeated by the Condition, but the Conveyance in which the Condition was contained made void by the Act of 28 *El.* before the ſaid Tender of the Ring, and before the Leaſe made; The Words of the Statute are, That every Perſon, &c. *within two Years after the laſt Day of that Seſſion, ſhall openly ſhew and bring forth into the Exchequer his Conveyance, and there in the Term-Time in open Court ſhall exhibit*, &c. *the ſame to be entred and inrolled of Record*, &c. And the Tender of the Ring was 18. *Mart. Anno* 31. before which Day all the Terms in the two Years were paſt; ſo that after *Hillary* Term paſt *Ann.* 31. it was not poſſible that the Conveyance ſhould be enrolled within the two Years in open Court in Term-Time. For the two Years paſſed by Effluction of Time before *Eaſter* Term; And therefore preſently after *Hillary*-Term paſſed, the Conveyance was void; and by Conſequence the Condition alſo. And thereupon the Caſe in *Temp. E.* 1. *Covenant* 29. & *F. N. B.* was put, That altho' the Covenant be that he leave the Wood in as good plight, &c. at the End of the Term, if the Leſſee cuts down the Trees, he ſhall preſently have an Action of Covenant, for it is not poſſible that he leave Trees, &c. at the End of the Term, ſo that the Impoſſibility of the Act ſhall give a preſent Action upon a future Covenant. But it was reſolved by the Court, That at the Time of the Tender of the Ring the ſaid Conveyance, and by Conſequence the Condition, was in force. And their Reaſon was, becauſe the Statute doth not require that the Enrollment of the Conveyance, which is the Act of the Court, ſhould be within the two Years; but the ſhewing and exhibiting thereof, which is the Act of the Party, ought to be within the 2 Years: For as to the ſhewing and exhibiting of the Conveyance, the Words are (*within 2 Years, &c. ſhall, &c. there in the Term-time in open court exhibit the ſame*) then the next words follow. are, (*to be entered and enrolled of Rec'd*) ſo that no time is limited when it ſhall be enrolled; but if the Words had been, (*and then and there ſhall be entred and inrolled of Record,*) then the Conveyance ought to have been enroll'd within the 2 Years: but as the Words are, it may be enrolled after the 2 Years paſt. And this was the firſt Caſe (that I know) that was argued and adjudged on the ſaid Act of 33 *H.* 8. which gives Conditions of Perſons attainted of Treaſon to the King. And in the Argument of this caſe, the Caſe of *T. Markenfield* Eſq; *an.* 19 *El.* in the Exchec. and divers other Caſes of Perſons attainted of Treaſon, who had Power of Revo. were cited:

Moor 446.

5 Co 21. a. F. N. B. 145. k. Moor. 313, 323. 2 Rol. Rep. 332, 347. Godb. 335.

and on Conſideration of them by the Barons, they reſolved *ut ſupra*, and gave Judgment for the Queen. But the Counſel of *Fran. Engleſield* were not ſatisfied with the Judgment, and chiefly as to this principal Point: For they conceived, that as this Caſe is, the Condition was ſo inſeparably annexed to the Perſon of Sir *Francis*, that it was not given to the Queen by the ſaid Act of 35 *H.* 8. And their Advice was to bring a Writ of Error. But at the next Parliament, *ſcil.* 35 *Eliz.* a ſpecial Act of Parliament was made to eſtabliſh the Forfeiture to the Queen.

Trin. 34 Eliz.

The Caſe of SWANS.

2 Rol. Rep. 30.

BEtween the Queen, and the Lady *Joan Young*, late the Wife of Sir *John Young* Knight, deceaſed, and *Thomas Saunger* Defendants, the Caſe was ſuch; An Office was found at *W.* in the County of *Dorſet*, 18 *September Ann.* 32 *El.* before Sir *Matthew Arundel* and other Commiſſioners of the Queen under the Great Seal, *Quod a villa de* Abbotsbury, *in præd' Com'* Dorſet. *uſque ad mare per inſulam de* Portland *in eodem Com' eſt quædam eſtuaria, Anglice* a Meere or Fleet, *in quam mare fluit & refluit, in qua quidem eſtuaria ſunt* 500 *cigni, quorum* 410. *ſunt albi, &* 90 *ſunt cignetti, & quod omnes prædicti cigni & cignetti ſunt in poſſeſſione* J. Young & Tho. Saunger, *& quod quilibet eorum eſt valoris* 2 s. 6 d. *quodque major pars tempore captionis dictæ inquiſitionis minime fuer. ſignat'* : which Office being certified into the Exchequer, a Writ was directed to the Sheriff of the ſame County to ſeiſe all the ſaid white Swans not marked, by force whereof the Sheriff returned that he had ſeiſed 400 white Swans. To which afterwards, *ſcilt. Hill.* 34 *Eliz.* the ſaid *Joan*

Joan Young and *Tho. Saunger* pleaded; *Quod præd' estuaria sive aqua, jacet in Paroch' de* Abbotsbury *in Com. Dorset* (and abutted it) and that before the Inquisition taken, The Abbot of *Abbotsbury* was seised *de præd' estuaria, & de ripis & solo ejusdem* in Fee, and that at the Time of the Inquisition, and Time out of Mind, *fuit & adhuc est, quidem volatus cignorum & cignettor' feror', vocat'* a Game of wild Swans, *in estuaria sive aqua illa, & ripis, & solo ejusd' nidificant' gignen' & frequentant' Anglice* haunting, *de quo quidem volatu cignor' & cignettor', præd' Abbas & omnes prædecessores sui Abbates Monasterii præd', per totum tempus prædict' habuere & gavisi fuerunt, & habere & gaudere consueverunt, tot. profic' & increment' omnium & singulor' cignor' & cignettor' feror' in estuaria præd' nidificant' gignen' & frequent' qui quidem cigni & cignetti per totum tempus præd' fuerunt feræ naturæ, & infra idem tempus iidem cigni & cignetti seu eorum aliqui aliquo signo non usi fuissent, nec consuevissent signari, nisi qd' præd' nuper Abbas & prædecessores sui præd' per totum tempus præd' ad eorum libitum quosd' seu aliquos de minorib' cignettis annuatim pullulant' quos ad usum & culinæ & hospitalitatis suæ statuerunt expendend', in hunc modum annuatim signare consueverunt, & usi fuerunt,* viz. *amputare mediam junctturam unius alæ, Angl'* to cut off the Pinion of one Wing, *cujuslib' talis cignetti, ea intentione, qd' cignetti sic amputati minime valerent avolare.* And afterwards the said Abbot surrendred the Premisses to K. *H.* 8. who *Ann.* 35th of his Reign granted to *Giles (a) Strangways* Esq; by his Letters Patents *inter alia, totam illam liberam Piscariam nostr' in aqua, vocat'* the Fleet in Abbotsbury *præd ac omnia mesuag' aquas, piscat' & cætera hæreditam' nostr' quæcunq; in* Abbotsbury, *in dict' Com'* Dorset *dict' nuper Monasterio, &c. adeo plene & integre, &c. & in tam amplis modo & forma, &c.* and that the said *Giles* died, and it descended to *Giles Strangways* his Cousin and Heir, who demised to the Defendants the said Game of Swans for one Year, *&c.* and prayed *quod manus dictæ Dominæ Reginæ amoveantur.* Upon which the Queen's Attorney did demur in Law.

(a) Dav. 57. a.

1. It was resolved, That all white Swans not marked, which have gained their natural Liberty, and are swimming in an open and common River might be seised to the King's Use by his Prerogative, because *Volatilia, (quæ sunt feræ naturæ) alia sunt regalia, alia communia:* and so *Aquatilium, alia sunt regalia, alia communia:* as a Swan is a Royal Fowl; and all those, the Property whereof is not known, do belong to the King by his Prerogative: and so *(b)* Whales and Sturgeons are Royal Fish and belong to the King by his Prerogative. And there hath been an ancient Officer of the King's called *Magister deductus cignorum,*

(b) Dav. 74. a. Stamf. Prærog. 37. b. 38. a. 5 Co. 108. b. Crawd. 315. b.

which continues to this Day. But it was reſolv'd alſo, that the Subject might have Property in white Swans not marked, as ſome may have Swans not marked in his private Waters, the Property of which belongs to him, and not to the King; and if they eſcape out of his private Waters into an open and common River, he may bring them back and take them again. And therewith agreeth *Bracton, lib. 2. c. 1. fol. 9. Si autem animalia fera facta fuerint manſueta, & ex conſuetudine eunt & redeunt, volant & revolant, (ut ſunt Cervi, Cigni, Pavones, & Columbæ, & hujuſmodi) conſq; noſtra intelligantur quamdiu habuerint animum revertendi.* But if they have gained their natural Liberty, and are ſwimming in open and common Rivers, the King's Officer may ſeiſe them in the open and common River for the King: For one white Swan without ſuch purſuit as aforeſaid cannot be known from another, and when the Property of a Swan cannot be known, the ſame being of its Nature a Fowl Royal, doth belong to the King; and in this Caſe the Book of 7 *H. 6. 27. b.* was vouched, where Sir *John Tiptoft* brought an Action of Treſpaſs for wrongful taking of his Swans; the Defendant pleaded that he was ſeiſed of the Lordſhip of *S.* within which Lordſhip, all thoſe whoſe Eſtate he hath in the ſaid Lordſhip, had had Time out of Mind, all Eſtraies being within the ſaid Manor; and we ſay that the ſaid Swans were eſtraying at the Time in the Place where, *&c.* and we as L'ds did ſeiſe and make Proclamations in Fairs and Markets, and ſo ſoon as we had Notice that they were your Swans, we delivered 'em to you at ſuch a Place. The Plaintiff replied that he was ſeiſed of the Manor of *B.* joyning to the Lordſhip of *S.* and we ſay, that we and our Anceſtors, and all thoſe, *&c.* have uſed Time out of Mind, to have Swans ſwimming thro' all the Lordſhip of *S.* and we ſay, that long time before the taking we put 'em in there, and gave Notice of 'em to the Defend. that they were our Swans; and prayed his Damages. And the Opinion of *Strange* there was well approved by the Court, That the Replication was good: For when the Plaintiff may lawfully put his Swans there, they cannot be Eſtraies, no more than the Cattle of any can be Eſtraies in ſuch Place where they ought to have Common; becauſe they are there where the Owner hath an Intereſt to put 'em, and in which Place they may be without Negligence or Latches of the Owner. Out of which Caſe, theſe Points were obſerved concerning Swans: 1. That every one who hath Swans within his Manor, that is to ſay, within his private Waters, hath a Property in 'em, for the Writ of Treſpaſs was of wrongful taking his Swans: *ſcil. Quare cignos ſuos, &c.* 2. That one may preſcribe to have a Game of Swans within his Manor, as well as a Warren, or Park. 3. That he who hath ſuch a Game of Swans may preſcribe, that his Swans may ſwim within the

Fitz. Barr 6. Br. Eſtray 3.

3 Keb. 315.

Manor of (*a*) another. 4. That a Swan may be an Estray, and so cannot any other Fowl, as I have read in any Book. In (*b*) 2 *R.* 3. 15. *b.* & 16. *a.* The Ld. *Strange* and Sir *John Charlton* brought an Action of Trespass against three, because the Defendants had taken and carried away 40 Cignets of the Plaintiffs in the County of *Bucks*, to his Damages of 10 *l.* One of the Defendants pleaded, That the Water of the *Thames* ran through the whole Realm, and that the County of *Buckingham* is adjoining to the *Thames*, and that the Custom of the said County of *Buckingham* is, and hath been Time out of Mind, That every Swan (for Cignet in the Book is taken for a Swan) which hath its Course in any Water, which Water runs to the *Thames* within the same County, That if any Swan comes on the Land of any Man, and there builds, and hath Cignets on the same Land, that then he who hath the Property of the Swan shall have two of the Cignets, and he who hath the Land shall have the third Cignet, which shall be of less Value than the other two; and that was adjudged a good Custom, because the Possessor of the Land suffers them to build there, where he may drive them off. And by this Judgment it also appears, That a Man may alledge a Custom or prescribe in Swans or Cignets. And in the same Case it is said, That the Truth of the Matter was, that the Lord *Strange* had certain Swans which were Cocks, and Sir *John Charleton* certain Swans which were Hens, and they had Cignets between them; and for these Cignets the Owners did join in one Action, for in such Case by the general Custom of the Realm, which is the Common Law in such Case, the Cignets do belong to both the Owners in common equally, *sc.* to the Owner of the Cock, and the Owner of the Hen; and the Cignets shall be divided betwixt them. And the Law thereof is founded on a Reason in Nature; for the Cock-Swan is an Emblem or Representation of an affectionate and true Husband to his Wife above all other Fowls; for the Cock-Swan holdeth himself to one Female only, and for this Cause Nature hath conferred on him a Gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the Poet saith;

(*a*) 3 Keb. 275.

(*b*) Cr. El. 275.

Cro. El. 725.

Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, &c.

And therefore this Case of the Swan doth differ from the Case of Kine, or other Brute Beasts. *Vide* 7 *Hen.* 4. 9. And it was agreed, that none can have a Swan-mark, which in *Latin* is called (*cigninota*) unless it be by the Grant of the King, or of his Officers authorized thereto, or by Prescription. And if he hath a lawful Swan-mark, and hath Swans swimming in open and common Rivers, lawfully marked therewith, they belong to him *ratione privilegii.* But none shall have a Swan-mark, or Game of Swans, unless he hath Lands or Tenements of an Estate of Freehold of the yearly Value of 5 Marks, above all Charges on Pain of Forfeiture of his Swans, whereof the K. shall have one Moiety, and he who seises shall have the other Moiety; and that is by the Stat. of 22 *Ed.* 4. *cap.* 6. And he who hath such Swan-mark may grant it over. And thereof I have seen a notable Precedent in the Time of *Hen.* 6. which is such, *Notum sit omnibus hominibus præsentibus & futuris, quod ego* J. Steward *Miles, dedi &*

conceſſi Tho' *fil' meo primogenito & hæredib' ſuis, cigninor' meam armor' meor' prout in margine lateraliter pingitur, quæ mihi jure hæreditar' deſcendeb' poſt mort'* J. Steward *mil' patris mei: Habend' ſibi & hæredib' ſuis, una cum omnib' cignis & cignicul' cum dicta nota baculi nodati ſignat', ſub condit' qd' quilib' feria ſolis durante vita, a gula* Auguſti *uſq; ad* Carniſprivium *apud dom' meam de* Darford, *unum cignicul' bene ſignat' mihi aut meis deliberet, qd' ſi defecerit, tunc volo, qd' hoc præſens chirographum caſſetur penitus, & pro nihilo habeatur. In cuj' rei teſtimon' ad inſtant'* Matildæ *uxor' meæ, meum ſigil' ſecret' Chriſti crucifixi preſentib' feci apponi. Hiis teſtib'* R. Clerico, J. *de* Conyers, *Alano Fabro, & al'. Dat. apud dom' meam manſional' de* Darf. *in vigilia S.* Dunſt' *Ep' an' Regni Regis* Hen' *poſt conqueſt'* Angliæ *ſexti* 14. And in the Margent was painted a little ragged Staff. And in this caſe it was reſolv'd, That in ſome of 'em which are *feræ naturæ*, a Man hath *jus proprietatis*, a right of property, and in ſome of 'em a Man hath *jus privilegii*, a right of privilege. And there are 3 manner of rights of Propert. *ſcil.* Propert. abſolute, Propert. qualified, and Property poſſeſſory. A Man hath not abſolute property in any thing which is *feræ naturæ*, but in thoſe which are *domitæ naturæ*. Property qualified and poſſeſſory a Man may have in thoſe which are *feræ naturæ*, and to ſuch property a Man may attain by two ways, by induſtry, or *ratione impotentiæ & loci*, by Induſtry as by taking them, or by making them *manſueta*, i. e. *manui aſſueta*, or *domeſtica*, i. e. *domui aſſueta*: But in thoſe which are *feræ naturæ*, and by Induſtry are made tame, a Man hath but a qualified property in 'em, *ſcil.* ſo long as they remain tame, for if they do attain to their natural Liberty, and have not *animum revertendi*, the property is loſt, *ratione impotentiæ & loci*: As if a Man has young Shovelers or Goſhawks, or the like, which are *feræ naturæ*, and they build in my land, I have poſſeſſory property in 'em, for if one takes 'em when they cannot fly, the owner of the ſoil ſhall have an action of Treſpaſs, *Quare boſcum ſuum fregit, & tres pullos eſſervor' ſuor'* or *ardear' ſuar' pretii tantum, nuper in cod' boſco nidificant', cepit & aſportav'*; and therewith agreeth the *Regiſt'* and *F. N. B.* 86. *L.* & 89. *K.* 10 *Ed.* 4. 14. 18 *Ed.* 4. 8 14 *H.* 8. 1 *b. Stamf.* 25 *b. &c. vid.* 12 *H.* 8. 4. & 18 *H.* 8. 12. But when a Man hath ſavage Beaſts *ratione privilegii*, as by reaſon of a Park, Warren, &c. he hath not any property in the Deer, or Conies, or Pheaſants, or Partridges; and therefore in an Action, *Quare Parcum, Warrennam, &c. fregit & intrav' & 3. damas, lepores, cuniculos, phaſianos, perdices, cepit & aſportavit*, he ſhall not ſay (*ſuos*) for he hath no property in 'em, but they do belong to him *ratione privil'* for his game and pleaſure, ſo long as they remain in the privileged Place: for if the owner of the Park dies, his heir ſhall have 'em, and not his Ex'ors or Adminiſtrat' becauſe without 'em the park which is an Inheri-

3 Inſt. 98, 109, 110.
Cro. El. 125.
Cro. Car. 388. 545, 554.
Co. Lit. 47. a.
Doct. pl. 314.
F. N. B. 86. M. 87. a. Cr. Car. 388, 554.
Co. Lit. 47. a.
F. N. B. 87. a.
Co. Lit. 8. a.
Cro. El. 372.
Kelw. 118. a.
Owen 20.
Goldſ. 129.
1 Rol. 916.
Wentw. 81.

Inheritance is not compleat; nor can Felony be committed of them, but of those which are made Tame, in which a Man by his Industry hath any Property, Felony may be committed. And therewith agrees the Rule of the Book in 3 *H.* 6. 55. *b.* 8 *E.* 4, 5. *b.* 22 *H.* 6. 59. which is ill reported, and 43 *E.* 4. 24. *vid.* 22 *Ass.* 12 *H.* 8. 3. 13 *El. Dyer* 306. 38 *E.* 3. 10. *Vide* 2 *E.* 2. *tit. Distress*, 2 *E.* 2. *Avowry* 182. 3 Inst. 98, 99, 109, 110.

But a Man may have Property in some Things which are of so base Nature, that no Felony can be committed of 'em, and no Man shall lose Life or Member for 'em, as of a Blood-hound, or Mastiff, *molossus*, 12 *H.* 8. 3 .*Vide* 18 *H.* 8. 2. But he who steals the Eggs of Swans out of the Nest, shall be imprisoned for a Year and a Day, and fined at the Will of the King; one Moiety to the King, the other to the Owner of the Land where the Eggs were so taken, and that is by the Stat. of 11 *H.* 7. *cap.* 17. And it hath been said of old Time, That he who steals a Swan in an open and common River, lawfully marked, the same Swan (if it may be) or another Swan shall be hung in a House by the Beak, and he who stole it, shall in Recompence thereof be obliged to give the Owner so much Wheat that may cover all the Swan, by putting and turning the Wheat on the Head of the Swan, until the Head of the Swan be covered with the Wheat. And it was resolved, That in the principal Case the Prescription was insufficient; for the Effect of the Prescription is to have all wild Swans, which are *feræ naturæ*, and not marked, *nidificant'*, *gignent'*, & *frequentant'*, within the said Creek. And such Prescription for a Warren would be insufficient, *scil.* to have all Pheasants and Partridges, *nidificantes*, *gignentes*, and frequenting within his Manor. But he ought to say, to have free Warren of them within his Manor: For altho' they are *nidificantes*, *gignentes*, and frequenting within the Manor, he cannot have 'em *jure privilegii*, but so long as they are within the Place. But it was resolv'd, That if the Defendants had alledged, that within the said Creek there had been Time out of Mind, a Game of wild Swans not marked, building and breeding; and then had prescribed, that such Abbot and all his Predecessors, &c. had used at all Times to have and take to their use some of the said Game of wild Swans and their Cignets within the said Creek, it had been good; for altho' Swans are Royal Fowls, yet in such a Manner a Man may prescribe in them; for that may have a lawful beginning by the King's Grant: For in *Rot. Parliam.* 30 *Ed.* 3. *part.* 2. *num.* 20. the King granted to *C. W.* all wild Swans unmarked between *Oxford* and *London* for 7 Years. In *eodem Rot' an'* 16. *R.* 2. *p.* 1. *num'* 39. the like Grant of wild Swans unmarked in the County of *Camb'* to *B. Bereford* Kt. In *eod' Rot' an'* 1 *H* 4. *p.* 6. *num'* 14. A Grant made to *J. Fenn*, to survey and keep all wild Swans unmarked, *ita quod de proficuo respondeat ad Scaccarium.* 3 Inst. 109. Stam. Cor. 25. b. Wing. Max. 17.

By which it appears that the King may grant wild Swans unmarked; and by Conſequence a Man may preſcribe in them within a certain Place, becauſe it may have a lawful Beginning. And a Man may preſcribe to have Royal Fiſh within his Manor, as it is held in 39 *Ed.* 3. 35. for the Reaſon aforeſaid. And yet without Preſcription they do belong to the King by his Prerogative.

Mich. 39 & 40 Eliz.

In the Exchequer.

Sir THOMAS CECIL's *Caſe.*

SIR *Thomas Cecil* being ſeiſed of the Manor of *Strickſton* in the County of *North.* did enter into Communication with one *Foſter* to exchange divers Parcels thereof with him for certain Lands which the ſaid *Foſter* had in the ſame Town; and before any Exchange perfected, Sir *Thomas* did convey the ſaid Manor, and the ſaid Land of the ſaid *Foſter*, by the ſpecial Name of the ſaid *Foſter*, by Deed indented and inrolled to Queen *Elizabeth*, her Heirs and Succeſſors, and covenanted with the Queen that he was ſeiſed as well of the ſaid Manor as of the ſaid Land late *Foſter*'s, of a good Eſtate in Fee-ſimple, *&c.* and the ſaid Sir *Thomas* was bound to the Queen in an Obligation of ten thouſand Marks to perform the ſaid Covenant amongſt others. And the ſaid Sir *Thomas* had before that Time exhibited an *Engliſh* Bill in the Exchequer-Chamber, containing the Matter aforeſaid; and that the ſaid Lands, Parcel of the ſaid Manor intended to be given in Exchange to *Foſter*, were of greater Value than the ſaid Land of the ſaid *Foſter*, ſo that the Queen was not deceived in the Value; which Lands Parcel of the Manor paſſed to the King by the Conveyance of the Manor, and nevertheleſs the Covenant and Obligation of the ſaid Sir *Thomas* as to that was broken and forfeited by the Rigour of the Law.

But

But the ſaid Sir *T.* in his bill did rely on the Stat. of 33 (*a*) *H.* 8. *c.* 39. by which it is enacted, *That if any perſon of whom any ſuch debt or duty is, or at any time hereafter ſhall be demanded, alledge, plead, declare, or ſhew in any of the ſaid Courts, good, perfect and ſufficient cauſe, and matter in law, reaſon, or good conſcience, in bar or diſcharge of the ſaid debt or duty, or why ſuch perſon or perſons ought not to be charged or chargeable to, or with the ſame, and the ſame cauſe or matter ſufficiently prove in ſuch one of the ſaid Courts as he or they ſhall be impleaded, ſued, vexed, or troubled for the ſame, that then the ſaid Courts, and every of them, ſhall have full power and authority to accept, judge, and allow the ſame proof, and wholly and clearly to acquit and diſcharge all and every perſon and perſons that ſhall be ſo pleaded, vexed, ſued, or troubled for the ſame, any thing in this preſent Act before mentioned to the contrary notwithſtanding, &c.* And that proceſs was ſued againſt him on the ſaid bond out of the court of Exch. Upon which Act of Parliam. and the matter aforeſaid (being as he ſuppoſed good, perfect, and ſuffic. cauſe and matter in reaſon, and good conſcience within the ſaid Act to diſcharge him of the ſaid bond) the ſaid Sir *T.* by his ſaid bill prayed to be relieved, and thereupon he had a Commiſſion to examine witneſſes, to prove the matter of his bill to be true, which was returned and publiſhed. And upon the hearing of the cauſe in court in the Exch. Chamber, it appeared by the teſtimony of divers witneſſes, that the Pl. had made direct proof of all the parts of his bill. And now in this Term, 39 & 40 *El.* divers Queſtions were moved touching this matter. 1. And the principal was, If the branch of the Act extended to any debt mentioned in the ſaid Act, for which the K. had remedy by the com. law, or in ſuch debts and ſuch caſes only for which the ſaid Act gave a remedy to the K. which he had not before. 2. If the Court could make a diſcharge by decree on this *Engliſh* bill within the intent. of the Act. And as to the 1ſt, it is to be known, that divers branches of the Act are to be conſidered: 1. The Act makes all Obligat. to the K. in nature of a Statute Staple. 2. Another branch gives the Suit to the K. altho' the Obligat. had been made to another to the uſe of the King. 3. That the King upon Suit upon every Obligat. made or to be made, ſhall recover damages and coſts. 4. The Stat. gives remedy to the K. for recovery of his debt or duty, &c. by *Capias*, *Extend' fac.* *Subpœna*, *Attachment*, and *Proclamation of Allegiance* (if need be) or otherwiſe as to any of the Courts it ſhall by their diſcretions be thought expedient for the ſpeedy recovery of the K's debts. 5. There is a clauſe, that the K. ſhall be preferred in his Execution before common Perſons. 6. The Heir who claims by the Gift of his Anceſtor ſhall be bound to pay the King's Debt (due before or after the Gift) by

(*a*) Hard. 27, 304, 368, 442. 4 Inſt. 118, 119. 3 Co. 12. b. Poſtea 21. a. b. Lane 51. O. Bendl. 65, 66, 67. Lit. Rep. 87, 88.

4 Inſt. 118, 119.

by Judgment, Recognizance, Obligation, or other Specialty, and ſhall bind the Land alſo to the K's Debt againſt the Iſſue in Tail; then comes the ſaid proviſo whereof the Queſtion doth ariſe. *Provided always, and be it enacted,* That if any Perſon, *&c. ut ſupra.* And it was objected, That it ſhould extend only in ſuch caſes in which remedy is given to the K. by this Stat. as where a Bond was made to the Uſe of the K. or in charging the Iſſue in Tail or in charging the Heir who claims by Gift before the Debt accrued, *&c.* there becauſe the Stat. gives the King a Remedy which he had not before, this branch gives the Party ſo charged by this Act, a Plea to diſcharge him, either by Matter of Bar in Law, or in good Conſcience. And that was ſtrongly enforced by the Concluſion of this Proviſo; for the Concluſion is, (as it appeareth before) *any thing in this Act before mentioned to the contrary notwithſtanding*; So that the Senſe was, that the Party might take any matter in Law or good Conſcience, notwithſtanding any Thing contained in this Act; which is as much as to ſay, that this Act ſhall be no Impediment to it. But in our Caſe the K. had a remedy by the Com. Law, and therefore this Proviſo ſhould not help him. As to that it was anſwered and reſolved by the Court, That the ſaid Sir *T. Cecil* on the Matter aforeſaid was to be relieved by the Aid of this Proviſo. For the ſaid Act of 33 *H.* 8. hath given a Benefit and Advantage to the King:

3 Co. 12. b. 8 Co. 171. a. 1. In making every Bond made to the King in Nature of a Statute Staple. 2. In giving Remedy to the King himſelf for Obligations made to others to his Uſe. 3. To recover Coſts and Damages. 4. In ſuing of Execution for all his Debts. 5. In charging the Iſſue in Tail, and the Heir who

Poſtea 21. b. hath the Land of the Gift of his Anceſtor; and therefore it was the Intent of the Act to gratify the Subject, that where a new Proviſion was made for the levying of the K's Debt in a more ſpeedy and beneficial Manner than the K. had before, the Subject alſo ſhould have ſome new Benefit which he had not before, and that was to diſcharge himſelf by Matter alledged to be a diſcharge in good Conſcience: Alſo this Proviſo doth not only give Benefit to him who

Hard. 304. hath Matter in good Conſcience, but alſo to him who hath *good, perfect, and ſufficient Cauſe and Matter in Law, Reaſon,* (and then comes) *good Conſcience:* And without Queſtion the firſt Words, *(Cauſe and matter in Law)* ſhall extend to all the King's Debts and Proceſs thereupon, as well at the Com. Law as upon this Act. And the Concluſion of the ſaid branch makes not againſt it, for the ſenſe of it was, that he might plead matter in law or good conſcience, and that nothing contained in the ſaid Act ſhould be an Impedim. to it. And ſo was it held in the like caſe on the like words, in the 2d ſaving of 27 *H.* 8. *cap.* 10. of Uſes in *Cheinie's* Caſe, where

where the proviſo ſaves the Right, &c. of, &c. As if the Act had not been made; and there the caſe was, that the Leſſor did enfeoff the Leſſee to the uſe of others, in which caſe, if the Stat. had never been made, the Term had been merged at the Com. Law. But *Trin.* 27 *El.* it was reſolved, that the Term was ſaved, and the ſame expoſition made of the Words as before. Alſo theſe notable Precedents were cited, which were reſolved in the Exchequer by the Barons of the Exch. upon conference had with the two Ch. Juſtices, one in the caſe of Sir *Will. Herbert* in *Trin.* 37 *El.* who was relieved on the ſaid Branch of the ſaid Act for matter in Equity, becauſe in a *Scire facias* againſt him as Heir to *Matthew Herbert* his Father on a Recognizance acknowledged to King *E.* 6. by the ſaid *Matt.* the Sheriff returned *Scire feci*, and upon his default Judgment was given, as you may ſee in *Matt. Herbert's* Caſe, in the 3d Part of my Reports. And becauſe in Truth he was never ſummoned, and had good matter, if he had notice thereof, to plead in diſcharge of the ſaid Recognizance, becauſe he had no Land by Deſcent from his Father, nor any Land from him after the Recognizance acknowledged, all which he ſhewed in certain in an *Engliſh* bill in the Exch. Chamber; upon which, upon conference had by Sir *Rog. Manwood* and the other Barons with the 2 Ch. Juſt. by decree he was diſcharged of the ſaid Recognizance, &c. Another caſe cited was, *Tho.* D. of *Norf.* was attainted by Parliam. *Anno* 38 *H.* 8. And King *E.* 6. ſold to Sir *Edw. Rous* divers Timber-trees growing upon the Poſſeſſions of the ſaid Duke in *Suff.* and Sir *Edw.* was bound in an Obligation to King *Ed.* 6. for Payment of certain Money, at a certain day for the ſaid trees and before the day of payment, and before the ſaid Sir *Edw.* cut down any of the ſaid trees, *Edw.* VI. died. And at a Parliament held *anno* 1 *Reg. Mar.* it was declared by Parliam. that the ſaid attainder of the ſaid Duke was void; for which cauſe the ſaid Sir *Edw.* could never enjoy the ſaid trees according to his bargain: And in a *Scire facias* in the Exchequer on the ſaid Obligation againſt the Heir and Tertenant of Sir *Ed. anno* 28 *El.* they appeared, and pleaded all the ſaid matter in Equity in Bar and Diſcharge of the ſaid Obligation in a *Latin* Plea in the Exch. And upon good Conſideration of the Stat. of 33 *H.* 8. by the Barons and of the ſaid Plea, at laſt (after it had depended long) it was reſolved by the Barons, that the Def. were to be relieved within the ſaid Act; and that the Def. might well plead it in Bar. And thereupon *Poph.* the Attorney General ſeeing the Opin. of the Court, *ulterius proſequi non vult.* Both which precedents I ſhewed to the Juſt. and accordingly it was reſolved by all the Juſt of *Engl.* (who met together to give their Opinions in the ſaid Caſe) That Sir *Thomas Cecil* was to be relieved upon the ſaid Matter in

3 Co. 15. b.

3 Co. 15. b.

Equity within the Purview of the ſaid Branch of 33 *H.*8. And 2dly, That the Court of Exchequer-Chamber might well upon the ſaid *Engliſh* Bill (altho' the Suit was by Proceſs at the Common Law in the Court of Exchequer before the Barons) make a Decree in the Caſe; for to this Purpoſe they are but one Court. Then it was moved, if the next Proviſo next following after the Branch concerning the equal charging of Land liable to the King's Debt in the Hands of every Owner and Poſſeſſor, that ſome of them ſhould not be charged only, but all entirely, if that extends to all the K's Debts; and to all Executions for the levying of them as well at the Common Law, as on the ſaid Act. And it was reſolved by them, that the ſaid Branch did extend to all Executions for the King's Debts, as well at the Common Law as on the ſaid Act; and that all ſhould be equally extended by Force of that Branch according to the Purview of that Act. It was alſo reſolved, That altho' the Obligation was made for Performance of Covenants, yet after that it was broken, (as it was in the Caſe at Bar at the Time of Sealing and Delivery thereof) That it was a Debt to the King by Obligation within the Act.

Hard.368,442.

Trin.

Trin. 41 Eliz.

In the Exchequer.

The Lord ANDERSON's *Caſe.*

BEtween the Lord *Anderſon* Chief Juſtice of the Court of Common Pleas, and *Sibthorpe* of the *Middle Temple*, a Queſtion was moved upon the Branch of the ſaid Act of 33 *H.* 8. *cap.* 39. That is to ſay, *That all Manors, Lands,* &c. *which now be, or that hereafter ſhall come, or be in, or to the Poſſeſſion or Seiſin of any Perſon to whom the ſame Manors, Lands,* &c. *have heretofore or hereafter ſhall deſcend,* &c. *in Fee-ſimple, or Fee-tail,* &c. *by, or after the deceaſe of any of his or their Anceſtor or Anceſtors as Heir, or by gift of his Anceſtor, whoſe Heir he is, which ſaid Anceſtor or Anceſtors, was, is, or ſhall be indebted to the King, or to any other Perſon to his Uſe, by Judgment, Recognizance, Obligation, or other Specialty; That then, in every ſuch Caſe, the ſame Manors, Lands,* &c. *ſhall be and ſtand by Authority of this Act from henceforth charged and chargeable, to and for the Payment of the ſame Debt.* If Tenant in Tail of the Manor of *D.* be bound in a Recognizance to *J. S.* which Recognizance afterwards comes to the King, by the Attainder of *J. S.* of High Treaſon, and afterwards Tenant in Tail dies, and the Iſſue in Tail Aliens the Land *bona fide*, If the Queen may extend the Manor of *D.* in the Hands of the Alienee. And in this Caſe four Points were reſolved by the Barons on Conference had with *Popham* Chief Juſtice, and divers other Juſtices. 1. It was reſolved, that before the ſaid Statute of 33 *H.* 8. If Tenant in Tail of Land became endebted to the King by Judgment, Recognizance, Obligation, or otherwiſe, and died, the King ſhould not (*a*) extend the Land in the Seiſin of the Iſſue in Tail; For the King is (*b*) bound by the Statute *de Donis Conditionalibus*, as it is adjudged in *Plowden's Commentaries* in the Lord *Berkley's* Caſe 22. in the principal Caſe; and therewith agree, as to the Point in Queſtion, the Reſolution of the Court in the Exchequer, and of the Court of Surveyors in the Caſe of *Brown*, Father of Juſtice *Brown*, as it

Lane 51.

(*a*) F. N. B. 247. C.
(*b*) 1 Co. 44. b. 48. a. 5 Co. 14. b. 11 Co. 72. a. Poſtea 32. a. Plowd. 423. b. 244. a. b. 248. b. 251. b. 252. a. 1 Rol. R. 153.

it is reported in *Plow. Com.* 249. *b.* So one Point well resolved, in which there was variety of opinions in our Books. *Vid.* 39 *Ass. p.* 18. 47 *E.* 3. 8. *Regist.* 143, 144. *F. N. B.* 217. *a.* & *b.* 2. It was resolv'd, that if Ten't in tail becomes indebted to the K. by the receipt of the K's Money, or otherwise, unless it be by Judgm. Recogniz. Obligat. or other Specialty, and dies, the land in the seisin of the issue in tail by force of the said Act of 33 *H.* 8. shall not be extended for such Debt of the K's, for the Stat. of 33 *H.* 8. extends only to the said 4 Cases; and all other debts remain at Com. Law. 3. It was resolv'd, That if Ten't in tail becomes indebted to the K. by one of the four ways mention'd in the said Act, and dies, and before any process or extent the issue in tail *bona fide* aliens the land in Tail, that now this land shall not be extended by force of the said Act of 33 *H.* 8. for as it appears by the Words of the said branch, it makes the land in the possession or seisin of the heir in tail only liable against the issue in tail, and not the Alienee. For the effect of the Purview as to that purpose is, *That all lands which shall be in the possess. or seisin of any person, to whom the same shall descend in fee-tail as heir, whose ancestor was indebted to the King*, &c. *that then, in every such case, the same land shall be charged with the K's debt:* So that by the express purview of the Act, the Land shall be only extended so long as it is in the possession or seisin of the heir in tail; for the Act saith, *That in every such case the land shall be charged*, and for as much as the land against the issue in tail was not extendable before the said Act, the K. hath the benefit to extend it in the possession of the heir in tail, which he could not before, but the K. cannot extend in the hands of the alienee, for the Stat. doth not extend to it: and the makers of the Act had reason to favour the Purchaser, Farmer, &c. of the heir in tail, more than the heir himself, for they are strangers to the debts of the Ten't in tail, and they come to the land *bona fide*, and on good consideration. There is likewise another clause next following the said branch, the effect of which is, *And that our Soveraign Lord, his heirs or successors, shall not be barred, delayed*, &c. *to demand and receive their just*, &c. *debts against any of his subjects, as heir or heirs*, &c. *if any such person or persons shall say or alledge, that they have no lands*, &c. *but only intailed or given to 'em by any of their ancestors to whom they be heirs:* So that by this clause also the intent of the makers of the Act appears, that the heir in tail shall be only charg'd with the King's debt. But lands in Fee-simple were extendable at the Common Law in whose Hands soever they came, and therefore as to them the Statute was but *declarativum antiqui juris*; but as to Estates in Tail, it was *introductivum novi juris* against the Issue in Tail, and that in the case at Bar makes the difference of the said Cases al-

O. Bendl. 66.

3 Co. 14. b.

Devant. 19. b.

Plowd. 440. c. 3 Co. 12. b.

Hard. 27.

altho' both be joyned together in one and the ſame Sentence. And *Popham* Ch. Juſt. ſaid, That ſo it hath been reſolved in the Excheq. before that time, in the caſe of Serj. *Nicholls*, Father of the Serj. that now is, that the Lands in the hands of the Purchaſer of the iſſue in tail ſhould not be extended by the ſaid Act of 33 *H.* 8. for the debt that the Father of the iſſue in tail owed the K. (by one of the 4 ways mention'd in the Act) but was diſcharged by the opinion of the Court of Excheq. 4. It was reſolv'd, that for as much as the ſaid debt in the caſe at Bar was originally due to a ſubject, that ſuch debt is not within the ſaid Act of 33 *H.* 8. to charge the land in the Poſſeſſion or Seiſin of the heir in tail: For the ſaid Act, as to charge lands intailed againſt the iſſue, extends only to debts originally and immediately due to the K. by Judgm. Regcogniz. Obligat. or other ſpecialty, for the words are, (*indebted to the K.* † *or any other to his Uſe by Judgm. &c.*) which is intended to be an *immediate debt; and not to debts which were due to ſubjects, and did belong or accrue to the K. by reaſon of attainder, utlawry, forfeiture, gift of the party, or by any other collateral way or means, for which the Stat. of 33 *H.* 8. hath a clauſe a little before the ſaid branch, for the ſhort and general manner, and form of pleading in ſuch caſes (for the recovery of 'em in the Courts mention'd in the ſaid Act) on the K's part, *ſcil. That the Party ſuch a year and day did give the ſame to the K. or was attainted, outlawed or other Offence, forfeiture, deed, act or thing committed or done, by reaſon whereof the ſaid debts did accrue and ought to remain, come, and be to the King.* So that the ſeveral manners of penning of theſe 2 Branches manifeſt the Intention of the makers of the Act, to prefer immediate debts due to the K. by Judgm. &c. before debts of the ſubjects, which accrued to the King by Aſſignm. Attainder, Utlawry, &c. and the reaſon was, becauſe debts due immediately to the K. by Judgm. Recogniz. Obligat. or other Specialty, are in their nature higher, and may be better known, and found upon ſearch, than debts due to ſubjects. Alſo when *J. N.* is indebt. to *J. S.* by Judgm. Recogniz. Obligat. or other Special. and afterwards *J. S.* is outlawed, &c. by which the debt comes to the K. by the Outlawry, &c. in that Caſe it cannot be properly ſaid, that *J. N.* is indebted to the King by Judgm. Recogniz. Obligat., or other Specialty; for by them he was indebted to *J. S.* and *J. S.* by his Outlawry (which is the K's Title) hath forfeited them to the King. So that by force of the Judgm. &c. and Outlaw. the debt doth belong to the K. And the words of the Act are (*indebted to the King, or any other to his uſe by Judgm. &c.*) ſo that the debt either ought to be immediately to the K. himſelf; or if it be to any other than the K. it ought to be originally to the uſe of the K.

† 1 And. 129. 130.
* Lit. Rep. 87, 88.

and that it is not when the Debt is originally due to a Subject to his own Uſe, and afterwards forfeited to the King by a ſubſequent Act. And ſo it was reſolved, That for ſuch Debt the Queen ſhould not extend either againſt the Alienee of the Heir in Tail, or againſt the Heir in Tail himſelf; for ſuch Debts are not within the ſaid Act of 33 *H.* 8. as to charge the Heir in Tail; and ſo remain at the Common Law as Debts immediately due to the King, which are not due by Judgment, Recognizance, Obligation, or other Specialty, as hath been ſaid before.

Trin.

Trin. 42 Eliz.

In the Common Pleas.

BUTT's *Caſe.*

IN a Replevin between *Fiſh* and *Butt*, the Caſe in Effect was, one ſeiſed of *Black Acre* in Fee, and alſo poſſeſſed of *White Acre* for Years, by his Deed granted a Rent out of both to *A.* to have and perceive to him for the Term of his Life, with Clauſe of diſtreſs in both: And for Rent behind *A.* doth diſtrein and avow in *White Acre*, and if the Diſtreſs was well taken or not, was the Queſtion. And it was agreed by the whole Court, That the Diſtreſs was well taken. And in this Caſe theſe Points were reſolved: 1. That if Leſſee for Years of a Carve of Land, grants to another a Rent out of the ſaid Carve for the Life of the Grantee, that it is a good Charge during the Term, if the Grantee ſo long live; for the Grant ſhall be taken more ſtrong againſt the Grantor, and ſhall not be void, when by any Conſtruction it may be made good (*Vide Plow. Comment.* in *Welchden*'s Caſe) and in ſuch Caſe the Grantee hath but a Chattel. So if the Leſſee for Years Grants the Carve of Land to another, for the Term of his Life, he hath the whole Term if he live ſo long, as well as in the Caſe of a Deviſe. 2. It was reſolved, That when a Rent is granted out of Land in Fee, and out of a Term for Years, to have and perceive to the Grantee for the Term of his Life, that that, as an Eſtate of Freehold, according to the Purport of the Deed, cannot Iſſue out of the Term for Years, but out of the Land which the Grantor hath in Fee-ſimple only, becauſe the Freehold of the Rent can Iſſue out of that, and not out of the Chattel. And one entire Rent cannot be a Freehold out of *Black Acre*, and a Chattel out of *White Acre*. And to make two Rents when one only is granted by one to another, would be in this Caſe injurious, and the Bargain and mutual Agree-

Cr. El. 183.

V. Poſtea 25. 1.

Co. Lit. 147. b. Cr. Jac. 390. 1 Rol. Rep. 330. Cr. El 607, 622.

ment of the Parties cannot charge ſuch thing with Rent, which is not (*a*) chargeable by the Law, as out of an Hundred, or Advowſon 30 *lib. Aſſiſarum pl.* 5. out of a Fair, 14 *E.* 3. *Sci' fac'* 122 the E. of *Kent*'s Caſe; neither can a Rent be granted or reſerved of any Eſtate of Freehold out of any other Hereditament which is not manurable, either in Poſſeſſion, Reverſion, or by Poſſibility, but is *hæreditamentum incorporeum*; for *Pacta privata non derogant jure communi*: And in an Aſſiſe they cannot be put in view, nor can any diſtreſs be taken in them. But in the Caſe at Bar, *White Acre* is *hæreditamentum corporeum*, and manurable; but for the Smallneſs and Incapacity of the Intereſt that the Grantor hath in it, this Rent of Freehold cannot iſſue thereout, but ſhall iſſue only out of the Land in Fee-ſimple. And in the Caſe at Bar, in an Aſſiſe brought of this Rent, the Land in Fee ſhall only be put in view, and if the Grantee accept a Leaſe, or Grant of *White Acre*, it will not ſuſpend his Rent, 3. It was reſolved, that *White Acre* ſhould during the Term be ſubject to the Diſtreſs of the Grantee for the Rent during the Years, altho' the Rent doth not iſſue thereout, as in 41 *Ed.* 3. 14. when Land is charged with a Rent in Fee, Goods (*b*) and Chattels may be bound to the Diſtreſs. And it was ſaid, foraſmuch as *White Acre* is only charged with diſtreſs, if the Grantee takes a Leaſe of any Part thereof, it is no Suſpenſion of the Diſtreſs, but that he may diſtrain in the Reſidue; for it is not iſſuing out of the Land, but to be taken on the Land: as if I have a Warren in another's Land, and take a Leaſe of Parcel of the Land, altho' the Land be charged with Warren, yet foraſmuch as it doth iſſue out of the Land it is not any Suſpenſion. *Vide* (*c*) 35 *H.* 6. 56. *a.* 14 *H.* 4. 6, *&c.* for a Man may have a Warren in his own Lands: So he may in many Caſes diſtrain in his own Poſſeſſion, as in 31 *E.* 1. *Diſtreſs* 64. *&* 7 *H.* 6. 3. *per Curiam*, one Tenant in common may diſtrein the Cattle of the other in the Land which they have in common: and 26 *H.* 8. 5. he may preſcribe to diſtrein in his own Land, but not to have a Rent out of his own Land. (*d*) If a Man by Deed grants a Rent of 40 *s.* to another out of his Manor of *D.* to have and perceive to him and his Heirs; and Grants further by the ſame Deed, that if the Rent be behind, the Grantee ſhall diſtrein in the Manor of *S.* (be the Manor of *S.* in the ſame County or in another, and be it granted by one or divers Deeds) the Rent is only iſſuing out of the Manor of *D.* and it is but a (*e*) Penalty that he may diſtrein in the Manor of *S.* but both the Manors are charged, one with the Rent, the other with the Diſtreſs for the Rent, one iſſuing out of the Land, the other to be taken on the Land.

(*a*) Co. Li. 47. a. 5 Co. 3. a. 4. a. Palm. 105. Co. Lit. 44. b. 142. a. 2 Rol. 446. Cr. Jac. 111, 112. Moor 163, 168, 2 Sand 303. 304. Raymond 194. Cr. El. 690. Br. Rents 11. Br. Tenure 26. Br. Aſſiſe 309.

(*b*) Co. Lit. 147. a.

(*c*) 11 Co. 13. b. Dy. 30. pl. 209. Dav. 5. b. Poph. 169.

(*d*) Co. Lit. 147 a. 2 Rol. 426.

(*e*) Co. Lit. 147. a. 2 Rolls 425.

And

And if I grant unto you, that you and your Heirs ſhall (*a*) diſtrain for a Rent of forty Shillings within my Manor of *S.* this by Conſtruction in Law ſhall amount to a Grant of a Rent out of my Manor of *S.* for if it ſhould not amount to a Grant of a Rent, the Grantee ſhould be of little force or Effect, if the Grantee ſhould have only a bare Diſtreſs, and no Rent in him; for then he ſhould never have an Aſſiſe thereof, &c. and that is the Reaſon, That it is often ruled and reſolved, that it ſhall amount to a (*b*) Grant of a rent by conſtruction of law, *ut res magis valeat*, 5 *Ed.* 3. 12. 3 *Aſſ. p.* 7. 14. *Aſſ. p.* 14. 16 *E.* 3. *tit. Grants* 64. 18 *Ed.* 3. 32. 26 *Aſſ. pl.* 38. 30 *Aſſ. pl.* 12. 46 *Ed.* 3. 18, 32. 8 *H.* 4. 19. 9 *H.* 6. 9. *a.* 22. *H.* 6. 11. *Littl.* 48. *b.* And in ſuch Caſe the Grantee ſhould not have a Writ of Annuity. But when one grants a Rent out of the Manor of *D.* and further grants, that if the Rent be behind, the Grantee ſhall diſtrain for the ſame Rent in the Manor of *S.* it is but a Penalty (*c*) in the Manor of *S.* for three Cauſes: 1. The Law (*d*) need not make Conſtruction that it ſhall amount to a Grant of a Rent; for here a Rent is expreſly granted to be iſſuing out of the Manor of *D.* and the Parties have expreſly limited out of what Land the Rent ſhall iſſue, and in what Land the Diſtreſs ſhall be taken, and the Law will not make an Expoſition againſt the expreſs Words and Intent of the Parties, when it may ſtand with the Rule of Law, (*e*) *Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.* 2. (*f*) If in that Caſe it ſhould amount to a Grant a Rent out of the Manor of *S.* then the Grantor would be twice charged; for if the Grantee brings a Writ of Annuity, that will extend only to the Manor of *D.* for on the Grant of a Diſtreſs in the Manor of *S.* no Writ of Annuity lies, becauſe the Manor of *S.* is only charged, and not the Perſon of the Grantor, as to that; and therefore the bringing of the Writ of Annuity cannot diſcharge the Manor of *S.* of any Rent; and ſo the Law, by Conſtruction againſt the Words and Intention of the Parties, would do an Injury to the Grantor to charge him twice. 3. (*g*) If in ſuch Caſe the Manor of *S.* in which the Diſtreſs is only appointed, ſhould be in another County, then it hath been often adjudged, that the Rent ſhould not iſſue out of it, but the Diſtreſs ſhould be as a Means and Remedy to compel the Tenant of the Land to pay the Rent. And it was ſaid, That there was no difference in reaſon, that the Law in Conſtruction ſhould make the Rent to be iſſuing out of it, when it lies in the ſame County, and not when it lies in ſeveral Counties, for the Words in both Caſes are all one, and it is not any reaſon to ſay, that he ſhall fail of

(*a*) Co. Lit. 147. a. 146. a. Rol. 424. 9 H. 6. 9. a. Dy. 22 pl. 141. 41. Aſſ. pl. 3. Moor 592. Plow. 139. a.

(*b*) Lit. ſect. 221.

(*c*) 2 Rol. 425. Co. Lit. 147. a.

(*d*) Co. Lit. 147. a.

(*e*) Wing. Max. 24. Co. Lit. 147. a. 2 Sand 167.

(*f*) Co. Lit. 147.

(*g*) Co. Lit. 147. a.

Antea 3. a. b. Recovery by Aſſiſe. *Vide ſupra* in *Bulwer's* Caſe, and the Books in 1 *Aſſ. pl.* 16. 1 *Ed.* 3. 21. and other Books do not ſay that the Rent Iſſues in ſuch Caſe out of both, but that the Land in which the Diſtreſs ſhall be taken is charged; and that is true; for it is charged with diſtreſs: and foraſmuch as it was charged with diſtreſs, their Opinion was, That the Co. Lit. 147. a. Ten'ts of both ſhould be named in the Aſſiſe. See the Books in 9 *Ed.* 3. 13. 31 *Aſſ. pl.* 27. 17 *Ed.* 4. 6. 10 *Aſſ.* 4. 10 *Ed* 3. 18. 2 *Ed.* 2. *Aſſ.* 360. 1 *Aſſ.* 10. 3 *Aſſ.* 7. 32 *H.* 6. 27. 22 *Aſſ.* 66. 31 *Aſſ. pl.* 27. 29 *Ed.* 3. *Aſſ.* 366. And the Opinion of (*a*) *Finchden* in 41 *Ed.* 3. 15. was affirmed for good Law, that if the Manor of *D.* out of which the Rent is granted, be recovered by eigne Title, that all the Rent is extinct. But if the Manor of *S.* in which the Diſtreſs is limited, be evicted, yet the whole Rent remains. So if the Grantee (*b*) purchaſes Parcel of the Manor of *S.* the Rent is not extinct, becauſe the Rent Iſſues only out of the Manor of *D.* *Vide* 17 *Ed.* 4. 6. the like Caſe. And it was ſaid, That if a Man (*c*) grants a Rent out of 3 Acres, and further grants, that if the Rent be behind, that he ſhall diſtrain for the Rent in one of the Acres, the Rent is entire, and cannot be a * Rent-ſeck out of two Acres, and a Rent-charge out of the 3d Acre, and therefore it is a Rent-ſeck for the whole; and yet he ſhall diſtrain for it in the 3d Acre. So if a (*d*) Rent be granted to two and their Heirs out of one Acre of Land, and that it ſhall be lawful for one of 'em and his Heirs to diſtrain in the ſame Acre for it, it is a Rent ſeck, for in Regard they ſtand jointly ſeiſed of one entire Rent, it cannot be as to one a Rent-ſeck, and as to the other a Rent-charge, and this diſtreſs is as appurtenant to the Rent; and therefore if he who hath the Rent dies, the Survivor ſhall diſtrain; and if both Grant over the Rent to one, he ſhall diſtrain for it. (*f*) But if a Man grants a Rent out of *Bl. Acre* to one and his Heirs, and grants to him that he may diſtrain for it in the ſame Acre for the Term of his Life, it is a Rent-charge for his Life, and a Rent-ſeck afterwards *diverſis temporibus*. Otherwiſe (*g*) is it if the Diſtreſs be limited for Years in the ſame Land, there it wholly remains a Rent-ſeck, becauſe the Fee and Freehold are ſeck in ſuch Caſe. But it was adjudged in the Caſe at Bar, that the Avowry was inſufficient for divers Cauſes: 1. Becauſe in the Avowry he did not make mention of any Land but of the Land in which he had but a Leaſe for Years, *ſc. quod conceſſit extra terr. m illam inter alia quendam reddit'*, &c. Whereas in his Avowry he ought to have derived the Rent out of the Land in Fee-ſimple only, for out of that in Judgment of Law, the Rent for Life was iſſuing: And although the Plaintiff in Bar to the Avowry hath diſcloſed the whole Truth of the Matter in ſpecial, which in Judgment of the Law makes for the Avowant, and hath made his Caſe bet-

(*a*) Co. Lit. 147. a.

(*b*) Co. Lit. 147. a.

(*c*) Co. Lit. 147. b.

*Kelw. 104. a. Co. Lit 153. a. Perk. ſect. 323.

(*d*) Co. Lit. 147. b.

(*e*) Co. Lit. 147. b.

(*f*) Co. Lit. 147. b.

(*g*) Co. Lit. 147. b. Bridg. 109.

better for him than the Avowant hath made it for himſelf, yet that doth not make the Avowry, which wants Subſtance, good; for the Avowry which is in the Nature of a Count, ought to contain ſufficient Matter upon which he may have Judgment to have a Return. But if the Avowry, or any Count or Replication, &c. wants Form or omits Circumſtance of Time, Place, &c. there the Plea of the other Party may mend ſuch Imperfections (*a*) but cannot ſupply the Defect of Matter of Subſtance. *Vide 6 Ed.* 4. 2. *b.* 6 *H.* 7. 10. 18 *Ed.* 4. 16. *b*, 18 *Ed.* 3. 34. *Plowd. Com. Barkley's* Caſe 230. 38 *H.* 6. 17, 18, & 19. 22 *E.* 4. 2. 5 *H.* 7. 13. *b.* 7 *H.* 7. 6. *b.* &c. 2. The Avowant pleaded the Grant out of the (*b* Term for Years only, and concluded, *virtute cujus* he was ſeiſed *in Dominico ſuo ut de libero tenemento pro termino vitæ ſuæ*, which is repugnant to have a Freehold out of a Term for Years. And ſo Judgment was given againſt the Avowant for inſufficient Pleading.

(*a*) 18E.4.16.b. Doct pl. 69. Co Lit.303. b. 8 Co. 120. b. Hetl. 174. Cr. Car. 209. 11H 7.24 b. Kelw. 13. a.
(*b*) Doct pl.326. Antea 23. a.

Caſes

Caſes of *Quare Impedit.*

Paſch. 31 Eliz.

2 Leon. 58. Sav. 107, 108.

JOHN Hall brought a *Quare Impedit* againſt the Biſhop of *Bath* and *Wells*, and *Thomas Maunton* Clerk, Defendants, for diſturbing him to preſent to the Vicarage of *Wollavington* appendant to the Manor of *Wollavington*, whereof the Dean of *Windſor* was ſeiſed in his Demeſne as of Fee in Right of his Deanery, and preſented *Robert Pitman* his Clerk, who was inſtituted and inducted, and conveyed that Manor to the Earl of *Leiceſter* by Leaſe for Years, who aſſigned all his intereſt to *George Sidenham* Kt. who granted it to *Chriſtopher Roll*; and during his Poſſeſſion the Vicarage became void by the Death of *Robert Pitman*; and the ſaid *Chriſtopher Roll* preſented one *John Davis* his Clerk to the ſaid Vicarage, who was admitted, *&c.* And afterwards the ſaid *Chriſtopher Roll* did grant his Intereſt in the ſaid Leaſe to the Plaintiff. And afterwards the Vicarage became void by the Deprivation of the ſaid *John Davis*, whereby it did belong to the Plaintiff to preſent, and the Defendants did diſturb him to his Damages, *&c.* To which the Biſhop pleaded, that he claimed nothing but as Ordinary, and demanded Judgment, if without ſpecial Diſturbance. And *Thomas Maunton* ſaid, That he claimed nothing in the Advowſon of the Vicarage, but that he is Vicar of the ſaid Church of the Preſentation of the ſaid *George Sidenham*, who is yet alive, not named in the Writ, and demanded Judgment of the Writ. The Plaintiff to the Biſhop's Plea prayed Judgment, foraſmuch as he claimed nothing in the Vicarage, and it was granted, but *ceſſet executio* until, *&c.* And as to the Plea of *Tho. Maunton* he did demur in Law. And the ſole Queſtion of the Caſe is, If the *Quare Impedit* lies againſt the Biſhop and the Incumbent without naming the Patron. And it was reſolved, That the Writ (*a*) ſhould abate, and that the Patron ought to be named in the Writ, and that for 2 Reaſons. 1. Becauſe the Patronage would in this Caſe be recovered againſt him

(*b*) Ca Jac. 651. Fitz. brief 582. Br. Quare Impedit 24.

him who hath nothing in the Patronage. And it is not reasonable that he who is Patron should be dispossessed and ousted of his Patronage, when he is a Stranger, and not Party to the Writ, and especially in this Case, when he may be made Party to the Writ. 2. At the Common (*a*) Law the Incumbent could not plead any Plea which concern'd the Right of Patronage, and therefore it would be against Reason that he should be only named in the Writ, who at the Common Law cannot defend the Patronage, and he who hath the Patronage, and can plead to the Right of it, omitted in the Writ: For at the Com. Law every one shall plead a Plea which is fit for him, and pertinent to his Case; as in Assise against Disseisor (*b*) and Tenant, *&c.* the Tenant shall plead a Plea which concerns the Tenancy, and not the Disseisin. And the Incumbent at the Common Law shall not plead to the Right of Patronage in which he hath nothing, but the Patron shall plead to that. And the Mischief was, that (*c*) by the faint Pleading or Confession of the Patron in a *Quare Impedit* the Incumbent was without Remedy, as the Book is adjudged in 18 *Ed.* 3. 23. *b.* which was before the Statute of 25 *Ed.* 3. *Vide* 22 *Hen.* 6. 28. *a.* 9 *Hen.* 6. 30. *a. b.* 31. *a. &c.* But the Stat. of 25 *Ed.* 3. *cap.* 7. enables the (*d*) Possessor, *&c.* (which is as much as to say, the Incumbent, after Induction, as it is held in 4 *Hen.* 8. *Dyer* 1.) to counterplead the Title taken for the King, and to have his Answer, and to shew and defend his Right upon the Matter, altho' he claim nothing in the Patronage, and by Equity he shall plead against all common Persons, as the Books are in 9 *Hen.* 6. 30. *a. b.* 31. *a. &c.* 22 *Hen.* 6. 28. *a.* 13 *Hen.* 8. 13. 14 *Hen.* 8. 29. *Vide* 39 *Ed.* 3. 30. 27 *Ed.* 3. 81. 46 *Ed.* 3. 13. 19. 47 *Ed.* 3. 11. *a. b.* 2 *Rich.* 2. *Incumbent* 4. 8 *Hen.* 5. 9. 7 *Hen.* 4. 34. 13 *Hen.* 4. 7. 22 *Hen.* 6. 26. 16 *Ed.* 4. 11. 2 *Hen.* 7. 14. 10 *Hen.* 4. *Statham.* And it is to be observed, that always when the Incumbent pleads in Bar, he first saith, that he is, *persona* (*e*) *impersonata Ecclesiæ prædt'*, *&c.* by which it is implied, that he is admitted, instituted, and able to plead in Bar, *scil.* against the King, that he is admitted, instituted, and inducted; and against a common (*f*) Person, that he is admitted and instituted, for then *est Ecclesia plena & consulta*, against a common Person, as it is held in 9 *H.* 6. 31. 22 *H.* 6. 27. 21 *E.* 4. 34. *b.* 24 *E.* 3. 30. 25 *E.* 3. 47. 38 *E.* 3. 9. *a.* 44 *E.* 3. 3. *&c.* But this Difference in the Case at Bar was taken and agreed; That when by the Judgment in the *Quare Impedit*, the Inheritance, Estate, or Intereſt of the Patron in the Patronage is to be devested by the Judgment in the *Quare Impedit* brought by *J. S.* there *J. N.* (*g*) who presented, (and his Clerk received) ought to be named in the Writ; but when the Inheritance, Estate or Intereſt of the Patron shall not be devested by the Judgment, then, if another Disturber be named in the Writ, it is not needful to name the rightful Patron in the Writ, and with this Differ. agree our Books. For in (*h*) 42 *E.* 3. 7. *a.* One brought a *Quare Imped.* against another; the Def. said, that he claimed nothing in the Patronage, but said, that the Bishop did present him by Lapse, Judgment if, *&c.* and there *Belknap* prayed a Writ to the Bishop, because he had disclaimed in the Patronage; and the Court would not grant it, because inasmuch as neither the Patron, nor the Bishop (who in the same Case was

(*a*) Hob. 162. 1 Anderſ. 238. 46 E. 3. 14. a. Doct. pl. 230. 1 Leon. 45.

(*b*) 13 H. 8. 14. b. Co. Lit. 285. b. 303. b. 2 Inſt. 414.

(*c*) 47 E. 3. 11. a. b

(*d*) Hob. 319. Doct pl. 230, 231. Hob. 161. 1 Leon. 45. Dyer 1. pl. 8. 1 Jones 161.

(*e*) Doct. pl. 231, 232. * F. N. B 34. K. 2 Inſt. 356. 2 Rol. 349. Co. Lit. 133. b. 344. a. b. Cr. Jac. 463.

(*f*) 6 Co. 49. a. 2 Inſt. 356. 2 Rol. 349. Co. Lit. 119. b. 344. a. Cr. Jac. 463.

(*g*) Noy 151 2 Rol. Rep. 239. 2 Show. 167. 3 Lev. 26, 206.

(*h*) Car Jac, 651 Fitz. brief 552. Br. Quare Impedit 24.

in the place of the patron) were not named in the writ, it was adjudged that the writ ſhould abate; and if ſuch writ ſhould be maintainable, every patron by covin between a ſtranger and the Incumb. might be ouſted of his Advowſ. and therewith agree 9*H.*6.30.*a.b.*31.*a.&c.* 3*H.*4.2.*b.&* 3.*a.* 13*H.*8.13. But in 7*H.*4. 25,37. there in a *Quare Imped.* becauſe the Preſentat. was only recovered, and not the Advowſ. nor the patron put out of Poſſeſſ. the writ was adjudged good without naming of the patron. If a *Quare Imp.* be brought againſt the patron and the Incumb. and the Patron dies pending the writ, the death of the patron ſhall not abate (*a*) the writ, as it is adjudged in 9*H.* 6.31. For there are 2 miſchiefs, one if the writ ſhould abate the diſturbance would be unpuniſhed; and altho' the writ was well brought, yet the Pl. would be without remedy, becauſe there wants a diſturber: And of the oth. part the other miſchief is, that if the writ ſhould not abate, but the Pl. proceed to Judgm. and Execution, the very Patron would be out of Poſſeſſ. And foraſmuch as in the one caſe, if the rightful patron ſhould be out of Poſſeſſ. he hath remedy by a writ of right to recontinue the Advowſ. and in the oth. caſe if the writ ſhould abate, the Pl. would be without remedy, which would be the greater miſchief, and for this cauſe the writ ſhall ſtand, and ſhall not abate; and therewith agree 7*H.*4. 26.*b.* 13*H.*8. 13. 9*H.*6. 57. And a *Quare Imped.* well brought by divers, as Coparceners, Joint-tenants *&c.* ſhall not abate by the (*b*) death of one of them; Nor a *Quare Impedit* brought by the Husband and Wife ſhall not abate by the Death of the Wife, becauſe otherwiſe the Pl. (if the ſix Months be paſt) would be without remedy, as the books are in *F.N.B.* 35.*b.* 38*E.* 3. 43. 37*H.*6.11. 7*H.* 4. 19. 14*H.*4.12. 9*H.*6.30. 57. 1 *H.* 5. 13. 17*E.*5.11. 17*E.*3.304. But if the K. preſents, and his Clerk is admitted and inſtituted, *&c.* there the *Quare Imped.* may be brought for Neceſſity againſt the Biſhop or Incumbent, for it doth not lie againſt the King: So of the Pope, if he had uſurp'd, 12*H.*8.12. 14*H.*7.15, *&c. Vide* 47*E.*3.(*c*) 11.*a.b.* The King brought a *Quare Imped.* againſt *W. Dawtree* of the Church of *Retfield*, and made his Title, foraſmuch as *Hamond* Bp. of *Rocheſt.* had preſented to the ſaid Church by Uſurpat. being void (the Advowſ. of which of right did appertain to 3 Daughters and Heirs) his Clerk, who was admitted, inſtituted and inducted, and afterwards the Incumb. reſign'd, and the Succeſſor preſented another, who was admitted, inſtituted, and inducted, and he died, by which it belonged to the K. to preſent, foraſmuch as the Bp. had gained that Advowſ. to him and his Succeſſors without Licence, by which the Advowſ. was become in *Mortmain.* The Def. pleaded, that he is parſon of the Preſentm. of *W. Wycleſey*, Predeceſſor of the Bp. that now is, *Tho.* by Name, ſo that the patronage is in *Thomas*; who we conceive ought to be named in the writ, by which we conceive that our Lord the King to this writ, in which the patron is not named, ought not to be anſwered, for

(*a*) 2 Leon. 58. Sav. 108 109 Cr. El. 324. Cr. Car. 592. 2 Siderf. 94. Goldsb. 46.

(*b*) Cr. Jac. 19. Dyer 279. pl. 8 Dall. 7. F.N.B. 35. l. Cr. Car. 529. 10 Co. 134. b. Moor 9 Cr. El. 324. Co. Lit. 198. a.

(*c*) Sav. 109. 47E. 3. 10. b. 11. a.b. Firz. Qu. Imped. 141. Br. Qu. Imp. 40. Br. Mortmain 6.

we conceive, That a *Quare Impedit* doth not lie againſt the Incumbent alone, without naming the Patron, where it is expreſly ſhewed that there is a Patron, who may plead in Bar of the Plaintiff or other Thing to ouſt the King of the Action, which lieth not in the Knowledge of the Incumbent to plead. And it was adjudged, That the King's Writ was good againſt the Incumbent alone, becauſe he might give by the Statute what anſwer he would alone in Maintenance of his Poſſeſſion of his Church; and the now Biſhop who is Succeſſor, is no Diſturber, for the Defendant came in by the Predeceſſor, and therefore ſhall not be charged with Damages or Coſts. And afterwards the Plaintiff *John Hall* perceiving, in the principal Caſe, the Reſolution of the Court, diſcontinued his Suit, and loſt his Preſentation, *illa vice*.

Paſch.

Paſch. 40 Eliz.

Sir HUGH PORTMAN's *Caſe.*

IN a (*a*) *Quare Impedit* by Sir *Hugh Portman* againſt the Biſhop of *Canterbury*, and *Mountgomery* Clerk, *ad Eccleſiam de Chelſey* in the County of *Somerſet*, and made his Title by Reaſon of a Grant of the next Avoidance *unica vice*, divers Points were reſolved: 1. If the Pl. in a *Quare Impedit* be Nonſuit (*b*) after Appearance, it is peremptory and a good Bar in another *Quare Impedit*, although it be brought within the ſix Months; and the Reaſon thereof is, becauſe the Defendant upon Title made (by which he is become Actor) ſhall have a Writ to the Biſhop to admit, *&c.* his Clerk into the ſame Church, *&c.* which is a good Bar in another *Quare Impedit*, and therewith agree 19 *E.* 4. 9. *a.* 22 *H.* 6. 44. *b.* 45. *a.* 33 *H.* 6. 1. 55. 20 *E.* 4. 14. 21 *E.* 4. 2. *b.* *&c.* *F.N.B.* 38. *k.* The ſame Law if the Plaintiff in the *Quare Impedit* diſcontinues (*c*) his Suit, the Defendant upon Title made ſhall have a Writ to the Biſhop, and by Conſequence it is peremptory, and therewith agreeth 31 *H.* 6. 15. *a.* But if the Writ of *Quare Impedit* within the ſix Months abates for falſe (*d*) *Latin*, or Inſufficiency of Form, that is the Fault of the Clerk, and ſhall not be peremptory to the Plaintiff, nor ſhall the Defendant thereupon have a Writ to the Biſhop, but the Plaintiff may have a new Writ of *Quare Impedit*; and therewith agree 3 *H.* 6. 3. *a.* 31 *H.* 6. 15. *a.* *F.N.B.* 38 *H. Vide* 34 *Aſſ. pl.* 9. the like. So if the Writ abate for Miſnoſmer (*c*) of the Plaintiff or Defendant, if the Plaintiff confeſſeth it, the Defendant ſhall not have a Writ to the Biſhop, for it may be the Fault of the Clerk in the Writing of it. And therewith agreeth *F.N.B.* 38. *M. Vide* 31 *H.* 6. 15. *a.* But if the Pl. be made a Knight (*f*) hanging the Writ, the Writ ſhall abate, and by Conſequence that is peremptory; for (as we ſee by common Experience in theſe Times) the ſame is the Pl's Act, and none is forced or compelled to it.

(*a*) Co. Ent. 481. pl. 4.

(*b*) Br. Quare Imped. 136. Br. peremp. 74. Br. brief al Eveſque 21. Br. Nonſuit 62. 2 Rol. 388. Hob. 138. Co. Lit. 139. a. Dall. 81, 82.

(*c*) Hob. 138. Br. brief al Eveſque 26.

(*d*) 2 Rol. 387, 388.

(*e*) F.N.B. 38 m

(*f*) 1 E. 6. c. 7. Stile 187.

Trin.

Trin. 27 Eliz. *Rot.* 320.

(*a*) BASKERVILE's *Caſe.*

IN a *Quare Impedit* in the Common Pleas, the Caſe was, That 1 *Mar.* Title to preſent by Lapſe was devolv'd to the Queen to the Church of *Cuſep* in the County of *Hereford.* Sir *Nicholas Arnold* the Patron preſented one *Evans*, who was thereto admitted, inſtituted and inducted, and died, and if the Queen had loſt her Title to preſent by Lapſe, or not, was the Queſtion; and it was adjudged, that the Queen had (*b*) loſt it. For the Queen had but *unam & unicam præſentationem hac vice.* which cannot be extended to the ſecond Avoidance; for Negligence to preſent ſhall loſe the Subject one Preſentment only by Lapſe, and not divers; and if the Queen has (*c*) *primam & proximam præſentationem* granted to her, ſhe cannot take the ſecond. And otherwiſe great Inconvenience would enſue to the Patron; for the Queen might forbear to preſent, and ſuffer divers to preſent by Uſurpation one after the other, and take her Turn when ſhe would, and the Patron might be in a Manner thereby diſinherited. And the Stat. of (*d*) *Prærogativa Regis, quod* (*e*) *nullum tempus occurrit Regi*, is to be intended when the King hath an Eſtate or (*f*) Intereſt certain and permanent, and not when his Intereſt is ſpecially limited, when and how he ſhall take it, and not otherwiſe; for there Time is the Subſtance of his Title, and in ſuch Caſe *Tempus occurrit Regi.* And ſo was it at another Time adjudged, *Paſch.* 28 *El. Rot.* 412. in the Common Pleas, between *Beverley* (*g*) Plaintiff, and the Archbiſhop of *Canterbury* and *Gabriel Cornwal*, Defendants for the Church of *Somerby* in the County of *Lincoln.*

(*a*) Co. Ent. 489. pl. 7. Cro. El. 356. 1 Leon. 280, 281. 2 Leon. 50.
(*b*) Palm. 354, 357. 1 Rol. Rep. 459. 2 Rol. Rep. 422. 2 Rol. 368. Noy 25. Winch 96. Hob. 152, 166. CroEl. 119, 120, 790. Cro. Jac. 44, 54, 216, 691. Cro. Car. 356. Owen 5, 89, 90. Goldsb. 86, 78, 83. pl. 4. Mo. 260, 900. Dy. 277. pl. 55. Stanf. Prær. 33. a.b. Dr. & Stud. lib. 2. c. 36. Lit. Rep. 99, 383.
(*d*) 1 And. 149. Plowd. 243. a. (*u*) Stanf. Prærog. 32, 33.
(*c*) 6 Co. 49. b. Hob. 347. Lit. Rep. 99, 340 Co. Lit. 41. b. 90. b. 118. a. 294. b. Hard. 24, 25. 1 Jones 79. Rep. 165. 2 Ra. 224, 269, 270.

2 Inſt. 273, 360. Godb. 207, 305, 312, 317. Plowd. 243. a 221. a. 1 Rol. Rep. 422. 1 Anderſ. 149. Pal. 354, 357. Cr. El. 44. (*f*) Godb. 305. (*g*) Moor 210. El. 44. Cro. Jac. 216. Owen 2. 1 And. 148, 149. Goldsb. 44.

Hill.

Hill. 43 Eliz. *Rot.* 1108.

In the Common Pleas.

MAUND's *Caſe.*

IN a Replevin between *Maund* and *Gregory*, the Defendant ſhewed, That a Rent-charge out of a Houſe and certain Lands was granted by Deed to one and his Aſſigns, for his Life, *pro conſilio impendendo*, payable yearly at four Feaſts, and for Default of Payment, if it be demanded, that it ſhould be lawful for the Grantee and his Aſſigns to diſtrain, the Grantee aſſigned the Rent to the Avowant, the Tenant attorned, the Aſſignee on the Land demanded the Rent after the Day, and for Default of Payment did diſtrain and avow, on which the Plaintiff did demur in Law. In this Caſe it was reſolved, 1. That a Rent granted to one and his Aſſigns, *pro conſilio impendendo*, may (*a*) be aſſigned over by the expreſs Words of the Grantor, who granted it to him and his Aſſigns; for *modus* (*b*) *& conventio vincunt legem.* 2. That in this Caſe the Aſſignee need not demand the Rent at the (*c*) Day, as he ought in Caſe of (*d*) Re-entry, (for there the whole Intereſt or Eſtate ſhall be defeated) or when any Sum (*e*) *nomine pœnæ* ſhall be forfeited, in both theſe Caſes the Demand ought to be made preciſely at the Day a convenient Time before Sun-ſet, in the one Caſe in Reſpect of the Condition, and in the other in Reſpect of the Penalty. But in the Caſe of Diſtreſs he who hath the Rent may demand it at what Time he will, for no Loſs or Penalty will thereon enſue, but only a Remedy to come at his Rent, which is Arrear, and which is due to him; and ſo was it adjudged in the Common Pleas, *Mich.* 40 & 41 *Eliz.* between *Stanley* and *Read*, where the Caſe was, That a Rent-charge was granted payable at a certain Day, and if it be behind and (*f*) demanded, that it ſhould be lawful for the Grantee to diſtrain. The Avowant ſhewed, how that he made a Demand at the Day; the Plaintiff traverſed that he did not make a Demand at the ſame Day (intending to make the Day Part of the Iſſue) upon which the Def. demurr'd in Law, and it was adjudged againſt the Plaintiff; For if the Demand were at any Time after the Day, and before the Diſtreſs it is ſufficient. 3. It was reſolved, That if a Man who hath a (*g*) Rent-ſeck, payable yearly at

(*a*) Moor 56. 2 Rol. Rep. 473. Co. Lit. 144. a. Dy. 65. pl. 1.
(*b*) 12 Co. 71. Co. Lit 19 a. 166 a. 180. a. Godb. 254. 1 Rol. Rep. 262. 2 Rol. Rep. 332. 2 Sand. 167. Winch 48, 96. Hob. 40. Lit. Rep. 208. Godb. 254.
(*c*) 1 Rol. Rep 235. 2 Rol. 426. Co. Lit. 144. a. 202 a. N. y 22 23. Hob. 207.
(*d* Co. Lit. 144 a.
(*e*) Mo 357, 358. Hob 82, 133, 208 1 Rol. 459. Co. El. 383. Goldsb. 129, 130, 186. Hutt 42, 114. 1 Brownl. 179. Palm. 206, 490. 1 Mod. Rep. 89.
(*f*) 1 Sand. 253, &c. Cr. El. 548, 721. 1 Leon. 190, 191.
(*g*) Hetl. 16. Lit. Rep. 34. Hob. 207. Cro Car. 508. 2 Rol. 427.

at the Feaſt of *Eaſter*, and hath once Seiſin of the Rent, and the Feaſt of *Eaſter* paſſes, and no Tender or Demand made of the Rent, he may, although it be after the Day of Payment, come to the Land and there demand the Rent, and although the Tenant of the Land be not there, yet on ſuch Demand, if none be ready to pay the Rent, it is a denial in Law, upon which he who hath the Rent ſhall have an Aſſiſe, for as much as no Penalty will enſue thereon, but only to have Remedy to recover his Rent and the Arrearages, with Coſts and Damages, and therewith agree *Litt. fo.* 51. and the Book of *Entries*, *fo.* 79. *b.* 29 *Aſſ. p.* 52. But in the ſame Caſe, if the Tenant at the laſt Inſtant of the Feaſt of *Eaſter* be ready on the Land to pay the Rent, and he who hath the Rent, nor any for him comes to demand or receive it, there he who hath the Rent cannot come in the Abſence of him who is Tenant of the Land, and demand it, and ſo make him a Diſſeiſor, and render Damages and Coſts, without any Default in him. But in ſuch Caſe, he who hath the Rent, becauſe the Default was in him, ought to make a Demand of it on the Land of the Perſon of the Tenant, and if he cannot find him on any Part of the Land out of which the Rent is iſſuing, then in ſuch Caſe he ought to demand the Rent at the next Feaſt of *Eaſter*, with all the Arrearages, and altho' it be in the Abſence of the Tenant, yet it will amount to a Denial in Law, and thereupon he who hath the Rent ſhall recover all the Arrearages, Damages and Coſts.

Co. Lit. 153. b.

Cro. Car. 508. 1 Rol. Rep. 60. 2 Rol. 427. Hob. 207.

Co Lit. ſect. 233. 2 Rol. 427. Hob. 207. 2 Rol. 427, 428.

2 Rol. 428.

I Diſ-

Diſcontinuance of Proceſs, &c. by the Death of the Queen.

Trin. 1 Jacobi.

Moor 748. Cro. Jac. 14.

THE Reſolution of the Juſtices after the Death of Q. *Elizabeth*, concerning Diſcontinuance of Proceſs, &c. There are two Manners of Re-ſummons and Re-attachments, the one general, the other ſpecial. The Effect of the general is, That the King doth direct a Writ *(exempli gratia)* to the King's Bench in this form; *Mandamus vobis, quod ad ſectam noſtram omniumque ligeorum populi noſtri, qui proſequi voluerint extra & ſuper omnia ſive aliqua recorda, placita, brevia, præcepta, proceſſus, billas loquelas, appella, fines, & alia memoranda quæcunque in curia noſtra coram nobis exiſten' vel in poſterum coram nobis proventur' omnimoda brevia reſummonit' reattachiament' & omnium alior' proceſs' pro nobis & dictis ligeis populi noſtri in hac parte habend' ſecund' bonas intentiones & propoſita ſubſcript' mutat' mutandis prout caſus requirit, ſecund' diſcretiones veſtras adjudicetis.* Special Reſummons is in ſuch form, *Rex vic' Salut. Reſummoneas per bonos ſummonitores* A. B. *quod ſit coram nobis in craſtino, &c. ubicunq; tunc fuer' in* Anglia, *audit' record' & judic' ſuum de loquela quæ fuit in Cur' Dom' H. nuper Regis, &c. ita quod loquela illa tunc ſit in eod' ſtatu quo fuit in priſtina curia præd' nuper Regis in Octabis, &c. ultim' præterit', de quo die loquela præd' adjornat' fuit uſq; &c. tunc proxim' ſequent' ante quem diem loquela præd' remanſit ſine die, eo qd' præd' nuper Rex diem ſuum clauſit extremum.* And note, on the general Reſummons the Original and the Iſſue *(if* any be joyned*)* is revived, for it is a full Record, and ought to be entire, but the Proceſs before the Iſſue joyned, nor the voucher, nor the Garniſhment, &c. ſhall not be revived without a ſpecial Writ reciting all the ſpecial Proceeding; 5 *H.* 7. 40. *a.* 9 *H.* 6. 41. *a.* 13 *E.* 4. 1. *a. b.* 1 *E.* 5. 2. *a.*

And

And it appears by the Book of *Entr. tit. Reattachm.* 499. that if iſſue be joyn'd, and the Jury return'd, and day given for trial, before which day the K. dies, yet by ſpecial Reſummons all ſhall be revived, for the Jury was return'd of Record, and the record thereof was made full and perfect; and therewith agrees 1 *Ma.* (*a*) 118. *Dyer. Vide* 21 *E.* 3. 44. contrary in the caſe of aid prayer, for there the Jury is not revived as it is there held: but a *Venire facias de novo* ſhall be awarded. And it is to be known, that the (*b*) Def. ſhall never have a reſummons or attachm. becauſe he had not nor can have ſummons or attachment; and therefore at the Com. Law, if a verdict had paſs'd for the Def. and before the day in bank the King died, in that caſe the plea is diſcontinued, and the Def. might by *Certiorari* remove the record, and altho' the parties ſhall never plead any plea, yet the Def. ought to ſue forth a *ſci' fac'* and thereupon have Judgm. but without a *ſci' fa.* he ſhall not have Judgm. becauſe the parties have no day in court, and the *ſci' fac'* ſhall revive the record, and give day to the parties, againſt the opinion of *Litt.* 10 *E.* 4. 13. *b.* altho' he ſaith that it was ſo adjudged, that the Defen. in ſuch caſe ſhould preſently have Judgm. But at the Com. Law by the demiſe of the K. the plea was diſcontinued, and the proceſs which was awarded and not returned before the K. death, was loſt: For by the writ of the predeceſ. nothing can be executed in the time of the new K. unleſs it be in ſpecial caſes: For by the demiſe of the K. not only the (*c*) Juſtices of the one bench, and the other, and the Barons of the Excheq. but the Sheriffs alſo, and Eſcheators, and all Commiſſions of *Oy.* and *Term.* Gaol-delivery, and Juſtices of Peace are determined by the death of the Predeceſſ. who made 'em. And for the remedy thereof was the Stat. of 1 *Ed.* 6. (*d*) *c.* 7. made, which provides, that by the demiſe of the K. any action, ſuit, bill, or plaint, *that ſhall depend between party and party, in any of the K's Courts, and other Courts of record, ſhall not any wiſe be diſcontinued, or put without day, but that the proceſs, pleas, demurrers, and continuances ſhall ſtand good and effectual, and be proſecuted and ſued forth in ſuch manner and form, and in the ſame eſtate, condition, and order, as if the ſame K. had lived.* So that now, if any judicial writ or proceſs in any court of record were awarded in the time of the Predeceſſor, it may now be executed in the time of the Succeſſ. 1 *El Dy.* 165. *accord.* But yet that act hath not provided remedy for all the miſchiefs. For 1. If the original be not (*e*) returned before the K's death, it is loſt; for the words are depending in any court: But in an appeal of death, if the writ be delivered to the Sheriff within the year, and before the return thereof; or that the Sheriff hath done any thing, the K. dies, and the year expires before the Day of the return, in that Caſe the Common Law gives remedy to the Plaintiff, *ſcil.* a *Certiorari* to the Sheriff, returnable in the King's Bench; and thereupon

(*a*) Dyer 118. pl. 78.

(*b*) Co. Lit. 130. b.

(*c*) Moor 176. 2 Keb. 375. B. N. C. 203. 1 And. 44. 45. Dyer 165. pl. 2. 1 El. Dyer 165. 1 E. 4. 3. 1 E. 5. 1. 4 E. 4. 44. 1 H. 7. 2.

(*d*) 1 And. 44, 45. Cro. Jac. 14. Cro. Car. 10. 1 Rol. Rep. 165. Co. Lit. 325. a. Yelv. 52. Hutt. 82.

(*e*) Dy. 65. pl. 2. 1 And. 44, 45. Latch 110. 5 Co. 47. b. 2 Sid. 94. Cro. El. 677. Cro. Jac. 11.

the Plaintiff ſhall have a Re-attachm. altho' it comes not in by the return of the Sheriff, but by *Certior'* and the reaſon is, for the neceſſity of the matter, for otherwiſe the Pl. who lawfully brought his Writ within the Year, without any fault in him, would loſe his appeal, the year being now paſt. And therefore foraſmuch as by the act of law the writ is diſcontinued, the law will give a means to revive it, to the end the party ſhall not be without remedy. So if a man brings a *Formedon* againſt a Pernor of the profits within the year after the title accrued, if before the return of the Writ, *&c.* the K. dies, the writ ſhall be remov'd into the Com. Pleas by *Certior'* and thereupon he ſhall have reſummons for the miſchief, as it is held in 10 *E.* 4. 13. *b.* & 14. *a.* 2. By the demiſe of the K. all Offices of (*a*) Sheriffs are determin'd; and therefore till new Patents of their offices nothing can be done. But in (*b*) *Lond.* and other places, where there are Sheriffs of inheritance by Charter, there they may execute any proceſs, or judicial writ awarded in the time of the Predeceſſ. 3. In the county court, and the like Courts which are not Courts of (*c*) Record it remains as it was at the Com. Law; for the words of the act are (*in any of the K's Courts, or other Courts of record.*) Alſo the Stat. extends only to Actions, Suits, *&c.* between Party and Party; and therefore it ſhall not extend to caſes where the (*d*) K. is party; and therewith agrees *Stamf.* 98. *b.* And therefore it is neceſſ. to know what the Com. Law is in ſuch caſes. If (*e*) an Inform. of Intruſion, or other Inform. be preferred, either meerly for the K. or *tam pro Dom' Rege quam pro ſeipſo*, and the Def. pleads to iſſue, or a demurrer be joyned, and afterwards the K. dies, all is abated and loſt, but only the Inform. and that ſhall ſtand: for the entry in the Excheq. is (ſhewing the continuance and death of the K. *H.* 8.) *per qd' loquela remanſit ſine die, & Dom' Edw. ipſum nuper regem in regimine hujus regni ſucceſſit, ac regimen ejuſd' regni ſuper ſe aſſumſit, ſuper quo concordat' qd' præd' Defend' attachietur de novo ad reſpond' dicto Dom' Regi nunc*, and thereupon an Attachm. is awarded, on the return of which the Def. ſhall appear and plead *de novo*; for altho' it is true, that the K. *in genere* doth not die (for there is no * *interregnum*) yet *in hoc individuo*, *H.* the K. and *Ed.* the K. *&c.* dies. And that appears by record, *Hill. an' 6 Ed. 6. Rot.* 50. an Inform. of Intruſion was preferred againſt *J. Schrymſal* Eſq; for intruding into the Manor of *Offeley*, in the County of *Staff.* The like Record *Mich' anno 6. Ed. 6. Rot.* 15. an Information preferred by the King's Attorney, for the King only, againſt *Michael Harecourt* on the Statute of Maintenance, *Hill.* 5 *Ed. 6. Rot.* 23 In the Exchequer in an Information on the Stat. 32 *H.* 8. for buying of Titles, *tam pro Domino Rege quam pro ſeipſo*, and after Iſſue joyned the King died, the Defendant appeared on the

(*a*) Dy. 165. pl. 7. 1 And. 44.
(*b*) Co. 72. b.
(*c*) 6. Co. 11. b. Co. Lit. 260. a.
(*d*) Cro Car. 10.
(*e*) Moor 748. Cro. Jac. 14. Cro. Car. 10, 11. Dodt. pl. 3. Hutt 82. Cawly 80.
* 7 Co. 12. a. Calvin's Caſe.

the Attachment, and pleaded *de novo*. *Simile per idem Record' Rot.* 24. *Simile per idem Record' Rot.* 54. *Simile Mic.* 1 & 2. *Phil. & Mar.* in the Exchеq. *Rot.* 131. in an Information of Intruſion againſt *Rich. Alford*, who appeared and pleaded a ſpecial Plea; on which there was a demurrer in Law, and the demurrer entred; and afterwards Q. *Mary* died, and upon that a *Subpœna* iſſued to appear *de novo*, returnable *Hill'* 1 *El.* which is in *ligula brevium ibidem*; and thereupon the Def. pleaded another ſpecial Plea, on which Iſſue was taken. And note, to ſuch effect as the Precedents are in the Exchеq. ſo they are alſo in the K's Bench as to all manner of Informations. The like *Paſ.* 5 *Ed.* 6. *Rot.* 38. where in a popular Action the K. died after demurrer on the Evidence, and before Judgm. and the Def. pleaded *de novo*. Upon which Records the Law appears to be, that in all the ſaid Caſes the K. being meerly Party, or when the Inform. is *tam pro Dom' Rege quam pro ſeipſo*, when the K. dies before Judgm. all the Proceeding on the Inform. is utterly abated and loſt, *quia Rex* Henric. *&c. fuit pars qui mortuus eſt.* But the Inform. or Indict. which is recorded for the K. ſhall ſtand, and the ſaid Def. ſhall be driven to anſwer it *de novo*, and nothing ſhall ſtand but the Inform. for that is a Record, and cannot abate. And the Law hath great reaſon in it; for on many penal Statutes the Suit is to be commenced within a certain Time, and therefore if the Inform. or Indictment ſhould not continue in force after the K's Death, by the K's Death, which is the act of God, the Offence would be unpuniſhed. But if the K. brings an original Writ, as *Quar' Imp' &c.* there by the K's Death the Writ ſhall abate, becauſe the K. for whom Judgm. ſhould be given, is dead, and after the Death of the K. who is Party, no Proceſs can be awarded on the Original, as it may be on an Inform. or Indict. *Vid. Mic.* 3 & 4 *El.* 206. *vid.* 4 *Ed.* 4. 43. & 44 *Br. Offices* 25. If one be indicted in the Time of one K. and pleads to Iſſue, and afterwards the K. dies, he ſhall plead *de novo*, as you may ſee in the Caſe of *Edw. Smith*, who pleaded to Iſſue on an Indictment of Felony in *Midd.* in 3 & 4 *Phil. & Mar.* in the King's Bench, and after the Death of Q. *Mary* repleaded in 3 & 4 *El.* and was acquitted. So *Clement Palmer* being arraigned in the King's Bench on a Nonſuit in an Appeal, at the Suit of the Queen, *Trin.* 4 & 5 *Phil. & Mar.* and pleaded to Iſſue, Queen *Mary* died, and *Mich.* 1 & 2 *El.* he repleaded. *Vide Paſch.* 1 *Ed.* 5. Traverſe of an Office in Chancery, and the Record ſent into the K's Bench, and afterwards the King died. And by the ſaid Stat. of 1 *Ed.* 6. it is enacted, *That in all Caſes, where any Perſon or Perſons heretofore have been, or hereafter ſhall be found guilty of any manner of Treaſon, Murder, Man-*

Cro. Jac. 14.

Cro. Jac. 14. Dock. pl. 3.

Dy. 206. pl. 8.

Cro. Jac. 14.

ſlaughter, Rape, or other Felony whatſoever, for the which Judgment of Death ſhall, or may enſue, and ſhall be repried to Priſon without Judgment, &c. *That the Juſtices of Gaol-delivery ſhall have full Power and Authority to give Judgment of Death againſt ſuch Perſon ſo found guilty, and repried*, &c. Before that Act at the Common Law, if a Man had been indicted and convicted by Verdict or Confeſſion before any Commiſſioners, and before Judgment the King died, in that Caſe no Judgment could have been given; for the King, for whom the Judgment ſhould be given, is dead; and the Authority of the Judges who ſhould give Judgment is determined: And this Act doth remedy thoſe ſpecial Caſes. But all the King's Suits by original, Bill, Information, or Indictment, for any other Offence, do remain at the Common Law.

Mich.

Mich. 2 Jacobi.

The Caſe of a Fine levied by the King Tenant in Tail, &c.

THE King was informed, That divers Manors and Lands were intailed to *Gilbert de Clare* Earl of *Glouceſter*, and the King who now is, is Heir of the Body of the ſaid *Gilbert* inheritable to the ſaid Land; ſome of which Manors, the King and others his Progenitors, for good Conſideration, had granted to divers Subjects; all which Grants (as was pretended) were in reſpect of the ſaid ancient Eſtate-Tail utterly void. The King that now is, of Grace and good Will to his Subjects, and for their quiet and repoſe, required *Popham* Chief Juſtice, and *Coke* Attorney General, to conſider how by Law he might eſtabliſh the Eſtate of the ſaid Patentees and others claiming under them, againſt the ſaid Eſtate-Tail. Whereupon, they ſeverally in the Vacation-Time did conſider on that Point; and afterwards on Conference they agreed in one, That the King being Tenant in Tail, by a Gift made to ſome of his Anceſtors being Subjects (as the Queſtion is moved) might by Fine levied on a Grant and Render bar the Eſtate-Tail, and that for divers Reaſons. 1. For as much as the King is bound (a) by the Stat. *de donis conditionalibus*, as it is adjudged in Lord *Barkley*'s Caſe, *Plow. Com.* 240. By which Act the King is reſtrained from Alienation; for it is enacted by the ſaid Act, *quod finis ipſo jure ſit nullus*; Reaſon requires, that the King ſhall take Benefit of the Acts of 4 (b) *H.* 7. & 32 (c) *H.* 8. which enables Tenant in Tail to bar his Iſſues: For it is agreed in all our Books, that the King ſhall take Benefit of any Act, altho' he be not named, 12 (d) *H.* 7. 21. *a.* 35 (e) *H.* 6. 60. the Lord *Barkley*'s Caſe, *Plow. Com.* 240. And it would be hard, that the King being Iſſue in Tail of a Gift made to a Subject, ſhould be in worſe Condition than if he had not been King. 2. There is a great Difference when the K. claims in reſpect of his natural Capacity, as Heir of the Body, *per formam doni*, as Heir of the Body of a Subject; for there he ſhall be bound by an Act of Parliament (and that was the principal Reaſon of the Judgment in the Lord *Barkley*'s Caſe, where the Gift

(a) Ant. 21. a. 1 Co. 44. b. 48. a. 5 Co 14. b. 11 Co. 72. a. 1 Rol Rep. 153. Plowd 243. b. 244. a. b. 248 b. 251. b. 252. a.
(b) 4 H. 7. cap. 24.
(c) 32 H 8. cap. 36.
* 11 Co. 68. b. 1 Rol. Rep. 151.
(d) 11 Co. 68. b. 1 Rol. Rep. 171.
(e) 1 Rol. Rep. 157.

was to King *H.* 7. and to the Heirs of his Body) and when the King claims a Thing in reſpect of his Royal and Politick Capacity, there a general Act ſhall not bind him, unleſs he be expreſly named, unleſs it be in ſpecial Caſes. 3. In the Caſe at Bar, the Bar which the Stat. *de donis conditionalibus* doth work, is againſt the Iſſues in Tail; for the Tenant in Tail himſelf, without any help of the Act might bar himſelf (and ſo might the King alſo by ſpecial Grant.) Then the Iſſues in Tail at the Time of the Fine levied by the King are but Subjects, who are bound by the ſaid Acts, and the Eſtate-Tail barred by the Fine and Proclamations. And note, That the Act of 32 *H.* 8. doth recite, that (*for avoiding of all Strifes and Controverſies*) which general word (*all*) includes alſo the Caſe of the King. And it was obſerved that the Stat. *de Donis*, &c. which binds the K. ſaith, *quod Dominus Rex* (*a*) *perpendend' qd' neceſſarium eſt in caſibus prædictis ponere remedium, ſtatuit, quod voluntas donatoris*, &c. And the Stat. of 4 * *H.* 7. which gives Power to dock the Eſtate-Tail, ſaith, *The K. conſidereth that Fines ought to be of greateſt Strength to avoid Strifes and Debates, and to be a final End and Concluſion: It is enacted that after the Fine engroſſed and proclaimed*, &c. *the ſame Fine ſhall conclude Privies*, &c. Within which Words the King's Iſſues are included. Alſo the Stat. of 32 (*b*) *H.* 8. Enacts, *That all Fines levied of any Lands intailed to the Perſon ſo levying the ſame Fine, or to any of his Anceſtors*, &c. And *Gilbert de Clare* was in Propriety of Speech the King's Anceſtor, and ſo within the expreſs Letter of the Act. But it ſeemed to them, that after the Render made it was neceſſary to have Letters Patents, to grant to the Conuſee by expreſs Words, that he may enter into the Land; for otherwiſe the Fine being Executory on a Grant and Render, it may be doubted if the Conuſee, without any ſuch grant can enter on the King. And afterwards, *Mich.* 5 *Jacobi*, after the Death of *Popham*, this Opinion on Conſideration and Conference had with *Fleming* and *Coke*, Chief Juſtices, and *Tanfield*, Chief Baron, was affirmed for good Law for the Reaſons and Cauſes before given. And divers Fines have been levied by the King according to that Reſolution.

(*a*) Plow. 248. b.

* 4 H. 7. c. 24.

(*b*) 10 Co. 50. a. 32 H. 8. c. 36.

Mich.

Mich. 2 Jacobi.

NEVIL's *Caſe.*

IN this Term, this Caſe by the Command of the K. was propounded to all the Judges. *Anno* 21 *R.* 2. *Ralph Nevil*, Lord of *Raby*, was by Letters Patents under the Great Seal created Earl of *Weſtmorland*, to him, and the heirs males of his body; which *Ralph*, by *Margaret Stafford* his firſt Wife had Iſſue, *Ralph* Earl of *Weſtmorland*, to whom *Charles* late Earl of *Weſtmorland* was lineal Heir Male of the Body of the ſaid *Ralph* the firſt Donee; and the ſaid *Ralph* the firſt Donee, by *Joan*, Daughter of *John* of *Gaunt*, Duke of *Lancaſter*, had Iſſue, *George* Lord *Latimer* (for all his elder Brothers were dead without Iſſue Male) from whom is lineally deſcended *Edward Nevil*, who now is the neareſt Iſſue Male to the ſaid Donee; and afterwards *Charles* Earl of *Weſtmorland* was attainted by Outlawry and by Parliament of High Treaſon, and died without Iſſue Male; and now the ſaid *Edward Nevil* claimed to be Earl of *Weſtmorland*. And in this Caſe three Queſtions were moved to all the Judges of *England*. 1. If the ſaid Limitation of the ſaid Dignity to the ſaid *Ralph* and the Heirs Males of his Body be within the Stat. *de donis conditionalibus*, or a Fee-ſimple conditional at the Com. Law. 2. Admitting that it was an Eſtate-tail within the ſaid Stat. if by the Attainder of Treaſon the Eſtate-tail was forfeited by a Condition in Law *tacite* annexed to the State of the Dignity. 3. If the Eſtate of the Dignity was forfeited by the Act of 26 *H.* 8. *cap.* 13. Or that the ſaid *Edward Nevil* as Heir Male of the Body of the firſt Donee ought to be Earl of *Weſtmorland*. And theſe Points were argued and debated at Serjeants Inn in *Fleetſtreet* by the King's Attorney, and by the Counſel of the ſaid *Edward Nevil*. And as to the firſt it was objected, That the ſaid Dignity was not within the Statute *de donis*, &c. for divers Cauſes. 1. Becauſe it was a great Dignity derived from the King, as the Fountain of all Dignity,

Weſtm. cap. 1.

dignity, and therefore it is not within the ſaid Act, which ſpeaks only *de tenement', quæ multotiens dantur ſub conditione, viz. cum aliquis terr' ſuam dat alicui viro, &c.* So this dignity can't be included within this word *Tenements* or *Land*. 2. The Stat. ſaith *in omnibus prædict' caſibus poſt prolem ſuſcitat. hujuſm' feoffati habuer. poteſtat. alienandi, &c.* But this dignity was adherent to the blood of the donee, and could not be aliened or granted, neither after nor before iſſue; and therefore ſuch caſes of dignities were out of the miſchief, the words and the intent of the makers of the Act *de donis, &c.* And the Opinion in *Manxel*'s caſe in *Pl. Com.* the Grant of a Thing which doth not concern land or tenements, nor (*a*) exerciſable in lands or tenements, as an (*b*) annuity which is perſonal, is not within the Stat. *de donis, &c.* And it was ſaid this dignity was perſonal, and annexed to the blood of the donee, and by conſequence could not be intailed within the ſaid Act. But it was reſolved by all the Judges of *Engl.* That a Name of (*c*) Dignity might be intailed within the ſaid Act: For in the caſe at bar it doth concern land, for he was made by the ſaid letters patents Earl of *Weſtmorl.* who by the com. law is the great conſervator of the peace, and ſheriffs are called *Vicecom'* becauſe in ancient times they were as deputies to Earls tho' now it is changed. And therefore ſuch office of dignity of any place doth concern land, and therefore may be intailed within the ſaid Stat. as it is ſaid in *Pl. Com.* in *Manxel*'s caſe. The office of ſteward, (*d*) receiver, or bailiff of ſuch a manor may be intailed within the ſaid Stat. becauſe it is exerciſable within lands, 5 *E.* 4. The office of (*e*) Marſh. of *Engl.* was intailed, 1 *H.* 7. 28. *b.* An eſtate-tail may be of a foreſterſhip, 18 *E.* 3. 27. The office of Serjeancy or cuſtody of the (*g*) church of *Nichol'* was intailed. 32 *H.* 6. 28. The Earldom of *Shrewsb.* was intailed to *J. Talbot* Kt. and the heirs males of his body. And I have ſeen a Parliam. Writ in *ann.* 27 *H.* 6. by which *Bromſtet* was ſummoned to Parliam. by the name of Ld. (*h*) *Veſey*, with Limitat. in the writ to him and the heirs males of his body. And it is to be known, that as in ancient time the ſenators of *Rome* were elected *a cenſu* of their revenues, ſo here in ancient times in conferring of nobility, reſpect was had to their revenues, by which their dignity and nobility might be ſupported and maintained. And therefore a Kt. ought to have (*i*) 20*l.* land *per ann.* a Baron, 13 Kts fees and a quarter, an Earl 20 Knights fees (for there was not any Duke in *Engl.* from the time of the conqueſt until 11 *E.* 3. and the D. of *Cornw.* was the firſt D. after the conqueſt in *Engl.*) And that appears by the Stat. of *Mag. Charta, c.* 2. For always the 4th part of ſuch revenue, which is requiſite by the law to the dignity ſhall be paid to the K. for (*k*) a relief; as the relief of a Kt. is 5 *l.* which is the 4th part of 20 *l.* which is a Kt's revenue; and the relief of a Baron is 100 Marks, which is the 4th part of his revenue, *viz.* 400 Marks, and includes thirteen Knights

(*a*) Co. Lit. 20. a.
(*b*) Co. Lit. 19. a. 20. a. 1 Rol. 837.
(*c*) 1 Rol. 837, 838. 12 Co. 81. Co. Lit. 20. a.
(*d*) 1 Rol. 838.
(*e*) Co. Lit. 20. a. 5 E. 4. 3. a.
(*f*) Co. Lit. 20. a.
(*g*) Rol. 838. Co. Lit. 20. a.
(*h*) Co. Lit. 20. a.
(*i*) 9 Co. 124. b. Co. Lit. 69. a. F. N. B. 82. c.
(*k*) 9 Co. 124. b. 2 Rol. 515, 516. Co. Lit. 69. b. 83. b.

Kts. fees and a quarter; and the relief of an Earl is 100 *l.* which is the 4th part of 400 *l.* which is the revenue of an Earl. And it appears by the records of the Excheq. that the relief of a Duke ſhall amount to (*a*) 200 *l.* and by conſequence his revenue ought to be 800 *l. per ann.* and that is the reaſon in our books, that every one of the Nobility is preſumed in law to have (*b*) ſufficient freehold *ad ſuſtinend' nomen & onus. Vide* 3*H.*6.48. 11*H.*4.15. 14*H.*6.2. See the Counteſs of *Rutl.* caſe in the 6th part of my Rep. *Vide Cambd. f.* 107. *Necdum hæreditaria fuit hæc dignitas (ſc. Comitis) verum cum Gulielm' Normanus, jam victor, ſummam rerum in hoc regno adminiſtraret, comites creati ſunt feudales, hæreditarii & patrimoniales, ut in antiquis cartis videre eſt, de tertio denario comitat', i. qui de placitis proven' in eod' comitatu.* And every Baron and other of Nobility is always created of ſome place; and now to what Value the ſaid old rents in the time of *H.* 3. & *E.* 1. at this day do amount to, every one knows. And ſo it was clearly reſolved, that the dignity in the caſe in Queſt. was within the Stat. *de donis conditional'*; and with this Reſolut. agree divers precedents, and the experience and practice always uſed; for the Earldom of *Northumb.* was intailed by Q. *Mary* to *T. Percy*, and the heirs males of his body; and for default of ſuch iſſue that *H.* his Br. ſhould be Earl, to him and the heirs males of his body: And in ſuch caſe by the attainder of *T.* of treaſon, *H.* was after his death Earl of *Northumb.* by force of his Rem'r, and his iſſue enjoy it at this day. So *A. Dudley* was by Q. *El.* created Earl of *Warw.* to him and the heirs males of his body, and for default of ſuch iſſue, that *R.* his brother ſhould be Earl, to him and the heirs males of his body: And *R.* was created Earl of *L.* in tail, with ſuch Limitat. to his brother *A.* and many other precedents are to the ſame effect. As to the 2d point it was reſolved, that altho' this dignity be within the Stat. *de donis conditional'*, yet by the attainder of (*c*) treaſon if the Stat. of 26*H.*8. had not been made, this dignity had been forfeited by force of a Condit. in law *tacite* annexed to the eſtate of the dignity: For thoſe who are Earls have an office of great truſt and confidence, and are created to 2 purpoſes; (*d*) 1. *Ad conſulend' regi temp' pacis.* 2. *Ad defendend' regem & patr' temp' belli:* And therefore Antiquity hath given them 2 enſigns to reſemble theſe 2 duties; for 1ſt, their head is adorned with a cap of honour and coronet, and their body with a robe in reſemblance of counſel. 2. They are girt with a ſword, in reſemblance that they ſhould be faithful and loyal to defend their Prince and Country. And of both theſe *Bracton* ſpeaks, *lib.* 1. *c.*8. (*e*) *Comites, viz. ſive a comitat' ſive a ſocietat' nomen ſumpſer', qui etiam dici poſſunt conſules a conſulendo; reges enim tales ſibi aſſociant, ad conſulendum & regend' populum Dei, ordinantes eos in magno honore & poteſtate, & nomine, quando*

(*a*) 9Co.124.b.

(*b*) 6 Co. 52.b. Stile 222. Hob. 61. Moor 767.

(*c*) 3 Inſt. 19. 1 Jones 76. Lane 46. Godb. 325. Sawy. Argument in Quo Warranto 34.

(*d*) 12 Co. 98.

(*e*) 9Co.49.a.

quando accingunt gladiis, i. ringis gladior'. By which appear theſe 2 ends, counſel and defence. Then when ſuch perſon againſt the duty and end of his dignity, takes not only counſel, but arms alſo againſt the K. to deſtroy him, and therefore is attainted by due courſe of law, by that he hath forfeit. his dignity by a Condit. *tacite* annexed to the eſtate of the dignity; in the ſame manner, as if Ten't in tail of an (*a*) office of truſt miſuſe it, or uſe it not, theſe are forfeitures of ſuch offices for ever by force of a Condit. in law *tacite* annexed to their eſtates, as it is held in 11 *E.*4.1. 20 *E.*4.5,6. 39 *H.*6.32. 22 *Aſſ.*34. 8 *H.*4.18. 2 *H.*7.11. 14 *H.*7.1. *Pl.Com.*370. *Nevil's* Caſe. As to the 3d point it was reſolved by all the Juſt. if that it had not been forfeited by the com. law, that by the Stat. of 26 *H.*8.*c.*13. the ſaid *Charles* had forfeited the dignity. For the words of the Act are, *ſhall loſe and forfeit to the King's Highneſs, his heirs and ſucceſſors, all ſuch lands, tenements and hereditaments, which any ſuch offender ſhall have of any eſtate of Inherit. in uſe or poſſeſſion, by any right, title or means:* And this dignity was an hereditament, and therein the ſaid *Charles* had an eſtate of Inherit. And where the Stat. ſaith (*in uſe or poſſeſſ.*) that was to expreſs, that all manner of inheritances ſhould be forfeited for treaſon, and in their judgments all inheritances were either in uſe or in poſſeſſion, (for that Act doth not extend to rights or titles) and it was neceſſary to add this word *Uſe*, for by the com. law an uſe, which was but a truſt and confidence, was not forfeited by attainder of treaſon. And when an uſe was expreſſed, then the Addit. of Poſſeſſ. was neceſſary for otherwiſe nothing but uſes would be given to the K. And therefore it was reſolved, that an annuity of inheritance ſhall be forfeited by force of this Act by Attaind. of treaſon, for that is an hereditament; and that was the 1ſt general Act by which an eſtate-tail was forfeited to the K. for treaſon. At the com. law before the Stat. *de donis conditionalib'*, if lands had been given to one and the heirs males of his body, in that caſe as well the donor as the donee had a poſſibility, the donor of a reverter, if the donee died without iſſue male, and the donee to have power to alien, if he had iſſue male. For if the donee had iſſue a ſon, now to ſome intent the Condit. was perform'd, for *poſt prolem ſuſcitatam*, he had *poteſtatem alienandi*; and the reaſon thereof was, becauſe he having a fee-ſimple, and having iſſue, his iſſue could not avoid the alienation, becauſe he claimed fee-ſimple, whereof his Father might bar him. And altho' the Donee and his Iſſue alſo after ſuch Alienation died without Iſſue, yet the Donor, who had but a Poſſibility or Condition in Law, and no Reverſion or Eſtate in him, could not recover the Land againſt the Alienee; for by the having of Iſſue the Condition was performed as to this Intent, *ſcil.* to make an Alienation. But in the ſame Caſe at the Common Law, if the Donee had Iſſue

(*a*) 2 Rol. 155.

2 Rol. Rep. 341. Lane 46. Godb. 303. 4 Inſt. 356.

Co. Lit. 19. a.

iſſue a ſon and died, yet the ſon had not an abſolute fee-ſimple in him, but only the ſame power which his father had, *ſc.* to alien; and if ſuch iſſue died without iſſue, and without any Alienat. made, the land ſhould revert to the donor, as *Brian* held, 12 *E.* 4. 3. & 18 *E.* 3. 46. by *Huſe*. For a collater. heir who is not heir of the body of the donee is not within the form of the gift, the Limitat. being to the heirs males of the body of the donee, which Limitat. of heirs males of the body, doth exclude all collateral heirs to inherit: But the policy of the law was, to give power after iſſue to alien for 2 cauſes; one that the eſtate of a Purchaſ. ſhould not be avoided by a remote poſſibility, *ſc.* if the donee and his iſſue alſo ſhould die without iſſue: 2. If he having a fee-ſimple ſhould not have power after iſſue to alien, it would be in a manner a perpetuity. and a reſtraint of Alienat. for ever, which the com. law for many cauſes will not ſuffer, and in 4 *H.* 3. *Formedon* 64. it is adjudged, that where lands were given in frank-marriage, and the donees had iſſue and died, and afterwards the iſſue died without iſſue; that his collateral heir ſhould not inherit; for the donor recovered the land in a *Formed.* in the *Reverter*; and in the ſaid caſe if the donee had iſſue 2 ſons, and died, and the elder ſon had iſſue a Daught. and died without iſſue male, the young. ſon ſhould inherit a fee-ſimple, *per form' doni* at the com. law: So if lands were given to one, and to his heirs females of his Body, and he had iſſue a ſon and a daughter, and died, the daughter ſhould inherit an eſtate in fee-ſimple *per form' doni*. And mark well the Stat. *de donis*, &c. doth not create an eſtate-tail, but of ſuch eſtate as was fee-ſimple conditional, and deſcendable in ſuch form at the com. law, as now by the Stat. the land ſhall deſcend; and the only miſchief was, that the donee after iſſue had power to alien in diſinheriſon of his iſſues, and bar of the Rev'n: But it doth not appear by the ſaid Act, that altho' the donee had iſſue, yet he had not an abſolute fee, ſo that the collateral heir of the iſſue ſhould inherit; for the words of the Act are, *Et præterea cum deficiente exitu de hujuſm' feoffatis, tenement' ſic datum ad donator' vel ad ejus hæred' reverti debuit per form' in carta de dono hujuſm' expreſſam, licet exitus, ſi quis fuerit, obiiſſet, per factum tamen & feoffamentum, &c. excluſi fuerunt hucuſq; de reverſione, &c.* by which it appears, that if the heir in Tail dies without iſſue, and without any Alienat. made, that the land ſhall revert, and by conſequence ſhall not deſcend to the collater. heir 30 *E.* 1. *Formed.* 65. If the donee in tail aliened before the Stat. and afterwards had iſſue, and then the iſſue died without iſſue, the land ſhould revert: For he had not power to alien at the time of the Alienat. but ſuch Alienat. ſhould bar the iſſue, as it is adjudged in 19 *E.* 2. *Formed.* 61. becauſe he claimed fee-ſimple. *N. B.* Theſe Rules yet hold place in caſe of a grant of an annuity to one and the heirs males of his body, and all other Inheritt. which are not within the Stat. *de donis conditional'*.

Co. Lit. 19. a.

1 Rol. 841.

Co. Lit. 19. a.

Co. Lit. 19. a. 20. a. 1 Rol. 837.

Hill.

Hill. 2 Jacobi.

Penal Statutes.

Dav. 69. b. Hard. 448. 1 Siderf. 6. 3 Inſt. 186, 187.

THIS Term upon Letters directed to the Judges to have their Reſolution concerning the Validity of a Grant made by Queen *Elizabeth*, under the Great Seal, of the Penalty and Benefit of a penal Statute, with Power to diſpenſe with the ſaid Statute, and to make a Warrant to the Lord Chancellor, or Keeper of the Great Seal, to make as many Diſpenſations, and to whom he pleaſed; and on great Conſideration and Deliberation by all the Judges of *England*, it was reſolved, that the ſaid Grant was utterly againſt Law. And in this Caſe theſe Points were reſolved, That when a Stat. is made by Parliament for the Good of the Commonwealth, the King cannot give the Penalty, Benefit and Diſpenſation of ſuch Act to any Subject; or give Power to any Subject to diſpenſe with it, and to make a Warrant to the Great Seal for Licences in ſuch Caſe to be made: For when a Stat. is made *pro bono publico*, and the King (as the Head of the Commonwealth, and the Fountain of Juſtice and Mercy) is by the whole Realm truſted with it, this Confidence and Truſt is ſo inſeparably joined and annexed to the Royal Perſon of the King in ſo high a Point of Sovereignty, that he cannot transfer it to the Diſpoſition or Power of any private Perſon, or to any private Uſe; for it was committed to the King by all his Subjects for the Good of the Commonwealth. And if he may grant the Penalty of one Act, he may grant the Penalty of two, and ſo *in infinitum*. And ſuch Grant of any penal law was never ſeen in our Books, nor before this Age was any ſuch Grant ever made; but it is true, that the K. may (upon ſome Cauſe moving him in Reſpect of Time, Place, or Perſon, &c.) make a *Non obſtante*

to

to diſpenſe with any particular perſon, that he ſhall not incur the Penalty of the Stat. and therewith agree our Books. But the King cannot commit the Sword of his Juſtice, or the Oil of his Mercy concerning any penal Stat. to any Subject, as is aforeſaid. It was alſo reſolved, That the Penalty of an Act of Parliament cannot be levied by any Grant of the K. but only according to the purport and purview of the Act; for the Act which gives the penalty ought to be followed only in the proſecution and levying thereof; and great inconveniencies would thereon follow, if penal Laws ſhould be transferred to Subjects, 1. Juſtice thereby would be ſcandalized; for when ſuch forfeitures are granted, or promiſed to be granted before they are recovered, it is the cauſe of a more violent and undue Proceeding. 2. When it is publickly known that the forfeiture and penalty of the Act is granted, it is a great Cauſe that the Act it ſelf is not executed; for the Judge and Jurors, and every other is thereby diſcouraged. 3. It will thereupon follow, That no Penalty will by any Act of Parliament be given to the K. but imited to ſuch Uſes with which the K. cannot diſpenſe. And hereupon divers who had ſued to have the Benefit of certain penal laws, were upon this Reſolution denied. And the Certificate of all the Judges of *England* concerning ſuch Grants of penal laws, and Statutes was in theſe words. *May it pleaſe your Lordſhips, we have (as we are required by your honourab. letters of the 21 of Oct. laſt) conferred and conſidered amongſt ourſelves (calling to us his Majeſty's Counſel learned) of ſuch matters as were thereby referred unto us, and have thereupon with one conſent reſolved for law and conveniency as followeth. 1ſt, That the Proſecut. and Execut. of any penal Stat. cannot be granted to any, for that the Act being made by the policy and wiſdom of the Parliam. for the general good of the whole realm, and of truſt committed to the K. as to the head of Juſtice and of the weal publick, the ſame cannot by law be transferred over to any Subject; neither can any penal Stat. be proſecuted or executed by his Majeſty's Grant, in other manner or order of proceeding, than by the Act it ſelf is provided and preſcribed: Neither do we find any ſuch Grants to any in former ages: And of late years, upon doubt conceived, that penal laws might be ſought to be granted over, ſome Parliaments have forborn to give forfeitures to the Crown, and have diſpoſed thereof to the Relief of the Poor, and other charitable Uſes, which cannot be granted or employed otherwiſe. We are alſo of Opinion, That it is inconvenient, That the Forfeitures upon penal Laws, or others of like Nature, ſhould be granted to any, before the ſame be recovered or veſted in his Majeſty by due and lawful proceeding; for that in our experience*

3 Inſt. 154.

Cro. Arg. 109.

2 Inſt. 48.

2 Inſt. 229.

Cr. Arg. 109.

perience it maketh the more violent and undue Proceeding againſt the Subject, to the Scandal of Juſtice, and the Offence of many. But if by the Induſtry or Diligence of any, there accrueth any Benefit to his Majeſty, after the Recovery, ſuch have been rewarded out of the ſame at the King's good Pleaſure, &c. Dated 8 *Novembr.* 1604. And to this Letter all the Judges of *England* ſet their Hands.

Mich.

Mich. 5 Jacobi.

LILLINGSTON's *Case.*

John Duncomb brought an Action of Debt againſt *Tho. Lillingſton*, (which began in the Common Pleas, *Paſc.* 4. *Jacobi*, *rot.* 704.) for 195 *l.* and declared, That one *Fauſtin Dixwell*, and *Mary* his Wife, and the ſaid *Tho. Lillingſton*, and *Mary* his Wife, were ſeiſed of the Rectory of *Lillingſton* in the County of *Bedford* in Fee, and *Mi.* 31 *El.* thereof levied a Fine to *Papworth* and *Chambers*, and the Heirs of *Papworth*, who granted and rendred a Rent-charge of 30 *l.* out of the ſaid Rectory to the ſaid *Fauſtin* for his Life, to begin after the Death of *Mary* his Wife, the Rent yearly to be paid at the Feaſts of St. *Michael* the *Archangel*, and the *Annunciation*: *Proviſo ſemper, quod prædict' Conceſſio prædict' annualis redditus* 30 l. *non aliqualit' ſe extendat ad onerand' perſonas dict' Papworth & Chambers ſed tantummodo ad onerand' dict' Rectoriam tota vita ipſius Fauſtini*; and rendred the ſaid Rectory to *Fauſtin* and *Mary* during the Life of *Mary*, the Remainder to *Thomas Lillingſton* and *Mary* his Wife in Tail, the Remainder to the Right Heirs of *Lillingſton*. 2 *Octob.* 33 *Eliz.* the ſaid *Fauſtin* before Sir *Chriſt. Wray*, Chief Juſtice, acknowledged a Recogniſance of 500 *l.* in the Nature of a Statute Staple, according to the Statute of 23 *H.* 8. to *Duncomb* now Plaintiff: 20 *Aug.* 39 *Eliz.* *Mary* the Wife of *Fauſtin* died, after whoſe Death *Lillingſton* and *Mary* his Wife entred into the ſaid Rectory, and were thereof ſeiſed in Tail, the Remainder in Fee to *Lillingſton*. The ſaid *Fauſtin* 15 *Aprilis* 40 *El.* by his Deed releaſed to the ſaid *Lillingſton* and his Heirs the ſaid Rent of 30 *l. per ann.* The Plaintiff 21 *Apr.* 40 *Eliz.* ſued out of the Chancery a *Certiorari* to the Clerk of the Statutes, *&c.* whereupon the ſaid Recogniſance in the Nature of a Stat. was certified; and ſued forth an *Extent*, by which the ſaid Rent was extended, and upon *Liberate* delivered to the Plaintiff, the Plaintiff, for ſix Years and a half ending at the Feaſt of St. *Michael* the *Archang' an.* 2 *Jacobi*, brought an Action of Debt againſt *Lillingſton*, who all that time was Ten't of the Land, and averred the Life of *Fauſtin*. And upon all this Caſe two Queſtions were moved; 1. Whether this Rent of 30 *l. per an.* being

4 Leon. 235, 239.

32 H. 8. cap. 6.

extinct by the ſaid Releaſe, had ſuch Eſſence as to the Plaintiff the Conuſee, that it might be extended and delivered to the Pl. 2. Admitting that it might be extended and delivered to the Pl. whether the Pl. as this Caſe is, could maintain an Action of Debt. As to the firſt it was objected, that this Recognizance is in the Nature of a Statute-Staple, and the Stat. of 27 *E.* 3. *c.* 9. to which the Stat. of 23 *H.* 8. *c.* 6. refers, gives Power to the Mayors of the Staple to take Recogniz. of Debts, *&c.* and that, on Certificate of ſuch Recognizance into the Chancery, a Writ be ſent to arreſt the Bodies of the Debtors, without letting 'em to Mainprize, and to ſeiſe their Lands and Tenements, Goods and Chattels, and that the Writ be return'd into the Chancery with the Certificate of the Value of the ſaid Lands and Tenements, Goods and Chattels, and that thereon Execution be made from Time to Time in the ſame Manner as is contained in the Stat. Merchant: Upon which words it was argued, that Rent extinct before Execution ſued was not within the ſaid Words, *ſc.* to ſeize the Lands and Tenements of the ſaid Debtors. For at the Time of the Execut. ſued the Debtor had not the Rent, but it was utterly extinct, and gone by the ſaid Releaſe. 2. The Writ of *Extent* is to extend *omnia terras & catalla ipſius Fauſtini, & in manus dict. nuper Reginæ ſeiſiri faceret, ut ea præfat. Johanni liberari faciat*; and for as much as the Rent was extinct before the ſaid Writ of *Extent*, it is not *in eſſe*, or to be extended, or taken into the K's Hands, or to be delivered to the Pl. 3. It would be againſt Reaſon, that the Freehold of the Rent being extinct, the Plaint ſhould have Execut. of it, and thereby to have but a Chattel: and the Opinion of 3 & 4 *Phil. & Ma.* (*a*) *Dyer fo.* was cited, where the Opinion is, that a Rent extinct cannot be extended, *&c.* To which it was anſwered and reſolved, that to ſome Purpoſes by the Com. Law a Rent extinct ſhall be ſaid in *eſſe* (*b*) as to a Stranger; and therefore, if the Husband ſeiſed of a Rent in Fee, releaſes the Rent to the Tenant of the Land, and afterwards the Husband dies, now the Wife ſhall be (*c*) endow'd of this Rent ſo extinct, and ſhall have a *Writ of Dower*. The Words of which Writ are, *Præcipe A. qd' juſte reddat. B. tertiam partem* 30 *libr' reddit'*: and the *Writ of Dower, unde nihil habet* is, *Præcipe A. qd' juſte reddat B. &c. rationabilem dotem ſuam quæ ei contingit de libero tenemento qd' fuit, &c.* and ſhe ſhall have Grand *Cape*, or a Petit *Cape*, as her Caſe requires, to ſeiſe the Rent into the King's Hands; for *quoad petentem*, it is *in eſſe*, altho' in Truth the Rent is extinct: and ſee in the Lord *Aburgaveny*'s Caſe, *fo.* 78. (*d*) in the ſixth Part of my *Reports*, many Caſes where a Thing extinct ſhall be ſaid *in eſſe* (*e*) for the Benefit of a Stranger. 2. It was obſerved, That the ſaid Act of (*f*) 23 *H.* 8. *cap.* 6. (by Force of which the ſaid Recognizance in the Caſe at Bar was taken) for the Execution refers to the Statute Staple and Statute Merchant, *ſcil.* the ſaid Act of 27 *E.* 3. refers to Statute Mer-

(*a*) Dy 205 p. 7. Poſtea 38. b.

(*b*) 1 Leon. 235, 239. 1 Jones 62. 2 Rol. 471. Hob. 165.

(*c*) 6 Co. 79. a. Co. Lit. 32. a.

(*d*) 6 Co. 79. a.

(*e*) 1 Jones 62.

(*f*) 3 Co. 12. a.

chant, *de an.* 13 (*a*) *E.* 1. The words of which Stat. are, (*And when the Lands of the Debtor be delivered to the Merchant, he ſhall have ſeiſin of all the lands that were in the hands of the Debtor, the day of the recognizance made, in whoſe hands ſoever that they come afterwards, by Feoff. or otherwiſe.*) Then preſently by the recognizance acknowledged the rent was bound, and ſhall be extended by the expreſs purview of the Stat. in whoſe hand ſoever it ſhall come, and no more than the releaſe of *Fauſtin* ſhall hurt after execution had by the conuſee, no more ſhall it before execution, for the rent was liable to execution preſently, by the Recognizance acknowledged. So if a man hath judgm. to recover debt or damages, the rent which he hath of any eſtate of freehold is thereby lyable to it; and therefore altho' after Judgm. he releaſes it, the Pl. ſhall have execution of a moiety by *Elegit*, which is given by the Stat. of *Weſt.* 1. *c.* 18. the words of which Stat. are; *Liberent ei medietatem terræ debitoris*; which by conſtruction of law, is of all which he had at the time of the judgm. given, or at any time after. And in *Cheny*'s Caſe, 27 *El.* in the court of wards it was reſolved, That where he in the reverſion did enfeoff leſſee for years to the uſe of others, that altho' the leaſe would be ſurrendred and extinct by the Com. Law, yet by the (*b*) ſaving of the Stat. of 27 *H.* 8. of uſes, the term of the feoffee was ſaved. Alſo in the ſame court 28 *El.* in one *Iſed*'s caſe it was reſolved, that where the Lord did enfeoff the copyholder to the uſe of others, that the copyhold eſtate by the ſaving of the ſaid act was preſerved. So in caſe at bar, by the act *de mercatoribus*, all the lands (which includes all hereditaments extendable) which the debtor had at the day of the recognizance acknowledged, ſhall be delivered; which act doth preſerve the rent to be *in eſſe* as to the execution of the conuſee. And the caſe in 21 (*c*) *E.* 3. 18. *b.* and (*d*) *F.N.B.* 223. *I.* is, if L. and Ten't Abbot be, and the L. releaſes to the abbot his Seigniory, it is *Mortmain* by the Stat. *de Religioſis*, and the Ld. paramount ſhall have it by force of the ſaid act, and yet the words of the act are *Dominus feodi taliter alienati* ſhall have it, and by the releaſe it is extinct, and yet as to the L. paramount it is by conſtruction of the act *in eſſe*, and he ſhall have it. 3. It would be hard, That the conuſor by his own act ſhould bar the Conuſee, who is a ſtranger to the Releaſe, of his Execution of the Rent, which perhaps was a chief cauſe of taking of the ſaid recogniz. to have execut. of it; and it is more reaſon to relieve the conuſee in whom no fault or lacheſs was, than the terretenant, who ought not to be miſconuſant of ſuch charges of record. 4. Every execut. hath in judgm. of law relation and retroſpect to the (*e*) judgm. as appears in *Shelly*'s caſe in the firſt part of my Reports. And the ſaid caſe of *Dower*, and the grand *Cape*, and *Petit Cape* thereupon, and the Statute *de Mercatoribus*, which binds all the Land of the Conuſor

(*a*) 3 Co. 12. a.

(*b*) Moor 196. a. 2 And. 192, 193. Winch. 106, 109, 117. O. Bendl. 57. Antea 19. b. 20. a. Raym. 148.

(*c*) Fitz. Mortm. 12.

(*d*) 3 Co. 31. a.

(*e*) Co. 34. b. 106. b. 10 Co. 38. a.

that he had the Day of the Recognizance acknowledged in whoſe Hands ſoever it ſhall come, give a full and ſufficient anſwer to all the ſaid Objections. And the Opinion of a Serjeant *Obiter* in 3 (*a*) & 4 *Ph. & Mar.* was utterly denied. As to the ſecond Point, it was reſolved by the whole Court, That the Action of Debt (*b*) lies not ſo long as the *Extent* endures, for ſo long hath the Rent Continuance, altho' the Freehold thereof be determined. And all that, as to this Point, which was reſolved in *Ognel's* Caſe in the 4th Part of my *Reports*, *fol.* 49. was affirmed to be good Law: and 9 *H.* 7. 17. *a.* That if the Lord grants his Seigniory for Years; the Grantee during the Years ſhall not have an Action of Debt. And it was alſo reſolved, That altho' there is an expreſs (*c*) *Proviſo*, that the Perſon ſhall not be charged in a Writ of *Annuity*, yet in ſuch Caſe after the Annuity or Rent determined, the Perſon of the Terretenant ſhall be charged in Debt for the Arrearages, becauſe the Annuity is determined, and he hath no other Remedy, as it is held in *Ognel's* Caſe, and 6 *El. Dy.* (*d*) 227. there cited. It was alſo reſolved, That if a Man grants a Rentcharge for Life out of his Land, and the Rent is behind; and the Grantor enfeoffs *A.* and the Rent is behind in his Time; and afterwards *A.* enfeoffs *B.* and the Rent is behind in his Time, and afterwards the Grantee dies, his Executors ſhall have an Action of Debt againſt each of them, for the Rent (*e*) behind in his Time. For (*f*) *Qui ſentit commodum ſentire debet & onus* as it is alſo held in *Ognel's* Caſe.

(*a*) Ant. 37. b. Dy. 205 pl. 7.
(*b*) 1 Rol. 596.
(*c*) 6 Co 41. b.
(*d*) Co. Lit. 146. b. 6 Co. 41. b.
(*e*) 4 Co. 49. b. Co. Lit. 162. b.
(*f*) 1 Co. 99. a. 5 Co. 24. b. 100. a. Co. Lit. 231. a. 2 Inſt. 489. Cart. 142. 3 Keb. 592. Plowd. 249.

Mich.

Mich. 5 Jacobi.

BEDELL's *Case.*

Hill. 1 *Jacobi Rot.* 375. in the King's Bench. Between *Eliz. Bedell* Plaintiff in Debt, and *Michael* (*a*) *Bedell* Defendant, the Case was such. *Rob. Bedell* seised of a Messuage, &c. in *Iver* and *Langley* in the County of *Bucks* in Fee, by the said *El.* his Wife had Issue 3 Sons; *James* was the 2d Son, and *Michael* the Defend. the 3d. The said *Robert* by Indenture Tripartite, between him and his Wife of the first Part; the said *James* his second Son of the second Part; and the said *Michael* his 3d Son of the 3d Part, in Consideration of the natural Affection and paternal Love which he had to the said *James* and *Michael*, and for their better Preferment and Advancement, and to the Intent that the same Tenements should continue in his Name and Blood, covenanted by the said Indenture, that he and his Heirs would stand seised of the said Tenements to the Use of himself for Life; and after his decease to the Use of the said *Elizabeth* his Wife for Life, and after their Deceases, of one Moiety to the Use of the said *James* in Tail, and of the other Moiety to the Use of the said *Michael* in Tail, &c. and afterwards *Robert* died, and all this Matter was found by special Verdict. And the sole Question was, whether (as this Case is) any use arose to *Elizabeth* his Wife or not. And it was objected, that the Wife was not within the Considerations which were expressed in the Indenture, and no other Consideration can be averred than is contained in the Deed, for the whole Substance of the Agreement of the Parties was referred to the Deed, and the whole ought to appear therein, and nothing is left to the Word or Averment of the Parties. To which it was answered and resolved, That a Consideration which stands with the Deed, and is not repugnant to it, might be well (*b*) averred, as it is adjudged in 3 & 4 *Phil. & Mar. Dyer* 146. in (*c*) *Viller's* Case; which see in the first Part of my *Reports* in *Mildway's* Case, 176. *a.* 2. Admitting that other Consideration than what is expressed in the Deed could not be averred, yet in this Case there is an express Consideration: For when he limits it to the Use of his Wife for Term of her Life, that imports a sufficient Consideration in it self; and there needs not any Averment; for (*e*) *manifesta proba-*

(*a*) 2 Rol. 782, 785. 11 Co. 24. b. 25. a. Jenk. Cen. 289. 1 Jones 419. 2 Jon. 105. March 50, 51.

(*b*) 2 Rol. 790. 1 Co. 176. a. 2 Co. 76. a. 5 Co. 26. a. b. 68. b. 5 Co. 0. a. b. 11 Co. 25. a. Cr. Jac. 29. 1 Rol. Rep. 42. 2 Rol. Rep. 362, 363. Lane 119. 1 And. 313. 1 Brownl. 191. Moor 192. Dy. 147. pl. 72, 73. 1 Vent. 368.

(*c*) 4 Co. 3. b. 11 Co. 25. a. 2 And. 47. N. Bendl. 39. Benl. in Kelw. 208. 2 Rol. 781. 2 Rol. Rep. 68. 2 Inst. 672. Ow. 33. Raym. 47. 50. Cart. 140. Palm. 214. 215, 506, 507. Moor 93, 505.

(*d*) 11 Co. 24. b. 25. a. 2 Rol. 782, 785. Jenk. Cent. 289. Cro. Jac. 168, 624, 625.

(*e*) 11 Co. 25. a.

probatione non indigent, as in 13 *H.* 4. 17. *a.* where the Stat. *Weſtm.* 1. *cap.* 38. ordains, That the Writ of Aſſiſe of *Mortdaunceſter* have the Term of Limitations from the Coronation of King *H.* 3. there it is held, That if an Infant brings an Aſſiſe of *Mortdaunceſter* of the Poſſeſſion of his Father or Mother, he (*a*) need not alledge, that it was after the Coronation of King *H.* 3. for it appears. So if the Father, Tenant by Knight's Service enfeoffs his Son and Heir apparent within Age, it need not be averred to be by (*b*) Colluſion, for it is apparent. *Wimbiſh*'s Caſe, *Pl. Com.* and 27 *H.* 8. *Dacre*'s Caſe. 33 *H.* 6. 14. 33 *H.* 6. 32. & *quædam tacita habentur pro expreſſis.* So if I covenant that in Conſideration of paternal Love and Affection to my eldeſt Son, to ſtand ſeiſed to the Uſe of my eldeſt Son for Life or in Tail, and afterwards to the Uſe of my ſecond Son in Tail, and afterwards to the Uſe of ſuch one my Couſin in Fee, altho' the Conſideration expreſſed in Words reſpects only the eldeſt Son, yet the Conſideration apparent in the Deed, in limiting the Uſe to my ſecond Son, or my Couſin, is ſufficient in Law to raiſe the Uſe. So if I covenant to ſtand ſeiſed to the Uſe of my Wife, Son, (*c*) or Couſin, it ſhall well raiſe an uſe without any expreſs Words of Conſideration: For ſufficient Conſideration appears, and Paternal Love and Affection appear. But if the Father by Deed indented in Conſiderat. of an * Hundred Pounds paid by the Son, covenants to ſtand ſeiſed to the Uſe of his Son, there no Uſe ſhall be raiſed to the Son, unleſs the Deed be enrolled, by the Stat. of 27 (*d*) *H.* 8. *cap.* 10. For it is in the Nature of a Bargain and Sale, and there (*e*) *expreſſum facit ceſſare tacitum.* And afterwards on this Judgment a Writ of Error was brought the ſame Term on the (*f*) new Stat. and by all the Juſtices of the Common Pleas, and Barons of the Exchequer, the Judgment was affirmed. *Quod nota bene.*

(*a*) 8 Co. 126. b. 9 Co. 54. b. Doct. pl. 86. Br. Mortdan. 8.

(*b*) Plow. 49. b.

(*c*) 1 Rol. Re. 68. Plowd. 304. a. 1 And. 79. Cro. Jac. 624. Cro. Car. 530. 8 Co. 94. a. 1 Jones 419. * 8 Co. 94. a. 11 Co. 24. b. 25. a 1 Vent. 138. Cart. 138, 146. Palm. 214. 215. Winch. 59, 60.

(*d*) 27 H. 8. c. 16.

(*e*) Co. Lit. 183. b. 5 Co. 97. a. 11 Co. 24. b. Godb. 449. Latch. 265. Raymond 46. Cart. 146.

(*f*) 27 El. c. 8.

Mich.

Mich. 5 Jacobi.

BERESFORD's *Case.*

IN the Court of Wards between *James Beresford* Relator, and *Thomas Beresford*, and others Defendants, the Case was briefly such; *Aden Beresford* being seised of the Manors of *Fennibently*, *Bircham*, and other Lands in Fee, by his Deed, 14 *Junii*, 40 *El.* did enfeoff *William Fleetwood*, and others in Fee to the Uses of certain Indentures bearing Date the 20th of *Novemb.* 34 *Eliz. scil.* to the Use of the *Aden* the Father, *for Term of his Life, and after his decease to the Use of* George Beresford, *Son and Heir apparent of the said* Aden, *and the Heirs Males of his Body lawfully begotten; and for default of such Issue to the Use of* Aden Beresford, *Son of* James Beresford, *and of the Heirs Males of the said* Aden, *Son of the said* James, *lawfully begotten, and for default of such Issue to the Use of the Heirs Males of the Body of the said* James Beresford *lawfully begotten; and for default of such Issue, to the Use of* Thomas Beresford, *third Son of the said* Aden, *and of the Heirs Males of the Body of the said* Thomas, *lawfully begotten; and for default of such Issue, to the Use of* Humph. Beresford, *fourth Son of the said* Aden, *and of the Heirs Males of his Body, lawfully begotten, with divers Remainders over, and with Remainder to the Heirs Females of the Body of* George, *and so of* Aden, *the Son of* James, *lawfully begotten*, &c. *with the Remainder to the right Heirs of* Aden *the Father for ever.* And the only Question of the Case was, What Estate *Aden* the Son of *James* had? and this Case was twice argued before the two Ch. Justices, and Ch. Baron, at *Serj. Inn.* And it was objected, That *Aden* the Son of *James* had not Fee-tail but Fee-simple; for the Limitation to him is, *To the Use of* Aden, *and of the Heirs Males of the said* Aden *lawfully begotten*; and here want these Words (*of the Body*) of the said *Aden*, so that now the Limitation is in effect, *only to the Use of* Aden, *and the Heirs Males of the said*

Cr. Jac. 448. 591. 2 Rol. Rep. 196, 217. Lit. Rep. 320, 347. Hutt. 85.

Aden, for the ſubſequent words *(lawfully begotten)* are implied; for every Heir ought to be lawfully begotten. And a limitation to one, and to his heirs males, is without queſtion a fee-ſimple. And a Judgm. in the K's bench between (*a*) *Abraham* and *Trigg*, *Hill.* 38 *El. rot.* 739. was ſtrongly urged, where a feoffm. was made to the uſes of certain indentures (as this caſe is) where one limitat. was, *ad opus & uſum Gabrielis Dormer & hæredum maſculor ſuor' legitime procreator' & pro defectu talis exitus*, to the uſe of divers others in tail in remainder: and upon argum. at the bar and bench, it was adjudged, That *Gabriel* had a fee-ſimple; for it is not limited of what body the heirs males ſhould be begotten, but his intent was, *qd' ſinguli hæredes ſui maſculi* ſhould inherit, which intent did not ſtand with the rule of Law; and altho' a remainder be limited over, which could not be upon a fee-ſimple, yet that could not againſt the rule of law make words of fee-ſimple to be converted to an eſtate-tail. And they concluded with *Litt. fo. 6. b.* that the reaſon wherefore when lands are given to one and his heirs males, or females, it is a fee-ſimple, is, becauſe it is not limited by the gift of (*b*) what body the iſſue male or female ſhall be begotten and ſo cannot in any manner be taken by the equity of the Stat. *de donis conditionalibus*, and therefore it is a fee-ſimple. So in the caſe at bar; and therewith agrees 8 *E.* 3. 49. where lands were given to one, *& hæredibus ſuis legitimis*, the ſame is fee-ſimple, which is all one with a limitat. to one, *& hæredibus ſuis legitime procreatis*. But it was anſwered and reſolved by the ſaid Ch. Juſtices and Ch. Baron, (*c*) that the ſaid *Aden* ſon of the ſaid *J.* had an eſtate-tail, by which all the remainders over were lawfully veſted: For it was agreed that to an eſtate in tail is requiſite in all gifts and limitations of uſes, that the heirs be limited to be procreated or begotten on ſome Body in certain, either by expreſs words, or by words which tantamount (*d*) for theſe preciſe words *(de corpore)* are not neceſſ. to the creation of an Eſtate-tail, ſo long as there are words which are equivalent; as in (*e*) 5 *H.* 5. 6. *a. b.* where the gift was *Dedi unum meſuag. R. & K. uxor' ejus & hæredib' eor' & aliis hæredib. dict' R. ſi dict. hæred' de R. & K. exeuntes obierint ſine hæredib' de ſe*. In that caſe theſe words *(de corpore)* are omitted, and yet it was adjudged a good eſtate-tail, for there are words which are equivalent; for the gift in effect is, to the Husb. and Wife, and to the heirs of the husb. and wife begot' or of the ſaid *R. & K. exeunt.* or *hæredib' de ſe*, and all this is by force of this preposition (*de*) and (iſſuing.) And in (*f*) 12 *H.* 4. *brev.* land was given to one, *& hæredib' quos ſibi contigerit habere de uxor' ſua*, here wanted words (*de corpore*) yet becauſe it doth amount to as much, it is adjudged an eſtate-tail. And 3 *Edw.* 3. *Brev.* 743. (*g*) Land is given to one, *& hæredibus ſuis de prima uxore ſua*, it is a good Eſtate-tail. And it was reſolved, if Land be given to one,

(*a*) Moor 424. Lit. Rep. 287, 347. El. 478. Hut. 86.

(*b*) Lit. Sect. 31. Co. Lit. 27. a.

(*c*) Hutt. 87. Cr. Jac. 448, 591. 2 Siderf. 42.

(*d*) Lit. Rep. 6. 2 Siderf. 73. Cr. El. 40. Cro. Lit. 27. b.

(*e*) Perk. Sect. 169. 2 Rol. Rep. 196. Lit. Rep. 260, 320. Bridgm. 2. Br. Tail 12. Br. Eſtates 62. Fitz. Tail 11. Co. Lit. 20. b. 1 Bulſtr. 222.

(*f*) Cr. Jac. 591. Co. Lit. 20. b.

(*g*) Co. Lit. 20. b.

one, & *hæredibus de ſe exeuntibus*, that it is a good eſtate-tail. And in theſe Caſes, the principal Cauſe is by Force of this Prepoſition (*de*). And divers other Caſes were put, for which Cauſe it was concluded, That either Words (*de corpore*) or which are equivalent, are requiſite to the Creation of an Eſtate-tail. And it was reſolved in the Caſe at Bar, there were Words which were equivalent; for by the Stat. *de donis conditionalibus*, *voluntas donatoris in charta doni ſui manifeſte expreſſa de cætero obſervetur*; and therefore in this Caſe ſuch Conſtruction ſhall be made as will produce 3 Effects, 1. To ſtand with the Rule of Law, 2. With the Intent of the Donor. 3. That all the Parts of the Indenture may ſtand together. And therefore tranſlate the ſaid Limitation to *Aden* into *Latin*, and then the Limitation is, *ad uſum Adeni & hæredum maſculorum de dicto Adeno legitime procreatorum*, or & *hæred' maſculorum legitime procreatorum de dicto Adeno*, which is as much as if he had ſaid, *per dict' Adenum legitime procreat'*; for it is all one in Effect: For this Word (*de*) or (*ex*) coupled with the Word ſubſequent *procreat'* doth appropriate the Heirs Males to be of the Body of *Aden*; for *de Adeno*, or *ex Adeno*, and *de corpore Adeni*, are all one. And that is directly proved by the Judgment in the ſaid Caſe of (*a*) 5 *H.* 5. 6. *a. b.* For there was (*de*) and (*exeunt.*) and here is (*de*) and (*procreat.*) which are all one in Effect. And in the ſaid Caſe of *Abraham* (*b*) and *Trigge* there wanted (*de*). And as to that it was objected, That the Limitation in *Latin* might well be, *ad uſum dicti Adeni*, & *hæredum maſculorum dicti Adeni* (in the Genitive Caſe) *legitime procreat.* and not (*de dicto Adeno*) or if the Limitation be not certain to make an Eſtate-tail, there are Words certain enough to make an Eſtate in Fee. To which it was anſwered and reſolved: 1. It ought to be, *de dicto Adeno*; for otherwiſe it would be againſt the Meaning of the Donor, and all the Remainders over would be void; and always ſuch (*c*) Conſtruction ought to be made, that all the Parts of the Deed may ſtand together, if it may ſtand with the Rule of the Law. 2. The ſubſequent Clauſe is, (*and for Default of ſuch Iſſue*) and Iſſue cannot be of *Aden*, unleſs the Words be (*de dicto Adeno*) and therefore one Clauſe is well explain'd by the other. And according to this Reſolution the Caſe was decreed accordingly. *Vide* 35 (*d*) *Aſſiſe pla.* 14. (*e*) 37 *Aſſ. pla.* 14. (*f*) 39 *Aſſ. pla.* 20. 24 *Edw.* 3. 28. 18 *Edw.* 2. *Brief* 836.

(*a*) Cr. Jac. 591. Perk. Sect. 169. Antea 40. b. 2 Rol Rep. 196. Lit. Rep. 260, 320. Bridgm. 2. Br. eſtates 62. Fitz. tail, 11 Co. Lit. 20. b. 1 Bulſtr. 222.

(*b*) Moor 424. Antea 40. b. Lit. Rep. 287, 347 Cr. El. 478. Hutt. 86.

(*c*) Wing. Max. 238.

(*d*) Fitz. tail 17. Br. eſtates 36. Br. tail 20.

(*e*) 1 Rol. 838. Perk. Sect. 171. Cr. Jac. 591. 37 Aſſ. pl. 15. Br. eſtates 61. Br. tail 21.

(*f*) 39 Aſſ. pl. 20 Br. eſtates 38. Br. tail 23. Fitz. tail 19. Co. Lit. 20. b. 22. a. Cr. El. 153. 313. Owen 148. 1 Ventr. 228. Palm. 33.

Mich.

Mich. 4 Jac.

KENN's *Caſe.*

Cr.Jac.186. Jenk.Cent.289. 1Rol.360. H.3.

IN the Court of Wards between *Thomas Robertſon*, and *Elizabeth* his Wife, Plaintiff, and *Florence* Lady *Stallenge*, Defendant, the Caſe was ſuch. *Chriſtopher Kenn* Eſq; was ſeiſed of the Manor of *Kenn* in the County of *Somerſet*, held by Knights Service *in capite*, and 37 *Hen.* 8. *de facto* took to Wife *Elizabeth Stowel*, and afterward the ſaid *Elizabeth Stowel* had Iſſue *Martha*, Mother of *Elizabeth*, one of the now Plaintiffs; and afterwards 1 & 2 *P.* & *Mar.* in the Court of Audience, between the ſaid *Chriſtopher Kenn* Plaintiff, and *Elizabeth Stowel* Defendant, the Judge there gave Sentence in theſe Words; *Prætenſ. tractat. contract. ſponſalia, & matrimonium, quin verius effigiem matrimonii inter Clr. Kenn, & Eliz. Stowel in minore & ſua impubertatis ætate eorundem aut eorum alterius de fact', habit. contract. & celebrat. fuiſſe & eſſe eoſdemque Chriſtophorum & Eliz. tam tempore contractus, & ſolemnizationis dict' prætenſ. matrimonii, quam etiam continuo poſtea eidem matrimonio prætenſ. & ſolemnizationi ejuſdem, diſſenſiſſe, contraveniſſe, reclamaſſe & reluctaſſe, ac eo prætextu hujuſmodi prætenſ. tractat. contract. ſponſalia, & matrimonium de jure nullum & nulla, irritum & irrita, caſſum & caſſa, invalidum & invalida, & minus efficax & inefficacia, fuiſſe & eſſe, viribuſque juris caruiſſe, carere, & carere debere; necnon antedictos Chriſt. Kenn & Eliz. Stowel, quatenus de facto fuer. ad invicem matrimon. ut prædicitur copulat', ab invicem ſeparand. & divorciand. fore debere pronunciamus, decernimus, & declaramus, eoſq; ſeparamus, & divorciamus, eiſdemque Chriſtophoro & Eliz. licentiam & libertatem ad alia vota convolanda concedimus, tribuimus, & impertimur per hanc ſententiam noſtram definitivam, ſive hoc finale noſtrum decretum, quam ſive quod ferimus & promulgamus in hiis ſcriptis, &c.* And after the ſaid Divorce the ſaid *Chriſtopher Kenn* married and took to Wife *Elizabeth Beckwith.* And afterwards, *anno* 5 *Eliz.* before the Commiſſioners Eccleſiaſtical,

ſiaſtical, the ſaid *E. Beckw.* did libel againſt the ſaid *Ch. Kenn*, that he (before the marriage contracted betwixt 'em) had married with the ſaid *E. Stowel*, whereupon proceſs was awarded againſt the ſaid *E. pro intereſſe*, and on due Examinat. of the cauſe there was a ſentence, that the marriage betwixt the ſaid *Ch. Kenn* and *E. Beckw.* was lawful, and ſentenced 'em *ad exequenda conjugal' obſequia, &c.* And that the ſaid *Ch. Kenn* was never lawfully married to the ſaid *E. Stowel*; and afterwards the ſaid *E. Beckw.* died, after whoſe death the ſaid *Ch. Kenn* married the ſaid *Florence*, by whom he had iſſue one daughter *E.* and died; and *ann.* 36 *El.* it was found by office in the county of *Som.* by force of a *Mandamus*, after the death of the ſaid *Ch. Kenn*, that the ſaid *E. Kenn* was his daughter and heir, and that ſhe was within age, *ſc.* of the age of ten months. The wardſhip and cuſtody of whom the Q. granted to Sir. *N. Stallenge*, and the ſaid *Flor.* then his wife: Whereupon the ſaid *Martha* pretending her ſelf to be daughter and heir to the ſaid *Ch. Kenn*, with her Husb. *Silv. Williams* exhibited their bill in the court of Wards againſt the ſaid Sir *N.* and *Florence*, ſurmiſing that the ſaid *Martha* was daughter and heir of the ſaid *Ch. Kenn* on the body of *E. Stowel* his lawful wife (as ſhe pretended) alledging that they at the time of their marriage, in *an.* 37 *H.* 8. were both of 'em above the age of conſent, and that they did cohabit together 9 or 10 years before the ſaid ſuppoſed divorce, during which Cohabitat. the ſaid *Martha* was gotten betwixt 'em, and prayed leave that the ſaid *Sil.* and *M.* might traverſe the ſaid office. To which the ſaid Sir *N.* and *Flor.* anſwered, and the Pl. examined divers witneſſes, and before Publicat. Sir *N.* died; and thereupon the ſaid *Sil.* and *M.* exhibited a bill of Revivor againſt the ſaid *Flor.* and afterwards *M.* having iſſue *El.* wife of the now Pl. died, after whoſe death the ſaid *T. Robertſon* and *El.* his wife brought a new bill of Revivor to revive the firſt Suit, in which the Witneſſes were examined. And this Caſe was referred to *Fleming* and *Coke* Ch. Juſtices, and to *Tanfield* Ch. Baron, and to *Yelverton* and *Williams* Juſtices, and *Snigg* and *Altham* Barons of the Exchequer. And in this Caſe 3 Queſtions were moved. 1. If againſt the firſt Divorce the Plaintiffs ſhould be received, ſo long as it remain'd in force, to aver, that they did agree and conſent to the marriage; or that they ſhould be concluded by the ſaid Divorce. 2. The ſecond Queſtion was, if they ſhould have a Traverſe to the ſaid Office before an Office found for them. 3. If they ſhould have a Bill of Revivor upon a Bill of Revivor, as this Caſe is, and the Juſtices heard many Arguments before them at ſeveral Days and in ſeveral Terms at Serjeants Inn. And as to the 1ſt it was objected, that it appears by *Litt. lib.* 2. *fol.* 22. and by the Statute of *Merton*, *c.* 6. and 35 *H.* 6. 40, *b. &c.* That the Common Law and Parliaments have taken Notice of the Age of Conſent of the Male to be (*a*) fourteen, and of the Female

(*a*) Lit. Sect. 104 Co. Lit. 79. a. b. 2 Inſt. 90.

male to be 12; and therefore it is triable at the com. law. And if in truth the Husb. and Wife are of age of conſent at the time of the marriage, no divorce after, pretending that they were within age of conſent ſhall conclude the parties or their heirs, but they may prove the contrary at the com. law and chiefly in the caſe at bar, becauſe it concerns inheritance and the true deſcent thereof; *& ſententia contra matrimon' nunquam tranſit in rem judicat'*. 2. Admitting that they were within age of conſent, and after age of conſent they aſſent or cohabit, and have iſſue, altho' a divorce for impuberty and minority of years be had, yet it is but evidence, and ſhall not conclude the parties in any Act'n at the com. law to prove the aſſent, for inaſmuch as the divorce is had for that caſe, and the cauſe is triable by the common law, the divorce ſhall not conclude. And 11*H.*7.27.*a.* was cited, that he who pleads a divorce ought to ſhew the cauſe of the divorce; and if the cauſe be triable at the com. law (as it is in the caſe at bar) there it ſhall not conclude; but if it be a thing not triable at the com. law, as a precontract, profeſſion, *&c.* there it is otherwiſe. But as to that it was reſolved by all the ſaid Juſt. and Barons, that the ſaid ſentence ſhould conclude as long as it remained in force, and that for divers cauſes. 1. The Eccleſiaſtic. (*a*) Judge hath ſentenced the contract and marriage to be void and of no effect, and altho' they were of the age of conſent, yet if the original contract was void, and of no effect, then there was juſt cauſe of divorce. 2. There were words of divorce and ſeparation, *eoſd' divorciamus & ſeparamus*; and gives each of them liberty *ad alia vota convolanda*. 3. If the marriage had been *infra ann. nubiles*, the Eccleſiaſt. Judge is Judge as well of the aſſent as of the firſt contract, and what ſhall be a ſufficient aſſent or not; and altho' the Eccleſiaſtic. Judge ſhews the (*b*) cauſe of his ſentence, yet foraſmuch as he is Judge of the original matter, *ſc.* of the lawfulneſs of the marriage, we will never examine the cauſe whether it be true or not; for of things, (the cognizance whereof belongs to the Eccleſiaſtical Court) we ought to give (*c*) credit to their ſentences, as they give to the Judgm. in our courts. Alſo the rule of their law is, *qd' maſculi quidem puberes, fœminæ viri potentes matrimon' conſentiri poſſunt*; and the Determinat. thereof doth belong to their cognizance. And as to the caſe of 11*H.*7.27.*a.* it is true, That the cauſe of the divorce ought to be ſhewed, becauſe ſome divorces diſſolve the marriage, *ſc. a vinculo matrimonii*, baſtardiſe the iſſue, and bar the wife of her dower, and ſome *a menſa & thoro*, which do not diſſolve the marriage, nor bar the wife of dower, nor baſtardize the iſſue; but in the caſe of Deprivat. the (*d*) cauſe need not be ſhewed, for be it right or wrong, upon cauſe or without cauſe, it ſtands, and every deprivation diſables and removes the Party deprived, as well for one Cauſe as for another, as long as the Deprivation remains

(*a*) Cr Jac. 186.

(*b*) Jenk. Cent. 289.

(*c*) Jenk. Cent. 289. 4 Co. 49 a. 2 Rol. 7. 5 Co. 7 a. Caudry's Caſe. 8 Co. 135 b. 2 Ventr. 43. Cawly 31.

(*d*) 1 Sid. 71, 251.

in force. *Vide* 8 *Ass*. 9 (*a*) *E*.4. 24. *a*. 7 *E*.4. (*b*) 32. *a*. 3 *H*.6. 12 *H*.8. 5. And *Coke* C. Just. cited the case in 22 *E*.4. Tit. *Consultat*. 5. *Corbet*'s case, where the case was, that Sir *R*. *Corb*. had by *Eliz*. his wife 2 sons, *Rob*. the elder, and *Roger* the younger, and died; *Rob*. the elder being within the age of 14 years, took one *Maud* to wife, and at full age they cohabited together, & *habuerunt carnal' copulam*, & *cogniti & reputati pro viro & uxore palam*; and afterwards the said *Rob*. put away the said *Maud* his wife, having no issue by her, and married one *Lettice*, &c. living the said *Maud*, and had issue *Rob*. by her, and afterwards *Rob*. who so married *Lettice*, died, and *Lettice* declared publickly, that she was the lawful wife of *Rob*. and her son a *Mulier*, for which the said *Roger* the son of the said Sir *Rob*. *Corbett* sued in the spirit' court to reverse the marriage betw. *Rob*. his brother and *Lett*. and that *Lett*. be put to silence; for which cause *Lett*. sued a Prohibit. And in that case 3 points were resolved. 1. That if *Rob*. and *Maud* had had issue and had been unjustly divorced, and afterwards *Rob*. had married *Lett*. and had issue and died, the issue of *Rob*. and *Maud* might sue in the eccleſiaſtical court to avoid the divorce, for so long as the divorce stood in force (the com. law gives so great credit (*c*) to it) the issue could not have remedy by the com. law. And note in the case no cause of the divorce doth appear, but because the marriage was had when the parties were *infra annos nubiles*; and in the said case of divorce, the issue shall have his suit to reverse it originally in the spiritual Court, for the divorce is a spiritual Judgm. and ought to be reversed in the spiritual court. But in the case of *Corbett* there is no divorce, nor other spiritual Judgm. that should disable the said *Roger*; and therefore he ought originally to begin at the com. law as heir, and he shall have all Actions in the temporal Court as heir, and all benefits as heir against the issue of *Let*. notwithstand. the 2d marriage; for that is void in all laws temporal and spirit', and the action and original to bastardize any, shall not be moved originally in the spiritual court, when no spiritual sentence doth disable him, but he shall begin in the temp. court. and then if need be, they shall write to the spiritual Judge, if general bastardy be alledged; and the reason thereof is, because a man may be a bastard in the temporal law, and *Mulier* in the spirit' law, and *e converso*. As a man who is begotten in adultery during the coverture is *Mulier* by the temp' law, and bastard by the spiritual law. And if a man (*d*) beats a clerk, if he sues in the spititual court to excommunicate him for the offence, he doth well; but if he sues there to have amends, he shall have a Prohibit. 2. It was resolved in the said case of *Corbett*, That when the spiritual court shall have Jurisdiction, the whole cause ought to be spiritual; as if a parson libels against a lay-man for taking away his Tithes, the temporal Court shall have Jurisdiction, for it is mixt with the Temporalty: And in the same Case the Matter

(*a*) Br. pleading 37. Fitz. brief 175.
(*b*) Fitz. bar 96. Bl. Abbe & Prior 14. Br. pleadings 123.
(*c*) Jenk. Cent. 289. 4 Co. 49. a. 2 Rol. 7. 5 Co. 7. a. Caudry's Case. 8 Co. 135. b. 2 Ventr. 43. Cawly 31.
(*d*) F.N.B. 51. K. 52. f. 12 H. 7. 23. a. 4 Co. 20. b. 5 Co. 51. a.

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is mixt (by conſequence) with the temporalty, *ſc.* that the one is heir, and that the other is a baſtard; but if the ſaid caſe of tithes be between parſon and parſon, or between a parſon and a lay-man, if the right of tithes comes in queſtion, the ſpirit' court ſhall have the Juriſdict. See the Star. *de circumſpecte agatis*, where it is ſaid, That (*a*) *mere ſpiritualia* belong to the Eccleſiaſt' Cognizance. And *Linwood, cap. de foro competent. fo.* 7. ſaith, *mere ſpiritualia ſic dicta, quia non habent mixturam temporali'*: And where the ſaid Act ſaith, *de mortali peccato*, *Linwood* expounds it, and ſaith, *Non* (*b*) *intelligas de omni peccato mortali, ſed de tali cujus punitio de ſua natura ſpectat ad forum eccleſiaſt': nam ſi de ratione cujuſlib' peccati mortal' cognoſceret eccleſia, ſic periret temporal' gladii juriſdictio, cum vix eſſet dare cauſ. quin ratione peccati poſſit deferri ad Eccleſ.* 3. It was reſolved in the ſaid caſe of *Corb.* That when the whole cauſe is originally ſpiritual, yet if after in the ſpiritual court they are to try a temporal conuſance, a Prohibit. ſhall iſſue; as if one parſon ſaith, that the place is within his pariſh, and the other contrary, after ſuch matter ſhewed, a Prohibit. ſhall iſſue, and therewith agree 39 *E.* 3. 23. & (*c*) 5 *H.* 5. 10. *b.* Note Reader, a good difference between a repeal of a ſentence of divorce given in the life of the parties, and to give ſentence of divorce after the death of the parties. For it appears by the ſaid caſe of 22 *E.* 4. that a ſentence of divorce may be repealed in the ſpirit' court by a ſuit there after the death of the parties, but if any of the parties be (*d*) dead before any divorce ſentenced in the eccleſiaſt' court, there they cannot ſue in the ſpirit' court, to declare the marriage void, and to baſtardize the iſſue. For the trial doth originally belong to the K.'s court, where no diſability is by ſentence in the ſpirit' court, and therewith agree 39 *Aſſ. p.* 10. 39 *E.* 3. 31. and 24 *H.* 8. Tit. *Baſtardy* 44. *b.* That a divorce after the death of any of the parties, or a ſentence declaratory that the marriage was void after the death of any of the parties, ſhall not bind 'em; for it is but in effect to baſtardize the iſſue, of which they have not originally cogniz. as hath been ſaid. *Vide* 19 *Aſſ. p.* 2. that if 2 be married *infra an. nubiles*, and after the full age a divorce be betwixt them, it diſſolves the marriage, for there the Wife brought an aſſiſe againſt her Husb. See *Bury*'s caſe in the 5th Part of my Rep. *f.* 98. and ſee *Cawdry*'s caſe in the ſame book; and ſee *Bunting*'s caſe in the 4th Part of my Rep. *f.* 29. & 11 *H.* 7. 9. 34 *H.* 6. 14. 12 *H.* 8. 5. As to the 2d point it was objected, that the Plaintiff ſhould have a traverſe without any office found for him; for when a direct and ſuffic. office is found in one county by force of a *Diem clauſit extremum*, or *Mandamus*, after the Death of the Anceſt. there ſhall never be an office found again for the ſame land, as long as that ſtands in its force; for otherwiſe the law would never have an End; and therewith agree 4 *H.* 4. 15. 14 *E.* 4. 5. 15 *E.* 4. 11. 2 *H.* 7. 12, 18. and therefore it would be hard to compel him to find an Office for him,

(*a*) 2 Inſt. 488.

(*b*) 2 Inſt. 488.

(*c*) Fitz. juriſdiction 39. Br. Juriſdict. 30.

(*d*) 1 Rol. 360. 1 Brownl. 42. Moor 228. Co. Lit. 244. a. Noy 29. 4 Mod. 182. Comb. 200. Salk. 151, 548.

Cr. Jac. 186.

before he can traverſe; where by the Law he cannot find in ſuch Caſe any Office. 2. It was objected, That the Statue of *E.* 6. *c.* 8. hath remedied it if any Office were requiſite by the Common Law, the Words of which Act are; *And whereas one Perſon or more is or ſhall be found Heir to the King's Tenant by Office where any other Perſon is or ſhall be Heir, or if one Perſon or more be or ſhall be found Heir by Office in one County, and another Perſon or Perſons is or ſhall be found Heir to the ſame Party in another County, &c. Be it enacted, that every Perſon grieved by any ſuch Office ſhall and may have his or their Traverſe to the ſame immediately, or after, at his or their Pleaſure, and proceed and have like Trial and Advantage, as in other Caſes of Traverſe.* By which it appears, that the Party grieved ſhall have a Traverſe (without ſpeaking of any Office) and proceed and have ſuch Advantage as in other Caſes of Traverſe; and in other Caſes of Traverſe there needs not any Office. But it was reſolved, That as this Caſe at Bar is, the Pl. ought to have an Office found before he can traverſe. And as to the firſt Objection it was anſwered and reſolved, that in ſuch ſpecial Caſe of finding of an Heir, he who is right Heir and grieved by the Office, ſhall have a new Writ of *Diem clauſit extremum*, or *Mandamus*. For he is a Stranger to the ſaid Office, and therefore the Office ſhall not conclude him. And the ſaid Rule, and the Books are to be intended, That the ſame Perſon ſhall not have a new *Diem clauſit extremum*, or *Mandamus*, after an Office once duly found, but another Perſon ſhall have one in that Caſe to prove himſelf Heir, and therewith agree 30 *Aſſ. p.* 28. *F.N.B.* 261, 262. 4*H.* 7. 15.*b.* 12 *R.* 2. *Livery* 28. *Stamf. prærog.* 52.*b.* And that there ought to be an Office before he can traverſe, the Common Law therein hath great Reaſon; for when the King is ſure of Wardſhip, or Primer Seiſin by the Office, it is not Reaſon that any one who pretends himſelf Heir ſhould traverſe the Office that the other is not Heir, until the King be ſure to have Profit by him, either by Wardſhip or primer Seiſin; for then after the firſt Office avoided by Traverſe, he might ſhew Matter to bar the King of Wardſhip and Primer Seiſin, which would not be reaſonable: Alſo at the Common Law Interpleader lies, where by two ſeveral Offices in one and the ſame County ſeveral Perſons are ſeverally found Heirs to one and the ſame Perſon, to one and the ſame Land; *Ergo* the Party grieved may have a Writ to find an Office for him; for otherwiſe no Interpleader can be; for the Heir who was firſt found Heir ſhall have a *Scire facias* in the Chancery, againſt him who is found Heir by the ſecond Office, (becauſe the King is in Doubt to whom to make Livery) upon which if he appear, and juſtify the ſecond Office, for the Trial of the Privity of the Blood, then he ought to traverſe the firſt Office, (for all the Interpleading ſhall be thereupon) and upon the Trial thereof, he who is found Heir ſhall have Livery. So that it clearly appears, that he who traverſes the Office in ſuch Caſe ought to have an Office found for him by the Common Law; and therewith agree 36 *E.* 3. *Traverſ.* 44. 16 *E.* 4. 4. *Fitz. Nat. Br.* 262. For he who ought to ſue Livery,

2 Inſt. 688, 689, *&c.*

Jenk. Cent. 289. Cro. Jac. 186. Co. Lit. 77. b. 2 Inſt. 690.

Livery, ought to have an office before he traverſes. Otherwiſe of a Stranger who deſtroys the King's Title. *Vide* 26 *E.*3. *Traverſ.* 44. 12 *E.* 4. 18.*b.* 16 *E.*4.4.*a.* 43 *Aſſ.* 20. 9 *H.* 7.24. 5 *E.* 4, 5. 12 *H.*6. 46 *E.*3. *bre.* 618. As to the 2d Objection, it was anſwered and reſolved, That the ſaid Act of 2 *E.*6. gives not a traverſe to him who pretends himſelf to be Heir againſt an Office finding for another Heir, without an Office found for him; for that is incident to it, which is not taken away by the general Words of the Act, for then all Interpleaders would be thereby alſo taken away, which never was the Intention of the Act; but the Intent of the makers of the Act was, to take away a great Doubt that was at the Common Law, if one be found Heir within Age by one Office, and afterwards another is found Heir in the ſame County of full Age, if any Traverſe and Interpleader ſhould be immediately, or if the Traverſe and Interpleading ſhould ſtay until the full Age of the Infant, *fuit vexata quæſtio*, as appears in our Books, *ſcil.* 36 *E.* 3 *Traverſe* 44. 5 *E.*4.4. 1 *H.* 7.14.*a. F.N.B.*162. And therefore to ouſt that doubt was the Stat. of (*a*) 2 *E.* 6. made, by which it is enacted, *That the Party grieved ſhall have a traverſe immediately*, which Word (*immediately*) proves the Intention of the ſaid Act to provide for the ſaid Doubt, and to give him who was grieved in ſuch Caſe a Traverſe preſently; but not to alter the Foundation of the Traverſe, *ſc.* Office, which ought to be found for the Party grieved before he could traverſe: And where the Stat. ſaith, That he ſhall have a Traverſe preſently, it is intended that he ought to obſerve all (*b*) Incidents to a Traverſe: For the Office is the Ground and Foundation of his Traverſe. As to the 3d Point it was reſolved by the greater Part, That a Bill of (*c*) Revivor on a Bill of Revivor ſhould not be admitted for the Infiniteneſs: For (*d*) *Infinitum in jure reprobatur*; and no Writ of Journeys Accompts on Journeys Accompts ſhall be brought. But it was reſolved by all, that as this Caſe is, the laſt Bill of Revivor was abſurd, for it prays that the firſt Bill might be revived; and the firſt Bill prays, That *Martha* might traverſe, and *Martha* is dead; and therefore the Bill of Revivor ought to have prayed that her Heir might traverſe. And ſo firſt the Divorce ſo long as it doth remain in Force doth bind the Right; 2. The not finding of an Office doth diſable the Plaintiff to traverſe the Office: And laſtly, the Bill of Revivor on the Bill of Revivor as this Caſe is, is not maintainable.

(*a*) 2 E.6.c.8. 2 Inſt. 688, 689, *&c.*

(*b*) 2 Inſt. 690.

(*c*) Cro. Jac. 186.

(*d*) 6 Co. 45. a 9 Co. 168. b. 12 Co. 24. 2 Inſt. 340. 2 Bulſtr. 99. Hob. 159.

F I N I S.